IN THE DISTRICT COURT
HELD AT WANGANUI

CRN: 5083006813-14

BETWEEN: THE TARANAKI FISH AND GAME COUNCIL

Informant

AND: KIRK MCRITCHIE
Otoko Pa
Parapara Road Wanganui

Defendant

J R Handley and N Percy for the Informant
M A Solomon and T Anaru for the Defendant

Date of Hearing: 9 August 1996

Date of Decision: 27 February 1997

DECISION OF JUDGE A J BECROFT

ULTIMATE ISSUE

The ultimate issue in this case is whether a Maori charged under s26 ZI (1)(a) of the Conservation Act 1987 (the Act) with fishing for freshwater fish (trout) without the required licence can rely on:-

(1) "Maori fishing rights", (s26 ZH of the Act), and/or

(2) The "principles of the Treaty of Waitangi." (s4 of the Act)

as a defence to the charge, given that trout are not an indigenous species and were introduced after the signing of the Treaty.

This case is regarded as a test case. Many concessions were made by Counsel in order to focus on the central issue.

THE FACTS

There was little if any dispute as to the facts. Briefs of evidence, an agreed statement of facts and much documentary material were produced by consent and referred to in the course of argument without technical opposition being taken to their admissibility.

(a) Specific Facts

On 29th January 1995 Kirk McRitchie was fishing for trout in the Mangawhero River, a few metres downstream from the Matthews Bridge. This area is within the

Taranaki Fish and Game Region (the Region). Little did he realise that his actions would spark a test case of national significance.

Mr McRitchie was observed by Kenneth McDowell at about 6.00 pm while casting with a conventional fishing rod and line. Mr McDowell was at all material times a properly appointed and warranted honorary fish and game ranger and produced his warrant in evidence. He had been patrolling around the Raetihi area that weekend and was driving home down State Highway Four (known locally as the Parapara route) which follows the course of the Mangawhero River. Mr McDowell identified himself to the defendant and questioned him. Mr McRitchie openly admitted he was trying to catch trout. He had not on this occasion caught any. However he told Mr McDowell that he had successfully done so in the past.

The defendant admitted he did not have a relevant licence to fish for trout. I accept his evidence that he was surprised to find he needed one. He told Mr McDowell he did not think he needed one. He said he was a member of the local hapu.

The defendant was at the time fishing with a triple hooked lure. He was told this was contrary to the provisions of the relevant Anglers Notice. Initially the defendant refused to give his name and address but quickly did so when warned he may be committing a more serious charge of obstruction. The defendant was then issued with an offence notice. He became concerned that his rod would be confiscated by Mr McDowell before he left which it was.

Mr McRitchie lives at Otoko Pa, on SH4, about 30 kilometres north of Wanganui. He has lived there since he was nine. He is a Maori. He belongs to Ngati Hine, Ngati Ruawai and Ngati Waikarapu hapu.

I accept that the Mangawhero River is within the Rohe (area) over which Mr McRitchie's hapu have manawhenua. The defendant has fished in the Mangawhero River since he was a child. He has fished for eel, tuna, trout and fresh water crayfish, depending on the time of the year. On this occasion he was fishing for trout to feed his family as is customary, he said, for his people. He said he has always had authority from his hapu to fish in the Awa (river). The river provides food for his hapu. He said he is often asked by his hapu to gather fish for huis. He said he is one of the main fishermen on his marae. He said he had never held a fishing licence and he felt he did not need one, whatever species of fish he was fishing for.

The defendant was uncertain as to the basis of the traditional fishing rights he said he relied upon (at one stage he admitted in cross examination that he thought a licence was only required for lakes and not rivers) and was also uncertain as to whether his manner of fishing (rod and line) was a traditional method. However, I find that when his evidence is assessed as a whole, and making proper allowance for his obvious nervousness while giving evidence, he genuinely believed that he was exercising a traditional maori fishing right according to proper protocol.

(b) Background Facts as to the Nature of Maori Fishing Rights and Traditional Maori Fishing within the Whanganui Area

Mr McRitchie's authority to fish in the Awa (river) was confirmed by Niko Tangaroa, a respected Kaumatua of Otoko Marae. Mr Tangaroa is well known within the Whanganui area.

Specifically in his brief of evidence, admitted by consent, he said

> "Our Iwi and Hapu have a very close relationship with the Awa. We are the owners of the Awa - it owns us.
>
> We hold Manawhenua and Tino Rangatiratanga over the river. The Awa to us is sacred. It is a provider for everything that we might require from its waters.
>
> Our Iwi have held Rangatiratanga over the Awa since time immemorial. The Awa is a taonga. The Awa is in our waiatas and karakia. We are owners and the kaitiakitanga of the Awa. These rights and responsibilities have been passed down from generation to generation. Our use of the Awa is governed by our own tikanga.
>
> Kirk McRitchie is one of the main providers for the marae for fishing and hunting. He has always observed our the tikanga of the Awa and its tributaries. Our tikanga provides that there are certain times when we go to fish and others not.
>
> We do not permit any fishing for commercial gain. Kirk has full authority from the Hapu to fish in the Awa. He has that inherent right to fish because he is a provider for the Hapu and also because he is a descendant of those who would hold manawhenua over the Awa.
>
> It is our tikanga that he does not require authority every time he goes fishing. Kirk is the Tohunga for fishing in our rohe. He is the best on the marae and is recognised for his ability.
>
> The river is the main provider of food within our rohe. We have very little land left and for that reason it is especially important. When we have hui or special gatherings our fisherman go out and gather food for our manuhari. Providing food for manuhari is of great cultural significance in Maori Society. The Awa also provides food on a day to day basis for the families at Otoko as it has since time immemorial.

> What ever fish that are in that Awa come under our Tino Rangatiratanga and we have the right to gather.
>
> Fish are gathered by various methods both traditional and modern. We retain the inherent right to take any of the fish which are local in the Awa. It does not matter what the species is because it is our Awa and we exercise our rangatiratanga to fish in it.
>
> We jealously guard our fishery resource. We would not permit others from outside our rohe to come in and take fish without our authority.
>
> Our Hapu have never had licences to fish in the Awa and we never will. Any licence would mean placing our rangatiratanga under someone else and means we would be subservient to someone else. We are not prepared to give away our rangatiratanga. Rangatiratanga is not limitable. We have had Rangatiratanga since time memorial and it was subsequently guaranteed and affirmed in the Treaty of Waitangi. That guarantee continues and is recognised in the Conservation Act."

Mr Tangaroa confirmed that he and his hapu and indeed the maori of the Whanganui River are affronted by this prosecution and dismayed that the matter could not have been resolved by other means.

He agreed that trout were introduced into the Mangawhero River after the signing of the Treaty of Waitangi, probably this century. However he strongly contended that the essential issue was Tino Rangatiratanga i.e. full authority over the Awa and the species in it, regardless of when and by whom they were introduced. His evidence emphasised that there could be no "divisibility" of that authority between those species existing before the Treaty was signed and those introduced afterwards. He also emphasised that the methodology of fishing will obviously evolve and change over time. He said that old or traditional methods are preferred but not to the exclusion of some more modern methods deriving from the old. He was unable to

answer whether the traditional methods used by his forebears were like the rod, reel and hook used here.

His evidence clearly satisfies me that the defendant was fishing according to the Maori protocol or kawa of the area and was properly within its terms.

The defence also called Mr Archie Taiaroa to give a wider perspective to the matter before the Court. Mr Taiaroa is a man of considerable mana within the Whanganui region. As chairman of the Whanganui River Maori Trust Board (a statutory body), chairman of the Maori Congress and member of the Treaty of Waitangi Fisheries Commission and chairman of its Fresh Water Fisheries Working Party, he is uniquely qualified to give such evidence. His evidence was clearly of important background relevance.

He produced by consent a helpful "Discussion Paper on the Nature and Extent of Fresh Water Fisheries Rights and Options for their Future Management".

Mr Taiaroa's evidence mainly concerned efforts made by Hapu and Iwi of the Whanganui district over the past 120 years in asserting their Tino Rangatiratanga over the Whanganui river and associated waterways.

He stressed that as the Mangawhero River originates from Mount Ruapehu, (as do the Whanganui and Whangaehu Rivers,) it falls within the wider Whanganui tribal boundaries. He clearly asserted that the Whanganui River Iwi, described as

Te Atihaunui-A-Paparangi, claim Tino Rangatiratanga over the river which covers all aspects of the river including habitat protection, fisheries, species, places of fishing, taniwha, kaitiaki, river flow levels and mauri. His people are committed to protecting the river and their rights over it as part of their kaitiaki (guardianship) obligations over the river. He stresses this is not a matter of choice but of obligation.

