

CHAPTER 9

THE RIVER AND THE TREATY

9.1 TREATY FINDINGS

9.1.1 Introduction and claim summary

Section 9.1 provides a Treaty audit of matters in chapters 1 to 8 with findings on the claim. Legal argument and key summaries are given in section 9.2.

The essence of the claim is:

- that Atihaunui-a-Paparangi have the customary authority, possession, and title to the lands, waters, and fisheries of the Whanganui River;
- that these were guaranteed to them by the Treaty of Waitangi and have not been willingly relinquished;
- that the claimed authority, possession, and title have been eroded or displaced by Crown laws, policies, and practices inimical to the Treaty; and
- that they continue to be eroded or displaced by current Crown laws, policies, and practices.

We find that these claims are established.

9.1.2 The title to the river in Treaty terms

At 1840, the Whanganui River and its tributaries were possessed by Te Atihaunui-a-Paparangi. That has long been recognised in the courts (see secs 9.2.1, 9.2.2).

The river system was possessed as a taonga of central significance to Atihaunui. The meaning of taonga is discussed in section 9.2.3. The river was conceptualised as a whole and indivisible entity, not separated into beds, banks, and waters, nor into tidal and non-tidal, navigable and non-navigable parts. Through creation beliefs, it is a living being, an ancestor with its own mauri, mana, and tapu. To Atihaunui, it was their ‘tupuna awa’.

The river, like lakes, swamps, and inshore seas, was no different from the land in that respect. These were all part of the people’s inheritance.

In 1990, the Planning Tribunal (now the Environment Court), on the Maori evidence before it, reached the same conclusion – the river was a taonga (see ch 8). Independently of the Planning Tribunal’s opinion, and without relying on Maori evidence that might be seen as self-serving, we reached the same conclusion in chapter 2.

The river was held by both the hapu and the people as a whole. The underlying social structure was outlined in chapter 2. Individual uses and hapu controls

That which was possessed

A taonga

Distribution of control

applied at different places, changing over time, but the hapu were part of one body and the river was as the aortic artery of their one heart.

Though the hapu were autonomous, ultimate control and rangatiratanga of the river vested in the single descent group. Other descent groups had interests as well. Atihaunui would be last to deny their interests, as the opening proceedings at Putitiki showed (see sec 1.4.3). Their interests, however, were not as direct.

The balance between local autonomy and central control depends on the matter in hand. In a world where relationships and utu prevailed, Western structures for political unity were not required. Songs, stories, carvings, and genealogies of symbolic value gave vent to the sentiment of unity and the river's unifying force. They represented an ethical code for unity as required.

**Whanganui River
Maori Trust Board**

These matters were addressed at section 1.5 and especially in chapter 2. For the reasons given, at this time Maori river interests should be represented through the Whanganui River Maori Trust Board.

**Case concerns
cultural survival and
race relationships**

The case is also about cultural survival. It includes but is larger than private property rights. It seeks recognition of the way that Maori relate to other people and to the environment, and how this informs race conflict and environmental care today. At heart is the ethic of respect.

The claimants' relationship with the river, its control of their lives, and its identity value were described in terms of the traditional Maori cosmos in chapter 2 and were expressed in the words of the people today in chapter 3.

**Significance of
relationships**

The significance of relationships is crucial to understanding Maori culture, a key to unlocking the past. The relationship that Maori sought with Europeans, as dictated by their customs, was considered in chapters 4 and 5. Where the latter sought ownership and political control, the former sought trade, reciprocity on a continuing basis, and something closer to a partnership. Elements still survive of the traditional Maori preference for a society based on working relationships rather than bureaucratic controls. But in time, the need arose for new forms of social and political organisation.

**Ownership now
required**

Ownership is now required. Customary rights and interests are not enough in an English legal framework. In light of the experience set out in chapters 5 and 6, when authority was imposed from outside by the settler governments and governments assumed rights of river control, attitudes changed, and consonant with the now prevalent English law, Atihaunui sought ownership of the river. The consequential litigation from 1938 is described in chapter 7.

**Waterway and
fishery**

Applying the criteria of English law to the reality on the ground, Atihaunui held the river as a waterway, not a public road. It was in all respects a private, tribal waterway and access was controlled. It was also a fishery, and private fisheries are protected in English law just as they are protected in the Treaty of Waitangi.

Water

Included in that possessed was the water. The river would be meaningless without it. The river was a waterway. The whole river was a fishery. The water was the habitat of creatures to whom Maori were related, from fish to taniwha. The emphasis on water purity for ritualistic and other reasons was described in

section 2.6. The water was treasured as the gift of Ranginui just as much as the land was respected as part of Papatuanuku.

It was said by Europeans that, as a freely flowing thing, water in its natural state could not be possessed. The question, however, is: What did Maori possess in terms of their own – not English – law, prevailing when the Treaty was signed? Adopting the holistic thinking of Maori, water was an integral part of the river that they possessed. Though its molecules pass by, the river, as a water entity, remains. The water was their water, at least until it naturally escaped to the sea, at which point its mauri changed. (This matter was considered at section 2.8.1 and see also section 9.2.9.)

Article 2 of the Treaty of Waitangi guaranteed to Maori that which they in fact possessed. In English, it said:

Application of the Treaty of Waitangi

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 . . .

The Maori text provided:

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangtiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa . . .

In other words, the Maori text guaranteed to Maori their full authority over lands, habitations, and all other things treasured by them (until they wished to dispose of them). Combining the texts, the river is a taonga and property which Maori possessed. Transposing possession to English law as discussed at section 2.8.1, it is a taonga that they owned.

Rivers in the Treaty

Context supports this conclusion. ‘Lands and Estates Forests Fisheries and other properties’ is a broad phrase, which, when read with the opening concern in the preamble to preserve the ‘property’ and ‘just rights’ of Maori, infers that the whole resources that a tribe possessed were intended. It is relevant to ask if the rangatira at Putiki would have signed the Treaty had they been advised that the river would pass to the Crown, and reasonable to assume a negative reaction.¹

‘Taonga’ in the Maori text is a word of broad application. As the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* noted, ‘estates’, ‘forests’, and ‘fisheries’ are not specifically mentioned in that text, but ‘taonga’ covers them all.² It also covers rivers. While exclusivity is not expressed, it is inherent in both ‘taonga’ and ‘rangatiratanga’.

We find that in Treaty terms Atihaunui had ownership of, and rangatiratanga – control or authority – over, the Whanganui River. An appreciation of

Finding

1. The same test was applied in Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 5.5.2.
2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, sec 10.3

rangatiratanga is given in section 9.2.4. It includes but is much larger than that which is referred to as guardianship, stewardship, or kaitiakitanga.

Their possessions

Further, the property rights that were guaranteed by the Treaty were the rights that Maori had. They were guaranteed their possessions, not possessions at English law. The test of possession in this context is a question of fact, not law, and the nature of the possession is not to be judged by property rights in England. There, lands had been largely enclosed (though there were still many commons) and ran, according to the case, to the water's edge or a river's centre line. Therefore, rivers could be owned in parts. Enclosure of rivers for individual possession was as foreign to Atihaunui experience as land enclosures. That which they possessed was the river as a whole.

Maori law applies

Supports for this approach are the oral undertakings to respect Maori law. In the record of the Treaty debate, there is reference to the importation of the Queen's law for the maintenance of peace, which Maori were pleased to hear, but they also expected that their own law would be recognised as well. The Governor's response was to promise that recognition. The particulars are set out in section 9.2.7.

American precedent is undoubtedly correct in asserting that, in treaties with indigenous people of oral traditions, spoken promises are as much a part of the treaty as those written in the formal document. It cannot then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws then ceased to apply. The Treaty is, rather, authority for the proposition that the law of the country would be sourced to two streams.³

Application of English Laws Act 1858

Wittingly, or unwittingly, the English Laws Act 1858 allowed for this duality, though it was not always recognised in practice. Made retrospective to 1840, the Act provided for English law to apply, but only 'so far as applicable to the circumstances' of the colony. It was thus arguable that English law did not apply if the effect was to prejudice existing Maori interests arising under Maori law.

This appears to have been the view of Chief Justice Stout in *Baldick v Jackson*.⁴ It was considered that the Crown's right to whales was not applicable to the circumstances of the colony in view of the Maori claim to them. In recent cases considered in chapter 2, it was also a reason for considering that navigable rivers and lakes in recently settled countries are not owned according to tenets of English law.

Fisheries

Though the Whanganui River was also a fishery and fisheries too were protected, in terms of the *Report on the Muriwhenua Fishing Claim*, this provides not an exclusive right to the river so much as a right to be protected in the business and activity of fishing. The fishing guarantee is thus more relevant to a further contention in the claim – that fishing practices have been deleteriously affected by the diversion of river waters. We find that they have been so affected, by river clearance work for steamers, direct pollution through discharges and land

3. David V Williams, *Te Kooti Tango Whenua: The Native Land Court, 1864–1909*, Wellington, Huia Publishers, 1999, pp 116–119

4. *Baldick v Jackson* (1910) 30 NZLR 343 (sc)

clearance, and indirect pollution through water abstraction from the Tongariro power scheme, as seen in chapters 3 and 6.

Continuing Maori control was also guaranteed. As stated by the Waitangi Tribunal in the 1985 *Report of the Waitangi Tribunal on the Manukau Claim*, rangatiratanga in the Maori text denotes more than a right to use and enjoy and covers both possession and authority and the right to control and manage according to one's own preference. It is a question of mana. We accept in that respect claimant counsel's submissions.⁵ Their interest was larger than the mere right of user for which Crown counsel contended (see also sec 9.2.4).

Control

9.1.3 Treaty principles

Four broad Treaty principles now well established in Treaty jurisprudence are applicable to this case. The first is that the Maori gift of governance to the Crown was in exchange for the Crown's protection of Maori rangatiratanga. Thus, governance is a qualified sovereignty. The same may be said of rangatiratanga in Treaty terms.

Sovereignty
constrained

The second is that active protection is required. The duty in this case is actively to protect Atihaunui river interests and their rangatiratanga or autonomous control. The degree of protection may vary according to the nature and value of the thing involved, but in this case the magnitude of the asset is large.

Active protection

The third is that the Crown cannot avoid its duty of active protection by delegating responsibilities to others, thus any delegation must be on terms that ensure that the duty of protection is fulfilled.

Duty on delegation

The fourth, known as the partnership principle, requires that the Crown and Maori act towards each other reasonably and with the utmost good faith.

Partnership

9.1.4 Extinguishment

No satisfactory evidence was adduced or is known to us to demonstrate that Te Atihaunui-a-Paparangi have at any time since 1840 willingly or knowingly relinquished their Treaty rights in the river. Instead, there has been an extraordinarily long record of attempts to retain those interests, as is summarised in section 9.2.5.

No willing
relinquishment

For reasons given in chapter 4, the Tribunal is also not satisfied that Whanganui Maori intended or knowingly agreed to sell the tidal reaches of the river as part of the 1848 transaction for European settlement.

McLean's deed

The effect of the Court of Appeal decision in 1962 was to determine that Maori customary interests in the Whanganui River were extinguished when the Native Land Court reformed the customary native title. This was extinguishment by a sidewind, as is further considered below.

Native Land Court
extinguishment

5. Document D18, p 17

Figure 18: View of Wanganui showing waka on the riverside at Pakaitore, circa 1870s.
 Photograph courtesy Alexander Turnbull Library (W J Harding collection, F11830½).

**Limitations of
 earlier court
 decisions**

The 1962 decision has limited value today. It turned most on the observations and advice of the Maori Appellate Court in 1958, observations unlikely to have been made if the court had before it the factual evidence and information that we have today. This is explained in section 9.2.2.

The nature of the case before us is not the same as that which was before the courts in the litigation of 1938 to 1962. Those proceedings concerned the riverbed as necessitated by statutory law; this claim concerns the river entire and the requirements of the Treaty of Waitangi. The question before the Court of Appeal was whether the Native Land Court, wittingly or unwittingly, had, as a matter of law, included the bed of the river in the title to the riparian land. The question before us is whether Maori knowingly and willingly agreed to relinquish their river interests.

The court proceedings were limited by the jurisdictional constraint that the Native Land Court could consider only land – and thus the riverbed. It prevented a necessary overview of the place of the river as a whole in the lives of the Atihaunui people.

As to extinguishment by the Native Land Court, the evidence is clear that, when the Native Land Court was operating, no one was thinking of the river, least of all the court, and neither did it enter their minds that river interests could be affected. Even afterwards, it appears, at least before the court's decision of 1962, that no one was conscious that river rights might pass upon the alienation of the riparian land, though by then the bed of the river had been taken under the coalmines legislation.

In any event, we find that Atihaunui did not agree to the Native Land Court process but had perforce to submit to it (see secs 9.2.1, 9.2.2, 9.2.12).

In law, river rights had been extinguished by the Coal-mines Act Amendment Act 1903 and also by a raft of other legislation vesting control of water uses and river management in the Crown, as described at sections 2.2, 3.3, and chapters 6 and 8. Further mention is made of these Acts below.

