MAORI FISHING RIGHTS AND THE NORTH AMERICAN INDIAN

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I INTRODUCTION

In an earlier article it was submitted that the characterization of the traditional fishing rights of the New Zealand Maori at municipal law had a direct corollation with the legal status of the fishing and hunting rights of the North American Indian.[1] It was stated that North American courts had long recognised the legal character of Indian claims to ancestral fishing rights; claims very similar to those which have recently attracted attention within New Zealand. Although often part of a claim to full title to certain land, these claims to legal rights of fishery have also been recognised as capable of existing in their own right independent of some larger territorial claim. Such claims were called 'non-territorial', an indication of their existence as some type of right similar to those which some third party might hold over land owned by another. If anything, it was suggested, Maori fishing rights approximated to some kind of aboriginal profit à prendre. The source of these non-territorial rights was claimed to be aboriginal. That is, the recognition at law of Maori rights to their traditional fisheries stemmed not from the Treaty of Waitangi (although these rights are recognised in the English version thereof[2]) nor from statutory acknowledgement (although such can be found[3]), but from the Maoris' use of their ancestral fisheries since time immemorial. The purpose of this article is to elaborate upon the relevance of the North American situation to Maori claims to their traditional fisheries.

The North American cases concerning Indian hunting and fishing rights proceed on the basis that these rights can stem either from an aboriginal title recognised at common law or from some treaty between certain tribes

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1 McHugh, "The legal status of Maori fishing rights in tidal waters" (1984) 14 VUWLR 247.

2 Although the English versions of the Treaty of Waitangi specifically guaranteed traditional Maori fishing rights, the Maori version mentioned only *whenua* (land), *Kainga* (homes), and *taonga katoa* (all highly prized possessions). It is not sure whether traditional fisheries fall into the last category. The omission of forests and fisheries from the Maori version is explained by Ross to have come from their omission from the English draft given to the Williamses to translate: "Te Tiriti o Waitangi" (1972) 6:2 NZJH 129 at 141-142. This paper relies upon their inclusion in the English versions of the Treaty.

3 Section 8 of the Fish Protection Act 1877 provided "Nothing in this Act contained, shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of aboriginal natives to any fishery secured to them thereunder". This section presupposes some viability at law of Maori rights to their traditional fisheries. Section 77(2) of the Fisheries Act 1908 provided that nothing in Part I of the Act "shall affect any existing Maori fishing rights". The most recent fisheries legislation provides similarly: the Fisheries Act 1984 s 88(3).

and the government. The cases acknowledge that valid legislation can intrude upon these hunting and fishing rights but there is no insistence upon statutory enactment to give life to such rights in order that judicial acknowledgement can proceed. In addition, the extensive Canadian and American case-law indicates that Indian hunting and fishing rights can arise in some non-territorial manner, particularly in those cases where certain aboriginal land has been ceded with the reservation of hunting and fishing rights over the ceded region. This article will focus in particular upon the sources of North American Indian hunting and fishing rights. These sources can be an aboriginal title recognized at common law, a title derived from 'treaty' or agreement with the Crown, or a combination of both (the 'treaty' being taken as a confirmation of pre-existing rights). Part II considers the aboriginal source of Indian hunting and fishing rights in Canada, Part III looks at Indian treaties as a source of rights in municipal law in Canada, whilst Part IV considers the position of the American Indian in the United States.

Although it will become apparent that Indian hunting and fishing claims in Canada and the United States arise within particular legal contexts peculiar to each country, one should not use this as a basis for the outright dismissal of the North American material. Underlying the North American case-law are consistent governing principles applicable to the New Zealand setting. Indeed, one is often struck by the similarity of aboriginal claims in North America and those at present made in New Zealand. It must be emphasised that the earliest cases within New Zealand upon questions of Maori rights have taken note of the North American case-law. In *R* v *Symonds* (1847)[4] Chapman J spoke with obvious knowledge and admiration of the decisions of the United States Supreme Court under Chief Justice Marshall. This body of cases contained a comprehensive recognition of the aboriginal rights at common law of the North American Indian and formed the cornerstone of both Canadian and American appraisals of Indian rights.[5] Prendergast CJ also spoke of the Marshall decisions glowingly but his interpretation of them in *Wi Parata* v *Bishop of Wellington* (1877)[6] is open to doubt. The Privy Council has indicated that the advice it has given on matters of aboriginal title establishes general principles applicable throughout the Commonwealth countries with an aboriginal (that is, tribal) population.[7] Such statements serve to highlight the universality of the common law principles which govern the Crown's conduct towards, and indeed the general legal position of, tribal peoples subsequent to British annexation. These principles comprise the doctrine

4 (1847) [1840-1932] NZPCC 387 (SC) at 388.

5 See, generally, Cohen "Original Indian title" (1947) 32 Minn L Rev 28; Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered" (1980) 31 Hast LJ 1213; Lysysk, "The Indian Title Question in Canada: an appraisal in the light of *Calder*" (1973) 51 Can Bar Rev 450; Cumming and Mickenberg (eds) *Native Rights in Canada* (1972) at 16-21.

6 (1877) 3 NZJur (NS) SC 72 at 77.

7 *Amodu Tijani* v *The Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 403.

of aboriginal title, a doctrine widely misunderstood or neglected in New Zealand.[8]

Put at its simplest, the doctrine of aboriginal title recognises the right at common law of tribal peoples subsequent to British annexation to the continued use and occupation of their ancestral lands, hunting grounds and fisheries. Since sovereignty is conceived in English law as a combination of *imperium* (the right to govern) and *dominium* (the Crown's paramount ownership of all land), aboriginal title in its classic formulation is seen as a burden upon the Crown's *dominium* in its newly-acquired territory.[9] The nature of this aboriginal title received recent examination in *Guerin* v *The Queen* (1982). Speaking for Canada's Federal Court of Appeal, Le Dain J made this observation:[10]

> . . . if the Indian title cannot be strictly characterized as a beneficial interest in the land[11] it amounts to the same thing. It displaces the beneficial interest of the Crown. As such, it is a qualification of the title of the Crown of such content and substance as to partake, in my opinion, of the nature of a right of property. I am, therefore, of the opinion that it could be the subject of a trust.

An aboriginal title cannot be extinguished other than by valid legislation or voluntary sale or relinquishment by its traditional owners to the Crown. The Crown enjoys the exclusive prerogative right (known as its pre-emptive right) to accept the cession of aboriginal territory but it enjoys no prerogative capacity to extinguish the aboriginal title unilaterally. Elsewhere it has been concluded that Maori fishing rights may well exist in New Zealand as part of an unextinguished non-territorial aboriginal title as is often the case in North America.[12] Let us look then to the North American cases to see the manner and form in which Indian hunting and fishing rights have found recognition at law.

The scope of this paper is limited to aboriginal claims over land owned by the government. In North America this land comprises huge inland tracts of ungranted and/or unoccupied Crown land as well as the bed of tidal and navigable waters. There are no such large tracts in New Zealand where Maori people exercise the aboriginal hunting and fishing rights of their ancestors. There may be tracts of privately-owned land in New Zealand subject to some sort of similar claim but the basis of such claims is a com-

8 See McHugh "Aboriginal title in New Zealand Courts" (1984) Canterbury LR 235. The doctrine is completely overlooked, for example, by Haughey "The Treaty of Waitangi – its legal status" [1984] NZLJ 392.

9 Idem.

10 (1982) 143 DLR (3d) 416 (FCA). Leave to appeal to the Supreme Court of Canada granted February 21, 1983. It was held that though lands in an Indian reserve are subject to an unextinguished aboriginal title, the Indian Act (which governs reserves and *not* other land subject to an unextinguished aboriginal title) gives the federal government such broad discretionary powers of management over Indian reserves that according to the principles in *Kinloch* v *Secretary of State for India* (1882) 7 App Cas 619 and *Tito* v *Waddell (No. 2)* [1977] 3 All ER 129 the legislation transforms the Crown's position as trustee from a legal (that is equitable) to political character [see Author's Postscript].

11 This means that the aboriginal title is not the result of an express trust but conforms more with a constructive trust model.

12 Supra n 1.

plicated question beyond the scope of the present inquiry. It can be noted though that the *Guerin* view of aboriginal title as an equitable interest in land means that Crown grantees of land and their successors in title may well be bound as constructive trustees (particularly in cases of express acquiescence) by subsisting aboriginal interests over that land notwithstanding their status as registered proprietors.[13] The particular focus of this article, however, is upon land the nominal title to which is in the Crown[14] or, in the case of the United States, the Federal Government.

II The Aboriginal Source of Canadian Indian Hunting and Fishing Rights

The position of Indian hunting and fishing rights in Canada is complicated by the federal character of the country. Section 91(24) of the British North America Act[15] gives the Federal Parliament exclusive jurisdiction over Indians and lands reserved for them. However, section 88 of the federal Indian Act[16] provides that "all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province". These provisions establish the basis of federal and provincial legislative authority over the Indian and Inuit people[17] and their land.

In certain parts of Canada, the Royal Proclamation of 1763[18] has relevance to questions of Indian hunting and fishing rights. This Proclamation, which has been judicially recognized as possessing the force of a statute,[19] contained acknowledgement of Indian hunting and, by strong associated implication,[20] fishing rights. In the Prairie provinces, the position of Indian hunting and fishing rights is also affected by the Natural Resource Transfer Agreements between Canada and Manitoba, Saskatchewan and Alberta. These Agreements contain a clause referring to Indian hunting and fishing rights which has been included in the Imperial,[21] federal[22] and provincial legislation[23] giving effect to the Agreements. This clause provides:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game

13 This presupposes a non-territorial aboriginal right of fishery binds purchasers of land subject to the Land Transfer Act 1952, notwithstanding section 182 of the same.

14 The sources of Crown ownership of the bed of navigable and tidal water in New Zealand are discussed in McHugh supra n 1 notes 10-31 and accompanying text.

15 30 & 31 Vict (UK) c 3.

16 RSC 1970 c 1-6.

17 In *Re Eskimos* [1939] SCR 104 it was held that Inuit were "Indians" within the meaning of s 91(24) of the British North America Act 1867.

18 Reproduced in RSC 1970 App at 123-129.

19 *Rex* v *McMaster (Lady)* [1926] Ex Cr 68 at 72; *R* v *White and Bob* (1964) 52 WWR 193 (BCCA) at 218.

20 *R* v *Wesley* [1932] 58 CCR 269 at 280-281; [1932] 4 DLR 774; [1932] 2 WWR 337 (Alta C 4).

21 The British North America Act 1930 20-21 Geo V (UK) 26.

22 The Natural Resources Act (Can) 1930 c 41, and see RSC 1970 App at 367, 377 and 385.

23 The Manitoba Natural Resources Act RSM 1954 c 180; Saskatchewan Natural Resources Act 1930 c 87; Alberta Natural Resources Act 1930 c 21.

> and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

In addition, it can be noted that section 88 of the Indian Act makes the provincial laws of general application expressly subject to the terms of any treaty between the Crown and Indian tribes whose forebears signed it.

The result of the above network of provisions is that four types of region within Canada can be identified so far as Indian hunting and fishing rights are concerned. These regions are:

(1) Those areas of Canada covered by the Royal Proclamation of 1763. This region covers most of Canada, save British Columbia[24] and the vast northern wilderness once held by the Hudson's Bay Company (Rupert's Land).[25]

(2) The Prairie Provinces of Manitoba, Saskatchewan and Alberta which are subject to the Natural Resources Agreements and the 'Numbered' treaties.[26]

24 *R* v *White and Bob* (1964) 52 WWR 193 (BCCA) (per Sheppard and Lord JJA); *R* v *Discon and Baker* (1968) 63 WWR 485 (BCC) at 495; *Attorney-General (British Columbia)* v *Calder* (1973) 34 DLR (3d) 145 (SCC) at 156 (per Judson J, Martland and Ritchie JJ concurring); and *Derrikson* v *The Queen* [1976] 6 WWR 480 (SCC). Contra vide *R* v *White and Bob* supra at 218 (per Norris JA) and *Attorney-General (British Columbia)* v *Calder* supra at 204-208 (per Hall J, Spence and Laskin JJ concurring).

