The Legal Status of Maori Fishing Rights in Tidal Waters

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Paul McHugh here considers what legal rights can be claimed by Maori tribes over coastal waters customarily fished by them. He discusses the applicability of the concept of aboriginal title to fishing rights in New Zealand, and concludes that a good argument can be made to the effect that the doctrine is consistent with local law, with the result that traditional Maori fishing rights are entitled to a measure of protection in the modern legal system.

I. INTRODUCTION

The purpose of this article is to investigate whether land below the tidal waters of New Zealand is subject to some form of aboriginal title. For the most part the content of this aboriginal title will be limited to an aboriginal claim to fishing rights over tidal waters and the subjacent land.

In the previous paper[1] it was seen that fishing, like hunting, rights were considered a valid basis upon which to found a claim to aboriginal title. That this

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1 "Aboriginal Title in New Zealand Courts" (1984) Canta. L.R. (forthcoming issue). The New Zealand Maori held a right at law to the use and occupation of their ancestral lands. This right arose immediately after the British acquisition of territorial sovereignty to New Zealand and was given the tag used in other Commonwealth jurisdictions of "aboriginal title". The Crown's acquisition of a new colony such as New Zealand in 1840 may have given it a feudal title blending *imperium* (the right of government) and *dominium* (paramount ownership of all land) but the latter was considered 'burdened' or qualified at law by the natives' traditional rights in their land. This aboriginal title was proprietary in character and capable of extinguishment only by the Crown through valid legislative process or voluntary agreement with the native owners. The Crown enjoyed no prerogative power to extinguish unilaterally the aboriginal title. However by virtue of the constitutional position as ultimate landowner and English law's requirement that rights in land derive from a grant by the Crown, the Crown enjoyed the sole right to quiet aboriginal title through the proper legal means. Legislative extinguishment aside, this meant the Crown possessed the sole capacity to purchase or accept the voluntary cession of the Maori's lands. The Crown could, however, assign this right to others — as where it issued a Crown grant to land over which the native title had not been quieted. This assignment entailed no ipso jure denial or extinguishment of aboriginal title but merely meant that the Crown was passing to another that which it alone possessed: the exclusive right of quieting aboriginal title through fair purchase or voluntary cession. Since these rules arose at Common Law

may be so has been acknowledged in New Zealand (albeit with respect to "customary land" — a sub-category of land subject to an unextinguished aboriginal title) in *Tamihana Korokai* v. *Solicitor-General*[2] when the Court of Appeal accepted that "customary title" might arise by virtue of the exercise of fishing rights. This article aims to develop the themes presented in the previous paper through the ascertainment of the legal character of traditional Maori fishing rights over tidal waters by investigating how these rights might possibly be set within the framework of a doctrine of aboriginal title. Put another way, this article is intended to discover whether traditional Maori sea fishing rights (such as those over the Motunui reefs in Taranaki) can exist at law binding upon the Crown's ownership of the bed of tidal waters and, secondly, to find the extent to which those rights have been affected, if at all, by legislation affecting this land and the superjacent water.

The 'bed of the tidal waters' and 'tidal land' are used in this article as general catch-all phrases to embrace five different types of land associated with tidal water. Technically speaking such terminological generalisation is not totally accurate but it has been made for reasons of convenience. It should be noted that they are compendious terms encompassing a diverse range of territory. The general argument that this article makes concerns all these types of 'tidal land'. Any variation

the Treaty of Waitangi in guaranteeing Maori right to traditional lands and securing the Crown's pre-emptive right, did no more than state what would have been the case in any event.

New Zealand courts, with the exception of *R.* v. *Symonds* (1847) N.Z.P.C.C. 387 and *Re "The Lundon and Whitaker Claims Act, 1871"* (1872) 2 N.Z.L.R. 41, 49 were unaware of these rules due mainly to the crude judicial application of feudal theory: all title to land had to derive from a grant by the Crown. This was a complete inability to grasp the rules of colonial law which formulated the doctrine of aboriginal title in a manner consistent with the feudal fiction through reconciling native title with the Crown's paramount title and restricting its alienability. Had New Zealand courts been more sensitive to the decision in *Symonds* the cases under Chief Justices Prendergast and Stout denying aboriginal title's existence at law might have been decided differently. Those cases contain an erroneous view of Maori aboriginal title.

The Native Lands Act 1909 provided (s.84) that the Maori claim to "customary land" or "customary title" was not to avail against the Crown. It provided also (s.85) that the Crown could by proclamation declare the customary title over specified tracts of land to be extinguished. This legislation reversed the rules of aboriginal title in so far as the Crown thereby acquired the executive power to extinguish aboriginal title unilaterally, although local lawyers saw it as no more than a codification and slight elaboration of the decisions already given in local courts. On the whole, though, the Maori's aboriginal title to their "customary land" was being transformed into a tenancy in common, a Crown-derived basis, by virtue of the operation of the Native Land Court following its statutory brief of ascertaining the traditional owners and then making a 'freehold order' for the land, the equivalent of a Crown grant.

That is the general position of Maori aboriginal title in New Zealand today. For the most part the few remaining tracts of land subject to an unextinguished aboriginal title comprise "customary land". That position notwithstanding, any land in New Zealand subject to an unextinguished aboriginal title and not "customary land" within the meaning of the Maori Affairs Act 1953 would not be affected by the Maori Affairs Act but would be subject to the Common Law rules of aboriginal title.

2 (1912) 32 N.Z.L.R. 321 (C.A.). See also *Re the Ninety Mile Beach* [1963] N.Z.L.R. 461 (C.A.).

arising for a particular type of tidal land will be apparent from the text's reversion to use of the precise term for the particular area to which the discussion at that moment applies. The first type of tidal land is the foreshore, being land between the high and low-water mark which is exposed when the tide is at its lowest ebb but covered at high tide. The next two types concern tidal lands always covered by water. First there is the seabed which comprises harbours, bays, estuaries, and land-locked tidal waters subjacent to the internal waters of New Zealand. This land is subjacent to the sea and tidal regions on the landward side of the baseline of the territorial sea of New Zealand delimited by reference to the Territorial Sea and Exclusive Economic Zone Act 1977.[3] The third type of tidal land concerns navigable rivers to the extent that they are affected upstream by the flow of the tide. This land is the navigable tidal riverbed. The fourth type is the non-navigable tidal riverbed. Finally there is the territorial seabed which is subjacent to the seas on the seaward side of the baseline of the territorial sea.[4]

II. SOURCES OF CROWN TITLE

Though title to tidal land in all its forms is vested in the Crown, the various sources of Crown title need identification.

Title to the foreshore is vested in the Crown by virtue of a prerogative title at Common Law.[5] This probably is also the case with the Crown's title to the navigable tidal riverbed though there is authority for the view that this title derives from section 261 of the Coal Mines Act 1979.[6] Title to the non-navigable tidal riverbed is also in the Crown at Common Law[7] though it is possible for a land-owner with property dissected or bounded by a tidal river to obtain a title by adverse possession.[8] Similarly the Crown has title to the bed of the internal waters by right of what Salmond called a "presumption of annexation" arising at the time Britain acquired territorial sovereignty over New Zealand.[9] The source of the Crown's title to the territorial seabed is less clear. It may originate from a Common Law rule imported into the colony or it may derive from a rule of international

3 Sections 5 and 6.

4 Idem.

5 *Raven* v. *Keane* [1920] G.L.R. 168; *Re the Ninety Mile Beach,* supra n.2, at 475-76 per T. A. Gresson J. For this rule of Common Law in England see *A.-G.* v. *Emerson* [1891] A.C. 649 at 653 (H.L.) per Lord Herschell and *Halsbury's Laws of England* (4th ed.) vol. 8, para. 1418.

6 Discussed below, text accompanying notes 12-16.

7 *Halsbury's Laws of England* (3rd ed.) vol. 39, paras. 664 and 775.

8 See Brookfield "Prescription and Adverse Possession" in G. W. Hinde (ed.) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 162, 203-205. The comment is made at 203 that the possibility of obtaining a title by adverse possession is "greater where the creek flows inland through the holding of a registered proprietor. In such a case the original Crown grant may well be found to be ambiguous as to whether the creek is included in the grant or not."

9 J. W. Salmond "Territorial Waters" (1918) 34 L.Q.R. 235 at 247. Salmond calls these waters the "enclosed sea", terminology which this article has avoided since Salmond's use of the term is different to that of international law: United Nations Convention on the Law of the Sea. Done at Montego Bay, December 10, 1982. XXI:6 I.L.M. 1261, article 122. New Zealand is a signatory nation but has yet to ratify this Convention (p. 1477).

law which has obtained effect in municipal law. Nonetheless, whatever its source, this title is confirmed by the local legislation setting up the extent of the country's territorial sea.[10]

Despite what local courts have said, the essence of the doctrine of aboriginal title is that it places a qualification upon the Crown's title to land vested in it by right of its sovereign status. Given this, those areas of tidal land vested in the Crown by the Common Law at the time of British annexation will be susceptible to the doctrine. There is a fundamental point which New Zealand courts have almost uniformly overlooked since *Wi Parata* v. *The Bishop of Wellington*:[11] the Common Law defines not only the *existence* but the content of the Crown title and colonial law is a part of that Common Law. This means that the Crown's title to the foreshore, tidal riverbed and bed of the internal waters can be analysed in terms of the doctrine of aboriginal title since the source of the Crown's title is the Common Law.

Preliminary discussion is needed however of the two areas of tidal land in respect of which the source of Crown title is unclear. These areas are the navigable tidal riverbed and territorial seabed.