**Statutory
extinguishment**

None of this is extinguishment in accordance with the Treaty of Waitangi. There, the question is whether Maori freely and knowingly disposed of their customary river interests and their traditional mana or control. The first part of article 2 of the Treaty was given above. The second part guarantees Maori possession of their properties 'so long as it is their wish and desire to retain the same in their possession'. It then introduces the concept of free and willing alienations to the Crown.

**Treaty standards for
extinguishment**

A question consistent with the Maori text is whether Maori agreed to the extinguishment of their rangatiratanga over their taonga.

Extinguishment is not inferable from a willingness to share. From the record as given in chapter 4, it appears that, up to at least 1848 and for so long as their mana was recognised, Maori expected that Europeans provided for in their territory would share the river's lower reaches. Their ships brought in the desired goods and ongoing relationships with Pakeha were sought. We can find no compelling evidence, however, that, in the pursuit of this goal, Maori knowingly divested themselves of their customary interests and rights.

**Sharing is not
extinguishment**

On the contrary, Maori action, in war and in peace, and their initiatives to establish committees and land trusts and to keep out the Native Land Court, are evidence of their continuing concern to retain their tribal properties and their traditional authority, at least upriver. These matters were described in chapters 5 and 6 and are referred to in section 9.2.5. Maori action was not anti-Pakeha but anti Government control of their upriver possessions and lives. Free and willing land sales could proceed as a matter of course so long as their own status and interests were respected, and, again in accordance with tradition, so long as beneficial relationships endured.

**Evidence of Maori
assumptions of
control**

As seen in chapter 6, conversely, the Crown did not acquire the Maori river interests as the Treaty required. There was no negotiation or agreement with the assembled rangatira of the several hapu, and indeed no negotiation or agreement with anyone that was specific to the river.

**Crown's title not
founded in
agreement**

The Crown's unburdened title is by virtue of its own statutes or, in the case of the river's tidal parts, through presumptions of English law.⁶ In turn, those presumptions were probably inconsistent with the circumstances of the colony, to use words in the English Laws Act 1858, given that prior Maori interests had first to be cleared. They were also probably inconsistent with long-established principles of English law for the recognition of the laws, customs, and properties of indigenous peoples on the assumption of British sovereignty. This is sometimes referred to as the doctrine of aboriginal or native title.

**By statute and
presumption**

6. We found, at section 4.8, that Maori interests in the lower river reaches were not extinguished by the transaction of 1848.

Arm of the sea	For reasons given in section 9.2.7, we find that the application by the Crown of the common law presumption that the Crown owned the tidal reaches of the Whanganui River as an arm of the sea was a breach of the Treaty principle that obliges the Crown actively to protect Maori interests under article 2.
<i>Ad medium filum</i>	So also was the application of the <i>ad medium filum aquae</i> rule a breach of Treaty principle. The rule had limited or no application in Maori custom and could not apply to negate the tribal interest or the principle of rangatiratanga (see also sec 9.2.10).
Riparian interests and tenure reform	To the extent that the Crown may claim rights by acquisition of riparian lands from Maori, there is the caveat that the lands did not come from the tribe. They came from individuals of the tribe and that was the result of the Crown's reform of customary titles in native land legislation. These reforms were opposed by the leaders of the tribe. They subsumed tribal controls and the leaders had other plans. As considered at sections 2.8.2 and 2.8.4, the tribal interest was not extinguished by this process.
Coal-mines Act Amendment Act 1903	<p>It is arguable that tribal interests in the river were not extinguished by the Coal-mines Act Amendment Act 1903 either, but that is a complex question of law. We consider that Act in terms of the Treaty.</p> <p>Section 14 of the Coal-mines Act Amendment Act deemed all beds of navigable rivers to be and to have always been vested in the Crown, unless the Crown had granted the riverbed to someone else. This has been seen to provide the more explicit extinguishment of customary interests, yet it was not entirely explicit since its purpose was never made clear, since in the context of the principal Act the purpose may be construed as intending to regulate the mining of coal, and since its application was limited to the bed.</p> <p>Crown counsel contended that this and subsequent Acts vesting ownership of the Whanganui riverbed in the Crown was a valid exercise of the Crown's power under article 1 and thus was consistent with Treaty principles. We do not agree. Governance was conditioned by article 2 of the Treaty and could not be exercised to negate it. As an integral part of the river, the bed was also guaranteed to Maori. The right of governance carried the duty to protect Maori properties, not to take part away.</p>
An agreement required	The governing rule appears to be that the Treaty of Waitangi, whether in terms or principles, does not allow of any diminution of Atihaunui ownership and control of the river without an explicit agreement to which the Crown and Maori subscribe and of which both are fully sensible. The only possible and rare exception to this rule that might justify the Crown in overriding the fundamental rights guaranteed to Maori in article 2 would be the existence of exceptional circumstances requiring such action as a last resort in the national interest. ⁷

7. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brooker's Ltd, 1995, sec 15.2.1(3). We discuss national interest in relation to the Tongariro power scheme later in this chapter.

9.1.5 Finding

The extinguishment of the river interests of Te Atihaunui-a-Paparangi arose from acts and policies of the Crown that were inconsistent with the principles of the Treaty of Waitangi requiring the Crown actively to protect the rangatiratanga of Atihaunui in their river. It was also prejudicial to them, denying them their legal and Treaty rights, affecting their livelihoods, and involving them in extensive and debilitating protests within and outside the courts. We conclude as a result that the claim is well founded. The extent of prejudice is now reviewed.

Claim well founded

9.1.6 Impact

(1) *Legal standing*

The lack of a recognised legal standing with regard to the river was to involve Atihaunui in protracted protests and proceedings.

The protests and petitions from 1873, the obstruction of channel clearance work in the 1890s, and the gravel claims and protests that continued until the present were considered in chapters 6 and 8. As noted, these and other attempts to retain the ownership of the river are summarised in section 9.2.5. They were all part of the Atihaunui attempts to hold on to that which in terms of the Treaty was theirs, and which would have been avoided had their legal and Treaty rights been recognised from the beginning.

Protest

Then, in a further attempt to hold on to their river rights, Atihaunui were involved in exhausting litigation from 1938 to 1962. This was described in chapter 7. Atihaunui began proceedings after seven years of waiting for a Native Land Court inquiry into one of their petitions. That inquiry was never undertaken. Parliament had referred the petition to the court with a request for a response as early as possible.

Riverbed litigation

The Crown's steps to overturn decisions unfavourable to it then extended proceedings. They included special legislation to refer matters to the Court of Appeal after a report from a royal commission.

The end of the riverbed case after 24 years was not an end to all litigation or political representations. As described in chapter 8, the gravel question remained outstanding, though a royal commission had recommended compensation as early as 1950. However, gravel was not a principal issue in the negotiations that followed from 1974 to the present. The river's ownership was still the focus. The first nine years of negotiations to 1983 were inconclusive. During that period, there was also a petition to the Queen and a petition to Parliament. By the end of the first round of negotiations in 1983, Titi Tihu had been involved in river petitions and litigation for over 50 years.

Negotiations

After 1983, the negotiations involved as well matters relating to the Whanganui National Park and user passes. The third round of negotiations from 1990 were no more conclusive than those preceding it. These negotiations are described in chapter 8.

River flows litigation

In the meantime, Atihaunui were ignored in the administration of matters relating to the river. Recognition of their interests did not emerge until after the Waitangi Tribunal's *Report on the Motunui–Waitara Claim* in 1983, whereafter a new Treaty consciousness developed and was reflected in planning legislation.⁸ However, it provided for much less than ownership.

The Government ignored all attempts by Atihaunui to be heard on the planning and construction of the Tongariro power project between 1955 and 1971, although this work adversely affected the Whanganui River more than other rivers. They could be heard only through the litigation on minimum water flows, as allowed for in planning legislation. They appeared on the first application in 1977 and again on the second in 1987. They were a principal party in the subsequent proceedings in the Planning Tribunal in 1989 and in the appeal to the High Court in 1992. By then, the Whanganui River Maori Trust Board had been established by statute.

Pending proceedings and status

Now they face further proceedings and inquiries in an application for a water conservation order and the development of regional plans. These will be separately considered in chapter 10.

The earlier projects and proceedings were referred to in chapter 8. Collectively, they describe how in the statutory regime the full extent of Atihaunui Treaty rights remains unrecognised. They point to the need to establish ownership and control rights first. In the interim, Atihaunui are as supplicants representing only one of several competing public interests, and control and authority remains vested in the Crown, either directly or indirectly through its statutory delegates.

(2) Other losses**Property**

Losses of a property nature have already been adverted to. They include the destruction of eel weirs, the extraction of gravel, the loss of income from river use charges, and, through pollution and water abstraction, the loss of fisheries. These would all be actionable losses in tort were the private property interests of Atihaunui recognised.

Gravel

As mentioned, compensation for the extraction of gravel was recommended by a royal commission as long ago as 1950, but a settlement has not been effected. In the meantime, gravel continued to be taken and at a greater rate. In view of the findings above, Atihaunui are entitled to compensation for all gravel taken and not just that removed until the Crown took the bed in 1903. The issue of compensation is reviewed in section 9.2.6. On one assessment, Atihaunui are entitled to \$21.7 million just for 1920 to 1988.

Personal

The further cost in human terms, in loss of esteem and status, and the inheritance of a grievance that compounds over generations, is more difficult to assess. It is a loss that Professor Ritchie described, as given at section 3.2.10.

8. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989

9.1.7 Treaty breaches

Without reference to Atihaunui or, initially, with only such reference as the exigencies of peace might require, the Government passed legislation for the river's control. We would not attempt to list each and every Treaty breach that followed but refer to some in illustration of a point.

(1) Legislation specific to the Whanganui River

Legislation specific to the Whanganui River was introduced in chapter 6. The Wanganui Bridge and Wharf Act 1872 empowered the Wanganui Borough to build a bridge over the river near the town and to control the bridge and the wharf. It assumed that, by common law, the riverbed was vested in the Crown. For reasons earlier given, that assumption should not have been made. Maori appear to have been happy with the bridge but their agreement was required.

The same assumption underlay the Wanganui Foreshore Grant Act 1873 to grant part of the riverbed to the Wellington provincial superintendent and the 1874 Act to change the grant to the Wanganui Borough.

The Wanganui Harbour and River Conservator's Board Act 1876 replaced the 1874 Act and established a board to take the bridge and wharf from the borough. No provision was made for Atihaunui on the nine-member board.

The Highways and Watercourses Division Act 1858 empowered provincial councils to build bridges, dams, wharves, and the like in or beside rivers or to sell or otherwise dispose of the bed of any river that been diverted or stopped up. There was no provision for Maori agreement or compensation.

The Marine Acts of 1866 and 1867 enabled superintendents, boards, or marine boards to control or manage ports or associated works, again without Maori consent or representation.

The Harbours Act 1878 made new arrangements, but again without Maori representation on the Wanganui Board. As with earlier legislation, the Act was silent on both Treaty and customary Maori rights to the foreshore and rivers.

The Wanganui Harbour Board Act 1893 and the Harbours Act 1950 reconstituted the board in the latter case with members chosen by electors of the city and environs but without separate provision for Maori representation. The Wanganui Harbour Act 1988 abolished the Wanganui Harbour Board and passed powers and responsibilities to the Wanganui City Council. The council was obliged to establish a standing committee of members appointed by Wanganui City, the Wanganui County Council, and the Patea District Council, but again without provision for the traditional authority of Atihaunui.

The two objectives of the Wanganui River Trust Act 1891 were to preserve the natural scenery along the banks of the upper river and to keep the river fit for navigation. Section 2 of the Wanganui River Trust Act Amendment Act 1893 authorised the trust, without notice, to remove earth, sand, and metal from the river. Whanganui Maori were not consulted on the Bill, and they opposed it. Their petition was referred to a committee of the House that failed to hear any of the petitioners.

Section 5 of the Wanganui River Trust Amendment Act 1920 vested in the trust the ownership of, and the right to sell, gravel and shingle in the river under its control. There was no provision for notice or compensation.

The trust comprised representatives for the Wanganui Borough and adjoining county councils, the Wanganui Chamber of Commerce, two local members of Parliament, and a Governor's appointee. The member for Western Maori was not included, nor was any member of Atihaunui, despite the trust's work in destroying eel weirs. There was no provision for consulting them.

Section 11 of the 1891 Act expressly preserved the rights conferred on Maori by the Treaty of Waitangi. It was a general provision without teeth, largely negated by the Act's specific terms, and effectively meaningless unless a complicated and expensive case was taken to the Supreme Court with uncertain chances of success.

In 1958, the Wanganui Harbour Board was given the right to license the taking of gravel and sand from the tidal reaches of the river.

The Wanganui River Trust Amendment Act 1922 substituted a trust board for the trust members under the 1891 Act and extended its powers. Neither the member of Parliament for Western Maori nor an Atihaunui representative was included in the board's membership. Maori Treaty interests in the river were ignored or implicitly denied.

The Native Townships Act 1895 was something of a misnomer, since it created not native but European townships in places where Maori communities existed. It was an Act to promote the opening and European settlement of the interior without the need for Maori consents or purchases of Maori land. Pipiriki was established as a river town under this provision. Not more than 20 percent of the township area could be reserved for Maori. They had no representation on the governing township body.

