FROZEN RIGHTS? THE RIGHT TO DEVELOP MĀORI TREATY AND ABORIGINAL RIGHTS

BY DR ROBERT JOSEPH*

I. INTRODUCTION

> Bishop Manuhuia Bennett often asked the question: "What did Māori call New Zealand before the arrival of the Pākehā [Europeans]?" After a deliberate pause, he would then simply utter: "Ours".[1]

It is beyond doubt that at a point in the history of Aotearoa New Zealand, everything belonged to Māori where Māori had property rights over the whole of the resources of this country. It is moreover, somewhat ironic that such a historic truism becomes the hardest fact to prove when scrutinised by imposed statutory tests and judicial frameworks. Furthermore, such tests appear to freeze already severely depleted Treaty and aboriginal title rights within a historic strait-jacket thereby prohibiting the contemporary development of these rights.

The historical practices and customary traditions that form the basis for the contemporary Treaty and aboriginal rights of Māori were not and should not be frozen in time. Māori identities, practices and rights, like all cultures, were and are constantly undergoing renegotiation, change and development. Nevertheless, the law in New Zealand has frozen Māori rights to a hunter-gatherer lifestyle that is inappropriate for contemporary Māori development.

So what is the appropriate development of Māori rights in New Zealand today? What does it mean to be Māori, Tainui, Maniapoto, Raukawa, Ngāi Tahu, Kahungunu, or a "traditional" Māori group in contemporary 21st century New Zealand?' Is it best to accept the omnipotent, omniscient and omnipresent assimilation of Māori into the pervasive global culture and economy or should Māori continue to strenuously resist this type of "development" and to hold on to remnants of a bygone culture that struggles to co-exist within this neo-liberal globalised world? The seductive lure of corporate wealth and alleged prestige may well be assimilating Māori communities into a neo-liberal and neo-tribal corporate identity but there are others who fight vehemently for the survival of Māori as Māori but in a contemporary context.

This article will analyse the right of Māori to develop their Treaty and aboriginal rights and to not be frozen in time to a bygone hunter-gather lifestyle which hinders 21st century self-determination aspirations and realities. It is acknowledged that Māori Treaty rights, aboriginal rights, and customary rights differ in origin, content and enforceability but these distinctions are beyond the scope of this article. Although important, the author has grouped these rights together in this article in terms of analysing how they have been frozen in time by legislative and judicial tests. The following discussion will address a number of challenges surrounding frozen Māori rights that

---

* Barrister and Solicitor of the High Court of New Zealand, and Lecturer at Te Piringa – Faculty of Law, The University of Waikato. Tainui, Kahungunu, Ngāi Tahu and Pākehā.

1 Cited in A Sykes "The Tide is Turning: Foreshore and Seabed Presentation" (Unpublished Paper, 9th Annual Māori Legal Forum, Wellington Townhall, 21 July 2010) at 1.

ultimately hinder the right of Māori to develop their self-determination rights commensurate with the ever changing world in which we live.

The article first discusses the inherent right of indigenous peoples to diversity and self-determination that provide scope for updated rights. We then analyse briefly the inevitable adaptation and development of culture, then extensively aboriginal rights jurisprudence in New Zealand and Canada with reference to key judicial tests that freeze indigenous development. The article then critiques the Foreshore and Seabed Act 2004 (now repealed) and the recent Marine and Coastal Area (Takutai Moana) Act 2011 in New Zealand, which continue to perpetuate these flawed tests. Finally, the article explores how the Waitangi Tribunal and international law have considered the right of Māori to develop their aboriginal, Treaty and customary rights in a 21st century context.

II. Right to Diversity and Self-Determination

From the outset, the author's opinion is that in a 21st century development context, cultural diversity is as valuable as the biological diversity upon which the world depends for its proper functioning. Appropriately acknowledging cultural diversity within the nation-state and globally is a positive development hence ancient indigenous cultures (and non-indigenous cultures for that matter) are worthy of preservation, conservation and development. Rather than transforming Māori cultural heritage into what Benjamin Barber has so aptly called "McWorld",[2] the kind of development advocated by the Indian economist Amartya Sen[3] should be sought – a development that brings with it the freedom to individuals and peoples to develop their capabilities, including, most importantly, the capability to be themselves. For Māori, this type of development is a fundamental tenet of the right of indigenous peoples to self-determination in international legal discourse which as a minimum is about the advancement and development of Māori in New Zealand, as Māori according to their worldviews, aspirations and priorities but in a modern 21st century context.

However, a contemporary legal and political challenge that continues to hinder this kind of development is the fossilisation of indigenous treaty rights and the common law doctrine of aboriginal rights. Consequently, contemporary indigenous development is frozen into that of a bygone age which does not allow for the development of these rights for contemporary 21st century indigenous self-determination.

A. Cultural Development Inevitable

There is no culture in the world that does not adapt and evolve with changing environmental, political, social and economic circumstances.[4] Indeed Underwood held that cultural identity is not a static essence that moves unchanged across time. It is constantly, if subtly and perhaps not altogether consciously, being constructed and reconstructed in response to changing circumstances

2 B Barber *Jihad v McWorld* (Ballantyne Books, New York, 1996).

3 A Sen *Development as Freedom* (Knopf, New York, 2000).

4 Granted, the Jewish diaspora may be one exception to this rule and it is a remarkable exception but orthodox Jews are a very interesting and exceptional group of people in this regard. Still, Jewish culture and identity have shifted and changed in some aspects albeit incrementally since the time of Moses.

and new ideological resources encountered by participation in the wider world.[5] It is, to use Jolly's apt phrase, a process of "continual recreation rather than passive perpetuation".[6]

Change does not necessarily imply that a culture is dying or is less authentic. It depends, among other things, on the degree of change that occurs. For example, the respected anthropologist Dame Joan Metge discussed the ability of Māori tikanga[7] (Māori customary laws and institutions), indeed Māori as a people, to change and adapt when she noted:[8]

> The process of transmission between generations inevitably involves adaptation and change, while traditions take only a few generations to become established. Māori beliefs and practices are legitimately described as "tuku iho no ngā tūpuna" and "traditional" if they have been handed on from generation to generation, whether they were first adopted five hundred, one hundred or fifty years ago.

