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*THE ATTORNEY-GENERAL V NGATI APA  
("NGATI APA" OR "MARLBOROUGH SOUNDS") CASE*

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S FIORLETTA-LEROY\*

ABSTRACT: The present article is a comment of the Court of Appeal *Marlborough Sounds*<sup>1</sup> decision. This decision overrules previous common law (*Re the Ninety Mile Beach*) which stated that no title on foreshore could be investigated if the land above high-water mark had lost the status of Māori customary land. In the present case, Justices are interpreting the Te Ture Whenua Māori Act 1993, which defines the Māori Land Court (MLC) jurisdiction and empowers it to determine if the “land” has an existing Crown title or is held in accordance with tikanga Māori. Justices are also interpreting the Foreshore and Seabed Endowment Revesting Act 1991 which declares that all land “for the time being vested in the Crown” is “land of the Crown”. Such context did not presume the answers given by the Justices to the questions of the High Court, particularly to determine whether the status of foreshore and seabed are under the MLC jurisdiction. This article describes the reasoning of the decision of each Justice and shows that the case basically reconciles the common law of New Zealand with the recognition of the existence of a Native title to land. It also demonstrates how such common law interferes with actual statutory provisions so as to find a path, alongside international, English and New Zealand law, to introduce the “tikanga Māori stream of law” in the common law of Aotearoa New Zealand.

I INTRODUCTION

Words do not reflect a strict reality. Most of the time, the ideals and functions they are embodying are more important than the usual, tangible, meaning one can figure out when looking at them. “Foreshore” and “seabed” are two simple words that encompass many complex realities – Legal realities, traditional, cultural and social realities. In every civilisation, the usage people have had of the foreshore and seabed has influenced their ‘legal’ history and these practical causes have had theoretical consequences. In parallel, in a judicial and legal context, the way words are interpreted may reflect the knowledge, rules, background and even sensitivity of the judge-interpreter. Interpreter, because, as a matter of fact, a judge is not an expert that holds a unique truth, he is a stranger experimenting with legal concepts and words. This is particularly true in a Common Law system.

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<sup>1</sup> *Attorney General v Ngati Apa* [2003] 3 NZLR 641 (“*Marlborough Sounds* or *Ngati Apa* case”). Note: further footnotes related to that case will be referred to by the name of the justice and the number of the paragraph(s) only.

RD Mulholland said:<sup>2</sup>

There is an increasing tendency not to define legal concepts, and to couch legal rules in very general and imprecise terms so as to retain their flexibility and help prevent confusion over words which may have been used in their formulation.

*Attorney General v Ngati Apa* [hereafter *Marlborough Sounds*] is a story about the interaction between the legislation and the common law. The quotation above reflects the ability of the judge to interpret statutory provisions with the support of the fluidity and variable geometry of common law rules. As we will describe, in many occasions in *Marlborough Sounds* the justices pick imprecise rules and give them the meaning that matches the implications of flexible legal concepts and how they apply in a real world. In order to do this, they not only consider New Zealand precedent, foreign cases, the Treaty of Waitangi, legislation and custom; they crystallize the very rules of the common law in order to achieve a practical result. The reading of this case teaches us another way to look at words and pay attention at all their hidden facets and meanings to finally retain one.

Common sense rules revealed by *Marlborough Sounds* are essentially the following. First, the common law doctrine of aboriginal title applies in New Zealand. Second, the determination that the Māori Land Court (hereafter MLC) has jurisdiction on foreshore and seabed areas partly derives from this recognition. Finally, national legislation has never affected the potentiality of Māori rights on foreshore and seabed.

If the decision would have started with completely different assumptions, the result would not have been the same. However, it is hardly thinkable that the “due process of law”,<sup>3</sup> would have been denied by the justices of the Court of Appeal themselves. As the judges are usually keen to notice, this would rather be a task for the legislature. Nevertheless, we will see how justices make common assumptions and interpretative choices that crucially affect the outcome of the case. By overruling precedent, they also paradoxically follow a methodology that is one of continuity.

It is noticeable that, while innovative, justices are concerned about previous decisions concerning the foreshore and seabed and legislation. At the same time, while being attentive to tikanga Māori and history, (emphasising the uniqueness of the Common Law of New Zealand) the justices do not ignore what is happening in the rest of the world. Amazingly and consequently, all these elements converge to support their final ruling, *i.e.* that Māori rights in foreshore and seabed areas existed prior 1840 and have never been extinguished.

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<sup>2</sup> RD Mulholland *Introduction to the NZ legal system* (10<sup>th</sup> edition, Butterworths, Wellington, 2001) 204.

<sup>3</sup> David V Williams “A submission on the foreshore/seabed controversy” in *Papers compiled for the 4<sup>th</sup> National Hui on the Foreshore and Seabed* (The International Research Institute for Māori and Indigenous Education, University of Auckland, 2004) 47.

In the present introduction, we will underline the historical and legal elements from which *Marlborough Sounds* emerges. Then we will describe the facts and procedure of the case. After discussing the interests and questions raised by the decision we will examine the answers provided by the justices. These answers will be closely analysed in the second and third parts of this paper.

### A *Historical and Legal Background*

Under the *Treaty of Waitangi*, signed in 1840, the sovereignty of the British Crown was established in New Zealand and, with it, the corresponding protections guaranteed by the Crown “to the Chiefs and Tribes of New Zealand and to the respective families and individuals” of “the full exclusive and undisturbed possession of their Lands...Fisheries and other properties....”<sup>4</sup>. However, the idea of the existence of such rights has been controversial.<sup>5</sup> In *Wi Parata v Bishop of Wellington*, it was assumed that the native customary property did not survive the acquisition of sovereignty as there was “insufficient social organisation upon which to found custom recognisable by the new legal order”.<sup>6</sup> Māori title or rights had then been extinguished by operation of the presumption of Crown ownership under the common law.

Despite the finding of *Wi Parata*, common law Aboriginal title has been “title recognised by principles of English common law as applied in Canada...and in Australia” where the common law and English system of land tenure are removed by the local circumstances and have no operation.<sup>7</sup> In New Zealand, the “local circumstances rule” was recognised by both the English Laws Act 1858 and the Courts. Indeed, judges decided that the radical title acquired by the Crown with sovereignty is subject to the existing native rights which cannot be extinguished otherwise than by the free consent of the native occupiers, and then only to the Crown, and by compliance with statutes.<sup>8</sup> The dominium was then firmly distinguished from the imperium and

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<sup>4</sup> Treaty of Waitangi Act 1975, sch 1, art 2.

<sup>5</sup> Nonetheless, recently, In *Te Weehi v Regional Fisheries Officer* [1987]1 NZLR 641, the High Court underlined that the rights the Treaty was protecting arose before 1840, see also Shaunnagh Dorsett and Lee Godden *A Guide to Overseas Precedents of Relevance to Native Title* (Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1998) ch 2, 101.

<sup>6</sup> *Wi Parata v Bishop of Wellington* (1877) 3 NZJur(NS)SC 72 (“*Wi Parata*”) as quoted by Elias CJ[23].

<sup>7</sup> C Rebecca Brown and James I Reynolds “Aboriginal Title to Sea Spaces: a Comparative Study” (2004) 37 UBCL Rev 449, 481. See also *Mabo v Queensland* (1992) 175 CLR 1 and *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [31] [153].

<sup>8</sup> *Nireaha Tamaki v Baker* [1901] NZPCC 371; *Te Runanga o te ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20.

Crown's radical title only described as a concept of land tenure that is not inconsistent with the recognition of Māori interests in land.

However, these rules derived from pure common law-based decisions.<sup>9</sup> Problems arose where the judge was confronted by both the previous common law and the statutory provisions introducing the concept of Māori customary land. This concept is basically used to convert such land into freehold land.<sup>10</sup> Māori customary land is, by definition in s129(2)(a) of the Te Ture Whenua Māori Act 1993 ("Land Act"), "held by Māori in accordance with Tikanga Māori". Under the same act, Tikanga means "Māori customary values and practices", it is, in fact, a "system of governance that regulates how Māori interact and manage their environment" including coastal marine area.<sup>11</sup> Tikanga is too complex a concept to be discussed in this article.

For the present article it is sufficient to notice that, historically, Pākehā description of the physical elements of the foreshore and seabed have nothing to do with spiritual elements of te takutai moana, te papamoana.<sup>12</sup>

Then, as suggested, the confrontation between the common law and legislation has been particularly relevant in matters related to the foreshore and seabed. The *Kauwaeranga case* for instance is symbolic of the difficulties of comparing the actual rights of Native people over land (that can extend from simple use or access of fishing to exclusivity or self-governance) with their equivalent under English law (e.g. usufruct, ownership). Referring to the Treaty of Waitangi, Chief Judge Fenton refrained from vesting the foreshore "absolutely in the natives" and made a simple order for the privilege or easement to fish, which he thought reflected more adequately the actual Māori rights as well as the intentions of both parties to the Treaty.<sup>13</sup> But, after the Native Land Act 1894, the investigations of native customary title undertaken by the Native Land Court had to automatically result in the conversion into Māori freehold land, making it impossible to recognise, as Chief Judge Fenton did, lesser interests.

Nearly one century later, in *Re the Ninety-Mile Beach*,<sup>14</sup> judges faced the question of whether the MLC jurisdiction to grant title over land lying between the high-water and

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<sup>9</sup> Brown, above n 7, 480.

<sup>10</sup> From 1862 to 1993, the Native Lands and Māori Affairs Acts were a mechanism for converting Māori customary proprietary interests into fee simple title.

<sup>11</sup> *Discussion framework on Customary Rights to the Foreshore and Seabed*, August 2003.

<sup>12</sup> In the Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* - WAI 1071 (2004) ch 1, 1, te takutai moana, te papamoana are te reo Māori translation for foreshore and seabed. They are "quintessentially bound up with tikanga. Tikanga imbues consideration of every aspect of the elements themselves, and how humans interact with them." See also, in the same document, 179, the glossary of terms, defining Pākehā as "European, non Māori".

<sup>13</sup> *Kauwaeranga Case* (1984) 14 VUWLR 227.

<sup>14</sup> *Re the Ninety-Mile Beach* [1963] NZLR 461 ("*Ninety-Mile Beach*").

the low-water mark - the foreshore only. North J, in the Court of Appeal, rejected the presumption of Crown's ownership over the foreshore at common law, accepting the fact that the Māori rights over the foreshore could not be removed by "a side wind".<sup>15</sup> However, he deprived the MLC of its jurisdiction to investigate title on foreshore on the ground that the land above high water mark had lost the status of Māori customary land by crown purchase or by a vesting order of the MLC where the boundary was defined by the ocean or its high-water mark. A successful claim to the foreshore was only possible where the boundary was fixed at the low water mark; otherwise the ownership of foreshore belongs with the Crown.<sup>16</sup> Even though, North J stated that there could hardly be "a block of land lying between high water mark and low water mark which has never been investigated."<sup>17</sup> Furthermore, his Honour stated that, if it happened that there still remains uninvestigated Māori customary land on the foreshore, the intention of the legislation<sup>18</sup> "was to ensure the foreshore were not disposed of except by special Act of Parliament".<sup>19</sup> Since this decision, there has been a presumption in favour of the Crown's ownership of foreshore and seabed.

