

# **THE MĀORI RIGHT TO DEVELOPMENT AND NEW FORMS OF PROPERTY**

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## **Introduction**

The world has changed since 1840; in particular, science has created new uses for old materials and allowed us to see into new worlds. Most of New Zealand has been able to take advantage of these developments: however, Māori generally still lag behind in health, education and employment statistics. Historical claims to the Waitangi Tribunal are now reaching an end, so iwi and the Crown must look to the future. The right to develop traditional taonga, and to make use of new resources is vital in maintaining the strength and relevance of Māori culture. The continuing importance of the Treaty of Waitangi cannot be denied. It was signed as a bargain, Māori expected some benefit in return for settlement and how that benefit arises in a modern world must rely in part on the right to development.

This paper examines the right to development in New Zealand. It focuses on the right in the context of claims to resources newly discovered since 1840, new uses for old resources and new forms of Government granted property rights. The right to development has been strongly endorsed by the Waitangi Tribunal, but lacks the full support of the courts, thus does not currently have a strong place in New Zealand law. Developments both in the Canadian courts and international human rights instruments may inform the further development of the right in New Zealand and clarify its application. Ultimately, this paper seeks to look to the future and establish a clear picture of how the right may be applied as new resources are found and new property rights are created.

The first chapter will examine the right to development with respect to both its source and the principles developed by the Waitangi Tribunal, courts and at international law. The second chapter focuses more pointedly on how the right has been applied in a number of cases by the Tribunal, to examine how it may be applied to new situations in the future. The third chapter examines the Canadian judicial application of a development right, and its tests which may help the formulation of the right in New Zealand. The fourth chapter applies this to a contemporary claim, currently before the Waitangi Tribunal, often referred to as the Wai262 claim, to suggest a potential application of the right to development. The fifth chapter gives an overview of the right and suggests a possible future direction.

## Chapter One: The Right to Development

This chapter examines the Māori right to development in terms of its potential sources. The right may be conceptualised as arising out of the principles of the Treaty of Waitangi, but international agreements also provide a possible source and some guidance on domestic application. In particular, New Zealand's recent endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>1</sup> may support the domestic application of the right.

This chapter argues that the principles of the Treaty are the most pertinent source of the right, and explores a three tiered understanding of the right in the New Zealand context. The Waitangi Tribunal has supported all three levels of the right, while the Court of Appeal, by contrast, has only supported the first level and to a more limited extent. The Tribunal's jurisprudence is relevant here as it is the key institution responding to the right to development, arising in both historical and contemporary claims. It should be noted that the Tribunal's jurisdiction is limited to applying the right to development that is based in the Treaty.<sup>2</sup>

The Court of Appeal has stated that the court should give "much weight" to the opinions of the Waitangi Tribunal in interpreting the principles of the Treaty of Waitangi, but noted that they are not binding on the Court.<sup>3</sup> The Tribunal cannot conclusively determine issues of law or fact.<sup>4</sup> However, it has been accepted that the Tribunal can contribute to the working out of customary or Treaty rights, but unless acted on by a court they have no force of law.<sup>5</sup> Thus, it can provide guidance to the courts. Findings made by the Tribunal are also considered to influence government policy, and guide settlement legislation.<sup>6</sup> Through this, the Tribunal may have some impact on the development of Treaty jurisprudence and future application of the right to development.

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<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/296, A/RES61/296 (2007) (UNDRIP).

<sup>2</sup> Treaty of Waitangi Act 1975, s 6.

<sup>3</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 [the *Lands* case] at 661; See also *Te Waero v Minister of Conservation* HC Auckland M360-SW01, 19 February 2002 at [59] where Harrison J stated that Waitangi Tribunal decisions should be given "considerable weight" by the Court.

<sup>4</sup> *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 651.

<sup>5</sup> *Ibid.*

<sup>6</sup> Meredith Gibbs "The Right to Development and Indigenous Peoples: Lessons from New Zealand" (2005) 33 *World Devel* 1365 at 1369.

## Sources

The Treaty of Waitangi, signed between the British Crown and a number of Māori chiefs in 1840, played an important role in establishing Crown sovereignty over New Zealand.<sup>7</sup> The Treaty set out the terms for settlement, the key provisions being cession of sovereignty (kāwanatanga) in return for protection of Māori rangatiratanga (chieftainship).<sup>8</sup> The Treaty was drafted in English and translated into Māori, and differences between these two texts leave the meaning of the Treaty ambiguous.<sup>9</sup>

Article 1 of the Treaty established the cession of sovereignty, or kāwanatanga (government) in the Māori text to the Crown. Article 2 guarantees “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties”, or in the Māori version a guarantee of “tino rangatiratanga” (chieftainship) over lands, villages and “taonga” (treasures). Article 3 confers on Māori “all the Rights and Privileges of British Subjects.”<sup>10</sup>

The Treaty is generally considered an enforceable international treaty.<sup>11</sup> However, it is not legally binding within New Zealand against the Crown unless incorporated into domestic legislation.<sup>12</sup> The Treaty is considered morally binding on the Crown,<sup>13</sup> and also takes the place as a fundamental document of the New Zealand Constitution.<sup>14</sup> This idea is supported by Cooke P in *New Zealand Maori Council v Attorney-General* (the *Lands* case), who stated the Treaty should be seen as an “embryo”, recognising that the text alone could not deal with every situation.<sup>15</sup>

Due to the differing versions, the content of the Treaty cannot be determined solely from the text.<sup>16</sup> In the *Lands* case, the Court of Appeal was able to examine the Treaty due to a statutory reference to the Treaty principles.<sup>17</sup> The Court considered Treaty principles to be vital to a contemporary understanding, and stated these principles were subject to change

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<sup>7</sup> Matthew Palmer *The Treaty of Waitangi In New Zealand's law and constitution* (Victoria University Press, Wellington, 2008) at 54-56.

<sup>8</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1978) at [11.2.2].

<sup>9</sup> Palmer, above n 7, at 51 and 62.

<sup>10</sup> The Treaty of Waitangi in the Treaty of Waitangi Act 1975, sch 1.

<sup>11</sup> Palmer, above n 7, at 167.

<sup>12</sup> *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 591.

<sup>13</sup> Palmer, above n 7, at 24.

<sup>14</sup> *Ibid*, at 277.

<sup>15</sup> *Lands*, above n 3, at 663 per Cooke P.

<sup>16</sup> Waitangi Tribunal (Wai 9, 1978), above n 8, at [11.3.5].

<sup>17</sup> State Owned Enterprises Act 1986, s 9.

within society.<sup>18</sup> Later decisions built on this finding, with the Court of Appeal stating “the Treaty is a living instrument and has to be applied in the light of developing national circumstances”.<sup>19</sup> Due to the uncertainty of the texts, it is often appropriate to focus on the principles of the Treaty.<sup>20</sup>

Parliament has delegated the jurisdiction to resolve differences between the texts to the Waitangi Tribunal, a standing commission of inquiry which hears claims of Crown breaches of the Treaty.<sup>21</sup> The Tribunal’s jurisdiction is based on the principles of the Treaty.<sup>22</sup> It follows from this that the Tribunal will engage with the issue of a right to development under the Treaty, as part of its core jurisdiction. The common principles stated are: Partnership, including good faith and cooperation;<sup>23</sup> Crown sovereignty and a right to govern, qualified by respect for Māori Rangatiratanga and self-determination;<sup>24</sup> and a Crown duty of active protection.<sup>25</sup>

Māori customary rights can also be recognised under the common law doctrine of Aboriginal title. Aboriginal title recognises original ownership of land by indigenous peoples, is held separate from Crown radical title, and is a burden on it. Aboriginal title must be properly extinguished by the Crown, by free consent in times of peace.<sup>26</sup> Claire Charters has argued that Aboriginal title is not an appropriate source for the right to development, as it requires use in accordance with traditional Māori custom, and so is limited in a way that is incompatible with such a right.<sup>27</sup>

### ***Sources of the Right to Development***

The Court of Appeal has noted that there is little practical difference between Treaty rights and the common law doctrine of Aboriginal title, because the Treaty may be viewed as an

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<sup>18</sup> *Lands*, above n 3, at 680 per Richardson J; see also at 663 per Cooke P, who regarded the Treaty as an “embryo rather than a fully developed and integrated set of ideas”.

<sup>19</sup> *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 4, at 655.

<sup>20</sup> *Lands*, above n 3, at 672-673 per Richardson J.

<sup>21</sup> Treaty of Waitangi Act 1975, s 5(2).

<sup>22</sup> *Ibid*, s 6.

<sup>23</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai22, 1988) at [10.5.4]; *Lands*, above n 3, at 664 per Cooke P.

<sup>24</sup> Waitangi Tribunal *Muriwhenua Land Report* (Wai45, 1997) at [11.2.2]; see also *Lands*, above n 3, at 663 per Cooke P.

<sup>25</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai8, 1985) at [8.3]; see also *Lands*, above n 3, at 664 per Cooke P; see also Palmer, above n 7, at 102-128 for an extended discussion of the Treaty principles.

<sup>26</sup> *R v Symonds* (1847) NZPCC 387; see also *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

<sup>27</sup> Claire Charters “Developing an Indigenous People’s Right to Development” (LLB (Hons) Dissertation, University of Otago, 1997) at 34 citing *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

assurance of customary rights.<sup>28</sup> The Court has also accepted that there is a strong argument both customary and Treaty rights could include a right to development.<sup>29</sup> This reflects that the source of the rights may be of little importance to their eventual enforcement. This paper will explore the right to development, as based in the Treaty as opposed to any potential right based in Aboriginal title.

### *Treaty of Waitangi*

The Court of Appeal supported a development right within the statutory incorporation of the principles of the Treaty of Waitangi in *Ngai Tahu Maori Trust Board v Director-General of Conservation*.<sup>30</sup> Following the finding of the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* that the Treaty of Waitangi is not incorporated in municipal law,<sup>31</sup> the right to development under the Treaty is not legally enforceable in the courts unless incorporated into statute.

The Waitangi Tribunal has consistently found a right to development inherent in the Treaty of Waitangi, both specifically under the principle of partnership, as well as a general right for Māori to develop as a people arising from the entire document. The *Muriwhenua Fishing Claim* Tribunal found “that all peoples have the right to retain their properties for so long as they like, and to develop them along either or both customary or modern lines”.<sup>32</sup> This suggests a fundamental right to develop as a people. The *Ngai Tahu Sea Fisheries* Tribunal also supported a right to development inherent in the Treaty.<sup>33</sup> The *Radio Spectrum Management* Tribunal held that a full right to development was supported within the Treaty of Waitangi as a whole.<sup>34</sup> The Tribunal found the Treaty “was not intended to fossilise the status quo” and is “a living instrument” to be applied in light of developing circumstances.<sup>35</sup> The right to development may be protected under the Treaty in a number of ways: as incidental to the guarantee that Māori may retain their properties,<sup>36</sup> as a result of partnership that development must be shared, or it may be a general right of all people to develop as

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<sup>28</sup> *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 4, at 655.

<sup>29</sup> *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 at 147.

<sup>30</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 560.

<sup>31</sup> *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*, above n 12, at 597.

<sup>32</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [S1.1].

<sup>33</sup> Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai27, 1992) at [13.11.1].

<sup>34</sup> *Ibid*, at [3.1].

<sup>35</sup> Waitangi Tribunal *The Radio Spectrum Management and Development Final Report* (Wai776, 1999) at [2.4.1]; See also Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai953, 2002) and Waitangi Tribunal *The Petroleum Report* (Wai796, 2003).

<sup>36</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [11.3.6].



citizens arising from Article 3. The *Te Ika Whenua Rivers* Tribunal summarised the opinion of the Waitangi Tribunal:<sup>37</sup>

...the Tribunal has, over a number of years, consistently upheld the principle that the Treaty did not simply preserve the status quo at 1840 but that it must be adapted to meet changing needs and circumstances—in other words, it must allow a right of development.

The Court of Appeal has stated “right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests.”<sup>38</sup> The *Muriwhenua Fishing Claim* Tribunal also considered that the right to development was recognised in International and Domestic law.<sup>39</sup> However, the *Ngai Tahu Sea Fisheries* Tribunal stated that New Zealand courts needed to explicitly adopt the right, which they had not yet done.<sup>40</sup> The Tribunal noted the Crown supported a right to development inherent in the Treaty and said:<sup>41</sup>

...were the question of whether the Treaty must be interpreted as including the right to develop the fishery to become justiciable in the New Zealand courts, that the right to develop would be recognised in our domestic law.