The Scenic Preservation Act 1903 created a Scenery Preservation Commission of not more than five persons. Maori land could be taken as for a public work but without prior notice or rights of objection. A 1906 attempt to include a Maori on the commission failed. The commission was to encounter considerable opposition from Atihaunui.

Finding Indeed, we could find no evidence of recognition of Atihaunui river interests in any legislation specific to the Whanganui River. The legislation as a whole was in contravention of the Treaty of Waitangi and the Treaty principles that required the Crown actively to protect the rangatiratanga of Atihaunui in and over the river and to recognise and respect tribal autonomy over the river.

(2) The Native Land Acts

Final conclusions on the Native Land Acts are deferred in view of pending land claims. However, the operation of these Acts was eventually determinative of legal river ownership as well, though neither Maori nor the machine that drove the Act, the Native Land Court, was aware of that at the time. To the extent that the Acts led to major changes to Maori river tenure, it was done without Maori acquiescence or

knowledge. In the Atihaunui case, there was Maori opposition to the scheme as a whole. Matters relating to these Acts were reviewed in section 2.8.2 and chapter 7.

(3) General legislation for resource control

The control of the river by a series of water use laws began more than 100 years ago. These laws were introduced at sections 2.3 and 3.3. Ordinances of 1864 for water-powered flourmills and sawmills are early examples. Subsequent Acts are too many for individual assessment, but some of the more recent legislation is commented on below, and the compilation of environmental law in current statutes is reviewed in chapter 10. The Coal-mines Act Amendment Act 1903 has already been referred to.

Assumption of control

Arguments for the Crown's long-standing assertion of the right to exercise control over the river have been based on at least two assumptions. The first was that rivers were incapable of ownership save for the beds. This may represent English law but it does not reflect the Maori reality that preceded English law or the protection promised in article 2 of the Treaty.

Counsel's arguments

The second, argued for the Crown in this case, is that the control of river resources rests with the Crown under article 1, and article 2 gives no more than a right to be consulted and for Maori views to be considered. The effect deprives Maori of their authority over important tribal possessions, yet authority over possessions is what article 2 guaranteed. It is not a proper construction of the Treaty to so read article 1 as to make article 2 nugatory.

With regard to the legislation generally, however, and although there were some exceptions, especially in the case of lakes, the Crown took no adequate steps to inquire into Maori Treaty rights to natural resources prior to passing legislation. The Crown simply assumed control rights, and for the most part the Treaty of Waitangi was barely thought of.

No inquiry of Maori rights

We find that, in so far as national legislation affected the Whanganui River, the Crown took no adequate steps to ascertain that, in terms of the Treaty of Waitangi, Atihaunui owned the river and its tributaries, had never willingly relinquished their authority over them, and their interests were larger than use rights. This was inconsistent with the Treaty duty to protect those interests.

We further find that the taking of the bed of the river by the Coal-mines Act Amendment Act 1903 and succeeding legislation, and the perpetuation of the Crown's statutory title in section 354 of the Resource Management Act 1991, were and are inconsistent with article 2 of the Treaty and the Treaty principle requiring active protection of the Atihaunui ownership of the river and their authority over it (see sec 9.2.16).

Statutory constraints on customary land claims, as introduced in 1909 and continued in the Limitation Act 1950 and the Te Ture Whenua Maori Act 1993, and as more particularly described in section 9.2.13, were and are inconsistent with the principles of the Treaty of Waitangi. It was inconsistent with the Treaty to deny Maori access to law, and the Treaty principle that customary interests cannot be extinguished except upon proof of a free and willing alienation of them remains to this day.

(4) *The Tongariro power scheme and laws relevant thereto***No inquiry of Treaty rights**

The Crown proceeded with the Tongariro power development scheme and, in particular, the western diversion of the headwaters of the Whanganui River, without first ascertaining the Atihaunui Treaty rights over the river. It relied instead on an interpretation of the general law.

No consultation or agreement with Atihaunui

As considered in chapter 8, the Crown consulted with many parties claiming a river interest when proposing the power scheme. The Crown also consulted with Tuwharetoa in respect of their affected rivers and lakes. However, the Crown did not consult with the party having the 'full exclusive and undisturbed' interest in the Whanganui River in terms of the Treaty of Waitangi, and it did not include Atihaunui in the compensation payments that were made. There was a cavalier dismissal of their attempt to be heard.

In view of the finding now made that, in Treaty terms, the Atihaunui river interest remained, the Crown was under a Treaty obligation to consult with them and secure their agreement to the power project, but it did not do so.

No statutory provision

The Crown did not provide for Atihaunui ownership of the river in the Water-power Act 1903, the Public Works Act 1905, and subsequent public works legislation, including the Public Works Act 1928 and the Water and Soil Conservation Act 1967, though their Treaty rights were affected and though the Treaty required that such interests be protected.

There was no provision in the Public Works Act 1928 requiring the Crown first to consult with Maori, where Maori retained river interests, before effecting river works.

The Order in Council under section 311 of that Act authorised the Crown to raise or lower the level of the Whanganui River and its tributaries and to impound or divert their waters without the consent of Atihaunui and without consulting them. It also authorised public works access to Maori lands without notice.

The 1964 Government approval in principle to the construction of the Tongariro power development was without prior notice to or consultation with Atihaunui, although the abstraction of water from the Whanganui River was the most controversial issue to be resolved.

The Water and Soil Conservation Act 1967 contained no provision for the recognition of Treaty principles or Maori ownership of rivers when empowering authorities to determine minimum river flows. The rivers where Maori retained significant interests in terms of the Treaty of Waitangi had not been determined before this legislation was passed, as would have been necessary to fairly protect those interests. In the result, the Act afforded no recognition of the Treaty rights of Whanganui Maori to the protection of their rangatiratanga over their river.

Status in proceedings

In effect, Maori interests became no greater than those of any other public group with an interest in the river. The 1967 Act required authorities to meet as many demands as possible; gave no guidance as to the criteria to be taken into account or the relative weight to be given to competing claims; accorded no priority to Maori ownership of, or Maori values and interests in, the river; and omitted any requirement to give effect to the Treaty rights of Maori.

Instead, the need was seen to accommodate Crown interests, or interests that the Crown had assigned to ECNZ, though founded on works undertaken in contravention of the Treaty, and probably in contravention of the standards that the 1967 Act later imposed.

Accommodation of
ECNZ

The Crown has submitted that, at the time that it exercised its statutory power to proceed with the Tongariro power development and the western diversion, it was essential in the national interest to do so. A taking in the national or public interest requires at least a positive averment of that fact, however, as happens with a public work. In this case, the action was taken without prior ascertainment of the Treaty rights of Atihaunui in the river. In the result, there was no attempt to notify, seek consents, or consult, and the citizens' right of appeal to the courts was denied.

Essential in the
national interest

Had the Crown done those things, it might well have chosen other options that were open to it and avoided the grave consequences that the scheme was to have.

9.2 LEGAL ARGUMENTS AND KEY SUMMARIES

9.2.1 The long-standing legal recognition that Atihaunui owned the bed at 1840

The litigation of 1938 to 1962, described in chapter 7, resolved a central issue in this claim: that, as a matter of fact and law, at 1840 the bed of the Whanganui River was held by Atihaunui under their customs and usages. That has not been questioned since.

Riverbed ownership
at 1840

In the first hearing in the Native Land Court, Judge Browne found that the bed belonged to Whanganui Maori through whose territory the river ran as much as the land forming its banks did. At the time of the Treaty, the bed was land held by Whanganui Maori under their customs and usages.

The six judges of the Native Appellate Court unanimously upheld that decision. Judge Carr noted that 'the water and the land underneath it [was] to the Maori indivisible'.⁹ Judge Whitehead found it to be well established that by native custom all the land within the tribal boundaries of each tribe, including land covered by water, whether navigable or not, belonged exclusively to the tribe.

In 1950, a royal commissioner (a former Supreme Court judge) endorsed the opinion of Judge Browne and the Native Appellate Court that the bed was held by Whanganui Maori owners under their customs and usages and was customary Maori land.

Three of the four judges of the Court of Appeal reached a similar decision in 1954. Though 'the bed' was defined as extending from the tidal limit to the junction with the Whakapapa River, that was because the application to the Native Land Court had been so framed.

9. *Title to the Bed of the Wanganui River* unreported, 20 December 1944, Maori Appellate Court (doc A77, vol 1(3)), pp 4-5

9.2.2 Critique of 1938–62 litigation

Looking back on it, the final result of this extensive litigation turned most on the observations and advice of the Maori Appellate Court in 1958, observations unlikely to have been made if the court had before it the evidence and information that we have today.

Before considering the court's advice, we recapitulate on the Native Land Court operations as described at section 2.8.2 and also our comments at section 7.2.3. When the land court heard evidence on who was entitled to various blocks of land, Maori made their claims on the basis of their forebears' use of it. For the most part, they need not have bothered, for the court generally decided on evidence of actual use and occupation of the land in question; but the ancestral evidence was received and entertained.

However, in their affairs generally, Maori put up remote ancestors for the tribe as a whole when speaking for the tribe, since remote ancestors included everybody. They put up recent ancestors when talking of local matters, for generally these covered only the local people. The choice of ancestors depended on the matter in hand.

Use of remote
ancestors for
riverbed title

Adopting the symbolic Maori way of speaking, the Maori river claimants in 1938 had put up remote ancestors for the river. This was to say no more than that the river should be held for all. In this case, the chosen ancestors were also symbolic, in Atihaunui traditions, of the essential unity of the river and the river people, for the ancestors were three siblings who had respectively occupied the river's upper, middle, and lower reaches (see also sec 2.5).

Use of recent
ancestors for land
blocks

On the other hand, however, the records of the Native Land Court showed that, when particular land blocks had passed through that court last century, the Maori claimants had nominated more recent ancestors as the ancestral source of title. This was understandable. The court was dealing with local blocks and to have used a remote, founding ancestor would have been to put everyone in every block. Only if the court been dealing with the whole of the Atihaunui lands as one title would a remote ancestor have been used. Again, this was covered at section 7.2.3.

Matters were confused by the way the case was presented. The Maori witnesses gave three ancestors for the river. These were not the same as those given for the land. There being different ancestors for the land and river, counsel argued that the Native Land Court had not investigated the river when it investigated the land. But in Maori terms, the evidence should have been read another way. The Native Land Court divided the land and so recent ancestors were used for each block. The river should not be so divided, however, for in fact and tradition it is a single entity and therefore remote ancestors should be used. The issue was not whether there were separate ancestors but whether the river should be conceived of in parts or as a whole. If it had been considered that it should be divided into parts, then recent ancestors would have been put up for each part, but no one came forward throughout the 24 years of litigation to urge that.

Another way of looking at it was this: if all the resources of the tribe should have been held tribally, as Maori had contended in the past, then the problem was not

with the choice of ancestors for the river but with the earlier choice of ancestors for the land.

Sitting in 1938, Judge Browne grasped the point. He wrote in his decision that he had never heard of such a proposition as separate ancestors for the river and the land, quickly dismissed the thought, then got down to the real issue of whether in the final analysis the river was held locally or by the people as a whole. Of course, there were both local and tribal interests, but it was obvious that one could only provide for both if the tribe took the title. To vest in local interests is to exclude the tribal interest, while a tribal title allows for traditional tribal operations and provides for hapu interests and hapu autonomy as well. This was discussed at section 2.8.2.

The key question put to the Maori Appellate Court by the Court of Appeal in 1958, which occupied most of the former's decision, was whether the ancestral right to the river was separate or different from that to the riparian lands. In replying that the ancestral right for both was the same, the court adopted Judge Browne's view, but in explaining why it was the same it took quite a different tack from Judge Browne and the Native Appellate Court that had upheld him. It observed that the Maori claims to the abutting lands had been for specific land parcels, for which recent ancestors were named. It noted that there had been no claim for the tribal estate as one block. It then assumed that that was so because that was the choice of Maori. They had sought to divide the land in preference to having one tribal title, it was thought. The implication was that, if that was the Maori desire at the time, the river should not now be dealt with differently.

Whether ancestral right to the river is different from riparian rights

It can thus be seen that the heart of the issue was not whether there were separate ancestors for the land or the river, but whether the river should be treated as the land was – that is, divided into portions with each part held locally – or whether it should be kept for the tribe as a whole. On that point, the court had a clear view. In making applications for the land, it was thought that 'the original or tribal right' had not been 'insisted upon by the tribe'.¹⁰ The inference was that it was now too late to insist upon the original or tribal right for the river.

Insistence on tribal right

The Court of Appeal's decision was that in making orders for the land the Native Land Court had, as a matter of law and even though it may not have appreciated it, included the adjoining river to the centre line.¹¹ The thought most pertaining to the Court of Appeal's decision was that given by the Maori Appellate Court – that this was consonant with Maori preference, as evidenced by the way that Maori had taken local and not tribal claims to the Native Land Court.

