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Maori Claims to Petroleum in New Zealand

Richard Boast* and Deborah Edmunds**

SUMMARY

In 2000 the Waitangi Tribunal heard a claim from a South Taranaki Maori group (Nga Hapu o Nga Ruahine) relating to the ownership of petroleum (Wai 796). The claimants argued that the nationalisation of petroleum in 1937 by the New Zealand Government was contrary to the Treaty of Waitangi (1840). As all petroleum in situ in Australia was also nationalised at roughly the same time the case may be of interest to lawyers specialising in native title and resources law in Australia. The paper explains the context of the petroleum claim, notes the main differences between applicable New Zealand and Australian law, and analyses the competing arguments advanced on behalf of the claimants and the Crown. The petroleum case arose principally as a consequence of the Waitangi Tribunal's earlier inquiry and report (1996) into a major historic land claim, the Taranaki confiscation claim, and from the New Zealand Government's stance that petroleum could not be used as a means of settling the Taranaki confiscation claim. Argument in the Waitangi Tribunal mainly focused on whether nationalisation in 1937 was contrary to the Treaty of Waitangi, although Native title issues were also raised. As at the time of writing the Tribunal has yet to report on the claim, mainly because it is constrained by inadequate resources.

* MA (Waikato) LLM (VUW); Senior Lecturer, Faculty of Law, Victoria University of Wellington, New Zealand.

** BA LLB (VUW); Partner, KPMG Legal, Wellington, New Zealand

Richard Boast gave evidence for the claimants as an expert historical witness, and Deborah Edmunds, along with A K Erueti, acted as counsel to the claimants.

INTRODUCTION

In 2000 the Waitangi Tribunal, sitting under urgency at Wellington, heard a claim relating to petroleum brought by a Maori claimant group from south Taranaki.[1] Following the grant of urgency the claim was heard in a sequence of hearings through the course of the year under a very compressed time frame.

The claim was novel in that it was the first occasion on which the Tribunal had been asked to consider a claim to a resource which was not known or used in any significant manner prior to the Crown's proclamations of sovereignty over New Zealand in 1840. The Tribunal principally deals with claims to land and associated resources, although it has on occasion considered resource claims of a more generic kind. These have been focused, however, on resources for which there is strong evidence of pre-European customary use and management, including sea fisheries and geothermal resources.[2] Perhaps the closest parallel to the petroleum claim was an earlier claim relating to the broadcasting spectrum, although even here the claim was structured around the Crown's already recognised obligation to safeguard and protect the Maori language – rather than on articulating property rights in the broadcasting spectrum as such.[3]

The fact that indigenous groups may or may not have used petroleum prior to colonisation need not determine whether such groups can own rights in respect of it today. In 1996 various American Indian tribes received nearly US$96 million in royalties from oil and gas production on reservation lands.[4] American Indians did not have a pre-contact petroleum industry any more than Maori did (although some North American tribes apparently did make some use of surface petroleum seeps,[5] and evidence was given to the

[1] *In re a claim to the Waitangi Tribunal by Thomas Tohepakanga Ngatai on behalf of Nga Hapu o Nga Ruahine in respect of claims to petroleum and other resources,* (Wai 796). Ngati Kahungunu, a Maori tribal group from the East Coast of the North Island, sought and obtained leave to be present at the hearings. The claim is referred to under the Tribunal's filing system as Wai 796.

[2] *Muriwhenua Fishing Report,* Wai 22, 1988; *Ngawha Geothermal Resource Report,* Wai 304, 1993; *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims,* Wai 153, 1993.

[3] *Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies,* Wai 26 and Wai 150, 1990; see also *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129.

[4] D H Getches, et al, *Cases and Materials on Federal Indian Law* (West Group, St Paul (Minn)), 1998, p 698, citing *Mineral Revenues 1996: Report on Receipts from Federal and Indian Leases,* US Dept of the Interior, Minerals Management Service, Royalty Management Program. See John D Leshy, "Indigenous Peoples, Land Claims and Control of Mineral Development: Australian and US Legal Systems Compared" (1985) 8 University of New South Wales Law J 271.

[5] Robert Sollen, *An Ocean of Oil: A Century of Political Struggle over Petroleum off California's Coast* (Denali Press, Juneau, Al), 1998, pp 4-6.