He emphasised three justifications for maori to fish for trout:

1. As an unqualified exercise of Tino Rangatiratanga.
2. As a food source because of the depletion of native species.
3. Because non Maori have damaged traditional fisheries.

He strongly emphasised that his people have had the customary right to fish for all species in the river (including trout), from time immemorial. In his view the Treaty allows for the development of indigenous fishing practices. He also claimed in cross examination, which was not refuted, and which I accept, that Maori at the time of the Treaty used a form of hook, made of bone which was used with baits. He too conceded trout were introduced after the Treaty.

As to historical fishing grievances, these are well set out in his brief of evidence admitted by consent. It is sufficient to note:-

> "The rights of hapu and Iwi over the river extended back generations before the Treaty. Article II of the Treaty merely confirmed our pre-existing aboriginal title and customary rights to the river. The sad fact is that even though the Treaty guaranteed our rights, these rights have never been respected by the Crown and those given

> the responsibility of managing the river under the Crown's laws such as local authorities and Fish and Game Councils.
>
> My people have been extremely patient in seeking to have our rights upheld. They have been patient but also persistent over a long period of time. This is because the rivers have such great spiritual significance to our people and is also our food basket.
>
> In 1887 and then again in 1927 my tupuna filed petitions in Parliament objecting to the destruction and damage to patuna (eel weirs) to the Whanganui River. The destruction was being done at the time to improve navigation for modern steamboats on the river. There has also been a Royal Commission of Inquiry into the claims relating to the Whanganui river. This eventually went to the Native Land Court and ended up in two hearings in the Court of Appeal in 1995 and again in 1962. I believe that the decision of the Court that we didn't own the river because we didn't own the adjoining land was wrong. The whole river is a taonga to our people and cannot be divided up into banks, bed and water.
>
> Between 1988-1990, our people were involved in an 84 day hearing in the Planning Tribunal, the High Court and the Court of Appeal in opposition to Electrocorps proposal to lower the level of the river. This was done to prevent further damage to the environment of the river and more importantly the mauri or life force of the river. We are committed to protecting the river and the rights to it as part of our kaitiaiki obligations over the river".

There is still a decision awaited from the Waitangi Tribunal in respect of Whanganui River Iwi claims over the River. That decision would have been helpful for the resolution of this case.

Mr Taiaroa also emphasised that Whanganui River Hapu and Iwi see their role as the natural guardians of the river and everything affecting it. That includes species such as trout. He emphasised:-

> "Whanganui River Iwi objected to the introduction of trout into the river system in about 1937. We did this because we were concerned at the effect trout would have on the habitat of native species such as tuna which was a very important source of food for our people. Trout also eat eel elvers. No-one asked us if they could put trout into our rivers. They just went ahead and did it."

Mr Taiaroa believes that Maori customary fishing rights apply equally to trout as they do to native species. He said his people looked at trout to supplement their food basket which is being depleted of tuna and other native species by the destruction of native specie habitat and pollution of the river. He conceded that some might say "what right do maori have to claim rights over introduced species?" In response he emphasised the principle of development of his people's resources which in his opinion included the right to take introduced species.

Finally, by consent, an agreed statement of facts was produced as to some of the traditional fishing practices within the Whanganui River region. It is necessary to set it out in full (headings have been added)

"SOME OF THE TRADITIONAL FISHING PRACTICES WITHIN THE WHANGANUI REGION"

Introduction

1. The Mangawhero River flows into the Whangaehu River. The Whangaehu is acidic, the source being the crater of Mount Ruapehu.

2. Because the Whangaehu waters are acidic, the fish life in the Mangawhero is governed by the amount of acidity in the river. During long periods of non-volcanic activity at Ruapehu the amount of acidity drops in the Whangaehu which allows more species to venture into the Mangawhero, e.g. migratory fish such as "karohi (whitebait), ngaore (smelt), kane (grey eyed mullet) and piharau (lamprey)". During periods of volcanic activity, very few fish enter the Mangawhero because they are destroyed in the acidic water of the Whangaehu.

3. There are only four types of fish in the Mangawhero River at present. Originally, before the European days, there were three. The four varieties are Plaice, Eel, Trout and a fresh water native trout also known as Pa-Ngoi-Ngoi. The Plaice is also known as the black mud flounder.

Trout were introduced by the European for sports fishing.

Fishing for Plaice.

4. The traditional ways that Maori fished for Plaice is by spear. These Mud flounder were not fished by line or net but by spear.

Fishing for Eel.

5. Eel were traditionally fished in several different ways:

The Rapu

(i) The first way is for the fisherman to feel for them with their hands. This is done by walking in the water and feeling along the edges of the banks. This is still used and a very effective way of catching eel.

(ii) They are sometimes caught at night using a torch and spear.

(iii) They can be fished by putting a glow-worm ("tari") on a thread and using a rod. No hooks are used. The glow-worm is then dangled into the water, and the eel are gently pulled onto the shore with the glow-worm in the eels mouth. The eel tries to twist the glow-worm off. This method of fishing is still used for eel.

Tuna Toke

(iv) The most common way of catching eel, traditionally, is in the eel basket. This has traditionally been left overnight and set with bait. This still occurs.

(v) For migratory eel - eel that go down the river to spawn - nets are set up by channelling the stream. The eel normally migrate down the rivers through March especially if there has been heavy rain, thunder and lightning etc. The eel move into the nets and can be taken from there.

Fishing for Pa Ngoi Ngoi

6. The fresh water native trout is a very rare and elusive creature. Very little, if anything has ever been written or recorded about this trout but it exists and has been caught in a side stream of the Mangawhero.

7. The fish is very slimy, more slimy than an eel. It is short and bulky and very fast in the water. It has been caught by hands when feeling the stream for "Koura". Koura is a native crayfish.

8. The traditional way of fishing for Pa-Ngoi-Ngoi was the "rapu method" which is "tickling" or "feeling".

Fishing for Trout:

9. The only other fish in the Mangawhero is trout. These are mainly brown trout but there are also some rainbow trout. These trout were introduced by the European.

10. An Eel would not take the lure and would only do so if there was bait on any of the hooks.

11. Fish taken from the Mangawhero before the introduction of trout were the Plaice and the Eel. Both of these fish are important for Maori diet and the most important fish of the two is the Eel.

Other Matters

12. The only other thing about traditional fishing is the chants and the prayers. Traditionally the fishermen chanted while fishing.

13. The other ritural that was traditionally observed, and I still do it, is saying a prayer or karakia before and after the fishing.

14. Changes with the traditional fishing practices since pre-european days include the use of modern materials are used for the nets and spears

> instead of the traditional flax or other materials which were used then. The same designs are used but different materials are used in them.

Useful and detailed information is also contained in Chapters 26 and 28 of "New Zealand Freshwater Fisheries: A Natural History and Guide" by R M McDowell. These chapters deal with "Maori Fisheries", and "The Impact of Exotic Fisheries" and were presented and referred to by the defence in its closing argument.

It seemed important to me that this background evidence only by inference established that Maori had fished for trout as a food source since their introduction to the Mangawhero river albeit to a lesser extent than they fished for indigenous species. I raised with counsel, after the evidence had been completed, the apparent lack of specific evidence on this point. Counsel, by consent, wish me to proceed on the basis that Maori have so fished for trout.

CHARGES

Two informations were laid against Mr McRitchie (on the 5 May 1995) and thus well within the one year extended period allowed under s43 of the Conservation Act 1987.

1. That on the 29 January 1995 at the Mangawhero River at Matthews Bridge he committed an offence against s26R(6) of the Act in that he used fishing tackle prohibited by the District Anglers Notice for the Taranaki Fish and Game Region.

2. That on the same date and place the Defendant committed an offence against s26ZI(1(a) of the Act in that he fished for sports fish during an open season while not being the holder of a current licence authorising him to fish for such fish.

Neither information was closely analysed by Counsel. In my view the first arguably fails to disclose an offence. It omits three essential ingredients of the offence. In any case it could not succeed from the outset. I raised this with both counsel subsequent to the hearing. After consideration, Counsel for the Informant confirmed that he did not wish to proceed with the first charge and that no decision was required in respect of it. Leave is given for its withdrawal, pursuant to s36 (1) of the Summary Proceedings Act 1957.

The second charge is considered the more important. This decision deals with that charge only.

