MAORI FISHING RIGHTS IN THE NEW ZEALAND COURTS: *MINISTRY OF AGRICULTURE AND FISHERIES V PONO HAKARIA AND TONY SCOTT*

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Maori[1] fishing rights have again been before the New Zealand courts. In the District Court case of *Ministry of Agriculture and Fisheries v Pono Hakaria and Tony Scott*[2] informations against the two named defendants charging them with the offence of taking toheroa[3] contrary to the New Zealand Fisheries (Amateur Fishing) Regulations 1986 were dismissed by Judge Inglis on the ground that the defendants were exercising customary Maori fishing rights. The regulations, which prohibit absolutely the taking of toheroa, were made pursuant to the New Zealand Fisheries Act 1983 ("the Act"). The defence was founded on section 88(2) of the Act which provides that "nothing in this Act shall affect any Maori fishing rights". While the case illustrates that rights accorded by the Treaty of Waitangi have become part of the workaday world of the District Courts, many aspects of the jurisprudence relating to the recognition of Maori rights within the New Zealand legal system remain un-

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1. The use of the word "Maori" to describe the indigenous tribes of New Zealand began about 1850; H W Williams A *Dictionary of the Maori Language* Seventh Edition (Wellington: Government Printer, 1985).
2. (Unreported) District Court of New Zealand, Levin, 19 May 1989 CRN 8031003482-3. The Ministry has indicated that it will appeal the decision, but at the date of writing proceedings had not been filed. The District Courts are constituted under the (NZ) District Courts Act 1947 and are the lowest courts in the hierarchy of courts of general jurisdiction.
3. *Amphidesma ventricosum*; a salt water clam now in short supply in New Zealand.

satisfactory. Following a summation of the facts of the decision, the specific problems relating to the extent of rights accorded by the Treaty of Waitangi and the recognition of Maori law will be briefly discussed.

The defendants were apprehended by fisheries officers on the Waiterere Beach, an area on the west coast of the North Island of New Zealand north of Wellington.[4] They were in possession of 21 toheroa which were claimed to have been gathered according to the customary rights of the Ngati Raukawa.[5] They had organised the meeting of two family groups at a nearby marae[6] and, as Judge Inglis put it, "[i]t was necessary, as a matter of commonly understood tradition and protocol, for the hosts to provide the best for the guests on this special occasion".[7] Toheroa was to be offered if possible and one of the defendants approached the Ministry of Agriculture and Fisheries requesting the Minister exercise a power of waiver of the prohibitory regulations and provide a permit for the taking of the shellfish. A bureaucratic scramble ensued and, recognising that any further approach to the Ministry would be unlikely to produce any constructive results, the defendants decided to gather the toheroa under the guidance of a kaumatua[8] according to tribal rights. A kaumatua accompanied the defendants to the beach but the confrontation between the fisheries officer and the Maori party, in the words of Judge Inglis, illustrated "very vividly the cultural abyss" which divided them. The fisheries officers were convinced that the defendants were in breach of the regulations while the kaumatua, acting as spokesperson for the two defendants, had attempted to explain, "with mounting impatience, the defendants' customary right to collect toheroa and the significance of the occasion".[9] After a delay of almost twelve months, informations were sworn which resulted in the present case. As Judge Inglis found that the defendants were exercising a Maori right specifically preserved by section 88(2) of the Act, the prosecutions failed.

4. Te Whanganui-a-Tara.
5. A tribal group associated with this area.
6. Enclosed space in front of a house, courtyard, village common; Williams, supra n 1
7. Supra n 2, 8.
8. Old man or woman; Williams, supra n 1. The term is used to describe tribal elders and leaders
9 Supra n 2, 8

The predecessor of section 88(2) first appeared as section 8 of the New Zealand Fish Protection Act 1877 which provided that "nothing contained in this Act 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". Except for a brief hiatus,[10] the purported preservation of Maori fishing rights has remained on the New Zealand statute books. In 1903 an amendment to the New Zealand Sea Fisheries Act 1896 provided that "nothing in this Act shall affect any existing Maori fishing rights" which is in substantially the same wording as the current section.

