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THE GOVERNMENT OF THEMSELVES

INDIGENOUS PEOPLES' INTERNAL SELF-DETERMINATION, EFFECTIVE SELF-GOVERNANCE AND AUTHENTIC REPRESENTATION

WAIKATO-TAINUI, NGĀI TAHU AND NISGA'A

A thesis
submitted in fulfilment
of the requirements for the degree of
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by

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'The Government of Themselves:[1] Indigenous People's Internal Self-Determination, Effective Self-Governance and Authentic Representation: Waikato-Tainui, Ngāi Tahu and Nisga'a'

A ABSTRACT

The present thesis analyses the recognition and realisation of the international legal, human and the inherent right of Indigenous Peoples to exercise internal self-determination through effective self-governance *within* the nation-states of Canada and New Zealand. The following areas are reviewed in depth: first, internal self-determination which is, inter alia, about international fora and national governments recognising this fundamental right of Indigenous Peoples to self-govern as nations within; second, effective self-government which is, inter alia, about Indigenous Peoples having the authority and capability to govern themselves; and third, authentic representation which is, inter alia, a manifestation of internal self-determination and effective self-government at the indigenous local, regional and national operational levels. The challenges and issues that emerge at all levels, that is, between governments and indigenous entities, and within indigenous communities themselves, are examined extensively. The thesis findings highlight that the frequency and complexity of these challenges, as well as the inadequate and inappropriate fora and processes for resolution offered, make it incredibly difficult for Indigenous Peoples to recognise, realise and actualise the government of themselves.

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[1] The short title of this thesis – 'The Government of Themselves' – comes from a number of important historical sources. In the early 1800s in North America, Chief Justice Marshall in his famous trilogy cases noted the following in *Cherokee Nation v Georgia* (1831) 5 Peters (30 U.S) 1:

> [The Cherokee] is a nation separate from others, capable of managing its own affairs and *governing itself.*

Chief Justice Marshall in *Worcester v Georgia* (1832), 6 Peters 515 at 548 – 49 subsequently added:

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory ... she considered them as nations capable of maintaining the relations of peace and war; of *governing themselves,* under her protection; and she made treaties with them, the obligations of which she acknowledged.

In New Zealand, s. 71 of the *New Zealand Constitution Act 1852* obligated the Governor to establish 'Native Districts' where tikanga Mäori was the law. Section 71 stated:

> 71. And whereas it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the *government of themselves,* in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:

The sub-heading describes this section - Her Majesty may cause Laws of Aboriginal Native Inhabitants to be maintained – which laws are key to the government of themselves.

KARAKIA - INVOCATION

Uea! Waera te One Tapu!

Ka hura Tangata a-uta;
Te turaki atu ki Tangata a-uta;
Ka hura Tangata a-tai;
Te turaki atu ki Tangata a-tai;
Pera hoki ra te korepe nui;
Te korepe roa, te waahi awa, te totoe awa;
Whakamoe Tama i ara ia!
Kauraka Tama e uhia,
Tukua atu Tama i ara ia!
I te Tawhangawhanga!
He putanga Ariki no Rongo
Ki te Ata-tauira mai, e!

Mai ea, mai ea te tupua!
Mai ea, mai ea te tawhito!
I haramai koe i whea?
I haramai koe i to whakaoti-nuku?
I haramai koe i to whakaoti-rangi?

Ko te manawa,
Ko taku manawa
E Tane! Ka irihia!
Whano! Whanake!
Tu mai te Toki!
Haumi, e!
Hui, e!
Taiki, e!

Arise! Seek out the Pathway across the Sacred Sands!
The whilst Men of the Land search for the Men of the Land;
The whilst Men of the Sea search for the men of the Sea.

The uprooting and the clearing of the Forest growth
Was long and it was arduous,
Ere we reached the Long Lagoon;
Indeed, we struggled through the rushes
And the wide stretching Reedy Marshes.

Rest here a space, O Son!
When this Son hath rested, let naught obstruct his way;
Let him go forth! Let him sail across the clear waters of the Bay

For this is the going forth of a High Chief
On a sacred mission of great Renown;
And he cometh as an Initiate
Of the House of Sacred Learning.

Let the spirit of the Primeval Being be placated!
Let the spirit of Ancient Times be placated!

From whence have you come, O Spirit?
Dost thou come to consecrate this earthly task?
Dost thou come to sanctify it with heavenly power?
Let your heart be united as one
With this aching heart of mine!

O thou, Virile Spirit, give unto this Son great strength!
Arise! Go forth!

Who holds the Sacred Axe aloft?

The Tribe united! The Tribe united!
Remain united! Remain united!
Yea, forever! Yea, forever!

This composition is the first stanza of an ancient Invocation or Karakia. In olden times it was chanted by an Adapt or High Priest, when setting out on a momentous journey, in order to placate the Gods and thereby ensure success for the enterprise.[1]

It is appropriate that this karakia be foremost in this thesis given that the Indigenous Peoples of New Zealand and Canada – the Waikato, Ngäi Tahu, Nisga'a, Nunavut Inuit, Mohawks, Mi'kmaq, Ngäti Maniapoto, Ngäti Raukawa, Ngäti Hauā and others, are setting out on a momentous journey of re-recognising and re-realising their legal, human and inherent rights to exercise internal self-determination through effective self-governance. To that end, powerful karakia are required to placate the Gods (and others) to thereby ensure success for this enterprise of contemporary Indigenous Peoples governing themselves.

[1] This ancient karakia is taken from a letter that Dr Pei Te Hurinui Jones of Ngāti Maniapoto, wrote on 22 April 1946 to celebrate the commencement of the Tainui Maori Trust Board managing the settlement compensation for the Waikato raupatu settlement successfully pursuant to the *Waikato-Maniapoto Maori Claims Settlement Act 1946*. Authorisation to use this karakia was given by Dr Pei Jones' son, Brian Jones. The letter can be located in the *Raupatu Document Bank*, (Volume 58, New Zealand Room, University of Waikato, 1995) at 22239-40.

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Kia ora tātou katoa

R.A Joseph (2006)

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LIST OF ACRONYMS

AIP	Agreement-in-Principle
AJHR	Appendices to the Journal of the House of Representatives
AMC	Assembly of Manitoba Chiefs
BC	British Columbia
BCTC	British Columbia Treaty Commission
BIA	Bureau of Indian Affairs
BNA	British North America Act 1867
CBC	Cabinet Business Committee
CBC	Cree Board of Compensation
CFRT	Crown Forestry Rental Trust
CHR	Commission on Human Rights
CHRWG	Commission on Human Rights Working Group
CMS	Church Missionary Society
CNA	Cree-Naskapi (of Quebec) Act 1984
CRA	Cree Regional Authority
CREECO	Cree Regional Economic Enterprise Company
CTA	Charitable Trust Act 1957
DBC	Durie's Biculturalism Continuum
DIAND	Department of Indian Affairs and Northern Development
ECOSOC	Economic and Social Council
FOMA	Federation of Māori Authorities
FTAs	Financial Transfer Agreements
HTC	Hunters and Trappers Committees
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFA	Inuvialuit Final Agreement
ILO	International Labour Organisation
INAC	Indian and Northern Affairs
IRC	Inuvialuit Regional Corporation
ISA	Internal Settlement Agreement
ITN	Inuit Tungavingat Nunamini
JBNQA	James Bay and Northern Quebec Agreement 1975
KILBGA	Kanesatake Interim Land Base Governance Act
KRG	Kativik Regional Government
LIL	Labrador Inuit Lands
LILCA	Labrador Inuit Land Claims Agreement
LISA	Labrador Inuit Settlement Area
MCDA	Māori Community Development Act 1962
MEFA	Mi'kmaq Education Final Agreement 1997
MFS	Māori Fisheries Settlement
MIOs	Mandated Iwi Organisations
MLTC	Meadow Lake Tribal Council
MTB	Māori Trust Boards
MTBA	Māori Trust Boards Act 1955

MUMA	Manukau Urban Māori Authority
MWWL	Maori Women's Welfare League
NA	Nunavut Act 1993
NAFTA	North Atlantic Free Trade Agreement
NEQA	Northeastern Quebec Agreement 1978
NFA	Nisga'a Final Agreement
NG	Nunatsiavut Government
NGO	Non-Governmental Organisation
NMTOK	Nga Mana Toopu o Kirikiriroa
NSA	Nisga'a Settlement Agreement
NTS	Ngai Tahu Settlement
NWT	Northwest Territories
NZMC	New Zealand Māori Council
OAS	Organisation of American States
OECD	Organisation of Economic Co-operation and Development
OTS	Office of Treaty Settlements
POSA	Post-Settlement Assets
PRESA	Pre-Settlement Assets
RCAP	Royal Commission on Aboriginal Peoples
RMA	Resource Management Act 1991
SIBSA	Sechelt Indian Band Self-Government Act
TAIA	Te Atiawa Iwi Authority Incorporated
TMTB	Tainui Maori Trust Board
TOKM	Te Ohu Kaimoana
TOKMTL	Te Ohu Kai Moana Trustee Limited
TPK	Te Puni Kōkiri
TROK	Te Rūnanga o Kirikiriroa
TRONT	Te Rūnanga o Ngāi Tahu
TTWM	Te Ture Whenua Māori Act 1993
UMA	Urban Māori Authority
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UnPO	Unrepresented Nations and Peoples Organisations
USA	United States of America
VGFSA	Vuntut Gwitchin First Nation Self-Government Agreement
WGDD	Working Group on the Draft Declaration
WGIP	Working Group on Indigenous Populations
WMMCSA	Waikato Maniapoto Maori Claims Settlement Act 1946
WRCS	Waikato Raupatu Claims Settlement
WRCSA	Waikato Raupatu Claims Settlement Act 1995
YUFA	Yukon Umbrella Final Agreement

1 INTRODUCTION

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> *Europe during the Discovery era refused to recognize any meaningful legal status or rights for indigenous tribal peoples because "heathen" and "infidels" were legally presumed to lack the rational capacity necessary to assume an equal status or to exercise equal rights under the West's medievally derived colonizing law. Today, principles and rules generated from this Old World discourse of conquest are cited by the West's domestic and international courts of law to deny indigenous peoples the freedom and dignity to govern themselves according to their own vision.*[1]
> -Robert A. Williams Jr.

When the first newcomers arrived in Great Turtle Island (North America) and Aotearoa (New Zealand), the First Nations and Māori 'Peoples' respectively had dwelt there for at least a thousand years. By then, Indigenous Peoples were self-determining 'nations' with their own complex systems of governance and law. These first indigenous laws, institutions and systems of self-governance varied dramatically among the various cultures and indigenous 'nations' within both countries.

Māori systems of self-governance were based on their cosmogony, which, as with other Indigenous Peoples, was a blueprint for life, setting down innumerable precedents by which Māori communities were guided in the governance and regulation of their day-to-day existence. The indigenous worldview generally acknowledged the natural order of living things and the relationship to one another and to the environment.[2] The overarching principle of balance underpinned all aspects of life and each person was an essential part of the collective. Each person formed part of the genealogy that linked Indigenous Peoples back to the beginning of the world. The very survival of the whole was dependent upon everyone who comprised it. Therefore, each person within the Indigenous group had his or her own intrinsic value and had a unique role to play.

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[1] Williams, R, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, Oxford, 1990) at 326.

[2] For a discussion on North American indigenous worldviews, see generally Dickason, O.P, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Oxford University Press, Ontario, 2002) chapters 2-4 (and Dickason's extensive bibliography); Jeness, D, *The Indians of Canada*, (Acland, Ottawa, 1932); Surtees, R, *The Original People* (Holt, Rinehart & Winston, 1971); Crowe, K, *A History of the Original Peoples of Northern Canada* (McGill University Press, Montreal, 1974); Miller, J, 'People, Berdaches and Left-Handed Bears' in *Journal of Anthropological Research* (Vol. 38, No. 3, 1982) at 272-87; Miller, J & Eastman, C (eds) *Tsimshian and Their Neighbours of the North Pacific Coast* (Seattle, 1984); McMillan, A, *Native Peoples and Cultures in Canada: An Anthropological Overview* (Douglas & McIntyre, Vancouver, 1988); and Hallowell, A, 'Ojibway Ontology, Behavior and World View' in Hallowell, A *Contributions to Anthropology* (University of Chicago Press, Chicago, 1976). For a specific discussion on the Nisga'a world view, see Nisga'a Tribal Council, *Nisga'a: People of the Nass River*, (Douglas & McIntyre, Vancouver, 1993); Nisga'a Language and Culture Department, *From Time Before Memory: The People of K'amligihahlhaahl* (Nisga'a Language and Culture Department, New Aiyanch, B.C, 1996) and the four volume study on Nisga'a society in Nisga'a Tribal Council, *Nisga'a Society: Ayuukhl Nisga'a Study* (Nisga'a Tribal Council, Wilp Wilxo'oskwhl Nisga'a Publications, 1995).

The Nisga'a, Blood Tribe, Mohawk, Mi'kmaq, Inuit, Cree and other Indigenous Peoples in Canada and the Waikato, Ngāi Tahu, Ngāpuhi, Ngāti Raukawa and Ngāti Maniapoto Indigenous Peoples in New Zealand had effective traditional self-governance systems, laws and governance institutions. These indigenous self-governance systems generally bore little resemblance to the governance structures, institutions and processes that the newcomers imported into Canada and New Zealand – a feature that largely explains why the European newcomers gave so little thought to displacing and ignoring systems of self-governance, self-administration, power, authority, wealth distribution, and social control that had served these indigenous 'nations' for generations, centuries, perhaps even millennia. As the processes of colonisation unfolded, a sustained effort was made to impose British and then Canadian and New Zealand laws and institutions on the Indigenous Peoples. Efforts were made to destroy traditional indigenous practices and replace them with laws and institutions such as the *Indian Act* and *Maori Affairs Act* governments and the Departments of Indian Affairs and Maori Affairs. Colonisation was determined to dramatically change many things.

Indeed, colonialism and imperialism had thrust the First Nations and Māori worldviews into a state of imbalance. Land and natural resource loss through confiscations and other legal machinations wreaked havoc on the relationship between people and the natural environment; forcible individualisation of land and property disturbed the balance between members of kin-groups; Christianity and introduced diseases damaged in many ways the connection between people and spiritual beings; and the individualistic and economic assumptions underlying capitalism and Western liberalism destroyed Indigenous Peoples' reciprocity economies, the equilibrium between kin, the physical and metaphysical world, the environment, and the fundamental reciprocal obligations to past, present and future generations.

However, as Māori academic Ranginui Walker observed: 'the coloniser had not taken into account the resilience of human nature.'[3] Contrary to popular expectations, First Nations and Māori did not perish altogether. Indigenous Peoples have survived and after five centuries of colonial and imperial influence, Indigenous Peoples are seeking to move beyond survival to overcoming the forces of colonisation and neo-colonialism. Like many Indigenous Peoples around the world, Indigenous Peoples in Canada and New Zealand are actively seeking to reassert control and governance over their own lives, to determine their own futures, and to once again be self-determining 'Peoples.'

[3] Walker, R *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 1990) at 10.

For many Indigenous Peoples, internal self-determination and self-government are seen as ways to preserve their cultural identities and to regain control over the government and management of matters that directly affect them. Self-government is referred to as an 'inherent' right, a pre-existing right rooted in Indigenous Peoples' indigeneity - long occupation and government of land and resources as first citizens before European settlement. Many Indigenous Peoples speak of self-determination and self-government as responsibilities given to them by the Creator and as a spiritual connection to the land. Indigenous Peoples do not expect to be granted self-government by Canadian and New Zealand Governments, but rather seek to have Canadians and New Zealanders recognise that Indigenous Governments existed long before the arrival of Europeans and seek to establish the conditions that would permit the revival and realisation of their Governments. First Nations and Māori often point to Treaties with the British Crown (and other colonial nations in a First Nations context) as acknowledging the self-governing status of Indian and Māori 'nations' at the time of Treaty signing.

The challenges confronting Indigenous Peoples as they engage in this 'struggle without end' are numerous and complex. The amount of activity in Canada and New Zealand in what can be termed indigenous self-determination and development is irrefutable. Nevertheless, the extent to which such activity can be said to represent authentic progress towards internal self-determination is, in the author's view, debatable. In an understandable eagerness to advance their social and economic positions of immiseration, insufficient thought is allocated to exactly what internal self-determination and self-government for Indigenous Peoples should achieve. Too often, it seems Indigenous Peoples are content to measure indigenous 'successes' and development with reference to the standards of the colonisers. As Mikaere opined:

> If indigenous peoples can be more like them, they assure themselves, they will rediscover the well being and prosperity that have been so elusive since the forces of colonisation were unleashed upon their ancestors.[4]

It should be readily apparent that indigenous self-determination could not be achieved merely by duplicating the colonisers for such activity would be assimilation with consent. Cultural diversity is as valuable as the biological diversity upon which the world depends for its proper functioning. Ancient indigenous (and non-indigenous) cultures are worthy of preservation, conservation and development. Rather than transforming

[4] Mikaere, A *Maori Self-Determination in Aotearoa/New Zealand* (Working Paper No. 5/2000, University of Waikato, 2000) at 5.

indigenous cultural heritage into what Benjamin Barber has so aptly called 'McWorld'[5] instead, the kind of development advocated by the Indian economist Amartya Sen[6] 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 and to govern themselves.

Furthermore, given the passage of more than five centuries in North America and over two centuries in New Zealand of cross cultural engagement and miscegenation, as well as an acknowledgement that neither groups are going away demographically, socially and culturally, segregation and secession are not appropriate self-determination options in the author's view. Moreover, indigenous and mainstream cultural constellations in New Zealand (and perhaps less so but increasingly in Canada) are polyphyletic in nature, combining in distinctive ways, ideas and practices, drawn and transmuted from many sources into their self-governance traditions, laws and institutions. Consequently, a cohesive jurisprudence and hybrid identity has emerged in New Zealand, derived from these polyphyletic traditions, which could possibly have sufficient flexibility and robustness to meet the future needs of the citizens of Aotearoa/New Zealand (and perhaps Canada). Indeed, the legal systems of both nation-states should evolve in order to accommodate the best values and concepts from both indigenous and non-indigenous cultures.

Surely the aim of internal self-determination and contemporary self-government then, should be to resuscitate indigenous worldviews in an updated, contemporary context, to take the principles of indigenous laws and institutions and traditional indigenous self-governance and adapt them to suit present-day realities (which should include polyphyletic cultural constellations). If this is how Indigenous Peoples define their goals of internal self-determination, self-government, and 'success' and development, it is clear that records of indigenous 'achievement' to date have been mixed.

[5] Barber, B *Jihad v McWorld* (New York: Ballantyne Books, 1996).
[6] Sen, A *Development as Freedom* (New York: Knopf, 2000).

1.1 THEMES

Two themes are interwoven into the current thesis. The first relates to the recognition of the right of Indigenous Peoples to internal self-determination through autonomy and self-governance as 'nations' within the geo-political framework of the nation-states Canada and New Zealand. The second theme explores effective indigenous representation as a realisation of the first theme and practical manifestation, challenge, right and responsibility of Indigenous Peoples when self-governing. Although both themes require a historical perspective, the present thesis is not primarily a history of the relationships between Indigenous Peoples and the nation-states of Canada and New Zealand. Instead, this thesis refers to events that have shaped government policy, attitudes and accomplishments of both Indigenous and non-Indigenous Peoples in both countries. It highlights how Indigenous Peoples have been engaged in a common struggle to assert a greater measure of autonomy and control, to re-assert and re-exercise their birth-right, indigenous right, inherent right, human right and their international legal rights and responsibilities to govern themselves effectively.

Indigenous Peoples and the nation-state are at times poles apart, at times almost in agreement, and at other times, uncertain about their respective rights, roles, responsibilities, obligations and mutual expectations. However, the focus of this work is not solely on disagreements between Indigenous Peoples and the nation-state, frequent though these may be, or on the unilateral assertions of autonomy, or the arrogant imposition of unjust laws, institutions and policies, or upon the disparities in standards of health, education and economic well-being that threaten to divide the nation-state. For the most part, the present thesis analyses indigenous aspirations against the backdrop of distinctive cultural identities and representations, changing national identities and a global assertion by Indigenous Peoples of the right to, and responsibilities of, internal self-determination.

Imperative questions regarding the nation-state, hegemonic power, control and authority reappear in several chapters of this thesis. There are also other questions that are equally significant and possibly more directly related to People in the day-to-day pursuit of their well-being, enjoyment and economic, social and cultural security. What is internal self-determination? Why is it valued? Is it over-valued? How is it measured? What range of concerns does self-determination cover and how is it manifest at local, regional, national and perhaps even international levels? How are 'grass-roots' Indigenous individuals and groups adequately and appropriately represented in an internal self-determination context?

Which 'Peoples' are 'Indigenous' with a right and responsibility of internal self-determination? What indigenous bodies and legal entities appropriately represent customary and contemporary indigenous self-determination rights and responsibilities today and how? This thesis does not attempt to provide all the answers to these questions but it does explore many of the underlying issues and challenges as they pertain to legal empowerment and self-governance. Moreover it is concluded that the central aims of internal self-determination and self-governance extend well beyond academic discussion about customary international law, constitutional arrangements, legal entities, customary rights and responsibilities and discourse on the hybridisation of peoples in a post-modern world, to embrace the well-being of Indigenous Peoples as 'nations within' as they progress through this new millennium.

1.2 CHAPTER SYNOPSES

Chapter one provides the introductory context for this thesis research.

Chapter 2 is the methodology section that outlines the significance of comparative research generally followed by specific justifications for this comparative research. A comparative thematic method and discourse analysis was employed to carry out this research.

Chapters 3 to 6 provide the international framework for recognising and realising the international human right of Indigenous Peoples to govern themselves through internal self-determination and self-government within the nation-state. These chapters provide the foundation for the rest of the thesis.

Chapter 6 discusses how contemporary Treaty settlements are one way to pursue internal self-determination through the self-government opportunities that stem from the settlement. Chapter 7 discusses the various self-determination options available in depth. The most important theme from this section is the option of Indigenous Peoples to choose what option best fits their community rather than having options imposed upon them.

Chapter 8 analyses extensively the important concept of representation which is a very important facet of self-determination and self-government. Essentially, this section provides an analysis on who exactly is the 'self' in self-determination and self-government.

Chapters 9 and 10 provide a comprehensive analysis on customary representation particularly in the areas of legitimacy, authenticity and representivity with a discussion on the 'lost' tribes of Waikato, Raukawa, Ngāi Tahu and some First Nations. Chapter 10 finishes with a discussion on the contentious issue of resurrecting 'lost' tribes and also forming 'new' tribes.

Chapter 11 outlines the complex and contentious area of representation at the various levels of indigenous identity and contemporary realities and the many contradictions, issues and challenges in this area. An analysis is provided on how government policy and legislation aid and abet in these challenges in a major way.

Chapter 13 discusses the various policies and legal options available to Indigenous Peoples in Canada and New Zealand in exercising self-government and discusses the various challenges and successes in exercising this right within an institutional representation context.

Chapter 14 picks up on the various themes and conclusions from this research. The Appendices provide much needed context to assist understanding of the challenges, issues, contradictions and successes of Waikato-Tainui, Ngāi Tahu, the James Bay Cree, the Nisga'a and other Indigenous Peoples in New Zealand and Canada.

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Te rongonui o te taniko kei roto i te whiriwhiri noa mau tonu tona ataahua. - The beauty of the taniko is that there is more than one pattern.[1]

2.1 COMPARATIVELY SPEAKING INTRODUCTION

In 1992, Māori and Crown negotiators, to settle all Māori commercial fisheries claims based on the *Treaty of Waitangi*, entered into the pan-Māori Fisheries Settlement (MFS) more commonly referred to as the 'Sealords Deal.' In 1995, the Waikato Raupatu Claims Settlement (WRCS) was the first contemporary land settlement addressing the outstanding Māori land confiscations of New Zealand's Waikato basin area. In 1998, the Ngai Tahu Settlement (NTS) was negotiated to address the outstanding land grievances of the Indigenous Peoples of New Zealand's South Island. In 2000, the Nisga'a Settlement Agreement (NSA) was the first contemporary land claims settlement addressing outstanding aboriginal land rights and legitimate questions of aboriginal title in Canada's Province of British Columbia (B.C). This thesis provides a comparative analysis of the post-Treaty settlement governance phase of these settlements, in addition to other contemporary indigenous Treaty settlements in both nation-states.

The dictionary states that to 'compare' is to recognise similarities and differences. Taken further, comparative research infers general laws from a multiplicity of specific cases, hence a process of induction is at the heart of comparative research.[2] Indeed, Denoon emphasises that 'there is only one analytical method in the social sciences - the comparative method.'[3] Comparative law is as much a method as a subject.[4]

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[1] This Māori proverb is called a whakataukī. Whakataukī commonly translate as proverbs but they differ from English proverbs in significant ways. English proverbs are regarded as folklore belonging to the public domain for general use without copyright. Some whakataukī are also common property but many can be traced to particular sources and are claimed by particular iwi or hapu as ancestral *taonga* (treasures). The metaphors and images used in whakataukī are highly condensed and cryptic. One symbol often has several referents and layers of meaning; necessary as well as unnecessary detail is omitted; and listeners are challenged to work out references and connections for themselves. Whakataukī are not fixed in form. Tribes have their own variant forms and orators often vary the wording to suit the context. While one interpretation may be generally favoured at any particular time, orators delight in finding new applications and interpretations. Most of the whakataukī used throughout this thesis are taken from Sir George Grey, *Ko nga Whakapepeha me nga Whakaahuareka a nga Tipuna o Aotearoa: Proverbial and Popular Sayings of the Ancestors of the New Zealand Race* (Saul and Solomon, Cape Town, 1857); Brougham, A, & Reed, A.W, *The Reed Book of Maori Proverbs* (Reed Publishing, Auckland, 1963); Mead, M & Grove, N, *Ngā Pēpeha a Ngā Tīpuna* (Victoria University Press, Wellington, 2001); Pou, H.H, 'A Short List of Whakatauki' (Unpublished Manuscript in author's possession, Taitokerau Whakatauki, no date); and Department of Māori Affairs (Whangarei), *Nga Whakatauki o Te Tai Tokerau* (Government Printing Office, Auckland, 1987).

[2] Dogan, M & Pelassy, D (2nd ed.) *How To Compare Nations: Strategies in Comparative Politics* (New Jersey: Chatham House, 1990) at 111.

[3] Denoon D *Settler Capitalism: The Dynamics of Dependent Development in the Southern Hemisphere* (The Clarendon Press, Oxford, 1983) at 8.

[4] Gutteridge, H *Comparative Law* (2nd ed) (Cambridge: Cambridge University Press, 1949) at 1.

The benefits of the comparative perspective cannot be stressed enough given that parochial New Zealanders (and others) can no longer afford the luxury of standing back and passively observing global developments in 'Indigenous Peoples/nation-state' relations, indigenous rights to internal self-determination and post-Treaty settlement governance. While acknowledging our differences – and there are many – we must investigate what we can learn from each other. The recurrent settlement of indigenous grievances and post-Treaty governance themes and patterns underlying the restructuring process in other countries, such as Canada, may enable us in New Zealand to recognise shared experiences, common aspirations and useful models of good indigenous governance. Our concern is especially critical and timely, as both Canada and New Zealand are grappling with the implications of new political realities for indigenous groups to achieve a degree of internal self-determination and self-governance through, inter alia, indigenous Treaty settlements as 'nations within' and for more effective macro-political post-colonial nation-building.

2.2 SIGNIFICANCE OF THE RESEARCH

Effective Māori and First Nations' self-governance and institutional redesign may potentially have major impacts on the well being of New Zealanders and Canadians. The quality and governance of institutions affects their instrumental value in promoting social capability and economic, cultural and political performance. Shared or mutually respected values – such as trust and respect – can also impact positively on social, political, cultural and economic development. Good indigenous self-governance should, therefore, be important for New Zealand and Canada because of the particular challenges of establishing a more solid base for inter-group and inter-ethnic co-operation and cohesion. For reasons of both self-governance and social cohesion, the resolution of historical indigenous Treaty claims is an area of critical strategic importance to New Zealand and Canada. The settlement process itself can provide, inter alia, an opportunity to publicly acknowledge and record the claimant group's history, heal grievances, assist with closure and reconciliation and for building or enhancing Māori and First Nations capability. However, post-settlement self-governance and the realisation of internal self-determination rights and responsibilities are inherently complex, contested and politicised but vital areas requiring urgent analysis.

2.3 AIMS OF COMPARATIVE RESEARCH FUNDAMENTAL FOR METHODOLOGY

When embarking on comparative research, one must first clearly state the aim of the comparison. One must be clear whether it is to contribute to the development of explanatory social science or to improve existing policies and nation-state practices. Combining two such different enterprises causes confusion. The researcher must be clear whether the aim is explanation or reform, for only the former is properly termed comparative social science.[5] As Nelken asserted, 'the pull of the policy audience only gets in the way of intellectual progress.'[6] Influential comparative sociologists recommend a division of labour in which the legal comparativist, with the strong interest in reform, sticks to legal doctrine while the sociologist goes beyond this so as to explain the 'law in action' and other aspects of the legal infrastructure which cannot be read out of legal texts,[7] in other words, law in context. The author has focused on contributing to the development of explanatory social science in this research.

2.3.1 AIMS OF RESEARCH - CORE OBJECTIVES

The core objectives of this research include the deconstruction and reconstruction of traditional and contemporary indigenous self-determination and self-governance rights and responsibilities and how traditional indigenous governance norms, values, institutions and processes explicitly and implicitly impinge on the successful:

- recognition of indigenous self-determination rights and responsibilities;
- realisation of indigenous self-governance and institutional re-design; and
- indigenous representation.

One of the main aims of this comparative research, then, is to contribute[8] to the emerging comparative knowledge of indigenous self-determination, self-governance and

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[5] Feely, M 'Comparative Law for Criminologists: Comparing for What?' in Nelken, D (ed) *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997) at 93-105.

[6] Nelken, D 'Understanding Criminal Justice Comparatively' in Maguire, M (ed) *The Oxford Handbook of Criminology* (Oxford, 2nd ed) at 560.

[7] Blankenburg, E 'Litigation Rates as Indicators of Legal Cultures' in Nelken, D (ed) *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997) at 41-69.

[8] A major contribution to this field has been made by Armitage, A *Comparing the Policies of Aboriginal Assimilation: Australia, Canada and New Zealand,* (UBC Press, Vancouver, 1995) - a very well contextualised and rigorous, single-author focused, policy study of child welfare policies. See also Francis Castles, Rolf Gerritson and Jack Vowles who, as editors, contribute significantly to the field with an innovative collaborative model involving specialists from two countries contributing a joint chapter on a topic, e.g. the excellent chapter by Richard Mulgan and Will Sanders, 'Transforming Indigenous Affairs Policy: Labour's Contribution to 'Internal De-colonisation',' in Castles, F Gerritson, R and Vowles, J (eds) *The Great Experiment: Labour Parties and Public Policy Transformation in Australia and New Zealand,* (Auckland University Press, Auckland, 1996) at 129–48.

representation in a contemporary indigenous Treaty settlement context in Canada and New Zealand. The most significant focus of previous research concerning contemporary indigenous Treaty settlements has been on the settlement negotiation processes and the form of Treaty settlements. Little attention has been allocated to the complex dynamics of post-Treaty settlement self-governance. Undoubtedly this is one of the most important stages of any indigenous Treaty settlement. The thesis will contribute to scholarship by:

- contextualising specific dilemmas and general challenges inherent in the post-Treaty settlement governance phase of implementation[9] in terms of the particular Indigenous Peoples concerned;
- identifying the inhibiting and facilitating dimensions of formal settlement instruments and the institutional and normative interfaces with the Crown and indigenous governance structures; and
- analysing the aspirational and contractual instruments that emerged from the negotiations to an examination of specific aspects of the post-settlement self-governance and representation phase, which these instruments enabled or sought to enable.

The general purpose is to draw attention to the fundamental and normative importance of a sound institutional basis for implementing internal self-determination through post-settlement self-governance and representation. The thesis will define and unpackage competing understandings of self-determination, self-governance, representation and cultural survival. The main aims of this comparative research methodology are, therefore, to:

- test theories of evolving indigenous self-determination, self-governance and representation policies on national and international jurisprudence;
- show how indigenous post-Treaty settlement self-governance models are embedded within changing, local and international, historical and cultural contexts; and
- classify and learn from the norms, rules, ideals, policies and practices of other political/legal jurisdictions.

The identification of key themes for indigenous Treaty settlement governance falls within the scope of this comparative research. Units of comparison include Canada and New Zealand with a primary focus on indigenous self-determination and self-governance rights and responsibilities and the effective implementation of contemporary indigenous settlement governance values, norms, processes and institutions. The thesis will thus attempt to comparatively address the following post-Treaty settlement self-governance and representation thematic challenges:

[9] For example, the examination of assumptions about self-government, decision-making and co-management, the relationship with the Crown, models of social and economic development - collective or individual; and jurisdictional ambit - urban, reserve, marae, iwi, hapū and whānau.

- political-legal institutional design for applying self-governance and representation principles to indigenous Treaty settlement governance entities;
- appropriate post-Treaty settlement governance structures – models of governance and species of justice - that actualise and maximise positive indigenous political, social, economic and cultural development;
- imposed governance models – the rule of law, civil society, democracy and capacity building;
- governance structures that provide for and enhance indigenous leadership, transparency, accountability, representivity, legitimacy and capacity building;
- tensions between cultural survival and economic development; modernity and pre-modern traditional ways of life; urban and rural; and inter-generational tensions (including ecological sustainability values);
- appropriate dispute resolution processes and fora within indigenous governance entities to appropriately deal with conflicts of values, goals, methods and processes being settled intra-tribally and/or inter-governmentally;
- lessons for Māori from international experience in this area.

The research aims to provide an academic analysis of indigenous settlement self-governance, internal self-determination and representation challenges and issues by contributing to the understanding of general and specific challenges, questions and insights into the way contradictions and complexities have been managed, confronted, ignored, even side-stepped by both the nation-state and indigenous governance entity's within Canada and New Zealand.

2.4 COMPARATIVE LAW METHODOLOGY

Attempts have been made to argue that comparative law is a science[10] but these often degenerate into a debate about language.[11] Another approach is to argue that comparative law is not one but three. Lambert argued these were:

- descriptive comparative law;
- comparative history of law; and
- comparative legislation.

The first is an inventory of systems and rules, past and present. The second is an attempt to establish a universal history of law and to measure the rhythms or natural laws of social phenomena. The third is an attempt to identify the common core of rules. The comparative research for this thesis is employing all of these three areas.

Watson, however, warned about the problems of comparative law as:

- superficiality;
- getting the foreign law wrong;

[10] Schmitthoff, M, 'The Science of Comparative Law' in *CLJ* (1939-41) at 94.
[11] Watson, A *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1972) at 2.

- the impossibility of being systematic; and
- mistaken desires to find patterns of development.[12]

Other criticisms have emphasised the vagueness and lack of rigour in comparative law scholarship.[13] Farrar noted that contemporary comparative law scholarship is in the doldrums[14] so we must face the fact that the problem is even more complex when we focus on comparative indigenous self-governance since we are not simply looking at laws but also institutions and self-regulating customs, norms and practices. Farrar additionally added that if comparative law was a science then the only science it could be is social science[15] and hence only the theory and methods of social science can be resorted to in the case of comparative indigenous self-governance. Social science methods can be classified in the following way:

- epistemology;
- theoretical perspective;
- methodology; and
- methods.

Epistemology is the theory of knowledge embedded in the theoretical perspective and the methodology.[16] The theoretical perspective is the philosophical approach that informs the methodology and provides a context for the process and grounding of its logic and the methodology.[17] Methodology is the strategy or plan of action lying behind the choice of particular methods and linking the choice of methods to the desired outcome.[18] Methods are the techniques used to gather and analyse data.[19]

Accordingly, the epistemology for this research is constructionism; theoretical is hermeneutics and post-modernism; the methodology is heuristic inquiry and research, and the methods employed are comparative analysis, case studies and interviews.

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[12] Ibid, at 6.
[13] See for example, Rogers, C A 'Gulliver's Troubled Travels, or the Conundrums of Comparative Law' *George Washington Law Review* (Vol. 67, 1998) at 149; and Mattei, U & Reimann, M 'Introduction' in *American Journal of Comparative Law* (Vol. 46, 1998) at 597.
[14] Farrar, J 'In Pursuit of an Appropriate Theoretical Perspective and Methodology for Comparative Corporate Governance' in *Australian Journal of Corporate Law* (Vol. 13, 2001).
[15] Ibid.
[16] Crotty, M *The Foundations of Social Research: Meaning and Perspective in the Research Process,* (St Leonards: Allen & Unwin, 1998) at 3.
[17] Ibid.
[18] Ibid.
[19] Ibid.

2.4.1 METHODS – WHY COMPARE?

A method is a means of obtaining, ordering and measuring data (information classified into usable conceptual units). Thus observation, documentary research, statistical operations, simulations, content analysis, sample surveys and in-depth interviews are all methods. The very act of comparison is in itself a method; a method of analysing data for the purposes of understanding and explaining. In the broader context of comparative research, methodology - the selection and employment of suitable methods for obtaining and analysing data - is more than a simple decision to compare. It involves the choice of methods, which will be practicable in use, congruent with the strategies being pursued, reliable as a means of obtaining the required information and suited to the theoretical and conceptual frameworks being employed. Methods, therefore, represent an integral aspect of comparative analysis that will affect and be affected by the theories, strategies and concepts chosen.

2.4.2 ADVANTAGES OF COMPARATIVE RESEARCH METHODS

The advantages of a comparative study of indigenous Treaty settlement self-governance within Canada and New Zealand are that it will increase our understanding of the historical, cultural and political processes whereby Indigenous Peoples become re-empowered in degrees to govern themselves effectively. This understanding could create an increased awareness of the range of options and choices confronting people throughout the Treaty settlement and post-settlement governance processes - collectively and individually, indigenous and non-indigenous alike.

The appeal of the comparative method lies in its ability to help Māori and others transcend the limitations inherent in theorising about and analysing a single society. By investigating the effects of predominantly English-speaking newcomers elsewhere, Māori are able to acquire a much fuller picture of group dynamics than would be possible had we limited ourselves to any one society. In this regard, Cornell's use of the comparative method in his study of Indigenous Peoples in the United States and Canada is instructive.[20] Fully aware of the danger of appearing to reduce unique identities to a bland and meaningless whole, Cornell argues that 'critical commonalities' remain within the Indian

[20] See Cornell, S & Kalt, J (eds) *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (American Indian Studies Center, Los Angeles: University of California, 1992); and Cornell, S & Kalt, J 'Where's the Glue? Institutional Bases of American Indian Economic Development' (Working Paper Series, Malcolm Wiener Center for Social Policy, John F. Kennedy School of Government, Harvard University, 1991).

experience that increasingly link native Americans with each other and to a common political trajectory. There is, therefore, a need to extend the search for 'critical commonalities' beyond the confines of New Zealand to include other Indigenous Peoples, in this case those of Canada. To what extent are Indigenous Peoples experiencing a common political trajectory? How relevant is the discourse on indigenous self-determination and self-government, particularly in relation to contemporary Treaty settlements and effective post-settlement governance in Canada and New Zealand? Why did the nation-state finally recognise indigenous rights to self-governance and how are they implementing self-governance 'on the ground'? Concepts such as internal self-determination, good governance and representivity are political ideas that arise within economic, cultural, social and political frameworks. The dynamic interplay of these concepts contributes to our understanding of Indigenous Peoples' post-settlement self-governance options.

2.5 JUSTIFICATIONS FOR COMPARATIVE RESEARCH

There are a number of further significant advantages for comparative research such as:

1. *To improve taxonomies and typologies for categorising knowledge*

Comparative research improves our analyses and classifications of indigenous/state relations and classification is a stepping-stone to explanation. Once we classify indigenous self-government through internal self-determination models, we can then look at the causes and consequences of each. Without variation, and some sort of measurement or classification of it, we have nothing to explain. Comparative analyses of contemporary indigenous Treaty settlement models in Canada and New Zealand, thus, turn constants into variables to improve taxonomies and create typologies for categorising knowledge.

2. *To refine the conceptual grid*

Comparative research is important for testing hypotheses in order to refine the conceptual grid by addressing the problem of perspective. Researchers of other jurisdictions seek to understand a variety of, for instance, self-governance models, in order to formulate and test hypotheses about the accommodations and effectiveness of integrating indigenous governance within other British common law frameworks. Comparative research enables us to develop and scrutinise such questions as - how does a nation-state accommodate indigenous self-determination and self-government rights?; what differences do contemporary Treaty settlements make, if any?; what is an appropriate

self-governance model for Waikato, Ngāi Tahu, and the Nisga'a to realise their internal self-determination aspirations? Verified hypotheses are valuable because they are essential for explaining the particular. The particular calls forth the general and theories can be used to explain specific cases.

3. *To explore the scope and limits of generalisation from one context to another*

Comparative research is important to explore the scope and limits of generalisations and intuitions from one context to another. This exercise, in turn, assists with the improvement of taxonomies and typologies for categorising knowledge and for refining the conceptual grid.

4. *To provide some perspective on one's own context from the knowledge of what occurs elsewhere and so avoid ethnocentrism*

The provision of context and the avoidance of ethnocentrism are further advantages of comparative research. What is to be gained by comparing contemporary indigenous Treaty settlements and post-settlement self-governance in different countries? First, to find out more about the places we know least about. Information about overseas models not only helps to interpret new developments, it also enables one's own legal system to be seen in a new light. Furthermore, through comparative research we discover our own ethnocentrism and the means of overcoming it.[21]

The origins, purposes and effects of a country's social policies have a complexity that defies simple description. Changes to demography, economics and culture can confuse the effects of a particular policy, and researchers can tend to either ascribe undue efficacy or undeserved failure to their research. The comparative method provides a partial solution to the problem of perspective, in that it presents one set of actions alongside another set, thus enabling one to ascertain similarities and differences between the two. If the similarities are sufficiently confirmed, then it begins to be possible to ascribe some of the differences to conditions that are unique to a particular society. Indeed, Higgins notes that the most important reason for engaging in comparative research is that it encourages a distinction between the general and the specific.[22]

[21] Wright, V (ed.) *Comparative Government and Politics* (3rd Ed.) (London: MacMillan Press, 1992) at 24.
[22] Higgins, J *States of Welfare* (Oxford: Basil Blackwell, 1981) at 12.

5. To discover general relationships among variables and factors

A further advantage of comparative research is to contextualise, in historical, cultural, legal and sociological terms, patterns of indigenous accommodation and internal self-determination, the role of the nation-state and the integration or denial of indigenous customary laws and institutions, judicial creativity, the process of settling indigenous claims and post-Treaty settlement self-governance. We thus see a need to extend the search for 'critical commonalities' beyond the confines of New Zealand to include the legal systems of Canada and perhaps elsewhere. Comparative research is advantageous in view of the growing interest in international comparisons of political/legal systems,[23] particularly with the growing internationalisation of Indigenous Peoples' rights.[24]

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[23] See for example, Geddes, W, 'Maori and Aborigine: A Comparison of Attitudes and Policies' in *Australian Journal of Science* (Vol. 24, No. 5, 1961) at 217-225; Tatz, C, 'Four Kinds of Dominion: Comparative Race Politics in Australia, Canada, New Zealand, and South Africa' (Inaugural Public Lecture delivered in Armidale, New South Wales, 17 July 1972); Guillemine, J, 'The Politics of National Integration: A Comparison of United States and Canadian Indian Administration' in *Social Problems* (Vol. 25, December, 1978) at 320-332; Howe, K, *Race Relations: Australia and New Zealand,* (Longman Paul, Auckland, 1978); Heidenheimer, A, Heclo, H & Teichadams, C, *Comparative Public Policy: The Politics of Social Choice in Europe and America* (Macmillan, London, 1978); Fisher, R, 'The Impact of European Settlement on the Indigenous Peoples of Australia, New Zealand and British Columbia: Some Comparative Dimensions' in *Canadian Ethnic Studies* (Vol. 12, No. 1, 1980); Parker, R, 'Comparative Social Policy and the Politics of Comparison' in Gandy, J, Robertson, A & Sinclair, S (eds.) *Improving Social Intervention* (Croom Helm, New York, 1983); Morse, B, 'Australia and Canada: Indigenous Peoples and the Law' in *Legal Services Bulletin,* (Vol. 8, No. 3, 1983) at 104-108; Morse, B, *Aboriginal Self-Government in Australia and Canada* (Institute of Intergovernmental Relations, Kingston, Ontario, 1984); Dyck, N (ed) *Indigenous Peoples and the Nation-State: 'Fourth World' Politics in Canada, Australia and Norway* (Institute of Social and Economic Research Memorial University, University of Newfoundland, 1985); Renwick, W, *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Wellington: Victoria University Press, 1991); Fleras, A & Elliot, J L *The Nations Within: Aboriginal-State Relations in Canada, the United States, and New Zealand* (Ontario: Oxford University Press, 1992); Guntram, G, *Self-Determination in Western Democracies: Aboriginal Politics in a Comparative Perspective* (Greenwood Press, Westport, 1992); Armitage, A *Comparing the Policies of Aboriginal Assimilation: Australia, Canada and New Zealand,* (Vancouver: UBC Press, 1995); ARA Consulting Group Inc. *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (Ministry of Aboriginal Affairs, Federal Treaty Negotiation Office, British Columbia, 1995); Wickliffe, C 'Indigenous Polities. Self-Government, Law, Citizenship and Property Rights: Inside-Out, Outside-In: A Comparative Study of the United States of America, Canada, and New Zealand' (Unpublished LLM Thesis, University of Victoria, Wellington, 1996); Shortall, S 'Aboriginal Self-Government in Aotearoa/New Zealand: A View through the Canadian Lens' (LLM Thesis Dissertation, University of Alberta, 1996); Gump, J 'A Spirit of Resistance: Sioux, Xhosa and Maori Responses to Western Dominance, 1840-1920' in *Pacific Historical Review* (Vol. 66, No. 1, 1997); Montgomerie, D 'Beyond the Search for Good Imperialism: The Challenge of Comparative History' in *New Zealand Journal of History* (Vol. 31, No. 1, 1997); Dow, C Gardiner-Garden, J 'Indigenous Affairs in Australia, New Zealand, Canada, United States of America, Norway and Sweden,' in Social Policy Group, Background Paper 15, Parliamentary Library of Australia, 1997-98, April 1998); Indian and Northern Affairs *Indigenous Peoples and Fiscal Relationships – The International Experience* (Strategic Research & Analysis Directorate, INAC, Canada, 1998); Wiessner, S 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' in *Harvard Journal of Human Rights* (Vol. 12, Spring 1999) at 58-128; Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999); Winks, R (ed) *The Oxford History of the British Empire: Volume V: Historiography,* (Oxford: Oxford University Press, 1999); Kersey, H *Indian Sovereignty in Two Cultures: Maori and American Indians Compared* (Occasional Paper No. 1, Treaty of Waitangi Research Unit, University of Victoria, Wellington, 2000) and the journal - *Australian Canadian Studies: A Multidisciplinary Journal: Indigenous Issues* (Vol. 21, No. 1, 2003) and other volumes.

[24] See for example Sanders, D 'The Re-Emergence of Indigenous Questions in International Law' in *Canadian Human Rights Yearbook* (1992) at 28; Coates, K & Taylor, J (eds) *Indigenous Peoples in Remote*

6. To evaluate the performance of systems, agencies, and institutions, and isolate factors that make for success or failure

A further justification for comparative research is to assist in the search for new ways to conduct public policy towards Indigenous Peoples. Change begins in many ways - sometimes through limited and local actions, often through state or national initiatives, and sometimes through international action. Existing policies, order, and stable government often suppress changes. Sometimes changes are allowed to occur and receive formal endorsement from social and political authorities. Changes occur at different rates in different countries, depending on local conditions. Not all changes will succeed, indeed many will fail, which is precisely why they need to be analysed - to evaluate the performance of systems and institutions and to isolate factors that make for success and failure.

7. To provide conceptual frameworks to assist with policy analysis, both for predicting outcomes and for advocating reform

Generalisations have potential for prediction, which is a further reason for comparative research. Often countries are selected for comparative study for their predictive value. If we find that a number of liberal democratic nation-states have been striving to forge new self-governance models that are accommodating indigenous self-determination aspirations, we can monitor them and try to reasonably predict, at least, whether similar models and strategies will be effective in New Zealand. Countries such Canada are prototypical of this type of research and comparative research provides some capacity to anticipate the future - though the control provided by this knowledge can be used for both good and not so good purposes. Comparative research thus provides conceptual frameworks to assist with policy analysis, both for predicting outcomes and for advocating reform.

Regions: Comparative Perspectives (Centre for Northern Studies, Ontario, 1993); Daes, E-I 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' in *Transnational Law and Contemporary Problems* (Vol. 3, 1993); Burger, J & Hunt, P 'Towards the International Protection of Indigenous People's Rights' in *NQHR* (Vol. 4, 1994) at 410 – 423; Pritchard, S (ed) *Indigenous Peoples, the United Nations and Human Rights* (Zed Books, Australia, 1998); Coates, K, & McHugh, P *Kōkiri Ngātahi Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998); Quentin-Baxter, A (ed.) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University of Wellington, New Zealand, 1998); and Havemann, P 'Politicising and Internationalising Indigenous Peoples' Rights Claims' in Havemann, P(ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, Auckland, 1999) at 181-186.

2.6 PROBLEMS WITH COMPARATIVE RESEARCH

Comparative researchers face an arduous task of considerable, even overwhelming complexity. They need to be explicit about their operational concepts and theoretical frameworks and to select units of comparison and contrast that are functionally equivalent.[25] Yet over-consciousness of a multiplicity of fine differences might lead to the conclusion that a valid comparison is methodologically impossible because there are just too many factors. This research adds to the rigor with which comparisons and contrasts can be made concerning contemporary indigenous Treaty settlement governance models for cultural survival and internal self-determination in New Zealand and Canada.

2.6.1 METHODOLOGY CHALLENGES

A commonly used but unsatisfactory method of trying to research the experience of other systems was comparison by juxtaposition - 'in one country we do this, in another we do that.' The result was research that often had the merits of offering careful accounts of different systems in their legal, political, historical contexts. How could we be sure that like was being compared with like? Methodological approaches to comparative research should, therefore, ensure a series of interconnected choices between the search for explanation or for other forms of understanding; emphasising similarities and differences, giving attention to the specificities of local culture or noting the effects of globalisation,[26] cultivating elegant theorising or practical knowledge.

2.6.2 METHODOLOGICAL CONSIDERATIONS

Those undertaking or using this kind of comparative research thus need to recognise:

- the need to justify all choices of units and themes and to be explicit about the focus of comparison and the standpoint of the writer;
- the historically contingent nature of events, processes and practices which take place in linked but unique historical eras of which they are both a product and a cause;
- the salience of contextual specificity, that is, the significance of unique historical, political, economic and sociological factors that combine to structure action and

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[25] See Mattei, D & Pelassy, D *How to Compare Nations: Strategies in Comparative Politics,* (Chatham House Publishers Inc., Chatham, N.J, 1990); Hague, R. Harrop, M. & Breslin, S. *Comparative Government and Politics,* (Macmillan, London, 1992).

[26] Wright, V (ed.) *Comparative Government and Politics* (3rd Ed.)(MacMillan Press, London, 1992) at 28. Globalisation and international law have significantly affected domestic law and policy development. For example, in Canada the *Indian Act* was amended in 1985 as a result of the violation of Article 27 of the International Convention on Civil and Political Rights (ICCPR). In New Zealand the *Race Relations Act 1971* and the *Human Rights Commission Act 1977* were also enacted specifically to implement the International Convention on the Elimination of Racial Discrimination (ICERD) and the ICCPR. Moreover, the preamble to the New Zealand *Bill of Rights Act 1990* states that the Act was implementing New Zealand's obligations under the ICCPR.

reaction – of which aboriginal rights jurisprudence, for example, is an outcome and an agency;

- the interdependence of internationalised discourses about Indigenous Peoples and the phenomenon that apparently similar concepts may have different meanings and significance in different jurisdictions—for example, indigenous or aboriginal rights.

Such considerations are as important when reading and using comparative research as they are when conducting it.

2.7 FRAMEWORKS OF COMPARISON

The methodology of this comparative analysis is informed by a number of conceptual frameworks that include comparing nation-states, societies and policies. An interest in the substance of public policy - in what governments do as well as how and why they do it - is vital to this research. The policy-making perspective raises such questions as why some indigenous groups seem to have more appropriate governance models than others. How do indigenous groups reconcile traditional and modernist governance values, laws, and institutions in a Treaty settlement governance context? How do indigenous communities resolve the inevitable post-Treaty settlement governance challenges and contradictions? A policy-centred approach offers several advantages in this research:

- first, it brings us to the core political/legal question of who gets what, when and how. To find out who benefits from a policy, we must look at how it is implemented and not just how it is made.
- second, the policy approach is well suited to comparative analysis. Comparing self-governance policy or representivity policy across indigenous groups is a clear, coherent brief. It can highlight cross-national and cross-cultural differences, and their causes and consequences, in an effective fashion.
- third, a policy perspective leads naturally to a concern with the implementation and effectiveness of policy. Some old approaches wrongly assumed that indigenous problems stopped once a policy and settlement had been adopted. In fact, some policies change in the process of execution - and others are hardly put into effect at all.
- fourth, comparative policy analysis offers the prospect of drawing lessons which can be used to improve the quality of public policy. A policy that succeeds in one country or with one indigenous community may be worth trying out in others; a policy that fails in one place may not be worth attempting elsewhere.

Hence, the policy-centred approach is a useful addition to the frameworks available in this comparative research.

2.7.1 COMPARING SIMILAR COUNTRIES

A binary analysis is a comparison limited to two countries that have been carefully selected depending on the subject. Binary comparison sufficiently highlights national case studies for the specificity of each to be noted, no matter what separates them and it can be used not only for increasing, through contrast, our knowledge of two different systems but can also contribute to an understanding of general phenomena. In such cases, the two countries considered are thought of as contrasted illustrations for a broad, encompassing theoretical reflection. Binary comparison is also used for countries that show contextual similarities, even if the aim is to bring out differences in one or more specific fields. In a binary comparison the two countries can be relatively similar or relatively different. If different, they can sometimes be considered prototypes of two series of countries. If they are relatively similar, the propensity of the researcher, at a certain moment, is to expand the analysis to other similar countries. Binary comparison permits a kind of detailed confrontation that is almost impossible when the analysis encompasses too many units; thus it makes possible an in-depth study,[27] which is what this research attempts to do.

2.7.2 CONTRASTING COUNTRIES

In one sense, no comparison is possible unless there are both analogies and contrasts. One does not compare identical objects; nor does one compare objects that are mutually exclusive. No two countries or communities are identical; two countries or communities always have something in common. Depending on the objective, at times comparative researchers will emphasise similarities, at times differences. They are at liberty to look for either similar or contrasting contexts but comparison will always be made at the point where the analogy cuts across the contrast. Thus, most comparisons are done between countries with similar political structures.

Contrasting comparisons are also possible between countries with differences, including forms of government, for example the United States. A comparison between contrasting countries is a comparison implying:

- that attention is fixed on situations presenting a maximum of contrasts, and
- that these contrasts are of broad significance and delineate political areas defined by systemic features.

Contrast, in this sense, implies that the situations under consideration have been chosen for their exemplarity. In this perspective, a comparison between the *Waikato Raupatu Claims*

[27] Dogan, M & Pelassy, D (2nd ed.) *How To Compare Nations: Strategies in Comparative Politics* (Chatham House, New Jersey, 1990) at 126.

Settlement 1995 and the *Alaska Native Claim Settlement Act 1971* will imply that the two situations are considered profoundly different. The differences that will be registered will emphasise elements that, in a general way, could bring into contrast settlements that are Anglo-Commonwealth or American, bicultural or assimilationist, less interventionist or paternalistic. For such a comparison to be fruitful, each unit of comparison must be representative of a type, a class or a conceptualised category. Contrasting comparison, therefore, is also possible between countries with significant differences; hence the sprinkle of indigenous self-governance models in the USA in this research, which provides further context.

2.8 SPECIFIC COMMONALITIES AND DIFFERENCES

2.8.1 COMMONALITIES AND DIFFERENCES FOR CHOICE OF UNITS

The justification for the choice of units of comparison and contrast needs to be methodologically viable for the aforementioned thematic focus. Aspects to probe include:

- commonalities
- differences
- chronologies for periodisation of landmark events and processes in terms of the thematic focus.

Selected co-ordinates for the comparison of key commonalities and specific differences,[28] to assist readers as they navigate through oceans of factual, historical and conceptual variables relating to the two settler societies, are set out in the Appendices. Commonalities and differences specific to the thematic focus and its context include attributes of Indigenous People, history of settlement and claims, homogenous versus heterogeneous cultures, imposed political economy, imposed political ecology, imposed law and politics of rights, genocide, ethnocide, post-assimilationist accommodation(s) and indigenous Treaty settlements and self-governance.

2.8.2 REASONS FOR COMPARING CANADA AND NEW ZEALAND

New Zealand and Canada are appropriate binary units for comparative research for a number of reasons including that the countries:

- share common Anglo-Commonwealth political environments;
- have a similar legal base derived from British common law;
- share a common colonial heritage;
- share a common history of settlement;

[28] See Armitage, supra, n 8, chapter 8.

- are developed welfare states;
- have a developed market economy that places a major emphasis on natural resource extraction, management, and development;
- include Indigenous Peoples who are marginalised minority groups.

2.8.3 REASONS FOR COMPARING INDIGENOUS PEOPLES WITHIN NEW ZEALAND AND CANADA

Canada is often regarded as the most advanced liberal-democracy in terms of its treatment of First Nations.[29] In many ways it is considered an exemplar. However, this admiration is far from universal, and its successes far from unqualified. Still, the Indigenous Peoples of New Zealand and Canada share similar cultural and historical parallels and experiences that provide sufficient commonalities for this comparative research such as:

- Indigenous Peoples controlled, occupied and used land and natural resources prior to European settlement;
- Indigenous Peoples were effective self-governing polities prior to newcomer settlement;
- each group experienced domination by the British Colonial power in the 1700s and 1800s as part of its grandiose plan of nation-building. This led to population declines, displacements from their lands and a substantial dissolution of political and social organisation;
- the natural environment is relevant to indigenous religions, cultures and societies in ways that are different for settler populations;
- Indigenous Peoples in both countries view themselves as having been unjustly misappropriated of their lands and natural resources and having been confined to marginal areas of society;
- each country has provided good general living standards for the settler populations that are higher than those of the general resident indigenous population. Indigenous Peoples now live in conditions (generally) much worse, by all measurable standards, than the general public in the rest of their country. They have lower life expectancies and incomes, and higher rates of unemployment, incarceration, suicide and substance abuse. Each group tends to live in poorly serviced, dispersed, economically non-viable locations;
- indigenous populations are growing faster than the national average. Each population is considerably younger than the national average. These demographics imply that each group requires a different mix of services, and faces different cost pressures than the general public;
- each group is seeking expressions of 'self-determination' and self-governance. There is renewed interest in indigenous traditions, languages, religion, ceremony and art. Each recognises it has unique forms of social organisation and wishes to develop self-governance institutions based on this uniqueness;
- Indigenous Peoples are seeking redress for past and present injustices caused by the colonisation process;

[29] Curry, S, *Indigenous Sovereignty and the Democratic Project* (Ashgate Publishing Ltd., England, 2004) at 159.

- Indigenous Peoples did not choose to live as a minority within an alien culture, while the settler groups immigrated either through choice or coercion to escape more serious difficulties in their countries of origin;
- both countries contain official laws and institutions that apply only to Indigenous Peoples;
- Indigenous Peoples are seeking to share in the prosperity of their country. They are attempting to redefine their political relationship with the rest of the country and build their land and economic base. In each country, these political and economic aspirations tend to be misunderstood and often mistrusted;
- each group is basing its political agenda on a careful interpretation of its original Treaties or understandings with the colonial power. History is also important because Aboriginal title to land still exists; and
- in both countries, Indigenous Peoples were/are in a coloniser/colonised relationship to settlers and, for long periods, had little influence on the policies that were applied to them.

These parallels are striking. Each group has suffered similar traumas to similar effect. Each indigenous group appears to have a similar goal – realising internal self-determination rights and responsibilities through reconstituting its land base and political institutions within a national government, and from this basis, building a strong culture and economy. Finally, each group faces similar obstacles:

- the geographical dispersion (urbanisation) of its population and the disintegration of its traditional territorial presence;
- a lack of political cohesion;
- a lack of economic power and relatively high service costs;
- a government regime with little experience or political willingness in dealing with the concept of indigenous self-governance although these issues have recently changed somewhat;
- mistrust and misunderstanding of these issues by the mainstream population as a whole (essentially no understanding of the historical development of the unsatisfactory state of affairs);
- a need to accommodate new self-governance arrangements within the established political framework; and
- conflict with existing service agencies and jealously guarded jurisdictional powers of other governments.

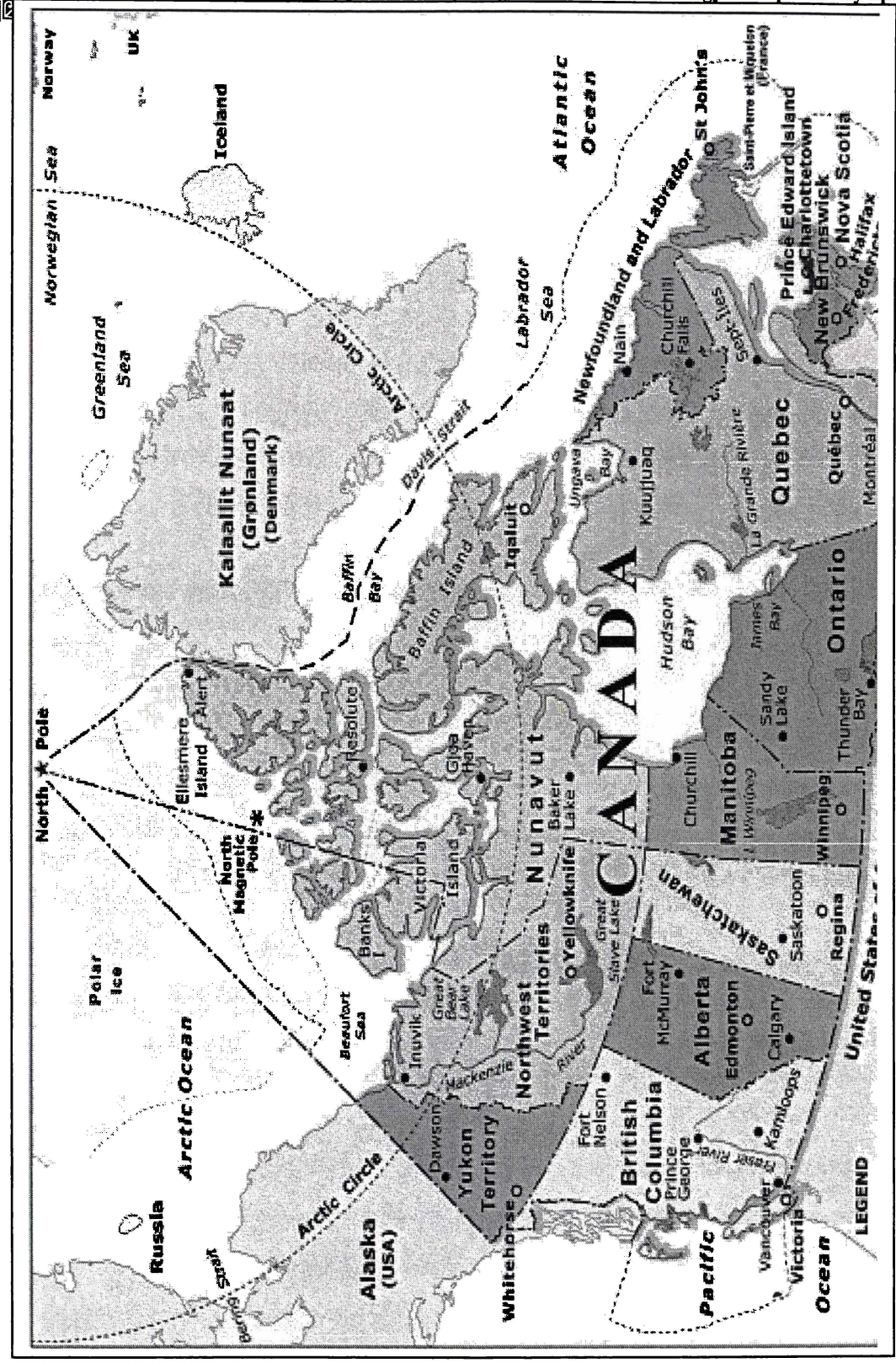

Figure 1 Canada Political Map

2.8.4 COMMONALITIES EXPLORED[30]

2.8.4.1 'INDIGENOUS PEOPLES'

In New Zealand and Canada considerable energy has been expended on both sides, indigenous and government, in reclassifying Indigenous Peoples as a distinctive social type, with a corresponding set of characteristics and powers that derive from acknowledgment of their status. Indigenous Peoples as defined by the international Working Group on Indigenous Populations make up distinct peoples constituting visible minorities in New Zealand and Canada. They were defined by their priority in time; voluntary perpetuation of their cultural distinctiveness; self-identification as indigenous; and experience of subjugation, marginalisation, dispossession, exclusion, and discrimination by the dominant society.[31]

Since the *Constitution Act 1982* the First Nations of Canada are recognised as Inuit, Indian and Métis. Ten to eleven language groups exist, with some languages spoken in various forms by several First Nations, and over forty tribes[32] and between 60–80 historically based 'nations'[33] constituting 1.5–3% of the total population. Māori is one of the two official languages of New Zealand. There are at least 36–43[34] or 58-110[35] iwi (distinct tribal groupings), each asserting various degrees of rangatiratanga (self-determination), and constituting 15-18% of the total population.[36]

2.8.4.2 HISTORY OF SETTLEMENT

Captain James Cook visited their coastlines: New Zealand 1769; and the Pacific Northwest Canada 1778. The 1837 report of the British House of Commons Select

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[30] This section has drawn heavily from Professor Paul Havemann's comparative work. See Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Oxford University Press, Auckland, 1999) at 4-10.

[31] The author is working on a forthcoming article on the concerns and challenges with defining 'Indigenous Peoples,' 'Aboriginals,' 'Indians,' and 'Māori,' both politically and legally.

[32] See M. Weaver, S *Making Canadian Indian Policy: The Hidden Agenda 1968–1970,* (University of Toronto Press, Toronto, 1981), maps 1 and 2.

[33] Royal Commission on Aboriginal Peoples, 'Governance' in *Restructuring the Relationship* (Vol 2, Minister of Supplies and Services, Ottawa, 1996) para 2.2.1

[34] The names and numbers of Māori iwi tribes have fluctuated and vary considerably from author to author. Metge and Walker, for example, cite 36 and 43 iwi tribes respectively. See Metge, J, *The Maoris of New Zealand: Rautahi,* (Routledge & Kegan Paul, London, 1967) at 129–34; and Walker, R 'The Maori People and their Political Development', in Miller, R (ed.) *New Zealand Politics in Perspective,* (Hyam Gold, 1992) at 379. But the *Maori Fisheries Act 2004* has recognised 58-60 'official' iwi tribes. Infra, chapter 10, sections 10.5-10.12.

[35] *Maori Fisheries Act 2004,* Schedule 3 records 58-60 official 'iwi' (see Appendix XVIII) while the 1996 census listed 85 iwi and the 2006 census recorded over 95 iwi. See Statistics New Zealand, *2001 Census of Population and Dwellings: Iwi* (Vol. 1, Statistics New Zealand, Wellington, 2002) at 16-21 and Statistics New Zealand, *2006 Census of Population and Dwellings: Iwi* (Statistics New Zealand, Wellington, 2006) 'List of iwi to help answer question 15.'

[36] Ibid.

Committee on Aborigines was the backdrop to humanitarian and assimilationist discourses in nineteenth-century phases of settlement.

2.8.4.3 HOMOGENEOUS VERSUS HETEROGENEOUS CULTURES

Early Anglo-Celtic Christian settlers (other than the French settling New France [present-day Quebec]) were culturally homogenous, relative both to the contemporary heterogeneity of modern migrants and to the substantial cultural diversity of the Indigenous Peoples they displaced. This also applies to Māori. Although they share a common language, each iwi has a distinct cultural and political identity and competitive relationship with other iwi. 'Māori' is a generic term for the tangata whenua (people of the land) deployed in settler discourse.

2.8.4.4 IMPOSED POLITICAL ECONOMY

British econo-political/population management requirements justified settlement, in the eighteenth and nineteenth centuries in the form of racialised nation building. The capitalist mode of production, focused on profit and predicated on growth, was imposed on subsistence indigenous kin-based modes of production for use and barter. The globalisation or internationalisation of economic relations through, inter alia, NAFTA, GATT, and the Kyoto Protocol increasingly challenge the capacity of national governments to honour obligations to Indigenous Peoples concerning land and access to resources by quarantining them from the open market.

2.8.4.5 POLITICAL ECOLOGY[37]

Despite their cultural heterogeneity, Indigenous Peoples share an approach to political ecology based on sustainability and a spiritual relationship between human beings and nature. Eco-indigeneity reflecting this holistic approach has been in continuous collision with the capitalist, anthropocentric approach of settlers. To avoid economic marginalisation, indigenous cultures face the invidious choice of sacrificing sustainability as one of their most salient distinguishing characteristics, in order to embrace growth for profit.

2.8.4.6 IMPOSED LAW AND THE POLITICS OF RIGHTS

The English common law, Westminster model of majoritarian representative democratic government, rule of law, and British assumptions about constitutionalism and citizenship for the settler polity, are all imposed. Indigenous rights are constructed as a *sui*

[37] See generally Howitt, R, Connell, J & Hirsch, P (eds.,) *Resources, Nations and Indigenous Peoples: Case Studies from Australasia, Melanesia and Southeast Asia* (Oxford University Press, Melbourne, 1996).

generis category of usufructuary life-style rights and/or a municipalised version of self-management powers, rather than as sovereignty rights for nations within. Indigenous rights talk reflects the unavoidable co-optation of indigenous leadership into voicing their claims in rights, the interpretive straightjacket for their claims in the imposed political-juridical system, frequently at the expense of meaningfulness and of grass-/flax roots mobilisation and accountability. Confrontation politics takes place, based on:

- demonstrations, blockades, sit-ins and isolated actions of civil disobedience – some with great symbolic power, such as the Māori Land March in 1975 to reclaim Māori mana over the North Island, and the Mohawks' highway blockade at Oka, Quebec, in 1990; and
- endless debilitating litigation such as the *Calder*[38] and *Delgamuukw*[39] and the *New Zealand Maori Council*[40] and *Ngati Apa*[41] cases and often one-sided 'negotiated' settlement confrontations with the Crown in boardrooms, such as the Nisga'a and Nunavut; and Waikato-Tainui and Ngāi Tahu negotiations.

Treaty and aboriginal rights are increasingly commodified in the 1990s and the 21st century. Examples of this trend include the 1996 proposals to amend the *Indian Act* to allow band reserve lands to serve as collateral for individuals' loans, and 1995 proposals for a billion dollar 'fiscal envelope' for the full and final settlement of Treaty claims.

2.8.4.7 GENOCIDE AND ETHNOCIDE AND POST-ASSIMILATIONIST ACCOMMODATIONS

Pacification of Indigenous Peoples was 'regulated' by genocide, wars and low-intensity armed conflict, mass population transfers, Treaties ceding land and proclaiming friendship, paternalist segregation, ethnocidal assimilation and post-assimilationist self-government talk. Scientific racism (social Darwinism), humanitarianism and evangelical Christianity legitimated paternalism, assimilationism and discrimination against Indigenous Peoples. Indigenous Peoples are over-represented in statistics of immiseration, despite Keynesian Welfare State programmes and policies in the 1930s–1980s.

Indigenous Peoples are significantly denied the status of distinct societies with inherent aboriginal rights to land, customary laws and modes of governance within the settler polity; the identification of a collectively defined self with locality is anathema to the logic of the modern liberal individualist, private property based, settler political

[38] *Calder v Attorney-General of British Columbia* [1973] SCR 313 (SCC).
[39] *Delgamuukw v R* (1991) 79 DLR (4th) 185 (BCSC).
[40] *New Zealand Maori Council v Attorney General* [1987] 1NZLR 641.
[41] *Ngāti Apa v Attorney-General* (CA173/01, 19 June 2003).

economy.[42]

2.8.5 SOME DIFFERENCES

While there are strong parallels between Canada's First Nations and Māori and there is much to learn from indigenous experiences abroad, both situations are also unique. There are significant political, legal, historical and geographical differences between New Zealand and Canada that make some comparisons inapplicable or misleading. Both countries involve unique political and social organisations, indigenous groups exist within different political and economic contexts, and both work on the basis of different historical developments - Treaty and Aboriginal rights and legal precedents. These differences have created subtle, but powerful, differences in the political agendas and means of each group. Some key differences are.

- the mix of powers and service responsibilities among tiers of government with respect to Indigenous Peoples;
- the nature and extent of Treaty and Aboriginal rights;
- Crown policy recognises the right to self-determination in Canada as an existing Aboriginal right protected in the Constitution;[43]
- the current powers of indigenous governments;
- the scale and co-operation of Indigenous Peoples' political organisation at the national, regional and local level.

Additional important differences include geography, population, doctrines of territorial acquisition, segregation and assimilation, Indigenous People's rights regimes, citizenship and the franchise, state design and the distribution of power, bureaucracy, mono/multi/bi-culturalism.[44]

2.8.5.1 GEOGRAPHY

Canada is among one of the largest single jurisdictions in the world covering 9 220 000 sq km. New Zealand consists of three islands covering 268 000 sq km.

2.8.5.2 POPULATION

Canada is relatively sparsely populated, with Indigenous Peoples often occupying remote and rural regions. Canada's population density is 2.8 persons per square kilometre;

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[42] Dyck, N 'Aboriginal Peoples and Nation States: An Introduction to the Analytical Issues', in Dyck, N (ed) *Indigenous Peoples and the Nation State: Fourth World Politics in Canada, Australia and Norway,* (Institute of Social and Economic Research, Memorial University, Newfoundland, St. Johns, 1985) at 7.

[43] Indian and Northern Affairs Canada, 'Federal Policy Guide: Aboriginal Self-Government': http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html (Accessed 3 September 2004).

[44] This section has also drawn heavily from Havemann's comparative similarities and differences of Canada and New Zealand. See Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Oxford University Press, Auckland, 1999) at 4-10.

75.9% of the total population is urban based. Indigenous Peoples in Canada are heterogeneous in terms of language, culture and political style. The tyranny of distance has inhibited the evolution of pan-tribal groupings and political organisation until relatively recent times. New Zealand's population density is 12.3 persons per square kilometre; 84% of the total population is urban based while 80% of Māori are urbanised. Some pan-tribal political activity has occurred since contact.

2.8.5.3 DOCTRINES OF TERRITORIAL ACQUISITION

Treaties of friendship and treaties consenting to relinquish land in exchange for recognition of distinct status and rights apply to parts of Canada. A Treaty of 'cession' – the *Treaty of Waitangi 1840* - forms the formal legal basis for New Zealand sovereignty.

2.8.5.4 SEGREGATION AND ASSIMILATION

Reserves and segregation on mission lands were the lynchpins of 'aboriginal affairs' policies in Canada until the 1960s. Aboriginal, Inuit and First Nation children were routinely removed from their kin groups to missions, residential schools, or white adoptive families. Māori were never segregated formally into reserves and children were not removed from their whānau (extended family). English was imposed as a compulsory medium of instruction from the 1860s.

2.8.5.5 INDIGENOUS PEOPLES' RIGHTS

Aboriginal/indigenous rights of First Nations of Canada, including existing rights under the *Royal Proclamation of 1763*, Treaty rights, and rights under modern Treaties in the form of a comprehensive claims settlement policy, were affirmed and entrenched into the Canadian Constitution under the *Constitution Act 1982*, ss 25 and 35. Māori rights are enshrined in the *Treaty of Waitangi 1840* and recognised in statutes such as the *Treaty of Waitangi Act 1975*, although there is no entrenched constitutional recognition of Māori (indigenous rights) or of the Treaty, as such, in the unwritten constitution of New Zealand.

2.8.5.6 CITIZENSHIP AND THE FRANCHISE

Until 1967 First Nation peoples in Canada could become enfranchised to vote in Federal elections only if they forsook their status as 'Indians' under the *Indian Act.* From the signing of the Treaty of Waitangi in 1840, Māori were recognised as having the rights of British subjects. They were allocated four Māori seats in the House of Representatives in 1867; the number of voters who have chosen to enrol on the Māori electoral roll now entitles them to five seats or more.

2.8.5.7 STATE DESIGN AND THE DISTRIBUTION OF POWER

Canada is a Federal nation-state with bicameral Federal legislatures. Canada has had jurisdictional power over First Nations ('Indians and lands reserved for Indians') since Confederation in 1867. Relations between Federal and Provincial Governments have historically been a major source of friction in Indigenous Peoples' relationships with the nation-state. New Zealand is a unitary nation-state, with a unicameral legislature since 1951; central government has jurisdiction over Māori development.

2.8.5.8 BUREAUCRACY

Canada manages relations with First Nations (except the Métis, for whom it accepts no responsibility) through a central government department, Indian and Northern Affairs. Arising from the comprehensive claims policy and inherent right policy, arrangements for varying degrees of self-government have been entered into since the 1970s. New Zealand manages relations with Māori through units in 'mainstream' departments guided by policy formulated in the Ministry of Māori Development and four specialist policy commissions.

2.8.5.9 MONOCULTURALISM / MULTICULTURALISM / BICULTURALISM

Multiculturalism forms the significant plank in Canadian public policy, whereas biculturalism forms the basis of ethnic management policies in New Zealand although New Zealand is also becoming more multicultural.

Notwithstanding the above differences, New Zealand and Canada share many commonalities (also discussed above), which justify this research, even with indigenous groups as different as the people of Waikato-Tainui, Ngāi Tahu and the Nisga'a.

2.9 INDIGENOUS SETTLEMENT UNITS OF COMPARISON

Indigenous Peoples' comparative research needs to rely on logical criterion for selection of what to compare: if indigenous settlements, which ones? if post-settlement self-governance, what areas? The wider the scope of the subject in terms of polities, the less obvious or limited the choice of structures or institutions within those nation-states that require comparison of settlements. To limit the subject in advance to certain settlements and post-settlement self-governance both restricts the number and range of countries to be compared, and seems to rule out *ab initio* certain types of explanation. A failure to allow for such differential explanations in comparison could result from a type of comparative analysis where the focus is restricted in advance. [45]

[45] Roberts, G.K *What is Comparative Politics?* (MacMillan Press, London, 1972) at 8 and 9.

2.9.1 SPECIFIC INDIGENOUS SETTLEMENT UNITS OF COMPARISON

Denoon notes that one cannot choose whether or not to make comparisons - between societies or between different eras in the same society - one can only choose the items which are to be compared, and whether to proceed with more or less caution and self-consciousness. Within the comparative method, several quite distinct approaches have emerged; and here the question of choice is forced upon all social scientists, since even the refusal to choose represents a crucial choice. A number of indigenous case studies have been carefully selected from these comparable jurisdictions for analysis based on the following criteria, for practicable purposes to serve as useful components for analysis:

- individually they should demonstrate a history of settlement and/or process of settlement that would enable impacts of settlement and the post-settlement self-governance process to be observed;
- collectively they should demonstrate a variety of self-governance options, including contrasting and comparative models;
- collectively they should demonstrate a range of social and economic impacts that affect recipient individuals and communities.

Furthermore, pragmatic criteria were needed to make this research viable, including case studies with:

- reliable and available material;
- established networks ;
- Anglo-Commonwealth political environments;
- multiple peoples and tribes;
- an indigenous self-governance model;

The characteristics of settlement models should further include:

- significant natural resources,
- the existence of a resource based industry,
- a mixed sociological structure,
- a mix of rural and urban environments, and
- market driven economies.

Hence, the choice of the following indigenous units of comparison for this research:

- Maori Fisheries Settlement 1992 (MFS) – the first significant contemporary Treaty settlement that settled all Māori commercial fishing rights in New Zealand. This settlement plays a significant role in influencing and determining contemporary Māori governance models and processes hence its inclusion in this research;
- Waikato Raupatu Claims Settlement 1995 (WRCSA) - the first contemporary indigenous land settlement in New Zealand with evolving good governance, representivity and membership challenges;

- Ngāi Tahu Settlement 1998 (NTS) - the second contemporary indigenous land settlement in New Zealand with evolving and problematic governance, representivity and membership policies;
- Nisga'a Settlement Agreement 2000 (NSA), British Columbia, Canada - the first contemporary and comprehensive First Nations settlement in British Columbia that provides examples of self-governance, representivity and membership.

2.9.2 COMPARATIVE HISTORICAL PERSPECTIVES

In the field of race relations, Schermerhorn has argued for comparative studies where the societies selected have somewhat comparable histories. Thus, eight appendices follow, namely with comparable histories of New Zealand and Canada and the settlement histories of the *Maori Commercial Fisheries Settlement 1992*, the *Waikato Raupatu Claims Settlement 1995*, the *Ngai Tahu Settlement 1998* the *James Bay and Northern Quebec Agreement 1975*, the *Nunavut Land Claims Settlement Agreement 1993*, and the *Nisga'a Settlement 2000*:

- Appendix VII: Indigenous Rights in the Political Jurisprudence of Canada;
- Appendix VIII: Indigenous Rights in the Political Jurisprudence of New Zealand;
- Appendix IX: Settlement History of the James Bay and Northern Quebec Agreement 1975;
- Appendix X: Settlement History of the Maori Commercial Fisheries Settlement 1992;
- Appendix XI: Settlement History of the Waikato Raupatu Claims Settlement 1995;
- Appendix XII: Settlement History of the Ngai Tahu Settlement 1998;
- Appendix XIII: Settlement History of the Nisga'a Settlement 2000, and
- Appendix XIV: Tables on Socio-Economic Differences Between Indigenous Groups in Canada, New Zealand, U.S.A. and Australia

The brief chronologies of political and legal events contained in these appendices are intended to assist readers to identify the evolving recognition of indigenous self-governance rights in Canada and New Zealand.[46]

It has, moreover, been important to contrast other indigenous settlement self-governance models to provide further context for this research, such as:

- *Alaska Native Claims Settlement 1971*, Alaska, USA - the first contemporary indigenous settlement in the United States, with interesting governance models that 'corporatise' the Indigenous Peoples with significant effects on cultural survival;
- *Inuvialuit Settlement Agreement 1984* - North West Territories, Canada - a contemporary First Nations settlement that provides good indigenous governance options;
- *Sechelt First Nation Self-Government 1986* – new British Columbia self-governance model;

[46] See Morse, B (ed.), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, (*Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Carleton University Press, Ottawa, 1989), both for the idea of the chronology and for information contained in his Chronology of Key Events at xxxix.

- *Vuntut Gwich'in Agreement 1992* – Yukon self-governance model;
- *Nunavut Land Claims Agreement 1993* – public government model in remote North-eastern Canada

2.10 OUTCOME

Given the relative similarities in Canada and New Zealand concerning Indigenous Peoples' rights discourse and internal self-determination, efforts to find lasting and viable solutions to indigenous land claims, internal self-determination rights and responsibilities, self-governance and representation, should, therefore, commence with a greater understanding of comparative dimensions and perspectives. The value of looking at other countries rests in the prospect that New Zealand stands to learn much from the experience of other Indigenous Peoples. Moreover, the New Zealand context is an auspicious indigenous situation globally given what Māori have achieved and how the nation-state has addressed and is continuing to address Māori Treaty rights and self-governance. Hence, in an international context, indigenous Treaty settlement self-governance in New Zealand also contributes to the international discourse of internal self-determination and self-government, which could assist other Indigenous Peoples to find lasting viable solutions hence other Indigenous Peoples may stand to learn from the experiences of Māori tribes. This thesis, therefore, aims to provide an academic analysis of indigenous self-governance and representation models and internal self-determination options in a post-Treaty settlement context by contributing to the understanding of general and specific self-governance and representation challenges, questions and insights into the way contradictions and complexities have been managed, confronted, ignored or even side-stepped by both the nation-state and indigenous communities within the liberal democratic nation-states of Canada and New Zealand.

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Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.
-Article 31, Draft Declaration on the Rights of Indigenous Peoples.[1]

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.
- Article 3, ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

3.1 INDIGENOUS & HUMAN RIGHTS TO SELF-DETERMINATION INTRODUCTION

The United Nations declared the decade from 1995 to 2005 to be the 'International Decade of Indigenous Peoples', which acknowledges that Indigenous Peoples globally share in a common struggle for the recognition and realisation of their rights. These indigenous rights include the right to self-determination through self-government and the right to representation through their own governance institutions. In international law, the status of indigenous self-governance exists in the field of human rights and is seen as an integral aspect of the wider human right of self-determination. No consideration of the current legal status of indigenous self-government would be complete without discussing the standing of this human right at international law.

The notion of a 'right' has a long history and is basic to any legal system.[2] All rights are legal interests but not all legal interests are rights. A 'right' appears to mean that one person has an affirmative claim against another. The other person thus has a legal duty

[11] The author has referred to the 2004 version of the Draft Declaration on the Rights of Indigenous Peoples throughout this thesis (refer to Appendix V). At the time of the final thesis being bound, the more recent 2006 version was available which has many differences in words, Article content and length. The 2006 version is included in Appendix V for readers to review. Infra chapter 4.

[2] *Human Rights and Responsibilities in Britain and Ireland* (Bailey, ed, 1988) at 12. For good references on the notion of 'rights,' see Hohfeld, W, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, New Haven, Conn; London, 1964); Finnis, J, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980); MacCormick, N, *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, Oxford, 1982); Campbell, T, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (Routledge & Kegan Paul, London, 1983); Waldron, J, *Theories of Rights* (Oxford University Press, Oxford, 1984); White, A, *Rights* (Clarendon Press, Oxford, 1984); Dworkin, R, *Taking Rights Seriously* (Belknap Press, Cambridge, Mass; London, 1986); Simmonds, N, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, London, 1986); and Sumner, L, *The Moral Foundation of Rights* (Clarendon Press, Oxford, 1989).

to respect that right. Hence concepts of right and duty seem to go hand in hand. When people assert that they have a right, it means that they are confirming that they have a legal interest in an object, such as land. But whether or not someone else can change the nature of that legal interest depends on the powers and the immunities associated with that object. Powers are created by statute and involve the ability to change the nature of the interest. Anyone who tries to deny another's interest in an object but does not have the power to do so can be accused of acting *ultra vires* – beyond the scope of the powers granted them by law. Human and indigenous rights are legal interests that people and even nation-states have a legal duty to respect.

Rights or legal entitlements may arise from contractual or other arrangements but human and indigenous rights have different status. The distinctive feature of human rights is that they are held to belong to individuals because they are human beings, regardless of status, nationality, race, religion, gender and so on. Indeed, Kofi Annan, Secretary-General of the UN, declared: 'there can be no global justice unless the worst of crimes, crimes against humanity, are subject to the law.'[3] Human rights are widely believed to exist whether or not there are laws to implement them.[4] Indeed, some human rights advocates claim that fundamental human rights should take precedence over any inconsistent laws promulgated by the nation-state.

Historically, the rights of Indigenous Peoples have been disregarded and ignored. International law has persistently, since the Middle Ages, viewed Indigenous Peoples as *objects* with no rights (including human rights).[5] Therefore, their rights need to be specifically recognised, affirmed and guaranteed as has been done with other groups. Consequently, and in recognition of Indigenous Peoples' indigeneity and status as first citizens, they have become distinct *subjects* of international law. Indigenous Peoples are entitled to the human rights available to all Peoples. A number of other rights often discussed in the context of Indigenous Peoples including the right to cultural expression, the right to benefit from scientific advances, and the right to speak one's own language, are universal rights to which all Peoples, both indigenous and non-indigenous, are entitled.

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[3] Quote taken from the main page of the International Criminal Court website, www.un.org/icc/main.htm. (Accessed 21 July 2005). Related themes are echoed by many human rights organisations. See for example, the Human Rights Osaka *Focus* (Volume 27, March 2002), 'Human Rights Accountability', www.hurights.organisationjp/asia-pacific/latest/01editorial.htm. (Accessed 10 July 2005).

[4] In this context, note the remark by Cooke P: 'Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them.' *Ministry of Transport v Noort* [1992] 3 NZLR 260, at 270.

[5] For good reference on the objectification of Indigenous Peoples through international law during the European Middle Ages, see Falcowski, J *Indian Law, Race Law: A Five Hundred Year History* (Praeger, New York, 1992); Williams, R, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, Oxford, 1990) and Venne, S, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Theytus Books Ltd, British Columbia, 1998).

International law also recognises certain rights that are specific to Indigenous Peoples, such as the right to be consulted about decisions that affect them and the right to a remedy if Treaties made with colonising powers are breached.[6]

'Indigenous' rights, however, are founded on what Bertrand Russell called a 'singular context,' in this case as *tangata whenua* - as people of the land and by virtue of a group's indigeneity. For Māori, the *Treaty of Waitangi* recognised and reaffirmed the right of Māori to self-determination - it did not create rights. Indigenous rights are inherent in indigenous values, laws and institutions, and in concepts such as *tino rangatiratanga* and *tangata whenua* to Māori in Aotearoa (New Zealand); and *kaienerekowa* and *Onkwehonwe* to the Iroquois Six Nations in 'Great Turtle Island' (North America). What makes indigenous rights specific is the fact that the philosophical grounds from which they have arisen, and the means by which they can be pursued, are not those of international law but those of the law and culture of the Indigenous Peoples themselves. Fundamental to these rights is the right of Indigenous Peoples to self-determination - to govern themselves.

Hence, the question of rights is essentially one of definition and it reflects the statement of the philosopher Virgil that 'rights arise in the mind of man when a need is recognised.'[7] Thus most 'rights' in the Western world have arisen when people have recognised a particular abuse, slavery for example, and have been seen to provide protection from it. In the post-colonial era, this process has been extended, but the mind from which definitions have sprung has remained bound by its own 'particular view of the world, and by its own particular interests in relation to other people.'[8]

In this sense the rights recognised by the Western jurists have been largely individuated, such as freedom from torture, and they have not affected the hegemony of Western or colonising nation-states in relation to Indigenous Peoples. There has been little recognition of collective rights, such as an indigenous group's right to authentic self-government, since they clearly challenge that dominance and hegemony in a political, social and economic sense. In the ILO Conventions there are 'imperial definitions' of indigenous rights and the interests of Indigenous Peoples are constantly regarded as being subordinate to, and dependent upon, the interests of the colonising nation-state. Their rights are defined as arising in relation to, rather than independent of, their often minority place within the nation-state. The Western definition of indigenous rights, therefore,

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[6] Human Rights Commission, *Human Rights & the Treaty of Waitangi: Te Mana o Waitangi* (Draft Discussion Document of the Human Rights Commission, Wellington, July 2003) at 8.
[7] Cited in Jackson, M 'The Crown, the Treaty, and the Usurpation of Maori Rights' in Aotearoa/New Zealand and Human Rights in the Asia/Pacific' (Policy Conference, May 1989) at 17.
[8] Idem.

merely maintains the status quo – the authority and power of those who do the defining. In effect, it says that Indigenous Peoples possess those individual rights, which recognise that they are born free and equal in dignity, but they do not possess the collective right of self-determination, which recognises that they are free and equal to govern themselves. Yet such a right clearly exists and has validity independent of international and domestic law. It is inherent in Indigenous Peoples' laws and institutions to govern themselves. But most international conventions on human rights fail specifically to recognise or describe such rights. Others, such as the ILO Conventions and perhaps even the *Draft Declaration on the Rights of Indigenous Peoples*, define the rights as being a subset within and, therefore, inferior to other internationally recognised human rights.

Thus, from the outset, the *right* to self-determination is a political rather than legal term. It is often used interchangeably with self-government, especially in Canada. The author regards good indigenous governance, indigenous development as freedom[9] and a robust and sustainable indigenous economy as being essential to Indigenous Peoples' self-determination and the exercise of a measure of real control over the relationship between Indigenous Peoples and the non-indigenous governments and governance institutions of the global, national and local economy. One must not, however, neglect the other equally important lynchpins of indigenous self-determination and self-government – cultural and social development and enhancement. Self-determination is the ultimate expression of cultural survival and without it assimilation is inevitable. As Williams opined:

> Self-determination must provide the conceptual and moral underpinning for Maori policy, and for constitutional and legal development, because if it does not, all we are doing is nibbling around the edges of the real issue. All we are doing is delaying the inevitable outcome ... assimilation.[10]

3.1.1 SELF-DETERMINATION RIGHTS

Hannum noted that it is debateable whether the right of self-determination is *jus cogens* but self-determination has undoubtedly attained the status of a 'right' in international law.[11] The right of all peoples to self-determination is fundamental to international law and is often invoked by Indigenous Peoples in their calls for greater

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[9] 'Development as freedom' as espoused by Indian economist Amartya Sen is a development that brings with it the freedom to individuals and peoples to develop their capabilities, including the capability to be themselves. Sen, A, *Development as Freedom* (Knopf, New York, 2000).

[10] Williams, J 'A Summing Up' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 191.

[11] Hannum, H 'Rethinking Self-determination' in *Virginia Journal of International Law* (Vol. 34, 1993) at 8. On self-determination being a human right, see Thornberry, P 'The Democratic or International Law of Self-determination with Some Remarks on Federalism' in Tomuschat, I (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993) at 111.

recognition by nation-states to govern themselves. Nation-states, such as Canada and New Zealand, have traditionally rejected any suggestion that the international legal right of self-determination is applicable to Indigenous Peoples *within* nation-states.[12] This position is, however, changing. Nation-states have recognised that the *principle* of self-determination can and does apply to Indigenous Peoples and there are an increasing number of international indigenous rights reflecting the norms of self-determination, including the human right to development and good governance. The main aim of human rights, whatever form of government prevails in any particular nation-state, is to protect the dignity of human beings no matter what their status or condition in life. Not only must human beings be protected from abuses of power by the organs of the nation-state but the nation-state is also obliged to organise society in a way that provides all individuals and people with the conditions and necessities of life to enable them to develop to their maximum potential as individuals and collectivities.

3.1.1.1 SELF-DETERMINATION - ELUSIVE CONCEPT

Stavenhagen provided a potent but amorphous definition of self-determination that, like many other international (and even national norms), is general and ambiguous:

> It does not help matters that 'self-determination' means different things to different persons. It is, as one international lawyer asserts, 'one of those unexceptionable goals that can be neither defined nor opposed.' Is it then, a goal, an aspiration, an objective? Or is it a principle, a right? And if the latter, is it only a moral and political right, or is it a legal right? It is enforceable? Should it be enforceable? Or is it none of these, or all of these at the same time, and more? ... Self-determination has become, indeed is, a social and political fact in the contemporary world, which we are challenged to understand and master for what it is, an *idée-force* of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that may also be expressed, in one of its many guises, as a legal right in international law. Whereas for some the 'self' in self-determination can only be a singular, individual human being for others the right of collective self-determination, that is, the claim of a group of people to choose the form of government under which they will live, must be treated as a myth in the Levi-Straussian sense (that is, as a blueprint for living); not as an enforceable or enforced legal, political or moral right.[13]

There is no precise definition of what is meant by self-determination in New Zealand and Canada but it is a fact of modern-day life that more and more peoples globally are seeking greater freedom and choice in their own lives and the governance of their own

[12] Iorns, CJ 'International Standards and State Obligations Concerning Indigenous Peoples' Self-Determination and Cultural Survival' (Unpublished Paper for Te Mātāhauariki Institute, Laws and Institutions for a Bicultural Aotearoa/New Zealand, University of Waikato Programme, 1998) at 1.

[13] Stavenhagen, R 'Self-Determination: Right or Demon?' in *Law and Society Trust* (Vol IV, Issue No. 67, November 1993) at 12.

affairs.[14] This is particularly so for Indigenous Peoples in New Zealand and Canada who, through processes of colonialism and imperialism, have been exploited, dispossessed, marginalised, inferiorised and pauperised within the lands they have occupied for centuries, perhaps millennia.

Self-government, mana motuhake and tino rangatiratanga have been used synonymously with self-determination in New Zealand but none of these terms are precise. Coxon defined self-determination by referring to tino rangatiratanga as 'the relative control that a group has over its operations and the decision-making process. Being able to 'name the world.'[15] Solomon declared that self-determination conveys the right to greater Māori freedom and control within the political, legal, social and economic decision-making structures of the country from 'Parliament right down to the local body or tribal levels.'[16] He also held that self-determination conveys:

> ... the right for Maori to exercise greater control and self-governance over their own affairs, doing so in a manner that recognises and incorporates their own customs and laws to suit the circumstances of today.17

Alan Ward referred to tino rangatiratanga as tending towards 'self-determination' and 'autonomy.' Ward reached this conclusion when he held:

> On the basis of the Crown's actions being most deliberate and hurtful of most people, the most important issue is the loss of rangatiratanga, or legitimate scope for autonomous Maori action. This has two major aspects:
>
> i) the loss of resources which underpin autonomy and self-determination at the individual and tribal level; and
>
> ii) the exclusion of Maori from the decision-making institutions that affect their lives and resources.
>
> The establishment or re-establishment of mechanisms of consultation and empowerment will be as important as the restoration of a resource base.[18]

The Waitangi Tribunal explained the guarantee of Māori tino rangatiratanga:

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[14] Solomon, M 'The Context for Maori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 76.

[15] Coxon, E, Jenkins, K, Ka'ai, T, Marshall, J & Massey, L *The Politics of Learning and Teaching in Aotearoa New Zealand.* (Dunmore Press, Palmerston North, 1994) at 167-8. Coxon appeared to be referring to Friere : Friere, P *Pedagogy of the Oppressed* (Penguin Education, Baltimore, 1972).

[16] Supra, n. 14 (Solomon) at 63.

[17] Idem.

[18] Waitangi Tribunal, *Rangahaua Whanui Series: National Overview* (GP Publications, Wellington, 1997) at 34 – 38.

> 'Tino rangatiratanga o ratou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority of control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but [over] persons within the kinship group and their access to tribal resources.[19]

Hence Article II of the Treaty of Waitangi highlights that the right of Māori governance flows from the undertaking to preserve for Māori the Māori way of life as 'confirmed' by the recognition that Māori retained the authority – tino rangatiratanga – they had always had over their own affairs to govern themselves.[20] The Waitangi Tribunal further noted:

> Maori autonomy is pivotal to the Treaty and to the partnership concepts it entails. Its more particular recognition is Article 2 of the Maori text. In our view, it is also the inherent right of the peoples in their native territories. Further, it is the fundamental issue in the Taranaki claims and appears to be the issue most central to the affairs of colonised indigenes throughout the world.

> The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as First Peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori words are 'tino rangatiratanga,' as used in the Treaty, and 'mana motuhake' as used in the 1860s.[21]

The Treaty of Waitangi has been referred to as a statement of principle.[22] The *principle* of self-determination concerns the right to determine one's destiny. Indeed, Ronan opined that 'individual self-determination, to rule one's self, to control one's life, is a basic given of human existence.'[23] While the concept is broad and encompasses more than aspects of government, historically the principle and right of self-determination have emerged in the context of debate over the form and character of government. Hence, each of these terms is a highly contested evolving concept and will mean different things to different people depending on numerous factors but with power sharing as a salient point. In the author's view, these concepts certainly go beyond the recognition of indigenous customary laws and institutions within the nation-state. The central issue of this persistent

[19] Waitangi Tribunal, *Muriwhenua Fishing Report* (GP Publications, Wellington, 1989) at 179 - 181
[20] Henare, D 'A Case Study' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 112.
[21] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (GP Publications, Wellington, 1996) at 5.
[22] Durie, E 'Self-determination' in *The Position of Indigenous People in National Constitutions: Speeches from the Conference* (Canberra, 4-5 June 1993) at 69.
[23] Ronan, D *The Quest for Self-Determination* (Yale University Press, New Haven, 1975) at 55.

colonial relationship of domination and subjugation, from the perspective of some Indigenous Peoples, is the recognition of the human right to self-determination through self-government, which ought to be, as a minimum, the power and authority of Indigenous Peoples to govern themselves.

3.1.1.2 DEVELOPMENT OF HUMAN RIGHTS

While the term 'human rights' is relatively recent, the underlying concept has a long history. Respect for the dignity of people can be identified in the religious and philosophical traditions of Judaism, Islam, Christianity, Buddhism, Taoism and Hinduism and also in many indigenous cultures. Confucius emphasised the importance of individual dignity and the necessity of the state to tolerate the freedom of expression of all its citizens.

In the Western tradition, ideas of human rights can be traced back to the Greek philosophers Aristotle, Socrates and Plato who were concerned with the position of the individual in relation to the functioning of civil society. All believed to some degree that a higher good existed against which all human conduct could be measured and their writings laid the foundation for the development of the notions of natural and immutable laws which form part of Roman law. They understood that certain rights and obligations attached to individuals because they were human but these rights and duties were confined to only some classes of people as they have been in modern Western history. Still, from these origins the concept has evolved and extended to more categories of 'people.'

Cicero, Gaius and Justinian argued that there were laws which, by virtue of universal reason, were applicable to all people. These ideas of natural law subsequently assumed a theological dimension when early Christian philosophers, such as St Augustine and St Thomas Aquinas, maintained that natural law was that part of God's law which could be discovered through the application of human reason. Man-made laws could thus be tested against natural law and, if found wanting, could be regarded as unjust, illegitimate and void. People were not, therefore, obliged to obey laws that offended against the natural law.

The development of human rights, as the term is known today, originated within the context of the nation-state as people attempted to impose legal restraints upon the power of the rulers to govern.[24] Among the first domestic documents referred to as a human rights instrument is the *Magna Carta* in 1215. His nobles forced this law on King John of England and it contains principles concerning the right to due process through a fair trial

[24] For a good discussion of these human rights issues specific to New Zealand, see New Zealand, *New Zealand Handbook of International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 1998).

and is still evident in modern human rights instruments. Among the many themes of natural law is the idea that all human beings are endowed with unique identity, an idea which Christianity emphasised and continues to emphasise with the tenet that the human being is important in the sight of God. After the Renaissance, secular scholars severed the theistic element from natural law. Hence, major developments in the domestic protection of human rights occurred during the 17th and 18th centuries with the emergence of revolutionary democracy in England, America and France. John Locke argued that all individuals were endowed by nature with the inherent rights to life, liberty and property and his natural rights theory exercised a profound influence over political thinking on the *American Declaration of Independence 1776* and the *French Declaration of the Rights of Man and of Citizens 1790.*

The English 'Glorious Revolution' of 1688 and the *Bill of Rights 1689* that confirmed the subsequent constitutional settlement of 1689 placed the Crown under the authority of Parliament and gave voice to concerns which would today be placed within the category of human rights. These included the requirements that neither excessive bail be required nor excessive fines imposed, nor cruel and unusual punishment inflicted and that jurors ought to be duly empanelled and returned. Even today the *Bill of Rights 1689* is referred to in human rights litigation.[25]

While the English Revolution had been concerned with bringing monarchical absolutism under Parliamentary control, over 100 years later the American Revolution aimed at severing colonial rule. In today's human rights language, this might be an exercise of self-determination by which American colonies reconstituted themselves as independent nation-states. The *Declaration of Independence 1776* was inspired by theories of the social contract and natural rights in its espousal of the equality of all people and their possession of 'inalienable rights' when it stated:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness ...[26]

The *Bill of Rights 1791* substantiated these views by describing rights that are constitutionally protected by the United States of America. It consists, in fact, of a number of constitutional amendments that are well known outside of the United States itself. These

[25] See for example, *Fitzgerald v Muldoon* (1976) 2 NZLR 616 at 617 per Sir Richard Wild CJ and *Ministry of Transport v Noort* [1992] 3 NZLR 260, at 277 per Cooke P.

[26] The American Declaration of Independence and Constitution 1776 (including the Bill of Rights) are conveniently set out in Foner, E & Garraty, J (eds) *The Reader's .Companion to American History* (Houghton-Miflin, Boston, 1991) at 1189.

include the First Amendment which protects freedom of religion, freedom of the press, freedom of expression and the right of assembly and the Fifth Amendment which establishes the privilege against self-incrimination and due process of law.

Inspired by the American experience, the French revolutionaries demolished an autocratic system of government and tried to establish a more democratic order. The French Revolution of 1789 represents another variation on the theme of revolutionary democracy. Here, the revolutionaries overthrew the absolutist monarchy and replaced it with representative government. Again, the French Revolution was influenced by the ideas of the social contract and natural rights. The rights protected by the post-revolutionary settlement were contained in the *Declaration of the Rights of Man and the Citizen 1789*, which refers to man's 'natural and imprescriptible rights' such as freedom of opinion, the right to property, the presumption of innocence and a number of other fundamental freedoms. The Declaration clearly is a libertarian document which affirms that liberty is being able to do anything that does not harm others, thus the exercise of the natural rights of every man has no bounds other than those that ensure other members of society enjoy these same rights. The fact that the French revolutionary government subsequently violated these rights during the Terror serves as a useful reminder that the statement of human rights in a constitutional document does not guarantee their application in the hearts and attitudes of people.

Clearly, the *American Declaration of Independence*, the United States *Bill of Rights*, and *French Declaration* bear some of the features of modern human rights documents. Their tone and content foreshadow the *Universal Declaration of Human Rights* adopted almost 200 years later. Indeed, the contours of the Canadian *Constitution Act and Charter of Fundamental Rights and Freedoms 1982* and the *New Zealand Bill of Rights Act 1990* are both seen in these documents of the 18th century.

The domestic development of human rights did not cease with the emergence of Western constitutional democracy. What are now referred to as civil and political rights had their origins in the constitutional revolutions which shaped the mechanisms of governance of these western states. Various other nation-states adopted their own bills of rights as they became independent from their colonial rulers or revolutionised their systems of governance. Developments in the early 20th century began to demonstrate concern not just with civil and political rights but also with economic, social and cultural rights. Mexico was the first nation-state to incorporate protection of such rights into their constitution but with the Russian Revolution of 1917 and its aftermath, economic, social and cultural rights began to assume greater importance.

Before World War II, neither the international community nor international law was much concerned with the question of human rights in any systematic way. The *Treaty of Westphalia 1684* illustrated concern with the question of freedom of religion, and number of Treaties during the 19th and 20th centuries dealt with the abolition of slavery. These were the *Treaty of Washington 1862*, the *Brussels Conferences 1867* and 1890 and the *Berlin Conference 1885*. A number of Treaties were also adopted to deal with the protection of individuals during times of armed conflict, especially the *Geneva Conventions of 1864* and 1906 and *The Hague Conventions of 1899* and 1907. The creation of what became known as the International Committee of the Red Cross as the body to supervise the implementation of the *Geneva Convention 1864* may be seen as the first international institution having a human rights dimension.

After World War I, further Treaties were adopted under the auspices of the League of Nations, the predecessor of the present UN, to protect ethnic, religious and linguistic minorities. Generally speaking, they provided minorities with equality before the law, freedom of religion and the right to maintain their own educational establishments. Minorities could thus bring alleged violations before the League of Nations, commencing a process which, very occasionally, led to the Permanent Court of International Justice. But the obligations assumed under the various peace Treaties dwindled with the failure of the League itself. The 'Native Inhabitants' clause in the Covenant of the League of Nations was also devised as a means to protect the proposed right of self-determination for Indigenous Peoples.

The International Labour Organisation's (ILO) role in the evolution of international human rights must not be overlooked. The creation of the ILO under the *Treaty of Versailles 1919* marked the emergence of precursors of economic, social and cultural rights on the world stage, given the ILO's broad concern with social justice, including regulation of the hours of work, the provision of adequate wages, social security and the prevention of unemployment. Although the ILO's constitution eschews the term 'human rights' it in effect confirms economic, social and cultural rights at the international level.[27]

During this same period, President Woodrow Wilson of the United States popularised the term self-determination and laid the foundations for the modern international legal right, particularly given his focus on a right to democratic government. Wilson, however,

[27] For a good succinct summary of international human rights law in New Zealand, see Hunt, P & Bedggood, M 'The International Dimension of Human Rights Law in New Zealand' in *Rights and Freedoms: International Human Rights Law* (New Zealand, 1999) at 37 – 69.

preferred the term self-government to self-determination[28] and he prophetically stated in 1918:

> National aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril. ... All well-defined aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.[29]

Wilson also promoted the concept of 'internal' self-determination – "the conviction that the only legitimate basis for government is the consent of the governed,"[30] which provided the ultimate justification for decolonisation. Wilson added that 'self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of democratic entitlement.'[31]

The real impetus, however, for the development of international human rights law, including self-determination, came with World War II. The various totalitarian regimes which came to power in the 1920s and 1930s adopted practices that led to the gross violation of human rights and the denial of life and freedom to millions of people. Testimonies and images of the victims of Nazi and other regimes' policies of genocide and extermination provided the moral impetus to place human rights at the forefront of the post-war settlement. It was against this backdrop that the *United Nations Declaration of Human Rights* was adopted in 1948.

3.1.1.3 UNITED NATIONS, HUMAN RIGHTS AND SELF-DETERMINATION INSTRUMENTS

Towards the end of World War II the United States, the United Kingdom, the Soviet Union and China released the proposals they had drafted for the establishment of a United Nations Organisation but the original proposals did not include any substantial material on human rights.[32] The rights of nation-states took precedence over individual's rights in this draft and the issue of colonial possessions was not raised. New Zealand was among an outspoken group of nation-states that called for stronger language on human rights based not only on the moral necessity of protecting such rights but on a widely held

[28] See Whelan, A 'Wilsonian Self-determination and the Versailles Settlement' in *ICLQ* (Vol. 43, 1999) at 100.
[29] Supra, n. 11 (Hannum) at 3.
[30] Idem.
[31] Idem.
[32] This proposal was collectively known as the Dumbarton Oaks Draft.

conviction that a regime which did not protect human rights, such as Nazi Germany, was likely to lead to international instability. There was also a resistance to domination by a small group of powerful nation-states and a desire for a representative organisation that reflected the diverse range of member countries. In his opening statement at the San Francisco Conference in 1945, the New Zealand Prime Minister, Peter Fraser, declared:

> Unless in the future we have the moral rectitude and determination to stand by our engagements and our principles then the procedures laid down in this new Organisation will avail us nothing; the suffering and the sacrifices our peoples have endured will avail us nothing; and the countless lives of those who have died in this struggle for security and freedom will have been sacrificed in vain. This is a moment in time, which will not recur in our lives, and it may never recur again. The world may well be bound for all time by what we, who are here today, make of our heavy and onerous responsibility here and now. It is my deep fear that if this fleeting moment is not captured the world will again relapse into another period of disillusionment, despair and doom. This must not happen.[33]

The final version of the *United Nations Charter* (the Charter) amplified this sentiment, opening with the words, 'We the peoples of the United Nations ... reaffirm faith in fundamental human rights.' No nation-state voted against the adoption of the Declaration although a handful abstained.[34] The Charter obligates nation-states to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.[35] In relation to specific international human rights instruments, t is clear that self-determination has undergone significant evolution, since the principle was expressly referred to in the Charter.[36] Article 1 provided in part:

> The Purposes of the United Nations are: ... 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other measures to strengthen world peace.

However, the Charter did not explain what was meant by the term 'human rights' and more importantly, at the time of its adoption, it was intended that the UN Charter recognise a right to self-determination in limited circumstances. Specifically, self-determination was to

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[33] Supra, n. 24 at 15.

[34] The abstaining nation-states were South Africa, Saudi Arabia and the socialist bloc of the USSR, Ukraine, Byelorussia, Czechoslovakia, Poland and Yugoslavia.

[35] *Charter of the United Nations,* Art 1, para. 2

[36] *Charter of the United Nations,* Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993. Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945. Signed by Canada on June 26, 1945 and ratified on November 9, 1945. The Charter was signed and ratified by New Zealand that same year. For an article-by-article commentary on the Charter, see Cot, J. -P. & Pellet, A. (eds.), *The Charter of the United Nations* (Éditions Economica, Paris, 1985).

be expressly recognised for those colonised peoples in the Non-Self-Governing Territories[37] and Trust Territories referred to in the Charter.[38]

The real breakthrough for international human rights came in 1948 when the UN adopted the *Universal Declaration of Human Rights* (sometimes referred to as the International Bill of Rights), which outlined the human rights and fundamental freedoms to which all individuals are entitled. The *Universal Declaration* is often referred to as the touchstone of human rights in the modern world and can certainly be regarded as an authoritative interpretation of the references to human rights in the UN Charter. The *Declaration* includes what the Charter omits – it sets out in some detail the meaning of the Charter's phrase 'human rights and fundamental freedoms' by enumerating classic civil, political, social, cultural and economic rights. The text of the *Declaration* has great moral force and has had a profound influence on the world. One of its architects, Eleanor Roosevelt, suggested the *Declaration* might become 'the Magna Carta of all mankind.'[39] Many of its provisions have since become accepted as binding in international law.

In 1960, the *Declaration on Independence to Colonial Peoples*[40] addressed specifically the issue of colonisation and self-determination with the unanimous adoption of Resolution 1514 (XV). Para. 2 of the 1960 Declaration provided:

> All 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.

However, it is generally viewed that the 1960 Declaration was not intended to extend to peoples in independent states. The 1960 Declaration only refers specifically to taking immediate steps in 'Trust and Non-Self-Governing Territories or any other territories which have not yet attained independence.'[41] Belgium unsuccessfully maintained that since all native (indigenous) peoples with a 'backward culture' were protected under the post-World War I League of Nations, they should have been protected under the UN.

Human rights protecting minorities and individuals against discrimination within nation-states were developed with the adoption of the United Nations Declaration in 1963 and the *Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) in

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[37] Hannum, supra, n. 11 at 40, where it was noted that 105 territories have been designated by the U.N. General Assembly as non-self-governing and that 18 remained in that category as of late 1993.
[38] Articles 73 & 76. Infra, chapter 4, section 4.1.3.2. and the accompanying text on the Belgian Thesis.
[39] U.N. General Assembly, 3rd Session, 180th Plenary Meeting (1948) at 862.
[40] *Declaration on the Granting of Independence to Colonial Countries and Peoples,* U.N.G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684, adopted on 14 December 1960.
[41] Para. 5.

1965.[42] In 1966, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[43] and the *International Covenant on Civil and Political Rights* (ICCPR)[44] both provided in identical terms for the right to self-determination as a human right.[45] Article 1 of both Covenants provides that:

> 1. All 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.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having a responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Although the International Covenants did not include any restrictions, some authors indicate that it is only for the liberation of colonial peoples. Others indicate that the right to self-determination extends beyond colonial peoples and is universal.[46] By 1970 it was increasingly evident in the *Declaration on Friendly Relations*[47] that the right to self-determination, in both its internal and external aspects,[48] was not intended to be limited to colonial peoples. Rather, in view of its overall scope, the 1970 Declaration is believed to recognise self-determination as a universal right. Under the heading entitled 'principle of equal rights and self-determination of peoples,' the 1970 Declaration provided:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural

[42] The Convention was signed by Canada and New Zealand in 1966 and ratified by Canada in 1970 and New Zealand in 1972.
[43] *International Covenant on Economic, Social and Cultural Rights,* G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966); Can. T.S. 1976 No. 46. Adopted by the General Assembly on 16 December 1966 and entered into force on 3 January 1976. In force for Canada on 19 May 1976 and New Zealand on the 28 March 1979.
[44] *International Covenant on Civil and Political Rights* (1966), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on 16 December 1966 and entered into force 23 March 1976. In force in Canada on 19 August 1976 and New Zealand in 1978.
[45] In regard to self-determination being a human right, see Thornberry, P. 'The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism' in Tomuschat, supra n 11 at 111.
[46] Hannum, supra n 11 at 19; Rosas, A. 'Internal Self-Determination' in Tomuschat supra n 11; and Thornberry, P. 'Self-Determination, Minorities, Human Rights: A Review of International Instruments', in *Int'l & Comp. L. Q.* (Vol. 38, 1989) 867 at 878.
[47] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,* UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in *I.L.M.* (Vol. 9, 1970) 1292.
[48] Idem.

development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Moreover, the above paragraph was qualified by the following:

> Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory[49] without distinction as to race, creed or colour.

In 1975 the right to self-determination was expressed in broad terms in the *Final Act of the Conference on Security and Co-operation in Europe* (*Helsinki Final Act*).[50] In 1990 the *Charter of Paris*[51] reaffirmed the commitment of States to the Principles in the *Helsinki Final Act*, including the right to self-determination.

At the regional level, Article 20(1) of *The African Charter of Human and Peoples' Rights* states that:

> All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.[52]

As discussed in more detail below, the *Draft Declaration on the Rights of Indigenous Peoples* explores more fully the right of Indigenous Peoples to self-determination. The *Draft Declaration* reflects the growing acknowledgement that Indigenous Peoples' self-determination and self-government are basic human rights.[53]

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[49] This requirement of 'representing the whole people belonging to the territory' was reiterated at the World Conference on Human Rights in 1992 in Vienna. See *Vienna Declaration and Programme of Action: Note by the Secretariat,* World Conference on Human Rights, U.N. Doc. A/CONF.157/23, (1993), para. 2, at 4.

[50] *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act),* signed by 35 states (including Canada, New Zealand and the United States) on August 1, 1975. Reprinted in *I.L.M.* (Vol. 14, 1975) 1295. Principle VIII refers to the 'principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.' However, this Act, despite its political importance, is considered to be legally non-binding. Supra, n. 11 (Hannum) at 28.

[51] *Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity,* 21November 1990, reprinted in (1991) 30 I.L.M. 190. The Charter is a document of the Conference on Security and Co-operation in Europe (CSCE) and is considered to be legally non-binding. The CSCE is now called the Organization on Security and Co-operation in Europe (OSCE).

[52] Article 20(1) *The African Charter on Human and Peoples' Rights, 1981.* Cited in Brownlie, I *Basic Documents on Human Rights* (Clarendon Press, Oxford, 1992) at 551.

[53] See Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Cree and Cree Territory into a Sovereign Quebec* (Grand Council of the Crees, Nemaska, Quebec, 1995) at 49. See also the discussion on the *Draft Declaration on the Rights of Indigenous Peoples* at infra, chapter 4.

Given that international law has been more responsive to the developing and influential transnational discourse concerned with achieving peace and human rights,[54] the human rights discourse has conceptualised and contextualised the nation-state as an instrument rather than master of humankind. This discourse further seeks to define international norms not by mere assessment of nation-state conduct but rather by the articulation of the expectations and values of human beings. Moreover, this discourse expands the competency of international law over spheres previously reserved to the asserted sovereign prerogative of nation-states, which is a fundamental shift in policy. The *Declaration of Human Rights* and other human rights instruments mentioned have therefore established a universal platform for the fundamental human rights of all individuals. In addition, the human rights discourse has provided a means for Indigenous Peoples to strengthen their subaltern positions against the nation-state. Having identified some of the international instruments that provide legal status for self-determination and, implicitly, self-governance, it is important to acknowledge that there is debate regarding the scope of this right.

3.1.1.4 DEVELOPMENT OF THE PRINCIPLE OF SELF-DETERMINATION

After World War II the wider context for the principle of self-determination was developed and applied in the international sphere in the context of decolonisation.[55] During the drafting of the UN Charter, nation-states quickly agreed that the former colonies of the defeated powers in the World Wars should be guided to 'self-government or independence.'[56] However, there was some hesitation in relation to other colonies. While nation-states agreed to include a system for the development of self-government and independence of other 'non-self-governing territories'[57] there was disagreement on criteria to decide which territories such provisions applied to. This debate resulted in the *1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Declaration on Colonialism),*[58] and *Resolution 1541* which defined 'colonial' countries and 'non-self-governing territory.'[59]

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[54] See Claude, R & Weston, B (eds.) *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, Philadelphia, 1992); Lutz, E, Hannum, H & Burk, K (eds.) *New Directions in Human Rights* (University of Pennsylvania Press, Philadelphia, 1989); Van Dyke, V *Human Rights, Ethnicity and Discrimination* (Greenwood Press, Connecticut, 1985); Dworkin, R *Law's Empire* (Belknap Press, Cambridge, Massachusetts, 1986).

[55] For a discussion on the history of the development of the right of self-determination, see Iorns, CJ 'Indigenous Peoples and Self-determination: Challenging State Sovereignty' in *Case Western Reserve Journal of International Law* (Vol. 24, 1992) 199 at 239 – 285.

[56] See UN Charter, Chapters XII and XIII.

[57] Ibid, Chapter XI.

[58] Resolution 1514 (XV), 1960 UN Year Book at 44 – 50.

[59] Infra, chapter 4, section 4.1.3.2 and the accompanying text on the Belgian Thesis.

Despite the *Declaration on Colonialism* affirming the right of 'all peoples to self-determination' the only entities entitled to the application of the decolonisation procedures were the geographically separate colonies of other nation-states.[60] Despite the International Covenants on Human Rights in 1966 providing in common Article I that 'all peoples have the right of self-determination' it was reinforced in the 1970 *Declaration on Friendly Relations* that the right of self-determination was to apply only to colonial situations and to peoples subject to 'alien subjugation.' While this Declaration ostensibly opened the legal door to the application of the right to self-determination in conditions other than true colonial situations, this category was reserved in practice for severely exclusionary regimes of racist minority rule, such as those that implemented apartheid.[61]

3.1.1.5 INTERNAL SELF-DETERMINATION

The focus on decolonisation ensured that the broad principle of self-determination was, in its application, fashioned into a narrower right of self-determination and independence for colonised peoples. The International Court of Justice in the *Western Sahara* case expressed this view broadly as the 'freely expressed will of peoples.'[62] This view has an external and internal component – namely, peoples under colonial domination have the right to choose their external form, including the right to independence from the colonial state; the people within any state have the right as a whole to determine their own form of government and this is seen as a continuing right. Cassesse stressed that:

> ... [the] essence of self-determination lies not in the final shape in which self-determination is achieved ... but in the method of reaching decisions based on the need to pay regard to the freely expressed will of peoples.[63]

International law has, accordingly, provided little guidance as to any preferred result of an exercise of self-determination, internal or external. However, the range of possible options has included independent statehood for the people concerned.[64] There are other more appropriate options.[65]

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[60] Resolution 1541 defined a non-self-governing territory as one which is 'geographically separate and is distinct ethnically and/or culturally from the country administering it' and is arbitrarily placed 'in a position of subordination' to the administering state. This has been described as the 'blue water' thesis, which referred to the need to have a sea between a coloniser and a colonised state for the latter to be considered non-self-governing, although this is, in fact, neither necessary nor sufficient. Iorns, supra, n 55 at 260.

[61] Idem.

[62] *Western Sahara Advisory Opinion*, 1975 ICJ Representative 12 (Oct 16). See Cassese, A *The International Law of Self-determination* (Cambridge University Press, 1998) at 128.

[63] Ibid, at 359.

[64] Iorns, supra n 12 at 5.

[65] Infra, chapter 7.1-7.2 and the accompanying text.

Indigenous Peoples within separate states argued after both World Wars that their inherent right to self-determination be recognised by nation-states. Predictably, national self-determination for Indigenous Peoples was rejected because, inter alia, of the feared violation of territorial integrity of the relevant states as a possible result of the exercise of the right of self-determination by Indigenous Peoples within those states. Following World War I the 'Native Inhabitants' clause in the Covenant of the League of Nations was devised as the means to protect the thesis that the proposed right of self-determination be applied to Indigenous Peoples.[66] This thesis was, however, defeated on the basis that states feared it would destroy the territorial integrity of the then present states and, thus, undermine state sovereignty. The international legal right of self-determination was explicitly declared to be inapplicable to Indigenous Peoples and other minorities within states. Instead, the inclusion of explicit minority protections was held to be sufficient to remedy the problems that all minorities, including Indigenous Peoples, faced.[67] This result was confirmed in 1984 by the Inter-American Commission on Human Rights (IACHR) of the Organisation of American States (OAS) regarding the Miskito Indians in Nicaragua. The IACHR denied that international law recognised the right of separate self-determination for Indigenous Peoples on the basis that this would violate the territorial integrity of present states.[68]

Nation-states today still reject the notion that Indigenous Peoples have the international legal right to self-determination because of fear of violation of territorial integrity and state sovereignty through secession. Indeed, this rejection of the right of self-determination has been manifested in the denial by states that Indigenous Peoples are even included as 'peoples.' Any inclusion of Indigenous Peoples as 'peoples' is countered by nation-states rejecting any implications that the inclusion might have, particularly in relation to international legal rights or the right of self-determination.[69]

Indigenous Peoples inevitably and continually reject such circumstances, arguing that they have an inherent right to control their own destiny and that states must recognise this in positive law. Anaya noted how one could distinguish between the substantive aspects of the general principle of self-determination and its application to individual cases where the standards have not been met. The narrower application that international law has

[66] Iorns, supra n 55 at 250-2.
[67] See for example, Article 27 of the *International Covenant on Civil and Political Rights*, discussed below. Infra sections 3.1.3.1-3.1.3.2 and the accompanying text.
[68] Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc., OEA/Ser.L/V/II.62. Doc. 26 (1984).
[69] See for example, Article 1(3) of *ILO Convention 169 on Indigenous and Tribal Peoples* as referred to below. Infra, section 3.1.3.4 and the accompanying text.

currently concerned itself with has concerned what Anaya termed 'remedial prescriptions' for only certain situations of deviation from the relevant standards.'[70] Remedial prescriptions that undo colonisation have produced what states accept as the international legal right of self-determination. The rules about who may take advantage of the right (for example, who is considered to be a 'people') as well as the external and internal aspects of the process and result of the exercise are important as products of this particular remedy.

Hence, the international community can expand its understanding of the *right* for self-determination to apply the general *principle* of self-determination to a wider range of situations than classical colonialism, fashioning a new set of remedial standards for different situations. Thus, in some situations, such remedies need not include secession and the formation of new states.[71]

Some states have publicly agreed that the principle of self-determination can apply to Indigenous Peoples but they emphasise that it cannot take priority over other principles of international law, such as the territorial integrity of present states and they explicitly limit the remedies entailed by the application of the general principle to what have traditionally been called the internal aspects of self-determination.[72] It is, however, significant that relevant states appear to accept that Indigenous Peoples, collectively and individually:

> ... [are] entitled to be full and equal participants in the creation of the institutions of government under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.[73]

Many states expressly refer to the *concept* of self-determination as applying to Indigenous Peoples, as has the UN Human Rights Committee.[74] Furthermore, the rights of Indigenous Peoples that have been recognised in the international sphere are based on and have been informed by the various aspects of the *principle* of self-determination. Such changes have led governments and others to attempt to define the requirements of self-determination in relation to Indigenous Peoples. Madame Erica-Irene Daes, Chairperson of the UN Working Group on Indigenous Peoples, argued that the principle of self-determination required the

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[70] Anaya, J *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 83.
[71] Ibid, at 84.
[72] See for example, the inclusion of a right of self-determination for Indigenous Peoples in the *Draft Declaration on the Rights of Indigenous Peoples* in the accompanying text. Infra, chapter 4, sections 4.0 – 4.2.
[73] Anaya, supra n 75 at 87.
[74] Ibid, at 86-7.

various parties in the nation-state to negotiate and undergo a process of 'belated state-building' in order to achieve the self-determination of Indigenous Peoples.[75] Daes added:

> This would be a process through which indigenous peoples are able to join with all other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.[76]

Daes further elaborated on a 'new contemporary category' of the right of self-determination, as applied to Indigenous Peoples:

> ... [means] that the existing State has the duty to accommodate the aspirations of Indigenous Peoples through institutional reforms designed to share power democratically. It also means that Indigenous Peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise the right of self-determination by this means and other peaceful ways, to the extent possible.[77]

In drafting the *Draft Declaration on the Rights of Indigenous Peoples*, nation-states agreed with Daes' interpretation of self-determination as applied to Indigenous Peoples. However, they have not accepted Daes' further suggestion that the application of self-determination should not be limited solely to internal aspects, but could encompass external remedies in certain circumstances, for example, situations which violate a state's territorial integrity.[78] Daes continued that:

> The right of self-determination of indigenous peoples should ordinarily be interpreted as the right to negotiate freely their status and representation in the State in which they live.[79]

Anaya adopted this standard set by Daes of 'belated state building' as the relevant remedy for redress for the denial of Indigenous Peoples' self-determination, emphasising that such processes of political change 'are to be developed in accordance with the aspirations of Indigenous Peoples themselves.'[80]

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[75] Daes, E.I 'Some Considerations on the Rights of Indigenous Peoples to Self-Determination' in *Transnational Law & Contemporary Problems* (Vol. 3, 1993) at 1, 9.
[76] Idem.
[77] Daes, E.I *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples* UN Doc. E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993) at 5.
[78] Iorns, supra n 12 at 21-3.
[79] Daes, supra n 77 at 5.
[80] Anaya, supra n 70 at 87.

3.1.2 MODERN CONCEPT

The modern concept of self-determination is therefore concerned with the legitimacy of the institutions of the government of a people, including their initial constitution and their ongoing functioning. Indeed, Anaya identified the general norm of self-determination as 'a standard of governmental legitimacy based on the core concepts of human freedom and equality'[81] against which institutions of government can, and, indeed, ought to be monitored. The principle of self-determination is sufficiently broad to apply normatively to the global range of models of governance. Anaya argued that:

> ... [despite] divergence in models of governmental legitimacy there is an identifiable nexus of opinion and behaviour about the minimum conditions for the constitution and functioning of legitimate government.[82]

Anaya identified two primary aspects of the principle of self-determination: the constitutive and the ongoing aspects.[83]

3.1.2.1 THE CONSTITUTIVE ASPECT OF SELF-DETERMINATION

The constitutive aspect of self-determination concerns the creation of, or change in, the institutions of government, whereby self-determination 'imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned.'[84] The precise levels or means of individual and group participation in such processes are not prescribed in any level of detail; only minimum standards are clearly evident, which Anaya concluded requires "minimum levels of participation on the part of all affected peoples commensurate with their respective interests."[85] For example, colonial expansion was a method of establishing government that has clearly been declared illegitimate when measured by the standards of self-determination. Importantly, the principle of self-determination does not determine the precise form of the result achieved through such processes.

3.1.2.2 ONGOING ASPECT OF SELF-DETERMINATION

The ongoing aspect of self-determination concerns the continuous 'form and functioning of the governing institutional order.'[86] Anaya defined it as:

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[81] Anaya, J 'A Contemporary Definition of the International Norm of Self-determination' in *TCLP* (Vol. 3, 1993) 131 at 143.
[82] Anaya, supra n 70 at 77.
[83] Idem.
[84] Iorns, supra n 12 at 3.
[85] Anaya, supra n 70 at 82.
[86] Idem.

> A governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis. In the words of the international human rights covenants and other instruments, peoples are to freely pursue their economic, social and cultural development.[87]

The principle of self-determination provides neither more than minimum standards nor any results that must be achieved, among which might be included notions of democracy and cultural pluralism in addition to the rejection of colonial rule.[88]

3.1.2.3 RIGHT OF SELF-DETERMINATION

Despite the definitions above outlining the broad concept of self-determination, the *right* of self-determination in international law has traditionally referred to a much narrower concept and set of standards, with a correspondingly narrow field of application.[89] This difference has caused confusion in debates over the application and requirements of self-determination.

3.1.2.4 REQUIREMENT OF SELF-DETERMINATION

While nation-states generally have been unwilling to recognise that Indigenous Peoples are entitled to the international right of self-determination, they have recognised that Indigenous Peoples, and other minorities within nation-states, have rights that need protecting. Initially, nation-states recognised rights to non-discrimination and equal treatment, such as ILO Convention 107[90] and Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR). However, as a result of increased pressure by Indigenous Peoples and increased support for their claims, nation-states have recognised a wide range of more substantive and positive Indigenous Peoples' rights. Importantly, there are a number of international rights of Indigenous Peoples that 'elaborate upon the requirements of self-determination which contain substantive and remedial prescriptions' that assist with determining the standards for achieving Indigenous Peoples' self-determination; and ongoing and constitutive prescriptions including remedial constitutive procedures to be employed in "belated state-building."[91] Anaya suggested that Indigenous Peoples fall within the categories of "non-discrimination, cultural integrity, lands and

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[87] Idem. Thus Anaya supports his analysis by the wording common to the Covenants and the Draft Declaration: The constitutive aspect – 'By virtue of that right [to self-determination] they [Indigenous Peoples] freely determine their political status'; and the ongoing aspect – 'and freely pursue their economic, social and cultural development.' Ibid, at 81.

[88] Idem.

[89] Iorns, supra n 12 at 3.

[90] *ILO Convention No. 107 on Indigenous and Tribal Peoples in Independent Countries (ILO 107)* was adopted by the ILO in 1957. Infra, n.125 and supra, n. 12 (Iorns) at 10.

[91] Anaya, supra n 70 at 97.

resources, social welfare and development and self-government."[92] The rights most relevant to this thesis are those concerning cultural integrity and self-government.

3.1.3 CULTURAL INTEGRITY

The primary focus for norms and principles of international law has been to protect and govern relations between nation-states. Within the conventional formulation of international law there are two sources – Treaties and custom, that is,' sovereign or state practice. In addition to the standard sources, the framers of the International Court of Justice (ICJ) pointed to other areas as evidence of international legal norms that would be considered by the Court. Within the rules of the court, the drafters brought together the public international law sources pursuant to Article 38(1)(a), (b) and (c) of its founding statute.[93] Within these sources, international law recognises a right of Indigenous Peoples to exist as distinct peoples *within* nation-states, maintaining and developing their distinct cultural identities. This right exists both in Treaty law and, arguably, in customary international law, both of which are binding upon New Zealand and Canada under international law and parts of their respective domestic common law.

3.1.3.1 TREATY LAW: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Treaty law is one source of international law whereby contracting parties, by express agreement, can establish norms and practice. Article 2(1)(a) of the *Vienna Convention on the Law of Treaties 1969* (a Treaty setting out the law of Treaties) defines a Treaty as:

> ... an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Brownlie clarified that a Treaty, based on the Vienna Convention, applies only to written Treaties:

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[92] Idem.

[93] Statute of the ICJ, Article 38 states: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a) international agreements, whether general or particular, establishing rules expressly recognised by the contesting States;
b) international custom, as evidence of a general practice accepted as law;
c) the general principles of law recognized by civilised nations;
d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

> A Treaty as an international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.[94]

Venne, however, asserted that Treaties might also be oral.[95] Still, while some argue that Treaties may not be a source of law in a strict sense, they are a source of obligation. Treaties negotiated and ratified between nation-states have no prescribed form.[96] Nation-states agree to bind themselves through the Articles of a Treaty.[97] The signing of a Treaty by a nation-state is an indication to other nation-states of its intention to be bound by the terms of the Treaty. However, the signing does not necessarily mean that the Treaty has formed part of the norms of international law:

> It must be emphasised that, whereas custom is the original source of international law, treaties are a source of power which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of law of nations, that treaties are binding upon the contracting parties.[98]

It is possible, however, to have a Treaty negotiated but not consented to by a nation-state until it is signed and ratified as formal acceptance under international law by the nation-states' legal mechanisms. There is a difference between 'consent to be bound' and 'entry into force' of a Treaty:

> A multi-lateral treaty frequently states that it will be open for signature at a particular place from a certain future date for a stated time. At the end of the negotiating conference, there will be a signing ceremony but these signatures will only adopt the final act of the conference, which will include the authentic text of the treaty. A signature to adopt a text is not a substitute for a signature to express consent to be bound by the treaty. ... The first few signatory states may not in fact be bound by the convention qua treaty law for some time. They are not, however, without obligation, for, as Article 18 of the Vienna Convention requires, once a state has expressed its consent to be bound it must 'refrain from acts which would defeat the object and purpose' of the treaty.[99]

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[94] Brownlie, I *Principles of Public International Law* (Oxford University Press, Oxford, 1991) at 601.
[95] Venne, supra n 5 at 25.
[96] There is no substantive requirement of form and, thus, for example an agreement may be recorded in the minutes of a conference. Brownlie, supra n 94 at 603.
[97] See for example, Menon, P.K *The Law of Treaties Between States and International Organizations* (The Edwin Mellen Press, N.Y, 1992).
[98] Finch, G *The Sources of Modern International Law* (Carnegie Endowment for International Peace, Washington, 1937) at 61-62. See also Villiger, M *Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Dordrecht, 1985) at 147.
[99] Kindred, H, *International Law Chiefly as Interpreted and Applied in Canada* (Edmond Publications Ltd, Canada, 1993) at 89.

Since the advent of the UN, there has been an attempt to draft universal standards and codes of conduct based on the Treaty process. For example, in the area of human rights, two United Nations Covenants (Treaties) are binding only on nation-states after they have become contracting parties. Any nation-state that becomes a member of the UN agrees to be bound by the Charter of the UN, which is itself a Treaty.

Due to the fight against racial discrimination, the international community adopted a Treaty - the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD) in 1965. This Convention upheld human rights laws, which protected minorities and individuals against discrimination within states. In 1966, after twenty years of negotiations, the UN adopted the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). These covenants affirmed the rights of individuals not to be discriminated against for reasons of race, colour, or national or social origin, and affirmed Indigenous Peoples' rights to self-determination and to natural resources in their territories. Moreover, these international Treaties: obliged domestic governments to report to the UN regarding their compliance with human rights; obliged nation-states to take positive measures to uphold minority cultures; and provided a vital international forum for Indigenous Peoples in those countries.

The ICERD was signed by Canada and New Zealand in 1966, and was subsequently ratified by Canada in 1970 and New Zealand in 1972. Ratification committed both nation-states to introduce measures for domestic compliance, which had far reaching consequences. In 1966 the ICCPR was also adopted and was ratified by Canada in 1976 and New Zealand in 1978. Consequently, these international legal developments concerning racial discrimination and civil and political rights have had a significant impact on the domestic laws of both nation-states.

New Zealand ratified these Treaties by enacting the *Race Relations Act 1971* and the *Human Rights Commission Act 1977* to promote and protect the rights enshrined in these Treaties. New Zealand has also formally accepted the Optional Protocol provision of the ICCPR, which provides individuals the power to approach the UN directly if they believe that their rights, pursuant to the Covenant, have been abused. Moreover, the New Zealand *Bill of Rights Act 1990* also contains civil and political rights and was justified, among other reasons, as implementing New Zealand's obligations pursuant to the ICCPR.

Canada, on the other hand, has constitutionally entrenched human rights, which reflects some international standards in the *Canadian Constitution and Charter of Fundamental Rights and Freedoms 1982*. The Charter includes provisions for non-

discrimination on the basis of race and for courts to strike down legislation inconsistent with the Charter provisions. Thus, the Charter reflects some international trends, with the separation of Indigenous People's rights from general minority rights.[100]

3.1.3.2 ARTICLE 27 ICCPR

Article 27 of ICCPR is significant in terms of Indigenous Peoples' rights to self-determination. Article 27 provides that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall be not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Most importantly, Article 27 specified the protection of rights for minorities to practice their culture in the community with other members of their community. This international legal development was significant in terms of its use by Indigenous Peoples and its impacts upon domestic policies. For example, in *Lovelace v Canada*[101], Lovelace complained to the United Nations Human Rights Committee, under the Optional Protocol to the ICCPR, that Canada had violated Article 27 of the ICCPR in denying her the right to reside on an Indian reserve. Her claim was upheld, which subsequently resulted in an amendment to the *Indian Act* in 1985 to comply with the Committees decision. Hence, the potent force of demonstrating abuse of Indigenous Peoples' human rights through the politics of embarrassment. The ICCPR, with its recognition of the right to self-determination thus became a rhetorical resource to assert indigeneity within Anglo-Commonwealth states. These international developments have, in turn, strengthened the centuries old resistance to subaltern positions of Indigenous Peoples by integrating their political grievances into the politics of rights - human and indigenous.

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[100] Iorns, C 'International Human Rights and Domestic Law' in Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, Auckland, 1999) at 254. I note here that s. 20 of the *New Zealand Bill of Rights Act 1990* incorporates Article 27 of the *ICCPR*.

[101] *Lovelace v Canada,* Communication no. R.6/24/1977, Human Rights Committee. UN Doc. A/36/40, Supp. No. 40. See also *Ominayak and the Lubicon Lake v Canada, Annual Report of the Human Rights Committee 1990,* United Nations Doc.A.45'40, vol. II, Appendix A, para.33. Māori have also attempted to challenge orthodox principles of international law before the Human Rights Committee pursuant to the ICCPR in *Apirana Mahuika v New Zealand* (Communication 547/93, Human Rights Committee). The Ainu succedded in arguing, in a Japanese court, that government construction of a dam without regard to potential harm to Ainu culture was an actionable violation of Article 27 in *Kayano and Kaizawa v Hokkaido Expropriation Committee* (Sapporo District Court, Japan, 1997), trans Levin, M, 38 I.L.M (1999) at 397. See also Levin, M.A 'Essential Commodities and Racial Justice: Using Constitutional Portection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan' in N.Y.U.J.I.L.P (Vol. 33, 2000) at 419.

In addition, Article 27 explicitly confers rights on individuals, rather than minority and indigenous groups as such, and it has traditionally been regarded by nation-states as implying solely negative rights. That is, that these rights must not be denied, or that such individuals have the right not to be discriminated against in these matters. However, the Committee on Human Rights has taken the view in respect of some communications before it that 'positive measures of protection' are also required and that the right also protects the group.[102] In a later *General Comment* issued by the Committee, it stated that positive measures are required both to prevent acts in violation of Article 27, whether by the nation-state itself or by other persons within the nation-state, as well as 'to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion in community with the other members of the group.'[103] The ICCPR *Committee on Human Rights Commentary on Article 27* further stated:

> Para. 3.2: Enjoyment of rights under Article 27 'does not prejudice the sovereignty and territorial integrity of a State party.' Nonetheless, aspects of rights of individuals protected under that article, such as enjoyment of a particular culture, 'may consist of a way of life which is closely associated with territory,' particularly for members of indigenous communities.
>
> Para. 6.1: A State party is 'under an obligation to ensure that the existence and the exercise of the right declared by Article 27 are protected against their denial or violation. Positive measures of protection are, therefore, required ... also against the acts' of non-state actors.
>
> Para. 6.2: Although the rights protected are individual, they depend on the ability of the minority group to maintain its culture. 'Accordingly, positive measures by States may also be necessary to protect the identity of a minority' and the rights of its members. Such positive measures must respect the non-discrimination clauses of the Covenant with respect to treatment among minorities and between minorities and the rest of the population. 'However, as long as those measures are aimed at correcting conditions impairing enjoyment of the guaranteed rights, they may constitute a legitimate differentiation ... [if] based on reasonable and objective criteria.
>
> Para. 7: Cultural rights under Article 27 extend to ways of life 'associated with the use of land resources, especially in the case of indigenous peoples ... The enjoyment of those rights may require positive legal measures of protections and measures to ensure the effective participation of members of minority communities in decisions which affect them.'
>
> Para. 8: None of the protected rights under Article 27 may be exercised 'to an extent inconsistent with the other provisions of the Covenant.'[104]

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[102] See for example, *Ominayak v Canada* communication No. 167/1984; views adopted on 26 March 1990; UN Doc. CCPR/C/38/D/167/1984 (28 March 1990).

[103] Human Rights Committee, *General Comment Adopted by the Human Rights Committee under Article 40(4) of the ICCPR, General Comment No. 23(50) (Art. 27)* UN Doc. CCPR/C/21Rev.1/Add.5 (26 April 1994) at 3.

[104] Idem.

The Committee continued:

> With regard to the exercise of cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with land and resources, especially in the case of indigenous peoples... The enjoyment of those rights may require positive legal measures of minority communities in decisions which affect them. ... The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned.[105]

The Committee's statement does not detail the matters that would be required to be affected. It does, however, note that more may need to be done than previously thought, and that members of the communities must effectively participate in decisions which affect them. Affirmative measures feature commonly in nation-state practice, including those in respect of the protection and revitalisation of indigenous languages; accommodating their use within the mainstream; the preservation of sites of religious significance to Indigenous Peoples; and the protection of other aspects of indigenous cultural heritage.[106]

The IACHR suggested that some autonomous arrangements might be required in order to protect indigenous cultural integrity. While the IACHR recommendation did not constitute recognition by nation-states, and is only a regional body of the Organisation of American States, its findings in respect of the Miskito Indians of Nicaragua in 1984 was, nonetheless, a landmark in international human rights law. The IACHR denied that international law recognised a right of autonomy or a right of separate self-determination for Indigenous Peoples. However, on the basis of Article 27 ICCPR and of the relevant provisions in the *American Convention on Human Rights*, it did hold that ethnic groups such as the Miskito are accorded 'special legal protection' for their language, religion, and all other 'aspects related to the preservation of their cultural identity.'[107] The IACHR commented that the preservation of these aspects:

> Entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan state. Such an institutional organisation can only effectively carry out its assigned purposes to the extent that it is designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely elected representatives.[108]

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[105] Idem.
[106] Anaya, supra n 70 at 97, 103-4 for comments on the variation in what a nation-state does and feels legally bound to do in respect of such measures.
[107] Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OAS Doc., OEA/Ser.L/V/II.62. Doc. 26 (1984) at 81.
[108] Ibid, at 82.

As a result of subsequent negotiations with various interested parties, the Nicaraguan government established two ostensibly autonomous regions.[109] However, Anaya commented that the autonomy regime is widely acknowledged to be faulty and its implementation has been difficult. Nevertheless it does represent the kind of context-specific effort at 'belated state-building' promoted by the international community as a remedial measure.[110]

The IACHR continued such reasoning in its 1985 findings in respect of the Yanomami of Brazil where, invoking Article 27, it held that 'international law... recognises the right of ethnic groups to special protection on the use of their language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.'[111] Incursions into Yanomami ancestral lands were held to be a threat to Yanomami culture and traditions.[112] Consequently, the Brazil government reported that it was working to secure measures of autonomy for Indigenous Peoples within Brazil.

In the more recent *Case of the Mayagna (Sumo) Community of Awas Tingni v Nicaragua,*[113] the IACHR, in interpreting the right of property as found in article 21 of the *American Convention on Human Rights*, made clear in its judgment that Indigenous Peoples' rights to their lands include rights to the resources there, and that these rights of ownership are held by the community in their collective capacity and according their own customary law, values, customs and mores. Unquestionably the decision found that international law protects the governmental or collective right of the community to land and resources.[114] Moreover, the case provided legal protection to indigenous communities against continuing nation-state and corporate encroachment onto their lands, which implicitly recognises Article 27 rights.

Several international law scholars even support the idea that Article 27 justifies self-government or autonomy "where that is the effective means of protecting the cultural

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[109] It was not just the IACHR decision that led to the creation of these autonomous regions but it was the result of several national and international political forces in Nicaragua in the 1980s. See generally, Hannum, H *Autonomy, Sovereignty and Self-Determination* (University of Pennsylvania Press, Philadelphia, 1990) at 203 – 225.

[110] Anaya, supra n 70 at 88.

[111] Case No. 7615 (Brazil), Inter-American Commission Res. No. 12/85 (5 March 1985), *Annual Report of the Inter-American Commission on Human Rights, 1984-1985,* OAS Doc. OEA/Ser.L/V/II. 66, doc. 10, rev.1, at 24, 31.

[112] Ibid, at 29 – 31.

[113] Inter-American Court of Human Rights, Judgment of 31 August 2000 (Series C, No. 79).

[114] Daes, E-I, *Indigenous Peoples' Permanent Sovereignty Over Natural Resources* (Preliminary Report of the Special Rapporteur, Erica-Irene Daes, submitted in accordance with Sub-Commission resolution 2002/15; E/CN.4/Sub.2/2003/20 at 4.

distinctiveness of a territorial minority."[115] Anaya went further by asserting that "customary international law currently recognises a right of cultural self-determination for indigenous peoples in particular."[116] This distinction shows that international law, which New Zealand and Canada are bound by, requires that Indigenous Peoples are entitled to their cultural integrity, perhaps even self-government under Article 27, and that nation-states are bound to take affirmative measures to help achieve these goals. A range of remedial measures may or may not be required to be taken and they must clearly be taken in conjunction with the Indigenous Peoples concerned. The measures may be administrative, legislative or perhaps even concerning change to the constitutional and administrative structure of the nation-state. The precise measures will depend on the circumstances of the Indigenous Peoples concerned and the wrongs to be remedied.[117]

3.1.3.3 CUSTOMARY INTERNATIONAL LAW

Customary international law, as accepted practice by a sovereign or nation-state, is one of the main sources of what has become international law. Custom can be defined as any practice or standard accepted into the law that is generally agreed on by nation-states:

> The elements of custom are four fold: duration, uniformity and consistency of practice, generality of practice and *opinio juris* [which is the requirement that nations must engage in the identified uniform and general practice out of a sense of legal obligation, as opposed to courtesy, fairness or morality].[118]

Custom as a source of international law entails determining state practice. One challenge of customary international law is assessing when state practices have acquired the status of accepted inter-state practice moving toward a customary practice. Venne held that it is a

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[115] See for example, Sanders who, in turn, cites and agrees with the views of Professor Rosalyn Higgins and Patrick Thornberry. See Sanders, D 'Self-determination and Indigenous Peoples' in Tomuschat, supra n 16 at 74.

[116] Anaya, J 'Indigenous Norms in Customary International Law' in *Arizona Journal of International and Comparative Law* (Vol. 8, 1991) at 2.

[117] Iorns, supra n 12 at 15. A Maori group named Mana Motuhake visited the United Nations Commissioner for Human Rights in Geneva in May 2004 over the New Zealand Government's politically and culturally divisive seabed and foreshore legislation policy. The group received an assurance that the Human Rights Commissioner would investigate the seabed proposal and was waiting for a report from Mana Motuhake. See 'Seabed issue to be considered by UN body' in *New Zealand Herald* (4 May 2004). One could assume that the investigation would be pursuant, inter alia, to Article 27 ICCPR, namely to protect the rights of a minority group's members to enjoy and develop their culture that may consist of a way of life closely associated with territory. In this case, coastal iwi and hapū culture is strongly based around *kai moana* (seafood) from the seabed and foreshore as well as 'wet' fishing. Contemporary coastal tribal 'ways of life' are still closely associated with the foreshore and seabed within their *rohe* (territory), hence potential grounds for an Article 27 investigation. See Ngāi Tahu's recent claim to the UN regarding the foreshore and seabed challenge. The text of Ellison's presentation and the UN's response can be located on the Ngāi Tahu news section of their website at http://www.ngaitahu.iwi.nz/ (Accessed September 2004).

[118] Gunning, I R 'Modernizing Customary International Law: The Challenge of Human Rights' in *Virginia Journal of International Law* (Vol. 31, 1991) at 214.

matter of fact.[119] In order to determine the facts for such an assessment, Brownlie suggested reviewing the following:

> Diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, comments by governments on drafts produced by International Law Commission, state legislation, international and national judicial decisions, recitals of treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, resolutions relating to legal questions in the United Nations General Assembly.[120]

In the *North Sea Cases*, the ICJ enunciated the conditions needed to prove *opinio juris:*

> The acts concerned ... must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it ... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[121]

The ICJ also suggested that a customary rule required both material practice and *opinio juris*, and that there is a close affinity between the two.[122] It seems that *opinio juris* must be widespread among more than a few nation-states but not necessarily found in every nation-state.[123]

Anaya argued that a right of cultural integrity or cultural self-determination for Indigenous Peoples is recognised in customary international law and is thus binding on all nation-states, not just those party to relevant Treaty standards. The author asserts that cultural self-determination for Indigenous Peoples is part of both New Zealand and Canada's common law. Anaya traversed international legal history from World War I, international Treaties, declarations and other statements, draft international instruments, decisions of international bodies, and state practice for evidence. He discussed the standards arising in respect of both the substantive and remedial aspects of self-determination. Two relevant aspects for this research include Article 27 of the ICCPR and the ILO Convention on Indigenous and Tribal Peoples. Anaya argued that Article 27 has achieved customary international law status. He noted that Article 27 had been invoked and used to support an IACHR case where the country concerned was not a party to the

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[119] Venne, supra n 5 at 12.
[120] Brownlie supra n 94 at 5.
[121] *North Sea Continental Shelf Cases, Federal Republic of Germany v. Denmark and v. Netherlands* [1969] ICJ Reports 3.
[122] Villiger, M *Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Dordrecht, 1985) at 27.
[123] Idem.

ICCPR.[124] As the cultural norm is embodied in Article 27, this provided support for the norm's character as customary international law.

Anaya further argued that ILO Convention No. 169 on Indigenous and Tribal Peoples concerning tribal integrity has also become customary international law. Neither New Zealand nor Canada is party to this Convention so its asserted status as customary international law could impose additional requirements on both nations that they are not otherwise bound to uphold.[125]

3.1.3.4 ILO CONVENTION 169

ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989, is the result of revision by the ILO of Convention No. 107. Convention 107 needed to be revised, owing to assimilationist and paternalistic language, and needed to be replaced by a respect for the distinct identity of indigenous and tribal peoples and their continued existence. The overall thrust of Convention 169[126] is to provide for the rights of indigenous and tribal peoples, to recognise equality with non-indigenous peoples in the mainstream, to benefit on an equal footing from the rights and opportunities granted to non-indigenous persons and to eliminate socio-economic gaps that may exist between indigenous and other members of the national community,[127] while at the same time providing for rights to the protection of their own separate cultures and communities. The instrument holds that governments must respect the integrity and existence of indigenous and tribal peoples as separate peoples, 'with respect for their social and cultural identity, their customs and traditions and their institutions.'[128] Furthermore, governments must adopt special measures for safeguarding indigenous and tribal persons, institutions, labour, cultures and environment,[129] as well as provide a means for their development. Importantly, in addition to respect by nation-states, the Convention provides for at least some control by Indigenous Peoples of their destiny. For example, Article 7

[124] The case was that of Brazil discussed earlier in supra, n. 111-112 and accompanying text.
[125] The only official document located in New Zealand on ILO 169 was a discussion document by Te Puni Kōkiri, the Ministry of Maori Development, which is responsible for working on the Convention. See Te Puni Kōkiri , *The International Labour Organisation Convention No. 169: Concerning Indigenous and Tribal Peoples in Independent Countries 1989: Discussion Document* (Te Puni Kōkiri , Ministry of Maori Development, Wellington, 1999). Official information in Canada on ILO 169 was even more elusive.
[126] As of 1 December 2003 there were 17 ratifications of ILO 169. These countries included Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, the Netherlands, Norway, Paraguay, Peru and Venezuela. See ILO 169 in Appendix V. Hannum recounted the history of ILO activity leading to the adoption of ILO Convention 107 in Hannum, H 'New Development in Indigenous Rights' in *Virginia Journal of International Law* (Vol. 28, 1988) at 652-53.
[127] Article 2.
[128] Article 2.
[129] Article 4(1).

provides that Indigenous Peoples shall have the right 'to exercise control, to the extent possible, over their economic, social and cultural development.'[130]

Convention 169 contains general rights of participation at all levels of national decision-making and of consultation. Indigenous and tribal peoples have a right to be consulted 'whenever consideration is being given to legislative or administrative measures which may affect indigenous and tribal peoples directly.'[131] While it does not require actual consent to such legislative or administrative measures, such consultations must be meaningful and in good faith, with the object of achieving agreement or consent rather than being mere formalities.[132] Moreover, they must be in an appropriate form and through appropriate procedures, in particular, through indigenous institutions.[133] Where indigenous institutions are not sufficiently developed, Article 6(1)(c) requires that nation-states 'establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.'

In relation to the application of national laws and regulations to Indigenous Peoples, due regard shall be had to indigenous customs or customary laws.[134] Furthermore, Indigenous Peoples 'shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.'[135] At least the general principles of ILO 169 can be seen as representative of new customary international law concerning the rights of Indigenous Peoples. These general principles and the overall thrust were not regarded as controversial but as essential rights. These are basic requirements that, arguably, have transcended the bounds of the Convention and thus have become customary international law. Anaya argued that they clearly evidence a customary international law right to at least a distinct identity and cultural self-determination.[136] Anaya stated that a 'preponderance of states and other relevant actors now accepts that Indigenous Peoples have the right to exist as distinct cultural communities and develop freely as such in all spheres of life, and to be genuinely associated with all decisions affecting them.'[137] Importantly, while some of the particular rights devised to give effect to these principles, that is, remedial measures, may be controversial and not yet able to be said to be customary international law, the rejection of the goals of assimilation and integration of ILO 107 does not represent the new

[130] Article 7.
[131] Article 6(1)(a).
[132] Article 6(2).
[133] Article 6(1)(a).
[134] Article 8(1).
[135] Article 8(2).
[136] Supra, n. 116 (Anaya) at 2.
[137] Idem.

international law on this point. Thus, all national action must be assessed against the new aims as well as some of the more accepted, specific provisions that give effect to them.

3.1.3.5 SELF-GOVERNMENT

At international law the status of indigenous self-government exists in the field of human rights. More specifically, self-government is seen as an integral aspect of the wider human right to self-determination. The concept of self-determination has been held by Cassidy to involve the right of peoples 'freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.'[138] In the 1991 UN Report on Indigenous Autonomy and Self-Government,[139] it was noted that Indigenous Peoples have 'the right to self-determination, including the right of autonomy, self-government, and self-identification.'[140] One recommendation from this report was that:

> Indigenous peoples have the right to self-determination as provided for in the International Covenants on Human Rights and public international law and as a consequence of their continued existence as distinct peoples. ... An integral part of this is the inherent and fundamental right to autonomy and self-government.[141]

Self-government, therefore, can be described as one aspect of self-determination and it follows that self-government assumes implicit legal status at international law.[142] Durie added that Indigenous Peoples assume the status of nationhood when they identify themselves as the original inhabitants of a land who wish to preserve their cultural heritage towards some form of self-government based on the principle of self-determination.[143]

As with standards relating to cultural integrity, the international standards relating to indigenous self-government are clear in terms of general principles but much less so on specific duties. Some international decision-making bodies have found it necessary in some cases to uphold the cultural integrity of particular Indigenous Peoples by suggesting autonomy and self-government arrangements. The norms relating to self-government continue along these lines but focus on what is required for political self-determination.

In terms of general principles, Anaya argued that the principles of political participation under democracy (including decentralisation) and cultural pluralism have

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[138] Cassidy, F (ed) *Aboriginal Self-Determination* (Co-published Lantzville, B.C; Halifax, Nova Scotia; Oolichan Books; The Institute for Research on Public Policy, 1991) at 191.
[139] UN Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government* (E/CN.4/1992/42, Nuuk, Greenland, September 24 – 28, 1991).
[140] Idem.
[141] Idem.
[142] Shortall, S.A 'Aboriginal Self-Government in Aotearoa/New Zealand: A View Through the Canadian Lens' (Unpublished LLM Thesis, University of Calgary, Edmonton, 1996) at 69 – 70.
[143] Durie, M 'Tino Rangatiratanga: Maori Self-Determination' in *He Pukenga Korero* (Spring, Vol. 1, No. 1, 1995) at 48.

resulted in acceptance of the general principle that Indigenous Peoples are entitled to 'spheres of governmental or administrative autonomy for indigenous communities' as well as 'effective participation of those communities in all decisions affecting them that are appropriated by the larger institutions of government.'[144] The right of Indigenous Peoples as groups to full and effective participation in the national political order is a comparatively easily accepted standard, following on from general democratic rights of individuals to participate as modified in accordance with the right of the group as a whole to integrity. This is provided for in ILO Convention 169, which is considered representative of customary international law on this point.

While statements of a right of Indigenous Peoples to participation as groups in the national political order is accepted comparatively easily, nation-states 'increasingly have expressed agreement that Indigenous Peoples are entitled to maintain and develop their traditional institutions and to otherwise enjoy autonomous spheres of governmental authority appropriate to their circumstances.'[145] This is consistent with the decisions of the Human Rights Committee and the IACHR, suggesting that autonomy may be required in order to uphold cultural integrity, depending on the circumstances. Thus, autonomy and self-government may or may not be seen as a right of the people concerned but it is seen at least as an appropriate remedial measure, in some circumstances, to achieve self-determination, both constitutive and ongoing. Anaya concluded on self-government:

> International law does not require or allow for any one particular form of structural accommodation for all indigenous peoples – indeed, the very fact of diversity of indigenous cultures and their surrounding circumstances belies a single formula. The underlying objective of self-government, however, is that allowing indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis. Constitutive self-determination, furthermore, requires that such political institutions in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.[146]

3.2

3.3 SUMMARY

Self-determination represents the kind of context-specific effort at 'belated state-building' promoted by the international community as a remedial measure. Remedial prescriptions that undo colonisation have produced what nation-states accept as the international legal *right* of self-determination. The rules about who may take advantage of the right (for example, who is considered to be 'a people') as well as the external and internal aspects of the process and result of the exercise are important as products of this

[144] Supra, n. 70 (Anaya) at 110.
[145] Ibid, at 111.
[146] Idem.

particular remedy. Hence, the international community can expand its understanding of the *right* of self-determination by applying the general *principle* of self-determination to a wider range of situations than classical colonialism, fashioning a new set of remedial standards for different situations.

The constitutive aspect of self-determination concerns the creation of, or change in, the institutions of government, whereby self-determination imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned. Self-determination also requires minimum levels of participation on the part of all affected peoples commensurate with their respective interests. In terms of general principles, political participation under democracy, including decentralisation, and cultural pluralism have resulted in acceptance of the general principle that Indigenous Peoples are entitled to spheres of governmental or administrative autonomy for indigenous communities, as well as effective participation of those communities in all decisions affecting them that are appropriated by the larger institutions of government. Existing nation-states have a duty to accommodate the aspirations of Indigenous Peoples through institutional reforms designed to share power democratically. Concomitantly, Indigenous Peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing nation-state, and to exercise the right of self-determination by peaceful ways and means. The modern concept of self-determination is, therefore, concerned with the legitimacy of the institutions of the government of a people, including their initial constitution and their ongoing functioning.

The international standards relating to indigenous self-government are clear in terms of general *principles* but much less so on specific *duties*. Some international decision-making bodies have found it necessary in certain cases to uphold the cultural integrity of particular Indigenous Peoples by suggesting autonomy and self-government arrangements, depending on the circumstances. The norms relating to self-government continue along these lines but focus on what is required for political self-determination. Thus, autonomy and self-government may or may not be seen as a right of the people concerned but it is seen, at least, as an appropriate remedial measure, in some circumstances, to achieve self-determination, both constitutive and ongoing. Self-government, therefore, can be described as one aspect of self-determination and it follows that self-government assumes implicit legal status at international law.

Nation-states are bound to take affirmative measures to help achieve these goals. A range of remedial measures may or may not be required and they must clearly be considered in conjunction with the Indigenous Peoples concerned. The measures may be

administrative, legislative or perhaps even changes in the constitutional and administrative structure of the nation-state. The precise measures required will depend on the circumstances of the Indigenous Peoples concerned and the wrongs to be remedied.

The international standards of self-determination and self-government for Indigenous Peoples are binding upon the New Zealand and Canadian Governments and such rights entitle Indigenous Peoples to the application of the principle of self-determination, even if it is not labelled as a general international legal right. These standards primarily concern processes of Indigenous Peoples' governing themselves, which may include consultation and decision-making, but with a view to achieving the overarching goals of the maintenance and perpetuation of Indigenous Peoples' cultural integrity and significant spheres of self-government. Given the ability of First Nations and Māori to make complaints to the UN Human Rights Committee about violations pursuant to Article 27 of the ICCPR and the automatic incorporation of customary international law into New Zealand's and Canada's common law, perhaps more attention needs to be paid to these international fora and principles and the possible implications they may have for Indigenous Peoples to govern themselves. The essence of self-determination, therefore, lies not in the final shape in which self-determination is achieved but in the method of reaching decisions based on the need to pay regard to the freely expressed will of Peoples.

> *Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*
> *- Article 23, Draft Declaration on the Rights of Indigenous Peoples.*

4 DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND SELF-DETERMINATION

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Whāia e koe te iti kahurangi; ki te tūohu koe me maunga teitei. – Seek that which is most precious; if you have to bow down, then let it be before a lofty mountain.[1]

4.1 INTRODUCTION

The *Draft Declaration on the Rights of Indigenous Peoples* (the Draft Declaration) is the latest in a long list of comprehensive human rights instruments developed by the UN. However, the purpose of the present setting is to recognise the specificity of a vast group of Indigenous Peoples largely ignored by the international community. Since ILO Convention 169 was adopted in 1989, within the UN there has been some move to develop an indigenous rights declaration in the UN Sub-Commission group, the Sub-Commission itself, and the UN Commission on Human Rights (UNCHR). The Working Group on Indigenous Populations (WGIP) is a subsidiary organ of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, itself a subsidiary of the Commission on Human Rights (CHR). By 1993, under the auspices of the Economic and Social Council (ECOSOC) of the UN, the WGIP compiled a set of indigenous rights, codified in the Draft Declaration. The Draft Declaration is the result of almost 13 years works in the WGIP by representatives of Indigenous Peoples, governments and non-governmental organisations, as well as individuals from all parts of the world. The Draft Declaration, after consideration by the Sub-Commission on Minorities, will go to the CHR and ECOSOC and from there it will be forwarded to the United Nations General Assembly for adoption. Nevertheless, governments have shown some scepticism towards it.

Alfred and Corntassel maintained that the most pressing goal for Indigenous Peoples during the past UN's International Decade of the World's Indigenous People (1995 - 2004) had been the revision of the UN *Draft Declaration on the Rights of*

[1] Pou, H.H, 'A Short List of Whakatauki' (Unpublished Manuscript in author's possession, Taitokerau Whakatauki, no date) at 11. Follow the pursuit of excellence and only turn from it before something great. The pursuit of the recognition and realisation of internal self-determination for Indigenous Peoples is a lofty mountain to traverse. The Declaration on the Rights of Indigenous Peoples is part of this pursuit of excellence. The reader is warned however, that the latest version of the Declaration on the Rights of Indigenous Peoples has a number of differences in text, length and content to the version referred to in this research. At the time of binding the thesis, the most recent version of the Declaration was available and is included in Appendix V to provide further context for the reader. See also Human Rights Council, *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994* (Resolution 2006/2, UN Doc E/CN4/2006/79).

Indigenous Peoples for eventual ratification by the General Assembly.[2] Nonetheless, only two of the Draft Declaration's 45 articles have been approved to date. [3]

The Draft Declaration, however, is intended to be a Declaration and not a Convention, which means that it would not, as such, be binding on member states. Thus, even after it has finally been adopted by the General Assembly, it will not impose legally binding obligations. Rather, it will be a statement of principle with considerable moral and persuasive force. While some might argue that the Declaration is only a 'draft', it is said that such proceedings from the UN Working Group are already being used 'as a source of legitimacy for particular positions in intrastate politics.'[4] The Draft Declaration is an indication of the present international trend and the New Zealand government even admitted that 'although the Declaration will not be binding on states, it will have powerful moral force and therefore should be compatible with New Zealand's national laws.'[5] Still, the adopted Draft Declaration will be legally binding to the extent that it reflects customary international law or *jus cogens.* For example, the prohibition against genocide is included in the Draft Declaration and would appear to be a rule of *jus cogens.*[6] Moreover, Kingsbury indicated that courts in such Commonwealth countries as Canada, New Zealand and Australia are also making use of such emerging international standards. In each case, international developments – including the output of the UN WGIP, organisations of Indigenous Peoples and the ILO – played some part both in reassuring courts that they were marching in the spirit of the times and in reminding them that they were speaking also to international audiences.[7] Thus, one would be imprudent to ignore the Draft Declaration. If it was adopted as a Declaration current New Zealand and Canadian policy could be seriously embarrassed.[8]

4.1.1 FOUR CORE VALUES

Indigenous Peoples have essentially identified four core values underpinning the Draft Declaration:

1. The Draft Declaration was always devised and intended only as a set of minimum standards at international law;

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[2] Alfred, G.A & Corntassel, J 'A Decade of Rhetoric for Indigenous Peoples' (12 January 2004). Taken from Alfred's official website at www.taiaiake.com. (Accessed 20 March 2004).
[3] Idem.
[4] See Kingsbury, B. 'Whose International Law? Sovereignty and Non-State Groups', in *Am. Soc. Int'l L. Proc.* [1994] 1 at 6.
[5] Te Puni Kōkiri, *Mana Tangata: Draft Declaration on the Rights of Indigenous Peoples 1993. Background and Discussion on Key Issues* (Ministry of Maori Development, Wellington, 1994) at 6-7.
[6] Brownlie, I *Principles of Public International Law* (Oxford: Oxford University Press, 1991) at 512.
[7] Ibid, at 7.
[8] Cameron, J 'Sovereignty, Equality and Plural Justice in New Zealand' (Unpublished in-house paper, Law Commission, New Zealand, 1997) at 39.

2. The Draft Declaration was intended to reaffirm the humanness of all of the world's indigenous peoples in order to redress the centuries of colonial legal thought which consigned them and their polities to a sub-human and even non-human status. It is not merely an exercise in legal abstraction but a statement of human worth;
3. The Draft Declaration was intended to meet the needs of all indigenous peoples; and
4. The Draft Declaration is a declaration of the rights *of* indigenous peoples not the rights of indigenous peoples as deemed acceptable by States.[9]

Referring to core value 1, Jackson asserted that any proposed amendments to the Draft Declaration in its current form should not reduce the nature of the rights below an already agreed minimum.[10] Unfortunately, the reality of UN declarations, conventions and covenants is that member states view such declarations as the upper limit of required compliance. Conversely, advocates for Indigenous Peoples' groups see such declarations as the lower limit of what is acceptable. Thus, Indigenous Peoples and nation-states negotiate and compromise as to what are acceptable meanings of definitions of each of the major issues covered.[11]

Jackson added that any proposed amendments to core value 2 should not deny the humanness of Indigenous Peoples by constraining or restricting their access to the general norms of human rights law. Proposed amendments to core value 3 should not be drafted to meet the needs of specific nation-states or indigenous interests if it jeopardises or diminishes the rights of other Indigenous Peoples, and any proposed amendments to core value 4 should not subordinate fundamental human rights to an overriding or perceived nation-state interest.

4.1.2 DRAFTING PROCESS

Between 1993 and 1995 the WGIP produced a revised Draft Declaration that largely reflected the views of indigenous representatives. The Draft Declaration goes well beyond ILO Convention 169, especially in its bold statements in areas of indigenous self-determination,[12] land and resource rights[13] and rights of political autonomy or self-government.[14] The Draft was adopted by the UN Sub-Commission on the Prevention of

[9] Cited in Jackson, M 'An Analysis of the Amendments Proposed by the Ministry of Foreign Affairs and Trade to the United Nations Draft Declaration on the Rights of Indigenous Peoples' (Unpublished Symposium Presentation at the School of Law, University of Waikato Symposium, Le Grande Hotel, Hamilton, August, 2003) at 1.
[10] Idem.
[11] For a discussion on how non-indigenous groups, Governments and other bodies interpret, re-interpret, define and re-define indigenous identity and representivity, see chapters 9.7, 9.10-9.12, 10.6-10.12 and 10.14.
[12] Draft United Nations Declaration, Art. 3, *Report of the Working Group on Indigenous Populations on its Eleventh Session* UN Doc. E/CN.4/Sub.2/1994/2 (1994)
[13] Ibid, Arts. 25-30
[14] Ibid, Arts 31-38. For a good analysis of the Draft Declaration, see Burger, J & Hunt, P 'Towards the International Protection of Indigenous People's Rights' *NQHR* (Vol. 4, 1994) at 410-423. For a discussion of

Discrimination and the Protection of Minorities and was subsequently submitted to the CHR. However, in 1995 the CHR did not approve the Draft Declaration because of state concerns that the provisions concerning self-determination went further than states were willing to accept in an international document.[15] Accordingly, the Commission established its own working group to consider the Draft. Still, working group meetings provided an important forum for indigenous representatives to make their concerns and opinions known to state representatives. Nearly all states with significant indigenous populations took part in the meetings or in discussions over the standards of the Draft. Government and indigenous representatives from Canada and New Zealand took leading roles in the discussions of the Draft standards and they continue to play a leading role.

Daes commented, as chairperson of the WGIP, on the Draft Declaration in 1995:

> The present text reflects an extraordinary, liberal, transparent and democratic procedure that encouraged and unified indigenous input. ... The real task of the Commission on Human Rights is to guarantee the greatest possible degree of indigenous participation in the further consideration and approval of the Draft Declaration.[16]

Mathew Coon-Come, the representative of the Grand Council of the Crees, stated on the same occasion:

> Every paragraph of the Draft Declaration is based upon known instances of the violations of the human rights of indigenous peoples. There is nothing theoretical, abstract, or speculative about the substantive content of the Draft Declaration. It is written as an antidote for a troubling reality.
>
> It is essential that every government understand that the Draft Declaration is remedial both in its content and in its scope. The Draft Declaration does not spring from political origins or from diplomatic niceties. It began as a cry from the indigenous peoples for justice, and it is drafted to confirm that the international standards, which apply to all peoples of the world, apply to indigenous peoples. It is an exclusive instrument, meant to bring indigenous peoples into the purview of international law as subjects of international law.[17]

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the Draft and the Government's response in New Zealand, Te Puni Kōkiri, supra, n. 5; and Quentin-Baxter, A *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998).

[15] Iorns, CJ 'Indigenous Peoples and Self-determination: Challenging State Sovereignty' in *Case Western Reserve Journal of International Law* (Vol. 24, 1992) 199 at 242.

[16] Daes, E-I, Chairperson, UN Working Group on Indigenous Populations, at a Seminar on 'The Draft Declaration of the Rights of Indigenous Peoples – Current Developments and Their Implications for the United Nations International Decade of the World's Indigenous Peoples', (Organised by the ATSIC, Sydney, 29 April 1995). See also Daes, E-I, 'Equality of Indigenous Peoples under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples,' in *St Thomas Law Review* (Vol. 7, 1995) 493 at 494.

[17] Coone-Come, M, Grand Chief, Grand Council of the Crees, at a Seminar on 'The Draft Declaration on the Rights of Indigenous Peoples – Current Developments and Their Implications for the United Nations International Decade of the World's Indigenous Peoples' (Organised by the ATSIC, Sydney, 29 April 1995).

At the first meeting of the Commission on Human Rights Working Group (CHRWG) in 1995, Coon-Come stated:

> The Draft Declaration is perhaps the most representative document that the UN has ever produced, representative in the sense that its normative statements reflect in a more than token way, the experience, perspectives, and contributions of indigenous peoples. In a word, it is a document that was produced in a decade-long spirit of equal dialogue and mutual recognition. ... The Working Group should approach the Draft Declaration before it on the basis of a high presumption of validity of its provisions.[18]

Daes has drawn attention to three main elements of the Draft Declaration that distinguish it from other human rights instruments, especially those dealing with minorities. These are legal personality, territorial security and international responsibility. According to Daes, the Draft Declaration not only acknowledges Indigenous Peoples as 'peoples' in the international sense but it recognises that they continue to possess a distinct collective legal character "even in cases where they have agreed to be incorporated into existing states:"

> This is of cardinal importance because indigenous peoples generally do not aspire to separate statehood. At the same time, they do not see that they can ever accept complete integration by force into the states that comprise the United Nations. Although equal in law to all other peoples, indigenous peoples tend to prefer partnerships over secure statehood to complete integration. To protect the integrity of these basic arrangements, indigenous peoples must continue to enjoy a legal status of their own and access to international forums.[19]

A corollary of legal personality is the principle of territorial security. According to Daes, this means that 'Indigenous Peoples define historical territories within borders of existing states, and the right to keep these territories physically intact, environmentally sound and economically sustainable in their own ways.' A further corollary of indigenous legal personality is international responsibility. This means that 'defending the right of Indigenous Peoples continues to be a matter of international concern, and a specific part of the mandates on international bodies and legal mechanisms to which Indigenous Peoples themselves should have access.'[20]

4.1.3 SUBSTANTIVE ARTICLES

The Draft Declaration is divided into eight main parts, each of which addresses particular thematic concerns (Appendix V). A ninth part contains miscellaneous provisions.

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[18] Commission on Human Rights Open-ended Intersessional Working Group, First Session, 20 November – 1 Dec 1995).
[19] Daes, supra, n 16 at 496-97.
[20] Idem.

Part I, General Principles,[21] proclaims the fundamental rights of Indigenous Peoples to self-determination, as well as to equality, freedom from adverse discrimination and nationality. Article 3 in its current form (as at 2004) states that:

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

Article 4 states that:

> Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Part II, Life, Integrity and Security,[22] affirms the right of Indigenous Peoples to physical existence, integrity and security and to full guarantees against genocide, including the removal of indigenous children. Articles 6-11 address the principal threats to the survival of Indigenous Peoples and their cultural values. There is recognition of rights to distinct identities, including self-identification, to belong to indigenous communities/nations, not to be forcibly removed and to security in periods of armed conflict.

Part III, Cultural, Spiritual & Linguistic Identity,[23] proclaims the rights connected with the cultural, spiritual and linguistic identity of Indigenous Peoples. These include the rights to cultural traditions and customs, to spiritual and religious traditions, and to languages and oral traditions.

Part IV, Educational, Information and Labour Rights,[24] addresses the role of education and public awareness programmes in the empowerment of Indigenous Peoples. Articles 15–17 recognise the right to their own educational institutions providing education in indigenous languages, to have their cultures and aspirations reflected in education and public information, and to establish their own media in their own languages. Article 18 refers to international labour law and national labour legislation.

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[21] Articles 1-5.
[22] Articles 6-11.
[23] Articles 12-14.
[24] Articles 15-18.

Part V, Participatory, Developmental and Other Economic and Social Rights,[25] is concerned with the economic and social empowerment of Indigenous Peoples, particularly through their own decision-making mechanisms. The importance of participation and issues of access to justice are emphasised. There is recognition of the right of Indigenous Peoples to participate in decision-making and in devising legislative and administrative measures that may affect them, as well as to maintain their own decision-making institutions. Recognised are rights to political, economic and social systems, to traditional and other economic activities, to special measures for the improvement of economic and social conditions, to determine priorities and strategies for exercising the right to development, and to traditional medicines and health practices.

Part VI, Land and Resources,[26] addresses the rights connected with the distinctive relationship of Indigenous Peoples with their lands, waters and other resources. There is also recognition of rights to own and develop their lands, waters and other resources, including recognition of customs and institutions for the management of resources. Rights to restitution or compensation for lands and resources confiscated or used without consent, and rights to the ownership of intellectual and cultural property are similarly recognised.

Part VII, Exercise of Self-determination, Indigenous Institutions,[27] provides guidelines for situations in which Indigenous Peoples exercise their right of self-determination through forms of autonomy and self-government. Article 31 states:

> Indigenous peoples, as a specific form of exercising their right of self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

The New Zealand government responded to this article by citing legislation that purportedly provides for the recognition of Māori rights at the iwi, hapū and whānau level. Moreover, the government held that national law would always be available to protect the rights of all New Zealanders. It referred to issues of criminal jurisdiction and taxation, where the government retains the right to limit the collective jurisdiction of Indigenous Peoples in order to protect the right of individuals, and reiterated the refusal to support a system of separate laws for Māori that do not derive their authority from Parliament. Furthermore, the New Zealand government refused to construe the right of Indigenous

[25] Articles 19-24.
[26] Articles 25-30
[27] Articles 31-36.

Peoples to the means of financing Māori autonomy as entitling Māori authorities, for example, to levy taxation independently of Parliament.[28]

Part VII also contains articles which affirm rights of Indigenous Peoples to determine their own citizenship, to have their own institutional structures and juridical customs and procedures, to establish relations and co-operation with other peoples across borders, and to be involved in the recognition of Treaties, agreements and other constructive arrangements concluded with States or their successors. Article 32 states:

> Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

The New Zealand government opposed this Article on the basis that it does not seem to be consistent with the principle of common citizenship established under the *Treaty of Waitangi* and the legislation subsequent to it. Moreover, the government held that it could not accept a right which implied that indigenous New Zealanders could establish separate categories of New Zealand citizenship independently of Parliament.[29]

Part VIII, Implementation,[30] is concerned with the obligations of States and the role of the international community in the recognition of the rights of Indigenous Peoples and in the implementation of the provisions of the Declaration.

The Draft Declaration is primarily about the rights of Indigenous Peoples globally, to retain their culture and resources, along with a level of authority that itself stems from earlier occupation and ongoing affinities with the land and the waterways. The preamble 'recognises' that Indigenous Peoples have the right to freely determine their relationships with nation-states, and 'acknowledges' that the UN Charter and other specified covenants affirm the fundamental importance of the right of self-determination of all peoples.

The Draft Declaration, therefore, appears to accept the validity of legal pluralism and indigenous self-governance.

According to the Draft Declaration, it seems that a single nation-state is capable of satisfying the parameters of indigenous self-governance and development as freedom,[31] provided that value and recognition are afforded to indigeneity as a distinct reality and that a relationship based on mutual respect and explicit understandings is forged between the

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[28] Te Puni Kōkiri, supra n 5 at 13-4.
[29] Ibid, at 1
[30] Articles 37 – 41.
[31] For a discussion on development as freedom, see Sen, A, *Development as Freedom* (Knopf, New York, 2000). Essentially, development as freedom is a development that brings with it the freedom to individuals and Peoples to develop their capabilities including the capability to be themselves and to govern themselves.

nation-state and the Indigenous Peoples. Although there is a lack of agreement about how the nation-state/indigenous relationship might evolve, at least the challenges have been identified, including the need for frameworks for multiple jurisdictions and greater clarity about the ways in which parallel and interfacing governance structures, values and principles might accommodate differentiated citizenship rights to self-government and representation.

Self-Determination Concerns

The right to self-determination of Indigenous Peoples is the most controversial provision of the Draft Declaration. But as outlined previously and in the ICJ *Western Sahara* case, the primary role and meaning of self-determination requires a 'free and genuine expression of the will of the peoples concerned.'[32] Indigenous Peoples pushed for the inclusion of self-determination in the Declaration in order to have their right to freely determine their future. Indeed, Cassesse opined that the principle of self-determination includes:

> The method by which States must reach decisions concerning peoples ... by heeding their freely expressed will. In contrast, the principle neither points to the various specific areas in which self-determination should apply, nor to the final goal of self-determination (internal self-government, independent statehood, association with or integration into another State).[33]

However, it seems that UN member states, such as Canada and New Zealand, with Indigenous Peoples within their territory want to continue to control Indigenous Peoples by dehumanising them.[34] Falk stated that nation-states take a 'statist view of self-determination'[35] Falk furthermore held that:

> Commentators have increasingly come to appreciate the overall human importance, ecologically and as an intrinsic benefit, of keeping indigenous peoples from being either extinguished through encroachment or by way of assimilation.[36]

A Declaration is neither binding on nation-state governments nor is it a Treaty with legal obligations. A Declaration in a General Assembly resolution is viewed as evidence of state practice and can contribute to the evolution of customary international law. As Venne

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[32] ICJ *Advisory Opinion of the International Court of Justice Concerning the Western Sahara* [1975] ICJ Reports 12.
[33] Cassesse, A, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) at 320.
[34] The notion of Indigenous Peoples being dehumanised is discussed by Jackson in supra, n 9.
[35] Falk, R 'The Rights of Peoples (In Particular Indigenous Peoples)' in Crawford, J (ed) *The Rights of Peoples* (Oxford University Press, Oxford, 1988) at 24-27.
[36] Ibid, at 36.

opined, the inclusion of the right of self-determination in the Draft Declaration should not be problematic.[37] Indigenous Peoples want to have recognised by the international community, their right to freely determine their future. Indeed, Sambo concluded:

> Indigenous peoples have regarded the right of self-determination as a prerequisite to the exercise of all other rights. The position of indigenous peoples has been that the Declaration must contain clear and explicit recognition of the fundamental right of self-determination, without discrimination or any other limitation. ... It is clear that substantial progress has been made with respect to the right of self-determination, but many indigenous peoples have expressed concern about maintaining such language throughout the progression of the Draft Declaration within the United Nations.[38]

Predictably, nation-states such as New Zealand and Canada have expressed strong opposition to the inclusion of self-determination in the Declaration. The major objection seems to stem from the fear that explicit recognition of the right would allow Indigenous Peoples to exercise a right of political independence and secession. They hold that the Draft Declaration should cover only self-determination *within* a nation-state. The New Zealand government rejected any implication that Māori could make law not derived from the authority of Parliament.[39]

Indigenous organisations and individual nations have continued to assert themselves by refusing to compromise their rights to self-determination in the face of nation-state pressures to do so, and there have been a proliferation of indigenous declarations across a wide range of issues over the last six years. Given the political context and non-binding legal status of these documents, they are ignored by nation-states. Some of the more recent indigenous declarations include:

- Indigenous Peoples Seattle Declaration 1999;
- Baguio Declaration 1999;
- Declaration of Indigenous Peoples on Climate Change 2000;
- Indigenous Peoples Millennium Conference Statement 2001; and
- Declaration and Platform of Action on the Occasion of the First Indigenous Women's Summit of the Americas 2002.

The words of today's indigenous leaders provide insight into their communities' needs for survival and self-determination. For example, the self-determination needs of some 30 indigenous representatives in Asia are clearly asserted in the Baguio Declaration 1999, which states:

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[37] Venne, S *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (British Columbia: Theytus Books Ltd, 1998) at 122.

[38] Sambo, D 'Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?' in *Transnational Law and Contemporary Problems* (Vol. 3, 1993) at 23-25.

[39] As cited in Cameron, supra n 8 at 39.

> The implementation of the right of self-determination is fundamental for the survival and achievement of human security for indigenous peoples, including, but not limited to, their cultures, values, languages, religions, economies, indigenous knowledge systems, way of life, ancestral territories, lands and resources.

But getting indigenous issues on the UN agenda is not enough to ensure the protection of Indigenous Peoples' human and political rights, including rights to self-determination.

4.1.3.1 GROUP RIGHTS V INDIVIDUAL RIGHTS

An important observation is that the Draft Declaration is essentially seeking to protect the collective rights of Indigenous Peoples.[40] The 1990 Draft provided in Article 24 that Indigenous Peoples' responsibilities and rights should be consistent with universally recognised human rights and fundamental freedoms. In the 1993 Draft this article disappeared and was replaced by the slightly weaker Article 33 (which is its current form), stating that Indigenous Peoples have a right to their distinctive juridical customs, traditions, procedures and practices in accordance with internationally recognised human rights standards. Article 1 declares the right of Indigenous Peoples to the full and effective enjoyment of all human rights and fundamental freedoms recognised in the UN Charter. And the preamble 'encourages' nation-states to comply with and effectively implement all international instruments, in particular those related to human rights. A potential issue for Indigenous Peoples, however, is the emphasis of international law and human rights norms on individual and not collective rights.

International law has traditionally protected individual rather than collective rights but there are some exceptions. The *African Charter on Human and Peoples' Rights* is replete with both individual and collective rights, reflecting the importance of kinship in African society. For many Africans the communal lifestyle, with its responsibilities and entitlements, has great meaning, which is similar to many other Indigenous Peoples, including Māori and First Nations. In contrast, however, to the Draft Declaration, the African Charter is a binding human rights instrument with implementation procedures, including a complaints mechanism, which extends to collective rights. Moreover, ILO Convention 169 protects the collective rights of Indigenous Peoples and the provision of

[40] Perhaps the best reference on collective rights of Indigenous Peoples is Will Kymlicka. See Kymlicka, W, *Liberalism, Community and Culture* (Clarendon Press, Oxford, 1991); Kymlicka, W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1991); Kymlicka, W, 'Three Forms of Group-Differentiated Citizenship in Canada' in Benhabib, S (ed.) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, NJ, 1996) and Kymlicka, W, Norman, W, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' in Beiner, R, (ed) *Theorising Citizenship* (State University of New York Press, Albany, 1995).

the ICCPR protecting minorities includes a group rights dimension. Thus, the Draft Declaration's emphasis on collective rights, although unusual to some, is not without precedent.

The concept of human rights is endorsed generally throughout the world but the Western ideologies reflected result in some disagreement between universalism and cultural relativism. Still, Amartya Sen opined about values generally:

> While the values underlying democracy (such as political tolerance and cherishing liberty and participation) can be found in much classical Western writing, they can be similarly found in classical Asian literature as well. The value of tolerance and liberty is part of world heritage, not a narrowly Western creation.[41]

Perhaps collective rights have similar resonance. For example, the notion of a social contract and utilitarianism focus on the collective.

Nevertheless, some claim that allowances must be made for different cultural norms and that a standard approach cannot be taken to human rights. Iorns noted that to require compliance with human rights conventions could also be an attempt to negate the right of Indigenous Peoples to their own customs by imposing non-indigenous cultural values upon them.[42] McLaughlin stated that it is unconscionable to place indigenous rights under the banner of human rights but to then exclude the operation of those rights within indigenous customary law.[43] A challenge, therefore, is which should yield in cases of conflict between customary law and human rights law, and over collective versus individual rights? No *a priori* answer is possible or appropriate.

In wielding governmental power, for instance, Indigenous Peoples may violate human rights norms in numerous ways. As an example, by discriminating among their members on grounds forbidden by those norms, except to the extent that disadvantaged members can be understood to 'accept' the discriminatory treatment as part of their cultural tradition. This issue raises many complex questions. A group's treatment of its own members within an autonomy regime poses issues about cultural relativism and universalism in human rights norms, and about the degree to which cultural survival for many communities may be understood to require practices violating human rights instruments – practices such as gender discrimination or government by a non-elected leadership. The notion of members' 'acceptance' of practices like discrimination or severe forms of punishment is itself problematic: what kind of acceptance, in what, if any, context

[41] Sen, A 'Choosing Freedom' in *Far Eastern Economic Review* (27 January 2002) at 37 – 42.
[42] Iorns, C *Aboriginal Law Bulletin* (3/64) at 4.
[43] McLaughlin, *Aboriginal Law Bulletin* (R 3/82) at 4.

of choice or even knowledge of alternative social arrangements? The notion of 'disadvantaged' members may itself be problematic, as a concept drawn from an alien political and moral framework.[44]

Angelo suggested that there is concern in the Pacific region about human rights in the context of the role of custom and notions of community and group viability.[45] He referred to working papers for the draft Pacific Charter, which recognised:

> The group-based structure of island societies can inhibit the exercise of individual rights if it is abused or used in an oppressive manner, but techniques may nevertheless be developed which reduce the possibility of conflict. For any example, an approach, which recognises the duties of the individual to the group and society as a whole, would help to encourage balanced consideration of the relationships between the group and its members.[46]

A similar challenge has arisen in Canada. The debate there was whether aboriginal justice systems should be subject to the Canadian Charter of Rights and Freedoms (the Canadian Charter) provisions. Like the New Zealand and other Bills of Rights, the Canadian Charter emphasises individual rights. The two sources of norms overlap, since both the Canadian Charter and the New Zealand Bill of Rights (explicitly) give effect to the UN Covenant on Civil and Political Rights. The state of the argument was expressed in Canada as follows:

> Aboriginal leaders ... have expressed reservations about the application of the Charter to Aboriginal governments ... On the other side of the issue, certain Aboriginal women's organisations ... have insisted that the Charter must apply to all Aboriginal governments to ensure that human rights standards are respected. ... many Aboriginal people see the application of the Charter as simply inappropriate, because it does not reflect Aboriginal values or approaches to resolving disputes ... The concern rests with the Charter's elevation of the guaranteed legal rights over unguaranteed social and economic rights, the emphasis on rights rather than responsibilities, the failure to emphasise collective rights, and the litigation model of enforcement. These are among the features of the Charter that are alien to many Aboriginal communities.[47]

Central to this notion of Indigenous Peoples' collective rights, however, is the Draft Declaration's affirmation that:

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[44] See the discussion of these issues in Minow, M 'Putting Up and Putting Down: Tolerance Reconsidered' in Tushnet, M (ed) *Comparative Constitutional Federalism: Europe and America* (1990) 77 at 88 - 94.

[45] Angelo, A.H 'Lo Bilong Yumi Yet' in *Essays and Documents on Human Rights in the Pacific* (Victoria University of Wellington, 1992) at 40.

[46] Ibid, at 40.

[47] Hogg, P and Turpel, M *Aboriginal Self-Government: Legal and Constitutional Issues* (Canada Communication Group Publishing, Ottawa, 1995) at 415.

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[48]

All Indigenous Peoples that have participated in the drafting of the Draft Declaration consider this collective right of self-determination to be fundamental. In a common statement by Indigenous Peoples at the Working Group on Indigenous Populations (WGIP) in 1987, it was argued that:

> The right of self-determination is fundamental to the enjoyment of all human rights. From the right of self-determination flows the right to ... develop and maintain governing institutions.[49]

Indigenous Peoples, therefore, claim that they have a right to maintain their differences and to determine their future development collectively.[50] This right does not limit their full enjoyment of all rights established by international human rights law. The Draft Declaration affirms that the self-determination provisions of the ICCPR and the ICESCR apply to Indigenous Peoples.[51]

In addition, many nation-states have recognised group political rights as a legitimate way of meeting the concerns of particular groups, who fear that they would be neglected or assimilated if all the decisions were made by majority governments. Examples include Switzerland, the Netherlands and Belgium, which Arend described as 'consociational' democracies. Whenever possible, the group has been given autonomy in matters that concern it. When autonomy is not possible because the interest of the other groups or the state as a whole also have to be met, the necessary arrangements are required to be the subject of agreement, backed by a veto power. Baxter held that the consociational arrangements have proved a valuable safety valve, reducing tensions among different communities.[52] The sharing of power through the devolution of Parliamentary authority

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[48] Article 3.

[49] Joint Statement of Indigenous Delegation at the Fifth Session of the WGIP, July 1987.

[50] Burger & Hunt, supra n 14 at 412.

[51] Both instruments have a common Article 1(1): 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' In 2003, the New Zealand government attempted to amend, *inter alia*, Article 34 of the Draft Declaration by including a dispute resolution process to deal with this collectivist/individualist challenge. The amendment read: 'Indigenous Peoples have the collective right to determine the responsibilities of individuals to their communities in conformity with international human rights standards. In the resolution of any resulting tension between a collective and an individual right, account shall be taken of the interests protected by each right in ensuring consistency with relevant international human rights standards.' Jackson, supra n 9 at 17.

[52] Quentin-Baxter, supra n 14 at 30-31. See also Gay Morgan's sub-chapter 'Belgium and (Nascent?) Political Pluralism' in Morgan, G 'Reflections on Pluralist Conundrums' in *The Yearbook of New Zealand Jurisprudence* (School of Law, University of Waikato, 1998).

has, moreover, occurred in a number Westminster systems ranging from the Scottish Parliament[53] to the Welsh Assembly.[54]

4.1.3.2 PEOPLES V POPULATIONS - SELF-DETERMINATION AND DEHUMANISATION

International fora and nation-states have continually disempowered Indigenous Peoples by redefining them as 'populations' and not 'peoples' entitled to the international human right of self-determination.[55] This disempowering concept and process has consigned Indigenous Peoples to a sub-human or non-human status since the inception of colonialism and the invasion of the New World in 1492. Following World War II there was some hope for Indigenous Peoples to attain in international fora subject status with a right of self-determination but this was ephemeral.

Belgian Thesis

In the early 1950s, the Belgian government proposed that Indigenous People with a 'backward culture' should be protected under the United Nations Charter[56] and be able to take advantage of the decolonisation provisions devised to enable some former colonies to become independent. Belgium argued that:

> ...limiting the benefits to those peoples who live in the colonies or protectorates, as is the present tendency, is committing an injustice with regard to the others ... the abuses from which the native populations suffer are hardly more rampant in the colonies or the protectorates.[57]

Belgium viewed the history, spirit, and meaning of the Charter as requiring a universal application of the 'sacred trust.' Moreover, it submitted a list of Indigenous

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[53] See Hazell, R 'The UK's Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union?' (School of Public Policy, University College, London, Presented at the Canadian Study of Parliament Group Conference: Continuity and Change in the Westminster System of Parliamentary Government, Ottawa, 10 June 2000). See also Brown, A & McCrone, D *Business and the Scottish Parliamentary Project: Report and Executive Summary* (The Governance of Scotland Forum, University of Edinburgh, 1999); and The Scottish Parliament Public Information Service, *The Scottish Parliament: A Devolved Parliament* (Scottish Parliament Public Information Service, Edinburgh, 1999).

[54] See Carter, D 'The Assembly Election Results' in '*Library of the National Assembly for Wales: Brief Llyfrgell Cynulliad Cenedlaethol Cymru: Briff Brief* (CBB/99/001, Library of the National Assembly of Wales, Cardiff, 1999) and the National Assembly of Wales Cynulliad Cenedlaethol Cymru, *Assembly Information Booklet: Your Guide to the Assembly* (The Public Information and Education Service, Cardiff, 2000).

[55] See the discussion of this issue of dehumanising Indigenous Peoples in the sections on 'Indigenous' 'Peoples' with a right to self-determination in chapters 4.1.3.1-4.1.3.3.

[56] The 'Belgian Thesis' is found in UN Doc. A./AC.67/2 at 3-31; see; Kunz, J 'Chapter XI of the United Nations Charter in Action', *American Journal of International Law* (Vol. 48, No.34, 1954) at 103 and infra.

[57] Belgium Government Information Centre, *The Sacred Mission of Civilisation: To Which Peoples Should the Benefit be Extended? The Belgian Thesis* (New York, 1953) at 3, as quoted in El-Ayouty, Y *The United Nations and Decolonisation: The Role of Afro-Asia* (The Hague, Nijhoff, 1971) at 50.

Peoples that lived in non-self-governing territories in almost every area of the world, including Africa, Asia, North and South America, Australia and a number of Pacific Islands.[58] Belgium perceived the issue as involving the exploitation of people at a lower stage of 'civilisation' by those of a higher stage of 'civilisation' and as having nothing to do with geography:

> During the last few years, the debates concerning the non-self-governing territories have taken a form which is not in keeping with the spirit of co-operation that the Members of the United Nations pledged themselves to maintain among themselves. ... More than half the States represented in this Assembly are in that position ... We are familiar with these problems too, because we have been trying to solve them in the Belgian Congo for generations.[59]

Belgium further maintained that since all native (indigenous) peoples with a 'backward culture' were protected under the post-World War I League of Nations, they should have been protected under the UN:

> All backwards peoples whose advancement is in the hands of representatives of a more highly developed race have the same rights: they are entitled to the same protection. ... To claim that only some of them ought to receive the rights proclaimed in the principle in the Charter would be unfair to all the rest. ... What is the mission of civilisation entrusted by the Charter to Member States which administer non-self-governing territories? It consists, in accordance with the principle that the interests of the inhabitants are paramount, of the duty of encouraging their political, economic and social advancement and of developing their capacity for self-government ... These obligations are essentially humanitarian and there is no inherent reason why they should be restricted to colonies only.[60]

The Belgian government did not view its position as a threat to state sovereignty since the 'only question is whether we treat them properly, and whether we are doing our best to improve their situation.'[61] The Belgians, additionally, observed that colonialism could occur overland as well as overseas. The UN used a mythological geographical barrier to limit the application of these universal human rights principles.[62] Thus backward

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[58] Ibid, at 59-64.
[59] Ibid, at 7-8
[60] Ibid, at 8, 11, 27-28, 49-50, 56-57.
[61] Eagleton, C *Covenant of the League of Nations and Charter of the United Nations, Points of Difference* (1946) at 22.
[62] G.A Res. 1514, 15 U.N. GAOR, Supp. (No.16) 188, U.N. Doc. N/323 Add. 1-6 (1960) According to the 'geographically separate' requirement, international law is thus asked to perceive a distinction between the historical subjugation of an alien population living in a different part of the globe and the historical subjugation of a population living on a piece of land abutting that of its oppressors. The former can, apparently, never be legitimated by the mere passage of time, whereas the latter is eventually transformed into a protected status quo. Supra n 56 on the 'blue water thesis.'

(indigenous) peoples should have received protection, and it was arbitrary and discriminatory to deny them this protection because of geographic criteria.[63]

Notwithstanding the force of its logic, the Belgian thesis was rejected in the face of strong opposition from the Latin American countries. In 1960, *United Nations Resolution 1541* was passed, which strengthened the geographic limitation placed on the application of the Non-Self-Governing Territories provision. It stated that 'there is an obligation to transmit information in respect of territory that is geographically separate and is distinct ethnically and/or culturally from the country administering it.'[64] Accordingly, the UN confined the application of the Non-Self-Governing Territories provision to narrowly defined 'geographically separate' non-self-governing territories and not to all non-self-governing territories as originally intended. The Belgian Thesis was thus defeated because nation-states regarded Indigenous Peoples as minorities within states (not nations within) entitled only to general minority rights.[65] Therefore, many Indigenous Peoples within nation-states had no acknowledged and respected international human rights to decolonisation and self-determination from hegemonic nation-states.

4.1.3.3 INDIGENOUS PEOPLES AS 'PEOPLES'

Cobo and Other Authorities

Many nation-states have interpreted the term *peoples* as restricting the scope of self-determination. The principle of self-determination is deemed only concerned with *peoples* in the sense of a limited universe of narrowly defined, exclusive communities entitled to the full range of sovereign powers, including independent statehood. This approach has encouraged controversy over whether Indigenous Peoples are 'peoples' entitled to self-determination. Thus, when the Working Group on Indigenous Populations (WGIP) was established in 1982 member states refused to use the word *peoples* for fear of its implications that Indigenous Peoples have the right that 'all *peoples'* have to self-determination as expressed in common Article 1 of the International Covenants, and for fear of the self-determination implications of secession. The government nation-states of the UN refused to accede to identifying Indigenous Peoples as *peoples*, referring instead to Indigenous Peoples as indigenous *populations* only or in the singular as indigenous *people,* thus precluding the right of self-determination and collective rights. The resulting difficulties in the development of ILO Convention 169 and the Draft Declaration have also

[63] Belgian Thesis, supra n 56, 57 at 16, 49.
[64] G.A Res. 1514, 15 U.N. GAOR, Supp. (No.16) 188, U.N. Doc. N/323 Add. 1-6 (1960).
[65] The fear was that the Belgian thesis would destroy the territorial integrity of nation-states and thus state sovereignty. Iorns, supra n 15 at 255-6.

manifested themselves, over the debate on the use of the term *peoples* to identify the beneficiaries of both instruments. As mentioned earlier, World War II gave rise to the UN and the self-determination of 'peoples', which was included in the *UN Charter* among the organisation's founding principles.[66] The international human rights covenants hold out self-determination as a 'right' of all 'peoples,'[67] as do the *African Charter on Human Rights and Peoples*[68] and the *Helsinki Final Act.*[69]

In 1971 the UN passed the resolution of the Economic and Social Council authorising the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities to conduct a study on the '*Problem of Discrimination Against Indigenous Populations.*'[70] Between 1981 and 1983 Special Rapporteur José Martinez-Cobo delivered the series of final reports on the *Problem of Discrimination Against Indigenous Populations*. This multi-volume work compiled extensive data on Indigenous Peoples worldwide and made a series of findings and recommendations generally supportive of Indigenous Peoples' demands. The Cobo Report became a standard reference for discussion of the subject of Indigenous Peoples within the UN system. The Cobo Report was the most notable development for Indigenous Peoples' rights at the time because, inter alia, Cobo considered that the right to self-determination is a right properly accorded to indigenous minorities as peoples:

> Self-determination in its many forms must be recognized as the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own fate.[71]

The Report also initiated a pattern of further information gathering and evaluative work on the subject by experts working under the sponsorship of international organisations. The study and its findings provided the groundwork for the first forum in the international arena that specifically addressed Indigenous Peoples' issues - the UN Working Group on Indigenous Populations whose role, as has been discussed above, is to report on

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[66] U.N. Charter Art.1, para.2.

[67] *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, G.A Res. 2200(XXI), Art 1(1), 993 U.N.T.S 3 (entered in force 3 January 1976); *International Covenant on Civil and Political Rights*, Dec. 16, 1966, G.A Res. 2200(XXI), art 1(1), 999 U.N.T.S 171 (entered into force Mar. 23, 1976), and others.

[68] *African Charter on Human Rights and Indigenous Peoples Rights*, June 27, 1981, Organisation of African Unity, Art. 20, 21 I.L.M. 59 (1981) (entered into force 21 October 1986).

[69] *Final Act of the Conference on Security and Cooperation in Europe (Helsinki),* 1 August 1975, Principle 8, 14 I.L.M 1292 (1975).

[70] E.S.C Res. 1589 (L), 21 May 1971, U.N. ESCOR, 50th Sess., Supp. No.1 at 16, U.N. Doc. E/5044 (1971).

[71] U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations,* U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4 (J. Cobo, Special Rapporteur).

developments in this area and to work on the Draft Declaration that reinforces the notion that Indigenous Peoples are *peoples* with a concomitant right to self-determination.

Moreover, Hannum concluded that 'all' peoples have the right to self-determination[72] but who can exercise this right and the scope of that right are not always clear. Murswiek noted:

> Mere minorities are not subjects of the right to self-determination ... But it is important to recognise that the terms 'minority' and 'people' do not totally exclude one another; rather they partly overlap: one group that is a minority in relation to the whole population of a State can, on the one hand, be a national minority in the meaning of the law relating to minorities. But on the other hand, it can be a people in the meaning of the right of self-determination at the same time.[73]

Deprival of the right of self-determination within an existing nation-state and the existence of serious human rights violations[74] may give rise to a legitimate right to compensation and settlement. In this regard, Juviler commented:

> ... a new consensus is forming among experts that would include a recognition of an ethnic group's collective right to self-determination over the objections of its national government in the case of serious and unremedied violations of the rights of members of the ethnic group and the ethnic group taken as a whole. Self-determination could take the form of various degrees of autonomy.[75]

Moreover, Espiell indicated that a right to external self-determination will arise in the context of colonial or alien domination 'if the national unity claimed and the territorial integrity invoked are merely legal fictions which cloak real colonial or alien domination.'[76]

Hence it is clear that the right to self-determination is a universally accepted human right and not a mere principle in international law. Moreover, the right to self-determination under international law includes self-governance. Deprivation of self-

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[72] Hannum, H 'Rethinking Self-Determination' in *Virginia Journal of International Law* (Vol. 34, 1993) at 33: The covenants' description of the right of self-determination as a right of all peoples' and the CSCE reference to 'all peoples' always having the right to self-determination cannot be ignored. This section draws heavily from the Grand Council of the Crees (of Quebec) *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory Into a Sovereign Quebec* (Nemaska, Quebec: Grand Council of the Cree (of Quebec), 1995).

[73] Murswiek, D. 'The Issue of a Right of Secession – Reconsidered' in Tomuschat, C (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993) at 37.

[74] See, for example, Laing, E. 'The Norm of Self-Determination, 1941-1991' in *Calif. Western Int'l L. J.* (Vol. 22, 1991-92) 209 at 246-248, 307. See also Umozurike, U. *Self-Determination in International Law* (Archon Books, Hamden, Connecticut, 1972) at 274.

[75] Juviler, P. 'Contested Ground: Rights to Self-Determination and the Experience of the Former Soviet Union', in *Transnat'l L. & Contemp. Probs.* (Vol. 3, 1993) 71 at 73.

[76] Espiell, H.G. Special Rapporteur, *The Right to Self-Determination: Implementation of United Nations Resolutions,* (Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, New York, 1980), U.N. Doc. E/CN.4/Sub.2/405/Rev.1 at 14.

determination within existing states, severe oppression, ongoing discriminatory treatment and other persistent and serious human rights violations can give rise to a right to settle historic and contemporary injustices. The right to self-determination of Indigenous Peoples is a fundamental human right. In the *Western Sahara* case, the ICJ emphasised that the realisation of the right of self-determination 'requires a free and genuine expression of the will of the peoples concerned.'[77] Consequently, if Indigenous Peoples in Canada and New Zealand have a right to self-determination (as this thesis claims), then settler governments and the wider nation-state populations ought to respect the free and genuine expression of the Indigenous Peoples concerned. Moreover, governments cannot purport to determine the destiny of indigenous groups concerned within their geo-political boundaries. As Judge Dillard stated in his separate opinion in *Western Sahara:* 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people.1[78]

The right to self-determination of Indigenous Peoples is increasingly being recognised by a wide range of commentators, internationally as well as in Canada and New Zealand. In the 5-expert study commissioned by the National Assembly of Québec,[79] it provided that Indigenous Peoples have the right to self-determination even if such right might not include a right to independence for Indigenous Peoples.[80] As noted above, the Draft Declaration provides for self-determination in the same terms as the *International Covenants on Human Rights* as Article 3 states:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. [81]

The UN Meeting of Experts in Nuuk, Greenland concluded:

> The Meeting of Experts shares the view that indigenous peoples constitute distinct peoples and societies, with the right to self-determination, including the right to autonomy, self-government, and self-identification.[82]

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[77] *Advisory Opinion on Western Sahara,* [1975] I.C.J. Rep. 6 at 32, para. 55.
[78] Ibid, at 122.
[79] Franck, T. Higgins, R. Pellet, A. Shaw, M. & Tomuschat, C. 'L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté' in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Les Attributs d'un Québec souverain* (Bibliothèque nationale du Québec, Québec, 1992), Exposés et études, vol. 1, 377, at 420, 442; Cristescu, A. Special Rapporteur, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments,* (United Nations, New York, 1981), U.N. Doc. E/CN.4/Sub.2/404/Rev.1, at 37-41; Eastwood Jr., L. 'Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia' in *Duke J. of Comp. & Int'l L.* (Vol. 3, 1993) 299 at 303.
[80] Ibid, at 443.
[81] *United Nations Declaration on the Rights of Indigenous Peoples*, in Daes, E-I. Chairperson/Rapporteur, Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its eleventh session, E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex I), Article 3.

Hannum added:

> Self-determination is also relevant to the matrix of human rights which has developed over the past four decades, including specific rights applicable to ... indigenous peoples.[83]

Woodward highlighted Canada's international obligations to recognise the right of self-determination of Indigenous Peoples:

> It is notable that the International Covenant addresses the rights of peoples', just as s. 35(1) of the Constitution Act, 1982 guarantees rights for Canada's aboriginal peoples. Canada should consider the possibility that, by signing the International Covenant, it has made a commitment to recognise the right of self-determination of the aboriginal peoples of Canada.[84]

In Canada, the 1991 Report of the Aboriginal Justice Inquiry of Manitoba concluded:

> It is our assessment that Aboriginal rights to self-determination must be acknowledged openly and freely by all levels of government ...[85]

Furthermore, Macklem emphasised that:

> Aboriginal nations have an inherent right to self-determination and self-government, and that this inherent right must find both practical and constitutional recognition by the Canadian state.[86]

De Bellefeuille in Canada stated that Indigenous Peoples are 'peoples' entitled to self-determination:

> The ultimate affront would be for us Canadians to deny that the Indians are a people. They are a people, according to any standard. They are therefore entitled to self-determination.[87]

Joffe and Turpel underlined that Indigenous Peoples require recognition of their right to self-determination without discrimination.[88]

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[82] United Nations Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government,* (Nuuk, Greenland, September 24-28 1991), Preamble, Conclusions and Recommendations.
[83] Hannum, supra, n 72 at 34.
[84] Woodward, J. *Native Law* (Carswell, Toronto, 1989), at 83.
[85] Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Vol. 1, Queen's Printer, Winnipeg, Manitoba, 1991) at 143-144.
[86] Macklem, P. 'Ethnonationalism, Aboriginal Identities, and the Law' in Levin, M. (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (University of Toronto Press, Toronto, 1993) 9 at 31-32.
[87] De Bellefeuille, P. 'If Quebec rates sovereignty, why not Indians?' in *The Gazette,* (Montreal, September 7, 1978) at 9.

Both Indigenous Peoples and jurists, therefore, are increasingly proving the necessity for consistent application of the right of self-determination under international law.[89] Barsh stated that 'Indigenous Peoples who occupy distinct territories should not by virtue of their indigenousness enjoy lesser rights than Kazakhs, Armenians, Croats, or Bosnians.'[90] In addition, Iorns concluded:

> The argument relating to consistent application of the law is even more relevant in the case of Canada and the proposed secession of Quebec. If Quebec is allowed to secede from Canada without objection from the international community then an argument can be made that consistent application demands that at least the indigenous peoples within Canada similarly be entitled to secede. This argument is stronger than in the European examples, particularly because of the lack of history of oppression of Quebec by Canada (it thereby does not fit the existing criteria for colonial or racist domination) or of imposed union with the other Canadian states, and because of the satisfaction of these criteria by the indigenous peoples.[91]

Consistent with the above, it is clear that there can be no double standard in recognising the right of Indigenous Peoples to self-determination. In the context of indigenous post-settlement self-governance and development, it is especially crucial that Indigenous Peoples in Canada and New Zealand are not denied such fundamental rights. Moreover, in the view of many commentators, the right to self-determination has become a pre-emptory norm and a part of customary international law. Pre-emptory norms are described as 'rules of customary law which cannot be set aside by Treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.'[92] Indeed, Anaya concluded:

> Beyond its textual affirmation, self-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens* (a pre-emptory norm).[93]

Laing added that:

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[88] Joffe P. & Turpel, M.E. *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives,* (A study prepared for the Royal Commission on Aboriginal Peoples, June 1995, Vol. 1) at 188.

[89] See for example Daes, E-I. *Explanatory note Concerning the Draft Declaration on the Rights of Indigenous Peoples,* (U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1) at 6, para. 28.

[90] Barsh, R. 'Indigenous Peoples in the 1990s: From Object to Subject of International Law?' in *Harvard Human Rts. J.* (Vol. 7, 1994) 33 at 37.

[91] Iorns, supra n 15 at 267.

[92] Brownlie, supra n 6 at 513. Indeed, Cassesse held: 'the conclusion is justified that self-determination constitutes a pre-emptory norm of international law.' Cassese, supra n 33 at 140.

[93] Anaya, J, 'Indigenous Norms in Customary International Law' in *Arizona Journal of International and Comparative Law* (Vol. 8, 1991) at 29-30; Brownlie, supra n 6 at 513; Thornberry, P. *International Law and the Law of Minorities* (Clarendon Press, Oxford, 1991) at 14; Espiell, H.G. 'Self-Determination and Jus Cogens' in Cassese, A. (ed.), *UN Law Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands, 1979) 167 at 167; Rosas, A. 'Internal Self-Determination' in Tomuschat, C (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993) at 247-248.

> ... although our analysis does not furnish a definitive answer to the question whether or not self-determination is *jus cogens*, there are extremely strong indications of this possibility.[94]

The separate opinion of Vice-President Ammoun of the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*[95] also held that:

> The [representative of Pakistan] rightly viewed the act of using force with the object of frustrating the right of self-determination as an act of aggression, which is all the more grave in that the right of self-determination is a norm of the nature of jus cogens, derogation from which is not permissible under any circumstances.[96]

Consequently, the right to self-determination *per se* cannot be denied to Indigenous Peoples in independent nation-states (including settler states). Regardless of whether nation-states recognise an Indigenous Peoples' right to self-determination, a right to settle injustices will arise if a particular people is treated in a colonised, oppressed manner. Although the traditional context of colonialism and decolonisation was said to refer solely to those overseas territories where there was 'blue water' between the colonial power and the Indigenous Peoples concerned and if the Indigenous Peoples constituted a majority in the territory, it can be strongly argued that this arbitrary framework cannot be justified and a broader definition of colonialism should result. In this regard, Franck noted:

> The first [scenario] arises when a minority [and indigenous peoples] within a sovereign state – especially if it occupies a discrete territory within that state – persistently and egregiously is denied political and social equality and the opportunity to retain its cultural identity. In such circumstances, it is conceivable that international law will define such repression, prohibited by the [International Covenant on Civil and Political Rights], as coming within a somewhat stretched definition of colonialism. Such repression, even by an independent state not normally thought to be imperial 'would then give rise to a right of decolonisation.'[97]

As Turpel pointed out, Indigenous Peoples are still being colonised from a political perspective:

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[94] Laing, E. 'The Norm of Self-Determination, 1941-1991' in, *Calif. Western Int'l L. J.* (Vol. 22, 1991-92) at 307-308,

[95] International Court of Justice, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970). Advisory Opinion,* [1971] I.C.J. 16 at 89-90 (Separate Opinion of Vice-President Ammoun): [Official Translation].

[96] Idem.

[97] Franck, T. 'Postmodern Tribalism and the Right to Secession' in Brölmann, C. Lefeber, R. Zieck, M. (eds), *Peoples and Minorities in International Law* (Kluwer Academic Publishers, Boston, 1993) at 14.

> Institutionally, the international trusteeship and decolonisation process did not address indigenous claims. Indigenous peoples, especially in the Americas, have yet to witness political decolonisation.[98]

By increasingly recognising the internal self-determination of Indigenous Peoples in the Canadian and New Zealand contexts, both settler states would be acting towards eliminating the possibility of claims that an external right of self-determination is warranted, based on international criteria. If, on the other hand, indigenous or other peoples are denied their internal right of self-determination to self-government, it can give rise to a right to secession. The author regards this latter option as the extreme, a last resort.

4.1.4 POLICY IN CANADA AND NEW ZEALAND

Some nation-states reject any use of the terms 'peoples' and 'self-determination' in the Draft Declaration. Others, such as New Zealand and Canada, are inclined to allow the use of these terms but expressly exclude any international law implications of the terms and expressly limit the right of self-determination to internal matters only.[99] The New Zealand government, for example, noted that 'although the term *peoples* has the technical meaning of self-determination in international law, the term *people* and also the term *populations* can be used in ways that do not carry this technical meaning. For this reason, some governments participating in the WGIP discussions have preferred the use of the singular term *people* or the term *population*.[100] In addition, the New Zealand government held that the UN instruments make a distinction between *peoples* and 'ethnic, religious or linguistic *minorities'* within a nation-state, which implied that *minorities* are not normally recognised to have such a right to self-determination.[101] In Canada, discussing the then recent UN World Conference on Human Rights in Vienna an Alberta Report Article from 2 July 1993 stated:

> The previous Friday had been set aside for consideration of the rights of 'indigenous peoples.' During that discussion, the Canadian government had insisted that the draft resolution refer not to 'peoples' but to 'people.' The Canadians explained that they wanted to avoid the former term since it might legally imply a right of self-determination and they did not wish to open up that Pandora's box yet.[102]

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[98] Turpel, M.E. 'Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' in *Cornell Int'l L. J.* (Vol. 25, 1992) at 579.

[99] See *Report of the WGIP on its Eleventh Session*, U.N. Doc. E/CN.4/Sub.2/1993/29 (23 August 1993) at 56.

[100] Te Puni Kōkiri, supra n 5 at 11.

[101] Idem.

[102] Cited in Roy, A.J 'Sovereignty and Decolonisation: Indigenous Self-Determination at the United Nations and Canada' (Unpublished MA Thesis, Department of Indigenous Governance, University of Victoria, Victoria, B.C, 1998) at 57.

Nonetheless, it is considered of crucial importance by indigenous groups that the term *peoples* or 'nations' be used and not *people*, *populations* or *minorities*. The ILO abandoned the term *populations* by adopting ILO Convention 169 on Indigenous and Tribal *Peoples*, which revised ILO Convention 107 on Indigenous and Tribal *Populations*.[103] In international law, *peoples* have more rights than *populations* and *people* are not always *minorities*.[104] Peoples not only have the civil, political, economic, social, and cultural rights of individuals but also those of collective entities, in particular the right to self-determination.

The Canadian *Royal Commission on Aboriginal Peoples* in 1997 concluded that Aboriginal Peoples in Canada had the right to choose self-government within Canada pursuant to their right of self-determination in international law.[105] Moreover, while attending the Human Rights Conference in Vienna, Chief Ted Moses of the Grand Council of the Crees advanced the notion that 'Indigenous Peoples ask to be accorded the same rights which the U.N accords the other 'peoples' of the world.'[106]

In 2000, a Permanent Forum on Indigenous Issues was established by ECOSOC but the forum was compromised from its inception, with nation-states refusing to approve a Permanent Forum on Indigenous *Peoples,* fearing that use of the word *peoples* would imply recognition of Indigenous Peoples rights of self-determination. Furthermore, appointed indigenous and government representatives attending the inaugural meeting of the Permanent Forum in New York stressed the view that it should function in support of research and policy-making and not as a site of 'complaints' and political debate, referencing the long-running and contentious annual meetings of the UN Working Group on Indigenous Populations in Geneva.

It is a serious mistake to focus too narrowly (as mentioned above) on self-determination as having meaning only within the context of sovereign nation-states. To do

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[103] Article 1, subsection 3 ILO Convention 169, however, reads: 'The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.'

[104] For example, in Guatemala some estimates suggest that Indigenous Peoples constitute as much as 65% of the population, while in Greenland, Inuit make up approximately 90% of the population and both groups have yet to be accepted as *peoples* at international law. See van de Fliert, L (ed) *Indigenous Peoples and International Organisations* (Bertrand Russell House, Nottingham, England, 1994) at 5; and Corntassel, J & Primeau, H 'Indigenous Sovereignty' and International Law: Revised Strategies for Pursuing 'Self-Determination' in *Human Rights Quarterly* (Vol. 17, 1995) 343 at 347.

[105] Wilson, B *Self-Determination of Native Peoples: A Canadian Perspective on Emerging Issues in New Zealand* (The Struggle for Simplicity Conference, Legal Research Foundation, Auckland, 4-5 May 1997) at 16.

[106] As stated in paragraph 1, Part II of the Declaration of the World Conference on Human Rights in Vienna June 1993, cited in van de Fliert, supra n 104 at 5.

so would be to deny the human characteristic of self-determination. The Draft Declaration was, according to Indigenous Peoples, intended to reaffirm the humanness of all Indigenous Peoples in order to redress the centuries of colonial jurisprudence that consigned them to a subhuman, and even non-human, status. Indeed, Anaya concluded:

> ... for a period in history, international law was concerned only for the rights and duties of independent sovereigns, disregarding the face of humanity beyond the sovereign. Under the modern rubric of human rights, however, international law increasingly is concerned with upholding rights deemed to inhere in human beings individually as well as collectively. Extending from the core values human freedom and equality, expressly associated with peoples instead of States, and affirmed in a number of international human rights instruments, the principle of self-determination arises within international law's human rights frame and hence benefits human beings *as human beings* and not sovereign entities as such. Like all human rights norms, moreover, self-determination is presumptively universal in scope and thus must be assumed to benefit all segments of humanity.[107]

Anaya further observed that:

> ... although self-determination presumptively benefits all human beings, its linkage with the term *peoples* in international instruments indicates the collective or group character of the principle. Self-determination is concerned with human beings, not simply as individuals with autonomous will but more as social creatures engaged in the constitution and functioning of communities. In its plain meaning, the term *peoples* undoubtedly embraces the multitude of indigenous groups like the Maori, the Miskito, the Navajo, which comprise distinct communities each with its own social, cultural and political attributes richly rooted in history.[108]

Anaya argued that it is anachronistic to confine self-determination to notions of sovereignty and statehood. To do so would diminish and undermine the rich tapestry of human relationships and cultures that exist within nation-state boundaries, and fail to take account of continually evolving international human rights norms:

> Any conception of self-determination that does not take into account the multiple patterns of human association and interdependency is at best incomplete and more likely distorted. The values of freedom and equality implicit in the concept of self-determination have meanings for the multiple and overlapping spheres of human association and political ordering that characterise humanity. Properly understood, the principle of self-determination, commensurate with the values it incorporates, benefits groups – that is 'peoples' in the ordinary sense of the term – throughout the spectrum of humanity's complex web of inter-relationships and loyalties, and not just peoples defined by existing or perceived sovereign boundaries. And in a world of increasingly overlapping and integrated political spheres, self-determination concerns the constitution and functioning of all levels and forms of government under which people live. Ordinarily, terms in international legal instruments are

[107] Anaya, supra n 93 at 76.
[108] Idem.

> to be interpreted according to their plain meaning. There should be no exception for the terms '*peoples.*'[109]

In 1992, 13 Māori groups asserted their right of self-determination as *peoples* by filing a complaint under Article I of the ICCPR with the UN Human Rights Committee over the Sealords Fisheries Settlement:

> The complainants claim their tribes are *peoples* within the definition and meaning of Article 1 and as such the complainants and their tribes are entitled to claim the right of self-determination. This is consistent with the position of those who signed the Treaty of Waitangi and is consistent with majority Maori opinion. ... It is submitted that the ability to claim the right to self-determination does not necessarily depend on an assertion of complete independence thus affecting the territorial integrity of the state but can encompass peoples who have a defined territory within a state, a long association with that territory, who operate as collectives and who have historically been treated by a majority government as a significant minority with acknowledged rights based on their special status and long association with the land and sea.[110] [emphasis added]

The UN complaint was also based on Article 27 of the ICCPR dealing with the rights of persons belonging to ethnic, religious or linguistic minorities. In response to the New Zealand government's arguments rejecting Māori self-determination, the Human Rights Committee noted:

> 15.4 As to the State party's argument that the author's communication pertaining to self-determination should be declared inadmissible because the Committee is not empowered to consider communications alleging violations of article 1 of the Covenant, the Committee finds that, in the instant case, only the consideration of the merits of the case will enable the Committee to determine the relevance of article 1 to the author's claims under article 27.[111]

The claimants then referred to international human rights instruments that allegedly acknowledged their special status as indigenous *peoples*, including ILO 107 and 169 and the *Draft Declaration on the Rights of Indigenous Peoples*. The New Zealand government, on the other hand, rejected this position stating:

> The right of self-determination as set out in Article 1, is clearly associated with the right of all the people of the territory, whether in the colonial context or otherwise, to determine their international status, and includes the right, should they wish to establish an independent state.

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[109] Ibid, at 77.

[110] United Nations, *International Covenant on Civil and Political Rights*, Human Rights Committee Decisions CCPR/C/55/D/547/1993 on Communication No. 547/1993 by Apirana Mahuika et al, Communication to the Human Rights Committee against the Government of New Zealand, 8 December 1992 (registered as Communication No. 547/1993) filed on behalf of Ngāti Porou, Ngāti Kahungunu, Rongomaiwahine, Ngāti Awa, Te Whānau a Nuku, Te Whānau a Rutaia, Te Whānau a Kaiao, Te Whānau a Tutawake, Te Whānau a Kahurautao, Te Iwi Moriori, Ngāpuhi, Tuhuru, Ngāti Wai, Rangitāne ki Wairau-Muaupoko, Te Tinana o Ngāti Whātua Nui Tonu.

[111] Ibid, at 25, para 15.4.

> The right as stated in Article 1 was not intended to guarantee to indigenous or other ethnic groups which may be present within an existing state, the right to establish an independent state, or outside of that, to grant such groups any right of autonomy or self-government. There may of course be evolution within a state towards greater autonomy or self-government for indigenous or other ethnic groups, and there are many examples of this, but that is part of a political process and does not derive from any legal rights contained in Article 1 of the Covenant. ... Thus in this case, a right of self-determination cannot be artificially attributed to Maori generally or to individual Iwi and Hapu within New Zealand when it is clear that they were not intended to be seen as 'peoples' for the purposes of Article 1.[112]

The Human Rights Committee ruling on admissibility was:

> That the communication is admissible in so far as it may raise issues under article 14, paragraph 1, and 27 in conjunction with article 1 of the Covenant.[113]

In addition, Daes explicitly declared, in 1993, that the WGIP considers that the Draft Declaration recognises the international law right of self-determination for Indigenous Peoples, albeit a 'new contemporary category' of the right.[114] Daes noted that its application to Indigenous Peoples:

> Means that the existing State has the duty to accommodate the aspirations of indigenous peoples through institutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise the right of self-determination by this means and other peaceful ways, to the extent possible. Furthermore, the right of self-determination of indigenous peoples should ordinarily be interpreted as the right to negotiate freely their status and representation in the State in which they live.[115]

To fail to recognise Māori in New Zealand and First Nations in Canada as *peoples* entitled to self-determination is to deny their inherent rights as an Indigenous People. It is to deny the guarantees given in the *Treaty of Waitangi 1840* and the *Royal Proclamation 1763*. It is to deny the rich and ancient tapestry of indigenous culture that has endured in both nation-states for a thousand years or more. It is to deny Indigenous Peoples their rights to preserve, practice and enhance their culture and identity in accordance with their own customary values, laws and institutions and appears to be, therefore, also a breach of their human rights.

> *We are the Indigenous Peoples, we are a People with a consciousness of culture and race, on the edge of each country's borders and marginal to each country's*

[112] Submission of the New Zealand Government on the Merits of Communication No. 547/1993, 3 September 1996, at 114.
[113] Mahuika, supra n 110 at 26, para 17.
[114] Daes, supra n 89 at 5.
[115] Ibid, at 4-5.

> *citizenship. And rising up after centuries of oppression, evoking the greatness of our ancestors, in the memory of our Indigenous martyrs, and in the home to the counsel of our wise Elders: We vow to control again our destiny and recover our complete humanity and pride in being Indigenous Peoples.*
> *- Indigenous Peoples and Human Rights Declaration of the World Council of Indigenous Peoples.*[116]

4.1.4.1 RECENT DEVELOPMENTS

As alluded to already, the New Zealand and Canadian governments have been participating actively in the deliberations of the UNCHR Working Group on the Draft Declaration. Although the Draft Declaration is still subject to change, nation-state representatives (including from Canada and New Zealand) have proposed modifications to limit the Draft. For example, the Rt. Hon. Douglas Graham commented on the right to autonomy or self-government of Indigenous Peoples in matters relating to their internal and local affairs when he stated:

> New Zealand has a number of special provisions enacted to encourage Maori authority over matters, which directly concern them. In addition to legislation perfecting settlements of grievance claims, these examples include the Maori Community Development Act 1962 which established local Maori Councils, the Te Ture Whenua Maori Act 1993 relating to land ownership, the Maori Language Act 1987 giving official recognition to the Maori language, and the Electoral Act 1993 which provides for separate Maori seats in Parliament. The number of Maori seats is now based on the number of voters registered on the Maori Electoral Role.[117]

Interestingly, Graham concluded that 'these laws were in accordance with the guarantee to Māori of tino rangatiratanga under the Treaty of Waitangi.'[118] No doubt some Indigenous Peoples will challenge such conclusions.

Predictably however, nation-state governments have proposed that if the term self-determination is to be used in the Draft Declaration it should be either qualified or explained. Canada has raised questions about the relationship between indigenous groups and the jurisdiction of existing states if an international right of self-determination is included in the Declaration.[119] Australia qualified their support for the inclusion of self-determination by calling for clarity in using a term which has a particular meaning under international law, and has expressed reservations about including it if the concept is

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[116] This Declaration was published in the Native Law Centre, *Justice as Healing* (University of Saskatchewan, Saskatoon, Canada, Vol. 5, 2000) at 2.
[117] Rt. Hon Douglas Graham 'The New Zealand Government Policy' in Quentin-Baxter, supra n 14 at 9.
[118] Idem.
[119] Te Puni Kōkiri, supra n 5 at 12.

blurred.[120] Mexico and Brazil have expressed concerns about the right of secession, which they see as implicit in the use of the term self-determination.[121] Inevitably, the New Zealand government stated that it would agree on the use of the term self-determination in the Declaration if the term were used so as to not imply the right of secession.[122]

In 1996, Canada shifted from its policy of implacably opposing Article 3 of the Draft Declaration to its recognition of the right of Indigenous Peoples to self-determination when it announced at the CHRWG:

> The Government of Canada accepts a right of self-determination for Indigenous peoples which respects the political, constitutional and territorial integrity of democratic states. In that context, exercise of the right involves negotiations between states and the various indigenous peoples within these states to determine the political status of the indigenous peoples involved, and the means of pursuing their economic, social and cultural development.[123]

In 1997, the New Zealand delegation to the CHRWG stated its position on Article 3:

> The question of self-determination is central to the draft Declaration. ... It is ... appropriate that it be the subject of careful and extensive consideration. Such consideration is consistent with an emerging usage at international law, which sees the right of self-determination applying to groups within existing states. ...
>
> The discussion of this issue may prove controversial but it could lead to ground-breaking understandings of the nature of the relationship between indigenous peoples and the states in which they live. ... subject to any draft Declaration being consistent with domestic understandings of the relationship between Maori and the Crown (representing all New Zealanders), and respecting the territorial integrity of democratic States and their constitutional frameworks where these meet current international human rights standards, New Zealand could accept the inclusion in the draft Declaration of a right of self-determination for Indigenous peoples. ...
>
> New Zealand considers that consistent with an emerging usage at international law, any right to self-determination included in the Declaration shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states, possessed of a government representative of the whole of the people belonging to the territory, without distinction as to race, creed or colour. The Declaration should clearly reflect these principles.[124]

In the same meeting, Canada reiterated its aim to develop a common understanding, consistent with international law, of how the right of self-determination applies to

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[120] Idem.
[121] Idem.
[122] Idem.
[123] Cited in Pritchard, S 'Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group' (Unpublished, Selborne Chambers, Sydney, June 2001) at 45.
[124] Draft Declaration Article 3, the Right of Self-Determination: Statement by the New Zealand Delegation, Geneva, 30 October 1997.

Indigenous Peoples and, when reached, it would have to be reflected in the wording of the Draft Declaration. Canada added that the exercise of the right involves negotiations between nation-states and Indigenous Peoples to determine the political status of the Indigenous Peoples involved, in the means of pursuing their economic, social and cultural development. Canada, moreover, stressed that the right to self-determination was intended to promote harmonious arrangements for self-government within sovereign and independent States, and must not be construed as authorising any action to impair territorial integrity or political unity. In reaching agreement on self-determination, Canada noted that it was important to avoid prescriptive solutions. Instead, the right had to be implemented flexibly through negotiations between States and Indigenous Peoples.[125]

In the 1999 meeting of the CHRWG, New Zealand declared that it could accept the inclusion of the right of self-determination in the Draft Declaration subject to it being consistent with the domestic understanding of the relationship between Māori and the Crown, and with respect for the territorial integrity of democratic States and their constitutional frameworks, where those met current international human rights standards.[126] Similarly, Canada restated its position that the traditional view of self-determination was limited to the colonial context and equated essentially with a right of statehood. Self-determination was now seen by many as a right that could be enjoyed in a functioning democracy in which citizens participated in the political system and had the opportunity to have input into the political, constitutional and territorial integrity of democratic States.[127] Consequently, in 2000 Canada accepted a right of self-determination for Indigenous Peoples that respected the political, constitutional and territorial integrity of democratic States.

The exercise of the right involved negotiations between States and the various Indigenous Peoples within those states to determine the political status of the peoples involved and the means of pursuing their economic, social and cultural development.[128] New Zealand, on the other hand, accepted the right of self-determination for Indigenous Peoples if the meaning of the term was clearly elaborated in a manner consistent with New Zealand domestic understanding of the relationship between Māori and the Crown. Some of the language of the Draft Declaration at the time was held to be inconsistent with New Zealand policy (such as autonomy, self-government and separate legal, taxation and judicial systems) and was more appropriate to the situation of Indigenous Peoples living on

[125] Pritchard, supra n 123 at 47.
[126] Ibid, at 50.
[127] Idem.
[128] Ibid, at 52.

reservations than those integrated into the wider society, as in New Zealand. The language of the Draft Declaration, according to the New Zealand delegation, needed to be clarified to ensure consistency with the *Treaty of Waitangi* settlement processes and policies, international understandings and domestic New Zealand law.[129]

Not surprisingly, in January 2003 the New Zealand government reviewed their stand on the Draft Declaration by emphasising the need for states and Indigenous Peoples to compromise, including changes to the text as currently drafted. There was seen to be a general need for greater transparency and less suspicion, with state meetings being open to indigenous representatives and an acceptance that delegations needed to work together to overcome difficulties. The New Zealand government discussed the fundamental issues of self-determination, lands and resources. Indigenous representatives attempted to allay state concerns about self-determination and territorial integrity but resisted changes to the key self-determination Article (Article 3), claiming that to qualify the right would be a retrograde step. A proposal was discussed to include in the preamble and Article 45 agreed language on self-determination from the *1970 Declaration on Friendly Relations* among states was discussed to provide the basis for a compromise.

Hence, New Zealand was among approximately ten states that played a substantive role and proposed changes to support and strengthen the text. States' willingness to propose changes was welcomed by the indigenous caucus as it allowed them to focus their interventions on the proposals made by states. On the other hand, Indigenous Peoples stressed the importance of the lands and resources Articles (25-30), noting that the relationship with the land and resources is usually spiritual as well as material. Many states recognised this but noted that their concerns included the retrospective nature of the articles as currently worded, as well as the need to recognise third party rights and the right of governments to govern for the good of all. No state said it would not accept the term 'Indigenous Peoples' but several said their acceptance depended on the context in which it was used.

Māori representation at the working group in 2003 was limited, with only Wellington lawyer Maui Solomon able to attend for part of the first week. The next meeting of the Working Group took place in Geneva, 15-27 September 2004. Beforehand, the New Zealand government was expected to hold meetings in order to exchange views with Māori on both the New Zealand position and how to achieve a Draft Declaration before the end of the decade.

[129] Idem.

In relation to specific changes, the New Zealand government, in August 2003, reviewed a number of the significant amendments to the Draft Declaration in its current form, as follows:

> Preambular paragraph 15: ... nothing in this Declaration may be used to deny any peoples their right to self-determination, *consistent with the principles of the 1970 Declaration on the Principles of International Law, Friendly Relations and Co-operation among States and other relevant international legal instruments.* [Italics in original].

This proposal effectively limits the human right to self-determination as guaranteed in all of the major UN Human Rights Conventions and effectively subordinates it to a state interest. In the Conventions, the right of self-determination simply vests in 'all peoples.' To restrict it in terms of the 1970 Declaration is to restrict the notion of 'peoples' and thus to deny the humanness of Indigenous Peoples.[130]

> Article 3: Indigenous Peoples have the right of self-determination *as enunciated in this Declaration.* By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Given statements in preambular paragraph 15 and various other articles, this change to the Draft Declaration would restrict the application of the right of self-determination. The addition of the italicised words above effectively renders the right of self-determination meaningless.[131]

> Article 4: Indigenous Peoples have the right, within the democratically-based constitutional framework of a State, to maintain and strengthen their distinct ... characteristics.

This proposal is inherently assimilative. The 'distinct characteristics' of Indigenous Peoples are not derived from the state, and neither should their maintenance and development be defined by them or within their institutions. Indeed, in many cases the framework of a state may be contrary to, and destructive of, indigenous characteristics.[132]

> Article 20: Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, *or acceptable to them,* in devising legislative or administrative measures that may affect them. States shall *consult fully* before adopting and implementing such measures.

[130] Jackson, supra n 9 at 2-3.
[131] Ibid, at 3.
[132] Idem.

The right of self-determination requires more than full consultation. Rather like the obligations inherent in a Treaty relationship, it actually requires recognition of equality and then meaningful negotiation. Consultation necessarily implies a subordination that is contrary to the status of a self-determining people.[133]

> Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands ... *to the extent consistent with the rights of others* ...

This proposal deletes the words 'lands ... *which they have traditionally owned or otherwise occupied'* and thus effectively closes off the possibility that Indigenous Peoples might be able to 'strengthen their relationship' with the land by claiming it via tribunal claims and through other mechanisms.[134]

> Article 31 currently states: Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means of financing these autonomous functions.

The suggested amendment by the New Zealand government is:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs.

The deletion of most of this Article and its consequent restriction of the right of self-determination to 'internal and local affairs' is yet another diminishing of the right itself. Self-determination has never been a right restricted to some notion of local management. Indeed, merely to suggest that implies a necessary diminution of all of the rights in other Human Rights Conventions that are dependent upon the effective exercise of self-determination. As the New Zealand government would clearly not want to be in breach of conventions it has already ratified, one can only conclude it sees the restriction only applying to Indigenous Peoples, in which case it seems prepared yet again to effectively limit the extent of indigenous humanness.[135]

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[133] Ibid, at 4.
[134] Ibid, at 5.
[135] Ibid, at 6.

There are fundamental difficulties with the proposed inclusion of the sentence in Article 34: 'In the resolution of any resulting tension between a collective and an individual right, account shall be taken of the interests protected by each right in ensuring consistency with relevant international human rights standards.' The proposed addition effectively privileges the notion of individual rights since most international standards are based on them. Indeed, collective rights are rarely acknowledged as international standards, which is another reason why the Draft Declaration has been so important for Indigenous Peoples.[136]

4.1.5 INDIGENOUS PRO-ACTIVITY

In December 2003 the Friends World Committee for Consultation (Quakers), a non-governmental organisation in general consultative status, implored the UNCHR to urge nation-states to approach work on the Draft Declaration in a spirit of compromise and commitment to the rights of Indigenous Peoples.[137] That same year the Society for Threatened Peoples, another non-governmental organisation in general consultative status, reminded the UNCHR that the Working Group on the Draft Declaration (WGDD) on the Rights of Indigenous Peoples was established 'as a matter of priority.' The aim of the WGDD was to complete the adoption of the Draft Declaration within the International Decade of the World's Indigenous People, which ended in 2004.[138] They also expressed concern that several nation states might misuse the principle of consent to obstruct the whole process, given that only two of the 45 articles of the Draft Declaration have been adopted since 1995. Nation states should stick by their commitment to a new partnership with Indigenous Peoples as it was proclaimed in 1994 at the beginning of the International Decade. Therefore, nation states should be more flexible in finding solutions in accord with Indigenous Peoples' needs and wishes. The same is true regarding other controversial issues such as collective rights of Indigenous Peoples, land rights and rights over natural

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[136] Idem.

[137] Written statement submitted by Friends World Committee for Consultation (Quakers), a non-governmental organisation in general consultative status, Commission on Human Rights, Sixtieth Session Item 15 of the provisional agenda: 'Indigenous Issues' in U.N. Doc. E/CN.4/2004/NGO/3, 4 February 2004.

[138] Written statement submitted by Society for Threatened Peoples, a non-governmental organisation in general consultative status, Commission on Human Rights, Fifty-ninth Session, Item 15 of the agenda, 'Indigenous Issues', U.N. Doc. E/CN.4/2003/NGO/258, 20 March 2003. At the time of binding the thesis, debate about adopting the Draft Declaration has raged on in New Zealand and overseas with liberal democratic governments refusing to adopt or trying to minimise the Draft Declaration. The Human Rights Council has been attempting to adopt the Draft Declaration at the General Assembly. See Human Rights Council Resolution 2006/2 'Working group Commission on Human Rights to elaborate a draft declaration on accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994' (UN Doc./E/CN.4/2006/79). This resolution was moved on 29 June 2006. Canada opposed the motion and New Zealand was not even present

resources. The Society for Threatened Peoples concluded by urging the UNCHR to support the demands of Indigenous Peoples to insist upon continuation of the WGIP and to appeal strongly to all members of the WGDD, particularly the nation states' representatives, to show more flexibility and agree upon a bipartisan Draft Declaration until the end of the International Decade.[139]

In February 2004, indigenous groups from North America expressed deep concern at the UNCHR that the mandate of the current inter-sessional Working Group may not be renewed after the end of the International Decade of the World's Indigenous People in December 2004.[140] This would in effect terminate the standard-setting process on the human rights of Indigenous Peoples within the UN This group urged the UNCHR to ensure an ongoing standard-setting process on Indigenous Peoples' human rights by renewing the mandate of the inter-sessional Working Group to consider further the Declaration on the Rights of Indigenous Peoples, and that any decision relating to the proclamation of a second Decade of the World's Indigenous Peoples be made independently. The human rights standard-setting process concerning Indigenous Peoples, however, is too important to hinge upon the establishment of a second Decade.[141]

This group additionally highlighted the fact that the process of working on the Draft Declaration has been time-consuming and difficult in terms of achieving consensus or 'making progress,' which is evidence of the complexity of the issues and the unique nature of the status and rights of Indigenous Peoples.[142] It is also evidence, at least to some degree, of the lack of political will of some nation-states to begin redressing past and ongoing violations of indigenous human rights and prevent such unacceptable acts in the future. Regardless of the ongoing challenges, it is crucial that the human rights of Indigenous Peoples be explicitly affirmed through a standard setting process leading to the adoption of a UN Draft Declaration. While such a Declaration cannot resolve all of the fundamental issues impacting on Indigenous Peoples' rights, it is an essential and significant first step. Indigenous Peoples' basic rights must be explicitly embraced within a principled international framework.

Moreover, it must be noted here that the Organization of American States (OAS) is working on creating a proposed '*American Declaration on the Rights of Indigenous*

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[139] Ibid.

[140] Written statement submitted by the Inuit Circumpolar Conference and the American Indian Law Alliance, non-governmental organisations in special consultative status, and the Grand Council of the Crees (Eeyou Istchee), a non-governmental organisation on the Roster, Commission on Human Rights, Sixtieth Session,' Items 15 and 18 of the provisional agenda, 'Indigenous Issues: Effective Functioning of Human Rights Mechanisms' in U.N. Doc.E/CN.4/2004/NGO/132, 8 March 2004.

[141] Ibid.

[142] Ibid.

Peoples.' Peruvian Ambassador Eduardo Ferrero Costa, heading the working group for the proposed document, stated that Indigenous Peoples existed before colonisation and have been subjected to some of the worst treatment in the history of America. Costa added that Indigenous Peoples need and deserve a set of special rights that recognise the past while looking forward to the future, by recognising special rights to preserving languages, customs and beliefs. The OAS draft calls for ambitious goals such as eradicating poverty, preserving indigenous languages and cultures, protecting spiritual freedom and establishing mechanisms for self-governance. Debate on the *American Declaration on the Rights of Indigenous Peoples* continues.

4.2 SUMMARY

What justification does a minority indigenous community in a democracy drumming up enough support to obtain a 'qualified majority' sufficient to convince its leaders to file for self-governance, internal self-determination and autonomy? Walzer perceived a sense of oppression, estrangement, and cultural differences as the 'crucial moral feature' in the search for self-determination.[143] There is always, however, the rule of the majority or the powerful even with contemporary indigenous Treaty settlements and self-governance. The question, then, concerns the legitimacy of the claim for self-determination by a few. Moreover, who has the right to self-determination – a group, an indigenous community and people or its individual members, a minority and subgroup, or the majority of the population of the nation-state?

The Canadian and New Zealand governments both have a moral and constitutional duty to recognise and uphold the indigenous and human rights of Indigenous Peoples to self-determination as recognised in the Draft Declaration.[144] The very existence of such a document at the UN is in itself recognition of the legitimacy and appropriateness of treating indigenous human rights concerns at the international level. Thus, Indigenous Peoples are fortifying the place of their indigenous and human rights at the international level.[145] However, the recognition of indigenous and human rights is not the same in New Zealand at the national level.

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[143] See Michael Waltzer, 'Commentary' in Danspeckgruber, W, & Watts, A, (eds) *Self-Determination and Self-Administration: A Sourcebook*, (Lynne Rienner, Boulder, Colorado, 1997) at 127.

[144] See Appendix V for the complete text of the Draft Declaration in its 2004 form which is directly followed by the 2006 version of the Declaration. The 2004 version was referred to throughout the thesis. The 2006 version was available while the thesis was being bound and it is included to provide further context for the convenience of readers.

[145] Moses, T 'The Struggle for International Recognition' in Leger, M *Aboriginal Peoples Toward Self-Government* (Black Rose Books, Montreal, 1994) at 29.