Since *Ninety-Mile Beach*, the Te Ture Whenua Māori Act 1993 (hereafter Land Act) has redefined the MLC jurisdiction and empowered it to determine if the 'land' has an existing Crown title (Māori freehold land, General land owned by Māori or General land) and, if not, if it is held in accordance with Tikanga Māori (s18(h)). If so, the Court can declare by a status order the Māori customary status of the land, otherwise it will be Crown Land or Crown Land reserved for Māori (s131). If successful in declaring a status order, the Court may then investigate relative interests and grant a vesting order to change it into Māori freehold land (s132). Another act, The Foreshore and Seabed Endowment Revesting Act 1991 (hereafter the Act 1991), amended in 1994, declared as to be "land of the Crown" all land that *inter alia* "is for the time being vested in the Crown".

### *B Facts and Procedure of the Case*

*Marlborough Sounds* originated in 1997 when an application was made by eight Māori tribes to the MLC to determine whether the land below the mean high-water mark in the Marlborough Sounds out to the limits of the territorial sea is Māori customary

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<sup>15</sup> Ibid 477-478.

<sup>16</sup> Ibid 473.

<sup>17</sup> Ibid 473-474.

<sup>18</sup> Crown Grants Act 1866, s12; Harbours Act 1950, s150.

<sup>19</sup> *Ninety-Mile Beach*, above n 14, 474.

land as defined in the Land Act. If successful, they wanted the Court to investigate whether that land can receive a vesting order and become Māori freehold land.

As stated in *Ninety-Mile Beach*, the Attorney-General submitted that everywhere where the foreshore was contiguous to land that has already been investigated (converted into freehold land), customary property has been extinguished as the ownership of the foreshore land cannot be divorced. The Attorney-General added that legislation<sup>20</sup> has vested all property in foreshore and seabed to the Crown and, as a consequence, any Māori customary property had been extinguished.

MLC Judge Hingston, in an interim decision, distinguished *Ninety-Mile Beach* and decided that the legislation was not effective to extinguish property. This decision was appealed by the Attorney-General. The Māori Appellate Court stated the case for the opinion of the High Court. Eight questions were posed for the High Court the first being: “To what extent the MLC has jurisdiction to determine the status of foreshore and seabed and the waters related thereto?” The High Court decided to follow *Ninety-Mile Beach* and Ellis J stated that “where the dry land contiguous to the foreshore is not or is no longer Māori customary land, the foreshore itself cannot be Māori customary land”.<sup>21</sup> The learned judge added that “the bed of the territorial sea and internal waters is vested in the Crown under the Territorial Sea and Exclusive Economic Zone Act 1977.” In brief, the land below low-water mark is beneficially owned by the Crown at both common law and legislation.

Crucially, concerning the foreshore, were it not that any customary land had been extinguished once the adjacent land lost the status of Māori customary land, it could be accepted that the MLC has jurisdiction.<sup>22</sup> The decision was appealed to the Court of Appeal whose decision is the focus of the present article.

### C *Interests, Focus and Questions arising from the Case*

The Court of Appeal then faces the question of the MLC jurisdiction. In her ruling, Elias CJ narrows the scope of the consequences of the decision in the very beginning of her judgment.<sup>23</sup> She emphasises that neither the recognition of any customary right nor their nature were at issue. Has nothing new been decided then?

Important for the present study is the way the Justices find a place in the Common Law of New Zealand to introduce the common law of Aboriginal title. We will see that the Court of Appeal could have recognised the MLC jurisdiction without overruling

<sup>20</sup> Territorial Sea and Fishing Zone Act 1965; Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s7; Foreshore and Seabed Endowment Revesting Act 1991, s9A.

<sup>21</sup> *Attorney-General v Ngati Apa* [2002] 2 NZLR 661, [52].

<sup>22</sup> *Ibid.*

<sup>23</sup> Elias CJ[8].

*Ninety-Mile Beach*. But the manner in which it overrules *Ninety-Mile Beach* makes clear it does not accept the Crown's presumption of ownership on foreshore and seabed, and recognises, at least, that the circumstances of New Zealand had displaced English law since 1840. In doing so, the Court follows the model inspired by Canadian and Australian statutes and Courts.

The present article will try to underline the reasoning of the decision by answering the following questions: How do the justices, at common law, proceed to reconcile the Common Law of New Zealand with the recognition of the existence of a Native title to land? How does it then interfere with actual statutory provisions?<sup>24</sup> How, finally, do the justices find a path, alongside English and New Zealand law to introduce "the Tikanga Māori stream of law" into the Common Law of Aotearoa New Zealand?<sup>25</sup>

#### *D The Answers Provided by the Justices*

Proving that native rights still exist is a matter of Tikanga with which both the Court of Appeal and the High Court refused to deal. However, proving that these rights have not been extinguished is a matter of law was faced by the judges.

Property and ownership rights are so important that there must be a set system to expressly and lawfully extinguishing them. As New Zealand was never deemed to be *terra nullius*, there may be then some reasons to think that Māori legally had, under the Common Law and before 1840, some kind of title or rights to the land. This view is confirmed and even accepted by the Solicitor-General in his submission that on "ordinary land" the Crown had no ownership interest until proprietary interests of Māori are validly extinguished.<sup>26</sup> However he maintained that it was otherwise on foreshore and seabed lands because of both common law and legislation.<sup>27</sup> The Solicitor-General argued that the common law presumes that the ownership of foreshore and seabed is in the Crown notwithstanding Māori interests in dry land.

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<sup>24</sup> Another important question arising from the case is how did the Common Law of New Zealand reconcile the Māori conception of customary interest in land with the English classical legal vision of property? Of course this ambitious question involves legal and political questions outside the scope of this article.

<sup>25</sup> This formulation is drawn from David Williams, above n 5, that this case was "a magnificent opportunity to acknowledge that the Tikanga Māori stream of law does have status alongside English law in the common law of Aotearoa New Zealand".

<sup>26</sup> As stated by the Court of Appeal in *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641.

<sup>27</sup> Elias CJ[48].



The justices of the Court of Appeal determined that on the foreshore and seabed, Māori property or use rights existed and had not been extinguished at common law. As a result, they have not been properly extinguished by any existing legislation.

One judgment of the 5 justices (Gault P) is dissenting on some points and there are many levels of recognition of the possibly remaining customary lands. Although it is unanimous that the MLC has jurisdiction to determine title status on foreshore and seabed, the reasons for recognising this jurisdiction, as well as the chance of a successful claim, clearly differ between justices. The purpose of this article is then to compare the major points of the decision of each justice and how they come to the same solution.

The first point made in the Court of Appeal judgment is to recognise the existence of pre-existing title and customary rights that are not derived from the Crown. Indeed, it is argued that while the Crown acquired an underlying interest to the foreshore and seabed, customary rights remained. Furthermore these rights could not be extinguished except if “ceded to His Majesty”<sup>28</sup> by the native owners or clearly and plainly extinguished by the legislation. To reach that decision the Court has to overrule *Ninety-Mile Beach* and accept the introduction into the Common Law of New Zealand of a more contemporaneous approach of the Native title to land already adopted in Canadian and Australian case law.<sup>29</sup> Then the departure point of the decision is that the Common Law doctrine of aboriginal title applies in New Zealand.

This leads to the second point made by the present decision: since the foreshore and seabed *may* be Māori customary land and, as previously demonstrated, do not belong to the Crown absolutely, the MLC is, under the Land Act 1993, competent to investigate title in the foreshore and seabed anywhere in New Zealand. Also, unless Native title has been explicitly and lawfully extinguished, it is possible for the MLC to investigate it under the Land Act 1993 (s131) and to convert it into Māori freehold land (s132). However rights must be proven by an investigation of facts. But still, it is not certain that the investigated title may result in a statutory grant of title.

The third main point is that, as neither the common law nor legislation presume the extinction of customary rights, these rights have to be clearly extinguished in order to protect the common law interest. The Court then examines if any of the legislation could be said to have extinguished Māori customary rights to the foreshore and seabed and, interpreting the customary rights against the common law background, finds that legislation did not affect these rights.

The remaining point the Court considers is whether the Land Act 1993 and its reference to land could be interpreted as giving jurisdiction to the MLC to determine

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<sup>28</sup> Cooper J in *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321, 352.

<sup>29</sup> *Mabo v Queensland* and *Delgamuukw v British Columbia*, above n 7.

the status of foreshore and seabed. No reason is found by the justices to exclude the foreshore and seabed from the ‘land’ of New Zealand. The MLC is therefore competent to investigate and determine its status. This decision is made under a very contextual and systemic approach opposing the literal, logical popular meaning of the word ‘land’ to its legal interpretation.

These points and the respective opposing views will be studied as follows. The two first points will be examined through the study of the Common Law of New Zealand and the consequences of its evolution. The last two points will be analysed by the study of the interactions between common law and statutes and their respective retrospective or non-retrospective effects.

## II THE CIRCUMSTANCES OF NEW ZEALAND CREATED AN INSTANT NEW ZEALAND COMMON LAW

It is noticeable that the Court of Appeal does not only say that customary rights may exist;<sup>30</sup> it says that Māori customary title has always existed as a part of the common law of New Zealand.<sup>31</sup> This affirmation interferes with the nature of the title acquired by the Crown with sovereignty as well as with the previous common law itself.

As a result of the presumption of the existence of Māori customary land, the MLC has jurisdiction to decide if it still exists in a particular area. However, the chances given to a discoverable title vary from one judge to another, as well as the nature and extent of the title itself.

### A *An Instant New Zealand Common Law: Māori Customary Title and Associated Status became part of the Common Law of New Zealand from the Start*

Tipping J starts his judgment by the assumption of the existence of the “vital rule” in the Common Law of New Zealand. This vital rule is that the special circumstances of New Zealand have displaced, when necessary, the law of England.<sup>32</sup> This position has been controversial. The common law has been determined historically by New Zealand courts to be for the most part applicable to New Zealand. Also the royal prerogatives are part of the Common Law of England and, as a consequence part of the Common Law of New Zealand, but only as far as it was appropriate to the situation existing in

<sup>30</sup> The notion of Māori customary land is based on customary values at the time of the claim.

<sup>31</sup> The notion of aboriginal title to land is based on customary values at the time of British sovereignty.