25 *Sigeareak El-53* v *The Queen* [1966] SCR 645 at 649-650; *R* v *Tom Tom* [1978] 1 WWR 275 (Yuk Ter Mag C); *Hamlet of Baker Lake* v *Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 (FCTD) at 541. Contra vide Slattery *The Land Rights of Indigenous Canadian Peoples* (1979) at 210-212. There is some doubt whether the Proclamation applied to the old colony of Nova Scotia: *Doe d. Burk* v *Cormier* (1890) 30 NBR 42 (NBSC) at 148; *R* v *Jacques* (1978) 34 APR 576 (NBPC) at 579-80; *R* v *Smith* [1978] 1 FC 653 (FCTD) at 655 note 3. See, more authoritatively: *Warman* v *Francis* (1958) 20 DLR (2d) 627 (NBSC) at 634; *R* v *Isaac* (1975) 13 NSR (2d) 460 (NSCA) at 478 (per MacKergan CJ).

26 These treaties were concluded between 1871 and 1921. They were as follows: Treaty No. 1, the Stone Fort Treaty, August 3 1871, ceding a portion of southern Manitoba and absorbing the Selkirk Treaty (this treaty concerned the Red River area Indians and Lord Selkirk to whom the Hudson's Bay Company had given 116,000 square miles for the establishment of the Assinibona colony: for a copy of the treaty see "The Hudson's Bay Company's Land Tenures and the Titles of the Selkirk Settlers" (1892) 3 Western Law Times 129 at 140-141 and, generally, "The Selkirk Purchase of the Red River Valley, 1811" (1932) 6 N Dak Hist Q 101); Treaty No. 2, the Manitoba Post Treaty, August 21 1871, ceding the area north of Treaty No. 1, west of Lake Winnipeg and including a portion of the southeastern corner of Saskatchewan; Treaty No. 3, the North-West Angle Treaty, October 3 1873, ceding a region west of the Robinson-Superior Treaty (infra n 27); Treaty No. 4, the Qu'Appelle Treaty, September 15 1874, ceding a large region in southern Saskatchewan; Treaty No. 5, the Winnipeg Treaty, September 20 and 24 1875, ceding northern Manitoba; Treaty No. 6, Treaties of Forts Carlton and Pitt, August 23 and 28 1876 (Carlton) and September 9 1876 (Pitt), ceding central Alberta and Saskatchewan; Treaty No. 7, the Blackfoot Treaty, September 22 1877, ceding southern Alberta; Treaty No. 8, June 21 1899, ceding the greater part of northern Alberta; Treaty No. 9, the James Bay Treaty, 1905-1906 (various dates), ceding northern Ontario; Treaty No. 10, 1906 (various dates), ceding northern Saskatchewan and a portion of northern Alberta; Treaty No. 11, 1921, ceding the Mackenzie River Country in the Northwest Territory. See, generally, Harper "Canada's Indian Administration: The Treaty System" (1947) 7 America Indigena 129 and for a map of the area covered by the Numbered Treaties, see Cumming and Mickenberg, *Native Rights in Canada* supra n 5 at 118.

(3) Those regions covered by treaties between the federal government and Indian tribes or bands. Typically, but not invariably, these treaties reserved to the signatory tribes rights of hunting and fishing. This invariably was the case with the 'Robinson'[27] and 'Numbered' treaties affecting most of central Canada. A stock provision of these treaties stated:[28]

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada.

The 'treaties'[29] concluded in the Maritime provinces were not as consistent in their recognition of Indian hunting and fishing rights. These treaties did not cover a significant proportion of the Maritimes area; nonetheless the Micmac treaty of 1725, later confirmed in similar terms in 1752, specifically left the signatory bands with "free liberty of hunting and fishing as usual".[30] A similar provision appeared in the 'Douglas' treaties concluded in respect of a limited area of British Columbia, mainly on Vancouver Island.[31] Indians belonging to bands able to claim the benefit of a treaty concluded by their forebears are known as 'treaty Indians'.

(4) Those regions, particularly in British Columbia and the Northwest Territory, subject to none of the above provisions.

It would be incorrect and too simplistic to think that Canadian courts confronted with Indian claims to hunting and fishing rights in regions (1)

27 These two treaties were negotiated in 1850 by William Robinson, a provincial commissioner assigned the task of extinguishing native title in the Lake Superior and Lake Huron region. These two treaties provided the model for the Numbered Treaties: Harper supra n 26 at 136-137. Both treaties and background material to their negotiation can be found in Morris *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880, reprint 1971) at 16-21 and 302-309.

28 This example is taken from Treaty No. 3, text in Cumming and Mickenberg, supra n 26 App IV at 315.

29 Some doubt has been expressed whether the Maritime agreements with Indians constitute 'treaties' for the purposes of section 88 of the Indian Act: *Rex* v *Syliboy* [1929] 1 DLR 307 (NSCC), *R* v *Simon* (1958) 124 CCC 110 (NBSC), *Reg* v *Francis* (1970) 10 DLR (3d) 189 (BBCA) at 192. The Court of Appeal stated that the same result arose even if the agreement with the Micmac Indians of 1779 was a 'treaty' for it was subject to federal legislation; similarly, *R* v *Nicholas et al* (1978) 22 NBR (2d) (NBPC); (1979) 26 NBR (2d) 54 (NB App Div) and *R* v *Sacobie* (1980) 30 NBR (2d) 70 (NBPC). See McKenzie "Indians and Treaties in Law" [1929] 7 Can Bar Rev 561 criticizing the *Syliboy* approach. In "Indian Hunting Rights: Constitutional Considerations and the role of Indian treaties in British Columbia" [1966] 2 UBCLR 401 at 406 Lysyk finds *Syliboy* to have been effectively overruled by *White and Bob* supra n 24. Also *R* v *Cope* (1981) 49 NSR (2d) 555 (NSCA); *R* v *Simon* (1982) 49 NSR (2d) 566 (NSCA).

30 The full texts of the Maritimes 'treaties' are given in Cumming and Mickenberg, supra n 5, appendix III.

31 These land cessions obtained by Governor James Douglas are nearly identical, uniformly reserving for the Indians "liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly" – see *British Columbia Papers Connected with the Indian Land Question,* 1850-1875 (1875) at 5-11.

to (3) above have been content to base their recognition upon some statutory acknowledgement of such rights. Unlike New Zealand courts, which since *Wi Parata* have taken a 'statute-based approach' to Maori rights,[32] nearly all Canadian courts have acknowledged the source of Indian hunting and fishing rights to be other than the statutory enactments affecting those rights.[33] The Canadian attitude has been that Indian hunting and fishing rights exist independently of statutory recognition. That is to say, they stem from either an aboriginal title or the recognition of these rights in treaties between the Crown and various tribes. This attitude is highly relevant to the New Zealand context, for applied to Maori claims it would mean that Maori fishing rights arise at law either as part of some aboriginal title or as a result of their embodiment in the Treaty of Waitangi. This means that the prevailing view within New Zealand as to the legal status of Maori fishing rights is directly challenged by the overwhelming body of Canadian case-law which will now be considered.

The legal character of Indian hunting and fishing rights in Canada first received judicial attention in 1903 when the Privy Council considered the Robinson treaty guaranteeing to the Indians the continued right "to pursue their avocations of hunting and fishing throughout the surrendered territory" given up by the treaty. In *Ontario Mining Co.* v *Seybold* (1903)[34] the Privy Council recollected the advice it had given several years earlier in the *St. Catherine's Milling and Lumber Co.* case.[35] It advised that the Crown in right of the Province of Ontario held title to land in the province "subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty".[36] The strong implication of this was that hunting and fishing rights existed as part of an aboriginal title but were severable interests capable of surviving as a non-territorial incident of an otherwise extinguished aboriginal title.[37] These rights were not directly at issue in the case, however, so it was left until *R* v *Wesley* (1932)[38] for the first full consideration of Indian hunting and fishing rights over land to which no territorial aboriginal claim attached.

R v *Wesley* arose in Alberta soon after the conclusion of the Natural Resources Transfer Agreements between the federal and provincial authorities. It has been seen that the Imperial, federal and provincial legislation giving effect to these Agreements expressly protected Indian hunting and fishing rights. This case arose when a treaty Stoney Indian was acquitted on two charges and convicted of another under the provincial

32 See McHugh "Aboriginal title in New Zealand Courts" supra n 8, passim.

33 The nearest exception is *R* v *Discon and Baker* (1968), supra n 24, which appears, however, to concede that aboriginal rights can arise from a treaty (at 493).

34 [1903] AC 73 (PC).

35 (1889) 14 AC 46 (PC), aff'g (1887) 13 SCR 577 (SCC).

36 Supra n 34 at 79.

37 See the comments of LaForest *Natural Resources and Public Property under the Canadian Constitution* (1969) at 119.

38 Supra n 20.

Game Act.[39] The provincial Court of Appeal affirmed the acquittals and quashed the conviction. During the course of his celebrated judgment, McGillivray JA made several observations on the origins of the Indian hunting and fishing rights referred to in the Natural Resources Agreements. One observation in particular was subsequently to elicit favourable judicial comment.[40] Here McGillivray affirmed the aboriginal character of Indian hunting and fishing rights, which rights were confirmed by later treaties and statute. Speaking of the relevant paragraph of the Agreement he stated:[41]

> I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary for his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s.12 *reassured* of the continued enjoyment of *a right which he has enjoyed from time immemorial.*

This passage was later seen by Norris JA as amounting to a reassurance of the aboriginal character of hunting and fishing rights.[42] In *R* v *White and Bob* (1964) Norris went on to give one of Canada's most exhaustive judgments on the origin and nature of Indian hunting and fishing rights. The case arose from a conviction of two treaty Indians under the provincial Game Act.[43] Judges in the British Columbia County Court, Court of Appeal and Supreme Court of Canada all affirmed that the provincial law did not apply to the Indians hunting for food on unoccupied land by virtue of section 88 of the federal Indian Act making provincial laws of general application expressly subject to the terms of any 'treaty'. The County Court judge characterized Indian hunting rights as aboriginal in origin,[44] a view confirmed on appeal by Norris JA. In confirming this status, Norris was clearly concerned to see that treaty Indians in region (3) were not given substantially greater protection of their hunting and fishing rights than those in region (4) who must place sole reliance upon a common law aboriginal title. The Royal Proclamation of 1763, the Natural Resources Agreements, Indian treaties and federal legislation are all characterized as confirming the existence at law of an aboriginal right.[45] This was not a case, Norris said, "merely of making the law applicable to native Indians as well as to white persons so that there may be equality of treatment under

39 RSA 1922 c 70.

40 *R* v *Strongquill* (1953) 8 WWR (NS) 247 (Sask CA) at 257 (per Gordon JA); *R* v *White and Bob* (1964) supra n 24 at 217 (per Norris JA); *R* v *Sikyea* (1964) 46 WWR 65 (NWTCA) at 66 (per Johnson JA); *Prince and Myron* v *The Queen* [1964] SCR 81 at 84; *Daniels* v *White and Reginam* (1968) 64 WWR 385 (SCC) at 397-400; *Cardinal* v *Attorney-General (Atta)* [1974] SCR 695 at 723-724; *R* v *Sutherland, Wilson and Wilson* [1980] 2 SCR 451 at 460; *R* v *Mousseau* [1980] 2 SCR 89, 111 DLR (3d) 443 (SCC) at 445-446.

41 Supra n 20 at 276 (emphasis added).

42 Supra n 24 at 217, where Norris gave this passage identical emphasis.

43 RSBC 1960 c 160.

44 (1964) 50 DLR (2d) 613 (BCCC) at 610, approved in *R* v *Kruger and Manuel* [1974] 6 WWR 206 (BCCC) at 217 (this decision was overruled on other grounds on appeal) and *Daniels* v *White and Reginam* supra n 40.

45 Supra n 24 at 218-231.

the law, but of depriving Indians of rights vested in them from time immemorial, which white persons have not had . . .".[46]

During the course of his judgment, Norris referred with approval to the decisions of Sissons J in the Northwest Territories Territorial Court.[47] Sissons, who in his time was considered rather a judicial renegade[48] although his reputation later enjoyed more favourable regard,[49] had handed down several decisions upon the question of Inuit hunting and fishing rights.[50] These decisions were given on the basis that the Royal Proclamation of 1763 applied to the Northwest Territories and later were to be overruled on this point. It is significant, however, that the Supreme Court expressly stated that the Sissons' judgments were being overruled only on this narrow point. The Supreme Court took no issue whatsoever with Sissons' views on the origin of native hunting and fishing rights.[51] Indeed, in other cases of the period, it will be seen, the Supreme Court was taking an almost identical attitude. The Sissons' approach is best summarized in this passage from *R* v *Koonungnok* (1963):[52]

> This [1763] proclamation has been spoken of as the 'Charter of Indian Rights'. Like so many great charters in English history, it does not create rights but affirms old rights. The Indians and Eskimos had their aboriginal rights and English law has always recognized these rights.
> Indian and Eskimo hunting rights are not dependent on Indian treaty or even on the royal proclamation.

