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Geoffrey W.G. Leane*  Indigenous Rights Wronged: Extinguishing Native Title in New Zealand

This article is an account of a recent controversy in New Zealand regarding the common law native title rights of indigenous Maori people to a possible title in certain areas of the foreshore and seabed. In overturning its own precedent the New Zealand Court of Appeal had opened the door to such claims. However, the legislature, overwhelmingly supported by the majority non-Maori population, moved quickly to extinguish the inchoate rights with no guarantee of fair compensation. The lack of any constitutional protection of civil and political rights, and the absence of alternative institutional checks and balances, allowed the legislation to proceed unimpeded notwithstanding vigorous protests from Maori and from the Waitangi Tribunal whose mandate relates to the treaty rights of New Zealand's indigenous Maori minority. The fragility of civil and political rights in New Zealand has been articulated elsewhere, and the narrative outlined here presents a near-perfect instance of an inadequate rights regime facilitating an iniquitous outcome for a disempowered minority. It is a fairly straightforward tale of rights abuse and an exemplary study of the importance of constitutional protection of certain rights, in this case discrimination on grounds of race, against hostile majorities even in a modern liberal democracy. Both the native title jurisprudence and rights issues are imbued with the Canadian experience but lie in (sometimes dramatic) counterpoint to it.

Cet article est un compte rendu d'une récente controverse en Nouvelle-Zélande relativement aux droits autochtones, en common law, du peuple Maori sur certaines zones littorales et sur le fond marin. En infirmant son propre précédent, la Cour d'appel de la Nouvelle-Zélande a ouvert la porte aux revendications de ce type. Cependant, la législature, avec l'appui de l'immense majorité de la population qui n'appartient pas au peuple Maori, a rapidement réagi pour éteindre ces droits virtuels, sans aucune garantie d'indemnisation équitable. L'absence de protection constitutionnelle des droits civils et politiques, et l'absence de quelque mécanisme de contrôle institutionnel ont permis à la loi d'être adoptée sans entraves, malgré les protestations vigoureuses des Maoris et du tribunal Waitangi dont le mandat vise les droits issus de traités de la minorité maori autochtone de Nouvelle-Zélande. La fragilité des droits civils et politiques en Nouvelle-Zélande a été expliquée ailleurs et les faits relatés ici sont un exemple quasi parfait d'un régime de droits inadéquat qui autorise un résultat inique pour une minorité démunie. C'est un récit qui résume clairement l'abus de droits et une étude exemplaire de l'importance de la protection constitutionnelle qu'il faut accorder à certains droits, dans ce cas la discrimination fondée sur la race, contre des majorités hostiles, même dans une démocratie moderne et libérale. La jurisprudence sur les droits autochtones et les questions de droits sont empreintes de l'expérience canadienne mais se présentent en contrepont –parfois dramatique–à cette expérience.

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Introduction

In June 2003 the New Zealand Court of Appeal handed down its controversial Ngati Apa decision recognizing the possibility of unextinguished common law rights for New Zealand's indigenous Maori people. More specifically it held that the courts—in particular the Maori Land Court—had jurisdiction to determine the status of the foreshore and seabed. In other words there remained the possibility (subject to a finding on the facts) that Maori retained a customary right to the foreshore and seabed which might in some cases amount to the equivalent of a fee simple title where exclusive use and occupation could be shown.

The appellants were a group of iwi (indigenous Maori tribes) at the top of New Zealand's South Island. They claimed as Maori customary land all of the foreshore and seabed of an area known as the Marlborough Sounds, extending to the limits of New Zealand's territorial sea. They had first applied for such a declaratory order from the Maori Land Court in 1997 and were successful in gaining an interim decision that such rights had not been extinguished. In 1998 the attorney-general appealed to the Maori Appellate Court, which in turn referred the case to the High Court. The appellants succeeded, whereupon the Maori claimants appealed to the Court of Appeal. They were successful on the question of the possibility of an unextinguished customary title. The Court of Appeal considered

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prior legislative vesting of the seabed in the Crown but found that it was not sufficient of itself to extinguish customary title,\(^3\) the implication being that a "clear and plain intention" to do so was required.\(^4\) In a similar case the High Court of Australia had recognized a qualified common law aboriginal title over the territorial sea,\(^5\) though that case was not referred to by the New Zealand court. The Crown has not appealed the Ngati Apa decision. Although the possibility of an unextinguished customary title was recognized by the Court of Appeal in Ngati Apa the court was not required to make any factual determination in this case; indeed it warned against excessive optimism.\(^6\) The mimimalist nature of the Court’s determination has been emphasised by commentators such as Paul McHugh.\(^7\)

The decision was "no judicial novelty"\(^8\) but unusual in that the Court of Appeal had to overturn its own precedent, for it had held in the Ninety-Mile Beach\(^9\) case that once the Native Land Court had made a determination of title to land then there was no further title seaward to be investigated—it belonged to the Crown. Similarly, the Court of Appeal finding that prior legislation in respect of the foreshore and seabed was not sufficiently explicit to extinguish any native title is perhaps not surprising. Given the historical difficulties of bringing native title claims in New Zealand (see below), and given the ruling in Ninety-Mile Beach, the Crown would understandably have assumed that there was no native title with which it need be concerned and therefore no need to assert its untrammelled sovereignty by explicitly extinguishing it. The abrupt undermining of that logic in Ngati Apa might help explain the alacrity with which the Crown hastened to undermine the decision.

In Ninety-Mile Beach the court had also held, perhaps obiter, that Maori customary title existed only at the discretion of the Crown and so was not legally binding on the Crown.\(^10\) In doing so it followed the nineteenth

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3. Ngati Apa, supra note 1 at para. 160 (per Keith and Anderson JJ.).
10. Ibid. at 468 (per North J).
century case of *Wi Parata*,\(^{11}\) which in turn was specifically disavowed by the Court of Appeal in *Ngati Apa*\(^{12}\) and which was in any event at odds with a long line of North American cases beginning with Chief Justice Marshall of the U.S. Supreme Court in *Johnson v M'Intosh*\(^{13}\), re-surfacing in Canada with the *Calder*\(^{14}\) case in 1973, and later in Australia with the *Mabo*\(^{15}\) case. Thus could *Ngati Apa* fairly be characterized as "no judicial novelty"; on the contrary, it merely aligned the New Zealand jurisprudence a little more closely with comparable Commonwealth jurisdictions. Though not the subject of this paper, one might incidentally draw out a similar alignment between legislative responses in Australia and New Zealand to these somewhat revisionist judicial findings on common law native title.\(^{16}\) Australian legislation (the *Native Title Acts*) sought to acknowledge customary title (albeit within certain constraints) but appears to have had something of chilling effect.\(^{17}\) As we shall see, however, the legislative response to *Ngati Apa* was of a different order and sought nothing less than the extinguishment of that form of native title amounting to exclusive use and occupation (should such a claim ever have succeeded). In both jurisdictions there was no constitutional restraint on legislation seeking to impinge on native title.

In any event jurisprudential arguments supporting the *Ngati Apa* decision were immediately lost in the extraordinary political controversy generated by the decision and the equally extraordinary legislative response. In fact such arguments were virtually never made in the rush to eliminate any perceived threat to majority non-Maori interests.

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17. See, for example, Maureen Tehan, "A Hope Disillusioned, An Opportunity Lost - Reflections on Common Law Native Title and Ten Years of the *Native Title Act*" (2003) 27 Melbourne U.L.Rev. 523 at 556-563; Alex Reilly, "From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from Mabo to Ward" (2002) 9 Murdoch University Electronic Journal of Law online: Murdoch University <http://murdock.edu.au/elaw/issues/v9n4/reilly94nf.html at para 30>. Note that the UN Committee on the Elimination of Racial Discrimination (CERD) ruled that amendments to Australia’s *Native Title Act* were discriminatory in their emphasis on extinguishment and uncertainty (Decision (2)54 on Australia – Concluding observations/comments, 18 March 1999), both of which characterize the New Zealand legislation.
I. Legislative response

Within three days of the Ngati Apa decision being handed down the prime minister foreshadowed the government’s intention to undermine the court’s finding of a possible unextinguished native title.18 Ironically she noted in the same press release that “[i]n a democracy, citizens are free to explore what their legal rights are through the court system.”19 Such was not to be. There was a swift and angry public response to the (misconceived) perception of widespread Maori ownership of the foreshore and seabed; indeed it was later admitted by the relevant minister that it was this anger that drove the political response.20 There followed a flurry of government press releases and reports21 attempting to assuage public fears. In August 2003, just two months after the Ngati Apa decision, the government released its framework policy, based on “principles” of access for all New Zealanders, regulation by the Crown, protection of “customary interests” and certainty over the administration of the foreshore and seabed. The essence of the government’s response was that the foreshore and seabed “should be public domain, with open access and use for all New Zealanders”22 and therefore even the possibility of Maori being able to demonstrate exclusive use and occupation over any part of it could not be tolerated. The historical basis for such an assumption was not stated but is perhaps open to question.23

19. Ibid.
20. The public response was, not surprisingly, ill-informed on the historical and legal issues and tended to focus on a misplaced fear that “ordinary,” non-Maori citizens would be excluded from the nation’s beaches. See, for example, The Press (14 July 2003) A9:

Application of the Court of Appeal’s decision could lead to the abomination of riparian apartheid, with the greater populous confined to narrow fenced-off strips of dry public land to watch a favoured few customary rights holders, invitees, and payees enjoying exclusive benefit of privatised beaches, tidal waters, and the sea.

In the same vein (B. Mason, “It Will Be a Profound Shock to Most People to Learn That They Have No Rights of Recreation Over Foreshores” Otago Daily Times (6 July 2003): [the Ngati Apa decision] threatens to open a Pandora’s box of electoral horrors: Maori claims to exclusive ownership and thereby control or prohibition of every New Zealander’s assumed right to fish, sail, walk, bathe, or kick a football around on the beach, anywhere, any time, for free.