<sup>32</sup> Tipping J[183].

the colony at the time the Crown sovereignty was received in New Zealand. Some are of the view that the royal prerogatives must be treated in New Zealand as they are in Britain and that the local circumstances guaranteed by the Treaty of Waitangi do not displace the Common Law of England.<sup>33</sup> However, as Dr McHugh noted, it does not mean that the Crown, at English Common Law, was recognised as having rights equivalent to full ownership of the area. The rights of the Crown were indeed subject to rights of fishing, navigation and innocent passage, but this is another issue.<sup>34</sup>

1 *From the presumption of Crown ownership to the recognition of pre-existing and still-possibly-existing customary rights in land*

This paragraph intends to describe the different levels of hesitation the Judges exhibited to change the law and overrule precedent. These levels are also the reflection of the strength of the society’s evolving needs to challenge the *stare decisis* doctrine.

(a) *The extent of the presumption in favour or against Crown “ownership” in foreshore*

Until recently there was no direct vesting legislation in New Zealand establishing Crown ownership in foreshore or seabed. The special situation of the foreshore and seabed - and beds of tidal rivers - was indeed derived from the English Common Law presumption that the Crown is the owner of the foreshore and seabed, unless the contrary is proved by a Crown grant or by a continuous occupation proving the adverse possession.

*Ninety-Mile Beach* decided that the Crown’s ownership presumption was rebuttable only by an express grant or statute abrogating the British Common Law. The High Court decision in *Marlborough Sounds* seemed to be more mitigated. The MLC and the Court of Appeal decisions,<sup>35</sup> however, are completely clear that under the Common Law of New Zealand, the radical title acquired by the Crown with sovereignty is a pure jurisdictional concept that does not include propriety or ownership because the British law was displaced by local circumstances from the start. These “local circumstances” arose from the 1840 pre-existing aboriginal rights in land, independently from any statutory or treaty provision. That rule applies to the land of New Zealand and to water areas that are treated in a territorial way.

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<sup>33</sup> *Waipapakura v Hempton* (1914) 33 NZLR 1065, 1071 “The law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us, except in so far as it has not in respect of sea fisheries been altered by our statutes.” as quoted by Dorsett, above n 5, 157.

<sup>34</sup> See the *Report on the Crown’s Foreshore and Seabed Policy*, above n 12, 51.

<sup>35</sup> *Te Tau Ihu o te Waka a Maui* (1997) 22A Nelson Minute Book, 1 (“*Marlborough Sounds claim*”).

(i) *The Ninety-Mile beach positions*

Despite North J recognising in *Ninety-Mile Beach* that ‘in early times’ and for some time after 1840 Māori customary title existed in relation to foreshore, he decided that this title was at the time completely dependent upon the Queen’s will to acknowledge it, whether on land or below water mark.<sup>36</sup> For him, the English Common Law rule that the Crown was entitled to every part of the foreshore between high and low water mark prevailed. Consequently the Crown may, as in England, “part with its ownership of the foreshore under an express grant” that defines the boundary at the low water mark.<sup>37</sup> In summary, except if there is an express grant from the Crown, the foreshore is presumed to be Crown’s territory.

The differences of wording and general approach in the presumption of the Crown ownership varied even in the *Ninety-Mile Beach* judgment, and, as Tipping J underlines, Gresson J starting point was that after 1840 all titles derived from the Crown.<sup>38</sup> To rebut the presumption that British law was the law of New Zealand it had to be “abrogated or modified by ordinance or statute”, that is to say by an express provision.<sup>39</sup> This position is even more difficult to overturn than the position of North J.

(ii) *Any prerogative of the Crown cannot apply if displaced by local circumstances: the pre-existing right*

The idea that the Crown assumes a radical title in the foreshore rather than ownership, based upon Australian and Canadian authorities, is adopted by the Court of Appeal and the MLC in *Marlborough Sounds*. One of the consequences is that the sovereignty in the offshore, as stated under the international law as incorporated into domestic statute, is burdened by aboriginal title whose extinguishment must be submitted to a clear and plain intention test (see part III below).

In an earlier case *R v Symonds*,<sup>40</sup> the Colonial Supreme Court decided that the “vital rule” of the law applied in New Zealand, that is to say that British law applies “so far as applicable to the circumstances of New Zealand” as confirmed

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<sup>36</sup> *Ninety-Mile Beach*, above n 14, 467-468.

<sup>37</sup> *Ibid* 472.

<sup>38</sup> Tipping J[211].

<sup>39</sup> Tipping J[212].

<sup>40</sup> *R v Symonds* (1847) NZPCC 387, 390.

in the English Laws Act 1858, s1.<sup>41</sup> As a consequence, only the radical title (imperium) was obtained by the Crown with sovereignty and not the absolute ownership (dominium). This rule was applied by the Privy Council in *Nireaha Tamaki v Baker*.<sup>42</sup> In that decision, the Privy Council decided that the radical title of the Crown is subject to existing native rights. It reversed the NZ Supreme Court decision which stated that “...the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony.”<sup>43</sup> The Privy Council held that:<sup>44</sup>

It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence...the Supreme Court are bound to recognise the fact of the “rightful” possession and occupation of the natives” until extinguished in accordance with law...

In *Marlborough Sounds*, the Court of Appeal decides to revive the old law of New Zealand and replaces the rules established by *Ninety-Mile Beach* that the Crown at Common Law holds absolute ownership to the foreshore and seabed. The judges, particularly Elias CJ and Tipping J, abundantly and instructively justify their position and it is not without hesitation that they overrule that decision. Tipping J states:<sup>45</sup>

[T]he problem is that they do not sufficiently recognise the appropriate starting point, namely that Māori customary title, and the associated status in respect of the land involved, became part of the common law of New Zealand from the start.

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I was initially hesitant but am now satisfied that the case for overruling *Ninety-Mile Beach* is clearly made out. Once the necessary background is properly appreciated, there is force in Sir Kenneth Roberts-Wray’s view, mentioned by the Chief Justice, that *Ninety-Mile Beach* represented “revolutionary doctrine”.

Elias CJ states that in 1840, the laws of England existed “so far as applicable” in New Zealand and that the land “owned by Natives under their customs and usages” was property in existence before 1840.<sup>46</sup> Moreover, she notes that the common law imported from England was applied differently by the New Zealand Courts to reflect local circumstances. If it can be accepted that the law of English tenure where all title derives from the Crown applies to New Zealand,

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<sup>41</sup> Elias CJ[28].

<sup>42</sup> *Nireaha Tamaki v Baker*, above n 8, 584.

<sup>43</sup> *Nireaha Tamaki v Baker* (1894) 11 NZLR 483, 488.

<sup>44</sup> *Nireaha Tamaki v Baker*, above n 8, 577-578; Elias CJ[24] [29].

<sup>45</sup> Tipping J[204][215].

<sup>46</sup> Elias CJ[14], Keith & Anderson JJ[134].

it must also be admitted that the common law of New Zealand is not prevented from recognizing customary property rights that can displace the English feudal system.<sup>47</sup>

After having changed the rule on the ground that an existing title to land displaced the law of England from the start, the judges then proceed to analyse whether the title has survived the change in sovereignty and the successive legislation dealing with the foreshore and seabed.

(b) *The extent of the presumption in favour of the still-possibly-existing (survival of a) pre-existing right*

The recognition of Aboriginal Title occurred in case law as early as 1847 in *R v Symonds* by the two judges of the Supreme Court. It was again recognised in *Re Landon and Whitaker Claims*.<sup>48</sup> In the latter case, Chapman J stated that the Crown is bound, at Common Law, “to a full recognition of Native proprietary right.” However, following *Wi Parata*,<sup>49</sup> *Ninety-Mile Beach* departed from the hypothesis that Māori property had no existence in law until converted in land held in fee of the Crown. That view had also been confirmed by legislation which prevented any recognition of Native customary property in the foreshore.<sup>50</sup> This same view was adopted by Ellis J in the High Court who decided that all titles derive from the Crown.<sup>51</sup>

Also, it appears that the degree to which the common law of aboriginal title was allowed to survive New Zealand Common Law depends on the interpretations made in the Court of Appeal *Marlborough Sounds* case of previous case and statutes.

(i) *The common law presumption in favour of the survival of a pre-existing right and other country’s common law place in the common law of New Zealand*

Since there was a pre-existing right, it displaced the Common Law of England. And, since that Common Law has been displaced, the pre-existing right has been allowed to survive. Elias CJ said that:<sup>52</sup>

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<sup>47</sup> Elias CJ[17]-[18].

<sup>48</sup> *R v Symonds*, above n 40, 390; *Re Landon and Whitaker Claims* (1872) 2 NZCA 41, 49.

<sup>49</sup> *Wi Parata*, above n 6.

<sup>50</sup> Harbours Act 1950, s150; Territorial Sea, Continuous Zone, and Exclusive Economic Zone Act 1977, s7; Foreshore And Seabed Endowment Revesting Act 1991, s9A.

<sup>51</sup> Elias CJ[7].

<sup>52</sup> Elias CJ[85].

The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law.

Her statement is very powerful. It implies that any customary right that has survived prevails over English law since it displaced it from the start. However, her Honour does not come with that conclusion easily and bases her reasoning in the law inherited from previous authoritative decisions and other countries.

New Zealand previous common law, particularly the decision of the Privy Council *Amodu Tijani v Secretary, Southern Nigeria* affirmed that a change in sovereignty did not alter the rights of private owners.<sup>53</sup> Moreover, as pointed out in *R v Symonds* and *Nireaha Tamaki v Baker*, these rights that survived sovereignty cannot be extinguished at common law without the consent of the owners.<sup>54</sup>

The reasoning in *Marlborough Sounds* goes even further. The Crown's radical title is not only burdened by native customary property (so that the Crown must acquire land from them for the right to be extinguished),<sup>55</sup> but it also does not consist of absolute dominium so that it is only a notional concept that is consistent with the recognition of native property.<sup>56</sup> These ideas are imported from overseas precedents where the Courts recognised that the native rights were rights at common law, not moral obligation of the Crown, and that they had to be extinguished for the Crown to acquire full ownership.<sup>57</sup> As Keith and Anderson JJ highlight, following the Marshall CJ comment about the treaty of cession of Spanish territories to the US, the cession "passed sovereignty and not private property".<sup>58</sup>

This reasoning is consistent with the legislative mechanism for converting Māori Land into freehold land. For without such a mechanism the land would stay Māori land and could not be ceded to the Crown and granted by her to other owners. If the land had been Crown land from the start such a mechanism would be unnecessary. As seen below, the radical title can then be consistent

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<sup>53</sup> *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 407-408 ("*Amodu Tijani*"); Elias CJ[15].

<sup>54</sup> Elias CJ[16].

<sup>55</sup> Elias CJ[18]-[22].

<sup>56</sup> Elias CJ[26]-[30].

<sup>57</sup> *Johnson v M'Intosh* 5 US 503 (1823); *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 App Cas 46; *Mabo*, above n 7, 50 as cited by Elias CJ[19]-[20], [30]-[31].