Since the 1970s, international human rights law[146] has evolved as a jurisprudence that is beginning to provide the means for Indigenous Peoples to actively participate at the UN for the protection against discrimination by nation-states and, more recently, to promote their rights to self-determination. Moreover, Indigenous Peoples have been successful in attracting an unprecedented amount of attention to their demands at the international level because issues of domestic jurisdiction are less and less a barrier to international concern over issues of human rights. Accordingly, a substantial amount of international concern for Indigenous Peoples and the content of their rights at international law have emerged. This promotion of Indigenous Peoples' rights has been promoted and facilitated through international institutions and conferences, and has proceeded in response to demands that indigenous groups have made over several years and upon an extensive record of justification. The prevailing assumption has been that the international norms concerning Indigenous Peoples are an exercise in identifying standards of previously accepted and generally applicable human rights principles.

In addition, the sense of obligation that attaches to these newly articulated norms concerning Indigenous Peoples has been properly viewed as being of a legal and not just moral character. Contemporary international law now includes broad moral precepts among its constitutional elements, particularly human rights. The human rights discourse has been held up as a matter of customary international law and has been utilised successfully by Indigenous Peoples. Consequently, the demonstration of the denial or abuse of these rights has been a potent component of the politics of embarrassment, which has provided moral and legal strength to settle Indigenous Peoples' historic and contemporary grievances by way of Treaty settlements, and has provided a platform for a degree of self-determination through self-governance in Canada and New Zealand. The scope of this right is the next significant challenge for Indigenous Peoples.

The latest proposed amendments by the New Zealand government to the Draft Declaration, however, are at best problematic and at worst deliberately inimical to the self-government and self-determination interests of Indigenous Peoples. The proposed new restrictions on the right of self-determination are especially unacceptable because they constrain the right as an abstraction but also because they sustain the old colonial social Darwinist assumption that, as lesser beings, Indigenous Peoples are only worthy of lesser rights. Indigenous Peoples have expected more throughout the many years of drafting the Draft Declaration and they should not be expected to accept less now. For 500 years

[146] This includes first, second, and third generation human rights. See Hunt, P 'Reclaiming Economic, Social and Cultural Rights' in *Waikato Law Review* (Vol. 1, 1993) at 141.

Indigenous Peoples have endured and survived oppression and dispossession at the hands of their collective colonisers. They now seek to reclaim and protect what little remains of their cultural heritage, identity and authority to govern themselves before it is too late. The Draft Declaration will have moral force and, as such, a generosity of spirit is required, as opposed to taking a minimalist, doctrinaire approach.

The next section will discuss the capacity of this self-determination right to self-government, with possible options for Indigenous Peoples to exercise, recognise and realise self-government as contemporary nations within nation-states.

5 SELF-DETERMINATION: RIGHT TO SECESSION OR SELF-GOVERNMENT?

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Ka maro te kakī o te kōtuku. – The kōtuku bird with its neck outstretched.[1]

5.1 INTRODUCTION - STATE LEGITIMACY

It is with some trepidation and caution that the current section is written, particularly, among other factors, in light of the obvious ramifications of secession. Indeed, Mason Durie noted that self-determination prompted some concern on the part of several nation-states, including New Zealand, especially if it were used to imply secession from colonial rule.[2] From the outset, it must be stressed that the author does not support the notion of secession by virtue of an Indigenous People's right to self-determination (or any other right for that matter) unless in extreme circumstances. Still, ethnic groups within many nation-states have invoked the right to self-determination, claiming political rights which range from internal autonomy to a right to secession. Tomuschat supported claims directed against the political and territorial integrity of an existing nation-state.[3] Such a notion was considered sacrilegious and preposterous 100 years or even 50 years ago because the 'veil of sovereign statehood could not be pierced.' With the emergence of international human rights law, however, this position has changed.

Is it not true that 'People' created nation-states to serve and protect them, and not the other way around? UN Secretary Kofi Annan argued in 1999 that 'the state is now widely understood to be the servant of its people – and not vice versa.'[4] Nation-states thus have a specific *raison d'etre* and if they fail fundamentally to live up to their essential commitments they begin to lose their legitimacy. In such circumstances, perhaps even their existence may be challenged. The nation-state is under a basic obligation to protect the human rights to life and physical integrity of its citizens, and if the nation-state turns itself into an apparatus of terror or gross neglect against specific groups of the population, those groups may withhold their loyalty to the nation-state. Not surprisingly, the concept of self-

[1] This whakataukī was quoted by Denise Henare at the Hui Taumata in 1984 in Department of Māori Affairs, *Māori Economic Summit Conference, Conference Proceedings* (Wellington, 1984). Henare stated: 'I believe we are like the kōtuku with its neck outstretched. Ready to take flight. We are determined to be uplifted from our present position; we are determined to make progress.' In the pursuit of internal self-determination, most Indigenous Peoples are determined to make progress and be uplifted from their present positions of immiseration but the author believes most Indigenous Peoples would favour internal self-determination to secession.

[2] Durie, M 'Tino Rangatiratanga: Maori Self-Determination' in *He Pukenga Korero* (Spring, Vol. 1, No. 1, 1995) at 46.

[3] Tomuschat, C 'Self-Determination in a Post-Colonial World' in Tomuschat, C (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993) at 2.

[4] United Nations Secretary-General Kofi Annan, *Address to the United Nations General Assembly,* (New York, 20 September 1999). See also Annan, K, 'By Invitation: Two Concepts of Sovereignty' in *The Economist* (November 1999).

determination, instead of uniting peoples, has become a divisive force.[5] However, the author submits, that secession can only be a step of extreme last resort and should not lightly be granted as a remedy for groups such as Indigenous Peoples within the Canadian and New Zealand nation-states. If a nation-state engages in genocide, the ultimate international crime, it has breached its social contract and forfeits its right to expect and require obedience and loyalty from the citizens it is targeting. Indeed, Daes argued that internal self-determination is not limited in the post-colonial era:

> Ordinarily, it is the right of the citizens of an existing independent State to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism ... secession cannot be ruled out completely in all cases.[6]

Still, Koskenniemi provided an interesting comment on self-determination and secession:

> [True] self-determination is ... in the existence and free cultivation of an authentic communal feeling, a togetherness, a sense of being 'us' among the relevant group. If, in extreme cases, this may be possible only by leaving the State, then the necessity turns into a right.[7]

It is therefore critical to create and augment Koskenniemi's notion of self-determination as authentic communal togetherness by, as a minimum, establishing socially and culturally inclusive political and legal institutions that derive their legitimacy from the values, laws and institutions of both Māori and Pākehā in New Zealand; and First Nations and non-aboriginals in Canada. As discussed further in this thesis, such a vision is explicit and implicit in both the *Treaty of Waitangi 1840* in New Zealand (Appendix 1) and the *Royal Proclamation 1763* in North America (Appendix V).

5.1.1 THREAT TO TERRITORIAL INTEGRITY

.Movements for greater autonomy and self-governance frequently demand secession, full independence and sovereignty – a fact that obviously concerns the respective central authorities from the outset. As the idealistic element of nation-state formation, self-determination has been responsible for the shattering of large empires and smaller nation-states alike. It was a major contributing factor to bloodshed and destruction

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[5] Ibid, at 2.

[6] Daes, E 'Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Sixth Session' United Nations Doc. E/CN.4/Sub.2/1988/24. 'Submissions to the Working Group of the Commission on Human Rights,' UN Doc. E/CN.4/1995/WG.15/2 & Add.1.at 4.

[7] Koskenniemi, M 'National Self-Determination Today: Problems of Legal Theory and Practice' in *International and Comparative Law Quarterly* (Vol. 43, 1994) 241 at 245.

in the international system of the 19th century, at the beginning of the 20th century, during and following World War I, in the immediate post-World War II era, and after the fall of the Berlin Wall in 1989. The notion of self-determination served the assertion of statehood and national identity at the expense of large multi-ethnic empires (Austro-Hungarian, German, Ottoman, British and Czarist Russian) and contributed to the dissolution of colonial empires, the sovereignty of the colonies, the unification of Germany and Italy, and the disintegration of Yugoslavia, the Soviet Empire and Czechoslovakia.

Hence the extension of any right to self-determination for all Indigenous Peoples has been denied for fear that acknowledgement of this right would threaten the territorial integrity of established nation-states. Explicit support was given to the territorial integrity principle in the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States.*[8] Under the heading 'principle of equal rights and self-determination of peoples' this Declaration provided that the right of self-determination could not be exercised so as to:

> Dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color. Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.[9]

Moreover, the 1970 Declaration makes clear that the establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

In 1975, the right to self-determination was expressed in broad terms in the *Final Act of the Conference on Security and Co-operation in Europe* (*Helsinki Final Act*).[10] Principle VIII provides:

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[8] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,* UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), (1970) 9 I.L.M 1292.

[9] United Nations, *United Nations Action in the Field of Human Rights* (United Nations, Publication, New York, 1980) at 25. The requirement of 'representing the whole people belonging to the territory' was reiterated at the World Conference on Human Rights in 1992 in Vienna. See *Vienna Declaration and Programme of Action: Note by the Secretariat,* World Conference on Human Rights, U.N. Doc. A/CONF.157/23, (1993), para. 2, at 4.

[10] *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act),* signed by 35 states (including Canada, New Zealand and the United States) on 1 August 1975. Reprinted in *I.L.M.* (Vol. 14, 1975) at 1295. This Act, despite its political importance, is considered to be legally non-binding. See also Hannum, H, 'Rethinking Self-determination' in *Virginia Journal of International Law* (Vol. 34, 1993) at 28.

> The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states.
>
> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Prioritisation of this right to territorial integrity over Indigenous Peoples' right of self-determination effectively protects the 'territorial framework of the colonial period in the decolonisation process.'[11]

Concern to protect this principle is reflected in decisions of the ICJ. In *Advisory Opinion on Western Sahara* the ICJ affirmed the right to self-determination in the decolonising context as a general rule of customary international law.[12] Spain was in the process of decolonising the Western Sahara and the UN asked the ICJ for an opinion as to whether the area should be granted independence as a separate state or be divided between Morocco and Mauritania.[13] Given that the opinion concerned the formation of a new state, not the assertion of self-determination within an existing entity, the Court was amenable to affirming the right to self-determination and recommended independence.

More recently, in the 1995 *East Timor (Portugal v. Australia) Judgment,* Judge Mbaye, in his dissenting opinion, interpreted self-determination in conjunction with 'the principle of inviolability of borders.'[14] Portugal alleged, inter alia, that Australia had failed to respect the rights of the people of East Timor to self-determination and other related rights.[15] The Court found that self-determination was limited to decolonising situations, although it was noted that the principle of self-determination 'is one of the essential principles of contemporary international law.'[16] Daes noted that the principle of self-determination, as reflected in the Draft Declaration, 'was used in its internal character, that is, short of any implications which might encourage the formation of independent states.'[17] Even where indigenous communities are accepted as *peoples* it appears they possess the

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[11] Shaw, M.N *International Law* (Brotius Publications Ltd, Cambridge, 1991) at 161.
[12] *Advisory Opinion on Western Sahara* [1975] ICJ Representative 6 at 32, para. 55. See also 37, para, 72, and 68, para, 162.
[13] Janis, M.W *An Introduction to International Law* (2nd ed)(Little Brown & Co., London, 1993) at 139.
[14] *East Timor (Portugal v. Australia) Judgment,* ICJ Reports 1995, 90 at 226.
[15] Ibid, at 92.
[16] Ibid, at 265.
[17] Cited in Corntassel, J & Primeau, H 'Indigenous Sovereignty and International Law: Revised Strategies for Pursuing 'Self-determination' in *Human Rights Quarterly* (Vol. 17, 1995) 343 at 362.

right to some form of 'internal self-determination *within* the nation-state.'[18] This could involve the rights of free and fair elections or guarantees of participation in government. The need to balance the recognition of human rights and the protection of territorial integrity has qualified any powers of self-governance enjoying current status at international law.[19] Indeed, Rourke opined:

> The sovereignty, territorial integrity and independence of States within the established legal system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead. ... Our constant duty should be to maintain the integrity of each while finding a balanced design for all.[20]

5.1.1.1 WHAT INDIGENOUS PEOPLES ACTUALLY WANT

In the author's view, indigenous self-determination need not, and in most cases would not, be exercised through secession and would not, therefore, undermine the territorial integrity of existing nation-states. Higgins concluded that 'self-determination has never simply meant independence.'[21] Sanders in Canada declared:

> A people's right to self-determination does not necessarily imply its independence, but rather its freedom to choose how it will be governed. That right also involves the further right to full compensation and restitution for the exploitation, depletion of, and damage to, their natural and other resources.[22]

The Society for Threatened Peoples stated at the UN in 2003:

> Self-determination or autonomy does not necessarily entail the right to secession. We are convinced that indigenous peoples do not intend to destroy the states whose borders they share.[23]

The UN emphasised that even foreign ownership of a means of producing a resource should not detract from the sovereignty of a nation-state.[24] Many nation-states, however, assume that recognising indigenous self-government and self-determination would herald

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[18] Rourke, J.T *Taking Sides: Clashing Views on Controversial Issues in World Politics* (The Dushkin Publishing Group Inc, Connecticut, 1998) at 247.

[19] Shortall, S.A 'Aboriginal 'Self-Government in Aotearoa/New Zealand: A View Through the Canadian Lens' (Unpublished LLM Thesis, University of Calgary, Edmonton, 1996) at 80.

[20] Rourke, supra n 18 at 247.

[21] Higgins, R *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) at 118.

[22] Sanders, W 'First Nations Sovereignty and Self-determination' in supra, n. 141 (Cassidy) at 191.

[23] Written statement submitted by Society for Threatened Peoples, a non-governmental organisation in general consultative status, Commission on Human Rights, Fifty-ninth session Item 15 of the agenda 'Indigenous Issues' in U.N. Doc. E/CN.4/2003/NGO/258, 20 March 2003.

[24] Sanders was referring to the U.N. *Declaration on Permanent Sovereignty Over the Natural Resources,* Res. 1803 (XVII), 1962.

the end of their nation-state. Existing nation-states, moreover, fear the renegotiation of internal jurisdiction and the sharing of governance power to such an extent that at fora such as the UN member states struggle to exclude Indigenous Peoples from the umbrella of self-determination. Anaya stated, however, that for Indigenous Peoples to focus on autonomous statehood as part of self-determination:

> ... diminishes the human rights aspect of self-determination and ignores the fact that many indigenous groups do not want to claim absolute political autonomy but rather to rearrange the terms of integration, reroute its path, or otherwise alter their position vis a vis the nation-states within which they find themselves.[25]

No Where Else to Go, Neither Going Away

With reference to the fears held by non-Māori and some Māori that self-determination in New Zealand means secession and establishing an independent Māori nation-state, Solomon opined that many Māori do not even desire to go down that path.[26] Moana Jackson concluded that the secession argument:

> ... ignores the often expressed Indigenous question about where they would secede to? Equally important, such a stance does not acknowledge the political reality that many Indigenous Peoples do not want a political status separate from existing states.[27]

That is aside from the obvious practical, geophysical, economic and legal difficulties associated with such a bold move. Moreover, as Lamer J stated in the Canadian Supreme Court decision of *Delgamuukw v British Columbia*,[28] which is germane for New Zealand:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, that ... we will achieve ... 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.' Let us face it, we are all here to stay.[29]

Nandor Tanczos recently declared that Pākehā (non-Māori New Zealanders) have a right to be in New Zealand because they signed the *Treaty of Waitangi* which created that right. But, Tanczos added, 'the right carries an obligation – Pakeha do not get to be here in New

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[25] Anaya, J *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 79.
[26] Solomon, M 'The Context for Maori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998).
[27] Jackson, M *Self-Determination: The Principle and the Process* (ATP Conference, Suva, Fiji, 4 September 1996).
[28] *Delgamuukw v British Columbia* [1998] 1 C.N.L.R 14 at 86, per Lamer CJ, (Supreme Court of Canada). [hereinafter *Delgamuukw*]
[29] Idem.

Zealand 100 per cent on their own terms.'[30] Moreover, Tanczos quoted Tariana Turia as saying 'Maori have nowhere else to go.'[31] Similarly, many Pākehā (who are six generation New Zealanders) have nowhere else to go either. Over 160 years of cross-cultural engagement, miscegenation working, playing and socialising together has resulted in a hybrid ethnic, biological and social mix of Māori and Pākehā, not binaristic dichotomised racial groups. Therefore, unless Māori are prepared to divide their Māori half or quarter (or whatever the fraction or quantum may be), secession as an option seems ludicrous, particularly when individuals would first have to secede from themselves. As Lamer opined, neither group is going away.[32]

Sullivan rejected secession as an option for Māori when she held:

> For Maori, taken to its ultimate outcome, the right of autonomy would form their own separate state. For secession to take place self-determination requires territory, sovereignty and the non-intervention of external forces. Secession is not an option that is promoted by many Maori.[33] Indeed, a nation which accords equality, equity and need as the rationale for social justice, coupled with a political system that ensures the collective rights of the indigenous people as well as those of the individual, would go a long way towards avoiding the need for secession.[34]

Joe Williams asserted that the signing of the *Treaty of Waitangi* in 1840 precludes Māori today from secession as an option for self-determination when he held:

> Any articulation of self-determination or self-government must be within the nation state of New Zealand. Very few Maori would disagree with that at a political level.[35]

Furthermore, Mead articulated with caution her understanding of the notion of self-determination and secession as:

> The right ... of Pacific Indigenous Peoples ... [to] the creation of new U.N. Member States, but it does not mean that this is what all indigenous peoples are seeking. For some, their right to self-determination means a negotiation of the system of governance to enable greater autonomy for them in political, economic, social and cultural decision-making. We must respect the different divisions of indigenous peoples, acknowledge their differences, identify the commonalities and work towards constructive agreements that do not pre-determine how indigenous peoples throughout the world will realise their self- determination. The

[30] Tanczos, N 'Tangata Whenua, Tangata Tiriti' (Unpublished paper in the author's possession, written as an opinion piece for the New Zealand Herald that was not chosen for publication, 12 March 2004) at 2.
[31] Idem.
[32] *Delgamuukw v British Columbia* [1998] 1 C.N.L.R 14 at 86, per Lamer CJ. (Supreme Court of Canada).
[33] Sullivan, A 'Self-determination and Redistributive Justice: the New Zealand Maori' in *He Pukenga Kōrero* (Ngahuru (Autumn) Vol. 3, No. 2, 1998). Sullivan cited Sharp, A *Justice and the Māori: The Philosophy and Practice of Māori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 1990).
[34] Ibid, (Sullivan) at 57.
[35] Williams, 'A Summing Up' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 188.

> fundamental area of commonality is the experience of colonisation and the wish therefore to decolonise, but the journey of decolonisation will be different according to the needs and aspirations of respective indigenous peoples and how they view their future colonising governments.[36]

Māori self-determination through self-government *within* the nation-state rather than secession *without* is also consistent with the views of the Waitangi Tribunal, who, in the *Taranaki Report,* did not regard "Maori autonomy as conflicting with national governance."[37]

Corntassel and Primeau in Canada added that the struggle between indigenous groups and state actors in the international system does not evolve around the extension of the right of self-determination to these groups as traditionally conceived under international law.[38] Sanders and others acknowledged that most indigenous groups seek not to secede from the territories of the nation-states in which they reside but rather to wield greater control over matters, such as natural resources, environmental preservation of their homelands, education, use of language, and bureaucratic administration or self-governance, in order to ensure their group's cultural preservation and integrity.[39]

5.1.2 NOT SECESSION BUT SELF-GOVERNANCE OPTIONS

It seems, therefore, that many Indigenous Peoples do not support the notion of self-determination as meaning secession but prefer authentic power sharing through self-governance, at least in the political, cultural, economic and social development of their community and perhaps within the wider nation-state and even globally. Durie opined that self-determination "could allow for the emergence of different political structures."[40] Sullivan noted that the extent of autonomy inherent in the concept of self-determination ranges from individual freedoms up to and including secession but she added that self-determination primarily involves the right to be independent.[41] Durie aligned self-determination with tino rangatiratanga, which captures the sense of Māori ownership and active control over the future and is less dependent on the narrow constructs of colonial

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[36] Mead, A *Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific* (ATP Conference, Suva, Fiji, 4 September 1996).
[37] Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (WAI 143, GP Publishers, Wellington, 1996) chapter 2.
[38] Corntassel & Primeau, supra n 17 at 343 – 344.
[39] Sanders, D 'The U.N. Working Group on Indigenous Populations' in *Human Rights Quarterly* (Vol. 11, 1989) 406 at 429. See also Torres, R 'The Rights of Indigenous Peoples' in *Yale Journal International Law* (Vol. 16, 1991) at 142; and Stavenhagen, R 'Challenging the Nation-State in Latin America' in *Journal of International Law* (Vol. 45, 1992) at 436.
[40] Durie, M, *Te Mana Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 153.
[41] Sullivan, supra, n 33 at 57.

assumptions.[42] Durie, moreover, held that self-determination could be applied at iwi and hapū levels as well as to all Māori people collectively and that *tino rangatiratanga* aligns with at least two facets – the way in which control and authority is distributed within Māori society and the way in which Māori and the Crown share power.[43] The common denominators are power, control, sharing and authority.

Certainty, Economics, Non-Indigenous Fears and Irrationality

Non-indigenous peoples should not feel threatened by indigenous claims to self-government through the human right principle of self-determination, particularly through contemporary Treaty settlements. Non-indigenous peoples need to overcome their irrational fear that Indigenous Peoples, in obtaining greater control and self-governance, will diminish their own well-being, public safety, civil government and way of life. Contemporary indigenous Treaty settlements represent change and most societies are wary of changes, which can lead to substantial shifts in material, social or political conditions.

Two integral factors underpinning the political will to negotiate and settle indigenous claims, and perhaps open the way for indigenous self-governance in Canada and New Zealand, are political economic and certainty[44] imperatives. Economic expansion served as the starting point for colonialism and imperialism and the economic imperatives have in no way diminished in contemporary times. In the 1970s the Canadian government sought to dispossess the James Bay Cree by inundating under water thousands of acres of their traditional territory through hyrdo-electric development. In the mid 1980s the New Zealand government sought to privatise and corporatise many of the national resources subject to Māori claims including the sale of lands, forestry and fisheries along with other resources, such as coal reserves within the Tainui raupatu boundary and much of the lands and resources disputed by Ngāi Tahu in the South Island. Consequently, a major outcome of indigenous land and resource claims has been a political climate of uncertainty, where developers have lost opportunities to invest in land and other resources.[45] Governments have, therefore, been anxious to resolve existing indigenous claims, particularly legal ones, before proceeding with big investment projects. One article on the Nisga'a Settlement referred to this urgent issue of certainty:

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[42] Durie, supra, n 40 at 46.

[43] Idem.

[44] See Federal Treaty Office, *British Columbia Treaty Negotiations, The Federal Perspective* (1995) 2-3: There remains much uncertainty with respect to land and resource use. Resolving this uncertainty can be pursued by litigation or negotiation. The Courts have endorsed negotiations, particularly from the *Delgamuuk* decision, supra n 32.

[45] Ibid, (Federal Treaty Office) at 4. See also Kunin, R (ed) *The Economic Aspects of Aboriginal Land Claims in British Columbia* (The Laurier Institution, Vancouver, 1997).

> Until the Indians and the governments agree to some ground rules for compensation, uncertainty and delays will debilitate the economy. The urgency of settling land claims is more apparent than ever. [46]

It has been publicly enunciated in British Columbia (BC) that one of the goals of Treaty negotiations is to establish certainty over land and resources to provide a more secure climate for investment and economic development.[47] The 1990 Price Waterhouse study in BC examined the extent of lost economic opportunities and estimated that over $1 billion and 1 500 jobs had been lost in the mining and forestry sectors alone as a result of disputes and uncertainty over land claimed by aboriginal people, hence the urgency to resolve indigenous land and resource claims.

Similarly, Mfodwo asserted that for New Zealand:

> There seems to be no clear or absolute policy as to which fora will negotiate ... on [Māori] claims although the New Zealand State retains the final power to determine in practical (usually *economic*) terms what the outcome of various decisions and deliberative processes will be.[48] [emphasis added]

A leaked 2003 draft report by economist Mike Copeland, commissioned by the Crown Forestry Rental Trust, stated that delays to *Treaty of Waitangi* settlements are costing, conservatively, $96 million a year.[49] Taylor additionally reported that the Treaty debate is hurting the New Zealand economy because of perceptions – both local and international – of Treaty debates affecting New Zealand property rights as being 'less secure,' perceptions which 'impact on economic development.'[50]

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[46] 'Nisga'a Negotiators are on Right Road' in *Vancouver Sun Opinion*, (2 Feb. 1998).

[47] Corinne McKay, 'The Nisga'a Final Agreement in the Canadian Context.' (Referendum Commissioner Nisga'a Ratification Committee New Aiyansh, BC, 1999).

[48] Mfodwo, K 'The Political Economy of Treaty of Waitangi Settlements: Aspects of a Policy Issues and Research Agenda' (Unpublished Seminar, Seminar Series, Law School, University of Waikato, 10 May 1996) at 16. Mfodwo's paper was originally presented at the *Beyond Accounting: Finance and Management Conference,* (SMS, University of Waikato, 14-15 July 1995). Māori claims are thwarting the State sale of State Owned Enterprises hence the haste for settling claims. See Kelsey, J, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993) and Kelsey, J, *The New Zealand Experiment: A World Model for Strucutral Adjustment?* (Bridget Williams Books, Wellington, 1995).

[49] Figure cited in Milne, J 'Settlement – Making Up is Hard to do' in *New Zealand Herald* (Political editor for the New Zealand Herald, 4 April 2004) at 2 and Milne, J 'Report Puts Treaty Settlement at $96m a year' in *New Zealand Herald* (4 April 2004) at 1.

[50] Taylor, K 'Treaty debate hurting the economy' in *New Zealand Herald* (26 March 2004). Taylor noted that the main areas hurting the economy are Treaty of Waitangi claims and delays caused by the Resource Management accountability. National Party leader Don Brash mentioned similar sentiments. He stated that employment relations legislation, holidays legislation, the health and safety in employment legislation, the *Resource Management Act* and the *Treaty of Waitangi* were issues that have been identified as hugely damaging for investment, productivity and growth. Brash specifically declared that 'uncertainty generated by unresolved treaty debates could potentially have quite a large impact on economic growth.' See Don Brash:

The Nisga'a reinforced their negotiating position by promoting their settlement within a humanistic and utilitarian property and economic rights context. Chief Joseph Gosnell stated in his Royal Roads University Lecture in 1999:

> Our Treaty will be in the best economic interest of the entire province. A fairly and honourably-reached Nisga'a Treaty will send an important economic message to boardrooms around the world.[51]

Gosnell then cited a very powerful and influential business leader, Milton Wong, CEO of M. K. Wong and Associates Ltd. and vice-president of the Hong Kong Bank of Canada, who urged Canada and British Columbia to sign the Nisga'a Treaty because:

> [The Nisga'a Settlement] will establish the social, political and economic certainty to encourage investment in British Columbia and therefore be of enormous help to the business communities across this province. In the global marketplace, international companies who may wish to invest in B.C. are well aware of, and seriously concerned about, the economic uncertainty that surrounds the province as a result of unresolved land claims.[52]

Gosnell, moreover, highlighted some economic statistics to persuade the BC public to support the Nisga'a Settlement when he noted:

> Consider for a moment the current economic problems in B.C.'s northwest corridor. A Nisga'a Treaty will be a major part of the solution. Not only will a Nisga'a Treaty provide economic certainty, it will, over the long term, save taxpayers' money. Critics who think the Nisga'a Treaty is generous should check the ongoing costs of leaving land claims unsettled. According to the 1996 Royal Commission on Aboriginal Peoples, the total cost of maintaining the status quo - under the universally despised and obsolete Indian Act - is a staggering 7.5 billion dollars a year. This cost will rise to more than 11 billion dollars a year over the next two decades.[53]

Gosnell, thus, integrated the Nisga'a political claims into the current political and economic discourse to placate public opinion.

Surprisingly, economic development has proved compatible with viable indigenous settlements in Canada.[54] The *James Bay and Northern Quebec Agreement 1975* (JBNQA)

'Economic growth key to living standards' in *New Zealand Herald* (29 March 2004). See also 'Mood of the Boardroom - what 300 company chiefs want' in *New Zealand Herald* (25 March 2004).

[51] For his role in negotiating the landmark Nisga'a Treaty, Nisga'a Tribal Council President Joseph Gosnell has been awarded the first honorary degree granted by Royal Roads University in Victoria. Chief Gosnell received a Doctor of Laws (Honoris Causa) at a convocation ceremony held 17 Oct 1997. This is the text of his speech to the first graduating class of the new university.

[52] Idem.

[53] Idem.

[54] See for example, ARA Consulting Group, *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis: Final Report* (Ministry of Aboriginal Affairs, Federal Treaty Negotiation Office, December 1995) online at www.aaf.gov.bc.ca/aaf/pubsarasumm.htm. (Accessed June 2004). See also

cleared the way for a massive hydroelectric project that provided huge economic benefits for the province. Similarly, the Nisga'a,[55] Tainui and Ngāi Tahu settlements provide economic certainty for both indigenous and non-indigenous peoples. The *Royal Commission on Aboriginal Peoples* (RCAP) stressed that redressing the ills of colonialism would benefit all Canadians, not just Indigenous Peoples. As mentioned above, the RCAP estimated that the under-development of Indigenous Peoples and their communities was costing the Canadian economy $7.5 billion in 1996 and expected this to increase to $11 billion by 2016 unless the socio-economic circumstances of Indigenous Peoples improve dramatically. The RCAP report went on to estimate that good indigenous self-government and economic development activities, that would reduce by 50% the economic gap between indigenous and non-indigenous peoples by 2016, would instead result in the Indigenous Peoples making a $375 million annual contribution to the Canadian economy.[56]

In 2003 a report on Māori economic development by the New Zealand Institute of Economic Research demonstrated the positive contribution of Māori to the wider New Zealand economy which, contrary to the public perception that Māori are a 'drag' on the New Zealand economy, highlights the existence of a 'Māori economy' that is robust, has been enjoying strong growth throughout the 1990s and is poised for continued expansion.[57] The Report stated that the New Zealand economy benefits from the positive and profitable contribution of the Māori economy. Māori production amounts to $1.9 billion per year and the Māori economy earns about $826 million in operating surplus. Māori-owned commercial assets produce more export revenue ($650 million) than New Zealand's overall wine, wool, kiwifruit and fisheries industries. Moreover, the report concluded that the broad direction of government policies to enhance economic development was more than just social responsibility or *Treaty of Waitangi* risk management; rather it is a policy area with significant potential to enhance New Zealand's overall economic performance.[58]

In several areas of Canada, local business leaders who initially opposed the land claims process became cautious indigenous supporters, recognising that settlements would contribute significantly to economic development.[59] The result has been an unexpected

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Anderson, R.B, *Economic Development among the Aboriginal Peoples in Canada: The Hope for the Future* (Captus Press, Ontario, 1999).

[55] Chief Gosnell stated in the media: 'To investors, the Nisga'a Settlement provides economic certainty and gives us a fighting chance to establish legitimate economic independence - to prosper in common with our non-aboriginal neighbours in a new and proud Canada. Chief Gosnell's Historic Speech to the British Columbia Legislature, December 2, 1998.

[56] Ibid, Anderson, at 2.

[57] See, New Zealand Institute of Economic Research (NZIER) (Inc) *Maori Economic Development: Te Ohanga Whanaketanga Maori* (NZIER, Wellington, 2003).

[58] Ibid, at v.

[59] ARA, supra n 54.

symbiotic relationship between economic development and indigenous land rights.[60] Thus, improving the socio-economic circumstances of Indigenous Peoples would benefit all Canadians and New Zealanders, while failing to do so would result in ever-increasing economic, social and political costs.[61]

Therefore, the vital interests of the business community present a prominent influence on the settlement of indigenous claims and the same sentiment is required in the post-settlement self-governance phase.[62] In addition, if contemporary Treaty settlements are to be durable, they must include the recognition and realisation of indigenous self-determination by authentic power sharing through self-government. Otherwise another round of indigenous grievances will be on the negotiating table.

Post-Treaty Settlement Fears Unfounded

To better comprehend the possible impact of contemporary indigenous Treaties in BC, the governments of Canada and BC commissioned a study of indigenous Treaty settlements in the past 25 years. The ARA Consulting Group conducted a series of case studies in 1995. The study involved both an analysis of the contents of the Treaties and the reaction of indigenous and non-indigenous people to the settlements – a post-settlement qualitative assessment.[63] In each case, contemporary indigenous Treaty settlements ended long-standing disputes over land and resources and provided a new framework for social, economic and political relations. Although there were many context specific differences,

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[60] Coates, K, & McHugh, P *Kōkiri Ngātahi Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) at 26.

[61] See for example, the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back* (Vol. 1, Supply and Services Canada, Ottawa, 1996), the comments by Michael Wong, Vice-President of the Hong Kong Bank of Canada, to the Select Committee on Aboriginal Affairs of the Legislature of British Columbia, and the British Columbian Government Report, *The Benefits & Costs of Treaty Settlements in British Columbia: Summary Report on the Social and Economic Impacts of Aboriginal Land Claims* (KPMG Report, B.C, Ministry of Aboriginal Affairs, 1998). Located on the Internet at the BC website www.aaf.governancebc.ca/aaf/pubs/kpmgsum.htm. (Accessed July 2004).

[62] Canada, *Report of the Task Force to Review Comprehensive Claims Policy*, (INAC, Ottawa, 1989) at 13. A clear example is the Agreement-in-Principle with the Inuvialuit in Canada's Western Arctic in 1978. The Federal government was anxious to clear title to support large scale petroleum and natural gas developments. When the project became unfeasible, the government's enthusiasm to settle died. A similar response occurred with the Dene comprehensive claim in the MacKenzie River Region of the Northwest Territories. The rise and fall of negotiations corresponded with the level of government enthusiasm for resource development. See Smith, S 'The History of the Dene/Metis Comprehensive Claim: Aboriginal Sovereignty and Political Will' in *Reserches Amerindiennes au Quebec* (1993).

[63] See ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis Appendices* (Ministry of Aboriginal Affairs, BC and Federal Treaty Office, BC, July 1995); ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: Final Report* (Ministry of Aboriginal Affairs, BC and Federal Treaty Office, BC, July 1995); and Coates, K *Summary Report* (Prepared for the Ministry of Aboriginal Affairs, BC & Federal Treaty Office, Canada, 1995). This report is online at:
www.aaf.governancebc.ca/aaf/pubsarasumm.htm. (Accessed July 2004).

by resolving long-standing disagreements through negotiation rather than litigation, or legally and politically imposed conditions, the study found that contemporary indigenous Treaties liberated both indigenous and non-indigenous peoples in liberal democratic settler nation-states (such as Canada, Australia and New Zealand) from contentious and difficult debates about the past. Moreover, following settlement, people generally got on with business and with life. Changes and adaptations were needed but people adapted quickly to the new conditions.[64] It would seem, therefore, that self-determination through contemporary Treaty settlements, where Indigenous Peoples govern themselves rather than secession, seems to be the preferred and logical option for reconciling indigenous and non-indigenous peoples and their respective governments' historical and contemporary challenges, in both Canada and New Zealand.

5.2 SUMMARY

5.2.1 GOVERNMENT RESPONSE TO SELF-DETERMINATION

While nation-states are limiting the application of the principle of self-determination to its internal aspects for Indigenous Peoples, it is not clear that they will go so far as to recognise a *right* to autonomy and self-government. Predictably, the New Zealand government stated that it would agree on the use of the term self-determination in the Declaration as long as the term was not used to imply the right of secession.[65] The New Zealand government seems to be more comfortable with 'self-management' rather than self-determination.[66] The government's opposition to the right of self-determination through secession from colonial rule was substantiated with the following claim:

> It is vitally important for governments that the principle of territorial integrity should not be undermined. ... a large part of the problem lies in the possibility of secession provided for in the post-war formulation of the right of self-determination. States are not sympathetic to doctrines that might fragment them.[67]

Thus, governments have proposed that if the term self-determination is to be used in, for example, the *Draft Declaration on the Rights of Indigenous Peoples*, it should be either qualified or explained. Australia qualified their support for the inclusion of self-determination by calling for clarity in using a term which has a particular meaning under

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[64] Anderson, supra n 53 at 251 – 261.
[65] Idem.
[66] Te Puni Kōkiri, *Mana Tangata: Draft Declaration on the Rights of Indigenous Peoples 1993. Background and Discussion on Key Issues* (Ministry of Maori Development, New Zealand, 1994) at 11.
[67] Idem.

international law, and has expressed reservations about including it if the concept is blurred.[68] Canada has raised questions about the relationship between indigenous groups and the jurisdiction of existing states if an international right of self-determination is included in the Declaration.[69] Mexico and Brazil have expressed concerns about the right of secession, which they see as implicit in the use of the term self-determination.[70]

Other nation-states, however, stated that they would recognise a right of self-determination through self-government and autonomy, including the USA, Denmark and Canada. The USA has always recognised Indigenous Peoples as distinct political entities outside the ambit of the Constitution, and measures affecting their self-governance have been accepted by the majority culture without constitutional challenge.[71] Canada accepts that in some circumstances it has already implemented a right of self-determination for its Indigenous Peoples, which respects the political, constitutional and territorial integrity of the nation-state.[72] Representatives from Canada at the WGIP commented:

> With regard to Article 31 [of the Draft Declaration], Canada interprets a right of self-determination in internal and local affairs as a right of indigenous peoples to govern themselves on matters whose primary focus and impacts relate to their lands and communities. ... However, it is equally Canada's view that the exercise of authority in these areas by indigenous governments should be based on negotiated agreements which ensure that indigenous peoples have the powers necessary to protect their unique culture and identity, while at the same time respecting the integrity of the State and the interests of the population at large.[73]

New Zealand, on the other hand, has expressly by implication rejected such a right to self-determination through self-government and autonomy, preferring instead stronger rights of participation in national government.[74] Canada was also of this view in 1995 but changed its position in 1996.[75]

The intent of self-government, in the author's view, is not just to create a 'state within a state.' Rather, negotiated arrangements should also ensure that indigenous jurisdiction and authority are exercised in harmony with those of other governments, so as

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[68] Ibid, at 12.
[69] Idem.
[70] Idem.
[71] Quentin-Baxter, supra n 26 at 30.
[72] Canadian statement to the UN Working Group on Article 3 of the Draft Declaration on the Rights of Indigenous Peoples, November 1996.
[73] Pritchard, S 'Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group' (Unpublished, Selborne Chambers, Sydney, June 2001) at 45, 47.
[74] Japan, Norway, Morocco, Argentina and Ecuador share this view with New Zealand.
[75] See Submissions to the Working Group of the Commission on Human Rights, UN Doc. E/CN.4/1995/WG.15/2 & Add.1.

to reduce confrontation and misunderstanding and to promote effective public administration.[76] There have been several examples, such as in Canada, of the devolution of self-government powers to Indigenous Peoples, even when a nation-state does not accept that international law requires them to do so. Canada has traditionally taken a conservative approach to the Draft Declaration while taking a more generous approach to domestic indigenous self-determination through self-governance. This illustrates the nature of self-government powers that are then exercised by the Indigenous Peoples concerned, such as Nunavut and Nisga'a.

[76] Canadian Statement to the Inter-Sessional Working Group of the Commission on Human Rights, (31 October 1996) at 3.

6 INTERNATIONAL LAW & CONTEMPORARY TREATY SETTLEMENTS

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Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.
- Article 36, Draft Declaration on the Rights of Indigenous Peoples

6.1 INTRODUCTION - INTERNATIONAL CONTEXT AND NEGOTIATED TREATY SETTLEMENTS

Under contemporary international norms, such as the principle of self-determination, Indigenous People are entitled to redress for historic land and resource claims, the development of social well being programmes, and governmental institutional change to secure cultural integrity and self-government. Such measures correspond with what Daes has called 'belated state-building'[1] through negotiations involving meaningful participation by indigenous groups.[2] Moreover, Daes asserted that self-determination entails a process:

> ... through which indigenous peoples are able to join with all other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.[3]

Thus, in an international context, 'belated state-building' measures would be developed in accordance with the self-determination aspirations of the indigenous groups concerned. The realisation of self-determination for Indigenous Peoples - including the enjoyment of non-discrimination, cultural integrity, land and resource rights, social well being and development, and self-government - is context-specific, given the diversity of indigenous circumstances throughout the world. However, direct negotiations based on good faith and political will allow for exploring and choosing from other models and mechanisms to secure Indigenous Peoples' rights. In this context, major international law

[1] Daes, E-I 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' in *Transnational Law and Contemporary Problems* (Vol. 3, 1993) at 1, 9.
[2] Idem.
[3] Idem.

initiatives during the late 1980s and 1990s to recognise and realise Indigenous Peoples' self-determination rights have been influential in both Canada and New Zealand.

6.1.1 HISTORIC NEGOTIATED SETTLEMENTS - TREATIES

Since the inception of colonialism Indigenous Peoples globally have relied upon negotiated agreements as a framework for securing rights related to their survival as distinct communities.[4] Early contacts between the European newcomers and First Nations or Māori groups, lead to Treaties that defined the terms of coexistence between the peoples concerned. Initially these historical Treaties were negotiated in the context of superior indigenous bargaining power, with a shift in power to the European newcomers at the point when the Indigenous Peoples became numerical, political and cultural minorities in their own land. Hence, the Treaties' aggregate effect often was to facilitate the newcomers' settlement. Nonetheless, in exchange for vast areas of land and other concessions, First Nations' and Māori Treaty signatories often received express or implied guarantees including, in many instances, the right to remain undisturbed on ancestral lands not ceded and to govern themselves according to their values, laws and institutions. Many First

[4] The British entered into numerous treaties with Indigenous Peoples. There has also been much dispute over the interpretation and meaning of many of these treaties. Treaties in Canada included the *Maritime Treaties* of 1693, 1713, 1717, 1725, 1752 and the Treaty with the Micmacs on Miramichi 1794. The *Micmac Treaty 1794* stated:

> 'By Governor William Milan and Micmac King John Julian on June 17th, 1794. The Treaty made with the Micmac Indians and the representative of King George III of England on June 17, 1794. Thus was agreed between the two Kings – The English King George III and the Indian King John Julian in the presence of the Governor, William Milan, on board His Majesty's ship, that henceforth to have no quarrel between them. And the English King said to the Indian King 'Henceforth you will teach your children to maintain peace and I give you this paper upon which are written many promises which will never be effaced.' Then the Indian King, John Julian with his brother Francis Julian begged His Majesty to grant them a portion of land for their own use and for the future generations. His Majesty granted their request. A distance of six miles was granted from Little South West on both sides and six miles at North West on both sides of the rivers. Then His Majesty promised King John and his brother Francis Julian 'Henceforth I will provide for you and for the future generation so long as the sun rises and river flows.' (Sgd) King John Julian, King George III per Governor WM. Milan.'

Other Canadian Treaties were the *Treaty of Paris 1763*, the *Royal Proclamation 1763*, the 11 Numbered (post-confederation) Treaties signed from 1871 - 1921. Treaties in India included the *Treaty of Surat 1752, the Agreement of Colonial Clive, Nabob, Serajah, Dowla (Mogul Empire, Bengal) 1757, the Treaty of Illiabad, Bengal 1765* and the *Treaty of Hyerabad 1768*. British Treaties in Africa included the *Convention of Sherbo, Bendo, Bullom, Bagroo, Bompey, Char, Jenkins, Plantain Islands, Sherbo Island, Tasso and Ya Comba (Sierra Leone) Plantain Isles 1824* which were similar to the *Treaty of Waitangi*. Others included the *Treaty of Kafir Chiefs of Gaika 1835* and *the Treaty of Kafir Chiefs of T'Slambie 1835*. The British even signed Treaties in the Pacific, including the *Hawaii Lahaina Agreement 1844*, the *Fiji Islands Agreement 1859*, the *Apia Treaty 1879*, the *Alofi Agreement 1900*, and others. See Jain, T (2nd ed) *Outlines of Indian Legal History* (1966); Parry & Hopkins (eds.) *Index to British Treaties 1101-1968* (HMSO, London, 1970); Slattery, B 'The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territory' (D.Phil. Dissertation, Faculty of Law, University of Oxford, 1979); Shaw, M *Title to Territory in Africa* (Clarendon Press, New York, 1985); and Bennion, T *Treaty Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi* (Research Paper for Administrative Law LLM, Wellington, 1987).

Nations in Canada have continued to look to the *Royal Proclamation 1763* and other Treaties as at least partial acts of constitutive self-determination and, hence, as critical points of reference for determining their specific ongoing rights and place.

Māori in Aotearoa/New Zealand regard the *Treaty of Waitangi,* entered into with Great Britain in 1840, as a constitutional instrument of sacred proportions. In many instances, therefore, securing Indigenous Peoples' self-determination and related rights may substantially be a function of giving effect to historically negotiated Treaties, renegotiating their terms in light of modern circumstances, or negotiating contemporary Treaties for historic and contemporary injustices, including self-governance.

6.1.2 CONTEMPORARY TREATIES

Agreements, although not typically called Treaties, have been negotiated in more recent years between Indigenous Peoples and nation-states to secure Indigenous Peoples' rights. Several of Canada's indigenous groups have negotiated or are in the process of negotiating with the Federal or provincial governments on self-government, joint management or land settlement agreements. Similarly, several of New Zealand's Māori groups have negotiated or are in the process of negotiating with the government on land and resource settlement agreements, although the agreements are generally not as comprehensive as their Canadian counterparts.

Although indigenous claimants are in a subordinate position of power, armed with court decisions that validate their claims they have been able to claim high legal and moral ground based on the recognition and protection of Indigenous Peoples' property rights, which are fundamental to commonwealth legal jurisdictions. Moreover, demonstrations of the denial or abuse of indigenous, human and Treaty rights are very influential components of the politics of embarrassment, useful with the public at large and in international fora.

Negotiations for the denial or abuse of their rights have been part of the search by the James Bay Cree, Tainui, Ngāi Tahu, Nisga'a and other Indigenous Peoples for redress and, although the route of negotiation typically has been contentious, direct negotiations have resulted in agreement and, in the larger context, have played a pivotal role in the settlement of Indigenous Peoples' claims for self-government.

6.1.2.1 JAMES BAY CREE – FIRST CONTEMPORARY TREATY SETTLEMENT IN CANADA

> *This is our land; no one has obtained surrender from us. We never lost in battle. We never signed a treaty. No one has taken it, and we're not allowed to let anyone take*

> *it from us! The issue was not merely a land claim settlement: It was a fight for our survival as a people and the survival of our way of life.*[5]
> -Cree Chief Billy Diamond

Direct negotiations were forced on the Cree because of the hydro-electric development in Northern Quebec. In early 1972, negotiations on the James Bay project proved futile when Premier Bourassa told the Crees the project was non-negotiable and would proceed. Later that year the Crees and Inuit in the area launched court proceedings because the Bourassa-led Quebec Government ignored the Crees' aboriginal rights. The Crees and Inuit were left with no option but recourse to the courts to attempt to have their aboriginal rights recognised. Chief Billy Diamond outlined the minimal demands that the Cree believed were necessary for their survival:

> The fundamental points we had to achieve were the preservation and protection of our traditional way of life; certain modifications to the project to minimise the negative ecological effects; suitable land, hunting, fishing and trapping rights; control of our own institutions; adequate monetary compensation; and participation in the development of the territory.[6]

Months and months of almost continual intense negotiations involving Cree and Inuit representatives, government officials and a host of biological, social science and legal experts resulted in the signing of an agreement in principle by 1974. These events subsequently lead to the signing of the *James Bay and Northern Quebec Agreement* (JBNQA) on 11 November 1975. The JBNQA was predicated upon the principle that the Crees and Inuit of Quebec had substantial aboriginal rights over the territory of the nature and extent as described in the Superior Court of Quebec judgment of Malouf J in *Kanatewat v The James Bay Development Corporation and Attorney-General of Quebec.*[7]

The Quebec Government in 1977 decided that all sectors of the provincial administration would offer their services and programmes to Indigenous Peoples throughout the province, not only to the beneficiaries of the JBNQA. This decision was based on the underlying principle of recognition of aboriginal title:

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[5] Grand Cree Chief Billy Diamond in MacGregor, R, *Chief: The Fearless Vision of Billy Diamond* (Penguin Group, Ontario, 1990) at 66.
[6] Diamond, B, 'Aboriginal Rights: The James Bay Experience,' in Boldt, M & Long, J *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto, Toronto 1985) at 280.
[7] [1974] R.P 38 (Que. C.S).

> [The] Indian and Inuit nations were first to come here, to know, to tend and to love the soil and the land they still inhabit ... [the Indigenous Peoples] also have the absolute right to share equally in all community or collective services that the population in general enjoys.[8]

The Cree, therefore, negotiated for the protection and perpetuation of their culture and identity through the recognition of their aboriginal rights to the territory; and they received tangible benefits for all Indigenous Peoples of the Province of Quebec based on these rights. The Cree with the Inuit subsequently negotiated successfully for self-government pursuant to the *Cree-Naskapi Act 1984*.

6.1.2.2 WAIKATO-TAINUI – FIRST CONTEMPORARY LAND SETTLEMENT

> *The Crown expresses its profound regret and apologises unreservedly for the loss of lives because of the hostilities arising from its invasion, and at the devastation of property and social life which resulted. ... The Crown acknowledges that the subsequent confiscations of land and resources ... were wrongful ... and have had a crippling impact on the welfare, economy and development of Waikato. ... Accordingly, the Crown seeks on behalf of all New Zealanders to atone for these acknowledged injustices, so far as that is now possible, and ... to begin the process of healing and to enter a new age of co-operation with the Kiingitanga and Waikato.*
> - Section 6(2)(3) and (6), *Waikato Raupatu Claims Settlement Act 1995.*

For Waikato-Tainui, direct negotiations commenced in 1930 following the Sim Commission investigations[9] into the raupatu confiscations, that is, the confiscation of lands following the conclusion of the Waikato Wars. The Report was submitted to Parliament in 1927 and found that the land confiscations had been excessive. The Crown made a series of approaches to bring about settlement but Tainui accepted none because the deals were offered in monetary terms only. The raupatu claim was pursued under the injunction enunciated by King Tawhiao in the nineteenth century:

> *I riro whenua atu, me hoki whenua mai* - As land was taken, so land should be returned; and *ko te moni hei utu mo te hara* - the money is acknowledgment by the Crown of its crime.[10]

The land for land principle was based on the belief that any money taken in compensation for land their ancestors had died for would be contaminated.[11] Te Puea and the elders

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[8] Government policy as cited in Gourdeau, E 'Quebec and Aboriginal Peoples' in Long, J & Boldt, M (eds) *Governments in Conflict: Provinces and Indian Nations in Canada* (Toronto University Press, 1988) at 113. See also Appendix IX for more context on James Bay Cree background.

[9] Sir William Sim, *Royal Commission on Confiscated Native Lands* (1928) *AJHR* Vol II G7.

[10] Mahuta, R 'Waikato: A Case Study of Tribal Settlement' (Address given at the Conference, 'Indigenous Peoples: Land, Resources, Autonomy,' Vancouver, 19-24 March, 1996) at 5.

[11] Idem.

reached a partial settlement in 1946.[12] In time, the inadequacies of this settlement emerged. In the Court of Appeal decision in 1989 and although dicta, Cooke P directed the Crown and Waikato-Tainui to work out their own agreement to settle the raupatu claim when he mentioned in his concluding statements:

> What does offer an alternative solution, however, is the willingness of Tainui as stated in this Court to resolve the coal and *other outstanding issues* in direct negotiation with the Crown.[13] [emphasis added].

The 'other outstanding issues' referred to the wider raupatu claim. Cooke P further suggested to the parties that there be:

> ... a negotiated settlement which recognised as regards coal that Tainui are entitled to the equivalent of a substantial proportion but still considerably less than half of this particular resource could be suggested as falling within the spirit of the Treaty of Waitangi.[14]

The case was significant given that it strengthened Waikato-Tainui's subordinate position by recognising their property rights as protected by the *Treaty of Waitangi.* The parties had already considered negotiations in 1988. The court decision provided the impetus to resolving the wider raupatu issue for Waikato-Tainui, with direct negotiations commencing in 1990. After months of intense negotiations, the Heads of Agreement was signed in 1994. The following year, legislation went through the select committee process and passed as the *Waikato Raupatu Claims Settlement Act 1995.*[15]

To settle their grievance, Waikato-Tainui had sent deputations and petitions to the British Crown in England and Parliament in Wellington, had been the subject of a Royal Commission, negotiated through various tribal leaders, obtained a full and final settlement, re-opened the claim, accessed the court system, filed a claim with the Waitangi Tribunal, and re-entered long and drawn out negotiations.

6.1.2.3 NISGA'A – FIRST CONTEMPORARY TREATY SETTLEMENT IN BRITISH COLUMBIA

> *[The Nisga'a Agreement] represents a hard-fought compromise that has seen a generation of Nisga'a grow old at the negotiating table. But we are making that*

[12] Ibid, at 8. See also King, M *Te Puea* (Hodder & Stoughton Ltd, Auckland, 1987) at 224.
[13] *Tainui Maori Trust Board v Attorney General* [1989] 2 NZLR 513.
[14] Ibid, at 129; Mahuta, supra n 10 at 10.
[15] Ibid, at 18. See also Tainui Maori Trust Board *Postal Referendum Information Package* (Tainui Maori Trust Board, Ngaruawahia, March 1995) at 5-8. See Appendix XI for more background context on Waikato-Tainui.

> *compromise in order to become full and active participants in the social, political and economic life of this country.*[16]
> - Nisga'a Chief Joe Gosnell

In a similarly resilient and tenacious manner, the Nisga'a First Nation in Northern British Columbia have been seeking redress for their indigenous grievances for generations. The Nisga'a sent deputations to Victoria, petitioned the Privy Council, accessed the court system, and sustained long and drawn out negotiations since 1976 to settle their outstanding indigenous grievances. The Nisga'a land question was pursued and negotiated under the guiding principles that the Nisga'a:

> [Become] full participants contributing in a positive way to the well being of the Nass Valley; and [obtain] self-determination over their own social, economic and political rights that are dependent on the shared and mutual responsibility of governments and the Nisga'a.[17]

The Nisga'a have accessed the court system to successfully strengthen their subaltern position against the nation-state, with the recognition of their aboriginal rights in *Calder. v Attorney-General.*[18] The negotiating position of the Nisga'a was further reinforced in subsequent decisions, particularly *Delgamuukw v British Columbia.*[19] At first instance, Lambert J emphasised the importance of negotiating settlement agreements between the First Nations and the Federal and Provincial Governments when he stated:

> In the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole.[20]

On appeal La Forest J found that the best process for resolving the dispute between the First Nations of British Columbia and the Provincial Government was by direct negotiations when he held:

> The best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.[21]

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[16] Chief Joe Gosnell, cited in Nisga'a Tribal Council, *Our Canoe Has Landed: A New Journey Begins* (39th Annual Convention of the Nisga'a Nation, Lakalzap, B.C, 23-26 April, 1996) at 20
[17] Nisga'a Tribal Council, 'Nisga'a Declaration' in *Nisga'a Nation 38th Annual Convention* (38th Annual Convention Nisga'a Nation, 24-28 April 1995) at 109; and ibid, at 18-9.
[18] (1973) 34 DLR (4th) 145. (Supreme Court of Canada).
[19] *Delgamuukw v British Columbia* [1993] 5 W.W.R 97. (British Columbia Court of Appeal).
[20] Ibid, at 379-80.
[21] Ibid, at 94, paragraph 207, per La Forest J.

In addition, in his concluding comments, Lamer CJ stated that s.35(1) of the *Constitution Act 1982:*

> ... provides a solid constitutional base upon which subsequent negotiations can take place. Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.'[22]

Lamer CJ also noted that the Gitskan and Wet'suwet'en people had overlapping unsettled claims to the territory at issue.[23] The Nisga'a thus had a direct interest in this landmark decision. Given that *Delgamuukw* upheld Nisga'a aboriginal rights, it strengthened their subordinate position vis-a-vis the government of British Columbia who refused to even enter negotiations until 1990. The Supreme Court decision, immensely affected the settlement of their land question to the Nass Valley and influenced the signing of the *Nisga'a Settlement Agreement 2000.*[24]

The importance of the various Court decisions for the Cree, Tainui, and Nisga'a reflected the turning point of the relationships with their respective governments, leading to negotiating settlements out of court. Perhaps the executive and judiciary were intimidated by the potential cost of recognising aboriginal rights, with negotiation on the substance of aboriginal and Treaty rights permitting the Indigenous Peoples and governments to come to a mutually agreeable and affordable settlement. Hence, without the negotiations based on aboriginal and Treaty rights there would not have been Treaty settlements for these indigenous groups. These positive results over the past three decades may indicate that the best hope for progress on Indigenous People's rights and claims,

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[22] *Delgamuukw v British Columbia* [1998] 1 C.N.L.R 14, 86, paragraph 186, per Lamer CJ (Supreme Court of Canada).

[23] Ibid, at 22, paragraph 9, per Lamer J.

[24] See 'Nisga'a Negotiators are on Right Road' in *Vancouver Sun Opinion*, (February 2 1998) where it was stated:

> The significance of that decision in December by the Supreme Court of Canada is profound, ... With its confirmation that aboriginals still have title to their land if they have not surrendered it in treaties, and that they have the right to exclusive use and occupation of the land, the court greatly strengthened the hand of the Indians in their negotiations with governments over land claims... Until the Indians and the governments agree to some ground rules for compensation, uncertainty and delays will debilitate the economy. The urgency of settling land claims is more apparent than ever. ... the Nisga'a AIP and Final Agreement appear moderate in light of the Delgamuukw decision. The Nisga'a, who negotiated for 20 years, said they would accept less than 10 per cent of the land they viewed as their traditional territory.

See also Appendix XIII for more context on the Nisga'a.

including to self-determination through self-government, lies outside of the judicial and parliamentary processes.

6.1.3 INTERNATIONAL LAW AND JUDICIAL ACTION

Domestic constitutional or statutory prescriptions that reflect or give effect to international norms may be resorted to in the courts within the ordinary constraints on jurisdiction and justiciability.[25] In some nation-states domestic tribunals may directly apply international customary norms or provisions in Treaties that have been ratified in accordance with relevant constitutional procedures.[26] At a minimum, domestic courts usually are capable of indirectly implementing international norms by using them to guide the judicial interpretation of domestic rules.

For example, international law was a factor in early United States Supreme Court cases concerning the status of Indians. An example is the Supreme Court decision in *Worcester v Georgia.*[27] In its 1832 decision in *Worcester,* the Court invoked international legal doctrine of the time to conclude that the Cherokee people had 'original natural rights,' that the Cherokee's legal status was that of a political community under the protection of the United States akin to the 'tributary or feudatory' states of Europe and that, as a consequence, Georgia could not extend its criminal jurisdiction over Cherokee territory.[28] Marshall CJ stated that:

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[25] See for example, Wallace, R *International Law* (2nd Ed.)(Sweet & Maxwell, London, 1992) at 7-28. Pursuant to the *Constitution Act 1982,* s. 35, is the Canadian constitutional affirmation of 'existing aboriginal rights and Treaty rights'. Section 35 has been the source of litigation and judicial decisions responsive to the demands of Indigenous Peoples in Canada. *Sparrow v R* [1990] 1 S.C.R 1075, *R v Lewis* [1993] 4 C.N.L.R 98; *R v McPherson* (1994) 111 D.L.R 278; *R v Van der Peet,* [1996] 4 C.N.L.R 177 (S.C.C); and *Delgamuukw v British Columbia* [1998] 1 C.N.L.R 14 (S.C.C).

[26] The extent to which a domestic court will give effect to international law is a function of the court's jurisdiction and the status accorded international law vis-à-vis domestic law within the applicable scheme. In Australia, Canada, New Zealand and other British Commonwealth countries in which the executive may enter Treaties without legislative approval, Treaties are not part of the body of law ordinarily binding upon the courts. Treaty norms thus can only become rules of decision for courts through specific legislative acts of incorporation. See Brownlie, I Principles *of Public International Law* (Oxford University Press, Oxford, 1991). Joseph, P *Constitutional and Administrative Law in New Zealand* (Law Book Co., Sydney, 1993); Gotleib, A *Canadian Treaty-Making* (Butterworth Publishers, Toronto, 1968); Gunther, D *The Treaty-Making Power in the Commonwealth of Australia* (1966). For a discussion on the incorporation of treaties by legislation in New Zealand and Canada see Lawrey, A 'Contemporary Efforts to Guarantee Indigenous Rights under International Law' in *Vanderbilt Journal of Transnational Law* (Vol. 23, 1990) at 703, 735-38. However, there may exist some limited possibilities in a number of nation-states for the direct judicial application of international treaty or customary norms. See Lillich, R 'The Role of Domestic Courts in Enforcing International Human Rights Law' in Hannum, H *Guide to International Human Rights Practice* (Clarendon Press, Oxford, 1992) at 228 and Bayefsky, A & Fitzpatrick, J 'International Human Rights Law in United States Courts: A Comparable Perspective' in *Michigan Journal of International Law* (Vol. 14, 1992).

[27] 31 U.S (6 Pet.) 515 (1832).

[28] Ibid, at 559-61.

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, and as often as questions of right depending upon it are duly presented for their determination.[29]

International law and its formation in the context of Indigenous Peoples has changed immensely since *Worcester* but as it evolves, international norms and principles continue to be applicable by United States courts, whose constitutional framework automatically incorporates binding Treaty and customary international law into domestic law.

In addition, the direct application of international Treaty and customary international law and the indirect use of international norms to guide the interpretation and application of relevant domestic rules by the domestic courts, applies in Australia, Canada and New Zealand. As discussed earlier, the judiciary in the latter countries have been very active in interpreting statutory or constitutional law concerning Indigenous Peoples. It is, therefore, suggested that insofar as an activist judiciary engages in developing and applying the domestic law as it concerns Indigenous Peoples, they should also endeavour to harmonise the law and its application to international obligations.[30] Courts may appropriately use international standards as interpretive tools even if standards appear in unratified Treaties or are otherwise considered non-binding. In this context, Indigenous Peoples have sought and obtained in the courts the recognition of indigenous, Treaty and human rights according to international law. [31]

6.1.3.1 AUSTRALIAN CONTEXT - MABO

The classic case illustrating the use of international standards by a judiciary to guide the judicial interpretation and application of domestic rules in the context of Indigenous Peoples is the 1992 High Court decision of Australia in *Mabo v Queensland [No.2].*[32] The case involved an effort by aboriginal people to assert indigenous (aboriginal) rights in lands designated as Crown lands. The Queensland Government argued that Crown ownership of lands precluded aboriginal rights over the same lands.[33] In separate opinions the High Court rejected the Crown's claim because it was based on the premise that the

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[29] *Worcester v Georgia* 31 U.S (6 Pet.) 515 (1832).

[30] As Marshall CJ of the Supreme Court stated in *Murray v The Schooner Charming Betsy,* 6 U.S (2 Branch) 64, 118 (1804) 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'

[31] See the United States Supreme Court in *Trop v Dulles* 356 U.S 86, 101-02 (1957) in which the Court held that the constitutional prohibition of cruel and unusual punishment should 'draw its meaning from the evolving standards that mark the progress of a maturing society' and accordingly referred to international norms and principles.

[32] *Mabo v Queensland,* (1992) 175 C.L.R 1. For a good analysis of this case see Reynolds, H 'The Mabo Judgment in Light of Imperial Land Policy' in *UNSWLJ* (Vol. 1, 1993) at 16; and Pritchard, S *Indigenous Peoples, the United Nations and Human Rights* (Zed Books, Australia, 1998).

[33] Ibid, at 25 (per Brennan. J).

aboriginal lands were *terra nullius* prior to European settlement, despite the presence of Indigenous People.[34] Brennan J held that the common law should be interpreted in conformity with contemporary values embraced by Australian society and also in light of contemporary international law:

> If it were possible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country ... The expectations of the international community accord in this respect with contemporary values pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights ... brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[35]

Brennan J also cited the advisory opinion of the ICJ in the *Western Sahara* case,[36] which critically examined and questioned the theory of *terra nullius* as a colonial tool for the acquisition of sovereignty over Indigenous Peoples.[37]

Thus guided by the important influence of international law, the Court reinterpreted the common law property regime by ousting the previously relied upon theory and practice of *terra nullius.* The result was a radical reinterpretation of common law doctrine to recognise aboriginal title and rights of beneficial ownership on the basis of historical use and occupancy, rights alienable only to the nation-state and subject to extinguishment by the nation-state through conveyances or other official acts.[38] In recognising and defining aboriginal title, the Australian High Court in *Mabo* invoked common law precedents in the United States and Canada that established similarly circumscribed indigenous land rights.[39]

Whatever one's view of the case, *Mabo* did provide the impetus for resolving long-standing indigenous land claims in Australia.[40] Following the decision, the government

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[34] For an excellent analysis of the *terra nullius* fiction and its legal history in Australia, see Reynolds, H *The Law of the Land* (Penguin Books, Melbourne, 1988); and Reynolds, H *Frontiers: Aborigines, Settlers and Land* (Allen & Unwin, Sydney, 1987).

[35] *Mabo v Queensland,* (1992) 175 C.L.R 1, 41-2 (per Brennan. J).

[36] *Western Sahara,* Advisory Opinion, 1975 I.C.J. 12.

[37] *Mabo v Queensland,* (1992) 175 C.L.R 1, at 40-41 (per Brennan J). See also 175 C.L.R at 181-82 (per Toohey J.).

[38] Ibid, at 58-60 (per Brennan J).

[39] Ibid, at 60 (per Brennan J). See the discussion on the doctrine of aboriginal rights, infra, chapter 9: 'Customary Representation,' subsection 9.1.11.1 'Fossilised Traditional Aboriginal Rights to Development' n 216-230.

[40] For a discussion on the High Court decision and its impact on Australian law, see generally Stephenson, M.A. & Ratnapala, S (eds) *Mabo: A Judicial Revolution* (University of Queensland Press, St. Lucia, Queensland, 1993).

entered into extensive negotiations with aboriginal leaders[41] which led to the *Native Title Act 1993* that created a framework, albeit imperfect, where Indigenous Peoples may secure possessory rights in lands and compensation for lands lost.[42]

6.1.3.2 INTERNATIONAL NORMS AND JUDICIAL ACTIVISM IN CANADA AND NEW ZEALAND

In the Supreme Court of Canada, Dickason CJ stated in *Slaight Communications Inc. v Davidson*[43]

> Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the [Canadian] Charter [of Rights and Freedoms] but also the interpretation of what can constitute pressing and substantial [Charter] objectives which may justify restrictions upon those rights.[44]

In the New Zealand Court of Appeal, Cooke P applied international norms as an interpretative guide in *New Zealand Maori Council v Attorney-General*[45] when he stated:

> 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.[46]

Somers J additionally cited international law instruments and commentary to assist his findings, particularly Article 2 of the *United Nations Charter*, and Articles 26 and 31(1) of the *Vienna Convention on the Law of Treaties 1969*.[47] Further, in 1995 Cooke P in the Court of Appeal enunciated that 'the right to development of indigenous rights is indeed becoming to be recognised' in other jurisdictions.[48] Hence, the judiciary in Canada and New Zealand are resorting to international norms and provisions in Treaties to guide some decisions as they affect Indigenous Peoples' rights.

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[41] This negotiation process is summarised in International Work Group for Indigenous Affairs, *The Indigenous World: 1993-94* (International Work Group for Indigenous Affairs, Copenhagen, 1994) at 92-3.
[42] *Native Title Act 1993* (Commonwealth), No.110 of 1993. For descriptions of the features of the Act and its ramifications, see Butt, P 'Mabo Revisited - Native Title Act' in *Journal of International Banking Law* (Vol. 9, 1994) at 75; Ladbury, R & Chin, J 'Legislative Responses to the Mabo Decisions: Implications for the Australian Resources Industry' in *Journal of Energy and Natural Resources Law* (Vol. 12, 1994) at 207.
[43] [1989] 1 S.C.R. 1038. (S.C.C).
[44] Ibid, at 1056-57 (S.C.C).
[45] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.
[46] Ibid, at 655-6 (per Cooke P).
[47] Ibid, at 682 (per Somers J).
[48] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 554.

6.1.3.3 INTERNATIONAL DOCTRINE OF GOOD FAITH

The international doctrine of good faith is a further example of domestic courts in New Zealand and Canada resorting to international customary norms to guide the judicial interpretation of domestic rules. The doctrine of good faith is expressed in the *United Nations Charter,* the *Vienna Convention on the Law of Treaties* and national jurisdictions, and it underlies the fundamental principle of Treaty law. Article 2(2) of the *United Nations Charter* on Treaties and Article 26 of the *Vienna Convention on the Law of Treaties 1969* state that every Treaty in force is binding upon the parties to it and must be performed in good faith. Obligations arising from promises in Treaties of cession, including the Treaty of Waitangi and contemporary Treaties, should, therefore, be interpreted in light of the international law doctrine of good faith.

The principle that nation-states or other subjects of international law must conduct themselves in good faith is a fundamental tenet of the law governing international relations. It underlies many other principles of international law, including *pacta sunta servanda* (agreements must be kept).[49] Indeed, Virally observed:

> ... good faith furnishes a measure - a pattern - for determining the extent of the legal obligations assumed by states or other subjects of international law ... Good faith protects those who trust, reasonably, the appearances created by the behavior of other international legal actors (who have confidence in the good faith of those actors), or who have truly fallen into error: the innocent victims, in all good faith, of appearances.[50]

The international doctrine of good faith has parallels in the municipal law on Treaties with Indigenous Peoples found within several jurisdictions in the colonial and contemporary periods. The Canadian judiciary in *Delgamuukw v British Columbia*[51] articulated this view when Lamer CJ directed the British Columbia government to negotiate contemporary Treaties with First Nations over their unextinguished aboriginal rights. He stated:

> The Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and

[49] Note the central importance of good faith as a principle of Treaty interpretation prescribed in Article 31 of the *Vienna Convention 1969*. The *1986 Vienna Convention on the Law of Treaties between States and International Organizations* uses the same terms. The Vienna Conventions do not apply directly to bilateral Treaties between parties other than nation-states or intergovernmental organisations, but they expressly keep open the possibility that such Treaties may be recognised and regulated by international law. See the *Nuclear Test Cases*, ICJ Rep, 1974 at 268, 473; and the *Lighthouses Case*, *PCIJ,* 1934, Series A/B-, No 62, at 47.

[50] Virally, M 'Review Essay: Good Faith in Public International Law' *American Journal of International Law* (Vol. 77, 1983) at 130, 132-3.

[51] [1998] 1 C.N.L.R 14.

> take on all sides, reinforced by the judgments of this Court, that we will achieve ... 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.'[52]

The Canadian judiciary has thus applied the international doctrine of good faith to guide and support the judicial interpretation of First Nations grievances and contemporary Treaty settlements. Stack held that it is likely that the Canadian courts will adopt and enforce a general duty of the Federal Government to negotiate contemporary Treaty settlements in good faith on aboriginal rights claims under the Canadian Constitution, even where they have not yet begun.[53] Stack also asserted that the RCAP suggests there should be a 'constitutional duty on non-Aboriginal society to negotiate a new relationship with Aboriginals in good faith'[54] and that the Courts should recognise it as part of their role in 'increasing the bargaining power of Aboriginals.'[55] Moreover, the Canadian RCAP recognised four principles for future relationships between the Crown and Indigenous Peoples, including mutual responsibility with fiduciary duties on all parties.[56] Such mutual vulnerability gave rise to mutual obligations which result in fiduciary relations where parties must interact with utmost good faith.[57]

The New Zealand judiciary also articulated the international doctrine of good faith in *New Zealand Maori Council v Attorney-General.*[58] Cooke P cited the importance of good faith in the partnership between the Crown and Māori when he held that 'the Pakeha and Maori Treaty partners [were] to act towards each other reasonably and with the utmost good faith.'[59] Moreover, Somers J referred to the principles of *Treaty of Waitangi* in retrospect when he stated:

> All dealings [of Great Britain] with the aborigines [Māori] for their lands must be conducted on the same principles of sincerity, justice and *good faith* ... [with] native rights binding on the faith of the Crown ... Each party in my view owed to the other a duty of *good faith.*[60] [emphasis added]

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[52] *Delgamuukw v British Columbia* [1998] 1 C.N.L.R 14, 86, paragraph 186, per Lamer CJ (Supreme Court of Canada).
[53] Stack, D 'The Impact of the RCAP on the Judiciary: Bringing Aboriginal Perspectives' into the Court Room' in *Saskatchewan Law Review* (Vol. 62, 1999) 471, at 507-509.
[54] Ibid, at 509.
[55] Ibid, at 511.
[56] The four principles of co-existence are mutual recognition, mutual respect, sharing and mutual responsibility and these principles are represented in a circular and continuing process of renewal and rediscovery of relations. See Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back* (Vol. 1, Supply and Services Canada, Ottawa, 1996) at 677 – 691; RCAP, *Renewal: A Twenty Year Commitment* (Vol. 5, Supply and Services Canada, Ottawa, 1996) at 141; Recommendation 1.16.1.
[57] Ibid, (Vol. 1, 1996) at 677 – 678.
[58] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 673.
[59] Ibid, at 667.
[60] Ibid, at 692.

Richardson J[61] and Casey J reinforced this doctrine.[62] The New Zealand judiciary has therefore applied the international doctrine of good faith to guide the judicial interpretation of domestic rules for the settlement of Māori grievances. Perhaps governments need to extend this development to include the international right of Indigenous Peoples to self-government through self-determination.

A consequence flowing from the international doctrine of good faith concerns the abuse of rights. One formulation is that international law prohibits the evasion of Treaty obligations under the guise of the alleged exercise of a right.[63] The abuse of rights exists as a doctrine in a number of civil law countries, but the specific precepts it embraces are so widely recognised that several judges and academics have propounded it as a general principle of the law of nations.[64] Hence, a demonstration of the denial or abuse of contemporary indigenous Treaty rights, including self-government, could be a very influential component of the politics of embarrassment at both the domestic and international levels.

Article 36 of the Draft Declaration in its current form states:

> Indigenous peoples have the right to the recognition, observance and enforcement of *treaties, agreements and other constructive arrangements* concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes, which cannot otherwise be settled, should be submitted to competent international bodies agreed to by all parties concerned. [emphasis added]

Article 36 reflects the international doctrine of good faith[65] recognised by the ICJ which stated:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.[66]

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[61] Idem, per Richardson J, at 680-3.
[62] Idem, per Casey J, at 703.
[63] Cheng, B *General Principles of Law as Applied by International Tribunals* (Stevens, London, 1953 - reprinted by Grotius Publications, Cambridge, 1987) at 12; *Free Zones,* PCIJ, 1932, Series A/B, no. 46, at 167; Oscar Chinn, PCIJ, 1934, Series A/B, no. 63, at 86. Interestingly, the abuse of rights in terms of an abuse of sovereign power between a corporation and State occurred in *BP v Libya* (1973) 53 ILR at 331.
[64] See for example Judge Alvarez in *Corfu Channel (Merits),* ICJ Rep. 1949, at 48: *Competence of the General Assembly for the Admission of a State to the United Nations* ICJ Rep, 1950 at 15-21. See also Judge Ammoun in *Barcelona Traction,* ICJ Rep, 1970 at 324. See Iluyomade, B 'The Scope and Content of a Complaint of Abuse of Rights in International Law' in *Harvard International Law Journal* (Vol. 16, 1975) at 47; Paul, V 'The Abuse of Rights and Bona Fides in International Law' in *Osterreichische ZRV* (Vol. 28, 1977) at 107; and Taylor, G 'The Content of the Rule Against Abuse of Rights in International Law' in *BYIL* (Vol. 46, 1972-1973) at 323; Kiss, A 'Abuse of Rights' in Bernhardt, R; Macalister-Smith, P *Encyclopaedia of Public International Law* (Inst. 7, North Holland, New York, 1992) at 1-5.
[65] Article 36, *Draft Declaration on the Rights of Indigenous Peoples*, 2005.
[66] *Australia v France; New Zealand v France,* ICJ Reports 1974, paragraph 46.

In 1998 the Rt. Hon Douglas Graham reviewed government policy. He affirmed that the principles of the *Treaty of Waitangi* reiterated the requirement of the Crown and Māori to act with the utmost good faith towards one another, that there should be full consultation on matters which are likely to affect Māori, and that the honour of the Crown requires long-standing grievances to be addressed.[67] The Office of Treaty Settlements in New Zealand reaffirmed this principle in its 2002 policy on negotiating Treaty settlements. Principle 1 of the current Crown negotiating principles states:

> The negotiating process is to be conducted in good faith based on trust and cooperation towards a common goal.[68]

6.1.4 TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS

Treaties and other agreements negotiated with colonial powers have had a profound impact on Indigenous Peoples. Repeatedly, however, the history of these Treaties has been one of lawlessness, injustice, deceit and dishonour. From the early days of the United Nations Working Group, it became clear that indigenous representatives attached great importance to a proper understanding of the role of Treaties in the conquest of their lands and resources. Thus, in 1989 Special Rapporteur Miguel Alfonso Martinez was appointed to prepare a study on "Treaties, agreements and other constructive arrangements" between nation-states and Indigenous Peoples.[69]

The doctrine of good faith underpins the fundamental principle of Treaty law that Treaties are binding on the parties and must be performed in good faith. Thus the thrust of the first sentence of Article 36 of the Draft Declaration above is no more than a restatement of the existing law of Treaties. Three other aspects of the provision in Article 36 warrant further discussion. Like the Martinez Study, the provision is not confined to 'treaties' but extends to 'agreements and other constructive arrangements.' Second, Indigenous Peoples have the right to recognition and observance of these instruments and also the right to their 'enforcement.' Third, the provision extends to nation-states and their successors. The law relating to nation-state succession of Treaty obligations is not well settled but the general

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[67] Rt. Hon. Douglas Graham 'The New Zealand Government Policy' in Quentin-Baxter, A *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) at 5.

[68] Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations With the Crown* (OTS, Wellington, 2002) at 30.

[69] ECOSOC Resolution 1989/77 of 24 May 1989. The Special Rapporteur's first progress report (E/CN.4/Sub.2/1992/32) was completed in 1992 and considered by the Working Group the following year. The Special Rapporteur's final report was completed in 1995.

rule is that a new nation-state is not tied by its predecessor – the 'clean slate' doctrine.[70] Although some indigenous Treaties may come within one of the exceptions to this non-transmissibility rule, the Draft Declaration errs on the side of caution and expressly includes both nation-states and their successors.

6.1.5 WAITANGI TRIBUNAL AND INTERNATIONAL LAW

In some countries domestic tribunals may directly apply, as rules of decisions, international customary norms or provisions in Treaties that have been ratified in accordance with relevant constitutional procedures. The Waitangi Tribunal (the Tribunal) is one such tribunal in New Zealand. Canada does not have an equivalent tribunal model but the Royal Commission on Aboriginal Peoples recommended the idea of a similar independent administrative tribunal.[71]

To legally invoke *Treaty of Waitangi* guarantees, Māori have had to file claims in the Waitangi Tribunal and/or in the Courts. Following the hegemonic ruling in *Wi Parata v Bishop of Wellington,*[72] Māori were unable to pursue justice in the legal system because of their non-justiciable aboriginal and Treaty rights. Consequently, few cases were litigated until the Treaty was resurrected into domestic law in 1975. Even then Māori could not seek justice in the Courts but had to appeal to the Waitangi Tribunal. For all its imperfections, the Waitangi Tribunal is that higher authority, it has adjudicated upon indigenous and human rights in its hearings and has been a potent influence on New Zealand jurisprudence.[73]

The Tribunal was established pursuant to the *Treaty of Waitangi Act 1975,* enacted at a time consistent with the sudden increased consciousness of indigenous rights and claims globally. The Act itself was a direct result of domestic political circumstances and pressure, as was its subsequent retroactive amendment in 1985. The Tribunal has been concerned to undertake careful analysis of the historical, anthropological, social and economic evidence relating to Treaty claims. Consequently, other courts and tribunals have been forced to acknowledge, respect and commend the approach of the Tribunal.[74]

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[70] Brownlie, supra n 26 at 667.

[71] Royal Commission on Aboriginal Peoples *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples,* (CCGP, Ottawa, 1996); and *Final Report* (5 Vols, CCGP, Ottawa, 1996).

[72] (1877) NZJR 72, 79. Following this decision, the New Zealand courts had no jurisdiction to entertain any claims based on Māori custom, law and usage, supposed aboriginal rights or rights based on the *Treaty of Waitangi.*

[73] See Havemann, P & Turner, K 'The Waitangi Tribunal: Theorising its Place in the Redesign of the New Zealand State' in *Australian Journal of Law & Society* (Vol. 10, 1994) at 165-93.

[74] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 661.

The Tribunal and the Courts have both referred to the principles of the Treaty, which include the Crown's obligations to actively protect Māori interests[75] and the concept of partnership.[76] As a result of this relationship, there is an obligation on the Crown to act in a manner that upholds the honour of the Crown.[77] There is a corresponding Treaty obligation on Māori to uphold the rule of law.[78] Both must act reasonably and with the utmost good faith[79] and the relationship should be founded on reasonableness, mutual co-operation and trust.[80] The Treaty also protects Māori interests in natural resources, although this Treaty right was whittled away in the recent foreshore and seabed debate.[81] The acceptance of the work of the Tribunal at the highest levels of the judiciary has, additionally, resulted in benefits for Māori claimants.

Of course the Tribunal is not without its challenges.[82] Hearings are long, protracted and costly. The Tribunal is severely under-resourced, low on the court hierarchy and possesses a non-binding recommendatory power, which impinges on the effective implementation of its findings.[83] The current politically charged debate on Māori claims to natural resources, such as oil and gas and the foreshore and seabed, and the current Labour government's policy of legislating for Crown ownership, highlights the Tribunal's fundamental weaknesses. In 2003, the Waitangi Tribunal identified that the Foreshore and Seabed Bill,[84] which extinguishes Māori Treaty and aboriginal rights to the foreshore and seabed, was in direct contravention of Articles II and III of the *Treaty of Waitangi 1840*.[85]

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[75] Ibid, at 517.
[76] Ibid, at 641; see also Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim* (G.P Publications, Wellington, 1988) at 194-95.
[77] *New Zealand Maori Council v Attorney-General* [1987] 1NZLR 641, 682.
[78] Idem.
[79] Ibid, at 664, 682.
[80] *New Zealand Maori Council v Attorney-General* [1994] 1NZLR 513, 517.
[81] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy,* (Wai 1071, GP Publications, Wellington, 2003). See also Waitangi Tribunal, *Nga Wha Geothermal Resource Report* (G.P Publications, Wellington, 1993). Infra n 82-82.
[82] For a very good discussion of the effectiveness of the Waitangi Tribunal, see Wickliffe, C 'The Waitangi Tribunal: A Critique: The Need for a Regional Human Rights Mechanism' in *New Zealand Law Librarian* (Vol. 2, No.4, Dec. 1996) at 125-130.
[83] There are two exceptions to this power. Where the land at issue in a claim is Crown forestland subject to a Crown forestry licence or 'memorialised lands', the Tribunal does have some powers that are binding upon the Crown pursuant to s. 27B *State Owned Enterprises Act 1987* and s. 36 *Crown Forests Assets Act 1989.* But this power has never been used. The Tribunal came close in the Turangitukua claim but the principal negotiator, the late Mahlon Nepia, mentioned to the author that the Tribunal was 'afraid' to implement this power. The Crown subsequently negotiated directly with Turangitukua to settle the claim. Personal communication at a Lake Taupo Forest Trust Hui, Tokaanu Marae, Tokaanu, 2002.
[84] Foreshore and Seabed Bill 2004.
[85] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (GP Publications, Wellington, 2003). See the Waitangi Tribunal's Foreshore and Seabed Report at www.waitangi-tribunal.govt.nz/reports/wai1071foreshore. (Accessed May 2004). See also the report by Rodolfo Stavenhagen on human rights and fundamental freedoms of Indigenous Peoples in New Zealand, which criticised the Governments foreshore and seabed policy. Stavenhagen, R, *Indigenous Issues: Mission to New Zealand: Human Rights and Indigenous Issues* (Report of the Special Rapporteur on the situation of human

The Tribunal first recommended that the New Zealand Government sit down with Māori and properly explore the options genuinely available. The Tribunal thought the Crown's principles could be achieved in a Treaty-compliant regime. The second recommendation from the Tribunal was for the Crown to do nothing, as there is no need for the Foreshore and Seabed Bill. The Crown, on the other hand, described the Waitangi Tribunal's Report as being 'dependent upon dubious or incorrect assumptions' and failed to make any significant acknowledgement of the Tribunal's findings. Still, given its specialist expertise, the Tribunal's reports have played a significant role in laying the basis for successful negotiations between the Crown and Māori claimants.

In an international law context, the Tribunal has resorted to international customary norms or provisions in Treaties to guide the judicial interpretation of domestic rules in New Zealand, particularly political developments affecting Treaty, indigenous and human rights. The Tribunal referred to international law principles of Treaty interpretation in formulating its approach to interpretation of the Treaty. In the *Motunui Report*[86] the Tribunal quoted extensively from a Memorandum by the Department of Maori Affairs on principles of international Treaty interpretation in English courts, the international rules concerning interpretation of Treaties with texts in two languages, and the principles of construction applied to Indian Treaties by the United States Courts. In the *Orakei Report*[87] the Tribunal drew upon Lord McNair's work on *The Law of Treaties* and on judicial construction of Treaties with Indigenous Peoples in the United States and Canada.[88] In the *Manukau Report*[89] the Tribunal based some of its findings on United States and English judicial practice, again based on international law.

The Tribunal, in its 1988 *Report on the Muriwhenua Fisheries Claim,* discussed the concept of a right to development in international law and specific principles concerning Indigenous Peoples' development. The Tribunal noted that 'all peoples have a right to development [which is] an emerging concept in international law following the *Declaration on the Right to Development,*' and referred to its possible application to Indigenous Peoples.[90] In the *Ngai Tahu Sea Fisheries Resource Report*[91] the Tribunal

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rights and fundamental freedoms of indigenous people, Ridolfo Stavenhagen, ECOSOC, Commission on Human Rights, UN Doc E/CN.4/2006/78/Add3, 13 March 2006). Predictably, the New Zealand Government responded by down playing the Report.

[86] Waitangi Tribunal *Motunui Report,* (G.P Publications, Wellington, 1983) at 55-8.

[87] Waitangi Tribunal *Orakei Report* (G.P Publications, Wellington, 1987) at 128-9.

[88] Idem.

[89] Waitangi Tribunal *Manukau Report* (G.P Publications, Wellington, 1985) at 88.

[90] Waitangi Tribunal *Report on the Muriwhenua Fishing Resource Claim* (G.P Publications, Wellington, 1988) at 235.

[91] Waitangi Tribunal, *Ngai Tahu Sea Fisheries Resource Report* (G.P Publications, Wellington, 1992) at 253, 259.

adopted the public international legal right to development. In the *Te Whanganui-a-Orotu Report*[92] and the *Kiwi Marketing Report*[93] counsel argued that the Crown breached New Zealand's obligations under the ICCPR in respect of the right of Māori to enjoy their culture and the right to self-determination at international law. Moreover, the Tribunal enunciated the importance of international law on Indigenous Peoples' rights in the *Taranaki Report*. Referring to Māori autonomy the Tribunal stated that:

> Maori autonomy is pivotal to the Treaty and to the partnership concept it entails. ... The international term for 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as First Peoples, and their rights to manage their own policy, resources, and affairs, within the minimum parameters necessary for the proper operation of the State.[94]

The work of the Tribunal has been accepted at the highest levels of the judiciary, including its decisions on some international law issues. A significant decision in this area was in 1997 in *The Taranaki Fish and Game Council v McRitchie*.[95] Becroft J adopted the approach of the Waitangi Tribunal, quoting at length the Tribunal's discussion of the emerging right to development in international human rights law in its *Muriwhenua Fishing Report*.[96] Based on the Tribunal's finding on the right to development, Becroft J allowed the defendant's fishing methods and extended the right to include fish species introduced since the Treaty.

In a Treaty settlement context, the Tribunal has played a pivotal role. The Tribunal's research has deconstructed the grand narrative of domination by the State. Armed with Tribunal reports that validate their claims, groups such as Ngāi Tahu, Muriwhenua, Ngāti Whātua, Ngāti Tūwharetoa, Taranaki, Pouākani and others have been able to claim the moral high ground based on sound and reliable research in negotiations with the Crown. Mahuta emphasised the impact of the Waitangi Tribunal and the judiciary upon the Waikato-Tainui settlement:

> Without the claim to the Waitangi Tribunal there would not have been a basis for the judgement of the Court of Appeal. Without the Court of Appeal there would not have been the pressure on the government to negotiate. Without the negotiations there would not have been a settlement.[97]

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[92] Waitangi Tribunal, *Te Whanganui-a-Orotu Report* (G.P Publications, Wellington, 1995) at 161.
[93] Waitangi Tribunal, *Kiwi Marketing Report* (G.P Publications, Wellington, 1995) at 3.
[94] Waitangi Tribunal *The Taranaki Report Kaupapa Tuatahi* (G.P Publications, Wellington, 1996) at 5.
[95] *The Taranaki Fish and Game Council v McRitchie,* Wanganui District Court, unreported, 27 February 1997, ORN: 5083006813-14, per Becroft J (overturned by the High Court, 1998).
[96] Ibid, at 38 for Becroft J's discussion on the Waitangi Tribunal *Report on the Muriwhenua Fishing Resource Claim* (G.P Publications, Wellington, 1988).
[97] Mahuta, supra n 10 at 12.

Once claimants' aboriginal and Treaty rights have been established by the Tribunal, any demonstration of the denial or abuse of those rights, including non-justiciable rights, have been a persuasive component of the politics of embarrassment, hence the importance of the Tribunal. In effect, the Tribunal has transformed non-justiciable rights into justiciable aboriginal and Treaty rights by applying, inter alia, international customary norms and provisions in its decision-making. In this context, it has been a potent influence on New Zealand jurisprudence for the recognition and incorporation of Māori as distinct peoples in the fabric of the New Zealand State[98] and for the recognition of their indigenous and human rights to self-determination. There remains a long path ahead in terms of fully realising these rights but at least Māori are on the path.

6.2 SUMMARY

As the above developments illustrate, judicial activism (including within domestic tribunals) may play an important role in the implementation of international norms. Even within the bounds of limited judicial competency, the courts in Canada and New Zealand have directly invoked international norms or enforced them against the political branches of Government. The mounting tension between judicial activism and executive negligence of Indigenous Peoples' rights has, inter alia, been utilised successfully by Indigenous Peoples, to the extent that indigenous rights have been resurrected, many of their grievances have been settled, it has opened up opportunities to negotiate options for self-government and other grievances are in the process of being addressed at both the domestic and international levels.

In addition, and independently of the extent to which they may be free from domestic legal constraints or judicial scrutiny, the political branches themselves must be attentive to applicable international norms that may serve as channels for the implementation of those norms. Ultimately, the nation-state as a whole is bound to standards embodied in or derivative of Treaties to which the nation-state is a party, as well as to those standards now part of customary international law. In the climate of the mid-1980s until the late 1990s, it would have been very difficult for the courts not to adopt a more flexible and sympathetic approach to indigenous claimants.

6.2.1 INTERNATIONAL LAW & INDIGENOUS SETTLEMENTS IN CANADA & NEW ZEALAND – CREE, WAIKATO-TAINUI AND NISGA'A

[98] Havemann, supra n 73 at 165-93.

6.2.1.1 INTERNATIONAL APPEALS

A lack of protection and respect for Indigenous Peoples' rights at a national level has driven Indigenous Peoples to develop new strategies for pursuing redress against nation-states. Consequently, in the last 30 years Indigenous Peoples have appealed to the international arena on an unprecedented level. Indigenous Peoples, including members of the James Bay Cree, Tainui, Ngāi Tahu and Nisga'a groups, have been actively involved at the UN to have their rights recognised, and to secure political and legal support for the settlement of their historic and contemporary grievances, including to self-government.

In Canada, First Nations invoked the international arena for the recognition of their human rights and to pursue their claims, one notable example being *Lovelace v Canada.*[99] Under the *Indian Act* Lovelace lost her Indian status and the right to reside on her band reserve because she married a non-Indian. Lovelace complained to the United Nations Human Rights Committee, under the Optional Protocol to the ICCPR, that Canada had violated Article 27 of the ICCPR in denying her the right to reside on an Indian reserve. Her claim was upheld, which subsequently resulted in an amendment to the *Indian Act* in 1985 to comply with the Committee's decision.

6.2.1.2 JAMES BAY CREE

Mathew Coon-Come, Grand Chief of the Grand Council of the Crees, referred to international norms with the signing of the JBNQA (albeit cynically) when he stated: 'when the Crees negotiated the JBNQA, in their minds they thought they were receiving something like self-determination in the international covenant on civil and political rights, to which Canada is a signatory.'[100] With the Canadian government's failure to recognise First Nations claims or even to implement many provisions of the JBNQA, the Cree appealed to the UN for the recognition and realisation of their rights and the settlement of numerous post-Treaty settlement grievances.

The Cree strategy included lobbying and active participation at the UN by integrating their claims in terms of indigenous and human rights. The politics of embarrassment was then used successfully by demonstrating the denial and abuse of their human rights. The Cree achieved this by inviting Daes, chairperson of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, to the 1987 First Ministers Conference in Ottawa. MacGregor commented on this event:

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[99] *Lovelace v Canada,* Communication No. R.6/24/1977, Human Rights Committee. U.N. Doc. A/36/40, Supp. No. 40.

[100] Coon-Come, M in Cassidy, F *Aboriginal Determination* (B.C: Oolichan Books, 1991) at 116.

> [Daes'] presence did not go unnoticed. Daes ... went quickly to work for the Cree cause. She went on to become an invaluable Cree ally at the United Nations when former Grand Chief Ted Moses and Cree adviser Bob Epstein launched a long-term lobby in Geneva, Switzerland, for a full - and potentially embarrassing, for Canada - study of aboriginal treaties to be undertaken by the United Nations Human Rights Commission.[101]

The Grand Council of the Crees has participated at the UN since 1981. The Crees gained full Non-Governmental Organisation (NGO) observer status at the UN in 1986, which enabled them to formally participate at the UN. In 1987, ECOSOC granted the Grand Council of the Crees consultative status. Members of the Grand Council attended seminars with the World Council of Indigenous Peoples and the International Indian Treaty Council in 1989. Ted Moses of the Grand Council attended annual Working Group and other human rights meetings at the UN. Moses later became rapporteur for the UN background papers on human rights, which he subsequently presented to the UNCHR in 1989.[102] Referring to Indigenous Peoples' injustices within capitalist nation-states, Moses declared:

> The remedy is to be found in the international community, outside of national or municipal legislation and jurisdiction. Indigenous peoples must demand that their rights be respected under international law, as subjects of international law.[103]

Moreover, the Grand Council was involved extensively in the preparation of the *Draft Declaration on the Rights of Indigenous Peoples*. The Crees even lobbied the Papacy to assist the implementation of their rights by, again, demonstrating the denial of their human rights.[104]

Mfodwo commented on the influence of international law on Indigenous Peoples' settlements in New Zealand when he stated:

> Changes in international relations and international law now require that states founded on colonisation/settlement processes which destroyed the institutions and life-chances of the

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[101] MacGregor, supra n 3 at 238.

[102] See Sanders, D 'Another Step: The U.N. Seminar on Relations Between Indigenous Peoples and States' in C.N.L.R. [Vol. 4, 1989] at 41.

[103] Moses, T 'The Struggle for International Recognition' in Leger, M *Aboriginal Peoples Toward Self-Government* (Black Rose Books, Montreal, 1994) at 27.

[104] MacGregor, supra n 3 at 238: In 1987, Grand Chief Ted Moses sent a letter to the Pope informing him of their situation with the Federal Government refusing to recognise their rights to development. He wrote: 'I understand that through your good offices, it may be possible for His Holiness to make reference to the [First Nations'] situation.' Later in 1987, Pope John Paul granted a thirty-minute audience to Canadian Indigenous leaders in which he gave his unqualified blessing for the aboriginal right to self-government. Six months later at the conclusion of his tour of Canada, Pope John Paul declared that Natives had a right to a just and equitable measure of self-governing, along with a land base and adequate resources necessary for developing a viable economy. He thus supported the Cree's indigenous right to self-determination. Unfortunately, the effectiveness of these strategies was minimal.

> previously residing Indigenous Peoples should make adequate recompense for these processes of colonisation.[105]

The successful negotiation and implementation of the JBNQA is some recompense and reconciliation for the second wave of colonisation of the Crees and other Indigenous Peoples in northern Quebec, and for the recognition of their right to a degree of self-determination. The Crees thus successfully lobbied at both the domestic and international levels for the recognition and implementation of their indigenous and human rights to self-determination.

6.2.1.3 WAIKATO-TAINUI

The international arena and the politics of embarrassment have also influenced the New Zealand Government to legislate human rights legislation relating to discrimination on the basis of race, and to negotiate and settle outstanding Māori claims. The politics of embarrassment was utilised proficiently by Waikato-Tainui members to assist with the recognition and realisation of Waikato-Tainui's international rights to self-determination. In 1988 Ngāti Te Ata, a hapū (tribe) of Waikato, took their Maioro (northern part of the raupatu) grievance[106] to the UN Ngāti Te Ata representatives spoke with Daes, chairperson of the WGIP, and they invited her to visit Maioro. In her subsequent Report Daes opined:

> ... my most important recommendation [is] that the Maori people be given formal and substantive government over their local and internal affairs. The minimum goal should be sufficient protection of the groups' collective right to existence and for the preservation of their identities. To this end a secure financial basis must be created, preferably through the establishment of rights to land and resources ... and when and if these are insufficient, the granting of lump sums for the free use of the self-governing entity.[107]

Daes additionally opined:

> The New Zealand government has the duty and the capability to effectively remedy existing short-comings. New Zealand, having voted in favour of the Universal Declaration on Human Rights 40 years ago and having subsequently ratified the International Covenant on Economic, Social and Cultural Rights (in 1987), the International Covenant on Civil and

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[105] Mfodwo, K 'The Political Economy of Treaty of Waitangi Settlements: Aspects of a Policy Issues and Research Agenda' (Unpublished Seminar, Seminar Series, Law School, University of Waikato, 10 May 1996) at 16.

[106] For details on the Ngāti Te Ata claim which formed part of the overall Raupatu claim, see Toataua, H & Stuart, M *Tainui and the Treaty of Waitangi: Tainui Me Te Tiriti* (Kirikiriroa 1990 Community Committee, Hamilton, 1991) at 26-30, and Oliver, W *Claims to the Waitangi Tribunal* (Waitangi Tribunal Division, Department of Justice, Wellington, 1991) at 85, 97.

[107] Huges, H *Environmental Management and the Principles of the Treaty of Waitangi* (A Report on the Crown Response to the Recommendations of the Waitangi Tribunal, 1983-1988, Wellington, 1988) 71, see also Ibid, (Toataua) at 27; Erica-Irene Daes, Chairman-Rapporteur of the United Nations Working Group Populations, Visit to New Zealand 2-7 January 1988.

> Political Rights (in 1978), and the International Convention on the Elimination of All Forms of Racial Discrimination (in 1972), to mention only a few crucial instruments, has obviously entered into obligations which require the correction of many of the problems to which Maoris have referred.[108]

Daes thus enunciated that 'Maori be given formal and substantive self-government over their local and internal affairs'[109] and she referred to the correct interpretation of the *Treaty of Waitangi* being the Māori text, which is consistent with international law and human rights protections of the less privileged.[110] Daes additionally recommended that Māoridom and the Government get together at the negotiating tables or apply the judicial process for finding comprehensive and just solutions to the many outstanding claims,[111] including the raupatu claim. The government of New Zealand subsequently defaulted on its commitment to Tainui by selling New Zealand Steel (part of the raupatu grievance). Ngāti Te Ata responded by sending representatives to Geneva where they unsuccessfully presented their grievances to the UNCHR.[112] Hence, members of Tainui, including representatives from Ngāti Te Ata, Ngāti Raukawa, and Pare Hauraki, have, like the Cree, been proactive visitors to the UN, particularly at the WGIP's sessions, for well over a decade.[113]

6.2.1.4 NISGA'A

The politics of embarrassment through confrontation and the denial of indigenous and human rights have also been utilised nationally and internationally by the Nisga'a. In the 1880s the Federal government established a Royal Commission of Inquiry to investigate rumours of a Nisga'a rebellion. The *McKenna-McBride Royal Commission* on the Nisga'a was also heard in 1915. Predictably, nothing came of these Royal Commissions. In 1913, a delegation of Nisga'a chiefs visited London seeking legal counsel and prepared a petition before the Judicial Committee of the Privy Council, declaring that their aboriginal title to Nisga'a lands remained unextinguished in accordance with the British principles embodied in the *Royal Proclamation 1763*. Unfortunately, leave was sought from the Canadian Government to ask for redress, and the Nisga'a petition was declined.

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[108] Daes, E. *Confidential Report, by Prof. Erica-Irene Daes,* (Chairman-Rapporteur of the United Nations Working Group on Indigenous Populations, on visit to New Zealand, 2-7 January, 1988) at 10.
[109] Ibid, at 12.
[110] Ibid, at 13.
[111] Ibid, at 14.
[112] Toataua, supra n 106 at 30.
[113] These Tainui groups with other Indigenous Peoples, including the James Bay Cree, were involved in the Working Group on Indigenous Populations as far back as 1988. See Daes, E *Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Sixth Session* United Nations Doc. E/CN.4/Sub.2/1988/24 at 5.

In *Calder v Attorney-General for British Columbia*[114] the Nisga'a won their famous landmark victory in the Supreme Court of Canada and a new era of direct Treaty negotiations, and the recognition of collective aboriginal rights, emerged. Immediately following the *Calder* decision, Nisga'a leaders discussed the possibility of lobbying at the UN or taking their claim to the World Court at The Hague to provoke some strong reaction about the denial of their aboriginal rights in the Nass Valley.[115]

In 1996 the Federal and Provincial Governments suspended the tripartite negotiations over funding contributions. Through intense lobbying efforts by the Nisga'a negotiations reconvened, eventually reaching the historic Agreement-in-Principle (AIP) in March 1996. After further prolonged and intense negotiations, accompanied by lobbying in BC and Ottawa, the *Nisga'a Settlement Agreement* was initialled in 1998. Following the signing, the President of the Nisga'a Tribal Council, Chief Joseph Gosnell, toured Europe seeking support from the international community for the Nisga'a Treaty Settlement. Gosnell visited Bonn, Vienna, The Hague, London and Cambridge University. In his speech in London, as the keynote speaker at an international symposium on aboriginal issues, he alluded to the politics of embarrassment and the politics of rights that assisted the settlement of the Nisga'a land question:

> Treaty negotiations have been monitored by a variety of human rights watchdogs worldwide. It is noteworthy that it comes so closely on the eve of the 50th anniversary of the Universal Declaration of Human Rights. I am also pleased to say that it rightly bolsters Canada's international reputation as a nation that respects human rights. It was a proud day for Canada. It is worthy of international attention, because although Canada is a nation known for its peacekeeping activities, and for its role as a champion of human rights, it has rarely been able to come to the world with clean hands regarding aboriginal rights. I believe that has now changed. I believe the Nisga'a Treaty is a triumph for Canada ... It is no coincidence that it was only after the signing of the Universal Declaration of Human Rights that the Nisga'a people could see - way out there on the horizon - that a new day was about to dawn.[116]

It is difficult to measure the cumulative effect of international lobbying by the Cree, Waikato-Tainui, Nisga'a and other Indigenous Peoples. The nation-states of Canada and New Zealand take pride in their international image as post-colonial nation-states, dedicated to upholding the human rights of all its peoples, including Indigenous Peoples. Hence, any action that has a potential for creating international embarrassment and

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[114] (1973) 34 DLR (4th) 145

[115] 'Court rejects Indian land claim Nishgas [sic] denied 'aboriginal title' in *The Sun* (Ottawa, 31 January 1973); and 'Calder to meet Trudeau' in *The Province* (Victoria, 2 February 1973). Personal communication Ian McKenzie, (Anglican Priest and Advisor to the Nisga'a Tribal Council) 'Lecture on the Nisga'a of the Nass Valley' (University of Waikato, 17 October 1996).

[116] Gosnell, J 'Triumph - Nisga'a Treaty Sends Signal of Hope & Reconciliation Around the World' (Speech of Chief Joseph Gosnell, European & UK Tour, November, 1998).

disapprobation of these nation-states for their treatment of Indigenous Peoples is likely to influence government policy on indigenous challenges. The focus on indigenous and human rights to self-government through self-determination has, in turn, strengthened the position of Indigenous Peoples in relation to the nation-state and has compelled national governments to address and settle indigenous grievances, albeit on less than favourable terms to Indigenous Peoples.

6.3 SUMMARY

Inevitably, an appeal to the international arena and the use of international norms, Treaties and customary international law is not without its challenges. Most international laws and conventions available to Indigenous Peoples are general in character, do not make specific reference to their conditions and rights and are open to differing interpretations. International law is perhaps more useful for its political and moral value than for its legal support. The legalisation and internationalisation of Indigenous Peoples' human rights have not guaranteed a swift or decisive action remedying indigenous grievances and for post-Treaty settlement development and self-governance. In addition, the long, costly and difficult processes involved with bringing a case based on international law has deterred most organisations from proceeding down this path. Nonetheless, the use of the politics of embarrassment, through confrontation and the politics of indigenous and human rights, has been developed fairly effectively by indigenous groups such as the James Bay Cree and Nisga'a in Canada, and the Waikato-Tainui and Ngāi Tahu people in New Zealand. The international arena has played a role, albeit limited, in the settlement of First Nations and Māori grievances and in the recognition and realisation of their human and indigenous rights to self-government through the international self-determination discourse.

7 SELF-DETERMINATION AND DEVELOPMENT NEXUS - RIGHT TO CHOOSE

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We want to be subjects of our destiny. Others always speak for us, turning us into folkloric objects, but we demand the right to speak.[1]
– Ivan Ignacio

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.
-Article 20, Draft Declaration on the Rights of Indigenous Peoples

7.1 INTRODUCTION

Faced with the threat of ethnocide (some assert past genocide), drastic reduction of life chances and social, political and economic exclusion, Indigenous Peoples seek to exercise their right of self-determination to choose to overcome their limited circumstances. Indigenous Peoples are burdened by what Held terms nautonomy - a lack of autonomy and structured disempowerment resulting from and in the asymmetrical production, distribution and enjoyment of life chances.[2] At the heart of this condition is the absence of empowering possibilities for active participation in the political processes necessary for optimising life chances. The degradation of life chances for Indigenous Peoples is directly linked to their systematic exclusion from political participation in dominant polities and their lack of access to control over land, capital and all other means whereby their cultural and material survival may be secured.[3] Even in relatively benign power hierarchies, such as Canada and New Zealand, Indigenous Peoples' experience a grossly nautonomous predicament. In Latin America, Asia and Africa, genocidal conditions predominate.[4]

As outlined above, there has been a considerable amount of activity and debate on the principle, concept and right of 'self-determination' and its application to Indigenous Peoples' development in a contemporary context. Human rights do not exist in a vacuum but operate within particular social and economic contexts, which means that the range and level of enjoyment of human rights by peoples in different countries will be conditioned not only by a nation-state's willingness to adhere to, and implement, international human rights obligations, such as the right of Indigenous Peoples to self-determination, but also

[1] Cited in Gandi, Ajay, 'Indigenous Resistance to New Colonialism' from the Cultural Survival Internet website: www.cs.org/pubications/CSQ/253.gandhi.htm. (Accessed 20 July 2004).
[2] Held, D *Democracy and the Global Order* (Polity Press, Cambridge, 1995).
[3] See Havemann, P 'Enmeshed in the Web? Indigenous Peoples' Rights in the Network Society' in Cohen, R & Rai, S.M *Global Social Movements* (The Althone Press, London, 2000) at 18 – 32.
[4] See Moody, R (ed) *The Indigenous Voice: Visions and Reality* (Vols 1 & 2, Zed Books, London, 1998).

by its technical and financial capacity to do so. Human rights and economic progress thus advance on a united front. This was recognised by those who drafted the *United Nations Charter.* In its Preamble, the member nation-states not only reaffirmed their faith in fundamental human rights but also pronounced themselves determined to 'promote social progress and better standards of life in larger freedom.' This premise was given further concrete expression in the UN *Declaration of Human Rights* whereby the protection of first and second-generation rights[5] was given equal prominence.

The nexus between human rights and development is best expressed in the *Declaration on the Right to Development 1986*, which states in Article 1:

> The right to development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Despite clear indications of the interrelationship between human rights and social progress, there is an ongoing debate among nation-states on how this might be best achieved. There are different perceptions about the relative weight given to economic, social and cultural rights on the one hand, and the right to development or civil rights on the other. Some developing nation-states argue that civil and political rights are a privilege for nation-states whose citizens struggle to gain access to the most basic human requirements such as food, health, safe water, housing and education.

These hurdles aside, the world community has in recent years made advances in this area. The UN has repeatedly recognised the interrelatedness and interdependence of both first and second generation rights, and in the *Final Declaration of the World Conference on Human Rights 1993*, the Conference acknowledged that universal respect for, and observance of, human rights and fundamental freedoms for all, contribute to the stability and well-being necessary for peaceful and friendly relations among nation-states. It concluded that to improve conditions 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing' and it was declared that the right to development 'was a universal and inalienable right and an integral part of fundamental human rights.'[6]

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[5] First generation human rights include civil and political rights while second-generation human rights include social and cultural rights. See Hunt, P 'Reclaiming Economic, Social and Cultural Rights' in *Waikato Law Review* (Vol. 1, 1993) at 141.

[6] New Zealand, *New Zealand Handbook of International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 1998) at 98.

While the full implications of a universal and inalienable right to development have yet to be worked out, there is a clear connection between good governance, human rights, participatory development and development for all.[7] However, the extent to which economic, social and political activity can be said to represent real progress towards authentic power sharing, development as freedom and indigenous internal self-determination is debatable. Understandably, Indigenous Peoples are striving to advance their social and economic position in their land to overcome their often dismal socio-economic conditions but it seems that insufficient thought is being given to what exactly internal self-determination and development for Māori and First Nations should achieve. It appears that some Māori and First Nations are selling themselves short by being content to measure success with reference to the models, achievements and standards of the colonisers.[8]

The Indigenous Peoples of Canada and New Zealand (let alone the rest of the world) do not have a homogenous position on exactly what they are seeking in relation to exercising their right to internal self-determination and development. One universal point is clear however - Indigenous Peoples want the freedom and power to choose for themselves rather than having choices imposed on them.

7.1.1 RIGHT TO CHOOSE

As mentioned earlier, Cassesse argued that the principle of self-determination includes:

> The method by which States must reach decisions concerning peoples ... [is] heeding their freely expressed will. In contrast, the principle neither points to the various specific areas in which self-determination should apply, nor to the final goal of self-determination (internal self-government, independent statehood, association with or integration into another State).[9]

Sanders acknowledged that most indigenous groups seek to wield greater control over matters such as natural resources, environmental preservation of their homelands, education, use of language, and bureaucratic administration or self-governance, in order to ensure their group's cultural preservation and integrity.[10] Durie aligned self-determination

[7] Idem. See also the United Nations Development Programme (UNDP) *Integrating Human Rights with Sustainable Human Development* (UNDP, Geneva, 1995).
[8] Mikaere, A. *Maori Self-Determination in Aotearoa/New Zealand* (Paper presented at the Saami Parliament Conference on Saami Self-Determination, Camp Gielas, Arvidsjaur, Sweden, 28 May 1999) at 5.
[9] Cassesse, A *Self-determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) at 320.
[10] Sanders, D 'The U.N. Working Group on Indigenous Populations' in *Human Rights Quarterly* (Vol. 11, 1989) 406 at 429. See also Torres, R 'The Rights of Indigenous Peoples' in *Yale Journal International Law*

with Māori ownership and active control over the future. Māori self-determination aligns with at least two facets – the way in which control and authority is distributed within Māori society and the way in which Māori and the Crown share power.[11]

The *Declaration on Friendly Relations 1970*[12] recognised that the right to self-determination, in both its internal and external aspects,[13] was a universal right. Principle VIII of the *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act),* provides:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Cobo defined Indigenous Peoples' self-determination in his 1986 Report:

> In essence, it constitutes the exercise of free choice by indigenous peoples who must, to a large extent, create the specific content of this principle, in both its internal and external expressions.[14]

Williams, moreover, emphasised the right of Indigenous Peoples to self-determination which, he noted, 'means choosing how to be governed'[15] while Juviler affirmed:

> The collective right to self-determination as spelled out in the International Human Rights Covenants ... means the right to the free choice of political status and economic, social, and cultural development.[16]

Cassesse concluded that self-determination includes the basic idea that a 'group must be able to exercise its own choice with regard to its political future.'[17] Sullivan concluded that

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(Vol. 16, 1991) at 142; and Stavenhagen, R 'Challenging the Nation-State in Latin America' in *Journal of International Law* (Vol. 45, 1992) at 436.

[11] Durie, M *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 46.

[12] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,* UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in *I.L.M.* (Vol. 9, 1970) 1292.

[13] Idem.

[14] U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations,* U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4 (J. Cobo, Special Rapporteur), at paras. 579 & 580.

[15] Williams, S *International Legal Effects of Secession by Quebec* (York University Centre for Public Law and Public Policy, North York, Ontario, 1992) at 7.

[16] Juviler, P *Contested Ground: Rights to Self-Determination and the Experience of the Former Soviet Union* (Vol. 3, 1993) 71 at 72.

[17] Cassesse, D 'Rethinking Self-Determination: A Critical Analysis of Current International Law Theories,' in *Syracuse Int'l L. & Com.* (Vol. 18, 1992) 21, at 24.

self-determination primarily involves the right to be independent.[18] Sen asserted that development as freedom includes the freedom to choose[19] and Higgins declared that self-determination is the right to choose the form of their political and economic future.[20] Daes added:

> The right to self-determination is best viewed as entitling a people to choose its political allegiance, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical, or territorial identity.[21]

Daes, moreover, highlighted the right of Indigenous Peoples to negotiate freely their political status:

> I believe that the right of self-determination should ordinarily be interpreted as the right of these [indigenous] peoples to negotiate freely their political status and representation in the States in which they live.[22]

Similarly, Walt van Praag declared:

> The right to self-determination is thus more of a procedural than a substantive right: it guarantees a people the opportunity to make a choice and implement it. It does not prescribe what that choice should be.[23]

Even the European Parliament[24] adopted a resolution concerning Indigenous Peoples that highlighted their 'right to choose' in determining the 'right to determine their own destiny by choosing their institutions and political status.'[25]

The nexus of self-determination and development therefore ought to convey a right to greater freedom and control, or authentic power sharing, within the political, legal, social, economic and cultural decision-making structures and institutions that affect the modern development of Indigenous Peoples from Parliament right down to the local body

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[18] Sullivan, A 'Self-determination and Redistributive Justice: the New Zealand Maori' in *He Pukenga Kōrero* (Ngahuru (Autumn) Vol. 3, No. 2, 1998) at 57.
[19] Sen, A *Development As Freedom* (Knopf, New York, 1999).
[20] Higgins, R *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994) at 118.
[21] Daes, E-I. 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' in *Transnat'l L. & Contemp. Probs.* (Vol. 3, 1993) 1 at 4-5.
[22] Ibid, at 9.
[23] Walt van Praag, M. 'The Position of UNPO in the International Legal Order' in Brōlmann, C; Lefeber, R and Zieck, M. (eds.), *Peoples and Minorities in International Law* (Kluwer Academic Publishers, Boston, 1993) at 319.
[24] The European Parliament is described in Shaw, M. *International Law,* (3rd ed.) (Grotius Publications, Cambridge, 1994) at 765. The European Parliament is one of the institutions of the European Community, the other institutions being the Council of Ministers, the Commission and the Court of Justice.
[25] *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples,* Eur. Parl. Doc. (PV 58) 2, (1994) at 3, para. 2.

and tribal levels.[26] Solomon even asserted that self-determination involves changing mainstream government structures to accommodate Māori aspirations and conveys a right for Māori to exercise greater control and self-governance over their own affairs in a manner that recognises and incorporates Māori customary values, laws and institutions adapted to suit the circumstances of today.[27]

It seems, therefore, that many Indigenous Peoples globally are seeking clear and unequivocal confirmation of their right to self-determination, which includes a right to choose their governance structures, principles and processes through the laws and institutions of their community at least in the areas of political, economic, social and cultural development. Indigenous self-government through contemporary Treaty settlements is a means to this end. The power to choose, however, is the key. One is inclined to ask: what self-determination options are available for Indigenous Peoples to choose to govern themselves so as to actualise their self-determination rights to economic, social, political and cultural development?

7.1.2 OPTIONS - DEGREES OF SELF-DETERMINATION

The debate about self-determination and self-government is a matter of perspective and degree. With greater political and public will, empathy and time, a clearer understanding and agreement may result. Through the *Draft Declaration on the Rights of Indigenous Peoples*, indigenous communities are seeking room for their unique value systems to operate within the legal and political systems of the nation-states in which they live. Indigenous Peoples are seeking authority, power and resources to govern themselves effectively. Denise Henare declared that notwithstanding the ambiguity of process in New Zealand, it is clear among Māori that there is a shared goal of self-determination and autonomy – the advancement of Māori as Māori and the protection of the environment for future generations.[28] Moreover, Henare concluded that self-determination is a 'right of the peoples, not of the territory and it must afford equal opportunity for the unimpeded enjoyment of peoples' political freedoms, socio-economic rights and development of cultural heritage.'[29]

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[26] Solomon, M 'The Context for Maori' in Quentin-Baxter, A (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Victoria University, Wellington, 1998) at 63.
[27] Idem.
[28] Henare, D 'A Case Study: Health Care' in ibid at 110. For references to the advancement of Mäori as Mäori, see Durie, M *Nga Kahui Pou: Launching Mäori Futures* (Huia. Wellington, 2003); and Durie, M, *Nga Tai Matatau: Tides of Mäori Endurance* (Oxford University Press, Melbourne, 2005).
[29] Idem.

Daes held that the Draft Declaration acknowledges that indigenous 'peoples' continue to possess a distinct collective legal character and that they tend to:

> ... prefer partnerships over secure statehood to complete integration. To protect the integrity of these basic arrangements, indigenous peoples must continue to enjoy a legal status of their own and access to international forums.[30]

The Draft Declaration makes clear that the establishment of a sovereign and independent nation-state, the free association or integration with an independent nation-state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination but secession is an option of extreme last resort. It is the author's view that there are many other appropriated. Indeed, Durie discussed the 'shades of difference between Maori sovereignty, Maori autonomy, self-determination, self-governance, Maori nationhood, self-management and greater Maori representation.'[31] Daes offered a further relevant option for indigenous self-determination that she termed 'internal' self-determination. Daes opined:

> Self-determination may range from independence [secession] to a recognition of their separate and equal status as sovereign peoples falling short of political independence, through to levels of self-government and local control over a range of different social, political, economic and cultural matters.[32]

Daes even attempted to apply this 'internal' self-determination option to Māori when she recommended:

> ... Maori people be given formal and substantive government over their local and internal affairs. The minimum goal should be sufficient protection of the groups' collective right to existence and for the preservation of their identities.[33]

Shelley Wright discussed the notion of 'internal' self-determination as including:

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[30] Daes, E-I, 'Equality of Indigenous Peoples under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples' in *St Thomas Law Review* (Vol. 7, 1995) 493 at 496-97.

[31] Durie, M 'Representation, Governance and the Goals of Maori Self-determination' in *He Pukenga Korero* (Massey University, Palmerston North, 1 May 1997) at 6.

[32] Daes, supra n 30 at 496-97.

[33] Daes, E-I, *Confidential Report, by Prof. Erica-Irene Daes,* (Chairman-Rapporteur of the United Nations Working Group on Indigenous Populations, on visit to New Zealand, 2-7 January, 1988) at 10. See also Huges, H *Environmental Management and the Principles of the Treaty of Waitangi* (A Report on the Crown Response to the Recommendations of the Waitangi Tribunal, 1983 - 1988, Wellington, 1988) 71; Toataua, H & Stuart, M *Tainui and the Treaty of Waitangi: Tainui Me te Tiriti* (Hinerauhuia, Kirikiriroa, Hamilton, 1991) at 27; Erica-Irene Daes, Chairman-Rapporteur of the United Nations Working Group Populations, Visit to New Zealand, 2-7 January 1988.

> A recognition of sovereignty which does not lead to independence as a nation-state – just as the province of British Columbia or the state of New South Wales enjoy legal and political sovereignty within their constitutional limits but are contained within the boundaries of the nation-state of Canada and Australia.[34]

Kirgis provided a useful matrix with a number of macro-political self-determination options besides the right to secession:

[34] Wright, S, 'Approaches to International Human Rights, Self-determination and Indigenous Cultural Sovereignty' (Conference Proceedings, Protecting Knowledge: Traditional Resource Rights in the New Millennium, UBCIC, Victoria, BC, February 2000) at 11.

Table 7. 1 Kirgis' Macro-Political Self-Determination Options [35]

Self-Determination Option	Example
1. The established right to be free from colonial domination	Africa, Asia and the Caribbean
2. The converse of that – a right to remain dependent, if it represents the will of the dependent people who occupy a defined territory	Island of Mayotte in the Comoros, or Puerto Rico.
3. The right to dissolve a state, at least if done peacefully, and to form new states on the territory of the former one	Former Soviet Union and Czechoslovakia. The break up of the former Yugoslavia, except for Serbia and Montenegro, might even be considered an example of this, after the initial skirmish in Slovenia ended and the Yugoslav Federal forces ceased operating as such in Croatia and Bosnia-Herzegovina
4. The disputed right to secede	Bangladesh and Eritrea
5. The right of divided states to unite	Germany
6. The right to limited autonomy, short of secession, for groups defined territorially or by common ethnic, religious and linguistic bonds	Autonomous areas within confederations, for example, Belgium. Perhaps also the Québécois in Quebec, Canada
7. Rights of minority groups within a larger political entity, as recognised in Article 27 of the ICCPR and in the General Assembly's Declaration on the Rights of Persons Belonging to National and Ethnic, Religious and Linguistic Minorities.	Miskito Indians in Nicaragua, Yanomami of Brazil
8. The internal self-determination freedom to choose one's forms of government, or even more sharply, the right to a democratic form of government	Haiti

[35] Kirgis, F 'Degrees of Self-Determination in the United Nations Era' in *Am. J. Int L* (Vol. 88, 1994) 304 at 306-7.

Hence, some of the macro-political options available for Indigenous Peoples in exercising their inherent right of self-determination. However, Indigenous Peoples ought to have the freedom to choose not have options imposed upon them, by virtue of the right of self-determination. Option 8 internal self-determination - the freedom to choose one's forms of government with authentic power sharing through indigenous self-government - is the author's macro-political preference, although without the Haiti example given the recent civil and political strife there.

Self-Determination, Autonomy Regimes and Accommodative Jurisprudence

Steiner and Alston discussed three specific options, in terms of self-determination forms and types of autonomy regimes, which are governmental systems or subsystems within a nation-state directed or administered by a minority or its members. Each of these regimes is an option for exercising the right of self-determination through self-government. Each governance regime depends on legal authorisation, be it customary, statutory or constitutional law. The nation-state in each case usually prescribes the powers and scope of the governance regime. Thus, autonomy regimes are instituted in law, and those governing or administering them exercise a form of self-governance power.[36]

1) *Personal Law Regime* – This provides that members of a defined ethnic group will be governed with respect to matters of personal civil law – marriage, divorce, adoption, inheritance and so on – by a law that is distinctive to it, usually religious in character. Thus, all members of a religious community may be subject to a personal law applied by religious courts. Depending on the nation-state, members of such groups may or may not be able to 'opt out' by selecting a nation-wide secular law.[37]

2) *Territorial Organisation Regime* – This organisation may take the form of a component part of Federalism, or of a regional government to which powers have been devolved within a unitary state. The ethnic minority exercises one or another degree of political control over the territory and to that degree governs its own affairs. Self-government, including regional elective government, can extend to matters ranging from regulation of natural resources or the tax system to control of

[36] Steiner, H & Alston, P *International Human Rights in Context: Law, Politics, Morals* (Clarendon Press, Oxford, 1996) at 991. For an analysis of how this type of regime operates in Africa, see Rumbles, W *Africa: Co-Existence of Customary and Received Law: Review of the South African Law Commission's Project 90: The Harmonisation of the Common Law and the Indigenous Law: Report on Conflict of Laws* (Te Mātāhauariki Institute, Waikato Print, Hamilton, 2000),
[37] Idem.

regional schools. A territorial regime, however, is plausible only when the ethnic minority at issue is regionally concentrated – as is the case with the Kurdish minority in several nation-states. Contemporary examples include Catalonia in Spain or the states of India.[38] An indigenous example is the Nunavut public government in Canada's north.

3) *Power Sharing Regimes* – These autonomy regimes assure that one or several ethnic groups will benefit from a particular form of participation in governance, economic activity and other fields. It may affect the composition of the national legislature, for example, through provision that members of an ethnic minority are entitled to elect a stated percentage of legislators through the use of separate voting rolls specific to the minority. It may require approval by a majority of the legislative representatives of a minority group before certain changes can be made, for example, constitutional protection provisions. A certain percentage of the civil service, or the army officer corps, or of cabinet positions may be reserved for members of the minority. Belgium and Lebanon are examples of this type of autonomy regime.[39] An indigenous example could be the Sami Parliament in the Scandinavian countries and, to a lesser extent, Māori in New Zealand, although more sharing of power and authority is needed as discussed extensively below.

[38] Idem.
[39] Idem.

7.1.2.1 LEGAL FORMS OF AUTONOMY REGIMES

Table 7. 2 Legal Forms of Autonomy Regimes

	Personal Law Regime	Territorial Organisation Regime	Power Sharing Regimes
Characteristics	• Ethnic group governed by personal law • Mainly religious groups co-existing in same geo-political area • National secular law	• Component of Federalism or regional government • Devolved powers • Regional elective government with extensive powers • Ethnic minority must be regionally concentrated	• Assures ethnic group participation in politics • Potential for constitutional protection • Genuine sharing of both power and authority between groups
Examples	• Jews, Muslims in Israel • Hindus and Muslims in India	• Tamil minority in Sri Lanka • Catalonia, Spain • Nunavut Canada	• Belgium, Lebanon, • Sami Parliament Scandinavian nation-states • Nisga'a

Autonomy regimes differ in a number of ways. The regime may involve relatively slight group differentiation and barely affect outsiders (a personal, religious law of marriage and divorce), or it may separate groups with respect to political matters of vital significance for all members of the polity (separate voting rolls, quotas, and so on). Within a Federal nation-state, an autonomy scheme for a geographically concentrated ethnic minority may grant that minority modest self-government and retain vital powers for the central government, or grant it extensive powers that border on self-rule. Those administering an autonomy regime may invite popular participation or may subject a population to decision-making power of, say, religious officials.[40] There are, therefore, various jurisprudential precedents for indigenous self-determination through self-government (autonomy regimes) around the world.

[40] Ibid, at 997.

7.1.2.2 BICULTURALISM - OPTIONS FOR STRUCTURAL CHANGE AND SELF-DETERMINATION IN NEW ZEALAND

The notion of biculturalism in the public service may provide a further context for indigenous self-determination and self-government options in New Zealand. In addressing the functions of the Department of Social Welfare, the Ministerial Committee in its report (which although dated may still have some contemporary relevance), *Puao-Te-Ata-Tu,* considered that biculturalism was the 'appropriate policy direction of a multi-cultural society.' The Committee interpreted biculturalism as the 'sharing of responsibility and authority for decisions with appropriate Maori people', which is an option for self-determination in New Zealand. Granted, it may not be the most empowering option but it is still an option nonetheless. The Committee commented:

> We perceive a social and cultural relationship here – not separatism [secession]. Biculturalism involves understanding and sharing the values of another culture, as well as understanding and/or preserving another language and allowing people the choice of the language in which they communicate officially.
>
> Biculturalism also means that an institution must be accountable to clients of all races for meeting their particular needs according to their cultural background, especially ... Maori.[41]

The Committee believed that the recognition of biculturalism was the first stage of change toward more culturally inclusive governance institutions. While recognising personal and cultural racism in society, the Committee was particularly concerned with the functioning of institutions:

> The most insidious and destructive form of racism though is institutional racism. It is the outcome of monocultural institutions which simply ignore and freeze out the cultures of those who do not belong to the majority. National structures are evolved which are rooted in the values, systems and viewpoints of one culture only. Participation by minorities is conditional on their subjugating their own values and systems to those of 'the system' of the power culture.[42]

The Committee elaborated on its perception of institutional racism in government institutions, which is manifested in the nautonomous showing of Māori in social statistics:

> The persistent myth advanced to explain the cause of Maori disadvantage is that Maori have not 'adapted' or have 'failed' to grasp the opportunity that society offers. This is the notion that poverty is the fault of the poor.

[41] Rangihau J, *Puao-Te-Ata-Tu* (Department of Social Welfare, Wellington, 1986) at 19-20.
[42] Ibid, at 19.

> The fact is, though, that New Zealand institutions manifest a monocultural bias and the culture which shapes and directs that bias is Pakehatanga [mainstream non-Maori institutions]. The bias can be observed operating in law, government, the professions, health care, land ownership, welfare practices, education, town planning, the police, finance, business and spoken language. It permeates the media and our national economic life. If one is outside, one sees it as 'the system.' If one is cocooned within it, one sees it as normal conditions of existence.
>
> Institutional racism is the basic weapon that has driven the Maori into the role of outsiders and strangers in their own land. ...
>
> Institutional racism can be combated only by a conscious effort to make our institutions more culturally inclusive in their character, more accommodating of cultural difference. This does not begin and end at 'the counter.' The change must penetrate to the recruitment and qualifications which shape the authority structures themselves. We are not talking of mere redecorating of the waiting room so that clients feel more comfortable.[43]

The notion of biculturalism has varying degrees that perhaps offer a form of internal self-government. Mason Durie provided a matrix on biculturalism in New Zealand at both the goal and structural levels that, although focusing on biculturalism in the New Zealand public service, may also provide options for Māori self-government and self-determination at one end of the spectrum. Durie noted, however, the lack of clarity, diverse meanings and significant differences in understandings over the concept of biculturalism. There is similar ambiguity with self-determination. Durie discussed the need to clarify the goals of biculturalism (and self-determination in this context) and suggested these could be described along a continuum:

> Bicultural goals may, for example, relate to improving race relations by celebrating cultural differences, or establishing New Zealand as a bilingual nation, all citizens being able to speak (with differing levels of competence) both English and Maori. Or, outside the sphere of culture, language and tradition, the goal of biculturalism may be to reduce socio-economic disparities or to ensure greater representivity in the workforce. Further, in the view of many Iwi, the most critical goal of biculturalism is the exercise of self-determination, tino rangatiratanga.[44]

This continuum also offers options for self-determination. The bicultural continuum was expressed in diagrammatic form:[45]

[43] Ibid, Appendix at 26-7.
[44] Durie, M *Understanding Biculturalism* (Race Relations Conference Paper, Gisborne, New Zealand, 20 September, 1994) at 5-6.
[45] Ibid, at 7, 8.

Table 7. 3 Mason Durie's Bicultural Continuum – Bicultural Goals

BICULTURAL GOALS				
1. Cultural skills and knowledge	2. Better awareness of the other culture's position(s)	3. Greater cultural participation in all the country's institutions and activities	4. Parallel cultural delivery systems alongside mainstream	5. Cultural self-determination, eg. Māori tino rangatiratanga

Durie explained that at one end the goals were about 'the acquisition of cultural skills and knowledge,' such as some awareness of Māori words, marae protocol, tribal history and tradition. The other end reflects 'aspirations for greater Maori independence.' These are 'two poles' within which 'integration (into a single framework) is the main goal.'[46] Durie also commented that this distinction is important, and needs to be made very clear in determining the meaning of biculturalism within any institution:

> Between the poles are at least three levels of biculturalism. One has as its main objective the introduction of a Maori perspective within the culture of the institution but as an addition to the overall culture of the organisation rather than as an integral part to its core business. Taha Maori programmes in schools could be classified in that category. A second level has as its main objective a more representative Maori workforce and an opportunity for a Maori component to develop within the central mission of the institution. Bilingual units in schools or Maori units in Government departments are good examples. The third level accepts that a single organisation cannot comfortably accommodate two quite distinct cultural approaches and opts instead for parallel institutions, both committed to the same overall aims but using different approaches and separate vehicles. Kohanga Reo and Kura Kaupapa Maori illustrate the point. Though operating within educational frameworks prescribed by the State, they have a degree of autonomy which enables them to conduct their cultural activities entirely in the Maori language and according to Maori cultural preferences.[47]

Durie also identified a continuum that applied to the structural arrangements that might arise out of bicultural goals, not secession:

Table 7. 4 Mason Durie's Bicultural Continuum – Bicultural Structural Arrangements

BICULTURAL STRUCTURAL ARRANGEMENTS				
1. Unmodified mainstream institutions	2. A cultural perspective	3. Active cultural involvement	4. Parallel cultural institutions	5. Independent cultural institutions

[46] Ibid, at 7.
[47] Idem.

The two poles of this continuum are unmodified monocultural (Pākehā) institutions and independent Māori institutions. Durie noted:

> At one level, biculturalism implies an inclusion of Maori values and perspectives in the major institutions of the State; at another level it suggests the development of specific Maori institutions to provide for Maori needs.[48]

Table 7. 5 Mason Durie's Bicultural Continuum[49]

BICULTURAL GOALS				
1. Cultural skills and knowledge	2. Better awareness of the other culture's position(s)	3. Greater cultural participation in all the country's institutions and activities	4. Parallel cultural delivery systems alongside mainstream	5. Cultural self-determination, eg. Māori tino rangatiratanga
BICULTURAL STRUCTURAL ARRANGEMENTS				
1.Unmodified mainstream institutions	2. A cultural perspective	3. Active cultural involvement	4. Parallel cultural institutions	5. Independent cultural institutions

Sharp described Durie's first level as 'bicultural reformism,' that is, the adaptation of Pākehā institutions to meet Māori requirements and concerns.[50] The second type, the development of different and specifically Māori institutions to share the authority defined in the *Treaty of Waitangi*, was described as 'bicultural distributivism.[51] Sharp also reviewed various earlier attempts to define biculturalism, in the context of and/or as opposed to multiculturalism.[52] Jackson proposed a concrete example, with the establishment of a parallel legal system of criminal justice defined and administered by Māori according to tikanga Māori.[53] This notion was firmly rejected, however, by the

[48] Ibid, at 5-6.
[49] Ibid, at 7, 8.
[50] Sharp, A *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 1997) at 227 – 236.
[51] Ibid.
[52] Ibid.
[53] Jackson, M *He Whaipaanga Hou: Maori and the Criminal Justice System: A New Perspective* (2 Vols, Department of Justice, Wellington, 1987, 1988).

Minister of Justice, Geoffrey Palmer and others, as a separatist proposal, which would be in conflict with the current legal system that assures equality under the law for every citizen.

Still, the notion of self-determination and development ought to convey a right to greater freedom and control - authentic power sharing – in the political, legal, social, economic and cultural development of Indigenous Peoples within the Canadian and New Zealand body politic. Authentic power sharing needs to occur between Indigenous Peoples and the nation-state within the decision-making structures and governance institutions from Parliament right down to the local body and tribal levels. That is, the further right one goes on the bicultural continuum the more appropriate in self-determination terms for Indigenous Peoples. As Solomon concluded, self-determination involves changing mainstream government structures and institutions to accommodate Māori aspirations.[54] It conveys a right for Māori to exercise greater control and self-governance over their own affairs in a manner that recognises and incorporates Māori customary values, laws and institutions appropriately adapted to suit contemporary circumstances.

7.1.2.3 RCAP STRUCTURAL ARRANGEMENT OPTIONS FOR SELF-DETERMINATION THROUGH SELF-GOVERNMENT IN CANADA

A large number of Indigenous Peoples in Canada live on territorially-separate reservation lands and many indigenous governments have exercised indirect, *de facto* self-rule, even without having formal governmental powers. From the 1970s, however, there has been debate on the constitutional recognition of a right of indigenous self-government. In 1992, a constitutional amendment to this effect was implemented, via a national referendum, as part of the *Charlottetown Accord.* The Accord proposed that the Constitution of Canada be amended to recognise that the 'Aboriginal[55] peoples of Canada have the inherent right of self-government within Canada.' The Accord proposed that the aboriginal right of self-government:

> ... includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction:
> a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
> b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and ensure the integrity of their societies.

[54] Solomon, supra n 26 at 63.
[55] The Royal Commission on Aboriginal Peoples (RCAP) generally referred to Indian, Inuit and Metis peoples as 'Aboriginal' rather than indigenous. This terminology is maintained in this section.

While the Accord was rejected, it is generally agreed that this outcome was primarily attributable to other provisions included in the proposal. Indeed, several opponents of the Accord nonetheless explicitly urged the adoption of the aboriginal self-government recognition proposal. Since 1992, the Canadian government has followed a policy of recognising indigenous autonomy and self-government and has entered into specific arrangements for this purpose with different indigenous First Nations. These arrangements have come about through the Treaty settlement of land claims as well as through separate self-government agreements. In 1995, the Canadian Federal government announced that it recognised the inherent right of aboriginal self-government and would enter into negotiations with First Nations peoples to define the exact nature of the powers to be transferred and the jurisdictions to be exercised, and clarify fiscal responsibilities. This development occurred despite there being no constitutional provision for it.[56]

The RCAP is particularly significant because of the wide-ranging scope of its inquiry and the breadth and detail of its report and recommendations. Among matters relevant to this thesis, the RCAP addressed self-determination and self-government arrangements. Indeed, the investigation of the recognition and affirmation of aboriginal self-government was included as the RCAP's second term of reference.[57] The full text of the second term is as follows:

> 2. The recognition and affirmation of aboriginal self-government; its origin, content and a strategy for progressive implementation.
> The Commission's investigation of self-government may focus upon the political relationship between aboriginal peoples and the Canadian State. Although self-government is a complex concept, with many variations, the essential task is to break the pattern of paternalism which has characterised the relationship between aboriginal peoples and the Canadian government. The Commission should review *models of self-government* which have been developed in Canada and around the world, and should make recommendations concerning fiscal arrangements and economic development initiatives necessary for successful transitions to self-government The scope, effect and future elaboration of ss. 25 and 35 of the Constitution Act 1982 may be evaluated.[58] [emphasis added]

The RCAP provided a detailed argument for the adoption of aboriginal self-government in Canada.[59] It described three specific options for self-government – nation government,

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[56] Department of Indian Affairs and Northern Development (DIAND), *Federal Policy Guide: Aboriginal Self-Government – The Government of Canada's Approach to the Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government* (DIAND, Ottawa, 1995), announced 10 August 1995.
[57] Royal Commission on Aboriginal Peoples (RCAP), 'Terms of Reference,' 26 August 1991, Schedule 1 to Order in Council P.C, 1991 – 1597, reproduced in *Report of the Royal Commission on Aboriginal Peoples* (Vol. 1, 1996) Appendix A at 699.
[58] Idem.
[59] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples Restructuring the Relationship* (Vol. 2, 1996). [hereinafter *Restructuring*].

public government and community of interest government. These models are described as follows:

1) *Nation Model* – The nation government model provides a largely autonomous form of governance for aboriginal peoples who choose to exercise their collective self-determination around the principles of a nation with a defined citizenship base.[60] Aboriginal Peoples possessing a right to self-government would govern as if they were an independent nation.[61] All institutions would be run and be structured according to Aboriginal wishes. Thus, representation would be according to Aboriginal means of decision-making. The nation would base itself on a territory consisting of Category One lands[62] and would exercise jurisdiction over all people within that territory, including non-Aboriginal people. Jurisdiction over members of the nation may extend to citizens who are not resident on the territory. However, where jurisdiction affects Crown jurisdiction over these non-Aboriginal people and over the land outside the territory, this Aboriginal nation's jurisdiction would be in the periphery of governmental powers. The nation could, therefore, only exercise this jurisdiction concurrently and after reaching an agreement with the Crown.

Aboriginal members of these nations would receive dual citizenship of the nation and of Canada, which would be shown on their passports.[63] International interaction through trade and representation on relevant committees, such as the Arctic Council, would be encouraged. However, the exercise of the right is subject to the provisions of the Charter of Rights and Fundamental Freedoms and the remainder of the *Constitution Act 1982*. These, require, for example, equal protection for rights of female members and prohibition of a blood quantum requirement for membership.[64]

2) *Public Government Model* – This model adopts a Western democratic representative system and would thus create an entity very much like an existing territory or province. A

[60] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Final Report,* (Vol. 2, 1996) at 278. [Hereinafter *Final*].
[61] Ibid, at 245 – 265.
[62] The RCAP identified three categories of lands and resources, which Aboriginal Peoples may have an interest in. Category One Lands are those over which the Aboriginal nation has or will have exclusive control. Category Two Lands are those over which the Crown and Aboriginal nations share control in some form of co-management arrangement. Category Three Lands are those in which Aboriginal nations have no greater than rights of access or usufruct, and which otherwise remain Crown lands. See ibid, at 578 – 582; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty Year Commitment* (Vol. 5, Supply & Services Canada, Ottawa, 1996) at 177-178; Recommendations 2.4.10-2.4.14. [Hereinafter *Renewal*].
[63] RCAP *Final* supra n 60 at 237 – 240; supra n 62 at 161; Recommendations 2.3.8, 2.3.9.
[64] Ibid, *Renewal* at 160 – 161; Recommendation 2.3.11; Chapter 3. Conclusion 19.

current example of such an entity is Nunavut. The territory would typically be created in an area where the nation possesses a majority of the population so that even under a Western democratic representative system the Aboriginal nation can form a majority government. In other respects the model is similar to the nation model.

3) *Community of Interest Model* – Urban communities of interest are not the majority in a particular area and so do not possess an inherent right to self-government. Urban communities of interest would typically exist over Category Three Lands.[65] Self-government here is necessarily as a result of government negotiations. Implementation of this model could be either as a sub-grouping of an Aboriginal nation which possesses an inherent right or as a result of purely political negotiations. If part of an existing nation, the community of interest would first need to conclude an agreement with the parent nation.[66] Moreover, given that urban affairs undoubtedly affect Crown jurisdiction, this sub-nation would have to conclude an agreement with the relevant Crown entity.

Still, given that self-government is a result of the parent nation's right, there may be more than one community of interest in any urban area. This may cause inefficiencies in the Aboriginal provision of services. Moreover, members of the urban community of interest may have lost touch with their ancestry, but their continuing cultural difference still needs expression in an independent urban community of interest. A community of interest could arise as a result of negotiations between the Crown and an independent urban grouping. The RCAP indicated that communities of interest are unlikely to exercise government over much more than cultural, health, education and family law issues.[67]

Two features – the nature of membership and the relationship to a land base – distinguish the community of interest government model from other forms of Aboriginal government. First, community of interest governments would be formed by and for aboriginal people from many nations, and membership would be based on individual choice. Aboriginal community of interest governments would be accountable to these members. Second, although access to and ownership of a land base is a possibility, it is not a distinguishing characteristic of the community of interest model.[68] Community of interest governments would provide an inclusive and practical response to the needs of Aboriginal

[65] RCAP *Restructuring* supra, n 59.
[66] RCAP *Final* supra n 60 at 275 – 276; supra n 62 at 588 – 589.
[67] Ibid, *Final*.
[68] Ibid, at 248.

people who, while they may not share the same Aboriginal group origin, do have a shared sense of identity arising from their common experience in urban and other areas.[69]

7.1.2.4 RCAP SELF-GOVERNMENT MODELS IN CANADA

Table 7. 6 RCAP Self-Government Models in Canada

	Nation Model	Public Government Model	Community of Interest Model
Characteristics	• Autonomous indigenous form of self-determination • Institutional redesign according to indigenous values, laws and institutions in a contemporary context • Subject to human rights provisions of the Charter	• Western form of democratic government • Majority of indigenous group form majority of government and therefore power • Form of self-determination	• Cater for urban indigenous groups • Membership based on indigeneity not tribal roots • Contemporary democratic realities • Not necessarily on a land base

The importance of the RCAP goes beyond Canadian borders. It is based not solely on the Canadian experience but also, and more importantly, on the wider principles of self-determination and self-government.[70] It can be applied outside the context of Canada and perhaps even to Māori in Aotearoa / New Zealand. The implementation of indigenous self-determination pursuant to the Draft Declaration and other human rights instruments, principles, concepts and rights would require close examination of the lessons to be learnt from North America, so as to utilise the successes without repeating the mistakes made.[71]

[69] Ibid, at 278; RCAP supra n 62 Chapt 3 Governance.
[70] Iorns, C 'A New Zealand Case Study: Child Welfare' in Quentin-Baxter, supra n 25 at 157.
[71] For further discussion on indigenous self-determination through self-government in Canada, including suggestions for implementation, see Coates, K 'Degrees of Separation: First Nations Self-government in British Columbia' (Unpublished paper, University of Waikato, 1996). See also Hawkes, D *Aboriginal Self-Government: What Does it Mean?* (Institute of Inter-Governmental Relations, Kingston, 1985); Hawkes, D (ed) *Aboriginal Peoples and Government Responsibility* (Carleton University Press, Ottawa, 1989); Weinstein, *Aboriginal Self-Determination off a Land Base* (Institute for Research and Public Policy, Halifax, 1989); Boldt, M, *Surviving as Indians: The Challenge of Self-Government* (University of Toronto Press, Toronto, 1993); Peters, E (ed) *Aboriginal Self-Government in Urban Areas: Proceedings of a Workshop* (Queen University Press, Kingston, 1994) and Cassidy, F & Biah, R *Indian Self-Government: Its Meaning in Practice* (Oolochan Books and the Institute for Research on Public Policy, Lantzville, B.C and Halifax, Nova Scotia, Canada, 1989).

7.2 SUMMARY

Indigenous Peoples globally appear to be seeking to exercise their common inherent right to self-determination by claiming the political, economic, social and cultural space, authority, resources and capability to govern themselves effectively. Internal self-determination is synonymous with development, which includes this right to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully recognised and realised. Most indigenous groups seek to wield greater control over local matters such as natural resources, environmental preservation of their homelands, education, use and preservation of language, and self-governance in order to ensure their group's cultural preservation and integrity while participating effectively in the development of their territory, regionally and even internationally.

There is a vast array of macro-political self-governance options for Indigenous Peoples to choose from in exercising their internal right to self-determination depending on geographic, political, social, economic and cultural specificities and contexts. There are diverse options with varying 'degrees' of self-governance in existence ranging from indigenous sovereignty to autonomy, nationhood, self-management and greater representation. Briefly, the main specific self-governance options discussed for Indigenous Peoples to choose from include:

- the established right to be free from colonial domination;
- a right to remain dependent if it represents the will of the dependent people who occupy a defined territory;
- the right to dissolve a state peacefully and to form new states on the territory of the former one;
- the right of divided states to unite;
- the right to limited autonomy for groups defined territorially or by common ethnic, religious and linguistic bonds;
- the rights of minority groups within a larger political entity as recognised in Article 27 of the ICCPR; and
- the internal self-determination freedom to choose one's functions and forms of self-government, or even more sharply, the right to a democratic form of government.

It seems that the intention is not to encourage disintegration and secession or independence of an indigenous community within a nation-state but to make a symbolic gesture demonstrating the ability of the nation-state to conduct democracy to its fullest extent. In essence, such provisions represent an attempt to incorporate self-determination concepts into domestic legal and political structures, that is, constitutions, and hence to provide for a top-down effect on other national and local institutions and the legal framework. They

should provide the means and mechanisms to offer predictability for Indigenous Peoples that search for greater autonomy in a manner that is acceptable to the central authorities and electorate. No central government wants its territory to be changed or reduced particularly for the worse. Equally, the majority of the international community will prefer the continued existence of sovereign boundaries and no change to the status quo. Nevertheless, it seems that offering Indigenous Peoples as much say as possible in the political and legal-administrative decision-making processes at the local, national, regional and perhaps even the international levels, will turn out to be more advantageous than restricting or denying it.

Inversely, it can be hoped that some kind of objective cost-benefit analysis on the part of the concerned community may come to the clear reasoning that the costs of achieving independence, as well as the costs of maintaining an independent nation-state, typically outweigh the benefits.[72] Secession to an independent nation-state, therefore, is a self-determination option of extreme last resort that the author neither subscribes to nor supports particularly in a geographically small and demographically diverse nation-state like New Zealand where, as Moana Jackson once questioned 'where would Maori secede to?' Furthermore, the hybrid identity and complex diversity of contemporary Māori society would preclude such an option. Like the First Nations in Canada, most Mäori share vast and diverse realities in terms of geographic locale, socio-economic circumstances, gender, generational, political orientation, religious preference, sexual orientation and globalisation. Furthermore, given that most, if not all, Māori also have Pākehā ancestry, this shared identity could provide a more appropriate framework for shared rule and shared governance hence the inappropriateness of the self-determination option of secession for New Zealand. It would be fair to assume that many of the First Nations in Canada share similar diverse realities and therefore face similar challenges with exercising the option of secession except, perhaps, the remote geographic vastness of the Canadian North, which is possibly why Nunavut acceded to within the geo-political boundary of Canada.

In addition, can Māori and First Nations be entirely independent in this post-colonial global age? In the author's view, total independence and even secession are not feasible because, inter alia, of the overlap between Indigenous Peoples and the national interests and the need for cooperation to enforce decisions of indigenous self-governance entities. The relationship between indigenous self-governance and national governments at least in Canada and New Zealand must be symbiotic, requiring a climate of faith, trust and

[72] This holds true if considering the expenses for a full-fledged foreign service, defence, and currency policy – particularly if the to-be-created nation-state is weak in power and population and lacks exceptional natural resources.

good will - a climate that can only develop over time. But much can grow from this. The recognition and realisation of internal self-determination for Indigenous Peoples through indigenous self-governance and autonomy over local affairs within the nation-state may be a far cry from a sovereign Māori and First Nations body but a strategic plan could do well to recognise that once an effective working relationship is established, constitutional arrangements and conventions can develop over time. Hence Māori and First Nations autonomy, in the context and circumstances of New Zealand and Canada, may not be the most positive option as a standing apart but rather as a method of working better together, hence negating the option of secession or total independence.

This situation need not be seen as a compromise either. In today's global environment with multi-national commercial interests and human rights concerns, national governance itself is no longer about independence but interdependence. No government today is truly sovereign and independent but must work with others and is constrained by international accords.

There are more appropriate self-determination options. Mason Durie offered his biculturalism continuum as specific options for Māori self-determination in New Zealand at both the goal and structural levels with varying degrees that perhaps offer a form of self-government at the right end of the spectrum. In practice, the New Zealand government has permitted a degree of internal self-determination and self-governance to Māori through negotiated Treaty settlements with new self-governance entities created to manage and develop settlement assets and through other self-governance arrangements such as Ngāti Porou's control over the health system of the East Coast.

In contrast, Canada recognised that Indigenous Peoples need to determine and control their development as 'peoples' according to their own values and priorities and to ensure the integrity of their societies. Accordingly, since 1992, the Canadian government has followed a policy of recognising indigenous autonomy and self-government and has entered into specific arrangements for this purpose with different indigenous First Nations. These arrangements have come about through the Treaty settlement of land claims as well as through separate self-government agreements. The Canadian RCAP addressed self-determination and self-government options, which included:

- nation;
- public; and
- community of interest self-government models.

The RCAP's self-determination and self-government options resonate beyond Canadian borders. The internal self-determination freedom to choose one's forms of government

with authentic power sharing through indigenous self-governance and commensurate with political, social, economic and cultural functions is the author's preferred macro-political option negotiated freely by way of contemporary Treaty settlements. The rights of minority groups within a larger political entity as recognised in Article 27 of the ICCPR, negotiated again by way of contemporary Treaty settlements, runs a close second place. Several international law scholars even support the idea of self-government as justified by Article 27 'where that is the effective means of protecting the cultural distinctiveness of a territorial minority.'[73] Anaya went further by asserting that 'customary international law currently recognises a right of cultural self-determination for Indigenous Peoples in particular.'[74] What this distinction shows is that international law, which New Zealand and Canada are bound by, requires that Indigenous Peoples are entitled to their cultural integrity, perhaps even self-government under Article 27 and nation-states are bound to take affirmative measures to help achieve these goals.

Thus, self-government may be seen as a human right of Indigenous Peoples to an appropriate remedial measure in some circumstances to achieve internal self-determination, both constitutive and ongoing. Anaya poignantly concluded his discussion on indigenous self-government:

> International law does not require or allow for any one particular form of structural accommodation for all indigenous peoples – indeed, the very fact of diversity of indigenous cultures and their surrounding circumstances belies a single formula. The underlying objective of self-government, however, is that allowing indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis. Constitutive self-determination, furthermore, requires that such political institutions in no case be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences among justifiable options.[75]

The Draft Declaration and other international instruments recognise indigenous communities' needs for place and space for their unique value systems to operate fully and effectively within the legal and political systems of the nation-state.

Another emerging challenge for realising the right of Indigenous Peoples to internal self-determination has to do with the tension between intensified integration and globalisation on the one hand, and the search for communal cultural autonomy on the other. Most indigenous and minority communities and peoples would accept the need for and overall benefits of economic and technological interdependence and integration, while

[73] See Sanders, D 'Self-Determination and Indigenous Peoples' in supra, n. 14 (Tomuschat) at 74.
[74] Anaya, J *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 2.
[75] Ibid, at 111.

at the same time wanting to maintain their cultural and communal heritage. Elazar found that there is a general move from statism to Federalism in our interdependent time:

> [This] is not [because] states are disappearing, but the state system is acquiring a new dimension, one that began as a supplement and is now coming to overlay ... a network of agreements and arrangements that are not only military and economically binding but are becoming constitutionally binding as well. This overlay increasingly restricts ... sovereignty and forces states into various combinations of self-rule and shared rule.[76]

Elazar suggested that under these conditions autonomy 'is needed as a means to satisfy demands for self-determination that cannot be satisfied by independent statehood. This fits well into the new Federalism paradigm.' He also recommended that the 'international community should recognise autonomy as an equally legitimate form of self-determination and provide a set of guidelines' to determine what can be considered true autonomy.[77]

Reference to the concept internal self-determination, in the author's view, is more appropriate than the concept of sovereignty given that too literal an interpretation may prove misleading. A term like sovereignty is inherently Eurocentric and can potentially undermine indigenous aspirations,[78] particularly given its connotations of secession and independence. A similar argument about Eurocentricity could be brought forward against concepts like 'self-determination' and indigenous 'peoples' but as Hannum noted, some degree of internal self-determination may be desired in the sense of being left alone to protect, enjoy and promote cultural values.[79] Furthermore, appeals to sovereignty may be invoked as an opening gambit for settling the terms of debate rather than a realistic solution or practical goal while internal self-determination may provide greater scope for a more amicable and workable solution.

Cardenas and Canas asserted that sub-national groups (including Indigenous Peoples) or minorities do not have – in principle – a legal entitlement to independence or external self-determination (sovereignty) but do have a right to autonomy or self-government as an expression of internal self-determination.[80] They agree with the general idea that an excessive push for self-determination can lead to 'inner isolation,' fragmentation, increased

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[76] Elazar, D, 'Commentary' in Danspeckgruber, W & Watts, *Self-Determination and Self-Administration: A Sourcebook* (Lynne Rienner, Boulder Colorado, 1997) at 94. For an interesting discussion on the move from statism to Federalism in a post-sovereign world, see Keating, M, 'Plurinational Democracy in a Post-Sovereign Order' in *Northern Ireland Legal Quarterly* (Vol. 53, No. 4, 2003) at 351.

[77] Idem.

[78] Tully, J, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995).

[79] Hannum, H, *Autonomy, Sovereignty and Self-Determination,* (Philadelphia, University of Pennsylvania Press, 1990).

[80] Cardenas, E & Canas, M 'The Limits of Self-Determination' in Danspeckgruber, W (ed), *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World* (Lynne Rienner, Boulder Colorado, 2002) at 101-118.

inter-ethnic strife, and concrete threats to national and international peace and security. They praise decentralised forms of government and self-administration, including the concept of consociationalism.[81] Cardenas and Canas suggested that in some nation-states such as Greenland, Madeira, the Azores and Aland Islands, legal measures should be granted such as international guarantees of autonomy, demilitarisation, neutralisation, granting greater political autonomy *within* an existing nation-state, and better internal political representation combined with guarantees of continued cultural autonomy, without necessarily offering full independence.[82] Today's self-determination, Cardenas and Canas argue, is too readily associated with independence, an idea – in their view - correlated with the decolonisation process. They also correctly attribute 'countless wars and conflicts' to the misuse of self-determination.

Consequently, the nexus between internal self-determination, self-government and development, in the authors view, is the right to greater freedom and control - authentic power sharing – within the economic, social, cultural, political and cultural decision-making structures and institutions that affect the modern governance and development of Indigenous Peoples from Parliament right down to the provincial, local body and tribal levels. Such an initiative includes radically changing mainstream attitudes, government structures and institutions to accommodate indigenous aspirations to exercise greater control and self-governance over their own affairs in a manner that appropriately recognises and incorporates indigenous customary values, laws and institutions with mainstream institutions adapted to suit contemporary circumstances. Furthermore, self-determination is rarely a zero-sum situation – it concerns not only the community in search of self-governance or autonomy and its relations with the central government but frequently also with other communities and regions within the nation-state. As Chief Judge Edie Durie (as he was then) noted:

> ... looking at matters historically, respect for others appears to be an important part. This has included respect for the government and other communities, both Maori and Pakeha.[83]

A workable approach must be a compromise otherwise it has no chance of winning local, national and even international acceptance. But there is room for compromise only if the ideas of autonomy, self-governance and internal self-determination are accepted as a

[81] Idem

[82] Ibid. See also the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Group, adopted by the UN General Assembly in December 1992, which grants minorities the right to enjoy their own culture.

[83] Durie, E, 'Governance' in School of Maori and Pacific Development, *Strategies for the Next Decade: Sovereignty in Action* (University of Waikato, Hamilton, 1996) at 116.

solution. In many cases, minority rights, indigenous rights and even democratic rights are not sufficient to solve the problem – even a democracy can become a dictatorship of the majority and can lead to civil war. Authentic power sharing through decentralisation may often be the only way to bring decisions nearer to the people and to make the nation-state itself more efficient. Graduated levels of autonomy, self-governance and internal self-determination can give the nation-state and Indigenous People time to adapt to a new self-governance structure.

Moreover, many nation-states have already recognised group political rights as a legitimate way of meeting the concerns of particular groups that fear that they would be neglected or assimilated if all the decisions were made by majority governments. Examples include Switzerland, the Netherlands and Belgium, which Arend described as 'consociational' democracies where the group has been given autonomy in matters that concern it, where possible. When autonomy is not possible because the interest of the other groups or the nation-state as a whole also have to be met, the necessary arrangements are required to be the subject of agreement, backed by a veto power. The sharing of power through the devolution of Parliamentary authority has moreover occurred in many Westminster systems from the Scottish Parliament to the Welsh Assembly. Given such precedents, could not similar options be applied to Indigenous Peoples as nations within a nation such as in Canada and New Zealand? In New Zealand, specific self-determination options could possibly include a Canadian 'nation'-type tribal model perhaps in areas such as Tuhoe, the Far North and parts of the East Coast; while a 'community of interest'-type model could be another option for urbanised Māori.

Notwithstanding the human rights norms, customary international law, and international and contemporary domestic Treaties, there is still a need for vigilance as Simpson warned:

> Many States lack the strength of leadership to accommodate indigenous political institutions and systems; indigenous ownership and control of land and resources; indigenous laws and customs and indigenous cultures. Rather than being seen as a means of fostering reconciliation and cultural diversity between indigenous and non-indigenous peoples within their jurisdiction, most States see the recognition of these rights as a threat to the status quo – destabilising and divisive. So long as the rights of indigenous peoples are not recognised by the world's governments as 'Peoples' with fundamental human rights such as the right to govern themselves through the wider right of self-determination, indigenous peoples will continue to wield very little economic and political power within their own countries, as well as on an international basis.[84]

[84] Simpson, T *The Cultural and Intellectual Property Rights of Indigenous Peoples* (Prepared on behalf of the Forest Peoples Programme, June 1997) at 77.

Although indigenous self-governance through self-determination may be a *right* at international law, it may not impel both the Governments of Canada and New Zealand (and elsewhere) to recognise and realise this right. Indeed, Judge Durie of the Maori Land Court noted that a rights based argument:

> ... [focuses] the debate on the developing international law for indigenous peoples. While this is important, and while indigenous peoples' self-government is an inherent right, albeit conditioned by certain state imperatives, this approach may not be the most helpful.[85]

Judge Durie's rationale was that on the one hand the concern is not just for rights but also for reconciliation. On the other, a rights based argument may not win.

> Framed as a right of self-determination, the argument falls to the control of lawyers, with debate on whether self-determination rights are limited by law, to states. Whether Maori win or lose that argument, they lose control of the case.[86]

However, the response of other nation-states to such inaction, negligence, internal or moral discomfort, and the potential for Indigenous Peoples to adopt more aggressive means to achieve their aspirations, may generate the good sense and political pressure to recognise indigenous self-governance through authentic power sharing. In a Māori context, Judge Eddie Durie noted the importance of settling Māori grievances given that Pākehā (non-Māori) continue to decide Māori matters for Māori such as mandating assumptions, the absence of agreed claims resolution policies, and Māori appointments:

> These sorts of grievances compounded over time, are threats to world peace ... for they show a state of powerlessness that may develop to widespread dissatisfaction.[87]

In a wider context Madame Daes implicitly made the important point when she noted:

> It is not realistic to fear indigenous peoples' exercise of the right to self-determination. It is far more realistic to fear that the denial of indigenous peoples' rights to self-determination will leave the most marginalised and excluded of all the world's peoples without a legal, *peaceful* weapon to press for genuine democracy in the States in which they live.[88] [emphasis added]

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[85] Durie, E, 'Governance' in School of Māori and Pacific Development, *Strategies for the Next Decade: Sovereignty in Action* (University of Waikato, Hamilton, 1996) at 111.
[86] Ibid
[87] Ibid at 113.
[88] Cited in Grand Council of the Crees (of Quebec), *Sovereign Injustice: Forcible Inclusion of the James Bay Cree and Cree Territory into a Sovereign Quebec* (Grand Council of the Crees, Nemaska, Quebec, 1995) at 56.

Indigenous Peoples have been vehemently searching for the recognition and realisation of their rights to self-determination and self-governance, justice and redress for past grievances, political recognition of their unique status, protection of Treaty rights, protection of their remaining lands and resources and protection against continued human rights violations.

It is important in this context that official recognition and authority as well as resource allocation be politically empowering of indigenous groups. Self-determination is a mere word without the wherewithal to achieve it. Hence, welfare benefits provide the least preferred alternative, in the Māori and First Nations experience, creating at best an unwholesome condition of state dependency. The unilateral confiscation of indigenous rights to natural resources, including New Zealand's recent foreshore and seabed and similar laws and policies, continue to undermine indigenous self-determination in process, form, substance and spirit. If the basic right to self-determination, as outlined in the Draft Declaration, were respected and implemented, then human rights breaches such as the unilateral confiscation of the foreshore and seabed from Māori may have been avoided.

The debate therefore about internal self-determination and self-government and their applicability to Indigenous Peoples is a matter of perspective and degree. There is a huge range of politically sound remedial measures that may or may not be required to be taken but they must clearly be taken in conjunction with the Indigenous Peoples concerned. The changes required may be administrative, legislative or perhaps even concerning change to the constitutional and administrative structure of the nation-state. The precise measures required will depend on the circumstances of the Indigenous Peoples and the nation-state concerned and the wrongs to be remedied. The best method for achieving self-governance measures is direct negotiations by way of contemporary indigenous Treaty settlements and other agreements. What is required most of all is greater political will and a willingness to compromise by nation-states and indigenous polities, a climate of trust, good faith, empathy, resources and time again from both groups and the wider public which may result in a more clear understanding and agreement as to the functions and forms of realising Indigenous Peoples' internal self-determination rights, responsibilities and aspirations.

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Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
-Article 19, Draft Declaration on the Rights of Indigenous Peoples

The hardest problem that this country has ... is the question of representation ... we have tried to get it right, we have sought the concurrence of the Maori people as best we can, but we are not going to wait another hundred years for Maori to sort out their own structure.
– The Rt. Hon. Douglas Graham in the second reading of the *Treaty of Waitangi (Fisheries Claims Settlement) Act 1992.* [1]

8.1 INTRODUCTION

8.1.1 SELF-DETERMINATION AND INDIGENOUS REPRESENTATION

At the beginning of the 21st century, struggles over self-determination have emerged in many different places of the globe – from south-eastern Europe via the Black Sea region and the Caucasus to central and southern Asia. Since the end of the Cold War, secessionist movements have mobilised in nation-states in Africa and Central America as well as in highly industrialised nation-states such as Canada, Belgium, France, Italy, Russia, and the United Kingdom. But each case harbours its own very specific background and level of development and differs in intensity and orientation. Causes range from economic and leadership interests and quests for sovereignty by communities to lingering unresolved inter-ethnic problems. Responses vary from suppression and domination to deliberate manipulation and incitement as well as outside power involvement.

In a sense, classical self-determination - the search for full independence and sovereignty by a community with the result to redraw international boundaries at the expense of the existing nation-state – represents a dichotomy between the traditional perspective of nation-state formation, the international system known till the end of the Cold War, and the emergence of a new global structure characterised by interdependence, high levels of real-time information, mobility, and a global market place.

One of the great difficulties of making self-determination operational as an international legal principle, however, has been the challenge of identifying the 'self.' A dichotomy was routinely drawn in the United Nations Charter and the practice of

[1] NZPD, (Vol. 532, 8 December 1992) at 12951-12952.

decolonisation and human rights protection between the right to self-determination on the one hand, and minority rights on the other. Self-determination applied principally to the entire 'people' of a European colony, while minority rights to national minorities *within* existing nation-states. But the concept of self-determination is increasingly extended to autonomy, internal self-government or substantial involvement in decision making by Indigenous Peoples or other groups within recognised nation-states – to the structuring and maintenance of relations, rather than secession.[2] Both the decolonisation variety and the emergent relational variety of self-determination have been significant in Canadian and New Zealand debates.

The challenge of defining the 'self' is, moreover, particularly acute in a world slowly moving away from the relatively tidy system of nation-states toward a more uncertain world in which national sovereignty is being eroded both from above (at the level of regional integration) and below (at the level of smaller scale political units drawing their cohesion from such factors as cultural, religious, ethnic, and linguistic similarity). We need therefore to determine which entity can justifiably argue for self-determination and thus autonomy and self-government – a community, a 'people' including Indigenous Peoples, and a former colony?[3] We must also consider the distinction between the holders of the right to self-determination, which can be a majority or a minority *within* a nation-state, or a community or 'people' separated by boundaries such as the Mohawk whose traditional territory crosses the Canadian and USA geo-political borders.[4]

Hence challenge of defining the 'self' was addressed in European decolonisation by declaring the 'self' to be the entire 'people' of the colonised territory, but such simple solutions are insufficient where the goal is to apply self-determination to relations between nation-states and indigenous 'peoples.' At the macro-political level, a core challenge is the overall stability at the level of the nation-state which includes limiting the number to around 200 with an upper limit of up to 250. To do this, outer limits on nation-state-shattering or secession exercises of the right to self-determination must be kept at a minimum. And yet the promise of self-determination to all 'peoples' of which Falk asserts

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[2] See Kinsgbury, B 'Reconstructing Self-Determination: A Relational Approach' in Aikio, P & Scheinin, M (eds) *Operationalizing the Rights of Indigenous Peoples to Self-determination* (Abo Akademi, Turku, Finland, 2000) at 25 and Coates, K & McHugh, P *Living Relationships, Kōkiri Ngātahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998).

[3] See Danspeckgruber, W & Watts, A (eds) *Self-Determination and Self-Administration: A Sourcebook* (Boulder, Colorado: Lynne Rienner, 1997).

[4] For an excellent discussion on this issue, see Cassese, A *Self-Determination of Peoples: A Legal Appraisal* (Cambridge: Cambridge University Press, 1995) at 141-157 and Horowitz, D *Ethnic Groups in Conflict* (Berkley: University of California Press, 1985).

there are at least 5,000[5] makes it very difficult to find a principled basis in law for denying claimants who seem to be a 'people' and have the will and capability to be an independent nation-state. Possibly, the evolution of various indigenous self-government models negotiated through Treaty settlements will allow Indigenous Peoples to achieve meaningful forms of autonomy without feeling the need to break out of an existing nation-state. If nation-states deepen democracy to ensure the equitable participation and protection of all 'peoples' subject to their authority and spheres of interest, secessionist motivations may be reduced, if not eliminated. In the event of such favourable developments, internal self-determination in its various contemporary dimensions may be eventually reconcilable with the maintenance of political stability. At present, patterns of governmental abuse and exploitation, dreams of freedom, and the mystique of statehood are so prevalent as to make nation-state-shattering and secession claims based on self-determination likely to persist for years to come.

Hence although trying to predict the actual number of nation-states in the international community a generation from now would be foolish, there are powerful political, economic, and military forces analogous with Māori and First Nations polities that fully support the geographers view of a world with an increasing number of small nation-states. With almost 200 'official' countries in the world, but (notwithstanding the challenges of Indigenous Peoples asserting recognition as 'peoples' with a right to internal self-determination as 'nations within a nation') there are dozens more independent breakaway states asserting a right to self-determination that do not officially exist - 'unrepresented stateless nations' – fighting for recognition as official nation-states in domestic and international law.[6] Some are poor countries while others have parliaments, armies and passports, but are not recognised as countries by the rest of the world. A common example in the last century was the creation of the state of Israel in 1948, which literally fought for official recognition. Another well-known unrepresented nation in the world is Taiwan or Formosa (as it was once called), which has been seeking recognition as a separate nation-state from Mainland China for decades. Taiwan has one of the most powerful economies in the world, but it has no seat at the UN and no major nation-state recognises it as a 'proper' country. When Mao Tze Tung's communists defeated their nationalist rivals, they fled to Taiwan and took over. Taiwan has since become a stable democracy, but Beijing views it as a renegade Province and wants it back.

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[5] Falk, R 'Self-determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience' in Danspeckgruber, supra n 3 at 65.

[6] See the BBC website for recent coverage on the unrecognised nations or stateless nations of the world at: http://news.bbc.co.uk/1/hi/programmes/this_world/4491257.stm (Accessed September 2005).

Other such stateless nations include Kosovo, Tibet, Transdniestria (Ukraine), Somaliland, South Ossetia, Ajaria and Abkhazia (parts of Georgia all declared their own independence when the Soviet Union collapsed), the Chechen Republic of Inckeria (Russia), Southern Cameroon, South Moluccas, West Papua, Tatarstan, Buryatia, Cabinda, Nagaland, Kurdistan, East Turkestan, Circassia, Zanzibar, Assyria, Mapuche, Chuvash, Abkhazia, Aceh and Khmer Krom. Sixty unrecognised nation-state organisations and parties have even formed an international organisation - the 'Unrepresented Nations and Peoples Organisations' (UnPO)[7] – which acts as a sort of un-UN organisation for unrecognised states which held its seventh general assembly of UnPO in June 2005 in The Hague.[8] In its 14-year history, 6 of the UnPO's former members have been officially recognised as nation-states within the international community – Estonia, Latvia, Armenia, Georgia, Palau and East Timor. Official recognition as a nation-state in the international arena is analogous to the quest many Indigenous Peoples are seeking in terms of exercising their inherent internal right to self-determination and self-government as 'nations within.'[9] Statehood or official recognition as a nation-state, the right to representivity and the right to think of oneself as a citizen of a nation-state, are precious political, cultural, social and even economic prizes, which history and geography distribute with terrifying caprice. Often, the official loss or recognition of nation-statehood was/is due to varying combinations of bad luck, betrayal, occupation, war, injustice, invasion, indifference and the whims of history and politics. Hence the 'self' in self-determination in the international discourse is dynamic, situational and fundamentally political.

Certain groups or 'peoples' could or should legitimately seek some degree of internal self-determination through self-governance. Although accepting that broad premise, there exist very weak guides as to what constitutes such groups or peoples and that in trying to protect them we may endow certain of them with a facetious reality that is neither historically nor dynamically grounded. Indeed, there are no natural, legal units in the international or in most national political systems. Even islands do not make natural units, as Ireland, Britain, Australia and New Zealand vividly demonstrate. When one thinks of the contemporary cases of self-definition and self-determination embodied in say Quebec, Georgia, Lithuania or Kurdistan, gratifying the urge for the self-rule of one group complicates, if not denies, similar gratification for groups living in their midst.

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[7] See the UnPO website for information at http://www.unpo.org (Accessed September 2005).

[8] The UnPO is regarded by its members as an important and necessary halfway house, especially in facilitating contact with international bodies such as Amnesty International and Human Rights Watch, whose attention is often all too necessary in places where questions of nationality and sovereignty are in dispute.

[9] It is noted that some Indigenous Peoples have representatives who are members of UnPO such as the Buffalo River Dene Nation of Canada.

Perhaps the issue is, above all, one of representation, participation and consent. Political systems must allow groups and peoples, if they so choose to act as groups and peoples, to seek representation and to consent to participate in a larger unit. Nations without states are by no means infrequent – the Scots, the Welsh, and the Canadian First Nations claim nationhood although they do not control states of their own. In describing aboriginal (indigenous) nations as the 'nations within,' Fleras and Elliot maintain that aboriginal people assume the status of nationhood when they assert a special relationship with the state based on a unique set of entitlements.[10] It is a step beyond simply identifying themselves as the original inhabitants of a land who wish to preserve their cultural heritage towards claiming some form of self-government and representation based on a principle of internal self-determination.

Whatever its contours, the nation-state is no better and no worse than any other context for playing out the process by which individuals, groups and 'peoples' come together, cooperate, move apart, and conflict. Self-determination implies some set of adjustable group interests, historically disembodied and immutable, whereas reality is far more malleable and inconstant. It is important that political systems allow individuals and 'peoples' to assert their identities as they see fit and to place no legal impediment or disincentives on the individual's and peoples' ability to redefine themselves constantly. Gottlieb has postulated that 'autonomy in a state without democracy has scant practical meaning.'[11] Moreover, where a nation-state exists in which the mechanisms of representation and the instruments of accountability and transparency work well, the issue of autonomy may lose its relevance.[12]

Waterbury argued that the use of self-determination needs to be treated with caution, that current guidelines to the definition of distinct groups and 'peoples' are weak, that such identities are often artificially or ahistorically grounded, and that honouring self-determination claims is not always politically feasible or attentive to the rights of all involved.[13] He maintains that effective, just political systems must be consent based and impartially just to members of all groups and each group as a whole and that national power is best won by parties via cross-ethnic and cross-lingual coalitions.

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[10] See Fleras, A & Elliot, L *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto: Oxford University Press, 1992).

[11] Gottlieb, G *Nation Against State* (1993) at 79. See also Halperin, M & Scheffer, D, Small, P (eds) *Self-Determination in the New World Order* (Washington DC, Carnegie Endowment for International Peace, 1992) at 58.

[12] Waterbury, J 'Avoiding the Iron Cage of Legislated Communal Identity' in Danspeckgruber, W & Watts, A (eds) *Self-Determination and Self-Administration: A Sourcebook* (Boulder, Colorado: Lynne Rienner, 1997) at 121.

[13] Ibid.

Waterbury moreover recognised some merit in Amitai Etzioni's communitarian theory but argued that the definition of distinct communities almost inevitably leads to animosity between groups. He maintained that near total freedom should be granted to groups desiring to organise non-violently, on any premise, in nation-states capable of drafting and implementing law and governing effectively. Waterbury suggested that the legal 'naming of group names' should be in most cases avoided, that the law should remain permissive and neutral toward all groups residing within a nation-state, and that cross-ethnic and cross-linguistic coalitions will provide stability, peace, and just governance.[14] Fundamental to such initiatives, then, is the authentic and effective representation of 'peoples,' including Indigenous Peoples, at least at both the macro-political and micro-community levels *within* the nation-state. Appropriate indigenous representation within the nation-state is fundamental to actualising and realising the indigenous right to internal self-determination and self-governance.

According to the United Nations, self-determination should be interpreted, inter alia, as entitling Indigenous Peoples to negotiate freely their status and mode of representation *within* existing nation-states.'[15] The United Nations *Draft Declaration on the Rights of Indigenous Peoples* is specific about indigenous political representation where it stated in 1993:

> Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by them in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions.[16]

Article 19 of the 2004 version of the *Draft Declaration on the Rights of Indigenous Peoples* as amended is more concise:

> Participation in Decision Making
> Indigenous peoples have the right to fully participate in all decisions affecting them, through representatives chosen by them.

But it is extremely difficult to represent individual and collective indigenous identity and representivity fully and accurately because, like the recognition of un-represented nations, it is fluid, situational, culturally relative and fundamentally political. The recognition of Indigenous Peoples as 'Peoples' in the international arena is as problematic and complex as the recognition of Indigenous Peoples collectively as First Nations,

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[14] Ibid.
[15] As cited in the Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, (Vol. 2, chapter 3, Minister of Supply and Services Canada, 1996) at s.2.2.
[16] Article 19, *Draft Declaration on the Rights of Indigenous Peoples 2004*.

Aboriginal Peoples (Indian, Mētis and Inuit), and tribes in Canada; and a Māori nation, iwi and hapū tribes in New Zealand; and individually, as Nisga'a, Mohawk, Squamish and Cree in Canada and Waikato, Maniapoto, Raukawa, Ngāi Tahu and Ngāpuhi in New Zealand.

The complexity of the political interfaces and contemporary relationships between the 'Crown in Right of Canada and First Nations' and the 'Crown in Right of New Zealand and Maori' requires both nation-states to engage with challenges of indigenous identity and representivity. It is widely accepted that the *Royal Proclamation 1763*[17] and the *Treaty of Waitangi 1840*[18] created partnerships or at least political relationships that require both the nation-states of Canada and New Zealand to actively protect the interests of their Indigenous Peoples and to respect a degree of autonomy where this is not incompatible with the wider public good.[19] But the central question remains – which indigenous groups are actually 'indigenous' and are to be considered as vehicles of First Nations' and Māori collective identity and representivity for the purposes of these political Treaty relationships? The primary impulse of both governments to date has been to engage in largely 'unilateral definitional exercises,' effectively removing the debate about First Nations and Māori identity and representivity from First Nations and Māori peoples. It is axiomatic that such policies are culturally and politically inappropriate in today's world but they still occur. One is inclined to ask what would motivate respective governments (national, regional local) to even attempt to 'define' indigenous identity and representivity?[20] A number of propositions (albeit rather cynical) are possible. One proposition is perhaps maintaining the hegemonic status quo of power and domination over Indigenous Peoples' traditional lands and natural resources, particularly through deliberate 'divide and rule' and 'unite and rule' strategies resulting from such defining exercises. Satisfying pressing economic objectives is another possible intention, and 'limiting' the number of 'Indigenous Peoples' and groups eligible to qualify for 'indigenous' Treaty and aboriginal rights and benefits, and hence minimising Crown obligations to take notice of

[17] See for example, Borrows, J 'Wampum at Niagra: The Royal Proclamation, Canadian Legal History and Self-Government' in Asch, M (ed) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (UBC Press, Vancouver, 1997). Woodward refers implicitly to an indigenous/Crown partnership when he noted that the Indigenous Peoples of Canada were recognised as 'Nations and Tribes of Indians' in the Royal Proclamation and as such, they have a continued legal existence in Canadian law, both as signatories of Treaties and land claim settlements, and as 'bands' under the *Indian Act*. Woodward, J *Native Law* (Vancouver: The Craswell Co. Ltd., 1989) at 2.

[18] See Te Puni Kōkiri *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington: Te Puni Kōkiri, 2002).

[19] Glover, K & Baird, N, 'Identifying the Māori Treaty Partner' in *University of Toronto Law Journal* (Vol. 52, No. 1, 2002) 40 at 52.

[20] International fora such as the United Nations and the Human Rights Committee on the Elimination of Racial Discrimination could also fall within the scope of this discussion.

and pay national and perhaps local government bills and other legal, political and moral obligations, are perhaps further possible motives.

8.1.2 REPRESENTATION CONCEPTUALLY

At its most basic, the notion of representation or political representivity is the difficulty experienced at all levels of a society in agreeing upon a person or entity that will appropriately represent the point of view of the collective.[21] Political representation is a person or body who, by custom or law or both, has the status or role of a representative within a political system.[22] The first main challenge for representation, however, is determining which person or body carries the authorised voice and right to speak for a particular group in specific situations and contexts. Establishing appropriate forms of representation for Indigenous Peoples is not simply a matter of drawing up boundaries on a map and nominating representatives to speak.[23] The complex nature of inter- and intra-group relationships in both traditional and contemporary Māori and First Nations society can make these determinations difficult, and sometimes leads to contestability for the same membership. Representivity, moreover, illuminates the legitimacy of leaders or governance organisations to speak on behalf of a people but what is the basis of that claim? What is the community or constituency whose representation is claimed? How are leaders chosen? Is legitimacy grounded in traditional power relationships or in ones borrowed or imposed from the colonial situation?

8.2 REPRESENTIVITY THEORY

The interest and importance of representivity and electoral system reform has in large part reflected a concern with what Hanna Pitkin termed 'descriptive' representation. Under this view, a high value is placed on 'a representative body being distinguished by an accurate correspondence or semblance to what it represents.'[24] When this principle is applied to political institutions, a priority is placed on how a governance body is composed.[25] Yet defining the concept of political representation must start by acknowledging that the concept is far from simple in both substance and process. Still, the notion of representation stands as one of the central tenets of Western liberal democratic

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[21] Wainright, C 'Maori Representation Issues and the Courts' (Unpublished paper for Roles and Perspectives in the Law Conference, Wellington, 5 – 6 April, 2002) at 3.
[22] Birch, A.H, *Representation* (Pall Mall Press, London, 1971) at 19.
[23] Stokes, E 'Representation' in Stokes, E *Bicultural Methodology and Consultative Processes in Research: A Discussion Paper* (Hamilton: Department of Geography, University of Waikato, 1998) at 36.
[24] Pitkin, H *Representative Government and Representation* (University of California Press, Berkeley, 1972) at 60-61.
[25] Idem.

thought. Consequently, Western political culture provides a set of assumptions and expectations about what representation ought to entail and how representatives are likely to act.[26] Birch, for example, distilled his understanding of representation into three main usages:

- to denote an agent or spokesperson who acts on behalf of his or her principal;
- to indicate that a person shares some of the characteristics of a class of persons; and
- to indicate that a person symbolises the identity or qualities of a class of persons.[27]

Sally Weaver similarly noted that the concept of First Nations (and Māori) and wider political representivity is seen to embody three related functions:

- to represent the views, needs and interests of constituents to government and society;
- to be representative of the constituency in its social composition; and
- to be responsive to the needs and aspirations of the constituency. [28]

With Weaver's first point, an indigenous governance entity would be expected to convey the feelings and demands of its membership to the government in a fairly accurate way – to be a reliable vehicle of communication. In a more formal sense, this meaning is understood as an organisation authorised to convey the views of members and which is held accountable to its constituents for this conveyance, for example, through elections or delegations. Weaver's second point occurs when an indigenous governance entity is seen to be politically representative if it is politically representative, of its constituency. In other words, the members of the governance entity are expected to be a social microcosm of the constituency, particularly its politically important social characteristics. Underlying this notion is the belief that if the governance entity's members reflect their constituents, the governance entity will be more sensitive to their needs and goals and, therefore, is able to convey those needs and goals accurately to the government and the public.[29] Weaver's third definition stresses the necessity for the governance entity to respond to the needs and demands of its constituency by providing services needed or expected by the constituency. As such, it involves more than a formal accountability. There may also be some implicit and explicit socio-economic expectations.

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[26] See Dyck, N 'Representation and Leadership of a Provincial Indian Association' in Tanner, A (ed) *The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada* (Institute of Social and Economic Research, Memorial University of Newfoundland, St. Johns, 1983) at 199.

[27] Birch, A *Key Concepts in Political Science: Representation* (London: Pall Mall Press Ltd, 1971) at 15.

[28] Weaver, S 'Political Representivity and Indigenous Minorities in Canada' in Dyck, N *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway* (Institute of Social and Economic Research, Memorial University of Newfoundland, St. John's, Nfld., Canada, 1985) at 117.

[29] See also Kornberg, A, Clarke, H & Goddard, A, 'Parliament and the Representational Process in Contemporary Canada' in Clarke, H (Ed.) *Parliament, Policy and Representation* (Methuen, Toronto, 1980) and Pitkin, supra n 24.

Both definitions above are germane for Indigenous Peoples representative governance within the liberal democratic settler nation-states of Canada and New Zealand. But, as Weaver highlighted, all three meanings of representivity rarely crystallise in the praxis of all governments and most if not all indigenous representative governance entities.[30] Collectively, they comprise an ideal principle in the political cultures of Canada and New Zealand, where the first meaning of the concept – to represent – has been the major principle applied in both national Parliamentary systems. This research, however, suggests that in contemporary indigenous societies in both nation-states, the ideal principle of representivity noted above, has largely become the criteria with which First Nations and Māori are assessed externally by governments, and internally by their constituencies, in terms of whether indigenous spokespeople or governance organisations are indeed representative.[31] The exception is those representatives who can claim a spokesperson's role as a result of their ascriptive status.[32] Hence, all three notions need to be applied to indigenous governance entities in both nation-states to assess whether First Nations and Māori governance entities at the national, regional and the local tribal levels are actually 'representative' and, therefore, have legitimacy. To that end, this research will discuss each of these principles by examining the representivity policies of contemporary Treaty settlements in Canada and New Zealand and by identifying some of the deficiencies of these processes. The need for pan-indigenous representation in certain contexts will also be reviewed, followed by a comparison of the notion of indigenous 'tribal' representation and an analysis of the need for careful tribal aggregation and participation. A number of indigenous case studies from Canada and New Zealand will be used to add context to the analysis.

Many controversies over political representation have revolved around the selection and functions of elected members of a representative assembly whose position cannot be equated easily with any of the three main types of representation defined above. To some

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[30] Weaver, supra n 28 at 114.

[31] Recognising of course that, in all three senses, this ideal principle of representivity is rarely achieved by either governments or Maori and First Nation's representatives.

[32] For example, Te Arikinui Dame Te Ātairangikaahu whose primary mandate as a tribal leader of Tainui and the Kīngitanga stems from her genealogical seniority, her descent line from the Ariki (paramount chiefs) of the Tainui confederation of tribes. Tumu Te Heuheu of Ngāti Tūwharetoa is another example in New Zealand. An example in Canada is perhaps the selection of tribal leadership by band custom pursuant to the *Indian Act.* Custom band councils do not derive their authority from the *Indian Act* but are chosen by traditional hereditary methods, which includes ascribed authority, mandating and legitimacy. For references, see Jones, P, *King Potatau: An Account of the Life of Potatau Te Wherowhero the First Māori King* (Polynesian Society, Wellington, 1959); Kirkwood, C, *Tawhiao: King or Prophet* (Turongo House, Hamilton, 2000); **Dame Te Ata book??** Grace, J, *Tuwharetoa: The History of the Taupo District* (Reed Books, Auckland, 1992); and Hereditary Chiefs of the Gitksan and Wet'suwet'en People, *The Spirit of the Land. The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987* (Gabriola, Reflections, B.C, 1989).

extent, representatives generally act as spokespersons for their electors but the nature of the proper relationship between elected persons and their constituents has been a matter of dispute for several centuries and it would certainly be wrong to regard elected representatives as being essentially agents for those who elected them. That they should act in this way and be appropriately selected is a common recommendation but this is not always the case in practice – representatives do not necessarily act in this way and therefore cannot always be defined in these terms. Elected indigenous representatives may, therefore, be representatives in any or none of the above three main senses that they ought to. Hence, the nature of indigenous political representation is a complex political, cultural matter which may not be understood by formulating a definition but more by examining the debates, disputes and challenges about indigenous representation that have taken place in various situations and contexts. We thus need to examine past and contemporary indigenous representation challenges and concerns in Canada and New Zealand. Representation and the good governance discourse will be briefly discussed first in this section followed by the relevance of agency theory and fiduciary obligations of governance entities to representivity.

8.2.1 REPRESENTATIVE DEMOCRACY

Dyck, commenting on the First Nations peoples of Canada and their experiences provides a useful analysis with which to understand agency and representation within indigenous-state relations.[33] Dyck noted that as a structured activity, representation involves the articulation of roles, resources and interests, both at and between different levels of organisation. Acts of representation create or make use of various types of relationships between leaders, followers, decision-makers, constituents and the agencies of the modern nation-state. The historical, contemporary and ideological context within which acts of representation occur between Māori and First Nations and their respective nation-state have a profound effect on the manner, processes and outcomes. Dyck contends that nation-states have always played a leading role in facilitating the exploitation of lands and resources held by Indigenous Peoples; the nation-states' subsequent involvement in administrating minority Indigenous Peoples that have been largely dispossessed of their lands and resources has been largely governed by complex social and ideological considerations as well as by economic factors;[34] and the modern nation-state is not a

[33] Dyck, supra n 26 at 198.

[34] See for example, Jaimes, A 'Federal Indian Policy: A Usurpation of Indigenous Sovereignty in North America,' in Sawchuk, J (ed) *Identities and State Structures: Readings in Aboriginal Studies* (Vol. 2, Bearpaw Publishing, Manitoba) at 245; and Mfundo, K 'The Political Economy of Treaty of Waitangi

monolithic structure but consists of an assemblage of agencies, institutions and processes that are, hypothetically, capable of being (although often not) centrally co-ordinated and controlled.[35]

In the nation-states of Canada and New Zealand, the representational inputs and outputs of elections at the national, provincial, local and tribal levels have commonly been regarded as key determinants of democratic governance. As Hunter opined, the quality of representative democracy is measured against a number of indicators:

- the authority and accountability of electoral systems to represent the views, needs and aspirations of voters;
- the institutional ability to produce a legislature or governance body that closely mirrors, in its social characteristics such as gender, ethnicity and social class, the composition of the constituent population represented; and
- the responsiveness of governance actors in translating voters' preferences into appropriate responses from government.[36]

Together and separately, these indicators reflect the normative principle that the activity and composition of the respective community governance entity plays a significant role in determining how well a governance entity can represent the distinct political interests of its constituents. Ideally, each citizen is entitled to have a voice in the deliberations of their governance entity as well as the right to bring grievances and concerns to the attention of his or her governance representative(s).[37]

The ability and willingness of Parliament to ensure the political representation of particular groups is an integral component of a democratic government, particularly given that political representation structures government activity. Those with access to the decision-making structures of Parliament act as gatekeepers, deciding which interests will be addressed in the public sphere and how they will be prioritised, packaged and presented. Consider the representative function of parliamentary debates in both nation-states. Securing political representation is not only important in terms of potential numerical outcome but also in terms of the character of the debate leading to the outcome. As Roger Gibbins noted, when the House debates issues such as abortion or Aboriginal rights, the outcome of the debate would arguably be different if the membership of the House

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Settlements: Aspects of a Policy Issues and Research Agenda' (Unpublished Seminar, Seminar Series, Law School, University of Waikato, 10 May 1996).

[35] See the discussion of the tactical considerations this presents to indigenous representatives in Dyck, supra n 26 at 28.

[36] Hunter, A 'Exploring the Issue of Aboriginal Representation in Federal Elections' in *Electoral Insight* (Aboriginal Participation in Elections, November 2003). See Young, L *Electoral Systems and Representative Legislatures: Consideration of Alternative Electoral Systems* (Report to the Canadian Advisory Council on the Status of Women, July 1994) at 1; Weaver, supra n 28 at 113–150 for Canada.

[37] *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at 183.

included greater representation from potentially affected groups.[38] As Alison Thom opined in a New Zealand context, the emerging purpose of Māori Rūnanga governance entities was/is:

> [T]o primarily act as a responsible and responsive representative of the constituent group in its ranging forms of takiwa, hapu, whānau and individuals. Within these sets are the full range of interest groups such as tamariki, urban dwellers, youth, kuia/kaumatua, parents, professional groups, the unemployed, claimant groups etc ... to represent them how, where and for what interests. This needs to be determined surely by the people and bodies of common interest ... [but it is] no small task.[39]

As mentioned above, the nature of political representation and good governance in an indigenous context is therefore a complex matter which may not be understood by formulating a definition but by examining the debates and disputes about indigenous representation that have taken place in various situations and contexts. The concept of political representation must start by acknowledging that it is far from simple in both substance and process. We thus need to examine past and contemporary indigenous representation challenges and issues in Canada and New Zealand.

8.2.2 GOOD GOVERNANCE AND REPRESENTIVITY

Good governance is closely linked to representation and legitimacy.[40] Internationally recognised principles of good governance are emerging from a solid grounding of empirical research that attempts to distil why some governance institutions are more effective than others. Some forms of governance are undoubtedly better suited in certain contexts than others; hence a literature is growing up around this concept of 'good governance'[41] the importance of which cannot be overemphasised. A World Bank study into the effectiveness of foreign aid to developing countries suggested that 'poor countries have been held back not by a financing gap, but by an 'institutions' and policy gap.'[42] Social institutions and their governance arrangements can be crucial to economic, social

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[38] Gibbins, R 'Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts' in Milen, R (ed) *Aboriginal Peoples and Electoral Reform in Canada* (Vol. 9 of *The Collected Research Studies*, Royal Commission on Electoral Reform and Party Financing, Dundurn Press, Toronto, 1991) at 157.

[39] Thom, A 'Committee to Competence: Regional Iwi Representative Bodies' (Unpublished Paper, CEO, Te Rūnanga a Iwi o Nga Puhi, in the author's possession) at 2.

[40] See for example, Corkery, J (ed.) *Governance: Concepts and Applications* (IIAS Working Group, International Institute for Administrative Studies, Brussels, 1999) at 173. See also Novartis, *Sustainable Development and Good Governance* (Novartis Foundation for Sustainable Development, 2001) at 2.

[41] The literature on 'good governance' is extensive. See the bibliography in Minogue, M *Power to the People* (Manchester: IDPM, 1999) and World Bank/UNDP Reports in the 1990s.

[42] World Bank *Assessing Aid: What Works, What Doesn't, and Why* (New York: Oxford University Press, 1998) at 33.

and cultural development, 'playing a more significant role than natural resource endowments or human or financial capital.'[43] Rosenberg and Birdzell boldly claimed that the economic success of the West is due largely to the institutional transformations that separated the political and economic spheres.[44]

The Institute on Governance in Canada[45] observed that citizens entrust the political executive of a representative organisation, or a country, with critical decision making responsibilities and want to ensure those powers are used wisely. Their principles for building sound institutions, based on observations of best practice, are:

- strong mechanisms to promote accountability;
- the transparent flow of relevant information;
- separation of political control from day-to-day economic development and policy management.

The Organisation of Economic Co-operation and Development (OECD)[46] reports that there is no single, world-wide model for best practice corporate governance, owing to differences in legal systems, institutional frameworks and traditions. Instead, the OECD promotes a set of fundamental governance principles they believe may be broadly applied:

- protection of shareholders' rights of ownership and participation;
- equitable treatment of shareholders;
- recognition of stakeholders' rights and the need to encourage their participation;
- timely and accurate disclosure of finances, performance, ownership, and other governance affairs;
- Board responsibility for the effective monitoring of management, and the Board's accountability for their decisions to shareholders.

These good governance principles are useful as a reference point for organisational design in societies undergoing rapid change, for example, due to a shift from a centrally planned economy toward one with a market basis, devolution of control from hierarchies toward local communities, and indigenous group's undertaking post-Treaty settlement self-governance. These principles are primarily aimed at companies trading in capital markets. However, the OECD believes they may also, with some modification, be applied to non-traded companies such as privately held or state-owned enterprises. The author submits

[43] Aboriginal and Torres Strait Islander Commission (ATSIC) *The Importance of Indigenous Governance and its Relationship to Social and Economic Development* (Australia: Aboriginal and Torres Strait Islander Commission, 2002).
[44] Rosenberg, N & Birdzell, L *How the West Grew Rich: The Economic Transformation of the Industrial World* (New York: Basic Books, 1986).
[45] Institute on Governance 'Understanding governance in strong aboriginal communities. Phase One: principles and best practices from the literature' (Canada: Institute on Governance, 1999).
[46] Organisation of Economic Co-operation and Development *OECD Principles of Good Governance* (France: OECD, 1999).

that good governance principles also apply to indigenous representative governance entities.

In addition to the benefits from having a sound foundation for its own growth, an indigenous organisation implementing good governance principles can expect enhanced legitimacy amongst peers, potential investors and financiers, locally and internationally. Newell and Wilson[47] studied a number of companies in emerging markets, such as India, Malaysia, Mexico, South Korea, Taiwan and Turkey, and concluded that visible adherence to good governance principles promotes the market value of a firm by encouraging institutional investors. They have additionally listed what they consider to be internationally recognised principles of good governance for commercial firms, which forms part of most, if not all, indigenous governance entities:

- transparent ownership: details of directors' and managers' holdings must be disclosed;
- appropriate board size: limited to between five and nine directors;
- Board accountability: roles and responsibilities of the directors must be clearly defined and promulgated;
- neutral ownership: take-over threats must be met openly, not by stealth; shareholders must be encouraged to exercise their voting rights;
- dispersed ownership: concentrated shareholdings should not be afforded special decision-making or information rights;
- independent audits and oversight: an independent committee should monitor certain board policies such as directors' compensation, auditing and internal controls;
- independent director: less than 50% of directors should also hold management positions, and at least 25% of directors should be independent of any management or ownership ties;
- transparency: timely and accurate disclosure of all material information;
- accounting standards: adherence to international standards;
- shareholder equality: for voting purposes and distribution of profits.

Although intended for companies trading in markets, principles relating to transparency, accountability and governance structures are applicable to non-profit organisations or those with a mix of profit-making and social objectives, as in many Māori and First Nations representative governance entities. In addition, many of the larger Māori and First Nations organisations have subsidiaries operating in commercial markets where these principles would be directly relevant.

[47] Newell, R & Wilson, G 'A premium for good governance' *The McKinsey Quarterly* (No. 3, 2002) http://www.mckinseyquarterly.com. (Accessed May 2003).

8.2.3 AGENCY THEORY

A fundamental component of good governance and appropriate and democratic representation at every governance level (from international to national, provincial, local and tribal governance) is agency. An agent is a person, either natural (a man or a woman) or artificial (the Crown, a government, an iwi, a hapū, band or tribal council), who has the right to act; and in acting to wield authority and, in an Indigenous People's context, who has the right to utilise assets and resources. In relation to Māori, agency theory is an issue of tino rangatiratanga and mana. In both Māori and First Nations terms, agency theory is an issue of self-determination.

Agents are persons, who by delegation (typically by contract – some legal while others may be social and cultural), act for those in authority over them[48] but the very idea that an agent can act with authority is parasitic on the idea of authority. Authority initially arises from individual agency and not from subjection to a superior. Thomas Hobbes even insisted that sovereignty – the highest form of agency there is, which is absolute –insisted that those who act, unless they have in some way (perhaps by contract) delegated their authority to act, are and remain authors of their own actions. Hobbes noted:

> A *person* is he whose words or actions are considered either as his own, or as *representing* the words and actions of another man. .... When they are considered as his own, then he is called a *natural person,* and when they are considered as representing the words and actions of another man, then he is a feigned or *artificial person.* ... The word *person* ... been translated to [mean] any representer, as in Tribunals [and] as [in] theatres,[49] so that the same *person* is the same as an *actor* is...
> Of *persons artificial* some have their words and actions *owned* by those they represent. And then the person is an *actor* (and he that *owns* his words and actions is the *author*): in which case the *actor* acts by *authority.* For that which in speaking of goods and possessions is called an *owner* (and in Latin *dominus*) ... speaking of actions, is called the *author.* And, as the right of possession is called *dominion,* so the right of doing any action is called *authority.* So that by 'authority' is always understood the right of doing any act, and 'done' by authority [means] 'done by commission or license from him whose right it is.'[50]

There can only be indigenous 'agents' in the contemporary New Zealand and Canadian sense where they are authorised to act and, thus, represent the indigenous constituency. Only when agents have in the first place delegated that authority, may they become, in turn, agents of that authority. If they do not delegate their authority they continue to act for themselves and not for another. In a contemporary Treaty settlement context, questions for

[48] Boston, M, Pallot, J & Walsh, P., *Reshaping the State* (Oxford University Press, Auckland, 1996) at 2-10.
[49] Hobbes has earlier explained that a 'persona' is a disguise or mask, the outward appearance as presented on a stage. A modern person might understand what this means by comparing the idea of an inward self with the idea of an outward person.
[50] Hobbes, T *Leviathan or the matter, forme and power of a commonwealth ecclesiastical and civil* (1651) Chapter 16: 'Of persons, authors, and things personated.' Available in McPherson, C (Pelican, Harmondsworth, 1968).

Māori and First Nations were inevitably those concerning their rights to act for themselves, to be authors of their own actions, and to legitimate representation in the affairs of the nation-state as well as local self-governance.

Agency costs are also a fundamental issue of corporate governance. The price others pay for the benefits of a corporate governance structure is the loss of control. Investors lose control over the use of their capital; managers lose control over their sources of funding; other participants in the corporate structure such as employees, creditors and so forth also lose some measure of control. Indigenous communities lose control over their group's assets to the respective governance entity, whether it is a Band or Tribal Council, a Company, a Private Trust, a Māori Trust Board or a special purpose legislative entity. The governance board has the oversight responsibility. It monitors the extent to which the various corporate participants retain control, the costs and benefits of their attempts to do so, and the resulting balance of power among them.[51]

The separation of ownership and control of a governance organisation gives rise to agency costs, which sometimes occur as a result of incongruence between the goals of owners and their agents. Agency costs may be defined as the cost of monitoring managers, together with the cost of managerial opportunism arising from imperfect monitoring.[52] Kingi, Rose and Parker found that Māori governance organisations generally had higher agency costs than non-Māori owing to insufficient controls by owners over management.[53] Communal owners lack the ability to trade shares and this provides a secure and low cost form of equity capital for management. It also removes two other important management disciplines, the threat of takeover and the market price mechanism as an indication of investors' expectations for future performance. Having a clear and simple objective, such as profit maximisation makes it easier for shareholders to monitor managerial performance. Organisations operating outside the market environment however need to use other measures, such as outcome monitoring. Potiki advocated an interesting framework for monitoring progress that measures members' cultural, social and political capabilities over time. The results would be compared against targets set by whānau and hapū, to avoid the risk of domination by a central elite.[54]

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[51] Monks, R A G & Minow, N *Corporate Governance* (3rd ed)(Maine, USA: Blackwell Publishing, 2004) at 5.

[52] Hansmann, H *The Ownership of Enterprise* (London: The Belknap Press of Harvard University Press, 1996).

[53] Kingi, T Rose, L & Parker, W *Tracking the Financial Performance of Indigenous Business Organisations: the Experience of New Zealand Maori Authorities* (Auckland: Massey University, 1999).

[54] Potiki, T 'A Traditionalist Approach to Iwi Government' in Durie, M (ed) *He Pukenga Korero* (Volume 5, Number 2, Palmerston North: Massey University 2000).

Jensen and Fama emphasised the important role that outside directors can play in monitoring management.[55] Nevertheless, independent directors are probably the exception rather than the rule for most Māori governance organisations, although Te Kauhanganui o Waikato and Te Rūnanga o Ngāi Tahu employed outside directors initially following the signing of their Treaty of Waitangi settlements. However, Pouākani trustees for the Te Putahitanga o Nga Ara Trust – the post-settlement governance entity for the Pouākani settlement - must come from within the community they serve. On the other hand, the board of the commercially thriving Wakatu Incorporation has had at least one independent director for a number of years.

Good governance and effective representivity also requires capable and committed leadership. It involves identifying the right balance between performance (maximising return for shareholders or members) and conformance (operating within company policies and legal obligations).[56] Good communication between leaders and owners, therefore, is vital to establishing and maintaining goal congruence. The OECD underscores the importance of protecting shareholders' property and participation rights, and their right to equitable treatment.[57] Shleifer and Vishny have found that most international approaches to corporate governance rely on giving shareholders some power, either through legal protections or the more commonly applied mechanism of concentrated ownership.[58] The latter can lead to poor outcomes for small shareholders, however, as assessed by La Porta who concluded:

> The principal agency problem in large corporations around the world is that of restricting expropriation of minority shareholders by the controlling shareholders, rather than that of restricting empire building by professional managers unaccountable to shareholders.[59]

Various formal and informal institutions that enforce the fiduciary duties of leaders toward their constituents also mitigate agency costs. Accountability, together with performance measurement and monitoring, provides a mechanism for encouraging ongoing goal alignment. But performance measurement is particularly difficult for indigenous organisations aiming to improve individual well-being in ways that cannot easily be quantified. This situation arises for many public, indigenous entities or community sector

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[55] Jensen, M & Fama, E 'Separation of Ownership & Control' in *Journal of Law and Economics* (Vol. 26, 1983) at 301.
[56] CCH New Zealand Limited *Corporate Governance: A Director's Handbook* (Auckland, 1999).
[57] Organisation of Economic Cooperation and Development, supra n 46.
[58] Shleifer, A & Vishny, R *A Survey of Corporate Governance* (NBER Working Paper 5554, Massachusetts: National Bureau of Economic Research, 1996).
[59] La Porta, R Lopez-de-Silanes, F & Shleifer, A *Corporate Ownership Around the World* (NBER Working Paper 6625, Massachusetts: National Bureau of Economic Research, 1998) at 1.

activities that, in the absence of the market price mechanism, 'lack a behavioural process to aggregate the many individual evaluations of product and cost.'[60] New tools for performance measurement in non-profit enterprises are emerging from contemporary research but the onus is upon organisations to adopt them effectively.

Before the neo-liberal economic and political revolution in New Zealand in the 1980s, there had been as much emphasis on who should by right receive resources from constituted authorities as there had been on who had the prior right to make such redistributions. When Māori had felt that their rights of recipience were frustrated, or that the means of delivery were ineffective, they had indeed tended to argue that the issue was not so much about who should get what but who had the authority to deliver what the people needed; who had authority to represent the people. Accepting that the most important thing was to ameliorate Māori immiseration (to acquire the resources necessary to improve the health, welfare, education, and economic development of the people), they had equally been able and willing to work within a non-Māori institutional framework to get what they needed. Māori did not always think that authority, subjection and property rights were in conflict.

The neo-liberal change in ruling ideas, institutional arrangements and economic policy made it more difficult, however, for Māori to sustain a balance between being a receiver (a patient or subject) and an actor (an agent or authority). The times were against that balance – there would be individual liberty in the market and individual responsibility for one's own life; human relations would be constructed via contract between individual and individual, worker and employer, Government and its 'agents,' grouping and regrouping. Men and women and team enterprises would have to look after themselves in a world dominated by the nation's need to survive in the international marketplace; and any agents (natural or artificial) in this world would be advised to act so as to enhance their power in it.[61] They had to act and not be acted upon; they had to be the author of their own destiny and not dependent on others; they had to become agents and not patients. Hence the directors and leaders of indigenous governance entities are regarded as agents for their indigenous constituents – they represent the interests of the collective who are often referred to as shareholders and/ or beneficiaries.

Shareholders are often referred to as the 'owners' of the corporation, and beneficiaries are often referred to as the 'owners' of a trust. However, the corporation's

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[60] Carver, J *Boards that make a difference: A new design for leadership in Non-profit and public organisations* (San Francisco: Jossey-Bass, 1997) at 6.

[61] Sharp, A 'The case of politics and the state' in Sharp, A, *Leap into the Dark: The Changing Role of the State in New Zealand Since 1984* (Auckland University Press, Auckland, 1994) at 4-7.

and trust's 'legal personality' raises questions about whether they can be 'owned' in any meaningful and effective way. There will always be agency costs in any corporate structure in which someone other than the management owns equity. Moreover, public and private, profit and non-profit, indigenous and non-indigenous companies and other governance entities often have managers with agendas different from their owners'. The challenge of good governance and representivity is to ensure that the resolution of such conflicts is accomplished in an appropriate, open and fair forum and process, and with indigenous leadership (agents or stewards) and entities that are informed, motivated and empowered. That challenge is primarily addressed by effective laws (mainstream and customary) and institutions. But the primary mainstream law governing agency and representivity challenge is the imposition of the highest standard of procedural and substantive performance ever developed under our legal system – the fiduciary standard. Interestingly, this standard is imposed on both shareholders (institutional shareholders only) and directors and, even more interestingly, there have been efforts to erode this standard over the past 20 years.[62]

8.2.4 STEWARDSHIP AND FIDUCIARY OBLIGATIONS OF REPRESENTATIVES

English law, from which New Zealand and Canadian law has developed, has traditionally used equitable concepts of trusteeship and fiduciary obligations to ensure that assets held by one group of people (agents or representatives) on behalf of others (principals) are managed appropriately on behalf of the beneficial or shareholder owners.[63]

While it has been said that the categories of fiduciary relationships are not closed,[64] accepted categories are traditionally seen as those involving trust and confidence.[65]

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[62] Monks, supra n 51 at 98.

[63] Generally, see Underhill & Hayton *Law of Trusts and Trustees* (15th ed.) (Butterworths, London, 1995) at 46; and Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996) at 47. For example, Trusts created either during a settlor's lifetime or by will, contain an irreducible core of obligations owed by trustees to beneficiaries and enforceable by them. This irreducible core is fundamental to the concept of a trust. Listed companies have detailed rules to ensure that the shareholders are appraised, by full disclosure, of what directors have done with their assets. This information also enables shareholders to trade their shares readily on the stock exchange. Shareholders' Councils are a recent innovation in co-operative dairy companies, which allow shareholders' representatives to deal more effectively with management and report to shareholders on what is being done with their assets.

[64] For example, *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 (HCA) at 96 (Mason J) and *Lac Minerals Limited v International Corona Resources Limited* (1989) 61 DLR (4th) 14 at 61 (Sopinka J). See also *Elders Pastoral Limited v Bank of New Zealand* [1989] 2 NZLR 180 (CA).

[65] *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 (HCA) at 96 (Mason J). The following types of relationship have been labelled as fiduciary in nature: trustee and beneficiary; agent and principal; solicitor and client; employer and employee; director and company; members of a partnership, as between themselves. Additionally, a relationship can be totally fiduciary, or fiduciary only in

Although writing in dissent in *Frame v Smith*,[66] Wilson J provided a general articulation of a fiduciary obligation.[67] This was subsequently adopted by the majority of the Supreme Court of Canada:[68]

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses. ... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed tend to possess three general characteristics:

1) the fiduciary has scope for the exercise of some discretion or power.
2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[69]

Although this excerpt is useful in a general sense, the fiduciary relationship between the Crown in Rt. of Canada and the First Nations people has developed into a unique body of law that is difficult to generalise. The Canadian courts have characterised the relationship between 'Aboriginal' people and the Crown as a special fiduciary or trust relationship.[70] This special relationship arises from numerous sources, including the historic, political, legal and socio-economic relationship the Federal Crown has had with First Nations people, the *Royal Proclamation 1763*,[71] Treaties, and legislation.[72]

The Supreme Court of Canada has discussed the fiduciary relationship between the Crown and Aboriginal or First Nations people in a number of decisions. The first decision to deal with the Crown's fiduciary relationship with Aboriginal people in a substantive manner was the 1984 case *R v Guerin.*[73] The Federal Crown committed a breach of trust to the Musqueam band by executing a lease of 162 acres of reserve land in Vancouver on

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part: *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 NZLR 163. For Canada, see *Norberg v Wynrib* [1992] 2 S.C.R 226.

[66] *Frame v Smith* [1987] 2 S.C.R 99.

[67] Ibid, at 136.

[68] *Lac Minerals Limited v International Corona Resources Limited* [1989] 2 S.C.R 574.

[69] *Frame v Smith* [1987] 2 S.C.R 99 at 136.

[70] See generally ibid, and supra *Lac Minerals* at 263; *Canson Enterprises Ltd v Boughton and Co.,* [1991] 3. S.C.R 543.

[71] Indians are referred to in the *Royal Proclamation 1763* and in many of the Treaties as being 'under the protection' of the Crown.

[72] In *Roberts v Canada* [1989] 1 S.C.R 322 at 337, Wilson J for the Supreme Court of Canada stated that the relevant provisions of the *Indian Act* 'codify the pre-existing duties of the Crown toward the Indians.'

[73] *R v Guerin* [1984] 2 S.C.R 335. For commentary, see Hurley, J 'The Crown's Fiduciary Duty and Indian Title: *Guerin v The Queen'* in *McGill Law Journal* (Vol. 30, 1985) at 559.

terms that were not as favourable as the terms originally agreed upon verbally with the Musqueam. Seven of the eight judges held that the Crown has a fiduciary duty respecting Indian lands. Dickason CJ wrote for the majority:

> The nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, established by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.[74]

In *R v Sparrow*[75] Dickason CJ stated:

> The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[76]

The *Sparrow* statement on the fiduciary relationship is significant in that it signifies a burden on the ability of Federal, Provincial and Territorial Governments to exercise their legislative authority. In *R v Van der Peet*[77] the Supreme Court of Canada also held:

> The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implications of the honour of the Crown, treaties, s. 35(1) and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation.[78]

Hence, the Crown's fiduciary relationship with First Nations people has undergone a dramatic change with respect to its meaning and effect. The jurisprudence relating to the Crown's fiduciary relationship with First Nations people has clearly affirmed that the Crown will be held to a high standard in all of its dealings concerning First Nations people and their lands when such dealings trigger the Crown's fiduciary duties. However, the Supreme Court of Canada has imposed limits on the ability of First Nations people to invoke the fiduciary doctrine in a general sense.[79]

This fiduciary relationship jurisprudence is persuasive in terms of the Māori-Crown relationship in New Zealand and has yet to be fully tested. Cooke P discussed this notion

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[74] Ibid, at 376.
[75] *R v Sparrow* [1990] 1 S.C.R 1075 at 1108.
[76] Idem.
[77] *R v Van der Peet* [1996] 2 S.C.R 507 at para 24.
[78] Idem.
[79] See especially *Wewaykum Indian Band v Canada* [2002] 2 S.C.R 245 (S.C.C).

of a fiduciary relationship between the New Zealand Crown and Māori when referring to a challenge to the Maori Fisheries Deed of Settlement in *Te Runanga o Wharekauri Rekohu v Attorney General* [80] when he noted:

> The opinions expressed in this Court in the cases already mentioned as to fiduciary duties and a relationship akin to partnership have now been further strengthened by judgments in the Supreme Court of Canada and the High Court of Australia. In these judgments there have been further affirmations that the continuance after British sovereignty and treaties of unextinguished aboriginal title gives rise to a fiduciary duty and a constructive trust on the part of the Crown: see *R v Sparrow* (1990) 70 DLR (4th) 385, 406-409 per Dickason CJ and La Forest J, delivering the judgment of the Court, a passage including the statement: 'The *sui generis* nature of Indian title, and the historic power and responsibility assumed by the Crown constituted the source of such a fiduciary obligation.' ... clearly, there is now a substantial body of Commonwealth case law pointing to a fiduciary duty. In New Zealand the Treaty of Waitangi is major support for such a duty.[81]

Referring to the Treaty of Waitangi Cooke P discussed the fundamental importance of the fiduciary relationship when he held that:

> Whatever constitutional or fiduciary significance the Treaty may have of its own force, or as a result of past or present statutory recognition, could only remain. That advice must have a significant bearing on constitutional and fiduciary issues. It [the Crown] cannot foreclose them.[82]

Dr Alex Frame recently discussed this notion of the fiduciary duties of the Crown to Mäori. Dr Frame examined whether the Canadian precedent of applying the equitable remedy of breach of fiduciary duty against the Crown could apply to Mäori and he concluded.

> Where either a true Trust or a 'Trust-like' relationship exists between the Crown and Mäori, equity will detect and enforce a fiduciary relationship;
> For a trust-like relationship to be found the court must be shown specific circumstances, albeit coloured by the context of the general Crown-Mäori relationship including the Treaty of Waitangi, and a specific Mäori legal interest which pre-dated the Crown's intervention, over which the Crown has assumed a discretionary control;
> The remedy is unlikely to be available to constrain the Crown in its general administration of social services or the political system;

[80] [1993] 2 NZLR 301. Following the signing of the Deed (but previous to the passage of the settlement legislation), Te Rūnanga o Wharekauri, the iwi of Chatham Islands, brought an action in the High Court. This sought a declaration that the Māori representatives had acted unlawfully in signing the Deed, and also an injunction halting implementation of the settlement. This action failed at first instance, and on appeal. The Court of Appeal held that insofar as the Deed was contractual, its signatories bound only their own iwi. To the extent that the Deed was a statement of legislative intent, the Court considered that the 'established principle of non-interference by the Courts in parliamentary proceedings' meant that it had no jurisdiction to grant the remedies claimed. For these reasons, the Court of Appeal struck out the proceedings as disclosing no reasonable cause of action.

[81] Ibid, at 306, lines 30-42.

[82] Ibid, at 309, lines 4-9.

> Breach of the fiduciary duty will occur where the Crown has failed fully to disclose relevant matters, or has acted in breach of the rules against profiting or self-dealing, or has permitted an exploitative bargain;
> The plaintiff must come to the Court 'with clean hands' and have commenced the proceedings within a reasonable time of either the acts or omissions complained about, or of the time when the Crown, having been made aware by the plaintiff of the complaint, has failed to provide redress.[83]

Dr Frame stated that the equitable remedy of breach of fiduciary duty is likely to be available against the Crown in New Zealand, except, probably, in relation to the foreshore and seabed, and that the circumstances for its application by New Zealand courts are likely to be those outlined by the Supreme Court of Canada in the line of the cases beginning with *Guerin* in 1984.[84]

Still, another important question one is inclined to enquire about is whether the relationship between an indigenous governance entity and its constituent community constitutes a fiduciary relationship. In a Māori context, governance entities that were established to hold and manage the use of Māori land after European settlement of New Zealand were designed through adaptation of these concepts of trusteeship and fiduciary obligation. In recent times the development of land has been undertaken, primarily, by trusts and incorporations. The most recent examples of trusts are to be found in section 438 of the *Maori Affairs Act 1953* and the Ahu Whenua Trust created under Part XII *Te Ture Whenua Maori Act 1993*.[85] The incorporation model is now enshrined in Part XIII of *Te Ture Whenua Maori Act 1993*.[86]

In *Hospital Products Limited v United States Surgical Corporation*, Mason J (as he then was) identifies the critical features of a fiduciary relationship:

> ... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.[87]

Subject to any agreement between the parties to the contrary[88] as a matter of law:[89]

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[83] Frame, A, 'The Fiduciary Duties of the Crown to Mäori: Will the Canadian Remedy Travel?' in *Waikato Law Review* (University of Waikato, 2005) at 59.
[84] Ibid, at 60.
[85] In particular, see *Te Ture Whenua Maori Act 1993* ss 210, 211, 215, 219-245.
[86] In particular, ibid, ss 246-284.
[87] (1984) 156 CLR 41 at 96–97.
[88] Fiduciary obligations may be limited or varied: *Berlei Hestia (NZ) Limited v Fernyhough* [1980] 2 NZLR 150 at 166.
[89] *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648.

> A fiduciary must act in good faith and for proper purposes;
> A fiduciary must not allow his or her own interests to conflict with those of the person on whose behalf powers or discretions are exercised; for example, fiduciaries must account for profits made if they use opportunities for personal benefit presented to them in their capacity as fiduciaries;[90] and
> Where a fiduciary has a personal interest in a matter, with which he or she is dealing on behalf of another, he or she must disclose the material facts to those on whose behalf he or she is acting. Failure can lead to a transaction, however favourable it may be to the beneficiary, being set aside at the instance of the beneficiary.

Where an entity manages as well as holds assets on behalf of another, appropriate standards of care are necessary.[91] How far trustees are under a duty of care, however, may be debatable. Millett LJ, for example, agrees that 'trusts must be performed honestly and in good faith for the benefit of beneficiaries,'[92] but does not accept that trustees are necessarily subject to duties of skill and care, prudence and diligence.

However, a fiduciary obligation may always be turned or enhanced to meet particular needs. For example, in *Berlei Hestia (NZ) Ltd v Fernyhough*,[93] Mahon J, in considering a case involving directors appointed by corporate shareholders, concluded that:

> ... [as] a matter of legal theory as opposed to judicial precedent, it seems not unreasonable for all the corporators to be able to agree on an adjusted form of fiduciary liability limited to circumstances where the rights of third parties vis-à-vis the company will not be prejudiced.[94]

Members of an indigenous constituent settlement group will thus need to determine the circumstances in which their leaders (in terms of governance and management) acting as agents or representatives (both indigenous and non-indigenous) responsible for the stewardship of the community assets should be liable to beneficial owners and how they will be held accountable to the constituency.

8.3 CONTEMPORARY MĀORI REPRESENTIVITY CHALLENGES

Māori and First Nations groups are now being called upon to respond in a representative fashion to all kinds of challenges in many different contexts. Probably the most obvious and well-known context for Māori is that of Treaty settlements and, more specifically, Māori commercial fisheries; and that of comprehensive claims and Band self-government in Canada. Another important yet problematic indigenous representation

[90] For example, *Keech v Sandford* (1726) Sel Cas 1 King 61; 25 ER223.
[91] See generally New Zealand Law Commission *Some Problems in the Law of Trusts* (R79, New Zealand Law Commission, Wellington, April 2002)
[92] *Armitage v Nurse* [1998] CH 241 at 253–254.
[93] [1980] 2 NZLR 150.
[94] Ibid, at 166; see also *Levin v Clark* [1962] NSWR 686 and *Re Broadcasting Station 2GB Pty Ltd* [1964-65] NSWR 1648.

context in New Zealand has to do with the consultation obligations between local governments and tangata whenua (the local Māori group) pursuant to the Part II provisions of the *Resource Management Act 1991* (RMA). Under the RMA, local and regional authorities are required to consult with relevant tangata whenua pursuant to ss. 6, 7, 8 and 33. Many local and regional authorities have appointed Māori Liaison Officers, whose jobs are largely to do with co-ordinating the activities of those who seek a Māori response to planning documents and development proposals. The RMA defines an iwi authority as 'the authority which represents an iwi and which is recognised by that iwi as having authority to do so,' and 'tangata whenua,' in relation to a particular areas, means 'the iwi, or hapu, that holds mana whenua over that area.'

In a wider context, a Māori response is sought in many areas of social policy. Consultation with Māori groups attends decision-making about the delivery of health services, about electoral matters and Māori political representation, about criminal justice, broadcasting, and prisons generally, about coroners' practices and improving education outcomes for Māori – to name but a few.[95]

8.3.1 TAINUI WAKA REPRESENTATION COMPLEXITIES WITHIN THE WAIKATO REGIONAL COUNCIL AREA

An illustration of the complexity of Māori representation challenges is demonstrated in the region of the Waikato Regional Council that was settled by various iwi and hapū who are all descendants of the immigrants of the Tainui waka (ocean vessel sometimes inappropriately translated as canoe) in approximately 1350 A.D.[96] In 1946 the Tainui Maori Trust Board (TMTB) was established to administer compensation moneys for Waikato lands unjustly confiscated in 1864-1865. In 1988, under separate legislation, the Maniapoto and Hauraki Maori Trust Boards were established and all these Trust Boards operated under the *Maori Trust Boards Act 1955*, with additional functions contracted by government to administer the delivery of social services under a policy of 'devolution.' The Ngāti Raukawa Trust Board is an incorporated society established for a similar purpose. There are also links with Ngāti Raukawa ki te Tonga, Ngāti Toarangatira and Ngāti Koata, the southern Tainui branches, who are descended from 19th century

[95] See the discussion in the Waitangi Tribunal, *Te Whānau o Waipareira Report* (GP Publications, Wellington, 1998).
[96] See Walker, R *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 2004); and Jones, P & Biggs, B, *Nga Iwi o Tainui: The Traditional History of the Tainui People Society* (Vol. 65, The Polynesian Society Inc, Wellington, 1956).

migrants to the Manawatu-Horowhenua, Porirua and te Tau Ihu South Island districts.[97] All of these tribes have iwi authorities, and most were registered under the now defunct *Runanga Iwi Act 1990*. There is also within the Tainui waka, a Waikato Maniapoto Maori Council, which sends delegates to the New Zealand Maori Council pursuant to the *Maori Welfare Act 1962*. Moreover, there are branches of the pan-Māori organisations such as the Maori Women's Welfare League and the Maori Warden's Association. Furthermore, there has been representation of Tainui tribes on Maori Congress. Within the Tainui waka tribes, the Kīngitanga, which was closely associated with the Tainui Maori Trust Board and now with the post-Treaty settlement governance entity - Te Kauhanganui o Waikato Incorporated - maintains its own organisation through Nga Marae Toopu (made up of over 60 contributing marae organisations), the regular cycle of annual *poukai* gatherings, and the annual *Koroneihana* (coronation) celebrations at Turangawaewae Marae. In addition, a steadily increasing urban (non-Tainui) Māori population (termed *mātāwaka* or *taurahere*[98]) has sought representation with local councils within the region.

According to the 1991 Census, the Waikato Regional Council area contained a total Māori population of 67,737,[99] of whom some 24,000[100] belonged to tribes of the Tainui waka. In 2001, that total had increased to 81,480,[101] with 30,471 affiliating to the Tainui waka.[102] The Hamilton City Council estimated that 40% of those identifying as Māori in Hamilton city are from hapū with close ties to the Hamilton area, while 60% are originally from other areas around the country. Together, Māori constitute around 20% of the people in Hamilton.[103] However, only part of the Waikato Regional Council's region is within the Tainui waka - to the east and south are the two large tribal confederations of Te Arawa and Ngāti Tūwharetoa, each with its own Maori Trust Board and comprising descendants from the Te Arawa waka. The iwi affiliation of Māori resident in the Waikato Regional Council area is shown in the following table. These numbers compiled from the 2001 census are

[97] For references on Te Rauparaha and his heke (migration) south, see Buick, L *Old Manawatu or the Wild Days of the West* (Buick & Young, Palmerston North, 1903) and Te Rauparaha's biography in Orange, C (ed) *The People of Many Peaks; The Māori Biographies from the Dictionary of New Zealand Biography 1769-1869* (Vol.1 Bridget Williams Books, Wellington, 1994). Online at www.dnzb.natlib.govt.nz (Accessed May 2005).

[98] Mātāwaka has been defined as 'Maori of different tribal affiliations who are living within the area/land of the mana whenua group,' i.e. Māori living outside their own tribal boundaries. See Hamilton City Council *A Vision for Our City: Hamilton's Community Plan 2004-2014* (Hamilton: Hamilton City Council - Te Kaunihera o Kirikiriroa, 7 July 2004) at 116.

[99] Stokes, supra n 23 at 37.

[100] Ibid.

[101] Statistics New Zealand *Iwi* (Vol. 1, 2002) at 47; Table 3: Regional Council by Number of Iwi Stated 2001.

[102] Ibid, at 48.

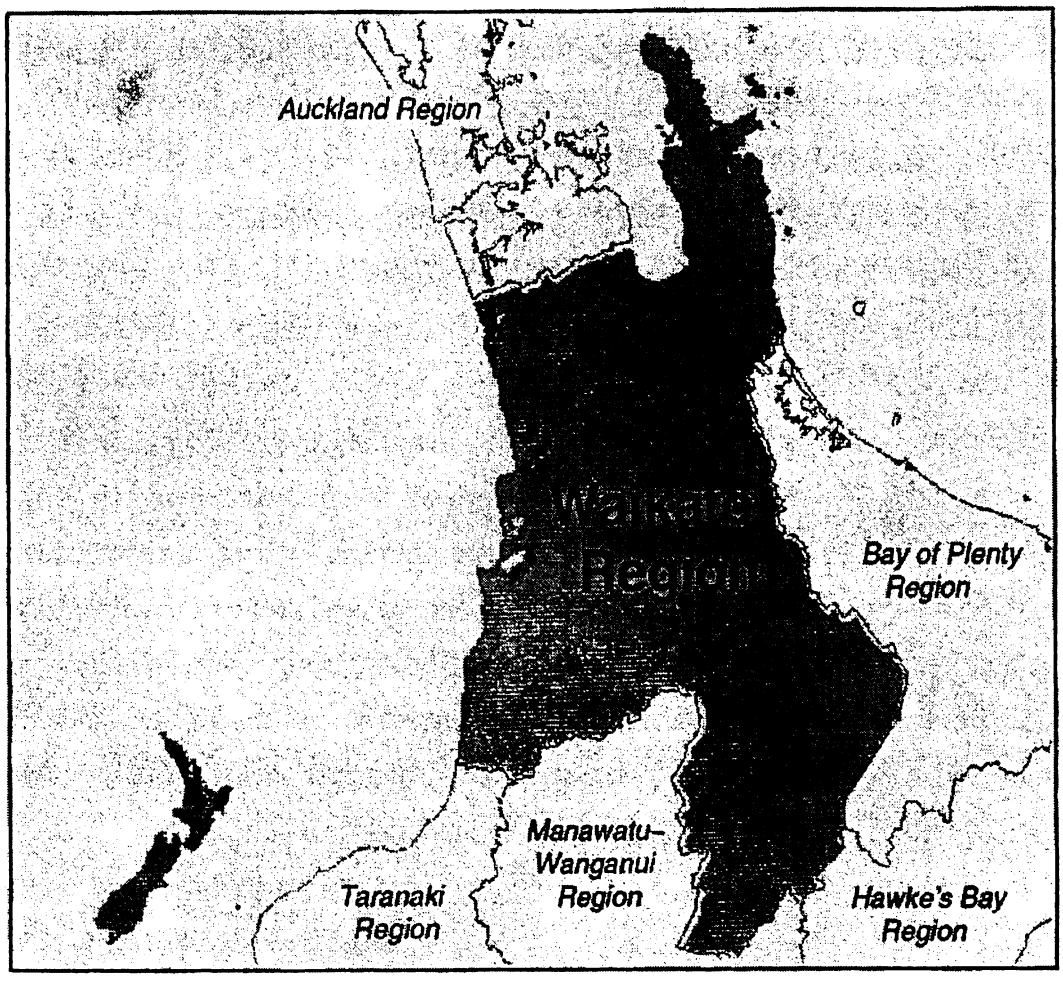
[103] Hamilton City Council, supra n 98 at 44.

indicative but not absolutely accurate, as is the nature of political arithmetic through enumeration in censuses.

Of the total Māori population (81,480[104]) within the region, 1647 people specified a hapū[105] not an iwi, 10,200 people named a waka or iwi confederation instead of an iwi,[106] while others were confused about the question. A total of 14,385 people did not know their iwi affiliation[107] and 5280 stated they had none.[108] Hence, there were difficulties in categorisation where some iwi had similar names, or where people listed the name of a waka such as Tainui, or a confederation such as Te Arawa, which is also a waka and is sometimes referred to as an iwi in its own right. Despite the difficulties of enumeration, it is obvious that the Māori population resident in the Waikato Regional Council area includes representatives of most if not all the 86 iwi identified in the 1991, and 96 iwi identified in the 2001, censuses, and the 58-60 'official' iwi recognised in the *Maori Fisheries Act 2004*.[109] The diversity of iwi names and numbers in various censuses and legislation is confusing and obviously does not reflect the socio-political realities and existential ontology's of contemporary Māori society. The variance in name and number of official iwi clearly complicates identity and representivity issues further and the significance of such policies are part of a phenomenon that has been dubbed 'political arithmetic' by Keyfitz.[110] This theme is elaborated further into the thesis.

[104] Statistics New Zealand, supra n 101at 47.
[105] Ibid, at 51.
[106] Idem.
[107] Idem.
[108] Idem.
[109] *Maori Fisheries Act 2004*, Schedule 3.
[110] See Keyfitz, N, 'Population Theory' in *International Encyclopaedia of Population,* (MacMillan/Free Press, New York, 1982).

MAP OF THE WAIKATO REGIONAL COUNCIL AREA 1998[111]



[111] See Stokes, supra, n at 37.

Table 8. 1

Iwi Affiliation of Māori Resident in the Waikato Regional Council Area, 1991 and 2001[112]

Region	1991	2001
Tai Tokerau (Auckland & Northland)	6,840	14,379
Tainui waka	23,974	30,471
Tauranga Moana	867	2,367
Te Arawa	1,956	3,372
Tuwharetoa	4,851	6,678
Mataatua (Eastern Bay of Plenty)	2,472	6,492
Tai Rawhiti (East Coast North Island)	5,028	11,367
Southern North Island & Northern part of South Island	1,598	2,088
South Island (Ngai Tahu, Ngati Mamoe)	528	2,313
'Don't know' or 'Don't belong'	16,731	14,385
Other or not specified	2,892	5,280

Table 8.1 shows an increase in tribal populations (including Tainui) from 1991 to 2001, within the Waikato Regional Council area, and for which the Council is politically and legally obligated to address and accommodate.

Table 8.2 lists the total populations for tribes who are tangata whenua within the Waikato Regional Council, area alongside the numbers actually resident there. It shows that many Māori do not live within their tribal region. A burning issue for iwi authorities and local and regional authorities in delivering services is how to provide for those residents who are not tangata whenua in the traditional sense. The Waikato Raupatu Lands Trust (which succeeded to the Tainui Maori Trust Board) has contracted with government to administer a number of programmes, not only for Trust beneficiaries but also for all Māori in the district. For example, Māori health services include provision for medical and pharmaceutical requirements at a lower cost than mainstream services, through clinics

[112] All of these statistics are taken from the tables 'Iwi (Total Responses) by Regional Council' in Statistics New Zealand *Iwi* - 1991 and 2001 respectively. The 2001 information is from the Census of Population and Dwellings (Vol. 1, 2002) at 48-51. The author acknowledges, with apologies, that some tribes, such as Taranaki and Whanganui, have been omitted from this table.

established in Huntly, Ngaruawahia and Hamilton under the Trust policy of Māori control of health programmes for Māori. While it may be too soon to assess the longer term effectiveness of this form of delivery of health services, in the short term local people feel they are having a more effective input than they did with mainstream services.[113]

In addition, Te Rūnanga o Kirikiriroa (TROK),[114] an urban Māori organisation, has been established, inter alia, to represent and assist urban Māori (mātāwaka[115]) to deal with social, economic, cultural and educational issues within the wider Hamilton area - principally Article III Treaty of Waitangi issues.[116] TROK provides the Hamilton City Council with a number of support services and access to urban Māori perspectives on a wide range of social issues. The City Council and TROK are working together to provide information to the community on election processes, and to provide support for a range of community support and housing services.[117] Both groups meet together regularly on the joint venture committee to discuss Māori contribution to decision-making, to facilitate Council consultation with Māori, and to support Māori social services and organisations.[118] The Maori Project Fund is administered by TROK on behalf of the Council, providing funding for a range of projects including capacity building for Māori community support groups in the city of Hamilton.[119]

Furthermore, some urban iwi groups have been forming taurahere or mātāwaka organisations in the Hamilton area, as traditional 'iwi' satellites, as it were, within an urban diaspora setting. Examples in the Hamilton area include (but not exclusively) Rongowhakaata, Ngāti Porou, Ngā Puhi, Ngäti Toarangatira, Ngāi Tahu and Ngāti Kahungunu ki Kirikiriroa.[120]

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[113] Stokes, supra n 23 at 38.
[114] Hamilton City Council, supra n 98 at 43.
[115] The Hamilton City Council stated that under a broad application of mātāwaka, Te Rūnanga o Kirikiriroa also represents Pacific Island peoples in Kirikiriroa/Hamilton. Ibid, at 116.
[116] Ibid, at 44, and personal communication with Maori representatives at Environment Waikato, May 2005. Nga Mana Toopu o Kirikiriroa is the tangata whenua representative entity for Article III Treaty of Waitangi consultation on issues that require a mana whenua perspective.
[117] Hamilton City Council, supra n 98 at 44.
[118] Idem.
[119] Idem.
[120] The Kahungunu group in Hamilton is referred to as Te Parirau o te Ika Taurahere. See Ngāti Kahungunu Iwi Incorporated *Hoea Ra: Iwi Newsletter* (Ngāti Kahungunu Iwi Incorporated, Hastings, October 2003) at 4-5. Many of these taurahere groups and other Māori iwi groups are in the process of being firmly established in Hamilton.

Table 8.2 Population of Tangata Whenua within the Waikato Regional Council Area 1991 and 2001

	Total Population		Population Resident in Waikato Regional Council Area	
Iwi	**1991**	**2001**	**1991**	**2001**
Te Arawa	22,208	28,251	1,956	3,372
Tuwharetoa	16,899	29,301	4,851	6,678
Hauraki	5,001	10,323	1,978	3,888
Ngäti Haua	5,265	3,840	2,226	1,944
Waikato	14,145	35,781	5,328	12,438
Ngäti Raukawa	13,128	5,175	2,859	1,983
Ngäti Maniapoto	15,531	27,168	6,516	9,615
Tainui	10,386	30,471	5,067	3,621

Table 8.2 shows the steady increase in the Tainui waka tribal populations within the Waikato Regional Council area with the exception, interestingly, of Ngāti Hauā and Ngāti Raukawa. More significantly, this table enumerates specific Tainui tribal population groups (tangata whenua) that the Council is legally obligated to, inter alia, consult with pursuant to the RMA and other legislation. The Council is thus obligated to consult with legal entities that purport to represent each of these tangata whenua tribal groups.

In the Waikato Regional Council area, numerous governance entities and organisations mushroomed into existence prior to and following the, now defunct, *Runanga Iwi Act 1990* and have been established to represent the interests of various Tainui whānau, hapū, iwi, taurahere and aggregate groups. Environment Waikato has recently stated that one of the outcomes it is seeking is the recognition of tangata whenua values through work programmes and plans, in addition to the Part II obligations of the RMA.[121] As a specific example, Environment Waikato consulted with Ngāti Maniapoto representatives as part of the consent application process over the management of the upper Waipa River. The Asset Management team of Environment Waikato invited output from two tribal subcommittees responsible for consent issues in the works area – the Nehenehenui Regional Management Committee and Rereahu Management Committee.[122] Table 8.3 lists some of the tangata whenua representative organisations, a list compiled by

[121] Environment Waikato *Annual Report 2003-2004* (Hamilton: Environment Waikato Regional Council, 2004) at 93.
[122] Ibid, at 55.

the Waikato Regional Council. Significantly, this table highlights, inter alia, the complexities of contemporary Māori society and the fluid nature of 'tangata whenua' (local Indigenous People) identity and representation. Although the table is specific to the Waikato Regional Council area, the complexities apply generally to contemporary Māori society across the board but in varying degrees.

Table 8.3 Tainui Waka 'Tangata Whenua' Governance Entities within the Waikato Regional Council Area 2005[123]

Iwi Tribal Area	Māori Representative Organisation
1) Hauraki:	Hauraki Maori Trust Board
	Marutuahu Whānau o Hauraki
	Moehau Ngā Tangata Whenua Trust
	Ngā Uri o Horowhenua
	Ngāi Tai
	Ngāti Hei Trust
	Ngāti Huarere ki Whangapoua Trust
	Ngāti Maru Iwi Authority
	Ngāti Paoa Whānau Trust Board
	Ngāti Porou ki Hauraki (Harataunga)
	Ngāti Pukenga ki Manaia Society Inc. Management Committee
	Ngāti Rahiri Tumutumu
	Ngāti Rongo Iwi Inc.
	Ngāti Tara Tokanui Tawhaki Management
	Ngāti Whānaunga Inc.
	Patukirikiri Management
	Te Runanga o Ngāti Puu
	Te Runanga a Iwi o Ngāti Tamatera
	Te Runanga Nui o Ngāti Paoa
	Te Kupenga o Ngāti Hako
2) Waikato:	Awaroa Environment (Ngāti Te Ata)
	Huakina Development Trust
	Kawhia Moana Trust
	Ngā Mana Toopu o Kirikiriroa
	Ngā Muka Development Trust
	Ngāti Naho Co-operative Society
	Ngā Uri o Mahanga
	Ngāti Karewa Ngāti Tahinga Trust
	Tainuiawhiro Ngunguru te Po, Ngunguru te Ao
	Te Kotuku Whenua Consultants
	Te Runanga o Ngāti Wehi
	Te Runanganui o Ngāti Hikairo
	Te Runanga o Kirikiriroa
	Te Tai Hauauru Trust
	Turangawaewae Trust Board
	Waahi Whanui Trust
	Waikato Raupatu Lands Trust
3) Maniapoto:	Hauauru ki Uta Regional Management Committee
	Maniapoto Maori Trust Board
	Mokau ki Runga Regional Management Committee
	Nehenehenui Regional Management Committee
	Ngā Iwi Toopu o Waipa – Waipa District Council
	Ngāti Kinohaku, Ngāti Peehi & Ngāti Te Kanawa hapu
	Puniu Iwi Consulting Group
	Rereahu Regional Management Committee
	Te Mauri o Maniapoto
	Te Tokanganui-A-Noho Regional Management Committee
	Tuhua Hikurangi Regional Management Committee
4) South Waikato:	Ngāi Kea Ngāti Tuara
	Ngāti Raukawa Kaumatua Kaunihera (Kaumatua Council)
	Ngāti Whaita Charitable Trust
	Raukawa Trust Board
	Te Komiti Maori o Matamata Piako

[123] This information is taken from the Environment Waikato Tangata Whenua Directory, Hamilton, 2005.

The above table highlights the prolific number of representative governance entities just within the Waikato Region, which is obviously problematic, to say the least, for councils and other government departments and institutions searching for a Treaty partner to work with. Given the difficulties in determining the local iwi and hapū authority representing tangata whenua, it is not surprising that some local authorities have applied to the Maori Land Court under s. 30 *Te Ture Whenua Maori Act 1993* for a determination of 'the most appropriate representatives' of any Māori group who may be consulted. In an early decision on an application by the Tararua District Council in *Re Tararua District Council*[124] the Maori Land Court set out some principles to be considered in determining appropriate representatives pursuant to s. 30:

- that there was variation in relevant circumstances created by different tribal histories, especially since Pākehā colonisation;
- that representation is about obligations, not just an assertion of rights;
- that tangata whenua status was not necessarily bound by nineteenth century determinations of the Native Land Court;
- that the Court should look to local marae in matters of customary authority because this is probably the single most enduring institution in Māori culture, including the development of urban marae that meet the needs of the large majority of urbanised Māori; and
- that customary authority must be sanctioned by a legitimate base.[125]

The Court recognised the dynamic nature of Māori society, past and present, and acknowledged that there was scope for new hapū to emerge, and that tangata whenua status should not be locked into a definition based on the Native Land Court perception of the situation as at 1840. The Court additionally acknowledged that many hapū have been assimilated or integrated with other hapū, their separate entity submerged by Crown dealings or Native Land Court determinations of title. While some hapū may seek recognition of their former status, the Court would not accept such re-emergence, unless a process of customary consensus including whānaungatanga - recognition of an ancestral kinship link - sanctioned this. The Maori Land Court, adjourning this hearing, delivered a message to the two Māori groups claiming primacy in the role of representing tangata whenua (who shared common ancestry and rights of occupation in the district), that they should embark on discussions toward agreement on a single group of people to represent tangata whenua when consultation is required. The Court also observed that Māori legal bodies corporate, created in response to the government's iwi devolution policy and

[124] *Re Rangitane o Tamaki Nui A Rua Inc* in *Takitimu ACMB* (Vol. 1, 1996, MAC).
[125] Ibid.

transfer of funding to iwi, do not necessarily have customary authority. Rather, such authority is rooted in institutions that continue to exist, such as marae.[126]

There is likely to be more debate and litigation over the customary, legal or statutory definition and representation of iwi, hapū and perhaps even whānau, in addition to the representation of urban Māori within metropolitan areas. Furthermore, once the legitimacy of a group has been established, the next hurdle is clarifying which governance entity or entities represent the group's collective interests, as well as those same governance entities holding onto and re-securing the group's mandate, legitimacy and, therefore, support.

The Hamilton City Council entered into a Service Agreement with Nga Mana Toopu o Kirikiriroa (NMTOK) that recognises NMTOK as the 'official' representative entity for tangata whenua. NMTOK provides input and knowledge of local Māori with mana whenua,[127] and advises the Council, as appropriate, of input on wider Māori interests.[128] NMTOK claims that it is the Management Committee established by the Kaumātua of Kirikiriroa and it claims to represent all of the marae of Kirikiriroa in regard to resource management issues.[129] In addition, both the Hamilton City Council and NMTOK recognise the Waikato Raupatu Lands Trust (which succeeded the Tainui Maori Trust Board) as the 'Iwi Authority' of the people of Waikato and that it shall not be bound by any actions or activities resulting from the 1998 Service Agreement[130] which could potentially complicate things more.

The Hamilton City Council noted that, in terms of RMA consultation with governance organisations representing tangata whenua in the Waikato, it will:

- ensure where possible that sufficient information is provided as requested by NMTOK;
- where appropriate encourage applicants to consult with NMTOK by directing them to approach NMTOK; and
- utilise the consultation provisions of the RMA in a positive and proactive manner.[131]

The RMA includes criteria for assessing the effects of resource consent applications on iwi such as:

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[126] Stokes, supra n 23 at 40.

[127] The Hamilton City Council defined mana whenua as 'Maori who are tied to the area/land by whakapapa (genealogy), whose ancestors have lived and died there. As a result they are kaitiaki (guardians) of that area of land.' For instance, mana whenua in Kirikiriroa and the outlying districts include several hapū (subtribes) of Waikato/Tainui, i.e., Ngāti Wairere, Ngāti Mahanga, Ngāti Hauā, Ngāti Koroki, Ngāti Tamainupo, Ngāti Te Wehi. See Hamilton City Council supra n 96 at 116.

[128] Hamilton City Council *Consultation Guide Resource Management Act 1991* (Hamilton: Hamilton City Council - Te Kaunihera o Kirikiriroa, 2002) at 3-4

[129] Ibid, at 4.

[130] Ibid.

[131] Ibid, at 3.