For the record, my concerns with the first charge were as follows. Section 26R(6) of the Act, the offence creating provision relied upon by the Informant, states:-

> Every person commits an offence and is liable to a fine of not exceeding $5000 who takes any sports fish from any waters at any time or place, or with any device or in any manner, if such taking is not permitted by any... Anglers Notice in force in respect of those waters. (my underlining)

Pursuant to s2(1)(b) of the Act:-

> "Taking", in relation to any fish, means fishing; and 'takes' and 'to take' have a corresponding meaning.

Under s2(1) of the Act:-

> "Sports Fish" means every species of freshwater fish that the Governor.General may declare, by Order in Council, to be sports fish for the purpose of this Act; and any such Order in Council may be expressed to apply to freshwater fish in any specified freshwater or other waters.

The first information does not allege fishing, or that the fishing was for sports fish. In my view both are essential ingredients of the charge. More fundamentally still, it is not alleged that the defendant is a licence holder, something which also appears to be an element of the charge. Under s26R(4) of the Act, an Anglers Notice, such as the one allegedly breached here, can only set out the conditions under which a current licence holder may fish for sports fish in the area to which the notice relates. The relevant notice is the District Anglers (Taranaki Fishing Game Region) Notice 1994 (Notice 6385 in the New Zealand Gazette) which applies (where relevant) only to licence holders.

Thus three essential ingredients of the charge are not set out in the information: namely that the defendant.

(1) Was a licence holder;

(2) That he fished;

(3) For sports fish.

It is a common law principle that an information must contain all ingredients of the charge, otherwise it fails to disclose an offence and is invalid: **R v Rodley** [1936] NZLR 1021. In **Police v Thomas** [1997] 1 NZLR 109, 113-4 Richmond J referred to the "... the principle of the common law which is sometimes stated in the form that an information is invalid which does not disclose an offence, and sometimes in the form that information is invalid if it does not state all the essential ingredients of the offence". In **Police v Walker** [1974] NZLR 418 it was held that the information disclosed no offence whatsoever and was so unintelligible that the exact

nature of the supposed offence could not be ascertained No amendment was possible because there was nothing (no information) to amend. Similarly, in **Muirson v Collector of Customs** [1982] 2 NZLR 506,510 Greig J held that an information which did not disclose an offence was a nullity and could not be saved by s204 nor could it be amended under s43. Of course the question of whether an information is a nullity is a matter of degree. My preliminary view here, accepted by counsel, was that the information was so flawed as to be a nullity. It could not be brought back to life by amendment.

In any case, if I am wrong on that point, there is a further problem. Paradoxically only a licence holder (not a non-licence holder) can commit the offence of fishing for sports fish using tackle prohibited by the relevant District Anglers Notice.

The solution is probably that non-licence holders who fish with unauthorised tackle, commit the "prime" offence of fishing without a current licence under s.26ZI(1)(a) the Act, as alleged in the second charge here. The nature of any unauthorised tackle used by an unlicensed fisherperson is then an aggravating factor to be considered at sentencing. Logically therefore the two charges laid against the defendant are mutually exclusive. The first depends on the defendant being a licence holder. The second depends on him not being a licence holder.

In my view the informant's decision not to proceed with the first charge (as it is not laid in the alternative) is both responsible and inevitable

As to the second charge, s.26ZI(1)(2) of the Act states:

Subject to this Act, every person commits an offence and is liable to a fine not exceeding $5000 who

(a) Takes sport fish from any freshwater at any time, unless that person is the holder of a licence issued under this Act authorising him or her to take such fish from such waters at such time;

It will be observed that the essential ingredients to be proved in respect of this charge are:-

(i) That the defendant took (that is fished for);

(ii) Sports fish;

(iii) From any fresh water (here the Mangawhero River);

(iv) During an open season;

(v) Not being the holder of a current licence authorising him to take (fish) such fish from such waters at such time.

These essential ingredients were all conceded by the defence. The sole issue is whether, on the facts, a defence is made out.

STATUTORY BASIS FOR THE DEFENCE

The defence relies upon two provisions of the Act.

1. 26ZH **Maori Fishing Rights Unaffected by this Part of the Act** Nothing in this part of this Act shall affect any Maori Fishing Rights.

The offence of taking sportsfish without a licence is within the relevant Part of the Act. This is the exact wording previously contained in S88(2) of the Fisheries Act 1983.

2. 4 **Act to give effect to Treaty of Waitangi** This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

Two points should be noted. First, under the authority of Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680, the defendant has the onus to prove on the balance of probabilities, the existence of a Maori fishing right covering his activities at the time of the offence. Second, by virtue of s43B of the Act, the offence of fishing for trout without a licence is one of strict liability, with a narrow scope of defence contained in s43B (2)(a) & (b). On the face of it the two defences don't fit easily together. Presumably, so as to make sense of the Act, the defence of a Maori fishing right stands separately and is not curtailed by strict liability considerations.

It should also be noted that there is an argument that the statutory defence (supra) has been negated by s10 of The Treaty of Waitangi (Fisheries Claims) Act 1992. That section states:-

> It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life... that are subject to the Fisheries Act 1983
>
> (a) Shall in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto
>
> (b) The Minister... shall
>
> (i) Consult with tangata whenua about; and
> (ii) Develop policies to help recognise -
>
> Use and Management Practices of Maori in exercise of Non-Commercial Fishing Rights, ...
>
> but
>
> (d) The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), Treaty of Waitangi, statute or otherwise, shall henceforth have no legal effect, and accordingly
>
> (i) Are not enforceable in civil proceedings: and
>
> (ii) Shall not provide a defence to any criminal, regulatory or other proceeding,
>
> except to the extent that such rights or interests are provided for in the regulations made under s89 of the Fisheries Act 1983. (underlining added)

Certainly, if trout are subject to the Fisheries Act 1983, then the defence would seem barred from relying on the statutory defences in the Conservation Act. Whether trout are (so subject) is unclear. Freshwater fisheries have been within the ambit of the Conservation Act 1987 since 1990 by virtue of Part VA and VB of The Conservation

Law of Reform Act 1990. However, in theory unless there is a statutory provision not referred to me or which I have overlooked, trout may also still be subject to the Fisheries Act 1983. This is because under s2 of that Act the definition of "fish" and "aquatic life", when referred to in that Act: (e.g. ss 97 & 98), seem to include trout.

Put simply, conflict arises in that the Conservation Act preserves a defence of Maori fishing rights for fish included under that Act. The Fisheries Act on the other hand appears to exclude such a right for fish included under that Act. The difficulty arises in that on the face of it trout appear to fall within the definition of fish included in both Acts, one of which includes the Maori Fishing Right defence and one which excludes it.

This problem was adverted to in the "Discussion Paper On The Nature And Extent Of Freshwater Fisheries Rights And Options For Their Future Management", produced by Mr Taiaroa. There it is recorded that the Minister of Fisheries gave an assurance to the Treaty of Waitangi Fisheries Commission that the "Settlement Act" does not apply to non-commercial inland fisheries. (i.e. the Mangawhero River). This represents a sensible approach to an unsatisfactory situation. The intention of all parties seems clear even if the law may not reflect this. A very "large and liberal" approach is necessitated.

I proceed on the basis that the only current Act relevant to freshwater fisheries (trout) is the Conservation Act 1987, and that the defences contained in it have not been negated.

WHETHER THE DEFENCE SUCCEEDS

If the taking (fishing) was for an indigenous fish, then the defence would clearly have succeeded on the unchallenged authority of **Te Weehi** and in the light of my factual findings that

(a) That the defendant is a maori from hapu and iwi with authority over the relevant part of the river;

(b) Local kawa/protocol was followed according to Maori custom;

(c) That the fishing was for personal use consistent with principles of conservation and preservation.

That case has been followed on numerous occasions since and its conclusions have been accepted even if on the facts the defence has been rejected: see for instance **Ministry of Agriculture and Fisheries v Love** [1988] DCR 370; **Ministry of Agriculture and Fisheries v Hakaira & Scott** [1989] DCR 289; **Green v Ministry of Agriculture and Fisheries** [1990] 1 NZLR 411; **Rawere v Ministry of Agriculture and Fisheries** (1991) 6 CRNZ 693; **Paku v Ministry of Agriculture and Fisheries** [1992] 2 NZLR 223.

The real issue here is whether it makes any difference if the fish is not indigenous (as in **Te Weehi**) but introduced after the Treaty. There is no caselaw directly on point. To uphold the defence would be to go further than any New Zealand Court has previously gone. Counsel presented detailed written submissions and referred to numerous cases from New Zealand, Canada and the United States of America and to many published articles. I mean no disrespect by not considering each of their arguments separately. I am very grateful for their assistance. I have tried to approach the issues step by step, which in the end can in my view be decided by the application of first principles.