<sup>58</sup> Keith & Anderson JJ[136]-[138].

with successive legislation only as long as it does not comprehend full dominium.

The Justices, except Gault P, by referencing overseas examples, not only distinguish *Ninety-Mile Beach*; they “drew on the common law of aboriginal title, linking the statutory jurisdiction to this source.”<sup>59</sup> They accept the doctrine of aboriginal title as recognised in Australia or in Canada a position that would have been impossible without overruling *Ninety-Mile Beach*. The consequences are important since overseas jurisdictions not only recognised pre-existing rights (in Canada aboriginal rights arise from the fact of the prior occupation) but also the continued existence of the rights whose purpose and proof of extinguishment have to be clear and plain.<sup>60</sup> The outcome is on the one hand, property interests of the Crown depend on and are burdened with pre-existing rights. On the other hand, the scope of the customary rights may extend from usufructuary rights to ownership. This remark leads to the limitation that “the common law can only recognise customary rights that do intersect with, or that can coexist with, its own norms [footnote omitted].”<sup>61</sup>

The Justices in the case try to reconcile as much as possible the two concepts thereby allowing the Tikanga Māori to be a part of the law of New Zealand. They also read the successive legislation as confirming the continue existence of customary rights.

(ii) *Confirmation of the presumption by the successive legislation*

Concerning the issue of recognition of pre-existing rights, the outcome of *Marlborough Sounds* is more about the ability the common law has to amend itself than an interpretation of statutory provisions. However the statutory interpretation is crucial to the issue of whether or not the rights continue to exist. We will then briefly consider the statutes used by the justices to confirm the presumption of existence of the customary rights.

By contrast with *Wi Parata*,<sup>62</sup> where the Supreme Court claimed that “a statute cannot call into being what is non-existent”, Elias CJ and the other justices find that “successive lands legislation...is consistent with the continuation of Māori interests in land”.<sup>63</sup> Her Honour notes that “the rights of any aboriginal natives”

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<sup>59</sup> Paul McHugh “Common Law Aboriginal Title in New Zealand after Ngati Apa v Attorney-General (2003)” in *The Foreshore and Seabed* (New Zealand Law Society Seminar, 2004) ch2, 25.

<sup>60</sup> *Mabo*, above n 7 as referred to by Elias CJ[30]; Keith & Anderson JJ [143][148].

<sup>61</sup> *Report on the Crown’s Foreshore and Seabed Policy*, above n 12, 50.

<sup>62</sup> *Wi Parata*, above n 6, 79.

<sup>63</sup> *Elias* CJ[34].



are recognised in the Letters Patent of 1840.<sup>64</sup> Keith and Anderson JJ argue that the Land Claims Ordinance of 9 June 1841 “declared unappropriated lands to be Crown lands – reflecting the Crown’s dominium...rather than its imperium”.<sup>65</sup> More interestingly, they also state that adopting a recognition view of “existing proprietary rights conformed with extensive law and practice of the time”.<sup>66</sup> ??? They endorse a purposive reading of the legal principle adopted in colonial times since this corresponds to the contextual approach and preservative role of the common law adopted today. Except that, as seen below, today, a mere purposive reading of legal principle would not be relevant of the emerging principle of legal continuity of customary rights.

The examination of the Crown Acts by Tipping J is interesting. For him Crown pre-emption is Native rights survival presumption: “A right of pre-emption must denote that there is something to buy and sell.”<sup>67</sup> This idea is also expressed by Elias CJ, that under all the successive Lands Acts it is clear that Māori customary interests have to be extinguished so that the Crown can dispose of the land: “The statement is further legislative acknowledgement that Māori customary property is a residual category of ownership not dependent upon title derived from the Crown.”<sup>68</sup> Since legislation has been necessary to affirm Crown’s right – for example the Native Lands Act 1909 accorded procedural rights to bring claims related to customary land to Court – it enhances the fact that land is not owned by the Crown. If the Crown did have absolute dominium and imperium such precision would have been useless.<sup>69</sup> Interestingly and similarly, in New Zealand, the Crown’s notional “radical title”, obtained with sovereignty had been long acknowledged to be “consistent with and burdened by native customary property”.<sup>70</sup> This view was confirmed in the Land Act 1993 which excludes customary lands from the Crown lands.

Beside successive legislation recognising a certain level of customary rights it is noticeable that whilst the Treaty of Waitangi is embodied in several of the statutes cited, reference to the legislative recognition of the Treaty is not an argument overused by the justices. It is certainly not the argument of Elias CJ. It is more an argument used in the judgement of Keith and Anderson but only

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<sup>64</sup> Ibid [35].

<sup>65</sup> Keith & Anderson JJ[140]; Elias CJ[36].

<sup>66</sup> Ibid.

<sup>67</sup> Tipping J[213].

<sup>68</sup> Elias CJ[40].

<sup>69</sup> Ibid [41].

<sup>70</sup> Elias CJ[21]; *R v Symonds*, above n 40; *Re the Landon and Whitaker’s Claim* (1872) 2 NZCA 41 (CA); *Nireaha Tamaki v Baker*, above n 8.

as a confirmation of their statement. The ignorance of the “treaty jurisprudence” is relevant of the fact that in the justices’ opinion, at common law, the recognition of pre-existing rights stands by itself.

2 *Overruling the assumption that investigation on dry land extinguishes interests in adjoining foreshore and seabed*

(a) *The sea as a boundary: the Ninety-Mile Beach view*

The Court of Appeal in *Ninety-Mile Beach* considered that, under the common law of England, Māori customary property had been extinguished on foreshore and seabed except for the foreshore contiguous to Māori customary land.<sup>71</sup> Anywhere else, where the dry land has been converted in fee simple, there may be “no strip” remaining in the foreshore for the recognition of Māori customary land.

Gault P’s judgment followed *Ninety-Mile Beach* position - and not the positions of the other justices - on the ground that it is consistent with the successive Native Land Acts which substituted interest in land with grants in fee simple.<sup>72</sup> He finds that the loss of the adjoining land title is a serious obstacle for the recognition of the existence of customary land in the foreshore. This idea is easily understandable and one might acknowledge that the view bears some force.

Just as *Ninety-Mile Beach* and Ellis J in the High Court did, Gault P retains the meaning of the legislation which is consistent with the intended application of the provisions. Gault P only distinguishes *Ninety-Mile Beach* by ruling that it did not consider the hypothesis that there could be investigated land that was not claimed as bordering the sea. In this case a strip could remain subject to a vesting order of the MLC which has jurisdiction. However, like the other justices, he states that the MLC has jurisdiction to hear the claims even if he expresses the very pessimistic opinion they could hardly succeed. One must recognise however that “the greatest difficulties would be faced by those whose physical connections to the foreshore and seabed have been most strained as a result of the loss of their adjoining land.”<sup>73</sup>

(b) *The legal discrimination between the Land and the Sea has no place in the common law of New Zealand and in the common law of Aboriginal title*

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<sup>71</sup> Elias CJ[4].

<sup>72</sup> Gault P[121]-[122].

<sup>73</sup> *Report on the Crown’s Foreshore and Seabed Policy*, above n 12, 59; Gault P[122].

At common law, as seen above, the presumption of legal continuity founded the common law of aboriginal title. For example, in Australia *Mabo* established the continuity of property rights derived from traditional law and custom. The continuity in the custom implies, in the present case a physical continuity between the land and the sea. Then, as Elias CJ states, *Ninety-Mile Beach* is understandable only “as a denial of any legal recognition of customary property”, which is, as Dr McHugh qualified it, a “legal discontinuity”.<sup>74</sup> However, as the Justices admit, the fact that the land was susceptible to divided ownership (partial or shared, individual or collective interests) is a question of “custom and usage” for the MLC to answer.<sup>75</sup> Also, Elias CJ finds the conclusion of *Ninety-Mile Beach* is inconsistent with “the applicable common law principle in the circumstances of New Zealand that rights of property are respected on assumption of sovereignty”.

Interestingly, in the MLC, Judge Hingston decided that he was not bound by *Ninety-Mile Beach* and asserted that the customary rights in the foreshore can still exist. Despite Māori having been separated from the adjacent land, the foreshore had never been included in any initial purchase or expressly extinguished.<sup>76</sup> That view is confirmed by the Court of Appeal:<sup>77</sup>

[A]n approach which precludes investigation of the facts...because of an assumption that custom is displaced by a change in sovereignty or because the sea was used as a boundary...is wrong in law.

The English law’s discrimination between the land and the sea has no application in the common law of New Zealand where the English law has been displaced by local circumstances. For Tipping J, this discrimination is simply arbitrary. It is a general belief that cannot justify why a change in status of the contiguous land could legally prevent from the recognition of Māori customary land on the foreshore.<sup>78</sup> It must be noted that the “promise contained in the Treaty” may have been misused by the Court of Appeal in *Ninety-Mile Beach* where North J justified his position as a Treaty-compliant one.<sup>79</sup>

Tipping J states that distinction at law between land and sea, if it exists, should be recognised in accordance with Tikanga Māori, which is “to this extent part of the common law of New Zealand”.<sup>80</sup> Thus, his Honour recognises Tikanga not

<sup>74</sup> McHugh, above n 59, 26.

<sup>75</sup> Elias CJ[88]-[89].

<sup>76</sup> Dorsett, above n 5, ch4, 161.

<sup>77</sup> Elias CJ[89].

<sup>78</sup> Tipping J[205].

<sup>79</sup> *Ninety-Mile Beach*, above n 14, 473.

<sup>80</sup> Ibid.

only to determine questions of fact but also as a tool to decide if the law of England should be applied in New Zealand or if local circumstances should displace it. He gives Tikanga a more legal significance than as a tool for the examination of facts. Rather his Honour uses it as a tool for continuity.

These considerations lead us to the extent of the jurisdiction recognised in the MLC.

### *B The MLC jurisdiction on foreshore and seabed*

The first question asked by the Māori Appellate Court presumes that the MLC has jurisdiction; *i.e.* the MLC has the power to investigate title on foreshore and seabed which can be Māori customary land and does not belong to the Crown absolutely. The Justices are seemingly unanimous on this point though their individual reasons differ. The next question is to determine if the claims that will be made are bound to be rejected or if a future claimant has a chance to see its rights recognised by a status and/or a vesting order.

#### *1 Nature and extent of the decision itself to give jurisdiction to the MLC*

##### *(a) The necessary recognition of a Native title at common law: the protective approach inspired from overseas*

Whereas *Ninety-Mile Beach* avoided the question of the MLC jurisdiction it had to answer by affirming the omni extinguishment of Native rights, *Ngati Apa* not only recognised the MLC jurisdiction but also revived the common law doctrine of aboriginal title. In doing so, it affirmed that the common law itself can provide recognition of customary property. As a consequence, as Elias CJ rightly underlines, the MLC statutory jurisdiction is not the source of natives' rights, it is "simply a mechanism" for statutory recognition and transmutation.<sup>81</sup> By that way, her Honour clearly makes the Crown's submission that the Land Act was not intended to create property in the seabed ineffective. Without having previously revived the common law of aboriginal title such conclusion would have been impossible.