The deputy prime minister, who was also charged with formulating a policy response to the Ngati Apa decision, admitted some time later that the Government had been motivated to enact the Foreshore and Seabed Act 2004 by “the depth of Pakeha [non-Maori] anger and alarm” (“Pakeha anger led to Gov’t. action” NZPA, The Press (13 October 2005) A2.
23. Paul McHugh, supra note 8, suggests at 161 that it is far from clear that Anglo-settler communities in Australasia are right in assuming a right of recreational use of beaches.
At no time was any attempt made to define the alleged threat to "all New Zealanders" in terms of the likelihood of any Maori claims succeeding given the difficulty of the legal tests, far less the actual areas likely to be claimed in exclusive use and occupation. Lost in the (misleadingly) egalitarian rhetoric was the unpleasant reality that equal access to some (in all likelihood very small) part of the coast was to be bought in a cynical trade-off with indigenous rights. The effect of the legislation is obviously the loss of indigenous people’s rights recognized by the country’s highest court, but worse is the unpleasant odour of racial discrimination when the group suffering the rights loss is defined by race, since by definition only indigenous peoples could assert the right being extinguished. Such a prospect would be remote in Canada in light of its entrenchment of "aboriginal and treaty rights" in section 35 of the Constitution Act 1982, or in other jurisdictions where protection from discrimination on grounds of race is entrenched in a constitution, but not in New Zealand.

In considering the public outcry which followed the decision it should be recalled that the Court of Appeal did not in fact find any Maori title or valid claim of any kind in the foreshore or seabed. On the contrary it warned of "a number of hurdles in fact and law."24 It merely acknowledged the possible existence of such a title. Any successful claim would depend on the facts and the ability of the claimants to meet successfully the difficult tests for showing native title. Given the concerns of the New Zealand public over access to beaches, it should also be noted that New Zealand law had never established a universal right of access to the nation’s waterways and that perhaps thirty per cent of the land alongside those waterways is, at least with respect to access, effectively privately owned.25

Nonetheless public opinion polls reported that some sixty per cent of New Zealanders supported the assertion of public ownership of the foreshore and seabed, with less than one-third willing to support customary ownership even where free public access was assured.26 More alarmingly, only three per cent wanted the government to do nothing and allow Maori claims to go through the court process to which they had been invited by

24. Ngati Apa, supra note 1 at 8 (per Elias, C.J.).
the Court of Appeal.\textsuperscript{27} Public opinion, it is argued by some, was not only misinformed on the issues but perhaps cynically so.\textsuperscript{28}

The public were invited to make submissions on the Government’s draft policy\textsuperscript{29} and a round of meetings with Maori were held.\textsuperscript{30} Non-Maori responses tended to vary between viewing the proposals as too hard on Maori while others found them too gentle.\textsuperscript{31} Maori submissions were unsurprisingly more critical: for example, one coalition of Maori organizations characterized the proposals as “the greatest property confiscation in New Zealand’s history, and one without compensation”\textsuperscript{32} and as “a race-based response.”\textsuperscript{33} Maori leaders organized a march and protest (or “hikoi”) on Parliament, attracting some 20,000 protesters.\textsuperscript{34} However, given the complexity of the underlying legal issues and the political imperatives driving the process it was not surprising that these consultations had little effect on policy. The subsequent Waitangi Tribunal report dismissed the consultation process as inadequate and echoed a common sentiment that the government had already made up its mind.\textsuperscript{35}

It may well be that from the perspective of high politics the government made a tactical mistake in signalling its intention to overrule Ngati Apa so quickly. Notwithstanding the public hysteria and hostility to any perception of “special rights” for Maori, the government might well have bided its time and left the matter to the courts. This more conventional option, along with the alternative of protracted negotiations with Maori, was commonly referred to as the “long conversation” and was seen by many as a more appropriate response. Given the difficulty of meeting the common law tests for demonstrating any customary right, far less exclusive use and occupation, the whole issue may well have proved to be a storm in a

\begin{footnotes}
\item[Ibid.]
\item[27] See, for example, F.M. (Jock) Brookfield “Popular Perceptions, politician lawyers and the sea land controversy” (Sept 2005) N.Z.L.J. 315 at 318: ‘The public were allowed, indeed encouraged, to perceive, incorrectly, that the Court of Appeal had perpetrated some extraordinary judicial coup and had created a problem only to be solved by the legitimate extinguishment of Maori customary title’.
\end{footnotes}
teacup. Even had some claims amounting to exclusive use and occupation eventually been proven they would in all likelihood have been relatively minor and should controversy have erupted again the government could have blamed “activist” judges and if necessary legislated at that time in the context of a demonstrated and tangible “threat” to the non-Maori majority.

In the event, however, the government proceeded with a poll-driven legislative response, firstly with a draft bill for consultation and then with the Foreshore and Seabed Act 2004. The Act was entirely unaffected by the consultation process. The original bill was the subject of Select Committee hearings around the country, but notwithstanding the controversial subject matter and some 3946 written submissions to the Committee it recommended no changes to the proposed legislation.36

The Foreshore and Seabed Act 2004 vested “the full legal and beneficial ownership of the public foreshore and seabed ...in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property.”37 For greater finality the same section asserts that “[t]he Crown does not owe any fiduciary obligation, or any obligation of a similar nature, to any person in respect of the seabed.”38 The “public foreshore and seabed” is defined (section 5) as “not includ[ing] any land that is ...subject to a specified freehold interest.”39 Thus only Maori property rights (as recognized by the Court of Appeal, but possibly extending to fee simple title) are extinguished, but not existing private titles. It is this aspect that incites accusations of race-based discrimination.

The Act then attempts to address a kind of common law native title, being the grounds upon which the Court of Appeal found for the claimants, but in doing so reveals a legislative contempt for that source of indigenous rights long recognized in, for example, Canada and the United States and more recently Australia. For example, nowhere in the Act is the term “native title” even used notwithstanding that it is that title which is being legislatively constrained and, in its strongest form of “exclusive use and occupation,” actually destroyed.40 More extraordinary, indeed unprecedented in any comparable jurisdiction, is the legislative allowance

37. Foreshore and Seabed Act 2004 (N.Z.) 2004/93, s.13(1).
38. Ibid. at s.13(4).
39. Ibid. at s.5.
40. The use of the term “extinguished,” though appropriate in normal parlance and used by some writers (eg Boast 2005 (supra note 2) at 133), may lead to confusion because “extinguishment” has acquired a restricted technical meaning in native title cases, as to which see Paul McHugh “Aboriginal Title in New Zealand: A retrospect and Prospect” (2004) 2 N.Z.J. Pub. & Int’l L. 139, 186 ff.
for this latter form of title to be claimed by any "group"; that is to say, it is no longer the exclusive domain of indigenous peoples—as is assumed by the entire body of Anglo-American law on native title—but of any "group" meeting the test, including settlers.41 There seems to be a conscious attempt to erode the integrity not only of the content and provenance of native title itself but even of the singular group to which it might adhere.

From there the legislation proceeds to divide native title according to possible forms of content.42 Firstly claims to "customary rights orders" by Maori will be heard in the Maori Land Court; those by non-Maori are to be heard in the High Court. In either case an application must be made by 2015.43 The test for such rights, based on specific use rights defined as an "activity, use, or practice" is broadly similar to those articulated in the Canadian jurisprudence,44 and is onerous. Customs capable of recognition must be integral to Maori culture, must have been practised substantially uninterrupted since the assertion of British sovereignty in 1840, continue to be practised and not have been prohibited or extinguished as a matter of law.45 Although the rights order may include a commercial component the exercise of customary activity, commercial or otherwise, is "subject to the scale, extent, and frequency specified ... in the order,"46 suggesting the possibility of a "frozen rights" approach long rejected in Canada.47

But the more contentious category is that of "territorial customary rights," a new nomenclature for rights amounting to exclusive use and occupation which might ground a claim equivalent to fee simple title.48 It was the spectre of these rights that raised for (non-Maori) New Zealanders the bogeyman of Maori excluding non-Maori from the nation's beaches, though recall that far from making any actual finding on the existence of

41. *Foreshore and Seabed Act 2004* (N.Z.). This peculiar provision was the result of a political trade-off by which the government, unable to stitch together a sufficient parliamentary majority, obtained the support of a minority party (New Zealand First) at the cost of accommodating its leader (now a Cabinet Minister though his party is not in any formal coalition), who has been quoted as saying that an "annual yachting regatta might qualify" (as a non-Maori customary activity)! (Boast 2004, *supra* note 2 at 23-25).


43. *Foreshore and Seabed Act 2004*, ss. 48 and 68 respectively.


45. *Foreshore and Seabed Act 2004*, s.50. The test is thus more onerous than the Canadian "reasonable degree of continuity."

46. *Ibid.* at ss. 52(2), (3).