The Combined Effect of Sections 4 and 26 ZH of the Act

What must be emphasised, and in the strongest possible way, is that this Act is unique in its combined inclusion of the defence of "Maori fishing rights" and the directive that the Act "be interpreted to give effect to the principles of the Treaty of Waitangi". The combined effect of these sections lays a much stronger basis for the defence than in **Te Weehi** where the Act only contained the Maori fishing right defence and did not refer to the Treaty. It may be as strong as in any case that has come before the New Zealand Courts.

Section 4 "Incorporates" the Treaty of Waitangi into the Act

Cooke P stated in **New Zealand Maori Council v Attorney-General** [1987] 1 NZLR 641, 655:-

> "... rights conferred by the Treaty cannot be enforced in the Courts except in so far as statutory recognition of the rights can be found."

His Honour noted this to be the only possible approach since the decision of the Privy Council in **Hoani Te Heuheu Tukino v Aotea District Maori Land Board** [1941] AC 308. The effect of s4 is that the Treaty and its principles are therefore effectively "incorporated" into the Act.

Section 4 is very similar to the provision contained in the **NZ Maori Council** case and the same approach must be adopted. That general approach was set out by Cooke P at page 655:

> "... The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to commit conduct inconsistent with the

> principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty." (emphasis added)

In the **NZ Maori Council** case the parallel provision was held to have used "simple and comprehensive words deliberately chosen by Parliament" (p 659). Its effect (as here) was to "override everything else" in the Act (p 667). The informant in this case would have it that s4 is restricted simply to the "principles" of the Treaty rather than the Treaty itself. With respect it would be ironic for Maori if the effect of the section were to deprive them from relying on the Treaty itself so that they were confined merely to Court interpreted principles. Indeed, that view is untenable in light of the decision of the Privy Council in the Broadcasting Assets case: **NZ Maori Council v Attorney-General** [1994] 1 NZLR 513. Speaking for the Privy Council Lord Woolf at page 517 said:

> "Both the 1975 [Treaty of Waitangi] Act and the [State-Owned Enterprises] Act refer to the "principles" of the Treaty. In Their Lordship opinion the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include but are not confined to the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty). With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms". (underlining added)

Are "Maori fishing rights" in S26ZH "Aboriginal" or "Treaty" based or both?

The decided cases are unclear as to whether the "Maori fishing rights" described in s26ZH derive either from "Aboriginal title"/"Maori customary title" (the terms.are used interchangably in cases) or "Treaty rights" or both. There has been much academic debate about it. See for instance: "Aboriginal Title in New Zealand Courts" (1984) 2 Canta LR 235; "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247- both articles by P G McHugh; "Treaty Rights or Aboriginal Rights?" R P Boast [1990] NLZJ 32; and "Sealords and Sharks: The Maori Fisheries Agreement (1992)" Dr P F McHugh NZLJ 1992 354. Indeed in the latter article McHugh noted:-

> "The legal character of Maori fishing rights was muddied by the inability, or perhaps, unwillingness of District Courts hearing s88 (2) [of the Fisheries Act 1983] defences to distinguish Treaty-based rights from common law aboriginal title. If this section were to be seen as a statutory recognition of Maori fishing rights under the Treaty then this would have required judicial reversal of **Waipapakura v Hempton** (supra). **Te Weehi** did not purport to achieve that. Even so, it was always open for a Court to see s88 (2) as incorporating both Treaty and common law aboriginal title fishing rights. however this is a possibility of which the District Court case law shows scant awareness".

At the risk of simplifying the argument on this point it is sufficient to note the following. The concept of "Aboriginal title" was analysed by Cooke P in **Te Runanganui o Te Ika Whenua Inc. Soc. v Attorney-General** [1994] 2 NZLR 20, 23 as being

> "...a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a

> radical or underlying title which goes with sovereignty.
> Where the colonising power has been United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.
> They are usually, although not invariably, communal or collective.
> It has been authoritatively said that they cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with relevant provisions of any relevant statutes."

The previous contrary view, expressed by the full Court of the Supreme Court in **Waipapakura v Hempton** (1914) 33 NZLR 1065 was that customary fishing rights were not preserved in law by the Treaty of Waitangi and could only exist if they had been conferred by legislation. This case has been described by the Court of Appeal as of "dubious authority": see the **Muriwhenua** case at p654.

The **Te Weehi** judgment proceeded on the basis that the "Maori fishing rights" referred to in the predecessor of s26 ZH were aboriginal title rights (i.e. a common law basis) not Treaty rights. However, the decisions of **Paku** (before) **Hakaria and Scott** (before) and apparently **Ministry of Agriculture and Fisheries v Campbell** (District Court, Gisborne, CRN 8016004552, 30 November 1988, Cullinane DCJ) and **Ngai Tahu Maori Trust Board v Attorney-General** (HC, Wellington, CP 559/87, 2 November 1987, Greig J) take a contrary view and interpret the identical section as protecting Treaty rights.

For myself I would probably have preferred the view that the "Maori fishing rights" referred to in s26ZH reaffirmed "aboriginal rights", on the basis that the language of

the section may not have been clear enough to incorporate the Treaty of Waitangi into the Act, as is required before Treaty rights can be relied upon

Either way the additional force of s4 means the issue does not need to be decided and "the rights" referred to can legitimately be seen to include Treaty rights and aboriginal rights.

Is there a distinction between "Treaty rights" and "Aboriginal rights"?

Had the question been open I would have considered the distinction important. In my view "aboriginal rights" have been interpreted and construed more strictly. They are arguably more easily "frozen in time" than Treaty rights which are "living" and take into account development and change since the Treaty was signed. However, there is strong obiter comment from the Court of Appeal in the **Muriwhenua** case to the effect that for practical purposes there is little difference between the rights: Cooke P, speaking for the Court of Appeal at p655, emphasised

> "It may therefore be that there has been no statutory extinction of Maori tribal sea fishing rights and that s88(2) of the Fisheries Act is indeed a statutory preservation and protection of them [similarly for fresh water fishing rights here]. That interpretation would accord with the Canadian approach, established by **Simon v R** [(1985) 24 DLR (4th) 390 (SCC)] and earlier cases, that treaties and statutes relating to Indians should be liberally construed. As to fisheries the treaty may be an assurance of protection for the customary title, on which view for practical purposes at the present day Treaty rights and customary rights would be one in the same. We note that this is not the way in which the position is expressed by the Waitangi Tribunal at P 209 of the *Muriwhenua Fishing Report*. But, for the purpose of giving practical effect now and in the future to the Maori Fishing Rights recognised by s88(2) of the Fisheries Act, we doubt whether there is any real difference".

Cooke P noted that this issue remained fully open to argument. Doubt is thus cast on the Waitangi Tribunal's conclusion in the "Muriwhenua Fishing Report" (Waitangi Report Number 22) which nevertheless is worth noting:

> "We were given to understand that the Treaty therefore had to mean the same [as aboriginal title]. 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."

If therefore, Treaty rights and aboriginal rights <u>are</u> virtually synonymous, then in my view they are to be given a wide interpretation. They mean fishing rights reserved and protected by the Treaty of Waitangi and are to be interpreted and applied down the ages in accordance with the Treaty's principles.

<u>What are "Maori fishing rights" as preserved by the Treaty and its principles</u>

The English and Maori versions of the Treaty need not be set out. They are contained in the Schedule to the <u>Treaty of Waitangi Act</u> 1975. In the **NZ Maori Council** case, previously referred to, the judgment of Cooke P (at pp662-663) sets out a "reconstruction" in English of the Maori text which was accepted by the parties to be accurate for the purposes of that case. The significant differences in the versions were well analysed in that case and many of the leading Court of Appeal cases since. There is no need to repeat them here. However, it is helpful in this case to refer to sections of the Waitangi's Tribunal's Muriwhenua Fishing Report (cited previously) to amplify the meaning of the Second Article of the Treaty (which refers to fishing rights) from the perspective both of the Maori and the European version. It seems

proper to do so, given the clear directives by the Court of Appeal in the NZ Maori Council case (p661) that reliance can be legitimately placed on them:

> "We should give much weight to the opinions of the Waitangi Tribunal expressed in reports under the Treaty of Waitangi Act".

and at p 662, l4

> "...I repeat that the opinions of the Waitangi Tribunal are of great value to the Court."