The author subscribes to the view that so long as the core values of the culture are maintained, but outwardly manifested in an updated contemporary context, then the culture still has some life to it as Judge Eddie Durie (as he was then) noted:[9]

> The lesson of history appears to be that change can be effected without prejudice to customary law provided the core values of that law are maintained.

Once those core values are lost, however, then the culture begins to lose its authenticity and, in the author's opinion, legitimacy and perhaps even efficacy.

Despite the major societal transformation Māori communities in New Zealand have undergone, Bennion believes the changes to tikanga Māori rarely produced changes to the "fundamental value system".[10] Traditional tikanga Māori are still regularly adhered to by many Māori in their most overt form on the various marae (Māori meeting houses). Māori communities may apply traditional Māori custom, consciously or unconsciously, in the everyday management of community and family affairs. Today, they may also apply custom consciously, for example, as a result of provisions in the charters of Māori governance entities that they have established for the administration of their tribe's affairs.[11]

III. New Zealand – Aboriginal Rights Jurisprudence

The common law doctrine of aboriginal title is relevant to the thesis that Māori rights have been frozen in time by both judicial and legislative decree. For example, in the 1908 decision of the High Court of *Public Trustee v Loasby,*[12] Cooper J instituted a three tier customary law test (based on aboriginal rights) when deciding whether to adopt a rule of Māori customary law. The first tier was whether the custom existed as a matter of fact, whether "such custom exists as a general cus-

---

5 G Underwood "Mormonism, the Māori and Cultural Authenticity" (2000) 35(2) Journal of Pacific History 133.

6 M Jolly "Specters of Inauthenticity" (1992) 4 Contemporary Pacific 57 at 59.

7 For references, see E Durie "Māori Custom Law" (Unpublished Paper, Wellington, 1994); and "Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law: Proto-Compendium" (Unpublished, Draft Version, Te Mātāhauariki Institute, The University of Waikato, June 2007). The latest version is forthcoming in 2012.

8 J Metge "Iwi: Word and Meanings" (Unpublished Paper in author's possession, 1991) at [8.9].

9 E Durie "Governance" (Conference Presentation, "Strategies for the Next Decade: Sovereignty in Action" School of Māori and Pacific Development International Conference, The University of Waikato, 1997) at 116.

10 T Bennion *The Māori Law Review* (March 2001), online at <www.bennion.co.nz/mlr/2001/mar.html>.

11 Durie, above n 9, at 7.

12 *Public Trustee v Loasby* (1908) 27 NZLR 801.

tom of that particular class of the inhabitants of this Dominion who constitute the Māori race."[13] The next tier was whether the custom was contrary to statute. The last tier was whether the custom was "reasonable, taking the whole of the circumstances into consideration."[14]

Subsequently in *Huakina Development Trust v Waikato Valley Authority*[15] Chillwell J applied the *Public Trustee v Loasby*[16] customary title test to find that "customs and practices which include spiritual elements are cognisable in a court of law provided they are properly established by evidence." The judiciary appears then to have acknowledged that aboriginal rights may evolve and develop in time under this third tier of what is reasonable.

The latest and most authoritative New Zealand decision on aboriginal title is the 2003 Court of Appeal decision of *Attorney-General v Ngāti Apa*[17] which affirmed the Māori Land Court's jurisdiction to investigate claims of Māori aboriginal rights in the foreshore and seabed.[18] However the decision was overturned by the controversial and hastily enacted Foreshore and Seabed Act 2004 which is discussed later in the article.

Still, it is clear that Māori customary law, via the doctrine of aboriginal rights, is cognisable and enforceable in the New Zealand courts with some hints of a right to evolve these rights but the recognition and inclusion of Māori custom appears to have been redefined and fossilised by Parliament and the judiciary.

We will now discuss briefly the leading Canadian decision that contributes to freezing Māori aboriginal rights in New Zealand.

IV. 1996 Van der Peet Decision Freezes Aboriginal Rights

The 1996 Supreme Court of Canada decision of *R v Van der Peet*[19] outlines the most exhaustive analysis by Commonwealth courts of the notion of "aboriginality" and what makes a right "aboriginal" in character. In other words, the case law prescribes or defines customary indigenous identity and rights that accrue to that identity. *Van der Peet*, moreover, refined the test for recognising indigenous rights by defining the rights identified by s 35 of the Constitution Act 1982 to include both aboriginal and treaty rights.[20]

The Stó:lō appellant sold ten salmon contrary to s 27(5) of the British Columbia Fishery Regulations. She challenged her conviction arguing that the provincial law violated the constitutional protection of aboriginal rights in s 35(1) of the Constitution Act 1982. At issue was whether the

13 Ibid, at 806.

14 Ibid.

15 *Huakina Development Trust v Waikato Valley Authority* (1987) 2 NZLR 188 at 215.

16 *Public Trustee v Loasby* (1908) 27 NZLR 801.

17 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

18 Ibid.

19 *R v Van der Peet* (1996) 2 SCR 507. For a good discussion, among many, on the *Van der Peet* decision, see RL Barsh and JY Henderson "The Supreme Court's Van der Peet Trilogy: Native Imperialism and Ropes" (1997) 42 McGill LJ 994.

