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Balancing a Colonial Past with a Multicultural Future: Maori Customary Title in the Foreshore and Seabed after Ngati Apa

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I. Introduction

The debate over property rights in New Zealand’s foreshore\textsuperscript{1} and seabed\textsuperscript{2} began in 1840 with the signing of the Treaty of Waitangi by the native Maori people and British colonists.\textsuperscript{3} The

\textsuperscript{1} The foreshore is defined as the beach land between the high and low water marks, also known as the intertidal zone. See Waitangi Tribunal Report, Report on the Crown’s Foreshore and Seabed Policy, No. Wai. 1071, at xi (2004), http://www.waitangi-tribunal.govt.nz/reports [hereinafter TRIBUNAL REPORT].

\textsuperscript{2} The seabed extends from the low water mark out to the sea. See id.

debate continues today. Within the last year, the foreshore and seabed dispute reached a climax, first with the courts, then New Zealand's government, and finally an extra-judicial independent commission all weighing in on the debate.

The controversy erupted following the New Zealand Court of Appeal's reversal of its own precedent in its June 2003 ruling in Ngati Apa v. Attorney-General. In its 1963 decision in In re Ninety Mile Beach, the Court held that "Maori customary title to land depended 'wholly on the grace and favour' of the Crown." Thus, under Ninety Mile Beach, no court had jurisdiction to hear Maori customary title claims to the foreshore and seabed. In Ngati Apa, the court reversed its holding in In re Ninety Mile Beach and held that the Maori Land Court possessed jurisdiction to hear Maori customary title claims to the foreshore and seabed. Outraged by the Court's decision in Ngati Apa, the ruling Labour

10 Maori customary title is defined as land that is "owned by Natives under their customs or usages." This refers to land that was held by native Maori before the signing of the Treaty of Waitangi in 1840 established British colonial governing authority. Glossary, Recognising the Rights of Indigenous Peoples, supra note 3, at xviii (Alison Quentin-Baxter, ed., 1998).

11 Brookfield, supra note 9, at 295 (quoting In re Ninety Mile Beach [1963] N.Z.L.R. 461, 468 (C.A.)).

12 Id.
party (the "Government") promulgated a proposal to vititate the Ngati Apa ruling and forbid new private ownership rights in the foreshore and seabed. Fierce opposition ensued, and a March 2004 report by the Waitangi Tribunal sharply rebuked the Government’s new foreshore and seabed policy, claiming that the proposal breached Articles Two and Three of the Treaty of Waitangi.

Part II of this Note will set the stage for exploring Ngati Apa through a brief introduction to New Zealand’s legal system. Part III of this Note will examine the decision in Ngati Apa in conjunction with a historical examination of the foreshore and seabed debate. The Treaty of Waitangi and the Maori-Crown relationship will be considered in the context of this important decision. Part IV will track the Government’s response to the Ngati Apa decision. Part V will explore the role of the Waitangi Tribunal in New Zealand’s foreshore and seabed policy. Finally, this Note will offer some brief remarks on the obligations of each of the aforementioned institutions and their role in casting future policy on the foreshore and seabed.

II. Setting the Stage for the Ngati Apa Debate

A description of New Zealand’s legal landscape is necessary in order to understand and better appreciate the importance of the Court’s decision in Ngati Apa and the government’s reaction. This Part first discusses New Zealand’s system of Parliamentary supremacy, followed by an examination of the Treaty of Waitangi, the Waitangi Tribunal, and the history of Maori land ownership.

13 In New Zealand, the ruling party in Parliament is often referred to as the "Government," or alternatively, the "Crown." New Zealand is a constitutional monarchy, with the Queen of England as titular head of state. In the 1930s, the Statute of Westminster granted virtual independence to New Zealand, and the Constitution Act, passed by the British House of Commons in 1986, ceded complete autonomy. See Silvia Cartwright, New Zealand’s Constitutional Monarchy, 6 GREEN BAG 57, 58 (2002). No legal oversight remains between New Zealand and Great Britain, though New Zealand retains a “historical friendship” with Britain, as well as a membership in the Commonwealth. Id.


A. New Zealand's System of Parliamentary Supremacy

One unique feature of the New Zealand government is Parliamentary supremacy.\(^{16}\) Parliament is unlimited in its lawmaking authority, even regarding questions of constitutional importance.\(^{17}\) New Zealand inherited the doctrine of parliamentary sovereignty from Great Britain.\(^{18}\) Under a system of parliamentary sovereignty, "Parliament ... [has] the right to make or unmake any law whatever; and further ... no person or body is recognized ... as having a right to override or set aside the legislation of Parliament."\(^{19}\) Parliament's sovereignty is not thought to represent a conception of supreme power; rather, Parliament is accepted as sovereign under the "common law rule that courts will recognise as laws the rules which Parliament makes by legislation."\(^{20}\) Since New Zealand has "no fundamental laws, no entrenched Bill of Rights, and no federal division of powers," the net result is legislative supremacy.\(^{21}\) This supremacy has allowed Parliament to make dramatic changes, such as restructuring the appellate courts, without having to comport with constitutional criteria.\(^{22}\) However, this supremacy is not without


\(^{17}\) Id. Where might one locate New Zealand's constitution? McDowell and Webb note that "New Zealand has a 'rich and vigorous' constitution embodied in both written and unwritten material." Id. at 127 (quoting P. A. Joseph, Constitutional and Administrative Law in New Zealand 1 (1993)). The "constitutional structure" of New Zealand is composed primarily of six sources: "rule of law; legislation (both of New Zealand and United Kingdom origin); constitutional conventions; common law; Letters; Patent; and the Treaty of Waitangi." Id.