Waitangi Tribunal in the petroleum claim that Maori did use oil from petroleum springs as a dye). The difference between New Zealand and North America was noted by Sir Apirana Ngata, New Zealand's leading Maori parliamentary politician, as long ago as 1937 when he opposed in parliament the New Zealand Government's plans to nationalise the resource: [6]

> "It is true that the Red Indians were not treated well by the Americans, but it looks as though providence has stepped in, for on the lands to which the Americans had driven the aborigines – the Red Indians – oil has been struck, and I am told that the Red Indians get great revenues from their royalties, because the oil was not purloined by the Government in the manner proposed in this Bill."

In Canada s 5(1) of the Oil and Gas Act 1985 provides that all oil and gas royalties paid to the Crown from "Indian lands" are held "in trust for the Indian bands concerned". In 1987 the Department of Indian Affairs and Northern Development (DIAND) established a corporation named Indian Oil and Gas Canada to manage oil and gas resources on Indian lands. There are thus some similarities with law and practice in the United States, although as it happens the Canadian law relating to indigenous rights to petroleum is very complex.[7]

The divergence between New Zealand on the one hand and the United States and Canada on the other has, of course, nothing to do with indigenous knowledge and utilisation of oil and gas. Rather, it is explicable solely because of the different legal regimes in the three jurisdictions. The obvious difference is the decision of the New Zealand Government to expropriate all petroleum by statute: in New Zealand, as in Australia, all petroleum belongs to the Crown. In the United States petroleum ownership is governed by the common law, based on doctrines of "capture" derived from early cases relating to underground water.

SIMILARITIES AND DISSIMILARITIES WITH AUSTRALIA

Ownership of Petroleum[8]

The law of petroleum ownership in New Zealand is the same as in Australia. As in all Australian States, petroleum in situ in New Zealand is owned by the Crown. Petroleum was expropriated by the New

[6] Sir Apirana Ngata, 6 Dec 1937 (1937) 249 NZPD 1042.

[7] J Woodward, *Native Law* (Carswell, Toronto), pp 248-248.4, 274.7-274.8; *Stoney Tribal Council v PanCanadian Petroleum and Attorney-General of Alberta* [1999] 1 CNLR 218.

[8] On the legal history of petroleum in New Zealand see generally D Grinlinton, "History and Development of Petroleum Law and Policy in New Zealand" (1995) 8 Otago Law Review 375.

Zealand Government in 1937.[9] The Labour Government[10] took this step because of strategic concerns, precedents set by the Australian States and by Great Britain, and pressure from international and domestic oil companies which since 1925 (at least) had been urging the New Zealand Government to nationalise the resource. The New Zealand Government was particularly influenced by British precedent. The United Kingdom nationalised all petroleum in 1934, with s 1 of the *Petroleum (Production) Act* 1934. The first British Commonwealth jurisdiction to nationalise petroleum, however, seems to have been Queensland (1915). Tasmania followed in 1929, Victoria in 1936, South Australia in 1940 and New South Wales in 1955.[11]

Prior to nationalisation, petroleum ownership in New Zealand was governed by the common law and by the doctrine of capture. There are signs that New Zealand law was evolving towards the "ownership in place" variant of the doctrine of capture found in some United States jurisdictions (such as Texas). There are, for example, some examples of District Land Registrars in New Zealand being prepared before 1937 to register separate Torrens titles to petroleum as separate estates in land severable from the surface ownership. There is no local case law on the point, however, and the development of law and practice was cut short by statutory expropriation in 1937. The doctrine of capture was also debated in parliament in 1937, some politicians on the government side trying to argue that since there were no property rights in petroleum until the resource was appropriated by drilling, nationalisation of the resource in situ did not affect private property rights.

At the present time ownership and management of petroleum resources in New Zealand is regulated by the *Crown Minerals Act* 1991. Section 10 preserves the effect of the three principal mineral nationalisations, those of petroleum (1937), uranium (1945) and gold and silver (1971). Apart from minerals reserved in Crown grants,[12] and, of course, those belonging to the Crown as a private landowner under the ad inferos doctrine, all other minerals in New Zealand law are owned privately. The *Crown Minerals Act* deals with licensing matters, and also with landowners' rights in the case of such mining permits as

[9] *Petroleum Act* 1937, s 4; see now s 10, *Crown Minerals Act* 1991.