48. As McHugh, *supra* note 8 noted, this regime assumes the existence of substantive native title rights, although it is not clear the courts would generally recognize such rights.
such a title the Court of Appeal cautioned against optimism in any such claim succeeding. Of course there could be no overarching claim to the coastline in its entirety but only localized claims by individual groups contingent on meeting strict factual and legal tests. The deputy prime minister, who was also charged with the government's policy response to Ngati Apa, himself thought of Ngati Apa as raising only "the remote prospect that customary rights might be crystallized as exclusive ownership."49

In any event the test for showing this stronger form of native title is extremely onerous, again largely following the Canadian jurisprudence in requiring exclusive use and occupation "without substantial interruption" since 1840 (when the founding Treaty of Waitangi was signed by the British Crown and Maori leaders) but with the additional requirement of showing continuous title to contiguous land since 1840.50 This latter requirement of continuous title in contiguous land, unrelated to existing common law tests, was a new twist added to the final version of the bill. As Maori and academic commentators have forcefully pointed out, it will present enormous difficulties to claimants, as they will only rarely own contiguous land.51 It is effectively a statutory override of the Ngati Apa decision, which held that the question as to whether foreshore and seabed rights were extinguished by the sale of adjoining land was a matter of fact to be determined, thereby overturning the Ninety-Mile Beach precedent. The Act essentially adopts the legally incorrect precedent of Ninety-Mile Beach. In referring to the government's original proposal to abrogate any Maori property rights which might arise out of the Ngati Apa decision, one distinguished commentator stated that "[t]here would be a gross breach of established constitutional convention if Parliament reversed the judgements given in their favour."52 Finally, in making a determination of exclusive use and occupation the Act stipulates that "no account may be taken of any spiritual or cultural association with the area, unless that association is manifested in a physical activity or use related to a natural or physical resource."53

50. Foreshore and Seabed Act 2004, ss.32(1)(2).
51. Te Ope Mana a Tai, Summary and Analysis of Amended foreshore and Seabed Bill (17 November 2004) at 7 online: Te Ope Mana a Tai <http://www.teope.co.nz/pdf/Analysis%20of%20Amended%20Foreshore%20and%20Seabed> ; Boast 2005, supra note 2 at 156.
52. Jock Brookfield, "Treaty does not stop at water's edge" The New Zealand Herald (1 July 2003) (the author is a professor emeritus at Auckland University and former Dean of University of Auckland Law School).
53. Foreshore and Seabed Act 2004, s.32(3).
Thus, having acknowledged the possibility of a strong version of native title amounting to exclusive use and occupation, the legislation excludes the possibility of such a claim by asserting the Crown's unqualified "full and beneficial ownership" unconstrained by even the kind of fiduciary duty to Maori which had been hinted at in case law.\(^{54}\) Whilst allowing for the possibility of less threatening "customary rights orders," the legislation undertook a barely qualified destruction of "territorial customary rights," or those which amounted to an exclusive use and occupation, by asserting the Crown's "absolute property" in the foreshore and seabed.\(^{55}\)

However, the effective extinguishment is slightly qualified in a somewhat bizarre piece of drafting by which allowance is made for a "group" (that is to say including non-Maori) to obtain a "finding" from the High Court that the group "would, but for the vesting of the full legal and beneficial ownership of the public foreshore and seabed in the Crown ... have held territorial customary rights to a particular area of the public foreshore and seabed at common law" (emphasis added).\(^{56}\) That is to say, a claimant group can attempt to surmount the difficult tests for demonstrating this "territorial" customary right in order to show that it would have succeeded in its claim if only the legislature had not already extinguished the right!

What would be the point of such a potentially costly\(^{57}\) exercise? In the event of successfully making such a claim the group can then apply for either of two orders from the High Court.\(^{58}\) It may apply for an order establishing a foreshore and seabed reserve,\(^{59}\) the purpose of which would be to recognize a guardianship and stewardship role for Maori claimants but also to "enable that area to be held for the common use and benefit of the people of New Zealand."\(^{60}\) The effect would therefore be to reduce the territorial customary right to something akin to the less threatening customary rights order and effectively extinguish any spectre of the exclusive use and occupation which the claimant had demonstrated.

The second kind of order for which the successful claimant could apply, and which the High Court must grant, is for a referral of the finding to the attorney-general and the Minister of Maori Affairs. Upon such a


\(^{55}\) *Foreshore and Seabed Act 2004*, s.13(1).

\(^{56}\) *Ibid.*, s.33.

\(^{57}\) Boast 2005, *supra* note 2 at 161 points to the possibility that such claims will require prohibitively expensive historical evidence.

\(^{58}\) *Foreshore and Seabed Act 2004*, s. 36.

\(^{59}\) *Ibid.*, s. 43

\(^{60}\) *Ibid.*, s. 40.
referral the ministers "must enter into discussions with the applicant group for the purpose of negotiating an agreement as to the nature and extent of the redress to be given by the Crown" (emphasis added).\textsuperscript{61} The wording ("the redress") suggests that some kind of redress would be forthcoming notwithstanding the ambiguous requirement that the ministers merely enter into "discussions." Note, however, that the use of the term "redress" is significant. The Waitangi Tribunal had already pointed out that "redress" was an inappropriate term in this context since it had been used by the Tribunal in cases where Maori had grounds for a claim but one not grounded in legal rights.\textsuperscript{62} In respect of the foreshore and seabed there were clearly legal rights at issue and the appropriate terminology would therefore be of one of "compensation," for the breach of legal rights could not be discharged by redress alone. In the words of the Tribunal "[r]edress occupies a vaguer territory, where the language of right gives way to the language of hope."\textsuperscript{63} Thus there is not only a conspicuous lack of any requirement that redress be "fair" or "satisfactory" to the claimants but even that it be correctly characterized as "compensation" for legal rights lost.\textsuperscript{64} Rather it would appear to remain at the grace and favour of the Crown.

In summary the \textit{Foreshore and Seabed Act 2004} is a brutal legislative response to a long overdue but politically unpopular judicial recognition of a common law native title right in Maori. Richard Boast has described it as "probably the biggest land expropriation since the New Zealand Settlements Act 1863, or perhaps ever."\textsuperscript{65} It is an extraordinary and unprecedented usurpation of a line of jurisprudence beginning in the nineteenth century in the British colonies and reinvigorated by the Canadian (and later Australian) courts over the past thirty years.\textsuperscript{66} Just as the New Zealand courts appeared to be making some effort to align themselves with that jurisprudence the New Zealand Parliament has stepped backward to the nineteenth century in emasculating an important source of indigenous peoples' rights.\textsuperscript{67} It has done so by re-characterizing common law conceptions of the content and legal tests for native title; for example, by splitting the title into relatively innocuous "customary rights" grounded in specific activities, and more

\begin{itemize}
\item \textsuperscript{61} Ibid., s. 37(1).
\item \textsuperscript{62} See, for example, Waitangi Tribunal, supra note 35 at para. 5.1.7.
\item \textsuperscript{63} Waitangi Tribunal, supra note 35.
\item \textsuperscript{64} Regarding the principle that compulsory acquisition of land in which indigenous people have a 'native law' interest gives rise to a right to compensation see, for example, the Privy Council decision in \textit{McGuire v. Hastings District Council}, [2002] 2 N.Z.L.R. 577 at 592, 594 (per Lord Cooke).
\item \textsuperscript{65} Boast 2005, supra note 2 at 132.
\item \textsuperscript{66} Boast 2005, supra, ch. 5; McHugh, supra note 8 at 145-153.
\item \textsuperscript{67} See, for example, \textit{Te Ope Mana a Tai}, supra note 51 at 8: "[the Act] represents an unparalleled attack on Maori ... in a manner not seen since the mid-Nineteenth century."
\end{itemize}
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far-reaching property rights into a "territorial customary right" which must be first be proved but which cannot be realized. Proof of the latter has been made the subject of legal tests more onerous than the already difficult tests stipulated by the common law in other jurisdictions, and even if successfully demonstrated the extinguished right is not subject to any guarantee of fair compensation. In effect a property right has been extinguished, without any assurance of adequate compensation, on grounds of race, since it is a right that resides only in an indigenous people. Comparable existing private titles are protected.

The prospect of such draconian and apparently discriminatory legislation might be expected to draw criticism, though of course the courts themselves cannot respond. The cacophony of protest from Maori (to the government's policy response) and non-Maori (to the original Ngati Apa decision) made rational and informed debate difficult, particularly given the legal niceties involved in the Court of Appeal overturning its own precedent.68 A more measured response, at least from the Maori perspective, came from the Waitangi Tribunal but a brief historical perspective might first serve to inform the discussion.

II. Historical perspectives

The Court of Appeal finding in Ngati Apa and the subsequent Foreshore and Seabed Act 2004 can best be understood in the historical framework of New Zealand case law and legislation on the contentious issue of indigenous peoples' rights in British colonies. The original sources of those rights in colonial legal systems are treaties and common law native title, both of which are relevant in New Zealand as in Canada and the United States, though not in Australia (where no treaties were signed). In New Zealand the Treaty of Waitangi, ceding sovereignty to the Queen but reserving native title in Maori, was signed by representatives of the British Crown and Maori in 1840.69

The Treaty occupies a peculiar and highly ambiguous space in New Zealand's constitutional arrangements. Notwithstanding that New Zealand joins only the United Kingdom and Israel as having no written constitution, the Treaty is said by some commentators to be of fundamental constitutional significance. The Waitangi Tribunal has characterized it as

68. See, for example, Waitangi Tribunal, supra note 35 at 3: "the public discourse has generally been ... unsatisfying, oversimplifying the issues and thereby distorting them ... polarised positions (not necessarily underpinned by good information) have quickly been adopted."

69. Note that there were English and Maori versions of the Treaty with important textual differences, the analysis of which is beyond the scope of this paper. See, for example, Philip Joseph, Constitutional and Administrative Law in New Zealand, 2nd ed, (Wellington: Brookers, 2001) at 47.
“a basic constitutional document,””70 the Privy Council described it as being “of the greatest constitutional importance to New Zealand.””71 Sir Robin Cooke (as he then was, and speaking extra-judicially) called it “simply the most important document in New Zealand’s history”72 and it has been described judicially as “part of the fabric of New Zealand society … part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper … to have resort to extrinsic materials.”73 Yet as a matter of law the Treaty is effectively legally unenforceable74 unless and until it is specifically invoked by the legislature. The provenance of this unfortunate principle goes back to the nineteenth century case of Wi Parata, which characterized the Treaty as a “simple nullity” on the grounds of the incapacity of Maori as “primitive barbarians” to enter into the treaty.75 It is not a constraint on the legislative supremacy of the New Zealand Parliament.76 The modern authority on the legal status of the Treaty holds that it has no legal force unless and until it is specifically adopted by statute into domestic law.77 There has been no such general incorporation.78 The contrast with the constitutionalizing of treaty rights in the Canadian Constitution is marked.