Judge Inglis found the words of section 88(2) to include rights accorded by the Treaty of Waitangi.[11] In the words of the Waitangi Tribunal:

> The Treaty of Waitangi has always assumed great importance in the eyes of the Maori...by the solemn agreement made with the Queen of England the peaceful colonisation of New Zealand became possible.[12]

The Treaty of Waitangi, signed in 1840 has three Articles. By Article One, Maori ceded kawanatanga, or the right to make laws, to the Crown. In exchange, Maori were guaranteed te tino rangatiratanga, or full authority, over their lands and other treasures.[13] Relying on an earlier New Zealand Court of Appeal decision, *New Zealand Maori Council v Attorney-General*,[14] Judge Inglis considered the correct approach to the Treaty of Waitangi to be as follows:

> [T]he Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively as a living instrument taking account of the subsequent developments of human rights norms; and that the Court

10. Between 1894 and 1903 the provision was absent although the (NZ) Sea Fisheries Protection Act 1896 provided the Native Minister the power to relax provisions of the fisheries regulations by Order in Council if in his opinion Maori were injuriously affected by them.
11. The texts of the Treaty of Waitangi are provided as an appendix to this case note.
12. The Waitangi Tribunal was established and operates under the (NZ) Treaty of Waitangi Act 1975. Any Maori who considers that she or he has been prejudicially affected by official action which is contrary to the principles of the Treaty of Waitangi may bring a claim to the Tribunal. If well founded, the Tribunal may make recommendations to the Government as to the rectification of the breach. The quotation is from *Findings of the Waitangi Tribunal on the Kaituna Claim* (1984) WAI 4, 15.
13. Much controversy surrounds the true meanings of the terms and the principles of the Treaty of Waitangi. Maori and English versions of the Treaty exist with important differences between them. For a full discussion see R M Ross "Te Tiriti o Waitangi: Texts and Translations" (1972) 6 NZJH 130
14. [1987] 1 NZLR 641

> will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty.[15]

Such an approach is necessary as the Treaty's status in New Zealand municipal law depends on it being incorporated into a statute either expressly or impliedly.[16] Consistent with current moves in New Zealand jurisprudence,[17] Judge Inglis had no difficulty in spelling out of section 88(2) a protection of Treaty fishing rights.

That conclusion extends the rule in the New Zealand High Court decision of *Te Weehi v Regional Fisheries Officer*[18] which involved substantially similar facts. The appellant had been convicted for illegally taking shellfish under the same set of regulations. On appeal, section 88(2) permitted the conviction to be quashed on the ground that the appellant was exercising a Maori fishing right. In that case however, the Treaty of Waitangi was not posited by the Judge as the basis for the rights. Rather the approach most closely approximated an application of the aboriginal rights doctrine.[19]

In both cases the extent of the Maori fishing rights recognised by the courts was limited. In *Te Weehi v Regional Fisheries Officer*[20] the rights were limited to the taking of shellfish for a personal food supply. In the present case the rights which avoided the convictions attached to "a special gesture of hospitality" and as such were "well within customary and traditional parameters".[21]

When rights under the Treaty of Waitangi are at issue, it is by no means clear that their ambit need be limited to what is characterised as traditional spheres of activity. Unlike the static rights recognised by the aboriginal rights doctrine, rights under the Treaty of Waitangi can grow. Judge Inglis somewhat obliquely adverted to this point in his comment:

> [S] 88(2) must be regarded as a clear expression of Parliament's intention to honour the Crown's promise, given by the Treaty, to preserve *at the least* traditional or customary fishing rights of a kind exercised at the time of the treaty by the Maori people.[22] (emphasis added)

15 Supra n 2, 4.
16. *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).
17. *Ngai Tahu Trust Board v Attorney-General* (unreported) District court of New Zealand, Wellington, 2 November 1987, *Muriwhenua Fishing Report* (1988) WAI 22.
18 [1986] 1 NZLR 680
19. A landmark decision in this area is the New Zealand case *R v Symonds* (1847) NZPCC 387.
20 Supra n 18.
21. Supra n 2, 10
22. Supra n 2, 5.

While it was not necessary for Judge Inglis to discuss what further rights the Treaty guaranteed beyond the traditional sphere,[23] that remains the vital interpretative issue when approaching the question of the rights accorded Maori by the Treaty of Waitangi to participate in the commercial fishing industry. The extent of the commercial fishery of Maori prior to the signing of the Treaty of Waitangi has now been well documented.[24] Even so, it is rapidly becoming clear that the view that Maori fishing rights can be contained by circumstances operating at the time of the Treaty signing is naive and will not survive.