The reason the Tribunal was able to find this right to development inherent in the Treaty in these decisions may be due to the recognition of the right at an international level.<sup>42</sup>

### *International Law*

As both the Waitangi Tribunal and Court of Appeal recognise, the right to development has also arisen at the international level. Sources of international law include international conventions, international custom, general principles of law and highly regarded judicial decisions and teachings.<sup>43</sup> Customary International Law arises from the general practice of states, it requires uniformity and acceptance the obligation is binding at international law. Determining this is difficult, but can be aided by international agreements that encode these customs.<sup>44</sup>

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<sup>37</sup> Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai212, 1998) at [10.2.4].

<sup>38</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation*, above n 30, at 560.

<sup>39</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [11.6.5(e)].

<sup>40</sup> Waitangi Tribunal (Wai27, 1992), above n 33, at [10.2.3].

<sup>41</sup> *Ibid.*

<sup>42</sup> Kerry Davis “Self-Determination and Constitutional Change” (2000-2003) 9 Auckland U. L. Rev. 235 at 239.

<sup>43</sup> Statue of the International Court of Justice Article (18 April 1946), art 38(1).

<sup>44</sup> Malcolm N Shaw *International Law* (6<sup>th</sup> ed, Cambridge University Press, Cambridge, 2008) at 69-93.

Treaties must be incorporated in legislation by parliament to have force at a domestic level.<sup>45</sup> The Courts can also take international agreements into account in a number of situations: as a foundation of the constitution, relevant to determining the common law, as declaratory of customary international law, as evidence of public policy or when interpreting statutes.<sup>46</sup> Relevance to determining law and public policy are how the courts are most likely to apply international agreements on the right to development in New Zealand.

The United Nations Declaration on the Right to Development (UNDRD),<sup>47</sup> supported by New Zealand, is a comprehensive document which tied together prior indications of a right to development.<sup>48</sup> The UNDRD provides that “all peoples”, as well as individual persons, can participate in and benefit from development as an inalienable human right.<sup>49</sup> Debate over whether human rights can apply to groups of people is therefore avoided by this specific recognition.

The UNDRD provides that states have a duty to ensure favourable conditions for such development to take place.<sup>50</sup> It also provides that all human rights are interdependent, and require equal protection.<sup>51</sup> The right to development, as entailed by various declarations, has been described as a “vector”.<sup>52</sup> This means that the right to development involves the exercise of a number of more general human rights, which must all be realised for the composite right to be protected. Meredith Gibbs argues that this means the process by which the right is realised is as important as the actual outcomes, supporting Māori involvement in this process.<sup>53</sup>

While the UNDRD is not binding, it was re-affirmed in the Vienna Declaration and Programme of Action<sup>54</sup> and again supported by the United Nations General Assembly in 2008, with the aim of working towards a binding international standard.<sup>55</sup> Many states are yet to include the right in their domestic legal system, although New Zealand is beginning to do

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<sup>45</sup> Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at 14.

<sup>46</sup> *Ibid*, at 23.

<sup>47</sup> *Declaration on the Right to Development* GA Res 41/128, A/RES/41/128 (1986) (UNDRD).

<sup>48</sup> See Charter of the United Nations, art 55 and 56; and *Universal Declaration of Human Rights* GA Res 2/317, art 28, A/RES/3/217 (1948).

<sup>49</sup> UNDRD, above n 47, art 1.

<sup>50</sup> *Ibid*, art 3.

<sup>51</sup> *Ibid*, art 6.

<sup>52</sup> Arjun Sengupta “The human right to development” (2004) 32:2 *Oxford Development Studies* 179 at 182.

<sup>53</sup> Gibbs, above n 6, at 1366.

<sup>54</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights (25 June 1993).

<sup>55</sup> *The Right to Development* GA Res 63/178, A/RES/63/178 (2008).

this, and it is not a constant in international practice.<sup>56</sup> This suggests that the right is not yet part of binding customary international law, especially where applied to Indigenous peoples.<sup>57</sup>

The UNDRIP, a non-binding agreement, supports a right to development of Indigenous peoples. It has recently been endorsed by New Zealand, however it is suggested that the Government considers the declaration aspirational and any moves to implement it will be within the current legal framework.<sup>58</sup>

The UNDRIP gives Indigenous peoples a right to self-determination, including over their development.<sup>59</sup> It also supports Indigenous peoples' right to active involvement in the implementation of their development.<sup>60</sup> Indigenous groups also have a right to "develop the past, present and future manifestations" of their culture, which includes sites, technologies and ceremonies.<sup>61</sup> The declaration also places an imperative on states to take appropriate measures to achieve the aims of the declaration, and give Indigenous peoples appropriate assistance.<sup>62</sup> The UNDRIP also recognises the options that a people should have and protects them from being forced to assimilate into another culture.<sup>63</sup>

International law does not currently operate as a strong source of the right to development in New Zealand, but still has an influence as a moral imperative on the Crown. It is clear that the right can apply to Indigenous people, such as Māori, both individually and as a collective group. New Zealand's recent endorsement of the UNDRIP suggests a political atmosphere more open to supporting such a right. These declarations strengthen Māori moral claims to a right to development and support consistent findings of the Court and Waitangi Tribunal. The right as applied within New Zealand to date has mostly occurred under the Treaty of Waitangi, international agreements can then inform the content of this right.<sup>64</sup>

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<sup>56</sup> Sengupta, above n 52, at 188.

<sup>57</sup> See Shaw, above n 44, at 302; contrast Catherine Iornes Magallanes "International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada and New Zealand" in Havemann (ed) *Indigenous peoples' Rights in Australia, Canada & New Zealand* (Oxford University Press, Auckland, 1999) 235 at 244.

<sup>58</sup> John Key "National Govt to support UN rights declaration" (press release, 20 April, 2010).

<sup>59</sup> UNDRIP, above n 1, art 3.

<sup>60</sup> Ibid, art 23.

<sup>61</sup> Ibid, art 11 and 12.

<sup>62</sup> Ibid, art 38 and 39.

<sup>63</sup> Ibid, art 8.

<sup>64</sup> Law Commission, above n 45, at 23.

## *Principles of the Right to Development in New Zealand*

The right to development has been conceptualised as consisting of three different levels. These levels have been used by the Waitangi Tribunal to recognise the extent of its support for the right to development, and findings of the courts can also be considered to fall within them:<sup>65</sup>

[1] the right to develop resources to which Māori had customary uses prior to the Treaty (development of the resource);

[2] the right under the partnership principle to the development of resources not known in 1840 (development of the Treaty); and

[3] the right of Māori to develop their culture, language, and social and economic status using whatever means are available (development of Māori as a people).

This part now explores the three levels of the right to development as considered in New Zealand, as well as the limits on them. This part looks first at the response of the Waitangi Tribunal, then the courts, then to international law.

### *1. Level One*

This is a right to develop those resources and properties which Māori customarily used before 1840. This is the most limited level of the right, and if it is the only one supported, then any claim that Māori have to new forms of property must arise out of resources used at 1840.

#### *(a) Waitangi Tribunal*

The *Muriwhenua Fishing Claim* Tribunal held that Māori access to new technology was protected as a quid pro quo for settler access to resources and sovereignty, as a mutual benefit was expected.<sup>66</sup> The Tribunal considered that the objectives of the Treaty included allowing Māori to retain their resources, and placing a positive duty of protection on the Crown to ensure Māori were able to develop.<sup>67</sup> The Tribunal only explicitly endorsed development of

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<sup>65</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [3.1].

<sup>66</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [10.5.4].

<sup>67</sup> *Ibid*, at [11.3.6].

the resources that were traditionally used. It also held that the Treaty supplemented Aboriginal rights, and was not limited by them, allowing both traditional and new practices.<sup>68</sup>

The *Ngai Tahu Sea Fisheries* report also gave clear support for a first level right.<sup>69</sup> The Tribunal considered it was a “truism” that Māori Treaty rights were not frozen at 1840 and some developments could not have been foreseen at the time.<sup>70</sup> This suggests that limiting developments to resources used at 1840 would unfairly hold Māori back as a Treaty partner while leaving settlers unrestricted. The Tribunal also upheld a Crown duty of active protection, which included the interests that Māori become entitled to under the right to development.<sup>71</sup>

The *Radio Spectrum Management* Tribunal held that there was a Māori right to develop taonga “through technology that has subsequently become available”.<sup>72</sup> Despite also supporting the second and third levels of the right, the Tribunal based its findings on the first level right, stating that Māori had made traditional use of the spectrum in navigating by starlight.

This Tribunal decision was contrary to the Court of Appeal findings that Treaty rights do not apply to things which are “remote from anything in fact contemplated” at 1840 in *Ngai Tahu Maori Trust Board*.<sup>73</sup> However, Gibbs argues that test may unreasonably limit Māori and therefore be inconsistent with the Treaty principles.<sup>74</sup> In fact, limiting the development from including things which were not contemplated at 1840 can be considered directly contrary both to the fundamental purpose of a development right, and to the conception of the Treaty as an evolving embryo. This also highlights the conflict over how far the use of a traditional resource can be extended before it can no longer be considered a natural development.

The *Te Ika Whenua Rivers* Tribunal held that Māori were entitled to fully use and develop the resources guaranteed under the Treaty, which could include a right to generate electricity. This was contingent on context, and as the iwi had reduced their interest in the rivers, this restricted their modern rights so they no longer had sole rights to generate electricity.<sup>75</sup> The

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<sup>68</sup> Ibid, at [11.3.5(a)].

<sup>69</sup> Waitangi Tribunal (Wai27, 1992), above n 33, at [11.5.6].

<sup>70</sup> Ibid, at [10.1].

<sup>71</sup> Ibid, at [11.5.1]-[11.5.2].

<sup>72</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [3.3.6].

<sup>73</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation*, above n 30, at 560.

<sup>74</sup> Gibbs, above n 6, at 1372.

<sup>75</sup> Waitangi Tribunal (Wai212, 1998), above n 37, at [10.3.5].

right to development was also considered to not extend to uses that were incompatible with the interests of other users, reflecting the concept of the right to development as limited, as well as extended, by modern developments.<sup>76</sup>

Many recent Tribunal decisions also supported a first level right, and hinted at extensive development possibilities from traditional uses of resources. For example, the *Te Arawa Geothermal* Tribunal found taonga resources were protected, and the right to development existed under Article 2 of the Treaty.<sup>77</sup> The Tribunal held an interest was not “confined by the traditional or pre-Treaty technology or needs” and includes a right to develop economically.<sup>78</sup> The *Ahu Moana* Tribunal accepted that the right to development exists, and stated that commercial development of resources does not depend on traditional commercial use.<sup>79</sup> The *Petroleum* Report rejected that because Māori did not know of potential uses for their resources at 1840, they could not benefit from them today.<sup>80</sup> The *Petroleum* Tribunal stated:<sup>81</sup>

the Māori interest [in petroleum] may be conceptualised as a development right—a right to exploit a resource not extensively used in traditional times for new purposes not contemplated in those times

This supported a right to develop resources that were known in 1840, using new technology, despite no prior use by Māori, also indicating extensive development of a newly discovered resource was possible. A resource that was known, but not utilised was able to be developed for commercial gain. This finding falls on the line between support for the first and second levels of the right.

In considering the right to development, the Tribunal in the *Foreshore and Seabed Report* considered the Treaty did not foreclose on new technology and opportunities for either Māori, or Pakeha. The Tribunal recognised that Māori rights and responsibilities were not frozen and held that Māori rangatiratanga over the seabed was open to expansion.<sup>82</sup>

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<sup>76</sup> Ibid, at [11.3.3].

<sup>77</sup> Waitangi Tribunal *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wai1153, 1993) at [2].

<sup>78</sup> Ibid, at [5.7].

<sup>79</sup> Waitangi Tribunal (Wai953, 2002), above n 35, at [6.1.1].

<sup>80</sup> Waitangi Tribunal (Wai796, 2003), above n 35, at [5.5].

<sup>81</sup> Ibid, at [5.5].

<sup>82</sup> Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at [2.1.7].

It has been argued the right recognised in the *Ngai Tahu Sea Fisheries* Tribunal was a matter of treaty interpretation and not articulation of a right to development.<sup>83</sup> Subsequent consistent recognition of such a right's existence under the Treaty, by both the Tribunal and the Court suggests that this line of argument is now closed.