The Supreme Court of Canada was also coming to terms with Indian hunting and fishing rights during the 1960s. In *Prince and Myron* v *R* (1964)[53] Hall J delivering the Court's judgment agreed with the passage from *R* v *Wesley* cited earlier. This was a case of an Indian claim in region (2) above; nonetheless in approving *R* v *Wesley,* the Court's attitude could only have been that the hunting rights in question derived not from

46 Ibid at 232.

47 Ibid at 231.

48 These remarks typify how he became the bane of federal authorities in the Northwest Territories: "It may seem amazing that such a weird measure [as the Game Ordinance (NWT) 1960 2nd Sess c 2] should be passed through parliament, but it is notorious that at Ottawa at the end of a long session and in the hot days of summer almost anything can be slipped over a dozing parliament with probably only a jaded quorum present, uninformed and indifferent as to the north and Eskimos": *R* v *Koonungnak* (1963) 45 WWR 282 (NWTTC) at 306.

49 His autobiography, Sissons *Judge of the Far North* (1968) was warmly received: (1968) 46 Can Bar Rev 717 (reviewed by D Schmeiser).

50 *R* v *Kogogolak* (1959) 28 WWR 376 (NWTTC); *R* v *Sikyea* (1962) 40 WWR 494 (NWTTC); *R* v *Koonungrak* supra n 48; *Kallooar* v *R* (1964) 50 WWR 602 (NWTTC).

51 Sissons found the Royal Proclamation was declaratory of Indian rights. In *Sigeareak El-53* v *The Queen* [1966] SCR 645 it was indicated that *Kallooar* and *Kogogolak* were wrongly decided only to the extent that they exempted the Inuit from federal legislation (at 652). In other words, the Supreme Court implicitly acknowledged the existence of an aboriginal right but unlike Sissons found it was subject to federal legislation.

52 Supra n 48 at 302.

53 Supra n 40.

statutory acknowledgement but from some aboriginal source. Later courts have interpreted *Prince and Myron* on this basis.[54]

In a later decision reported the same year, the Supreme Court took a similar approach. Its judgment delivered by Hall J in *Sikyea* v *R*[55] simply agreed wholeheartedly with the opinion of Johnson JA in the Northwest Territories Court of Appeal, which was, in turn, an appeal from a decision of Sissons J. In the Territorial Court, Sissons had discharged a treaty Indian in region (3) above convicted under the federal Migratory Birds Convention Act.[56] The Court of Appeal had cast no disapproval on Sissons' views as to the aboriginal origin of the native hunting right but was unable to agree that federal (as opposed to provincial) legislation must be read as qualified by the aboriginal hunting right in the event of an outright conflict.[57] Indeed, Johnson JA made a finding identical to Sissons on the aboriginal nature of the hunting and fishing right:[58]

> The right of Indians to hunt and fish for food on unoccupied crown lands has always been recognised in Canada — in the early days as an incident of their 'ownership' of the land, and later by the treaties by which the Indians gave up their ownership rights in these lands.

In *Daniels* v *White and Reginam* (1968) the Supreme Court was faced with interpretation of the relevant paragraph of the Natural Resources Agreement protecting Indian hunting and fishing rights in region (2) from legislative intrusion. The majority of the Supreme Court expressed no opinion on the origin of such rights, holding that the Agreements spared these rights only from provincial legislation.[59] Delivering judgment for the minority, Hall J held that the hunting and fishing rights were protected from federal as well as provincial legislative disruption. Unlike the majority, Hall went on to consider the origin of these rights, confirming that the Royal Proclamation, treaties and relevant Imperial and federal legislation did no more than confirm pre-existing rights:[60]

> The federal authority was already under treaty obligation contained in Treaties 5 and 6 . . . to preserve the Indians' right to hunt and fish for food at all seasons of the

54 *Kallooar* v *R* supra n 50 at 607-608; *R* v *White and Bob* supra n 24 at 216 (per Norris JA) where it said that *Prince and Myron* "recognizes the aboriginal right, and treats the provision of *The Game and Fisheries Act* RSM 1964 ch 94 and *The Manitoba Natural Resources Act* RSM 1954 ch 180, as recognizing an existing right . . .".

55 [1964] SCR 642 aff'g (1964) 43 DLR (2d) 150; 46 WWR 65 (NWTCA).

56 RSC 1970 c M-12. The hunting season in the North-west Territories for ducks stipulated by this Act occurs after the birds have flown south for the winter. The injustice of this to northern natives who rely on bird meat for subsistence is clear. See Schmeiser "Indians, Eskimos and the Law" (1968) 38 Sask L Rev 19 and 20. This Act is one of the most sensitive points of Indian-federal relations. The Department of Indian Affairs made a policy of not charging Indians under this Act, a policy which was held at first instance in *R* v *Catagas* [1977] 3 WWR 706 (Man CC) to be a defence to a charge under the Act. This finding understandably was overruled on appeal ([1978] 1 WWR 282 (Man CA)) on the basis that the Crown may not dispense with laws by executive action.

57 Supra n 55 at 74.

58 Ibid at 66.

59 Supra n 40 at 410.

60 Ibid at 402-403.

> year . . . . The obligation of Canada to preserve the right to hunt and fish for food at all seasons was an historical one arising out of the rights of Indians as original inhabitants of the territories from which Manitoba, Saskatchewan and Alberta were carved and arising out of the treaties above mentioned.

Hall's views about the legal and aboriginal character of native rights were to culminate in his celebrated judgment in *Attorney-General (British Columbia)* v *Calder* in which he gave full recognition to territorial aboriginal title as a creature of the common law.[61] His fellow judges took a similar approach but parted company with him on the issue of the legislative extinguishment of the territorial aboriginal title of British Columbia Indians. Subsequently the Court was called upon to adjudicate the Indian claim to a non-territorial aboriginal right to fish upon ancient tribal territory in British Columbia notwithstanding the provincial fishery regulations. The provincial fishery laws are unique because they arise under a head of jurisdiction in which the federal and provincial legislative powers overlap. Consequently, the federal Parliament has delegated its powers to the provinces who enact regulations on the authority of a federal statute.[62] This meant that the Okanagan Indian from British Columbia who appealed his conviction in *R* v *Derriksan* (1973) had suffered at the hands of federally-derived legislation. Not surprisingly, the Supreme Court held that if the aboriginal right existed in region (4) it was governed by the relevant legislation.[63]

The Supreme Court in *Derriksan* expressly left open the question whether a non-territorial aboriginal right to fish existed in that case but gave judgment on the supposition that the right existed.[64] This has been an assumption which many lower courts have subsequently been happy to note[65] and was quite in keeping with the Court's previous record on questions of native hunting and fishing rights. The same assumption appeared in stronger form in *Kruger and Manuel* v *The Queen* (1978)[66] this time with a clear indication of the Court's belief that the assumption was completely justified at law but was simply too complicated and unnecessary an inquiry for the matter before it. This was a case in which valid pro-

61 Supra n 24 and see the comments of Lysysk supra n 5; Mahoney J in the *Baker Lake* case supra n 25 at 541; *Guerin* v *R* supra n 10 at 462.

62 *Attorney-General (Canada)* v *Attorneys-General (Ontario, Quebec and Nova Scotia)* [1898] AC 700 (PC); *Re Shoal Lake Band of Indians No 39 et al* (1979) 25 OR (2d) 334 (Ont HC).

63 [1976] 6 WWR 480 (SCC).

64 Laskin CJC opens his judgment "[o]n the assumption that Mr Sanders is correct in his submission (which is one which the Crown does not accept) that there is an aboriginal right to fish in the particular area arising out of Indian occupation and that this right has had subsequent reinforcement (and we express no opinion on the correctness of this submission) . . ." There is some ambiguity here. Is Laskin accepting the existence of aboriginal fishing rights as a general proposition of law but reserving consideration of its particular application to the case at bar or is he reserving opinion on the general proposition itself? The former option is more likely given the Court's earlier decisions and its subsequent judgment in *Kruger and Manuel* v *The Queen* [1978] 1 SCR 104; see also Bickenbach "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title" (1980) 38 U Tor Fac L Rev 232 at 245.

65 *R* v *Jacques* (1978) 20 NBR 576 (NBPC); *R* v *Nicholas* (1978) 22 NBR 285 (NBPC) aff'd (1979) 26 NBR 54 (NB App Div); *R* v *Sacobie* supra n 29.

66 Supra n 64.

vincial legislation[67] under section 88 of the Indian Act — that is, a provincial law of 'general application' — had modified a presumed aboriginal right to hunt. The 'even if . . .' assumption of the judgment spared an unnecessary and elaborate inquiry to arrive at an 'even though . . .', for the legislation had qualified the right to hunt. In this case, four non-treaty Indians in region (4) had killed four deer without the permits required under the provincial Act for hunting deer during the closed season. These permits were readily obtainable and the four convicted Indians had got them easily in the past. To find the existence of an aboriginal right to hunt required expert anthropological evidence, the presentation of which was pointless given the validity of the provincial law vis à vis Indian hunting rights. This stance is significant because it accepts the existence of a non-territorial aboriginal right to hunt and fish as a general proposition of law.[68] In addition, the Court indicated that there is a distinction between the legislative extinguishment and regulation of aboriginal title:[69]

> The Court of Appeal was not asked to decide nor did it decide . . . whether aboriginal hunting rights were or could be expropriated without compensation . . . [It does not follow that] absence of compensation supports the proposition that there has been no loss or regulation of rights . . . Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The *Wildlife Act* illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place, and manner of hunting game. It is not directed to the acquisition of property.

In other words, there is a distinction between the extinguishment of an aboriginal title and regulation of incidents of that title.[70]

Other recent decisions in Canadian courts, a notable instance being Mahoney J's judgment in *Baker Lake* v *Minister of Indian Affairs and Northern Development* (1980),[71] have confirmed the aboriginal nature of the Indian's hunting and fishing rights.[72] Generally speaking, these rights have been recognized as originally comprising part of a full territorial title which by virtue of treaties have been transformed into non-territorial rights subsisting over ungranted and unoccupied Crown land as some kind of aboriginal profit à prendre. The decision in *Kruger and Manuel* indicates, however, that a treaty reserving hunting and fishing rights is not a pre-

67 The Wildlife Act (BC) 1966 c 55.

68 See also Bickenbach supra n 64 at 245 and Pibus "The Fisheries Act and Native Fishing Rights in Canada: 1970-1980" (1981) 39 U Tor Fac L Rev 43 at 46.

69 Supra n 64 at 109.

70 Also Bickenbach supra n 64 at 245. This recalls the distinction highlighted in *France Fenwick and Co* v *The King* [1927] 1 KB 458 at 467 per Wright J between the expropriation and negative regulation of a property right.

71 Supra n 25.

72 *R* v *Isaac* (1975) 13 NSR (2d) 460 (NSCA), aff'd *R* v *Cope* and *R* v *Simon* supra n 29 (aboriginal rights can be abrogated by valid legislation); *R* v *Tom Tom* [1978] 1 WWR 275 (Yuk TMC); *R* v *Sutherland, Wilson and Wilson* [1980] 2 SCR 451 esp. at 460; *R* v *Haines* (1978) 8 BCLR 211 (BCPC) at 225 (overruled on other grounds (1980) 20 BCLR 260 (BCCC)), Fll'd *R* v *Tenale* (1982) 66 CCC (2d) 180 (BCPC), *R* v *Curley* [1982] 2 CNLR 171 (NWTTC) at 174.

condition to non-territorial status.[73] It should also be noted that the right to hunt and fish is limited to 'aboriginal' purposes; that is to say, ceremonial and subsistence requirements.[74] No aboriginal right to the commercial exploitation of traditional game and fish resources exists in Canada.

