The legal basis for Maori claims against the Crown

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In this important article, one of the leading writers in the field discusses aspects of Maori claims against the Crown. He points out the difference between two legal bases of Maori claims: statutory recognition of the Treaty of Waitangi; and the Common Law's recognition of aboriginal title. His analysis of the law of territorial title reveals a highly significant point, perhaps unappreciated by legislators. An effect of the Maori Affairs Bill of 1987 is that the Common Law of territorial title becomes justiciable in New Zealand courts — with application historically to past dispositions of title. The writer outlines the principles of North American jurisprudence upon which such justiciability might rest. Also significant are the implications of the Common Law of non-territorial title that are explored by the writer. North American cases again provide principles which may be persuasive in New Zealand courts — for enforcing non-territorial aboriginal title against the Crown (and possibly even against third parties who acquire title). Finally the writer speculates on the applicability of aboriginal title in New Zealand's Exclusive Economic Zone and the extent of jurisdiction of the courts and the Waitangi Tribunal in this area.

I. INTRODUCTION

The recent assessment of the "principles of the Treaty of Waitangi" by the Court of Appeal in *The New Zealand Maori Council* v. *Attorney-General*[1] may have given the misleading impression that the Treaty has at last obtained some enforceability in New Zealand courts *of its own right.* In truth the most recent approximation to such an approach is Chilwell J.'s judgment in *Huakina Trust Development* v. *Waikato Valley Authority* where the Treaty was characterised as part of the backdrop of public policy against which legislation was to be interpreted.[2] In the *New Zealand Maori Council* case the Court stressed that its capacity to look at the Treaty derived wholly from section 9 of the State-Owned Enterprises Act 1986. This section provides that the Act, which *inter alia* facilitates the transfer of Crown land to the state-owned enterprises, does not permit the Crown to act in a manner inconsistent with "the principles of the Treaty of Waitangi". The case turned completely upon the statutory recognition of the Treaty. Indeed, given this statutory basis the Court of Appeal, sideswipes by Richardson[3] and

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1 (1987) 6 N.Z.A.R. 353. Also reprinted in *The Treaty of Waitangi in the Court of Appeal* (Wellington, 1987).

2 (1987) Unreported, Wellington Registry, M 430/86.

3 Supra n.1, Richardson J., 389.

Somers JJ.[4] excepted, purposefully eschewed assessment of the *legal* principles behind the Treaty of Waitangi.[5] Instead the court looked at the overall interpretation and understanding put upon the Treaty by the parties and from this essentially non-legal exercise isolated the important concepts of partnership and good faith. This was an endorsement of the approach taken by the Waitangi Tribunal[6] which has stated on numerous occasions that the reference to "the principles of the Treaty of Waitangi" in the Treaty of Waitangi Act 1975 enables it to go beyond the legal aspect.[7]

These opening comments are made because the writer believes that modern New Zealand courts have yet to comprehensively confront the *legal* principles underlying the Treaty of Waitangi. The notable exception to this is Williamson J.'s admirable judgment in *Te Weehi* v. *Regional Fisheries Officer*.[8] However even this case is being treated, quite wrongly (it is respectfully submitted), as an example of the statutory-recognition approach to the Treaty noted above.[9] *Te Weehi* turned on the Common Law's recognition of Maori fishing rights as part of an unextinguished aboriginal title over land vested in the Crown.[10] The statutory provision (in this case section 88(2) of the Fisheries Act 1983) was not the source of the fishing right but simply excepted a common law right from the Act's regulatory scheme.

The thrust of this article is that a full modern judicial assessment of the legal principles behind the Treaty of Waitangi is unlikely to eventuate from cases resting upon some statutory reference to it. In such cases judicial confrontation of the legal significance of the Treaty is theoretically possible if one takes the view that the Treaty is declaratory of Common Law rights or if some of the other and separate legal approaches are used. This option is, however, one which has been mostly avoided due in large part, one suspects, to the legal community's present uncertainty as to how the different legal approaches to the Treaty tie in.[11] A full judicial assessment of the legal significance of the Treaty of Waitangi is most likely to arise in cases like *Te Weehi* where the Common Law is the substantive source of the Maori claim. In such cases the courts simply cannot

4 Ibid., Somers J., 398-399.

5 Ibid., especially Cooke P., 360.

6 The Court of Appeal, as indeed did Chilwell J. in *Huakina Trust Development* v. *Waikato Valley Authority,* supra n. 2, 78-79, referred to the Tribunal with almost glowing approval: supra n.1, Cooke P. 367 ("the opinions of the Waitangi Tribunal are of great value to the Court"); Casey J. 410; Richardson J. 375-376; Bisson J. 421-422; Somers J. 397. The Tribunal noted the Court of Appeal's favourable review of its activity: Press Statement of the Deputy Chairman, Deputy Chief Judge A.G. McHugh, 30 June 1987.

7 *Finding of the Waitangi Tribunal on the Kaituna Claim* (1984), para 5.11; *Finding of the Waitangi Tribunal on the Manukau Claim* (1985), para 6.2.

8 (1986) 6 N.Z.A.R. 114.

9 *Huakina Trust Development* v. *Waikato Valley Authority,* supra n. 2, 49-51; *Morunga* v. *Ministry of Agriculture and Fisheries* (1987) Unreported, Wellington Registry, 9-10.

10 F.M. Brookfield, "Maori Fishing Rights and The Fisheries Act 1983: *Te Weehi's* case" [1987] Recent Law 63.

11 The different approaches are identified and their relationship(s) clarified in the writer's paper (publication forthcoming) "The legal principles of the Treaty of Waitangi".

use a statute as the source of recognition of the Treaty or, more precisely, the rights therein recognised, but must look to some other source. This will be, of course, the Common Law.

The Crown has yet to feel the full effect of Maori claims against it based on the Common Law doctrine of aboriginal title. This doctrine treats the Treaty of Waitangi as declaratory but not the source of Maori property rights.[12] The *locus classicus* of this is the statement of Chapman J. in *R.* v. *Symonds* that "in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi . . . does not assert either in doctrine or in practice anything new and unsettled".[13] An important inkling of the Crown's exposure to the Common Law claims of the Maori was given by *Te Weehi* but the implications of this judgment remain unexplored. The purpose of this article is to show the susceptibility of the Crown to Maori claims based on the Common Law doctrine of aboriginal title recognised by but not derived from the Treaty of Waitangi. The writer believes that whilst cases turning on the statutory recognition of "the principles of the Treaty of Waitangi" will amplify its extra-legal context and meaning, the legal principles will best (and probably only) be revealed in cases where a Common Law right is alleged. The conclusion reached is that the Crown may be reaching a position of acute vulnerability to such claims.

