

# In Re Ninety Mile Beach Revisited: *The Native Land Court and the Foreshore in New Zealand Legal History*

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*The Court of Appeal decided in In re Ninety Mile Beach that the Maori Land Court had no jurisdiction to investigate title in the foreshore, the area between high and low water marks. The basis for this decision was that once the Maori Land Court had concluded an investigation of title into a coastal block, customary rights in the foreshore were automatically extinguished. The author argues that the Court of Appeal's reasoning is flawed in some respects, ambiguous in others, and has little relevance to the precise circumstances of Ninety Mile Beach itself.*

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## I INTRODUCTION

The decision of the Court of Appeal in *In re Ninety Mile Beach*<sup>1</sup>, delivered in 1963, is a case of critical importance in New Zealand legal history and Maori land law. The Court of Appeal's decision, that the Maori Land Court has no jurisdiction to conduct an investigation of title into the foreshore, remains the law at the present time. A principal effect of the judgment was to end the long history of Maori attempts to assert claims to ownership of the foreshore by closing off the sole remaining avenue by which such claims could be pursued. The issue of rights of control over the foreshore remains, however, of continuing importance. This is shown by current claims made in the Waitangi Tribunal to Lake Ellesmere, the Manukau Harbour, Napier Inner Harbour (Te Whanganui-a-Orotu), Kawhia Harbour, and, indeed, to Ninety Mile Beach (Te Wharo Oneroa a Tohe) itself.<sup>2</sup> The Waitangi Tribunal's powers are principally

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1 [1963] NZLR 461.

2 For Ellesmere (Waihora) see Waitangi Tribunal, *Ngai Tahu Report* (Wai 27), 1991, vol 3 863-73 (4 WTR 339-349). For the Manukau Harbour see Waitangi Tribunal, *Manukau Report* (Wai 8), 1985. Napier Harbour and Ninety Mile Beach form parts of claims currently being pursued before the Waitangi Tribunal, respectively claims Wai 55 and Wai 45. Napier Harbour was the subject of an elaborate report by Judge Harvey of the Native Land Court in 1948: see *Report and Recommendation on Petition No 240, of Turi Tupaea and others, praying for relief in connection with Whanganui-o-Rotu (or Napier Inner Harbour) and their right of property therein*, 1948 AJHR G-6A; see also Patrick Parsons, *Claimant's Report to the Waitangi Tribunal: Te Whanganui a Orotu (The Napier Inner Harbour)*, 2 vols, March 1991, and RP Boast, *Te Whanganui-a-Orotu (Napier Inner Harbour) 1851-1991: A Legal History*, a report to the Waitangi Tribunal, March 1992. On Ninety-Mile Beach itself see, *Evidence of RP Boast in Respect of a Claim to Wharo Oneroa a Tohe/Ninety Mile Beach* presented to

recommendatory only, however, and cannot be compared with the Maori Land Court, a court of record with binding powers to issue legal titles and perform other functions relating to the ownership and management of Maori land.

The principal basis for the Court of Appeal's conclusion was that once the Maori Land Court had conducted an investigation of title into a coastal block, customary rights in the foreshore were automatically extinguished. It is the author's contention that the Court of Appeal's reasoning in support of this conclusion is flawed in some respects and ambiguous in others. More significantly, it has very little relevance to the precise circumstances of Ninety Mile Beach itself. One of the most surprising aspects of the Court of Appeal's judgments, as well as that of Turner J in the Supreme Court<sup>3</sup>, is the evident complete lack of understanding of the legal history of the beach. This can be partially explained by the way in which the litigation originated, a point which will be returned to below. Before dealing with that, however, it is necessary to explore the background legal history of Ninety Mile Beach and additionally the general question of Maori ownership claims to the foreshore as dealt with in the Land Court in the years before 1963.

## II NINETY MILE BEACH (TE WHARO ONEROA A TOHE): A LEGAL HISTORY

### A *The Beach and its Significance*

Ninety Mile Beach runs along the western shore of the Aupouri Peninsula in the far north of the North Island, from Ahipara in the south to Scott Point at its northern end. It is a long, straight, rather forbidding and desolate beach, isolated even today. Geologically it is part of a tombolo, or immense sandspit, connecting the Kaitiaki district to the volcanic rocks around Cape Reinga and North Cape. It is part of what is known in Maori as Te Wharo Oneroa a Tohe, the great highway or pathway of Tohe. Tohe was a founding ancestor and explorer, who, together with his slave, in ancient times made the journey southward from Kapo Wairua (Spirits Bay) to Whangape harbour. Many landmarks along the course of the beach are to this day associated with incidents of Tohe's journey.<sup>4</sup> The beach is famous too as the pathway by which the spirits of the dead converge from all over the country and travel on a final journey along the beach to the leaping off place at Te Reinga.

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the Waitangi Tribunal at a sitting of the Muriwhenua Lands (Wai 45) Tribunal in March 1991.

3 *In re an Application for Investigation of Title to the Ninety Mile Beach* [1960] NZLR 673 (SC).

4 See Waerete Norman, "The Muriwhenua Claim" in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989), 181, 195.

As well as possessing great spiritual importance the beach was a vital source of fish and shellfish. Walter Tepania, who was the claimant in the 1957 proceedings in the Maori Land Court (which led ultimately to the 1962 Court of Appeal decision), stated:<sup>5</sup>

The Maoris got toheroa, pipi, tuatua, tipa on the beach, kutai on the rocks below high water mark. There are rocks at Maunganui (the Bluff) - I cannot give all the names of the fish that the Maoris knew of - they used to catch the following fish in the sea off this beach. Mullet, schnapper (tamure), flounder (patiki), kahawai, parore, herrings (aua), ngakoeke (rock cod), araia (yellow tail), kingfish (warehinga), shark (mango). The older Maoris relied about 90% on shell fish and sea fish for their food.

A great deal of evidence has been recorded concerning Maori management practices along the beach, particularly on the subject of rahui (prohibitions). Hohepa Kanara, another witness before the Land Court in 1957, explained the purpose and significance of rahui:<sup>6</sup>

I saw some of the customs on the beach - rahuis. There are many reasons for them. If a person drowned at sea a rahui would be made within the area he was drowned for a certain period. If food from the seabed became exhausted a rahui would be created so as to make allowance for pipis etc. to replenish supply. A Chief could effect a rahui by declaring a certain area subject to the mana of a rahui - during this period no one can do anything within the rahui until such time as the restriction has been lifted... Once a place has been declared subject to the mana of a rahui no person is allowed to trespass.

The persistence of customary management practices and of a firmly exercised Maori authority over the beach was vividly described by James Bowman, a Pakeha who appeared before the Land Court in 1957 to give evidence in support of the Maori claimants. As a child he had been a member of one of the very few Pakeha families living at Ahipara in the early days. He describes the situation on the beach in the 1880s:<sup>7</sup>

[There were ] no Pakeha missionary families living there [Ahipara] in my young days. They came out to the beach only when I was a young man. They could not please themselves as to when they came and went. A chief named Mumu was in charge. He was the head one of the whole lot - there were a lot of chiefs. Mumu controlled very nearly the whole beach and the land too. There were raupo huts all over the place right along the coast along Reef Point way. He [Mumu] was a big man 6ft 4in - tattooed all over except his chest. Mumu lived at Te Kohanga in Ahipara Bay. He spent most of his life around there. They had gardens all round Reef Point. The huts extended to Hukatere and some had their houses there until they moved to Ahipara - Hukatere is about 25 miles up the coast. I used to see the old homesteads and posts. Mumu and his brothers and cousins were in charge up to Hukatere. We couldn't do what we liked - we were frightened of them - we wouldn't dare to walk and trample over it. I saw rahuis on the beach. When the old chief Mumu died they buried him and put up a rahui. They put up a pole, a good thick post, and they carved some sort of tattoo on it. When they

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5 (1957) 85 Northern MB 57.

6 Above n5.

7 Above n5.

put this rahui up it was for one part of the coast - they left the other part open... It was the Maori custom that if a chief died they closed part of the beach to fishing. The people were not allowed to fish in the sea off the beach either... If anyone came along and broke the rahui they would make him pay. They might chuck him in the tide. Later on they did away with this custom; when the older chiefs died.

Politically speaking, control over the beach was divided between two of the northern iwi (tribes). The Rarawa controlled the southern section from Ahipara to Hukatere, and the Aupouri held the mana over the northern half of the beach from Hukatere up to Scott Point.<sup>8</sup> Both tribes in former times had villages along the coast as well as burial places (Hohepa Kanara gave the names of 14 separate cemeteries<sup>9</sup>).