*(b) Courts*

The Court of Appeal recognised a limited first level development right in *Ngai Tahu Maori Trust Board*.<sup>84</sup> Ngāi Tahu claimed a veto right over the Director-General allowing the establishment of competing whale-watching businesses. The Court of Appeal held that rights under the Treaty, which would include a Treaty development right, apply only to those things contemplated by the parties at 1840 and that commercial whale watching and tourism was a modern development, stating:<sup>85</sup>

...however liberally Māori customary title and Treaty rights may be construed, tourism and whale-watching are remote from anything in fact contemplated by the original parties to the Treaty. Ngai Tahu's claim to a veto must be rejected.

The Court of Appeal held that:<sup>86</sup>

Although a commercial whale-watching business is not *taonga* or the enjoyment of a fishery within the contemplation of the Treaty, certainly it is so linked to *taonga* and fisheries that a reasonable Treaty partner would recognise that Treaty principles are relevant.

The Court of Appeal upheld “special interests” of Ngāi Tahu in the whale-watching business.<sup>87</sup> This recognises a weak first level development right that while not offering exclusive protection, does give primacy to Ngāi Tahu, and was suggested to potentially include a right to protection long enough for Ngāi Tahu's commercial expenditure to be justified.<sup>88</sup> The Court stressed that the combination of features in this case may be unique, and so the precedent may not apply to other situations.<sup>89</sup> This case supported a more limited scope for development than that accepted by the Tribunal in later claims.

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<sup>83</sup> Scott Davidson “Current Legal Developments: New Zealand: The Ngai Tahu Sea Fisheries Report” (1993) 8 Int'l J Marine & Coastal L 300 at 309.

<sup>84</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation*, above n 30.

<sup>85</sup> *Ibid*, at 560.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*, at 562.

The Court of Appeal stated any right to development “is not necessarily exclusive of other persons or other interests.”<sup>90</sup> This suggests that a right to development may have to be applied within the boundaries of modern society. On this view, the right to development is not limitless and must take account of modern non-Māori interests and may even be able to limit traditional practices as necessary.

In the *Lands* case the Court of Appeal held that the Crown has a right to govern without unreasonable restriction.<sup>91</sup> Gibbs considers this may allow a right to development to be reasonably restricted within a contemporary context.<sup>92</sup> Thus, rights that would have been appropriate at 1840 may no longer be appropriate in a modern context.

The Court of Appeal in *Tainui Maori Trust Board v Attorney General*<sup>93</sup> recognised coal could be “a form of taonga”.<sup>94</sup> The Court accepted that Māori had used coal before 1840 and been involved in the industry since then.<sup>95</sup> Cooke P made a “personal suggestion” that Tainui would be entitled to a “significant” share of the resource under the principles of the Treaty.<sup>96</sup>

Commenting on that case, Gibbs states that “the Court’s comments suggest its acceptance of at least the first level of the right to development”, being those used traditionally by Māori in 1840.<sup>97</sup> While this case does give protection to the coal resource as a form of taonga, the context is limiting. The case turned on the interpretation of whether the coal interest could be considered an interest in land, and so fall under protection of the State Owned Enterprises Act 1986 claw-back regime.<sup>98</sup> The suggestion that any settlement give to Māori a share in the coal resource was just a suggestion that a resource be shared. The Court was not definitive, and merely recognised this could be a possible remedy. Acceptance of this first level of the right to development gives rise to the question “what would be reasonably contemplated at the signing of the Treaty at 1840?”<sup>99</sup> Considering the *Radio Spectrum Management* report, what can be linked to traditional use could be very extensive.

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<sup>90</sup> Ibid, at 560.

<sup>91</sup> *Lands*, above n 3, at 665.

<sup>92</sup> Gibbs, above n 6, 1372.

<sup>93</sup> *Tainui Maori Trust Board v Attorney General* [1989] 2 NZLR 513.

<sup>94</sup> Ibid, at 529.

<sup>95</sup> Ibid, at 527.

<sup>96</sup> Ibid, at 529.

<sup>97</sup> Gibbs, above n 6, at 1371.

<sup>98</sup> *Tainui Maori Trust Board v Attorney General*, above n 93, at 518.

<sup>99</sup> Kiri Chanwai and Benjamin Richardson “Re-working Indigenous Customary Rights - The Case of Introduced Species” (1998) 177 NZ J Envtl L 157 at 178.



*(c) International Law*

This first level is more specific than the aims set out in the UNDRTD, but receives recognition in the UNDRIP, which protects an Indigenous peoples' right to retain, develop and control their traditional lands and resources.<sup>100</sup> This recognition in the now supported document imparts a level of international support for a right to develop the resources used at 1840, supporting the findings of both the Tribunal and Court of Appeal.

*2. Second Level*

This involves a right to develop new resources or properties that Māori did not know of or use at 1840. This is less limited than the first level, and if supported would give Māori a right to a share of resources newly discovered, or not used at 1840, also extending to new forms of property rights.

*(a) Waitangi Tribunal*

The *Radio Spectrum Management* report found there was a development right for property specified in the Treaty of Waitangi, but for unspecified taonga, this was less certain and it noted the reluctance to support development of resources unknown at 1840.<sup>101</sup> The Tribunal noted it was not bound by prior findings of the Court of Appeal that Treaty rights could not include the right to generate electricity.<sup>102</sup> It also recognised the conflict between the courts and various tribunals as to development rights, especially over whether there is a right to develop "other" properties unspecified in the Treaty.<sup>103</sup>

The Tribunal found "the ceding of kawanatanga to the Crown did not involve the acceptance of an unfettered legislative supremacy over resources".<sup>104</sup> And neither partner has a monopoly rights over a resource.<sup>105</sup> Sovereignty is also qualified by rangatiratanga, which may include a right to develop new properties.<sup>106</sup>

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<sup>100</sup> UNDRIP, above n 1, art 26 and 32.

<sup>101</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [2.4.1].

<sup>102</sup> *Ibid*, at [2.4.1].

<sup>103</sup> *Ibid*, at [3.3.6].

<sup>104</sup> *Ibid*, at [2.2].

<sup>105</sup> *Ibid*, at [3.3.1].

<sup>106</sup> *Ibid*, at [2.4.1].

It found the Crown has a fiduciary duty to protect property known at 1840, or discovered later, for Māori.<sup>107</sup> The Tribunal stated the Crown had a duty to protect Māori rights and property, and that it would be difficult to argue the Crown had the sole right to undiscovered properties in New Zealand as this was not reserved under the Treaty.<sup>108</sup> This shows support for the second level of the right. The Tribunal showed the most extensive recognition of the right by any official institution, and suggested partnership justifies a Māori right to new property and resources. The Tribunal accepted the second level of the right to development, that Māori have a right to develop resources not known about or used traditionally at 1840, noting that the Treaty must not be fossilised in 1840.<sup>109</sup> The Tribunal accepted a Māori right to develop resources not known in 1840 in partnership with the Crown.<sup>110</sup> Because the Tribunal held that the electromagnetic spectrum was a taonga used at 1840, it did not need to apply the second level of the right in this claim.

Judge Savage, in the minority, warned the Tribunal should be wary of attributing ownership rights unless they are explicitly within Article 2.<sup>111</sup> He thought that under the Treaty the taonga of Māori was protected, but this did not extend to properties that were the “taonga of mankind”.<sup>112</sup> Judge Savage also considered the right to develop was not a general right.<sup>113</sup> He stated “Treaty principles refer to a right to develop a right, not a bare right to develop”.<sup>114</sup>

Gibbs argues that this Tribunal “specifically acknowledged a Treaty right to development at all three levels for the first time”.<sup>115</sup> This conclusion is hard to disagree with, but such wholesale support has not been forthcoming in more recent Tribunal decisions.

The *Radio Frequencies Allocation* Tribunal also considered that taonga may include things not yet known, showing support for a wide view of what could come under the right to development.<sup>116</sup>

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<sup>107</sup> Ibid.

<sup>108</sup> Ibid, at [3.3.3].

<sup>109</sup> Ibid, at [3.3.6].

<sup>110</sup> Ibid.

<sup>111</sup> Ibid, at [2.4.2].

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Waitangi Tribunal *Radio Spectrum Management and Development Interim Report* (Wai776, 1999) at 16.

<sup>115</sup> Gibbs, above n 6, at 1372.

<sup>116</sup> Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, 1990) at [8.3].

(b) Courts

Gibbs considers the Court of Appeal has hinted at acceptance of the second level of the right to development, particularly in *Ngai Tahu Maori Trust Board*, where it held Treaty principles may give Māori development of taonga and closely linked resources a degree of priority.<sup>117</sup> This argument may be tenuous as the decisions were clearly based on a traditional right to a resource that was traditionally considered taonga, the interest in fisheries and traditional use of coal. While her argument recognises that the modern interest supported by the Court is arguably far removed from traditional use, the extension was justified from the position of traditional taonga, rather than a development of Māori rights to use new resources, as entailed by the second level of the right to development.

The Court of Appeal in *McRitchie v Taranaki Fish and Game Council*<sup>118</sup> rejected a Māori right to fish introduced trout and salmon species. However, the Court of Appeal accepted there was “considerable force” that a case may establish a customary fishing right was a right to fish for food in a particular fishery, not confined to a particular species.<sup>119</sup> A Māori interest in the new species was rejected as due to legislative intent for a statutory code to cover fishing of the new species, there was no room for Māori interest except under this statutory regime.<sup>120</sup> While this suggests a rejection of the right to development applying to new resources, as the case turned on the legislative code covering the species from before their introduction, the right to introduced resources not covered by legislation remains open.

Thomas J, dissenting, held that parliament had not extinguished or curtailed any rights to fish.<sup>121</sup> However, he left open whether the appellant’s fishing rights included the right to take trout from the river.<sup>122</sup> He found that general Māori fishing rights may not relate to specific fish, but a right to fish for food, and that the introduced species may have diminished and therefore replaced indigenous resources may be relevant.<sup>123</sup> This shows a conception of the original right as being very broad, which would allow a wider range of developments from it.

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<sup>117</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation*, above n 30, at 560.

<sup>118</sup> *McRitchie v Taranaki Fish and Game Council*, above n 29.

<sup>119</sup> *Ibid*, at 147.

<sup>120</sup> *Ibid*, at 148-149.

<sup>121</sup> *Ibid*, at 163 per Thomas J dissenting.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid*, at 157 per Thomas J dissenting.

The Court in *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* rejected that a right to generate electricity could arise from the Treaty or customary title, holding:<sup>124</sup>

...however liberally Māori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power as such a suggestion would have been far outside the contemplation of the Māori Chiefs and Governor Hobson in 1840.

This case states the consistent opinion of the Court that Treaty rights do not arise in respect of things that were not contemplated at 1840, a rejection of the second level right. Support for the first level right is articulated in such a way to exclude the second level right. This is in direct conflict with some Waitangi Tribunal reports, as noted in the *Radio Spectrum Management* report<sup>125</sup> and is also in conflict with the possibility that Māori may have a Treaty interest in resources that were unknown at 1840 but are essential to their culture in a contemporary context.<sup>126</sup> The Court thought that if the claims had merit, the most practical remedy was through the Waitangi Tribunal, as the Crown has been willing to remedy injustices.<sup>127</sup> This suggests court support for the political settlement process to settle these issues.

### *(c) International Law*

The second level of a right to development, as applied to Māori by the Tribunal, is not explicitly supported in the international jurisprudence. This is due to the second level of the right arising out of the partnership principle in the Treaty of Waitangi, which supported a right to new resources, as neither Māori nor the Crown has a monopoly right, and sovereignty is tempered by rangatiratanga.

### *3. Third Level*

This level of the right to development is the most expansive, encompassing a Māori right to develop culture and traditions. While it would not give a direct right to new forms of property and resources, it suggests that Māori require a share of those available, to enable them to develop as a distinct people alongside the rest of society.

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<sup>124</sup> *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 24.

<sup>125</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n35, at [2.4.1].

<sup>126</sup> Tom Bennion “Other Jurisdictions: *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*” (Jan 1994) 6 Māori L Rev 1 at 8.

<sup>127</sup> *Te Runanganui o Te Ika Whenua Society v Attorney-General*, above n 124, at 27.

(a) *Waitangi Tribunal*

The *Ngai Tahu Sea Fisheries Tribunal* considered the partnership principle, of two peoples living in harmony, relevant to the right to development.<sup>128</sup> The partnership principle was later used to argue that Māori have a right to share in new resources that were not known or used at 1840. The *Radio Spectrum Management Tribunal* noted that under the partnership principle, which included sharing resources and development, that matters of Māori interest such as language have a place in broadcasting.<sup>129</sup> This shows that some of the broader development interests that Māori may have will most likely fall under the partnership principle.