For the most part, the Canadian cases concerning native hunting and fishing rights have involved native claims to exemption from provincial and federal game and fishing legislation. The degree of immunity the courts have given in any particular situation depends upon the extent to which federal or provincial legislation has been made subject to Indian rights. In regions (2) and (3), provincial legislation of general application is qualified by the terms of any treaty but in areas (1) and (4) above all federal legislation and provincial laws of general application govern the exercise of aboriginal hunting and fishing rights. This means that non-treaty Indians exercising an aboriginal hunting or fishing right have lesser protection from provincial legislation than treaty Indians, in particular the Indians of the Prairie provinces. Nonetheless, despite this patchwork quilt of protection, one point appears settled. This conclusion is that although capable of being strengthened by treaty and/or statutory recognition, Canadian Indian hunting and fishing rights arise from an aboriginal title and can exist independently of a territorial aboriginal claim. According to the most recent judicial formulation, these interests will be considered equitable in nature. It can be added also that the Constitution Act of Canada (1982) entrenching certain rights and liberties recognizes the "existing aboriginal and treaty rights of the aboriginal peoples of Canada".[75] This is taken as both confirmation and constitutional protection of common law aboriginal (and treaty) rights.[76]

III Indian Treaties as a Source of Native Hunting and Fishing Rights

1 The Canadian 'contractual obligation' approach

Although the overwhelming approach of Canadian courts has been to place the origins of Indian hunting and fishing rights in some doctrine of aboriginal title, several judges have viewed these aboriginal rights as originating from or, in most cases, being supplemented by the express provisions of treaties between the Crown and a particular band or tribe. As

73 This was a case in which the convicted Indians were unable to claim the benefit of a treaty protecting fishing rights. As a result, their claim to fishing rights on all unoccupied and ungranted Crown land was based purely upon an aboriginal title.

74 *R* v *Wesley* (1932) 2 WWR 337 (Alta CA) at 344 per McGillivray JA; *R* v *Prince and Myron* (1962) 40 WWR 234 (Man CA) at 242 (per Freedman JA – this dissenting opinion was expressly adopted on appeal: [1964] SCR 81); *R* v *Sutherland* supra n 72 at 460; *Moosehunter* v *The Queen* [1981] 1 SCR 282 at 285, Contra vide *R* v *Daniels* [1966] 56 WWR 234 (Man CA) at 240 (per Monnin JA) ". . . hunting for food no longer means the difference between life and death for the Indian and his family, especially nowadays, with all the social security measures available for all Canadian citizens, as well as others available only to Indians"; cited favourably in *R* v *Discon and Baker* supra n 24 at 487. These two cases are not good law on the point.

75 Formally enacted by the Canada Act 1982 (UK) c 11 s 35(2) and Part II of the Constitution Act.

76 Bartlett "Indians and Native Law" (1983) 15:2 Ott LR 431 at 499; Slattery "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32:2 Am J Comp L 361 at 366.

a result, several Canadian judgments provide an insight into the legal effects of these treaties and the rights therein contained.

The usual starting point for a consideration of the law of Canadian Indian treaties is the advice of the Privy Council in *The Indian Annuities* case (1897) where it was stated:[77]

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due . . .

In this case the Indian treaty, one of the Robinson treaties between the Crown and Indians of the Great Lakes region, had been entered into under the Crown's prerogative power to silence aboriginal title by voluntary cession of the native owners. The treaty made provision, however, for the payment of annuities to the signatory bands. This promise, the Privy Council advised, was unenforceable because the Crown is constitutionally unable to expend public funds without authorization from the legislature.[78] Nonetheless, the tenor of the advice is that Indian treaties are capable of binding the Crown in some way.

An indication of the basis upon which Indian treaties could bind the Crown appeared in *R* v *Wesley* (1932) where the Alberta Court of Appeal seemed to interpret *The Indian Annuities* case as establishing that Indian treaties were binding on the Crown as some form of contractual obligation. McGillivray JA observed that in "Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements".[79] Nonetheless the Court noted that this status notwithstanding, the Crown was under an executive obligation to observe treaties between itself and the Indian tribes:[80]

> Assuming as I do that our treaties with Indians are on no higher plane than other formal agreements yet this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought the Crown had departed from those equitable principles which . . . uniformly governed the British Crown in its dealing with the aborigines.

Later in his judgment, McGillivray points out that these treaty rights binding on the Crown in its executive capacity can be abrogated by legisla-

77 *Attorney-General (Canada)* v *Attorney-General (Ontario)* [1897] App Cas 199 (PC) at 213.

78 See the explanation in Cumming and Mickenberg supra n 24 at 56. This would seem an application of the old belief that the Crown could not be liable for any agreement involving public expenditure without the Parliamentary appropriation of the necessary funds: *Churchward* v *R* (1865) LR IQB 173. A series of Privy Council decisions indicate, however, that the Crown might still be liable under such agreements. If judgment is obtained in New Zealand against the Crown, the sum owing can be recovered as a judgment debt for which funds are permanently appropriated under the Crown Proceedings Act 1950 s 3(2)(a). Generally Hogg *Liability of the Crown* (1971) at 120-125; Falkner *Government Building and Civil Engineering Construction Contracts* (LLM thesis 1984) at 35-36.

79 Supra n 20 at 283.

80 Idem.

tion. Fortunately no such abrogation could be found in the case before him:[81]

> It is satisfactory to be able to come to this conclusion and not to have to decide that 'the Queen's promises' have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be 'convinced of our justice and determined resolution to remove all reasonable cause of discontent'.

In subsequent cases, Indians sought without success to invoke the protection of treaties in situations where valid legislative enactments adversely affected rights they thought completely protected by treaty.[82] It is significant that the courts often cited *The Indian Annuities* and *R* v *Wesley* to the effect that treaty rights could be legislatively abridged but none stated that Indian treaties lacked any legal effect whatsoever. Most proceeded on the unelaborated premise that the treaties were in some way binding upon the Crown. A notable instance of this is the constant affirmation in the western courts that the constitutional protection given to Prairie treaty Indians by the Natural Resources Agreements was a "merger and consolidation of the treaty rights theretofore enjoyed by the Indians".[83] These words clearly presume some legal status to have inhered in those rights prior to the 1930 'merger and consolidation'.

Several judges have not been content to presume some unelaborated efficacy at law of Indian treaties but have explicitly taken the 'contractual obligation' approach implicit in *The Indian Annuities* and *R* v *Wesley*. In *R* v *White and Bob* (1964) Davey JA spoke of the Indian hunting and fishing rights reserved by treaty. In his opinion, he said, the Indians' "peculiar rights of hunting and fishing over their ancient hunting grounds arising under agreements by which they collectively sold their ancient lands are Indian affairs over which parliament has exclusive legislative authority, and *only parliament can derogate from these rights*".[84] The corollary of the emphasized words is that the Crown lacks an executive power to derogate from hunting and fishing rights arising from Indian treaty. This interpretation is borne out elsewhere in the judgment when Davey speaks of "the contractual rights of hunting notoriously reserved to Indians by agreements" such as the Douglas treaty of 1854.[85] More recently in *The Town of Hay River* v *The Queen* (1980) Mahoney J spoke *obiter* of the capacity of Indian tribes to bring an action against the Crown based upon rights conferred by a treaty. Treaties with the Indian tribes fall somewhere between full

81 Ibid at 285.

82 For instance *R* v *Commanda* [1939] 3 DLR 635 (Ont SC); *R* v *Sikyea* [1964] supra n 40; *R* v *George* [1966] SCR 267; *Francis* v *The Queen,* supra n 29; *R* v *Sacobie,* supra n 29; *R* v *Cope* supra n 29; *R* v *Simon* supra n 29.

83 *Frank* v *The Queen* [1978] 1 SCR 95 at 100; *R* v *Sutherland, Wilson and Wilson* supra n 40 at 460; *Moosehunter* v *The Queen* [1981] 1 SCR 282 at 285. These cases do not employ the same phrase but have been held as authority for the same proposition: *R* v *Wesley* supra n 20; *R* v *Smith* [1935] 2 WWR 433 (Sask CA); *R* v *Strongquill* supra n 40; *Cardinal* v *Attorney-General (Alta.)* supra n 40.

84 Supra n 24 at 199.

85 Ibid at 198.

international treaties and local contracts, he indicated, and are governed by principles derived from both areas:[86]

> It is not necessary, for this purpose, to attempt a comprehensive definition of the legal nature of Treaty No. 8. Clearly it is not a concurrent executive act of two or more sovereign states. Neither, however, is it simply a contract between those who actually subscribed to it. It does impose and confer continuing obligations and rights on the successors of the Indians who entered into it, provided those successors are themselves Indians, as well as on Her Majesty in right of Canada. It confers no rights on strangers to the Treaty such as the plaintiff.

This approach seems evident also in the insistence of Griffith J in *R* v *Tennisco* (1981) that an Indian treaty must have the elements of a valid contract, meaning, it is clear from the statement's context in the judgment, that there must be an element of exchange in the instrument claimed to be a treaty.[87] But beyond that requirement, the judicial intimation is that strict contractual rules as to privity are inapplicable to Indian treaties. In this approach one can see an emerging notion of the 'quasi-corporate' status of an Indian tribe: tribal status is not sovereign (as the term 'treaty' would suggest) but corporate in character.[88]

One might ask what it means to state that Indian treaty rights bind the Crown in its executive capacity. The answer would appear to be that subject to the doctrine of executive necessity the Crown cannot rely on any supposed prerogative or executive right in a manner inconsistent with its formal obligations to the aboriginal signatories and their progeny. It has long been held, for example, that the Crown cannot use its prerogative right to make grants of its waste lands in such a manner as to derogate from the rights of the aboriginal occupants. Any grantee takes subject to the Indian right of occupancy, the grant effectively amounting to no more than an assignment by the Crown of its pre-emptive right to silence Indian title by negotiation with and purchase from the native owners.[89] A similar example, although one lacking in judicial authority, would be where the Crown seeks to rely on some prerogative or executive title to land under tidal or navigable water to perform some act inconsistent with a native right in respect of that land.[90] Any such intrusive activity would need permissive legislation if it is to derogate from the treaty right.

86 [1980] 1 FC (TD) 262 at 265. See similarly *Pawis* v *R* (1979) 102 DLR (3d) 602 (FCTD).

87 (1981) 131 DLR (3d) 96 (Ont HC) at 105.

88 This explanation of tribal legal personality is implicit in the cases. Under traditional legal theory (as influenced by the analytical school of legal thought) an Indian tribe lacks sovereign status. Is the Crown's conclusion of a treaty with Indian tribes to be taken as a grant of incorporation or does 'quasi-corporate' status arise as a presumption of law independent of the treaty?

89 *Fletcher* v *Peck* (1810) 6 Cranch 87 (USSC) (land could be granted whilst held in Indian title but the Indians could not be ejected by the grantee); *Johnson and Graham's Lessee* v *M'Intosh* (1823) 8 Wheat 543 (USSC) at 574 (government grantees take subject to the Indian title); *Clark* v *Smith* (1839) 13 Pet 195 (grantee only takes full title upon Indian relinquishment of title); *Beecher* v *Wetherby* (1877) 95 US 517; *Cramer* v *United States* (1923) 261 US 219 approved by Hall J in *Calder* supra n 24 at 200-201; *R* v *August* [1980] 1 CNLR 68 (BCPC) (grant of land taken subject to reserved Indian hunting and fishing rights).

90 As to ownership of these lands in New Zealand, see McHugh supra n 1, notes 10-31 and accompanying text.

Similar conclusions would be reached, it must be stressed, through the application of the doctrine of aboriginal title uncomplicated by questions of treaty rights. This shows the complementary character of the common law rules of aboriginal title and the judicial attitude towards Indian treaties. Even if one takes the view that native rights derive from formal undertakings of the Crown (treaties) rather than common law assumptions as to the Crown's behaviour (doctrine of aboriginal title) similar conclusions are reached. Put simply, this conclusion is that the Crown's executive capacity is qualified by aboriginal or treaty rights. Since the Treaty of Waitangi was no more than declaratory of common law principles of aboriginal title[91] it matters not what approach one uses to identify the source of Maori fishing rights. These rights might be aboriginal or contractual in origin but from either approach the Crown is inhibited in its executive activity as far as these rights are concerned.