\(^{18}\) Alison Quentin-Baxter, The International Law and Constitutional Law Contexts, in Recognising the Rights of Indigenous Peoples, supra note 3, at 40.

\(^{19}\) Id. (quoting A.V. Dicey, Introduction to the Law of the Constitution 39-40 (9th ed.)).

\(^{20}\) Id. at 41.


\(^{22}\) See Joseph, supra note 21, at 472.
limits. Commentators have generally recognized, for instance, that constitutional conventions dictate that Parliament should not pass legislation that violates international law.\textsuperscript{23}

\textbf{B. The Treaty of Waitangi}

The Treaty of Waitangi ("the Treaty"), signed in 1840, governs the relationship between the Maori,\textsuperscript{24} the indigenous people of New Zealand, and the European descendants, known as "Pakeha,"\textsuperscript{25} who today constitute the overwhelming majority of the population.\textsuperscript{26} The British entered into the Treaty to provide some justification for its continued presence in New Zealand.\textsuperscript{27} Hasty drafting, differing intents, and changes at fundamental levels of society have resulted in countless battles between the British and Maori over the true meaning of the Treaty.\textsuperscript{28}

\textsuperscript{23} Quentin-Baxter, \textit{supra} note 18, at 41.

\textsuperscript{24} Maori are thought to have been mariners from the Polynesian islands. Richard B. Collins, \textit{Sacred Sites and Religious Freedom on Government Land}, 5 U. Pa. J. Const. L. 241, 244 (2003). According to the latest census figures, New Zealand's ethnic composition includes 14\% Maori, 10\% Asian, 6\% Pacific Islanders, and 70\% White, or Pakeha. Marguerite L. Spencer, \textit{A White American Civil Rights Attorney in New Zealand: What Maori Experience(s) Teach me about the Cause}, 28 WM. Mitchell L. Rev. 255, 257 (2001). Once a predominately rural people, Maori flocked to urban centers in droves in the wake of the World War II economic boom. \textit{Id.} at 259. Today, 80\% of Maori live in cities, a statistic that has contributed to "cultural loses [and] disenfranchisement of urban Maori from their tribal land and origins and socio-economic difficulties ..." \textit{Id.} at 260. As a result of this Maori diaspora, far too many Maori have suffered tremendous socio-economic difficulties within the inner cities, in addition to losses of cultural knowledge and familial ties. \textit{Id.} at 260. Recently, some discussion of a "Maori Party" in Parliament has taken place, undoubtedly in response to a perceived, and very likely real, lack of attention to the Maori plight by the major political parties. \textit{Feasibility of new Maori Party to be Explored,} N.Z. Herald, Mar. 7, 2003, available at http://www.nzherald.co.nz.

\textsuperscript{25} Spencer, \textit{supra} note 24, at 256 (describing a Pakeha as a "person of predominately European descent").

\textsuperscript{26} \textit{Id.} at 257; McDowell \& Webb, \textit{supra} note 16, at 193. One eminent New Zealand jurist referred to the Treaty of Waitangi as "simply the most important document in New Zealand's history." \textit{Id.} at 189 (quoting Cooke P., \textit{Introduction, Special Waitangi Issue}, 14 N.Z.U.L. REV. 1 (1990)).


\textsuperscript{28} McDowell \& Webb, \textit{supra} note 16, at 189-94.
At a fundamental level, precisely what power the Treaty ceded to the Crown remains unclear. The British view the Treaty as establishing the Crown’s sovereignty over New Zealand. Maori disagree, seeing the Treaty as a pact endowing the Maori with a set of important rights in return for a concession to limited British governance. Even courts have treated the issue inconsistently. The Privy Council has consistently taken the British view of cession of sovereignty, while the local New Zealand courts have worked assiduously to avoid the issue where possible.

International law dictates that each language version of a treaty be given full effect. As a result, the legal meaning of the Treaty has been debated since the day of its signing, with little true agreement being reached. The English language text of the Treaty provided for a grant of full “sovereignty,” while the Maori version relinquishes “kawanatanga,” which indicates a bestowal of some amorphous right of governance on the English. The exact nature of the grant was not precisely defined, probably due to English ignorance of the Maori language in assuming “sovereignty” equaled “kawanatanga,” but historians generally regard “kawanatanga” to be a grant of power somewhat less than full “sovereignty.” The Maori version further provides a reservation of “rangatiratanga,” which represents the idea that Maori would be left “to own, use and manage Maori lands and other resources according to Maori ways.”

In addition to the disagreement over the Treaty’s meaning, it is debatable whether the Treaty is a valid document under principles of international law. To constitute a treaty of cession under

29 Id. at 197.
30 Id. Two treaties were signed: one in English and one in Maori. Id.
31 Id.
32 See REBECCA M. M. WALLACE, INTERNATIONAL LAW 230 (1992) (describing the practices for interpreting treaties authenticated in two or more languages).
34 Wiessner, supra note 3, at 70.
35 Id.
36 Id.
international law, the signing parties must possess: (1) international legal personalities; (2) an intention to act under international law; (3) an agreement; and (4) the intention to create legal, not merely moral, obligations. The pivotal question remains whether the Maori people possessed an international legal personality, otherwise known as statehood, at the time the Treaty was signed. Many orthodox scholars argued that the signatory Maori chiefs were unable, under international law standards, to enter into a treaty of cession. In an authoritative text on the subject, Lord McNair wrote:

According to the modern doctrine of international law, an agreement made between a state and a native chief or tribe cannot be regarded as a treaty in the international sense of the term; nor can it be said that such an agreement produces the international legal effects commonly produced by a treaty.

Other writers have supported this interpretation and have argued that since Maori chiefs were unable to enter into a treaty with the British, the Treaty of Waitangi cannot, therefore, be "the legal means whereby Great Britain acquired sovereignty in New Zealand."