The *Radio Spectrum Management* report also supported a third level right to development, stating “in our view, the Treaty as a whole provides support for the Māori right to develop as a people.”<sup>130</sup> This should be contrasted to Judge Savage, in the minority, who considered that the *Ngai Tahu Sea Fisheries* and *Muriwhenua Fishing Claim* reports did not support a general right to develop, and that if they did he would disagree with them.<sup>131</sup> He supported the first level of the right to development as well as a general right of Māori to develop as a people, but did not support such a right extending to newly discovered resources.<sup>132</sup>

Gibbs states of the *Radio Spectrum Management* report: “the Tribunal had no hesitation in upholding ... the right of Māori to develop *as a people*.”<sup>133</sup> She considered this important as it was the first recognition of a general right to develop, rather than one linked specifically to traditional resources and gave Māori “a right to develop as a distinct people.”<sup>134</sup>

(b) *Courts*

The courts have not explicitly explored this level of the right to development, neither confirming nor denying it.

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<sup>128</sup> Waitangi Tribunal (Wai27, 1992), above n 33, at [11.5.5].

<sup>129</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [2.1].

<sup>130</sup> *Ibid*, at [3.1].

<sup>131</sup> *Ibid*, at [1.3.2].

<sup>132</sup> *Ibid*.

<sup>133</sup> Gibbs, above n 6, at 1373, citing Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [3.1].

<sup>134</sup> Gibbs, above n 6, at 1373.

### *(c) International Law*

The international right fits best into this third level, as a right to the “expansion of the enjoyment of substantive freedoms and of capabilities of persons to live the kind of lives they value”.<sup>135</sup> The right to development as a human right at the international level entails a right to cultural, social, political and economic development and includes a claim on resources necessary for that development.<sup>136</sup> This clearly entails the development of a people, using the means that are available to them in the modern society in which they exist. A general right to “to the improvement of their economic and social conditions” is also espoused in the UNDRIP.<sup>137</sup>

### ***Principle of Options***

The right to development does not stand alone, and the principle of options is important for its recognition. This supports a Māori right to decide how to manage their development. The Waitangi Tribunal has stated that settlement was a bargain and that:<sup>138</sup>

The settlement profit to Māori derives from the tribe’s access to new technologies and markets, from Māori opportunity to adopt Western ways or from a combination of both. In terms of the Treaty none of these alternatives was denied or can be denied today...

This supports a right to choose to develop along traditional or western lines, as well as a choice to “walk in two worlds”.<sup>139</sup> This gives Māori control over their development processes, and the ability to determine what they will develop. This choice is an important aspect of how the right is applied and is also supported by the UNDRIP.<sup>140</sup>

### ***Conclusion***

The source of the right is of limited importance as the most consistent application arises from the Treaty of Waitangi, either through the Waitangi Tribunal or the courts in the case of incorporation of Treaty principles in legislation. International declarations provide support for the right, but are yet to have a binding effect on New Zealand law. The Court of Appeal and Waitangi Tribunal have both shown support for a right to develop those properties used

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<sup>135</sup> Ibid, at 1366.

<sup>136</sup> Sengupta, above n 52, at 192.

<sup>137</sup> UNDRIP, above n 1, art 21.

<sup>138</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [10.5.4].

<sup>139</sup> Ibid.

<sup>140</sup> UNDRIP, above n 1, art 3.

at 1840, and have held the right clearly extends to properties specified in the Treaty of Waitangi. While the second level of the right has been rejected several times by the Court of Appeal, the Tribunal has strongly supported it. The third and more general conception of the right also has support from the Tribunal, and has not been as obviously rejected by the courts.

This leaves the law in a somewhat uncertain state, with potential future developments in international law, the right may be recognised as binding in New Zealand. The more recent decisions of the Waitangi Tribunal may reflect the status of the right, as the courts have been silent on the right for a decade. The *McRitchie* case suggested the Court of Appeal was open to greater scope for development rights but for the present, and as most contemporary claims are being made under their jurisdiction, the Waitangi Tribunal reports remain most relevant.

## Chapter Two: Application of the Right by the Waitangi Tribunal

This chapter examines how the Waitangi Tribunal has applied the right to development to specific factual situations. Five key Tribunal decisions are reviewed in depth: the *Muriwhenua Fishing Claim* report, the *Ngai Tahu Sea Fisheries* report, the *Radio Spectrum Management* report, the *Ahu Moana* report and the *Petroleum* report. As the Waitangi Tribunal is a specialist body and has been engaged in applying the right, its reports provide a potential framework for future application of the right to new resources and forms of property.

### *The Muriwhenua Fishing Claim Report (1988)*

This report aimed to define the Treaty fishing rights of the Muriwhenua people.<sup>141</sup> The Tribunal found that Muriwhenua traditionally made full fishing use of their regional water up to 25 miles offshore.<sup>142</sup> Muriwhenua held authority over this area, and their fisheries were considered as much property as land.<sup>143</sup> The Tribunal found that Muriwhenua had been extensive in their use of the fisheries, while maintaining resource levels.<sup>144</sup> The Tribunal found that traditional Māori gift exchange developed into a western concept of trade with the arrival of settlers.<sup>145</sup> Māori also allowed settlers use of their fisheries but considered they retained authority over them.<sup>146</sup> By 1900 Māori had not adopted any major new fishing technology, except for whaling boats, as they believed their own technology to be superior to that of the settlers.<sup>147</sup>

“Exclusive” possession guaranteed in the Treaty of Waitangi was held to mean an exclusive right, and rangatiratanga was held to be consistent with this.<sup>148</sup> “Fisheries” was found to mean “the business [Māori] have and may develop in fishing and includes the fish they catch and the places where they catch them” and “taonga” incorporated fisheries and included control and management.<sup>149</sup>

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<sup>141</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [1.2.1].

<sup>142</sup> Ibid, at [11.2.1].

<sup>143</sup> Ibid, at [11.2.2].

<sup>144</sup> Ibid, at [11.2.5].

<sup>145</sup> Ibid, at [11.2.7].

<sup>146</sup> Ibid, at [3.5] and [11.2.8].

<sup>147</sup> Ibid, at [5.6.2].

<sup>148</sup> Ibid, at [11.3.1].

<sup>149</sup> Ibid, at [10.3.2].



The Tribunal held that nothing in the Treaty, or traditional New Zealand territorial water limits, prevented Māori from extending their fishing grounds to major offshore fishing, general use of which had not developed until 1970.<sup>150</sup> As a property right, the business of fishing was not limited to the business as it was, but to where and how it could expand.<sup>151</sup> Māori were also found to have a special interest in offshore fisheries, potentially as replacement fish species given the depletion of traditional inshore fisheries.<sup>152</sup> The Tribunal found that though Māori fisheries always had a commercial component, they could also have developed one under the right to development.<sup>153</sup>

The Tribunal specifically found that the Treaty did not prevent any “manner, method or purpose of taking fish”, or from making use of improvements in “techniques, methods and gear”.<sup>154</sup> It also remarked that as western technology has been allowed to develop, the same right extends to Māori.<sup>155</sup> The Tribunal found no customary restraints, except for resource maintenance that prevented development.<sup>156</sup>

The Tribunal noted an important feature of the Quota Management System (QMS) was the creation of a valuable, saleable property interest of an exclusive right to fish commercially.<sup>157</sup> The Tribunal considered that the QMS could be in fundamental conflict with Māori Treaty fishing rights.<sup>158</sup>

The Tribunal concluded that the Treaty protected Māori fishing rights, including an unlimited right to develop, either following traditional or modern methods.<sup>159</sup> The Tribunal found the specific location of traditional fisheries did not limit development into new areas, and a right to development was considered to include development of new commercial uses.<sup>160</sup> Offshore fisheries were also considered a logical extension of inshore fisheries, opened up as technology advanced. While this was the application of the first level of the right to develop, the Tribunal formulated the modern incarnation widely, and by reference to how the resource and fishing industry had developed.

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<sup>150</sup> Ibid, at [11.6.7].

<sup>151</sup> Ibid, at [11.3.6].

<sup>152</sup> Ibid, at [11.6.7]-[11.6.8].

<sup>153</sup> Ibid, at [11.6.6].

<sup>154</sup> Ibid, at [11.6.5].

<sup>155</sup> Ibid.

<sup>156</sup> Ibid, at [11.2.7].

<sup>157</sup> Ibid, at [8.2.5]-[8.2.8].

<sup>158</sup> Ibid, at [8.2.12].

<sup>159</sup> Ibid, at [12.1.2].

<sup>160</sup> Ibid, at [12.1.3]-[12.1.5].

### *The Ngāi Tahu Sea Fisheries Report (1992)*

This report examined the nature and scope of Ngāi Tahu fishing rights.<sup>161</sup> The Tribunal found that at 1840 Ngāi Tahu exercised full rangatiratanga and regularly fished out to at least twelve miles offshore.<sup>162</sup> They took any fish they wanted along their shore, but were unlikely to have known about deep-sea fish.<sup>163</sup> Ngāi Tahu regularly traded fish,<sup>164</sup> and its Treaty fishing rights at 1840 amounted to full, exclusive and undisturbed possession of their business and activity of fishing, not limited to specific locations.<sup>165</sup>

Ngāi Tahu developed their fishing technology as needed and possible, including adoption of settler technology.<sup>166</sup> Ngāi Tahu wished to retain rangatiratanga over their fisheries, but were willing to allow non-Māori use.<sup>167</sup> The Tribunal found that Ngāi Tahu were fishing commercially up to thirty miles offshore by 1860.<sup>168</sup>

The Tribunal noted the fishing industry operates inshore and offshore fisheries, within a 200 mile zone.<sup>169</sup> Since 1840, there have been significant advances in fishing technology, and the discovery of new species. Commercial fisheries have also shifted focus to newly available offshore fisheries.<sup>170</sup> The Tribunal noted taonga incorporated fisheries, supporting the findings in the *Muriwhenua Fishing Claim* report, and held “their fisheries” meant “their activity and business of fishing”, and were not limited to specific sites or species.<sup>171</sup>

The Tribunal accepted nothing in the Treaty confined Māori to fishing grounds to those already used, or stopped them developing inshore or offshore fisheries.<sup>172</sup> If new technology opened up new fishing grounds, then Ngāi Tahu were entitled to an equitable share, and the Crown had a duty to act reasonably and in good faith to secure this.<sup>173</sup> The Tribunal also

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<sup>161</sup> Waitangi Tribunal (Wai27, 1992), above n 33, at [1.2.1].

<sup>162</sup> Ibid, at [13.4].

<sup>163</sup> Ibid, at [3.10.5]-[3.10.11].

<sup>164</sup> Ibid, at [3.10.13].

<sup>165</sup> Ibid, at [13.3].

<sup>166</sup> Ibid, at [3.4.2].

<sup>167</sup> Ibid, at [13.6].

<sup>168</sup> Ibid, at [5.2.10].

<sup>169</sup> Ibid, at [9.1.2].

<sup>170</sup> Ibid, at [10.1].

<sup>171</sup> Ibid, at [4.4.10].

<sup>172</sup> Ibid, at [10.3.2(a)]-[10.3.2(b)].

<sup>173</sup> Ibid, at [10.3.1].

considered when New Zealand territorial waters expanded Māori had a development right to a reasonable share in the new resource.<sup>174</sup>

The Tribunal also noted the Crown agreed there was a commercial element to traditional Māori fishing, so development included that for commercial purposes.<sup>175</sup> The Tribunal held that it followed from the right to employ new technology, that there was a Treaty right to a reasonable share of all commercially viable fish, both known at 1840 and not.<sup>176</sup> The Tribunal considered offshore fisheries a logical development of inshore fisheries, and given their traditional experience and early economic development, Māori would have been able to engage in extensive commercial fishing, if not prejudiced by Crown actions.<sup>177</sup>

The QMS was found to create a property interest in the right to catch fish.<sup>178</sup> This guaranteed to modern fisheries users the rights already guaranteed to Māori under the Treaty, and so was in conflict.<sup>179</sup> In considering quota being transferred to Māori as a possible remedy, the Tribunal considered allowance had to be made for the depletion of the inshore fishery.<sup>180</sup>

This report supported the *Muriwhenua Fishing Claim* Tribunal, that Māori could develop offshore fisheries, they were not limited to location or method, and could develop a commercial aspect from traditional use. It also suggested that resources made available due to new technology development, in this case deep-sea offshore fisheries, should be shared equally between the Treaty partners.