### *B Alienation of the Coastal Blocks*

The far north of New Zealand was an area in which the Crown happened to make extensive purchases of Maori land well before the establishment of the Native (later Maori) Land Court in 1862.<sup>10</sup> Before the existence of the Court only the Crown could acquire Maori land, which was normally done by negotiated purchase between local chiefs and the government's land purchase commissioners, the actual transaction taking the form of a deed of conveyance. In relation to the beach the two principal purchases were the Muriwhenua South purchase of 3 February 1858 (86,885 acres, for which the Crown paid £ 1,100) and the Ahipara purchase of 13 December 1859 (9,470 acres, for which the Crown paid £ 800).<sup>11</sup> The Muriwhenua South transaction, in particular, involved an extensive block with about 25 miles of beach frontage. Together, the two

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8 This was a principal finding of the Maori Land Court in 1957: see (1957) 85 Northern MB 126-127 (Chief Judge Morison). The Court found that the northern part of the beach was the territory of Te Aupouri and the southern portion within the territory traditionally occupied by Te Rarawa and that "the members of these tribes had their kaingas [villages] and their burial grounds scattered inland from the beach at intervals along the whole distance"; that these territories were held to the exclusion of other tribes; "that the land itself was a major source of food supply for these tribes in that from it the Maoris obtained shellfish, namely toheroa, pipi, tuatua, and tipa from the beach itself, and kutai from the rocks below high water mark at the part known as the Maunganui Bluff," that the sea from the beach was fished in canoes, and that the beach itself was managed by the customary device of rahui.

9 Above n8, 17.

10 The Court was established by the Native Landss Act 1862 (26 Vict No 42) but was significantly re-constituted by the Native Lands Act 1865 (29 Vict No 71). Many amending and consolidating acts have been passed since then. The prime function of the Court was to substitute the right of Crown pre-emption by a process of judicial enquiry. Once a block had been brought before the Court by its Maori owners, investigated, and a title issued - followed by a Crown Grant - the land became freely alienable. The principle of free alienability has, however, been progressively attenuated. The Court is still in existence and plays a vital role in the management of Maori land at the present time: the current act is the Maori Affairs Act 1953.

11 The Maori and English texts of the Muriwhenua South and Ahipara deeds can be found in HHTurton, *Maori Deeds of Land Purchase in the North Island of New Zealand* (Government Printer, Wellington, 1877), vol 1, 48.

purchases accounted for a significant part of the land adjoining the central and southern sections of the beach.

Neither purchase explicitly vests the foreshore in the Crown. The Muriwhenua South purchase simply describes the boundaries of the block by means of reference to well-known vantage points. The western - that is, the Ninety Mile Beach - boundary is described as follows:<sup>12</sup>

...until it reaches the sea on the western coast at a well known rocky point called Te "Arai", - here it turns, and follows the western coast line until it reaches the southern extremity of the boundary at a point called "Waimoho"...

he Rae kowhatu te tohu, ko te "Arai", ka whawhati, ka rere tonu i te tai tuauru a, - tutuki noa ki "Waimoho".

The language used in the Ahipara deed, while somewhat different, similarly does not include the beach as part of the transaction and simply describes the western boundary as running down the coast.<sup>13</sup>

The construction of these two deeds and the associated plans<sup>14</sup> is a complicated problem. It is possible that the Crown's land purchase commissioners made no attempt to include the foreshore within the area purchased because they were operating under the impression that it belonged to the Crown in any event by prerogative right.

What of the rest of the beach frontage? Part of it was accounted for by areas of "surplus lands" within the two old land claims blocks of Otaki and Okiore. The Otaki and Okiore transactions were not Crown acquisitions but were entered into between Pakeha individuals and local Maori chiefs before the Treaty of Waitangi and the following proclamations of British sovereignty. Pre-Treaty transactions of this kind were subsequently enquired into and the titles converted into Crown grants. The Land Claims Ordinance of 1841, however, restricted the maximum acreage of any one Crown grant to 2560 acres. This created a balance, or "surplus" between the grant and the area claimed to have been purchased in the original transaction. Maori protest notwithstanding, the Crown took the view that the "surplus" areas were Crown land.<sup>15</sup>

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12 Above n11, 48.

13 Above n12, 9: "...following the survey line to the coast (Reserves excepted) until it joins the point where the boundary commenced" ("marere noa ki te moananui; otira kei te Mapi o te Ruritanga, te tino tikanga o nga Rohe, me nga wahi i kapea mo nga maori, tutaki noa ki te timatanga o te kaha").

14 Each Crown purchase involved the preparation of a Survey (SO) Plan. For Muriwhenua South the relevant plans are Nos 948A (1857) and 948 (1865); for Ahipara 43A. The originals are all held at the Department of Survey and Land Information at Auckland.

15 Few aspects of the subject of the history of Maori land alienation are as involved and as intractable as the subject of "surplus lands". The surplus lands issue is an important aspect of the Muriwhenua lands claim before the Waitangi Tribunal (Wai 45). There has also been an earlier major enquiry: see the *Report of the Royal*

In respect of these two blocks the "surplus" areas acquired as Crown land were areas along the Coast. Otaki and Okiore lie between the Ahipara and Muriwhenua South Crown purchase blocks. The upshot is that virtually the entire frontage of the southern and central sections of the beach came into Crown possession before the advent of the Native Land Court, a key aspect of the history of the beach which neither the High Court nor the Court of Appeal seems to have been aware of when these Courts came to rule on ownership of the Ninety Mile Beach foreshore in the 1960s.

### C *The Native Land Court era*

By 1862, when the Native Land Court was established by the first of the long sequence of Native Lands Acts, the Crown therefore already owned most of the beach frontage. What was left in Maori hands was an area of beach frontage around Ahipara Bay and a much more substantial stretch to the north of the northern boundary of the Muriwhenua South Crown purchase block. It was only these areas which were investigated by the Land Court - and it is thus only to these parts of the beach (as will be seen) that the elaborate reasoning of the Court of Appeal in 1963 has any application.

The objective of the first Native Affairs Acts was to replace Crown pre-emption by, in effect, free trade in Maori land. Once Maori had had their title to a block investigated by the Land Court and a title issued it was freely alienable, not only to the Crown but to private purchasers.<sup>16</sup> This was to lead to numerous abuses, and it can be said that although the system of Crown purchasing before 1862 led to many problems and some vast injustices the cure turned out to be worse than the disease.<sup>17</sup> In Muriwhenua the effects of the Land Court era were mixed: some blocks were sold more or less immediately after passing through the Court, while others remain Maori freehold land<sup>18</sup> today.

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*Commission to Inquire into and Report on Claims by Members of the Maori Race touching certain lands known as Surplus Lands of the Crown* 1948 AJHR G-8. For a full discussion of the surplus lands issue see the following reports prepared on behalf of the claimants in the Waitangi Tribunal Muriwhenua Lands (Wai-45) claim: (i) RP Boast, *Surplus Lands: Policy Making and Practice in the Nineteenth Century: A Report to the Waitangi Tribunal*, June 1992; and (ii), Michael Nepia, *Muriwhenua Surplus Lands: Commissions of Enquiry in the Twentieth Century*, 1992. There has as yet been no Crown evidence heard on this aspect of the Muriwhenua lands claim.

16 See Native Lands Act 1862, s 17; Native Lands Act 1865 s 46.

17 Alan Ward's verdict on the period after 1862 is much quoted: "The Maori people were consequently exposed to a thirty-year period during which a predatory horde of storekeepers, grog-sellers, surveyors, lawyers, land agents and money-lenders made advances to rival groups of Maori claimants to land, pressed the claim of their faction in the Courts and recouped the costs in land": Alan Ward, *A Show of Justice: Racial 'Amalgamation' in nineteenth century New Zealand* (Auckland University Press/Oxford University Press; Auckland; 1974), 185-6.

18 Most Maori land today is Maori freehold land, meaning Maori land which has passed through the Land Court, for which a title has been issued and which has remained in continuous Maori ownership. See Maori Affairs Act 1953, s2. There is little if any

The principal adjudicated block abutting the beach is an area known as the Parengarenga block, the subject of monumental hearings before the Native Land Court and Native Appellate Court in 1896 and 1898.<sup>19</sup> There were also a number of adjudications to blocks around Ahipara Bay, including one very late investigation into a substantial area of Maori customary land still in existence in 1909.<sup>20</sup> Those blocks which were not sold were repeatedly partitioned, so much so that confusion over land titles made much Maori land in Muriwhenua virtually unusable. Judge Acheson, the Tai Tokerau district Maori Land Court judge in the 1930s and 1940s was responsible for conducting a number of important hearings in the 1930s which facilitated the consolidation of titles and the establishment of dairy farming.<sup>21</sup> Until Acheson's work the main source of income for the Maori communities of the north had been kauri gum digging.

### III THE LAND COURT AND THE FORESHORE

#### A Background

The Ninety Mile Beach case was an attempt to assert that the Maori Land Court had jurisdiction over the foreshore and could issue titles to it. This claim was not a novel one but was predated by numerous attempts by Maori claimants to pursue foreshore issues in the Land Court. Before describing some these earlier cases, however, it is necessary that the common law and statutory background be sketched in.