Section 261 of the Coal Mines Act 1979 provides:[12]

> Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

In *The King* v. *Morison,* the first in the series of judicial considerations of the Maori claim to the bed of the Wanganui River, Hay J. ruled that the effect of the forerunners of section 261 was to vest title to the navigable riverbed in the Crown absolutely, unqualified by a Maori claim.[13] The word "granted" in subsection (1) was interpreted as meaning "expressly granted". However in *Attorney-General ex rel. Hutt River Board* v. *Leighton,* Fair J. expreessed the view that the word "granted" should be construed as meaning "expressly or by necessary implication granted" whilst F. B. Adams J. was of like opinion.[14] In *Re Bed of the Wanganui River*[15] the Court of Appeal proceeded on the basis that the Maori claim over the navigable portion of the river could not be based upon a Crown grant express or implied and so was not saved by the opening words of section 261. Significantly, however, F. B. Adams J. was later to resile from the position that the Crown's title to the navigable (and tidal) riverbed originated from section 261 which was the underlying assumption in *Re Bed of the Wanganui River*:[16]

10 Territorial Sea and Fishing Zone Act 1965, s.7; Territorial Sea and Exclusive Economic Zone Act 1977, s.7.
11 (1877) 3 N.Z. Jur. (N.S.) S.C. 72.
12 This provision first appeared as s.14 of the Coal-Mines Act Amendment Act 1903, and later became s.206 of the Coal-Mines Act 1925.
13 [1950] N.Z.L.R. 247, 267; [1949] G.L.R. 567, 576.
14 [1955] N.Z.L.R. 750, 772-73 (C.A.) per Fair J.; ibid. at 789-90 per F. B. Adams J.; Stanton J. expressed no opinion on the point.
15 [1955] N.Z.L.R. 419.
16 *A.-G. ex rel. Hutt River Board* v. *Leighton,* supra n. 14 at 789.

> The operative words are "shall remain and shall be deemed to have always been vested in the Crown". These are not words purporting to vest or divest anything. The words "shall remain" look to the future, and the other words look back to the past, and there are no words operative *in praesenti* such as one would expect to find if the purpose were to divest interests already alienated from the Crown and to revest them in the Crown. This is the sort of thing one expects in a declaratory enactment; and in my opinion, the wording tells strongly against the theory that any divesting of private rights already acquired was intended.

This was an analysis of the words and construction of section 261 which previously had not been made. It is clear, logical interpretation of the words of the provision and hence is the one adopted here: section 261 was enacted as no more than declaratory of Crown title and so does not exclude application of the doctrine of aboriginal title. It has no constitutory effect.

Section 7 of the Territorial Sea and Exclusive Economic Zone Act is declaratory in tone and duplicates section 7 of the Territorial Sea and Fishing Zone Act 1965. These provisions state that title to the territorial seabed is in the Crown and contain a saving clause much like section 261 of the Coal Mines Act 1979 though these clauses appear to be wider than that of the latter Act. These sections state:

> Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown.

Does this section prevent the recognition of Maori fishing rights over the seabed? A negative answer can be given on two counts. First, the section is declaratory in character so it is possible for the Crown's title to be bound by estates and interests other than those referred to in section 7. The section does not give a comprehensive definition of the types of interests that might subsist over the territorial seabed because only Crown-derived rights are acknowledged. Secondly, the section can be seen as simply stating that the Crown's title is qualified by any rights or interests recognised at common law or by statute. The choice of the word "grant" in preference, say, to "existence" or "presence" merely indicates the legislators' choice of a standard formula they believed to encompass all private rights over the seabed. Here one might also recall and apply the analysis of F. B. Adams J. quoted earlier concerning the similar (and narrower) saving clause in the coal mining legislation affecting the nevigable riverbed. Whatever view one takes, this section declaring the Crown's title to the territorial seabed does not exclude the doctrine of aboriginal title by virtue of a definitive description of the Crown's title. It has no such purport.

As section 7 is declaratory it is necessary to isolate the source of the rule recognising Crown ownership of the territorial seabed and to see the bearing which this source has upon claims to an aboriginal title thereover. If Crown ownership derives from some ancient Common Law title then the position is quite simple. The territorial seabed would be ordinary Crown lands and hence on general principle burdened by any aboriginal title arising in the same way at it would over land above the low-water mark. It may well be, though, that the Crown's title to the territorial seabed derives from some norm of international law which has

become incorporated into municipal law. It may be that aboriginal title cannot burden a Crown title when the source of title is a rule of international law as opposed to prerogative title recognised at Common Law.

The importance of this question must be explained a little more fully. In *R.* v. *Keyn* it was held by a narrow majority that the realm of England ended at the low-water mark.[17] This rule has been interpreted in the dominions to the effect that colonial boundaries extended only to the low-water mark.[18] The cases holding this indicate, however, that by a process independent of the acquisition of the colony in question the Crown obtained territorial sovereignty to the territorial seabed.[19] It is still a matter of some controversy but it appears that this created what Salmond called a band of maritime territory "in gross"[20] around the colony vested in the Crown in right of the United Kingdom rather than comprising part of the adjacent colony. Title to this territory passed to the successor in title to the Crown in right of the United Kingdom by some process of constitutional devolution which in New Zealand's case would probably have been in 1947 when the Statute of Westminster was adopted.[21] Until then colonial legislation affecting the territorial sea, and there appears to have been some such statutes,[22] would have been justified on the "peace, order, and good government" powers of legislation granted the

17 Also known as *The Franconia* (1876) L.R. 2 Ex. D. 63; 13 Cox Crim. Cas. 404. The case and its effect in England are discussed by G. Marston *The Marginal Seabed: United Kingdom Legal Practice* (O.U.P., 1981).

18 *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177 per Barwick C.J. and Windeyer J.; contra, Kitto J. (H.C.A.); *Re Offshore Mineral Rights* [1967] S.C.R. 792 (S.C.C.); *New South Wales* v. *The Commonwealth* (1975), 135 C.L.R. 337 per Barwick C.J., McTiernan, Mason and Jacobs JJ.; contra, Gibbs and Stephen JJ. This ruling arises from disputes within a federal system of government.

19 *Bonser* v. *La Macchia,* supra n. 18, at 190 per Barwick C.J. and at 222 per Windeyer J.; *Re Offshore Mineral Rights,* supra n. 18 at 807-808 (the Supreme Court indicated the source of Crown title to be a rule of international law which has become incorporated into municipal law); *New South Wales* v. *The Commonwealth,* supra. n. 18 at 368-369 per Barwick C.J. (title derives from a rule of international law); at 378-382 per McTiernan J. (title derives from a rule of international law); at 461-466 per Mason J. (title derives from a rule of international law); contra, at 441 per Stephen J. ("sovereignty over the colonial land mass carried with it ownership and dominion of its league seas" as a matter of Common Law) and at 392 per Gibbs J. (title derives from the Common Law). This approach, rightly, has been criticised for its "curious legal alchemy" whereby the territorial sea slid from the Imperial to the colonial Crown: D. P. O'Connell *The International Law of Sea* (2nd ed., Clarendon Press 1982) at 116 (n. 279) and 118-121.

20 Supra n. 9, at 240.

21 The Statute of Westminster Adoption Act 1947.

22 Some examples are the Oyster Fisheries Act 1866; Inquiry into Wrecks Act 1863; New Zealand and Australian Submarine Telegraph Act 1870; Fish Protection Act 1877. There has been a judicial intimation that the boundaries of the colony of New Zealand at the time of British annexation extended to include a three mile belt of territorial sea: *Waipapakura* v. *Hempton* (1914) 33 N.Z.L.R. 1065 (S.C.), 1071 per Stout C.J. This stance accords with the colonial legal practice evidenced by the above statutes, a practice too overwhelming to be based upon a "peace, order, and good government" legislative competence. It is also a rejection of the applicability of *Keyn* (supra n. 17) to New Zealand, a case which Marston (supra n. 17) has authoritatively shown to be wrongly interpreted.

colonial legislature by the Imperial authorities.[23] The precise moment need not be isolated since it is clear that title to New Zealand's territorial seabed has long been vested in the Crown in right of New Zealand and that this is the appropriate sovereign to consider bound by any subsisting aboriginal title thereover.

It appears that even if the Crown's "sovereignty" over the territorial sea derives from some title in international law, that "sovereignty" for municipal law purposes is the same as that for land above low-water mark. That is, there is no qualitative difference between the local formulation of "sovereignty" in either region. For all its ebb and flow the international law of the sea appears consistently to have held no more than that a state's national boundaries can include a belt of territorial sea. International law has left it to each country to define in its own terms the nature of its "sovereignty" over the territorial sea around its shores. International law provides the rules for the delimitation of this region as well as regulating some aspects of the coastal state's activities in the region. This regulation does not, however, challenge the coastal state's sovereignty except to the extent that it imposes duties on the coastal state in respect of its exercise of *imperium* (that is, its right of government) in the territorial sea.[24] The territorial sea legislation of New Zealand makes it plain that the traditional formula blending *imperium* and *dominium* applies to the country's sovereignty in the region.[25] Thus, even if the Crown's title to the territorial sea and subjacent soil derives from a rule of international law there would appear to be no basis for finding that this source disqualifies application of a doctrine of aboriginal title unless invocation of the doctrine challenges the Crown's sovereignty in this region.

It could be said that an aboriginal claim in respect of the territorial seabed amounts to a claim which is sovereign in character in as much as it is based upon some residual, aboriginal sovereign status. That is, the Maori could be alleged to

23 This power was conferred by the New Zealand Constitution Act 1852 (U.K.), 15 & 16 Vict., c.72, s.53.

24 The Convention on the Territorial Sea and the Contiguous Zone (done at Geneva on 29 April 1958, 516 U.N.T.S. 206) and the United Nations Convention on the Law of the Sea recognise in article 1 and article 2 respectively that a coastal state's 'sovereignty' extends over its territorial sea. O'Connell, supra n.19 at 80 observes: "There is no doubt that the intention behind the use of the word 'sovereignty' in Article I of the Convention on the Territorial Sea and Contiguous Zone is to concede to the coastal state plenary power to regulate events in the territorial sea. If such power carries with it in that State's constitutional law the attribution to the sovereign of the characteristics of the public domain, there is no reason to suppose that the Convention forbids this: it allows the maximum implications that may be drawn from the concept of sovereignty, but it does not impose these implications on the coastal State; it leaves them to be drawn in municipal law." The regulation of a coastal state's territorial sea prescribed by international law relates to the right of innocent passage (U.N. Convention on the Law of the Sea, Part II, s.3) and the coastal state's duty to protect and preserve the marine environment (ibid. Part XII).