20 *R v Van der Peet* [1990] 1 SCR 1075 at [31] and [40]. See also *R v Cōtē* [1996] 3 SCR 139; *Kruger v The Queen* [1978] 1 SCR 104; *R v NTC Smokehouse Ltd* [1996] 2 SCR 672; *R v Nikal* [1996] 1 SCR 1013; *R v Gladstone* [1996] 2 SCR 723; *R v Pamajewon* [1996] 2 SCR 821; and *Mitchell v MNR* [2001] 1 SCR 911.

aboriginal right of fishery included a right to sell for commercial purposes. The Court agreed that the doctrine of aboriginal rights arose through Canadian law as Lamer CJ expounded:[21]

> In my view the doctrine of aboriginal rights exists, and is recognised and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

The majority held that the commercial selling of salmon however, was not an "aboriginal" aspect of the fishing right.

The majority took an "integral-incidental" test. Lamer CJ found that in order to be an aboriginal right, an activity must be an element of a practice, custom or tradition *integral* to the distinctive culture of the aboriginal group *at the time of contact* with Europeans.[22] In identifying practices, traditions and customs integral to the distinctive cultures of aboriginal peoples, there are a number of factors a court must take into account.

- First, they must consider the perspective of aboriginal peoples themselves.
- Secondly, they must identify precisely the nature of the claim being made, notably the possibility that the activities may be the exercise in modern form of practice, tradition or custom that existed *prior to contact*.
- Thirdly, in order to be "integral," a practice, tradition or custom must be of central significance to the aboriginal society in question.

Lamer CJ stated that "a practical way of thinking about this problem is to ask whether, without this practice, tradition, or custom, the culture in question would be fundamentally altered to other than what it is".[23] The practices, traditions and customs that constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed *prior to contact*. McLachlin J held that barring extinguishment or treaty, an Aboriginal right will be established once "continuity" can be shown between a modern practice and the Native laws that "held sway before superimposition of European laws and customs".[24] Lamer CJ explained the emphasis upon pre-contact rather than pre-sovereignty aboriginal society:[25]

> Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is that period prior to the arrival of the Europeans, not the period prior to the assertion of sovereignty by the Crown.

Lamer CJ noted that the practice must be of "independent" significance to the aboriginal culture, "distinctive" and not merely "distinct".

Lamer CJ noted further that while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Stó:lō culture, this was not sufficient without a demonstration that it was the exchange of salmon which was a significant and de-

---

21 *R v Van der Peet* (1996) 2 SCR 507 at 538, 137 DLR (4th) 289. See also *R v Sappier; R v Gray* [2006] 2 SCR and *R v Sundown* [1999] 1 SCR 393.

22 Ibid, at 310–315. See also *Campbell v British Columbia* [2000] BCJ. No. 1524 (BCSC) 139 at [79], [52].

23 *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 24 per Lamer CJ.

24 *R v Van der Peet* (1996), above n 21; 137 DLR (4th), above n 21 at 634–635.

25 *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 34.

fining feature of Stó:lō culture.[26] Given that salmon exchange, although part of the interaction of kin and family exchange, was not an integral part of pre-contact Stó:lō society, the pre-sovereignty trade which the band established with the Hudson's Bay Company did not have the necessary continuity to support an aboriginal right. Moreover, the Stó:lō were at a band rather than a tribal level of social organisation and the specialisation of labour characteristic of the tribe was absent and, therefore, the absence of regularised trade or a market is suggestive that the exchange of fish was not a central part of Stó:lō culture.[27]

The case therefore, concluded that those self-defining practices, customs and traditions that qualify as "aboriginal" must be part of a central aspect of pre-contact society which has continued to the present. In British Columbia, the magic date for aboriginal rights seems to be 1846.[28] In New Zealand, the 1840 rule of the signing of the Treaty of Waitangi is the magic date for the affirmation of aboriginal rights.

A. Frozen Aboriginal Rights

The Stó:lō First Nation asserted that the traditional process used to determine the content of an aboriginal right (in this case to fish commercially) created a traditional practice and the doctrine of aboriginal rights should transform that practice into an aboriginal right. The Supreme Court did not address this aspect of the appellant's argument but it constructed a standard test to determine the content of an aboriginal right by a process that emphasised the need to look at the actuality of indigenous practices that created a right to a custom exercised traditionally. The dissenting judgment of L'Heureux-Dube J highlighted the fossilisation of Indigenous traditional rights through this process:[29]

> The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture to which they are rooted. The analysis turns on the manifestations of the "integral" part of [the aboriginal's] distinctive culture.

R v Pamajewon and Jones[30] confirmed that the exact nature of the activity claimed to be a right must be a defining feature of the culture in question *prior to contact* with Europeans.[31]

The majority's decision in *Van der Peet* has been heavily criticised for freezing aboriginal rights to only those practices that existed prior to colonisation. Indeed, John Borrows opined: "Aboriginal rights should exist to ensure Indigenous Peoples' physical and cultural survival, not necessarily to preserve distinctive elements of pre-contact culture."[32]

Moreover, making aboriginal rights dependant on the factual continuation of a practice for 170 or so years is also unreasonable given the fact that pndigenous peoples have been dispossessed, disempowered and forcibly assimilated into mainstream during this time. The law is allowing colonial history to dictate what is and what is not able to be recognised as a right of indigenous

---

26 Ibid, at 41–42.

27 Ibid, at 42–43.

28 As per *Delgamuukw v British Columbia* [1998] 1 CNLR 14, (Supreme Court of Canada) cited in British Columbia, *Provincial Policy for Consultation with First Nations* (BC Consultation Policy, Victoria, BC, October 2002) at 10.

29 *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 345–349.

30 *R v Pamajewon and Jones* (1996) 2 SCR 821.