At common law the Crown owns the foreshore by prerogative right in the sense that it is presumed to belong to the Crown absolutely in the absence of proof to the contrary.<sup>22</sup> In New Zealand, however, the issue which evolved was not so much the extent of the Crown's supposed prerogative rights in the foreshore but a conflict between competing statutes: the Harbours Act 1878 and the jurisdictional provisions of the Native Land Acts.

In the late 1860s and early 1870s the issue of control over the foreshore became intensely politicised and a matter of major concern to the government. The precise question was that of the ownership of the foreshore around Thames, of particular concern due to the valuable gold deposits thought to be present. This, and the real risk of violence between miners and local Maori led to a flurry of official investigations and

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Maori customary (papatipu) land remaining - ie uninvestigated Maori land still held under customary title. The Ninety Mile Beach case was an attempt to assert that the foreshore was Maori customary land for which an investigation could proceed.

19 See (1896) 27 Northern MB 95 (judgment at 300); (1898) 28 Northern MB 35.

20 Blocks investigated by the Land Court at Ahipara include the Pukepoto block, (1865) 1 Northern MB 7; Ahipara Beach, (1865) 1 Northern MB 7, and the Ahipara papatipu block, (1909) 43 Northern MB 185.

21 The final hearings relating to title consolidation at Ahipara can be found at (1930) 63 Northern MB (Judge Acheson).

22 See McNeil, *Common Law Aboriginal Title*, (Clarendon, Oxford, 1989), 104.

reports in 1869<sup>23</sup>. The Shortland Beach Act 1869 prohibited any persons other than the Crown from entering into any "contract lease or conveyance" with any "aboriginal Native" in respect of foreshore land at Thames. But at roughly the same time, and despite Chief Judge Fenton's repudiation of the practice in the Kauwaeranga decision<sup>24</sup>, the Land Court granted a number of freehold (ie not merely fisheries) titles to Maori to areas between high and low-water mark. These grants of freehold title to areas below high-water mark were also mainly in the Thames area.<sup>25</sup> Not much information exists concerning them. Some, perhaps most, were later re-purchased by the Crown.<sup>26</sup>

The Crown acted promptly in an attempt to ensure that the judges of the Native Land Court desisted from granting any further titles to the foreshore. Section 4 of the Native Lands Act 1867 allowed the Governor to suspend the operation of the Court in any districts. In purported reliance on this a proclamation was issued suspending the Court's operations "within the Province of Auckland, being all that portion of the said Province situate below high water mark".<sup>27</sup> At the next foreshore case at Thames, made to a block known as Kapanga Moana No 2, Crown counsel intervened in the hearing and produced the proclamation, which had the effect of bringing the case to a halt.<sup>28</sup> The proclamation, however, was inadvertently rendered ineffective in 1873 when its empowering statute was replaced by the Native Lands Act of that year.

Five years later the Harbours Act 1878 was enacted. Section 147 provided that "no part of the shore of the sea" could be conveyed or granted in any way to any body or person "without the special sanction of an Act of the General Assembly". This provision is of considerable importance, especially because of the virtually confiscatory effect to be attributed to it by some of the judges in the *Ninety Mile Beach* litigation.

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23 See *Report by Mr Mackay on the Thames Gold Fields*, 1869 AJHR A-17 (very informative on the serious tensions between miners and Maori); *Report of the Select Committee on the Evidence Adduced before the Native Lands Bill Committee*, 1869 AJHR F-6A; *Report of the Select Committee on the Thames Sea Beach Bill*, 1869 AJHR F-7.

24 (1870) 4 Hauraki MB 236; reprinted in (1984) 14 VUWLR 227. Whatever the value of the case as a early judicial recognition of the Treaty of Waitangi, its principal effect was to uphold Crown rights of foreshore ownership. Chief Judge Fenton declined to issue a freehold foreshore title but awarded instead a right of fishery, observing that he could not contemplate without uneasiness "the evil consequences which might ensue from judicially declaring that the soil of the foreshore will be vested absolutely in the natives": see (1984) 14 VUWLR 244.

25 Information on these blocks was collected together by officials of the Department of Lands and Survey as a part of the Crown's preparation of the Ninety-Mile Beach case in 1957, and the box file is now held by the Department of Survey and Land Information's Auckland office. For a list of the blocks see Boast, *Ninety-Mile Beach Report*, above n 2, 22. The blocks are shown on Maori Land Plans 2390-2404 and 1677.

26 An example being a block of foreshore known as B Whakaharatau A, Deed 3981 D, 6 May 1872. This was an area of 7 acres of foreshore investigated by the court and vested in the owners who subsequently sold the block to the Crown for £15.

27 (1872) 187 New Zealand Gazette 347.

28 See (1872) 2 Coromandel MB 315-16.



It makes best sense to regard the provision as in fact a limitation of the prerogative powers of the Crown: the Crown's prerogative right to issue a grant to an area of foreshore was removed and henceforth this could only be done by statute. The parliamentary debates do not reveal any awareness of the supposed effect of the provision on Maori claims to the foreshore. This was not debated at all. The only reference to section 147 of any sort was made by Colonel Whitmore in introducing the bill at its second reading in the Legislative Council, where he remarked:<sup>29</sup>

Foreshores and land under the sea could only be granted by special authority of the General Assembly, for reasons which were obvious.

But Whitmore may not have been thinking of Maori claims.

Whatever Parliament's intentions might have been, it is undoubtedly the case that the Harbours Act 1878 failed to clarify the Land Court's jurisdiction over the foreshore. Although the Act did not allow the Crown to grant an area of foreshore, that arguably did not prevent the Court from conducting the preliminary steps to a grant, that is to say an investigation of title in the Court and the issuing of a title from the Court.<sup>30</sup> Alternatively, it might be the case that the Native Affairs Acts were themselves an exception to s 147 of the Harbours Act. But these legal questions were, for obscure reasons, never pursued or resolved for decades. Sufficient doubt about the relationship between the Native Lands Acts and the Harbours Act remained for the Land Court to entertain a number of important foreshore claims in the first half of the twentieth century.

A final link in the chain of statutory provisions came in 1909 came with sections 84-87<sup>31</sup> of the Native Lands Act of that year. One key objective of these provisions

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<sup>29</sup> (1878) 28 *New Zealand Parliamentary Debates* 214.

<sup>30</sup> The issue of a *title* by the Court is a different matter from the issue of a *grant* by the Crown. The Native Land Acts were initially designed to establish a system where the court would inquire into a claim to a surveyed block, and provided it was satisfied with the claimant's case, could issue a title to the block. This was then followed by a separate application for a Crown grant. As the years went by, reality diverged from theory increasingly, so that in many cases the only title records were the Court records. No application for a Crown grant (or the modern equivalent, a certificate of title under the Land Transfer Acts) was made - or if it was, the "official" Crown derived documents were quite different from the Court records.

<sup>31</sup> Now sections 155-158 of the current Act, the Maori Affairs Act 1953. The provisions provide that Maori customary title is unenforceable against the Crown; that a Crown proclamation that any land is free from customary title is to be treated as conclusive; that customary title is extinguished over all land in the possession of the Crown in the period from 1900-1910; and that alienations or dispositions of land by the Crown cannot be challenged on the basis that customary title has not been extinguished. There is now a long-overdue new bill replacing the 1953 Maori Affairs Act before parliament, titled *Te Ture Whenua Maori* (Maori Land Act). This does not repeal ss 155-158, but amends the Limitation Act 1950 in order to ensure that the types of litigation predicted by Dr Paul McHugh in 1988 will not occur. (See McHugh, "The legal basis for Maori claims against the Crown", (1988) 18 VUWLR 1,

may have been to block the claim of certain Ngati Kahungunu hapu to Te Whanganui-a-Orotu, Napier Inner Harbour.<sup>32</sup> In providing that claims to land based on Maori customary title could not be asserted in any Court "save so far as otherwise expressly provided in any other Act" Maori claimants were expressly restricted to the statutory jurisdiction of the Native Land Court. Sections 84-87 represented a further tightening of the statutory noose. But the question was left open whether in pursuance of its ordinary powers the Land Court could conduct an investigation of title over the foreshore. It was *this* issue which was to be settled in the Ninety Mile Beach case, but not, however, before a prolonged struggle in the Native Land Court.

## B Maori Reactions

The topic of ownership of the foreshore was of compelling interest to Maori. In the Waitangi Tribunal's *Manukau* report of 1985 considerable importance was attached to the Orakei hui (meeting) of 1879 at which one of the most frequently discussed topics was control over the foreshore.<sup>33</sup> A consistent theme was concern over the Crown's claim that it owned the foreshore by operation of law. Apihai Te Kawau, a Manukau chief, remarked:<sup>34</sup>

It was only the land that I gave over to the pakehas. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and the fish are my goods. I have always considered them my goods up to the present time.