25 Supra n.10. This is true also of most other Commonwealth nations. In *N.S.W.* v. *The Commonwealth* (supra n.18) all the judges talked of 'sovereignty' over the territorial sea in terms blending *imperium* and *dominium*. See the review of colonial legislation in G. Marston "Colonial Enactments Relating to the Legal Status of Offshore Submerged Lands" (1976) 50 A.L.J. 402. See also the review of national legislation concerning sovereignty over the territorial sea in O'Connell, supra n.19, at 82-83.

be setting up a rival sovereign claim in respect of the territorial sea which is incompatible with the exclusive sovereignty given a nation by international law. There is a certain irony in this contention as it attributes the source of Maori claims over the territorial seabed to a long judicially denied Maori sovereign status. More fundamentally, it views aboriginal title as flowing from some former sovereign status surviving in a residual form with respect to the territorial sea. This variation on the feudal obsession with the sovereign-derived character of property rights is countenanced neither by the cases concerning aboriginal title nor the colonial practice of the Crown. Aboriginal title derives from tribal use and occupation of its traditional territory since time immemorial and whether claimed in respect of land above or below the shoreline poses no challenge to the Crown's sovereignty. Indeed its existence at law is reliant upon that sovereignty since aboriginal title is based upon an attribute of the Crown's sovereignty, its *dominium*.

It is submitted, therefore, that whatever the source of Crown title to the territorial sea and adjacent soil, the Maori are able to make an aboriginal claim in respect thereof.

III. APPLICABILITY OF MAORI LAND LEGISLATION?

The purpose of this paper is to inquire into the existence of Maori fishing rights over tidal land. It has been alleged that this task is best undertaken through use of the doctrine of aboriginal title. The Crown's ownership of tidal land has been shown though the situation regarding Maori fishing rights when the Crown has made a grant of this land has yet to be considered.[26] The next step to be taken in identifying the legal character of Maori fishing rights is to consider the nature of the rights which on the pure application of the doctrine of aboriginal title would burden the Crown's title. In short, what is the nature of this burden on the Crown's ownership of tidal land?

The general principle of the Common Law is that fishing rights are mere profits of the soil over which the water flows and that title to a private or several fishery arises from the right to the soil.[27] In other words, the right of fishery is but one right accruing from ownership of the soil albeit a right of a severable character. So far as fisheries in tidal waters are concerned the law presumes that the soil subject to the ordinary flow and reflow of the tide up to the line of medium high tide belongs to the Crown and the rights of fishery over it are common to all subjects except where some subject(s) acquires a proprietary exclusive of the Common Law rights of the public.[28] It is possible however for a several fishery to co-exist with some public rights — the two are not mutually exclusive. In English law the possession of a several fishery to the exclusion of others was presumed to carry with

26 Discussed below, text accompanying notes 79-85.

27 *A.-G. (British Columbia)* v. *A.-G. (Canada)* [1914] A.C. 153 (P.C.), 167; *Marshall* v. *Ulleswater Steam Navigation Co.* (1863) 3 B. & S. 732; 122 E.R. 274, aff'd (1865) 6 B. & S. 570; 122 E.R. 1306 (Ex.Ch.); *Lord Chesterfield* v. *Harris* [1908] 2 Ch. 397 (C.A.), 413 per Buckley L.J., aff'd sub nom. *Harris* v. *Earl of Chesterfield* [1911] A.C. 623 (H.L.); *Neill* v. *Duke of Devonshire* (1882) 8 App.Cas. 135 (H.L.), 169 per Lord O'Hagan. And see generally *Halsbury's Laws of England* (4th ed.), vol. 18, para. 601.

28 *Lord Fitzwalter's Case* (1674) 1 Mod. Rep. 106, 86 E.R. 766; *Carter* v. *Murcot* (1768) 4 Burr. 2163; *Neill* v. *Duke of Devonshire,* supra n.27, at 158 per Lord O'Hagan.

it the soil, the origin of the right going back to some grant or act of the Crown prior to Magna Carta or alternatively to some legislative grant.[29]

So far as the Maori claim to fishing rights over tidal land is concerned it is quite plain that the presumption of legal ownership of the soil accorded the owner of a several fishery is immediately inapplicable since the very basis of the doctrine of aboriginal title is that legal title to the land subject to such a claim is vested in the Crown with the Maori claimants enjoying what amounts to some form of charge or burden upon the Crown's ultimate title. In short, the presumption of Maori ownership of the maritime *solum* is instantaneously rebutted. Reference to this presumption may be inappropriate not only for reasons of logical consistency, however, but also because there is no compelling reason for the Maori claim to a fishing right over a given area of tidal land to be a claim to some form of exclusive ownership of the soil. It may be and hereinafter it is taken as given that the solitary claim to a fishing right is something less than a claim to full aboriginal ownership of the subjacent soil. This is perfectly consistent with the Common Law's position on several fishery rights since it acknowledges the severable character of those rights.

However, is the existence of an aboriginal 'charge' upon (as opposed to an aboriginal claim to) tidal land consistent with the Common Law's stance that private fishery rights must derive from statutory grant or Crown grant prior to Magna Carta? Here one must not fall foul of the trap which has ensnared New Zealand judges, in particular the courts of Prendergast and Stout C.JJ. and exclude colonial law from the reckoning. This part of the Common Law governed the Crown's acquisition of overseas territories and as the previous paper showed was the source of the doctrine of aboriginal title. Nor should it be forgotten that the law as it stood in England was only imported into the colony to the extent that it was applicable to local circumstances.[30] This settled rule clearly presupposed the vigour of colonial law, a vigour fully evident in the consistent recognition of aboriginal title during the first decades of British rule in New Zealand.[31] Given this, the require-

29 *Malcomson* v. *O'Dea* (1863) 10 H.L. Cas. 593, 11 E.R. 1155; *Carlisle Corporation* v. *Graham* (1869) L.R. 4 Exch. 361; *Parker* v. *Lord Advocate* [1904] A.C. 364 (H.L.); *Lord Fitzhardinge* v. *Purcell* [1908] 2 Ch. 139, 167.

30 *Delohery* v. *Permanent Trustee Co. of New South Wales* (1904) 1 C.L.R. 283 (H.C.A.); *Winterbottom* v. *Vardon & Sons* [1921] S.A.S.R. 364 (S.Aust.S.C.); *Belilios* v. *Ng Li Shi* (1893) (Hong Kong S.C.) appended to the report of *Re Tse Lai-chiu* [1969] Hong Kong L.R. 159 (Hong Kong S.C.); *Garrett* v. *Overy* (1968) 69 S.R. (N.S.W.) 281 (N.S.W.C.A.). It is laid down in *R.* v. *Cyr* (1917) 13 Alta. L.R. 320, 38 D.L.R. 601 (Alta. C.A.) that regard should be had to the general condition of public affairs and the attitude of the community on the issue. See also *Halsbury's Laws of England* (4th ed.), vol. 6, para. 1196 and K. Roberts Wray *Commonwealth and Colonial Law* (Stevens, London 1966) 544. The rule was used in New Zealand in *Veale* v. *Brown* (1868) N.Z.L.R. 1 C.A. 152 (the law of escheat held applicable to the circumstances of the colony). See also these local statutes: the English Laws Act 1854; the English Laws Act 1858; and the English Laws Act 1908.

31 The reader is referred to P. Adams *Fatal Necessity: British Intervention in New Zealand 1830-1847* (1979) at 86-87; A. Ward *A Show of Justice* (1974); I. Wards *The Shadow of the Land* (1968); A. H. McLintock *Crown Colony Government in New Zealand* (1958). These leading historical accounts of the colonial practices vis-a-vis Maori land reveal a consistent, almost unwavering recognition by colonial authorities of the Maori's right to their land. R. Simpson *Te Rire Pakeha: The White Man's Anger* (1979) contains numerous inaccuracies.

ment in England that a several fishery derive from a pre-Magna Carta Crown grant or later statutory grant was probably one of those rules unsuitable for local circumstances at least to the extent of aboriginal sea fishing rights which did not amount to a claim to full aboriginal ownership of the subjacent soil.

Not surprisingly Stout C.J. failed to realise this in *Waipapakura* v. *Hempton,* one of the earliest cases considering the legal character of Maori fishing rights. The Chief Justice ruled that the law of sea fishery in New Zealand was exactly the same as that in England except insofar as it had been altered by statute.[32] This meant that the existence at law of a private Maori fishing right in tidal waters was dependent on a grant from the Crown prior to Magna Carta or statutory grant. The logical absurdity of the former requirement was plain. The Maori, unknown to English society until the late eighteenth century, could hardly point to a grant from the English Crown several centuries before the Crown had even learnt of their existence. Accordingly Stout C.J. proceeded on the basis that only an Act of Parliament could confer a private right of fishery on the Maori. This wholesale importation of English law neglected to consider colonial law's recognition of aboriginal title and the maxim that English law was only imported to the extent appropriate.[33] Indeed it was at that time and remains quite possible to reconcile aboriginal title's recognition of traditional fishing rights with the law of sea fishery as applied in England by holding that the rights existed as an aboriginal profit over the tidal *solum* severed from its ownership (or a claim thereto).

What has been done here is the division of aboriginal title into two categories. First, there is a form of aboriginal title which amounts to a claim to exclusive rights of use and occupation — aboriginal ownership if you like, or, a 'territorial aboriginal title'. Secondly, there are those rights of a lesser character which do not amount to a claim to exclusive 'ownership' but which subsist by way of a charge upon the land. The most notable example of this second category is seen in Canada where the courts have consistently recognised the Indian's possession of an aboriginal right to hunt for subsistence purposes upon unoccupied Crown land.[34] The concern

32 Supra n.22 at 1072.

33 It is interesting, though, that Stout C.J. applied this maxim in *Baldick* v. *Jackson* (1911) 30 N.Z.L.R. 343, 344-345 when he indicated that the Statute of 17 Ed. II, c.2, concerning royal fish was inapplicable to the circumstances of the colony on the grounds that though this statute expressly reserved the right to whales as part of the Royal prerogative, it was a right "not only that has never been claimed, but one that it would have been impossible to claim without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with . . . " This seems to amount to a holding that the Crown is bound by Maori rights, a position quite at odds with Stout C.J.'s general stance on aboriginal title.