In the 1980s a reformist Labour government began to include “treaty clauses” in particular pieces of legislation, most famously in the State Owned Enterprises Act 1986. That Act was an important instrument in a far-reaching program of neo-liberal economic reforms. It provided for the divestment of certain government assets subject to the proviso (section 9) that “[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.” The Court of Appeal was therefore required to give some legal form to whatever these “principles” might be when confronted with the issue in New Zealand

73. Huakina Development Trust v Waikato Valley Authority, [1987] 2 N.Z.L.R. 188 at 210 per Chilwell J.
74. Ibid.
75. Wi Parata, supra note 11 at 77.
76. New Zealand Maori Council, supra note 54.
78. For a more detailed, if inconclusive, discussion of current constitutional thinking and the Treaty of Waitangi see, for example, B.V. Harris “The Treaty of Waitangi and the Constitutional Future of New Zealand” (2005) 2 N.Z.L. Rev. 189.
The Court elected to eschew a “strict or literal interpretation” of the words of the treaty in favour of safer motherhood notions of “partnership” including a duty on the partners to act with “utmost good faith” and a recognition of the “honour of the Crown” being at stake—principles which one might have thought could be taken as a given. Though hailed as a landmark in New Zealand jurisprudence—which it arguably was in light of the historic repression of Maori treaty and common law rights—one need only consider the negation of those terms to appreciate their banality; that is to say, rivalry as opposed to partnership, bad faith as opposed to “utmost good faith,” shame of the Crown as opposed to “honour.”

The Treaty then has at least arguably become “a bona fide legal and policy risk to be managed within the entire machinery of the bureaucracy, ... ‘vertically integrated’ into the systems of government.” Yet it remains legally fragile and subject to the whim of Parliament, that is to say the whims of passing legislative majorities, both in terms of its inclusion in legislation (it is noticeably absent, for example, from the *Foreshore and Seabed Act* notwithstanding its subject matter) and even of removing mention in existing legislation. It lacks any formal constitutional protection and might effectively be removed from New Zealand’s legal and constitutional landscape with the stroke of a legislature’s pen. Its vulnerability is perhaps demonstrated no more dramatically than in the *Foreshore and Seabed Act* itself. Comparisons with treaty case law, and in particular with long-established principles of treaty interpretation from Canada and the United States sympathetic to indigenous peoples, are invidious but beyond the scope of this paper.

If the Treaty of Waitangi has been largely disavowed as the source of legal rights for Maori then a second basis of claims, particularly in the context of post-*Calder* Canada and post-*Mabo* Australia, would be

79. *New Zealand Maori Council, supra* note 54.
80. *New Zealand Maori Council, supra* note 54 at 673 (per Richardson J.) and 714 (per Bisson J.).
81. Williams, *supra* note 72 at 167-8. For more detailed recitation of how Maori legal interests are protected see B.V.Harris, *supra* note 78 at 191-192.
82. Rt. Hon. Winston Peters, Media Release, “MPs urged to support Treaty Principles Bill” (10 May 2005) online: New Zealand First <http://www.nzfirst.org.nz>. The Bill in question is The Principles of the Treaty of Waitangi Deletion Bill, a private member’s bill which seeks to remove references to the principles of the Treaty from all legislation. The author is the leader of the New Zealand First political party, a former Treasurer and Deputy Prime Minister and now a Minister in the current government. See also Winston Peters “A treaty for us all” *The Press* (Christchurch) (12 May 2005), A9 wherein the author claims that the Treaty principles “have turned the treaty into a festering sore . . .”
common law native title. Indeed the *Ngati Apa* decision was an attempt to more closely align the New Zealand jurisprudence with those modern contexts. A brief history will inform that claim.

The common law native title was effectively confirmed in the Treaty itself,\(^84\) but also confirmed as an independent source of rights in early New Zealand jurisprudence.\(^85\) In 1877 the *Wi Parata* case, as well as declaring the Treaty of Waitangi to be a nullity, set down a new authority for the rule that native title was not a legal obligation on the Crown but only a moral one and required statutory enactment to ground a claim. That precedent endured (in, for example, the *Ninety-Mile Beach* case which was overruled in *Ngati Apa*), notwithstanding criticism from the Privy Council early in the twentieth century.\(^86\) The New Zealand response to the Privy Council’s rebuke was to enact legislation making native title unenforceable against the Crown. The *Native Lands Act 1909* contained a provision\(^87\) which effectively codified the *Wi Parata* decision in providing that customary title was not enforceable against the Crown. The *Maori Affairs Act 1953* preserved this provision\(^88\) and it was only repealed by the *Maori Land Act 1993*.

The judicial and legislative prohibition on the assertion of common law native title claims has been peculiar to New Zealand and understandably

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84. Article II of the Treaty of Waitangi states (in the English version) that Maori are to retain ‘... the full exclusive and undisturbed possession of the Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire ...’. For an early affirmation see, for example, *R. v. Symonds* (1847) N.Z.P.C.C. 387 at 390

85. *Ibid.* per Chapman J: “it cannot be too solemnly asserted that [Native title] is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers ...the Treaty of Waitangi ...does not assert either in doctrine or in practice any thing new and unsettled.”

86. See *Nireaha Tamaki v. Baker* (1901) N.Z.P.C.C. 371 where the Privy Council was pressed with the argument “that there is no customary law of the Maoris of which the Courts of law can take cognizance” only to riposte “it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss.3 and 4 of the Native Rights Act 1865 [referring to native title derived from 'custom and usage'] by saying (as the Chief Justice said [in *Wi Parata]*) that ‘a phrase in a statute 'cannot call what is non-existent into being.” See also *Wallis v. Solicitor-General* (1903) N.Z.P.C.C. 730.

87. s. 84.

88. s. 155. Note that a special limitation was imposed via the *Limitation Act 1950* requiring that any claims against the Crown must be brought within 12 years of the breach, thus blocking most potential claims.
has provoked criticism. The legislative response to *Ngati Apa*, reviving the possibility of an unextinguished native title, might therefore be seen as a return to the nineteenth century. Attempts by the courts, initially the Privy Council and now the New Zealand Court of Appeal, to advocate or defend conceptions of a common law native title have been met with a quick and crude legislative rebuttal. Again, comparisons with modern Canadian jurisprudence and the constitutionalizing of common law aboriginal rights are invidious.

Thus from the *Wi Parata* case in 1877 until the present Maori have been unable as of right to assert claims under the Treaty (unless specifically empowered by the Parliament) or under common law native title. That vacuum has been at least partially filled by a peculiarly New Zealand legal response in the form of the Maori Land Court. This court was originally constituted in 1862 and reconstituted in 1993. It was established as a legal gateway through which Maori could establish their interests in land and for resolving disputes in respect of such lands. It mostly deals with issues relating to the administration of Maori freehold land, and where the status of the land is unclear it can make a determination. The purpose of the original (then) Native Land Court in the nineteenth century was to facilitate the conversion of Maori customary titles into a freehold interest which could be disposed of to settlers. The conversion of customary titles into Crown-granted freeholds has long been regarded as completed but the *Ngati Apa* case now raised the possibility of new determinations of title to the foreshore and seabed.

Article II of the Treaty of Waitangi also included “exclusive rights of pre-emption” in the Crown, as is the case with modern common law native title. The intention is usually taken to be protection of indigenous peoples from the aggressive pursuit of land purchases by settlers, though

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89. See, for example, a comment by F. Brookfield: the courts cannot be exonerated in their refusal to recognize at common law ... Maori customary rights in respect of land and fisheries ... there is] no doubt that since the late 1870's successive New Zealand judges have misunderstood the law ... on the whole they did indeed get it wrong ... [and] notwithstanding correction by the Privy Council around the turn of the century ... this view has prevailed into our own time ... now little customary land remains (emphasis added).


90. Hoani Te Heuheu, supra note 77.

91. Brookfield, supra note 89.


93. There may be uncertainty as to whether the land is, for example, Maori customary land, Maori freehold land, Crown land or general land held in freehold title. Should it be Maori customary land then the court can determine which Maori group has best title based on history and custom.
in New Zealand the right of pre-emption was periodically manipulated to suit settler interests. Within twenty years of the signing of the Treaty nearly all of the South Island and much of the North Island was purchased from Maori at negligible prices. In 1852 New Zealand was granted self-government and settlers began to assume responsibility for Maori affairs, including facilitating the further acquisition of Maori land and the use of the Native Land Court to validate titles. Conflicts over land culminated in the Maori Land Wars and subsequent confiscation of land from hostile Maori. It was in this context that the unfortunate *Wi Parata* decision was handed down in 1877.

A modern institutional response to the resolution of Maori claims has been the negotiation of agreements by the Office of Treaty Settlements on such issues as fishing rights, an attempt to impose a “fiscal envelope” on the total amount the government considered affordable in settling claims and various individual tribal claims. These last claims broadly follow the precedent of Canadian settlements such as the Nisga’a Agreement. The modern negotiated settlements might be read as an institutional response to the negation of Treaty and native title rights, though in that light they are inconsistent with the government response to *Ngati Apa*, that is to say, there was in the *Foreshore and Seabed Act 2004* and its lead-up a distinct unwillingness on the part of the government either to enter into meaningful consultation with Maori or to commit to compensation.

Finally, a quasi-judicial institutional response to unresolved Treaty issues came with the creation of the Waitangi Tribunal in 1975 as a forum

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95. *Ibid.* at 169 re the *New Zealand Settlement Act 1863* – more than three million acres of Maori land were confiscated.
96. *Ibid.* at 169 re the "New Zealand Settlement Act 1863" – more than three million acres of Maori land were confiscated.
98. In 1994, the government proposed a $1 billion settlement fund based not on actual losses suffered by Maori but on what the government thought it could afford. The cap was removed in 2000 and the criteria for settlement were now to be merit.
Indigenous Rights Wronged

for dealing with Maori grievances.\textsuperscript{102} It will be recalled that with almost no common law jurisprudence on which to draw with respect to native title, and no general (legal) recognition of the Treaty of Waitangi, Maori were faced with a dearth of institutional forums within which to assert claims. The establishment of the Tribunal was a political response to that vacuum at a time of growing Maori nationalism. The Maori Land Court was, as we have seen, essentially a judicial vehicle for translating Maori claims to land into a recognizable legal form for ease of settler acquisition.

The Waitangi Tribunal on the other hand is not a court but a quasi-judicial body,\textsuperscript{103} and its jurisdiction is restricted to advisory opinions, including the issue of advisory opinions on matters pertaining to the Treaty of Waitangi and thus (for the purposes of this piece) including the government’s policy response to Ngati Apa.