The issue re-surfaced at an important conference of northern chiefs held at Waitangi in 1881.<sup>35</sup> Some 3,000 Maori were present together with a large number of sympathetic or curious Europeans and William Rolleston, the Native Minister. Challenged as to the basis of the Crown's claim to the foreshore, Rolleston replied:<sup>36</sup>

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7-8; also "Second Reading Speech Notes- Te Ture Whenua Maori", typescript, November 1992, pp 14-17 (Mr Kidd, Minister of Maori Affairs)).

32 This is not widely appreciated, the usual interpretation being to emphasise the reaction to the Privy Council's decision in *Wallis v Solicitor-General*, (1903) [1840-1932] NZPCC 730. (See eg McHugh, "The legal basis for Maori claims against the Crown", (1988) 18 VUWLR 1, 5-6). This was no doubt part of the background, but there is some evidence to show that the Crown was motivated by a perceived need to defeat some pressing claims of the day. In the Rotorua Lakes case before the Native Land Court, counsel for the Arawa claimants, Earl K.C. claimed that sections 84-100 were drawn up for "the special purpose of defeating the claim to these Lakes". On the opposite side of the page on the Crown Law Office copy of the transcript of the proceedings is minuted "No! Arose out of claims at Napier". (The author of the minute is unknown.) See CL 174/1, Rotorua Lakes Case, National Archives, Wellington. (My thanks to Alex Frame for this reference.)

33 See *Manukau Report* (Wai 8) 2nd ed 1989, 68. See also *Paora Tuhaere's Parliament at Orakei 1879* AJHR G-8.

34 Quoted in *Manukau*, 68.

35 For reports of this gathering, see *New Zealand Herald*, 24, 25 and 26 March 1881.

36 *New Zealand Herald*, 25 March 1881.

The law of nations is that the great highway of nature, the foreshore, is reserved for the use of the whole. Without a special vote of parliament the foreshore belongs to the sovereign for the use of both nations.

To which a chief named Honi Mohi replied:<sup>37</sup>

We don't object to ships and boats travelling the sea. It is what the sea produces we object to having taken away by Europeans without any returns to us.

At the heart of Maori concern was control over all-important foreshore resources, fish and shellfish. The conflict between the Crown and Maori was fought out over a number of important estuaries, lagoons and areas of foreshore, culminating in the litigation over Ninety Mile Beach itself. Some of the most important of these earlier cases will now be examined.

### *C      Te Whanganui-a-Orotu*

Te Whanganui-a-Orotu, also known as Te Maara a Tawhao, Ahuriri Lagoon and Napier Inner Harbour, was an extensive lagoon occupying an area to the north and west of the town of Napier. One of the consequences of the Hawkes Bay earthquake of 1931 was that the lagoon bed was uplifted and drained out, so that only a small part of the former large area of lagoon and coastal wetland now remains. Both before and after the earthquake the area was claimed by local Maori hapus of Ngati Kahungunu as Maori customary land.

The ownership issue was complicated by a number of factors. The most significant of these was the Ahuriri purchase of 1851, by which local Maori sold the very large Ahuriri block to the Crown. It is not clear from the Ahuriri deed, however, whether the bed of the lagoon is included in the purchase. In 1874 an Act was passed which vested the bed of the lagoon in the Napier Harbour Board as an endowment, although what the Crown supposed its legal right to ownership of the lagoon bed to be is not known.<sup>38</sup> The lagoon was a fishing and shellfish ground of critical importance to local Maori, who had not objected to ships and boats using the lagoon but who were dismayed by the Crown's action in handing ownership over to the harbour board. There was also concern about reclamation works, harbour developments, and pollution from the rapidly-growing town of Napier.

In 1916 local Maori leaders brought an application before the Native Land Court, claiming ownership of the lagoon and seeking an investigation of title. The Crown, finding its ownership of the lagoon challenged in this way, sought an opinion from the solicitor-general, Sir John Salmond. Salmond's opinion was that although the Crown

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<sup>37</sup> Above n36.

<sup>38</sup> See Napier Harbour Board Act 1874, and schedule describing "Ahuriri Lagoon". The area vested in the Harbour Board excluded a number of islands which, with the exception of some which had already been investigated by the Native Land Court and sold, remained Maori customary (papatipu) land.

did not purchase the lagoon in the original Ahuriri deed in 1851, nevertheless as it was a tidal lagoon it was foreshore and belonged to the Crown in any event by prerogative right.<sup>39</sup> In the meantime, the Native Land Court had decided that it had no jurisdiction to hear the claim as Te Whanganui-a-Orotu was not Maori land or Maori customary land.<sup>40</sup>

In view of this, local Maori proceeded with an alternative strategy. Instead of seeking title to the lagoon bed in the Land Court, they proceeded with claims in the Land Court to the lagoon *islands*, whose status as Maori customary land was not in doubt. They also petitioned Parliament to establish an enquiry which could investigate Maori interests in Te Whanganui-a-Orotu on the merits and free from the technicalities of the provisions governing the Native Land Court's jurisdiction.<sup>41</sup> The government of the day agreed to refer the matter to a special enquiry, and a hearing of the Native Lands Commission, presided over by Chief Judge (of the Native Land Court) R N Jones sat at Napier to enquire into Te Whanganui-a-Orotu in August 1920. The commission's report was published the following year.<sup>42</sup>

Judge Jones was an experienced Native Land Court judge and thus was in no doubt that at least in terms of Maori custom, property rights certainly could include the foreshore and the sea. He was also satisfied that Maori had tried to protect their interests in the lagoon at the time of the execution of the Ahuriri deed in 1851 by attempting to retain reserves along the lagoon perimeter. Nevertheless, he managed to conclude that Maori must be treated as having alienated the bed of the lagoon in 1851 and thus they now had no right to compensation. This finding did not settle the matter. A further petition relating to the lagoon was lodged by Waka Pango in 1925.<sup>43</sup> Despite the fact that the Native Affairs Committee at Parliament referred the petition to the government for consideration, no action eventuated. Thus matters stood in 1931, when, as a result of the destructive Hawkes Bay earthquake virtually the whole of the great lagoon was suddenly lifted above sea level.

This unexpected and dramatic event led to a number of repercussions. Instead of a lagoon stretching to the north of the town there was now an extensive plain which the Harbour Board regarded as its own property. The former islands in the lagoon, Maori customary land, had simply merged into the uplifted lagoon bed and were indistinguishable from it. Legislation was passed to facilitate the compulsory

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39 Salmond to Under-Secretary of Lands, 28 August 1916. Copy on Lands & Survey file 29057, Ahuriri Lagoon, National Archives, Wellington.

40 (1916) 66 Napier MB 235. See Boast, *Te Whanganui-a-Orotu: A Legal History* (above, n 1) 67-71. The Court was of course quite correct. The area had been specifically vested by statute in the Harbour Board. In fact counsel for the Maori claimants stated to the court that his own clients had "no title" - not unnaturally counsel for the Napier Harbour Board was in complete agreement.

41 Petition of Mohi te Atahikoia and 47 others (Petition No 365/1919).

42 1921 AJHR G-5.

43 Petition No 419/1924.

acquisition of these former islands by the Napier Harbour Board.<sup>44</sup> Hori Tupaea then lodged yet another petition calling for a fresh enquiry into Maori claims to Te Whanganui a Orotu. Hori Tupaea argued that the earthquake had transformed the situation. The Harbour Board still had its original site and now additionally had received a valuable piece of land “in exchange for a body of water, which was thought nothing to them”. Local Maori had, however, lost all, and had “nothing to represent the rights which they formerly had and which they were always so anxious to preserve”.<sup>45</sup>

Hori Tupaea’s petition resulted in the Native Purposes Act of 1933 authorising an enquiry into Te Whanganui-a-Orotu<sup>46</sup> and in 1934 a further hearing into the claim opened before Judge Harvey, also a Native Land Court judge, at Hastings. The enquiry was a matter of considerable concern to the Crown Law Office. By the mid 1930s the Crown Law Office was adopting a generally pessimistic approach as to the Crown’s ability to defeat Maori claims to the foreshore in the Native Land Court. The Crown Solicitor was not satisfied that Sir John Salmond had been correct when he stated that the lagoon at Napier was owned by prerogative right:<sup>47</sup>

With all respect to the late Solicitor-General’s opinion, I doubt if *Waipapakura v Hempton* (1914) 33 NZLR 1065, goes as far as he suggests; once the law has recognised the assertability of Native rights in the demesne lands of the Crown, which no doubt it has done - *Nireaha Tamaki v Baker*, [1901] AC 561 - it is difficult to find a good ground for excluding any land over which the Crown has imperium, dominium, and mesne ownership, whether it be land covered by air or covered by water, whether the covering water be river, lake or sea, whether tidal or not, and whether the land be above, within, or below the foreshore strip. But I trust such important issues will not be raised on the present reference.