Court of Appeal decision

The flaw in this is that Maori did not in fact prefer to put up claims for individual blocks, but they had no choice, owing to the practice and procedure of the Native Land Court and the purposes of the Native Land Acts. For reasons given at section 2.8.2, the operations of that court made it impracticable and impossible for Maori to claim for the whole tribal estate. Survey plans were required at a prescribed rate

Virtually no scope for tribal claims under Native Land Acts

10. *Title to the Bed of the Wanganui River*, p 4

11. The Court of Appeal may have overlooked, however, that, at the time that the Native Land Court sat, the *ad medium filum* rule does not appear to have applied in the country: see sec 9.2.12.

for fees and no one could have afforded the costs, the tribal estate here being over one million acres from the central plateau to the coast. In any event, the court itself was intent on smaller block-by-block investigations; individual, not tribal, ownership was preferred; and, in line with that, claims based on mana or remote ancestors were rejected. The process was driven by the 'court's policies', to use the Maori expression, though more accurately it was instigated by the Government in its land reform policies, as provided for in the Native Land Acts. There was a 'court's policy', however, with some legislative sanction, and that was to limit the owners in any block to no more than 10.

In 1958, the Maori Appellate Court appears to have been unaware of these matters. Title investigations had begun in this district in 1866 and most of them were completed by the 1880s. The court was not dealing with matters within its own knowledge and experience but with the practices, procedures, and circumstances as they applied about 80 years before, and it was considering an area of jurisdiction that, comparatively, had ceased to have significance for the court from the turn of the century.

However, the court had no evidence on the early operations of the Native Land Court, save that of official documents and maps. These did not give the surrounding circumstances. On the face of the record, Maori had applied for the investigation of specific surveyed blocks but had not applied for an investigation of the tribal district as one.

Research since 1958

Since 1958, considerable historical research has been undertaken on the operations of, and the circumstances surrounding, the original Native Land Court.¹² This material is now known to this Tribunal. It paints the entirely different picture described above. We believe that the court would not have reached the conclusion that it did had this information been available to it.

There has also been much more research undertaken on Maori social structures. It is apparent that the tribal right and the distinction between it and local rights to particular uses, each operating in their own, but overlapping, spheres, were not appreciated in the court's account. Similarly, its comments on tribal structures and boundaries reflect a Eurocentric conceptualisation of Maori society.

Attempts to assert tribal rights

More especially, however, subsequent historical research has shown that Maori, including Atihaunui Maori, in fact took all steps that they might reasonably have taken to keep their tribal lands as one and to prevent the Native Land Court from operating. Nevertheless, as discussed at section 5.3, they eventually had to submit to the court's process of land dismemberment. In brief, contrary to the court's assertion, Maori did in fact 'insist' on the 'tribal right' to the best of their ability. That research is now available to us. On reading it, we find that the Maori Appellate Court could not have reached the conclusion that it did had this evidence also been before it.

12. Historical research on Maori land purchases exists from an earlier period but has exponentially increased since the 1950s. Seminal in modern scholarship is Keith Sorrenson's 'The Purchase of Maori Lands, 1865-1892', MA thesis, University of Auckland, 1955.

There was also a further comment of some mystery, that being that Maori had never before claimed separate river ancestors. It is a strange comment because Maori had never before claimed a river. The reasons why are given at section 9.2.11. The Native Land Court on every previous occasion was investigating the claim to land adjoining the Whanganui River, not investigating a claim to the bed of the river, and there was no thought at the time that the river was affected.

First river claim

Custom was relevant to the extent that a knowledge of it would have assisted counsel and the court to appreciate what the Maori witnesses were saying. Judge Browne had an instinct for the matter. It was not the question of separate ancestors for the land and the river that was important but the message, of which the ancestors were symbolic – in this case, that the river was a single entity and should be held intact. In 1958, however, little had been written on how Maori symbolism should be interpreted.

It was not something that Maori Land Court judges were necessarily experienced in either. They were versed in law, and often in Maori land law, but not necessarily in custom. The ‘custom’ cases arose mainly on title investigations, and most of those were done last century.

Land court law and
Maori custom

Nor could the witnesses assist much. All three of the original Maori witnesses were dead by then, and all but one of the Maori who had previously given evidence were deceased or infirm, including Hekenui Whakarake and Piki Kotuku, who had been the more coherent in explaining matters. Of the original claimant group, only Titi Tihu survived, and only he gave evidence in 1958. He was a tohunga steeped in Maori learning but not in the art of cross-cultural dialogue. The lengthy cross-examination appears to have suffered problems of translation and interpretation. His evidence was largely dismissed as metaphysical and cosmogenic. It was felt that claims to the court should be ‘tied more to the foundations of practical realism rather than to those of mere symbolism’.¹³

It is one thing for a Maori to give evidence in terms of their customs and quite another thing again to give evidence that explains them. It is how customary evidence is interpreted that is the more crucial matter. The Tribunal uses expert evidence, Maori or Pakeha, for that purpose. Today, we have the benefit of anthropologists who provide just that. Anthropology was but a fledgling discipline in 1958, and Maori studies had still to receive independent recognition in universities. Moreover, today there are Maori who are able to clarify the meaning behind the symbols and to impart knowledge of their customs in terms comprehensible to Europeans. Several Maori witnesses before us were able to do this.

Interpretation of
customary evidence

We do not think that the Maori Appellate Court would have treated as it did with the evidence of Titi Tihu were there an expert witness to explain the metaphors in the Maori manner of speaking.

13. Document A77, vol 2(9), p 2

Apart from the finding that Atihaunui owned the bed at 1840, we consider that the decisions in the courts now have limited value for this inquiry. The factual base on which the legal findings depended is now too much in question.

Special legislative authority was needed for the Maori Appellate Court to act. It was not operating within its normal jurisdiction. Also, the matters before that court were matters of fact not law – matters of custom and Native Land Court process – but its findings of fact were determinative.

Waitangi Tribunal
jurisdiction

Nor are they binding on us. Though the results are binding on the parties unless overturned, we are not a court, and on questions of fact (not law) we can inquire beyond the evidence that was before the court.

On the application of facts to law, or in our case to the principles of the Treaty, this claim differs in two critical respects. First, it is concerned with the river entire. To fit the jurisdiction of the Native Land Court, the litigation concerned only the bed, creating an artificial division of the river. This appears to have influenced the approach taken. The nature of the case before us is not that which was before the courts.

Rights under Treaty
of Waitangi

Second, the claim before us is founded on the rights of the claimants under the Treaty of Waitangi. The Treaty rights of Atihaunui were not in issue in the riverbed litigation; they were not within the jurisdiction of the courts to consider at that time.¹⁴

The question before the Court of Appeal was whether the Native Land Court, wittingly or unwittingly, had, as a matter of law, included the bed of the river in the title to the riparian land. The question before us is whether Maori knowingly and willingly agreed to relinquish their river interests.

Atihaunui did not
agree with Native
Land Court process

Looking to the facts, we find that Atihaunui did not agree to the Native Land Court process by which their tribal interests were extinguished. Were it the case that they had agreed to it, then on the evidence, especially that of Hekenui Whakarake and Simpson and others who examined the plans with the applications, they still would have been entirely unaware that their river interests were also affected.

9.2.3 An appreciation of taonga

Atihaunui claim that the river is a living taonga. In chapter 2, we accepted that on the basis of our own understanding of Maori anthropology and so without reference to the Maori evidence, which could be seen as self-serving (see sec 2.7). Thus, the ‘peoples’ account’ in chapter 3 then follows.

Elaboration on
taonga

But taonga requires elaboration. From our own knowledge and research on the Maori comprehension of rivers (see sec 2.6), we see the river, like other taonga, as a manifestation of the Maori physical and spiritual conception of life and life’s forces. It contains economic benefits, but it is also a giver of personal identity, tribal

14. In only one statute, the Whanganui River Trust Act 1891, was there a savings provision for Maori rights to the river under the Treaty (s 11), but that was limited to the purposes of that Act, was too general to have practical effect, and was not relevant to the case.

cohesion, social stability, empathy with ancestors, and emotional and spiritual strength.

Thus, while previous judicial findings that Atihaunui owned the bed at 1840 are supported by clear fact and law, they are still partial findings, for Atihaunui owned more than a bed and more even than a river. They owned a taonga. It is that which underlines for Atihaunui the incongruity of dissecting it to parts, dividing it along a centre line, or seeing it as an adjunct to riparian land interests – especially since they occupied both sides. In short, it was one whole and indivisible entity.

We adopt the exposition of ‘taonga’ in the *Report on the Muriwhenua Fishing Claim*, of which part is reproduced below. Though the reference is to fisheries, it applies also to the Whanganui River, and not just because the river was also a fishery:

Definition of
‘taonga’ from
Muriwhenua fishing
report

- (a) There are obvious distortions when Maori concepts are translated in Western terms. It must be understood that the division of properties was less important to Maori than the rules that governed their user. These criteria underline Maori thinking—
- (i) A reverence for the total creation as one whole;
 - (ii) A sense of kinship with fellow beings;
 - (iii) A sacred regard for the whole of nature and its resources as being gifts from the gods;
 - (iv) A sense of responsibility for these gifts as the appointed stewards, guardians and rangatira;
 - (v) A distinctive economic ethic of reciprocity; and
 - (vi) A sense of commitment to safeguard all of nature's resources (taonga) for the future generations.

To meet their responsibilities for these taonga, an effective form of control operated. It ensured that both supply and demand were kept in proper balance, and conserved resources for future needs.

Maori extended their deep sense of spirituality to the whole of creation. In their myths and legends they acknowledged gods and other beings who bequeathed all of nature's resources to them. There was a system of tapu rules, which combined with the Maori belief in departmental gods as having an overall responsibility for nature's resources served effectively to protect those resources from improper exploitation and the avarice of man. To disregard or to disobey any of the rules of tapu was to court calamity and disaster.

To the pre-European Maori, creation was one total entity – land, sea and sky were all part of their united environment, all having a spiritual source. It was by divine favour that the fruits from these resources became theirs to use. The first fruits taken were invariably offered back to the gods.

All resources were ‘taonga’, or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future. Their myths and legends support a holistic view not only of creation but of time and of peoples.

- (b) To understand the significance of such key Treaty words as ‘taonga’ and ‘tino rangatiratanga’ each must be seen within the context of Maori cultural values. In the Maori idiom ‘taonga’ in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori ‘taonga’ in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or ‘belonging’, but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a ‘hurt’ to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life’s forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing grounds, fishing methods and the sale of resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind, as referred to in evidence by Miraka Szazy in the context of spiritual guardianship.¹⁵

9.2.4 An appreciation of rangatiratanga

Te tino
rangatiratanga

Atihaunui also claimed rangatiratanga over the river. The Muriwhenua Tribunal considered that:

15. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, sec 10.3.2; adopted also in Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 4.3.2

‘Te tino rangatiratanga o ratou taonga’ tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga.¹⁶

In the Maori Treaty text, authority is expressed as rangatiratanga, derived from rangatira or chiefs, who led by virtue of their mana, or personal and spiritual prowess. It was usual for Maori to personalise authority in that way, so that the one word mana applies to both temporal authority and personal attributes.

The *Report of the Waitangi Tribunal on the Manukau Claim* considered that mana is the more usual Maori word for authority but was avoided by the missionary composer of the Treaty for its association with heathen gods.¹⁷ The Tribunal observed that in again debating the Treaty in 1879, it was mana that Maori consistently used to describe that which they thought the Treaty had reserved.

The Tribunal in both the *Report on the Muriwhenua Fishing Claim* and the *Ngai Tahu Sea Fisheries Report* rejected Crown and fishing industry suggestions that rangatiratanga denotes something less than ownership for stewardship (or kaitiakitanga as it is now called).

We reject that view too. Stewardship, which involves the oversight of resources to protect and conserve, is but a part of the exercise of rangatiratanga or control. It describes an ethic of ownership, but not ownership itself, while rangatiratanga includes both. Like the Ngai Tahu Tribunal, we endorse this conclusion from Muriwhenua that:

Maori autonomy

Maori ranked those properties much higher than mere commodities, holding them with profound spiritual regard for a vast family, of which many are dead, few are living, and countless are still unborn. That cultural peculiarity cannot be used to deny ownership, however, or to imply that because of it, the resources must be shared.¹⁸

Muriwhenua and *Ngai Tahu* both referred to three elements in the Treaty guarantee of rangatiratanga:

The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically, and spiritually. The second is that the exercise of authority must recognise the spiritual source o taonga (an indeed of the authority itself) and the reason for stewardship as being the maintenance if the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.¹⁹

The larger dimension to rangatiratanga as sovereignty or Maori autonomy was given in the *Taranaki Report*:

16. *Report on the Muriwhenua Fishing Claim*, sec 10.3.2; *Ngai Tahu Sea Fisheries Report 1992*, sec 4.3.2

17. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 8.3

18. *Report on the Muriwhenua Fishing Claim*, sec 10.3.3; *Ngai Tahu Sea Fisheries Report 1992*, sec 4.3.4

19. *Report on the Muriwhenua Fishing Claim*, sec 10.3.2; *Ngai Tahu Sea Fisheries Report 1992*, sec 4.3.2

We see the claims as standing on two major foundations, land deprivation and disempowerment, with the latter being the main. By ‘disempowerment’, we mean the denigration and destruction of Maori autonomy or self-government. Extensive land loss and debilitating land reform would likely have been contained had Maori autonomy and authority been respected, as the Treaty required.