This restriction on the capacity of the Crown also provides a yardstick by which legislation affecting native rights is judicially assessed. In *R* v *Sikyea,* for example, an Indian convicted of unlawfully killing a migratory bird during closed season contrary to the federal Migratory Birds Convention Act 1917 tried unsuccessfully to rely on Treaty No. 11 which guaranteed Indian hunting rights. This Treaty had been concluded in 1921, four years after the restrictive federal legislation had been passed. In the Territorial Court, Sissons J found the legislation had no application to Indians "engaged in the pursuit of their ancient right to hunt, trap, and fish game and fish for food at all seasons of the year on all unoccupied crown lands".[92] The federal legislation did not derogate from this right, he found, because the "solemn proceedings surrounding treaty 11 and the pledge given by the Crown and incorporated in the treaty would indeed be delusive mockeries and deceitful in the highest degree if the Migratory Birds Convention [of 1917], made just five years previously [to Treaty 11 of 1921] had curtailed the hunting rights of Indians".[93] This decision was overruled on appeal on the simple basis that federal legislation must prevail whenever it conflicts with aboriginal or treaty rights. It can be noted, though, that both appellate courts took the position that legislation must be read wherever possible as consistent with the executive obligations of the Crown. This, said Johnson JA, was an unfortunate instance of the federal Parliament 'overlooking' an executive obligation, "a case of the left hand having forgotten what the right hand had done".[94]

A similar instance of judicial attempts to interpret legislation in a manner consistent with treaty obligation can be seen in *R* v *George* (1966). The majority of the Supreme Court of Canada held that the class of "laws of general application" which under section 88 of the federal Indian Act could

91 "It follows . . . that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled" per Chapman J in *R* v *Symonds* supra n 4 at 390. See more generally McHugh supra n 8.

92 (1962) 40 WWR 494 (NWTTC) at 504.

93 Idem.

94 (1964) 46 WWR 65 (NWTCA) at 74.

not affect treaty rights was limited to provincial legislation.[95] As a result, federal legislation of general application was able to affect adversely Indian hunting and fishing rights. Cartwright J's dissent is significant, however, because he felt that section 88 embraced federal as well as provincial legislation. Given this, where federal legislation of a general character conflicted with the terms of a treaty, he felt the latter should prevail. In support, he cited[96] Lord Coke's ruling in the *Saint Saviour's Southwark (Churchwardens)* case (1613):[97]

> [I]f two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may according to the rule of law be adjudged good, and by another it shall by law be adjudged void: then for the King's honour, and for the benefit of the subject, such construction shall be made, that the King's charter shall take effect, for it was not the King's intent to make a void grant . . .

The majority cast no disapproval upon this approach. To them this was a case not of two possible interpretations of the restrictive legislation but rather a case of outright conflict between statutory provision and treaty rights. Inevitably the statutory scheme had to prevail. Other Canadian courts have taken an approach similar to Cartwright in order to see that Indian treaties are applied in a manner consistent with the honour of the Crown and the understanding of the Indians at the time of signature.[98] Of these cases, *R* v *Taylor* (1981) provides an outstanding example.

In *R* v *Taylor* an Indian was accused of taking bullfrogs during the closed season contrary to the provincial game legislation. The accused argued that he was protected by virtue of section 88 of the Indian Act and Treaty No. 20 (1818). This treaty did not make express reservation of fishing and hunting rights but the oral negotiations had led the Chippewa Indians to believe they were preserved. Their Chiefs had asked for these rights and the Crown's negotiator had replied that the "rivers are open to all and you have an equal right to fish and hunt on them". The Chippewa's belief and the negotiator's statements were recorded in the minutes of the tribal council meeting which preceded and followed the signing of the written agreement which led to the written treaty. The Ontario Court of Appeal found these minutes recorded the oral portion of the written treaty and were as much a part of it as the written articles.[99] In interpreting a treaty, a court must consider the history and oral traditions of the tribe concerned and the surrounding circumstances at the time of its conclusion. In this case, the Court had regard to the fact that the Chippewa had hunted and fished in the

95 Supra n 82.

96 Ibid at 279.

97 (1613) 10 Co Rep 666 at 676; 77 ER 1025 at 1027 (KB).

98 Cartwright's approach was followed in *R* v *Taylor* (1981) 62 CCC (2d) 227 (Ont CA) at 335. Also *R* v *White and Bob* supra n 24 at 210 (per Norris JA); *R* v *Cooper* (1969) 1 DLR (3d) 113 (BCSC) at 115; *Dreaver* v *The King* (1935) unreported but see the account in Cumming and Mickenberg supra n 5 at 62; *R* v *Johnston* (1966) 56 DLR (2d) 749 (Sask CA) at 752; *R* v *Sutherland, Wilson and Wilson* supra n 72 at 464; *Cardinal* v *A-G (Alta)* supra n 40 at 721 (per Laskin J dissenting, Hall and Spence JJ concurring); *R* v *Smith* supra n 83.

99 Supra n 98 at 233-237.

area and taken bullfrogs since earliest times. It was part of the oral tradition, that is history, of the tribe that this right was not only recognized at the time of the treaty but that they continued to exercise the right without interruption until the present. Moreover, historical records indicated the Indians highly trusted the Crown's negotiator. Any ambiguity in the terms of the treaty should be interpreted in order to uphold the honour of the Crown and the rights of the signatory tribes. Finally, the Court indicated that any evidence by conduct or otherwise as to how the parties understood the terms of the treaty is of assistance in giving content to the term or terms of the treaty. This is a Canadian approach to Indian treaty interpretation remarkably similar to that which Maori representatives have argued for the Treaty of Waitangi.

The Canadian approach to Indian treaties noted above has purposefully focused upon the old agreements whereby Indian tribes ceded vast tracts of aboriginal territory. The circumstances behind the conclusion and the content of these early agreements reflects the uninformed bargaining position of the signatory tribes. The same cannot be said of the most recent Indian 'treaty', the James Bay agreement with the Indians of Northern Quebec which has been recognized by the Courts as a full Crown contract and subject to all the usual rules governing such contracts.[1] The Treaty of Waitangi is more analogous to the older Indian treaties.

It has been seen that Canadian courts have chosen at times to take a 'contractual obligation' approach towards Indian treaties. There are a number of weaknesses in transplanting this approach to New Zealand at least so far as the Treaty of Waitangi is concerned. Post-Treaty cessions of traditional land by the various tribal owners are another question. If the Treaty of Waitangi is some sort of contract, what rights, for example, would the non-signatory tribes enjoy? The contractual approach presupposes the existence of an aboriginal title otherwise any contract would be void for failure of consideration, ie the Crown would be promising to respect land rights which did not exist in law. In this sense, a contractual approach to the Treaty is hardly a basis for finding a source of Maori fishing rights independent of the common law doctrine of aboriginal title. Even if one considers the parties to the Treaty to be the various tribes and sub-tribes, are these groups to be accredited quasi-corporate status by New Zealand courts? Further problems of certainty attach to the terms rather than parties to the Treaty. What rights of fishery are protected by the Treaty? It might be said that the right is limited to members of a particular sub-tribe fishing for food or ceremonial purposes within their traditional fishing grounds. The evidence is that these rights are still exercised according to strict tradition and that outside his traditional fishing grounds a Maori usually considers himself to be fishing as a member of the general public unless permission to encroach upon another sub-tribe's grounds has

1 This agreement was approved by federal and provincial legislation: SC 1976-77 c 32; SQ 1976 c 46 and 1978 c 92 (as amended) but is taken as enjoying some status independent of the legislation. This is implicit in *Grand Council of the Crees* v *The Queen* [1982] 1 FC 599 (FCA) (injunctive relief against the Crown refused); *Naskapis de Schefferville Band* v *The Queen* [1982] 4 CNLR 82 (Que SC); *Commission Scolaire Kativik* v *Procureur General due Quebec* [1982] 4 CNLR 54 (Que SC).

been obtained properly.[2] One might use the Treaty of Waitangi to give such rights contractual effect (recalling always that these rights have not been legislatively abridged by the Fisheries Act 1983), but is it not better to rely upon the doctrine of aboriginal title and post-Treaty reservations of fishing rights?

A more fundamental objection to the contractual approach to Indian treaties might be that the Canadian treaties are agreements between Crown and native subject whereas the Treaty of Waitangi was probably a compact between the Crown and non-subjects. This aspect of Canadian Indian treaties prompted the comment in *Sero* v *Gault* (1921) that to "talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada . . . is much the same . . . as to talk of making a treaty of alliance with the Jews in Duke Street or with the French immigrants who have settled in England".[3] This, it might be said, was hardly the case in New Zealand since the Treaty of Waitangi was concluded during the process of British assumption of territorial sovereignty. It could not, therefore, be considered analogous to a unique kind of contract between Crown and subject as is the case in Canada. Rather it is an 'act of state' made during the process of territorial acquisition behind which the Courts will not look. This objection might not be possible if one supposes British sovereignty over New Zealand to have been established *before* the conclusion of the Treaty of Waitangi on February 6, 1840, as Prendergast CJ supposed in *Wi Parata* v *The Bishop of Wellington*;[4] then the Maoris' Treaty is in a similar position to those of the Canadian Indian. That is, it was a compact between Crown and subject. The moment of British sovereignty over New Zealand has never been authoritatively identified, however, and numerous dates before and after February 6, 1840, have been suggested.[5] One might note, in particular, the English Laws Act 1854 (New Zealand) which provided that the laws of England as existing on January 14, 1840, shall "so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and be taken to have been in force therein on and after that day . . ."[6] It could be said that this Act requires local courts to presume British sovereignty to date from January 14, 1840, several weeks prior to the Treaty of Waitangi. If this is so, then the Treaty is well able to rank on the Canadian approach as a special contract between Crown and subject. Moreover, if British sovereignty pre-dated the Treaty of Waitangi, this pact could hardly be considered an 'act of state' to which no judicial recognition can be given since it is a cardinal principle of English constitutional law that there can be no act of state by the Crown

2 This was made clear by Maori evidence which resulted in the recent *Finding of the Waitangi Tribunal on the Kaituna Claim* (December 1984), Part III.

3 (1921) 50 OLR 27 (Ont HC). Similarly in *R* v *White and Bob* supra n 24 at 197 Davey JA said that an Indian treaty is not an executive act establishing relationships between what are recognized as two or more independent states acting in sovereign capacities".

4 Supra n 6, p 63.

5 The several dates postulated by various commentators are given and discussed by Rutherford *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand, 1840* (1949) at 5-11.

6 The English Laws Act 1854 No 1 section I; see also the English Laws Act 1858 No 2 and the English Laws Act 1908 No 55.

against its own subjects.[7] The same inconsistency arises when post-Treaty cessions of Maori (customary) land are labelled acts of state, the terms of which a local court will not give legal effect to.[8] This latter inconsistency confuses the Crown's prerogative right to accept the cession of aboriginal land with its prerogative powers in matters of foreign policy. This confusion is endemic to the New Zealand case-law on Maori rights arising from the Treaty of Waitangi.

Post-Treaty sales or cessions of traditional land are transactions distinct from the Treaty itself. The Treaty is, in all probability, a pact made during the assumption of territorial sovereignty by the Crown whereas post-Treaty sales or cessions are transactions between Crown and subject. Most New Zealand courts, starting with the *Wi Parata* judgment, have classed the two together and refused to give effect to post-Treaty cessions. Given the distinction, it may be that the contractual approach of Canadian courts to Indian treaties is appropriately applied to these post-Treaty transactions. It may be added that the *Guerin* judgment opens the alternative possibility that the terms of post-Treaty agreements concerning traditional fishing rights may be enforceable as an action in equity[9] for breach of trust, fiduciary duty or suchlike. Problems of limitation aside, this means that there may be two possible and independent actions against the Crown for breach of post-Treaty agreements concerning traditional rights of fishery (actions in respect of agreements concerning land are inhibited by section 155 of the Maori Affairs Act 1953[10]).

The difficulties in applying the contractual approach to the Treaty of Waitangi itself do not mean that the Treaty is disqualified as a source of Maori rights independent of the doctrine of aboriginal title. This is an important matter which touches upon the status of treaties of cession in municipal law.

2 *Treaties of cession in municipal law*

During the course of his classic judgment in *Campbell* v *Hall* (1774), Lord Mansfield stated six propositions "too clear to be controverted".[11] The third of these was that "the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning".[12] This

7 *Walker* v *Baird* [1892] AC (PC) at 496-497; *Johnstone* v *Pedlar* [1921] 2 AC 262 (HL) at 272 per Viscount Finlay; *Attorney-General* v *Nissan* [1970] AC 179 (HL) at 207, 213 per Lord Reid; at 226-227 per Lord Pearce; at 235 per Lord Wilberforce; and at 240 per Lord Pearson.