It was decided that the Crown should intervene in the Native Land Court to oppose the claim. The hearings took place in early 1934. Then occurred one of the most extraordinary events in this already protracted case: the staggering delay before Judge Harvey released his report. This did not appear until 1948, nearly fourteen years later, by which time many of the participants in the case had died. In the interim the areas of the former lagoon islands, Maori customary land, had been compulsorily taken by the Napier Harbour Board (no compensation was ever paid for them). Local Maori, assuming that Judge Harvey’s report would never see the light of day, lodged further petitions in 1945<sup>48</sup> and 1948<sup>49</sup> seeking fresh investigations. It was not until the Prime Minister intervened in 1947, following a visit of senior Tuwharetoa elders who enquired as to the fate of the Napier harbour case, that Judge Harvey finally completed his report. But the report settled nothing. Judge Harvey concluded that the lagoon was not

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<sup>44</sup> Napier Harbour Board Empowering Act 1932-33.

<sup>45</sup> Petition of Hori Tupaea, Petition No 240/32. For a detailed analysis see Boast, *Te Whanganui-a-Orotu: A Legal History* (above, n 1) 87-89.

<sup>46</sup> Native Purposes Act 1933, s 27 and Second Schedule.

<sup>47</sup> Crown Law Office to Under-Secretary, Department of Lands and Survey, 15 March 1934, copy on Lands and Survey file 1/29057, National Archives, Wellington.

<sup>48</sup> Petition of Paneta Maniapoto Otene and 13 others, Petition 82/1945, Le 1/1945/12.

<sup>49</sup> Petition of Ahere Hohepa and others, Petition 26/1948, Le 1948/18.

purchased in the 1851 Ahuriri transaction. However, he felt that there was insufficient evidence as to whether the lagoon waters in 1840 were freshwater or seawater, and thus no definite recommendation about compensation could be made.<sup>50</sup> Judge Harvey also ventured the possibility that claims to areas of the foreshore *could* be asserted in the Native Land Court.<sup>51</sup>

In some cases, as already shown, the Native Land Court has dealt with lands which lie below high-water mark and the Crown has to some extent recognised these orders by giving a limited [ie fisheries] title to Natives.

Thus the Napier Harbour Claim failed to be resolved and is now a claim before the Waitangi Tribunal.<sup>52</sup>

#### *D      Awapuni Lagoon, Gisborne*

The Awapuni lagoon at Gisborne was at the centre of an important case in the Native Land Court in 1928. The Marine Department regarded the lagoon as useless and was in general sympathetic to plans to fill it in<sup>53</sup> but local Maori evidently felt differently and in 1928 an application was made to the Court seeking a freehold order for the lagoon bed. In his decision Chief Judge Jones dismissed the application without prejudice.<sup>54</sup> Judge Jones saw the key issue being the means by which the lagoon assumed its present undoubtedly tidal character. Although the lagoon was now an arm of the sea, this “by no means settles the question”:<sup>55</sup>

It is of importance to ascertain how the bed of the lagoon became an arm of the sea since if it became such by some sudden erosion or convulsion of nature it would not pass to the Crown...On the other hand if the land became an arm of the sea through slow and gradual accretion it would become the absolute property of the Crown. In this case there is not sufficient evidence of how the land became overrun by seawater to justify the Court in displaying the *prima facie* title of the Crown.

Judge Jones left open the question as to whether the Land Court could grant a title to an arm of the sea. He noted the provisions of the Harbours Act (at that time s 144 of the Harbours Act 1923) and observed:

A freehold order issued by the Court has the same effect as if the land named therein has been granted by the Crown and is deemed to be so granted accordingly. It may be that the provisions of the Harbours Act estops the Native Land Court from issuing a title but it is not necessary to finally decide that question in the present proceedings.

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50      See *Report and recommendation on Petition No 240 of 1932, of Hori Tupaea and four others, praying for relief in connection with Whanganui-o-Rotu (or Napier Inner Harbour) and their right of property therein*, 1948 AJHR G-6A, 90.

51      Above n50.

52      Wai-55. The Tribunal began to hear claimant evidence in November 1992.

53      See Marine Department file 1/4/1877, Awapuni Lagoon, National Archives Wellington.

54      The judgment can be found at (1928) 56 Gisborne MB 284.

55      Above n54.

It is likely that even if the Court could issue such a title, that would in Judge Jones' view be strictly limited to those situations where the Crown's *prima facie* title to the foreshore could be displaced at common law.<sup>56</sup>

### *E The Northern Cases*

The immediate background to the Ninety Mile beach case was a sequence of foreshore cases in the Tai Tokerau Native Land Court. These cases featured two formidable opponents, Judge Acheson of the Court, and Sir Vincent Meredith, the Crown Solicitor at Auckland. Prominent Maori personalities were also involved, including Whina Cooper, who was friendly with Judge Acheson<sup>57</sup> and who was one of the claimants in the Ngakororo case.

Ngakororo is an area of mudflats in the Whakarapa 'River' (in fact an arm of the northern Hokianga harbour). This area is at the centre of a bitter and long-running dispute.<sup>58</sup> In 1922 one Robert Holland was given permission to extend his farm by draining and banking an area of foreshore. This incensed local Maori who used the area for collecting fish and shellfish, and they took direct action by destroying Holland's stop-banks. The protracted dispute dragged on through the 1920s and 1930s, being brought to a head when local Maori brought an application before Judge Acheson seeking an investigation of title over the area, an action which was vigorously resisted by the Crown. In 1941 Judge Acheson ruled in favour of the Maori applicants, to the effect that the mudflats were "papatupu or Native customary land for which an Order on Investigation of Title should issue".<sup>59</sup> The Crown appealed to the Native Appellate Court, but won what it must have regarded as a Pyrrhic victory. The Appellate Court upheld Judge Acheson's conclusion that the Land Court could investigate and grant titles to areas below high-water mark, but found that in the circumstances the Maori applicants had not met the requisite standard of proof and allowed the Crown's appeal. The Appellate Court said:<sup>60</sup>

The Native Land Court's decision as to whether these mudflats are papatupu land must rest upon findings of fact. Just as in the investigation of title to customary land, it is

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56 This appears from his willingness to accept that the *prima facie* title to the foreshore rests with the Crown, combined with his analysis and application of a standard exception to the common law rule. Whether Judge Jones would have accepted that the Crown's *prima facie* title could be displaced simply by evidence of Maori customary use is uncertain.

57 See Michael King, *Whina* (Penguin Books, Auckland, 1991) 106, 113, 128. King describes Acheson at 128 as a "decidedly pro-Maori" judge who tended to have a "romantic idealisation of Maori life" as shown by his novel *Plume of the Arawas*, published in 1930.

58 See MA 1, 5/13/1, Ngakororo Mud Flats: Title to Reclaimed Land, National Archives, Wellington.

59 A copy of Acheson's judgment may be found in MA, 1 5/13/1 and also in the Lands and Survey Department's Ninety-Mile Beach Box File, held in the Department of Survey and Land Information at Auckland.

60 Ngakororo case, (1942) 12 Auckland NAC MB 137.

necessary for the claimants to establish their right, and this is done by showing that the land has descended to them from a tribal ancestor and has been in the continual occupation of the claimants and their predecessors prior to 1840 and down to the date of investigation. If the proof offered by the claimants in respect of their claim established that these mud flats have been exclusively occupied by a particular hapu or tribe prior to 1840 and since then to the present day, without attempting to decide the matter we should have thought that they might have been able to establish title to the land itself, *although it may have lain below high-water mark*. In England, the fee simple to land below high-water mark has, in certain instances, become vested in the proprietor of the foreshore. If, under the circumstances of the English people, title to the sea-bed can be established in this way, we see no reason why title should not just as well be established by the Maori people of New Zealand. [emphasis added]

It is possible, in fact, that the Native Appellate Court's strategy was to accept Judge Acheson's view that claims to the foreshore could be enquired into but to effectively defeat such claims by insisting on an impossibly high standard of proof. The Appellate Court noted the generally strict evidentiary requirements of Maori land law and observed that "the evidence shows that the mud flats have been used at low tides by anyone desiring to cross and there is no indication that the claimants have exercised any proprietary rights in respect of the land or of exclusive rights of fishing or otherwise". Maori resistance to the Crown's claim to own the foreshore by prerogative right must have been tenacious indeed in order to meet such requirements in 1940.