Not surprisingly, a number of modern writers have argued precisely the opposite. Sir Kenneth Keith, for one, confronted the "Eurocentric" ideas of nineteenth century international law:

[Eurocentrism] coincided with the general view then held by many international lawyers (after the completion of the European colonization of the Americas, Asia, and Africa) that international law had a narrow geographic scope; it did not extend beyond "the civilized and Christian people of Europe" and those of European origin.

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38 Joseph, supra note 21, at 50.
39 Id. at 49. Under principles of customary international law, the requirements for statehood are: "(a) a permanent population; (b) a defined territory; (c) a government to which the population renders habitual obedience; and (d) capacity to enter into international relations. Modern writers sometimes include two more elements: independence and sovereignty." Id.
40 Id.
42 Joseph, supra note 21, at 50.
Keith noted that between 1826 and 1910, sixty-five treaties between European countries, as well as the United States, and island peoples were given effect. Ian Brownlie has noted the "entirely normal" nineteenth century European practice of entering into binding agreements with tribal societies. Historically, New Zealand courts have consistently declined to construe the law in light of Maori customary practices. However, scholars have recently illuminated trends within the common law courts of New Zealand, where evidence indicates an increased effort by judges to construe legislation in light of Maori customs and family structure. Now, virtually all legislative debates, including the foreshore and seabed controversy, are analyzed with a mind toward the Treaty. Recently, Parliamentary legislation, after significant debate over consistency with Treaty principles, has been enacted with final provisions stating that the Bill "shall not be construed inconsistently with Treaty of Waitangi principles." Such practices almost certainly are an acknowledgement of a better organized, more politically powerful, Maori people.

C. The Waitangi Tribunal

During the late nineteenth and twentieth centuries, Maori were systematically removed from their land by political machinations coupled with an omnipresent threat of physical violence. As the legal and governmental institutions in place consistently offered no assistance, Maori increasingly turned to the principles

44 Id.
47 Id. at 74. For example, courts have become increasingly willing to modify their legal approaches to the common law property doctrines of partition and alienation in light of Maori family traditions. Id.
48 Id. at 80.
49 Id. at 79-80; see also Quentin-Baxter, supra note 18, at 52.
50 Durie & Orr, supra note 46, at 62.
embodied in the Treaty of Waitangi for protection.\footnote{id} Maori political influence gained momentum through mobilization efforts in the 1960s, culminating with the creation of the Waitangi Tribunal ("the Tribunal") in 1975.\footnote{id} The Treaty of Waitangi Act of 1975 empowered the Tribunal to hear Maori complaints about Crown practices, measure them against Treaty principles, and make recommendations to improve the relationship.\footnote{id} While the Tribunal does not create law itself, it has been called a "harbinger of things to come,"\footnote{id} and its reports are recognized for setting important precedent. In offering its formal recommendations on Government legislation, the Tribunal has consistently championed a "bicultural" approach to government that recognizes Maori people as important members of the legislative and political process.\footnote{id}

The Tribunal possesses broad powers to regulate its own procedures. Pursuant to the Treaty of Waitangi Act, the Tribunal may commission research, act on unsworn testimony, receive as evidence statements, documents, information, or other matters that would otherwise be legally inadmissible, and appoint its own counsel for a claim.\footnote{id} Although the Tribunal’s powers were slow to gain recognition, the Tribunal began to hear cases on a diverse range of political policy questions in the 1980s, including education, public works, environmental resources, town planning, and fisheries control.\footnote{id}

\textbf{D. Maori Land Ownership}

During the nineteenth century, the British firmly entrenched their political control over the whole of the island. Thus, Maori conceptions of communally-owned property,\footnote{id} which clashed

\footnote{\textit{Id.}}\footnote{\textit{Id.}}\footnote{\textit{Id.}}\footnote{\textit{Id. at 63.} The Treaty, however, is not formally recognized as a legal document in New Zealand law, and thus has no force of law. \textit{Id.}}\footnote{\textit{Id.}}\footnote{\textit{Id. at 64.}}\footnote{\textit{Id.}}\footnote{Stuart Banner, \textit{Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand}, 24 \textit{L. & Soc. INQUIRY} 807, 808 (1999). Professor Banner recognizes,}
considerably with the British system of tenurial land ownership, gradually dissipated.\textsuperscript{59}

Large portions of Maori land were appropriated in the nineteenth and early twentieth century by parliamentary acts that represented little more than pernicious land grabs.\textsuperscript{60} During the land wars, Parliament permitted the confiscation of tribal land from Maori accused of rebellion against the Pakeha government.\textsuperscript{61} The Maori Land Act of 1862 stripped them of the customary right of occupation and converted Maori land into freehold estates held for the benefit of the Crown.\textsuperscript{62} Several decades later, the 1909 Native Land Act extinguished any right of enforceability Maori land-holders may have held against the Crown.\textsuperscript{63} The Native Land Act provided that “native customary title to land could not avail against the Crown.”\textsuperscript{64} In addition to these two Land Acts, the Crown made a number of cheap land purchases from Maori chiefs who possessed a limited conceptualization of the western monetary valuations attached to the property.\textsuperscript{65}

Since the creation of the Waitangi Tribunal in 1975, protections for the Maori have increased.\textsuperscript{66} The Tribunal’s appropriately, the fundamental difficulty with using the terms “property systems” or “property rights” in a comparative setting: “To the extent that the idea of property rights implies enforcement by a central state, or a market for their transfer, the phrase is no doubt misleading as applied to precontact Maori culture.”\textsuperscript{Id.}

\textsuperscript{59} \textit{Id. at 807}.

\textsuperscript{60} Quentin-Baxter, \textit{supra} note 18, at 40.