34 *R.* v. *White and Bob* (1965) 52 D.L.R. (2d) 481 (S.C.C.) affirming 50 D.L.R. (2d) 613 (B.C.C.A.); *R.* v. *Kruger and Manuel* (1974) 51 D.L.R. (3d) 435 (B.C. Co. Ct. Yale) (reversed on other grounds on appeal); *R.* v. *Wesley* (1975) 9 O.R. (2d) 523 (Alagoma D.C.); *R.* v. *Taylor and Williams* (1979) 55 C.C.C. (2d) 172 (Ont. H.C.). For a full discussion of the cases see D.E. Sanders "Indian Hunting and Fishing Rights" (1973-74) 38 Sask.L.Rev. 45. In some areas another form of non-territorial aboriginal right may be a water right: R. H. Bartlett "Indian Water Rights on the Prairies" (1980) 11 Man.L.J. 59.

of this paper is whether Maori fishing rights over tidal water are part of a 'non-territorial aboriginal title'. The distinction is crucial.[35]

This distinction is confirmed by an inspection of Maori land legislation and the cases concerning fishing rights. One of the most important cases is the famous *Kauwaeranga Judgment* of Chief Judge Fenton of the Maori Land Court.[36] In this case certain claimants applied to the Native Land Court for a certificate of title to land covered by high water at ordinary tides but left by the water as the tide receded so forming an extensive mudflat unsuitable for use as a highway by persons on foot. It was argued that the claimants (and opposing claimants) had possessed and used the land for generations for fishing with stake nets, as a preserve for curlews and as a private ground for gathering shellfish (*pipi*). This use had been exclusive.

In the first part of his judgment Fenton made an extensive review of the authorities and process by which New Zealand became a British colony. This review was prefaced first by a paragraph cribbed from but not attributed to Chapman J.'s eloquent statement in *R.* v. *Symonds*[37] of the applicability of colonial law to questions of native land rights and, secondly, by explicit reference to Marshall C.J.'s judgment in *Johnson* v. *M'Intosh*[38] — the two classic authorities on the nature of aboriginal title.[39] Chief Judge Fenton refused to let feudal principle blending the Crown's *imperium* and *dominium* blinker his vision, indicating his belief that not only did the Maori once possess a sovereign status recognised by the British, a matter of some judicial controversy, but also his opinion that the Maori's rights to their land were recognisable in municipal law not only as a matter of general principle but also by virtue of the relevant local and Imperial statutes from the Land Claims Ordinance 1841 onwards.[40] For all the criticism sometimes aimed at Fenton[41] his belief as to the legal position was undoubtedly more correct than the rigid stand in feudal dogma shortly afterwards taken by his contemporaries in higher levels of the colonial bench.

The second part of Fenton's judgment reached the nub of the case before him, this being the issue of whether the court could grant a certificate of title for lands over which the sole aboriginal claim was to fishing rights (and a minor hunting right in respect of the curlew). Section 23 of the Native Lands Act 1865 provided that the Native Land Court having ascertained by evidence the rights of the applicant and other claimants

35 The choice of terminology comes from the submissions of Sir John Salmond as Solicitor-Salmond as Solicitor-General in *Waipapakura* v. *Hempton,* supra n.22, at 1066-1067.

36 Sent in despatch 2705 from the Governor of New Zealand, 13 January 1871—CO 209/221. I am grateful to Dr. G. Marston, Sidney Sussex College, for making available his copy of this judgment. [The full text of the judgment is published in this issue of the V.U.W.L.R. Ed.].

37 Supra n.1, at 388.

38 (1823) 8 Wheat. 543 (U.S.S.C.).

39 In *Calder* v. *A.-G. (British Columbia)* (1973) 34 D.L.R. (3d) 145 (S.C.C.), 193-195 Hall J. provides an impressive list of the cases which have relied on *Johnson* v. *M'Intosh.*

40 *Kauwaeranga Judgment,* supra n.36, at p.8.

41 A. Ward, supra n.31, at 94 reports Fenton to have been an extremely egotistical man.

> shall order a certificate of title to be made and issued which certificate shall specify the names of the persons or of the tribe who own or are interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate or the Court may in its discretion refuse to order a certificate to issue to the claimant or any other person.

Fenton refused to issue a certificate of title recognising "an absolute freehold interest in the soil" to be in the Maori claimants "for a 'fishery' will mean an interest of no higher character than a privilege or easement".[42] Accordingly the court issued an order pursuant to section 23 recognising the claimants' fishing rights and no more. It is probably a matter of some debate but Judge Fenton seems evidently to have considered his statutory mandate to have empowered him to make such orders as were appropriate for the type of rights being claimed as part of what the Act called "native title".[43] Fenton felt a claim solely to fishing rights to be in substance different to and of a lesser character than a claim to land and saw the Treaty of Waitangi itself as justifying this distinction.[44] According to Fenton's interpretation there were, then, two types of aboriginal title recognisable by his court under the 1865 legislation. First there were those claims which gave the claimants the right to a full certificate of title for the land, the certificate acknowledging the full and exclusive Maori ownership of the land. Secondly, there were those lesser aboriginal interests which did not justify the grant under the 1865 legislation of the equivalent of a freehold title to the land. By way of analogy to English law these lesser interests subsisted as a profit or easement over the land. In short, the 1865 legislation recognised the two forms of aboriginal title identified earlier. This two-fold categorisation must be borne in mind as the effect of the important 1909 legislation and successive statutes is considered. It corresponds with the vital distinction made earlier between territorial and non-territorial aboriginal title.

Section 161 of the Maori Affairs Act 1953 replicates the provisions of the Native Lands Acts of 1909 and 1931 concerning the jurisdiction of the Maori Land Court to make orders in respect of customary land.[45] This section provides:

> (1) The Court shall have exclusive jurisdiction to investigate the title to customary land, and to determine the relative interests of the owners thereof.
>
> (2) Every title to and interest in customary land shall be determined according to the ancient customs and usages of the Maori people, as far as the same can be ascertained.
>
> (3) On any investigation of title and determination of relative interests under this section the Court *shall* make an order (in this Act called a freehold order) defining the area so dealt with, naming the persons found entitled thereto, and specifying their relative interests in the land. (Emphasis added)

42 Supra n.36, at 11.

43 In *Hira Tamati* v. *District Land Registrar* [1957] N.Z.L.R. 231, North J. observed at 242 that many of the early Native Land Acts used this term "but precisely what was the nature of that ownership or title, so far as I can see, has always evaded precise definition". This, he intimates, to be in contradistinction to the term "customary title", the nature of which is the right to a freehold order (237). Somehow, then, "native title" comprehends a fuller if less certain set of rights than a "customary title".

44 Supra n.36, at 11.

45 The Native Land Act 1909, ss.84-91; the Native Land Act 1931, s.112 (as amended by the Native Land Amendment Act 1913, s.43(1)) and ss.113-119.

The following section provides:

> Every freehold order shall on the making thereof have the effect of vesting the land therein referred to in the persons therein named for a legal estate in fee simple in possession, in the same manner as if the land had been then granted to those persons by the Crown: and the land shall be deemed to have been so granted accordingly, and shall thereupon cease to be customary land and shall become Maori freehold land.

Together these sections stipulate that wherever Maori claimants can make out what is termed a "customary title" or "title to customary land" they shall be entitled as of right to a freehold order vesting the land in them.[46] This is the sole result which can flow from the establishment of a customary title. This is a narrower jurisdiction than that formerly held by the court under the 1865 legislation for the court is limited to the ascertainment of aboriginal title to lands for which the Maori claimants hold an exclusive title or right of full ownership. Whereas the 1865 legislation allowed the recognition of territorial and non-territorial aboriginal title the current legislation allows only for territorial rights or what is given the name customary title. In practice this may have meant very little for more often than not applications heard by the Maori Land Court were probably of a territorial character. Nonetheless the exclusion of non-territorial aboriginal title from the ambit of statutory regulation under the Maori Affairs Act 1953 (and its 1909 and 1931 predecessors) is unmistakeable. This does not mean that non-territorial aboriginal title has no existence at law, unless the 'statute-based approach' of New Zealand courts since the turn of the century is accepted. The exclusion of non-territorial aboriginal title from the Native Land Court's jurisdiction from 1909 onwards meant no more than the court could not give an order of the type issued in the *Kauwaeranga Judgment*. This hardly produced the elimination of those rights of aboriginal title. Thereafter they existed at Common Law independently of the provisions of the legislation affecting customary land.

The reduction of the forms of aboriginal title within the jurisdiction of the court to those rights of a territorial character only was recognised soon after the passage of the 1909 legislation. In *Waipapakura* v. *Hempton,* a case concerning Maori fishing rights in tidal waters Stout C.J. did not explicitly acknowledge that that Native Lands Act 1909 had reduced the Native Land Court's jurisdiction to territorial title alone. However he did so by direct implication when he noted that "no special jurisdiction has been conferred on the Native Land Court to deal with "fisheries" — i.e. fishing rights.[47]

This feature of the 1909 and successive legislation appears also to have occurred to F. B. Adams J. in *Inspector of Fisheries* v. *Ihaia Weepu,*[48] the next case after *Waipapakura* to consider Maori fishing rights in tidal waters. Adams referred to the distinction made by Salmond in arguing the latter case between a claim to

46 In fact, the distinction between "native" and "customary" title first appeared in the Native Land Court Act 1894, s.73, but it was not until 1909 when s.84 of the Native Land Act, the precursor of s.155 Maori Affairs Act 1953, was enacted that the distinction took significance for present purposes.

47 Supra n.22, at 1069.

48 [1956] N.Z.L.R. 920.

fishing rights as part of a customary title to land and a mere claim to fishing rights over ungranted Crown land,[49] and later expressed doubt whether a "mere right to fishery" is covered by section 155 of the Maori Affairs Act 1953.[50] This section, as has been seen repeatedly, provides that a claim to customary land cannot avail against the Crown. Adams J.'s doubts about the applicability of this section to non-territorial rights were well-founded. The section extends only to those lands for which the Maori Land Court is able to make a freehold order, namely lands subject to a territorial aboriginal title or customary land.