- the relationship of Māori, their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga;[132]
- to have particular regard to kaitiakitanga – the exercise of guardianship over natural resources;[133] and
- to take account of the principles of the Treaty of Waitangi.[134]

These types of issues were reviewed in relation to the RMA in the 1998 report of the Parliamentary Commissioner for the Environment *Kaitiakitanga and Local Government.*[135] There is scope for the development of a policy to establish a legal definition of an 'iwi' or tribe, with provision for urban residents, on the basis of principles agreed among the tribes, without becoming bogged down in the niceties of boundary definition. Perhaps an indicator of tangata whenua legitimacy within an area is the presence and effective operation of marae, both in customary ancestral form and modern urban, pan-tribal derivations, given that marae are enduring Māori institutions.[136]

Many will and have argued cogently that the hapū or perhaps even the whānau are the traditional primary social units, and that it was hapū, not iwi, referred to in the *Treaty of Waitangi* and, hence, true and legitimate representation should be at the hapū level. This challenge raises the issue of what form the 'traditional' units for Māori social organisation took – was it the whānau, hapū, other sub-groups, iwi or aggregate groups? An answer is that Māori social and political structures and organisation were fluid and flexible, and negotiable as circumstances required.[137] Groups of hapū did join into federations as the perceived need arose. It can be argued that confederations such as the Kīngitanga and Kotahitanga movements arose, inter alia, out of the particular situation of 19th century colonisation and resistance to loss of land. The traditional associations and representative organisations required no legal definition. What was appropriate was not codified but negotiated by consensus, according to the circumstances. There are also modern arguments about economies of scale in a tribal federation of hapū, with different and complementary jurisdictions at hapū and iwi level. Some federations are working well, while some hapū operate as autonomous iwi. Should all be forced into a codified structure? More importantly, Stokes opined that social policy might lie in reinforcing the role of the marae community taking care of whānau, which includes both local residents and urban migrants.[138] However, as highlighted earlier, the Tainui waka tangata whenua groups and

[132] Section 6, *Resource Management Act 1991*(RMA).
[133] Section 7, RMA.
[134] Section 8, RMA.
[135]Parliamentary Commissioner for the Environment *Kaitiakitanga and Local Government.*(Wellington).
[136] Stokes, supra n 23 at 40.
[137] Ibid, at 41.
[138] Idem.

respective representative governance organisations within the Waikato Regional Council boundary highlight the complexities of contemporary Māori representation. This example is typical and applicable in most, if not all, regional council areas of New Zealand.

8.4 INDIGENOUS REPRESENTATION AND CONTEMPORARY TREATY SETTLEMENTS

The situation of indigenous representation and legitimacy is exacerbated by imminent Treaty claim settlements and post-Treaty settlement self-governance in both Canada and New Zealand. Proof of a representational mandate is essential for tribes and bands wanting to receive governance authority and contemporary Treaty settlement assets from their respective governments and other institutions, such as Te Puni Kōkiri (TPK), the Office of Treaty Settlements (OTS), Te Ohu Kaimoana (TOKM) and the Crown Forestry Rental Trust (CFRT) in New Zealand and the Department of Indian Affairs and Northern Development (DIAND) and Indian and Northern Affairs (INAC) in Canada. Which governance organisations best represent Māori and First Nations politically and at what levels? Which organisations ought to receive assets resulting from Treaty of Waitangi grievance claims in New Zealand and comprehensive settlements and self-government in Canada? Are iwi and hapū conceptual entities at best? Are Māori trust boards and incorporations and First Nations Bands and Tribal Councils outdated and irrelevant? Where do urban and pan-tribal governance organisations sit? All of these questions collectively indicate immense representivity and legitimacy challenges facing Māori and First Nations' internal self-determination, self-governance and political development in the 21st century.

Specific representation challenges in a contemporary indigenous Treaty settlement context in both Canada and New Zealand concern at least four distinct points of the claims processes:

- the right to prosecute a claim pre-settlement;
- the right to represent a claimant group in negotiations for settlement;
- the right to administer assets transferred as part of settlement agreements post-settlement; and
- the right to represent the indigenous community in a mandated governance entity for post-settlement development, self-governance and self-determination.

Questions of representation, legitimacy and mandate arise in the pre-settlement process and the same questions will arise in the post-settlement period in both nation-states. Such problems are likely to continue to arise in the future.

When a Deed of Settlement in New Zealand and an Agreement in Principle in Canada are executed the Crown in each country determines the basis upon which both the claims and overlapping claims are to be settled. By this time, representation issues relating to the governance and allocation of settlement assets should have been well and truly solved. This is, unfortunately, not the case in either nation-state. In general terms, it is important that the obligations of the parties are clear and the rules applied be sufficiently stable to allow those who are participating in the process to be assisted in reaching and enforcing arrangements made among them. Moreover, in dealing with post-Treaty settlement governance, it is important that the objectives of the rule of law are furthered and that the legal systems of both nation-states can respond to an accepted set of both indigenous and non-indigenous rules, values, laws, institutions and principles.

Chief Judge (as he was then) Eddie Durie opined that Māori representation (which is germane for First Nations) has at least three specific and important aspects that will be explored in detail:

- customary representation – which hapū or iwi have customary interests in any particular area;
- level of representation – what matters should be settled at a hapū, iwi or national level?; and
- modern institutional representation – what bodies or associations should represent any Māori grouping?[139]

[139] Durie, E, 'The Process of Settling Indigenous Claims' (Indigenous Peoples: Rights, Lands, Resources, Autonomy International Symposium and Trade Show, Vancouver Trade & Convention Centre, British Columbia, Canada, 20 – 22 March, 1996) at 6.

8.4.1 CUSTOMARY REPRESENTATION

The first question to ask regarding contemporary indigenous representation, Treaty settlements and customary ownership of any resource is who owns it or who owned, controlled, occupied or utilised the resource traditionally? Who had the customary rights? Māori and First Nations recognised a range of interests in resources that are usually based on traditions passed on by word of mouth. Professor Alan Ward discussed the notion of customary rights in the Waitangi Tribunal when he stated the importance of:

> ... which Māori groups held the customary rights to land at the time of Crown acquisition, which therefore were injured by the Crown's actions, and in what degree, what relationship those groups have to modern Māori social organisation and who has the right to represent them.[140]

Indeed, a specific example was customary fisheries, when the Waitangi Tribunal enunciated in its 1992 Fisheries Settlement Report that 'an eel weir in a river might belong to a single family while many hapū could have interests in common or severalty in a sea-fishing ground. For Māori, there was little distinction between land and fisheries in that both tended to be held not by individuals but the group.'[141] But the next question is, which group? - the whānau, hapū, sub-hapū, the larger iwi, or perhaps even a pan-Māori representative organisation in a Māori context; and the band, tribe, clan, village group or even a pan-First Nations representative organisation in a First Nations context? The tribal ownership of fisheries was made clear in the Waitangi Tribunal's *Muriwhenua Report*[142] but the Muriwhenua Tribunal carefully refrained from commenting whether 'tribe' meant 'hapu' or 'iwi.' It does appear, however, that the main Māori group in a Treaty of Waitangi context was the hapū. The Waitangi Tribunal concluded that local fisheries were mainly associated with hapū, while smaller units and individuals on the one side and the larger iwi on the other, had interests too.[143] The Treaty of Waitangi recognises both collective and individual possession, and as to the collective interest refers to 'hapu,' the word 'tribe' in the English text being rendered as 'hapu' in the Māori.

In the context of the above Tainui waka example, customary representation issues resonate around challenges of traditional tangata whenua status, traditional boundaries and traditional resource rights but also on the constitutional place of the Kīngitanga in

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[140] Ward, A 'Historical claims under the Treaty of Waitangi' in *Journal of Pacific History* (Vol. 28, 1993) at 181.
[141] Waitangi Tribunal, *Fisheries Settlement Report,* (GP Publications, Wellington, 1992) at 12.
[142] Waitangi Tribunal, *Muriwhenua Fishing Report*, (Department of Justice, Wellington, 1988); J C Upton for Ngāi Tahu pointed out in referring to para 11.6.
[143] Waitangi Tribunal, supra n 141 at 12.

contemporary Tainui governance entities such as the Te Kauhanganui o Waikato Inc., the legitimacy of traditional hapū recognition and representation, and hapū reclamation of and stewardship over customary lands and resources.

8.4.2 LEVEL OF REPRESENTATION

There can be no one rule for all cases when deciding the amorphous area of indigenous group identity and representivity. Some matters are local issues and should be managed locally, while others should be handled regionally, nationally and, perhaps, even internationally. A specific claim to a particular piece of land or other natural resource may fall in that category. The Waitangi Tribunal decided that the fisheries settlement for political efficacy (among other reasons) be dealt with at no less than an iwi level. The Tribunal noted that property rights are important but there were many with traditional customary interests in fishing and many groups could legitimately claim interests along with smaller whānau and even individuals. The consent of all with an interest would be impracticable, however, hence the political reality was/is that in any indigenous society, the protection, enhancement or limitation of property rights may need to be settled for all through appropriate and wider representative institutions. In the above Tainui waka example, the place of and relationships between individual whānau, hapū, iwi and the Tainui waka confederation as well as the place of the Kīngitanga within these groups, needs to be decided on at each level.

8.4.3 INSTITUTIONAL REPRESENTATION

A plethora of Māori governance entities emerged in anticipation of the devolution of social services to iwi pursuant to the now defunct *Runanga Iwi Act 1990*, while other governance entities were already established pursuant to the *Maori Social and Economic Advancement Act 1945* and the *Maori Trust Boards Act 1955*. Consequently, several institutional governance bodies may be seen to represent whānau, hapū, iwi, confederations of tribes and pan-Māori groups, including:

- Māori trusts and incorporations under the *Te Ture Whenua Maori Act 1993*;
- trust boards;
- incorporated societies;
- private and charitable trusts;
- private statutory bodies;
- Māori councils;
- federated Māori authorities, and
- rūnanga.

Hence, there is diversity in name, number, structure and use of governance entities and institutions that may represent whānau, hapū, iwi and other Māori groups in different places and contexts. For example, there appeared to exist, for Tainui and Ngāi Tahu, settled governance arrangements that combined marae or hapū based representation (Nga Marae Toopu and Rūnanganui-a-Tahu) with a trust board (Tainui and Ngai Tahu Maori Trust Boards) under some uniting umbrella (Kīngitanga and Papatipu Rūnanga Iwi Authority) while the respective contemporary Treaty settlement of both groups established governance institutions that were considered to be more representative of and accountable to the constituency of both groups (Te Kauhanganui o Waikato Inc. and Te Rūnanga o Ngāi Tahu). But as noted above, the Tainui waka area has over 50 governance entities to represent the various whānau, hapū, iwi and waka interests. On the other hand there appears to be three to five (perhaps more) separate bodies with standing in Te Arawa - a trust board, a rūnanga, a fisheries trust, a Te Arawa executive[144] and the local branch of the Federation of Mäori Authorities (FOMA). In that district one may need to consult with each of these. Separate bodies are also important in Kahungunu, but the main ones there appear to be, at present, a district Māori council, six Taiwhenua, and an incorporated society rūnanga. Ngāti Tūwharetoa however, is represented in a single trust board but there have even been some attempts to establish other entities that are representative of Tūwharetoa hapū.[145] The extent to which any of these governance bodies may represent the respective whānau, hapū and iwi, or replace the traditional governance authorities, is obviously problematical. In some areas, the ratification of the kahui ariki, kawai rangatira or the ropu kaumātua, remains a pre-requisite, irrespective of the existence of a board or other governance authority, while in other places, kaumātua councils have been integrated into the governance structure. For others however (especially many younger and urbanised Māori constituents) the expectation remains that whoever presumes to represent the whānau, hapū or iwi must have a mandate from an elected or representative body.

Indigenous Māori and First Nations identity and representivity with land and natural resources, and within tribal regions was/is generally tied inextricably with genealogy and traditional customary uses and occupation. Customary tenure of land and resources was a complex, interlocking and overlapping system of usufructuary rights, fluid and flexible, and capable of regeneration, as conditions and circumstances seemed appropriate. Such rights operated at different levels and carried with them reciprocal obligations. Some matters would be dealt with at the level of the clan, a social group

[144] Ngā Kaihautu o Te Arawa Executive was recognised by the Crown on 1 April 2004.
[145] For example, the Ngāti Tuwharetoa Hapū a Iwi Claims Forum that the Crown recognised with a Deed of Mandate on 19 March 2004.

identified by descent from a common ancestor several generations earlier. A large kin group might subdivide and regroup with the passage of time, and with changing allegiances. In addition, a range of contemporary indigenous political institutions has been created by statute for specific governance and management purposes. The author will now elaborate more extensively on each these areas of contemporary indigenous representation (customary, level and institutional representation) to investigate the complexities and highlight the difficulties of realising and actualising the thesis of contemporary indigenous internal self-determination through Treaty settlements that provide for a degree of self-governance as 'nations within.'

9 CUSTOMARY REPRESENTATION, TRADITION AND 'LOST' TRIBES

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E kore e ngaro ngā mana o ōna tūpuna; he tukunga iho ki a ia. – The mana of a person's ancestors is not lost; they are gifts passed down to him/her.[1]

Indigenous peoples have the right to practice and revitalise their cultural traditions and customs.
-Article 12, Draft Declaration on the Rights of Indigenous Peoples

9.1 INTRODUCTION

This chapter will analyse different aspects of the ideological dimensions of customary representation, customary traditions, traditionalism, detraditionalisation, re-traditionalisation, identity and representivity politics in New Zealand and Canada. The analysis is applied to the 'tribes' of Waikato-Tainui, Ngāi Tahu's Papatipu Rūnanga and other Mäori tribal groups in New Zealand. Traditional customary representation challenges within the Nisga'a, James Bay Cree and other First Nations in Canada is additionally analysed. The 33 'traditional' hapū of the *Waikato Raupatu Claims Settlement Act 1995,* and other cross claim challenges are also discussed as further case studies. It is hoped that this analysis will provide a general indication of the way in which indigenous customary representation; customary rights and cultural traditions may be deployed (rightly or wrongly) in some political contexts.

One crucial challenge raised by philosophers of justice, politicians and others in situations of historical injustices committed against Indigenous Peoples is *who* ought to pay if at all compensation or make restitution, and to *whom*? Given that decades or even centuries may have lapsed between the time of the injustice and the present in which reparation in Treaty settlements is being made, in most cases the individuals involved in the historical situation of injustice are no longer alive. Hence what rights do present-day descendants of people have to a claim of recompense for what was done to their ancestors, and what obligations and duties do the current generation owe to make good those wrongs? [2] Or as Don Brash preached in his 2004 Orewa speech:

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[1] Cited in Metge, J, *New Growth from Old: The Whānau in the New World* (Victoria University Press, Wellington, 1995) at 228.

[2] See for example, Sher, G 'Ancient Wrongs and Modern Rights; in *Philosophy and Public Affairs* (Vol. 10 (1), 1981); Morris, C.W 'Existential Limits to the Rectification of Past Wrongs' in *American Philosophical Quarterly* (Vol. 21 (2), 1984); Waldron, J 'Historic Injustice: Its Remembrance and Supercession' in Oddie, G & Perrett, R (Eds.) *Justice Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) at 139; Sher, G 'Compensation and Transworld Personal Identity' in *The Monist* (Vol. 62, 1997); Wheeler, S.C 'Reparations Reconsidered' in *American Philosophical Quarterly* (Vol. 34 (4), 1997).

> [Why should] people who were not around in the 19th century pay compensation to the part-descendants of those who were. ... None of us were around at the time of the New Zealand wars. None of us had anything to do with the confiscations. There is a limit to how much any generation can apologise for the sins of its own grandparents.[3]

Rightly or wrongly, the Treaty settlement context in both New Zealand and Canada acknowledges that past injustices may persist over time and have ongoing effects. Section 2 of the *Treaty of Waitangi Act 1975* states that any Māori who claims to be prejudicially affected by breaches of the Treaty, including breaches going back to the signing of the Treaty, can make a claim to the Waitangi Tribunal. In Canada, existing aboriginal rights[4] were recognised and affirmed in s. 35(1) of the *Constitution Act 1982* which states, inter alia, that the legal nature of First Nations claims to possess, occupy and use their traditional territories were recognised by King George III in the *Royal Proclamation 1763*.

The ongoing effects of historical injustice and persisting injustices do seem to affect communities over time.[5] Present-day communities may well suffer from the consequences of historic injustices such as general Māori and First Nations statistics of immiseration and systemic disempowerment, which can give rise to a moral right to redress persisting over time, despite the death of individuals directly involved in the past injustices. Moreover, the only entities capable of deserving reparations for historic wrongs are communities. Wheeler considered the nature of 'communities' and concluded that they are social constructs that can be 'intentional artefacts.'[6] Wheeler added however that when communities are the recipients of compensation for past injustices, it has two unjust consequences. First, given that communities, and their members are self-identifying, groups can constitute identities in order to create moral obligations on others such as the obligation to restore past wrongs, or alternatively, to avoid moral obligations. Furthermore, individuals can opt in or out of communities according to whether or not it will benefit them.

Second, Wheeler argues that further wrongs can reduce moral debt for example by the suppression of the identity or consciousness of a community that would otherwise be entitled to reparations for past wrongs. Wheeler thus concludes that there is no justification for the widespread intuition that the descendants of the perpetrators of the injustice should

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[3] Brash, D, 'Nationhood' (Unpublished National Party Speech, Orewa Rotary Club, Auckland, 27 January 2004) at 2. See www.scoop.co.nz/mason/stories/PA0401/S00220.htm (16 August 2004).

[4] See the very informative analysis of aboriginal rights by Henderson, J.Y, 'The Doctrine of Aboriginal Rights in Western Legal Tradition' in Boldt, M & Long, J.A, (eds) *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) at 185.

[5] See Lyons, D, 'The New Indian Claims and Original Rights to Land' in *Social Theory and Practice* (Vol. 4, No. 3, 1977).

[6] Wheeler, S.C 'Reparations Reconsidered' in *American Philosophical Quarterly* (Vol. 34, No. 4, 1997) at 303.

make reparation to the descendants of the victims of those injustices.[7] Wheeler does note that there are good *reasons* but not *obligations* for why this should in fact occur.[8] With respect, the authors submits, inter alia, that those members of groups who benefit from past injustices are vicariously liable and have a legitimate moral obligation to pay compensation to the original victim's descendants. Benefiting from historic injustices in certain ways makes one liable.[9] Accordingly, what is important in terms of indigenous representation is that a 'community' or a 'related group of persons'[10] continues to exist. In an indigenous settlement context, a contemporary community must exist that has inherited the customary rights and therefore representation of the group who were subjected to the historic injustice.

In New Zealand, the parties to the *Treaty of Waitangi* were Queen Victoria and the rangatira (chiefs) of hapū comprising the Confederation of United Tribes of New Zealand together with independent rangatira of hapū not belonging to the Confederation. In 1852, responsible self-government was passed on the settlers pursuant to the *New Zealand Constitution Act 1852* while in 1863 the conventions of responsible government in Māori matters were transferred from the United Kingdom to New Zealand.[11] Hence the enduring notion of 'the Crown' can clearly be established and the present entity responsible for representing Queen Victoria and for providing redress for breaches of the Treaty is the Crown in Right of New Zealand, that is, the government of the day.

In Canada, the parties to the *Royal Proclamation 1763* were the King George III and the 'several Nations or Tribes' with whom the British were connected and who were living or who would live under their protection.[12] The traditional First Nations are partners to the Proclamation who have suffered from British colonialism and exploitation. The *British North America Act 1867*- an Act of the British Parliament granting near independence to Canada – gave the Federal government jurisdiction over 'Indians and Lands reserved for Indians' pursuant to s. 91(24). For the James Bay Cree and Northern Quebec Inuit, the Inuvialuit and Nunavut Inuit, Yukon First Nations, Nisga'a and other First Nations of British Columbia and other parts of mostly Northern Canada, their

[7] This issue is complicated in New Zealand (e.g. Waikato, Ngāi Tahu, Pouākani, Turangitukua, Whakatane and other Treaty settlement areas) by the fact that many people are descendants of both victims and perpetrators, while others do not descend from either group.

[8] Ibid at 303-306.

[9] Nagel, E, *Equality and Preferential Treatment* (Princeton University Press, 1977) at 13.

[10] Sher, G 'Ancient Wrongs and Modern Rights' in *Philosophy and Public Affairs* (Vol. 10 (1), 1981) at 8.

[11] See Brookfield for analysis of this process in Brookfield, F.M *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999).

[12] To view the *Royal Proclamation 1763* section that deals with First Nations, see Cumming, P & Mickenberg, N, *Native Rights in Canada* (2nd ed.)(Indian–Eskimo Association of Canada, General Publishing Co. Ltd, Toronto, 1972) at 291-2. Refer to Appendix IV for the full Proclamation.

traditional lands and natural resources have not been ceded or purchased by the Crown and the *Royal Proclamation 1763* continues to apply to them. Hence, the Crown in Right of Canada is the present entity representing King George's obligations pursuant to the *Royal Proclamation* including redress for historic and contemporary breaches of Treaty and aboriginal rights.

There also seems little doubt that Māori and First Nations collectives have endured in spite of the high mortality rates of individual members since the *Royal Proclamation 1763* and the *Treaty of Waitangi 1840* were signed by indigenous representatives on their behalf. Māori and First Nations individuals have brought claims on behalf of wider descent groups to settle outstanding claims against both the Crown in Right of Canada and New Zealand. First Nations and Māori society, however, have always been dynamic, and the form and importance of different indigenous groupings within First Nations and Māori societies have changed over time. Furthermore, First Nations and Māori collectives may be legally constituted or represented by a variety of entities including bands, tribal councils, trust boards, incorporated societies, incorporations and other corporate structures including umbrella organisations.

In the contemporary Treaty settlement processes in both countries, careful analysis is needed, however, to ascertain whether an entity making a contemporary claim or receiving settlement assets, has historical continuity with the unjustly treated First Nations and Māori collective in question. There may be questions of degree in particular cases. Certainly this line of argument raises major uncertainties for more recent collectives of First Nations and Māori, such as urban First Nations and Māori entities having any legitimate claim for historical injustices done to Indigenous Peoples generally. For some this may be a major limitation on the justice that both Treaty settlement processes can deliver and the cause of some confusion and complexity of expectations. There is also an unresolved issue where Crown breaches were so detrimental that First Nations and Māori communities became severely fragmented or even disappeared or were 'lost' altogether. Despite these shortcomings, at this stage it is sufficient to concede that First Nations and Māori collectives do exist that have enduring historical continuity suitable to receive contemporary reparation for historical injustices through, inter alia, negotiated Treaty settlements. In a contemporary Treaty settlement context, the issue rests on customary rights and customary representation - who owned the resources traditionally - who was the traditional indigenous group that was stripped of its resources, identity and earning capacity by the British coloniser? and who represents that customary group today? As Professor Alan Ward noted:

> ... which Māori groups held the customary rights to land at the time of Crown acquisition, which therefore were injured by the Crown's actions, and in what degree, what relationship those groups have to modern Māori social organisation and who has the right to represent them.[13]

Moreover, Māori and First Nations recognised a range of interests in resources that were traditionally controlled by certain indigenous groups that are usually based on traditions passed on by word of mouth. But which groups? The whānau, hapū, sub-hapū, the larger iwi, or perhaps even a pan-Māori representative organisation in a New Zealand context; and the house, band, tribe, clan, village group or even a pan-First Nations representative organisation in a Canadian context.

9.2 INTERNATIONAL CONTEXT FOR CUSTOMARY REPRESENTATION

An interesting aspect of contemporary indigenous Treaty settlements in New Zealand and Canada is the rediscovery or reinvigoration of indigenous customary rights to iwi and hapū, houses, band and tribal cultural traditions of governance, representivity and identity - or selected elements of such customary traditions. Māori and First Nations claimant groups promoting such customary traditions are often part of a broader project of postcolonial nation building, good governance, representivity and identity reconstruction promoting renewed pride in a traditional heritage that may have been suppressed or virtually destroyed by the British colonial power. The phenomenon is hardly unique to New Zealand and Canada. It has also been evident in the Pacific, the Americas, Asia, Africa and the Middle East. A similar phenomenon is recognisable also in the heartlands of some former colonial powers. Across Europe, traditional cultural identities are being asserted - at a sub-state level - in political forms from Scotland, Wales, and the former Yugoslavia to Catalonia in Spain. Traditional cultural identities are also being asserted at a supra-state level across northern Scandinavia by the Sāmi and the Québécois in Canada, and at the level of the state itself, most recognisably in Germany, where the collapse of the Wall has resulted in problems with the reintegration of a suitable, coherent national identity. It is also recognisable in the current nation-building projects of many newly independent countries following the breakdown of the Soviet Empire.

One may conclude that such changes or events cannot be understood as independent happenings but must, in some way, be linked. How they are linked is a theme explored in this chapter. Although these movements vary enormously in the actual content

[13] Ward, A, *An Unsettled History: Treaty Claims in New Zealand Today* (Auckland University Press, Auckland, 1999).

of their programmes, traditions and the symbolic resources they use, as well as in the means deployed in achieving their political goals, they have many common elements, including general concerns about customary rights, cultural traditions and survival, traditional and contemporary group representation, the ideology of traditionalism, detraditionalisation and identity and representivity reconstruction.

The close association of such movements with ideas of liberation, regeneration and opposition to globalisation and global homogenisation also means that they are generally seen to represent a positive manifestation of identity and representivity politics, and as a cause for celebration in a world where cultural difference and pluralism seem politically acceptable. In terms of some good indigenous governance frameworks, they are also seen as inherently 'democratic' in some sense - as if the revival of indigenous traditional governance, representivity and cultural identities are in and of themselves manifestations of democracy. There are exceptions, of course. Bosnia-Herzegovina, Israel, East Timor and Rwanda are obvious cases where aspects of identity politics and traditional identity reconstruction assumed a violent and destructive form. Other forms also have a less attractive side. For example, the mistreatment of women by some Indigenous Peoples evident in some political expressions of traditionalism, as well as the implications that traditionalism has for democratic governance as opposed to theocratic, quasi-dictatorial and oligarchic regimes.

9.3 TRADITIONAL MĀORI SOCIAL ORGANISTAION

9.3.1 'TRADITIONAL' MĀORI SOCIAL ORDER

Māori society is generally perceived as being 'traditionally' organised along a framework of kin-based descent groups. The continual division and fusion through an increase of numbers in the extended family groups formed larger groupings held together by common descent. Durie characterised traditional Māori social organisation by the 'atomisation and reformation of autonomous groups, or hapū, and by the absence of centralised regional authorities.'[14] The literature characterised these 'traditional' kin-based corporate structures consisting of four major social classificatory units ranging in size from the whānau (immediate and extended family), hapū (clan, sub-tribe), iwi (confederation of hapū, tribe) and waka (tribal confederation).[15] To this list, Mason Durie added kainga.[16]

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[14] Durie, E *Custom Law* (V.U.W.L.R. 325, Address to the New Zealand Society for Legal and Social Philosophy, 1994) at 12.

[15] See Walker, R *Ka Whawhai Tonu Matou: Struggle Without End* (Penguin Books, Auckland, 1990) at 63 – 65; Papakura, M *Makereti: An Old Time Māori* (Gollancz, London, 1938) at 34 – 43; Buck, P *The Coming of the Māori* (Whitcombe & Tombs, Wellington, 1950) at 333; Firth, R *The Economics of the New Zealand*

9.3.1.1 WHĀNAU

The whānau, the smallest social and economic unit, represented the primary household, which usually extended beyond the biological family to include kaumātua - patriarch koroua and his wife (or wives), and matriarch kuia and her husbands - their single children or sometimes married children and their families.[17] Many also included slaves. The free members of a household were described collectively as the whānau of its kaumātua. But whānau seems to also have been used to describe a kaumātua and his descendants, a bilateral descent-group including persons who were no longer members of his household, but excluding affines.[18] This double use has been the cause of some confusion. Buck used the term 'biological family' for the whānau although Winiata held that it was a term 'better restricted to the individual family forming the constituent units of the whānau.'[19] Winiata noted that the whānau consisted of three or four levels, including grandparents, parents, children and grandchildren and numbering as many as thirty persons.[20] Best provided an example of a whānau of two brothers, a sister, their children, grandchildren and great-grandchildren – ninety-two persons in all.[21]

An increase in population of the whānau led to a division. A younger son and his family together with his slaves may have left the hapū village to establish his household units in a neighbouring part of the hapū land.

9.3.1.2 HAPŪ

As whānau units that could trace blood ties to common ancestors and which co-operated in the common use of land and defence expanded over succeeding generations they allegedly acquired the status of hapū. The hapū was a social group defined by descent from an eponymous or common ancestor through male and female links and distinguished by his/her name. The 'founders' of all sections of a tribe and through them their members were linked by descent from the founder of the tribe.[22] Best and Firth used the term 'clan'

Māori (Whitcombe & Tombs, Wellington, 1959) at 112 – 114; Best, E *The Māori As He Was* (Government Printer, Wellington, 1925) at 96.

[16] Cited in Law Commission, *Māori Custom Law and Values in New Zealand Law* (Study Paper 9, Wellington, 2001) at 41- 43.

[17] Ibid, and Hazelhurst, K *Political Expression and Ethnicity – Statecraft and Mobilisation in the Māori World* (1993). See also New Zealand *He Hinatore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) at 27 – 42.

[18] Metge, J *The Maoris of New Zealand* (London: Routledge and Kegan Paul, 1976) at 6.

[19] Winiata, M 'Leadership in Pre-European Maori Society' *The Journal of the Polynesian Society* (Vol. 65, The Polynesian Society Inc, Wellington, 1956) at 218. Firth provides a useful sociological analysis of whānau in Firth, R *Primitive Economics of the New Zealand Maori* (Routledge, London, 1929) at 96 – 98.

[20] Ibid, at 218.

[21] Best, E *The Maori* (Vol. 1, Polynesian Society Memoir, Wellington, 1924) at 343.

[22] Metge, supra n 18 at 5.

for hapū[23] while Buck referred to the term 'expanded family' literally expressing biological descent from common ancestors.[24] The hapū was a territorially and consanguinally defined corporate group, under the authority of a senior patriarch or matriarch rangatira (chief). The large majority of a hapū's members lived together on hapū territory forming, with slaves and spouses from other groups, one or two local communities.[25] In conversation and speech making, the community was identified with the hapū and by its name. Thus though outside spouses never became members of the hapū descent group they were assimilated to it as an operational group and given rights of use in its resources as long as they lived on its territory.[26] Hapū perhaps ranged in size from 200 to 2000 people or larger. Best noted in 1815 that Okuratope pa had 200 huts and Whakawhiti kainga (village) had 2,000 fighting men in 1834.[27] Skinner noted that the Puketapu hapū of Te Atiawa occupied the main village of Puketapu with 800 to 1,000 warriors.[28]

Achievement of hapū status was not automatic however. The conditions under which the identity as a hapū was recognised included the emergence of a leader with mana derived from founding ancestors through his or her whakapapa, skill in diplomacy, ability to strengthen the identity of the hapū by political marriages, and fighting prowess. Once territorial control of the hapū's standing in relation to other hapū was confirmed, then the name of the founding leader was adopted as the name of the hapū or a name was adopted after a significant event. Hapū united the whānau groups for purposes of work and military defence[29] and were located in a kainga (village) thus giving it a more compact organisation.[30] At the centre of the kainga (village) stood two institutions – the marae (communal centre) and the whare rūnanga (assembly house), which together represented the social core of the group.

Though the term is commonly translated as 'sub-tribe,' hapū were often subdivisions of sub-tribes, other hapū and even sub-sub-tribes,[31] or de facto autonomous tribes. When a hapū grew too large for effective functioning, it would become unstable and a section would split off the unit under the leadership of the chief's sons or younger

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[23] Idem, and Firth, supra n 15 at 98 - 100
[24] Buck, supra n 15 at 331 – 333.
[25] Metge, supra n 18 at 6.
[26] Idem.
[27] Best, supra n 15 at 314.
[28] Skinner, W 'The Capture of Rewarewa Pa by a Taua of the Taranaki' in *The Journal of the Polynesian Society* (Vol. 2, Wellington, 1893) at 179 – 185.
[29] Best, E *The Maori* (Vol. 1, Polynesian Society Memoir, Wellington, 1924) at 340 – 43; Ngata, A 'Tribal Organisation' in Sutherland, I.L.G (ed) *The Maori Race Today* (New Zealand Council for Educational Research, Wellington, 1940) at 167 and Smith, P 'The Peopling of the North' in *The Journal of the Polynesian Society* (Vol. 6, Supplement, 1897) at 91.
[30] Winiata, supra n 19 at 217.
[31] Metge, supra n 18 at 6.

brothers. The new hapū would establish themselves independently, either on part of the original territory or relocate to a neighbouring area[32] on land acquired by conquest or occupation, sooner or later acquiring a new name. Underpinning the more physical aspects of the hapū *kainga* (village) was the kinship system outlined in the *whakapapa* (genealogies), which joined all members to a common eponymous ancestor. This hapū ancestor was generally the one where the branch line stemmed away from the *tahuhu* (main ridge pole) of the genealogy and it usually provided the name of the hapū although sometimes the name was obtained from an important incident in the group's history.[33] Remembering their origin, minor hapū formed in this way often joined forces under the original name for large-scale undertakings such as war and *heke* (migrations). But the hapū operated as a group on many more occasions than the iwi especially with regard to land use, the production and use of capital assets such as meeting-houses and large *waka* (boats), large-scale projects such as building construction, cultivations, fishing expeditions and war, and the entertaining of visitors.[34]

9.3.1.3 IWI

The next social grouping of 'traditional' Māori society was the iwi or tribe although this is a very late development as a cohesive political unit. Iwi seemed to be the largest socio-political organisation in Māori society[35] and were made up of the majority of the free men and women of the population divided into numerous iwi as independent political units with occupied separate territories. An iwi consisted of a loose confederation of smaller constituent hapū that still recognised common ancestry through an eponymous ancestor or common event, whether or not the actual links remained within genealogical memory. The iwi varied in size from a few thousand to many thousand members. The iwi was a rather loosely defined framework in many cases of relationships between groups, which were themselves autonomous and which endeavoured to settle internal disputes peacefully, and defended their political and territorial integrity by force of arms.[36] In addition to tribal members, the population of each tribe's territory included a few spouses of other tribes, a number of slaves captured in war, and occasionally groups of refugees paying tribute as vassals.[37] Each group was a broad descent-group with its membership being based on

[32]Winiata, supra n 19 at 217, and Hazelhurst, supra n 17.
Firth, supra n 15 at 112 – 114; Best, supra n 15 at 96.
[33] Ngāti Mutuahi example from Rangitāne.
[34] Metge, supra n 18 at 5.
[35] Best, supra n 15 at 339, 341, 342, 345; Buck, supra n 15 at 333; Cowan, J *The Maoris of New Zealand* (Whitcombe & Tombs, Christchurch, 1910) at 142; and Firth, supra n 14 at 100.
[36] Metge, supra n 18 at 4-5.
[37] Ibid, at 5.

descent or adoption by a descendant from an ancestor identified as the tribe's 'founder' traced through both male and female links. Waka ancestors who had great mana were used as points of reference for the definition of iwi identity. Most iwi were known by the name of the eponymous ancestor prefixed by a word meaning 'descendants of': Ngāti, Āti, Ngāi, Ngā, Aitanga, Whānau or Uri. Other iwi and hapū bore tribal names derived from an incident in their history such as Aupouri, Te Rarawa, Pahauwera and Mutuahi. Some iwi also bore the names of a *waka* (ancestral boats) within certain contexts such as Tainui and Te Arawa.

The iwi was the pre-eminent corporate body based upon the right to share a bounded territory and a mutual obligation to defend. The leaders of the component hapū units of an iwi regarded themselves as co-equals, although there was a hierarchy in terms of *tuakana* and *teina* relationships of senior and junior descent. The structural relations within the iwi were maintained by the constant interaction between constituent groups, expressed through war, kinship, sentimental attachment to a specific district, common leadership, common Gods, and a history that traced back to a romanticised past.[38] The iwi was at its most effective in defending tribal territory against enemy tribes.[39]

9.3.1.4 WAKA

The largest social unit became the waka, an ideological confederation of related tribes bound by a belief that the iwi concerned all had descended from ancestors of a common ship (sometimes but incorrectly defined as a canoe – waka were seaworthy vessels or boats in their own right) in the days of the first migrations across te Moananui-a-Kiwa - the Pacific Ocean between 800 and 1200 AD.[40] The waka was a very loose ideological association rather than a federation for defined ends, with the constituent iwi sometimes fighting each other.[41] But the tribes often recognised some obligation to help each other if requested.[42] Should tribes from other waka invade their domain, the waka bond would be used to form an alliance against the intruders.[43] Hence the waka was a very loose cluster of related tribal groups based in a specific territory and bound by a romantic

[38] Best, supra n 29 at 445; and Buck, supra n 15 at 366-67.
[39] Ibid, Buck, at 333-4; Firth, supra n 15 at 114.
[40] Ibid, and Hazelhurst, supra n 17. waka migration refs
[41] Waikato against Raukawa and Maniapoto, Ngāti Toa against Waikato and Maniapoto, Ngāti Maru against Ngāti Hauā, Hauā against Waikato. One of the best references on the *pakanga* (battles) between the Tainui tribes is Jones, P. T & Biggs, B *Nga Iwi o Tainui: The Traditional History of the Tainui People* (Auckland University Press, Auckland, 1995). See also Jones, P *King Potatau: An Account of the Life of Potatau Te Wherowhero the First Mäori King* (Polynesian Society, Wellington, 1959); and to a lesser extent Kelly, L *Tainui: The Story of Hoturoa and His Descendants* (Polynesian Society, Wellington, 1937), although Kelly plagiarised Pei Te Hurinui Jones' work.
[42] Metge, supra n 18 at 5.
[43] Buck, supra n 29 at 336; Firth, supra n 15 at 115.

sentiment back to the crewmembers of the waka. The waka ancestor was accorded a great deal of prestige that was reflected later in the leading families of the territory. The tribes of waka usually occupied contiguous territory such as Tainui in the Waikato Basin, Hauraki in the Coromandal, Raukawa in the lower Waikato and Maniapoto in the south.[44] Other waka included the Te Arawa tribes in the Central Plateau, the Mātaatua tribes of the Bay of Plenty, the tribes of the East Coast that derived from the Horouta and Nukutere waka (Cape Runaway and Wairoa) and Ngāti Kahungunu and some Tauranga Moana and Ngāi Tahu tribes from the Takitimu waka. The Taranaki and Northland tribes descend from diverse waka traditions.

9.3.1.5 DESCENT-GROUP AFFILIATION

In most societies organised on the basis of descent (or whakapapa in Māori society), descent-group membership is obtained by affiliation through one kind of parent only – either the father (patrilineal affiliation) or the mother (matrilineal affiliation) and each descent group consists of members attached through a line of links of one sex, either male (a patrilineal group) or females (a matrilineal group).[45] Māori, however, could attach themselves to any one descent-group through either parent and to different descent-groups of the same order through both parents at once (ambilineal affiliation).[46] Consequently, Māori descent groups were composed of persons who traced their descent back to the founding ancestors through lines of mixed male and female ambilineal group links, and there was some overlapping in the membership of groups of the same order.

If one's parents belonged to the same descent-group at any level, the person had a double qualification for membership, though usually they stressed that through the parent of higher rank. If they belonged to different groups, they had claims to membership in each one. A claim to membership, however, was only a claim until it was validated by contact

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[44] The following Tainui aphorism sets out the traditional boundaries (refer to the map, infra, p 301) of this ideological confederation:
Ko Mokau ki runga, ko Tamaki ki raro,
Ko Mangatoatoa ki waenganui;
Ko Pare Hauraki, ko Pare Waikato,
Ko Te Kaokaoroa o Patere
Ki Te Nehenehenui.

From Mokau in the south,
To Tamaki – Auckland – in the north,
Mangatoatoa – Tokanui centre wise
Hauraki to the east,
Waikato to the west,
And the sheltering bastion of Te Kaokaoroa o Patere – Raukawa
To Te Nehenehenui – Waipa

[45] Metge, supra n 18 at 7.

[46] Idem.

with the group and participation in its activities. To obtain the full benefits of membership in a descent-group, it was necessary to live on its territory in close association with other members. If this were not possible, the rights accorded the claimant diminished in proportion to the frequency and length of their visits. Māori normally gave primary allegiance to one group by living with it, while maintaining secondary ties with one or two others. The person could change priorities by changing one's residence. Unvalidated claims could be passed on for three or four generations, but were eventually extinguished if not taken up.

In affiliation as in other respects, Māori society preferred the male before the female. Young married couples usually lived with the husband's parents, so that most children were brought up and identified themselves with their father's people. However, occasionally a man settled with his wife's people. A woman often sent a child (whāngai or atawhai) home to replace her and to 'keep warm her place' among her own kin; and even adults sometimes went to live with their mother's kin.[47]

9.3.2 TRADITIONAL NISGA'A SOCIAL ORGANISATION

The hierarchy of traditional and contemporary Nisga'a socio-political organisation commences with the Nisga'a 'nation,' to the *Pdeek* or tribe, *wilp* or house, the nuclear family and Nisga'a individuals. The social organisation, indeed life, of the Nisga'a nation is governed and regulated by *ayuukhl Nisga'a* or Nisga'a customary laws and institutions which have existed since time immemorial to protect and keep the Nisga'a distinct, strong and cohesive.

There are four Nisga'a *Pdeek* or tribes: Ganada (Raven/Frog), Laxgibuu (Wolf/Bear), Gisk'aast (Killerwhale/Owl) and Laxsgiik (Eagle/Beaver). Every Nisga'a citizen is a member of one of these tribes. Under the Nisga'a tribes is a *wilp* or house. Each house has its own chiefs, territories, history, rights, stories, songs, dances and customary rights and traditions. As a member of a tribe or *wilp*, a Nisga'a participates in many feasts and other important ceremonies. By taking a place as a host or a guest at these events, Nisga'a learn more about their *wilp* and tribe which knowledge is an important and fundamental part of their identity.

Members of a *wilp* have special customary rights, properties and responsibilities to each other and to other *huwilp* (plural for *wilp*). The Nisga'a *wilp* descend from a common female ancestor with membership being matrilineal at birth. Each *wilp* has its own *Sim'oogit* or chief. The *Sigidimnak* is the highest-ranking woman or the matriarch in a

[47] Idem.

wilp. For example, the Laxsgiik *pdeek* is made up of people who claim the Eagle as their primary crest and others who claim the Beaver as their primary crest. Those who claim the Beaver are known as Lax Ts'imilx.

When a Nisga'a *Sim'oogit* holds an important feast (potlatch), members of his *wilp* and *pdeek* support him. The *wilksilaks* are the people who belong to a Nisga'a father's *wilp* who have a responsibility to assist people in many different ways in life including for potlatch ceremonies. A chief can get assistance from his *wilksilaks* and from his wife's *wilp,* in addition to the chief's *wilp* mobilising support from their own *wilksilaks* and their spouse's *wilp,* hence creating a complex system of reciprocity and balance. The interdependence created by such a support system protects and strengthens the Nisga'a as a nation.[48]

Table 8.4 Māori and Nisga'a Social Organisation

Ascending Social Organisation	Māori	Leadership	Nisga'a	Leadership
Level 1	Whānau (Family)	Kaumātua (Elders) – Koroua, Kuia	Nisga'a Family	Elders
Level 2	Hapū (Sub-Tribe)	Rangatira (Chiefs)	Wilp (House)	Sim'oogit - Matriarchs
Level 3	Iwi (Tribe)	Ariki (Paramount Chiefs)	Pdeek (Tribe)	4 tribes - Elders
Level 4	Waka (Boat)	Ideological Group e.g. Kīngitanga	Nisga'a Nation	Nisga'a Lisims Government

9.3.3 INDIGENOUS PEOPLE AND TRADITION

Indigenous Peoples have been globally enmeshed in renaissance movements since the inception of colonialism but such movements gathered momentum in the post-World War II decolonisation and post-colonialism periods. A characteristic stance of Indigenous Peoples enmeshed in such renaissance movements is to look both forward and backward, though not necessarily at the same time, or at the same sectors of the society, or with equal intensity. A further aspect is a reliance on customary rights through tradition. Goldsmith asserted that Indigenous Peoples might anticipate a longed-for future, yet frequently justify

[48] See Nisga'a Language and Culture Department School District No. 92 (Nisga'a) *From Time Before Memory: The People of K'amligihahlhaahl* (Friesen's Yearbook, Altona, Manitoba, 1996) at 15-20.

it by reference to the past through traditions.[49] Sometimes those traditions are historically attested, sometimes they are 'invented', but they seem to be created and recreated for use in the present.[50] Giddens noted that tradition provided a relatively fixed horizon of action that involves active processes of reconstruction, particularly as filtered by its guardians.[51] However one views it, there is a burgeoning debate about the nature and scope of tradition.[52]

The world of traditional societies is one in which cultural pluralism takes the form of an extraordinary diversity of norms and customs, each of which exists in a privileged space.[53] All premodern societies remained saturated with tradition of one kind or another.[54] Habermas noted that the discussion about the relationship between politics and culture is about 'which traditions citizens want to perpetuate and which they want to discontinue, how they want to deal with their history, the future, with one another, and with nature.'[55] The world of many Indigenous Peoples, including Māori iwi and hapū and First Nations bands and tribes, is a world that places a strong emphasis on tradition because, inter alia, it legitimates contemporary social organisation, practices, laws and institutions.

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[49] Goldsmith, M 'Māori Assertions of Indigeneity: Post-Colonial Traumatic Stress Disorder, and Holocaust Denial' in *Politics of Indigeneity in the South Pacific* (Vol. ,) at 85–94.

[50] See Hanson, A 'The Making of the Māori: Culture Invention and its Logic' in *American Anthropologist* (91/4, 1989) at 890-902; Keesing, R 'Creating the Past: Custom and Identity in the Contemporary Pacific' in *The Contemporary Pacific* (1/1-2, 1989) at 19-42, Keesing, R 'The Past in the Present: Contested Representations of Culture and History' in Goldsmith, M & Barber, K (eds) *Other Sites: Social Anthropology and the Politics of Interpretation* (Department of Social Anthropology, Massey University, Palmerston North, 1992) at 8–28; and Goldsmith, M 'The Tradition of Invention' in Goldsmith, M & Barber, K (eds) *Other Sites: Social Anthropology and the Politics of Interpretation* (Department of Social Anthropology, Massey University, Palmerston North, 1992) at 29–41.

[51] Giddens, A 'Living in a Post-Traditionalist Society' in Beck, U, Giddens, A & Lash, S (eds) *Reflexive Modernisation* (Blackwell Publishers, Oxford, 1994) at 76.

[52] See for example, Linnekin, J 'Defining Traditions: Variations on the Hawaiian Identity' in *American Ethnologist* (10, 1983) at 241 – 252; Linnekin, J 'The Politics of Culture in the Pacific' in Linnekin, J & Poyer, L (eds) *Cultural Identity and Ethnicity in the Pacific* (University of Hawaii Press, Honolulu, 1990); and Linnekin, J 'On the Theory of Politics and Cultural Construction in the Pacific' in *Oceania* (62, 1992) at 249 – 263. See also Hobsbawm, E & Ranger, T (eds) *The Invention of Tradition* (Cambridge University Press, Cambridge, 1983); Handler, R and Linnekin, J 'Tradition, Genuine or Spurious' in *Journal of American Folklore* (97, 1984) at 273 – 290, Babadzan, A 'Kastom and Nation-Building in the South Pacific' in Guideiri, R. Pellizi, F & Tambiah, S (eds) *Ethnicity and Nations: Processes of Inter-Ethnic Relations in Latin America, Southeast Asia and the Pacific* (The Rothko Chapel, Houston, 1988) at 199 – 228; Jolly, M 'Spectres of Inauthenticity' in *The Contemporary Pacific* (4, 1992) at 49 - 72, Thomas, N 'The Invention of Tradition' in *American Ethnologist* (19, 1992) at 213 – 232; Ralston, C 'Māori Women and the Politics of Tradition: What Roles and Power Did, Do, and Should Māori Women Exercise?' in *The Contemporary Pacific* (Spring, 5, 1993) 23 – 44; Alfred, G *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford University Press, Toronto, 1995), Heelas, P, Lash, S & Morris, P (eds) *Detraditionalisation: Critical Reflections on Authority and Identity* (Blackwell Publishers, Cambridge, Massachusetts, 1996); Alfred, T *Peace, Power and Righteousness: an Indigenous Manifesto* (Oxford University Press, Toronto,1999) and Te Mātāhauariki Institute, 'Te Matapunenga: A Proto-Compendium of Māori Customary Law' (Forthcoming, Te Mātāhauariki Institute, University of Waikato, 2003).

[53] Giddens, supra n 51 at 104.

[54] Ibid, at 66.

[55] Habermas, J 'Struggles for Recognition in the Democratic Constitutional State' in Taylor, C (ed) *Multiculturalism* (Princeton University Press, Princeton, 1994) at 125.

9.3.3.1 DEFINITION OF TRADITION

Many of the traditional and not so traditional ways of thinking about the notion of tradition have been discussed by anthropologists and academics such as Gross,[56] Shils,[57] Luke,[58] Boyer,[59] Linnekin,[60] Babadzan,[61] Keesing,[62] Thomas,[63] Giddens,[64] Lash,[65] Heelas[66] and Alfred.[67] Gross defined tradition by referring back to its Latin verb *tradere* that implies transmitting or giving something up or over to another, since Roman jurisprudence saw this practice as what legally constituted making a bequest or inheritance. *Traditio* is the process of giving and *traditum* is the thing being transmitted. Hence, tradition is something precious or valuable that is given to someone in trust, after which the person who receives the gift is expected to keep it intact and unharmed out of a sense of obligation to the giver.[68] Gross thus defined tradition as characters that appear as the cohesive agencies of authority that once gave life meaning, purpose and foundation; it told people what they should do in order to be in harmony with the world; it made clear the past through the medium of tradition.[69]

Gross suggested that the disembodied agency of tradition did what nothing or nobody else was able to do – it supplied categories, provided order, stabilised society, preserved heritages, fortified community, fostered dispositions, gave cohesion, produced respect and encouraged piety.[70] Giddens noted that tradition represents not only what 'is' done in a society but also what 'should be' done. The normative components of tradition are not normally spelled out but are usually interpreted within the activities or directives of the guardians of the culture at hand. Tradition has the hold it does, Giddens noted, because its moral character offers a measure of ontological security to those who adhere to it. Traditions are those ways of doing things that work in a particular geographic and/or social

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[56] Gross, D *The Past in Ruins: Tradition and the Critique of Modernity* (University of Massachusetts Press, Amherst, 1992).
[57] Shils, E *Tradition* (Faber & Faber, London, 1981).
[58] Luke, T 'Identity, Meaning and Globalisation: Detraditionalisation in Post-Modern Space-Time Compression' in Heelas, supra n 51.
[59] Boyer, P *Tradition as Truth and Communication* (Cambridge University Press, Cambridge, 1990).
[60] Linnekin, supra n 52 at 241–252; Linnekin, supra n 51 at 249–263.
[61] Babadzan, supra n 52 at 199–228.
[62] Keesing, supra n 50 at 16–35.
[63] Thomas, supra n 52 at 213–232.
[64] Giddens, supra n 51 at 66.
[65] Heelas, supra n 52.
[66] Ibid.
[67] Alfred, supra n 52.
[68] Gross, supra n 56 at 9
[69] Ibid, at 10.
[70] Ibid, at 20 - 23.

environment; they promote a society's interests and facilitate the achievement of common goals.[71]

Edward Shils defined tradition in its most general sense as simply 'anything that is transmitted or handed down from the past.'[72] Luke extended this definition as 'no more than traces of practices, signs of belief, and images of continuity revealed in human thought and action, which are continuously sent and chaotically received throughout all the generations.'[73] Luke added that tradition 'essentialises and/or subjectifies a set of beliefs and practices that are always no more than an objectified set of contingent values and actions.[74] Helu opined that cultural traditions are those forms of behaviour (activities, beliefs, values and institutions) that change so slowly that they give the impression of not changing at all, and are so because they are promoted throughout society. Giddens distilled his understanding of tradition, noting that one of the main implications of the idea of tradition is repetition, which has so often been merged with cohesiveness. Giddens added that tradition is the glue that holds premodern social orders together but there is no necessary connection between repetition and social cohesion, and the repetitive character of tradition is something that needs to be explained not just assumed.[75]

9.3.3.2 RITUALS – PERFORMATIVE ASPECTS OF TRADITION

Tradition, especially among Indigenous Peoples, usually involves rituals. Giddens defined tradition as being bound up with collective memory, it involves ritual, is connected with a formulaic notion of truth, has guardians and, unlike custom, has a binding force which has a combined moral and emotional content.[76] Ritual is integral to the social frameworks that confer integrity upon traditions. Ritual is a practical means of ensuring preservation, and firmly connects the continual reconstruction of the past with practical enactment and can be seen to do so. Ritual enmeshes tradition in practice, but it is important to see that it also tends to be separated more or less clearly from the pragmatic tasks of everyday activity. Giddens added that ritual has connections with social solidarity but it is not the mechanical following of precepts accepted in an unquestioning way.[77] Like all aspects of tradition, ritual has to be interpreted but such interpretation is not normally in the hands of the lay individual. Tradition involves formulaic truth to which traditional guardians, usually elders, have full access to interpret the truths such traditions disclose.

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[71] Helu, I *Tradition and Good Governance* (ANU, Canberra, Discussion Paper No. 97/3 1997) at 1
[72] Shils, supra n 57 at 12.
[73] Luke, supra n 58.
[74] Ibid, at 114.
[75] Giddens, supra n 51 at 62.
[76] Ibid, at 63.
[77] Ibid, at 62.

Formulaic truth depends upon ritual language which is performative and may sometimes contain words or practices that the speakers or listeners can barely understand.[78]

Professor Hibbitts of the University of Pittsburgh discussed the significance of the 'performance aspect' of rituals in non-literate legal systems. Hibbitts wrote:

> '[the] performative understanding of law differs profoundly from our own. In a writing culture that can physically separate contracts, judgments, and statutes from their proponents, we consider law to exist apart from, and indeed above, human individuals. This attitude is perhaps best captured in the aspirational phrase: 'a government of laws and not of men.' In performance cultures, however, laws and men are virtually coincident. Finding the law generally means finding someone who can perform or remember it.[79]

Performance rituals depend on the use and synthesis of such media as speech, gesture and touch that require the ongoing live participation of a human actor. In a culture where little if anything can be located in written records, no significant knowledge passes on without personal action. Traditional Māori and First Nations rituals were used to transmit knowledge and, inter alia, as a performative means of social control. Dr Te Maire Tau discussed the idea of recognising the aesthetics and performative aspects of Māori tradition:

> The thoughts of a community are not limited to the written word. Spatial layout of the marae, the village, one's body movements, the iconography of the community – all these represent forms of thought in a language that exceeds the text.[80]

An example of customary rituals used to transmit knowledge and, inter alia, as a performative means of social control is the Māori custom of hākari and the northwest First Nations' custom of the potlatch.

9.3.3.3 CUSTOMARY FIRST NATIONS POTLATCH INSTITUTION

Most First Nations on the Northwest Coast of Canada had performative potlatch rituals, including the Nuu-chah-nulth, Coast Salish, Kwakiutl, Bella Coola, Haida, Nootka, Tsimshian, Nisga'a and Tlingit.[81] Anderson noted that potlatches were 'important feasts in

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[78] Ibid, at 65.

[79] Hibbitts, B 'Coming to Our Senses: Communication and Legal Expression in Performance Cultures' in *Emory Law Journal* (Vol. 41, 1992) at 873. See also Frame, A & Meredith, P 'Performance and Customary Legal Process' in *Journal of the Polynesian Society* (Vol. 114, No. 2, June 2005) at 135-155.

[80] Tau, M 'Matauranga Maori as an Epistemology' in Sharp, A & McHugh, P (eds) *Histories, Power and Loss: Uses of the Past: A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) at 69.

[81] Much of this information on potlatch ceremonies in the Pacific Northwest was taken from the internet website: http://www.peabody.harvard.edu/potlatch/page2a.html. (Accessed 17 July 2005). Reciprocity and hospitality were characteristic 'laws' of First Nation societies generally, not just the Northwest nations. Interestingly, the violation of reciprocity was even considered to be a crime. See Ganong, W, (ed) *New Relation of Gaspesia* (The Champlain Society, Toronto, 1910) at 246; and Le Clercq, C, *Nouvelle relation de*

structuring social and economic relations.'[82] All changes in social relationships within the northwest First Nations were declared and legitimated by property distributions and feasts at potlatches. These events were held either inside large longhouses or outdoors.

Traditional potlatch ceremonies were performative social and political occasions given by a host to, inter alia, establish or uphold the host's status position in society, as a means of transferring property and, it seems, to establish and consolidate reciprocity relationships.[83] The Nisga'a elders Rod Robinson and Alvin McKay mentioned to the author that the '*yuqu* or Nisga'a potlatch was similar to a 'land registry office' where the 'hosts proclaim to other chiefs their stories, history, resources, songs and dances.'[84] Every one had to know their own history or they could be trespassing which was punishable by death.[85] The Nisga'a frequently held potlatch feasts or *yuqu* at which everyone's position within the Nisga'a social system was confirmed. The CMS missionary McCullagh discussed how the Nisga'a referred to themselves which included a discussion of the potlatch institution:

> No better description could be given of the Indian people than that supplied by the name they give themselves – 'Alu-gigiat' Truly they are a 'Public-people,' for they have no private business, no private rights, and no domestic privacy. Every right is 'holden' (that is the meaning of the word YUQU, which the Whiteman judging from outward appearance, calls Potlatch, i.e., 'giving'), and every matter regulated by a

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la Gaspésie, (Auroy, Paris, 1691). Hospitality could even be carried out to the point of self-impoverishment, which did not strike Europeans as a virtue when they encountered it. This was observed very early among the Mi'kmaq in an 18th century report:

> It is neither gaming nor debauchery that disable them from the payment of their debts, but their vanity, which is excessive, in the presents of peltry to other savages, who come in quality of envoys from one country to another, or as friends and relations upon a visit to one another. Then it is, that a village is sure to exhaust itself in presents; it being a standing rule with them, on the arrival of such persons, to bring out everything they have acquired, during the winter and spring season, in order to give the best and most advantageous idea of themselves.

An Account of the Customs and Manners of the Micmakis and Maricheets, Savage Nations, Now Dependent on the Government of Cape Breton, (London, 1758) at 4.

[82] Anderson, M.S, 'Understanding the Tsimshian Potlatch' in Morrison, R.B, & Wilson, C.R, (eds) *Native Peoples: The Canadian Experience* (Oxford University Press, Onatrio, 2004) at 408 – 430.

[83] Adams, J *The Gitskan Potlatch: Population Flux, Resource Ownership and Reciprocity* (Holt, Rinehart & Winston, Montreal, 1973). Reciprocity and hospitality are characteristic of tribal societies generally, that were also practiced in pre-Renaissance Europe. Unfortunately, Europeans forgot their own traditions and did not generally reciprocate indigenous hospitality. Consequently, Indigenous Peoples in the Americas continued such customs among themselves, but with Europeans they soon began to demand payment, much to the latter's disgust. Furthermore, with first contact, Europeans did not appreciate the reciprocity economy of Indigenous Peoples which was based on the general principle of 'I give to you that you might give to me,' which was quickly denigrated as 'Indian giving,' particularly when Indigenous Peoples, perceiving that the Europeans did not reciprocate, asked for their gifts back. See Ganong, supra n. 81 at 246; and Le Clercq, supra n 81.

[84] Seminar with Nisga'a Elders Alvin McKay and Rod Robinson, and support people Leanne Wright, George Moore and George Williams, Nisga'a Tribal Council Office, New Aiyanch, British Columbia, 28 August 1998.

[85] Ibid.

> public manifestation of assent on the part of the united clans. And the public expression of assent, made by the clans and acknowledged by the individual, is what we call Potlatch.[86]

Often potlatches were held to mark a significant event of a family such as the birth of a child, a marriage, when a child reached the age of 8, then again at 12, at the *O'sk* ceremony when a man assumed the right to wear some important crest, at the *Oiag* ceremony when a Nisga'a was allowed to apply for membership to one of their secret esoteric societies, at the *Llin* ceremony – a legal formality that recorded a change of status, for instance divorce, or at the death of a clan member. The major focus of feasting among Tsimshian groups was the cycle that began with the death of a chief and culminated with the installation of his heir, who was generally the eldest son of his eldest sister. The cycle generally included a memorial feast, the feasts associated with the erection of a memorial pole and the building of a new house, and the final feast of name assumption. When the deceased was the head of a local lineage, guests were generally invited from all groups with which political relationships were maintained. The prestige of the local lineage and the maintenance of its economic and political power were dependent on the success of events, including distribution of sufficient wealth to demonstrate control over territories.[87] Potlatch ceremonies were, therefore, a venue in which customary ownership to economic and ceremonial privileges were asserted, displayed, and formally transferred to heirs by performative ritual thus illustrating a 'performative' legal system. Every event during a potlatch ceremony highlighted the host's status by demonstrating wealth or expounding on inherited privileges.

Guests were invited to a potlatch ceremony to hear and participate in speeches, singing, dancing, lavish feasting, and gift-giving. Speeches, songs, and dances allowed a host to assert ancestral privileges to the guests. Masks, headdresses and button blankets were worn during dances and given as gifts. Serving food allowed the host to demonstrate generosity and wealth, as did distributing gifts. A good host was expected to provide more food than guests could possibly eat; and there are stories about guests becoming physically ill from over-eating. Usually guests were also given food to take home and share with others, thus spreading the word of the host's generosity. Guests were seated at potlatches on the basis of status and were served with great formality by their hosts. High-ranking individuals, such as chiefs, were served first and given the choicest food in greater quantities than other guests. Raunet noted that for the Nisga'a, the 'potlatcher' had to

[86] McCullagh, J, 'Progress Among the Nishga Indians' (Church Missionary Society, London, 1895) at 37-8.
[87] Ibid.

distribute appropriate gifts, often emptying his house of goods. But by accepting the gifts, the guests gave official recognition to claims and guaranteed the legitimacy of the titles assumed.[88]

The chiefs involved in the fur trade with the Hudson Bay Company in the 1830s became wealthy and there was a period of great prosperity and opulence. During this time huge amounts of wealth entered the First Nation's reciprocity economy, while established relationships of rank were destabilised by new aggregations around the trading post, which brought together chiefs who had not previously had stable political relationships through the potlatch system. Moreover, high mortality rates from introduced diseases meant that many 'names' became vacant which encouraged the promotion of multiple claims to 'names' hence the emergence of competitive potlatching and rivalry.[89]

The significance and nature of performative gifting in potlatches was commonly portrayed as extremely competitive, with hosts bankrupting themselves to outdo their rivals and aggressively destroying property. But excessive gifting developed during the 19th century as a means of negotiating status within and between groups. In addition, the potlatch was not a private endeavour but a collective one, as reported by a CMS missionary Pierce:

> As a rule, the potlatch must be carried on by one crest. For instance, a wolf crest will give a potlatch to all the other crests of the different villages excepting that of the wolf, but all the wolves of the village where the potlatch is held will help the wolf who is the giver of the potlatch. The same is true of the eagle, blackfish, and crow.[90]

In terms of hosts bankrupting themselves and reciprocity, Tomlinson added that 'by Indian law, he is entitled to receive back all that he gave away.'[91] Hence another always followed one potlatch and the host who organised an earlier potlatch was bound to receive gifts in later ceremonies and thus right the economic imbalance as it were, highlighting the First Nations traditional reciprocity economy.

Copper was an important gift, not only for its intrinsic value, but also for its cultural value as a symbol of wealth and prestige. Shield-shaped plates of beaten copper

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[88] Raunet, D, *Without Surrender Without Consent: A History of the Nisga'a Land Claims* (Douglas & McIntyre, Vancouver, 1996) at 30-1. Renaut cites a specific example of a Nisga'a potlatch ceremony at Gitlakdamix on 21 December 1893, as recorded by Reverend McCullagh who was present, which feasting and gifting lasted from 5.00 pm until the next morning.

[89] See Coderre, H, *Fighting With Property: A Study of Kwakiutl Potlatching and Warfare, 1792-1930* (American Ethnological Society, Monograph # 18, Augustin, New York, 1950).

[90] Pierce, J.B, *From Potlatch to Pulpit, Being the Autobiography of the Rev. W.H Pierce,* (Rev. J.P Hicks, Vancouver, 1933) at 125.

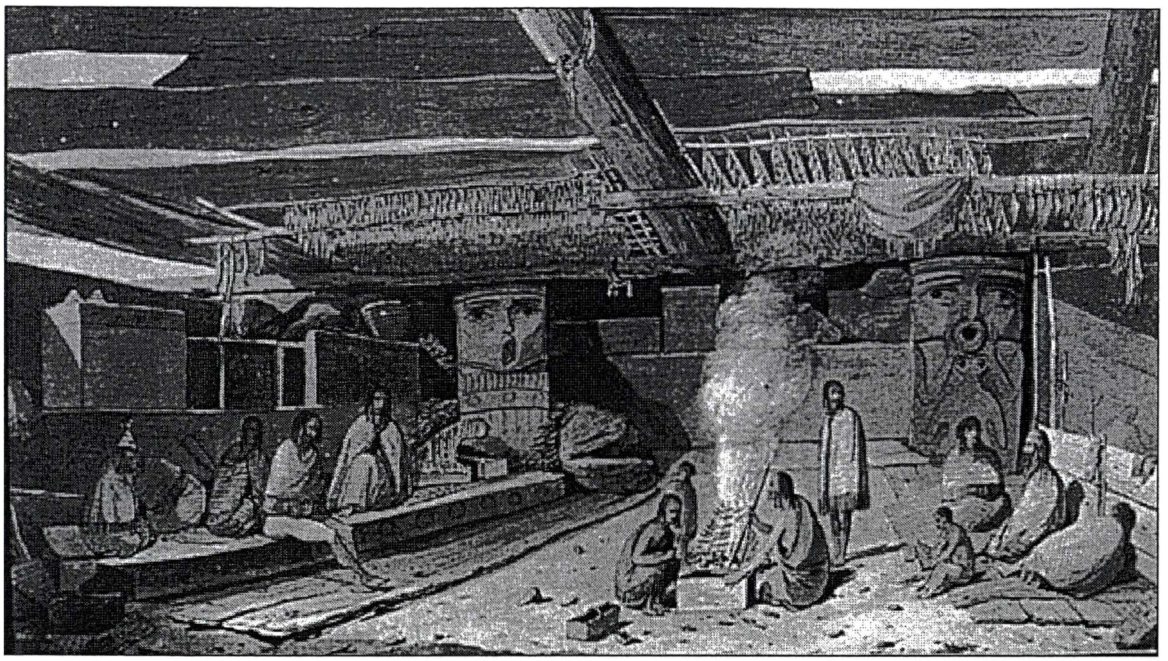
[91] Tomlinson, R, 'Journal of a Tour on the Nass and Skeena Rivers' (The Church Missionary Intelligencer, London, 1875) at 255.

were often decorated by painting and engraving and were important as a means of documenting major events such as births or marriages. During Potlatch ceremonies, the host would sometimes break the copper and distribute it to high status guests. Copper gifting sometimes would involve rivalry. If a chief offered a broken piece of his copper to a rival, the rival had to reciprocate with a piece of copper of equal or greater value or suffer humiliation. Available resources determined the kinds of gifts distributed and changed over time. Before newcomer contact, gifts might have included canoes, slaves, goat hair blankets, and food. The variety and quantities of gifts increased with European trade. Photographs taken in the late 19th century show piles of trade blankets, sacks of flour, household goods, bracelets, and even sewing machines.[92]

Extreme competition, rivalry, bankrupt hosts and the destruction of property were not the only by-products, however, and to reduce potlatches to these issues does not do the institution justice. In Tlingit mortuary potlatches, gifts given to guests compensated them for funerary services they had performed for the host's clan. Gifts also served as payments so that guests would remember the transfers of ownership they witnessed. In the absence of written records, witnesses' memories were critical to keeping track of legitimate claims to ownership over generations. Moreover, by accepting payment in the form of gifts, guests signalled their acceptance of the host's ownership claims. Hence the performative rituals of the potlatch institution were used to transmit knowledge, legitimate claims, consolidate group leadership and cohesion, establish and maintain reciprocal economic relations and, inter alia, as a performative means of social control.

[92] For a number of good references on the potlatch institution, see McCullagh, J, 'The Indian Potlatch' (Toronto's Woman's Missionary Society of the Methodist Church, no date (1890s)); Barnett, H.G, 'The Nature of the Potlatch' in *American Anthropologist* (Vol. 40, 1938) at 349-58; Anderson, M, Halpin, M, *Potlatch at Gitsegukla: The 1945 Field Notebooks of William Beynon,* (University of British Columbia Press, Vancouver, 2000); Dundes, A 'Heads or Tails: A Psychoanalytical Study of the Potlatch' in *Journal of Psychological Anthropology* (Vol. 2, No. 4, 1979) at 395-424; and Fleisher, M, 'The Potlatch: A Symbolic and Psychoanalytical View' in *Current Anthropology* (Vol. 22, No. 1, 1979) at 69-71.

Figure 1 Northwest Longhouses where some Potlatches took place. Note the fish drying on the sealing



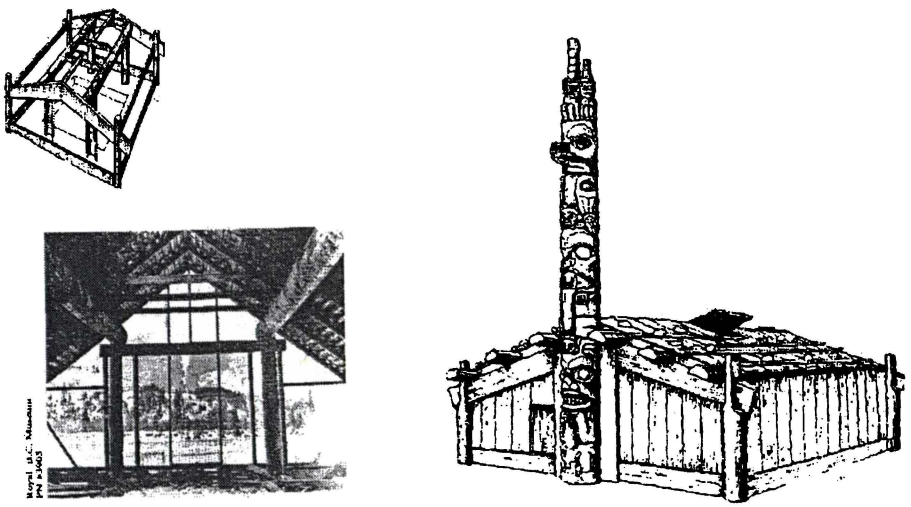
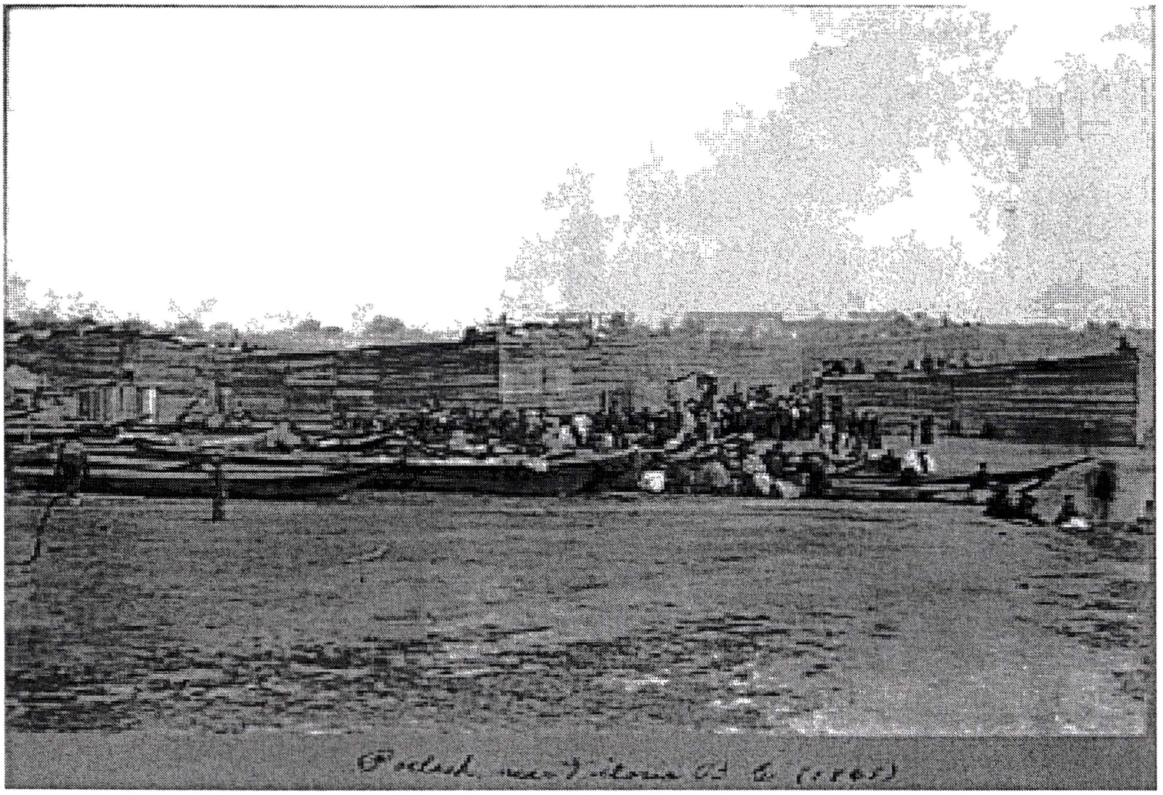


Figure 2 Northwest Longhouses where some Potlatches took place.

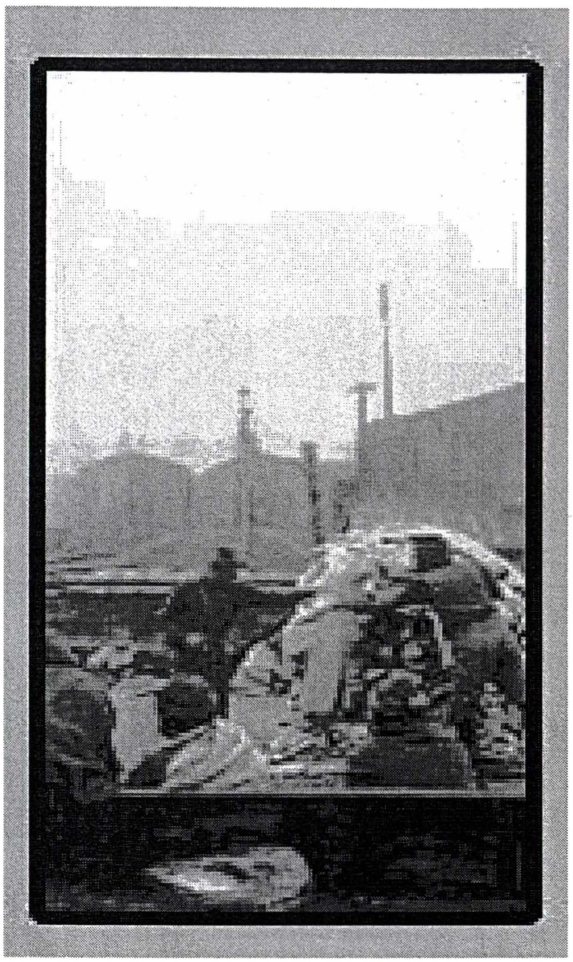
Figure 3 Potlatch, B.C, 1898[93]

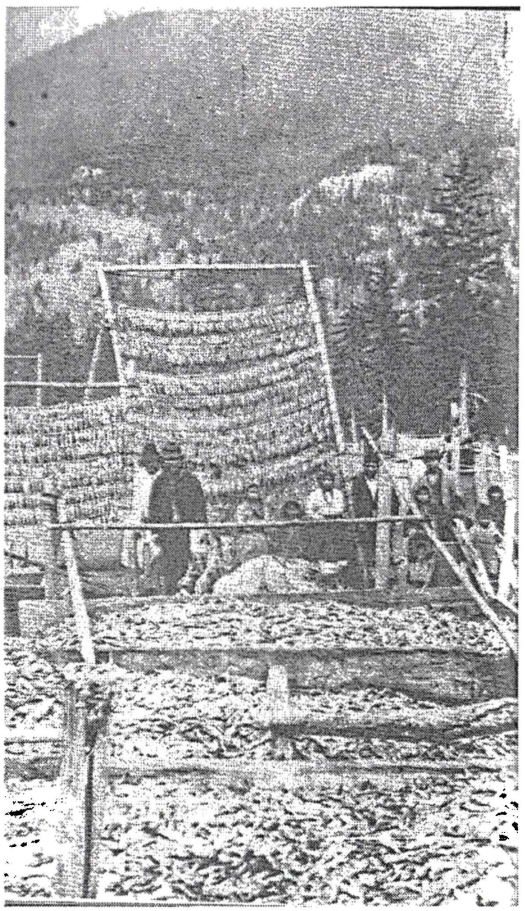
Figure 4 Potlatch, Victoria, 1865 [94]



[93] Potlatch at Fort Rupert, British Columbia, (Photograph by R.B. Dixon, 1898, PMAE # 2004.1.363.3).
[94] Items lined up for a potlatch near Victoria, British Columbia, 1865, (PMAE # 2004.1.806).

Figure 5 Potlatch pile of gifts – blankets and fish, to distribute to guests





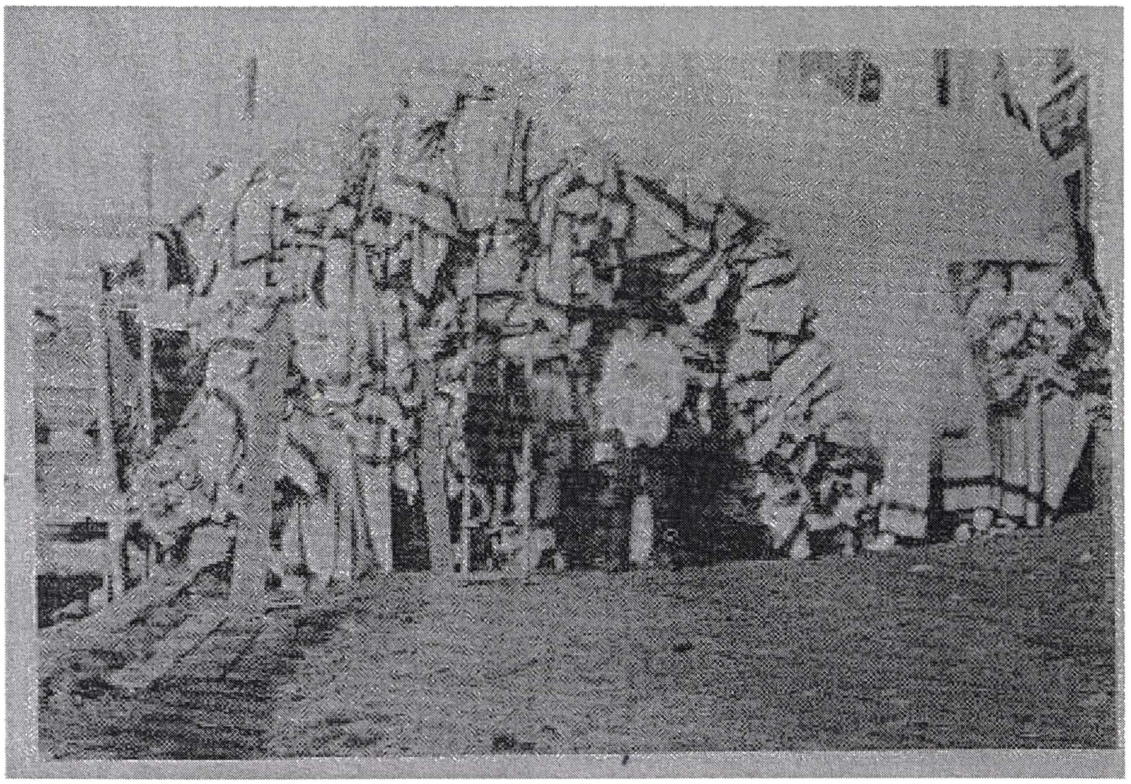
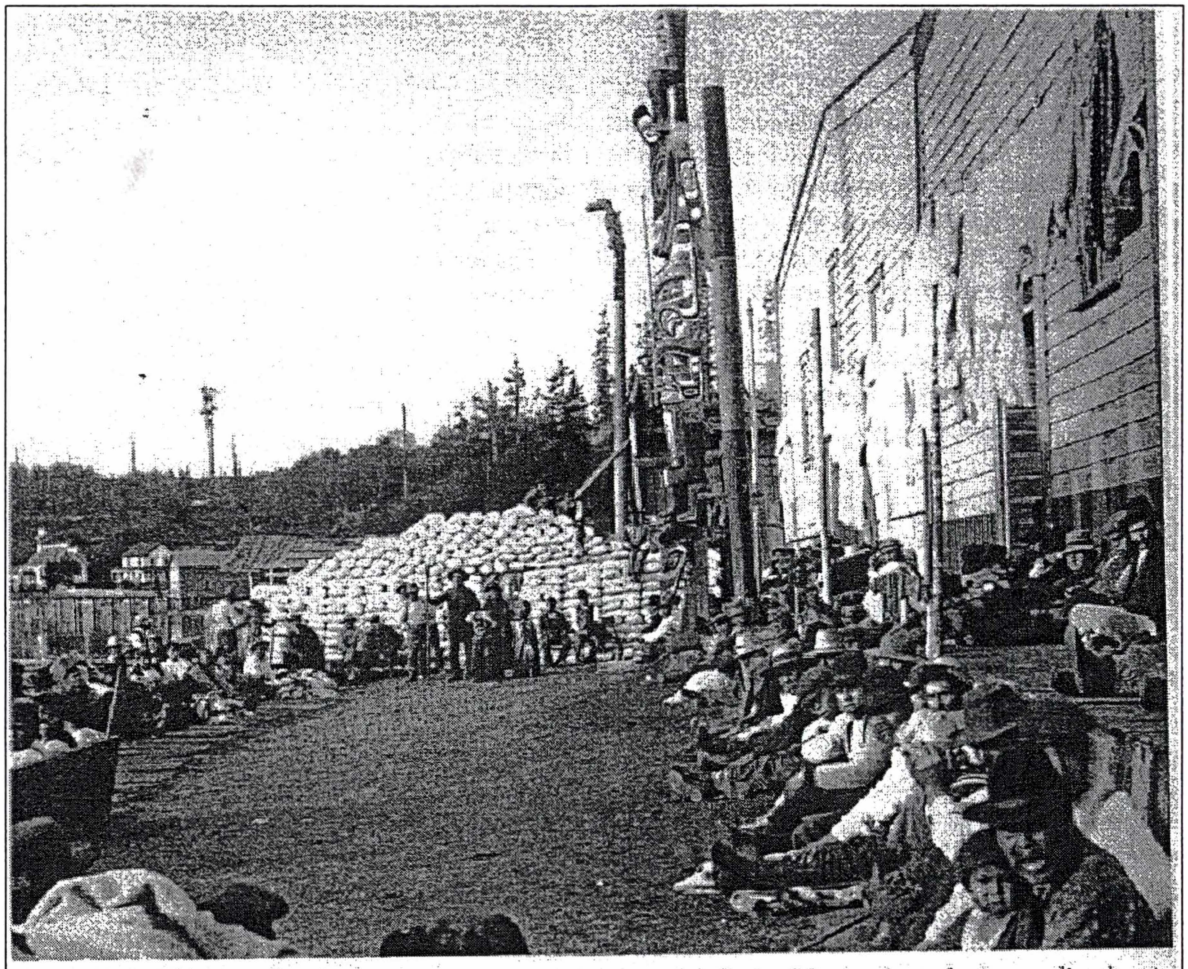


Figure 7 Potlatch Alert Bay, 1910.



Potlatch at Alert Bay. Guests are assembled to hear the words of the speaker, who is recording the privileges and claims of his chief. When the speeches are concluded sacks of flour will be distributed to the assembled guests. Photo by W.M. Halliday, *c.* 1910. (Courtesy of the Royal British Columbia Museum, PN 10067)

Figure 8 Potlatch Alert Bay, 1910.

9.3.3.4 CUSTOMARY MĀORI HĀKARI INSTITUTION

In a similar manner to the First Nations customary potlatch institution, hākari were Māori customary feasts, typically held after the main ceremony of a hui (gathering, meeting) and viewed as an essential feature of most Māori gatherings. Each hui culminated in a big day with a ceremony or series of ceremonies including speeches and followed by a hākari. When the hākari was ready, a host elder would call the guests into the dining hall, the most important individually, then the various tribal and sub-tribal parties. Usually two and sometimes three sittings were necessary. The hosts do not eat until the guests have finished.

Traditionally however, hākari were entertainment feasts and some tribes built high wooden frameworks to place food for feasting and gift giving. In his 1845 journal, the CMS missionary Thomas Chapman described a hākari at Puhirua, Rotorua, given by Wiremu Hikairo. Chapman recorded that the parties met together and dispersed on the 23rd of July after the 'main hākari' without the least disturbance after receiving the 'customary departing gift.' Chapman noted:

> Scene animating in the extreme - all noise cheerfulness and motion and Hikairo indeed Master of the Ceremonies. I counted about 600 pigs and 500 bushels of kumeras [sic] besides Potatoes, Fish, pumpkins etc, etc. Amid all this in a retired part of the Pa, the Chiefs were speechifying thro' the greater part of the day, Peace and their improvement the general topic ... A couple of hours cessation from all but dividing out the Food into heaps according to Families nearly concluded the business of this Meeting, as tribes were respectively called to, themselves divided out into families, and this over, the Feast was considered at an end.

A well-recorded hākari was the paremata or reciprocal feast given in May 1844 by Te Wherowhero of Waikato to Ngāti Hauā and other neighbouring tribes at Remuera, Auckland. It may be surmised that one effect of the hākari was to emphasise the importance of Te Wherowhero in the eyes of Government. Up to 6000 people were estimated to have attended.[95] Joseph Merrett recorded the event in a drawing titled 'Maori Feast at Remuera' (1844) with a note printed with the original lithograph that stated:

> A shed 400 yards long had been erected and was covered with blankets; and tents decorated with little flags dotted the ground. The provisions comprised 11,000 baskets of potatoes, 9000 sharks, 100 pigs and quantities of tea, tobacco, and sugar. A thousand blankets had been provided as presents... 1600 natives danced the war dance. The assembling of so large a

[95] *Te Karere o Nui Tireni,* (Vol. 3, No.6, 1 June 1844) at.1.

force near the infant capital caused some uneasiness among the settlers, but admirable order was maintained throughout.[96]

It was also recorded that excess food was sold to the local Europeans in attendance.

Figure 9 Te Wherowhero's Hakari, Remuera, 1844, lithograph by Joseph Merrett

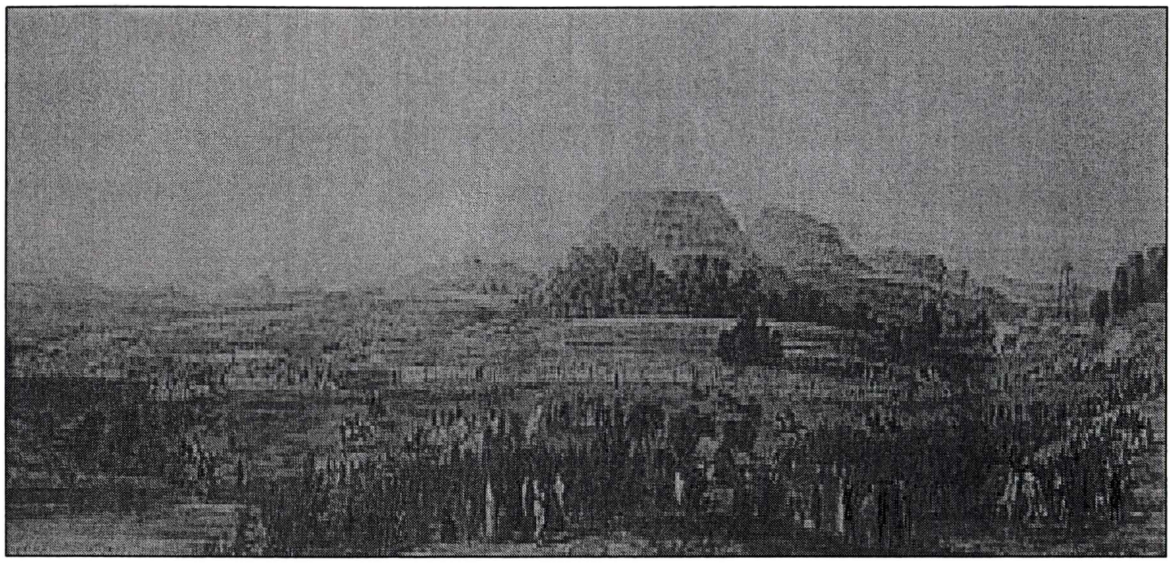
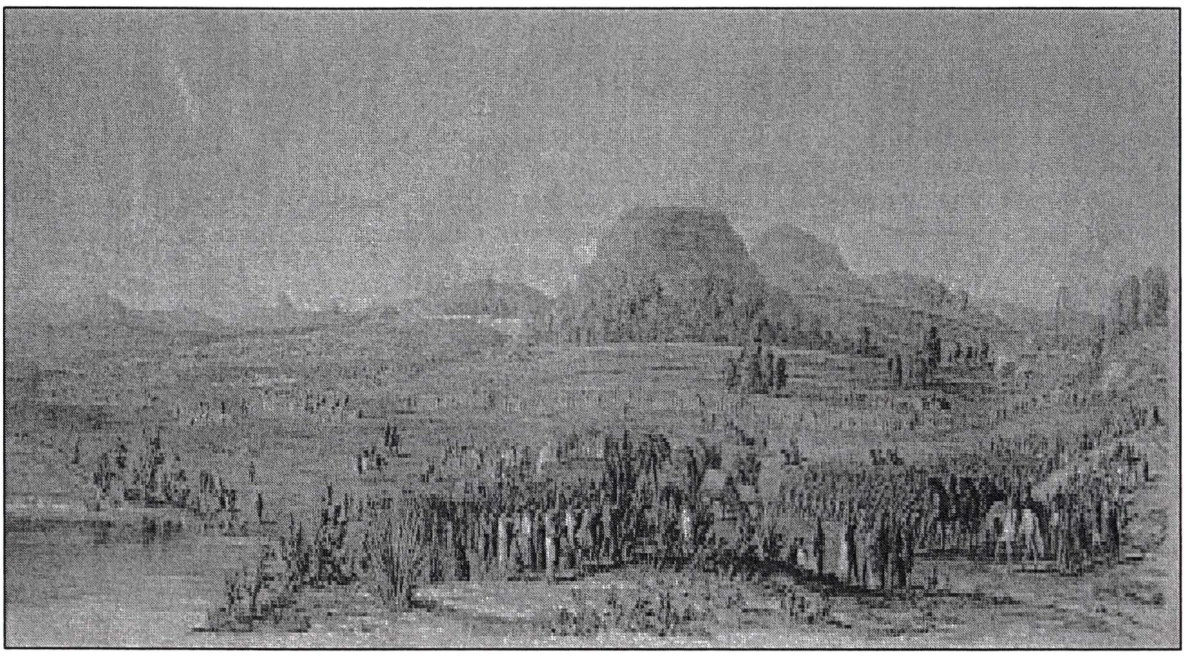


Figure 10 Te Wherowhero's Hakari, Remuera, 1844, lithograph by Joseph Merrett



Firth provided an interesting table of various hākari distinguishing four kinds of feasts.[97] First, those marking 'crises of life' such as birth, naming, tattooing, tangi. Secondly, those accompanying 'periodic events of economic or social importance' such as

[96] Petherick, E. M. *Maori Meeting Held at Remuera, Auckland, N.Z., May 14th, 1844.* [no date]. 'Copied from the original in two sheets by Joseph Jenner Merrett.' 'Petherick Collection' -Accession register. R7246. A lithograph of the Potatau's Hakari at Remuera is held at the Alexander Turnbull Library in Wellington.

[97] See chapter 9: 'The Feast,' in Firth, R, *Economics of the New Zealand Maori,* (A.R Shearer, Government Printer, Wellington, first published in 1929) at 308-338.

planting or opening a new whare. Thirdly, 'facilitating social cohesion' such as gathering allies, celebrating peace etc. The fourth was, 'economic feasts.' Firth noted the political significance of hākari:

> The feast also played a valuable social role in promoting harmonious relations between them. Food had a very mellowing influence when it was a question of patching up tribal differences.[98]

Ballara listed and discussed a series of hākari in her work when she commented that:

> This series of hui and hākari shows many common elements. There are obvious differences as time and contact with Europeans went on, and new occasions such as Christian festivals, adopted forms of rites of passage, new foods, new technology and new names for them were introduced. But a similar spirit and some common forms of organisation are also obvious. The work was done communally by hapu or clusters of hapu ... Reciprocity was taken for granted to such an extent that no thanks were rendered for gifts; the recipients were incurring a new obligation.[99]

The first of Ballara's list involves a pre-European hākari in which a chief unable to provide sufficient food for a 'return' hākari insisted on giving land instead.[100]

Interestingly, the Waitangi Tribunal in the Muriwhenua Land Report discussed the persistence of certain Māori customs, including hākari,[101] to refute the Crown counsel's suggestions that, once a native culture has lost its perceived pristine form, it has somehow bent to some foreign sway.[102] What was also very interesting is the Tribunal made a brief comparison with the potlatch feasting practices of the First Nations in northwest Canada:

> The resident magistrate's determination to abolish the hākari has parallels with the Canadian authorities' drive to ban the Indian potlatch, which was remarkably similar in structure and purpose. In both countries officials remarked despairingly on the extravagant displays and generous gifting of all that the people possessed, only to face poverty, penury, and starvation, they thought, next winter.[103] In fact, the hākari [and potlatch] was an insurance that, if crops failed locally or there was a war, full support must inevitably come from elsewhere, as honour would so require.[104]

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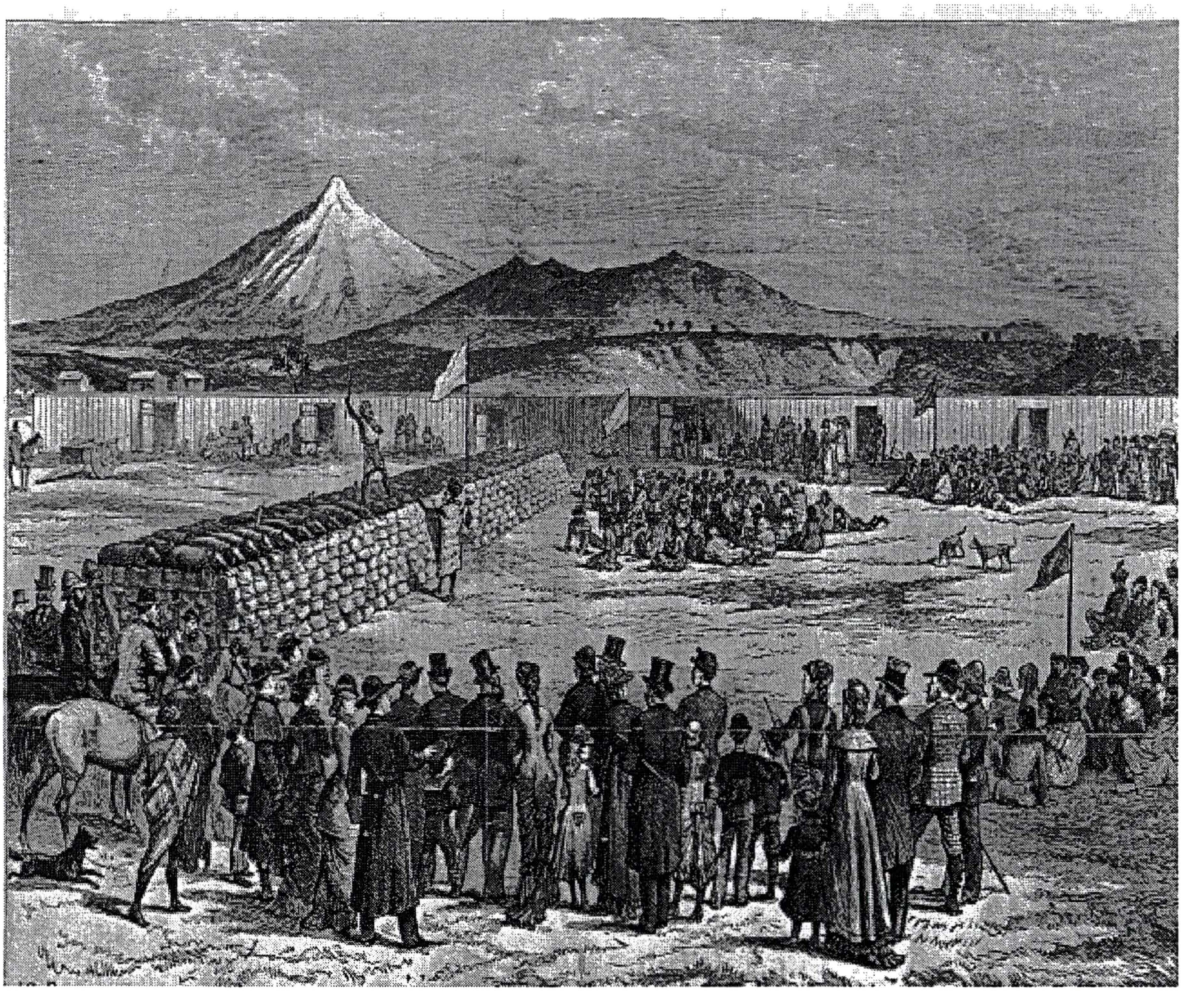
[98] Firth, supra n 15 at 308.
[99] Ballara, A. *Iwi: The Dynamics of Maori Tribal Organisation,* (Victoria University Press, 1998) at 225.
[100] Ibid.
[101] The Tribunal made reference to a feast in 1863 in Ahipara. See an Account of Meeting Held at Ahipara, May 1863', Grey Papers, Auckland Public Library.
[102] Waitangi Tribunal, *Muriwhenua Land Report,* (Wai 45, 1997, Government Printer) at 195-197. See www.waitangi-ribunal.govt.nz/reports/northislandnorth/wai045b/chapt06/chapt0615.asp (Accessed May 2005).
[103] See for example, 'Ko Te Hakari' in *Te Karere o Poneke,* (24 September 1857) at 2; and 'Nga Hakari Maori' in *Te Haeata* Vol. 1, No. 2, Auckland, 2 May 1859) at 1. The hākari was defended by Māori, however, as 'according to customary law, being an appropriate practice for our well-being.' See Hapurona Tohikura, *Te Waka Maori o Niu Tirani,* (Issue 9, No. 7, 14 Mei 1873) at 53.
[104] Waitangi Tribunal, *Muriwhenua Land Report,* (Wai 45, 1997, Government Printer) at 195-197.

Figure 11 Hakari in Waitara 1878. Note the Literal Stacks of Food[105]



[105] From Harper's weekly :Meeting of natives with the British authorities at Waitara, New Zealand. J R B [sc.] [New York] Harper's weekly 1878.

Figure 13 Hakari Gifts, Whakatane 1890?

Figure 12 Hakari Gifts, Whakatane 1890?

Figure 14 Hakari Gifts to Distribute, Whakatane, 1930s?

Food and gift display at a hui

Figure 15 Hakari Gifts to Distribute to Guests as a Display of Mana, Nelson 1930s?

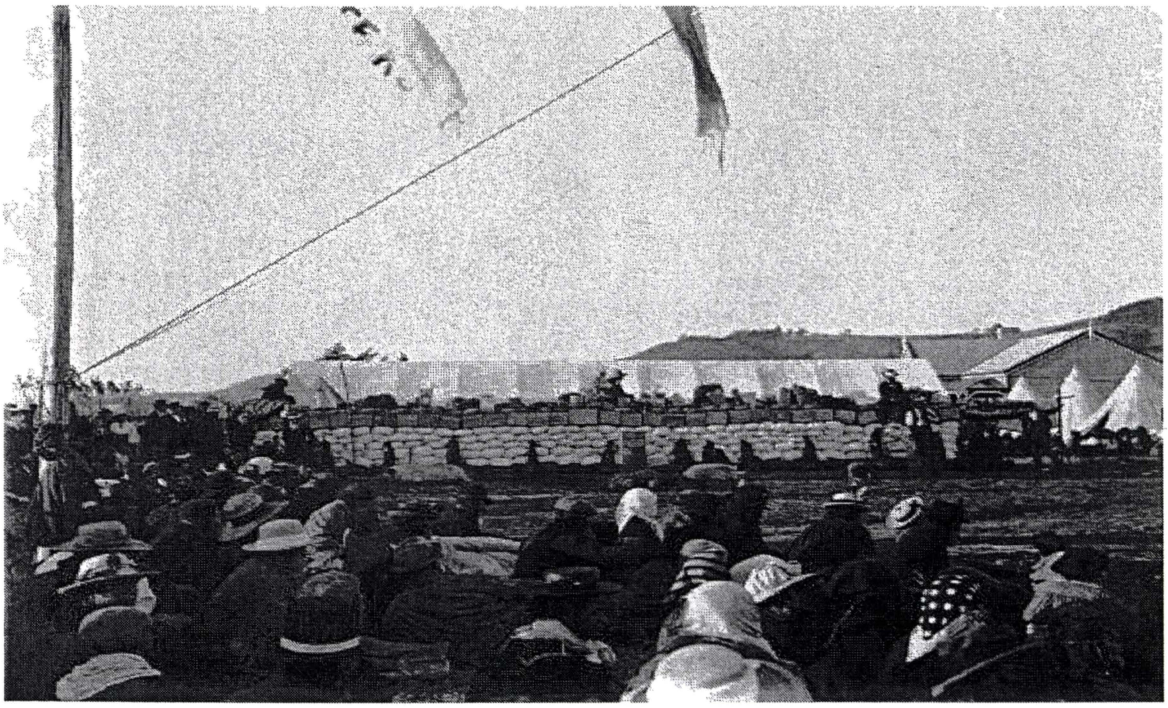


Figure 16 Ngā Puhi Hakari Stage, Bay of Islands, 1849

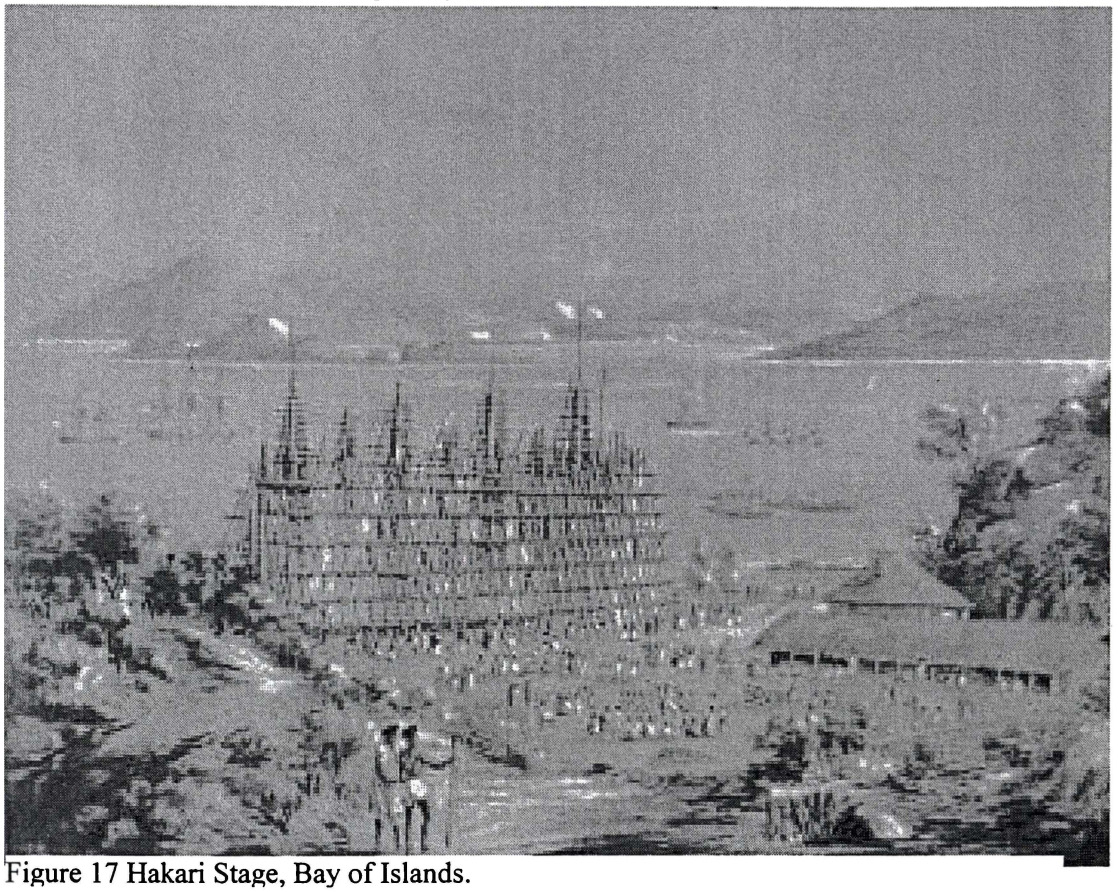


Figure 17 Hakari Stage, Bay of Islands.

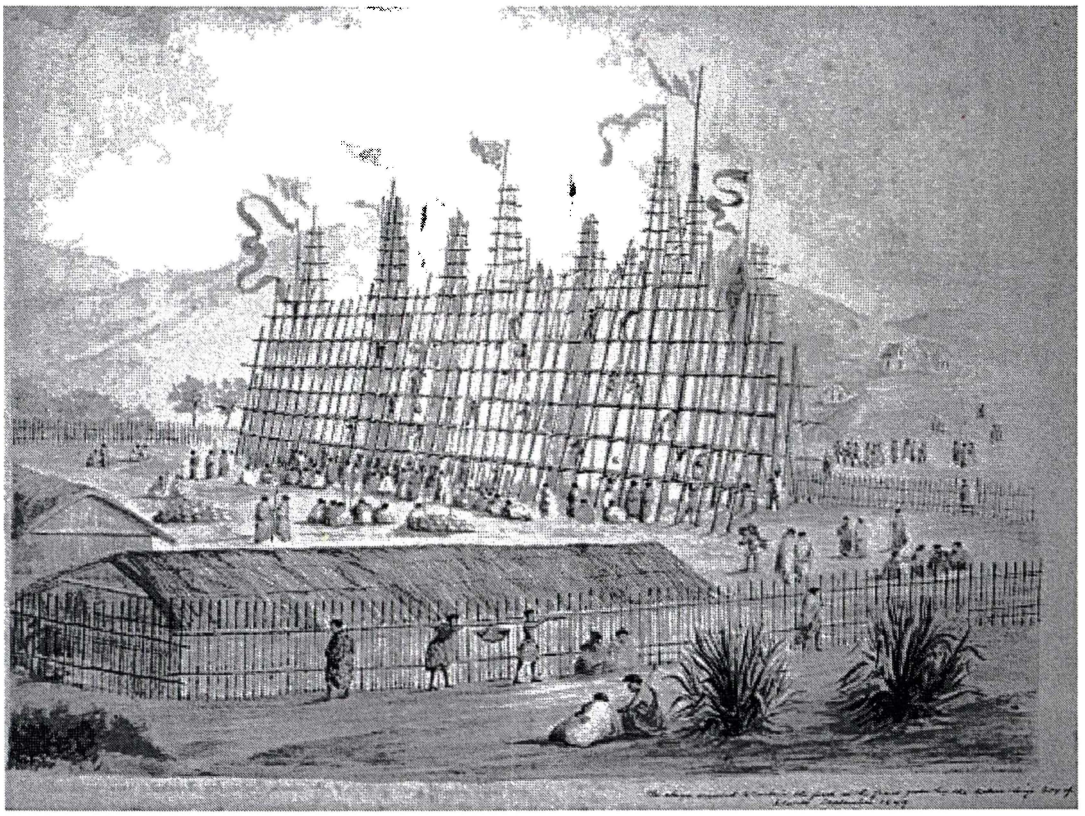
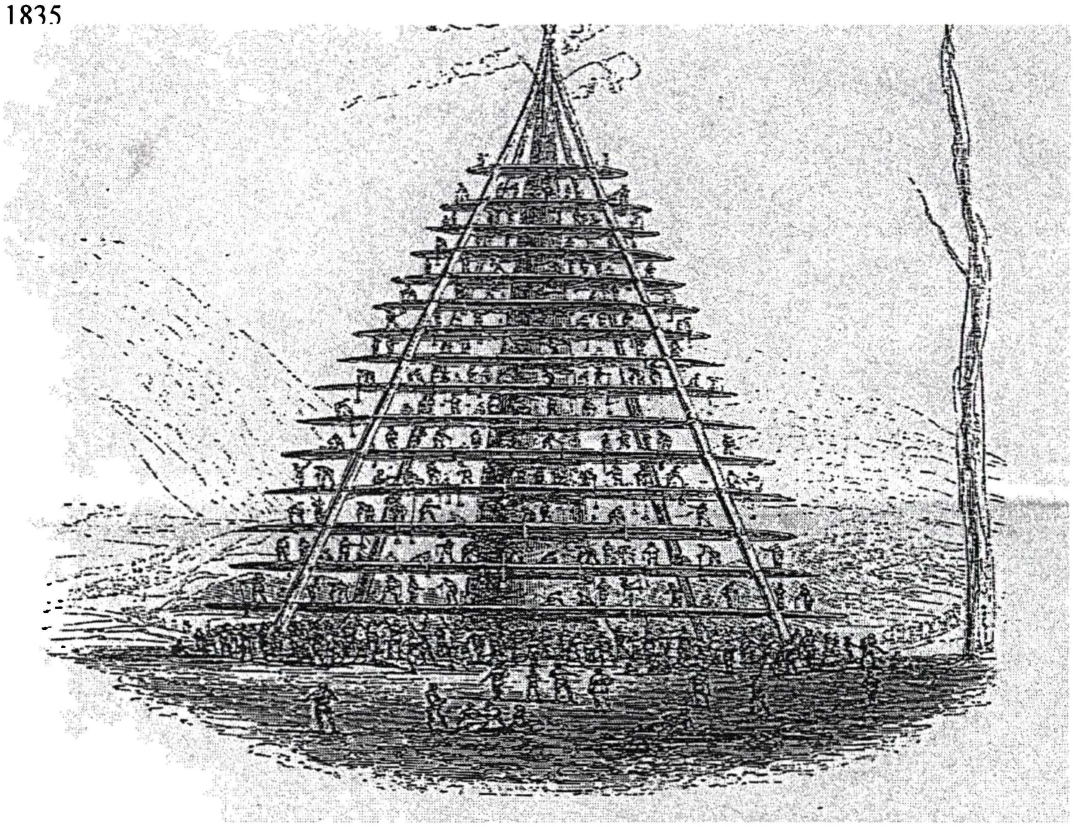
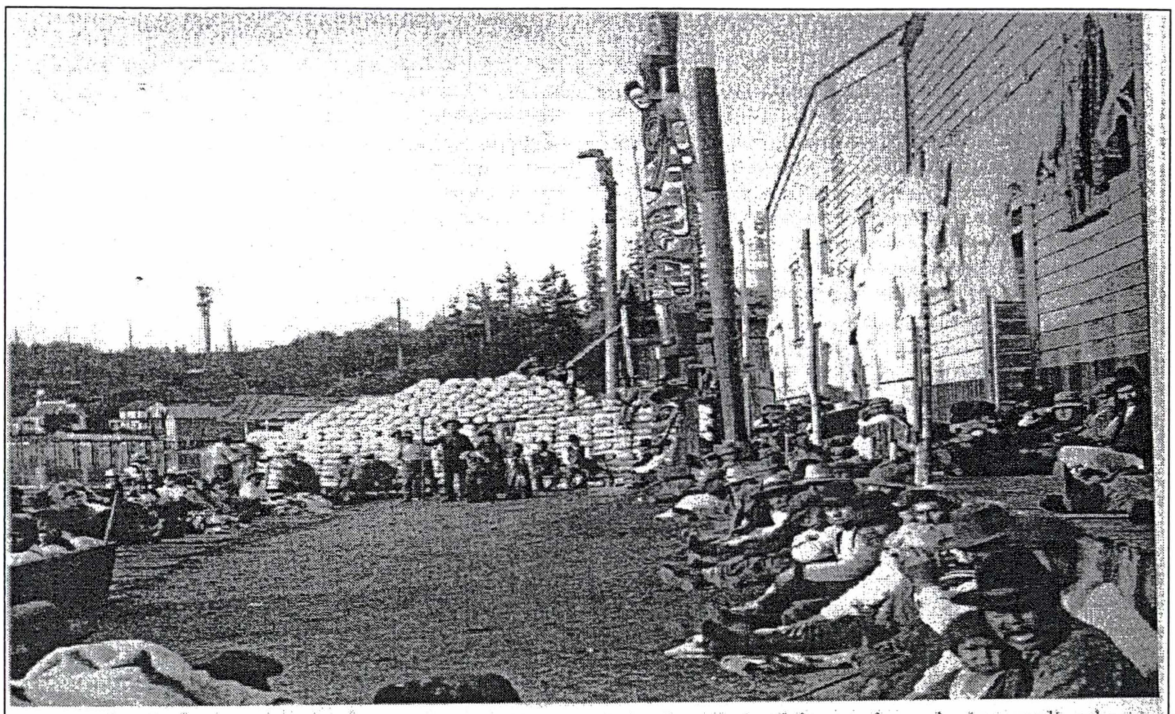


Figure 18 Hakari stages where food and gifts were placed on the stage rows, Bay of Islands, 1835



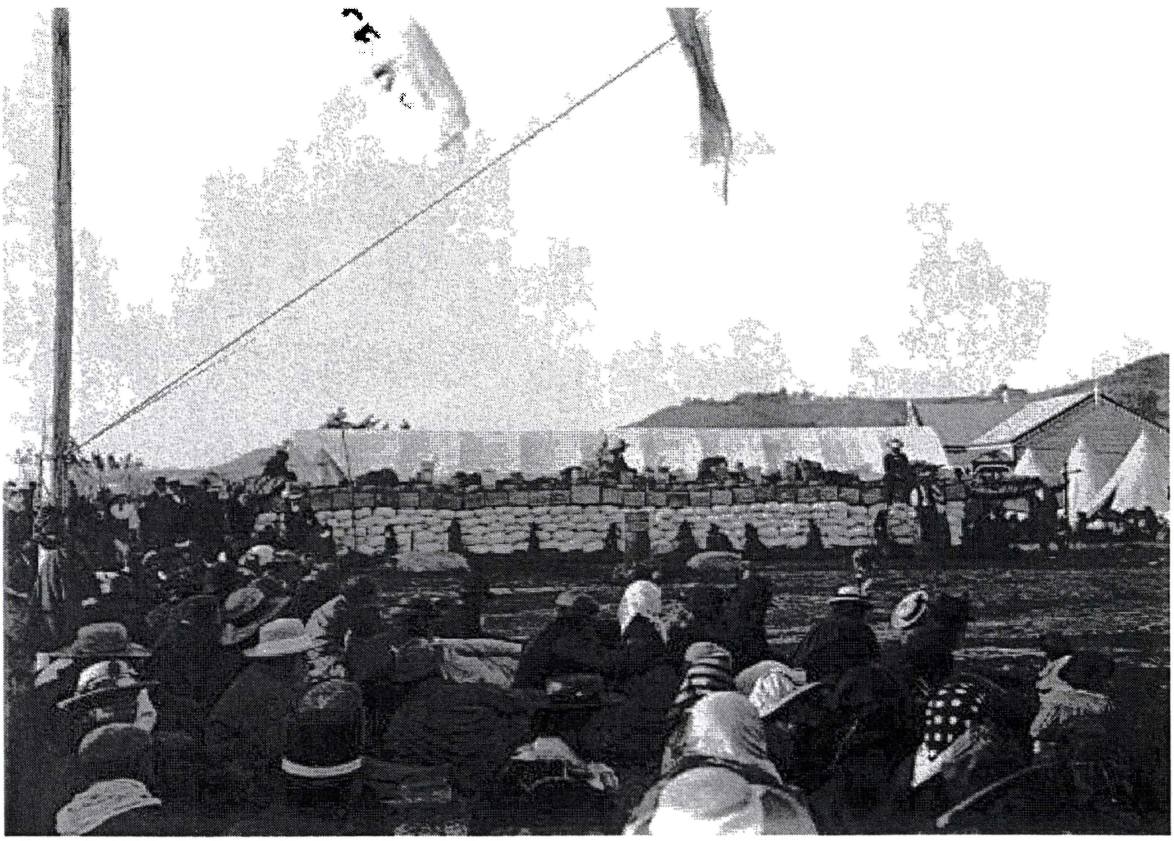
Indigenous Performative Customary Institutions

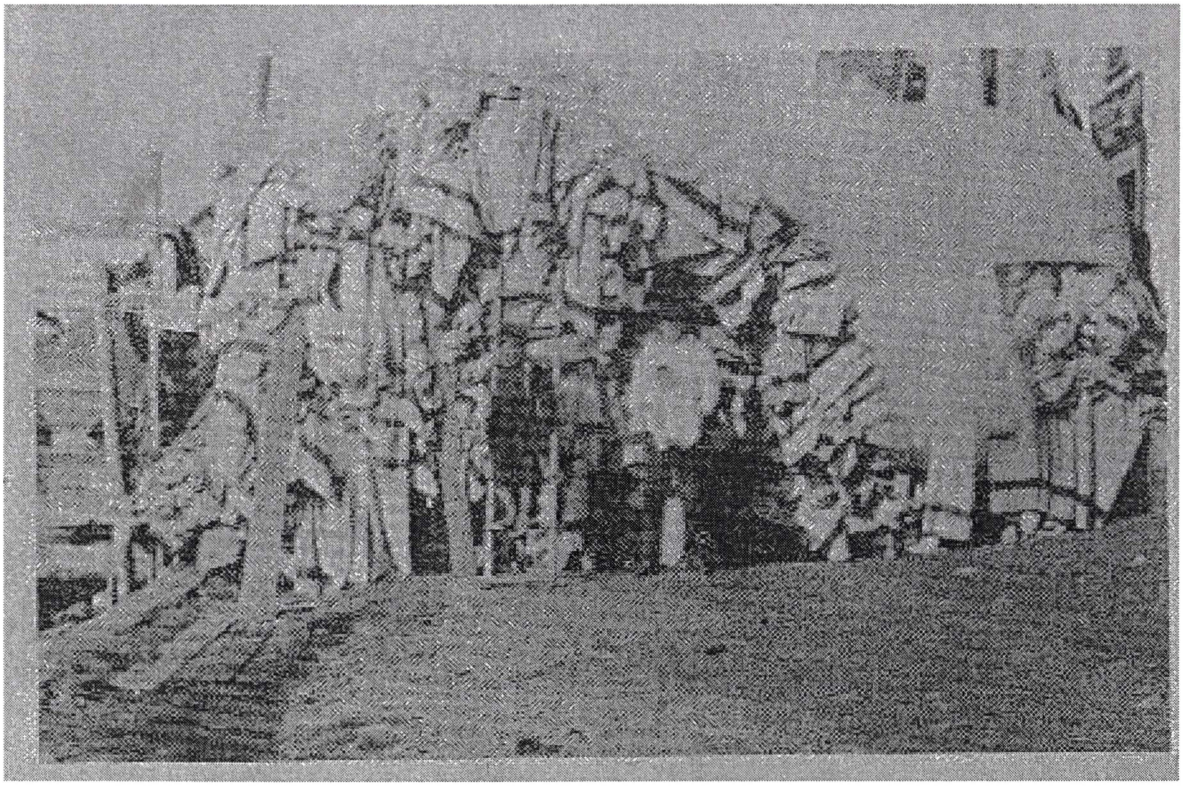
	Northwest First Nations - Nisga'a, Haida, Salish, Nootka, Tsimshian, Tlingit	Māori – Tainui, Ngā Puhi, Ngāi Tahu, Whakatohea, Ngāti Awa, Ngāti Tuwharetoa
Institution	Potlatch – Nisga'a YUQU	Hakari, Ngai Tahu - Kaihaukai
Performance	Lavish feast, gift giving	Lavish feasts, gift giving
Purpose	• Public event to establish and uphold hosts status; • Mark significant group events; • Demonstration of wealth, inherited privileges, group solidarity; • Means of transferring property; • Transfer and consolidate leadership; • Establish reciprocal relationships	• Public event for manaakitanga – to uphold and enhance mana of hosts; • Mark significant group events; • Demonstrating wealth, power, kotahitanga unity, group cohesion; • Enhance legitimacy of leadership; • Establish reciprocal relationships
Venue	Inside large longhouses or held outside	Inside wharekai or held outside
Settler Reaction	Contempt, Outlawed	Contempt, Outlawed
Current Practice	Yes, smaller scale	Yes, smaller scale

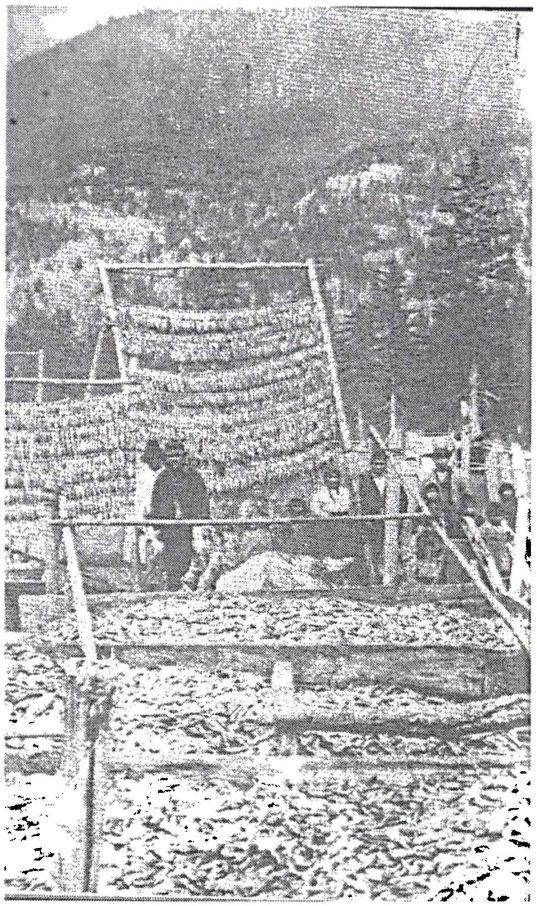


Potlatch at Alert Bay. Guests are assembled to hear the words of the speaker, who is recording the privileges and claims of his chief. When the speeches are concluded sacks of flour will be distributed to the assembled guests. Photo by WM. Halliday, c. 1910. (Courtesy of the Royal British Columbia Museum, PN 10067)

The above and below pictures are a pictorial comparison of the First Nations potlatch and Mäori hakari institutions which appear to be remarkably similar.







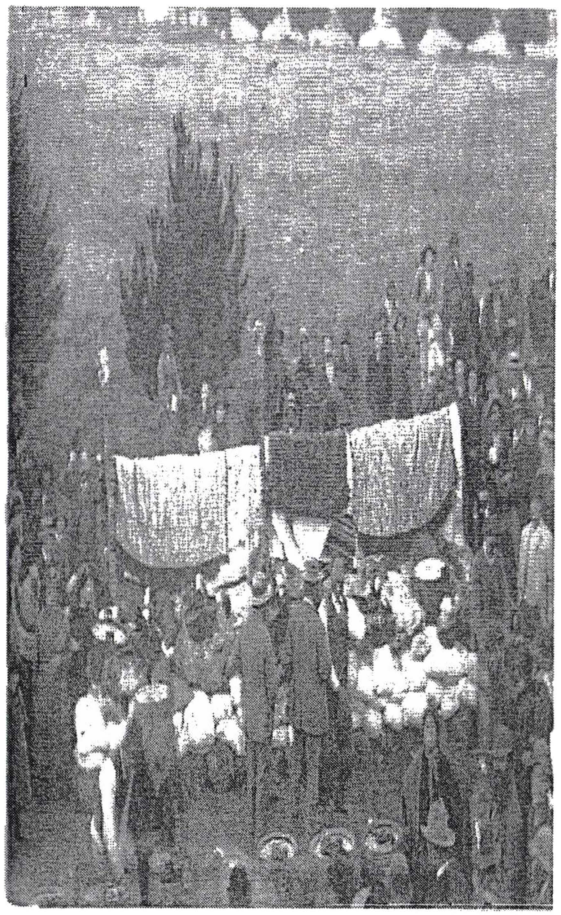


Figure 19 Potlatch and Hakari Institutions Compared

Having highlighted the performative aspects generally of indigenous customary traditions and practices and specifically, with the First Nations potlatch and Māori hākari institutions, the next section will discuss the important and wider notion of indigenous customary 'law.'

9.3.4 INDIGENOUS CUSTOMARY 'LAW'

Durie contrasted Māori and British newcomers' law (and the author suspects First Nations law) highlighting one as being rules-based western law (literate) and the other being governed by values to which the community generally subscribed (non-literate and performative).[106] Metge noted however that 'Western laws are also values-based, the values concerned being interpreted by the law makers.'[107] Richard Mulgan added:

[106] Durie, supra n 14 at 3.
[107] Metge, J, 'Commentary on Judge Durie's Custom Law' (Unpublished Custom Law Guidelines Project Paper, 1997) at 5.

> All law, Pakeha as well as Māori, arises out of social norms and the need to enforce these norms within society. The ultimate source of Pakeha law is not the courts or statutes but the social values reflected by Parliament in statutes and by judges in their decisions.[108]

Metge concluded that the difference between Western law and tikanga Māori (and it is suspected indigenous law generally) originates in their respective sources and in the contrast between oral and written modes of communication:[109]

> Tikanga arise out of on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift. Western laws are formulated and codified by a formal law-making body and are published in print; their amendment, while possible, is a complex and lengthy process. As a result laws often lag behind community opinion and practice; at times, however, they can be ahead and formative of it.[110]

Although Māori and First Nations' values, customs and norms were largely idealised, they were 'law' in a jurisprudence context and they constituted a legal system, given that the application or neglect of customs and norms would have provoked a predictable response. Most anthropologists nowadays accept that all human societies have law (legal principles and legal processes), whether or not they have formal laws and law courts.[111] Metge commented:

> Except in times of exceptional crisis, all human societies pursue as key aims the maintenance of order, the reinforcement of accepted values and the punishment of breaches. Large-scale, complex state societies codified into a system, courts and judges. Small-scale societies with simpler political structures use means which are mainly informal, implicit and serve other purposes as well.[112]

In terms of indigenous law and indigenous legal systems being based on custom, the *Oxford English Dictionary* records two distinct meanings of 'Custom:'

> 1. A habitual or usual practice; common way of acting; usage, fashion, habit, (either of an individual or of a community); and
> 2. Law. An established usage which by long continuance has acquired the force of a law or right.[113]

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[108] Mulgan, R, 'Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pakeha Political Scientist' (Unpublished Paper, Law Commission, 1997) at 2.
[109] Metge, supra n 108 at 5.
[110] Idem.
[111] Notwithstanding the *Wi Parata* approach, infra, n. 250.
[112] Metge, supra n 108 at 2.
[113] *The Oxford English Dictionary*, 2nd ed. (Vol.IV, 1989). This section on defining customary law has drawn heavily from the work of Te Mātāhauariki Institute's 'Te Matapunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law: Proto-Compendium' (forthcoming in 2007 (Te Mātāhauariki Institute, University of Waikato, June 2003 Draft Version) at 3-8.

The distinction is thus made between custom that is mere habit (or fashion) – usual but nevertheless optional – and custom that gives rise to obligation and right. The 1608 *Case of Tanistry* affirmed the potency of custom as a source of law in this way:

> ... custom, in the understanding of the law, is such usage as has acquired the force of law and is respected as a binding law in a particular place ... Because when the people find any rule to be good and beneficial, suitable and agreeable to their nature and disposition, they use and practice it from time to time; and it happens through frequent repetition and multiplication of the rule, Custom is created: and having been followed for as long as people can remember, acquires the force of law.... In brief, custom is a reasonable rule, followed consistently and continuously by the people from time immemorial.[114]

Sir John Salmond makes a similar distinction between mere habit and customary law when, in setting out the requirements for the reception of custom as law, he includes the following:

> The third requisite of the operation of a custom as a source of law is that it must have been observed as of right. A merely voluntary practice, not conceived as based on any rule of right or obligation, does not amount to a legal custom...A legal custom must be the embodiment in inveterate practice of the conviction of the community as to the rights and obligations of its members towards one another.[115]

But what will suffice to add the 'obligatory' aspect, which turns custom into 'customary law'? Will organised and systematic social pressure, in the absence of formally constituted judicial and enforcing authorities, allow us to find 'customary law'? The American theorist, Hoebel, asserted:

> A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognised privilege of so acting.[116]

Hoebel's definition is considerably wider than that of the school of Western jurisprudence, which saw the predominant characteristic of 'law properly so-called' as a 'command' within a unitary political system, backed by force. The American jurist Lon Fuller has criticised this tendency to assume 'that law must be regarded as a one-way projection of

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[114] *Case of Tanistry*, 80 Eng. Rep. 516 (1608), quoted in Braybrooke, E.K. 'Custom as a Source of English Law' in *Michigan Law Review* (Vol.50, 1951) 71 at 73. For more detailed discussion, see Frame, A, *Grey and Iwikau: A Journey into Custom*, (Victoria University Press, Wellington, 2002) at 29.

[115] Sir John Salmond, *Jurisprudence*, (7th. Ed.)(Sweet and Maxwell, London, 1924) at 219.

[116] Hoebel, E.A, *The Law of Primitive Man: A Study of Comparative Legal Dynamics,* (Harvard University Press, 1954) at 28.

authority, instead of being conceived as a collaborative enterprise.'[117] Whatever may have been the contemporary political reasons for the adoption of such a restrictive view by English and British theorists such as Hobbes, Bentham and Austin, the criticism of Sir Carleton Allen in his Introduction to Sir Henry Maine's *Ancient Law* seems well aimed:

> Its exclusion of historical considerations from the province of jurisprudence led it into the radical fallacy of regarding all systems of law as being typified by Western European monarchical states.[118]

Although Hoebel's definition is open to objection for clinging to a central position for 'force' as the identifier of 'law,'[119] the definition is helpful, given that collective social recognition and reinforcement of 'supernatural' consequences constitutes a degree of social pressure, which is functionally equivalent to more direct applications of physical force. Fuller had raised, but left unanswered, this very question in relation to Hoebel's definition:

> Just what is meant by force when it is taken as the identifying mark of law? If in a theocratic society the threat of hell-fire suffices to secure obedience to its law, is this 'a threat of force'? [120]

Fuller preferred to state simply that:

> A legal system, to be properly called such, has to achieve some minimum efficacy in practical affairs, whatever the basis of that efficacy – a proposition both unobjectionable and quite unexciting.[121]

The approach which discounts centrally administered force as the defining characteristic of 'law' has antecedents in the work of writers such as von Gierke, Ehrlich, Weber and Pospisil who deny that there is any practical reason to confine the meaning of 'law' to situations in which coercion is guaranteed by the political authority.[122] Max Weber has pointed out that:

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[117] Fuller, L *The Morality of Law,* (first published in 1964, Yale University Press, revised edition 1969) at 227.

[118] Sir Henry Maine, *Ancient Law,* (first published 1861, with Introduction by Sir Carleton Allen, The World's Classics, 1959) at xiii.

[119] Fuller, for example, states that 'the notion that its authorization to use physical force can serve to identify law... has done great harm to clarity of thought about the functions performed by law', Fuller, supra, n 118 at 108.

[120] Fuller, supra n 118 at 109.

[121] Ibid, at 109-110. Interestingly, the Maori and Polynesian concept of *mana* is often explained as requiring, among other things, *effectiveness* in social affairs.

[122] See Pospisil, L. 'Legal Levels and Multiplicity of Legal Systems in Human Societies,' in *The Journal of Conflict Resolution,* (Vol. XI, No.1, March 1967) at 2-26.

> Law, convention, and custom belong to the same continuum with imperceptible transitions leading from one to the other ... It is entirely a question of terminology and convenience at which point of this continuum we shall assume the existence of the subjective conception of a 'legal obligation.'[123]

We must be conscious also of drawing too firm a distinction between 'obligatory' and 'persuasive' norms, a point recently made by Professor Bruno Saura in Tahiti:

> The very idea of distinguishing between obligatory customs, because they are of a legal nature, and customs which are more or less arbitrary stems from a Western perspective in which judges – rather than priests, sorcerers or divine forces – are in charge of issuing punishments for breaches of matters that the community deems crucial to respect.[124]

Malinowski, in his introduction to Hogbin's *Law and Order in Polynesia,* made some pertinent observations on the 'law-not-law' debate concerning custom:

> Those rules, the working of which are essential for the maintenance of such primitive institutions as the family, the village community, forms of organized economic co-operation, chieftainship or religious institutions, are entirely compatible with our rules of law. They are really obligatory, they are enforced.
>
> Our own law is nothing but intrinsically valid custom, custom safeguarding the smooth working of our institutions, custom obeyed not so much through the fear of penalties but for much deeper reasons which the sociologist and psychologist have to discover.
>
> Co-operation always implies a body of people united by some fundamental constitution, that is, body of rules, which regulates their mutual behaviour.[125]

The co-operative and reciprocal elements in customary law systems seem to require explicit recognition in any definition which aims to comprehend the social foundation of law. Hence, the following adaptation of Hoebel's definition of indigenous customary law:

> A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of force or the imposition of serious social disadvantage by an individual, group, or agency possessing the socially recognized privilege of so acting. [126]

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[123] Weber, M *Economy and Society: An Outline of Interpretive Sociology,* (ed Roth, G. and Wittich, C. transl. Fischoff, E. Vol.1, University of California Press, 1978) at 319-321.

[124] Saura, B 'Chapter 4,' in Deckker, P.de and Faberon, J-Y, (eds), *Custom and the Law,* (Asia Pacific Press, Canberra, 2001) at 81.

[125] Malinowski, B, 'Introduction' in Hogbin, H. I, *Law and Order in Polynesia,* (first published 1934, Cooper Square, New York, 1972). The three quoted excerpts are from pages xxix, xxx and xxxii of the Introduction.

[126] Hoebel, E.A, *The Law of Primitive Man: A Study of Comparative Legal Dynamics,* (Harvard University Press, 1954) at 28.

The idea that social norms found in traditional performance cultures were either not law at all or, at best, only 'primitive law' has been a persistent error in European jurisprudence. It is often found coupled with analyses that propose an 'evolutionary scale' for law in which fully-fledged law only emerges as societies struggle into the light of written law, administered in a centralised way by specialist courts. Maclaurin provides a contribution to the 'evolutionary scale' view of legal development in Māori and First Nations society. Maclaurin discusses the evolution of 'property' in terms of such a scale, in which he identifies a 'number of types:'

> The lowest – represented by the Bushmen of South Africa, or some of the inhabitants of Central Borneo - consists of a primitive horde of wandering hunters, with neither houses nor cattle ... they own only what they actually hold.
>
> A slightly higher type is met with in Australia and other places where a clan system prevails. The members of the clan are, or are supposed to be, akin. They have advanced from the lowest type in so far as they have a well defined hunting ground; but this belongs to the clan and not to the individual.
>
> The next type is represented by tribes from the North American Indians or the Maories [sic] of New Zealand. There is now a considerable amount of private property in goods – in food, weapons, canoes, and most important of all in slaves ...Wealth accumulates and leads to distinctions of rank and power, and ere long chiefs begin to demand special privileges and do much to develop the idea of private ownership even in land.
>
> The next stage is reached when we come to the village community ... Each tribe is divided into a number of smaller groups bound together by ties of kinship, real or imagined. Agriculture has now become 'intensive'... The chief has increased his privileges since the last stage; his land has in many cases become hereditary, and as a rule he claims large powers over all the territory that has not been allotted.
>
> As time goes on the powers of the chief increase, and to meet his growing demands the claims of the kindred and the clan have to be set aside. The idea of private property in land thus fostered by the head of the state is disseminated by many forces – notably by the Church in Western Europe – until at length our present stage is reached when private property seems simple and 'natural' and we have a difficulty in believing that any other system could ever have prevailed.[127]

Maclaurin was surely right to relate the concepts and institutions of any legal order to the circumstances in which it serves. However, it would not seem to be either a necessary or a desirable step to derive from such analysis any classificatory or definitional 'scale' of law as more or less 'primitive.' Concepts, institutions and procedures may be judged to work, or not, in a particular social context but that does not seem to provide a

[127] Maclaurin, R.C. 'Title to Realty' in Maclaurin, R.C. *On the Nature and Evidence of Title to Realty*, (C.J. Clay and Sons, London, 1901) at 3-5.

basis for describing law as 'primitive' or 'advanced,' any more than a particular language could intelligibly be characterised in that way. The author agrees with the view expressed by Professor Rouland of the University of Aix:

> We believe, following Levi-Strauss, that there is not a pensee des sauvages (thinking of the savages) and a pensee des civilises (thinking of the civilised). Rather the pensee sauvage and the pensee civilise exist, in different degrees, in all forms of humanity – rationality is not our privileged domain, any more than custom belongs exclusively to exotic societies, it can be as 'modern' as the law.[128]

Traditional Māori tikanga and kawa and many First Nations customary laws and institutions were generated by performative social practice and acceptance as distinct from 'institutional law', which is generated from the organs of a super-ordinate authority.[129] Durie, for example, noted an important difference between tikanga and kawa:

> Tikanga described Māori law, and kawa described ritual and procedure ... ritual and ceremony themselves were described by kawa ... [which] referred also to process and procedure of which 'karakia' (the rites of incantation) formed part.[130]

Karetu discussed a number of the traditional performative rituals Māori used:

> Before the coming of the Pakeha [European] to New Zealand... all literature in Māori was oral. Its transmission to succeeding generations was also oral and a great body of literature, which includes haka [dance], waiata [song], tauparapara [chant], karanga [chant], poroporoaki [farewell], paki waitara [stories], whakapapa [genealogy], whakatauki [proverbs] and pepeha [tribal sayings], was retained and learnt by each new generation.[131]

By way of a specific Tainui illustration, traditional land boundary markers had great social importance indicated by special marks, stones, *pou* (posts) or holes and were instituted with elaborate rituals performed by a tohunga (ritual leader, specialist).[132] Down to contemporary times the boundaries denote a significance of far greater cultural value than the conventional points shown by the European surveyor's plans. The history and traditional property rights of the tribe are revived in a ritual that involves the recital of the prominent landmarks that constitute the boundaries of the land. Among Tainui iwi and

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[128] Norbert, R, 'Chapter 1,' in Deckker, P.de and Faberon, J-Y, (eds.) *Custom and the Law* (Asia Pacific Press, Canberra, 2001) at 14.
[129] Idem at 4.
[130] Durie, supra n 14 at 3.
[131] Karetu, T 'Language and Protocol of the Marae', in King, M (ed) *Te Ao Hurihuri: The World Moves On* (3rd Ed)(Longman Paul Press, Auckland, 1981).
[132] For a very well researched and written article describing traditional Māori leadership, see Winiata, supra n 19 at 212 – 232.

hapū, the text of the following traditional *pepeha* (tribal saying) ritual is recited by the leading orators in proud identification of their affiliations:

Ko Mokau ki runga, ko Tamaki ki raro,
Ko Mangatoatoa ki waenganui;
Ko Pare Hauraki, ko Pare Waikato,
Ko Te Kaokaoroa o Patere
Ki Te Nehenehenui.

From Mokau in the south,
To Tamaki – Auckland – in the north,
Mangatoatoa – Tokanui centre wise
Hauraki to the east,
Waikato to the west,
And the sheltering bastion of Te Kaokaoroa o Patere – Raukawa
To Te Nehenehenui – Waipa.[133]

[133] Cited in Waikato Museum of Art and History *Te Ara o Tainui – Tainui the Journey* (Tainui Māori Trust Board, Hamilton, 1997) at 1.

REGIONAL MAP

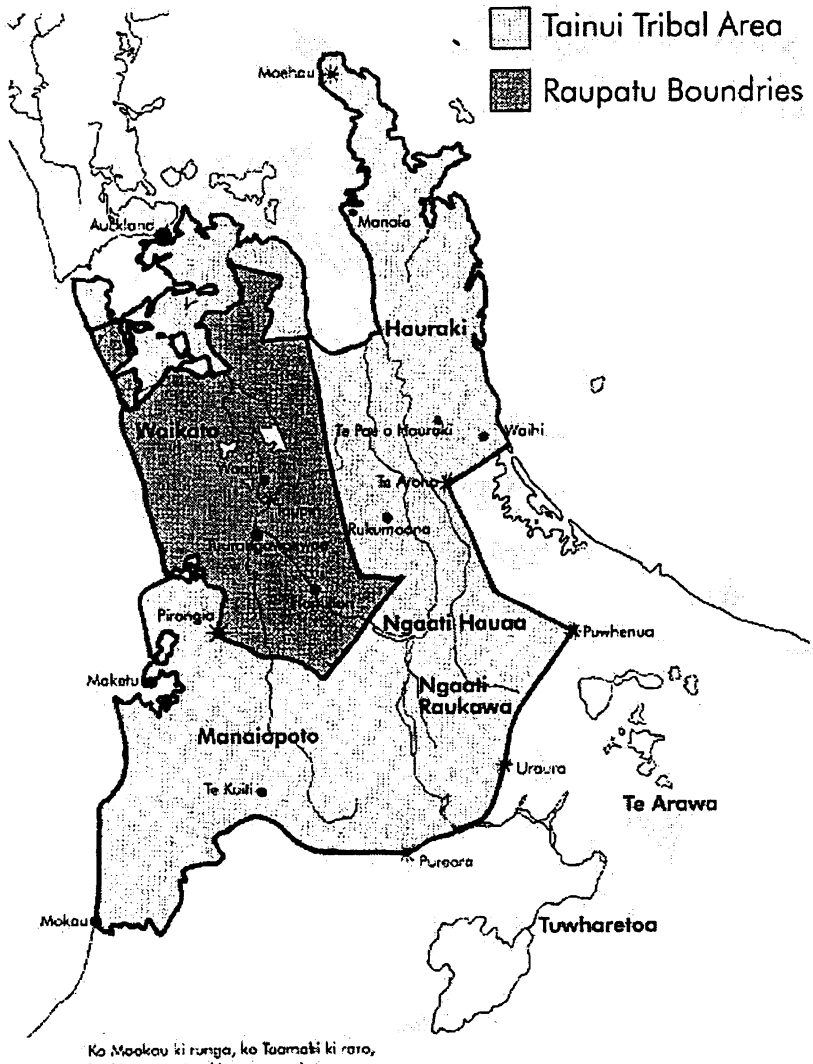

Figure 20

This traditional *pepeha* ritual is heard today on ceremonial occasions in the Waikato and Maniapoto tribal districts. In context, that simple ritual becomes weighted with tribal history and sentiment. Moreover, if there were a boundary dispute with traditional neighbouring tribes, this *pepeha* would be recited to settle the dispute thus establishing a property right through performative rituals.

Rituals and cultural practices give expression to the values and beliefs of the society from which they emerge; they are an external manifestation of an internal commitment to the core values and beliefs of the respective society. In written cultures, a transaction becomes binding, inter alia, when the parties sign and date a contract (although the author does concede that the signing and witnessing is in fact a ritual as is the existence of verbal contracts). In performative cultures, it is, in the author's view, the traditional rituals that bind the parties to transactions. The Six Nations Iroquois Confederacy in North America, for example, have a Treaty tradition built around the *Gus-wen-qah* or Two Row Wampum which the six nations signed with the English, French and Dutch who came to their territory. The Two Row Wampum commemorating a 1613 Treaty between the Mohawk and the Dutch captures the understanding of these Indigenous Peoples:

> Two rows of purple, and those two rows represent the spirit of our ancestors.
>
> A bed of white wampum symbolizes the purity of the agreement. There are three beads of wampum separating the two purple rows symbolize peace, friendship and respect. The two rows of purple are two vessels traveling down the same river together. One, a birch bark canoe, is for the Indian people, their laws, their customs and their ways. The other, a ship, is for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.[134]

The pre-Treaty farewell waiata (song) of Te Whatanui for Ngāti Raukawa's land at Maungatautari is an example in New Zealand that had dire consequences for Ngati Raukawa when trying to return to their abandoned lands, as it was recorded and recited by Ngāti Koroki in the Māori Land Court:

> 'Koia ranei, Raukawa
> Me hoki ano te whenua
> Kua warewaretia nei e te ngakau?'
> 'Indeed! O ye Raukawa,
> Should we return to the land

[134] Canada, *Royal Commission on Aboriginal Peoples: Looking Forward Looking Back* (Ontario. 1996).

That has been abandoned by the Heart?'[135]

A 'constitution' may be recorded in Māori waiata, performative artistic forms of expression that have been used in land claims for more than a century. The presentation of an important *taonga* (gift, treasure), recorded in action and song, may state and record the 'contractual' relations between parties, as was the case with Ngāti Porou ki Harataunga at Kennedy's Bay on the Coromandal Peninsula.[136] The discussion above about the significance of Māori hākari and First Nations potlatch ceremonies are also examples of the significance of traditional performative rituals. As societies evolve then so will the rituals.

9.4 TRADITIONAL INDIGENOUS CUSTOMARY LAW

To further illustrate the relevance of indigenous customary laws and institutions, the following text will attempt to define and discuss tikanga Māori in a New Zealand context and *ayuukhl Nisga'a* as an example from a First Nations context. As time, space and resources do not permit an elaboration of other First Nations' customary laws, my focus will be restricted to the Nisga'a.

9.4.1 VALUES BASED GOVERNANCE – NGA TIKANGA MĀORI

While Māori displayed a variety of cultural patterns, Māori as a people lay claim to a set of customary values and ways of organising social life that are distinctively Māori. Māori have referred to these ways as *nga tikanga Māori.* Judge Durie stated that *tikanga* described Māori law, *kawa* described ritual and procedural law, and *ture* (Hebraic 'Torah')

[135] Cited in Jones, supra n 41 at 156. Potatau Te Wherowhero, Arikinui (paramount chief) of Waikato and later the first Māori King, made a journey to Otaki in 1840 with Te Heuheu, Arikinui of Tūwharetoa, and other chiefs. The object of this visit was to invite Te Whatanui and his Ngāti Raukawa and Ngāti Te Kohera (Tūwharetoa) people to return to their ancestral lands at Maungatautari in the Waikato. But Te Whatanui decided to remain in the Manawatu and Horowhenua-Otaki districts on the lands they had conquered. Te Whatanui's reply to the delegation of chiefs was given in song. In subsequent years, when Te Whatanui's Ngāti Raukawa people made a claim in the Māori Land Court on the Maungatautari Block, Te Whatanui's song was used against them. Raukawa's claim was opposed by Ngāti Koroki who was in occupation and the principal witness for the opponents to the claim, when giving evidence, sang the opening lines of Te Whatanui's song (above), in which the rest of his people joined in singing. The singers and the witness emphasised their point in song and gesture. Consequently, Ngāti Raukawa lost the case.

[136] The Ngāti Porou ki Harataunga kaumātua, Dr Paki Harrison, recited the following story in a Te Mātāhauariki Institute Seminar in 2000 which the author attended: 'During the Musket Wars (1820s) in Hauraki, the Ngāti Tamatera rangatira Paora Te Putu was being hunted by Nga Puhi through the Coromandal Peninsula. Ngāti Porou sheltered him at Kennedy Bay, which was an ancient Ngāti Porou trading route. Paora Te Putu subsequently married into the tribe and gifted the land in Kennedy Bay to Ngāti Porou with a mere (club). The intermarrying and gifting of the mere made Te Putu's word permanent, that is, the transfer of land to Ngāti Porou was complete. The tikanga for such an occasion was, according to Dr Harrison, tapaetoto, or the 'mixing of blood' (intermarriage) and the handing over of the mere which sealed the transfer, as it were. Today when Ngāti Maru tribes dispute Ngāti Porou's presence at Kennedy Bay, Dr Harrison stated that they present Te Putu's mere and the issue is settled.' Unpublished Te Pu Wananga Seminar with Dr Paki Harrison, (Waipapa Marae, Auckland University, 28 April 2000).

described church law, western institutional law and institutional Māori land law. [137] Metge agrees with Durie in identifying *tikanga, kawa* and *ture* as of key importance in the context of custom law. She adds, however, *ritenga* (likeness, a repeated pattern, hence custom), *kaupapa* (plan, scheme, proposal) and *whakaaro* (thought, way of thinking) to the list as values and conceptual regulators.[138]

Tikanga is a noun formed by adding the ending – *anga* to *tika*, an adjective that means straight, just (fair) and right (correct) in opposition to *he* (wrong, mistaken). Exactly which of these meanings is intended can be determined only by context, and even then, the other meanings are present as over- and under- tones.[139] As noted by Lord Cooke in *McGuire v Hastings District Council* (in reviewing House of Lords authorities on interpreting legislation): 'In law, he [Lord Steyn] has said elsewhere, context is everything.'[140] Metge defined *tikanga* as a word that identifies 'the right way', a rule or custom embodying accepted understandings of what is *tika* because of the range the word *tikanga* covers, [141] Metge considers it the best translation for both custom and culture. The phrase *nga tikanga Māori* is increasingly being used to mean Māori culture and is defined as the rules or guidelines for living generally accepted by Māori as *tika*. Metge continues:

> I like the use of *nga tikanga Māori* to translate Māori culture because the plural form reminds us that despite its singular form 'a culture' is not a singular monolithic thing but a collection (singular) of customary ways (plural).[142]

The late Bishop Manu Bennett defined tikanga as: 'Doing things right, doing things the right way, and doing things for the right reasons.'[143]

Nga tikanga are believed to originate in the spiritual realm with the Gods and are endorsed and sanctioned in this world by the community as a whole. At a hui at Te Kuiti in 1911, Sir James Carroll argued for the development of a tikanga Māoritanga to ensure the continuation of Māori individuality and identity:

> Ehara i te Ture i hanga mai o ratou tikanga na ratou ano i whakataki mai i nga Pu atua, Tangata hoki, ka nui haere o ratou tikanga o nga iwinunui Waihoki mo tenei tikanga, ki te tupu ka nui haere, ka huri nui te motu, hei rauhi, mo nga morehu, o taua tupuna i ahu mai nei

[137] Durie, supra n 14 at 3.
[138] Metge, supra n 108 at 3.
[139] Ibid, at 3.
[140] *McGuire v Hastings District Council* [2001] NZRMA 557, 1 November 2001, per Lord Cooke, at 561.
[141] Williams defines *tikanga* as 1. a rule, plan, method ... 2. custom, habit ... 3. anything normal or usual... 4. reason... 5. meaning, purport ...6. authority, control. See Williams, H.W *A Dictionary of the Māori Language* (7th Ed.)(Government Printer, Wellington, 1971) at 416-7.
[142] Metge, supra n. 108 at 4.
[143] Te Pū Wānanga Seminar with Bishop Bennett, Bishop Verco, Te Ariki Mōrehu, (Te Mātāhauariki Institute, Unpublished Seminar, Rotorua, 23 March 2000).

> i Hawaiki. Titiro mai ko ratou tikanga. ([Translation by Te Matahauariki] Likewise with this tradition, if it develops it will grow throughout the land as a focal point for the remnants of our ancestors who came here from Hawaiki. Look at their customs which weren't created by the law, they sought them out themselves from divine and human sources and cultivated them among the great tribes.)[144]

Tikanga may be seen as Māori principles and values for maintaining the rule of law. Metge however, sees justness and fairness as a secondary rather than the primary meaning of *tikanga. Nga tikanga Māori* fulfils other functions besides maintaining the rule of law. Tikanga covers the whole range of human behaviour, including moral and spiritual aspects and is enforced by other means (other than legal ones). On the other hand, Metge does join Durie in emphasising that the idea of justice is implicit in the concept of *tikanga.*[145]

Interestingly in 1838, a House of Lords Select Committee was established to inquire into New Zealand affairs, which discussed the application and transmission of tikanga. The Committee called a Surgeon, Mr J. Watkins, who had spent some time in New Zealand, and the following exchange was recorded:

> Are the Customs and Laws completely different in different Portions of the Island?
> The Customs and Laws appear to be very much alike, and they seem to be remarkably tenacious of them, and they initiate their children into them in very early Days. It is very amusing to see them teaching their Children; they will teach their children as if they were old persons and in return hear them as patiently as if they were old People speaking, allowing the Child to ask any questions.
>
> They have no Persons there to expound the Law?
>
> No; they appear to have Councils or annual Meetings of Feasts there. Chiefs of various Tribes meet together and speak at great length... They reason very acutely indeed; and they have their Assistants to sit with them as Reporters to assist them to remember the speech. In case they would forget something they would refer to their friends.[146]

Recently, the New Zealand Law Commission described tikanga as:

> ...values, principles or norms which determine appropriate conduct, the Maori way of doing things, and ways of doing and thinking held by Maori to be just and correct. They are established by precedents and validated by more than one generation, and vary in their scale, as rules of public through to private application.[147]

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[144] Wahanui, H.H. *Maori Development Hui,* (Alexander Turnbull Library, Wellington, Reference No. MSY-5005).

[145] Metge, supra n 108 at 4. Metge then proceeds to give some very good illustrations of the different meanings and contexts of *tikanga* as a mechanism for justice.

[146] *Report from the Select Committee of the House of Lords appointed to Inquire into the Present State of the Islands of New Zealand...with Minutes of Evidence.*' (Ordered to be printed, London, 8 August 1838) at 29.

[147] Law Commission, *Maori Custom and Values in New Zealand Law,* (Study Paper 9, Law Commission, Wellington, 2001).

Nga tikanga Māori encompasses and holds together ways of thinking (*whakaaro nui*) and ways of doing (*mahinga*), principles, and practice.[148] *Nga tikanga Māori* are by definition *tuku iho no nga tupuna* (handed down from the ancestors), in most cases from pre-European times but this does not mean that they are static and frozen. While the principles are deeply entrenched there is always scope for choice and flexibility in the way they are interpreted, weighted and applied in particular situations. Under the guidance of group leaders, succeeding generations reflexively adapted tikanga to the needs and goals of their time.[149]

Tikanga was also used for ritual but in the sense that ritual was also *tika*, customary or correct. Ritual and ceremony themselves were described by *kawa*. *Kawa* referred also to process and procedure of which *karakia* (the rites of incantation) formed part. *Tikanga* was also pragmatic and open-ended. Its lack of rule-like definition compensated for its ability to change without institutional intervention. *Tikanga* was flexible, subject to reinterpretation according to circumstances. Decisions were pragmatic, not bound by unbreakable rules. *Kawa* was rule-like, more rigid and applied mainly to process and procedure. The principles of *tikanga* provided the traditional base for the Māori jural order.[150]

Whānaungatanga (relationships), *mana* (prestige, status), *manaakitanga* (sharing), *aroha* (charity), *mana tupuna* (intrinsic power), *wairua* (spirituality) and *utu* (reciprocity) may be described as the traditional conceptual regulators of *tikanga*, or as providing the fundamental principles or values of traditional Māori law and, therefore, governance.[151] The Māori legal concept of governance was, thus, values oriented not rules based. The goal was to promote the emulation of the idealised characteristics and achievements of renowned forebears and to eschew those of the unsuccessful.[152]

9.4.2 AYUUKHL NISGA'A - NISGA'A CUSTOMARY LAW

Given the diversity amongst First Nations, this section will highlight the traditions and customs of one prominent First Nations group – the Nisga'a of the Nass Valley. The Nisga'a worldview acknowledges the natural order of the universe, the interrelationship of all living things to one another and to the environment, and the overarching principle of

[148] Metge, J 'The Flax Bush: family and whānau' in Metge, J *New Growth from Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 21.
[149] Ibid, at 21.
[150] Durie, supra n 14 at 4.
[151] Ibid., at 5.
[152] Ibid., at 8.

balance. The Nisga'a as a people lay claim to a set of values and ways of organising social life that are distinctively Nisga'a. The Nisga'a *Pdeek* (tribes) and *wilp* (house, extended family) possess traditional mythological stories or *adaawak* that tell the history of the Nisga'a.[153] The Nisga'a creation story talks of *K'amligihahlhaahl* the Supreme God who realised that in order for his people to live in harmony with his creation they must have some guiding principles and they needed a messenger to show them the way.[154] The messenger was *Tzeemsin* one of the most important Nisga'a cultural heroes and a type of *Maui* demi-god figure from the Māori cosmogony. *Tzeemsin* changed the earth to make it a better place for the Nisga'a who were living in darkness so he brought the sun to the earth. He also brought fire and made tides and mountains, rivers, fish, game and other foods. *Tzeemsin* also made the Nass Valley as a home for the Nisga'a.[155]

The Nisga'a *adaawak* accounts of history have been gleaned from the legends, stories and examples that *Tzeemsin* set, which set a precedent or code of social conduct for Nisga'a. The traditional governance of Nisga'a society was underpinned by these distinctive customary values and laws learned from *Tzeemsin* and are termed *ayuukhl Nisga'a*.[156] Hence, a*yuukhl* are believed to originate in the spiritual realm with the Gods and are endorsed and sanctioned by the Nisga'a communities as a whole. As Bert McKay noted:

> In every legend Tzeemsin *presented* there was some form of direction included in it and these became the Nisga'a laws.[157]

Ayuukhl are the golden protocols of life and interpersonal relations, which included Nisga'a institutions and principles of good governance. *Ayuukhl* is the record of the Nisga'a nation, its mythology and its image of the world. It is Nisga'a history as told by themselves - the creation of the world, the flood, the devastating effect of the volcano eruption,[158] the legends behind local typography, the founding of the great families and their crests, the mythical feats of warriors, shamans and spirit beings. *Ayuukhl* permeated

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[153] Nisga'a School District No. 9, *From Time Before Memory: The People of K'amligihahlhaahl* (Friesen's Yearbook Division, Manitoba, 1996) at 29.
[154] McKay, B, Ayuukhl Nisga'a Seminar' (The Vancouver School of Theology, British Columbia, July 1988) cited in Nisga'a Tribal Council, *Nisga'a: People of the Nass River* (Douglas & McIntyre, Vancouver, 1993) at 125 – 129.
[155] Nisga'a, supra, n. 154 at 150-1.
[156] Much of this information came from a seminar the author had with the Nisga'a elders Rod Robinson, Alvin McKay, Joe Gosnell, and others, in New Aiyanch, British Columbia, Canada in 1996 and 2001.
[157] McKay, B, 'Ayuukhl Nisga'a Seminar' (The Vancouver School of Theology, British Columbia, July 1988) cited in Nisga'a Tribal Council, supra n 154 at 125.
[158] Infra n. 174-175.

through Nisga'a life from birth to death, child rearing, marriage, land and resource boundaries, uses and transfer and governance. The Nisga'a nation was a strong and cohesive indigenous community guided by *ayuukhl Nisga'a* that resulted in peaceful co-existence.[159]

Besides being a storehouse of mythical cosmological events, *ayuukhl Nisga'a* is also a sophisticated set of laws and institutions that established and defined Nisga'a governance, as well as a code of collective and personal conduct. *Ayuukhl Nisga'a* encompasses and holds together ways of thinking and ways of doing, principles and practice. *Ayuukhl Nisga'a* was also used for ritual but in the sense that rituals were also customary or correct. *Ayuukhl* were also pragmatic and open-ended. Under the code, every Nisga'a person belongs to a *pdeek* (tribe) and a *wilp* (house), which owns its own *adaawak* (stories), songs, crests, dances and territory, thus establishing identity with both rights and obligations based on these customary values. All of these rights are handed down through matrilineal succession in a ceremony known as the settlement feast (potlatch), which is a formal registration of title and ownership.[160] The ancient code of the *ayuukhl Nisga'a* additionally instructs that Nisga'a not use strong language and not insult those who oppose them. *Ayuukhl* further instructs Nisga'a to respect everyone's way of life and to share their land and resources but not give them away.[161] The principles of *ayuukhl Nisga'a* therefore provided the traditional base for the Nisga'a jural order.

Nisga'a elder Bert McKay listed ten areas of traditional *ayuukhl Nisga'a* that are still observed and considered to be hallowed: respect; education; laws governing chieftainship and the matriarch; settlement of estates and property rights, the institution of marriage, adoption and succession rights, divorce, war and peace, trading, and sanctions for breaching the above *ayuukhl* which was based on restitution.[162]

- Respect – when you understand the meaning of respect you have a power that emanates from you and the people around you will respond likewise; they will treat you respectfully.[163]
- Education – Nisga'a had a traditional form of education where all are learners, which was a gift from *K'amligihahlhaahl* the creator and everyone had potential to contribute to the Nisga'a nation. The most important of this edict was that of preserving life, knowing how to sustain life.[164]

[159] Nisga'a Tribal Council, supra n 154 at 6-7.
[160] Ibid., at 4-5.
[161] Ibid., at 6-7.
[162] McKay, B, Ayuukhl Nisga'a Seminar' in Nisga'a Tribal Council, supra n 154 at 125.
[163] Idem.
[164] Idem

- Chieftainship and the role of the matriarch – both the male and female are traditionally equal in power but the matriarch is far superior to the chieftain because it is through her that the line of inheritance is passed on.[165]
- Settlement of estates – when a person dies the name of the chieftain can be transferred to a person according to *ayuukhl*. One has to be reared for chieftainship, disciplined and have the approval of the people before they can take that rank. Along with chieftainship are very strict *ayuukhl* governing what seemed to be stewardship over property rights.[166]
- Succession – in terms of succession and use rights, Nisga'a are matrilineal meaning, inter alia, their citizenship rights derive from their mother's line. McKay noted that he was from the Raven *pdeek* (tribe) and his father was a Wolf *pdeek* chieftain. According to *ayuukhl* because he was his fathers son, he and any of his brothers and sisters were privileged to harvest from his resource area as long as the father was alive. Once he died, the privilege was given back. McKay married a woman who was a Killer Whale *pdeek* princess and they have resource areas so when they married, because the children they were going to have would be Killer Whale, he was privileged to feed from that resource area as long as his wife was alive. This *ayuukhl* was based on reciprocity. McKay's Raven people would say the same to his wife but if McKay died, that property goes back to the Raven *pdeek*. The Nisga'a still observe this *ayuukhl* today.[167]
- Marriage – it is through the home that lifelines and family values are kept. Under marriage, there are *ayuukhl,* which govern adoptions because a mother has a right to raise children. Under the clan system, a woman could ask any one of her sisters for whatever child she wants or she could ask cousins and other members of the *wilp*. The chieftainess is also allowed to adopt but the child should be from the same bloodline especially when inheritance is involved.[168]
- Divorce – This was a very strict *ayuukhl* where rather than see a life lost (in cases of domestic violence for example),[169] the marriage was annulled by the ruling chieftain in consultation with the four ruling chieftains from each of the villages.[170]
- War and peace – the *ayuukhl* for war and peace was based on the premise that the Nass Valley is the home of the Nisga'a and should be defended from outside attacks, which occurred against the Haida, Tlingit, Jits'aawit and others. Nisga'a believe it is important to keep the peace with their neighbours but they have always defended themselves when threatened. Nisga'a went to war to protect Nisga'a land and lives, to protect against insults but also to capture slaves.[171]
- Trading – Nisga'a were a seafaring people who engaged in trade with other groups for copper, beautiful canoes from the Haida and other prized goods. The Nisga'a had trade agreements and trade protocols with other First Nations. Governed by *ayuukhl* such as the importance of maintaining *ksiiskw* or balance.
- Sanctions – to maintain balance or *ksiiskw,* when a life is lost carelessly or over greed, the *ayuukhl* states that before the sun sets if the offending family does not settle the issue with the grieved family, then those people have a right to take double the lives that they lost. To resolve such incidents, restitution had to be made in the form of payment of goods. Where certain of the other *ayuukhl* were broken, not restitution but the requirement to make

[165] Ibid, at 127.
[166] Idem.
[167] Ibid, at 128.
[168] Idem.
[169] One real life example is cited in Nisga'a, supra n 155 at 203.
[170] McKay, supra, n. 155 at 128.
[171] Supra n. 154 at 212.

> amends was required, to make a complete break from the shame that the perpetrator imposed on his family, and that was called public cleansing.[172]

Bert McKay also emphasised that underpinning each of these ten *ayuukhl* was the almighty force of compassion as a gift that each Nisga'a carries.[173]

To knowingly or unknowingly reject or ignore a*yuukhl* would result in punishment, owing to an imbalance in the Nisga'a world that often resulted in both physical and metaphysical sanctions. For example, two hundred and fifty years ago some young Nisga'a boys abused the *ayuukhl* sacred accord by placing burning sticks through salmon and throwing them back into a river. The result was K'amligihahlhaahl - the Creator - sent a reminder to the Nisga'a of the sacredness of life, with the volcano *Wilksi Baxhl Mihl* erupting in the lower Nass Valley sending lava that covered two Nisga'a villages and killed 2000 people. Consequently, the vast lava fields are sacred ground that serves as a reminder of the sacredness of *ayuukhl Nisga'a.*[174] In recent times the Nisga'a object to the exploitation and pollution of their lands, resources, rivers and air, actions that obviously constitute a breach of *ayuukhl Nisga'a.* The Nisga'a maintain that the imbalance caused by air pollution, for example, has resulted in metaphysical sanctions with physical consequences such as skin cancer.

The Nisga'a have been guided by the *ayuukhl* to withstand outside pressure and to survive as a unique indigenous nation. The Nisga'a have been guided by the customary *ayuukhl* traditions and institutions for centuries perhaps millennia and they wish to continue to incorporate traditional *ayuukhl Nisga'a* contemporaneously, particularly as part of their Treaty settlement and as part of their post-settlement self-governance structure (Nisga'a Lisims Government) to withstand outside assimilationist pressure, to continue to survive as a nation and as an integral part of their indigenous right to self-determination and political, economic, social and cultural development.

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[172] Ibid, at 129.

[173] Ibid, at 129. Balance and harmony appear to be values that underpin many indigenous worldviews. There appears to be similarities with the Māori *taua muru* institution and even the Samoan *efoga* institution, which were both compensatory raiding expeditions to plunder and restore balance to an aggrieved group to avert all-out warfare. See 'Te Muru: The Concept of Ritual Compensation' in Mead, H.M, *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 151-166; and Warren, L, *Efoga: Samoa's Answer to Dispute Healing* (Te Mātāhauariki Institute, University of Waikato Print, Hamilton, 2003).

[174] Idem.

Indigenous Customary Laws Compared

Category	Mäori	Nisga'a
Customary code of conduct from world view	Tikanga Mäori, Ritenga	Ayuukhl Nisga'a
World View	Holistic	Holistic
Natural order of the universe	Yes	Yes
Interrelationship of all things to one another and the environment	Yes	Yes
Maintenance of balance & harmony paramount	Yes	Yes
Cosmogony	Metaphysical, mythological	Metaphysical, mythological
Cultural hero brought light into the world	Yes – Tane Mahuta	Yes - Tzeemsin
Cultural hero, trickster	Maui	Tzeemsin
Mode of transmission of laws	Oral, inclusive – pakiwaitara (stories), whakatauki (proverbs)	Oral, inclusive – Adaawak (stories)
Specific values, principles	Mana, tapu, utu, whānaungatanga, manaakitanga, rangatiratanga	Ksiiskw (balance), restitution, shame, spirituality, unity, sharing, respect, autonomy
Liability, Responsibility	Direct and indirect to Gods, nature, environment, group	Direct and indirect to Gods, nature, environment, group
Social Organisation	Whānau, hapu, iwi, waka	Family, Pdeek (tribe), Wilp (house), Nisga'a Nation
Citizenship/Identity	Ambilineal	Matrilineal
Land/Resource use	Stewardship, shared not owned, not given away or sold	Stewardship, shared not owned, not given away or sold
Scope of laws	Birth, marriage, adoption, divorce, leadership, use rights, death, succession	Birth, marriage, adoption, divorce, leadership, use rights, death, succession
Ability to Adopt & Adapt	Yes but within parameters	Yes but within parameters
Contemporary Place	Increasing, strong in some areas, less so in cities but growing	Vibrant in Nass Valley, less so with urbanised Nisga'a.

9.5 FURTHER ASPECTS OF TRADITIONS

From the above discussion on *tikanga* Māori and *ayuukhl* Nisga'a, one can see there are different types of indigenous customary laws and traditions. Thompson categorised 'tradition' into four aspects: hermeneutic, normative, legitimation and identity:

Hermeneutic aspect – It is important to view tradition as a set of background assumptions that are taken for granted by individuals in the conduct of their daily lives and transmitted by them from one generation to the next. Thus, tradition is an interpretative scheme, a framework for understanding the world. Some hermeneutic philosophers emphasised that all understanding is based on presuppositions, on some set of assumptions that we take for granted and which form part of the tradition to which we belong.[175] Hence the hermeneutic aspect of tradition is a set of taken-for-granted assumptions that provide a framework for understanding the world.[176]

Normative Aspect – Sets of assumptions, forms of belief and patterns of action handed down from the past can serve as a normative guide for actions and beliefs in the present. For example, certain routinised practices done with little reflection on why they are being done in a particular way such as refraining from eating within the marae and the removal of shoes before entering into a wharenui. Another example is material handed from the past can serve as a normative guide in the sense that certain practices can be traditionally grounded, that is, grounded or justified by reference to tradition. This is a stronger sense of normativity because the grounds of the action are made explicit and raised by asking why one believes something or behaves in a certain way; and these beliefs or practices are traditionally grounded if one replies by saying 'that's what we have always done' or 'that is our way.'

Legitimation aspect – Tradition can in certain circumstances serve as a source of support for the exercise of power and authority. This aspect is brought out well by Max Weber who noted that there are three principal ways in which the legitimacy of a system of domination can be established: legal authority - rational grounds involving a belief in the legality of enacted rules; charismatic grounds involving devotion to the sanctity or exceptional character of an individual; or traditional authority - the devotion to a belief in the sanctity of immemorial traditions. Traditional authority, in this context, is helpful because it highlights that in certain contexts, tradition may have an overtly political character; it may serve not only as a normative guide for action but also as a basis for

[175] Heidegger, M *Being & Time* (Basil & Blackwell, Oxford, 1962) at 31 – 33; and Gadamer, H *Truth & Method* (Sheed & Ward, London, 1975) at 235 – 274.
[176] Thompson, J 'Tradition and Self in a Mediated World' in Heelas, supra n 52 at 92.

exercising power over others and for securing obedience to commands. In this respect, traditions may become ideological, that is, they may be used to establish or sustain relations of power that are structured in systematic and asymmetrical ways.[177]

Formation of identity aspect – Self-identity refers to the sense of oneself as an individual, endowed with certain characteristics and potentialities, as an individual situated on a certain life-trajectory. Collective-identity refers to the sense of oneself as a member or being part of a social group that has a history of its own and a collective fate. Both types of identity formation are relevant here. As sets of assumptions, beliefs and patterns of behaviour handed down from the past, traditions provide some of the symbolic materials for the formation of identity both at the individual and collective levels. The sense of oneself and the sense of belonging are both shaped – to varying degrees, depending on social context – by the values, processes, beliefs and forms of behaviour that are transmitted from the past. The process of identity and representivity formation can rarely if at all start from scratch; they always build upon a pre-existing set of symbolic materials that form the bedrock of identity.[178]

Table 9. 1 Typology of Tradition

Indigenous People	Hermeneutic	Normative	Legitimation	Identity Formation
Māori examples	Citing whakataukī in a dispute, moteatea for claiming rights	Kawa and tikanga eg. respect for elders, marae protocol	Kīngitanga poukai hui and Koroneihana	Reciting one's pepeha and whakapapa at hui
First Nation examples	Potlatch ceremonies for transferral of rights and ritual witnesses	Iroquois Haudenosaunee clan mothers selecting male leaders	Inuvialuit umialiq (chiefs) required both ascribed and achieved authority	Nisga'a stone-moving feast for adopting outsiders

With the shift of indigenous societies such as Māori hapū and iwi and First Nations bands and tribes from pre-modernity to late, high-modernity, there is a gradual decline in the traditional grounding of action and in the role of traditional authority – that is, in the normative and the legitimation aspects of tradition. In other respects, tradition retains its significance in the modern world, particularly as a means of making sense of the world –

[177] For a full account of the notion of ideology assumed here, see Thompson, J *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Polity Press, Cambridge, 1990).
[178] Thompson, supra n 177 at 92 – 93.

the hermeneutic aspect – and as a way of creating a sense of belonging – the identity aspect. With urbanisation and globalisation, the uprooting of traditions from the shared locales of everyday life does not imply that traditions float freely. [179] On the contrary, traditions will be sustained over time only if they are continuously re-embedded in new contexts and remoored to new kinds of territorial units. Māori and First Nations renaissance movements generally involve the re-mooring of tradition in a context of mobility to the contiguous territory of an actual or potential 'people' or group, a territory that encompasses but exceeds the limits of shared locales.

In a similar manner, Helu asserted that there are at least two types of cultural traditions. The first are those that promote the general welfare of the group or community as a whole, such as sharing and co-operation. These benign cultural traditions are strategies for group cohesion and survival, as in the words of a *manaakitanga* (hospitality) *whakataukī* (proverb): *nau te rourou, naku te rourou, ka ora nga manuhiri* – with your food basket and my food basket, the guests will be satisfied – the hermeneutic and normative aspects of tradition. As Māori society has expanded in terms of membership, space and structure, things become more complex and a new category of traditional practices begins to emerge. These constitute Helu's second class of cultural traditions and values, the function of which is to maintain or consolidate the power of the traditional ruling elite, the legitimation and, in some contexts, the formation of identity and representivity aspects of tradition. An example is the political cultural traditions among many iwi and hapū such as *koroua* (male elders) speaking on the *paepae* of the *marae* to the exclusion of *kuia* (female elders) and the annual Kīngitanga *poukai* (marae allegiance) hui and *Koroneihana* (coronation celebrations). Such institutions may be object lessons or social theatre aimed at showing, among other things, where power lies.

These types and aspects of cultural traditions and values, which exist in all societies, have attained a certain level of complexity. The particular customs or traditions may vary across societies owing mainly to differences in environment, political, cultural, economic and social context and evolutionary history. Taken together, they are simply ways in which particular communities can function smoothly in particular environments. They start as required tasks and constraints necessary for the survival of the community. However, as society becomes increasingly complex, conflicting demands clash more brutally in the social arena. The 'winning' demands become norms and are subsequently known as rights, or demands that can be made good. Cultural traditions and norms may have the social force of law, though they are not technically legal. But law in the

[179] Ibid, at 94.

Benthamite sense is contingent on there being a recognised set of natural rights in the first place.[180]

Traditional Māori 'law' or tikanga, and *ayuukhl Nisga'a* covered all social norms and were wider than European 'law.' All law arises out of social norms and the need to enforce those norms within society. The ultimate source of Māori, Nisga'a, First Nations and Pakeha newcomer law, in the author's opinion, is neither the courts nor statutes but the community's social values that are reflected by Parliament in statutes, by judges in their decisions and the community social norms on a day to day basis. Thus, for a legal system to operate effectively one would need to consult the community's values and principles (which are usually implicit) and which was how Māori and First Nations elders would operate customary laws and institutions traditionally.

9.5.1 CULTURE CONTINGENT ON INTERACTION WITH OTHERS

The construction of 'tradition' in political contexts often requires an opposing image to provide a contrast. Edward Said noted that the formation of culture, identity and traditions is contingent on interactions with 'others.' Perhaps by way of an example, the political and omnibus term 'Māori' was a post-European construct. Prior to European contact, the word māori traditionally meant 'usual' or 'normal,' as in *wai māori* (fresh, pure water or drinkable water). There was neither a notion of a Māori polity nor a concept of Māori identity predicated on cultural or national semblance. European contact and the contrast of the newcomers' culture provided the indigenous peoples of Aotearoa with a reflexive, re-traditionalised impetus, emphasising their common ethnicity rather than kindred differences. In relation to the newcomers, the Indigenous Peoples were *tangata māori* or ordinary people. 'Māori' was used to distinguish themselves from the opposing image of the European newcomers. The notion of a Māori people was given further impetus as the forces of colonisation exposed these kindred groupings to external threats of land alienation, political disenfranchisement, ecocide and ethnocide.[181] In other words, the perception of a common enemy and threat to the survival of hapū and iwi contributed to the union of 'Māori,' both politically and culturally. Reflexive solidarity was sought in re-

[180] Idem.

[181] In recent times, some Maori have even challenged the word and label 'Maori.' Tariana Turia stated: 'Maori really is a word that means natural. It's a word that was used by non-Maori to describe the collective of our people and I think we should be using terminology that is our own.' Dr Ranginui Walker added: 'Once Europeans became dominant the word Maori became a 'colonial artefact' that placed Maori in the minority and was part of the 'Pakeha power and domination of Maori.' So when Maori get out of line, they get thumped in the press. Maori this, Maori that.' Thomson, A 'People of the land say Maori a Pakeha name they dislike' in *New Zealand Herald* (8 August, 2003).

traditionalised political[182] and religious[183] movements constructed around the notion of a pan-Māoriness.

Moreover, while there are many variations on this theme, a persistent opposing image that permeates contemporary discussions of cultural traditions in indigenous societies often revolves around some concept of 'the West.' In the past there has been a fairly persistent detraditionalist theme of opposing the 'traditional' to the 'modern'. The image of the 'West' versus the 'non-West', however, seems to have taken over where the old tradition/modern dichotomy left off. In some places the 'non-West' has been given a more explicit form. In liberal democratic nation-states, such as Australia, Canada and New Zealand, for example, this has often been embodied in the notion of the 'Indigenous Way.' For some, even more specific cultural images have been encompassed in such terms as the 'Māori way' or the 'Tainui,' 'Ngāi Tahu,' 'Nisga'a' or 'Mohawk way.' Whichever is used, however, it is often in opposition to the 'West' or the 'Pakeha newcomers' way' and the many things it stands for, including western liberalism, individualism, materialism and sometimes perhaps even democratic governance.

The politics of culture and identity in New Zealand and elsewhere has identified similar exercises in cultural construction. Political leaders have sometimes held up an essentialised image of what it is to be 'Māori,'[184] 'Tainui,' 'Ngāi Tahu' or 'Nisga'a' in explicit contrast with 'the West' or the 'Pakeha newcomer way.' This exercise is, of

[182] Such political groups included the Confederation of Northern Tribes of New Zealand (not Māori) who established the Declaration of Independence 1835, and the Kīngitanga, Kauhanganui and Kotahitanga political movements. See generally Cox, L *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Auckland, 1993) and O'Malley, V, *Agents of Autonomy: Maori Committees in the Nineteenth Century* (Huia, Wellington, 1998).

[183] The numerous religious movements included Papahurihia, Pai Mārire, Pao Miere, Ringatū, Parihaka, Tariao, Iharaira, the Church of the Seven Rules of Jehovah, Te Hāhi o te Wairua Tapu and the Ratana movement. See Elsmore, B *Mana from Heaven: A Century of Maori Prophets in New Zealand* (Reed Books, Auckland, 1989); Binney, J *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland University Press, Auckland, 1995); Binney, J & Chaplin, G *Nga Morehu The Survivors* (Oxford University Press, Auckland, 1986); and Mikaere, B *Te Maiharoa and the Promised Land* (Heinemann, Wellington, 1988). It is also interesting to note that many First Nations also turned to messianic movements as a reaction, inter alia, to colonialism and as revitalisation movements. Such groups included, inter alia, the Ghost Dance of the Sioux, the Peyote group, the Sundance movement on the Praires, and even the Mētis movement under Louis Riel. See Gump, J, 'A Spirit of Resistance: Sioux, Xhosa, and Māori Responses to Western Dominance, 1840-1920' in *Pacific Historical Review* (Vol. 66, No. 1, 1997).

[184] One might add here the sometimes-negative connotations of the label the 'Maori way' that is comparable with the 'Indian way' in North America. The type of negative, stereotyped image of 'Maori' and 'Indians' (First Nations) includes that they are improvident, dirty, irresponsible, coddled by government, looked after too much, lack stickability and a capacity for planning or budgeting. Even the use of phrases such as, 'the 'Maoris' do this,' 'the 'Maoris' are that' are usually unwarranted generalisations where Maori are presupposed to react in particular situations in predetermined ways, and all in the same way. Professor James Ritchie surveyed non-Maori attitudes to Maori, highlighting 'positive responses' that were also patronising stereotypes. For example, 'Maori are 'happy-go-lucky' which meant irresponsible, 'hard working' meaning fit for manual labour, 'pleasure-loving' meaning pleasure seeking, in all a bifurcated 'not like us' stereotype. See Ritchie, J *Race Relations: Six New Zealand Studies* (Victoria University of Wellington, 1964) and Ritchie, J *One Nation or Two? Maori and Pakeha in Contemporary New Zealand* (New Zealand University Press, 1971).

course, central to contemporary debates about 'Māori and First Nations values' or the 'Māori way' or 'Nisga'a way' and has particular salience to discourses on democracy and human rights. More generally, these developments are likely to have a significant impact on notions of good post-Treaty settlement governance, representivity and membership and all that this entails in terms of future policy directions.

The fact that cultural traditions are dynamic and fluid makes it difficult to object to the assertion that Māori and First Nations economic development and good corporate and democratic governance, for example, are not 'Māori.' Māori and First Nations values, representivity, identity and traditions develop in response to their own and other cultures' practices, customs and traditions.[185] As such, 'Māoriness' and 'Indigeneity' are extended by Māori and First Nations governing themselves, which may be one way to assert more control over what it means to be indigenous. Such an understanding demonstrates that tradition can support a notion of differentiated citizenship that encourages self-determination and autonomy and, at the same time, unifies and connects iwi Māori, First Nations and Pakeha newcomers to one another and the lands and resources they both rely on. That is, if those within the current establishment are prepared to cede or share power.

9.6 SHIFTING OR SHIFTY TRADITIONS – CUSTOMARY RIGHTS AND TRADITION CHALLENGES

Numerous criticisms of cultural traditions occur from inside and outside a given traditional society. The following discussion will address a number of these criticisms.

9.6.1 POWER OF TRADITION

As customary traditions are conveyed, their transmission or giving over can be contested, accepted, challenged or assimilated with complete acquiescence or all round conflict. Gross enlarged his original reified version of tradition by casting it as a subjectified process or as a 'conversation' between generations. Gross suggested that the disembodied agency of tradition provided order, stabilised society, preserved heritages, fortified community, fostered dispositions, gave cohesion, produced respect, defined values, established continuities and codified patterns of behaviour.[186] Tradition, therefore, is a form of power. In other words, traditions act, and human beings react. Gross forgets, however, that traditions cannot act or think, only people engage in action and thought.

[185] For a discussion of how identity is formed through this interactive, dialogical process, see Bakhtin, M *The Dialogic Imagination: Four Essays* (edited by Michael Holquist, translated by Caryl Emerson and Michael Holquist, University of Texas Press, Austin, 1981) at 354.
[186] Gross, supra n 56 at 20-23.

Gross's reconstruction of tradition's power thus involves misplaced cultural concreteness and mistakes social agency. Only people can do these activities but the question is why and how did they do them in the complex contexts of discursive interplay and reflexive co-operation defined by traditional categories? Tradition does not, as Gross claims, 'rule' through time as an authoritative subject.[187] Human subjects in authority over others use tradition as rules through time to organise collective understandings of thought and action. Tradition has as much power as is prescribed to it by its followers. Tradition should not, therefore, be regarded as being necessarily static, backward and conservative. Traditions are dynamic, fluid, contemporary and forward-looking because they are actively part of one's daily life in the modern world.[188]

9.6.2 CHANGING TRADITIONS

Traditions according to Shils are always changing[189] but there is something about the notion of tradition that presumes endurance; if it is traditional, a belief or practice has integrity and continuity that resists the buffeting of change. But traditions, like culture, change with, among other things, a group's economic, political and social environment. It is therefore imperative to discuss the processes of cultural change, both traditional and contemporary, especially as traditional societies inevitably adjust to global trends such as globalisation and its attendant social processes (reflexivity, detraditionalisation and re-traditionalisation) as indigenous societies move from pre-modernity to late/high modernity in a post-Treaty settlement context.

As mentioned earlier, Habermas noted that the discussion about the relationship between politics and culture is about 'which traditions citizens want to perpetuate and which they want to discontinue, how they want to deal with their history, the future, with one another, with nature and so on.'[190] In addition, Helu opined that cultural traditions are those forms of behaviour (activities, beliefs, values and institutions) for a given social group that change so slowly that they give the impression of not changing at all.[191] Helu discussed culture change when he stated that some cultural traditions may cease to work in their own society or they may be rejected by former adherents if there have been radical changes in locality or conditions. In addition, when traditions have ceased to function overtly or pragmatically as they used to, they obviously have significance for group

[187] Ibid, at 20.
[188] Luke, T 'Identity, Meaning and Globalisation' in Heelas, supra n 52 at 116.
[189] Shils, E *Tradition* (Faber & Faber, London, 1981).
[190] Habermas, J 'Struggles for Recognition in the Democratic Constitutional State' in Taylor, C (ed) *Multiculturalism* (Princeton University Press, Princeton, 1994) at 125.
[191] Helu, I *Tradition and Good Governance* (ANU, Canberra, Discussion Paper No. 97/3 1997) at 1

identity and representivity. More often than not, however, people continue to activate old customary traditions even when these customs have long ceased to fulfil a socio-cultural function in homes or in a new setting. Gross opined that for tradition to be valuable, it must be preserved in form and content to retain its value as it is passed on through at least three generations. Gross noted:

> Traditions, as thing-like containers, therefore become discreet vessels carrying a certain cargo of spiritual value or moral meaning. And, this freight of moral, spiritual, cultural prestige creates a sense of continuity, as if one were a link in a chain stretching back in time.'[192]

Giddens asserted that tradition is an orientation to the past, such that the past has a heavy influence over the present. Yet clearly, in a certain sense at any rate, tradition is also about the future, since established practices are used as a way of organising future time. The future is shaped without the need to carve it out as a separate territory. Repetition reaches out to return the future to the past, while drawing on the past also to reconstruct the future.[193]

Notwithstanding the process of detraditionalisation, surviving traditions are allegedly alive at least at four different sites in late modern societies: at the centre of society in religious, educational, political and cultural institutions; at the periphery of society in ethnic enclaves, rural areas, or urban bohemias; at the cracks and interstices of society in family practices, kinship institutions or personal emotional ties; and in the underground of society where religious sects, linguistic minorities, tribal groups, secret societies and revolutionary political movements operate.[194] Gross held that, notwithstanding detraditionalisation increasing through the shift of societies, such as Māori and First Nations' to late modernity, tradition has persisted but it does so beside, between, behind or beneath the practices and structures of modernity. It still survives, albeit in a re-traditionalised state.

The integrity or authenticity of a tradition, therefore, is more important in defining it as a tradition than how long it persists.[195] Moreover, in the author's opinion, the person(s) or institution(s) with the capacity and authority to change or update tradition and the processes employed to undertake such tasks are more important than endurance.

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[192] Gross, supra n 56 at 10.
[193] Giddens, A 'Living in a Post-Traditionalist Society' in Beck, U, Giddens, A & Lash, S (eds) *Reflexive Modernisation* (Blackwell Publishers, Oxford, 1994) at 62.
[194] Luke, T 'Identity, Meaning and Globalisation' in Heelas, P, Lash, S & Morris, P (eds) *Detraditionalisation: Critical Reflections on Authority and Identity* (Blackwell Publishers, Oxford, 1996) at 113.
[195] Giddens, supra n 194 at 63.

9.6.3 ROMANTICISED TRADITIONS

Some hold that it is unrealistic to imagine and expect iwi Māori and First Nations, for example, to be willing and able to jettison contemporary Māori and First Nations governance structures in place today for the romantic golden age hopes of a return to the pre-contact status quo ante. Referring to the transformation of modern Jewish communities since the granting of citizenship rights in the aftermath of the French Revolution, Morris noted that in order to legitimate the new forms and views there was a simultaneous reworking or recreation of the traditions of the past or a re-traditionalisation of the past. The past was re-envisaged in either prejudicial or romantic ways. Prejudicially by many, the past was reconstructed as the time of isolation before the modern freedoms. Romantically by others, the past was re-figured as a perfect model of a community life offering security, certainty and a place in the grand scheme of things. The past traditions were thus 'invented' and remembered to suit current purposes.[196]

The construction and reconstruction of traditions often leads people, including Māori and First Nations, to look back to a nostalgic utopia, a golden age of traditional customary laws and institutions when indigenous leaders were alleged to be more accountable and just to their followers and where communities functioned in a communal manner governed by tradition. As Don Brash cynically noted in his infamous Orewa speech:

> Too many of us look back through utopian glasses, imagining the Polynesian past as a genteel world of 'wise ecologists, mystical sages and artists, heroic navigators and pacifists who wouldn't hurt a fly.'[197]

Keesing argued that 'in New Zealand, increasingly powerful and successful Māori political movements incorporate idealised and mythicised versions of a pre-colonial Golden Age, the mystical wisdom of Aotearoa.'[198] Stokes added that at times there even creeps into Waitangi Tribunal hearings an element of 'idealising and romanticising of a 'traditional' past, before the Native Land Court upset Māori tenure by individualising titles.'[199] A close examination of 'traditional' tikanga Māori will challenge such mindsets of Māori prone to romanticising the past, as this section will attempt to illustrate. Tahu

[196] Morris, P 'Community Beyond Tradition' in Heelas, supra n 194 at 224.
[197] Brash, D, 'Nationhood' (Unpublished National Party Speech, Orewa Rotary Club, Auckland, 27 January 2004) at 2. See www.scoop.co.nz/mason/stories/PA0401/S00220.htm (Accessed 16 August 2004).
[198] Keesing, F 'Creating the Past: Custom and Identity in the Contemporary Pacific' in *Voyaging Through the Contemporary Pacific* (2000) at 234.
[199] Stokes, E *The Individualisation of Māori Interests in Land* (Te Mātāhauariki Institute, University of Waikato, Hamilton, 2002) at 187.

Potiki of Ngāi Tahu provided an interesting warning about romanticising tradition with a great interrogatory:

> In lamenting the loss of a traditional frame of reference, we must be careful not to romanticize the past. Tradition is the spring from which we draw our healing water; but any decisions must take into account contemporary economic, social, and political concerns. We seek the answer to one of the basic questions any society must answer: what is the right way to govern?[200]

9.7 CUSTOMARY TRADITIONS IRRELEVANT TODAY?

Pelikan ascribed to a detraditionalist/re-traditionalist approach, opining that tradition is either 'the dead faith of a living people or the living faith of a dead people.'[201] If Māori and First Nations traditions, customary laws and institutions are not regarded as useful in tackling contemporary concerns, and applying in current circumstances, then these traditions are the detraditionalised dead faith of living people. On the other hand, if iwi Māori and First Nations peoples, their institutions and ideologies, are relevant for participation beyond their boundaries and for post-Treaty settlement governance, representivity and contemporary political, economic, social and cultural development in a global, national and local context, this marks the living faith of their ancestors – the re-traditionalised living traditions of their people. Māori and First Nations claimant groups can resist neo-assimilationism and neo-colonialism by applying their traditions to answer the questions and challenges they encounter in the multifaceted, pluralistic globalised world they now inhabit. The author favours the process of re-traditionalisation over detraditionalisation.

Some critics may be tempted to ask why it is so important to return to a traditional perspective or support detraditionalisation, asserting that traditional tikanga has no place in the 'boardroom' and in the day-to-day business management of iwi Māori. Hirini Moko Mead responded:

> There are some citizens who go so far as to say that tikanga Māori should remain in the pre-Treaty era and stay there. To them tikanga Māori has no relevance in the lives of contemporary Māori. That body of knowledge belongs to the not so noble past of the Māori. Individuals who think this way really have no understanding of what tikanga are and the role tikanga have in our ceremonial and in our daily lives. It is true, however, that tikanga are linked to the past and that is one of the reasons why they are valued so highly by the people. They do link us to the ancestors, to their knowledge base and to their wisdom. What we have

[200] Potiki, T, 'A Traditionalist Approach to Iwi Government' in *He Pukenga Korero: A Journal of Māori Studies* (Vol. 5, No. 2, Massey University, 1999) at 12.

[201] Cited in Kymlicka, W (ed) *Citizenship in Diverse Societies* (Oxford University Press, New York, 2000) at 332.

today is a rich heritage that requires nurturing, awakenings sometimes, adapting to our world and developing for the next generations.[202]

Some may even assert that the socio-economic problems currently besetting many Māori and First Nations are the peoples' own failure to adapt to a late modernity reality shaped by forces that traditional values and customary law cannot comprehend, let alone deal with. Tradition, in this view, is unsuited to the harsh realities of the modern world. Both views may have some merit. The author favours a re-traditionalist approach where a continuing maintenance and adapting of traditional tikanga in a contemporary context is needed.

Furthermore in the author's view, it is too pessimistic to suggest that there is no room for traditional Māori and First Nations values, customary laws and institutions – a detraditionalised approach in a contemporary context. Mediating between these extremes, it could be argued that most Māori and First Nations communities would simply be better served by indigenous governance entities founded on those principles and values drawn from their own traditional customs, laws and institutions that are relevant to the contemporary reality – a re-traditionalised approach. In a practical sense, this is what one Canadian academic, Taiaiake Alfred, meant by a return to 'traditional governance.'[203]

9.7.1 FROZEN REIFIED TRADITIONS

Iwi Māori and First Nations are not homogenous publics and 'customary traditions' may and do differ between iwi Māori, hapū and even whānau, but customary norms and traditions definitely and significantly differ between the numerous First Nation groups. It is important to ask 'what does it mean to be Māori, Tainui, Ngāi Tahu, Nisga'a or 'traditional' but in a contemporary context?'[204] Iwi Māori and First Nations' practices and

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[202] Mead, H.M *The Nature of Tikanga* (Paper presented at Mai i te Ata Hapara Conference, Te Wananga o Raukawa, Otaki, 11- 13 August, 2000) at 16. For a good discussion on the historic and appropriate contemporary use of tikanga with specific examples, see Mead, H.M, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003). The current CEO of Te Runanga o Ngāi Tahu (TRONT), Tahu Potiki, in a personal interview with the author discussed the contemporary place of tikanga within TRONT and its subsidiaries for Ngāi Tahu. Potiki mentioned that Ngāi Tahu have, for example, *karakia* (prayers, incantations) to start and finish board meetings, they encourage open debate and participation which is part of their traditional tikanga, they encourage and use appropriate *whakatauki* (proverbs) and *waiata* (tribal songs) to reinforce points as well as in official documents, and they constantly refer to Ngāi Tahu *tupuna* (ancestors) for vision, legitimacy and for guidance from the legacy they left for present and future generations of Ngāi Tahu. Potiki added however, that the problem with tikanga use in a contemporary context is that people are often trying to make a 'square peg fit into a round hole.' 'But it is still worth the effort,' he added. Interview with Tahu Potiki of Ngāi Tahu, Te Hunga Roia Māori Law Society Conference, Tamatekapua Marae, Rotorua, 3 September, 2003.

[203] Alfred, T *Peace, Power and Righteousness: An Indigenous Manifesto* (Oxford University Press, Toronto, 1999) at 29.

[204] The construction of some of these identifying indigenous labels in a legal-political context is discussed in sections 9.10-9.14.

customary traditions are not and should not be frozen. Their identity, representivity and traditions, like all cultures, are constantly undergoing renegotiation and change. Underwood held that cultural identity is not a static essence that moves unchanged across time and space. It is constantly, if subtly and perhaps not altogether consciously, being constructed and reconstructed in response to changing circumstances and new ideological resources encountered by participation in the wider world.[205] It is, to use Jolly's apt phrase, a process of 'continual recreation rather than passive perpetuation.'[206]

Māori and First Nations are traditional, modern and post-modern peoples; hence their traditional customs and institutions are constructed and reconstructed through local, national and sometimes even international experiences. The myriad meanings of being Māori, Tainui, Ngāi Tahu or Nisga'a, for example, are not confined to some pristine moment prior to the arrival of Europeans in New Zealand and Canada. Similarly, the notion of New Zealander, Canadian, or any other cultural identifier, is not fixed. As Edward Said observed about identity and culture:

> No one today is purely one thing. Labels like Indian, or woman or Muslim or American are not more than starting points, which if followed into actual experience for only a moment are quickly left behind. Imperialism consolidated the mixture of cultures and identities on a global scale. But its worst and most paradoxical gift was to allow people to believe that they were only, mainly, exclusively, white or Black, or Western, or Oriental. Just as human beings make their own history, they also make their cultures and ethnic identities. No one can deny the persisting continuities of long traditions, sustained habitations, national languages and cultural geographies but there seems no reason except fear and prejudice to keep insisting on their separation and distinctiveness, as if that was all human life was about.[207]

Some Indigenous Peoples have legitimate traditions and customs that are sometimes protected by law, for example, succession, land administration and ownership, and child adoption in New Zealand and Canada. Colonial policy, however, has fossilised the dynamic nature of Māori, Nisga'a, and other First Nations' customary traditions. There exists an interesting yet detrimental tendency among some indigenous and non-indigenous people to insist that 'genuine' or 'authentic' indigenous customs, traditions, institutions, identity, representivity, governance and life must be that of, for example, tikanga Māori and *Ayuukhl Nisga'a*, prior to European contact. Thus, judges of the Native Appellate Court in 1906 complained that:

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[205] Underwood, G 'Mormonism, the Māori and Cultural Authenticity' in *The Journal of Pacific History* (Vol. 35, No. 2, 2000) at 133.
[206] Jolly, M 'Specters of Inauthenticity' in *The Contemporary Pacific* (Vol. 4, Spring, 1992) 57 at 59.
[207] Said, E *Culture and Orientalism* (Knopf, Random House, New York, 1993) at 336.

> In dealing with questions of Māori custom, the difficulty is becoming daily more pronounced of disentangling genuine custom from the incrustations which have grown round it under the influence of Pakeha ideas.[208]

There is no culture in the world that does not change and evolve with changing environmental, social and economic circumstances.[209] 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. Metge discussed the ability of tikanga, indeed Māori, to change and adapt when she noted:

> 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 nga tupuna' 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.[210]

The author subscribes to the view that so long as the core values of the culture are maintained, but outwardly manifested differently in an updated contemporary context, then the culture still has some life to it. As Judge Durie noted:

> 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.[211]

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

Still, academic debate on the definition and meaning of customs and 'tradition' often cynically focuses on determining whether or not Indigenous Peoples are authentically representing 'traditional' beliefs and practices as hermeneutically observed, recorded, and described (and redefined?) by anthropologists from outside the culture. The object of such exercises (admittedly not all) have often been for anthropologists and government officials to define or re-define Indigenous Peoples off their land and resources and out of existence by creating an unrealistic concept of custom and tradition, including identity and representivity, as a base reference against which to check the authenticity of contemporary

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[208] *Re Roera Rangi* (Native Appellate Court, New Plymouth, 28 October 1906). Cited in Rei, T & Young, B *Customary Māori Land and Sea Tenure: Nga Tikanga Tiaki Taonga o Nehera* (Manatu Māori, Wellington, 1991) at 2.

[209] Granted, the Jewish diaspora may be one exception to this rule but orthodox Jews are a very interesting and exceptional group of people in this regard. Jewish culture and identity has changed in some aspects albeit incrementally.

[210] Metge, J, 'Iwi: Word and Meanings' (Unpublished paper in author's possession) at para. 8.9.

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

Indigenous Peoples. Jaimes even asserted that much of the original impetus towards the Federal pre-emption of the sovereign indigenous prerogative of defining 'who's Indigenous,' and 'Indian' in North America and the standardisation of the racist degree-of-blood method of indigenous identification, derived from the budgetary considerations of national governments anxious to avoid paying their Treaty bills.[212] As Giago opined when referring to the Lakota in the USA:

> Why must people be categorised as full-bloods, mixed bloods, etc? Many years ago, the Bureau of Indian Affairs decided to establish blood quanta for the purpose of [tribal] enrolment. At that time, blood quantum was set at one-fourth degree for enrolment. Unfortunately, through the years, this caused many people on the reservation to be categorised and labelled.[213]

Means also discussed this issue:

> Our treaties say nothing about your having to be such-and-such a degree of blood in order to be covered. ... Now we have Indian people who spend most of their time trying to prevent other Indian people from being recognised as such, just so that a few more crumbs – crumbs from the Federal table – may be available to them. Personally, I don't have to tell you that this isn't the Indian way of doing things.[214]

Don Brash continued with this ploy in New Zealand, although to a lesser extent, when he asserted:

> Let me turn briefly to what we mean by 'Māori.' ... Anthropologists tell us that by 1900 there were no *full-blooded* Māori in the South Island. By 2000, the same was true of the North Island. [Emphasis added].[215]

Brash appeared to be implying that because there are no 'full-blooded' Māori, there are no 'real' Māori and therefore no need for special 'Māori' Treaty rights for 'real' Māori, Māori based funding and programmes, in conjunction with his egalitarian and utilitarian rhetoric.

In recent times anthropologists have also challenged this project by taking the alternative view that indigenous cultures are authentic in any representation by a person or

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[212] Jaimes, A, 'Federal Indian Policy: A Usurpation of Indigenous Sovereignty in North America,' in Sawchuk, J (ed) *Identities and State Structures: Readings in Aboriginal Studies* (Vol. 2) (Manitoba: Bearpaw Publishing, Manitoba) at 780. This strategy was actually tried in the USA in the wake of the passage of the *Termination Act* in June 1953. The Federal dissolution of some American Indian nations, however, tarnished the US image and the implementation of the policy was soon suspended.

[213] Giago, T, 'Blood Quantum is a Degree of Discrimination' in *Notes from Indian Country* (State Publishing Co, Pierre, South Dakota, 1984) at 337.

[214] Means, R, 'Speech' (School of Law, the University of Colorado, Boulder, 19 April 1985).

[215] Brash, D, 'Nationhood' (National Party Address, Orewa Rotary Club, Auckland, 27 January 2004) at 7.

institution having a connection to an indigenous community, or by subjective self-identification. This view may also be problematic as De Cora noted:

> ... the feds suddenly reverse themselves completely, saying its all a matter of *self-*identification. Almost anybody who wants to can just walk in and announce that he or she is Indian – no familiarity with tribal history, or Indian affairs, community recognition, or anything else really required – and, under the law, there's not a lot that Indians can do about it. The whole thing is suddenly just *laissez faire*, really out of control. At that point, you really *did* have a lot of people showing up claiming that one of their ancestors, seven steps removed, had been some sort of 'Cherokee princess.'[216]

While the academic debate rages, Indigenous People still must face the fact that the nation-state uses both perspectives against them in the courts and in politics: the static scholars to justify state incursions into indigenous lands and resources ('they are not real Indigenous People, Indian, Nisga'a, Māori, Ngāi Tahu or Tainui tuturu) and the evolutionaries to justify state incursions into indigenous cultures ('they have no right to deny anyone's indigeneity').

9.7.1.1 FOSSILISED TRADITIONAL ABORIGINAL RIGHTS TO DEVELOPMENT

Contemporary Māori and First Nations aboriginal and Treaty rights seem to have been legally restricted to those that existed at the time of newcomer contact and it appears to restrict Māori and First Nations customary practices and traditions that can be converted into aboriginal and Treaty rights to evolve and develop. Traditional English common law presumes and recognises some continuity of the local aboriginal law subsequent to British annexation.[217] Hence, elements of pre-existing aboriginal title and rights were not extinguished[218] but were subject to the Crown's plenary powers during the assumption of sovereignty.[219] Professor Slattery distilled his understanding of aboriginal rights as follows:

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[216] De Cora, L, 'Statement on radio station KILI,' (Porcupine, South Dakota, 12 October 1986).

[217] *The Case of Tanistry* 80 Eng. Representation 516 (1608) Davies 28 (K.B); *Memorandum* (1722) 2 P Wms 75 (P.C); *Campbell v Hall* (1774) 1 Cowp 204 (K.B); see also McHugh, P *The Aboriginal Rights of the New Zealand Māori at Common Law* (Unpublished PhD. Thesis, Sydney Sussex College, Cambridge, 1987) at 152-8.

[218] As a body, the colonists viewed native land not so much as the property of the Māori as the property of the Colony, merely encumbered with a certain native right of occupancy, a right which was acknowledged as a matter of expediency rather than of justice and which it was the government's duty to clear away in accordance with the needs of European settlement. Dalton, B *War and Politics in New Zealand 1855 -1870* (Sydney University Press, 1967) at 8.

[219] McHugh, P 'Constitutional Theory and Māori Claims' in Kawharu, H (ed.) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 40-1.

> The doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In the same way that colonial law determined whether a colony was deemed to be 'settled' or 'conquered', and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of native peoples. The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia. Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.[220]

Baragwanath noted that 'this doctrine was part of English common law in its broadest sense, to the protection of which Māori as British subjects became entitled in 1840, even apart from the provision of Article III of the Treaty.'[221]

It is also important to note that the Supreme Court of Canada attempted to clarify the distinction between aboriginal rights and aboriginal title in *R v Van der Peet.*[222] It has now been determined that aboriginal title is a sub-category of a broader doctrine known as the doctrine of aboriginal rights which the Supreme Court stated:

> ... aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organisation and distinctive cultures of aboriginal peoples on that land. In considering whether a claim has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimants distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification of aboriginal rights.[223]

This distinction was reaffirmed in *R v Adams*[224] and *R v Côtē*[225] where the Supreme Court held that aboriginal rights protected by s. 35 are not confined to rights inexorably linked to aboriginal title. They can exist on land to which aboriginal title cannot be established because some Indigenous Peoples were nomadic and they survived through reliance on practices, customs and traditions that were unrelated to aboriginal title. The Court held that aboriginal title was just one manifestation of aboriginal rights. Although dicta, the significance of the statement that aboriginal title is a sub-set of the doctrine of aboriginal

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[220] Slattery, B 'Understanding Aboriginal Rights' in *Can Bar Rev* (Vol. 66, 727, 1987) at 737- 8. This reference was adopted by Lamer CJ C in the Supreme Court of Canada in *R v Côtē* (1996) 138 DLR 385 at 405.

[221] Baragwanath, D 'The Treaty of Waitangi and the Constitution' in *Treaty of Waitangi Issues – the Last Decade and the Next Century* (New Zealand Law Society Seminar, April 1997) at 1.

[222] (1996) 137 D.L.R (4th) 289.

[223] Ibid, at 320.

[224] (1996) 138 D.L.R (4th) 657, 666-668.

[225] Ibid, at 385, 399-401.

rights, is a major and important development in the common law as Wickliffe noted, 'it potentially expands the number of aboriginal claims that may be made to pre-existing rights.'[226]

Still, the elements of aboriginal rights maintained were those that were not repugnant to common law and which did not interfere with or challenge the new sovereign.[227] The rules governing aboriginal title were not solely rules for the extinguishment of an aboriginal title but rules providing for the continuity of tribal property rights. They were common law rules establishing a type of legal pluralism.[228] The continuity of tribal title was defined by traditional customary laws[229] and, to that limited extent, Māori rangatira retained some degree of legally recognised de jure power. Such authority was exercised de facto by the rangatira after British sovereignty and until the Crown was practicably able to exercise what it had claimed as a matter of law.[230] This meant that some tribes remained subject to their traditional laws, norms and institutional forms of government.[231]

9.7.1.2 1840 – FIXING 'TRADITIONAL' TITLE IN TIME

The Native Land Court aided and abetted in the fossilisation of traditional Māori customary law by fixing 1840 as the starting point of the application of English law and colonial government through colonial officials in New Zealand.[232] Hence, 'civilisation'

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[226] Wickliffe, C, 'A Māori Commentary on the Paper Written by the Hon. Bertha Wilson entitled: Self-determination of Native Peoples: A Canadian Perspective on Emerging Issues in New Zealand' (Unpublished Paper, 1997, in author's possession) at 4.

[227] McHugh, supra n 218 at 150.

[228] McHugh, supra n 220 at 51.

[229] A definition of 'customary law' is provided by the Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (2 Vols., 1986) as 'both a body of rules backed by sanctions and a set of dispute resolution mechanisms. At a more informal level it was also a series of accepted behaviours which allowed daily social life to proceed ... the stuff of interpersonal relationships, the self-regulating patterns of interaction.' (Para. 37, vol. 1). For a specific and informative account of Māori customary law see Durie, E *Custom Law* (V.U.W.L.R. 325, Address to the New Zealand Society for Legal and Social Philosophy, 1994). Three commentaries on Durie's paper were Belgrave, M *Māori Customary Law: from Extinguishment to Enduring Recognition* (Law Commission, 1999); Mulgan, R *Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pakeha Political Scientist* (Law Commission, 1999); and Metge, J *Commentary on Judge Durie's Custom Law* (Law Commission, 1999). See also Law Commission *Māori Custom and Values in New Zealand Law* (New Zealand Law Commission, Wellington, New Zealand, 2001) and Ministry of Justice *He Hīnātore ki te Ao Māori A Glimpse Into the Māori World* (Ministry of Justice, Wellington, 2001).

[230] The first Attorney-General William Swainson tried to argue that the Crown did not have sovereignty over those tribes who had not signed the *Treaty of Waitangi* or had done so with the imperfect knowledge of its consequences. Swainson / Shortland, 27 December 1842, CO 209/16: 487; Opinion of 13 July 1843, enclosure in Shortland / Stanley (no. 2), 13 July 1843, CO 209/22: 245 at 285-93.

[231] In many rural areas, including the Urewera, far North, and parts of the East Coast, Māori leaders continued to exercise de facto jurisdiction right up until the 1950s. A similar situation occurred and still continues to occur to a greater extent in Canada's North - the Yukon, the Northwest Territories, Inuvialuit, Nunavut and Northern Quebec, and perhaps in other remote areas.

[232] For example, the jurisdiction of claims heard before the Waitangi Tribunal date from the Treaty of Waitangi's inception – 6 February 1840. *The Treaty of Waitangi Act 1975*, s. 6(1) as inserted by the *Treaty of Waitangi Amendment Act 1985*, s. 3(1).

was a benefit bestowed on Māori in 1840. To maintain a degree of consistency in decision-making Judge Fenton found it convenient to set 1840 as the magic date – the time when customary rights would be determined, rather than the date of application before the court. Such a rule was not without precedent in traditional English law. In 1276 'time immemorial' was fixed by statute as the year 1189 A.D, the beginning of the reign of King Richard I. Proof of unbroken possession or use of any right since that date made it unnecessary to establish an original grant thus gaining automatic legitimacy.[233]

Fenton, in the Compensation Court in the *Oakura*[234] case, first set out the 1840 rule authoritatively in 1866 when Ngāti Tama and Ngāti Mutunga were denied compensation for their confiscated Taranaki lands on the basis that they abandoned them prior to 1840 and had not maintained the principle of 'ahikāroa' (fires burning) in the intervening period. There seemed to be some customary precedent for such actions. Some Māori Land Court witnesses asserted that 'it was not according to Māori custom to claim land that he or his ancestors have left for seven generations.'[235] Abandoning land for any reason meant that rights not maintained by kaitiaki (stewardship) or re-visited frequently 'grew cold' or were lost. If an individual left without returning and his or her descendants did not return for many generations, their claims went cold; their fires had gone out. Conversely, if their offspring in the next generation or even in the succeeding one returned, their rights would probably be recognised and their occupation would not be opposed. They were permitted to 'relight' their fires but it would be a matter of choice for the occupying group whether the returnee would be welcomed or not, and often the rights of such returnees were restricted to being given allotted land.[236] Judge Fenton followed this customary norm to some extent when he held:

> We do not think it can reasonably be maintained that the British Government came to this Colony to improve Maori titles or to reinstate persons in possession from which they had been expelled before 1840, or which they had voluntarily abandoned previously to that time. Having found it absolutely necessary to fix some point of time at which titles as far as this Court is concerned must be regarded as settled, we have decided that that point in time must be the establishment of the British Government in 1840, and all persons who are proved to have been the actual owners or possessors of that land at that time must be regarded as the owners or possessors of those lands now.[237]

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[233] *The Public Domain Webster's Revised Unabridged Dictionary* (1913).
[234] The case can be found in Fenton's published collection: *Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879* (1879) at 9-12. The case is also located in AJHR (A13, 1866) at 3.
[235] Evidence of Te Poari of Tapuika re Rangiuru Block, in *Maketu Minute Book* (Vol. 1, Māori Land Court, Waiariki) at 24.
[236] Evidence of Te Keepa Te Rangihiwinui re Rangataua Block, *Wanganui Minute Book* (Māori Land Court, Aotea) at 364.
[237] Ibid.

This 1840 rule was applied in the Native Land Court, the implications of which were discussed by Sinclair:

- No use of force could confer rights to land (take raupatu);
- No later assertion of rights could be upheld that did not have the consent of the ownership at 1840;
- Lack of occupation did not destroy a claim that was valid at 1840; and
- The owners at 1840 could voluntarily dispose of their rights or admit other persons to ownership.[238]

The *Oakura* decision was formalised further by Fenton in the *Orakei* decision.[239] The court held that it 'would recognise no titles to land acquired by intertribal violence since 1840,'[240] and further occupation asserted since 1840 was denied:

> It would be a very dangerous doctrine for this Court to sanction that a title to Native lands can be created by occupation, since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be deprived 'pro tanto' of their rights.[241]

Hence, from the 'coming of the law' in 1840 'traditional' Māori land titles became fixed, or more accurately, because of the absence of legal institutions to settle issues of traditional customary title between 1840 and 1862, attempts by Māori to take land by force or by occupation were to be rejected.[242] As McKay and Scannell commented in 1892 'Native title became petrified.'[243]

Although this rule was practical in that it assisted judges to analyse customary rights at a particular point in time, it also fossilised traditional Māori customary rights to land. Moreover, 1840 was an unfortunate time to fix forever in concrete 'traditional' customary land rights. The unsettling consequences of the 'Musket Wars,' invasions, the devastating effects of introduced diseases, and the breakdown of the Māori social fabric that

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[238] Sinclair, F 'The '1840 Rule and the Moriori Claim,' in Report to the Waitangi Tribunal (Wellington, 1995) at 3-4.
[239] *Orakei, Important Judgments Delivered in the Compensation Court and the Native Land Court, 1866 – 1879* (Published under the direction of the Chief Judge, Native Land Court, 1879) at 86.
[240] Idem.
[241] Ibid, at 94.
[242] For a useful analysis proposing that Maori did have an effective pre-contact 'legal' system of 'law,' not the inferior 'lore', see Jackson, M 'Nga Ture a Te Maori' in Jackson, M *The Maori and the Criminal Justice System: He Whaipaanga Hou – A New Perspective* (Part 2, Department of Justice, Wellington, 1988) at 37 – 44. For a positive analysis of this issue from early explorers, see Wakefield, E J, *Adventure in New Zealand* (London, 1845) at 108, and Shortland, E, *The Southern Districts of New Zealand: A Journal* (London, 1851) at 95. For a more contemporary analysis, see Spiller, P, Finn, J & Boast, R, *A New Zealand Legal History* (Brookers, 1995) at 124-125, and Boast, R, 'Māori Customary Law and Land Tenure' in Boast, R, Erueti, A, McPhail, D & Smith, N, *Māori Land Law* (2nd ed)(LexisNexis, Wellington, 2004) at 21-39.
[243] Cited in Chief Judge Seth-Smith, *Omahu Block*, (C.J.M.B., Vol 2) at 53.

contributed to the Māori diaspora resulted in old and new territories being inevitably refought before the Native Land Court. A grant of land to one tribe could give substance to an invasion repulsed or to reasserted rights to territories lost.

Further confusion was caused by the Native Land Court's arbitrary 'three generations rule,' although Metge noted a customary norm for such a policy when she stated:

> Within the iwi, hapuu, whānau and individuals obtained rights in specific areas of land by take whenua and/or take tuku (allocation by rangatira or kaumatua). These rights were rights of occupation and use symbolised by the image of te ahi kaa [fires burning]. If not used, they became progressively weaker. Up to the third generation they could be revived by occupation and use – the embers fanned back into life. After that they were held to have become mataotao (totally cold, extinguished.)[244]

The Native Land Court determined that Māori rights could be held dormant for three generations after someone had left the land, or had been driven off. Whether through migration or conquest, this rule offered tribes the opportunity to re-establish rights. Tribes defeated in war were able to return to their lands vacated for strategic purposes in the 1830s. The invading forces had in some cases been defeated while in others they were simply too stretched across the landscape to assert any other form of ownership than that of a *taua* (raiding party). Rights to such lands were granted to the original tangata whenua under the three-generation rule. Where the invaders maintained some form of occupation at 1840, even if abandoned later, the Court often rejected the claims of the original traditional owners, as it did in the Chatham Islands. The 1840 rule, thus, shut out any opportunity for tribes to reclaim rights under the three-generation rule. Still, short of allowing tribal wars to continue some kind of cut-off point was necessary and, as Metge noted, the three generation rule did have an element of tikanga in it – ahikāroa – which did allow a fair amount of time but it did cement in place Ngāti Whātua's occupation of Tāmaki (Auckland), which would have been convenient for the government. But the '1840 rule' fossilised traditional customary rights by inventing 'traditional' rights using 1840 as the arbitrary date for the birth or confirmation of traditional rights.

9.7.2 DENIAL AND REDEFINING OF 'TRADITIONAL' MĀORI CUSTOM

The New Zealand legal system later shifted its fossilisation policy even more adversely regarding traditional Māori aboriginal rights, particularly aboriginal title. Aboriginal title, via Māori customary law, is part of the common law and is enforceable by the ordinary Courts. After the *Constitution Act 1852* the learned judges evaded the

[244] Metge, J 'Customary Māori Land Tenure and the Status and Representation of Iwi' (Unpublished paper prepared for the Crown Forest Rental Trust, in author's possession) at 3.

obligation to continue the application of traditional Māori customary usage and law until customary title was extinguished. In *Re The Lundon and Whitaker Claims Act 1871*[245] the Court of Appeal reasserted that 'the Crown was bound, both by the common law of England and by its solemn engagements, to a full recognition of native proprietary right.'[246] The Court stated 'whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it.'[247] This was the strongest judicial recognition of Māori customary title at the time. Māori customary law is thus part of New Zealand common law in the sense that the 'internal' content of property rights protected by Aboriginal title can only be governed by the customary rules.[248]

However, in the infamous *Wi Parata v Bishop of Wellington*[249] decision Prendergast C.J denied that Māori had 'any kind of civil government' or any 'settled system of law.' Prendergast C.J also erroneously held that the *Treaty of Waitangi* was a 'simple nullity'[250] and, referring to traditional Māori custom and usage in s. 4 of the *Native Rights Act 1865*, he concluded:

> Had any body of law or custom capable of the "Ancient Custom and Usage of the Māori people", as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. ... no such body of law existed.[251]

Prendergast C.J thus advanced the circular proposition that traditional Māori custom did not exist because it was not recognised by the legal system in statutes whilst any statutory recognition of traditional Māori custom could be disregarded because traditional Māori custom did not exist![252] Consequently, the *Treaty of Waitangi* and traditional Māori aboriginal and constitutional rights were distorted and Māori rights generally were rapidly

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[245] (1871) 2 N.Z (C.A) 41.
[246] Idem.
[247] *Re 'The Lundon and Whitaker Claims Act 1871* (1871) 2 N.Z (C.A) 41, 49.
[248] Boast, R 'Treaty Rights or Aboriginal Rights?' in *New Zealand Law Journal* (1990) 32 at 33.
[249] *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 79.
[250] Ibid, at 78. Despite the large volumes of case law and literature commenting on the Treaty of Waitangi, the formal legal status of the Treaty remains as stated by the 1941 Privy Council decision *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308. Viscount Simon LC held that the Treaty of Waitangi was a valid Treaty of cession and that the Treaty was enforceable of itself in the New Zealand courts except to the extent that it had been given effect by statute. The Lordship stated: 'It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except insofar as they have been incorporated in municipal law. ... So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that must refer to the Courts to some statutory recognition of the right claimed by him.' For a discussion on the background of this case, see Duncan, C.J *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board: Maori Land Administration in West Taupo 1906-41* (LLB (Hons) Research Paper, Law Faculty, Victoria University of Wellington, 1994). See also Dr Alex Frame's more recent article, Frame. A, 'Hoani Te Heu Heu's Case in London 1940-41: An Explosive Story' in *New Zealand Universities Law Review* (Vol. 22, No. 1, 2006) at 148-180.
[251] Supra, n 250 (*Wi Parata*) at 79.
[252] For an excellent brief article tracing the demise of Māori custom, see Frame, A 'Colonising Attitudes Towards Māori Custom' in *New Zealand Law Journal* (17 March 1981) at 109.

marginalised within the legal system. In a similar manner, the Canadian judiciary in the 1928 case *R v. Syliboy*[253] decided against Chief Gabriel Syliboy in which the Mi'kmaqs were described as 'savages incapable of contracting with the Crown' when the *Mi'kmaq Treaty* was signed in 1752 between the Mi'kmaqs of Nova Scotia and Governor Hopson.[254]

Back in New Zealand, Prendergast C.J subsequently refused to accept that marriage according to Māori customary law had any legal validity in the eyes of the New Zealand courts in *Rira Peti v Ngaraihi Te Paku.*[255] Prendergast C.J also referred, in this case, to s. 10 of the *New Zealand Government Act 1846* that recognised the laws, customs and usages of Māori in native districts, and he denied the recognition of Māori custom, law and native districts from this section when he held:

> Aboriginal districts were never appointed. The natives are British subjects, their relations to each other are governed by the laws of the land, and not by their usages.[256]

Prendergast C.J thus reinforced the hegemony of the settler state by fully denying the de jure existence of traditional Māori custom. Hence, he firmly ushered in the establishment of a monocultural legal system that took minimal cognisance of traditional Māori norms, values, customs and institutions. This lasted for over a century.

Still, Prendergast CJ's approach was idiosyncratic and cannot be used to typify the approach of the New Zealand legal system as a whole. His remarks were completely at variance with the statutory direction in s. 23 of the *Native Lands Act 1865* that titles were to be investigated according to 'Native custom.' Hence the legislature did believe that such customs existed.

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[253] *R v. Syliboy* [1929] 1 D.L.R 307 (N.S.C.C). Patterson J held that the Micmac-Nova Scotia Treaty of 1752 was not a treaty because of the incapacity of the parties and a lack of ratification by Great Britain.

[254] Ibid, at 313, per Patterson J. Patterson J held: 'The Indians were never regarded as an independent power. ... The savages' rights of sovereignty even of ownership were never recognised. ... In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual – an agreement that, as we have seen, was very shortly after broken. Ibid., at 313-4. The 1752 Treaty was later held to be valid and binding by the Supreme Court of Canada in *Simon v The Queen* [1985] 2 SCR 401. Furthermore, the *Wi Parata* decision was also applied in other parts of the British Empire including South Africa. A distinctive policy towards customary law began with Britain's occupation of the Cape in 1806. The new colonial power confirmed the Roman-Dutch law already operating in the Cape as the general law of the land, for that system was deemed to be suitably 'civilised' with no account of the indigenous KhoiSan customary laws, primarily because they were too primitive to have a legal system worthy of respect. *Wi Parata* was cited to justify this policy. See Burman, *Cape Policies Towards African Law in Cape Tribal Territories 1872-1883* (Chapter 2); and Rumbles, W, *Africa: Co-Existence of Customary and Received Law* (Te Mātāhauariki Institute, University of Waikato Press, 1999)

[255] (1889) 7 NZLR 235.

[256] *Rira Peti v Ngaraihi Te Paku* (1889) 7 NZLR 235, 238-9.

Other courts did not accept Prendergast CJ's approach. The Judicial Committee of the Privy Council rejected Prendergast's denial of traditional Māori custom in *Nireaha Tamaki v Baker*[257] when their Lordships held:

> It was said ... that there is no customary law of the Māoris of which the Courts of law can take cognisance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court.[258]

The response to the Privy Council's decision was a protest of Bench and Bar in New Zealand. Later the New Zealand Prime Minister, Sir Joseph Ward, defended the New Zealand position at the 1911 Imperial Conference in London by highlighting their Lordships' ignorance of local circumstances. He stated:

> Our people in New Zealand ... consider that in matters relating to native land [and custom] which come before the Privy Council ... here what is a custom, as far as the native law in New Zealand is concerned, may not in the ordinary sense be fully recognised by the Privy Council when dealing with those laws.[259]

Interestingly, a motion was moved at the Conference that a New Zealand judge be appointed as an assessor to the Privy Council for cases referring to native land. Sir Joseph Ward stated:

> It was of greatest importance that there be present a judge who knew the customs of the natives, which had to be considered in such cases. ... When litigation in connection with this land arose, native customs had to be taken into account, and it was felt that when important cases of this kind came before the Privy Council, it would be a great advantage if they had a representative judge from New Zealand present.[260]

It would be more interesting, in the author's view, to have investigated the New Zealand judges' expertise to appropriately examine traditional tikanga Māori and the authoritative work for referring to Māori custom that would have inevitably included hermeneutic perspectives and, therefore, a probable re-defining of tradition and customary rights.

Still, subsequent case law and other attempts have since 1901 accepted the Privy Council's views rather than those of Prendergast CJ. For example, the Chief Justice in

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[257] (1901) NZPCC 371.
[258] *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382.
[259] Sir Joseph Ward *Précis of Proceeding of the Houses of Parliament of Great Britain, Imperial Ministers Conference* (Minutes of Proceedings, London, June 1911).
[260] Ibid, at 49.

1905 proposed to codify Māori customary law in relation to land tenure which was noted in a newspaper:

> What his Honour presumed, the Native Court had to do, was to incorporate English law and Māori custom together, and from this conglomerated law find succession, and call it according to Māori custom. It seemed to his Honour that the time had come when there should be some authoritative definition of what Māori custom or usage was. It should not be left to Native Land Court judges to declare what they think Native custom is.[261]

Having spoken with the Chief Justice, the Attorney-General in a memo to Cabinet 1 September 1905 proposed the idea of codification of Māori custom in principle.

> His Honor, in an interview with myself upon the matter, expressed the opinion that steps should be taken by the government to have what constituted Maori custom and usage codified and enacted by the legislature.[262]

It would appear that Cabinet was not too interested in codifying Māori custom, the response being a memo to Justice and Native Affairs that 'where land was clothed in European title, Native Custom was to be abolished.'

In the decision of the High Court in *Public Trustee v Loasby,*[263] Cooper J stated, in deciding whether to adopt a rule of Māori customary law, three matters had to be considered by the Court. The first was whether the custom existed as a matter of fact, whether 'such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Māori race.'[264] The next question was whether the custom was contrary to statute. The last question was whether the custom was 'reasonable, taking the whole of the circumstances into consideration.'

Following this case, the continued vitality of Māori customary law was affirmed in s. 91 of the *Native Land Act 1909* which was drafted by the famous New Zealand jurist, J.W. (later Sir John) Salmond, with the assistance of Apirana (later Sir Apirana) Ngata. The Act declared that:

> Every title to and interest in customary land shall be determined according to the ancient custom and usage of the Māori people so far as the same can be ascertained.[265]

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[261] 'On Māori Customs being Codified' in *New Zealand Times*, (30 August 1905) at 6.
[262] National Archives, (MA 1, 1906/285).
[263] (1908) 27 NZLR 801.
[264] Ibid, at 806.
[265] *Native Land Act 1909,* s. 91.

The recognition of Māori custom in relation to succession to land titles was recognised in *Willoughby v Panapa Waihopai.*[266] Referring to the ascertainment of ownership according to Māori custom by the Native Land Court, Chapman J remarked:

> Its Judges have acted on the assumption that they might invoke Native custom to determine the succession to the freehold lands of Maoris. That is to say, that Court has applied the same rules of succession to the lands of Maoris which happened to be held under title derived from the Crown as it habitually applied to lands not so held ... A body of custom has been recognised and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court must have been founded with but slight regard for the ideas which prevailed in savage times.[267]

The concept of tenure is fundamental to English land law but has little relevance to Māori communal property concepts which theoretically meant that Māori title could have no legal existence apart from statute. The application of Māori custom was thus not always applied by the Native Land Court Judges as Chapman J mentioned. Nor was British law in its entirety. Examples include the exclusion of spouses and the recognition of customary marriages and adoptions for succession purposes.[268]

The continued vitality of tikanga Māori was affirmed in the most important codification of New Zealand law relating to Māori land. Furthermore, in the 1919 Privy Council case *Hineiti Rirerire Arani v Public Trustee*[269] concerning the legal status of Māori customary adoptions, Lord Phillimore held that the Courts could take cognisance of and apply Māori customary law relating to adoption.[270] The Privy Council considered that the custom of a race:

> ... is not to be put on a level with the custom of an English borough or other local area which must stand as it has always stood, seeing that there in no quasi-legislative internal authority which can codify it.[271]

The Privy Council cited with approval an extract from a decision of the Native Appellate Court of 1906 that it was:

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[266] (1910) 29 NZLR 1123.
[267] Idem.
[268] Cited in Law Commission, *The Treaty of Waitangi and Maori Fisheries: Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi* (Preliminary Paper, No. 9, Wellington, New Zealand, 1992) at 135.
[269] (1919) [1840-1932] NZPCC 1 (P.C); [1920] AC 198.
[270] Ibid, at 5.
[271] Ibid at 6.

> ...abundantly clear that Native custom is not a fixed thing. It is based upon the old custom as it existed before the arrival of the Europeans, but it has developed, and become adapted to the changed circumstances of the Maori race today.[272]

However, Parliament intervened by overriding Māori customary rights by legislating in s. 161 of the *Native Land Act 1909,* which provided that Māori customary adoption was of no legal effect.[273]

With reference to Māori custom, the Privy Council was supported in a subsequent Privy Council decision. Māori land title could be subject to Māori customary right and could also be unappropriated which was highlighted by the Privy Council's 1921 decision *Amodu Tijani v The Secretary Southern Nigeria.*[274] Viscount Haldane remarked on 'native title':

> ... in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates.[275]

Viscount Haldane's decision in effect held that the laws of another race or culture must be seen as the people of that place and culture see them and must not be interpreted according to systems that have grown up in England.[276] Interestingly, in the 1996 Supreme Court of Canada decision *R v Van der Peet,*[277] Lamer CJ stated:

> The challenge in defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly different legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. A morally and politically defensible conception of rights will incorporate both legal perspectives.[278]

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[272] Idem.
[273] See *Whittaker v Māori Land Court of New Zealand* [1996] NZFLR 163. For a contemporary analysis and update on the legal accommodation of Māori customary adoption practices, see Law Commission, *Adoption and Its Alternatives: A Different Approach and a New Zealand Framework* (Report 63, New Zealand Law Commission, Wellington, 2000).
[274] [1921] 2 AC 399 at 402.
[275] Idem.
[276] It is worth mentioning that Viscount Haldane's view was also endorsed by the New Zealand Court of Appeal in *Te Runanga o te Ika Whenua v Attorney- General* [1990] 2 NZLR 641.
[277] *R v Van der Peet* [1996] 2 S.C.R 507.
[278] Ibid, at 546.

Even so, common law lawyers continue to assume that indigenous custom is to be proven according to the principle of consistent practice as understood in English law, particularly in relation to mercantile law which was evident in the foreshore and seabed debate in New Zealand.

In *Huakina Development Trust v Waikato Valley Authority*,[279] Chillwell J applied *Nireaha Tamaki*[280] and *Public Trustee v Loasby*[281] to find that 'customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence.' He cited Cooper J's three-part test for the establishment of a rule of customary law. Hence, it is clear that Māori customary law is cognisable and enforceable in the New Zealand Courts but the recognition and inclusion of Māori custom has in some ways been redefined by Parliament and the Courts. Still, the period between the Treaty of Waitangi 1840 and the decision of Chief Justice Prendergast in *Wi Parata v The Bishop of Wellington*[282] is the period that the New Zealand nation-state set down its relationship with traditional Māori customary law, and it is from a reassessment of this period that renewed recognition of traditional customary rights may emerge.

Nevertheless, like the First Nations in Canada and the United States of America the primary impetus leading to increased recognition of traditional Māori aboriginal rights was litigation, the politics of embarrassment at a national and international level, and direct negotiations, particularly through contemporary Treaty settlements. The following discussion will now turn to the First Nations in Canada for an assessment of the fossilisation of aboriginal rights process that is germane to Māori.

9.7.3 FOSSILISING 'TRADITIONAL' ABORIGINAL RIGHTS

The recognition of what has been termed the 'aboriginality' of Indigenous Peoples is important in Canada as Hawke and Maslove commented:

> The role of the Federal government vis-à-vis aboriginal peoples concerns the preservation and enhancement of 'Indianness' or more generally, 'aboriginality.' This includes the definition and protection of the special status of aboriginal persons, institutions and land. There is no reason to confine such special status to those residing on reserve lands, since section 91(24) applied to Indians as persons and communities wherever they are. ... it follows that the Federal government must acknowledge a responsibility for those programs and services which are required by the special needs of 'aboriginality.' ... special Federal

[279] (1987) 2 NZLR 188 at 215.
[280] (1901) NZPCC 371, 382.
[281] (1908) 27 NZLR 801.
[282] *Wi Parata v Bishop of Wellington* (1877) 3 N.Z Jur. (N.S) S.C 79.

development programs and services are required to preserve and strengthen ... 'aboriginality.'[283]

This notion of 'aboriginality' is substantially an ethnic one,[284] the scope of which has been discussed by the Canadian judiciary via the doctrine of customary aboriginal rights.

Prior to 1973, recognition of aboriginal title in Canadian law was very limited. The conservative view was set by the Privy Council in *St Catherine's Milling and Lumber Co. v The Queen*,[285] which held that aboriginal title was a mere 'personal and usufructuary right' dependent upon the goodwill of the Sovereign.[286] The 1973 Supreme Court of Canada decision in *Calder v Attorney-General of British Columbia*[287] provided the impetus behind the Federal Government's policy shift.[288] The Nisga'a lost on a technicality; nevertheless, the Supreme Court did agree with the Nisga'a that title to aboriginal lands had not yet been resolved. Six of the seven judges confirmed that aboriginal title is a legal right derived from the Indians' historic possession of their tribal lands and that it existed whether governments recognised it or not.[289] Aboriginal title emerged as a prevailing issue within the judiciary following the *Calder* decision[290] but was laid to rest by the Supreme Court of Canada in *Guerin v R.*[291] The Court found that aboriginal title to traditional or reserve lands is an independent legal right, not dependent on the *Royal Proclamation of 1763*, executive order or the *Indian Act*. It is therefore more than a mere personal usufructuary right.[292] That title is generally inalienable other than to the Crown who also acts under a fiduciary obligation to deal with the land on the Indians' behalf. The courts have found that extinguishment of aboriginal title could occur by a number of means including conquest, purchase or the exercise of dominion in a manner adverse to the right of native occupancy.[293]

The Canadian *Constitution Act 1982* affirmed the existing aboriginal and Treaty rights of Indigenous Peoples without specifying their magnitude or scope. The judiciary

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[283] Hawke, D & Maslove, A 'Fiscal Arrangements for Aboriginal Self-Government' in Hawke, D (ed) *Aboriginal Peoples and Government Responsibility* (Carleton University Press, Ottawa, 1989) at 93 at 100-1.
[284] McHugh, supra n 220 at 159.
[285] *St Catherines Milling and Lumber Co. v The Queen* (1887) 14 A.C. 46. [hereinafter *St. Catherines*].
[286] Wickliffe, supra n 227 at 35.
[287] *Calder v Attorney-General of British Columbia* (1973) 34 D.L.R. (3rd) 145 [hereinafter *Calder*].
[288] Canada, *Perspective's in Native Claims Policy* (A background paper prepared for the Canadian Arctic Resources Committee's Third National Workshop on 'People, Resources and the Environment North of 60,' (Yellowknife, June 1-3, 1983) at 2-3; Canada, *In All Fairness: A Native Claims Policy* (Queen's Printer, Ottawa, 1981) at 11; and Price, R.T *Legacy: Indian Treaty Relationships* (Plains Publishing, Alberta, 1990) at 82-83.
[289] British Columbia, *B.C Treaty Commission: Annual Report 1995 - 96* (B.C Government, 1996) at 15.
[290] See *Attorney-General of Ontario v Bear Island.* [1985] 1 CNLR 1, 31-2 Ont .S.C.
[291] *Guerin v R* [1984] 2 S.C.R. 335, 336; [1985] 1 CNLR 120.
[292] For a comprehensive discussion on the usufructuary rights of Indigenous Peoples, see Bartlett, R *Indian Reserves in Quebec* (Native Law Centre, University of Saskatchewan, Saskatoon, 1984) at 24 - 28.
[293] *Calder v Attorney-General of British Columbia* (1973) 34 D.L.R. (3rd) 313 per Judson J.

thus defines the aboriginal rights of First Nations. Prior to the *Constitution Act 1982* aboriginal rights existed only at common law and could be extinguished or regulated by Parliament with or without aboriginal consent.[294] However, section 35(1) of the *Constitution Act 1982* recognised and entrenched 'aboriginal' rights in the Constitution. Any interference with these rights must be justified consistent with the test adopted in *R v Sparrow*.[295] In this case the Supreme Court of Canada ruled that aboriginal rights might only be extinguished by express and unambiguous means. Nevertheless, the aboriginal complainant must establish first the traditional existence of the aboriginal right concerned and show that it was an integral part of life.[296]

The Supreme Court of Canada case *R v Van der Peet*[297] outlines the most exhaustive analysis by Commonwealth courts of the notion of 'aboriginality' and what makes a right 'aboriginal' in character, which provides inferential guidance as to what characteristics a group must show in order to be 'aboriginal.' In other words, the case law prescribes or defines customary indigenous representivity to some extent. *R v Van der Peet*[298] refined the test for recognising aboriginal rights by defining the rights identified by s. 35 of the *Constitution Act 1982*. The Sto:lo 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, therefore, was whether the aboriginal right of fishery included a right to sell for limited commercial purposes. The Court agreed that a doctrine of aboriginal rights arose through Canadian law as Lamer CJ expounded:

> 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.[299]

However, the court was divided on whether or not the undoubted right to fish for subsistence and ceremonial purposes extended to the limited right of commercial selling

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[294] See *R.* v *Sikyea*, [1964] S.C.R. 642; *R.* v. *George*, [1966] S.C.R. 267; *Daniels* v *The Queen*, [1968] S.C.R. 517; *R.* v *Derricksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).

[295] [1990] 1 SCR 1075. See also *R.* v *Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw* v *British Columbia*, [1997] 3 S.C.R. 1010; *and R.* v *Marshall [No. 2]*, [1999] 3 S.C.R. 533.

[296] *R v Sparrow* [1990] 1 SCR 1075, at 1099.

[297] (1996) 2 SCR 507. For a good discussion, among many, on the *Van der Peet* decision, see Barsh, R.L, & Henderson, J.Y, 'The Supreme Court's Van der Peet Trilogy: Native Imperialism and Ropes' in *McGill Law Journal* (Vol. 42, 1997) at 994.

[298] Idem.

[299] *R v Van der Peet* (1996) 2 SCR 507, at 538-9; 137 DLR (4th) at 289.

claimed by the appellant. The majority held that the commercial selling of salmon 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.[300] 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.'[301] Consequently, 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.'[302] Lamer CJ explained the emphasis upon pre-contact rather than pre-sovereignty aboriginal society:

> 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.[303]

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 Sto:lo culture, this was not sufficient without a demonstration that it was the exchange of salmon

[300] Ibid., 310-315.
[301] *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 24 per Lamer CJ.
[302] *R v Van der Peet* (1996) 2 SCR 507, at 538-9; 137 DLR (4th) at 634 – 35
[303] *R v Van der Peet* (Unreported Judgment, 22 August 1996) at 34.

which was a significant and defining feature of Sto:lo culture.[304] Given that salmon exchange, although part of the interaction of kin and family exchange, was not an integral part of pre-contact Sto:lo 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 Sto:lo 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 Sto:lo culture.[305]

The ratio of this case in a customary aboriginal rights context, therefore, is that those self-defining practices, customs and traditions that qualify as 'aboriginal' must be part of a central aspect of pre-contact society which have continued to the present. In British Columbia the magic date for aboriginal title seems to be 1846.[306] In New Zealand the 1840 rule is the magic date for the affirmation of aboriginal rights, at least to land title. In the USA, the Federal Government prescribed (among other criteria) that an American Indian entity must show a substantially continuous basis to the year 1900[307] as the date to receive formal recognition as an Indian 'tribe' with all its attendant benefits. Incidentally, this process is fiercely competitive and political.

9.7.3.1 FROZEN ABORIGINAL RIGHTS

The Sto:lo 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 traditions through this process:

> 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.

[304] Ibid, at 41-2.
[305] Ibid, at 42-3.
[306] As per *Delgamuukw v British Columbia* [1998] 1 C.N.L.R 14, (Supreme Court of Canada) cited in British Columbia, *Provincial Policy for Consultation with First Nations* (B.C Consultation Policy, Victoria, B.C, October 2002) at 10.
[307] This was a change from the 1978 requirement of continuity 'from historical times.' Infra, Chapter 11, section 11.1.15 'BIA Petition for Recognition Criteria'

> The analysis turns on the manifestations of the 'integral' part of [the aboriginal's] distinctive culture.[308]

R v Pamajewon and Jones[309] 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.[310]

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). 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.[311] 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.'[312]

This customary aboriginal rights defining and freezing process in the Supreme Court did not, therefore, create a right that was exercised customarily. There is a clear distinction between a right to a customary practice and an actual customary right. By means of this process a practice is falsely termed a right. What is determined through this test is not what Indigenous People 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 evidence of absence. Thus, a *Van der Peet* aboriginal rights-defining process conflicts with the preservation of indigenous laws and institutions and the process eliciting the content and scope of those traditional indigenous laws and institutions,[313] including indigenous representation.

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[308] Ibid, at 345- 9.
[309] (1996) 2 SCR 821.
[310] Ibid., at 833
[311] Supra, n 290 at 60-1.
[312] Idem.
[313] For a thorough analysis of *Van der Peet* and its implications for Māori customary laws in New Zealand, see Kilgour, J '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' in Waikato University College, *Te Taarere aa Tawhaki* (Journal of the Waikato University College, Vol. 1, Koroneihana, Hamilton, 2001) at 192 – 210.

In *R v Cote*[314] the Supreme Court of Canada held that the above rights protected by s. 35 are not confined solely to those inexorably linked to aboriginal title. *R v Cote*[315] considered the conviction of some Algonquin Indians who had taught traditional fishing methods in a controlled harvest zone, which breached Quebec Fishery Regulations. The Supreme Court unanimously allowed the appeal, applying the Van der Peet principles holding that in this case the fishing right to teach its practice was an integral part of Algonquin life since pre-contact times.[316] In *R v Adams*[317] a Mohawk was charged with fishing in Lake St. Francis without a licence under Quebec law. The Supreme Court applied the Van der Peet principles again and held that there was sufficient basis and continued practice to qualify as an aboriginal right under s. 35(1).[318]

Aboriginal land rights can still exist despite the nomadic nature of some Indigenous Peoples and their survival being unrelated to aboriginal title. In *Delgamuukw v British Columbia*[319] Lamer CJ concluded that s. 35(1) of the *Constitution Act 1982:*

> ... provides a solid constitutional base upon which subsequent [settlement] negotiations can take place. Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, at 31, to be a basic purpose of s. 35(1) - 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.' Let us face it, we are all here to stay.[320]

In summary, the Van der Peet principles affirm the notion of aboriginality for establishing aboriginal rights but it stresses 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 development. As Professor Slattery noted, 'aboriginal title is like an historical diorama in a museum.'[321]

The Canadian approach to the fossilisation of aboriginal rights is germane to Māori in New Zealand. Although aboriginal rights have not received formal constitutional protection via an entrenched constitutional statute, relevant comparisons can still be made with the Canadian approach, given that the Treaty has received some constitutional

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[314] [1996] 2 S.C.R at 139.
[315] Idem.
[316] Idem, para. 39-47.
[317] (1996) 3 SCR 101.
[318] Ibid.
[319] *Delgamuukw v British Columbia* [1998] 1 C.N.L.R 14, (Supreme Court of Canada).
[320] Ibid., at 86, paragraph 186, per Lamer CJ (Supreme Court of Canada).
[321] Slattery, B, 'Understanding Aboriginal Rights' in Isaac, T, (ed) *Readings in Aboriginal Studies* (Vol. 5: Aboriginal People and Canadian Law, Bearpaw Publishing, Manitoba, 1996) at 24-5.

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*[322] when he stated:

> 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.[323]

Lord Wolf, in the Privy Council, noted that the *Treaty of Waitangi* 'is of greatest constitutional importance to New Zealand.'[324] The Waitangi Tribunal asserted that the Treaty must be seen as a 'basic constitutional document.'[325] Chilwell J recorded in a key High Court decision in 1987 that the Treaty is 'part of the fabric of New Zealand society.'[326] Sir Robin Cooke, of the Court of Appeal, speaking extra-judicially, stated the *Treaty of Waitangi* is 'simply the most important document in New Zealand's history.'[327] In addition, he 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.'[328] A further concern of this process is that the locus of power has shifted from the actual Treaty of Waitangi to what the courts or legislature perceives the Treaty to represent, a concern that is beyond the scope of the present discussion.

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*[329] the judiciary consented to recognise the *mana*[330] of local tribes over sea fisheries according to their customary law. The guarantees of the Treaty were also indirectly recognised in *Te Runanga o Te Ika Whenua Inc. Society v Attorney General.*[331] In this decision Cooke P stated that unless special circumstances existed, aboriginal title should not be extinguished without Māori consent.[332] It stands to reason that this standard should apply to all aboriginal rights. In the 1997 High Court decision *The Taranaki Fish and Game Council v*

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[322] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641. (SOE Case).
[323] Ibid. at 655-6 (per Cooke P).
[324] *New Zealand Māori Council v Attorney-General* [1994] (PC) per at 516. (Broadcasting Assets Case).
[325] Waitangi Tribunal, *The Ngai Tahu Report* (GP Publications Wellington, 1991) at 224.
[326] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.
[327] Cooke, R, 'Introduction' in NZULR (1990) at 1.
[328] *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2NZLR 301 at 308-309 (CA).
[329] (1986) 6 NZAR 114 (H.C).
[330] *Mana* has been defined as prestige, respect, intrinsic power or authority which is spiritually endowed and maintained. See Mead, H.M, *Tikanga Māori: Living by Māori Values* (Huia, Wellington, 2003) at 25-35.
[331] [1994] 2 NZLR 20.
[332] Ibid, at 24.

McRitchie[333] Becroft J permitted the defendant's fishing methods to be employed and extended this aboriginal right to include fish species introduced after the Treaty. These legal and political developments seem to have strengthened the constitutional status of the *Treaty of Waitangi* in New Zealand. It must be noted here that the fourth Labour Government did attempt to constitutionally entrench the *Treaty of Waitangi* in the 1985 Draft White Paper on the Bill of Rights.[334] The Paper proposed in the preamble the incorporation of the Treaty into New Zealand law as a constitutional fact. Interestingly, Clause 4 of the Bill read:

> The Treaty of Waitangi
> ... Rights of Māori people under the Treaty are hereby recognised and affirmed.

It seems that Clause 4 was extracted from s. 35 of the *Constitution Act 1982* in Canada. The clause was eventually removed, however, from the *New Zealand Bill of Rights Act 1990* because of opposition from civil servants, lawyers and some Māori.