\textsuperscript{61} \textit{Id. at 38}.

\textsuperscript{62} Wiessner, \textit{supra} note 3, at 70-71.

\textsuperscript{63} \textit{Id.}. A further example of this type of legislation was the Native Lands Act of 1865, which recognized the policy of the Act was to “encourage the extinction of such proprietary customs . . . .” \textit{Ngati Apa v. Attorney-General} [2003] 3 N.Z.L.R. 6343, para. 40 (C.A.).

\textsuperscript{64} \textit{Id.}. A further example of this type of legislation was the Native Lands Act of 1865, which recognized the policy of the Act was to “encourage the extinction of such proprietary customs . . . .” \textit{Ngati Apa v. Attorney-General} [2003] 3 N.Z.L.R. 6343, para. 40 (C.A.).

\textsuperscript{65} \textit{Joseph, supra} note 21, at 92. Professor Joseph argues that the Native Land Act both “consolidated” the \textit{Wi Parata} doctrine and “empowered the Crown to extinguish unilaterally Maori customary title over Crown land.”\textsuperscript{Id.}

\textsuperscript{66} See Carter D. Frantz, \textit{Getting Back What Was Theirs? The Reparation Mechanisms for the Land Rights Claims of the Maori and the Navajo}, 16 \textit{DICK. J. INT’L L.} 489, 492 (1998) (providing historical background about land deals negotiated by the British with the Maori). That the property would have a valuation in a strictly financial sense was a concept to which Maori were unaccustomed. \textit{See id.}

investigations and recommendations have led to important actions, including the recognition by the New Zealand government of a "trust-like" relationship with the Maori people under the Treaty.67

III. The Ngati Apa Decision

A. Background Law

New Zealand has long struggled with the problem of native property rights. In the 1877 case of *Wi Parata v. Bishop of Wellington*,68 the issue before the Court of Appeal was a common law rule that the Crown's acquisition of sovereignty over colonial lands did not extinguish "native customary property."69 The Court found this rule to be inapplicable in New Zealand.70 *Wi Parata* rested on the dubious late nineteenth century presumption held among the ruling Pakeha class that Maori lacked a sufficient social organization "upon which to found custom recognizable by the new legal order."71 Thus, in *Wi Parata*, the Court concluded:

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Maori tribes were incapable of performing the duties, and therefore of

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69 *Ngati Apa* para. 23. Prendergast C.J. considered Maori to have "insufficient social organization upon which to found custom recognizable by the new legal order." *Id.* Further: "[T]he supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice." *Id.*

70 *Id.*

assuming the rights, of a civilised community.\textsuperscript{72}

In the 1963 case, \textit{In Re Ninety Mile Beach}, the Native Land Court, the precursor to the Maori Land Court, investigated Maori customary title in the foreshore and concluded that “Maori customary title to land depended ‘wholly on the grace and favour’ of the Crown.”\textsuperscript{73} In recognizing full Crown ownership in the foreshore, \textit{Ninety Mile Beach} relied on the controversial rule announced in \textit{Wi Parata}.\textsuperscript{74}

Among those in the common law world, New Zealand’s stance on native property rights, adopted in \textit{Wi Parata} and affirmed in \textit{Ninety Mile Beach}, was in the distinct minority.\textsuperscript{75} Courts in the United States, Great Britain, Canada, and Australia had, in a line of cases dating as far back as 1823, applied a rule that “native customary title, until lawfully extinguished, encumbers the radical title claimed by the Crown on the assumption of sovereignty . . . .”\textsuperscript{76} The \textit{Wi Parata} doctrine did not escape criticism by the Privy Council,\textsuperscript{77} which, though centered in

\textsuperscript{72} Wi Parata, [1877] 3 N.Z. Jur. (N.S.) S.C., at 77.
\textsuperscript{73} Brookfield, \textit{supra} note 9, at 34.
\textsuperscript{75} Brookfield, \textit{supra} note 9, at 295.
\textsuperscript{76} Id. \textit{See also} Mabo v. Queensland, 175 C.L.R. 1 (1992) (preserving the land entitlement of the inhabitants of the Murray Islands as native title); R. v. Sparrow [1990] 1 S.C.R. 1075 (stating that an aboriginal fishing right was not extinguished by government regulations). \textit{But see} Johnson v. Mc’Intosh, 21 U.S. (8 Wheat.) 543 (1823) (ruling that an aboriginal title to lands granted to private individuals cannot be recognized in United States courts), \textit{questioned in} Alabama-Coushatta Tribe v. United States, 28 Fed. Cl. 95 (Fed. Cl. 1993). Professor Brookfield notes that the \textit{Ninety Mile Beach} rule was “far from the widely accepted understanding of the nature of property rights of a native people who have been colonized by the British Crown.” Brookfield, \textit{supra} note 9, at 295.
London, was New Zealand's court of final appeal. Despite harsh criticism, the case was never expressly discredited until the Ngati Apa decision, where the Court of Appeal adopted a view in line with the majority of common law nations.

B. The Ngati Apa Decision

1. Procedural History

In 1993, the Maori Land Court was established and granted jurisdiction to hear land claims to determine the status of land under the Maori Land Act ("the Act"). Four years after its creation, several Maori iwi, or tribes, brought suit in the Land Court in an effort to have the foreshore and seabed of the Marlborough Sounds region declared Maori customary title under common law. Under the terms of the Act, if the Land Court issues a declaration of customary title, the Court may then seek an investigation of title to the land and, at its discretion, grant an order to vest the land as a Maori freehold estate to the persons found to be entitled to it. Granting an interim decision, the Land Court recognized it had jurisdiction to investigate the title of the foreshore and seabed, although it reserved judgment on the specifics of the case at bar. On appeal, the case went to the Maori Appellate Court, then to the High Court, and finally to the Court of Appeal for clarification of several points of law.