Maori autonomy is pivotal to the Treaty and to the partnership concept it entails. Its more particular recognition is article 2 of the Maori text. In our view, it is also the inherent right of peoples in their native territories. Further, it is the fundamental issue in the Taranaki claims and appears to be the issue most central to the affairs of colonised indigenes throughout the world.

The international term of ‘aboriginal autonomy’ or ‘aboriginal self-government’ describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori words are ‘tino rangatiratanga’ as used in the Treaty, and ‘mana motuhake’, as used since the 1860s.²⁰

We adopt these statements and consider that rangatiratanga includes the notions of ‘autonomy’, ‘self-management’, ‘self-regulation’, and ‘self-government’ that have been variously used in earlier Tribunal reports.

9.2.5 The record of Atihaunui attempts to retain ownership of the river

The claim is further that possession and authority in respect of the river have not been willingly relinquished. That is clearly so. History provides a lengthy record of Atihaunui determination to hold on to both.

Relationships
compared with
ownership

Chapter 4 covered a time to about 1850. It described that which we consider pivotal to understanding the history of Maori and Pakeha relationships. While settlers sought ownership of land and political control, as consonant with their traditions, Maori, following traditions of their own, sought a relationship with Pakeha where Maori mana or status would also be recognised. The English incidents of land ownership and their centralised system of power were unknown.

These distinctive traditions inform the actions of both Maori and Pakeha in the period described, from land transactions to military intervention, with Maori continuing to seek working relationships with Pakeha while retaining their own mana in the theatres of a small war. That was also the time when the McLean transaction was put up.

Resistance to land
sales

Chapter 5 describes an increasing resistance to land sales thereafter amongst the Atihaunui and some sympathy for a Maori king. In the war that followed throughout the country, for Whanganui the 1864 battle of Moutoa was critical for the protection of the town at the river’s mouth. The early historian James Cowan observed, however, that the Maori refusal of a river right of way was ‘not so much

20. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, sec 1.4

out of regard for the pakeha of the Town of Wanganui as for the mana of their river²¹.

We saw too that Maori opposition was directed not at the settlers as such but at the presumed power of the Governor. The subsequent building of a Government stockade 50 miles upriver at Pipiriki led to Maori building a fighting pa some two miles further along, and this in turn led to further military action.

In the peace that followed 1871, and as word got about of the Native Land Court, Maori took steps to keep their land out of the court and to retain it intact.

Rather than have the Native Land Court fix boundaries, in 1871 leaders of Atihaunui, Ngatiapa, Ngati Raukawa, and Ngati Whiti largely reached agreement on boundaries themselves. At Koroniti in 1872, some 300 Maori from all parts of the river between Putiki and Hiruharama discussed setting aside land between the Whanganui and Turikino Rivers as a reserve in perpetuity. In 1874, over 300 Whanganui Maori gave their names as active supporters of a proposal by Henare Matua of Kahungunu that all land selling and leasing cease, that the Native Land Court be abolished, and that every major tribe be represented in a parliament. A network of komiti was formed to organise the repudiation movement and Whanganui representatives attended meetings each year from 1874 to 1878 at various locations. A primary goal was that Maori should organise their own land management policies (see sec 5.3).

In an attempt to regain control over their land, some 180 Whanganui Maori signed a deed for Te Keepa's land trust. The trust was to enable Atihaunui to manage the alienation of their land on a tribal basis and encompassed an estimated 1.5 million acres from Wanganui to Mt Ruapehu. At the upper limit of the river's tidal reaches, Te Keepa erected a carved post some 30 feet high to mark the point where the river was closed to Europeans in the interim without a pass signed by him.

Te Keepa's land trust

Following the reconvened 1860 Kohimarama conference at Orakei in 1879, Whanganui along with other tribes continued their efforts to persuade the Government to establish a Maori parliament under the Treaty of Waitangi and the Constitution Act 1852. They attended hui throughout the country. In 1877, Metekingi built the 'quasi-parliament', Te Paku o te Rangi, at Putiki. At Parakino on the Whanganui River in 1892, a committee of 80 drafted legislation for a Maori parliament, which was adopted at Waitangi in April. The first Maori Parliament comprising two Houses met in June 1892. Thereafter, it met each year until 1902, when it disbanded (see sec 5.4).

Te Paku o te Rangi at Putiki

In the meantime, there were various attempts to close the river to Pakeha. Te Keepa's pole was not the first attempted aukati. The Tangarakau River was closed to prevent Europeans prospecting for coal or gold. In 1861, Crawford was turned back at Utapu for not paying a toll, and other parties were stopped from proceeding in 1877 and 1884. When river steamers were mooted with Maori in 1844, at a meeting

Attempts to close the river to Pakeha

21. James Cowan, *The New Zealand Wars: A History of the Maori Campaigns and the Pioneering Period*, 2 vols, Wellington, Government Printer, 1922, vol 2, p 32

with the Native Minister at Ranana, Maori assumed the Maori committees would decide and the Minister was so advised.

Though these initiatives were all thwarted, they tell of Maori concern to formulate a coherent policy of self-government and self-administration of their lands – and in the Whanganui case, also to keep control of the river. The intention was not to separate the races but to ensure Maori participation in national affairs with Maori deciding Maori policy.

In illustration, support for these initiatives was from Te Keepa and Metekingi, who had fought with the Governor in the wars. But Maori could not withstand the power of the Government to control Maori affairs. They were obliged to submit to alternative Government plans or to proceed by protest and petition.

Protest Chapter 6, from section 6.3, describes the record of subsequent protest to about 1930. Prominent in the written material is the record of parliamentary petitions. These ranged from the general to the specific. Thus, the 1883 combined petition of Maniapoto, Raukawa, Tuwharetoa, and Whanganui complained of laws said to be contrary to the Treaty of Waitangi and sought, amongst other things, the replacement of the Native Land Court. The majority of the petitions were specific and related to the introduction of steamers, river clearance and deepening work, the destruction of eel and lamprey weirs, the removal of gravel, the taking of abutting land for scenic purposes, the sale of liquor, the release of trout, and payment of compensation for the public use of the river. A consistent underlying assumption was that Maori owned the river and that their agreement to any development was required. In evidence before parliamentary committees or commissions of inquiry appointed to consider the petitions, Maori ownership of the river was explicitly claimed or assumed.

River clearance works were physically obstructed at various times during 1891 to 1896, leading eventually to police arrests.

All this was a prelude to the debilitating litigation from 1938 to 1962, as chapter 7 describes, and thereafter a substantial involvement in the water flows litigation, detailed in chapter 8, from 1977 to 1992, and submissions as to Maori ownership of the river in the reform of environmental legislation between 1986 and 1991. The latter is described in chapter 10.

The claim that Maori never willingly relinquished their river rights is an understatement. They went beyond exhaustion to maintain them.

9.2.6 Gravel compensation

**Authority to remove
gravel**

The Wanganui River Trust Amendment Act 1893 authorised the Wanganui River Trust, comprised of members of Parliament and representatives of local authorities but with no Maori representation, at any time and without notice, to remove earth, sand, and metal from the river. Any Maori adversely affected could seek compensation from the Native Land Court. Wanganui Maori were not consulted about the Bill, which was opposed by them. A petition to Parliament protesting the

Bill was referred to a committee of the House, which failed to hear any of the Maori petitioners.

Section 5 of the Wanganui River Trust Amendment Act 1920 vested in the trust ownership of, and the right to sell, gravel and shingle in the river under its control. Atihaunui consent was not sought or obtained and this time there was no provision for compensation.

**Right to sell gravel
and shingle**

The 1922 amendment substituted a trust board for trust members and extended its powers. Again, there was no provision for Maori representation.

In 1940, the trust and the board were abolished and their lands and functions dispersed to the Minister of Lands and other Government agencies. The Lands and Survey Department proceeded to collect royalties for gravel taken from the river (see sec 6.2.1).

In 1950, a royal commission under a Supreme Court judge found Atihaunui owned the riverbed until 1903, when the bed was taken under the Coal-mines Act Amendment Act. He determined that the Maori owners were entitled to compensation for the loss of gravel from the riverbed to that date. However, the commissioner lacked sufficient evidence to quantify the loss and recommended that a panel of three, including an assessor appointed by Whanganui Maori, should assess the extent of the Maori loss. The Crown has not yet implemented this recommendation (see sec 7.5).

**1950 royal
commission
recommended
compensation**

In April 1989, the Whanganui River Maori Trust Board, considering Atihaunui was entitled to the bed after 1903 since it was taken without agreement or compensation, received a report that it commissioned from Beca Carter Hollings and Ferner on the quality and value of the gravel extracted from the Whanganui River between 1903 and 1988.²²

The report noted that:

- It is unlikely that great quantities of sand and shingle were extracted from the river before the 1920s, when the general use of the motor car made the use of metalled roads a necessity.
- Evidence before the 1950 royal commission showed that the extraction of gravel for reballasting the railway started in the 1930s and that the Public Works Department and counties were consistent users in the decades up to 1950.
- After the Second World War, the demand for concrete construction, road formation, and sealing greatly increased, and its use for railway ballast continued.
- The harbour board gained the right to license gravel and sand extraction in the lower tidal reaches of the river in 1958.
- Catchment board records detail substantial quantities of gravel extracted under licence between 1977 and 1987.
- On the basis of the above and other information (as given in the report), an estimate could be made of the quantities of gravel extracted for the period

22. Document A31

from 1920 to 1988 and the likely stream of royalties accruing from such extractions. The ‘minimum justifiable value’ of such royalties as at March 1989 is \$8.267 million. A ‘more likely investment probability’, assuming the claimants had invested the funds accruing in property, would yield a value, at 1989, of \$21.786 million.

- Because of the scarcity of gravel in the Wanganui region, actively negotiated prices would probably have produced a higher estimated value.

Compensation
negotiations

The report was given to the Minister of Maori Affairs in May 1989.²³ When the Government established the Whanganui River Maori Trust Board in 1988 to negotiate the gravel claim for Atihaunui and to represent Atihaunui on other matters, it agreed to pay an establishment cost of \$140,500. In October 1990, the Government paid the trust a further \$200,000 on the condition that that payment and the earlier payment were to be regarded as an advance on its claim.²⁴ A large part of the latter payment was used to meet the cost of the minimum flow hearings.²⁵

9.2.7 Legal argument on the ‘arm of the sea’

The English common law presumption that the Crown owns the tidal reaches of a navigable river as an arm of the sea was introduced at section 2.2.

To Atihaunui, the tidal reaches of a river are a part of the river, not the sea. The river mauri proceeds into the sea even beyond the mouth, as can be seen in a view from a hill, until its mana finally mingles with that of the ocean.

Atihaunui view of
water

The difference is that Maori did not see water from a human interest view, in terms of ship navigability and safe harbours. They looked to the gods and the origins of water in creation beliefs. Salt water came from Tangaroa, the god of oceans, and in Atihaunui traditions the fresh water derived from Ranginui, the sky father. The mauri of each was distinctive.

Implication of
Crown ownership of
tidal reaches

The Crown submitted that the bed of the tidal reaches – that is, the river up to Raorikia – became the Crown’s through the common law rule, though as a presumption it is rebuttable as upon proof of a private fishery.²⁶ If the Crown’s submission is correct, there was the potential to deprive Maori of valuable resources without agreement or compensation. Legislative action (described in chapter 6) suggests that the Crown acted on the common law premise.

Claimant counsel submitted that the rule is inconsistent both with aboriginal title and with Treaty principles. We are concerned with the Treaty, but in this instance the two may be analogous.

Crown counsel saw the arm of the sea rule as consistent with Treaty principles, saying that the Treaty signatories would have been surprised had it been said that

23. Document B8(b), p 59

24. Ibid, p 64

25. Document B8, p 71

26. *Halsbury’s Laws of England*, 4th ed, London, Butterworths, 1984, vol 8, para 1418

the Government would come without its laws. On its face, the Treaty contemplated European settlement, which would require English law.

But how could Maori agree to a doctrine of law that they knew not of (we suspect many English had not heard of it either) and that was antithetical to their own beliefs? We think that Maori expected settlement, and while they did not appreciate the size of it at the time, they also expected that arrangements with the settlers would be on the basis of Maori customary relationships. That was the view we took of the history in chapter 4.

Maori not informed
of doctrine

The more relevant question is whether Maori were informed that, on signing the Treaty, their rights to the tidal reaches would go. They were not, but had they been, they would likely have disagreed. The river mouth was a primary fishing place, and there was fishing elsewhere in the tidal reaches.

In any event, in the words of the Treaty, fisheries and all those things they treasured were actually reserved.

Oral promise of
protection of
customs

These words did not suggest that the Governor's law, even where unknown, would determine rights between Maori and the Crown. Moreover, the Governor's law appeared limited. In the Treaty, it was said to be for the purposes of keeping peace, and the application of it for these purposes was also stated in the accompanying debates, according to the record, and was given in the context of the preceding musket wars between tribes and tensions between Maori and some sailors. Though it is said today that the assumption of sovereignty brought in English law, that is a construct of law that was not a reality on the ground for some years after, and it was not written into the Treaty.