[10] Labour took power in 1935 and held office until 1949. As it happens, many of the leading figures of this Government were Australians, including the Prime Minister (M J Savage); R Semple (Minister of Works) and P C Webb (Minister of Labour in 1938). Semple and Webb left Australia after being blacklisted following the strikes on the Victorian coalfields in 1902-4.

[11] See F R S Forbes and A G Lang, *Australian Mining and Petroleum Laws* (Butterworths, Sydney), 1987.

[12] The Crown began to reserve ownership of minerals in certain leasehold grants after 1892. Under s 59 of the *Land Act* 1948 the Crown reserved ownership of minerals in all subsequent "disposals" of Crown land; see now *Crown Minerals Act* 1991, s 11.

may be issued by the Ministry of Commerce. Reflecting the strategic and economic significance of petroleum, landowners, including Maori landowners, do not have the same powers of veto in the case of petroleum permits as apply to other Crown-owned minerals.[13]

The legal arguments raised in the Waitangi Tribunal were focused on the effects of the 1865 confiscations on ownership of petroleum, on the Crown's actions in nationalising petroleum in 1937, and on some contemporary issues, including effects of petroleum mining and exploration on water quality and waahi tapu (sacred sites). Was nationalisation contrary to the Treaty of Waitangi? Was it an expropriation of a resource owned in some degree by Maori, either under their common law rights as landowners, or alternatively under the doctrine of Native Title? Similar questions could presumably be asked in Australia.

Articulation of Native Title Claims in New Zealand Law

If the statutory and common law rules applying to mineral ownership in Australia and New Zealand are roughly equivalent, the law relating to native title in New Zealand and the ways in which Maori land claims can be advanced and resolved is radically different from Australia.

To begin with, in a sense, native title has always been recognised in New Zealand law. It has been historically recognised in two concrete ways. First, Maori were recognised as having title to the whole country. Second, before the Crown could acquire land, either to retain it as Crown land or to issue Crown grants to private landowners, Maori title had to be extinguished. Usually this was done by purchase, although sometimes more coercive methods have been employed, including confiscation (which happens to be vitally significant in Taranaki).

Second, New Zealand law recognises a category of land that has no counterpart in Australia, this being Maori freehold land. This accounts for about 5 percent of the country. Maori freehold land is Crown-granted land in Maori ownership subject to the jurisdiction of the Maori Land Court. The Maori Land Court came into existence in 1865, charged with the responsibility of investigating titles to such land as remained in Maori ownership as at that time.[14] Having obtained a title

[13] See *Crown Minerals Act* 1991, ss 59, 63-65, 67-70, and 72-74; R Boast, A Erueti, D McPhail and N F Smith, *Maori Land Law* (Butterworths, Wellington), 1999, pp 262-4.

[14] On the Native Lands Acts and the origins of the Native (now Maori) Land Court see Boast, Erueti, McPhail and Smith, *Maori Land Law*, pp 47-64. Along with general (ie private) and Crown land, Maori freehold land is one of the three major categories of land in New Zealand. The current law is set out in *Te Ture Whenua Maori/Maori Land Act* 1993.

from the court, Maori could then obtain a Crown grant from the Governor, at which point they became freeholders and could freely alienate their land or retain it in their possession. Maori land today is concentrated in a number of regions of the North Island, and is often beset with complex survey and multiple ownership problems. Many blocks are in fact owned by thousands of people.

Third, the principal forum for adjudication and investigation of Maori historic grievances is the Waitangi Tribunal, which also has no exact Australian equivalent. The Waitangi Tribunal is essentially a permanent commission of inquiry that hears claims advanced by Maori that acts or omissions of the Crown are contrary to the principles of the Treaty of Waitangi.[15] The Tribunal's starting-point, therefore, is not the common law relating to native title, but rather the principles of the Treaty, which it has derived from a process of systematisation of the English- and Maori-language texts of 1840. While native title issues are relevant to the Tribunal's inquiries they play a secondary role. With the exception of some special binding powers,[16] the Waitangi Tribunal's powers are only recommendatory. Anything the Tribunal says about Maori rights to petroleum could theoretically simply be ignored by the Government, although for a number of reasons that would be unlikely.

Native title claims can of course be heard in the ordinary courts of New Zealand, and sometimes are, but a native title claim to petroleum in the High Court would be difficult given the clear language of s 3 of the *Petroleum Act* 1937.[17] As New Zealand lacks a written constitution and the Treaty of Waitangi is not per se enforceable in the New Zealand courts[18] there would be no

[15] *Treaty of Waitangi Act* 1975, s 6. This allows "any Maori" to bring a claim to the Tribunal who claims he or she "or any group of Maoris of which he or she is a member" has been "prejudicially affected" by any Act or ordinance, regulation, Crown policy, practice, act, or omission which was or is inconsistent with the principles of the Treaty.