The recognition of MLC jurisdiction derives directly from the recognition of Native title. The title rights is now recognised in the Court and do not depend

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<sup>81</sup> McHugh, above n 59, 27; see also Elias CJ[56] "The Māori Lands legislation has never been constitutive of customary property." and [47] New Zealand legislation "has assumed the continued existence at common law of customary property until it is extinguished" without being "constitutive" of such a property.

on the will of the Crown. This is what Keith J called “the protective approach” as adopted by the Supreme Court in Canada and in the High Court of Australia.<sup>82</sup> That approach bears in itself the “preservative role of the common law aboriginal title”. [I]t does not “purport to be historical truth” but it takes “certain factual configurations in that past...and reconstitutes them into a more contemporary, justiciable model” as Dr McHugh described it.<sup>83</sup> As a consequence, the rights must be proved in accordance with Tikanga before the MLC (or the High Court) while the onus of extinguishment, which must be “plain and clear”, lies on the Crown.<sup>84</sup>

- (b) *The MLC statutory jurisdiction has been unanimously recognised independently of the recognisable title proving that...*

Amazingly, even Ellis J reformulated the Counsel submission that as all aboriginal title had necessarily been extinguished, the MLC jurisdiction had lost its *raison d’être*. Ellis J corrected him by reversing the argument and said that “while the MLC had jurisdiction” it could only conclude that all Māori customary land has been extinguished.<sup>85</sup>

For the present purpose it is sufficient to notice that without recognising any actual ownership in foreshore or seabed, the Justices accordingly recognise the MLC jurisdiction to investigate titles:<sup>86</sup>

It may well be that any customary property will be insufficient to permit a vesting order with the consequence of fee simple title. But that does not seem to me to be a reason to prevent the applicants proceeding to establish whether any foreshore or seabed has the status of customary land.

For Tipping J, the claim may fail as a matter of fact, however the MLC investigation of these facts must be allowed unless if, as a matter of law, it can be proved that customary titles have been extinguished.

- (c) *...Fenton CJ Kauwaeranga case has been misread and misused in Ninety-Mile Beach*

In *Ninety-Mile Beach*, the judges read the *Kauwaeranga* case as if Fenton CJ, by declining to make a freehold order, declared that the MLC jurisdiction was not

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<sup>82</sup> Keith & Anderson JJ[148].

<sup>83</sup> McHugh, above n 59, 30.

<sup>84</sup> Keith & Anderson JJ[148]; Elias CJ[49]; Tipping J[185] “Parliament would need to make its intention crystal clear.”

<sup>85</sup> *Attorney-General v Ngati Apa*, above n 21, [13].

<sup>86</sup> Elias CJ[57]; Keith & Anderson JJ[129]; Gault P[124]-[125]; Tipping J[186].

reasonable. Indeed, Gresson J ruled that: “Chief Judge Fenton declined to make freehold orders and it would be reasonable to suppose that other MLC Judges may well have been similar opinion.”<sup>87</sup>

But even in an improbable situation of a freehold title, because there is a strong presumption that all land has already been converted, this does not imply that the MLC may not have jurisdiction.

Gresson J just wanted to make a “reasonable” supposition but did not give any rule-based argument to support his idea that “[i]t is likely, then, that due regard would be had by the Court to the common law rule that the Crown was entitled to every part of the foreshore between high and low water mark”. (emphasis mine) But “likely” is not law, it is an hypothesis that is not compatible with a due process right. As *Marlborough Sounds* showed, Gresson J’s reasoning was wrong for two reasons. First, at common law, there are presumptions with respect to rules of natural justice and access to the courts. You cannot just assume that a right does not exist to suppress any right to access a Court. In *Marlborough Sounds*, the justices recognised that principle. Tipping J, for example, insists on the fact that the “proper inquiry” is not about grant but about extinguishment.<sup>88</sup> As such, there must be an inquiry to decide whether the title has been extinguished and this inquiry should be judicial. Even Gault P emphasises that the decision is given as a matter of law, whether “it will lead to any outcome favourable ...will be for the MLC after investigating the facts” to decide.<sup>89</sup> Secondly, statute law has changed since Fenton CJ’s decision, and the judges in *Ninety-Mile Beach* read it as if, at the time *Kauwaeranga* was decided, the main objectives of the Native Land Court was to convert title into freehold land, as it was the case after 1894. Gresson J focused on the fact that this particular conversion was decided to be not reasonable. But, on the other hand, he omitted to mention that, at least, some rights were recognised and that without the Native Land Court’s jurisdiction this would not have been possible.

2 *Nature and extent of the land subject to a recognisable title and of the title itself : answer to the Attorney-General submission that ownership on shore is unthinkable*

Crown’s submission is that “Native title always ended where the land ends and the sea begins”.<sup>90</sup> This view is supported by two arguments: the Crown ownership presumption at common law – discussed above – and the inherent

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<sup>87</sup> *Ninety-Mile Beach*, above n 14, 472.

<sup>88</sup> Tipping J[197].

<sup>89</sup> Gault P[125].

<sup>90</sup> See Elias CJ[50].

qualities of foreshore and seabed as public areas making private ownership “somehow unthinkable”.<sup>91</sup>

The justices point out three main arguments to answer the Crown’s second submission that private ownership on foreshore and seabed is “unthinkable”. Two of them are rather simple and practical: first, such lands have already been granted,<sup>92</sup> and secondly, property in sea areas, whatever private or public, is not incompatible with and is “subject to public rights such rights of navigation”<sup>93</sup> or fishing rights.

The third argument is more creative and theoretical.<sup>94</sup> It encompasses the fact that, on the one hand there is no legal reason why property interests on foreshore and seabed would not be possible and, on the other hand, these interests do not have to amount to freehold interests “conceived as creatures of inherent legal principle”.<sup>95</sup> However, nothing is said in the Court of Appeal as to how these interests would be procedurally or substantively recognised.

- (a) *The fundamental distinction between s131 and s132 of the Land Act : status and vesting orders can now be divorced*

One should notice that from 1894 until 1993, Māori Customary Land was not necessarily converted into freehold land. Although it is not clear to which point the procedural aspects of status and vesting orders can be separated, this aspect is decisive in *Marlborough Sounds* where the justices crafted on it the ground for recognition of lesser interests reflected by custom and traditional law. Indeed, Elias CJ argued that although “it is not clear to what extent” the MLC can recognise “interests in land ...which do not translate into fee simple..., it is enough to note that any property interests ... may not result in vesting orders...”.<sup>96</sup>

That view is very similar with Fenton CJ in *Kauwaeranga* and with Lamer C.J.C in *Delgamuukw* who referred to aboriginal title as a right in land which confers “the right to use land for a variety of activities”.<sup>97</sup> This interpretation is not shared by all the justices. Tipping J agrees that there is no “inevitability” of transfer and that if a vesting order will not always be appropriate it does not prevent the MLC from making a status order.<sup>98</sup> He is nevertheless more

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<sup>91</sup> Ibid.

<sup>92</sup> Elias CJ[51]; Keith and Anderson JJ[133].

<sup>93</sup> Elias CJ[51]; Keith and Anderson JJ [135].

<sup>94</sup> Elias CJ[52]-[54].

<sup>95</sup> *Amodu Tijani*, above n 53, as quoted by Elias CJ[54].

<sup>96</sup> Elias CJ[46].

<sup>97</sup> *Delgamuukw*, above n 7, [111].

<sup>98</sup> Tipping J[196].

pessimistic and expresses the view that in some cases a status order is the only order that “should properly be made”.<sup>99</sup>

Gault P recognises that Part 6 of the Land Act was “designed to enable the interests of Māori ...to be brought under the land transfer system conferring title as near as possible...to that previously enjoyed”.<sup>100</sup> He expressed the opinion that:<sup>101</sup>

Interests in land in the nature of usufructuary rights or reflecting mana, though they may be capable of recognition both in tikanga Māori and in a developed common law informed by tikanga Māori, are not interests with which the provisions of Part 6 are concerned...It is for this reason that...I have real reservations about the ability for the appellants to establish that which they claim.(emphasis mine)

These considerations however interesting are probably obiter and the MLC only could properly decide on the issue as a matter of tikanga.

(b) *The recognition is a matter of Tikanga: a door open for unanswered questions*

The Justices left unanswered the question of how these rights will be recognised and how the continuity principle will operate in the New Zealand common law.<sup>102</sup> In that sense the decision is more procedural than substantive.

The only question left was then to know if any statute ever extinguished Māori customary rights or the MLC jurisdiction. So we turn now from the common law to the study of the interpretation of statutory provisions.

### III STATUTORY PROVISIONS INTERPRETED IN THE LIGHT OF THE COMMON LAW OF ABORIGINAL TITLE

As Lord Woolf said in *New Zealand Māori Council v Attorney-General*: “With the passage of time, the ‘principles’ which underlie the Treaty have become much more important than its precise terms.”<sup>103</sup> Without discussing the controversial non-enforceability of the Treaty of Waitangi, one can notice that what has been said for the Treaty by Lord Woolf could be said for the legislation in the present case. Indeed, to decide that neither Māori rights or MLC jurisdiction have been extinguished by the

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<sup>99</sup> Ibid.

<sup>100</sup> Gault P[104].

<sup>101</sup> Ibid [106].

<sup>102</sup> McHugh, above n 59, 35-37.

<sup>103</sup> *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 (“*Māori Language case*”) as cited by Dorsett, above n 5, ch1, 33.



legislation, the justices have given statutory provisions a significance that fits with both the context and the fundamental principles of the Common Law. To achieve such a goal, the degree of scrutiny necessary to define concepts proved to be at least as important as the degree of scrutiny necessary to define words. The Court of Appeal has then been able, with a systemic approach, to capture an interpretation that confirms the presumption against the extinguishment of customary rights at common law. By contrast, Ellis J in the High Court and the justices in *Ninety-Mile Beach* preferred a more conservative literal and purposive approach leading to the opposite conclusion.

In this part, we will analyse the following points. First, the justices, to decide that any of the statutes held by the Crown never extinguished any Māori rights on the foreshore and seabed, use the presumption that the statutes only apply for the future. Second, statutes shall be interpreted in the light of the most recent common law and not in the light of the actual common law of their enactment. Consequently, the Crown submission that the Land Act was enacted under another common law is ineffective. Finally the justices have to consider the Crown's submission that "land" in article 129 of the Land Act comprises foreshore and seabed.