Although the Ngakororo case was the most important of the earlier foreshore cases in the Tai Tokerau division of the Land Court, it certainly was not the only one<sup>61</sup>. In January 1941 Judge Acheson handed down a decision relating to Herekino harbour, also involving an area of foreshore. The claim was brought by Toma Atama on behalf of the Maori people of Rangikohu, who conducted the case himself, and it was opposed by the Crown, represented by Meredith. The concerns of the applicants related to fishing and access rights and the damage caused by reclamation dams installed by a local farmer. Acheson ruled that the Maori claimants were entitled to the area in question both on the basis of accretion and on the basis that the area was uninvestigated (papatipu) land, and was firm in insisting on rights based on the latter. In defining the law of accretion as Pakeha law Judge Acheson, remarkably for his time, insisted on equal standing for Maori proprietary claims founded on Maori customary law:<sup>62</sup>

It follows from the above that the Court in the exercise of its judicial duty to deal justly and equitably with the Native claim, cannot accept the suggestion made on behalf of the Crown that the Natives are entitled to the bulk of the land west of the Herekino River under the Pakeha law as to accretion. The Court holds definitely that the Natives are entitled to all the land west of the River and shown on Plan 13805

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61 Another case, not mentioned in the text, and also featuring Judge Acheson and Meredith was the case dealing with accretion to Maori land at Orakei (Auckland): see Acheson's decision at (1941) 23 Kaipara MB 159.

62 Herekino case, judgment (1941) 72 Northern MB, provisional judgment 22 January 1941 (copy in RP Boast (ed), *Annexures to Evidence Regarding 90-Mile Beach*, Waitangi Tribunal Muriwhenua Lands Claim [Wai-45] Doc C3A, Annexure 11), para 8.



because it is “papatupu” or Customary Land for which an order on Investigation of Title can and should issue. The fact that the Natives would also be entitled to this land under the Pakeha law as to accretion is beside the point. The Court declines to derogate from the papatupu right of the Natives by basing its decision upon the law as to accretion. Vital issues are at stake and no attempt at compromise should be allowed by the Court.

Once again the Crown took the case on appeal to the Native Appellate Court, and once again Judge Acheson was overruled. The decision of the Native Appellate Court was that “accretion after investigation cannot give a new area of papatupu land”: instead the accretions attached to the owners of the existing *individualised* blocks who should apply for correction of their plans at the Land Transfer Office.<sup>63</sup>

#### F *Attitude of the Crown Law Office*

The Crown Law Office is not normally regarded as a policy-making department of state, but there is little doubt that it was in the Crown Law Office that the government’s response to Maori foreshore claims in the courts was formulated. There appear to be two reasons for this. There was the practical reality that since the issue was manifesting itself essentially as litigation in the Native Land Court, Crown Law was naturally called on to advise whether the Crown should actively oppose the claims and what strategy should be pursued. Another factor is the influence and prestige of Sir John Salmond, who as Solicitor-General wrote a number of influential opinions on the response to Maori claims (as for instance regarding the Roturua Lakes and Te Whanganui-a-Orotu cases<sup>64</sup>). Salmond’s role had the effect of placing Crown law in the forefront of policy-making in this area, which continued long after Salmond’s departure.

The 1934 Crown Law opinion on Te Whanganui-a-Orotu has already been referred to.<sup>65</sup> As noted, Crown Law on that occasion thought that there was no particular reason why Maori property rights could not be asserted in any of the demesne lands of the Crown, including the foreshore, but was hopeful that “such important issues will not be raised on the present reference”. This pessimistic approach towards the Crown’s legal position over the foreshore is essentially the same as in an opinion that was prepared in 1932 and a memorandum written in 1935 relating to the Northland foreshore claims. In the 1932 opinion the Crown Solicitor clearly grasped the

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63 Maori Appellate Court, Judgment re Rangikohu Mudflats, Herekino harbour, 1 September 1942 (copy in Boast, above n 62, Annexure 13).

64 Salmond’s opinion on Te Whanganui-a-Orotu is on Lands and Survey file 1/29057, National Archives, Wellington (see above n 39), and on the Roturua Lakes on CL 174/1, Roturua Lakes case, also at National Archives (Salmond to Under-Secretary of Lands, 11 June 1917, re Lakes Roturua and Waikaremoana). In the latter Salmond argued that navigable inland waterbodies such as Lake Roturua should be regarded as the property of the Crown to be held on behalf of the public, and that a claim to treat the beds of such lakes as Maori customary land should be opposed.

65 Above n 40.

distinction between the Crown's radical title and the property rights being sought by the Maori claimants:<sup>66</sup>

By Section 2 of the Native Lands Act, 1931, the definition of *customary land* is land which being vested in the Crown is held by Natives or the descendants of Natives under the customs and usages of the Maori people. The argument by the Maori claimants is, therefore, that although tidal lands may be vested in the Crown it is also customary land.

The Crown Solicitor advised that "the Crown has little hope of success in the present case" and suggested a number of possible strategies which could be followed as a response to the claim:

One course open to the Crown is to make a formal assertion before the Court that the Crown claims this land and then on the decision of the Court to lodge an appeal under Section 61 of the Act, and perhaps, as the Appellate Court to state a case under Section 71 of the Act for the opinion of the Supreme Court. The adoption of this procedure would hold up a final decision for a period, but I understand the desire is to get the matter settled as early as possible... The alternative course is to obtain legislation defining the title of the Crown and providing for compensation for those entitled to claim. A Proclamation could be issued under Section 113 of the Native Lands Act, 1931, but such procedure would not bring the issue to finality. A final decision is, I think, essential as other claims are sure to be put forward by natives in other localities.

A further memorandum prepared by the Crown Solicitor for the Solicitor-General in 1935 focused on the definition of the foreshore and argued that the Crown's claim to the area between high-water mark (ordinary high tides) and the land covered by ordinary spring tides was especially weak and the Crown's claim to the foreshore as a whole difficult to substantiate:<sup>67</sup>

The consensus of opinion (in which I fully concur) is that the claim of the Crown is weak. The Department would prefer that the matter, if possible, be removed from the jurisdiction of the Native Land Court.

Legislation aside, there were two options open as to dealing with the present (Ngakororo) case. The hearing could be allowed to proceed, but similar applications would be opposed in future. This was thought undesirable as it might "have the effect

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66 Memorandum of Crown Solicitor to Under-Secretary of Lands, 7 March 1932, re Ngakororo case (found in Lands and Survey Department box file relating to Ninety-Mile Beach case, held in Department of Survey and Land Information Regional Office, Auckland: a copy is in RP Boast (ed), *Annexures to Evidence Regarding Ninety-Mile Beach*, Waitangi Tribunal Muriwhenua Lands Claim [Wai-45] Doc C3A, Annexure 8).

67 Crown Solicitor to Solicitor-General, 30 August 1935, found in Lands and Survey Department box file relating to Ninety-Mile Beach case, held in Department of Survey and Land Information Regional Office, Auckland: a copy is in RP Boast (ed), *Annexures*, (see preceding footnote), Annexure 16).

of encouraging further applications from optimistic natives".<sup>68</sup> The other was to oppose the application and to endeavour to remove the case from the Native Land Court to the ordinary courts, where, presumably, the Crown might expect more sympathetic treatment.<sup>69</sup>

[The Crown should] oppose the application vigorously from this stage onwards, asking in particular for a re-hearing of the evidence taken in the absence of the Crown, and on the judge finding for the natives, to lodge an appeal on general grounds, and in addition to ask for a re-hearing on the ground that evidence was taken in the absence of the Crown - this application for a rehearing constituting a last endeavour to obtain an opportunity to cross examine the witnesses put forward by the applicants. In addition, to give consideration to the question of having a special case stated for the Supreme Court to determine whether "tidal lands" may be customary lands within the meaning of the legislation relating to native customary lands.

This was the strategy which was ultimately pursued with the last and most important of all the foreshore claims, that relating to Ninety Mile Beach itself.

#### IV IN RE NINETY MILE BEACH ANALYSED

##### A *The Application and the Land Court decision*

The starting point for the litigation was the application lodged by Waata Hone Tepania of Ahipara in the Maori Land Court (Tokerau) district office at Kaitaia on 16 May 1955. The applicant sought an investigation of title into a piece of land named "Wharo Oneroa a Tohe also known as the Ninety Mile Beach being the foreshore (that is that part of the land between high water mark and low water mark)"<sup>70</sup>. The application raises concern about management of the beach: the disappearance of toheroa, a prized shellfish, and the poor quality of Marine Department management.<sup>71</sup> An order was sought vesting ownership of the beach in trustees. The case was heard in the Maori Land Court at Kaitaia from 12-15 November 1957 before Chief Judge Morison. The Crown opposed the application and was represented at the hearing by Sir Vincent Meredith; the applicants were represented by a Mr Dragicevich, a Kaitaia solicitor. The principal reason advanced in argument by the Crown for opposing the application was that "on cession of New Zealand under the Treaty [of Waitangi] everything passed to the Crown, and that imported the Common Law of England under which the foreshore always was the property of the Crown and was held by the Crown for the benefit of the

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68 Above n 68, para 19.