8 The standard authority for this proposition relied upon by New Zealand courts has been *Wi Parata* v *The Bishop of Wellington* supra n 6 esp. at 78 where Prendergast CJ said that cessions of Maori land obtained by the Crown "cannot be examined or called in question by any tribunal".

9 Supra n 10, p 64.

10 This section provides that a Maori customary title cannot be pleaded against the Crown. It has been found elsewhere (supra n 1, p 80) that an aboriginal claim merely to rights of fishery is an incident of aboriginal title (termed a 'non-territorial right') not part of a customary title under the Maori Affairs Act 1953.

11 (1774) 1 Cowp 204 (KB) at 208-209. The case is also reported in Lofft 655 98 ER 848; 20 St Tr 239.

12 Idem.

proposition is open to several interpretations. It might mean that the Crown's legislative and executive powers are bound by the terms of a treaty of cession, that only the latter capacity (from which its prerogative legislative power in ceded colonies is excluded[13]) is bound or that the Crown's obligation is a moral one only. In the context of *Campbell* v *Hall* it appears Mansfield meant the second of these interpretations. Hall J considered this proposition in *Attorney-General (British Columbia)* v *Calder* (1973) and found that it applied a fortiori to 'treaties' between the Crown and the aboriginal inhabitants of 'settled' territory made during the process of territorial acquisition.[14] The rationale for this was that limiting the proposition to conquered or ceded territory meant that the occupants of this type of territory enjoyed fuller protection at law than those in settled territory. In other words, the rights of the former enemies of the Crown under treaty with the Crown could not be placed on a better footing than those of the guileless aboriginal peoples who had exerted no serious forcible resistance to the Crown's territorial ambition and willingly entered into a treaty with the Crown. The lack of status at international law held by aboriginal treaties[15] should in no way detract from their 'sacred and inviolable' character for the purposes of municipal law. The effect, then, of Hall's dicta in *Calder* is to place aboriginal treaties of cession signed during the process of territorial acquisition on the same plane as other treaties of cession. This means that one need not prove the Treaty of Waitangi to have been a treaty between two sovereign powers (although contemporary understanding leads to such a conclusion[16]).

Two cases are normally cited in support of the proposition that municipal courts have no power to give effect to the terms of treaties entered into by the Crown during its assumption of territorial sovereignty. It need hardly be added that this proposition contradicts the one given by Mansfield in *Campbell* v *Hall.* Indeed, notwithstanding the two cases discussed below, it is clear that Mansfield's proposition cannot stand as totally unqualified as Hall seemed to imply in *Calder.* Nonetheless it does stand as an early

13 In colonies obtained by conquest or cession, the Crown enjoys a prerogative legislative power both in the constituent field and otherwise; *Calvin's Case* (1608) 7 Co Rep 1a 77 ER 377; *Campbell* v *Hall* supra n 11; *Lyons* v *East India Co* (1836) 1 Moo Ind App 175 (PC); *Phillips* v *Eyre* (1870) LR 6 QB 1; *Sammut* v *Strickland* [1938] AC 678 (PC) at 701; *Abeyesekera* v *Jayatilake* [1932] AC 260 (PC). This rule was based on medieval precedent, being seen notably in Henry II's treatment of Ireland. *The Case of Tanistry* (1608) Davis 28 80 ER 516 (KB) and Edward I in Wales (*Process into Wales (circa* 1668-1674) Vaughan 395; 124 ER 1072 (CP)). See also Chitty *Prerogatives of the Crown* (1804) at 26-27. The Crown's legislative authority, that is, its legislative power in Parliament or especially in some prerogative capacity, is necessarily distinct from its inherent executive authority in new colonies: de Smith *Constitutional and Administrative Law* (2nd ed 1973) at 139.

14 Supra n 24, p 66 at 199.

15 Westlake *International Law* (1910) I in Ch V; Hall *The Foreign Powers and Jurisdiction of the British Crown* (1894) paras 101 and 95 (note); Oppenheim *International Law* (3rd ed 1920) I of para 221. See also *Wi Parata* v *Bishop of Wellington* supra n 6, p 63 at 78. This view is out of step with contemporary learning: see for example the *Western Sahara, Advisory Opinion* [1975] ICJ 12 at 39 para 80.

16 See, notably, Lindley *The Acquisition and Government of Backward Territory in International Law* (1926) esp. at 45-47; and in the New Zealand context, McKean "The Treaty of Waitangi Revisited" in Wood and O'Connor (eds) *W. P. Morrell: A Tribute* (1973).

and powerful authority for the general proposition that the Crown is able to make actions binding upon its executive capacity during its assumption of territorial sovereignty of which the local courts will subsequently take some notice.

The first contrary case referred to above is *Cook* v *Sprigg* (1889) in which certain concessions made to the appellants by Sigcau, the Paramount Chief of Pondoland, were at issue. These grants were executed prior to the annexation of Pondoland to Cape Colony in 1894 which followed upon a deed of cession signed by Sigcau and other chiefs. The exact nature of these rights is unclear, the case report stating them to involve "railway, mineral, township, land, forest, trading and other right".[17] Whether they were merely contractual rights as against the previous sovereign or perfected rights to land is unclear, yet counsel for the appellants characterized the rights as obligations attaching to Sigcau as Paramount Chief. The Privy Council rejected the appellant's claim on the narrow grounds that the local Crown Liabilities Act did not allow for a declaration of right and damages. The Board went on, however, to affirm that the government's refusal to recognize the concessions was apparently an act of state made during the process of acquisition of territorial sovereignty. No municipal court could review the justice of this refusal:[18]

> It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.

The passage affirms that by the rules of international law, the Crown is obliged to respect rights of private property upon assumption of territorial sovereignty. If, however, it chooses not to do so, the local courts will give effect to the Crown's decision notwithstanding its non-compliance with its obligation at international law. To that extent, the above passage rehearses familiar doctrine. It does not go beyond that to assert that upon acquisition all private rights of property are nullified ipso facto.[19]

Indeed, the Board's advice in this case is riddled with so many uncertainties that Lord Wilberforce later called it "a case of doubtful authority".[20] The decision in *Cook* v *Sprigg* appears to have been taken as no more than illustrative of the general position in English law as to the rights of a contractual character held against the former sovereign or government.[21] According to English law, the Crown does not automatically assume the contractual obligations of its predecessor. In the absence of

17 [1899] AC 572 (PC).

18 Ibid at 578.

19 See the discussion in Moore *Act of State in English Law* (1906) at 80 and Slattery supra n 25, p 66 at 56.

20 *Attorney-General* v *Nissan* supra n 7 at 232. Also de Smith supra n 13, p 83 at 140.

21 *West Rand Central Gold Mining Co Ltd* v *R* [1905] 2 KB 391; Moore supra n 19; *Attorney-General* v *Nissan* supra n 7, p 82 at 210-211 per Lord Reid and at 226 per Lord Pearce.

acts or legislation confirming its obligation, the Crown is not bound in its own courts by the contractual obligations of its predecessor.

A second important authority is the case of *Vajesingji Joravarsingji* v *Secretary of State for India in Council* (1924).[22] The appellants claimed proprietary rights termed *pattas* to certain lands in the Panch Mahals which rights they held from the former government prior to the cession of the territory to Britain in 1860. The British government maintained that these rights were of a leasehold character, a finding which was confirmed in a specially commissioned officer's report. When the appellants refused to accept renewals of the lease on the terms offered, they sued as proprietors. The Privy Council's advice is delivered in sweeping terms but must be considered in the light of the facts before it. The *pattas* rights appear not only to have been of a contractual nature but during the British assumption of sovereignty these rights had been expressly identified in the treaty of cession as surviving British sovereignty subject to later confirmation. This meant that even if the *pattas* rights were property rights, they had been validly suspended (made subject to later confirmation) by the treaty as an 'act of state' and the promise attached to that suspension could not be enforced against the Crown. This sweeping statement of the Privy Council becomes more understandable and can only be understood in that light:[23]

> . . . when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.

This broad dictum establishes that the British Crown is able to make acts of state during the process of acquisition which can modify private rights. The local courts cannot call such acts of state into question. Nonetheless the courts must on occasion inquire whether private rights have in reality been respected by the Crown.[24] There is, in other words, a difference between the act of modifying private rights during acquisition (an act of state which the courts will not challenge) and the inquiry to ascertain whether those rights have indeed been modified. This distinction is apparent in the Privy Council's advice in the *Bai Rajbai* case (1915) when the Board considered the position of certain land rights subsequent to the cession of the territory to the Crown:[25]

> The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry on under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign,

22 (1924) LR 51 Ind App 357 (PC).
23 Ibid at 360.
24 This distinction is stressed by Slattery supra n 25, p 66 at 57-58.
25 (1915) LR 42 Ind App 229 (PC) at 237.

> by agreement express or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these ante-cession rights . . ., and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights becomes a relevant subject for inquiry in this case.

To identify what Maori rights the Crown has elected to respect upon its assumption of sovereignty over New Zealand, it follows from the above passage that one must necessarily look to the Treaty of Waitangi. In terms of the *Bai Rajbai* test, the Treaty amounts to an 'express agreement' wherein the Crown conferred 'legal enforceable' rights upon the aboriginal inhabitants. As the extract above makes plain, these rights do not need legislative acknowledgement. The courts will not challenge the power of the Crown to do whatever it pleases during its assumption of sovereignty but must be able to ascertain whether that power has been exercised and to what extent. This is, in short, the distinction between the existence of a power and the result of its exercise. In those cases where no express agreement is made by the Crown during the process of acquisition, the courts will start from the assumption that the Crown has intended to respect the property rights of the local inhabitants or, in other words, the Crown will be taken to have complied with its obligation at international law to observe pre-existing property rights.[26]

There would appear to be no substance to the claim of local courts that they cannot give effect to the terms of the Treaty of Waitangi recognizing Maori rights in respect of their traditional lands and fisheries.[27] It is true they cannot challenge any act of state during acquisition but once British sovereignty is established, they will have to ascertain whether any act of state has actually been made suspending the à priori assumption of continuity of local property rights. Unlike the instrument in *Vajesingji* the Treaty of Waitangi is no act of suspension to which the courts must give effect without question. Quite the opposite — it is an express agreement by the Crown confirming the assumption of continuity. There is no reason whatsoever for local courts to ignore its presence in so studied a manner. Since the Crown has indicated during its assumption of sovereignty that subsequently it will consider itself bound to respect Maori property rights, it follows that the Treaty of Waitangi is highly relevant to judicial inquiry into the effects of British annexation upon the Maori.

26 *Oyekan* v *Adele* [1957] 2 All ER 785 (PC) at 788.

27 Cf *Hoani Te Heuheu Tukino* v *Aotea District Maori Land Board* [1941] AC 308 (PC) at 324; citing *Cook* v *Sprigg* and *Vajesingji* as applicable to Maori rights under the Treaty of Waitangi. This was a case of a Maori claim that the Treaty was a limitation on the legislative capacity of Parliament. The wide dicta in this case must be interpreted on this basis — it certainly went beyond the submissions of the respondents (their counsel was Denning KC who later in his judicial capacity was to give the Board's advice in *Oyekan* v *Adele* supra n 26) who conceded the aboriginal title (at 315). The sole issue was the local Parliament's legislative competence to abridge the alleged Treaty rights — a futile argument to take as far as the Privy Council and one with which the Board showed some understandable impatience.

In the context of traditional Maori fishing rights, it can be concluded, therefore, that even if British sovereignty originated from or post-dated the Treaty of Waitangi, the recognition given those rights within the Treaty amounts to an express agreement by the Crown. This agreement confirms the common law assumption of the continuity of local property rights and indicates the Crown's acceptance that subsequently it will consider itself bound by these rights. Constitutionally the Crown has, of course, the power to pass laws in Parliament or a local assembly[28] derogating from these rights, meaning that the Crown in its legislative capacity can hardly be restrained by Maori fishing rights. Nonetheless it can still be bound in its executive capacity. In this way, Maori fishing rights become, to use Lord Mansfield's words from *Campbell* v *Hall,* "sacred and inviolable".