Still, in New Zealand jurisprudence there is no absolute standard test to determine the content of a traditional aboriginal right. However, there are some requirements that must be fulfilled. There must be detailed and convincing evidence that a traditional practice existed.[335] 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.[336] A stricter test was applied by Hammond J, requiring that the custom must prove to have existed since time immemorial, it must be reasonable, certain (in nature, locality and who it affects) and must have continued without interruption since its origin.[337] This test has not been affirmed elsewhere but this may reflect the ad hoc nature of rights determination.[338] This rights determining process 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.[339]

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[333] *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).
[334] Palmer, G, *A Bill of Rights for New Zealand* (Department of Justice, Wellington, 1985).
[335] See *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (H.C) at 690, 691 (per Williamson J); *Taranaki Fish and Game Council v McRitchie* [1991] 2 NZLR 139 (CA) at 147.
[336] Ibid.
[337] *Knowles v Police* (1998) 15 CRNZ 423, 426.
[338] See also *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC) at 341.
[339] However, in *MAF v Love* [1998] DCR 370 (DC), it was held that Māori had no commercial fishing right regardless of evidence of bartering.

Thus, what is determined through this flawed test is what Māori did, not what they had a right to do.

The Waitangi Tribunal offered some hope, albeit short-lived, when it discussed the notion of the 'right to development' in the Muriwhenua Fishing Report. The Tribunal noted that traditional Māori fishing technology was advanced and access to new technology and markets was the quid pro quo for settlement.[340] The Tribunal then noted that 'there is nothing in either tradition, custom, the Treaty or nature to justify the view that [Māori fishing technology] had to be frozen.[341]

> 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.[342]

Hence the Tribunal identified that freezing Māori traditional fishing rights at 1840 would concomitantly limit non-Māori to their catch capabilities at 1840.[343] The Tribunal justified its stance by referring to the international right to development and to domestic law pursuant to *Simon v The Queen.*[344] The Tribunal stated:

> 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:
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> 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.

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[340] See Waitangi Tribunal *Muriwhenua Fishing Report*, (Department of Justice, Wellington, 1988) [hereinafter *Muriwhenua*]; and Waitangi Tribunal *Ngai Tahu Sea Fisheries Report*, (Department of Justice, Wellington, 1992). Neither report actually contains much empirical data about the scope of Maori deep-sea fishing. Both reports, especially the former, were intended as key statements on fisheries at crucial stages in the negotiations. For the most part *Muriwhenua* is a detailed study of national fisheries legislation and a discussion of why the Tribunal believed these to be contrary to the principles of the *Treaty of Waitangi.* There was also some discussion of overseas case law, notably the famous Federal District Court decision in *United States v State of Washington* (1974) 384 F Supp 312 (WD Wash) and the decision of the British Columbia Court of Appeal in *R v Sparrow* (1986) 36 DLR (4th) 246. 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.' Ibid, at 200

[341] *Muriwhenua,* supra n 341 at 223.

[342] Ibid.

[343] Ibid.

[344] (1985) 24 DLR (4th) 390, 402.

> 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).[345]

Hence, traditional Māori fishing, and all other traditional aboriginal rights, should not be frozen in time and space to 1840.

However, in the *Te Runanga o Te Ika Whenua Inc Society v Attorney-General*[346] decision of the New Zealand Court of Appeal, the learned President limited the nature and scope of Māori customary title (aboriginal title):

> The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case.... At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee simple recognised at common law. ... At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.[347]

Te Runanga o Te Ika Whenua Inc. Society applied for an interim declaration by way of judicial review, 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:

> ... [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.[348]

The Court of Appeal also held:

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[345] As cited in *Muriwhenua,* supra n 341 at 223-24.
[346] [1994] 2 NZLR 20 (CA). [Hereinafter *Te Ika Whenua*].
[347] The President, Justice Cooke, cited judgments in the Australian case *Mabo v. State of Queensland (No.2)* (1992) 175 CLR 1, to support both ends of the spectrum.
[348] *Te Ika Whenua,* supra n 347 at 25.

> 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.[349]

Similarly, Don Brash complained that 'some people are trying to wrench the Treaty out of its 1840 context.' This view indeed prohibits the evolution and development of aboriginal rights.

Dr Alex Frame commented on the Te Ika Whenua case that 'it will not comfort those who seek certainty in law to learn that Māori customary rights are of 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.'[350] It is also interesting to note that neither Treaty party contemplated hydroelectric development in 1840 but the latter party has a contemporary right to the development of hydro-electricity while the former seems to be locked in 'an historical diorama in a museum.'

A similar situation of hydroelectric development denying and then attempting to unilaterally extinguish First Nations aboriginal rights occurred with the James Bay Cree although this situation was in the 1970s. The Cree and Inuit applied successfully to the Quebec Superior Court for an injunction to cease all hydro-electric construction in their traditional territories in *Robert Kanatewat v James Bay Development Corp.*[351] The arguments against proceeding with the case were that the James Bay Development Corporation was a Crown corporation, it enjoyed Crown immunity, and, 'Indians had no rights [aboriginal rights] in the province of Quebec. Never have had, never will.'[352] The Cree's legal counsel, James O'Reilly, responded that the Cree had unextinguished aboriginal rights citing, inter alia, the *Royal Proclamation 1763*, and the Royal Instructions King George III issued to Governor Murray in the new colony at the time, which stated in part:

> ... whereas our Province of Quebec is Inhabited and Possessed by several Nations and Tribes of Indians with whom it is both necessary and expedient to Cultivate and Maintain a strict friendship and good Correspondence ... You are on no Account to molest or disturb them in the Possession of such Parts of the said province as they at present occupy or possess; but to use the best means you can for conciliating their Affections, and uniting them to our Government.[353]

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[349] Ibid, at 24.
[350] Frame, A *Property and the Treaty of Waitangi: A Tragedy of the Commodities?* (Te Mātāhauariki Institute, University of Waikato Press, Hamilton, 2001) at 7.
[351] [1974] RP 38 (Quebec Supreme Court).
[352] MacGregor, R *Chief: The Fearless Vision of Billy Diamond* (Ontario: Penguin Group, 1990) at 82-3.
[353] Ibid, at 84.

Chief Billy Diamond was the first witness who talked about the sacredness of the land to the Cree, the importance of traditional hunting and fishing areas and methods to their culture, paddling up the massive rivers in the area, traditional medicines and the affects of being sent to residential schools, and how the hydroelectric development would destroy the Cree 'way of life.' The Provincial prosecutor, Jacques Le Bel, questioned Diamond often challenging the Cree traditions that they had been westernised or assimilated to the 'white man's ways' and therefore undermining their 'aboriginality.' McGregor noted some of Le Bel's questions:

> Surely when Chief Billy Diamond had spoken so romantically of paddling up the rivers he was fully aware that the outboard motor had long been available throughout the North. And surely the chief of Rupert House who had waxed eloquent about the dog sleds of James Bay was more than familiar with the skidoo that had been rolling off the Bombardier assembly line in Valcourt for the past thirteen years.

Le Bel asked: 'How many skidoos have you got, personally, chief?' Diamond replied 'I have two.'[354] But Diamond would not back down. Many of the Cree trappers used outboards for heading up the rivers but they also still paddled in the rapids. While many used skidoos, the trappers still used their dogs. Le Bel even alleged that the James Bay Indians hunted caribou from planes which some did. Hence Le Bel's challenge to Cree 'aboriginality' that if they have no or little 'aboriginalness' left because they are not hunting exactly as their ancestors did centuries ago, then they have no aboriginal rights left to defend, hence freezing aboriginal authenticity to an undeveloped, precontact hunter-gatherer lifestyle.

In November 1973 Malouf J ordered the construction work to halt on the grounds that the Cree and Inuit:

> ... have been in possession of these lands and exercising fishing, hunting and trapping rights therein since time immemorial ... and the obligation assumed by the Province of Quebec in the legislation of 1912, appears that the Province of Quebec cannot develop or otherwise open up these lands for settlement ... without prior agreement of the Indians and [Inuit].[355]

[354] Ibid, at 89-90.

[355] Diamond, B 'Aboriginal Rights: The James Bay Experience,' in Bold, M & Long, J *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto, 1985) at 276-277; *Kanatewat v James Bay Development Corporation and Attorney-General for Quebec* [1974] RP 38 (CS). La Rusic, I, *Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement* (Department of Indian Affairs and Northern Development, Ottawa, 1979) at 6.

The Quebec Court of Appeal reversed the injunction granted by the Supreme Court of Quebec within a week.[356] The Court of Appeal held that the Cree had failed to show that they would suffer any great inconvenience if the dam was to be built [357] and that the 'interest of all the people of Quebec must be weighed against the interest of approximately 2,000 of its inhabitants.'[358] Interestingly, Turgeon J concluded that 'the indigenous peoples had abandoned their traditional way of life and had taken up modern conveniences'[359] again undermining their 'aboriginality.'[360] O'Reilly dubbed the decision 'might makes right' or 'the majority always rules.'[361]

Although leave to appeal was refused by the Supreme Court of Canada,[362] the Supreme Court did hear the petition to appeal. Two dissenting judges expressed the opinion that there were material issues involved, which warranted a full hearing before their court.[363] The Quebec government could not risk the possibility of the Cree successfully establishing their rights and obtaining recognition in the Supreme Court, particularly given that the unextinguished aboriginal rights of the Nisga'a were recognised by three other judges in *Calder v Attorney-General*[364] earlier that year. Moreover, additional expensive disruptions and stoppages to the hydro-electric project were halting progress and indicated the possibility of a Cree and Inuit victory.[365] The determination of the James Bay Cree and their Inuit neighbours to protect their land interests through litigation provided the impetus to persuade the Quebec and Canadian governments to enter into intense negotiations that culminated in the *James Bay and Northern Quebec Agreement 1975*.

Jolly discussed the above tendency to reify and idealise culture and then prescriptively attach it to Indigenous Peoples. Jolly held that the logic has been that if Indigenous Peoples are no longer doing 'it', they are no longer themselves. On the other hand, if colonisers are no longer doing what they were doing one century ago, this is a comforting example of Western progress. Diversity and change in one case connote

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[356] *James Bay Development Corporation and Attorney-General for Quebec v Kanatewat* (Unreported, 22 December 1973, Quebec Court of Appeal).
[357] Richardson, B.J *Regional Agreements for Indigenous Lands and Cultures in Canada: A Discussion Paper* (Darwin, North Australia Research Unit, The Australian National University, 1995) at 17.
[358] Diamond, supra n.356 at 277.
[359] Richardson, supra n 358 at 17.
[360] Idem.
[361] O'Reilly, J 'Indian Land Claims in Quebec and Alberta' in Long, J & Boldt, M *Governments in Conflict: Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) at 36.
[362] *Kanatewat v James Bay Development Corporation and Attorney-General of Quebec* [1975] 1 S.C.R 48; (1974) DLR (3d) 1 S.C.C.
[363] MacGregor, supra n 353 at 113.
[364] *Calder v Attorney General* (1973) 34 D.L.R. (3rd) 145.
[365] Morantz, T 'Quebec' in Coates, K *Aboriginal Land Claims in Canada* (University of B.C: Copp Clark & Pitman Ltd, 1992) at 112.

inauthenticity, in the other the hallmarks of true Western civilisation.[366] This double standard seems to be germane to contemporary Māori development in New Zealand and indigenous development in other settler liberal democratic nation-states including Canada.

The general '1840 test' was applied to determine whether a particular object was within the reasonable contemplation of Māori chiefs at the time of the Treaty of Waitangi.[367] The test was also applied in *Ngai Tahu Māori Trust Board v Director General of Conservation*[368] with respect to tourism and whale watching, and it allowed the Court to restrict the interpretation of Māori rights through their limited perception of Māori intention. Still the findings of the Waitangi Tribunal have assisted in this area (as mentioned earlier) in *The Taranaki Fish and Game Council v McRitchie.*[369] Becroft J quoted the *Muriwhenua Fishing Report*[370] where the Tribunal discussed the emerging right to development in international human rights law. Owing to the Tribunal's findings, Becroft J permitted the defendant's traditional fishing methods to be employed and extended this right to include fish species introduced after the Treaty.

A more recent example of the freezing of Māori aboriginal and Treaty rights to 1840 and therefore 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* extinguishes Māori tikanga and common law rights in the foreshore and seabed and replaces them with full Crown title, which Moana Jackson declared is in effect a confiscation that clearly breaches Articles II and III of the Treaty of Waitangi and standard common law rules.[371] To establish customary rights, Māori claimant groups must establish that their rights and title existed prior to 1840 and continue uninterrupted up to the present day. Section 39 of the Act states:

> Determination of applications for ancestral connection orders
> i) The Māori Land Court may make an ancestral connection order only if it is satisfied that the order will apply to an established and identifiable group of Māori –
>
> a) whose members are whānaunga; and

[366] Jolly, M 'Specters of Inauthenticity' in *The Contemporary Pacific* (Vol. 4, Spring, 1992) at 57. Jolly draws on and endorses the similar perspectives found in Linnekin, J & Poyer, L (eds) *Cultural Identity and Ethnicity in the Pacific* (Honolulu, 1990) and Handler, R & Linnekin, J 'Tradition: genuine or spurious' in *Journal of American Folklore* (Vol. 97, 1984) at 273 – 290.

[367] Not all Māori rangatira (chiefs) signed any version of the *Treaty of Waitangi* but New Zealand law operates on the doctrine of absorption, holding that territory acquired by several means – settlement, cession, discovery – will be governed as if it were acquired by the earliest means.

[368] [1995] 3NZLR 533, 560 per Cooke P (Richardson, Casey, Hardie-Boys and Gault JJ concurring).

[369] *The Taranaki Fish and Game Council v McRitchie,* (Wanganui District Court, Unreported, 27 February 1997, ORN: 50830068) at 13-14, per Becroft J (overturned by the High Court, 1998). Supra, n 336.

[370] Ibid, at 38 for Becroft J's discussion on *Muriwhenua,* supra n 341.

[371] Jackson, M 'An Analysis of the Foreshore and Seabed Bill' (Māori Law Commission, Wellington, May 2004) at 1.

b) that has had since 1840, and continues to have, an ancestral connection to the area of the public foreshore and seabed specified in the application.

The codification of indigenous cultures by liberal democratic governments often results in an epistemological, pedagogical and hermeneutic redefining and therefore misappropriation of the indigenous group's culture. Moreover, culture is constantly evolving - it is qualitative not quantitative and the ancestral connection test in s. 39 above freezes Māori into an 1840 'hunter-gatherer' exercise of rights which is inappropriate. Cultural beliefs, customs and practices do not freeze and remain static and unchanged through time and space.

Furthermore, Dr Michael Cullen and Attorney General, Margaret Wilson (as she was then), defended the government's position of depriving Māori of the right to enjoy their culture pursuant to s. 20, *Bill of Rights Act 1990* (BORA) and implicitly Article 27, *International Covenant on Civil and Political Rights* (ICCPR) by placing the onus of proof on Māori to prove that 'traditional' customary practices required exclusive fee simple title[372] Both Dr Cullen's and Margaret Wilson's views are erroneous given that they divert Māori from the original issue, the right to enjoy their culture in a contemporary context not having to prove they engaged in activities that required fee simple title over their natural resources in a fossilised 'hunter-gatherer' context. In addition, Cullen and Wilson's views seem to be incorrect factually because, the author alleges, some Māori did have traditional exclusive property rights to parts of the foreshore and seabed.[373] As early as 1835 records show that Māori had a property right in the foreshore and seabed that resembled exclusive possession and therefore a fee simple 'type' right. James Busby, British Resident, sent a despatch to the Colonial Secretary that year noting that with some Bay of Islands Māori:

> A payment has been pretty regularly exacted in this harbour for permission to water and I have heard of a demand for harbour dues having been made by one of the chiefs of the Hokianga river.[374]

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[372] Cullen, M, 'Speech on the Foreshore and Seabed to Grey Power' (Waipuna International Hotel, Mt Wellington, Auckland, 5 April 2004) at 5 and Wilson, M 'Attorney-General's Opinion on Consistency of Legislation with the Bill of Rights: Foreshore and Seabed Bill' (Ministry of Justice, Wellington, 6 May 2004) at 5, paragraph 31. See: www.justice.govt.nz/bill-of-rights/bill-list-2004/f-bill/foreshore-seabed-bill.html. (Accessed August 2004).

[373] This section has drawn heavily from the work of Te Mātāhauariki Institute at the University of Waikato. See Te Mātāhauariki, 'Maori Customary Rights: The Hard Yards' in Te Mātāhauariki, *Newsletter* (Issue 7, September 2003) at 2-6.

[374] 'Despatches from James Busby, British Resident, 1835', Alexander Turnbull Library, Wellington, Ref. No. qMS-0344, No. 65/2. See also Te Moananui's Petition in *AJHR* 1869 (E) F. NO. 7, 18 Report of Committee on Thames Sea Beach Bill.

In 1871 Chief Judge Francis Fenton of the Native Land Court discussed in his judgment in the *Kauwaeranga* case concerning claims to the foreshore and mudflats near the mouth of the Waihou River by Māori who use to fish for Patiki (flounder). Judge Fenton granted to Māori applicants the exclusive right of fishing upon and using for the purposes of fishing, whether with stake-nets or otherwise, the surface of the soil of all that portion of the foreshore or parcel of land between the high water and low water mark. Although Fenton was not willing to grant absolute ownership - exclusive possession - he did note:

> I cannot contemplate without uneasiness the evil consequences which might ensue from judicially declaring that the *soil of the foreshore* of the colony will be *vested absolutely in the natives*, if they can prove certain acts of ownership, especially when I consider how readily they may prove such, and how impossible it is to contradict them if they only agree among themselves. ... it appears to me there can be no failure of justice if the natives have secured to them the *full, exclusive and undisturbed possessio*n of all the rights and privileges over the locus in quo which they or their ancestors have ever exercised: and the Court so determines.[375] [Emphasis added]

As Fenton alluded to above Māori may have had exclusive property rights to the foreshore and seabed and they could have proven this easily. Solicitor General John Salmond provided a further example in 1914. Salmond was involved in arguing the Crown's side in legal proceedings concerning the Treaty of Waitangi and Māori customary rights. Salmond wrote a memorandum to the Attorney-General in 1914 which adds valuable context to discussion on Māori traditional ownership of the foreshore and seabed:

> The Prime-Minister ... has instructed me to appear before the Native Land Court to contest the claims of the Natives on the ground that the only rights possessed by the Natives over the larger lakes of this country are rights of fishery (which would not enable a *freehold order* to be issued) and not rights of ownership as are now claimed. ... It is to be observed in the first place that the question relates not merely to Lake Rotorua but to all rivers, lakes, *foreshores* and tidal waters in the Dominion. ... I think it exceedingly doubtful whether any such contention as that which I am now instructed to raise before the Native Land Court could be maintained. ... it may be anticipated that the Court will hold that by native custom the Natives *own not merely the land but the water* of this country and *freehold titles will be issued accordingly.*[376] [Emphasis added]

Captain Gilbert Mair provided evidence on behalf of Te Arawa that was cross-examined at the Native Land Court hearing of the Rotorua Lakes claim in 1918:

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[375] *Kauwaeranga Judgment,* Chief Judge Fenton, reprinted in *Victoria University of Wellington Law Review*, (Vol. 14, Wellington, 1984) at 227. This version was constructed from the Crown Law text, which is the version cited in modern New Zealand case law. See National Archives, CLO 196/7.

[376] Salmond to Attorney-General, 1 August 1914, *Opinions Relating to Lands Department 1913–15.* Cited in Frame, A *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 119.

Q: Did the Arawas go to the Bay of Plenty sea fishing?
A: Yes, the Arawas had fishing grounds off Maketu.

Q: Did they claim fishing grounds several miles out?
A: Yes, quite in accordance with their Māori custom.

Q: Would those fishing grounds be staked out at all, or marked off or located from the shore?
A: Yes, they were had marks on the land which were only disclosed to the favoured few, and even those miles out off Maketu were *the property of tribes and not common grounds*. They caught Hapuku [Groper] and other fish there.[377] [Emphasis added]

More recently, the Waitangi Tribunal considered the nature and extent of Māori fishing rights. In the Muriwhenua Fishing Claim the Tribunal declared:

> As with land, fishing grounds were clearly included as part of the Māori asset base and within the concept of traditional ownership rights. To the casual observer of the time the impression that Māori fisheries were site-specific was most commonly gained. Fisheries were seen to have functioned on a site-specific basis, whether used by individuals, whānau, hapu or even the whole tribe. However, so far as the tribe was concerned, it controlled not only the site-specific grounds but the whole of the inland waters and seas adjacent to its tribal lands.[378]

It would appear that some Māori tribes had exclusive rights to the foreshore and seabed, which were an integral element of their maritime culture. Hence it seems, with due respect, the position of Dr Cullen, Margaret Wilson and the wider government foreshore and seabed policy of not breaching the right of Māori to enjoy their culture because they did not have a traditional exclusive property right, is incorrect. It appears that some Māori did have a traditional exclusive property right to the foreshore and seabed.

Still, the overall context in terms of indigenous customary rights is that the New Zealand and Canadian courts have restricted the development of Māori and First Nations' traditional rights by freezing them through a formal fossilisation process. It is worth mentioning again the dissenting judgment of L'Heureux-Dube that emphasised the need to look at both the actuality of traditional indigenous practices and the overall context of the indigenous society and not to treat them as frozen in history.[379]

9.8 CAPACITY OF TRADITIONAL CUSTOMARY LAW TO CHANGE AND DEVELOP

[377] Evidence of Captain Gilbert Mair, Crown Law Office file, CLO 174, Part I at 270.
[378] Waitangi Tribunal, *Muriwhenua Fishing Report,* (GP Publications, Wellington, 1988) at 37.
[379] *R v Van der Peet* (1996) 137 DLR (4th) 289, 345- 9.

Over the past 400 years for First Nations and 150 years for Māori the British Crown has evolved itself substantially from a monarch-based sovereign to its current form. At the same time, there has not been any equal recognition that the indigenous parties to various Treaties and other Royal Instructions in North America and New Zealand should also have the right to maintain and develop their traditional laws and institutions over time and space in order that they can continue to participate in an effective Treaty and aboriginal rights relationship ensuring that historical and contemporary Treaty and aboriginal rights are 'living' with a vital relevance.

Indigenous polities and governance entities have an inherent right and even obligation to evolve to meet the changing circumstances of time in order to be properly accountable, transparent and stewards to their kin-based constituency. Wilkinson referred to the Indian 'tribes' favouring a 'tribal right to change' to enable tribes to evolve from contact times. He noted the 'recognition of Indian Tribes as living, expanding, and adaptive societies' amounting to 'one of the leading developments of the modern era because of its rejuvenating effect on tribalism.'[380] Wilkinson added that 'tribes' have asserted the right to develop new forms of governmental institutions, the best examples, being formal, judicial, and taxing systems when he commented:

> Thus change – whether the result of cultural invention, borrowing, aggression, altered circumstances, or novel ways of thinking about and acting in the world – is engendered in all societies. No society could survive without the ability to absorb new ideas and behaviours and to adapt to changed conditions. The question, then, is not so much whether societies change as *how* they change.[381]

The fundamental nature of change in society is demonstrated by the work of Hoebel who labelled four broad functions that 'law' serves in all societies that included (traditional?) provision for change:

> The first [function of law] is to define relationships among the members of a society, to assert what activities are permitted and what are ruled out, so as to maintain at least minimal integration between the activities of individuals and groups within the society.
> The second is derived from the necessity of taming naked force and directing force to the maintenance of order. It is the exercise physical coercion as a socially recognised privilege-right, along with the selection of the most effective forms of physical sanction to achieve the social ends that the law serves.
> The third is the dispossession of trouble cases as they arise.
> The fourth is to redefine relations between individuals and groups as the *conditions of life change*. It is to maintain adaptability.[382]

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[380] Wilkinson, C, *American Indians, Time and the Law* (Yale University Press, 1987) at 68-75.
[381] Idem.
[382] Hoebel, E, 'The Law of Primitive Man' in Hoebel, E. A & Llewellyn, C, *The Cheyenne Way* (1967) at 275.

Wilkinson added:

> The implicit acceptance by the Supreme Court of the basic right of Indian tribes in the United States to change is a core element in according tribes the ability to survive and prosper in contemporary society.[383]

Traditional Māori and First Nations customary laws have traditionally been fluid and flexible to need and circumstances. While there may be basic values and principles underpinning debates on tradition, custom and usages, Māori and First Nations customary laws and institutions are the application of these values and principles to particular situations by specific groups of people. Traditional Māori and First Nations customary laws and institutions have often been defined in a re-traditionalised manner as using the authority of the past for current conduct but the past is a place of reference not residence. Like other traditional societies, Māori and First Nations learned from but did not live in the past. The fossilisation of their traditional customs and institutions including identity and representivity, were often a result of European influences, as asserted above.

A further concern with the earlier New Zealand '1840 rule' was the relegation of traditional Māori custom to the past, denying its flexibility and the possibilities for development. The rule was premised on the assumption that because European law was not available to Māori prior to the Native Land Court, no other law was in operation. Moreover, the relegation of traditional custom to the past and a fixed point of time was a rejection of the ability of Māori to continue to develop traditional custom to deal with new circumstances. Instead of seeing the Māori adoption of elements of European law as part of the vitality of traditional customary law, Europeans saw it as evidence that custom had become debased. The capacities of traditional tikanga Māori to adapt in a re-traditionalised manner to new circumstances was crucial then and is crucial now for, inter alia, contemporary Māori self-governance, legitimacy, representation and development. Indeed, Justice Durie explained that:

> ... adherence to principles, not rules, enabled change while maintaining cultural integrity, without the need for a superordinate authority to enact amendments. Custom does not, therefore, appear to have been lacking vitality and flexibility. Inconvenient precedent could simply be treated as irrelevant, or unrelated to current needs, but precedent nonetheless was regularly drawn upon to determine appropriate action. Accordingly, while custom had usually been posited as finite law that has always existed, in reality customary policy was dynamic and receptive to change, but change was effected with adherence to those

[383] Wilkinson, supra, n 381 at 74-5.

> fundamental principles and beliefs that Māori considered appropriate to govern the relationships between persons, peoples and the environment.[384]

In the words of Dame Joan Metge already cited above about the ability of tikanga to change:

> 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 nga tupuna' 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.[385]

It is this ability of traditional tikanga Māori to change that accounts for its variations among tribes and hapū. One such institution among the Tainui tribes is the *hakari* (great feast) while Ngai Tahu refer to the institution by another name – *kaihaukai* which shares the same function but has a different form. While the practice of tikanga can differ depending on the circumstances of particular iwi and hapū, those changes should always be guided by the fundamental core values and principles that underpin tikanga. Traditional tikanga Māori has been receptive to change while maintaining congruence with its basic beliefs.[386] As Metge concluded:

> The time has come to devise a new strategy which pays due respect to the traditional Māori social order but which also, *in the tradition of that order*, is adjusted to current political realities.[387] [Emphasis added].

Metge added:

> The Māori have survived into the 1990's [and the 21st century] as a people with a strong identity because of their capacity for adapting old and developing new tikanga to meet contemporary needs and realities.[388]

There is value at looking to the past insofar as it sheds light upon the present and guides the future. One must also acknowledge that to portray pre-European societies as 'timeless, unchanging isolates', Linnekin opined, neglects 'the patent fact that they had their own dynamics of development before Westerners arrived. Too often, anthropologists

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[384] Durie, E *Custom Law* (V.U.W.L.R. 325, Address to the New Zealand Society for Legal and Social Philosophy, 1994) at 331.
[385] Metge, J, 'Iwi: Word and Meanings' (Unpublished paper in author's possession, 2000) at para. 8.9.
[386] Durie, E 'Ethics and Values' (Te Oru Rangahau Māori Research and Development Conference, Massey University, Palmerston North, 1998) at 15.
[387] Metge, J, 'Customary Māori Land Tenure and the Status and Representation of Iwi' (Unpublished paper presented to the Crown Forest Rental Trust, Wellington, 1999) at 12.
[388] Metge, J, 'Submission on the Runanga Iwi Bill' (Submitted to Māori Affairs Select Committee, Wellington, 1990) at 4.

and historians implicitly and perhaps unwittingly conveyed the impression that culture change and 'history' begin with foreign contact.'[389] Thus, the analytical task is not to strip away from a fixed, pre-contact core later cultural developments as inauthentic but to understand the process by which cultural innovation at any given point in time acquires authenticity.[390] Indeed, Justice Durie held that:

> Old custom is no more important than modern custom however. The former may govern the examination of claims, but the latter may need to apply in considering what must now be done.[391]

Justice Durie supported a notion of re-traditionalisation when he proposed that cultures could undertake considerable change voluntarily without causing detriment to their basic underlying core values:

> Consider the enormous changes in Māori society at a time when Māori reigned freely before the Treaty of Waitangi of 1840 and when there was only the moral influence of a small number of missionaries. During that time Māori totally or substantially jettisoned endemic practices of cannibalism, infanticide, sorcery, slavery and to a lesser extent, warfare. These were major reforms with economic consequences, at least with regard to slavery, but there was no lasting impact on the Māori values system.[392]

Events during the contact period, from 1769 to 1840, had a dramatic impact on traditional Māori society. These changes did not affect all iwi and hapū in the same way and at the same time, and there was ample opportunity for regional differences to be accentuated. Changes in group formation and identity, individual status and in spatial location were significant, especially during the Musket War period (approximately 1820 to 1830). In the most populous areas of the North and in the central North Island, people remained largely in territories occupied traditionally by their ancestors for several generations. In many other areas, the iwi and hapū claiming territorial rights under the Treaty of Waitangi had not been living there in 1820.[393]

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[389] Linnekin, J 'Contesting Approaches' in Denoon, D et al (eds) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Cambridge, 1997) at 12.

[390] Hanson, A 'The making of the Māori culture: culture invention and its logic' in *American Anthropologist* (Vol. 91, 1989) at 898. See also Ballara, A 'Settlement Patterns in the Early European Māori Phase of Māori Society' in *Journal of the Polynesian Society* (Vol. 88, No. 2, 1988).

[391] Durie, supra n 387 para 107.

[392] Durie, E *Constitutionalising Māori* (Paper presented at the Legal Research Foundation Conference, Liberty, Equality, Community: Constitutional Rights in Conflict, Auckland, 20–21 August 1999) at 10.

[393] The level of tribal migration is discussed in detail in a series of papers prepared for the Waitangi Tribunal as part of the *Rangahaua Whanui programme*. These papers are available on the internet at www.waitangitribunal.courts.govt.nz. (Accessed November 2005). The 'Musket Wars' severely destabilised Maori society causing, inter alia, social and geographic upheaval that resulted in tribes moving to new areas for settlement. See also Crosby, D *The Musket Wars* (Reed Publishers, Auckland, 1999).

Other tribes had in the years immediately preceding the Treaty, been forced to leave their traditional *kainga* (villages) and to join their kin elsewhere for mutual protection. Few anywhere had been unaffected by the Musket Wars. Moreover, new crops, new foods and European technology were widely embraced, and Christianity, literacy and the spirit of entrepreneurship became commonplace in Māori communities resulting in the replacement of the traditional and complex reciprocity economy with a cash economy. The results of such tumultuous change were uncertainty and detraditionalisation, aspects of which were fixed artificially by the coming of British law.[394]

Still, Schaniel provided an interesting analysis of the post-contact impact of European technology on the Māori economy highlighting a post-contact process of re-traditionalisation.[395] Schaniel argued that the introduction of European technology prior to the Treaty of Waitangi did not result in a detraditionalised collapse of Māori culture as some espoused.[396] New technologies were adopted in the context of their traditional values. Iron tools, white potatoes, agricultural technology and firearms were all integrated into Māori livelihood and resulted in a change in Māori society and economy, but Māori adapted these to their traditional social processes.[397] Historians have assumed that the introduction of new European technology to indigenous societies usually caused catastrophic changes in social process, livelihood, culture and identity. For example, Wright erroneously held that:

> [T]raditional Māori ideas, as usual, when applied to western importations resulted in eventual confusion. The Maoris became confused because they could not control by Māori means the western articles they took so much trouble to acquire. There was a long chain of cause and effect, which followed the introduction of any western articles and led inevitably to cultural disturbances.[398]

Wright added that the disturbances of modernity resulted in a 'collapse of traditional values and confidence.'[399] Moreover, Cumberland held that the result of introduced European technologies was detraditionalisation - Māori 'culture and economy was largely destroyed.'[400] Although the views of Wright, Cumberland and others were not totally true,

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[394] Belgrave, M 'Maori Customary Law: from Extinguishment to Enduring Recognition' (Unpublished paper for the Law Commission, Massey University, Albany, 1997) at 6.
[395] Schaniel, W 'European Technology and the New Zealand Māori Economy' in *The Social Science Journal* (Vol. 38, 2001) at 137–146.
[396] Idem.
[397] Ibid, at 137.
[398] Wright, H *New Zealand, 1769–1840: Early Years of Western Contact* (Harvard University Press, Cambridge, 1967) at 144-45.
[399] Idem.
[400] Cumberland, K 'A Land Despoiled: New Zealand About 1838' in *New Zealand Geographer* (Vol. 6, 1960) at 33–34.

neither were they totally false. New technologies did lead to profound 'disturbances' in the economic and political order but not all of these 'disturbances' were malign. Schaniel cogently argued that Māori adopted, adapted and then applied European technology to their traditional processes.[401] European missionaries consistently attempted to teach Māori groups English farming techniques but Māori continued to use traditional techniques in the cultivation of introduced vegetables and fruit, illustrating the re-traditionalised continued vitality of traditional Māori values. Māori also adopted few European agricultural implements and those that were adopted were adapted to Māori concepts of appropriate techniques.[402]

More than one distinct cultural group, with their traditional values, laws and institutions, can be acknowledged and accommodated within one society. The recognition of distinct cultural communities does not preclude the existence of a collective national identity.[403] Durie cautioned that care must be taken to avoid the imposition of inappropriate norms upon a culture and that it is a grave matter to say that cultural difference invalidates the search for universal standards. A workable compromise is possible between the two extremes of universalism and cultural relativity. This could allow for the development of a framework that recognises cultural diversity while encouraging a high level of human rights protection but such a compromise requires working within the underlying value system of each culture. Durie continued:

> Thus one would think that the oppressively cruel treatment of an offender cannot be justified in today's world simply because that treatment is normal in that offender's society. Today's societies no longer exist in isolation but as part of a global community and, for personal fulfillment and world peace, it remains necessary to promote global standards that societies should aspire to. What needs to be held in check is the tendency, sometimes unwittingly, to impose foreign norms when that is not appropriate. The task is to ensure the judicious application of norms having regard to the circumstance of the case, a task requiring a sensitive approach rather than a strict bureaucracy.[404]

In the process of negotiating Treaty grievances, notions of customary traditions of representivity and identity have continually been interpreted, reinterpreted and manipulated by governments, iwi and hapū individuals, corporate entities, and First Nations and other groups. Governments and indigenous claimant groups in arriving at conclusions of representivity, tribal boundaries, and social formation, membership, and dispute resolution and property rights have frequently deployed the notion of tradition. Stokes recently

[401] Schaniel, supra n 396 at 138.
[402] Ibid, at 141.
[403] Law Commission, *Māori Custom and Values in New Zealand Law* (Study Paper 9, Law Commission, Wellington, 2001) at 5.
[404] Durie, supra n 385 at 10.

warned that cultural contact is an ongoing, two-way process, and both sides respond and adapt. However, when the Pakeha settler government became the 'power culture' it imposed its rules and constraints on Māori society and the process of cultural evolution became skewed.[405] When the newcomer culture became the power culture in Canada, similar processes occurred.

9.8.1 WEST/NON-WEST, INSIDERS AND OUTSIDERS – HERMENEUTIC PRIVILEGING

The notion that political governance and perhaps management institutions should be embedded in their own traditional cultural milieu raises another important point about customary rights, tradition, cultural difference and the 'West/non-West', 'indigenous/non-indigenous' dichotomy. This has to do with the idea that societies (traditional and non-traditional, indigenous/non-indigenous) more or less constitute unique, bounded entities that are clearly distinguishable from each other. This is also closely connected to the idea of cultural relativism as well as the 'cultural' positioning of commentators on any cultural tradition, be they anthropologists, political scientists, lawyers, academics or elders; which brings us to the issue of 'insiders' and 'outsiders.' Keesing noted in a discussion on culture, class and custom in the South Pacific that some criticisms of indigenous representations of cultural identity and nationalism had drawn strong protests from those who promote the view that 'the insider position of Pacific Islanders gives them a primary right to advance representations of their cultural past.'[406] Norton reaffirmed Māori identity as a construction of discourse, not politics[407] but his account privileged the theoretical interpretations of outsiders[408] over the detailed empirical accounts of Māori insider intellectuals involved in this process.[409] Cheater and Hopa argued that this emphasis is

[405] Stokes, E *The Individualisation of Māori Interests in Land* (Te Mātāhauariki Institute, University of Waikato Press, Hamilton, 2002) at 190.
[406] Keesing, R 'Creating the Past: Custom & Identity in the Contemporary Pacific' in *The Contemporary Pacific* (Vol. 1, Centre for Pacific Island Studies, University of Hawaii, Spring/Fall, 1989) at 36.
[407] Norton, R 'Culture and Identity in the South Pacific: A Comparative Analysis', in *Man* (ns) (Vol. 28, No. 4, 1993) at 741–759.
[408] Hanson, A 'The Making of the Maori: Cultural Invention and its Logic' in *American Anthropologist* (91, 1989) at 890-902; Keesing, supra n 407 at 19-42; Linnekin, J 'The Politics of Culture in the Pacific' in Linnekin, J & Poyer, L (eds) *Cultural Identity and Ethnicity in the Pacific* (University of Hawaii Press, Honolulu, 1990); and Linnekin, J 'On the Theory and Politics of Cultural Construction in the Pacific' in *Oceania* (Vol. 62, 1992) at 249-263.
[409] See Greenland, H 'Maori Ethnicity as Ideology' in Spoonley, P, Pearson, D & Macpherson, C (eds) *Nga Take: Ethnic Relations and Racism in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1991);

misleading.[410] The idea of conceding superior insight to the insider is a form of hermeneutic privileging which means that the 'insider' – the member of the cultural group, rather than an 'outside' observer - is awarded a privileged position when it comes to the interpretation or explanation of a tradition.[411]

Some novelists such as Jorge Luis Borges adopted hermeneutic privileging believing that in order to really understand a tradition, one must belong to it.[412] In 1989, Keesing discussed an additional dilemma that sympathetic 'outsiders' face:

> Across the Pacific, from Hawaii to New Zealand, in New Caledonia, Aboriginal Australia, Vanuatu, the Solomon Islands, and Papua New Guinea, Pacific peoples are creating pasts, myths of ancestral ways of life that serve as powerful political tools. ... Scholars of Pacific cultures and history who are sympathetic to these political struggles and quests for identity are in a curious and contradiction-ridden position in relation to these emerging ideologies of the past. The ancestral ways of life being evoked rhetorically may bear little relation to those documented historically, recorded ethnologically, and reconstructed archaeologically – yet their symbolic power and political force are undeniable.[413]

In 1992 Keesing added:

> What are we to do when to voice our doubts and scholarly criticisms could have the effect – however unintended – of subverting the political interests of historically oppressed peoples or causes we otherwise support?[414]

In such situations some 'insiders' may assert: 'but your critical standards are Eurocentric; you do not understand and, furthermore, you never can.'[415] Professor Haunani-Kay Trask of the University of Hawaii charged Keesing with an aggrieved and complaining sense of white superiority:

Jackson, M 'The Crown, the Treaty and the Usurpation of Maori Rights' (Paper presented at the Conference on Human Rights in the Pacific and Asia, Wellington, 1989), Walker, R *Ka Whawhai Tonu Matou Struggle Without End* (Penguin, Auckland, 1990) and Walker, R 'Maori Leadership' (Paper presented at the Hui Whakapumau / Maori Development Conference, Massey University, Palmerston North, 1994).

[410] Cheater, A & Hopa, N 'Representing Identity' in James, A, Hockey, J & Dawson, A (eds) *After Writing Culture: Epistemology and Praxis in Contemporary Anthropology* (Routledge, London, 1997) at 208.

[411] Lawson, S *Cultural Traditions and Identity Politics: Some Implications for Democratic Governance in Asia and the Pacific* (Discussion Paper No. 97/4, ANU, Canberra, 1997).

[412] Borges, cited in Meredith, P, 'Urban Maori as New Citizens: The Quest for Recognition and Resources' (Te Mātāhauariki Institute Working Paper, University of Waikato, Hamilton, 2000) at 40.

[413] Keesing, supra n 407 at 19.

[414] Keesing, R 'The Past in the Present: Contested Representations of Culture and History' in Goldsmith, M & Barber, K (eds) *Other Sites: Social Anthropology and the Politics of Interpretation* (Department of Anthropology, Massey University, 1992) at 18. See also Metge, J 'Kia Tupato! Anthropologists at Work' in *Oceania* (Vol. 69, 1998) at 47 and O'Regan, T, 'Old Myths and New Realities: Some Contemporary Uses of Traditional History' in *New Zealand Journal of History* (Vol. 26, 1992) at 5.

[415] Webster, S 'Escaping Post-Cultural Tribes' in *Critique of Anthropology* (Vol. 15 (4), SAGE Publications, London, 1995) 381, at 389.

> For Hawaiians, anthropologists in general (and Keesing in particular) are part of the colonizing horde because they seek to take away from us the power to define who and what we are, and how we should behave politically and culturally.[416]

However, Borges acknowledged that distance could also work to the advantage of the interpreter in some ways.[417] Furthermore, exaggerating the role of pre-understanding that comes with belonging to a tradition can lead to the idea of closed and inaccessible traditions, and to the belief that an unfamiliar tradition is indeed so alien that it may as well be from another planet. In other words, it promotes the problematic view of a particular culture as an entity that is 'enclosed' in what Lawson termed a 'falsely abstracted horizon.'[418] Moreover, it denies the possibility that so called 'alien horizons' are open to understanding. There is therefore good reason to be critical and suspicious of the 'myth of the framework,' a myth that implies, as Berstein noted, that we are forever enclosed in our 'own horizons, our own paradigms and our own cultures.'[419]

9.8.2 MYTH OF BIFURCATION AND CULTURAL HOMOGENEITY

There are further problems with hermeneutic privileging. It requires a clear distinction between the so-called 'insiders' and 'outsiders, 'indigenous-non-indigenous', 'West/non-West'. It is not always possible to distinguish clearly between societies that constitute unique, bounded entities. New Zealand provides an example challenging the so-called distinctions between cultural 'insiders and outsiders' of bounded entities. The 'traditional' relationship between Māori and Pakeha (non-Māori) was concentrated and contested around a binarism that was/is oversimplified and essentialised highlighting two distinguishable entities. The dichotomous categories of us/them, either/or naturally resulted in adversarial polarities premised on 'alterity, exclusivity and purity.'[420] But 150 years of co-existence, cross-cultural engagement, miscegenation and interculturalism has produced a unique social, cultural, biological and political affinity within an Aotearoa/New Zealand context. Consequently, assumptions about culture and identity have or need to shift from an 'us/them' dualist tradition to a mutual sense of 'both/and' acknowledging and negotiating not only difference but also affinity. The distinction between the two entities – Māori and Pakeha – is blurred.

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[416] Cited in Keesing, supra n 415.
[417] Supra n 413.
[418] Ibid.
[419] Ibid.
[420] Papastergiadis, N, 'Tracing Hybridity in Theory' in Werbner, T (ed) *Debating Cultural Hybridity Multicultural Identities and the Politics of Anti-Racism* (Zed Books, London, 1997) at 257 – 281. In a New Zealand – Māori/Pakeha context – see Metge, supra n 388 at para. 15.

Meredith discussed the detraditionalist notion of hybridity in the third space – as an antidote to the traditional binaristic, essentialising of Māori-Pakeha relations.[421] Meredith cited Bhabba who discussed hybridity as the indeterminate spaces in-between subject-positions that are lauded as the locale of the disruption and displacement of hegemonic colonial narratives of cultural structures and practices. Bhabba posits hybridity as such a form of liminal or in-between space where the cutting edge of translation and negotiation occurs. This 'Third' space is intrinsically critical of essentialist positions of identity and a conceptualisation of 'original or originary culture.' Rutherford noted:

> For me the importance of hybridity is not to be able to trace two original moments from which the third emerges, rather hybridity to me is the 'Third Space,' which enables other positions to emerge.[422]

Thus hybridity in the third space is a mode of articulation, a way of describing a productive and not merely reflective space that engenders new possibility. It is an interruptive, interrogative, and enunciative space of new forms of cultural meaning and production blurring the limitations of existing boundaries and calling into question established categorisations of culture and identity.[423] Such a concept provides a spatial politics of inclusion rather than exclusion that 'initiates new signs of identity and innovative sites of collaboration and contestation'[424] and overwhelms the notion of 'insiders' and 'outsiders in bifurcated distinguishable societies that constitute unique, bounded entities. Hence the myth of bounded and dichotomous bifurcated entities in New Zealand. The author must also emphasise with Thomas that 'cultural conjunctures must be explored in ways that do not equate hybridity with a lack of authenticity.'[425]

Furthermore, a simplistic rendition of the insider/outsider theme also tends to homogenise the plurality of both groups which has the potential of reducing the whole body of 'insiders and outsiders' to a uniform singularity. Neither the Māori nor Pakeha (nor hybrid) group is a homogenous public. In addition, if there is a leader powerful

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[421] Meredith P 'Hybridity in the Third Space: Rethinking Bi-Cultural Politics in Aotearoa/New Zealand' in School of Maori Studies, *Te Oru Rangahau* (Maori Research and Development Conference Proceedings, Massey University, Palmerston North, 7 – 9 July 1998) at 308.

[422] Rutherford, J 'The Third Space: Interview with Homi Bhabba' in Rutherford, J *Identity, Community, Culture, Difference* (Lawrence & Wishart, London, 1990) at 211.

[423] Bhabba, H *Frontlines, Borderposts, Displacements: Cultural Identities in Question* (Bammer Bloomington, Indiana University Press, 1994). See also the recent conference address by the Te Mātāhauariki Representatives, Dr Alex Frame and Paul Meredith on this very topic. Frame, A & Meredith, P 'One Plus One Equals Three' in 'One Country, Two Laws' (Symposium, University of Auckland, 22 July 2006).

[424] Ibid, at 1.

[425] Jolly, M & Thomas, N 'The Politics of Tradition in the Pacific: Introduction' in *Oceania* (Vol. 62, No. 4, 1992). A relevant overview of how the concept of hybridity interfaces with the study of folklore is Kapchan, D 'Hybridization and the market place: emerging paradigms in folkloristics' in *Western Folklore* (Vol. 52, 1993) at 303–326.

enough to claim a privileged position as the spokesman for the groups, can they claim to speak for the group with the only 'authentic' voice? The politics of poverty and representivity in the current Māori fisheries allocation debate proves that such a notion is to be economical with the truth.

However, this does not mean that there is no place for interpretative approaches that give weight to the voices of 'insiders', or 'outsiders' for that matter. There is a place for both but certainly not in a form that privileges the very people whose interpretations should be scrutinised most critically. Possibly, the best way to approach the 'texts' of political leaders – both insider and outsider, indigenous and non-indigenous – is by what Lawson termed a 'hermeneutics of suspicion.'[426]

Furthermore, the rhetoric of the 'Indigenous way,' 'Māori way' or the 'Indian way,' is the dichotomisation of the 'Māori way' and the 'Pakeha way,' or the 'Indian way' and the 'newcomer Canadian and New Zealand way,' which has prefigured so prominently in recent traditionalist/culturalist rhetoric that simply replicates all of the most obnoxious aspects of racism. The politics of traditional cultural identity and traditionalism have a great deal to do with fending off criticism from external sources especially in the 'West' but it also has much to do with dealing with the more dangerous insider critics at home.

9.8.2.1 CULTURAL CRITICS ON THE INSIDE

Some neo-conservative traditionalists and fundamentalists may criticise and oppose 'outsiders' and 'outsider ideas' such as good governance and democracy. But what happens when 'insiders' – those who actually belong to the traditional group - criticise their cultural traditions, group governance and leadership? Insider critics cannot be branded as 'unwelcome interlopers' or be told it is 'none of their business' or that they 'simply do not understand our traditions because they are a 'Westerner' and are not part of 'them.' Conservative traditionalist insiders usually respond with the view that 'insider critics' are traitors to their own cultures and traditions or that a critic of traditional leaders who appeals to democratic norms is 'too westernised' or 'too out of touch' with the realities of their own cultural or traditional ways. Such a device is used to externalise even an indigenous critic or to brand such a critic as 'unauthentic' – that is, not a 'real' Māori or a 'real' Waikato or Ngāi Tahu Māori, Nisga'a, Inuit, or Mohawk, for instance.

Moreover, a further aspect of the 'insider/outsider' debate is that it concerns hermeneutic concepts as well. Some governance values like harmony, consensus and community-oriented processes and principles are construed as inherent elements of the

[426] Lawson, supra n 412.

Indigenous, Māori and First Nations way and of Indigenous, Māori and First Nations values. Conversely, culturally and socially constructed images of discord, dissent and individualism are depicted as being typically 'Western, 'Pakeha,' or 'European', if not uniquely so. In this context, Western democracy which purportedly encapsulates the latter concepts and by implication, none of the former 'Indigenous' concepts, is construed as an external, alien form of political rule unsuited to traditional (Indigenous) Māori and First Nations societies. Moreover, Māori and First Nations groups embroiled in discord, dissent and individualistic activities may be perceived to be 'Westernised' or corporatised. Such a fallacy again reinforces the false notion of the dichotomy between the 'West' and the 'Indigenous Way,' the 'Māori' and 'Pakeha Way' or the 'Indian' and 'Canadian way.'

As mentioned above, neither the 'West/non-West' nor 'Māori/Pakeha-Indian/Canadian' are coherent homogenous entities. Each is an extremely complex heterogeneous category although people may easily be able to see certain general differences between these categories. It is also possible to elucidate numerous similarities and common ground across both of them. An appreciation and toleration of cultural and ethnic difference between and within groups is critical and positive but an exclusive emphasis on difference where cultural markers ideologically, textually and politically are taken to represent a radical demarcation between groups has the potential to cultivate racism in all its insidious forms.

9.9 SELF-CONSCIOUS TRADITIONALISM

To cope with late modernity and the necessary detraditionalist changes to tradition one indigenous Canadian academic, Taiaiake Alfred, concluded that Indigenous Peoples must launch into what he termed 'self-conscious traditionalism.'[427] Alfred, however, drew a distinction between 'traditionalism' and 'revitalisation.' Revitalisation, he argued, amounts to the re-invention of culture, whereas traditionalism is to 'operationalise dormant values and principles located within the history and memory of the people.'[428] The implication is that certain tribal values and practices can be isolated, referred to and ultimately re-traditionalised, modernised and applied as guiding principles or as philosophical underpinnings to contemporary tribal practices. Tahu Potiki provided a very interesting Ngāi Tahu example using the *powhiri* as a tradition that appeared to be 'culturally persistent' but did in fact pass through many stages of transformation. Potiki noted:

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[427] Alfred, G *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford University Press, Toronto, 1995).
[428] Ibid.

> Within Kai[429] Tahu we are now well versed in the ritual of *powhiri* [welcome ceremony] and if you were to arrive on most *marae* in the south the local people could rustle up all the necessary components to bring you appropriately onto the *marae*. This was not the case 10 years ago and perhaps was also not the case 100 years but for very different reasons. We spoke to some of our oldest surviving *kaumatua* (elders), studied *kaumatua* interviews from the 1920s, and worked our way through some of our most valuable tribal manuscripts, particularly those that are consistent with Māori myth templates and that retell our story in an identifiably traditional manner. What we found was very little reference to a *powhiri* ritual. We did find evidence of rituals of encounter, we did hear from people who had participated in other types of ritual but there was very little to suggest the same type of *powhiri* as those that we participate in today.
>
> Much analysis has gone into the *powhiri*, its function and its component parts. In a modern sense we utilise it to bring guests onto our *marae* or within our spiritual fold. Why then was this absent within parts of Kai Tahu? Rather than believe that Kai Tahu are a totally different sort of Māori we have concluded that the *powhiri* is one manifestation of the expression of *manaakitanga* [hospitality].
>
> In our *whakapapa* [genealogy] are the parables that conform to the general myth patterns and within these are examples of highly ceremonial encounters between in-laws or recent enemies that enter into a village under the cover of darkness and head straight for the house of the chief. The chief immediately feeds the visitors even though he may not have any particular connection to them. One of our *kaumatua* by the name of Hoani Tapiha Te Wanikau recorded a kōrero about one of the first encounters between Kai Tahu and Kati Mamoe.
>
> Ka ki atu a Tiotio ki tana wahine kia Turaumoa kia meatia he kai. Ka kai rātou ko aua takata. Ko tēnei riteka he ture na ka kaumatua, ka whakatu te takata he tohu mo te ora kia rongo rawa te iwi kua kai i ana kai e kore tae te whakamate. (Te Wanikau, C1890).
>
> (Tiotio said to his wife, Turaumoa, organise some food. They all ate together. This is a tradition that has been handed down from our elders. The visitor is given food so that the people will all know that they are protected and may never be killed.)
>
> We have a number of similar traditions about ancestors who sought protection under the *mana* of a local chief before they were safe and the brief ritual that they must pass through to gain that protection. To Māori this concept is known as *manaakitanga* and is often translated and explained as equivalent or similar to the western notion of hospitality but of course it is considerably more complex than that.[430]

As traditional societies evolve, it naturally follows that so will their traditional rituals. However, in the case of colonised peoples, there is often more emphasis on preserving the rituals than a comprehensive understanding of the epistemological underpinning values and principles. A dynamic society will evolve as it encounters other societies and other epistemologies, pedagogies and ontology's and there will be or will

[429] Branches of Ngāi Tahu have a dialectal language difference with their use, amongst others, of 'k' to replace 'ng' hence Kai Tahu as opposed to Ngāi Tahu; taoka-taonga (treasure), rakatira-rangatira (chief); and Māoritaka – Māoritanga (Māoriness).

[430] Potiki, T, 'A Traditionalist Approach to Iwi Government' in Durie, M (ed) *He Pukenga Korero* (Vol. 5, No. 2, Massey University, Palmerston North, 2000) at 11, 12.

need to be ongoing maintenance of the traditional values and principles and their relevance in a contemporary context. Indeed, Da Cunha concluded:

> Culture is a production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future is not the preservation of cultural products, but the preservation of the capacity for cultural production.[431]

Indigenous People have many different perspectives on what constitutes tradition, and what is good and bad about traditional ways in a contemporary context. Alfred noted, for example, that during the 1970s civil rights era, his people, the Mohawks of Kahnawake, refused to participate in their own colonization and embarked on the path of tradition, rejecting the identities and power relations that characterized them as a dominated people. In one generation, Alfred asserted, the Mohawks accomplished the rebirth of tradition in Kahnawake.[432]

Cultural revival and survival is not a matter of rejecting all Western influences however, but of a re-traditionalised separation of the positive from the negative and of fashioning a coherent set of ideas out of the traditional cultural values and principles to guide whatever forms of political and social development - including the good elements of Western forms - are appropriate to the contemporary reality. What Indigenous Peoples have to do as a minimum is know, understand, internalise and integrate personally and collectively their basic underlying values and principles in the first place, and their languages and rituals, and then blend the contemporary and traditional together - but they have to have the values and principles right from the outset. It is this rootedness in traditional values and principles that should define an Indigenous People. A culture that does not reflect the basic principles and values of the traditional philosophy of governance, representivity, membership and dispute resolution may not, in the author's opinion, be considered to be Indigenous, Māori, Indian, Inuit, Tainui, Ngāi Tahu, Nisga'a or Mohawk in any real sense. As Indigenous Peoples understand and integrate the correct cultural values and principles of their respective group, they are then positioned to govern themselves more appropriately, rather than be governed from a distance.

9.9.1 THE INVENTION OF TRADITION

Yet another point of caution in the re-traditionalisation processes of Indigenous Peoples, particularly in an indigenous post-Treaty settlement governance, representation,

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[431] Da Cunha, M.C 'The Case of Brazilian Indians' in *Children and the Politics of Culture* (1995).
[432] Alfred, supra n 428.

identity and dispute resolution context, is the invention of tradition. Within anthropological and academic literature, a bewildering variety of terms have been employed to identity and representivity transformations, re-enactments and hermeneutic re-interpretations of tradition by governments and Indigenous Peoples in colonial and post-colonial nation-states like New Zealand and Canada. Such terms include 'invention', 'reinvention', 'construction', 'reconstruction', 'detraditionalisation,' 're-traditionalisation,' 'inversion', folklorisation,' 'objectification,' 'reification' and 'formalisation.'[433] Anthropologists have developed a strong interest in the construction of the past and the invention of traditions in non-Western cultures.[434] Since the 1960s ethnogenesis – the ongoing creation of ethnicity – has been recognised by anthropologists as a political strategy in disputes over resources. Cohen argued that retribalisation – the earlier term for ethnogenesis – is about protecting control over resources, and prefigured the later 'invention of tradition.'[435] Linnekin substituted the term 'construction of tradition' for the politically loaded 'invention of tradition'[436] Jolly and Thomas questioned whether efforts to forge new cultures of national unity were exercises in cynical manipulation[437] and Jolly stressed the need to explore more carefully the complex articulation between local and national reifications and re-evaluations of tradition.[438] In this regard she criticised Babadzan for siding with the local against the national in his discussion of the fetishisation and folklorisation of tradition by Pacific elites.[439]

The term 'invented tradition' has been used in a broad, but not imprecise sense. There has been a plethora of studies and cases, as well as refinements of ideas about 'inventing' traditions.[440] However, Hobsbawm, in his seminal work in this area, defined the process of 'invented tradition' to mean:

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[433] Sissons, J 'The Systematisation of Tradition: Māori Culture as a Strategic Resource' in *Oceania* (Vol 64, No 2, December 1993) at 97 – 116.

[434] See for example, Friedman, J 'The Past in the Future: History and the Politics of Identity' in *American Anthropologist* (Vol. 4, No. 4, 1992) at 837 – 859; and Hughes, D & Trautmann, T (eds) *Time, History and Ethnologies* (Ann Arbor, University of Michigan Press, 1995).

[435] Cohen, A *Custom and Politics in Urban Africa* (Routledge & Kegan & Paul, London, 1969).

[436] Linnekin, J 'Test Bites and the R-Word: The Politics of Representing Scholarship' in *The Contemporary Pacific* (Vol. 3, 1991) at 253. See also Linnekin, J 'Defining Tradition: Variations on the Hawaiian Identity' in *American Ethnologist* (Vol. 10, 1983) at 241 – 252.

[437] Jolly, supra, n 426 at 243.

[438] Jolly, M 'Spectres of Inauthenticity' in *The Contemporary Pacific* (Vol. 4, 1992) at 49 – 72.

[439] Babadzan, A 'Kastom and Nation-Building in the South Pacific' in Guideiri, R. Pellizi, F & Tambiah, S (eds) *Ethnicity and Nations: Processes of Interethnic Relations in Latin America, Southeast Asia and the Pacific* (The Rothko Chapel, Houston, 1988) at 199 – 228.

[440] See for example, Handler, R & Linnekin, J 'Tradition, genuine or spurious' in *Journal of American Folklore* (Vol. 97, No. 385, 1984) at 273 – 290; Hanson, supra n 409 at 890 – 902; Underwood, G 'The Mormon Church, Māori and Authentic Identity' in *Journal of Pacific Studies* (Vol. 35, No. 2, 2000) and Jolly, M 'Specters of Inauthenticity' in *The Contemporary Pacific* (Vol. 4, Spring, 1992) at 57.

> [A] set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to articulate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past ... However, insofar as there is such reference to a historic past, the peculiarity of 'invented traditions' is that the continuity with it is largely fictitious. In short, they are responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition.[441]

Hobsbawm noted that it included both 'traditions' actually invented, constructed and formally instituted and those emerging in a less easily traceable manner within a brief and dateable period – a matter of a few years perhaps – and establishing themselves with great rapidity.[442]

Hobsbawm stated that there is probably no time or place that has not seen the 'invention of tradition', although he also argued that invented traditions occurred more frequently at times of rapid social transformation when 'old' traditions were disappearing. He therefore expected an especially large number of 'new' traditions to be invented over the past two centuries in both 'traditional' and 'modern' societies.[443] He also mentioned that not only adaptations and new uses of old traditions for new purposes are invented traditions but also the re-use of ancient elements in new contexts. 'Extinct' traditions too can become re-invented traditions when they are revived.[444]

Hobsbawm distinguished between three types of invented traditions each with a distinctive function:

- those establishing or symbolising social cohesion and collective identities;
- those establishing or legitimising institutions and social hierarchies; and
- those socialising people into particular social contexts.[445]

The first type has been most commonly referred to and often taken to imply the two other functions as well. Hobsbawm has also argued that all invented traditions use references to the past not only for the cementation of group cohesion but also for the legitimation of action, and that historians in the present should become much more aware of such political uses of their work in the public sphere.[446]

Some of the later literature, however, has been explicitly critical of approaches which assume that relatively recent exercises in construction are somehow less 'authentic'

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[441] Hobsbawm, E & Ranger, T (eds) *The Invention of Tradition* (Cambridge University Press, Cambridge, 1983) at 1.
[442] Idem.
[443] Ibid, at 4.
[444] Ibid, at 5-8.
[445] Ibid, at 9.
[446] Ibid, at 12.

in cultural terms because of their modern origin. This has led to an acknowledgment that all cultural traditions are 'invented' at one time or another. In other words, they are obviously social constructions - which may be recent, or long-standing, or somewhere in between - rather than naturally occurring phenomena. Thus sometimes 'traditional' traditions are historically attested, sometimes they are 'invented', but they are always created and recreated for use in the contemporary context.[447]

Discussions of traditional *nga tikanga Māori* and *ayuukhl Nisga'a*, for example, implies a cultural identity and traditional ways of being and doing according to traditional customary laws and institutions, handed down from the ancestors that may sometimes be recently invented. Dr Paki Harrison lamented the tendency in Māori society today to engage in what he termed 'culture reinvention:'

> I study a lot of ancient Māori history pertaining to...living tikanga and it's my job as a tohunga whakairo [expert in carving] that I should know these. Culture reinvention is something that is alive and well in our society today, and the usual answer you will get when you ask... 'Who told you that?' is 'Oh, my koro [grandfather], or my kuia [grandmother],' and of course, when you inquire further you find that the kuia is about 45 or 50, and you know they are people who have never been in contact, who have never seen the vestiges of the last of the Māori world - te ao kōhatu, we call it. I remember my great grandfather was fully tattooed and he was over 100 to 115 when he died.[448]

Metge even commented on the difficulty of using the word 'traditional' to mean or imply something in Māori society that existed before European contact. Metge quoted the *Concise Oxford Dictionary,* which defined 'tradition' as 'a custom, opinion or belief handed down to posterity, especially orally or by practice'; and 'traditional' is therefore 'of, based on or obtained by tradition.' The term 'traditional' is often used in this context in a manner that Metge articulated as problematic:

> The word *traditional* is another which causes difficulty. It has often been used to identify Māori society and culture 'as they were,' so that it has become in many minds a synonym for pre-European. Applied in a 20th century context, it is often taken to mean 'the same as in pre-European times,' ignoring change. These usages are ambiguous and misleading. ... Numerous anthropological studies have shown that transmission orally or by practice favours flexible adaptation, modification, innovation and incorporation of new cultural elements. In New Zealand the archaeological record and comparison of accounts of the doings of the ancestors provide convincing evidence of extensive changes in technology and in social and economic organisation between first settlement and the coming of Europeans, and the same processes have been at work in post European times. As long as this is recognised, the word

[447] See Hanson, supra n 409 at 890 - 902; Keesing, supra n 415 at 19-42, Keesing, supra 407 at 8 – 28; and Goldsmith, M 'The Tradition of Invention' in Goldsmith, M & Barber, K (eds) *Other Sites: Social Anthropology and the Politics of Interpretation* (Department of Social Anthropology, Massey University, Palmerston North, 1992) at 29 – 41.

[448] Te Mātāhauariki Institute, 'Te Pū Wānanga Seminar with Dr Pākī Harrison,' (Unpublished, Waipapa Marae, University of Auckland, April, 2000).

traditional is the best translation I know to render the Māori phrase 'tuku iho no nga tupuna' (handed down from the ancestors).[449]

During the 19th century, Pakeha colonisation and the imposition of British law led to attempts to codify tikanga Māori, if not suppress it. Hence the nation-state and some Māori reified, and in the process, invented some Māori traditions. But while a new legal framework of Māori land tenure, for example, was imposed on Māori, concepts of customary rights, kinship, ancestry, identity, representivity and identification with territory persisted.[450] Still, these may have also been hermeneutically fossilised and hence perhaps falling into being categorised themselves as invented traditions.

9.9.1.1 IDEOLOGY OF TRADITIONALISM

As noted above, Hobsbawm held that 19th and 20th century 'traditions' that appear or claim to be old are quite often recent in origin and sometimes invented. Invented traditions are not necessarily constructed in a deliberate way, although this is sometimes the case. Thus for example, many 19th century buildings in Britain were erected or rebuilt in Gothic style. The contact claimed with the past in invented tradition, Hobsbawm says, is 'largely factitious' in contrast to 'genuine traditions.' Invented traditions, Hobsbawm argues, proliferate in the context of early modern institutions. 'Ancient materials' are used for modern ends – most especially to create legitimacy for emerging systems of power.

Also mentioned earlier was that one of the purposes of cultural traditions is to maintain or consolidate the power of the ruling elite. My critique in this area is not of tradition per se but rather of the way in which the idea of tradition is sometimes used politically in New Zealand and elsewhere. My critique is concerned with the ideology of traditionalism, which is an ideological rendering of tradition in the sense that it gives the idea of tradition an explicit normative and prescriptive content. Traditionalism as an ideology emerges at the point where the preservation of a particular social or political practice becomes a matter of political concern, often for instrumentalist reasons. This is at the point at which it becomes possible to reify, objectify, reinvent or appeal to tradition to politically legitimate and validate a person's, or group's, position of power.

More specifically, where this works to provide normative support of established political authority, tradition emerges as a vital adjunct to political conservatism. This is because it is implicit in the ideological rendering of tradition that established social and

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[449] Metge, J *New Growth from Old: Exploring the Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 49 – 50.

[450] Stokes, E *Bicultural Methodology and Consultative Processes in Research: A Discussion Paper* (Department of Geography, University of Waikato, New Zealand, 1998) at 59.

political institutions are seen, not as a set of human constructions that are potentially alterable, but as a set of natural forms which command the automatic allegiance of those who 'belong' to them, that is, those who are supposed to follow the leaders.[451]

Tradition often incorporates power relations and tends to naturalize them. The symbolic material of culture – traditional rules imputed to ancestors, performative rituals and myths – serve ideological ends, reinforcing the power of some and the subordination of others.[452] Consequently, the traditional rituals, myths and ideologies of hierarchy often serve political purposes. Not surprisingly, traditional Pacific chiefs and leaders invented genealogies connecting them to the Gods, and discrediting fallen rivals. As Keesing commented:

> Spurious pasts and false histories were being promulgated in the Pacific long before Europeans arrived, as warrior leaders draped veils of legitimacy over acts of conquest, as leaders sought to validate, reinforce, institutionalise, and 'celestialize' their powers (to borrow a term from Marx), and as factions battled for dominance.[453]

Those individuals or classes acquiring sufficient political power to control symbolic production could bend cultural rules and roles to their own ends, reinforcing and legitimating their power. 'Ancestral cultures' themselves represented legitimations of political power and aspirations. Cultures were contested spheres. Lamb, in his criticism of the development of literary culture in New Zealand, discussed the irony of origin illustrating the ideology of traditionalism:

> What is more difficult, and what needs to be done more often, is to assess the damage wrought when factions compete for the best whakapapa (genealogy), [and] the most commodious Turangawaewae (standing place), so that the victors can sing their hearts out at the expense of everyone else's authenticity.[454]

It must be remembered, however, that the ideology of traditionalism is not endemic to Māori and other Indigenous Peoples. Europeans and other societies have also promulgated spurious pasts and false histories since time immemorial, for example, the two millennia old traditional dichotomy and enmity between the Jewish Old Testament and the Christian New Testament of the Judeo-Christian tradition. Dr Alex Frame provided a

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[451] Lawson, supra n 412 at 16. See also Otto, T & Thomas, N (eds) *Narratives of Nation in the South Pacific* (Hardwood Academic Publishers, Netherlands, 1997).
[452] Keesing, supra 407 at 36.
[453] Ibid, at 236.
[454] Lamb, J 'Risks of Myth: The Politics of New Zealand Literary Journals' in Lee, J (ed) *Meaning* (Vol. 3, 1985) at 382.

more recent example[455] from the early colonisation period in New Zealand in Fenton's 1858 translation of the laws of England into Māori. Māori were told:

> A wise and generous people, the English, have settled in this land; and as a people are willing to teach him, and to guide him in the well-made road which themselves have for so many generations' that is the path of the perfected law - in the path by which themselves have attained to all good things which they now possess; wisdom, prosperity, quietness, peace, wealth, power, glory, and all other good things which the Pakeha possesses.[456]

English law was far from perfect both then and now. Apirana Ngata perhaps provided an example with the Māori use of whakapapa:

> The preservation of whakapapa would be a matter of interest to most families, and they would retain those which established connection with a particular line or was associated with land or a gift or some outstanding incident in the family history. The 'tahuhu'[457] would be neglected. There would be no one interested in setting it out. The custodian of the family history and pedigree would take a direct line to the contemporary of the incident which was desired to be commemorated, and from that point develop the branches of the family tree.[458]

Sir Peter Buck, moreover, cautioned that some genealogists were not above falsifying whakapapa for political purposes:

> The longer genealogies have been studied by European scholars, whose faith in these feats of memory has led them to overlook certain flaws which exist in the alleged human sequences. In some, the names of various lands at which the ancestors sojourned have been included, perhaps accidentally as human beings. Various qualifying terms, as long, short, large, small, have been added in a sequence to the same name, but each is treated as a generation. The method is a convenient technique for lengthening a lineage. In others again, the personifications of natural phenomena that belong to a mythical period have been interpolated into the human succession. Individuals have falsified records in order to give prestige to families newly risen to power or to hide the bar sinister that somehow cannot be avoided in long descent. The Hawaiian historian, David Malo, truly said that the expert genealogist was the wash-bowl of the high chief.[459]

Ballara added that Māori Land Court witnesses would admit the rights of various members of a hapū to certain lands, concede that they had houses on the land and had occupied '*no mua iho*' (from time immemorial or ancient times), but deny their rights unless they

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[455] Te Mātāhauariki Institute, 'Te Matapunenga Sample: Draft Introduction and Some Titles Developed' (Unpublished, Te Mātāhauariki Institute, University of Waikato, July 2003) at 8.
[456] Fenton, F.D *The Laws of England Compiled and Translated into the Māori Language by Direction of His Excellency Colonel Thomas Gore Brown, C.B, Governor of New Zealand* (Auckland, 1858) at ii.
[457] Direct line of ancestry.
[458] Cited in Sorrenson, M.P.K *Na To Hoa Aroha: From Your Dear Friend: The Correspondence Between Sir Apirana Ngata and Sir Peter Buck 1925 – 50* (Vol. 2, 1930 – 32?) at 152.
[459] Buck, P *Vikings of the Sunrise* (J.B Lippincott Co., New York, 1938) at 24.

claimed from one ancestor rather than from another.[460] Hapū identity also changed according to context, often depending on the land being claimed and the source of the right. Hāpeta Hautehoro, for example, noted in the Māori Land Court:

> I am claiming for the descendants of Tukutahi who have a right. Descendants of Tukutahi are properly called N'Korouateka – that is under the Uenukukopako, but under Rangitearere they are N'Tamahika.[461]

Hōhepa Rokoroko mentioned to Nīheta Kaipara that he could take timber from Ōrutu on the Te Haehaenga block as a Ngāti Te Ngaro, but not as a Ngāti Te Āpiti.[462] Thus whakapapa was sometimes bent or even changed for a particular purpose be it political, cultural, economic or social. Hence, what is claimed to be 'traditional' in a contemporary Māori (and it is suspected First Nations) Treaty settlement and post-settlement governance, identity and representivity context is contested and disputed, and often negotiated inappropriately through litigation.

9.9.1.2 GREY'S RŪNANGA SYSTEM AND THE IDEOLOGY OF TRADITIONALISM

Māori 'traditions' have been deployed by political élites (usually Māori but sometimes non-Māori) for instrumentalist purposes.[463] A non-Māori example of the ideology of traditionalism and the invention of tradition was Governor Grey's mis-translations of Māori texts and his Rūnanga System of Māori governance in 1861. Governor Grey was allegedly well acquainted with the Māori language, traditions, customs and institutions such as tribal governance and administration. He devised an instrumentalist mechanism (from his experience with chiefly councils in South Africa) to adapt traditional Māori governance structures to serve State-driven purposes. Furthermore, Governor Grey established the Rūnanga System to undermine the Kīngitanga. The administration of Māori Districts through Rūnanga was established pursuant to the *Native Districts Regulation Act 1858* and the *Native Districts and Circuit Courts Act 1858*.[464]

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[460] Ballara, A, 'Customary Land Tenure in the Central North Island' in Ballara, A *Tribal Landscape Overview, c.1800 - c.1900 in Taupo, Rotorua, Kaingaroa and National Park Inquiry Districts*, (CNI Waitangi Tribunal Inquiry, Commissioned by the Crown Forest Rental Trust, September 2004) at 234.

[461] Evidence of Hāpeta Hautehoro re Mokoia Block, *Mokoia Minute Book* (Vol. 1, Māori Land Court, Waiariki) at 38.

[462] Evidence of Hōhepa Rokoroko re Te Haehaenga Block, *Maketu Minute Book* (Māori Land Court, Waiariki) at 237.

[463] For an excellent reference on the ideology of traditionalism, see Lawson, supra n 412 at 2.

[464] For comprehensive details of the Rūnanga System, see Ward, A *A Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University Press, Auckland, 1973) 'The New Institutions' at 125-146 and 'The McLean System' at 237-250; Gorst, J *The Maori King or the Story of Our Quarrel with the Natives of New Zealand* (MacMillan & Co, London, 1864) 'The New Institutions' at 245–266. Cox, L *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Auckland, 1994) at 80-84.

At the national level, twenty Rūnanga districts were proposed with each new Māori district being in areas where Māori predominated. They were to operate under the auspices of European District Commissioners and were tasked with mundane administrative matters. At the local level, the system was embodied in the form of 'Hundreds.' Six Hundreds per district was prescribed as an optimum number and each Hundred was to select two representatives to be known as native magistrates who as a group would form the district rūnanga. At the village level, resident magistrates were to convene village rūnanga to administer local affairs. These rūnanga would feed into the Hundreds system. Village Rūnanga (under the direction of a Resident Magistrate) and District Rūnanga (under Civil Commissioners) were empowered to make by-laws on matters of local concern. These Rūnanga were chaired by European Circuit Court judges appointed with Māori assessors, juries and they employed Māori police to enforce the bylaws for each division of a district. Māori assessors additionally had independent jurisdiction in cases involving penalties up to £5.[465] The areas of jurisdiction for the assessors, resident magistrates and the rūnanga included fencing, stock trespass, sobriety, common nuisance, and title to land. When a land interest, determined by the rūnanga, was confirmed by the allocation of a Crown grant, the land was then available for alienation to Europeans. The rūnanga could also authorise this transfer, thus precipitating land acquisition for settlement.

Around this time, iwi combined to form Rūnanga with, among other tribes, Waikato and Ngāi Tahu but Potatau established his rival Rūnanga – the Kingitanga - for Waikato and others, while Ngāi Tahu established governance entities under Grey's Rūnanga system. Consequently, both the Kīngitanga and Ngāi Tahu Rūnanga from this time have been recognised as being part of local traditions and are a fundamental component of both group's Treaty settlements.[466] Ngāi Tahu outlined their reasoning for adopting this new governance regime:

> There was a desire ... for a new system of administering pakeha law and order. ... it wasn't long before the combined Pakeha and Ngai Tahu laws and customs in the form of Runanga became popular throughout Te Waipounamu. [the South Island] ... The runanga was not simply an adoption by Ngai Tahu of a Pakeha imposed institution. Ngai Tahu took Buller's model and grafted it onto their existing traditional community structure. The most dramatic evolution came with the development of the traditional runanga as the organisational hearts

[465] Ibid, (Ward), Chapter 5.

[466] The Kīngitanga is referred to, inter alia, in the *Waikato Raupatu Claims Settlement Act 1995* in the preamble, s. 6 apologies and implicitly in s.19 Potatau Te Wherowhero Title; as well as in the objects of the Rules of Te Kauhanganui o Waikato Inc. The Ngāi Tahu Rūnanga are referred to, inter alia, in s. 9(2) *Te Runanga o Ngai Tahu Act 1996,* and s. 6, Charter of Te Rūnanga o Ngāi Tahu (1997).

> of the Ngai Tahu Claim process from the 1870's onwards. Today the 18 *traditional* Runanga are centred on their marae and are the focus of tribal and social order.[467] [Emphasis added].

While Governor Grey employed these Acts to establish rūnanga in Māori districts, they were a failure in districts already embroiled in war. In particular, in the Waikato with King Potatau's rival Rūnanga – the Kīngitanga - to administer the King's law.[468] Still, this was the first occasion when comprehensive machinery was set in motion to involve Māori in a substantial measure of legislative, judicial, and administrative authority in their own districts. Governor Grey's Rūnanga System was repealed, however, in 1891. The Rūnanga System fell into contempt once it became evident that Māori did not want to decide land title questions through it and were reluctant to alienate land through this system, hence the mixed results.[469] This governance system appears to have been an example of the deployment of traditional Māori governance principles and institutions by Governor Grey, albeit for instrumentalist purposes - assimilation and land alienation.

Traditional tikanga Māori is often not synonymous with personal agendas and points of view of both Māori and non-Māori advocating a particular outcome for a dispute in court proceedings.[470] There have been idiosyncratic and perverse attempts to rely on 'traditional' Māori custom law. In a Treaty settlement and governance context, the very idea of custom, culture, identity, representivity and 'tradition' have become contested and transformed into an ideology of traditionalism under certain circumstances.

Given that one purpose of cultural traditions appears to be to consolidate the power of the ruling elite through, inter alia, the process of the ideology of traditionalism, 'tradition' is used to provide normative support of established political authority. Rata labelled this phenomenon neotraditionalism – 'the ideology of neotribal capitalism which is used to justify the appropriation of traditional resources by the neotribes and to conceal the emergence of a privileged capitalist aristocracy in beliefs of ascribed traditional leadership.'[471]

In examining the dynamics of the ideology of traditionalism however, it is clear that there is certainly much political mileage to be gained from portraying certain traditions as

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[467] Te Rūnanga o Ngai Tahu, *Whakapapa Ngai Tahu: A Guide to Enrolment and Research* (Te Rūnanga o Ngai Tahu, Christchurch, 1996) at 8-9.

[468] Ibid, at 66-7, 107, 126. In a critical assessment of the operations of the Native Rūnanga system concerning the operation of the rūnanga according to Māori custom see *Te Manuhiri Tuarangi* and *Native Intelligencer,* (No. 10, 1 August 1861) at 9-14.

[469] Ward, supra n 465 at 147.

[470] For an excellent reference on Maori groups advocating particular outcomes in court proceedings, see Wainright, C 'Maori Representation Issues and the Courts' (Unpublished paper for Roles and Perspectives in the Law Conference, Wellington, 5–6 April, 2002).

[471] Rata, E *Neotribal Capitalism and Public Policy* (Conference Address, Public Policy Network Conference, Victoria University, Wellington, 30-31 January 2003) at 9.

embedded in the ancient past. For anything that appears to be of great antiquity can be portrayed as carrying greater authority in the present. In traditional English law 'time immemorial' means 'a time before legal history, and beyond legal memory' fixed by statute as the year 1189. Proof of unbroken possession or use of any right since that date made it unnecessary to establish an original grant thus gaining automatic legitimacy.[472] Similarly, if contemporary Māori and First Nation leaders and élites can associate themselves closely with what are assumed to be age-old cultural traditions, then so much the better from the point of their own legitimacy.[473] One needs to at least claim a traditional right from 1840 as espoused in the '1840 rule' in New Zealand and 1846 in British Columbia, Canada. Metge warned, however, that 'from the signing of the Treaty of Waitangi 'Māori have adapted borrowing practices to Māori ends, editing and re-interpreting traditional tikanga in ways which increase their sense of worth.'[474]

Curiously, while tradition is used as a strategy in acquiring access to perceived iwi and hapū resources - benefiting from Treaty settlements, for example - sometimes iwi claimant groups conveniently ignore their traditions. In *Te Runanga o Atiawa v Te Atiawa Iwi Authority*[475] conflicting evidence as to what constituted *nga tikanga o Te Atiawa* was presented by Te Atiawa claimants to Justice Robertson in the High Court. Not surprisingly, economic forces are today frequently proving stronger than some traditional, spiritual and social considerations.[476]

Tradition and custom, plainly, are sometimes bound up with power and they protect against contingency. Some have argued that the sacred is the core of tradition, because it invests the past with a divine presence, hence from this point of view, political rituals have a religious quality. However, one should rather see formulaic truth as the property which links the sacred with tradition. Formulaic truth is an attribution of causal efficacy to ritual where guardians, usually elders, have the importance they do in tradition because they are believed to be the agents of the essential mediators, of its causal powers. Their skills come from their involvement with the causal power of tradition. Formulaic truth is what renders

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[472] *The Public Domain Webster's Revised Unabridged Dictionary* (1913).
[473] Lawson, supra n 412 at 2.
[474] Metge, J 'Facing Up to Our Responsibilities' (1994) at 1. A prominent Māori example is the Kīngitanga, which is discussed later. Infra, chapter 10.
[475] (Unreported, High Court, New Plymouth, CP13/99, 10 November, 1999) Robertson J.
[476] To cite an example, one need not go past the Fisheries litigation over the meaning of 'Iwi' that had been referred to the Privy Council, referred back to the High Court and then back to the Privy Council and seemed to totally override traditional tikanga and values of manaakitanga, kotahitanga, aroha and whānaungatanga. See *Tainui Māori Trust Board v Treaty of Waitangi Fisheries Commission* [1997] 1 NZLR 513 (Lord Goff of Chieveley, L Browne-Wilkinson, L Lloyd, L Hope, L Clyde) and *Manukau Urban Authority v Treaty of Waitangi Fisheries Commission* (Unreported, Privy Council, Lord Slynn of Hadley, L Steyn, L Hoffman, L Hutton, L Millett, 2 July 2001, PC 67/2000).

central aspects of tradition 'untouchable' and confers integrity and legitimacy upon the present in relation to the past.[477]

Dr Taiaiake Alfred even boldly devised a test using the concept of traditionalism[478] as *the* litmus test for authentic indigenous traditions when he held:

> [The] concept of traditionalism is very clearly defined among 'real' indigenous people. Tradition is the stories, teachings, rituals, ceremonies, and languages that have been inherited from previous generations. Without specific reference to a particular form or structure, something is authentically indigenous and traditional if it draws on what is indigenous to the culture to honour the values and principles of the inheritance. It if fails in its primary reference to inherited ways, beliefs, and values, it is not traditional or authentically indigenous.[479]

Meredith challenged such identity and representivity assumptions as being concentrated and contested around a binarism of Māori (and Indigenous People) - as the colonised; and Pakeha (non-indigenous peoples) – as the coloniser,[480] that is oversimplified and essentialised and *the* Māori (and it is suspected First Nations') perspective is utopic, romantic and nostalgic often resulting in the reinvention of tradition as traditional culture.[481] Moreover, the notion that any culture is pure or essential is debatable.[482]

9.10 TRADITIONALISM AND RE-TRADITIONALISATION

Stokes seemed to favour a detraditionalisation approach to contemporary Māori governance when she noted that the traditional social, economic and political structures of Māori society, however defined and reconstructed, evolved in the different circumstances of the past and may not be appropriate to meet future needs.[483] Robertson-Shaw however espoused a retraditionalisation approach:

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[477] Giddens, A 'Living in a Post-Traditionalist Society' in Beck, U, Giddens, A & Lash, S (eds) *Reflexive Modernisation* (Blackwell Publishers, Oxford, 1994) at 104.

[478] For further discussion on the notion of traditionalism in a First Nations North American context, see Alfred, T *Peace, Power and Righteousness: An Indigenous Manifesto* (Oxford University Press, Toronto, 1999); Alfred, supra n 428; Donald, L 'Liberty, Equality, Fraternity: Was the Indian Really Egalitarian?' in Clifton, J (ed) *The Invented Indian* (Transaction Publishers, New Brunswick, N.J., U.S.A, 1990) at 145-68; Levin, M. (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (University of Toronto Press, Toronto, 1993); and Scott, C 'Customs, Tradition and the Politics of Culture: Aboriginal Self-Government in Canada' in Dyck, N & Waldram, J (eds) *Anthropology, Public Policy and Native Peoples in Canada* (1993) at 311 – 33.

[479] Alfred, supra n 479 at 148.

[480] The language of the 'coloniser and the colonised' is a term Memmi uses in Memmi, A, *The Colonizer and the Colonized* (Beacon Press, Boston, 1967).

[481] Meredith, supra n 422 at 308.

[482] Ashcroft, B, Griffiths, G & Tiffin, H (eds) *The Post-Colonial Studies Reader* (Routledge, London, 1995).

[483] Stokes, E *The Individualisation of Māori Interests in Land* (Te Matahauariki Institute, University of Waikato Press, Hamilton, 2002) at 190.

> Governing institutions match a society's culture when its governing authority is exercised and its members regard that as legitimate ... Institutions have to have legitimacy with the people if they are going to work. This is not necessarily a signal to revive traditional governing systems that were designed for a very different environment than today, and had to meet the challenges of their times. Iwi governments operate in a very different environment today and have to solve very different kinds of problems. Not only have the demands on iwi authorities changed but the ideas carried in the community, the iwi cultures have changed too. The trick is to invent iwi governments that are capable of operating effectively in the contemporary world, but also to match people's ideas, *traditional or not*, about what is appropriate or fair.[484] [Emphasis added]

The appropriate matching of socio-political and cultural beliefs, values and institutions to contemporary practice and organisational development is fundamental to reorganising governing institutions for successful economic development. Indeed, Dr Stephen Cornell, Director of the very interesting Harvard Project on Indian Economic Development concluded:

> Governing institutions have to have the support of the people they govern. This in turn appears to be a matter of fit between the formal institutions of governance on one hand, and indigenous conceptions of how authority should be organised and exercised, on the other... Institutions have to be effective.... For Cochiti Pueblo, it may mean a system of government without any written constitution in which the spiritual leadership of the tribe appoints the senior tribal administrators [and where they] have matched formal institutions to contemporary indigenous political culture.[485]

According to the Harvard Project, good indigenous governance needs to reflect the retraditionalised cultural values, laws and institutions of the claimant group for successful economic development.

Thus re-traditionalised cultural revival may not be a matter of rejecting all Western influences and indigenous traditions, but of separating the good from the bad and of fashioning a coherent set of ideas out of the traditional culture to guide whatever forms of political and social development – including the good elements of Western forms – are appropriate to the contemporary reality. It is this rootedness in traditional values that ought to define an Indigenous People. An indigenous culture that does not reflect the basic principles of the traditional philosophy and values of the indigenous community may not be considered to be 'indigenous' and legitimate and, for that matter economically successful, at least according to the Harvard Project in any real sense.[486]

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[484] Robertson-Shaw, M 'Foreword' in Douglas, T. K & Robertson-Shaw, M (eds) *Ngai Tatou 2020: Indigenous Governance and Accountability* (Foundation for Indigenous Research in Society and Technology, Auckland, 1999) at 9–10.

[485] Cornell, S. *Nation Building and the Treaty Process Remarks by Stephen Cornell*, (British Columbia Treaty Commission Forum, Vancouver, British Columbia, March 1, 2001) at 5. See the website address: http//www.nativemaps.org/abstracts/cornell. (Accessed June 2004).

[486] Alfred, supra n 479 at 28.

Rather than indigenous elites consolidating their perceived positions of power through the ideology of traditionalism by, inter alia, inventing, reviving and manipulating traditions - good indigenous governance, authentic representation and democratic principles ought to prevail with acquiescence, decision-making and power being located where it was 'traditionally' and where it should be today - with the grassroots people. This notion of consensus seems to have been a fundamental traditional principle of many indigenous groups', including Māori in New Zealand and First Nations in North America.

This research will now analyse the traditionalisation and customary representation of the contemporary 'tribes' of Waikato-Tainui, Ngāti Raukawa and Ngāi Tahu to show how traditional and contemporary tribal identity and representivity have changed significantly due to, inter alia, what may be alleged to be the ideology of traditionalism, inventing, reviving and manipulating 'traditional' tribal groups.

10 CUSTOMARY REPRESENTATION, 'TRADITIONAL' TRIBAL IDENTITY AND THE 'LOST' 'TRIBES' OF WAIKATO-TAINUI

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Kia ū ki tou kāwai tupuna, kia mātauria ai, i ahu mai koe i hea, e anga ana koe ko hea. – Trace out your ancestral stem, so that it may be known where you come from and in which direction you are going.[1]

10.1 INTRODUCTION

10.1.1 CUSTOMARY REPRESENTATION, 'TRADITIONAL' IDENTITY BOUNDARIES AND THE 'LOST' TRIBES OF WAIKATO-TAINUI

Contact between customary traditions and the construction of identity and representivity can give rise to intensified boundary-defining activity. Attempts may be made to protect the integrity of traditions and to re-assert forms of collective identity, which are linked to traditions by excluding others in one's midst. These boundary-defining activities can both be symbolic and territorial – symbolic in the sense that the primary concern may be to protect traditions from the incursion of extraneous symbolic content, and territorial in the sense that the protection of traditions may be combined with an attempt to re-moor these traditions to particular regions or locales in a way that forcibly excludes others. A region may become a 'homeland', which is seen by some as bearing a privileged relation to a group of people whose collective identity is shaped in part by an enduring set of traditions.[2] Tradition may thus be bound up with power. Giddens maintained that formulaic truth is what renders central aspects of tradition 'untouchable' and confers integrity upon the present in relation to the past.[3] The current 33 beneficiary hapū officially recognised within the raupatu boundary of the *Waikato Raupatu Claims Settlement Act 1995* may be an example of this type of boundary defining and 'untouchable' traditions that legitimate the present from the alleged past.

10.1.2 TAINUI MAORI TRUST BOARD NAMES 33 WAIKATO HAPŪ

As one traces the history of the 33 'traditional' beneficiary hapū of the *Waikato Raupatu Claims Settlement Act 1995* (WRCSA) an interesting pattern of detraditionalisation and re-traditionalisation emerges with Waikato 'tradition' being, in Hobsbawm's terms, invented, reconstructed and negotiated in a contemporary context. An investigation of these 33 hapū is also interesting in terms of highlighting the fluid and

[1] This whakatauki comes from the papers of Rev. Maori Marsden. See also Brougham, A Reed, A & Karetu, T *Maori Proverbs* (Auckland University Press, Auckland, Revised Edition, 1987) at 85.

[2] Thompson, J 'Tradition and Self in a Mediated World' in Heelas, P Lash, S & Morris, P (eds) *Detraditionalisation: Critical Reflections on Authority and Identity* (Blackwell Publishers, Oxford, 1996) at 106.

[3] Giddens, A 'Living in a Post-Traditionalist Society' in Beck, U, Giddens, A & Lash, S (eds) *Reflexive Modernisation* (Blackwell Publishers, Oxford, 1994) at 104.

dynamic nature of 'traditional' Tainui and Waikato social organisation through the ideology of traditionalism. Over the last 150 years, the traditional 'iwi' and 'hapū' identity of Waikato-Tainui has shifted considerably.

The WRCSA referred to the beneficiary hapū of the Waikato raupatu grievance as being the 33 hapū within the arbitrary raupatu boundary. The names of these constituent hapū are shown in Table 10.2 below. The Preamble of the WRCSA recorded that land was confiscated from 'Tainui iwi' while identifying 'Waikato' as 33 named hapū that had allegedly suffered from the raupatu confiscations.[4] The 33 hapū comprising the former Tainui Maori Trust Board (TMTB) were also named as the 'hapū' of Waikato' in the first schedule to the Rules of Te Kauhanganui o Waikato Incorporated, the new governance entity for Waikato to manage the returned settlement assets in 1999.

Table 10. 2 The '33' Waikato Raupatu Settlement Constituent Hapu 1995[5]

Waikato Raupatu Constituent Hapu 1995			
Amaru	Mahuta (North & South)	Ngaitai	Taratikitiki
Apakura	Makirangi	Raukawa ki Panehakua	Te Ata
Haua	Ngutu	Ruru	Te Akitai
Hikairo	Naho	Tahinga	Te Wehi
Hine	Paretaua	Tai	Tipa
Koheriki	Paretekawa	Tainui-a-Whiro	Wairere
Koroki	Pou	Tamainupo	Werokoko
Kuiarangi	Puhiawe	Tamaoho	Whawhakia
Mahanga			

Total Hapū = 33

[4] *Waikato Raupatu Claims Settlement Act 1995,* s. 7 & *Waikato Deed of Settlement 1995*, clause 34 Definitions.
[5] Idem.

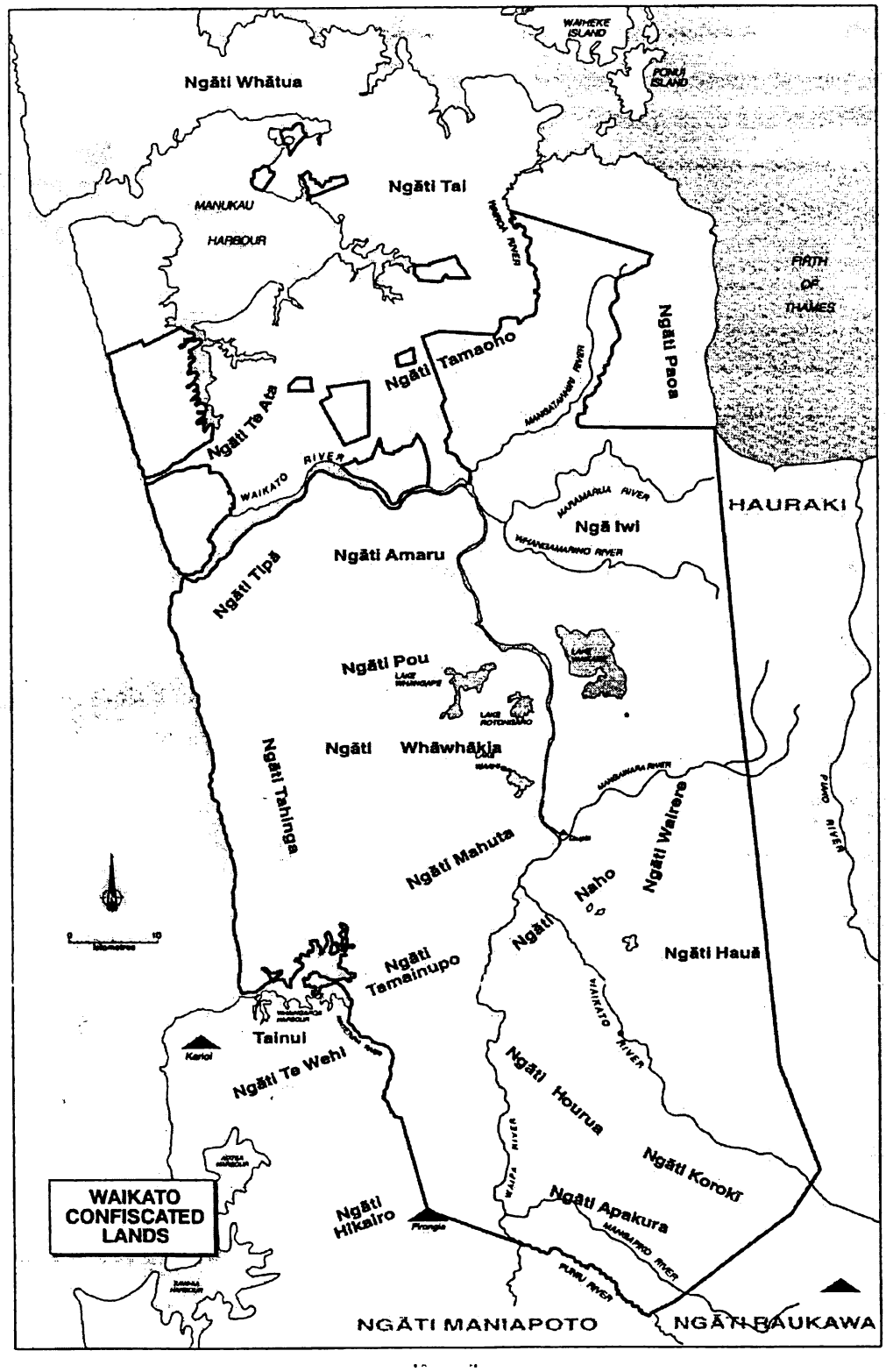

Figure 21
Waikato Raupatu Hapu 1864 Boundaries

Figure 22 shows the boundaries of many of the current Waikato hapu.[6]

[6] This map is from Dame Evelyn Stokes in Stokes, E *Bicultural Methodology and Consultative Processes in Research: A Discussion Paper* (Department of Geography, University of Waikato, 1998) at 36.

10.1.2.1 THE 1946 WAIKATO-MANIAPOTO SETTLEMENT AND 'TRIBES'

In 1946, the New Zealand Government partly settled the protracted raupatu grievance pursuant to the *Waikato Maniapoto Maori Claims Settlement Act 1946* (WMMCSA). A prerequisite for settlement was the need to establish a trust board to administer the compensation funds received, hence the Tainui Maori Trust Board (TMTB). The WMMCSA used both the names of Waikato and Maniapoto because of their traditional origins in the Tainui waka[7] and because Princess Te Puea (niece of King Mahuta) favoured the option to enable the TMTB to consolidate her welfare schemes.[8] In addition, the WMMCSA identified 'Tainui' as comprising the named hapū that allegedly suffered from the raupatu confiscations.[9] This is where *the* 33 hapū of Waikato, according to Mahuta, allegedly originated albeit in a complex and disputed manner. The 'Waikato Maori Claims Settlement Bill' (forerunner to the WMMCSA) originally defined the 'Tainui Tribes' as:

> The Tainui tribes or sections of the Tainui tribes who were formerly the owners, *according to Maori custom*, of the areas of land in the Waikato District which were affected by the confiscations referred to in the preamble to this Act ... and includes their descendants.[10] [Emphasis added]

Tainui *tohunga* (expert) and scholar, Dr Pei Te Hurinui Jones forwarded a letter commenting on this provision of the Bill to the Minister of Maori Affairs recommending that the Tainui 'tribes' be amended as the 'Tainui tribes of the Waikato, Raglan, Tāmaki, Waipa and Puniu districts whose lands were confiscated as hereinbefore mentioned in the preamble of this Act.'[11]

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[7] New Zealand *NZPD 1946* (Vol. 275, Government Printer, Wellington, 1946) at 181.
[8] Ibid, at 180, 183, 313.
[9] Cheater, A & Hopa, N, 'Representing Identity' in James, A, Dawson, A & Hockey, J (eds) *After Writing Culture* (Routledge, London, 1997) at 212, 220.
[10] 'Waikato Maori Claims Settlement Bill' in *Raupatu Document Bank* (hereinafter *RDB*), Vol 58 at 22204-22205; 22167-8.
[11] Letter to the Native Minister from Pei Jones, 30 May 1946, *RDB* Vol. 58 at 22200-22201.

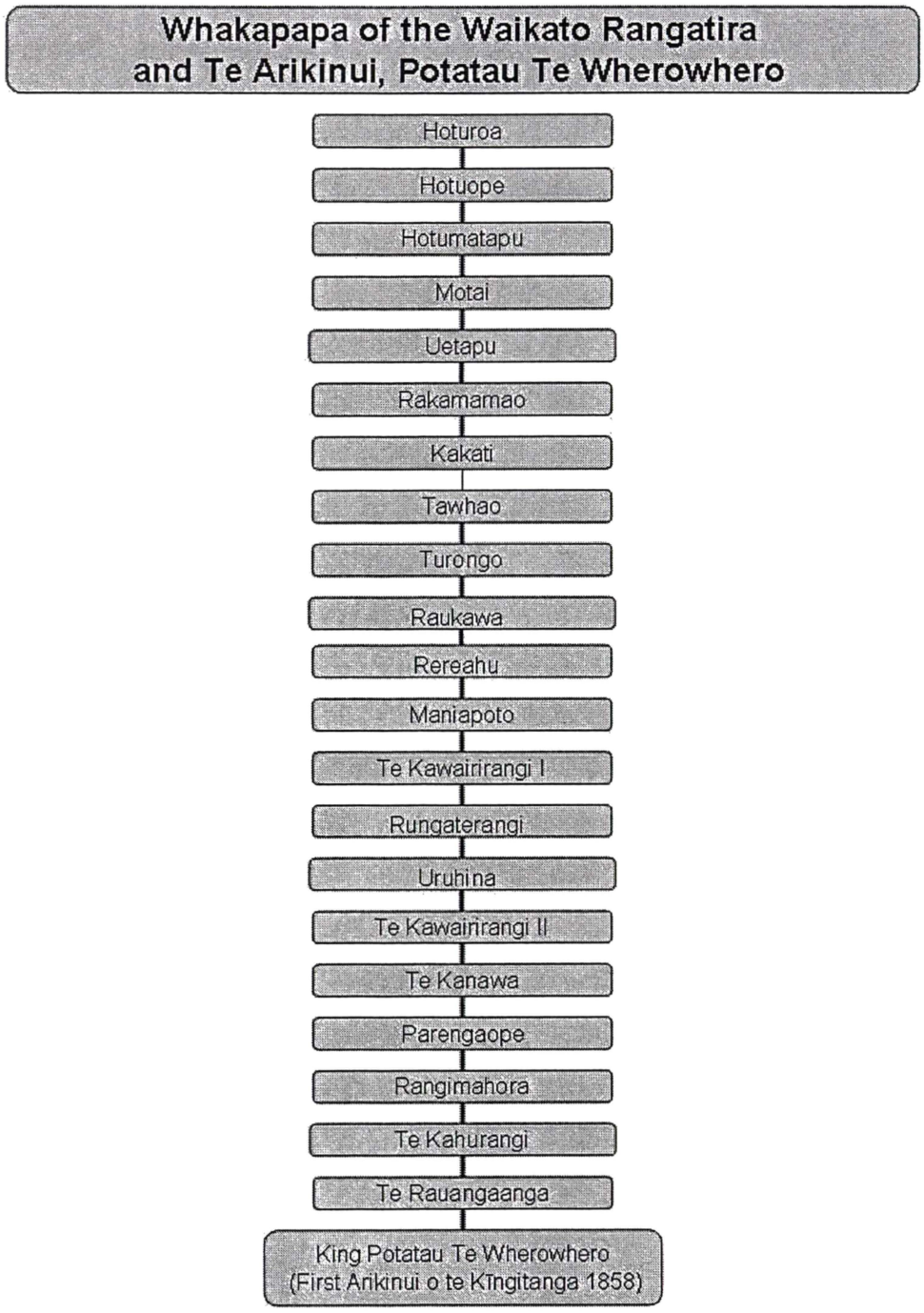

Figure 22 Whakapapa of the Waikato Rangatira and Te Arikinui, Potatau Te Wherowhero[12]

Below is a whakapapa table of the *Kahui Ariki* (Royal Family) of the Kīngitanga from King Potatau Te Wherowhero above to Dame Te Atairangikaahu, the present monarch who is often times referred to affectionately as 'the Mäori Queen'.

[12] This whakapapa is taken from Dr Pei Jones in Jones, P *King Potatau: An Account of the Life of Potatau Te Wherowhero, the First Maori King* (Wairarapa: The Polynesian Society, Roydhouse & Son, 1960) at 179.

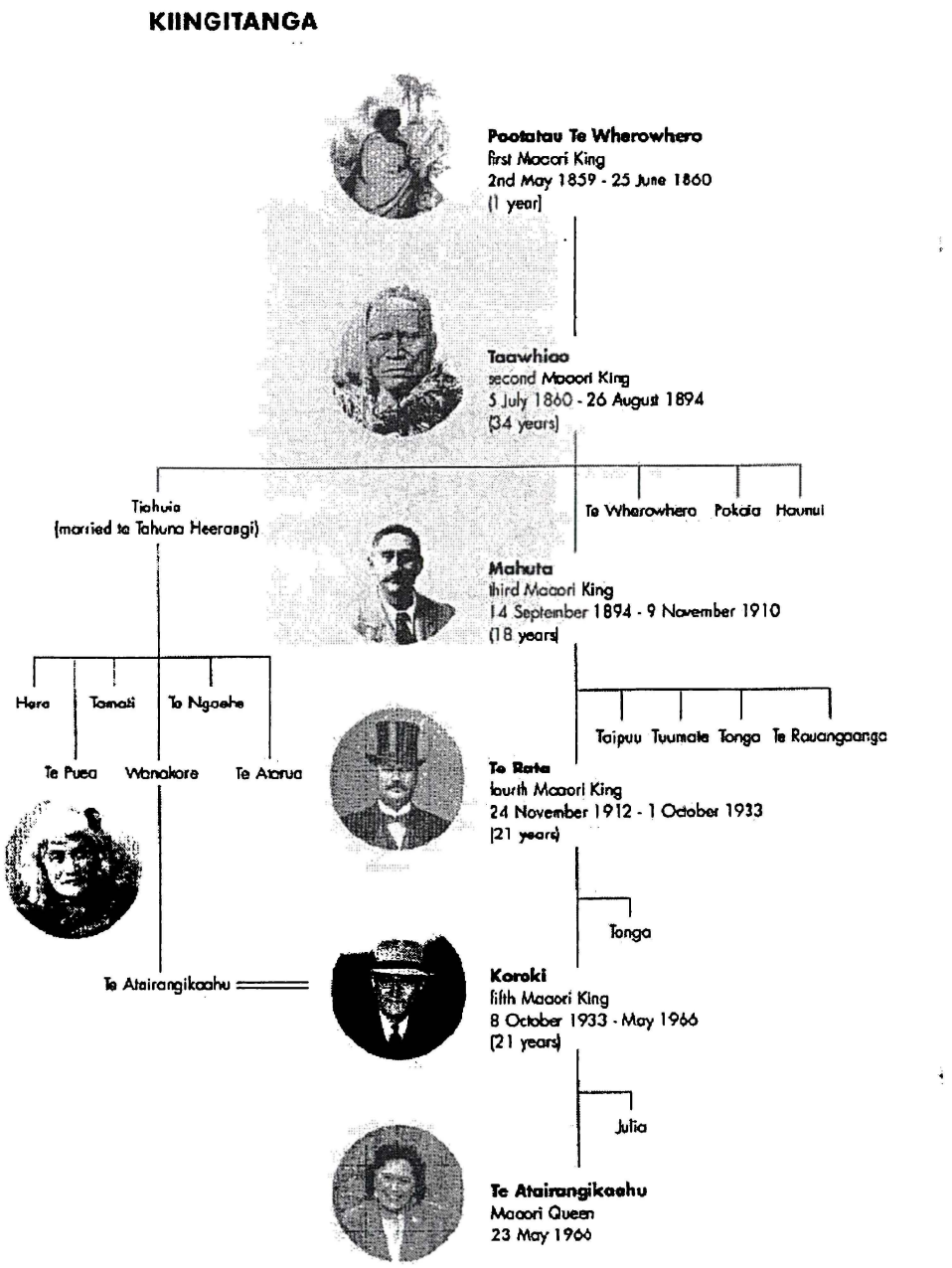

Figure 23 Whakapapa of the Kahui Ariki of the Kingitanga

Interestingly, the WMMCSA actually commenced with 30 hapū in 1947 that were listed in the *New Zealand Gazette* of that year as shown in Table 10.3 below.

Table 10. 3 Waikato Constituent Hapu 1947 as Listed for the WMMCSA[13]

Waikato Constituent Hapu 1947		
Akitai	Naho	Tamainupo
Amaru	Ngaitai	Tamaoho
Apakura	Ngutu	Taratikitiki
Hine	Paretekawa	Te Ata
Koheriki	Pou	Te Wehi
Koroki	Raukawa-ki-**Panehakura**	Te Werokoko
Kuiarangi	Ruru	Tipa
Mahanga	Tahinga	Wairere
Mahuta (North & South)	Tai	**Werewere**
Makirangi	Tainui	Whawhakia

Total Hapū = 30 The bolded hapu are excluded from the 1948 List.

On 6 May 1946 a faction lead by Aupouri Whitinui and three others wrote to Mason, the Native Minister, protesting against the choice of the TMTB's representatives. The group traced their descendants from the Tainui hapū of Ngāti Apakura, Ngāti Hinetu and Ngāti Marotaua and stated that they preferred to select their hapū representatives themselves.[14] Interestingly, Ngāti Marotaua was neither included among the Waikato constituent hapū lists in the WMMCSA of 1947 and 1948 nor was it included in the WRCSA 1995. It appears that Ngāti Marotaua was a 'lost' tribe at least officially according to legislation at this time.

Moreover, on 8 May 1946, Taingakawa Tamihana of Ngāti Hauā – the Kingmaker lineage to the Kīngitanga – tried unsuccessfully to defer the WMMCSA for a month to provide time for Ngāti Hauā to challenge it.[15] Te Puea told Rotohiko Jones that Ngāti Hauā had an opportunity at the previous hui on the 21-22 April where the issues were discussed openly before the people. Ngāti Hauā abandoned the matter and left early, which Te Puea interpreted to be an insult to Prime-Minister Peter Fraser and Native Minister Rotohiko Jones.[16] Interestingly, Te Puea also asked: 'what right did they [Ngāti Hauā] have to interfere? It was not their land that had been confiscated!'[17] Therefore, it appears that Ngāti Hauā did not technically 'suffer' from the raupatu grievance given that they were outside the arbitrary raupatu boundary line, hence (the author postulates), their exclusion in the original 30 constituent Waikato hapū of 1947.

The following year however, Ngāti Werewere was omitted from the TMTB's constituent hapū and Ngāti Hauā as well as Ngāti Hikairo, Paretaua and Puhiawe were

[13] New Zealand Government *The New Zealand Gazette 1947* (No. 30, Government Printer, Wellington, 1947) at 710.
[14] Native Minister from Aupouri Whitinui and three others, 6 May 1946, *RDB* at 22165.
[15] Letter to Fraser, Prime Minister, from Wiremu Tamihana, 8 May 1946, *RDB* at
[16] Letter to Rotohiko Jones from Te Puea, 8 May 1946, *RDB*, at 22213.
[17] Idem.

added.[18] In addition, Panehakua was spelt correctly from the mis-spelled Ngāti Raukawa-ki-Panehakura. One can already see a pattern emerging of the invention of tradition by compartmentalising, ossifying and reifying Waikato hapū identity. The very act of making lists has these effects. The WMMCSA legislation prescribed Waikato hapū as those that suffered from the raupatu whose lands were within the arbitrary raupatu boundary. Such a legal prescription was an arbitrary identity marker antithetical to traditional Māori identity and representivity. As mentioned earlier, traditional Māori identity was fluid, dynamic, multiple and adaptable, it was not static and compartmental as was the case here. Hence it appears that the process of listing *the* 33 hapū of Waikato-Tainui was a manifestation of the invention, construction and reification of 'traditional' Waikato hapū identity that was subsequently legitimated and institutionalised through legislative social engineering. In addition, through the WMMCSA the term 'Tainui,' which up to that point had identified a waka (ie. a group of iwi stemming from crew of a colonising ship) was used as an 'iwi' name. Some have called this a 'state tribe.'[19] The following information (Table 10.4) shows the 1948 constituent hapū for Waikato which later formed the basis of the Waikato Raupatu Settlement hapū.

Table 10. 4 Waikato Constituent Hapu 1948[20]

Waikato Constituent Hapu 1948			
Amaru	Mahuta (North & South)	Puhiawe	Taratikitiki
Apakura	Makirangi	Raukawa ki Panehakua	Te Akitai
Haua	Naho	Ruru	Te Ata
Hikairo	Ngaitai	Tahinga	Te Wehi
Hine	Ngutu	Tai	Tipa
Koheriki	Paretaua	Tainui	Wairere
Koroki	Paretekawa	Tamainupo	Werokoko
Kuiarangi	Pou	Tamaoho	Whawhakia
Mahanga			

Total Hapū = 33

Over the past century and a half, hapū and iwi identities within Waikato (and likely within Māoridom) have changed with processes of hapū formation, amalgamation and disappearance being very active, concurrently with iwi change that has legislatively (in a

[18] New Zealand Government *The New Zealand Gazette 1948* (No. 41, Wellington: Government Printer, Wellington) at 906-7.
[19] Webster, S 'Escaping post-cultural tribes' in *Critique of Anthropology* (Vol. 15, No. 4, 1995) 381-413, at 397.
[20] Idem.

Waikato context) converted, ossified and compartmentalised 33 hapū into *the* exclusive 'Waikato tribes.'

10.1.2.2 TAINUI IDENTITY PRE-TREATY OF WAITANGI

The period prior to the *Treaty of Waitangi 1840* in the Waikato District must also be discussed because it was a turbulent period of social upheaval and tribal diaspora particularly with the effects of the Musket Wars. Parts of Ngāti Maru moved inland from the Hauraki coast into Ngāti Hauā and Waikato territory; Ngāti Raukawa was first pushed east from Maungatautari towards the more barren areas of Arapuni, Waotu, Arohena and Mangakino, and parts of Raukawa departed with Ngāti Toa from Kawhia to invade the lower half of the North Island and the north of the South Island hence Ngāti Raukawa ki te Tonga of the Horowhenua District, and Ngāti Koata and Ngāti Toa in both Porirua and in the north of the South Island.[21] The 'traditional' hapū and iwi of the Waikato-Tainui area therefore were very different prior to 1840. But 1840 became the fixed political and legal date in time for tradition. Yet Māori tradition and identity transcends arbitrary boundaries and dates on a calendar thus exacerbating the ambiguity of the 'traditional' hapū and iwi of this area.

Still, the author will now attempt to address the complex topic of waxing and waning Waikato-Tainui iwi and hapū from 1840 to 1995 to illustrate, inter alia, the fluidity and dynamism of traditional Waikato social organisation, identity and representivity politics since the Treaty.

10.1.3 WAXING AND WANING OF WAIKATO HAPŪ 1840-1995

The waxing and waning of Waikato hapū and those hapū that 'suffered from the raupatu' have been officially recorded in the Appendices of the Journal of the House of Representatives in 1857 and 1900, the *New Zealand Gazette* in 1879, and in the 1908 and 1949 Māori electoral lists. Moreover, Dr Pei Te Hurinui Jones provided a map[22] and tribal list on the centenary of the *Treaty of Waitangi* in 1940 which provided details of Tainui 'sub-groups' in 1840. In each of these lists, the Waikato hapū differ quite considerably in both name and number.

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[21] For an extensive discussion of the Musket Wars and the social upheaval of the period, see Crosby, D *The Musket Wars* (Reed Publishers, Auckland, 1999); Jones, P T & Biggs, B *Nga Iwi o Tainui: The Traditional History of the Tainui People* (Auckland University Press, Auckland, 1995) and the relevant biographies in Orange, C (ed) *The Turbulent Years: The Māori Biographies from the Dictionary of New Zealand Biography 1870-1900* (Vol. II) (Wellington: Bridget Williams Books, 1994). For a discussion on the Tainui tribal diaspora, see Jones, P.T, *King Potatau: An Account of the Life of Potatau Te Wherowhero trhe First Maori King* (Polynesian Society, Wellington, 1959).

[22] Jones, P T 'Tainui Canoe Area 1840' (Unpublished Map, Photostat of MS prepared by P Te Hurinui Jones for Centennial Branch, Department of Internal Affairs, 1940). Refer to Appendix XVIII.

10.1.3.1 DR JONES' 1840 LIST

As noted above, in 1940 Dr Pei Te Hurinui Jones provided the Department of Internal Affairs with a map listing the Tainui tribes and sub-tribes as at 1840 when the Treaty was signed (Appendix XVIII). Each of the Tainui tribes identified by Dr Jones have survived into the present day and are shown in Table 10.5.

Table 10. 5 Jones' Tainui 'Tribes' 1840

Tainui 'Tribes' 1840				
Haua	Hauraki	Maniapoto	Raukawa	Waikato

Total Tribes = 5

Jones also went on to list 'sub-tribes' (hapū?) for each of these Tainui tribes. This information is displayed in Table 10.6 below.

Table 10. 6 Jones' 'Tainui' 'Sub-Tribes' 1840

Iwi	'Sub-Tribes' 1840				Total
Haua	Haua (proper)	Hinerangi	Koroki	Wairere	4
Maniapoto	Hari Huiao Kinohaku Matakore Paemate	Pahiri Paiariki Raerae Rangatahi Rarua	Rereahu Rora Rungaterangi Te Ihingarangi Te Kanawa	Tutakamoana Uekaha Urumumia Waiora Whakatere	20
Raukawa	Paretekawa	Raukawa (proper)	Whaita	Wairangi	4
Waikato	Amaru Apakura Haurua Hikairo Mahuta	Naho Ngaiwi Pou Tahinga	Tai Tainui Tamainupo Te Ata	Te Waiohua Te Wehi Tipa Whawhakia	17

As shown in Table 10.6, Jones included Te Waiohua, Haurua and Ngaiwi as Waikato hapū in 1840 but these were not included in the 1947, 1948 and 1995 official lists shown in Tables 10.2, 10.3 and 10.4 respectively. Furthermore, of the 4 Ngāti Hauā sub-tribes listed by Jones, Ngāti Hinerangi has not survived officially into the present day.

Interestingly, Jones used the words 'sub-tribes' and 'sub-tribal groupings' in his retrospective Tainui map. Why did he use these terms and not the common terms 'iwi' and 'hapū' or even 'whānau?' There is no doubt that Jones was aware of such social terms

given his involvement in collating the Waikato 'hapū' lists for the WMMCSA in 1947 and 1948, but why use 'sub-tribes?' Why did a Tainui expert who was steeped in tradition and *whakapapa* (genealogy) and who was a licensed interpreter, employ such words for Waikato socio-political organisation? This issue will be discussed later.

10.1.3.2 FRANCIS FENTON'S 1857 WAIKATO TRIBE LIST

The *Appendices to the Journal of the House of Representatives* (AJHR) provided another, more extensive, list of Waikato hapū in 1857 complete with hapū, districts and leaders. Francis Fenton,[23] who was a Resident Magistrate in the Waikato before the Waikato Wars, compiled a list of tribes in the Waikato district. The 14 officially recorded Waikato 'Tribes' for 1857 are listed below in Table 10.7.

Table 10. 7 Fenton's Waikato District 'Tribes' 1857

Waikato District 'Tribes' 1857			
Apakura	Mahanga	Rewha	Te Ata
Haua	Mahuta	Ruru	Temaoho
Hine	Maniapoto	Tahinga	Tipa
Hinetu	Pou		

Total Tribes = 14

Of all the Waikato District 'tribes' listed in 1857, Ngāti Rewha was listed in 1879 but disappeared from the lists compiled in 1900, 1947, 1948, 1949 and 1995. Interestingly, Ngāti Rewha was later referred to in the 1908 Māori electoral list (shown later in Table 10.15), further highlighting another discrepancy between perhaps the 'official' view of what constitutes a tribe and that of the grass roots people.

Fenton also included a detailed list of what he coined 'family' of the above 'tribes' in the Waikato district. Fenton's use of the word 'family' was synonymous with the contemporary use of 'hapū' which he referred to later in his list. As expected, there were several more 'family' (hapū) than the 33 Waikato hapū identified in 1995. Table 10.8 shows Fenton's extensive list.

[23] Fenton, F *List of the Tribes and Hapus of the Waikato District* AJHR 1860 B-No.9 – F-No.3, at 146-149. Refer to Appendix XIX for Fenton's 1857 Waikato Tribal List.

Table 10. 8 Fenton's Waikato District 'Family' (Hapū) 1857

'Tribe'	'Family'				
Apakura*	Apakura±	Raparapa	Waitapu		
Hauā*	Hanui Haua± Heke Hiniuira	Hourua Hua Kahukura Koroki±	Ngarangi Pari Purangataua	Taka Te Ruarangi Teao	Tehura Wairere± Werewere
Hine*	Hine±	Tau	Turangarua		
Hinetu	Hinetu Kaiotaota	Kiri	Marotana	Rangimahora	Te Urikopi
Mahanga*	Iwikairakau Kuku	Mahanga ± Pakura	Taka	Tohe	Wai
Mahuta*	Hapi Huaki Hurumangiangi Kahuono Kaiawhi Karere Korehe Kotara Koura Mahuta±	Makirangi± Mango Mariu Moana Naho± Nainai Ngahia Ngamuri Ngawhainga Pango	Paratai Parehaehaeora Parewehi Pari Pehi Rangi Reko Ringatahi Rori Ruahine	Tamainu± Tapa Te Ahiwaru Te Iwipoaka Te Kawerau TeMatetakahia Te Ngaungau Te Patukohru Te Patukoko Tekeriwai	Temaoho± TeMaungaunga TePatuahora TePatupo Tewehi± Tu Tupango Whaiakai Whao Whauroa
Maniapoto	Awekaha Hikairo± Hua Huiao Kaputuhi Kinohaku	Mahuta± Makahori Makino Maniapoto Matakore Ngawaero	Ngawai Paiariki Puhiawe± Rereahu Rora	Ruaroa Te Kanawa Te Pairangi Te Rahurahu Umarouru	Urunumia Waha Wai Waiora Wera
Pou*	Amuri Hapi	Kahu Karewa	Manoki Pou±	Rua Tehoru	Tekaitutai Tekehou
Rewha	Rewha	Taha			
Ruru*	Hangare	Ruru	Waenganui		
Tahinga*	Koata Kura	Tahinga±	Tainui±	Teika	Whanga
Te Ata*	Kahukoka	Te Ata±	Te Iwiware	Te Uringahu	Te Urioteoro
Temaoho*	Te Akitai±	Te Aua	Te Uriotapa	Waiohua	
Tipa*	Hua	Karewa	TeWatuhuhi	Tipa±	

Total 'Family' (Hapū?) = 148 * Tribes officially acknowledged in the Waikato Raupatu Constituent Hapu 1995 ± 'Family' groupings officially acknowledged in the Waikato Raupatu Constituent Hapu 1995

Fenton listed approximately 148 'family' (hapū) groups, in the Waikato District in 1857. Of the 14 'tribes' listed above (see Tables 10.6 and 10.7), 11 are officially recognised among the 33 Waikato constituent hapū (see Table 10.1) and are, therefore, part of the official lists to date. Conversely, Ngāti Maniapoto is excluded from the 33 Waikato constituent 'hapū' but is officially recognised as an iwi in its own right, pursuant to the *Maori Fisheries Act 2004.*[24] However, there are three Maniapoto 'family' included among the 33 Waikato hapū – Ngäti Hikairo, Mahuta and Puhiawe. Furthermore, of the 148

[24] *Maori Fisheries Act 2004,* Schedule 3 List of Iwi. Refer to Appendix XX.

'family' groupings, 20 are present within the 33 'hapū' of Waikato leaving three 'tribes' (Ngāti Rewha, Hinetu and Maniapoto) and 128 'family' (hapū) groups unaccounted for. There are some questions that naturally emerge such as: what happened to these tribes? Where have they disappeared to and are they able to be resurrected today? These issues are discussed further on in this chapter.

10.1.3.3 MAORI CENSUSES 1874, 1878, 1881 AND WAIKATO HAPŪ

Māori censuses were held constantly after Fenton's Waikato District iwi and hapū list in 1857. Tables 10.9-10.11 respectively show the hapū that were identified as Waikato hapū in the 1874, 1878 and 1881 Māori censuses.

Table 10. 9 Waikato Hapu from the Maori Census AJHR 1874[25]

'Tribe'	'Hapu'			
Hikairo	Puhiawe			
Mahanga	Hourua Ngamuri	Ngarape	Ruru	Tohe
Mahuta	Naho	Ngahia	Te Patupo	Tehuaki
Pou				
Reko	Reko			
Tahinga	Huru Kohiko Kura	Mataruahine Pare Pehi	Pou Raeroa Tahinga	Te Wera Whaine
Tai				
Tainui	Koata			
Tamainu	Huaki	Kotara	Tamainu	
Te Ngaungau	Tai	Tu		
Te Wehi	Paiaka	Paipai	Reko	
Tipa	Karewa	Rangi	Tipa	
Waikato	Apakura Apakuru Haua	Hinetu Hourua Koroki	Mahuta Mahutu Naho	Pou Tamainu Teata

Total 'Tribes' = 13 and Total 'Hapū' = 46

[25] 'Approximate Census of the Maori Population, 1874,' in AJHR 1874, G-7 at 4-6.

Table 10. 10 Waikato Hapu from the Maori Census AJHR 1878[26]

'Tribe'	'Hapu'			
Reko	Reko			
Tahinga	Koata Mata	Paretenenga Pihikeria	Raeroa Tahinga	Te Kura Te Wera
Te Ata	Kahukoka Karewa Ngatapare	Pare Rua Tawhaki	Te Uri Ngahu Te Uri o Te Oro	Te Uri Tawhaki Te Whānaupani
Tipa	Hika Karewa	Mateharakeke Peke	Rangi Rangihaea	Te Waotuhuhi Wauwau
Waikato	Amaru Apakura Haua Hihaui Hikairo Homua Hourua Hua Huierangi	Kaiawhi Karere Koata Koro Mahanga Mahuta Naho Ngarape	Paiaki Paipai Pou Puhiawe Reko Tahinga Tainui Tamainu	Tamaoha Te Aua Te Kawerau Te Patupo Tehuaki Tekauawa Tewehi Tipa

Total Tribes = 5 and Total Hapū = 59

Table 10. 11 Waikato Hapu from the Maori Census AJHR 1881[27]

Principal[28] **Tribe**	**Sub-tribe or Hapu**			
NgātiTai	Tai			
Te Koheriki	Te Iwi Pungarehu			
Waikato	Amaru Apakura Hape Haua Hikairo Hine Hineahi Hinetu Horua Hourua Huakore Huia Kahu Kahukura Kamuaua	Karewa Karewa Kea Kiore Koroki Mahanga Mahuta Maru Naho Parehikairo Paretawhaki Parikirangi Pou Puhiawe Rangi	Reko Ruru Tahinga Tai Tainui Tamainu Tamaoho Tapaea Taramatou Tarau Tawhaki Te Akitai Te Iwi Pungarehu Te Kaingaahi Te Kaitutae	Te Mata Harakeke Te Patupo Te Uriaro Te Wehi Teoro Tepopuni Tipa Tiru Tu Urupikia Wai Werewere Whawhakia Whia

Total Tribes = 3 and Total Hapū = 57

[26] 'Enclosures' in AJHR 1878, G-2 at 14-17.
[27] 'Census of the Maori Population, 1881' in AJHR 1881, G-3 at 13-15.
[28] The author recognises the change in grouping terminology from 'Tribe' to 'Principal Tribe' and from 'Hapu' to 'Sub-tribe' and 'Family Grouping.' This is after the manner in which the lists were officially recorded.

In the 1874 Maori Census (Table 10.9) 13 Waikato tribes were identified and 46 hapū; in 1878 (Table 10.10), five tribes were identified along with 59 hapū and in 1881 (Table 10.11), only three tribes were identified and 57 hapū. Yet again, the above data highlights the fluctuation and variance among Waikato tribal and hapū social organisation.

10.1.3.4 WAIKATO RAUPATU HAPU LIST 1879

Following the battle of Orakau in 1864,[29] the New Zealand government confiscated 1.2 million acres of prime land in the fertile Waikato Basin and its surrounding area under the auspices of Proclamations and Orders in Council pursuant the *New Zealand Settlement Act 1863* and amendments. However, some lands were later returned. Section 4 of the *Confiscated Lands Act 1867* stated:

> ... it shall be lawful for the Governor from time to time, as he shall think fit, by Proclamation in the New Zealand Gazette, to reserve out of lands under 'The New Zealand Settlements Act 1863,' as amended by 'The New Zealand Settlement Act 1864' and the 'New Zealand Settlements Amendments and Continuance Act 1865' such lands as shall seem fit, and thereout to grant such portion or portions thereof as he shall think fit to such person or persons of the Native race as shall have proved to his satisfaction to have been in rebellion, and have subsequently submitted to the Queen's authority...

When some of the confiscated lands were returned to hapū members within the Waikato raupatu area, many of those individuals and their respective hapū were listed in the *New Zealand Gazette 1879*, which provided an interesting list of Waikato hapū[30] shown below in Table 10.12.

[29] The battle of Orakau was the last battle of the Waikato Wars and was fought on 31 March-2 April 1864. Notwithstanding overwhelming odds, the Maori held out the might of the British army for 3 days. For a detailed account of the Orakau battle, see Cowan, J *The New Zealand Wars and the Pioneering Period* (Vols. I & II, Wellington, 1922-3) at 366. For a Maori account of the battle, see Hitiri Te Paerata *Description of the Battle of Orakau as Given by the Native Chief Hitiri Te Paerata of the Ngāti Raukawa Tribe* (At the Parliamentary Buildings, 4 August, 1888, Government Printer, Wellington, Interpreter - Capt. Gilbert Mair) and a Tuhoe commentary in Best, E *Tuhoe: Children of the Mist* (Vols I & II, Wellington, 1926) at 566. For a contemporary critique see Belich, J *The New Zealand Wars and the Victorian Re-Interpretations of Racial Conflict* (Auckland University Press, Auckland, 1986); Pugsley, C 'Walking the Waikato Wars: The Siege of Orakau: 31 March-2 April 1864' in *New Zealand Defence Quarterly* (No. 18, Spring, 1997) at 35; and Maxwell, P *Frontier: The Battle for the North Island of New Zealand, 1860-1872* (Celebrity Books, Auckland, 2000).

[30] See *RDB* Vol 70 at 26989.

Table 10. 12 Returned Raupatu Lands to Waikato 'Hapu' AJHR 1879

Waikato 'Hapu'				
Amaru	Koheriki	Paoa	Rangiherehere	Tehuaki
Apakura	Koroki	Parakirangi	Rangituruturu	Tekahurangi
Hape	Koura	Pare	Raparapa	Temihi
Haua	Kura	Parehiawe	Raukawa	Teohinga
Hikairo	Mahanga	Parehina	Rewha	Teoro
Hine	Mahuta	Parehuia	Ruarangi	Tewhe
Hinepare	Maingako	Paretoka	Ruru	Tupaea
Hinetore	Mango	Parewehi	Tahinga	Uweroa
Hineuira	Maniapoto	Patukoko	Tai	Waenganui
Hinewera	Manuwhakaaweawe	Patupo	Tainui	Waikai
Hourua	Moenoho	Pehi	Tamaho	Wairere
Huakatoa	Naho	Peke	Tamainu	Werewere
Kahukura	Nainai	Pihere	Tamanga	Whānaunga
Kahutakiri	Ngamuri	Pikiahu	Tangiaro	Whanga
Kaiaua	Ngapuhi	Pou	Tapa	Whao
Karewa	Ngaungau	Pukauae	Tapaea	Whawhakia
Kiora	Ngutu	Purangataua	Te Whetui Apiti	Whearua
Kiri	Pango	Rangi	Teata	Whetui

Total Hapū = 90

Twenty-two of the hapū listed above in 1879 are present in the 33 hapū listed in 1995 (see Table 10.2). Seventeen of the above hapū were included in Jones' 1840 list (see Table 10.6), 42 were listed in Fenton's 1857 list (see Table 10.8), 21 are shown in the WMMSCA 1947 list (see Table 10.3) and 22 in the 1948 Official Gazette list (see Table 10.4). Approximately 90 Waikato hapū appear to have disappeared or to have been reduced, not necessarily in social organisation but possibly in commentator's perceptions of which groups are important. There is likely to have been a discrepancy between the 'official' perception of tribal names and numbers and that of the grassroots people. Either way, a decrease from 90 hapū to 22 hapū in 47 years is a considerable decline in social organisation.

An interesting note about the 1879 list in Table 10.12 is the inclusion of Ngāpuhi, an iwi located in the far north of New Zealand and definitely outside of Waikato-Tainui boundaries. An investigation regarding the reason for Ngāpuhi's inclusion in the 1879 list is beyond the scope of this research, however, this anomaly is acknowledged. Notwithstanding this discrepancy, those hapū members seeking compensation for raupatu in the Maori Land Court or some other forum are likely to have drafted this list and it does provide some important details for the present discussion on the 'lost' tribes of Waikato-Tainui.

10.1.3.5 INDIVIDUALS AND HAPŪ WHO 'SUFFERED RAUPATU' LIST 1900

The AJHR provided another list of Waikato hapū in 1900 that, again, differs from the official Waikato hapū lists heretofore mentioned. This 1900 list also provides specific names of individuals and their respective hapū who 'suffered from the raupatu.' The hapū listed in 1900 are displayed in Table 10.13 and the 'sub-hapū' that were categorised are shown in Table 10.14. Note the use of the word 'sub-hapū' to identify groups in Table 10.14 versus the word whānau.

Table 10. 13 Waikato Landless Native Hapu List AJHR 1900

Hapu			
Amaru	Mahuta	Pou	Teata
Apakura	Mahuta	Poututeka	Tekiriwai
Hine	Makirangi	Pukaue	Tekura
Hinekaraka	Mango	Rangi(Ma)hora	Teuritaniwha
Hinetu	Marae	Ranginui	Tipa
Hinewai	Mataruahine	Raromanoturi	Toheaia
Hourua	Moeahu	Reko	Tu
Iranui	Moenoho	Ringatahi	Tukimata/Okapue
Kaho/Ngao	Naho	Tahinga	Tunahore
Kahu	Ngahia	Tamahapai/Rangitaua	Tupoukeka
Kahui	Ngaitauho	Tamainui	Tutengangana
Kahukura	Paitukuhi	Tamaoho	Unuwai
Kaiamo	Pareteuaki	Tangaroa-a-Whai	Wairere
Kaiawa	Paretoka	Tawhake	Wehiwehi
Karewa	Paretuaki	Te Kanawa	Whau
Kautata	Peehikiria	Te Poa	Whauroa
Koko	Pirirakau	Te Wera	Whawhakia
Koroki	Po	Te Wero	

Total Hapū = 71

Table 9. 14 Waikato Landless Native Sub-Hapu List AJHR 1900

Sub-Hapu			
Amaru	Kahukoka	Manuki/Monoki	Rangi
Hape	Karewa	Naenae	Raparapa
Hekenui	Koro	Pareteuaki	Tautuku
Hourua	Koura	Pareue	Tupu

Total Sub-Hapū = 16

Fourty of the 71 hapū listed in 1900 (see Table 10.13) were not recorded by Fenton as being in the Waikato in 1857 (see Table 10.8). If the WRCSA is, inter alia, about acknowledging the individuals and hapū who suffered raupatu, then one questions why this list that was compiled in 1900 was not consulted to identify the specific hapū and descendants of those who 'suffered from the raupatu.'

With regard to a robust methodology, the author acknowledges that the above official lists may not have been the most accurate system of recording. For example, the 'Returned Raupatu Lands' list from 1879 (see Table 10.12) which included Ngāpuhi as an official Waikato hapū, despite Ngāpuhi being outside the Waikato region. In addition, accuracy depends on the definitions of the words being used in the lists, that is, words such as 'hapū,' 'iwi,' 'tribes,' 'sub-tribes' and 'family.' Furthermore, criticism may even emerge suggesting that Māori did not compile such lists traditionally and, therefore, the credibility and reliability of these lists may be questionable. One could seek better clarity perhaps by consulting a subjective list of Waikato hapū whereby Māori self-identified their iwi and hapū affiliations. The two lists shown in the following section meet this criterion (see Table 10.15 and Table 10.16).

10.1.3.6 MĀORI ELECTORAL LIST 1908

Another valuable list of Māori iwi and hapū, located in the National Archives in Wellington, is the 1908 Māori Electoral Roll. In contrast to the lists mentioned previously, the 1908 Māori Electoral Roll is a subjective self-identification list of Waikato (and other tribal group) 'iwi' and 'hapū.' Māori who voted in 1908 listed their full name, iwi, hapū, place of residence and gender on the Eastern, Western and Northern Maori Rolls. Hence, the Maori Electoral Rolls provide a subjective snapshot of Māori social organisation as at 1908. Unfortunately, to date, the Southern Maori Roll (Ngāi Tahu) has not been located.

Māori were entitled to vote by declaration and were not required to enrol until 1956. This explains why the roll is a list of those who voted rather than those who were registered as electors. Persons entitled to vote on the Māori Roll in 1908 had to be over the age of 21 years and had to have at least 'half, or more, Maori blood.' Māori with exactly half Māori blood were entitled to vote on either the Māori or European rolls.

The Western Maori Electoral Roll takes in, inter alia, the tribal districts of Waikato, Ngāti Maniapoto, Ngāti Hauā, Ngāti Raukawa ki Waikato and Ngāti Raukawa ki te Tonga thus providing vital information on the traditional socio-political organisation of the Tainui 'tribes' in 1908. It is important to remember that most Māori were still domiciled within their traditional tribal domains at that time. Urbanisation occurred extensively following World War II, hence, the current Māori diaspora throughout other parts of New Zealand and the rest of the world. Notwithstanding this, the 1908 Maori Electoral Rolls provide a somewhat accurate snapshot of iwi and hapū identities and their general locale at the turn of the 20th century, prior to the social upheaval of urbanisation.

The use of hapū lists in the current analysis may lead to questions and possible criticisms regarding this type of research methodology. Possible criticisms may include the accuracy of the information that was collected as well as the accuracy of information gathering procedures. In addition, one must be mindful of the purpose for which this information was collected and the accompanying motives of those gathering the data. It is possible that some Māori may have been influenced with a suggested list of hapū given while they voted, or were perhaps influenced by some of their own kinsfolk.

Interestingly, some members of the same whānau have recorded different hapū. In an interview with a kaumātua, it was mentioned that whānau members often recorded different hapū affiliations compared to their siblings in order to maintain the family's connections to all of their respective hapū and hapū resources, including land.[31] Nevertheless, the 1908 Maori Electoral Roll is still an invaluable Māori self-identification list, thus adding to the current discussion about the fluid and dynamic nature of Māori socio-political organisation. Table 10.15 listed specific Waikato 'hapū' in 1908.

[31] This point was mentioned to the author by a Ngāti Porou kaumātua.

Table 10. 15 Waikato 'Hapu' from the Māori Electoral Roll 1908[32]

Waikato Hapu				
Ahiwaru	Kauahi	Pakakohe	Ruahine	Te Pakakohi
Amaru	Kauwhata	Paraue	Ruanui	**Te Patupo**
Amua	Kiawhi	Pare	Ruateatea	Te Ra
Apakura	Kirihika	Parehaehaeroa	***Ruru***	Te Rangitauawau
Hape	Kiriwai	Parehikairo	Taheke	Te Rao
Haua	Koata	Parehuia	Tahiki	Te UrioTawhaki
Haupunga	Kohatu	Parekino	**Tahinga**	Te Urioteoro
Hekewai	**Koheriki**	Paretai	Tai	Te Urukope
Hikaurua	Kokako	**Paretekawa**	Taikawa	Te Waha
Hine	**Koroki**	Pareterakau	**Tainui**	**Te Wehi**
Hinehape	Kotara	Paretuaki	Taka	Te Wera
Hinehiapa	Koura	Paroa	**Tamainu**	Te Wha
Hinemotu	Kuiarangi	Patupo	**Tamaoho**	Te Whakamai
Hinepare	Kuku	Peehi	Tamatera	Tenerau
Hinetera	Kukuti	Pehi	Tangairo	Terewai
Hinetu	**Mahanga**	Pekeha	Tangiaro	**Tipa**
Hinga	Mahuta	Piki	Tapa	Tokanui
Hinu	**Makirangi**	Po	Tapu	Tonganui
Hopu	Marae	**Pou**	Tara	Tu
Horotakere	**Marotaua**	Puhiawe	Taramatau	Tukemata
Hounuku	Matarau	Pukauwa	Tarametau	
Hourua	Mataruahine	Pukauwae	Tarao	Tupaea
Hua	Mate	Pukoro	**Taratikitiki**	Tupito
Huakatoa	Maungaunga	Pukorokoro	Taupiri	Tupou
Huakau	Mihinga	Puta	Te Ahiwaru	Turu
Huaki	Moenoho	Rahui	Te Aritai	Tutengangana
Huia	Moewaho	Raka	**Te Ata**	Tuwhera
Huiao	Mona	Rako	Te Awhiroa	Ueroa
Huiarangi	Monoki	Rangihora	Te Hekenui	Uruwahia
Huri	Motai	Rangimaheu	Te Hiakai	Waenganui
Hurumangi-angi	Motemote	Rangimahora	Te Houhi	Waiaranui
Irahui	Naenae	Rangitaka	Te Huaki	Waikohika
Iranui	**Naho**	Rangitauwaro	Te Ika	Waimarama
Kaho	Ngahia	Raoho	Te Kaingaahi	Waiora
Kahukoka	Ngahina	Raparapa	Te Kanawa	**Wairere**
Kahukopa	Ngamahanga	Rarua	Te Kao	Wairiri
Kahukura	Ngamuri	Rawhiti	Te Karu	Waitapu
Kahuone	Ngapoutama	Rehu	Te Keho	Wawau
Kaiahi	Ngarape	Reka	Te Kiriwai	***Werokoko***
Kaiaua	Ngariki	Reko	Te Koheriki	Whaine
Kakoho	Noke	Rewha	Te Kura	Whakahi
Kakutakiri	Paeahi	Rewhare	Te Mihinga	Whakamaru-rangi
Kapua	Paetiki	Ringatahi	Te Mutu o Waikato	Whare
Karewa	Paetoka	Rori	Te Ngaungau	**Whawhakia**
Katara	Paetoko		Te Omunga	Whia
Kau				

Approximately 220 Waikato Hapū in 1908

Key – The above bolded tribes are included in the current 33 hapu of the WRCSA. Those tribes that are italicised are discussed later in this chapter.

[32] New Zealand Government *Western Maori Electorate: List of Maori Electors who voted at the General Election in Above-Named Electorate in 1908* (Wellington: Government Printer, 1908).

10.1.3.7 MĀORI ELECTORAL LIST 1949

Another valuable self-identification iwi and hapu list was recorded in the 1949 Māori Electoral Roll. This list is particularly useful given that it provided the tribal and hapū affiliations of approximately 35,000 Māori adults. According to the 1951 Māori census, approximately three quarters of the adult Māori population were recorded in the 1949 Electoral Roll. Significantly, this list included the information from a generation of Māori who were commencing massive social upheaval caused by urbanisation and Māori diaspora. It is likely that this group would have been relatively domiciled within their tribal domains and somewhat familiar with their iwi and hapū affiliations. The specific Waikato hapū recorded in the 1949 Māori Electoral Roll were recorded as follows in Table 10.16.

An important note regarding the Table 10.16 tribal list is that the Waikato-Maniapoto Settlement and the discussions surrounding the Waikato hapū (that eventuated in the current 33 Raupatu Hapū, see Table 10.2) occurred between the years 1946-1948. The Waikato hapū list below was compiled in 1949, one year later, and shows a considerable discrepancy in the names and number of Waikato hapū. In 1949, the Māori Electoral Roll recorded over 200 Waikato hapū as identified by the 'people' whereas only 30 hapū were identified by the WMMCSA in 1947 and 33 in 1948. There appears to have been at this time, therefore, a large hiatus between the views of Government and official Waikato leadership on the one hand, and the grass roots people on the other, at least in terms of hapū identity and ontological social organisation.

Table 10. 16 Waikato 'Hapu' from the Māori Electoral Roll 1949[33]

Waikato Hapu				
Aaua	Kaiaua	Maru	Pou-Amaru	Tarao
Ahiwaru	Kanawa	Matakore	Pourahui	Taratikitiki
Ahuru	Kanohi	Mataruahine	Pou-Tarao	Taratiti
Amaru	Kaputahi	Matira	Puehutore	Tarawa
Apakura	Kaputuhi	Miru	Puhiawe	Tauaiti
Apakura-Rahui	Karewa	Moana	Pukauae	Tawhaki
Araukuku	Karewa-Te Kura	Moenoho	Pukeko	Te Ata
Ata-Rahiri	Kauwhata Ngako	Moko	Rahui	Te Ata-Paretaua
Hahu	KauwhataNgamuri	Naenae	Rangi	Te Patu
Hainatira	Kawiti	Naho	Rangimahora	Te Pau
Hangarau	Kea	Nako	Rangimarama	Te Uri o Tai
Hape	Kirihika	Ngaha	Rangiwaharoa	Te Uru
Hapo	Kiriwai	Ngaho	Rangiwahitu	Te Waha
Hari	Kiwarangi	Ngaiterangi	Raparapa	Te Wehi
Haua	Koata	Ngako	Raukawa	Te Wera
Hawea	Koheriki	Ngamahana	Reko	Te Werekoko
Hikairo	Kohirihi	Ngamuri	Ringatahi	Teika
Hikairo-Horotakere	Kohua	Ngatapa	Ruanui	Tipa
Hikairo-Te Mihinga	Koroki	Ngawaero	Ruru	Tonganui
Hine	Koroki Tukorehe	Ngutu	Tahi	Tourua
Hinehape	Koroki-Hua	Noho	Tahinga	Tu
Hinemutu	Koroki-Kahukura	Ono	Tahiwaru	Tukorehe
Hinepare	KorokiPukauae	Oro	Tahora	Ueroa-Kahukura
Hine-Pou	Koroki-Ueroa	Oro-Kahukura	Tahunga-Te Ika	Ui
Hinerangi	Kotara	Oro-Waihoro	Tai	Urikaraka
Hinerongo	Kounga	Pa	Tainui	Waenganui
Hinetu	Kowhatu	Pakanae	Tainui-Hounuku	Waerere
Hinga	Kura	Pakura	Tainui-Mahuta	Wai
Hora	Kura-Tahinga	Paoa	Tainui-Tamainu	Waihoro
Horotakere	Mahaka	Papapapa	Tainui-Tipa	Waikohika
Hounuku	Mahanga	Paratai	Takihiku	Waiohua
Hourua	Mahanga-Hourua	Pare	Tamainu	Wairere
Hourua-Whare	Mahuta	Parekino	Tamainupo	WairereTamaoho
Hua	Mahuta-Hikairo	Pare-Tahinga	Tamainupo-Kinohaku	Wehi-Taupiri
Huakatoa	Mahuta-Huiarangi	Paretaua	Tamainupo-Kotara	Werewere
Huaki	Mahuta-Kawiti	Paretekawa	Tamaki	Werokoko
Huanui	Mahuta-Po	Pareua	Tamaoho	Whaene
Huerangi	Mahuta-Pou	Pareue	Tamatera	Whakamaru
Hui	Mahuta-Rangitaka	Patupo	Tamatira	WhakamaruRangi
Ika	Mahuta-Tai	Pawa	Tanewai	Whānaunga
Kahu	Mahuta-Te Kiriwai	Pehikeria	Tangaroawhai	Whangaparaoa
Kahukoka	Makirangi	Pekeria	Tangata	Whare
Kahukura	Makirangi-Pawa	Po	Tangowahine	Whatua
Kahukura-Tipa	Maniapoto	Poa	Taramatau	Whauroa
KahukuraUeroa	Marae	Pou	Taramatua	Whawhakia
Kahuone	Marotaua			

Total Waikato Hapū = 227

[33] Mako, C *Nga Iwi Me Nga Hapu i te Tau 1949: An Analysis of the Tribal and Sub-Tribal Affiliations of 1949 Maori Electors* (Working Paper, Wellington: Department of Maori Affairs, 1989) at 75.

The considerable changes in the names and numbers of Waikato hapū within 100 years highlights again the dynamic and fluid nature of Waikato hapū identity and representation.

10.1.3.8 NGĀTI KAHUKOKA - A 'LOST' TRIBE OF WAIKATO AND NGĀTI TE ATA

In a more specific Waikato hapū context, a Waikato hapū that appears to be a 'lost' tribe, at least for official purposes, is the Ngāti Te Ata hapū - Ngāti Kahukoka. In a personal interview with the author, a Waikato woman mentioned that her whānau were Ngāti Kahukoka but this hapū or tribe is not officially recognised as one of *the* 33 constituent hapū of the WRCSA 1995 (see Table 10.2). The woman's whānau applied for registration on the WRCSA beneficiary roll (benrol) as Ngāti Kahukoka but were rejected on the grounds that Ngāti Kahukoka is extinct. The whānau's response was: 'It can't be, we are still here!' She continued with this statement

> Our koro told us our hapū within Waikato is Ngāti Kahukoka and that is who we are. As long as we are alive, Kahukoka is not an extinct [or lost] hapū![34]

The present discussion will briefly trace the development and demise (at least officially) of Ngāti Kahukoka by utilising, where applicable, the various Waikato tribal lists mentioned above.

The Ngāti Te Ata leader, politician and advisor to the Kingitanga, Henare Kaihau, had tribal affiliations to Ngāti Kahukoka via his father Aihipene Kaihau.[35] Ngāti Kahukoka as a hapū or tribe is excluded from the Waikato 'tribal' lists of Dr Jones for 1840 (see Tables 10.5 and 10.6), the Waikato Raupatu hapū listed in the AJHR 1879 (see Table 10.12), the respective 30 and 33 Waikato constituent hapū gazetted in 1947 and 1948 (see Tables 10.3 and 10.4), the 33 hapū of the WRCSA (see Table 10.2) and the *Maori Fisheries Act 2004.* However, in 1857 Ngāti Kahukoka was included by Fenton as a 'Family' (hapu) of the Ngāti Te Ata 'Tribe' (see Table 10.8) and it was included in the Maori Census in 1878 (see Table 10.10). Interestingly, there were only four members recorded for Ngāti Kahukoka in the 1878 Maori Census suggesting that Ngāti Kahukoka was demographically becoming extinct. Notwithstanding this, Ngāti Kahukoka was listed as a 'sub-hapū' in the Landless Waikato Tribes in the AJHR 1900 with at least 24 members in 1900 (Table 10.14).

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[34] Personal communication to the author by a Ngāti Kahukoka whānau member at the University of Waikato, Hamilton, 2005.
[35] Orange, supra n 21 at 36.

In the Maori Electoral Roll of 1908 (see Table 10.15), 12 people[36] reported their Waikato hapū to be Ngāti Kahukoa. Furthermore, Ngāti Kahukoka was listed in the 1949 Maori Electoral Roll (see Table 10.16) with one person listing Kahukoka under the iwi Ngāti Hauā, three listing it as their hapū for Waikato and 20 listed Kahukoka as their hapū under Ngāti Raukawa. Thus, Ngāti Kahukoka had 24 official adult members listed for 1949. However, with membership fluctuating from 4 to 24 people between 1878 and 1949, such a quantity is demographically minute. Nevertheless, a healthy hapū can recover from 24 people in just two generations but, as mentioned above, Ngāti Kahukoka presently does not officially exist as a hapū or tribe of Waikato pursuant to either the WRCSA 1995 or the *Maori Fisheries Act 2004*. Notwithstanding this technicality, as the Kahukoka woman mentioned to the author, Ngāti Kahukoka does indeed exist in the minds and hearts of her whānau. It is only an extinct or 'lost' hapū within the official legislation and political organisation of the WRCSA 1995 but not within the self-concept of some of the grass roots people of Waikato. The critical question to ask, then, is whether there is official scope for the resurrection of 'lost' tribes such as Ngāti Kahukoka.

10.1.3.9 SOME 'FAMILY GROUPINGS' EVOLVED INTO THE LARGER HAPŪ

Of particular interest to the present discussion is the fact that seven of the 'family' (hapū) groups listed by Fenton in 1857[37] as a 'sub-group' of Ngāti Mahuta (see Table 10.8) were recognised in 1995 as part of the TMTB's 33 constituent hapū (see Table 10.2). The names of these 'family' groups are shown below in Table 10.17.

Table 10. 17 Ngāti Mahuta 'Family' (Hapū) Groups (1857) now Recognised as Independent Hapu (1995)

Ngāti Mahuta 'Family' (Hapū) Groups (1857) now Recognised as Independent Hapū (1995)		
Makirangi	Tamainupo (Tamainu)	Wehiwehi (Tewehi)
Naho	Tamaoho (Temaoho)	Whawhakia (Ngaungau)
Ngutu (Tu)		

Total Hapū = 7

Interestingly, parts of the previous discussion have raised the notion of disappearing iwi or hapū, tribes or sub-tribes, but this Ngäti Mahuta example suggests a

[36] New Zealand Government, supra n 505.

[37] 'Report of the Waikato Committee' (F-3, plus Appendix B) in New Zealand *Appendix to the Journals of the House of Representatives* (Wellington: Government Printer, 1860) at146-8.

development to the contrary. While several hapū are no longer officially recognised in the many lists heretofore mentioned (for example, Ngāti Kahukoka) these Ngāti Mahuta 'family' (hapū) groups are now recognised as officially independent hapū.

10.2 SUMMARY OF THE 'LOST' TRIBES OF WAIKATO

As the development of the 33 Waikato hapū from the WRCSA is traced through time and space, it has become obvious to the author (and possibly to current readers) exactly how perplexing and arbitrary it has been to follow and understand the previous discussion. The use of the terms 'iwi,' 'hapū,' 'whānau,' 'tribe,' 'sub-tribe' and 'family' have been used interchangeably among the various official lists, thus adding to the confusion and difficultly in researching and presenting 'traditional' Tainui customary socio-political organisation and representation. As was repeatedly shown, the names of the tribes and their respective numbers have fluctuated considerably from 1840 to 1995, again making the discussion difficult to follow.

The identification of the '33 hapū of Waikato who suffered confiscation'[38] only came formally in the *Waikato Raupatu Claims Settlement Act 1995* (WRCSA). Today, existing Māori governance institutions have the power to refuse to legitimise new claimant groups to iwi, hapū and marae status[39] and to de-tribalise existing members through, inter alia, the ideology of traditionalism and invented traditions. The late Sir Robert Mahuta once noted that 'each tribe must choose for itself how to act, depending on its group identity ... its Tuhoetanga, Waikatotanga, Ngapuhitanga and so on.'[40] Interestingly, Mahuta, who was chief negotiator of the WRCSA, subsequently described 'hapū' as existing 'only in concept, only in the head,' as a 'myth with no formal structure.'[41] What the author finds interesting about this perspective is, as mentioned earlier, hapū seemed to be the main unit for traditional Māori social organisation, not iwi, or even waka. Mahuta refused to acknowledge this part of tradition or to accommodate for it in a contemporary context. In contrast, the Maori Fisheries Commission, Te Ohu Kai Moana (TOKM), acknowledged that perhaps hapū was the main unit of traditional Māori social organisation but for administrative purposes and political efficacy, iwi have been selected as the main

[38] *Waikato Raupatu Claims Settlement Act 1995,* s. 7.
[39] See Cheater, A & Hopa, N 'The Historical Construction of the Tainui Maori Trust Board' (Unpublished Paper, Hamilton, 2004) at 1.
[40] Mahuta, R 'Race Relations in New Zealand' in Stokes, E (ed), *Nga Tumanako: Proceedings of the National Conference of Maori Committees* (Hamilton: Centre for Maori Studies and Research, University of Waikato, November, 1978) at 25-6.
[41] Mahuta, R in *Listener* (24 June, 1995) at 22.

contemporary unit of Māori social organisation for the allocation of the Maori Fisheries Settlement assets.[42]

As outlined extensively above, Waikato hapū have changed significantly, diminishing from 14 'tribes' and 148 'family'(hapū) in 1857 (Tables 10.7 and 10.8) to 33 hapū in 1995 (Table 10.2). The waxing and waning of Waikato hapū up until 1995 has been well documented and may illustrate the (re)invention of Waikato hapū tradition. With nation-state assistance, 'Tainui' has subsequently, through the 1995 WRCSA, converted itself into a 'corporate tribe.' Perhaps the ideology of traditionalism has been used to consolidate the power of some of those leaders and tribes who feature predominantly among the governance entities within this 'corporate tribe,' from an ideological, numerical and economic perspective. The lack of consensus in terms of hapū names and numbers is not necessarily due to intellectual cultural failure to define the groups, but is, perhaps, due to a degree of cultural gerrymandering. This suggests that the 'lost' tribes of Waikato, in a Treaty settlement context, are closely linked to sensitive political and legal factors or 'political arithmetic'[43] (as Keyfitz defined it), in particular, the fundamental issue pertaining to the right of customary representation and governance. An obvious question that evolves from this section is whether this situation is specific to Waikato-Tainui or is it applicable to Māori communities generally. The following sections will now review similar patterns among other iwi and hapū tribes to identify whether this issue of 'lost' tribes is indeed iwi-specific or not.

10.3 NGĀTI RAUKAWA HAPŪ CHANGES

As a prominent iwi of the Tainui waka, Ngāti Raukawa is an integral part of traditional and contemporary Tainui politics. Ngāti Raukawa has two main branches with their own governance entities – Ngāti Raukawa ki Waikato (south-east Waikato) and Ngāti Raukawa ki te Tonga in the Horowhenua-Otaki region. Other sections of Ngāti Raukawa as a tribe include Ngāti Raukawa tuturu, Ngāti Raukawa ki Wharepuhunga, Ngäti Raukawa ki Panehakua and Ngāti Raukawa ki te Patetere ki Kaokaoroa. Diagram 10.2 shows how Ngāti Raukawa is affiliated with the Tainui waka via genealogical connections and, hence, its place and legitimacy in Tainui politics.

[42] Te Ohu Kai Moana *He Kawai Amokura: A Model for Allocation of the Fisheries Settlement Assets: Report to the Minister of Fisheries* (Wellington: The Treaty of Waitangi Fisheries Commission, May 2003) at 27-29.
[43] See Keyfitz, N 'Population Theory' in Ross, J (ed) *International Encyclopaedia of Population* (Vols. I & II) (New York: Free Press, 1982) at 538.

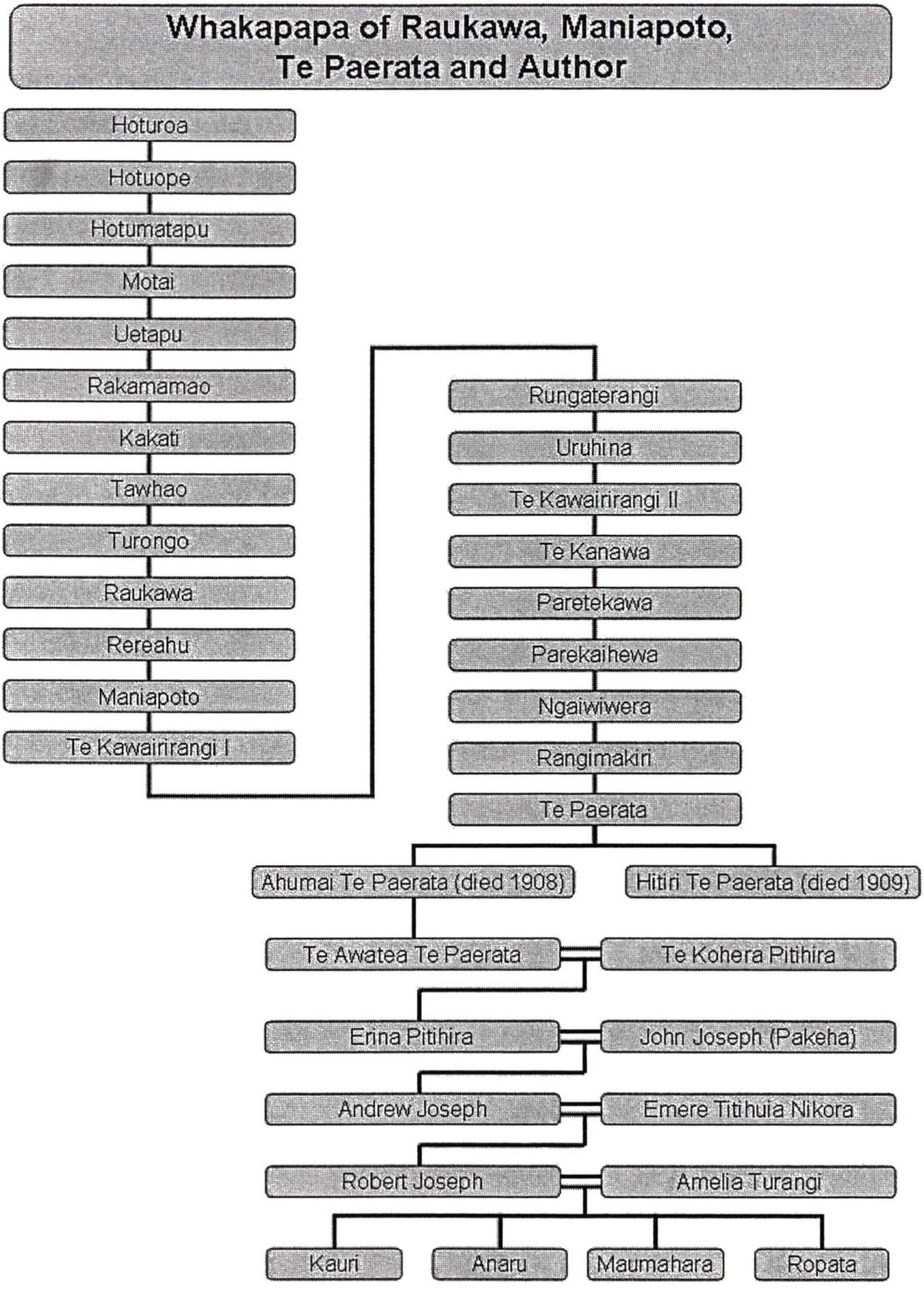

Figure 24 Whakapapa of Ngāti Raukawa Rangatira, Hitiri and Ahumai Te Paerata and the Author's Whānau[44]

[44] This whakapapa is taken from Dr Pei Jones in Ngata, A *Nga Moteatea: He Maramara rere no nga Waka Maha, The Songs: Scattered Pieces from the Many Canoe Areas* (Part 1) (Wellington: Reed Ltd, 1928) at 136 & 188.

10.3.1.1 OFFICIAL LISTS IDENTIFYING NGĀTI RAUKAWA HAPŪ

Like the tribes or hapū of Waikato-Tainui, Ngāti Raukawa hapū have similarly waxed and waned over time and space. Table 10.18) is a compilation of different Ngāti Raukawa hapū extracted from a list established by Dr Jones in 1840 and from the Māori censuses between 1874 to 1881.

Table 10. 18 Ngati Raukawa Hapu identified by Jones (1840) and in the AJHR Maori Censuses (1874-1881)

Jones' Ngati Raukawa ki Wharepuhunga List 1840[45]				**Total Hapu**
Paretekawa	Raukawa (tuturu/ proper)	Whaita	Wairangi	4
Raukawa Hapu (Taupo) List AJHR 1874[46]				
Kohera Manunui	Parahuka	Parekawa	Tarakaiahi	5
Raukawa Hapu (Taupo) List AJHR 1881[47]				
Hururi	Parewahawaha	Raukawa		3
Raukawa Hapu (ki te Tonga) List AJHR 1878[48]				
Huia Kohuru	Pukiahu	Turanga	Wakatere	5
Raukawa Hapu (ki te Tonga) List AJHR 1881[49]				
Huia				1
Raukawa Hapu (Waikato) List AJHR 1874[50]				
Hinemata Hineteao Huri	Maihi Takihiku Te Kohera	TeRangitawhia Teahuru Tukorehe	Uruhina Wairangi	11
Raukawa Hapu (Waikato) List AJHR 1878[51]				
Ahuru Hinemata Hinerangi	Hireteao Huia Huri	Kapu Maihi Te Kohera	Tukorehe Uruhina Wairangi	12
Raukawa Hapu (Waikato) List AJHR 1881[52]				
Ahuru Hinemata Hireteao	Huia Huri Huruhina	Kapu Maihi Te Kohera	Tukorehe Wairangi	11

[45] Jones, P, 'Dr Pei Te Hurunui Jones Manuscripts,' (Pei Jones Room, University of Waikato, Hamilton, 2004). Refer to Appendix XVIII.
[46] 'Approximate Census of the Maori Population' in AJHR 1874, G-7 at 13.
[47] 'Census of the Maori Population, 1881' in AJHR 1881, G-3, at 25.
[48] 'Enclosures' AJHR 1878, G-2, at 19.
[49] 'Census of the Maori Population, 1881' in AJHR 1881, G-3, at 25.
[50] 'Approximate Census of the Maori Population' in AJHR 1874, G-7 at 5.
[51] 'Enclosures' AJHR 1878, G-2, at 16-17.
[52] 'Census of the Maori Population, 1881' in AJHR 1881, G-3, at 15.

Table 10.18 shows that the Raukawa hapū located in the Taupo region decreased from five hapū in 1874 to three hapū in 1881. According to these records, none of the hapū that were identified in 1874 were present in 1881. Of the Raukawa hapū listed for Waikato between 1874-1881, only five (Hinemata, Maihi, Te Kohera, Tukorehe and Wairangi) were recorded in all three censuses. The remaining hapū appeared on only one or two of these official lists. Furthermore, in 1878, the Māori census listed five hapū for Raukawa ki te Tonga but in 1881, Huia is the only hapū listed.[53] In a similar manner but on a smaller scale to Waikato-Tainui, the data in Table 10.18 illustrates how Ngāti Raukawa hapū identity has shifted in both name and number.

Interestingly, with regard to the Raukawa hapū for Waikato listed in the 1874 census, Major Gilbert Mair stated that 'Ngati Raukawa are so intermixed it is impossible to separate the hapus.'[54] Mair also went on to note that six of the Raukawa hapū (Hinemata, Huri, Maihi, Teahuru, Te Rangitawhia and Tukorehe) 'lived generally on the right bank of the Waikato and called themselves Queenites,'[55] while the remaining five hapū (Hineteao, Takihiku, Te Kohera, Uruhina and Wairangi) lived 'constantly on the left bank of the Waikato and are Kingites.'[56] Mair ended his comments by stating that 'Ngati Wairangi was half and half,' that is, half Queenite, half Kingite.[57] Such statements indicate that these Ngāti Raukawa hapū were politically divided, which influenced (or was influenced by) their geographic location and their social organisation. Therefore, not only was group formation based on whakapapa but this example suggests it was also based on situational and political factors.

In addition, Locke, the Resident Magistrate of Taupo, identified five hapū as being 'partly Ngati Raukawa' in the Taupo region in 1874, which is siginificant because the traditional boundaries of Ngāti Raukawa appeared to not extend into the Taupo Ngäti Tuwharetoa region except within the Pouākani Block area. Still, tribal boundaries were more zones rather than lines and the Pouākani area was regarded as an *aratika* (crossroads) for 4 prominent tribes – Tuwharetoa, Raukawa, Maniapoto and Te Arawa.[58] What this example may suggest, however, is that Raukawa identity was not 'place' based, that is, it

[53] Ibid, at 25.
[54] 'Approximate Census of the Maori Population' in AJHR 1874, G-7 at 5.
[55] Idem.
[56] Idem.
[57] Idem.
[58] See the Pouākani Waitangi Tribunal Report for a discussion on how these 4 prominent tribes traversed this area as a cross-road. Waitangi Tribunal, *The Pouākani Report* (Wai 33, Brooker and Friend Ltd, Wellington, 1999).

was not dependent upon location within the tribal territory. It may be more accurately described as being 'space' based, that is, one's Raukawa identity was portable.

10.3.1.2 MĀORI ELECTORAL LISTS 1908 & 1949

The 1908 Maori Electoral Roll listed the following hapū for Ngāti Raukawa ki te Tonga and for the Waikato region. This information is displayed in Table 10.19 and Table 10.20 respectively. The 1949, the Ngāti Raukawa hapū for both of these regions were combined in a single list (see Table 10.21 below).

Table 10. 19 Ngāti Raukawa Hapu (ki te Tonga) List from the Māori Electoral Roll 1908

Ngāti Raukawa (ki te Tonga) Hapu				
Hamua	Kahu	Koperi	Poutu	Te Whānau a Ruataupare
Hau	Kaitangata	Koura	Rakau	Tukorehe
Haumia	Kapu	Kura	Rarangikura	Tukorehu
Hineau	Kauwhata	Ngako	Rongo	Turanga
Hinepare	Kikipere	Ngarongo	Tahuriwakanui	Turoa
Hinetu	Kiri	Pare	Takihiku	Tutengangana
Hoa	Kiwi	Pareraukawa	Te Au	Wehiwehi
Huia	Koata	Parewahawaha	Te Kohera	Whakatere
Kahoro				

Total Hapū = 41

Table 10. 20 Ngāti Raukawa Hapu (Waikato) List from the Maori Electoral Roll 1908

Ngāti Raukawa (Waikato) Hapu				
Ahura	Huri	Kura	Pikiahu	Te Rangi
Ahuru	Hurumangiangi	Maiataka	Pu	Te Riri
Ha	Kahoro	Maihi	Puehutore	Tihireka
Hae	Kapa (Kapo)	Maiotaka	Rakaha	Tokoko
Hamua	Kaputuhi	Maiotaki	Rangi	Tokorahi
Haruru	Kauwhata	Maniaihi	Rango	Tokorere
Haua	Kea	Mateawa	Rereahu	Tokorohi
Hina	Kerehika	Motai	Takaha	Tukoheke
Hinekahu	Kerihika	Ngako	Takeiko	Tukorohi
Hinemata	Kiri	Ngarongo	Tataka	Turoa
Hineone	Kirihika	Pango	Taujra	Uri
Hinerangi	Kiritaratara	Pare	Te Aupunga	Wairangi
Hoa	Kiriupokoiti	Parehaehaeora	Te Hinga	Wehiwehi
Horo	Kiriwera	Parehaurangi	Te Koroheke	Whānaurua
Huia	Koroheke	Parekawa	Te Maihi	

Total Hapū = 74

Table 10. 21 Ngāti Raukawa Hapu (Waikato & ki te Tonga) from the Māori Electoral Roll 1949

Ngāti Raukawa (ki Waikato & ki te Tonga) Hapu				
Ahi	Kauwhata	Muaupoko	Rakau	Te Oro
Apa	Kea	Mutunga	Rakaupaewai	Te Rangi
Apakura	Kimihia	Naenae	Ranginui	Te Uri o Roroi
Awa	Kiri	Ngaiterangi	Rangitane	Titoki
Ha	Kirihika	Ngamo	Rangiwehiwehi	Toa
Hamua	Kohera	Ngamuri	Rikawa	Tokotoko
Hangarau	Kopa	Ngarauru	Tahuriwakanui	Tu
Hape	Koroki	Ngarongo	Tainui	Tuara
Hine	Kuia	Ngatokowaru	Takaha	Tukorehe
Hineaute	Mahana	Ngawaero	Takihiku	Turanga
Hineone	Mahuta	Pango	Tangata	Waenganui
Hinerangi	Maihi	Pare	Tauira	Waewae
Hineuru	Maiotaki	Parekawa	Taupunga	Waihurihia
Hori	Mairehau	Pareraukawa	Tawhaki	Wairangi
Huia	Maniapoto	Parewahawaha	Te Ahuru	Wairere
Huri	Matakore	Pikiahu	Te Ao	Wehiwehi
Irekehu	Mateawa	Pou	Te Apatu	Whaita
Kaharau	Moekino	Poutama	Te Apunga	Whakamana
Kapu	Morehu	Puehutore	Te Atiawa	Whakatere
Kapua	Motai	Pukeko	Te Au	Whangaparoa
Katohiku	Moupoko	Punoke	Te Hinga	Whatua

Total Hapū = 105

As shown in the above tables, the number of Ngāti Raukawa hapū has increased phenomenally since the 1800s. The number of hapū recorded for Raukawa ki te Tonga increased substantially from five in 1878 (see Table 10.18) to 41 hapū in 1908 (see Table 10.19). Similarly, the Raukawa hapū recorded for the Waikato area increased from 11 in 1874 (see Table 10.18) to 74 in 1908 (see Table 10.20). Interestingly, the combined number of hapū for Raukawa ki te Tonga and the Waikato region decreased from 115 hapū in 1908 (see Tables 10.19 and 10.20) to 105 hapū in 1949 (see Table 10.21). Furthermore, while some of the names originally identified in the Māori censuses (see Table 10.17) continue to appear in the 1949 Electoral Roll (e.g., Ahuru, Maihi, Huia, Turanga, Wairangi; see Table 10.20), many appear to have 'officially' disappeared (e.g., Hireteao, Kohuru, Huruhina). Conversely, some hapū have been 'resurrected.' Takihiku was listed in the 1874 Māori census for Waikato (see Table 10.18), it was not included in the subsequent censuses in 1878 and 1881 and then reappeared on the Maori Electoral Roll in 1949 (see Table 10.21). However, it was recorded as a hapū for Raukawa ki te Tonga in

1908 (see Table 10.19). Once again, these trends highlight the fluid nature of Māori socio-political organisation.

10.3.1.3 NGĀTI RAUKAWA HAPŪ IN 2005

At present, Te Rūnanga o Raukawa Inc. have the following hapū listed for Ngāti Raukawa ki te Tonga (see Table 10.22). While only 23 hapū were identified, the Rūnanga member stated that there were still more hapū for this area.[59]

Table 10. 22 Ngāti Raukawa Hapu (ki t e Tonga) Listed by Te Rūnanga o Raukawa Inc. 2005[60]

Ngāti Raukawa Hapu (ki te Tonga) 2005				
Wehiwehi	Kapumanawawhiti	Tukorehe	Te Kopiri	Pareraukawa
Parewahawaha	Manomano	Kauwhata	Turanga	Whakatere
Takihiku	Koroki	Maiotaki	Rangatahi	Matakore
Pikiahu waewaepoupatate	Pikiahu waewae ki Tokorangi	Katihiku	Te Au	Huia ki Matau
Ngarongo	Waihurihia	Tamatehura		

Total Hapū = 23

The current Ngäti Raukawa Trust in Tokoroa listed the following constituent hapū in 2005 for Ngāti Raukawa ki Waikato (see Table 10.23). It must be noted that when this data was collected, the personnel imparting the information stated that there were definitely other hapū for this region,[61] nevertheless, only 17 are listed below.

Table 10. 23 Ngāti Raukawa (Waikato) Hapū Listed by the Raukawa Trust 2005[62]

Ngāti Raukawa (Waikato) Hapū 2005				
Ahuru	Koroki	Puehutore	Tarakaiahi	Wairangi
Haa	Kahukura	Ruru	Te Apunga	Werokoko
Hinerangi	Moekino	Takihiku	Te Kohera	Whaita
Kauia	Parekawa			

Total Hapū = 17

Although the 2005 lists for Ngāti Raukawa ki te Tonga and Waikato (see Tables 10.22 and 10.23 respectively) are not exhaustive, there are obvious discrepancies between the historical lists (e.g., the Maori Censuses, Maori Electoral Rolls) and the contemporary lists. It appears that these inconsistencies were comparable in terms of 'lost' tribes to those identified among the tribes of Waikato-Tainui but on a smaller scale.

[59] Personal communication with a member of Te Rūnanga o Raukawa Inc., Otaki, 14 October 2005.
[60] Idem.
[61] Personal communication with a member of the Ngāti Raukawa Trust, Tokoroa, 18 October 2005.
[62] Idem.

10.3.1.4 NGĀTI KAUWHATA - A 'LOST' TRIBE OF NGĀTI RAUKAWA

Intermarriage and community reformation over generations often resulted in 18th century hapū that belonged to more than one tribe. The difficulties encountered by some of the 19th century descent groups illustrate the attenuated nature of 18th century tribes.

The joining of another tribe and subsequent assumption of a new identity was one way that tribes sometimes became 'lost.' Ngāti Kauwhata is perhaps an example of this phenomenon. The people of Ngāti Kauwhata descend from the Tainui waka, stemming from the complex divisions among the descendants of Hoturoa. Kauwhata was not a descendant of Raukawa. Instead Kauwhata descended from Raukawa's uncle, Whatihua. This whakapapa relationship is shown in Diagram 10.3.

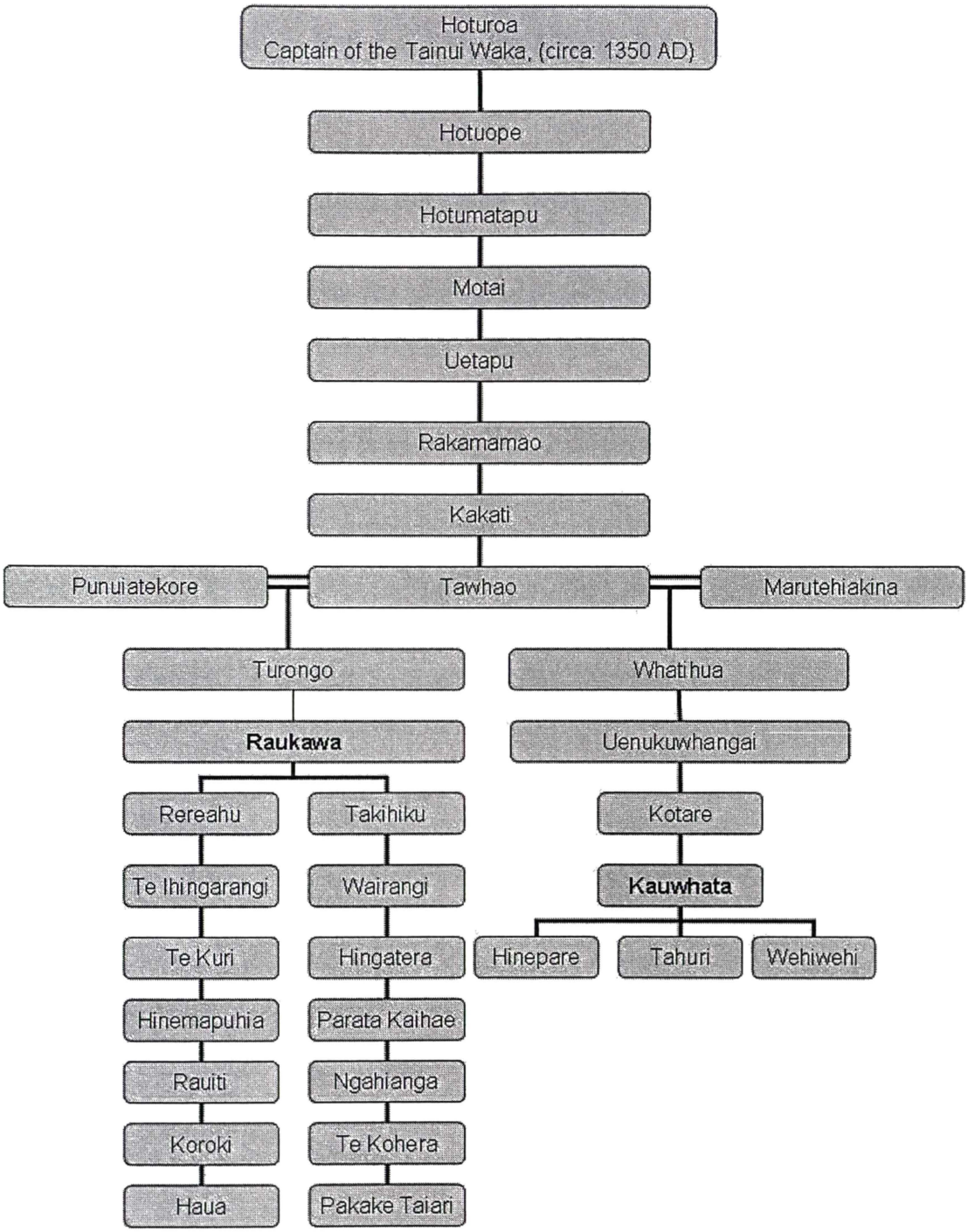

Figure 25 Ngäti Kauwhata, Hauä and Te Koherä Whakapapa

Diagram 10. 1 Whakapapa of Ngāti Kauwhata[63]

The primary criterion of membership of any Māori iwi tribes or hapū is direct descent from the founding ancestor. Neither marriage nor residence was in any way a substitute for descent. Hence Ngāti Raukawa and Ngāti Kuawhata should have been separate peoples. By the 18th century, Ngāti Kauwhata and its several ramified hapū (Ngāti Hinepare, Ngāti Tahuri, Ngāti Wehiwehi, Ngāti Werokoukou (Werokoko?) and Ngāti Ruru) lived in the Maungatautari district at certain places such as Rangiaohia, Puahoe, Pukekura and others. Their nearest neighbours were the many hapū of Ngāti Raukawa with whom there had been much intermarriage. Kauwhata had also intermarried with Ngāti Hauā and with other Waikato people such as Ngāti Korokī and Ngāti Apakura.

By the 18th century, many of the Ngāti Kauwhata hapū were equally descended from Korokī or his son Hauā or other Waikato ancestors as they were from Kauwhata, or as much from Raukawa and his early descendants as they were from Kauwhata. The various hapū were so intermixed that their early origins became blurred into a wider category – 'Tainui' - and irrelevant to their present circumstances. Hitiri Te Paerata of Ngāti Raukawa, Te Kohera and Wairangi, also kin to Ngāti Kauwhata, stated as a Crown witness in the Ngati Kauwhata Claims Commission in 1881:

> Ngatimaniapoto are ... of Waikato, and came in the same canoe (Tainui). Ngatikauwhata and Ngatiraukawa were known as one people. Ngatiraukawa are from Kauwhata, and Ngatikauwhata have come from Raukawa – doubly they are one people.[64]

McDonald, the agent for Ngāti Kauwhata then asked: 'for what reason are these people the same?' to which Hitiri replied: 'The tribes I have named are from Tainui. Ngatihaua is the same.' McDonald asked: 'Is that why you say they are one tribe because they came in the same canoe?' Hitiri replied: One tribe: Tainui is the canoe. Canoe and tribe are synonymous terms.' When asked if Tainui had later divided, Hitiri replied: 'Lately they are divided into Waikato, Ngatiraukawa, and Ngatimaniapoto. He was then asked where Ngāti Hauā fitted into this division; Hitiri defined this people as 'Waikato.'[65] Ballara noted that Hitiri was describing the widest possible category of people rather than a specific corporate group called either Ngāti Raukawa or Ngāti Kauwhata. Most of the other Māori witnesses, whether for Ngāti Raukawa, Ngāti Kauwhata or the Crown insisted that

[63] Jones, supra n 12 at 10.
[64] Hitiri Te Paerata *Ngati Kauwhata Claims Commission* in AJHR 1881, (G-2A) at 23.
[65] Idem.

Ngāti Kauwhata and Ngāti Raukawa were separate peoples.[66] In spite of intermarriage however, there remained a tribe called Ngāti Kauwhata. According to Tapa Te Whata, a Ngāti Kauwhata chief, they were a great people which could muster 800 to 1,000 fighting men.[67] The great Ngāti Hauā rangatira, Te Waharoa, and his son and grandson Wiremu Tamihana Tarapipi Te Waharoa and Tupu Taingakawa Te Waharoa, were also Ngāti Kauwhata.[68]

Given that Ngāti Kauwhata was such a prominent Tainui iwi (tribe) in the 18th and 19th centuries, one is inclined to ask what of this tribe today? Ngāti Kauwhata, as either a tribal iwi or hapū entity, is excluded from the current official 33 Waikato hapū list of the WRCSA 1995 (Table 10.2) and the current Raukawa ki Waikato (Table 10.23), Ngäti Hauā (Appendix XVI) and Maniapoto hapū lists (Appendix XVII) and the *Maori Fisheries Act 2004*[69] (Appendix XX). It appears therefore that the official identity of Ngāti Kauwhata as an iwi or even a hapū has been 'lost.' Utilising the various Waikato tribal lists mentioned earlier from 1840-1995 and 2004, it is interesting to note that the iwi Ngāti Kauwhata was excluded from Jones' map and tribal list (Table 10.5); Fenton's 1857 Waikato District list (Table 10.8); the AJHR Waikato Raupatu Hapu lists of 1878 and 1881 (Tables 10.10 and 10.11); the AJHR Landless Waikato Maori list of 1900 (Table 10.13); the Waikato constituent hapū gazetted in 1947 and 1948 (Tables 10.3 and 10.4); and the 33 hapū of the WRCSA 1995 (Table 10.2).

Ngāti Kauwhata was excluded from the 1874 Maori Census (Table 10.9) but one of its hapū – Ngāti Ruru – was included under the Upper Waikato area and it had a register of 7 people.[70] Ngāti Kauwhata was identified as a 'true and living' tribe (not hapū) in the 1878 Census (Table 10.10) identifying 129 people as Kauwhata.[71] The 1881 Census (Table 10.11) did not identify Ngāti Kauwhata at all but its hapū Ngāti Ruru is listed as a hapū of Waikato with 37 people for that year.[72] Ngāti Kauwhata was identified by a number of people in both the 1908[73] and 1949 Maori Electoral Rolls (Tables 10.15 and 10.16). Interestingly, those people who registered under Ngāti Kauwhata in the 1908 Electoral roll (Table 10.15) did so not as an iwi in its own right but as a hapū or sub-tribe of Ngāti

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[66] Ballara, A *Iwi: The Dynamics of Maori Tribal Organisation from c.1769 to c.1945* (Wellington: Victoria University Press,1998) at 148.
[67] *Ngati Kauwhata Claims Commission* in AJHR 1881, (G-2A) at 12, 14, 15, 19, 33.
[68] Ibid, at 8.
[69] Schedule 3.
[70] 'Approximate Census of the Maori Population 1874' in AJHR (G-7, 1874) at 5.
[71] 1878 Maori Census, Wanganui District, AJHR G-2 at 19.
[72] Onewhero District, AJHR 1881, G-3 at 14
[73] The following number of people recorded Ngāti Kauwhata as their respective hapu under a number of tribes in 1908: Ngāti Raukawa – 20; Ngāti Maniapoto – 3; Ngāti Hauā – 1, Rangitāne (Manawatu) – 1 and Ngāti Apa (Manawatu and Horowhenua) – 1. Ibid.

Raukawa.[74] What is also interesting is that Ngāti Kauwhata was listed by Māori in the Electoral Roll of 1949 (Table 10.16) as a hapū of Ngāti Hauā,[75] Ngāti Maniapoto,[76] Ngāti Raukawa,[77] Waikato;[78] Ngāti Apa[79] and Rangitāne.[80]

In more recent times, Ngāti Kauwhata has disappeared off official maps, census and iwi lists. Ngāti Kauwhata was, for example, excluded from the 1991, 1996 and 2001 Iwi Maori lists and it is excluded from the *Maori Fisheries Act 2004* Schedule of contemporary 'Iwi' tribes for fisheries resource allocations.[81] Although 2 traditional Ngāti Kauwhata hapū – Ngāti Ruru and Ngāti Werokoko – have been included in the 33 hapū of the WRCSA 1995 (Table 10.2) and as hapū of Waikato in the *Māori Fisheries Act 2004* (Appendix XX), Ngāti Kauwhata as an entity appears to be an officially 'lost' tribe of Tainui, Waikato, Raukawa, Hauā, Maniapoto, Rangitāne and Ngāti Apa.

10.3.2 SIMILAR TRENDS WITH OTHER TRIBES AND FIRST NATIONS

One may be inclined to ask whether the trend of iwi and hapū, tribes and sub-tribes waxing and waning considerably over time and space is specific to the Tainui 'tribes' of Waikato and Raukawa or whether the phenomenon of 'lost' tribes is general to other, if not all, Māori communities. The next section will examine briefly, but in a similar manner, the 'lost' tribes of Ngāi Tahu Whānui, to show that the phemonenon of 'lost' tribes was indeed general to other Māori groups. An example of a 'lost' tribe in North America will then be discussed to show that such phenomena is not confined to the Māori 'tribes' on the shores of Aotearoa but similar challenges have, in addition, occurred among the First Nations of North America.

10.3.2.1 THE 'LOST' TRIBES OF NGĀI TAHU

Like all Māori tribes, Ngāi Tahu tribal and socio-political organisation appear to have waxed and waned traditionally. However, colonisation affected the demise of tribal organisation, socio-political organisation and what appears to have been the extinction of some Ngāi Tahu 'tribes.' The 1886 AJHR provided a copy of the census of the Native residents of the Ngai Tahu Block in 1848, which provided the basis for the current 'Blue

[74] Over 40 people registered Ngāti Kauwhata as a hapu of Ngāti Raukawa while one listed Ngāti Kauwhata as a hapu of Waikato in 1908. Some listed Ngāti Kauwhata and its hapu, such as, Ngāti Wehiwehi and Ngāti Hinepare in the 1908 Electoral Roll. Others registered directly under the Kauwhata hapu – Ngāti Wehiwehi, Hinepare, Ruru and Werokoko. See New Zealand Government, supra n 505 and 506.
[75] One person registered Kauwhata as a hapū of Hauā in 1949. Mako, supra n 506 at 26.
[76] Three people registered Kauwhata to be a hapū of Maniapoto in 1949. Ibid at 36.
[77] Twenty people registered Kauwhata as a hapū of Raukawa. Ibid at 57.
[78] Three people registered Kauwhata to be a hapū of Waikato. Ibid at 75.
[79] Ibid at 17.
[80] Ibid at 53.
[81] Schedule 3. Refer to Appendix XX.

Book.'[82] The following table (Table 10.24) shows the Ngāi Tahu 'tribes' or 'hapū' that were listed in 1848.

Table 10. 24 Ngai Tahu 'Tribes' from the AJHR Ngai Tahu Kaumatua list 1848[83]

Ngai Tahu 'Tribes'				
Hamua	Kanaku	Pokihau	Tawaiteraki	Tueanuku
Hapa	Kaweriri	Puneke	Tawakiteraki	Tukete
Hapuiti	Kaweriweri	Putete	Teaotaumarewa	Tuketemamoe
Hatoka	Koki	Rakai	Teatawiua	Tuna
Hikuroroa	Koko	Rakaihikuroa	Tekahukura	Turakautahi
Hinapuariari	Kopiha (Kopihi)	Rakaimamoe	Tepaihi	Turakipawa
Hinarau	Kura	Rakewakaputa	Terakiamoa	Tuteauka
Hinekakai	Kuware	Raki	Terakitauneke	Tutekawa
Hinekata	Mahaki	Rakiihia	Terakitawio	Uakaue
Hinekura	Makihikihi	Rakiwakaputa	Terakiwhakaputa	Uakehu
Hinepa	*Mamoe*	Rakiwaputa	Terangihokaia	Wairaki
Hineteao	Manaia	Tahupo	Terehe	Wairua
Hinetewai	Maru	Tahupotiki	Teropuaki	Waitai
Huikai (Huekai)	Mateka	Tamakaitaki	Teuataki	Waiwai
Huirapa	Moki	Tamateraki	Tihapuiti	Wakakino
Hurihia	Moruka	Tamatiraki	Tomoware	Wata
Huruhaka	Ngatimu	Tamaueraki	Tu	Wera
Ikatutahi	Pakihau	Taoka	Tuahuriri	Whakai
Kahu				

Total 'Tribes or Hapū' = 91

As shown above in Table 10.24, the AJHR lists a large number of Ngāi Tahu tribes for 1848. It is worthwhile noting that the use of the term 'tribe' is likely to be synonymous with the word 'hapū.'

10.3.2.2 OFFICIAL LISTS IDENTIFYING NGĀI TAHU TRIBES/HAPŪ

The following table (Table 10.25) represents a list of Ngāi Tahu 'tribes' and 'hapū' prepared by different officials for different purposes. In 1858, Walter Mantell prepared a list of the Ngāi Tahu tribes for the purposes of purchasing Ngāi Tahu lands; the 1861 list was prepared by Walter Buller for establishing reserves for Ngāi Tahu people; and the data for the 1874 and 1878 AJHR lists were gathered during the Māori censuses.

[82] The 'Blue Book' is the 1848 Kaumātua Census that records the Kaumātua of Ngāi Tahu who were alive in 1848 and is used to verify and therefore define contemporary Ngai Tahu citizenship. Ngāi Tahu Maori Trust Board *Ngaitahu Kaumatua Alive in the 1848 as established by the Maori Land Court in 1935 and Ngaitahu Census Committee in 1929* (Christchurch: Ngāi Tahu Māori Trust Board, 1967).

[83] 'Census of the Middle Island Natives, Copy of the Native Residents in 1848 in the Ngaitahu [sic] Block' in AJHR 1886, G-16 at 1-6.

Table 10. 25 Ngai Tahu Tribes/Hapu identified by Mantell (1858), Buller (1861) and in the AJHR Maori Censuses (1874-1878)

Mantell's Ngai Tahu 'Tribes' List 1858[84]				Total Tribes
Hawea Hikatutai Huirapa Hurihia Kahukura Koko	Mamoe Matamata Moki Mokihi Rakiamoa Tamahaki	Taoka Teaotamarewa Terakiamoa Terakimoa Teruahikihiki	Tuahuriri Tuapawa Tuhaitera Turakipawa Waewae	22
Buller's Ngai Tahu 'Hapu' List 1861[85]				
Hinetewai Huirapa Mahaki *Mamoe*	Taoka Teatawhiua Teirakehu Teraki	Terangiamoa Terongowhakaputa Teruahikihiki	Tuahuriri Tuauriri Tutehuarewa	14
Ngai Tahu Tribes List AJHR 1874[86]				
Huirapa Mako *Mamoe*	Ngai Tahu Tarewa	Te Ruahikihiki Tuahuriri	Tutehuarewa Wheke	9
Ngai Tahu 'Hapu' List AJHR 1878[87]				
Huirapa Mako	Tarewa Teruahikihiki	Tuahuriri Tutehuarewa	Wheke	7

Upon reviewing the number of tribes officially recognised for Ngāi Tahu, there was indeed a dramatic decline in the 10 year period from 1848-1858. In Table 10.24, according to the 1848 Kaumatua list, the number of Ngāi Tahu tribes was estimated at 91. Within a 10 year period, this number had declined to only 22 tribes in 1858 (Table 10.25). Similarly, in 1861, the number had declined again to 14 tribes and according to the Māori censuses, only nine tribes were recorded in 1874 and seven tribes in 1878.[88]

As mentioned earlier, the details of the Southern Mäori Electoral Roll 1908 with triba information on Ngāi Tahu has been unfortunately lost. Still, the list of Ngāi Tahu hapī

[84] 'Memorandum' (Sale of Ngai Tahu Lands) in AJHR 1858 C-No. 4, at 2-5. This Memorandum listed the survey boundaries for the sale of some of the Ngāi Tahu lands as well as providing a list of the Ngāi Tahu rangatira who agreed to the sale with a list of their tribes.

[85] Walter Buller 'Reports on the State of Native Affairs on the Arrival of Sir George Grey' in AJHR 1862, E-No. 7 at 35 and 37. This report provided a list of some of the 'hapu or sub-divisions' and the 'principal men' of the Ngāi Tahu 'tribe' in 1861.

[86] 'Approximate Census of the Maori Population, 1874' in AJHR 1874, G-7 at 18. The total Ngāi Tahu population for 1874 was listed to be approximately 1,641.

[87] 'Native Census Enclosures 1878' in AJHR 1878, G-2 at 25. The Ngāi Tahu population for 1878 was estimated to be approximately 1,652.

[88] Interestingly, the 1881 Maori census did not provide any hapu or 'tribes' for Ngāi Tahu at all. Instead, th census listed only the total population of Ngāi Tahu as 2,161. See 'Census of the Maori Population, 1881' i AJHR 1881, G-3 at 26. Unfortunately, the Southern Maori Te Waipounamu Electoral Roll of 1908 has bee misplaced and therefore is not referred to here.

gathered in the Southern Maori Electoral Roll in 1949 is available and is shown below in Table 10.26.

Table 10. 26 Ngai Tahu Hapu from the Southern Maori Electoral Roll 1949

Ngai Tahu Hapu				
Ahuriri	Irekehu	Moke	Rangitane	Te Raki
Ake	Kahukura	Moki	Rangiwhakaputa	Te Raupu
Apa	Kai Tipahi	Morehu	Rikiriki	Te Waipounamu
Awa	Kaitoka	Moruka	Rongomai	Toa
Awaia	Kaka	Muaupoko	Rongomai-Mamoe	Tu
Hapuiti	Kawariri	Ngaterangi	Ruahikihiki	Tuahiwi
Hawea	Koata	Paaka	Ruapo	Tuahuriri
Hine	Koko	Pahauwera	Tahinga	Tuapaua
Hinekawau	Kuia	Pahi	Tahupotiki	*Tuhuru*
Hinekura	Kura	Puneke	Takaroa	Tukoko
Hinemaku	Kuri	Rahitamau	Tako	Tutehuka
Hinematua	Kuru	Rakeha	Tanetiki	Urihia
Hinemihi	Mahaki	Rakehu	Taoka	Urukehu
Hinetakaroa	*Mamoe*	Rakiamoa	Te Aotaumarewa	Waea
Hinetewai	Mamori	Rakiwhakaputa	Te Atawhiua	Waewae
Hinewaka	Marewa	Rangiamoa	Te Autaumarewa	*Waitaha*-Huirapa
Hou	Maru	Rangitamau	Te Hapueti	Wheke
Huirapa				

Total Hapū = 86

In contrast to the official lists documented in Table 10.25 which suggest the demise of Ngāi Tahu tribes, the above list (Table 10.26) shows an equally dramatic increase in hapū representation. Notwithstanding this massive renaissance, the 86 hapū recorded in the 1949 Electoral roll, has again been whittled down by legislation to what appears to be a mere five Ngāi Tahu hapū. In addition, both Ngāti Mamoe and Waitaha (which were traditionally recognised in the above lists as either 'tribes' or hapū of Ngāi Tahu) have been absorbed into the newly established tribe of Ngāi Tahu 'Whānui' pursuant to the *Te Runanga o Ngai Tahu Act 1996*. Section 9 of the Act states:

> Meaning of Ngai Tahu and Ngai Tahu Whanui: (1) For the purposes of this Act and any other enactment, unless the context otherwise requires, 'Ngai Tahu' and 'Ngai Tahu Whanui' each means the collective of individual's who descend from the primary hapu of Waitaha, Ngati Mamoe, and Ngai Tahu, namely Kati Kuri, Kati Irakehu, Kati Huirapa, Ngai Tuahuriri, and Te Ruahikihiki.

The Charter of Te Rūnanga o Ngāi Tahu is more clear on the hapū of Ngāi Tahu in clause 1.1 'Ngai Tahu Whanui':

> Ngai Tahu Whanui' means the collective of individuals who descend from the five primary hapu of Ngai Tahu, Ngati Mamoe and Waitaha, namely Kati Kuri, Ngati Irakehu, Kati Huirapa, Ngai Tuahuriri and Ngai Te Ruahikihiki.[89]

Subsequent to the *Te Runanga o Ngai Tahu Act 1996*, the following list (see Table 10.27) of primary hapū are now the 'official' hapū of Ngāi Tahu.

Table 10. 27 Primary Ngāi Tahu Hapu Identified in the Ngāi Tahu Claims Settlement 1998[90]

Ngāi Tahu Tribes				
Huirapa	Kuri	Tahu	Tuahuriri	Waitaha
Irakehu	Mamoe	Te Ruahikihiki	Waewae	Wheke

Total Tribes = 10

10.3.2.3 SUMMARY OF THE 'LOST' TRIBES/HAPŪ OF NGĀI TAHU

As the tribes/hapū of Ngāi Tahu are analysed from 1848 to the present day, it has become increasingly apparent that the names and number of tribal groups has shown incredible changes over time. The customary representation rights of Ngāi Tahu tribes have fluctuated from 91 'tribes' in 1848 (see Table 10.24) to seven hapū in 1878 (see Table 10.25) then increased to 86 hapū in 1949 (Table 10.26) and declined again to 10 'official' hapū in the Ngai Tahu Claims Settlement (see Table 10.27). It appears that this trend of tribal growth and attrition is not limited solely to Waikato or other Tainui tribes such as Ngāti Raukawa. In fact, Ngāi Tahu has experienced similar challenges in their quest to realise their indigenous rights to internal self-determination which includes the freedom to be themselves and to govern themselves. As reviewing the changes for all Tainui iwi and hapu names and numbers is beyond the scope of this research, a collection of tables is included in Appendices XVI and XVII that reflect similar trends among two other prominent Tainui iwi - Ngāti Hauā and Ngāti Maniapoto respectively.

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[89] Clause 1.1 Interpretation: Ngai Tahu Whanui, *Charter of Te Rūnanga o Ngai Tahu* (TRONT, Christchurch, 27 September 1997) at 5.

[90] As prescribed by legislation pursuant to s. 9(1), *Te Runanga o Ngai Tahu Act 1996*. Ngāti Wheke implicitly and Kati Waewae explicitly are also included in s. 9(2), First Schedule, *Te Runanga o Ngai Tahu Act 1996* and clause 1.1: Interpretation: 'Members' *Charter of Te Runanga o Ngai Tahu* (TRONT, Christchurch, 27 September 1997) at 4.

10.4 'LOST' FIRST NATION TRIBES IN CANADA - BEOTHUK

The North American experience of 'lost' indigenous tribes seems to have been more extensive and brutal than the experience among Mäori in New Zealand. It appears that numerous indigenous tribal groups in the Americas have become 'lost' or extinct numerically, culturally and politically, through both legal artifice and outright genocide. One Canadian example is the Beothuk nation of Newfoundland. Very little is known about these people except that they were semi-nomadic hunter/gatherers who were organised into small independent bands of extended families that moved seasonally between the rich Newfoundland fishing coast during summer and rugged interior in the winter.

With contact, the interests of the European settlers were in competition with the Beothuk, which escalated into open conflict. From early encounters, hostile incidents accumulated into a feud that embittered both sides as the development of the dry fishery meant that European fishermen needed shore space for the drying racks often erected on sites favoured by the Beothuk for summer fishing. The island geography of Newfoundland meant that there were practically no alternatives for the Beothuk when traditional subsistence patterns were disrupted Consequently, the Beothuk retreated as far as they could into the interior of the island, occasionally emerging to attempt the traditional exploitation of the sea, if they were not frustrated by the European presence. Alternatively, they raided any European gear they could find. Once haphazard European settlement began, the feuding turned into an open hunting season against the Beothuk. Armitage noted that the killing of indigenous men, women and children occurred in Newfoundland and all but a remnant of the Beothuk population had been murdered.[91] Newfoundland was not declared a colony until 1824 but by this time there were practically no Beothuk left – the last known Beothuk was a woman named Shawnadithit who died of tuberculosis in 1829.[92]

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[91] Armitage, A *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (UBC Press, Vancouver, 1995) at 5. See also Howley, J, *The Beothucks or Red Indians* (Cambridge University Press, Cambridge, 1915); Upton, L 'The Extermination of the Beothucks of Newfoundland' in *The Canadian Historical Review* (Vol. 58, 1977) at 144-53; Rowe, F, *Extinction: The Beothuks of Newfoundland* (McGraw-Hill Ryerson, Toronto, 1977); and Pastore, R, 'Fishermen, Furrier and Beothuks: The Economy of Extinction' in *Man in the Northeast* (Vol. 33, 1987) at 47-62. For references on the extermination of other Indigenous Peoples in the Americas, see the article by the German-Jewish-Anishinabe woman, Liliam Friedberg, 'Dare to Compare': Americanizing the Holocaust' in *American Indian Quarterly* (Vol. 24, Summer 2000) at 3; Merk, F *Manifest Destiny and Mission in American History: A Reinterpretation* (Knopf, New York, 1963); Novik, P, *The Holocaust in American Life* (Houghton Mifflin, New York, 1999); Axtell, J, *Beyond 1492: Encounters in Colonial North America* (Oxford University Press, New York, 1992); Jaimes, A (ed) *The State of Native America: Genocide, Colonization and Resistance* (South End Press, Boston, 1992); Katz, S, 'The Depopulation of the New World in the Sixteenth Century' in *The Holocaust in Historical Context: Volume I: The Holocaust and Mass Death Before the Modern Age* (Oxford University Press, New York, 1994) at 87; Duran, E *Native American Postcolonial Psychology* (Sunny Press, New York, 1995); La Duke, W, *All Our Relations: Native Struggles for Land and Life* (South End Press, Cambridge, 1999)

[92] Interestingly, the island of Tasmania in Australia became a colony in 1803 as a penal settlement and genocide had occurred there. The extermination of the Aboriginal population, however, proceeded more

Dickason, however, mentioned that the oral history of the Mi'kmaq nation asserts that the Mi'kmaq were intermarrying with the Beothuk at the time of European contact and that some Mi'kmaq today claim Beothuk ancestry.[93] If this is so, could those of mixed Mi'kmaq-Beothuk ancestry claim authentic customary rights to Beothuk representation today? Could these same people resurrect the 'lost' Beothuk identity to re-emerge as a First Nation today? These and many important questions are for those people and their respective governments to work out, if at all. For the purposes of the discussion at hand, it appears that the trend of tribal attrition and 'lost' tribal identity is not limited to Waikato, Ngāti Raukawa and Ngāi Tahu in New Zealand. Some First Nations in Canada such as the Beothuk have experienced similar (although more brutal) experiences, in terms of being 'lost' as a nation politically and culturally.

10.5 CONTEMPORARY TRIBAL FORMATION – SCOPE FOR RESURRECTING OLD AND FORMING NEW TRIBES

The creating, dividing, recreating and disappearing of hapū, iwi and First Nations has been an intense intergenerational dynamic traditionally. The present research has focused on the disappearance of over 100 lost hapū within Waikato-Tainui, Raukawa and Ngāi Tahu over approximately a 150-year period in New Zealand, and the Beothuk First Nation over a 500 year period in Canada. But the process is an open two way process – past and future. One may thus be inclined to question the possibility of resurrecting past hapū and iwi for contemporary purposes or even the creation of new hapū and iwi tribes in the nature of traditional Māori social organisation processes. Indeed, the Law Commission discussed the notion of resurrecting former hapū, albeit briefly, when they noted:

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rapidly than the Beothuk in Newfoundland. The last full-blood Tasmanian Aborigine, also a woman, apparently died in 1876, less than a century later. See Napier, J, *Colonisation* (London, 1835) and King, P, *The Aborigines Protection Society: Chapters in its History* (London, 1899). The Aborigines Protection Society was formed in 1837 with the avowed aim of securing for all men an equality of natural rights. Through the lobbying efforts of Sir Thomas Buxton and the Aborigines Protection Society, a Select Committee of the British House of Commons investigated the problems of colonisation within the British Empire, which culminated in its famous *House of Commons Select Committee Report on Aborigines (British Settlements) 1837* (GBPP, June 1837/425). This Report was a remarkable expression of liberal opinion in the treatment of Indigenous Peoples put forward by any Parliamentary Inquiry in the 19th century which subsequently succeeded in shifting colonial policy from one of extermination of Indigenous Peoples to assimilation. Extermination in the Report referred specifically to the experiences of Indigenous Peoples in the Caribbean, Tasmania and other parts of Australia and the Beothuk of Newfoundland. See Halstead, J, *The Second British Empire: Trade, Philanthropy and Good Government, 1820-1890* (Greenwood Press, Westport, 1983); Reynolds, H *The Law of the Land* (Ringwood, Penguin, Victoria, 1987) and Armitage, ibid.

[93] Dickason, P *Canada's First Nations: A History of the Founding Peoples from Earliest Times* (Oxford University Press, Ontario, 2002) at 77. Later, on the Northwest Coast, First Nation disappearances would take another form, that of smaller groups merging with larger ones. Dickason noted that at least five nations disappeared in this way during the 19th century. Idem. For other references, see

> Many hapu, for a number of reasons, were assimilated with or integrated into other hapu and their separate identity became submerged. In recent times they have re-emerged and claimed their former status. The process is only valid when there is acceptance by all of their re-emergence. In the absence of war it is important to note that tribal bodies wishing to reassert their former status ought to do so through a consensual process relying on customary concepts such as Whānaungatanga.[94]

Traditional Māori socio-political groups waxed and waned under differing circumstances so that the traditional socio-political organisation of Māori groups was fluid and dynamic. Scholars have re-examined the relative importance of the concepts 'iwi' and 'hapū,' and have been critical of the rigid and static models of earlier writers such as Elsdon Best. Angela Ballara offered a valuable insight on the traditional place of hapū:

> Later 20th century scholarship has modified this model of tribal organisation, emphasising the role of the hapu in the era before European contact as the largest effective corporate group which defended a territory or worked together in peaceful enterprises. The term 'sub-tribe' has usually been dropped since this time, as it hardly fits with the new understanding of the hapu's perceived role as the effective, independent political unit of pre-contact Maori society.[95]

Metge added that traditional Māori socio-political organisation was dynamic, fluid and complex and changes have taken place and continue to take place in its social forms.[96] George Clark, the first Māori protector, made some early observations in 1843 about the traditional process of creating, dividing, recreating and disappearing hapū:

> If, as is the general impression of all who have given their attention to this subject, the natives emigrated at different periods, we have at once a clue to the origin of titles. Each emigration landed, subdued, and laid claim to a certain district, now claimed by their posterity; each party would most probably acknowledge a leader, either nominated or assuming such character by virtue of superior prowess, who would naturally be considered as the first chief of the 'iwi' or tribe. His children, with a portion of the 'iwi,' or tribe, who might attach themselves to a particular child, may be considered as giving rise to the *different 'hapus*,' or lesser tribes, who, although a part of the original family, would form a separate and distinct community, uniting, however, in times of war, to repel the common enemy, but claiming and exercising independent interests in the soil in times of peace.[97] [emphasis added].

It appears that Māori socio-political groupings waxed and waned in time and space with different circumstances and there was scope traditionally for the formation of new groups whether at the hapū or iwi level.

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[94] Law Commission, *Maori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, 2001) at 17.
[95] Ballara, supra n 66 at 19.
[96] Metge, J 'Iwi: Word and Meanings' (Unpublished Paper in author's possession).
[97] George Clark to the Colonial Secretary, *BPP* (New Zealand), (Vol. II, 17 October1843) at 356.

In a remarkably similar manner, the traditional socio-political organisation of the Nisga'a was fluid and dynamic waxing and waning over time and space. Amelia Morven, a Nisga'a elder commented:

> Traditional Nisga'a society had, and still has three basic levels of organisation: the village; the phratry or clan (*pdeek* in Nisga'a); and the house or matrilineal family group (*wilp* in Nisga'a). Within some of the villages and some of the *pdeek* there was another, a fourth level of organisation, the *wilnaat'ahl.* The *wilnaat'ahl* were a complex of houses or *wilp*, each of which had their own chiefs, one of whom was the recognised head chief of the *wilnaat'ahl.* The various different *wilnaat'ahl* appear to have arisen in different ways. Some of them ...are houses that were split off from one *wilp* as the group grew too large to continue being managed as a single unit; still others are amalgams of *wilps* brought together by other events or decisions in Nisga'a social history.[98]

Other Nisga'a added that sometimes a new *wilp* splits off an older one and when this happens some of the names and territories of the older *wilp* need to be given to the new *wilp*, while at other times, one *wilp* would be adopted by another. The process by which the new *wilp* emerges is recorded in the *adaawak* (stories) at a potlatch ceremony of both *wilp* and everyone knows that the new *wilp* used to be part of the older *wilp.*[99] The reasons for a new *wilp* include a serious disagreement between the ranking members of a *wilp*, sometimes a long famine or other terrible event caused a *wilp* to leave its home and journey to find new territory, sometimes part of a travelling *wilp* might find a home while the rest of the *wilp* kept moving.[100] A specific example of the formation of a new *wilp* was the *Gitwilnaak'ii Laxgibuu* of Gitlaxt'aamiks:

> The three brothers were *K'eexkw* (the eldest), *Gwingyoo* and the *Duuk'* (the youngest). When the younger brothers moved, *K'eexkw* had *Gwingyoo* build his *wilp* on the left and *Duuk'* on the right. They then became known as the *Gitwilnaak'ii* [which] translates as 'separate but of one.'[101]

Ballara recently commented on the traditional process of forming new groups within Māori society:

> It was a characteristic of hapu that they tended to break away from earlier groups and become known by new names to mark change in their lives. Often it was as simple as the multiple adult sons of a parent of rank, their chief, taking his name to mark themselves and their

[98] Testimony of Amelia Morven (Nilk'ililw) of the Wolf *(W:k;eexkw) wilp*, in Nisga'a Tribal Council, *The Land and Resources: Traditional Nisga'a Systems of Land Use and Ownership* (Vol. IV, Wilp Wilxo'oskwhl Nisga'a Publications, Ayuukhl Nisga'a, Nisga'a Tribal Council, New Aiyansh, B.C, 1995) at 17.
[99] Boston, T, Morven, S & Grandison, M, *From Time Before Memory* (School District No. 92, Nisga'a, P.O. Box 240, New Aiyansh, B.C, 1996) at 34.
[100] Idem.
[101] Idem.

> families off as a set of persons distinct from the larger group from which they now considered themselves a branch.[102]

Ballara also discussed the importance of multiple wives of certain chiefs and their influence on the formation of new tribes:

> The numerous adult children of great chiefs with multiple wives might differentiate themselves into sets by the names of their various mothers; this was the more likely if the mothers derived from different hapu or iwi.[103]

Ballara added that sometimes hapū took names from incidents rather than from ancestors, changing their ancestral names to names taken from events which happened to their people and this new name might remain permanent or last only for a short time, the hapū then reverting to the ancestral name. Elsdon Best, for example, noted that the people from Ohiwa in the Bay of Plenty known as Ngāi Te Hapū were defeated at sea while being pursued by another group and they afterwards took on the name Te Patuwai (killed at sea).[104] Sir Apirana Ngata, in correspondence with Dr Peter Buck in 1928, commented on this traditional process for creating a new tribe:

> I can see that the whakapapas will enable one to work out the actual growth & development of the *hapu* & tribal organisations & even to determine the actual period & circumstances under which tribal appellations were applied. One can see the process at work today. The Whānau-a-Apanui children are drowned while crossing 'Motu' - the hapu name 'Ngati Horomoana' comes into being at once. A generation or more ago the Manaua Te Rangitaotahi living at Tikapa on the south-side of Waiapu opposite Rangitukia lost a couple of canoe loads of their people while returning from Waipare, south of Tokomaru. There had been some great 'hapa' in ceremonial, which brought up an 'apuhau' from the South-East, causing the disaster. This [new] *hapu was called Ngati-Puae (Puwai) & its former name is never heard.*[105] [emphasis added].

Sir Apirana Ngata, moreover, reported to Dr Peter Buck on a Maori Land Development Scheme involving migrant labour from other tribes in the Te Arawa area. Ngata discussed the emergence and recognition of a 'new' community:

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[102] Ballara, supra n 66 at 182. Hana O'Regan provides a brief but interesting discussion on the 'new urban tribe' referring to contemporary Māori demographic realities – approximately 80% of Māori live in urban centres outside of their traditional tribal territories and have formed 'new' urban tribes focusing on their general Maori identity rather than tribal affiliation. O'Regan, H, *Ko Tahu, Ko Au: Kāi Tahu Tribal Identity* (Horomaka Publishing, Christchurch, 2001) at 108-9.

[103] Idem.

[104] Best, E, *Tuhoe: The Children of the Mist* (Reed, 4th ed, Polynesian Society, Vol. I, 1996) at 82. But such groups still reckoned their membership from a founding ancestor, in this case, a rangatira named Te Hapu. See evidence of Hone Te Whetuki of Te Patuwai re Motiti, *Maketu Minute Book* (Vol. 1, Maori Land Court, Waiariki) at 28. It is also noted here that Te Patuwai is a contemporary hapu of Ngāti Awa with a population of 1,000 members in 2002. See 'Ngati Awa Hapu Database Count' in *Te Runanga o Ngati Awa Charter Draft* (Te Rūnanga o Ngāti Awa, Whakatane, 2004).

[105] Sorrenson, K, *Na To Hoa Aroha,* (Vol. I, Auckland University Press, Auckland, 1987) at 103.

> The Horohoro Māori population should reach nearly 150 next winter. Already the first Kahungunu- Arawa intermarriage has taken place. On Xmas day Fred Bennett and a bevy of Māori clergy consecrated a tablet on the Rongomaipapa rock, he tohinga no te marae [dedicating the marae], and Mita dubbed the combined colony NGATI-PUNGAPUNGA [the tribe of the pumice lands], and formally created it a sub-tribe of the great Arawa confederation. In your social organisation notes this fact should be registered.[106]

Buck followed up with some useful observations about the new Kahungunu-Arawa (tribe?) group:

> You have a community developing under your eyes... But the 'ure' [descent] is always a connecting link. Marriages take place and the two communities become allied. As war on either side is now impossible, you will probably have the development of a mixed Kahungunu-Arawa tribe commencing from the marriage you write about.[107]

Dr Joan Metge also recorded the formation of a number of new iwi tribes earlier in the 20th century:

> According to its elders, Ngāti Kahu of Whaingaroa won recognition from representatives of many tribes assembled at Rotorua in 1920 of the visit of Prince of Wales, when their spokesmen successfully argued a case based on independence in pre-European times. Ngāti Ranginui of Judea (Tauranga) asserted and gradually re-established a separate identity during the 1950s, under the leadership of Maharaia Winiata. On the other hand, Uri-o-Hau, formerly a tribe in its own right, is usually classified today as a *hapū* of Ngāti Whatua.[108]

The current New Zealand Crown policy of grouping smaller groups together (or 'large natural groupings') for settlement negotiations means that rather than smaller groups such as hapū being able to enter into direct negotiations with the Crown, they are forced to amalgamate together under the banner of an iwi or a sui generis body constructed for the purpose of settlements. The potential for smaller groups to have their interests (identity and representivity) prejudiced in this process is significant, as the interests of the larger group could eclipse their concerns and aspirations. The Court of Appeal emphasised, however, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*[109] that the fisheries benefits are to be distributed to 'iwi' but on the basis that:

> ... hapū, whānau and individual Māori may be acknowledged as the ultimate beneficiaries in the wider sense, but the law has been interpreted to require them to receive their benefits through iwi structures.[110]

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[106] Ibid, at 95.
[107] Ibid, at 113.
[108] Metge, J *The Maoris of New Zealand: Rautahi* (Routledge & Kegan Paul, London, 1967) at 131-2.
[109] [2000] 1 NZLR 285, at 370-371.
[110] Te Ohu Kai Moana, *Annual Report* (Te Ohu Kai Moana, Wellington, 1998) at 15.

Early s. 30, *Te Ture Whenua Maori Act 1993* Maori Land Court determinations on group representation discussed this issue in *Re Tararua District Council*[111] and the *Ngati Toa Rangatira Decision.*[112] Ironically, the Maori Land Court in this case recognised the dynamic nature of Māori society, past and present, and acknowledged that there was scope for new hapū to emerge, and that tangata whenua status should not be locked into a definition based on the Native Land Court perception of the situation as at 1840. In *Re Tararua District Council*[113] the Court noted that some 'were trying to revive and recreate a new tangata whenua.'[114] The Court additionally acknowledged that many hapū were assimilated or integrated with other hapū and their separate identity became submerged because of a variety of factors not the least being questionable Crown dealings or Native Land Court determinations of title. While some 'lost' hapū in recent times have re-emerged and may seek recognition of their former status, the Court noted that this process is 'only valid when there is acceptance by all of the re-emergence particularly by the hapū that has harboured them.'[115] The Court added: 'tribal bodies wishing to reassert their former status ought to do so through a consensual process relying on customary concepts such as whānaungatanga.'[116]

Commenting on this case, Mikaere noted that it seems to be:

> ... unduly harsh on those hapu who were, through the fault of the Crown and the Native Land Court, deprived of their distinct identity, to now be forced into a position where they must convince the hapu or iwi into which they were assimilated that they should be allowed to re-emerge.[117]

The Waitangi Tribunal noted in 1999 'often bitter' struggles between hapū which were 'thought once to have died' ['lost?'] resurface when claims are heard and settlements negotiated.'[118] Current Crown policies such as the Fisheries allocations and Treaty settlement negotiations with 'large natural groupings' are powerful imperatives against presently dominant hapū or iwi agreeing to the 're-emergence' of others. An indication of how dangerous it may be to allow the existence of distinct 'lost' hapū and iwi to be

[111] *Re Tararua District Council* (Māori Land Court, Vol. 138, *Napier Minute Book*, 1994) at 85.
[112] *Ngati Toa Rangatira Decision,* (Vol. 21, *Nelson Minute Book,* Te Waipounamu, 1994, Judge Hingston) at 1.
[113] *Re Tararua District Council* (Māori Land Court, Vol. 138, *Napier Minute Book*, 1994).
[114] Ibid, at 87.
[115] Ibid, at 90.
[116] Idem.
[117] Mikaere, A, 'Maori Issues' in *New Zealand Law Review* [1995] at 143.
[118] Comments reproduced in Tom Bennion 'Whanganui River claims of Atihaunui and Tamahaki' in the *Maori Law Review* (March 1999) at 4.

determined by other hapū and iwi was mentioned in past statements by Te Ohu Kai Moana (TOKM) – the Mäori Fisheries Commission - before allocation under the fisheries settlement can proceed. The tribal recognition process requires validation of 'iwi' status and such validation will depend increasingly on acknowledgement by other 'iwi.' Indeed, TOKM noted in 1995:

> So, if all neighbouring Iwi deny the Iwi status of a claimant group, then TOKM will consider removing that purported Iwi from the final list of Iwi.[119]

That a statutory body should be in a position to 'validate' and draw up a 'final list' of 'iwi' is an extraordinary situation, one that is just as fundamentally inconsistent with the *Treaty of Waitangi* as was the ill-fated *Runanga-Iwi-Act 1990*. That 'iwi' should be given such blatant encouragement to deny recognition to any potential competitors for shares in fisheries assets appears to be little more than a cheap divide and rule tactic. It is, however, entirely consistent with the Crown's persistent attempts to treat a single body with which it can consult as the voice of all Māori. Those iwi who successfully deny the existence of others stand to gain much from doing so. It needs to be said that they will effectively be assisting the Crown in its efforts to rationalize iwi into a small number of representative conglomerates with whom it can do business, not simply with regard to fisheries but across the full spectrum of Crown-Māori interaction.[120]

In 1998, Sir Tipene O'Reagan, then chairman of TOKM, discussed a possible Fisheries Settlement allocation model with benefits going to iwi rather than 'known,' 'lost' and 'new' hapū. O'Reagan noted:

> It follows as a matter of simple logic that the return of wrongfully alienated fisheries assets should be the original owners. Contrary to the claims made in several corners, we know who is the closest contemporary expression of that ownership – Iwi. ... I can hear the counter chorus, 'No. They belong to hapu. It was hapu who signed the Treaty!' This strident cry chooses to ignore the fact that at least 1,000 hapu are probably in existence today, and knowing human nature, another 1,000 would soon be plucked from oblivion were we to allocate to hapu. Beyond the number, the intense intergenerational dynamic of hapu – creating, dividing, recreating and disappearing – makes it functionally impossible to allocate to those outside the group which contains it, the iwi. ... Common sense dictates that to fractionate the asset into small units would be an administrative nightmare, let alone the strong arguments against vesting such economically non-viable packages.[121]

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[119] Te Ohu Kai Moana, *Te Reo o Tini a Tangaroa: Newsletter of the Treaty of Waitangi Fisheries Commission,* (No. 23, February 1995) at 6.
[120] Mikaere, supra n 117 at 144.
[121] Te Ohu Kai Moana, *Annual Report* (TOKM, Wellington, 1998).

The author concurs with the common sense approach to prevent the fragmentation of the fisheries resource and human nature 'plucking hapū from oblivion.' But a fundamental aspect of traditional tikanga Māori is acknowledgement. When one analyses *pōwhiri* (welcoming ceremonies), *tangihanga* (funerals), *whakapapa* (genealogy), *whakataukī* (proverbs) and *pepehā* (tribal mottoes)– there is a strong emphasis on acknowledgement - of the past, of *tupuna* (ancestors), whānau connections, hapū and iwi; an acknowledgement of *nga Atua* (the Gods) and so forth. Furthermore, what is also important in a contemporary Treaty settlement context is an acknowledgement of the traditional processes of socio-political group formation among Māori that included scope for the formation of new hapū under certain contexts, the resurrection of 'lost' hapū and the submergence or aggregation of currently recognised hapū and iwi under certain circumstances such as for economies of scale. Does the current Treaty settlement process accommodate for such processes?

In addition, perhaps what may have assisted O'Reagan's dogma above is an acknowledgement of these traditional processes – that perhaps hapū were the main political corporate group of traditional Māori social organisation and there was scope for group waxing and waning but given the fragmentation and tendency for hapū proliferation as well as administrative logistics TOKM preferred to allocate to groups of hapū, that is, iwi.

There is likely to be more debate and litigation over the customary, legal or statutory definition and representation of iwi, hapū and perhaps even whānau, the resurrection of 'lost' hapū and the creation of new hapū, in addition to the representation of urban Māori within metropolitan areas. Furthermore, once the identity and legitimacy of a group has been established, the next hurdle is clarifying which governance entity or entities represent the group's collective interests, as well as those same governance entities holding onto and re-securing the group's mandate, legitimacy and therefore support

The 1994 Maori Land case *Ngati Toa Rangatira Decision*[122] was a challenge within Ngāti Toarangatira to different representative bodies seeking TOKM recognition of their mandate between two legal entities - the Rūnanga o Ngāti Toa Inc., in Porirua (the Rūnanga) and Ngāti Toarangatira Manawhenua ki te Tau Ihu Trust (the Trust) in the Nelson area. A central question to the case was who represents the Tainui tribe Ngāti Toa Rangatira and was it possible to have a break off entity from Ngāti Toa, a type of new tribe? The Rūnanga told the Court that it was:

[122] *Ngati Toa Rangatira Decision,* (Maori Land Court, Vol. 21, *Nelson Minute Book*, Waiariki, 1994) at 1 (Judge Hingston).

> ... irrational and non-traditional for Wairau Ngati Toa to *create a new hapu* exclusive to Ngati Toa who resided in or had strong connections to the Wairau. The Court was told of the creation of Te Runanganui by the various tribes and the refusal of the Porirua Ngati Toa to subordinate Ngati Toa to this *new grouping*.[123] [emphasis added].

Interestingly, the response of the Trust was that 'it was a community, not necessarily a hapū or iwi, because they had been ignored by their northern *whānaunga* (relatives) they had adjusted their loyalties in a multi-iwi manner and were strong supporters of the Rūnanganui.'[124] The Trust added that 'time passing has meant that they have developed an identity of their own, Ngati Toa ki Wairau,'[125] and in effect a new tribe.

The Court held that 'notwithstanding living next to or amongst other iwi may have blurred the clear hapū or tribal identities, those who elect a non-tribal identity in lieu of Ngāti Toa loyalty are not in accord with tikanga Maori.'[126] Importantly, the Court additionally stressed that 'the creation of bodies corporate did not create new traditional bodies.'[127] 'The creation of a corporate body confers no customary authority.'[128] The Court concluded that there is only one Ngāti Toa 'tribe' and it disallowed the formation of a new 'tribe' Ngāti Toa Rangatira ki Wairau because it was not in tikanga terms a hapū or iwi but part of Ngāti Toa Rangatira whānui. Hence the formation of a new tribe was rejected in this instance.

One contemporary example of the successful formation of a new tribe is Ngāti Hauā in Tāmaki-Makarau or Auckland as Dr Richard Benton noted:

> In 1939, a large whānau from one of the Muriwhenua hapū left their northern home with the expressed purpose of settling permanently in Auckland and re-establishing themselves as the core of what came to be described as an urban hapū, quite distinct from the people back home.[129]

Dr Benton continued:

> They saw themselves at the time simply as a hapū from Taitokerau [northern tribes] that had shifted to a new patch in their own domain. They leased Council land at Waikumete for an urupā [cemetery], thereby establishing themselves (from their own perspective) as a tangata whenua group specifically in Tāmaki-makarau, with the same status as those who had remained in possession of other plots of land from earlier times.[130]

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[123] Ibid, at 4.
[124] Ibid, at 5-6.
[125] Ibid, at 10.
[126] Ibid, at 10.
[127] Ibid, at 10-11
[128] Idem.
[129] Benton, R *Well-Being and Disparity in Tāmaki-Makarau: General Overview* (Vol. 1, Report for Te Puni Kōkiri, The James Henare Maori Research Centre, University of Auckland, 2002) at 65.
[130] Idem.

Dr Benton then listed the criteria, as it were, that qualifies a group to be tangata whenua (local) and perhaps a new tribe:

> Having made sure their dead would be properly taken care of, they set about organising a marae, first in the Maori Community Centre in Victoria Park, then, in cooperation with other settlers from the Far North, they purchased land in Epsom and established the marae complex now known as Te Unga Waka. Four generations of children of members of this hapū have now been born, raised, housed and employed in Tāmaki-makarau. Young and old are buried in the hapū urupā in Waikumete. They have all the elements which go with permanent occupation of the land: ahikāroa (continuous presence), ringa kaha (ability to ensure they are not dispossessed), a marae, an urupā, and whakapapa tying them to the land and to each other.[131]

It appears, then, that Ngāti Haua ki Tamaki-Makarau has successfully established themselves as a new tribe in Auckland, according to traditional tikanga processes of group formation.

Another successful example that demonstrates the formation of a new hapū tribe following the traditional processes of social formation based on whānaungatanga among two contemporary 'traditional' iwi (and it is appropriate that it is a 'Tainui' example) is Ngāti Raukawa ki te Tonga of Horowhenua (southern Raukawa), and (ironically) Ngāti Toa of Porirua.

Mason Durie discussed the formation of the new hapū Ngāti Manomano in the Fielding (Raukawa) area when he noted:

> ... new marae have sometimes developed around new hapu. In 1996, for example, the Taumata o te Ra marae was opened at Halcombe, near Fielding. It was established by Ngati Manomano, a new hapu based on the large Kereama whānau and though the principal house, Manomano, was decorated in both classical and contemporary styles, the marae observes all the customs of the neighbouring Ngati Raukawa marae with adherence to the Tainui tradition.[132]

In 2000 Professor Whata Winiata of Te Rūnanga o Raukawa added context to this process of hapū diminution and formation, commenting specifically on Ngāti Manomano:

> Many Hapu have disappeared [are 'lost'?] this century [20th century]. In contrast to this, only one *new* Hapu can be identified, namely, Ngati Manomano. Its short history and experience is vitally important to our long-term survival because it is a most valuable illustration of creative and beneficial growth and expansion.

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[131] Idem.

[132] Durie, M, *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 221. See also Taumata o te Ra Marae Committee, *Taumata o te Ra Marae,* (Souvenir Booklet to commemorate the opening of Taumata o te Ra, Marae Committee, Fielding, 1996).

> Two fundamentally opposed solutions for a particular problem took hold on Ohinepuhiawe Marae, more popularly known as Parewahawaha Marae, near Bulls. Ngati Parewahawaha was divided. The two solutions could not co-exist in the one space, namely on Parewahawaha Marae.
> One approach to be taken was to live with the tension and division. Another was to free the marae of one of the solutions by the advocates of one of the solutions or the other moving away with a view to establishing themselves elsewhere – *as was the practice among our tupuna*. That is what happened. In due course the departing group built their own marae, Taumata-o-te-Ra, and called themselves Ngati Manomano. [emphasis added]
> From the vantage point of the related Hapu and Iwi, the whole process was completed without lingering disadvantage to anyone and with generosity between the parties involved.
> The [Te Raumano] Confederation is the stronger for the lessons from this episode. We have another Hapu and one more marae thoroughly intact and thriving is the associated mana-a-Hapu and mana-a-Iwi within the Confederation.[133]

Hence the traditional processes of hapū groups waxing and waning are still occurring albeit, it seems, in a more limited manner and such processes appear to be more successful when negotiated in practice among Māori groups rather than through official government policy, legislation or litigation.

In a Canadian context, s. 17 of the *Indian Act* states:

> New Bands
> 17(1) The Minister may, whenever he considers it desireable,
> amalgamate bands that, by a vote of a majority of their electors, request to be amalgamated; and
> constitute new bands and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.
>
> (2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.

In contrast to the situation in New Zealand, there is some legislative scope for the formation of new bands or First Nation groups pursuant to the *Indian Act* that is activated by the First Nations themselves. There also appears to be a greater scope for the formation of new bands in Canada than the re-emergence of extinct or 'lost' tribes but the latter option is available.

Perhaps an example of the former provision in practice is the Miawpukek First Nation of Conne River, Newfoundland who were recognised as an Indian Band pursuant to the *Indian Act* in 1986. Following registration, Miawpukek were awarded a reserve in 1987

[133] Winiata, W 'Whakatupuranga Rua Mano: Capacity Building in Practice' in School of Maori & Pacific Development, *Nation Building and Maori Development in the 21st Century* (University of Waikato, Conference Proceedings, Hopuhopu, 30 August-1 September, 2000) at 140-141. The Te Raumano Confederation consists of the tribal groups Ngāti Toarangatira, Ngāti Raukawa and Te Ati Awa in the lower west coast of the North Island from Wellington up to Horowhenua, Shannon, Bulls and further up the Rangitikei.

and in 2002 requested an addition to the reserve which was signed in 2004.[134] Another more prominent example of the formation of a new First Nations 'tribe' in Canada is that of course of the Mētis nation, although it is not without its controversy.[135]

A contemporary example of the latter option – the re-emergence of a 'lost' tribe in Canada - occurred in Saskatchewan in the late 1980s, which culminated in litigation in the 1992 Federal Court of Canada case *Bigstone v Big Eagle.*[136] This case involved an internal dispute among members of the Ocean Man Indian Band No. 69 located in Saskatchewan. This band was a party to Treaty No. 4 signed in 1875 under which some 23,000 acres were set aside for the Band's reserve. Due to a serious attrition of its population through disease, and a similar attrition rate for the nearby Pheasant's Rump Band, these two bands surrendered their reserves in 1901 which were disposed of by the Crown and the bands ceased to exist politically culturally and socially. The remaining members of the Ocean Man Indian Band No. 69 moved onto the reserve of White Bear Indian Band No. 70 and became absorbed into that band.[137]

There had been, however, some injustices in the surrender of the Ocean Man and Pheasant Rump reserves in 1901, and in the 1970s, the White Bear Band brought an action against the Crown in respect of these matters. This grievance was remedied by a settlement agreement between the Crown and the White Bear Band Council in January 1986, which was approved by members of the White Bear Band through referendum. The settlement provided for the Government to pay the White Bear Band $16 million that was held in trust. Section 10 of the settlement contemplated that the Minister would establish two additional bands if requested to do so by members of the White Bear Band who were descendants of the former Ocean Man Band and of the former Pheasant's Rump Band. $8.4 million of the trust funds were to be spent on acquiring reserve lands for these two resurrected bands.[138]

In 1987, the White Bear Band elected three negotiating committees – the White Bear, Pheasant Rump and the Ocean Man Committees. As a consequence of these committees, an Internal Settlement Agreement (ISA) was signed in 1989 approved by

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[134] See Indian and Northern Affairs, *Self-Government Framework Agreement and Land Transfer Agreement for Miawpukek First Nation* (INAC News, Ottawa, 28 April 2005).

[135] For references on the Mētis 'nation', see Chartrand, P 'Sisyphus is Smiling' defining the 'Metis peoples' for purposes of s.35' (Paper prepared for the National Judicial Institute, 31 March 2001); Chartrand, P 'Aboriginal Rights' The Dispossession of the Metis' in *Osgoode Hall Law Journal* (Vol. 29, No. 3, Fall 1991) at 457; Chartrand, L 'A Commentary on Metis Identity and Citizenship from an International Law Perspective' in *Justice as Healing* (Vol. 6, No. 2 (Summer), A Newsletter on Aboriginal Concepts of Justice, Native Law Centre, University of Saskatchewan, 2001); and McCaslin, W 'Section 35: Entrenchment and Framework of the Future' (Unpublished Paper, Saskatoon, 10 May 2001, in author's possession)

[136] [1993] 1 C.N.L.R 25 (Fed. Ct. T.D).

[137] Idem.

[138] Ibid, at 29-30.

referendum that year. The negotiating committees were the parties to the ISA and they represented respectively the future Pheasant's Rump Band, Ocean Man Band and the continuing White Bear Band. The ISA provided that the Ocean Man and Pheasant's Rump committees would request the Minister to recognise their bands in accordance with s. 10 of the 1986 Settlement Agreement. It subsequently made this request and the Minister of Indian Affairs reconstituted the Ocean Man Band on 23 August 1990 which event triggered a deadline for transfers of members of the White Bear Band to the Ocean Man Band on such 21 December 1990, 4 months after the resurrection of the 'lost' band. On 20 September 1990 the Governor-in-Council set aside lands for the new Ocean Man Band members thus establishing it on reserve. By the terms of the ISA, approved by referendum, members of the White Bear Band had 4 months after the re-establishment of the Ocean Man Band to declare themselves members of the Ocean Man Band. 125 persons elected to join the new Band.[139]

A number of procedural irregularities occurred, however, which eventually lead to litigation. There were large amounts of money at stake in this dispute and the plaintiffs were seeking a court order to remove the incumbents from the offices of Chief and Councillors of the custom Council which the judge refused. The *Indian Act* does not contemplate the re-emergence of 'lost' Bands or tribes. As the Band members in this case had decided to go ahead with a custom Council that was apparently the type of government they had enjoyed before 1901, the judge was not prepared to interfere. The details of the rest of this case are beyond the scope of this research. The main point in the context of the discussion at hand is the scope in Canada for the re-emergence of previously 'lost' tribes by direct negotiations with the Crown.

A further example of the formation of a new tribe or band through the ressurection of a former 'lost' First Nation is the Opiponnapiwin Cree Nation in Manitoba. Members of this new First Nation had ortiginally signed an adhesion to Treaty 5 in 1908 as members of the Nelson House Band on the basis that it was distinct band and would receive its own reserve at a later time. The ressurection of this 'lost' First Nation came about after a lengthy process of direct negotiations and settles a long-standing grievance. Most members of the Opiponnapiwin Cree Nation had been members of the Nisichayashk Cree Nation and had been seeking to constitute a new band with an independent reserve since the early

[139] Ibid, at 30-31.

1900s. On 25 November 2005, the Opiponnapiwin Cree Nation was officially constituted (ressurrected) as Manitoba's 63rd and latest First Nation.[140]

Back in New Zealand, the Charter of Te Rūnanga o Ngāi Tahu (TRONT) allows for the formation of new Papatipu Rūnanga with the consent of all other Rūnanga pursuant to clause 24.2 of the Charter of TRONT. Although admirable in terms of preparing for the future, there is one major flaw with this enabling clause – it does not allow for the formation of new tribes but new Rūnanga. A Runanga is not the same as a new hapū or tribe. It appears in the author's view, that a corporate governance entity may be more than representing hapū tribes in this context – it may be assuming a new and, in the author's view, inappropriate function – that of replacing rather than representing tribes. The TRONT Charter, and all other tribal constitutions, ought to allow for the formation of new tribes and the resurrection of 'lost' old tribes for that appears to have been the traditional Māori way.

Still, the recently negotiated settlement between the Crown and Ngāti Awa provided an interesting situation in terms of the formation of new hapū through direct negotiations which was subsequently enshrined in legislation. In the Parliamentary debates over the third reading of the Ngati Awa Claims Settlement Bill in March 2005, discussion ensued over the inclusion of two 'new' urban hapū as part of the constituent base for Ngāti Awa. Pita Paraone on behalf of New Zealand First opposed the Bill in the House for the following reasons:

> ... with regard to clause 13(3)(a) which defines Ngati Awa. In particular, I refer to those hapu identified in the bill as 'Ngati Awa ki Tamaki Makaurau' [Auckland] and 'Ngati Awa ki Poneke [Wellington].' New Zealand First believes that the inclusion of those new entities as 'hapu' for the purposes of this bill is outside the traditional concept of what establishes or creates a hapu. ... every member registered to those hapu held whakapapa links back to their traditional hapu within the Ngati Awa tribal area, in the same way as do other Ngati Awa descendants who are resident elsewhere in the world.[141]

Paraone then discussed the rationale for including these new hapū and his opposition to this initiative on the following grounds:

> Firstly, the establishment of those hapu can be regarded as a creation of expediency and convenience. Secondly, should Parliament be vested with the authority to *create new hapu*?

[140] See 'Manitoba's Newest First Nation Awarded Adhesion to Treaty 5 Medals' in *News Release Communiqué* (Indian and Northern Affairs, Canada, Ottawa, 11 August, 2006). The Opiponnapiwin Cree Nation is comprised of 1064 members and is located approximately north of the Nisichawayasihk Cree Nation in Manitoba.

[141] Pita Paraone (NZ First) Speech on the 'Ngati Awa Claims Settlement Bill' in New Zealand, *Hansard Debates* (Weekly Hansard, Vol. 83 for inclusion in Vol. 624, First Session, Forty-Seventh Parliament, 17 March 2005) at 19327.

> Thirdly, what of other Ngati Awa descendants living elsewhere in the world? Why should they be expected to connect with their hapu at home while residents in Tamaki Makaurau and Poneke have the convenience, and even the choice, to connect with either?[142] [emphasis added].

Paraone then made a very important point in terms of the forum and process for the creation of new hapū:

> Of further concern to New Zealand First is our belief that to legislate for the creation of hapu, as proposed, will pose the question some time in the future as to whether the Crown can legislate for the creation of hapu over and above the traditional Maori social structure, as determined by tikanga Maori. If it cannot, why was this allowed to happen? The creation of hapu as proposed is not the responsibility of Parliament, nor should it be. [New Zealand First members] do not accept the right or authority of this House, and indeed, the Crown and its bureaucracy, to legislate for the creation of hapu.[143]

Richard Prebble of the ACT Party also remarked on the Ngati Awa Claims Settlement Bill in the same debate:

> How on earth can this Parliament start to define different hapu in a bill of this sort? ... Now it seems that [there] will become an inflation of the number of hapu. This is not an area where the Crown ought to be going, and it is certainly not something we should put into statute law.[144]

With respect and as noted above, the creation of new hapū for pragmatic reasons was tikanga and the demographic realities of urbanised Ngāti Awa members in Auckland and Wellington would seem to be *tika* (correct, right) according to traditional Mäori group formation processes to validate such changes. Moreover, if a tribal referendum has sanctioned the creation of these new hapū that is Ngāti Awa *tino rangatiratanga* (self-determination) and Parliament is not creating the new hapū but affirming the will of Ngāti Awa in the strongest legal form possible – the mana (power) of legislation as some view it.

Interestingly, the Nisga'a Settlement provides scope for the formation of new *wilp* or tribes including urban groups. Section 9 of the Agreement states:

> 9. The Nisga'a Nation will have a Nisga'a Constitution, consistent with this Agreement, which will:
> f) provide for the creation, continuation, amalgamation, dissolution, naming, or remaining of:
> i) Nisga'a Villages on Nisga'a Lands, and
> ii) Nisga'a Urban Locals

[142] Ibid, at 19328.
[143] Ibid, at 19328-9.
[144] Ibid, at 19330.

Sections 12 and 13 outline the Nisga'a Government structure which consists of elected members as set out in the Nisga'a constitution and includes three Nisga'a Urban local groups: Prince Rupert/Port Edward Urban Local; Terrace Urban Local; and Greater Vancouver Urban Local. Section 14 outlines the following members of the new Nisga'a governance entity – Nisga'a Lisims Government - and includes 'at least one representative elected by the Nisga'a citizens of each Nisga'a Urban Local.'[145] Hence the Nisga'a have created 3 new urban *wilp* or tribes, and they have scope within the settlement to create more new tribes as dictated by circumstance and *ayuukhl Nisga'a*. There does not seem to be any scope for the formation of new tribes (at either the hapū or iwi levels) in any Treaty settlement[146] in New Zealand, except for the urban hapū of Ngāti Awa to date. The author suspects that we have not heard the last of the iwi/ hapū, 'lost' tribe/'new' tribe challenges, and if so, the need is critical for an appropriate process and forum to deal with this and many other traditional tikanga challenges to contemporary Māori identity, group formation, representivity, borders, membership and governance.

10.6 SUMMARY

This chapter has provided an overview of some aspects of the ideological dimensions of customary representation rights based on tradition, traditionalism and identity politics of Maori generally, and the lost 'tribes' of Waikato, Raukawa and Ngāi Tahu specifically in New Zealand, and, to a lesser extent, among some of the other prominent *Treaty of Waitangi* settlement groups and First Nations, including the Nisga'a, in Canada. This chapter gives a general idea of the way in which cultural traditions may be deployed in some political contexts. In the rubric of a cultural construction of tradition, it would appear that Māori iwi, hapū and even whānau identity and representivity are being contested and renegotiated by kaumātua, lawyers, urban groups, feminists, rangatahi, the state, government departments, corporate entities and others to accord with their own present day political ambitions and ontological existential realities. In keeping with the changes in people's lives, key Māori concepts and traditions have also changed. This research examined the evolution of Waikato-Tainui, Raukawa and Ngāi Tahu identity and Māori and some First Nations' representivity, not to judge claims about the authenticity of customary rights and tradition so much, as to emphasise the changes that have occurred in

[145] Section 14(c) *Nisga'a Final Agreement* (Canada, British Columbia, Nisga'a Nation, 1998) at 162.
[146] Particularly in the *Maori Fisheries Act 2004* except for the recognition of Ngāti Hine and Ngāti Rongomaiwahine which were and continue to be vexatious issues for their respective 'parent' tribal organisations as well as TOKM.

key Māori and First Nations' beliefs, epistemologies, ontologies and activities throughout the 19th and 20th centuries.

It seems that traditionally, pre-contact Māori and some First Nations identified themselves flexibly, according to function, purpose and context but this has proved to be problematic in a modern context, as the respective Crown tries to settle Treaty settlements with Māori and First Nations whose social organisation continue to evolve into new membership groups. One of the main underlying concerns is that current Māori governance structures claiming representative status are relatively fixed and permanent organisations that represent social groupings that are not. The hermeneutic task of defining Māori groups and matching them with Treaty settlement resources is extraordinarily difficult. A process that requires as an outcome the definition of the relationship of a Māori kin group with an asset will always produce conflict and dissent, because, inter alia, it involves defining that which is, by its nature, indefinable, or which is changed by the process of definition. Thus an impact of colonisation and the indigenous response to it was a move to more rigid group structures, and hence leadership tenure, social organisation and governance shifted from the conditional toward the absolute. George Clark's comments in 1862 are instructive when he stated that 'hapū claiming independent action, control and management of their own local affairs, though inconvenient, was yet obvious.'[147] It is very difficult to represent traditional Māori and First Nations political identity and representivity fully and accurately, because it was/is fluid, situational and fundamentally political. The historical context of cultural identity and representivity are contested and the New Zealand and Canadian nation-states, and Māori and First Nations groups construct and attribute categorical identity and representivity to individuals and groups.