Two particular aspects are considered. First Part II discusses the legal accountability of the Crown for its dealings with tribal owners extinguishing their aboriginal title. In Part III the enforceability of "aboriginal servitudes" over Crown land, the vestiges of the aboriginal title, will be considered. It should be stressed that Part II deals with what has become known as the territorial aboriginal title or, to use the terminology of Maori land statutes since 1909,[14] "customary title". This particular form of aboriginal title represents a tribal claim to full titular ownership of the land in question. A non-territorial aboriginal title, the subject-matter of Part III below, arises where the titular tribal ownership or "customary title" has been lost by one of a number of processes. These processes might have been: first, sale to the Crown (as was usually the case prior to 1865); second, process established by statute such as confiscation under the New Zealand Settlement Acts[15] or transmutation of title by the Native (today Maori) Land Court;[16] or, thirdly, legislation preventing a claim to titular ownership as with legislation vesting legal title to land subjacent to tidal and navigable water in the

12 The fullest exposition of this approach is the writer's dissertation "The aboriginal rights of the New Zealand Maori at common law" (Cambridge, 1987). [Copies of this dissertation have been lodged in the law libraries at Auckland and Victoria Universities].

13 (1847), [1980-1932] N.Z.P.C.C. 387, 390 (S.C.).

14 The Native Land Act 1909, ss.84-91; the Native Land Act 1931, s.112; the Maori Affairs Act 1953, Part XIV.

15 Discussed by M. R. Litchfield "Confiscation of Maori Land" (1985) 15 V.U.W.L.R. 337.

16 Discussed in the writer's "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 V.U.W.L.R. 313, 323-325.

Crown.[17] Part II is concerned with the legal status of the first of these processes. Part III deals with land the title to which is vested in the Crown but over which a non-territorial aboriginal title, a traditional right less than "customary title", is claimed.

II. THE CROWN AND MAORI CUSTOMARY TITLE

During the mid-nineteenth century the Crown entered into numerous transactions with the Maori tribes of New Zealand by which it purported to extinguish the tribes' aboriginal title over their ancestral lands. This process was a consequence of the Crown's exercise of its "pre-emptive" (meaning exclusive)[18] right to silence the native title, a right recognised by the common law, article 2 of the Treaty of Waitangi and in the numerous legislative enactments for the colony from 1840 onwards.[19] Until the establishment of the Native Land Court in 1865 these land purchases were the usual means by which land was acquired from the tribes for settlement by European colonists. Such transactions occurred throughout the country and although the circumstances and interpretation of these dealings have long been part of tribal lore it is only recently that the New Zealand legal system has had to assess them. This necessity has been a consequence of the extension of the jurisdiction of the Waitangi Tribunal to include "historic" (i.e. pre-1975, the date of the Tribunal's foundation) claims.[20]

One such transaction, "Kemp's Purchase" (1848) of Canterbury, illustrates two usual characteristics of these purported extinguishments of the aboriginal title. During 1848 Henry Tracy Kemp was sent to the South Island as Commissioner to negotiate with the Ngai Tahu chiefs. An important part of the negotiations included a promise by the Crown to set aside land as reserves for the tribe. An assurance was also made that the tribe's traditional food and flora-gathering rights (*kainga* and *mahinga kai*) were not to be disrupted. "Kemp's Deed", the instrument signed by the chiefs, stipulated:[21]

> Our Kainga and mahinga kai are to be reserved for us and our children after us; and it shall be for the Governor hereafter to Set apart some portion for us when the land is surveyed by the surveyors; but the greater part of the land is unreservedly given up to the Europeans forever.

In the end some land was set aside but it was much less than promised and of an inferior quality. The Ngai Tahu position has always been that the Crown has not honoured the obligation undertaken with "Kemp's Purchase" to set aside sufficient land for the tribe. Since the details and interpretation of this transaction are presently

17 Discussed in "The legal status of Maori fishing rights in tidal waters" (1984) 14 V.U.W.L.R. 247. The distinction there made between territorial and non-territorial title was accepted by Williamson J. in *Te Weehi* v. *Regional Fisheries Officer,* supra n.8, 126.

18 "The aboriginal rights of the New Zealand Maori at common law," supra n.12, chapters 6 and 7, especially 237-250. Cf. R. M. Ross, "Te Tiriti O Waitangi: Texts and Translations" (1972) 6 N.Z.J. Hist. 129.

19 Idem, chapter 7.

20 The Treaty of Waitangi Amendment Act 1985, s.3.

21 H. C. Evison, *Ngai Tahu Rights and the Crown Pastoral Lease Lands in the South Island of New Zealand* (Ngai Tahu Maori Trust Board, Christchurch, 1986) 21.

before the Waitangi Tribunal[22] it is not proposed to go into any forensic inquiry. This "Purchase" will be used simply as an example of a transaction by which the Maori owners gave up land to the Crown but upon conditions which they believe the Crown has failed to observe.

The conditions attaching to such transactions may have two broad aspects. First, there may have been conditions requiring the Crown to perform some positive act. In "Kemp's Purchase" the Crown positively undertook to set aside sufficient land for the grantees. Secondly there may be conditions negative in character by which the tribal owners except a portion of the aboriginal title from that being ceded. The provision for *kainga* and *mahinga kai* in "Kemp's Deed" represents such an exception. (The term "exception" is better used than reservation, since the latter term technically means a giving up and grant back whereas an exception is that which is wholly and originally excluded from the sale. Where the term "reservation" is used, however, the courts will look to see if an "exception" actually occurred).[23] This second aspect will be discussed in Part III below.

Transactions between the Crown and Maori tribes extinguishing the aboriginal title have traditionally been regarded as non-justiciable by the New Zealand courts. This position has rested upon two related grounds. First, the courts denied any legal continuity of the tribal title subsequent to British annexation. This position was a crude blend of feudal and Austinian thoughts, all title to land being (narrowly and inaccurately) seen as derived from Crown grant. The Common Law doctrine of aboriginal title challenges this approach and appears to have regained acceptance in New Zealand. Numerous commentators including the Attorney-General[24] and chairman of the Waitangi Tribunal[25] have adopted the present writer's previous conclusions on this matter.[26] It may be added that the formality of these transactions, by "deed" in most cases, is hardly consistent with a belief that the tribal title had no legal basis. They took a distinctive conveyancing format. Secondly in *Wi Parata* v. *The Bishop of Wellington* Prendergast C.J. found relations between Crown and tribe extinguishing the aboriginal title were "acts of state" beyond judicial purview.[27] Again the extreme

22 "Opening submissions for the claimants" by P. Temm Q.C., 18 August 1986; B. Ansley, "Claiming the Mainland", *New Zealand Listener,* Wellington N.Z., 19-25 September 1987, 23.

23 *Duke of Sutherland* v. *Heathcote* [1891] 3 Ch. 504, [1892] 1 Ch. 475; *Attorney-General for New South Wales* v. *Dickson* [1904] A.C. 273; *Re Dances Way, West Town, Hayling Island* [1962] Ch. 490.

24 *A Bill of Rights for New Zealand: A White Paper,* paras 10.37-10.38; J. B. Elkind and A. Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand,* (Oxford University Press, Auckland, 1986), 41.