31 Ibid, at 833.

32 J Borrows "Frozen Rights in Canada: Constitutional Interpretation and the Trickster"(1998) 22(1) Am Indian LR 37 at 49.

peoples.[33] In other words, only those practices that were able to survive colonisation, as opposed to those practices which were created in response to it, are deemed sufficiently "indigenous" or "aboriginal" by the courts.[34]

Still, L'Heureux-Dube J noted that all practices, customs and traditions sufficiently connected to the self-identity and self-preservation of organised aboriginal societies should be held to deserve the constitutional protection of s 35(1) Constitution Act 1982. What constituted a practice, custom or tradition distinctive to native culture and society should be examined through the eyes of aboriginal people themselves through a dynamic, as opposed to a frozen, approach. The activities which comprise the alleged right need not have existed in pre-contact society because that would limit any subsequent self-defining capacity only to those pre-contact activities.[35] L'Heureux-Dube J insisted that the contemporary relevance of aboriginal rights must be considered in relation to the needs of the natives as their practices, customs and traditions evolve with the overall society within which they live. The activity upon which the right is founded must have formed an integral part of a distinctive aboriginal culture "for a substantial period of time, a period of 20 to 50 years."[36] Morse added that the Canadian *Van der Peet* approach tells aboriginal people that "what is relevant about them is their past – not their present or their future".[37]

What is determined through this fossilising test is not what indigenous peoples had a right to do but what they actually did. If there is no clear evidence of a traditional practice, then that will be detrimental to determining a customary right, although the maxim applies that absence of evidence is not necessarily evidence of absence. Thus, the *Van der Peet* aboriginal rights-defining process conflicts with the inherent rights of indigenous peoples to self-determination including the preservation and development of indigenous peoples' laws and institutions and the process eliciting the content and scope of those traditional laws and institutions.[38]

In summary, the *Van der Peet* principles affirm the notion of "aboriginality" for establishing aboriginal rights but they stress the historic origin and continuity of the indigenous practices that constitute the group and comprise a particular aboriginal right. In effect, the *Van der Peet* test for aboriginal rights fossilises indigenous customs, practices and traditions in time, thereby limiting indigenous self-determination and development rights as Professor Slattery noted, "aboriginal title is like an historical diorama in a museum".[39]

---

33 L Godden "Grounding Law as Cultural Memory: A 'Proper' Account of Property and Native Title in Australian Law and Land" (2003) 19 AFLJ 61 at 72.

34 MT Kennedy "The Tide of History: Canadian Waves Washing Away Māori Rights in the New Zealand Foreshore and Seabed Act" (Unpublished Student Essay, School of Law, University of Victoria, Wellington, New Zealand, 2010) at 3.

35 *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 60–61.

36 Ibid.

37 BW Morse "Permafrost Rights: Aboriginal Self-Government and The Supreme Court in *R v Pamajewon*" (1997) 42 McGill LJ 1011 at 1031.

38 For a good analysis of *Van der Peet* and its implications for Māori customary laws in New Zealand, see J Kilgour "The Te Ika Whenua Decision as an Obstacle to the Right to Development: A Discussion of the Fossilisation of Māori Rights in New Zealand Law"(2001) 1; Te Taarere aa Tawhaki (Journal of the Waikato University College) at 192–210; and J Kilgour "Rights Reductionism, Māori Rights and the New Zealand Common Law: An Essay on Cultural Oppression" (Thesis (LLM), School of Law, The University of Waikato, 2000).

39 B Slattery "Understanding Aboriginal Rights" in T Isaac (ed) *Readings in Aboriginal Studies* (Vol 5 Aboriginal People and Canadian Law, Bearpaw Publishing, Manitoba, 1996) at 24–25.

V. New Zealand – Constitutional View of the Treaty and Aboriginal Rights

The Canadian approach to the fossilisation of aboriginal rights in *Van der Peet* is germane to Māori in New Zealand. Although aboriginal rights have not received formal constitutional protection via an entrenched constitutional statute similar to s 35 of the Canadian Constitution Act 1982, relevant comparisons can still be made with the Canadian approach given that the Treaty of Waitangi has received some constitutional recognition, albeit limited. For example, in the New Zealand Court of Appeal, Cooke P implicated the constitution-like status of the Treaty of Waitangi in *New Zealand Māori Council v Attorney-General*[40] when he opined:[41]

> The Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms ... I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.

Furthermore, Lord Wolf, in the Judicial Committee of the Privy Council noted that the Treaty of Waitangi "is of greatest constitutional importance to New Zealand"[42] and the Waitangi Tribunal asserted that the Treaty must be seen as a "basic constitutional document".[43] Chilwell J recorded in a key 1987 High Court decision that the Treaty of Waitangi is "part of the fabric of New Zealand society".[44] Sir Robin Cooke speaking extra-judicially added that the Treaty of Waitangi is "simply the most important document in New Zealand's history".[45] Moreover, Cooke P expressly left open the question of the Treaty's precise constitutional status when he wrote that "a nation cannot cast adrift from its own foundations. The Treaty stands".[46]

In terms of aboriginal rights in New Zealand, the common law has evolved in a manner that directly recognises aboriginal rights. In *Te Weehi v Regional Officer*[47] the judiciary consented to recognise the mana (authority)[48] of local tribes over sea fisheries according to their customary law. The guarantees of the Treaty of Waitangi were also indirectly recognised in *Te Rūnanga o Te Ika Whenua Inc Society v Attorney General*.[49] In this decision, Cooke P stated that unless special circumstances existed, aboriginal title should not be extinguished without Māori consent.[50] It stands to reason that this standard should apply to all aboriginal rights. In the 1997 High Court decision of *The Taranaki Fish and Game Council v McRitchie,*[51] Becroft J permitted the defendant's fishing methods to be employed and extended this aboriginal right to include fish species introduced after the Treaty of Waitangi.

---

40 *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (SOE Case).

41 Ibid, at 655–656 per Cooke P.

42 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at 516 (Broadcasting Assets Case).

43 Waitangi Tribunal *The Ngāi Tahu Report* (GP Publications, Wellington, 1991) at 224.

44 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

45 R Cooke "Introduction" (1990) NZULR at 1.

46 *Te Rūnanga o Wharekauri Rekohu v Attorney-General* [1993] 2NZLR 301 at 308–309 (CA).

47 *Te Weehi v Regional Officer* (1986) 6 NZAR 114 (HC).