The Waitangi Tribunal overcame its early years of relative impotence to become both an instrumental and a legitimating voice for Maori claims\textsuperscript{104} and a respected voice in New Zealand social and political life, even “a kind of truth commission.”\textsuperscript{105} Among its responsibilities is a duty to report on proposed legislation referred to it by Parliament. In the case of the original Foreshore and Seabed Bill, it conducted an urgent enquiry at the behest of various Maori groups. It did so with some trepidation—indeed even before the Tribunal hearings began the government warned that “in the end this matter will be resolved in the legislative arena so any solution must be able to attract a Parliamentary majority,”\textsuperscript{106} clearing signalling the majoritarian imperatives driving policy. Nonetheless the Tribunal’s report on the government’s proposed legislative response to Ngati Apa might reasonably be taken to be a litmus test on the integrity of that response with respect to Treaty issues. It will be recalled that the foreshore legislation extinguished common law native title rights where they amounted to exclusive use and occupation but that such rights were affirmed in the Treaty of Waitangi. As we have seen the Treaty does not confer legal status on the rights but the

\textsuperscript{102} For a brief overview of the Tribunal see, for example, McDowell & Webb, \textit{supra} note 99 at 223-27.
\textsuperscript{103} In reporting on the Crown’s foreshore and seabed policy the Tribunal self-characterized as “a quasi-judicial body standing outside the political process ... proceed[ing] in the expectation that governments in New Zealand want to be good governments, whose actions although carried by power are mitigated by fairness” (Waitangi Tribunal, \textit{supra} note 35 at xii).
\textsuperscript{104} McDowell & Webb, \textit{supra} note 99 at 226.
abrogation of native title rights must have important implications for the Treaty itself, hence the importance of the Waitangi Tribunal's comments.

III. The Waitangi Tribunal Report

Unsurprisingly the Tribunal issued a powerful rebuke to the government. With regard to the government’s consultation process with Maori the Tribunal opined that “the ... process was too short; and it was fairly clear that the Government had already made up its mind.” With respect to the government’s initial policy response announcing its intention to extinguish Maori property rights where exclusive use and occupation were shown, the Tribunal saw the consequent inability of Maori to assert their rights in the courts as effectively removing the rights themselves. It similarly condemned the removal of property rights without compensation, substituting rather a mere right to an opportunity to participate in an administrative process (referring to what became in the final legislation a right to enter into “discussions”). Generally the Tribunal saw the Crown as benefiting from a greater degree of certainty as to the status of the foreshore and seabed and instead transferring “a situation of extreme uncertainty” to Maori. The Tribunal characterized the policy as a clear breach of the principles of the Treaty of Waitangi and of failing to respect “wider norms of domestic and international law that underpin good government ... includ[ing] the rule of law, and the principles of fairness and non-discrimination.”

Specific breaches of the Treaty of Waitangi were of course of particular concern to the Tribunal. It found the Crown’s policy to be in breach of the Article II protection of native title, and that the Crown did so in breach of the test of “exceptional circumstances and as a last resort in the national interest.” It also found a breach of Article III of the Treaty, which guaranteed to Maori the rights of all citizens to equal treatment under the law. It did so by extinguishing only the property rights of Maori and in denying Maori the protection of the rule of law by effectively overturning a judicial decision and denying further access to the courts (since the

107. Waitangi Tribunal, supra note 35.
108. Waitangi Tribunal, supra note 35 at xii.
109. Waitangi Tribunal, supra note 35 at xiii.
110. Waitangi Tribunal, supra note 35.
111. Waitangi Tribunal, supra note 35 at xiv. For academic support on the same issues see, for example, Brookfield, supra note 25 at 318: referring to the recognition and protection of Maori customary law property rights in the context of accusations of 'judicial activism' by the Court of Appeal in Ngati Apa he notes that:

[s]ince the values of equality before the law and of non-discrimination endure in present day New Zealand society, the Ngati Apa Court legitimately, without exceeding its proper constitutional rule, repaired a serious defect in the New Zealand common law.
112. Supra note 84.
113. Waitangi Tribunal, supra note 35 at 127-8.
Indigenous Rights Wronged

Act, it will be recalled, substitutes for territorial customary rights a mere right to participate in an administrative procedure via “discussions”

Further, the policy was said to breach the fundamental principles of the Treaty as articulated by the courts, including principles of “reciprocity,” “partnership,” “active protection,” “equity” and “redress.”

It saw the “overriding of the rule of law ... [as] a very unusual and significant step in 2004” and recommended instead that the government draw back and “do nothing”; that is to say, allow the courts to investigate and declare rights on a case by case basis as foreshadowed in Ngati Apa and if necessary respond when the ambit of those rights is known. That would be to follow the path of other comparable jurisdictions such as Canada, albeit without the constitutionalizing of aboriginal rights. It would also of course facilitate Maori access to the courts to assert the legal rights the courts had recognized in Ngati Apa, an access one might have assumed as residing in all citizens.

The government’s response to the Waitangi Tribunal Report was predictably negative, with ministers again invoking parliamentary sovereignty as a determinative answer to any challenge. The government proceeded with legislation that was in important ways even more draconian than originally foreshadowed in the initial policy response considered by the Tribunal, in effect reinforcing its rejection of the Tribunal’s report.

There was, however, one final legal stage upon which the issues might be addressed, for the government was required under domestic legislation to at least make a show of rationalizing what was to informed observers an expropriation of a property right on racial grounds with no guarantee of just compensation. There was opportunity for some robust rights discourse given that the assertion of “one law for all New Zealanders,” namely access to the foreshore and seabed, was in effect a denial of the legal rights of Maori to assert a title which the courts had said might be theirs.

IV. Conflict with the Bill of Rights Act 1990

The institutional opportunity for addressing rights conflicts flows from the New Zealand Bill of Rights Act 1990 (Bill of Rights).

114. Waitangi Tribunal, supra note 35 at 130-6.
115. Waitangi Tribunal, supra note 35 at 138.
116. Waitangi Tribunal, supra note 35 at 143.
119. Ibid. (asserting that the most important of these “dubious or incorrect assumptions ...is an implicit rejection of the principle of parliamentary sovereignty”).
120. For more detailed discussion of the Bill of Rights see Joseph, supra note 69 at ch.26.
for a constitutionally entrenched Bill based on the Canadian Charter of Rights and Freedoms, including entrenchment of the Treaty of Waitangi, foundered on predictable concerns over parliamentary supremacy and fear of incorporating the Treaty.121 The Bill that was eventually salvaged was passed as ordinary, indeed subordinate, legislation in that it specifically preserved inconsistent legislation.122 It promotes the adoption of interpretative principles with respect to other legislation that is consistent with the Bill123 but also imposes a “reasonable limits” constraint—the “justified limitations” clause (section 5) allows for “reasonable limits prescribed by law [such] as can be demonstrably justified in a free and democratic society,” though it too is explicitly subject to the section 4 subordinating clause.124 Aside from the subordinating effect of section 4, the section 5 “reasonable limits” clause is taken directly from the Canadian Charter.125 Importantly for the present analysis, the New Zealand legislation offers no constitutional protection to those claiming even the most egregious breaches of its enumerated rights since it will always be overridden (via section 4) by the clear and plain intention of conflicting legislation, in this case the Foreshore and Seabed Act.126 In short, the New Zealand Bill of Rights offers perhaps the weakest form of rights protection that one could imagine in rights legislation.127

122. New Zealand Bill of Rights Act 1990 (N.Z.), 1999/109, s. 4 states that:
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be
in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment
by reason only that the provision is inconsistent with any provision of this Bill of Rights.
(cf. Canadian Bill of Rights 1960, s.2.)
123. Ibid., s. 6 reads:
Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.
124. Ibid., s. 5 reads:
Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (emphasis added).
127. Leane, ibid., for example, (at 188) in regard to “the protection of the legal rights of indigenous populations, the dangers of majoritarianism are most clearly evident and most troubling in the New Zealand case.” More generally, see Geoffrey Palmer Unbridled Power: An Interpretation of New Zealand’s Constitution and Government, 2nd ed. (New York: Oxford University Press, 1987).
Section 19 of the *Bill of Rights* also incorporates the right to freedom from discrimination under the New Zealand *Human Rights Act 1993*, which in turn enumerates various prohibited grounds of discrimination including that of "race." In respect of the *Foreshore and Seabed Act* only Maori are losing the right to realize territorial customary rights, whereas existing private owners are unaffected, so there would seem to be clear discrimination on grounds of race. In addition the *Human Rights Act 1993* forbids indirect discrimination, that is to say where the effect of the practice (if not its explicit wording) constitutes discrimination.

So even though the *Foreshore and Seabed Act* very clearly extinguishes territorial customary title on grounds prohibited by the *Bill of Rights* it will trump the *Bill of Rights* through the subordinating effect of section 4. There is no doubt that the foreshore legislation will prevail. That disposes of substantive legal arguments about legislative conflicts.

However, there was a remaining procedural constraint on the government by virtue of section 7 of the *Bill of Rights*, requiring the attorney-general to bring to the attention of Parliament any inconsistency between a proposed bill and the *Bill of Rights*. This section echoes section 3 of the *Canadian Bill of Rights 1960*, a non-entrenched predecessor to the *Canadian Charter of Rights and Freedoms*, and has similarly been applied only sparsely. Under section 7 the New Zealand Parliament is at least to be made conscious of its intention to derogate from the enumerated rights and thereby at least risk the spectre of some political accountability.