An area of great difficulty is the relationship between Maori law and the Treaty of Waitangi. In the present case Judge Inglis evinced reluctance to characterise the rights accorded by section 88(2) as relating to Maori law at all. His Honour's diction is illustrative as he refers to "lore", "custom" and "tradition" which, within western frameworks, must result in an undervaluing of these concepts. While such a result was, doubtless, unintentional, the language suggests that whatever is protected by section 88(2), and therefore by the Treaty also, does not have the same status as the imported New Zealand law. Further, problems exist with the process of recognition of Maori law. Expert witnesses were called to prove that the right to take toheroa did attach to the tribe associated with the geographical area.[25] As with the common law doctrine of aboriginal rights, when assessing rights accorded by the Treaty of Waitangi, courts may be involved in a process of recognition of the appropriate customary law. When Treaty rights are at issue it should be asked whether the western institutions which are the official fora for determination of Maori rights taint the recognition process.[26]

23. The Waitangi Tribunal has made recommendations recognising the protection of treasured possessions as applying to the Maori language which impact directly on the broadcasting industry and the state controlled education system, *Te Reo Maori* (1986) WAI 11.
24. *Muriwhenua Fishing Report* (1986) WAI 22; G Habib *Korekore Piri Ki Tangoroa, Maori Involvement in the Fishing Industry* (Wellington: Department of Maori Affairs, 1987); New Zealand Law Reform Commission *Report on the Treaty of Waitangi and Maori Fisheries, Mataitai Nga Tikanga Maori me te Tiriti o Waitangi* (1989)
25. The same approach was taken in *Te Weehi v Regional Fisheries officer,* supra n 18.
26. For a general discussion of the history of these principles see E Vitta "The Conflict of Personal Laws" [1970] Israel LR 170.

Although the Treaty of Waitangi provides a textual and legal meeting point for two sets of people in New Zealand, they will not meet squarely until a consistent and honest process of recognition of Maori law is attained. In the present case Judge Inglis envisaged a better future for the New Zealand legal system. His Honour said:

> Surely there must come a day when every New Zealander will know and understand what rights were preserved for the Maori by the Treaty; when matters special to the Maori people will be appreciated and understood; when quite basic things like the right to shellfish, guaranteed by the Treaty, will not have to be explained and proved in a New Zealand Court almost as if they were strange and foreign to New Zealand life.[27]

That future might best be achieved by giving official recognition to Maori fora for the determination of Maori law. The call for such recognition in New Zealand is growing.[28] In that future, if western courts *are* required to interpret the Treaty of Waitangi their processes cannot but be enhanced by allowing Maori jurisprudence to develop in a culturally appropriate and independent manner. It may be that legal coherence may best be achieved by legal separateness.

Such issues are, of course, enormously complex and within the confines of a casenote can only be superficially touched upon. On one level the case of *Ministry of Agriculture and Fisheries v Pono Hakaria and Tony Scott* is unremarkable as it is consistent with the generalised process of recognition of Treaty rights occurring within the New Zealand legal system. However, judges in New Zealand have so far not been placed in the position of having to determine the legal rights of Maori outside of traditional areas of economic activity. The assessment of rights accorded Maori under the Treaty of Waitangi remains in an embryonic state in New Zealand despite a geometric increase of interest and writing in the area. However, no consensus as to the process by which those rights may be recognised and accorded their appropriate priority has yet been achieved in New Zealand. That is particularly alarming in a time of increased recognition of the Treaty of Waitangi through direct incorporation of its "principles" in statutory schemes. While Courts are the principal interpreters of statute law, the incorporation of the Treaty of Waitangi into New Zealand statutes presents unprecedented challenges. Those challenges will be most acute if the rights accorded Maori in non-traditional areas of activity have to be determined.

27. Supra n 2, 11.
28. M Jackson *The Maori and the Criminal Justice System* (Wellington: Department of Justice, 1987-8).

APPENDIX: TEXT OF THE *ENGLISH*[#] VERSION OF THE TREATY OF WAITANGI

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands — Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article The First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights

The text is from the First Schedule of the (NZ) Treaty of Waitangi Act 1975 The Act also includes the official Maori version. Neither should be regarded as a translation of the other The Waitangi Tribunal has jurisdiction to determine differences between the texts Principle difficulties are associated with the terms "kawanatanga" and "te tino rangatiratanga". "Kawanatanga" which is used as a gloss for "sovereignty" is an abstraction of the missionary coined word "Kawana" which was used in early translations of the Bible for "Governor". Arguably the cession of kawanatanga is less complete than a full cession of "all the rights and powers of Sovereignty" Similarly, "te tino Rangatiratanga" is associated with the full exercise of chieftanship. Article Two, therefore, guarantees more than "exclusive possession" and may include the right to regulate behaviour respecting Maori property. See further n 13.

and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or may be supposed to exercise or to possess over their respective Territories as the sole Sovereign thereof.

Article The Second

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

Article The Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects

W HOBSON Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof; in witness of which we have attached our signatures or marks at the places and dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

APPENDIX: TEXT OF THE *MAORI*[##] VERSION OF THE TREATY OF WAITANGI

"Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o No Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua

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

Ko te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata

First Schedule, (NZ) Treaty of Waitangi Act 1975

maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarni.

(Signed) WILLIAM HOBSON,
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.