25 Chief Judge E. T. J. Durie, "Part II and Clause 2b of the Draft New Zealand Bill of Rights" in *A Bill of Rights for New Zealand* (Legal Research Foundation, Auckland, 1985) 175.

26 Also F. M. Brookfield, supra n.10, and "The Constitution in 1985: The Search for Legitimacy" (1985) 15-19; S. E. Kenderdine, "Statutory Separateness (1): Maori issues in the planning process and the social responsibility of industry" [1985] N.Z.L.J. 249; G. Hinde, D. McMorland and P. Sim, *Introduction to Land Law,* (2nd ed., Butterworths, Wellington, 1986) 17.

27 (1877) 3 N.Z. Jur. 72, 79 (S.C.).

infirmity of this approach has been explained elsewhere[28] although it may be added that it flowed from Prendergast's mischaracterisation of the tribal title as subsisting at Crown sufferance. The Privy Council did not subscribe to this view of the relation between Crown and tribal owners. In *Nireaha Tamaki* v. *Baker* the Board found that the statutory references to "native title" and such like since 1841 meant at least legislation had recognised the legal basis of the tribe's aboriginal title.[29] The Board also intimated in strong terms its inability to accept that British annexation had produced an *ipso jure* suspension of tribal title, meaning, in other words, that the Common Law recognised the continuity of the tribal title to their ancestral land. This position caused a local kerfuffle[30] and resulted in legislation codifying the Prendergast position. This reaction survives as sections 155 and 157 of the Maori Affairs Act 1953. The former provides:

> 155. Except so far as may be expressly provided in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against Her Majesty the Queen or against any Minister of the Crown or any person employed in any Department of State acting in the execution of his office.

This section applies only to "customary title", a particular variety of the Common Law aboriginal title. There is another form of the common law aboriginal title, the "non-territorial title" as it was termed in *Te Weehi,* which falls outside the scope of section 155 and which will be discussed in Part III below. Nonetheless in covering the "territorial" aboriginal title section 155 prevented the Maori suing the Crown for breach of positive obligations arising out of its transactions with the aboriginal owners (as in "Kemp's Purchase") even, of course, were local courts minded to accept the Privy Council's position.

The unconstitutionality of section 155 is clear.[31] It was enacted to prevent a class of British subjects — the tribal landowners, commencing litigation in Her Majesty's courts to obtain the legal protection of their property and contractual rights. This was a serious infringement of articles 2 and 3 of the Treaty of Waitangi. Perhaps legal history will judge sections 155 and 157 and their predecessors to be amongst the most serious legislative violations of the Treaty of Waitangi during the past 150 years. Not only did it deny the right given all British subjects to use the courts to protect their property but also it offended the land guarantee of the Treaty.

Significantly the Government has indicated that section 155 will not be re-enacted.[32] The Maori Affairs Bill presently before Parliament has no similar provision. If section

28 Supra n.12, 269-270; "Aboriginal title in New Zealand courts" (1984) 2 Canterbury Law Review 235, 245-247.

29 (1900-1901) [1840-1932] N.Z.P.C.C. 371, 382-383.

30 *Wallis* v. *Solicitor-General* (Protest of Bench and Bar) (1903) [1840-1932] N.Z.P.C.C. 730 (Appendix).

31 "The aboriginal rights of the New Zealand Maori at common law" supra n.12, 278-290; Brookfield, "The Constitution in 1985" supra n.26.

32 The Hon. K. T. Wetere, Minister of Maori Affairs, moving the introduction of the Maori Affairs Bill 1987, 29 April 1987: "The provisions that stated that customary title shall not avail against the Crown have been dropped because they were contrary to the principles of the Treaty of Waitangi". N.Z. Parliamentary Debates, vol. 480, 1987: 8610.

155 is repealed it will mean a restoration of the justiciability of the transactions between Crown and tribe extinguishing the aboriginal title. The courts could consider and enforce transactions such as "Kemp's Purchase" either on the "statute-based" approach of *Nireaha Tamaki* or the Common Law principles of *R.* v. *Symonds.*

Most lawyers would react to this proposition with an instinctive reference to the problem of limitations: Even if these purchases and transactions became justiciable with the disappearance of section 155 does not their occurrence over (often) a century ago fall foul of the Limitation Act? The answer, surprisingly, is in the negative. Section 6(1) of the Limitation Act 1950 (which binds the Crown) stipulates that "nothing in this Act shall apply to any Maori land which is customary land within the meaning of the Maori Affairs Act 1953."

This provision means that limitations do not run in relation to Maori customary land. Section 6(1) of the Limitation Act was doubtless intended to prevent white settlers acquiring title to customary land by adverse occupation — a real problem during the mid-to late-nineteenth century. However the section is not framed in terms that so limit its scope. The section states quite plainly that the limitation rules of the statute are not to apply to Maori customary land. Necessarily that has to include the Crown's dealings with the land as much as the attempts by settlers to acquire title over it by adverse occupation.

In the event of the repeal of section 155 of the Maori Affairs Act 1953 three possible causes of action would seem to lie against the Crown. First the owners of the customary land might bring an action to recover the possession of the land. Although the Limitation Act specifically prevents such actions after the expiration of twelve years, section 6(1) would render this limitation inoperative so far as Maori customary land is concerned. Section 159 of the Maori Affairs Act, which unlike many of the sections presently found in Part XIV of the Act has re-appeared in the Maori Affairs Bill 1987,[33] stipulates that no action or other proceeding for the recovery of the possession, damages or an injunction in respect of any trespass to customary land can be brought other than by or on behalf of the Crown. This provision effectively insulates third parties holding title from the Crown. It does not however protect Crown land. Indeed, if anything, it accentuates the accountability of the Crown to the customary owners for its dealings with their land. Were section 155 repealed an action for the recovery of the possession of customary land would theoretically be possible in those instances where it could be shown that the customary title had not (in the words of section 158 of the Act) been "duly extinguished". If the failure of the Crown to keep its side of agreements such as "Kemp's Purchase" means the aboriginal customary title has not been extinguished, it may be possible to upset the pastoral and other leases over this land. The Land Act 1948 excludes Maori customary land from the Crown land in respect of which the Crown is authorised to grant leases under the Act.[34] This is one way in which third parties may be

33 Maori Affairs Bill 1987, cl.154.

34 Section 2: "Crown land" does not include "any Maori land" (meaning customary or Maori freehold land — s.2, Land Act 1948 and s.2, Maori Affairs Act 1953).

affected by an action for the recovery of land over which the customary title has not been duly extinguished.

Two other related causes of action would arise in the wake of the repeal of sections 155 to 158 of the Maori Affairs Act 1953. If the tribal owners cannot establish an unextinguished customary title, as they would need to in any action seeking the recovery of possession of Crown land, they might allege that the Crown's extinguishment of that title was marred by a breach of fiduciary duty or, alternatively, that in failing to keep its side of the bargain the Crown is in breach of contract. Both of these causes of action flow from the Common Law doctrine of aboriginal title although the latter could be sustained independently through the "statute-based" approach to the original tribal title. The Crown Proceedings Act 1950 permits actions against the Crown for the breach of any contract or trust although the remedy is limited to declaratory relief.[35] Whilst the transfer of the legal title to Crown land to third parties might prevent the recovery of the possession of the land in any action against the Crown (which is not to say the transferees will be unaffected by a subsisting aboriginal title)[36] it would not inhibit a declaration of entitlement to damages.