Although the statutory obligation under section 7 of the New Zealand *Bill of Rights* arises upon the introduction of a government bill, it is theoretically possible for an offending section to be inserted later—for example, this happened on one occasion in respect of a retrospective criminal penalty. Generally the section has not proven to have its anticipated deterrent effect; for example, over the first ten years four of

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129. Ibid. at s. 65.
130. *supra* note 122, s. 7 reads:
where any bill is introduced into the house of representatives, the attorney-general shall,
(a) in the case of a government bill, on the introduction of that bill; or
(b) in any other case, as soon as practicable after the introduction of the bill,
bring to the attention of the house of representatives any provision in the bill that appears
to be inconsistent with any of the rights and freedoms contained in this bill of rights.
five government bills proceeded through Parliament notwithstanding infringements of the *Bill of Rights*.\footnote{134. Joseph, *supra* note 69 at 1053-54. For a more detailed account of the impact of the Bill of Rights at 1054-61.} Even should the attorney-general admit to a conflict between the *Bill of Rights* and proposed legislation it will not affect the passage of the proposed legislation (because of section 4—see discussion above) but merely ensure a certain measure of self-awareness in the Parliament. Nonetheless there is at least some potential for political embarrassment, though in the case of the *Foreshore and Seabed Act* the main Opposition (National) Party would have gone even further\footnote{135. See, for example, Dr. Don Brash (National Party Leader) “Speech to the House in the third reading debate on the Foreshore and Seabed Bill” (18 November 2004) online: National <http://www.national.org.nz/Article.aspx?ArticleID=3181>.} and would not likely have protested any breach of the *Bill of Rights*. In any event, and notwithstanding the flaws in the section 7 procedure, there was not to be even this minimal degree of examination by Parliament since the attorney-general, a member of the cabinet which framed the Act itself, would not concede the existence of a breach.

Perhaps nowhere is the weakness of the New Zealand rights regime more clearly evident than in this refusal to even acknowledge a breach of the *Bill of Rights*—and this is about as egregious a breach as one could reasonably imagine in a modern liberal democracy—far less have to justify it or even defend it. Canadian observers would do well to ponder the virtues of their (comparatively) robust rights regime, whilst Canadian First Nations might murmur some thanks to Pierre Trudeau and the constitutional entrenchment of their aboriginal and treaty rights.\footnote{136. For further discussion and for a comparative analysis of the Canadian and New Zealand experience with constitutional reform see, for example, Leane, *supra* note 126.} Academic observers looking for a sophisticated rationale for this race-based curtailment of rights will be disappointed, for while such arguments would be difficult to make the attorney-general declined even to make the effort. The analysis, including a travesty of the *Oakes* test arguments familiar to Canadian *Charter* observers, is at best superficial and at worst self-serving.

V. *The attorney-general’s opinion*

Even a casual glance at section 5 of the *Bill of Rights* (wherein “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”) suggests that the language and logic are manipulable. It is perhaps conceivable that the attorney-general, a member of the same cabinet that framed the legislation in question, might be tempted to spin such an investigation accordingly, especially with the
knowledge that a refusal or failure to discharge her obligations under section 7 is not reviewable by the courts. Indeed, and notwithstanding what would appear to be a very substantial inconsistency between the Bill of Rights provisions on discrimination and the Foreshore and Seabed Act's discriminatory provisions on territorial customary rights, the attorney-general's opinion on the Foreshore and Seabed Bill considered the Bill to be consistent with the Bill of Rights.

The methodology for deciding whether a Bill of Rights section 7 report is necessary in respect of the Foreshore and Seabed Act first requires an analysis of whether under section 5 of the Bill of Rights a prima facie infringement is a reasonable limit "as can be demonstrably justified in a free and democratic society." Recall that section 5 mirrors section 1 of the Canadian Charter of Rights and Freedoms except of course that a failure of New Zealand legislation to satisfy the relevant test will not invalidate the legislation due to the operation of the section 4 override in the Bill of Rights. Nonetheless some minimal level of accountability is called for under section 7.

The attorney-general's analysis is revealing and utterly at odds with that of the Waitangi Tribunal. In summary, she accepts that "there is a significant argument for a prima facie breach of section 19" (the freedom from discrimination clause of the Bill of Rights) but concludes that any such infringement is "demonstrably justifiable in a free and democratic society" under section 5 of the Bill of Rights. The logic of that conclusion, or rather the lack of it, is illuminating.

The attorney-general first deals with the question of whether the legislation deprives Maori of the fruits of litigation under s.27(3) of the Bill of Rights. The proper interpretation of the section is disputed but the attorney-general simply chooses the Crown's own position that it means only that the Crown has no procedural advantage but that it is free to assert

137. Joseph, supra note 69 at 1053.
139. Joseph, supra note 69 at 1051-52. The full text of section 5 stipulates that "[s]ubject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
140. Attorney-General, supra note 128 at para.2.1.
141. Attorney-General, supra note 128 at para.2.2.
142. Section 27(3) states that "[e]very person has the right to bring civil proceedings against, and to defend civil proceeding brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals."
a substantive advantage by reversing the effect of a judgment.\textsuperscript{143} Similarly she defends claims of a breach of private property rights under section 21 (citing Canadian and New Zealand authorities)\textsuperscript{144} and of a right to natural justice under section 27.\textsuperscript{145}

Section 20 of the Bill of Rights protects the right of “an ethnic … minority … to enjoy the culture, [and] to profess and practice the religion … of that minority.” The attorney-general admits that section 20 may be relevant where the rights in question are necessary in conducting activities essential to the culture of the group. As to the question of whether the exclusive title (being the foundation of the extinguished territorial customary title) is necessary for the practice of essential cultural activities the attorney-general simply asserts that “[m]y understanding is exclusive title is not necessary for the enjoyment of any of the practices raised by Maori before the Waitangi Tribunal or in representations to government” (original emphasis).\textsuperscript{146} That is a rather odd (if not disingenuous) claim given that the right to make such claims had only just been acknowledged in Ngati Apa and that there had as yet been no opportunity to assert any factual claims in the courts. That there was no history of such claims is again hardly surprising given that they had been statutorily barred and had in any event been judicially disavowed in Ninety-Mile Beach.\textsuperscript{147} The attorney-general simply asserts that which she is required to show.

But rights issues become most hotly debated on the issue of discrimination, particularly on grounds of race. Recall that freedom from discrimination on grounds of race, whether direct or indirect (where the effect is discriminatory) is one of the protected rights in the Bill of Rights. The requirement of proof of comparative disadvantage (from the Canadian case of Andrews)\textsuperscript{148} is met in the case of the Foreshore and Seabed Act and the Attorney-General has little choice but to admit that there is “a significant argument that the Bill, to the extent that it treats the holders of ‘specified freehold interests’ and Maori customary landowners differently (the latter’s rights are extinguished, while the former’s rights are preserved), may contain a prima facie breach of section 19 ….”\textsuperscript{149} It will also be recalled that under section 7 a prima facie infringement brings

\textsuperscript{143} Attorney-General, supra note 138 at para. 12-18. (Contrary opinions are cited in para.14 and at Brookfield, supra note 89.)
\textsuperscript{144} Attorney-General, supra note 138 at para. 19-22.
\textsuperscript{145} Attorney-General, supra note 138 at para. 23.
\textsuperscript{146} Attorney-General, supra note 138 at para. 31 & 36.
\textsuperscript{147} On this see Paul McHugh “Aboriginal Title in New Zealand: A Retrospect and Prospect” (2004) 2 N.Z.J. Pub. & Int’l L. 139.
\textsuperscript{149} Attorney-General, supra note 138 at para. 56, 75-76 & 79.
section 5 into play, requiring the attorney-general to subject the impugned legislation to the "reasonable limits" test in establishing whether or not she need bring the infringement to the attention of Parliament. Again, whatever the outcome of the section 5 analysis, section 4 of the *Bill of Rights* will preserve the conflicting legislation, but the conflict should at least be acknowledged under section 7. The section 5 analysis might therefore reasonably be taken to represent a litmus test of how seriously the government of the day takes rights discourse, or more to the point, how seriously it regards the rights claims of its aboriginal people. So the intention here is to show that analysis as paradigmatic both of the historical treatment of indigenous people's rights in New Zealand and of the flawed rights regime which still facilitates that treatment today.

The judicial approach in New Zealand to a section 5 justified limitation draws heavily on Canadian jurisprudence with respect to section 1 of the *Charter of Rights and Freedoms* and the leading Canadian authority of *R. v. Oakes*. In New Zealand the test of a "compelling legislative objective" is of course less demanding as the rights are not constitutionally entrenched as in Canada but rather are enumerated in ordinary, if not subordinate, legislation. That might reasonably be taken to suggest that less importance is placed on the enumerated rights in New Zealand as opposed to Canada. In this Australia might be characterized as occupying a middle ground at least in respect of racial discrimination.

That fragility of rights protections also suggests a different kind of liberal rights discourse informing the respective instruments, the Canadian model being more distinctively Kantian in affording individual rights supreme protection in the constitution and the New Zealand model being more distinctively utilitarian in subordinating them to the whims of majoritarian legislatures. Indeed that philosophical inclination is reflected in the opening paragraph of the attorney-general's section 5 analysis wherein she adopts the approach of Richardson J. (writing extra-judicially) in looking to "a utilitarian assessment of the public welfare in determining whether setting reasonable limits on a protected right is justified." Of course that may well be putting too theoretical and too


151. Whilst Australia lacks a constitutionally entrenched Bill of Rights, the Australian *Racial Discrimination Act 1975* (Cth), enacted pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination, was sufficient authority to read down attempts at a legislative override of aboriginal title by the Queensland Government (*Mabo v Queensland* (1988), 166 C.L.R. 186 (H.C.A.) [*Mabo (No.1)*].

152. For an analysis of the respective rights regimes of New Zealand and Australia see, for example, Leane, *supra* note 126.

kind a face on what was more likely a crudely executed piece of poll-driven political expediency. However, it does echo the egalitarian rhetoric under which politicians and commentators sought to justify overturning Ngati Apa.

But even taking the attorney-general at face value when she then turns to the reasons for the government policy response, one is struck by the superficial and self-serving tone of the argument. She tells us that the “principal reason for introducing the Bill is to clarify the law [given that] [t]he state of the law on this subject may best be described as radically indeterminate.”