*A The Law can be read as the Reflection of the Strictness of the Presumption against Extinguishment of Customary Rights*

In *Taylor v New Zealand Poultry Board*, Cooke J went as far as to say that "some common law rights run so deep that even Parliament could not override them".<sup>104</sup> Challenging the parliamentary supremacy, his Honour highlighted that some rights, such as the right to keep silent in the *Poultry Board* case, cannot be taken away except by statute where the will of the Parliament is unequivocal and clear.<sup>105</sup> The question to answer then is to what extent does a statute have to be clear to counter the presumption against extinguishments; and more generally, to what extent the judges, at common law, have the discretion to decide about the rules of statutory interpretation and particularly how clear the Parliament should be in making statutes.

The question to answer then is "whether Parliament has extinguished any property rights which Māori may be shown to have had?"<sup>106</sup> The conclusion of the decision is that a general enactment never properly extinguishes Māori customary land. Once again, the justices do not exactly follow the same path to achieve this conclusion.

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<sup>104</sup> *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (*"Poultry Board"*).

<sup>105</sup> In that case the Parliament should have expressly abolished the previous Act ruling that a criminal penalty could not be increased retrospectively.

<sup>106</sup> Elias CJ[57].

However, be it in *Marlborough Sounds* or *Ninety-Mile Beach*, the tools used by the judges, alternatively, similarly or differently could come down to the following:<sup>107</sup>

To apply a particular presumption may defeat the clear intent of Parliament, or to take a literal approach may result in an absurd outcome. In such cases, a degree of common sense must be used. The words of the statute must be the starting place...In discovering the intention of Parliament, it may be helpful to look at all kind of surrounding information. (emphasis mine)

1 *The seabed, foreshore and other statutory expropriation: the “clear and plain” standard test for extinguishment test*

Generally, in *Marlborough Sounds* the different statutes are interpreted in accordance with fundamental presumptions: 1) the presumption against deprivation of property and; 2) the presumption against statutes having retrospective effects. Consequently, not only do statutes need to be perfectly clear to extinguish property rights, they also can not have any legal effects in the past.

Other provisions are not examined by the Court of Appeal but left for the MLC to determine their application.

(a) *Harbour and Crown Grants Acts*

The Harbours Acts prohibited grants on the foreshore except by authority of a special Act. In *Ninety-Mile Beach*, the justices were satisfied to read the Acts in “the intention of the legislature” view, that is to say the MLC was forbidden to undertake an investigation since only an Act of Parliament could grant the foreshore. Keith J’s response to this argument is consistent with the doctrine of aboriginal title.<sup>108</sup> First, a claim to the MLC does not involve a grant and “existing grants” preserved by the Acts. As such, there is then no reason why existing native property should not also be preserved. Thus, these Acts applied only for the future and left unchanged existing customary rights. Second, *Ninety-Mile Beach* did not sufficiently recognise the necessity of a clear and plain extinguishment. The wording of the Acts cannot be read as having a confiscatory effect.<sup>109</sup>

Keith J, however, notes that practically a century of denial of MLC jurisdiction could be seen as having a confiscatory effect.

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<sup>107</sup> Morag McDowell and Ducan Webb *The New Zealand Legal System* (Butterworths, Wellington, 1995) ch7, 310-311.

<sup>108</sup> Keith and Anderson JJ[154].

<sup>109</sup> See also Elias CJ[59].

(b) *Territorial Sea Acts*<sup>110</sup>

The study of these Acts is more interesting for two reasons: they did not exist when *Ninety-Mile Beach* was decided, and they were valid statutes at the time of *Marlborough Sounds*.

The submission that private property has been extinguished on seabed because the Sea Acts revested it on the Crown is a very strong one. Nevertheless, read in the light of the doctrine of aboriginal title this argument is less convincing. Still, the interpretation given by the justices reflects the strictness of the presumption against extinguishment.

The vesting of seabed in the Crown is one of radical title (*imperium* only) that is “not inconsistent with the continuing existence of Māori customary property”.<sup>111</sup> As the Sea Acts relate to a matter of sovereignty and private property,<sup>112</sup> the justices reject the argument that the legislation vested both *imperium* and *dominium* simultaneously. In contrast the Coal Mines Act 1925 explicitly vests both *imperium* and *dominium* in the Crown. Keith J notices that the wording of the Coal Mines Act was to give “absolute property” of minerals to the Crown, and must be distinguished with the Sea Acts that do not contain such a “plain and clear” extinguishment. That “critical difference” was relevant of the margin between property and radical title.

The clarity required by an Act is consistent with “the standard test as recognised in Canadian, Australian and New Zealand case law”.<sup>113</sup> For the present purpose, Keith J finds that the Act was not clear enough to extinguish property.

Gault P’s reasoning also deserves to be underlined at this point. He notes that, at the time the Sea Acts were enacted, a vesting order by the MLC was deemed to be a Crown grant since, in the Land Act s41, the vesting of the land in fee simple is done “in the same manner as if the land had been granted...by the Crown”.<sup>114</sup> The “minor change of wording”, in his view, must support the non-extinguishment and the radical title – compatibility interpretation rather than “closing a door otherwise left open” for Māori claims.<sup>115</sup> The same kind of remark is made by Tipping J about the Act 1991 s9A(1)(b): whereas the earlier

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<sup>110</sup> Territorial Sea and Fishing Zone Act 1965; Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s7.

<sup>111</sup> Keith and Anderson JJ[160].

<sup>112</sup> *Ibid* [161]. Elias CJ[63].

<sup>113</sup> Richard Boast “Foreshore and Seabed in the Māori Land Court” in *The Foreshore and Seabed* (New Zealand Law Society Seminar, 2004) ch1, 7.

<sup>114</sup> Gault P[105].

<sup>115</sup> *Ibid* [113].

terminology stated “land not yet alienated from the Crown”, the Act 1991 terminology is “not set aside for any public purpose or held by any person in fee simple.” The difference is subtle but significant enough to deduce that the law admits that not all title necessarily results from a Crown grant and that there can be some land “held in fee simple” that is not the result of a Crown alienation.<sup>116</sup> This interpretation is the continuity of the doctrine of aboriginal title; another solution would amount to accept “a most indirect route [of extinguishment] when express legislative enactment would have been expected”.<sup>117</sup>

## 2 *The Foreshore and Seabed Endowment Revesting Act 1991: “Crown Land” excludes “Māori land”*

This part of the decision has been decided very methodically, particularly by Elias CJ. The issue was whether, under s9A of the Act 1991, the land “for the time being vested in the Crown” (but not held by any person in fee simple) and whether this “land of the Crown” status included Māori Land so as to extinguish Māori customary land. If yes, it was then necessary to consider if s2(2)(b) of the same Act, stating that nothing in the Act “shall limit or affect...any interest in that land held by any person other than the Crown” could applied to a status order that land is Māori customary land.

Elias CJ considers the definition of Māori Land under the Māori Affairs Act 1953: it is land which is “customary land or Māori freehold land”, that is to say, held according to tikanga or in fee simple. In parallel, she considers the definition of land of the Crown under the Act 1991: “land vested in the Crown, but for the time being is not set aside for any public purpose or held for any person in fee simple” and notes that this definition is very close to the one given in the Land Act. She deduces that, since the “Land Act definition specifically excludes ‘any Māori Land’”,<sup>118</sup> Māori land must be excluded by the wording of s9A(1)(b). She reasons by analogy saying that, provided that “the land for the time being vested in the Crown” corresponds to the radical title, not only would it be in contradiction with the Land Act, but also this would lead to an absurd conclusion since this title is vested “for all time” and not just “for the time being”.<sup>119</sup>

Her precise argument and interpretation of the Act 1991 are supported by her interpretation of the Resource Management and Conservation Acts. The key to her reasoning is the nexus she finds among the three (Act 1991, RMA, Land

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<sup>116</sup> Tipping [200].

<sup>117</sup> Gault P[113].

<sup>118</sup> Elias CJ[69].

<sup>119</sup> Ibid [70].

Act) acts – as parts of a “package” – which allows her to say that since the Treaty of Waitangi is embodied in each of these Acts, it is contextually “inconceivable that s9A was intended to effect an expropriation”.<sup>120</sup>

This reasoning dispenses with the need to consider s2(2)(b), which she simply describes as a “confirmation that no expropriation was intended by Parliament”.<sup>121</sup>

Gault P does not come to the same conclusion. He considers s9A to have a broader scope than the one envisaged by Elias CJ and states that the section is “related to all foreshore and seabed within the coastal marine area”.<sup>122</sup> Nevertheless, he attenuates this large version of the s9A by noting that, under s2(2), a status order could be constitutive of an interest in land, the right could not be affected by the Act 1991. His vision is characteristic of a more purposive approach and it is noticeable that his argument does not mention the Treaty of Waitangi at all.

By comparison, without being very conclusive about s9A, Keith J insists on the fact that s2(2) is “a sufficient basis ...for the application to proceed” and added that “there is no general confiscatory purpose in the 1994 Amendment Act<sup>123</sup>”.<sup>124</sup>

Tipping J’s interpretation of s9A is closer to that of Elias CJ. Additionally, he gives an interesting interpretation of the protected interests of s2(2): they can “fairly” include a status order but, it is improbable that they may “ultimately” extend to a Land Transfer title.<sup>125</sup> Indeed, this would create a conflict between s9A and s2(2) of the Act 1991.

In general, the justices agree that what has never been vested cannot be re-vested in the Crown. Since customary property does not derive from the Crown, it has never been subject to a Crown grant and therefore cannot be re-vested. The most innovative interpretation of the Act 1991 made by Elias CJ is also the most contextual. However Keith J makes a very good purposive interpretation by looking at Hansard and by raising the following pointed question: “Does s9A proceed on the assumption that Māori customary property no longer exists or does it extinguish that property?”<sup>126</sup> He underlines that the Act 1991 – and

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<sup>120</sup> Ibid [72].

<sup>121</sup> Ibid [74].

<sup>122</sup> Gault P[115].

<sup>123</sup> From which derives s9 of the Act 1991.

<sup>124</sup> Keith & Anderson JJ[170].

<sup>125</sup> Tipping J[202].

<sup>126</sup> Keith & Anderson JJ[170].

the others – was “enacted at a time when the *Ninety-Mile Beach* decision was law”.<sup>127</sup> By answering “No” to the two questions above he points out that although the common law rules are not retrospective, they changed the rules retrospectively as if they were law at the time the Acts were enacted. Such a conception of judicial power may be very controversial as it can conflict with other legal values such as stability and predictability. Nonetheless, this issue is not treated lightly or ignored:<sup>128</sup>

The decision in *Ninety-Mile Beach* has stood for 40 years. Furthermore, it must have been regarded as correctly stating the law by those responsible for subsequent legislation. Hence a cautious approach should be taken to the suggestion that the case was wrongly decided....

Yet, the good faith presumption that no expropriation would be made implicitly exceeds the problems created by making other rules unclear or changing their effect.