The Court of Appeal's opinions in *In re the Ninety Mile Beach*[51] also proceeded on the basis that the 1909 legislation had reduced the types of aboriginal title within the Maori Land Court's cognizance to one. In this case the Maori applicants sought a freehold order by the Maori Land Court recognising their customary title to a stretch of foreshore. The court's opinion on the matter will be discussed briefly at a later stage but in the meantime it is important to note that nowhere did the courts considering the matter raise the possibility of the issue of an order other than one recognising an exclusive Maori title to the land in question. Quite simply the option of an order such as that made by Chief Judge Fenton in *Kauwaeranga* was excluded by the legislation.

It is not enough to say that the exclusion of non-territorial rights from the ambit of customary title governed by the Maori Affairs Act 1953 was an oversight. Almost inevitably these rights would have been claims to fishing or (to a much lesser extent) hunting rights. A substantial proportion of such claims would have arisen in respect of tidal land and, as seen, the issue of a freehold title for tidal land on the basis of such claims was unthinkable.[52] The Public Reserves Act 1854 had given the Governor power to make grants of the foreshore, tidal riverbed and the bed of the internal waters and, it appears, territorial seabed.[53] Over the next two decades colonial administrators changed their mind about the suitability of a general faculty to make such grants. The Public Reserves Act 1877 did not duplicate section 2 of the statute it replaced. The next year the Harbours Act 1878 provided that any grant of tidal land must be pursuant to special legislation.[54] This requirement survives as section 150 of the Harbours Act 1950.[55] In *Re the Ninety Mile Beach* the Court of Appeal found that the Maori Land Court had jurisdiction to issue freehold orders for the foreshore but that once a freehold order

49 Ibid. 923.
50 Ibid. 925.
51 Supra n.2.
52 Said North J. (ibid. 467) ". . . it is pertinent to observe that at this late period in the development of New Zealand,both claims to the foreshore, if well founded, would have startling and inconvenient results." This especially applied to tidal regions usually considered open to public access viz. all categories of tidal land except in some cases the non-navigable tidal riverbed in respect of which it appears some private title was obtainable (supra n.8).
53 The Public Reserves Act 1854, s.2.
54 The Harbours Act 1878, s.147.
55 For recent examples of the effect of s.150 see 1973, No. 121, s.6 (parts of Timaru Harbour foreshore vested in local authority); 1972, No. 38, s.13(4) (land reclaimed by Wellington Harbour Board to vest in it) and 1975, No. 134, s.4(2) (foreshore adjacent to reclaimed land to vest in the Wellington Harbour Board).

was issued for the customary land immediately adjacent thereto the customary title over the foreshore was extinguished.[56] This was some qualification on the ambit of section 150 of the Harbours Act which Turner J. had found in the Supreme Court to be a total exclusion of the Maori Land Court's jurisdiction.[57] Nonetheless given that the customary title to most land abutting the sea will have long been adjudged and the boundaries generally taken to be the high-water mark (unless the Maori Land Court specifically ordered otherwise, which appears to have occasionally been the case[58]) the qualification on the ambit of section 150 of the Harbours Act 1950 is in practical terms meaningless. Effectively the Maori Land Court's jurisdiction and with it the geographical extent of "customary land" ends at the high-tide mark.[59]

It has been seen that the Maori Land Court can make a freehold order for customary land along the shoreline, the order being capable of including land to the low-water mark. It cannot however make orders for tidal land alone by virtue of section 150 of the Harbours Act 1950. When a customary title is found, however, the court is obliged to make a freehold order. Since section 150 has this disabling effect in respect of tidal land it appears that this land cannot be subject to a "customary" title. Since the essence of customary title is that the Maori Land Court "shall" issue freehold orders for this land it follows that any land in respect of which the court cannot fulfil this obligation is not customary land. Customary land is only that land for which the court can issue a freehold order. This, therefore, is another basis upon which the provisions of the Maori Affairs Act 1953 affecting customary title might be said to be inapplicable to Maori claims over tidal land. The conclusion applies to territorial and non-territorial claims.

This position is a total reflection of the view that any grant of tidal land is a weighty act requiring special consideration by Parliament. The general premise behind legislation affecting tidal regions appears to be that it is preferable that title to tidal land remain in the Crown with various rights and licences being granted in respect of it pursuant to statutory authority.[60] The exception to this are those local bodies, namely harbour boards, undertaking the exercise of such comprehensive functions over a given area of tidal region that the grant of title to the tidal *solum* is necessary for the satisfactory completion of their statutory duties. However this premise is not challenged in any way by the existence of Maori fishing rights over tidal land since these are of a non-territorial character co-existent with the public right of fishery.

IV. CONTEMPORARY STATUS OF MAORI RIGHTS

To date the position taken is that Maori fishing rights arise as private rights over tidal land co-existent with public rights of fishery. Given this co-existence

56 Supra n.2.
57 [1960] N.Z.L.R. 673, especially at 678.
58 Supra n.2, at 471 per North J.
59 This, too is the conclusion of the Waitangi Tribunal *Report, Fndings and Recommendations of the Waitangi Tribunal . . . in relation to fishing grounds in the Waitara District* (1983) at p.15.
60 The statutes affecting tidal water and land are discussed below, text accompanying notes 91 to 94.

what is the point of the distinction between Maori and public rights?

That question can be answered under three heads. First is a consideration of the effect of section 77(2) of the Fisheries Act 1908 which provides that nothing in Part I of the Act regulating sea fisheries "shall affect any existing Maori fishing rights". Secondly, there is the status of Maori fishing rights to consider when a Crown or legislative grant of tidal land has been made. A final consideration relates to the effect of the statutory regime of tidal land on Maori fishing rights. Subsequently the Motunui controversy will be briefly discussed as illustrative of the points made in this article.

A. "Existing Maori Fishing Rights"

Part I of the Fisheries Act 1908 governs sea fishing in New Zealand. It covers registration of fishing boats and licensing of fishermen.[61] It allows the Governor-General in Council to declare fish, oysters, seal, edible shellfish and sponges to be subject to the protective provisions of the Act.[62] Amongst other provisions of Part I are those specifying penalties for breach of the Act.[63] Significantly the last section of Part I closes with the words that "nothing in this Part of this Act shall affect any existing Maori fishing rights".[64]

Apart from a brief period from 1894 to 1903 the New Zealand sea fisheries legislation has consistently maintained a clause in respect of Maori sea fishing rights.[65] The courts have consistently and rightly held section 77(2) to be of a saving character in that it saves rather than grants "existing fishing rights".[66] But this begs the question of the origin of those fishing rights.

The interpretation of section 77(2) was first confronted at a time when New Zealand courts were adopted (somewhat tardily it must be added) a "statute-based approach" towards Maori rights as recognised in the Treaty of Waitangi.[67] By this approach the rights embodied in the Treaty only became recognisable in municipal law to the extent that legislation had given them any enforceability. Prior to the passage of the 1909 legislation the courts under Prendergast and Stout C.JJ. had consistently held that aboriginal title was incapable of any recognition at Common Law. The saving rather than enacting

61 Fisheries Amendment Act 1945, ss.3-5. [The Fisheries Act 1908 was replaced by the Fisheries Act 1983 which came into force on 1 October 1983, and which is arranged differently from the earlier Act. References to corresponding provisions in the new Act are given below in square brackets].

62 Fisheries Act 1908, s.10(1). [1983 Act, Part III and s.89(1)(b)].

63 Ibid. ss.47-63. [1983 Act, ss.93-107].

64 Ibid. s.77(2). [1983 Act, s.88(2). This subsection omits the word "existing"].

65 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 the aboriginal natives to any fishery secured to them thereunder." The history of legislation concerning sea fishery as it affects the Maori is given by Hardie Boys J. in *Keepa* v. *Inspector of Fisheries* [1965] N.Z.L.R. 322, 329.

66 *Waipapakura* v. *Hempton,* supra n.22, at 1070; *Inspector of Fisheries* v. *Ihaia Weepu,* supra n.48 at 922; *Keepa* v. *Inspector of Fisheries,* supra n.65 at 324.

67 Discussed, supra n.1.

character of section 77(2) caused a problem, however, in that this meant the courts were unable to see it as a statutory grant of the rights ostensibly protected by the Treaty of Waitangi. This meant the courts fell back on old rigid dogma; they could only recognise and enforce those rights in land which flowed from a grant by the Crown. Since section 77(2) could not fit alongside a 'statute-based approach' its reference to "existing Maori fishing rights" could not be a reference to aboriginal rights at Common Law because these did not exist or, as Prendergast C.J. said in *Wi Parata* v. *The Bishop of Wellington,* aboriginal rights being non-existent a statute could not call them into being.[68] Despite what one would have thought the development of a judicial climate increasingly receptive to Maori claims, the 'no statutory enactment, no legal right' equation has consistently plagued Maori attempts to invoke section 77(2).

But the 'statute-based approach' sits alongside an even more fundamental approach to Maori rights which employs the Common Law doctrine of aboriginal title. Placing section 77(2) into this context it is highly probable that the "existing Maori fishing rights" it preserves are those rights to sea fisheries arising from a non-territorial aboriginal title.

The cases concerning section 77(2) make a distinction between a claim to a right to fish over lands subject to a territorial claim and claims to rights to fish over Crown land not subject to any territorial Maori right.