To conclude this section: if one considers British sovereignty to pre-date the Treaty of Waitangi, this agreement between the Crown and her Maori subjects may well be considered a peculiar type of contract in which the Crown bound itself to recognize traditional Maori fishing (and land) rights. If British sovereignty springs from or post-dates the Treaty, this instrument can be seen as an express agreement (not requiring legislative confirmation) confirming the common law assumption of continuity. This means it is an indication that upon British sovereignty the Crown will consider itself bound to respect Maori fishing rights. At the end of the day, Maori fishing rights enjoy the same protection of law irrespective of the date of British sovereignty.

IV Indian Fishing Rights in the United States

The case-law in the United States on Indian fishing rights is much more sophisticated than its Canadian counterpart. This case-law must be approached with some caution, however, as it is based upon certain constitutional premises inapplicable to Canada and New Zealand. In particular, Article 6, clause 2 of the United States Constitution provides that "all Treaties made . . . shall be the Supreme Law of the Land . . ." This constitutional provision has been held to include treaties concluded between

28 New Zealand is generally regarded as a colony acquired by settlement. This was the basis upon which the Crown's powers in the colony were considered to rest at the moment of annexation (see Roberts-Wray *Commonwealth and Colonial Law* (1966) at 102) and local courts have generally regarded New Zealand as a 'settled' colony; *Wi Parata* v *Bishop of Wellington* supra n 6; *R* v *Joyce* (1904) 25 NZLR 78; *Waipapakura* v *Hempton* (1914) 33 NZLR 1065 (SC); *Re the Ninety Mile Beach* [1963] NZLR 461 (CA); contra vide *Hoani Te Heuheu Tukino* v *Aotea District Maori Land Board* supra n 27 at 324 where the Privy Council indicates New Zealand to be a ceded colony. The corollary of 'settled' status was that the Crown lacked a prerogative legislative power in the colony — the British Settlements Acts (UK) enlarging the Crown's ordinary legislative powers in settled colonies never applied to New Zealand. In settled colonies the Crown merely enjoyed the constituent power to establish a representative assembly (meaning a legislative body of which one half are elected by the inhabitants of the territory concerned); Roberts-Wray supra at 68-69, 151-152. The Colonial Office regarded the prospect of a representative assembly in New Zealand in 1840 with horror (see the minute of James Stephen, July 21 1840, quoted in Robson (ed) *New Zealand — The Development of its Laws and Constitution* (2nd ed 1967) at 3-4). As a result, the Crown's constituent power at common law in respect of the New Zealand 'settled' colony was enlarged by Imperial legislation, 3 & 4 Vict (UK) c 62.

the United States government and the Indian tribes within its frontiers,[29] a finding which needs some explanation.

In *Cherokee Nation* v *State of Georgia* (1831)[30] and *Worcester* v *State of Georgia* (1832)[31] the Supreme Court of the United States held that the Indian tribes of America who had not entered into treaty relations with the Crown and its successor in sovereign title, the federal government, were 'domestic dependent nations'. Even after signing treaties, the tribes retained attributes of sovereignty but these attributes were necessarily diminished by the paramount sovereignty of the United States. In other words, the sovereignty over the United States territory was divided between the United States (the federal and state organs) and the Indian tribes. The Indian tribes retained the right to internal self-government as attributes of their residual but inherent sovereignty.[32] This meant that their limited rights as vestigial sovereigns of their ancestral lands could be extinguished only by treaty between the federal government (under its exclusive treaty-making power) or Congressional legislation.[33] These premises form the basis of federal Indian law which can be understood on no other basis. They have resulted in the constitutional protection of Indian treaties under the United States Constitution.

In the parlance of English lawyers, the position of the American Indian could be equated with a protectorate relationship[34] by which the protecting power assumes the 'external sovereignty' with the 'internal sovereignty'

29 See cases cited notes 30 and 31 infra. Also, for example, *The Kansas Indians* (1867) 5 Wall 737; 72 US 667 (USSC); *Cherokee Tobacco* v *United States* (1871) 78 US 619 (USSC); *United States* v *Kagama* (1886) 118 US 375 (USSC); *Dick* v *United States* [1908] 208 US 340 (SC). The federal government's power also arises from its Constitutional power to regulate trade and commerce with foreign and Indian nations (US Const art I para 8 cl 3). See, generally, Wilkinson and Volkman "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth' — How Long a Time is That?" (1975) 63 Calif L Rev 601.

30 (1831) 5 Peters 1; 8 L Ed 25 (USSC).

31 (1832) 6 Peters 515; 8 L Ed 483 (USSC).

32 See generally Cohen *Handbook of Federal Indian Law* (1945) at 122 (cited as a "classic authority" by the Supreme Court in *Merrion* v *Jicarilla Apache Tribe* (1982) 455 US 137 at 144) and these cases are illustrative: *Yellow Beaver et al* v *Board of Commissioners of County of Miami* (1867) 72 US 673 (USSC); *Tatton* v *Mayes* (1896) 163 US 376 (USSC); *Iron Crow* v *Oglala Sioux Tribe of Pine Ridge Reservation* (1956) 231 F 2d 89 (CA 8th Circ) at 92, 99; *Williams* v *Lee* (1959) 358 US 217 (USSC) at 220; *McClanahan* v *Arizona State Tax Commission* (1973) 411 US 164 (USSC) at 167-173; *Montana* v *United States* (1981) 450 US 544 (USSC); *United States* v *Wheeler* (1978) 435 US 313. See generally Clinton "Isolated in Their Own Country: A Defence of Their Own Country: A Defence of Federal Protection of Indian Autonomy and Self-Government" (1981) 33 Stan L Rev 979.

33 See *Cherokee Tobacco* v *United States* (1871) 78 US 619 (USSC). The proposition found its fullest expression in *Lone Wolf* v *Hitchcock* (1903) 187 US 553 and has become known as 'The Lone Wolf Doctrine'; Newton supra n 5, p 63 at 1264-1267. The 'Doctrine' has been employed countless times.

34 By the time English courts had occasion to consider the position of protectorates and the Crown's powers therein, English legal theory had finally accepted Henry Maine's injunction that the "powers of sovereigns are a bundle of powers and may be separated one from another" (*International Law* (1888) at 58); *R* v *Earl of Crewe, ex part Sekgome* [1910] 2 KB 576 at 619; *Sobhuza II* v *Miller* [1926] AC 518 (PC) at 523. This development was too late and too radical to be applied to the aboriginal population of territory to which the Crown claimed *full* territorial sovereignty (supra text accompanying notes 22-30, p 85-86).

(that is powers of internal self-rule) being retained by the protected power.[35] This doctrine of residual inherent tribal sovereignty was, however, one peculiar to the United States. It was one which found ready support in the historical record and accorded Indian treaties significant constitutional protection. Mindful in all probability of Austinian theory scorning any notion of the divisibility of sovereignty,[36] the Anglo-Commonwealth courts have not taken a similar approach. The idea of a retained, residual tribal sovereignty was incompatible with the Crown's assumption and declaration of territorial sovereignty over the region in question.[37]

It is significant that the Crown's law officers quickly pooh-poohed the opinion of the first Attorney-General of New Zealand, William Swainson, that the Crown only had sovereignty over those regions in New Zealand whose tribes had signed the Treaty.[38] Most historians[39] have overlooked that Swainson was doing no more than applying the Marshall Court opinions on Indian *tribal* sovereignty to the New Zealand setting. The Colonial Office's outright dismissal of Swainson's opinion[40] and, indeed, the shabby and unfair treatment Swainson has since received, was a reflection of the summary attitude English lawyers had long taken to aboriginal sovereignty from the early seventeenth century when royal charters declared full British sovereignty over vast tracts of American land.[41]

35 An important difference between the protectorate relationship and position of aboriginal peoples is that the former involves no claim to underlying territorial sovereignty which ultimately forms the basis of Congressional legislative authority over the Indian people and land according to the *Lone Wolf* doctrine (supra n 33).

36 Austin *Lectures on Jurisprudence or the Philosophy of Positive Law* (5th ed 1911) I 252-256. Austin condemned those who refered to "half or imperfectly sovereign states", a category into which the 'domestic, dependent Indian nations' fell. Austin's views laid the basis of English legal theory's mid-nineteenth century pre-occupation with the indivisibility of sovereignty. This pre-occupation gravely hamstrung British colonial policy in the Pacific and, to a lesser extent, Africa: see generally Johnston *Sovereignty and Protection* (1973). The proposition that aboriginal tribes lacked any residual sovereign status subsequent to British annexation had become too engrained to be changed by English law's gradual and necessary acceptance of the divisibility of sovereignty (recognized, for example, in *R* v *The Earl of Crewe* supra n 34, p 88). On the other hand, the divisibility of sovereignty has always been fundamental to American jurisprudence: Adams *Political Ideas of the American Revolution* (1939).

37 A municipal court will give effect to an authoritative Crown claim to the territorial sovereignty over a given region: *Attorney-General for British Honduras* v *Bristowe* (1880) 6 AC 143 (PC) at 148; *Sobhuza II* v *Miller* supra n 34 at 522-524; *In Re Wong Hon* [1959] HKLR 601 at 607-613; *R* v *Kent Justices* [1967] 1 All ER 560 (QBD) at 564; *Post Office* v *Estuary Radio Ltd* [1967] 3 All ER 663 (CA) at 680; *Moore* supra n 19, p 84 at 33 et seq; and *Halsbury's Laws* 4th ed VI par 803 at 322.

38 See Swainson to Shortland, 27 Dec 1842, CO 209/16: 487-494.

39 Wards, *The Shadow of the Land* (1968) at 67-68; Adams, *Fatal Necessity: British Intervention in New Zealand* (1977) at 162-163; Ward, *A Show of Justice* (1973) at 62.

40 Recounted by Adams supra n 39 at 163.

41 The Tudor and early Stuart charters authorizing discovery of the New World envisaged a part of the world subject to heathen sovereignty in which pockets of English territorial sovereignty were to be established. Outside these 'pockets' the jurisdiction of the Crown was formulated in personal as opposed to territorial terms. The grantees took from the Crown only as full as that which "wee by our letters patent maie or cann graunte": for instance, see the second and third Virginia Charters (1610 and 1612) in Bemiss *The Three Charters of the Virginia Company* (1927) 51 at 53, 76 at 78; the letters patent (1610) to the Newfoundland Company in Carr *Select Charters of Trading Companies* (1913) 51 at 53. After 1620 English territorial claims embodied in royal charters and letters patent

To English lawyers, such assertions of sovereignty were sufficient as a matter of municipal law to establish the Crown's claim to full territorial sovereignty. American lawyers, guided by Marshall's post-Revolutionary sense of enlightenment, differed in that they saw such claims as establishing only a limited sovereignty which excluded other European nations and gave a supervening territorial sovereignty to the Crown but left intact the Indians' 'internal sovereignty'. The difference between the American and English approach is an important one of emphasis. The American approach takes the Crown's dealings with the Indian tribes more literally than the English approach which sees the Crown's claims as conclusive of full, unqualified sovereignty as a matter of municipal law.

The American approach has been outlined in order that the effects which do and do not flow from it can be clarified. It is apparent that the rights of self-government enjoyed by the Indian tribes on their reservations stem from their residual sovereign status.[42] It is equally plain, however, that their rights in respect of their ancestral lands and fisheries do not derive from any residual sovereign status but from their use and occupation of the land since time immemorial.[43] In other words, their rights of *dominium* (ownership) exist independently of their rights of *imperium* (government). This is evident in Marshall CJ's celebrated judgment in *Johnson and Graham's Lessee* v *M'Intosh* (1823).[44] English lawyers may have found his Court's finding on Indian sovereignty unpalatable but his findings upon aboriginal title (questions of aboriginal *dominium* as opposed to *imperium*) have found widespread acceptance.[45]

This distinction between American Indian land rights aboriginal in source and those which are attributes of a residual, inherent sovereignty preserved by treaty is one which most American courts avoid simply because it is one which there is no need to confront. The reason for this is that most treaties between the United States and the Indian tribes provide guarantees of their land and, often, hunting and fishing rights. Since these treaties cover most of the United States[46] most American Indian claims to hunting and fishing rights have been based upon treaties enjoying constitutional protection. It is only exceptionally that claims have been based purely upon some aboriginal title, the most notable instance being the claims of the Alaskan Indians who until the mineral exploration of recent decades had

became more absolute — see, generally, Juricek "English Territorial Claims in North America under Elizabeth and the Early Stuarts" (1975) VII Terra Incognita 7.