80 Id. para. 2.

81 Id. para. 3.

82 See N.Z. BUSINESS ROUNDTABLE, supra note 74, at 5 (focusing on a broad analysis of the public policy issues raised by the Ngati Apu decision).

83 See id.

84 Ngati Apa at para. 5. The Maori Land Court and Maori Appellate Court are courts of limited jurisdiction, while the High Court and Court of Appeal are courts of general jurisdiction.
2. Analysis

In the Court of Appeal, the Crown challenged the Maori Land Court’s ruling by invoking the reasoning of Ninety Mile Beach and Wi Parata.\(^{85}\) In Ngati Apa, the Court forcefully rejected Ninety Mile Beach and Wi Parata, declaring the rule to be “wrong” and proffering that it “should not be followed.”\(^{86}\) Notably, in overruling Ninety Mile Beach, the Court made clear that Ngati Apa did not represent a “modern revision” of the law but rather that the Ninety Mile Beach Court had been incorrect from the time the decision was handed down.\(^{87}\)

The Court of Appeal decision only addressed whether the Maori Land Court had jurisdiction to investigate native \(iwi\) claims of customary title in the foreshore and seabed of New Zealand’s waters.\(^{88}\) The Court declined to reach the second issue on appeal: whether the law actually recognized “any Maori customary title to all or any part of the foreshore.”\(^{89}\)

By deciding the case without addressing this second issue, the Court avoided delving into two delicate legal queries.\(^{90}\) First, the judges avoided ruling on the effect of the Treaty of Waitangi Fisheries Claim Settlement Act of 1992 on customary law claims.\(^{91}\) This Act ostensibly “settled Maori claims to commercial fishing, clarified Maori rights to customary or non-commercial fishing, and discharged the Crown’s obligations in respect to Maori commercial fishing interests under the Treaty of Waitangi.”\(^{92}\) Some Maori customary interests, according to the Court, may have been “affected by the terms of the settlement,”\(^{93}\) although the Court avoided any in-depth analysis of this issue. Second, the Court reserved judgment on the vitality of the

\(^{85}\) In Re Ninety Mile Beach [1963] N.Z.L.R. 461.
\(^{86}\) Id.
\(^{87}\) Id.
\(^{88}\) Id. para. 90.
\(^{89}\) Id. para. 6 (emphasis added).
\(^{90}\) Brookfield, \textit{supra} note 9, at 297.
\(^{93}\) Ngati Apa para. 10.
Foreshore and Seabed Endowment Revesting Act of 1991,\footnote{See id. para. 64-76.} which some academics have argued cannot be reconciled with the Maori Land Act of 1993.\footnote{Brookfield, supra note 9, at 297.} The Revesting Act purports to “revoke certain endowments of foreshore and seabed and re-vest those endowments with the Crown.”\footnote{\textit{Ngati Apa} para. 64.} Whether Maori customary land is included as part of the Revesting Act is unclear at this point,\footnote{Brookfield, supra note 9, at 297.} and the issue likely requires further litigation before its relevance to the Court’s decision may be discovered.

IV. The Government’s Response to \textit{Ngati Apa}

Since \textit{Ngati Apa} was handed down in June 2003, the debate on the issue of the foreshore and seabed has been both broad and fierce. Asserting its sovereignty, the Government responded to the Court of Appeal by proposing a re-ordering of the foreshore and seabed legal framework that would undermine the \textit{Ngati Apa} decision.\footnote{See \textit{Foreshore and Seabed: A Framework}, supra note 5, at 1-3.}

\textbf{A. The Government’s August Proposal}

In light of New Zealand’s absolute Parliamentary supremacy, the Government is free to return the law to its pre-\textit{Ngati Apa} roots, provided it culls the votes necessary for the passage of legislation on the issue.\footnote{See \textit{Joseph}, supra note 21, at 472.} Just two months after the Court of Appeal decided \textit{Ngati Apa}, the Government issued a blistering rebuke of the new legal framework established in the decision.\footnote{See Richard Boast, \textit{Foreshore and Seabed: Latest Developments}, [2003] N.Z.L.J. 404 (2003). Boast incredulously notes that the titling of the document is misleading. \textit{See id.} (“[\textit{Government Proposals for Consultation}] was not, or was not only, a set of ‘proposals.’ It was an announcement that certain decisions had already been taken.”).

(1) \textit{Principle of Access}: The foreshore and seabed should
be public domain with open access and use for all New Zealanders;

(2) Principle of Regulation: The Crown is responsible for regulating the use of the foreshore and the seabed on behalf of all present and future generations of New Zealanders;

(3) Principle of Protection: Processes should exist to enable the customary interests of whanau, hapu, and iwi in the foreshore and seabed to be acknowledged and specific rights to be identified and protected;

(4) Principle of Certainty: There should be certainty for those who use and administer the foreshore and seabed about the range of rights that are relevant to their actions.\(^\text{101}\)

The Government further clarified its intent to bypass the Ngati Apa framework by establishing a policy that would eliminate all private title in the foreshore and seabed as well as remove any ability for Maori to obtain a freehold title from a customary property interest.\(^\text{102}\) The principle of access appears to contemplate a desire by the Government to appropriate all existing private titles in the foreshore. Such private titles are thought, however, to be limited in number because the law governing Crown land grants presumes “that a grant bounded by the coast takes its boundary at high water mark.”\(^\text{103}\) Nevertheless, all sides agree that if an iwi currently possesses a private right of title to a section of the foreshore, then the Crown would be required to pay just compensation for seizing the title.\(^\text{104}\)

Following the release of the Government Proposals for Consultation, the Government held a number of consultation hui\(^\text{105}\) with Maori throughout the country.\(^\text{106}\) Non-Maoris were not included in the hui,\(^\text{107}\) but the Government allowed any individual or organization to submit a paper offering comment on the

\(^{101}\) Id.