The prospect presented by the combination of section 6(1) of the Limitation Act and the repeal of section 155 of the Maori Affairs Act would be the legal accountability of the Crown for its dealings with the tribal owners for the extinguishment of their customary title. Although the extinguishment of the customary title by operation of the Native Land Court would stand aside from this accountability it would mean the courts could be called upon to adjudicate in such matters as "Kemp's Purchase". The Crown's transactions with the tribes prior to 1865, in particular the orgiastic activity of the Land Purchase Department (1854-65), would be especially sensitive to such judicial scrutiny. This would leapfrog the recommendatory function of the Waitangi Tribunal making such dealings a matter for judicial determination. The significance of such a development cannot be overstated.

Recent North American cases considerably clarify the legal principles upon which the Crown's accountability for its dealings with customary title would rest.

In *Oneida County, New York* v. *Oneida Indian Nation of New York State* the claimant Indian tribe brought an action for the wrongful possession of their land.[37] They alleged that in 1795 their ancestors had conveyed 100,000 acres to the State of New York in violation of the Trade and Intercourse Act 1793. This statute invalidated any purchase or extinguishment of the tribal aboriginal title other than by the federal authorities. The Supreme Court of the United States indicated that this statute no more than codified a rule of the federal common law. At issue was the ability of the Oneida tribe to bring an action over one hundred and fifty years later in respect of this transaction. The Supreme Court ruled that the action could be maintained. Under the federal Common Law,[38] all

35 Section 17.

36 "Aboriginal servitudes and the Land Transfer Act 1952", supra n.16.

37 105 S.Ct. 1245 (1985).

38 The term "Federal Common Law" means the law judicially fashioned in federal courts: J.P. Ludington "The Supreme Court and the Post-Erie Federal Common Law" (1980) 31 L.Ed. (2d) 1006.

Judges agreed, the Indians could maintain an action upon their aboriginal title. The Supreme Court noted the recognition of this Common Law title since the judgments of Chief Justice Marshall in the early nineteenth century.[39] The Court emphasised that an action to vindicate the Common Law aboriginal title did not need the support of a treaty (part of American law by the Constitution),[40] statute or other formal government act.[41] Given the legal basis of the aboriginal title the Court returned to the long-recognised "canons of construction applicable in Indian law . . . rooted in the unique trust relationship between the United States and the Indians." "It is well established," the Court added, "that treaties should be construed liberally in favor of the Indians."[42] Any possibility of federal ratification of the state's unlawful purchase was to be approached in a manner consistent with the upholding of the aboriginal title. Since no "plain and unambiguous" federal extinguishment of the aboriginal title could be found, the 1795 transaction remained void under the Trade and Intercourse Act. The Court then turned to the question (to which we will come soon) of limitations and laches.

Several features of this portion of the judgment are noteworthy: It affirms the basis of the aboriginal title in the Common Law. It emphasises the government's "unique trust relation" to the aboriginal tribes in exercising its exclusive right to extinguish their aboriginal title. The "trust relation" provides the legal yardstick by which the federal government's conduct is measured. This yardstick applies as equally to the interpretation of "treaties" as legislation by which the aboriginal title is affected. The conduct of the government is to be interpreted in a manner consistent with the protection and survival of the aboriginal right.

The Canadian courts have identified legal principles virtually identical to those typified by the *Oneida Indian* case. The earliest litigation in the Canadian courts was concerned with the simple recognition of the Common Law aboriginal title.[43] Unlike the American courts with over a century of experience behind them, the Canadian courts have only recently been called upon to clarify the legal relationship which the aboriginal title establishes between Crown and tribe. The tidemark of this is *Guerin* v. *The Queen* where it was held by the Supreme Court of Canada that the aboriginal title placed a fiduciary-like obligation upon the Crown.[44] Although the Crown technically holds the legal title to land subject to the unextinguished aboriginal title it remains

39 *Fletcher* v. *Peck* (1810) 6 Cranch 87; *Johnson* v. *M'Intosh* (1823) 8 Wheaton 543; *Cherokee Nation* v. *Georgia* (1831) 5 Pet. 1; *Mitchel* v. *United States* (1835) 9 Pet. 711. See also F. Cohen "Original Indian Title" (1847) 32 Minnesota Law Review 28, recently cited by the Supreme Court (supra n.37, 1251) with approval.

40 The Federal Constitution (September 17, 1787), article 6: ". . . all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land".

41 This emphasised the Supreme Court's disapproval of its own temporary aberration in *Tee Hit Ton Indians* v. *United States* 348 U.S. 272, 99 L.Ed. 314 (1955).

42 Supra n.37, 1258.

43 *R.* v. *White and Bob* (1964) 52 W.W.R. 193 (B.C.C.A.); *Calder* v. *Attorney-General for British Columbia* (1973) 34 D.L.R. (3rd) 145 (S.C.C.); *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* [1980] 1 F.C. 518 (T.D.).

44 (1984) 13 D.L.R. (4th) 591 (S.C.C.).

legally accountable for its dealings with this land where statute has not removed the justiciability. The judgments in *Guerin* highlight the cross-fertilisation of different areas of English law that occurs in describing the Crown's position. In one sense the Crown is a trustee for the aboriginal beneficiaries, in another it may act as their agent. But whatever tool of English law is used, the judgments in *Guerin* stress the justiciability and the uniqueness of the Crown's obligation. This obligation is located squarely in the historical character of the Crown's relations with the tribes. Canadian courts have affirmed the *Guerin* approach on a number of occasions.[45] The have also recognised principles similar to those of American courts concerning the interpretation of agreements between Crown and tribes ("treaties") affecting the aboriginal title. The Canadian courts have ruled that these agreements are to be construed not merely by reference to the written text but with regard to all the surrounding circumstances.[46] The conduct of the parties during the negotiations, including the preliminary oral discussions (as subsequently incorporated into tribal lore) and the tribal trust in the Crown's representatives, as well as the subsequent conduct of the tribe all go to the interpretation of the agreement. The Canadian courts have not however embraced as fully the American requirement that there can only be a "plain and unambiguous" or, in other words, express statutory extinguishment of the aboriginal title. The Canadian courts have been prepared to accept that legislation completely inconsistent with the survival of any aboriginal title can act as an implied extinguishment.[47] The implication must be unavoidable. The courts have stressed such legislation has to be expropriatory in character. Legislation, such as game laws, which are simply regulatory cannot be treated as impliedly extinguishing the aboriginal title.[48] Although a little less than the American requirement of express statutory extinguishment, the Canadian position still sets a high threshold consistent with the Crown's Common Law duties in respect of the aboriginal title.