[16] By ss 8A and 8B of the *Treaty of Waitangi Act* 1975, as inserted by s 4 of the *Treaty of Waitangi (State Enterprises) Act* 1988, the Tribunal was given power to make binding recommendations relating to land held by State-owned enterprises. Further binding powers were later conferred on the Tribunal in relation to Crown-owned exotic forest land in 1989 (*Crown Forest Assets Act* 1989) and railway land in 1990 (*New Zealand Railways Restructuring Act* 1990, ss 43-48).

[17] "Nothwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum existing in its natural condition on or below the surface of any land, whether the land has been alienated from the Crown or not, is hereby declared to be the property of the Crown."

[18] *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308, [1941] NZLR 590 (PC); *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC). Essentially these cases regard the Treaty as a valid international treaty of cession which is only enforceable in New Zealand domestic law to the extent it is given effect in statute. For an analyses of the case law on the status of the Treaty see Sir K J Keith, "The Treaty of Waitangi in the Courts" (1990) 14 NZ Universities LR 37; P Joseph, *Constitutional and Administrative Law in New Zealand,* 1993, Ch 3; Boast et al, *Maori Land Law*, pp 272-4.

possibility of arguing in the High Court that the nationalisation of petroleum was of no effect as contrary to the principles of the Treaty of Waitangi.[19]

IMMEDIATE CONTEXT OF THE PETROLEUM CLAIM

The Taranaki Raupatu (Confiscation) Claim (Wai 143)

To the Maori people of Taranaki, any claim to petroleum derives from a much larger and (as far as they are concerned) vastly more significant issue, the Crown's actions in confiscating huge quantities of Maori land in Taranaki during the 1860s. It is important that this historical dimension to the petroleum claim is understood.

The Taranaki confiscation was made pursuant to the *New Zealand Settlements Act* 1863, enacted to facilitate the confiscation of land belonging to Maori "rebels". The legislation, which had antecedents and parallels in Ireland and the South African colonies, was not targeted at Taranaki specifically, but it was here that one of the largest confiscations took place. Estimates of the amount of land actually confiscated vary. The Sim Commission of 1928 calculated that the New Zealand Government confiscated about 1,275,000 acres in Taranaki, principally in January and September 1865, of which 557,000 acres was subsequently purchased and 256,000 returned, leaving 462,000 acres as the area finally confiscated. The Waitangi Tribunal, however, found in 1996 that the actually confiscated area was more like 1,199,622 acres.[20]

The Waitangi Tribunal's inquiry into the Taranaki confiscation claim, one of the largest and most complex of the Waitangi Tribunal's inquiries, opened in September 1990 at Owae Marae[21] at Waitara in North Taranaki. There were 12 hearings in all, lasting from 1990–1995, and the Tribunal was presented with a great deal of material from

[19] As it happens, there is a statutory reference to the Treaty of Waitangi in s 4 of the *Crown Minerals Act* 1991 ("all persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi"), but the implications of this are very uncertain.

[20] *Report of the Royal Commission to Inquire into Confiscations of Native Lands,* 1928 Appendices to the Journals of the House of Representatives (AJHR), G-7. The Waitangi Tribunal calculated that 1,199,622 acres (485,487 ha) were confiscated in Taranaki; to which should be added a further 296,578 acres "said to have been purchased" and another 426,000 acres "expropriated by land reform and the government's Native Land Court process", *Taranaki Report,* Wai 143, 1996, p 312.

[21] A marae is a Maori ceremonial centre, which always features a meeting house, often impressively carved and decorated, and a dining room and kitchen. Some also have a church and a *kohanga reo* (Maori-language kindergarten) attached. There are hundreds of marae all over the country, some in urban settings or at schools and universities, others in remote country districts. The Waitangi Tribunal routinely hears claimant evidence on marae.

claimants and from expert historians commissioned by the claimants, by the Tribunal itself, and by the Crown. The Tribunal reported in June 1996, with a 370-page report.[22] The Tribunal concluded that the confiscations were certainly in breach of the principles of the Treaty (indeed that "the whole history of Government dealings with Maori of Taranaki has been the antithesis to that envisaged by the Treaty of Waitangi"[23]) and that "generous reparation" was called for:[24]

> "As to quantum, the gravamen of our report has been to say that the Taranaki claims are likely to be the largest in the country. The graphic muru [plunder] and the raupatu [confiscation] without ending describe the holocaust of Taranaki history and the denigration of the founding peoples in a continuum from 1840 to the present."