### ***The Radio Spectrum Management and Development Report (1999)***

This was a claim that Crown kāwanatanga over any natural resource is limited by Māori rangatiratanga over that resource.<sup>181</sup> This was an opportunity for the Waitangi Tribunal to give effect to the second level right, however their approach only applied the first level of the right. This involved taking a very wide view of what traditional taonga was, to give effect to a modern right.

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<sup>174</sup> Ibid, at [10.4.5].

<sup>175</sup> Ibid, at [10.2.6].

<sup>176</sup> Ibid, at [13.11.4].

<sup>177</sup> Ibid, at [10.3.4].

<sup>178</sup> Ibid, at [12.5.2].

<sup>179</sup> Ibid, at [12.5.4].

<sup>180</sup> Ibid, at [13.16].

<sup>181</sup> Waitangi Tribunal (Wai776, 1999) *Interim Report*, above n 114, at 5-7.

The claim concerned the full radio spectrum, exploitable by then current technology and was set out as “Māori have a right to a fair and equitable share in the radio spectrum resource... especially where the Crown has an obligation to promote and protect Māori language and culture.”<sup>182</sup>

The Tribunal considered there would be a breach of Treaty principles if the Crown auctioned spectrum rights without setting some aside for Māori.<sup>183</sup> It noted there was a right to develop property specified in the Treaty, but that unspecified property is more contentious.<sup>184</sup> The Tribunal also noted a right to geothermal development had been recognised in the *Te Arawa Geothermal* report<sup>185</sup> and considered the approach in *Te Runanganui o Te Ika Whenua Inc Society*<sup>186</sup> to be anomalous.<sup>187</sup>

The Tribunal found the Crown had a fiduciary duty, which was relevant to the alienation of resources. Māori expected to share in technological developments under the principle of mutual benefit and Crown kāwanatanga needed to account for Māori rangatiratanga.<sup>188</sup> The Tribunal considered Māori had a right to a fair and equitable share in the radio spectrum resource due to the:<sup>189</sup>

Treaty principles of partnership, the Crown’s fiduciary duty, active protection, mutual benefit, the need to temper the exercise of kāwanatanga with respect for tino rangatiratanga, and the right to development.

It held the Crown had the right to manage, but not alienate rights without considering Māori rangatiratanga rights.<sup>190</sup>

The Tribunal supported the findings of the *Radio Frequencies Allocation* report<sup>191</sup> on a hierarchy of interests in natural resources: first the Crown’s duty to manage, then a Māori

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<sup>182</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [1.1].

<sup>183</sup> Waitangi Tribunal (Wai776, 1999) *Interim Report*, above n 114, at 5.

<sup>184</sup> *Ibid*, at 6.

<sup>185</sup> Waitangi Tribunal, *Preliminary Report on Te Arawa Representative Geothermal Resource Claims* (Wai 153, 1993).

<sup>186</sup> *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, above n 124.

<sup>187</sup> Waitangi Tribunal (Wai776, 1999) *Interim Report*, above n 114, at 7.

<sup>188</sup> *Ibid*, at 8.

<sup>189</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [3].

<sup>190</sup> *Ibid*, at [3.3.2].

<sup>191</sup> Waitangi Tribunal (Wai26, 1990), above n 116.

tribal interest, and finally commercial and recreational interests of the general public. Māori could not argue prior ownership, but had a special interest in the resource.<sup>192</sup>

Māori traditionally used the light of stars to navigate, which the Tribunal considered use of the electromagnetic spectrum, though without technological medium.<sup>193</sup> The Tribunal therefore accepted that Māori had traditional knowledge of parts of the spectrum, it was taonga and they had a right to develop it.<sup>194</sup> The Tribunal also agreed that the spectrum was different from other taonga as it could not be possessed by one person or group.<sup>195</sup> The Tribunal also noted there is a need for affirmative action to correct the imbalance in society and protect Māori culture and language, and an equitable share of the spectrum could help this.<sup>196</sup>

The Tribunal accepted that the spectrum, in its natural state was known to Māori, and that they have a Treaty right to technological exploitation after 1840.<sup>197</sup> The Tribunal found that under the principle of partnership, and its fiduciary duty, the Crown had to protect Māori property and consult Māori before creating a property right.<sup>198</sup> The Crown could not convert a public resource into private property without considering a rangatiratanga right to control and manage it.<sup>199</sup>

The Tribunal also considered that under the right to development, Māori were entitled to develop properties and have a fair and equitable share in Crown created property rights and the Treaty needed to evolve to meet new circumstances.<sup>200</sup>

### *Minority Finding*

The minority finding of Judge Savage was based on the view that the Tribunal should not ascribe ownership rights unless they fall directly within Article 2 of the Treaty of Waitangi. He considered that radio waves were not known at 1840 so the claim was not well founded.<sup>201</sup>

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<sup>192</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [3.3.1].

<sup>193</sup> *Ibid.*, at [3.3.6].

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*, at [3.3.4].

<sup>197</sup> *Ibid.*, at [5.1].

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> Waitangi Tribunal (Wai776, 1999) *Interim Report*, above n 114, at 11.

Judge Savage considered that the Treaty preserved for Māori “their taonga”, which did not include the electromagnetic spectrum, or resources generally.<sup>202</sup> He also considered Māori had a right to a fair and equitable share in the resources guaranteed in the Treaty, but that a general right to resources would be an absurdity, and not within the ambit of the Treaty terms or principles.<sup>203</sup>

***Ahu Moana: The Aquaculture and Marine Farming Report (2002)***

This report dealt with the potential prejudice to Māori resulting from aquaculture legislation reform and examined the nature of the Māori interest in aquaculture.<sup>204</sup> There was evidence that Te Ātiawa, Ngāi Tahu and the other claimants had traditionally engaged in the transplantation of shellfish, seeding new shellfish beds and removing contesting species from shellfish grounds.<sup>205</sup> The Crown argued this was enhancement of wild fisheries and did not amount to marine farming or aquaculture.<sup>206</sup>

The Tribunal considered that all claimants had a relationship with their coastal areas.<sup>207</sup> It found that, incidental to this relationship, Māori had an interest in aquaculture and marine farming, and that it was therefore incorporated within their taonga.<sup>208</sup> The Tribunal considered that:<sup>209</sup>

The practices associated with aquaculture suggest a form of marine farming, however rudimentary and less detailed it may have been in terms of man-made infrastructure of the type that we now see for contemporary marine farms.

The Tribunal held this could develop into modern aquaculture:<sup>210</sup>

Māori cultural practices can be seen as a precursor for modern marine farming. In other words, Māori participation in the industry is a natural and logical progression and extension of those practices traditionally exercised.

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<sup>202</sup> Waitangi Tribunal (Wai776, 1992) *Final Report*, above n 35, *Minority Finding* at [1.3.1].

<sup>203</sup> *Ibid.*, at [1.3.2].

<sup>204</sup> Waitangi Tribunal (Wai953, 2002), above n 35, at [1.3].

<sup>205</sup> *Ibid.*, at [4.1.1].

<sup>206</sup> *Ibid.*, at [4.2.3].

<sup>207</sup> *Ibid.*, at [5.3.3].

<sup>208</sup> *Ibid.*, at [5.4].

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*, at [6.1.1].

The Tribunal considered the Crown had a duty to actively protect Māori rangatiratanga over their resources, especially where they had a traditional interest in it, as here.<sup>211</sup> The traditional practice had developed into modern aquaculture, the main change being the use of technology. The Tribunal considered a lack of ownership over the traditionally enhanced shellfish beds did not prevent the practice from evolving into aquaculture.

### ***The Petroleum Report (2003)***

This report dealt with a claim to the petroleum resources within the rohe of two claimant tribes.<sup>212</sup> The claimants asserted Māori had a right to the resources of their universe and to profit from their commercial exploitation.<sup>213</sup> The Tribunal found petroleum was historically known to Māori, and conceptualised as connected to the people. Māori knew of some sources and petroleum's flammable properties, but lacked the technology and the imperative to extract it.<sup>214</sup>

The Tribunal noted oil exploration is difficult and significant technological progress has improved chances of discovery in more recent times and that western extraction of oil is a relatively recent technological development.<sup>215</sup>

The Tribunal found that the Petroleum Act 1937, which expropriated all petroleum to Crown ownership, breached the principles of the Treaty.<sup>216</sup> The Tribunal held that Māori had an interest in Petroleum, which included a right to exploit it for economic gain, whether they used petroleum before or after the Treaty.<sup>217</sup>

The Tribunal did not decide whether petroleum was taonga separate from land.<sup>218</sup> It treated the interest in petroleum as incidental of surface title and any rights to development of that land, could also apply to the petroleum.<sup>219</sup> The Tribunal also considered that the Māori legal interest in petroleum could be a development right, which is set out as “a right to exploit a resource not extensively used in traditional times for new purposes not contemplated in those

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<sup>211</sup> Ibid, at [6.2.1].

<sup>212</sup> Waitangi Tribunal (Wai796, 2003), above n 35, at [1.1.1]-[1.1.3].

<sup>213</sup> Ibid, at [1.4].

<sup>214</sup> Ibid, at [2.2].

<sup>215</sup> Ibid, at [2.3].

<sup>216</sup> Ibid, at [5.1].

<sup>217</sup> Ibid, at [5.2].

<sup>218</sup> Ibid, at [5.3].

<sup>219</sup> Ibid, at [5.4].

times”.<sup>220</sup> The Tribunal considered that resources incidental to land title could be developed along with that land. This included a right to develop commercial uses, whether the resource was traditionally used or not. This finding did not cover resources that are not linked to land title, but suggests that once a resource becomes taonga, or incidental to taonga, Māori have a right to extensive development of it.

### ***Summary of the Waitangi Tribunal Approach***

The Tribunal recognises that Māori should be able to develop explicitly protected resources to modern uses along the same lines as they have been developed by non-Māori. The resources reserved in Article 2 of the Treaty of Waitangi should be construed broadly, rather than limited to traditional locations and uses. As Māori have traditionally been developers, the Tribunal sees nothing constraining them to pre-settlement methods and technology. The Tribunal also supports a fair share of any new resources and properties being preserved for Māori. It also supports a right to develop commercial uses of their resources regardless of traditional practices.

The Tribunal has suggested it supports a development right for resources not explicitly protected in the Treaty, but it passed up opportunities to apply this in the *Petroleum* and *Aquaculture* reports. Instead, it construed taonga broadly to find a traditional use of the electromagnetic spectrum, and finding rights to petroleum incidental to land. The *Radio Spectrum Management* report found that Māori have a greater interest than the general public in natural resources that were not used at 1840.

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<sup>220</sup> Ibid, at [5.5].



### Chapter Three: Comparative Application of the Right in Canada

In the past five years, the Canadian courts have considered a number of cases involving modern practices of traditional Aboriginal rights, mostly arising from treaties with the various Aboriginal bands. These Canadian precedents may provide guidance to the New Zealand courts if they are called on to apply a right to development in future.

The Court of Appeal has suggested that New Zealand must prevent Māori rights becoming “less respected than the rights of Aboriginal peoples in North America”.<sup>221</sup> It has recently refused to consider Canadian authorities on Crown fiduciary duties to Aboriginal peoples, stating “Those decisions reflect the different statutory and constitutional context in Canada”.<sup>222</sup> However, this would not preclude the courts looking to Canada outside the different approaches to the fiduciary duty of the Crown, where similarities in aboriginal or treaty rights do exist.

Aboriginal and treaty rights of Aboriginal peoples of Canada are given constitutional protection:<sup>223</sup>

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

This allows the courts to ensure protection.<sup>224</sup> While New Zealand courts cannot generally apply the principles or terms of the Treaty of Waitangi, they can do where they are incorporated into legislation.

This chapter looks briefly at some of the early Canadian cases, and then moves to discuss the three most recent Supreme Court of Canada decisions exploring the right to development and commentary arising in response to these.

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<sup>221</sup> *Te Runanaga o Muriwhenua Inc Society v Attorney-General*, above n 4, at 655 per Cooke P.

<sup>222</sup> *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 at [81].

<sup>223</sup> The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s 35(1).

<sup>224</sup> See *R v Sparrow* [1990] 1 SCR 1075 at 1108-1109 per Dickson CJ which held section 35 of the Constitution Act 1982 protects aboriginal rights from being denied by unjustified legislation; See also *R v Badger* [1996] 1 SCR 771 at 812-816 which held the same protection existed for treaty rights.