\(^{102}\) Id.

\(^{103}\) Id. See also Crown Grants Act, 1908, § 35 (N.Z.).


\(^{105}\) Hui is the Maori term for “meetings.” Boast, supra note 100, at 405.

\(^{106}\) See id.

\(^{107}\) See id.
proposed new rules. At eleven organized *hui in marae* around the country, the Government heard from nearly 200 Maori orally and received written submissions from hundreds more. Unsurprisingly, Maori overwhelmingly rejected the proposed new policy and angrily protested the lack of Maori voice in the formulation of the Government framework. Many Maori considered the consultation process to be an unmitigated disaster.

### B. Dissent Stirs and the Government Responds

Maori and non-Maori alike voiced concern with the abbreviated consultation period following the initial policy paper. Several organizations complained that the six-week deadline for submissions on the foreshore and seabed allowed no time for an in-depth review and analysis of the Government's proposals. Others faulted the failure on the part of the Government and the New Zealand television and print media to fully engage with the wider public.

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110 *Submissions Analysis*, supra note 108, at 3. Over 3,000 Maori attended. *Id.*

111 See Boast, supra note 100, at 405 (indicating that the *hui* were a fairly predictable failure).

112 See *Submissions Analysis*, supra note 108, at 11 (denoting Maori dissatisfaction with the proceedings).

113 *Id.* at 9-11.

114 *Id.* at 11. St. Columba's Havelock North Environmental Group, for example, explained their frustrations with the speedy process this way:

> Our group has given the report initial consideration but feels it has not had the time to fully grasp or explore all the implications. We believe that the issue needs very careful thought, that is has the potential to be very divisive, and that Maori deserve both the courtesy of adequate time for consideration and a fair hearing.

*Id.* at 9.

115 *Id.* at 7-10. One submission, from a Lecturer in Land Tenure Studies, asserted that: "The media has been left as the only avenue for discussion and as such it has emphasised the sensational and radical, and been of little help in a real explanation of the
Of the written submissions proffered, fewer than 30% endorsed the four principles of the Government's policy proposal.\(^{116}\) Despite widespread opposition to the new foreshore and seabed framework, the Government forged ahead. After the Government reviewed the written submissions and the hui were concluded, Prime Minister Helen Clark, on December 17, 2003, announced the Government's formal proposal to re-order the ownership in the foreshore and seabed “in the best interests of all New Zealanders.”\(^{117}\) Prime Minister Clark noted that the foreshore and seabed, under the new policy, will be held in perpetuity “by the people of New Zealand, with open access and use for everybody.”\(^{118}\)

Guided by the four principles set forth in the Government’s August proposal,\(^{119}\) the Government’s December proposal framework seeks to vest ownership of the foreshore in “all New Zealanders.”\(^{120}\) To effect this policy, the Government proposed the establishment of a “public domain” title: “Current provisions in law which deem to vest the foreshore and seabed in the Crown will be repealed and replaced with a public domain title, vesting the full legal and beneficial ownership of the land in the people of New Zealand.”\(^{121}\)

The new proposal carefully delineates between the statutory and common law concepts of customary title.\(^{122}\) The Government is seeking to develop a statutory conception of customary title that

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\(^{116}\) Id. at 17. The Government Submission Analysis explained: “Many respondents were strongly opposed to the four principles, including almost all Maori and many non-Maori” (emphasis added). Id.


\(^{118}\) Id.

\(^{119}\) See N.Z. BUSINESS ROUNDTABLE, supra note 74.

\(^{120}\) N.Z. GOV’T, Foreshore and Seabed: Frequently Asked Questions and Answers, Dec. 17, 2003, available at http://www.beehive.govt.nz/foreshore/foreshore-seabed.faq.pdf. Note that those who own private title to various areas of the foreshore and seabed under the Land Transfer Act will retain that title. Id. at 1. Those lands under private ownership are relatively few. Id. at 3.

\(^{121}\) Id. at 2.

\(^{122}\) See id.
will run concurrently with the public domain title in the entirety of the foreshore and seabed.\textsuperscript{123} Under the proposed legislation, the statutory title would: (1) recognize that the customary title holder has an ancestral connection over a particular area of the foreshore and seabed; (2) provide the holder “an enhanced ability to participate in relevant local and central government decision making processes” relevant to the titled foreshore area; and, (3) include “annotations that identified any specific customary rights” as identified by the Maori Land Court.\textsuperscript{124}

The Government’s proposal ultimately abrogates all potential Maori claims of common law customary title in the foreshore and seabed\textsuperscript{125} and, thus, effectively legislates-away the core holding of \textit{Ngati Apa}. In many respects, the Government’s December proposals represent a compromise.\textsuperscript{126} Though Maori were stripped of potential private freehold ownership rights in the foreshore and seabed, they were ceded a position of authority in the debate over future uses of the area.\textsuperscript{127} Whether this represents an equitable trade-off is decidedly unresolved.