From one perspective, the changes in traditional Māori society in a Treaty of Waitangi settlement process, in this case Waikato-Tainui's 33 reconstructed hapū, and the 'lost' tribes of Ngāti Raukawa and Ngāi Tahu, and the formation of new tribes in New Zealand and Canada could be considered textbook examples of the cultural incorporation and reconstruction that scholars have been writing about for over a generation. The *Waikato Raupatu Claims Settlement Act 1995* (WRCSA) and the *Te Runanga o Ngāi Tahu 1995* (TRONT) *Act* legalised, traditionalised and institutionalised 'new' hapū and tribes and concealed some 'lost' hapū of Waikato-Tainui and Ngāi Tahu respectively and voided and excluded all other claims to traditional Waikato-Tainui hapū within the Waikato raupatu and wider area; and Ngāi Tahu tribal claims within its *takiwa* (boundaries). The

[147] Clarke, G *Report by George Clark, the Civil Commissioner of the Bay of Islands Respecting the Runanga, 1862.*

WRCSA and TRONT Acts also re-traditionalised the Kīngitanga and the Papatipu Rūnanga respectively, although tribal insiders have challenged these 'traditional' positions of power. However, the Kīngitanga and Papatipu Rūnanga have consolidated their positions, inter alia, through the reinvention of tradition and the ideology of traditionalism. Moreover, the post-settlement collectivist approach, shared by 'Waikato-Tainui' and 'Ngāi Tahu' and the nation-state respectively, to returning Waikato and Ngāi Tahu lands, seems likely to have narrowed rather than increased the range of potential beneficiaries, both hapū and individuals, to the advantage of Kīngitanga and Papatipu Rūnanga supporters whether or not their ancestors had suffered from historic Treaty grievances.

Still, the customary values, traditions and answers developed by the tupuna (ancestors) ought to hold power today as they did generations ago. As societies evolve then so will their customs, institutions and traditions. In the case of colonised peoples, however, there is often more emphasis on preserving the traditions and rituals than a comprehensive understanding of the underpinning values, beliefs and traditional processes for custom, ritual and cultural reconstruction. Indigenous communities that are denied the opportunity to self-determine and the right to self-define become desperate to ensure that the tiny details of each traditional practice are retained and any progression is resisted. A dynamic society will evolve as it encounters other societies and new knowledge, circumstances and technology and there will be ongoing maintenance of the traditional values and their relevance. As Da Cunha concluded:

> Culture is production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production.[148]

In a corporate governance context, Tahu Potiki concluded that Māori:

> ... should define the parameters and the use of the corporate entity, not the other way around. The corporate should inhabit the periphery, not the centre. In our search for modern models that will allow us to progress with cultural integrity we have ignored the models of our own making and that are rooted in our own world view.[149]

Dame Evelyn Stokes added:

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[148] Da Cunha, M.C., 'The Case of Brazilian Indians' in Stephens, S (ed) *Children and the Politics of Culture* (Princeton University Press, Princeton, New Jersey, 1995).

[149] Potiki, T 'A Traditionalist Approach to Iwi Government' in Durie, M, (ed.) *He Pukenga Korero* (Volume 5, No. 2, Massey University, Palmerston North, 2000) at 8.

> Governing institutions match a society's culture when its governing authority is exercised and its members regard that as legitimate. ... Institutions have to have legitimacy with the people if they are going to work. This is not necessarily a signal to revive traditional governing systems that were designed for a very different environment than today, and had to meet the challenges of their times. Iwi governments operate in a very different environment today and have to solve very different kinds of problems. Not only have the demands on iwi authorities changed but the ideas carried in the community, the iwi cultures have changed too. The trick is to invent iwi governments that are capable of operating effectively in the contemporary world, but also to match people's ideas, traditional or not, about what is appropriate or fair.[150]

In a similar manner, Dame Joan Metge made an interesting submission on the *Runanga Iwi Act 1990* where she discussed the use of the word 'traditional' in the Act as it pertained to 'Iwi:

> This use of 'traditional' is an extension of the basic meaning of the word, which refers simply to the handing on of knowledge and customs from generation to generation; it has no in-built indication of time or context. In Māori as in other societies new ways often become traditions within only a few generations. ... Using 'traditional' to mean 'of pre-European origin' is a dangerous usage because it sets up a false opposition between tikanga on the basis of origin and fosters the idealising of tikanga of pre-European origin as timeless and unchanging. The Māori have survived into the 1990's as a people with a strong identity only because of their capacity for adapting old and developing new tikanga to meet contemporary needs and realities.[151]

It is necessary to adapt traditional answers to the contemporary reality. Māori and First Nations must acknowledge the fact that cultures change, and that any particular notion of what constitutes 'tradition' will be contested. Nevertheless, certain common beliefs, values and principles that form the persistent core of a community's culture should be identifiable. It is this traditional framework that Māori and First Nations must use as the basis on which to build a better society. Māori and First Nations culture, institutions and customary traditions are not static and they develop and redevelop through a wider variety of interactions than is recognised in conventional narratives of Māori and First Nation's citizenship, social formation and governance. Narratives of Māori and First Nation's political participation should be transformed to reflect this fact. Traditional iwi Māori and hapū, and First Nation's leaders must reconfirm or reinterpret the existing ideology and group institutions and customary traditions, or create an integrated ideology, institutions and customary traditions, according to need and function and then design governance institutions to fit. The past is a place of reference not residence. We need to learn from but

[150] Stokes, supra n 6 at 190.
[151] Metge, J, 'Submission on the Runanga Iwi Bill' (Submitted to Māori Affairs Select Committee, Wellington, 1990) at 4.

not live in the past. We also need to go back in an attempt to go forward. Traditions and customs assist this process but should not pre-empt it.

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No right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.[1] *We are done with annexation of some helpless people meant, in some instances by some powers, to be used merely for exploitation.*[2] – Woodrow Wilson, former US President, 1917.

Ko te mana kei a tatou ano he iwi hoki tatou – The authority is in ourselves. We are a people.[3] – Whakatōhea Kaumātua, 1980

We want to be subjects of our destiny. Others always speak for us, turning us into folkloric objects, but we demand the right to speak.[4] – Ivan Ignacio

11.1 CUSTOMARY LEVELS OF REPRESENTATION AND THE 'TRIBE'

From a contemporary perspective, Māori and First Nation collectives receiving Treaty settlement redress (including compensation, assets, acknowledgement, governance authority, recognition and representation) must represent all members of that collective appropriately if contemporary settlements are to be durable and to prevent the creation of new injustices by, inter alia, excluding members from participating in policy formation, governance generally and from receiving settlement benefits. Consequently, indigenous governance entities established as part of Treaty settlement processes ought to effectively represent constituent communities (in a general sense) that have historical continuity, had mana (authority and legitimacy), and exercised stewardship over the traditional resources at the time of the initial colonial injustices that resulted in the group's grievances and loss of self-government. Furthermore, the current governance entity (or entities) of these contemporary indigenous polities must provide appropriate representation for all tribal socio-political groupings within the constituent cells at all levels, to enable them to exercise a degree of localised self-governance, autonomy and stewardship with respect to returned settlement assets, again at appropriate levels. Indeed, Manuka Henare discussed the notion of differing representation levels within Māori society:

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[1] Hackworth, G.H *Digest of International Law* (Vol. 1, Government Printing Office, Washington, 1940 – 44) at 424.

[2] Cited in Venne, S *Our Elder Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Theytus Books Ltd, B.C, 1998) at 30.

[3] Delamere, M (Whakatōhea Kaumatua) cited in Durie, E T 'Treaties and the Common Law as Sources of Indigenous Rights' in *Commonwealth Law Conference: Session on Indigenous Rights* (Conference Papers, Auckland, 18 April 1980) at 11.

[4] Cited in Gandi, Ajay, 'Indigenous Resistance to New Colonialism' from the Cultural Survival Internet website: www.cs.org/pubications/CSQ/253.gandhi.htm. (Accessed 20 July 2004). In the context of indigenous levels of representation, it appears that similar strategies to those mentioned on the aforementioned whakatauki may have been used to prevent some indigenous constituencies from appropriate representation within indigenous umbrella organisations with the significant difference that such actions or inactions are sometimes committed by indigenous people to themselves, which is a far cry, to say the least, from the effective government of themselves.

> We talk about levels of identity of which the canoe is one and also being a Maori. The same about kinship would apply to one's identity as a Maori. ... there are levels of identity for Maori especially Maori today.[5]

The historical background of the people who are today's indigenous communities, however, highlights a number of difficulties, which arise because indigenous socio-political structures are, and have always been, fluid and dynamic. The internal and external importance of whānau, hapū and iwi - the units making up Māori tribal society - and family, village clans, bands and councils - making up First Nations society - have waxed and waned in particular cases over time and space.

This chapter will critique the processes of identifying who is a 'tribe' or indigenous polity for appropriately representing Indigenous Peoples in New Zealand, Canada and the USA and at which level for appropriate indigenous representation. The section has focussed on the legal and political processes of recognising indigenous 'tribes' as being an inappropriate level politically and culturally for recognising indigenous groups as official 'tribes' and thus, inappropriate levels of representation.

11.2 TRADITIONAL INDIGENOUS LEVELS OF REPRESENTATION VARIED

From the outset, it is important to emphasise that group identity and representivity are difficult to represent fully and accurately because such processes are, inter alia, fluid, situational, culturally relative and fundamentally political. Indigenous examples in North America and New Zealand are no exception. Customary indigenous Māori and First Nations identity and representivity, in terms of governance within social groups, with land and natural resources, and within tribal regions, appeared to be inextricably tied up with kinship, respect for land and resources, and customary uses and occupation. Customary tenure of land and resources was a complex, interlocking and overlapping system of usufructuary rights that were fluid and flexible, and capable of regeneration, as conditions and circumstances seemed appropriate. Such rights operated at different levels and carried with them reciprocal obligations. Some matters would be dealt with at the level of the clan, a social group identified by descent from a common ancestor several generations earlier. A large kin group might subdivide and regroup with the passage of time, and with changing allegiances. Erueti noted the tendency of Māori socio-political organisation to generally

[5] Transcript and Notes in the Auckland High Court, 'Notes of Evidence Taken Before Hon. Justice Patterson' in the 'Iwi' case, *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J) at 34, Lines 3-5. [Hereinafter the 'Iwi' Transcript].

'wax and wane over generations.'[6] Angeline Greensill also discussed the tribal tendency to emphasise different levels of organisation according to circumstances within the Tainui area when she noted:

> In the concept of iwi there is a certain fluidity ... there are times when [we] are a hapū of the Waikato tribes, there are times when [we] see ourselves as the Tainui people as an iwi in its own right ... there are times when [we] might refer to ourselves as part of the Tainui waka.[7]

Given such fluid and dynamic processes, historical accounts are ambiguous as to exactly which unit of indigenous society exercised what customary rights over lands, resources and people and at what levels - precontact and post-contact - including at the time the historical injustices were committed. It would appear, therefore, to be difficult to concentrate on a particular unit of indigenous society as *the* unit that traditionally had customary governance and stewardship over resources and people. With whom are the national and local Governments of New Zealand and the Federal and Provincial Governments of Canada obliged to consult regarding infringements of aboriginal and Treaty rights, and for negotiating contemporary Treaty settlements for, inter alia, self-government and internal self-determination, and at what levels? As referred to above, in terms of customary representation, this question raises complex customary and contemporary challenges. Chief Judge (as he was then) Eddie Durie provided a pithy insight into the level of traditional Māori decision-making and socio-political organisation:

> As with all tribal societies, Māori authority was located at the most local or village level. All above that were mere federations of interests dependent for their validity on continued support from the base. The Western power structure, where law and power descends from the top down, becomes inverted in the tribal context. Indigenous societies work from the bottom up.[8]

In New Zealand, it appears that the Government, through policies regarding the Treaty settlement process, prefers to deal at the level of iwi 'tribes' or 'large natural groupings.' In contrast, Federal Government policy in Canada dictates that self-government negotiations and Treaty settlements may be dealt with at the 'band,' 'tribal,' public government and 'community of interest' levels and there may even be scope for the 'nation' level. The USA provides an interesting example of identifying (or perhaps

[6] Erueti, A, 'Māori Customary Law and Land Tenure: an Analysis' in Boast, R, et al *Māori Land Law* (Butterworths, Wellington, 1999) at 30.
[7] Angeline Greensill, supra n 5 at 154.
[8] Durie, E, 'Māori Sovereignty – Threat or Opportunity?' (Unpublished Paper, Capital City Forum, Wellington, 1 October 1995).

manufacturing) 'tribes' as indigenous polities for self-government and other substantial benefits with a process that is germane in many ways to New Zealand. Hence a fundamental yet vexed question to deal with from the outset is who constitutes the contemporary indigenous settlement unit – the 'tribe' or 'sub-tribe,' clan, band or tribal council – at appropriate levels, and how does this challenge impact on the appropriate formation of governance structures for post-Treaty settlement governance and internal self-determination?

Tensions have occurred and will occur in most, if not all, Treaty settlement communities in relation to ascertaining appropriate levels of governance and representation within post-Treaty settlement governance entities. In the author's view, there is a need to empower all constituent units of the traditional and contemporary social organisation of the group where appropriate and to manage the relationships between each constituent unit so that all units have an appropriate say, inter alia, in policy formation, governance and the distribution of settlement benefits. It is, however, difficult to determine which, if any, of the contemporary indigenous units with governance entities are the present manifestations of any specific traditional unit. As the Māori Land Court emphasised, 'the creation of bodies corporate did not create new traditional bodies and the creation of a corporate body confers no customary authority.'[9] Given these complexities, to whom might settlement assets be justly returned and at what levels?

There is no single rule for all cases when deciding the ambiguous area of indigenous group identity and representivity. Some matters are local issues and should be handled locally while large matters could be more appropriately handled regionally, nationally and perhaps even internationally. A specific claim to a particular piece of land or other natural resource may fall into the category of the family, sub-tribe or tribe depending on its size, resource uses and other complexities. The Waitangi Tribunal decided that the fisheries settlement for political efficacy (among other reasons) should be dealt with at no less than an iwi level. The Tribunal noted that property rights are important but there were many with traditional customary interests in fishing and many groups could legitimately claim interests along with smaller whānau and even individuals.[10] The consent of all with an interest would have been impracticable, however, since the political reality was/is that in any indigenous society, the protection, enhancement or limitation of property rights may need to be settled for all through appropriate and wider representative institutions.

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[9] *Ngati Toa Rangatira Decision,* (Māori Land Court, *Nelson Minute Book,* Vol. 21) at 10-11 (1994, Judge Hingston).

[10] Waitangi Tribunal, *Fisheries Settlement Report 1992* (GP Publications, Wellington, 1992) at 10-15.

In the earlier Tainui waka local government example,[11] the place of and relationships between individual whānau, hapū, iwi and the Tainui waka confederation as well as the place of the Kingitanga within these groups, needs to be appropriately decided at each level. The 1995 Waikato Settlement was settled at the tribal level for the alleged 33 constituent hapū and the 1998 Ngai Tahu Settlement was also settled at the tribal level for the 18 constituent Papatipu Rūnanga. The 1998 Turangitukua Settlement is an example of a contemporary agreement being settled at the hapū level, while the 1999 Pouākani Settlement was settled at a pan-iwi geographic specific level between Ngāti Maniapoto, Te Arawa, Ngāti Raukawa and Ngāti Tūwharetoa. The pan-Māori protest over the national government's handling of the foreshore and seabed issue is an example of a recent (and rare) united pan-Māori initiative, while the pan-indigenous lobbying at the United Nations and other international fora, that resulted in the Draft Declaration on the Rights of Indigenous Peoples, is a possible example of a pan-indigenous aggregation level.

11.3 GOVERNMENT PROPENSITY TO CONTROL REPRESENTATION

It appears that the respective Governments of the nation-states New Zealand, Canada, the USA (and elsewhere), have a high propensity to direct policy and legislation for determining indigenous representation for contemporary Treaty settlements, self-government and internal self-determination. The situation of unilaterally 'finding' (or perhaps manufacturing) a group, cloaking it with a mandate, then negotiating with it as *the* 'legitimate' group is not a new phenomenon but dates back to the Roman Empire, perhaps earlier. Edward Said asserted that 'Orientalism' is a primarily European discourse that systematically constructs the Orient 'politically, militarily, ideologically, scientifically and imaginatively.'[12] The 'scholarly construction' of peoples and lands through a master discourse has been a common thread throughout the colonised worlds and New Zealand, Canada and the USA are no exception to this rule. From the time of the earliest European explorers of each of these countries, the Indigenous Peoples were subjected to definitions and descriptions through the lens of the coloniser. The definitions were influenced by ethnocentric understandings, underpinnings and constructions that originate well before the European imperialism period. In 77AD for example, a classification of 'monstrous races' distinguishable 'by their peculiar appearance and unusual behaviour' was propagated that were described as 'people having faces on their chests or large protruding lips useful as

[11] Supra, chapter 8.3.1.
[12] Said, E *Culture and Orientalism* (Knopf, Random House, New York, 1993) at 3.

sun-umbrellas.'[13] Although ludicrous and obtuse, such ideas were typical of biased European notions of 'other' peoples even after actual contact demonstrated such 'monsters' to be a complete myth. 'Other' races and 'peoples' were however, constructed by the ethnocentric European colonial discourse as 'barbaric heathens' and 'infidels.'

During the colonisation of the New World, ethnographic narratives purporting to extend the 'native' point of view were often hermeneutically re-interpreted with a hiatus between the perception of the 'native' (the colonised) and that of the coloniser. Hence notions of cultures constructed through the frequently supercilious, though possibly well meaning and perhaps even benevolent motives of non-indigenous peoples, reflected what Clifford termed the 'historical predicament of ethnography [being] the fact that it is always caught up in the invention, not the representation, of cultures.'[14] In the context of indigenous 'tribes' in North America (and New Zealand) Alfred Kroeber noted that the more closely one looks at indigenous North America, the more largely does the 'usual concept of tribe ... appear to be a White man's creation of convenience for talking about Indians, negotiating with them, administering them.'[15]

The utilisation of historic and contemporary Treaties as instruments in which to control indigenous identity and representation has occurred in Canada and New Zealand through subsequent government policy and legislation such as the *Indian Act* and Native Land and Māori Affairs legislation. This control over a group's identity and representation is the language of what Memmi termed the 'coloniser and the colonised'[16] and in each case, the government manipulation of the question of indigenous identity and representivity has played its role. To the nation-state, bestowing recognition to claims of Māori and First Nations representation – that is, assigning political representivity – can be a resource that it can ascribe or withdraw.[17] Clearly, in this sense, political representivity is an assigned political status rather than an empirically demonstrable condition.[18] Thus when the nation-state is pressured by Māori and First Nations demands that it dislikes or disagrees with, it can use representivity, or the lack of it, as a weapon to discredit the demands, or even the organisation making those demands. Alternatively, when the nation-

[13] Webster, S 'Escaping post-cultural tribes' in *Critique of Anthropology* (Vol. 15, No. 4, 1995) at 381-413.
[14] Idem.
[15] Kroeber cited in Leacock, E, 'Ethnohistorical Investigation of Egalitarian Politics in Eastern North America' in Tooker, E (ed) *The Development of Political Organisation in Native North America* (Proceedings of the American Ethnological Society, 1979).
[16] Memmi, A, *The Colonizer and the Colonized* (Beacon Press, Boston, 1967).
[17] Kornberg, A, Clarke, H & Goddard, A, 'Parliament and the Representational Process in Contemporary Canada' in Clarke, H (Ed.) *Parliament, Policy and Representation* (Methuen, Toronto, 1980) at 114.
[18] Weaver, S 'Political Representivity and Indigenous Minorities in Canada and Australia' in Dyck, N (ed.), *Indigenous Peoples and the Nation-State* (Institute of Social and Economic Research, Memorial University, St. John's, Newfoundland, 1985) at 14.

state decides to pursue a particular policy regardless of Māori and First Nations opinion,[19] it may choose to overlook representivity altogether or, alternatively, assign representivity to an organisation, or even to an individual, irrespective of their representational status.

Assigning, or denying Māori and First Nations political representivity can also impact on Māori and First Nations' traditional territories and resources. For example, if the aim is to narrow, self-serving needs – such as exploiting the fisheries resources in a Māori and First Nations area – it becomes pertinent to seek political representivity rather than mere Māori and First Nations representation. In such situations, the nation-state can, and often does, accord political representivity to purported 'representative' Māori and First Nations institutions or individuals, irrespective of their actual representation. Invariably, the ability of the nation-state to use political representivity as a resource is always linked to its control over Māori and First Nations and their traditional territories. The examples below may be perceived as being both part of the historical and contemporary 'grand scheme' of the settler nation-states' exploitation of resources (both human and natural), internal colonialism and 'manifest destiny'[20] as it was once termed.

11.4 FORM FOLLOWS FUNCTION

Notwithstanding the cynicism, it is proposed that perhaps a more appropriate process for formally recognising indigenous polities should be to focus on function and purpose rather than legal corporate form which (it is alleged) is an aspect of the traditional processes for group formation, at least for traditional Māori socio-political organisation. The traditional processes of forming Māori social organisation according to function will now be analysed followed by the policies and specific criteria for identifying how 'tribes' and 'bands' are formally recognised in terms of form and will be compared to illustrate the different levels of indigenous representation in New Zealand and Canada and the divisive effects such policies have on Indigenous Peoples.

A fundamental principle of contemporary indigenous governance and customary and contemporary socio-political organisation is the effective application of the axiom 'form follows function.' In its application, indigenous polities need to be absolutely clear on their

[19] One example in New Zealand was the contentious foreshore and seabed policy in 2004. Perhaps a similar example in Canada was the First Nations Governance Initiative of self-government, devolution and the repeal the *Indian Act* that was eventually discarded which is perhaps a significant difference between both examples.

[20] For Canadian references, see Weinberg, A, *Manifest Destiny: A Study of Nationalist Expansion in American History* (John Hopkins University Press, Baltimore, 1935); Parella, F, '*Lebensraum* and Manifest Destiny: A Comparative Study in the Justification of Expansion' (Masters Thesis, Georgetown University, 1950); Merk, F *Manifest Destiny and Mission in American History: A Reinterpretation* (Knopf, New York, 1963); Horsman, R, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxism* (Harvard University Press, Cambridge, 1981).

objectives before devoting time, money and energy to governance entities and structural issues.[21] It is possible that an over emphasis on getting governance structures right can mask the importance of more strategic governance concerns. Puketapu concluded that Māori organisations should focus on goals and not become too concerned with structures, and that it is more important to ensure the structures adopted are flexible enough to adapt as those goals shift.[22] Hyndman offered a similar view in his study of institutional arrangements for public sector organisations, suggesting the key to the selection of an appropriate organisational form is a focus on *ends* rather than *means*.[23] Instead of focussing on a factor such as how best to manage risks associated with asset specificity, it is better to consider what form will best meet overall strategic goals. Although the focus on strategic goals approach may have salience in a governance entity context (even then it is debateable), it is inappropriate in an indigenous socio-political context, as in the present discussion. The form or shape of a contemporary Māori and First Nations polity or entity should not precede the function or purpose for the polity or entity. Form ought still to follow not precede nor force function. It appears, however, that the contemporary form of indigenous socio-political organisation may be based more on politics and form than on kinship and function as it was traditionally. Indeed, Manuka Henare noted:

> Depending on the purpose for which Maori had to either protect or organise themselves, those alliances of hapū or sub tribes have frequently been referred to as iwi. ... [but] the trick is to understand the context and the purpose for which these words [and groups] are being used.[24]

Traditional pre-European Māori social organisation comprised loose groups of whānau, hapū, iwi and waka but it appears that group formation was dependent often on function or purpose, with hapū being the main corporate unit. The four types of groups, whānau, hapū, iwi and waka, are related to each other in a nested or hierarchal fashion (which is often oversimplified) - whānau combining into sub-hapū and hapū, hapū into iwi, and iwi (in many but not all cases) into waka. Each type of group had specific functions and significance at different levels of the social order, whānau at the domestic level, hapū at the community level and iwi and waka at the regional and political level,[25] but even

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[21] 'Good governance means broadening skills base' in Te Puni Kōkiri *Kōkiri Patae* (Te Puni Kōkiri, Wellington, August, 2003) at 11.

[22] Puketapu, B, 'Maori Organisation and Contemporary Maori Development: Strengthening the Conceptual Plait,' (PhD Thesis, Massey University, Palmerston North, 2000).

[23] Hyndman, M, *Optimal Institutional Arrangements for Public Sector Activities*, (Unpublished Report Produced for The Treasury, Wellington, 1999).

[24] Manuka Henare, supra n 5 at 34.

[25] Metge, J,' Submission on the Runanga Iwi Bill 1990,' (Wellington, 1989) at 3 paragraphs 3.1 and 3.2.

these functions and the levels at which they were carried out varied. Indeed, Stephen Webster, while referring to the traditional waxing and waning of Māori socio-political groups following newcomer contact, noted:

> The foundation in those years was hapū and mainly due to trade and influence of commerce before colonisation. ... Hapū became aligned to one another in different areas of the country. ... Hapū themselves were ... intermixed with one another and under these early colonial conditions formed alliances. ... Those concepts were concepts actually evolved over a long period of time depending on what was happening and what the purposes were. ... The same thing can be done with iwi or hapū that is consistent with fluidity and the need to keep on surviving with the reality of the particular time for Maori in New Zealand. Te Arawa is a Confederation of Iwi ... a Confederation of hapū which sometimes takes the form of an iwi for a particular purpose at particular times.[26]

In contrast to iwi and waka, hapū were always corporate groups, that is, there were at least some occasions when they combined all their membership to act as one body in political, social or economic affairs. Makereti, for example, discussed the corporate function of hapū with specific reference to a forthcoming hui.

> All the many hapū of Ngāti Tuhourangi (Te Arawa) would commence to collect food, each hapū according to its different means and location: fish from coastal-dwelling hapū, birds, berries and fruits from those near forests, and extra cultivations of kumara, hue and potatoes from the rest. The hapū was the unit of concerted or communal economic activity; the hapū was the unit that attended the hui.[27]

Such closely associated small and even some larger hapū, whose members often intermarried so that the offspring belonged to more than one hapū within the community, often performed these economic tasks as one community. Tōpia Tūroa once described the situation of two of his closely related hapū in the Murimotu area south of Ruapehu, both groups the descendants of Taiwiri: 'There is no boundary between Patutokotoko and Ngāti Rangi – because they 'noho tahi ki to ratou wahi' [live together in their place].'[28]

Individuals or small *ope* (working parties) which might be made up of an individual, one or two siblings or kin by marriage, carried out many economic tasks that did not require concerted manpower. But some required the combined manpower of one or more large hapū. Hapū usually (although not always) formed a military unit fighting on the same side in any battle, and at least sometimes carried out economic tasks requiring concerted manpower in concert. (Large hapū with ramified branches were more likely to

[26] Stephen Webster, supra n 5 at 167.
[27] Makereti *The Old-Time Māori* (Gollancz, London, 1938) at 158.
[28] 'Evidence of Tōpia Tūroa re the Murimotu Block' Native Land Court, *Wanganui Minute Book* (Vol. 1E, Aotea) at 599.

be divided politically). Hapū are most easy to see in action in records of war or other political situations.[29]

Probably at least partly because of multiple links, as well as partly from economies of scale derived from the practical limits of corporate size, before contact an iwi did not normally function as a corporate group - that is a group which together carried out functions such as defending their people as one unit in one pā, or working together in at least some economic tasks. Iwi were instead the widest social groups within which individuals and groups could claim the privileges and protections conferred by kinship through descent. These privileges and protections were used in conducting the wider social relations of individuals and smaller hapū or corporate descent groups who could claim kin links through these large iwi, and also through waka.[30]

When asked whether temporary fission occurred by groups into hapū and whānau followed by fusion as iwi as well as permanent break ups forming combinations of those groupings Dr Ngapare Hopa responded:

> I think it unlikely that all groupings who might have claimed descent from a particular waka would have altogether formed or be a concerted group who worked or moved cohesively. You might find groupings of common descent - a small group who amalgamate depending on the circumstances or event.[31]... There would be an amalgamation of autonomous groupings. If you look at the wars in Taranaki and Waikato ... given the situation and circumstances that groupings or lineages called hapū made alliances ... to resolve that particular problem but once that was resolved, they could resort to their own unit or autonomous state.[32]

It would thus appear to be inappropriate to identify one form of traditional and contemporary socio-political organisation as 'most significant' overall because group formation and representation varied according to function and context, not corporate form.

Moreover, the iwi, hapū and whānau form of social organisation was characteristically flexible and dynamic in operation, and highly responsive to changes in the balance of power. As is clear from Māori histories (oral and written) the number and identity of iwi and hapū changed over the course of time as a result of internal and external struggles for mana, the fortunes of war, migration, colonisation and urbanisation. As an iwi and hapū increased in size with the addition of new generations, it produced an array of ambitious young rangatira. As Metge noted:

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[29] Ballara, A, A 'Tribal Landscape Overview' Addendum, (Unpublished Paper, 2005, in author's Possession) at 178.
[30] Ibid, at 177.
[31] Dr Ngapare Hopa, supra n 5 at 37, lines 5-10.
[32] Ibid, at 37, lines 23-25.

> Throughout history, there have been those groups of Māoridom that have been called themselves iwi and hapu at certain stages and whānau at other stages. ... If you read any tribal history you'll find groups of hapū which in time become strong under strong leadership and establish themselves and continue to figure on the maps which record the iwi or tribes of New Zealand.[33]

An exceptionally able ariki might attract and hold the different sectors of an iwi and hapū together during his or her prime, but sooner or later they split into several new iwi and hapū. Iwi and hapū that had been defeated or lost many members in war or other disasters combined with others.[34]

Eddie Durie, then chief Judge of the Māori Land Court, succinctly summed up the 'traditional' place, purpose and power of the hapū:

> These were groups large enough to be effective for such purposes as war, gift exchange, hosting and harvesting resources. There were several hundred hapū, most of them free and independent. In terms of structure they were remarkably fluid, constantly changing, dividing as numbers increased, or fusing if due to war or famine numbers were reduced. In the result there were generally many hapū in any natural geographic region, which, through historic genealogies reinforced by continuing inter-marriage, were all related. It was characteristic of these hapū to be self-managing, but to federate in varying combinations for specific purposes, from war to entertaining, or fishing to long distance travel. They were independent yet inter-dependent, and related through a complex web of kin networks.[35]

If iwi and hapū forms changed before the coming of the Pākehā, they have undergone even more radical changes since, in response to external influences and pressures. To begin with, the changes were in the tradition of earlier times, the establishment of new iwi and hapū as a result of migration, conquest or amalgamation, but since 1840 iwi and hapū have been constrained by laws and administrative practice. Contemporary Māori socio-political polities - whether whānau, hapū, sub-hapū or iwi level – have their origins in pre-European society but developed their present form and some functions in the 19th and 20th centuries.[36] Ballara referred to them as 'modern tribes' rather than 'traditional tribes.'[37] Where the pre-European iwi was essentially a political grouping with some social functions, by 1990 the iwi was better described as *the* social grouping with residual political functions.

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[33] Dr Joan Metge, supra n 5 at 343.
[34] Ibid, at 5, para 4.5.
[35] Durie, E.T, 'Will the Settler's Settle? Cultural Conciliation and the Law' in *Otago Law Review* (1996) at 449.
[36] Dr Joan Metge, supra n 5 at para. 8.10.
[37] Ballara, A *Iwi: the Dynamics of Māori Tribal Organisation from c 1769 to c 1945* (Victoria University Press, Wellington, 1998) at 279-325.

Where the iwi as a whole may have formerly held an over-right over the whole of its territory, so that occupying whānau and hapū could not alienate territorial resources without iwi approval, after the establishment of the Māori Land Court increasingly large stretches of the iwi territory passed out of iwi control into the ownership of individual iwi members and of Pākehā but Webster noted:

> Iwi, like tribes everywhere in the world, are primarily political organisations that readjust kinship connections to suit, and tribes everywhere in the world, in that sense, are an integral part of a colonial history.[38]

Most iwi and hapū now own very little land in their own right. They remain associated with particular land areas, but their association is conceptual, not legal. Indeed, Metge noted:

> One quality that existed in a historical sense was that the group, apart from sharing a descent or whakapapa, tended to occupy a land area with some boundaries. Taking that same group today, evidence is clear that all that is left is a descent line or whakapapa. I think the whole thrust of developments over the last 10 or 15 years and the motive that powered what is sometimes called the Maori resurgence is the hope of regaining more than that. But the functioning group functioned within defined boundaries in proximity to one another. Together with that quality they also shared a whakapapa or descent line.[39]

Furthermore, where for centuries most members of iwi and hapū lived on the iwi and hapū territory, with only a small proportion travelling or marrying out, since World War II iwi and hapū members have settled in other areas (especially cities) in such numbers that from 50 to 90% of the members of most iwi and hapū are living outside their iwi territories.[40] However, Metge added, in terms of contemporary Māori socio-political groups, 'do not under estimate the power of symbolic identity.'[41] The association between iwi and hapū and the land they once held persists strongly in the hearts and minds of Māori today. Pepeha (tribal mottoes, proverbs) referring to mountains, rivers and lakes retain their vitality as markers of iwi and hapū identity. The status of tangata whenua continues to be of primary significance in the Māori social order. For example, one of the author's 'tribal' *pepeha* (sayings, mottoes) in the *rohe* (boundary) of Ngāti Maniapoto and Ngāti Raukawa ki Wharepuhunga is:

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[38] Dr Stephen Webster, supra n 5 at 178.
[39] Dr Joan Metge, supra n 5 at 344.
[40] Metge, supra n 29 at 5, para 4.6.
[41] Dr Joan Metge, supra n 5 at 344.

Ko Kakepuku te maunga,	Kakepuku is my mountain
Ko Waipa te awa,	Waipa is my River,
Ko Ngāti Paretekawa te hapū	Paretekawa is my 'tribe'
Ko Te Paerata te tangata	Te Paerata is the man (over this area)
Ko Ahumai Te Paerata toku kuia	Ahumai Te Paerata is my kuia

11.5 WHO COMPRISES THE TRIBE?

This section will now address the vexed area of ascertaining which unit and at what level was the traditional 'tribe' with customary rights to land and resources as well as self-governance in Māori and First Nations society. Given that an increasing number of individuals in New Zealand and Canada claim indigenous status outside of the 'tribe' or 'band,' the question of indigenous identity and representivity is one of growing importance. Often these individuals are urban Indigenous Peoples estranged from or living outside the traditional tribal domain, its format and history of political relations with the nation-state. This, in turn, raises a fundamental question that is becoming very important. Given that the settler state has duties in relation to its indigenous population including to internal self-determination, to whom do those duties extend? Are the state's relations primarily with Indigenous Peoples organised as 'tribes' or some similar political form? Or are those relations with Indigenous Peoples as a race? Is there some other basis from which the settler state's duties and relations arise?

11.5.1 THE NOTION OF 'TRIBE'

The notion of a 'tribe' is inherently ambiguous as applied to presumed authentically 'other' cultures everywhere. The term 'tribe' and many of its connotations were legitimated in nineteenth century anthropology through biblical and classical usage. Hence the concept 'tribe' is the English version of the Latin *tribus,* which in its original Roman usage referred to the three great divisions of the Roman patricians, each of which was supposed to be descended from a different ancestor. The number was later extended to thirty and then to thirty-five to include all the common people, represented politically by 'tribunes.' Later usage took the term outside the Roman context and applied it, for example, to the Twelve 'Tribes' of Israel, each of which was supposed to be descended from one of the sons of Jacob.[42]

Twentieth century anthropological usage has added scientific legitimacy to the term. Reference to Indigenous Peoples of Africa, North America, New Zealand, Australian

[42] See Genesis 49 and Deuteronomy 33 in the Bible for background and context on the twelve 'tribes' of Israel.

Aboriginals, and many other Pacific peoples as 'tribes' is now established and the word or its connotations have been adapted from English into hundreds of languages of the colonised as well as into other languages of colonisation. However, some anthropologists have long queried the overload of the assumptions in the notion of 'tribe'.[43] Webster noted a post-war attempt in the US to define the term more rigorously as a stage in a loose evolutionary sequence ('band', 'tribe', 'chiefdom', and 'state') assumed in various forms since nineteenth century anthropology.[44] Alfred Kroeber noted in 1954 that the more closely one looks at indigenous North America, the more largely does the 'usual concept of tribe ... appear to be a White man's creation of convenience for talking about Indians, negotiating with them, administering them.'[45] In 1966, Fried began to develop the thesis that 'all tribes are secondary, meaning that all known tribes, including those known to us only from the recesses of history formed as a reaction to previously existing states'[46] which sought to draw a priori functionalist logic back into particular histories. Leacock discovered through her research in Labrador that Canadian Indian 'bands,' as relatively stable political and territorial entities, are similarly a product of colonisation, especially mercantile trade.[47]

In more recent times, the term 'tribe' in the United States and New Zealand and 'First Nation' in Canada, which ramify into 'bands,' is the polity form of indigenous political organisation (rightly or wrongly), which carries the weight of tradition and of the depredations of history. McHugh made some very interesting and relevant observations on the importance of the 'tribe' in New Zealand or 'band' in Canada for Treaty settlements and self-determination. The tribe or band becomes an aboriginal version of the nation-state as the sole vehicle for an indigenous individual's claim to identity and therefore representivity, which identity is mediated through membership of the tribe. Membership of the political association becomes the source of individual identity and of the indigenous rights and status that a person is able to claim. The 'tribe' thus precedes and constitutes the indigenous individual.[48] In this way, the tribe or band is able to claim a monopoly of Crown attention for representation. In this, it also appears to ape the structuralist form of the settler state itself and so takes up a posture, which is mutually authorising. In the

[43] For example, see Fried, Kuper and Leach all cited in Webster, S 'Escaping Post-Cultural Tribes' in *Critique of Anthropology* (Vol. 15, No. 4, 1995) 391 at 394.
[44] Ibid, at 394.
[45] Kroeber, supra n 15.
[46] Fried, supra n 43.
[47] Leacock, supra n 43.
[48] McHugh, P, 'Aboriginal Identity and Relations in North America and Australasia' in Coates, K, & McHugh, P *Kokiri Ngatahi Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) at 144-45.

structuralist paradigm the political forms of state and tribe implicitly license and authorise each other.

Over the last thirty years in Canada and the past fifteen years in New Zealand, two questions have dominated debates on the recognition of tribes for funding and settlement purposes:

- Who, in First Nations and Māori culture, comprises the 'tribe' or band, that is, the body that traditionally allocated the resources and spoke for the people? Is it the band, clan or tribe in Canada and the hapū or the iwi or some other group in New Zealand?
- If the Tribal Council, Band Council or Iwi Authority represents the tribe, then which particular groups are tribes and bands; iwi and hapū?

The significance of the second question, on Tribal or Band Council and hapū or iwi status, arises from policies involving substantial sums of money, control over resources, representation on local government and other committees, and internal self-determination. These policies generally favour tribal councils in Canada and iwi (as opposed to hapū) in New Zealand, for asset management and service delivery purposes. Over the past thirty years in Canada the most notable policies of this kind have been those of the Federal and Provincial Governments that have dealt with comprehensive and specific aboriginal claims and Treaty settlement agreements. Over the past 15 years the most notable policies of this kind in New Zealand have been those of the Government and the Treaty of Waitangi Fisheries Commission and subsequent contemporary Treaty of Waitangi settlement agreements. Tribal and Band Councils and Iwi Authorities also have been preferred for obligatory, resource-management consultations. The resultant questions, which have seriously taxed relationships amongst First Nations and Māori groups in competition for funds, services and settlements, is whether any particular group qualifies as a First Nation's 'Tribe' or 'Band' and a Māori 'Iwi' or 'Hapū.'[49]

Below, a background is given to the first question on the customary position, and a response is given to the second on iwi identification. It is then suggested that the conceptions of tribe and band, hapū and iwi, need not in fact constrain the establishment of indigenous entities to represent a range of traditional groups. Indeed the question of which groups are tribes, bands, hapū and iwi may be seen as irrelevant for the purposes of indigenous entity formation. In terms of asset management the essential question is one of economy – what size of entity will best serve the interests of the constituent members of the group. In that context, the traditional status of those entities need not be of any concern.

[49] Supra chapters 9.10-9.13 on the tribal recognition debates over, inter alia, the Māori Fisheries Settlement allocation challenges.

11.6 HAPŪ AND IWI 'TRIBES': CONCEPTS AND INTER-RELATIONS

11.6.1 CHALLENGE TO 'TRADITIONAL' WHĀNAU, HAPŪ AND IWI TAXONOMY

The position appears to be that at a time when the science of anthropology was undeveloped, some early 20th century ethnologists, when examining Māori society, set out a tidy taxonomy and socio-political hierarchy comprised of iwi (tribes) composed of numerous hapū (sub-tribes) in turn made up of whānau (extended families). Indeed, early ethnologists posited iwi as the organ at the apex of a tribal pyramid. While traditional pre-colonial Māori society was allegedly organised along these predominantly tribal lines, the image of a classical hierarchy of social groups, chiefs and tribal members may be misleading. Winiata noted:

> It was not until the external pressures of European society that there was any movement towards a closer association of groupings joined by descent from a waka, and occupying the same territory.[50]

Winiata added that there was a sentimental attachment between Māori social groups and the ancestral waka. This backward looking sensitiveness rather than a political unity characterised social relations in the waka.[51] Andrew Erueti, however, noted that:

> Since the late 1840s, Māori kinship groups have been described in terms of a tidy taxonomy of iwi, hapū and whānau.[52]

Joan Metge identified this tidy taxonomy as a 'simplified version of a complex reality.'[53] Before 1840 hapū had a much greater degree of political freedom than is commonly recognised, and the iwi was more of an alliance of comparable groups than a unified polity, except occasionally under particularly able chiefs. Since 1840 however, hapū and iwi alike have had their powers of political self-management progressively reduced: in this century

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[50] Winiata, M 'Leadership in Pre-European Maori Society' *The Journal of the Polynesian Society* (Vol. 65, The Polynesian Society Inc, Wellington, 1956) at 213. See also Buck, P *The Coming of the Maori* (Maori Purposes Fund, Wellington, 1949) at 336; Firth, R *The Primitive Economics of the New Zealand Maori* (Routledge, London, 1929) at 101; Grey, G, *Nga Mahi a Nga Tupuna* (Vol. 1, Maori Texts, 3rd Ed) (Edited by H.W Williams, Board of Maori Ethnological Research, Wellington, 1928) at 194 and Ngata, A 'Anthropology and the Government of Native Races' in *New Zealand Affairs* (New Zealand Institute of Pacific Relations, Christchurch, 1929) at 30.

[51] Idem (Winiata).

[52] Erueti, supra n 6 at 30.

[53] Metge, J, supra, 25 at 3, para 3.3.

they have been able to assert their mana only in Māori settings, principally through oratory and hospitality on the marae.[54]

A post-structuralist view of traditional Māori social organisation sees political structures and form as a consequence rather than as the source of identity and relations. Post-structuralism starts with the premise that human identity and relations are inherently open, negotiated and layered.[55] A post-structuralist approach to identity and relations emphasises process, contingency and negotiation regarding political form and social structures as dynamic and participative rather than a predetermined expression of identity. Hence Cheater and Hopa[56] asserted that from 1840, it has been difficult to differentiate iwi from hapū and hapū from extended families [whānau], especially 'large-families' numbering 30 – 50 people.[57] An examination of pre-colonial governance and representivity practices reveals a fluid form of social and political organisation, with an emphasis on relationships over hierarchy, and with authority exercised at many levels. According to Ballara, 'in spite of periods of relative stasis, Māori society was dynamic in all its phases and 'traditional Māori society' is itself something of a myth.'[58] Webster added that we should avoid any assumptions of a timelessly 'traditional' Māori society, especially with regard to particular institutions such as hapū, iwi and whānau.[59] Webster held that iwi and waka took no clear shape until the musket wars of the 1820s.[60]

The post-contact period was one of social and political transition, more regular habitation, permanent agriculture, progressively less mobility, larger aggregations, less unit fractionation, more settled community polities, and the development of the latent ideology of a wider collective represented in waka and iwi.[61] Mason Durie asserted that kāinga, in the sense of a community, was also a component of traditional Māori social organisation with the fundamental difference that it was not entirely dependent on whakapapa or descent. Kainga highlighted the importance of rules and norms that did not necessarily

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[54] Idem.

[55] For an analysis of post-structuralism in an indigenous context, see Tully, J *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995); Patton, P 'Post-Structuralism and the Mabo Debate: Difference, society and Justice' in Wilson, M & Yeatman A (eds) *Justice and Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) at 153; and Radhakrushnan, R 'Ethnic Identity and Post-Structural Difference' in *Cultural Critique* (Vol. 6, 1987) at 199.

[56] Cheater, A & Hopa, N 'The Historical Construction of the Tainui Māori Trust Board' (Unpublished Manuscript, 2004, in author's possession) at 1.

[57] Metge, J *The New Zealand Maoris: Rautahi* (Routledge & Kegan & Paul, Auckland, 1976) at 131.

[58] Ballara, supra n 37 at 219.

[59] Webster, supra n 43 at 15.

[60] Idem. See also Groube, L.M 'Settlement Patterns in Prehistoric New Zealand' (Unpublished MA Thesis, University of Auckland, 1964) and Meijl, T van 'Māori socio-political organisation in Pre- and Proto-history' in *Oceania* (Vol. 65, 1995) at 304 – 330.

[61] Durie, E *Custom Law* (V.U.W.L.R. 325, Address to the New Zealand Society for Legal and Social Philosophy, 1994) at 13. See also Ballara, A 'Settlement Patterns in the Early European Māori Phase of Māori Society' in *Journal of the Polynesian Society* (Vol. 88, No. 2, 1988).

require bloodlines for example; rules of reciprocity and mutual advantage were probably more about survival than relatedness.[62] The transformation of Māori social organisational forms and traditions thus changed from what may be described as a pre-modern, post-structuralist, pre-bureaucratic situation of what Barcham termed a 'Heraclitian flux' to one of 'neo-Parmenidean stasis and ahistoricity [which] began from the very first point of contact with the west, wherein records were kept of customs of the newly discovered peoples.'[63]

During the 19th and early 20th century, new and existing tribal and hapū institutions evolved with changing circumstances, including attempts to retain land ownership in the face of the insatiable demand of new immigrants. Indeed, Durie noted that:

> The contact period was marked by unprecedented social change with major migrations and relocations and a marked increase in warfare between unrelated groups.[64]

At the same time, pan-tribal movements were working with tribal and hapū leaders to unite Māori and 'confront the problems of colonisation'[65] such as the confederation of Northern Tribes with the *Declaration of Independence 1835*,[66] the Kīngitanga in 1858, the Kotahitanga movement in 1892 and the various Messianic movements such as Pai Mārire, Te Whiti and Tohu at Parihaka and the Ratana church.

Tribal territories and groups were later further crystallised and frozen in legislative space through their recording and subsequent reification in the proceedings of the Māori Land Court in the late 19th and early 20th centuries. This process was further compounded by the work of various European scholars at the turn of the 19th century, such as Elsdon Best, Edward Tregear and Percy Smith, who were hoping to salvage ethnographic histories of Māori 'traditions' for the future, in their erroneous belief that the spread of European modernity would lead to the gradual extinction and disappearance of these customs and Māori as a people. A particularly well-known exposition of this view came from the Superintendent of the Wellington Province, Dr Featherston:

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[62] See Law Commission, *Māori Custom Law and Values in New Zealand Law* (Study Paper 9, Wellington, 2001) at 43 para 175.

[63] Barcham, M '(De)Constructing the Politics of Indigeneity' in Ivison, D, Patton, P & Sanders, W (eds) *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) at 142.

[64] Durie, supra, n. 61 at 13.

[65] Ballara, supra 37 at 335.

[66] For an in-depth analysis of the Declaration of Independence and the reflexive move towards a pan-Maori nation, see Henare's chapter 'The Phenomenon of the Maori Nation' in Henare, M 'The Changing Images of Nineteenth Century Maori Society – From Tribes to Nation' (Unpublished PhD Thesis, Victoria University of Wellington, August 1003) at 107 – 199.

> The Maoris are dying and nothing can save them. Our plain duty as good compassionate colonists is to smooth their dying pillow. Then history will have nothing to reproach us with.[67]

This was actually part of the larger late 19th century Western infatuation with theories of social Darwinism in which the inevitable, evolutionary extinction or its social equivalent, assimilation, of Indigenous Peoples within European colonies was widely assumed.

Certain Māori leaders such as Sir Apirana Ngata and Sir Peter Buck also played a key role in the process of temporal freezing with their concern to collect records of 'traditional' Māori life at the turn of the 19th/20th century to demonstrate that these traditions were eternally essential for Māori identities – past, present and future.[68] Māori traditions and organisational forms were thus objectified and reconstituted in a timeless asynchronicity.[69]

The traditional fluidity and dynamism of Māori lineage, identity, representivity and social organisation has thus been complicated by both written genealogies which were often treated as secret documents,[70] and by nation-state recognition and misappropriation of 'iwi' and 'hapū' identity through legislation,[71] official records, and also census categories.[72] It is conceded, however, that much of these state misappropriations of Māori identity and representivity were based to a large extent on the persuasions of high-ranking Māori bureaucrats and politicians. Indeed, the early ethnologists who posited iwi as the organ at the apex of a tribal pyramid were almost certainly influenced by the proclamations of Māori of their day.

In contemporary times Erueti commented:

> From the late 1970s, this 'iwi model' has increasingly come under attack from historians and anthropologists who see it as too simplistic and static, ignoring the role of hapū as a functioning corporate group, the absence of clearly defined hapū and iwi boundaries, and the tendency for all Māori descent groups to wax and wane over generations.[73]

Ballara also reached a similar conclusion about Māori forms of social organisation when she argued that:

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[67] Cited in Buller, W 'The Decrease of the Māori Race' in *New Zealand Journal of Science* (Vol. 2) at 55. In 1882, the renowned Dr A. K Newman spoke to the New Zealand Institute on the topic 'The Causes Leading to the Extinction of the Māori', and in 1885, Dr Isaac Featherstone uttered his infamous phrase justifying a humane policy towards the Māori as 'smoothing the pillow' before a dying race. Cited in Belich, J *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Auckland, 1996) at 247 – 8.

[68] Meijl, T van, 'Historicising Māoritanga: Colonial Ethnography and the Reification of Māori Traditions' in *Journal of the Polynesian Society* (Vol. 105, No. 3, 1996) at 329 – 30.

[69] Barcham, supra n 63 at 142.

[70] See Metge, supra n 57 at 120.

[71] Such as the *Māori Trust Boards Act 1955.*

[72] Supra, chapters 9.10 – 9.14.

[73] Erueti, supra n 6 at 30.

> The Māori political and social system was always dynamic, continuously modified like its technology in response to such phenomena as environmental change and population expansion.[74]

11.6.2 HAPŪ NOT IWI

The question of who is the 'tribe' in New Zealand must obviously be considered in the context of history but any discussion on the traditional social organisation of Māori society must take account of the passage of time and the processes of adaptation and change that have been at work in Māori society and culture throughout more than a millennium of occupation of Aotearoa. Belich showed how over a period of eight centuries before the coming of Europeans, Māori social, economic and political forms went through a series of adaptive changes in response to a varied and changing environment, increasing population densities, and changes in food resources. Far from always being there, the high level of socio-political groupings now referred to as iwi and hapū emerged after centuries of development.[75]

As one reviews the early evidence for the period around first contact, historians and anthropologists conclude that the hapū was the most significant socio-political group for most of the people most of the time.[76] In precolonial times, Māori land and resources seemed to be traditionally held in common by local descent groups called hapū. Henare noted that a further dominant feature of Māori social organisation was a decentralised system of social groups known as whānau and hapū.[77] Durie held that in the pre-contact era (pre-1769) all lands were vested in groups that were based on common descent, residency and participation in community activities. Durie called these groups 'Pu' or hapū and in some districts, 'whānau' with a membership that appeared to have varied from about 100 to 1000.[78] Pare Hopa concluded that the hapū rather than the tribe was the basic social and political unit in Māori society.[79] Ballara portrayed pre-European Māori communities as fluid collections of hapū and sub-hapū where the chief's authority over the community was recognised only while they consented to it. This 'reciprocal contract' was often rejected by either party, resulting in the 'break-up of that community, the migration of some of its elements, and the formation of the new communities elsewhere.'[80] Indeed, Metge noted

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[74] Ballara, supra n 37 at 21.
[75] Belich, supra n 67 at 67-89.
[76] Metge, J, 'Iwi: Word and Meanings' (Unpublished Paper, in author's possession) at para 8.3.
[77] Henare, supra, n 66 at 125.
[78] Durie, supra, n. 61 at 15.
[79] Hopa. N. K 'The Rangatira: Chieftainship in Traditional Māori Society' (Unpublished B. Litt Thesis, University of Oxford, Oxford, 1966) at 61.
[80] Ballara, supra n 37 at 206.

that the word hapū had three slightly different, overlapping referents. According to context the hapū could be:

- a descent category, comprising all known descendants of the focal ancestor, however scattered and whether in communication with each other or not;
- a descent group, comprising those descendants of the focal ancestor who interacted and worked with each other for common ends; and
- a local community consisting of those descendants of the focal ancestor, in-married spouses and other residents, who worked together for common ends under the maru (shelter) of the hapū name.[81]

In anthropological terms, the hapū was a cognatic descent group. The essential feature of such a group was that its members were all descended via either parent from a founding ancestor. But often this hapū founder him or herself descended from multiple ancestors from different lines of descent. Sometimes quite major, long-established hapū could trace to the earliest tangata whenua, and also to various ancestors arriving in the later canoes, or later migrating to the area where their descendants were to be found. In this way the descent of hapū was often reckoned from multiple, diverse ancestral directions. In the affairs of the hapū, these different links would be emphasized or glossed over as political circumstances dictated.

Hapū were described or given the title of 'tribes' in the Treaty of Waitangi 1840 and 'iwi' were not mentioned at all in connection with Māori.[82] The Preamble and concluding text of the Treaty of Waitangi state:

> ... ki nga Rangatira me nga Hapū o Nu Tirani – the Native chiefs and tribes of New Zealand...
>
> ...ko nga Rangatira o te Wakaminega o nga hapū o Nu Tirani ... - the Chiefs of the Confederation of the United Tribes of New Zealand...

'Iwi' was included, however, in connection with the people of England. The Preamble of the Treaty of Waitangi states in part:

> '... Na te mea hoki he tokomaha ke nga tangata o tona iwi kua noho ki tenei wenua, a e haere mai nei:' '... a great number of the people of her [Queen Victoria's] tribe have settled in this country, and more will come.'

'Iwi' was also included in Article I of the Declaration of Independence 1835 which states in part:

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[81] Metge, supra n 76 para 9.5.

[82] Ward, A *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1997) at 5, 24.

> 'Ko matou, ko nga Tino Rangatiratanga o nga iwi o Nu Tireni ...' 'We the hereditary chiefs and heads of the tribes of New Zealand ...'[83]

Referring to 'traditional' Māori 'tribes', Mason Durie noted:

> If we are looking at pre-1840, I take a lot of direction from the wording of the Treaty of Waitangi which, when addressing the question of the ownership of resources, refers to hapū not iwi so if that's what we mean by traditional view, the 1840 view, I'm aware there are other views that go before that but in terms of the 1840 view, hapū was the term that was in use.[84]

Although the Treaty distinguished ownership and representation, it also pointed to the need for new representational models. Thus while the land, resources and other taonga are guaranteed to hapū, the Treaty purported to be made with the newly formed 'Confederation of United Tribes' and was in fact mainly executed along iwi lines although most of the chiefs gave the name of a hapū, for example, Hone Heke Pokai no Matarahurahu.[85] Furthermore, in 1927 Tutere Wi Repa referred to the East Coast tribe Rongowhakaata *tuturu.*[86] Reweti Kohere of Ngāti Porou similarly referred to Ngāti Porou *tuturu* in 1930.[87] Ballara commented on the use of the suffix *tuturu* and the similar term *whānui*:

> The terms tuturu and whanui refer to different planes of existence or levels of identity of iwi and hapū. ... What they demonstrate is that some named groups existed on more than one plane or level. On one level there was a home or tuturu group living in the original or some long-held location; this group eventually took the name of the eponymous ancestor as the mark of their identity. ... Although in the 18th century the different branches or hapū of the iwi did not act together as one corporate group, they continued to acknowledge their descent from that original founder, thought of themselves as part of the wider people, and in some circumstances would define themselves by the name of that iwi.[88]

Hence, it would appear that Māori socio-political organisation was ambiguous and fluid - pre-contact, post-contact, pre-Treaty and post-Treaty - with function having the most influence on the particular form a group chose to organise and legitimise itself.

Early European settlers provided some interesting observations on Māori socio-political organisation such as George Clark, the first Māori protector, who stated in 1843:

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[83] The text of the *Declaration of Independence 1835* was supplied by Te Whakakotahitanga o nga Iwi o Aotearoa/ The Māori Congress. See Network Waitangi Otautahi, 87 Soleares Ave, Otautahi (Christchurch) at 8008. Refer to Appendix III.

[84] Durie, supra, n 8 at 204.

[85] This very important point was highlighted by the Waitangi Tribunal in Waitangi Tribunal, *Fisheries Report* (GP Publications, Wellington, 1992) at 12.

[86] Wi Repa, T, 'Te Tiupiri o Kihipane' in *Te Toa Takitini* (October 1927) at 672-3.

[87] *Te Toa Takitini* (1 Noema 1930) at 2182.

[88] Ballara, supra n 37 at 127.

> If, as is the general impression of all who have given their attention to this subject, the natives emigrated at different periods, we have at once a clue to the origin of titles. Each emigration landed, subdued, and laid claim to a certain origin, now claimed by their posterity; each party would most probably acknowledge a leader, either nominated or assuming such character by virtue of superior prowess, who would naturally be considered as the first chief of the 'iwi' or tribe. His children, with a portion of the 'iwi', or tribe, who might attach themselves to a particular child, may be considered as giving rise to the different 'hapūs' or lesser tribes, who, although a part of the original family, would form a separate and distinct community, uniting, however, in times of war, to repel the common enemy, but claiming and exercising independent interests in the soil in times of peace.[89]

In 1847 William Martin held that 'the whole face of these Islands [New Zealand] were held by 'sub-tribes' of a tribe – descendants of a common ancestor whose name it generally bears.'[90] Moreover, in 1861 Martin noted that:

> ...[the] whole community has a right like what we should call a reversionary right over every part of the land of the community. ... intermarriages for many generations between sub-tribes have so blended them together as to render it impossible to draw any distinction between them for any practical purpose. Owing to this process of fusion and intermixture there may be difficulty sometimes in determining the exact limits of the community.[91]

Martin emphasised that the 'community' which jointly exercised control over resources of a territory was made up of several overlapping hapū or - given that a hapū may be represented in different villages and in any case without distinct boundaries – parts of hapū. In 1862 George Clark also commented on Māori hapū:

> The disposition of the Natives to break up into small communities, claiming for themselves independent action, control and management of their own local affairs, though inconvenient, is yet obvious.[92]

Ballara described hapū as both corporate and conceptual groups. In other words, hapū existed on the basis of observable activities in common, as well as the genealogical links between members. Ballara noted that in the 18th century, 'iwi did not function as political units. In terms of corporate function, such as the defence of their people or a

[89] George Clark to the Colonial Secretary, 1843.
[90] Martin, W, 'England and the New Zealanders: remarks upon a dispatch from the right Hon. Earl Grey, dated 23 Dec., 1846, (1847); Bishops' Auckland, printed at the College Press, Excerpts, republished in Turton, H.H (ed) *Epitome official documents relating to Native Affairs and Land Purchases of the North Island* (Government Printer, Wellington, 1883) and again in various authorities on Native Tenure, *Appendices to the Journal of the House of Representatives* (1890), Appendix G-1.) at 48ff.
[91] Ibid, at 4.
[92] Clarke, G *Report by George Clark, the Civil Commissioner of the Bay of Islands Respecting the Runanga, 1862.*

common policy towards other groups, iwi were not operative units.'[93] Metge concluded that iwi did not act in corporate ways; the functions of hapū included managing its own external and internal relations, while the iwi functioned, minimally, as a source of identity and influence.[94] She noted that in the years preceding the establishment of settler government in New Zealand, individuals and whānau obtained access to productive resources, social support and protection against enemies only within the context of hapū functioning as groups.[95] Metge also concluded that a key difference between traditional and contemporary hapū and iwi social groups is not one of genealogical depth or size but of function.[96] As Ballara said:

> ... hapū were corporate as well as conceptual groups – groups of people who thought of themselves as a group because of their kin links through descent, but who combined in concrete ways to perform various functions for their defence, their self-management, to conduct relations with the outside world, and in many of their most important economic affairs. Hapū were independent politically; they acknowledged no higher authority than that of their own chiefs.[97]

The missionary Thomas Chapman remarked on how a hapū remained a distinct entity notwithstanding how convoluted the kinship links of its members:

> To understand something of the feuds and national feelings of the New Zealanders, it is necessary to state, that their clan-like divisions, however broken in upon by intermarriages, are indissoluble and defined.[98]

Webster discussed the nature of hapū organisation and the importance of socio-political functions at the hapū level:

> Hapū, where they've maintained their organisation for lack of land and other resources, often have been able to maintain their organisation to some extent. They can do it on a face to face basis but it's not true of iwi. Iwi have a great deal of difficulty serving their people, it's a high ideal. Many hapū can't do that but hapū, in so far as they are organised at all, can maintain a degree of face to face familiarity with one another. The kinship connections are much stronger. ... The whole sense of solidarity rests on a particular ancestor and perhaps a marae. Sometimes the hapū is named after the ancestor, people who don't live there and the great majority of Maori nowadays, and quite a few in olden times, didn't live in that territory but could maintain contact with the hapū.[99]

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[93] Ballara, supra n 5 at 124.
[94] Metge, supra n 5 at para 11.3.
[95] Ibid, at para 9.3.
[96] Ibid, at para 11.2.
[97] Ballara, supra n 37 at 336.
[98] Thomas Chapman, *Letters and Journals*, (TS, A.I.M., Vo.II, at 449, Entry for 1 September 1852).
[99] Dr Stephen Webster, supra n 5 at 178.

Referring to the values of *manaakitanga* (hospitality) and *aroha* (charity) and the socio-political level at which such values were manifested, Whata Winiata noted that it was:

> ... probably chiefs and among their hapū but no doubt there were occasions between iwi traditionally. ... [but] it would be the people doing the exercising, providing and displaying of aroha. ... Whānau, hapū particularly at that level. I say that because, in our area anyway, hapū were identified with marae and that is the principal home and the place where manaakitanga is extended. ... There are three hapū in Otaki marae, [but]. ... most of the tangihanga there are hapū based. There are some events distinctly of Ngāti Raukawa and other events of Iwi.[100]

Arapeta Tahana from Te Arawa also discussed the way hapū has been replaced by iwi:

> The terms iwi and hapū have come to be used interchangeably and when one responds to the question iwi one is responding to the hapū aspect of it rather than the iwi aspect ... the word iwi to a certain extent has come to replace hapū. This is because often for government administration purposes, rather than the government dealing with the hapū, it has wanted to deal with an iwi and so the term iwi has tended to become more dominant than what in my view it should be.[101]

11.6.3 LEGISLATIVE HISTORY OF HĀPU

Early legislation did not squarely address the question of whether the traditional tribe was hapū or iwi but generally provided descriptions in English along the lines of 'each tribe or division of a tribe.'[102] Legislation was vague for a time in terms of affirming whether the hapū was the main corporate unit in traditional Māori society. For example, the Native Land Court had power to vest land in certain 'tribes' and s. VII of the *Native Lands Act 1862* stated:

> Upon the application of any *Tribe Community or Individuals* of the Native Race it shall be lawful for the Court to ascertain ... the right title estate or interest of the applicants or of any other claimants to or in any land ... and upon the Court being satisfied that such *Tribe Community or Individuals* are according to Native Custom possessed of or entitled to any estate ... it shall be lawful for the Court to define such right title estate or interest. [Emphasis added].

Section XII of the same Act provided

> ... the President and Members of the Court shall sign and issue a Certificate of Title in favour of the *Tribe Community or Individuals* whose title shall have been ascertained defined and registered as aforesaid. [Emphasis added].

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[100] Arapeta Tahana, supra, n 5 at 398.
[101] Ibid, at 231.
[102] See for example, the *Resident Magistrates Courts Ordinance 1846* and the *Native Lands Acts 1862* and *1865*.

The *Native Lands Act 1865* continued with this pattern in section XXIII:

> The Court shall order a certificate of title to be made and issued which certificate shall specify the names of the persons or of *the tribe* who according to Native custom own or are interested in the land. ... Provided further that if the piece of land ... shall not exceed five thousand acres such certificate may not be made in favor of a tribe by name. [Emphasis added].

This legislation appears to show that the 'Tribe' was seen as a cognisable right-holding entity without needing any legislation to confer that status upon it, but it does not clarify whether the 'Tribe' was the hapū or iwi.

Still, while there is at least one reference to 'iwi or hapū chiefs' in associated commentaries on legislation, later commentaries clearly saw hapū as the tribe and as the possessor of the resources of the land. The *Confiscated Lands Act 1867*, for example, referred to 'compensation for the *hapu* entitled;' the *Tauranga District Lands Act 1886* mentioned 'other *hapu* in the area;' the *Native Land Court Act 1886* referred to 'land granted to the tribe/*hapu*;' the *Maori Lands Administrations Act 1909* mentioned '*hapu* boundaries;' and the *Maori Social and Economic Advancement Act 1945* referred to the 'exclusive use of Maori or any other tribe or *hapu*,' hence hapū appeared to have been the corporate level of Māori society at least after the *Treaty of Waitangi 1840*.

The change to the 'iwi' level may have occurred more recently in legislation such as the *Criminal Justice Act 1985* which referred to 'the care of an appropriate ethnic group, such as a tribe (iwi), a sub-tribe (hapu), an extended family (whānau), or marae.'[103] In subsequent legislation, particularly the *Runanga Iwi Act 1990*, *iwi* (without translation) was clearly intended to refer to 'tribe' and hapū was sub-tribe.[104] From this time, it appears that government policy and legislation have referred to 'iwi' instead of hapū as the traditional tribe.

It appears from the research above, therefore, that 'iwi' institutions can be said to be no more 'traditionally' authentic than other forms of Māori social organisation, a historical fact highlighted by legislative history as well as credible experts such as Henare, Ballara, Metge, Durie, Webster, Winiata and Tahana (among others), who demonstrated that hapū were the primary political and economic organisations of 'traditional' pre-European Māori society. Ballara even asserted that the notion of 'iwi' as an active political body wielding tribal sovereignty was a comparatively modern phenomenon that was not at

[103] Section 2 and definition of 'programme', *Criminal Justice Act 1985*.

[104] Section 6 of the *Runanga Iwi Act 1990* declared that 'the iwi is hereby acknowledged as an enduring, traditional and significant form of social, political and economic organisation by Maori.' This Act was short-lived however, and was repealed a year later pursuant to the *Runanga Iwi Act Repeal Act 1991*, but it appears that the policy of recognising iwi above hapū has persisted.

all in keeping with the historical reality of the decline of the political power of Māori kin-based organisational forms from the point of colonisation onwards. Following the signing of the Treaty of Waitangi, the loss of their military power in the 1860s, and an unsuccessful attempt to establish a separate Parliament, iwi and hapū found themselves at the end of the 19th century facing an ever decreasing power base.[105] Throughout most of the 20th century iwi seemed to be relatively weak politically and more a cultural institution than a political one.

Each hapū member seemed to have a right in common with the whole hapū over the disposal of land and resources and an individual right, subject to the hapū rights, to use land and other resources. Hapū rights appear to be based on possession (without contesting claims) and use over several generations; or conquest (raupatu) and subsequent occupation; or gift. Rangatira (chiefs) frequently donated land to meet their obligations to individuals or groups who aided them, to cement alliances by dynastic marriages, and to make peace.[106] As hapū grew they divided to occupy different places, generally in reasonable proximity to one another. They did not form sub-groups but divided laterally to form autonomous units of the same people. The people as a whole in a district were called the 'iwi' more in the vague sense of 'nation' than of a cohesive political unit implied by 'tribe.' By way of comparison those of other districts were called 'tauiwi.' The traditional social processes of fission and fusion would look after the growth of whānau and hapū until there was another whānau and hapū perhaps even iwi. Winiata held that 'beneath the relations that sustained the social groups was a system of kinship. Kinship had a two-fold effect – to divide and to unite together.'[107]

11.6.4 BUT HAPŪ FORM VARIED – SIZE AND A NEW NAME

As alluded to earlier, it appears that traditional Māori socio-political form was dictated by function rather than the reverse – form followed function - but what may have been confusing, and still is to some extent, is the use of labels to name the different forms and levels of Māori identity and representivity. Indeed, Ballara warned that hapū form and structure were ambiguous and heterogeneous:

> The study of the hapū of the 18th century is the study of the functioning independent political unit of the then contemporary Māori society. But hapū came in many styles and sizes. The largest, most successful hapū were the descent groups most like the 'tribe' of the literature;

[105] Maaka, R, 'The Politics of Diaspora', (Paper given at the 'Treaty of Waitangi: Māori Political Representation Future Challenges' Conference, Wellington, 1997) at 3.
[106] Cheater supra, n 56 at 2.
[107] Winiata, supra n 50 at 221.

> that is, they were the largest socio-political units whose members at least *sometimes* acted together as a corporate group, defensively or offensively in war, or in other common objectives. Such a group did not *always* live or act together; often it had many, smaller sub-hapū of its own which were scattered, sometimes in separate villages, sometimes grouped together, two or three forming a community. ... These communities... also at times behaved as corporate units, together or alone pursuing common economic and social goals. But whether the discussion is about a major hapū ... or a minor hapū, ... hapū of all kinds had in common an acknowledged descent from the founding ancestor of a wider people. They considered themselves as part, not the whole, of a people.[108]

In the context of the vexed challenge of assessing whether iwi or hapū were 'traditional tribes', Joan Metge commented:

> I think we are getting hung up on labels rather than what we are applying the labels to - in today's circumstances how do modern iwi vary from those of 200 years ago? The modern iwi live within the context of a state and are subject to limitations on their ability to be autonomous and govern by that position. One quality that existed in a historical sense was that the group apart from sharing a descent or whakapapa it tended to occupy a land area with some boundaries. Taking that same group today evidence is clear that all that is left is a descent line or whakapapa. ... I think the whole thrust of developments over the last 10 or 15 years and the motive which powered what is sometimes called the Maori resurgence is the hope of regaining more than that. But the functioning group functioned within defined boundaries in proximity to one another together. With that quality they also shared a whakapapa or descent line.[109]

Furthermore and in terms of the difference between hapū and iwi before 1840, Metge noted that hapū and iwi had the same form – 'they were both descent groups with members who defined themselves as a group by reference to an ancestor from whom all were descended and whose name they used as a group title.'[110] Sets of small hapū sometimes occupied several settlements together, but defended one pā at a time as circumstances dictated (they often moved according to the exigencies of war and built new pā). They formed one community for defence but were distinct groups of kin within it. Each of these kin groups had their own senior man (and sometimes woman) as chief, but together they usually recognised one or two leaders of the whole community. This arrangement persisted into the mid-nineteenth century. Thomas Chapman once described a typical situation:

> Take a pa of 200 male adults. Separate it into (perhaps) eight compounds. To each of these there is a principal Chief – and perhaps one of these Chiefs is a leading man [for the whole pā/community] – from age or valour, or resolute conduct and tact.[111]

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[108] Ballara, supra n 37 at 163-4.
[109] Metge, supra n 5 at 344.
[110] Metge, J, 'Customary Maori Land Tenure and the Status and Representation of Iwi' (Presented to the Crown Forestry Rental Trust, Wellington) at 7.
[111] Thomas Chapman, *Letters and Journals*, (TS Vol.2, at 236, entry for 8 November 1854).

As political relations and the balance of power changed, iwi and hapū frequently adopted new names, choosing ancestors who best symbolised their current grouping,[112] and some small hapū had their own senior man as chief – very occasionally a senior woman - but often lived under the mana of a recognised great chief of several descent groups. For example, Te Taipū was reckoned by his descendants to be chief over three hapū: Ngāti Rehu, Ngāti Tauana and Ngāti Wahapūa. These were three small family hapū which had developed within the intersecting genealogical lines of Tapuika and Ngāti Rangiwewehi. Ngāti Wahapūa was a subdivision or sub-hapū of Ngāti Rehu, and all three hapū, by the mid-nineteenth century, came under the umbrella of Ngāti Rangiwewehi rather than Tapuika. After the advent of Christianity, they became associated with Puhirua.[113]

Large, older and more established hapū were usually to be found scattered across a number of sets of settlements and pā living under the mana of various different chiefs. These sets of settlements were often to be found within contact with each other in one general district, even if interspersed with those of other hapū. But the vicissitudes of war, before contact as well as after, meant that branches of hapū could be widely separated by geographical location. This was especially the case for many of the hapū of parts of the central North Island during the wars of the 1820s and 1830s, as war disrupted living patterns and conquests provided widely separated alternative sites for settlement, for example those hapū with branches at Rotorua and Maketū, or others with branches from Rangitīkei and Murimotu south of Ruapehu to Rangitoto north of Taupō.[114]

Groups of kin defined by Māori as hapū were usually more recently differentiated from their parent bodies than iwi, and so of relatively shallow genealogical depth. That is, they might take their names from ancestors living four to twelve or so generations before people living in the nineteenth century. (This was not always the case; earlier groups with ramified branches sometimes waned in numbers and influence and shrank together, as it were, to reform as hapū or corporate groups.) For example, the ancestor Moeroro lived five generations before Tūreiti Te Heuheu Tūkino living in the late nineteenth and early twentieth century, and was five generations descended from Parekāwā, a woman descendant of Tūwharetoa,[115] whose husband, Ngāhianga, was a descendant by about six generations from Raukawa. Evidence was given that:

[112] Metge, supra n 25 at 5, para 4.5.
[113] 'Evidence of Hūtana Te Pokenui of Ngāti Rangiwewehi re Taumata No.3 Block,' in Native Land Court, *Tauranga Minute Book* (Vol, 2, Waiariki) at 73 ff.
[114] Ballara, supra n 29 at 179.
[115] Eponymous ancestor of Ngāti Parekāwā, a major hāpu of Ngāti Tūwharetoa.

> Moeroro was known as [Ngāti] 'Raukawa and as 'Tuwharetoa – he had no hapū name; there were no hapū names at that time. It was only in Moeroro's time that the name Ngātiparekawa [sic] was introduced.[116]

Small or minor hapū, the ramified branches of major hapū, could sometimes take their name from ancestors living only one to three or so generations before mature individuals living in the mid-nineteenth century. These small groups were often to be found living together in a body, inhabiting one set of settlements together, although perhaps sharing them and their pā of refuge with other small hapū. They differed little from large, extended families or whānau. For example, Aropeta Te Haeretūterangi described 'Ngāti Tūkaiora' as 'a mere family name.'[117]

As well as sometimes being termed 'iwi', many major descent groups were often termed 'hapū'. This was so even though, like iwi, they might be populous and also have widely separated (geographically) and ramified branches, some of which were quite small, recently separated and newly defined groups, virtually indistinguishable from large, multi-generational whānau or extended families. Thus the term 'hapū' could be applied to groups varying widely in terms of size and antiquity. Between 1800 and 1840, both Tūhourangi and Ngāti Whakaue did at times draw together and defend themselves as units, mainly in times of outside attack, such as the Ngā Puhi invasions. By the late nineteenth century many of these large groups which had many hapū associated with them, and in the case of waka several associated iwi, had become political as well as categorical realities with which to confront the challenges and strains of colonisation by a foreign power.

Hence, between the period 1800 to 1900, partly because of developments within Māori society but at least to some extent as a result of contact, the norms of Māori society were subject to considerable change and perilous imbalance. Many of the hapū which were dominant in the period 1800 to 1850, began in the second half of the century to be submerged, at least in the eyes of Crown officials and other Europeans, in wider identities such as 'Te Arawa', 'Ngāti Porou', 'Ngāti Tūwharetoa', 'Ngāti Awa', 'Urewera', 'Kahungunu', and 'Ngāi Tahu'. Even as early as the 1830s, European newcomers began to apply labels to larger groupings of Māori 'tribes' such as the 'Waikato tribes' and the 'Nga Puhi tribes.' Government officials began this practice often through information given by Māori about territories and peoples other than their own, which was not thoroughly investigated by officials. In 1843 the Protector of Aborigines, George Clarke, observed:

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[116] 'Evidence of Ngākuru Te Rangikaiwhiria re Hauhungaroa Block,' in Native Land Court, *Ōtorohanga Minute Book*, (Vol. 40, Waikato-Maniapoto) at 218.
[117] 'Evidence re Rangataua,' in Native Land Court, *Wanganui Minute Book*, (Vol. 3 Aotea) at 271.

> The natives living between the North Cape and Whangarei would invariably be styled 'Ngapuhis' by the inhabitants of the Thames and Waikato; nevertheless, this district includes numberless 'hapūs' or smaller tribes, with independent interests, and not infrequently at war with each other. The Thames natives, on the other hand, are known to the Ngapuhis as a body by the name of the 'Ngātimaru' but they are divided amongst themselves into four or five considerable tribes.[118]

Later in 1871, Resident Magistrate Samuel Locke, reported on the Taupō district:

> The people known under the general name of Ngatituwharetoa [sic] hold a very important position in the centre of this Island, having the possession of a large expanse of country surrounding Taupo and Rotorua Lakes, the country about Tongariro and Ruapehu mountains, and the upper waters of the Wanganui, Rangitikei, and Waikato Rivers, stretching down the latter river to near Titiraupenga, where they become intermixed with the Ngatiraukawa, and are again connected in the north and west beyond Tuhua by the Ngatimaniapoto.[119]

Thus to Locke and others like him, the Māori world was made up of huge peoples such as Ngāti Maniapoto, Ngāti Raukawa and Ngāti Tūwharetoa, each one of which acted together politically as one unit. In his opinion Ngāti Tūwharetoa was *the* unit, which controlled not only Taupō and regions to the north and south, but Tūhua, the upper Whanganui, the upper Rangitīkei and Lake Rotorua. He considered that 'the whole of this people, with the exception of Poihipi Tukairangi and a few followers, joined the King movement at its commencement.'[120]

In Locke's opinion, it appeared that in 1871 Tūwharetoa not only controlled a vast area, but also performed in the political arena as one corporate body. Yet his use of the phrase 'under the general name of Ngāti Tūwharetoa' indicated some awareness that this was not the only way the people of the wide regions he discussed identified themselves. Where did this leave large independent hapū, some of which had at least as many important links by descent to other ancestors as they had to Tūwharetoa, such as Ngāti Wairangi, Ngāti Tarakaiahi, Ngāti Te Koherā, Ngāti Moekino, Ngāti Parekāwā and the rest, whose chiefs made their own decisions and were autonomous over their rohe territory? Poihipi Tūkaikarangi's group were not the only Tūwharetoa people who did not join the Kingitanga,[121] neither did Tūwharetoa control the upper Whanganui,[122] nor

[118] GBPP, New Zealand, Vol. 2, at 356, Enclosure 6 in No. 4, George Clarke to the Colonial Secretary, 17 Oct. 1843.
[119] *AJHR*, 1871, F.-No.6, at 6, Enclosure in No.4, S. Locke to J.D. Ormond, 13 May 1871.
[120] Idem.
[121] Hōhepa Tamamutu and his people at Ōruanui, and Hāre Tauteka and his people, as well as a lot of people at Rotoroa did not support the Kingitanga.
[122] Te Ati Haunui a Paparangi Controlled the Upper Wanganui.

Tūhua.[123] Given such 'official' mistakes, it is no wonder there are cross claims within contemporary settlement areas.

Still, unity in new, wider groups was one of the results of fighting for the government. Many hapū of the central North Island - from northern Taupō, the Rotorua lakes area, the western parts of Kaingaroa and Maketū – became kūpapa (a term which actually meant 'neutral', but came to be used for the government's Māori allies and later as a derogatory for 'traitors'.) To a great extent the combinations of those who did become kūpapa coincided with the great political divisions of the inter-tribal wars of the 1820s and 1830s, when Ngāi Te Rangi and their Ngāti Hauā and Waikato allies fought Te Arawa peoples for the control of Maketū.[124] One of the later phases of those battles saw many Te Arawa groups, having combined for defence at Ōhinemutu, heavily defeated by the forces of Ngāti Hauā and Waikato at Mātaipuku in 1836. Struggles between Ngāi Te Rangi and their allies, and Te Arawa and their allies, were still continuing in the 1840s and 1850s. Such wars encouraged the beginnings of the use of 'Ngāi Te Rangi' as one label for the whole Tauranga district (even though not all the people of Tauranga were descendants of Te Rangihouhiri, especially the many hapū of Ngāti Ranginui) and 'Te Arawa' as another (even though the latter name had not yet been generally adopted.) The name 'Te Arawa' was first made popular as a name for the Rotorua and lakes iwi and their off-shoots at Maketū in the 1840s. It was said to have been coined by Wī Maihi Te Rangikāheke.[125]

Early 'Ngāi Te Rangi/ Te Arawa' divisions were reinforced in the 1860s in the early official rūnanga system, and even more so in the wars of the 1860s and 1870s. In the process of fighting for the government, the military force forged from the Lake District and Maketū hapū was often identified as Te Arawa, at least by its European officers, as against the separate hapū identities such as Ngāti Whakaue, Tūhourangi or Ngāti Pikiao formerly most important in Bay of Plenty politics. However, in the wars of the 1860s one of the constant themes was still the competition between Ngāti Pikiao, Ngāti Whakaue and other hapū; it would therefore appear to be premature to speak of an established 'Arawa' identity at this time. It had meaning only when compared to 'Ngāi Te Rangi' or 'Ngāti Awa' or 'Te Urewera'. But in the early 1870s, the Arawa Flying Columns were designed to break down hapū rivalries, and to some extent succeeded. The great hapū endured as they do still, but these years saw the beginnings of 'Te Arawa' as an important identifying label in the lives of Te Arawa people.

[123] Ngāti Maniapoto and Whanganui peoples controlled Tuhua.
[124] Ballara, supra n 29 at 194.
[125] 'Evidence of Pētera Te Pukuatua,' in Native Land Court, *Maketu Minute Book*, (Vol. 1, Waiariki) at 61.

In a similar manner, 'Ngāti Tūwharetoa' as a concept meant different things to different people at different times; again, after the end of the wars of the early 1870s it was becoming much closer to being a corporate reality. The establishment of the Tūwharetoa Komiti and the differentiation of Taupōnuiatia from the Rohepōtae block did much to establish 'Ngāti Tūwharetoa' as a corporate body, as distinct from the mass of independent hapū previously evident.[126]

11.6.5 FORMATION OF THE IWI-HAPŪ-WHĀNAU TAXONOMY

In the late 19th century and early 20th century, amateur ethnologists drew on the understandings of Māori informants to reconstruct the life of 'the Māori as he was.' Foremost among these, Elsdon Best formally articulated the iwi-hapū-whānau hierarchy[127] which model was picked up by both Firth[128] and Buck.[129] The result was a model of the pre-European Māori social order which distinguished three levels of organisation - those of iwi, hapū and whānau - each level consisting of a combination of groups from the level below linked by descent from common ancestors. Thus each iwi was seen as made up of hapū linked by descent from a selected tribal ancestor; each hapū was made of whānau linked by descent from the hapū ancestor. Each level was associated with a particular kind of leader: iwi with ariki, hapū with rangatira, whānau with kaumātua.[130]

Best, Firth and Buck identified the 'iwi' as a 'tribe,' the hapū as a sub-tribe, and the whānau as an extended family household. They stressed political autonomy as the defining feature of the iwi, which distinguished it from the hapū that, as a descent group, had the same form. Adoption of the term 'sub-tribe' for 'hapū' strengthened the inference that the hapū was subordinate to the iwi.[131] Metge noted however that this model was a 'simplified and generalised version of a complex, variable and dynamic reality.'[132] As a model, it represented a considerable achievement but it had a serious fault - it barely recognised the passage of time, except for cursory reference to the period of earliest settlement. It was timeless in the sense of leaving time and change out of the account. In theory open to criticism and revision, in practice it was accepted as established both by Māori and non-Māori scholars for decades.[133]

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[126] Ballara, supra n 29 at 195.
[127] Best, E *The Māori as He Was* (Vol. 1, Polynesian Society Memoir, Wellington, 1924).
[128] Firth, supra n 50.
[129] Buck, supra n 50.
[130] Metge, supra n 76 at para 7.4. See also Best, supra, at 127; Firth, supra n 50 at 111-112 and Buck, supra, n 50 at 333-35.
[131] Supra, Ballara, supra n 37 at 93-123 for more detail.
[132] Supra, Metge, supra n 76 at para 7.7.
[133] Ibid, at para 7.7.

It was not surprising that during the 1984-1994 Decade of Māori Development,[134] an emphasis had been placed on policies and delivery mechanisms at the level of the iwi not the hapū. In the 1980s Māori became increasingly articulate in their drive to win recognition as tangata whenua and regain rangatiratanga (control) over their own affairs and future in terms of internal self-determination. Supposedly looking to their ancestors and the tikanga they had passed on and this iwi-hapū-whānau hierarchical model '*mairano*,' (since time immemorial) from the distant past to the present, Māori leaders and Māori bureaucrats during this period joined in emphasising the tidy taxonomy as *the* basic framework of Māori socio-political organisation. This model was a theme of numerous reports and policy statements[135] and the basis for disbanding the Department of Māori Affairs and developing the policy of devolving to Māori a proportion of its development and welfare functions. The model of the Māori social order presented at the time however, was 'simplified, generalised, timeless and hierarchical, bearing a close resemblance to the model criticised as inadequate by scholars.[136]

Subsequently, the planning and policy making developed on this basis quickly became focused at the iwi level. Iwi development became the preferred vehicle for Māori development on the assumption that, no matter where they lived, Māori individuals would be able to relate at least to one iwi and therefore have more reliable access to social services such as Matua Whangai or economic development packages such as Mana Enterprises. The unique assumed position iwi occupied as tangata whenua in a particular location became a Treaty-derived political status of particular relevance to partnership with the Crown in respect of physical resources. After the 1984 Hui Taumata,[137] and partly because other Māori structures seemed unable to satisfactorily address Māori needs, iwi 'tribes' were encouraged to establish representative authorities to which certain government services could be devolved and through which channels of communication could be opened with the Crown. It was assumed that the iwi would develop services in consultation with the hapū contained within them. In the process the standing of the hapū became depressed vis-à-vis iwi. Government agencies, notably those engaged in

[134] Love, N, 'The Hui Taumata and the Decade of Māori Development in Perspective' in Department of Māori Studies, Massey University, *Kia Pumau Tonu: Proceedings of the Hui Whakapumau Māori Development Conference,* (Massey University, Palmerston North, 1994) at 21-27.

[135] See for example, Ministerial Advisory Committee, *Puao-Te-Ata-Tu* (Government Printer, Wellington, 1986); Royal Commission on Social Policy, *Report* (Vol. III, The Royal Commission on Social Policy, Wellington, 1988) at 3-41; Māori Affairs-Social Welfare Justice Departments, *Maatua Whangai* (Government Printer, Wellington, 1986); Minister of Māori Affairs, *Te Urupare Rangapu: Partnership Perspectives* (Government Printer, Wellington, 1988); Ministry of Māori Development, *Ka Awatea: Report of the Ministerial Planning Group* (Government Printer, Wellington, 1991).

[136] Metge, supra n 76 at para 7.10.

[137] Department of Māori Affairs, *Māori Economic Summit Conference, Conference Proceedings,* (Hon. K.T Wetere, Wellington, 1984).

negotiations over Treaty settlements, adopted a policy of dealing with the representatives of iwi only, and there was an increasing tendency, both within government and among iwi representatives, to focus on iwi as the only valid form of Māori socio-political organisation.

The final step of the devolution process was the establishment of Te Tira Ahu Iwi (the Iwi Transition Authority) established for a limited time to strengthen and develop 'iwi authorities' to provide services for Māori within the takiwa (territory) of the iwi concerned. The now defunct *Runanga Iwi Act 1990* provided for the incorporation of 'rūnanga' as legal entities for the express purpose of legally representing and acting on behalf of their iwi. The *Runanga Iwi Act* saw the structural relationship of basic Māori society as follows:

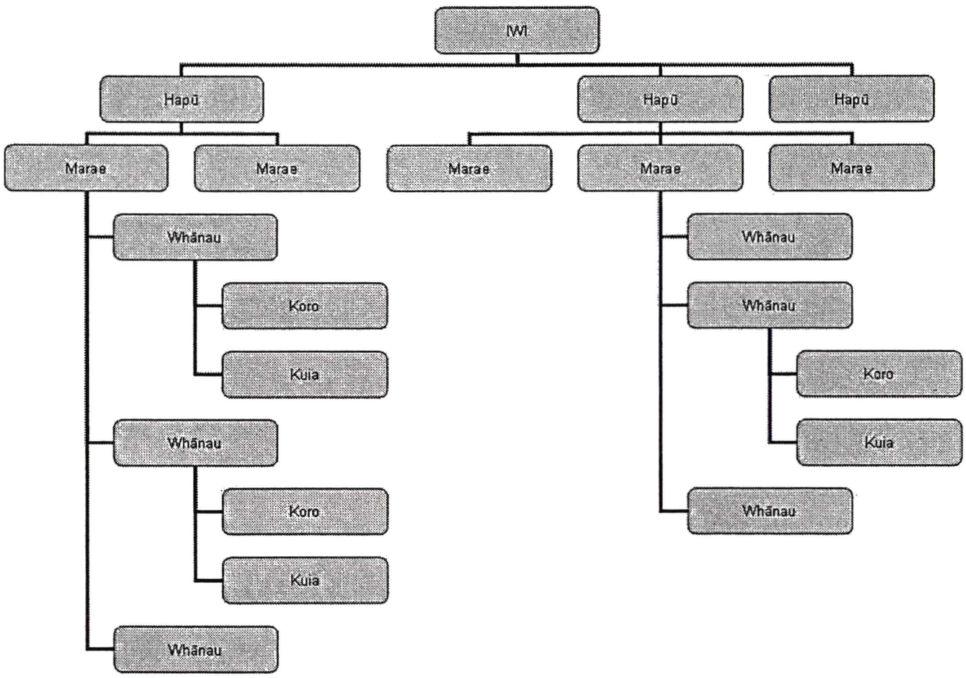

Figure 26 Iwi, Hapū, Whānau Taxonomy

Whānau included extended family and nuclear family. Extended family included those not necessarily related by direct blood ties, which were fluid and changeable and must be seen in the context of individual circumstances. Hence, the tidy taxonomy of 'traditional' Māori social organisation was:

- an iwi resembles a confederation of hapū; and
- a hapū resembles a confederation of whānau who are affiliated to a marae.

Section 6 of the *Runanga Iwi Act* recognised for the first time only 'iwi' as the 'enduring, traditional, and significant form of social, political, and economic organisation for Māori.'

Moreover, the rūnanga (council) of each iwi that chose to incorporate under the *Runanga Iwi Act* would be deemed to be *the* 'authorised voice' of that iwi.[138]

For many years now, iwi and hapū members, historians and anthropologists have researched the scholarly models of Māori socio-political organisation and have challenged this tidy iwi-hapū-whānau model. Metge among others noted:

> The problem goes back to the application of hapū and iwi. ... not just the word but also the group to which the words are applied. When I was a young anthropologist I adopted the model that had been laid down by my predecessors and made use of it and that was one which used the word 'iwi' and matched it with the English word 'tribe' and used 'hapū' and matched it with 'sub-tribe.' However, in actually engaging in fieldwork, in talking to Maori in the city and country, I discovered that people didn't fit that academic strait jacket. People would use the word 'hapū' for groups that my reading and the experts had told me were usually classified as 'iwi' and in a number of occasions when I asked people to name their 'iwi' or 'tribe,' they gave me a name which I had never heard before and could subsequently establish to be a 'hapū' of one of the tribes or names I did recognise. In the real world there is quite a range of variation in how people use these words and what they understand, with reference to actual groups.[139]

When the Runanga Iwi Bill was before the Parliamentary Select Committee, many submissions were made criticising the Bill. One submission presented by Te Kotahitanga o 'Tai Tokerau' was particularly critical, dismissing the Crown's definition of 'iwi' as 'delimiting, static and culturally wrong.' Te Kotahitanga o 'Tai Tokerau' pointed out that the iwi of Tai Tokerau most often stemmed from not one but a set of ancestors associated with a waka or a particular historic event, that they did not have clear-cut boundaries but shared borderland areas and in some cases heartland as well, and that marae were 'owned' by whānau and hapū, rarely by iwi. Te Kotahitanga o 'Tai Tokerau' noted:

> This definition effectively lessens the mana of Hapū, marae, rohe, takiwa and papakainga. Indeed we would argue that our Hapū and Marae are more important than Iwi as social and cultural institutions, and as focal points for community development. Iwi is of importance for the wider aspects of political and economic organisation and as a shelter for Hapū and Marae, without usurping their mana.[140]

Metge criticised the Runanga Iwi Bill for taking a static, simplified view of the Māori social order limiting flexibility and ignoring problems of delivery in urban areas.[141]

Notwithstanding the criticisms, the simplified model of iwi underpinning the *Runanga Iwi Act 1990* and the policy of iwi development has become the prevailing

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[138] Section 26, *Runanga Iwi Act 1990.*
[139] Dr Joan Metge, supra, n 5 at 342-3.
[140] Cited in supra, Metge, 76 at 7.14.
[141] Ibid, para 7.15.

orthodoxy in government departments and among many but not all iwi leaders through the 1990s and into the new millennium. It was adopted by Te Ohu Kai Moana even before the 1992 Hui-a-Tau. The definition of iwi presented in TOKM's 1997 and 1999 documents drew heavily on that contained in the *Runanga Iwi Act* and was word for word the same as that contained in the explanatory notes produced by the Māori Land Court, Manatu Māori and Te Tira Ahu Iwi in 1990.[142] The recently enacted *Māori Fisheries Act 2004* appears to continue to adopt the 'iwi' form from the *Runanga Iwi Act 1990.*

11.6.6 HAPŪ OR IWI?

As emphasised above, Māori social organisation was much more complex and particularised than earlier whānau-hapū-iwi models, and distinguished by their sense of history and their recognition of change.[143] Still, although the schematic representation was overly simplistic, the depiction had popular appeal. Naturally governments prefer to deal with iwi for expediency purposes. They do not appreciate the prospect of dealing separately with 700 to 1000 or more politically independent hapū and therefore promote the concept of iwi federations and iwi settlements, via the policy of dealing only with 'large natural groupings' for Treaty settlement negotiations, if only to make their own task easier. In 1998, Sir Tipene O'Reagan set out, when he was chairman of TOKM, a possible Fisheries Settlement allocation model with benefits going to iwi rather than hapū:

> It follows as a matter of simple logic that the return of wrongfully alienated fisheries assets should be the original owners. Contrary to the claims made in several corners, we know who is the closest contemporary expression of that ownership – iwi. ... I can hear the counter chorus, 'No. They belong to hapū. It was hapū who signed the Treaty!' This strident cry chooses to ignore the fact that at least 1,000 hapū are probably in existence today, and knowing human nature, another 1,000 would soon be plucked from oblivion were we to allocate to hapū. Beyond the number, the intense intergenerational dynamic of hapū – creating, dividing, recreating and disappearing – makes it functionally impossible to allocate to those outside the group which contains it, the iwi. ... Common sense dictates that to fractionate the asset into small units would be an administrative nightmare, let alone the strong arguments against vesting such economically non-viable packages.[144]

The author concurs with the common sense approach to prevent the fragmentation of the fisheries resource and human nature 'plucking hapū from oblivion.' But a fundamental aspect of traditional tikanga Māori is acknowledgement. When one looks at powhiri, tangi, whakapapa, whakataukī, pepeha – there is a very strong emphasis on

[142] Ibid, para 7.17.
[143] Idem. Foremost among these researchers are Ballara, supra, n 37; Webster, S, 'Hapu as a Whole Way of Struggle: 1840-50s before the Land Wars,' in *Oceania* (Vol. 8. No. 3, 1998) and Ward, A, *An Unsettled History: Treaty Claims in New Zealand Today* (Auckland University Press, Auckland, 1999).
[144] Te Ohu Kai Moana, *Annual Report* (Te Ohu Kai Moana, Wellington, 1998).

acknowledgement - acknowledgement of the past, of tipuna, whānau connections, hapū and Iwi; an acknowledgement of nga Atua and so forth. Perhaps what may have assisted O'Reagan's dogma is an acknowledgement of this tradition – acknowledgement that perhaps hapū were the main political corporate group of traditional Māori social organisation 'mairano' but given the fragmentation and hapū proliferation challenges as well as administrative logistics TOKM preferred to allocate to aggregate groups of hapū tribes, that is, to iwi.

In his final speech as a Member of Parliament in 1999, the Rt Hon Sir Douglas Graham was involved in a short exchange over this vexed enmity between hapū and iwi within Treaty settlements with the then opposition MP Tariana Turia, which proceeded as follows:

> Rt Hon. Sir Douglas Graham: If that member thinks we are going to deal with hapū settlements, she can forget it. There are thousands of them, and if she thinks the Crown is dividing people now, which we are certainly not trying to do -
>
> Tariana Turia: It's a treaty right.
>
> Rt Hon. Sir Douglas Graham: The member keeps talking about treaty rights. If the member does not want any settlements, and I know she does not, then, say we want to deal hapū by hapū, in a thousand years' time she will still be working it out and will still be arguing about the hapū rohe boundary. It is bad enough dealing at the iwi level, but that is another issue.[145]

This exchange reveals how government policy on Treaty settlements prefers to operate at the iwi not hapū level which is problematic to say the least.

11.7 CONTEMPORARY PLACE OF HAPŪ

Some politicians, bureaucrats and even Māori leaders have questioned whether hapū were defunct as functioning corporate units by the mid-20th century implying that hapū are defunct in contemporary New Zealand. It has been alleged that different groups including iwi tribes, urban networks, marae or new style whānau, not all of which are based on cognatic descent, have superceded the place of hapū. Contemporary Treaty settlements in New Zealand have both challenged and reinforced that assumption. Webster considered that hapū, albeit adapting into new forms, have had a continued existence as a unit of Māori social organisation.[146] Indeed, Ballara concluded:

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[145] Rt Hon Douglas Graham NZPD (5 October 1999, 580) at 19590.
[146] Webster, supra n 143.

> However defined, hapū continued to be the primary units of Māori society. In 1947 it was reported in relation to the electoral roll of that year that 'Half the applicants did not know their tribe ... and 10 per cent did not know their hapū.'[147] To put it another way, to 90 per cent of Māori in 1947 their hapū was the unit of everyday reality; their tribe was a formal category they might or might not know, and might or might not make use of. Rural marae continued to be owned and operated by communities or by hapū, sometimes small family hapū or whānau,[148] sometimes single larger hapū or hapū clusters.[149]

The late Sir Robert Mahuta made a very interesting yet controversial comment regarding the role of hapū within Waikato, highlighting perhaps the perceived and real tension and enmity between hapū and iwi specifically within the Waikato Raupatu Claims Settlement boundary but with general application in most if not all tribal areas throughout New Zealand. Sir Robert was reported in the New Zealand Listener in 1995 as stating that hapū are deemed to be so irrelevant to contemporary land ownership when he noted that: 'hapū exist only in the head ... [as a] myth with no formal structure.'[150] Sir Robert defended his view:

> That statement was made on the basis of questions being asked of me by what I regard as a cub reporter who didn't know anything about being a Māori and I didn't have time to educate them.[151]

Sir Robert then supported his view, however, of bypassing hapū when he held:

> ... for practical day to day purposes of managing Māori affairs, the Māori Committee was probably the most viable and regular forum for discussing local affairs.[152] ... Whatever it might have been in olden times for present day purposes, Waikato iwi sees it as more practical and sensible to bypass the concept of hapū and deal directly with marae because they are the reality of modern day living. The present time, that is the most convenient way of us trying to manage our tribe through our marae and we have around about 60 of them.[153]

Still, Mahuta did add comment that 'the marae is the physical base for hapū.'[154]

There was inevitable opposition to Sir Robert's view from, among others, Angeline Greensill and Dr Ngapare Hopa. Greensill noted with concern that 'marae structures have begun to replace hapū,'[155] while Dr Hopa was more assertive:

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[147] *New Zealand Herald,* (22 January 1947).
[148] See also Metge, J *New Growth from Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 39-40; and Sissons, J *Te Waimana The Spring of Mana: Tuhoe History and the Colonial Encounter* (University of Otago Press, Dunedin, 1991) at 117.
[149] Ballara, supra n 37 at 282. See also Salmond, A, *Hui: A Study of Maori Ceremonial Gatherings* (Wellington: Reed, 1975). at 2, 31, 57, 61.
[150] New Zealand *Listener* (24 June 1995) at 22.
[151] Sir Robert Mahuta, supra n 5, at 537, lines 3-6.
[152] Idem, lines 8-10.
[153] Idem, lines 11-13.
[154] Ibid, at 540.

> I find it difficult to reconcile the notion that hapū are only constructs of the mind, that they are myths with no formal structure. How can that be? Hapū as I understand it are a group of kin who can claim descent as defined strictly – they are people not just constructs of the mind.[156]

When asked about the place of urban Māori who do not, for all practical purposes, know their hapū and iwi, Mahuta responded that 'it is one question of knowing, another of exercising that knowledge'.[157] Perhaps an example of this situation is John Tamihere, former Chief Executive Officer of Te Whānau o Waipareira Trust, Labour MP and staunch advocate of Treaty rights for urban Māori collectives who still strongly acknowledges his Ngāti Porou whakapapa, as Melbourne recorded:

> John says he is not denying his Ngati Poroutanga. But he was born and lives in Auckland. ... And he says what has protected him as a Maori person living in the city is Te Whānau o Waipareira.[158]

Mahuta did acknowledge the fluid nature of traditional Māori socio-political organisation, however, when he noted: 'The structures are not static, but change with time and adapt whether a sub-tribe or a tribe.'[159] If the *Waikato Raupatu Claims Settlement Act 1995* (WRCSA) (which Mahuta masterminded) is anything to go by the place of hapū appears to have been usurped by marae but more especially by the iwi in this case 'Waikato.' This situation and the depiction of a tidy taxonomy of whānau, hapū and iwi has not passed unchallenged by some Māori groups who continue to see 'tribe' as 'hapū.' Some groups insist that the only form of governance with any meaning in their daily lives was based upon the marae of their hapū and that traditionally, 'hapū' was the only term used on marae when referring to visiting and local 'tribes'[160]

A vexed enmity thus appears to exist between the mana of many hapū and the expediency of dealing with iwi. In a Māori Fisheries Settlement context but with relevance to contemporary Māori social organisation, identity and representation, technical questions have been raised and continue to be raised – is there a difference of meaning between the Māori word 'hapū' and the English word 'tribe' in the Treaty texts? Is hapū a tribe or a sub-tribe? Should leaders of iwi (which have been institutionalised by the state) or hapū

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[155] Ibid, lines 10-11.
[156] Ibid, lines 6-11.
[157] Ibid, at 537.
[158] Melbourne, H *Māori Sovereignty The Māori Perspective* (Hodder Moa Beckett, Auckland, 1995) at 113.
[159] Iwi Transcript, supra n 5 at 537.
[160] Durie, E, 'Entities, Tribes, Beneficiaries and Members' (Unpublished Draft Governance Paper, Law Commission, Wellington, 2004) at 4.

(legitimated by the Treaty) represent their people? As alluded to already, in pre-contact Māori society there were hierarchical structures known as iwi (or tribes) which comprised a number of hapū or (sub-tribes) but in the eighteenth and nineteenth century the hapū was politically independent. Generally groups of related hapū were spoken of as iwi or people, but iwi had no everyday political function except when under threat from outside. The current political situation and Treaty settlement policy places iwi at the apex of a legal fiction – a politically and legally manufactured cultural and political pyramid - with an omnipresent and omnipotent function that it did not have traditionally.

Angeline Greensill provided a specific example of one such grievance being created from the *Waikato Raupatu Claims Settlement Act 1995*[161] between the iwi Waikato and one of its 'official' constituent hapū, Ngāti Whawhākia as well as an officially 'lost' Waikato tribe - Ngāti Ngaungau.[162] Greensill cited a submission made by Manaki Kewene who objected to the Crown vesting Ngāti Whawhākia and Ngāti Ngaungau hapū lands at Hopuhopu in the then Tainui Māori Trust Board (TMTB) without consultation with them as the original owners who donated the land to the Anglican Church.

Briefly, in 1853 Heta Tarawhiti, of Ngāti Ngaungau, gifted 1385 acres of land at Hopuhopu to the Anglican Church. The Governor issued a school grant for Hopuhopu to the Bishop of New Zealand so long as the land was to be used to support and maintain a school for religious education. A school opened in 1857 but ceased to function a decade later. By 1873 Heta Tarawhiti asked the Church Missionary Society (CMS) on behalf of his hapū why the land had run to gorse, why the school was closed and why the land had not been returned to his people. The CMS without consultation then promptly leased out the land for a period of 42 years. At the beginning of the 20th century descendents of Heta Tarawhiti petitioned the CMS and the Government for not adhering to the conditions of the school grant which was investigated by a Royal Commission of Inquiry in 1905. In 1920 Hone Pere and 41 other descendants of Heta Tarawhiti petitioned Parliament for the return of the land. However in 1922 the Crown acquired the land through the *Public Works Act*. In 1950 another generation of descendents from Ngāti Whawhākia and Ngāti Ngaungau sought information on previous petitions to determine their position or current status. Apparently this was to no avail, as the Crown continued to hold the land for defence purposes.

[161] Cited in Shaw, M.R, 'Conference Introduction' in The FIRST Foundation, *Indigenous Governance and Accountability: Whakahaere-a-Iwi, Whakamarama-a-Iwi* (Ngai Tatou 2020 Conference Proceedings, Wellington, 30 September – 1 October 1999).

[162] For a discussion on this phenomenon, supra, sections 9.10 – 9.13 on the 'lost' tribes of Waikato.

In 1992 the Government vested the land (now declared surplus for defence requirements) to the TMTB, an iwi authority, purported to represent *the* 33 hapū throughout Waikato. The transfer of Hopuhopu was an advance return of land in partial settlement of the *Waikato Raupatu Claims Settlement Act 1995*. However, the direct descendents of the original donors were unaware of the Crown's intention that these lands were vested in Potatau Te Wherowhero title. In March 1993, at a special hearing of the Māori Land Court held at Turangawaewae marae, in the first indication to those assembled that such a trust existed, the three custodial trustees[163] were announced and the TMTB was managing trustee of the Potatau Te Wherowhero Trust. Consequently, 37 of Heta Tarawhiti's descendents appealed unsuccessfully against the vesting of the lan in the Maori Appellate Court[164] because the TMTB alleged that the lands were returned to 'Waikato and not to any one individual.'[165] Every inquiry or petition was forwarded by Heta Tarawhiti himself or his direct descendents[166] but the die was cast for the extinction of hapū rights under the collective TMTB and Kīngitanga title of Potatau Te Wherowhero.[167]

11.8 THE IMPACT OF HAPŪ AND IWI IDENTIFICATION

The next and more taxing question that has commonly arisen from policies to recognise iwi, as already stated, has been whether any particular group is an iwi or a hapū. This is no easy question to answer given that there are numerous factors that hinder a regional approach based simply on descent. In any region, distinct descent groups may co-exist. This may be the result of migrations or conquests, for example. Furthermore, those in major migrating parties were regularly recruited from a range of unrelated hapū resulting in many distinct tribal groups occupying a single region today.[168] In other areas, discrete descent groups in fact settled on lands mainly occupied by others, sometimes in a client relationship, and in other areas again, minority groups had long existed in districts, tracing their descent from distinct lines, even to the crew of entirely different waka.[169]

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[163] The three custodial trustees of the new Potatau Te Wherowhero Land Holding Trust in 1993 were the present Head of the Kingitanga, Dame Te Atairangikaahu, her adopted brother Robert Mahuta and uncle Tumate Mahuta.

[164] Grant, J *Summary of Submissions in the Māori Appellate Court of New Zealand*, (Waikato-Maniapoto Land District, Appeal No. 1993/2).

[165] Tainui Maori Trust Board, *Annual Report* (Tainui Maori Trust Board, Hamilton, 1993).

[166] FIRST, supra, n 161.

[167] See Hopa N, 'Land and Re-Empowerment: The Waikato case' in Cheater, A (ed) *The Anthropology of Power* (ASA Monograph 36, Routledge, London, 1999) at 103-119.

[168] For example, in the major migrations to the Kapiti coast in the 1820's, Te Rauparaha recruited supporters from throughout the central North Island, from the west to east coast.

[169] Ballara well illustrates the range of circumstances where she views *iwi* as peoples or nations and *hapū* as tribes. Ballara, supra, n 37.

Accordingly, the division of iwi according to regions can mean that some significant autonomous groups are left unrecognised or are forced into positions that they see as diminishing their status. For example, it appears that that is how the people of Rongomaiwahine and Ngāti Hine saw themselves in their arguments before the Treaty of Waitangi Fisheries Commission and the Parliamentary Select Committee. A further difficulty is that the distinction between a hapū and an iwi is not absolute. A group may be identified as either a hapū or an iwi depending on the context.[170]

11.9 IWI OR NOT IWI – THAT IS THE QUESTION

11.9.1 WAR OF WORDS, WAR OF INTERPRETATION – MĀORI 'TRIBES'

Vygotsky discussed the importance of consciousness and words when he stated:

> Consciousness is reflected in a word as the sun in a drop of water. A word relates to consciousness as a living cell relates to a whole organism, as an atom relates to the universe. A word is a microcosm of human consciousness.[171]

In his commentary on the work of the Chinese philosopher Chuang Tzu, Kuang-Ming Wu discussed the importance of words noting that:

> Words are the tools and trails of our discernment of life. They are an abstractive sieve which captures not only general themes but clues to the pulsations of the real. They are useful because they constantly refer us back to the thick 'mud' of existence where the dynamic of ambiguity persists in its own renewal.[172]

Wu then added the connection between words and what the reader discovers:

> A writer works on things between the words, not directly on what is said explicitly; the reader discovers it only when he thinks it for himself.[173]

Brian Friel linked history to language and images in his play *Translations* commenting that:

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[170] A group may be counted as an iwi if regard is had to its numerous divisions and marae, and yet the same group may count itself as a hapu of a larger confederation. This appears to apply to several 'hapu' of Te Arawa for example, like Ngāti Whakaue, Ngāti Tuhourangi and Ngāti Pikiao. Dame Joan Metge mentioned to the author that in the 1960s, Pei Te Hurinui Jones identified these Te Arawa groups as 'iwi' and Te Arawa as an 'iwi of iwi.' Personal Communication, October 2005. See Metge, J, *The Maoris of New Zealand* (Routledge & Kegan Paul Ltd, London, 1967).

[171] Vygotsky, L.S 'Thought and Word' in Baker, M (ed) *Routledge Encyclopaedia of Translation Studies* (2001) at 126.

[172] 'Chuang Tzu: World Philosopher at Play Chuang Tzu,' see Arrington, R, *The World's Great Philosophers at Play* (Blackwell, Malden, MA, 2003) at 22.

[173] Ibid, at 34.

> ... it is not the literal past, the 'facts' of history, that shape us, but images of the past, embodied in language. ... we must never cease renewing those images; because once we do, we fossilize.[174]

The fossilisation of words has occurred within the context of the contemporary indigenous settlements in Canada and New Zealand particularly when it comes to indigenous rights, identity, representation and self-governance. Often indigenous words, which have been incorporated into legislation and policy, require defining and unpackaging for political certainty and political efficacy. What often results from codifying indigenous words and concepts in legislation and policy is a mistranslation, redefining or narrowing of those words and cultural concepts – a hiatus in that microcosm of human consciousness, the pulsations of the real and a hiatus in that subjective discernment of life with regards to that word. Often, it seems, such (mis)translation 'games' are a manifestation of the omnipresent master discourse of control and hegemony over Indigenous Peoples lives and being. Indeed, Bruce Biggs identified the 'Humpty-Dumpty principle'[175] when translating words across cultures which he defined as 'assigning new meanings from the source language (English) to an existing word in the target language (Māori, First Nations).'[176] He was referring to a passage in Alice in Wonderland by Lewis Carroll: 'When I use a word,' said Humpty-Dumpty, 'it means exactly what I choose it to mean. Neither more nor less.' [177] The objective in this context appears to be that by re-defining an indigenous word by fiat, as it were, it will mean what it has been chosen to mean.[178]

Jean Franco stated that 'discussions over the use of words often seem like nit-picking; language seems to be irrelevant to 'real' struggles. But the power of interpretation, and the active appropriation or misappropriation and invention or re-invention of language, are crucial tools for emergent social movements seeking visibility and recognition for views and actions.'[179] As David Slater suggests, such cultural contestations and social struggles can be viewed as 'wars of interpretation' within which the orientation and substance of demands are constructed.[180] In a New Zealand context for example, it is sometimes difficult in a court case to distinguish between the incorporation of Māori

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[174] Friel, B *Translations* (Faber & Faber, London, 1981).
[175] Biggs, B 'Humpty-Dumpty and the Treaty of Waitangi' in Kawharu, I.H (ed), *Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 304.
[176] Idem.
[177] Idem.
[178] Idem.
[179] Cited in Meredith, P, 'Urban Maori as New Citizens: The Quest for Recognition and Resources' (Te Mātāhauariki Institute Working Paper, University of Waikato, Hamilton, 2000) at 10.
[180] Slater, D. 'Spatial Politics/Social Movements' in Pile, S and Keith. M (eds) *Geographies of Resistance* (Routledge, New York, 1997) at 258-276.

customary law into a statute and the mere use of a Māori word in a statutory provision. With the former, the customary rule, if in issue, needs to be rigorously proven. With the latter, however, the matter is merely one of statutory interpretation, and the Court has rather more scope to rely on its own general or linguistic knowledge or what can be ascertained from standard dictionaries and expertise.[181]

The difficulties of distinguishing between incorporations of Māori 'words' as opposed to incorporations of Māori 'customary law' and a war of interpretation over words was aptly manifested in the Māori fisheries litigation in the High Court, Court of Appeal, and Privy Council over the meaning of the word 'Iwi' in the schedule to the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.*

11.10 THE 'IWI' CASE LAW

This section will briefly outline the background to this case, the fisheries settlement and allocation methodologies to 'iwi' to provide context for the examination and reconstruction of the word and entity 'iwi.' Māori purportedly agreed, in the Fisheries Settlements 1992, that:

- the settlement would extinguish all commercial fishing rights and interests;
- existing civil proceedings would be discontinued;
- they would 'endorse' the Quota Management system (QMS);
- they would support the implementing legislation; and
- the Waitangi Tribunal should be stripped of its powers to consider commercial fisheries matters.[182]

The *Treaty of Waitangi (Fisheries Claims) Settlement* Act 1992 (the 1992 Act) empowered the Māori Fisheries Commission or Te Ohu Kai Moana (TOKM) to allocate the 'pre-settlement assets' to 'iwi.'[183] TOKM has at its disposal in 2005 a very substantial amount of fisheries cash, shares and quota assets totalling approximately $700 million available for distribution to 'Māori' and is also responsible for devising a way of fairly distributing the benefits of the settlement to all 'Maori.' Fisheries settlement allocation is an extremely difficult challenge, however, as it goes to the very core of what the settlement

[181] Boast, R 'Māori Customary Law and Land Tenure' in Boast, R et al *Māori Land Law* (2nd Ed, Lexis-Nexis, Wellington, 2004) at 2.2.5.

[182] This was all given formal effect by the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, which separates commercial from customary fishing rights.

[183] *Maori Fisheries Act 1989*, s 6, as amended by s 15 *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*. Section 6(e) gave to TOKM the additional function of considering 'how best to give effect to the resolutions in respect of TOKM's assets, as set out in Schedule 1A to this Act.' Schedule 1A sets out resolutions made by TOKM at its hui-a-tau on 25 July 1992 including a resolution 'that the hui endorse the decision made by TOKM to seek legislative authority to further secure TOKM's intention to allocate its assets to 'iwi.'

was purportedly about and which Māori groups the settlement supposedly represented. As Lord Goff noted in *Treaty Tribes Coalition v Urban Maori Authorities*[184] Maori have found the task of dividing the fisheries resource to be 'an extremely challenging process.'[185]

Much was left ambiguous in the Sealords deed, which was drawn up with 'Māori,' without further explanation, and which left to one side the question whether 'Māori' was supposed to be represented by some kind of federation of autonomous 'iwi' or whether it simply meant a sector of the general population of the country differentiated by an ethnic criterion. Was the settlement for the benefit of everyone who happened to be 'Māori,' or was it intended as a restoration of property rights to specific groups based on territory, historic involvement in marine fishing or some other criterion of specific, tribal connection to the resource? TOKM argued that Māori living in urban areas must belong to some 'iwi' ('tribes') if they can be meaningfully said to be 'Māori' at all, and urban Māori would benefit from a distribution of assets to 'iwi.' The initial distribution, so the argument went, would be to 'iwi' who can then apportion interests to the members of the iwi wherever they happen to live. However, Separate Urban Maori Authorities (UMAs),[186] claiming to represent Māori living in urban areas,[187] were no longer prepared to accept that 'tribal' approaches were sufficient to accommodate all Māori interests and development strategies and so they challenged TOKM and the 'traditional tribes' by taking a case to the High Court in conjunction with Te Rūnanga o Muriwhenua.

In the fisheries litigation the four urban Māori authorities and Te Rūnanga o Muriwhenua were also supported by Te Waka Hi Ika o Te Arawa, an incorporated society representing Te Arawa fishers and the Te Arawa Maori Trust Board.[188] TOKM on the other hand was supported by the Treaty Tribes Coalition (which includes Ngāi Tahu and Ngāti Kahungunu), Tainui Waka Fisheries, Te Rūnanga o Ngāti Porou and the Te Iwi Maori Trust Board. Those favouring a distribution on an iwi/tribal basis were themselves divided as to how this should be done. In brief, the issues at stake were particularly

[184] *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513, 517 (PC).
[185] Idem.
[186] There are two Auckland Urban Maori authorities (UMAs), Manukau Urban Authority Inc (MUMA) and Te Whānau o Waipareira Trust (Waipareira), one from Wellington, Te Runanganui o Te Upoko o Te Ika Association, and one from Christchurch, Te Rūnanga o Nga Mata Waka Inc.
[187] Ibid, 517 per Lord Goff. Interestingly, some 'urban' Maori simply happen to belong to iwi whose traditional territory were encroached on by urbanisation and who now fall within urban areas such as Ngāti Whātua of the Tāmaki isthmus (Auckland) or Ngāti Toa based at Porirua and Ngāi Tahu in Christchurch and Dunedin. Ngāti Toa, and the other tribes, the author is assured, certainly see themselves as traditional 'iwi' rather than as 'urban Maori.' Urbanisation came to them not the other way round as with urban Māori.
[188] The Te Arawa confederation, one of the largest groupings within Māori society, is made up of a number of descent groups mostly living inland around the Rotorua lakes, but also holding a small strip of coastal territory around Maketu. Any allocation of assets based on coastal territory would disadvantage Te Arawa.

difficult and raised quite fundamental questions about the purpose of the 1989 and 1992 settlements and indeed the contemporary nature of Māori society.

The litigation focused on the distribution of the pre-settlement assets. In *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Inc*[189] Anderson J had decided that a preliminary question in judicial review proceedings brought by the Area One Consortium and four urban Māori authorities should be set down for hearing before the substantive case began.[190] The question was:

> Is the Treaty of Waitangi Fisheries Commission [TOKM], in the exercise of its power to allocate presettlement assets, required to allocate those presettlement assets to iwi?[191]

The Court of Appeal allowed the appeal, finding that 'no useful purpose' could be served by the determination of this preliminary point. In coming to that view the Court of Appeal considered at some length the meaning of the term 'iwi.'[192] Controversially, the Court held that 'iwi' meant, simply, 'people of the tribe,' and accordingly TOKM had to make separate provision for urban Māori.[193] In determining the meaning of 'iwi' the Court considered six sources:

- the Māori text of the Treaty of Waitangi,
- the Waitangi Tribunal's, *Fisheries Settlement Report*;[194]
- Williams' *Maori Dictionary* (the most authoritative dictionary of the Māori language);[195]
- the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*,
- the 1992 Sealords deed itself,[196] and
- the submissions and memoranda of counsel.[197]

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[189] [1996] 3 NZLR 10, 16.

[190] This case is procedurally complex. The Area One Consortium and four Urban Maori Authorities against the Treaty of Waitangi Fisheries Commission and the Crown, alleging bias and breach of statutory duty by TOKM, filed judicial review proceedings. The Treaty Tribes Coalition, Te Rūnanga o Ngati Porou, and Te Waka Hi Ika o Te Arawa also brought proceedings. Then on 30 June 1995 Anderson J ordered the preliminary question be decided before trial. It was this order that was appealed by the Area One Consortium (one of the plaintiff groups) to the Court of Appeal. There were also separate proceedings before Ellis J following on from claims in the Waitangi Tribunal lodged by the Area One Consortium and the Urban Maori Authorities. The Tribunal's decision to proceed with inquiring into these claims led to judicial review proceedings against the tribunal being filed in the High Court by the Treaty of Waitangi Fisheries Commission and the Treaty Tribes Coalition. The plaintiffs argued here that the Tribunal could not hear the claim because of s 6(7) of the *Treaty of Waitangi Act 1975*, inserted by the *Treaty of Waitangi (Fisheries Claims Settlement) Act 1992*. Ellis J held that s 6(7) did not prevent the Tribunal from hearing the claim; but on appeal the Court of Appeal held that the section was effective to oust the Tribunal from inquiring into the issue (see *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika* [1996] 3 NZLR 10, 16). This point was not appealed to the Privy Council.

[191] Idem.

[192] *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika* [1996] 3 NZLR 10.

[193] Ibid, at 19-20.

[194] Waitangi Tribunal, *Fisheries Settlement Report*, (Department of Justice, Wellington, 1992).

[195] Williams, H.W. *Dictionary of the Māori Language* (GP Publications, Wellington, 1992).

[196] Her Majesty the Queen and Māori, *Maori Commercial Fisheries Deed of Settlement* (1992).

[197] Ibid, at 17-19.

The Court of Appeal relied, at least in part, on the Waitangi Tribunal, which noted that the 'iwi' ('tribe')[198] was not the main structural unit of Māori society but rather the hapū (sub-tribe or clan). Nevertheless the tribunal added that some matters of particular importance had to be decided at the iwi level. With European settlement, 'iwi structures became more necessary, significant and permanent' and 'the current wisdom appears to be that matters of common policy affecting the people generally, should be determined or ratified at an iwi or iwi-whanui plane.'[199]

The Court of Appeal decision was appealed to London by some of the parties. The Privy Council's decision, released on 16 January 1997, was reported as *Treaty Tribes Coalition and Others v Urban Maori Authorities*[200] and the appeal was allowed in part and the preliminary question was remitted to the High Court and reformulated to the High Court in *Te Waka Hi o Te Arawa and others v Treaty of Waitangi Fisheries.*[201] The precise question before the Court involved the interpretation of s. 6(e), of the *Maori Fisheries Act*, which gave to TOKM the additional responsibility of considering 'how best to give effect' to certain resolutions to allocate its assets to 'iwi.'[202] The Court was directed to determine whether the pre-settlement assets should be distributed to 'iwi,' and, if so, whether 'iwi' meant 'only traditional Maori tribes.' Patterson J carefully considered the context of both the legislation and the Hui-a-Tau itself and concluded that TOKM was required by law to allocate its assets to 'iwi.' The second problem was the meaning of 'iwi.' Patterson J saw the issue as essentially one of statutory interpretation (rather than as the incorporation of Māori customary law).

> A complication is that, for present purposes, the word is a Maori word used in an English statutory context.[203]

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[198] Waitangi Tribunal, *Fisheries Settlement Report*, (Department of Justice, Wellington, 1992) at 12-14.
[199] Idem.
[200] [1997] 1 NZLR 513.
[201] *Te Waka Hi Ika o Te Arawa and others v Treaty of Waitangi Fisheries Commission* (4 August 1998)(Unreported, High Court, Auckland Registry, CP 395/93 (Wgtn) Anderson J. (Hereinafter *Te Waka Hi Ika 1*].
[202] Resolutions at the Hui-a-Tau of 25 July 1992 incorporated as a schedule to the 1992 Act. Resolution 1 was that the Hui-a-Tau endorse TOKM's decision to seek legislative authority in order allocate it assets to 'iwi.'
[203] *Te Waka Hi Ika 1*, supra n 201 at 72. Proof of a point of Maori customary law, whether incorporated by statute, as an aspect of the doctrine of aboriginal title (as in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680) or simply on the basis that Maori customary law is part of the common law of New Zealand (as in *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Heneiti Rirerire Arani v Public Trustee* (1919) [1840-1932] NZPCC 1; and see also Chilwell J's dicta in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 215 (HC)) is a different process from interpreting Maori words in a statute. Proof of customary law requires expert evidence from those qualified in the customary system, as in *Loasby*, which followed standard English and British colonial practice as to proof of customary law. However the distinction

In interpreting the provision Patterson J followed Lord Wilberforce's approach to interpretation of foreign words in statutes in *Fothergill v Monarch Airlines Ltd.*[204]

> I am not willing to lay down any precise rule on this subject. The process of ascertaining the meaning must vary according to the subject matter. If a Judge has some knowledge of the relevant language, there is no reason why he should not use it... There is no reason why he should not consult a dictionary if the word is such that a dictionary can reveal its significance; often of course it may substitute one doubt for another.[205]

The key point is that interpreting foreign words in English or New Zealand statutes is a somewhat more flexible process than interpreting statutorily-incorporated foreign law, although the distinction might often be difficult to draw. Is 'iwi' merely a Māori word or an incorporation of Māori law? The case was argued before Patterson J who treated it as the former, and took into account dictionary definitions, the views of the Waitangi Tribunal as an expert body, and the corpus of evidence before the court. The decision was released on 4 August 1998[206] and Patterson J found that the basic unit of traditional Māori social structure was not the iwi (tribe) at all, but the hapū (sub-tribe, clan).

> [R]esource management and welfare functions were typically carried out at whānau or hapu level and not iwi level. Often an iwi had no rigid structure and hapu entered and left collectives as needs dictated.[207]

Fishing rights were held by hapū, not iwi, and, accordingly, 'it is, in the main, rights which were vested in hapū which were infringed by the QMS and which the Crown has now abrogated and taken away.'[208] More recently, and partly in consequence of government policies, said Patterson J, 'it is the iwi which has come into prominence.' This view was endorsed by the 3:2 majority decision of the Court of Appeal who reached the conclusion that urban Māori associations as iwi are too 'radical a departure from custom' given the following conclusion:

> It is fundamental, in our view, that the implementation of the settlement accords with Maori traditional values, although it will necessarily utilise modern-day mechanisms ... The settlement was of the historical grievances of a tribal people. It ought to be implemented in a

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between a statutory incorporation of a Maori *word* and of a *rule of Maori customary law* is very fine - the example of 'iwi' being a case in point.

[204] *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 273.

[205] Idem.

[206] *Te Waka Hi Ika 1*, supra n 201.

[207] Ibid, at 28.

[208] Ibid, at 26.

> manner that is consistent with that fact. With all due respect to UMA, who are formed on the basis of kaupapa not whakapapa, they cannot fulfil such a role.[209]

At the same time, however, the Māori population has become largely urbanised, concentrated to a large extent in Auckland, and to a growing degree (it would seem) remote from iwi links.[210] Patterson J concluded:

> The above considerations lead to the conclusion that... 'iwi' means traditional Maori tribes in the sense that a tribe includes all persons who are entitled to be a member of it because of kin links and genealogy.[211]

The UMAs were not 'iwi,' although, of course, 'many, if not all, of their Māori members are entitled to share in the benefits of the settlement.'[212] TOKM was not, therefore, required to make any separate provision for the UMAs. Immediately after the decision Maori Affairs Minister Tau Henare called on Māoridom to allow the fisheries settlement assets to proceed without further court action, but representatives of the UMAs appealed to the Privy Council.[213]

11.11 IWI OR NOT– WILL THE 'REAL' IWI PLEASE STAND UP?

11.11.1 EXPERTS DEBATE THE WORD 'IWI'

The word 'tribe' has taken on a number of similar as well as different traits such as political entities of common descendants that are indigenous polities with an inherent right to self-government within the geopolitical framework of settler states such as Canada, New Zealand and elsewhere. Joan Metge provided a poignant warning, however, when referring to Māori 'tribes' as 'iwi' or 'hapū' in New Zealand:

> A great deal of the confusion arises when a Maori word is matched with an English equivalent or is set in an English context. The problem is that the match between words that appeared in this way such as 'iwi' and 'tribe' are really imperfect because the content of the two words are not identical. The immediate content, and often the connotation surrounding the words can be different. ... The problems with the English words that are chosen, both the word 'people' and the word 'tribe' which are matched with 'iwi,' are imprecise and subject to a range of meanings.[214]... The word 'tribe' actually has a wide reference ... the Oxford Dictionary ... brings out the variety of ways in which the word 'tribe' is defined. The word

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[209] *Te Waka Hi o Te Arawa and others v Treaty of Waitangi Fisheries Commission* (4 August 1998)(Unreported, High Court, Auckland Registry, CP 395/93 (Wgtn) at 54 per Patterson J. (Hereinafter *Te Waka Hi Ika 2*].

[210] Patterson J referred to the 1996 census which showed a total of 597,414 Maori, 70% of whom lived outside tribal territories (rohe); 112,566 people identifying as Maori indicated that they did not know which iwi they belonged to and another 40,917 did not specify their iwi. Idem.

[211] *Te Waka Hi o Te Arawa 2*, supra n 201 at 79.

[212] Ibid, at 81.

[213] Let Fisheries assets flow, Henare urges Maoridom,' in *The Dominion*, (Wellington, August 5, 1998).

[214] Dr Joan Metge, supra n 5 at 338.

> 'tribe' has also become part of the anthropological vocabulary in that it has a technical meaning. However, in trying to discover that meaning I had great difficulty because many people *give* it different definitions.[215] [emphasis added].

Similarly, Professor Hirini Mead of Ngāti Awa discussed the use of the word 'tribe' when he was asked who the traditional tribes in New Zealand were?

> The word 'tribe' is a colonial word ... one coined by the colonisers when they first came to New Zealand and applied it to Maori. ... I'm not at all happy with the fact we are concentrating on the English words when we are here to consider the Maori words. It seems 'iwi' is the word we are talking about here. ... 'Tribe' or 'tribes' is not a word or words that Maori like very much. It has a connotation ... although as an anthropologist it is a fairly neutral word but in some circles is not well received.[216]

Thompson Winitana from Tuhoe also made an important point about the use and abuse of Māori words (although referring to rohe in this instance) in contemporary politics:

> As a result of the actions of the Maori Land Court, our people have been forced into the situation of defining [rohe] boundaries according to surveys. ... rohe is something that has been imposed by the Courts. ... The Maori language has been forced to accommodate the English language instead of being interpreted in its own right, the translation then accommodates the English definition of what a boundary is.[217]

Metge provided an interesting definition of 'tribe' that she gathered from Professor Piddington, her professor:

> My own old Professor [Piddington] who is the founding Professor in Anthropology gave us in his introductory text a definition of 'tribe' which was extremely broad ... He defined [tribe] as a group of people speaking a common dialect inhabiting a common territory and displaying a certain homogeneity in their culture but he went on to say that it is not primarily or usually a kinship group though it may be, and it is frequently a political unit but not always. The point I want to make is that if we take both the dictionary definition and the anthropological definition the way the word 'tribe' has been used in New Zealand and matched with 'iwi' is a fairly specialised application of that word. I'd like to suggest that it is not a question of choosing a word as a translation and sticking to it .... but of being clear what is being referred to. ... iwi could be ... tribe ... 'A high level social political grouping in the Maori social order identified more particularly in the past by the English word tribe.' I should have added a high level descent based socio-political grouping ... iwi could mean people or peoples or tribe or tribes.[218]

The significance, therefore, of the word and concept 'tribe' in the contemporary indigenous political arena, is that often the tribal polity is the recognised entity that the nation-state

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[215] Idem.
[216] Hirini Mead, supra n 5 at 407-8.
[217] Thompson Winitana, supra 5 at 254.
[218] Ibid, at 338-9.

will negotiate with for the settlement of aboriginal and Treaty rights claims and internal self-determination in New Zealand and Canada, with some parallels also in the USA.

In the 'iwi' litigation, two questions had been referred to this Court. First, should pre-settlement assets be distributed to 'Iwi'; and second, if yes, did 'iwi' mean 'traditional tribes' in the context of a scheme of allocation. In the 1996 Court of Appeal judgment, 'iwi' was taken to mean 'people' rather than 'tribe.' But the Privy Council was not satisfied that the Court had heard sufficient evidence on the matter and in upholding the appeal by the *Treaty of Waitangi* Fisheries Commission and 'traditional tribes,' referred the case back to the High Court in New Zealand. Of the several interested parties, Te Whānau o Waipareira, argued that the term 'iwi' was not bound by rigid structural determinations and that over the generations there were many instances where 'iwi' had formed around a cause (kaupapa), rather than an ancestor (whakapapa). Tribes, however, argued that 'iwi', at least in the *Māori Fisheries Act 1989* meant a group of people who share a common descent and a more or less definable territory. Others claimed that because 'iwi' was never mentioned in the Treaty of Waitangi, the more correct term was 'hapū' not 'iwi.' 'Iwi' was a recent construction, which did not and should not replace the rights of hapū.

11.11.2 WHAKAPAPA OF 'IWI'

The kupu or word 'iwi' is used by speakers and writers with a number of meanings depending on context. The Māori Dictionaries by Williams, Ryan and Ngata list seven meanings for the word 'iwi,' each conveyed by a single English word: bone, fruit-stone, strength, tribe, people, nation and race.[219] Metge noted that in her experience, Māori who are native-speakers of the Māori language use the word 'iwi' to refer to:

1) the large cognatic descent-group usually glossed with the English word tribe;
2) a federation of iwi so defined: for example, Te Arawa, which comprises ten groups also identified by their members and neighbours as iwi;
3) people, meaning a plurality of persons linked by common feature(s) and purposes(s). In this sense, iwi is applied to both ad hoc groups and on-going groups. These vary widely in size, from quite small groups (for example, te iwi kainga, the people of a local community), to large institutions (such as Te Iwi Morehu, the people of the Ratana Church) and ethnic groups (te iwi Māori, te iwi Pākehā).

[219] Williams, H.W (ed) *A Dictionary of the Maori Language* (7th Ed, revised and augmented by the Advisory Committee on the Teaching of the Maori Language, Department of Education, Government Printer, Wellington, 1971) at 80; Ryan, P.M, *The Reed Dictionary of Modern Maori* (Reed Books, Auckland, 1995) at 67; Ngata, H.M, *English-Maori Dictionary* (Learning Media, Wellington, 1993) at 294, 332, 372 & 499.

4) a whole nation. In the Treaty of Waitangi the word iwi appears only once, in the expression 'tona iwi,' referring to 'her (Queen Victoria's) people', that is, the British nation. The term used throughout to refer to Māori groups is hapu.[220]

The use of iwi in the sense of 'bones' has an important imagery in terms of Māori social and political organisation. In non-Māori terms, kinship relationships are often expressed by the ties of blood but the equivalent in Māori is 'bones.' It is said that 'they are my bones.'[221] Waerete Norman of Muriwhenua provided the imagery of a body and the place of iwi within that paradigm:

> The kupu (word) 'iwi' itself however, is an ancient one and is derived from koiwi (the skeletal framework or bones), hapu is the state of being pregnant, whānau relates to giving birth, and tangata whenua are individuals collectively named. The metaphor is one of a single body, linked by bones and containing smaller groupings, which through the birthing process produces related individuals inter-linked through common ancestry or whānaungatanga.[222]

Andrew Sharp also commented on this imagery:

> The imagery of kin connection among persons and between persons and things was presented as a highly wrought imagery of the body, especially the body giving birth: not only does 'iwi' denote 'bone,'[223] but 'hapu' is pregnant' or 'conceived in the womb,'[224] and 'whānau' is 'to be born' or 'to be in childbed.' The prefixes for names for particular iwi and hapu mean 'issue from the copulation of,' as in *Ngati* (eg. Whatua), *Ngai te* (eg Rangi), *te Aitanga*, and *Te Ati.*[225] 'Whenua,' the land, also means the placenta or afterbirth. 'Whare whakairo,' the carved meetinghouses to be found on the more elaborately realized marae, are redolent with the imagery of the body of the tribe.[226]

Professor Hirini Moko Mead of Ngāti Awa discussed the extensive rights an individual of this body acquires with whānau, hapū and iwi identity:

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[220] Metge, supra n 76 at 1-2.

[221] Affidavit of Professor Wharehuia Milroy and Professor Timoti Karetu at 4, in *Te Runanga o Te Upoko o te Ika Association Inc., and Ors v the Treaty of Waitangi Fisheries Commission & Ors* (1998), C.P No. 122/95 (H.Ct of New Zealand, Auckland Registry). Judgment on that case *per* Patterson J., reported [2000] 1 N.Z.L.R at 289; and affidavit of Professor Timoti Karetu at 4.

[222] Affidavit of Waerete Violet Beatrice Norman in Support of Muriwhenua, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 16.

[223] Affidavit of Tamati Reedy, ibid, at 5 and affidavit of Professor Hirini Moko Mead, ibid, at 15.

[224] Ibid, Mead at 10.

[225] Affidavit of Professor Tamati Reedy, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 6-7, 18-20.

[226] Sharp, A, Blood, custom and consent: Three kinds of Māori groups and the challenges they present to governments' in *University of Toronto Law Journal* (Vol. LII, No. 1, Winter 2002) at 20-1. See also Sharp, A *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand Since the 1970s* (Oxford University Press, Auckland, 1990) at 52-5.

> The act of whakawhānau (giving birth) produces a newborn child, a whenua (placenta) and eventually a pito (umbilical cord). The whenua and the pito are buried or placed within the land of the whānau and that establishes a spiritual link between the land and the child. Once born the child inherits a number of rights called a birthright. The birthright includes:
>
> - the right to be Māori and the attributes that come with it including mauri, wairua, mana, tapu, whenua and whānaungatanga;
> - the right to an identity and whakapapa as a member of the whānau, the hapu , the iwi and the waka;
> - the right to share in the tribal estate, including the rights to succeed to the interests of the parents;
> - the right to use the marae;
> - the right to be buried in the urupa;
> - the right to be listed on a hapu and iwi beneficiary roll; and
> - the right to share in the benefits of any settlement to the hapu or iwi.
>
> When the child matures the birthright can be exercised. These rights are automatic and have become the foundation of rights in the hapu and iwi.[227]

The word 'iwi' in early Māori writings appeared to mean 'people' rather than 'tribe' in some contexts. For example, Edward Hongi, nephew of Hongi Hika, wrote a letter in 1825, which is possibly the earliest example of Māori writing by a Māori author. The letter includes the sentence:

> E tuhi kino pea te tuhi a te tangata Maori i te mea kino No wai te iwi pai o te tangata kino o te tangata pai a hea oti te pakeha o reira kia kite au.

Either the author or Reverend William Yate apparently prepared the accompanying translation of the sentence:

> Perhaps both the writing and the words of New Zealanders are bad to whom will the bad men go when they die and to whom will the good men go.[228]

'Iwi' was used in this early context to clearly mean 'people' and certainly not exclusively 'tribe.'

One of the first Bibles published in Māori was *Ko tetahi wahi o Te Kawenata Tawhito* in 1848 by Maunsell, a Pākehā missionary. This Bible illuminates the usage of iwi meaning 'people' when contrasted with the equivalent passage in the King James version of the Bible. For example, in Ekoruhe (Exodus) 11: 3 it reads:

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[227] Affidavit of Professor Hirini Moko Mead, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 7-8.

[228] The originals of this document are held at the Alexander Turnbull Library in Wellington and are part of the Webster Collection, ATL MS Papers, 1009-2/1.

> A na Ihowa mea kia paingia te iwi e nga Ihipiana. Ko te tangata hoki, ko Mohi, i nui rawa ki te whenua o Ihipia, ki te aroaro o nga tangata o Parao, ki te aroaro ano hoki te iwi. [sic]
>
> And the Lord gave the people favour in the sight of the Egyptians. Moreover, the man Moses was very great in the land of Egypt, in the sight of Pharoah's servants, and in the sight of the people.

Wi Te Rangikaheke of Te Arawa, writing during the 1840s, outlined the characteristics and qualities of the Rangatira – the Māori leader.[229] In the text, reference is made to hapū, the largest socio-political unit, with no reference to 'iwi' meaning 'tribe.' The Ringatu Church Prayer Books which contain the thoughts and visions of Te Kooti, the Māori prophet and nationalist leader of the late 19th century, provide further context on the usage and meanings of 'iwi.'[230] Te Kooti used the word 'iwi' in this context to convey the meaning 'people' in his Prayer Books and he used the Christian Bible as the basis of his chants and prayers.

Minutes of the Te Kotahitanga Māori Parliament recorded on 14 April 1892 – Nga Korero o te hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi, Apereira 14, 1892 - recorded in part:

> Te whakatuturutanga o te kotahitanga o nga iwi Māori, o te moutu nei.[231]
>
> Confirmed the writing of all Māori tribes of Aotearoa and Te Waipounamu and those other islands.

'Iwi' used in this context refers to all the tribes of New Zealand, but 'iwi' was used later in the minutes in a different way:

> He mea ata kowhiri na te iwi nui tonu o taua whakaminenga.
>
> It was carefully selected by the main body of that assembly.[232]

Te iwi is used in this context to refer to 'the main body' of the assembly meaning those 'people' present at the assembly. Hence it would appear that the word 'iwi' in a given context includes 'bones' and 'traditional tribes' but archival evidence appears to

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[229] Te Rangikaheke, W, 'Te Tikanga o tenei mea o te Rangatiratanga o te Tangata Māori' in Grey, G, *Grey New Zealand Maori Manuscript* (1885) at 91-97.

[230] *Te Pukapuka o Nga Kawenata e Waru a Te Atua me Nga Karakia katoa a Te Haahi Ringatu – The Book of the Eight Covenants of the Lord and all the Prayers of the Ringatu Church* (Te Kooti Arikirangi Te Turuki). See also *Ko etahi Himene Ritenga Katorika – Hymns and Rituals of the Catholic Church*, (Translator by Hepi Kahotea Heuheu o Ngati Tuwharetoa, 1923).

[231] Minutes of Te Kotahitanga Māori Parliament, 14 April 1892 (Nga Korero o te hui o te Whakakotahitanga i tu ki te Tiriti o Waitangi, Wairarapa, Apeira 14, 1892) at 15.

[232] Ibid, at 14 and 8 for the translation of the proceedings.

demonstrate that 'iwi' also means 'people' or 'groups of people' depending again on context.

11.11.3 EXPERT OPINIONS ON IWI

Following the Privy Council's direction, there was now a considerable volume of evidence on the record on the meaning of 'iwi' in Māori customary law – 74 affidavits from 64 deponents were filed, 44 of whom were cross-examined. Each side produced affidavits of 'experts' who addressed the meaning of 'iwi' to which I now turn in terms of defining a Māori word in a non-Māori context - what is an 'iwi' in a fisheries settlement context? The first list of expert evidence below was by those pukenga experts who believe that 'iwi' means 'traditional tribe.' The second list maintain that 'iwi' means 'people' and the small third list believe 'iwi' means both 'traditional tribe' and 'people' depending on context.

11.11.3.1 'IWI' – 'TRADITIONAL TRIBE'

A number of prominent and perhaps conservative kaumātua provided their expert opinion on 'iwi' being a 'traditional tribe' and excluding, implicitly and explicitly, UMA's under the ambit of 'iwi.' Sir Robert Mahuta of Waikato, for example, stated:

> The meaning of iwi as I understand it is that it is a collection of sub-tribes who trace their descent to a common ancestor. Kinship links are an integral part of iwi organisation. In my view, without kinship links, no group can purport to call themselves an iwi. Some urban Maori groups have attempted to model themselves as iwi (such as Ngati Poneke), but they lack long-term enduring ties associated with whānau, hapu and iwi kinship links. These links are the glue that keep a tribe together and are fundamental to the concept of iwi.[233]

Professor Wharehuia Milroy of Ngāi Tuhoe also noted:

> The original meaning of the word iwi is tribe.[234] ... the word iwi has been translated as people, tribe and bones. The words before me just refer to people and tribe, no bones[235] ... I agree there are many usages of this word Iwi but on its own there is no other definition beyond iwi meaning descended from the eponymous ancestor.[236] ... I have only one understanding that the word iwi is a tribe.[237] ... If there is no contextual reference ... there is only one meaning that can be derived from that content on its own and that is tribe.[238]

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[233] Affidavit of Sir Robert Mahuta in support of Tainui Waka Fisheries, in *Te Runanga o Muriwhenua v Treaty of Waitangi Fisheries Commission*, M1514/94 (Rudd Watt & Stone, Auckland, 24 February 1998) at 18.
[234] Wharehuia Milroy, supra n 5 at 325.
[235] Ibid, at 326.
[236] Ibid, at 332.
[237] Idem.
[238] Ibid, at 334.

Professor Tamati Reedy of Ngāti Porou held:

> I have spent a great deal of time ... explaining the meaning of the word iwi which I've come down to the final conclusion that it is the descent group from an eponymous ancestor we are talking about, the second part is explaining the context in which the word iwi stands in that phrase on behalf of iwi.[239]

In his affidavit, Professor Reedy concluded that 'the core meanings of iwi are solely bones or traditional tribes and historically this was the usual context of the term iwi'[240] Professor Hirini Moko Mead of Ngāti Awa referring specifically to urban Māori commented:

> They are not iwi, they are not whakapapa based, they are not iwi. ... They have the qualities of metaphorical hapu and iwi but they are not an iwi.[241] ... we are tribalising them by using the term and by tribalising them we are also inferring the entire structure of whānau, hapu and iwi. By doing so Māori people are very clear as to the distinction between those groups tribalised by the extension of the word iwi and those genuinely iwi.[242]

Hugh Kawharu of Ngāti Whātua referring to UMAs added:

> UMAs lack the wairua and the checks and balances of the kinship system – mana whenua.[243] ... There was no conception of 'urban' in classical Māori thinking so ... to say that iwi applied to urban combinations in a classical use of iwi and put rather simply does not make sense.[244]

David Higgins of Ngāi Tahu was asked whether the Fisheries rights should be with Māori as a whole or with iwi to which he responded: 'with the iwi, with the tribe.'[245] Dr Te Maire Tau also of Ngāi Tahu was asked about the place of hapū and whether iwi meant tribe to which he responded:

> I think it is best described as tribe ... a collection of hapu constitute the iwi. ... [The hapu] was not completely autonomous. The best example is my hapu. That is the matamua line and the relationships between those hapu that bind them together ... the hapu have their main line because ours holds the line as well. We are tightly bound to the iwi as well so not autonomous. ... there are interrelationships between whānau and iwi and I take it they change but it is always in the context of genealogy. ... It is relative to the context of genealogy.[246]

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[239] Tamati Reedy, ibid, at 369.
[240] Ibid, at para 9.
[241] Hirini Mead, ibid, at 405.
[242] Ibid, at 406.
[243] Hugh Kawharu, ibid, at 542.
[244] Ibid, at 545.
[245] David Higgins, ibid, at 565.
[246] Dr Te Maire Tau, Ibid, at 568-9.

Dr Tau appeared to be implying that iwi is a tribe connected by genealogy which undermines the place of UMAs as iwi. Perhaps the strongest view of Māori leaders that 'iwi' excludes urban Māori is from Apirana Mahuika of Ngāti Porou who, commenting on Paul McHugh, boldly asserted:

> [McHugh says] that cultural identity should be on ethnic non-blood lines rather than on tribal blood lines. This approach would be suicidal for iwi and culture, because whakapapa is the heart and core of all Māori institutions, from Creation to what is now iwi. Whakapapa is the determinant of all mana rights to land and marae, to membership of a whānau, hapu, and, collectively the iwi ... whakapapa determines kinship roles and responsibilities to other kin, as well as one's place and status within society. To deny whakapapa therefore as the key to both culture and iwi is a recipe for disaster, conflict and disharmony.[247]

Hence the opinion of a number of very prominent Māori *pukenga* (knowledgeable experts) that the Māori word 'iwi' in the fisheries context means 'traditional tribes' not urban Māori, pan-Māori or other Māori authorities.

11.11.3.2 'IWI' – 'PEOPLE'

On the other hand, a number of other prominent kaumātua and pukenga from all around the country maintained that 'iwi' means 'people' not just 'traditional tribes' in this context. Manuka Henare of Muriwhenua, for example, described iwi as:

> A term which includes a larger grouping of hapu or what is commonly known as a 'tribe.' Iwi were often alliances of hapu who from time to time collected together as a mutually interdependent political or military unit. However, the term also means people. ... the term iwi as the people was also appropriate for describing non-hapu or more correctly, pan-hapu collectives which were present in the 19th Century. ... The existence of pan-tribal unity and Māori solidarity was recognition that with the dynamism of Māori society new institutions and new structures emerged which enhanced and consolidated traditional Māori social groups.[248]

Manawa Aperahama also of Muriwhenua added:

> The concept of iwi to me is the total Māori people, the Māori race. ... Prior to [Pakeha influence] the principal social and political unit were basically whānau and hapu. ... The iwi concept was used as a framework to unify a number of communities be they hapu or whānau or spiritually based communities like the Ratana movement te iwi Morehu into alliances ... An iwi then is a collective of individuals who have so organised themselves for a purpose or many purposes be it temporary or enduring.

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[247] Mahuika, A, 'Whakapapa is the Heart' in Coates, K & McHugh, P *Living Relationships: the Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 214 at 219.

[248] First Affidavit of Manuka Henare, in *Te Runanganui o Te Upoko o Te Ika Association Inc & Ors v Treaty of Waitangi Fisheries Commission & Ors* (Russell McVeagh McKenzie Bartlett & Co, Auckland, 29 January 1998) at 3-4.

Aperahama then went on to define 'iwi' liberally but excluded UMAs:

> The concept iwi is one that should not be limited to traditional iwi only. However I do not accept that tribal or urban Māori authorities are iwi either. Branches of a tree must grow back to the trunk.[249]

Rima Edwards of Muriwhenua defined iwi as follows:

> In simple terms an Iwi is, he huihuinga tangata, a collective of people. An iwi is in the individual in that, without individuals there can be no iwi, without individuals there can be no hapu and without individuals there can be no whānau. How these individuals decide to organise themselves is what matters most. ... The Māori race is an iwi. ... Different collectives of people have become known as iwi. These include Ngapuhi, Waikato, Ngatiporou, Ngaitahu, Whakatohea [sic] ... and so on. I estimate that there are about 60 such groupings in this country. The Commission's approach of treating these as the fixed and only form of iwi has given this form of iwi a huge financial boost since the Sealords agreement was signed ... Iwi has other meanings and does not just mean the above. I do not disagree with any other point of view of what an iwi is because it can mean different things to different people in different situations. However I can say that in my opinion the word 'iwi' in Schedule 1A of the Māori Fisheries Act 1989 means the Māori race as a whole both as individuals and as a collective or Nation.[250]

Waerete Norman of Muriwhenua referred to Article II of the Treaty of Waitangi 1840:

> From my understanding, Māori people are given several strands that enable them to identify from the past into the present. The first entitlement is the retention of their iwi and therefore their hapu link if they so desire. Another option is the opportunity and ability to operate in the system of British democracy. One has a choice to belong to either one or both. This enables then to interact as either iwi in a traditional context, iwi kainga or as an individual in an introduced democratic system. Therefore the flexibility of 'iwi katoa' (a nation of people) ensures that both are eligible for an allocation of economic assets such as benefits from the fisheries.[251]

Predictably, John Winitana of Te Rūnanga o Te Upoko o Te Ika Association Inc., an UMA, stated:

> I have been asked to talk on what is an iwi and how it is represented. That is a problem because traditionally iwi meant just 'the people.' It was regularly used as 'te iwi Maori me te

[249] Affidavit Manawa Aperahama in Support of Muriwhenua, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 4-5.

[250] Affidavit of Rima Edwards in Support of Muriwhenua, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 4-5.

[251] Affidavit of Waerete Violet Beatrice Norman in Support of Muriwhenua, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 20-21.

> iwi Pakeha,' the Maori and the Pakeha people. 'Iwi' could be used for the people of a hapu, the people of a district or the people of a country. It could be used for rich people, the poor people, the people of Auckland or whatever. When we talked of tribe we spoke of hapu.[252]

June Jackson, when referring to the Manukau Urban Māori Authority (MUMA) another UMA, noted:

> Our organisation is a group of people who came together for a common purpose. So in that definition I see us as an iwi.[253]

The late Sir John Turei of Ngāi Tuhoe recorded his clear understanding of 'iwi':

> Iwi appears to be a pre-1840 concept ... and an alliance of hapu but... its people no two ways about that. In today's context its quite commonly used to describe a gathering of people.[254] ... Iwi means tribe but other things as well. Any group with a common purpose is an iwi.[255]

The renowned Māori scholar Dr Ranginui Walker of Whakatohea added his understanding of 'iwi':

> If it stood on its own I would take iwi to mean people. ... I'm not a tribal person in one sense, more of a pan-tribal person though I can trace my roots to a tribe. When I was growing up the only category I knew were hapu categories in our area or district. ... I only knew of the hapu names. It wasn't until later life as an adult that I came to know the category Whakatohea as an iwi.[256]

Te Ariki Morehu of Te Arawa defined 'iwi' in this manner:

> Today when we go to tangihanga or hui we are often referred to as Te Arawa Waka, Te Arawa Tangata, Te Arawa Iwi by the tangata whenua. This protocol also applies when we refer to ourselves when we are hosting those of the waka and in this manner we retain the essence of the traditional definition of the term Iwi as it has been passed down the generations in 'oral tradition.' ... The term iwi has evolved to now include people who belong through whakapapa descent to a certain waka (migration) or a tribe. This illustrates that the concept of iwi is a fluid one which has adapted to meet the political, social and economic circumstances of our people.[257]

Mason Durie of Ngāti Rangitāne was asked what is the appropriate definition of 'traditional tribes' to which he answered:

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[252] Affidavit of John Winitana, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 10.
[253] June Jackson, supra n 5 at 115.
[254] Sir John Turei, supra n 5 at 4, lines 10-12, 30.
[255] Ibid, at 8, lines 12-3.
[256] Dr Ranginui Walker, supra n 5 at 101-02.
[257] Affidavit of Te Ariki Morehu in Support of Te Arawa in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 2.

> I take a lot of direction from the wording of the Treaty of Waitangi which when addressing the question of the ownership of resources, refers to hapu not iwi. ... Since 1990 ... the word tribe has been associated with the word iwi.[258]

Durie then went on to give what appeared to be his balanced opinion on the best way to define iwi from a more utilitarian view. Durie defined 'iwi:

> ... in a way which led on to benefits and I think the broadest definition is most useful. The broadest definition would include tribes, aggregation of hapu, hapu and other groupings that will be able deliver benefits to Māori people.[259]

Sir Graham Latimer also of Muriwhenua was asked whether 'iwi' meant 'traditional tribes' to which he responded:

> It depends on where you are. ... whatever they are they are people.[260] ... that is my concern ... trying to use the word iwi to take over the position of the tribes and I won't agree to that.[261]

Academics from Victoria University's Treaty of Waitangi Research Unit asserted that 'in 1840 hapū, which may be fewer than one hundred or up to a thousand people was the effective social and political unit of Maori society, although in times of war or other crises hapū may combine into larger iwi groups.'[262]

11.11.3.3 'IWI' – 'TRADITIONAL TRIBE' AND 'PEOPLE'

A number of experts also concluded that 'iwi' means both 'traditional tribe' and 'people' as well as other meanings depending on context. Dr Ngapare Hopa of Ngāti Wairere and Ngāti Hikairo defined 'iwi' in the context of Waikato:

> The Waikato tribes are part of the confederation of tribes descended from the voyagers of the Tainui canoe which made its landfall at Maketu on the Kawhia harbour. Since that day descendants have spread throughout the Waikato area and beyond, firstly forming whaanau, then hapuu, and finally iwi, who form the Tainui confederation as we know it today. Beside Waikato, the major tribes of Tainui consist of Maniapoto, Raukawa, Ngaati Hauaa and Hauraki. Each tribe traces to an eponymous ancestor who, in turn, can be traced back to Hoturoa or one of the other voyagers on the Tainui.

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[258] Durie, supra n 5 at 204.
[259] Ibid, at 205.
[260] Graham Latimer, supra n 5 at 196.
[261] Idem, at 198.
[262] Hill, R and O'Malley, V *The Maori Quest for Rangatiratanga / Autonomy 1840-2000* (Treaty of Waitangi Research Unit, Wellington, 2000) at 1-2.

> There are many forces of a spiritual, cultural and organisational nature which bind Tainui into the most cohesive tribe within Maoridom. Apart from a common ancestry, there are also linkages of the Waikato River, Kiingitanga, the land wars and raupatu.[263]

Dr Hopa subsequently asserted:

> I've come to the conclusion that iwi is not just limited to groups who can claim their whakapapa, that historically and continuing it has been used loosely to refer to people of a place, of another culture, and so on. ... The definition and meaning of iwi as defined according to whakapapa is valid but not the only and sole basis or criteria. ... iwi can mean different things.[264]

It is appropriate to close this part of the discussion with the opinion of Dr Joan Metge, anthropologist and adopted traditionally into Te Rarawa of the Far North, who concluded:

> [Iwi is] a high level descent based social political grouping in the Maori social order identified more particularly in the past by the English word 'tribe.'[265]

When asked whether iwi meaning people is the more traditional use of the word Metge replied: 'The evidence and logicality suggests that but I don't feel there is enough either way to make a decision.'[266] Hence the diversity of expert opinion on what exactly the Māori word 'iwi' means which appeared to leave the Court none the wiser.

11.11.4 SECOND PRIVY COUNCIL APPEAL

Consequently, this decision was appealed to the Judicial Committee of the Privy Council in *Manukau Urban Maori Authority and Others v. Treaty of Waitangi Fisheries Commission and Others,*[267] which raised the question on TOKM's intention to allocate its assets to 'iwi' or 'traditional tribes.' The UMAs claimed that a distribution only to iwi could not give effect to the overriding purpose of the settlement, which was that it should be for the benefit of all Māori. It would exclude the many Māori who were not in touch with their iwi, including a substantial number who could not identify the iwi to which they belonged.[268] TOKM's response was that it had no statutory power to distribute any of its assets except that conferred by section 9(2)(l) of the 1989 Act, to iwi and no one else. TOKM accepted that the settlement had to be 'ultimately for the benefit of all Maori' but

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[263] Mahuta, supra n 233 at 18.
[264] Dr Ngapare Hopa, supra n 5 at pp 40-41.
[265] Ibid, at 337.
[266] Ibid, at 339.
[267] *Manukau Urban Maori Authority and Others v. Treaty of Waitangi Fisheries Commission and Others and Reuben Brian Perenara Treaty of Waitangi Fisheries Commission and Others* (Privy Council Appeal No. 68 of 2000 Delivered the 2nd July 2001).
[268] For example, Urban, Cosmopolitan, and trans-Tasman Māori.

said there was no reason why it should not be able to devise a scheme for distribution to iwi, which satisfied this requirement.

Predictably, the Privy Council held that TOKM, as a statutory body, has no power to distribute its assets except in accordance with the terms of the Act. Section 19(2) of the 1992 Act makes it clear that TOKM's only power to dispose of quota or its shares in its company Aotearoa Fisheries Ltd is that conferred by section 9(2)(l) as amended. That paragraph provides only for a distribution under a scheme which gives effect to the resolutions of the hui. Those resolutions plainly provide for distribution to 'iwi.' The concurrent findings of Paterson J and the Court of Appeal, which were scarcely challenged in argument, were that in using the term 'iwi,' the resolutions intended to refer to 'traditional tribes.' As Thomas J said in his judgment 'there is not the slightest doubt that those representatives of 'iwi' gathered at the hui-a-tau on 25 July 1992 intended the pre-settlement assets to be distributed to 'iwi' and that they meant iwi in the sense of 'traditional tribes.'

The Lordships concluded that the Parliamentary sanction given to the resolutions of the hui-a-tau for the distribution of pre-settlement assets formed part of a political settlement, not only between the Crown and Māori but also to some extent between Māori and Māori. Of course it was assumed to be consistent with the overall objective of a settlement for the benefit of the Māori people as a whole. And it is possible that TOKM or the Minister may eventually reach the conclusion that consistency is impossible and that the settlement has to be revised. Or a court may decide that no other conclusion is rationally possible. But their Lordships did not think it right for the courts to revise the terms of the settlement now. As the Waitangi Tribunal remarked 'treaty matters are more for statesmen than lawyers'[269] and the appeal was dismissed.

11.11.5 MISAPPROPRIATION OF INDIGENOUS IDENTITY - LEGAL CRITERIA FOR 'IWI' RECOGNITION – FOCUS ON FORM

In a similar manner in terms of customary representation, the Māori fishing settlement has precipitated the identification of who the customary owners of the fisheries rights were for contemporary development, and in a wider context in the author's view, general aboriginal and Treaty rights. Te Ohu Kai Moana (TOKM) the Māori Fisheries Commission was of the view that the Fisheries resource is vested in Māori 'iwi' (tribes)[270]

[269] Waitangi Tribunal *Fisheries Settlement Report 1992* (GP Publications, Wellington, 1992) at 21.
[270] Some would define 'iwi' as 'nation' similar to the First 'Nations' context.

which they thought to number between 58-60 in New Zealand.[271] At its 1992 Hui-a-Tau TOKM captured the necessary attributes of an 'iwi' and proposed that an 'iwi' is 'a group of related Māori having the following essential (shared) characteristics:

- shared descent from Tipuna (ancestors);
- hapū (sub-tribes);
- marae (meeting houses);
- belonging historically to a Takiwa (territory);
- an existence traditionally acknowledged by other 'iwi.'

This criteria for recognising official 'iwi' appears to be exactly the same as that definition offered in the now repealed *Runanga Iwi Act 1990.* Joan Metge criticised these characteristics of 'iwi' from her submission made in 1990 on the Runanga Iwi Bill (which issues are still relevant) when she asserted:

> I object to the embodiment of this list of the 'essential characteristics of iwi' ... not because I disagree with its content , but on the grounds, firstly, that the right to decide which groups are iwi and which are not and to define the criteria to be used in the process is the prerogative of te iwi Maori (that is, nga iwi collectively), not something to be imposed by the law; and secondly, because it would freeze the definition of the iwi in time, precluding recognition of future developments.[272]

Metge recommended that these 'iwi' characteristics be regarded as a set of guidelines instead of a legal prescription:

> The list of iwi characteristics ... [are] on the whole sound and helpful. As it stands it reflects the static view of the iwi I have just criticised, but this could be easily remedied by minor amendments.[273]

Commenting on TOKM's criteria for 'iwi' Waerete Norman noted:

> There needs to be established which or what groups are actually operating on the ground and to further devise a realistic and practical approach of asset delivery to all its beneficiaries. Other questions posed are will 'essential criteria' proposal and its interwoven strands achieve this? Will all Māori entitled to their fair share of asset distribution by way of fishing Quota share in the catch, or will it be reduced to a mere scale of the tail, before the fish is beached even?[274]

Waerete Norman continued further:

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[271] *Maori Fisheries Act 2004,* Schedule 3 and 3A lists the 58'official' iwi recognised for fisheries. See Appendices XX, XXI and XXII for 'Iwi' lists from the 1996 and 2006 censuses, and the 'Iwi' list in the *Maori Fisheries Act 2004.*

[272] Metge, J, Submission on the Runanga Iwi Bill, (Wellington, 14 February 1990) at 7.

[273] Idem.

[274] Affidavit of Waerete Violet Beatrice Norman in Support of Muriwhenua, in *Te Runanga o Muriwhenua & Others v Treaty of Waitangi Fisheries Commission & Ors* (CP 395/93 (Wgtn) (Rangitauira & Co Solicitors, Rotorua, 12 February 1998) at 12.

> The TOKM definition [of iwi] it seems that it has not allowed for the dynamism, adaptation, and adjustment that Māori people have undergone since the advent of colonisation. In setting its 'essential criteria' it too has assumed that native social groupings such as that of 'iwi' have remained static and unchanging over time and continue to do so despite modernisation and successive government policies of assimilation, absorption and integration which have impacted on Māori.[275]

Dr Ngapare Hopa criticised this criteria in that:

> [It] ignores the dynamic and core fluidity of political alliances, but it also does not take into account the genius of our people to be flexible, to form alliances and new groupings [for] different responses, or changes in circumstances, economic or otherwise. I'm not saying that iwi as defined by whakapapa and one's membership of it is fine but not their only grouping. It is not the only grouping of lineages of whakapapa, for example, that is a vehicle for addressing our peoples' needs.[276]

Interestingly, the legal prescription of indigenous socio-political organisation via legally constituted 'tribes' and 'bands' through legislation and litigation, which challenges are germane to Māori in New Zealand, have also occurred in North America.

11.12 FEDERALLY RECOGNISED 'TRIBES,' 'BANDS' & 'NATIONS' IN CANADA

This section will turn to similar challenges and issues to iwi Māori in North America. Who, in First Nations' cultures, comprises the 'tribe' or 'band' in Canada? That is, who is the body that traditionally allocated resources, made decisions for the group, and represented or spoke for the people? If that body represents the 'tribe' or 'band', or 'nation,' then which groups are a 'tribe,' 'band,' or/and 'nation' at least within the contemporary context of indigenous representation for consultation, Treaty settlements, self-government and internal self-determination? Moreover, what are the appropriate levels for contemporary indigenous representation and good governance in Canada?

A good place to commence for identifying the indigenous groups with a right of self-government is with semantics. The early explorers of North America referred to Indigenous People as 'Indians,' which became the generic term for anyone and everyone indigenous. But there was also a need to refer to indigenous communities and the two terms that emerged to satisfy this need were 'nation' and 'tribe.' The *Massachusetts Bay Colony Treaty 1717* stated: 'We, the subscribers, being Sachems and Chief men of the several Tribes of Indians;'[277] while the *Micmac Treaty 1752* stated: 'That the said Tribe

[275] Ibid, at 12.
[276] Dr Ngapare Hopa, supra n 5 at 41.
[277] *Massachusetts Bay Colony Treaty 1717.* For a copy of this Treaty, see Cumming, P & Mickenberg, N, *Native Rights in Canada,* (2nd ed.)(Indian–Eskimo Association of Canada, General Publishing Co. Ltd, Toronto, 1972) at 299.

shall sue their utmost Endeavours to bring in the other Indians to Renew and Ratify this Peace.'[278] Yet one also finds the use of the term 'nation' as in the beginning of the *Royal Proclamation 1763*:

> And whereas it is just and reasonable, and essential to our Interest, and the Secretary of our Colonies, that the several Nations and Tribes of Indians with whom We are connected, and who live under our protection, should not molested.[279]

In the early nineteenth century, the *Selkirk Treaty* was signed in the Red River Valley with 'the undersigned chiefs and warriors of the Chippeway or Sauteaux Nation and of the Killistine or Cree Nation.'[280] It appears, therefore, that the terms 'tribe' and 'nation' were used interchangeably and were politically acceptable in Canada to refer to the various traditional indigenous polities. In the United States, Chief Justice Marshall referred to Indians as 'nations' and coined the phrase 'domestic dependent nations' although he occasionally used the word 'tribe.'

In Canada, the term 'tribe' became commonplace in several pre-confederation statutes;[281] and in the numbered Treaties, between 1871-1877. The term 'tribe' was used specifically in Treaties 1, 2, 3, 5 and 6 while the word 'nation' was not used in any of Treaties 1 through to 7.[282] 'Tribe' was also used in the opinion of the Judicial Committee of the Privy Council in *St. Catherine's Milling v Attorney-General.*[283] The word 'nation' largely disappeared from political discourse following *St. Catherine's* but it occasionally appeared in other usages such as in reference to the multi-tribal confederacies – the Six Nations Haudenosaunee of Ontario and the Blackfoot Nation of Alberta.

The *Indian Act 1876* introduced a new element into the identity discourse of First Nations, specifying the 'band' as the effective unit of political organisation under the law.[284] Bands have existed since this time as loose sub-tribal, familial groupings, which led a separate existence at times but also united with other bands for hunting, warfare and festivals. The *Indian Act* transformed these loose groupings into rigidly defined communities complete with membership lists, assigned reserves and institutions of local

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[278] *Micmac Treaty 1752.* Ibid, at 307.
[279] *Royal Proclamation 1763.* For a copy of the *Royal Proclamation 1763*, see Appendix IV.
[280] The *Selkirk Treaty 1817* was negotiated between Lord Selkirk and the Indians of what is now known as southern Manitoba. This Treaty was a land cession Treaty negotiated during the Hudson's Bay Company's regime. See Morris, A, *Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Belfords, Clarke, Toronto, 1880) at 299.
[281] See Smith, D *Canadian Indians and the Law: Selected Documents* (McClelland & Stewart, Toronto, 1975) at 32-57.
[282] Morris, supra n 280 at 313-375.
[283] (1887) 13 S.C.R 577 (S.C.C); appealed and upheld by the Judicial Committee of the Privy Council in *St Catherine's Milling and Lumber Co. v R* (1888) 14 A.C, 46 (J.C.P.C).
[284] *Indian Act 1876*, s. 3(1). See Smith, supra, n 281 at 87.

government. Hence from the time of the *Indian Act* onward, 'band' became the standard term for any Indian group having a legal corporate existence, while 'tribe' referred to larger, mostly linguistic, groupings scattered across separate reserves and no longer capable of collective action except through the cooperation of their constituent bands.[285]

In the famous Nisga'a case *Calder v Attorney-General,*[286] the Nisga'a Indian 'tribe' joined with several 'bands,' four of whom styled themselves the Nisga'a 'Nation.'[287] When the Parti Quebecois won the Quebec provincial election in 1976, Prime Minister Pierre Trudeau restarted the constitutional process and Indigenous Peoples demanded to be included as one of the founding 'peoples.' This attempt led to the invention of the phrase 'First Nations' which appeared in public in late April 1980 when the National Indian Brotherhood hosted a 'First Nations' Constitutional Conference in Ottawa.

Notwithstanding the semantics, the question of who is the 'tribe' or 'band' for representation purposes in Canada is still elusive. Who exactly are the First Nations, bands or tribes for self-government, government consultation and Treaty settlements? The Penner Committee encountered this challenge at the outset when it noted:

> The Assembly of First Nations suggested that the Committee think, at least initially, of each individual Indian band as a 'First Nation,' although some bands may amalgamate and others may choose to split into two or more units.[288]

The Penner Report also referred cautiously to the word 'nation' as:

> ... a group of people who possess a common language and culture and who identify with each other as belonging to a common political entity. [But] it is not intended to carry separatist connotations.[289]

Furthermore, the Royal Commission on Aboriginal Peoples (RCAP) noted that as a matter of practicality, the Crown must recognise those entities with which it is prepared to deal:[290]

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[285] Flanagan, T *First Nations? Second Thoughts* (McGill-Queen's University Press, Montreal, 2000) at 71-3.
[286] *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 (S.C.C).
[287] Idem.
[288] DIAND, *Report of the Parliamentary Committee on Indian Self-Government,* abridged in Ponting, J 'Proposals for Self-Government by the Special Parliamentary Committee on Indian Self-Government' in Ponting, J (ed) *Arduous Journey: Canadian Indians and Decolonisation* (McClelland & Stewart Ltd, Toronto, 1986) at 341.
[289] As cited in ibid Ponting, at 341. Throughout the Report the term 'Indian First Nations' was used to refer to the entities that would be exercising self-government.
[290] Canada, *Restructuring the Relationship* (Royal Commission on Aboriginal Peoples, Vol. 2, Part I, 1996) at 180-184; Chapter three, Conclusion 6; [hereinafter, RCAP, *Restructuring*] and Canada, *Royal Commission on Aboriginal Peoples: Renewal: a Twenty-Year Commitment* (Vol. 5, The Royal Commission on Aboriginal Peoples, Ottawa, 1996) at 155.

> ... in practice there is a need for the Federal and provincial governments actively to acknowledge the existence of the various Aboriginal *nations* in Canada and to engage in serious negotiations designed to implement their rights of self-determination.[291] [emphasis added].

In a similar manner to the identification of 'tribes' in the USA[292] and 'iwi' in New Zealand, there are many complexities. Flanagan highlighted an example with the Stoney Nation in Alberta, which consists of three bands sharing three inhabited reserves, but, for all practical purposes, is considered a single 'community.'[293] 'Nation' is often used for larger groupings of many bands such as the Cree Nation or the Nisga'a Nation. There is a further conceptual problem however – why should bands, which are artefacts of the *Indian Act*, have the prestige of being First Nations with all of the powerful connotations of indigeneity or aboriginality, while much larger and older historic groupings are merely 'Nations?'

The RCAP recognised that the right of self-government cannot sensibly be 'vested in small local communities (bands) that are incapable of exercising and fulfilling the responsibilities of an autonomous governmental unit,' and that 'at least several thousand people' need to be involved, 'given the range of modern governmental responsibilities.'[294] It was the RCAP's conclusion that an inherent right to self-determination and this self-government right rests in any aboriginal 'nation,' which the RCAP defined as:

> A sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories.[295]

More specifically, the RCAP outlined the necessary attributes of an Aboriginal 'nation':

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[291] Ibid, at 155.
[292] Infra, chapter 10.13.
[293] Flanagan, supra n 285 at 78.
[294] RCAP, *Restructuring*, supra n 290 at 177-180; chapter three, Conclusion 4; and RCAP, *Renewal,* supra, 290 at 155. Professor Ken Coates referred to this challenge as being very common among most First Nations seeking self-government. Coates noted that demographically, most First Nations simply do not have the numbers and capacity to implement self-government. The Nisga'a for example, have a population of approximately 5,000 that is considered to be one of the larger First Nations. First Nations self-government involves, inter alia, establishing an infrastructure and bureaucracy that includes policy, law and decision-making, police, housing, health, the administration of justice, environmental management, fishing, forestry, hunting, economic development and so. With a young population of 5,000 people, who will fill all of the required offices? Consequently, most First Nations will have to recruit external consultants to assist with self-government operations 'on the ground' which will, more often than not, result in a further challenge of who will actually govern – the First Nations people or external consultants by remote control. See Coates, K, 'Degrees of Separation: First Nations Self-Government in British Columbia' (Unpublished Paper, History Department, University of Waikato, 1996, in author's possession).
[295] Idem.

- The nation has a collective sense of national identity that is evidenced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
- It is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
- It constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.[296]

In a manner analogous to the 'iwi' debate in New Zealand, the RCAP further noted that 'peoples' or 'nations' not urban communities possess the right to self-government.[297] The RCAP held:

> In our view, the inherent right of self-government is vested in the entire people making up an Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not vest in local communities as such, considered apart from the nations of which they are part.[298]

Also in a manner analogous to TOKM in New Zealand who listed 58-60 official 'iwi', the RCAP estimated in 1996 that there were around 1,000 Aboriginal 'communities' in Canada but there were only 60 – 80 historically based Aboriginal 'nations.'[299]

While the RCAP approach may be appropriate for aboriginal 'nations' in Canada that were or are presently united by a common social and political organisation such as the Sarcee, (who have over a thousand band members, one reserve, and no nearby linguistic relatives) it might be difficult to apply to geographically-extended nations. Such indigenous nations might span more than one Province, although political expedience and convenience would probably make them coincide with Provincial boundaries in many cases. The Cree, for example, share a culture and language but lack a unifying political structure. The Cree were in fact parties to several of the numbered Treaties entered into in the prairie region in the 1870s[300] in addition to contemporary Treaties such as the James Bay Cree in the *James Bay and Northern Quebec Agreement 1975*. If the Cree were an Aboriginal 'nation' in whom an inherent right of self-government was vested at the time, one has to question whether separate Cree groups could have signed different Treaties that may have had an impact on that right.

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[296] Supra, RCAP, *Restructuring,* supra n 290 at 177-180; RCAP, *Renewal,* supra, 290 at 155.
[297] Ibid, *Restructuring,* at 678.
[298] Ibid, at 234.
[299] Ibid, at 177-84, 234-36.
[300] See Morris, A, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Belfords, Clarke & Co., Toronto, 1880); Arthur J. Ray, A.J, Miller, A and Tough, F, *Bounty and Benevolence: A History of Saskatchewan Treaties* (McGill-Queen's University Press, Montreal & Kingston, 2000).

11.12.1 THE POLITICS OF SMALLNESS

An additional challenge for Indigenous Peoples as 'nations' to actualise their right to effective self-government is the politics of smallness. In 2003, for example, there were 445,436 Status Indians, 285,139 of which resided off-reserve. There were 614 First Nations Band communities, 52 'nations' or cultural groups and more than 50 languages. About 61 percent of First Nations communities have fewer than 500 residents while only 6 percent have more than 2,000. Overall, 34.6 percent of on-reserve Status Indians lived in urban areas, while 44.6 percent live in rural areas.[301] Dr Ken Coates discussed what he terms the 'politics of smallness:'

> The language of self-government speaks of governments, nation to nation negotiations, community based administration and the like [which] ignores one very fundamental reality: smallness. Most First Nations in Canada are very small. The larger bands typically have their populations divided between several reserves.[302]

Although Mäori tribes are larger demographically,[303] they are a dispersed, urbanised and young population. Government policy and legislation dictates the various levels at which self-government occurs which is located mainly at the iwi and sometimes hapū levels. All Mäori groups have their own marae as focal points for tribal politics and the leadership of most tribes is (rightly or wrongly) often concerntrated in certain whānau within each tribe. Consequently, although demographically larger, Mäori tribes are 'on the ground' similar to First Nations in terms of being actually governed by smaller communities such as Hopuhopu, Ngaruawahia and Waahi for Waikato, and perhaps Tuahiwi, Rapaki and other Papatipu Runanga communities for Ngāi Tahu, hence the politics of smallness is very relevant for Mäori.

Smallness is a vital, and often overlooked political issue. Governments of small nations, whether it be the Nisga'a of northern British Columbia, or the Waikato-Tainui and Ngāi Tahu people of Aotearoa, face peculiar realities – political intimacy, personal relationships, the interconnectedness of individuals and administrative decisions, and the 'gold fish bowl'[304] experience of public life.

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[301] Indian and Northern Affairs, *Aboriginal Claims: A Practical Guide to Canadian Experiences* (Ministry of Indian Affairs and Northern Development, Ottawa, 2003) at 39 and Indian and Northern Affairs, *Basic Departmental Data 2003* (Indian and Northern Affairs, Ottawa, 2003) at ii. See also Indian and Northern Affairs, *Band Classification Manual* (Indian and Northern Affairs, Ottawa, 2004).

[302] Coates, supra n. at 294.

[303] See for example, Tables 8.1 and 8.2, supra chapter 8 showing Iwi Affiliation Demography in the Waikato Region in 1991 and 2001.

[304] The 'Gold Fish Bowl' experience of life occurs when people know what others are up to simply because of the small size of the population, resulting in closely knit communities. Thus, everyone knows each other's business. As a result of the politics of smallness, close band, hapū and whānau relations emerge in small communities that increase interaction at school, work, on the marae or longhouse, at church, sports and so forth.

Smallness creates an enormous set of difficult political and operational dilemmas. Budgetary expenditures have a direct and immediate impact on people that are known or related to decision-makers. The imperative to place family considerations ahead of or on par with community concerns is very strong. Neptosim is extremely difficult to avoid, particularly in First Nations and Mäori communities where there appears, anecdotally, to be a very strong relationship between family and leadership, employment and educational attainment. Within indigenous communities, one can add the extra difficulties of clan or moiety affiliations and the often difficult relationship between contemporary and traditional decision-making structures and processes. Over-riding all of these factors is the relative absence of privacy. People know what goes on in other people's lives. An individual experiencing marital difficulties might well discover the community unwilling to follow their lead on social or cultural matters, precisely because they know about the domestic situation.

Such challenges are not indigenous challenges. They are, first and foremost, a matter of the politics of size. The larger the political aggregation, the less likely (onew would hope) personal considerations are to influence day to day administration. As governments become smaller – whether for a small agricultural settlement, a remote mining town, a First Nations reservation, hapū marae area, or a tiny coastal fishing village – pressures intensify on the individuals involved and there are increased complications between domestic and admininstrative matters. Many of the political problems that are assumed to be 'indigenous,' 'Indian,' or 'Mäori,' and which have been manifest in community-level politics over the past few decades are, in fact, best understood as the challenges of smallness. To the degree that the self-government process is based at the community, whānau or perhaps hapū and band levels, and not the tribal or regional level (and even then there are no guarantees), the politics of smallness will intrude on indigenous decision-making, hence the reality is that the smallness of First Nations bands and Mäori whānau and hapū precludes the effective actualisation of the right of 'nations' to self-government and internal self-determination politically and practically.

11.12.2 ABORIGINAL 'NATION' LEVEL

Johnathan Kay commented in 2002 on the challenges of focusing First Nations representation at the 'nation' level:

> Right now, we have, in Canada, about 400,000 reserve resident Aboriginals. The RCAP report looked at about, I think, 60 Aboriginal nations. You would therefore have nations that had somewhere between about five and ten thousand people. What does that mean to have something we call a nation with five and ten thousand people – in many cases, only a couple of dozen of whom have a college education – in remote, geographically isolated places, where there's absolutely no possibility in the foreseeable future of having any kind of

> economically sustainable lifestyle, where most of the money comes from government transfer payments from the Federal government? Does that sound like the sort of government you would want? That would be a formula for welfare dependence and all the pathologies.[305]

The RCAP, moreover, acknowledged that the *Indian Act*'s regime of Indian bands and band councils has fragmented some Aboriginal 'nations' by creating local political entities:

> We recognize that there are obstacles to implementing this approach to self-government. In the case of First Nations, for example, one of the effects of the band orientation of the *Indian Act* has been to foster loyalties at the level of the local community, at the expense of broader national affinities arising from a common language, culture, spirituality and historical experience.[306]

Thus in a manner analogous to Māori 'iwi,' many First Nations would need to aggregate as First Nations associated by similar languages and cultures and historic ties for, inter alia, economies of scale. There would also probably be several Métis and Inuit nations, because these are also diverse aggregations even though they are identified as 'peoples' in the *Constitution Act 1982*.

The RCAP approach, while appropriate for some First Nations, may neither be appropriate nor cannot be applied universally. An approach that takes account of both the historical and current differences (at least in terms of demography, geography, ethnicity, and cultural vitality) among the various First Nations of Canada might be more plausible. Moreover, there is a terminological problem here that needs to be acknowledged if we are to avoid begging the vital question of the identity and representivity of the holders of customary aboriginal rights that provide scope for contemporary self-government and internal self-determination. The term 'Aboriginal nation' may not be appropriate given that it cannot be applied universally to the indigenous holders of this customary right.

Similarly, iwi may not be appropriate in New Zealand given that the traditional holders of Māori customary rights around the time of the Treaty were more the hapū and perhaps whānau. Perhaps the broader but less familiar term 'indigenous polity' is more appropriate given that it has been defined as a 'condition of civil order; form, process, of civil government; organised society, and state.'[307] The author's use of the term 'indigenous polity' is intended to encompass all the collectivities that hold the customary inherent right, including Aboriginal 'nations' and 'tribes' in Canada and Māori 'iwi,' 'hapū' and 'whānau' in New Zealand.

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[305] Kay, J 'First Nations Governance: the 'New' Indian Act' (Aboriginal Peoples Television Network, Town Hall, Canadian Museum of Civilisation, Gatineau, Quebec, 14 April 2002) at 21.
[306] RCAP, *Restructuring*, supra n 290 at 235.
[307] The term 'polity' is defined by *The Concise Oxford Dictionary* (Clarendon Press, Oxford, 1964).

Whoever is recognised (and perhaps more importantly how and by whom) as the holder of this customary right and in whom the inherent right of contemporary self-government is vested (that is, who has the governance and representation right today), the RCAP concluded that that Aboriginal polity also has the authority to deal with the Canadian Government in regard to that right.[308] However, in *R.* v. *Marshall [No. 2]*,[309] the Supreme Court noted that, because the *Mi'kmaq Treaties 1760-61* consisted of a series of local agreements with individual Mi'kmaq 'communities' rather than a single Treaty with the Mi'kmaq Nation, 'the exercise of the treaty rights [to hunt and fish] will be limited to the area traditionally used by the local community.' Moreover, because those rights are communal, they are 'exercised by authority of the local community to which the accused belongs.' This seems to imply that the right of self-government in relation to Mi'kmaq hunting and fishing is vested in local communities rather than in the Mi'kmaq 'Nation.'[310]

While the RCAP expressed this view in relation to negotiations leading to Treaties for implementing the right to self-government,[311] the same logic appears to apply in the context of consultation obligations over infringements of this and other aboriginal rights - the people who must be consulted are the people who hold the customary right. Moreover, as the right of self-government, like other aboriginal rights, is a communal right that is vested in the aboriginal polity as a whole rather than in individual members,[312] consultation has to be with the polity as a community. This is not to say that an aboriginal polity cannot delegate authority to individuals or to institutions to consult with the Federal government on their behalf. However, this ought to be done in accordance with the Indigenous People's own traditions of self-government and representation.[313]

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[308] RCAP, *Restructuring,* supra n 290 at 235.

[309] [1999] 3 S.C.R. 533 [hereinafter *Marshall [No. 2]*].

[310] However, this aspect of *Marshall [No. 2]* has been criticised, as it is inconsistent with the Court's acquittal of Mr. Marshall in *R.* v. *Marshall [No. 1]*, [1999] 3 S.C.R. at 456 [hereinafter *Marshall [No. 1]*, at paras. 49-52 (Binnie J.), para. 78 (McLachlin J., dissenting on other grounds) because he had not in fact been fishing in the traditional fishing grounds of his local community when he caught the eels he was charged with selling. See Wildsmith, B.H, 'Vindicating Mi'kmaq Rights: The Struggle Before, During and After *Marshall*,' (1999/2000 Access to Justice Lecture, University of Windsor Faculty of Law, March 2000) at 24-29; and Patterson, S 'The *Marshall* Decision as Seen by an 'Expert Witness' in *Canada Watch* (Vol. 8, No. 1-3, 2000) 53 at 59.

[311] RCAP *Restructuring,* supra n 290 at 235.

[312] See *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010.at para. 170; *Campbell* v. *British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), at para. 137. It has been held as well that the right to vote in band council elections is a communal right: see *Corbiere* v *Canada (Minister of Indian and Northern Affairs)*, [1992] 2 C.N.L.R. 31 (F.C.T.D.), at 33, relying on *Twinn* v *The Queen*, [1987] 2 F.C. 450 (F.C.T.D.), at 462-63, where it was held that an Aboriginal right to control band membership would be a communal right.

[313] The historic Treaties provide examples of Aboriginal polities negotiating with representatives of the Crown through leaders chosen by them in accordance with their own customs and traditions. Similarly, the *Treaty of Waitangi* in New Zealand was signed by Māori individuals (in accordance with tikanga Māori) representing hapu polities with a representative of the Crown.

11.12.3 REPRESENTATION AND NEGOTIATION CRITERIA

In the context of comprehensive Treaty settlement negotiations over infringements of customary aboriginal rights - the people, community, group or polity who ought to be consulted are the people who hold the customary right. But in a more narrow and difficult manner, in terms of acceptance for negotiating comprehensive claims, Federal policy dictates that a First Nations group must demonstrate all of the following criteria to negotiate a comprehensive claim:

- The aboriginal group is and was an organised society;
- The organised group has occupied a specific territory over which it asserts aboriginal title from time immemorial, and the traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations;
- The occupation of the territory by the aboriginal party was largely to the exclusion of other organised societies;
- The aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes;
- The group's aboriginal title and rights to resource use have not been dealt with by treaty; and
- Aboriginal title has not been eliminated by other lawful means.[314]

In British Columbia, indigenous groups do not need to provide the same evidence of prior occupation as in the rest of the country.[315] But this criteria would most likely (though not exclusively) apply to indigenous 'tribes,' 'bands' or 'nations' isolated on traditional tribal territories (reserves) with unextinguished aboriginal rights which are mostly in the isolated areas of Northern Canada - the Yukon, Northwest Territory, Nunavut, northern Quebec, Labrador and scattered parts of British Columbia. Furthermore, meeting all of these narrow criteria for Treaty negotiations would be difficult to meet at best and may exclude many bona fide claims that would otherwise be valid but for the criteria.

The identification of the Aboriginal, indigenous or Māori polities with whom consultation and Treaty negotiations should take place is, therefore, problematic in Canada and New Zealand. For example, the RCAP's approach above that consultation must take place with the polity that holds the right of self-government, which in most cases is an Aboriginal 'nation' rather than an *Indian Act* band becomes a contest for membership, authority and resources. There are always overlapping claims to traditional boundaries within Treaty settlements as well as competition for institutional representation, authority and jurisdiction in all contemporary Treaty settlement communities in both countries (that

[314] Indian and Northern Affairs Canada, *Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences* (Indian and Northern Affairs, Ottawa, Canada, 2003) at 8.
[315] Idem.

the author is aware of) hence there is a lack of customary fit and legitimacy that complicates the analysis, both legally and practically, presently and in the future.

Lastly, given that the inherent right of self-government is a collective right that is held by all the members of the aboriginal polity in Canada (and also in New Zealand) *as a community rather than as individuals*, consultation and Treaty negotiations have to be with the group as a collectivity, not with individuals. Hence once the nation, band, tribe, iwi, hapū or polity has been identified and verified, the next hurdle is identifying clearly what legal entity represents that polity. The community's own political organisation and procedures, which are themselves expressions of the polity's inherent right of self-government, would have to be respected for consultation and Treaty negotiation processes to be valid.

This research will now consider how indigenous 'tribes' are recognised in the USA to provide further context to the discussion at hand on indigenous identity and representation in a contemporary Treaty settlement and post-Treaty settlement governance context.

11.13 UNITED STATES FEDERAL RECOGNITION OF 'TRIBES'

In the United States the Federal Bureau of Indian Affairs (BIA) (under the Department of the Interior) deals with Indians living on or near reservations or trust lands established by Treaty, statute or executive or court order under Federal law. The Federal Government deals with Indians as members of political associations or entities known as 'tribes' as residual sovereign entities. Hence American law and practice is primarily related to these 'Federally recognised tribes' living on reservations. McHugh pointed out that the term 'Indian' signifies an historical not a racial category.[316] Federal regulation of Indian Affairs was based upon the status of Indians as members of separate political entities – the doctrine of residual tribal sovereignty articulated in the Marshall Trilogy cases – with their own political institutions. In *Cherokee Nation v Georgia*[317] Justice Marshall rejected the argument that the Cherokee nation was a 'foreign state, but he accepted their argument that they were a state, a distinct political society separated from others, capable of managing its own affairs and governing itself.'[318] American law recognises that the distinct constitutional status of the tribes arises from their inherent organisation and the historical

[316] McHugh, P, 'Aboriginal Identity and Relations in North America and Australasia' in Coates, K, & McHugh, P *Kokiri Ngatahi Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) at 150.
[317] 30 US (5 Pet.) 1 (1831).
[318] Ibid, at 16.

character of governmental relations with them. The powers of self-government, which flow from their residual sovereign status, are inherent and not a delegation from the Federal powers created by the Constitution of the United States.[319] 'Tribes' are thus to be distinguished from voluntary associations or imagined communities as Young noted:

> Indian tribes are ... self-authenticating, because their will and integrity were created by and are sustained by no other source other than their own internal beliefs and arrangements. Neither state nor Federal governments ever put the breath of communal life into them. 'Indian tribes within Indian country' are a good deal more than 'private, voluntary organisations.[320]

What is also crucial is the fact that residual sovereignty has been reformulated by Federal law and practice into a distinction between formally recognised and non-recognised 'tribes.' Government programmes and services including contracting extend only to those tribes that are Federally recognised. Still, the Supreme Court has held that the formal recognition is not necessary for a tribe to have some status under Federal law and has given this definition of a 'tribe' and 'band' in the 1901 case *Montoya v United States*:[321]

> By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band' a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a 'band' does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action.[322]

11.13.1 PROCESSES FOR RECOGNITION AS A 'TRIBE'

Throughout the United States history, Congress, the Executive branch, and Federal Courts have acknowledged Indian 'tribes' for specific purposes. Prior to the adoption of the acknowledgement regulations by the BIA in 1978, there was no uniform methodology for Federal acknowledgement of Indian 'tribes,' which was a regulatory process.[323]

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[319] *Talton v Mayes* 163 US 376 (1896).

[320] Young, S 'Indian Tribal Sovereignty and American Fiduciary Undertakings' in *Whittier Law Review* (Vol. 8, 1987) 825 at 827.

[321] *Montoya v United States* 180 US 261 (1901) at 266.

[322] Ibid. The Supreme Court was dealing with the *Depredation Act 1891* giving the Court of Claims jurisdiction to compensate settlers whose property had been taken or destroyed by Indians belonging to any 'band, tribe or nation' in amity with the United States but the legislation did not define the term 'Indian tribe.'

[323] United States Government, Department of the Interior, 43 *Federal Regulation 39361* (September 5, 1978). Among many indigenous scholars in the USA, there is no greater controversy than the process by which Indian tribes gain Federal recognition. Peter Beinart discusses some of the difficulties that plague this process, which is very interesting when considering the similar arguments surrounding the contemporary definition of what constitutes a Māori 'iwi.' See Beinart, P, 'Lost Tribes: Native Americans and Government Anthropologists Feud Over Indian Identity' in *Lingua Franca* (May, 1999).

Congress has the 'plenary power' concerning Indian affairs, pursuant to Article I, s. 8 of the *United States Constitution*, to 'regulate commerce with foreign nations, among the several states, and with Indian tribes' hence the Federal process for tribal recognition.

The benefits of Federal recognition as a 'tribe' are that 'tribal' status makes 'tribes' eligible to participate in billion dollar Federal assistance programs and can result in the granting of significant rights as sovereign entities – including exemptions from state and local jurisdiction and the ability to establish casino gambling operations. About $4 billion was appropriated for programs and funding almost exclusively for recognised 'tribes' in the fiscal year 2000. In 1999, 193 recognised 'tribes' generated approximately $10 billion in annual revenues from on-reservation gambling operations, with 27 of those 'tribes' producing two-thirds of all revenue.[324] Given that Federal recognition carries important consequences for Indian tribes, it is not surprising that those to whom it has been denied should campaign strenuously for it.

There are two official processes in which an Indian 'tribe' can become Federally, and therefore officially, recognised:

- a tribe is required to petition for acknowledgement from the U.S Department of the Interior's BIA; or
- a tribe can seek recognition through an Act of Congress.

The former option is the most utilised but there have been some cases of tribes receiving recognition from an Act of Congress usually as part of a contemporary indigenous land claims settlement.

11.13.2 BIA PETITION FOR RECOGNITION - CRITERIA

In 1978, the BIA established a regulatory process intended to provide a uniform and objective approach to recognising 'tribes.' This process requires groups that are petitioning for recognition to submit evidence that they meet certain criteria – basically that the group has continued to exist as a political and social community descended from a historic 'tribe.' Owing to the rights and benefits that accrue with recognition and the controversy surrounding Indian gambling, the BIA's regulatory process has been subject to intense scrutiny by groups seeking recognition and other interested parties.

The BIA has a list of 7 criteria for recognition under the regulatory process briefly as follows:

[324] General Accounting Office, *Indian Issues: Improvements Needed in Tribal Recognition Process* (Report to Congressional Requesters, United States General Accounting Office, Washington D.C, 2001) at 2.

1) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;
2) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;
3) The petitioner has maintained political influence or authority over the members as an autonomous entity from historical times until the present;
4) The group must provide a copy of its present governing documents and membership criteria;
5) The petitioner's membership consists of individuals who descend from a historical Indian tribe or tribes which combined and functioned as a single autonomous political entity;
6) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and
7) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.[325]

Generally, the petitioning group must have 'been identified as an American Indian entity on a substantially continuous basis since 1900 – a change from the 1978 requirement of continuity 'from historical times.' The requirement of 'tribal political influence or other authority over its members' has been subtly reoriented from its 1978 Reform. The group must still show political influence and authority over its members' since historical times' but the means by which this can be proven include evidence that the group is able to mobilise significant numbers of members and resources for group purposes, that the membership considers issues acted upon by its leadership to be of importance, and that there is widespread knowledge and involvement in political processes. Significantly, evidence of internal conflicts, 'controversy over valued group goals, properties, policies, processes and/or decisions' far from undermining the claim is now to be regarded as supporting the claim to recognition. The emphasis is less upon the outward coherence of a political structure, the 'tribe,' than upon its historic and continued vitality - it is that vitality which is regarded as having constitutive force.

11.13.3 ACT OF CONGRESS RECOGNITION OF 'TRIBES'

The other method for the official recognition as an Indian 'tribe' is through an Act of Congress usually through a contemporary Indian land claims settlement. Ford discussed an important challenge with this process, however, that 'there would seem to be no check upon the ability of the political branches of the United States government [Congress or the executive] to recognise, or to de-recognise, Indian tribes.'[326] For example, in the 1950s and 1960s, Congress terminated the special relationship between the United States and some tribes as part its an assimilation policy. Between 1954 and 1964, Congress passed 14 Acts

[325] Ibid, at 11.
[326] Ford, C.A 'Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition' in *Denv. U. L. Rev.* (Vol. 73, 1995) at 141.

that ended Federal acknowledgment for 109 Indian tribes and bands but later restored Federal acknowledgment to some of these tribes and repealed the termination of others.

Still, Federal courts have limited some Congress authority to acknowledge Indian 'tribes' in the U.S. Supreme Court case *United States v. Sandoval*,[327] which held that 'Congress could not confer Federal acknowledgment arbitrarily by calling any group of people an Indian tribe.'[328] Moreover, the Court ruled that there is a limitation on Congress power to regulate Indian affairs. The Court stated that 'use of this power must be rationally related to the purposes of the government-to-government relationship.'[329]

11.13.4 MISAPPROPRIATION OF MASHPEE INDIAN 'TRIBAL' IDENTITY

The Mashpee Indian 'tribe' in the USA provides an interesting example of the indigenous struggle for official 'tribal' recognition through an inappropriate process, an example that may be analogous to Māori with the recognition of iwi as Māori 'tribes' in the Courts. Clifford provided an account of the Mashpee tribe's fight for recognition.[330] Clifford's essay provided an experimental ethnographic description of the trial, which was intended to be a serious historical and ethnographical account of the 'reality of Mashpee' as an indigenous 'tribe.' In August 1976 the Mashpee Wampanoag Tribal Council Inc., sued in Federal court for possession of approximately 16,000 acres of land constituting three-quarters of Mashpee, Cape Cod's Indian Town. In a case somewhat analogous to the Māori Fisheries case *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission,*[331] [the 'Iwi' case] an unprecedented trial ensued the purpose of which was not to settle the question of land ownership but rather to determine whether the group purporting to be the Mashpee Tribe was in fact an Indian 'tribe' and the same 'tribe' that in the mid-nineteenth century had lost its lands through a series of contested legislative Acts.[332] As in the 'Iwi' case, the opportunity for study of the anthropological notion of culture in practical use proved to be invaluable but not decisive.[333]

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[327] 231 U.S. 28 (1913). In the case *Baker v. Carr*, 369 U.S. 186 (1962) which did not involve Federal acknowledgement, the Court discussed this issue and stated that 'the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.'

[328] Idem.

[329] *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

[330] Clifford, J, *The Predicament of Culture* (MA, Harvard University Press, Cambridge, 1988). See also Beinart, supra, n 323.

[331] *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* (High Court, Auckland CP 395/93, 4 August 1998, Patterson J). [Hereinafter the 'Iwi' case]. Supra, section 11.10 and accompanying text of this chapter.

[332] Clifford, supra n 330 at 277.

[333] For a good reference on the Mashpee trial, see Campisi, J, *The Mashpee Indians: Tribe on Trial* (Syracuse University Press, New York, 1991).

Although the trial was formally about 'tribal' status, its scope was significantly wider. As in the Iwi case, the courtroom provided an enormous amount of expert testimony from both sides debating the authenticity of Indian culture in Mashpee. Often this seemed to have become the crucial point of contention.[334] Indigenous anthropologists such as William Sturtevant and Vine Deloria were more comfortable with a polymorphous notion of culture than with the political category of 'tribe.'[335] But far from fulfilling the anthropological assumption of cultural wholeness, structure and continuity in which the judge, lawyers and jury tended to persist despite anthropological guidance out of it, the Mashpee trial seemed to reveal people who (like many Māori but in a New Zealand context) were sometimes separate and 'Indian,' sometimes assimilated and 'American.' As Clifford noted:

> Their history was a series of cultural and political transactions, not all-or-nothing conversions or resistances. Indians in Mashpee lived and acted between cultures in a series of ad hoc engagements.[336]

Clifford concluded:

> Organised Indian life had been going on in Mashpee for the past 350 years. ... Moreover a significant revival and reinvention of tribal identity was clearly in progress. I concluded that since the ability to act collectively as Indians is currently bound up with tribal status, the Indians living in Mashpee and those who return regularly should be recognised as a 'tribe.'[337]

On the stand Sturtevant similarly avoided reifying 'tribes' by emphasising historical variation and Vine Deloria attempted the same by invoking cultural relativity when he asserted: 'we don't make the same distinctions that you do in the Anglo world.'[338] The socio-political organisation of this indigenous First Nation was (like Māori) fluid, dynamic and evolving with changes in environment, time and space.

In the end, the conceptions of a 'tribe' proposed by both expert witnesses for the Mashpee were made to appear amorphous, fuzzy, fluid and opportunist as the even more central anthropological notion of culture.[339] The jury concluded that except for a short period of time in the mid-1800s, the Mashpee did not constitute an Indian 'tribe' and had not constituted a 'tribe' on the several specific dates at issue since 1790.[340] Interestingly, it appears that the judge may have erred in terms of focusing on the legal existence of the

[334] Ibid, at 337.
[335] Ibid, at 323.
[336] Ibid, at 342.
[337] Ibid, at 336.
[338] Ibid, at 223.
[339] Cited in Webster, S 'Escaping Post-Cultural Tribes' in *Critique of Anthropology* (Vol. 15, No. 4, 1995) at 391.
[340] Clifford, supra n 330 at 277.

Mashpee 'tribe' rather than the fundamental issue of property rights and land ownership. The judge had proceeded to trial refusing to consider the question of land brought to him by the Mashpee until the present trial had determined 'that these people of Indian ancestry' of the Mashpee were '*the* Mashpee 'Tribe' that had, they alleged, been despoiled of collectively held lands during the mid-nineteenth century.'[341] The judge's determination to first look at the collective that purported to represent the Mashpee as a 'tribe' or culture may have been the Mashpee's undoing.

Webster commented that in this case, both the judge and Clifford put the 'cart before the horse.'[342] Any understanding of Mashpee 'culture' let alone the 'tribe' necessarily presupposes a particular history of control over resources, probably especially land but also the various cultural or ethnic capacities of the Mashpee to be the Mashpee at any particular time in their long history. When attempting to come to grips with the issues raised by such challenges from Federal policies, indigenous groups such as the Mashpee confront a Catch-22 from litigation that masks the substantive issues in Court procedure and the Federal criteria for recognition of contemporary 'tribal' existence:

> An Indian is a member of any Federally-recognised Indian Tribe. To be Federally recognised, an Indian Tribe must be comprised of Indians. To gain Federal recognition, an Indian Tribe must have a land base. To secure a land base, an Indian Tribe must be Federally recognised.[343]

The system of essential meanings constituting such things as a culture or a 'tribe', either in their own or 'expert' opinion, is not conceivable apart from the particular interests or forces which support or undermine these meanings at any given historical moment.[344] Hence, as Webster concluded, the Mashpee might well have not been the Mashpee 'tribe' because their land had been misappropriated.[345] The Mashpee tribe appear to have had their identity as a 'tribe' also misappropriated.

11.13.5 MASHANTUCKET PEQUOT LAND CLAIMS SETTLEMENT ACT 1983

The Mashantucket Pequot 'tribe' of Connecticut, on the other hand, provides another interesting example of the legal and political construction of an indigenous 'tribe' in the USA that possibly provides further insights into our present discussion on

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[341] Ibid, at 278.
[342] Webster, supra n 339 at 392.
[343] Native American Consultants Inc, *Indian Definition Study* (Office to the Secretary of Education, U.S Department of Education, Washington D.C, January 1980).
[344] Asad, T, 'Anthropology and the Analysis of Ideology' in *Man* (N.S, Vol. 14, 1979) at 607-27.
[345] Webster, supra n 339 at 392.

indigenous identity and representation. European contact in the 17th century with the Mashantucket Pequots of Connecticut (who were also known as the Fox people) devastated the once powerful Pequot clans that numbered approximately 13,000.[346] Disease as well as the Pequot War on 26 May 1637 resulted in the death of 700 – 800 Pequots (mostly women and children) and the enslaving of the many survivors who were subsequently sent to Bermuda and the West Indies. The *Treaty of Hartford 1638* (also called the Tripartite Treaty) divided the Pequot remnants as slaves among the neighbouring Indian tribes, and the Treaty decreed that no Pequot might inhabit their traditional territory, while the use of the name 'Pequot' was even outlawed which resulted in the social, political and cultural extinction of the Mashantucket Pequot as a tribal polity.[347] Over the next 350 years the Pequot tribe was a 'lost' or extinct 'tribe' that did not officially exist at least for Federal Government purposes.

The State of Connecticut did recognise the Pequot's, however, by allowing some survivors to inhabit lands allowing them to establish four Indian towns supervised by two governors. A reservation was established in 1666 with approximately 3,000 acres for the exclusive use of the Pequots.[348] Border disputes with Massachusetts and Rhode Island meant that the towns shifted resulting in two reservations – the Paucatuck Pequot and the western Pequot or Mashantucket Pequot people. Hence the once great nation had become two distinct but small socio-political 'tribes.' Over the years much of the reservation lands were lost by legal avarice so that by the 1970s the 2,000 acres had dwindled to 213 acres and (due to urbanisation) the tribal population had fallen drastically to a mere two Mashantucket people living on the reservation in 1974.[349] Elizabeth Plouffe, considered the last surviving Pequot, on her dying bed apparently pled with her grandson Richard Hayward to 'hold the land.' Hayward subsequently organised and mobilised his family members to resurrect their Mashantucket Pequot heritage so that by 1976, the family had established the Mashantucket Pequot Tribal Council with Hayward elected as chairman.[350]

Hayward subsequently filed a successful claim against the Federal Government to regain the Mashantucket Pequot lands that had been misappropriated over the prior three centuries and gain Federal recognition. Impending litigation, inter alia, over what appeared to be unextinguished aboriginal rights, provided a fulcrum of change for the Pequot claim

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[346] Harvey, S, 'Two Models to Sovereignty: A Comparative History of the Mashantucket Pequot Tribal Nation and the Navajo Nation' in *American Indian Culture & Research Journal* (Vol. 20, No. 1, 1996) at 151.

[347] See Hauptman, L.M & Wherry, J.D (eds) *The Pequots in Southern New England: The Rise and Fall of an American Indian Nation* (University of Oklahoma Press, USA, 1990).

[348] Harvey, supra n 346 at 180.

[349] Ibid, at 152.

[350] Hauptman, supra n 347 at 214.

that resulted in direct negotiations with the Federal Government. The Mashantucket Pequot Land Claims Settlement was subsequently negotiated and agreed to by both parties and ratified in the *Mashantucket Pequot Land Claims Settlement Act 1993* (MPLCSA).[351] The MPLCSA Congressional findings stated that:

- there is a lawsuit in Federal court involving claims by the tribe to public and private land in Ledyard, Connecticut;
- the lawsuit placed a cloud on the titles to much of the land in Ledyard, including land not involved in the suit, that created severe economic hardship for town residents;
- Congress, the state of Connecticut, and the parties to the lawsuit desire to remove all clouds on titles from Indian claims;
- the parties and others interested in the settlement of the land claims reached an agreement requiring implementation by Congress and the Connecticut legislature;
- the Western Pequot Tribe represented by the Mashantucket Pequot Tribal Council is the successor to the entity that claimed aboriginal title to certain lands in Connecticut; and
- based on Connecticut's contribution of 20 acres of land, road construction and repair, and its provision of past services to the tribe not required by Federal law, Connecticut is not required to contribute otherwise to the settlement.

This debate is germane for aboriginal rights claims and indigenous grievances in New Zealand and Canada given that they cause uncertainty in property rights that need to be settled by direct negotiations between governments and indigenous tribes respectively.

A committee report on the bill noted that the state of Connecticut negotiated the settlement because the lawsuit placed a cloud on the land titles of private property owners in the claims area and litigation would address a wide variety of new legal issues that could lead to many appeals and take many years. Consequently, the report stated that property owners would find transactions relating to the land or its natural resources impeded or frustrated by the claim.[352] Moreover, several legislators discussed the need to settle the land claims and the parties' agreement to the settlement. Importantly, the House debate on the first version of the Act, stated that the Act met the Interior Committee's criteria for settlements:

- the claim was credible,
- the settlement terms were reasonable,
- the affected parties generally agreed to the terms, and
- state and local communities made a significant contribution to the settlement.[353]

Importantly, the Act of Congress recognised the Mashantucket Pequots as a Federally recognised 'tribe' and hence provided the political impetus for a cultural, social and

[351] 1983 United States Code, Title 25, Chapter 19, sub-chapter IV s. 1754. The settlement provided the Pequots a settlement fund of $900,000 to repurchase lands within a prescribed area and for the economic development of the tribe. The Act also provided that any lands purchased by the Tribe within the Mashantucket Pequot Area would automatically become reservation land.

[352] Senate Report No. 98-222.

[353] State of Connecticut Parliamentary Debates, *Congressional Digest-House*, (March 22, 1983) at 6443.

economic renaissance. The Act defined 'tribe' as the 'Mashantucket Pequot Tribe (also known as the Western Pequot Tribe)' and 'all its predecessors and successors in interest'[354] and the 'tribe' was represented by the governance entity - the Mashantucket Pequot Tribal Council.[355] Representative Nancy Johnson addressed the question of Federal recognition by an Act of Congress in a House debate on the first version of the Act:

> Recognition of an Indian tribe by act of Congress is admittedly an unusual procedure but it is essential in the settlement of a claim by Congress. Without this Federal recognition, the United States, the State of Connecticut, and innocent landowners would remain vulnerable to future suits raised by groups purporting to be the Pequot Tribe. Whatever the merits of the Federal recognition project administered by the Bureau of Indian Affairs, it should not stand as a bar to the designation by Congress of one of the principal parties to the settlement. Federal recognition is essential to a final settlement of the claims.[356]

11.13.6 INDIAN GAMING 'CREATES' INDIAN 'TRIBES'

The US Supreme Court confirmed in *California v Cabazon Band of Mission Indians*[357] that Indian 'tribes' have the authority to establish gambling operations on their reservations outside State regulation provided the affected State permitted some type of gambling. Congress subsequently passed the *Indian Gaming Regulations Act 1988* (IRGA),[358] which established a regulatory framework to govern Indian gaming operations. Crucially, the IRGA stated that only Federally recognised Indian 'tribes' might engage in gambling operations. Hence, Indian 'tribes' are nations and can run their own gambling operations on tribal land, free of taxes and regulations that reign in the casinos of Las Vegas and Atlantic City. The *Cabazon* ruling created a more than $10 billion business, while some cynically argue that it also 'created' some Indian 'tribes' or at least resurrected many of them.[359]

For the Mashantucket Pequots, being recognised as a resurrected 'tribe' provided access to loans guaranteed by the BIA, along with a $55 million loan from Kien Huat bankers in Malaysia, which the tribe used to open a high-stakes bingo parlour on the reservation. By 1994, the casino brought in $400 million a year.[360] In 1996, the Foxwoods

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[354] Chapter 832 of the *Mashantucket Pequot Land Claims Settlement Act 1993* 25 U.S 2701 – 2721 (1988).
[355] Pursuant to s. 1752 *Mashantucket Pequot Land Claims Settlement Act 1993* 25 U.S 2701 – 2721 (1988). See the Mashantucket Pequot homepage www.pequotacademy.com/home.htm (Accessed May 2005).
[356] State of Connecticut Parliamentary Debates, *Congressional Record-House*, (March 22, 1983) at 6445.
[357] 480 U.S. 202 (1987).
[358] 25 U.S.C 2701.
[359] 'Are Pequots really Pequots? in CBS News Story, (6 June 2000). Located on the internet at url: www.cbsnews.com/now/story/0,1597,198627-412,00.shtml (Accessed 27 October 2001).
[360] Passell, P, 'Foxwoods a Casino Success Story' in *The New York Times*, (8 August 1994) at 1.

Resort Casino boasted a casino facility, a theatre, 21 dining establishments, unique retail shops and specialty theatre rides.[361]

With such high stakes, it is no wonder that the Mashantucket Pequot 'tribe' has as many as 10 applications for enrolment a week. Under Federal law Indian 'tribes' have the right and power to determine their own membership requirements,[362] hence the Tribal Council determines absolutely its matters of membership. It appears that the main criteria a person needs to qualify for membership, as a Mashantucket Pequot, is blood quantum descent - they must have one-sixteenth Pequot blood.[363] But 'original' descent may not be enough to qualify for tribal membership given that the Tribal Council later restricted membership to a 1900 and 1910 Mashantucket Pequot census list.[364] Johnson cynically noted however that because of the high mortality rate of Pequot males during the wars of the 17th century and high urbanisation:

> The first great familial fact of Pequot life is that nearly every tribe member is descended from a single group of five sisters whose grandchildren and great grandchildren are now in adulthood.[365]

Inevitably, the Mashantucket Pequots are not exempt from internal and external critics. Jeff Benedict, for example, published research entitled *Without Reservation*[366] criticising the Pequots as not being 'real' Pequots. Benedict spent two years pouring over court records and census tracts on the Pequot claim concluding that the present day Mashantucket Pequots were not the same Pequots that inhabited Connecticut centuries ago. He added that the Pequots could not trace their bloodlines back to the original tribe as

[361] Foxwoods Resort Casino, Public Relations Department cited in Rueters Business Briefing, *United States PR Newswire,* (13 November 1996). Not surprisingly, other Indigenous Peoples have aspired to similar wealth and prosperity through casino and other gambling developments. In Canada, some First Nations have unsuccessfully claimed the right to operate casinos and regular high stake gambling on reserve in *R v Pamajewon* [1996] 2 S.C.R 821. A number of Mäori tribes have also attempted to establish casinos on tribal lands, such as Te Arawa in Rotorua (unsuccessfully) and Waikato (successfully) with their shares in the Novotel Casino in downtown Hamilton. Indigenous casino developments are not without controversy however both from the indigenous constituency as well as from non-indigenous peoples. The challenge for the author is that gambling has disastrous effects on indigenous (and non-indigenous) individuals and families who are often already plagued with addictions. Furthermore, aspiring to develop casinos similar to the Pequots will not occur due to contextual differences – a US reservation is under Federal law and has been cleared for gambling exclusively in states such as Connecticut where casinos are illegal. Consequently, First Nations have a monopoly as well as a high density and wealthy population demography (a market), which are crucial differences to many First Nations in remote parts of Canada and Mäori groups in New Zealand.

[362] *Santa Clara Pueblo v Martinez* 436 US 49, 72 n 32 (1978). This case held that the legitimacy of tribal membership requirements 'depend on questions of tribal tradition and custom which tribal fora may be in a better position to evaluate than Federal courts.'

[363] Neath, M 'American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity and a Perilous Future' in *University of Chicago Law School Roundtable* (Vol. 3, 199) at 689.

[364] Libby, S' Who is an Indian and Who Decides' in *The New York Times* (14 January 1996) at 6.

[365] Johnson, K 'Tribe's Promised Land is Rich but Uneasy' in *The New York Times* (20 February 1995) at 1.

[366] Benedict, J *Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods the World's Largest Casino* (Harper Collins, USA 2002).

Congress required and they had not functioned as a 'tribe' for decades until Hayward moved his friends and family to the reservation in the early 1970s.[367] Hence the construction of indigenous 'tribes' in the United States as well as New Zealand (and to a lesser extent in Canada) has been problematic to assess in a legal-political context. What has also been as challenging in New Zealand has been the government's unilateral policy of entering into direct negotiations with groups and at levels convenient to the Crown and not Mäori.

11.14 GOVERNMENT POLICY CONTROLS REPRESENTATION LEVELS FOR EXPEDIENCY PURPOSES

11.14.1 'LARGE NATURAL GROUPINGS' - GOVERNMENT PROPENSITY TO CODIFY MĀORI FORMS OF SOCIAL AND POLITICAL ORGANISATION

The Crown in New Zealand prefers, when resolving Treaty grievances, to settle with 'large natural groups,'[368] which may comprise a combination of claimants. For example, in the now defunct Central North Island umbrella claim to settle central North Island forest assets as a single settlement, there were five tribal groupings representing around a third of all Māori - Ngāti Tūwharetoa, Te Arawa, Ngāti Manawa, Ngāti Whare and Tuhoe.[369] While this approach has advantages for the Crown,[370] the likelihood of disputes is greater when different kin groups are involved in the same settlement.

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[367] 'Are Pequots Really Pequots?' in CBS News Story located on the internet at the following website: www.cbsnews.com/now/story/0,1597-412,00.shtml (Accessed 27 October 2001). Moreover, in 2002 leaders from three eastern Connecticut town representatives asked for Federal help to resolve a mystery over a missing map purporting to outline the boundaries of the traditional Mashantucket Pequot reservation which was part of the Mashantucket Pequot Settlement in 1983. The importance of the boundary map was that it appeared to highlight a discrepancy between the language of the Settlement Act and the tribe's current reservation which would call into question whether the Foxwoods casino is lawfully located on Indian land as required by the *Indian Gaming Regulatory Act 1988*. See 'Original Mashantucket reservation map missing' in Native News Online, Associated Press, 7 February 2002. www.nativenewsonline.org/natnews.htm (Accessed 8 February 2002).

[368] A Mandate Checklist is noted in Office of Treaty Settlements, *Treaty of Waitangi Claims – Direct Negotiations Process – An Introduction* (Office of Treaty Settlements, Wellington, 1999) at 52; 2000/01 *Financial Review of the Ministry of Justice*, Report of the Justice & Electoral Committee, 11; and Office of Treaty Settlements, *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown: Summary Edition* (Office of Treaty Settlements, Wellington, 2004) at 32.

[369] 'The key Māori claims' in *New Zealand Herald* (19 July 2003).

[370] For example, it is cost efficient from the point of view of both the Crown and claimant groups who can achieve economies of scale. This policy also makes the process easier to manage and work through; improves efficiency due to fewer sets of negotiations; reduces cross-claims by dealing with overlapping interests, provides the opportunity for the settlement package to cover a wider range of redress, and ensures finality. See Law Commission, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (Wellington, 2002) at 3. See also Birdling, M 'Healing the Past or Harming the Future? 'Large Natural Groupings' and the Treaty Settlement Process' (LLM Research Paper, Victoria University of Wellington, 2003). This article was

Through this policy of dealing with 'large natural groupings,' the Crown has unilaterally defined the Māori Treaty partner for the purposes of historical settlements. This kind of decision has considerable influence on the settlement process and subsequent Treaty settlement self-governance. Identifying the Māori Treaty partner, and particularly the appropriate level of representation within Māori society to pursue Treaty negotiations, is undoubtedly a vexed issue. As alluded to earlier, while contemporary Māori society is diverse, fluid, situational and organised in many ways, the 'traditional' iwi, hapū and whānau taxonomy is popular.

From the policy's inception in 1993, it was suggested that dealing with 'large natural groupings' could be problematic when defining Māori representation. A 1993 Cabinet paper noted that 'with every claim there is an inherent risk for the Crown that it may not be dealing with the appropriate representatives of the claimants.'[371] While this relates more directly to the issue of mandating rather than to the issue of appropriate levels, the footnoted text of the Cabinet paper reveals that the problem can arise in three ways. One of those ways is when 'the wider group (e.g., iwi) does not represent the interests of a sub-group (e.g., hapū) within the claimant group with respect to some particular land.'[372] The paper further noted:

> One approach could be for the Crown to state its position that it will only settle claims with iwi, rather than hapu or individual Maori. This would not remove the problem of overlapping claims, but would reduce it. To be effective this position may need to be incorporated in legislation. This issue is likely to be particularly controversial for Maori and would require discussion and consultation. The Treaty in its Maori version protects both iwi and hapu.[373]

The following year in 1994, the issue was mentioned again in a Cabinet Report,[374] which highlighted the importance of correctly addressing representation issues given that 'excluding the right people or including the wrong people can both result in new grievances.'[375]

When considering which group to deal with and at what level, the report noted that:

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subsequently published as Birdling, M, 'Healing the Past or Harming the Future? Large Natural Groupings and the Treaty Settlement Process' in *New Zealand Journal of Public International Law* (Vol. 2, 2004) at 259. The author has drawn heavily from Birdling's research paper in this section, whose work and competence is acknowledged.

[371] Officials Strategy Committee 'Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori' (28 June 1993) CSC (93) at 90, para 64.

[372] Ibid, at 17, footnote 1.

[373] Ibid, at 90, para 67.

[374] Ad Hoc Officials Committee 'Treaty of Waitangi Settlement Policies: Outstanding Matters. (CSC (94), 10 October 1994) at 140.

[375] Ibid, at 140-2.

> ... aggregating grievances into a wider group, e.g. hapu grievances being subsumed at the iwi level emphasises the overall nature of grievance felt by Maori but could lead to settlements that are not seen to extinguish highly specific grievances.[376]

Moreover, Cabinet noted this issue at the October 1994 meeting that considered the above report.[377]

The Crown did not firmly identify its preference and the question of what level of Māori society to deal with in Treaty settlement negotiations appeared to be left open.[378] There were, however, various suggestions made to Te Puni Kōkiri (TPK) regarding the appropriate level for contemporary Māori representation.[379] Although the Crown's report of submissions noted that whānau or hapū often 'conflicted with each other,' it was clearly stated in the submissions that the Crown would need to consider the possibility of dealing with these smaller groups.[380] In 1996, an inter-departmental working group examined proposals for negotiation processes and recommended that 'the Government explicitly place a priority on negotiating and settling claims brought by iwi or confederations of iwi.'[381] This was subsequently approved by the Cabinet Strategy Committee,[382] and reflected in the Crown's settlement guide.[383]

Interestingly, the preference for dealing even solely with 'iwi' was subsequently changed to a preference for dealing with 'large natural groupings.' The change occurred in recognition of 'the diversity of Maori political organisation.'[384] Consequently, smaller groups are unable to negotiate directly with the Crown over *Treaty of Waitangi* grievances because they do not fit the criteria for what constitutes a 'large natural grouping,'[385]

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[376] Ibid, at 140-3.
[377] Cabinet Minute 'Treaty of Waitangi Settlement Policies: Outstanding Matters' (CAB (94) M 39/11, (b)(iii), 17 October 1994).
[378] See Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims (Detailed Proposals)* (Wellington, 1995) at 42-43.
[379] Te Puni Kōkiri *Report of Submissions: Crown Proposals for Treaty of Waitangi Claims* (Wellington, 1995), 92-93. These submissions variously suggesting that whānau, hapu or iwi were the desirable vehicle for negotiations.
[380] Ibid, at 93. Submissions asserted that 'whānau should sometimes be considered appropriate mandating groups;' 'Hapū are the mandated negotiating body for iwi;' 'the Treaty of Waitangi guaranteed hapū ownership so one person should not negotiate on behalf of iwi.' There were other submissions that suggested that iwi should generally be the negotiating body, with hapū negotiations occurring rarely.
[381] Ministry of Justice 'Treaty Settlement Policies: Reports from Working Groups' (CSC (96), 5 July 1996) at 127, paras 14, 45.
[382] Cabinet Strategy Committee 'Treaty Settlement Policies: Reports from Working Groups' (CSC (96) M22/810, July 1996).
[383] OTS *Ka Tika,* supra n 368 at 24.
[384] Birdling, supra n 370 at 11.
[385] These factors include relevant Waitangi Tribunal findings; whether the group has a distinctive area of interest; whakapapa, tūpuna, iwi, hapū, marae; and (crucially) the relative size of the group in terms of its population and rohe.

apparently 'to accommodate the reality that a settlement with each registered claimant is unsustainable.'[386]

11.14.2 POLITICAL CONVENIENCE AND EXPEDIENCY

Apparently, the rationale for this policy is to 'make the process of settlement easier to manage and work through, and [to help] deal with overlapping interests' in addition to reducing costs for both the Crown and claimants.[387] The Office of Treaty Settlements (OTS) explored these reasons in more detail in a report to the Maori Affairs Select Committee, which stated:[388]

> Settling all the claims of large natural groups (as opposed to the claims of small groups such as individual hapu) is the key to completing the settlement process expeditiously. Paradoxically, the settlement process will be prolonged if the Government attempts to increase the pace of settlement by negotiating with small groups.

The Hon. Margaret Wilson, former Minister in Charge of Treaty of Waitangi Negotiations, also endorsed this view.[389] Clearly, the rationale for the policy is political expedience for making full and final settlements easier to achieve for the Crown. Ironically, there is a risk that the Crown may not be negotiating with the 'right' people representing the 'right' Māori groups, therefore contemporary Treaty settlements could overlook legitimate grievances of some Māori groups and subsequently create new grievances.

The need to correctly identify legitimate Māori representative groups at appropriate levels is imperative if Treaty settlements are expected to be sustainable and durable. In order for the process to be successful, it must promote support and ownership from a wide spectrum of Māori and also non-Māori. However, as Baird and Gover point out, the contemporary Treaty relationship has been 'conceptualized in government rhetoric and popular discourse as a binary, quasi-diplomatic partnership between two centralized and homogenous polities.'[390] Neither polity is homogenous. The Crown defines Māori identity and representivity and therefore controls the Treaty partner as the group that best suit *their* desire for speedy and cost-effective settlements. Gover and Baird rightly note that the

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[386] Idem.
[387] OTS *Ka Tika,* supra n 368 at 44.
[388] Office of Treaty Settlements 'Paper to Maori Affairs Committee Re: Speeding up of Historical Treaty Settlements' (8 October 2002); and Office of Treaty Settlements *Briefing to the Incoming Minister in Charge of Treaty of Waitangi Negotiations* (Wellington, 2002).
[389] See Written Question from Rt. Hon. Winston Peters to Hon. Margaret Wilson (24 October 2002) 54 NZPD Q Supp 2655, question No 11982, where Ms Wilson stated 'negotiations with smaller groups, or negotiations covering only some of the claims of the group (non-comprehensive settlements) will mean more negotiations are required than otherwise, and this will tend to delay completion of the settlement process.'
[390] Gover, K and Baird, N 'Identifying the Maori Treaty Partner' in *Univ of Toronto Law Journal* (Vol. 32, 2002) at 39-40.

effect of defining Māori representivity in this manner fails to recognise contemporary Māori socio-political and socio-economic realities and diversity by excluding 'non-traditional Maori collectives.'[391]

Furthermore, not only are non-traditional collectives excluded from the process, the policy makes it virtually impossible for any groups other than iwi, large hapū, or sizable confederations of hapū to satisfy the 'large natural grouping' criteria.[392] According to OTS and TPK, the reason why 'large hapu or confederations of hapu' may qualify is because they function 'in similar ways to iwi.'[393] As noted earlier, traditional Māori socio-political organisation was, in the author's view, constructed according to function, not form. Form followed function, thus 'large hapū or confederations of hapū' that 'functioned like iwi' took on the form of 'iwi' and subsequently the status. Large hapū (and some small hapū) actually function like, and resemble iwi, particularly given that both hapū and iwi share the same form:

- shared descent from tūpuna (ancestors);
- sub-tribes;
- marae (meeting houses);
- takiwā (territory), and
- an existence traditionally acknowledged by other tribes.

Thus, the difference between the two institutions is that of function. Large contemporary 'hapū' that function like 'iwi' such as Ngāti Mahuta in Waikato, Rongomaiwahine in Ngäti Kahungunu, Te Taou in Ngäti Whatua[394] and Ngāti Hine in Ngāpuhi are actually iwi according to tikanga and traditional socio-political group processes and should be acknowledged as such. The effect of the large natural groupings policy is that the Crown will seek to negotiate the direct settlement of historical grievances with iwi and certain large hapū that function like iwi. It is the author's view that these large hapū (and perhaps other tribes) should be acknowledged and recognised as contemporary iwi pursuant to the *Māori Fisheries Act 2004.*

Moreover, researchers and the Waitangi Tribunal have repeatedly acknowledged that hapū, not iwi, were (and arguably still are) the primary vehicles of Māori political

[391] Idem.
[392] Supra, n 373, Birdling, supra n 370 at 14.
[393] Idem.
[394] See the very passionate and comprehensive work of Lily George on Te Taou reclaiming their inherent right to self-determination as an 'iwi' and not the subjugated status of hapū under Ngäti Whatua. George, L, *Different Music, Same Dance: Te Taou and the Treaty Claims Process* (Social and Cultural Studies, Massey University, December 2004).

organisation.[395] As noted earlier, viewing iwi as *the* primary unit has emerged largely in response to the challenges posed by colonisation and to the desire by officials to find a 'comprehensive hierarchical body politic with which to negotiate land purchases.'[396] The primacy of iwi within the contemporary Māori socio-political order can thus be viewed as largely a Pākehā (non-Māori) construct, as well as a response to the effects of colonisation.[397] Interestingly, this phenomenon of deliberate manipulation forming the basis of 'traditional' identification and representation is not unique to New Zealand, and has similarly occurred in the colonial context in other countries.[398]

Also noted above was the inaccurate tidy taxonomy of whānau-hapū-iwi that assumed the paramountcy of iwi bodies commanding obedience from hapū, who in turn command obedience from whānau. As Ward asserted:

> The supposedly neat hierarchy of whānau, hapu, and iwi, with its rangatira and its ariki (a tidy pyramidal model which still gets trotted out in anthropology and sociology that feeds upon previous publication rather than undertaking original research or checking the most recent writings) was not actually like that.[399]

By choosing to negotiate almost solely with iwi, the Government is choosing a model inconsistent with *tikanga*, *ahuatanga* (traditions) and traditional socio-political organisation. Gover and Baird describe this process as the 'primary impulse of governments to engage in largely unilateral definitional exercises, effectively removing the

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[395] Ballara, A, *Iwi: The Dynamics of Māori Tribal Organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998); Bourossa, S and Strong, A.L, 'Restitution of Land to New Zealand Maori: The Role of Social Structure' in *Pacific Affairs* (Vol. 76, 2002) at 162; Webster, S 'Maori Retribalisation and Treaty Rights to New Zealand Fisheries' in *The Contemporary Pacific* (Vol. 14, 2002) at 341. See also Waitangi Tribunal *Ngati Awa Raupatu Report* (GP Publications, Wellington, 1999) at 132; Waitangi Tribunal *The Fisheries Settlement Report* (Brooker & Friend Ltd, Wellington, 1992) at 12; and Waitangi Tribunal *Ngati Awa Settlement Cross-Claims Report* (Legislation Direct, Wellington, 2002) at 72.

[396] Ibid, Ballara, at 59, 70, 81. See also Cox, L *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Auckland, 1993) at 141.

[397] See Rumbles, R 'Treaty of Waitangi Settlement Process: New Relationship or New Mask' (Paper Presented at Compr(om)ising Post Colonisation Conference, Woolongong, 10-13 February 1999) at 10. This paper was subsequently published in Ratcliffe, G (ed) *Compr(om)ising Postcolonialism(s): Challenging Narratives and Practices* (Dangaroo Press, Sydney, 2002).

[398] See the discussions above on Indian 'tribes' in the USA and Aboriginal bands and 'nations' in Canada, supra, sections 11.12 and 11.13. See also Ranger, T 'The Invention of Tradition in Colonial Africa,' in Hobsbawn, E and Ranger, T (eds) *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983) at 247-252 where it is noted that 'Modern Central Africa tribes are not so much survivals from a pre-colonial past but rather largely colonial creations by colonial officers and African intellectuals.' Similar challenges have emerged in Canada with Indian Bands and tribal councils usurping the roles and responsibilities of traditional units. See the tension between the traditionalised Kahnawake Mohawk Band Council and traditionalist groups in 'Native Political Elites' in Alfred, T, *Peace, Power and Righteousness: an Indigenous Manifesto* (Oxford University Press, New York, 1999) at 30; and 'The Dragon of Discord: Kahnawake in the Modern Era' in Alfred, G, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford University Press, New York, 1995) at 52.

[399] Ward, A 'Historical claims under the Treaty of Waitangi' in *Journal of Pacific History* (Vol. 28, 1993) at 181.

debate about Maori identity [and representivity] from Maoridom.'[400] Dr David Williams even called this approach to mandating issues the 'one major flaw' of the modern Treaty settlement process.[401]

11.14.3 COMPREHENSIVE SETTLEMENTS

The Office of Treaty Settlements (OTS) has stated that the Crown 'strongly prefers to negotiate settlements of all the historical claims of a claimant group at the same time.'[402] What this means is that once a mandate is accepted, the Crown will proceed to negotiate an umbrella settlement that covers all of the hapū and whānau present in the area, which requires an umbrella approach. Such settlements will include 'all claims of the group whether the claims have arisen or been considered, researched, registered, notified or made on or before the settlement is reached.'[403]

Larger Groups are able to obtain extensive research, and therefore gain detailed knowledge about their claims, giving them the power to negotiate and settle their claims with the Crown, whereas smaller groups are often unable to conduct sufficient research to even prove a grievance may possibly exist.[404] If the process is sped up in the way proposed, these smaller groups will be still further disadvantaged, excluding their grievances from the settlement process, and potentially resulting in more injustices.[405]

In the context of the large natural groupings policy, this means that the Crown will look for a 'large natural group with which it can conduct negotiations for the comprehensive settlement of *all* claims of *all* the groups it purports to represent.'[406] The prospect is that these larger groups may claim to represent smaller groups who do not accept the mandate of the larger group to do so.

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[400] Gover and Baird, supra n 390 at 40.
[401] Williams, D 'Honouring the Treaty of Waitangi – Are the Parties Measuring Up?' in *Murdoch University Electronic Journal of Law* (Vol. 9, 2002) at 3, para 2; see also generally the Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill [1990] AJHR I.10A.
[402] OTS, *Ka Tika,* supra n 368 at 44.
[403] Letter from Tony Sole, Manager, Claims Development, Office of Treaty Settlements to Rawinia Konui (18 August 2003), which describes the policy in relation to the Ngāti Tūwharetoa negotiation process.
[404] Wayne Rumbles noted that 'the New Zealand state is able to construct the past and therefore is able to control the present is evident in the case of Treaty settlements; by having the power to accept the existence and the extent of Treaty breaches, the Crown can determine to large degree the outcome of the settlements,' in Rumbles, supra n 397.
[405] Note the conclusions of the Waitangi Tribunal in the *Pakakohi and Tangahoe Settlement Claims Report* (Legislation Direct, Wellington, 2000) at 66. Here it is noted that there was a need for any deed of settlement in the Ngāti Ruanui claim to reflect the traditions and identity of the smaller grouping lest they be 'written out of Taranaki history.'
[406] Birdling supra n 370 at 19.

11.14.4 EXTINGUISHMENT AND 'FINALITY'

The desire to achieve comprehensive settlements is augmented by the main aim of the Treaty settlement process to obtain full and final settlements (or the extinguishment) of historical Treaty grievances. To this end, the redress provided by the Crown in settlements is offered to finally settle and extinguish all historic grievances at all levels of an indigenous group. Such a policy is consistent with the Crown's intention to put the issues of past grievances behind them.[407] Finality is ensured by the inclusion of a provision in the settlement legislation that the settlement is final, backed up by provisions stopping any possibility of the settlement being re-opened by either the courts or the Waitangi Tribunal.[408] Obviously, such provisions provide 'powerful structural barriers to prevent Maori from pursuing their Treaty claims in the future.'[409] These barriers can be seen in the wording of such provisions in settlement legislation passed to date.[410] The combination of the comprehensive settlement and finality and extinguishment policies is that once a claimant group has negotiated a settlement, the enacting legislation will remove any possibility for smaller groups not involved in the settlement process to pursue their claims.

The Canadian Government has a similar policy to New Zealand of extinguishing aboriginal rights through contemporary Treaties. Both the *Royal Proclamation of 1763* and *St. Catherine's Milling and Lumber Company v The Queen*[411] substantiated the uninhibited and exclusive right of the sovereign to extinguish aboriginal title.[412] Nevertheless, while the sovereign undoubtedly assumed the authority to extinguish Indian title, the law and consistent political history in this area shows that the courts should proceed with extreme caution before assuming that extinguishment has occurred.[413]

'Extinguishment' of aboriginal title to land and resources was and continues to be the goal and policy affirmed over the years for Aboriginal Treaty claims in Canada. The Canadian Government has formerly extinguished, and continues to extinguish the aboriginal rights of native peoples. The land cession Treaties in which First Nations ceded

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[407] Hon. Douglas Graham *Insight '94*, National Radio, 25 July 1994. Note, however, that the Waitangi Tribunal opined that the concept of finality was 'clearly inconsistent with the Treaty' in Waitangi Tribunal *The Fisheries Settlement Report*, (Wellington, 1992) at 10, and that if tribal leaders were to sign such final settlements it would serve 'only to destabilise their authority.' Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (Wellington, 1996) at 314.

[408] OTS, *Ka Tika,* supra n 370 at 77.

[409] Mikaere, A, 'Settlement of Treaty Claims: Full and Final, or Fatally Flawed?' in NZULR (Vol. 17, 1997) at 425, 454.

[410] See, for example, the *Ngai Tahu Claims Settlement Act 1998*, s. 461(3).

[411] *St. Catherine's Milling and Lumber Company v The Queen* (1889), 14 App. Cas. 46, 55 (P.C) [herein after *St. Catherine's Milling*].

[412] In *St.Catherine's Milling*, Lord Watson commented that Indian title subsisted until 'that title was surrendered or otherwise extinguished.' (1889), 14 App. Cas. 46 at 55 (P.C.).

[413] Cumming, P & Mickenberg, N *Native Rights in Canada* (The Indian-Eskimo Association of Canada, Toronto, 1970) at 43.

vast tracts of aboriginal lands in return for a reserve and other benefits exemplify this policy. These Treaties also offer evidence that historic Government policy was to at least obtain consent from Indigenous People before intruding upon their ancient rights.[414]

Up until 1973, however, there was no Federal policy that officially recognised the existence of aboriginal rights. Furthermore, no Canadian case had attempted to explain how an extinguishment of aboriginal rights could be executed until this time. The landmark Nisga'a case *Calder v Attorney General of British Columbia*[415] affirmed the existence of aboriginal rights as Judson, J stated:

> ... the fact that when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal and usufructuary right.' What they are asserting in this action is that they had a right to live in their lands as their forefathers had lived and this right has never been lawfully extinguished.[416]

Hall, J added:

> In enumerating the indicia of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nisga'a are the owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent.[417]

The result of the Nisga'a litigation was a shift in Federal Government policy for the negotiation of land claims, which established both comprehensive and specific claims.[418] Hamilton commented on the new comprehensive and specific claims policies:

> The policy's aim was not the recognition of Aboriginal rights and title to land and resources. ...The policy was merely an extension of the process of the past – 'extinguishment' of Aboriginal rights and title in return for compensation or other benefits.[419]

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[414] Ibid., 42: Richardson also asserts that the simple extinguishment clause in the JBNQA is reminiscent of early treaties in Canada. Richardson, B *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada* (Douglas & McIntyre, Toronto, 1993) at 20-21. Mathew Coon-Come of the James Bay Cree and former President of the Assembly of First Nations noted:

> When the Cree people on the prairies signed ... the numbered treaties, they did so with the knowledge of their traditions and with the understanding that they would be able to continue their ways of life. The extinguishment of native title contained in those documents was a foreign concept. This policy of extinguishment of native title unleashed radical changes in land use and land resources use and made the exercise of the right to continue the indigenous way of life illusory. From the indigenous point of view ... these treaties were a tragic deception on the part of the Federal government.

Coon-Come, M 'Implementation: How Will First Nations Government Happen?' in Cassidy, F *Aboriginal Self-Determination* (Oolichan Books, B.C, 1991) at 114

[415] [1973] SCR 313, 328.

[416] Idem.

[417] Ibid., at 375.

[418] The Hon. A.C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership*, (Report of the Hon. A.G Hamilton, Fact Finder for the Minister of Public Works and Government Services, Ottawa, 1995) at 15.

[419] Ibid.,16.

The *James Bay and Northern Quebec Agreement 1975* (JBNQA) sought to achieve certainty of title to lands and resources through the use of clauses that provided for the surrender and extinguishment of all Aboriginal rights and title.[420] The main surrender clauses state that the Aboriginal parties:

> ... cede, release, surrender and convey all their native claims, rights, titles and interests, whatever they may be, in and to land in the Territory[421] and in Quebec.[422]

In addition, the JBNQA stated that the legislation to approve the agreement was to specifically 'extinguish all native claims, rights, title and interests ... in and to the Territory ... whatever they may be.'[423] Hence the *James Bay and Northern Quebec Native Claims Settlement Act SC 1976-77* which states:

> s3(1) The Agreement is hereby approved, given effect and declared valid.
>
> s3(2) Upon the extinguishment of the native claims, rights, titles and interests referred to in subsection (3), the beneficiaries under the Agreement shall have the rights, privileges and benefits set out in the Agreement.
>
> s3(3) All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and Inuits, wherever they may be, are hereby *extinguished*, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as to those resulting from the Indian Act, where applicable, and from other legislation applicable to them from time to time.[424] [Emphasis added]

The approach of combining an unlimited surrender in a treaty with legislated extinguishment has been referred to as 'blanket extinguishment.'[425] Grand Chief Billy Diamond commented on the blanket extinguishment of the Cree rights under the Agreement as follows:

> In so far as aboriginal rights were concerned, we agreed that we would surrender all our general claims, rights, titles, and interests, and land in Quebec in return for specific and defined rights, privileges, and benefits which would be confirmed by Federal and provincial legislation.[426]

Interestingly, Diamond also defended the decision to extinguish Cree rights:

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[420] Idem.
[421] *James Bay and Northern Quebec Agreement 1975*, ss. 2.1, 2.3.
[422] *Northeastern Quebec Agreement 1978,* s 2.1.
[423] *James Bay and Northern Quebec Agreement, 1975*, s. 2.6.
[424] *James Bay and Northern Quebec Native Claims Settlement Act SC 1976-77* c.32, ss. 3(1), 3(2) and 3(3).
[425] Royal Commission on Aboriginal Peoples *Treaty Making in the Spirit of Co-existence* (Canada Communication Group, Ottawa, 1995) at 5 - 7.
[426] Diamond, B 'Aboriginal Rights: The James Bay Experience' in Boldt, M & Long, J *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) at 281.

> The James Bay and Northern Quebec Agreement does not represent an abandonment of aboriginal rights. To the contrary, the agreement recognises specific and precise claims regarding the land which could have no source other than aboriginal rights.[427]

Diamond continued but rather cautiously:

> What exactly was surrendered, and what exactly was the nature of the native claim to the land, however, is a matter of future controversy. [No Agreement] might have called forth Federal legislation extinguishing such [aboriginal] rights in exchange for compensation, and compensation under such legislation might have been less generous than that achieved by the Crees through the James Bay and Northern Quebec Agreement.[428]

Therefore, although the Supreme Court of Canada acknowledged the existence of Aboriginal rights and title in the *Calder* decision, but the Federal government's policy is the status quo - extinguish rather than allow recognition to stand.[429] This policy was further emphasised in 1981 with the Federal policy specifying 'certainty' and 'finality' as Federal objectives.[430]

> ... the government requires that the negotiation process and settlement formula be thorough so that the claim cannot arise again in the future. ... any land claim will be final ... this policy is to exchange undefined aboriginal land rights for concrete rights and benefits.[431]

According to Hamilton,[432] the policy statement did not specifically explain how it planned to obtain certainty and finality. Nevertheless in 1982, the *Inuvialuit Final Agreement* contained a surrender clause[433] similar to the Quebec agreements, perhaps highlighting the Federal Government's subtle disguise at maintaining this extinguishment policy. This policy seems to be persisting in Canada, although to differing degrees but the wording has been modified somewhat.

11.14.5 NISGA'A

The Indian and Northern Affairs Department (INAC) appeared to rearticulate this 'full and final' policy extinguishing aboriginal rights although using different language in 2003:

> In recent years, new approaches to achieving certainty have been developed as a result of comprehensive land claims negotiations. These include the 'modified rights model' pioneered by the Nisga'a negotiations, and the 'non-assertion model.' Under the modified

[427] Idem.
[428] Idem.
[429] Hamilton, supra n 418 at 18.
[430] Canada, *Outstanding Business: A Native Claims Policy* (DIAND, Ottawa, 82) at 7, 19.
[431] Ibid 3-7.
[432] Idem, and Hamilton supra n 418 at 19.
[433] Canada, *The Western Artic: The Inuvialuit Final Agreement* (DIAND, Ottawa, 1984), s. 3 (6).

> rights model, aboriginal rights are not extinguished but are modified into the rights articulated and defined in the treaty. Under the non-assertion model, Aboriginal rights are not extinguished, and the Aboriginal group agrees to exercise only those rights articulated and defined in the treaty and to reassert no other Aboriginal rights.[434]

The highly problematic 'extinguishment' language of cession and surrender used in previous land claim agreements was not specifically reiterated in the *Nisga'a Final Agreement* (NFA). A careful analysis of the NFA however, highlights the persistence of this policy although to a lesser extent than the JBNQA.[435] The NFA refers to the 'full and final settlement' of Nisga'a claims in Chapter 2, s.22, which states:

> This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga'a Nation.

Moreover, sections 26 and 27 of the NFA also state:

Section 26:

> If, despite this Agreement and the settlement legislation, the Nisga'a Nation has an aboriginal right, including title, in Canada, that is other than, or different in attributes or geographical extent from the Nisga'a section 35 rights as set out in this Agreement, the Nisga'a Nation releases that Aboriginal right to Canada to the extent that the aboriginal right is other than, or different in attributes or geographical extent from, the Nisga'a section 35 rights as set out in this Agreement.

Section. 27:

> The Nisga'a Nation releases Canada, British Columbia and all other persons from all claims, demands, actions, or proceedings, of whatever kind, and whether known or unknown, that the Nisga'a Nation ever had or may have in the future, relating to or arising from any act, or omission, before the effective date that may have affected or infringed any aboriginal right, including aboriginal title, in Canada of the Nisga'a Nation.

According to some, essentially the same result flows from the 'modified rights' approach in Chapter 2 general provisions referred to above dealing with the exhaustive definition of section 35 rights and 'release.' Like the JBNQA, the Nisga'a have settled all of their aboriginal rights claims including aboriginal title, and they have released all of their past, present and future aboriginal rights claims to the government and others. Hence the unlimited surrender of their aboriginal rights is comprehensive and appears to be similar in effect to a blanket extinguishment but with different wording.

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[434] Indian and Northern Affairs, Canada, *Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences* (INAC, Ottawa, 2003) at 24.

[435] The Nisga'a Agreement-in-Principle 1996 General Provisions stated: 'The Final Agreement will constitute the full and final settlement of the Nisga'a Nation including all the jurisdictions, powers, rights and obligations of the Nisga'a Government.' Government of Canada, Province of British Columbia and the Nisga'a Tribal Council, *Nisga'a Treaty Negotiations: Agreement-in-Principle 1996* (15 February 1996), General Provisions, cl. 25.