### *Early Cases*

The Supreme Court of Canada in *R v Simon*<sup>225</sup> held that a treaty protecting the “liberty of Hunting and Fishing”<sup>226</sup> conferred a positive protection for hunting rights. The Court considered that limiting the ability of the Indians hunting to that at the time of the treaty would be an artificial constraint, especially as treaties with Aboriginal bands should be liberally construed.<sup>227</sup> The right to hunt included the possession of a rifle and ammunition - modern equipment.<sup>228</sup> The Court noted that for effective protection of hunting rights flexibility was required as standard methods changed.<sup>229</sup> This approach suggests considering the Treaty right to be flexible, to allow the purpose of the right to be realised as standard methods of carrying out the activities protected change through time.

The Supreme Court of Canada in *R v Sundown*<sup>230</sup> held that the use of temporary shelters for hunting, evolved to the erection of a permanent hunting cabin in a modern context, as this was appropriate for expeditionary hunting in modern society.<sup>231</sup> It also noted that the court had previously rejected considering aboriginal and treaty rights as frozen in time.<sup>232</sup>

### *R v Marshall (2005)*

In a leading Canadian decision, *R v Marshall*,<sup>233</sup> the Supreme Court of Canada held that a treaty right to trade under the 1760 and 1761 “Peace and Friendship” Treaties did not extend to commercial logging. However, the Court accepted that the rights were not frozen in time, but only extended to the modern “logical evolution” of ancestral trading activities, and not to “new and different” trading activities.<sup>234</sup> In effect, a treaty right to trade and access the resources to make a moderate living.

The Court also drew from earlier cases<sup>235</sup> that the right under the treaty was to practice the traditional trading activities in a modern way.<sup>236</sup> McLachlin CJ stated:<sup>237</sup>

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<sup>225</sup> *R v Simon* (1985) 2 SCR 387.

<sup>226</sup> *Ibid*, at [25].

<sup>227</sup> *Ibid*, at [29].

<sup>228</sup> *Ibid*, at [31].

<sup>229</sup> *Ibid*, at [29].

<sup>230</sup> *R v Sundown* [1999] 1 SCR 393.

<sup>231</sup> *Ibid*, at [33].

<sup>232</sup> *Ibid*, at [32].

<sup>233</sup> *R v Marshall* [2005] 2 SCR 220.

<sup>234</sup> *Ibid*, at [16].

<sup>235</sup> *R v Marshall (No. 1)* [1999] 3 SCR 456; *R v Marshall (No. 2)* [1999] 3 SCR 533.

...treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made. ... Logical evolution means the same sort of activity, carried on in the modern economy by modern means.

The relevant treaty, and the trade clause, was not allowed to extend to all natural resources, just those which were traded at 1760. As the Aboriginal groups did not engage in trade in logging historically, the Supreme Court upheld earlier findings that modern commercial logging was not a logical evolution of the treaty trade right.<sup>238</sup> There was traditionally the occasional trading of wood products, but not of harvesting trees, and commercial logging was not contemplated by either party.<sup>239</sup>

In effect, this treaty right is held to allow an equivalent of the first level of the right to development. The development in this sense is limited to the traditional activities, and new uses need to have evolved from those traditional uses. This leaves no room for development rights to new forms of property, or new resources that become available after the Treaty was signed.

In discussing this case, Margaret E. McCallum argues that the Supreme Court of Canada failed to set down any clear rules, and the most that can be taken from this case in relation to treaty rights is that the specific tribe in this case have no right to commercially log under the treaties.<sup>240</sup>

It has also been argued the outcome of the case means that “the treaty rights to engage in commercial harvesting of natural resources is defined by the aboriginal lifestyle and economy of at the time of the treaty”.<sup>241</sup> As such, the right is allowed only a very limited logical evolution, which is the modern method of carrying out the very same traditional activity within the same scope.

This interpretation of developing Indigenous rights under a treaty is limited to the specific treaty clause, but in terms of considering how the rights in the treaty are considered to develop, it shows a restrictive view. If applied by the courts in New Zealand, this would

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<sup>236</sup> *R v Marshall* [2005], above n 233, at [24].

<sup>237</sup> *Ibid*, at [25].

<sup>238</sup> *Ibid*, at [35].

<sup>239</sup> *Ibid*, at [33].

<sup>240</sup> Margaret E McCallum, “After Bernard and Marshall” (2006) 55 UNBLJ 73 at 84.

<sup>241</sup> John McEvoy “Marshall and Bernard: treaty rights and a treaty table” 55 UNBLJ 105 at 118.

suggest that development would only be allowed for rights specifically considered by the parties to the Treaty of Waitangi. For example, fisheries, and forestry rights would be allowed, for the modern equivalent of the use contemplated at 1840.

### *R v Sappier (2006)*

In *R v Sappier*,<sup>242</sup> the Supreme Court of Canada, in considering modern rights to wood, held that domestic harvesting was integral to the Aboriginal traditional culture.<sup>243</sup> It upheld “a right to harvest wood for domestic uses as a member of the aboriginal community.”<sup>244</sup> Bastarache J, who gave the principal decision on behalf of eight of the justices, went on to state that here this meant:<sup>245</sup>

...the right to harvest wood for the construction of temporary shelters must be allowed to evolve into a right to harvest wood by modern means to be used in the construction of a modern dwelling. Any other conclusion would freeze the right in its pre-contact form.

This approved the logical evolution test from *R v Marshall*. The court did not closely look at the links between the traditional practice of domestic wood use and the modern uses claimed in the case, but Bastarache J recognised that without the ability to develop, or evolve, and remain relevant, aboriginal rights would become useless in modern society.<sup>246</sup>

Binnie J concurred with the principal judgement, except for stating that he would define the right more broadly to allow barter, or sale as the modern equivalent, of goods within an Aboriginal community.<sup>247</sup> He considered this better recognised the division of labour within pre-contact Aboriginal communities and promoted efficiency, but that trade outside the community was beyond the scope of the right.<sup>248</sup>

This is an example of a non-treaty right being allowed to develop to a modern context. The right remains very specific, the use of a traditional resource, wood, from traditionally utilised collection sites for personal purposes. The right was allowed to develop to allow the resource to be put to modern uses. This suggests, like *R v Marshall*, a limited, but existing right to develop traditional uses of specific resources, and cultural activities to a modern purpose.

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<sup>242</sup> *R v Sappier* [2006] 2 SCR 686.

<sup>243</sup> *Ibid*, at [47].

<sup>244</sup> *Ibid*, at [24].

<sup>245</sup> *Ibid*, at [48].

<sup>246</sup> *Ibid*, at [49].

<sup>247</sup> *Ibid*, at [74].

<sup>248</sup> *Ibid*.

This case also shows support for the *R v Marshall* approach that, if applied in New Zealand, would allow development of resources used at 1840, and of activities traditionally undertaken by Māori.

### ***R v Morris (2006)***

The Supreme Court of Canada in *R v Morris*<sup>249</sup> held that treaty rights allowed the Tsartlip people to hunt at night using illumination devices.<sup>250</sup> This meant that night hunting was not inherently dangerous and only dangerous night hunting could reasonably be prohibited. The relevant treaty included the right to hunt “as formerly.”<sup>251</sup> But the court held that this meant hunting at night with illumination was protected, and that it had evolved to allow modern tools to be used in carrying out activities, the changes in method did not change the actual right that was protected.<sup>252</sup> This meant that hunting using modern implements was allowed under the treaty, the right allowed the tools used to develop in accordance with society, and not remain frozen in time. The Court used the doctrine of inter-jurisdictional immunity that places Treaty rights within federal authority to protect Aboriginal bands from provincial legislation impacting their rights. The Court looked at the intention of the Treaty partners, and considered the development of the treaty right in terms of, how the right has evolved to exist in the modern world, and what contemporary substitutes would be.

The Court here also shows support for the approach that the modern variant of a treaty right must be allowed to evolve, to allow modern methods to be used in practicing the traditional activity. But rights are limited to the modern equivalent of those historically practiced in fact.

In discussing this case, Kerry Wilkins notes the Minority held the evolution of the right resulted in night hunting becoming inherently dangerous, and so more constrained, due to consideration of wider evolution of society<sup>253</sup>, limiting a right by allowing it to develop.<sup>254</sup> He suggests this may result in future decisions that modern incarnations of rights may be more constrained than traditional methods.<sup>255</sup>

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<sup>249</sup> *R v Morris* [2006] 2 SCR 915; See Mahmud Jamal “Everything Else: Non-Charter Constitutional Developments (2006) 23 Nat'l J Const L 21 for a full discussion of this case.

<sup>250</sup> *R v Morris*, above n 249, at [4].

<sup>251</sup> *Ibid*, at [17].

<sup>252</sup> *Ibid*, at [33].

<sup>253</sup> *Ibid*, at [114] per McLachlin J and Fish J dissenting.

<sup>254</sup> Kerry Wilkins “R v Morris: A Shot in the Dark and Its Repercussions” (2008) 7 Indigenous LJ 1 at 5.

<sup>255</sup> *Ibid*, at 6.

### *Summary of the Canadian Approach*

While no clear rule may have been set down in *R v Marshall*, the subsequent consistent application and approval of allowing the evolution of traditional rights into expression in a modern form suggests this approach is gaining acceptance. This line of reasoning also provides guidance to how the New Zealand courts may approach the question of modern equivalents of traditional rights. The rights that have been allowed to evolve, or develop, to a modern context are restricted to those rights that were guaranteed to, or practiced by, the First Nations around the time of contact. Applied to New Zealand, this would suggest that Māori would only have a right to practice traditional activities, but using modern methods and those rights should not be frozen in time. This suggests a similar approach as taken by the Waitangi Tribunal in the *Muriwhenua Fishing Claim* report.<sup>256</sup>

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<sup>256</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [11.6.5].

## Chapter Four: The Indigenous Flora & Fauna and Cultural Intellectual Property Claim

This chapter deals with the right to development in the context of the contemporary Wai262 Claim, which is currently before the Waitangi Tribunal awaiting publication of its final report. This chapter suggests a possible response, specifically focussing on the aspects of the claim relating to the use of intellectual property in the genetic resources in native flora and fauna. This will cover Māori rights to indigenous species under the Treaty of Waitangi, and whether these can reasonably develop to include rights in the genetic information contained in those resources, as well as whether the genetic information could be considered a new resource in which Māori are entitled to a fair and equitable share.

### *The Claim*

The *Flora and Fauna* claim was lodged in 1991 by claimants on behalf of Te Rawara, Ngāti Kuri, Ngāti Koata, Ngāti Porou, Ngāti Kahungunu and Ngāti Wai.<sup>257</sup> It is a “claim to intellectual and cultural property under Article 2 of the Treaty”.<sup>258</sup> The claim encompasses cultural works, biological and genetic resources of indigenous species, tikanga Māori, mātauranga Māori, Te Reo Māori, and rongoā (traditional medicine).<sup>259</sup> Relevant to this paper are intellectual property rights in indigenous flora and fauna, specifically the right to development arguments.

### *Rights Claimed*

The claimants allege that rangatiratanga includes the right to control the propagation, development, transport, study and sale of indigenous flora and fauna, and the genetic resources within them.<sup>260</sup> They also claim it includes authority over proprietary interests in

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<sup>257</sup> “Statement of Claim” *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document #1.1 (9 October 1991).

<sup>258</sup> Maui Solomon “The Wai262 Claim: A Claim by Māori to Indigenous Flora and Fauna: Me o Ratou Taonga Katoa” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 213 at 214.

<sup>259</sup> “Statement of Issues” *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document #2.314 (6 July 2006).

<sup>260</sup> *Ibid*, at [2.2]-[2.3].

natural resources, particularly including indigenous flora and fauna.<sup>261</sup> Indigenous species are those which naturally occur at a given location, generally excluding human introduction.<sup>262</sup>

Ngāti Kuri, Te Rawara and Ngāti Wai claim rights to indigenous species include the genetic codes and resources within them, which are themselves also protected taonga.<sup>263</sup> They argue rangatiratanga includes a right to development that gives Māori full rights to control the use of indigenous flora and fauna, and the right to be involved in and benefit from technological advances.<sup>264</sup> They also claim that the Waitangi Tribunal has previously acknowledged the right to development arose from Article 2.<sup>265</sup>

Ngāti Porou claim Māori traditional resources, including flora and fauna and biological and genetic resources are taonga under Article 2 and subject to rangatiratanga.<sup>266</sup> This Iwi argue that under the Treaty principle of partnership, Māori have an inherent right to develop customary practices and resources.<sup>267</sup> This is alleged to mean Māori are not limited to their position at 1840 and can take advantage of new forms of property rights, such as intellectual property in genetic material.<sup>268</sup> Ngāti Porou supports a broad view of taonga, as all things treasured by Māori.<sup>269</sup> It argues natural resources are taonga, and this includes biological and genetic resources.<sup>270</sup> It contends intellectual property rights are the appropriate way to protect that taonga.<sup>271</sup> Ngāti Porou claim a right to biological and genetic resources as an incident of land ownership and use of the flora and fauna, and through what they argue to be a first level “right to development” over their resources and traditions.<sup>272</sup>

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<sup>261</sup> Ibid, at [2.2.11].