48 "Mana" is loosely translated as prestige, respect, honour or intrinsic authority that is spiritually endowed and maintained. See Mead, HM *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25–35.

49 *Te Rūnanga o Te Ika Whenua Inc. Society v Attorney General* [1994] 2 NZLR 20 [Hereinafter *Te Ika Whenua*].

50 Ibid, at 24.

51 *The Taranaki Fish and Game Council v McRitchie* (Unreported, 27 February 1997, Wanganui District Court, ORN 5083006813-14 per Becroft J) (Overturned by the High Court, 1998).

However, in New Zealand jurisprudence there is no absolute standard test to determine the content of a traditional aboriginal right, but there are some requirements that must be fulfilled. There must be detailed and convincing evidence that a traditional practice existed.[52] There seem to be restrictions as deemed in traditional Māori society such as tribal jurisdiction over territory (mana whenua) and membership of a tribe or who might gain authorisation from a relevant tribal authority.[53] A stricter test was applied by Hammond J, requiring that the custom must prove to have existed since time immemorial (assuming 1840 is "time immemorial"), it must be reasonable, certain (in nature, locality and who it affects) and must have continued without interruption since its origin.[54] This test has not been affirmed elsewhere until recently in the Foreshore and Seabed Act 2004 (now repealed) and the Marine and Coastal Area (Takutai Moana) Act 2011 which may reflect the ad hoc nature of aboriginal rights determination, which requires an empirical determination of a custom as evidence of a proprietary or usufructuary right. Moreover, in determining whether an action translates into a customary right, the courts will examine whether that act featured in traditional Māori society,[55] hence what is determined through these flawed tests is what Māori did, not what they had a right to do.

VI. New Zealand – Frozen Rights – Te Ika Whenua

In the 1994 *Te Rūnanganui o Te Ika Whenua Inc Society v Attorney-General*[56] decision (*Te Ika Whenua*), the full bench of the New Zealand Court of Appeal was confronted by an application from Te Rūnanganui o Te Ika Whenua Inc Society for an interim declaration by way of judicial review. Te Ika Whenua was seeking to stay the privatisation of two Bay of Plenty dams on the Rangitaiki and Wheao Rivers until the Waitangi Tribunal could make a recommendation on their claims.

The *Te Ika Whenua* decision represents the view that Māori culture and any rights that derive from it cannot develop beyond colonisation and are, thus, fossilised as Cooke P held:[57]

> … [neither] under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Māori, as distinct from other members of the general New Zealand community, had preserved or assured to them any right to generate electricity by the use of water power.

The Court of Appeal also held:[58]

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

This *Te Ika Whenua* test to determine whether a particular object was within the reasonable contemplation of Māori chiefs at the time of the signing of the Treaty was applied in *Ngāi Tahu Trust*

52 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) at 690, 691 per Williamson J; *Taranaki Fish and Game Council v McRitchie* [1991] 2 NZLR 139 (CA) at 147.

53 Ibid.

54 *Knowles v Police* (1998) 15 CRNZ 423 at 426.

55 However, in *MAF v Love* [1998] DCR 370 (DC), it was held that Māori had no commercial fishing right regardless of evidence of bartering.

56 *Te Ika Whenua*, above n 49,

57 Ibid, at 25.

58 Ibid, at 24.

Board v Director General of Conservation[59] with respect to tourism and whale watching. This test allows the Courts to restrict the interpretation of Māori Treaty and aboriginal rights through their limited perception of Māori intention.

Dr Alex Frame commented on the *Te Ika Whenua* decision that:[60]

> "it will not comfort those who seek certainty in law to learn that Māori customary rights are of an indeterminate nature and of an extent dependent on the Court of Appeal's view of what was in the mind of the Māori chiefs and Governor Hobson at Waitangi in 1840".

It is also interesting to note that neither Treaty of Waitangi party (Māori nor British) contemplated hydroelectric development in 1840 but the latter party has a contemporary right to the development of hydroelectricity while the former seems to be locked into "an historical diorama in a museum."

In a manner similar to the *Van der Peet* test in Canada, the Court of Appeal in *Te Ika Whenua* fossilised Māori Treaty and aboriginal rights to that which was contemplated by Māori in 1840. Accordingly, some people object to Māori seeking updated and modern Treaty and aboriginal rights, such as Don Brash who opined "some people are trying to wrench the Treaty out of its 1840 context".[61] Such a narrow view prohibits the inevitable evolution and development of culture and aboriginal rights.

One is inclined to ask why is it that of the parties to the Treaty of Waitangi, Māori are not allowed to develop their rights while the other party can. It appears that one possible answer could be based on a theory of the "purity of development". There is an ability for indigenous peoples to develop but if any development integrates with the knowledge, technology or processes of another culture or nation, then it is irreparably removed from indigenous development.[62] Such an approach is duplicitous at best given that western society is permitted the amalgamation and even exploitation of other (including indigenous) knowledge and technologies without similar detriment to their own rights.[63]

VII. New Zealand Update

A. Foreshore and Seabed Act 2004

A relatively recent example of the freezing of Māori aboriginal and Treaty rights to 1840, undermining the right of Māori "aboriginality" to develop, is the vexed and politically charged area of the foreshore and seabed. The Foreshore and Seabed Act 2004 extinguished Māori tikanga and common law aboriginal rights in the foreshore and seabed and replaced them with full Crown

59 *Ngāi Tahu Trust Board v Director General of Conservation* [1995] 3 NZLR 533 at 561. See also Waitangi Tribunal Report, *The Radio Spectrum Management and Development Final Report* (Wai 776, GP Publications, Wellington, 1999) at 59.

60 A Frame *Property and the Treaty of Waitangi: A Tragedy of the Commodities?* (Te Mātāhauariki Institute, The University of Waikato Press, Hamilton, 2001) at 7.