This modified rights model with the articulation and definition of Nisga'a rights in the Treaty seems to be very limiting in terms of what the Nisga'a ceded and released. This issue remains a pressing one for First Nations for which extinguishment, or its equivalent, ought not to be a pre-condition for Treaty conclusion. The opposing view holds that the language is necessary because Treaties must produce certainty and ensure finality.

In this respect, it should be noted that reports to the Federal Government have addressed the extinguishment issue. In 1995, both the Federal fact finder mandated to explore alternative Treaty models[436] and the Royal Commission on Aboriginal Peoples suggested that certainty might be achieved without extinguishment, with the latter recommending that the policy be abandoned in favour of one viewing modern Treaties as instruments of co-existence.[437] The then Minister of Indian Affairs said that he would use these reports and other proposals in giving further consideration to the extinguishment issue. Interestingly, in April 1999, the United Nations Human Rights Committee recommended to the Federal Government 'that the practice of extinguishing inherent aboriginal rights be abandoned because the policy was incompatible with Article 1 of the *International Covenant on Civil and Political Rights.*[438] To date, no comprehensive new policy has been released, leaving a contentious issue for Aboriginal groups unresolved.

11.14.6 MÄORI FISHERIES, WAIKATO-TAINUI AND NGĀI TAHU

The way the National Government in New Zealand conducted the extinguishment of the Treaty rights of the Mäori Fisheries settlement, Waikato-Tainui, Ngai Tahu and others is strikingly similar with the fair, full and final settlement of First Nations' claims in Canada.

11.14.7 COMPREHENSIVE SETTLEMENTS

11.14.7.1 MÄORI FISHERIES SETTLEMENT

[436] Hamilton, supra n 418. Hamilton advised that certainty could be secured by incorporating six essential elements in treaties, including: provisions detailing the land and resource rights of all Parties as well as the rights of others affected by the treaty; mutual assurance clauses in which the Parties agree to abide by the treaty; mutual statements that the treaty satisfies the claims of all Parties to the land covered by the treaty and that no future claims will be made except as they arise under the treaty; a dispute resolution process, and so forth.

[437] Royal Commission on Aboriginal Peoples, *Treaty Making,* supra n 425.

[438] *Concluding Observations of the Human Rights Committee: Canada,* (CCPR/C/79/Add.105, 7 April 1999) par. 8. See also *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada,* (E/C.12/1/Add.31, 10 December 1998). The documents may be accessed on the website of the United Nations High Commissioner for Human Rights at http://www.unhchr.ch/. (Accessed May 2002)

The Office of Treaty Settlements (OTS) stated that the Crown 'strongly prefers to negotiate settlements of all the historical claim of a claimant group at the same time.'[439] Once a Mäori claimant group's mandate is accepted, the Crown will negotiate a settlement that covers all of the iwi, hapu and whānau in the area. Such settlements will include 'all claims of the group whether the claims have arisen or been considered, researched, registered, notified or made on or before the settlement is reached.'[440] Hence the Crown will look for a Mäori settlement community with a legal representative entity that it can conduct negotiations with for the comprehensive settlement of all claims of the groups it purports to represent. The challenge is the fact that larger groups purport to represent smaller groups who do not accept the mandate of the larger group to so act on their behalf. The policy of seeking comprehensive settlements may mean that smaller groups find their claims subsumed by larger groups, without consent. A specific example is s. 9 of the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* which states:

> 'It is hereby declared that –
> All claims (current and future) by Mäori in respect to commercial fishing –
> Whether such claims are founded on rights arising by or in common law (indicating customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and
> Whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and
> Whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal, -
>
> having been acknowledged and having been satisfied by the benefits provided to Mäori by the Crown under the *Mäori Fisheries Act 1989*, this Act and the Deed of Settlement referred to in the Preamble to this Act, are hereby finally settled, and accordingly:
>
> The obligations of the Crown to Mäori in respect of commercial fishing are hereby fulfilled, satisfied and discharged, and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Mäori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Mäori referred to in paragraph (a) of this section; and
> All claims (current and future) in respect of, or directly based on, rights and interest of Mäori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.

Hence all Mäori claims to commercial fisheries are extinguished by both the interim and final settlements in exchange for certain fishing assets (including shares, quota and

[439] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua : Healing the Past, Building a Future* (Wellington: OTS, 2002) at 44.
[440] Letter from Tony Sole, Manager, Claims Development, Office of Treaty Settlements to Rawinia Konui (18 August 2003), which describes the policy in relation to the Ngati Tuwharetoa negotiations process.

cash) to be vested in TOKM. Almost immediately a Waitangi Tribunal claim and High Court litigation commenced.[441]

11.14.7.2 WAIKATO-TAINUI SETTLEMENT

Similarly, the manner in which the National Government settled Waikato-Tainui's raupatu Treaty rights was through this same policy, which in effect extinguished Waikato's claims to the raupatu (land confiscations) grievance. Prior to settlement, the Tainui Mäori Trust Board distributed a Postal Referendum Information Package that outlined the Crown's intentions.

> The Crown added the word 'fair' in this offer to the words 'full and final' which were expressed to describe the settlement in *Waikato-Maniapoto Claims Settlement Act 1946*. The legislation in the 1995 settlement will provide that the settlement is 'fair, full and final' and any other provision ... to achieve certainty, finality and durability.[442]

The words 'full and final' have been interpreted to mean that by providing land and compensation for the grievance, Treaty claims cannot be revisited. The *Waikato Raupatu Claims Settlement Act 1995* (WRCSA) settled the raupatu grievance fully and finally so that the people of Waikato cannot seek any more redress in the form of land or compensation to satisfy the land claim, although Waikato have reserved their customary, Treaty or other legal rights or interests.[443] Waikato acknowledged that the Crown acted honourably and reasonably and that the settlement discharged the Crown from its obligations for the raupatu lands and that the settlement is fair, final and durable. This acknowledgment was expressed in the Deed, the legislation, and any record of settlement.[444] The Waikato Deed of Settlement states that Waikato agree:

> ... to support...this Deed and to achieve certainty, finality and durability of the obligations undertaken by each party in order to achieve the Settlement[445] ...acknowledgments by Waikato-Tainui that the Settlement is fair, final and durable.[446]

Section 9 (1) of the *Waikato Raupatu Claims Settlement Act 1995* states:

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[441] Waitangi Tribunal, *Fisheries Allocation Claim: Determination of Preliminary Issue* (GP Publications, Wellington, 1995) and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR (C.A).

[442] Tainui Mäori Trust Board (TMTB), *Postal Referendum Information Package* (Tainui Mäori Trust Board, Ngaruawahia, 1995) at 22.

[443] Idem. The WRCSA did not extinguish <u>all</u> Waikato Treaty and aboriginal rights. Section 8(2) of the WRCSA actually excluded specific claims to the Waikato River, West Coast harbours, some forests and claims to the Wairoa and Waiuku blocks within the settlement. This provision allowed for Waikato to pursue later claims to these resources. Waikato is currently negotiating for some form of ownership of the Waikato River.

[444] Idem.

[445] New Zealand Government, *Waikato-Tainui Deed of Settlement* (New Zealand Government, Wellington, 1995) 'Waikato Tainui Obligations,' cl 14.2.

[446] Ibid, 'Acknowledgments by Waikato-Tainui,' cl 15.2.

> No further inquiries into Raupatu claims - Without limiting the acknowledgments expressed in, or any provision of, the deed of settlement, it is hereby declared that the settlement of the Raupatu claims to be effected pursuant to that deed is final [447]

Consequently, the undertakings obtained in respect to coal mining licences and surplus 'Coalcorp' lands and subsequent injunctions and the declaration granted in the Court of Appeal in *Tainui Mäori Trust Board v Attorney-General*[448] were discharged.[449] All other proceedings in the courts or before the Waitangi Tribunal in relation to the raupatu land claim of Waikato were discontinued,[450] as s. 9 continues:

> Notwithstanding any other Act or rule of law, no court or tribunal shall have jurisdiction to inquire into those claims...[451]

Shane Solomon, legal advisor at the time, commented that the claim is full and final and there would be no further inquiry into a raupatu claim.[452] The late Sir Robert Mahuta however qualified this position when he stated 'It is full and final in terms of what we have signed.'[453]

11.14.7.3 NGĀI TAHU SETTLEMENT

The *Ngai Tahu Claims Settlement Act 1998* (NTCSA) includes a similar extinguishment section with what appears to have a similar effect to the Mäori Commercial Fisheries and Waikato settlement rights and claims. Section 461(3) of the NTCSA states:

> Despite any other enactment or rule of law, no court or tribunal has jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of,---
> (a) Any or all of the Ngai Tahu claims; or
> (b) The validity of the deed of settlement; or
> (c) The adequacy of the benefits provided to Te Runanga o Ngai Tahu and others under this Act or the deed of settlement; or
> (d) This Act.

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[447] *Waikato Raupatu Claims Settlement Act 1995*, s 9.
[448] [1989] 2 NZLR 513.
[449] Tainui Maori Trust Board, supra n 445 at 23. This case was successfully litigated in the Court of Appeal by Waikato-Tainui. The Court recognised that Waikato had an interest in the Coal Corp lands around Huntly (part of the raupatu lands) that the Government wanted to sell off. Cooke P directed the Government to negotiate directly with Waikato to settle the issue which provided more impetus for the WRCSA negotiations.
[450] Idem, see also New Zealand Government, *Waikato-Tainu Deed of Settlement*, cls 14.2, 14.3, 14.4, 14.5,14.6,15.2, 15.4, 19.11.
[451] *Waikato Raupatu Claims Settlement Act 1995*, s 9(2).
[452] Solomon, S, *The Waikato Raupatu Claims Settlement Act: A Draft Users Guide To The Act As At 28 October 1995*, (Tainui Mäori Trust Board, Ngaruawahia, 1995) at 22.
[453] Melbourne, H, *Mäori Sovereignty: The Mäori Perspective.* (Hodder & Beckett, Auckland, 1995) at 146.

The current Crown policy has slightly different wording – Deeds of Settlement generally do not use the term 'full' as many agree that the Crown cannot provide full compensation for the losses suffered by Mäori. Instead the Crown refers to a 'comprehensive and final' settlement but the effect appears to be the same. The guidelines for resolving historical claims include the requirement that settlements are to be durable, fair, achievable and they must 'remove the sense of grievance'[454] which removes the risk of the Government being sued again and again. Moreover, the Crown has a direct interest in progressing the settlement process because of the political advantage it gains in being able to claim a 'final' Treaty settlement. By insisting on full and final or comprehensive and final settlements, the respective Crown reconstructs the counter-hegemonic claims of Mäori and First Nations claimant groups and reinforces its position of dominance.

Still, given that the *Treaty of Waitangi* and historical First Nations Treaties are living documents, Mäori and First Nations will always have the ability to make claims for contemporary grievances, notwithstanding any historical or contemporary Treaty settlements they may have signed.

11.14.8 CROWN'S RESPONSE - UNCLEAR ROLE AND ENTITLEMENTS

There are the enduring issues of mandate and representation within the Treaty settlement processes of both countries at all levels.[455] These issues can be within, or between kin groups, or expand to groups beyond kin groups involved in the settlement process. The role of the Crown in New Zealand in approving mandates in this area is a specific issue in itself. OTS alleged that it has processes in place to ensure that the settlement policy does not compromise smaller groups such as hapū or whānau. These processes are effective, according to OTS, as they require 'a transparent and inclusive mandating process, offering specific redress to [smaller] groups and providing an opportunity for all claimants to participate in the acceptance of a settlement offer through a ratification process.'[456]

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[454] OTS, supra n 439 at 28. 'The process of negotiation is intended to ensure that the Crown and a claimant group sign a Deed of Settlement only when both parties are satisfied that it is fair, and the claimant groups agree that their grievances will be finally settled.'

[455] For instance, determining Māori groups for consultation purposes under the *Resource Management Act 1991*, amongst others. See, however Law Commission *Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri* (NZLC SP8, Wellington, 2001) which made suggestions for amendments to s 30, *Te Ture Whenua Māori Act 1993* based on concepts of mediation rather than Court adjudication. See also the Review of the Office of Treaty Settlements by the Māori Affairs Select Committee (included as Appendix A in the *2000/01 Financial Review of the Ministry of Justice*, (A Report by the Justice and Electoral Select Committee, Wellington, 2001).

[456] Cited in Birdling, supra n 370 at 21.

In the negotiation and pre-settlement phase, both TOKM and the Māori Land Court in New Zealand encourage claimant groups to resolve disputes between themselves, through mediation if necessary. However, inevitable settlement and governance entity disputes often revolve around mandate and representivity issues. Mediation processes are almost always confidential and exclude the wider settlement community, which closed-door process is itself inappropriate when issues of tribal governance and mandate are at stake. The process, moreover, fails the Crown's negotiating principle of transparent decision-making. The role of mediation, therefore, cannot be to determine which body is the appropriate representative of a claimant group. It can only assist the disputing parties to better understand their respective positions. The ultimate result may be that the parties agree on a process to be put to the claimant community itself for ratification.[457]

Furthermore, OTS, in a letter to the interim representatives of claimant groups in the Central North Island, stated that 'it is important that the interests of individual hapu and whānau are represented around the table.'[458] The letter went on to say that OTS expects claimant groups to have 'good processes and structures to enable this to occur.' However, the letter continued 'at the same time, we are conscious that whānau and hapu issues should not distract from progressing settlements at the wider level,'[459] which implies that the Crown is willing to accept whānau and hapū interests being subsumed by larger groups and compromised in the quest for a 'comprehensive' settlement.

The *Treaty of Waitangi Act 1975*, moreover, provides that any Māori may lodge a claim to the Waitangi Tribunal which has allowed individuals, whānau, hapū, iwi, marae, urban communities and national interest groups to lodge claims often with genuine cause. The existence of smaller claimant groups (whānau, hapū and traditional or ancestral iwi) within the settlement community and of groups outside the claimant community with overlapping claims has led to litigation and dispute in almost every contemporary Treaty settlement. A concern with the settlement process is that the Governments current 'large natural groupings' policy does not accommodate individuals, whānau and hapū claims

Two vexed representation issues in this area concern the identification of customary groups to be recognised for the purposes of Treaty settlements (customary representation

[457] Whata, C, Dawson, M and Rangi, G 'Inter and Intra Tribal Debate' (Paper presented at the Business Information in Action Public Law Conference 2002, Duxton Hotel, Wellington, 16-17 April 2002) at 16. For a very thorough and interesting discussion on Māori governance, representation and legislative structural options, see Gray, D, 'Kaupapa Maori Authorities: A Proposal for Legislation to Recognise a New Class of Maori Organisation' (Unpublished Manuscript, Auckland, 2003).

[458] Letter from Ross Phillipson, Central North Island Project Leader, Office of Treaty Settlements to Interim Representatives of claimant groups (16 June 2003) Wai 950 Doc #2.1133(b), (Wai 951 Doc #2.1039(a), Wai 952 Doc #2.1022(a)).

[459] Idem.

discussed earlier), and the determination of groups with an interest in any Crown lands available for settlement purposes (group identification at appropriate levels). Customary group formation and diaspora appear to have been fluctuating and dynamic historically, and this issue may need to be determined by alternative criteria such as that highlighted by Justice Eddie Durie:

- the identification of groups according to appropriate scales of economy;
- commitment to the equitable restoration of those groups without undue reference to assumed tribal boundaries;
- adequate protection for and recognition of sub-groups in the settlement structure; and
- recognition that the extent of recovery should not depend upon the accident of current Crown asset locations.[460]

Furthermore, OTS noted that in some cases specific smaller claims from whānau and hapū 'can be addressed within the comprehensive settlement.'[461] Birdling cited the return of Turuturu Mokai Reserve to Ngāti Tupaia Hapū in the Ngāti Ruanui settlement as an example.[462] The return of the Turuturu Mokai Reserve was negotiated within the 'large natural grouping' framework, and title to the reserve vested not in the hapū, but in Te Rūnanga o Ngäti Ruanui Trust, the entity representing the iwi as a whole.[463] Not surprisingly, a number of Ruanui whānau and hapū rejected the settlement, and even travelled to Wellington to object at the first reading of the settlement legislation.[464]

11.14.9 INEVITABLE CROSS CLAIMS

The effectiveness of both the 'large natural groupings' policy and the Crown's attempts to mitigate any challenges with it can be gauged by examining the extent to which it is contributing to specific challenges in practice. The most obvious manifestation of these challenges can be seen in a number of cases where smaller groups have taken steps to cross claim, to challenge settlements negotiated by larger entities out of a concern that their interests will be subsumed within a wider settlement without their consent or involvement. Interestingly but not surprisingly, similar challenges have occurred in both Canada and New Zealand.

The different categories of indigenous cross-claims include intra-tribal debate that usually focuses on claims by two or more representative bodies claiming to represent the

[460] Durie, E, 'The Process of Settling Indigenous Claims' (Indigenous Peoples: Rights, Lands, Resources, Autonomy International Symposium and Trade Show, Vancouver Trade & Convention Centre, British Columbia, Canada, 20 – 22 March, 1996) at 11.
[461] OTS *Ka Tika,* supra n 439 at 66.
[462] Birdling, supra n 370 at 21.
[463] See *Ngati Ruanui Claims Settlement Act 2003*, s. 34.
[464] This was noted at the time by Metiria Turei NZPD (3 October 2002, 603) at 885-887.

same claimant group or members of claimant groups (including individuals, villages, clans, bands, tribal councils, whānau, hapü, iwi and other groups) refusing to participate in the negotiation and ratification process and the establishment of governance entities. Inter-tribal debate involves overlapping claims to the same settlement lands and/or resources by (usually) neighbouring claimant groups.[465]

11.15 INTRA-GROUP CROSS-CLAIMS

11.15.1 CANADIAN EXAMPLES

11.15.1.1 JAMES BAY INUIT

As outlined above, through the JBNQA the Canadian Parliament unilaterally enforced a blanket extinguishment of the aboriginal rights of the Cree, Inuit and all other Indigenous Peoples in and to the claimed territory, thereby releasing Canada and Quebec from their legal obligations. Section 2.6 of the JBNQA provided that the empowering legislation was to extinguish all native claims, rights, title and interests in and to the Territory whatever they may be hence the surrender and extinguishment of all aboriginal rights and title.[466] Section 3(3) of the *James Bay and Northern Quebec Native Claims Settlement Act SC 1976-77* states:

> s3(3) All native claims, rights, title and interests, whatever they may be, in and to the Territory, of *all Indians and Inuits*, wherever they may be, are hereby *extinguished*, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as to those resulting from the Indian Act, where applicable, and from other legislation applicable to them from time to time.[467] [Emphasis added]

Among those First Nations affected by the extinguishment provisions who were not signatories to the JBNQA was the dissident Inuit group - Inuit Tungavingat Nunamini (ITN) who opposed the JBNQA that affected the Northern Quebec Inuit signatories.

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[465] See for example *Ngäti Toa Rangatira Decision,* in *Nelson Minute Book,* (Vol. 21, Te Waipounamu, 1994); *Te Hau v TOKM* (Unreported, High Court, Wellington, Doogue J, 3 April 2000, CP 12/00); *Te Runanga o Ngäti Kuri me Ngai Takoto & Anor v TOKM & Anor* (High Court, Wellington, CP222/98); *Waitangi* Tribunal, *Ngäti Maniapoto / Ngäti Tama Settlement Cross Claims Report 2001* (Wai 788 & Wai 800, GP Publications, Wellington, 2001); Waitangi Tribunal, *The Ngäti Awa Settlement Cross-Claims Report* (Wai 958, GP Publications, Wellington, 2002); and *Milroy & Nikora, Tuhoe-Waikaremoana Mäori Trust Board & Pryor v Attorney-General, Minister in Charge of Treaty Negotiations and Te Runanga o Ngäti Awa* (Unreported, High Court, Wellington, CP 78/02 & 77/02, 30 August 2002; Goddard J).

[466] *James Bay and Northern Quebec Agreement, 1975*, s. 2.6.

[467] *James Bay and Northern Quebec Native Claims Settlement Act* SC 1976-77 c.32, ss. 3(1), 3(2) and 3(3).

11.15.1.2 NISGA'A

Within the Nisga'a community, the dissident Nisga'a House of Sag'nism challenged the authority of the Nisga'a Tribal Council to conclude the Nisga'a Settlement Agreement. In the case *House of Sag'nism, Nisilada v Canada*[468] the plaintiffs applied for an interlocutory injunction to stop the settlement, which challenge was unsuccessful.[469] In addition, members from the Nisga'a village of Kinkolith at the mouth of the Nass River opposed the settlement in court on a number of grounds. The Kinkolith dissident group alleged that it represented 1,800 Nisga'a Indians, and its objection to the Nisga'a Treaty goes back to 1997 when they requested their two representatives be removed from the Nisga'a negotiating team. They vigorously objected to the governance structure mandated by the Treaty which they viewed as 'a centralized and potentially oppressive governance structure, which is totally alien to traditional aboriginal culture.' The Kinkolith group apparently appeared in court unsuccessfully six times trying to overturn the Nisga'a Treaty Settlement.[470]

11.15.2 MÄORI EXAMPLES

11.15.2.1 TOKM & TURANGITUKUA

The Mäori negotiators of the Mäori Fisheries Settlement (the Sealords Deal) had an uncertain mandate purporting to represent all Mäori commercial fisheries claims as Walker observed:

> The parameters of the document were drawn up and defined by the Crown. At least two of the principal Mäori negotiators were in a subaltern relationship with the Crown. All the Mäori negotiators, whether subaltern or not, were in a weak position of being cosseted in the Beehive with the Crown partner, and therefore isolated from the collective wisdom and strength of their people.[471]

Almost immediately after the settlements, a Waitangi Tribunal claim[472] and High Court litigation[473] commenced questioning which tribes the Deed of Settlement covered before it was entrenched in statute. The legitimacy of the mandate for the Sealords Deal was found wanting and Mäori have been paying for it ever since although the current situation with the *Mäori Fisheries Act 2004* will hopefully improve the situation. The

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[468] *House of Sga'nism, Nisilada v Canada* [2000] BCJ No. 831 (B.C.S.C)
[469] See also 'Dissident Nisga'a will Continue Battling Treaty' in *Vancouver Sun,* (Canadian Press, 30 April 2000) at B8.
[470] See the article by Barbara Yaffe, 'One group of Nisga'a fights on against the treaty'
[471] Walker, R, 'Changes to the Traditional Model of Mäori Leadership' (Unpublished Paper, November 1992) at 20. See also the recent Waitangi Tribunal Report, *Te Arawa Mandate Claims* (Wai 950, 1185 Central North Island Inquiry, GP Publications, Wellington, 2004).
[472] Waitangi Tribunal, *Fisheries Allocation Claim: Determination of Preliminary Issues* (WAI 47, Wellington, 1995).
[473] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR (C.A).

Ngäti Turangitukua settlement attracted less protest but there were intra-group cross claim challenges over representation levels by some whänau who maintained that the hapü had no say over their whänau lands and that the settlement dealt with hapü and not whänau grievances.

11.15.2.2 WAIKATO-TAINUI

The mandate of the Tainui Mäori Trust Board was challenged for the settlement of the Waikato raupatu claims, inter alia, on appropriate representation levels couched in procedural irregularities in *Greensill v Tainui Mäori Trust Board.*[474] Irregularities in some of the members' appointments were cited as well as the fact that of the 11,600 beneficiaries whose votes were sought via a postal referendum, only 3,092 had voted in the board's favour. The plaintiffs sought injunctions to prevent the board from signing the Deed of Settlement until further consultation had been completed to resolve the mandate issue. Hammond J dismissed the application expressing his satisfaction at the procedures followed by the board to prove their representative authority, such satisfaction apparently resulting in part from the Crown's view of the matter:

> I have no hesitation in accepting the Minister's statement ... that the Crown accepts that the Board has a mandate from Waikato-Tainui.[475]

The Court considered this to be a 'political' matter, rather than a question of law, and concluded that 'as to overall interests of justice ... there is a compelling national interest in moving forward.'[476]

11.16 INTER- GROUP CROSS-CLAIMS

11.16.1 CANADIAN EXAMPLES

11.16.1.1 JAMES BAY CREE

Through s. 3 of the James Bay Settlement legislation,[477] the Federal Government unilaterally enforced a blanket extinguishment of the aboriginal rights[478] of <u>all</u> other Indigenous Peoples in and to the claimed territory, thereby releasing Canada and Quebec

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[474] (Unreported, 17/5/95, Hammond J, HC Hamilton M117/95).
[475] Ibid, at 11.
[476] Ibid, at 14.
[477] *James Bay and Northern Quebec Native Claims Settlement Act 1977*, s. 3(3).
[478] The James Bay Crees believed that any extinguishment of fundamental human rights is abominable and should be condemned. See Joffe, P & Turpel, M *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives* (Royal Commission on Aboriginal Peoples, Ottawa, June 1995) at 1662; see also Canada, *Report of the Aboriginal Justice Inquiry of Manitoba, The Justice System and Aboriginal People* (Canada Communication Group, Ottawa, 1991) at 183.

from their obligations of 1898 and 1912.[479] Those overlapping claims from First Nations affected by the extinguishment provisions who were not signatories to the JBNQA were the Montagnais from Quebec and Labrador who had a population of over 11,000; the Atikamekw who number over 4,000; as well as the Algonquin who number over 5,000; and the dissident Inuit group - Inuit Tungavingat Nunamini (ITN). The Naskapi Indians were subsequently invited by the Cree and Inuit to participate in negotiations, and they became signatories in 1978 to the *Northeastern Quebec Agreement 1978* (NEQA). However, the main surrender clause in the NEQA stated that the aboriginal parties:

> ... cede, release, surrender and convey all their native claims, rights, titles and interests, whatever they may be, in and to land in the Territory[480] and in Quebec.[481]

This action was executed unilaterally irrespective of other First Nations who were not parties to the JBNQA. Moreover, indigenous groups primarily resident outside the territory or in an adjoining Province, but who also claimed rights to land and resources in the territory had their aboriginal rights to the area extinguished.[482] The Cree maintain that such a unilateral extinguishment policy strongly appears to be invalid, unconstitutional,[483] and a serious violation of fundamental human rights that need to be addressed appropriately.[484]

11.16.1.2 NISGA'A OVERLAPPING CLAIMS

The Gitanyow First Nation has been engaged in negotiations under the British Columbia Treaty process since 1993. Most of the territory claimed by the Gitanyow lies within the Nass watershed. Under the terms of the Nisga'a Final Agreement (NFA), the Nisga'a hold title to portions of this territory. The Gitxsan[485] and Tahltan Nations also

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[479] See Morantz, T 'Quebec' in Coates, K *Aboriginal Land Claims in Canada* (University of B.C, Copp Clark & Pitman Ltd, 1992) at 115.

[480] *James Bay and Northern Quebec Agreement 1975*, ss. 2.1, 2.3.

[481] *North-Eastern Quebec Agreement 1978*, s 2.1.

[482] Hamilton, supra n 418 at 18; Rights of Aboriginal third parties were extinguished upon the insistence of the Government of Quebec. See *House of Commons, Debates*, (April 28, 1977) at 5090 (Hon. Warren Allmand, Min. of Indian Affairs and Northern Development).

[483] The unilateral extinguishment of Aboriginal third party rights that took place in connection with the JBNQA is of doubtful constitutionality. See Joffe & Turpell, supra n. 478 at 315; Dupuis, R & McNeil, K *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec* (1995) 37 where they state: We have seen that the 1870 Rupert's Land Order placed a constitutional obligation on Canada to settle Aboriginal land claims. As this obligation would probably be violated by unilateral extinguishment, it may be that the extinguishment of the land rights of non-signatories is invalid.

[484] Grand Council of the Cree, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory Into a Sovereign Quebec* (Grand Council of the Crees (of Quebec), Nemaska, Quebec, 1995) at 261.

[485] The Gitanyow are culturally Gitxsan.

claim territory in the Nass watershed.[486] In March 1998, prior to the conclusion of the Final Agreement, hereditary chiefs of the Gitanyow initiated court proceedings seeking declarations:

> ... that in undertaking to negotiate a treaty with the Gitanyow under the B.C. treaty process, and in proceeding with those treaty negotiations, the Federal and provincial Crowns are obliged to negotiate in good faith and to make every reasonable effort to conclude and sign a treaty with the Gitanyow; and that for the Federal and provincial Crowns to conclude a treaty with the Nisga'a 'or to allow the designation for any purpose related to the Nisga'a Treaty over lands and resources in respect of which Gitanyow, Canada and British Columbia are involved in a treaty process until treaty negotiations with the Gitanyow are concluded' would be contrary to the Crown's duty to negotiate in good faith, significantly undermine the Gitanyow claim to 'overlapping' territory in the Nass Valley and nullify the Gitanyow treaty process.[487]

In March 1999, Williamson J of the British Columbia Supreme Court ruled on the first issue. He held that, while the Federal and Provincial Crowns were not under an obligation to enter into Treaty negotiations with the Gitanyow, having done so their fiduciary obligations toward Aboriginal peoples resulted in 'a duty to negotiate in good faith' that was binding on all Crown representatives. A declaration to that effect was issued.[488] In April, Canada and British Columbia appealed the ruling on the basis, inter alia, that subjecting the Treaty process to court supervision could turn negotiations into an avenue for litigation.[489] Originally scheduled for May 2000, the appeal, like the second question raised by the Gitanyow, remains in abeyance.[490] In November 1999, subsequent to the resumption of active negotiations in June of that year,[491] the Federal and BC Governments made the Gitanyow a land and cash offer.[492] Although the Gitanyow criticised the joint

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[486] A discussion of overlapping claims in the Nass River watershed from the Gitxsan and Gitanyow perspective can be found in Sterritt, N, 'The Nisga'a Treaty: Competing Claims Ignored!,' in *B.C. Studies*, (No. 120, Winter 1998-99) at 73.

[487] *Gitanyow First Nation* v. *Canada*, [1999] 1 C.N.L.R. 66, par. 1 (B.C.S.C.).

[488] *Luuxhon* v. *Her Majesty The Queen in Right of Canada*, [1999] 3 C.N.L.R. 89, par. 70-75.

[489] 'Federal Government Concerned Decision Undermines Treaty Negotiation Process – Appeals *Luuxhon* Ruling,' in DIAND, *News Release*, (Vancouver, 21 April 1999), available online at http://www.inac.gc.ca/nr/prs/j-a1999/index_e.html. (Accessed July 2005).

[490] Cited in Mary C. Hurley, M, *The Nisga'a Final Agreement,* (Department of Indian and Northern Development, Law and Government Division, 9 February 1999, Revised 24 September 2001), Correspondence with DIAND Official, 20 September 2001.

[491] 'First Nations in Stage 4, Agreement in Principle Negotiations: Gitanyow Hereditary Chiefs,' in British Columbia Treaty Commission, *Annual Report 1999*, (June 1999), accessible via the BCTC website, at http://www.bctreaty.net/annuals/99stage4.html. (Accessed May 2005).

[492] 'Canada and B.C. Present Settlement Offer to Gitanyow,' in B.C. Ministry of Aboriginal Affairs, *Treaty Negotiations Information Bulletin*, (29 November 1999), located at http://www.aaf.gov.bc.ca/aaf/gitoffernov27.htm. (Accessed May 2005).

offer for failing to take adequate account of their concerns,[493] the parties have continued to negotiate,[494] with some progress apparently achieved in 2000 and 2001.[495]

The overlap issue affects many, if not all, claims in British Columbia. In deciding a preliminary procedural matter in the Gitanyow case, Williamson J noted that 'myriad Court applications seem inevitable unless the Treaty negotiation process deals with overlapping claims.' In his view, 'if the parties fail to deal with [this] conspicuous problem, they may well face Court imposed settlements which are less likely to be acceptable to them than negotiated settlements.'[496] In *Delgamuukw* v. *British Columbia*, the Supreme Court of Canada encouraged the negotiation rather than litigation of Aboriginal title claims, adding that '[t]hose negotiations should also include other Aboriginal nations which have a stake in the territory claimed.'[497] The British Columbia Treaty Commission has also underscored the urgent need for Governments and First Nations to address the sensitive overlap question.

The First Nations Summit, Canada and BC, in reviewing the Treaty process as a result of the *Delgamuukw* decision, have agreed to examine the issue of overlaps. The BC Treaty Commission (BCTC) believes that experience in BC and elsewhere will lead the parties to conclude that it is essential to resolve issues relating to overlap claims early in negotiations, well before the parties agree to the contents of an Agreement-in-Principle.[498]

The BCTC proposed that 'agreements in principle should be signed only if a number of key guidelines [in the area of overlapping claims] are met.'[499] This position was reiterated by the Chief Commissioner of the BCTC in testimony before Parliamentary Committees considering Federal ratification legislation.[500]

The general consensus among the Parties, the BCTC, First Nations groups and other experts in Aboriginal matters is that overlap situations are best resolved between or among affected First Nations prior to the conclusion of any land claim agreement. According to

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[493] Fournier, S 'Offer Insulting, Say Gitanyow,' in *Vancouver Province*, (30 November 1999) at A15.
[494] 'Status of Each Negotiation,' in British Columbia Treaty Commission, *Annual Report 2000*, (June 2000), accessible via the BCTC website, at http://www.bctreaty.net/annuals/00status.html. (Accessed May 2005)
[495] 'Status of Each Negotiating Table,' in British Columbia Treaty Commission, *Annual Report 2001: The Year in Review*, (September 2001), accessible via the BCTC website, at: http://www.bctreaty.net/annuals/2001%20Annual%20Report.pdf . (Accessed May 2005)
[496] *Gitanyow First Nation* v. *Canada*, [1998] 4 C.N.L.R. 47, par. 41 (B.C.S.C.).
[497] [1997] 3 S.C.R. 1010, par. 185-86. [Herein after *Delgamuukw*].
[498] 'Overlaps,' in British Columbia Treaty Commission, *Annual Report 1998*, located at http://www.bctreaty.net/annuals/98overlaps.html. (Accessed May 2005)
[499] 'Overlap Agreements a Must in Treaty Negotiations,' in British Columbia Treaty Commission, *Newsletter*, (Vancouver, October 1998), http://www.bctreaty.net/updates/oct98overlap.html. (Accessed May 2005)
[500] See, for example, evidence of Miles Richardson, Standing Senate Committee on Aboriginal Peoples, (Issue No. 4, 23 February 2000), available via the Committee's website above.

the Minister of DIAND, current Federal policy holds that despite the absence of an overlap agreement, a Treaty may be concluded with a First Nation that is ready to settle where:

- the group has held good faith negotiations with its neighbour(s);
- measures to resolve the overlap have proved unsuccessful; and
- the treaty explicitly provides that it will not affect any Aboriginal or Treaty rights of any other Aboriginal group.[501]

11.16.2 NEW ZEALAND EXAMPLES

11.16.2.1 WAIKATO-TAINUI

In a similar manner, a number of Waikato-Tainui tribal groups challenged the Waikato-Tainui settlement including a claim from neighbouring Tainui waka groups such as Hauraki relating to the taking of some lands claimed. In this instance, Waikato-Tainui made an agreement with the Hauraki Mäori Trust Board to settle any lands claimed by Hauraki, subject to this claim being resolved.[502] As for other hapü and neighbouring iwi, it appears that the WRCSA has extinguished their rights. According to Solomon in 1995:

> There are also claims by other tribes - Maniapoto and Raukawa that overlap this claim. When the lands are returned under this settlement, it will be very difficult, if not impossible, for those lands to be later given over to the other tribes. [503]

11.16.2.2 TE ATIAWA

A similar challenge occurred during the Te Atiawa settlement. In its Taranaki Report, the Waitangi Tribunal listed the hapū groupings with which the Government should enter into settlement negotiations.[504] One of these was Te Atiawa, a group of six hapū, which included the Puketapu hapū. These six hapū formed the Te Atiawa Iwi Authority Incorporated (TAIA) as a representative entity through which to pursue negotiations with the Crown.[505] Doogue J described what followed:

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[501] Ibid., (Issue No. 7, 23 March 2000), evidence of Hon. Robert Nault, P.C., available via the Committee's website above.

[502] Solomon, supra n 452 at 22: This claim relates to the Maramarua forest. Hauraki are also claiming lands west of the forest and including the Whangamarino swamp lands, next to the Meremere Power Station. Fortunately for Hauraki, this claim will be decided in the future by the Waitangi Tribunal, the Mäori Land Court or any other court. Therefore, this claim is preserved for future decision making. See the Deed of Settlement, cls s 14.7, 14.9, 17.3, 19; and Crown Forestry Rental Trust, *Tainui Claims to Onewhero and Maramarua Forests* (Crown Forest Rental Trust, Wellington, 1993). This issue has now been settled.

[503] Solomon, supra n 440 at 22.

[504] Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (GP Publications, Wellington, 1996).

[505] *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney-General & Te Atiawa Iwi Authority* (Unreported, High Court, Wellington, CP344/975 February 1999) Doogue J, 2-4.

> It appears that some time during 1995 before the incorporation of TAIA there was a change in the relationship between the Puketapu hapu and other hapus [sic] within the Te Atiawa iwi.[506]

In 1996, TAIA lodged a claim by way of a Deed of Mandate on behalf of the other five hapū, but the Puketapu hapū sought to progress their own separate claim. There were attempts at mediation but eventually the then Minister in Charge of Treaty of Waitangi Negotiations, Douglas Graham, decided to accept the mandate of TAIA to negotiate on behalf of the Te Atiawa aggregation. To this effect, he wrote a letter to TAIA stating the conditions on which the mandate was accepted:

> In accepting the mandate the Crown notes that there are unresolved issues between the Iwi Authority, Puketapu hapu and potentially Otaraua hapu. The Crown's acceptance would be provided on the basis that the Iwi Authority continues to ensure that:
>
> - provisions for Puketapu hapu representation and other hapu groups remain in place
> - Te Atiawa Iwi Authority remains committed to keeping Puketapu hapu and other hapu groups informed of the progress of negotiations, and
> - the five hapu continue to support Te Atiawa Iwi Authority (particularly Otaraua hapu).[507]

Dissatisfied with this outcome, in late 1997 Puketapu submitted its own deed of mandate that was rejected by the Minister.[508] TAIA was purporting to be negotiating a comprehensive settlement for *all* claims in the Te Atiawa rohe, including those of Puketapu, despite Puketapu's rejection of the mandate of TAIA to represent them. Puketapu unsuccessfully challenged this in Court, seeking a prohibitory injunction on the grounds that 'it was for the Puketapu hapū to decide whether or not to negotiate with the Crown and, if so, how, and that it had its own deed of mandate for its representation and did not recognise TAIA's ability to represent it.'[509]

11.16.2.3 NGĀI TAHU

In Te Waipounamu (the South Island), a similar situation occurred when Waitaha challenged the authority of Ngāi Tahu to enter into a settlement of its Treaty claims.[510] Interestingly, Ngāi Tahu was supported by the Attorney-General on behalf of the Minister in Charge of Treaty of Waitangi Negotiations in defending this challenge. Te Rūnanga o

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[506] Ibid, at 3.
[507] Hon. Doug Graham, letter to the interim chairperson of Te Atiawa Iwi Authority Incorporated, reproduced in ibid, at 8-9.
[508] Idem.
[509] Idem.
[510] *Waitaha Taiwhenua o Waitaki Trust & Ors v Te Runanga o Ngai Tahu & Attorney-General* (17 June 1998) (Unreported, High Court Christchurch CP41/98 Panckhurst J. A description of the background to this dispute can be found in Sharp, A 'Recent Juridical and Constitutional Histories of Maori' in Sharp, A and McHugh, P (eds) *Histories: Power and Loss* (Bridget Williams Books, Wellington, 2001) at 48-56.

Ngāi Tahu (TRONT) was established pursuant to *Te Runanga o Ngai Tahu Act 1996* to, inter alia, provide a body corporate with which the Crown could conduct settlement negotiations. Section 15(1) of the Act provided that 'the body (TRONT) shall be recognised for *all* purposes as the representative of Ngai Tahu Whānui (wider group).' [Emphasis added]

Waitaha as a tribe was excluded in the definition of Ngāi Tahu Whānui in s. 2 of the Act.[511] Waitaha subsequently filed a claim with the Waitangi Tribunal for consideration of their own historical grievances.[512] However, a Deed of Settlement was signed between Ngāi Tahu represented by TRONT and the Crown. The relevant provisions of the Deed of Settlement were challenged in court and summarised by Panckhurst J as follows:

> [C]lause 17.3.11 contemplates amendment of the definition of 'Ngai Tahu Whanui' in s. 2 of the 1996 Act to include a reference to 'Waitaha'. Clause 1.2.1 contains an extensive definition of 'Ngai Tahu claims' and, relevantly for present purposes, includes [Waitaha's Tribunal claims] therein. The intent was for the Waitaha people to be recognised as included in Ngai Tahu Whanui and their unresolved claims to be subsumed as part of the greater Ngai Tahu settlement. By clause 17.3 the Crown agreed within six months to introduce legislation to give effect to the settlement.[513]

Consequently, the interests of Waitaha as a tribe were included and subsumed in the Ngāi Tahu settlement, despite Waitaha's refusal to accept Ngāi Tahu's mandate to negotiate on their behalf. Despite a further challenge in the High Court, the provisions in the Deed of Settlement were passed into legislation and Waitaha are now unable to pursue their representation claims through either the Courts or the Waitangi Tribunal.[514]

11.16.2.4 NGĀTI RUANUI

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[511] A supplementary order paper to the Bill sought to add Waitaha to the definition of Ngāi Tahu Whānui in clause 2 of the Bill, although this was withdrawn by the Hon Doug Kidd, who proposed it, after significant debate in the House –NZPD (20 March 1996, 553) at 11580. Of significant interest from this debate is the statement made on the behalf of Waitaha during select committee proceedings referred to by the Hon. Mrs T W M Tirikatene-Sullivan:

> We of the iwi, hapū, and whānau of Waitaha have not, do not, and will not recognise any other iwi as having the reo, the mana, the tapu, the ihi, the wehi for Waitaha in all matters to do with our whakapapa, our waiata, our purakau, our patere, our karakia, our whānau, our hapū, and our iwi."

- NZPD (20 March 1996, 553) at 11579.

[512] The Wai 618 and Wai 622 claims.

[513] *Waitaha Taiwhenua o Waitaki Trust & Ors v Te Runanga o Ngai Tahu & Attorney-General* (17 June 1998) High Court Christchurch CP41/98 Panckhurst J, 3-4.

[514] See *Ngai Tahu Claims Settlement Act 1998*, s. 9; Sandra Lee, the then deputy leader of the opposition Alliance party noted in Parliament during the third reading of the Act that other groups – including Ngāti Apa, Ngāti Rangitāne, Ngāti Rarua and Ngāti Mamoe also had their rights prejudiced by the passage of the Act – NZPD (29 September 1998, 572) at 12376.

During the course of the Ngāti Ruanui settlement, similar issues arose over the Crown's decision to accept the mandate of the Ngāti Ruanui Muru me te Raupatu Working Party to settle all the historical claims of Ngāti Ruanui. Two hapū that would have had their claims subsumed by any such settlement, Pakakohi and Tangahoe, argued that the working party did not possess such a mandate, and that they should have the opportunity to negotiate for the settlement of their claims independently.[515]

Pakakohi and Tangahoe obtained an urgent hearing in the Waitangi Tribunal, which considered the matter and concluded that the claims of Tangahoe were not distinct from those of Ngāti Ruanui as a whole, but that Pakakohi's claims were. However, the Tribunal found that there was not sufficient evidence of support for a separate settlement to warrant the Tribunal taking a hard look at the Crown's handling of the process.[516] Consequently, the settlement went ahead despite a subsequent High Court challenge.[517]

11.16.2.5 OTHER SETTLEMENTS

In every Mäori claimant district there exists an actual or potential risk of many hapū simply acquiescing to the policy out of fear that they will be excluded from the settlement process if they challenge it. When a number of hapū and whānau expressed concern about their role in the Ngāti Tūwharetoa settlement process, OTS responded with a letter outlining their policy stating that:

> ... if a minority of hapu choose to stand outside of ... negotiations that would not be sufficient cause for the Crown not to begin negotiations... I should emphasise that – consistent with the policy of comprehensive settlement with large natural groups - the Crown would not contemplate having separate negotiations with individual hapu.[518]

Consequently, some claimants are reluctantly forced to amalgamate into 'large natural groupings' or they may be excluded from participating in the Treaty negotiations and being marginalised from the settlement benefits. The Mokai Patea Waitangi Claims Committee, a body established by a number of hapū in the Whanganui area, stated that they had 'no choice but to enter this foreign process to protect [their] interests.'[519]

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[515] See the covering letter to the Waitangi Tribunal's *Pakakohi and Tangahoe Settlement Claims Report* (Legislation Direct, Wellington, 2000).

[516] Ibid, at 66. Proceedings were brought unsuccessfully following the production of this Report alleging bias on the behalf of Chief Judge Joe Williams who presided at the hearing. See *Hayes & Ors v Waitangi Tribunal & Ors* (10 May 2001) (Unreported, High Court Wellington CP111/01) Goddard J.

[517] *Watene & Ors v Minister in Charge of Treaty of Waitangi Settlements* (Unreported, High Court Wellington CP120/01 11 May 2001) Goddard J.

[518] Letter from Tony Sole, Manager Claim Development, Office of Treaty Settlements to Rawinia Konui (18 August 2003).

[519] See 'Submission from the Mokai Patea Waitangi Claims Committee Concerning the Inquiry Boundary' (Wai 903 Doc #2.57, 2 November 2002).

11.16.3 HISTORIC PRECEDENTS

The imposition of a settlement on large tribal groupings is not a new event to Mäori. Full and final settlements, the extinguishment of Treaty rights, and attempts at settling historical Māori grievances have occurred periodically throughout New Zealand history, particularly during the 1930s and 1940s.[520] In the late 1920s, the Sim Commission[521] made a number of recommendations to the Government relating to the settlement of grievances emerging from the raupatu (land confiscations) following the New Zealand Wars of the 1860s.[522] This Commission led to an increased awareness of past wrongs which, combined with the influence of the Ratana movement in the Labour Government of the 1930s and the end of the great depression, led to a political climate conducive to settlement negotiations.[523]

A number of Treaty grievances were settled at this time and were enshrined in legislation. As with the current process, finality was key. The *Ngai Tahu Claim Settlement Act 1944*, for example, stated that it was an 'Act to effect a Final Settlement of the Ngaitahu [sic] claim,'[524] and that it was 'in settlement of all claims and demands which have heretofore been made' and 'which might hereafter be made.'[525] The failure of the 1944 Ngai Tahu 'settlement' is clearly obvious from the fact that just over fifty years later it was necessary to adopt legislation enshrining the terms of a new settlement negotiated to more appropriately address Ngāi Tahu grievances.[526]

Interestingly in the Waitangi Tribunal hearing which preceded the 1998 settlement, the Crown argued that Ngāi Tahu were estopped by the 1944 settlement from suggesting they were entitled to further compensation.[527] The Tribunal responded that 'equity and justice required the Crown in good conscience to review the 1944 Act.'[528] One is inclined to question whether the Crown might not be persuaded to do so again given this precedent.

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[520] See the *South Island Landless Natives Act 1906*, which intended to finally settle any sense of grievance in the South Island – and the comments of the Hon. James Carrol in NZPD (1906, 137) at 318-320. See also Riley, B 'Mocked Before the Ink is Dry on the Statute? Final Settlements of Treaty of Waitangi Claims' (LLB(Hons) Research Paper, Otago University, 1994) at 29.

[521] A Royal Commission of Inquiry established by the Government in 1928.

[522] See Hill, R *Enthroning 'Justice above Might'? The Sim Commission, Tainui and the Crown* (Treaty of Waitangi Policy Unit, Wellington, 1989); and Belich, J *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (2nd Ed, Penguin, Auckland, 1998).

[523] Riley, supra n 520 at 29.

[524] See the Long Title, *Ngaitahu Claim Settlement Act 1944*.

[525] *Ngaitahu Claim Settlement Act 1944*, s. 2.

[526] See the *Ngai Tahu Claims Settlement Act 1998*.

[527] See Waitangi Tribunal *Ngai Tahu Report*, (Brooker & Friend, Wellington, 1991) at 1027.

[528] Idem. The Report refers to the *Maori Purposes Amendment Act 1973* which revisited the terms of the 1944 settlement.

Ngāi Tahu is not the only example of a 'final' settlement being discarded and re-negotiated.

Similar wording can be found in the *Waikato-Maniapoto Maori Claims Settlement Act 1946* that purported to settle claims relating to the raupatu land confiscations in the Waikato.[529] The Ngāi Tahu and Waikato experiences are almost identical to that of Taranaki, where the claimants 'agreed to accept the provisions [of the *Taranaki Maori Claims Settlement Act 1944*] in full settlement and discharge of the aforesaid claim.'[530]

The inadequacies of these settlements emerges with the fact that the claims have had to be renegotiated because they unfair, unjust, inequitable and therefore incapable of being full, final settlements. A more recent example is the settlement of the historical grievances of Ngāti Whātua at Orakei. While an initial settlement was made in 1978, it was revisited in 1991 for similar reasons to the Treaty settlements of the 1940s.[531]

11.16.4 BACK TO THE FUTURE: WILL HISTORY REPEAT ITSELF?

The lessons from these experiences are evident. If current Treaty settlements are not negotiated appropriately, the result, despite what negotiations have committed to, will not be durable. Indeed, Donna Awatere-Huata, with respect to the Fisheries Settlement, opined:

> [F]rom the outset, the four Maori Crown negotiators were appointed by the Crown. Now, when is it a partnership when one partner decides who will negotiate on behalf of the other partner? If you steal my car, and then you appoint, against my wishes, my neighbour as my negotiating agent, if you two decide that you will buy me a pushbike, you can hardly cry foul when I object to your procedures and to your full and final settlement.[532]

The perception within Government that similar problems from the past will not re-emerge is an absolute facade. The comparison between the present Treaty settlement process and that of the 1940s as well as the results is predictable. In both cases, the Crown have presented Māori with a process which is the 'only deal in town'[533] with the

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[529] An interesting narrative of the process leading up to this settlement, including the negotiations with then Prime Minister Peter Fraser, can be found in King, M *Te Puea* (Sceptre, Auckland, 1987).

[530] *Taranaki Maori Claims Settlement Act 1944.*

[531] See *Orakei Block (Vesting and Use) Act 1978*; *Orakei Act 1991*; Munro, J 'The Treaty of Waitangi and the Sealord Deal' in VUWLR (Vol. 24, 1994) 389, at 421-422.

[532] Awatere-Huata, D, speech to the 1993 New Zealand Law Conference, quoted in Council for Aboriginal Reconciliation 'Reconciliation and Social Justice Library' http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/kip7/16.html (Accessed 25 August 2005). Josie Anderson, of the Waitangi Tribunal, made a similar comment in Gardiner, W *Return to Sender – What really happened at the fiscal envelope hui* (Reed, Auckland, 1996) at 125.

[533] This expression is from Professor Ranginui Walker who used it in the context of the 'Sealords Deal' in his inaugural lecture at Auckland University, Walker, R 'Tradition and Change in Maori Leadership' (Auckland University Research Unit for Maori Education, Monograph No 18, August 1993) at 19.

expectation that the final outcome represents a definitive extinguishment of, and end to, historical Treaty grievances. If the Government intends to achieve such a result, there are valuable lessons to learn from the past. George Santayana's words are germane: '[t]hose who cannot remember the past are condemned to repeat it.'[534]

The Crown must consider the possibility that current settlements may be neither full nor final. It was known as early as 1993, when the direct settlement proposals were still being developed, that declaring a policy of negotiating solely with iwi would 'be controversial for Maori' and that the issue of claimant representation would 'need to be resolved if the objectives of finality and durability are to be achieved.'[535] If grievances are aggregated into a wider group there is a risk that settlements would not be seen to extinguish highly specific grievances.[536] In addition, this very topic has been raised in Parliament on numerous occasions.[537] Shortly after taking office, the former Minister in Charge of Treaty of Waitangi Negotiations asserted:

> [t]he Government will pay special attention to mandate and cross-claim issues and will work closely with individual claimants to ensure a robust process... [u]nlike the previous Government, this Government recognises that it needs to be flexible regarding these issues and that different approaches will be needed for different claimant groups. We will be working with claimants to this end.[538]

Irrespective of how pressing the need is to settle with Māori, or to appease the non-Māori public, any settlements reached under the current process may have been inappropriately negotiated with the wrong parties, or may have omitted parties that should have been included. Furthermore, 'quick-fix' solutions are only temporary. In the future, the Government may be subject to re-opening claims and re-negotiating Māori grievances.

11.17 ROLE OF THE COURTS

Given that the above Treaty settlements purport to extinguish the rights of Māori groups to bring forth a claim for historical Treaty grievances, there should be some form of appropriate recourse, in terms of forum and process, to the Courts.

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[534] Santayana, G *The Life of Reason; or, The Phases of Human Progress* (Scribner, New York, 1954).
[535] Officials Strategy Committee 'Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori' (CSC (93) 90, 28 June 1993) paras 74-76
[536] Officials ad hoc Committee 'Treaty of Waitangi Settlement Policies: Outstanding Issues' (CSC (94) 140, 10 October 1994) at 3.
[537] See Sandra Lee NZPD (5 October 1999, 580) at 19594; and Tariana Turia NZPD (17 September 1997, 563) at 4401-4402 where the Ngai Tahu (Pounamu Vesting) Bill was said to be 'the creation by this Government of further grievances that successive Governments will be expected to resolve.'
[538] Hon. Margaret Wilson 'Principles to guide settlement of Treaty claims' *Press Release* (3 August 2000).

11.17.1 GENERAL APPROACH OF THE COURTS

With an increase in Treaty settlements being 'finalised,' there are more intra- and inter-tribal challenges arriving in Court.[539] In some cases, constituent hapū have refused to recognise the authority of iwi claiming to speak on their behalf in settlement negotiations. For the most part however, these cases have run into a jurisdictional hurdle. High Court judges have held that the direct settlement process is 'not by its nature amenable to supervision by the Courts.'[540] The reason given by the Court for its lack of jurisdiction is that negotiations are 'entertained by the Crown as part of a political process and not part of a legal process'[541] and that Court intervention 'would be an outright interference in what is nothing more or less than an ongoing political process as opposed to a distinct matter of law.'[542]

Furthermore, it has been held that if these negotiations lead to a settlement, that settlement would also be non-justiciable until it passes into legislation.[543] At this stage, as a matter of elementary constitutional principle, the decisions will be 'inviolate and totally beyond the reach of the Court's supervision.'[544]

The Court of Appeal recently examined the subject and upheld this line of reasoning. Gault P concluded:

> [t]he importance of the process for addressing claims in respect of breaches of the Treaty is fully recognised. Where that involves the exercise by the Executive of statutory or prerogative powers, lawfulness can be challenged on established grounds for judicial review. But where the action challenged does not itself affect the rights of any persons and is undertaken in the course of policy formulation preparatory to the introduction to Parliament of legislation, the courts will not intervene.[545]

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[539] See *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney-General and Te Atiawa Iwi Authority* (5 February 1999) High Court Wellington CP344/97 Doogue J; *Pouwhare and Or v Attorney-General and Te Runanga O Ngati Awa* (30 August 2002) High Court Wellington CP78/02 Goddard J; *Rukutai Watene and Ors v Minister in Charge of Treaty of Waitangi Negotiations* (11 May 2001) High Court Wellington CP120/01 Goddard J.

[540] *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa* ibid, para 42; note that this approach has a familiar resonance with the comments of Prendergast CJ in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 (SC) that the extinguishment of native title was an 'act of state' and therefore beyond the reach of the courts.

[541] *Kai Tohu Tohu O Puketapu Hapu Inc v Attorney-General and Te Atiawa Iwi Authority* ibid, 15.

[542] *Greensill & Ors v Tainui Maori Trust Board* (17 May 1995) High Court Hamilton M117/95, 12-13 Hammond J.

[543] *Pouwhare and Or v Attorney-General and Te Runanga o Ngati Awa* above, para 45.

[544] Idem.

[545] *Milroy and Ors v Attorney-General and Te Runanga o Ngati Awa* (11 June 2003) CA 197/02, Gault P, para 18.

As the direct negotiations settlement process has no statutory basis, the Courts will not generally look at the process at all, instead holding it to be non-justiciable.

11.17.2 STATUTORY TRUSTS

There is the odd exception to the above rule such as the case *Waitaha Taiwhenua o Waitaki Trust v Te Runanga o Ngai Tahu and Attorney-General*[546] where the claimants filed an application for review, arguing that Te Rūnanga o Ngāi Tahu (TRONT) did not have the authority to negotiate on behalf of Waitaha, nor did they 'have authority to purport to even conditionally settle Waitaha claims.'[547] The defendants argued that the cause of action should be struck out, as these issues were non-justiciable.[548]

This case is of particular interest, as the Court refused to strike out the claims immediately. Counsel for the plaintiffs sought to distinguish the earlier failed cases alleging that as the negotiating body was a statutory trust with defined powers, it was qualitatively different from the negotiating bodies in earlier cases.[549] Panckhurst J noted that he broadly accepted the thrust of the plaintiff's arguments and consequently refused to strike out the proceedings. The Court noted, in what Cheryl Simes called 'perhaps an excess of legal positivism,'[550] that if the settlement legislation was passed, further review of the ability of Ngāi Tahu to settle on behalf of Waitaha would be impossible:

> If the Bill was passed relatively unamended for present purposes I consider that Parliament would have spoken and the Court's intervention would be wrong in principle. In that regard I accept the submission of Mr Andrew, for the second defendant, that for the Court to intervene to restrain approval of the statute 'would be to sit in judgment on Parliament and to conclude that it had acted in error.' [551]

The Bill proceeded relatively unamended and the hapū Waitaha was included in the settlement legislation.[552] The case, therefore, never made it to a substantive hearing. Consequently, the High Courts' position is that generally, they will not intervene except perhaps in the situation where the body conducting negotiations is a statutory body with limited and defined powers. In any event, when the enabling settlement legislation is passed, the Courts will hold that to be impervious.

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[546] *Waitaha Taiwhenua o Waitaki Trust & Or v Te Runanga o Ngai Tahu and Attorney-General* (17 June 1998) High Court Christchurch CP 41/98 Panckhurst J.
[547] Ibid, at 5.
[548] Idem.
[549] Ibid, at 9-10.
[550] Simes, C 'Deciding Who Should Represent Maori' in *New Zealand Law Journal* [2002] at 100, 101.
[551] *Waitaha,* supra n 546 at 11.
[552] See *Ngai Tahu Claims Settlement Act 1998*, s. 9.

11.17.3 WAITANGI TRIBUNAL

The approach of the Waitangi Tribunal has been essentially the same as the Courts. While it has stated that that it does have jurisdiction to consider whether any particular decision on settlements is a breach of the Treaty, it has also stated that it considers that there is an 'air of artificiality' about such claims, due to the focus of the Tribunal on Crown actions.[553] This occurs because while the claims 'are technically aimed at the Crown, they mask what is essentially an internal dispute between closely related kin groups as to which organisation at which level speaks for them.'[554]

Furthermore, the Tribunal has adopted the reasoning of the Courts, holding that:

> There are a number of important considerations which mitigate against the Tribunal interfering ... except in clear cases of error in process, misapplication of tikanga Maori, or apparent irrationality. These considerations include the political nature of the decision making under challenge, the artificiality of treating internal disputes as if they were disputes against the Crown, and the inherent difficulty of the subject matter. [555]

Hence the approach of both the Courts and the Waitangi Tribunal, as concluded by Judge Carrie Wainwright, is that 'it is very hard indeed to persuade any forum to call a halt to the process of effecting a settlement in order that the misgivings of the few can be addressed in the face of the apparent desire to proceed of the many, and of the Crown.'[556]

11.17.4 SHOULD THE COURTS BE MORE INVOLVED?

Judge Wainwright noted that these challenges to previous settlements raised 'matters of substance that needed unraveling' but were not addressed as the courts 'possibly lacked the will [and] means to help.'[557] Judge Wainwright added that litigation is not the best means by which to resolve these issues as any attempt to fit these kinds of disputes into 'legal boxes' obscures the real issues as well as souring ongoing community relationships.[558]

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[553] Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report* (Legislation Direct, Wellington, 2000) at 55-56. Judge Carrie Wainright discussed this very issue in depth in Wainright, C, 'Mäori Representation and the Courts' (Paper presented to the New Zealand Centre for Public Law Roles and Perspectives in the Law Conference, Law School, Victoria University of Wellington, 5 April 2002, copy in author's possession).

[554] Ibid, at 55. The inappropriateness of the Waitangi Tribunal as a forum for such grievances was noted over ten years ago by Chief Judge Edward Durie (as he then was) at the New Zealand Law Conference. See Durie, E, 'Politics and Treaty Law' (Lecture to New Zealand Law Conference, Wellington, 2-5 March 1993).

[555] *Pakakohi,* supra n 543 at 57.

[556] Wainwright, C 'Maori representation issues and the Courts' in Carter, D and Palmer, M (eds) *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, Wellington, 2002) at 191.

[557] Wainwright, supra n 553 at 191.

[558] Idem.

Still, Chief Judge Durie (as he then was) at the 1993 New Zealand Law Conference made an observation on the Treaty settlement process that continues to be significant today:

> The just resolution of Maori claims that are fair and reasonable, not only between the partners but amongst Maori themselves, presents the greatest challenge to the claims process. Despite some opinion that the settlement of claims is a political matter, the courts may need to have a continuing role in the search for a proper solution ... for the protection of the Crown as much as anyone else.[559]

In a similar manner as well as being around the same time, Sir Robin Cooke (as he then was), observed that what progress had occurred in the Treaty arena was the result of:

> ... an interaction of three forces: first, some enlightened leadership on both the Crown and Maori sides; secondly, the inquiries and reports of the Waitangi Tribunal ... thirdly, the traditional courts and in some of their judgments an increased willingness to take into account the Treaty and the fiduciary concept. The responsibility of judicial decision is quite different from that of Tribunal recommendation. The functions are complementary. All three forces are probably essential to further progress.[560]

Sir Robin Cooke added that the Treaty settlement process is not solely political, and is one in which the Courts play an integral part. Chief Judge Durie, moreover, opined that for the process to achieve its aims, it is necessary to ensure it is conducted fairly. If the political process is failing to provide this fairness, then the Courts must intervene.

Furthermore, Tom Bennion observed that large natural groupings that achieve settlements would form legal structures to manage them – each with rules about membership, decision-making and distribution of benefits.[561] Bennion predicted that in some areas, unresolved issues around hapū and other small groups will come bubbling back up after settlement in the form of applications for judicial review of their actions, and litigation concerning the interpretation of any rules.[562]

Still, Judge Wainwright noted that even if Courts have the will to intervene, they lack the jurisdiction to do so.[563] Professor Mason Durie pointed out that one of the key motives behind the direct settlement process was a desire that the Government and not the courts would have the final say on Treaty issues.[564] One is inclined to question how the

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[559] Durie, E 'Politics and Treaty Law' (Lecture to New Zealand Law Conference, Wellington, 2-5 March 1993).
[560] Rt. Hon. Sir Robin Cooke 'The Challenge of Treaty of Waitangi Jurisprudence' in *Waikato Law Review* (Vol. 2, 1994) at 1.
[561] Cited in Birdling, supra n 370 at 37.
[562] Idem.
[563] Wainwright, supra n 553 at 191.
[564] Durie, M *Te Mana, te Kawanatanga: The Politics of Maori Self-Determination* (Oxford University Press, Auckland, 1998) at 188.

Courts fulfil the role that Chief Judge Durie and Sir Robin Cooke saw as being fundamental to the durability of settlements.

11.17.5 MEDIATION PROVISIONS - SECTION 30

One answer to the above question is applying for a determination of representation in the Maori Land Court. Chief Judge Joe Williams mentioned a role for the Court in resolving disputes over representation issues.[565] The Court currently has jurisdiction contained in the mediation provision pursuant to s. 30 of the *Te Ture Whenua Maori Act 1993*, which provides:

> 30. Maori Land Court's jurisdiction to advise on or determine representation of Maori group
> (1) The Maori Land Court may do either of the following things:
> (a) advise other courts, commissions, or tribunals as to who are the most appropriate representatives of a class or group of Maori:
> (b) determine, by order, who are the most appropriate representatives of a class or group of Maori.
> (2) The jurisdiction of the Maori Land Court in subsection (1) applies to representation of a class or group of Maori in or for the purpose of (current or intended) proceedings, negotiations, consultations, allocations of property, or other matters.
> (3) A request for advice or an application for an order under subsection (1) is an application within the ordinary jurisdiction of the Maori Land Court, and the Maori Land Court has the power and authority to give advice and make determinations as the Court thinks proper.

The prospect of this provision being used in the settlement context was raised as long ago as 1994.[566] In an early decision on an application by the Tararua District Council,[567] the Maori Land Court set out some principles to be considered in determining appropriate representatives pursuant to s. 30:

- that there was variation in relevant circumstances created by different tribal histories, especially since Pākehā colonisation;
- that representation is about obligations, not just an assertion of rights;
- that tangata whenua status was not necessarily bound by nineteenth century determinations of the Native Land Court;
- that the Court should look to local marae in matters of customary authority because this is probably the single most enduring institution in Māori culture, including the

[565] Chief Judge Joe Williams 'The Maori Land Court – A Separate Legal System?' in *Victoria University Centre for Public Law Occasional Paper No 4*, (Wellington, 2001) at 10-11.
[566] See Bennion, T 'Who Represents Maori Groups?' in *Maori Law Review* (November 1994) at 1; note that the possibility of using the mediation provisions in the *Te Ture Whenua Maori Act* to deal with mandate issues was considered by Cabinet during the initial development of the settlement proposals, but appears to have not gone further. See Hon John Luxton, Minister of Maori Affairs 'Treaty of Waitangi Settlement Fund: Claimant Representation' (CSC (94), 9 March 1994) at 15; Officials Strategy Committee 'Treaty of Waitangi Settlement Fund: Size, Shape, Timescale and the Reciprocation from Maori' (CSC (93), 28 June 1993) at 90.
[567] *Re Tararua District Council* (Maori Land Court, *Napier Minute Book*, Vol. 138, Takitimu, 1994) and *Re Rangitane o Tamaki Nui A Rua Inc* in *Takitimu ACMB* (Vol. 1, 1996, MAC).

development of urban marae that meet the needs of the large majority of urbanised Māori; and

- that customary authority must be sanctioned by a legitimate base.[568]

The Court recognised the dynamic nature of Māori society, past and present, and acknowledged that there was scope for new hapū to emerge, and that tangata whenua status should not be locked into a definition based on the Native Land Court perception of the situation as at 1840. The Court additionally acknowledged that many hapū have been assimilated or integrated with other hapū, their separate entity submerged by Crown dealings or Native Land Court determinations of title. While some hapū may seek recognition of their former status, the Court would not accept such re-emergence, unless a process of customary consensus including whānaungatanga - recognition of an ancestral kinship link - sanctioned this.

More recently, this provision, as amended in 2002,[569] would have allowed the Maori Land Court to have determined by order who were the most appropriate representatives of each of the objecting groups in the above cases, and as such, 'whether the group should, for the purposes of negotiation, be involuntarily subsumed into the larger class.'[570]

Such groups could now apply to the Chief Judge of the Maori Land Court in writing under s. 30C of the *Te Ture Whenua Maori Act* for a determination. However, whether the Chief Judge chooses to act upon this request is largely at his or her discretion.[571] There is no requirement that every application under s. 30 receives consideration, let alone a hearing, and the application may be dismissed if it is vexatious, frivolous or an abuse of the Maori Land Court, fails to satisfy rules of court, does not present serious issues for determination or, crucially 'if the Judge considers it appropriate to dismiss or defer consideration of the application for any other reason.'[572]

This situation provides what Megan Symes has termed an 'extraordinarily subjective discretion'[573] which could pose problems to claimants, especially in light of the fact that judges in other Courts have been extremely reticent to enquire into what they view as policy decisions. In addition to these legal difficulties, even if the Court holds that the

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[568] Ibid.
[569] *Te Ture Whenua Maori Amendment Act 2002 / Maori Land Amendment Act 2002.*
[570] Simes, supra n 550 at 101. See also the comments of the Waitangi Tribunal *Pakakohi and Tangahoe Settlement Claims Report* (Legislation Direct, Wellington, 2000) at 56-57. However, note the concerns as to the efficacy of such determinations in Wainwright, supra n 553 at 192-194; and the concerns of the Maori Land Court in *Re Ngati Paoa Whānau Trust* in *Hauraki Minute Book* (Vol. 96A, Waikato-Maniapoto, 1995) at 155 which were raised in New Zealand Law Commission *Determining Representation Rights Under Te Ture Whenua Maori Act 1993* (NZLC SP8, Wellington, 2001) at 12.
[571] Symes, supra n 550 at 101.
[572] *Te Ture Whenua Maori Act*, s 30C(6); supra, Symes, at 101.
[573] Idem.

larger grouping is not the appropriate representative for the smaller group, there is nothing to stop the Government from deciding as a matter of policy that it will ignore the decision and proceed to settle with the larger group.[574] The Maori Land Court noted this point when it was asked to intervene in the dispute as to distribution of fisheries assets.[575] Deputy Chief Judge McHugh stated:

> The determination made by the Maori Land Court following an inquiry under section 30(1)(b) may be... accepted as conclusive by the Chief Judge but there the matter rests. The determination is not binding on any other party. It is certainly not a determination that has any binding effect beyond the Chief Executive or Chief Judge although those respective persons may convey the determination by way of advice to third parties.[576]

Overall, s. 30 provides one mechanism by which a Court could examine the issue of who the appropriate representative of a hapū and iwi is for the purpose of settlement negotiations, and therefore, whether the policy itself is appropriate for any given claimant group. However, given the limitations of the provision, it is not as effective as smaller groups would have hoped. Moreover, smaller groups will be ineligible for legal aid and will be required to fund any such Maori Land Court action themselves.[577]

11.17.6 EFFECTS OF THE CROWN POLICY

The cumulative effect of the Crown's unilateral 'large natural grouping' policy, the measures taken to ensure the extinguishment and finality of settlements and the Courts inability (and reticence) to become involved is severe. Smaller groups are shut out of the process altogether, unless they acquiesce to the will of a larger grouping. Such an approach is severely prejudicial to the smaller group's rights, as settlement legislation invariably ensures the finality of the settlements by removing the ability of the courts and Waitangi Tribunal to re-open the historical claims.[578]

11.17.6.1 IGNORING HAPŪ

As the analysis above shows, academic opinion is clear on the point that hapū played the central role in Māori social organisation at the time of the signing of the Treaty. The Waitangi Tribunal has stated on a number of occasions that the traditional structure of

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[574] Idem.
[575] *Cracknell v Treaty of Waitangi Fisheries Commission* in *Tairawhiti Minute Book*, (Tairawhiti, 1993) at 152.
[576] Ibid.
[577] See *Rapai Amber Te Hau v Gisborne District Legal Aid Committee* (19 October 2000) Legal Aid Review Authority LRA 136/2000, Legal Aid Review Authority, Judge Middleton.
[578] OTS *Ka Tika,* supra n 368 at 77.

social organisation is to be preserved under the Treaty.[579] As such, the Crown should protect the traditional structures of social organisation during the settlement process, otherwise the Crown cannot be said to be acting in accordance with the Treaty. Furthermore, the Tribunal repeatedly observed that 'tribal restoration' is a key component of the settlement process.[580]

However, as detailed above, the effect of the large natural grouping policy has been to, in many cases, force hapū to either amalgamate with a larger group or risk having settlements negotiated without their input. Whether this is compatible with the obligation to protect traditional social structures is questionable.

As Tariana Turia (then an opposition MP) noted during Parliamentary consideration of the Maori Affairs Committee's report on the Ngāi Tahu (Pounamu Vesting) Bill, the process 'pits... hapu against their own whānaunga because the Crown prefers to deal with one legal iwi corporate structure instead of recognising the treaty rights of the hapu.'[581] This disruption is occurring during a time when, to quote one group of claimants in the Whanganui district, many groups are:

> ... involved in a process of re-establishing our historical and traditional social (political) structures which were destroyed during colonisation. This process will facilitate the long term development including the spiritual and economic advancement of our people.[582]

The group notes that, notwithstanding the rebuilding process, after taking note of the mandate requirements of the claims process they have 'had no choice but to form [a] claims committee consisting of representatives of the four hapu / iwi' and that they 'also have no choice but to... enter this foreign process to protect [their] interests'.[583]

There is a strong argument that the large natural grouping policy is in direct conflict with the Crown's obligations under the Treaty, as it is undermining the process of rebuilding traditional social structures. As Sandra Lee put it during the first reading of the Ngati Turangitukua Claims Settlement Bill:

> [f]or the Crown to insist determinedly that only iwi negotiators will be accepted at the door is, in itself, a grievance. It is generating conflict within hapu who belong to iwi who feel

[579] Munro, supra n 531 at 393, referring to the Waitangi Tribunal *Mangonui Report* (Government Printer, Wellington, 1988) and Waitangi Tribunal *Waiheke Report* (Brooker & Friend Ltd, Wellington, 1987).
[580] See Waitangi Tribunal *Turangi Township Remedies Report* (GP Publications, Wellington, 1998) at 2.6.3; Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Brooker & Friend Ltd, Wellington, 1987), 14.2; Waitangi Tribunal *Waiheke Report* (Brooker & Friend Ltd, Wellington, 1987) at 41.
[581] Tariana Turia NZPD (17 September 1997, 563) at 4401-4402.
[582] 'Submission from the Mokai Patea Waitangi Claims Committee concerning the inquiry boundary' (Wai 903 Doc 2.57) at para 5.
[583] Ibid, at paras 11-12.

> marginalised in terms of their own particular social structures and the responsibilities that attach to them in terms of their tikanga.[584]

Rather than assisting with the rebuilding of the traditional structures, the current process can instead be seen as fostering the growth of larger groups because they are easier for the Crown to deal with. An analogy can be drawn to the short lived Runanga Iwi Act 1990, the long title of which stated that it was to provide "for the registration by any iwi of a body corporate as the authorised voice of the Iwi".[585] It was through these bodies that the Government was to devolve service provision functions from the old Department of Māori Affairs to iwi.[586]

Annie Mikaere wrote of this Act at the time that it was a breach of the Article II guarantee of *tino rangatiratanga* (self-determination).[587] Her argument was that rūnanga established under the Act must follow rules set by the Government, otherwise their supply of funds would evaporate.[588] The existence of such strict controls was said to be 'anathema to tino rangatiratanga.'[589] This sentiment was echoed in submissions to the select committee that considered the Bill, with the added allegation that it breached the Treaty principle of equal partnership.[590] Writing ten years later, Roger Maaka described the Act as 'legislative social engineering.'[591]

In the now defunct *Runanga Iwi Act* the Government sought to strictly define the form of the bodies that it would deal with. The Government has not been so explicit with its current Treaty settlement process and large natural groupings policy, but similarities between the settlement process requirements and the *Runanga Iwi Act* are striking, notwithstanding the Hon. Douglas Graham comments about claimant representation:

> Whilst those rights may be undeniably held by the whānau or the hapu of the time, it is the tribe's right to sit down and ask: 'Have we still got the right structure for us?' It is not for the Crown to get involved and start telling them what the structure should be.[592]

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[584] Sandra Lee NZPD (5 October 1999, 580) at 19593-19595.
[585] *Runanga Iwi Act 1990*, long title.
[586] See McLeay, E M 'Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation' in *Political Science* (Vol. 43, 1991) at 30, 37; Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill AJHR (I.10A, [1990]) at 3-4.
[587] Mikaere, A L 'Maori Issues' in *New Zealand Recent Law Review* [1990] at 122.
[588] Ibid.
[589] Ibid; see also the reporting back of the Maori Affairs Committee on the Runanga Iwi Act Repeal Bill, where the concern of submitters that 'rights under the Treaty of Waitangi to govern themselves without interference from the Crown were totally ignored, and that the concept of partnership was undermined by the one-sided accountability' Joy McLauchlan NZPD (23 April 1991, 514) at 1417-1419.
[590] Interim Report of the Maori Affairs Committee on the Runanga Iwi Bill AJHR (I.10A, 1990) at 5.
[591] Maaka, R 'A Relationship, Not a Problem' in Ken Coates and PG McHugh *Kokiri Ngatahi: Living Relationships* (Victoria University Press, Wellington, 1998) 203.
[592] Comments of Doug Graham in NZPD (17 September 1998, 571) at 12125.

The Government added that 'it is for the claimant group to decide who will represent them and to determine an appropriate way to select their representatives,'[593] but this must be read in light of the fact it is not open for claimants to organise in any way they wish. Indeed, the large natural grouping policy means it is not open for them to organise, as many hapū wish, along hapū lines in order to seek independent negotiations. The Crown has firmly entrenched is view that it will only negotiate at a particular level - iwi. The Crown, then, is simply engaging in a subtler version of the *Runanga Iwi Act* policy, and the Treaty-based objections to it apply just as strongly.

11.17.6.2 VESTING

By vesting assets in what may be the incorrect group, the Crown may be further compounding the Treaty breach caused by refusing to deal with smaller groups. By choosing not to distribute assets to traditional hapū, but to larger settlement entities, the Crown may be prejudicing the redevelopment, growth or even existence of these hapū. This would almost certainly be contrary to the aim of 'tribal restoration' as detailed by the Waitangi Tribunal.[594]

One example of where assets have been vested in a larger entity is the Ngāi Tahu settlement, where various assets and taonga were vested in Te Rūnanga o Ngāi Tahu (TRONT). It is also important to note here that the ownership of *pounamu* (greenstone jade) returned to Ngāi Tahu under the settlement was not returned to the traditional hapū in the Arahura River valley where the resource is located but to TRONT[595] and from them immediately to Mawhera Incorporation, a legal entity purporting to represent Poutini (West Coast) Ngāi Tahu but whose mandate was strenuously challenged.[596] At the Committee of the Whole House stage, amendments were proposed to the Ngāi Tahu settlement legislation that would instead vest these in hapū. In support of these amendments, Sandra Lee stated:

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[593] OTS, *Ka Tika,* supra n 439 at 45.

[594] See Waitangi Tribunal *Turangi Township Remedies Report* (GP Publications, Wellington, 1998) at 2.6.3; Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Brooker & Friend Ltd, Wellington, 1987) at 14.2; Waitangi Tribunal *Waiheke Report* (Brooker & Friend Ltd, Wellington, 1987) at 41.

[595] As part of the Ngāi Tahu settlement, the *Ngāi Tahu (Pounamu Vesting) Act 1997* returned all Crown-owned pounamu occurring in its natural state in Ngāi Tahu's tribal area to TRONT. Not all pounamu was returned however. The deed of transfer of the Arahura River pounamu from TRONT to the Mawhera Incorporation was appended to the Pounamu Submission of TRONT (Pounamu Submission NTP/20-MA/97/27).

[596] Most of the opposition was voiced at the Māori Affairs Committee reporting on TRONT, Ngāi Tahu (Pounamu Vesting) Bill 1997 and Ngāi Tahu Claims Settlement Bill 1998. The Parliamentary Select Committee was for many the last resort to find a forum to air their views, for a number of reasons. Some Ngāi Tahu argued that there had been inadequate consultation within Ngāi Tahu regarding the establishment of TRONT, the return of pounamu to TRONT and the Mawhera Incorporation, and the settlement in general. See for example, Pounamu Submissions NTP/15W, NTP/17, NTP/17A, NTP/18, NTP/19, NTP/19A, NTP/21, NTP/22, and NTP/25.

> I think that the Committee should focus its mind on the fact that the tangata whenua - the real tangata whenua - should be given the right to be the kaitiaki of these properties, because it was those hapu who had the properties taken from them and were denied access to their food-gathering reserves in the first place. It was not a corporate body that was denied access; it was actual hapu that were denied the right to their reserves in the first place. [597]

The rationale behind these amendments was to 'turn back the clock and restore to those people the kaitiakitanga and the property right that was originally under the mana whenua of the tangata whenua of the hapū in these various different areas.'[598]

However, the amendments were rejected, and the legislation was passed, vesting the assets in TRONT.[599] Sandra Lee was deeply opposed and asserted:

> How can it be a treaty settlement when fundamental issues such as mahinga kai are being taken by the Crown and given to a corporate body at the expense of the people who were the original owners?... They were identifiable then when they were taken, and their descendants are identifiable now... They have an absolute right to be the guardians of that which is theirs. But, more important[ly], may I say, they have a need as well. If this is meant to be a durable settlement, it should recognise that need. Those hapu depend on those mahinga kai areas. They have always sustained our people. They sustained us historically, and I can tell members from my personal experience as a member of Poutini Ngai Tahu that they sustain our people still... For the Crown to create a law that says that they have to go to a corporate body created by the Crown and purporting to be the representatives of people for all purposes as the appropriate way to go about it is even more onerous than the requirements for consultation under the Department of Conservation legislation. [600]

By handing control of assets to larger groups through legal entities the rights of hapū are compromised, and their ability to govern themselves and realise their internal self-determination rights and responsibilities are threatened. If the effects predicted by Sandra Lee are borne out across the country as a result of the settlement process and large natural groupings policy, the prospects of a string of new Treaty grievances are likely to emerge.

11.18 SUMMARY

Although *whakapapa* (genealogy) is very important when defining, forging and cementing relationships, both traditionally and contemporaneously, physically and metaphysically, at all levels of Māori society, neither *whakapapa* nor *ahuatanga* (tradition) were sole determiners of future action. It appears that the traditional levels of Māori socio-political organisation and representation varied depending on the particular functions at hand, and not solely on *whakapapa* form. The form (level) of representation depended on a

[597] Sandra Lee, NZPD (17 September 1998, 571) at 12117.
[598] Ibid, at 12117-12118.
[599] See the *Ngai Tahu Claims Settlement Act 1998.*
[600] Sandra Lee NZPD (17 September 1998, 571) 12124.

particular purpose or function ranging from providing *kai* (food) for a *hākari* (celebratory feast) to supporting kin in battle. It appears that traditional levels of representation ascribed to the adage – form follows function.

From a contemporary perspective, one of the main functions of Māori and First Nation collectives receiving Treaty settlement redress (including compensation, assets, acknowledgement, governance authority, recognition and representation rights) must be to represent all members of that collective appropriately in order for contemporary settlements to be durable and to avoid the emergence of new injustices by, inter alia, excluding individuals and constituent cells from participating in policy formation, settlement negotiations, governance generally and from receiving settlement benefits. Therefore, indigenous governance entities established, as part of Treaty settlement processes ought to effectively and appropriately represent constituent communities (in a general sense) that have historical continuity, continue to have *mana* (authority and legitimacy), and exercised stewardship over the traditional resources at the time of the initial colonial injustices. Furthermore, the current governance entity (or entities) of these contemporary indigenous polities must provide appropriate representation for all tribal socio-political groupings within the constituent cells at all levels, to enable them to exercise a degree of localised governance, autonomy and stewardship over returned settlement assets, again, at appropriate levels.

The Crown's unilateral policy of 'manufacturing' Māori representation at higher levels due to its policy of 'large natural groupings' (that is, at the level of large hapū, iwi or aggregate groups) is anathema to traditional Māori socio-political organisation. Government driven agendas and political efficacy do not legitimate social organisation. Alan Ward even boldly asserted that 'it should be recognised that most of the Mäori structures above the level of hapū clusters are post-colonial in any case.'[601] Such organisational processes must come from the people through their respective cultural norms and values, rather than being imposed from outside.

Hapū appeared to be the most significant socio-political group in traditional Māori society most of the time. Iwi were more accurately described as alliances of hapū that waxed and waned in strength and coherence over time. Hapū, or sections of hapū, left existing alliances for various reasons and joined or formed others. Reorganised alliances validated their formation by choosing a common ancestor to serve as a symbol of, and focus for, their unity. While descent was an important basis for alliance, the choice of focal

[601] Ward, A, *The National Overview: Waitangi Tribunal Rangahaua Whanui Series* (Waitangi Tribunal, Wellington, 1997) at 141.

ancestor followed, rather than dictated, political alignment. This situation indicates again that form followed (it did not force) function.

Although the common ancestors of a hapū are typically more recent than those of the iwi to which they belong, some hapū have greater genealogical depth and more living descendants than some of the officially recognised iwi, such as Ngāti Mahuta in Waikato-Tainui. It is the author's view that the key difference is not one of genealogical depth or size but of function. Both hapū and iwi have the same form in terms of constituent marae, whakapapa, takiwā, population and acknowledgement from other tribes. However, the function of each polity varies on different levels and all groups at all levels need to accommodate accordingly. Moreover, hapū traditionally exercised and continue to exercise control over resources and activities at the community level and managed their own external and internal relations, while iwi functioned, minimally, as a conceptual political group.

Therefore, contemporary policy levels of Māori representation need to focus on allowing the function of the entity to dictate the form of representation. Contemporary Māori units should not focus on whether hapū or iwi constitute the tribe (that is, the form of the tribe). Instead, Māori units should look more openly in terms of groups combining for practical functions (no matter how the groups may define themselves), then identifying an appropriate name for that function and then basing the group's form and name upon appropriate genealogical links.[602] Māori were pragmatists and it is the author's view that a focus on function, instead of form, was tikanga. Hence, the key issue for deciding an appropriate level for contemporary group representation may not be one of status, but one of reconciling the tension between the need to collectivise for economic reasons (as in asset management and political representation) and the desire for local autonomy (as consonant with tradition and individual enterprise). It may then be considered that the issue of autonomy and self-governance are the same, whether or not the constituent cell describes itself as a hapū, sub-hapū, iwi or pan-groups.

Accordingly, the central question is whether a strategy for achieving unity while respecting autonomy can be agreed upon. That, in turn, may depend on the existence of a structure that shifts the focus from the centre to building the strength of each group, once a central capital base has been adequately secured for future generations. It might also be considered that the responsibility of tribal leaders is always to identify as to what is most

[602] Durie, E, 'Entities, Tribes, Beneficiaries and Members' (Unpublished Draft Governance Paper, Law Commission, Wellington, 2004) at 9. Durie quotes: 'Iwi Nicholson of Otaki, for example, has referred to the carefully arranged marriages of the 1820's to establish connections between migration groups and local hapu in Rangitikei to Horowhenua. He referred to certain families who descend from such marriages as the 'takawaenga' – those who stand in the middle to unite both groups.'

likely to advance the long-term benefit of the people they represent and to be guided by those factors, rather than by preconceptions of status. The focus ought to be on function not form.

As Durie J opined:

> The question then is substantially one of economy – marshalling assets to achieve greater investment effectiveness, a more skilled infrastructure at less cost (by avoiding duplication) and more power when treating or litigating with third parties.[603]

It appears that aggregation was tikanga. The issue of assessing the function, and then a form of organisation commensurate with the particular function, is tikanga.

Change to social organisation through new political groupings for the purpose of fulfilling a new function contributed to the temporary submergence of individual hapū. This was manifest to some extent in the great political and religious movements and alliances of the post-contact period. These movements, including the rūnanga movement, had many functions such as desire to enhance Māori identity and the desire for internal self-determination in the face of the growing power of the colonial or settler government. One of the most powerful motives for kotahitanga (union) was to protect Māori lands from the ravages of clandestine land-selling to Crown agents, and later, to rapacious private interests as well, by irresponsible individuals.[604]

There were at least two decades from the late 1850s when the Kīngitanga[605] was regarded as holding the mana of the lands of those hapū that opted to join the King, a matter, although not generally recognised, that was more often defined by *whakapapa* (genealogy) than by ideological choice. Pou or mountain markers of the boundaries of the King's mana were said, by the most committed Kīngitanga adherents at least, to include not only Karioi, near Aotea on the west coast of Waikato, Taupiri, Maungatautari and Hikurangi in southern Waikato, but also Tongariro, Ruapehu, Tītīokura between Taupō and Hawke's Bay, Pūtauaki in the Bay of Plenty, Kaimanawa towards Tauranga, and Ngongotahā, west of Rotorua.[606] This area included the whole of the Taupō district

[603] Ibid, at 10, para 31.
[604] Ballara, supra n 395 at 192
[605] The Kīngitanga or King movement was the widespread Māori movement from the late 1850s to choose and adhere politically to a Māori King as a protector of Māori national identity, and as the focus of Māori self-government, although most adherents accepted the supreme authority of the British Queen. The lands of Kīngitanga followers were placed under the King's mana to protect them from alienation and other malign colonisation processes and institutions. Pōtatau Te Wherowhero of Ngāti Mahuta, a Waikato-Tainui tribe, became the first King. Within two years Potatau was succeeded by his son, Matutaera or Tāwhiao. The adherents of the King movement included many in the central North Island, especially in Tauranga, north-west Rotorua and the coastal Bay of Plenty, Whakatāne, Kaingaroa, Tāupō and upper Whanganui. Most Arawa hapū did not join, although contingents of some groups (particularly Ngāti Rangiwewehi and some hapū of Ngāti Pikiao/Waitaha) did become Kīngitanga adherents.
[606] *Te Paki o Matariki*, (25 June 1893) at 3.

(including most of the Tongariro National Park), the upper Whanganui region, the upper Rangitīkei, Kaingaroa, and large areas of the Bay of Plenty, including the hinterlands of Tauranga and Whakatāne, and at least some Arawa territories. There were other adherents from Te Urewera, the eastern Bay of Plenty, the East Coast and elsewhere, outside the central North Island. The lands placed under the mana of the King were intended to be the 'Crown lands' of the Māori Kingdom.[607]

As an expression of identity, the King movement had its limitations, even at the height of its influence. The old patterns of hapū independence tended to reassert themselves: they had never been fully subjugated and it was always a matter of voluntary association with the Kīngitanga. Hapū independence was most evident in times of crisis and disillusionment, as it became increasingly manifest that despite its great efforts, the Kīngitanga could not protect its peoples from the military power of the British Empire, and later from the settler forces of militia and Armed Constabulary. But the King movement was reinforced by the emergence of Pai Mārire[608] as a prophetic spiritual force. It was no accident that many of the same peoples who had given their allegiance to the Kīngitanga turned in hope to Pai Mārire. The people of the Kīngitanga and Pai Mārire were exploring alternative political and religious groupings (forms) to the authority of the chiefs of hapū because of the new circumstances (functions) that confronted Māori due to the colonisation process.

Therefore, historical evidence suggests that measuring Maori levels of representation in relation to function and economy, rather than in terms of a fundamental view about hapū and iwi form, is a more appropriate approach. Alan Ward even asserted that 'Mäori structures above the level of hapū clusters are post-colonial in any case.'[609] Still, Māori reflexively de-traditionalised and re-traditionalised their socio-political form according to the new functions of their day, whether it was to aggregate at differing levels, or to revert back to their basic form, which appeared to be the hapū. The groups would then search for an appropriate identity to compliment the new group either in distant or

[607] *Te Hokioi*, (15 June 1862), Letters from chiefs and tribes dated 1859.

[608] Pai Mārire (or Paimārire) was the religious movement which developed from the visions of the Taranaki prophet, Te Ua Haumēne in the 1860s. It was based on a reinterpretation of mainly Old Testament Christianity, purified, in Te Ua's view, from missionary error. It foresaw the restoration of the Māori birthright in their own promised land, but by good and peaceful means. Some followers later developed a military wing of the movement, preaching the use of violence to attain the Māori millennium. This military sect became known as the Hauhau movement. See Elsmore, B *Mana from Heaven: A Century of Maori Prophets in New Zealand* (Reed Books, Auckland, 1989); Clark, P, *Hauhau: The Pai Marire Search for Maori Identity,* (Auckland, 1975); and Babbage, S *Hauhauism* (Wellington, 1937).

[609] Ward, A, *The National Overview: Waitangi Tribunal Rangahaua Whanui Series* (Waitangi Tribunal, Wellington, 1997) at 141.

close whakapapa connections or through a common incident. Indeed, the traditional levels of Māori representation were ambiguous and dependent on function not form.

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Kāore ā te rākau whakāro, Kei te tohunga te whakāro. – The insight is not in the wood. It is in the artist (expert).[1]

He rei nga niho, he paraoa nga kauae - A whale's tooth in a whale's jaw.[2]

12.1 INSTITUTIONAL REPRESENTATION AND SELF-GOVERNMENT

Indigenous institutional representation is inextricably connected to self-government and internal self-determination in practice. Indigenous self-government and internal self-determination have emerged as principal matters being discussed in international, national and local fora. To many non-indigenous people, internal self-determination and self-government for Indigenous People remains a perplexing challenge. What does it mean? How would it work? How would it impact on the economy? How would it affect non-indigenous people? What good would it do for Indigenous Peoples? But from the point of the Indigenous Peoples themselves, the issue is how to survive as distinct peoples and this means reaffirming and reinforcing their power and ability to exist as distinct collectivities – as nations within. It is the reaffirmation of what are in the nature of collective rights that is summarised in part in the demand for internal self-determination and self-government – the condition for the exercise of any collective right.

As a juridical concept, self-government suggests that Indigenous Peoples should have the authority to govern themselves and to manage their own affairs, but it does not indicate if that authority is to be limited or absolute. It is generally understood that self-government for Indigenous Peoples does not imply secession and independence - on the contrary in my view. Whatever self-governance institutions Indigenous Peoples in Canada and New Zealand eventually develop would have to be constituted as governments and legal entities within the Canadian and New Zealand political systems. But this begs the question of what institutional form such governments would take. How would they be constituted? What powers would they have? What relationships would they have to other governments in the Canadian and New Zealand political systems? What influence would

[1] Pou, H.H, 'A Short List of Whakatauki' (Unpublished Manuscript in author's possession, Taitokerau Whakatauki, no date) at 9. This whakataukī suggests that the material one works with does not dictate what becomes of it, but it is the artist who creates from it who sees what is in it. It is the worker's skill, which informs the task not the object being worked on. In a governance context, this whakataukī perhaps suggests that the respective governance structure a group creates is not the key to success; it is the people and leadership that make the difference.

[2] This whakataukī highlights how one must have the right qualifications (people) and perhaps tools such as institutional structures for great enterprises such as actualising internal self-determination within the nation-state.

they have over non-indigenous peoples within their governance territory? What kind of relationships could they develop with other indigenous governments elsewhere?

This thesis cannot answer any of these questions in a final and definitive manner. Only a political process can do that. But the thesis can try to bridge the gulf between indigenous self-government as a concept and its practical realisation by examining how internal self-determination and self-government could be put into place. It assumes that in recognising an indigenous right to internal self-determination and self-government, we are concerned with establishing new institutions to respond to and appropriately represent indigenous demands for self-government. Fundamentally, what we are dealing with when talking about forms of indigenous self-government are the various institutional arrangements that can be put into place to enable the Indigenous Peoples to make their own collective decisions – to effectively govern themselves.

The first step then is to identify what these institutional arrangements might be. This analysis will reveal that not only are there many institutional arrangements possible, but that any national policy on indigenous self-government would have to consider several different institutional forms to meet indigenous demands for self-government. This has implications for what the right and concomitant responsibilities to indigenous self-governance can be taken to mean.

The second step is to review how authority could be accorded to indigenous institutions. A major part of this section of the thesis focuses on the ways in which indigenous self-government institutions could be constituted and their authority recognised. The central controversy involved with establishing indigenous self-government institutions remains the relationship these new institutions would have with existing governments. The controversy is over whether this authority should be exercised as delegated authority or as inherent authority and whether or how it should be constitutionally entrenched.

12.2 INSTITUTIONAL REPRESENTATION – SELF-GOVERNMENT LEGAL ENTITIES

In a New Zealand Māori self-governance context, a plethora of Māori governance entities emerged in anticipation of the devolution of social services to iwi pursuant to the now defunct *Runanga Iwi Act 1990*. Consequently, several institutional governance bodies may be seen to represent whānau, hapū, iwi, confederations of tribes and pan-Māori groups, including:

- Māori trusts and incorporations under the *Te Ture Whenua Maori Act 1993*;

- trust boards;
- incorporated societies;
- private and charitable trusts;
- private statutory bodies;
- Māori councils;
- federated Māori authorities, and
- rūnanga.

Similar institutional representation challenges have emerged for the First Nations of Canada. A plethora of governance entities has emerged purporting to represent the immense diversity of contemporary First Nations socio-political organisation and existential realities. Canada has indigenous institutions representing status and Treaty Indians, Metis, Inuit and non-status Indians at the national, regional and local levels. Under umbrella institutions are subsidiary entities such as trusts and corporations with various functions. The legal institutions that First Nations have established include:

- *Indian Act* Bands (elected or appointed by hereditary custom);
- Tribal Councils;
- Tribal Confederations;
- Pan-Tribal Confederations such as the Iroquois Six Nations Confederacy;
- Umbrella Organisations;
- Pan-Indian, Metis, Inuit and Non-Status Indian Organisations;
- Treaty Settlement Organisations; and
- Special Purpose Organisations.

The First Nations have special purpose entities, gender specific entities and other legal entities to assist with social service and economic development. Contemporary Treaty settlement agreements provide scope for consolidating these entities under one umbrella organisation to represent particular groups at a 'nation-to-nation' level in its treatment with outsiders.

Hence, there is diversity in name, number, function, structural form and use of governance entities and institutions that may represent whānau, hapū, iwi and other Māori groups, and tribes, clans, houses, bands, and other First Nations or indigenous groups in Canada in different places, situations and contexts. Some contemporary indigenous political institutions have been created by statute for specific governance and management purposes while others have been established by customary means and have been functional and effective even without legal sanction. This chapter will elaborate more extensively on contemporary indigenous institutional representation in Canada and New Zealand to investigate the complexities and strengths and some of the difficulties of realising and

actualising internal self-determination through Treaty settlements and other arrangements that provide for a degree of self-governance as 'nations within.'

12.3 INDIGENOUS SELF-GOVERNMENT

12.3.1 SELF-GOVERNMENT DEFINITION

Self-government can be defined as government by 'self,' over 'self.' In the context of community, this involves the communal group having the ability to govern their own affairs.[3] Broadly speaking, it has been noted that 'beyond this level of generality, self-government is not a term that carries with it a shared, determinate meaning.'[4] In the international arena self-government equates with self-determination but it is only one aspect of self-determination. In the 1991 *Nuuk Report on Indigenous Autonomy and Self-Government,* self-government was described as an integral 'part' of self-determination,[5] while the *Draft Declaration on the Rights of Indigenous Peoples* noted that self-government is one 'specific form' of the right to self-determination.[6]

Indigenous self-government at least involves self-steering;[7] a political unit that has jurisdiction over internal matters while external affairs are managed by some larger political system.[8] Canada is perhaps an example of this limited type of self-governance pursuant to the provisions of the *Indian Act,* although often regarded as a restrictive, colonial legislative regime; various First Nations have used this Federal Act to assume certain powers of self-administration or management over their own communities. However, while band members can elect their own council governments, who then have municipal-type legislative and administrative responsibilities, these powers are constantly subject to approval and restriction by the Minister for Indian Affairs and Northern Development. Such a system poses the critical question of whether a certain degree of control is required before a community can be said to have a meaningful level of self-government. Self-government under the *Indian Act* therefore appears to do little to facilitate actual or meaningful self-government.

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[3] See Macklem, P 'First Nations Self-Government and the Borders of the Canadian Legal Imagination' in *McGill Law Journal* (Vol. 36, 1991) 382 at 388.
[4] Idem.
[5] United Nations Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government,* UN Doc. E/CN.4/1992/42, Nuuk, Greenland, 24-28 September, 1991)
[6] United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Declaration on the Rights of Indigenous Peoples* (1995) 34 I.L.M 541 at Article 31.
[7] Deutsch, K.W, *Politics and Government: How People Decide Their Fate* (Houghton Mifflin Co., Boston, 1970) at 159.
[8] Ibid, at 142.

The powers of self-government sought by indigenous communities are likely to be somewhat variable. The degree of autonomy asserted would depend upon the needs of each community and function(s) of the respective governance entity, hence the futility of seeking one all-inclusive ('one size fits all') definition and policy of what the right to self-government involves.[9] Given the variance in context of each indigenous community, the meaning of self-government when asserting an indigenous claim also varies. Hence the complexities and challenges in achieving a universal definition and policy of this right which cannot be over-stated.

Claims to self-government involve assertions of governmental control. Governmental control implicates the matters that all governments undertake, regardless of ethnicity, including law making, administration, policy setting and the provision of services. Self-government in an indigenous context is no more and no less susceptible of definition as opposed to specific expression then non-indigenous self-government.

What is clear is that definitions represent positions taken by parties who are competing to achieve a variety of goals.[10] These definitions are merely of theoretical importance. They are tools of debate that are of little significance once agreement is reached. Upon specific recognition of the right to indigenous self-government in Canada and New Zealand, the implications of this amorphous term will be of much greater significance that any generic pre-ordained meaning assigned to it.

This existential reality was identified in the 1995 policy announcement of the Canadian Federal Government concerning indigenous self-government. According to the announcement, the government had developed an approach to implementation that focused on reaching practical and workable agreements on how self-government would be exercised, rather than trying to define it in abstract terms.[11] Given the varying context specificity of each indigenous group throughout Canada, it was acknowledged that implementation of the inherent right could not be uniform or result in a 'one-size-fits-all' form of self-government.[12] Instead, the government recognised:

> The inherent right is based on the view that the aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to

[9] See Elliot, D.W (ed) *Law and Aboriginal Peoples of Canada* (2nd ed, Captus Press Inc., Ontario, 1994) at 193.
[10] See Guntram, G, *Self-Determination in Western Democracies: Aboriginal Politics in a Comparative Perspective* (Greenwood Press, Westport, 1992) at 2.
[11] Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government,* (Federal Policy Guide, Ottawa, 1995) at 1.
[12] Ibid, at 4.

their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.[13]

The realisation of self-government in Canada, as opposed to New Zealand, is a lot further advanced in terms of policy, practice, scope, form and possibilities. For status Indians a number of initiatives have increased local control under the *Indian Act* and allowed the negotiation of new legislative frameworks to replace that Act. However, many First Nations maintain that any form of delegated authority is inconsistent with an inherent right of self-government. Inuit have pursued self-government through public government arrangements in the north in conjunction with land claims, while the Métis have advanced various claims for land and self-government.

12.3.2 SELF-GOVERNMENT - FIRST NATIONS[14]

The administration of Indigenous Peoples has long been tied to the level of non-indigenous interest in First Nations territories. At the turn of the nineteenth century, official policy towards First Nations shifted from securing allegiance and mutual protection to assimilation or removal to allow for settlement. Governments moved in during the Gold Rush era in Canada to supervise, if not regulate, indigenous life, but only for those areas under development pressure. The *Act to Encourage the Gradual Civilisation of Indian Tribes 1857* promulgated the explicit assimilation policy. Indians who forfeited their right to register as Indians were extended the 'privilege' to vote like Europeans.

Accordingly, in the *British North America Act 1867* (BNA Act), the First Nations were ignored. Section 91(24) of the BNA Act gave the Federal government jurisdiction over 'Indians and lands reserved for the Indians.' Thus, Indian affairs, policy, and legislation were placed under Federal jurisdiction and authorities developed an elaborate and uniform system of external paternalistic controls.

The first *Indian Act* amalgamated pre-confederation legislation passed by Parliament in 1876 and laid down broad outlines of tutelage over registered Indians on reserves established under *Gradual Civilisation Act 1857*. A Supreme Court decision in

[13] Ibid, at 3.

[14] For a good reference on self-government in Canada, see Wherrett, J, *Aboriginal Self-Government.* (Law and Government Division CIR 96-2E. Political and Social Affairs Division, Parliamentary Research Branch, Library of Parliament, Ottawa, 27 September 1999, Revised 1 August 2000). Perhaps one of the better studies of aboriginal self-government in Canada appears to be Boldt, M, *Surviving as Indians: The Challenge of Self-Government* (University of Toronto, Toronto, 1993). For a more ideological critique of the politics behind self-government, see Mawhiney, A-M, *Towards Aboriginal Self-Government: Relations Between Status Indian Peoples and the Government of Canada, 1969-1984,* (Garland, New York, 1994). See also Hylton, J, *Aboriginal Self-Government in Canada* (Purich, Saskatoon, 1994).

1939 also brought Inuit within Federal responsibility.[15] Métis, with the exception of those living in Métis settlements in Alberta, were not subject to special Federal or provincial legislation.

Early provisions of the *Indian Act* discriminated against Indians by denying them the right to vote, to purchase and consume alcohol, and to participate in religious ceremonies such as the potlatch and sun dance. Although First Nations had a minor say in their affairs under the *Indian Act* band system through the election Band Chief and Council system, preponderant authority rested with increasingly influential Indian Agents. Now armed with the controlling mechanisms of the *Indian Act*, more generous funding and greater administrative apparatus, the Indian Agent operated with considerable freedom on the reserves. Some exercised their powers gently; others ruled more firmly. In general, however, they represented the epitome of government paternalism, the embodiment of the idea that non-indigenous governments knew what was best for Indigenous Peoples.[16]

Furthermore, in 1927 the *Indian Act* was amended to require Indians to obtain permission from the Superintendent-General of Indian Affairs to solicit funds for making legal claims, which restricted their capacity to seek redress in court for Treaty breaches. This draconian measure was not repealed until 1951. The *Indian Act* was again amended in 1930, making it an offence for pool hall operators to allow inordinate frequenting of poolrooms by Indians. In addition, residential school established to assimilate Indians increased. Consequently, the First Nations people were second-class citizens vulnerable to marginalisation, pauperisation, inferiorisation and discrimination.

Up to the 1950s, government policies attempted to assimilate Indigenous Peoples into the larger non-indigenous society. Indian Band Councils exercised limited; Federally delegated power to govern a land base within reserves and the primary decision-making responsibility rested with the Minister of the Department of Indian Affairs and Northern Development (DIAND). In the years after World War II, the increasing expansion of the Canadian population and economy meant that many Indigenous People were no longer able to enjoy their traditional livelihoods. The need for social assistance and unemployment insurance programs grew. Efforts to create short-term employment opportunities began to increase. Federal government housing programs were introduced.

[15] *Re Eskimoes* [1939] S.C.R 104 (S.C.C.). 5 April 1939.

[16] For a strongly worded critique of this process, see Adams, H, 'Red Powerlessness: Bureaucratic Authoritarianism on Indian Reserves' in *Cornell Journal of Social Relations,* (Vol. 18, No. 1, Fall, 1984) at 28-40. As this related to Canadian Indigenous People in the 1960s, see Hawthorne, H.B, *A Survey of the Contemporary Indians of Canada* (2 Vols, Indian Affairs Branch, Ottawa, 1966-67).

Government grew and grew, but it was not indigenous self-government. It was Crown government imposed on Indigenous Peoples.

In the 1950s, the transfer of Indian Affairs programs to bands, provinces and other Federal agencies commenced. The devolution of programs continues to the present day. In the late 1960s, the Federal government considered abandoning the *Indian Act* and the Department of Indian Affairs arrangements. The Liberal White Paper of 1969 called for the elimination of Indian status and the removal of all special privileges for First Nations people. National and regional aboriginal organisations were galvanised into action, using the assault on the White Paper as a springboard from which they criticised the very foundations of government paternalism in Canada. In the process of asserting their rights to continue to exist as 'Indians' and to have their special rights as Indigenous Peoples recognised, First Nations in Canada began to assert their right and their ability to manage their own affairs. It was in the burst of the late 1960s radicalism and activism that one finds the roots of the contemporary indigenous land claims and self-government movements. First Nations made it abundantly clear that they wanted the power of self-government.[17]

Many First Nations communities began to expand the administrative capacity of their band councils and institutions that were begun originally as the result of Federal legislation. As this happened, they began, in many cases, to perceive a growing need for the efficiencies of scale and the benefits of larger political units, so they formed tribal councils, amalgams of two or more band councils, as well as a raft of regional and provincial/territorial level organisations. Often, the programs and services that were provided through various First Nations organisations were found to be culturally inappropriate by those who administered or received them. Consequently, particularly as the 1980s unfolded, efforts were made to redesign these programs and services. Greater involvement on the part of elders and traditional leaders was sought. Bureaucratic fragmentation was replaced by more holistic approaches, particularly with regard to social provisions. Efforts were made to replace justice as the administration of punishment with justice as community control.

In 1982, a Special Committee of the House of Commons on Indian Self-Government (the Penner Report after Committee chair Keith Penner)[18] was appointed to review legal and institutional issues related to the status, development and responsibilities of band governments on reserves. Its 1983 report recommended that the Federal

[17] Weaver, S, *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970* (University of Toronto, Toronto, 1981).
[18] Canada, *Indian Self-government in Canada: Report of the Special Committee,* (Penner Report, Queen's Printer, Ottawa, 1983).

government recognise First Nations as a distinct order of government within the Canadian federation, and pursue processes leading to self-government. It proposed constitutional entrenchment of self-government and, in the short term, the introduction of legislation to facilitate it. The Penner Report presented the basis for a significant departure from then current Federal policies regarding Indian bands.[19] The report raised the profile of indigenous issues and had a significant impact on the constitutional debate. But while greeted with enthusiasm by First Nations organisations, which saw the Penner Report as a major leap forward in government recognition of indigenous aspirations, it was quickly pushed aside by the Federal government, which opted for a much slower process of administrative and structural change.[20]

12.3.3 CONSTITUTIONAL SELF-GOVERNMENT CHANGES IN CANADA

Over the next few years, constitutional issues dominated discussions of indigenous self-government. In Canada there have been dramatic developments relating to indigenous self-government. It has been argued that existing aboriginal rights are protected by s. 35(10), *Constitution Act 1982*. Consequently, certain aboriginal people in Canada hold a constitutionally recognised right to local self-government. In *Eastmain Band v Gilpin*[21] arguments were developed that the over-regulation under the *Indian Act* of the affairs of the Bands is an affirmation of the right to self-government rather than an extinguishment. Consequently, the right to self-government still exists and should be protected under s. 35(1) of the *Constitution Act 1982*.

During the 1980s s. 37(1) of the *Constitution Act 1982* required the convening of constitutional conferences involving the Prime Minister of Canada and the First Ministers of the Provinces. During these conferences constitutional matters directly affecting aboriginal peoples of Canada were to be on the agenda. Moreover, aboriginal peoples were to be invited to attend and participate in these conference discussions. These conferences (the last in 1987) failed to advance the issue of self-government and finalise a national model. Instead the development of local and regional self-government models emerged.

For the Federal and provincial governments, Indigenous Peoples' self-government is also a matter of authority, but authority to these governments means their exclusive authority under the Constitution to exercise full jurisdiction in relation to various matters.

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[19] It should be noted that the Penner Report Committee examined only 'Indian' self-government, not self-government for all 'Indigenous Peoples', i.e. Metis, Inuit and non-status Indians were excluded from the Committee's terms of reference and mandate.

[20] Asch, M, 'Penner and Self-Government: An Appraisal' in *Canadian Dimension* (Vol. 19, No. 5, 1985) at 14-17.

[21] [1987] 3 CNLR 54, 67.

Under the current constitutional framework, the Federal and provincial governments assert, only delegated jurisdictional powers can be provided to Indigenous Peoples, and this must be accomplished through various forms of Federal and provincial legislation.

On the other hand, First Nations, Inuit and Métis strive to articulate the inherent right to self-government in practice as well as in principle. In practice, they simply, if sometimes with great opposition from the governments of the Crown, took more control over political, social and economic programs. In principle, they sought recognition of their inherent right of self-government and other indigenous rights in the Canadian Constitution. These demands led to the recognition and affirmation of existing aboriginal and Treaty rights in the *Constitution Act, 1982*. Four constitutional conferences were held between 1983 and 1987 to attempt to further define those rights. The first amendments to the 1982 Constitution were agreed to at the 1983 conference. They included recognition of rights arising from land claims agreements and a commitment to include Indigenous Peoples in constitutional conferences dealing with their rights but this commitment was not honoured. In the conferences that followed, indigenous self-government emerged as the dominant issue. First Nations presented the matter as one of self-determination, and argued that their pre-existing right to govern themselves should be entrenched in the national constitution. As debates continued, the gap seemed to widen rather than narrow. First Nations leaders spoke of a 'third order' of government, and of the establishment of Indigenous Peoples as permanent players in the highest level of national representation and administration.[22] However, in the absence of a clear understanding of the content of a right to self-government, parties failed to reach an acceptable agreement.

Following the failure of the 1987 First Ministers' Conference on Aboriginal Rights to produce a self-government agreement, governments turned their attention to the broader constitutional agenda. In the process, Indigenous Peoples were excluded from participation in the constitutional negotiations that led to the 1987 Meech Lake Accord. This produced strong indigenous protests that contributed to the Accord's defeat in 1990. After much negotiation, the Provincial Premiers, Territorial Government leaders, indigenous organisations and the Federal Government agreed, as part of the 1992 Charlottetown Accord (the Accord), on amendments to the *Constitution Act, 1982* that would have included recognition of the inherent right of self-government for Indigenous People. For the first time, indigenous organisations had been full participants in the talks; however, the Accord was rejected in a national referendum. With regard to the indigenous provisions,

[22] For a politician's analysis of the concept of third order of government, see Penner, K 'Their Own Place: The Case for a Distinct Order of Indian First Nation Government in Canada,' in Long, and Boldt, (eds) *Governments in Conflict: Provinces and Indian Nations in Canada* (Toronto University Press, 1988).

concerns over the content of self-government continued to be voiced. Ironically, many Indigenous People also rejected the Accord. Some felt that it limited the powers of their governments too much. They pointed to the application of the Charter and worried about the implications of this approach on a number of levels, particularly with reference to traditional customs and institutions. They also looked, with some trepidation, at a provision in the Accord that stated that the actions of Aboriginal Governments could not be inconsistent with those laws that are essential to the preservation of peace, order and good government in Canada.

These were not the only objections to the Accord on the part of Indigenous Peoples. Some asserted that the proposed constitutional provisions would reduce the force of the historic Treaties, which many First Nations had made with Canada in the seventeenth, eighteenth and nineteenth centuries. They feared that the amendments would make these Treaties subject to the powers of the Federal and provincial governments and critically alter the nature of the Treaties as 'nation-to-nation' arrangements. Moreover others, including many indigenous women, rejected the Accord because they believed that current day indigenous governments are not fully accountable to their communities and are not fully committed to protecting all of the human rights of their people.

The Federal Government did not wait for constitutional change to proceed, in a limited way, with First Nations self-government. In March 1985 the Federal Government adopted a 'two-track' approach to self-government. On one track were constitutional negotiations. On the second track the government introduced community-based negotiations with Indian bands, and a tripartite process between the Federal Government, Provincial Governments, and Métis and Non-Status Indians. A cabinet Minister was designated Interlocutor for Non-Status Indians and Métis and was to serve as lead Minister for tripartite negotiations.

In April 1986, the Federal Government released its Policy on Community-Based Self-Government Negotiations. This was an initiative to increase band control and decision-making and provide more scope for community government than was possible under the *Indian Act*, through legislated self-government agreements. While many First Nations leaders and groups rejected the approach – which retained the paternalistic, centralising influences of government-dominated administration and which included a rejection of the concept of 'inherent' indigenous rights to govern themselves – other communities entered into negotiations to transfer control into their hands.

The Sechelt Band in BC was the first to capitalise on this opportunity when they negotiated a self-government agreement in 1988, but their model was criticised as being

little more than municipal administration.[23] Community-based self-government proved, in the words of Ron Irwin, Federal Minister of Aboriginal Affairs, to be an 'expensive failure.' Negotiations dragged on with little success. As late as 1993 over 175 Nations were negotiating with the government and, according to one study, some 50 were near agreements. But that is where almost all of them stalled. With First Nations leaders continuing to push for sweeping constitutional change, the tightly bounded negotiations under community self-government initiatives appeared to be little more than a pale reflection of indigenous aspirations.

During the debates leading up to and following the referendum of October 1995, Indigenous Peoples raised issues related to their self-determination in the event of Quebec's secession. The Crees of Quebec argued that no annexation of them or their territory to an independent Quebec should take place without their consent, and that if Quebec has the right to leave Canada then the Cree people have the right to choose to keep their territory in Canada. Following the referendum, indigenous groups asserted that they must have a role in any future constitutional discussions.

12.3.3.1 ROYAL COMMISSION ON ABORIGINAL PEOPLES

A year before the Charlottetown referendum, in an attempt to appease First Nations for the political conflicts stirred up by the Meech Lake Accord, Prime Minister Brian Mulroney had established the Royal Commission on Aboriginal Peoples (RCAP). The second item in the terms of reference called on the Commission to investigate self-government and, further, observed that:

> The Commission's investigation of self-government may focus upon the political relationship between aboriginal peoples and the Canadian state. Although self-government is a complex concept, with many variations, the essential task is to break the pattern of paternalism which has characterised the relationship between aboriginal peoples and the Canadian government.[24]

The RCAP has, in a variety of statements, indicated its strong support for the expansion of aboriginal self-government – with this concept emerging at the centre of its initiatives and recommendations. The RCAP released its final report on 21 November 1996. Volume 2 of the five-volume report addressed self-governance issues built on the recognition of aboriginal governments as one of three orders of government in Canada. Among the

[23] Etkin, C.E, 'The Sechelt Indian Band: An Analysis of a New Form of Native Self-Government' in *Canadian Journal of Native Studies,* (Vol. 8, No. 1, 1988) at 73-105.
[24] Royal Commission on Aboriginal Peoples, 'Summary and Terms of Reference,' (Ottawa, August 1991).

recommendations, the report called for both new legislation and bureaucratic reorganisation by the Federal Government. Recommendations included:

- a new Royal Proclamation to set out the principles for a new relationship and outline new laws and institutions that would be established;
- passage of an Aboriginal Nations Recognition and Government Act;
- elimination of the Department of Indian Affairs and the position of Minister of Indian Affairs;
- establishment of a new Cabinet position, the Minister for Aboriginal Relations, and a new Department of Aboriginal Relations to negotiate and manage agreements with Aboriginal nations. A Minister of Indian and Inuit Services and a new Indian and Inuit services department would be responsible for delivering services at the Federal level;
- passage of an Aboriginal Parliament Act to establish a representative body of Aboriginal peoples that would evolve into a House of First Peoples and become a part of Parliament.

While the RCAP asserted in Partners that it would generally be preferable for Indigenous Peoples to implement their inherent right of self-government through agreements with Federal and provincial authorities, it concluded that there are persuasive reasons for thinking that in some jurisdictional areas, Indigenous Peoples may implement their right of self-government on their own initiative, without the concurrence of Federal or provincial authorities. If Canadians are going to forge a new relationship with Indigenous Peoples, the Royal Commission suggested, then this relationship needs to be built on mutual recognition and respect:

> ... the time has come for tears of sorrow to be wiped away and our throats cleared of dust, and for us to speak in a frank and open fashion about our future in this land that we share, Aboriginal peoples and newcomers alike.[25]

But the RCAP, millions of dollars over budget and several years overdue, lost much of its steam and has, on the self-government front, been over-run by events.[26]

The Federal government responded to the RCAP report in January 1998 with *Gathering Strength – Canada's Aboriginal Action Plan,*[27] which included a Statement of Reconciliation expressing Canada's regret for past actions that had resulted in damage to Indigenous Peoples and communities, and an agenda for the development of a new relationship between the Federal Government and Indigenous People. The agenda centres

[25] Royal Commission on Aboriginal Peoples *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution,* (The Royal Commission on Aboriginal Peoples, Ottawa, 1995).
[26] The final report of the Royal Commission on Aboriginal Peoples was released in 1996. Attention had focused on the demand for a major increase in Federal expenditure on aboriginal programming.
[27] Royal Commission on Aboriginal Peoples *Gathering Strength – Canada's Aboriginal Action Plan* (The Royal Commission on Aboriginal Peoples, Ottawa, 1995).

on four objectives: renewing the partnership; strengthening indigenous governance; developing a new fiscal relationship; and supporting strong communities, people and economies.

Gathering Strength noted that the Federal Government had recognised the right of self-government as an existing inherent aboriginal right within s. 35 of the *Constitution Act, 1982*, and outlined self-government processes that are ongoing. With regard to the RCAP recommendations calling for a restructuring of Federal institutions, the government responded that it was 'open to further discussions on the departmental and institutional arrangements that could improve existing systems.' With respect to the recognition of aboriginal governments, the Federal government said it would 'consult with aboriginal organisations and the provinces and territories on appropriate instruments to recognise aboriginal governments and to provide a framework of principles to guide jurisdictional and intergovernmental arrangements.'

The government has focused on capacity building in the negotiation and implementation of self-government. It is prepared to work with Indigenous People on the possible establishment of governance resource centres that could help Indigenous People develop models of governance, provide guidance on best practices, and support capacity development in administrative and financial management.

Gathering Strength expressed the Federal government's willingness to work in partnership with Treaty First Nations to achieve self-government within the context of the Treaty relationship, and to establish tripartite processes that link discussions on Treaties with governance, jurisdictional and fiscal negotiations. The government is also prepared to consider the creation of additional Treaty commissions, similar to the Office of the Treaty Commission in Saskatchewan.

12.3.3.2 INHERENT RIGHT FEDERAL SELF-GOVERNMENT POLICY

With few prospects for constitutional change following the 1992 referendum, the Liberal government elected in 1993 committed itself to recognising the inherent right of self-government and implement it without reopening constitutional discussions. The Federal government found a way of advancing the concept of ensuring that the rights negotiated with First Nations would gain constitutional protection under s. 35, *Constitution Act 1982.* In August 1995, the Hon. Ron Irwin, Minister of Indian Affairs and Northern Development, announced the inherent right policy. Arguing that 'the status quo, paternalistic system has just not worked – and proof is all around us,' Irwin advocated a sweeping initiative to transfer powers to First Nations and to ensure that those powers

remained in aboriginal hands. The government agreed to recognise aboriginal self-government as a right as defined in the constitution and then laid plans to negotiate that right with First Nations across the country. It was, at root, a sweeping admission of the failure of several decades of government-centred administration of aboriginal affairs and the extension of a long-standing debate about the meaning and nature of self-government.

The inherent right policy fell short of the more comprehensive demands of some First Nations leaders, particularly those pushing for an open-ended acceptance of indigenous sovereignty.[28] While the government was clearly willing and intended to pass substantial and meaningful power to First Nations, it would only do so within fairly clear limits:

- No recognition of aboriginal sovereignty as commonly understood in international terms is implied in this policy; First Nations people will be Canadian citizens and will continue a strong relationship with Federal and provincial governments;
- The inherent right is an existing Aboriginal right under section 35 of the *Constitution Act, 1982*;
- Despite numerous First Nations demands for exemption (and some equally loud aboriginal voices in favour of the government's policy), self-governing groups will not be exempt from the *Canadian Charter of Rights and Freedoms*. Given that the Chapter includes specific reference to the special rights of aboriginal peoples, this policy is intended to provide a measure of flexibility combined with the continued protection of the national charter;[29]
- Federal funding for self-government will be achieved through the reallocation of existing resources;
- Where all parties agree, rights in self-government agreements may be protected in new Treaties under section 35 of the Constitution, as additions to existing Treaties, or as part of comprehensive land claims agreements;
- Laws of overriding Federal and provincial importance will prevail, and Federal, provincial, territorial and Aboriginal laws must work in harmony;
- Self-government is not to be a time-specific, take-it-or-leave-it proposition. Agreements are to be negotiated when First Nations are ready to assume certain responsibilities, and the arrangements will therefore vary in timing and substance from First Nation to First Nation;
- Not all government powers are available for negotiation. The range of First Nations jurisdiction is seen as 'likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution;[30]
- The range of powers available for First Nations includes governing structures, membership lists, marriage, adoption, child welfare, indigenous culture and language, education, health, social services, the establishment and enforcement of local laws and Aboriginal customary law, police powers, property rights, land

[28] One of the best studies of the sovereignty issue as it relates to Australia with some comparable application to both Canada and New Zealand is Reynolds, H, *Aboriginal Sovereignty: Three Nations, One Australia,* (Allen & Unwin, Sydney, 1996).

[29] On the relationship between the Charter of Rights and Freedoms and self-government, see McNamara, L, 'Aboriginal Self-Government and Justice Reform in Canada: The Impact of the Charter of Rights and Freedoms' in *Australian-Canadian Studies* (Vol. 11, No. 1-2, 1993).

[30] Indian Affairs and Northern Development, supra n 9 at 5.

management regimes, natural resources management, agriculture, taxation (direct and property taxation), public works management, housing, licensing of businesses;
- There is a second list of laws that, subject to negotiation with Federal and provincial governments, may involve some measure of First Nations administration, although the broader laws of application would apply. These areas include divorce, labor and training, justice issues ands criminal codes, jails, environmental protection, gambling and emergency procedures;
- There is a third list of government powers 'where there are no compelling reasons for Aboriginal governments or institutions to exercise law-making authority.'[31] These powers include defence and international relations, immigration, international trade, monetary policy, commercial laws, national criminal law, health and safety issues, postal services, shipping and transportation, broadcasting, census, and several others. In these areas, the Federal government has indicated a willingness to negotiate managerial responsibility, but not law-making authority.

Although not a complete self-government policy, the fact remains that the self-government initiative is a sweeping departure from prior paternalistic practice. And the relatively quick negotiation of several substantial deals, including an agreement with the Union of Manitoba Indian chiefs, made clear that the government was serious about implementing the policy. This in turn was in keeping with Minister Irwin's determination to abandon the pursuit of a single, national agreement and a reliance on negotiations with the Assembly of First Nations, and the government's preference for smaller deals on a local or regional level. The goal, put simply, was to demonstrate that the policy was operable by negotiating several agreements.

The Minister of Indian Affairs has a mandate to enter into negotiations with First Nations, the Inuit, and Métis groups in the north. The Federal Interlocutor for Métis and Non-Status Indians has a mandate to enter into negotiations with Métis south of the 60th parallel and Indian people who reside off a land base. For groups without a land base, the government is prepared to consider forms of public government, the devolution of programs and services, the development of institutions providing services, and arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base.

12.3.3.3 OTHER SELF-GOVERNMENT DEVELOPMENTS

In British Columbia, the negotiations over self-government have been merged with Treaty negotiations. The inclusion of self-government considerations in Treaty discussions added an additional layer of complexity to already complex negotiations, but the initiative is so integral to the principle of empowerment that underlies the Treaty process that they fit

[31] Ibid, at 6. Many First Nations would disagree with the Federal Government's position but the stance is unlikely to change.

easily together. On 1 March 1996, the *British Columbia Treaty Commission Act* formally establishing the BC Treaty Commission came into effect, as did the provincial *Treaty Commission Act* and a resolution of the BC First Nations Summit. As of 23 April 1999, 51 First Nations, of the 197 in British Columbia, were active in the BC Treaty Commission process. On 16 April 1999, representatives of the governments of Canada and British Columbia and the Sechelt Indian Band signed an Agreement-in-Principle, the first in the British Columbia Treaty Commission process. In December 1996, the Office of the Treaty Commissioner of Saskatchewan was re-established to facilitate self-government negotiations and to assist with exploratory discussions on Treaty issues. This expanded the mandate of the Office, which was created in 1989. Saskatchewan judge David Arnot was appointed to a five-year term as Treaty Commissioner. Both institutions assist Indigenous Peoples in various contexts to realise group self-government, hence their importance.

12.4 INSTITUTIONAL REPRESENTATION AND INDIGENOUS SELF-GOVERNMENT MODELS IN CANADA

12.4.1 INDIGENOUS SELF-GOVERNMENT IN PRACTICE

The realisation of Indigenous Peoples' rights and responsibilities to internal self-determination remains a perplexing issue to many non-indigenous peoples. What does it mean? How would it work? The indigenous movement for recognising and realising internal self-determination through indigenous self-governance has taken many forms in both Canada and New Zealand. In a similar effort to achieve their aspirations and goals to internal self-determination to Māori in New Zealand, the Indigenous Peoples of Canada - Indian, Inuit and Métis groups - have sought constitutional, legislative, judicial and policy changes. Indigenous Peoples have drawn on the right of self-determination at international law to support their claims. The developing body of international law on human rights has focused much attention, in recent years, on the right to internal self-determination as it applies to Indigenous Peoples. Indigenous organisations have argued that the inherent right of self-government is an aspect of the right of self-determination recognised in the United Nations Charter and in the *Draft Declaration on the Rights of Indigenous Peoples*.

For status Indians a number of initiatives have increased local control under the *Indian Act* and allowed the negotiation of new legislative frameworks to replace that Act. However, many First Nations maintain that any form of delegated authority is inconsistent with an inherent right of self-government. Inuit have pursued self-government through

public government arrangements in the north in conjunction with land claims, while the Métis have advanced various claims for land and self-government.

12.4.2 INDIGENOUS DIVERSITY – DIFFERENT MODELS

Overall, Indigenous Peoples are no more homogenous than non-indigenous peoples in Canada and New Zealand. The RCAP recognised the enormous diversity among the Indigenous Peoples of Canada when they consulted on the RCAP. Indigenous Peoples do not make up a single-minded, monolithic entity, speaking with one voice. Indigenous Peoples spring from many nation traditions, diverse languages, belief systems and outlooks, although they share much as well. Indigenous Peoples differ also in their experience of life in Canada and New Zealand - by age, by region, by location and by socio-economic circumstances. The diversity of indigenous perspectives and outlooks is a reality that other Canadians and New Zealanders must accept, for the sake of greater understanding across the cultural divide. Indigenous People themselves are struggling to come to terms with it, as they strive to build bridges across their differences so that they can use their combined voices to their collective benefit.

Consequently, Indigenous Peoples have no single self-governance model in mind. No one answer will do for all Indigenous People. Varieties of institutional arrangements and processes have been and will need to be created by Indigenous Peoples and governments to recognise and realise their rights and responsibilities to internal self-determination. Policies will have to be flexible enough to accommodate diverse governance structures and allocations of policy responsibility. Just as there are many voices, there must be many responses. To that end the RCAP identified three basic self-government models, each with many possible variations. These self-governance models are workable in the framework of the Canadian federation

12.4.2.1 NATION GOVERNMENT

Indigenous People with a strong sense of shared identity and an exclusive territorial base will probably opt for the 'nation' model of self-government. Inside their boundaries, nation governments would exercise a wide range of powers and authority. They might choose to incorporate elements of traditional governance and could choose a loose federation among regions or communities, or a more centralised form of government. They will also need to find ways of representing the interests of non-indigenous residents in decision-making.

12.4.2.2 PUBLIC GOVERNMENT

In some regions, Indigenous People are the majority in territory they share with non-indigenous people - for example, in the more northerly parts of Canada. Existing agreements (such as the Nunavut Agreement) signal that indigenous nations in that situation will probably opt for the 'public' model of self-government where all residents participate equally in the functions of government, regardless of their heritage. Structures and processes of government would likely be similar to those of other Canadian governments - but with adaptations to reflect indigenous traditions and protect indigenous cultures.

12.4.2.3 'COMMUNITY OF INTEREST' GOVERNMENT

In urban centres, Indigenous People from many nations form a minority of the population. They are not 'nations' in the way the RCAP defined it, but they often want a measure of self-government nevertheless - especially in relation to education, health care, economic development, and protection of their cultures. The RCAP suggested that urban indigenous self-governments could operate effectively within municipal boundaries, with voluntary membership and powers delegated from indigenous nation governments and/or provincial governments.[32]

12.4.2.4 URBAN INDIGENOUS SELF-GOVERNMENT

One of the challenging issues of indigenous self-government is the urban First Nations. What does indigenous self-government mean in the cities? Will there be 'indigenous zones,' with their own laws and governments? The RCAP identified three possible approaches to self-government in urban areas:

The first involves the reform of local government services, to ensure indigenous influence. It would require guaranteed indigenous representation on boards and agencies whose activities directly affect Indigenous People. Cities with a large indigenous population could establish indigenous affairs committees to give advice and guidance and

[32] For a discussion on the issue of governance structures for First Nations living off reserves, see Weinstein, J, *Aboriginal Self-Determination Off a Land Base* (Institute of Intergovernmental Relations, Kingston, Ontario, 1986). For a discussion on the unique aspects of aboriginal self-government in urban centres, see Peters, E (ed) *Aboriginal Self-Government in Urban Centres: Proceedings of a Workshop.* (Queen's University Press, Kingston, 1994) and Peters, E, 'Self-Government for Aboriginal Peoples in Urban Areas: A Literature Review and Suggestions for Research' in *Canadian Journal of Native Studies,* (Vol. 12, No. 1, 1992). See also Wherrett, J & Brown, D, *Models for Aboriginal Government in Urban Areas* (Research & Analysis Directorate, Indian and Northern Affairs, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, 1994).

co-management arrangements for the programs and services of greatest significance to indigenous residents – analogous to Te Rūnanga o Kirikiriroa in Hamilton, New Zealand.[33]

Under the second approach, urban 'communities of interest' would operate some government services (schools, day-care centres, housing services) for themselves. A 'community of interest' is an indigenous collectivity that has emerged over time in an urban setting, through voluntary association of people from different indigenous backgrounds. Its members could design and control their own city-wide institutions, with an umbrella political structure to oversee and co-ordinate activities - analogous to the Urban Māori Authority in New Zealand

The third approach is the 'nation-based' approach. Many Indigenous People have strong ties to their traditional lands and nations of origin and want a form of self-government with roots at home. For this approach to work, indigenous 'nations' would have to take responsibility for their members who live in cities. Where indigenous nations accept this responsibility, they could establish urban branches of their home-based services and programs – analogous to the taurahere type in New Zealand.

Given the complexities and vast diversity among Canada's Indigenous Peoples, the Federal and Provincial governments have sensibly developed a policy of utilising a number of different types of self-government models and processes for indigenous peoples to govern themselves which depend on various factors such as culture, history, demography, geography, residency, land and resources, location north or south of the 60th parallel, socio-economic and political contexts.

The Government of Canada has recognised that Indian, Inuit and Métis peoples have different needs, circumstances and aspirations, and want to exercise their right to internal self-determination in different ways. Some indigenous groups want their own governments on their land base; some want to work within wider public government structures; and some want institutional arrangements. The Government is prepared to support various approaches, taking into account differing needs and circumstances, and to be flexible on the specific arrangements which may be negotiated.

12.4.3 ACCOMMODATING SELF-GOVERNMENT FOR ALL INDIGENOUS PEOPLES

12.4.3.1 FIRST NATIONS

Many First Nations have expressed a strong desire to control their own affairs and communities, and deliver programs and services better tailored to their own values and

[33] Supra, chapter 8.3 on the Concept of Representation and Tainui representation within the Waikato Region.

cultures. They want to replace the outdated provisions of the *Indian Act* with a modern partnership which preserves their special historic relationship with the Federal government. Those First Nations that have entered into Treaties with the Crown want to ensure that implementation of the inherent right will be consistent with the relationship established by their Treaties. All First Nations want other governments to recognise their legitimacy and authority.

The Government of Canada is prepared to work with First Nations and other governments to address these aspirations and it is also prepared to work with Treaty First Nations to ensure that negotiated self-government agreements build on their Treaties and the existing Treaty relationship. The Canadian Government believes that its approach to implementing the inherent right will allow First Nations and governments to establish mutually satisfactory negotiation processes leading to agreements that will recognise the jurisdiction and authority of First Nations' governments. Finally, where the parties to negotiations agree, the Government is prepared to protect rights contained in self-government agreements as constitutionally protected rights under section 35 of the *Constitution Act, 1982.*

The Government recognises that not all members of a First Nation live on the group's land base. The application of First Nation laws and the delivery of First Nation services to members who reside off the land base of the First Nation may be addressed in agreements with the provinces concerned. However, any such extra-territorial application of laws or receipt of services would be at the option of non-resident members and would have to take into account issues of feasibility and affordability.

12.4.3.2 INUIT COMMUNITIES

Inuit groups in various parts of Canada have expressed a desire to address their self-government aspirations within the context of larger public government arrangements, even though they have, or will receive, their own separate land base as part of a comprehensive land claim settlement. The creation of the new territory of Nunavut is one example of such an arrangement on a large scale. The Government is prepared to work with Inuit groups and other governments to arrive at effective agreements, and is willing to consider a variety of public government approaches. It is also prepared, where all parties agree, to use existing negotiations processes to the greatest extent possible. Public government arrangements will, of course, have to take into account the rights and interests of all people in the area covered by such arrangements.

The Government is also prepared to constitutionally protect rights negotiated in public government arrangements as s. 35 rights where appropriate and if the parties to the negotiations agree. Such negotiations would necessarily include the provincial or territorial government in order to ensure harmonious intergovernmental relationships. Self-government arrangements in a public government context do not preclude consideration of other arrangements at some future date, provided that all parties concerned are in agreement.

12.4.3.3 MÉTIS AND INDIAN GROUPS OFF A LAND BASE

Métis and Indian groups living off a land base have long professed their desire for a self-government process that will enable them to fulfil their aspirations to control and influence the important decisions that affect their lives. The Canadian Government is prepared to enter into negotiations with provinces and Métis and Indian groups residing off a land base when they live south of the sixtieth parallel. The Government is also prepared, with provincial agreement, to protect rights in agreements as constitutionally-protected s. 35 Treaty rights. Negotiation processes may be initiated by the indigenous groups themselves and will be tailored to reflect their particular circumstances and objectives.

The Government of Canada, moreover, recognises the need for flexibility in developing self-government arrangements. As such, negotiations may consider a variety of approaches to self-government off a land base including:

- forms of public government;
- devolution of programs and services;
- the development of institutions providing services; and
- arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base.

Many Métis groups have expressed the view that enumeration is an essential building block for self-government. The Government agrees and is prepared to share with provinces the cost of the enumeration of Métis and the identification of Indian people living off a land base who may be covered by self-government arrangements. This information will provide valuable input for the implementation of self-government for Métis and non-land based Indian groups. Further, the Government of Canada is prepared to discuss the provision of land, but only if it is deemed necessary and complementary to the management of a Federal program or service that is transferred to a Métis or non-land based Indian group.

12.4.3.4 MÉTIS WITH A LAND BASE

The Alberta Métis Settlements have also expressed interest in pursuing self-government as it applies to their specific circumstances. Consequently, the Federal

government, with the participation of the Government of Alberta, is also prepared to negotiate self-government arrangements with Métis people residing on Alberta Métis Settlements, which reflect their unique circumstances. Should other provinces provide lands to Métis people under similar regimes, the Federal government is prepared to negotiate similar arrangements, with the participation of the province in question.

Where the parties to negotiations agree, the Government is prepared to protect rights contained in self-government agreements with the Métis as constitutionally protected rights under s. 35 of the *Constitution Act, 1982*.

As in the case of First Nation members residing off their land base, the application of Métis laws and delivery of Métis services to members who reside off the Métis land base may be addressed in negotiations with the provinces concerned. Any such extra-territorial application of laws or receipt of services would be at the option of non-resident members and would have to take into account issues of feasibility and affordability.

12.4.4 TERRITORIAL SELF-GOVERNMENT

12.4.4.1 SELF-GOVERNMENT IN THE WESTERN NORTHWEST TERRITORIES (NWT)

Indigenous groups in the western NWT have a unique opportunity to develop self-government arrangements that are not readily available south of the sixtieth parallel. In the western NWT, the Government prefers that the inherent right find expression primarily, although not exclusively, through 'public government.' The Government believes that this approach is the best way to address the distinctive features of this region including: the demographic profile of the territory; the fact that many communities are mixed and that settlement lands under land claim settlements do not, in most cases, include the communities; and, finally, the decision to divide the Northwest Territories. Given these circumstances, and considering inefficiencies that may arise due to duplication of programs and services in mixed communities, the creation of completely separate indigenous governments in the western NWT may not be practical or efficient.

In the Federal government's view, the self-government aspirations of Indigenous Peoples in the NWT can be addressed by providing specific guarantees within public government institutions. The creation of indigenous institutions to exercise certain authorities may also be a useful approach. Issues related to overall territorial governance structures and related arrangements in the western NWT after division should be dealt with in other processes.

12.4.4.2 SELF-GOVERNMENT IN THE YUKON

There are four First Nation self-government agreements that were brought into force by legislation in 1995 and processes are in place to continue negotiating with the remaining First Nations in the Yukon. The Federal government's participation in these negotiations will be guided by the inherent right policy and existing commitments.

12.4.4.3 MANDATE FOR NEGOTIATIONS WITHIN THE FEDERAL GOVERNMENT

Within the Federal government, the Minister of Indian Affairs and Northern Development has a mandate to enter into negotiations with First Nations, the Inuit, and Métis groups north of the sixtieth parallel. The Federal Interlocutor for Métis and Non-Status Indians has a mandate to enter into negotiations with Métis south of the sixtieth parallel and Indian people who reside off a land base. In addition, Ministers of other Federal government departments have mandates to enter into sectoral negotiations in their respective areas of responsibility. Self-government proposals from Indian, Inuit and Métis groups are directed accordingly.

A Federal Steering Committee co-ordinates implementation of the inherent right within the Federal government and maintains an overview of all self-government activities across the Federal government. The Committee ensures the participation in negotiations, as required, of all Federal departments and agencies. In addition, the Committee monitors the progress of all self-government negotiations.

12.5 COMMENSURATE STRUCTURAL DIVERSITY

Mason Durie's biculturalism continuum examined possible legal and political structural arrangements that may arise out of self-governance negotiations to assess how much power is being shared with Indigenous Peoples.[34] The significance of this continuum is that it, inter alia, highlights the various self-governance options and scope and therefore structural diversity to accommodate cultural and demographic diversity among Indigenous Peoples. The continuum is also useful in assessing whether various governance structures assist Indigenous Peoples to realise their internal self-determination aspirations and goals, which should be at least a part of the function of every governance and management structure:

[34] Durie, M *Understanding Biculturalism* (Race Relations Conference Paper, Gisborne, New Zealand, 20 September 1994) at 7-8.

Mason Durie's Bicultural Continuum – Bicultural Structural Arrangements

BICULTURAL STRUCTURAL ARRANGEMENTS				
1. Unmodified mainstream institutions	2. A cultural perspective	3. Active cultural involvement	4. Parallel cultural institutions	5. Independent cultural institutions

The two poles of this continuum include unmodified monocultural institutions at one end and independent cultural institutions (internal self-determination) at the other.

The notion of internal self-determination ought to convey a right to greater freedom and control - authentic power sharing – in the political, legal, social, economic and cultural development of Indigenous Peoples within the Canadian and New Zealand body politic. Authentic power sharing needs to occur between Indigenous Peoples and the nation-state within the decision-making structures and governance institutions from Parliament right down to the local body and tribal levels. The left side of Durie's Biculturalism Continuum (DBC) reflects assimilation goals, while the right side reflects internal self-determination aspirations; hence, the further right on the continuum the better from an Indigenous Peoples' view point.

12.6 THEORETICAL SELF-GOVERNANCE INSTITUTIONAL FORMS

Most of the institutions governing indigenous life today originate outside indigenous communities. For the most part, they operate according to principles and rules that generally fail to reflect indigenous values, institutions and preferences. In every sector of public life, there is a need to make way for indigenous institutions. Development of many of these institutions could proceed even before full self-governing nations emerge; for example, control over health, education and some economic development.

Furthermore, a fundamental principle of good governance, which I am assuming is an important part of indigenous self-governance, is the axiom 'form follows function.' Indigenous polities need to be absolutely clear on the objectives and function of the governance entity they form before devoting time, money and energy to structural issues (form).[35] Governance functions need to be assessed thoroughly first, then an appropriate

[35] 'Good governance means broadening skills base' in Te Puni Kōkiri *Kōkiri Patae* (Te Puni Kōkiri, Wellington, August, 2003) at 11.

entity is formed to meet those functions. An over emphasis on getting governance structures (form) right can mask the importance of more strategic governance concerns (function). Hence, instead of focussing on a single factor, such as how best to manage risks associated with asset specificity, it is better to consider clearly what the function of the entity is and what form will best meet overall strategic goals.

To that end, we will now consider the various theoretical structural models (forms) available to Indigenous Peoples for realising self-government and its myriad functions that include as a minimum political, economic, social and cultural development.

12.6.1 INDIGENOUS SELF-GOVERNMENT MODELS

Any institutional arrangement designed to secure greater indigenous participation in the public policy process is broadly speaking self-government. Boisvert[36] listed the following institutional arrangements for self-government that provide various options for realising Indigenous Peoples' internal self-determination:

- institutional interest groups;
- special purpose and administrative bodies;
- law-making bodies
- local governments;
- aboriginal governments; and
- corporate models

12.6.1.1 INSTITUTIONAL INTEREST GROUPS

Special mechanisms to express interests that represent Indigenous Peoples and to articulate their interests to established authorities fall under this category. Indigenous Peoples are organised into an interest group where special institutions are created to facilitate the articulation of indigenous interests and concerns to nation-state authorities. Examples include the Sami Parliament in Finland, Norway and Sweden, the Assembly of First Nations that represents status Indians nationally in Canada, and perhaps the New Zealand Māori Council in New Zealand. They fall within the DBC value – 3 possibly 4 (parallel cultural institutions).

[36] Boisvert, D *Aboriginal Peoples and Constitutional Reform: Forms of Aboriginal Self-Government* (Institute of Inter-Governmental Relations, Queen's University, Kingston, Ontario, 1985) at 6-11. This section has relied heavily on Boisvert's work. Ibid.

12.6.1.2 SPECIAL PURPOSE AND ADMINISTRATIVE GROUPS

Special purpose bodies can be considered a distinct institutional category in their own right. Special purpose bodies are generally established for functional purposes and are usually given some form of administrative authority, something most interest groups do not have. As administrative agencies they have recognised executive powers only. They involve Indigenous Peoples in the executive and bureaucratic structures of the nation-state, and are usually established as administrative or regulatory bodies in which Indigenous Peoples participate. Examples in Canada include the administrative agencies established pursuant to the JBNQA, aboriginal participation in the Federal Native Economic Development Fund and Indian band councils under the Indian Act. A special purpose and administrative group in New Zealand could be TOKMTL, Taura Whiri i te Reo Māori (the Māori Language Commission) and perhaps even the Māori Land Court. Such groups fall within the DBC value – 3, perhaps 4 (parallel cultural institutions).

12.6.1.3 LAW MAKING INSTITUTIONS

There are several examples of indigenous participation in law-making institutions throughout the world. The several forms for indigenous law-making institutions include participation in existing legislative assemblies – such as the *Māori Representation Act 1867* which guarantees at least 4 Māori seats in Parliament, or territorial government that has authority over a certain region or territory. Participation in territorial governments is principally a function of residency, which is an adequate vehicle for establishing self-government for Indigenous Peoples wherever Indigenous Peoples are the majority population, as in the Greenland home-rule model and Canada's Nunavut. United States court decisions have also recognised a sovereign basis for indigenous authority that allows many Indian 'tribes' to exercise some power to make laws. DBC value – 2 or 3.

12.6.1.4 LOCAL GOVERNMENTS

Municipal or local governments share with territorial forms of self-government the fact that their authority extends only over a certain area and that rights of participation and representation are determined essentially on the basis of residency in the area concerned. But the powers of local governments are usually inferior to those held by regional governments. In the USA, a 'tribe' is effectively governed as a municipality, while in Canada it has sometimes been suggested that aboriginal governments could be established as municipal governments. DBC value – 4.

12.6.1.5 ABORIGINAL GOVERNMENTS

Aboriginal government involves establishing self-governing institutions specifically for an aboriginal community. In the USA, where such a form of government can be said to exist, the authority of indigenous government is recognised to apply on a reserve, but the rights to participate in government are premised on membership in the community, not on residency in a particular community. Governing institutions can take many forms depending on the history and cultural traditions of the Indigenous Peoples concerned, and often draw inspiration from traditional patterns of authority, values, laws and governance institutions. DBC value – 5 in the USA, 4 in Canada, perhaps 3 in New Zealand.

12.6.1.6 CORPORATE MODELS

It is possible to conceive of a form of indigenous self-governance, which would not be attached to a land base. Corporate entities such as professional or occupational associations are given rule-making authority over their members. Although such corporate bodies can be given law-making powers applying strictly to their own members, as a rule, it is the threat of loss of membership that gives force to what are otherwise non-legally enforceable corporate rules. Bar associations offer an example of corporate self-government. Membership in an indigenous community is very different from membership in corporate or occupational entities, but such a model might be applied to indigenous self-governance off a land base. The Sami herdsmen association is an example of the corporate model applying to an Indigenous People. DBC value – 2 (a cultural perspective).

12.7 TYPOLOGY OF THEORETICAL SELF-GOVERNANCE MODELS AVAILABLE

The kinds of institutions that have been established throughout Canada and New Zealand to provide self-government to Indigenous Peoples reflect significant differences in institutional arrangements. The most notable difference lies in the authority indigenous institutions exercise. Are they created merely to represent indigenous interests to existing authorities, do they exercise administrative powers, or are they government authorities in their own right? Most indigenous institutions do not have any real authority and are advisory only but there are a few examples where Indigenous Peoples either control government institutions of their own or have secured participation in national legislative institutions. Thus, the first important variable involved with forms of self-government for Indigenous Peoples is the authority to function – the kind and degree of authority they are recognised as having within the political system.

Indigenous institutions differ markedly in the degree of indigenous participation, which is the key factor in ascertaining the extent of indigenous control of the institution in question. Many of the governance institutions discussed have been established specifically for the Indigenous Peoples and are in one way or another formally reserved to them. This is especially so of institutions that organise Indigenous Peoples as an interest group. Administrative and special purpose bodies usually involve Indigenous Peoples in the bureaucratic structures of the nation-state and usually therefore involve participation from both Indigenous Peoples and government officials. What 'public' representation exists on these bodies is however reserved to Indigenous Peoples, while indigenous participation in government institutions is often reserved exclusively for the Indigenous Peoples, except in the case of strictly indigenous governments. Territorial governments are formally open to all residents and function as 'public governments', although it is possible to conceive of different degrees of indigenous participation in government. Generally speaking, the degree of indigenous participation in governing institutions is an either/or proposition.

Indigenous institutions that function principally as interest groups are not attached to territory in the same way governments are, since they do not make rules applying over a territory. However, they often do reflect the political structure of the political systems in which they are established. Institutions of this kind in Scandinavia and Australia are national in scope, and in Canada they tend to be so as well, but strongly Federalised. Like interest groups, corporate bodies do not have the ability to make rules applying over a territory but unlike most interest groups, they can exercise certain law-making authority over their members. They are more than an interest group but something less than a government. Special purpose bodies can be established on either a national, regional or local basis but their functional or sectoral responsibility is their chief distinguishing feature, not attachment to territory.

These three functions – the authority function, the participation function, and the dimension function – account for most of the variation in indigenous institutions in both nation-states. The can be combined in different ways to produce different forms of self-governing institutions for Indigenous Peoples.

12.7.1 IDENTIFICATION OF SELF-GOVERNMENT MODELS

The main models of self-government that are possible through different combinations of these functions were listed by Boisvert and were narrowed down to approximately 15 models:

12.7.1.1 TYPE I NATIONAL INDIGENOUS GOVERNMENT

- Law-making on the authority function;
- Exclusive on the participation function;
- National on the dimensions function;
- Linked to territory.

This combination would produce a national territorial government reserved exclusively for Indigenous Peoples which is in effect, secession, and therefore most unlikely. DBC value – 5 (independent cultural institution).

12.7.1.2 TYPE II REGIONAL INDIGENOUS GOVERNMENT

- Law-making on the authority function;
- Exclusive on the participation function;
- Regional on the dimensions function;
- Linked to territory.

This combination would produce regional governments reserved exclusively for Indigenous Peoples. The Federation of Saskatchewan Indian Nations (FSIN) is perhaps an example of this model. DBC value – 4 (parallel cultural institutions).

12.7.1.3 TYPE III LOCAL INDIGENOUS GOVERNMENT

- Law-making on the authority function;
- Exclusive on the participation function;
- Local on the dimensions function;
- Linked to territory.

This combination would produce local governments reserved to Indigenous Peoples. Most proposals for indigenous government fall within this category. However, local governments generally do not have a high authority co-efficient relative to other governments. DBC value – 4 perhaps 5 in theory.

12.7.1.4 TYPE IV REPRESENTATION IN NATIONAL GOVERNING INSTITUTIONS

- Law-making on the authority function;
- Public on the participation function;
- National on the dimensions function;
- Linked to territory.

This combination likely describes a situation where Indigenous Peoples are secured representation in national governing institutions (e.g. representation in the House of Representatives and Senate, 4 Māori seats in New Zealand, US State of Maine representation for Indigenous Peoples). DBC value – 2 (a cultural perspective).

12.7.1.5 TYPE V REGIONAL GOVERNMENT

- Law-making on the authority function;
- Public on the participation;
- Regional on the dimensions function;
- Linked to territory.

This configuration describes 'public government.' Over a region which Indigenous Peoples may control depending on their demographic importance. It also represents a situation where Indigenous Peoples are guaranteed representation in a regional government such as a province or territorial government. Most proposals for indigenous self-government made in Canada's North of 60 fall within this category. Perhaps the Waikato Regional Council is an example in New Zealand. DBC value – depending on demographics 2 –3 (active cultural involvement).

12.7.1.6 TYPE VI MUNICIPAL GOVERNMENTS

- Law making on the authority function;
- Public on the participation function;
- Local on the dimensions function;
- Linked to territory.

This configuration describes municipal or local government structures, which the Indigenous Peoples may or may not control, depending on their demographic importance, e.g. Hamilton City Council. DBC value – depending on demographics hovering from 1 – 3 (unmodified mainstream institution –active cultural involvement).

12.7.1.7 TYPE VII NATIONAL INDIGENOUS SPECIAL PURPOSE BODIES

- Administrative on the authority function;
- Exclusive on the participation function;
- National on the dimensions function;
- Linked to territory.

This represents national exclusively indigenous institutions, which do not act as governing authorities but which have administrative responsibilities. National administrative bodies of this kind could be created for many different purposes. Examples include possibly Te Ohu Kai Moana Trustee Ltd (TOKMTL) and Te Kawai Taumata. DBC value – 3.

12.7.1.8 TYPE VIII REGIONAL INDIGENOUS SPECIAL PURPOSE BODIES

- Administrative on the authority function;
- Exclusive on the participation function;

- Linked to territory.

This configuration includes administrative bodies reserved exclusively to Indigenous Peoples on a regional basis. The institutions established pursuant to the JBNQA may be for the most part considered examples of such institutions. A New Zealand example is perhaps the Treaty Tribes Coalition – an East Coast tribal confederation. DBC value – 3.

12.7.1.9 TYPE IX BAND COUNCIL GOVERNMENT

- Administrative on the authority function;
- Exclusive on the participation function;
- Local on the dimensions function;
- Linked to territory.

This configuration probably best describes present band council government in Canada for example the Squamish Band on reserve in North Vancouver. DBC value – 2 in Canada and New Zealand.

12.7.1.10 TYPE X NATIONAL CORPORATE GOVERNMENT

- Law making on the authority function;
- Exclusive on the participation function;
- National on the dimensions function;
- Not linked to territory.

This would represent a situation where Indigenous Peoples would have their own governing institutions without any authority to apply rules over any particular territory. Compliance with corporate rules entitles them to benefits of corporate membership. Examples include perhaps the Federation of Māori Authorities (FOMA) and TOKMTL. DBC value – 3 or 4.

12.7.1.11 TYPE XI REGIONAL CORPORATE GOVERNMENT

- Law-making on the authority function;
- Exclusive on the participation function;
- Regional on the dimensions function;
- Not linked to territory.

This would represent a situation where Indigenous Peoples organised corporate government on a regional basis. Examples include Inuvialuit Regional Corporation and perhaps Te Rūnanga o Ngāi Tahu. DBC value – 2 or 3.

12.7.1.12 TYPE XII LOCAL CORPORATE GOVERNMENT

- Law making on the authority function;

- Exclusive on the participation function;
- Local on the dimensions function;
- Not linked to territory.

Same as type X and XI, except that the corporate organisation of the Indigenous Peoples concerned would exist at the local level only. DBC value – 2 or 3.

12.7.1.13 TYPE XIII NATIONAL INDIGENOUS INTERESTS GROUPS

- Nil on the authority function;
- Exclusive on the participation function;
- National on the dimensions function;
- Not linked to territory.

This identifies a case where Indigenous Peoples are organised in a national body to represent their interests to government. The Sami Parliament, the old ATSIC model in Australia, the Assembly of First Nations in Canada and perhaps the New Zealand Māori Council and Māori Women's Welfare League in New Zealand are examples of this model. DBC value – 3.

12.7.1.14 TYPE XIV REGIONAL INDIGENOUS INTERESTS GROUPS

- Nil on the authority function;
- Exclusive on the participation function;
- Regional on the dimensions function;
- Not linked to territory.

This might describe indigenous interest groups at the provincial level for example, regional branches of the New Zealand Māori Council and Māori Women's Welfare League. DBC value – 3.

12.7.1.15 TYPE XV LOCAL INDIGENOUS INTEREST GROUPS

- Nil on the authority function;
- Exclusive on the participation function;
- Local on the dimensions function;
- Not linked to territory.

This represents indigenous interest groups at the local or municipal level perhaps Māori advisory units in the City Council and other government (local and national) departments. DBC value – 2.

12.7.2 SUMMARY

Not all possible institutional arrangements have been identified by this typology. Each function could be further refined to reveal a wider number of forms. However, these

categories do generally represent the main paths indigenous governance institutions can take. Not all are relevant: for example Type I appears to be secession with an exclusively indigenous government on a national basis, which is, in my view, politically inappropriate. Types XIII, XIV and XV which all provide for indigenous representation on non-authoritative bodies, have an important place. Variations II to XI – local indigenous governments, regional government, municipal government, national indigenous special purpose bodies, regional indigenous special purpose bodies, band council type government, indigenous representation in national and regional governments, and even regional indigenous government – do represent possible avenues of self-governance that Indigenous Peoples could take in the Canadian and New Zealand context.

Variations X to XII, which suggest various forms of corporate government, are possible options for self-government off a land base. i.e. for urban indigenous groups. There is no reason why we could not experiment with all of these forms at once to meet different situations across the countries. Still, the issue becomes that of choosing the form or forms that match function in any particular case, and selecting the form or forms best suited to specific Indigenous Peoples in Canada and New Zealand. Within the context of Durie's Biculturalism Continuum, all structural options in the continuum are represented in the above institutional models.

12.8 TYPOLOGY OF CANADIAN SELF-GOVERNMENT INSTITUTIONAL MODELS

Given the above complexities and diversity among Canada's Indigenous Peoples, the Federal and Provincial governments have sensibly developed and made available a number of avenues, options and policies for recognising self-government to assist with the realisation of internal self-determination that include:

- Judicial Self-Government – common law
- Legislated Self-Government;
  -*Indian Act* Band Self-Government;
- Negotiated Self-Government;
  -Guaranteed Participation;
  -Public Government;
- Coordinated Ethnic Self-Government;
- Separate Ethnic First Nations Self-Government
- Other Self-Government Models

The next section will now examine each institutional self-government model and policy within the context of Durie's Biculturalism Continuum (DBC) that could indicate

how viable the model is for realising the indigenous group's rights and responsibilities for internal self-determination.

12.8.1 JUDICIAL SELF-GOVERNMENT – LITIGATED COMMON LAW SELF-GOVERNMENT

In Canada, as in countries such as New Zealand and Australia, Indigenous Peoples often have had no choice but to resort to the courts in their efforts to seek justice, recognition and the realisation of their internal self-determination rights. Throughout the 1980s, the early 1990s and the new millennium, the Supreme Court of Canada provided an increasing recognition of aboriginal and Treaty rights as well as the constitutional responsibilities of the Crown to Indigenous Peoples through a series of decisions based on aboriginal and Treaty rights. Michael Asch argued that at their core, aboriginal rights (including title) involve having the ability to maintain ways of life that are distinct from the non-indigenous population of Canada:

> These ways of life are not to be interpreted as ethnic in the sense of a Canadian mosaic, but rather as a composite of autonomous systems that integrates languages, economies, social organisations, political organisations, religions and other values into a total culture. ... The right to preserve and develop such autonomous systems in Canada is perceived to derive, in part, from the manifest failure of the current programs designed to develop viable lifeways for the majority of the aboriginal population. However, at the core, it arises from a vision of Canada as a colonial manifestation and from the perception of aboriginal peoples as 'colonised' nations that, like those indigenous populations on other continents, have an inherent right to assert their self-determination and control over their own affairs.[37]

That Indigenous Peoples are the first citizens of Canada and New Zealand is central to the concept of aboriginal rights.[38] These rights inure to Indigenous Peoples 'by virtue of their occupation upon certain lands from time immemorial.'[39] In demanding the realisation of internal self-determination through a broad range of economic, social, cultural and political rights and responsibilities, Indigenous Peoples are essentially making specific claims for the recognition of this prior presence.[40]

In *R v Sparrow*,[41] the Supreme Court ruled that s. 35 of the Constitution is not an 'empty box.' Rather the Court found that the aboriginal right to fish for social, ceremonial and

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[37] Asch, M, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Methuen Publications, Ontario, 1984) at 37.

[38] See Morse, B, (ed) *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Carleton University Press, Ottawa, 1985) at 48.

[39] Isaac, T, 'The Storm over Aboriginal Self-Government: Section 35 of the Constitution Act 1982 and the Redefinition of the Inherent Right to Aboriginal Self-Government' [1992] 2 C.N.L.R 6 at 8.

[40] See Boldt, M & Long, J.A (eds) *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (University of Toronto Press, Toronto, 1985) at 140.

[41] (1990) 46 B.C.L.R. (2d) 1.

food purposes is recognised and affirmed by s. 35 of the Constitution, thereby leaving the door open to the possibility that other aboriginal rights, including the right of self-government, are also guaranteed by the Constitution. Following *Sparrow* there were some indications that the courts may not continue in the same vein.

The *Delgamuukw v British Columbia*[42] case adopted the 'integral part of their distinctive culture' test to describe the 'practice, custom or tradition that is sufficiently significant and fundamental to the culture and social organisation of a particular group of aboriginal people as to command recognition as an aboriginal right.'[43] The *Delgamuukw* test recognises the aboriginal rights are integral to a distinctive culture. The protection of these rights provides a legal basis for aboriginal communities to maintain their distinct ways of life and to develop their civilisation.

Determining those practices, customs or traditions that are integral to aboriginal culture is often controversial, however. Anthropologists describe aboriginal rights as having a 'multivalent' quality – many different layers of definition depending on the speaker, the context of use, and the time at which evoked.'[44] Still, it is clear that an integral part of indigenous culture was and continues to be the existence of self-governance systems, laws and governance institutions. In Canada the aboriginal right to self-government has been recognised by the Federal Government as 'inherent' – those which 'inhere in the very meaning of aboriginality.'[45] Although the Canadian judiciary has readily accepted traditional activities like hunting, fishing and trapping as inhering in aboriginality and included within the doctrine of aboriginal rights, there has been little opinion on the scope of claims to non-resource rights such as self-government.

In the initial decision *Delgamuukw v British Columbia*,[46] the Supreme Court of British Columbia ruled that aboriginal rights, including aboriginal title and the right of self-government, were extinguished in British Columbia by the Crown's efforts to establish a general regime for land use and ownership when the colony was established in the mid-nineteenth century.[47] The Court of Appeal of British Columbia subsequently overturned much of the first *Delgamuukw* ruling in 1993. As they brought the *Delgamuukw* action before the courts, the Gitksan and Wet'suwet'en peoples of northwestern British Columbia asserted that they own their traditional lands and have inherent jurisdiction in relation to

[42] [1993] 5 C.N.L.R 1.
[43] *Delgamuukw v British Columbia* [1993] 5 C.N.L.R 1, 104 D.L.R 470 at 517 (B.C.C.A) reversing [1991] 5 C.N.L.R 1, 79 D.L.R (4th) 185 (B.C.S.C) at 641.
[44] Boldt, supra n 40 at 141.
[45] Department of Indian Affairs and Northern Development, supra 9 at 1.
[46] [1991] 5 C.N.L.R 1, 79 D.L.R (4th) 185 (B.C.S.C) at 641.
[47] See Cassidy, F (ed) *Aboriginal Title in B.C: Delgamuukw v. The Queen* (The Institute for Public Policy, Montreal, 1992).

them. This jurisdiction, they asserted, is exercised through their 'House' and feast systems (potlatch), the traditional institutions of Gitksan and Wet'suwet'en self-government. Jurisdiction, they argued, is exercised in the determination of House membership, the maintenance of the House system, the regulation of family relations, education, harvesting, management and conservation of House territories and resources, dispute resolution and relations with other peoples.

As Indigenous Peoples have been asserting since their first contacts with Europeans, the Gitksan and Wet'suwet'en maintained that their right to govern themselves is a broad and fundamental one. In the same way, they contended, as the Crown's underlying title and aboriginal title are co-existing, so also are the concepts of Crown sovereignty and aboriginal jurisdiction. Aboriginal jurisdiction, they maintained, has both deep historical roots and contemporary significance in the law.

The Court of Appeal did not respond positively to any of these arguments. With regard to the broad assertion by the Gitksan and Wet'suwet'en of inherent jurisdictional powers, the Court declared that: 'Rights of self-government, encompassing a power to make general laws governing the land and resources in the territory, and the people in that territory can only be described as legislative powers.'[48] Such rights, the Court argued, would enable the Gitksan and Wet'suwet'en to limit provincial jurisdiction and establish a third order of government within Canada. This, the Court of Appeal contended, could not be done. 'It was on the date that the legislative power of the Sovereign was imposed,' the Court declared, 'that any vestige of aboriginal law-making competence was superseded.'[49] When Crown sovereignty and English law were imposed in the Colony of British Columbia in the mid-nineteenth century, the Court of Appeal maintained, the indigenous right of self-government, the right to make general laws governing people, land and resources, was superseded.

Even if this were not the case, the idea that the governments of Indigenous Peoples could have undelegated legislative powers, the Court held, is inconsistent with the constitutional division of powers. Sections 91 (Federal) and 92 (Provincial) of the Constitution, from this perspective, exhaustively distribute legislative power in Canada. Moreover, s. 91 (24) awards legislative competence in relation to 'Indians' to Parliament.

The Gitksan and Wet'suwet'en, the Court of Appeal conceded, had an organised society with traditions, rules and regulations, upon the establishment of Crown sovereignty in their traditional territories. As long as the members of their communities agree to adhere

[48] *Delgamuukw v British Columbia* [1993] 5 C.N.L.R. [1993] 5 W.W.R. 97, 104 D.L.R. (4th) 470, 30 B.C.C.A 1, 49 W.A.C 1, (B.C.C.A).
[49] Ibid.

to their traditional practices, the Court noted, there is no reason why the Gitksan and Wet'suwet'en should not continue to follow them, but they cannot do so if their actions are in conflict with the laws of British Columbia or Canada.

Two of the five justices who took part in the British Columbia Court of Appeal's ruling dissented, but neither treated the right to self-government in a way that would be acceptable to Indigenous Peoples. Refusing to use the term self-government, Justice Hutcheon argued that Aboriginal peoples have not lost the right to what he termed 'self-regulation.' He also advised that it would be useful to 'avoid reference to aboriginal laws' because the word 'laws' carries with it the notion that the indigenous traditions were enforceable by some state authority.' This, he concluded, could not be the case. For this reason, Justice Hutcheon asserted, the term 'self-regulation' is preferable to the term 'self-government.'[50]

Although he used the term self-government, another judge, Justice Lambert, concurred with Justice Hutcheon's views that aboriginal rights in relation to governance do not rest on aboriginal laws. Nor do these rights reflect a claim to aboriginal sovereignty, Justice Lambert contended. To the contrary, 'it may be helpful', the Justice suggested:

> ... to compare aboriginal self-government and self-regulation to the self-government and self-regulation practiced by a forest company or a ranching company or a Hutterite community in relation to their own land and the resources on their land, and to the ordering of their internal affairs.[51]

The Gitksan and Wet'suwet'en sought to appeal the second Delgamuukw decision at the level of the Supreme Court of Canada in the fall of 1993. The Court agreed to hear the appeal. In June 1994, British Columbia and the Hereditary Chiefs of the Gitksan and Wet'suwet'en signed an Accord of Recognition and Respect. The province, the Wet'suwet'en, and the Gitksan agreed to join with Canada to resolve the outstanding issues through Treaty negotiations. If 'significant progress' in these negotiations can be made over the subsequent year to a year and a half, then the parties to the Delgamuukw action will discontinue the appeal to the Supreme Court. Such a move would provide a strong indication that there is some hope for a political as contrasted with a more strictly legal resolution to many of the issues that Indigenous Peoples have brought before the Canadian public, but it remains to be seen if this will happen.

[50] Ibid.
[51] Ibid.

Although the B.C Court of Appeal found that the plaintiffs had no jurisdiction to enact laws that would conflict with provincial and Federal laws, thereby missing the Gitskan and Wet'suwet'en claims to self-government, this decision involved considerable discussion of the nature of aboriginal rights that stems from occupation and use of land as their traditional home prior to the assertion of sovereignty. Aboriginal rights are site-specific and are integral to the distinctive culture of an aboriginal society. But the precise bundle of rights that a particular aboriginal community can assert depends upon a number of factors including the nature, kind and purpose of the use and occupancy of the land and the extent to which such use and occupancy was exclusive or non-exclusive. An integral aspect of this occupation of land was surely the exercise of effective self-governance. As noted by Marshall CJ in *Worcester v State of Georgia:*[52]

> America ... was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.[53]

The doctrine of continuity ensured that aboriginal rights would form part of Canadian (and New Zealand) common law. Different approaches adopted by judiciaries over the years have determined the nature of those aboriginal rights recognised at common law.

Still, Lambert J.A in his dissenting judgment concluded:

> I would declare that the present Aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, would include rights of self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity.[54]

Lambert J.A's judgment can be read restrictively in that self-government and self-regulation are exercisable only to 'preserve and enhance' the identity of Indigenous Peoples. In remains to be seen whether self-government and self-regulation could include legislative authority akin to that held by the provinces or Parliament.

In *R v Williams*[55] the B.C Court of Appeal agreed with the trial court decision that any possibility that indigenous self-government authority remained unextinguished was

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[52] *Worcester v State f Georgia* 31 U.S (6 Pet.) 515 (1832) at 542-43.

[53] Ibid. Marshall CJ also noted at 559:

> The settled doctrine of the law of nations is, that a weaker power does not surrender its independence – its right to self-government – associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right to self-government.

[54] *Delgamuukw v B.C.,* [1993] 5 C.N.L.R (B.C.C.A.) at 250.

[55] [1995] 2. C.N.L.R 229 (B.C.C.A.).

terminated by the British Columbia Terms of Union of 1871[56] and by the *Constitution Act 1867*, wherein all legislative powers were divided between the Federal and provincial governments. The fact that Indians are subjects of the Crown either by Treaty[57] or otherwise[58] sets a limiting context within which self-government could exist in Canada, by means other than negotiated agreements.

In *R v Pamajewon*[59]the appellants claimed the right to operate casinos and regulate high stakes gambling on reserve, describing this as a 'broad right to manage the use of their reserve lands.'[60] The Court noted that this right is not specific enough for the *Van der Peet* test, which requires that the asserted right must be examined in light of the specific history and culture of the indigenous group claiming the right, having regard to the specific circumstances of the case. This position was reaffirmed by the Supreme Court of Canada in its decision in *Delgamuukw,*[61] wherein Lamer C.J noted 'rights to self-government, if they existed, cannot be framed in excessively general terms.'[62] The Court held that based on the evidence presented, high-stakes gambling was not an activity that formed an integral part of the distinctive cultures of the Shawanaga and Eagle Lake First Nations. The Court focused on the need for specificity in analysing any aboriginal right to self-government, if such a right exists within the rubric of s. 35(1). The onus to demonstrate this level of specificity is placed on the indigenous group claiming such a right.

In *Campbell v B.C,*[63] the British Columbia Supreme Court considered an application seeking an order that the Nisga'a Final Agreement (NFA) is, in part, inconsistent with the Constitution of Canada and therefore, in part, of no force or effect. The applicant argued that the NFA was inconsistent because it purports to bestow upon the governing body of the Nisga'a Nation legislative assemblies of the provinces by ss. 91 and 92 of the *Constitution Act 1867.* The Court held that the assertion of sovereignty by the British Crown did not necessarily extinguish the right of Indigenous People to govern themselves. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by Federal legislation or it could be replaced or modified by the negotiation of a Treaty. Post-1982, such rights could not be extinguished, but they may be defined and given meaning by way of a Treaty.

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[56] *British Columbia Terms of Union,* R.S.C 1985, Appropriate II, No.
[57] See *Logan v Styres* (1959), 20 D.L.R (2d) 416 (Ont. H.C).
[58] See *Pawis v R* [1979] 2.C.N.L.R 52 (F.C.T.D).
[59] *R v Pamajewon* [1996] 2 S.C.R 821.
[60] Ibid, at para. 27.
[61] *Delgamuukw v B.C* [1997] 3 S.C.R. 1010.
[62] Ibid, at 170.
[63] *Campbell v B.C (A.G),* [2000] 4 C.N.L.R. 1 (B.C.S.C).

The Court held that the NFA defined the content of indigenous self-government expressly. The *Constitution Act 1867* did not distribute all legislative power to Parliament and the provincial Legislatures. The *Constitution Act 1867* did not purport to and does not end what remain of the royal prerogative of aboriginal and Treaty rights, including the diminished but not extinguished power of self-government, which remained with the Nisga'a in 1982. Section 35 of the *Constitution Act 1982* recognised and affirmed a constitutionally limited form of self-government that remained with the Nisga'a after the assertion of sovereignty – the NFA and settlement legislation give that limited right definition. The Nisga'a Lisims Government is subject both to the limitations set out in the NFA itself and to the limited guarantee of the rights recognised and affirmed by s. 35, *Constitution Act 1982.*

The stance of the Canadian courts regarding the indigenous right of self-government may well change over time, as various challenges to the power of the Crown make their way through the judicial system. Based on Canadian jurisprudence, if the right to indigenous self-government exists at all, the Supreme Court of Canada seems focused on limiting that right to specific activities of governance and only as a relatively minor power of self-regulation. Demonstrating the substantive right of self-government envisioned by many Indian bands and Indigenous Peoples in Canada will be subject to a high standard in the legal system. From this perspective there can only be one set of laws and one set of governing institutions in Canada, the laws and institutions, which are explicitly described in the *Constitution Act, 1982.* In the wake of the defeat of the Charlottetown Accord, it would be fair to say that the 'one law for all' and 'we are all one people' perspectives tend to be a dominant image of indigenous self-government in Canadian (and New Zealand) political circles at the current time. Like Treaty making, direct negotiations between the various parties is probably the best means for Indigenous Peoples to achieve self-government and help realise the group's internal rights and responsibilities to internal self-determination. 'Successful' litigation, however, provides a lever in the negotiation processes.

12.8.2 LEGISLATED & INSTITUTIONALISED SELF-GOVERNMENT – INDIAN ACT BANDS

Indigenous self-government that is created and protected by ordinary legislation is a form of self-government. It is unilaterally created and can be unilaterally changed by a majority vote in Parliament. It is produced at least in part by elected politicians. The best example in Canada is perhaps the *Indian Act.*

The *Indian Act 1876,*[64] is a comprehensive piece of legislation that covers activities in all sectors of Indian communities and has been the central piece of legislation governing the status of Indians, the administration of reserves, registration of Band Councils, administration of the affairs of the Band Councils, and the extent of their jurisdiction. Band self-government is first and foremost Band Council government – government by a group of members who have been chosen in one way or another by the general membership in their constituent communities. Traditionally, the *Indian Act* encouraged assimilation often through paternalism. Indeed, the stated purpose of the Act was to 'protect Indians until they were ready to be treated like other Canadians.'[65] The current main purposes of the *Indian Act* as described by the Department of Indian Affairs and Northern Development (DIAND) in the Penner Report are:

> To provide for band councils and the management and protection of Indian lands and moneys, to define certain Indian rights, such as exemption from taxation in certain circumstances, and to define entitlements to band membership and to Indian status.[66]

Armitage, however, articulated the omnipotent and omnipresent power of the *Indian Act* as an instrument to subordinate the Indigenous Peoples of Canada:

> The Indian Act 1876 was conceived as a complete code of management of Indian affairs. ... Resistance from First Nations peoples was met with amendments to the Indian Act – amendments that made its provisions even more effective. ... When First Nations bands elected their traditional leaders, the act was amended (in 1884) to give the government the power to depose those considered to be immoral, incompetent, or intemperate and to prevent their re-election. When traditional First Nations customs, in the view of missionaries or Indian agents, interfered with progress towards assimilation, legislation was introduced to ban them (e.g. in 1884 the potlatch [BC] and the Sun Dance [Prairies] were banned). In 1920, provisions requiring First Nations peoples to seek permits to appear in traditional dress and to perform traditional dances were written into the Indian Act; when the First Nations peoples of Manitoba and the Northwest Territories persisted in continuing to hunt and fish the act was amended so that the game laws applied to them as well as to non-aboriginals (1890); when schools on the reserves were not well attended and First Nations parents failed to send their children to residential schools, provisions permitting the governor-general-in-council to issue regulations and to commit children to such institutions were written into the act (1894); when these provisions failed to obtain consistent attendance, the act was strengthened by classifying delinquent all children who did not attend and by making their parents subject to criminal penalties (1920); and when First Nations peoples failed to apply for enfranchisement, provisions making it compulsory were written into the act (1922).[67]

The status and rights of Indians in the provinces has depended on this legislation and the numbered Treaties affecting the southern half of Canada. The first of these post-

[64] *Indian Act 1876* S.C 1876.
[65] Ibid, c. I-5.
[66] Canada, supra n 18 at 17.
[67] Armitage, A *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: UBC Press, 1995) at 78-9.

confederation Treaties were negotiated in 1871 for the cession of lands in Manitoba and the adjoining area of the North West Territories. These were the first and second of what have been called the numbered Treaties. In total, the Federal Government of Canada concluded 11 numbered Treaties. The final Treaty, negotiated in 1921, covered the Mackenzie Valley. The Treaties usually adopted a formula of apportionment of land rights based on individual members of an Indian Band. This was the basis upon which land was allocated for reserves and, if not possible, this was how compensation was assessed. In addition these Treaties deal with hunting and fishing rights over non-settled areas. Before 1982 Federal laws could over-ride the terms of Treaties.[68] Now s. 35 *Constitution Act 1982* ratifies and affirms 'existing aboriginal and treaty rights' and, pursuant to ss. 25 and 52(1), *Constitution Act 1982,* these rights are deemed to be part of the supreme law of Canada. These matters are significant because they affect the status and powers of the individual Band Councils recognised under the *Indian Act.*

12.8.2.1 LEGAL STATUS UNCERTAIN

A reserve is defined in s. 2 of the *Indian Act 1990* as:

> A tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

A band is defined as a 'body of Indians' meaning persons registered or entitled to be registered as an Indian under the Indian Act:

a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart ...
b) for whose use and benefit in common, moneys are held by Her Majesty, or
c) declared by the Governor in Council to be a band for the purposes of this Act.

Governance of a reserve is vested in a Band Council, elected under the provisions of ss. 74-80 of the *Indian Act* or in s. 2(1): 'the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band.' The legal status of a Band appears to be unclear[69] and shrouded in mystery as McHugh termed it.[70] McHugh noted that a Band is considered an unincorporated

[68] *Indian Act 1970,* R.S.C I.C-6, s. 88 as amended.
[69] Isaac, T *Aboriginal Law: Cases and Materials: Cases and Materials* (Purich, Saskatoon, 2004) at 464.
[70] McHugh, P 'Native Land Development' in *Saskatchewan Law Review* (Vol. 47, No. 1) at 141.

association,[71] which means that it may hold property for its members on either trust or a co-ownership basis.[72] Williston and Rolls observed:

> An unincorporated association, other than a partnership, or a quasi-corporation, has no legal existence apart from its members. It is not a legal entity capable of suing or being sued *econ nominee:* it is not capable of contracting or appointing an agent, and service cannot be effected against its officers. Any proceedings against an association are a nullity and not a mere regulation which can be waived by the entry of an appearance, and judgments by or against it are null and void.[73]

Woodward added:

> A band, as an enduring entity with its own government, is a unique type of legal entity under Canadian law. The rights and obligations of the band are quite distinct from the accumulated rights and obligations of the members of the band. What distinguishes a band from a club is that a band exists apart from any voluntary act of its members. In this respect a band is more like a nation than a club. But no comparison is totally appropriate. In law a band is in a class by itself.[74]

Isaac noted that some cases suggest that a band is neither a legal person nor a corporation while other cases suggest a more liberal approach.[75] The now defunct *First Nations Governance Act 2002* proposed to clarify this position by expressly providing that Band Councils are natural persons and are capable of entering intro contracts, being sued and other related functions.[76] Band councils are currently distinct entities capable of being sued and have been found to be similar to municipal forms of government.[77] Hence the *Indian Act* has provided meagre legal certainty for a band and Band Council, which has proven to be detrimental in terms of attracting external (and internal) investors, providing insufficient collateral for loans to further business, and possession not title of reserve lands for band members, and therefore hindering economic, social, cultural and political

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[71] Ibid citing *Mintuck v Valley River Band* 63A [1976] 4 W.W.R 543 (Man. Q.B); [1977] 2 W.W.R 309 (Man.C.A); *Afton Band of Indians v A.G* (N.S) [1978] 3 R.P.R 298 (N.S.S.C., T.D); *Mathias v Findlay* (sub.nom. *Joe v Findlay*) (1978) 4 W.W.R 653 (B.C.S.C); (1980), 109 D.L.R (3rd) 747 (B.C.S.C); *Cache Creek Motors Ltd v Porter* (1980), 14 B.C.L.R 13 (B.C.S.C).

[72] Lloyd, D *The Law Relating to Unincorporated Associations* (London, 1938) at 165, 175; Paton, G & Derham, D (eds) A *Textbook of Jurisprudence* (4th Ed) (Oxford, 1972) at 428.

[73] Williston, W & Rolls, R *The Law of Civil Procedure* (Vol. 1, Toronto, 1970) at 290.

[74] Woodward, J *Native Law* (Carswell, Toronto, 1989) at 397.

[75] *R v Cochrane*, [1997] 3 W.W.R 660 (Man. Co. Ct) and *R v Peter Ballantyne Band* [1987] 1 C.N.L.R 67 (Sask. Q.B). These cases held that a band is neither a natural nor a legal person and is not a corporation. However, other cases have held that a band can sue and be sued and is a legal entity with legal rights and obligations, notwithstanding that it may not be a legal person.' See *Springhill Lumber v Lake St. Martin Indian Band* [1986] 2 C.N.L.R 179 (Man.Q.B) and *Clow Darling Ltd v Big Trout Lake Band of Indians* [1990] 4 C.N.L.R 7 (Ont. D.C).

[76] First Nations Governance Act (2002) Bill C-61, s. 15.

[77] *Isolation Sept-Iles Inc. v Montagnais de Sep-Iles ef Maliotenam* [1989] 2 C.N.L.R 49 (Que. S,C). See also *Mohawks of the (Bay of Quinte) Tyendinega Mohawk Territory (Re),* [2001] 1 C.N.L.R. 195 (Can. Indust. Rels. Bd) at paras. 28-9.

development opportunities. Indeed Jason Calla of Fiscal Realities, an economic consulting firm with First Nation clients commented on lost opportunities on Indian reserves:

> Approval of a development project on Indian land [*Indian Act* reserves] can take four to six times longer than approval on non-Indian land. ... The problem – due partly to the legislated oversight involvement of the Federal Indian affairs department – is holding back bands and tribes from their climb out of poverty. ... Governments are losing $2 billion a year in revenue because Canada's Indians are not participating in the economy at the same level as other Canadians. ...The glacial-like approval process turns off potential investors, who divert projects to adjacent non-aboriginal lands.[78]

Calla added that the main issue is the relationship with DIAND:

> The Indian Act puts Ottawa in a conflict of interest. On the one hand, the department, which has a major say in projects on aboriginal lands, wants to encourage economic development. However, it also has a fiduciary responsibility to protect First Nations interests and that discourages risk-taking. ... We hope we can streamline some of the processes if we have a stronger level of jurisdiction ourselves, for example over the ability to lease lands and also ease the access as far as financing using the equity of our lands or other resources.[79]

12.8.2.2 BAND STRUCTURE

Under the *Indian Act* certain powers of self-government are conferred on elected chiefs and Band Councils,[80] the Minister of Indian and Northern Affairs, and the Governor in Council. Band members can select their own Band Council governments. A chief and between two and twelve councillors are chosen either by indigenous custom or by elections from among adult band members pursuant to ss.74 and 77. This is a system that grants much power to the Federal Cabinet and the Minister, at the expense of Band autonomy and self-government. For example, the Minister may declare that a band council consisting of chief and councillors shall be elected 'for the good government of a band.' Regulations for elections are laid out in the Act and the Governor in Council may make additional regulations regarding elections, band meetings and council meetings. In effect, the Band Councils are trustees of band assets, and must act fairly in allocation of lands for the benefit of all band members.

12.8.2.3 BAND POWERS

The Governor in Council has the power to declare a body of Indians to be a Band under the *Indian Act*. He or she may also decide what powers may or may not be conferred on the Band. The Governor in Council can determine what parts of a reserve may be vested

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[78] 'Red Tape stymies native Indians, economist says' in *Vancouver Sun*, (22 November 2001).
[79] Idem.
[80] See generally, *Indian Act*, R.S.C 1985, c/ I-8, especially ss. 74-86; and Bartlett, R.H, *The Indian Act of Canada* (2nd ed)(University of Saskatchewan Native Law Centre, Saskatoon, 1988), chapter IV.A; and Woodward, supra n 74.

in a Band, may consent to the expropriation of Band lands, regulate natural resource use on reserves, regulate the estates of Indians, regulate meetings of Bands, veto loans and the list goes on. The Minister likewise has control over Band matters relating to elections, by-laws, spending of Band funds, management of Band artefacts and so on.

Section 81 of the *Indian Act* outlines that a band council may make by-laws subject to disallowance by the Minister, to:

- provide for the health of residents on reserves;
- regulate traffic;
- observe law and order;
- prevent disorderly conduct and nuisance;
- regulate domestic animal activities;
- construct and maintain water courses, roads, bridges, ditches, fences and other local works;
- divide reserves into zones and enforce prohibitions for these zones;
- regulate the construction, repair and the use of buildings
- survey and allot reserve lands among band members;
- destroy and control noxious weeds;
- regulate bee-keeping and poultry raising;
- construct and regulate water works;
- control and prohibit public games, sports and other amusements;
- regulate the conduct and activities of merchants on reserves;
- preserve, protect and manage fur-bearing animals, fish and other game on reserve;
- remove and punish persons trespassing on reserves;
- regulate the residence of band members and other persons on the reserve, and
- provide for entry permits to band lands except for parties entitled to enter the reserve pursuant to Federal or applicable provincial authority.

The band may make money by-laws 'where the Governor in Council declares that a band has reached an advanced stage of development.' The money by-law power extends to the taxation of reserve lands occupied by band members and the licensing of business, callings, trades and occupations. The Band Council may also make by-laws regarding the sale, barter, supply, manufacture or possession of intoxicants on the reserve which power is not subject to disallowance.

Table 11.1 Indian Act Band Council Model

Advantages	Disadvantages
Democratic government (cultural match though)	Extremely paternalistic
Scope for hereditary representation	Anachronistic 'colonial' governance model
Municipal-type government	Problems of accommodating hereditary and elected councillors and leadership
Council by-law powers	Funding depends upon DIAND (external)
Intervention of Minister	Council by-laws subject to disallowance by Ministerial
Tax exemption on reserve	Relatively limited scope, limited to status reserve resident
Fiduciary relationship with Federal Government	Complex
	Centralist structure of the *Indian Act*
	Small size (often less than 500 people), isolation, limited human and economic resource base
	Property possession not title
	Unstable legal status of the Band entity

The Band Council therefore is a municipal-type legislative self-government model. Evelyn Peters noted that band government under the *Indian Act* is limited in its jurisdiction and it may be argued that this arrangement does not actually represent self-government, but rather self-administration or self-management.[81] The *Indian Act* imposed Eurocentric governance systems and values on First Nations peoples. Not surprisingly, First Nations have been frustrated by the paternalism inherent in the *Indian Act* which perhaps has parallels with the *Maori Trust Boards Act 1955* and the old *Maori Affairs Act* legislation. Social Darwinism, humanitarianism and evangelical Christianity legitimated this type of paternalism and assimilationism against Indigenous Peoples in New Zealand and Canada. If the bottom line for indigenous self-governance and to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governing institutions, processes, systems and disputes, then the DBC value of this legislated self-governance model is 2 - a cultural perspective structural arrangement.

12.8.3 FIRST NATIONS GOVERNANCE ACT 2002 (BILL C-7)

On 30 April 2001, Robert Nault, Minister of DIAND, unveiled a new initiative to update the Indian Act, primarily with respect to governance. The new First Nations

[81] Peters, E, *Aboriginal Self-Government Arrangements in Canada* (Institute of Intergovernmental Relations, Queens University, Kingston, Ontario, 1987) at 5.

Governance Initiative was intended to assist in designing a new statutory framework for Indian governance including:

- updating electoral and voting systems for reserve-based governments;
- balancing the interests of on- and off-reserve Indian band members; and
- enhancing the resources available to band councils to operate effective governments.

As part of this initiative, Bill C-61 was introduced in the House of Commons on 14 July 2002 and reintroduced as Bill C-7. In effect, the First Nations Governance Act was the Federal government's attempt to modernise the Indian Act and provide more accountability to Indian people by their reserve-based governments. Section 5 of Bill C-7 called for the introduction of leadership selection codes by Indian bands that would ensure that guidelines respecting band council elections were put in writing, including those Indian bands that presently operate by custom election. Bill C-7 also contained provisions regarding the establishment of codes for financial management and accountability by Indian bands and for administration of government, dealing with matters such as conflicts of interest, access to information of government, privacy, and standards regarding the frequency of, and notice relating to, Indian band meetings.

Minister Nault noted that this initiative was not intended to replace Treaties and Treaty negotiations and it would not implement self-government or replace the entire Indian Act.

Rather, the governance legislative initiative was an interim step along the road to self-government because the Indian Act did not reflect the capabilities or needs of First Nations communities or governments. The Indian Act did not give First Nations governments the tools they needed to exercise 'good governance or to foster economic growth and development.' DIAND noted that the new governance initiative was a change in authority to the First Nations government and First Nations members.

Minister Nault added that the new initiative would allow First Nations to tailor modern tools of governance with their own unique customs and traditions and it would provide First Nations operating under the Indian Act with the tools needed to foster open, responsive and accountable governance.

The scope of the First Nations Governance Act was to address the fundamental aspects of governance, including elections, political and fiscal accountability based on best practices, redress mechanisms, disclosure and access to information, First Nations and government institutions, the role of indigenous customs and institutions in governance,

clear legal status of First Nations, women's issues relating to governance and additional provisions related to bylaw enforcement. DIAND proceeded on the understanding that the legislation would strengthen First Nations governance by dealing with matters the Indian Act did not address. Hence under this initiative, with an effective and accountable governance framework, the primary relationship would shift from between the Government of Canada and Chief and Council, to one between First Nations governments and First Nations citizens. Minister Nault concluded: 'I am confident we can make good governance a reality for all First Nations.' However, the initiative failed and the First Nations Governance Act 2002 (Bill C-7) was subsequently repealed in 2004. If the bottom line for indigenous self-governance and to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governing institutions, processes, systems and disputes then the DBC value of the First Nations Governance Act 2002 self-governance model, had it been implemented, would have been 3 - active cultural development - which would have been an improvement on the Indian Act Band governance regime.

12.8.4 TREATY SETTLEMENT NEGOTIATED SELF-GOVERNMENT MODELS

Another avenue for developing self-governing arrangements was the process under which the Federal government, since 1973, has negotiated comprehensive land claims settlements. Increasingly in the 1990s, many Indigenous People in Canada have pointed to the Treaty-making process as the best road to self-government. Treaty settlement agreements are more generally termed 'land claims settlements'.

In relation to these issues the Federal Government of Canada stated in their claims policy documents:

> It is recognised that land claims negotiations are more than real estate transactions. In defining their relationships, aboriginal people and the Government of Canada will want to ensure that the continuing interests of claimants in settlement areas are recognised. This will encourage self-reliance and economic development as well as cultural and social well-being [internal self-determination]. Land claims negotiations should look to the future and should provide a means whereby aboriginal groups and the Federal government can pursue shared objectives such as self-government and economic development.[82]

Comprehensive claims are defined as claims based upon traditional use and occupancy and unextinguished aboriginal title (i.e. not dealt with by Treaty or 'superseded

[82] Canada, supra n 11.

by law'). Much of the landmass of Canada had been subjected to Treaties up until 1921. For the most part, Canada has not honoured the spirit of these Treaties. This is so with regard not only to what might be termed these 'historic Treaties' but also to 'modern Treaties'. The largest percentage of specific land claims is made within these territories and relate to the concerns of Bands and Councils living in these areas. Remaining lands that fall within the arc beginning in Newfoundland and Labrador in the east, through to Quebec, the eastern portion of the Northwest Territories, most of the Yukon Territory and into British Columbia in the west form the majority of comprehensive land claims (unextinguished aboriginal title claims) in Canada.

Modern Treaties or land claims agreements have brought many benefits to Indigenous Peoples. The Nunavut agreement in the eastern Arctic is increasingly cited as a model for indigenous self-government in countries such as Australia. The Nunavut, James Bay, Yukon, Nisga'a and other agreements have provided for the transfer of hundreds of millions of dollars from the governments of the Crown to indigenous entities and institutions.

Specifically, land claims agreements usually include rights to lands and resources that are relatively extensive when compared to the lands and resources to which most Indigenous Peoples in Canada currently have access. The agreements also provide for significant monetary compensation packages as well as the creation of many boards and entities to foster health, education, economic development and environmental protection as well as a variety of other concerns.

According to the revised statement of comprehensive claims policy in 1986, a new feature of the policy was the possibility of negotiations on a broader range of self-government matters. The 1986 policy statement explicitly provided that self-government arrangements negotiated through claims settlements would not receive constitutional protection without a constitutional amendment to that effect. This meant that the government preferred to negotiate self-government arrangements separately from other matters in order to avoid entrenchment under s. 35(3) of the *Constitution Act, 1982*. Section 35(3) provides that the recognition and affirmation of existing Treaty rights in s. 35(1), includes 'rights that now exist by way of land claims agreements or may be so acquired.' A number of agreements have included a self-government component. Three types of self-government forms are available with negotiated self-government models:

- Guaranteed Participation;
- Public Government; and
- Coordinated Ethnic Government.

12.8.5 GUARANTEED PARTICIPATION – CO-MANAGEMENT STRUCTURES

One self-government approach found in land claims agreements is guaranteed participation in public structures of government. Guaranteed participation is an important element in all land claims agreements, and the key governmental element in the earlier agreements. In Nunavut, the key governmental element is in the creation of a new territory in which Inuit constitute a majority, while in the Yukon it is separate self-government agreements. Typically, Indigenous Peoples are guaranteed a certain proportion of seats on an administrative, advisory or decision-making body. The JBNQA Inuit have guaranteed representation in fields such as education, game, environmental and development control and justice.

12.8.5.1 CO-MANAGEMENT STRUCTURES – SHARED RULE?

Comprehensive land claims agreements have been used to secure indigenous participation in decision-making at the regional and sub-regional level through co-management structures. The bottom line for all indigenous proposals for self-governance to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governing institutions, processes, systems and disputes – authentic power – sharing. I will now examine a number of co-management regimes in Canada within this framework of power-sharing.

12.8.5.2 CO-MANAGEMENT REGIMES

12.8.5.2.1 JAMES BAY AND NORTHERN QUEBEC AGREEMENT 1975 - CO-MANAGEMENT

The James Bay and Northern Quebec Agreement 1975 (JBNQA) provides for a number of regional boards and commissions to administer lands, to look after Treaty entitlements, to stimulate economic development and to provide public services in the region concerned. Although these agencies are established through legislation, they are explicitly provided for in the comprehensive land claims agreement. Furthermore, Indians have reserves and status under the *Indian Act*, while the Inuit parties to the JBNQA have won municipal status for their communities under Quebec legislation. Providing for indigenous representation on regional boards and commissions like the JBNQA is one method of securing indigenous participation in regional affairs.

The JBNQA established a hunting, fishing and trapping co-coordinating committee to administer the Agreement's fish and wildlife management regime. Indigenous and Crown parties are represented equally and other corporations attend as observers. Committee members can change at the discretion of the parties and the Chair rotates

annually amongst the parties. The committee is limited to an advisory role designed to review, manage and supervise the management regime but the ultimate authority remains with the Crown, with certain exceptions for establishing upper-kill limits. Recommendations are forwarded to the Minister who may accept, reject or alter them. The sole obligation of the Minister is to inform the board of the reasons for his/her decision. There is a technical secretariat funded by the Crown who supports the board. However, the Cree and Inuit must pay their own costs of participation. At the local level, there are community landholding corporations that manage the exclusive harvesting rights of the indigenous beneficiaries and provide authority over sport hunting, fishing, outfitting and non-indigenous access on Category I and II lands. In order to support these corporations, the parties have had to create expensive research departments.[83]

The Cree and Inuit have been largely unsatisfied, however, with the results of the co-management regimes created under the JBNQA. The indigenous parties regarded these arrangements, as partnerships with the Crown, believing the JBNQA would secure their lands and their way of life in exchange for enabling certain developments. The Indigenous Peoples also believed the JBNQA would be implemented in good faith and in a cooperative spirit.[84] In practice, harvesting rights and environmental protection have proven subordinate to the right to development. Furthermore, instead of creating a partnership, the JBNQA excluded the Cree and Inuit from any significant influence on development, use and allocation of natural resources.

The Cree and Inuit feel the management regime did not help them to control events affecting wildlife and local resources, despite the intent of the regime. There have been significant problems surrounding the mandate, structure and operation of the advisory committees. The Crown never intended to delegate management to the boards or to make them instruments of the nation-state.[85] The idea of consultation was quite innovative in the early 1970s, but today the right to be consulted exists for all indigenous groups across the country. While there have been some improvements in environmental protection, it is not clearly integrated into the Crown's decision-making processes. Hence, given its complexity and perhaps political will or lack thereof, the JBNQA has not been fully implemented after 35 years because it appears that it was not fully implement-able.

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[83] Royal Commission on Aboriginal Peoples (RCAP), *Restructuring the Relationship* (Appendix 4b at section 1, Ottawa, 1995).

[84] Usher, J, *North Project Area 5: Land, Resource and Environment Regimes Contemporary Aboriginal Land, Resource and Environment Regimes Origins, Problems and Prospects* (Report prepared for Royal Commission on Aboriginal Peoples Land, Resource and Environmental Regimes, P.J Usher Consulting Services, 1996) at 5.4.1.

[85] Idem.

12.8.5.2.2 NEW AGREEMENT CONCERNING THE NEW RELATIONSHIP BETWEEN THE GOVERNMENT OF QUEBEC AND THE CREES OF QUEBEC 2002

Twenty-five years after the JBNQA very few Cree were employed in the development of the territory, had little control over resource management and lacked housing and community infrastructure. In response to widespread dissatisfaction and given new development projects in forestry, mining and hydro-electricity, the parties went back to the negotiation table. Under the new agreement, the James Bay Cree were to be paid $70 million a year for the next fifty years for hydro-electric development. $850 million was also promised in construction contracts for Cree companies, training and employment programs for permanent and construction jobs, and transmission lines to Cree communities. In an important symbolic move, both parties acknowledged the 'nation to nation' relationship between Quebec and the Crees based on respect and cooperation. A new co-management agreement was also negotiated, which forces the government to take the best interests of the Cree into account but still limits the Cree to a consultative role. The New Agreement states:

- the continued application of the provincial forestry regime still applies, but the Cree traditional way of life has to be taken into account, sustainable development is to be better integrated into the process of forestry management and the Cree are to participate in several management processes;
- new management units will be created by a Cree-Quebec working group;
- sites of special interest to the Cree are to be mapped by the Cree in coordination with the Ministry of Natural Resources;
- the new Cree-Quebec Forestry Board is to create longer-term planning and management of forestry activities;
- community level working groups will be created with an advisory role.

In terms of the control the James Bay Cree share in their co-management institutions, the DBC value is, in my view, 2 – a cultural perspective perhaps leaning towards 3 – active cultural involvement – with the new 2002 agreement.

12.8.5.2.3 INUVIALUIT FINAL AGREEMENT CO-MANAGEMENT REGIME 1984

The Inuvialuit Final Agreement (IFA) created several Inuvialuit institutions and five co-management bodies, founded on the recognition of Inuvialuit harvesting, land and resource rights. These rights give the Inuvialuit exclusive rights to harvest furbearers and the preferential right to harvest most other species of wildlife. Exclusive rights are limited to subsistence, thus omitting exclusive commercial rights. The co-management regime was established to achieve the following objectives:

- integrate the interests of harvesters and government in resource management;
- integrate wildlife management jurisdictions;

- Integrate wildlife and habitat management;
- integrate traditional and scientific knowledge;
- balance conservation interests with those of development;
- compensate harvesters for loss and future loss from development and;
- promote self-management and self-regulation among harvesters backed by government regulations.

The management scheme created several management institutions:

- Hunters and Trappers Committees (HTC) - Inuvialuit beneficiaries advise and collect data for the Game Council on issues of local concern, establish by-laws in their area regulating harvesting rights and can enforce lawful use of resources;
- Inuvialuit Game Council charged with the responsibility (along with the Inuvialuit Regional Corporation (IRC)) of overall implementation of the IFA. It has 13 representatives – two from each HTC and a Chair. The Council appoints members to the joint boards and distributes information, allocates quotas and represents Inuvialuit wildlife interests nationally and internationally;
- Fisheries Joint Management Committee represents equally the Crown and Inuvialuit designed to assist both parties in administering their respective responsibilities. It determines harvesting levels, maintains a registration system and regulates general public fishing. It also advises the Minister on policy and regulation issues;
- Wildlife Management Advisory Council provides advice to the appropriate ministers and other bodies on matters relating to wildlife policy and administration of harvesting. It also prepares a wildlife conservation and management plan for the whole western Arctic region;
- Environmental Impact Screening Committee examines all development proposals to determine the potential negative impact on the environment and harvesting. Proposals projecting a significant impact are referred to a Review Board, which recommends to the Minister whether the project should continue;
- Joint Secretariat provides administrative and technical support services to all joint committees. It administers funding, provides staff to respond to issues, shares information amongst the parties and collects information for the harvest study.[86]

The IFA goes further than the JBNQA in that it creates advisory boards, although it falls short of real power sharing, given that no recommendation from one of the advisory boards has been overturned.[87] The IFA has allowed for a high-degree of Inuvialuit integration and participation, so that the Inuvialuit appear to be largely in control of their resources. This success has been attributed to Inuvialuit members' fluency in English, cultural comfort between the parties, a transparent decision-making process, trust in the quality of the technical staff and chairs of the boards and trust in the strength of the IFA itself.[88] Clear funding agreements also ensured operations could run effectively. The clarity of both party mandates has made co-operation and decision-making much easier as well as allowed for greater flexibility in the operation of the IFA while still retaining its

[86] RCAP, supra n 83 (Appendix 4b at section 1, 1995).
[87] Usher, supra n 84 at 5.4.2.
[88] Idem.

ultimate vision. The IFA has resulted in a better understanding of the resources and wildlife populations and has protected the environmental integrity of the region.[89] The biggest challenge with the IFA is the Crown's unwillingness to change its power structure or compromise its ultimate jurisdiction, which uncertainty undermines the Inuvialuit's right of internal self-determination and could undermine their ability to protect their territory and culture. Hence the control by the Inuvialuit peoples of their co-management institutions would provide a DBC value of 3 – active cultural involvement.

12.8.5.2.4 NISGA'A FINAL AGREEMENT 2000 - CO-MANAGEMENT

The Nisga'a Final Agreement (NFA) allows the Nisga'a nation to have complete jurisdiction over fish, wildlife and forestry within their own territory. Beyond the Nisga'a territory, the Nisga'a are to be involved in management committees providing advice and recommendations to Federal and provincial governments. In addition, Nisga'a will be allocated rights to salmon according to a harvest agreement and will be encouraged to participate in the commercial fishing industry. The Nisga'a will receive an annual allocation for moose, grizzly bear and mountain goat and will work with the Minister of Environment, Lands and Parks regarding management.

Although there is little information available as to the success of the Nisga'a co-management arrangement, the NFA seems promising. The Crown has transferred unprecedented jurisdiction over wildlife, forestry, water and mining to Nisga'a Lisims Government (NLG), highlighting that the Nisga'a have real decision-making power. In the 2002 Annual Report of the NFA, Nisga'a Lisims Government expressed their satisfaction with the NFA and noted the growth of their economy and the growing health of their marine and wildlife populations because of conservation efforts.[90] Nisga'a control over their own governing institutions, including this co-management regime would provide a DBC value of 4 – parallel cultural institutions.

12.8.5.2.5 LABRADOR INUIT LAND CLAIMS AGREEMENT 2003 - CO-MANAGEMENT

The Labrador Inuit Land Claims Agreement (LILCA) was signed in August 2003, after 25 years of negotiations and sets out arrangements for land ownership, resource sharing and self-government. LILCA provides for the establishment of the Labrador Inuit Settlement Area (LISA) over 72,520 sq kilometres in northern Labrador, and includes fee simple ownership of 15,800 sq kilometres known as Labrador Inuit Lands (LIL). The self-

[89] Craig, D, 'Recognising Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences' in *New Zealand Journal of Environmental Law* (Vol. 199, 2002) at 25-28.

[90] *'Prosper' - Nisga'a Final Agreement 2002 Annual Report*, (Published under the authority of the Nisga'a Nation, the Province of British Columbia and the Government of Canada, 2002).

government provisions of LILCA require the preparation of a constitution, as well as the creation of an Inuit Central Government to be known as the Nunatsiavut Government (NG).[91] Five local governments will also be established, along with Community Corporations to represent the interests of Inuit residing outside of the settlement area.[92] NG and each community government is a legal entity with a legal personality to enter into contracts, hold property, rise, borrow and expend money, sue and be sued, and form corporations and other legal entities[93]. The legislative powers of the NG will extend to the making of laws applicable to the Inuit in LIL with respect to culture, language, education, health, social services as well as law enforcement and justice.[94] In terms of institutional representation, the LILCA guarantees Labrador Inuit representation in Part 2.21:

> **Warranty of Representation**
> Labrador Inuit Association represents and warrants to Canada and the Province that it represents Inuit.

LILCA establishes the Torngat National Park reserve as well as several other protected areas with an advisory co-management board created with equal representation from the Inuit and the Federal and Territorial governments, complete with a clear mandate, budget and decision-making process (consensus decision-making, with democratic voting as a last resort). LILCA also outlines how future protected areas would be established, requiring the completion of a protected area agreement with the NG. The carrying out of any archaeological activities within national parks or reserves also requires consultation with the NG. Further, any land development requires a comprehensive plan to be created by the Province and the NG. Federal and provincial environmental assessment laws will continue to apply across the Settlement Area.

Labrador Inuit will have rights to harvest wildlife, plants, fish and marine mammals for food and social purposes throughout the LISA. The Crown upon recommendation by NG will determine any limits. With some exceptions, the NG will control who may harvest plants and wildlife and fish within the Settlement Area. Existing commercial fishing licenses will not be affected; however, the Inuit will receive a percentage of revenues from

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[91] Canada, Newfoundland and Labrador and the Inuit of Labrador, *Labrador Inuit Lands Claims Agreement, 2003* (Her Majesty the Queen of Canada, Her Majesty the Queen of Newfoundland and Labrador and the Inuit of Labrador, Ottawa, 2003), Chapter 17: 'Labrador Inuit Self-Government'. Online at: http://www.laa.gov.nl.ca/laa/liaclaims/pdf/complete.pdf (accessed on June 5, 2005).
[92] Ibid, Chapter 17.38 and Schedules 17-A, B, C, D and E. Community Corporations are established pursuant to the *Municipalities Act 1999.*
[93] Ibid, Part 17.4.1.
[94] Ibid, Chapter 17. Parts 17.5 – 17.37.

new commercial fishing licenses. Compensation may be payable where developers carry out projects that adversely affect wildlife, fish, habitat or harvesting activities of the Inuit.

LILCA was ratified in January 2005 through a referendum, hence it is still early to assess the new co-management regime. However, it is possible to look at potential strengths and weaknesses of LILCA. LILCA is strong in terms of the legislative and political strength of the new governing body, the Nunatsiviut Government, but the Crown remains unwilling to transfer to the Inuit full jurisdiction over the management of natural resources, although there are consultation requirements and a co-management advisory board for the new National Park. Still, if the recommendations coming from these new structures are reasonable and supported by the whole board, the Inuit have the possibly of playing a key role in the resource management of the area. LILCA also shows a genuine effort to appropriately accommodate Inuit culture, language and values, with a focus on consensus building and Inuktitut language rights.[95] Hence, the control exercised by the Labrador Inuit over their co-management institutions would provide a DBC value of 4 – parallel cultural institutions.

12.8.6 PUBLIC GOVERNMENT

Indigenous People are free to participate in the ordinary structures of public government throughout the country and several have made significant contributions in recent times.[96] Where indigenous 'peoples' constitute a potential majority of the electorate their opportunity for influence is enhanced. This is the case for the Inuit in the northeastern Arctic region of Canada or Nunavut.

12.8.6.1 NUNAVUT SELF-GOVERNMENT

For decades, Inuit of the central and eastern Arctic have been calling for the creation of a new territory. This effort took on added impetus in 1976 when the Inuit Tapirisat of Canada submitted a proposal to the Federal government requesting the creation of a new territory to be called Nunavut ('our land' in the Inuktitut dialect of the region). A 1982 plebiscite and several years of negotiations followed. A key provision of the Tungavik Federation of Nunavut land claim agreement, which was finalised in 1991, was

[95] See Fagan, C, *The Successes and Failures of Indigenous Co-Management Regimes in Canada: Possible Ways the Waikato River Claim Settlement Process Can Learn from the Canadian Experience* (Waikato Raupatu Trustee Co. Ltd., Hamilton 2005).

[96] For example, Elijah Harper, the Manitoba M.L.A; Nellie Cournoyea, former government leader of the Northwest Territories; Ethel Blondin-Andrews, M.P; and Paul Okalik, government leader Nunavut.

the creation of a new territory. The Nunavut Settlement Agreement (NSA)[97] committed Canada, the Government of the North West Territories (NWT), and the Tungavik Federation of Nunavut to negotiate a political accord to deal with powers, financing and timing for the establishment of the Nunavut public government. The NSA with the Inuit finalised in 1992-1993 provided for Inuit self-government, albeit public government. Article 4 of NSA committed Canada to passing legislation to create a new Territory, the Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories, and to that end a political accord was negotiated by the parties.[98] Consequently, the *Nunavut Act 1993*[99] (NA) was passed to establish the Territory of Nunavut and to provide for its public government. The Nunavut territory and public government was established on 1 April 1999. It has jurisdictional powers and institutions similar to those of the government of the NWT. Inuit control through public government is premised upon the existence of an Inuit majority in Nunavut. Currently, 85% of the population of the region is Inuit hence the Nunavut government will represent many Inuit values and traditions, apparently including the allowing of workers time off pursuing traditional activities like seal hunts.

On 15 February 1999, residents of Nunavut held their first election for members of their Legislative Assembly and Paul Okalik was selected as the territory's first premier. The NA provides for the seat of Government to be designated by the Governor-in-Council, for the appointment of a Commissioner for Nunavut and a Deputy to exercise the powers formally exercised by the Commissioner of the Northwest Territories. The NA authorises the establishment of the Executive Council of the Nunavut and the Legislature with powers to make laws, including laws of general application that apply to all people or only in respect of Indians and Inuit. Among the laws that may be made are laws for the purpose of implementing the land claims agreement entered into by the Inuit and the Canadian Government. The NA also authorises the establishment of the Supreme Court and Court of Appeal of Nunavut; the Nunavut Consolidated Revenue and associated procedures, the Nunavut Implementation Commission; the process for the retention of Crown lands and rights to beneficial use; and the process for the protection of cultural sites and property.[100]

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[97] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada,* (Tungavik and the Department of Indian and Northern Affairs, Ottawa, 1993).

[98] Ibid, Article 4.1.1.

[99] *The Nunavut Act 1993* (Statutes of Canada 1993, Ch. 28).

[100] See generally Nunavut Tungavik *Nunavut '99: Changing the Map of Canada* (Nortext Multimedia Inc, Nunavut Tungavik Inc, Iqaluit, Nunavut, 2000). For a good discussion on Nunavut, see Jull, P & Roberts, S *The Challenge of Northern Regions* (Australian National University North Australia, Darwin, 1991); Jull, P, 'New Deal for Canada's North' in *North* (Vol. 1, 1999) at 5-10; Jull, P 'Reconciliation and Northern Territories, Canadian Style: The Nunavut Process and Product' in *Indigenous Law Bulletin* (Vol. 4, No. 20,

The legislative Assembly, Cabinet and territorial courts will operate in the three official languages of English, French and Inuktituk. With government departments and agencies set up in the twenty-eight communities throughout the territory, the Nunavut government is decentralised, responding to the economic needs of the region.

The Government will be established in evolutionary stages over sixteen years, scheduled to end in 2009, with the Federal Government promising more than $1.2 billion in capital transfer payments to the people of Nunavut. Commenting on the Nunavut Settlement John Amagoalik noted that:

> Through the settlement of our land claims and the rebirth of Nunavut, our generation has won back our right to determine our political future. ... There is a resurgence of Inuit pride and we have become loyal Canadians.

The Government of Nunavut is a 'public government' not an 'ethnic form' of self-government. Indeed, the Nunavut negotiators conceded early to opt for a public government, a pragmatic decision that would aid them in their quest to achieve a territory. The Inuit people originally wanted an Inuit government but the negotiators urged them to eliminate 'nativeness', and 'separateness' because it 'would not have a snowball's chance in hell of making it.' Yet by supporting a public government, they noted 'we can get the same thing.' The Nunavut negotiators always maintained their non-negotiable position of a separate territory with their own government. They were even willing to sacrifice the claim rather than give up and sign an agreement that did not include this crucial point. The Nunavut public government and Nunavut land claim are both linked issues such as the number of Inuit employed in the public service being directly proportional to the number of Inuit in Nunavut society and respective expertise in required areas. Another interesting indigenous innovation of the Nunavut public government entity is the fact that it will have no political parties at the territorial level. Instead, the legislative assembly of the territory will operate on the basis of consensus politics similar to indigenous decision-making systems, according to the consensus of the majority of its members rather than political party lines in contrast with other Territorial and Provincial legislative governments.

The Nunavut public government shares all of the principles of good government, democratic institutions, the rule of law, equality, respect for human rights, transparency, public participation, democratic elections and so on like any Territorial government but with a number of major differences. The Inuit of Nunavut are the politically acknowledged majority who are managing their own land and affairs consistent with Inuit values and

1999) at 4-7; and Jull, P, 'Nunavut: The Still Small Voice of Indigenous Governance' in *Indigenous Affairs,* (Vol. 3, 2001) at 42-51.

traditions, a largely Inuit public service, and a decentralised government. Indeed, Allen Maghagak, the former chief negotiator, stated that:

> Pressing for a Nunavut government was essential to make sure that our claims settlements covered everything. Past claims agreements dealt only with real estate and cash.

In terms of real power sharing, Tom Molloy who was involved in the negotiations of Nunavut for the Federal government, stated:

> The government of Canada was not keen about creating [Nunavut Inuit] boards that would have full decision-making powers. They were prepared to create boards that would have an advisory role ... Ultimately, it was agreed that the treaty would provide a guarantee that there would be boards that would be called instruments of public government. In other words, the creation of a board and its responsibilities, functions, powers, objectives and duties would be set out in the treaty to function as instruments of public government.

Whether these Nunavut boards and Nunavut public government constituted authentic power-sharing or just delegation of authority, Molloy implied:

> We were creating a new relationship, a relationship that balanced rights set out in the treaty with the role of public government and public government institutions. I believe that the creation of Nunavut is a current example of a successful partnership in pursuit of the public interest. ... [In] Nunavut the Federal government, the Inuit, and the territorial government were willing to share some uncertainty and risk, and they found creative ways to find solutions, which would allow the common goals of each of the parties to be obtained.

Molloy concluded:

> We have the Nunavut model, which I say, is not self-government; it's public government, but as a result of a treaty, the Inuit have a role to be decision-makers in the public government process in a real way.

It would appear then that the Nunavut public governance model for the Inuit is a self-determining model within existing mainstream governance structures that provides the Inuit 'real power.' If the bottom line for indigenous self-governance and realising internal self-determination rights and responsibilities is control by an Indigenous People over *their* own governing institutions, processes, systems and disputes then the Nunavut self-government model, is ironically, a competent model, albeit a non-indigenous (especially non-Inuit) governance model. Consequently, the DBC value of this legislated self-governance model is 4 - a public mainstream model but parallel cultural institution – with hybrid (by default) structural arrangements.

12.8.6.2 KATIVIK PUBLIC GOVERNMENT

The JBNQA provided for a form of public government for the Inuit signatories at the local level. The *Act Concerning Northern Villages and the Kativik Regional Government 1978* (*Kativik Act*) applies to the territory of Quebec situated north of the 55th parallel. The *Kativik Act* established Inuit settlements in northern Quebec as northern village municipalities under provincial legislation. The *Kativik Act* and the institutions created by it are not of an ethnic character. Local and regional governments represent municipalities in which all residents, indigenous and non-indigenous, may vote, be elected and otherwise participate. Still, over 90% of the population in the area are Inuit and receive benefits under the JBNQA, hence the inevitable ethnic 'flavour' as it were, about this public government form.

12.8.6.2.1 ADMINISTRATIVE STRUCTURE

The JBNQA provided for the enactment by the province of legislation establishing municipal community government and municipal regional government. Part I of the *Kativik Act* refers to the local level of government. Inuit settlements became, after receiving letters patent, 'Northern Village Municipalities.' The inhabitant's and ratepayers of every municipality form a corporation. Northern village municipal corporations may:

- enter into contracts and agreements;
- purchase lands and property for municipal purposes;
- found, maintain, assist, and subsidise bodies for industrial, commercial and tourist promotion; and
- assist in the furtherance of any social welfare enterprise of the population.[101]

An elected council manages northern village municipal corporations. The *Kativik Act* outlines qualifications for municipal office, composition of the council, elections and procedures for passing and enforcing by-laws.

12.8.6.2.2 GENERAL LEGISLATIVE POWERS

Municipalities are empowered to make by-laws to secure the peace, order, good government, health, general welfare and improvement of the municipality. Municipalities have powers to make by-laws concerning:

- zoning and land use planning to the extent that by-laws do not affect the rights of Inuit Landholding Corporations;
- expropriation subject to the regulations of the Kativik Act;
- taxation for local purposes;
- regulation of buildings and other structures;
- public health and hygiene;

[101] *Act Concerning Northern Villages and the Kativik Regional Government 1978*, Part I.

- parks, recreation and culture;
- regulation of roads, traffic and transportation; and
- public works.[102]

By-laws may not be contrary to the laws of Canada or of Quebec, or inconsistent with any special provision of the *Kativik Act*. Municipal council by-laws shall not be contrary to the ordinances of the Regional Government in matters of competence. The Quebec Minister of Municipal Affairs is empowered to disallow any by-law.

12.8.6.2.3 REGIONAL ORGANISATIONS - AGGREGATION

Part II of the *Kativk Act* created the Kativik Regional Government (KRG). KRG has the powers of a northern village municipality, described in Part I of the *Kativik Act*, over those parts of the territory that are not part of the village corporations, and regional powers over the whole territory including the municipalities; and it exercises regional powers. KRG has the general powers of a corporation under the Civil Code of Quebec and in addition it is competent in matters of:

- local administration and assistance to northern village municipalities;
- transport and communications;
- regional police; and
- advising the provincial government about manpower training and utilisation.

KRG's internal structure, operation and procedures for making by-laws and ordinances are set out in the *Kativik Act*. A council and executive committee govern KRG; the administration of its business is governed by officers (manager, secretary and treasurer) and by department. The council is composed of regional councillors elected by the municipalities.

Certain provisions of the JBNQA, not incorporated into the *Kativik Act*, give additional functions, including:

- administration of the Inuit hunting, fishing and trapping support program;
- acting as a regional health and social service council charged with promoting the advancement of public health; and
- acting in an advisory capacity in matters related to the administration of justice, protection of the environment, the Kativik School Board, and the Kativik Regional Development Council.

Kativik has paramountcy in relation to municipal by-laws. It has the power to establish minimum standards for building and road construction, sanitary conditions, water pollution and sewerage. It may establish radio and television aerials, public transportation services and a regional police force for the enforcement of its ordinances and of other laws. Subject

[102] Ibid.

to the powers of Federal and provincial governments, Kativik may make laws governing harvesting activities and hunting and fishing by non-indigenous peoples. The Quebec Minister of Municipal Affairs, however, is empowered to disallow any by-law passed by Kativik.

The Federal and Quebec governments have been negotiating with the Makivik Corporation, which represents the Inuit, to further the self-government powers gained by the Inuit of Northern Quebec pursuant to the JBNQA. The Makivik Corporation (Makivik) was created on 23 June 1978 to 'administer the implementation of the JBNQA and invest the $90 million in compensation, paid over 20 years from 1975 – 1996.' The mandate of Makivik is to foster socio-economic development among the 14 Inuit communities that are signatories[103] to the JBNQA.

In terms of realising Inuit internal self-determination rights and responsibilities by controlling their own governance institutions, processes and systems, the DBC value of Kativik Government would be 3 – active cultural involvement or perhaps closer to 4 parallel Inuit cultural institutions.

12.8.6.3 INUVIALUIT FINAL AGREEMENT PUBLIC GOVERNMENT

The Inuvialuit Final Agreement (IFA) has no specific provision for self-government.[104] Instead the IFA represents an example of comprehensive co-management for resource management and economic development. According to Connelly of the Department of Social Welfare, self-government by the Inuvialuit in the Western Arctic Region is largely impractical due to the fact that through the vast settlement area there would be several overlapping claims to social services from both indigenous and non-indigenous peoples.[105] Instead, the Inuvialuit are pursuing with the Federal and territorial governments a form of regional public indigenous government that takes over delivery of territorial government programs but does not just attend to the needs of Indigenous Peoples in the area. In this sense the Inuvialuit want to have control of social service delivery and

[103] The traditional territory of the Inuit communities of the JBNQA is called Nunavik. The population is approximately 7,000.

[104] Connelly, R, Regional Director of Inuvik Region, (Department of Executive, GNWT, 1995) cited in 'Yukon Umbrella Final Agreement, 1993' in ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (Ministry of Aboriginal Affairs, BC, Federal Treaty Negotiations Office, December 1995) at 4-5; and ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: Final Report* (Ministry of Aboriginal Affairs, BC and Federal Treaty Office, BC, July 1995) at 4-5.

[105] Ibid.

the other financial issues *related* to self-government, but for practical purposes it would take on a community approach.[106]

Several mechanisms have been established both to integrate the Inuvialuit into formal decision making processes for resource management and economic development. The IFA created several Inuvialuit institutions and five co-management bodies, founded on the recognition of Inuvialuit harvesting, land and resource rights. These rights give the Inuvialuit exclusive rights to harvest furbearers and the preferential right to harvest most other species of wildlife. Exclusive rights are limited to subsistence, thus excluding exclusive commercial rights.

For Inuvialuit economic development, a number of corporate structures to administer and manage settlement funds, lands and other benefits were established. These include:

- The IRC, the umbrella organisation for the Inuvialuit, composed of representatives from each of the six community corporations, to receive initially the settlement funds and lands and to coordinate Inuvialuit implementation efforts;
- Six Inuvialuit Community Corporations, to control the IRC through elected representatives to the board. These community corporations include Sachs Harbour, Holmon Island, Paulatuk, Tuktoyaktuk, Inuvik, and Aklavik.
- The Inuvialuit Land Corporation to administer the settlement lands; and
- The Inuvialuit Development Corporation and the Inuvialuit Investment Corporation to carry on business on behalf of the Inuvialuit and to invest settlement funds on behalf of beneficiaries.

The IFA guarantees that Inuvialuit will be a part of making any changes to public government in the Northwest Territory and that even though they are not considered status Indians, Inuvialuit will be treated the same as other indigenous groups.[107] In terms of realising internal self-determination rights and responsibilities by controlling their own governing institutions and processes, the IFA as a public government form in my view has a DBC value of 3 active cultural involvement structural arrangements.

12.8.7 COORDINATED ETHNIC SELF-GOVERNMENT

The coordinated ethnic government approach provides for a governmental structure, which is ethnic at the local level, but coordinated with provincial or territorial structures at the regional and provincial or territorial level. Examples of this approach can found in the JBNQA 1975 and the *Sechelt Indian Band Self-Government Act 1986.*

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[106] Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review 1990-1991,* (Department of Indian Affairs and Northern Development, Ottawa, 1991); Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review, 1991-1992,* (Department of Indian Affairs and Northern Development, Ottawa, 1992); Department of Indian Affairs and Northern Development, *Western Arctic (Inuvialuit) Claim Implementation Annual Review,1992-1993,* (Department of Indian Affairs and Northern Development, Ottawa, 1993).

[107] Cited from the Inuvialuit website: www.beaudelselfgov.org/inuvialuit.html (accessed 15 November 2005).

12.8.7.1 JAMES BAY AND NORTHERN QUEBEC AGREEMENT 1975, NORTHEASTERN QUEBEC AGREEMENT 1978

The Cree and Naskapi First Nations of northern Quebec were the first indigenous groups to negotiate self-government as part of their land claim agreements, the James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement (JBNQA) in 1975 and 1978 respectively. Under the JBNQA, the James Bay Cree have governments, which are ethnic at the local level, exercising the powers of band but without the ministerial or cabinet controls in the *Indian Act.* These local governments are coordinated with provincial structures at the regional level where there is a Cree Regional Authority. The Inuit have public, not coordinated ethnic, local government structures, which they dominate demographically, and a coordinated regional government, the Kativik Regional Government. Both the Cree and the Inuit have guaranteed participation in advisory bodies.

The JBNQA obligated the Federal government to recommend to Parliament special legislation respecting local government and land administration for the Cree Indians of the James Bay Territory. These provisions for local government were implemented pursuant to the *Cree-Naskapi (of Quebec) Act* (CNA) *1984*, which replaced the *Indian Act* for the Cree and Naskapi,[108] and limited the responsibilities of the Federal government in the day-to-day administration of band affairs and lands. The nature and scope of the CNA was pre-determined in many respects by the JBNQA from which it emerged and as such the CNA operates in conjunction with the JBNQA.

12.8.7.1.1 GOVERNANCE STRUCTURE

Separate systems of municipal government were established for the Cree and Inuit at both local and regional levels. Each of the nine Cree and Naskapi Bands were incorporated and have the 'capacity, rights, powers and privileges of a natural person' subject to the limits declared by the JBNQA.[109] The Cree band councils were invested with local governmental powers over 1A lands;[110] Village Corporations managed 1B lands as municipalities under Provincial law, and Cree bands at the regional level. Each corporation and its Category IA and IA-N lands constitute a municipality or a village under the *Quebec Cities and Towns Act.* Band corporations have by-law powers similar to those possessed by local governments under provincial legislation. In addition, there is provision for

[108] *Cree-Naskapi (of Quebec) Act 1984,* ss. 5, 13, 15
[109] Ibid, ss. 12-14.
[110] Ibid, s. 21.

indigenous involvement in the delivery of community services such as education, health, and community law enforcement.[111]

In general, band corporations have by-law powers similar to those possessed by a local government under provincial legislation. The CNA in 1984 recognised local indigenous government powers and established a system of land management. Section 12(1), CNA transformed the James Bay Cree *Indian Act* bands into separately constituted corporations with good governance and management objectives to make by-laws:

> a) to act as the local government authority on its Category IA or IA-N land;
> b) to use, manage, administer and regulate its Category IA or IA-N land and the 15 natural resources thereof;
> c) to control the disposition of rights and interests;
> d) to regulate the use of buildings;
> e) to use, manage, and administer its moneys and other assets;
> f) to promote the general welfare of the members of the band;
> g) to promote and carry out community development and charitable works in the community;
> h) to establish and administer services, programs and projects for members;
> i) to promote and preserve the culture, values and traditions of the Cree;
> j) to exercise the powers and carry out the duties conferred or imposed on the band ... by and Act of Parliament.[112]

A Band Corporation acts through its Council in exercising its powers and carrying out its duties under the CNA.[113] The CNA also establishes guidelines for Council meetings, procedures for passing and enforcing by-laws and procedures for holding referenda. Each Band Corporation has also established its own election by-law. The election by-law must be approved by the electors of the Band, and by the Minister. Under the terms of the CNA, the election by-law covers the way in which an election is called for elections, and the means by which the chief and councillors are chosen. The Bands are required to forward to the Minister copies of all by-laws enacted. The Minister is not empowered with authority to approve Band by-laws except in relation to election, and hunting, fishing and trapping by-laws.

12.8.7.1.2 INSTITUTIONAL REPRESENTATION

The Grand Council of the Crees (Eeyou Istchee) (Grand Council) and the Cree Regional Authority (CRA) were established as the Cree's post-Treaty settlement self-governance entities in 1974 and 1978 respectively. Both entities are composed of the elected chiefs, and one other elected member from each band. The Grand Council provides

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[111] Richardson, B *Regional Agreements for Indigenous Lands and Cultures in Canada: A Discussion Paper* (North Australia Unit, Australia National University, 1995) at 22. See also Jull, P & Roberts, S *The Challenge of Northern Regions* (Australian National University North Australia, Darwin, 1991).
[112] *Cree-Naskapi (of Quebec) Act 1984*, ss 12(1), and 21.
[113] Ibid, ss. 25-26.

the forum for inter-village discussion of policies affecting all Cree. The Grand Council established the Cree Regional Authority (CRA), which attends to administration, education and culture to local Cree; the Cree Board of Compensation (CBC), which is responsible for the use of compensation funds under the agreement; and the Cree Regional Economic Enterprise Company (CREECO), which manages business development.[114]

The Grand Council was created by Letters Patent issued in 1974 by the Deputy Register General of Canada pursuant to the *Canada Corporations Act 1970.*[115] The Cree Regional Authority was established pursuant to the Quebec National Assembly: *The Act Respecting the Cree Regional Authority 1978.*[116] The Grand Council and the Cree Regional Authority are two distinct legal entities but they have identical membership, boards of directors, governing structures and are de facto managed and operated as one entity by the Cree 'nation.'[117] The Grand Council has twenty members – a Grand Chief and Deputy Grand Chief elected at large by the Cree, the chiefs elected by each of the nine Cree communities, and one other representative from each community. The form and level of Cree representation therefore appears to be commensurate with particular functions with local representation appearing to be the starting point.[118]

12.8.7.1.3 GOVERNANCE FUNCTIONS

The powers and functions of the Grand Council, according to its Letters Patent, include the following:

- to act as a regional council, group or association to solve and assist in solving the problems of the Cree people of Quebec;
- to assist the Cree through all means permitted by law to affirm, exercise, protect, enlarge and have recognised and accepted the rights, claims and interests of the Cree of Quebec;
- to foster, promote, protect and assist in preserving the way of life, values and traditions of the Cree people;
- to improve and assist in improving the conditions in Cree communities and lands or northern Quebec and to foster and promote the development of the Cree communities, lands and people of Quebec;
- to act as a regional or local government, authority, administrative or managerial body, institution or group in respect to such subject matters as may be given, delegated or confided to it by the Cree people;

[114] ARA Consulting Group, Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (Ministry of Aboriginal Affairs, BC, Federal Treaty Negotiations Office, December 1995) at 3.

[115] *Canada Corporations Act, R.S.C. 1970,* c. C-32.

[116] *Act Respecting the Cree Regional Authority, R.S.Q.,* c. A-6.1.

[117] 'Cree Governance' as discussed in the Grand Council of the Crees (Eeyou Istchee) website at http://www.gcc.ca/gcc (Accessed 16 November 2005).

[118] *Cree-Naskapi (of Quebec) Act 1984,* ss 25-26 where Cree Bands are represented through their Cree Councils who delegate representative authority to the Cree Regional Authority for regional functions who then delegate authority on to the Grand Council of the Cree for pan-Cree national functions.

- to provide regional services in regard to programs, communications and activities which may affect or benefit the Cree people of Quebec.[119]

The CRA is a corporation – its corporate seat is the Category I lands allocated to the James Bay Cree. The powers of the CRA are exercised by a council, which consists of the chief and one other member of each Band Corporation. The CRA is the chief administrative entity of the area. In terms of administration its powers and responsibilities are:

- to appoint Cree representatives on the James Bay Regional Zone Council;
- to appoint representatives of the Cree on all other structures, bodies and entities established pursuant to the JBNQA;
- to give valid consent, when required under the JBNQA, on behalf of the James Bay Cree; and
- to co-ordinate and administer all programs of the Band Corporations, with their consent.

Services are provided throughout to the Crees, the Naskapis, and to their lands, which the CRA accomplishes by offshoot organisations affiliated with the CRA.

According to the *Act Respecting the Cree Regional Authority 1978,*[120] the functions of the CRA include:

- to give consent, on behalf of the James Bay Crees, where such consent is required pursuant to the JBNQA or pursuant to an act;
- to appoint representatives of the James Bay Crees on all agencies, bodies and entities established pursuant to the JBNQA or an act;
- to relieve poverty, promote the general welfare and advance the education of the James Bay Crees, promote the development and means of intervention of the Cree communities and promote civic improvements;
- to assist in any social welfare enterprise of the James Bay Crees;
- to assist in the organisation of recreational centres and public places for sports and amusements;
- to work toward the solution of the problems of the James Bay Crees and, for such purposes, to deal with all governments, public authorities and persons;
- to provide technical, professional and other assistance to the James Bay Crees;
- to assist the James Bay Crees in the exercise of their rights and in the defence of their rights.[121]

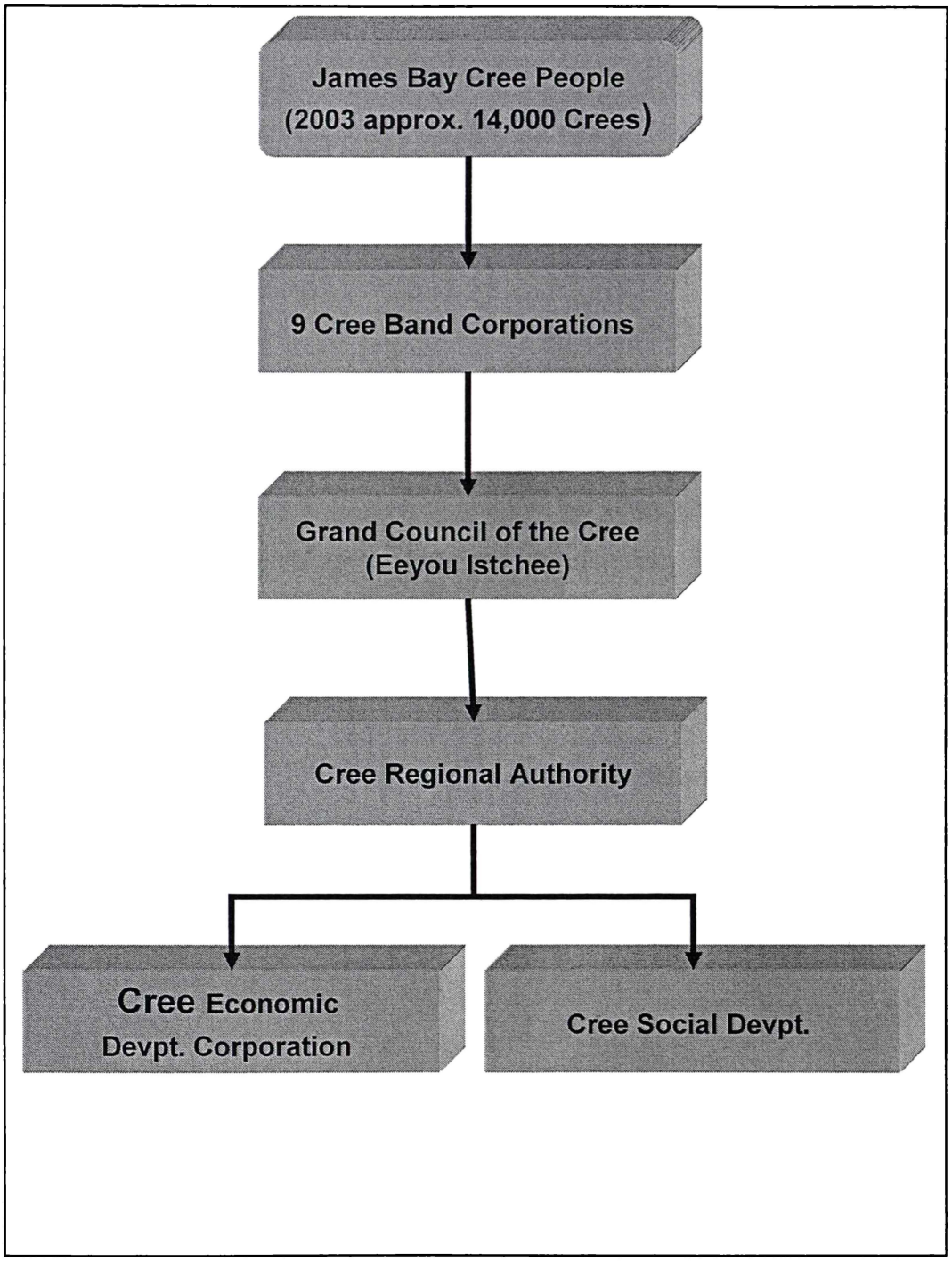
From the above functions, it is obvious that the Grand Council, Cree Regional Authority and Band Corporations are the institutional governance entities that represent the James Bay Crees in the modern era in their endeavours. Thus with the new Cree governance entities, the Cree bands established statutory entities with extensive powers, functions and authority to pass by-laws concerning matters including the maintenance of

[119] Ibid.
[120] *Act Respecting the Cree Regional Authority, 1978 R.S.Q.*, c. A-6.1.
[121] Ibid.

public order, local taxation, the administration of band affairs, environmental protection, roads and transportation, business regulations, and land and resource use and planning.[122] If the bottom line for all indigenous proposals for self-governance to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governing institutions, processes, systems and disputes then the DBC value of this coordinated ethnic self-governance model is 4 parallel cultural institutional structural arrangements, at least at the local level.

[122]ARA, supra n 111 at 3.

James Bay Cree Institutional Representation and Governance[123]



12.8.8 COORDINATED ETHNIC SELF-GOVERNMENT - SECHELT INDIAN BAND SELF-GOVERNMENT ACT 1986

The Canadian Government has passed special legislation recognising the principle of self-government in relation to Bands formally constituted under the *Indian Act*. A

[123] Part of this Cree Governance diagram is taken from La Rusic *Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement* (Research Division & Evaluation Group, Department of Indian and Northern Affairs, Ottawa, 1979) at 34.

coordinated ethnic self-government approach replaces an *Indian Act* band by providing for a governmental structure that is ethnic at the local level, but coordinated with provincial or territorial structures at the regional and provincial or territorial level. The *Sechelt Indian Band Self-Government Act*[124] (SIBSA) is an example of this approach. In May 1986, SIBSA was passed after 15 years of negotiation and consultation. This was a specific piece of legislation that allowed the Sechelt Indian Band, consisting of 33 reserves and located on the British Columbia coast about 50 kilometres north of Vancouver, to move toward self-government.

12.8.8.1 GOVERNANCE STRUCTURE

The Sechelt Indian Band Council is the governing body of the Band, and the Band acts through the Council in exercising its powers. The Band Council has municipal status under provincial legislation and is an indigenous governing body that has Federal powers in regard to more than 900 status Sechelt Indians.[125] The Sechelt Band is established as a legal entity with the capacity, rights, powers and privileges of a natural person.[126] The Band may:

- enter into contracts and agreements;
- acquire and hold property or any interest therein and sell or otherwise dispose of that property or interest;
- expend or invest moneys;
- borrow money; and
- do such things as are conducive to the exercise of its rights, powers and privileges.[127]

12.8.8.1.1 EXECUTIVE

The Band's written constitution determines membership of the Band and the Band Council and it lists the powers and duties of the Band and its Council.[128] This constitution was ratified by referendum by the Band and was declared in force in October 1986. A written Band Constitution may contain the ability to:

- establish the composition of the Council, its terms of office and tenure of its members;
- establish procedures relating to the election of Council members;

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[124] *The Sechelt Indian Band Self-Government Act SC 1986* – C-93.
[125] *The Sechelt Indian Band Self-Government Act 1986,* S.C c. 27. See also the companion British Columbia statute, *The Sechelt and Indian Government District Enabling Act 1987,* S.B.C c. 16, proclaimed in force on 23 July 1987. See also Taylor, J, & Paget, G, 'Federal/Provincial responsibility and the Sechelt' in Hawkes, D, *Aboriginal Peoples and Government Responsibility* (ed) *Aboriginal Peoples and Government Responsibility* (Carleton University Press, Ottawa, 1989), chapter 8.
[126] *The Sechelt Indian Band Self-Government Act 1986,* S.C, s. 5(1).
[127] Ibid, s. 6.
[128] Ibid, s. 7.

- establish the procedures or processes to be followed by Council in exercising the Band's powers and carrying out its duties;
- provide for a system of financial accountability of the Council to the members of the Band;
- include a membership code for the Band;
- establish rules and procedures relating to the holding of referenda;
- establish rules and procedures to be followed in respect of the disposition of interests in Sechelt lands;
- set out specific legislative powers of the Council selected from among the general classes of matters set out in the SIBSA; and
- provide for any other matters relating to the government of the Band, its members, or Sechelt lands.[129]

The Governor-in-Council, on the advice of the Minister, has the power to declare in force the Constitution or amendments to the Constitution.[130] The Band Council can, moreover, determine its own membership through a membership code.[131] Although the Band owns its former *Indian Act* reserve land in fee simple title,[132] the land is deemed to be s. 91(24) land under the *Constitution Act, 1867.*[133] Section 87 of the *Indian Act*[134] applies to the Sechelt who are Indians under the *Indian Act.*[135] Generally, the *Indian Act* applies to the Sechelt where SIBSA does not.[136] Furthermore, SIBSA is without prejudice to the Sechelt's comprehensive land claim.

12.8.8.1.2 GOVERNANCE POWERS

The Band Council has the power to make laws in relation to matters coming within any of the following classes of matters to the extent that it is authorised by the Constitution of the Band. Section 14(1) of the *Sechelt Indian Band Self-Government Act 1986* states that the Sechelt Council has the power to make laws in relation to matters coming within the following classes of matters:

- access and residence on Sechelt lands;
- zoning and land use planning in respect of Sechelt lands;
- expropriation, for community purposes, of interests in Sechelt lands;
- taxation for local purposes;
- administration and management of property belonging to the Band;
- education of Band members on Sechelt lands;

[129] Ibid, s. 10(1).
[130] Ibid, s. 11(1).
[131] Section 10(2). But this right is subject to the *Indian Act* membership rights in existence immediately prior to the establishment of the code.
[132] *The Sechelt Indian Band Self-Government Act 1986,* S.C, s 5(2). The Band has decided itself that the land cannot be alienated except by a 75 per cent referendum vote.
[133] Section 31.
[134] This section confers tax immunity on Indians who are or have an interest in reserve lands.
[135] Section 35(1).
[136] Ibid

- social and welfare services including custody and placement of children of Band members;
- health services on Sechelt lands;
- preservation and management of natural resources on Sechelt lands;
- preservation, protection and management of fur-bearing animals, fish and game on Sechelt lands;
- public order and safety on Sechelt lands;
- construction, maintenance and management of roads and the regulation of traffic on Sechelt lands;
- operation of business, professions and trades on Sechelt lands; and
- prohibition of the sale of, barter, supply, manufacture or possession of intoxicants on Sechelt lands.

12.8.8.1.3 REGIONAL ORGANISATION - AGGREGATION

The Governor-in-Council may recognise the Sechelt Indian Government District Council,[137] which may exercise jurisdiction over land outside Sechelt reserve lands. The District is a legal entity with powers to:

- enter into contracts or agreements;
- acquire and sell property; and
- spend, invest or borrow money.[138]

The Sechelt Indian Government District Council is the governing body for the District with members coming from the Band Council. The powers and duties of the Band Council may be transferred to the District Council by the Governor-in-Council if provincial legislation is in place. In its capacity as a District Council it also has provincial powers over the more than 500 non-Indians who live in the area,[139] hence an advisory group that includes non-Indians advises the governing body. The Band District Council can enter into agreements with the Province for exercising municipal-type powers.[140] The Band's municipal and regional powers go beyond those exercised by Band Councils.[141]

12.8.8.1.4 CRITICISM

The Sechelt community-based self-government model has been rebuffed by most First Nations as being little more than municipal administration, governed by provincial legislation and lacking constitutional protection.[142] On the other hand, this protection may

[137] *The Sechelt Indian Band Self-Government Act 1986,* S.C, s. 17.
[138] Ibid, s. 18.
[139] Pursuant to the *Sechelt and Indian Government District Enabling Act 1987,* S.B.C c. 16
[140] For example, it levies taxes on behalf of the province in return for full municipal taxes and obtains the rest of its funding through a block funding arrangement with the Federal Government.
[141] The powers include zoning, taxation, roads, education, welfare, game, businesses, estates, and generally, 'matters' related to the good government of the Band, its members or Sechelt lands.' *Sechelt Indian Band Self-Government Act 1986,* S.C s. 14. See also *The Sechelt and Indian Government District Enabling Act 1987,* S.B.C, s. 15.
[142] See Etkin, C.E, 'The Sechelt Indian Band: An Analysis of a New Form of Native Self-government,' in *Canadian Journal of Native Studies* (Vol. 8, No. 1, 1988) at 73-105; and Taylor, J, & Paget, G,

be possible at a later date, either together with or separately from a Sechelt land claim agreement. The Sechelt people contend that theirs is a unique model, established in response to their particular situation, and not intended to constrain other communities. In the meantime, the Sechelt have secured substantial practical and formal control over their own affairs. Graham Allen, lawyer for the Sechelt Band commented on the Sechelt self-government model when it was being negotiated in 1986:

> There were two propelling concerns for the Sechelt people as to why they very strongly wanted to be self-governing. One was their urge to own their own land. ... Sechelt wanted to be able to hold land like the white man does. The other part of that ... is the requirement by the Sechelt that they be able to effectively manage their own land. Sechelt had the most leases and the most reserves in BC and a huge land management program underway.... Sechelt wanted to become [legal not just beneficial] owner of their reserves.[143]

Following the Penner Report in 1983, Sechelt produced its next concept that was:

> ... basically an opting out act in which an individual First Nation could say we've had enough of the *Indian Act,* we want to opt out, there's a provision to do that, and we will now develop our own constitution and that will set out how we will govern ourselves – our institutions.[144]

Allen discussed the political climate at the time when David Crombie was the Minster of Indian Affairs who was committed to trying new approaches to self-government:

> [Crombie] was very clear, instead of making communities fit our legislation, we will make legislation that fits the community. He said self-government will be the process, not the end result.[145]

As if to refute the criticism of SIBSA being just another municipal-style of government, Allen noted:

> [Sechelt] holds these 33 former reserves in fee simple title, and it has [sic] complete land management control. For those who talk about municipal-style government, [Sechelt] has also the ability of lawmaking in areas of education, health, child custody, social and welfare services for its own membership. These are provincial-level powers that Sechelt enjoys under this model.[146]

'Federal/Provincial responsibility and the Sechelt' in Hawkes, D, *Aboriginal Peoples and Government Responsibility* (1989) at 297.