The specific concern here is with the second type of those claims as they affect tidal land though some brief comments should be ventured on the claim to a fishery right over tidal land subject to a territorial claim, namely customary land. The cases hold that a claim to a private right of fishery over customary land will be recognised as an "existing Maori fishing right" under section 77(2) since this is part of the bundle of rights comprising the customary title recognised by statute. When, however, the Maori Land Court converted that customary title into a freehold title the Maori's traditional rights of ownership became completely assimilated into the English format and thereafter the Maori owners enjoyed no greater right of fishery than any European landowner. In short, with the ascertainment of customary title they lost the protection of section 77(2) of the Fisheries Act 1908. This ruling from *Ihaia Weepu*[69] was taken further by the Court of Appeal in *Re the Ninety Mile Beach.*[70] In this case the customary title to land fronting the sea (X) had been ascertained. The Maoris claimed a customary title to the foreshore (Y) of this land. The court ruled that ascertainment of the customary title to X extinguished any Maori rights over Y. It is submitted that this finding is illogical in as much as the identification of rights in a parcel X was held to extinguish rights over a separate parcel Y. In fairness, the Court of Appeal was concerned with a unique type of land in Y (the foreshore) and its

68 (1877) 3 N.Z.Jur. (N.S.) S.C. 72, 79. One is reminded of the words of Lord Hailsham in *Oppenheimer* v. *Caternole* [1975] 1 All E.R. 538 at 555 ". . . the only way known to English law of disregarding an unpleasant fact is to create the legal fiction that it does not exist."

69 Supra n.48 at 923; approved in *Keepa* v. *Inspector of Fisheries,* supra n.65.

70 Supra n.2.

approach got around the problem presented by section 150 of the Harbours Act 1950 and past acts of the Maori Land Court which would seem to challenge that provision.[71] But, more importantly, the case was proceeding on the basis that the only form of aboriginal title recognisable in New Zealand courts was that of a territorial character (viz. customary title under Part XIV of the Maori Affairs Act 1953). All the parties including the court seemed convinced that the only method by which Maori fishing rights over the foreshore might receive legal recognition was through a freehold order by the Maori Land Court for Y, the foreshore. If an attempt is made to put the matter into proper perspective, the picture emerging would be one where Maori claimants sought some judicial recognition of their fishing rights over the foreshore and tidal land as part of a non-territorial aboriginal title. These rights would be protected by section 77(2) of the Fisheries Act 1908. The matter is not one for the Maori Land Court which is concerned only with territorial claims. To achieve recognition of non-territorial rights over the foreshore a local court would have to be prepared to distinguish *Re the Ninety Mile Beach* on the basis that the Court of Appeal considered only a territorial claim.

Exactly the same form of reasoning can be applied to Maori fishing rights over the navigable tidal riverbed. In *Re Bed of the Wanganui River*[72] the Maori failed to establish a territorial claim to the riverbed when their application for recognition of a customary title thereover was rejected. It is possible though that this was the wrong form of claim to make at least so far as protection of fishing rights was concerned and that the way is still open for a judicial recognition of non-territorial aboriginal title over this type of tidal land. The heart of this contention is that section 261 of the Coal Mines Act 1979 declares (or even vests) title to the navigable (tidal) riverbed in the Crown but makes no alteration of private rights subsisting by way of charge over that land. In short, the provision concerns title to, not charges upon, the navigable riverbed. The Crown has territorial title but non-territorial private rights are not excluded.

Returning more specifically to non-territorial aboriginal claims it can be seen that the cases take the predictably uniform approach: unlike the rights incidental to customary (territorial) title these fishing rights have received no recognition by statute and therefore reliance on the Treaty of Waitangi will not avail the Maori claimants. F. B. Adams J. said in *Ihaia Weepu* that non-territorial Maori fishing rights are "not legal rights in the full sense of those words, and to describe them as 'rights' [is] really a misnomer". These rights subsist over Crown lands at regal sufferance and give the Maori no rights above and beyond those enjoyed by the public at large. Since non-territorial fishing rights can enjoy no independent existence at law, the judicial reasoning concludes, they are not covered by the terms of section 77(2) of the Fisheries Act 1908.[73]

This approach can be criticised for its failure to consider any form of Common Law doctrine of aboriginal title and its rigid adherence to unadulterated feudal

71 Supra n.58.
72 [1962] N.Z.L.R. 600.
73 *Ihaia Weepu* v. *Inspector of Fisheries,* supra n.48, at 922. *Also Waipapakura* v. *Hempton,* supra n.22, at 1072; *Keepa* v. *Inspector of Fisheries,* supra n.65, 328.

principle. A more recent example of the same type of reasoning is seen in Henry J.'s unreported judgment in *Hita* v. *Chisholm*.[74] This case appears to have been sparked by a hopeful counsel's reliance on an article several years earlier in the *New Zealand Law Journal* in which a writer argued (and dismissed) the possibility that the Treaty of Waitangi might have been referentially incorporated into New Zealand law by virtue of its inclusion in the schedules to the New Zealand Day Act 1973 and the Treaty of Waitangi Act 1975 which constituted the Treaty of Waitangi Tribunal.[75] Rightly Henry J. gave this contention short shrift[76] but he too failed to consider any doctrine of aboriginal title.

Besides those fishing rights inhering in a customary title it is clear that Stout C.J. considered[77] the type of right protected by section 77(2) of the Fisheries Act 1908 to be of the kind contained in section 10 of the Fisheries Amendment Act 1923 and section 33 of the Maori Social and Economic Advancement Act 1945.[78] It appears, though, that these provisions in no way presuppose the non-existence at law of Maori sea fishery rights. The first provision allows the Governor-General by Order in Council to declare any tidal lands or tidal waters defined in the order and situated in the neighbourhood of any Maori pa or village to be an oyster fishery where only Maoris may take oysters for their own food. The section goes on to provide for the administration of the fishery by a committee of local Maoris. This section, which is limited to oyster fisheries, is a regulation and statutory organisation of the Maori right found here to exist at Common Law. There is nothing in the section to indicate that it is constitutory of such a right and it should not be forgotten that this provision is subject anyway to section 77(2) of the principal Act. Section 33(1) of the Maori Social and Economic Advancement Act allowed the Governor-General by Order in Council to "reserve any pipi ground, mussel bed, other shell fish area, or fishing ground or any edible seaweed area for the exclusive use of Maoris or of any tribe or section of a tribe of Maoris". The subsequent subsections went on to provide that the Governor-General could give the control of such reserved fishing zones to any Tribal Executive or Committee constituted under the Act. As with section 10 of the Fisheries Amendment Act 1923 this provision allowed a regulation and statutory organisation of the fishing right. It did not deny the existence of such a right but consistent with the scheme of the Maori Social and Economic Advancement Act set up the machinery whereby the local fishery rights could be overseen by tribal bodies constituted under the Act. It cannot be said, therefore, that neither of these sections would have been necessary had the Maori's non-territorial sea fishing rights some existence at law.

B. Crown and Legislative Grants of the Seabed

On general principle Crown grants of land were taken subject to pre-existing

74 Supreme Court, Auckland Registry, 1 and 8 February 1977, (M 1539/76).
75 A. P. Molloy "The Non-Treaty of Waitangi" [1971] N.Z.L.J. 193, 196.
76 Supra n.74, at 3.
77 *Waipapakura* v. *Hempton,* supra n.22, at 1070.
78 This Act was repealed by the Maori Welfare Act 1962, s.144 and Schedule.

public and private rights thereover.[79] The same rule applied to grants of land subject to an unextinguished aboriginal title: such grants were taken subject to the particular aboriginal right subsisting over that land. This was, of course, but a logical consequence of holding aboriginal title to be a private right recognised at Common Law. Nonetheless it was a finding incompatible with the mainstream of New Zealand authority which held that the Crown enjoyed a prerogative power to extinguish aboriginal title unilaterally. These cases laid down that the Crown's exercise of its executive power to make grants of the colony's "waste lands" involved a simultaneous exercise of its prerogative power to extinguish aboriginal title. It was shown however that the Crown never enjoyed a prerogative power to extinguish aboriginal title unilaterally — this had to be performed by valid legislation or through voluntary sale or cession by the native owners. As with so many other aspects of aboriginal rights, the New Zealand courts were on this count, it is submitted, simply wrong. This means that consideration of the effect of Crown grants of tidal lands upon rights of a non-territorial aboriginal title must not be blemished by reference to the misconceived line of local judicial thought inaugurated and typified by *Wi Parata* v. *The Bishop of Wellington.*

After reviewing colonial legal practice Marston concluded it was "clear . . . that the Colonial Governor was thought competent to make dispositions of the submerged lands provided he was authorised to do so by the colonial legislature".[80] In New Zealand this authorisation was first provided by the Public Reserves Act 1854, which provided in section 2 that

> . . . it shall be lawful for the Governor, with the advice of the Executive Council, to grant and dispose of any land reclaimed from the sea, and of any land below high watermark in any harbour. arm, or creek of the sea, or in any navigable river, or on the sea coast, within the Colony, either to the Superintendent of the Province and his successors, in or to which such land is situate or adjacent; or in such other manner, to such other persons, and upon such terms, as shall be thought fit.

Section 12 of this Act was a saving clause providing that "nothing herein contained shall in any way prejudice or affect the right of any persons or Body Corporate in, to, or over any such lands, except the right of Her Majesty . . . ".

The legislation was predicated on a *nemo dat non quod habet* basis in as much as the Crown could only pass as good a title as that which it held and so codified the ordinary rule. Any grants by the Governor under the general faculty given by this Act would be taken subject to any non-territorial aboriginal title subsisting over that land.[81]

As seen earlier, this general power did not survive the Public Reserves Act 1877 and the next year the Harbours Act 1878 provided that any grants of tidal land were only to be made pursuant to a special Act of Parliament. This requirement, which survives in section 150 of the Harbours Act 1950, cannot of itself be taken

79 See with respect to the tidal lands of New Zealand *Crawford* v. *LeCren* (1868) N.Z.L.R. 1 C.A. 117, 131 per Arney C.J. As regards Crown grants of land subject to an unextinguished aboriginal title see the discussion, supra n.1.