This type of language, and especially the Tribunal's perhaps ill-considered use of the word "holocaust", did not go down very well in all quarters, and was the subject of some adverse comment in the media. That substantial compensation was called for, was however, obvious to the Government and generally accepted by the New Zealand public.

Petroleum and the Resolution of the Taranaki Claim

It so happens that the Taranaki region, the locus of this hugely significant and complex historical claim, is also the centre of the New Zealand petroleum industry. In 1959 a consortium made up of Shell, BP, and the Todd Group discovered the Kapuni gas-condensate field in South Taranaki. Production from Kapuni began in 1970. The enactment of the *Continental Shelf Act* 1964 quickly led to exploration of the New Zealand continental shelf by overseas and New Zealand companies. By 1970 1,000,672 sq km of the continental shelf had been leased.[25] Ten offshore wells were drilled, three of them establishing the existence of the large Maui gas-condensate field, off the South Taranaki coast, from which production began in 1979. If the more optimistic predictions are borne out, the industry may be due for a substantial expansion following a major new on-shore discovery of petroleum at Mokoia, in South Taranaki, by Swift Energy of Texas: it has been claimed that the new field may contain as much as 500 million barrels worth approximately $28 billion.[26]

[22] Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi,* Wai 143 (GP Publications, Wellington), 1996.
[23] Ibid, p 308.
[24] Ibid, pp 314, 312.
[25] *Prospectus for Petroleum Exploration in New Zealand,* Ministry of Energy, Wellington, 1980.
[26] Philip Matthews, "After the Gold Rush", *New Zealand Listener,* 15-21 April 2000, p 20.

One of the difficulties with settling the Taranaki claim is that the Crown has virtually no land left in Taranaki which might be used as part of a land-based settlement: the land has either been Crown-granted to private owners or is now located in national parks and scenic reserves. It has naturally occurred to the Taranaki confiscation claimants that one way the Crown might make redress to them is via the most valuable publicly-owned resource the Government happens to have in Taranaki – its ownership of petroleum and the royalty revenues it derives from it. In *Love v Attorney-General* the plaintiffs, who were also the main Waitangi Tribunal Taranaki raupatu claimants, sought an injunction restraining the Crown from disposing of its shares in Petrocorp (a state-owned petroleum exploration and development company) to a wholly-owned subsidiary of Fletcher Challenge Ltd.[27] The application was opposed by the Crown and refused by the court on the basis the relevant legislation, the *Ministry of Energy Act* 1977 and the *Finance Act* 1982, contained no references of any kind to the Treaty of Waitangi. The case illustrates clearly, however, that the claimants at that time saw the Crown's petroleum assets in Taranaki as an important means of compensation should the confiscation claim prove successful. In Ellis J's words:[28]

> "The essence of their claim is that the Taranaki Maori people are prosecuting a claim before the Waitangi Tribunal.The applicants maintain that they may be able to obtain a recommendation from the Waitangi Tribunal that substantial relief be granted to them by way of compensation. Indeed they maintain it is likely. They also maintain that they are likely to obtain recommendations that the relief take the form of a transfer of land and money by way of compensation. They maintain that they are likely to receive recognition from the Tribunal that their rights include rights to petroleum gas and other minerals beneath the surface of the land as being a natural incidence and consequence of the rights guaranteed to them under the Treaty of Waitangi."

None of these substantive issues were addressed in this case, which was disposed of on the basis that the Crown was not under any legal duty to consider the principles of the Treaty when selling its Petrocorp shares.

Following the release of the Waitangi Tribunal's Taranaki confiscation report in 1996, the Government began a series of complex negotiations with Taranaki Maori groups aimed at seeking fair and durable settlements of the confiscation claim. Maori politics in Taranaki are very intricate, characterised by a number of large iwi

[27] *Love v Attorney-General* (unreported, 17 March 1988, High Court, Wellington Registry, CP 135/88).
[28] Ibid, pp 2, 5.