In the event of the repeal of section 155 of the Maori Affairs Act the legal principles given by the North American courts will become directly relevant to Maori litigation concerning the Crown's past disposition of customary title. The Common Law doctrine of aboriginal title establishes the lawful right of the tribes to their land and the fiduciary-like duties of the Crown towards the tribal lands. The cases recognise that in

45 *Kruger* v. *The Queen* (1985) 17 D.L.R. (4th) 591; *Re Boyer and the Queen* (1986) 26 D.L.R. (4th) 284; *Hunt* v. *Halcan Log Services Ltd.* (1986) 34 D.L.R. (4th) 504 (B.C.S.C.); *R.* v. *Sparrow* (1986) 36 D.L.R. (4th) 247.

46 *R.* v. *Bartleman* (1984) 12 D.L.R. (4th) 73 (B.C.C.A), following *R.* v. *Taylor and Williams* (1981) 62 C.C.C. (2d) 227; *R.* v. *Augustine and Augustine* (1986) 35 D.L.R. (4th) 237; See M. H. Ogilvie "Evidence — Judicial Notice — Historical Documents and Historical Facts — Indian Treaty Rights" (1986) 64 Canadian Bar Review 183. Also *Simon* v. *The Queen* (1985) 24 D.L.R. (4th) 390, 405 (S.C.C.) per Dickson C.J. requiring "strict proof of the fact of extinguishment in each case where the issue arises" and citing in support *United States* v. *Santa Fe Railway Co.* 314 U.S. 339 (1941); and *Nowegijick* v. *The Queen* (1983) 144 D.L.R. (3rd) 193, 198 (S.C.C.) where the same judge cited *Jones* v. *Meechan* 175 U.S. 1 (1899).

47 *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* supra n.43; *Attorney-General for Ontario* v. *Bear Island Foundation* (1984) 15 D.L.R. (4th) 321.

48 *Kruger and Manuel* v. *The Queen* (1977) 75 D.L.R. (3rd) 434; *R.* v. *Sparrow* supra n.45.

exercising its exclusive right to extinguish the aboriginal title the Crown is under a duty of good faith. These transactions concerning the aboriginal title are enforceable and create rights binding on the Crown in all but its legislative capacity.[49] Even then, legislation affecting aboriginal title is to be construed in a way consistent with the interest of the traditional owners. Since *Te Weehi* there appears no doubt these Common Law principles have at least some residual importance (indeed more than is realised, this article argues) to New Zealand. There are a variety of principles embodied in the Treaty of Waitangi. These include the notion of good faith, the recognition of Maori title to their traditional lands, forests, fisheries and other treasured things, and the tribes' entitlement as British subjects to have these property rights protected in the courts. These are principles, however, which can be found already and separately incorporated into the common law. Their justiciability does not require a statutory basis.

It has been indicated that the justiciability of the Crown's transactions in relation to the Maori aboriginal title is not affected by limitations as a result of section 6(1) of the Limitation Act. The fatal legal barrier at present is section 155 of the Maori Affairs Act. It is instructive to look at the North American position regarding limitations and actions by tribes based upon the Crown or government's past derogations from the common law aboriginal title. The discussion returns to the *Oneida Indian* case before proceeding onto the Canadian case law.

In the *Oneida Indian* case the Supreme Court of the United States indicated that limitations do not affect the tribe's claim as the federal statutes had expressly excepted Indian claims based on historic claims. The exception, the Court noted, was consistent with Congressional concern that in the past the United States "had failed to live up to its responsibilities as trustee for the Indians."[50] The Supreme Court has since ruled that the limitations exception applies only to tribal claims based upon the federal common law as in the *Oneida Indian* case. Claims deriving from a derogation from the rights of a tribal allottment holder under the Dawes General Allottment Act (1887)[51] or resting upon the Fifth Amendment do not enjoy the same limitations exception.[52]

The Supreme Court also mentioned by way of *obiter dicta* in the *Oneida Indian* case that the equitable doctrine of laches cannot apply to Indian claims based upon a common law aboriginal title.[53] The inapplicability of this doctrine goes back to the federal government's trust responsibility to the Indian tribes. As authority the Court footnoted itself in *Ewert* v. *Bluejacket*:[54]

49 *R.* v. *White and Bob* supra n. 43, 618: "only Parliament can derogate from those rights" left with the Indians upon extinguishment of the territorial aboriginal title. See also the cases supra nn.44 and 45.

50 Supra n.37, 1256.

51 *United States* v. *Mottaz* 90 L.Ed. (2d) 841 (1986); *Nichols* v. *Rysavy* 809 F.2d. 1317 (1987).

52 *Canadian St. Regis Band* v. *State of New York* 640 F. Supp. 203 (1986).

53 Supra n.37, 1257.

54 259 U.S. 129, 138 (1922).

> . . . the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void indeed and to bar the rights of Indian wards . . .

In his dissent on this question Rehnquist J. stressed the close relation of laches to limitations. He stated that "the equitable doctrine of laches with its focus on legitimate reliance and inexcusable delay, best reflects the limitation principles that would have governed this ancient claim at common law."[55] The common law "limitation" of which he was thinking is the rule that an aboriginal title becomes extinguished upon abandonment by the tribal owners. The difficulty with this approach, however, must be the use of equitable doctrine to get round the clear statutory exception of the common law aboriginal title from the American limitation statutes. Even were the Rehnquist approach adopted, each particular claim would still have to be screened judicially in order to find any such abandonment. It is not part of the Rehnquist approach to contest the initial justiciability of the federal government's disposition of the Common Law tribal title.

In Canada there has been no exemption of government-tribal relations concerning the aboriginal title from limitations such as one finds in the United States. However there is one important Canadian case on the question of limitations. This case has significance for New Zealand for it gives an indication of the legal position regarding transactions such as "Kemp's Purchase" aside from the exception represented by section 6(1) of the Limitation Act (N.Z.). *Kruger* v. *The Queen* concerned limitations legislation virtually identical to the New Zealand but with an absence of provision similar to section 6(1).[56]

In *Kruger* the claimant Indians brought an action agains the Crown for the lease of reserve land to the Department of Transport in 1941-42 for use as an airport. Reserve land is land subject to an unextinguished aboriginal title although this common law title is supplemented by the regulatory scheme of the federal Indian Act. The claimants alleged that the Crown had breached its fiduciary duties towards the Indian owners. They claimed damages for breach of trust and lost revenue or, alternatively, compensation for wrongful taking and the return of the land. Judges Urie and Stone held that the Crown had not acted in breach of its fiduciary duty.[57] Heald J. held otherwise.[58] Both Urie and Heald JJ. ruled, however, that the provincial limitations laws prevented the claimants bringing the claim. This was not an action for concealed fraud as to bring the action within section 38 of the relevant statute which provided that in such cases the cause of action was not to accrue until it could with reasonable diligence have been discovered.[59] Heald J. also dismissed the applicability of the exception to the general limitations rules established by section 83 of the Trustee Act

55 Supra n.37, 1266.
56 Supra n.45.
57 Ibid., 647-648.
58 Ibid., 597-599, 609, 622-623.
59 Statute of Limitations 1936 (B.C.).