80 G. Marston, supra n. 25, at 409.

81 *Crawford* v. *LeCren,* supra n.79, at 132; held obiter grants under this Act were subject to pre-existing private rights.

to mean any ipso jure extinguishment or even negation of aboriginal fishing rights over tidal land. The survival of these rights will be a matter of interpretation of the special Act vesting tidal land in a particular person(s). Here the "necessary result" of the legislation must be "tantamount to saying that the legislator has expressed a clear and plain intention to extinguish that right" of fishery.[82]

For the most part, however, it will be a very rare occasion on which areas of tidal land subject to a non-territorial aboriginal claim will be vested in private persons as such grants tend to be of land close to built-up areas in which the Maori would have long forsaken foraging and fishing for food. Moreover, given that the vesting of tidal land is usually made in cases where the government wants the grantees to exercise complete powers of control (as with land granted to harbour boards) it would be hard to see the survival of any non-territorial aboriginal right subsequent to the passage of the special vesting Act.[83]

Though non-territorial aboriginal rights might survive the grant of tidal land by legislation or indeed its acquisition by third parties through other means, the position of these rights is unresolved if that grant becomes registered under the Land Transfer Act 1952. It appears that this Act applies to grants of tidal land as equally as other land, notably section 10(d) which provides that the 'land' referred to in the Act includes "all land which hereinafter becomes vested in any persons for an estate in fee simple in possession by virtue of any Act of the General Assembly". Nor does section 2 provide any indication that grants of tidal land are incapable of registration under the Act. It may well be that in practice grants of tidal land are not allowed to be registered under the Act.[84] It is equally possible however that portions of land subjacent to tidal waters, particularly reaches of non-navigable tidal rivers, have become entered on the register. How will this registration affect non-territorial fishing rights? This inquiry is much more complex than its significance merits; however, the following speculative answers are suggested: where the registered proprietor is and always has been the Crown the Maori holders of the aboriginal fishing right may be able to enforce a claim against the Crown.[85] If the registered and original proprietors are the Maori claiming to hold the aboriginal right they may be able to get their interest registered by following the same formalities as those when, say, a right of way or easement is created in respect of that land. If the registered proprietor is none of the above

82 This was the test adumbrated in *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* (1979) 107 D.L.R. (3d) 513 (F.C.T.D.) at 552 per Mahoney J. It is the standard test for assessing legislation which may affect rights inhering as an aboriginal title: supra n.1.

83 As by acquisition of title by a Crown grant under section 2 of the Pubilc Reserves Act 1854, or through adverse possession of a non-navigable tidal riverbed (supra n.8).

84 This perhaps on the basis that land not subject to the Land Transfer Act 1952 includes land and existence of which is only disclosed by the making of a new survey: G. W. Hinde, D. W. McMorland and P.B.A. Sim *Land Law* (Butterworths, Wellington, 1978) vol. 1, at para.2029.

85 This on the basis that a registered proprietor enjoys no projection from the 'indefeasibility of title' protection given by s.62 of the Land Transfer Act, when he is "exposed to claims *in personam*": *Frazer* v. *Walker* [1967] 1 A.C. 569 (P.C.), 581 per Lord Wilberforce; *Tataurangi Tairuakera* v. *Mua Carr* [1927] N.Z.L.R. 688, especially at 702; *Bevan* v. *Dobson* (1906) 26 N.Z.L.R. 69, 72 per Stout J.

the fishing right is probably swept off the land by virtue of section 62 of the Land Transfer Act containing the 'indefeasibility of title' principle of the Torrens system of registration. Nonetheless it may be that the Maori holders of the lost right can maintain some form of action against the Crown for compensation or even damages.[86]

C. The Legislative Regime of the Seabed

Nowadays the tidal water and subjacent land of New Zealand is regulated by a variety of statutes ranging from those concerned with salvage to those dealing with discharge of sewage into maritime areas. What effect does this legislative regime have upon non-territorial aboriginal title over tidal land? Is the extinguishment of traditional Maori fishing rights a "necessary result" of the gradual parliamentary construction of this regime?

First, start with the supposition, undoubtedly a correct one, that legislation prior to 1908 has not extinguished non-territorial Maori rights over tidal land. This assumption is made for reasons of convenience relating to space and clarity of analysis — a detailed historical study of the legislation affecting tidal land would unnecessarily prolong and complicate what is already a sophisticated and intricate matter. It can be observed though that this supposition is justified by the reference in section 77(2) of the Fisheries Act 1908 to "existing" Maori fishing rights. They could hardly have "existed" in 1908 had they been previously extinguished by legislation.

In *Calder* v. *Attorney-General* the Supreme Court of Canada considered the range of legislation passed by the colony of British Columbia prior to its union with Canada as a federal province. This legislation concerned Crown lands in the colony, land which on the technical application of the doctrine of aboriginal title would be subject to an unextinguished aboriginal title. In the end the case went off on procedural grounds but six of the seven judges considered the effect of this legislation on an aboriginal title which all acknowledged to exist at common law. Judson J. (Martland and Ritchie JJ. concurring) held that the proclamations and ordinances revealed a unity of intention to exercise, and the legislative exercising of, absolute sovereignty over all the lands of British Columbia and such exercise was inconsistent with any conflicting interests, including one as to "aboriginal title.[87] Hall J. (Spence and Laskin JJ. concurring) considered the same body of legislation and found that the only possible way it could be taken to extinguish aboriginal title was in so far as it presupposed title to the land in the colony to be vested in the Crown. But this was hardly a new situation, Hall J. indicated, for the legislation "merely" stated "what was the actual situation under the common law", namely that the Crown had paramount title to land in the Province.[88]

86 It is possible that s.172(b) of the Land Transfer Act 1952 extends to non-territorial Maori rights sicne it refers to anyone "deprived of any land, or of any estate or interest ... in land." The Privy Council has held that compensation lies for loss of equitable as well as legal interests: *Williams* v. *Papworth* [1900] A.C. 563, especially at 568 per Lord Macnaghten. Given this, a non-territorial aboriginal right swept off the land by registration under the Land Transfer Act 1952 would be compensatable.

87 Supra n.39, at 160.

88 Ibid. at 214-15.

The statutory repetition of this position unaccompanied by a qualification for Indian title did not mean a negation of that title's existence. To put it colloquially: to tell only half the story did not mean the non-existence of the other half. Subsequently, Hall J.'s judgment has come to be preferred not only by the courts[89] but, significantly, by the Canadian federal government.[90]

In considering the statutory regime affecting tidal water and the subjacent land it matters not, then, that this legislation may presuppose Crown title to the tidal land and water. This means no automatic negation of aboriginal title. Indeed, the important question concerning such legislation is much more specific: to what extent is the exercise of a particular statutory right granted by this legislation inconsistent with the presence of an aboriginal fishing right?

Although by no means a comprehensive catalogue, the important examples of the types of statutory rights over tidal water and subjacent land can be found in the following Acts: the Fisheries Act 1908, the River Boards Act 1908, the Petroleum Act 1937, the Harbours Act 1950, the Submarine Cables and Protection Act 1966, the Water and Soil Conservation Act 1967, the Marine Farming Act 1971, the Marine Reserves Act 1971, the Mining Act 1971, the Town and Country Planning Act 1977, the Coal Mines Act 1979, the Continental Shelf Act 1964, the Iron and Steel Industry Act 1959, the National Development Act 1979.

Space inhibits a comprehensive analysis of these Acts and the effect which exercise of the rights granted thereunder might have upon pre-existing property rights. Nonetheless a general theme is apparent in this body of legislation.

First it can be observed that these Acts are generally designed to authorize specific activity in tidal waters and upon the subjacent soil. Whilst authorizing a particular activity as, for example, submarine mineral exploration, these Acts are so drafted as to ensure the minimum of interference with pre-existing rights. Compensation provisions are present in these Acts authorizing activity likely to have an adverse effect upon pre-existing property rights. For instance, the Petroleum Act 1937 after stipulating that the holder of a mining licence under the Act must exercise its rights so "as to interfere as little as possible with the occupation and use of the land by any other person having a right to occupy or use it",[91] grants a right of compensation to "any person having any right, title, estate or interest in any land injuriously affected".[92] Such provisions[93] would extend, it is suggested, to traditional Maori fishing rights arising from a non-territorial aboriginal title

89 *R.* v. *Kruger and Manuel* (1974) supra n.34, at 445 Washington, Co. Ct.J. Hall J.'s judgment was relied on heavily in *R.* v. *Wesley* supra n.34 and *Baker Lake* v. *Minister of Indian Affairs,* supra 82. Cf. *R.* v. *Derriksan* [1975] 1 W.W.R. 56 (B.C.S.C.).

90 S. M. Weaver *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (1980) at 198-99 and authorities cited there.

91 Petroleum Act 1937, s.9.

92 Ibid. s.29.

93 For example see also the Mining Act 1971, s.220; the Coal Mines Act 1979, s.83; the Iron and Steel Industry Act 1959, s.28. It appears that the injurious affection must be such as would be actionable but for the statutory licence and must arise from some physical interference with some right of which the owners of property are by law entitled to make use: *Tawa Central Ltd.* v. *Minister of Public Works* [1934] N.Z.L.R. 841, 860.

adversely affected by a particular activity authorized by statute. Other Acts such as the River Boards Act 1908, the Harbours Act 1950, and Town and Country Planning Act 1977 are regulatory in character involving as a general rule no substantial impairment of the enjoyment of pre-existing private rights. Such legislation is of the regulatory (as opposed to confiscatory) character referred to in the *Kruger and Manuel* case.[94]

It is important to add that asthe aboriginal rights of fishery is proprietary in character any legislation of an expropriatory character must be read as not intending to deprive the traditional fishing rights without compensation unless so stated in express terms.[95] This presumption would presumably arise in those situations where exercise of the statutory right amounted to an effective expropriation or extinguishment of the traditional fishing right and where the compensation provisions of the Act (if any) were inapplicable.

Finally it can be observed that the grant of a right to undertake certain activity upon or above tidal land is not a grant of permission for the negligent or malicious infraction of pre-existing property rights.[96] In such circumstances, the defence of statutory authority is not available. Moreover it may be that the defence of statutory authority will not avail the holder of the statutory right in an action for damages for any nuisance resulting from the grantee's activity even where no question of negligence or malice arises.[97]

V. CONCLUSIONS

The previous three paragraphs stated the general basis upon which the effect of effluent discharge onto Maori fishing grounds can be assessed. In the main the legal authority for such discharges will emanate from the Water and Soil Conservation Act 1967.[98] This statute vests in the Crown the sole right to "discharge

94 See *Kruger and Manuel* v. *R.* [1978] 1 S.C.R. 104 (S.C.C.) discussed in "Aboriginal title in New Zealand Courts", supra n.1.