<sup>262</sup> Robert McClean and Trecia Smith *The Crown And Flora and Fauna: Legislation, Policies and Practices*, 1983-98, (Waitangi Tribunal, Wellington, 2001) at 16.

<sup>263</sup> “Statement of Issues” (Wai262) #2.314, above n 259, at [2.2.21]-[2.2.22].

<sup>264</sup> Ibid, at [2.2.23]-[2.2.25].

<sup>265</sup> “Closing Submissions for Ngati Kuri, Ngatiwai and Te Rawara” *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document # S3 (16 April 2007) at [10.5.2] and [11.3.7].

<sup>266</sup> “Closing Submission on behalf of the Ngati Porou Claimants” *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document #S6 (24 April 2007) at [29].

<sup>267</sup> Ibid, at [52].

<sup>268</sup> Ibid, at [58].

<sup>269</sup> Ibid, at [59].

<sup>270</sup> Ibid, at [70].

<sup>271</sup> Ibid, at [88].

<sup>272</sup> “Closing Submission on behalf of the Ngati Porou Claimants: Appendix One: Answers to Statement of Issues” *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document #S6(a) (24 April 2007) at [2.3.1].



Ngāti Kahungunu claim that Article 2 guarantees rangatiratanga over all taonga, which included indigenous flora and fauna within their rohe.<sup>273</sup> It claims rights to indigenous species, either through customary use or incidental to land title,<sup>274</sup> and that development rights must protect and allow development of all aspects of the species, including genetic resources.<sup>275</sup>

Ngāti Koata claim taonga includes biodiversity and genetics, as well as indigenous flora and fauna and the genetic information within it.<sup>276</sup> It specifically claims that the right to development attached to genetic resources when technology enabled those to be identified.<sup>277</sup> It also contends that rangatiratanga included the right to be involved in, control and make decisions about development and benefit from technological advances related to the breeding and genetic manipulation of indigenous species.<sup>278</sup>

### *Breaches Alleged*

All the claimants allege that the Crown has prevented Māori control over intellectual cultural property rights in indigenous flora that are included in rangatiratanga, citing a number of specific species.<sup>279</sup> For example, Crown actions granting plant variety rights to pohutakawa prevented Māori access to and control over the discovery, genetic development, and plant breeding technologies under the right to development.<sup>280</sup>

The claimants allege that the issue of proprietary rights and patents over indigenous species by the Crown and its agents is in breach of the Treaty, circumventing the guarantee to Māori of their property.<sup>281</sup> Ngāti Kuri, Te Rawara and Ngāti Wai also allege the Crown has a duty to protect indigenous flora and fauna from genetic manipulation contrary to Māori custom and laws.<sup>282</sup>

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<sup>273</sup> “Statement of Issues” (Wai262) #2.314, above n 259, at [2.2.30].

<sup>274</sup> “Closing submissions on behalf of Ngāti Kahungunu – Volume One” *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document #S1 (16 April 2007) at [35].

<sup>275</sup> *Ibid*, at [50].

<sup>276</sup> “Statement of Issues” (Wai262) #2.314, above n 259, at [2.2.32].

<sup>277</sup> “Closing Submissions of Counsel on Behalf of Ngāti Koata” *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document #S4 (19 April 2007) at [11.9.1].

<sup>278</sup> *Ibid*, at [5.13].

<sup>279</sup> “Statement of Issues” (Wai262) #2.314, above n 259, at [2.2.2.6].

<sup>280</sup> *Ibid*, at [2.2.2.5].

<sup>281</sup> *Ibid*, at [2.2.2.12]-[2.2.2.13].

<sup>282</sup> *Ibid*, at [2.2.27].

## *Crown Response*

The Crown accepts that some specific species of indigenous flora and fauna may constitute taonga protected under Article 2, but denies indigenous species are automatically taonga.<sup>283</sup> It accepts the claimants have the exclusive rights to flora and fauna on land they owned, but denies exclusive rights over indigenous flora and fauna as a whole.<sup>284</sup> The Crown denies that rangatiratanga guaranteed Māori rights in resources or proprietary rights that were not known at 1840.<sup>285</sup> The Crown denies that genetic material is itself taonga protected by Article 2.<sup>286</sup>

The Crown accepts Māori are entitled to exercise rangatiratanga over resources that they own, including a right to develop them.<sup>287</sup> This supports a first level development right for property recognised in the Treaty. The Crown also argues that Māori development rights to enjoy the benefits of technological and scientific advances are not greater than those of every New Zealander, as they only exist under of Article 3 of the Treaty.<sup>288</sup> The Crown denies that Article 2 rights are equivalent to Indigenous people's rights, and it does not include development rights over genetic resources.<sup>289</sup> This specifically denies the protection of Indigenous people's genetic resources recognised in the UNDRIP.<sup>290</sup> The Crown denies Māori have exclusive rights in controlling and benefitting from the development of indigenous flora and fauna.<sup>291</sup> The Crown suggests that only pre-existing rights can evolve under a right to development.<sup>292</sup>

The Crown argues that to be protected by the Treaty, rights in indigenous species must be directly linked to taonga contemplated by the Treaty, to be determined case by case.<sup>293</sup> It considers Māori are entitled to exercise rangatiratanga, including a right to develop, to the extent of their legal ownership over resources.<sup>294</sup> The Crown also claims it is limited by

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<sup>283</sup> "Statement of Issues" (Wai262) #2.314, above n 259, at [2.2.35]-[2.2.36].

<sup>284</sup> "Crown Statement of Response" *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* (Wai262) record of inquiry document #2.256 (28 June 2002) at [88]-[89].

<sup>285</sup> Ibid, at [41]-[42].

<sup>286</sup> Ibid, at [98].

<sup>287</sup> Ibid, above, at [45].

<sup>288</sup> "Statement of Issues" (Wai262) #2.314, above n 259, at [2.2.44]-[2.2.45].

<sup>289</sup> "Crown Statement of Response" (Wai262) #2.256, above n 282, at [50].

<sup>290</sup> The Crown denies the right contained in Article 29 of the Draft UNDRIP, the substance of which is now contained in Article 31, UNDRIP.

<sup>291</sup> "Statement of Issues" (Wai262) #2.314, above n 259, at [2.2.48].

<sup>292</sup> "Crown Closing Submissions" *The Indigenous Flora & Fauna and Cultural Intellectual Property Claim* Wai262 record of inquiry document #T1 (21 May 2007) at [67].

<sup>293</sup> "Crown Statement of Response" Wai262 #2.256, above n 284, at [44].

<sup>294</sup> Ibid, at [45].

resources being in the public domain, the interests of non-Māori and international commitments.<sup>295</sup>

### *The Relevant Issue*

The Statement of Issues of 2006 set out a number of specific questions which the Tribunal aims to resolve, the relevant issue to this paper is whether Māori have a right to biological and genetic resources within indigenous and taonga species.<sup>296</sup> I will aim to resolve this proposition with respect to the right to development.

### *The Right to Development Applied*

The strongest claim to a development right would be under the first and second levels of the right, as described in Chapter One. The first level claim is that traditional use of flora and fauna means it is taonga and therefore can develop to include a right to the genetic information made available through technology. The second level right to share in new resources and properties would be based in the partnership principle, and the idea of mutual benefit, that Māori have an interest in resources not known at 1840. A third level right could also be found, that Māori have a development right to utilise the commercial and scientific applications of the genetic resources and intellectual property in them to develop their culture, economy and society as a people. This third level may be supported in principle, and is reinforced by international law conceptions of the right to development but has not been previously applied by the Tribunal. These will be examined as the most likely routes through which the right to development could be applied.

A patent grants the exclusive right to an invention in New Zealand. The Intellectual Property Office of New Zealand currently accepts product patents over new organisms and genes, sequences and related proteins. The Plant Variety Rights Act 1987 allows for exclusive rights to reproduce and sell a new species or variety of plant for twenty years.<sup>297</sup> Patents are premised on the Government granting an exclusive right to the invention in exchange for the benefit to society.<sup>298</sup> Patents on living matter have been possible since 1980, as long as they

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<sup>295</sup> Ibid, at [81]-[82] and [138]-[140].

<sup>296</sup> “Statement of Issues” (Wai262) #2.314, above n 259, at [2.3.1].

<sup>297</sup> Plant Variety Rights Act 1987, s14.

<sup>298</sup> Peter Dengate Thrush *Indigenous Flora and Fauna of New Zealand* (Brookers, Wellington, 1995) at 27.

are produced by humans.<sup>299</sup> The Patents Bill, which has been reported back from Select Committee, provides for a Māori Advisory Committee to advise whether commercial exploitation of an invention derived from traditional knowledge or indigenous plants and animals is contrary to Māori values.<sup>300</sup> This is a limited recognition of a Māori interest in the rights derived from indigenous flora and fauna.

*1) Is the genetic and biological information inherently taonga?*

While the genetic information in indigenous flora and fauna was arguably not known or used at 1840, knowledge of breeding may entail a pre-modern conception of genetics. Māori rights in indigenous species could exist by virtue of direct rights as taonga, or as incidental to land ownership, as argued by the claimants.<sup>301</sup> The Crown specifically denies that genetic material is taonga itself, and as such rights were not recognised at 1840 they are not protected by the Treaty. The law at 1840 did not recognise rights in the radio spectrum either, but the Tribunal has shown a willingness to develop rights recognised in the Treaty to their modern form. Evidence suggests a deep relationship between Māori iwi and indigenous flora and fauna, and a type of knowledge of genetics through whakapapa.<sup>302</sup> It is however strongly argued that as the genome was not known or legally in existence at 1840 it could not be protected by the Treaty.<sup>303</sup> An in depth consideration of whether specific flora or fauna could be considered Māori taonga is a matter of fact and beyond the scope of this dissertation. If genetic material is not taonga in itself, then it could follow from specific indigenous species being considered taonga, accepted as possible by the Crown,<sup>304</sup> rights in them could develop to include their genetic information. If a right to genetic material was not contemplated or possible at 1840, for either Pakeha or Māori, could such a right develop?

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<sup>299</sup> “Patentability of Microorganisms”, directive from the New Zealand Assistant Commissioner of Patents, 6 October 1980; “Naturally Occurring Microorganisms”, directive from the New Zealand Assistant Commissioner of Patents, 4 April 1991.

<sup>300</sup> Patents Bill 2008 (2010 No 235-2), cl 275-278, as reported back from the Commerce Committee: a Government Bill introduced in 2008.

<sup>301</sup> “Closing submissions on behalf of Ngati Kahungunu – Volume One” Wai262 #S1, above n 274, at [35].

<sup>302</sup> Solomon, above n 258, at 223; see also David Williams *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Waitangi Tribunal, Wellington, 2001) at 101-102.

<sup>303</sup> Dengate Thrush, above n 298, at 55.

<sup>304</sup> “Statement of Issues” (Wai262) #2.314, above n 259, at [2.2.35]-[2.2.36].

2) *Is genetic information in protected species taonga by virtue of a level one development right?*

The strongest support for a development right to the genetic resources within indigenous species is under the first level of the right. Māori taonga was guaranteed to them under Article 2 of the Treaty of Waitangi, supporting retention of rights to traditional resources. The specific Treaty guarantee of forests also strengthens rights to plant resources. The Crown argues that flora and fauna are not inherently taonga, but has accepted that species controlled incidental to land ownership can be considered taonga. Following from this, an interest in genetic material could develop from that taonga relationship. Tribunal support for Māori development along modern lines, using the available technology, could extend to derivative genetic information from indigenous species.

The *Radio Spectrum Management* Tribunal would provide strong precedent for this finding. Use of the electromagnetic spectrum's visible manifestation, star-light, was found to support a right to part of the spectrum which was unavailable without modern technology. This suggests that it may be possible to find a development right to genetic information in living resources. While this resource was not available to Māori at 1840, the organisms were utilised at a macroscopic level.<sup>305</sup> Traditional use of a resource can translate to modern use, through the modern methods and technology available. Taking a wide view of what is entailed by traditional rights in indigenous flora and fauna could lead to a finding that the genetic resources are included in the organic resources as a whole. Arguably, genetic resources, in their natural state, were known to Māori and used by them at 1840, as far as possible at the time, similar to use of the electromagnetic spectrum

Property rights in the genetic resources can be seen as the logical evolution of rights over the species of plants. As technology progressed, new uses for organisms and the amount of information subject to property rights has increased. The fact that western technology, and rights to flora and fauna have been allowed to develop to include intellectual property rights favours a similar level of development for Māori rights.