(tribes) in a comparatively small region, which do not always see eye to eye; and, moreover, where the "tribes" are, as is not unusual in the Maori world, divided into much smaller units which often disagree with one another on a range of issues. Progress on settling the claims has been slow.

The Crown took a number of steps to make it clear that there was no possibility of Crown interests in petroleum being made available to compensate Taranaki Maori. In the Crown's view, Treaty interests in natural resources such as petroleum are confined to 1840 use and value interests only. This has been Crown policy since at least 1994 when the Crown first released its formal proposals for the settlement of Treaty claims.[29] In 1999 the Office of Treaty Settlements issued a policy paper which stated that the Crown owns and manages petroleum, uranium, gold and silver under the *Crown Minerals Act* 1991 in the national interest, and that these minerals are not available for redress.[30]

This stance was reflected in the various Heads of Agreement (HOA) entered into by the Crown and Taranaki iwi, Ngati Mutunga, Ngati Tama, and Ngati Ruanui in 1998-99. The HOA clauses relating to Ministry of Commerce protocols (cll 4.5 and 4.6) assumed that the Crown would continue to own and manage petroleum under the *Crown Minerals Act* 1991, and simply set up a process for more adequate consultation with Taranaki iwi by the Ministry of Commerce on the administration of petroleum. Moreover, as a condition of settlement, the HOA required Taranaki iwi to agree to settlement legislation providing for the removal (with effect from the settlement date) of the jurisdiction of the courts, the Waitangi Tribunal and any other judicial body or tribunal in respect of their "Historical Claims" (cl 7.1.2). Such a clause would of course eliminate the possibility of a claim to petroleum or to petroleum royalties.

Shortly after the Tribunal had already granted urgency to the petroleum claim in May 2000 the Minister in Charge of Treaty Negotiations, the Hon Margaret Wilson, issued a press release to the following effect: [31]

> "The Government has reaffirmed policy that Crown minerals (including petroleum), which are owned and managed in the national interest, *will not be included for consideration in the historical claims process*. However, the Government will explore ways to address the Crown's contemporary obligations to Maori under the Treaty with regard to natural resources [emphasis added]."

[29] *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, Office of Treaty Settlements, Department of Justice, Wellington, 1994.
[30] *Healing the Past, Building a Future*, Office of Treaty Settlements, Wellington, 1999, p 114.
[31] Hon Margaret Wilson, Minister in Charge of Treaty of Waitangi Negotiations, Press Release, *New principles to guild the settlement of historical Treaty claims,* Thursday 20 July 2000.

Then on 16 October, on the first day of the hearings, the Associate Minister of Energy (Paul Swain) issued a statement that he had assured the petroleum industry that Crown ownership would continue and described the Waitangi Tribunal inquiry as "futile".[32] This statement, which seemed to amount to a direction to the Waitangi Tribunal that in hearing the petroleum claim it was wasting its time, was not well received by either the Tribunal or the claimants. It also caused something of a political row, with some Maori Government MPs attacking Swain's statement (all given great prominence in the media). The attitude of the industry, however, seems to be that it is unconcerned to whom royalties are paid, so long as the royalties do not increase. Mike Patrick, of the Petroleum Exploration Association, said that the case was of "national significance" but that the industry had "no problems" with royalties being paid to iwi (Maori tribes).[33]

Crown Participatory Rights in the Kupe Field

The Crown held (and still does hold) an 11 percent non-participatory interest in the Kupe oil and gas field licence 38146, which falls directly within the offshore rohe (tribal territory) of Nga Ruahine, the principal claimants in the petroleum case. The Crown had earlier advised Nga Ruahine that it was currently considering the option of exiting its 11 percent interest in the licence. The Crown had also made it clear to Nga Ruahine that the Crown interest in the licence was not available for the redress of Treaty of Waitangi grievances. Nga Ruahine felt, however, that this interest could also be capable of forming part of a redress package to compensate Nga Ruahine for the loss of its customary title. At the hearing an official of the Ministry of Economic Development gave evidence that no decision had as yet been made on the Crown interests in the Kupe field; the Government was not, however, prepared to give an undertaking to the Tribunal that it would not divest itself of these interests.