V. The Waitangi Tribunal’s Response

\textit{A. The Waitangi Tribunal Weighs In}

In late 2003, in response to the \textit{Ngati Apa} decision and the Government’s proposals, several claimants brought an application for urgent inquiry before the Waitangi Tribunal. Hearings were scheduled for six days at the end of January 2004, and in March, the Tribunal issued its preliminary “Findings and Recommendations.”\textsuperscript{128} Before the Tribunal began its examination of the substantive claims regarding the breach of the Treaty of Waitangi, it acknowledged the Government’s ultimate authority on the issue “to do what it wishes.”\textsuperscript{129} At the same time, however, the Tribunal gently implored the Government to carefully consider its

\begin{enumerate}
\item \textit{Id.} at 4-5.
\item \textit{Id.} at 4.
\item \textit{Id.}
\item \textit{Id.}
\item Brookfield, \textit{supra} note 9, at 37.
\item \textit{Id.}
\item \textit{TRIBUNAL REPORT, supra} note 1.
\item \textit{Id.} at xii.
\end{enumerate}
findings that the proposed new foreshore and seabed policy breaches the Treaty of Waitangi.\(^{130}\)

First, the Tribunal found that the Government’s proposal breaches Article Two of the Treaty of Waitangi. The English language version of Article Two of the Treaty guarantees Maori “full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and such other Properties as they may collectively or individually possess.”\(^{131}\) According to the Tribunal, Government’s policy will remove courts’ jurisdiction to grant customary title in the foreshore and seabed.\(^{132}\) The restriction on Maori being able to enter a court to have a property interest declared represents a breach of this Article, under Tribunal analysis.\(^{133}\)

Next, the Tribunal found fault with the Government under the “equal treatment” doctrine of Article Three. Article Three provides: “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.”\(^{134}\) The Tribunal again premised its reasoning on the Government’s proposed abolition of Maori common law rights in the foreshore and seabed.\(^{135}\) With the removal of these common law rights, Maori will no longer be able to claim fee simple title in the Land Court.\(^{136}\) As a result, Maori will be stripped of the right to enter a court to have a claim enforced by judicial decree.\(^{137}\) Since no non-Maori’s land is affected, the Government’s policy, the Tribunal argues, wrongly abrogates Maori claims only and, thus, represents a violation of the principle of equal treatment.\(^{138}\)

Under the Treaty, the foundation of the Crown-Maori relationship lies in the principle of reciprocity, which implies each

\(^{130}\) Id. at xiv-xv.
\(^{131}\) Id. at 127.
\(^{132}\) Id. at 128.
\(^{133}\) Id.
\(^{134}\) Id. at 129.
\(^{135}\) See id.
\(^{136}\) Id.
\(^{137}\) Id.
\(^{138}\) Id.
party both receives and owes certain privileges and obligations. Courts have described the relationship as something of a “partnership” with each partner owing the other the “utmost good faith, which is the characteristic obligation of partnership.” Thus, the Tribunal concluded with the finding that the Government violated the partnership ideal of good faith by appropriating Maori property rights: (1) before they were even clearly defined; (2) without consent; and (3) in the absence of exigent circumstances, such as war. The Tribunal harshly rebuked the Government for an unfairness “of a character that flies in the face of the norms of good government in developed societies,” faulted the Government for appropriating a property right without just compensation, and found the process inherently prejudicial, declaring that Maori citizenship had been devalued and placed in the position of a lesser class.

B. The Tribunal’s Recommendations — But Will the Crown Listen?

The Waitangi Tribunal concluded its report with several recommendations. The first recommendation is simply entitled The Longer Conversation. The Tribunal noted that the

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139 Id. at 130. The Tribunal has in the past noted: “The basic concept [of the Treaty] was that a place could be made for two peoples of vastly different cultures, of mutual advantage, and where the rights, values, and needs of neither would necessarily be subsumed.” Id.

140 Id. at 130-31.

141 Id. at 131.

142 Id.

143 Id. at 136.

144 Id. The Tribunal concluded: “This discrimination provides the basis for an enduring and justified sense of being wronged, and marginalises Maori in a way that we fear will threaten the harmony of race relations. The prejudice to Maori—and indeed to our society as a whole—can hardly be overstated.” Id. at 136-37.

145 See id. at 139-43.

146 Id. at 139. Auckland University Associate Professor of Law David Williams favors a “longer conversation,” and calls the Government’s Foreshore and Seabed Bill an interruption of “due process.” David Williams, Controversial Legislation Needs Further Discussion, N.Z. HERALD, May 6, 2004, available at http://www.nzherald.co.nz. Professor Williams faults the Government’s lawyers for being ill-prepared for the Ngati Apa ruling, despite the fact that the legal reasoning underpinning the decision is essentially in line with the trend in the common law in other Commonwealth countries.
complexity of the issues underlying the foreshore and seabed debate warrant a "longer conversation" in resolution of the controversy.\textsuperscript{147} In addition, the Tribunal noted that the parties may still reach a settlement agreement.\textsuperscript{148} In this author's opinion, an agreement which arrives with input from both poles seems superior to a policy enacted in a summary fashion by a controlling political bloc-coalition.

The Tribunal's second recommendation is for the Government to take no action.\textsuperscript{149} Under this approach, the courts would be free to run their course on the foreshore and seabed issue, allowing for a better-tailored policy approach from the Government when the time is appropriate, after the issues have been clearly delineated by the litigation.\textsuperscript{150} The government's current proposal seeks to legislate against concerns that are entirely theoretical at this point in time.\textsuperscript{151} According to the Tribunal, once the cases have been subject to the judicial process, the Government will then have a better idea of the needs and aspirations on both sides of the debate.\textsuperscript{152}

In the final analysis, the most important suggestion the Tribunal offers may be one in which the Government and the Maori are forced to spend time with each other to work through the issues.\textsuperscript{153} The Tribunal concluded that the two sides are not really as far apart as they might think and that a dialogue between the Government and Maori would create a cohesive policy from which all New Zealanders truly benefit.\textsuperscript{154}