In any event, Maori clarified the point. They asked if their own law would be protected and it was said that it would be. That at least was at Waitangi and at Kaitaia, as is noted in the *Muriwhenua Land Report*. There is no record of what was said at Putiki, but the Kaitaia and Waitangi statements are indicative of the Governor's thinking. At Waitangi, the Governor assured Maori, after preparing a written statement, that Maori customs would be protected by him, and at Kaitaia, it was said on the Governor's behalf that 'the Queen will not interfere with your native laws or customs'.²⁷

In the Treaty debate, things unsaid may be as significant as those stated. It was not said, for example, that for the British sovereignty meant that the Queen's authority was absolute. Nor was it said that with sovereignty came British law, with hardly a modification. (This is not to impute deception. Matters had to be simply put and British legal norms were as incomprehensible to Maori as Maori societal norms were a mystery to the British.²⁸)

The British position is illuminated by Lord Normanby's instructions for the preparation of the Treaty.²⁹ He cautioned against acquiring 'any Territory the retention of which by them would be essential, or highly conducive, to their own

27. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, sec 4.2

28. Ibid, sec 4.3

29. Ibid, sec 4.4

comfort, safety or subsistence'.³⁰ While the reference was to land, the principle has application to all properties, as described in the eventual Treaty texts.

American precedent

American precedent asserts that, in a treaty with indigenous people of oral traditions, spoken promises are as much a part of the arrangement as those written in the formal document, and surrounding papers may be used to flesh out the parties' intentions. It cannot then be said, as a matter of fact, that the Treaty introduced the law of England if the corollary is that Maori laws thereafter ceased to apply. The Treaty is rather authority for the proposition that the law of the country would be sourced to two streams.³¹

Qualification of
English Laws Act
1858

Subsequent enactments also suggest that the Crown did not intend English law to apply totally. The English Laws Act 1858, made retrospective to 1840, provided for English law to apply, but only 'so far as applicable to the circumstances' of the colony. It is arguably inapplicable if the effect is to deprive persons of their possessions. That would also rationalise the English tenure laws with the doctrine of aboriginal title, which dates in England from at least the 1600s.

The qualification in the English Laws Act has recently been applied in former British colonies to determine that the law allowing private ownership of navigable rivers and lakes is inapplicable to the circumstances of those new countries. This was noted in chapter 2.

Having regard to the foregoing and the guarantee of taonga in article 2, we consider that the arm of the sea presumption does follow as a consequence of the Treaty but is in breach of it.

Royal protection

Crown counsel sought further support from article 3, which extended a 'royal protection' to Maori and imparted to them all the rights and privileges of British subjects. As we see it, this does not mean that English law applies to everyone the same. Leaving aside the Maori text, where arguably the article could be a guarantee of Maori law, we think that the focus is primarily on civil rights. The applicable right in this case is the right to have one's private property interests respected.

9.2.8 Legal argument on 'exclusive ownership'

Crown counsel went on to contend that the Maori interest did not amount to exclusive ownership. They invoked the following passage in the *Report on the Manukau Claim*:

That interest [the Maori interest in the Manukau Harbour] is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out.³²

30. 'Annexation of New Zealand to New South Wales: Lord Normanby's Instructions to Captain William Hobson, on Appointment as Consul and Lieutenant-Governor', in *Speeches and Documents in New Zealand History*, W D McIntyre and W J Gardiner (eds), London, Oxford University Press, 1971, doc 5, p 14

31. Williams, pp 116–119

32. *Report on the Manukau Claim*, sec 8.3

The report considered, however, that the Manukau Harbour occupied a unique position. It is the second biggest harbour in New Zealand. Traditionally, it was shared by several descent groups. Today, it is subject to the special demands of the largest city in New Zealand and the demands of major projects approved and supported by the Crown. The Tribunal considered that protection and management of the harbour deserves national as well as regional support.³³

These factors appear to have influenced the Tribunal's finding. But it must be borne in mind that the Tribunal said this in the context of its then jurisdiction, which was limited to 'contemporary claims', to consider matters arising post-1975, and when the Tribunal itself was limited to three persons. The context was a question of how competing interests at the time of hearing could be reconciled.

As a general proposition, that Maori interests in rivers, lakes, or harbours cannot be exclusive to the descent group, we consider, with respect, in the light of further evidence revealed by the Tribunal's historical claims process, that the Manukau conclusion is unsustainable on the facts. At least, it is unsustainable on the facts in this case.

**Manukau
conclusion
unsustainable**

9.2.9 Ownership of water

The ownership of water was introduced at section 2.8.1. We considered that Maori owned the water as part of that which they possessed.

In terms of both the general law and the Treaty, that which Maori possessed must be determined by reference to what they possessed in fact, and not by reference to what may be legally possessed in England. We considered that, if the river is regarded as a whole, as we think it must be in terms of Maori possessory concepts, then the water is an integral part of the river that was possessed. Accordingly, the water was possessed as well. Though its molecules may pass by, as a water regime the water remains, constantly being replenished.

**Possession of a river
regime**

Indeed, we thought, the river would be meaningless without it. The river was a waterway. The whole river was a fishery. It was the habitat of creatures to whom Maori were related, from fish to taniwha. The emphasis on water purity for ritualistic and other reasons was also described (sec 2.6). The water was treasured as the gift of Ranginui just as much as the land was respected as part of Papatuanuku. The water was their water, at least until it naturally escaped to the sea, at which point its mauri or character changed.

As Judge Carr held in the Maori Appellate Court decision of 20 December 1944:

It was a recognised feature of the ancient customs of the Maori that all land within the boundaries of a tribe belonged to the members of that tribe and to no one else. Woe betide any outsider who trespassed on track or on water without permission – it mattered little whether the water was stationary or whether it was running.³⁴

33. Ibid, sec 9.2.6

34. Document A77, p 4

Aboriginal title to
water

However, Crown counsel also noted that the doctrine of aboriginal title recognises a right to water but claimed that it is described as a use right. They referred to a passage in the decision of the Supreme Court of Canada (on appeal from the Court of Appeal of British Columbia) in *Calder v Attorney-General of British Columbia*.

In fact, this case makes it clear that the indigenous people in that case, the Nishga of British Columbia, were the owners of both the lands and the waters that had been in their possession from time immemorial. Given the Crown's contention that any sort of claim to running water is novel, it is desirable to refer in some detail to the *Calder* decision, which removes that novelty.

*Calder v Attorney-
General of British
Columbia*

Seven judges heard the appeal in the Supreme Court. Justice Judson, in a judgment concurred with by Justices Martland and Ritchie, cited the *Indian History of British Columbia* by Dr Wilson Duff:

It is not correct to say that the Indians did not 'own' the land but only roamed over the face of it and 'used' it. The patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognised by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognise ownership of plots used for village sites, fishing places, berry and root patches and similar purposes. Even if they didn't subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food-gathering. Even if they didn't sink mine-shafts into the mountains, they did own peaks and valleys for mountain goat hunting and as sources of raw materials. Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the owned and recognised territory of one or other of the Indian tribes.³⁵

Dr Duff gave evidence on behalf of the Nishga, who were the appellants in the Supreme Court proceedings. In citing the above passage, Justice Judson noted that Dr Duff had been described by the trial judge as a scholar of renown. Dr Duff was asked if the foregoing passage applied to the Nishga people and he confirmed that it did.³⁶

Notwithstanding the approval of the foregoing by Justice Judson and his two colleagues, they disallowed the appeal on the ground that the sovereign authority had elected to exercise complete dominion over the lands in question, adverse to any rights of occupancy that the Nishga tribe may have had when, by legislation, it opened up such lands for settlement, subject to the land reserves set aside for Indian occupation. Such claims of sovereignty, it was said, were inconsistent with any conflicting interests, including one as to 'aboriginal title'. This finding does not, however, detract from their acceptance of the statement by Dr Duff cited by Justice Judson.

35. *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, 149 (citing Wilson Duff, *Indian History of British Columbia*, British Columbia, Provincial Museum of Natural History and Anthropology, 1964, vol 1)

36. *Ibid*, pp 178, 180-181

A different view of the matter was taken by Justice Hall, with the concurrence of Justices Spence and Laskin. In his judgment, Justice Hall stated:

When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants [the Nishga] described it as ‘an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature, a tribal interest inalienable except to the Crown and extinguishable only by the legislative enactment of the Parliament of Canada’. The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation. The issue here is whether any right or title the Indians possess as occupants of the land from time immemorial has been extinguished.³⁷

Justice Hall noted that Dr Duff was cross-examined by counsel for the Attorney-General as to the basis for his statement that the Nishga owned their land and waters.³⁸ Dr Duff duly cited authority for his views. Counsel further put to him that anyone ‘has to be careful about what word you apply because of the legal implications and to speak of ownership simply because some-one has an unchallenged possession is to confuse two things’. To this, Duff responded that, ‘although their concepts of ownership were not the same as our legal concept of ownership, they nevertheless existed and were recognised’.³⁹

Following his account of this cross-examination, Justice Hall stated that: ‘Possession is of itself at common law proof of ownership.’ He cited leading texts by Cheshire and Megarry and Wade on the law of real property in support.⁴⁰

In his judgment, Justice Hall sets out a line of questioning by the trial judge in which Justice Gould endeavoured to relate Dr Duff’s evidence as to Nishga concepts of ownership of real property to the conventional common law elements of ownership.⁴¹ Such questions (which he set out), Justice Hall said, disclose that Justice Gould’s consideration of the issue was inhibited by a preoccupation with the traditional indicia of ownership. In so doing, Justice Gould failed to appreciate what Lord Haldane had said in *Amodu Tijani v The Secretary, Southern Nigeria*:

in interpreting native title to land, not only in Southern Nigeria, but other parts of the British Empire much caution is essential. There is a tendency, operating at times increasingly, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.⁴²

After setting out the trial judge’s questioning of Dr Duff, Justice Hall said that:

In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the

37. Ibid, p 173

38. Ibid, p 184

39. Ibid, p 173

40. Ibid, p 185

41. Ibid, p 184

42. *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 402

owners of the lands that have been in their possession from time immemorial and, therefore the burden of establishing that their right has been extinguished rests squarely on the respondent [the Crown].

What emerged from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law . . .⁴³

Justices Hall, Spence, and Laskin held that the Nishga were entitled to assert their Indian title as a legal right and that their right had not been extinguished by surrender to the Crown or by competent legislative authority. They would have allowed the appeal. However, the seventh judge, Justice Pigeon, held against the Nishga on a technical question of jurisdiction, and accordingly the view of Justice Judson and his two colleagues prevailed.

Atahanui and
ownership

In our view, this case, which was invoked by the Crown, does not support their contention that Te Atahanui-a-Paparangi had no more than a use right in their river. Rather, it supports the view that they did in fact own it. Dr Duff's statement, approved by six of the Supreme Court judges in *Calder* that the Nishga 'patterns of ownership and utilization which they imposed upon the lands and waters were different from those recognised by our system of law, but were nonetheless clearly defined and mutually respected' applies equally to the relationship of the Whanganui iwi to their river.⁴⁴

In our opinion, there is nothing in the judgments in *Calder* to suggest that a distinction was drawn by the Nishga between lands on the one hand and waters on the other. It is clear that Dr Duff considered that the Nishga's concept of ownership applied to both. The same equally applies to the Atihaunui concept of ownership. Lord Haldane's warning against imposing common law notions on those of indigenous peoples with a distinct concept of ownership should be applied to Atihaunui in our view, and to their concept of the nature of their relationship with the river.

9.2.10 Whether *ad medium filum* was also Maori custom

The *ad medium filum aquae* rule was introduced in chapter 2. It is a rebuttable presumption of English conveyancing law that ownership of land adjoining a non-tidal river includes the ownership of the bed of the river (or of a lake) to its mid-point.

*Ad medium filum
aquae* and the Treaty

For the same reasons as were given for the 'arm of the sea' debate, we consider that this rule does not apply in terms of the Treaty (and is probably rebutted in law) if the effect is to deny existing property interests, or the Atihaunui interests in this case. We note that, in applying facts to law in the Mohaka River claim – facts that were not materially different from this case – the Tribunal found that, even were the

43. *Calder v Attorney-General of British Columbia*, pp 189–190

44. *Ibid*, p 149

Crown entitled to rely on the *ad medium* rule, the presumption would have been rebutted.⁴⁵

However, here the arguments were different. Crown counsel gave examples to say that the rule was sufficiently consonant with Maori customary opinion. At section 2.4, we cautioned against such an approach, since anecdotal comments and particular incidences are not usually expressive of fundamental beliefs. In any event, we think that the examples given have too many variables for the inference that was drawn.

(1) Mamaku's discussion with Taylor

A diary note of the Reverend Richard Taylor of 1847 notes a conversation with Te Mamaku. It records that Mamaku:

gave the natives a long account of what he thought was European policy, saying that we [the Europeans] had taken the harbour of Wellington so that no native could go in or out without permission, that we were doing the same at Waikanae, Porirua, Otaki, Ohau, Manawatu, and Wanganui.