61 D Brash "Nationhood" (Unpublished National Party Address, Orewa Rotary Club, Auckland, 27 January 2004) at 2.

62 See R Boast *Rangahaua Whanui National Theme Report* (Waitangi Tribunal Reports, GP Publications, Wellington, 1996).

63 Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Wellington, 2011).

title, which Moana Jackson declared was in effect a modern day raupatu (confiscation) that clearly breached Articles II and III of the Treaty of Waitangi and standard common law rules.[64]

It came as no surprise that to establish customary aboriginal rights, Māori claimant groups had to establish that their rights and title in the foreshore and seabed existed prior to 1840 and continue uninterrupted up to the present day, particularly in s 39 of the Act. A customary rights order was defined in the s 5 interpretation section of the Act as a public foreshore and seabed customary rights order made by either the Māori Land Court under s 50; or the High Court under s 74.

Under ss 50 and 51, Māori groups could apply to the Māori Land Court, and any other group of New Zealanders could apply to the High Court, for a customary rights order to recognise a particular activity, use or practice carried out in an area of the coastal marine area. These were non-territorial customary rights that related to an activity and not ownership.

Section 49 of the Act required the use, activity or practice being claimed as a right to be "integral" to tikanga Māori and to have existed continually since 1840. This integral and continuing test appeared to be the test set out by Lamer CJ in *Van der Peet*.[65] Kent McNeil analysed the Foreshore and Seabed Act 2004 with Canadian jurisprudence and criticised it on the basis that the Foreshore and Seabed Act adopted:[66]

> ...two of the most doctrinally flawed and heavily criticised aspects of the law on indigenous land rights in Canada. Namely, the integral to the distinctive culture test and the requirement of substantial maintenance and the continuation with the land in accordance with traditional laws and customs.

The Ministerial Review of the Foreshore and Seabed Act noted that this "integral" requirement most likely derived from the Supreme Court of Canada's decision in *Van der Peet*.[67] The review panel questioned how high should the traditional activity threshold be for this "integral test" and then cited Lamer CJ referring to high levels of centrality, significance and distinctiveness:[68]

> To satisfy the integral to a distinctive culture test the aboriginal claimant group must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central or significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of the things that truly made the society what it was.

Commentators have argued that Chief Justice Lamer's threshold test is too high.[69] For example, is taking whitebait something that made Māori society what is was? It depends on what the traditional "activity" was. Maybe whitebaiting did not make Māori society what it was per se but the general "activity" of fishing certainly did. Still, given that neither customary rights orders were issued, nor was there any body of precedent on the interpretation of this aspect of the Act, and the

---

64 M Jackson "An Analysis of the Foreshore and Seabed Bill" (Māori Law Commission, Wellington, May 2004) at 1.

65 *R v Van der Peet*, above n 21.

66 K McNeil "Legal Rights and Legislative Wrongs: Māori Claims to the Foreshore and Seabed" in C Charters and A Erueti, (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) at 97. See also G Christie "Aboriginal Rights, Aboriginal Culture, Aboriginal Protection" (1998) 36 Osgoode Hall LJ 447; and G Christie "Development Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC Law Rev 139.

67 E Durie, R Boast and H O'Regan *Pakia ki Uta, Pakia ki Tai: Report of the Ministerial Review Panel of the Foreshore and Seabed Act 2004* (New Zealand Government, Wellington, Vol 1, 2010) at 129.

68 *R v Van der Peet*, above n 21, at [55].

69 R Boast *Foreshore and Seabed* (Lexis-Nexis, Wellington, 2005) at 175.

recent repeal of Foreshore and Seabed Act 2004, made the challenges around the integral activity threshold in New Zealand difficult to ascertain.

In its recent review of the Foreshore and Seabed Act 2004, however, the current New Zealand Government noted that it "believed it inappropriate to use a test based entirely on another country's legal experience".[70] Although it is well accepted and prudent to address the development of legal principles and precedents in other countries when developing domestic law, it was inappropriate with the enactment of the Foreshore and Seabed Act 2004. Given that the frozen aboriginal rights *Van der Peet* test is flawed in Canada, what makes it any better in New Zealand?

Furthermore, Chief Justice Elias affirmed in *Attorney-General v Ngāti Apa*[71] that the common law in New Zealand is different to other common law countries:[72]

> But from the beginning of the common law of New Zealand as applied in the Courts, it differed from the common law of England because it reflected local circumstances.

Chief Justice Elias continued:[73]

> Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga.

The common law of New Zealand is not the same as the common law of England or Canada because it reflects local circumstances. One such local circumstance that makes the New Zealand legal system distinct is the acknowledgement of its first law, tikanga Māori customary laws.

With respect, the legislature should have refrained from defining Māori Treaty and aboriginal "rights" according to what Canadian judges believe aboriginal peoples' "rights" to be in Canada. The legislature adopted the flawed Canadian common law "integral and continuing test" from *Van der Peet* and codified it. In doing so, while this test is open for subsequent Canadian courts to adjust, the judiciary in New Zealand is robbed somewhat of this potential flexibility. In addition, the "integral and continuing test" is flawed given that it freezes indigenous peoples' rights in a "historic diorama in a museum" thus inhibiting its scope for adaptation and development in the 21st century.

B. Marine and Coastal (Takutai Moana) Act 2011

The Marine and Coastal (Takutai Moana) Act 2011 (the Act) repeals the Foreshore and Seabed Act 2004 and introduces a new framework for recognising and protecting customary rights in the marine and coastal area. This recognition will include the right to go to the High Court (or to negotiate an out-of-court settlement with the Crown) to seek customary marine title for areas with which groups such as iwi (tribes) and hapū (sub-tribes) have a longstanding and exclusive history of use and occupation.

A glimmer of hope emerged in the Act where it acknowledges in s. 51 that customary rights develop and evolve over time which is a significant concession. Sections 51 states:

---

70 New Zealand Government *Reviewing the Foreshore and Seabed Act 2004: Consultation Document* (New Zealand Government, Wellington, March 2010) at 33.