[143] Allen, G, Snarch & Allen Law Firm, 'The Sechelt Indian Band and Self-Government' in British Columbia Treaty Commission *Speaking Truth to Power III: Self-Government Options and Opportunities'* (BC Treaty Commission, Vancouver, 2002) at 47.

[144] Ibid.

[145] Ibid, at 48.

[146] Ibid, at 48.

In terms of realising internal self-determination rights and responsibilities and the degree of control Sechelt have of their own governing institutions, processes, systems and disputes in the respective settlement areas, the DBC value of this model in my view is 3 – active cultural involvement structural arrangements.

12.8.9 COORDINATED ETHNIC GOVERNMENT MODEL – ALBERTA MÈTIS SETTLEMENTS LEGISLATION

The Alberta Métis Settlement Legislation[147] is another example of coordinated ethnic government model. Alberta first enacted a *Métis Population Betterment Act* in 1938 to set aside land in the centre of the Province for Metis settlements.[148] Following concerns over the administration of the lands, the Alberta government has enacted a set of statutes to protect this land, to clarify its management, and to outline a form of expanded local and regional government for the Métis. Hence the legislation is part of a package of Alberta legislation that seeks to provide a governance and land tenure regime for Métis in Alberta.

Under the legislation, eight Métis settlement corporations have been established with the rights, powers and privileges of a natural person pursuant to s. 3(1). These settlement corporations can exercise powers similar to those of municipalities pursuant to s. 3(2):

a) to engage in commercial activities;
b) make investments ...
c) lend money;
d) borrow money;
e) guarantee the repayment of a loan by a lender to someone other than the settlement, or
f) guarantee the payment of interest on a loan by a lender to someone other than the settlement.[149]

Each settlement has a council composed of 5 councillors which body has perpetual succession.[150] A General Council corporation consists of the councillors of all the settlement councils and the officers of the General Council[151] which administers policies affecting land development, finance, membership, and hunting, fishing and trapping, although most General Council policies can be overruled by the provision for special protection for General Council policies which relate to hunting, fishing and trapping.[152]

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[147] *The Métis Settlements Land Protection Act,* S.A 1990, c. M-14.8; *Métis Settlements Act 1990, S.A, c. M-14-3; Métis Settlements Accord Implementation Act, S.A 1990,* c. M-14-5; and the *Constitution of Alberta Amendment Act, 1990,* c. 22.2.
[148] *Métis Betterment Act 1938,* S.A, c. 6.
[149] *The Métis Settlements Land Protection Act,* S.A 1990, c. M-14.8; s. 3(2).
[150] Section 8(1) and (2).
[151] Section 214(1) and (2).
[152] Section 239(1)(2)(3). See generally, Bell, C, *Alberta's Metis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands,* (Canadian Plains Research Centre, University of Regina, Regina, 1994).

The by-law making authority of settlement councils include general governance, health, safety and welfare, fire protection, nuisances and pests, animals, airports, refuse disposal, posters and advertising, refuse disposal, public health, control of business, sewerage system fees, planning, land use and development, general council policy.[153]

In terms of realising internal self-determination rights and responsibilities and the degree of control the Métis have of their own governing institutions, processes, systems and disputes in the respective settlement areas, the DBC value of this model in my view is 3 – active cultural involvement structural arrangements.

12.8.10 'ETHNIC NATION' SELF-GOVERNMENT MODEL - YUKON FIRST NATIONS – VUNTUT GWITCHIN

Under separate ethnic government, there are distinct and separate indigenous governmental structures at the local, regional, and – in some areas – provincial or territorial level. Although there are links with provincial or territorial governments, within designated areas indigenous governments can operate as parallel systems and can exercise provincial-type or territorial-type powers that prevail over those of the province or territory in which they are located. The earliest examples of separate ethnic government can be found in the self-government agreements that accompany the First Nations Final agreements in the Yukon.[154] One of these, the 1993 *Vuntut Gwitchin First Nation Self-Government Agreement* will be explored in more detail.

12.8.10.1 YUKON SETTLEMENT AGREEMENT 1993

The Council for Yukon First Nations, the government of the Yukon and the Federal government of Canada signed a Yukon Umbrella Final Agreement (YUFA) on 29 May 1993. Chapter 24 of the UFA established the basis for the negotiation of final land claim settlements and self-government agreements with each of the 14 Yukon First Nations. The UFA provides land, cash compensation, wildlife harvesting rights, land and resource co-management, and protection for the culture and heritage of Yukon Indians. It also sets out the framework for individual Yukon First Nations Final Agreements, which will incorporate the UFA and address the specific circumstances of each First Nation.

Four First Nations, Vuntut Gwitchin, Nacho Nyak Dun, Champagne and Aishihik, and Teslin Tlingit, signed individual land claim and self-government agreements in 1993,

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[153] Schedule 1, ss. 1-19, *Metis Settlements Land Protection Act,* S.A 1990, c. M-14.8.

[154] Chapter 11: 'Nisga'a Government' and Chapter 12 'Administration of Justice' in *The Nisga'a Settlement Agreement 1999* (Canada, British Columbia, Nisga'a Nation, 1998) and, Chapter 17 'Labrador Inuit Self-Government.' in the *Labrador Inuit Land Claims Agreement 2004* (Canada, Newfoundland and Labrador, Inuit of Labrador, 2004).

which came into effect in 1995. Land claim and self-government agreements for the Selkirk First Nation and Little Salmon/Carmacks First Nation were concluded in July 1997 and came into effect in October of that year. On 16 July 1998, Tr'ondëk Hwëch'in First Nation became the seventh Yukon First Nations to sign final land claims and self-government agreements.

Under the *Yukon First Nations Self-Government Act*, these First Nations have law-making authority over internal management of the First Nations; laws of a local or private nature on settlement land in relation to matters such as land use and control; hunting, trapping and fishing; the licensing and regulation of businesses; and the taxation of interests in settlement land and other modes of direct taxation of First Nations citizens on settlement land. The First Nations have authority to enact laws for their citizens throughout the Yukon in the areas of language, culture, health care, social and welfare services, and education. First Nations constitutions provide for citizenship codes; the powers, composition and procedures of governing bodies; financial reporting systems; and procedures to protect the rights of citizens.

Most sections of the *Indian Act* cease to apply to the First Nations, their citizens and their settlement lands. Five-year Financial Transfer Agreements with the Federal government provide funding for programs and services. On 16 April 1999, land claim and self-government agreements for the White River First Nation were initialled. In 2002, the Ta'an Kwacha'n Council signed a final and self-government agreement with the Federal and Yukon governments. The Tlicho Agreement and Kluane First Nation Self-Government Agreements were signed in 2003 while the Kwanlin Dun First Nation Final and Self-Government Agreements were signed in 2005. Agreements for the remaining Yukon First Nations are at various stages of negotiation.

12.8.10.2 VUNTUT GWITCHIN SELF-GOVERNMENT

The Vuntut Gwitchin First Nation Self-Government Agreement[155] (VGFSA) is part of a more general package. Following the blueprint in YUFA,[156] there are also self-

[155] *Vuntut Gwitchin First Nations Self-Government Agreement* (DIAND, 29 May 1993). For further discussion on the Yukon self-government agreement in Canada, see Whittington, M, 'Aboriginal in Canada' in Whittington, M, & Williams, G (eds) *Canadian Politics in the 1990s* (Nelson Canada, Toronto, 1995) at 3, 11-18.

[156] On its own, the *Umbrella Final Agreement* is a non-legal 'framework' agreement. However, it is to be incorporated in the legally binding Yukon First Nations final agreements that are to be included with each of the 14 First Nations. As the *Umbrella Final Agreement,* each final agreement is to add provisions specific to the individual First Nation that signs it.

government provisions in the VGFSA.[157] This Agreement provides for guaranteed Yukon Indian participation in settlement structures of public government in many of the areas affecting the Vuntut Gwitchin's land claims agreement. The provisions of the First Nation Final Agreement tend to emphasise guaranteed Yukon Indian involvement in common governmental structures, especially in regard to land and natural resources.[158]

In contrast, the VGFSA[159] emphasises separate self-government. Under it, the Vuntut Gwitchin First Nation government has power to establish its own constitution[160] to address such matters as its own governmental structure[161] and the membership criteria for Vuntut Gwitchin First Nation Citizens.[162] In keeping with its dual role as settlement manager as well as governing body, the First Nation has exclusive legislative power over the administration of settlement benefits[163] as well as more general legislative powers in relation to most of the subject areas that are conferred on the territorial legislation by s. 17 of the *Yukon Act.*[164]

Section 13.3, VGFSA gives the First Nation jurisdiction to enact laws affecting both Vuntut Gwitchin Citizens and other people on Vuntut Gwitchin settlement land, in relation to 23 categories of subject matter.[165] Section 13.2 gives the First Nation legislative powers that apply to Vuntut Gwitchin Citizens in Yukon, both on and off Vuntut Gwitchin settlement land, in relation to 15 categories of subject matter.[166] Separate sections confer emergency powers and legislative powers[167] in relation to the administration of justice[168] and taxation.[169] The First Nation can enact property taxes on residents on settlement land

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[157] The VGFSA incorporates two transboundary agreements, the Gwitch'in Transboundary Agreement and the Old Crown/Inuvialuit Reciprocal Harvesting Agreement, pursuant to ss. 25.50 and 25.60 of the *Vuntut Gwitch'in Self-Government Agreement*, respectfully.

[158] These governmental structures include the Yukon Land Use Planning Council, Regional Land Use Planning Commissions, the Yukon Development Assessment Board, the Yukon Heritage Resources Board, the Yukon Geographical Place Names Board, the Yukon Water Board, the Fish and Wildlife Management Board, Renewable Resources Councils, the Dispute Resolution Board, the Surface Rights Board, and the Kluane National Park Management Board.

[159] This is based on the *Draft Model of Self-Government Agreement* of November 19, 1991, a blueprint agreement that serves for most self-government matters, a function similar to that served for the settlement as a whole by the *Umbrella Final Agreement.*

[160] Ibid, at s. 10.1.

[161] Ibid, at s. 10.1.2.

[162] Ibid, at s. 10.1.1.

[163] And exclusive legislative powers over internal government matters. Ibid, s. 13.1.

[164] R.S.C 1985, c. Y-2.

[165] These include 'gathering, hunting, trapping or fishing and the protection of fish, wildlife and habitat' - s. 13.3.4; 'control or prohibition of the operation and use of vehicles' – s. 13.3.13; and 'establishment, maintenance, provision, operation or regulation of local services and facilities' – s. 13.3.13.a closing category relates to 'matters coming within the good government of Citizens on Settlement Land' – s. 13.3.23.

[166] These relate to subject matter such as 'adoption by and of Citizens' – s. 13.2.6; 'inheritance, wills, intestacy and administration of estates of Citizens including rights and interests in Settlement Land,' – s. 13.2.9, and 'solemnisation of marriage of Citizens' – s. 13.2.12.

[167] Ibid, at s. 13.4.0.

[168] Ibid, at s. 13.6.0.

[169] Ibid, at s. 14.0.

and may be able to enact other forms of direct taxes such as income and sales taxes on citizens on settlement land.[170]

The First Nation can, moreover, compel the territorial government to negotiate the transfer of the administration of programs and services in an area within its legislative jurisdiction.[171] The VGFSA requires the Federal government to negotiate with it a self-government financial agreement to ensure the First Nation has sufficient money to administer such programs and services.[172]

Vuntut Gwitchin laws would have legislative paramountcy over public territorial or municipal laws in Yukon,[173] which is considerably broader than the normal 'necessary inconsistency' test[174] that applies to relations between Federal and provincial laws.[175] The VGFSA contemplates paramountcy of Vuntut Gwitchin laws over Federal laws in an unspecified number of areas.[176] Some Vuntut Gwitchin laws apply and can override public territorial laws beyond settlement lands.[177] Conceivably, Vuntut Gwitchin legislation on settlement land could affect government or interest off settlement land.[178] The Vuntut Gwitchin government can delegate any of its powers to any legal entity in Canada including organisations and institutions outside Yukon.[179]

The other Yukon First Nations that have concluded final agreements can exercise all of the above powers. When all final agreements are concluded, they will be available to all fourteen Yukon First Nations. First Nations jurisdiction is discretionary. There is no general restriction on when a First Nations government or its delegate can legislate in an area previously occupied by the Government of Yukon. Subject only to the requirement of notice or consultation,[180] this can be done in most subject areas at will.[181] Hence potential

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[170] Ibid, at s. 14.0.
[171] Ibid, at s. 14.1.
[172] Ibid, at s. 17.0. See also s. 16.1 and the equalisation provision in s. 36(2) of the *Constitution Act 1982.*
[173] The key paramountcy provisions in the VGFSA are ss. 13.5.2 and 13.5.3.
[174] Section 13.5.4 of the VGFSA.
[175] The express contradiction test was affirmed by the Supreme Court of Canada in *Bank of Montreal v Hall* [1990] 1 S.C.R 121 (applying the test established in *Multiple Access Ltd v McCutcheon* [1982] 2 S.C.R 161.
[176] Section 13.5.2 VGFSA requires negotiations to identify the areas in which Vuntut Gwitchin First Nation laws will prevail over Federal laws.
[177] See generally s. 13.3 VGFSA.
[178] For example, liquor control, licensing and regulating of businesses, environmental and health standards laws.
[179] Section 12.0 VGFSA.
[180] Section 13.5.5 VGFSA requires 'where the Yukon reasonably foresees that a Yukon Law of General Application which it intends to enact may have an impact on a law enacted by the Vuntut Gwitchin First Nation, the Yukon shall consult with the Vuntut Gwitchin First Nation before introducing the legislation in the Legislative Assembly. The Vuntut Gwitchin First Nation is subject to a reciprocal obligation – s. 13.5.5. See also ss. 13.5.3, 13.5.5, 13.5.6, 13.5.7 and 13.5.7.1, VGFSA.
[181] Special agreements are contemplated in the areas of administration of justice and taxation – s. 13.6.0 and 14.0. However, for administration of justice First Nations can enact enforcement measures without prior agreement – s. 13.6.4.1, VGFSA.

First Nations jurisdiction can serve as a lever to help compel the public territorial government to conclude agreements on their terms.

This Yukon self-government model is very complex – after all of the self-government agreements are concluded, the Yukon will have a public territorial government subject to guaranteed representation requirements,[182] a Federal government with powers in certain areas, and fourteen governments with provincial-type legislative powers. Where there is an overlap, the self-government agreements provide that the powers of the fourteen indigenous governments will prevail over those of the territorial government and over some of the powers of the Federal government. The fourteen indigenous self-governments will be able to assume, relinquish, or delegate their legislative powers and will be entitled to exercise administrative responsibility with or without indigenous rights legislation. These different forms of government will be subject to agreements on taxation, financial revenue transfers and so on.

Although complex, cumbersome and unwieldy, Vuntut Gwitchin self-government based on a separate ethnic government model is probably the best model discussed so far in terms of actual power-sharing between indigenous and non-indigenous peoples and polities. If the bottom line for indigenous self-governance to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governance institutions, processes and systems then the DBC value of this separate ethnic model is 4 - a parallel cultural institutions.

12.9 OTHER SELF-GOVERNMENT MODELS IN CANADA

12.9.1 SECTORAL INITIATIVES

Sectoral or incremental self-government initiatives have been developed in several areas. Examples include agreements to transfer education jurisdictions and enhance First Nations' authority over reserve land management, and to provide for greater flexibility in managing funding.

12.9.1.1 MI'KMAQ EDUCATION

On 14 February 1997, the Minister of Indian Affairs and Mi'kmaq Chiefs of Nova Scotia signed a Final Agreement, with the involvement of the government of Nova Scotia, to transfer legislative and administrative jurisdiction for Mi'kmaq education to nine First Nations in Nova Scotia. The result of six years of negotiations, the *Mi'kmaq Education*

[182] Pursuant to the Yukon Final Agreements.

Final Agreement 1997 (MEFA) lead to the transfer of $140 million for Mi'kmaq education to the Nova Scotia Mi'kmaq over a five-year period. The *Mi'kmaq Education Act 1998,* Federal legislation to implement MEFA received Royal Assent in June.

12.9.1.2 LAND MANAGEMENT

In the area of land management, chiefs of 13 First Nations from British Columbia, Alberta, Saskatchewan, Manitoba and Ontario signed a Framework Agreement with the Minister of Indian Affairs on 12 February 1996. A fourteenth First Nation joined at a later date. The agreement is intended to give the First Nations control over reserve lands and resources and end the discretion of the Minister under the *Indian Act* over land management decisions on reserves. Enabling legislation was passed in Parliament in June 1999.

In terms of First Nations funding, the department has a pilot project with about 70 First Nations to examine new financial transfer arrangements (FTAs). These are intended to increase First Nations' control, flexibility and accountability over funding.

12.9.1.3 MEADOW LAKE FIRST NATIONS

On 22 January 2001 the Meadow Lake Tribal Council (MLTC) and the Governments of Canada and Saskatchewan signed a tripartite agreement in principle establishing the provincial role in self-government negotiations among the parties. The MLTC and Canada also signed a comprehensive agreement in principle, which sets out the terms for finalising a self-government agreement among the parties. The Meadow Lake First Nations under the final agreement would have authority to enact laws in a wide variety of areas and would be able to delegate this law-making authority to a regional body, such as the MLTC. Meadow Lake First Nations laws would operate concurrently with Federal and provincial laws and the final agreement would set out a process regarding how conflicts between laws would be resolved. Both of the Meadow Lake First Nations comprehensive and tripartite self-government agreements have not progressed past the agreement-in-principle stage since 2001.

12.9.1.4 MOHAWKS OF KANESATAKE

On 14 June 2001 the *Kanesatake Interim Land Base Governance Act*[183] (KILBGA) was passed. The Act gives legal effect to an agreement between the Mohawks of Kanesatake and the Government of Canada that recognises an interim land base for the Mohawks as s. 91(24) or Federal lands, but not lands under the administration of the

[183] *Kanesatake Interim Land Base Governance Act,* S.C. 2001, c. 8.

Indian Act. KILBGA sets out the legal basis upon which the Mohawks can establish and implement laws over an array of areas. KILBGA also provides that before jurisdiction can be exercised, the Mohawks of Kanesatake must adopt a land governance code dealing with matters such as rights of appeal, accountability, and land assessment.[184]

KILBGA also addresses a matter of importance to many non-indigenous local governments – the harmonisation between local communities and indigenous governments. KILBGA states that before the Mohawks of Kanesatake can make any law dealing with land use or establishing land use standards, they must enter into a harmonisation agreement with the Municipality of Oka.[185]

12.9.1.5 OTHER SELF-GOVERNMENT NEGOTIATIONS

Various other land claim and self-government negotiations are currently ongoing.

- Representatives of the Government of Newfoundland and Labrador, the Federal government and the Labrador Inuit Association finalise the Labrador Inuit Land Claims Agreement in 2005;
- The chiefs of the United Anishnaabe Councils, which represents eight First Nations in south central Ontario, and the Minister of Indian Affairs signed the Anishnaabe Government Agreement on Anishnaabe self-government in 2004;
- In July 2000, negotiators for Canada and the BC. Westbank First Nation initialled the Westbank First Nation Self-Government Agreement, the first 'stand-alone' self-government agreement to be concluded under the current inherent right policy. While this agreement is not a Treaty protected under s. 35 of the *Constitution Act, 1982*, tripartite Treaty negotiations under the B.C. Treaty Commission process are ongoing. In 2003, the Westbank First Nation – Self-Government Agreement was finalised.
- In January 2000, the Government of the Northwest Territories, the Federal government and the Dogrib First Nation signed the Dogrib Agreement-in-Principle, the first joint land claim and self-government package north of 60°. The Tlicho (Dogrib) Final Agreement was signed in 2003.
- In Alberta, a self-government AIP was signed with the Blood Tribe;
- In Quebec, the Mamuitin AIP was initialled and a framework agreement was signed with the Inuit of Nunavik;
- In May 2000, Canada, Saskatchewan and the Federation of Saskatchewan Indian Nations signed the Framework for Governance of Treaty First Nations to guide formal negotiations toward a self-government arrangement for the province's Treaty First Nations. An AIP to this Framework was subsequently signed in 2003.
- In April 1999, the Federal and BC governments and the Sechelt Indian Band signed the first Agreement-in-Principle under the BC Treaty Commission process. It maintains the delegated form of self-government practised by the Sechelt since 1986. In May 2000, the AIP's status became uncertain when the Sechelt announced they might withdraw from negotiations and pursue their land claim in court.

[184] Ibid, ss. 7-9.
[185] Ibid, ss. 12-13.

- On 18 May 1999, the Micmac Nation of Gespeg, the Quebec government, and the Federal government signed a framework agreement for negotiating self-government for the Micmac Nation of Gespeg.
- In May 1999, the Mi'kmaq Nation of Gespeg, the Quebec and Federal governments signed a framework agreement for negotiating self-government.
- In November 1999, the Innu Nation, Canada and Newfoundland and Labrador reached an Agreement-in-Principle on interim measures that included putting in place the legal arrangements for Innu governance, pending conclusion of an Innu land claim and self-government agreement.
- On 14 October 1998, the Deline Land/Financial Corporation Ltd. and the Deline Dene Band, the Northwest Territories government and the Federal government signed an agreement on process and schedule for self-government negotiations.

12.9.1.6 MANITOBA DISMANTLING

In March 1994, the Minister of Indian Affairs announced that DIAND's regional office in Manitoba would be dismantled and its responsibilities transferred to the First Nations of Manitoba. A memorandum of understanding was signed between Canada and the Assembly of Manitoba Chiefs (AMC) in April 1994, and a Framework Agreement to begin the process of dismantling was signed in December 1994. The Framework Agreement sets out the process to dismantle DIAND operations, develop Manitoba First Nations government institutions, and restore to Manitoba First Nations governments the jurisdictions currently held by DIAND and other Federal departments. Discussions between the Assembly of Manitoba Chiefs and Federal officials on the details of the Framework Agreement began in April 1996. Media reports state that the implementation of the initiative is taking longer than originally anticipated, due to the complexity of negotiating issues of jurisdiction and governance. An independent three-year review of the process, required by the Agreement, was completed in early 1999.

12.9.1.7 SUMMARY

In addition to the foregoing, sectoral agreements provide many First Nations with limited self-government authority over, for example, education, land management, and child and family services. As of mid-2000, over 80 self-government negotiations, comprehensive and sectoral, were in progress. In 2003, 457 indigenous communities were negotiating different forms of self-government covering every province and the territories (excluding Nunavut).[186] The current approach to self-government focuses, therefore, on a more holistic challenge of setting a framework for new government-to-government relationships, including the development of internal governance capacities, skills and structures as a basis for negotiating self-government agreements. DIAND's self-

[186] 'Self-Government Negotiations' in Indian and Northern Affairs, *Basic Departmental Data* (Indian and Northern Affairs, Ottawa, 2003) at 67.

government negotiations include comprehensive self-government negotiations (i.e. a range of jurisdictions), sectoral negotiations (i.e. one jurisdiction such as education, child welfare) and self-government negotiations that are proceeding with a large number of communities in conjunction with their comprehensive land claims negotiations. In 2005, 22 indigenous self-government agreements had been finalised in Canada.[187]

Other subjects worthy of note include the various approaches to self-government for Indigenous People off-reserve and in urban areas have been proposed which include forms of public government or links to land-based indigenous governments. The issue is complicated, however, by questions relating to Federal/provincial responsibility for Indigenous People. Unlike other 'new' initiatives, self-government in Canada has been around in various forms and at various levels, for quite some time. The Federal and the B.C governments are not moving into uncharted territory in attempting to understand the potential impacts and difficulties of this large and bold initiative.

Having discussed extensively the various self-governance and institutional representation models for Indigenous Peoples in Canada, the next section will examine the various self-governance and institutional representation models available for Māori in New Zealand. This section will provide a comparative analysis of the various institutional representation approaches utilised and the appropriateness of the processes and structures employed by both nation-states.

[187] Information taken from the Director General, 'Self-Government Branch,' Department of Indian and Northern Affairs (INAC), Canada. www.inac.gc.ca (Accessed 15 November 2005).

12.10 MĀORI GOVERNANCE STRUCTURAL FORMS FOR INSTITUTIONAL REPRESENTATION

12.10.1 MĀORI SELF-GOVERNMENT CONTEXT

The *Treaty of Waitangi* is the founding constitutional document of New Zealand and was signed between the Māori and the British Crown in 1840.[188] Article II guaranteed Māori the use and protection of their lands, forests, fisheries and other cultural treasures, thus protecting their the tribal territories, governance structures, and customary laws and institutions of Māori tribes. Article III provided Māori the rights of British subjects. Section 71 of the *New Zealand Constitution Act 1852* similarly recognised Māori laws and institutions. Section 71 stated that particular districts should be reserved wherein Māori laws, customs or usages should be observed which appears to be analogous to the 'domestic dependent nations' concept of Marshall CJ in the United States of America in the early 1800's.[189] Section 71 was, however, never implemented.[190] Another constitutional development transpired when Māori were allocated four seats in the House of Representatives pursuant to the *Māori Representation Act 1867*.[191] On the other hand Māori numbered approximately 56,000, which should have entitled them to 20 of the 70 seats in the House of Representatives.

In 1892 the Kingitanga established its own great council – Te Kauhanganui – while the tribes outside the Kingitanga formed their own form of self-government – Paremata Māori (Māori Parliament) under Te Kotahitanga (unity). Both bodies made policy

[188] The author acknowledges the view that the *Declaration of Independence 1835* is the starting constitutional document of New Zealand. That it was significant to the signing of the Treaty of Waitangi is well documented. However, the *Declaration of Independence 1835* currently has no *legal* status in contemporary New Zealand law due to the judgment in *Warren v The Police* (Unreported, AP 133/99, High Court, Hamilton, 9 February 2000), per Penlington J. For references, see Orange, C *The Treaty of Waitangi* (Allen & Unwin New Zealand Ltd, Wellington, 1987); Moon, P & Biggs, P *The Treaty and its Times: the Illustrated History* (Resource Books, Auckland, 2004); and Cox, L, *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Auckland, 1993).

[189] In *Cherokee Nation v Georgia* 30 U.S (5 Pet.) 1 (1831) Marshall C.J likened the Indian tribes to 'domestic dependent nations' within a relationship to the United States that resembled that of a ward to his guardian. Marshall, however, held that the Cherokee people did not qualify as a 'foreign state' pursuant to Article III of the United States Constitution, which entitled a foreign government to invoke the Supreme Court's original jurisdiction. Still, Marshall's designation of qualified nationhood did not clearly identify the tribes as inherently inferior or as having a status necessarily outside the scope of the law of nations. The Indian tribes therefore retained and continue to possess much of their political autonomy within the geo-political boundary of the United States. See Faulkner, R *The Jurisprudence of John Marshall* (Princeton University Press, Princeton, 1968).

[190] For a discussion on the development and demise of, as well as attempts to implement, section 71 of the *Constitution Act 1852*, see Joseph, R *The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852* (Monograph, Te Mātāhauariki Research Unit, Hamilton, 2002).

[191] For a good discussion on the four Māori seats in the New Zealand Parliament, see Ward, A, *A Show of Justice: Racial Amalgamation in the Nineteenth Century* (Auckland University. Press, 1973); Cox supra n 188; and Stokes, E *Maori Political Representation in Parliament* (Occasional Paper, Centre for Maori Studies and Research, University of Waikato, 1981).

recommendations to the mainstream Parliament according to the conventions and democratic procedures of the Westminster system but were ignored. By the turn of the century, the Crown had established governance entities such as incorporations and trust boards for the management of returned assets and Māori Councils pursuant to the *Māori Councils Act 1900* and other legislation. As statutory bodies, these entities were crafted to have limited functions in the interest of social governance and political hegemony.

Apirana Ngata and other Māori intellectuals entered mainstream Parliament following the turn of the century and they worked within the power structure essentially as reformists with concern for the physical and cultural survival of Māori rather then self-government. The establishment of tribal trust boards in the first five decades of the 20th century provided a mechanism for tribal leaders to mobilise to some extent for self-government. But Ngata's land development schemes came too late to support the growing Māori population with widespread poverty increasing particularly with the depression of the thirties. Many Māori subsequently turned from Māori academic leaders to the charismatic prophet leader Wiremu Tahupotiki Ratana and the Ratana church.

Ratana turned his religious movement into a political force by selecting candidates from his church to contest and win the four Māori seats in Parliament. The 40-year liaison with the Labour Government brought little benefit to Māori however. The only minor achievement was the passing of the *Treaty of Waitangi Act 1975* which established the Waitangi Tribunal to hear grievances after the Act came into force. The Waitangi Tribunal did establish a platform however for truth finding and telling which precipitate the settlement of a number of outstanding tribal grievances including the *Waikato Raupatu Settlement 1995* and the *Ngai Tahu Claims Settlement 1998*. Both settlements have provided scope for a degree of Māori self-government.

Therefore, as compared to the First Nations, Māori had considerable political concessions within the constitutional framework of New Zealand particularly with the guarantee of their rights as British subjects (Article III) and the 4 seats in the House of Representatives. At the same time, the nation-state rhetorically acknowledged Māori autonomy and self-governance over their world with Article II tino rangatiratanga Treaty rights, s. 71 *New Zealand Constitution Act 1852* 'native district' rights, and, more recently, Treaty settlement self-government. The self-governance models in New Zealand, however, are neither as diverse nor accommodating as the models in Canada.

12.10.1.1 GOVERNMENT POLICY ON MĀORI SELF-GOVERNANCE INSTITUTIONAL FORMS

After a settlement of Māori claims has been negotiated in New Zealand, a Memorandum of Understanding is developed recording the parties' intentions to settle the claim in principle. Appropriate governance structures then need to be developed. In 2001, the Ministry of Justice in the Post Election Briefing Documents for Incoming Ministers advised the requirements the Crown seeks from negotiators regarding post-Treaty of Waitangi settlement governance:

> 4.4.5 Governance Entities
>
> Most claimant groups do not have governance structures in place at the start of the negotiation process suitable to receive settlement assets. There is no single governance entity model; some claimants seek statutory bodies and others use incorporations or companies. Mandate disputes often concern issues associated with governance, such as whether settlement assets will be held centrally and what is the role of people outside the *rohe* [territory].
>
> In the Terms of Negotiation and Heads of Agreement, the Crown seeks agreement from claimant negotiators that before settlement assets can be transferred a governance structure needs to be in place that:
>
> - is representative of, and accountable to, the claimant community;
> - has a transparent decision-making and dispute resolution process;
> - has been ratified by the claimant community.

The Office of Treaty Settlements (OTS), like the Treaty of Waitangi Fisheries Commission, is currently working through what are the desirable characteristics for governance entities. An issue under consideration is the establishment of generic governance entity legislation. The options include:

> a) dealing with governance entity issues on a case-by-case basis; and
> b) creating further generic requirements for governance entities, for example, by legislation.[192]

The role of the Crown can, generally, be regarded as completed once a Treaty of Waitangi grievance has been addressed and settlement funds have been transferred. While the Crown can be seen to have a legitimate interest in the successful operation of settlement entities (in particular in relation to the delivery of social and economic benefits to Māori) it is preferable to regard the management of assets transferred as part of the settlement as within the exclusive domain of the relevant settlement community. However, the Crown has a prescriptive list of criteria that all claimant groups must adhere to in order to receive

[192] Law Commission, 'Memorandum, After Settlements Asset Project: Scoping Issues' (Ngatata Love & Paul Heath, 24 July 2001) at 2. See also Law Commission, *Maori Custom and Values in New Zealand Law* (New Zealand Law Commission, Wellington, SP9, 2001).

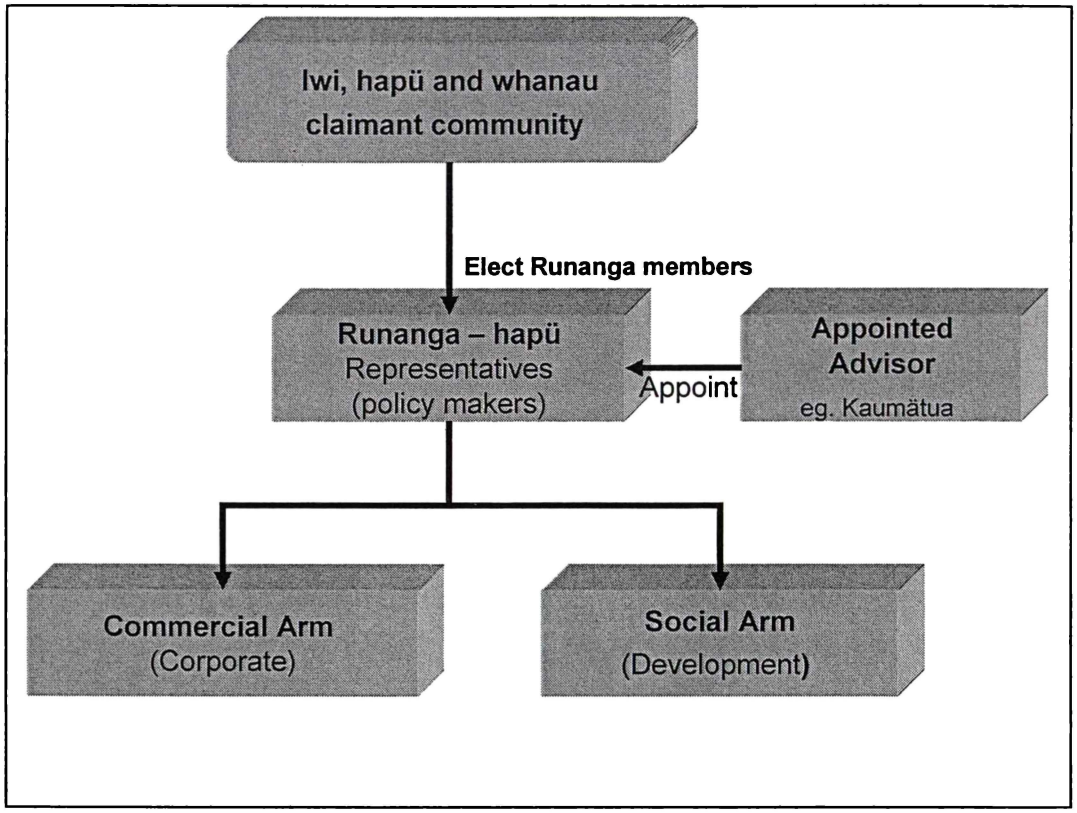
and manage their settlement assets and compensation efficiently and effectively. These good governance principles and criteria stem from the Office of Treaty Settlements (OTS) and both the old Te Ohu Kai Moana (TOKM) and the new Te Ohu Kai Moana Trustee Limited (TOKMTL) with some input from Te Puni Kōkiri (TPK), the Ministry of Māori Development.

12.10.2 REVIEWING AND RATIFYING A GOVERNANCE ENTITY

While a claimant group's mandated representatives will have the leading role in exploring and developing options for a governance entity, they must also give all members of the claimant group the chance to review and ratify their proposed entity. The proposed post-settlement governance entity must be ratified by the members of the claimant group and established as a legal entity before the Crown can introduce settlement legislation and transfer settlement redress to the claimant community. The ratification process may be carried out at the same time as the claimant members consider ratifying a Deed of Settlement, or it can occur as a separate process. The Crown must also have had the opportunity to assess the proposed governance entity against its principles before the wider claimant group membership is asked to ratify that entity. The Crown's review of the entity against the principles will also take in any subsidiaries of that entity as well.[193]

[193] Office of Treaty Settlements *Ka Tika a Muri, Ka Tika a Mua: Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations With the Crown* (OTS, Wellington, 2002) at 53.

Basic OTS Governance Design for Māori Representative Governance Bodies



12.10.2.1 TE OHU KAI MOANA (TOKM) GOVERNANCE REQUIREMENTS

TOKMTL tends to be more prescriptive for approval of post-settlement governance entities than OTS, probably because, unlike OTS, TOKMTL operates under Acts of Parliament including the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* and the recently enacted *Māori Fisheries Act 2004.* An additional point is that, after a decade of litigation, it has been decided that the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* requires TOKM to deal with 'iwi' in their historical and traditional sense and not just any Māori claimant 'organisation.'[194]

At the end of December 2003, TOKM recognised approximately 58 'official' iwi, with 4 compliant with TOKM's good governance criteria:

- Te Rūnanga a Iwi o Nga Puhi;
- Te Aitanga a Mahaki Trust;
- Te Rūnanga o Whaingaroa (Ngāti Kahu ki Whaingaroa); and
- Te Rūnanga o Ngāti Ruanui Trust.

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[194] See Te Ohu Kai Moana, *He Kawai Amokura A Model for allocation of the Fisheries Settlement Assets: Report to the Minister of Fisheries* (Te Ohu Kai Moana, May 2003) at 18, 26, and 27. *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (HC & CA); *Manukau Urban Authority & Ors v Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17 (PC) and s. 3 *Treaty of Waitangi (Fisheries Settlement) Act*; clause 4.5.1 Deed of Settlement and s. 6 and Resolution 1 of Schedule 1A, *Māori Fisheries Act 1989.*

The enactment of the *Māori Fisheries Act 2004* changed the criteria, leaving none of the above entities TOKMTL compliant. Iwi governance entities thus need to conform to the new criteria and have much work to do.

12.10.2.1.1 MANDATED IWI ORGANISATIONS (MIOS)

The recently enacted *Māori Fisheries Act 2004* has changed some of the above governance criteria for Mandated Iwi Organisations (MIOs). Te Ohu Kai Moana Trustee Limited (TOKMTL) – the new Māori Fisheries Commission created pursuant to the *Māori Fisheries Act 2004* (post-fisheries asset allocation) - has a number of powers where it may recognise, by special resolution, MIO for each iwi if it is satisfied that specified recognition criteria are met.[195] An MIO is entitled to receive and hold on behalf of its iwi any assets allocated by TOKMTL.

Criteria for the recognition (and continued recognition) of a MIO are set out in s. 14 of the *Māori Fisheries Act 2004*, which includes the establishment of a company, trust or incorporated society whose constitution, trust deed or rules provide for the following kaupapa:

a) The MIO is obliged to act ultimately for the benefit of all members of the Iwi for fisheries settlement purposes no matter where its members live;[196]
b) All adult members of the Iwi are entitled to membership (expressed as the right to participate in choosing representatives, at intervals not exceeding five years);
c) Iwi members are entitled to vote in Iwi elections and matters relating to constitutional amendments; whether whangai are Iwi members and able to vote are matters at the discretion of each MIO;
d) The MIO electoral system is to be agreed by the Iwi;
e) Iwi members are entitled to request a postal vote for elections or constitutional amendments; where there are electronic voting facilities, electronic voting must be allowed;
f) The MIO maintains a membership register of those who affiliate by whakapapa, including contact details and makes ongoing efforts to add members and keep the register current;
g) The MIO is accountable to all Iwi members for its performance by providing planning or reporting systems; these include that Annual General Meetings be held, at which of these annual plans, reports and audited accounts are to be presented to members, among other matters
h) The MIO is to provide a dispute resolution mechanism for disputes within the Iwi in relation to matters arising under the *Māori Fisheries Act 2004*;
i) The establishment of a company, trust, body corporate set out under an enactment, or incorporated society but nonetheless responsible to and wholly owned or controlled by the separate MIO to:
    - act for the benefit of all members of the iwi, irrespective of where those members reside;

[195] Sections 12 – 14A, *Māori Fisheries Act 2004*.
[196] Ibid, s. 12(1)(a).

- receive allocated quota and income shares of the Iwi;
- provide any financial return on use of the assets solely to the MIO (the Recipient Entity); and
- represent its iwi to appoint or remove a member

j) where the Iwi wishes to have its own fishing operation or be involved in a joint venture, a company or trust must be established separate to the MIO and the Recipient Entity but nonetheless responsible to the MIO to:
   - undertake those operations;
   - provide all return on its operations direct to the MIO

k) No more than 40% of the directors, trustees or office holders of the Recipient Entity can also be elected members of the MIO;

l) The MIO must exercise strategic governance over the Recipient Entity and any fishing company. As part of that exercise, the MIO must agree on annual plans which set out certain matters

m) Any proposals to change the constitution or deed of the MIO, Recipient Entity, asset-holding company and subsidiary of an asset-holding company must have 1 or more constitutional documents that must not be inconsistent with matters set out in paragraphs (i) to (l) above. Furthermore, the ratification of the constitutional documents of the MIO must be by not less than 75% of the adult members of the iwi who vote either in person or by postal ballot, and the constitutional documents of each asset holding company and subsidiary by not less than 75% of the directors, trustees or office holders of the MIO that owns the asset-holding company and must be reported to all members

n) Any proposal to change the constitution, trust deed or rules of the MIO, asset-holding company or subsidiary or changes referred to in paragraph (m) above, has a number of restrictions, including the requirement for at least a 75% majority of votes passed at a general meeting of the MIO; it must not be made earlier than 2 years after the date on which the MIO is recognised by TOKMTL, and such changes can only be prompted if the MIO resolves that the changes are ultimately for the collective benefit of all members of the Iwi.

Further criteria for the recognition as a MIO include:

a) the directors or trustees of the MIO must be able to demonstrate that they continue to have the confidence of the majority of adult members of the Iwi to act on their behalf

b) the constitutional document of the MIO must permit (but not require) the MIO to benefit Māori other than members of the Iwi, or the community generally, if its directors, trustees or office holders consider that to be appropriate

c) the constitutional document of the MIO must also be approved by TOKMTL

d) TOKMTL may also, from time to time (as published in the *Gazette*), require such other criteria and requirements in respect of the MIO and its constitutional documents, which may include:
   - minimum notice for meetings and hui or nomination of candidates;
   - use of alternates for Iwi representatives;
   - availability of constitutional documents and annual reports to Iwi members

Section 14 of the *Māori Fisheries Act 2004* outlines the specific criteria for recognition as an MIO:

> The criteria for recognition and continuing recognition of a mandated iwi organisation under section 13(1) are that---
>
> (a) the organisation is a company, trust, body corporate set up under an enactment, or incorporated society; and

(b) the constitutional documents of the organisation comply with section 17; and

(c) the directors, trustees, or office holders, as the case may be, are able to demonstrate that, for the purposes of their responsibilities under this Act, they have been duly elected or appointed in accordance with the constitutional documents of the organisation; and

(d) the organisation has a register of iwi members that---

(i) complies with kaupapa 5 of Schedule 7; and

(ii) has no fewer than the minimum number of members specified in column 4 of Schedule 3.

12.10.2.1.2 ALLOCATION OF ASSETS

Section 3 *Māori Fisheries Act 2004* outlines that the purposes of the Act are, inter alia, to provide for the development of the collective and individual interests of iwi in fisheries, fishing, and fisheries-related activities in a manner that is ultimately for the benefit of all Māori, to establish a framework for the allocation and management of settlement assets through the allocation and transfer of specified settlement assets to iwi and the central management of the remainder of those settlement assets.

Sections 3, 5 and 12 of the Act provide that TOKMTL must allocate pre-settlement assets (PRESA) and post-settlements assets (POSA) to Iwi only when:

- the Iwi has a MIO; and
- the MIO holds coastline agreements (as anticipated in ss. 10 - 11); and
- the MIO has satisfied TOKMTL that it has a minimum number of members on its Iwi register (as required and specified in ss. 10, 35 - 37).

Each MIO claiming that any specified length or percentage of coastline properly relates to its Iwi for the purposes of allocation of quota of any fish stock must take all reasonable steps to consult and agree with the MIO of any other affected iwi (i.e., with overlapping coastline) as to the extent of the coastlines relating to their respective Iwi for that fish stock. Each MIO must also have a register of members that is equal to, or exceeds, the number of members required of that respective Iwi as set out in ss. 35 – 37.

12.10.2.2 LATEST KAUPAPA FOR CONSTITUTIONAL DOCUMENTS OF MIOS:

The following kaupapa principles[197] apply to all MIO constitutional documents for the purposes of the *Māori Fisheries Act 2004* and, like the governance criteria of OTS, are based around themes of representation, accountability, ownership, dispute resolution and governance:

SCHEDULE 7

Kaupapa applying to constitutional documents of mandated iwi organisations

The kaupapa set out in this schedule---

[197] Schedule 7, *Māori Fisheries Act 2004*.

(a) must be provided for in the constitutional documents of every mandated iwi organisation; but

(b) only apply for the purposes of this Act.

KAUPAPA OF IWI REPRESENTATION

Kaupapa 1

(1) All adult members of an iwi must have the opportunity, at intervals not exceeding 3 years, to elect the directors, trustees, or officeholders, as the case may be, of the mandated iwi organisation of the iwi.

(2) Elections for individual offices may be held at different times, and for different terms of office. However, no person elected to office may hold office for a period longer than 3 years without facing re-election.

Kaupapa 2

All adult members of an iwi---

(a) have voting rights---

(i) in elections for the appointment of directors, trustees, or other officeholders of the mandated iwi organisation; and

(ii) on amendments to the constitutional documents of the mandated iwi organisation; and

(iii) in relation to the disposal of income shares under section 70; and

(iv) in relation to the disposal of settlement quota under sections 159 and 162; and

(b) may put forward proposals for constitutional change for the consideration of the directors, trustees, or other officeholders, as the case may be.

Kaupapa 3

(1) A mandated iwi organisation must ensure that voting rights of iwi members are able to be exercised at appropriate times in an election of directors, trustees, or other officeholders, in accordance with the constitutional documents and policies of the mandated iwi organisation, but iwi members have no right to vote in respect of the appointment of the employees of a mandated iwi organisation.

(2) If a mandated iwi organisation has electronic voting facilities, every adult member of the iwi has the right to vote by electronic means, but electronic voting must not be the only means by which a member may vote.

NOTIFICATION OF MEETINGS

Kaupapa 4

(1) A general meeting of a mandated iwi organisation must be notified by a public notice that must include---

(a) the date and time of the meeting and its venue; and

(b) the agenda for the meeting; and

(c) where any relevant explanatory documents may be viewed or obtained; and

(d) any other information specified by or under this Act.

(2) In the case of the general meeting of a mandated iwi organisation required by section 17(2) (which relates to ratification of the constitutional documents of the mandated iwi organisation), the meeting must be notified by both---

(a) a public notice that gives---

(i) the information required under subclause (1); and

(ii) advice that a vote is to be taken to ratify the constitutional documents of the mandated iwi organisation; and

(b) a private notice, sent to every adult member on the register of iwi members, that gives---

(i) the information required for the public notice; and

(ii) a copy of the ballot paper for the vote to be taken at the meeting; and

(iii) advice as to the address to which, and the date by which, the completed ballot paper must be returned.

(3) In the case of a general meeting of a mandated iwi organisation required by kaupapa 2 (which relates to elections), section 18 (which relates to changing a constitutional document), section 70 (which relates to the disposal of income shares), or by sections 159 or 162 (which relate to the conversion and disposal of settlement quota), the mandated iwi organisation---

(a) must give a public notice that includes---

(i) the information required under subclause (1)(a); and

(ii) the matter or issues on which the vote is to be taken; and

(b) must give a private notice with the information required under subclause (2)(b) to any adult member of the iwi who,---

(i) at the time of registering on the register of iwi members, made a written request to be sent a private notice and postal ballot papers for every meeting relating to 1 or more of the relevant provisions; or

(ii) whether or not on the register, makes a written request for a private notice in respect of a particular meeting.

IWI MEMBERSHIP

Kaupapa 5

Every mandated iwi organisation must---

(a) have, and maintain in a current state, a register of iwi members---

(i) that includes the name, date of birth, and contact details of every member of the iwi who applies for registration; and

(ii) that is available for inspection by registered members of the iwi; and

(b) provide for---

(i) adult members of the iwi to register themselves; and

(ii) other members to be registered by a parent or legal guardian; and

(iii) persons registering on the register of iwi members to be able to state whether they wish to receive a private notice for general meetings and postal ballot papers relating to the matters listed in subclause (3) of kaupapa 4; and

(c) make ongoing efforts to register all iwi members.

Kaupapa 6

(1) The policy of a mandated iwi organisation relating to the rights of whangai or other persons who do not descend from a primary ancestor of the iwi must be---

(a) determined in accordance with the tikanga of the iwi; and

(b) stated in the constitutional documents of the mandated iwi organisation

(2) In this kaupapa, whangai refers to a person adopted by a member of an iwi in accordance with the tikanga of that iwi, but who does not descend from a primary ancestor of the iwi.

ACCOUNTABILITY

Kaupapa 7

(1) Every mandated iwi organisation is accountable for its performance to all the members of the iwi, including members not living within its territory, and therefore has reporting responsibilities in relation to--

(a) its own performance; and

(b) the performance of---

(i) its asset-holding companies; and

(ii) any joint venture or other entity that conducts business using the settlement assets of the mandated iwi organisation.

(2) Each year, each mandated iwi organisation must hold a general meeting at which it provides an opportunity for the members of the iwi to consider---

(a) the annual report for the previous financial year, made available not less than 20 working days before the meeting, that reports against the objectives set out in the annual plan for the previous year, including---

(i) information on the steps taken by the mandated iwi organisation to increase the number of registered members; and

(ii) a comparison of its performance against the objectives set out in the annual plan, including---

(A) changes in shareholder or member value; and

(B) dividend performance or profit distribution; and

(iii) the annual audited financial report, prepared in accordance with generally accepted accounting practice, and accounting separately for settlement cash assets; and

(iv) a report giving information of the sales and exchanges of settlement quota in the previous year, including---

(A) the quantity of settlement quota held by the asset-holding company of the mandated iwi organisation in that year; and

(B) the value of settlement quota sold or exchanged; and

(C) the identity of the purchaser or other party to the exchange; and

(D) any transaction with settlement quota that has resulted in a registered interest by way of caveat or mortgage being placed over the quota; and

(E) the settlement quota interests that have been registered against the quota shares of the mandated iwi organisation; and

(F) the value of income shares sold, exchanged, or acquired; and

(v) a report on the interactions of the mandated iwi organisation in fisheries matters---

(A) with other entities within the iwi; and

(B) with other mandated iwi organisations; and

(C) with Te Ohu Kai Moana Trustee Limited; and

(vi) any changes made under section 18 to the constitutional documents of the mandated iwi organisation or those of its asset-holding companies or any subsidiaries of the asset-holding companies; and

(b) an annual plan for the next financial year, that must include---

(i) the objectives of the annual plan; and

(ii) the policy of the mandated iwi organisation in respect of sales and exchanges of settlement quota; and

(iii) any changes in that policy from the policy for the previous year; and

(iv) any proposal to change the constitutional documents of any fishing company owned by the mandated iwi organisation; and

(c) in relation to every asset-holding company of a mandated iwi organisation or any subsidiary of an asset-holding company that receives settlement assets,---

(i) an annual report on---

(A) the performance of that asset-holding company or any of its subsidiaries; and

(B) the investment of money of that asset-holding company or any of its subsidiaries; and

(C) the matters set out in paragraph (b) of kaupapa 11; and

(ii) any proposal to change the constitutional documents of the asset-holding company or any of its subsidiaries.

(3) Information referred to in this kaupapa must be made available in writing on request by any member of the iwi.

DISPUTE RESOLUTION

Kaupapa 8

There must be a dispute resolution mechanism to deal with disputes between members of the iwi and the mandated iwi organisation relating to matters arising under this Act, including a means to deal with disputes raised by persons whose applications for registration are not accepted.

OWNERSHIP OF IWI FISHERIES ASSETS

Kaupapa 9

(1) If a mandated iwi organisation wishes to have its own fishing operation, utilising annual catch entitlement from its settlement quota to harvest, process, or market fish, or to be

involved in a joint venture for those purposes, it must establish a fishing enterprise separate from, but responsible to, the mandated iwi organisation to undertake those operations.

(2) An enterprise set up to undertake such operations must be a separate entity from the asset-holding company or subsidiary established by an asset-holding company to which any settlement quota or income shares of the iwi are transferred.

GOVERNANCE

Kaupapa 10

The elected directors, trustees, or officeholders, as the case may be, of a mandated iwi organisation must not comprise more than 40% of the total number of directors, trustees, or officeholders of an asset-holding company, a subsidiary established by an asset-holding company, or a fishing enterprise established in accordance with Kaupapa 9.

Kaupapa 11

Every mandated iwi organisation must exercise strategic governance over ---

(a) its asset-holding companies, any subsidiary of an asset-holding company, and any fishing company or joint venture referred to in Kaupapa 9; and

(b) the process to examine and approve annual plans that set out---

(i) the key strategies for the use and development of iwi fisheries assets:

(ii) the expected financial return on the assets:

(iii) any programme to---

(A) manage the sale of annual catch entitlements derived from the settlement quota held by asset-holding companies or their subsidiaries:

(B) reorganise the settlement quota held by asset-holding companies or their subsidiaries, as by buying and selling settlement quota in accordance with this Act.

A post-Treaty settlement governance entity recognised by OTS for a Treaty of Waitangi settlement must, if requested, be recognised by TOKMTL as an iwi governance entity MIO if, before the commencement of the *Māori Fisheries Act 2004*, that entity was:

- approved as a governance entity of the Iwi for the purposes of the settlement of the historical Treaty of Waitangi claims of that iwi as perfected through the enactment of legislation,
- represents an iwi listed in Schedule 3,
- is a company, trust, body corporate set up under an enactment, or incorporated society;
- has established 1 or more asset-holding companies,
- has directors, trustees or office holders, who are elected in a manner that complies with Kaupapa 6, and
- complies with Kaupapa 8, Schedule 6.[198]

Given this provision, it would mean that the following Treaty settlement governance entities or Recognised Iwi Organisations (RIOs),[199] as the Act refers to them were potentially TOKMTL compliant by default:

- The Waikato Raupatu Lands Trust;
- Te Rūnanga o Ngāi Tahu;
- Te Rūnanga o Ngāti Ruanui Trust; and
- Te Rūnanga o Ngāti Tama.

[198] Sections 14(1) and especially s. 14(2) *Māori Fisheries Act 2004*.
[199] Ibid, Schedule 3A.

Each of the above entities however were not TOKMTL compliant due to a number of complexities in their respective enacting statutes and Deeds which did not meet the standards of the *Māori Fisheries Act 2004*. In late 2005 Te Rūnanga a Iwi o Ngāpuhi, Ngāti Kahu ki Whaingaroa, Te Aitanga a Mahaki and Ngāti Rarua were the first of the 58-60 recognised iwi to have their governance entities become TOKMTL compliant and are now MIO's pursuant to the *Māori Fisheries Act 2004.*[200] By May 2006, the following 'Iwi' 'Tribes' were compliant and received fisheries allocations from TOKMTL: Ngäpuhi, Ngäti Kahu ki Whäingaroa, Te Aitanga a Mähaki, Ngäti Rarua, Chatham Islands iwi, Ngäti Awa, Ngäitakoto, Te Atiawa ki Whakarongotai, Ngäti Whätua, Ngäti Ruanui, Ngäti Porou, Ngäti Apa, Ngäti Hauiti, Te Atiawa, Ngäti Koata, Waikato, Ngäi Tahu and Rongowhakaata. Time will tell how effective this initiative will be for Māori polities to realise their internal self-determination rights and responsibilities.

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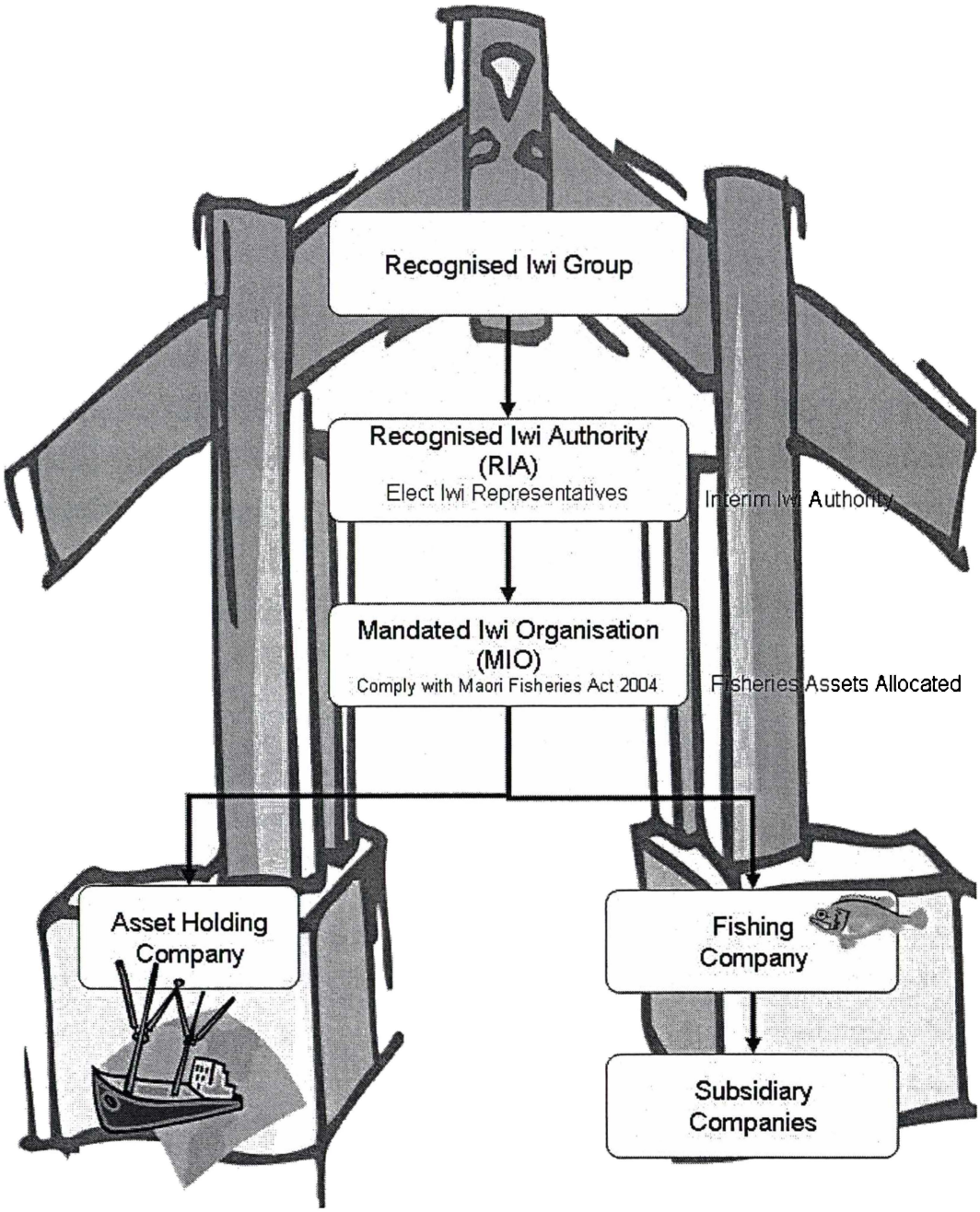
Basic TOKMTL Governance Design for MIOs - Māori Representative Governance Bodies



12.10.3 LATER OTS PROPOSED GOVERNANCE POLICY CHANGES

In February 2004, Cabinet directed officials to report back to the Cabinet Policy Committee on developing a statutory framework for post-settlement governance entities established to hold and manage Treaty of Waitangi settlement redress on behalf of the claimant community.[201] The Cabinet Business Committee (CBC) noted that it is vital for the durability of settlements that robust governance entities are established to manage settlement assets and to undertake ongoing functions under the Deed of Settlement on behalf of the settlement group. The CBC also noted:

- noted that the process of developing suitable governance entities is expensive and time-consuming for both the claimant groups and the Crown;
- noted that the Law Commission recommended in an August 2002 advisory report that a 'new model settlement entity be created by statute, through which a settlement group can receive, and have administered on its behalf, assets transferred to it in the settlement of grievances';
- directed OTS officials to report back by 30 June 2004 with a scoping report on what matters might be covered by a framework statute, the policy issues that may need to be addressed, and whether the Government should proceed further with the approach;
- agreed that the scoping report be developed in consultation with the Law Commission, and in the context of the more generic work being undertaken by TPK on governance issues, across the public sector;

OTS is currently reviewing its post-settlement governance policy as a result and is proposing that framework legislation should focus on matters that require statutory backing, rather than the internal rules of the entity, which can be addressed in a separate and non-statutory document. In August 2004, the Hon. Dr Michael Cullen was asked in the Parliamentary debates what methods were being considered in order to streamline Treaty of Waitangi historic settlements to which he responded:

> The Government is considering ways to simplify settlement legislation so that once settlements are agreed they can be implemented faster and more easily; secondly, it is exploring the possibility of enabling legislation to make it easier for Māori groups to establish robust post-settlement governance entities, and thirdly, it is looking at ongoing work surrounding their lodging of claims with the Tribunal.[202]

[201] Office of the Minister in Charge of Treaty of Waitangi Negotiations, 'Statutory Framework for Post-Settlement Governance Entities: Scoping Report' (Unpublished Memorandum for Cabinet Business Committee, Office of Treaty Settlements, Wellington, 2004) at 1.
[202] New Zealand Government, *Hansard Parliamentary Debates* (Wellington, 24 August, 2004).

What is required is the development of a framework of constitutional arrangements that can be adopted and adapted to meet the particular needs of Māori groups in a range of roles, responsibilities and relationships, including the management of assets.

It is alleged that such a policy shift would address a number of current issues, including the lack of a suitable legal vehicle providing for incorporation, and the current need for special legislation to provide for succession from existing governance entities and existing Māori Trust Boards. The statutory framework would provide flexibility for settlement groups to develop constitutions that were tailored to their needs. No minimum standards for constitutions would be proposed in the statute, given that OTS, as part of the Treaty settlement process, vets the constitutions of governance entities.

The *Māori Fisheries Act 2004* provides for 58 MIOs to receive Fisheries assets with Schedule 6 prescribing various matters that must be reflected in the constitutional documents of MIOs as noted above. The Act does not mandate the legal form of an MIO but any entity holding assets and reporting back to the MIO must be either a trust or a company.

The pressing need for a legislative framework is heightened by ongoing progress towards Treaty settlements, including those likely to involve distribution of accumulated rentals from the Crown Forestry Rental Trust, the provisions of the *Māori Fisheries Act 2004*, the *Foreshore and Seabed Act 2004*,[203] the *Aquaculture Reform Act 2005*,[204] and the requirements of the *Local Government Act 2002* for greater engagement between Māori and local government.[205]

12.11 MĀORI GOVERNANCE MODEL CHALLENGES

12.11.1 TIMING OF GOVERNANCE ENTITY CRUCIAL

The creation of a suitable settlement entity needs to be planned for early in the settlement process. Evidence suggests that the creation of the settlement entity is often seen

[203] Sections 36 – 46, *Foreshore and Seabed Act 2004* discuss Māori governance and representation of the Foreshore and Seabed at the local level.

[204] Clause 41, Aquaculture Reform Bill noted that consultation with a Māori entity represents customary fishing interests in coastal marine areas. Subpart 4, Part 5 outlines the recognition of 'Iwi Aquaculture Organisations' (IAO's) i.e. MIO's from the *Māori Fisheries Act 2004*, with a constitution authorising it to act on behalf of the iwi for aquaculture claims & settlement assets.

[205] At the time of binding the thesis, the Law Commission's Report on Māori governance was available and is very relevant to this research. It was, however, too late to incorporate into this work. It is mentioned here nonetheless as an invaluable reference. See Law Commission, *Waka Umanga: A Proposed Law for Māori Governance Entities* (Report 92, Law Commission, Wellington, May 2006).

as the last hurdle to overcome in achieving settlement of Treaty grievances but such a fundamentally important aspect of the settlement ought to be decided well before signing the agreement. Planning and consultation is also often inadequate. Commentators have noted:

> A common aspect of the settlement processes and outcomes is disagreement as to the basis for representation (by marae, hapū, or otherwise) within the governance structure and the mechanisms for accountability.... Many groups complain that no funding or information is given to 'minority' groups with which to formulate and propose alternative governance models. As a result, iwi members are often presented with a single proposed model, developed with or without consultation (and sometimes inconsistent with consultation undertaken). Because the development of the governance body is generally the responsibility of the tribal negotiators, the settlement package and the governance body are usually presented to the tribe as co-requisites.[206]

OTS funds claimants up to $50,000 to complete the ratification of both the Deed of Settlement and the settlement entity. Most claimants use this funding to organise consultation hui and to organise postal voting on both issues to minimise costs.

The settlement entity is so important, however, that perhaps these two issues are better kept as distinct as possible. As the Māori Affairs Select Committee noted:

> The Office of Treaty Settlements considers it is for the claimant community to determine how the ratification process is carried out. Given that the conduct of the ratification process can affect the durability of settlements, we have reservations about the wisdom of this hands off approach. We consider care should be taken to organise the communication hui so that major marae within the settlement area are not excluded from the process. Also, where groups have expressed concern about the settlements, special care should be taken to ensure they have full opportunity to participate.[207]

The ratification process is crucial for legitimising the whole settlement and therefore its durability but claimant groups need time and space to absorb the significance of their decisions. Ratifying the settlement and governance entity together may not provide enough time and opportunity for such important decisions. Timing is everything in this context.

Perhaps one of the reasons why Ngāi Tahu seem to be prospering more than other settlement groups is because they established their governance entity well before actually settling their Treaty grievance. Two years *before* the settlement, Parliament enacted the *Te Runanga o Ngai Tahu Act 1996*, which established Te Rūnanga o Ngāi Tahu (TRONT), a private statutory governance entity, to administer the tribe's assets for the benefit of Ngāi Tahu Whanui. In contrast, Waikato established Te Kauhanganui o Waikato, an

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[206] Whata, C, Dawson, M and Rangi, G 'Inter and Intra Tribal Debate' (Paper presented at the Business Information in Action Public Law Conference 2002, Duxton Hotel, Wellington, 16-17 April 2002) at 8

[207] Māori Affairs Select Committee *Report of the Māori Affairs Select Committee on the Te Uri o Hau Claims Settlement Bill* (Wellington, March 2002) at 3-4.

incorporated society under the *Incorporated Societies Act 1908*, in 1999, four years *after* signing the settlement. There was an extensive consultation process, significant technical (legal and financial) advice, and overwhelming ratification via a tribal plebiscite. Waikato also undertook a very involved process to combine the best of tikanga with the corporate world[208] but they still ran into a lot of difficulty (which they are still grappling with) in terms of legitimacy, representivity, tikanga and good governance. In addition, it is important to recognise that the processes adopted by OTS have evolved over a number of years. It was not until 1995 that OTS was formed as an Office within the Ministry of Justice.[209] Since then, the criteria that apply to the approval of settlement entities have been developed. It goes without saying that entities, which received settlements prior to the articulation of the more robust criteria utilised presently, do not necessarily comply with that criterion. As is the case with most new regimes, both claimants and the Crown have been forced to learn through experience. This has (perhaps necessarily and understandably) resulted in some challenges emerging.

12.11.2 ISSUES OF ECONOMY

Māori claimant groups need to comply with the governance entity criteria prescribed by OTS and TOKMTL before receiving settlement assets but the economic costs of compliance can be very high. The Law Commission noted that the current Treaty settlement entity of choice is a private trust and mentioned the high costs involved in establishing a trust.[210] Given that a Deed of Trust must be prepared to fit the circumstances of each particular claimant group, the cost of establishing a trust as a vehicle to receive and manage settlements can be extremely high. Similarly, because there was no standard format, the task of approving the form of a Deed of Trust was and still is labour intensive from the perspective of OTS. However, the OTS has the advantage of institutional knowledge and experience in dealing with these matters, which claimants usually lack. In 2002, OTS estimated that between $20,000-$30,000 was spent in obtaining legal advice to review a single settlement entity, in addition to the time of 2-3 Senior Analysts for a period of months.[211] The cost to Māori claimant groups is also high.

In the case of settlements involving smaller assets, the costs of fulfilling these requirements could outweigh or at least significantly decrease the potential benefits to beneficiaries. The taxable status of settlement entities also needs to be clarified, given the

[208] Willis, R, 'Good Maori Governance' (Unpublished Paper, 2003) at 15. In author's possession.
[209] Replacing the Treaty of Waitangi Policy Unit, part of the former Department of Justice.
[210] Law Commission, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (Law Commission, Wellington, 2002) at 7.
[211] Letter from OTS to the Law Commission, 18 October 2001.

importance that both the Crown and Māori attach to the issue[212] and the need to achieve a commercially effective vehicle. A post-settlement governance entity therefore needs to be cost-effective as a minimum for the claimant group. Te Ohu Kai Moana is considering ways to assist asset allocation to iwi, perhaps by developing a model asset management company structure that could be readily adopted by iwi at low cost.[213] In addition, it is helping iwi develop their management and governance capabilities.

12.11.3 GOOD GOVERNANCE BY PRESCRIPTION

As a result of the complex and lengthy Treaty settlement governance criteria prescribed by OTS and TOKMTL, Māori will have systems of governance imposed on them in respect to how they administer and manage their settlement assets. This model, as outlined extensively above, is essentially designed to reflect good corporate governance ideals and aspirations of performance. The rationale for imposing this type of governance system on Māori is paternalistic and anachronistic and seems to be a form of neo-assimilationism. While many Māori do not have extensive business and corporate governance experience (many do have extensive corporate experience), TOKMTL's requirements tend to the mechanical and popular (for example, a separation of governance and management) and do not address the inherent structural issues such as the cultural mismatch of the body politic and of the governance entity to ensure that the governance entity is sustained. Furthermore, the realisation of internal self-determination goals should match the form and function of the entity.

12.11.4 HARVARD PROJECT FINDINGS CHALLENGE PRESCRIPTIVE GOVERNANCE

In addressing the needs of a particular settlement group it will be necessary to have regard to the group's collective goals, which often include cultural, social, economic and political development and internal self-determination. While there is little published empirical evidence[214] available in New Zealand dealing with Treaty settlement issues, good post-Treaty settlement governance and economic development, the results of the

[212] See Walters 'Māori Trusts and Māori Charitable Bodies' in *New Zealand Law Journal* (March 2002) at 65-66. Also note the Government's changes to the status of Maori entities qualifying for charitable status pursuant to the *Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003*. See Inland Revenue Department, 'Maori Organisations – Maori Authorities' (IRD, Wellington, 2004) http://www.ird.govt.nz/maori-organisations/maori-authorities/ (Accessed December 2005).

[213] Communication with Tony Sole, Te Ohu Kai Moana, 27 May 2002. Cited in Law Commission, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (Law Commission, Wellington, 2002).

[214] Although this situation is quickly changing.

Harvard project on American Indian Economic Development[215] provides much useful information. That research suggests that there are at least six main governance ingredients required for economic success:

- Self-rule: local tribal leaders make better decisions about their future approaches and development than non-tribal decision-makers who administer from a distance;
- Institutions matter: successful tribal governance structures share several core institutional attributes:
- Depoliticized dispute resolution mechanisms - they settle disputes fairly;
- The indigenous governance entity and the people separate the functions of elected representation and day to day business management; and
- Effective administration through a depoliticised and competent bureaucracy, which bolsters legitimacy and the self-rule of the organisation.
- Culture matters: Refuting the argument that cultural assimilation was a prerequisite for economic development, the Harvard Project found that the opposite was, in fact the case. Indian culture was a resource that strengthened tribal governance and economic development.

12.11.5 CULTURAL MATCH

The challenge involved in matching socio-political and cultural beliefs, values and institutions to contemporary practice and organisational development is fundamental to reorganising governing institutions:

> Governing institutions have to have the support of the people they govern. This in turn appears to be a matter of fit between the formal institutions of governance on one hand, and indigenous conceptions of how authority should be organised and exercised, on the other... Institutions have to be effective.... For Cochiti Pueblo, it may mean a system of government without any written constitution in which the spiritual leadership of the tribe appoints the senior tribal administrators [and where they] have matched formal institutions to contemporary indigenous political culture.[216]

The governance entity, therefore, needs to reflect the cultural values, laws and institutions of the claimant group for successful economic development according to this project. This information may be contrary to the Crown's policy on Māori governance fitting a corporate governance framework as prescribed by OTS and TOKMTL, which is what makes the Harvard findings interesting and something to contemplate. Māori are not a homogenous group and some Iwi were traditionally great entrepreneurs.

It can be assumed by many Māori, however, that their Article II rights of tino rangatiratanga extend to the relatively prosaic decision-making around the choice of and

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[215] See Cornell, S and Kalt, J (eds.) *What can Tribes do? Strategies and institutions in American Indian Economic Policy* (Harvard Project on American Indian Economic Development, Boston, Massachusetts, 1997). See http://www.ksg.harvard.edu/hpaied/reloading%20the%20dice.pdf (Accessed November 2003).

[216] Cornell, S. *Nation Building and the Treaty Process Remarks by Stephen Cornell*, (British Columbia Treaty Commission Forum, Vancouver, British Columbia, March 1, 2001) at 5. http//www.nativemaps.org/abstracts/cornell. (Accessed November 2003).

process for governance entities. However, the convergence of Treaty settlement processes and Crown stipulation mean that Māori will not be working with a 'clean sheet' for long. That is, the prescriptive Māori governance preconditions for Treaty settlement redress and fisheries allocation mean that practically all Māori within a decade will have to implement new or significantly modified governance entities – as approved by OTS and TOKMTL.[217]

As has been clearly stated above, the Crown will not settle historic Treaty breaches, until the Crown approves the governance entity for the relevant group:

> ... [to] fulfill its responsibilities to taxpayers and all members of a claimant group, the Crown has developed a set of principles against which proposed governance entities are assessed. If the proposed governance entity is consistent with these principles – which are normally included in the Deed of Settlement – the Crown is able to transfer assets to the claimant group, once any settlement legislation is enacted.[218]

The Crown's principles for post-settlement governance entities are that the entity has a structure that:

- adequately represents all members of the claimant group
- has transparent decision-making and dispute resolution procedures
- is fully accountable to the whole claimant group
- ensures the beneficiaries of the settlement and the beneficiaries of the governance entity are identical when the settlement assets are transferred from the Crown to the claimant group; and
- has been ratified by the claimant community.[219]

Crown policy recognises that it 'is a matter for the claimant group to choose a governance entity that will serve their needs and reflect their tikanga,'[220] that is, though subject to compliance with the Crown's principles. At the structural level however, the Crown noted:

> Although on the surface the range of options for claimant groups seeking to develop a new governance entity is quite large, in practice the number of options that meet the needs and purposes of such groups following the conclusion of a settlement is relatively small. ... increasing numbers of claimant groups have found that private trusts, with subsidiary trusts or companies to manage the settlement assets, meet their post-settlement objectives. The Crown is also comfortable about transferring settlement redress to such entities.[221]

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[217] Willis, supra n 208 at 3.
[218] Office of Treaty Settlements, supra n 193 at 71 – 72
[219] Ibid.
[220] Ibid, at 71.
[221] Ibid, at 72.

This issue highlights the hegemonic power imbalance between the Crown and claimant groups. Similarly, TOKMTL's proposal for Māori governance entities[222] is that it will not allocate commercial fisheries assets until Iwi:

- have a constitution that meets the standards set out in the *Maori Fisheries Act 2004* and received the approval of TOKMTL;
- have met all the structural requirements as set out in the *Maori Fisheries Act 2004* and received approval of TOKMTL;
- have a register of members that is equal to, or exceeds the number of members required of that respective Iwi as set in the *Maori Fisheries Act 2004* and received approval of TOKMTL; and
- have obtained coastline agreements and where appropriate harbour and freshwater agreements with all affected Iwi which have been approved by TOKMTL in accordance with the *Maori Fisheries Act 2004*.[223]

12.11.6 APPROPRIATE GOVERNANCE STRUCTURES – COMPLIANCE VERSUS PERFORMANCE

Good corporate governance is fundamentally about the stewardship of shareholders, property. In a Treaty settlement context, Māori individually and collectively, past, present and future, are the 'shareholders' over whose property governance boards and entities have stewardship. There is a need to recognise, however, that businesses (private or public, Māori or non-Māori) are not a homogenous form and a rigid 'one-size-fits-all' approach may not always be appropriate. Equally, a prescriptive approach will result in a form over substance risk, or a moral hazard risk, as the process and rulebook dominates the culture, behaviour and values. In this situation form replaces function.

While there is no set model for restructuring and 'one-size' does not fit all, a number of fundamental principles have emerged over the years as being relevant for most iwi governance structures. These include:

- the need to establish a structure where the individual iwi members have ultimate control;
- the legal capacity and powers of the governance structure are certain; and
- ownership and management functions are kept separate, as are commercial and non-commercial objectives.[224]

A further fundamental principle of good governance is that 'form follows function' i.e. governance bodies need to be absolutely clear on their objectives before devoting time,

[222] As reflected in Te Ohu Kai Moana, supra n 194 and the *Maori Fisheries Act 2004*.
[223] Ibid, at 115.
[224] Tapsell, D, 'Appropriate Structures Critical to Iwi Growth and Development' (Bell Gully Law Firm Publications, Wellington, April 2002) at 2.

money and energy to structural issues.[225] It is possible that an over emphasis on getting governance structures right can mask the importance of more strategic governance concerns. Puketapu concludes that Māori organisations should focus on goals and not become too concerned with structures, and that it is more important to ensure the structures adopted are flexible enough to adapt as those goals shift.[226] Hyndman offers a similar view in his study of institutional arrangements for public sector organisations. He suggests the key to the selection of an appropriate organisational form is a focus on *ends* rather than *means*.[227] Instead of focussing on a factor such as how best to manage risks associated with asset specificity, it is better to consider what form will best meet overall strategic goals.

Bad governance, mismanagement and corporate scandals are not endemic to Māori. People assume that the existence of committees and policies will ensure that the right thing is done. However, all of the well-publicised corporate scandals of recent times had all the necessary committees, procedures and policies in place but they still suffered from misrepresentation of financial results,[228] unethical behaviour,[229] erosion of shareholder wealth,[230] and corporate implosion.[231] Thus compliance with a comprehensive prescriptive list of good corporate governance principles and procedures does not guarantee good corporate (and cultural, social and political) performance. That is not to say that the prescriptive list of governance requirements for Māori entities by OTS and TOKMTL are not important. It seems to the author to be a means-end debate. Perhaps too much emphasis is being placed on compliance and not enough on performance.

Healey noted that precision in defining and discussing good corporate governance is also essential.[232] The OECD provided an excellent definition of good corporate governance, but the best summary according to Healey was by Elaine Sternberg. She defined good corporate governance as 'ways of ensuring that corporate actions are directed to achieving the shareholder objectives.'[233] A study by McKinsey & Co. found that corporate governance was at least as important as financial performance when evaluating

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[225] 'Good governance means broadening skills base' in Te Puni Kōkiri *Kōkiri Patae* (Te Puni Kōkiri, Wellington, August, 2003) at 11.
[226] Puketapu, B, 'Maori Organisation and Contemporary Maori Development: Strengthening the Conceptual Plait,' (PhD thesis, Palmerston North: Massey University, 2000).
[227] Hyndman, M, *Optimal Institutional Arrangements for Public Sector Activities*, (Unpublished Report produced for The Treasury, Wellington, 1999).
[228] Enron.
[229] Arthur Anderson.
[230] Air New Zealand.
[231] Ansett.
[232] Healy, J 'From Good to Great: Maori Governance' in Te Ohu Kai Moana, *Kia to Tika ki to Taumata – Nothing Less than the Best* (Maori Commercial Fisheries Conference, Sheraton Hotel, Auckland, 28 May 2003) at 6.
[233] As cited in idem.

investments. Moreover, institutional investors are willing to pay a premium for good governance and that premium can be as high as 20%. Other studies have highlighted equally strong returns from businesses exhibiting good corporate governance.[234]

Healy further concluded that good corporate governance is intrinsically linked to good performance with an emphasis on performance. He added, moreover, that there is more value lost to shareholders, employees and society in general through poor corporate and board performance than through fraud and malpractice. Commentators lose sight of this fact and yet this is the key corporate governance issue that shareholders should be concerned about.

Good corporate governance therefore has to be intrinsically tied to the primary purpose of business and viewed as an economic imperative, not just a compliance or legal requirement such as the post-Treaty settlement governance principles that Māori groups need to comply with. The good corporate governance emphasis therefore must place priority of performance over compliance and reflect the tendency to place emphasis on regulations, procedures and policy manuals – a 'tick in the box' – compliance approach when the real issue is one of commitment to Māori shareholders, leadership, philosophy and values.

Māori governance entities therefore must give a clear instruction to those managing the settlement assets to deliver a return on capital commensurate with the risks involved. No Māori group will prosper if capital is not working productively and growing in a sustainable way. Māori must make sure that the post-settlement governance arrangements make it clear that shareholders want their wealth to grow through stock price appreciation and dividend flows and that this is a primary measure of how well the businesses have been managed and governed.[235]

12.12 SPECIFIC MĀORI SELF-GOVERNANCE MODELS

12.12.1 PRINCIPLES

There are numerous types of governance and management entities capable of being used by Māori claimant communities for Treaty of Waitangi settlements and for the future development of Māori settlement claims. Different legal entities have evolved over time in New Zealand to provide for particular purposes whether for commercial trading purposes (companies); non-commercial administrative purposes (incorporated societies); or asset

[234] See Gomper, E *Corporate Governance and Equity Prices* (NBER, Working Paper 8449, August, 2001); and Institute of Business Studies, *Does Business Ethics Pay?* (London, 2003).
[235] Healy, supra n 232 at 7.

protection purposes (trusts).[236] There are a number of characteristics, however, that are unique generally to Māori ownership and the development of assets which make it difficult if not impossible for any single entity to meet all of the purposes necessary for post-Treaty settlement development.

- The first characteristic is that settlement and Māori assets generally tend to be owned on a communal/tribal basis on behalf of Māori members derived by virtue of descent. In contrast, ownership on an individual or collective basis on behalf of non-Māori members is often derived by subscription or application, which is common in the case of non-Māori assets.
- The second is that Māori governance structures tend to have multiple of objectives rather than any single objective, including a political/representative role, a social/distributive function, cultural values, norms and institutions function, and a commercial/business function.
- A further characteristic is traditional ways of governing, whether tribal or colonial, and the need to reconcile traditional and modern governance values, processes and structures.

Given such unique characteristics, the structuring of Māori governance entities should generally consider the following issues (which are not exhaustive):

- a separation of the political/representational (governance) roles from business (management) and (in some cases) distribution of benefits;
- a separation of business (commercial) from distribution of benefits (social);
- a separation of asset ownership from trading activities undertaken as part of the business role of the organisation;
- accountability of political representatives and asset management and business representatives;
- the role of a Māori group's traditional values, norms and institutions in the governance entity;
- the role, office, and general value of elders within the governance and management entities (perhaps in advisory roles);
- the alignment of the overall objectives, vision and goals of the group with good governance, commercial pragmatism and the maintenance of Iwi identity, values and institutions;

[236] For a number of good references comparing the various legal governance entities available to Maori, see Walters Williams, 'Preliminary Proposal in Relation to Structure and Strategy for Settlement of Muriwhenua Treaty Claim for Submission to Waitangi Tribunal' (Walters Williams, Barristers and solicitors, Auckland, 1998); Maniapoto Maori Trust Board, *Maniapoto Maori Trust Board – Options for Restructuring* (Maniapoto Maori Trust Board, Te Kuiti, 1999); Walters, J., Mahuika, M., Powell, G. 'What Ownership Structure is Best for Settlement and Development,' (Walters Williams & Co, Auckland, 2000); and Whata, C, Dawson, M & Rangi, G 'Inter and Intra Tribal Debate' (Conference Proceedings, Business Information in Action Public Law Conference, Duxton Hotel, Wellington, 16 –17 April, 2002); Jones, P 'Maori Governance: Foundations for Indigenous Social Capability' (Unpublished Report for the Social Policy of The Treasury, Wellington, 2002); Law Commission, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (Law Commission, Wellington, 2002) and Gray, D 'Kaupapa Māori Authorities: A Proposal for Legislation to Recognise a New Class of Māori Organisation' (Unpublished Manuscript, Pukekohe, July 2003) and Te Puni Kōkiri *Nga Tipu Whakaritorito: A New Governance Model for Māori Collectives* (Te Puni Kōkiri, Wellington, 2004). See the Te Puni Kōkiri website dedicated to providing information on Māori Governance challenges at: http://www.hmlsystems.com/newmaorigovernance/tpk_mGvrnce/govtatt.shtm (Accessed 20 July 2005).

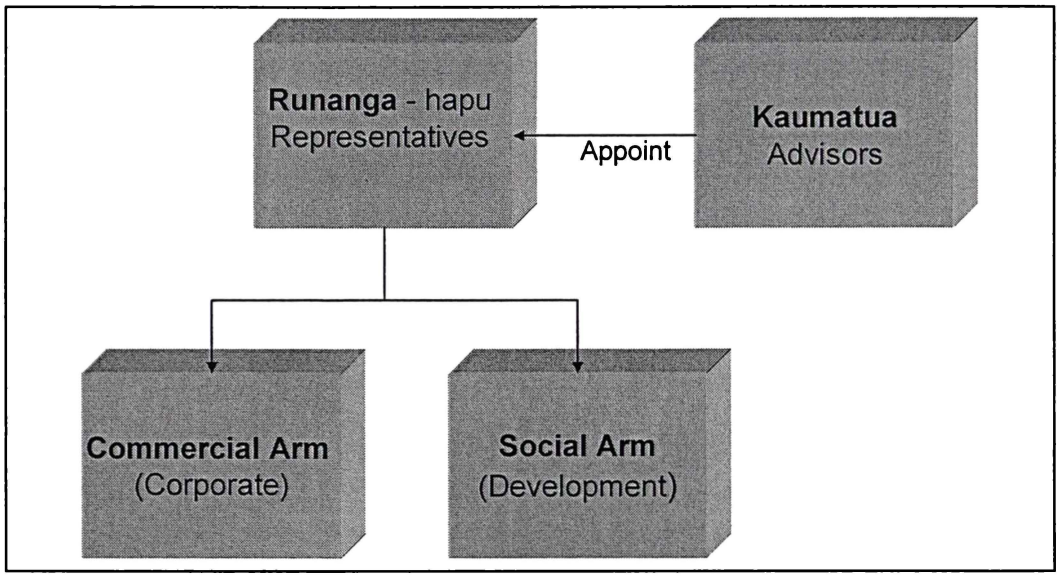
- mechanisms and processes, both Māori and non-Māori, for accountability, transparency, and stewardship;
- culture match;
- voting rights, responsibilities and Māori representivity challenges;
- institutional and individual capacity building;
- investor (both internal and external) confidence in the group's governance entity and other commercial concerns;
- membership, cultural survival, group identity reconstruction and perpetuation;
- the norms, processes and institutions of the dominant state and market with which Māori entities must interface; and
- appropriate dispute resolution fora, processes and mechanisms to successfully resolve the inevitable post-settlement concerns and challenges that emerge.

These considerations will usually result in a combination of different types of entities in order to achieve and successfully traverse the numerous objectives required in order to best utilise assets for the benefit of the Māori group involved. This section will briefly investigate the range of legal governance entities that are currently available for use by Māori for the various purposes of their respective areas of post-settlement development. The advantages and disadvantages of each within a good governance context are examined, and their respective suitability (or otherwise) for use as post-Treaty of Waitangi settlement governance entities is also discussed.

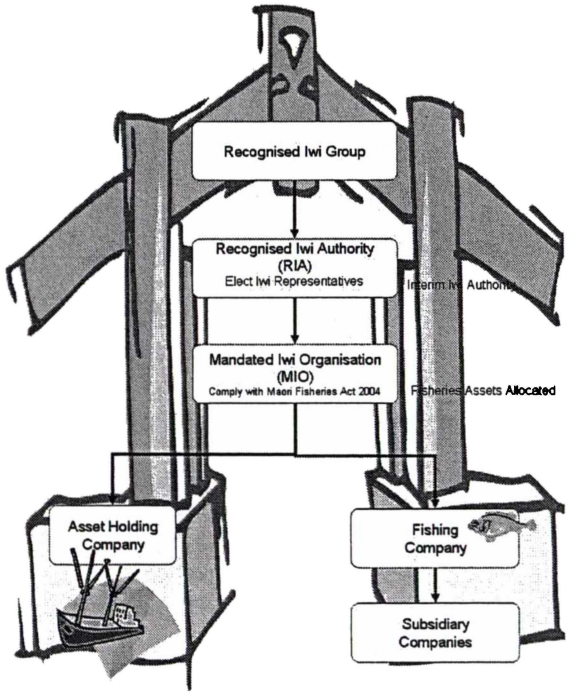
12.12.2 BASIC GOVERNANCE DESIGN

The basic design of governance entities for Māori claimant communities is a representative body (private trusts, companies, private legislation entities from Treaty settlements or incorporated societies, with subsidiary trusts or companies to manage the settlement assets) as shown below:

Basic OTS Governance Design for Māori Representative Governance Bodies



Basic TOKMTL Governance Design for MIOs - Māori Representative Governance Bodies



An appropriate balance must be struck between those responsible for managing the settlement assets and the owners of the assets (the Māori beneficiaries), a balance which aspects of New Zealand law have been dealing with for some time. Any governance entity in which those responsible for managing the assets do not also own the assets requires rules to regulate questions of governance/management, representation, accountability, transparency and dispute resolution. Rules-based constitutions governing those issues can be found in a multitude of entities carrying on business in New Zealand.[237] In addition, there are a number of unique factors Māori groups must take into account when designing appropriate governance structures for their representative and subsidiary bodies. Durie has pointed to concerns about an over-emphasis on business models 'which fail to capture the essential cultural basis of the tribe.'[238] But he adds that pragmatic tribal leaders appreciate the need for financial independence from the Crown as a means of achieving self-determination, and it is often necessary to adopt business models to this end. Hall suggested that Māori governance structures need a balance between at least three dimensions, each requiring distinct capabilities:

- commercial reality – requires skilled asset managers;
- cultural reality – needs policy makers skilled in Maori ethics and values;
- social reality – needs an appreciation that the development of people is as important as capital development.[239]

There is a growing acceptance of the need for Māori governance entities with an organisational structure that provides explicit separation between these three main dimensions. Separation allows competing objectives to be accommodated more transparently, and conflicts of interest can be minimised. A distinct policy-making body made of elected representatives provides the opportunity for member involvement in planning and guiding at the strategic level, where decisions have the most effect. This allows the operational units of the organisation to efficiently go about their business within the strategic and accountability parameters set by the community as a whole.[240]

A common structural challenge is the appropriate makeup of the boards of both principal and subsidiary governance entities. It can be difficult to maintain a balance

[237] For example the *Companies Act 1993, Incorporated Societies Act 1908, Charitable Trusts Act 1957, Trustee Act 1956, Building Societies Act 1965, Credit Unions & Friendly Societies Act 1982.*

[238] Durie, M *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998) at 227.

[239] Hall, D 'Indigenous Governance and Accountability' in Douglas, E., & Robertson-Shaw, M., *Ngai Tatou 2020: Indigenous Governance & Accountability*, Auckland: Foundation for Indigenous Research in Society & Technology, 1999).

[240] Jones, P 'Maori Governance: Foundations for Indigenous Social Capability' (Unpublished Report for the Social Policy of The Treasury, Wellington, 2002) at 23.

between sufficient diversity of directors' skills and the need for a congruent vision. Another conundrum is determining the degree of overlap between the elected representatives and the membership of subsidiary boards with responsibility for asset management or operations. Hence the prescriptive good governance criteria by OTS and TOKMTL (outlined above) and with which every Māori governance entity must comply to receive Treaty settlement assets, redress and/or Māori fisheries allocation benefits.

12.13 INSTITUTIONAL REPRESENTATION AND SELF-GOVERNANCE MODELS

In determining what legal entity to adopt for Māori post-Treaty settlement governance, the main legislative governance models currently existing in New Zealand include:

- Governance structures pursuant to the *Te Ture Whenua Māori Act 1993;*
- Māori Trust Boards under the *Māori Trust Boards Act 1955;*
- Incorporated Societies under the *Incorporated Societies Act 1908;*
- Company structures under the *Companies Act 1993;*
- A Co-operative Company under the *Co-operative Companies Act 1996;*
- Charitable Trusts under the *Charitable Trusts Act 1957;*
- Private Statutory Bodies; and
- Private Trusts created (by Deed) under the *Trustee Act 1956* for particular purposes.

Inevitably, the settlement entity will create and manage other entities (such as companies and charitable trusts) to effectively perform its various internal self-determination functions so that it can compete and prosper in the commercial world in order to provide social benefits to beneficial owners. Further, it is possible that a settlement governance entity could be regarded as the basis of the Māori group's legal identity for representation and other such purposes that needs to be borne in mind when considering the appropriateness of particular legal structures. It is important to emphasise, however, that the governance entity is not the tribe. The governance entity is the instrument that is fashioned to effect the goals of the tribe(s) it represents. It is also a mechanism for managing the tribe's political and developmental interests.[241] No current governance entity model is 'perfect' for post-Treaty settlement self-governance and internal self-determination. Every governance model has its strengths and weaknesses but perhaps the most appropriate model to date is a Ngāi Tahu type private statutory model.

[241] Durie, E 'Entities, Tribes, Beneficiaries and Members' (Unpublished Draft Governance Paper, Law Commission, Wellington, 2004) at 11.

12.13.1 TYPOLOGY OF MĀORI GOVERNANCE

A fundamental principle of self-governance and common thread through part of this research, which is very important when deciding on an institutional self-governance form, is the axiom 'form follows function.' Indigenous polities need to be absolutely clear on their objectives and functions before devoting time, money and energy to self-governance structural form.[242] Hyndman offered a view in his study of institutional arrangements for public sector organisations suggesting that the key to the selection of an appropriate organisational form is a focus on *ends* rather than *means*.[243] Instead of focussing on a factor such as how best to manage risks associated with asset specificity, it is better to consider what form will best meet overall strategic goals, remembering the overarching goals of internal self-determination through economic, political, social and cultural development.

Kirsty Glover and Natalie Baird coined the phrase 'boutique autonomy' which refers to the adaptation of institutional forms of organisation to the particular needs and aspirations of group members of new Māori expressions of collectivity (socio-political organisation).[244] Māori individuals participate in, and act on behalf of, a range of groupings with different purposes, choosing the best avenue for group responses on the myriad issues affecting their lives and determining the best approach for collective engagement with the Crown, non-governmental entities, and other Māori collectives of whānau, hapū, iwi, UMAs, pan-Māori groups and other Indigenous Peoples. Glover and Baird's boutique autonomy thesis appears to support the idea, in the author's view, that Māori were pragmatic and organised their political forms according to function with amazing creative adaptability.[245] Tradition was not the sole determiner of future action. It should follow, then, that with the evolution of new functions for Māori collectives in a contemporary globalised world, commensurate new and more appropriate forms (or boutique autonomy) would evolve at the local, regional, national and even international levels of contemporary Māori, indeed, indigenous socio-political organisation.

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[242] Te Puni Kōkiri, supra n 225 at 11.

[243] Hyndman, supra n 227.

[244] Glover, K & Baird, N, 'Identifying the Māori Treaty Partner' in *University of Toronto Law Journal* (Vol. 52, No. 1, 2002) at 52-54.

[245] On this issue, Judge Eddie Durie in 1996 stated: 'There were several hundred hapu, most of them free and independent. In terms of structure [or form] they were remarkably fluid, constantly changing, dividing as numbers increased, or fusing if due to war or famine numbers were reduced. ... It was characteristic of these hapu to be self-managing, but to federate in varying combinations for specific purposes [or function], from war to entertaining, or fishing to long distance travel.' Durie, E, 'Will the Settlers Settle? Cultural Conciliation and Law' in *Otago Law Review,* (Vol. 8, 1996) 449 at 450.

12.13.1.1 PATERNALISTIC AND INSTRUMENTALIST LAW AND POLICY

As far as analysis of the historical trajectory of Māori commercial enterprise is concerned, the special Māori affairs legal regime was originally established to consolidate settler hegemony as part of the process of 'controlling' Māori political, social, cultural and economic life after the New Zealand Wars.[246] Indeed the Honourable Henry Sewell who was simultaneously Minister of Justice and Premier set out what was the primary motivation, the primary political end, for creating the Native Land Court and the Native Land Acts:

> The object of the Native Lands Act was twofold: to bring the great bulk of the lands of the northern island which belonged to the natives into which, before the passing of this Act, were extracomercium, within the reach of colonisation. The other main object was the detribalisation of the natives; to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based and which stood as a barrier in the way of all attempts to amalgamate the native race into our own social and political system. It was hoped the individualisation of titles to land, giving them the same individual ownership that we ourselves possessed, they would lose their communistic character and their social status would become assimilated into our own.[247]

There existed a deliberate policy to 'break the beastly communism of the Maori' and detribalise them through assimilation and the individualisation of land title. Most of the North Island was administered pursuant to the idea that by individualising title it would be easier to alienate as well as detribalise and Europeanise Māori in the process. Hence the raison d'etre of the Native Land Court was to destroy Māori 'communistic'[248] custom and governance institutions because it would make it easier to accomplish the above objectives. Ironically, the undermining of traditional Māori corporate governance institutions, which Māori had developed to an amazing degree, was noted by William Rees in 1891:

> When the colony was founded the Natives were already far advanced towards corporative existence. Every tribe was a quasi corporation. It needed only to reduce to law that old system of representative action practiced by the chiefs, and the very safest and easiest mode of corporate dealing could have been obtained. So simple a plan was treated with contempt. The tribal existence was dissolved into its component parts. The work which we have, with so much care, been doing amongst ourselves for centuries, namely the binding together of individuals in corporations, we deliberately undid in our government of the Maoris.[249]

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[246] For a balanced narrative of the New Zealand Wars, see Belich, J *The New Zealand Wars and the Victorian Re-Interpretation of the Conflict* and perhaps Cowan, J *The New Zealand Wars and the Pioneering Period* (2 Vols, Wellington, 1922-3).

[247] Honourable Henry Sewell, NZPD 1877, Vol 24, at 254

[248] It is noted here that traditional Māori society was not communistic in the sense of Marxist-Leninist communism or socialism. Māori society was communalistic not communistic.

[249] William Rees, AJHR 1891G4, at xviii:

Consequently, the Māori affairs legal regime was animated by certain logics of assimilation, paternalism and hegemony that continue to have some effect today. The institutional forms of Māori governance and organisation recognised and permitted by the nation-state came to form part of the process of establishing settler hegemony over Māori lives, communities and resources. The organisational forms drew on pre-colonial forms and understandings but were not independent organisations and, in many ways, were travesties of the original indigenous institutions to which they superficially bore a resemblance. The subsequent Māori Affairs legislation created a range of Māori land trusts, incorporations and Māori Trust Boards with remnants of the colonial ethos of paternalism, individualism and land alienation.

12.13.1.2 MĀORI AFFAIRS LEGISLATION – TE TURE WHENUA MĀORI ACT

The legislation controlling Māori land entities is to be found principally in the reformed and substantially modernised *Te Ture Whenua Māori Act 1993* (TTWM). TTWM creates a range of Māori land trusts and incorporations to facilitate and promote the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whānau, their hapū, and their descendants. The institutional forms allowed under TTWM include:

- land holdings under multiple ownership which are not controlled through a Māori Trust or Māori incorporation;
- Māori Trusts – a form of Māori denominated Trust based on adaptations of English trust law but giving no formal recognition to concepts of Māori law; and
- a form of Māori denominated body incorporate – the Māori Incorporation.

From the early 20th century Māori trusts and incorporations have primarily undertaken the development of land.

12.13.1.3 TRUST MODELS UNDER THE TE TURE WHENUA MĀORI ACT 1993

The contemporary Māori land trusts are to be found in s. 438 of the *Māori Affairs Act 1953* and the Ahu Whenua Trust created under Part XII TTW.[250] There are five types of trust entities now available under TTW namely:

- *Ahu Whenua Trust* - The most common Māori land trust and probably the most flexible trust, in that it is designed to promote the use and administration of Māori land in the interest of the owners. As such these trusts are often used for commercial purposes. These trusts apply to Māori land or general land owned by Māori and they are designed to promote and facilitate the use and administration of land for the benefit of the beneficiaries and are equivalent to the s. 438 trust under the *Maori Affairs Act 1953* which continue today as ahu whenua trusts.

[250] In particular, see *Te Ture Whenua Māori Act 1993* ss 210, 211, 215, 219-245.

- *Whenua Topu Trust* - This is the iwi or hapu based trust. It is designed to facilitate the use and administration of the land in the interest of the iwi and hapu. This type of trust is used for receiving Crown land as part of any settlement. The essential purpose of whenua topu trusts is to hold land and other assets for the benefit of hapu or iwi and income must be applied for Māori community purposes as defined in the Act.
- *Whānau Trust* - This is the whānau-oriented trust. It allows the whānau to consolidate their Māori land interests and to halt fragmentation for the benefit of the whānau and their descendants; and
- *Putea Trust* - This trust allows owners of small and uneconomical interests to pool their interests together to prevent fragmentation below the minimum share unit by stopping further succession. A putea trust is designed to manage the interests and shares of owners of very small interests in trusts and incorporations.
- *Kai Tiaki Trust* - This trust relates solely to an individual who is a minor or under a disability and who is unable to manage their affairs.[251]

Ahu Whenua and Whenua Topu Trusts are both land management trusts and involve the whole of the land blocks, which makes them an option for Treaty settlement self-governance. Whānau and Putea Trusts are share management trusts and relate primarily to specified shares in land and Kai Tiaki trusts are obviously irrelevant for the purposes of this research and will not be discussed further. Trust powers for Ahu Whenua and Whenua Topu Trusts must be exercised strictly in accordance with the specific terms of the Trust Deed establishing the Trust itself, irrespective of type and they have to be set up by the Maori Land Court. There is a further issue with Trust Deeds as some are significantly outdated and may contain provisions and duties that are unduly restrictive. Robinson and Dyall refer to this as a major impediment to the operation of Māori commercial organisations,[252] although the extent to which outdated Trust orders are problems is unclear empirically.

In addition, there is a considerable although restricted freedom to deal with land and other assets by the trustees who perform the management and stewardship function. The significant restriction in relation to land transactions is that trustees cannot make sales or gifts of land held in trust. Further, where the trustees grant a right to one party, it cannot then be assigned to another party without assessment and confirmation by the Maori Land Court. This restriction on commercial transferability is of some significance in contexts where Māori interests are dealing with organisations with complex structures or persons who wish to employ sub-contractors.[253] Māori trusts thus lack full commercial viability.

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[251] See generally Te Puni Kōkiri *Te Ture Whenua Maori Act 1993: A Working Guide to the Act* (Ministry of Maori Development, 1993) at 30-31.

[252] Robinson, S & Dyall, J *Maori Resources: An Overview* (mimeograph, no date) cited in Mfodwo, K 'The Political Economy of Treaty of Waitangi Settlements: Aspects of a Policy Issues and Research Agenda' (Unpublished Seminar Series, School of Law, University of Waikato, Hamilton, 1996) at 11, 31.

[253] Thus for example, a forestry right is granted to a wholly owned company, which now wants to transfer that right to a joint venture.

Māori have been frustrated by the paternalism inherent in Māori Land legislation since its inception in the 1860s. If the bottom line for indigenous self-governance and to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governing institutions, processes, systems and disputes then the DBC value of this Māori land trust model is 2 - a cultural perspective structural arrangement.

Table 11.2 Te Ture Whenua Maori Act 1993 Māori Trusts

Advantages	Disadvantages
Ability for Maori Land Court intervention	Maori Land Court intervention can be time consuming and costly
High level of beneficiary participation	Māori land trusts deal primarily with Māori freehold or customary land & can be difficult to adapt to other purposes
Specifically designed for multiple ownership of assets	Rules are very prescriptive and limits power to make commercial decisions, hence lack commerciality
Restrictions on alienation	Māori land trusts have come under some criticism for being too protective of Māori land and therefore restricting commercial development & the rights of individual landholders
	The restrictions on alienation can impede development
	Difficulties in obtaining finance
	Can be cumbersome due to high level of beneficiary participation

12.13.2 MĀORI INCORPORATIONS MODEL UNDER *TE TURE WHENUA MAORI ACT 1993*

Māori incorporations are a form of corporation, akin to a company, established especially for use by Māori. Like the body corporate in the non-indigenous world, Māori incorporations have perpetual succession and a common seal, and they can sue and be sued. The assets around which shareholders in a Māori incorporation structure their participation in a joint enterprise are interests in land. Māori incorporations are the most commercial of all Māori land entities. In their latest form under *Te Ture Whenua Maori Act 1993* (TTWM) Māori incorporations are able to diversify and operate in ways similar to the mainstream Anglo-American corporate model. The incorporation model is now enshrined in Part XIII of TTWM.[254] Māori incorporations cannot grant or transfer a lease or licence for a term of more than 21 years, unless approved by a special resolution of the incorporation passed by a majority of the shareholders. Sales and gifts of Māori land are possible, however, provided there has been a special resolution by shareholders holding at

[254] In particular, see *Te Ture Whenua Māori Act 1993* ss. 246-284.

least 75% of the shares in the incorporation. Controls by the Maori Land Courts include the fact that the incorporations are still subject to confirmation by the Maori Land Court; sales and gifts in the terms outlined above must still be confirmed, whilst the Registrar need only note mortgages, leases and licences for more than 21 years. Assignments of an originally permissible interest in the land cannot be made without the approval of the Maori Land Court. Obviously this restriction is of some significance in terms of attracting internal, outside and foreign investment.

The Court plays a prominent part in the administration of these structures under TTWM, and they are also subject to the *Trustee Act 1956*, equitable legal principles, and the body of trust law. Managers of Māori Incorporations in particular are subject to tight control by the Court, e.g. voting procedures are controlled by s 275 of the Act; limits on reimbursement for business travel expenses - s 274; powers given to Court appointed examining officers to investigate managers' performance – s 280; the Court's powers to become directly involved in business affairs - ss 280-281.

Table 11.3 Te Ture Whenua Maori Act 1993 Māori Incorporations

Advantages	Disadvantages
Ability for Maori Land Court intervention	Maori Land Court intervention
High level of beneficiary participation	Can be cumbersome re high level of beneficiary participation
Specifically designed for multiple ownership of assets	Rules are very prescriptive and limits power to make commercial decisions
Have the capacity to undertake any business or activity, do any act, or enter into any transaction in order to discharge their obligations	Māori incorporations are not necessarily representative of their whole membership, as shares in Māori Incorporations are potentially distributed unevenly among shareholders
	The autonomy of these entities is limited, as the Māori Land Court has a wide ability to intervene in the operation of entities
	There is a risk that the list of owners in a trust or incorporation might be narrower than those who are eligible to be members through whakapapa

Like Māori land trusts, Māori incorporations perpetuate the paternalism inherent in Māori land legislation. In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the DBC value of the Māori incorporations self-governance model is 2 - a cultural perspective structural arrangement or perhaps leaning to 3 - active cultural involvement.

12.13.2.1 SUMMARY

A key feature of TTWM management structures is that ownership interests can generally only be transferred to a preferred class of alienees, and this must be done with

the approval of the Maori Land Court. There are representation problems, with Incorporations and Ahu Whenua trusts dating back to the way the Native Land Court created the original land title deeds. In most cases titles were only issued to a maximum of ten kaumātua of the relevant hapū, effectively excluding a number of hapū members and their descendants in perpetuity.[255]

Maori Trusts and Incorporations, while providing a high level of beneficiary participation, can also prove to be unwieldy in a commercial context and only relate to Māori customary or Māori freehold land, not other assets. Moreover, the Māori Land regime is still somewhat paternalistic with the need for confirmation from the Maori Land Court with land alienations and the legislative imposition of land retention, which can hinder economic development opportunities. Further, the various Māori Trusts and Incorporations provide a formal governance/management structure which deals reasonably easily with land and can enter into contracts with outsiders both Māori and non-Māori. It is however, often a part-time structure with consequences described succinctly by Robinson and Dyall:

> In essence Maori incorporations and Trusts have the following characteristics: a) part-time management; b) engagement of an accountant who acts as secretary; c) and lack of a full time Chief Executive. The consequences have been a) reactive management; b) conservative operating policies; c) and land based economic activities.[256]

Robinson and Dyall also noted a further barrier to Māori in terms of access to finance and capital - many financial institutions appear to regard lending to Māori entities with communal land ownership and governance as being in the 'too hard' basket. The fundamental problem is the routine belief that Māori communal organisations cannot adequately meet the requirements of the banking and financial systems where substantial borrowings are an issue. Despite a significant improvement in recent times, the mainstream organisations in the banking and financial sectors have been on balance unwilling to accept economic units and governance entities structured very directly and obviously around iwi and hapū identity as anything other than exceptional customers. There is a general lack of confidence in what are perceived as 'indigenous' and therefore inherently strange, different, inferior, and intrinsically unreliable institutions. There is also an inability to raise capital on multiply owned land because of a lack of collateral, since Māori communities are usually unlikely to use individually owned land as collateral. Given the control that the government maintains via the Māori Land Court over TTWM governance entities, they are

[255] Boast, R Erueti, A McPhail, D & Smith, N (eds) *Māori Land Law* (Wellington: Butterworths, 1999).
[256] Robinson, supra n 252 at 2-4.

inappropriate forms for post-settlement self-governance entities for receiving and managing settlement funds and assets and ultimately realising internal self-determination.

12.13.3 MAORI TRUST BOARDS ACT 1955 MODEL

Ten Māori Trust Boards (MTB) were created between 1922 and 1953 by statute to receive and administer compensation paid by the Crown to settle a number of different Māori grievances against the Crown. The *Māori Trust Boards Act 1955* (MTBA) was enacted to standardise and improve the administration of these Boards as well as providing a template for future organisations to follow. The enactment of this legislation was not without opposition, which focussed primarily on the paternalistic nature of the statute – criticisms that have endured to this day.

Pursuant to s. 24, MTBA, MTBs are expected to provide money for the benefit or advancement of beneficiaries, and to apply their monies towards the promotion of Māori needs in the areas of health, socio-economic welfare, education and vocational training.[257] The State and beneficiaries have subsequently called upon MTBs to meet a wider range of expectations than previously. They are engaging in a diverse range of activities ranging from provision of educational grants to negotiating with the Crown for settlement of Treaty of Waitangi claims through to managing complex commercial enterprises.

The Boards have the advantage that, by virtue of their empowering legislation and initial certification by the Commissioner of Inland Revenue, they have charitable status. So long as the original trust deeds are flexible enough to allow assets to be added to the original trusts then it is theoretically possible for settlement assets to be added to a MTB. However, in practice the lack of accountability to beneficiaries means OTS would not give approval to a MTB being used as a self-governance entity for settlements, at least not without significant amendment to the empowering legislation.

While MTB's are appropriate in some circumstances, they are inadequate to meet all the needs of Māori particularly in the future. There are serious deficiencies in the Trust Board model. Section 32 MTBA makes the MTB ultimately accountable to the Minister of Māori Affairs and not to the Māori community, which is not even a semblance of internal self-determination. In 1994 the Mason Committee said that the MTBA was enacted 'solely for the benefit of the Crown.... [and] that the [Act] is an anachronism created during a

[257] For a good reference on the *Maori Trust Boards Act 1955* and its appropriateness to a tribal authority's contemporary activities, see Maniapoto Maori Trust Board *Maniapoto Maori Trust Board – Options for Restructuring* (Maniapoto Maori Trust Board, Te Kuiti, 1999).

considerable Māori dependency and State paternalism.'[258] MTB structures do not offer the sort of limited liability which incorporation of legal structures under the Companies Act 1993 does. Assets held in trust structures are therefore unable to avail themselves of risk management, capital raising and other benefits which limited liability confers. This has an overall long run effect of limiting choice, increasing risk, and reducing efficiency. The use of trust structures for undertaking large-scale commercial enterprise is likely to distort the bearing of risk. Where there is ministerial responsibility for authorising the raising of debt, for example, providers of debt finance may place inappropriate reliance on the Crown's role in MTB structures thereby reducing incentives for performance. Alternatively, the absence of standard commercial structures may inhibit the debt raising capacity of Māori. The level of risk adversity dictated by trust relationships may mean that an overly conservative attitude is adopted in Māori commercial activity. Māori would wish to have available to them the choice to cover the same breadth of high, medium and low risk investing opportunities as is available to others.

Furthermore, the underlying concept of a trust and trustee relationship stems from the notion of diminished responsibility. Trusts are frequently used as a means for managing the assets of the infirm and the very young, or more generally, those deemed to be incapable of managing the assets in their own interest. This concept is peculiarly ill suited to concepts such as self-governance and internal self-determination. Equally inappropriate seems to be the notion of obtaining ministerial permission prior to undertaking standard commercial procedures such as raising debt and having much of the formal monitoring regime channelled through Crown procedures and agencies. The development of increased autonomy and self-governance by Māori, the restoration of Māori assets, and the decreased dependency of Māori on the Crown, all point to structures in which independent activity is contemplated in line with other economic actors in society, hence the inappropriateness of this governance model for realising internal self-determination

Notwithstanding the weaknesses of the MTB model, interest was initially expressed by Ngāti Awa to establish a MTB under the MTBA as an appropriate governance entity for holding its settlement assets. At a nation-building hui at Hopuhopu in 2000, Joe Mason, principal negotiator of the Ngati Awa Settlement, commented:

> It is my view that the Trust Boards Act really served our purposes. That's really what governance is all about. You need to choose the governance structure that suits you. So all we're going to do is take the Maori Affairs out of the Maori Trust Boards Act and that's

[258] Te Puni Kōkiri, *Report of the Mason Committee on Māori Trust Boards* (to Chief Executive of Te Puni Kōkiri, August 1994) at 58-70.

> basically going to be our charter. It's very, very simple. No fancy structures. You have your elections, *nga uri o nga hapu o Ngāti Awa*, one vote on the Rūnanga, one vote per hapu. And it will be done as close as possible to how it's done in the Maori Trust Boards Act. Of course we have to go through the enacting legislation but our actual accountability will be to our beneficiaries and not the Minister. So there's very little change. Basically, the new structure is *nga uri o nga hapu o Ngāti Awa*, they pick the Trust Board, simple and easy, and the Trust Board is the governing body like most organisations that govern. They enact policy and they develop your commercial arm, and carry out all the monitoring processes that go with it and whatever else Ngāti Awa puts up. There will be a commercial arm, just like Tainui and Ngai Tahu, and a social services arm, because really that is what we are all about, our aim is being to develop our people totally. Cultural, social and economic – it's all written down in the Act.[259]

Ngāti Awa's initial proposal to use the MTB model was to take advantage of the Trust Board's certified charitable status, which is relatively easily accessible. Any initiation of amendments to rectify the accountability problem is likely to bring about the end of the tax advantages the groups are seeking by proposing the use of this structure as a settlement entity. Ngāti Awa subsequently established Te Rūnanga o Ngāti Awa, a private trust as its current self-governance model.

While there was interest by some groups negotiating settlements with the Crown, the MTBA would require significant amendment to make it a suitable governance entity for the holding of settlements. The initiation of amendments to satisfy the requirements of the OTS[260] and TOKM,[261] however, would likely also bring about an end of the tax advantages the groups are seeking by proposing the use of this model as a settlement entity. Moreover, the lack of accountability to beneficiaries means OTS would probably not approve of a MTB being used as a self-governance entity, at least not without significant amendment to the empowering legislation. Both Waikato and Ngāi Tahu achieved charitable status for various arms of their operations through other means in the ensuing legislation, winding up their MTBs created under the 1955 Act.[262]

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[259] Mason, J 'Ngati Awa: From Raupatu to Self-Governance' in University of Waikato *Nation Building and Maori Development in the 21st Century* (School of Maori and Pacific Development, Conference Proceedings, Hopuhopu, 30 August – 1 September 2000) at 79 – 80. Ngāti Awa has subsequently changed their position on the use of a Maori Trust Board model of governance. Personal communication, 2002.

[260] Office of Treaty Settlements, 'Matter required in disclosure material for governance entities' Internal draft 5 February 2001.

[261] Te Ohu Kai Moana *He Tohu Arahi – a Guide to Representation on Iwi Organisations* (August 2001) at 6-8.

[262] See *Te Runanga o Ngai Tahu Act 1996*, s. 20 and *Waikato Raupatu Claims Settlement Act 1995*, s. 28

Table 11.4 Maori Trust Boards Self-Governance Model

Advantages	Disadvantages
Body corporate status provides for perpetual succession and limited liability	Reporting/accountability to the Crown seen as being paternalistic and anachronistic
Reasonably clear powers & objectives under Maori Trust Boards Act 1955	Limited flexibility and often cumbersome from commercial perspective
Specific reporting and accountability rules	Absence of any clear accountability to Board 'beneficiaries'
Charitable status easily achievable	The boards may not include representatives of each of the traditional constituencies and areas
Statutory requirement to administer assets for the 'general benefit of its members'	The structure of the boards (although not necessarily their practices) lack clarity and transparency because boards are not required to report to members
	Boards have limited flexibility as the purposes and structure are prescribed by legislation
	Boards are unlikely to meet the prescribed requirements for receiving Treaty settlement and fisheries assets required by OTS and TOKM.

There are currently 17 Māori Trust Boards in operation. Some are subject to both their own establishment Act as well as the *Maori Trust Boards Act 1955*, for example:

- *Te Runanga o Ngati Porou Act 1987*
- *Tauranga Moana Maori Trust Board Act 1981* - a conglomerate including members of Ngāi Te Rangi, Ngāti Ranginui and certain other Bay of Plenty iwi.
- Wakatu Incorporation - constituted pursuant to s. 15A of the *Maori Reserved Land Act 1955* by the Wakatu Incorporation Order 1977. Members are descendants from a number of tribes located in the northern part of the South Island.

Like Māori land trusts and incorporations, Māori have been frustrated by the paternalism inherent in the *Maori Trust Boards Act 1955* particularly with accountability to the Crown rather than the Māori constituency the Trust Board purports to represent. In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the DBC value of the Maori Trust Boards self-governance model is 2 - a cultural perspective structural arrangement. Hence the Māori Trust Board model is inappropriate as an indigenous self-governance model for assisting Indigenous Peoples to realise their internal self-determination aspirations rights and responsibilities.

12.13.4 MAORI COMMUNITY DEVELOPMENT ACT 1962 MODEL

The New Zealand Māori Council (NZMC) was established in 1962 pursuant to the *Māori Community Development Act 1962* (MCDA), as part of a government policy to foster a sense of Māori identity that did not depend on tribal organisation. The country was divided into 18 District Maori Councils and one national New Zealand Maori Council.

During the 1980s, the NZMC had a strong and visible leadership and delivered influential policy advice to government on Māori issues. The NZMC was also an applicant in the key court cases of the late 1980s and early 1990s, seeking to enforce Crown adherence to legislative Treaty of Waitangi obligations[263] and bringing the Treaty before the courts, with some success, for the first time since 1877. A review of this pan-Māori governance model in1988 revealed a significant decline in Māori confidence in the NZMC. A strong view was expressed that the NZMC had ceased to be relevant to many Māori and that it had operated on its own with little or no link back to the people it purported to represent.[264] Given these shortcomings, the NZMC governance model would be inappropriate for realising Indigenous Peoples' internal self-determination rights and responsibilities although, in my view, there is an important place for tribal aggregation, perhaps even a pan-Māori governance entity in certain contexts. The DBC value of this legislated self-governance model is 2 - a cultural perspective structural arrangement.

12.13.5 INCORPORATED SOCIETIES ACT 1908 MODEL

An incorporated society is a group or organisation that has been incorporated under the *Incorporated Societies Act 1908* (ISA). The Society can be for any lawful purpose other than pecuniary gain (i.e. commercial or personal). The incorporated society model is most commonly used for groups such as sports clubs, social and cultural groups. An incorporated society is a body corporate with a separate legal personality and perpetual succession (the society has no statutorily imposed time frame). It may carry out any act that is consistent with its objectives as laid out in its rules. The rules of an incorporated society must meet the requirements outlined in the ISA. The rules must be registered and constitute a contract between the members and the society.

Incorporated societies have low compliance costs and constitutional flexibility. They are not however suitable for organisations seeking financial gains for members. Members

[263] *New Zealand Māori Council v Attorney-General* [1987) 1NZLR; *New Zealand Māori Council v Attorney-General* [1989] 2NZLR 142; *New Zealand Māori Council v Attorney-General* [1991] 2NZLR 147; *New Zealand Māori Council v Attorney-General* [1992] 2NZLR 576.

[264] See Te Puni Kōkiri, 'Discussion Paper on the Review of the Māori Community Development Act 1962 (Te Puni Kōkiri, Wellington, April 1999).

have unlimited liability in some cases (e.g. unlawful activity or activity conducted for commercial gain) and members have no property rights, except when the society is wound up. When examining post-settlement self-governance challenges of the Waikato tribal executive, the High Court commented that Incorporated Societies were 'open to abuse by small cliques of individuals who seize the reins of power... There is no oppression remedy.'[265] Examples of Incorporated Societies include:

- Te Kauhanganui o Waikato Inc., (Waikato-Tainui);
- Te Kohanga Reo National Trust Board Inc.;
- Muaupoko Tribal Authority Inc - constitution defines role of kaumātua council (hapū representatives) in advising, but not voting, on issues. They have the right to appoint and dismiss trustees;
- Maori Women's Welfare League (MWWL);
- Manukau Urban Authority Inc. (MUMA); and the
- Federation of Maori Authorities. (FOMA).

Table 11.5 Incorporated Societies

Advantages	Disadvantages
Body corporate status provides for perpetual succession and limited liability	Lack of commerciality
Specific requirements to lodge accounts with the Registrar and to make available for public inspection	Limited flexibility
Ability to involve Registrar in respect of certain breaches of the Act and incorporation rules	Members cannot have the pursuit of pecuniary gain as one of their objectives which removes the option of providing scholarships
	Only operate for the benefit of the subscribers for membership of the incorporation
	Are 'purpose-oriented' entities which means that they operate for the benefit of the members but are not owned by the members as in a company
	Do not fulfil the requirements for receiving Treaty or fisheries settlements or marine farming allocations because they cannot achieve pecuniary gain and so are unable to receive settlement assets.
	Strong oligarchy tendencies

In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the DBC value of

[265] *Kingi Michael Porima v Te Kauhanganui o Waikato Inc, Te Arikinui Dame Te Atairangikahu, Sir Robert Te Kotahi Mahuta*, (2000), M208/00, High Court Hamilton, Hammond J.

the incorporated society self-governance `model is 2 - a cultural perspective structural arrangement.

12.13.6 CHARITABLE TRUSTS ACT 1957 MODEL

The *Charitable Trust Act 1957* (CTA) provides for charitable trusts to be established for charitable purposes relating to the advancement of religion, education, or the relief of poverty, sickness or disability or other purposes that are 'beneficial to the community.' This latter requirement (benefit the community) is generally referred to as the public benefit test and has been the subject of considerable debate concerning the ability of kin based groups (whānau, hapū and iwi) to meet the required standard.

Furthermore, incorporating as a charitable trust does not automatically entitle a collective to charitable tax status. Charitable trusts may seek the view of the Inland Revenue Department as to whether it is charitable for tax purposes and thereby exempt from tax. Other structures, for instance incorporated societies, are also able to do the same. After years of struggle and litigation, the IRD has finally agreed to recognise a subset of Māori organisations known as 'Māori Authorities' and accepted the following Māori governance entities as having charitable trust status:

- trusts and other legal entities constituted under the *Te Ture Whenua Maori Act 1993*;
- the Maori Trustee;
- Maori Trust Boards constituted under the *Maori Trust Boards Act 1955*;
- the initial legal entities established for receipt of Treaty settlement assets;
- Te Ohu Kai Moana and the Crown Forestry Rental Trust; and wholly owned entities of a Maori authority or group of Maori authorities.[266]

Charitable trusts are not suitable for organisations with profit-seeking intentions and given that economic development is one of the pillars for the realisation of internal self-determination, charitable trusts are inappropriate as the representative self-governance structure for Indigenous Peoples. Charitable Trust examples include:

- Te Whänau o Waipareira Trust;
- Mawhera Trust – a South Island reserved lands owner;
- Te Putahitanga o Nga Ara Trust (Pouākani);
- Ngäti Turangitukua Charitable Trust;
- Te Rūnanga A Iwi o Ngāpuhi.

[266] See the *Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003*. See also Inland Revenue Department, 'Maori Organisations – Maori Authorities' (IRD, Wellington, 2004) http://www.ird.govt.nz/maori-organisations/maori-authorities/ (Accessed December 2005).

Table 11.6 Charitable Trust Governance Structure

Advantages	Disadvantages
Can be registered as a body corporate and therefore has perpetual succession and limited liability	Need to satisfy public benefit test can expose assets to wider groups of beneficiaries than intended
Charitable Trust status provided that it is actually for charitable purposes and satisfies the public benefit test	Not best for business structure
Subject to satisfying the test for a charity, is reasonably flexible	Are established for a purpose, which generally rules out ownership, by members. Trustees are therefore accountable to the purposes of the trust rather than to the beneficiaries
	Are restricted from making payments or distributions to beneficiaries that are not within the charitable purposes
	Are restricted in their ability to operate commercially as they cannot operate for pecuniary gain or non-charitable purposes
	May not be able to fulfil all of the objectives of Māori collectivities because of restrictions on certain activities (such as political representation)
	Upon winding up, the assets of a charitable trust must be used for another charitable purpose and cannot, for example, be divided between the beneficiaries. This may create the risk of collective assets being alienated from the collective

In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the DBC value of the charitable trust self-governance model is 1 – an unmodified mainstream institution.

12.13.7 PRIVATE TRUST GOVERNANCE MODEL

The current settlement vehicle of choice in New Zealand is the trust model, albeit in circumstances where legislation specifically states that the rule against perpetuities does not apply. In a private trust, a person has a legal control over the trust's assets, but it is bound to exercise that legal control for the benefit of other persons. The powers of trustees are set out in the trust deed and are supplemented by common law and the requirements in the *Trustee Act 1956* (TA). Trustees are bound by a fiduciary obligation to the beneficiaries.

As mentioned above, the underlying concept of a trust and trustee relationship stems from the notion of diminished responsibility as a means for managing the assets of those

deemed to be incapable of managing the assets in their own interest. This concept is therefore ill suited to concepts such as self-governance and internal self-determination. In a post-Treaty settlement self-governance context, the reliance on trust structures and concepts becomes increasingly problematic. A more diverse approach to organisational form and the development of efficient legal entities is called for.

One of the other main disadvantages of this model is the cost in creating trusts for the holding of Treaty assets. Given that a Deed of Trust must be prepared to fit the circumstances of each particular claimant group, the cost of establishing the trust as a vehicle to receive and manage settlements can be extremely high. Similarly, because there is no standard format, the task of approving the form of a Deed of Trust will be labour intensive from OTS's perspective. OTS estimated that between $20,000-$30,000 is spent by it in obtaining legal advice to review a single settlement entity, in addition to the time of 2-3 Senior Analysts for a period of months.[267] Commensurately, the cost to claimant groups would be similar if not more than the costs incurred by OTS, as those groups do not have the advantages gained from economies of scale. In the case of settlements involving smaller settlement assets, the costs of fulfilling these requirements could outweigh or at least significantly decrease the potential benefits to beneficiaries. Granted that OTS funds claimant groups approximately $50,000 in order to complete the ratification of both the Deed of Settlement and the Governance entity, it is still very costly in time, money and resources.

Notwithstanding the above disadvantages, private trusts are the governance structure most used by Māori collectives because, as the Law Commission stated, 'they are the least offensive.'[268]

[267] Letter from the Office of Treaty Settlements to the Law Commission, (18 October 2001).
[268] Law Commission, supra n 205 at 39.

Table 11.7 Private Trust Governance Model

Advantages	Disadvantages
Body corporate status provides for limited liability	Can be expensive to establish in time and cost for collectives wishing to establish complex trust arrangements
Perpetual succession up to 80 years	Commercial development is restricted by the fiduciary obligations placed on trustees
Fiduciary obligation of trustees highest legal standard	Trusts have a limited span of 80 years which may not be in accordance with the inter-generational objectives of Māori collectives. Recent Treaty settlement legislation has had to override the rule against perpetuities
Adequate means to protect property	The assets are held for individuals and not for the benefit of a class of persons which may not be consistent with the concept of communal ownership
	Perception that trustees 'own' the assets not the beneficiaries, given that the assets are in the name of the trust and the trustees control the trust

In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the DBC value of the private trust self-governance model is perhaps 3 – active cultural involvement structural arrangements.

12.13.8 COMPANIES ACT 1993 MODEL

Companies are bodies corporate that have full capacity to undertake any business or activity, do any act or enter into any transaction. Company structures offer flexibility, clear rules regarding management, governance, representation, reporting, accounting, and well-established rules on the obligations of office-holders and others to the company and shareholders. The primary purpose of companies is pecuniary gain, and they provide benefits to shareholders primarily through dividends, hence a company is the best structure for a purely commercial enterprise. Companies are registered with the Companies Office and they commonly exist as commercial subsidiaries of the larger Māori organisations. In order to register a company must have a name, at least one shareholder, at least one director and a registered office. The *Companies Act 1993* provides clear rules for the governance of companies and clarity of roles for governors and shareholders. Accountability provisions are established by the *Companies Act 1993* and the *Financial*

Reporting Act 1993. However the individual allotment of shares is likely to be seen as inappropriate for collectives. Examples include:

- Ngāi Tahu Holdings Corporation Limited – asset management subsidiary of Te Rūnanga o Ngāi Tahu;
- Tainui Group Holdings Ltd – asset management subsidiary of Te Kauhanganui o Waikato Inc.;
- Sealord Group Limited - fishing company subsidiary of Te Ohu Kai Moana, jointly owned by Nippon Suisan Kaisha (Nissui).

Table 11.8 Company Governance Structures

Advantages	Disadvantages
Body corporate status provides for perpetual succession and limited liability	Requirement that the owners hold shares is seen to make them inappropriate for certain aspects of settlement structures and creates issues regarding succession and the introduction of new members.
Clear rules regarding management/operation	Companies must act in the best interests of the current membership (shareholders), which limits the ability to benefit future generations
Extremely flexible	Companies are not representative in a democratic sense as shareholders may receive or accumulate unequal shares in the organisation
Clear set of reporting and accounting rules	Individualisation of communal assets is generally resisted by Māori collectives
Well established rules on the obligations and duties of office holders to the shareholders, creditors, other office holders	Strong commercial focus of companies may make them inappropriate for a kaitiaki role
	An excess of the corporate role, culture, objectives and success can subsume other objectives (social, cultural) tempting Māori collectives to 'corporate' and thus assimilate to the loss of the culture

In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the DBC value of the company self-governance model is 2 – a cultural perspective structural arrangement.

12.13.9 COOPERATIVES COMPANY MODEL

A co-operative company is a business conducted by or on behalf of a group of people or members. Like a company, a co-operative company can undertake any business or activity, do any act or enter into any transaction. There are two ways for cooperatives to incorporate: Dual registration under the *Companies Act 1993* and the *Cooperative Companies Act 1996*. In this case, limited liability for members applies, as do the

requirements of the *Financial Reporting Act 1993*. Members are liable up to the unpaid value of their (usually nominal) shareholding in the cooperative. Examples include:

- Ngāti Pahauwera and
- Ngāti Kahu ki Whaingaroa.

In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the DBC value of the co-operative company self-governance model is 2 – a cultural perspective structural arrangement.

12.13.10 PRIVATE STATUTORY BODY MODEL

Private statutory entities (any entity established under its own legislation) are unusual and unique but some Māori groups prefer this option for realising their self-governance aspirations.[269] The major advantages of this model are that it establishes body corporate status which provides for perpetual succession and limited liability, and, more importantly, the model can be designed to fit the precise function of a Māori collective and hence the best potential legal model for realising internal self-determination and self-governance. Furthermore, there is a perception among some Māori that a private statute model has more 'mana' than other models.[270] Judge Eddie Durie (as he was then) made an interesting observation on this point in terms of recognition:

> I have no difficulty with the establishment of a Runanga by legislation for example. It has been said that that merely demonstrates the superiority of the state but that is only one way of looking at it. Another is that it is an act of recognition. The organs of a tribe exist without legislation, but legislation facilitates the operations of the tribe within the state's structures and helps to settle disputes on Māori representation.[271]

Ngāi Tahu is the only settlement group to utilise the statutory body through their private statute *Te Runanga o Ngai Tahu Act 1996*, although Te Rūnanga o Ngati Awa attempted to tread this path.[272] This model has given Ngāi Tahu an efficient legal personality that has contributed to the continued economic success of the iwi. However,

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[269] The Māori settlements groups that have tried to pursue this option include Ngāti Ruanui and Ngāti Awa that the author is aware of. No doubt, other settlement communities have and will attempt to tread this same path.

[270] Interview and seminar with Te Puni Kōkiri officials working on Māori governance entity policy changes, in Wellington and Hamilton respectively, 2004.

[271] Durie, E, 'Governance' in School of Māori and Pacific Development, *Strategies for the Next Decade: Sovereignty in Action* (Conference Proceedings, School of Māori and Pacific Development, University of Waikato, 1997) at 113.

[272] A member of Te Rūnanga o Ngāti Awa mentioned to the author that Te Rūnanga o Ngāti Awa is a private statutory model similar to Ngāi Tahu's self-governance entity Te Rūnanga o Ngāi Tahu. Personal communication, 10 November 2005.

the number of current and future settlements and busy Government legislation programmes hinder the possibility the enactment of successive private statutes for every settlement group. Current Government policy and practical legislative considerations seem to effectively preclude this option for the future as the OTS noted:

> Governance entities established through private legislation also tend to have more drawbacks than advantages. Firstly, an individual Member of Parliament must agree to sponsor the proposed law. Secondly, Parliament must be convinced that there is no other way of achieving the aims of the legislation within existing law. And, as with all legislation, it will be subject to public notification and consultation.[273]

OTS continued:

> Such a Bill also faces extensive and public examination by a Select Committee during its passage through Parliament and that Select Committee may recommend changes to the legislation to which the claimant group is opposed. And, if subsequent amendments to the legislation establishing the governance entity are needed because of changes of circumstances, the claimant group will have to convince Parliament to make those amendments.[274]
>
> Private Bills also proceed on a timetable that is not within the control of either a claimant group or the government. As a result, the governance entity may not be established by the time a settlement has been concluded. Settlement legislation is not introduced to Parliament until the governance entity is established so it is possible that seeking to establish a governance entity through private legislation could lead to a delay in the transfer of the settlement assets to the claimant group.[275]
>
> A Private Bill can also be costly. Claimant groups must pay for any legislation to be drafted, devote a considerable amount of their own time and managing the process and meet the cost of any professional advisers used during the passage of a Private Act.[276]
>
> Any governance entity established under a Private Act must still comply with the

OTS and TOKM/MFA governance criteria. The Crown, as with any other post-settlement governance entity, does not provide tax advantages to governance entities established in this way.[277]

[273] OTS, supra n 193 at 73.
[274] Ibid
[275] Ibid.
[276] Ibid.
[277] Ibid.

Table 11.9 Private Statutory Governance Structures

Advantages	Disadvantages
Body corporate status provides perpetual succession and limited liability	Difficult and potentially costly to establish and maintain
Can be designed to fit precisely the purpose of the asset owning group	Relies upon the legislative process to be given effect
	Can require further legislation to amend

All of the indigenous Treaty settlement self-governance models in Canada are statutory models created to fit the specific context and circumstances of the respective First Nations groups. There is neither a 'cookie-cutter' nor a 'one-size-fits-all' model, which is the better policy in the author's view. The Ngāi Tahu model is the only statutory equivalent in New Zealand. The most important advantage with a private statutory model is the legislative ability to form an entity according to its functions. In terms of indigenous self-governance and indigenous control of their governing institutions, processes, systems and disputes, then, for the reasons above, the potential DBC value of the private statute self-governance model is possibly 4 – parallel cultural institutions depending on the scope of the legislation, or even 5 – independent cultural institutions.

12.13.11 STATUTORY BODIES WITH A CROWN INTEREST

- The old Te Ohu Kai Moana Māori Fisheries Commission established pursuant to *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* which has now been superceded by He Kawai Taumata who appoints commissioners for Te Ohu Kai Moana Trust pursuant to the recently enacted *Māori Fisheries Act 2004*;
- Maori Television Service (statutory corporation) – *Maori Television Service Bill*
- Maori Trustee (independent corporation)- *Maori Trustee Act 1953*

The DBC value for these self-governance models is possibly 3 – active cultural involvement.

12.13.12 SUMMARY

From the above analysis of the self-governance models available for Māori polities, no one model is appropriate. Each of the entities discussed has limitations in meeting the functions of Māori polities, particularly the overriding function of realising internal self-determination. A whānau may set up a private trust to look after its assets, but legal ownership of the assets is vested in the trustees. This may be inconsistent with communal ownership. Under the rule against perpetuities, a private trust must also wind up within 80 years, which limits the ability of the whānau to practice kaitiakitanga and long term planning. Similarly, a rūnanga that sets up an incorporated society to deliver social services

faces restrictions on operating purely for profit. This may prevent it from developing its assets for commercial purposes.

In order to undertake more than one function, many Māori polities have to establish several different subsidiary entities such as: companies to develop assets for economic development, incorporated societies for distributing social benefits (social development), trusts to safeguard assets, charitable trusts to preserve assets in perpetuity, marae committees to engage in political advocacy, and other bodies to receive Treaty settlement assets from the Crown. Consequently, Māori self-governance and internal self-determination is an overly complex mesh of self-governance arrangements, accountabilities, representations and appropriate dispute resolution fora and processes.

12.13.13 RANKING MĀORI SELF-GOVERNANCE MODELS

Damian Stone ranked the various governance entities currently available to Māori groups as post-Treaty settlement governance structures in this order:

- private statute;
- private trust;
- charitable trust;
- private company;
- incorporated society;
- Māori trusts and incorporations; and
- Māori Trust Boards.

However, Stone made a very interesting observation first:

> We are relatively limited in the types of legal entities that we can use and most if not all of them have been devised for the purposes of a Westminster legal system and so trying to sort of squeeze a square peg into a round hole. You can do the best you can with the subject matter you've got but it's fair to say that none of the entities that are available have been designed specifically for iwi.[278]

In terms of ranking from most effective to least Mr Stone noted:

> Although you can say that none of the entities are perfect, I think you can still rank them according to which one is better than the other and definitely in our view a statutory body is the preferred way to go because you get the flexibility of drafting what you like and making it as close as possible as to what you'd want. But there are also downsides in respect of that – you really have to have it passed through Parliament subject to the will of the Members of the House and at the end of the day, you can't really guarantee that you'll get the supported numbers to get it through.[279]

[278] Interview with Damian Stone, Wellington, 4 December 2003.
[279] Ibid.

The next most preferred option is the common law or private trust to which Stone commented:

> Probably the next most preferred option is the common law trust. A private trust gets you what you want in the Trustees. A down side of a private trust is the rule against perpetuities.[280]

Stone then ranked a charitable trust third, followed by a company structure, then an incorporated society.[281]

In the author's view, one of the fundamental challenges of Māori, in contrast to First Nations, is that Māori are focusing too much on post-settlement governance, good governance, economic development and so on, which are a means to an end. Māori may be missing the mark. In contrast, many of the First Nations appear to focus on 'nation-building' and the realisation of internal self-determination. It is a small but significant difference in perspective that makes a fundamental difference in outcome, means and ends - Treaty settlement governance versus self-governance and internal self-determination.

12.14 LEGAL INSTITUTIONAL ENTITIES INAPPROPRIATE

From an assessment of the above governance models available for Māori groups to realise their internal self-determination aspirations, the question may be asked – do existing governance structures meet the governance requirements of Māori collectives and communities?

[280] Ibid. Judge Stephanie Milroy of the Māori Land Court ranked a private trust as the better model to date.
[281] Ibid.

Table 11. 10 Self-Governance Functions and Appropriate Institutional Forms for Māori[282]

SELF-GOVERNANCE FUNCTIONAL REQUIREMENTS	WHERE EXISTING ENTITIES ARE LIMITED
Governance Rules	Māori trust boards rules are contained in the Māori Trust Boards Act 1955 and trust constitutions. Incorporated societies are contained in the Incorporated Societies Act 1908 and constitution of the society Companies are in the Constitution Act 1993 and the constitution of the company Māori land trusts and incorporations are contained in the Te Ture Whenua Māori Act 1993. Charitable trusts are contained in the trust deed. Private trusts are governed by the respective trust deed Private legislation is governed by the respective legislation.
Clear definition of roles, including clear rules about the mandate of governors	The rules of a private trust are subject to the trust deed. Māori land trusts are subject to the intervention of the Māori Land Court
Processes to ensure accountability and transparency	Māori trust boards are accountable to the Minister of Māori Affairs Māori land trusts are subject to the intervention of the Māori Land Court Incorporated societies are primarily accountable to the registrar
A process for ensuring the participation of members	There are no processes for ensuring participation in a private trust outside the trust deed.
Ability to be attuned to tikanga and kawa	No entity is able to meet this requirement (private trust deeds may allow some match)
Body corporate status	Private trusts are not a body corporate
Ability to operate commercially	Māori land trusts, charitable trusts, incorporated societies and Māori trust boards are limited or precluded from operating for pecuniary gain or in a commercial capacity

[282] This table is partly taken from Te Puni Kōkiri, 'Working Paper: A New Governance Model for Māori Collectives,' (Unpublished Paper, Te Puni Kōkiri, Wellington, November 2004) at 29

Ability to exist in perpetuity and to operate in the interests of current and future generations	Private trusts have a limited life span (except where waived by legislation)
Ability to benefit a class of members as well as individuals	Charitable trusts cannot provide benefits to individual members ad incorporated societies are limited from distributing pecuniary gain to members.
Ability to recognise collective ownership	Company ownership is based on individual shareholding. (Rules can be developed to limit the transfer of shares.
Ability to resolve disputes with Māori issues such as tikanga, customary, appropriate levels and institutional representation disputes	Māori trust boards can resolve Māori disputes but recourse to the Minister of Māori Affairs is paternalistic. Incorporated societies have no mechanism to deal with Māori disputes. Recourse is to the registrar or ordinary courts. Māori land trusts and incorporations provide mechanisms to resolve Māori disputes but only in relation to land. Private trusts provide recourse to the ordinary courts and private legislative models depend on the legislation.

As referred to constantly throughout this section, if the bottom line for indigenous self-governance and to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governing institutions, processes, systems and disputes, then the DBC value of all of the above Māori self-governance models (except perhaps the Ngāi Tahu private statutory model) is inappropriate and inadequate. Māori governance models appear to be management models rather than self-governance models. Granted they do have a place in realising the internal self-determination aspirations, rights and responsibilities of respective indigenous groups but management and economic development, social services and political representation on their own are not internal self-determination and self-governance. They are a means to realising internal self-determination but not the end in and of themselves.

Te Puni Kōkiri (TPK), the Ministry of Māori Development, noted that current governance entities available for Māori collectives are inappropriate. Previous reviews of models of Māori governance structures have found that:

- the Māori framework does not sit well within regulatory and compliance systems designed without consideration of the relevance to, and impacts on, Māori;

- These tensions create barriers to Māori organisations achieving their core purpose;
- Existing structures for Māori governance are not able to meet the full range of activities Māori wish to undertake in a modern context,[283]

The functions of Māori governance entities have changed considerably from traditional times as well as since the respective governance models were established such as Māori Trust Boards in the 1920s, 1940s and 1950s. Furthermore, changing legal requirements have been imposed on Māori communities brought about by historical Treaty and fisheries settlements, and by the increased use of contractual arrangements in Māori service delivery. Consequently, and in the spirit of tikanga which includes scope for creative adaptation, the forms of Māori socio-political organisation, representation and self-governance should also change appropriately and commensurately with the new (and old) contemporary self-governance functions.

Developing and adapting governance structural forms based on existing models often imposes significant time constraints and cost to Māori. This has been most clearly demonstrated in recent Treaty settlements where specific legislation has been used to override inappropriate or limiting aspects of existing entities, such as the *Ngāti Tama Claims Settlement Act 2003*, or to create tailor-made institutions such as Te Rūnanga o Ngāi Tahu pursuant to *Te Rūnanga o Ngāi Tahu Act 1996*.[284]

The above analysis and assessment of each self-governance legal entity available to Māori communities for realising their internal self-determination rights and responsibilities through a degree of self-governance demonstrates that there is currently no legal structure available that is ideal for governing all the interests of Māori groups in all situations all of the time. Consequently, Māori groups can spend a lot of time, energy and money trying to mesh together currently available legal entities to meet their self-governance needs and functions. Still, back to the point, no legal entity is currently appropriate for realising Māori self-governance aspirations, rights and responsibilities.

It is the author's view that the self-governance discourse and policies in Canada, although not perfect, are much more appropriate than the range of legal entities Māori have to select from. Te Puni Kōkiri is currently discussing the option of an all-purpose Māori governance entity created by legislation to get around all of the legal issues discussed above when it stated:

[283] Te Puni Kōkiri, *Nga Tipu Whakaritorito: A New Governance Model for Māori Collectives* (Te Puni Kōkiri, Wellington, 2004) at 5.
[284] Ibid, at 5.

> We are proposing a new legislative framework so that any entity that meets certain minimum requirements can apply for incorporation. Under this framework an entity will have the flexibility to allow collectives to provide clarity around the roles and relationships between members and governors.
>
> The new governance model will enable Māori collectives to tailor their entities to meet their own needs, aspirations and cultural requirements. How these minimum requirements are translated into an entity's constitution will depend on the activities a collective wish to undertake. An iwi or hapu with multiple functions and significant resources will have different rules to one with fewer functions and resources.[285]

Perhaps legislative self-government models that accommodate for indigenous group diversity with diverse self-governance models commensurate with the context specificity of particular Māori groups and at different levels within the groups are another appropriate policy. Such an approach is comparable to current self-government policies in Canada although it is conceded that there is no province or area appropriate in New Zealand for a Nunavut-type public government equivalent given that that model is dependent upon the 85 per cent Inuit majority and wide geographic space in the Canadian arctic. There is no equivalent context in New Zealand for such a model except perhaps in remote parts of Tuhoe in the Urewera Mountains. Perhaps a Nisga'a-type 'nation' self-governance model would be more appropriate for Tuhoe. Still, one thing is for sure - none of the current governance models in New Zealand are appropriate for Māori polities to realise their self-governance aspirations. It the author's view, the policies and processes for recognising indigenous self-governance in Canada may provide further options to consider.

12.14.1 LEGAL STATUS OF MĀORI UNITS

An even more important consideration is the legal status of the political units that made and make up Māori society – the tribe, iwi, hapū and whānau and the relationship of the tribe or polity with the legal entity. To determine the relationship between a manufactured legal entity and an historic tribe it is helpful to consider the juristic nature of a tribe, i.e. the way in which a Māori tribe (or any indigenous tribe) is to be recognised in law. It appears that in law, a tribe may be recognised as having its own, inherent, corporate identity. Are tribes governments, families, or a class of people? A tribe is surely not the same as a croquet or tennis club entity. Tribes may be analogous in some ways to a local government with fiduciary duties to its constituency as well as established subsidiaries for economic development and profit

[285] Ibid, at 10. See the recent report: Law Commission, *Waka Umanga: A Proposed Law for Māori Governance Entities* (Report 92, Law Commission, Wellington, May 2006).

Justice Durie held that a tribe is 'a polity that is much more than a private organisation that may be formed or unformed with relative ease. It is essentially a body politic that, by dint of history, historical association with place and an accumulated, social and cultural infrastructure, exists as a corporate entity in an inherent capacity.'[286] Adopting the terminology of the prominent New Zealand jurist, Sir John Salmond, in about 1922, it may be appropriate to see tribes, or a collection of tribes of a common descent group, as nations, in the same way as Indian tribes were seen in the United States and later, in Canada.[287]

Tribes are definitely a perpetual polity and so they need a more enduring governance structure to complement and enhance that function. With a company structure, membership is bought into by shareholders individually who can likewise sell their individual shares and therefore trade their membership. Irrespective of practical difficulties in the issuing of share allotments to beneficiaries (present and future), the individualisation of communal assets has long been seen as a major problem inhibiting Māori kin group economic and social development.

In contrast, to an indigenous Māori and First Nations tribe, membership depends on birth and descent and is sometimes enhanced by contribution, residency, ascription, achievement and a number of other factors. Membership in a tribe is first and foremost a birthright and it is personal to the individual. Membership to a tribe was definitely not a property right tradeable on the share market. Tribal property belongs to the tribe and hence the tribe should be the 'beneficiary' of Treaty settlement assets and not individual beneficiaries. Although this situation would create a legal fiction, corporate entities are

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[286] Durie, supra n 238.

[287] Salmond defined 'nation' in terms of persons united by common blood and descent and by such subsidiary bonds as common speech, religion and manners. He contrasted that with a State, which he defined in terms of a society of persons united under one government. He effectively predicted the modern 'nation state' when diverse peoples under one State so merged as to meet the criteria for both 'State' and 'Nation'. See Frame, A *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 109.

> 'The identification of Indigenous Peoples as 'nations' is then apparent in Article 9 of the Draft Declaration on the Rights of Indigenous Peoples 1993 which provides: 'Indigenous Peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.'

Maori tribes are also described as 'nations' by the historian Angela Ballara in Ballara, A *Iwi: The Dynamics of Maori Tribal Organisation from c.1769 to c.1945* (Victoria University Press, Wellington, 1998):

> 'The modern description of Maori and other cultures as 'ethnic groups', in contrast to the earlier use of 'race', does not appear to affect the legal conception of tribes as nations. It rather emphasises that tribes are defined not just by culture but by place, Aotearoa in this instance, and so to give greater stress to Maori as indigenous. As to the stress on ethnicity in official New Zealand Statistics.'

See also Robson, B and Reid, P *Ethnicity Matters: Maori Perspectives* (Statistics New Zealand September 2000) at 10.

legal fictions. Governance entities, therefore, are not the tribe; they represent but do not replace the tribe. The function of the tribe and the governance entity are very different yet complementary and it is important not to get the two mixed up. Guy Royal, a Māori lawyer who has worked extensively in the field of corporate governance and Treaty settlements, made a very interesting and relevant observation on this point:

> Talking to clients, they say to us we are Te Rarawa and so we do not need these imposed governance structures. [We respond] we know that and then you've got to ask them the question: well you are Te Rarawa and your acting for an organisation that has been created called Te Runanga o Te Rarawa. ... You are proposing that you will act on behalf of all these people who whakapapa to Te Rarawa, so you need to separate that. That's a big issue for our people – the separation of who is the governance and who in fact is this political social being called the iwi.[288]

Although the corporate nature of a tribe must be recognised in legal philosophy for political and commercial purposes,[289] it lacks the organs by which it may treat with the outside world and sue or be sued.

As with all bodies politic, nations or states, some recognised medium or agency is required. Entities are manufactured for that purpose. They may then be manufactured for a single hapū, an iwi, or any combination of groups as may best suit the commercial or political aims and functions of those concerned.

It ought then to be seen clearly that the tribe is the tribe and not the entity that the tribe, alone or with others, has created. The entity may be sued. It does not follow that the tribe is sued. The entity may be wound up. The tribe is not wound up with it. The tribe and the entity are related and yet quite separate. The entity may be seen as the agent of the tribe in that it exists to serve the tribe's purposes, and yet the tribe is not a principal who is liable for its agent's actions. It is the entity that is liable.

The converse is true. An entity is established and is answerable to the tribe. But once established a tribe cannot interfere in the operations of the entity except in strict accordance with the entity's own rules. This is necessary to maintain the political and commercial integrity of the entity that the tribe has created and to protect third parties who may treat with it. The point is illustrated in the decision of the High Court in *Porima v Te Kauhanganui o Waikato Inc.*[290] But as the decision also makes clear, the distinction is as important for the protection of the tribal culture and its significant and sacred institutions as it is for the protection of the entity and third parties.

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[288] Interview with Guy Royal, Hamilton, 2 December 2004, at 6.
[289] The political purpose of an entity for iwi was described in the *Runanga Iwi Act 1990* as being to serve as 'the authorised voice of the iwi' when treating with the Crown and Public Authorities.'
[290] [2001] 1 NZLR 472.

Furthermore, the juridical and political status of the tribe is important in terms of realising the internal self-determination aspirations, rights and responsibilities of the tribe. If the tribe is just another tennis or croquet club at law then it just requires a simple legal entity to perform the respective function adequately, which would probably be an incorporated society. But if a Māori 'tribe' (whether hapū or iwi) with the juridical and political status of a 'nation' similar to the First 'Nations' in Canada or the 'domestic dependent nations' legal status of Indian tribes in the USA, then it follows that the functions of such polities include self-governance to realise the 'people's' internal self-determination rights and responsibilities. Moreover, the particular legal form – the governance entity – to perform the tribe's functions would need to be at the least a self-tailored statutory model akin to some of the various self-government models in Canada.

12.14.2 REPRESENTATION AND SELF-GOVERNMENT CHALLENGES

As mentioned earlier, the notion of political representation is the difficulty experienced at all levels of Māori and First Nations society in agreeing upon a person or entity that will represent the point of view of the collective. There are the enduring issues of mandate and representation within the Treaty settlement process in both countries at all levels,[291] including within, or between kin groups, or expand to groups beyond kin groups involved in the settlement process. The role of the Crown in approving mandates in this area is a specific issue in itself.

The settlement and post-settlement dilemmas, issues and concerns in New Zealand are perhaps epitomised in the much publicised settlement disputes in the fisheries litigation, which involves more than 20 different proceedings involving interpretation of the Deed of Settlement to the recognition of mandated representatives and the construction of traditional Māori identity and representivity. The fisheries settlement sought to finally conclude all claims by Māori to commercial fisheries. The 'Sealords' Deed of Settlement was negotiated by respected Māori leaders and ratified by many tribal leaders but the settlement occurred under pressure of a potential sale of Sealords overseas with the loss of about 26% of all quota then issued. Both the interim and final settlement provided for certain fishing assets to be vested in Te Ohu Kaimoana (TOKM) to determine the final

[291] For instance, determining Māori groups for consultation purposes under the *Resource Management Act 1991*, amongst others. See, however: Law Commission *Determining Representation Rights under Te Ture Whenua Māori Act 1993: An Advisory Report for Te Puni Kōkiri* (NZLC SP8, 2001) which made suggestions for amendments to s 30, *Te Ture Whenua Māori Act 1993* based on concepts of mediation rather than Court adjudication. See also the Review of the Office of Treaty Settlements by the Māori Affairs Select Committee (included as Appendix A in the *2000/01 Financial Review of the Ministry of Justice* (Report by the Justice and Electoral Select Committee, Wellington, 2001).

allocation method. Almost immediately, a Waitangi Tribunal claim and High Court litigation commenced,[292] questioning which 'tribes' were covered by the Deed before it was entrenched in statute. Within the tribes, different representative bodies sought TOKM recognition of their mandate.[293]

All Māori tribes opposed allocation to Urban Maori Authorities, arguably the ultimate expression of population-based claims. That litigation has been to the Judicial Committee of the Privy Council,[294] referred back to the High Court to determine as a preliminary question the meaning of 'Iwi', and back again to the Privy Council.[295] From that litigation emerged a relatively foreign concept in Treaty of Waitangi litigation – that the trust for the 'ultimate benefit of the Māori people' is a concept of public law, implying that it does not confer the type of beneficial proprietary interest common in indigenous rights jurisprudence. What this litigation and concept will produce in terms of the inter- and intra-tribal debate is difficult to predict. But it certainly forces a realignment of thinking for those who believe that settlements are about 'property' rights and entitlements.

In a similar manner, the mandate of the Tainui Māori Trust Board was challenged for the settlement of the Waikato raupatu claims in *Greensill v Tainui Māori Trust Board.*[296] Irregularities in some of the members' appointments were cited as well as the fact that of the 11,600 beneficiaries whose votes were sought via a postal referendum, only 3,092 had voted in the board's favour. The plaintiffs sought injunctions to prevent the board from signing the Deed of Settlement until further consultation had been completed to resolve the mandate issue. Hammond J dismissed the application expressing his satisfaction at the procedures followed by the board to prove their representative authority, such satisfaction apparently resulting in part from the Crown's view of the matter:

> I have no hesitation in accepting the Minister's statement ... that the Crown accepts that the Board has a mandate from Waikato-Tainui.[297]

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[292] *Te Runanga o Wharekauri Rekohu Inc v A.G* [1993] 2 NZLR (CA).

[293] For example, the Maori Land Court proceedings between Te Runanga o Ngati Toa Inc v Ngati Toa Rangatira Manawhenua ki te Tauihu Trust, *Ngati Toa Rangatira Decision*, 21 *Nelson Minute Book* (Vol.1, 1994, Aotea, Judge Hingston); Kahungunu and Te Whānau o Rongomaiwahine Trust in *Te Hau v TOKM* (Unreported, High Court, Wellington, Doogue J, 3 April 2000, CP 12/00); High Court Proceedings by Ngati Kahu Trust Board, Te Rūnanga o Ngati Kahu, Te Runanga o Ngati Kuri me Ngai Takoto in *Te Runanga o Ngati Kuri me Ngai Takoto v TOKM* (High Court, Wellington, CP222/98.

[294] *Tainui Maori Trust Board v Treaty of Waitangi Fisheries Commission* [1997] 1 NZLR 513 (Lord Goff of Chieveley, L Browne-Wilkinson, L Lloyd, L Hope, L L Clyde).

[295] *Manukau Urban Authority v Tainui Maori Trust Board v Treaty of Waitangi Fisheries Commission* (Unreported, Privy Council, Lord Slynn, L Steyn, L Hoffman, L Hutton, L Millett, 2 July 2001, PC67/2000.

[296] (Unreported, 17/5/95, Hammond J, HC Hamilton M117/95).

[297] Ibid, at 11.

The Court considered this to be a political matter, rather than a question of law, and concluded that 'as to overall interests of justice ... there is a compelling national interest in moving forward.'[298]

In more recent times, Te Atiawa faced internal issues with the Puketapu hapū refusing to mandate the Te Atiawa Iwi Authority, which represented the remaining 4 Te Atiawa hapū.[299] Ngāi Tahu also faced representivity challenges to the mandate of Te Rūnanga o Ngāi Tahu (TRONT) during their Treaty settlement negotiations. The Māori Affairs Select Committee heard extensive challenges to TRONT's mandate to settle Waitaha and Ngāti Mamoe claims. As a result the settlement legislation amended the TRONT Act to include Waitaha in the statutory definition of Ngāi Tahu Whānui.[300]

Hence intra-tribal debate usually focuses on claims by two or more representative bodies claiming to represent the same claimant group or members of claimant groups (including individuals and hapū) refusing to participate in the negotiation and ratification process and the establishment of governance entities. Inter-tribal debate involves claims to the same taonga by (usually) neighbouring claimant groups.

In the negotiation and pre-settlement phase, both TOKM and the Māori Land Court encourage claimant groups to resolve disputes between themselves, through mediation if necessary. However, settlement and governance entity disputes often revolve around mandate and representivity issues. The mediation processes are almost always confidential and exclude the wider settlement community. That closed-door process is itself inappropriate when issues of tribal governance and mandate are at stake. Moreover, that process fails the Crown's principle of transparent decision-making. The role of mediation, therefore, cannot be to determine which body is the appropriate representative. It can only assist the disputing parties to better understand their respective positions. The ultimate result may be that the parties agree on a process to be put to the Māori community itself for ratification.[301]

12.14.3 LEGISLATIVE AND POLICY SOCIAL ENGINEERING

Some matters that are best determined by Māori ought to be left to competent Māori and Mäori fora and processes to determine. One such matter is this vexed area of

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[298] Ibid, at 14.

[299] *Kai Tohu Puketapu Inc v Attorney-General* (Unreported, High Court, Wellington, Doogue J. 5 February 1999, CP 344/97).

[300] See Waitangi Tribunal, *Ngai Tahu Report 1992* (GP Publications, Wellington, 1992).

[301] Whata et al, supra n 206. For a very thorough and interesting discussion on Maori governance and legislative structural options, see Gray, D, 'Kaupapa Maori Authorities: A Proposal for Legislation to Recognise a New Class of Maori Organisation' (Unpublished Manuscript, Auckland, 2003).

group determination – the political and economic organisation of settlement groups. Erueti offered an overview of the issue when he noted:

> Since the late 1840s, Māori kinship groups have been described in terms of a tidy taxonomy of iwi, hapū and whānau.[302]

Erueti criticised the inevitable outcome of such restricted thinking:

> From the late 1970s, this 'iwi model' has increasingly come under attack from historians and anthropologists who see it as too simplistic, and static, ignoring the role of hapū as a functioning corporate group, the absence of clearly defined hapū and iwi boundaries, and the tendency for all Māori descent groups to wax and wane over generations.[303]

Ballara also reached a similar conclusion about Māori forms of social organisation in her seminal work *Iwi* when she held:

> This book will argue that the Māori political and social system was always dynamic, continuously modified like its technology in response to such phenomena as environmental change and population expansion.[304]

Consequently, any approach allowing for traditional forms of Māori political organisation in a post-Treaty settlement context must allow for groups of hapū to coalesce for the purposes of forming a post-settlement governance entity. Such an approach is fundamentally different to the one taken by the government during the heyday of Rogernomics, neoliberalism and the devolution of government authority to Māori authorities via iwi as recognised in the now defunct *Runanga Iwi Act 1990* which provided that iwi (not hapū) were 'acknowledged as an enduring, traditional and significant form of social, political and economic organisation for Māori.'[305]

It seems that the New Zealand government has a persistent propensity to codify Māori forms of social organisation, including at present in its insistence on dealing with 'large natural groupings' for Treaty claims negotiation purposes and its prescriptive criteria for post-settlement governance. Government policy seems to have an inherent tendency towards creating streamlined programs to address problems in an economically sustainable manner. Indeed, Roger Maaka noted:

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[302] Erueti, A, 'Māori Customary Law and Land Tenure: an Analysis' in Boast, supra n 255 at 30.
[303] Ibid, at 30.
[304] Ballara, supra n 287 at 21.
[305] *Runanga Iwi Act 1990,* s. 6.

> This is not the first time that the government, in its desire to respond to the Māori 'situation,' has exerted pressure on Māori social formations to conform to their expectation. The Runanga Iwi Act 1990 gave the 'tribe' a legal identity to enable it to enter into formal contracts in its own right. Even though the aim of the Act was pragmatic, the result was legislative social engineering. It did not merely identify and promote the tribe as the primary social formation for Māori; it also regulated the acceptable shape, form, and mandate of an iwi.[306]

The current Crown policy on post-settlement governance as prescribed by OTS and TOKMTL seems to be doing something similar.

In addition, how can government policy appropriately deal with the traditionally dynamic, flexible and fluid nature of Māori social organisation in a contemporary context or any context for that matter? In 1862 George Clark, the first 'Māori Protector' made an interesting observation of Māori social organisation when he asserted:

> The disposition of the Natives to break up into small communities, claiming for themselves independent action, control and management of their own local affairs, though inconvenient, is yet obvious.[307]

Convenience, finality and certainty seem to be the main drivers of Crown policy rather than justice, authentic power sharing and the effective governance of themselves.

Moreover, Māori governance structures claiming representative status as part of current post-Treaty settlement governance policy are usually permanent and static organisations that represent people who are not. The hermeneutic task of defining, compartmentalising and bureaucratising Māori socio-cultural organisation and matching them with Treaty settlement policy and resources are extraordinarily difficult. A process that requires as an outcome the definition of the relationship of a Māori kin group with an asset will always produce conflict and dissent, because, inter alia, it involves defining that which is by its nature indefinable, or which is changed by the process of definition. Accordingly, perhaps the government and some Māori power brokers need to avoid any form of legislative and policy social engineering but then again what of an alternative? These issues highlight the complex nature of implementing such a policy on group determination.

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[306] Maaka, R 'A Relationship, not a Problem' in Coates, K and McHugh, P (eds) *Living Relationships: the Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) at 203.

[307] Clarke, G, *Report by George Clark, the Civil Commissioner of the Bay of Islands Respecting the Runanga, 1862.*

12.14.4 TIKANGA AND REPRESENTIVITY

As alluded to earlier, Treaty settlement processes struggle to accommodate tikanga in a representivity context. The two are at times perceived to be inconsistent, with the desire to demonstrate 'accountability' as paramount and superior to acknowledgement of cultural imperatives.[308] For example, Māori leadership and bureaucracies' accused of corruption may sometimes defend their behaviour as 'traditional', or appeal to a disjunction between local traditions and introduced colonial law.[309] A distinction between 'public' and 'private' is also hard to sustain in indigenous societies like those that preceded colonial rule, or in a constitutional monarchy where 'crown property' is to some extent still the personal property of the monarch.

Māori groups, who bring claims under the *Treaty of Waitangi Act 1975*, are most often bonded by *whakapapa*[310] to a common *tūpuna.*[311] However, even where a settlement has been effected with members of such a group, there remains the potential for dispute between the tribal leadership and members of a particular whānau or hapū[312] over representation issues and the use or distribution of assets or the proceeds of assets according to tikanga. When settlements embrace more than one kin group, tikanga disputes are even more likely to occur.

Still, although kin groups have in the past brought most claims, the new reality is that more Treaty claims are being brought by Māori not bonded necessarily by kinship, i.e., large natural groupings. These claims focus rather on generic issues such as the claims relating to flora and fauna,[313] generic broadcasting,[314] electoral issues,[315] Crown asset sales,[316] forestry ownership,[317] fisheries[318] and the Māori language.[319] Such approaches are

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[308] Whata, supra n 206 at 8.
[309] In the author's opinion, this situation occurred to some extent in Waikato-Tainui's post-settlement governance – the Te Kaumarua (now Te Arataura) and Kauhanganui.
[310] Translates generally as 'genealogy,' but in this context used to connote the tracing of descent from a tupuna.
[311] tūpuna translates as 'ancestor.'
[312] Generally translated as 'sub-tribe' or 'clan'. Historically the major socio-political corporate grouping in Māori society.
[313] WAI 262, Waitangi Tribunal, 'Indigenous Flora and Fauna and Māori Intellectual Property Claim' Wellington).
[314] WAI 176, Waitangi Tribunal, 'Report on Broadcasting Claim.' (Wellington, 1994).
[315] WAI 413, Waitangi Tribunal, *The Māori Electoral Option Report* (GP Publications, Wellington, 1994).
[316] Culminating in the *Treaty of Waitangi (State Enterprises) Act 1988* that followed the decision in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.
[317] For example, WAI 790 (also known as the 'Volcanic Interior Plateau (VIP) Claim').
[318] Culminating in the *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.*
[319] WAI 11, Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Māori Claim* (GP Publications, Wellington, 1986).

likely, however, to carry an even greater potential for tension, inter alia, in areas such as representivity.

Tensions are more likely to turn to disputes once claimant representatives are selected and settlement assets are transferred to the claimant group. Another challenge in this vexed area is the process used to decide who should fill leadership roles. This can involve tensions between democratic principles and the role of traditional leadership. Durie described this tension in the context of the Marae, where trustees were traditionally appointed to represent whānau interests, and typically on a basis of seniority within that family grouping.[320] There is growing pressure to have more transparent selection, typically using some form of election process. Sometimes a compromise was reached by directly appointing board level trustees on a basis of seniority, whilst allowing the democratic election of marae management committee members. Such an approach is not viable with leadership elections of MIOs according to the *Māori Fisheries Act 2004* and also with post-Treaty settlement governance entities approved by OTS. But in the author's opinion, good leadership is the key issue rather than structures, values and processes of good governance.

Already, outside the realm of Treaty settlements, often the real issues before the courts lie within one of the five areas identified earlier by Chief Judge Joe Williams,[321] sometimes masked by the way the cases have been pleaded using tikanga: governance,[322] succession and/or membership of a kin group,[323] leadership accountability within a kin group,[324] participation of members of a kin group in policy formulation,[325] and the distribution of benefits among members of the kin group.[326] These disputes are not easily resolved under the general law by a judge inexperienced in the tikanga of a particular iwi.

One example perhaps of a governance dispute over the interface of tikanga law and good governance principles is Waikato-Tainui's Te Kauhanganui (the post-settlement

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[320] Durie, supra n 238.

[321] Williams, J Paper presented to the Māori Affairs Select Committee that was considering Te Ture Whenua Māori Amendment Bill 1999. It is published as a companion paper: *Determining Representation Rights Under Te Ture Whenua Māori Act 1988 – An Advisory Report for Te Puni Kōkiri,* (14 September 2000) at 13.

[322] For example, see *Re Edwards* (Vol. 1, Waiariki ANB 102, 1998) (MAC), *Re Rangitane o Tamaki Nui A Rua Inc* (Vol. 1, Takitimu ACMB 1996) (MAC).

[323] For example, *Re Oku Raupatu B4B2A Block* (Vol. 13 ACTK 154, 2000) (MAC), *Re Waimania Hohua* (Vol. 10, APRO 43, 2001) (MAC), *Re Hoturangi Tautau* (Vol. 33, ACMB 228, 1999) (MAC) and *Re Rawinia Tuki* (Vol. 9, Waiariki ACMB 247, 1999) (MAC).

[324] *Re Tikirahi Block* (Waikato Maniapoto ACMB 266, 1995) (MAC) and *Re Lynette Walker* (Vol. 18 Waikato Maniapoto ACMB 260, 1995) (MAC).

[325] For example, *Re Rotoma No. 1 Block Inc* (Vol. 1, Waiariki ACMB 25, 1996) and *Re Tataraakina C Block* (Vol. 11, Takitimu ACMB 50, 1994) (MAC).

[326] For example, *Re Te Karaka Ahi Tapu* (Vol. 5, APWH 209, 2000) (MAC) and *Re Te Hapua 24* (Tokerau ACMB 275, 2000) (MAC).

governance entity) that was involved in several high profile High Court proceedings (and their appeals) in 2000[327] and 2001.[328] Those proceedings dealt with, among other issues, disputes on the correct interpretation of the Kauhanganui's constitution. At the heart of the matter the proceedings dealt with tikanga and traditional leadership within the top tiers of the Kauhanganui and its executive – Te Kaumarua; the tribe's commercial direction and the appropriate level of control over, and accountability of, the tribe's elected representatives. In *Te Runanga o Atiawa v Te Atiawa Iwi Authority*[329] conflicting evidence as to what constituted nga tikanga o Te Atiawa was presented to the Judge.

Internal disputes are better anticipated, and resolved, the author considers, by empowering the settlement group to make internal rules (within the group's constitutional charter) that are consistent with their community expectations and tikanga, and which enable such disputes to be resolved in a manner that promotes confidence and trust

Hence Māori groups are now being called upon to respond in a representative fashion to all kinds of challenges in many different contexts. Probably the most obvious and well-known context in New Zealand is that of Treaty settlements and Māori fisheries with the Crown as highlighted briefly above.

One of the great difficulties in making self-determination operational as an international legal principle has been the problem of identifying the 'self' in self-determination, which is, inter alia, about the issue of representivity. This difficulty was addressed in European decolonisation by declaring the self to be the entire people of the colonised territory, but such simple solutions are insufficient where the goal is to apply self-determination to relations between nation-states and Indigenous Peoples as in New Zealand, Canada and elsewhere. In the *Waipareira Report*, the Waitangi Tribunal faced an analogous problem to that of the 'self- in self-determination, namely the question of which groups are entitled to the special recognition required by the Treaty guarantees of tino rangatiratanga, and who has right to representation. Confronted by the situation of urban Māori communities, who, as collectivities, are not unified by whakapapa kinship, the Tribunal adopted what Kingsbury called an 'ingenious if adventurous solution.'[330] The Tribunal rejected the view that because the Treaty was made with rangatira representing

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[327] *Porima & Ors v Te Kauhanganui o Waikato Inc Soc Ors* (Unreported, High Court, Hamilton, Hammond J, M208/00, 22 September 2000), *Mahuta & Ors v Porima & Ors* (Unreported, High Court, Hamilton, Hammond J, M290/00, 9 November 2000); and *Te Kauhanganui o Waikato Inc Soc Ors v Porima & Ors* (CA 205/00).

[328] *Porima & Ors v Waikato Raupatu Trustee Company Ltd* (Unreported, High Court, Hamilton, Robertson J, M330/00, 20 February 2001); *Mahuta & Ors v Porima & Ors* (CA 36/01).

[329] High Court New Plymouth CP13/99 10 November 1999 Robertson J.

[330] Kingsbury, B 'Competing Conceptual Approaches to Indigenous Group Issues' in *University of Toronto Law Journal* (Vol. LII, No. 1, Winter 2002) at 113.

what in 1840 were the principal groups of Māori. Political organisation – whānau, hapū and iwi – all of these being kinship groups premised upon links through ties to a common eponymous ancestor, the present application of tino rangatiratanga is limited to such kinship groups. Instead, tino rangatiratanga can exist in a wide array of Māori communities, it being 'a relationship fundamental to Māori. Cultural identity' between leaders and members that 'gives a group a distinctively Māori character; it offers members a group identity and rights.' According to the Tribunal, any group in which tino rangatiratanga now exists internally is one to which the Crown's obligations of special protection applies. This is controversial among Māori, some of whom argue that whakapapa and membership of kin groups is essential to Māori identity. Mahuika, for example, vehemently asserted in typical Ngāti Porou fashion:

> Whakapapa is *the* determinant of all mana rights to land, to marae, to membership of a whānau, hapū and, collectively, the iwi whakapapa determines kinship roles and responsibilities of other kin, as well as one's place and status within society. To deny whakapapa therefore as *the* key to both culture and iwi is a recipe for disaster, conflict and disharmony.[331] [Emphasis added].

The issue is further complicated because the organising principles and dynamics within a group may have already been shaped by continuing nation-state action, so the argument that nation-state institutions should now adopt a detached posture may be far from the usual liberal arguments for nation-state neutrality.

The Waitangi Tribunal additionally limited the entitlement of special recognition and protection to groups that demonstrate tino rangatiratanga values in the Waipareira Report. Not all groups of Māori individuals qualify according to the Tribunal. The Tribunal's reference to 'all the Māori people' is potentially of great significance. It appears that the Crown's duty of 'protection' applies to all Māori, while special recognition applies to tino rangatiratanga groups. As the Tribunal opined:

> Another important question is whether the policies and practices at issue in this claim enhance the solidarity and integrity of Māori communities and empower the people, or whether they divide and rule them. In chapter 1 we reiterated that the Queen's protection applies in a general way to all Māori people; in particular, we found that article three assured Māori of recognition and protection as a people, in addition to rights of equal citizenship.[332]

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[331] Mahuika, A 'Whakapapa is the Heart' in Coates, K & McHugh, P *Kokiri Ngatahi: Living Relationships: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) at 219. See also Te Puni Kōkiri, 'Draft Treaty Framework' Draft 8.4 (July 2000).

[332] Waitangi Tribunal, *Te Whānau o Waipareira Report* (GP Publications, Wellington, 1998) at 215-6.

Perhaps, as Kingsbury asserted, the Tribunal means to refer to the protection of a Māori individual's capacity or ability to belong to a rangatiratanga group, which is also a part of the protection of tino rangatiratanga itself.[333]

Te Puni Kōkiri (TPK) justified this criterion in two ways: One is contractual - someone must have inherited the rights and obligations of the Māori signatories to the Treaty of Waitangi. But the Tribunal seemed itself to reject this approach. The Tribunal's assertion that the Treaty was signed by rangatira 'on behalf of all Māori people, collectively and individually,' has been described by Brookfield as 'remarkable.'[334] Brookfield suggested that this may have been current policy but it could not represent what actually happened in 1840.[335] TPK's other justification, which the Tribunal seemed to endorse, was in terms of the maintenance of a distinctive Māori culture and identity. Presumably, this is a policy argument, and one that reinforces the preference for tino rangatiratanga over self-determination as the governing concept. For liberal self-determination implies a freedom to choose assimilation or integration, just as European colonies, on decolonisation, were in theory free to choose to merge with other nation-states. Although the ethos of the Indigenous People's movement strongly supposes that self-determining groups will seek to maintain their distinct identities and values, some groups are conscious of problems of isolation and seek greater involvement in the ambient society.[336] One such example was Nunavut public government. One element that apparently influenced some indigenous leaders of Nunavut to seek a municipal rather than an ethnic indigenous model of government was a wish to be open to contact with the ambient mainstream society. Indeed, the RCAP asserted:

> Inuit in particular have long been concerned about the social, economic and political implications of being confined to exclusive land bases. Because Inuit constitute a majority of the population in their traditional territories, they are in a position to exercise effective control over local and regional governments elected by majority rule. In these circumstances, public government allows Inuit to maintain and strengthen their relationships with their traditional lands while avoiding the risks they associate with confinement to an exclusive land base.[337]

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[333] Kingsbury, supra n 330 at 111.
[334] Brookfield, F.M *Waitangi and Indigenous Rights:* (Auckland University Press, Auckland, 1999) at 105-6.
[335] Idem.
[336] Kingsbury, supra n 330.
[337] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Vol. 2, Communication Group, Ottawa, 1996) at 1.3.

Other pressures were involved and the choice of the municipal public government model has also been much criticised by other indigenous groups.[338]

The Waitangi Tribunal's approach called for new thinking on the part of the Crown, because such Māori groups seeking recognition and representation may be recently formed, even evanescent, and has particular connections with traditional lands, forests, fisheries, or other properties the Crown is accustomed to dealing with in historic grievance claims centred on Article II. The beginning of a government effort to recognise a wider conception of tino rangatiratanga tie it in to neo-liberal free market ideology, and carve out for the concept some autonomous scope in what might previously have been described as Article III terrain, which is evident in TPK's November 1999 post-election briefing:

> The Government must therefore ensure that Māori are able to adapt in a Māori way to changing conditions. This has implications for Māori standards of health and education and the processes of wealth production generally: if Māori are not competitive under modern market conditions they cannot develop and thrive ... But what is it to adapt and develop in a Māori way, and how can the Government determine this? In fact, of course, only Māori can determine the Māori response. The primary Treaty obligation of the Government is therefore to recognise and respect Māori processes for determining their own responses. The way Māori do this is essentially through the institution of rangatiratanga – the principle of Māori collective organisation and development. As the Tribunal says, the Crown should protect rangatiratanga because it is through the exercise of rangatiratanga that Māori protect themselves.[339]

Hence the Tribunal's reliance on a dynamic and autonomous concept of rangatiratanga is potentially more flexible and adaptable to contemporary situations than have been approaches taken elsewhere to identifying units of self-determination for inter alia, recognition and reorientation. Canada's RCAP thought it would be possible to identify in a fixed way all of the Canadian legal indigenous groups eligible for self-determination, based on criteria including tradition, identity, and size, and that the number of such groups would be between sixty to eighty.[340]

One view expressed by TPK and other policy institutions was that the protection envisaged by the Treaty is open to all Māori who 'continue to live as Māori', but that it is only as part of a Māori collective, living by the principle of rangatiratanga, that Māori individuals should qualify for the special, additional protection which the Treaty offers over and above the citizenship rights enjoyed by all New Zealanders including Māori. Tino rangatiratanga is a fundamental concept in the Treaty, but for the specific purpose of

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[338] For example, Venne proclaimed a Dene position on the Nunavut model: 'none-of-it,' as cited in Kingsbury, supra n 330 at 111.
[339] Te Puni Kōkiri, 'Post-Election Briefing' (Wellington, November 1999) at 48.
[340] Royal Commission on Aboriginal Peoples, supra n 337 s. 2.31 at para. 4.

determining which groups are entitled to be regarded as participants in the relationships with the Crown contemplated by the Treaty, it seems reasonable to envisage that, in addition to tino rangatiratanga, the presence in a particular group of other widely recognised features of Māori social relations might also be relevant, for example, Māori values and principles such as *tapu, noa, mana, utu, aroha, kaitiakitanga, manaakitanga*, and *rangatiratanga*, as well as other elements of *tikanga* and *ahuatanga*. The Tribunal did not appear to address these various concepts explicitly but it did remark that:

> There are then other Māori values to be brought into account. Respect for other Māori communities is one ... A sense of inclusiveness is another, not an exclusive regime that provides for some but denies opportunities for others or which is unconcerned for different sections of the Māori people. It is the sense of generosity and concern for all the people that has been a hallmark of the modern rangatira and which characterises our current rangatira.[341]

The Tribunal then rightly concluded that 'we do not believe that prescriptive practice is a genuine reflection of Māori custom.'[342]

Whether the Tribunal believes that there is a simple bifurcation between Māori as ordinary citizens and Māori as constituents of tino rangatiratanga groups is not clear. Kingsbury even asserted that the Crown has obligations to the Māori people as a whole, under the principle of royal protection, that go beyond the obligations connoted by equal citizenship.[343]

12.14.5 CAPACITY BUILDING - PEOPLE AND GOOD LEADERSHIP

Whatever governance entity form indigenous groups choose, they will shape the governance entity that best suits the particular objectives, functions and goals of the group. But the 'perfect governance entity' is no guarantee of perfect governance. Ultimately, such a lofty ideal is achieved (or not) by those individuals with the responsibility to lead; hence good people, indeed, good leaders and followers make the difference.[344] Dr Charles Royal made an interesting comment on this issue. Referring to whānau, Dr Royal stated:

> Whānau were likened to flax bushes because they renew themselves from within. It is organic as we are. My granduncle use to say that 'We are more organism than organisation.' We get so caught up in all sorts of law structures, regulations, committees, machinery and function that we lose sight that we are organic.[345]

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[341] Waitangi Tribunal, *Te Whānau o Waipareira Report* (GP Publications, Wellington, 1998) at 21.
[342] Idem.
[343] Kingsbury, supra n 330 at 117. See also ibid, at 21.
[344] Willis, supra n 208 at 2.
[345] Royal, C, 'Speech Notes,' in Te Puni Kokiri, *Proceedings of Whakawhānau: Whānau Development National Hui* (Wellington, 24-25 March 2003) at 47.

Dr Royal's comments are a gentle reminder about the importance of our people and values and our fundamental paradigm, which should not be lost in the process of establishing legal entities in our pursuit of internal self-determination. People and the tribal group are more important than institutions and legal structures. Damian Stone, a Māori lawyer who has worked extensively on Treaty settlements and post-settlement governance entities also commented:

> Your legal structure is one aspect of governance ... that's only one aspect and I guess it's probably not even the most important one. In my view, the most important aspect is the people who fill the positions within a legal structure. ... It's essentially to get the right people, how to get them is another question.[346]

12.15 INSTITUTIONAL REPRESENTATION FORMATIVE CONCLUSIONS

12.15.1 INDIGENOUS UNIT AND COMMENSURATE STRUCTURAL DIVERSITY

Indigenous Peoples have made a strong case for special forms of self-government that reflects their unique cultures. At the same time, indigenous self-government and internal self-determination involve responsibilities as well as rights and powers. Indigenous self-governance will affect non-indigenous peoples as well as indigenous citizens, and must co-exist with the general norms of good governance, public government, the rule of law and equal treatment for all Canadians and New Zealanders. But equality does not mean treating everyone the same. It is crucial that there is space and accommodation for difference within the laws and institutions of the nation-state and the hearts and minds of the people within the nation-state. To succeed in the long term, indigenous self-governance should be able to encourage general support by all those it affects. This requires compromise, conciliation and negotiation from both indigenous and non-indigenous people.

International experience suggests that there is a need for self-governance for Indigenous Peoples to manage their own affairs effectively characterised by broad and consistent efforts to gain more control over their lives by moving back and forth between service and program delivery, economic development, 'land claims,' direct action and constitutional negotiations. If international experience teaches us anything it is that different nation-states have dealt with their Indigenous Peoples in different ways. Ultimately, Canada and New Zealand must do the same. The institutional arrangements

[346] Interview with Damian Stone, Wellington, 4 December 2003.

used to provide self-government must reflect the particular realities of Canada's and New Zealand's own Indigenous Peoples.

Good governance and effective representation are both broad concepts and cannot be determined by merely examining whether or not an indigenous self-governing polity possesses jurisdictional authority and a legal entity with an official mandate. Mason Durie's biculturalism continuum shows that there are various options for implementing structures for indigenous self-government that range from an unmodified mainstream institution such as a company to an independent cultural institution with connotations of secession or political independence. However internal self-determination need not necessarily result in classic sovereignty and full independence but can be successful with autonomy, self-governance and perhaps even integration. Self-determination implies a freedom to choose assimilation or integration. Although the ethos of the Indigenous Peoples' movement strongly supposes that self-determining groups will seek to maintain their distinct identities and values, some groups are conscious of problems of isolation and seek greater involvement in the surrounding society. One such example was Nunavut public government. One element that apparently influenced some indigenous leaders of Nunavut to seek a municipal rather than an ethnic indigenous model of government was a wish to be open to contact with mainstream society.

Still, each case is unique as each community and people has its own specific history, traditions, culture, location and aspirations. There exists an amazing diversity in function, structural form, name and number of indigenous governance entities and institutions in Canada and New Zealand that may represent houses, clans, tribes, bands, councils, whānau, hapū, iwi, and other indigenous polities in different situations and contexts. The diversity of Indigenous Peoples and their respective governance and management entities reveals that both Māori and First Nations have sought to address in different ways the complex contemporary issues of indigenous identity and representivity. Furthermore, indigenous diversity includes tribal, rural, urban, metropolitan, cosmopolitan, religious, gender and age-based groups of Māori and First Nations who seek to advance the interest of their own people or group. Both countries have legal entities representing urban Indigenous Peoples as well as tribal peoples, Treaty and non-Treaty Indians and Māori, and status and non-status Indians in Canada, and special purpose entities. Consequently, no indigenous governance entity represents all Māori or all First Nations in everything all of the time. The sheer diversity of indigenous polities in Canada and New Zealand complicates contemporary indigenous identity and concomitantly, representivity, which can make internal self-determination more difficult to achieve if Indigenous Peoples are

fighting among themselves over recognition, rights, responsibilities, funding, consultation and so forth rather than uniting. Hence, it is not a question of establishing just one form of indigenous self-government for all Indigenous Peoples but several according to the diverse functions of indigenous polities. What is required is a national policy that would be sensitive to this fact and that would make it possible to deal with indigenous self-governance in a number of different ways and at different levels.

A 'cookie-cutter' or 'one-size-fits-all' approach to indigenous self-governance will not work in either Canada or New Zealand. Rather, negotiations must proceed within a generally agreed upon framework but must allow for case-by-case circumstances to be considered. Indigenous Peoples have no single self-governance nor should they have any single model in mind. No one answer will do for all Indigenous Peoples all of the time. Varieties of institutional arrangements and processes have been and will need to be created by Indigenous Peoples and governments to recognise and realise indigenous rights and responsibilities to internal self-determination.

12.15.2 FORM FOLLOWS FUNCTION

The imposition of a governance and representative entity on indigenous settlement groups by an external entity is an approach that cannot succeed in the long term given that the political and cultural dynamics within indigenous groups are too diverse. What works within Waikato or the Nisga'a may not work for Ngāi Tahu, Muriwhenua or Nunavut. Indigenous polities need to be absolutely clear, therefore, on the objectives and functions of a governance entity before devoting time and money into structural issues (form). Governance functions need to be assessed thoroughly first then the legal form of the entity is determined commensurate with those functions. It follows that the functions of such entities include self-governance to realise the 'peoples' internal self-determination rights and responsibilities. Further, it is possible that a governance entity could be regarded as the basis of the group's legal identity for representation and other such purposes, which needs to be born in mind when considering the appropriateness of particular legal structures.

There is currently no legal entity available that is ideal for governing all of the interests of Māori and First Nation polities in all situations all of the time. No current governance model is 'perfect' for post-Treaty settlement self-governance and internal self-determination. Every governance model has its strengths and weaknesses, which were discussed extensively. In my view, the particular legal form to perform the tribe's functions would need to be at the least a self-tailored statutory model akin to some of the

various self-government models in Canada, and to a lesser extent, a Ngāi Tahu type private statutory model.

Furthermore, in order to undertake more than one function and self-government in particular, Māori and First Nation polities have to establish several different subsidiary entities including companies to develop assets for economic development, incorporated societies for distributing social benefits (social development), trusts to safeguard assets, charitable trusts to preserve assets in perpetuity; marae and longhouse committees to engage in political advocacy, and other bodies to receive Treaty settlement assets from the Crown. The future is likely to see increasing combinations of trusts and commercial structures such as companies and perhaps co-operative company structures as subsidiaries depending on function, good leadership, prudent investment and capital. Consequently, Māori and First Nations self-government will be a complex mesh (not mess) of self-governance arrangements, accountabilities, representations and appropriate dispute resolution fora and processes.

Still, the corporatisation of indigenous polities through corporate functions and objectives, economic development, and the establishment of corporate forms are perhaps inevitable to some extent. Law appropriate to a liberal democratic western society and a corporate world of global corporations has replaced the world of indigenous tradition and locality in some if not most indigenous groups to a greater or lesser extent. But self-determination is also about cultural, social and political development not just economic development.

Moreover, the current functions of Māori and First Nations governance entities have changed considerably from traditional times as well as when the respective governance models were established such as Māori Trust Boards in the 1920s, 1940s and 1950s. Changing legal requirements have also been imposed on Māori and First Nations communities brought about by historical Treaty settlements, and by the increased use of contractual arrangements in Māori and First Nations service delivery. Consequently, and in the spirit of some indigenous customary laws such as tikanga Māori and ayuukhl Nisga'a which include scope for creative adaptation, the forms of Māori and First Nations socio-political organisation, representation and self-governance should also change appropriately and commensurately with the new contemporary self-governance functions.

12.15.3 PLACE OF CUSTOMARY LAWS AND INSTITUTIONS

DIAND, the BCTC and INAC in Canada and TOKM and OTS in New Zealand play key roles in strengthening indigenous governance arrangements through their gatekeeper

roles of facilitating Treaty settlement negotiations and the allocation of Treaty settlement assets. All groups have arrived at a set of governance structure and representational requirements that appear to provide for sound institutional governance assurances without fully compromising the customary imperatives of settlement groups. However, there is a critical need for improved dispute resolution mechanisms (fora and processes) that might include a primary emphasis on intra-group fora within governance constitutions, supported (facilitated but not dominated) by special indigenous courts or in some cases the judiciary.

International principles of good corporate governance often need to be applied in ways that give regard to traditional indigenous as well as non-indigenous values, institutions and practices, hence the relevance of the Harvard Project's notion of cultural match. Contemporary indigenous polities and governance entities cannot ignore others given the need to deal on a daily basis with the outside world. Indigenous tribal governance entities are vehicles for collective action and the designers of those governance entities and related institutions cannot completely ignore the external environments in which tribes have to operate to survive. Other principles of good governance appear to be relevant to indigenous governance entities, including the need for a group to assume responsibility for its own affairs (self-governance), the importance of the separation of governance and management, and recognition of local values and practices.

But it is the tribe and sub-tribes, as people interacting with each other in their everyday lives, not the indigenous governance entity that are the primary protectors of custom and tradition. The extent to which tikanga Māori and ayuukhl Nisga'a, for example, should be provided for in the constitution of a governance or management entity is a matter for the Indigenous Peoples concerned. However, certainty of meaning is an important consideration when prescribing rights and duties for the commercial operations of the entity. Certainty and efficacy are also necessary to avoid exposing commercial operators to unnecessary litigation. In those circumstances, if tikanga and ayuukhl are important considerations with regard to any matter, it is important to spell out the applicable principles of tikanga and ayuukhl and how they are to be applied in a given case.

12.15.4 LITIGATED SELF-GOVERNMENT LIMITED

The litigation in court of aboriginal rights (including title) involving the ability to maintain ways of life that are distinct from the non-indigenous cultures of Canada and New Zealand has restrictively but not surprisingly defined self-government as self-regulation.

Hence direct Treaty negotiations not litigation are probably the best means for Indigenous Peoples to achieve self-government.

12.15.5 SELF-GOVERNMENT, SELF-MANAGEMENT OR SELF-REGULATION?

The bottom line for indigenous self-governance and to realise internal self-determination rights and responsibilities is control by an Indigenous People of their own governing institutions, processes, systems and disputes. The *Indian Act,* the *Native Land Acts* and other Māori Affairs legislation were/are limited in jurisdiction and self-government powers and scope and it may be argued that these arrangements do not actually represent self-government, but rather self-administration or self-management. Contemporary Māori Treaty settlement governance models, moreover, appear to be more self-management rather than self-governance models. Granted they do have a place in realising the internal self-determination aspirations, rights and responsibilities of respective groups but land management and economic development, the delivery of social services and political representation on their own may not be internal self-determination and self-governance - they appear to be more self-management and self-regulation.

12.15.6 CANADA BETTER INDIGENOUS SITUATION

The indigenous self-governance policies and models in Canada, although not perfect, are a lot more appropriate than the limited selection of legal entities for self-management options that Māori have to choose from. The recognition and realisation of indigenous internal self-determination through self-governance is far more advanced in Canada than New Zealand in terms of policy and practice, scope and possible form. Unlike other 'new' initiatives, indigenous self-government in Canada has been around in various forms and at various levels, for quite some time. The Federal government of Canada is not moving onto uncharted territory in attempting to understand the potential impacts and difficulties of indigenous self-government.

But one of the fundamental challenges for Māori, in contrast to First Nations, is that Māori appear to be focusing almost exclusively on post-settlement good governance, corporate governance and economic development which are a means to an end. So Māori may be missing the mark. In contrast, many of the First Nations appear to focus on 'nation-building' and the realisation of internal self-determination and self-government. It is a small but significant difference in perspective that makes a fundamental difference in outcomes, means and ends - Treaty settlement good governance versus indigenous self-governance and internal self-determination. Hence the self-tailored statutory self-

government model, similar to Canada's First Nations, is the more appropriate option for Māori in my view. Canada is probably one of the better models in the world for realising indigenous internal self-determination rights and responsibilities through self-government. New Zealand, on the other hand, is possibly one of the most favourable situations in the world in terms of indigenous-non-indigenous relationships and appropriately addressing cross-cultural challenges.

12.15.7 SEPARATION OF THE TRIBE AND ENTITY

The governance entity that is created is not the indigenous tribe or sub-tribe itself. The legal entity is simply the mechanism by which an indigenous house, clan, tribe, hapū, iwi or indigenous unit combinations relate to the outside world for prescribed political and economic purposes. Each constituent member of the group may also have its own entity to manage its independent, political and economic affairs. But whatever institutional forms the governance entity takes on, it is important to remember that the function of that entity or entities is to represent not replace the tribe. The entity is the agent and the servant not the master of the 'tribe.' However, the legitimacy of the institutional entity will depend less on its consonance with tradition and customary laws and more on its competence in modern governance and commercial management. The form an entity takes is whichever legal vehicle is best for realising its specific function. Hence the need for a separation between the tribe and its institutional governance entities so that the entities can get on with their respective functions (social and economic development) and the tribe can get on with its respective functions (perhaps cultural and political development).

12.15.8 PEOPLE IMPORTANT

A shortage of effective leadership with both indigenous and non-indigenous administrative and management capability will hinder the development of good governance and positive development for many indigenous groups, which in turn undermines the group's internal self-determination aspirations. The 'perfect governance entity' is also no guarantee of perfect governance. Ultimately, such a lofty ideal is achieved (or not) by those individuals with the responsibility to lead, hence good people and good leaders make a significant difference. In this respect, the quality, nature and availability of higher education may also be a determining factor in the ultimate success of governance entities and arrangements.

12.16 SUMMARY

The movement for indigenous self-governance in Canada and New Zealand has come a long way in the past thirty years. If it is to continue to proceed forward and if difficult issues such as achieving a balance between the rights and responsibilities of Indigenous Peoples and as Canadians and New Zealanders are to be resolved, then Canadians and New Zealanders are going to have to look deep into their own histories and cultures. Canadians and New Zealanders are going to have to think about their countries, their past and future, in vastly different ways than those with which they have become familiar. It might be argued that this is not very likely. And that may be so, but such an arrangement should not obscure what is necessary for a full recognition of the indigenous right to internal self-determination through effective self-governance and authentic power sharing in Canada and New Zealand today. The future of these great nation-states depends on today and what we do with it.

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E kore e hekeheke he kakano rangatira. I will never be lost for I am the seed of chiefs. Our ancestors will never die for they live on in each of us.

I am an Indian. I am proud to know who I am and where I originated. I am proud to be a unique creation of the Great Spirit. We are part of Mother Earth. ... We have survived, but survival by itself is not enough. A people must also grow and flourish.[1] – Chief John Snow.

13.1 OVERALL THESIS CONCLUSIONS

This thesis has discussed the establishment of the legal, political and moral right of Indigenous Peoples to govern themselves effectively both in the international arena via the human rights of Indigenous Peoples to internal self-determination, and domestically via contemporary Treaty settlements and other arrangements established through direct negotiations between the respective Crown governments and mandated indigenous groups. Neither the international nor the national arenas, however, have willingly accepted Indigenous Peoples' rights to internal self-determination and self-governance. Indigenous Peoples have had to fight every step of the way for the recognition and realisation of this fundamental right of 'peoples' to govern themselves effectively. Consequently, litigation, confrontation, negotiation, mediation, the politics of embarrassment and other means have been utilised, often effectively, by a number of indigenous groups in order to win recognition of their legitimate inherent rights to be self-governing 'nations' *within* nation-states. The realisation of this indigenous right to internal self-determination will require similar vigilance from Indigenous Peoples.

13.2 INDIGENOUS AND HUMAN RIGHTS TO SELF-DETERMINATION

At the beginning of the 21st century the international system is in a transitional phase. It remains in search of new overarching mechanisms and structures to operate in an ever more interdependent world at the same time that its traditional foundation, national sovereignty, is in decline and mobility and the flow of goods, services and information increase. Current calls for self-determination by Indigenous Peoples (among others) are a substantial break from the tradition associated with Woodrow Wilson who argued that self-determination was to stop 'the aggression of the great powers upon small.' Wilson's view that self-determination was about protecting the nation from being absorbed by others was

[1] Stevens, S, *These Mountains Are Our Sacred Places* (Toronto, 1977).

what motivated nationalists of the 20th century. The view that communities and 'peoples,' not necessarily nation-states, ought to have control over their own affairs reflects a new empathy for other political units. There is real potential for disputes between 'peoples' or between 'peoples' and nation-states to disrupt world peace as easily as disputes between nation-states, as recent events have shown.

The evolution of the right of self-determination is one of the most dramatic normative developments of the 20th and 21st centuries. The identification of the right of a 'people' in a world in which many 'peoples' lack a nation-state of their own or are victimised by an oppressive nation-state is bound to produce problems if a contrary objective is to keep the existing territorial arrangements of nation-states reasonably stable. Yet to dismiss self-determination as an option is impossible at this stage. Its reality has sunk too deeply into political and legal consciousness, and there remain in the world too many 'distinct peoples' enduring alien and/or oppressive rule. The idea of self-determination recognises that the legitimacy of any political arrangement depends on the will of the people subject to its authority and is closely associated with ideas of democracy and fundamental human rights.

Consequently, a thorough analysis of the classical concept of self-determination and the examination of a new role and meaning in the emerging global system has become important. Internal self-determination for Indigenous Peoples represents a kind of new role and context-specific effort at 'belated nation-building' promoted by the international community as a remedial measure. In our time the search for internal self-determination, indigenous autonomy and self-governance ought not necessarily nor automatically cause the break-up of sovereign nation-states, bloodshed or the change of external boundaries. Rather, the introduction of self-governance - maximum autonomy in combination with regional integration and the acceptance of multiple and hybrid identities and representivities – could satisfy the aspirations of Indigenous Peoples looking for greater self-governance while enabling the nation-state continued existence. Such an adapted concept of traditional self-determination could offer a safety valve for the indigenous community seeking autonomy and self-governance while keeping it from the often-destructive path towards independence, help avoid civil strife, bloodshed and destruction, and save the international and respective national community anxiety, cost and effort.

Nonetheless, the presence of an array of potential claims by Indigenous Peoples around the world relating to the right of self-determination adds to the current confusion regarding the status of the right and contributes to nervousness on the part of many diplomats about the persistence and character of a right of self-determination in the alleged

postcolonial era. Still, remedial prescriptions that undo colonisation have produced what nation-states accept as the international legal *right* of self-determination. Indigenous Peoples claim that their exercise of the right of self-determination occurs within a colonial context, given that such peoples have been severely colonised and are entitled to self-determination, as are those 'peoples' who were formally categorised and denominated as colonial. There is historical and ethical merit in such a perspective but it seems that anything like its full acceptance might be very destabilising, making even its serious consideration politically unacceptable to the entrenched interests of the established order. Any validation of such indigenous rights could conceivably confront many nation-states with immense territorial claims the satisfaction of which could lead to devastating economic, political, social and even cultural effects for the vast majority of their populations, who would presumably resist implementation by violence if necessary. Such resistance by the nation-state and its majority population need not occur. There exist other more appropriate means and options for negotiating and working with Indigenous Peoples so that they may be self-governing *within* the nation-state.

What adds to the confusion in this context, however, is the intermixing of symbolic and substantive goals and the deliberate blurring of the distinction by both sides. If the claims to the right of self-determination were clearly symbolic of full statehood, it would seem less threatening for existing nation-states to acknowledge the right. An integral part of the symbolic value of the right of self-determination is its affirmation of the unencumbered right of a people to choose its destiny, including, in theory, territorial sovereignty and full independence. The fact that such a claim is very difficult to successfully exercise and practically implement within the setting of present world conditions does not altogether provide nation-states with sufficient reassurance that they will not be faced with challenges to their unity and present character. However, as with other controversial aspects about the proper scope of the right of self-determination, it is too late to deny its applicability altogether to the situation of Indigenous Peoples. To attempt to do so would intensify conflict (real and perceived) and would be unacceptable to Indigenous Peoples and to those who support the general improvement in the protection of Indigenous Peoples and regard such peoples as victims of acute injustice.

Some Indigenous Peoples and their representatives have insisted on their core right of self-determination which befits their generally shared avowal of sovereignty, independence and statehood. But the degree to which such a right of self-determination is

currently part of international law remains uncertain and controversial.[2] There is no binding formal instrument that establishes such a right or clarifies its scope, particularly in relation to international sovereign nation-states within whose territory or territories such Indigenous Peoples and nations are situated.[3] Not even the adoption of the *Draft Declaration on the Rights of Indigenous Peoples* would change this situation.

Still, it is also worth noting the legal progress that Indigenous Peoples have made, at least in the last three decades, moving from the category of unprotected victims and objects of the colonisation process to subjects, individuals and 'groups' entitled to protection from neo-colonialism and neo-assimilationist norms and discrimination and then to groups whose autonomous ways of life deserve protection. The protection of indigenous autonomous ways of life now qualifies as a norm of customary international law that is widely endorsed by nation-states. This norm may imply a full right of self-determination but the safeguarding of indigenous autonomy is necessarily a matter for negotiation, compromise and conflict resolution and should be treated as a category of its own. The unresolved issue is how to confer on Indigenous Peoples an appropriate entitlement that belatedly rectifies, to some extent, past injustices without in the process creating an explosive situation with respect to contemporary political, economic, social and cultural realities.

For this reason, there has been a notable evolution of political consciousness with respect to indigenous claims to self-determination, as well as a process of acknowledgement to a degree within the UN and on the part of many existing nation-states. It can be argued that the right of self-determination inheres in Indigenous Peoples and need not be established separately in international law or that the path of customary international law has been cleared to a sufficient degree to admit of the legal existence of a right of self-determination. Such matters are controversial and are likely to remain so for the next decade or so. The rules about who may take advantage of the right (for example, who are considered to be a 'people') as well as the external and internal aspects of the process and result of the exercise are important as products of this particular remedy. The international community can expand its understanding of the *right* of self-determination by applying the general *principle* of self-determination to a wider range of situations than classical colonialism, fashioning a new set of remedial standards for different situations.

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[2] See for example, Lam, *At the Edge of the State: Indigenous Peoples and the Self-Determination* (Transnational Publishers, New York, 2000) and Anaya, J *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996).

[3] Falk, R 'Self-determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience' in Danspeckgruber, W, & Watts, A, (eds) *Self-Determination and Self-Administration: A Sourcebook* (Lynne Rienner, Boulder, Colorado, 1997) at 61.

The constitutive aspect of self-determination concerns the creation of (or change in) the institutions of government, whereby self-determination imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or 'peoples' (including 'Indigenous Peoples') concerned. Internal self-determination also requires minimum levels of participation on the part of all affected 'peoples' commensurate with their respective interests. In terms of general principles, political participation under democracy (including decentralisation and devolution) and cultural pluralism have resulted in acceptance of the general principle that Indigenous Peoples are entitled to spheres of self-governance or administrative autonomy for indigenous communities as well as effective participation of those communities in all decisions affecting them that are appropriated by the larger institutions of government. Existing nation-states such as Canada and New Zealand have a moral and legal duty to accommodate the aspirations of Indigenous Peoples through institutional reforms designed to share power democratically. Concomitantly, Indigenous Peoples have the duty to try to reach an agreement, in good faith, on sharing power *within* the existing nation-state, and to exercise the right of internal self-determination by peaceful ways and means. The modern concept of internal self-determination should therefore be concerned, inter alia, with the legitimacy of the institutions of the government of a 'people,' including their initial constitution, their ongoing effective functioning and institutional representation.

The international standards relating to indigenous self-government, however, though relatively clear in terms of general *principles* are much less so on specific *duties*. Some international decision-making bodies have found it necessary to uphold the cultural integrity of particular Indigenous Peoples by suggesting autonomy and self-government arrangements depending on circumstances. The norms relating to self-government continue along these lines but focus on what is required for political self-determination. Thus, autonomy and self-government may or may not be seen as a right of the people concerned but are seen at least as an appropriate remedial measure in some circumstances to achieve internal self-determination, both constitutive and ongoing. Self-government, therefore, can be described as one aspect of internal self-determination and it follows that self-government assumes implicit legal and stronger moral status at international law. Nation-states are bound to take affirmative measures to assist Indigenous Peoples achieve their internal self-determination goals and aspirations. For is it not true that 'people' created nation-states to serve and protect them and not the other way around? Indeed, UN Secretary Kofi Annan argued in 1999 that 'the state is now widely understood to be the

servant of its people – and not vice versa.'[4] Hans Adams presented a similar position when he argued that the state should principally offer services to its citizens, they in turn should have the right to 'choose their states and citizenship freely.'[5]

The international standards of internal self-determination and self-government for Indigenous Peoples appear to be binding upon the New Zealand and Canadian Governments and, if so, such rights entitle Indigenous Peoples to the application of the principle of internal self-determination even if it is not labelled as a general international legal right. These standards primarily concern processes of Indigenous Peoples' governing themselves effectively, which might include (as a minimum) consultation and decision-making but with a view to achieving the overarching goals of the maintenance and perpetuation of Indigenous Peoples' cultural integrity and significant spheres of self-government.

The rights of minority groups within a larger political entity have been recognised in Article 27 of the ICCPR, negotiated by way of contemporary Treaty settlements. Several international law scholars' even support the idea of self-government as justified by Article 27 'where that is the effective means of protecting the cultural distinctiveness of a territorial minority.'[6] Anaya went further by asserting that 'customary international law currently recognises a right of cultural self-determination for Indigenous Peoples in particular.'[7] What this distinction shows is that international law, which New Zealand and Canada are bound by, requires that Indigenous Peoples are entitled to their cultural integrity, perhaps even self-government, under Article 27 and nation-states are bound to take affirmative measures to help achieve these goals. Given the ability of First Nations and Māori to make complaints to the UN Human Rights Committee about violations pursuant to Article 27 of the ICCPR and the automatic incorporation of customary international law in New Zealand's and Canada's common law, perhaps more attention needs to be paid to international fora and principles and the possible implications they may have for Indigenous Peoples to govern themselves effectively. The essence of internal self-determination, therefore, may lie not in the final shape in which self-determination is

[4] United Nations Secretary-General Kofi Annan, *Address to the United Nations General Assembly,* (New York, 20 September 1999). See also Annan, K, 'By Invitation: Two Concepts of Sovereignty' in *The Economist* (November 1999).

[5] Prince, Hans Adams II of Liechtenstein, 'Democracy and Self-determination' (Schloss Vaduz, Liechtenstein, 1997).

[6] See for example, Sanders who in turn cites and agrees with the views of Professor Rosalyn Higgins and Patrick Thornberry, in Sanders, D 'Self-Determination and Indigenous Peoples' in Tomuschat, C (ed) *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Boston, 1993) at 74.

[7] Anaya, J *Indigenous Peoples in International Law* (Oxford University Press, New York, 1996) at 2.

achieved but in the method of reaching decisions based on the need to pay regard to the freely expressed will of 'Peoples,' including 'Indigenous Peoples.'

13.3 SELF-DETERMINATION AND CO-OPERATION NOT SECESSION

It is a mistake to assume that the colonisation of New Zealand and Canada were Victorian, Crown-based settlement projects. From a Marxist analysis, they were economic projects. The settler polity in both nation-states started to consolidate after the *Constitution Act 1852* in New Zealand and the *British North America Act 1867* in Canada and were constructed without relinquishing power or sharing it with Māori and First Nations. Consequently, Māori and First Nation 'peoples' have pursued many avenues in their attempts to reclaim their birthright to govern themselves effectively, as their ancestors had done for centuries, and to come to terms with colonial hegemony, modernity and globalisation. Independence, armed resistance, withdrawal, messianic movements, unity, ethnicity, litigation, mediation, partnerships, devolution, biculturalism, direct negotiations, Treaty settlements and now self-governance: all have seemed to promise much.

Almost any institutional re-design to enhance representation or powers of self-governance is a challenge to the hierarchy of power intrinsic to the Austinian 'grundnorm' concept of the indivisible sovereign, although none of these types of rights would seem to split the grundnorm any more than Federalism does. Such innovations do have the potential to create a horizontal configuration of power sharing along partnership lines and form a basis of parity to help achieve internal self-determination. Internal self-determination, by definition, must be specified in terms that express the assertion of Indigenous Peoples, not the concessions that the nation-state is prepared to make. Internal self-determination through self-government rights is most likely to be accomplished at the micro-community level rather than at the macro-level of institutions of the nation-state, at least as far as one can see from the present trajectory of change.

Community relations in many indigenous tribes are characterised by two often-countervailing tendencies. First, a strong urge to assert internal self-determination through self-governance – to control and manage their own affairs - resisting interference and seeking ways to uphold their mana; and second, an equally strong urge to recognise linkages and reinforce them through cooperation, moved by traditional values such as inclusiveness, kinship, reciprocity and unity. Both are integral to the way Māori and First Nations social structures work and both must be taken into account in plans for self-governance and development as freedom, effectively eliminating secession as an option.

The primary objective is to find mechanisms and policies to help avoid the danger of bloodshed and destruction for the future, to search for new avenues to satisfy both the aspirations of the communities and 'peoples' concerned, while maintaining stability and peace in the nation-state and the region. An abandoning of the often-futile objective to secede or create a new independent nation-state could help but the principal aim should be the amelioration of the situation of the individual citizen and groups, promoting and supporting their rights, well-being, safety and potential prosperity. Under these conditions autonomy and self-governance are needed as means to satisfy demands for self-determination that cannot be satisfied by independent statehood. This fits well into the new Federalism paradigm.

Two general possibilities for communities and 'peoples' to find an acceptable and more appropriate way out of a potential self-determination dilemma include clearly delineating self-determination modes and mechanisms in the constitution of a nation-state; and finding a feasible and acceptable alternative to classical self-determination (secession and independence). The international community should recognise autonomy and self-governance as an equally legitimate form of internal self-determination and provide a set of guidelines to determine what can be considered true autonomy. This alternative should be in line with the emerging globalised international system and can help to avoid fractionation and separation, bloodshed and destruction, while providing for a peaceful and lasting solution.

Perhaps one of the more important points is that the more flexible an institution and government in dealing with its Indigenous Peoples and minorities and their demands, the greater the chance of negotiating a solution for all parties involved – not only for those who want self-governance but also for the other communities and regions that intend to remain in the system, particularly the minorities and other Indigenous Peoples. But the more the central authority tries to repress, deny and ignore such initiatives, the greater the chance for radicalisation and explosive outbursts calling for secession, civil disruption and nation-state shattering.

The appropriate settlement of indigenous self-governance claims in Canada and New Zealand is a very complex process that requires time, understanding, good faith, attitudinal change and much political will from both the Crown and indigenous claimant groups. I concur with Sir Douglas Graham and Grant Powell who asserted that the Treaty of Waitangi settlement process is the reason we have few protests, little political vandalism

or violence.[8] Powell, a lawyer who deals with Treaty settlement issues, recognised that the settlement of historic grievances against Indigenous Peoples is a global issue produced by colonialism and we have a process that does not involve suicide bombers or people running around shooting each other.[9] Consequently, there is much to learn and applaud from Māori settlement and post-settlement self-governance processes in New Zealand. Internal self-determination should give life to indigenous worldviews in a contemporary context, to take the principles of indigenous law and self-governance and adapt them to suit present day realities. What is required to improve the situation from the start is perhaps a bigger leap of faith from all parties involved.

Furthermore, no right is absolute and so an indigenous right to self-determination within Canada and New Zealand has to be exercised in a way that respects the equal rights of others. Indigenous Peoples must not focus on secession but on the government of themselves and allow others the same privilege to co-exist within the space or even both together in a third space. The norm of self-determination has to do with the freedom of choice for distinct groups. Internal self-determination is a project of emancipation and decolonisation but in a different way, because in both Canada and New Zealand, neither the Indigenous Peoples nor the newcomers are going away demographically, politically, socially or culturally.

13.4 HYBRID CONVERGENCE AND THE THIRD SPACE

Internal self-determination depends upon self-government rights and presents, for both Indigenous Peoples and the settler polity, challenges that are both conceptual and practical, and are about both processes and outcomes. Few Indigenous Peoples enjoy discrete territorial boundaries and inhabit homogenous cultural communities any longer, except perhaps the Inuit of Nunavut and other parts of northern Canada and perhaps the Tuhoe tribe in New Zealand. Still, globalisation, the increased social reflexivity of individuals and the processes of detraditionalisation and re-traditionalisation now create, within all polities, shared ground where tradition and modern self-constructs of identity and representivity converge and diverge. Almost everywhere we now find multicultural communities made up of people with hybrid identities. The social cohesion that made communities of descent distinct is eroding in the face of modernisation and globalisation and is being overrun by the construction of communities of assent based on choice.

[8] Bingham, E 'Treaty settlements teeter at make-or-break stage' in *New Zealand Herald* (19 July 2003).
[9] Idem.

Interestingly, both Māori and non-Māori mainstream cultural constellations in New Zealand are polyphyletic in nature, combining in distinctive ways ideas and practices drawn and transmuted from many sources into their, inter alia, self-governance traditions, laws and representative institutions. Hence, a cohesive jurisprudence and hybrid identity has emerged, derived from these polyphyletic traditions, which could possibly have sufficient flexibility and robustness to meet the future needs of the citizens of Aotearoa/New Zealand (and perhaps Canada) as individuals and as members of varied collectivities - familial, ethnic, social, cultural and political. The bifurcated dualism of the past is inaccurate, unhelpful and untrustworthy. There exists a hybrid space that opens between the colonising and the colonised in both countries' post-colonial eras but perhaps, it appears, more so in New Zealand.

With this situation comes the possibility of a new position, a third space, which need not replicate either the coloniser or the colonised indigenous system. Māori (and First Nations) self-determination concerns can no longer be ignored legally or socially. Hence, the urgent need to find and indeed strengthen the points of convergence so that unity and diversity within the New Zealand legal system, and New Zealand society, can coexist in a creative rather than destructive tension. The functions of indigenous self-determination are not nation-state shattering, violence and civil disruption but the government of themselves, peaceful co-existence, and economic, cultural, social and political development.

Furthermore, Indigenous Peoples must be wary of fixing the signifier 'Māori,' or 'Indian,' or even 'Indigenous,' in essentialist all-encompassing positions. This issue is important particularly when it becomes a sufficient category for which to argue all indigenous group politics, i.e. whether something is 'Māori' or not; 'Indian' or not; 'Aboriginal' or not, 'Indigenous' or not, which can focus on socio-political form not function. There is a danger that one's view and argument can become too 'Māori-centric' or too 'Indian-centric' which ghettoises and thus limits 'Māori,' 'First Nations,' or 'Indigenous' potentialities and possibilities.

Although the 'Māori' and 'First Nations' categories, or the 'Indigenous,' 'Waikato,' 'Ngāi Tahu' or 'Nisga'a' categories, may profoundly influence many of our experiences, identities and representations, the latter are not exhausted by these categories. In addition, such regressive 'Māori-centric' and 'Indian-centric' approaches are not useful where the borderland zones between groups, particularly within New Zealand and Canada and, to a lesser extent within the global sphere, are becoming increasingly blurred as one witnesses cultural encounters 'across cultural boundaries, in the third space of the confluence of more than one cultural tradition, of the negotiations of dominant and

subordinate positions.'[10] Functional possibilities should be worked out first followed by creative adaptations in form.

Granted, there is a cultural politics of difference but there is also a co-existence of groups (indigenous/non-indigenous; coloniser/colonised) within the same space, coupled with growth and inter-change that could intensify the manufacture of hybridised constructs that could have a cross-cultural appeal. We, therefore, must not over-determine difference and thereby lessen the potentiality of a cultural politics of affinities, particularly where a critical consciousness is investigating those differences and affinities.[11]

The essence of any successful relationship is in unity or oneness, achieved not by sameness, cloning or amalgamation, but by complementarity. Each of us ought to respect the 'other(s)', seek and embrace common-ground affinities, accommodate differences, and work to change our own prejudices. Within the Māori – Pākehā and First Nations-non-indigenous contexts, perhaps this could be considered authentic intercultural hybridity. Both nation-states could then move on to the rest of New Zealand and Canadian society. The future of these great nation-states is built upon today and what we do with it.

13.5 REFLEXIVITY AND ADAPTABILITY

It is very important to recognise the dynamism of the Māori and First Nations social order, and the changes that have taken place and continue to take place in their social forms. If anything can be identified as originating in and handed down from the pre-European Māori and First Nations' ancestors unchanged, it is not any particular social form (such as iwi or hapū, house, clam, tribe or confederation) or particular practices (such as hākari and potlatch ceremonies) but the principle of creative adaptation itself. Constructed to meet the challenges of the present day, the models of self-governance and socio-cultural and political organisation prescribed by government policy are themselves products of the process of creative adaptation that Indigenous Peoples ignore. A dynamic society will evolve as it encounters other societies and other knowledge systems and there will also be ongoing maintenance of the customary traditional values and their relevance. As Da Cunha concluded:

[10] Hall cited in Meredith, P 'Urban Maori as New Citizens: The Quest for Recognition and Resources' (Te Matahauariki Institute Working Paper, University of Waikato, Hamilton, 2000) at 40.
[11] Idem.

> Culture is production and not a product, we must be attentive in order to not be deceived; what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production.[12]

As in the past, Māori in New Zealand and some First Nations in Canada have survived dramatic changes of colonisation, urbanisation and now globalisation, individually and collectively, by deploying their capacity for adaptation, on the one hand modifying traditional forms to serve new functions or purposes and on the other creatively adapting introduced forms to their own ends, transforming both in the process. In particular, Māori developed the concept of 'iwi' tribes to their benefit in dealings with government agencies, especially the Native Land Court. More recently, urban-Māori and pan-Māori and urban-Indian and pan-Indian aggregate forms have been developed to meet new contemporary functions. Indigenous Peoples should be controlling the process of cultural change and adaptation rather than Governments or other organisations such as Te Ohu Kai Moana (TOKM) and the Office of Treaty Settlements (OTS) in New Zealand, and the British Columbia Treaty Commission (BCTC), Indian and Northern Affairs Canada (INAC) and the Department of Indian Affairs and Northern Development (DIAND) in Canada.

Consequently, tikanga may be expressed as the 'right Māori ways' with connotations of fairness and justice that bind together ways of thinking and ways of doing, values and action, principles and practice. Nga tikanga Māori are not static and unchanging. While the principles and values are deeply embedded and enduring, they are always interpreted, differentially weighted and applied in practice in relation to particular contexts, giving ample scope for choice, flexibility and innovation. The ayuukhl Nisga'a customary laws and institutions appear to serve similar functions for the Nisga'a First Nation in British Columbia.

13.6 DIVERSITY AND UNITY

Self-determination need not necessarily result in classic sovereignty and full independence but can be successful with maximum autonomy, self-governance and integration. Still, each case is unique as each community and people has its own specific history, traditions, culture, location and aspirations. Hence there is no 'one size fits all' model of self-governance and internal self-determination. But which groups inherit the status of the Crown's Treaty partner in Canada and New Zealand? Which are entitled to benefit from the Crown's obligations to recognise and help realise Indigenous Peoples'

[12] Da Cunha, M.C, 'The Case of Brazilian Indians' in Stephens, S (ed) *Children and the Politics of Culture* (Princeton University Press, Princeton, New Jersey, 1995).

internal self-determination and self-governance aspirations through Treaty settlements and other arrangements? The diversity of Indigenous Peoples and their respective governance and management entities has grown in recent years as both Māori and First Nations have sought to address in different ways the complex contemporary issues of indigenous identity and representivity.

Indigenous diversity in both nation-states includes tribal, rural, urban, metropolitan, cosmopolitan, religious, gender and age-based groups of Māori and First Nations who seek to advance the interest of their own people or group. Consequently, a plethora of indigenous entities exist purporting to represent Indigenous Peoples, including at the national level in Canada such as the Assembly of First Nations, Mētis National Council, Inuit Tapiriit Kanatami, Congress of Aboriginal Peoples and Native Women's Association of Canada. While there is no equivalent Māori governance body in New Zealand a number of national entities do exist, such as the New Zealand Māori Council, National Māori Congress and Māori Women's Welfare League but not at the same level and with equivalent powers as in Canada. Regional aggregate entities also exist such as the Council for Yukon First Nations, Iroquois Six Nations Confederacy, Federation of Newfoundland Indians, Labrador Metis Nation, Māori District Councils and the Treaty Tribes Coalition. Both countries have legal entities representing urban Indigenous Peoples as well as tribal peoples, Treaty and non-Treaty Indians and Māori and status and non-status Indians in Canada; and special purpose entities such as the Federation of Māori Authorities and the Māori Law Commission in New Zealand and the Council for Aboriginal Business and Indigenous Bar Association in Canada.

Consequently, no indigenous governance entity represents all Māori or all First Nations in everything all of the time. Demographic and socio-economic realities, geography and the sheer diversity of indigenous polities in Canada and New Zealand complicate contemporary indigenous identity and, concomitantly, representivity. This can make internal self-determination more difficult to achieve if Indigenous Peoples are fighting among themselves over rights, recognition, funding, consultation and so forth rather than uniting.

The result of indigenous legal and cultural distinctions in terms of identity and representivity is that those in power have surely been aware that such nominal distinctions have a 'divide and conquer' effect. Indigenous Peoples become easier to control as they begin to fight among themselves. The distinctions between traditional and urban Māori, and between Treaty and non-treaty Indians, have been particularly divisive. Both groups receive different 'privileges', different amounts of money from different sources, and

different rights respectively. Indigenous Peoples who fall under separate legal categories often lead similar lifestyles, hence the similarities among Indigenous Peoples in Canada and New Zealand frequently overshadow the legal differences. But these legal differences and distinctions can be exaggerated or ignored at will by the dominant group to suit its purpose. Distinctions can be emphasised to divide Indigenous Peoples, or ignored through stereotypes and generalisations that avoid individual issues.

13.7 ARE UMAS IWI?

To answer the vexed question whether Urban Māori Authorities (UMAs) are 'iwi' or not depends on one's perspective. UMAs are not an iwi in the sense of 'tribe' defined on the basis of descent or whakapapa. They are formed on the basis of common residence and function or kaupapa, and they are usually located and operate within the takiwa (territory) of iwi to which most of their members and clientele do not belong. On the other hand, they are an iwi in the wider sense of people defined by and sharing common characteristics and functions. In the tradition of the Māori social order, the form a socio-political group took often depended on function (kaupapa) and not always whakapapa (form). Hence UMAs are traditional iwi within the tradition of creative adaptation, which has been an outstanding characteristic of that traditional order for over five hundred years, and the outcome of choice, which is fundamental to self-determination. Consequently, UMAs are an integral part of the Māori social order and they have their own special character and place in 21st century Māori and New Zealand society.

13.8 CONTEMPORARY TRIBES

The socio-political entities referred to as 'traditional tribes' in present-day New Zealand have their origins in pre-European society but developed their present form and functions in the 19,th 20th and 21st centuries. They are 'traditional' in the sense of being handed on from generation to generation, whether they were first adopted five hundred, one hundred, fifty or even ten years ago. Some 'traditional' tribes, such as Ngāti Manomano of Ngāti Raukawa ki te Tonga, are as recent as 1996. Other tribes, such as Ngāti Hine, Te Taou and Rongomaiwahine, are asserting their self-determination rights to recognition as a contemporary iwi tribe within the tradition and, therefore, legitimacy of the ancestors. The Métis are a 'new' indigenous group, officially recognised by law in Canada that formed according to function based, inter alia, on a common struggle, miscegenation, cultural survival and politics.

13.9 NEW TRIBES - SOCIO-POLITICAL GROUPS FORMED BASED ON FUNCTION (KAUPAPA) NOT WHAKAPAPA

It is important that Treaty settlements and legislation not define iwi and hapū in such a way as to preclude recognition of iwi and hapū that were not recognised as such at key dates, such as 1769, 1840, 1864, 1946, 1947 and 1948 for Waikato, and 1769, 1840, 1848, 1852, 1925, 1929 and 1945 for Ngāi Tahu; or which may emerge (or re-emerge) in the future, such as Ngāti Kahukoka and Ngāi Tuhuru in each respective tribe. The traditional socio-political processes of group formation in Māori society provided scope for the loss of some tribes and the establishment of new tribes. Treaty settlements ossify and freeze Māori socio-political organisation in a manner that is antithetical to traditional socio-political group diminution and formation processes.

Since European contact, Māori and First Nations have increasingly taken up the option of establishing ties outside the descent group framework in addition to, and occasionally instead of, their descent group membership. Māori and First Nations have joined in a wide range of voluntary associations - groups that bring people together on the bases of individual choice in search of support and companionship and/or commitment to a cause (kaupapa). Aggregate movements recruiting adherents without reference to tribal affiliation and whakapapa have emerged repeatedly within Māoridom such as Te Whiti's movement centred at Parihaka, the Ratana and Ringatu Churches, the Māori Women's Welfare League and the national networks of Māori Committees and Councils. Urban Indians have formed similar voluntary associations with similar functions such as the Canadian Off-Reserve Indians Nations Inc., and the Congress of Aboriginal Peoples, hence they probably face similar challenges. The First Nations have also had their own messianic groups, such as the Dreamer Movement among the Sahaptin peoples of the Pacific Northwest, the Ghost Dance on the northern plains and even Louis Riel and his Métis movement in Manitoba and Saskatchewan.

By the late 20th and early 21st centuries, membership in kaupapa-based associations was as or more meaningful to a large proportion of the Māori population and to a lesser extent the First Nations population, as their tribal membership in terms of both practical and emotional support. Furthermore, voluntary associations established by Māori and First Nations to serve Māori and First Nations functions, organised and run by them on the basis of their values and rules, are an integral part of the present Māori and First Nations social order.

13.10 HAPŪ AND IWI

Hapū appeared to be the most significant socio-political group in traditional Māori society for the people most of the time. Iwi were more accurately described as alliances of hapū that waxed and waned in strength and coherence over time. Hapū or sections of hapū left existing alliances for various reasons and joined or formed others. Reorganised alliances validated their formation by choosing a common ancestor to serve as a symbol of and focus for their unity. While descent was an important basis for alliance, the choice of focal ancestor followed rather than dictated political alignment. Form followed function.

Although the ancestors of a hapū are typically more recent than iwi to which they belong, from whom they are typically seen as descended, some hapū have greater genealogical depth and more living members than some officially recognised iwi, for example, Ngāti Hine in Ngāpuhi and Ngāti Mahuta in Waikato. It is my view that the key difference is not one of genealogical depth or size but of function. Both hapū and iwi have the same form in terms of constituent marae, whakapapa, takiwa, population and acknowledgement from other tribes. But the function of each polity varies on different levels. Hapū, moreover, traditionally exercised and continue to exercise control over resources and activities at the community level, and managed their own external and internal relations, while iwi functioned, minimally, as a source of identity and influence.

But since the forces of colonisation influenced Māori, the relation between hapū and iwi has undergone radical change. Some iwi activated themselves as alternative, more rigidly defined, corporate groups and adapted themselves to become in the 20th and 21st centuries the most recognised Māori descent groups. Thus, hapū became subsumed within the iwi. Today, both hapū and iwi provide their members with a source of identity, yet hapū concentrate on managing their own resources of land and people within the shelter of the iwi, while iwi are concerned with managing resources held on behalf of iwi members as a group and managing relations with other iwi, with government and with government agencies. Within the limits of the iwi takiwa, hapū retain local autonomy over their own marae and other taonga and activities, participate in iwi deliberations and decide whether to support or not decisions taken at the iwi level.

13.11 HYBRID INDIGENOUS GROUPS

In the urban Māori/tribal Māori contest, representing a kaupapa (function or purpose) based versus a whakapapa (genealogically) based contest, the disadvantaged and the alienated have a great deal in common. They share the same ultimate goals and pursue them using the same basic Māori values and many traditional ways of proceeding. Both

groups wrestle with the same problems, problems from the settlement of so many Māori outside their tribal takiwa and with the nautonomous circumstances that so many Māori live in. The First Nations appear to be facing similar tensions and challenges of nautonomy, as well as similar divisions.

A characteristic of the Māori cultural tradition, and closely associated with the Māori capacity for creative adaptation, is insistence on the right not only to choose between options but to keep the available options open, emphasising different choices in different contexts. In resolving challenges of all kinds, such as hapū and iwi affiliation, tribal and urban enmity, asset management, governance form and conflict resolution, Māori traditionally preferred 'both/and' solutions to 'either/or' ones. Fundamental to internal self-determination is this scope for choice.

13.12 MEMBERSHIP CHOICE

Status as a member of a hapū depended on commitment and contribution to community undertakings, and claims had to be validated by residence and participation in group activities. Individuals gave primary allegiance to the group on whose territory they were currently living but they did not give up their other claims but asserted them in appropriate contexts, for example, visits to or from kin. The choices made were not final and might change in the short- or long-term for various reasons.

An element of choice is built into the Māori system of cognatic descent. Under its rules, an individual traces descent from significant ancestors through links of either or both sexes in each generation, according to choice. Consequently, each individual has numerous descent lines and, where his or her ancestors came from different hapū and iwi, has claims to membership in each. Moreover, iwi and hapū are not discrete, exclusive groups; each includes a proportion of members who also trace their descent from other ancestors and, therefore, other iwi and hapū and so they are hybrid not purist groups. The Māori-Pākehā dichotomy is similarly more elusive than real, given that most if not all Māori also have Pākehā ancestry. In my view, both should be acknowledged and celebrated and neither should be suppressed.

13.13 CHANGING TRIBAL FORM FITS WITH THE CHANGING NATURE OF THE NEO-LIBERAL NATION-STATE

Although the New Zealand government recognised the 'tribe' as a legitimate social group, the government also pressured Māori to codify the 'tribe' into a form that fits its own notions of political organisation and governance, which has resulted in a centralised

tribal entity largely constructed by government policies and designed to meet government driven agendas for fully and finally settling outstanding Treaty claims, devolution, mainstreaming and other neo-liberal agendas. The nation-state has, therefore, defined what constitutes a legally constituted Māori governance entity and has forced tribal groups towards corporatised legislative embodiment.

Granted, no Treaty settlement governance entity is perfect and right for all tribal functions and objectives all of the time but the issue is nevertheless one of power and control. Internal self-determination is about making choices rather than having choices imposed on you, including on the group's objectives of political, cultural, social and economic representation. Current government policy in New Zealand appears to be more good governance and representation by prescription rather than internal self-determination.

Furthermore, if Māori societies are to maintain their cultural uniqueness they must consider carefully the future governance entity or entities that will represent their cultural, social, economic and political development. Historically, whakapapa has been a key determiner for Māori socio-political organisation form but I have argued that kaupapa or function has also played a key role, subservient to whakapapa but a key role nonetheless. Māori were pragmatists and adapted to technology and social, political and economic change in a remarkable manner. In 21st century New Zealand and Canada, Indigenous Peoples face new functions and purposes that include political, cultural, economic and social development in a globalised world. Consequently, new forms of socio-political organisation are required to deal effectively with these new functions.

Change is a fundamental part of life and self-determination. The ability to change while maintaining the group's cultural uniqueness, values and wairua (spirit) is crucial. If these elements of an indigenous group are lost, the resulting self-governance structures, principles, processes and functions would accomplish what historic and contemporary government and Crown policies have been trying to accomplish for over a century – the amalgamation of indigenous groups under one system, regardless of boundaries, values, wairua and tikanga, essentially abrogating an indigenous group's internal self-determination rights by both prescription and consent. Indigenous Peoples have come too far to fall willingly and be swallowed up into a neo-assimilationist and neo-liberal globalising governance McWorld.

13.14 INSTITUTIONAL REPRESENTATION

Indigenous legal entities institutionally represent and give effect to many of the collective aspirations of indigenous communities across a range of diverse objectives that contribute to stronger communities and overall internal self-determination aspirations and general well being. Indigenous governance entities are steered, however, by a diverse, complex and evolving collection of governance foundations with some unique features. Indigenous institutional representative entities face a different set of challenges than do most other New Zealand and Canadian corporate bodies, challenges such as the need for dual legitimacy in terms of customary values and the New Zealand and Canadian legal systems. Increasingly stable and effective forms of institutional governance will continue to evolve over time

Institutional representation for Indigenous Peoples depends on establishing an appropriate legal form or entity to meet the group's objectives for a particular function. A plethora of legal entities exist in New Zealand and Canada for Indigenous Peoples to utilise, depending on function and, perhaps, political will. In a wider self-determination context, the ability to choose, again, is key. Indigenous governance entities are characterised by similarity among some key underlying indigenous and non-indigenous values and principles but there is a wide variation of expression in governance design and purpose. The future is likely to see increasing combinations of trusts and commercial structures, such as companies and perhaps co-operative structures, again depending on function, leadership, assets and capital.

A shortage of leadership and administrative and management capability is hindering the development of good governance and positive development for many indigenous groups, which undermines the group's internal self-determination aspirations. A lack of capability within group membership limits the demand for, and participation in, processes that minimise agency costs. Furthermore, the dispersed and often indeterminate nature of that membership complicates things further, hence the need to rebuild communities of interest or in some cases to create them anew at the house, band, tribe, hapū, iwi or even Māori and First Nations level.

International principles of good corporate governance appear to apply to indigenous governance entities, including transparency, accountability and appropriate dispute resolution processes. But these principles often need to be applied in ways that give regard to traditional indigenous as well as non-indigenous values, institutions and practices, hence the relevance of the Harvard Project's notion of cultural match. Other principles of good governance that are relevant to indigenous governance entities include the need for a group

to assume responsibility for its own affairs (self-governance), the importance of the separation of governance and management, and recognition of local values and practices.

Te Ohu Kai Moana (TOKM) and the Office of Treaty Settlements (OTS) in New Zealand and Indian and Northern Affairs Canada (INAC), the Department of Indian Affairs and Northern Development (DIAND), and the British Columbia Treaty Commission (BCTC) in Canada play key roles in strengthening indigenous governance arrangements through their gatekeeper roles for settlement processes and the allocation of Treaty settlement assets. All groups have arrived at a set of governance structure and representational requirements that appear to provide for sound institutional governance assurances without compromising the customary imperatives of settlement groups. However, there is a critical need for improved dispute resolution mechanisms (fora and processes) that might include a primary emphasis on intra-group fora within governance constitutions, supported (facilitated but not dominated) by the judiciary or special indigenous courts, in some cases. The imposition of a uniform governance and representative entity on indigenous settlement groups by the Crown is an approach that cannot succeed given that the political and cultural dynamics within indigenous groups are too diverse. What works within Waikato or the Nisga'a may not work for Ngāi Tahu, Muriwhenua or Nunavut.

In New Zealand, the most politically appropriate body to govern and manage tribal affairs, perhaps, is the iwi rather than the hapū, particularly for reasons of political and financial economies of scale. The trend to larger iwi, pan-iwi and perhaps even pan-Māori and pan-First Nations governance entities may also be necessary for political and economic necessity. But the tradition of hapū or small iwi autonomy still appears to provide for maximum community participation and is still important. However, the relationships between the settlement constituent cells (hapū and iwi and perhaps even whānau) need to be appropriately managed in the governance constitution, allowing for effective participation, transparency, accountability and appropriate dispute resolution mechanisms.

13.15 SEPARATION OF TRIBE AND ENTITY

The iwi and hapū are the 'tribe' in contemporary Māori society but Māori governance entities are not themselves iwi or hapū. Whatever institutional form the governance entity takes, what is vitally important is a reminder of the function of that entity or entities. The tribe and the governance entity are related yet quite separate. The function of the governance entity is to represent the tribe or socio-political group not to

replace it. The entity is the agent of the tribe in that it exists to serve the tribe's functions or purposes. Consequently, the entity is answerable to the tribe.

Theoretically, governance entities are established to serve their iwi and hapū as their legal arm but, because of the wide geographic distribution of iwi and hapū members consultation with the full iwi and hapū membership, or even with the active membership, is cumbersome and time consuming, requiring the calling of special meetings, expensive mailing of notices and newsletters and some members travelling long distances. Unless the constitution is very carefully formulated, there is the potential (and considerable temptation) for the directors of the governance entity to act as an independent body with limited reference to iwi and hapū members, hence, usurping the role of the tribe. It must always be remembered that the function of the governance entity is to be as the servant and not the master of the 'tribe.'

Moreover, internal self-determination is realised at the tribal level: the governance entity is simply the legal entity representing the tribe in the business and political world. However, the legitimacy of the institutional entity will depend less on its consonance with tradition and customary laws and more on its competence in modern governance and commercial management, that is, its function. The form it takes is whichever legal entity is best for realising that particular function. We must be vigilant and not neglect the big picture and overall vision, which is a not major economic profit and 'corporatised' indigenous group but the realisation of the indigenous right to internal self-determination. Some groups miss the mark when they focus on profit, despite many who argue that economic development is the key to all else.

Profit and economic development have an important place in the development and self-determination aspirations of Indigenous Peoples but so too do cultural, social and political development aspirations. The all too elusive balance between objectives and functions is required. Competence in modern governance is, moreover, relevant to determine the legitimacy or integrity of the tribe in terms of participation, accountability, transparency and appropriate dispute resolution fora and processes. For tribal integrity (mana), however, adherence to the norms of the customary traditions and values of the particular indigenous group is more likely to be critical. Hence, the need for a separation between the tribe and its institutional governance entities so that the entities can get on with their respective functions (social and economic development) and the tribe can get on with its respective functions (perhaps cultural and political development).

Once governance and management entities have been legally established to represent a tribe, the tribe should not interfere with the operational functions of the entity

except in strict accordance with the rules of the entity. This is necessary to maintain the political and commercial integrity of the entity created by the tribe, to protect third parties who may treat with it. The distinction is as important for the protection of the tribal culture and its significant and sacred institutions as it is for the protection of the governance entity and third parties.

A central consideration in the formation of Māori governance entities for hapū, iwi and tribal combinations is the allocation of rights and duties to define the relationship between the central umbrella entity for the combined group and the constituent cells. A failure to properly define these relationships may cause tensions and disputes that could jeopardise the entity's function and the group's operations, reputation and overall self-determination. Equally, a failure to see that relationships can be worked out and incorporated into constitutional documents may prevent groups from forming when it is plainly in the best interests of their constituencies for political, economic, social and cultural development functions that they should do so. A central task in constitutional formation may be to define the tribal vision and strategy, as well as the rights and obligations of the umbrella entity on the one hand, and the hapū constituent cells on the other (including internal group self-determination aspirations), so as to ensure that both functions and objectives are adequately met. This would provide for a symbiotic relationship based on function but validated through legal form.

Depending on the particular circumstances affecting the groups concerned, there is traditional scope for groups aggregating based on function while also incorporating provisions to ensure that a burgeoning, central iwi bureaucracy or confederation did not subsume hapū autonomy and self-determination. Internal Māori self-determination traditionally proceeds from its own source, as opposed to the Western liberal democratic fiction that the Crown is the 'sole fount of justice.' Power in traditional Māori and other First Nations' societies generally flows from the people up and not from the top down, hence the need to protect and manage hapū and iwi autonomy.

13.16 PLACE OF TIKANGA

The distinction between the tribal governance and management entities and the tribe has important implications. For example, the tribe, not the governance entity, is the primary custodian of the tribe's cultural ethics, values and traditions or tikanga. While the entity may be fashioned with cultural norms in mind and the enhancement of cultural development, the primary function of the entity is spelled out in its rules, which usually include being effective in the modern commercial and political environments. This will

require that any cultural values that are seen to be important for the entity's operations should be clearly defined in the constitution, in the interests of commercial certainty, rather than being left for the entity itself to determine. There is a high propensity for the entity's legal officers being taken to court by dissatisfied tribal members who, for example, may feel that the entity has not acted, as tikanga requires.

13.17 USE OF MĀORI WORDS IN OFFICIAL CONTEXTS

Māori words and concepts often have several meanings, depending on context and other factors. This complicates things when such words are used in official texts. Consequently, there is a possibility of ambiguity, which can be deliberately exploited. Examples are the 'iwi' and 'wāhitapu' debates in court. To avoid misunderstanding, it is imperative that writers indicate their intended meaning clearly and that readers check the meaning out in particular contexts. Hence, in using Māori words in official contexts (legislation, policy, constitutions, charters) such as 'iwi,' 'hapū,' 'whānau,' 'wāhitapu,' 'kaitiakitanga,' 'tangata whenua,' 'mana whenua,' 'koha' and even 'Māori,' there is one golden rule - leave nothing to be inferred but always spell the intended meaning out in full within the text. Although it narrows the meaning of the words, it gives a measure of self-determination as the people define what words mean to them in certain contexts.

13.18 BUREAUCRATISATION OF WHAKAPAPA – CORPORATISED TRIBES

The corporatisation of indigenous polities through corporate functions and objectives and the establishment of corporate forms are perhaps inevitable to a large extent. However, self-determination is more than just commercial transactions and profit; it is also about cultural, social and political development. Law appropriate to a liberal democratic Western society and a corporate world of global corporations, however, has replaced the world of indigenous tradition and locality. A list of beneficiaries is very different from a group of Indigenous Peoples with a right to self-determination who are culturally obligated to and responsible for land, whānau and resources through whakapapa. A whakapapa book and whakapapa lists on their own are lists of names isolated from the lives and stories that explain the kinship connections. Whakapapa lists isolate any knowledge and wairua of how relationships are maintained and sustained. There is no responsibility for a registered beneficiary to maintain the complex principles of whakapapa, whānaungatanga, kaitiakitanga, aroha, wairuatanga, manaakitanga, mana and utu. Neither is there any obligation to acquire the knowledge, values and wairua to do so.

For Ngāi Tahu, the membership criteria is whakapapa from a Ngāi Tahu kaumātua on a census list in 1848, which effectively makes it a property right with no traditional reciprocal cultural obligations to participate in and contribute to the group. Waikato membership is based on whakapapa to an individual tupuna who was a member of one of the 33 recognised hapū within the raupatu boundary in 1864 and affiliation to a recognised raupatu settlement marae. Nisga'a membership is based on matrilineal descent to one of the four Nisga'a clans, which, again, appears to be a property right and not cultural responsibility. Each of these settlement communities has effectively had to bureaucratise its membership through written application forms, checking and verifying records, challenging and contesting claims, excluding those who may have been accepted into the group in the past by virtue of their contribution to the tribe but lacked the whakapapa connection or who were adopted according to customary laws but lacked the whakapapa.

Ngāi Tahu and Waikato do not recognise 'traditional' adoptions unless they also have the legally prescribed whakapapa to match. The Nisga'a, on the other hand, accept adopted members into the fold as long as they have been adopted according to their traditional stone moving feast. A further challenge with rational-bureaucratic institutions that all Indigenous Peoples must also face is the issue of whether bureaucrats (indigenous and non-indigenous) bureaucratise indigenous rituals such as the Nisga'a stone moving feast and Māori atawhai and whāngai adoptions, karakia, whakanoa ceremonies and even koha. The options are either they bureaucratise the rituals or they ritualise the bureaucracy. The former is the more likely choice and if so, it will bureaucratise by freezing, defining, re-defining and narrowing the scope of indigenous rituals utilised by indigenous governance institutions. Hence, the bureaucratisation of indigenous genealogy and rituals may undermine the group's internal self-determination by undermining traditional processes and institutions.

13.19 GOVERNANCE REPRESENTIVITY BY NON-TRIBAL MEMBERS

It should also be remembered that, on any given occasion, those acting in the an iwi or hapū's name of, such as directors and employees of a tribal governance entity, are likely to include some non-members acting with and 'as if' iwi members, thus creating a legal fiction. While spouses who are not members of the iwi and hapū by right of their own cognatic descent do not become iwi and hapū members on marriage, they are often accepted as workers on iwi and hapū projects and may be elected by iwi and hapū members to serve on iwi and hapū committees in various capacities. One example is the wife of the late Sir Robert Mahuta, Reiha, Lady Mahuta, who is from Ngāpuhi and has

replaced her deceased husband as principal negotiator; trustee of the Potatau Te Wherowhero Trust and in other significant leadership capacities within the Waikato tribe. Hence, the emphasis on tribal citizenship hinging on whakapapa as the sole determiner can be more apparent than real, with contribution to function and purpose nevertheless still applying in some cases as it did traditionally.

13.20 INDIGENOUS 'PEOPLES' DECIDE INDIGENOUS REPRESENTATION

It ought to be left to Māori and First Nations to work out for themselves how they wish to organise their affairs (their self-governance) and what decision-making values, norms, processes and structures best suit their present-day circumstances. The Crown's role should be facilitative not dictatorial, thus, sharing power with Indigenous Peoples as promised in the *Royal Proclamation 1763* and the *Treaty of Waitangi 1840*.

It is axiomatic that, as part of the right to internal self-determination, any indigenous 'people' is inherently entitled to determine for itself the criteria by which it constitutes its own group socio-political organisation, identity and membership along with the institution by which it is to be recognised and represented to external groups, including other Indigenous Peoples, local, regional and national governments and even international entities. Contrary to this 'common sense' practice, however, 'settler' nation-states such as Canada, the USA and New Zealand have generally opted to pre-empt unilaterally the rights of Indigenous Peoples to engage in these most fundamental rights of internal self-determination and levels of decision-making. Instead, it appears that in pursuit of the vital interests of the nation-state rather than those of the indigenous groups that are thereby affected, national government policies and laws have increasingly imposed and assigned indigenous identification and representation standards of their own devising. Typically centering upon criteria for group representation that supports government-driven agendas (such as the extinguishment of indigenous rights, full and final settlements, political and economic certainty, and political efficacy and administrative convenience) rather than the 'traditionally' complex and fluid nature of indigenous socio-political organisation and representation, these aspects of settler nation-state government policies and law have increasingly wrought havoc within indigenous communities, often to individuals and group senses of 'self' over the centuries. This inevitably undermines the realisation of internal self-determination by, inter alia, confusing, demoralising and disempowering the 'self.'