1936 (British Columbia). This section is very similar to section 21 of the Limitation Act 1950 (New Zealand). It provides that there is no limitation period in actions by beneficiaries against a trustee if the action is based upon fraud or fraudulent breach of trust or to recover trust property. Needlessly — for the principles in *Guerin* are enough to give the Crown trustee-like status, Heald J. ruled that since the Crown had enjoyed an unjust enrichment from its actions it could be said to be in the position of a trustee.[60] This was not an action based on fraud but an action either to recover trust property or to obtain compensation for breach of a fiduciary duty. Heald J. indicated the action to recover trust property could not be maintained since even if in breach of fiduciary duty the Crown's expropriation was valid under the procedure required by section 48(1) of the Indian Act.[61] The latter cause of action fell outside the scope of section 83.[62] Still, despite the failure of the claimant Indians, *Kruger* leaves open the possibility of an action to recover trust property from the Crown where it has obtained the extinguishment or otherwise removed the aboriginal owners in breach of the Common Law fiduciary-like duty. There is also, of course, the (extremely difficult) possibility of proving fraud. In either situation the Crown's accountability would in the New Zealand setting arise quite independently of its exposure under section 6(1) of the Limitation Act. Again it is stressed that such a result requires the (prospective) repeal of section 155 of the Maori Affairs Act.

It is submitted that the New Zealand government has faced itself with a conundrum. There has been a commitment to the repeal of section 155 of the Maori Affairs Act without an accompanying awareness of the consequence this will have for the Crown's legal accountability for its historic dealings with Maori customary title (outside of the transmutation of title processes of the Native Land Court). In particular the government will have to clarify the relation of its prospective exposure to liability resulting from the repeal of section 155 to the recently conferred retrospective jurisdiction of the Waitangi Tribunal. It may be that the Maori Affairs Bill will need amendment to provide that no action may be brought in the courts in respect of the Crown's extinguishment of the customary title by exercise of its pre-emptive right prior to a determination of the question by the Waitangi Tribunal. Such provision may well require a concomitant change of the Waitangi Tribunal's role from recommendatory to adjudicative. Such a transformation might undermine the Tribunal's present procedural flexibility and responsiveness to the Maori position. The overseas experience suggests that land claims bodies given an adjudicative function are much less successful than those which give a less formal delineation of the respective sides' position.[63]

The stakes are high. Maori claims of the variety typified by "Kemp's Purchase" run to hundreds of millions of dollars. The tribes have a deep sense of injustice which the

60 Supra n.45, 625-626.

61 Section 48(1) requiring the consent of the Governor in Council to the compulsory acquisition of reserve land for public works. This consent had been given.

62 Supra n.45, 626.

63 "The constitutional role of the Waitangi Tribunal" [1985] N.Z.L.J. 224; E. T. J. Durie, "The Waitangi Tribunal: Its relationship with the judicial system" [1986] N.Z.L.J. 235 (stressing the value of the Tribunal's semi-legal approach).

government has pledged to correct. The repeal of section 155 of the Maori Affairs Act seems to be considered as no more than constitutional tokenism. Yet such a step has massive significance so long as section 6(1) of the Limitation Act remains. The way in which this conundrum is resolved calls for acute political sensitivity for whatever way the government reacts it risks transgression of the principles of the Treaty of Waitangi.

III. THE CROWN AND SUBSISTING ABORIGINAL TITLE

In *Te Weehi* it was held that section 88(2) of the Fisheries Act 1983 excepts traditional Maori fishing rights from the Act's regulatory scheme.[64] The section provides that nothing in the Act "shall affect any Maori fishing rights." Williamson J. ruled that these fishing rights had their basis in the Common Law doctrine of aboriginal title. These rights subsisted over the tidal land on a non-territorial basis.[65] That is to say, they were rights apart from a claim to ownership of the land which by statute was vested in the Crown. However, Williamson J. held that although the Crown held the legal title this did not exclude the possibility of an aboriginal title less than a claim to titular aboriginal ownership. The non-territorial aboriginal title recognised in this case is not unlike a servitude over the land in question. It consists of the traditional incidents of the original tribal title which have not been extinguished by statute or voluntary relinquishment by the tribe.

Williamson J.'s judgment holds significant consequences for Crown land. It recognises that, absent statutory extinguishment or tribal relinquishment, Crown land can be burdened by a non-territorial aboriginal title. The mere vesting of legal title in the Crown, whether by statute or other extinguishment of the "customary title," is not enough. One cannot assume that removal of the "customary title," the territorial aboriginal title, has taken with it the non-territorial aboriginal title.

"Kemp's Purchase" of the Canterbury block again provides a useful illustration. In 1848 the Ngai Tahu agreed to give up their territorial title over the region with an exception of certain incidents of the traditional title (*mahinga kai*). These rights survived the transaction — they were never part of it, and continued as a non-territorial aboriginal title. This title certainly survives over Crown land in the South Island. *Te Weehi* is direct authority for this proposition since the case did *not* turn on the type of land involved (that subjacent to tidal water). It was enough that the Crown held the legal title to (that is, owned) the land over which the aboriginal title was exercised. The tidal character of this land was not relevant; Crown ownership was.

The potential, indeed unmistakable, applicability of the principles in *Te Weehi* to all of Crown land is clear. This, however, is a ramification which seems to have been missed. The point was touched upon by counsel in the *New Zealand Maori Council* case but none of the judgments considered fully the status of unextinguished non-territorial

64 Supra n.8.
65 Ibid., 126.

aboriginal title over Crown land.[66] Perhaps rightly, and certainly understandably, the Court of Appeal kept to rather narrow grounds, giving judgments requiring the "treaty partners" to negotiate a solution. However some discussion of the status of the residual aboriginal title over Crown land would have clarified the negotiating position considerably. The transfer of legal title by the Crown to third parties may have some deleterious effect upon the enforceability of the non-territorial aboriginal title, reducing it from *de jure* to *de facto* status. This would particularly affect land becoming subject to the indefeasibility of title provisions of the Land Transfer Act.

As things stand at the time of writing, Crown land can be subject to an unextinguished non-territorial aboriginal title where no extinguishment can be shown. Such extinguishment can be the statute (as may be the case with land confiscated under the New Zealand Settlement Acts) or by voluntary relinquishment to the Crown. This means the precise status of the aboriginal title over a particular piece of land will be a matter of detailed forensic inquiry combining legal and historical analysis. This inquiry would have to include reference to the tribal owners' position towards its rights over the land. The continued exercise of such rights will be a powerful sign that no extinguishment has occurred. The inquiry into the status of the aboriginal title is directed towards the particular land. In *Kruger and Manuel* v. *The Queen* Dickson J., as he then was, said for the Supreme Court of Canada.[67]

> Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that band and to that land, and not on any global basis.