Of course the opinions of the Tribunal expressed in such reports are not binding on the Courts.

Maori Text

The relevant observations by the Waitangi Tribunal in the "Muriwhenua Report" as to what was intended by the terms *tino rangatiratanga* and *taonga* (pp 179-181) include:-

"(a) There are obvious distortions when Maori concepts are translated in Western terms. It must be understood that the division of properties was less important to Maori than the rules that governed their user. These criteria underlie Maori thinking -

(i) A reverence for the total creation as one whole;
(ii) A sense of kinship with fellow beings;
(iii) A sacred regard for the whole of nature and its resources as being gifts from the gods;
(iv) A sense of responsibility for these gifts as the appointed stewards, guardians and rangatira;
(v) A distinctive economic ethic of reciprocity; and
(vi) A sense of commitment to safeguard all of natures resources (taonga) for the future generations.

To meet their responsibilities for these taonga, an effective form of control operated. It ensured that both supply and demand were kept in proper balance, and conserved resources for future needs.

Maori extended their deep sense of spirituality to the whole of creation. In their myths and legends they acknowledged gods and other beings who bequeathed all of nature's resources to them. There was a system of tapu rules which combined with the Maori belief in departmental gods as having an overall responsibility for nature's resources served effectively to protect those resources from improper exploitation and the avarice of man. To disregard or to disobey any of the rules of tapu was to court calamity and disaster.

To the pre-European Maori, creation was one total entity - land, sea and sky were all part of their united environment, all having a spiritual source.

It was by divine favour that the fruits from these resources became theirs to use. The first fruits taken were invariably offered back to the gods.

In Maori terms these resources were possessed. Before European contact Maori had no system of buying and selling. Rather their economy was based principally on the giving of gifts upon which were attached the obligations of reciprocity.

All resources were 'taonga', or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future. Their myths and legends support a holistic view not only of creation but of time and of peoples.

Maori involvement with fish and fisheries is as ancient as the creation. The North Island is a fish in their legends.

(b) To understand the significance of such key Treaty words as 'taonga' and 'tino rangatiratanga' each must be seen within the context of Maori cultural values. In the Maori idiom 'taonga' in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori 'taonga' in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging' but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a 'hurt' to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing grounds, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind, as referred to in evidence by Miraka Szazy in the context of spiritual guardianship (doc A13).

(c) "Te tino rangatiratanga o o ratou taonga" tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee or rangatiratanga. the first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources. (underlining added)

English Text

The relevant findings in the Muriwhenua Report are set out at pp 202-204. The Tribunal found, when considering the term *"full, exclusive and undisturbed possession"* that:

> "No one seriously contended that full, exclusive and undisturbed possession" means other than what it says. Arguments abounded that exclusive rights have been relinquished, that exclusivity relates to specific areas, and even that the intention was to provide an exclusive share. These arguments are considered below. It was apparent that the only difficulty with the words is the inconvenience they present".
>
> "The meaning is altogether too clear. "Exclusive" means "exclusive" - that was so held by the Supreme Court in the **United States v State of Washington** 384 F Supp. 312 at 390-393, in construing certain treaties that gave exclusive fishing rights on Indian reservations.
>
> There is nothing in the Maori text inconsistent with those words. On the contrary, "rangatiratanga" is consistent with them. In that respect, the two text are in harmony with each other."

On the meaning of *"their fisheries"* the Tribunal had this to say:

> "The word 'fisheries' may refer to the palce where fish are caught, the types of fish to be found, the right to fish or the business of fishing.
>
> We consulted four dictionaries on the meaning of 'fisheries' and each gives the business of fishing as the first meaning, thus *"the act, process [or] occupation.... of taking fish or other sea products"* (Websters third New International Dictionary 1981 USA); *"the industry of catching .."* (Collins Dictionary of the English language 2nd ed 1986); *"the activity or business of catching fish and other sea animals..."* (Longmans Dictionary of the English language); and *"the business, occupation or industry of catching fish or of taking other products of the sea..."* (Oxford English Dictionary on Historical Principles 1933).
>
> Fishing laws use 'fisheries' with reference to the species that are sought, as in trout fisheries, or orange roughy fisheries (see for example, section 2 Fisheries Act 1983). This is a subsidiary meaning in the dictionaries referred to. Webster considers 'oyster fishery' and 'salmon fishery' relates to the place of catching rather than the fish caught and distinguishes *"the technology of fishery: a branch of knowledge concerned with the methods and economics of fishery..."*.

The private or 'several' fisheries of England refers specifically to site specific places of fishing (see especially Oxford English Dictionary on Historical Principles) but at an international level, a nation may claim its 'fishery' to be the whole of its coastal waters to a given extent.

'Their fisheries' in the Treaty we find, refers to their activity and business of fishing, and that must necessarily include the fish that they caught, the places where they caught them and the right to fish.

'Taonga' as discussed, includes all of these things, and had other dimensions too. It includes even the incantations recited to ensure success.

In many of the arguments however, one or other meaning was presumed to apply. The claimants contended that 'their fisheries; meant the whole of the band that they used, or in effect, their territorial seas. Others argued they were limited to the fish they caught or to specific fishing grounds.

In addition, it was argued that 'their fisheries was intended to do no more than secure rights of fishing. These were likened to a profit a pendre (the right to take produce from) or a usufruct (the right to use) over property of the Crown. It was contended that the Treaty could confer no greater rights than Maori already had, as a matter of Imperial law. The Treaty right was also described as an encumbrance whereby the Crown's ownership of the sea is subject to a Maori right to use. We need not review those arguments in full. They amount to one contention that Maori had no more than a right of access to the sea, and that the right being co-existent with that of others. access had necessarily to be shared.

The Treaty intended no such limitation in our view. Reading the Treaty as though today were 1840 'their fisheries' is the business they have and may develop in fishing and includes the fish they catch and the places where they catch them.

In 1840, the fish they caught in Muriwhenua, were the whole of the inshore and migratory species. The place where they caught them was the whole of the inshore seas. The business they had in fishing was extensive and capable of being developed.

We specifically reject the contention that the rights they had were merely rights of access. To reduce Maori rights over land or fisheries, to a usufruct controlled by chiefs, is an unacceptable diminution of the Maori position (and a misuse of the essay by Alan Ward that was relied upon - Ward 1985:259). If we must think of things in Western terms, then as explained at 10.3.2 (f), it is proper to consider that tribes once held dominion over their land and sea territories. It is axiomatic that the tribes had rights of access, but more importantly, they had the right to exclude access by others. We also reject the view that the meaning of 'their fisheries' in the Treaty can be constrained by various legal categories or the current legal definition in the

> Fisheries Act. This may suit the convenience of fish administrators or law but it does not fit with the Treaty.
>
> It is in any event essential to bear in mind the substantial concession that the Maori made in ceding sovereignty, and in accepting and thereby legitimising, European settlement (see Brookfield *The Constitution in 1985: The Search for Legitimacy* pp6, 7). It required that those things assured to Maori should not be read down."
> (underlining added for emphasis)

I accept that "*their fisheries*" as interpreted by the Waitangi Tribunal (and thus of persuasive authority only) means more than just the species of fish caught as at 1840. I accept the submission of the defence that it has a much wider meaning "encompassing the activity and business of fishing, the place where fish were caught and the right to take fish." The Tribunal found that "taonga" includes all of these things. These interpretations are absolutely consistent with the defence evidence here - specifically that the iwi's "right" of Rangatiratanga was in respect of the river as a whole, "indivisible" entity. This is consistent also with the findings of the Waitangi Tribunal in the "Te Ika Whenua - Energy Asset Report" (1993) and "Mohaka River Report" (1992). Indeed, in the **Ika Whenua** case Cooke P approved of the Tribunal adopting the concept of the river being a "taonga". He went on to say "one expression of the concept is a whole and indivisible entity, not separated into bed, banks and waters". Therefore I do not favour a restrictive approach to the words "their fisheries" appearing in the Treaty as contended for by the informant.

Do "Maori Fishing Rights" Include the Right to fish for Introduced Species e.g. Trout

It is now well settled that the Treaty does not exist in a vacum. The leading Court of Appeal cases have emphasised that the

> "...the Treaty is a living instrument and has to be applied in the light of developing national circumstances": **Muriwhenua case** (p655).

It is out of this recognition that the "principles" of the Treaty, have developed so that the Treaty can be applied to a modern day context rather than remain frozen at 1840. Applying the meaning that I have adopted for the term "their fisheries" then prima facie trout seem included within the right, and the timing of their introduction to rivers/lakes is not relevant.