Management and Environmental Issues

The claimants were not concerned only with property rights in respect of petroleum. They were also very concerned with the policies in respect to the granting of permits by central government and the downstream environmental effects of exploration and

[32] Jonathan Milne, Maori Affairs Reporter, "Maori oil claims futile, says minister", *The Dominion*, Wellington, 16 October 2000, p 1.
[33] Ibid.

production activities. These are significant day-to-day problems for Taranaki Maori. In particular claimants objected to the lack of consideration given to Maori concerns at the time of grant of petroleum exploration and mining permits by the Ministry of Economic Development, and the perceived failure of local government, acting under the *Resource Management Act* 1991, to adequately address Maori concerns, especially the effects of the petroleum industry on water quality, archaeological sites and on waahi tapu (sacred sites).

ARTICULATION OF THE CLAIM IN THE WAITANGI TRIBUNAL

Procedural History

The petroleum claim attracted a considerable amount of media attention and the hearings were attended not only by the usual representatives of the Office of Treaty Settlements but also by a substantial group of officials from the Treasury and the Ministry of Economic Development.

Urgency was granted on 12 May 2000. The substantive hearings all took place in the second half of 2000, and to save time and expense were heard not on a marae but in a conference centre at Wellington. The Nga Ruahine claimants were represented by D A Edmunds, K Bellingham and Andrew Erueti,[34] Ngati Kahungunu by Grant Powell, and the Crown by senior counsel (V L Hardy) from the Crown Law Office at Wellington. A number of Nga Ruahine people gave evidence of their ancestral occupation of their region and their use and management of its resources. The Tribunal commissioned an independent expert with a long term involvement in the industry (Geoffrey Logan) to prepare and file a background report on the industry for the assistance of all parties and the Tribunal.[35] A great deal of technical material on the history of the industry, Government policy, royalties regimes and so on was also placed on the record. The hearings were presided over by Joe Williams, Chief Judge of the Maori Land Court, who is himself Maori (Ngati Pukenga). Expert historical evidence was given on behalf of the claimants by R P Boast.[36] Professor Gary Hawke, a well-known economic historian from Victoria University of Wellington, and Dr John Yeabsley, Senior Fellow of the New Zealand Institute of Economic Research, gave

[34] Andrew Erueti, a Maori legal practitioner and academic, also belonged to Nga Ruahine and was one of the claimants.

[35] G Logan, *A Review of the New Zealand Petroleum Industry,* Wai 796, Doc A37.

[36] R P Boast, *Maori and Petroleum: A Report to the Waitangi Tribunal,* May 2000, Wai 796 Doc A1.

expert evidence on behalf of the Crown.[37] A considerable amount of the evidence focused on the reasons for the Crown's nationalisation of the resource in 1937, and whether this could be fairly be said to be a breach of the principles of the Treaty of Waitangi.

Claimant Arguments: Native Title and Maori Freehold Land

The claimants had to find a way of fitting this claim within the particular legal discourse employed in the Waitangi Tribunal, in which legal argumentation has to be structured around breaches of the principles of the Treaty of Waitangi.

This did not mean, however, that the law relating to native title was of marginal importance. The claimants had to show that when the Government enacted the *Petroleum Act* in 1937 it had the effect of expropriating a resource that was to some extent Maori-owned. The claimants argued that while it was the case that most of their land in Taranaki was confiscated by the 1865 proclamations, the proclamations, and their empowering Act, the *New Zealand Settlements Act* 1863, may have been insufficiently clear and plain to extinguish Maori interests in petroleum (whatever they may have been at that time). In this respect the claimants relied on the 1986 New Zealand High Court decision in *Te Weehi v Regional Fisheries Officer*[38] and Brennan J's discussion of the same point in *Mabo v Queensland (No 2)*,[39] cited in the New Zealand Native title case of *Faulkner v Tauranga District Council.*[40] The confiscation may have extinguished surface titles but not mineral and petroleum rights, or to put it another way only part of the estate would have been extinguished leaving sub-surface rights in Maori hands.

If the confiscation legislation and proclamations did not extinguish title to petroleum then that arguably meant that the Taranaki iwi held title to perhaps all or most of the petroleum in Taranaki (excepting, possibly, areas separately purchased by the Crown, where extinguishment would turn on the precise language and terms of each deed) until the enactment of the *Petroleum Act* 1937.