42 Supra n 32, p 88.

43 See, however, Henderson "Unravelling the Riddle of Aboriginal Title" (1977) 5 Am Ind L Rev 77 who accredits the source of aboriginal title to some bygone sovereign status. The authorities do not countenance this view.

44 Supra n 89, p 77.

45 It would require an appendix to list the cases in which *Johnson* v *M'Intosh* has been cited and followed. These cases well exceed 200 in number — see *Shephard's United States Citations* for references. On the unacceptability to Commonwealth courts of the 'domestic dependent nation' approach of the United States a good recent example is *Coe* v *Commonwealth* (1978) 18 ALR (HC) at 595.

46 Royce *Land Cessions in the United States: 18th Annual Report of the Bureau of American Ethnology* (1882) in Part 2 gives a comprehensive appendix of Indian land cessions throughout the United States.

largely been left to their own devices unpressed by the push of settlement.[47] Nonetheless, it is instructive to consider the claims of the Alaskan Indians to an aboriginal fishing right since these claims are uncomplicated by the constitutional considerations affecting treaty rights.

A special jurisdictional Act was passed by Congress in 1935 giving the Court of Claims jurisdiction over "all claims, legal or equitable" for lands or other tribal or community property rights taken from the Tlingit and Haida Indians of Alaska by the United States without compensation.[48] The 'equitable' aspect of the Court's jurisdiction is used to mean the 'moral' claims the Indians might have against the government by reason of Congressional intrusion upon Indian title or, in other words, to address claims resulting from any legislative abridgement of Indian title. The jurisdictional Act, enacted to overcome problems of sovereign immunity,[49] elsewhere recognizes the legal nature of Indian title "arising from occupancy and use, in lands or other tribal or community property".[50]

The basis of the Tlingit and Haida claim was that a series of Congressional enactments[51] cumulatively had "made it possible for white settlers, miners, traders and businessmen to legally deprive the Tlingit and Haida Indians of their use of the fishing areas, their hunting and gathering grounds and their timber lands and that is precisely what was done".[52] In assessing the claim, Laramore J found Indian title to be proven to the lands in question by reason of actual use and occupancy from time immemorial. This finding was made after a special Commissioner of the Court by separate trial[53] had made "detailed findings of fact concerning the culture and characteristics of the Tlingit and Haida Indians, the manner in which they used and occupied the claimed lands, and the extent and loeation of the land so used and occupied in 1867 and long prior thereto . . .".[54]

After finding the "major part of the lands aboriginally used and occupied" by the claimant Indians had been taken from them by the United States without compensation,[55] Laramore passed on to consider the question of Indian fishing rights. This passage is particularly significant:[56]

47 Barsh "Indian Land Claims Policy in the United States" (1982) 58 N Dak L Rev 7 at 37-39.

48 Act of June 19 1935, 49 Stat 388 c 275.

49 The Indians were unable to prosecute their grievances directly because they were still classified for many purposes as nations under treaty, beyond the routine jurisdiction of American courts. As a result, special jurisdictional acts were passed by Congress overcoming the problem of sovereign immunity. These acts gave jurisdiction to the Court of Claims, a special court established in 1855 (10 Stat 612) to hear citizens' complaints re the central government. For a while (1946-1978) these claims were handled by the Indian Claims Commission.

50 Supra n 48, s 2.

51 Viz The Organic Act of Alaska 1884 (23 Stat 24); Act of March 3 1891 (26 Stat 1095) and Presidential proclamations thereunder on June 20 1902, on September 10 1907 and February 16 1909; Act of May 14 1898 (30 Stat 409); Act of June 6 1900 (31 Stat 321); Act of June 8 1906 (34 Stat 225) and Presidential proclamation thereunder of February 26 1925.

52 *Tlingit and Haida Indians* v *United States (No. 1)* (1959) F Supp 452 (USCC).

53 Under Rule 38(b), 28 USCA.

54 Supra n 52 at 454.

55 Ibid at 467.

56 Ibid at 468.

> The most valuable asset lost to these Indians were their fishing rights in the area they once used and occupied to the exclusion of all others. The plaintiffs have suggested that since the effective exploitation of the fisheries was dependent upon their continued occupancy and use of the shore lands, the fishing rights might be considered in the nature of easements fixed in such lands. Viewed in this way, they could be considered as having been lost or appropriated, and the value of the fishing rights can be considered in determining the value of the land areas to which they were attached as of the date of the taking . . . .

The basis of this finding is that the aboriginal right to fish was effectively lost when the land adjoining the fishing grounds was taken. The Court found that the aboriginal right to fish was not of a territorial character but that its exercise was dependent upon access to land abutting the traditional fishing grounds.

The claim in *Tlingit and Haida Indians (No. 1)* had arisen prior to the enactment by Congress of the Statehood Act of Alaska (1959). Significantly this Act contained a disclaimer similar to one previously used in respect of other states with, however, a special saving provision for aboriginal fishing rights. By this Act, the State of Alaska disclaimed all right and title to and the United States retained "absolute jurisdiction and control" over, inter alia, "any lands or other property (including fishing rights) the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives".[57] This provision was considered by the Supreme Court in *Organized Village of Kake* v *Egan* (1962) in which the Court had occasion to consider the applicability of Alaska state legislation to Indians exercising their traditional rights of fishery. The Court found that the phrase "fishing rights" included rights of fishery aboriginal in origin. The disclaimer, the Court indicated, "was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law [ie treaty, Presidential reservation, or Congressional provision], aboriginal right, or simply occupancy, against the Government".[58] These rights were property rights. The Court went on in a manner similar to the Canadian Supreme Court's judgment in *Kruger and Manuel* (1978).[59] It held that there was a distinction between appropriation and regulation of Indian property rights and that the "absolute" federal jurisdiction reserved by the disclaimer did not impart "exclusive" jurisdiction.[60] This meant that state law was able to affect the aboriginal rights of fishery.

Several years later in *Tlingit and Haida Indians (No. 2)* v *United States* (1968)[61] the Court of Claims purported to explain the Supreme Court's decision in *Organized Village of Kake.* In this case, the claimant Indians, like those in *Organized Village of Kake,* had claimed an exclusive right of fishery over the free-swimming migratory fish passing through their ancient fishing grounds. The Court of Claims conceded that an aboriginal (private) right of fishery was able to co-exist with a public right but the

57 72 Stat 339 s 4.
58 (1962) 369 US 60; 82 S Ct 562; 7 L Ed 2d 573 at 579.
59 Supra n 64, p 72.
60 Supra n 58.
61 (1968) 389 F 2d 778 (SCA).

claim to an exclusive right had necessarily to fail. This aboriginal right was not a 'property' right, the Court found, since such a holding would be incompatible with the public right of fishery which the federal and state governments are unable to abridge without specific and unambiguous legislation.[62] The judgment in *Organized Village of Kake* was explained away as having proceeded on a purposely unanswered assumption that the ancient fishing rights were "property" rights within the meaning of the Statehood (Alaska) Act.[63] The Court of Claims saw itself as testing that assumption. Quite apart from the misinterpretation of *Organized Village of Kake,* the fallacy in this finding lies in the implicit belief in a mutual antagonism between the exercise of a public right and the aboriginal 'property' right. It was still open to the Court to agree with the Supreme Court's unqualified finding[64] that the aboriginal right was a property right but to add that it was not the exclusive right insisted upon by the claimants. Thus the amount of compensation available for its abridgement by federal legislation would be assessed by a mathematical exercise computing the aboriginal percentage vis à vis the public share. This, it can be noted, is hardly an exercise strange to American courts.[65] In any event, the Alaskan cases show that the American courts recognize the existence of an aboriginal right to fish. This right is not part of any public right; it co-exists with such rights, arising independently as some sort of private right.

V Conclusion

The Canadian and American cases acknowledge that the indigenous peoples of the continent enjoy an aboriginal right to their ancient fisheries. This right is not a property right in the sense that it gives the aboriginal owners an exclusive right of fishery in tidal and navigable waters. Nonetheless, it is a private right co-existing alongside albeit separate from the public right of fishery. The cases acknowledge that the fishing right is able to arise as a non-territorial incident of the Crown's ownership of submerged lands. That is, it can be made as a claim of some third party right not amounting to a claim to full aboriginal ownership of the underlying land. This non-territoriality can arise through the fishing rights being severed from the land as by reservation in a treaty of cession with the Crown or through reconciliation of the Crown's *dominium* over tidal and

62 Ibid at 786-787.

63 Idem.

64 In *Organized Village of Kake* supra n 58, p 92, the Supreme Court had stated unequivocally that fishing rights recognized by federal law or aboriginal in source were property rights.

65 A notable instance is the litigation spawned by the North West Pacific Indian fisheries controversy where Washington State Indians sought judicial enforcement of the Stevens Treaties of 1854 and 1855 guaranteeing them the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory". In *Sohappy* v *Smith* (1969) 302 F Supp 899 (D Or) it was ruled that these treaties entitled the treaty Indians to a 'fair share', later ruled after a historical review of the conclusion of the treaties and subsequent Indian fishing practices to mean a 50% share of the harvestable number of fish: *United States* v *Washington (Phase I)* (1974) 384 F Supp 312 (WD Washington), substantially aff'd sub nom *Washington* v *Washington State Commercial Fishing Vessel Association* (1979) 443 US 658 (USSC) and *United States* v *Washington (Phase 2)* (1980) 506 F Supp 187 (WD Washington) (allocation of hatchery fish and recognition of Indian right of environmental protection).

navigable water with its obligation at common law to respect aboriginal rights. The North American material has great significance to the Maori since it indicates that Maori ancestral fishing rights claimed over land owned by the Crown (ie land subjacent to tidal and navigable water) could be capable of recognition by New Zealand courts.

These rights can be recognized either by reason of their aboriginal origin or by virtue of their acknowledgement in the Treaty of Waitangi. The first of these sources, the doctrine of aboriginal title, has found consistent, almost unwavering recognition in North American courts. Alternatively, Maori fishing rights could derive in some way from their recognition in the (English version of the) Treaty of Waitangi. If British sovereignty predated the Treaty, it is open to the courts to take the 'contractual obligation' approach of some Canadian judges. The Treaty would be analogous to a Crown contract with the Maori tribes, problems of privity being avoided by the quasi-corporate status of the tribes. Alternatively and preferably, if British sovereignty post-dates the Treaty, the protection it gives Maori fishing rights can be considered as part of the general conduct of the Crown during the assumption of territorial sovereignty whereby it agreed that subsequent to annexation, it would be bound to respect these fishing rights. Either formulation of the Treaty's place in municipal law[66] would find the Crown to be bound in its executive capacity to respect Maori fishing rights. This would mean that the Crown's ownership of land underlying tidal and navigable water is subject to the non-territorial Maori fishing right.

AUTHOR'S POSTSCRIPT

In the year since this article was written a number of Canadian decisions have been given. The judgments of the Supreme Court of Canada in *Guerin* v *The Queen* (1984) 13 DLR (4th) 301 provide a dramatic and the most forceful judicial exposition of the doctrine of aboriginal title to date. The Federal Court of Appeal has followed the Supreme Court's approach (*Kruger* v *The Queen* 17 DLR (4th) 591) whilst the provincial courts have attempted to limit its effect: *MacMillan Bloedel* v *Mullin* [1985] 2 WWR 1 (BCSC) and *Attorney-General (Ontario)* v *Bear Island Foundation* (1984) 15 DLR (4th) 321 (Ont HC). According to *Guerin* aboriginal title amounts to a *sui generis* fiduciary relationship between the Crown and Indian tribes, the breach of which is actionable according to the rules of fiduciary duty: see Bartlett "You Can't Trust the Crown: The Fiduciary Obligation of the Crown: *Guerin* v *The Queen* [1985] Sask L Rev. The *Guerin* judgments strongly underline the conclusions in Part II of this article.

66 The writer is aware of the approach advocated by Carter, "The Incorporation of the Treaty of Waitangi into Municipal Law" (1980) 4 Auck L Rev 1 which is a reconstruction of a tentative argument made earlier by Keith "International Law and New Zealand Municipal Law" in *The A. G. Davis Essays in Law* (1968) 130, which in turn develops the themes of Mann *Studies in International Law* (1973). This approach, whilst plausible (but Carter's argument is marred by her confusion over the meaning of the term "ratification"), ignores the special position of treaties of cession (in contradistinction to ordinary multi- or bilateral treaties) in municipal law.