Crown land which is not under the Land Transfer Act is subject to any unextinguished non-territorial aboriginal title according to the Common Law principles identified in *Te Weehi*. Crown land which has been brought under the Land Transfer Act probably is also bound by the same on the basis of the *in personam* exception to indefeasibility of title.[68] Aboriginal title, recall, is a fiduciary-like obligation binding the Crown. The issue of a certificate of title to the Crown for its own land could not discharge its *in personam* duties in relation to that land. The non-territorial aboriginal title is enforceable against the Crown. Section 155 of the Maori Affairs Act 1953 may prevent

66 "Outline of submissions in support", paras 8.9 - 8.10. Counsel mistakenly treated the non-territorial "customary rights" as subject to s.155 of the Maori Affairs Act 1953 — a result, perhaps, of confusion between "customary rights" and "customary title". The latter is a particular type of aboriginal title (the territorial title regulated by Part XIV of the Maori Affairs Act) whereas the former is a catch-all phrase without *legal* consequence. [The writer is grateful to Mr D. Baragwanath Q.C. for a copy of these submissions]. Cooke P. indicated that rights (such as fishing) traditionally exercised over Crown land could not be affected by any alienation of Crown land. This protection was based upon s.9 of the State-Owned Enterprises Act 1986 (*New Zealand Maori Council* v. *Attorney-General* supra n.1, per Cooke P. 363). This further illustrates the strict "statutory recognition" approach of the Court of Appeal to Maori properlty rights under the Treaty of Waitangi (see above, Introduction).

67 [1978] 1 S.C.R. 104, 108-109. Applied *Hunt* v. *Halcan Log Services Ltd.* supra n.45, 508-509.

68 *Frazer* v. *Walker* [1967] 1 A.C. 569 (P.C.).

the enforcement of a customary (or territorial) title against the Crown but it does not affect non-territorial aboriginal property rights.

The applicability of North American cases to the question of non-territorial aboriginal title has been discussed elsewhere. Nonetheless two recent Canadian cases and one from the United States can be discussed briefly as illustrative of the argument offered in this Part.

In *R.* v. *Sparrow* the British Columbia Court of Appeal considered the status of Musqueam Indian rights of salmon fishery.[69] The Court had no doubt that the basis of these fishing rights lay in the common law doctrine of aboriginal title recognised by itself and the Supreme Court of Canada on numerous previous occasions.[70] The Court touched upon the distinction between territorial and non-territorial aboriginal title. The *Calder* case[71] had considered "whether the general land legislation of the colony had the effect of extinguishing any title to the land which the Nishga may have had."[72] Even if one took the position (which the Court indicated not to have prevailed) that this legislation had extinguished the Nishga's titular aboriginal ownership, this did not necessarily affect those aboriginal property rights not amounting to a claim to full ownership of the land.[73] In short, the Court of Appeal re-affirmed the non-territorial basis of the aboriginal fishing right. It noted the extensive legislation regulating the right, commenting that such constant regulation of the aboriginal fishing right presupposed such rights existed at law.[74] The constitutional protection of this existing aboriginal right did not prohibit federal and provincial regulation so long as this did not reduce the available catch below that required for reasonable food and societal needs and could be reasonably justified as necessary for the proper management and conservation of the resource.[75] The Court looked at the South West Pacific cases in the United States courts, indicating their usefulness in determining when the legislative regulation of the common law aboriginal right became an expropriation.[76] The Court did not consider the relation of this aboriginal fishing right to the titular ownership of the land other than to stress (as seen) the aboriginal claim to the former was distinct to a claim to the latter. The British Columbia courts have recognised aboriginal fishing (and hunting) rights over unoccupied Crown and privately-owned land.[77] The relation of these rights to the provincial Torrens system of land title has yet to be confronted although the issue was broached in *Hunt* v. *Halcan Log Services.*[78] The plaintiff Indian Band had ceded their territorial aboriginal title over Deer Island near Vancouver in one of the "Douglas Treaties" signed at Fort Rupert on 8 February 1851. As with many

69 Supra n.45.
70 Ibid., 260-266, 270-272.
71 Supra n.43.
72 Supra n.45, 264.
73 Ibid., 264-265.
74 Ibid., 265-266, citing *Kruger and Manuel* v. *The Queen* supra n.67.
75 Ibid., 277.
76 Ibid., 272.
77 *R.* v. *White and Bob* supra n.43; *R.* v. *Sparrow* supra n.45; *R.* v. *Bartleman* supra n.46.
78 Supra n.45.

such transactions between Crown and aboriginal tribe, the cession excepted the "liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."[79] The Kwakiutl Band sought to prevent the disruption of these rights by the logging activity of the defendant company which relied on its indefeasible title under the provincial Torrens legislation and a Ministerial logging permit. Trainor J. referred[80] to Mahoney J.'s comment in the *Baker Lake* case that the "coexistence of an aboriginal title with the estate of the ordinary private landholder is readily recognized as an absurdity."[81] Although he did not determine the question the grant of an injunction restraining the logging pending trial would indicate a Torrens title is not as immune from an aboriginal title as hardened conveyancers might believe. The eventual outcome of this case will be awaited with interest for it will be the first Commonwealth assessment of an important issue as relevant to New Zealand as Canada. Can the title of a Crown grantee holding under a Torrens system of land title registration be affected by an unextinguished non-territorial aboriginal title? It is clear the Crown can be bound but what of those third parties acquiring title to the land? The possibility of a coexistence of an aboriginal title with a Torrens title is not as absurd as Mahoney J.'s casual remark in *Baker Lake* might suggest.

In *Oregon Department of Fish and Wildlife* v. *Klamath Indian Tribe* the United States Supreme Court considered the claim of the respondent tribe to a non-territorial fishing right.[82] A reservation had been created for the tribe in 1864 by a treaty which expressly recognised their fishing rights in the reserve. In 1901 a portion of the reserve was ceded, the tribes quitting "all their claim, right, title and interest thereover." Another provision of this disagreement stipulated that the rights held under the 1864 treaty were not to be disrupted. A majority of the Supreme Court held that the fishing rights outside the reservation (i.e. the land ceded in 1901) had been given up in 1901 whilst the minority would have ruled that the saving provision had priority. The Court did not dispute, indeed emphasised, that legal ambiguities were to be resolved in the Indians' favour and by reference to the historical record of tribe-government relations. The Court parted company on the interpretation of the 1901 agreement. Nonetheless it stated that "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land,"[83] a finding virtually identical to that reached in New Zealand in the *Te Weehi* case. This American case reaffirmed the Court's long-established recognition of the non-territorial aboriginal title of South West Pacific tribes to their traditional salmon fisheries, these rights being excepted from the tribes' past cessions of

79 Texts of the Douglas land cessions can be found in *British Columbia Papers Connected with the Indian Land Question, 1850-1875* (1987), 5-11.

80 Supra n.45, 511.

81 Supra n.43, 549.

82 87 L.Ed. (2d) 542 (1985).