Taylor replied that, at Wanganui, 'one side at least belonged to the natives and they possessed the entrance "as much as the Europeans"'.⁴⁶

Taylor's diary does not record that Te Mamaku objected, and that could imply that he agreed.⁴⁷ However, a rangatira's silence is not assent in Maori custom. More regularly, it is the opposite. Leaving that aside, however, and many other possibilities, we think that the diary note can be seen as a record of opposing views.

In our perspective of the history as given in chapter 4, Maori expected to share the river's use but not to cede authority. That emerges from the record of Te Mamaku's concern. He is anxious that Europeans are assuming a right of control. Taylor's reply does not address the implied question. It is relevant only to usage.

(2) The log in the river

In 1849, McLean sought to settle a Maori claim to a log of timber bearing their mark that was sunk in the river and was taken from there by a gunboat's crew.⁴⁸ He gave the Maori to understand, so he said, that all logs in the river, excepting those immediately fronting their reserves, were European property. This 'decision', he said in a letter to the Governor, was satisfactory to them.

Taylor and McLean thus implied different things, one that Maori had 'at least' half the river, the other that it belonged to the Europeans, presumably meaning the Crown and relying on the 'arm of the sea'.

We think, as Sinclair suggested, that Maori acquiescence, if there was any, was more likely on the basis of the settled Maori law that flotsam was a gift from Tangaroa and belonged to the people nearest to where it was delivered or was

45. *The Mohaka River Report 1992*, sec 3.7

46. Taylor, qms diary, 12 March 1847–31 December 1848, pp 39–40 (doc A49, pp 24–25)

47. Document c10, p 22

48. Document A49, p 31

beached.⁴⁹ There was excitement as to where floating goods might be delivered for no one owned them until they were beached. It was not tika (right) for the Europeans to take the log in this case, but Maori also could not claim it. The issue in other words was referable not to river ownership but to the ownership of floating logs. They may also have decided not to make too much of the matter in order to maintain good relations with the Europeans.

(3) Kawana Paipai's centre line claim

In the centre line claim of Kawana Paipai, the facts are obscure but appear to be that, possibly because of some river works on the 'European side' of the river, about a chain was eroded from the 'Maori side' at Putiki.⁵⁰ This led Maori, in 1873, to seek approval from the Maori Land Court for new plans for their sections. Some claimed the foreshore, the part under water, probably because it had been part of their title originally. However, Paipai claimed to the centre line.

Some evidence suggests that Paipai, a warrior leader of old, was about 90 at the time. The court dismissed the application without giving reasons. It does not follow that Paipai saw the centre line view as part of Maori custom or that he accepted that view. Applications to the Native Land Court are indicative not always of what Maori believed were their customary rights but sometimes of what Maori thought that court might deliver. The court required a plan, and the surveyor may have thought that Paipai could claim to the centre line – and so on. The possibilities are many.

(4) The 1916 Scenery Preservation Commission

The 1916 Scenery Preservation Commission was appointed following Maori protests over the taking of riparian land for scenic purposes. Maori witnesses spoke of their land and also their interests in the adjoining river.

It is only natural that on this inquiry local interests were referred to. It is not evidence that Maori saw the river as divided into parts belonging to riparian landowners. More significant is the fact that, although the inquiry was localised and related to land, Maori still raised the tribal river interest.

Thus, Wharawhara Topine said, 'this question of our river rights extends from the head of the river to its mouth, and all the subtribes who own the abutting lands are interested in its solution'.⁵¹ Hakiaka Tawhaio sought a clear statement on what the Government proposed for the river waters, which, he said, 'belong entirely to us'. He added later, 'The Maoris own the river . . . I lay more stress on our river rights than on these scenic lands'.⁵²

49. Document c10, pp 25–26

50. Ibid, p 30

51. Transcript of evidence before 1916 Scenery Preservation Commission, DOSLI HO228/05/07 LINZ (doc c10(a)(7), p 37)

52. Document c10(a), pp 30–31

(5) The 1927 petitions

In separate parliamentary petitions, different petitioners sought, in the first case, compensation ‘in respect of our rights in the Wanganui River and its tributaries’ and, in the second, compensation in respect of the Whanganui River.⁵³ The signatories in the latter petition were ‘the owners of the Wanganui River commencing from Taumarunui to Wanganui a distance of 144 miles’. The context was the use of the river by steamers and tourists and the destruction of eel weirs to allow for steamer passage. In total, there were 377 petitioners.

There is reference to local river uses by people of abutting lands, as was necessary for the context in which the claims were brought, but the petitions relate also to the tribal conception of the river as a whole. Evidence of the former is not a denial of the latter when the two coexist, and does not establish the customary acceptance of an *ad medium filum* rule.

(6) The Tuwharetoa experience

In 1939, a Tuwharetoa claim to part of the river’s upper reaches near Lake Rotoaira was withdrawn when the Crown admitted that, where Maori owned the banks of non-navigable streams, they owned the land to the centre of the streams.⁵⁴

We do not see this as an acceptance that such a rule customarily applied. At this time, and much earlier, Maori had need to think in English law terms, and could accept the doctrine if their interests were not too compromised. As we understand the position, nearly all the land in and around Lake Rotoaira at that time was Maori land, on both sides of the stream, and the Crown’s proposal could be agreed. The alternative would be long and expensive litigation. Circumstances were different for Atihaunui, who needed to challenge the rule – no matter the cost.

Acquiescence
cannot be seen as
consent

9.2.11 Why the river claim was not made until 1938

The river claim was not made until 1938, well after the title to the abutting lands had been investigated. It was then argued that the river was held as a whole. This led the Crown to contend that the novelty of the claim showed that it lacked substance and was an afterthought. The inference was that it was fabricated. It was submitted that matters of spiritual value and the contention that the river was held as a whole had not been raised earlier when there was the opportunity to do so.

The facts are against the Crown’s view. In the first instance, we consider there was not a realistic opportunity to have brought the river claim earlier to the Native Land Court. That court dealt with land, and as was considered at section 2.8.2, the court’s own process determined the types of cases that might be brought. It was not considered at the time that a claim could be made to rivers, though it was eventually accepted in 1883, after the main land investigations were completed, that a claim could be made for lakes (see the discussion on lakes at section 2.2).

53. Document D19(a), pp 1, 7

54. Document C10(a), p 22

Figure 19: Front view of Poutama Meeting House, Hikurangi, Karatea, Whanganui River, with P H Metekingi seated in front, 1967. Photograph courtesy Alexander Turnbull Library (F61140½).

No opportunity for tribal river claim

Moreover, there was little chance of succeeding with a claim to anything last century on the basis that it might be held as a large and single entity. The whole purpose of the Native Land Acts made the Native Land Court averse to large tribal claims (see sec 2.8.2). The predilection of the court was to break things down into small blocks, and Maori just had to fit in with that process.

Crown historian Fergus Sinclair observed the novelty in the thought that the land could be owned one way and the river another. However, as was seen in section 9.2.2, the novelty came not from Maori but from the Native Land Acts. Though it was occupied in severalty, Atihaunui owned the whole of their territory as one, land and river the same. It was the Native Land Acts that broke the land to parts and introduced some novelty. Maori sought to resist this, as seen in chapter 5, but to no avail. It is unsurprising that they sought to keep the river entire.

Statutory constraints

Finally, statutory constraints were introduced from 1909 to prevent Maori from claiming rivers, lakes, and foreshores. The riverbed case was not brought until after those restrictions were relaxed. This is dealt with at section 9.2.13.

In the result, Atihaunui had come to depend on petitions to Parliament. As discussed at section 7.2.1, the river claim came only through the enterprise of a Wellington lawyer. It came as an innovative answer to his clients' problem that after seven years waiting the Native Land Court had failed to address the Atihaunui river petition as Parliament had required of it with a request for an early response. Even then, he was obliged to fashion the case to fit the limitation of the Native Land Court to matters of land, thus bringing the claim to the bed. In the end, this limitation proved fatal.

It does not follow that Maori had not regarded themselves as having a ‘whole river’ claim before 1938. We think that there is compelling evidence that that view was held. That has been the gravamen of our review of the evidence in the report to this point.

The lack of reference to spiritual concerns in prior material was considered at section 2.4. In the preceding period, the issues had focused on the more mundane – the introduction of steamers, the destruction of eel weirs, the acquisition of scenic lands, and the like. It was not the time to raise spiritual concerns, and there was no likelihood of a receptive audience to spiritual pleas at the time.

This was to show when the case was eventually brought. As described at section 7.7.2, Crown counsel invited the court to ‘depreciate any attempt to introduce matters of Maori mythology into mundane matters like this’, saying they were entirely irrelevant and that he would not refer further to ‘such matters as plaited ropes and the mana of rivers and things like that’. The court responded that claims should be ‘tied more to the foundations of practical realism rather than to those of mere symbolism’. An alternative legal view on spiritual evidence is given elsewhere: see section 9.2.14.

Unwilling to
recognise Maori
customary beliefs

In considering whether there was some novelty in the 1938 application to the court, we also bear in mind that thoughts and approaches mature over time. We need only look at the dynamics of the legal process to see that that is so. For example, though *ad medium filum aquae* is an old law from England, it did not come into judicial consciousness in New Zealand until 1900. This is addressed next.

9.2.12 *Ad medium filum* did not in fact apply when customary titles investigated

Though raised vaguely by lay observers like Richard Taylor, it appears that *ad medium filum aquae* did not receive explicit judicial recognition in New Zealand until 1900.⁵⁵ We consider that claimant counsel was correct in contending that previously the Crown asserted a river control by virtue of some presumed general right of navigation and that the rule was not comprehensively advanced until the 1938 litigation.

*Ad medium filum
aquae* not
recognised

Evidence that the Crown itself relied upon the river’s navigability is in the Crown’s assertion to that effect in its Court of Appeal submissions and in its similar assertion with regard to the Waikato River, where it opposed the contention that *ad medium filum* applied.⁵⁶

As noted in chapter 7, the Court of Appeal held that, where a block of land fronting on a non-tidal river has been held by Maori under their customs and usages and later the title has been investigated by the Native Land Court and separate titles issued, the bed of the river becomes, to its middle line, a part of the adjoining block and the property of its respective owners.

55. Document A49(d), pp 260–313

56. *Mueller v Taupiri Coal Mines* (1902) 29 NZLR 89

Claimant counsel's observation underlines that riparian ownership was probably not in the mind of the Native Land Court when, last century, the titles were investigated.

Nor does it appear to have been in Maori minds. As discussed in chapter 7, Hekenui Wharawhara deposed, in 1949, 'at no time was the Whanganui River . . . included in the Ohutu block as a result of this arrangement nor was it intended to be so included'. That was the only block that lay on both sides of the river. Affidavits by N F Simpson, N A Stevens, and J Caradus confirmed that that was so.

9.2.13 Statutory constraints on customary land claims

From late last century, Maori brought claims to the ownership of lakes, and with some success (see the discussion on lakes at section 2.2). Similar thoughts were entertained with regard to rivers, and there was no certainty that the Coal-mines Act Amendment Act 1903, which applied only to beds, would prevent customary claims to water regimes as a whole.

Legislation to
prevent Maori
customary claims

In 1909, the Crown introduced legislation to prevent further Maori customary claims without the Crown's approval. It was a denial of Maori free access to the law but, having been put forward by New Zealand's most famous Maori politician and drafted by an outstanding New Zealand jurist, the proposal was not unkindly made in the circumstances of the day. Litigation was consuming Maori efforts and assets. The alternative was legislation that would recognise Maori and public interests in water regimes – but, despite Sir Apirana Ngata's exertions, the alternative never came.

Sections 84 to 87 of the Native Land Act 1909 provided that native customary title to land was not available or enforceable against the Crown; that a proclamation that any Crown land was free from native customary title was conclusive in all proceedings; and that no grant or other disposition of land by the Crown could be questioned or invalidated on the ground that native title had not been extinguished. In addition, customary title was automatically extinguished in respect of land that for 10 years before 31 March 1910 had been continuously in the possession of the Crown, 'whether through its tenants, or otherwise'.

Section 100 of the 1909 Act empowered the Governor by Order in Council, at any time and for any reason he thought fit, to prohibit the Native Land Court from ascertaining the title to any area of customary land. There was a hiatus for a period after 1913, when the Whanganui River claim was brought. The provision was repealed by section 43 of the Native Land Amendment Act 1913 and a savings provision introduced to give Maori the right to have their claims to customary land investigated and adjudicated by the court.

With these qualifications, the provisions were continued through to sections 153 to 157 of the Maori Affairs Act 1953. They remained in force until 1993, when they were repealed, along with the remainder of the 1953 Act, by the Te Ture Whenua Maori Act 1993. The 1993 Act did not re-enact them, but instead sections 360 and 361, by amendments to the Limitation Act 1950, provide that no action can be

brought against the Crown to recover Maori customary land after the expiration of 12 years from the date when the right accrued. A six-year limitation period is provided for in the case of any action against the Crown in respect of any trespass or injury to Maori customary land. In each case, the right of action is the date on which the wrong occurred, whether before or after the commencement of the 1993 Act.

While the Maori right to bring proceedings against the Crown in respect of customary land is now recognised, it is unlikely, given the antiquity of most causes of action, that many will fall within the limitation periods. In short, the great majority of actions will be barred.