### 3 *Consequences of the “clear and plain” test*

One of the justices’ tasks is to determine the point at which a statute is clear enough to amount to the extinguishment of aboriginal title. Manifestly, the standard adopted is a strict presumption against extinguishment. This led to much criticism. However, inevitably, a judicial decision “must land on one side or the other of a political divide...and will be criticised by some who would have preferred an alternative outcome. But the decision will nevertheless be based on legal considerations.”<sup>129</sup>

Additionally, the uncertainty about the standard of extinguishment may raise further questions about the meaning of several statutes, e.g., whether the natural resources they deal with have been vested in the Crown or if the “clear and plain” test is insufficiently met.<sup>130</sup>

#### *B Foreshore and Seabed are “Land” under the Land Act: the Treaty of Waitangi spirit compliant interpretation must not hide the adoption of the doctrine of aboriginal title*

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<sup>127</sup> See generally *Report on the Crown’s Foreshore and Seabed Policy*, above n 12, 45.

<sup>128</sup> Tipping J[204].

<sup>129</sup> Claus-Dieter Ehlermann and Nicolas Lockhart “Standard of Review in WTO Law” (2004) 7 JIEL 491, 492-493.

<sup>130</sup> Particularly the Crown Minerals Act 1991, s10; Resource Management Act 1991, s354.

L’Heureux-Dubé J, of the Supreme Court of Canada, has held that the literal interpretation of the legislation is not adequate anymore.<sup>131</sup> In *Thomson v Canada*, the issue was whether the word “recommendation” meant “a nomination” or “advice that is not binding”, a meaning more consistent with common usage. L’Heureux Dubé J decided that, according to the context and the purpose of the legislation, the word “recommendation” could be interpreted as an obligation. This example is famous since it is indicative of how differently the legal definition of a word can be compared with the usual dictionary meaning.

The meaning of a provision derives from many sources such as the context in which it is written, the context of the law itself, from the actual and logical acceptance of the law by the community, and from the intention of the legislator.

Privileging one of these contexts or sources from the others can be misleading. The literal approach, for example, cannot be conclusive in itself since even the best legislative draftsman would be unable to frame legislation in unambiguous terms. Indeed even if this were the case, human nature would have the tendency to interpret it differently with new factual possibilities.<sup>132</sup> As to the purposive approach, attempting to determine Parliament’s intention or a member’s intention concerning a particular piece of legislation from sources outside of the written statute implies a need for information about the history and the context in which the legislation was enacted.

In *Marlborough Sound*, the remaining issue is whether the jurisdiction of the MLC in foreshore and seabed has been extinguished by legislation and in particular by the Land Act. If the jurisdiction had been statutorily extinguished, none of the justices could conclude that the MLC has jurisdiction over the foreshore and seabed.

### 1 *The Crown submission and the High Court conclusions*

The Crown argued that ‘land’ under s129(1) of the Land Act excludes the foreshore and seabed. The answers given by the justices are all slightly different but very relevant to the issue of the ‘fluidity’ of the common law.<sup>133</sup>

It is interesting to notice that, even without answering to the Crown submission on the word “land”, Ellis J himself concluded that the term ‘land’ in the context of the New Zealand territory, necessarily included the foreshore and enclosed

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<sup>131</sup> *Thomson v Canada (Deputy Minister of Agriculture)* [1992] 1 SCR 385, 406 (“*Thomson v Canada*”). “Pour déterminer la portée véritable d’une loi, la recherche du sens littéral ou de la définition du dictionnaire ne prévaut plus.”

<sup>132</sup> See generally McDowell, above n 107, ch 7, 282-288.

<sup>133</sup> Elias CJ[55]; Gault P[110]; Keith & Anderson JJ[171-181]; Tipping J[187]-[188].

waters. Ellis J referred to John Salmond’s approach stating that “in the case of a dominion such as New Zealand ...where territory was described as land, that would include the foreshore and ‘enclosed waters’”.<sup>134</sup>

2 *The unanimous interpretation of “land” contrary to the dictionary definition*

Under s2 of the Land Transfer Act, ‘land’ (realty) is defined as including “dwellinghouses, outbuildings, hereditaments together with all paths, passages, waters, watercourses, liberties and easements”. In s4 of the Land Act, ‘land’ simply “includes Māori land, General land, and Crown land”. Though the ‘land’ is usually seen as a tangible object, it is not limited to the surface territory. In many Civil Law systems a property in land includes *inter alia* the underground, the soil, and even the air column above the ground out to the sky. Why then should the sea and the foreshore not be land? It is to be considered that, as Dr McHugh stated: “Compared with land above high-water mark, the foreshore and seabed is a ‘special juridical space’ over which the Crown’s sovereignty has a special character.”<sup>135</sup> This special character is derived from the English common law presumption that the Crown is the owner of the foreshore and seabed, unless the contrary is proved by a Crown grant or by a continuous occupation.

The justices, to answer the Crown submission, use all the means they have at common law to confirm their vision that the foreshore and seabed is included in the definition land. They, particularly Keith and Anderson JJ, use both presumptions, external and internal methods of interpretation in a way that enhances the continuity and the homogeneity of the law.

(a) *The intrinsic aids of interpretation*

(i) *The literal, ordinary meaning supported by the dictionary...only*

The lexical definition is the ordinary understanding of the word, i.e., the meaning which is prevailing over the others.<sup>136</sup> The justices admit that the ordinary meaning of the word land does not include the seabed. However, they depart from that meaning with justification. First, the dictionary definitions may not be conclusive. Some are consistent with the idea that seabed and foreshore are land since they are “solid portion of the earth’s surface”,<sup>137</sup> but some are not.

<sup>134</sup> *Attorney-General v Ngati Apa*, above n 21, [20].

<sup>135</sup> *Report on the Crown’s Foreshore and Seabed Policy*, above n 12, 50.

<sup>136</sup> I Eagles et al *Legal Structures and Reasoning* (Palatine Press, Auckland, 1994), ch6, 94.

<sup>137</sup> See Elias CJ[55].



Second, in the opinion of Elias CJ, literal meanings can be fundamentally different from legal ones. She even ironically remarks that the beds and rivers' beds claims have never caused "jurisdictional impediment" whereas one could have argued that they are not legally "land" under the jurisdiction of the MLC.<sup>138</sup> Identically, Keith and Anderson JJ agree that the dictionary meaning is unable to cover all the different legal contentions and give the example of the airspace that is considered as "land" under the Resource Management Act.

Thus, the "stipulative" definition, "taken beyond the ordinary meaning",<sup>139</sup> is to be considered and has been in many ways.

(ii) *The purposive meaning: the Parliament necessary intention of an inclusive definition*

Keith and Anderson JJ note that the Land Act 1993 includes the air in the definition of land, whereas the dictionary meaning does not. Parliament intentions can be clearly different from the narrow definition proposed by the Crown.<sup>140</sup>

Tipping J's arguments focus even more on the role of the legislature. Had it been the Parliament's intention to extinguish rights in seabed, the Parliament would have done it in a clearer manner other than by the simple use of the word "land"; assuming that "land" would have to be interpreted in a strictly lexical way by excluding seabed. Furthermore, Tipping J envisaged the Act as the necessary reflection of the relationship between Māori and Land and authorised Māori custom as a means of interpretation. Indeed, as the Act is designed to protect Māori customary rights, it is hardly believable that Parliament's simple use of the word "land", rather than the expression "land and coastal area" would have, by "necessary implication", excluded the seabed.<sup>141</sup>

The judge is, at common law, asserting that the extinguishment by legislation of property rights shall not be interpreted: it needs to be explicitly stated. Moreover, due to the Māori's attachment to the foreshore and seabed, the seabed is presumably included in the land.

(iii) *History and custom as supportive concepts of the contextual approach*

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<sup>138</sup> Ibid.

<sup>139</sup> Eagles, above n 136, ch 6, 94.

<sup>140</sup> Keith and Anderson JJ[173].

<sup>141</sup> Ibid.

This approach is adopted by Keith J and Anderson J's judgment that links the word "land" with the Land Act's history. This history provides the "primary contexts relevant to the determination of the meaning".<sup>142</sup>

The main argument is that the Land Act preamble embodies the Treaty of Waitangi. By embodying the treaty which references the word "fisheries",<sup>143</sup> the Act necessarily extends itself to marine areas. Also, since the Treaty must be read as including coastal areas in land and since the Treaty is an explicit part of the Land Act, the nexus between the two Acts supports the interpretation of the word "land" in a Treaty-compliant manner.

It is noticeable that the treaty of Waitangi has long been an interpretative tool used by the Courts and has, in some ways, been recognised by the common law as a part of the legislation more than by the legislature itself.<sup>144</sup> Moreover, it has been said that "the Courts have given recognition to the treaty within the limits of its own constitutional role".<sup>145</sup> However, the will to recognise Māori interests is not new and is not supported by the Treaty only – but by the custom and history too—<sup>146</sup> particularly in the domain of interpretation of the words "fisheries" and "land". Fenton CJ, for example, stated:<sup>147</sup>

I do not hold the opinion without doubt that, if the word "fishery" were not present in the Treaty, the word "land" would not suffice to support a claim in the natives to the foreshore of sufficient value to be turned into an absolute freehold interest in the soil, for a "fishery" will mean an interest of no higher character than a privilege or easement.

Chief Judge Fenton view is that the word "land" in the treaty, even independently of the presence of the word "fishery", could extend to the foreshore. If the statement seems to be recognised at common law today, it is noticeable that Fenton CJ used the Treaty of Waitangi to justify his position. Remarkably, Fenton CJ was doubtful about the issue and his approach is humble, this attitude shall not be misread: his reluctance about according absolute property on foreshore to aboriginal people must be read in the historical context of conflictual relationship with the tribes at the time more than in the current Pākehā/ Māori relationship.

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<sup>142</sup> Keith and Anderson JJ [176]-[178].

<sup>143</sup> Ibid.

<sup>144</sup> *R v Symonds*, above n 40; *Nireaha Tamaki v Baker*, above n 8; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 ("Māori Council case").

<sup>145</sup> Morag McDowell and Duncan Webb *The New Zealand Legal System* (2<sup>nd</sup> ed, Butterworth, Wellington, 1998) ch5, 215.

<sup>146</sup> Keith and Anderson JJ [144], [178].

<sup>147</sup> *Kauwaeranga* case, above n 13 as seen in *Important Judgments delivered in the Compensation Court and Native Land Court 1866-1879* (Published under the Direction of the Chief Judge, Native Land Court, 1879).