The argument for the informant effectively confines and restricts the fishing right preserved in the Treaty to rights existing at 1840. The Fish and Game Council emphasise a "species" and "method" limitation to the right. The basis of this argument is that (a) only indigenous species are part of the right and not species introduced after the Treaty, and (b) only naturally in evolving "methods" of fishing based on traditional fishing practices can be used to exercise the right.

In principle this is a more restrictive approach than is taken in the North American cases and I would be reluctant to apply a different interpretation here. Those cases though, only refer to indigenous species and they beg the essential question here as to whether introduced species can be included in the right. However it seems to me the general principle can be applied.

For instance in the case of **United States v State of Washington** (1974) 384 F Supp. 312 at p401 (para 59) it was said:

> "The right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, purpose or use. or the time or manner of taking, except to the extent necessary to achieve preservation of the resource..." (underlining added)

And in the next para it was noted:

> "The passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the rights secured by the treaties but have merely affected the limits which may be placed upon its exercise in order to preserve the fishery resources which are necessary to the continued and future employment of the right".

The only reference to "exotic" or introduced fish in these cases in Washington case at p344 (para 38) which, in passing, noted

> "It is suggested in Puyallup - II if a dinstinction between native and propagated steelhead could be made in computing the allocation to off-reservation treaty right and to non-treaty right fishing.

> This appears to present many difficulties and problems which must be considered and determined with all deliberate speed by agreement or judicial decision."

It seems to me that considerable encouragement can be derived from these cases in applying the Treaty fishing right to introduced trout. This is especially so as the logical extension of the informant's argument results in an absurdity: Maori, fishing in a river with the authority of relevant territorial iwi and in accordance with the local protocol, would need to differentiate between any fish caught as being either "pre Treaty" or "post Treaty" and would need to throw the introduced "post Treaty" species back into the river. No doubt a handbook on the history of New Zealand fishing and the date of specie introduction would be handy!

As to the "method" argument advanced by the Fish and Game Council, frankly it is unappealing. If the argument means to show that fishing with a fibreglass rod, a nylon line and a triple hook is contrary to the Treaty then I reject it. As was noted in the Washington case the treaties

> "...do not prohibit or limit any specific manner, method or purpose of taking fish and Treaty tribes may thus utilise improvements in traditional fishing techniques, method and gear, subject only to restrictions necessary to preserve and maintain the resource."

Similarly in the case of **Simon v The Queen** 24 DLR 390 at pp402-403 Dickson CJC stated:

> "First of all, I do not read the phrase "as usual" (there the relevant Treaty guaranteed "...free liberty of hunting and Fishing as usual...") as referring to the types of weapons to be used by the Micmac and limiting them to those used in 1752. Any such construction would place upon the ability of the

> Micmac to hunt an unnecessary and artificial constraint out of keeping with the principle that Indian Treaties should be liberally construed. Indeed, the inclusion of the phrase "as usual" appears to reflect a concern that the right to hunt be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices. The phrase thereby ensures that the Treaty will be an effective source of protection of hunting rights".

In any case, the uncontradicted evidence of the defence (Mr Taiaroa) was that a traditional form of Maori fishing was to use a line with a form of hook. This evidence effectively dispenses with the "method" argument on the facts of the case.

The Waitangi Tribunal, in its findings in the Muriwhenua Report, made strong findings on the issues of new technologly, right to development and new species. It is helpful to set them out (p234 ff):

> **"New Technology and the Right to Development**
>
> (a) The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.
>
> (b) Access to new technology and markets was part of the quid pro quo for settlement. The evidence is compelling that Maori avidly sought Western technology well before 1840. In fishing, their own technology was highly developed, and was viewed with some amazement by early explorers. But there is nothing in either tradition, custom, the Treaty or nature to justify the view that it had to be frozen.
>
> (c) An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.
>
> It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.

Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new geat, to adopt technologies developed in other countries and to learn from each other.

(d) The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty. (The Crown has generally accepted these principles - see doc H6 para 6.8).

(e) The right to development is recognised in domestic and international law, in domestic law in *Simon* v *The Queen* (1985) 24 DLR (4th) 390, 402, for example.

That all peoples have a right to development is an emerging concept in international law following the Declaration on the Right to Development adopted on 4 December 1986 by 146 states (including New Zealand) in resolution 41/128 of the United Nations General Assembly. This includes the full development of their resources. Professor Danilo Turk, a leading drafter of the declaration considered:

> *"In other words, states should adopt special measures in favour of groups in order to create conditions favourable for their development. If a group claims that the realisation of its right to development requires a certain type of autonomy, such a claim should be considered legitimate.*

The International Symposium of Experts on Rights of Peoples and Solidarity Rights (UNESCO, San Marino, 1982) considered:

> *The rights to development is one of the most fundamental rights to which peoples are entitled, for its realisation is the source of respect for most of the fundamental rights and freedoms of peoples (UNESCO SS-82/WS/61 Art 38).*

It was added:

> *Each people has the right to determine its own development by drawing on the fundamental values of its cultural traditions and on those aspirations which it considers to be its own. this right to authentic development is, in fact, three-oronged: economic, social and cultural (Art 40).*

New Species

(a) The tribal treaty interest is not limited as to species of fish, the origin of fish, the location of fish or the purpose or use to be had of them. Maori harvested all types of fish at every type of location but had no need to explore the wider seas. Through non-Maori overfishing, they now have a special interest in 'new' species.

(b) At 1840, Muriwhenua Maori did not exploit orange roughy, but there was then no need to seek those species more difficult to catch.

(c) At 1840, non-Maori knew not of orange roughy either, but there was never a suggestion that non-Maori were restricted to catching fish that Maori did not exploit.

Tradition

(a) Tradition applies more to beliefs than to methods. Maori believed that resources must be protected for future generations. It was also a traditional opinion that the use rights of others must be respected.

(b) It is not traditional fishing when Maori deplete the resource.

(c) It is not traditional fishing when Maori fish outside their Tribal area without consent.

(d) But Maori tradition does not prevent Maori from developing either their personal potential, or resources, for traditionally Maori were developers. In terms of the equipment at their disposal they substantially modified the natural environment. There was considerable adaptation and development when Maori first arrived here (see 3.1) and Maori adapted with alacrity to new development forms when Europeans first came (see 4.2). It is the inherent right of all people to develop their potential.

(e) There is nothing in tradition to constrain the use of new gear save that directed to resource maintenance . There is nothing in tradition to say that those practices handed down must be passed on without improvement.

(f) An opinion that Maori cannot have it both ways, the advantages of new technologies as well as privileges in traditional fishing, does not come from the Treaty for that is precisely what Maori bargained for. In return for ceding sovereignty and accepting a British settlement, they gained full rights of citizenship in article the third, and the guarantee of their own authority and resources in the second.

(g) Maori believed that resources must be protected for future generations. That belief does not prevent commercial exploitation but underlines the need for balance and caution. Maori were major developers of resources in Western terms, even before 1840, and at a time when custom reigned (see 10.3.2 (j)).

(h) There is a tension in modern Maori society between conservation and development. Its existence does not justify the refusal of commercial development rights to Maori, until all Maori are agreed. The same tension exists in society as a whole. The tension is necessary and beneficial for all people (see 10.3.2(j)).

(i) Maori fishing interests are reserved rights not privileges. The Treaty is not founded on the propagation of privilege but on a recognition of just rights." (underlining added)

The reasoning of the Waitangi Tribunal in the Muriwhenua Report with respect to the right to development and new species was adopted by the Waitangi Tribunal in its Ngai Tahu Sea Fisheries Resource Report 1992 (pp253 and 259). In particular, it was accepted that Maori had a right of development to a reasonable share of the deep water fisheries notwithstanding that they may not have been fully utilised as at 1840. The Courts, especially the Court of Appeal, upheld the findings that Maori had a right to share in the allocation of commercial fish quotas and new species developed in the commercial sea fisheries since 1840: see the line of Court of Appeal Fisheries cases ending with **Te Runangau o Warekauri - Rekohu Inc v Attorney-General** [1993] 2 NZLR 301. Needless to say none of these findings and decisions involved introduced species, but adopting this approach of the Court of Appeal, it would frankly seem a reasonable extension of the "Maori fishing" rights to include a species introduced after the Treaty was signed.