83 Ibid., 552.

land to the government.[84] The case is yet another American example of the distinction between territorial and non-territorial aboriginal title and the principles for the interpretation of government relations with tribes over matters concerning ancestral lands.

The discussion in this Part has centred upon the possibility of an unextinguished non-territorial aboriginal title being enforced against the Crown. Part II indicated that the form of territorial aboriginal title known as "customary land" under the Maori Affairs Act 1953 has largely disappeared. However there remains a region over which a territorial aboriginal title may remain vested in the Maori tribes and which is not "customary land." This is the land and waters of the Exclusive Economic Zone (EEZ) of New Zealand. The legislation establishing this Zone does not claim Crown ownership of the Zone, a provision which (as in the case of the territorial sea) would pre-empt any legal claim to a territorial aboriginal title.[85] The Crown simply claims "sovereign rights" in the Zone.[86] Since this clearly separates *imperium* (government) from *dominium* (ownership), pre-existing private property rights have not been affected by the Crown's claim to powers of government in the EEZ. This has important consequences for the government's attempts to exploit the fishing resources of the Zone. These attempts may well be frustrated by a subsisting territorial aboriginal title over the region. This aboriginal title would still have to be proved by the rules established in the cases but once so shown, and absent clear statutory extinguishment (which does not appear in the EEZ legislation[87]), the government's activity in the Zone would have to take account of this pre-existing property right. Having said that, however, the enforceability of any such property right may not be a matter for municipal courts. It is clear that any aboriginal title over the EEZ is *not* a claim to "customary land" and hence its enforceability against the Crown is not restrained by section 155 of the Maori Affairs Act.[88] Nonetheless it is a property right outside the boundaries of New Zealand. These boundaries extend to the outer limit of the territorial sea.[89] New Zealand courts cannot recognise property rights over a region which by municipal law is not part of New Zealand. The jurisdiction of the Waitangi Tribunal, however, is not so limited. Section 6(1) of the Treaty of Waitangi Act 1975 enables the Tribunal to assess any Act, regulations, Order in Council or policy or practice of the Crown which may be "inconsistent with the principles of the Treaty of Waitangi." The Tribunal's

84 *United States* v. *Winans* 20 L.Ed. 689 (1905); *Kennedy* v. *Becker* 241 U.S. 556 (1916); *Tulee* v. *Washington* 86 L.Ed. 1115 (1942); *Puyallup Tribe* v. *Department of Game of Washington* 391 U.S. 392 (1968); *Puyallup Tribe* v. *department of Game* 38 L.Ed. (2d) 254 (1973); *Sohappy* v. *Smith* 302 F. Supp. 899 (1969); *United States* v. *Washington* F.Supp. 312 (1974), aff'd 520 F.2d. 674 (9th Cir.), *cert.* denied 96 S.Ct. 877.

85 "The legal status of Maori Fishing rights in tidal water" supra n.17, 249-261.

86 Territorial Sea and Exclusive Economic Zone Act 1977, preamble.

87 Indeed s.10 of the Act provides that the provisions of the Fisheries Act 1983 affecting sea fisheries shall apply in the EEZ. Section 88(2) of the Fisheries Act expressly excepts "Maori fishing rights" from the statute's regulatory scheme. In *Te Weehi* this provision was taken as including Maori rights of fishery under a common law aboriginal title.

88 Supra n.85, 259.

89 G. Marston and P. Skegg "The boundaries of New Zealand", N.Z.U.L.R. (forthcoming).

durisdiction does not seem limited to claims in respect of land in New Zealand. Indeed the Tribunal has recently given an interim report onthe Muriwhenua claim to fisheries off the Northland coast in which an aboriginal title over the EEZ and territorial sea is recognised. So far as the EEZ is concerned, the enforcement of an aboriginal title through the court system would appear thwarted. The non-territorial aboriginal title over the territorial sea, however, would be enforceable in the same way as it is in respect of the Crown land onshore.

IV. CONCLUSION

The Crown's relations with the Maori tribes in respect of their traditional rights over lands have a legal basis. The establishment of the Waitangi Tribunal with (its recently granted) retrospective jurisdiction has created a forum in which legalism cannot and does not prevail. Indeed strict legalism has but a small role to play in the Tribunal's assessment of the merits of a claim. This, however cannot exclude the courts as an alternative means through which the Crown may be held accountable for its dealings which affect the traditional tribal property rights. In some situations such as the *New Zealand Maori Council* case this accountability to the courts will derive wholly from some concession by Parliament in a particular statute. There is, however, the Common Law position of the Crown to consider. A sustained analysis of this position appears to have been lost, overwhelmed by litigation resulting from some statutory recognition of the Maori aboriginal rights embodied in the Treaty of Waitangi. Indeed the solitary exception to this flurry of legal activity concerned with the interpretation of Maori rights as recognised in statute is the *Te Weehi* case. Even this case, however, is becoming seen in terms of the approach from which it stands so strongly apart. It is submitted that the Common Law position of the Crown must be seen as every bit as important as and distinct from those cases wherein the traditional Maori property rights derive justiciability from statute.

The Crown may be exposing itself to legal accountability for past purchases of aboriginal title from tribal owners. "Kemp's Purchase" was used as an example. This vulnerability results from a combination of the government's commitment to the repeal of the "unconstitutional" section 155 of the Maori Affairs Act and the continuance of section 6(1) of the Limitation Act. In the event of the repeal of the former section further liability might arise quite apart from the terms of section 6(1) of the Limitation Act. The enforcement of a subsisting non-territorial aboriginal title against the Crown does not require the repeal of section 155 which deals with territorial or "customary" title. The *Te Weehi* case recognises that an unextinguished non-territorial aboriginal title may survive over Crown land although the status of such rights over particular blocks and regions will be a matter for judicial inquiry on each occasion such rights are alleged.

The legal accountability of the Crown discussed in Parts II and III above rested upon Common Law rules of aboriginal title. These place a fiduciary-like obligation upon the Crown in respect of any land vested in it subject to the unextinguished aboriginal title. Transactions purporting to extinguish the aboriginal title as well as statutes likely to

have similar effect are to be interpreted in a manner consistent with the honour of the Crown and its unique duties towards its aboriginal subjects. Such interferences with the title to the land may remove the tribes' claim to titular (territorial or customary) ownership whilst leaving non-territorial aboriginal rights.

It is to be expected that once the full implications of the Crown's Common Law position are realised and properly related to whilst also distinguished from claims based solely upon some statutory incorporation of "Treaty rights", the courts will become a more frequent forum for the recognition and protection of traditional Maori property rights. This will be especially so if section 155 of the Maori Affairs Act is repealed and section 6(1) of the Limitation Act retained. Some may see the Crown's sensitivity to such claims as novel. It is not. It is simply the legal expression and recognition of the historic character of Crown-tribe relations. For decades Maori claims against the Crown based on a Common Law aboriginal title were inconceivable (due largely to the confusion of Common Law property with Treaty rights). *Te Weehi* has let a crack of light through the door. The repeal of section 155 will open it even further.