69 Above n 68, para 19(2).

70 There are in fact two separate applications, one dated 16 May 1955 and the other 19 September 1957. The passage quoted comes from the 1957 claim.

71 No all-weather road up the Aupouri peninsula existed until 1950, and the beach was used extensively as a road and stock-route. It is still used extensively as a road by tour buses which travel up the east coast road to Cape Reinga and then drive down the beach to Ahipara. The grounds for the application are set out fully in the first (1955) application.

subjects of the Crown which would include Maoris and Europeans alike<sup>72</sup>. The Crown expressly did not concede that the Rarawa and Aupouri tribes owned the beach prior to the Treaty under their customs and usages.

Immediately after hearing the case, Judge Morison gave a brief judgment in favour of the applicant.<sup>73</sup> He began by noting that the application was for an investigation of title to an area of land lying between high water and low water mark. He referred to the Aupouri and Rarawa tribes as the applicants, noting that there was no dispute between them as to where the boundary was. He then listed the Crown's reasons for opposing the application, and observed that the only point the Maori Land Court was to determine was the question of traditional ownership. The other issues raised by the Crown involved substantial legal questions which could only be resolved in the Supreme Court. Judge Morison stated that the evidence clearly established the following points:<sup>74</sup>

- (a) That the Northern portion [of the beach] was within the territory occupied by Te Aupouri and the Southern portion was within the territory occupied by Te Rarawa.
- (b) That the members of these tribes had their kaingas and their burial grounds scattered inland from the beach at intervals along the whole distance.
- (c) That the two tribes occupied their respective portions of the beach to the exclusion of other tribes.
- (d) That the land itself was a major source of food supply for these tribes in that from it the Maoris obtained shell fish, namely toheroa, pipi, tuatua, and tipa from the beach itself, and kutai from the rocks below high water mark at the part known as the Maunganui Bluff.
- (e) That the Maoris caught various fish in the sea off the beach, and for this purpose went out in canoes. The fish caught were mullet, schnapper, flounder, kahawai, parore, herrings, rock cod, yellow-tail, kingfish and shark.
- (f) That for various reasons from time to time rahuīs were imposed upon various parts of the beach and the sea itself.
- (g) That the beach was generally used by the members of these tribes.

None of this is contentious; it is indeed hard to see what other conclusions the Land Court could have come to.

#### *B Turner J's decision in the Supreme Court*

The appeal by way of case stated from the Native Land Court was argued in the Supreme Court at Auckland before Turner J. Turner J held that the question whether the Maori Land Court had jurisdiction to enquire into the foreshore and issue titles to it had

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<sup>72</sup> (1957) 85 Northern MB 10.

<sup>73</sup> (1957) 85 Northern MB 126.

<sup>74</sup> Above n 73, 126-27.

to be answered in the negative.<sup>75</sup> Turner J begins his analysis with a summation of what he sees as the relevant background legal principles. These were, firstly, that at the date of the acquisition of British sovereignty every part of the country was owned by Maori according to their own customs. However, secondly, following the "establishment of British rule in this country"<sup>76</sup> the whole country "became the property of the Crown, from whom all titles must be derived".<sup>77</sup> Thirdly, says Turner J, the rights of the Maori people as "original occupiers of the country" were "reserved" to them by the Treaty of Waitangi. However, "the treaty itself gave no Maori or group of Maoris any legal cause of action"; it is not until the Crown's policy is translated into statute that the Treaty can become enforceable in the Courts<sup>78</sup>.

The Solicitor-General argued that the Maori Land Court had never had at any stage in its history jurisdiction to issue a certificate of title or a freehold order in respect of the

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75 *In re an Application for Investigation of Title to the Ninety-Mile Beach* [1960] NZLR 673, 678.

76 It is perhaps unnecessary to point out that the date of formal acquisition of sovereignty for the purposes of British law was in fact in no way coincident with the effective establishment of British rule in New Zealand: not for decades after 1840 was the process of reduction of Maori autonomy complete.

77 [1960] NZLR 675. This remark is at best an oversimplification. The Maori "customary" or aboriginal title is not a title "derived" from the Crown in any meaningful sense, although the Crown can extinguish such title. In stating that the Crown "owns" the country Turner J is being imprecise: "owned" in what sense? By the orthodox common law of aboriginal title the Crown's radical title needs to be kept sharply distinct from its rights as a landowner: *imperium* and *dominium* should not be blurred.

78 [1960] NZLR 675. Turner J's views on the status of the Treaty of Waitangi were the legal orthodoxy of the day (and to a large extent of the present day), following the decision of the Privy Council in *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1942] AC 308. This view of the status of the Treaty of Waitangi has not been significantly denied by the New Zealand courts in recent cases. There are dicta in Cooke P's judgment in *Maori Council v Attorney-General* [1987] 1 NZLR 641 and in Chilwell J's judgment in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 that on occasion the Treaty of Waitangi can have a kind of *sui generis* status which allows it to be used as a device for interpreting ambiguous statutes. (See especially Cooke P, [1987] 1 NZLR 655-56.) But this has to be set alongside the conspicuous reluctance of other judges to endorse these tentative approaches. In the most recent case, *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, 603 [broadcasting assets case] orthodoxy is reasserted by McKay J: "Treaty rights cannot be asserted in the Courts except insofar as they have been given recognition by statute." The present author would argue, however, that it is wrong to deduce from the fact that orthodox doctrine has apparently prevailed that there have been no significant changes in judicial approach. Dr Ranginui Walker of the Auckland District Maori Council, certainly not a person who is easily impressed, has argued that the recent cases shown that New Zealand has moved "firmly into the post-colonial era": see R Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, (Penguin Books, Auckland, 1990) 288. One disadvantage of a narrowly doctrinal approach to legal scholarship is that the political consequences of litigation can be overlooked.

foreshore. This was because either the Crown had acquired ownership with the importation of the Common Law, or, alternatively that such ownership had been recognised and the Land Court's jurisdiction circumscribed by statute. The statutes relied on were section 150 of the Harbours Act 1950<sup>79</sup> and section 12 of the Crown Grants Act 1866. These submissions were accepted by Turner J. Section 150, he observed, "appears" to prohibit the grant or conveyance of any part of the foreshore. No Act had been cited which "is authority for the grant or conveyance of any part of the foreshore".<sup>80</sup> He construed the section "as prohibiting the Maori Land Court from so exercising its jurisdiction as to effectuate a Crown grant of foreshore to any claimant". In reaching this result he was fortified by the language of section 12 of the Crown Grants 1866, although this seems to be quite irrelevant.<sup>81</sup>

Turner J therefore based his approach simply on the statutes. In effect, his judgment amounts to an assertion that the Harbours Act and the Crown Grants Act have extinguished Maori aboriginal title to the foreshore. Given the stringent requirements now insisted on relating to legislative extinguishment of aboriginal title, it is unlikely

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79 The section provides: "Except as hereinbefore provided, no part of the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith, where and so far up as the tide flows and reflows, nor any land under the sea or under any navigable river, except as may already have been authorized by or under any Act or Ordinance, shall be granted, conveyed, leased, or disposed of to any Harbour Board, or any other body (whether incorporated or not), or to any person without the authority of a special Act". The parent section of this was s 147 of the Harbours Act 1878. See above, part III A.

80 [1960] NZLR 677. But a strange weakness of Turner J's judgment is its failure to analyse the provisions of the Maori Affairs Act 1953 itself and the convoluted history of the preceding Native Lands Acts. The key question in the narrow terms of statutory interpretation was the apparent conflict between the jurisdictional provisions of the Maori Affairs Act and such statutes as the Harbours Act. The phraseology he employs in his discussion of the Harbours Act seems to indicate, however, that in his view whatever the jurisdictional provisions of the Maori Affairs Act might say, the key question is whether the Court's decision to allocate a foreshore title can be *perfected* by the subsequent issue of a Crown Grant without statutory authority.

81 Section 12 of the Crown Grants Act 1866 (now s 35 of the Crown Grants Act 1908) states that "where in any grant the ocean, sea, or any sound, bay, or creek, or any part thereof affected by the ebb or flow of the tide, is described as forming the whole or part of the boundary of the land granted, such boundary or part thereof shall be deemed and taken to be the line of high-water mark at ordinary tides". Turner J thought ([1960] NZLR 678) that the section "prevents a Crown grant from being construed as extending title from the landward side past high water mark", but that it was not necessary to settle what the provision meant as the point at issue was clearly settled by s 150 of the Harbours Act. In fact it is hard to see how this provision of the Crown Grants Act could conceivably have any relevance. It is a mere conveyancing presumption. It means only that if a Crown grant defines a block as bounded (say) "by the sea" then the foreshore is not included in the Grant - but it does not follow that the foreshore thus excluded becomes Crown land.

that a modern court would be prepared to accept Turner J's approach<sup>82</sup>. Turner J himself admitted that it was a "little curious" that a provision of such "sweeping" effects should be found in the relative obscurity of the Harbours Act.<sup>83</sup> In any event the Court of Appeal was to devise an alternative analysis.