Hence, the imposition of state-defined concepts of indigenous identity and representivity are pervasive in Canada and New Zealand. The striking similarities between these two settler nation-states underscore important aspects of the Canadian and New

Zealand scene, such as a reminder that there are many diverse indigenous groups within the nation-state as well as within indigenous communities themselves, rather than a single homogenous polity of 'Indian,' 'Aboriginal' and 'Māori,' 'Nisga'a,' 'Inuit,' 'Métis,' 'Waikato' and 'Ngāi Tahu.' With various Māori and First Nations groupings claiming representation, the nation-state is also able to decide to whom such representational status should be accorded. That is to say, the nation-state can and often does use 'representivity' as a political resource by assigning, or withdrawing representivity to serve its own interests. In turn, the control of Māori and First Nations representivity by the nation-state can also cause the contest for resources to be shifted away from a nation-state-indigenous tussle to one between Māori and First Nations themselves. The Bill C-31 changes to the *Indian Act* in 1985 and the 'iwi' Fisheries Settlement debate being classic examples of this process in Canada and New Zealand respectively.

The embodiment of official identity and representivity criteria, listing, for example, what is an iwi or hapū, who is an Indian or Māori, who is Nisga'a, Waikato or Ngāi Tahu, and which legal governance entities represent them, is the very antithesis of self-determination. This is not because the content may not be sound but because the right to decide belongs to and should rest with te iwi Māori (that is the iwi, collectively) in an iwi context, and the respective tribes, Nisga'a, Waikato and Ngāi Tahu people themselves. The decisions are not something to be imposed by law or policy. Furthermore, such policies are culturally an anathema because they freeze and ossify the definition of the iwi, hapū, Indian, Māori, Waikato, Nisga'a and Ngāi Tahu in time, precluding recognition of future developments. Indigenous socio-political organisation was fluid and flexible, depending on function, time and other circumstances and imposed identity and representivity policies appear to be an imposed non-indigenous attempt to concretise indigenous identity and representivity for, among other reasons, administrative convenience and certainty. Indigeneity is inherently fluid and uncertain, as is life in general.

The control of processes of identity and representivity by non-indigenous peoples ultimately undermines indigenous *self*-determination, particularly given that such actions and policies are more accurately indigenous *government-defined*-determination or indigenous *government-agenda*-determination and definitely not indigenous *self*-determination.

Therefore, Indigenous Peoples ought to devise a new strategy which pays due respect to the traditional First Nations and Māori social order but which also, in the tradition of that order, is adjusted to current political realities. Such strategies will not work unless they are developed and administered by Māori and First Nations themselves,

seeking advice and support where they choose, without fear of veto. Imposed solutions do not work. Internal self-determination is about freedom to choose, not imposed choices, which are not really choices at all.

It would also be tika (right), and in the best traditions of the tupuna, that contemporary governance entities representing traditional Māori tribes as well as Urban Māori Authorities representing urban Māori, instead of competing for resources and followers, were to forge an alliance to work together, sharing expertise and information and complementing each others' functions. This would provide for political and financial economies of scale. Such an arrangement would preserve the rights of individual Māori to seek support and make their contribution in contexts where they are comfortable and feel they belong, a right which is lost when the allocation of resources is limited to so called 'traditional' iwi tribes. Details of such aggregate alliance arrangements would no doubt take time to work out but given the Māori capacity for creative adaptation already evidenced in both types of entities, it is my view that they would be more effective in the long run in ensuring that all Māori have access to the benefits of internal self-determination and self-governance through Treaty settlements[13] and other arrangements. Many Indigenous Peoples have a strong desire to be empowered to manage their own affairs in ways that benefit them and not exclusively outsiders.

13.21 APPROPRIATE DISPUTE RESOLUTION FORUM AND PROCESS CRUCIAL

The true value of any system lies in its ability to correct itself when crises arise particularly such situations as the Asian financial crisis, Enron, Air New Zealand, the Bank of New Zealand, and the Waikato and Ngāti Ruanui settlement crises of governance and management. A test of internal self-determination, therefore, is the way in which an indigenous group can adequately deal with the inevitable self-governance and management crises. All in-house and some inter-indigenous group disputes should be settled by a culturally and legally constituted tribal dispute resolution forum and process that should be included within the governance entity's constitution. This forum could be made up of local and perhaps some outside elders, including men and women, perhaps some young and mostly elderly tribal members, steeped in tikanga as well as the laws and institutions of the

[13] The Māori Fisheries Settlement 1992 was 'ultimately for the benefit of all Māori' not just individuals, hapu and iwi hence the inclusion in the *Māori Fisheries Act 2004* of the New Zealand Māori Council, Māori Women's Welfare League, Federation of Māori Authorities, National Māori Congress and UMAs as well as hapu and iwi in terms of electing people on to the new pan-Māori entity – He Kawai Taumata – who subsequently elect the trustees for Te Ohu Kaimoana Trustee Ltd.

land. The types of disputes to be settled by such a forum could include tikanga (the location of wāhitapu, the placing and lifting of tapu, managing rahui, deciding who are the group's kaumātua); whakapapa rights and obligations that accrue with membership; membership issues, including the adoption of non-members into the group and cultural fraud; the resurrection of old 'lost' tribes and the formation of new tribes; required shifts in group functions and policy and the establishment of new legal and cultural forms commensurate with these new functions; constitutional amendments; disputes between the umbrella entity and constituent cells; possible remedies for failing economic, social, cultural and political development, and intergenerational and gender disputes as well as disputes between group factions and established traditional institutions such as the Kingitanga and Ngai Tahu's Papatipu Rūnanga.

Traditional Māori methods for resolving disputes were not limited to fighting but included a strongly developed tradition of negotiation and gift exchange, with an emphasis on magnanimity, generosity and aroha, and secondly, that when it came to choosing iwi and hapū leaders the ancestors were pragmatists who chose the persons best fitted to meet the challenges of their times, taking into account all their qualifications and character.

13.22 MARAE TEST

The marae is probably the single most enduring self-governance institution in Māori culture. Consequently, marae should be referred to in matters of customary authority. A legitimate base must sanction customary authority. The formation of indigenous legal body corporates does not necessarily have customary authority to represent indigenous polities and socio-political groups. Rather, such authority is rooted in customary institutions that continue to exist, such as marae in New Zealand and longhouse in Canada.

There should be scope for the development of a policy to establish a legal definition of an indigenous tribe, with provisions that reflect the demographic and political realities such as appropriate representation for urban indigenous residents on a basis of principles agreed among the tribes without becoming too bogged down in the niceties of boundary definition and competition for resources. Customary institutions such as the marae and longhouse, both in their customary ancestral forms and modern urban, pan-tribal derivatives, are enduring indigenous institutions.

Many argue about who held traditional customary authority and rights, and who should hold those rights today. These challenges raise the issue of what the 'traditional' socio-political indigenous organisations were. Perhaps an answer to such a complex yet

important question is that indigenous social and political structures and organisations were fluid, flexible and negotiable as circumstances, functions, purposes, adaptations and time required. Groups of hapū did join into federations as the perceived need and function arose. It can be argued that confederations, such as the Kingitanga and Kotahitanga confederations in New Zealand and the Iroquois Six Nations and Mi'kmaq Wabanaki Confederacy in Canada arose out of particular situations that required change. These traditional associations required no 'legal' definition. What was appropriate was not codified but negotiated by consensus according to the circumstances. There are also modern arguments about the need for traditional indigenous groups to aggregate for functions such as economies of scale in tribal federations of hapū and clans, with different and complementary jurisdictions at hapū, and iwi, clan and tribal levels. Some federations are operating well while some hapū and clans may operate as autonomous units. Should all be forced into a codified structure? The more important challenge may lie in the role of the marae and longhouse community (and other equivalent indigenous structures) to take care of their constituency groups, both local residents and urban migrants.

13.23 NEW RUNANGA IWI ACT

Notwithstanding all of its criticism and frailties, the now defunct *Runanga Iwi Act 1990* did have some positive contributions to make within Māoridom, particularly in regard to representation. The incorporation of tribal authorities with a function to 'represent iwi in accordance with charters prepared by iwi' is a positive function of internal self-determination. Legally constituted tribal institutions will likely be entrusted with other functions promoting the good of the tribe as a whole, such as the collection, preservation and transmission of tribal taonga including land, whakapapa, history and language. This kind of legislation by request and consent only is similar to that provided for the Dominions after World War I pursuant to the *Statute of Westminster Act 1931.*

Having been established by the tribe and responsible to it, the entity will be ideally placed to represent the tribe in relations with outside bodies and individuals in such matters as requests for authoritative information on the tribe and on Māori matters generally, including boundaries, tikanga, views on public issues, and to nominate spokespersons to represent the tribe on other organisations, including local government bodies. Having the governance entity providing the 'authoritative voice of the tribe, either through Treaty settlement legislation or a new *Runanga Iwi Act*, could eliminate much if not all of the confusion and misunderstanding that arises because non-Māori and some Māori do not know whom to approach for tribal representation.

13.24 NATIONAL PAN-MĀORI AND PAN-FIRST NATIONS GOVERNANCE BODIES

There is contention over the extent to which particular descent groups should or should not be included in any tribal self-governance combinations, and over who can validly represent any indigenous tribe or indigenous body politic. It is axiomatic that the power to decide which groups are iwi and hapū should reside with the iwi and hapū collectively and not be usurped by government. Instead of the government appointing its own officers to adjudicate on this issue, it is suggested that the government should invite iwi and hapū to work out a way of doing it that would recognise and respect Māori internal self-determination rights. Indeed Wi Maihi Te Rangikaheke suggested something similar in his submission to a Parliamentary Select Committee in 1857-8 regarding the attitude of the Kīngitanga to the legal system:

> The Maoris have said let there be one law for the two races; had the administration of justice by the Government been clear, the mana would have been one, but the Pakeha system went contrary to the Maori. The Maori chiefs proposed to elect a chief for themselves, but still to have one law, ... if the law was administered by Pakeha magistrates in conjunction with Maori magistrates and runanga there would be two manas united in that mode of administering justice and the chiefs would not feel aggrieved. Land disputes should be settled by joining of the two systems, if the magistrates and runanga could not settle the dispute, influential chiefs and a tohunga who had command of the genealogies and history of the land should be involved.[14]

This is a situation where a national indigenous body could provide guidelines or a dispute resolution forum and process. Perhaps a national roster or college of experts (tohunga, pukenga, wananga) nominated by their respective tribes could select a limited number of their members as a panel to adjudicate on particular cases. Once the decision about the status of the applicant group had been taken, the final steps in scrutinising and approving the application could be taken by this panel sitting jointly with (and perhaps chaired by) a judge of the Māori Land Court with a right of appeal to the Māori Appellate Court. In the meantime, if Indigenous Peoples value self-governance or internal self-determination, it is unsatisfactory that respective government departments, Parliament, the judiciary or bodies other than Indigenous Peoples or not chosen by Indigenous Peoples can determine these issues or influence them as with mandating, representation and funding.

[14] *AJHR*, 1860, F-3, at 24.

13.25 OVERALL COMPARISONS

Attempts to address and settle historic and contemporary colonial (and post-colonial) injustices against Indigenous Peoples are in motion in the Commonwealth, including New Zealand and Canada. One such claim by Indigenous Peoples is the right to self-governance, which may stem from the international legal right to internal self-determination, and historic and contemporary Treaties, as well as pre-existing inherent not contingent indigenous rights. In the Taranaki Report in New Zealand, the Waitangi Tribunal discussed Māori disempowerment and the determination of Taranaki Māori to retain autonomy and self-governance. Indigenous autonomy or aboriginal self-government was described in the report as a 'right of indigenes to constitutional status as first peoples and their rights to manage their own policy, resources and affairs within minimum parameters necessary for the proper operation of the State.'[15] Chartrand similarly concluded that basically what is behind the move towards political autonomy, self-determination and self-government is that Indigenous Peoples want to develop policy. 'We are in the best position to decide what is good for us and what is in the public interest.'[16]

Not only was extensive land deprivation seen as a foundation for the Taranaki claim but also the Tribunal considered that the destruction of autonomy and self-government was an equal injustice. The Tribunal went on to illustrate how Māori self-governance had been progressively undermined by the imposition of government-inspired policy and systems of administration. According to the Tribunal, the 'single thread that most illuminates the historical fabric of Maori and Pākehā contact has been Māori determination to maintain Māori autonomy and the Government's desire to destroy it.' Consequently, the Tribunal concluded that 'an endowment that provides adequately for tribal autonomy in the future is important, not payments for individual benefit.'[17] Judge Eddie Durie commented poignantly on the loss of Māori autonomy and self-governance as being a more serious consequence than confiscation of Māori land:

> The more serious consequence of that early colonial period was not the confiscation of the land but the abrogation of aboriginal autonomy, for the confiscation happened in the past but the denial of aboriginal autonomy is still continuing.[18]

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[15] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (GP Publications, Wellington, 1996) at 5-15.
[16] Chartrand, P, 'Aboriginal Peoples in Canada: Aspirations for Distributive Justice as Distinct Peoples' in Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, Auckland, 1999) at 93.
[17] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (GP Publications, Wellington, 1996) at 5-15.
[18] Durie, E, 'Governance' in School of Māori and Pacific Development, *Strategies for the Next Decade: Sovereignty in Action* (University of Waikato, Hamilton, 1996) at 112.

The realisation of internal self-determination for Indigenous Peoples through contemporary Treaty settlement self-governance and representation, however, has been marred by governance and representation concerns and challenges. These emerge with growing frequency, and indigenous polities are either unprepared for or are unable to deal effectively with them. Even more alarming is the limited academic attention focused on the complex dynamics of post-Treaty settlement self-governance and representation, arguably the most important areas of contemporary indigenous Treaty settlements. There is a critical need for moving analysis beyond the aspirational regulatory legal instruments that have emerged from Treaty negotiations towards an examination of specific aspects of the post-Treaty settlement self-governance phase. Indeed, as Denese Henare (who was heavily involved in the Waikato-Tainui Treaty negotiations) cautioned, 'post-settlement implementation involves matters that are quite different to those which were of importance during the negotiation of claims and following settlement proceedings.'[19] The successful realisation of Waikato-Tainui, and other indigenous settlement groups' post-settlement self-governance is a complex, long-term project that will not eventuate from one quick government action. For Waikato-Tainui, Ngāi Tahu and the Nisga'a, internal self-determination and effective self-governance is occurring in stages. This enables local communities and neighbours time to adjust to the realities of new governing structures, systems and processes. There are no assurances, however, that indigenous post-Treaty settlement self-governance will run smoothly and no guarantees that difficulties will not occur within and between the local indigenous and non-indigenous communities. For Waikato-Tainui, Ngāi Tahu, the Nisga'a and the Inuit of Nunavut indigenous self-determination and self-governance is successful in many areas and is failing in others.

The realisation of indigenous self-determination and self-governance through contemporary Treaty settlements is, therefore, a highly complex and demanding process of institutional re-design in which Indigenous Peoples need to reconcile appropriately the design in terms of their traditional governance values, structures and processes, as well as be able to evolve the governance values, structures and processes that interface with the social, political and legal order of the dominant society. Experience in every indigenous group's post-Treaty settlement self-governance phase in New Zealand and most groups in Canada has seen Indigenous Peoples experience turmoil and conflict at a time when one might have assumed that the struggle with the coloniser was over resulting in a new post-colonial beginning. Despite the many variations in consultation, mandating, negotiation,

[19] Henare, D in 'Post Settlement Issues' in School of Māori and Pacific Development, *Strategies for the Next Decade: Sovereignty in Action* (University of Waikato, Hamilton, 1996) at 23.

representation, settlement and post-settlement self-governance entities and processes, all claimant communities and all Treaty settlements have faced dissent at all ends of the countries concerned. Inter-tribal challenges include insufficiency of consultation and the maintenance of the negotiators' mandate; complaints regarding access to information and opportunity to participate in decision-making processes; and the issue that bodies seeking Crown recognition must prove to the Crown that they are accountable while the ongoing strength and maintenance of a mandate undergoes a much less robust evaluation.

Intra- and inter-indigenous group struggles have blighted post-settlement development and self-governance for Waikato-Tainui and TOKM to some extent. Ngāi Tahu seem to have a more successful self-governance model in terms of an economic bottom line but even that model has political, financial and cultural struggles. Waikato-Tainui seems to have been the exact opposite in terms of their struggles for economic development, which is one aspect of indigenous self-determination. The Nisga'a of British Columbia and the Nunavut self-governance models are exceptional indigenous examples in terms of re-drawing the boundary of Canada, empowering the local Indigenous Peoples and providing space and potential for economic, social, cultural and political development – the realisation of internal self-determination.

Nonetheless, every indigenous settlement has been a trophy of struggle against the coloniser but each has also struggled (all indigenous groups will in my view) with post-Treaty settlement self-governance in terms of incorporating and developing the group's indigenous values, structures and processes in the context of the larger dominant society. TOKM has struggled with identifying iwi constituency representation and with the allocation of benefits to all 'Māori.' Ngāi Tahu, Waikato-Tainui and the Nisga'a have struggled for generations to resolve their historic grievances and many have been born and have died in the shadow of their Treaty settlements.

There are some parallels between the North American and New Zealand situations in terms of similar internal self-determination and self-governance aspirations, unjust and paternalistic laws and institutions, the misappropriation of indigenous identity and representivity, indigenous claims and grievances to land and resource alienation, settlement of historic and contemporary injustices through negotiated Treaty settlements and the indigenous quest for power-sharing as 'nations within' through contemporary self-government models. But there are distinct differences in the way things are done. In Canada the various self-government models and the more comprehensive nature of their Treaty settlements make a significant difference while, in New Zealand, Treaty settlements have been confined to land and fisheries not to *all* Māori grievances. Furthermore, given

the relative isolation of many First Nations on reserves or in Canada's isolated and rugged snow covered north where many of the Indigenous Peoples are a majority, it is more politically viable and acceptable for Canada to be embarking on more comprehensive and indigenous empowering settlement agreements than in New Zealand. The Inuit in the new Nunavut Territory, with their public government self-government model, are an 85 per cent majority in the region.

A further significant difference is the fact that Canada is a Federal nation-state, which provides an ethos for power sharing. The desire of indigenous communities to determine their own Indigenous Peoples' public interest within Canada as a whole can be accommodated by the concept and the institutions of Federalism. Federalism provides that for some purposes, in order to survive, a group can have self-rule; while for other purposes, in order to survive materially and otherwise in a shared territory, you must share with some big institution - shared rule. The notion of Federalism essentially focuses on self-rule in respect to diverse goals and shared rule in respect to common goals. New Zealand, on the other hand, is a unitary nation-state, which follows the outdated Austinian notion of sovereignty being indivisible, hence an ethos of not sharing power with Māori to the same extent as First Nations in Canada, particularly in terms of a territorially-based public self-government model such as Nunavut. New Zealand can still learn much from North America in terms of recognising and realising indigenous self-determination aspirations and goals, Treaty settlement negotiations processes, customary indigenous representation levels and institutions, the de-traditionalisation and re-traditionalisation of indigenous identity and representivity, and dealing appropriately with a diverse indigenous public. Nevertheless, the North American parallels, though interesting and instructive, do not provide satisfactory models that can be fully replicated in New Zealand. New Zealand can learn from North American and other international parallels but ultimately New Zealanders must work our own way through our challenges together.

13.26 INTERNATIONAL AND NATIONAL COMPARISONS

A further conclusion from this research is the remarkable similarities experienced by Indigenous Peoples in methods for addressing and solutions in realising rights to internal self-determination, notwithstanding geographic distance, different political systems and variance in customary traditions and institutions of self-governance. Furthermore, it appears that as Indigenous Peoples and unrepresented 'nations' have struggled for recognition and representation in the international arena, so it is for 'Indigenous Peoples' seeking recognition and representation in national and local fora.

There exists neither an adequate forum for recognising a nation, Indigenous Peoples or 'peoples' with a right to self-determination, nor is there an appropriate process for recognition and representation of nations and 'peoples.' Criteria for recognition are arbitrary, situational and fundamentally political. Similar recognition and representation challenges have arisen for Indigenous Peoples, in their respective national and local arenas in deciding who is a hapū and iwi, houses, bands and tribes. In Canada and New Zealand, who decides who is an Aboriginal, Indian, Inuit, Metis, Mohawk, Nisga'a, Māori, Ngāi Tahu, Waikato? How are or how should these indigenous identity and representivity issues be decided and by whom?[20]

It is clear from this research that the realisation of internal self-determination through Treaty settlement self-governance is an elusive and difficult, yet critical, task within the political culture surrounding Indigenous Peoples/nation-state relations in Canada and New Zealand (and elsewhere). The processes involved in the effective self-governance of indigenous groups commenced well before the respective settlement agreements were signed. The indigenous settlements of the James Bay Cree has extended over a 30 year period, Waikato-Tainui over a 10 year period, Ngāi Tahu over a 7 to 10 year period, and the Nisga'a settlement over a 5-year period. A common theme from each of these indigenous Treaty settlements is that the realisation of internal self-determination for Indigenous Peoples through negotiated self-governance arrangements is neither completed nor fully tested. There have been and will be numerous successes and failures in each of these self-governance examples. Nevertheless, several general conclusions about the realisation of indigenous self-determination through self-governance can be drawn. Essentially, this research has identified a number of extremely significant obstacles to the successful implementation of a settlement agreement, both at the macro-political level against international fora and the respective liberal nation-state, and within and between the indigenous communities. Many of these challenges have been recognised by Waikato-Tainui, Ngāi Tahu and the Nisga'a 'peoples' from the outset, and each group appears to have been committed to addressing these challenges from the inception of their respective Treaty settlements.

There is a critical need to draw attention to the fundamental importance of sound planning through the negotiations, beginning with clear goals and pragmatic expectations. Commenting on indigenous claims in New Zealand, the Hon. Doug Graham emphasised the importance of sound goals and objectives:

[20] He whakatauki tenei no nga tupuna - Hutia te rito o te harakeke? Kei hea te komako e? Tena ki mai ki ahau: He aha te mea nui o te Ao? He tangata, he tangata, he tangata! Tell me: what is the greatest thing in the world? Tis people! 'Tis people! 'Tis the people!

> There was a hurdle that was critical. While most if not all tribes knew about the claims, having passed down the grievance from generation to generation, no one had turned their mind to the question of how they might be settled.[21]

When the Cree signed the JBNQA their goals were to continue the traditional way of life, to participate economically in the development of the region and to maintain control over their own land. The attendant expectations were that the agreement would enable them to advance as full participants in the social and economic life of Quebec and Canada, while still preserving their traditional culture and lifestyle. The Cree optimistically believed that the JBNQA would lead to a better, more secure, and prosperous future for themselves and for future generations along with political, social, cultural and economic development. Cree support of the JBNQA was thus dependent upon whether the specific self-determination objectives they had set would be realised.

Unfortunately, change has come much more slowly than anticipated and Cree self-determination aspirations and goals have either been neglected or marginalised, the problem being implementation. The rights over specific resources and developments are not functioning as intended, the Cree do not have a significant role in the development of the region, and their traditional way of life has been marginalised owing to, among other things, modernity and assimilation into a cash economy. The JBNQA has, moreover, failed to establish a viable self-sufficient economic base as a foundation for Cree self-government and internal self-determination, and has appeared to simply re-arrange the traditional dependency pattern. The result of the devolution of services to the Cree communities under the JBNQA has merely maintained the status quo, with the difference that this time, the Cree are administering to their own poverty and not self-determination. Furthermore, the JBNQA has simply given the Cree what other Canadians have enjoyed for years, basic human rights such as education, citizenship, health care and control over municipalities, as well as assuring the Cree rights they have enjoyed since time immemorial - hunting, fishing and trapping. In short, they have merely negotiated citizenship rights not self-determination.

In a similar manner, the goals of the Indigenous Peoples of Waikato were, inter alia, to reclaim their birthright to the restoration of 1.2 million acres of land, a desire to become part of the wider business community and to contribute to the collective benefit of New Zealand. Waikato had an additional goal, to expand their land base around marae with

[21] Graham, D 'Trick or Treaty?' in *Mana: The Maori News Magazine for all New Zealanders* (No. 20, February/March 1998) at 71.

the aim of creating localised economic estates. These ambitious goals were and are pragmatic and principled, with effective planning being utilised to bring them to fruition. A challenge with indigenous Treaty settlements generally has been a perception that they will cure all indigenous nautonomy and human rights challenges and provide *the* framework for indigenous self-governance and internal self-determination. Such expectations are unrealistic, as the Cree have demonstrated; things do not always work out as expected. Contemporary Treaty settlements are a means to an end and not an end in themselves – they provide *a* framework for Indigenous Peoples to govern themselves but not *the* framework. Indigenous self-governance through negotiated Treaty settlements is not the end but a good start to recognising that Indigenous Peoples have a right to internal self-determination. The realisation of that right is a process, not an event. Much more is needed to bring internal self-determination to fruition, from the indigenous community, local and national governments, and even from international fora and entities. There is a need for good faith relationships between indigenous communities themselves and indigenous groups and their respective local and national governments and communities as well as the international community.

13.27 'TO BE OR NOT TO BE'

The history of settler liberal democratic governments in imposing upon Indigenous Peoples their standards, policies and laws for identification and representation upon Indigenous Peoples in North America and New Zealand is particularly unattractive. Its cost to Indigenous Peoples has involved millions of acres of land, bloodshed, the destruction of ancient cultures and effectively functioning indigenous self-governance systems, control over vast mineral resources which might have afforded Indigenous Peoples a comfortable standard of living, control over their identity and representivity, and their ability to form themselves into viable and meaningful political governance entities at any level. Worse, it has played a prominent role in bringing about Indigenous Peoples' generalised psychic disempowerment – if one is not even allowed to determine for oneself, or within one's peer group, the answer to that all-important question 'who am I?,' and how one is to be appropriately represented in a political socio-cultural context, what possible personal and collective power can one feel that they and their respective group possess? The negative impacts, both physically and psychologically, of this process upon succeeding generations of Indigenous Peoples in North America and New Zealand are simply incalculable.

Fortunately, increasing numbers of Indigenous Peoples in North America and New Zealand are becoming aware of this fact. The recent analysis and positions assumed by

such politically diverse indigenous groups, representative organisations and individuals, are favourable signs. The willingness of some indigenous groups to defy government policy and standards by adopting identification, enrolment and representation policies in line with *their* own interests and traditions is particularly important.

However, Indigenous Peoples are currently at something of a crossroads. If Indigenous Peoples are able to continue the positive trend in which they reassert their internal self-determination prerogative to control the criteria of their own membership identity and group representivity, one may reasonably assume that they will be able to move into re-establishing themselves as functioning local, regional, national and, perhaps, even international entities. The alternative, of course, is that they will fail; continue to be misled into bickering over the questions who is Indigenous, Indian, Māori, Waikato, Ngāi Tahu, Nisga'a, Mi'kmaq, Mohawk, what is an 'iwi,' 'hapū,' 'band,' and 'tribe,' and who represents us; and thus facilitating not only their own continued subordination, expropriation and colonisation but ultimately also their own statistical and cultural extermination and loss of the potential legitimacy and capacity for recognising and realising their international right to internal self-determination through the effective government of themselves.

Ko te pae tawhiti arumia kia tata
Ko te pae tata whakamaua
Kia puta ii te wheiao ki te aomarama

Seek to bring the distant horizon closer
But the closer horizon, grasp it,
So you may emerge from darkness into enlightenment

14 GLOSSARY

adaawak	Nisga'a oral histories, stories recording and transmitting customs
Aroha	to love, sympathise, charity
Atawhai	to be kind to, look after, adopted child
Ayuukhl	Nisga'a customary laws, golden protocols of life.
Gus-wen-qah	Iroquois Confederacy Two Row Wampum Treaty, symbolically signifying two nations rowing together
haka	fierce dance with chant, war dance performed before battle
hakari	great feast, ceremonial feast, gift, ceremonial gifting
hapu	descent group with local base on a marae, section of a tribe, sub-tribe
hegemony	political domination
hui	formal gathering.
iwi	tribe or people.
jus cogens	Pre-emptory norms of general international law accepted andrecognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character
Kahui Ariki	royal family, Kingitanga lineage, nobles
Kaienerekowa	Kanien'kehaka (Mohawk) for the 'great law of peace.'
Kāinga	home, village
kai moana	seafood, including shell fish, seaweed and fish
K'amligihahlhaahl	Nisga'a for the creator
Karakia	prayers, incantations, prayer-chant, service
karanga	chant, call, relative
kaumātua	respected elder, old man, can be both sexes
kaupapa	rule, basic idea, topic, plan, foundation
kawa	protocol of the marae, varies among the tribes, ceremonial, dedication.

Kïngitanga powerful pan-tribal Kingship movement, spiritually based political movement uniting tribes stemming from the Tainui waka.

koroua male elders

Kotahitanga unity movement.

kuia elderly woman.

ksiiskw maintaining balance in the Nisga'a world, payment for a life taken

Llin, Liligidim pdeek Nisga'a ceremony, feast for tribe, organising meeting on the eve of the main event where the host family delegates out various tasks

Lisims the Nass River

mana ascribed and achieved power, authority and prestige, spiritually endowed and maintained.

Manaakitanga hospitality

mana tupuna ascribed authority inherited from ancestors, inherited rights and resonsibilities

marae meeting place, village courtyard, spiritual and symbolic centre of Mäori community affairs.

Mātāwaka kinsfolk from ancestral canoe, ancestral home, kin in urban areas

Nga taonga tuku iho no nga tupuna treasures, heirlooms, traits inherited handed down from the ancestors

Onkwehonwe Kanien'kehaka ('people of the flint' or Mohawk), Six Nations, term for the original people of the land

O'sk Nisga'a ceremony

Päkehä New Zealander of non-Mäori descent, non-Mäori.

paki waitara oral stories, fairy stories

pdeek Nisga'a tribe, very large 'family' descending from common ancestors, matrilineal membership-based

pepeha tribal sayings, proverbs, tribal mottoes

poroporoaki farewell

powhiri to wave, welcoming ceremony

pts'aan	totem pole
pukenga	expert, wise person
rangatira	chief, both male and female leaders
rangatiratanga	chieftainship, authority, kingdom, principality
raupatu	to seize land, confiscation of land
rohe	tribal territory, boundary, district, area
runanga	council, assembly, debate
sigidimnak	Nisga'a highest ranking woman in a *wilp* (house, or extended family).
sim'oogit	Nisga'a chief, one of the highest ranking men in the family
takiwa	tribal territory, area, space, place
tangata whenua	people of the land, Indigenous People of a given place.
tangi	lament, to cry, weep, mourn
taonga katoa	all treasured possessions – precious objects, cultural norms, customs, values, institutions, property, treasure.
tauparapara	classic chant to start a speech
taurahere	rope, cord that binds, urban kin recognised by home peoples
tika	correct, straight, right ways
tikanga	'right ways', custom, from *tika* (adj.) straight, right, correct, fair, just, rules, principles
tohunga	expert, specialist, priest
tupuna	ancestor
Tzeemsin	trickster, Maui-like figure in Nisga'a mythology
tūrangawaewae	a place to stand, basis of rights of the tangata whenua.
ture	law, authorised by government, passed by formal legislature
utu	reciprocity, compensation, involved the initiation and maintenance of relationships both hostile and friendly.
wāhi tapu	sacred places, cemetery, reserved ground
waiata	song, to sing, psalm

wairua	spirit, metaphysical world
whakaaro	think, opinion, feelings, concept.
whänau	extended family.
whangai	feed, foster child, adopted child
whakapapa	genealogy
whakatauki	proverbs
whenua	land.
wilksilaks	Nisga'a, members of your father's family
wilp	Nisga'a house
yuqu	Nisga'a potlatch feasts

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16 APPENDICES

16.1 APPENDIX 1: THE TREATY OF WAITANGI 18401

ENGLISH TEXT OF THE TREATY

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands.

Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

[1] Taken from the internet site www.govt.nz/aboutnz/treaty.php3 (Accessed July 2003).

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

[Signed] W Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

16.2 APPENDIX II: TE TIRITI O WAITANGI 1840

MĀORI TEXT OF THE TREATY

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amoa atu ki te Kuini, e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.
[signed] William Hobson Consul & Lieutenant Governor

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

16.3 APPENDIX III: THE DECLARATION OF INDEPENDENCE 28 OCTOBER 18352

1. Ko matou, ko nga Tino Rangatiratanga o nga iwi o Nu Tireni i raro mai o Hauraki kua oti nei te huihui i Waitangi i Tokerau i te ra 28 o Oketopa 1835, ka wakaputa i te Rangatiratanga o to matou wenua, a, ka meatia ka wakaputaia e matou he Wenua Rangatira, kia huàina ko te Wakaminenga o nga Hapu o Nu Tireni.

2. Ko te Kingitanga ko te mana i te wenua o te wakaminenga o Nu Tireni ka meatia nei kei nga Tino Rangatira anake i to matou huihuinga. A, ka mea hoki e kore e tukua e matou te wakarite ture ki te tahi hunga ke atu, me te tahi Kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni. Ko nga tangata anake e meatia nei e matou e wakarite ana ki te ritenga o o matou ture e meatia nei e matou i to matou huihuinga.

3. Ko matou ko nga Tino Rangatira ka mea nei kia huihui ki te runanga ki Waitangi a te ngahuru i tenei tau i tenei tau ki te wakarite ture, kia tika ai te wakawakanga, kia mau ki te rongo, kia mutu te he, kia tika te hokohoko. A, ka mea hoki ki nga tauiwi o runga, kia wakarerea te wawai, kia mahara ai ki te wakaoranga o to matou wenua, a, kia uru ratou ki te wakaminenga o Nu Tireni.

4. Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawe atu i to matou aroha nana hoki i wakaae ki te Kara mo matou. A, no te mea ka atawai matou, ka tiaki i nga pakeha e noho nei i uta, e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.

Kua wakaaetia katoatia e matou i tenei ra, i te 28 Oketopa 1835, ki te aroaro o te Reireneti o te Kingi o Ingarani.

1. We the hereditary chiefs and heads of tribes of the Northern parts of New Zealand, being assembled at Waitangi in the Bay of Islands, on this 28th day of October, 1835, declare the independence of our country which is hereby constituted and declared to be an independent State under the designation of the United Tribes of New Zealand.

2. All sovereign power and authority within the territories of the united tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity, nor any function of government to be exercised within the said territories, unless by persons appointed by them and acting under the authority of laws regularly enacted by them in Congress assembled.

3. The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi in the autumn of each year for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade. They also cordially invite the southern tribes to lay aside their private animosities and to consult the safety and welfare of our common country by joining the Confederation of the United Tribes.

[2] Taken off the internet at www.corso.org.nz/page1OV67.html (Accessed June 2003).

4. They also agree to send a copy of this Declaration to His Majesty the King of England to thank him for his acknowledgment of their flag. In return for the friendship and protection that they have shown and are prepared to show to such of his subjects as have settled in their country or resorted to its shores for the purposes of trade, they entreat that he will continue to be the parent of their infant State, to protect it from all attempts upon its independence.

Agreed to in its entirety by us on this 28th day of October, 1835, in the presence of His Britannic Majesty's Resident.[3]

[3] The Declaration of Independence 1835 has no legal effect in contemporary New Zealand law. See *Warren v The Police* (AP 133/99, High Court, Hamilton, 9 February 2000), per Penlington J.

16.4 APPENDIX IV: THE ROYAL PROCLAMATION 1763

October 7, 1763
BY THE KING. A PROCLAMATION

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace, concluded at Paris. the 10th Day of February last; and being desirous that all Our loving Subjects, as well of our Kingdom as of our Colonies in America, may avail themselves with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation, We have thought fit, with the Advice of our Privy Council. to issue this our Royal Proclamation, hereby to publish and declare to all our loving Subjects, that we have, with the Advice of our Said Privy Council, granted our Letters Patent, under our Great Seal of Great Britain, to erect, within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.

First--The Government of Quebec bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John, to the South end of the Lake Nipissim; from whence the said Line, crossing the River St. Lawrence, and the Lake Champlain, in 45. Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

Secondly--The Government of East Florida. bounded to the Westward by the Gulph of Mexico and the Apalachicola River; to the Northward by a Line drawn from that part of the said River where the Chatahouchee and Flint Rivers meet, to the source of St. Mary's River. and by the course of the said River to the Atlantic Ocean; and to the Eastward and Southward by the Atlantic Ocean and the Gulph of Florida, including all Islands within Six Leagues of the Sea Coast.

Thirdly--The Government of West Florida. bounded to the Southward by the Gulph of Mexico. including all Islands within Six Leagues of the Coast. from the River Apalachicola to Lake Pontchartrain; to the Westward by the said Lake, the Lake Maurepas, and the River Mississippi; to the Northward by a Line drawn due East from that part of the River Mississippi which lies in 31 Degrees North Latitude. to the River Apalachicola or Chatahouchee; and to the Eastward by the said River.
Fourthly--The Government of Grenada, comprehending the Island of that name, together with the Grenadines, and the Islands of Dominico, St. Vincent's and Tobago.

And to the end that the open and free Fishery of our Subjects may be extended to and carried on upon the Coast of Labrador, and the adjacent Islands. We have thought fit. with the advice of our said Privy Council to put all that Coast, from the River St. John's to Hudson's Streights, together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said Coast, under the care and Inspection of our Governor of Newfoundland.
We have also, with the advice of our Privy Council. thought fit to annex the Islands of St. John's and Cape Breton, or Isle Royale, with the lesser Islands adjacent thereto, to our Government of Nova Scotia.

We have also, with the advice of our Privy Council aforesaid, annexed to our Province of Georgia all the Lands lying between the Rivers Alatamaha and St. Mary's.

And whereas it will greatly contribute to the speedy settling of our said new Governments, that our loving Subjects should be infomed of our Paternal care, for the security of the Liberties and Properties of those who are and shall become Inhabitants thereof, We have thought fit to publish and declare, by this Our Proclamation, that We have, in the Letters Patent under our Great Seal of Great Britain, by which the said Governments are constituted. given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government: And We have also given Power to the said Governors, with the consent of our Said Councils, and the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws. Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and Restrictions as are used in other Colonies; and in the mean Time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England; for which Purpose We have given Power under our Great Seal to the Governors of our said Colonies respectively to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our Said Colonies for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England, with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases. to appeal, under the usual Limitations and Restrictions, to Us in our Privy Council.

We have also thought fit, with the advice of our Privy Council as aforesaid, to give unto the Governors and Councils of our said Three new Colonies, upon the Continent full Power and Authority to settle and agree with the Inhabitants of our said new Colonies or with any other Persons who shall resort thereto, for such Lands. Tenements and Hereditaments, as are now or hereafter shall be in our Power to dispose of; and them to grant to any such Person or Persons upon such Terms, and under such moderate Quit-Rents, Services and Acknowledgments, as have been appointed and settled in our other Colonies, and under such other Conditions as shall appear to us to be necessary and expedient for the Advantage of the Grantees, and the Improvement and settlement of our said Colonies.

And Whereas, We are desirous, upon all occasions, to testify our Royal Sense and Approbation of the Conduct and bravery of the Officers and Soldiers of our Armies, and to reward the same, We do hereby command and impower our Governors of our said Three new Colonies, and all other our Governors of our several Provinces on the Continent of North America, to grant without Fee or Reward, to such reduced Officers as have served in North America during the late War, and to such Private Soldiers as have been or shall be disbanded in America, and are actually residing there, and shall personally apply for the same, the following Quantities of Lands, subject, at the Expiration of Ten Years, to the same Quit-Rents as other Lands are subject to in the Province within which they are granted, as also subject to the same Conditions of Cultivation and Improvement; viz.
To every Person having the Rank of a Field Officer--5,000 Acres.

To every Captain--3,000 Acres.
To every Subaltern or Staff Officer,--2,000 Acres.
To every Non-Commission Officer,--200 Acres .
To every Private Man--50 Acres.

We do likewise authorize and require the Governors and Commanders in Chief of all our said Colonies upon the Continent of North America to grant the like Quantities of Land, and upon the same conditions, to such reduced Officers of our Navy of like Rank as served on board our Ships of War in North America at the times of the Reduction of Louisbourg and Quebec in the late War, and who shall personally apply to our respective Governors for such Grants.

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds.--We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure. that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments. as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved. without our especial leave and Licence for that Purpose first obtained.

And. We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do. with the Advice of our Privy Council strictly enjoin and require. that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies

where, We have thought proper to allow Settlement: but that. if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government. they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose: And we do. by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever. provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside. and also give Security to observe such Regulations as We shall at any Time think fit. by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribc as aforesaid.

And we do further expressly conjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever. who standing charged with Treason. Misprisions of Treason. Murders, or other Felonies or Misdemeanors. shall fly from Justice and take Refuge in the said Territory. and to send them under a proper guard to the Colony where the Crime was committed of which they, stand accused. in order to take their Trial for the same.
Given at our Court at St. James's the 7th Day of October 1763. in the Third Year of our Reign.

16.5 APPENDIX V: THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2004)[4]

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia* , in 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,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

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 also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

[4] Draft Declaration on the Rights of Indigenous Peoples, UN Doc/CN.4/Sub.2/1994/2/Add.1 (1994).

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;

(b) Recruit indigenous children into the armed forces under any circumstances;

(c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;

(d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

PART IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.
States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.
Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.
States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.
Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any

project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.
States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights

recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia* , of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

MOST RECENT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2006[5]

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

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,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Further recognizing the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their

[5] The latest version of the Declaration on the Rights of Indigenous Peoples has a number of differences to the version referred to in the research. At the time of binding the thesis, the most recent version was available and is included to provide further context for the reader. See Human Rights Council, *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994* (Resolution 2006/2, UN Doc E/CN4/2006/79).

institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that the rights affirmed in treaties, agreements and constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Also considering that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

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,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect,

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately-owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's

education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a significant threat to relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and

genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

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 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements.

2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of Indigenous Peoples contained in Treaties, Agreements and Constructive Arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States, shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

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.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

16.6 APPENDIX VI: ILO 169: INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and
Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and
Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and
Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and
Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and
Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and
Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and
Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and
Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and
Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;
adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

PART I. GENERAL POLICY

Article 1

1. This Convention applies to:
(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of

present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

PART II. LAND

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:
(a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
(b) the provision of the means required to promote the development of the lands which these peoples already possess.

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

(a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
(b) equal remuneration for work of equal value;
(c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
(d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
(a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
(b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
(c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.
4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.
2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.
3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V. SOCIAL SECURITY AND HEALTH

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.
3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

PART VI. EDUCATION AND MEANS OF COMMUNICATION

Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.
2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.
2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.
3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

PART VII. CONTACTS AND CO-OPERATION ACROSS BORDERS

Article 32

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

PART VIII. ADMINISTRATION

Article 33

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.
2. These programmes shall include:
(a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
(b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

PART IX. GENERAL PROVISIONS

Article 34

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X. FINAL PROVISIONS

Article 36

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.

16.7 APPENDIX VII: CANADA FIRST NATIONS CHRONOLOGY[6]

CANADA: Pre-1860s: Cooperation / Genocide / Dispossession Era

1693–1862 British North America: colonial Crown sign 40+ Treaties with First Nations.

1763 Imperial: Royal Proclamation sets aside vast tracts of land in British North America (now eastern USA and Canada) recognising it as belonging to Indian tribes and nations; but contains the provision that no part can be acquired by settlers unless by consent of Crown—ignored by Maritime colonies; dubious application in West.

1776 Declaration of Independence by American colonies—creation of USA. Obligations to First Nations under Royal Proclamation of 1763 received into USA law (but from 1830s independent line of judicial authority evolves through Marshall Supreme Court, recognising First Nations as 'domestic dependent nations').

1783 British North America (Upper and Lower Canada [present-day s. Ontario and s. Quebec], Maritime colonies, North West Territories [including present Prairie Provinces]): policy towards Indians shifts from securing allegiance and mutual protection to assimilation or removal to allow settlement.

1812 War between USA and UK.

1817 Selkirk 'Treaty' with Ojibway and Cree on the Red River (Western Canada).

1836 Upper Canada: Mantoulin and Saugeen land cession Treaties with Odawa and Ojibway First Nations.

1841 Upper and Lower Canada unite to form the Province of Canada.

1849 Residential and English language schooling for First Nation children begins in what used to be Upper Canada.

1850 Province of Canada: Lake Huron and Lake Superior (Robinson) Treaties signed with Ojibway in NW.

1850–1853 Vancouver Island, BC: 14 Treaties with tribes signed by colonial Crown.

1860s–1920s: Paternalism: Coercion / Segregation / Assimilation Era

1857 Province of Canada: *Act to Encourage the Gradual Civilisation of Indian Tribes* promulgates explicit assimilation policy. Indians who forego right to register as Indians extended 'privilege' of enfranchisement, i.e. obtain right to vote like Europeans.

1867 Imperial: *British North America Act* creates confederation of colonies into Canadian Federal State with Federal Govt, Provinces and Territories. [Louis Riel of Manitoba Métis provisional govt later recognised as founding father of confederation, too.]

s91(24) allocates jurisdiction over 'Indians, and Lands reserved for the Indians' to Federal Govt.

First Nations of Nova Scotia retain right to vote in Provincial elections.

1869 Canada (Can): *Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs* sets up regime applicable to Indian First Nations as registered Indians under the Act. Excludes Inuit and Métis and certain other tribes. Federal Govt bestows on itself powers over Indians (collectively known as bands) on reserves as though they are State wards. Right to vote Federally confined to those who agree to relinquish Indian status.

1870 Can: *Manitoba Act* amounts to Treaty with the 12 000 Red River Métis, recognising their continuing land rights and capacity to govern themselves. Sets up new Province under the Dominion as response to 1969 rebellion of Red River Métis. (Métis felt rights under previous agreements with Hudson's Bay Company going back to 1670s not safeguarded;

[6] Appendix VII has drawn heavily from the chronologies of Professor Paul Havemann in his seminal book Havemann, P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University Press, Auckland, 1999). See also the very useful chronology in Bradford W. Morse (ed) *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada, Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Carleton University Press, Ottawa, 1985).

set up provisional govt under Louis Riel, prompted peaceful negotiations.) 'Half-breeds' to be allotted 1 400 000 acres in settlement of their 'Indian title' claims—though, crucially, in form of individual scrip (title to land) rather than as a collectivity.
Can: *Dominion Lands Act* extends similar recognition of Métis land rights in the North West Territory (NWT) areas outside Manitoba (Man).
1871–1921 Crown in right of Canada signs 'numbered' land surrender Treaties 1–11 with First Nations of Western Canada.
1871 Treaties 1 and 2 with Ojibway in Man and NWT.
1873 North-West Angle Treaty 3 with Ojibway.
1874–1877 Treaties 4, 5, 6, and 7 with Saulteaux, Cree, Swampy Cree, Assiniboine, Blood, Blackfoot, Peigan, Sarcee and Stoney First Nations of Canadian south-west.
1876 Can: First *Indian Act* lays down broad outline of regime of tutelage over registered Indians on reserves established under *Gradual Civilisation Act 1857,* including prohibition of sale of liquor on reserve; offence for Indian to be intoxicated on or off reserve—provision ultimately struck down by Supreme Court of Canada (SCC) in 1970 *Dry Bones* decision under Canadian Bill of Rights.
1879 Can: Federal Govt commissions Davin Report on Industrial Schools for Indians and Half Breeds; sponsors 200 day schools and 30 residential schools for 'civilisation' of Indians.
1881 Can: *Indian Act* amendment: offence to purchase agricultural produce from Indians without a permit—restricts Indian farmers' ability to compete with settler farmers on open market.
1884 Can: *Indian Advancement Act* expands band self-management powers but under chairmanship and ultimate control of an official from Department of Indian Affairs (DIA), the Indian agent.
1885 Louis Riel returns to Canada from US to continue struggle for justice for Métis of Western Canada after rapid alienation of scrip title issued to Métis; proposes a Bill of Rights and another provisional Métis govt. Dominion troops overwhelm his supporters; Riel and 8 Indians hanged in Regina as traitors.
Can: *Indian Act* amended to prohibit customary practices of Potlach and Tamanawas dance.
Can: Indians in eastern Canada (old Province of Canada) extended right to vote in Federal elections only if enfranchised. [Repealed in 1898.]
1885–1890s Superintendent-General of Indian Affairs trials 'pass system' as administrative device to control, monitor and restrict movement from reserves. *Indian Act* and *Criminal Code of Canada* used to criminalise as vagrants Indians off-reserve without permission.
1888 Judicial Committee of the PC (JCPC)/SCC: *St Catherines Milling & Lumber Co.* v *The Queen:* land surrendered by Indians treated as vested in Crown. Surrender has to be consensual. Native title rights derive not from the Indians but from the Royal Proclamation of 1763; they are personal and usufructuary and 'dependent on the good will of the sovereign'.
1890s Northern Treaties 8, 9, 10 and 11 with Cree and Dene First Nations of Yukon, northern BC, Alberta (Alta) and Saskatchewan (Sask) regions of NWT.

1920s–1960s: Assimilation / Coercion Era
1914 Can: *Indian Act* amendment requires First Nation peoples to obtain Indian Agent's permission to wear customary and traditional attire in public, especially at fairs and shows.
1917 Federal franchise extended to Indians on- and off-reserve serving in armed services.
1920 Federal franchise restricted to off-reserve Indians and veterans.
Can: DIA policy: English to be compulsory in all Indian schools to enable Indians to take their place as citizens of Canada.

1927 Can: *Indian Act* amended: requires Indians to obtain permission from Superintendent-General of Indian Affairs to solicit funds for making legal claims—restricts capacity of Indian leaders to seek redress in court for Treaty breaches. [Repealed in 1951].
1930 Can: *Indian Act* amended: offence for pool hall operator to allow inordinate frequenting of pool rooms by Indians.
1930s Can: DIA policy: residential school programme increased.
1941 Can: *Indian Act* amended: offence to purchase furs and wild animals from Indians without a permit—restricts capacity of Indian hunters and trappers to compete with non-Indians.
1944 Federal franchise extended to on- and off-reserve Indians who had performed military service, and their spouses.
1947 New Senate–House of Commons Joint Committee on Indian Affairs receives report from Chief Govt Anthropologist: 'Plan for Liquidating Canada's Indian Problem in 25 Years' recommends termination of special status of Indians under the *Indian Acts*.
1949 BC: Provincial franchise extended to Indians.
Newfoundland joins Confederation as a Province; in agreement with Canada, no Aboriginal peoples recognised for purposes of *Indian Act* status.
1950 Federal franchise extended to all on-reserve Indians who waive tax-exempt status under the *Indian Act.* Inuit also enfranchised.
1952 Man: Provincial franchise extended to Indians.
1954 Ontario (Ont): Provincial franchise extended to Indians.
1957 Alta: *Re Samson Indian Band:* Dist. Ct. rejects attempt by protesters within Samson Indian band to expel families from band membership: grounds that a 'forebearer' took half-breed scrip inadequate, too vague—protests ruled invalid for procedural reasons, individuals restored to band membership. [Diefenbaker Govt redrafts s112 of *Indian Act* in 1961 to end possibility of involuntary individual or band enfranchisement.]
1958 Can: James Gladstone the first First nations senator appointed to the Senate.
1960 Federal franchise extended to all Indians without restrictions.
Sask: Provincial franchise extended to Indians.
1963 Prince Edward Island (PEI) and New Brunswick (NB): Provincial franchise extended to Indians.
1965 Alta: Provincial franchise extended to Indians.
1966–7 Federally commissioned Hawthorne Report: *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs* recommends policy of greater autonomy in the form of a 'citizens *plus*' recognition of special status.

1968–1979 Trudeau Liberal Governments
1960s–1970s: Integration
1969 Can: Trudeau's Federal Liberal Govt White Paper proposes to abolish special status of First Nations enshrined in the Royal Proclamation and *Indian Acts*.
Pan-Indian movement grows to oppose loss of status and reduction to 'citizens minus'.
1970s–1990s: Aboriginal Rights Talk / Confrontation Era
1969 Harold Cardinal, Indian leader, publishes landmark book *The Unjust Society* attacking Federal Indian policy.
Quebec: Provincial franchise extended to Indians.
1970 SCC: *Drybones* finds *Indian Act* offence for an Indian to be intoxicated off-reserve discriminatory under *Canadian Bill of Rights Act.*
Alta: Blue Quills Indian communities in St Pauls, Alta unilaterally take over Church-

run Federally-funded residential school.

1971 Can: Senate–House of Commons Standing Committee on Indian Affairs, Education Sub-Committee concludes that Federal, provincial and church schools have failed Indian children; recommends substantial Indian control.

1973 SCC: *Calder* v *Attorney General of BC:* Nisga'a claim to aboriginal title rights from original occupancy and use not upheld but important *obiter* signal recognition in principle of possibility of native/Indian/aboriginal title arising from occupation: ruling does not depend on application of 1763 Royal Proclamation but on occupancy since time immemorial. Such title could not be extinguished by Crown unless intention to do so 'clear and plain'.

Can: Minister of Indian Affairs issues directive acknowledging *Calder* finding and stating that claims based on 'Native title, Original title, Aboriginal title' or 'usufructuary rights', where not superseded by law or extinguished by a Treaty, could be considered for recognition and/or compensation—i.e., comprehensive claims policy.

1975 Can: Federal govt confirms comprehensive claims policy.

1976 Can: Federal govt concludes *James Bay Agreement* with Cree and Quebec under comprehensive claims policy. Settlement provides $225m (CAD), harvesting rights over 150 000 sq kms, self-government powers.

1977 'Saskatchewan formula' negotiated with Can, Sask, Man and Alta for distribution of Crown land in satisfaction of First Nations claims.

1978 SCC: *R* v *Kruger and Manuel:* Provincial legislative regulation of exercise of an aboriginal right (e.g. requirement of fishing licence) does not amount to extinguishment of that right. [Followed in Ont: *R* v *Agawa* 1988, after 1982 constitutional recognition of aboriginal rights.]

Can: Federal govt concludes *Northeastern Quebec Agreement with* Naskapi under comprehensive claims policy. Follows James Bay model; settlement provides $9m (CAD) grant.

1979–1980 Clark Progressive Conservative Government

1980–1984 Trudeau/Turner Liberal Governments

1980 Federal Court of Canada (FCC): *Hamlet of Baker Lake* v *Minister of Indian Affairs* stipulates stringent requirements for proof of aboriginal title: organised society; specific territory; exclusive occupation; occupation coincidental with time of assertion of Crown sovereignty.

1981 UN Human Rights Committee: *Lovelace* v *Canada:* finds s12(1)(b) of *Indian Act* violates Article 27 of ICCPR by discriminating against Indian women if they marry non-Indians.

1980–1982 Federal Govt initiates constitutional hearings to explore patriation of Canada's Constitution from Westminster, draw up a new Constitution, and entrench a Charter of Fundamental Rights and Freedoms. First Nations appeal to UK Westminster Parliament and Federal Govt on grounds that aboriginal rights threatened. Patriation might diminish historical obligations undertaken by British Crown now borne by Canada to First Nations, e.g. Royal Proclamation 1763, pre-1867 confederation Treaties. Some Provinces (e.g. Alta) try to bargain away aboriginal rights in exchange for supporting gender equality rights.

1982 Can: *Constitution Act,* including Charter of Fundamental Rights and Freedoms:

s 25 guarantees recognition of Royal Proclamation aboriginal rights or freedoms and any acquired by land claims settlements; s35 recognises and affirms existing Aboriginal and Treaty rights. 'Aboriginal peoples' include Métis people (first recognition by Federal Crown of Métis nation as a distinct group since 1880s Riel Rebellion); s37 sets up constitutional amendment process through PM and First Ministers' Conferences that are to include participation from First Nations including Inuit and Métis on items 'directly' affecting them.

1983 First Ministers' Conference (FMC) under *Constitution Act 1982;* s37 amends s35 to go beyond existing Aboriginal and Treaty rights, to include any to be acquired after 1982; s35 rights to apply equally to male and female persons, consistent with s15 equality provisions of Charter contained in *Constitution Act 1982.*
Federal Parliamentary (Penner) Committee on Indian Self-Government recommends self-government, i.e. creation of a tier of aboriginal govts; finds Department of Indian and Northern Development (DIAND) has subverted transfer of control to Indians, especially in area of education.
SCC: *Nowegijick* v *The Queen:* the construction of treaties and statutes affecting First Nations should be liberal and resolved in their favour. [Affirmed in SCC: *Horseman* v *The Queen* (1990)].

1984–1993 Mulroney / Campbell Progressive Conservative Government
1984 Can: *Western Arctic (Inuvialuit) Claims Settlement Act:* second Agreement under comprehensive claims policy. Settlement provides 90 650 sq kms in fee simple, 15% of mineral rights, compensation over 15 years amounting to $152m (CAD).
1984, 1985 Can: s37: First Ministers challenged at FMCs by Assembly of First Nations (AFN), Native Council of Canada (NCC), Inuit Tapirisat, Aboriginal Women's Organisation to fill the 'empty boxes', i.e. define rights under s35, and notably to elevate self-government onto the FMC agenda.
UNHRC: *A.D.* v *Canada:* Mikmac invoke right as non-State entity to complain to the UN Human Rights Committee. [Claim failed due to a lack of standing on the part of the actual complainant.]
1985 SCC: *Guerin* v *The Queen:* Crown must honour its obligations under s35 to First Nations because it owes them a fiduciary duty to act *uberrimae fidei.*
Bill C-31 amendment to *Indian Act:* s 12(1)(b) to remove legislated discrimination against Indian women who lost Indian status, and hence right to live on reserve, upon marriage to a non-Indian.
1986 SCC: *Simon* v *The Queen:* Treaties must be construed in favour of First Nations even if minimal and incomplete.
Can: *Sechelt Indian Band Self-Government Act.*
1987 Can: s37: FMC: Federal Govt makes Meech Lake Accord for a constitutional amendment to give Quebec unique status as a 'distinct society' within the confederation; First Nations demand amendment to include them as 'distinct societies'. Alta threatens separation if request granted. Provinces ceded power to veto 'provincehood' for Yukon and NWT—significant power capable of being used to curtail First Nation interests.
1990 Meech Lake Accord, which does not expressly recognise self- government rights of First Nations, fails to get provincial legislative ratification. First Nations MLA Elijah Harper filibusters Manitoba provincial legislature to prevent Meech Lake ratification.
Quebec: Confrontation lasts weeks between Mohawk First Nation and Quebec Provincial Police at Oka over blockading of route into Montreal.
Can: Comprehensive Claim Agreement with Dene Nation and Métis Association of NWT.
SCC: *Attorney General of Quebec* v *Regent Sioui:* no extinguishment of a Treaty right can occur from lack of invocation or the passing of laws incompatible with its exercise unless the First Nation consents to extinction (as in *Horseman*).
SCC: *R* v *Sparrow:* SCC provides substantive answers to meaning of 'aboriginal rights protected under s35(1)': proof requirements as in *Baker Lake* (1980), plus proof the right is an integral part of the claimants' distinctive culture; aboriginal right may be exercised in a contemporary manner. 'Plain and clear intention' to extinguish such an aboriginal right is required. Regulation of an aboriginal right not same as extinction of such a right.

UNHRC: *Ominayak and the Lubicon Lake Band* v *Canada:* Lubicon Cree successfully claim that resource extraction sanctioned by provincial and Federal govts destroying their culture and traditional way of life. Canada makes compensation as a result.

1991 Can: Indian Claims Commission established to hear aboriginal rights-specific claims against Canada.

1992 Can: Federal govt offers *Gwich'In Agreement* with Dene and Métis under comprehensive claims policy. Settlement provides 24 000 sq kms, resource royalties, wildlife harvesting rights, $75m (CAD) over 15 years, participation in environmental regulation. [Accepted 1996]

1993 Federal–Provincial Charlottetown (constitutional amendment) Accord defeated including recognition of First Nations' inherent right to self-government.

Can: *Nunavut Land Claim Agreement* signed under comprehensive claims policy. *Nunavut Act* comprises undertaking to establish a Territorial Govt for Inuit of the eastern Arctic region by 1999.

BCCA: *Delgamuukw* v *British Columbia:* Court of Appeal holds that aboriginal title does not include sovereignty and is a unique but non-exclusive usufructuary right to use Crown land for continuing subsistence.

Can: *Yukon Land Claims Final Agreement Act* confers self-government on 14 First Nations according to Yukon Indian Nations Umbrella Final Agreement, though some Yukon First Nations are not *consensus ad idem* over specific terms of the agreement.

Can: *Sahtu Dene and Métis Agreement* under comprehensive claims policy.

Settlement provides 41 437 sq kms, $75m (CAD) over 15 years, resource royalties, harvesting rights, and participation in environmental regulation.

1994 Can: *Vuntut Gwich'in First Nation Agreement, First Nation of Nacho Nyak Dun Agreement, Teslin Tlingit Council Ageement, Champagne and Aishihik First Nations* Agreement made under comprehensive claims policy.

1995 Can: Federal Govt announces policy of recognition of First Nations' inherent right to self-government.

SCC: *Native Women's Association of Canada* v *Canada:* NWAC claim, that Federal Govt's refusal to fund their participation in constitutional review process infringes their s35 aboriginal rights, dismissed.

1996

SCC: *R* v *Van der Peet:* distinctiveness test—refinement of test for recognition of an aboriginal right protected under s35(1): right must be to engage in an activity, practice, custom or tradition integral to the distinctive culture of the Aboriginal group at the time of contact with Europeans. [Followed by SCC: *Gladstone, Smokehouse,* including claims to exercise powers of self-government: see SCC: *Pamajewon* v *R.*].

SCC: *R* v *Adams:* aboriginal rights under s35 (1) exist within a broad-based conceptual framework, not solely where a claim to aboriginal title to land has been made out; applied *Van der Peet.*

Can: RCAP delivers final report.

Roman Catholic Church apologises for abuse of Inuit children in its facilities.

Quebec referendum on sovereignty: 'yes' vote narrowly defeated.

First Nation and Inuit Independent Referendum on Quebec sovereignty: Inuit vote 95% 'no'; Cree 96% 'no'.

1990s: Commodification of Aboriginal Rights Era?

1996 Can: Minister of Indian Affairs proposes changes to *Indian Act* to free up reserve land to be used as collateral for individual loans, signalling individualisation of ownership. Proposal watered down by the *Indian Act Optional Modification Act.*

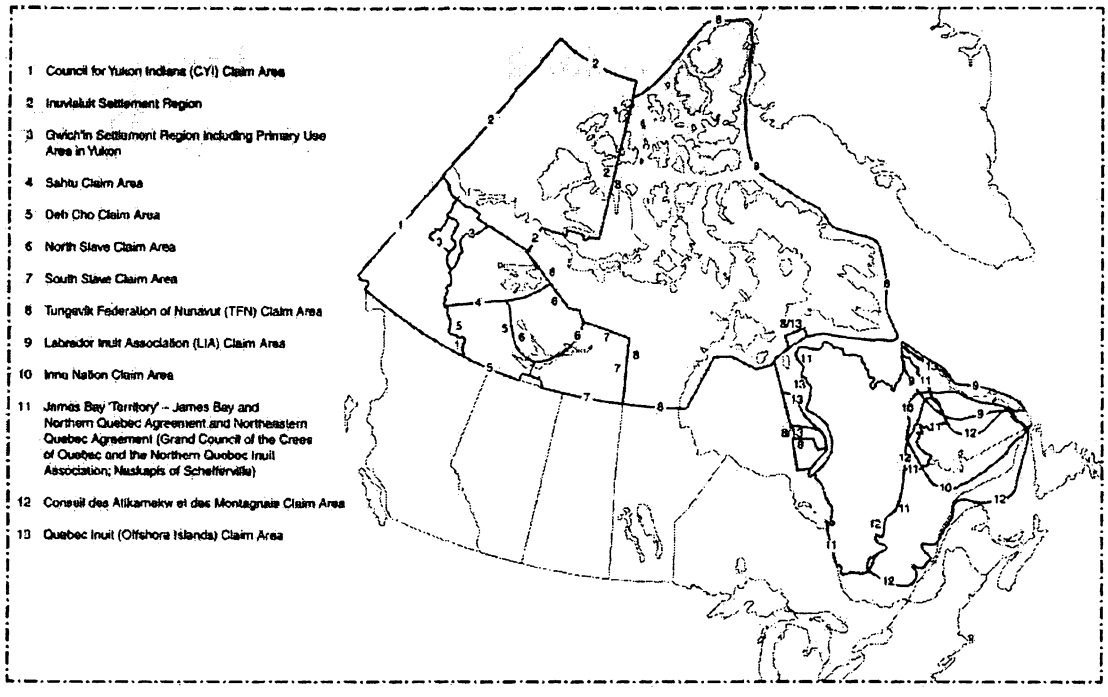
SCC: *Blueberry River Indian Band et al.* v *R:* transfer of mineral assets to DIA in 1948 breached Crown's fiduciary obligations to the band.

Can and BC: Nisga'a's Treaty Negotiations Agreement-in-Principle on Self-Government signed with Canada and BC: first modern-day Treaty in BC.
BC: BC Treaty Commission process commences over 40 sets of negotiations with First Nations over BC claims.
1997 Can: *Little Salmon/Carmacks First Nation & Selkirk First Nation Agreements* settled under comprehensive claims policy.
BC: BC Treaty Commission process increase to 50 sets of negotiations with First Nations over BC claims.
Can: National Aboriginal Financing Task Force Report.
Can: Human Rights Commission Report, *Mikmaqs of Newfoundland,* critiques Federal Govt for failure to address constitutional status of Mikmaq First Nation since Confederation in 1949.
Can: New DIAND Minister Jane Stewart affirms that RCAP provides catalyst for significant change; budget to grow by 2%; partnership, fiscal accountability, increased capacity for Aboriginal self-governance and strengthening of community infrastructure to form basis for post-RCAP renewed relationship with Aboriginal peoples.
Alta: *Pe Sakastew Centre* (Coming Sunlight) first Aboriginal self-help/ self-healing centre set up near Hobbema as an alternative to jail.

1998 – 2005 – new liberal government
1999 Nunavut Territory, Nunavut Public Government established in 1999 – majority Inuit based public government model.
2000 *Nisga'a Final Agreement 2000* settled; Nisga'a Lisims Government established within the *Nisga'a Final Agreement* settlement area in the Nass Valley, northern British Columbia. Nation-based self-government model.
2000 In *Campbell v B.C,*[7] the British Columbia Supreme Court considered an application seeking an order that the *Nisga'a Final Agreement* (NFA) is, in part, inconsistent with the Constitution of Canada and therefore, in part, of no force or effect. The Court held that the NFA defined the content of indigenous self-government expressly. The *Constitution Act 1867* did not distribute all legislative power to Parliament and the provincial Legislatures. The *Constitution Act 1867* did not purport to and does not end what remain of the royal prerogative of aboriginal and treaty rights, including the diminished but not extinguished power of self-government, which remained with the Nisga'a in 1982. Section 35 of the *Constitution Act 1982* recognised and affirmed a constitutionally limited form of self-government that remained with the Nisga'a after the assertion of sovereignty – the NFA and settlement legislation give that limited right definition. The Nisga'a Lisims Government is subject both to the limitations set out in the NFA itself and to the limited guarantee of the rights recognised and affirmed by s. 35, *Constitution Act 1982.*
2002 New Agreement concerning the new relationship between the Government of Quebec and the Crees of Quebec – Crees paid an additional $70 million a year for next 50 years for hydroelectric development; $850 million promised in construction contracts for Cree companies, training and employment and transmission lines in Cree communities, new co-management agreements negotiated forcing the government to take into account the best interests of the Crees.
2003 First Nations Self-Government Act is defeated.
2004 *Labrador Inuit Final Land Claims Agreement* settled in Labrador and Newfoundland.
2005 Hon. Ethel Blondin-Andrew, Minister of State (Northern Development) issues a Ministerial statement on the Government of Canada's involvement in the Mackenzie Gas Project

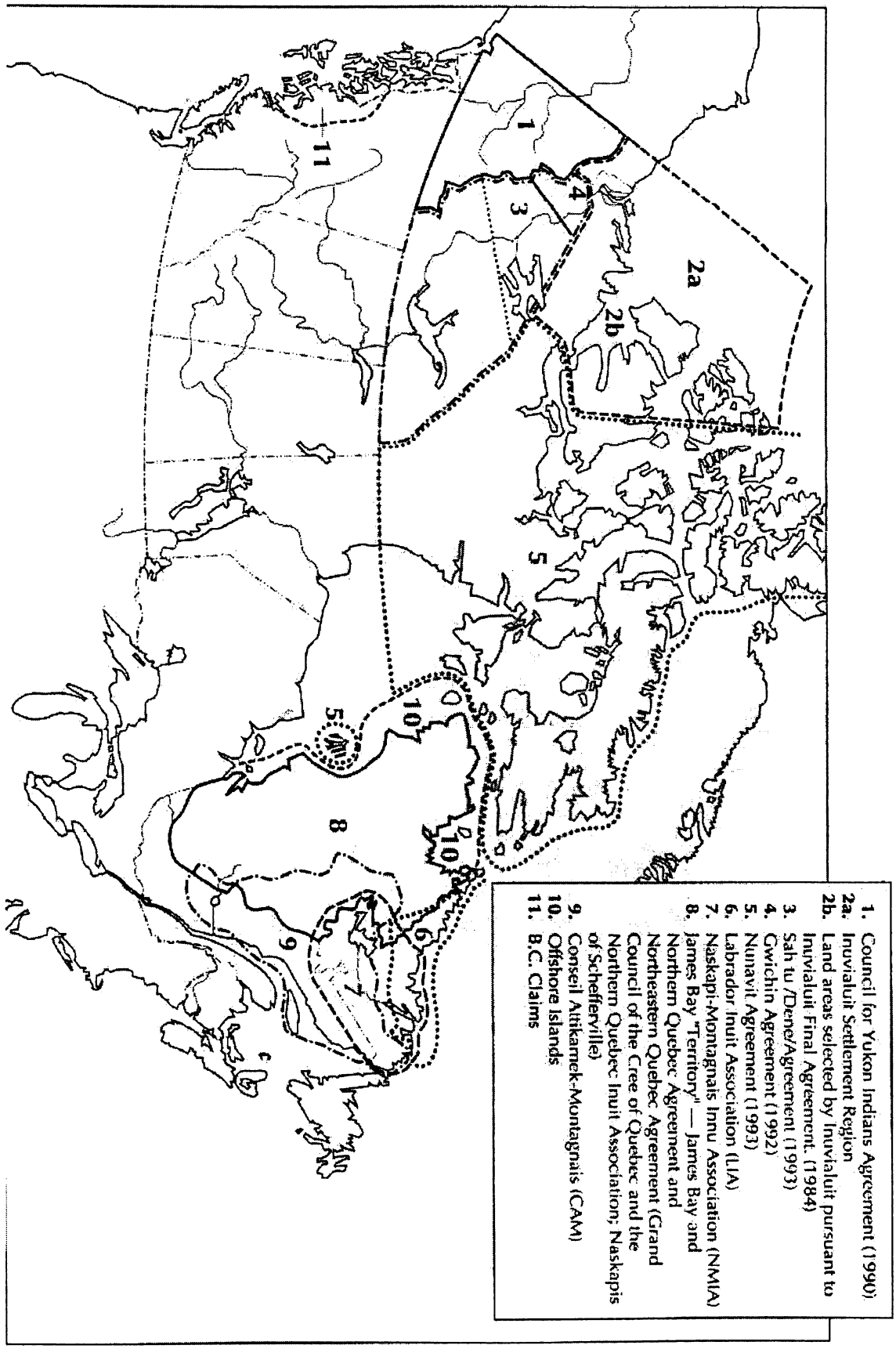
[7] *Campbell v B.C (A.G),* [2000] 4 C.N.L.R. 1 (B.C.S.C).

Self-government framework Agreement and Land Transfer Agreement for Miawpukek First Nations, April 2005.
New Nunavut Commissioner, Ann Meekitjuk Hanson appointed
Government of Canada supports First Nation hydro project.
BCTC Chief Commissioner, Hon. Judge Steven Point, appointed
Tlicho Land Claims Self-government Act receives Royal Assent
Carcross/Tagish First Nation first final and self-government Agreements signed.



Major comprehensive claim areas

Source: Adapted from Indian and Northern Affairs, Comprehensive Land Claims in Canada, Revised map June 1992, Comprehensive Claims Branch, DIAND, Ottawa.


1. Council for Yukon Indians Agreement (1990)
2a. Inuvialuit Settlement Region
2b. Land areas selected by Inuvialuit pursuant to Inuvialuit Final Agreement. (1984)
3. Sah tu /Dene/Agreement (1993)
4. Gwichin Agreement (1992)
5. Nunavit Agreement (1993)
6. Labrador Inuit Association (LIA)
7. Naskapi-Montagnais Innu Association (NMIA)
8. James Bay "Territory" — James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement (Grand Council of the Cree of Quebec and the Northern Quebec Inuit Association; Naskapis of Schefferville)
9. Conseil Attikamek-Montagnais (CAM)
10. Offshore Islands
11. B.C. Claims

16.8 APPENDIX VIII: NEW ZEALAND MĀORI CHRONOLOGY[8]

New Zealand is a unitary state and jurisdiction over Maori affairs has rested with the central government since 1851.

Pre-1860s: Cooperation / Dispossession Era

1769 Captain Cook first visits New Zealand shores.
1835 Declaration of Independence by Maori Chiefs.
1837 Report of the House of Commons Select Committee on Aborigines.
1840 Treaty of Waitangi (between Maori chiefs and Queen Victoria): Crown purports to have acquired 'sovereignty' under the doctrine of acquisition by 'cession'.
Protector of Aborigines appointed.
1841 *Land Claims Ordinance:* grants Crown right of pre-emption, i.e. power to control sale and purchase of Maori land.
1847 SC: *R* v *Symonds:* Judicial affirmation of Treaty obligations and rights but also of Crown's power to extinguish native title. Followed in 1963 *Re Ninety Mile Beach* and many other cases.
1852 *Constitution Act:* establishes a self-governing colony and separation from colony of NSW. Maori districts are included, in which chiefs would govern, but this measure is never brought into force.
Maori control 34m acres.
1858 *Native Circuit Courts Act* and *Native Districts Regulation Act:* short-lived empowerment of Tribal runanga (councils) to administer Maori customary law for dispute settlement.

1860s–1920s: Coercion / Segregation / Assimilation Era

1858 Tainui-based Kingitanga movement elects first Maori King to help with resistance against alienation of Maori lands.
1860 Maori control 21m acres.
1860–1865 Land Wars and unlawful confiscation of over 3.25m acres of land in the North Island (mostly from Waikato and Taranaki Tribes).
1861 Native Department established.
1863 *Suppression of Rebellion Act:* suspends Maori civil rights in many circumstances.
1863–1865 *New Zealand Settlements Act:* validates confiscation of Maori land on the North Island, notably Taranaki and Waikato.
1865 *Native Land Act:* promotes individualisation of Maori title to Maori land to 'destroy the principle of communism which ran through the whole of their institutions'.
Native Rights Act: purports to promote recognition of Native customs and usages.
1866 *Oyster Fisheries Act:* prohibits Maori from commercial oyster harvesting.
1867 *Maori Representation Act:* creates 4 Maori seats—under-representing potential electorate on Maori roll and requiring Maori MPs to represent massive constituencies combining many different iwi. Fails to stop Kotahitanga movement (calling for a Maori Parliament).
1870 *Native Lands Fraud Prevention Act:* to invalidate lands purchase from Maori made by means of improper consideration and trickery.
Native Schools Act: provides for compulsory primary schooling for Maori children in English.
1877 SC: *Wi Parata* v *Bishop of Wellington,* per Prendergast J: judicial nullification of the Treaty obligations and those under the 1865 *Native Rights Act.*
1880 Maori Prophet Te Whiti leads his followers in passive resistance to loss of lands.

[8] See the very useful chronologies in Asher, G & Naulls, D *Maori Land,* (1987), and Ihi Management Consultancy, *Chronology: Aotearoa 1769-1988,* (1988).

Govt reacts with draconian measures:
Maori Prisoners Act: validates indefinite imprisonment of 200 Taranaki Maori protesters for blocking the survey of confiscated land;
West Coast Settlements Act: empowers authorities to arrest and detain for up to two years with hard labour any Maori hindering the survey of land for settlement.
1886 *Native Equitable Owners Act:* attempts to regularise sale of Maori lands sold in breach of collective trusts, i.e., unauthorised sale by individuals.
1891 Maori control 11m acres.
1892 Native Councils bill, to create Maori self-management councils, withdrawn.
1892–1894 *Native Lands Purchases Acts:* to accelerate sale of Maori lands.
1894 Native Rights bill, introduced by Maori MP to give Maori power to make laws for themselves, defeated.
1900 *Maori Lands Administration Act:* restricts sale of Maori land.
PC: *Nireaha Tamaki* v *Baker*: PC criticises NZ courts for their failure to take account of the Treaty unless reference to a right was incorporated into statute.

1920s–1960s: Assimilation Era
1908 *Tohunga Suppression Act:* prohibits practice of Maori traditional healing.
CA: *Hohepa Wi Neera* v *Bishop of Wellington:* Court upholds *Wi Parata*, reasoning that *Native Lands Act* enacted that the Crown may override customary native title.
1909 *Native Health Act:* prohibits breastfeeding by Maori mothers in public and the practice of kin (whaangai) adoptions.
1911 Maori control 7m acres.
1920 Maori control 4.7m acres.
1928 Sim Commission finds Taranaki and Waikato Raupatu (confiscations) unjust and excessive.
1929 *Native Land Amendment Act:* enables Govt for first time to provide financial support for developing Maori land and commercial ventures.
1930s Depression: cash benefits for Maori at half Pakeha rate on ground that Maori can live off land.
1935 Influential Maori Ratana Church forges alliance with Labour Party, effectively guaranteeing the 4 Maori seats to Labour (until 1996).
1939 JCPC: *Hoani Te HeuHeu Tukino* v *Aotea District Maori Land Board:* almost on centenary of signing of Treaty, PC holds that for the Treaty to have any authority it must be incorporated into municipal legislation.
1945 *Maori Social and Economic Advancement Act:* sets up network of Maori committees to provide input into community developments; Maori Wardens system established to maintain law and order in Maori settlements and marae.
1947 Native Department replaced by Department of Maori Affairs.
1953 *Town and Country Planning Act:* severely restricts Maori building on Maori land and contributes to urban drift by Māori.
1955 *Maori Trust Boards Act:* creates umbrella under which statutory trust boards can be established to administer tribal assets.
CA: In Re the Bed of the Wanganui River, Courts refuse recognition of the Treaty rights unless incorporated into statute.

1960s–1970s: Integration Era
1960 Hunn Report recommends overall policy of integration as basis for monocultural New Zealand.
1962 *Maori Community Development Act:* creates Maori advisory councils at national and district levels.
Prichard-Waetford Report (on Maori Land Courts and Maori land ownership problems)

recommends ways to ease transfer of Maori land into general ownership.
1963 CA: In *Re the Ninety Mile Beach*, Court refuses recognition of Treaty rights unless incorporated into statute.
1967*Maori Affairs Amendment Act*:: Department empowered to pressure owners to sell their 'uneconomic shares' in communally owned land; where such land held by fewer than 4 people, has to be put under one title. Aims to address problem of uneconomic fragmentation of Maori land andto make transfer of Maori land to general title easier.
Rating Act :makes Maori freehold land subject to municipal rates.
1971 *Race Relations Act:* enactment justified to give domestic effect to International Convention on the Elimination of All Forms of Racial Discrimination through the Office of the Race Relations Conciliator.

1970s–1990s: Aboriginal Rights Talk / Confrontation Era
1972–1975 Kirk/Rowling Labour Government
Matiu Rata appointed Minister of Maori Affairs.
1974 *Maori Affairs Amendment Act:* makes provision for re-transferring former Maori land back into Maori freehold land.
1975 *Treaty of Waitangi Act:* establishes Waitangi Tribunal, empowered (with inquiry powers only) to investigate and recommend on Treaty breaches from 1976 onwards only, and to recommend on principles for the interpretation of the Treaty.
Land March from the North to Wellington presents 60 000 signature petition calling for preservation of Maori land in Maori hands.
3m acres remain under Maori control.

1975–1984 Muldoon National Government
1977 *Human Rights Commission Act:* enactment justified to give domestic effect to the ICCPR creates the Commission and an Equal Opportunities Tribunal.
1977–1978 Bastion Point in Auckland occupied by Maori owners. Occupiers forcibly removed by massive police force.
1977–1979 Raglan Golf Course protest by Maori owners results in return of land.
1978 First Waitangi Tribunal (WT) Reports:
(WAI 1) *Fisheries Regulations*
(WAI 4) *Kaituna River* Report [Impact on *Maori Fisheries Act* 1989]
1979 Matiu Rata leaves the Labour Party to form a Maori political party, Mana Motuhake.
1980 Royal Commission investigating Maori land system recommends ultimate abolition of Maori Land Court and incorporation of Maori land into general land transfer system.
1981 Maori protesters disrupt investiture of Maori leaders Dame Whina Cooper and Sir Graham Latimer.
Majority of district Maori Councils oppose sporting links to South Africa and Springbok Rugby Tour.
Children and Young Persons Court hears cases on a marae for first time.
Tauranga Moana Trust Board Act: Crown agrees to retrospectively pardon, and pay compensation to descendents of, tribes involved in battles of Gate Pa and Te Ranga during Land Wars of 1860s.
1982 Kohanga Reo flaxroot-based Maori language nurseries founded— expand from a handful to 119 within 12 months.
Race Relations Conciliator issues doomsday prediction, *Race Against Time* report on race relations, unless action initiated.
1983 WT: (WAI 6) *Motonui-Waitara* Report finds Crown duty-bound under Treaty to protect Maori fisheries from pollution. [Impact on *Maori Fisheries Act 1989*]
1984 Hikoi (peace walk) 2000-strong to protest national Waitangi Day 'celebrations'.

1984–1987–1990 Lange/Palmer/Moore Fourth Labour Government

1985 WT: (WAI 8) *Manukau* Report affirms Ngati Whatua guardianship (kaitiakitanga) role over Auckland harbour. [Impact on *Maori Fisheries Act 1989* and *Resource Management Act 1991*]

Treaty of Waitangi (Amendment) Act: Waitangi Tribunal empowered to conduct retrospective inquiry into Treaty breaches since 1840. Tribunal membership greatly increased.

NZ Law Commission imposes requirement on itself to take tikanga Maori into account in law reform.

Minister of Justice proposes, in *A Bill of Rights for New Zealand* White Paper, entrenched recognition of Treaty. Proposal, partially modelled on Canadian *Constitution Act 1982,* meets with opposition from all sides.

1986 Royal Commission on the Electoral System proposes Mixed Member Proportional representation (MMP) and abolition of the 4 Maori seats.

State Owned Enterprises Act: asserts requirement that actions under the Act must be consistent with the 'principles of the Treaty'.

HC*: Te Weehi* v *Regional Fisheries Officer*: recognition that Maori customary practices may override legislation of general application.

Puao-Te-Atatu: (Daybreak): Ministerial Advisory Committee criticises Department of Social Welfare for lack of recognition of Maori perspectives, and recommends policy of biculturalism.

WT: (WAI 11) *Te Reo Maori* Report. [Impact: 1987 *Maori Language Act.*]

Labour Cabinet minutes departments to prepare legislation taking into account Crown's obligations under principles of Treaty.

1987 *Maori Language Act:* declares Maori an official language, sets up Maori Language Commission to promote the language and assist Crown to do so.

CA: *NZ Maori Council* v *A-G:* declares Treaty a foundation constitutional document (contrast *Wi Parata* 1877) creating a partnership between Maori and Pakeha to act reasonably and in good faith. Crown owes fiduciary obligation to Maori to interpret legislation in a fashion consistent with the 'principles of the Treaty'.

HC: *Huakina* v *Waikato River Authority:* continues judicial recognition of Treaty principles and partnership requirement of respect for Maori values.

WT: (WAI 9) *Orakei* Report recommends return of Bastion Point in central Auckland to Ngati Whatua Māori.

1988 WT: (WAI 22) *Muriwhenua Fisheries* Report. [Impact on *Maori Fisheries Act 1989* and *Treaty of Waitangi (State Enterprises) Act.*]

Treaty of Waitangi (State Enterprises) Act: empowers Tribunal to attach a memorial to any deed of transfer concerning State-owned asset transferred under privatisation while subject to Tribunal inquiry, to the effect that such asset would resume to the Crown in the event of a finding favouring Maori claimants.

Parliamentary Commissioner for the Environment highlights Treaty principles and lack of implementation of Waitangi Tribunal's recommendations.

Royal Commission on Social Policy, April Report, asserts significance of Treaty obligations and partnership.

1989 *Crown Forest Assets Act, Education Act, Broadcasting Act:* incorporate consistency with Treaty principles provision.

Maori Fisheries Act:: recognition of Crown-iwi partnership in management of estuarine and littoral fishery through individual transferable quota system.

Govt issues Principles for Crown Action on the Treaty guidelines.

1990 Labour passes *New Zealand Bill of Rights Act* to give further domestic effect to ICCPR. No entrenched Treaty rights (or other rights) included, due to widespread opposition. Maori regard entrenchment as redundant as Treaty was already, supposedly, a

foundational constitutional document.
CA: *A-G* v *NZ Maori Council* (radio frequencies case): strongly affirms that Treaty considerations must apply to negotiations between Maori and Crown.
Runanga Iwi bill: legislation proposed to enable devolution of activities of Department of Maori Affairs to iwi authorities, supervised by the Iwi Transition Authority and conducted via direct negotiation with iwi, introduced by Labour Govt—dies on order paper between parliaments.

1990–1996 Bolger National Governments
1991 *Ka Awatea* Report sets out National Govt Maori policy, pulling back from devolution to iwi. Ministry of Maori Development replaces Department of Maori Affairs; policy of mainstreaming services to Maori through general departments.
WT: (WAI 27) *Ngai Tahu* Final Report recommends major settlement of claims affecting much of the South Island.
WT: WAI 119 *Mohaka River* Report.

1990s—Commodification of Aboriginal Rights Era?
1991 *Resource Management Act, Harbour Boards Dry Lands Revesting Act, Crown Minerals Act:* incorporate consistency with Treaty principles provision.
1992 National Cabinet adopts plan to settle all major Maori claims by the year 2000 and sets ceiling [$1b (NZ) fiscal envelope] on amount of money to be allocated for this.
Sealords Deed of Settlement signed between Crown and iwi concerning part-ownership in a fisheries multinational as fulfilment of Crown's obligations to honour Maori commercial fishery rights.
Treaty of Waitangi (Fisheries) Commission Act: establishes institutional mechanism for management and distribution of Maori fishery resource between iwi.
WT : (WAI 27) *Ngai Tahu Fisheries* Report.

1993 Bolger National Government re-elected
Treaty of Waitangi Fisheries Claim Settlement Act: extinguishes option for future Treaty-based claims to commercial fisheries in exchange for Sealords Deal.
Govt awards Maori through the Treaty of Waitangi Fisheries Commission capital [$150m (NZ)] to enter a joint venture with a multinational fishery corporation.
WT: (WAI 304) *Ngawha Geothermal Resource* Report critiques Treaty and tikanga Maori (Maori custom and beliefs) provisions of *Resource Management Act 1991.*
Te Ture Whenua Maori Act: reforms regime of Maori land to keep most Maori land in Maori hands while freeing some Maori-owned land up for sale.
1994 Maori hui (consultation meetings) across country strongly repudiate proposal for full and final settlement of treaty claims for $1b (NZ) by year 2000.
1995 *Waikato-Tainui Raupatu: Deed of Settlement:* Crown vests Tainui with interests in land [worth $170m (NZ)] in compensation for illicit confiscations of 1860s.
WT: (WAI 55) *Te Whanganui-a-Orotu* Report,
WT: (WAI 449) *Kiwi Fruit Marketing Board* Report.
1996 WT: (WAI 143) *Taranaki* Report. Kaupapa Tuatahi finds Taranaki confiscations invalid and identifies a holocaust perpetrated on Taranaki tribes in 1860s war waged by the colony.
Ngai Tahu [worth $170m (NZ)] and Whakatohea [worth $40m (NZ)] Settlement Heads of Agreement signed with Crown.

1996– Bolger–Peters, National–New Zealand First Coalition Government: first Govt after first MMP election. 15 Maori MPs elected; Labour loses control of Maori seats (won by NZ First). (Maori) Winston Peters becomes Deputy Prime Minister and Treasurer, and

Tau Henare, Minister of Maori Development.

1996 HC: *Tangiora* v *Wellington District Legal Services Committee:* HC overturns decision of legal services committee to deny legal aid for preparation of a complaint to go before UN Human Rights Committee by 18 Maori complainants against Treaty of Waitangi Fisheries Commission.

NZ Govt-proposed fiscal envelope dropped.

1997 JCPC: *Tainui Maori Trust Board & Ors* v *Treaty of Waitangi Fisheries Commission:* PC refers back to NZHC meaning of 'iwi' and mode of distribution of fisheries asset to Maori groupings and entities including urban Maori without specific iwi connections.

WT: (WAI 45) *Muriwhenua Land* Report finds Muriwhenua claims well-founded.

District Court: *Taranaki Fish & Game Council* v *McRitchie:* finds Maori customary fishing rights include rights to fish for introduced game fish, e.g. trout, without a licence.

Minister of Justice states that there is one law for Pakeha and one law for Maori and that Maori customary law recognises exclusive Maori rights.

Coalition establishes four commissions to focus govt policy on Maori:

1. Health; 2. Education; 3. Economic Development; 4. Employment.

Ngai Tahu iwi offered largest [$170m (NZ)] financial settlement in New Zealand history, transfer of land, re-introduction of Maori place names, and exclusive access at specified times to numerous sites throughout South Island. See above re Ngai Tahu Heads of Agreement.

1998-2005 Labour Clarke

1998 – 2005 Turangitukua 1999, Pouäkani 2000, Te Uri o Hau 2002, Ngäti Ruanui 2003, Ngäti Tama 2003 settlements,

2004 Waitangi Tribunal Reports – Tauranga Moana, Gisborne, Foreshore and Seabed Report (rejected); National Maori hikoi protesting the Foreshore and Seabed Bill but Act still passed, Maori Fisheries Act 2004; Don Brash Orewa speech polarised the nation;

2005 Hui Taumata, Labour re-elected to Parliament;

Ngäti Awa 2005, Tuwharetoa (Bay of Plenty) 2005, Ngä Rauru Kïtahi Treaty settlements.

16.9 APPENDIX IX: THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT 1975 (JBNQA)

The traditional area occupied by the James Bay Cree consisted of 150,000 square miles in Northern Quebec. This territory had been inhabited by the Cree Bands since time immemorial and with European encroachment, this territory became part of the Rupert's Land or the Hudson's Bay territory.[9] Several major rivers flowing into James Bay and Hudson Bay were traditionally used by the Cree as transportation routes. The territory was almost exclusively used by the Cree, and for centuries had been quite isolated. The Cree were dependent heavily upon hunting, fishing, trapping, and the harvesting of the natural resources of the land for their livelihood.[10] In 1970, the Cree were divided into eight bands, four of which had settled along the James Bay coast, one of which had settled on Hudson Bay, and three of which had settled some 500 kilometres inland.[11] The total registered Cree population was 5,638 persons, with the communities ranging in size from 250 to 2,000 all having developed as reserves with a substantial sedentarized population.[12]

1611 Henry Hudson explores the Rupert River. He discovered magnificent furs of the Indians and established the pattern for trading in the James Bay region.[13]
1670 Charles II granted a Royal Proclamation to Prince Rupert of the Rhine to serve as true and absolute Lords and Proprietors of Hudson Bay. French explorer, Grosseilliers, claims to have purchased land from the local chief while trading along the Rupert River. This trading post developed into the domain of the Hudson Bay Company.
1627 *French Charter for the Company of One Hundred Associates* allowed Indians to become French citizens if they converted to Roman Catholicism.[14] French also recognised some form of aboriginal title.
1689 Franco-Anglo battles in the Hudson and James Bay areas.
1713 *Treaty of Utrecht* placed all northern territories back in the firm control of the true and absolute Lords and proprietors of the Hudson Bay Company.
1760 *Articles of Capitulation*: Article XL recognises that Indians shall be maintained in the lands they inhabit, if they chose to remain there not molested.
1763 *Royal Proclamation* guaranteed to the James Bay Cree, Indian title to their land and reserved their native hunting territories for their use until such time as Treaties were made.
1868 *Ruperts Land Act* passed by the British Government ceding the area of Quebec to Canada.
1870 *Imperial Order in Council*, stipulating that the Canadian government must obtain the surrender of Indian Title to lands that formerly composed this domain.
1898 and **1912** *Boundary Extension Acts* where lands were transferred to the Province of Quebec. *Quebec Boundaries Extension Act 1912* recognised the rights of the Indians and the release of such rights;[15] the Trusteeship of the Indians and management of any lands reserved for their use subject to the control of the Government of Canada.[16]

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[9] See Coates, K *Aboriginal Land Claims: A Regional* Perspective (1992) for history of settlement in Quebec and the James Bay region; Hodgins, B & Cannon, K (ed) *On the Land: Confronting Visions of Self-Determination in Northern Quebec and* Labrador (1995); Diamond, B 'Aboriginal Rights: The James Bay Experience' in Bold, M & Long. J *The Quest for Justice: Aboriginal Peoples and Aboriginal* Rights (1985) at 265

[10] See Gagne, M *A Nation Within a Nation: Dependency and the Cree* (1994); McCutcheon, S *Electric Rivers: The Story of the James Bay Project* (1991); ibid, Diamond at 266

[11] La Rusic, I *Negotiating a Way of Life* (1979) at VI.

[12] Ibid, at VI

[13] MacGregor, R *Chief: The Fearless Vision of Billy Diamond* (1990) at 4

[14] Cumming and Mickenberg, *Native Rights in Canada* (1972) at *76*

[15] Elliot, D *Law and Aboriginal Peoples of Canada* (1992) at 172. See also infra, Morantz at 104

[16] Morantz, T 'Quebec' in Coates, K Aboriginal *Land Claims in Canada* (1992) at 104

1927 Quebec's boundary adjustments establishing the present day boundaries with the award of a large area of the Labrador land being awarded to Newfoundland.[17]

1971 Hydro-Electric project announced.

Dorion Commission found that by the terms of the *Quebec Boundaries Extension Act 1912,*[18] Quebec was bound to recognise certain aboriginal rights over the land, which the Act had assigned to the province, and that the region in question should not be developed until these rights had been ceded.

1972 Premier Bourassa told Cree the hydro-electric project was non-negotiable.

Under Quebec Association of Indians (IQA), the Cree and Inuit applied to the Quebec Superior Court for an injunction to stop all construction in the area. *Robert Kanatewat v James Bay Development Corp*[19]

1973 Justice Malouf granted the interlocutory injunction ordering the construction work to halt.

On appeal in the Quebec Court of Appeal the injunction was reversed within a week. Leave to appeal was refused by the Supreme Court of Canada. The Supreme Court did, however, hear the IQA's petition to appeal. Two dissenting judges expressed the opinion that there were material issues involved, which warranted a full hearing before their court.[20]

Negotiations commence between Canada, Quebec, Hydro-Quebec and the Cree and Inuit.

1974 Agreement- in- Principle signed.

1975 *James Bay and Northern Quebec Agreement* (JBNQA) signed between the James Bay Cree and Quebec Inuit, the Quebec and Canadian Governments, and the hydro-electric companies.[21]

1976 *James Bay and Northern Quebec Native Claims Settlement Act 1976* (Quebec)

1977 *Act Approving the Agreement Concerning James Bay and Northern Quebec* (Federal)

1978 Naskapi Indian Band negotiated the *Northeastern Quebec Agreement*[22] (NEQA) amending the JBNQA. The JBNQA has been amended by 12 additional agreements concluded by the parties between 1975 and 1993.[23]

1982 *Tait Report* discharged the Canadian government's responsibilities for the poor implementation of the JBNQA. Established the James Bay Agreement Implementation Secretariat to provide better coordination of implementation efforts. Cree receive $32 million to improve their infrastructure.

1983 *Constitution Act 1982* constitutional amendment to section 35 resulting in legal protection of JBNQA.

1984 *Cree-Naskapi (of Quebec) Act* provided Indian self-government for Cree and Inuit. Cree-Naskapi Commission formed to monitor the implementation of the *Cree-Naskapi Act.*

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[17] *Ibid.*

[18] Canada *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec* (Vol. 2)(Royal Commission on Aboriginal Peoples, Aug. 1995) at 34-41.

[19] *Robert Kanatewat v James Bay Development Corp and Attorney-General for Quebec* unreported, 22 Dec. 1973.

[20] MacGregor, supra n 11 at 113; Richardson, B *Regional Agreements for Indigenous Lands and Cultures in Canada: A Discussion Paper* (1995).

[21] See Feit, H "James Bay Cree Self-Governance and Land Management" in Wilmsen, E (ed) *We Are Here: Politics of Aboriginal Land Tenure* (1989); Moss, W "Implementation of the James Bay and Northern Quebec Agreement" in Morse, supra n 5.

[22] The Northeastern Quebec Agreement follows the same format as the James Bay and Northern Quebec Agreement. In return for the surrender of all their native claims, rights, titles and interest, the Naskapi of Quebec are to receive $ 9 million and land rights similar to those established under the JBNQA.

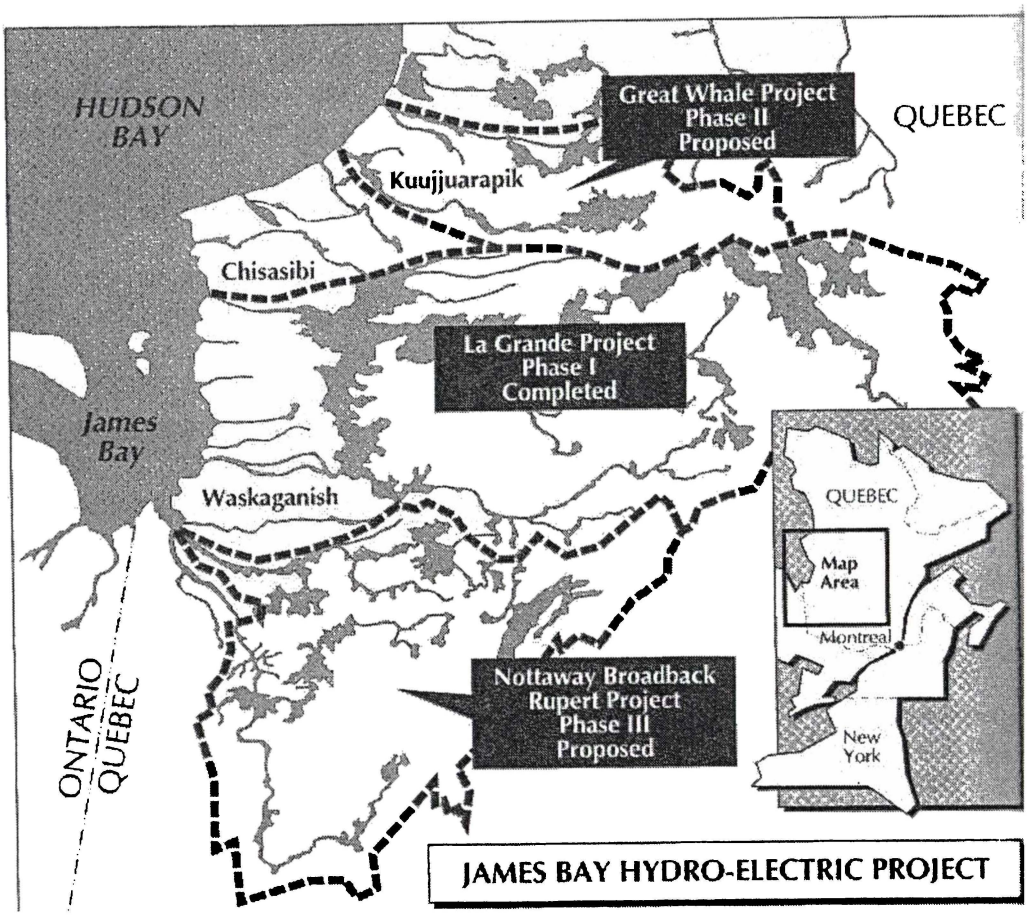
[23] Canada *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec* (Vol. 2)(Royal Commission on Aboriginal Peoples, Aug. 1995) at 35; see also Grand Council of Cree *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory Into a Sovereign Quebec* (1995).

1990s Hydro-Quebec proposed to enlarge the James Bay power scheme with the Great Whale River Complex. Cree have challenged the legal validity of the scheme, further polarising of relations, more litigation, lobbying and disputing.

1991 – 2005 update of settlement

Great whale project, La Grande project, others

2002 New Agreement concerning the new relationship between the Government of Quebec and the Crees of Quebec – Crees paid an additional $70 million a year for next 50 years for hydroelectric development; $850 million promised in construction contracts for Cree companies, training and employment and transmission lines in Cree communities, new co-management agreements negotiated forcing the government to take into account the best interests of the Crees.



MAJOR COMPONENTS OF THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT 1975[24]

Claim	The James Bay and Northern Quebec Agreement 1975
Total Cash Compensation:	Cree $ 135 Million Inuit $ 90 Million
Other Payments:	Cree $ 136 Million Inuit $ 88.4 Million
On-going Income:	Hunters and Trappers Income
Total Land Surface:	Cat. I: 14,000 sq. kms Cat II: 150,000 sq. kms Cat III: 1 Million sq, kms
Social Service Delivery Role:	Yes
Conservation Management Role:	Yes
Governance:	Local Cree and Inuit Governments Negotiations are in progress for Inuit Regional Government.

[24] ARA Consulting Group, *Social and Economic Impacts of Aboriginal Land Claims Settlements: A Case Analysis: Final Report of the BC Claims Task Force* (DIAND, Ottawa, 1995) at 8

16.10 BREAKDOWN OF THE JBNQA

The James Bay and Northern Quebec Agreement is a lengthy and complicated document. According to the terms of the *James Bay and Northern Quebec Native Claims Settlement Act 1976-77*, aboriginal title to vast tracts of land were extinguished in exchange for reserve land, financial compensation, hunting-fishing- trapping rights, economic and social benefits, participation in regional environmental planning and management, and self-determination over local affairs.[25] According to Morse, the agreement affects approximately 6,500 Cree and 4,200 Inuit who have released their aboriginal title over 379,400 square miles in Northern Quebec, to the Crown for the benefit of Quebec.[26] The main parts of the agreement, as laid down in the Act, were:

- land regime (ss.5-8);
- Cree local/regional government structures (ss. 9-13);
- health and social services (ss.14-15);
- indigenous education (ss. 16-17);
- police and administration of justice (ss. 18-21);
- environmental management and development control (ss.22-23);
- wildlife use rights (s.24);
- compensation and taxation (s.25); and
- economic and social development (s.28-29).

Extinguishment of Aboriginal Title

In dealing with the indigenous lands, the JBNQA incorporated both a 'surrender-grant-back' approach and the simple 'extinguishment' of Aboriginal title provided for in section 2.6 which directs that the enabling Federal legislation: 'shall extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory.' The former approach involves the surrender of land to the government, which in turn grants back some indigenous rights which now flow from the agreement rather than from the original Aboriginal title. This is reflected where sections 2.1 and 2.2 of the Agreement state:

> The James Bay Cree and Inuit of Quebec hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec. ...
>
> Quebec and Canada ... hereby give, grant, recognise and provide to the James Bay Cree and Inuit of Quebec the rights, privileges and benefits specified herein.

Land Regime

The JBNQA and the Northeastern Quebec Agreement (NEQA) created a four-tiered land regime, each with specific provisions regarding access to resources by the Cree. The Agreement divided the Territory into what seems to be concentric zones, namely Category IA, IB, II and III lands:

Category IA: lands transferred to Federal jurisdiction for the exclusive use and benefit of Indigenous People.

Category IB: lands transferred to Provincial jurisdiction for the Cree Village Corporations.

Category II: lands belonging to the Provincial Crown, but Indigenous Governments share management for purposes of hunting, fishing and trapping, tourism development and forestry. Indigenous People have exclusive hunting, fishing and trapping rights on these lands. Category III: lands which are a special type of Quebec public lands, unoccupied

[25] Elliot, supra n 13 at 60; see also Richardson, supra n 18 at 21.

[26] Morse, supra n 5 at 656.

Provincial lands earmarked for future development activities. Both Indigenous and non-Indigenous peoples may hunt here subject to special regulations adopted in accordance with the agreements. Indigenous groups have exclusive rights to harvest certain aquatic species and fur bearing animals and to participate in the administration and development of the land. The Quebec government, the James Bay Energy Corporation, Hydro-Quebec and the James Bay Development Corporation have specific rights to develop resources on Category III lands. Development projects are submitted for Federal or provincial government impact assessment, depending on jurisdiction.[27] According to Chief Billy Diamond:

> The agreement recognises specific and precise claims regarding the land which could have no other source other than aboriginal rights...[recognising] exclusive hunting, fishing and trapping rights over virtually all of our traditional territory. It establishes the right to hunt, fish and trap all of our species of animals, fish and birds everywhere and at all times, with limited exceptions having to do with conservation and public safety...[the agreement] further imposes specific restrictions and controls on hunting and fishing by non-Native people.[28]

Local Government Provisions

Separate systems of municipal government were established for the Cree and Inuit at both local and regional levels. Indigenous band councils were invested with local government powers over IA lands; Village Corporations managed IB lands as municipalities under Provincial law; and a Cree Regional Authority (CRA) was created to coordinate, administer, and assist in the development of common services for Cree communities at the regional level. Advisory Consultative Committees, with joint Cree and Quebec government representation, function to help define the administration of Provincial services to the Indigenous People. In addition, the JBNQA provides benefits to the Cree including provision for Indigenous involvement and substantial control over the delivery of community services such as education, health and social services, Cree police forces and the extensive control over the administration of justice.

The CRA functions as an organ of municipal government, coordinating and advising on a range of matters including environmental policy, community services, cultural programs and economic development. The CRA is funded by income from investments made by the Cree Board of Compensation. Under the umbrella of the CRA is a Traditional Pursuits Agency - concerned with the maintenance of hunting/trapping rights, conservation and environmental impact assessments, and the preservation of Cree culture. There are provisions recognising the use of the Cree and Inuit languages in administration. The Community Services Agency implements local police and legal services, oversees housing and community infrastructure construction and coordinates recreational services. The Human Resources Agency assists the training of administrative personnel and in job creation schemes; and the Economic Enterprises Agency is responsible for promoting economic self-sufficiency at the community level through coordinating sectoral developments, as well as identifying potentially feasible projects and locating funding resources for them.

In 1984, the *Cree-Naskapi (of Quebec) Act* recognised local self-government powers and set up a system of land management. The *Indian Act* no longer applies to the Indigenous beneficiaries of the Agreement except with respect to Indian status. The new Act thus recognises a form of Indian self-government for the first time in Canada.[29]

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[27] Elliot, supra n 13 at 172.
[28] Diamond, supra n 7 at 281.
[29] Ibid.,173.

Education

Sections 16 and 17 of the JBNQA established Cree and Inuit school boards which, although under Quebec jurisdiction and essentially similar to other Quebec school boards, are endowed with special powers to ensure educational programs are culturally relevant by developing a curriculum to preserve and transmit the language and culture of the Indigenous Peoples. The operational and capital budgets of the school boards are funded jointly by Canada and Quebec, with Canada paying 25% of the Inuit budget and 75% of the Cree and Naskapi budget. Management responsibility rests primarily with Quebec.

Environment and Social Protection

This regime is concerned with the undesirable environmental and social impacts of development. It attempts to maximize positive effects while assessing their impact. The principal mechanisms established under the JBNQA for protecting the environmental resources of the Indigenous communities are the Hunting and Trapping Coordinating Committee (HFTC), and the Advisory Committee on the Environment (ACE). These bodies are mandated to review environmental issues, policies and regulations and advise the relevant Provincial and Federal Ministers. Each committee includes Federal, provincial and indigenous representatives.[30]

The Cree received exclusive hunting and trapping rights on Category I and II lands, and preferential harvesting rights to wildlife resources on Category III lands which are to be shared with other users. The JBNQA recognises the efficacy of Indigenous wildlife management and provides that although all harvesting is subject to the principle of conservation (s. 24.2), there is to be only a 'minimum of control and regulation' on harvesting practices (s.24.3.30b). There is also an income security program for Cree hunters and trappers which provides cash to supplement local subsistence economies (s. 30).

Under the Agreement, environmental impact studies are mandatory for all major development projects. An Environmental Quality Commission and the James Bay Environmental Review Board, with Indigenous representation, are responsible for overseeing the EIA process. However, the hydro-power development is not subject to any of the environment terms of the JBNQA (s.27.7.2). The JBNQA also released the James Bay Corporation from all claims based on the environment impacts of their hydro-power projects and provided no obligation for the exchange of environmental information on the development projects between the corporation, government and indigenous groups.

Hunting, Fishing and Trapping

This regime provides for certain rights regarding wildlife harvesting. A coordinating committee comprised of representatives from Federal and provincial governments and three Indigenous groups was established. It administers, reviews, may set guaranteed levels of harvesting and advises governments on wildlife management.[31] The agreement provides for various economic and social development measures and for monetary compensation for the Crees from the governments of Quebec and Canada as well as special corporations to manage the compensation[32]

Compensation

A total compensation package of C$225 million was divided 60:40 between the Cree and Inuit. Of this sum, $150 million was in consideration for the surrender of Aboriginal title in northern Quebec and 75 million was compensation for the impact of future development in their homelands. The compensation monies would be paid over a 22 year period ending in

[30]Idem.
[31]Idem.
[32]Ibid., 282.

1997, but without adjustment for inflation. A Cree Board of Compensation, composed of mixed Cree and government representation, was established to receive, administer and invest this money. The Agreement also set up the James Native Development Corporation as a subsidiary of the James Bay Development Corporation, to receive $15 million of capital to invest in Cree enterprises or joint ventures with Cree entrepreneurs.

Federal Role

Federal involvement in Northern Quebec has been modified appreciably as a result of the 1975 and 1978 agreements. The Federal government now subsidises many services it formerly provided. These are now administered by local Indigenous governments and the province of Quebec. The Departments of Indian and Northern Affairs, Environment, and Employment and Immigration, are only a few of the Federal departments which play important roles in the various regimes established by the agreements. Overall responsibility for coordinating Federal activity was assigned to the Minister of Indian and Northern Affairs by the *James Bay and Northern Quebec Native Claims Settlement Act 1977.*

Overall, Chief Billy Diamond, the principal negotiator of the Agreement, initially viewed the benefits of the agreement significantly as "securing ...the traditional [Cree] way of life while allowing those Crees who wish to pursue a new way of life to do so. It also allows for a mixture of the two."[33]

[33]Idem.

16.11 APPENDIX X: MAORI COMMERCIAL FISHERIES SETTLEMENT 1992

CHRONOLOGY

Under Article II of the *Treaty of Waitangi 1840*, Maori were guaranteed 'the full, exclusive and undisturbed possession of their... *fisheries* and other possessions.'[34] Since then, Maori have seen this guarantee eroded, while the technology and scope of fishing has expanded greatly beyond the traditional fishing practices of 1840. Maori have thus had to litigate and negotiate their way into the fishing industry.

Commencing the in early 1980s, the New Zealand government moved to create the Quota Management System (QMS) to regulate commercial fishing. The *Fisheries Amendment Act 1986* substantially amended the *Fisheries Act 1983* to usher in the QMS system. The new regime required commercial fishers to obtain permits to fish. To be granted a permit they needed to earn at least $10,000 annually from fishing, or fishing had to make up 80% of their income. Many Maori were not eligible for permits - especially those in the north. The 1986 amendment was conceptually innovative, and attempted to escape from the older regulated system,[35] that contained no incentives for fishers to conserve the resource. The solution was to privatise the resource by creating valuable, transferable property rights in it that could operate in a free market. The legislation is based around the concept of quota, a fraction of a particular 'total allowable commercial catch' and an 'annual catch entitlement' (permit)[36] for a particular fish stock defined by reference to species and particular quota management areas, these latter being divisions of the New Zealand territorial sea and the Exclusive Economic Zone.

The first allocation fishing permits was based on how much commercial fishers had historically caught. Regrettably, many Maori no longer had commercial fishing permits, and so were excluded when quota was first allocated. As Maori agitated for and gained recognition of their fishing rights under the *Treaty of Waitangi* that had not been protected, efforts were made to improve the situation, especially in respect of Maori claims to commercial fishing and rights to customary or non-commercial fishing. Hence the QMS was unacceptable to Maori because the system took no account of Maori fishing rights guaranteed by the Treaty of Waitangi.

Two Fisheries Settlements

There have in fact been two fisheries settlements, one, which was understood by all parties to be an interim one in 1989, and a purportedly final settlement in 1992. Both settlements are embodied in the *Maori Fisheries Act 1989* and the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* and both are interlocked with a set of civil proceedings against the Crown brought by a broad front of Maori plaintiff groups claiming interests in marine fisheries. The Court of Appeal case *New Zealand Maori Council v Attorney-General*[37] distinguished between the so-called 'first bracket' proceedings, the original actions of 1987, which resulted in Greig J's 1987 decisions[38] to issue interim

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[34] See Law Commission, *Maori me te Tiriti o Waitangi* (New Zealand Law Commission, Preliminary Paper No. 9, Wellington, 1992) and Boast, R *Maori Fisheries 1986-1998: A Reflection* (Indigenous Peoples and the Law An online institute of law affecting Indigenous Peoples, 11 March 2000) (from which this article has dawn heavily from). Online at www.kennett.co.nz (Accessed June 2004)

[35] For an authoritative discussion of the main shifts in New Zealand fisheries management policy in the twentieth century see Taylor, R, *The State of New Zealand's Environment* (Ministry for the Environment/GP Publications, Wellington, 1997) at 9, 85-107.

[36] Pursuant to ss. 65 and 66 of the *Fisheries Act 1996.*

[37] *New Zealand Maori Council v Attorney-General* (8 October 1987) (Unreported, High Court, Wellington, CP 553/87).

[38] The interim declarations prevented the Minister of Agriculture and Fisheries from taking any steps to implement the quota system for certain fish. All of the following negotiations were conducted under the shadow of Greig J's interim declarations against the Crown of 30 September and 2 November 1987, which

declarations halting the allocation of quota, and the 'second bracket' proceedings were filed in 1988.

What were also important in the first phase of the litigation were some interim recommendations of the Waitangi Tribunal in 1987-1988.[39] The pleadings filed in the High Court raised substantial and difficult questions of law relating to the legal basis of Maori claims to fisheries and the scale and extent of such rights, including the scope of section 88(2) of the *Fisheries Act,* which stated that 'nothing in this Act shall affect any Maori fishing right.' The 1989 settlement was thus a mere expedient based on the assumption that the proceedings would at some stage be fought out in the courts and the main questions of fact and law authoritatively settled.

In the meantime the government enacted into law its interim settlement offer of October 1988 by which it agreed to transfer 10% of the available quota over a 4-year period to a new Maori Fisheries Commission (MFC). TOKM was required to establish a commercial company known as Aotearoa Fisheries Ltd (AFL), to which the Crown was to pay $10 million, and AFL was to hold half of the quota transferred from the Crown, leaving the balance free to be leased out. Once the substantive issues at stake had been resolved, a final settlement could then be implemented in future based on the outcome of the litigation all pursuant to the *Maori Fisheries Act 1989.*

While the first settlement was the outcome of a protracted and complicated history of negotiations, the second arose quite by accident from what Caren Wickliffe described as the 'entirely fortuitous event' of Sealords Ltd, which held 22% of the quota, coming on to the market.[40] It was agreed that the Crown would fund the purchase of Sealords in exchange for a final fishing settlement, and a Memorandum of Understanding was signed on 27 August 1992. This was followed by a series of hui, and while not everyone was happy with the proposal or the consultation process the Waitangi Tribunal concluded that 'there was indeed a mandate for the settlement, provided that the Treaty was not compromised.'[41] A deed of Settlement was drawn up on 23 September 1992 and the Crown agreed that it would pay to the MFC (reconstituted as the Treaty of Waitangi Fisheries Commission – TOKM – TOKM) $150 million to advance Maori commercial fishing, thus providing the finance to allow 'Maori' to proceed with a joint venture purchase of the Sealords company. The Crown also agreed that it would give 'Maori' 20% of new species quota in addition to the 10% already agreed to and implemented in statute by the *Maori Fisheries Act 1989.*

In return 'Maori' agreed that the settlement 'shall discharge and extinguish all commercial fishing rights and interests of Maori' and that the existing civil proceedings would be discontinued; it was agreed that 'Maori' would 'endorse' the QMS, support the implementing legislation, and that the Waitangi Tribunal would be stripped of its powers to consider commercial fisheries matters, all pursuant to the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, which separates commercial from customary fishing rights, and purports to wholly extinguish all Maori commercial fishing rights in exchange for the consideration set out in the deed and the *Maori Fisheries Act 1992*. The 1992 Act also amended the *Maori Fisheries Act 1989* to allow TOKM to allocate the pre-Sealord assets

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effectively halted the allocation of quota until a settlement of some kind was worked out. See *New Zealand Maori Council v Attorney-General* (8 October 1987) (Unreported, High Court, Wellington, CP 553/87) and *Ngai Tahu Maori Trust Board v Attorney-General*, (2 November 1987) (Unreported, High Court, Wellington, CP 559/87, 610/87, 614/87) which are both conveniently reprinted in the Waitangi Tribunal's *Muriwhenua Fishing Report*, (Department of Justice, Wellington, 1988) at 303-314.

[39] These Tribunal pronouncements are cited and discussed by the Court of Appeal in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 645-6.

[40] Caren Wickliffe 'The Co-Management of Living Resources and Maori Customary Fishing Rights' (Unpublished paper presented to the Indigenous Land Use Agreements Conference, Darwin, 26-28 September 1995) at 15.

[41] Waitangi Tribunal *Fisheries Settlement Report*, (Department of Justice, Wellington, 1992) at 15.

(usually called the 'pre-settlement assets' or PRESA),[42] and amended the *Treaty of Waitangi Act 1975* to prevent the Waitangi Tribunal not only from inquiring into 'commercial fishing or commercial fisheries' but also into the Sealords deed itself.[43] Section 43 of the Act provided for Maori representation on statutory fisheries bodies. It should be stressed that at no stage was the substantive litigation actually heard, and that the main Tribunal of fact when it comes to marine fisheries has been the Waitangi Tribunal, which released comprehensive reports on fisheries in 1988 and 1992.[44]

The settlements, especially the 1992 settlement, did not involve only the transfer of cash and quota entitlements. Also important was encouraging Maori to become involved in the business of fishing. To date this has mainly been done by leasing undistributed quota at a discount and by funding scholarships. Generally TOKM leases quota to iwi bodies at 60% below true market rates (although this still provides TOKM with a considerable income).[45] The Treaty of Waitangi Fisheries Commission is also responsible for devising a way of fairly distributing the benefits of the settlement to all 'Maori.'

Although Maori commercial fishing rights under the Treaty have been fully and finally settled, there still exists a Treaty obligation on the Crown to consult with *tangata whenua* to develop policies that would help to recognise the customary use and management practices of Maori for non-commercial fishing. Moreover, the *Maori Fisheries Act 1989* also constructed the concept of *taiapure* - local fisheries that are coastal waters of special significance to iwi or hapu as a source of food or for spiritual/cultural reasons. A management committee, nominated by the local Maori community, has the role of recommending fishing controls for these areas.

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[42] *Maori Fisheries Act 1989*, s 6, as amended by s 15 *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*.

[43] *Treaty of Waitangi Act 1975*, s 6(7) as amended by s 40 of the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*.

[44] Waitangi Tribunal *Muriwhenua Fishing Report*, (Department of Justice, Wellington, 1988); Waitangi Tribunal *Ngai Tahu Sea Fisheries Report*, (Department of Justice, Wellington, 1992). In the former Report (at 200) 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.'

[45] See Treaty of Waitangi Fisheries Commission/Te Ohu Kai Moana *Annual Report, 2001* AJHR C19 [2001] at 11.

16.12 TREATY OF WAITANGI (FISHERIES CLAIMS) SETTLEMENT 1992

Claim Legislation	*Treaty of Waitangi (Fisheries Claims) Settlement Act 1992* *Maori Fisheries Act 1989*
Extinguishment of Treaty Rights	Yes, ss. 9, 11 only Maori commercial fishing rights
Acknowledgement & Apology	No
Total Cash Compensation	$170 million cash.
Interest	No
Relativity Clause	No
On-going Income	Yes, Crown purchase of joint venture in Sealords Fishing Company, leasing fishing quota
Total Land	None but fishing property rights under QMS; Maori get 20% of new species quota in addition to the 10% already agreed to and implemented in the *Maori Fisheries Act 1989.*
Governance	Treaty of Waitangi Fisheries Commission reconstituted as Te Ohu Kai Moana (TOKM), a statutory governance model, pursuant to the *Maori Fisheries Act 1989* and *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*
Resource Management Role	No, but can lobby during resource consent process.
Social Service Delivery Role	Yes, encouraging Maori to become involved in the 'business of fishing' by leasing undistributed quota to iwi bodies at 60% below true market rates and by funding scholarships.
Conservation Management Role	Yes, 2 members from TOKM appointed to Fishing Industry Board (ss. 41-43), Act also acknowledges Maori as guardians of Lakes Manapouri, Monowai & Te Anau appointments (ss. 44-45).
Other	TOKM responsible for devising a way of fairly distributing the benefits of the settlement to all 'Maori.' Treaty obligation on the Crown still exists to consult with *tangata whenua* to develop policies that would help to recognise the customary use and management practices of Maori for non-commercial fishing. *Taiapure* - local fisheries that are coastal waters of special significance to iwi or hapu as a source of food or for spiritual/cultural reasons. A management committee, nominated by the local Maori community, has the role of recommending fishing controls for these areas.

16.13 APPENDIX XI: THE WAIKATO RAUPATU CLAIMS SETTLEMENT

1995

Historians have estimated that the people of Tainui arrived in Aotearoa approximately in the year 1350.[46] They settled in the areas of South Auckland, Hauraki, Waikato and the King Country. Theirs was a stable society, with clear, evolved systems of law, societal control and intertribal negotiation.[47] Prior to the Treaty of Waitangi, the people of Tainui numbered some 50 - 80,000, and they occupied the whole of their territory in settlements and areas on whose resources they depended. Good working relationships had been established with Crown agents, missionaries, friendly traders and settlers.[48] Settler technology and the desire for Tainui people to learn initiated extraordinary economic growth. 'Literacy was becoming widespread. The response to contact was powerful, positive and progressive. Politically and economically Tainui faced a future of great promise.'[49]

1820's Waikato Confederation developed under the leadership of Te Wherowhero. [50]
1839 Te Wherowhero signed the *Declaration of Independence.*[51]
1840 *Treaty of Waitangi* - Tainui did not sign the Treaty nor did they subscribe to the political compact of the Treaty.
1850's Tainui adapted and utilised introduced settler technology successfully. Flourmills were built, foodstuffs were raised. Māori owned canoes, coastal vessels and trading ships and transported many tons of agricultural produce to Auckland, Australia and America.[52]
1860 War broke out in the Waitara. Some parties from the Waikato-Maniapoto area lent support to the Taranaki people.
1863 Colonial forces wage war on the Tainui people.
1865 War ended in death, misery and the subsequent confiscation of 1.2 million acres of tribal land (Raupatu)[53] under Orders in Council made pursuant to the *New Zealand Settlements Act 1863*
Defeated King Tawhiao and his people settle deep in Ngati Maniapoto country (King Country).
1885 King Tawhiao leads a deputation to England seeking redress from Queen Victoria but refused audience.
1920 Princess Te Puea constructed Turangawaewae at Ngaruawahia to revive the Kīngitanga.
1926 Sim Commission formed to investigate the scale of confiscation (raupatu).
1927 Sim Report submitted to Parliament, found the land confiscations excessive.
1930 Pei Jones and Tumate Mahuta commence negotiating with the government over the raupatu.
1935 Formal negotiations between the Tainui people and the Crown commence over the raupatu issue.[54]

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[46] See Rice, G *The Oxford History of New* Zealand (2nd ed.) (1992); Orange, C *The Treaty of Waitangi* (1987) at 136 - 160; Tainui Māori Trust Board, *Tainui Māori Trust Board: Annual Report* 1993 at 56
[47] Toataua, H *Tainui and the Treaty of Waitangi: Tainui Me Te Tiriti o Waitangi* (1991) at 1
[48] Tainui Maori Trust Board, *Postal Referendum Information Package* (March 1995) at 12
[49] Ibid
[50] New Zealand *Te Kingitanga: The People of the Māori King Movement* (1996).
[51] *He Wakaputanga o Rangatiratanga o Niu Tireni, The Declaration of Independence*
[52] Mahuta, R *Waikato: A Case Study of Tribal Settlement* (Indigenous Peoples: Land, Resources, Autonomy Conference, Vancouver, Canada, March 1996) at 2; See Von Hochstetter, F *New Zealand, Its Physical Geography, Geology and Natural History* (Stuttgart JG Cotta, 1867) at 270; See also Temm, P in *Christian Brethren Research Fellowship Journal*, (1989) at 10; McLintock, A *Crown Colony Government in New Zealand* (1958).
[53] Mahuta, supra n 50 at 4

1939-45 Negotiations halt during World War 2.

1946 Negotiations commence with Prime Minister Fraser visiting Turangawaewae. Offer of 6000 pounds per year for fifty years and 5000 pounds thereafter in perpetuity made which after some disagreement accepted by Te Puea and the elders.[55]

1986 Tainui file a claim with the Waitangi Tribunal over the raupatu lands, the Waikato River and the West Coast Harbours-WAI 30.

1987 Crown changed State Coal to Coal Corporation, attempting to transfer the ownership and licences within the raupatu boundaries to the SOE. Tainui Maori Trust Board challenge the transfer.

1988 Crown proposes to sell Coal Corp to private concerns, Trust Board protests again.

1989 Tainui Māori Trust Board applied to the High Court to stop the sale. High Court sent the matter on to the Court of Appeal. *Tainui Maori Trust Board v Attorney General*, [56] Court found in favour of the Board and prevented the transfer. Court admonished government to negotiate the wider raupatu issue.

1994 Heads of Agreement signed.

1995 Deed of Settlement signed, and *Waikato Raupatu Claims Settlement Act* passed to finalise settlement.

1996 – 2005

1995 – 1999 – intensive tribal consultation rounds on training, new governance entities, capacity building, management, marae training, investments, scholarship strategies.

1999 Te Kauhanganui o Waikato Inc., established by tribal plebiscite, new tribal governance entity with 3 representatives per marae making it a 183 member entity. Te Kaumarua - new executive of 11 elected Kauhanganui members with 1 appointed by Te Arikinui (Sir Robert Mahuta first appointment).

2000 Governance and mismanagement crises from poor investments, bad decision-making, lack of accountability and transparency, lack of adequate systems. Write off of over $40 million in debt recovery. Liquidation of tribal companies. A series of debilitating court cases emerges with tribal fighting and leadership feuding which has an even more crippling effect on the tribe.

Mahuta & Ors v Porima & Ors (Unreported, High Court, Hamilton, Hammond J, M290/00, 9

Mahuta & Ors v Porima & Ors (CA 36/01).

Porima & Ors v Te Kauhanganui o Waikato Inc Soc Ors (Unreported, High Court, Hamilton, Hammond J, M208/00, 22 September 2000).

Porima & Ors v Waikato Raupatu Trustee Company Ltd (Unreported, High Court, Hamilton, Robertson J, M330/00, 20 February 2001)

Te Kauhanganui o Waikato Inc Soc Ors v Porima & Ors (CA 205/00).

The tribe is polarised over those mobilising support for Te Arikinui and the Kingitanga (traditional allegiance) and those who support the new democratic governance entity – Te Kauhanganui and Te Kaumarua – which cripples the tribe even more.

2001 Sir Robert Mahuta dies, leaving a vacuum in leadership.

2004 Te Kauhanganui Inc., Rules Review Committee established to review tribal governance. Tainui Group Holdings and other companies post profits again.

2005 Te Kauhanganui Inc., Rules Review Committee consultation rounds including in Otautahi (Christchurch) taurähere groups. Te Kauhanganui votes in favour of the executive's name change from Te Kaumarua to Te Arataura.

Te Kauhanganui votes in favour of the new rules review changes.

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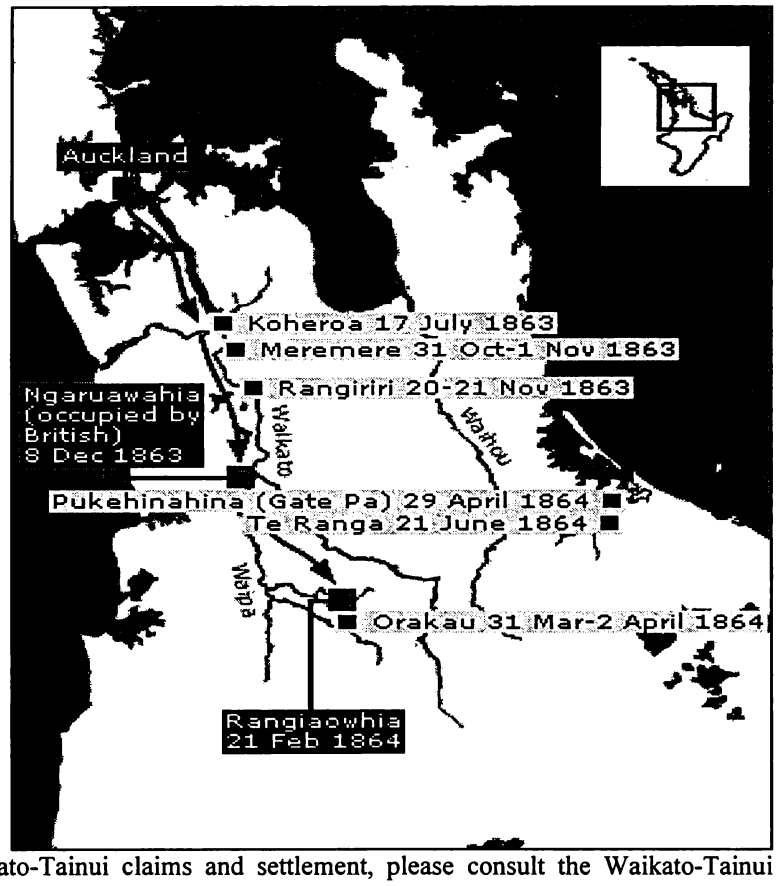
[54]Ibid at 5

[55]Ibid at 8,See also King, M *Te Puea* (Hodder & Stoughton, Auckland, 1987) at 224

[56] *Tainui Maori Trust Board v Attorney General* [1989] 2 NZLR 513 (CA).

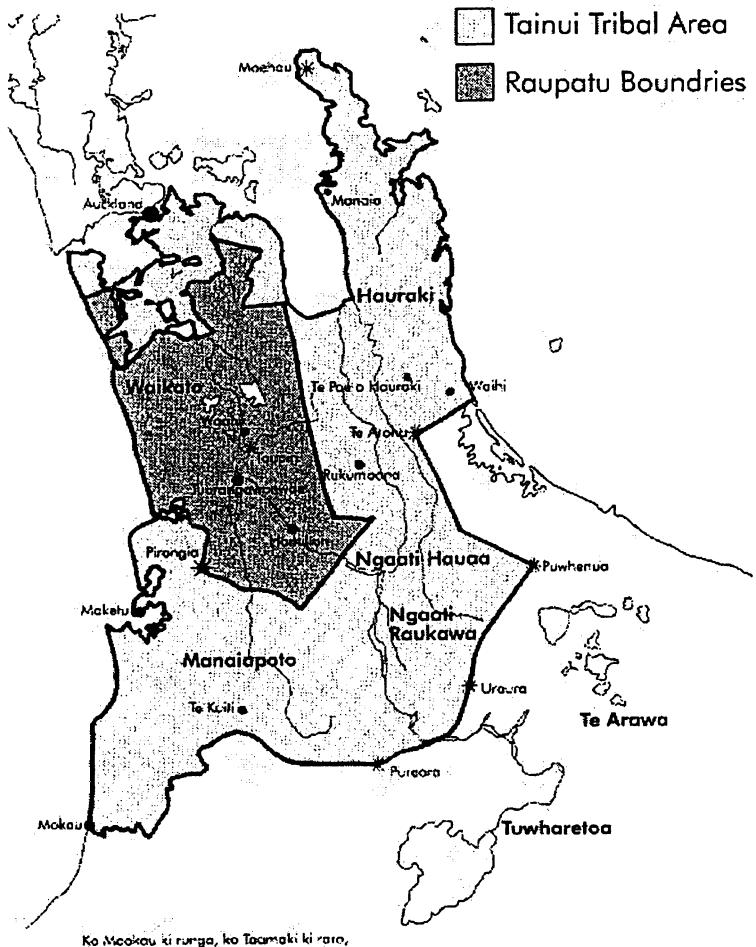
The Waikato Campaign 1863-64

- Battle Site
- Locality
- British Advance
- Great South Road



For the official record of the Waikato-Tainui claims and settlement, please consult the Waikato-Tainui Raupatu Deed of Settlement 1995 (available online at www.ots.govt.nz); and the Waikato Raupatu Claims Settlement Act 1995.

REGIONAL MAP



Ko Maokau ki runga, ko Taamaki ki raro,
Ka Mangatoatoa ki waenganui;
Ka Pare Hauraki, ko Pare Waikato,
Ko Te Kaokaoroa o Paatetere
Ki Te Nehenehenui.

From Maokau in the south,
To Taamaki - Auckland in the north.
Mangatoatoa - Tokanui centre wise
Hauraki to the east,
Waikato to the west;
And the sheltering bastion of Te Kaokaoroa o Paatetere - Raukawa
To Te Nehenehenui - Waipa.

16.14 MAJOR COMPONENTS OF THE WAIKATO RAUPATU CLAIMS SETTLEMENT 1995

Claim Legislation	*Waikato Raupatu Claims Settlement Act 1995*
Extinguishment of Treaty Rights	Yes, s. 9 but only raupatu land rights
Acknowledgement & Apology	Yes, in Act recitals acknowledging the claims validity process of rebuilding, marked the end of the grievance period, beginning of healing process
Total Cash Compensation	Land Acquisition Fund of $170 Million less Crown Land Allocations upon settlement $100 million
Other Payments	Costs $750,000 (approx.)
Interest	Yes, $45 million (approx.)
Relativity Clause	Yes, s.
On-going Income	Leases and rentals from Crown Transferred Properties (approx. $4 million / year)
Total Land	40,000 acres.[57] Crown retains 50,000 acres (gifted back to New Zealand) mostly Conservation Land
Governance	Te Kaumarua (Executive), Te Kauhanganui o Waikato (Parliament) an incorporated society under *Incorporated Societies Act 1908*
Resource Management Role	Yes, from the Resource Management Act and Legislation for other Iwi
Social Service Delivery Role	Yes, provision of education scholarships, cultural and social grants but Article III 'Citizenship' rights apply
Conservation Management Role	Yes, permanent position to the Waikato Conservation Board
Excluded Claims	West Coast harbours, Waikato River, some forests to be negotiated at a later date
Other	Acknowledgment of Crown's unjust invasion, labelling Waikato as 'rebels' and injustice of raupatu; acknowledgement of Māori contribution to New Zealand development.

[57] Tainui Maori Trust Board, *Tainui Maori Trust Board Annual Report 1995* (TMTB, Ngaruawahia, 1995) at 12.

16.15 BREAKDOWN OF THE WAIKATO RAUPATU CLAIMS SETTLEMENT 1995

The Waikato Raupatu Claims Settlement (the Waikato Settlement) is the first contemporary land settlement in Aotearoa/New Zealand. Given that the Waikato Settlement is principally a land settlement, it is not as comprehensive in its scope as the Indigenous settlements of Canada. Consequently, the Waikato Settlement is not as complex and elaborate as the JBNQA and the Nisga'a Settlement, but it is, nonetheless, as significant and important. The *Heads of Agreement, Deed of Settlement, Waikato Raupatu Lands Trust Deed* and the *Waikato Raupatu Claims Settlement Act 1995* are the legally binding documents that govern the settlement and post-settlement phase. The main features are as follows:

Preamble

The recitals have established in the public record the correct history of what happened to Waikato during the years preceding the New Zealand Wars, the effects of those wars on Waikato and the results of the raupatu - loss of lands and life and the continuing effects of the injustices of the raupatu. The correct history is now publicly acknowledged.

Furthermore, under the Deed of Settlement, the Crown acknowledges that the Waikato Raupatu Claims Settlement does not diminish or in any way affect the Treaty of Waitangi or the ongoing relationship between the Crown and Tainui in terms of the Treaty, or undermine any rights under the Treaty, including rangatiratanga rights.

Acknowledgments and Apology

Pursuant to sections 4-6, the Crown acknowledges the substantial contribution of Waikato to the development of the Waikato region, the wrong committed (raupatu), and the cost Waikato has borne. To atone for the injustices caused by the war, raupatu and its subsequent effects, the Crown has profoundly apologised to the people of Waikato. The apology further acknowledges that raupatu was in breach of the Treaty of Waitangi and refers to entering into as new age of co-operation with the Kiingitanga and Waikato.

Full and Final Settlement

The Waikato Settlement is the full and final settlement of all Waikato raupatu claims pursuant to section 9 of the Act. Moreover, pursuant to section 14, all resumptive memorials are lifted despite the provisions of such Acts as the *Treaty of Waitangi State Enterprises Act* that enables SOE lands to be subject to section 27B memorials with successful claims to the Waitangi Tribunal. The only exceptions are those SOE lands that run next to the Waikato River and lands in the Maramarua area. There will thus be no further inquiry into a raupatu land claim.

Redress

The Settlement established a Land Acquisition Fund of $170 million less Crown land allocations upon settlement ($100 million). Moreover, the redress is not only to atone for the wrong committed by the Crown but also to recognise the mana of the Kīngitanga.

Costs

The Crown payed an additional $750,000 for the costs involved in processing the claim including the direct negotiations for the settlement.

Lands

The return of Crown lands (approximately 40,000 acres) and money to purchase more lands and to establish Endowed Colleges. The Crown retains 50,000 acres of land within raupatu region, mainly Department of Conservation lands for the benefit of all New

Zealanders. Lands returned may be placed under Potatau Te Wherowhero Title pursuant to sections 19 - 21 of the Act. In effect, a new title to land in New Zealand has been created by the settlement. Lands placed under this title are held in trust, administered by three custodial trustees, and alienated only by a 75% majority vote of the Settlement beneficiary Marae and the unanimous vote of the three custodial trustees. Thus land placed under this title is virtually inalienable.

Transfer Process

The process for returning lands over a 5-year period, and a first right of refusal over residual Crown lands within the raupatu boundary not returned to Waikato, pursuant to sections 11- 13. Under section 11, Waikato has a first right of refusal and can purchase Crown lands not returned under the settlement, such as schools and DOC lands if they come up for sale. Those residual Crown lands not returned will be officially noted as having to be first offered to Waikato if there ever is a sale pursuant to section 13.

New Trusts

The Settlement has established two new trusts. Pursuant to section 18, a New Lands Trust receives the lands returned, cash to buy more lands and does not need the Minister of Māori Affairs' permission to acquire or receive lands being returned. This trust is the Waikato Raupatu Lands Trust, referred to in the *Deed of Settlement*. Section 19, enables the Land Holding Trustee to place certain lands under Potatau Te Wherowhero title, which is managed by the three custodial trustees. This Trust has the power to apply income earned off the settlement lands for a variety of purposes including payment of costs of running the trust, payment of debt relating to the trust or its property such as rates and mortgages, and the distribution of income for charitable purposes.

The second trust is the Land Acquisition Trust, pursuant to section 24, which receives the money under the settlement to purchase more lands and to also establish the Endowed Colleges. This trust lasts for the first five years after the settlement or until the money is transferred across from the Crown. The Tainui Māori Trust Board was the interim trustee of both trusts until the Kauhanganui decided by tribal plebiscite replaced it.

Endowed Colleges

As part of their financial distribution policy, one of the goals of the Waikato Raupatu Lands Trust is to establish two Endowed Colleges. These Colleges are to be established at Auckland and Waikato Universities. They are postgraduate residential colleges, which will draw from a diverse group of students including Tainui students and others nationally even internationally. The focus of the Endowed Colleges will be development management including tribal, economic, political, cultural, social, environmental and other topical developmental issues. The Waikato Endowed College is set to commence in 2000.

Ongoing Income

Some of the lands returned as part of the settlement include down town Hamilton lands, education and other lands suitable for leasing. Some of this land has also been placed under the protective regime of Potatau Te Wherowhero title including the University of Waikato, Waikato Polytechnic, Hopuhopu, Te Rapa and others. Consequently, the leases and rentals from these Crown transferred properties provide an annual ongoing income of approximately $3-4 million.

Māori Land Court

Section 22 of the Act prevents the Māori Land Court from having a say in the affairs of the tribe. This section specifically excludes the *Te Ture Whenua Māori Act 1993* from applying to the land holding trust or any land that is registrable or registered in the

name of the land holding trustee or registered under Potatau Te Wherowhero title. This provision is significant in terms of the severing of generations of past paternalistic practices.

Conservation Board

Section 25 of the Act provides for the Head of the Kāhui Ariki or their nominee to always be a member of the Waikato Conservation Board - the Board that holds the 47,000 acres of Conservation lands within the raupatu region.

Kauhanganui

Sections 27 - 29 and the fourth schedule of the Act dissolve the Tainui Māori Trust Board which is to be replaced by another governing body, determined by the beneficiaries of the settlement. A postal referendum commenced in 1998 to all beneficiaries over 18 to vote for their choice of the new management structure to manage the settlement into the next millennium. The new structure - the Kauhanganui 'great council', was the name of King Tawhiao's council. The Kauhanganui will be decided by, managed by and accountable to the people, unlike Māori Trust Boards, which are accountable to the Minister of Māori Affairs. Hence the Te Kauhanganui is another break from the paternalistic practices of the past.

Membership

Section 7, the interpretation section of the Act, defines 'Waikato' to be the Waikato descendants of the Tainui waka who suffered or were affected by the confiscation of their land under the *New Zealand Settlements 1863*, being members of the 33 hapu of Waikato. In addition, the Trust Board has outlined further criteria for legal membership including nomination and affiliation to one beneficiary Marae, with all applications being endorsed by a Trust Board member.

Implementation Interest

The implementation interest clause is hidden away in the *Heads of Agreement 1994.* This clause provides that the $170 million as compensation for the settlement will also earn an annual interest rate of 8.87 %, to be paid over the five years after the settlement. The result is that Tainui will earn another $30 million in interest. As assets are transferred, the Government will pay interest on a reducing amount - the $170 million less the value of those assets. The interest payments are to protect the value of the settlement while it is implemented over five years.

Relativity

The relativity clause is contained in the *Deed of Settlement* to ensure that the Waikato settlement is the largest settlement for Māori land claims over the next 50 years. If another tribe receives a settlement, which exceeds that of Waikato, the Crown is obligated to provide additional value to the Waikato settlement by maintaining its 17% value of any monies set aside by the Crown for Māori claims.

Exclusion

Section 8(2) outlines those claims within the Waikato region which are specifically excluded from the settlement. These include the Waikato River, the West Coast Harbours and the Waiuku and Wairoa Blocks - to be settled in the future with the raupatu claim preserved.

16.16 APPENDIX XII: NGAI TAHU CLAIMS SETTLEMENT 1998

16.16.1 CHRONOLOGY

Ngai Tahu are the people that claim traditional occupation and use rights (ownership) over the vast majority of Te Waipounamu – the South Island of New Zealand. The origins of the tribe lie in the North Island and before that in the islands of Eastern Polynesia. Through a series of migrations, wars and marriage alliances, they became firmly established as tangata whenua over much of Te Wai Pounamu by the mid-1700s. By the early 1800s they enjoyed a lucrative trade with European whalers and sealers. Although contact with Pākehā brought diseases to which the tribe had no immunity, it also led to intermarriage and knowledge of European ways. There are three main streams of descent that flow together in those histories to make up what is known as Ngai Tahu whānaui – Waitaha, Mamoe and Tahu. Over time these groups migrated across Raukawa-moana (Cook Strait) and formed the principal southern tribe known as Ngai Tahu. The iwi (tribe) lived in widely separated kainga (villages) but were connected by a closely woven mesh of whakapapa (genealogy) in chiefly marriages which system was woven together and continually reinforced by strategic marriage that also gave Ngai Tahu singular characteristics not so evident in most North Island Māori tribes.

1800s Ngai Tahu spread throughout the whole of the South Island to Rakiura (Stewart Island) and other off-lying islands. Ngai Tahu has extensive early contact with Pākehā particularly on the Eastern coast and in the far south.
Ngai Tahu groups embrace settler technology, engage successfully in trade with Pākehā whalers, sealers and traders, both in New Zealand and Australia.
1830s the central and nnorthern areas of Ngai Tahu suffer enormous casualties from musket warfare with Te Rauparaha and his North Island tribal allies. The settlements of Kaikoura, Kaiapoi and Akaroa are decimated. Southern Ngai Tahu tribes retaliate and expel the northern invaders resulting in a shift of leadership to Whakataupuka and Tuhawaiki of Murihiku (Southern Bluff area).
1840s the Musket Wars had their outcome in a negotiated peace when Ngai Tahu prisoners were returned to their homes accompanied by their former enemies, now advocates of Christianity.
1840 Treaty of Waitangi signed, Governor Hobson sent the Treaty around New Zealand seeking further signatures. May – Major Bunbury sailed around the Southern coasts collecting signatures hence its signing at Akaroa. June – Treaty signed at Ruapuke and Otakou.
June – after returning to Cloudy Bay, Major Bunbury formally declared British sovereignty over te Waipounamu by cession.
1844 The Ōtākou block - now estimated to comprise 534,000 acres - was bought by the New Zealand Company. This was done by waiving the Crown's exclusive right of purchase (as contained in Article Two of the English-language version of the Treaty). Ngāi Tahu received £2400 and less than 10,000 acres for their own occupation; more generally, they were to receive the benefits of 'civilisation.'
1848 Governor Grey visited Akaroa and discussed with the chiefs the question of a Government purchase for the whole of the area between Nelson and Otago. Using various means Governor Grey gained Ngai Tahu agreement to the deed known as the 'Kemp Purchase.' The Deed was signed 20 June and twenty thousand acres were sold for two thousand pounds. Kemp was instructed to mark out reserves for the owners before the deed was executed but he reversed the order of things, and got the deed signed first.
The Crown's purchase in 1848 of the Canterbury block - about 20 million acres, or nearly one-third of the entire country.

1849 Walter Mantell compiles a census of Ngai Tahu (1848) in order to award the promised reserves but he subsequently initiates more land transactions, namely the Banks Peninsula purchases.

1851 Pressure and demand for Ngai Tahu land and resources rapidly increases in response to organised European settlement programmes. Mantel is commissioned to inspect the southern portion of Otago with a view to its purchase.

1852 Mantell carries out more census work with plans for large reserves. The years following the major land purchases were years of hardship for Ngai Tahu. The management of reserves marked out by Mantell were increasingly problematic with disputes over ownership, occupation and succession.

1858 During this time Government officials began to promote the idea of Runanga as a means by which it could deal with and relate to the Māori groups. There was also an intention to destroy the traditional social order thus loosening the grip on tribal assets. Buller discussed

1849 Ngāi Tahu's long history of protest over these purchases begins. The rangatira Matiaha Tiramorehu complained that lands, or reserves, which the tribe wished to keep, had been included in the purchased area. This was to be a central grievance against the Crown, whose purchase agents reported that they 'got the land [Ngāi Tahu's reserves] reduced as much as possible.' Over the next 150 years Ngāi Tahu also protested against: the low prices paid:

- the broken promises over their ownership of pounamu (greenstone)
- the loss of mahinga kai (customary food-gathering places)
- the Crown's failure to provide schools and hospitals, which had been promised
- the unclear boundaries of the purchased lands
- the leasing to settlers in perpetuity of reserved lands, without the tribe's consent
- the forced sale of their interests in some lands because the Crown had already purchased these from other tribes.

Walter Mantell even supported these grievances spending the rest of his life campaigning for the government to honour its promises.

1864 Rakiura (Stewart Island) was purchased and by this time more than 34 million acres had been acquired from Ngāi Tahu in return for just over £14,750 (amounting to a fraction of one penny an acre) and about 37,000 acres in reserves for the tribe's use. Ngāi Tahu was left with about one-thousandth of their original lands.

1868 Ngai Tahu applications for title flooded into the Native Land Court before Judge Fenton at Christchurch. An additional 2,000 acres were set aside in Canterbury, and 2,100 acres in Otago but the land was not allocated equally, and people remained unprovided for, while a large proportion of the land awarded was very far below the original reserves.

1870s From the early 1870s a steady stream of committees and commissions of inquiry investigated and upheld many of the Ngāi Tahu claims. In the late 1800s the tribe made determined efforts to seek justice (led by Hori Kerei Taiaroa), often persuading the government of the day to appoint yet another inquiry. But getting compensation from the Crown took much longer.

1879 Government appointed a Royal Commission to inquire into the Ngai Tahu claim, under Smith and Nairn to investigate the problems pertaining to the Kemp Purchase. The Commission announced its findings that Ngai Tahu was entitled to the promised reserves but the Commissions funding was cut off. Despite its efforts, the Commission achieved little.

1886-7 The Native Land Court judge and Commissioner Alexander Mackay was appointed to co-ordinate yet another commission reporting (and again in 1891) that what Ngāi Tahu needed most was enough land to support themselves. Three joint committees were tasked

with the investigation of the Claims further between 1888 and 1890 but Mackay's report was largely ignored.

1890 Judge Mackay was again appointed a Royal Commissioner on the recommendation of the last Joint Committee. Mackay reported that there were a large number of people who were either landless or insufficiently provided for. Ngai Tahu complained bitterly that Mackay's parameters were too narrow.

1906 The Crown decided to make available certain lands to the complainants who had partitioned the various commissions. Ngai Tahu was not consulted about the location of the lands the government was offering. Mackay and Percy Smith were tasked with completing the lists of landless natives and allocating sections to them. The South Island Landless Natives Act 1906 eventually provided 50 acres for adults and 20 acres for those under fourteen (for those in Southland and Otago) to be awarded to landless Ngāi Tahu. 142,118 acres were allotted to 4064 people not all of whom were Ngai Tahu. Moreover, the lands were often so remote and rugged as to be virtually useless; it did not allow Ngāi Tahu to participate in the farming industry that was now the mainstay of the South Island economy.

1907 A hui of Ngai Tahu and Ngati Mamoe was held at Temuka to settle Te Kereme. A committee was established to collate documents, appoint legal advice, call meetings and levy funds. Ngai Tahu reaffirm intentions to have a Runanga based tribal parliament at Tuahiwi.

1909 Tiemi Hipi and 916 other Ngai Tahu present yet another petition to Parliament seeking settlement of the claims relating to the Kemp purchase. The Native Land Act repeals the South Island Landless Natives Act 1906 which made provisions for the Native Land Court to inquire into the matter.

1921-25 The Native Land Claims Commission recommended that Ngāi Tahu receive £354,000 compensation. While Ngāi Tahu rejected this as inadequate, the Crown considered it too much.

1925 The Native Land Court sat at Tuahiwi in order to ascertain who was entitled to participate in any relief in respect of the Kemp Purchase which resulted in division, tension and further inquiries.

1929 Prime Minister Sir Joseph Ward gave Ngai Tahu a definite assurance that Te Kereme would not be shelved any longer but would be dealt with during the coming session of Parliament. Native Land Court hearings continued to decide boundaries and those entitled to be beneficiaries from previous censuses.

1944 The Ngāi Tahu Claim Settlement Act provided for annual payments of £10,000 for thirty years to a Ngāi Tahu Māori Trust Board. The tribe was not consulted on this, however, until the legislation was passed. The Act did not prevent the tribe from further pursuing its claim. The annual payment did seem to be the maximum amount possible for the times, and was later turned into a perpetual payment. Eventually, Ngāi Tahu leaders used much of the money to pursue wider claims under the Treaty of Waitangi. In a manner similar to Waikato, Ngai Tahu did not accept that the 1946 settlement was fair, reasonable and final.

1955 The Māori Trust Boards Act reinforced the 1925 census lists and reaffirmed the requirement of beneficial right derived from them.

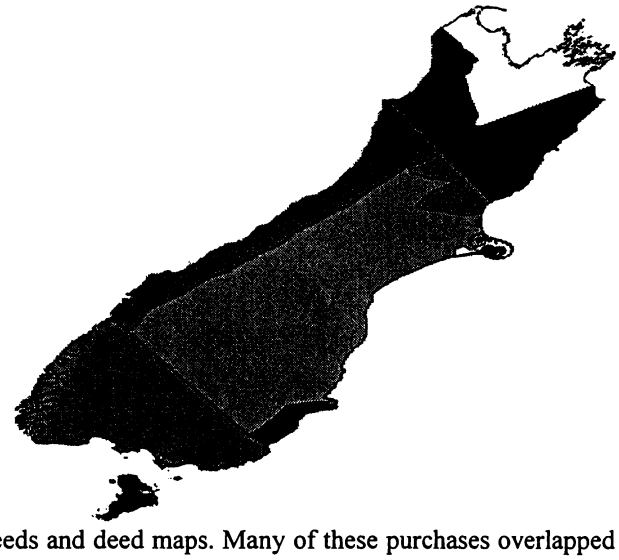
1986-1992 The Waitangi Tribunal heard Ngāi Tahu's claim, and released a three-volume report in 1991. Finding that 'the Crown acted unconscionably and in repeated breach of the Treaty of Waitangi' in its land dealings with the tribe, it recommended substantial compensation. At the time, and perhaps still, this was the Tribunal's most comprehensive inquiry.

1992 Direct negotiations with the Crown began but they were complicated by another Ngāi Tahu claim to commercial fisheries. The Tribunal reported on this in 1992. It was eventually settled during the broader negotiations, which led to the establishment of the Māori Fisheries Commission. Te Runanga o Ngai Tahu Bill introduced.

1994 Crown suspends negotiations and Ngai Tahu commences litigation.
1996 Ngai Tahu moved quickly and deliberately to establish suitable governance structures prior to settlement by establishing Te Runanga o Ngai Tahu (TRONT) pursuant to a private statute - *Te Runanga o Ngai Tahu Act 1996.* 4 months after TRONT was established, Ngai Tahu entered into a Heads of Agreement with the Crown in October.
1997-98 Crown's settlement offer made and affected on 29 September 1998. Ngai Tahu (Pounamu Vesting) Act becomes law.

Ngai Tahu Crown Purchases – Te Kereme[58]

Legend
- Akaroa 1856
- Arahura 1860
- Arahura 1860 / Kemp 1848
- Kaikōura 1859
- Kemp 1848
- Murihiku 1853
- North Canterbury 1857
- North Canterbury 1857 / Kaikōura 1848
- North Canterbury 1857 / Kemp 1848
- Ōtākou 1844
- Port Cooper 1849
- Port Levy 1849
- Rakiura 1864



Note: The Ngāi Tahu purchases according to the deeds and deed maps. Many of these purchases overlapped each other. The Kemp purchase overlapped with the Kaikōura, North Canterbury and Arahura purchases, while the North Canterbury purchase also overlapped with the Kaikoura.

[58] Waitangi Tribunal, *Ngāi Tahu Report 1991*, (Volume 1, Wellington, 1991) at 6.

16.17 MAJOR COMPONENTS OF THE NGAI TAHU CLAIMS SETTLEMENT 1998

Claim Legislation	*Ngai Tahu Claims Settlement Act 1998*
Extinguishment of Treaty Rights	Yes, s. 5(8)
Acknowledgement & Apology	Yes, acknowledging the claims validity process of rebuilding, the end of the grievance period, beginning of healing process
Total Cash Compensation	$170 Million cash, $10 million of which was paid 'On-Account' in June 1996, and another $10 million of which was paid when the settlement legislation was introduced.
Interest	Interest from October 1996 to payment date.
Relativity Clause	Yes, s. if future settlements are large relative to the Ngai Tahu settlement amount provides for 'top-up' payments to ensure the tribe's relative position is maintained
On-going Income	Leases and rentals from Crown Transferred Properties
Total Land	Settlement, commercial, farms, forestry, tribal properties, high country stations; right to buy certain Crown assets (the Deferred Selection Process and the Right of First Refusal).
Governance	Te Runanga o Ngai Tahu, private statutory model, pursuant to *Te Runanga o Ngai Tahu Act 1996*
Resource Management Role	Yes, from the Resource Management Act and Legislation for other Iwi. Ngai Tahu *kaitiaki* responsibilities provided mana over taonga resources in day-to-day management. *Nohoanga* access to *mahinga kai*, while dual place names and new mechanisms, such as *Topuni*, stamp Ngai Tahu presence and mana on the landscape.
Social Service Delivery Role	Yes, tribe to buy the assets to fund social and cultural development. Provision of education scholarships, cultural and social grants but Article III 'Citizenship' rights maintained
Conservation Management Role	Yes, *mahinga kai, topuni*, statutory acknowledgments involved in resource consent applications on certain areas, appointments on Conservation Boards
Other	Aoraki (Mt Cook) represents the restoration of Ngai Tahu mana, and Ngai Tahu and Crown Treaty partnership. Crown returned title to the tribe, Ngai Tahu to gift Aoraki to New Zealand as an enduring symbol of the Ngai Tahu commitment to co-manage with the Crown areas of high historical, cultural and conservation value; Non-Tribal Redress Claim-specific redress in non-tribal Ancillary and SILNA Claim upheld by the Waitangi Tribunal. Redress to descendants of original beneficiaries of each Ancillary and SILNA Claims. Vesting of the bed of Te Waihora, Muriwai (Cooper's Lagoon) and Lake Mahinapua and to lease Te Waihora sites; *Ngai Tahu (Pounamu Vesting) Act 1997 Ngai Tahu* Ngai Tahu own Pounamu (Jade).

16.18 BREAKDOWN OF THE NGAI TAHU CLAIMS SETTLEMENT 1998

Preamble

The recitals have established in the public record the correct history of what happened to Ngai Tahu

Acknowledgments and Apology

The Crown's apology is fundamental to the settlement. It acknowledges the validity of the claims Ngai Tahu made over seven generations. It begins the positive process of rebuilding while not forgetting the past but it also marks the end of the grievance period so healing can begin.

Full and Final Settlement

The Ngai Tahu Deed of settlement

Redress

The Settlement amount comprised $170 million.

Costs

The Crown payed $10 million 'On Account' in June 1996 and another $10 million of which was paid when the settlement legislation was introduced.

Lands

The Economic Redress also includes mechanisms that give Ngai Tahu the right and opportunity to buy certain Crown assets (the Deferred Selection Process and the Right of First Refusal).

Transfer Process

The process for returning lands over a 5-year period,

Conservation Board

Mount Aoraki (Mt Cook) is the taonga that represents the restoration of Ngai Tahu's mana. The Crown returned title to the maunga to Ngai Tahu who in turn were to gift it back to the people of New Zealand as an enduring symbol of Ngai Tahu's commitment to co-manage with the Crown areas of high historical, cultural and conservation value.

Self-Governance

Te Runanga o Ngai Tahu was established in anticipation of the settlement in 1996 pursuant to the Te Runanga o Ngai Tahu Act 1996. TRONT is a unique private statutory governance model.

Māori Land Court

The establishment of TRONT prevents the Māori Land Court from having a say in the affairs of the tribe.

Membership

Membership is based on being able to whakapapa back to an 1848-kaumātua-census list, which appears to be a property rights approach. There is no obligation on Ngai Tahu citizens to contribute back to the tribe at least officially.

Implementation Interest

The implementation interest clause provided that the Crown would pay interest on the $170 million from October 1996 to payment date.

Relativity

The relativity clause is contained in the *Deed of Settlement* to ensure that the Ngai Tahu settlement, like Waikato-Tainui, are the largest settlements for Māori land claims over the next 50 years. If another tribe receives a settlement, which exceeds that of Ngai Tahu, the Crown is obligated to provide additional value to the Ngai Tahu settlement by maintaining its 17% value of any monies set aside by the Crown for Māori claims.

The Ngai Tahu settlement provided compensation valued at $170 million. It also confirmed Ngāi Tāhu's ownership of pounamu, granted certain rights to sites of significance, and allowed them some role in managing conservation estate resources within their boundaries. The Crown also expressed its "profound regret" and apologised "unreservedly" for the suffering and hardship it had caused by not honouring its obligations. In addition, Ngāi Tahu's sacred maunga (mountain), Aoraki/Mount Cook, was to be symbolically returned to the tribe and later gifted back to the nation. (Both parties continue to discuss how this might best be put into effect.) This gesture of goodwill by both Ngāi Tahu and the Crown seemed to confirm that the Treaty relationship was at last on a more hopeful footing.

16.19 APPENDIX XIII: THE NISGA'A SETTLEMENT AGREEMENT 2000

Given that most First Nations in British Columbia (BC) have never signed Treaties, the majority of the province remains subject to outstanding Aboriginal claims. In addition, the province of B.C involves most of the outstanding comprehensive claims in Canada, which represent 75% of aboriginal claimants nation-wide. One of the more proactive First Nations in B.C has been the Nisga'a of the Nass Valley in northern B.C. The Nisga'a people have occupied the Nass River Valley since time immemorial.[59] Up until the late 1700s, there was no written history about Nisga'a culture.

1793, Captain Vancouver expedition to Observatory Inlet and Salmon Cove, first contact between Nisga'a and Europeans.
1800s, BC government rejected the validity of claims, arguing that Aboriginal rights or title were extinguished before British Columbia became part of Canada. If claims were found to exist, the province said they were entirely the Federal government's responsibility.
1858 Colony of British Columbia established
1871 B.C join Canadian confederation including the Nass Valley without consultation with the Nisga'a.[60] Moreover, B.C asserts that aboriginal rights or interests had been extinguished by the assertion of British sovereignty in British Columbia before the province joined Canadian Confederation.
1887 Nisga'a Elders travel to Victoria to demand recognition of title, negotiation of Treaties and provision for self-government
1890 Nisga'a establish their first Land Committee to begin the campaign for recognition of territorial rights
1913 Nisga'a send a petition to British Privy Council seeking to resolve the land question.
1927 Parliament of Canada holds hearings on Aboriginal title and passes legislation to prohibit First Nations organisations from discussing or spending money on land claims.
1951 Parliament of Canada repeals legislation prohibiting potlatches and organising to pursue
land claims
1955 The Nisga'a Land Committee re-establishes as the Nisga'a Tribal Council
1968 The Nisga'a Tribal Council initiates litigation in the BC Supreme Court on the land question which later became known as the *Calder v The Attorney-General of British Columbia,*[61] the *Calder* case
1973 In the *Calder* case, the Supreme Court of Canada unanimously recognises the possible existence of Aboriginal rights to land and resources but splits on whether or not this title had been extinguished. This decision prompts the Federal government to develop a new policy to address Aboriginal land claims.
1976 Canada begins negotiating with the Nisga'a Tribal Council
1989 Canada and the Nisga'a Tribal Council sign a bilateral framework agreement which sets out the scope, process and topics for bilateral negotiation
1990 The BC government, recognising that their involvement was necessary to resolve questions around lands and resources, formally joins Canada and the Nisga'a Tribal Council at the negotiating table
1991 Canada, B.C and the Nisga'a Tribal Council sign a tripartite framework agreement which sets out the scope, process and topics for negotiation.
1991 - 1995 Federal and provincial negotiators hold close to 200 consultation and public information meetings in north-western B.C

[59]Robinson, R *Nisga'a Tribal Council Meeting* (Minutes, New Aiyansh,28 August,1996) at 4.
[60]McKay, A *Nisga'a People of the Mighty River* (Nisga'a Tribal Council, New Aiyansh, 1992) at 3
[61] *Calder v The Attorney-General of British Columbia* (1973) 34 D.L.R. (3rd) 145

1992 The three parties sign an interim protection measures agreement regarding resources and land use.

1996 Canada, British Columbia and the Nisga'a Tribal Council initial an agreement-in-principle which forms the basis for the first modern-day Treaty in BC

1998 Canada, British Columbia and the Nisga'a Tribal Council initial a final agreement awaiting final ratification.

2000 *Nisga'a Final Agreement 2000* settled; Nisga'a Lisims Government established within the *Nisga'a Final Agreement* settlement area in the Nass Valley, northern British Columbia. Nation-based self-government model.

2000 In *Campbell v B.C (A.G),* [2000] 4 C.N.L.R. 1 (B.C.S.C), the British Columbia Supreme Court considered an application seeking an order that the *Nisga'a Final Agreement* (NFA) is, in part, inconsistent with the Constitution of Canada and therefore, in part, of no force or effect. The Court held that the NFA defined the content of indigenous self-government expressly. The *Constitution Act 1867* did not distribute all legislative power to Parliament and the provincial Legislatures. The *Constitution Act 1867* did not purport to and does not end what remain of the royal prerogative of aboriginal and Treaty rights, including the diminished but not extinguished power of self-government, which remained with the Nisga'a in 1982. Section 35 of the *Constitution Act 1982* recognised and affirmed a constitutionally limited form of self-government that remained with the Nisga'a after the assertion of sovereignty – the NFA and settlement legislation give that limited right definition. The Nisga'a Lisims Government is subject both to the limitations set out in the NFA itself and to the limited guarantee of the rights recognised and affirmed by s. 35, *Constitution Act 1982.*

2005 – Nisga'a have passed numerous laws regarding the governance of their territory and appear to be functioning as an indigenous self-governance entity in an effective and efficient manner.

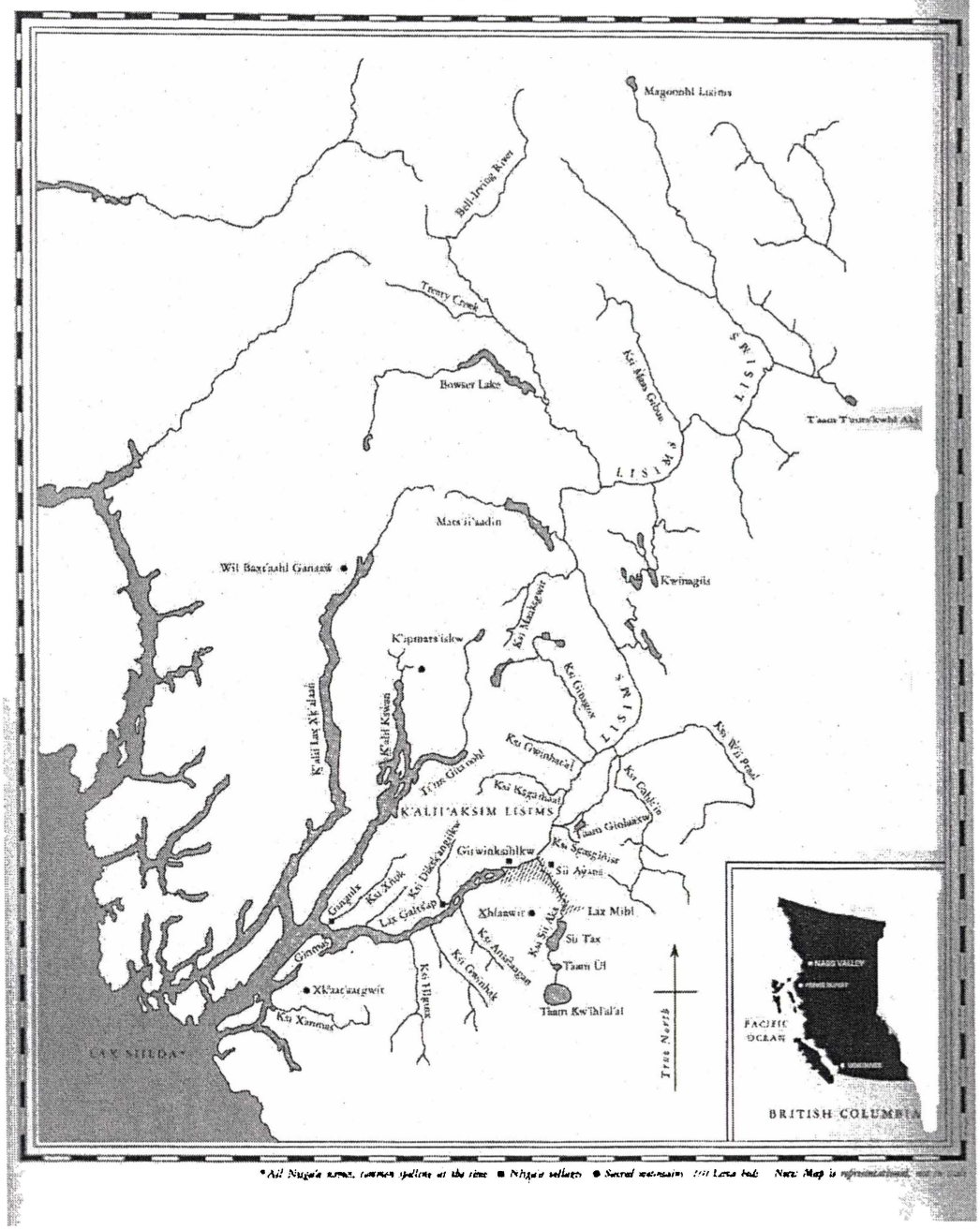
16.20 MAJOR COMPONENTS OF THE NISGA'A FINAL AGREEMENT 2000[62]

Claim	Nisga'a Final Agreement 1998 (signed 1998, enacted 2000)
Total Cash Compensation	$ 190 million
Other Payments	Nisga'a government will receive fiscal transfers to enable them to provide government services at levels generally comparable to those available in the North West region of BC.
On-going Income	Yes. Allocation of certain fish species and $11.5 million towards increased participation in the coastal commercial fishing industry.
Total Land Surface	1,992 square kilometres including surface (forests) and subsurface resources on the lands.
Resource Management Role	Yes. Environmental protection standards on Nisga'a landswill be set by the Nisga'a. These standards must meet or exceed those set by the Federal or provincial government
Social Service Delivery Role	Yes. Nisga'a government will make laws, governing culture, language, health, child welfare, education services.
Conservation Management Role	Yes. Environmental protection standards on Nisga'a lands will be set by the Nisga'a which standards must meet or exceed those set by the Federal or provincial government.
Governance	Nisga'a Lisims Self-Government
Other	Cultural artefacts will be returned to the Nisga'a by the Royal BC Museum of Civilisation; Nisga'a government will have power to tax Nisga'a citizens on Nisga'a lands; Nisga'a will manage forest resources following an eight year period; Nisga'a are also entitled to hunt moose and other species, and harvest migratory birds according to international convention and applicable laws.

[62]Ibid, See also Canada, *Nisga'a Treaty Negotiations: Agreement -In - Principle in Brief* (Tripartite Group, 1996) at 1-6; Canada *Nisga'a Agreement-in-Principle*_(Tripartite Group, 1996); Federal Treaty Office, *Treaty News* (Federal Treaty Office, 1996) at 6

NISGA'A NATION

TRADITIONAL TERRITORY



* Ait Nisga'a names, common spellings at the time ■ Nisga'a villages ● Several watercourses Ksi Lacsa bak Note: Map is

16.21 BREAKDOWN OF THE NISGA'A SETTLEMENT 2000

The Nisga'a Final Agreement provides for the following:

Constitutional Provisions

The Nisga'a continue to be an aboriginal people under the *Constitution Act 1982*. The Nisga'a continue to be entitled to the rights and benefits of other Canadian citizens. Lands owned by the Nisga'a are held in fee simple; none of the lands are reserve lands under Act or lands reserved for Indians under the Constitution. The *Canadian Charter of Rights and Freedoms* applies to Nisga'a Government and its Institutions. The Criminal Code of Canada applies. Federal and provincial laws of general application continue to apply to the Nisga'a and Nisga'a Lands unless varied by the terms of the Final Agreement. Nisga'a Government jurisdiction over Nisga'a citizens on Nisga'a Lands will be phased in over time. The *Indian Act* will no longer apply to the Nisga'a except for determining who is a Status Indian as defined in the Act and transition provisions dealing with such things as outstanding wills and arrangements for people unable to look after their own affairs. The Nisga'a aboriginal rights under section 35 of the Canadian Constitution are modified into Treaty rights.

Full and Final Settlement

The Nisga'a rights are exhaustively defined in the Treaty. The Settlement constitutes the full and final settlement of those aboriginal rights, including aboriginal title. Any other aboriginal rights that are determined to have existed, or may exist in the future, are released by the Nisga'a. The Final Agreement is not intended to affect or recognize rights of other aboriginal people. If this occurs, the relevant provision will be inoperative, and the Parties will attempt to replace the provision.

Nisga'a Lands

The Nisga'a own two types of land in fee simple: Nisga'a Lands and Nisga'a Fee Simple Lands outside Nisga'a Land: Nisga'a Lands consist of 1992 sq. km of land located in the lower Nass River area, comprised of 1930 sq. km of provincial Crown land and 62 sq. km of former Nisga'a Indian reserves (56 in number), including the four villages of New Aiyansh (Gitlakdamiks), Canyon City (Gitwinksihlkw), Greenville (Lakalzap) and Kincolith (Gingolx), which cease to be Indian reserves. Ownership of Nisga'a Lands includes forest and subsurface resources. Nisga'a Lands do not include existing fee simple lands, lands subject to existing agricultural leases and woodlot licence, submerged lands and the Nisga'a Highway. Existing traplines, guide outfitter and angling guide tenures on Nisga'a Lands remain under provincial jurisdiction. Existing legal interests on Nisga'a Lands, such as rights of way, will be continued under replacement tenures issued by the Nisga'a. However, Nisga'a Government, as owners of Nisga'a Lands, will be able to set the terms and conditions for any new interests which they choose to grant in the future.

The second type of land holdings are Nisga'a Fee Simple Lands outside Nisga'a Lands. These lands are divided into two categories:

Category A lands consist of 18 Nisga'a Indian reserves. Some of these have been adjusted to include additional Crown land totalling 12.5 sq. km. All of these reserves cease to be Indian reserves. The total size of Category A lands is 25.0 sq. km.

Category B lands consist of 15 parcels of Crown land totalling 2.5 sq. km. These lands have been transferred to the Nisga'a Government to provide economic development opportunities.

Both categories of land are owned by Nisga'a Government, but will be subject to provincial laws. The Nisga'a have the ability to bring some or all of their land into the provincial land title system. The Land Title Act will apply to any Nisga'a Lands brought into the system. The Nisga'a receive a commercial recreation tenure, which operates under provincial laws.

Naming Nisga'a Cultural Sites

Key cultural sites are designated provincial heritage sites under provincial legislation. Key geographic features are renamed with Nisga'a names in accordance with provincial policy. The Nisga'a Memorial Lava Bed Park and Gingietl Creek Ecological Reserve continue under provincial ownership and jurisdiction. Bear Glacier is established as a 'Class A' provincial park.

Water Rights

The Province retains full ownership and regulatory authority over water. Existing water licences remain in place. The Nisga'a have a water allocation equal to one per cent of the annual average flow from the Nass Valley watershed for their domestic, industrial and agricultural needs. The Nisga'a also have a reservation for the purpose of conducting studies to determine the suitability of streams for hydropower purposes. Any hydro development will be subject to provincial approval and regulation.

Forestry Resources

The Nisga'a own all forest resources on Nisga'a Lands. Existing licensees will continue to harvest timber on Nisga'a Lands for a five-year transition period. The Nisga'a may establish rules and standards which meet or exceed provincial standards to govern forest practices on Nisga'a Lands following the transition period, or for Nisga'a harvesting operations during the transition period. In recognition of provincial licensees continuing to harvest timber on Nisga'a Lands during the transition period, the Province will put the Nisga'a in the same economic position as if there were no transition. Existing forest licence holders must meet their silviculture obligations. The Province supports in principle the Nisga'a purchase of an existing timber forest licence to a maximum of 150,000 cubic metres. Any such acquisition would be subject to approval and regulation under the *Forest Act*.

Public Access

The public have access to Nisga'a public lands for hunting, fishing and recreation. Nisga'a Government can regulate access for public safety and protection of environmental, cultural or historic features. Fee simple property owners and third party tenure holders have guaranteed access to their interests. The Nisga'a Highway through Nisga'a Lands remains a provincial highway. Other key roads which provide access for the public, residents and commercial activities are held by the Province as perpetual and exclusive rights of way. The Federal and provincial governments can acquire interests in Nisga'a Lands (e.g. rights of way) for public or industrial purposes, subject to fair compensation.

Fisheries Resource

The Nisga'a have an annual allocation of salmon which will, on average, comprise approximately 17 per cent of the Canadian Nass River total allowable catch. In addition, the Nisga'a have an allocation of sockeye and pink salmon for domestic and commercial purposes under a harvest agreement outside the Treaty. The Nisga'a can sell their salmon only if there are directed harvests in commercial or recreational fisheries. All sales are subject to laws of general application.

Canada and British Columbia retain responsibility for conservation and management of fisheries and fish habitat, according to their jurisdictions. The Nisga'a can regulate their harvest subject to annual fishing plans approved by the Federal and provincial Ministers. A joint management committee with representatives of the Nisga'a, British Columbia and Canada will make recommendations to the responsible Federal or provincial Minister on Nisga'a fisheries, fisheries management and enhancement activities.

The Nisga'a have an entitlement to harvest steelhead for domestic purposes. They will have a specific allocation for summer-run steelhead when the stocks can support such a harvest. The Nisga'a also have an entitlement to harvest non-salmon species for domestic purposes, as well as allocations for oolichan and bivalve shellfish and future allocations for species such as halibut, crab and herring. Non-salmon entitlements may not be sold.

Furthermore, the Nisga'a receive $11.5 million for participation in the commercial fishing industry through the purchase of vessels and licences, and other fisheries initiatives. A fisheries

trust affirms a Nisga'a stewardship role for Nass River fisheries. The Nisga'a cannot establish large fish processing facilities for eight years following the effective date of the Final Agreement.

Wildlife Harvesting

The Nisga'a have a Treaty entitlement to harvest different wildlife species and inland fish for domestic purposes in the Nass Wildlife Area, an area comprising the Nisga'a Lands and some surrounding Crown land. They have specific allocations for moose, mountain goat and grizzly bear. The Nisga'a can harvest migratory birds according to an international convention and applicable laws of general application. Nisga'a hunting will be subject to conservation, public health and public safety requirements, and will not interfere with other authorized uses of Crown land or the ability of the Crown to dispose of Crown land.

The Nisga'a are required to prepare an annual management plan for their harvest, which must be approved by the Minister. A wildlife committee, with representatives of the Nisga'a, British Columbia and Canada, will make recommendations respecting the Nisga'a harvest and wildlife management in the Nass Wildlife Area. The Nisga'a cannot sell wildlife, but can continue to trade and barter among themselves or with other aboriginal people. Nisga'a citizens who hunt wildlife outside the Nass Wildlife Area will be subject to provincial laws.

Conservation Role

The Nisga'a have concurrent authority with Canada and British Columbia for environmental assessment and protection on Nisga'a Lands, but Federal and provincial laws prevail if a conflict occurs. British Columbia and Canada may respond to natural disasters and environmental emergencies on Nisga'a Lands.

Government

The Nisga'a have a "central" government (Nisga'a Lisims Government) and four village governments, similar to local government structures. The Nisga'a have a constitution that spells out the structure, duties and functions of their government and ensures it is open, democratic and accountable to the Nisga'a people. The Nisga'a can make laws governing such things as culture and language, public works, regulation of traffic and transportation, land use and solemnization of marriages.

Social Service Delivery Role

The Nisga'a continue to provide health, child welfare and education services under existing arrangements, but may also choose to make laws in these areas. All Nisga'a law-making powers are concurrent with those of Canada and British Columbia. The Nisga'a have no exclusive powers. Most Nisga'a law making is limited to Nisga'a Lands and Nisga'a people. Powers related to solemnization of marriages, social services and adoption apply to Nisga'a people throughout the Province with their consent. People residing on Nisga'a Lands who are not Nisga'a citizens: will be consulted about and may seek a review of decisions which directly and significantly affect them; and can participate in elected bodies which directly and significantly affect them.

Justice and Policing

With the approval of the provincial Cabinet, Nisga'a Government can provide full policing services on Nisga'a Lands in the same manner as larger municipalities. The police must meet the provincial requirements for training, qualifications and professional standards that apply to municipal police. The Nisga'a can establish a Nisga'a court, which will have jurisdiction over Nisga'a laws on Nisga'a Lands. The Court must meet provincial standards for independence, accountability and supervision. Accused persons may choose to have their cases heard in Provincial Court. Nisga'a Lands will continue to be part of Electoral Area "A" of the Kitimat-Stikine Regional District. Nisga'a and the Regional District may enter into service agreements or otherwise coordinate their activities with respect to common areas of responsibility.

Funding

Nisga'a Government continue to receive fiscal transfers from Canada and British Columbia to enable them to provide government services at levels reasonably comparable to those available in the Northwest region of British Columbia. Nisga'a Government's ability to raise revenue is

taken into consideration when fiscal transfers are calculated. Fiscal financing agreements are negotiated every five years.

Compensation

The Nisga'a receive $190 million from Canada and BC, which will be paid over a period of 15 years.Canada also contributes $10 million to a fisheries trust. In addition, the Nisga'a receive $10.4 million for implementation activities, approximately $16.1 million over five years for new fiscal support and $30 million for infrastructure and training development. Canada is responsible for the large majority of this funding.

Tax

Nisga'a Government has authority to levy direct taxes on Nisga'a citizens on Nisga'a Lands. Nisga'a Government and British Columbia may negotiate a tax delegation agreement to permit Nisga'a Government to impose property taxes on non-Nisga'a occupiers of Nisga'a Lands, once Nisga'a Government imposes these taxes on its own citizens. Nisga'a Government generally is tax-exempt in respect to its government activities, similar to other local governments in Canada.

The Indian Act tax exemption for Nisga'a citizens will be eliminated after a transitional period of eight years for transaction (e.g. sales) taxes and 12 years for other taxes (e.g. income). Nisga'a Government, Canada and British Columbia will negotiate the coordination of their respective tax systems on Nisga'a Lands.

Nisga'a Artifacts

The Royal British Columbia Museum and the Canadian Museum of Civilization will return a significant portion of their collections of Nisga'a artifacts to the Nisga'a. The museums retain collections of Nisga'a artifacts for the public.

Dispute Resolution

If disputes arise on the application, implementation or interpretation of the Final Agreement, the Parties will try to resolve them through co-operative negotiations and a variety of mediation options. If these efforts fail, they will have recourse to arbitration or the British Columbia Supreme Court.

Membership

Criteria for Nisga'a enrolment reflect the matrilineal system and the Ayuukhl (Nisga'a traditional law). An enrolment committee comprising eight Nisga'a persons (two from each of the four tribes) is responsible for establishing a register of names. A three-member appeal board will consider appeals from the enrolment committee's decisions.

Ratification

The Nisga'a will submit the Final Agreement to a special assembly of the Nisga'a Nation which will authorize a referendum. The Nisga'a will have ratified the Final Agreement if 50 per cent plus one of those persons eligible to vote in the referendum vote to approve.

British Columbia and Canada will ratify the Final Agreement by signature of the responsible provincial and Federal Ministers and enactment of provincial and Federal settlement legislation.

16.22 APPENDIX XIV – TABLES ON SOCIO-ECONOMIC DIFFERENCES BETWEEN INDIGENOUS GROUPS IN CANADA, NEW ZEALAND, U.S.A. AND AUSTRALIA[63]

Table 15.1: Indigenous Peoples in Australia, Canada, New Zealand and the United States, 2001		
Nation	**Indigenous People**	**Percentage of Total**
AUSTRALIA		
Aboriginal Australians	416 500	2.1
Torres Strait Islander Australians	26 000	0.15
Aboriginal & Torres Strait Islander descent	17 500	0.15
Indigenous Australians	460 000	2.4
TOTAL POPULATION	19 485 300	
CANADA		
(Registered Indians)	(558 175)	(1.9)
(Not Registered)	(418 135)	(1.4)
Total Aboriginal only population	976 305	3.3
North American Indians only	455 805	
North American Indian and non-Aboriginal	501 840	
Metis only	72 210	
Metis and non-Aboriginal	193 810	
Inuit only	37 030	
Inuit and non-Aboriginal	14 365	
Other Aboriginal multiple origin	44 835	
Total Indigenous population	1 319 890	4.5
TOTAL POPULATION	29 639 035	
NEW ZEALAND		
Maori single ethnicity	273 438	
Maori & European	151 869	
Maori & pacific islander	13 758	
Total "Maori"	441 400	14.5
(Non-Maori) Polynesian only	124 083	
Polynesian & Maori	240	
Polynesian & European	17 811	
Total "Polynesian"	142 134	5.6
("European" only*)	2 115 050	(57.0)
TOTAL POPULATION	3 831 000	
UNITED STATES		

[63] Kauffman, P *Diversity and Indigenous Policy Outcomes: Comparisons between Four Nations* (Department of Foreign Affairs and International Trade: Ottawa, 2003) Available at: http://www.dfaitmaeci.gc.ca/aboriginalplanet/750/resource/canada/documents/diversityindigpolicy-en.asp#t1 (accessed July 2005)

One race		
(White)	211 460 000	(75)
(African American)	34 660 000	(11)
(Latin American)	35 300 000	(11)
(Asian)	10 100 000	(4)
American Indian and Alaskan native	2 475 956	0.9
Native Hawaiian and pacific islander	398 835	0.1
Two or more races		
American Indian/Alaskan native and white	1 082 683	0.4
American Indian and African American	182 494	0.1
American Indian; White; Black	112 207	-
American Indian and other race	182 494	0.1
Other, including American Indian	172 119	0.1
Total American Indian	4 119 301	1.5
TOTAL POPULATION	281 412 910	

Table 15.2: Socio-economic differences between Indigenous Peoples in Australia, Canada, New Zealand and United States 2001

Indicator	Australian Aboriginal	Aboriginal Canadian	Maori	Native American
Demographic profile				
Median age	20.0	25.5	21.4	27.0
Population under 15 years (%)	39.0	33.2	37.0	TBA
Single-parent families (%)	28.1	26.6	TBA	39.0
Total fertility rate	2.1	2.5	2.6	2.1
Employment (%)				
Unemployed	20.0	24.0	10.0	14.6
Employment rates (employed/ total population > 16 years old)	44.0	44.3	56.0	TBA
Education (%)				
Speak Aboriginal or Maori language at home	13.3	29.3	15.0	23.0
Left school <16 years	40.0	21.9	26.4	26.8
Post-school qualification	13.6	36.6	85.0	TBA
Completed certificate/ diploma	7.2	17.1	23.0	TBA
With University degree	2.6	3.3	4.0	2.1
Health				
Infant mortality rate (/1000)	14.0	11.6	7.5	8.3
Youth suicide (12-24 year males/100 000)	108.0	TBA	56.0	36.4
Smokers (% of population)	45.0	TBA	50.0	34.0

Diabetes sufferers (%)	24.0	TBA	30.0	11.0
Male life expectancy	56.0	68.2	67.2	67.6
Female life expectancy	63.0	75.9	71.6	74.7
Home ownership (%)	32.0	TBA	50.0	TBA
Prisons (%)				
Non-Indigenous population in prison	0.12	0.1	0.06	0.7
Indigenous population in prison	1.7	0.6	0.5	1.0
Rate of Indigenous over-representation	14 times	6 times	8 times	1.4 times

Table 3: Annual income differences between Australian, Canadian New Zealand and United States Indigenous adults 2000

Income unit	Australian Aboriginal %	Canadian Indians%	Maori %	Native American %
Median income, adults	$A 13 000	$C 19 640	$NZ 15 600	US$ 21 620
Median income, adults (US$)	7 180	16 640	7 920	US$ 21 620

Table 7 - Key national policies and Indigenous outcomes

	Australia	Canada	New Zealand	United States
Constitutional recognition of Indigenous Peoples	No	Yes	Yes	Yes
Indigenous treaties	No	Yes	Yes	Yes
Diversity policies	Few	Yes	Yes	Yes
OUTCOMES				
Male life span (Years)	56	68	67	68
Infant mortality (per 1 000)	14	12	8	8
Over-representation in prison	14 times	6 times	8 times	1.4 times

16.23 APPENDIX XVI TABLES HIGHLIGHTING THE CHANGES IN NGĀTI HAUĀ HAPŪ FROM 1840-2005

The following tables show the names of Ngāti Hauā hapū that were listed officially between 1840 and 2005.

Table 16.1 Jones' 1840 'Sub-Tribes' List[64] and Fenton's 1857 'Family' List[65] for Ngati Haua (excerpts taken from Tables 10.5 and 10.7 respectively)

List	Ngati Haua 'Sub-Tribes'/'Family' (Hapu?)				Total
Jones 1840	Haua (tuturu or proper)	Hinerangi	Koroki	Wairere	'Sub-Tribes' = 4
Fenton 1857	Hanui Haua Heke Hiniuira Hourua	Hua Kahukura Koroki Ngarangi	Pari Purangataua Taka Te Ruarangi	Teao Tehura Wairere Werewere	'Family' (Hapu?) = 17

Table 16.2 Ngati Haua Hapu from the Maori Censuses AJHR in 1874,[66] 1878[67] and 1881[68]

Year of Census	Ngati Haua Hapu				Total
1874	Hanui Koura Pare	Purangataua Rangi	Te Oro Te Ruarangi	Wairere Werewere	9
1878	Kahukura				1
1881	Hape Hau	Kahukura Tawhaki	Te Paea Teoro	Werewere	7

Table 16.3 Ngati Haua Hapu Listed in the Western Maori Electoral Roll 1908[69]

Ngati Haua Hapu				
Hauatuarua	Kahukura	Rongo	Te Omanga	Waenganui
Haurua	Kopirimau	Rua	Te Oro	Waikai
Hineaia	Koura	Ruarangi	Te Patukoko	Waiora
Hinepare	Naenae	Tahauariki	Te Rangi	**Wairere**
Hinerangi	Pare	Takaiwa	Te Ruarangi	Wera
Hinetore	Parehineaira	Takihiku	Te Uringahuru	Werewere

[64] Jones, P T 'Tainui Canoe Area 1840' (Unpublished Map, Photostat of MS prepared by Pei Te Hurinui Jones for Centennial Branch, Department of Internal Affairs, 1940).
[65] Fenton, F *List of the Tribes and Hapus of the Waikato District* AJHR 1860 B-No.9 – F-No.3, at 146-149.
[66] 'Approximate Census of the Maori Population' in AJHR 1874, G-7 at 5.
[67] 'Enclosures' in AJHR 1878, G-2, at 15. This enclosure also lists Ngāti Hauā as a 'tribe' in the Whakatiwai Te Akaaka area but the hapu is unknown. Idem.
[68] 'Census of the Maori Population, 1881' in AJHR 1881, G-3, at 15.
[69] New Zealand, *Western Maori Electorate: List of Maori Electors who voted at the General Election in Above-Named Electorate in 1908* (Wellington: Government Printer, 1908).

Ngati Haua Hapu				
Hinetori	Parikirangi	Tama	Te Waharoa	Weriweri
Hinewai	Peehi	Tamanga	**Te Werokoko**	Whaearua
Horo	Puraho	Tawhaki	Timihi	Whakamarurangi
Hourua	Purangataua	Te Ata	Timomanga	Wharekirangi
Hua	Rangi	Te Kahurangi	Ueroa	Whati
Kaeroa	Reremai	Te Mihi		

Total Hapu = 58

Table 16.4 Ngati Haua Hapu Listed in the Māori Electoral Roll 1949[70]

Ngati Haua Hapu				
Hape	Maru	Tahu	Tipa	Wehiwehi
Hekewai	Pourua	Tangata	Tu	Wera
Herewai	Rangi	Tawhaki	Wahangarau	Werewere
Hinemihi	Ruahine	Te Ao	Wainuiarua	1.1.1.1.1 Werokoko
Kahukura	Ruru	Te Oro	Wairere	Whaearua
Kauwhata				

Total Hapu = 26

Table 16.5 Ngati Haua Constituent Hapu in the Waikato Maniapoto Maori Claims Settlement 1947,[71] **1948**[72] **and 1995**[73]

Year	Ngati Haua Constituent Hapu				Total
1947	Koroki Raukawa ki Panehaukua	Ruru Te Werokoko	Wairere	Werewere	6
1948	Haua Koroki	Raukawa ki Panehakua	Ruru Te Werokoko	Wairere	6
1995	Haua Koroki	Raukawa ki Panehakua	Ruru Wairere	Werokoko	6

16.24

[70] Mako, C *Nga Iwi Me Nga Hapu i te Tau 1949: An Analysis of the Tribal and Sub-Tribal Affiliations of 1949 Maori Electors* (Working Paper, Wellington: Department of Maori Affairs, 1989) at 26.
[71] *The New Zealand Gazette 1947,* (No. 30, Government Printer, Wellington, 1947) at 710.
[72] New Zealand Government *The New Zealand Gazette 1948* (No. 41, Wellington: Government Printer, 1948) at 906-7.
[73] *Waikato Raupatu Claims Settlement Act 1995,* s. 7 & *Waikato Deed of Settlement 1995*, clause 34 Definitions.

16.25 APPENDIX XVII TABLES HIGHLIGHTING THE CHANGES IN NGĀTI MANIAPOTO HAPŪ FROM 1840-2005

The following tables show the names of Ngāti Maniapoto hapū that were officially listed between 1840 and 2005.

Table 17.1 Jones' 1840 'Sub-Tribes' List[74] and Fenton's 1857 'Family' List[75] for Ngati Maniapoto (excerpts taken from Tables 9.5 and 9. 7 respectively)

List	Ngati Maniapoto 'Sub-Tribes'/'Family' (Hapu?)				Total
Jones 1840	Hari Huiao Kinohaku Matakore Paemate	Pahiri Paiariki Raerae Rangatahi Rarua	Rereahu Rora Rungaterangi Te Ihingarangi Te Kanawa	Tutakamoana Uekaha Urumumia Waiora Whakatere	'Sub-Tribes' = 20
Fenton 1857	Awekaha Hikairo Hua Huiao Kaputuhi Kinohaku Mahuta Makahori	Makino Maniapoto Matakore Ngawaero Ngawai Paiariki Puhiawe Rereahu	Rora Paiariki Ruaroa Te Kanawa Te Pairangi Te Rahurahu Umarouru	Te Kanawa Urunumia Waha Wai Waiora Wera Waha	'Family' (Hapu?) = 27

Table 17.2 Ngati Maniapoto Hapu from the Maori Censuses in 1874,[76] 1878[77] and 1881[78]

Year of Census	Ngati Maniapoto Hapu				Total
1874	Nekaha Te Kanawa Tauhunu	Rangi Urumuruia	Pehi **Paretekawa**	Kinohaku Parekahuki	9
1878	Kinohaku Ngatipu Ngawaero **Ngutu** Paia	Parekaihuia Parekaihuki **Paretekawa** Puhi	Rora Te Kanawa Tumarouru Urunumia	Wai Waiharoto Waiora Wharekokoai	17
1881[79]	Kinohaku Ngawaero	**Paretekawa** Rora	Urunumia	'Various Hapu'	5?

[74] Jones, P T 'Tainui Canoe Area 1840' (Unpublished Map, Photostat of MS prepared by Pei Te Hurinui Jones for Centennial Branch, Department of Internal Affairs, 1940).
[75] Fenton, F *List of the Tribes and Hapus of the Waikato District* AJHR 1860 B-No.9 – F-No.3, at 146-149.
[76] 'Approximate Census of the Maori Population' (compiled by Officers in Native Districts) in AJHR 1874 G-7 at 6.
[77] 'Enclosures' in AJHR 1878, G-2 at 17-8. This census listed approximately 2,487 people affiliated to Ngāti Maniapoto hapū in 1878.
[78] 'Census of the Maori Population, 1881' (presented to the Houses of the General Assembly by Command of His Excellency in AJHR 1881, G-3 at 15.

Table 17. 3 Ngati Maniapoto Hapu Listed in the Western Māori Electoral Roll 1908[80]

Ngati Maniapoto Hapu				
Aiariki	Koata	Parekaihewa	Ruahine	Tinihuia
Arawaere	Korokino	Parekaitini	Rora	Tinikino
Awaroa	Kouparanga	Parekarau	Ruapuha	Tiniuhi
Hanuku	Koupararanga	Parekawa	Ruaroa	Tiroa
Hari	Maringi	Paretapoto	Rungatahi	Tokanui
Harotake	**Marotaua**	Paretapotu	Rungaterangi	Tu
Harotaki	Mata	**Paretekawa**	Ruru	Tuhingarangi
Haua	Matakore	Parewaeno	Taewa	Tuhoro
Heke	Mauri	Parewaiona	Taiheke	Tutakamoana
Hikairo	Mihi	Peehi	Taipoto	Uekaha
Hinato	Moenoa	Poa	Taiwa	Ueroa
Hinekino	Motemote	Pourahui	Tamaina	Unu
Hinekuia	Muriwaka	Poutu	Tara	Upokomutu
Hinetera	Ngaungatahi	Puhiawe	Tarahuia	Urunumia
Hineuru	Ngautauhunu	Purahui	Tarapikau	Waha
Hinewai	Ngawaero	Raeapa	Tauhunu	Waiharoto
Hinewhare	**Ngutu**	Raerae	Tauhuru	Waikorara
Hopu	Paeahi	Rahere	Te Ake	Waimahu
Houtakiri	Paehi	Rahiri	Te Aranui	Waimaku
Huahua	Paemata	Rahui	Te Ihingarangi	Waiora
Huiao	Paemate	Rahurahu	Te Ika	Wairo
Huiau	Paerangi	Rairai	Te Kanawa	Waiuri
Inurangi	Paeriki	Rakei	Te Mihinga	Wera
Kaahu	Pahere	Rangi	Te Ra	Werewere
Kahu	Paia	Rangimahinga	Te Rau	Werokoko
Kaputuhi	Paiariki	Rarua	Te Waha	Whakairi
Karewa	Paratai	Rereahu	Te Whānaupani	Whakatere
Kinohaku	Parekahuke	Rongo	Terewai	Whetu
Kiri	Parekahuki			

Total Hapū = 142

Table 17.4 Ngati Maniapoto Hapu from the Western Maori Electoral Roll 1949[81]

Ngati Maniapoto Hapu				
Apakura	Kouparanga	Parekahuki	Rangatahi	Tawhaki
Hape	Kura	Parekaihina	Rangi	Te Kanawa
Hari	Mahanga	Parekaitini	Rangimahora	Te Paemate
Haua	Mahuta	Parekaruhi	Rangitaki	Te Waha
Hekewai	Makahori	Parekauri	Raparapa	Te Wihi
Hikairo	Marotaua	Parekawa	Raukawa	Tikohaku
Hine	Matakore	Paretapoto	Rauru	Tipa

[79] Additional hapū were not specified but the total number of Maniapoto people listed in 1881 was over 1,200).

[80] New Zealand, *Western Maori Electorate: List of Maori Electors who voted at the General Election in Above-Named Electorate in 1908* (Wellington: Government Printer, 1908).

[81] Mako, C *Nga Iwi Me Nga Hapu i te Tau 1949: An Analysis of the Tribal and Sub-Tribal Affiliations of 1949 Maori Electors* (Working Paper, Wellington: Department of Maori Affairs, 1989) at 36-8.

Ngati Maniapoto Hapu				
Hinemanu	Matekore	Paretawhero	Rereahu	Titahi
Hinemihi	Mekaha	Paretekati	Rerehu	Toa
Hinetu	Mihi	Paretekawa	Roa	Tokanui
Hori	Miriwaka	Parewaeono	Rora	Tu
Hounuku	Moenoho	Parewhata	Ruanui	Tuirirangi
Hua	Mokau	Pari	Ruaroa	Tupatu
Huiao	Monika	Patupo	Rungaterangi	Turiu
Ihingarangi	Naenae	Peehi	Rura	Tutakamoana
Kahu	Nehenehenui	Pikiahawaewae	Taewa	Uekaha
Kahukura	Nga Waero	Pikiahu	Tainui	Unu
Kaiapa	Ngahia	Pikiao	Tainui-Marotaua	Uru
Kaputai	Ngaupaka	Pioteamate	Taiwa	Urunumia
Kaputuhi	Ngawaero	Poa	Tamainu	Waiharoto
Kauwhata	Ngutu	Pou	Tamateao	Waikorara
Kinehaku	Paeriki	Pourahui	Tamia	Waikorau
Kineohau	Pahere	Puhi	Tara	Wainuiarua
Kinohaku	Paia	Puhiwae	Taramatau	Waiora
Kiriwai	Paiariki	Pukenga	Tauhinu	Wairere
Kohera	Pakira	Puta	Tauhuna	Whakairi
Kohua	Pamoana	Rahiri	Tauhunu	Whakamarurangi
Koi	Pare	Rahurahu	Tauhuru	Whatua
Koreperenga	Parehe	Rairora	Taupiri	Whawhakia
Koroki	Parehuia	Rakei		

Total Hapū = 148

Table 17.5 Maniapoto Māori Trust Board Constitutent Hapū 2005[82]

Ngati Maniapoto Constituent Hapū				
Apakura	Makino	Parewaeono	Rereahu	Te Rukirangi
Hari	Mangu	Parewaione	Rewa	Te Urupare
Hikairoa	Matakore	Peehi	Rora	Te Waha
Hinemihi	Ngutu	Pourahui	Ruapuha	Toa Tupahua
Hinetu	Paemate	Putaitemuri	Rungaterangi	Tupu
Huiao	Pahere	Raerae	Takiari	Uekaha
Kahu	Pare	Rakei	Tauhunu	Unu
Kerapa	Pare Raukawa	Rangatahi	Te Ihingarangi	Urunumia
Kinohaku	Parekaitini	Raukawa	Te Kanawa	Waiora
Mahuta	Paretekawa			

Total 'Official' Hapū = 47

□ Maniapoto Māori Trust Board 'Tribal Registration Form' (Maniapoto Māori Trust Board, Level 1, NZ Post Building, 123 Rora Street, PO Box 36, Te Kuiti, 2005) at 2.

Appendix XVIII dr pei jones' tainui tribal map 1840

Figure 27 Pei Jones' Tainui Tribal Map 1840

Appendix XIX IWI LISTS

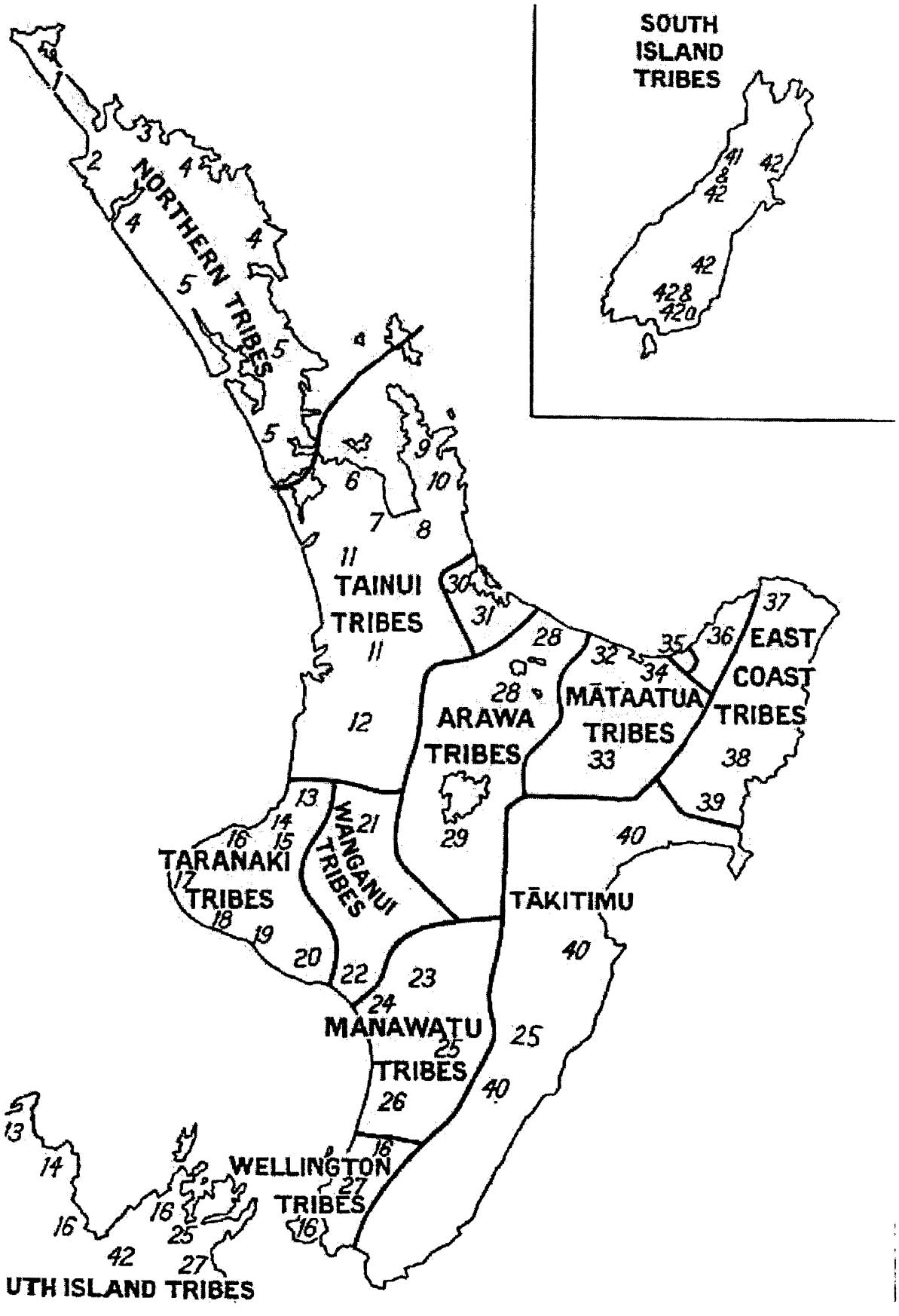


Figure 28 Maori Tribal Areas 1875

Key to map of tribal areas

Regional grouping	*Tribe*	*Canoe*
The Northern Tribes (Tai-Tokerau)	1. Aupōuri	Kurahaupo
	2. Rarawa	Ngātokimātāwhaorua
	3. Ngāti Kahu	Mamari
	4. Ngāpuhi	Mahuhu
	5. Ngāti Whātua	and others
The Tainui Tribes	6. Ngāti Tai	Tainui
	7. Ngāti Paoa	
	8. Ngāti Maru	
	9. Ngāti Tamaterā	
	10. Ngāti Whanaunga	
	11. Waikato	
	12. Maniapoto	
The Taranaki Tribes	13. Ngāti Tama	Tokomaru
	14. Ngāti Mutunga	
	15. Ngāti Maru	
	16. Te Ati Awa	
	17. Taranaki	Kurahaupo
	18. Ngā Ruahine	Aotea
	19. Ngāti Ruanui	
	20. Ngā Rauru	
The Wanganui Tribes	21. Ngāti Haua	Tainui and Arawa
	22. Te Ati Hau	Aotea and Kurahaupo

Regional grouping	*Tribe*	*Canoe*
The Manawatu Tribes	23. Ngāti Raukawa	Tainui
	24. Ngāti Apa	Kurahaupo
	25. Rangitāne	
	26. Muaupoko	
The Wellington Tribes	16. Te Ati Awa	Tokomaru
	27. Ngāti Toa	Tainui
The Arawa Tribes	28. Arawa	Arawa
	29. Ngāti Tūwharetoa	
The Bay of Plenty Tribes	30. Ngāi Terangi	Mātaatua and Tainui
	31. Ngāti Ranginui	
	32. Ngāti Awa	Mātaatua
	33. Tūhoe	
	34. Whakatōhea	
	35. Ngāi Tai	Tainui
	36. Whānau-ā-Apanui	Mātaatua and Horouta
The East Coast Tribes (Tai-Rāwhiti)	37. Ngāti Porou	Horouta and Nukutere
	38. Rongowhakaata	Takitmu
	39. Te Aitanga-ā-Māhaki	
Takitimu	40. Ngāti Kahungunu	
	25. Rangitāne	Kurahaupo
The South Island Tribes	13. Ngāti Tama	Tokomaru
	14. Ngāti Mutunga	
	16. Te Ati Awa	
	25. Rangitāne	Kurahaupo
	27. Ngāti Toa	Tainui
	41. Poutini	Tākitimu and others
	42. Ngāi Tahu	
	42a. Ngāti Mamoe*	

* The Ngāti Mamoe of the southern part of the Southern Island were completely assimilated by the invading Ngāi Tahu in the eighteenth and nineteenth centuries. Today Ngāti Mamoe and the southern Ngāi Tahu are virtually one people, though the former are sometimes distinguished by name for ceremonial purposes.

Figure 29 Maori Tribal Areas 1875

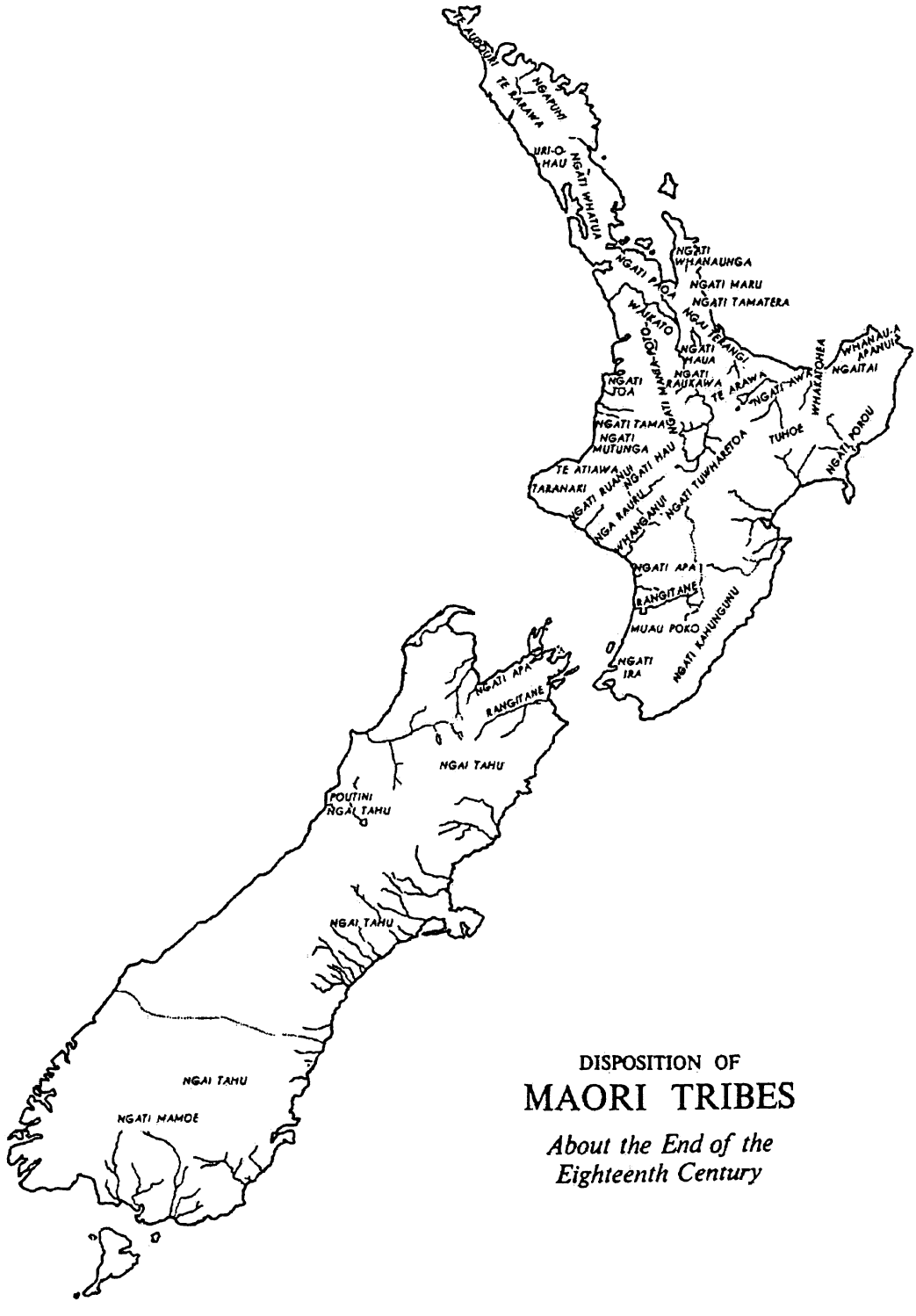


Figure 30 Maori Tribes (End of Eighteenth Century)

Schedule of Iwi for Statistical Purposes

Northland *Auckland*	*Hauraki*	*Waikato* *King Country*	*Te Arawa* *Taupo*
Te Aupouri	Ngāti Hako	Ngāti Haua	Ngāti Pikiao
Ngāti Kahu	Ngāti Hei	Ngāti Maniapoto	Ngāti Rangiteaorere
Ngāti Kuri	Ngāti Maru	Ngāti Raukawa	Ngati Rangitihi
Ngāpuhi	Ngāti Paoa	Waikato	Ngāti Rangwewehi
Te Rarawa	Patukirikiri		Tapuika
Ngai Takoto	Ngāti Rahiri-Tumutumu		Tarawhai
Ngāti Wai	Ngāti Tai		Tuhourangi
Ngāti Whātua	Ngāti Tamatera		Uenuku-Kopako
Te Kawerau	Ngāti Tara Tokanui		Ngāti Whakaue
Te Uru-o-Hau	Ngāti Whanaunga		Tuwharetoa

Bay of Plenty	*East Coast*	*Hawke's Bay* *Wairarapa*	*Taranaki*
Ngāti Pukenga	Ngāti Porou	Rongomaiwahine	Te Atiawa
Ngaiterangi	Te Aitangi-a-Mataki	Ngāti Kahungunu	Ngāti Maru
Ngatiranginui	Rongowhakaata	ki te Wairoa	Ngāti Mutunga
Ngāti Awa	Ngai Tamanuhiri	ki Heretaunga	Ngāti Rauru
Ngāti Manawa		ki Wairarapa	Ngā Ruahine
Ngāti Whare		Rangitane	Ngāti Ruanui
Ngai Tai			Ngāti Tama
Tuhoe			Taranaki
Whakatohea			Tangahoe
Whanau-a-Apanui			Pakakohe

Whanganui	*Manawatu* *Horowhenua* *Wellington*	*South Island* *Chatham Islands*	
Ngati Apa	Te Atiawa	Te Ati Awa	Ngāti Rarua
Te Ati Hau Nui-a-Paparangi	Muaupoko	Ngāti Koata	Ngai Tahu
Ngāti Haua	Rangitane	Ngāti Kuia	Ngāti Tama
	Ngāti Raukawa	Kati Mamoe	Ngāti Toa
	Ngāti Toa	Moriori	Waitaha
		Ngāti Mutunga	Ngāti Apa
		Rangitane	

Source: Statistics New Zealand

Figure 31 Iwi List Census 1996

Te Tai Tokerau / Tāmaki-makaurau (Northland / Auckland) Region
Te Aupōuri
Ngāti Kahu
Te Kawerau
Ngāti Kurī
Ngāpuhi
Ngāpuhi ki Whaingaroa-Ngāti Kahu ki Whaingaroa
Te Rarawa
Te Roroa
Ngāi Takoto
Te Uri-o-Hau
Ngāti Wai
Ngāti Whātua

Hauraki (Coromandel) Region
Ngāti Hako
Ngāti Hei
Ngāti Maru (Marutuahu)
Ngāti Paoa
Patukirikiri
Ngāti Porou ki Harataunga ki Mataora
Ngāti Pūkenga ki Waiau
Ngāti Rāhiri Tumutumu
Ngāi Tai (Hauraki)
Ngāti Tamaterā
Ngāti Tara Tokanui
Ngāti Whanaunga

Waikato / Te Rohe Pōtae (Waikato / King Country) Region
Ngāti Haua (Waikato)
Ngāti Maniapoto
Ngāti Raukawa (Waikato)
Waikato

Te Arawa / Taupō (Rotorua / Taupō) Region
Ngāti Pikiao (Te Arawa)
Ngāti Rangiteaorere (Te Arawa)
Ngāti Rangitihi (Te Arawa)
Ngāti Rangiwewehi (Te Arawa)
Ngāti Tahu-Ngāti Whaoa (Te Arawa)
Tapuika (Te Arawa)
Tarāwhai (Te Arawa)
Tūhourangi (Te Arawa)
Ngāti Tūwharetoa
Uenuku-Kōpako (Te Arawa)
Waitaha (Te Arawa)
Ngāti Whakaue (Te Arawa)

Tauranga Moana / Mātaatua (Bay of Plenty) Region
Ngāti Awa
Ngāti Manawa
Ngāti Pūkenga
Ngaiterangi
Ngāti Ranginui
Ngāi Tai (Tauranga Moana / Mātaatua)
Tūhoe
Whakatōhea
Te Whānau-a-Apanui
Ngāti Whare

Taranaki Region
Te Atiawa (Taranaki)
Ngāti Maru (Taranaki)
Ngāti Mutunga (Taranaki)
Ngā Rauru
Ngā Ruahine
Pakakohi
Ngāti Ruanui
Ngāti Tama (Taranaki)
Tangāhoe
Taranaki

Te Tai Rāwhiti (East Coast) Region
Te Aitanga-a-Māhaki
Ngāti Porou
Rongowhakaata
Ngāi Tāmanuhiri

Te Matau-a-Māui / Wairarapa (Hawke's Bay / Wairarapa) Region
Ngāti Kahungunu ki Heretaunga
Ngāti Kahungunu ki Tāmakinui-a-Rua
Ngāti Kahungunu ki Tamatea
Ngāti Kahungunu ki Te Wairoa
Ngāti Kahungunu ki Wairarapa
Ngāti Kahungunu ki Te Whanganui-a-Orotu
Rangitāne (Te Matau-a-Māui / Hawke's Bay / Wairarapa)
Rongomaiwahine (Te Māhia)
Ngāti Pāhauwera
Ngāti Rākaipaaka

Whanganui / Rangitīkei Region
Ngāti Apa (Rangitīkei)
Te Ati Haunui-a-Pāpārangi
Ngāti Haua (Taumarunui)
Ngāti Hauiti

Manawatū / Horowhenua / Te Whanganui-a-Tara (Manawatū / Horowhenua / Wellington) Region
Te Atiawa (Te Whanganui-a-Tara / Wellington)
Te Atiawa ki Whakarongotai
Muaūpoko
Rangitāne (Manawatū)
Ngāti Raukawa (Horowhenua / Manawatū)
Ngāti Toarangatira (Te Whanganui-a-Tara / Wellington)
Ngāti Tama ki Te Upoko o Te Ika (Te Whanganui-a-Tara / Wellington)

Te Waipounamu / Wharekauri (South Island / Chatham Islands) Region
Ngāti Apa ki Te Rā Tō
Te Atiawa (Te Waipounamu / South Island)
Ngāti Koata
Ngāti Kuia
Kāti Māmoe
Moriori
Ngāti Mutunga (Wharekauri / Chatham Islands)
Rangitāne (Te Waipounamu / South Island)
Ngāti Rārua
Ngāi Tahu / Kāi Tahu
Ngāti Tama (Te Waipounamu / South Island)
Ngāti Toarangatira (Te Waipounamu / South Island)
Waitaha (Te Waipounamu / South Island)

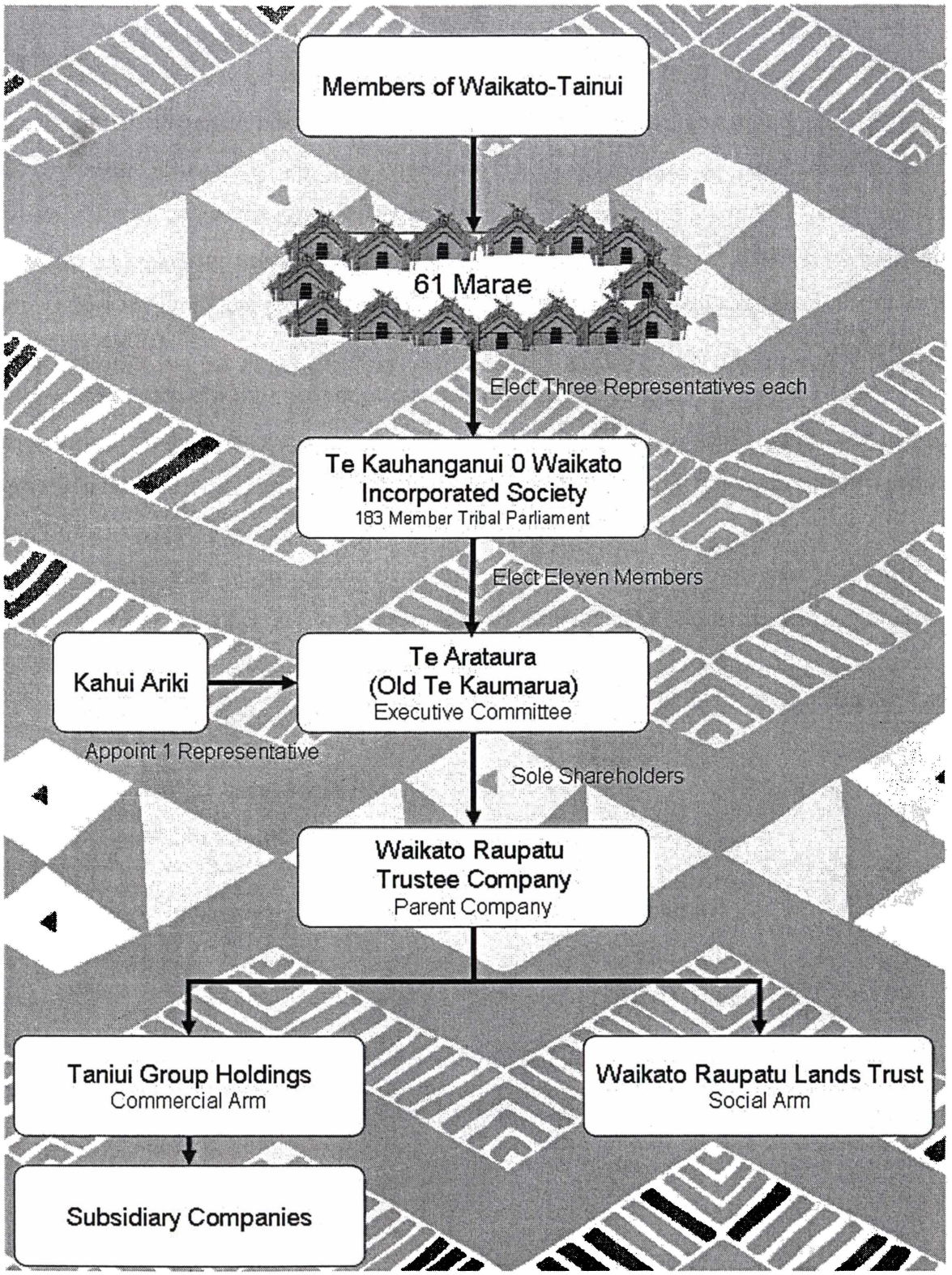
Figure 32 Cenus 2006

16.26 APPENDIX XX: WAIKATO-TAINUI, NGĀI TAHU, TE OHU KAI MOANA AND NISGA'A SETTLEMENT SELF-GOVERNANCE

As noted above Waikato-Tainui received a similar Treaty settlement quantum to that of Ngāi Tahu, but has demonstrated a lesser ability to govern and manage it as effectively. This may be due, at least in part, to problems with its governance structure, Te Kauhanganui o Waikato Inc., which is an incorporated society. Eleven of Tainui's twelve member executive committee, Te Kaumarua (now Te Arataura), are appointed by the tribal parliament, Te Kauhanganui. The other member is appointed by the Tainui monarchy, the Kīngitanga.

Ngāi Tahu on the other hand has a private statute model – Te Rūnanga o Ngāi Tahu – with a constituent base of 18 elected Papatipu Rūnanga representatives while an electoral college has been established to elect the trustees of the new Te Ohu Kai Moana Trustee Ltd, the entity that governs the Māori commercial fisheries assets. The Nisga'a in northern British Columbia have a more extensive self-government model that allows for the economic, political, social and cultural development of the Nisga'a as a people. Their governance entity is the Nisga'a Lisims Government - a statutory self-government model that appears to have self-government powers greater than municipal government.

Figure 33 Waikato-Tainui Post-Settlement Governance Structure[83]



Waikato-Tainui Tribal Area

(The Red line demarcates the Raupatu Boundary)

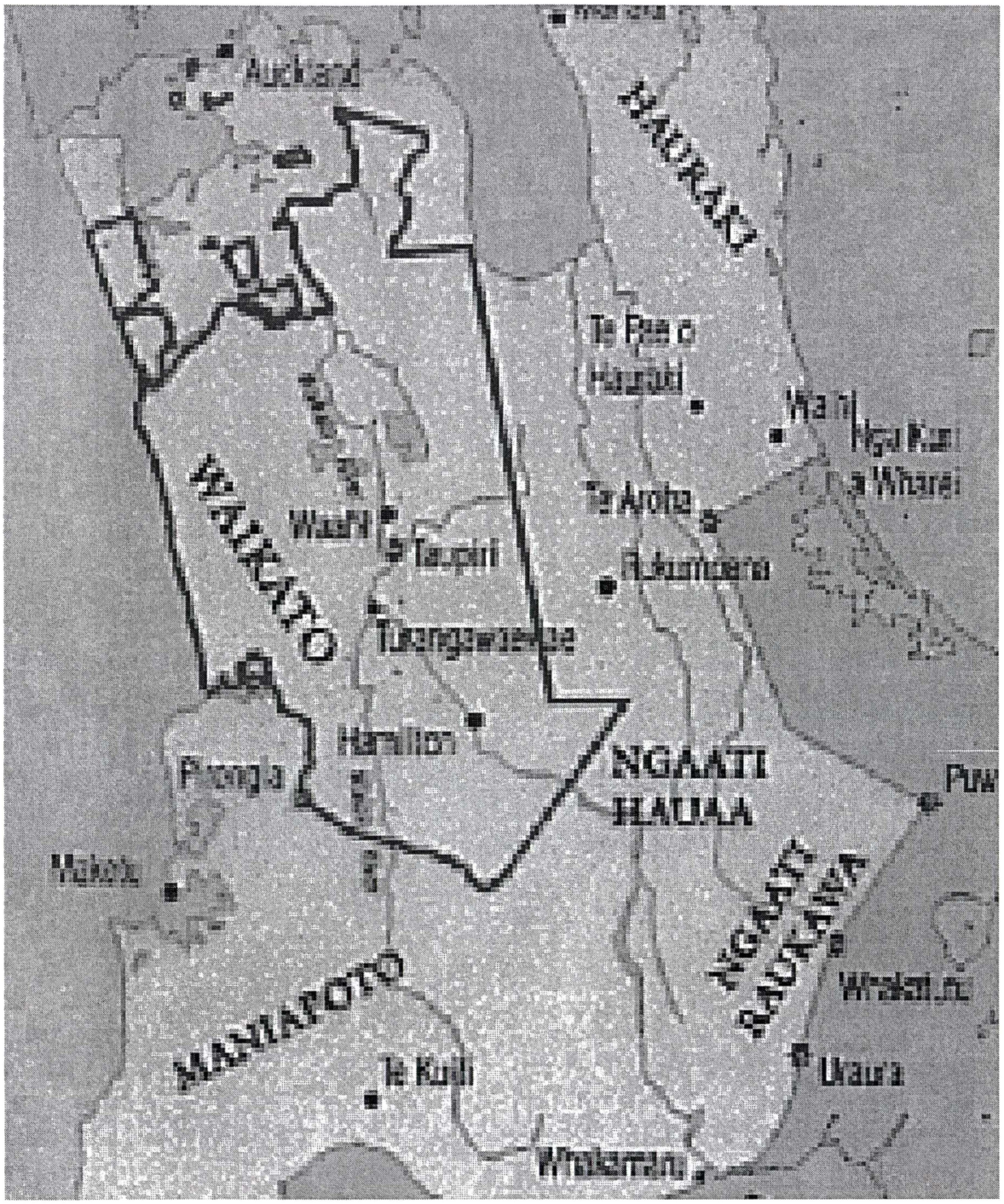
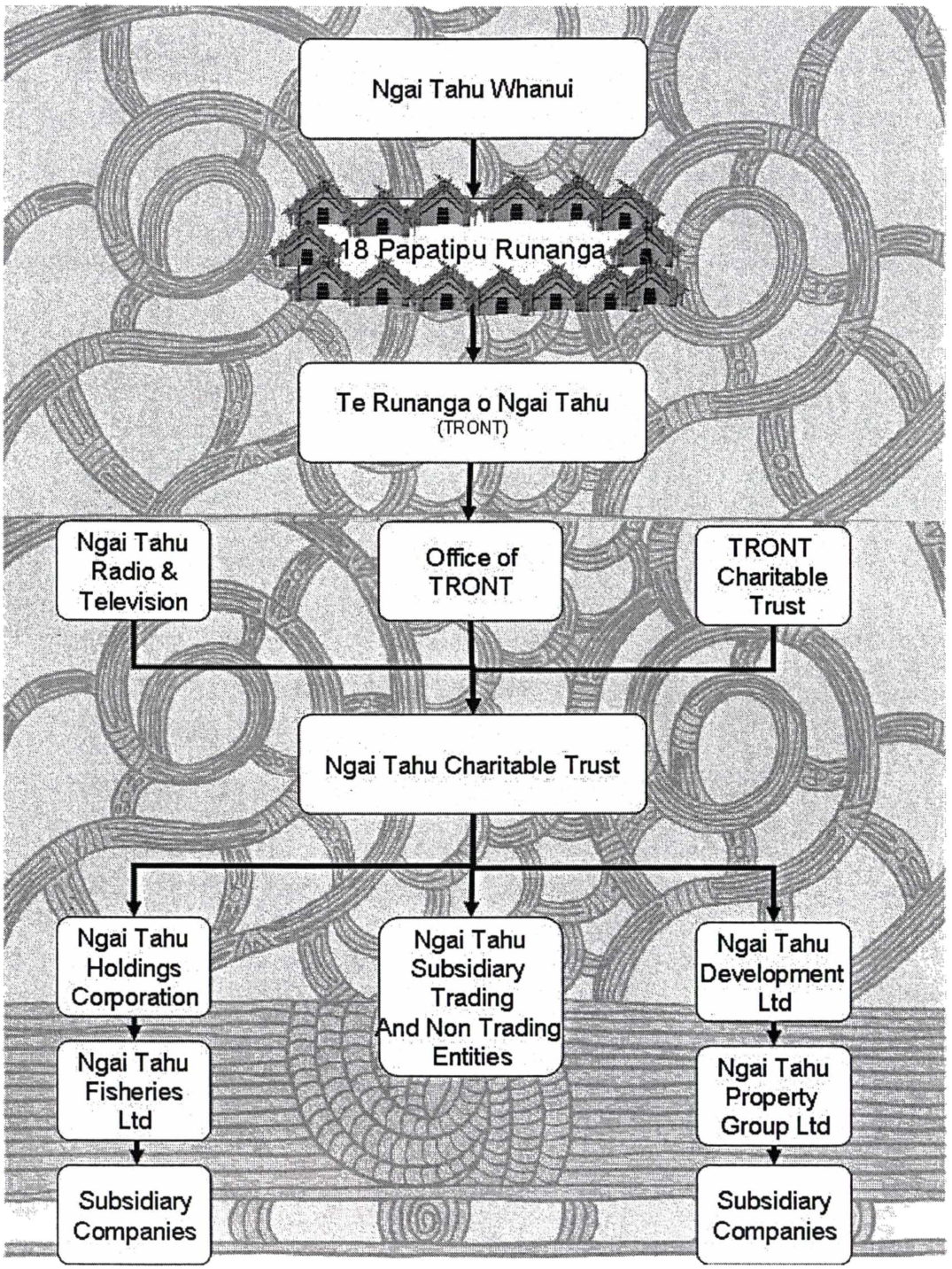


Figure 34 Te Rūnanga o Ngāi Tahu

Te Rūnanga o Ngāi Tahu (TRONT) is a private statutory model of Māori self-governance:

Ngāi Tahu Post-Treaty Settlement Governance Structure [84]



[84] Te Rūnanga o Ngāi Tahu, *Te Runanga o Ngai Tahu Annual Report 2000* (Te Rūnanga o Ngāi Tahu, Christchurch, 2000)

Figure 35 Te Runanga o Ngai Tahu Papatipu Runanga Constuent Groups

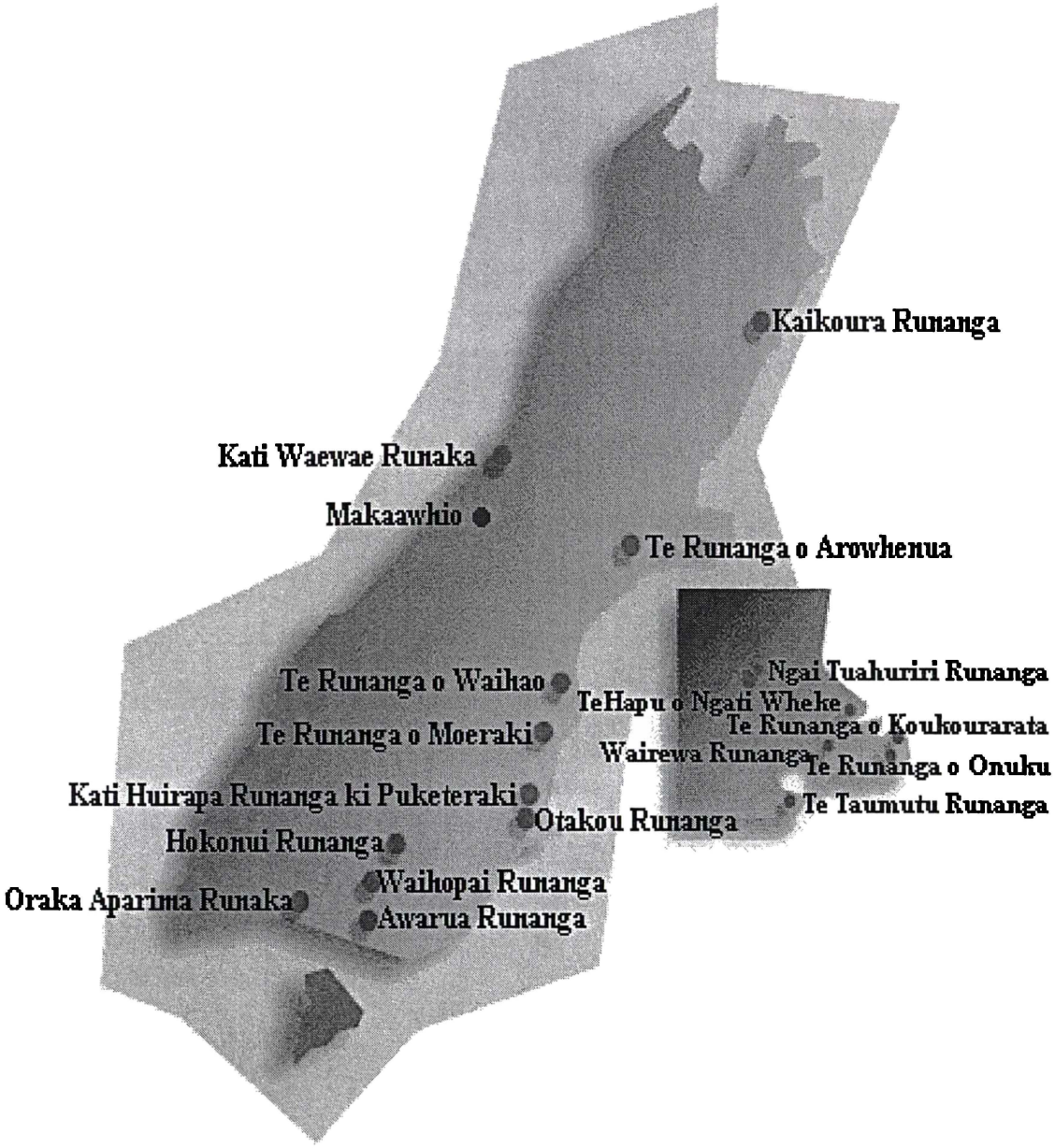
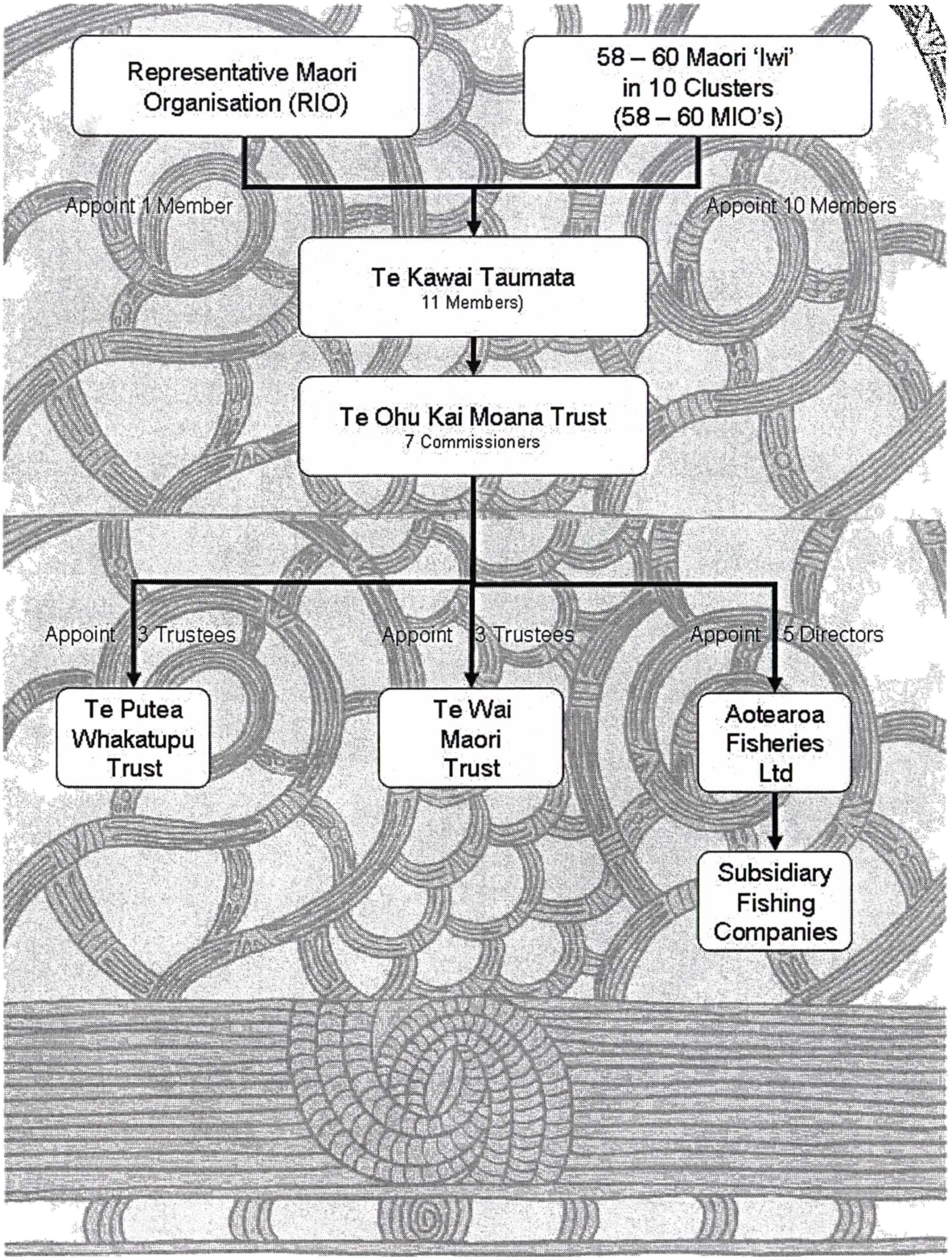


Figure 36 Te Ohu Kai Moana Trust Governance Structure



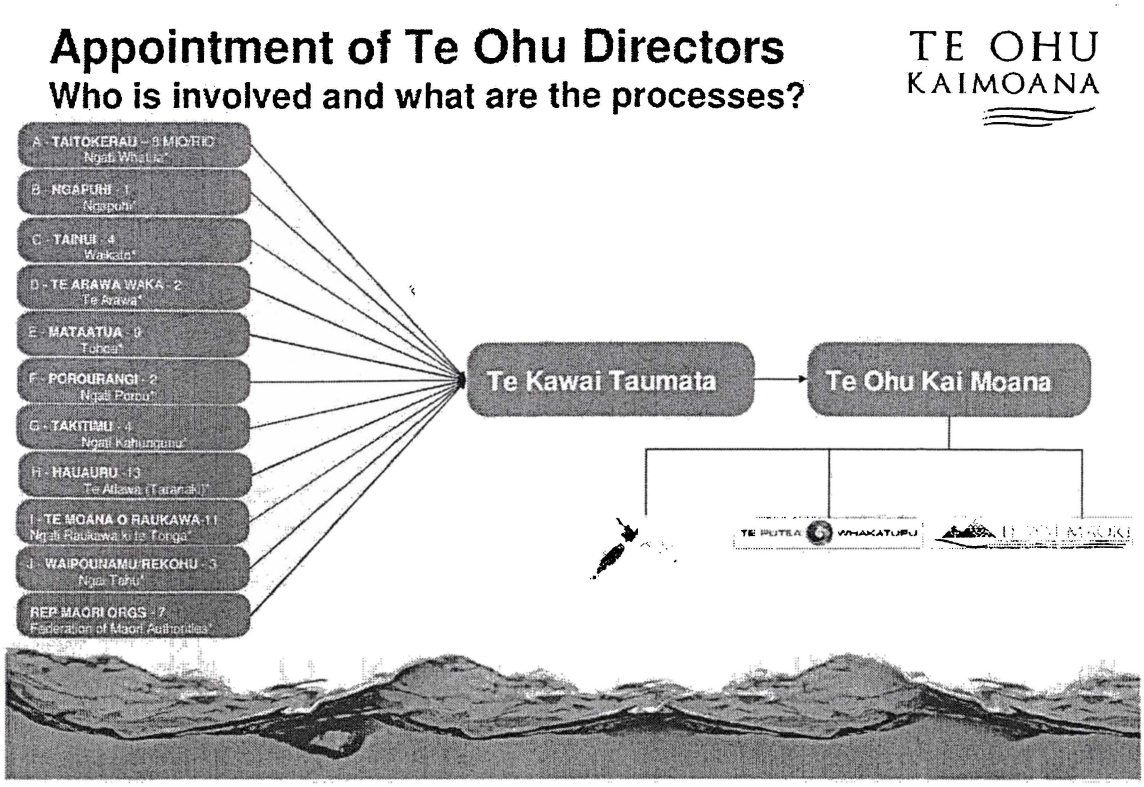
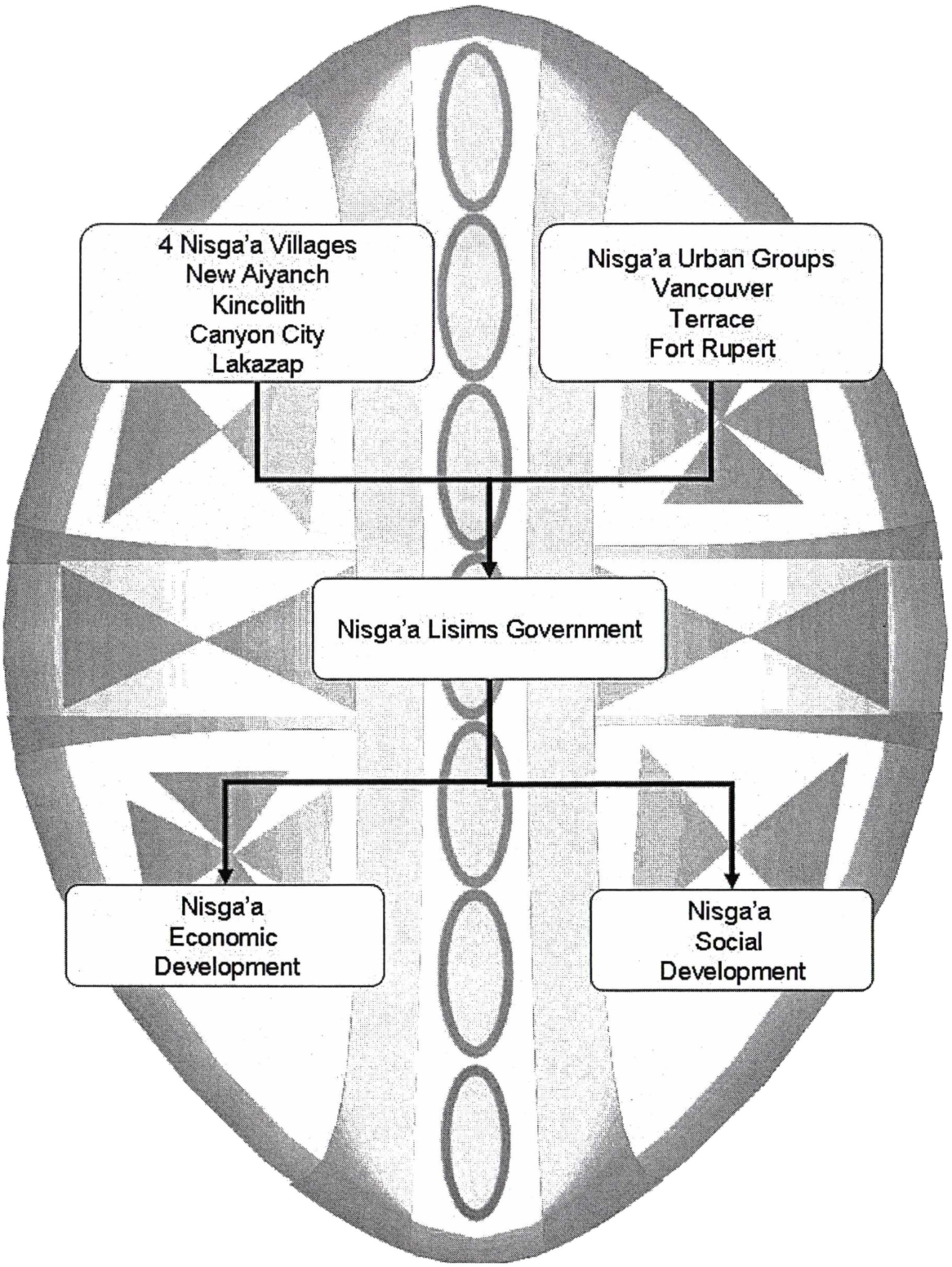


Figure 37 Maori Fisheries Representation

Figure 38 Nisga'a Lisims Government



Ko te pae tāwhiti arumia kia tata
Ko te pae tata whakamāua
Kia puta i te wheiao ki te aomarama
Seek to bring the distant horizon closer, grasp it
So you may emerge from darkness into enlightenment

Nō reira, ka mutu: tēnā tātou katoa.

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