71 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 577.

72 Ibid, at 652, [17].

73 Ibid, at 660, [49].

> 51 Meaning of protected customary rights
>
> (1) A protected customary right is a right that—
>
> (a) has been exercised since 1840; and
>
> (b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or *evolves over time*; and
>
> (c) is not extinguished as a matter of law [emphasis added].

Section 51 appears to remove the former *Van der Peet* integral component test which is a positive development in the author's view. However, optimism needs to be balanced with caution.

Retaining the requirement, in s 58 of the Act, for the custom to have been continually practised in a substantially uninterrupted manner since 1840, severely restricts and continues to freeze Māori customary rights, notwithstanding s 51 acknowledging that aboriginal rights evolve. The activity must be carried on in the marine and coastal area; it must have been continually exercised since 1840; it cannot be prohibited by any enactment or rule of law; and has to be unextinguished, which is a high threshold. Commenting on these provisions in the Hansard debates, Catherine Delahuntly cautioned:[74]

> In my limited experience, a limited list of hapū—perhaps Te Tairāwhiti—may be able to pass this test, but I ask who else and where? And even within that rohe … I can think of numerous examples where mana whenua hapū simply could not pass that test, as a result of colonisation.

Hone Harawira added:[75]

> This Bill should be called the Foreshore and Seabed Act Revisited; because Minister Finlayson's comment that "Māori will have to show that they held exclusive use and occupation of the area since 1840, without substantial interruption, and that the area in question was held in accordance with tikanga" is exactly the same as in 2004. … the research [shows] that 98% of Māori will NOT be able to prove unbroken tenure, [which] confirms the Prime Minister's view that Māori don't stand a Māori's chance in parliament of getting their land back.

Similarly, Annette Sykes concluded:[76]

> When the Prime Minister announced this proposal ... he confirmed his view that very few Iwi [tribes] would be able to meet the criteria for seeking customary title[77]... they will let us on the playing field, but set the goal so high that effectively it remains unachievable, and if required, change the goal posts to ensure the protection of majoritarian principles that will ensure their right to govern.

Customary rights should not require lengthy litigation due to difficult evidentiary requirements to prove such a "continuous practice since 1840" because the imposition is not likely to come into conflict with others' rights. The authors of the Ministerial Review of the Foreshore and Seabed Act 2004 even noted that politicians give "collecting hangi stones from the beach" as an example of a potential content of a customary right[78] which appears to freeze Māori Treaty and aboriginal

74 "Marine and Coastal Area (Takutai Moana) Bill" (15 March 2011) 670 NZPD 17280.

75 Hone Harawira, "Verbal Submission on the Marine and Coastal Areas (Takutai Moana) Bill, 14 December 2010". Online on the Hone Harawira website: <hone.co.nz/2010/12/14/verbal-submission-to-the-Māori-affairs-select-committee-on-the-marine-and-coastal-areas-bill/>.

76 A Sykes "The Tide is Turning: Foreshore and Seabed Presentation" (Unpublished, 9th Annual Māori Legal Forum, Wellington Town Hall, 21 July 2010) at 7.

77 See "Foreshore and seabed legislation to be repealed" at <www.stuff.co.nz> November 2010.

78 Ministerial Review Panel: Foreshore and Seabed Act 2004 (30 June 2009) at 129.

rights to the marine and coastal area to an 1840 activity, and hinders the appropriate development of these rights for Māori in 21st century New Zealand.

The New Zealand legislature then, appears to have stated clearly that only those Māori customary practices in the coastal and marine area that were able to survive colonisation, as opposed to those practices that were developed in response to it, are deemed sufficiently to be "Māori" as a result of the above threshold tests.

VIII. Waitangi Tribunal Espouses the Indigenous Right to Development

The Waitangi Tribunal offered some hope when it discussed the notion of the "right to development" in the 1988 Muriwhenua Fishing Report. The Waitangi Tribunal is a tribunal of inquiry with mostly non-binding recommendatory powers, but it is a forum for affirming traditional Māori customary law, and a domestic source of law in terms of it being a determining body that reaffirms normative law within Māori society.

Accordingly, the Tribunal noted in the Muriwhenua Fishing Report that traditional Māori fishing technology was advanced and access to new technology and markets were the quid pro quo for European settlement.[79] The Tribunal then noted that there is nothing in either tradition, custom, the Treaty of Waitangi or nature to justify the view that Māori fishing technology had to be frozen.[80]

> Māori no longer fish from canoes but nor do non-Māori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other. … The Treaty offered a better life for both parties. A rule that limits Māori to their old skills forecloses upon their future.[81]

Hence the Tribunal identified that freezing Māori traditional fishing rights to 1840 would concomitantly limit non-Māori to their catch capabilities at 1840.[82] The Tribunal justified its stance by referring to the international right to development. The Tribunal asserted:[83]

> That all people have a right to development is an emerging concept in international law following the Declaration on the Right to Development adopted on 4 December 1986 by 146 states (including New Zealand) in resolution 41/128 of the United Nations General Assembly. This includes the full development of their resources. Professor Daniloi Turk, a leading drafter of the declaration considered:
>
> > In other words, states should adopt special measures in favour of groups in order to create conditions favourable for their development. If a group claims that the realisation of its right to development requires a certain type of autonomy, such a claim should be considered legitimate.

79 Waitangi Tribunal *Muriwhenua Fishing Report* (Department of Justice, Wellington, 1988) [hereinafter *Muriwhenua*]; and Waitangi Tribunal *Ngāi Tahu Sea Fisheries Report* (Department of Justice, Wellington, 1992). In *Muriwhenua,* the Tribunal's main findings of fact were that there was "a commercial component in pre-European tribal fisheries through 'gift exchange'" and that gift exchange "was capable of adaptation" and indeed "adapted and developed to trade in Western terms". (*Muriwhenua*, at 200).