VI. Conclusion

In delivering its proposed policy, the Government worked

\textit{Id.}  
\textsuperscript{147} TRIBUNAL REPORT, \textit{supra} note 1, at 139.  
\textsuperscript{148} Id.  
\textsuperscript{149} Id.  
\textsuperscript{150} Id. at 140-41.  
\textsuperscript{151} Id. at 140.  
\textsuperscript{152} Id. at 141.  
\textsuperscript{153} Id. at 144.  
\textsuperscript{154} Id. Concludes the Tribunal: "Whatever happens, we hope for an outcome that is faithful to the vision of the Treaty: two peoples living together in one nation, sharing authority and resources, with fundamental respect for each other." Id.
assiduously to convince the public that the new foreshore and seabed framework was "consistent with the principles of the Treaty of Waitangi." Following the release of the Waitangi Tribunal’s report on April 8, 2004, the Government introduced the Foreshore and Seabed Bill for full debate before Parliament. In line with the Government’s proposals, the proposed Foreshore and Seabed Bill would vest “ownership of the foreshore and seabed in the Crown.” In conjunction with the introduction of this legislation, the Prime Minister confirmed the Government’s intent to keep the foreshore and seabed free from private title: “Ownership of the foreshore and seabed has long been considered to lie with the Crown. These areas are important to all New Zealanders and everyone must be able to use and enjoy them now and in the future.” Maori may, however, apply for “ancestral recognition” that will lend them an undefined voice in the management of New Zealand’s coast.

Public hearings on the Foreshore and Seabed Bill are in progress, although opponents of the measure have been vexed by the Foreshore Select Committee’s decision to hold hearings in only New Zealand’s largest cities: Wellington, Christchurch, and Auckland. The Government has received more than 4,000 submissions on the Bill. The chief substantive law complaint by Maori and many non-Maori was that the proposals breached the

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155 Foreshore and Seabed: A Framework, supra note 5, at 1.
Treaty and violated New Zealand law.\textsuperscript{162} Many powerful interest
groups oppose the Bill, including the Seafood Industry Council,
the New Zealand Maori Law Society, the New Zealand Business
Roundtable,\textsuperscript{163} and the Treaty of Waitangi Fisheries
Commission.\textsuperscript{164} Thus far, the Government has heard complaints
from a Maori Studies professor and the chief executive of the
Maori Language Commission that the Foreshore and Seabed Bill
could trigger civil war in New Zealand.\textsuperscript{165} In addition,
Transpower, the national electricity operator, has warned that the
Bill could "jeopard[ize] the long-term and secure transmission of
electricity around the country."\textsuperscript{166} Peace Movement Aotearoa
criticized the "essentially meaningless set of new 'rights'" created
by the Bill.\textsuperscript{167} Maori tribal representatives condemned the

\begin{enumerate}
\item\textsuperscript{162} \textit{Submissions Analysis, supra} note 108, at 11.
\item\textsuperscript{163} \textit{Id.} The Business Roundtable is generally concerned that presently existing
private property rights be upheld, and that the courts are the correct place for Maori to
pursue claims to title. \textit{Id.}
\item\textsuperscript{164} \textit{Id.}
\item\textsuperscript{165} Auckland University Professor of Maori Studies Margaret Mutu warned of a
coming "civil war" over the Government's proposed Foreshore and Seabed Bill.
Professor Mutu remarked: "The warning by a senior civil servant of the inevitability of
civil war if this bill is enacted is not hyperbole." Simon Collins, \textit{'Bloodshed' if Seabed
Bill Passed, Professor Warns}, N.Z. HERALD, Aug. 26, 2004 available at
http://www.nzherald.co.nz. Professor Mutu compared the situation in New Zealand to
Israel and Palestine. Ruth Berry and Jon Stokes, \textit{Maori Leader Chides Mutu for
http://www.nzherald.co.nz. Professor Mutu's remarks were denounced by many,
including the Waitangi Fisheries Commission Chairman, who labeled the remarks "a
gross distortion" and "appalling." \textit{Id.} The chief executive of the Maori Language
Commission, Haami Piripi, has made similar remarks to Professor Mutu's. In a written
submission on the Foreshore and Seabed Bill, Piripi stated,

\begin{quote}
In the face of its own Court of Appeal decision, a Waitangi Tribunal
recommendation, and the overwhelming objection by Maori people, the
Government had continued down a path of action which is confiscating in
nature and contrary to the principles of natural justice . . . . This country could
be brought to its knees by internal conflict and civil war over the coming
decades as a direct result of this bill.
\end{quote}

Audrey Young, \textit{Clark's Anger Subsides of 'Civil War' Submission}, N.Z. HERALD, Aug. 3,

\item\textsuperscript{166} Ruth Berry, \textit{Foreshore Bill 'Threat to Electricity,'} N.Z. HERALD, July 29, 2004,
\item\textsuperscript{167} Peace Movement Aotearoa, Foreshore and Seabed Information: The Foreshore
Government’s plan as a veiled attempt at expropriating private property rights.\textsuperscript{168} Three different institutions with three different outlooks weighed in on the issue of Maori customary title in the foreshore and seabed. The only opinion that counts is the Government’s, however.\textsuperscript{169} If nothing else, this issue raises fundamental questions of fairness. Under New Zealand’s system of parliamentary sovereignty, it seems as if no check exists where the Government seeks to hurry through legislation with a speed that raises legitimate questions. The foreshore and seabed debate is premised on a difficult and highly technical body of law. That in a matter of ten months, a landmark court ruling was issued, a wholly new Government policy was set down, and an independent commission was able to conduct hearings and write a massive report boggles the mind and forces one to consider whether the Government’s actions have been in good faith. The Government’s Foreshore and Seabed Bill has been roundly condemned by groups representing vastly disparate interests. Perhaps it is time to heed the advice of those level-headed participants who advocate a “longer conversation” to work out the kinks in this plan.

\textbf{CHRISTIAN N. SIEWERS, JR.}


\textsuperscript{169} See discussion \textit{supra} part II.A.