That is largely true, for the Ngati Apa decision whilst legally conventional was a significant departure from the status quo. But as we have seen the reasons for that indeterminacy are that on the one hand Maori were historically precluded by legislation from bringing native title claims, and on the other hand the legally incorrect Ninety-Mile Beach decision (overturned by Ngati Apa) foreclosed claims to the foreshore and seabed. There have simply been no legal or institutional means for Maori to have their common law native title rights “clarified,” and yet this disenfranchisement is now turned back on them by the attorney-general to justify extinguishing the flicker of resuscitated rights offered in Ngati Apa. It surely lies ill in the mouth of the perpetrator of those historical wrongs to invoke them as a defence. Lest the point be overlooked, the attorney-general then proceeds in the next paragraph to blame Maori for this dearth of native title jurisprudence: “[t]he common law of customary interests has been little developed to date in New Zealand because Maori have chosen to obtain redress through the Treaty of Waitangi” (emphasis added). “Without legislation” (she goes on to say) “the Courts would be required to develop the common law of indigenous rights on a case-by-case basis over many years.” Indeed, just as they have in Canada, the United States and more recently Australia! The regrettable jurisprudential lacuna is as we have seen a consequence of the historical refusal of New Zealand legislatures and courts to honour and develop a regime of aboriginal and treaty rights. It surely ill behoves that same legislature to invoke the failure as an excuse for further repression. The astonishing hypocrisy of both blaming the victim for not seeking judicial recognition of native title while removing access to the courts once redress is sought is apparent to the observer, if not to the attorney-general.

154. Attorney-General, supra note 138 at para. 83.
155. Supra notes 86-88.
156. Attorney-General, supra note 138 at para. 84.
157. Attorney-General, supra note 138.
Similar indications of the Attorney-General’s self-serving characterization of history can be seen in the next paragraph wherein she invokes one of the witnesses before the Waitangi Tribunal as asserting that “it was doubtful the common law would have recognised exclusive rights equivalent to fee simple titles.” Of course that was not for her to say, but in any event the deputy prime minister had, barely two months earlier, reiterated the spectre of “the granting of freehold title to what could be substantial areas of foreshore and seabed” (emphasis added). Other attempts by the attorney-general to justify the legislation are simply spurious—confusion over the jurisdiction of the Maori Land Court (which could be easily amended by legislation), confusion over the interface with the Resource Management Act (which uncertainty should hardly be resolved by the extinguishment of an inconvenient native title), and finally a strange plea that “New Zealand is an island nation” and presumably therefore entitled to suppress Maori (but not existing private) ownership of any part of its coastline, though one would have thought that (on the same reasoning) the same coastline would have been at least as important to indigenous peoples.

In any event the attorney-general had still to confront the awkward issue of the lack of guaranteed redress—not to say fair and adequate compensation—for Maori for the extinguishment of any proven claim to what the legislation calls “territorial customary rights.” Recall that the legislation allowed for Maori to claim territorial customary rights, that is to say those amounting to exclusive use and occupation, in the High Court, and if successful to apply for a referral to the attorney-general and Minister for Maori Affairs. The ministers must then “enter into discussions …to consider the nature and extent of any redress that the Crown may give” (emphasis added). A right to enter into “discussions” with the very party which extinguished the underlying right and with no guarantee of any redress at all would hardly seem adequate compensation for the loss of what was in effect a fee simple property right. Recall too that “redress” is in any event inappropriate terminology when it is a legal right that has been abrogated. The attorney-general does in fact concede that “[t]here is
an argument that a body independent of government should determine the
nature and extent of the redress.”164 Indeed!

Yet in another paternalistic dismissal of the issue the attorney-
general simply asserts that “the process for redress through negotiation
with the government is justified ....[I]t cannot be assumed the Crown
will approach negotiations in bad faith.”165 It is not surprising that the
attorney-general herself was conscious of potential accusations of bad
faith. Recall that the legislation in question extinguishes the most valuable
aspect of a property right which Maori had just had affirmed after a
century of legislative override and judicial dismissal (which the Court of
Appeal itself confessed was legally wrong), and in its place been granted
access to an administrative process with no guarantee of fair or adequate
compensation, such compensation being dependent on the poll-driven
policies of governing parties which must inevitably pander to a hostile
non-Maori majority. Further, the legislation has been enacted in the face of
fierce resistance from Maori, inadequate consultation, in flagrant disregard
of the Waitangi Tribunal and, as can be seen from the attorney-general’s
report, an unwillingness to seriously address rights issues. It is difficult
to imagine a context more suggestive of bad faith. Maori have literally
nowhere else to go, the courts and the legislature having been effectively
closed to them. Their last hope—proving a territorial customary right in the
High Court—lies in bringing an expensive and difficult claim to the courts
in the hope of being granted a hearing from an almost certainly hostile
government, whose only assurance is that (after all this) “you can trust
us”!

Readers familiar with “justified limitation” jurisprudence will note
that there is no consideration of other aspects of the Oakes test which, it
will be recalled, has been adopted by the New Zealand courts.166 As noted
the requirement of a “pressing and substantial objective” is a less onerous
test in New Zealand given the subordinate status of the Bill of Rights as
opposed to the constitutional status of the Canadian Charter. But there is
no attempt to address the test of proportionality between the means used
(extinguishment of a property right) and the ends served (stated as being
the removal of uncertainty with respect to the nature and extent of native
title, though the attorney-general herself asserts that they may not even
exist as fee simple rights).167 Perhaps the answer to that reluctance lies in

164. Attorney-General, supra note 138 at para. 97.
165. Attorney-General, supra note 138 at para. 98.
at 283 (C.A.).
167. Attorney-General, supra note 138 at para 85.
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one aspect of the test—that “the measures should impair as little as possible the right or freedom in question.” If ever a legislative hammer was taken to crack an annoying nut this must surely be it. She also, perhaps for the obvious reason, chooses not to reference the rich vein of Canadian jurisprudence on native title though well aware of it.

Finally, the Attorney-General’s opinion ends with an admission that, while there is no domestic remedy left to Maori, “I accept there is a risk a human rights body may regard this [lack of guaranteed redress] aspect of the Bill as imposing an unjustifiable limitation on a protected right,” which indeed proved to be the case. “However,” she continues, “I note the government must be accorded a margin of appreciation in this area,” and therefore “the Bill meets the section 5 test …[and] accordingly, it does not involve any breach of the Bill of Rights Act.”

In short the attorney-general invokes a presumption of honourable Crown behaviour which is highly questionable in light of the Act itself and its history. Having effectively admitted that the legislation is discriminatory she simply claims a “margin of appreciation” for the government and simply dismisses the discrimination, again assuming away that which is required to be shown. This signals a cavalier disregard not only for the rights of indigenous peoples but, more broadly, for her statutory role as protector of civil liberties generally in the face of parliamentary supremacy. However, it is (as the earlier discussion suggests) entirely consistent with the provenance of indigenous rights and of rights discourse generally in New Zealand.

VI. Human rights organizations

New Zealand is a party to the International Convention on the Elimination of All Forms of Racial Discrimination, which it ratified in 1972. The UN Committee on the Elimination of Racial Discrimination (CERD) includes in its mandate the rights of indigenous peoples. In particular, the Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and
use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories (emphasis added).

Three Maori groups went to CERD under its “early warning measures and urgent action procedures.” CERD released its decision in March 2005. It expressed concern at the “apparent haste” with which the *Foreshore and Seabed Act 2004* was enacted, that “insufficient consideration may have been given to alternative responses to the *Ngati Apa* decision,” and that “the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori.” All eighteen members of the Committee agreed that the Act discriminates. The decision was unusual in finding New Zealand to be in breach of a human rights treaty, and was the first time it had been criticized by an international human rights body in respect of its indigenous peoples. It was also the first time that a New Zealand government chose to respond negatively to an international tribunal.

The New Zealand prime minister reacted with hostility to the report, saying that CERD followed “a most unsatisfactory process” and opted instead to shoot the messenger by characterizing CERD as “a committee that sits on the outer edge of the UN system.” The deputy prime minister was similarly unresponsive in saying that there were no plans to change the Act, whilst also denying that the Act did in fact breach the Convention (“a very bizarre conclusion” according to the complainant’s lawyer). As well as incurring the ongoing scrutiny of CERD, New Zealand will, as a consequence of the finding of race discrimination concerns with the Act, come under ongoing scrutiny from the UN Human Rights Committee (pursuant to the same human rights Convention as was cited in the long

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and the Committee on Economic, Social, and Cultural Rights (established under the *International Covenant on Economic, Social, and Cultural Rights*). However, in the absence of effective compliance and enforcement powers international fora such as these are limited to "name and shame" exercises which, as is often the case, are ineffective in constraining the New Zealand government.\(^\text{183}\)

An alternative domestic forum is available to Maori under the New Zealand *Human Rights Amendment Act 2001*. If a complainant can establish discrimination under the *Human Rights Act 1993* there is a process by which the New Zealand Human Rights Commission can provide mediation services which, if unsuccessful, can lead to civil proceedings before the Human Rights Review Tribunal. The Human Rights Commission was originally established under the *Human Rights Commission Act 1977* to enable New Zealand to ratify the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Cultural and Social Rights*.\(^\text{184}\) The Tribunal can grant various forms of relief, including a declaration of inconsistency with respect to the impugned legislation and the *Bill of Rights*. Recall that the Act prohibits discrimination on the grounds of race.\(^\text{185}\) In response to such a declaration the relevant minister must table a response in Parliament within 120 days. However, that will not repudiate the legislation (since section 4 of the *Bill of Rights* preserves inconsistent legislation). The motivation is rather one of accountability. Of course even to reach this stage assumes that the government has not been successful in its section 5 "justified limitations" defence to a *prima facie* inconsistency, which in the case of the *Foreshore and Seabed Act* it claims to have done.

The Human Rights Commission itself did make a submission on the original Foreshore and Seabed Bill, identifying potential breaches of the rights of minorities, the right to freedom from discrimination, the right

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182. The Long Title of the *New Zealand Bill of Rights Act 1990* includes an affirmation of "New Zealand’s commitment to the International Covenant on Civil and Political Rights." Note that there had been an earlier appeal by Maori to the UN Human Rights Committee in 2000 regarding the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* (Apirana Mahuka v New Zealand, 27 October 2000, A/56/40). The appeal failed in that case, though it should be noted that (unlike the Foreshore and Seabed Act referral) the settlement in question reflected support from the Waitangi Tribunal (though qualified), the New Zealand Court of Appeal and a broad cross-section of Maori - see Charters and Erueti, *supra* note 178 at 270-271.