Another way to approach the question as to whether the Maori fishing rights extends to trout, is that adopted in the **Ika Whenua** case (at p24). There Cooke P said: (as to whether hydro electric dams on rivers and the generation of power were within the Treaty)

> "The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga, or in the official English version "full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other property..." In doing so the Treaty must have been intended to preserve for them effectively the Maori customary title as mentioned in the Fisheries case at p655. But, however liberally Maori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori Chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity".

On this approach, it is proper is to ask what would have been within the reasonable contemplation of the parties at the signing of the Treaty in 1840. In this case, would the parties have anticipated the introduction of new species into the Colony's rivers and lakes? In my view it is difficult to exclude such an expectation or anticipation. After all, Maori had the example of Europeans introducing new animals into this country. In my view the introduction of new fish species is not nearly so unamaginable as the construction of hydro-electric dams would have been. It is not unreasonable to suggest that introduced fish species could have been within the contemplation of the signatories to the Treaty. If Maori had been asked at the time by Europeans whether they would claim the right to fish for new species of fish to be

introduced at a later stage into the rivers and lakes in which they traditionally fished, the answer would surely have been "yes".

Yet another way of approaching the matter, and in this case yielding the same conclusion, is the defence submission of a Treaty "development right". The Waitangi Tribunal "Muriwhenua" and "Ngai Tahu" Fishery Reports recognise a Maori development right. The existence of such a right has also been recognised by the Court of Appeal in **Ngai Tahu Maori Trust Board v Director-General of Conservation** [1995] 3 NZLR 553. There Cooke P concluded: (pp559-60)

> "...it is obvious that commercial whale-watching is a very recent enterprise, founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the Treaty. We were referred to no case and any jurisdiction dealing with a claim to exclusive commercial whale-watching rights. The right of development of indigenous rights is indeed becoming to be recognised in international juris prudence, but any such right is not necessarily exclusive of other persons or other interests." (Emphasis added)

The Court added:

> "Although a commercial whale-watching business is not a taonga or the enjoyment of the fishery within the contemplation of the Treaty, certainly it is so linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles are relevant. Such issues are not to be approached narrowly. The Crown is right to accept in this case that Treaty principles apply, at least if not inconsistent with the particular legislation. On the other hand, the Crown is not right in trying to limit those principles to consultation. Since the Lands case, **New Zealand Maori Council v AG** [1987] 1NZLR 641... It has been established that the principles require active protection of Maori interests. (Emphasis added)

This was apparently the first case to involve consideration of the obligations under s4 of the Conservation Act 1987. It is authority for the proposition that Courts will interpret the principles of the Treaty in an expansive manner, even to the extent that they include rights in relation to "resources founded on the modern tourist trade and distinct from anything envisaged in or any rights exercised before the Treaty". There, Ngai Tahu were unable to rely on s26ZH and were forced to rely entirely on the construction of Treaty principles under s4. Notwithstanding that whale-watching was not a taonga protected by the Treaty, the Court still found sufficient nexus linking the activity to "taonga" and "fisheries" to enable Ngai Tahu a reasonable preference to the resource. In one sense the defendant's rights here are probably more clear cut than in the whale-watch case. However, that case obviously did not involve an introduced species. Also, the finding that the tribe was "entitled to a reasonable degree of preference" is something different to establishing a Maori fishing right sufficient to provide legal defence to a prosecution. But in this case rivers are a "taonga" and there is obviously a close nexus between the river and acquatic life within it. In my view

the "development right" concept is not decisive, but the thrust of the Court of Appeal's reasoning surely points in the defence's favour.

The foregoing sets out a series of principles to be applied in establishing whether trout are to be included within the "Maori fishing right". There may be room for legitimate debate as to how these principles are applied. Conceivably different people may reach different conclusions. In the end I think the question is really a matter of degree, as to how far the right should be extended. The clear principles ennunciated in the series of leading Court of Appeal cases do not seem inconsistent with trout, an introduced species, being included within the right. My preference is to include trout within that right. However, one important issue remains for consideration. That issue, is whether the fresh water fisheries legislation explicitly excludes trout from the "...any Maori fishing rights".

Whether Fisheries Legislation Excludes Trout from the Ambit of "Maori fishing rights"

The informant strongly argues that whatever the scope of the "Maori fisheries right," successive legislation has clearly excluded trout from it. It is said the legislative intent has clearly been to restrict the right in this way. In other words trout are, and always have been part, of a separate regime whereby they were bred, hatched, introduced into fresh water locations and controlled with funding provided by licence fees, payable by Maori and other New Zealanders alike.

It is necessary to set out the relevant legislation in some detail.

The earliest legislation in New Zealand relating to fresh water fisheries is The Salmon and Trout Act 1867 (Number 34). That Act in contemplation of the introduction of salmon and trout into "this colony from abroad", provided for the Governor to regulate (inter alia) for the preservation of young trout and salmon. This included regulations covering conditions and restrictions in respect of the fishing for salmon and trout such as the times and seasons permitted for fishing and the prohibiting of nets, etc. No mention at all was made of "Maori fishing rights" and whether they were to be "affected."

The Fish Protection Act 1877, the forerunner to the present fisheries legislation, gave the Governor the power to make regulations and specifically provided (s8):

> "Nothing in this Act contained shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi or take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder".

The Fisheries Conservation Act was enacted in 1884 and dealt mainly with oysters and seals. However, under a series of Fisheries Conservation Act Amendment Acts in 1902, 1903 and 1906 specific provision was made for fresh water fish. The 1902 Amendment Act dealt with the establishment of fish breeding and hatcheries and the formation of Acclimatisation Societies. Powers were again given to the Governor to make regulations providing for the conditions of licences. There was an additional condition allowing occupiers of lands to fish without a licence. The 1903

Amendment Act set dates for the opening and closing of the trout fishing season and provided the Governor with power to make regulations concerning the issue of licences and the regulation of export trout. It also concerned the prevention of pollution of streams. The 1906 Amendment Act dealt amongst other things with the export of trout and "fish ladders for dams".

The Fisheries Act 1908 effectively consolidated previous legislation including a part headed "Fresh Water Fisheries". Acclimatisation Societies were given the power to make regulations (s83) for the providing for licences to fish for trout or other acclimatised fish and:

> "(c) Prohibiting or imposing restrictions and conditions on fishing in any waters or in any specified part or parts thereof, or the taking of any species of fish therein, and, in the case of indigenous fish, exempting Maori either wholly, particially or conditionally, or in respect of any specified waters from the operation of any such prohibition, condition or restriction.

However s67(2) provided:

> "Nothing in this Part of this Act shall affect any existing Maori fishing rights"

Further, as part of s 90, special provision was made for the Maori Council to make recommendation for members of the (Arawa) Rotorua Maori District to be issued with licences to fish for trout within that district. The "licence" authorised the holder to fish for trout for the use and consumption of himself and the members of his family and for no other purpose whatsoever".

The Maori Land Amendment and Maori Land Claims Adjustment Act 1926 made specific reference to fishing rights in Taupo waters. That Act declared the bed of Lake Taupo to be the property of the Crown and provided for Maori fishing rights apparently following from that change of status. Section 14(2) stated:

> "There shall be reserved to the members of the Tuwharetora tribe the right to fish for and catch for their own use any indigenous fish in the said lake but no such fish shall be sold except with the consent of the Board..."

Section 14(9)(c) provided that "such members of the 'Tuwharetoa Tribe' as are nominated by the Board" shall be entitled to have issued to them, free of charge, licences to fish for imported fish in accordance with the Regulations, provided that not more than 50 licences shall be issued in any one year without the consent of the Governor-General and Council.

The Taupo Fishing Regulations 1983 take this special provision into account in Clause 54.

It is the Game Council's strong contention that since the 1877 legislation there has been sensitivity to rights under the Treaty, and customary rights (albeit on a restricted basis) have been specifically left intact. It is submitted that "...the importance of the legislation is to show that it was intended that all persons (Maori or otherwise) would be required to comply with the legislation regarding fresh water fisheries, other than owners of the land adjoining the waters who always had the right to fish for sports/acclimatised/imported fish."

The specific legislative provisions for Taupo and Rotorua Tribes are strongly emphasised by the Game Council. If the legal position was that Maori already had the right to fish for trout then in the case of the Tuwharetoa Tribe there would have been no need to provide for the issue free of charge of not more than 50 licences to fish for imported fish to nominated members of the Tribe. In short the Game Council argue:

> "There is no principle of the Treaty of Waitangi which prevents the Crown from legislation and control of resources as long as it is, in general terms, dealing with the preservation of resources and customs of Maori, within the general principles of the Treaty. Indeed, one of the principles of the Treaty is that the Crown must govern".