9.2.14 The recognition of spiritual values in law

Crown counsel submitted that ‘a Treaty cannot be read as guaranteeing the full expression of any form of Maori religious belief regardless of the consequences for other subjects of the Crown’.⁵⁷ The Crown considered that the economic dimension of the claim must be separated from the symbolic and spiritual concerns.

In responding, Sian Elias for the claimants commented on the ‘chasm in understanding’ between her and Crown counsel on this matter. We accept her response that the river is a subject of veneration as well as a source of physical and material sustenance and that there is no inconsistency between the two. We also accept Ms Elias’s submission that it is not accurate to say that the spiritual relationship of Whanganui Maori with the river is symbolic, for it is part of their daily existence. The evidence of the people is testimony to this and that it is not simply a ‘natural resource’.

No inconsistency
between veneration
of river and use for
sustenance

Claimant counsel further submitted that a distinction between ‘metaphysical’ interests and ‘property’ interests is unsound as a matter of English law. We agree. That the English common law is capable of understanding quite different and abstract cultural aspects is, she said, demonstrated by the decision of the Privy Council in *Mullick v Mullick*.⁵⁸

This was an appeal to the Privy Council from a decision of the Indian High Court Appellate Division and concerned the legal status of a Hindu idol. The Privy Council stated that:

A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the regulations thereof by Courts of law, a ‘juristic entity’. It has a juridical status with the power of suing and being sued. Its interests are attended by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir . . .⁵⁹

57. Document D19(c), p 45

58. *Mullick v Mullick* (1925) LR 52 Ind App 245

59. *Ibid*, p 250

It went on to say:

The true view . . . is that the will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the shebait [guardian], it be thought that a family idol should change its location the will of the idol itself, expressed through his guardian, must be given effect to.⁶⁰

The Privy Council ruled that the idol should appear by a disinterested next friend appointed by the Indian High Court. We note, however, that this decision was made by the Privy Council applying Indian, not English, common law and accordingly cannot be taken as a recognition under English law of the legal personality of an idol.

Ms Elias also referred to a recent decision of the English Court of Appeal in *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and Others*, in which it was held that a Hindu temple, with legal personality in Indian, but not English, law was entitled to sue in an English court. The Court of Appeal found that this accorded with the principles of the comity of nations and did not offend English principles of public policy.⁶¹

Claimant counsel next referred to *Huakina v Waikato Valley Authority*, where Justice Chilwell considered whether the provisions of the Water and Soil Conservation Act 1967 ‘can embrace an objection on the ground that discharge of cowshed effluence prejudices one’s interest in the spiritual value of a river or the interests of the public generally in that spiritual value’.⁶² The judge decided that:

Customs and beliefs are capable of being established on evidence by the Courts. See *Mullick v Mullick* (1829), *Nireaha Tamaki v Baker* (1901), *Mullick v Mullick* (1925), *Public Trustee v Loasby* (1908), and *Te Weehi v Regional Fisheries Officer* (1986), all previously referred to.

The Privy Council decision of *Nireaha Tamaki* involved the interpretation of a statute which recognised customary Maori rights guaranteed by the Treaty of Waitangi, Lord Davy said:

‘It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence’ ((1901) NZPCC 371, 382).⁶³

9.2.15 The Lake Omapere decision

One of the most perceptive judgments of the Native Land Court, in our view, and one that is instructive for this claim is the 1929 decision of Judge F O V Acheson on Lake Omapere. It was referred to in the *Te Whanganui-a-Orotu Report 1995*, but bears repeating where relevant to the Whanganui River:

60. *Mullick v Mullick*, p 259

61. *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis and Others* [1991] 4 All ER 638

62. *Huakina v Waikato Valley Authority* [1987] 2NZLR 188

63. *Ibid*, pp 214–215

Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?

... Yes! And this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.

... To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people.

... To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended.

... Finally, to all these things there was added the value of a lake as a permanent source of food supply.

... Lake Omapere ... has been to the Ngapuhis for hundreds of years a well-filled and constantly-available reservoir of food in the form of the shellfish and the eels that live in the bed of the lake. . .

... Was Lake Omapere, at the time of the Treaty of Waitangi (1840), effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?

... Yes! The occupation of Omapere was as effective, continuous, unrestricted and exclusive as it was possible for any lake occupation to be.

It is not contested that for many hundreds of years the Ngapuhis have been in undisputed possession of this lake, and have lived around or close to its shores. . . Great numbers of the Ngapuhi must have grown up within sight of Omapere's waters, and have regarded the lake as one of the treasured tribal possessions. By no [process] of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed.

In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fishing pas on or close to its shores.

In short, the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.

... It was contended (but not seriously pressed) on behalf of the Crown that sales by Natives to the Crown, of areas adjoining Lake Omapere, gave to the Crown rights in those portions of the bed of the lake fronting on to the portions sold.

This contention had no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake bed adjoining. See also Judgment of Court of Appeal in *Re Mueller v Taupiri Coal Mines Co* (1900) 3 GLR 154.

Also the mere fact that Lake Omapere was 'customary land' was an absolute bar to sales of any portions of it to the Crown. Section 89 of 'The Native Land Act, 1909', forbids sales of 'customary land' to the Crown, and earlier statutory provisions were to the same effect.

Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.

There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.⁶⁴

Just as Lake Omapere was tribal territory, so was the Whanganui River.

9.2.16 Coal mines and the statutory taking of the bed

The far-reaching provision in section 14 of the Coal-mines Act Amendment Act 1903, which deemed all beds of navigable rivers to be and to have always been vested in the Crown, unless it had granted a riverbed to someone else, was grafted on a minor washing-up Bill at the last moment (see sec 2.2).

64. *Application by Ripi Hongi and Other Natives for Investigation of Title* unreported, 1 August 1929, Judge Acheson, Native Land Court (Bay of Islands Native Land Court minute book, vol 2, pp 253-278) (cited in Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, Wellington, Brooker's Ltd, 1995, sec 12.3.4). Material from pages 8 and 9 of this decision is also quoted in the section on Maori belief systems in section 2.6 of this report.

Shortly before the Bill was read a third and final time, the Premier, Richard Seddon, had the Bill recommitted to consider a new clause (which became section 14). He explained that some members wished to conserve existing rights, which Seddon said the Government did not wish to disturb. The nature of such rights was not explained, but he thought that the new clause would meet the difficulty. William Massey (the member for Franklin) agreed.

One reading of section 14

That is the sole recorded discussion. The new clause was approved and added to the Bill, which was read a third time and passed without further discussion.⁶⁵

The provision appears to have been a sequel to *Mueller v Taupiri Coal Mines Ltd* (see secs 2.2, 6.6, 7.4.2). The court there held that Crown grants of land alongside the Waikato River did not pass ownership of the bed to the middle line because surrounding circumstances, particularly the use of the river as a public highway, rebutted the *ad medium filum* presumption, which would otherwise apply.⁶⁶

Section 14 a reaction to *Mueller v Taupiri Coal Mines Ltd*

The 1903 Act reflects the Crown's desire to assert an exclusive title to the beds of navigable rivers analogous to its claimed common law title to the foreshore and the tidal part of navigable rivers. There is no evidence of Maori being consulted.

The arrangement still applies. Section 14(1) of the 1903 Act was re-enacted as section 3 of the Coal Mines Acts of 1905 and 1908. In the Coal Mines Act 1925, it was again re-enacted (in section 206), save only for a shorter definition of 'navigable river'. The saving provision for rights of riparian owners in respect of the beds of non-navigable rivers was retained (s 206(3)). These provisions were in turn re-enacted in section 261 of the Coal Mines Act 1979.

In 1991, the Crown Minerals Act repealed section 261 of the Coal Mines Act 1975. However, section 354(1) of the Resource Management Act 1991 stated that the repeal of section 261 of the Coal Mines Act 1979:

shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

Thus, the Crown's statutory ownership remains.

In 1950, the Supreme Court had held, in *The King v Morison and Another*, that the bed of the Whanganui River, for such of its length as was capable of being used for navigation, was vested in the Crown by virtue of section 206 of the Coal Mines Act 1925 (originally provided for in section 3 of the 1903 Act).⁶⁷

As considered at section 9.2.13, any suggestion that Maori customary rights to the bed of the Whanganui River might have survived the enactment of section 3 of the Coal-mines Act Amendment Act 1903 was effectively decided in favour of the Crown by sections 84 to 87 of the Native Land Act 1909.

The statement of claim contends that:

65. Coal-mines Act Amendment Act 1903, NZPD, 1903, vol 127, p 68 (doc A49(b), pp 343-351)

66. *Muellar v Taupiri Coalmines Ltd* (1900) 20 NZLR 89 (CA)

67. *The King v Morison and Another* [1950] NZLR 247. For a fuller discussion of Justice Hay's decision, see section 7.4.

The Crown by interfering with Maori rangatiratanga customary and common law rights in respect of the River purportedly under s 261 of the Coal Mines Act 1979 and its predecessors failed to protect the economic interests, ownership rights, and Treaty rights of Atihaunui a Paparangi. Their customary and common law rights were interfered with but not extinguished.⁶⁸

In her closing submissions, Ms Elias referred in some detail to the Court of Appeal decision in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*.⁶⁹ In addition to comments on the possible unreliability of the application of the *ad medium filum* rule, it was said that:

The Maori Affairs Act 1953, s 155, enacts that except so far as may be otherwise expressly provided in any other Act the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any manner against the Crown. The provision goes back to 1909 and the draftsmanship of Sir John Salmond. It is not clear that the provision extends to water, and in their *Te Ika Whenua – Energy Assets Report* in 1993 and *Mohaka River Report* in 1992 the Waitangi Tribunal have adopted the concept of a river as being taonga. One expression of the concept is ‘a whole and indivisible entity, not separated into bed, banks and waters’. The vesting of the beds of navigable rivers in the Crown provided for by the Coal Mines Act Amendment 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept . . .⁷⁰

Need for test cases

These comments were obiter but cast doubts on the legal effectiveness of the various statutes that relate only to land and not to rivers as such. Whether as a matter of law the rights to rivers and waters may exist as a matter of aboriginal title or customary law and may not be overridden by the Coal-mines Act Amendment Act 1903 and succeeding legislation, or the *ad medium filum aquae* rule, will not be known until such time, if ever, as the issues are further tested in the High Court and Court of Appeal.

Meanwhile, the Crown in opening submissions claimed that it has title to the beds of navigable rivers, including the Whanganui, by virtue of the Coal Mines Act 1979 and its predecessors and section 354 of the Resource Management Act 1991.

Crown position

The Crown further claimed that section 3 of the Coal-mines Act Amendment Act 1903 was a valid exercise of the Crown’s power under article 1 of the Treaty of Waitangi and also that it was consistent with the principles of the Treaty in general terms. It was acknowledged, however, that the Act removed Maori rights, having regard to the 1962 Court of Appeal decision, since in 1903 significant amounts of land abutting the Whanganui River were still in Maori ownership. They thought that, though more information was needed to assess the extent of impact, the Crown may be prepared to concede that, having been done without consultation or compensation, it may have constituted a breach of the principles of the Treaty.⁷¹

68. Claim 1.1, para 6.1

69. *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20

70. Ibid, p 26

71. Document C21, p 10

In closing, however, the Crown somewhat resiled from this position. It reiterated its preceding view that the legal ownership of the bed is settled and that the legal position is consistent with the principles of the Treaty. It went further and claimed that, in any event, the Waitangi Tribunal is not the forum for revisiting these issues. We address the latter point at section 9.2.17.

The question is whether section 3 of the Coal-mines Act Amendment Act 1903, the provisions that succeeded it, and section 354 of the Resource Management Act 1991 are inconsistent with the Treaty and Treaty principles.

We have found that the river was owned by Atihaunui at 1840. We have also found that they never knowingly or willingly relinquished it, as the Treaty requires for a proper alienation to have been made. The 1962 decision of the Court of Appeal does not say otherwise.

The question of whether it was properly taken for a public work does not arise since it was not taken for a public work, even if the intention was to secure it for public access, and none of the processes for a public works taking were adopted. Instead, it was taken, by statute, without the agreement or the knowledge of the owners and without compensation being paid.

The Crown has established no basis on which it might have been taken consistently with the Treaty. We find that the powers ceded by Maori to the Crown in article 1 were and remain subject to, and necessarily qualified by, the protection guaranteed by the Crown to Maori in article 2.

We find that the legislative severance of one essential element of the Whanganui River, namely the bed, and the taking of the bed by the Coal-mines Act Amendment Act 1903 and succeeding legislation, and as continued in force by section 354 of the Resource Management Act 1991, was and is inconsistent with article 2 of the Treaty and the Treaty principle requiring active protection of the Atihaunui ownership of the river and their authority over it.

Inconsistent with
the Treaty of
Waitangi

9.2.17 Can the Waitangi Tribunal address questions of law?

Crown counsel submitted in effect that the Waitangi Tribunal cannot address questions of law. No authority was cited in support. We reject this view. There is a distinction between binding determinations of the law – a task for the courts – and the interpretation of law for the purposes of the Treaty of Waitangi Act 1975. To consider whether a law is consistent with the principles of the Treaty of Waitangi, the Tribunal must consider what that law is.