### C      *The Court of Appeal*

The claimants appealed to the Court of Appeal from Turner J's judgment. Judgments were given by North J and TA Gresson J<sup>84</sup>. North J described the claim to the beach as "novel", although - as this article has attempted to demonstrate - this was not at all the case. Maori complaints about and claims to the foreshore had been asserted continuously in a variety of ways over a period of many years. The appeal was dismissed. The Court of Appeal placed weight not, however, primarily on statutes such as the Harbours Act, but on the consequences of an investigation of title to adjoining coastal block by the Land Court.

The judges of the Court of Appeal were not persuaded that the mere introduction of the common law was sufficient to destroy the undoubted pre-Treaty Maori title over the fore shore. During the period 1840-62, states TA Gresson J, the Crown "might" have asserted a contention that customary Native title over the foreshore had been extinguished. But he "doubts the validity" of such an argument:<sup>85</sup>

[Such an argument] would involve a serious infringement of the spirit of the Treaty of Waitangi and would in effect amount to depriving the Maoris of their customary rights over the foreshore by a side wind rather than by express enactment.

For the Court of Appeal the key event was the establishment of the Native Land Court with the 1862 and 1865 Native Lands Acts. The Court of Appeal formulated an assumption and then followed this with an analysis. The assumption, however, was false; and the analysis can be criticised in a number of respects.

The Court of Appeal proceeded on the basis that the Native Land Court must have investigated all of the land adjoining the beach. North J makes the assumption explicitly:

The case stated by the Maori Land Court does not supply any information whether the whole of the land extending along the length of the Ninety Mile Beach above high-water mark has been investigated, but as the first Maori Land Court was constituted rather more than 100 years ago and it was recorded more than 50 years ago that the Native customary title to land in New Zealand had then for the most part been extinguished, it would seem to me that the probabilities all are that it has. Therefore, if this judgment is to be of any real assistance to the Maori Land Court it would be

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82      See below, n 89.

83      [1960] NZLR 677.

84      *In re the Ninety-Mile Beach* [1963] NZLR 461.

85      [1963] NZLR 477.

better if I assume that the various blocks of land abutting the Ninety Mile Beach have been investigated and freehold titles issued.

But, as has been explained above, this was not so. Only a relatively small part of the beach littoral conformed with the situation described by North J. The greater part of the coast was either purchased by the Crown, or acquired by the Crown by taking for itself the "surplus" left over after Crown grants had been issued to two individuals who had purportedly bought land from Maori before 1840. In none of these areas was it ever necessary for the Land Court to investigate the title to the coastal blocks: they became Crown land *before* the Land Court was established. North J's remark reveals that the Court of Appeal judges could not even have seen the transcript of the proceedings in the Ninety Mile Beach case itself in the Maori Land Court, which include a reasonably detailed statement of evidence on the legal history of the coastal area given by an officer of the Department of Lands and Survey.<sup>86</sup> The implications of this fundamental misapplication of fact by the Court of Appeal will be returned to below.

Having proceeded on the basis that the answer lies in the process of adjudication by the Land Court on the coastal blocks, the Court of Appeal next turns to the consequences of such investigation. Essentially this was that if the Land Court did not stipulate that the foreshore adjoining the coastal block under investigation was included in the relevant title, then the Maori customary title must be treated as extinguished. According to North J: <sup>87</sup>

I am of opinion that once an application for investigation of title to land having the sea as one of its boundaries was determined [ie by the Land Court] the Maori customary communal rights were then wholly extinguished. If the Court made a freehold order or its equivalent fixing the boundary as low water mark and the Crown accepted that recommendation, then without doubt the individuals in whose favour the order was made or their successors gained a title to low water mark. If on the other hand, the Court thought it right to fix the boundary at high water mark, then the ownership of the land between high water mark and low water mark remained with the Crown, freed and discharged from the obligations which the Crown had undertaken when legislation was enacted giving effect to the promise contained within the Treaty of Waitangi. Finally, as it would appear most often has been the case, if in the grant the ocean sea or any sound, bay or creek affected by the ebb and flow of the tide was described as forming the boundary of the land, then by virtue of the provisions of s12 of the Crown Grants Act 1886 the ownership of the land between high water mark and low water mark likewise remained in the Crown

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<sup>86</sup> (1957) 85 Northern MB 29-31.

<sup>87</sup> This last sentence merits careful analysis. I have already argued that the Crown Grants Act cannot by itself extinguish title to anything: its objective is to clarify conveyancing law. For North J to state that the foreshore "remains" in Crown ownership it must be supposed that the Crown has come to own it somehow. But how? The Court *rejects* the theory that the Crown acquired ownership of the foreshore by the mere introduction of the common law.



This amounts to a simple assertion that the process of investigation of title by the Native Land Court is sufficient to extinguish Maori title<sup>88</sup> to the foreshore - and by implication, to any other associated property rights not ultimately specified by the Court and included in the subsequent Crown Grant. The assertion is not tenable and would be unlikely to be accepted by a contemporary court. This article cannot deal fully with the law governing extinguishment of aboriginal title: suffice to say that the requirements are strict and certainly call for a very close analysis of the supposedly "extinguishing" statutes.<sup>89</sup> Furthermore, in *Te Weehi v Minister of Fisheries* <sup>90</sup>[Williamson J rejected an analogous argument that the grant of a Maori Land Court title to a coastal block extinguished fishing rights. It can therefore be argued that the grant of title to a coastal block should not extinguish property rights in the adjacent foreshore, or at the very least that the presumptions identified by the Court of Appeal in *In re the Ninety Mile Beach* should be reversed: that if the court order and the grant do not specify that the foreshore is included then the presumption should be that aboriginal title to the foreshore is unextinguished.

The Court of Appeal did not place nearly as much emphasis on the provisions of the Harbours Act as did Turner J in the High Court. North J stated that the argument that the words "except as may already have been authorised by or under any Act or ordinance" in section 150 of the Harbours Act had "the effect of preserving the original jurisdiction of the Maori Land Court" had "some force". He concluded, however, that in the end the "better view" was that the section ensured that the foreshore was not "disposed of by special Act of Parliament unless express authority to that effect had already been given in particular cases".<sup>91</sup> It remains open to doubt whether the Court of Appeal at the present day would agree.

There is still the problem that much of the Court's reasoning has no application to Ninety Mile Beach in any event, for reasons already explained. The Court's failure to grasp the legal history of the lands adjoining the beach meant that a group of important issues were never explored. What is the effect of a Crown purchase of a coastal block where the deed is unclear on whether the vendors intended to alienate the foreshore or not? What presumptions should govern the situation? What should be the situation where the Crown takes for itself an area of "surplus" land along the coast despite Maori objections? What are the legal issues surrounding these "surplus" lands and, in particular, to what extent is the fairness and degree of understanding by the Maori

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88 I have not in this paper pursued the issue of the distinction between "territorial" and "non territorial" aboriginal title, a sophistication clearly unknown to the Court of Appeal in 1962. The claim advanced by Mr Tepania to 90-Mile beach - and the type of claim which the the Maori Affairs Acts and its predecessor statutes were designed to facilitate - was a *territorial claim*. The Maori Affairs Act gave no scope for pursuing fishing rights or other sorts of less than fee simple property rights.

89 McHugh *The Maori Magna Carta* (Oxford University Press, Auckland, 1991), 135-141, for a discussion of the case law; and see now *Mabo v Queensland*, (1992) 66 ALJR 408.

90 [1986] 1 NZLR 690.

91 [1963] NZLR 474.

“vendors” of the initial pre-Treaty transaction relevant? None of these questions have been traversed in the Courts, although they are certainly now receiving the attention of the Waitangi Tribunal in the Muriwhenua Lands claim.

## V CONCLUSION

This article is offered as a study in New Zealand legal history, rather than as an analysis of the law of foreshore ownership, although obviously in this instance the two are closely interconnected. The writer has endeavoured to make use of a wide range of source materials in the conviction that New Zealand legal history cannot be adequately written from inside the confines of the law library. The aspiration has been to place the Ninety Mile Beach litigation firmly in its historical context and to demonstrate, if nothing else, that if Mr Tepania’s application for an investigation of title into the beach may have been, in North J’s words, “far-reaching” it was anything but “novel”.<sup>92</sup> Considered narrowly in terms of the formal law, and quite apart from the Crown’s obligations under the Treaty of Waitangi, the law governing ownership of the foreshore in this country remains profoundly unsatisfactory and needs to be considered afresh.

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92 [1963] NZLR 466.