The creation of intellectual property rights in genetic resources contained within taonga species can be considered analogous to the fishing quota created under the QMS, as considered in the *Muriwhenua Fishing Claim*. The Government creation and grant of special

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<sup>305</sup> Also note that DNA was not known to Pakeha settlers at 1840 either.

rights to a valuable property interest in resources, in which Māori have a traditional interest, conflicts with the exclusive possession of both forests and taonga guaranteed under the Treaty. Intellectual property rights may be an appropriate way to remedy loss of rangatiratanga over this aspect of protected flora and fauna.

The limiting factor is whether genetic resources can be considered a logical evolution of the traditional rights to organic resources. As intellectual property rights to genetic information are not limited to specific physical manifestations, but are more general use rights, it can be argued that they are not linked. This can be contrasted to extending fishing rights to new species or locations.<sup>306</sup> Genetic information can be considered similar to the electromagnetic spectrum, in that no one person can control it, suggesting neither Treaty partner should hold monopoly rights over the genetic resources.

The strongest support for finding a level one development right comes from the *Radio Spectrum Management* Tribunal finding that Māori were entitled to a fair share of Crown created property rights in a natural resource.<sup>307</sup> The development right to genetic resources can also entail a commercial use, as numerous Tribunals have held that commercial development does not turn on traditional commercial use of the property. Support can also be found in the *Muriwhenua Fishing Claim* Tribunal's approach that "taonga" should be construed widely, suggesting that a Tribunal may tend towards recognising a resource or property as taonga, even if uncertainty exists.<sup>308</sup>

The Crown denies that rights not known at 1840 could arise, however this ignores the acceptance of a right to the radio spectrum in the *Radio Spectrum Management* report. This shows that the Tribunal will support a Māori interest in a new right, incidental to but distinct from a traditional use of a resource. By analogy, the breeding of indigenous species could be seen as use of the stars to navigate, both ultimately utilised a resource not known to Māori as it is today, and so both should give rise to a right to such a resource when it does become known.

The Crown's argument that the Māori right to development arises out of Article 3 of the Treaty is contrary to previous findings of the Tribunal as well. A right to development only under Article 3 would be contrary to the specifically indigenous rights guaranteed by the

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<sup>306</sup> Waitangi Tribunal (Wai22, 1988), above n 23.

<sup>307</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [5.1].

<sup>308</sup> Waitangi Tribunal (Wai22, 1988), above n 23, at [10.3.2].

UNDRIP. The Crown denies that Article 2 rights are general indigenous people's rights, but they can be informed by such general rights recognised in international agreements, this approach was accepted by Cooke P in the *Lands* case.<sup>309</sup> The right to development can also give Māori a greater interest in a natural resource than the general public, recognised in the hierarchy of rights accepted by the *Radio Spectrum Management* Tribunal.<sup>310</sup> Article 3 rights would also mean that once Māori have developed to the same level as the rest of New Zealand, they would have no independent rights, which suggests a more general third level right than the specific Māori rights guaranteed in the Treaty. This may be artificial and neglect the partnership principle, that Māori have a special place in New Zealand society and the Crown owes them an active duty of protection. Ngāti Koata are critical of this argument, alleging Article 2 rights, inclusive of a right to development have been accepted by the Tribunal.<sup>311</sup>

By comparison, the courts may be less forthcoming in supporting a development right to these resources due to judicial precedent that developments only apply to things contemplated at 1840.<sup>312</sup> However, limiting the extent of development too far may be contrary to the principles of the Treaty.<sup>313</sup> The Court of Appeal precedent may support a limited "special interest" in the biological and genetic resources, possibly entailing consultation rights or rights to limited intellectual property rights. Failure to recognise some kind of intellectual rights in the genetic resources ignores the fact that intellectual property in genetic resources are new to both Māori and the Crown.

*3) Do Māori have a second level development right to genetic information? Does this translate to an intellectual property right in the resource?*

A second level right to development would result in Māori rights to the genetic resources even if they are considered too far removed from traditional use of the flora and fauna resources to be a logical extension. The existence of a right to property and resources unknown at 1840 is less certain, but has received some support from the Waitangi Tribunal.

The *Radio Spectrum Management* Tribunal found a Crown duty to consider Māori when alienating any rights. The Treaty principle of mutual benefit also limits the Crown's right to

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<sup>309</sup> *Lands*, above n 3, at 656 per Cooke P.

<sup>310</sup> Waitangi Tribunal (Wai776, 1999) *Final Report*, above n 35, at [3.3.1].

<sup>311</sup> "Closing submissions of Counsel on behalf of Ngati Koata" (Wai262) #S4, above n 277, at [9.2].

<sup>312</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation*, above n 30.

<sup>313</sup> Gibbs, above n 6, at 1372.

govern and grant property rights in new resources. The Tribunal supported a hierarchy of interests in natural resources as placing a Crown duty to manage first, followed by Māori tribal interests, which were above those of the general public. Māori would lack exclusive rights to the genetic information contained in indigenous species, but would have an important interest, which requires consideration.

The Waitangi Tribunal has also recognised taonga may include things not yet known, which suggests that if genetic resources are not considered linked to the traditional use of flora and fauna, they may become taonga when they arise. At the very least, the Crown had a duty to consult with Māori before allowing intellectual property rights in genetic resources to alienate parts of the limited resource from Māori.

Crown sovereignty is limited by rangatiratanga, which can be considered to include a right to new properties under the right to development. This, in conjunction with neither Treaty partner having a monopoly right over a resource suggests the Crown should make provision for Māori interests in the genetic resource, manifested through intellectual property rights. Partnership and mutual benefit could result in a development right to a measure of intellectual property in native flora and fauna. The difficulty of dividing up the intellectual property rights between Crown, Māori and other public and private interests would lead to the most practical result being sharing and consultation in the development and use of rights.

The Crown denial of exclusive Māori rights to intellectual property in indigenous flora and fauna gains traction here. As such rights must be seen in context in contemporary society and taking into account the Crown right to govern; such rights would not be exclusive. The Crown right to manage natural resources for all New Zealand, as recognised by the Tribunal suggests that while Māori have a justifiable interest in genetic material, such rights would not be exclusive.

### ***A Possible Outcome***

Māori rights to intellectual property in genetic resources contained within indigenous flora and fauna could be supported by level one and two of the right to development, as applied by the Waitangi Tribunal. The first level right can support such rights, if they are recognised as a logical extension of the traditional rights in and use of the macroscopic indigenous organisms. If this development is considered to be too far from the traditional use contemplated under the Treaty of Waitangi, a second level right could be found. This



supports a Māori right to a fair share of the newly available resource, and also to the Government created property rights in it. A third level right can also be argued, that Māori have a right to make use of any development to further their culture, economy and social development, but as this level has not been applied by the Tribunal in the past, it is less likely to be used to justify such interests.

## **Chapter Five: A Future for the Right to Development**

It is clear that the right to development arising out of the Treaty of Waitangi, as accepted by the Waitangi Tribunal entails a right to benefit from new technology, and to use it to develop taonga protected by the Treaty. The extent of the development allowed and suggested by the Tribunal is extensive, and not confined by the needs of Māori at 1840. The Tribunal has also supported a right of Māori to share in new resources made available since 1840.

The courts have accepted a more limited right, involving recognition of special interests that Māori have over taonga used at 1840. The Court of Appeal has supported a right to development that is not exclusive of others, and must recognise the boundaries in place due to the Crown's right to govern New Zealand. The Court has rejected the more extensive view of the Waitangi Tribunal, denying development rights to things not contemplated at 1840, or a right to new resources.

The support from the Tribunal is of less legal impact than that of the Courts, as it is not generally binding, and so requires Government support and acceptance for such rights to be implemented through Settlement legislation. The jurisprudence of the Tribunal does have an impact on the New Zealand legal landscape, and may pave the way for the Courts to recognise a stronger right if the issue is raised before them in future.

The courts have not examined the right to development for a number of years, and so the developments by the Tribunal and in International law may provide guidance as to future claims made under the right to development. The recent Supreme Court of Canada decisions which consider the right to development have recognised that it would be artificial to limit traditional rights and that Canadian treaty rights can be considered to evolve or develop. That Court has suggested a rough "logical evolution" test, which examines whether a modern incarnation of a right can be considered sufficiently linked to the traditional right enjoyed by an Indigenous people. Such a test may be helpfully adopted here when considering the first level of the right to development, aiding determination as to how far a traditional right can be developed. The Canadian cases also recognised that modern expressions of rights may be justifiably limited through consideration of other developments in the modern world that may justify novel considerations.

The first level right is best seen as arising out of Māori rangatiratanga over their taonga. The second level of the right arises from both this principle and the principle of partnership, that both Māori and the Crown have legitimate interests in resources, and that Māori have an interest in property rights, especially where they affect control over taonga.

The principle of options recognises the right to development is not an unavoidable march towards “progress”, but that Māori can control its implementation and choose to follow a more traditional path of development. It has been convincingly argued that development should not be imposed, but chosen.<sup>314</sup> The imposition of a specific, western form of “development” is what historically led to the alienation of Māori from their taonga in the first place.

### ***New Resources and Property***

Māori are a partner under the Treaty, and as such have an interest in new uses for natural resources, in newly discovered natural resources and in new forms of proprietary control and ownership over resources. An equitable share in new resources and new property rights should not be overlooked. What constitutes an equitable share has not been clearly set out for all circumstances, and will most likely depend on the relevant considerations for each right. The right to development does not result in an exclusive right to new resources; Māori do not have a fundamental title to all things in New Zealand’s future. The right to development does not exist in a vacuum, and must be considered in the context of modern society. Māori rights should not be incompatible with the rights of others who have legitimate interests in the same subject matter. However, their rights cannot be denied nor limited to traditional practices. The challenge is to develop a way for the right to development to be exercised consistently with other contemporary concerns.<sup>315</sup>

### ***The Future***

It is clear that the right to development requires further development to become a force in New Zealand. Despite almost wholesale acceptance of the right to development by the Waitangi Tribunal, the right remains to be fully accepted by the Courts. The possibility of future claims being laid in the courts by iwi may give rise to the opportunity to reconsider the right. Reconsideration by the courts, in light of numerous Waitangi Tribunal decisions and

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<sup>314</sup> Williams, above n 302, at 156.

<sup>315</sup> Chanwai and Richardson, above n 99, at 177.

developing international customary law may result in the right to development gaining greater recognition, and a stronger position in New Zealand law.

The Crown has shown an interesting perspective on the right to development in most Māori claims before the Waitangi Tribunal, accepting its existence while attempting to deny it any practical effect. Such practical impacts are necessary for the right to be of any use, and so until the courts directly support the right to development, much relies on Crown acceptance and implementation of Tribunal reports.

The right to development is still not the subject of any legally binding international agreements, or clearly part of international customary law. Past progress has been slow, but there appears to be a clear goal of greater recognition of Indigenous peoples' rights, inclusive of the right to development. The full impact of the Government's support for the UNDRIP also remains to be seen. It has been suggested that the implications will be vast, as morally binding statements of principle can filter into the law.<sup>316</sup>

Future claims under the right to development are hard to predict. Newly discovered resources are an obvious possibility for the application of the right, and naturally beyond our current conception. New uses for old resources, made possible through technology are also relevant. The New Zealand Māori Council's recent assertion to an exclusive entitlement to the 4G telecommunications spectrum may be over-reaching, but outright rejection of any valid interest ignores potential development rights.<sup>317</sup>

We can only speculate at what the future will hold in terms of new technology, new resources and uses and new property rights. As much as the original signatories of the Treaty were in the dark over new developments, we cannot foresee the future with clarity. A firm framework, which enables Māori to continue to develop their social, cultural and spiritual identity, would give greater certainty.

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<sup>316</sup> Comments of Hon Sir Edward Taihākūrei Durie, read in Parliament by Hone Harawira, 21 April 2010 662 NZPD10324.

<sup>317</sup> "Joyce casts doubts on Māori 4G claim" The National Business Review (New Zealand, 18 June 2010) <[www.nbr.co.nz](http://www.nbr.co.nz)>.

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