Moreover, the two justices stressed that the rangatiratanga is “over whenua and taonga”, that is to say, among others, over both land and fisheries. Since the rangatiratanga has been embodied in the Treaty of Waitangi, itself reaffirmed in the preamble of the Land Act, they see no reason why in the Land Act, the general use of the word “land” should not include coastal marine areas.<sup>148</sup> The conclusion of the justices on that point insist on the fact that this view is “of course one of continuity”, highlighting the idea of the survival title to land.<sup>149</sup>

(b) *The use of extrinsic material*

(i) *The Use of other legislation as a guide to interpretation: “arguing across statutes”<sup>150</sup>*

Gault P briefly argues that if certificates have been issued in the past for land under the sea – as identified in Port Marlborough by s4(2)(c)(iii) of the Foreshore and Seabed Endowment Revesting Act 1991 – then “there can be no tenable argument that at least some seabed within the claim area could constitute ‘land in New Zealand’ within s129” of the Land Act.<sup>151</sup> Here again, the interpretation of the Acts is consistent with the application and/or interpretation of other Acts dealing with the same issue. The presumption of continuity and consistency of the common law has not been ignored by the justice.

If the context implies that Parliament’s intention was that the Land Act shall be read together with other Acts and that “land” might have the same meaning in one Act or in another, however, Gault P made it clear that the analogy was limited to “some seabed” and applies only “within the claim area”.<sup>152</sup> It may be relevant of his concern of not being too innovative on the issue. This restraint on the particular issue of the definition of land has not been expressed by the other justices.

Indeed, Keith and Anderson JJ also reasoned by analogy with the s2 of the Resource Management Act 1991 where the definition of land includes both the water below and the airspace above it.<sup>153</sup> They also used the argument that the air is included in the definition of the Land Act, seeking for an analogy that could have been avoided since similar prior statutes such as 1952 Act and predecessors

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<sup>148</sup> Keith and Anderson JJ [177], [179].

<sup>149</sup> Ibid [180].

<sup>150</sup> Tipping J[173].

<sup>151</sup> Gault P[110].

<sup>152</sup> Ibid.

<sup>153</sup> Keith and Anderson JJ[173]

granted seabed within ports, providing justices with a much stronger argument. Nevertheless, their Honours' arguments demonstrate a strong will to show that for water to be excluded from the MLC jurisdiction, "given the long history of Māori property and rights",<sup>154</sup> "a much clearer indication would have had to appear"<sup>155</sup> in the Act.

Tipping J has been even more incisive. For Tipping J there is hardly any justification to include the foreshore and seabed in the definition of land. He implicitly comments that if "land" in the art. 9A of the Foreshore and Seabed Endowment Revesting Act includes the foreshore and the seabed, and has no hesitation in rejecting the Crown's argument that the word land is "incapable in law of referring to the seabed".<sup>156</sup>

(ii) *Recourse to previous case law for statutory interpretation and common presumptions supporting the "stipulative" definition*

As already noted, Elias CJ does not see any reason why the seabed should be legally distinguished from rivers. She strengthens her point by giving case law examples illustrating the possible conciliation between Māori customary interests in land other than dry land.<sup>157</sup> Here again, custom seems to play a fundamental role in the interpretation of the Land Act since the justices do not want to depart from the "usual" common law and want to make land claims as homogeneous and continuous as possible. The idea of continuity and stability is a strong presumption at common law that seems to fit with the idea of continuity of the aboriginal title to land set forth in the Australian doctrine. That idea is also underlined in Keith and Anderson and in the High Court judgments where, for instance, enclosed waters were treated as having a territorial status.<sup>158</sup>

In conclusion of this part, one should notice that, by contrast with previous decisions,<sup>159</sup> the justices gave more weight to the fact that the legislation must be read in concert with the doctrine of common law aboriginal title manner rather than in a Treaty compliant manner. This approach is closer to the Civil Law system where the legal recognition of a non-enforceable text would be

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<sup>154</sup> Ibid [178].

<sup>155</sup> Ibid.

<sup>156</sup> Tipping J[187]-[188].

<sup>157</sup> Elias CJ[56]; *Re the Bed of the Wanganui River* [1955] NZLR 419 and *Omapere Lakes* MLC decision of 1 August 1929.

<sup>158</sup> Keith & Anderson JJ[175]; *Attorney-General v Ngati Apa*, above n 21, [20].

<sup>159</sup> *Te Weehi v Regional Fisheries Officer*, above n 5; *Māori Language case*, above n 103.

impossible. In such system two solutions would have been possible to reach the conclusions above. Either the Treaty of Waitangi should have been formally included in the legislation or even “constitutionalised” – as most of the national Human’s Right Declarations in Civil Law systems are – or it could have been recognised by the competent Court as a general or fundamental principle (e.g., a fundamental principle recognised by the laws of the Republic, in France), that is to say, not written but nevertheless enforceable in Court. Here the approach is quite comparable, though the principles underlined in the Treaty do not derive from it, they are recognised as fundamental rights displacing the common law of England from the start: there seem to be some constitutional, hierarchically superior rights cognisable in New Zealand courts.<sup>160</sup> As Sir John Laws argues:<sup>161</sup>

[T]he defining feature of judicial supremacy is the acceptance of a distinction between judicial and elective power...legislators have power in respect of matters of social or economic policy, while judges have power to protect individual rights, which are values that stand beyond political debate....But it is never made entirely clear what rights the judiciary are expected to protect.

Whether in *Marlborough Sounds* the justices overstep the role reserved to Parliament is uncertain. Some may argue that they simply are the guardians of essential freedoms and judicial fairness. Other will say that they put legislation upside down so as to challenge the legislative Supremacy. The case is not decisive. On the whole, justices could have been less deferent towards the laws they overturned and the legislation they interpreted. Maybe, the future will say if judicial decisions on fundamental rights can cause serious injury to the sovereign legislature.

Moreover, the Treaty of Waitangi incorporation clauses have been used, but not overused and not ignored either. They were read as what they simply are: a confirmation of the survival of natives’ right and the ‘quasi-legislative’ echo of the doctrine of aboriginal title. This is not uncontroversial. James Allan recently wrote that:<sup>162</sup>

These clauses , too, are in my view a bad thing since no one seems to be able to say what they are. They have the effect of simply handling certain social policy decisions over the unelected judges and are, in that sense, anti-democratic.

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<sup>160</sup> *R v Pora* [2001] 2 NZLR 37 Despite a previous Act forbidding it, criminal penalty had been increased retrospectively by a second Act. The justices stated that, to be valid, the second Act should have expressly repealed the first one since the provisions dealt with in the first Act were conformed with Human Rights and, as a consequence, presumed to be the good ones.

<sup>161</sup> Cited in Richard Ekins “Judicial Supremacy and the Rule of Law” (2003) 119 LQR 127.

<sup>162</sup> James Allan “Parliament to blame for Judges taking High Ground” [2004] *The National Business Review* 20, 21.

There is a chance, however, that in *Marlborough Sounds*, the justices know exactly how to deal with these clauses, and, that they have found a balance between their theoretical existence and their practical meaning.

#### IV CONCLUSION

The study of this *Marlborough Sounds* provides one with a multitude of facets about common law and common law reasoning. *Marlborough Sounds* has considerably added to the theoretical and practical aspects of the common law of New Zealand. First, it enlarged its scope to the common law of aboriginal title. Second, it reintroduced the customs and usages of the land made by Māoris as a completely different and parallel part of the law and way of thinking about property. Such a judicial approach would have been difficult in a Civil Law system.

By reinvigorating the ancient common law, the justices give themselves more flexibility to interpret statutory provisions without having to be too inventive. They just apply the rule of law they find appropriate to the case. They do not, literally, “make” the law or “change” the law made by the Parliament. In their own words they simply apply the legislation.<sup>163</sup> Moreover, the common law of aboriginal title has not suddenly appeared from nowhere as a divine creation. The justices show that its foundations are rooted in history and the decision is one of continuity: the continuity of the common law and the continuity of Māoris’ rights as the first settlers of Aotearoa New Zealand.

Nevertheless, statutory provisions supporting aboriginal doctrine are also included in the case and the Treaty of Waitangi has also been looked at as a source of the law of New Zealand, particularly in the interpretation of the word “land”. But it was not, in itself, constitutive of aboriginal rights. The common law of aboriginal title is and used to be the legal corollary of these “local circumstances” that displaced the English law of land tenure in New Zealand. This is the first rule stated by *Marlborough Sounds*. The practical consequences could be huge.

*Marlborough Sounds*’ judicial interpretations of statutory provisions have been very much criticised. But, as this article intended to show, the lowest common denominator of the four judgments is “crystal clear”: property rights cannot be extinguished by a “side wind”. Furthermore, for five justices, as different as they are, to achieve such a tangible common denominator is relevant of some kind of reality. The reality is pre-existence and continued existence of Māoris’ common law rights in New Zealand.

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<sup>163</sup> As it was the case in *R v Pora*, above n 160.

It has been said about this case:<sup>164</sup>

If the legislature uses empty, indeterminant words to avoid making tough decisions, that is no fault of the judges. They have been forced to give the empty words some sort of content.

On the other hand, too clear and precise legislation will also dramatically undermine common law flexibility and, as this case demonstrated, adaptability to local circumstances. The balance between the rule of law and Parliament supremacy is still before us.

Nonetheless, before the decision, we could hardly see the forest through the tree, where the forest was the aboriginal doctrine and the tree the Treaty of Waitangi. Indeed, the Treaty jurisprudence consisted of the recognition of rights as it related to statutory provisions. These provisions principally aimed at the rationalisation of rights and uses of land and resources. By contrast, the revived aboriginal doctrine is looking behind that tree, seeking for some palpable, broader customary rights that deserve to be recognised. These rights existed before the common law itself and the common law, at least, was able to recognise what statutory provisions insufficiently or artificially did: the existence of another “stream of law”, comparable to equity, alongside the law of New Zealand. Justices have had to remove and “change” the rules, they had to make the legislation that was drafted under other common law rules unclear. Nevertheless, this decision was necessary since the previous one was wrong in law. *Marlborough Sounds* gives to the common law the opportunity to amend itself.

In that way, the justices have not been activists, they have only followed a path that initiated about 20 years ago with a broader way of thinking about customary possessions. The path was the common law designed to make the law fairer, more protective of native rights, more rational and continuous, more natural.<sup>165</sup> Problems arose at the junction between common law rights and aboriginal customs and usages. Justices merely choose to make them fit together without denying any of them. While preserving the “skeleton” of the common law,<sup>166</sup> justices add a legally recognisable aboriginal title to it. This title is considered as able “to co-exist with that radical title and although inherently fragile, could be seen as a burden of that radical title”.<sup>167</sup>

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<sup>164</sup> Allan, above n 162.

<sup>165</sup> As suggested by McHugh, above n 59, 29.

<sup>166</sup> *Mabo*, above n 7, 29.

<sup>167</sup> *The Commonwealth v Yamirr* (2001) 75 ALJR 1582, [47] as cited by Brown, above n 7, 473.

Justices demonstrate that the common law of New Zealand is not in a complete isolation of the rest of the world. Their contemporaneous evolutionary, not revolutionary, approach of the legislation is in harmony with the protective common law that exists overseas.