183. For a critique of the international regime in protecting indigenous peoples (and other "ascriptive" groups) see Benedict Kingsbury "First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society" (2002) 3 Chicago J. Int’l L. 183.


185. *Supra* note 128.
not to be arbitrarily deprived of property and compensation, and the right to development. The Commission recommended that the legislation be abandoned and that the court process continue; failing that, at least that compensation be guaranteed, an appeal process be implemented and time limits for bringing claims be removed. Their advice went unheeded on each point.

These international and domestic rights tribunals do not pose any material threat to determined government action, merely the threat of some measure of political accountability and embarrassment. That will not be a problem for governments buoyed by popular support for the policy in question, as is the case here with overwhelming non-Maori support for foreclosing Maori claims to customary rights. That is of course the very reason why certain rights need constitutional protection from self-interested majorities.

Conclusion
There is little need of theory here. Unusually (for a rights dispute) there is no need for a subtle, finely calibrated balancing of competing rights for this is more a narrative about the assertion of raw political power unconstrained by such arguments. The merely descriptive is sufficient to make some obvious points about this particular rights regime.

It is interesting that in this extinguishment of indigenous peoples’ rights the language invoked to justify it is consistently framed in terms of parliamentary sovereignty, which is taken to be the sine qua non of the argument. There is simply no consciousness that any rights have (or should have) sufficient status to stand against the monolithic force of a parliamentary majority, legitimized (as it is presumed to be) by a democratic mandate. In this case therefore Maori have no effective recourse left open to them, effectively no place to go; not to the courts, as the High Court no longer has the ability to grant territorial customary rights, and will not review the section 7 opinion by the attorney-general; not to the non-Maori-dominated legislature, for it is the instrument of extinguishment; not to the Waitangi Tribunal, for it can only deliver an advisory opinion, did so in the strongest terms and was ignored; not to the international community, for its criticism has no domestic force and has been rejected; and not to the domestic Human Rights Commission, for it can only deliver a declaration of no binding force. Thus, in the absence of the kinds of constitutional and/

187. Ibid.
or institutional checks and balances found in other liberal democracies,\textsuperscript{188} there is in New Zealand no effective domestic remedy in the face of legislative discrimination\textsuperscript{189} or indeed of other breaches of civil and political rights commonly taken for granted in liberal democracies. The only legal course now open to Maori is to hope to surmount the formidable legal and financial impediments to demonstrating territorial customary rights in the High Court in order to access an administrative process which may or may not result in fair compensation from governments dependent for support on a non-Maori majority demonstrably hostile to the assertion of such rights. A bleak prospect. What kinds of alternate readings might one give to this troubling scenario?

As a legal academic—admittedly one raised (in terms of legal education) on the native law jurisprudence of post-\textit{Calder} and post-\textit{Charter} Canada—writing in the context of rights discourse in a modern liberal democracy it is a very clear picture. To put it bluntly, the rights of an indigenous minority have been crudely steamrollered by a self-interested settler majority represented by a poll-driven governing party unconstrained by the checks and balances of comparable Anglo-American structures of government.\textsuperscript{190} It is difficult to characterize as anything more than unprincipled political opportunism. To justify discrimination on the grounds of crude egalitarianism without acknowledging that it is bought at the price of corresponding minority rights is hypocrisy of a particularly offensive kind. The asymmetry with Canada—where one finds an articulate and sophisticated native title jurisprudence evolving through powerful and empowered courts backed by a commitment to individual and minority rights in a written constitution—is especially dramatic.

As a politician the events must appear quite differently. A senior appellate court suddenly re-discovers a native title it had somehow overlooked for one hundred and fifty years and defends it against prior legislation which was grounded in turn on the assumption that the native title was no impediment as the courts themselves had said so. As a practical matter, the politicians might say, it was simply too late in the day for the Court of Appeal to suddenly discover its inner rights-bearer. As well, practically speaking, the \textit{realpolitik} of a non-indigenous majority overwhelmingly hostile to what it sees as “special rights” for its indigenous peoples could readily be invoked to justify the smokescreen of “equal rights for all New

\textsuperscript{188} Leane, \textit{supra} note 126.
\textsuperscript{190} Leane, \textit{supra} note 126.
Zealanders,” misleading as that egalitarian mantra is. Political realities dictated the response, and indeed the Labour government which enacted the *Foreshore and Seabed Act* managed to survive only narrowly in a subsequent election in September 2005, albeit with a sharp rebuke from Maori voters who elected four members to a newly formed Maori Party. The deputy prime minister, who was also responsible for managing the foreshore controversy, admitted that the government’s response to *Ngati Apa* was necessary because of “the depth of Pakeha [non-Maori] anger and alarm.”

New Zealand may be a liberal democracy but it is a utilitarian one and the Kantian liberalism of Canadian or American rights discourse does not necessarily sit well. That discomfort is paradigmatically illustrated in New Zealand’s *Bill of Rights Act*, itself an ode to legislative supremacy and reflecting a utilitarianism that in this case permits legislation that even the attorney-general had to concede smacked of racial discrimination. It is, however, rather difficult to accept the attorney-general’s “justified limitation” arguments at face value; if there were defensible arguments under the Canadian-style section 5 analysis she did not articulate them, but presumably did not feel an overwhelming need to do so.

A related argument for political theorists would be that of parliamentary versus constitutional supremacy. A recurring theme in the foreshore debate, most clearly articulated by the deputy prime minister, was that no matter what the courts or the Waitangi Tribunal might say, the ultimate responsibility (and power) lay with the Parliament. In New Zealand, with a Westminster system of government but lacking an upper house or a written constitution, that really meant the cabinet of the ruling party. On a continuum of legislative versus constitutional supremacy New Zealand must lie at the opposite extreme from, say, Canada or the United States. As in no other liberal democracy, the Parliament in New Zealand is supreme. So in the end these events are perhaps best read as a cautionary tale of the risks faced by minorities—even in a liberal democracy—when the baser majoritarian instincts of a legislature and its constituent public are not constrained either by adequate institutional checks and balances or ultimately by a constitution which holds it to certain rights promises.

A disinterested pragmatist might argue that the impugned rights may never have amounted to anything substantial, and that it would take a

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192. *Ibid.;* see also Leane, *supra* note 126
195. Note, however, that many academic writers are more sanguine about these issue even to the point of lauding them as “creative tensions” (Kingsbury, *supra* note 105 at 103) and (at 119 ) “enabling the country to avoid a dangerously ethnicized politics.”
great deal of time, resources and considerable social discord to tease out
their meaning and content, if any. The response to that of course must be
that it cannot lie with the self-interested, settler majority to foreclose that
option; at a minimum it suggests a “long conversation” of consultation and
negotiation, if not litigation. Rights struggles are notoriously difficult and
contentious but surely no less important for that.

A member of an indigenous minority would likely see here a familiar
story of inchoate rights being snatched away whenever majority settler
interests are threatened. Rarely have New Zealand courts been willing
to find and give content to native title (or indeed treaty) rights as have
Canadian and (later) Australian courts. When they have done so settler-
dominated legislatures have typically responded with legislation to remove
any judicially-inspired threat, as happened at the turn of the century196 and
now a century later with respect to the Ngati Apa case. Faced with generally
unsympathetic courts and a hostile legislature, and lacking the protection
of a constitutionally entrenched regime of rights, there are no effective
domestic options left to Maori. In that light the Foreshore and Seabed
Act presents as just another manifestation of a sustained and determined
policy of disempowering an indigenous people. As the Waitangi Tribunal
put it (in less colloquial terms), the monkey of native title uncertainty was
deftly removed from settlers’ backs and placed firmly on Maori. That is
a course that Canada, and even Australia (though with less enthusiasm),
have declined to follow.

In the more cosmopolitan context of the international human rights
regime there is some solace to be found by Maori but that regime typically
lacks the institutional apparatus to make it effective. The ability to “name
and shame” has little domestic impact on governments wielding almost
unconstrained power and relying on non-indigenous majorities for their
electoral prospects. There may be a certain embarrassment in international
fora but nothing that would weigh heavily on local politicians or indeed on
the New Zealand public.197

196. See supra, notes 87-89.
197. For example, in November 2005 the UN Special Rapporteur on the Human Rights and
Fundamental Freedoms of Indigenous People (of the UN Commission on Human Rights) visited
New Zealand. Although his report is not due until April 2006 he released a statement on departure
commenting on the socio-economic and health disparities (including a ten-year difference in life
expectancy) between Maori and non-Maori, together with mention that “[p]articularly troubling to
Maori at the present time is the Foreshore and Seabed Act...[I]t is hoped that these concerns will be
addressed in New Zealand’s forthcoming report to the committee ....” The Government’s response was
that it “would listen ...but only act on those recommendations consistent with its policies” (emphasis
added). The Opposition (National) Party was more openly hostile, retorting that “New Zealanders
don’t need to be told by the UN what it means to be a Kiwi. Fair-minded Kiwis will reject these
statements outright, because they know them to be untrue.” Online: Pacific Centre for Participatory
In conclusion it is submitted that this story of dispossession can be taken as an exemplary narrative of the importance of not only minority indigenous peoples’ rights but of the importance of constitutional protection of certain rights against self-interested majorities. One of those rights must be freedom from discrimination on grounds of race. The full extent of whatever native title rights might have flowed from the *Ngati Apa* decision will likely never be known and that loss must diminish non-Maori New Zealanders for it was their own law which was supposed to honour them. It simply did not honour them enough. There was a casual arrogance in the government’s response which diminishes it more than it does Maori. It is against such arrogance that constitutional entrenchment offers some (though never complete) protection.

When expressing disappointment with one’s political masters there is a commonly invoked aphorism along the lines of “they are us, but we are more than them.”¹⁹⁸ In light of the public hostility to minority Maori rights that would not seem to be the case here. The worst one might say of the politicians here is that they failed to make us better than we are, indeed they did not even try.

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¹⁹⁸ For example, Roberto Mangabeira Unger, “The transformation of experience” (Lecture at The Boutwood Lectures, Corpus Christi College, Cambridge University) online: Harvard Law <http://www.law.harvard.edu/faculty/unger/english/docs/corpus2.doc>.