80 *Muriwhenua,* above n 79, at 223. The right of Māori to develop their rights through the international right to development was also referred to in subsequent Waitangi Tribunal Reports including the *Radio Spectrum Management and Development Report* (Wai 776, Wellington, 1999); the *Ahu Moana Aquaculture and Marine Farming Report* (Wai 953, Wellington, 2002); the *Petroleum Report* (Wai 796, Wellington, 2003); and the recent "Indigenous Flora and Fauna and Cultural Intellectual Property Claim" report entitled *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Wellington, 2011).

81 *Muriwhenua*, above n 79, at 223.

82 Ibid, above n 79.

83 Ibid, at 23–24.

> The International Symposium of Experts on Rights of Peoples and Solidarity Rights (UNESCO, San Marino, 1982) considered:
>
> > The right to development is one of the most fundamental rights to which peoples are entitled, for its realisation is the source of respect for most of the fundamental rights and freedoms of peoples (UNESCO SS-82/WS/61 Art 38).
>
> It was added:
>
> > Each people has the right to determine its own development by drawing on the fundamental values of its cultural traditions and on those aspirations which it considers to be its own. This right to authentic development is, in fact, three pronged: economic, social and cultural (Art. 40).

Hence, traditional Māori fishing and all other traditional aboriginal and Treaty rights (including, inter alia, to land and the coastal and marine areas) should not be frozen in time to 1840.

IX. UN Declaration on the Rights of Indigenous Peoples 2007

Public international law (customary and conventional) is increasingly becoming a source of widely held norms that form the backdrop against which domestic law can be assessed. The United Nations Declaration on the Rights of Indigenous Peoples is one such instrument that was adopted by the United Nations General Assembly during its 62nd session at UN Headquarters in New York City on 13 September 2007. While as a General Assembly Declaration it is not a legally binding instrument under international law, it does represent the dynamic development of international legal norms and it reflects the commitment of the UN's member states to move in certain directions. The UN describes it as setting:[84]

> … an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet's 370 million indigenous people and assisting them in combating discrimination and marginalisation.

In terms of the present analyses on the right of indigenous peoples to develop their treaty and aboriginal rights, the Preamble of the Declaration states:

> *Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,
>
> *Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,
>
> *Recognizing* and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.

It would appear that the Declaration supports the right of indigenous peoples to develop their rights in the preamble. The main ambit for advocating the right of indigenous peoples to contemporaneously develop their treaty and aboriginal rights in the articles is mostly under the umbrella of the inherent right of indigenous peoples to self-determination. In this respect, the relevant articles include Articles 3, 23, 31, 34 and 45 (refer to Appendix 1).

---

84 "Indigenous Peoples, Indigenous Voices: Frequently Asked Questions on the Declaration on the Rights of Indigenous Peoples" (Unpublished document on the UN website about the Declaration on the Rights of Indigenous Peoples 2007) <www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

The UN Declaration on the Rights of Indigenous Peoples adds valuable context to our analysis by reiterating the self-determination right of indigenous peoples to develop their treaty and aboriginal rights and to not freeze them in some bygone era in a historic straight jacket. Article 45 is the second to last article which provides scope for indigenous peoples' future rights to be claimed and developed which is thesis of this article – the indigenous right to develop past and present indigenous rights, and to develop future ones.

X. Some Formative Conclusions

Māori self-determination and development are, inter alia, about Māori having the capacity, right, space and responsibility to make fundamental choices that affect their identities, practices, customs and communities, and the rights that accrue to these communities, in a past, present and future context, not having these limited and frozen by legal verdict in a "historical diorama in a museum".

However a contemporary legal and political challenge that hinders Māori self-determination and development is the fossilisation and restriction of Māori Treaty and aboriginal rights to a bygone era as determined by the judicial tests in the *Van der Peet* and *Te Ika Whenua* decisions. This fossilisation of Māori rights decided not what Māori had a right to do but what they actually did at a frozen point in time. Thus, the *Van der Peet* and *Te Ika Whenua* decisions conflict with the Māori self-determination right to preserve and develop their laws, institutions and rights, and the processes eliciting the content and scope of those traditional laws, institutions and rights today and in the future.

The recently repealed Foreshore and Seabed Act 2004 and the new Marine and Coastal Area (Takutai Moana) Act 2011 appear to continue to perpetuate the fossilising of Māori marine and coastal rights into an 1840 "hunter-gatherer" exercise of those rights. The latter Act does provide some scope for Māori customary rights to evolve, but this area is yet to be tested. Moreover, the historic truism that everything in Aotearoa New Zealand belonged to Māori becomes a hard fact to prove when scrutinised by the imposed customary threshold tests of both statutes regarding the marine and coastal area. These tests appear to freeze already severely depleted Māori Treaty and aboriginal rights within a historic strait-jacket thereby prohibiting the contemporary development of these rights.

The law appears then to be allowing colonial history to dictate what is and what is not able to be recognised as a contemporary Māori right. Only the practices that were able to survive colonisation, as opposed to those that were created in response to it, are deemed sufficiently "Māori" that they thereby convert into contemporary Māori rights. The result of such laws and policies is an epistemological and hermeneutic redefinition and misappropriation of Māori culture and identity and the fossilising of those rights that accrue to that culture and identity.

The Waitangi Tribunal and international law, through the international right to development, and the preamble and at least four articles of the UN Declaration on the Rights of Indigenous Peoples support this right of Māori to develop their cultures, identities and commensurate rights in a modern and future context.

Ultimately, what is required is an appropriate balancing and acknowledgment that Māori Treaty and aboriginal rights should not be locked and limited into a bygone era but must have the legal and political authority, space and capacity to develop in terms of scope and pace with mainstream

cultures. Māori therefore seek to adapt these frozen rights according to 21st century Māori self-determination priorities, aspirations and needs, not those of the past.

Appendix: UN Declaration on the Rights of Indigenous Peoples 2007

Article 3
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 23
Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.

Article 31
Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.