This aspect of the case has caused me the most concern. With respect, Counsel for the defendant in their otherwise comprehensive submissions did not fully address this point, emphasising instead the width of the fishing right, as discussed under the previous heading. After anxious consideration, it is my view that for the reasons set out following, the foregoing legislation does not exclude trout from the scope of the fishing right.

1. Whatever the extent of the principle of the "right to govern" it does not extend to the right to remove or restrict precisely that which the Treaty protects, ie. "full, exclusive and undisturbed possession of their fisheries" as I have interpreted that phrase to mean. The Courts are naturally reluctant to ascribe such an intention to Parliament.

2. The legislation relied on by the Fish and Game Council does not expressly limit or restrict that right. At most it does so only by implication. Much clearer words would be necessary. In any case it could be persuasively argued that the view of the law on which that legislation was based is flawed. That legal position existing before the recent Court of Appeal cases, was that Maori had no "proprietary" or "possessive" rights over their traditional rivers and waterways save for the right to fish for such indigenous acquatic life found there. It was previously considered that under the Treaty, Maori had parted with all rights over the rivers. As was remarked by Cooke P in the **Ika Whenua** case (p26).

> "The vesting of the beds of navigable rivers in the Crown provided for by the Coal-Mines Act Amendment 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept [that of a river as being a taonga], although it is odd that the concept seems not to have been put forward in quite that way in the line of cases concerning the Wanganui River, the last of which was the decision of this Court in **Re The Bed of the Whanganui River** [1962] NZLR 600. Perhaps the approach which Counsel for Maori argued for in that line of cases, emphasising the bed and the adjacent land more than the flow of water, is an example of the tendancy against which the Privy Council warned in **Amodu Tijani** (at p403) of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law. Similarly, as the Waitangi Tribunal bring out in their Mohaka River Report at pp34-38, the ad medium filum acquae rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with."

If all the previous legislation relied on by the informant was enacted in the context of what the Court of Appeal now accepts is a probably incorrect view of the law as to what Maori orginally parted with, then s4/s26ZH in this Act,

allows the Court to give a fuller interpretation of "Maori fishing rights" rather than perpetuate a view which conflicts with the Treaty.

As if to emphasise this point, the defence points to s26ZO of the Act which allows any person who is the lawful occupier of any land to fish on such land or waters within such land without a licence. The unchallenged submission by the defence was that the Fish and Game Council accept that if Mr McRitchie's hapu had been the "lawful occupier" of the area of the Mangawhero River bed between Otoko Pa and Matthews Bridge, then he would have been lawfully entitled to fish for trout without a licence. As the land beside the Mangawhero River is owned by private citizens in fee simple. Mr McRitchie's hapu have no lawful rights over the river. Section 26ZO is expressly "subject to this Act" and, therefore, subject to 26ZH. The defence emphasise the considerable irony that Mr McRitchie and his hapu, who have "occupied the land adjoining the river since time immemorial, have less rights than recent owners of land adjoining the river."

3. To the extent that Maori rights over fisheries arise from "aboriginal title", (and include the rights over the waters as a whole rather than just the species found there) then such rights exist until specifically and clearly extinguished by Parliament and with the free consent of the native occupiers. Counsel for the informant was unable to point to any such consent ever having been given.

4. Section 26ZH of the Conservation Act applies only to the very Part of the Act which deals with fresh water fishing and trout in particular. If Parliament had intended for the Maori fishing right not to apply to trout then it would have been qualified accordingly. An available construction and interpretation of s26ZH, consistent with the principles of the Treaty of Waitangi, is that it is to apply to all species of fresh water fish whether indigenous and exotic. However, I accept it could also be interpreted so as to protect rights to fish for indigenous species only, and that the argument is not strong.

5. The legislative provision applying to Tuwharetoa and Arawa Tribes does not necessarily support the informant's argument. It could equally be seen as a legislative recognition of the very right contended for by the defence, rather than the creation a new right that did not exist previously.

Moreover the defence points to s10(3) of the Maori Trust Boards Act 1955 which grants to Tuwharetoa 50% from the proceeds of:

(a) Fishing licences in boats and vessels used on Lake Taupo;

(b) Revenue received from camp sites;

(c) Half the amount of all fines and penalites for breaches of infringements of the Fisheries Act 1908, and Harbours Act 1950.

The defence submits this is an indication and recognition that Tuwharetoa have a development right to share in the commercial returns associated with the trout fishery. This case, the defence emphasised, does not involve commercial gain but is simply the exercise of a traditional fishery, and the case is the stronger for it.

6. The position contended for by the informant contains an inherent practical absurdity, which I should be slow to hold as being Parliament's intention: a Maori fishing for native trout (Pa Ngoi Ngoi). or just simply fishing and not being the holder of a fishing licence would have to throw back any introduced trout he or she happened to catch to avoid possibly committing an offence. If he or she could satisfy a fish ranger that it was not his/her intention to catch trout then presumably this would not constitute an offence, though the distinction is a fine one.

CONCLUSION:

Applying the factual findings I have made to my view of the law I find the defence of "Maori fishing rights" asserted by the defendant is made out on the balance of probabilities.

To summarise my reasoning:

(1) The combination in the Act of s4 and s26ZH is unique and strong.

(2) Section 4 "incorporates" the Treaty into the Act.

(3) The "Maori fishing right" referred to in s26ZH is both an "Aboriginal right" and "Treaty right." It should, in the spirit of the Treaty , be construed expansively and generously.

(4) The right does not apply simply to "species" of fish but to "fisheries" in the broadest sense of the word as helpfully defined by the Waitangi Tribunal and must include the places (i.e. rivers) where Maori fished. A construction that separates land, water and fish from fishing rights should be avoided. The correct approach in my view is to apply the Maori fishing right comprehensively which does not make any artificial distinction between the nature of the right and the types of species that are subject to the right.

(5) On the difficult issue of whether trout should be included in the right, it could not be said that it was far outside the contemplation of the Maori chiefs and Governor Hobson in 1840 that any new species of fish, which European chose to introduce into the colony, would not be included within the fisheries right reserved to Maori. Who could say this was not a perfectly reasonable expectation? The concept of a "development right" is also of some help here.

(6) I find that the successive legislation affecting fresh water fishing does not, on balance, restrict the Treaty right by excluding trout from it.

The essence of my decision is contained in the reasoning under the last three headings before this "Conclusion."

There is no need to consider other interesting arguments raised by the defence as to possible application the New Zealand Bill of Rights Act.

I fully accept that this decision is at what might be called "the liberal" end of the spectrum. There is clearly room for legitimate debate and argument as to the question of reasonable expectations of "Treaty partners" and as to the effect of fresh water fishing legislation. Some will argue that as a matter of interpretation or policy that Maori fishing rights can never, by definition, apply to introduced (exotic) fish. But the argument does not lead to one conclusion only and the issue is not clear cut. Value judgments are involved. I believe all my conclusions are perfectly consistent with the approach taken by the Court of Appeal in the last ten years. One need look no further than the "Whale-watch case" to justify this assertion.

Lest I be misunderstood, the effect of my decision is to allow Maori from hapu or iwi having traditional territorial authority over a river fishery, 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.**

This decision is not a charter for Maori to fish for trout without a licence anywhere in New Zealand. Nor does it declare "open season" on trout.

Of course, as emphasised in the **Te Weehi** case, 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. As I have strongly emphasised, this would be to overstate the ambit of my decision. When the Maori fishing right claimed for is viewed in its proper perspective the arguments concerning frustation of the purposes of the Act have less significance. I accept however that such a right will not apply to Europeans or other New Zealanders fishing without a licence. To that extent there may be an injustice. But that is precisely the position that the Treaty of Waitangi, incorporated into the Conservation Act, creates. As was said by Williamson J in **Te Weehi** "I am conscious that the same argument [as to injustice] can be made whenever any person or class of persons are exempted from particular provisions. Viewed in a more general way, such an equality between persons may indicate an overall justice rather than an injustice." If the Treaty is to be paid more than lip service it seems to me inevitable that consequences, such as this decision, will flow from it.

In light of the Conservation Act's directive that it be administered consistent with the principles of the Treaty of Waitangi it is my hope that the Taranaki Fish and Game Council together with hapu/iwi from the Whanganui River region can negotiate a protocol or deed of understanding between themselves so that a similiar prosecution is avoided.

I find the defendant not guilty of the charge still remaining before the Court and dismiss the information accordingly.

ANDREW J. BECROFT
District Court Judge