95 This is based on the maxim that only express words to that effect in an enactment would authorise a taking of private rights without compensation: *City of Montreal* v. *Montreal Harbour Commissioners* [1926] A.C. 299; *A.-G.* v. *De Keyser's Royal Hotel Ltd.* [1920] A.C. 508; *Burmah Oil Co. (Burmah Trading) Ltd.* v. *Lord Advocate* [1965] A.C. 75. And with respect to aboriginal title see *Calder* v. *A.-G. (B.C.)*, supra n.39, at 173 per Hall J.

96 See, generally, *Halsbury's Laws of England* (4th ed.) vol. 14, para. 251 on the rights of an owner of a profit à prendre. Also with respect to rights in a several fishery see *Pride of Derby and Derbyshire Angling Association Ltd.* v. *British Celanese Ltd.* [1952] 1 All E.R. 1326; on appeal [1952] 1 Ch. 149; [1953] 1 All E.R. (C.A.) (action in nuisance to protect fishing rights).

97 The leading recent case on the defence of statutory authority to nuisance actions is *Allen* v. *Gulf Oil Refining Ltd.* [1979] 3 All E.R. 1008 (C.A.); [1981] 1 All E.R. (H.L.). This case as decided by the majority of the House of Lords has been subject to severe criticism with which the writer agrees: S. Tromans "Nuisance — Prevention or Payment" [1982] C.L.J. 87, 106-108. Tromans argues that a successful defence of statutory authority might prevent a court granting an injunction but it should not inhibit the award of damages.

98 The procedures in this Act are subject to the "fast track" provisions of the National Development Act 1979, s.18(2) and Schedule. The Maori people of the Manukorihi Marae unsuccessfully sought to establish that the proper procedures had not been followed for the approval of the synthetic fuel plant in Taranaki: *North Taranaki*

any natural water into any natural water, or to use natural water".[99] The Act goes on to outline the proper procedure for applications to the local Regional Water Board for a water right and the hearing of objections made by any person.[100] The decision of the Regional Water Board is subject to appeal to the Planning Tribunal.[101]

The aim of the Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983 is to grant the New Zealand Synthetic Fuels Corporation an interim right to discharge plant effluent into the sea through either the Waitara Borough Council's marine outfall or through an alternative outfall.[102] The right granted by the Act is to continue in force until the grantee acquires authority to discharge the effluent in some other lawful manner, or until 12 March 1992, whichever is the earlier.[103]

The Maori people have protested that this discharge over the Motunui reefs will ruin their traditional fishing grounds. They complain too that the Waitara Borough Council's outfall has not been properly kept and is causing some damage to the reefs.[104] What ramifications does the doctrine of aboriginal title have for these people facing further harm to their traditional fishery? This can be shown through the reduction of the discussion to date into the following set of conclusions:

1. Maori fishing rights arise from a doctrine of aboriginal title. These fishing rights exist as a burden upon the Crown's ownership of tidal land. These rights are recognisable and enforceable at common law. A claim to fishing rights simpliciter is a non-territorial aboriginal claim. It does not amount to an exclusive claim to the land so as to justify the issue of a freehold order by the Maori Land Court in respect of that land.Hence it is not "customary land" and consequently the claim to fishing rights is not affected by Part XIV of the Maori Affairs Act 1953 which only affects territorial claims. The wide powers given by this Part of the Act to the Crown are inapplicable in respect of Maori fishing rights. The ousting of the Maori Land Court's jurisdiction by section 150 of the Harbours Act 1950 also prevents tidal land being customary land.[105]

2. Aboriginal title does not fit squarely into any of the traditional categories of property rights, a feature deriving from its unique character and source. If anything an aboriginal non-territorial fishing right approximates to a profit à

Environment Protection Association Inc. v. *Governor-General* [1982] 1 N.Z.L.R. 312 (C.A.).

99 The Water and Soil Conservation Act 1967, s.21(1). Section 2 of the Act defines "natural water" to mean all forms of free-flowing water including sea and salt water.

100 These Boards are constituted under s.19 of the Act. Note that by section 20(5)(i) the Board has the same functions in respect of the territorial sea and internal waters as it has for inland rivers, streams, lakes etc. For standing to bring an appeal see s.24(4).

101 Ibid. at ss.21, 23 (applications by the Crown) and 24.

102 Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983, s.3(1).

103 Ibid. s.3(3).

104 *Recommendations of the Waitangi Tribunal,* supra n 59, in Part 7 of the Report (pp.25-36); "No winners, only losers in legal battle" in *Tu Tangata* (June/July 1982) issue 6 at pp.10-11.

105 Subject to the rider in *Re The Ninety Mile Beach,* discussed in the text accompanying notes 56-59.

prendre, this being the Common Law's usual classification of fishing rights. It follows that the Maori holders of the fishing right can use all legal means at their disposal to protect their aboriginal interest as though it were a profit à prendre. This means they can maintain actions in tort to protect their traditional fishing grounds. They could also have these rights recognised by a declaratory judgment, or as a defence to a charge under Part I of the Fisheries Act 1908.

3. The Maori aboriginal rights in respect of tidal land have not been extinguished by any of the statutes affecting tidal water and the subjacent land taken en masse or considered singly. Indeed, the only Act potentially posing a direct challenge to such rights, Part I of the Fisheries Act 1908 which regulates sea fishery in New Zealand, contains an explicit recognition of Maori fishing rights, directing that Part I of the Act is to be read subject to "existing Maori fishing rights". At worst the legislative regime of tidal land presupposes title to be in the Crown. However as Hall J. indicated in *Calder* this does no more than state what is the case in any event.

4. The statutes affecting tidal land give authority for the exercise of certain specified rights in respect of the soil and superjacent water. The statutes provide no authority for the tortious infraction of pre-existing private rights in respect of tidal land. So, for example, the negligent maintenance of a sewage outfall may be a cause of action if this negligence is causing damage to the Maori fishing right. The valid exercise of a statutory right may however impair Maori fishing rights. To the extent that this is a "necessary result" of the activity authorised by legislation the Maori fishing right will suffer. The plea of statutory authority might not be a complete defence however to the commission of a nuisance (where no question of negligence or malice arises) and a right to damages may be available. If the effect of the activity allowed by statute is much more deleterious so as to restrict completely the exercise of traditional fishing rights this may amount to confiscation. If there is no right of compensation provided for in the statute, or Maori fishing rights do not fall within its scope, an action may lie at Common Law.

The impact which the above conclusions, especially those in 4. (which have been framed in a speculative fashion) could have upon Maori fishing rights is obvious. They amount to a dramatic revision of previously held beliefs as to the nature of Maori rights at law.

There may be some unfavourable response to these conclusions on the ground that they give the Maori a greater right to fish than those rights enjoyed by the average person. The best reply to this, without trying to sound polemical, is to invite people to consider the nature and extent of the aboriginal fishing right herein found to exist. It is a right co-existent with the public right of fishery albeit subject to greater legal protection by virtue of its character as a private right. It may well be in the public's interest that the Maori have the standing to see some protection of the fishing resources enjoyed by them and the public (as, for example, in an action for nuisance against a miscreant grantee of a water right under the Water and Soil Conservation Act 1967). Secondly, the right is one which extends only to the particular tribe or sub-tribe which has used the fishing grounds since the coming of the European. That is the very essence of its

aboriginal character. It is not a right given Maoris in general. In addition, it is a right to take food for traditional purposes which means for personal food supplies and tribal occasions (as a *hui, tangi,* or wedding). The aboriginal right provides no licence for the commercial exploitation of the fishing grounds subject to the right. It does not challenge any rights granted by statute in respect of tidal waters and tidal land but can be used to ensure that the holder of the right proceeds carefully in his activity. If the exercise of the statutory right is confiscatory in effect the right to compensation acknowledges that more is at stake in respect of that land for the Maori holders of the aboriginal right than for European fishermen (who can always go elsewhere). Seen in this light the Maori aboriginal fishing right found to exist in this article is hardly a challenging one. It has no implications so potentially disruptive as to make judges demur as in *Re the Ninety Mile Beach* when the Maori litigants sought a freehold order for the foreshore.[106] The aboriginal right gives the Maori holders no blanket protection but realises that when activity over tidal water and the subjacent land adversely affects their traditional fishing grounds the effect goes not only to economic and leisure-related considerations (as it will with most Europeans) but cuts to much deeper seated aspects of Maori life. Is it not right that the law acknowledges this fact?

But a word of caution is needed. The conclusions contained in 2. 3. and especially 4. above are deductions made from the Common Law recognition of aboriginal title. They are, however, propositions largely untested in the courts, least of all the New Zealand courts which historically have been quite unreceptive to aboriginal claims. This means that if the question of aboriginal title is presented to New Zealand courts again there will need to be a lot of research into the sources of colonial law, in particular the Crown's conduct in other colonies with a tribal indigenous population. There will need to be a close inspection of decisions in other jurisdictions sharing a Common Law background. The way must be carefully laid. Much more detail has to be painted minutely and painstakingly onto the broad canvas given here so that New Zealand courts are not faced with the type of claim seen in *Hita* v. *Chisholm.*[107]

The central conclusion of this article is to express doubt about the mainstream view that the Maori enjoy no rights at Common Law to their traditional sea fisheries.[108] The doctrine of aboriginal title recognises traditional fishing rights in tidal waters to be private rights subsisting by way of an aboriginal profit à prendre over the Crown's ownership of land subjacent to the tidal waters of New Zealand.

106 Supra n.2; see also Judge Fenton in his *Kauwaeranga Judgment,* supra n.41, at 11: "I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the soil of the foreshore of the colony will be vested absolutely in the natives, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree amongst themselves."

107 Supra n.74-76.

108 The Waitangi Tribunal, supra n.59, at p.41 doubted "whether there is adequate legislative recognition of Maori fishing grounds and adequate legislative provisions for their protection." This view is predicated upon a "statute-based" approach to fishing rights which overlooks the common law doctrine of aboriginal title. Similarly see J. A. B. O'Keefe "Waitangi Tribunal 'Decision' " [1983] N.Z.L.J. 136 and D. V. Williams "Waitangi Revisited", ibid. at 214.