Quite apart from that, it is beyond argument that owners of Maori freehold land under Land Court titles had the right, in common with all freeholders, to drill into petroleum reservoirs underneath their land and win petroleum under the doctrine of capture, or at least to

[37] *Statement of Evidence of Professor Gary Hawke,* 13 September 2000, Wai 796 Doc A32; *Evidence of John Yeabsley,* 26 September 2000, Wai 796 Doc A31.
[38] [1986] 1 NZLR 680 at 691.
[39] (1992) 175 CLR 1 at 64.
[40] [1996] 1 NZLR 363.

enter into petroleum leases. Some Maori groups – not in Taranaki, as it happens, as so much land had been confiscated – had been doing exactly that when the Petroleum Act was enacted in 1937. By 1937, at least, Maori landowners were certainly aware of the value of petroleum and some had been attempting to gain commercial benefits from it.

Nationalisation and the Treaty of Waitangi

At the core of the claimants' case, however, was their claim that the nationalisation of petroleum in 1937 was contrary to the principles of the Treaty of Waitangi. There was no need to demonstrate that the confiscations were contrary to the Treaty as that had already been accepted by the Tribunal in its 1996 report.[41] The argument about nationalisation was pitched at a quasi-constitutional level, essentially that in nationalising petroleum the Crown was using is powers of governance and control ceded in Art I of the Treaty ("kawanatanga" – literally governorship) in a manner which illicitly impinged on the "rangatiratanga" (chieftainship) retained by Art II.

Thus posed, the argument opened the doors to a wide-ranging historical debate. Was the nationalisation of petroleum an appropriate step for the Government to take in 1937? This may seem an unusual line of enquiry to pursue in a judicial forum, but in fact argumentation of this kind is standard fare in the Waitangi Tribunal.

Many of the arguments about the constitutionality, as it were, of expropriating petroleum had already been traversed in 1937. Sir Apirana Ngata had at that time opposed the nationalisation loudly and eloquently. His main objection had been to the Government's proposal to take all petroleum royalty income for itself. Ngata had argued that this confiscatory measure was not justified and was not necessary to achieve the government's strategic goals. His own Ngati Porou people had in fact even composed a haka to express their anger over the Government's decision – this referred to the Minister's "boiled head", a deadly insult in the Maori world. Ngata was supported in his views by the other Maori members of parliament and by members of the National Party opposition, including Gordon Coates, formerly the Prime Minister.

A similar line of argument was advanced in the 2000 case. The claimants argued that it was not necessary to go to the lengths of expropriating the resource in order for the Government to achieve its strategic goals. It was pointed that coal resources were far more significant to the New Zealand economy at the time than was

[41] Waitangi Tribunal, *Taranaki Report,* 1996, pp 308-11.

petroleum, but it was not felt necessary to nationalise the coal resource.[42] The claimants argued that expropriation of petroleum was certainly a breach of the Treaty of Waitangi, as Ngata and the Native Department had claimed in 1937.[43]

In 1937 the Government argued that there could be no breach of the Treaty of Waitangi as the legislation affected everyone and was not directed specifically at Maori. Ngata, however, had been unconvinced. The fact that expropriation was directed at everyone, he noted, did not make it any less of a breach of the Treaty of Waitangi as far as Maori were concerned.[44]

The claimants also brought to the Tribunal's attention a number of recent large scale settlements of indigenous land claims in which provision had been made to varying degrees for mining and oil and gas royalties. Counsel referred to the *Alaska Native Claims Settlement Act* 1971, the *Aboriginal Land Rights (Northern Territory) Act* 1976, and a number of recent settlements in Canada: the Gwich'in and Sahtu Dene and Metis Mackenzie Valley settlements, the Nunavut Settlement Agreement, the Yukon First Nations Umbrella Final Agreements, and the Nisga'a Nation agreement.

Crown Arguments

The Crown accepted that there probably was a Maori customary interest in petroleum prior to the confiscations of 1865. However, by 1937 there was no customary interest remaining, and Maori would only have had the same rights to petroleum as did other private landowners – the right to drill for petroleum on their own land and win what they could under the doctrine of capture. In arguing along these lines the Crown appeared to re-arguing the point made in 1937: that as the legislation was non-discriminatory it could not be a breach of the Treaty of Waitangi.[45]

The Crown also argued that the decision to nationalise petroleum in 1937 was made in good faith and on the basis of the New Zealand Government's best assessment of the strategic exigencies of the time. The Tribunal could not now sit in judgment on the Crown and substitute its own opinions for those of the Government and its advisers in 1937 (an understandable point, perhaps, but this type of

[42] *Submission of Counsel for Nga Hapu o Nga Ruahine,* para 109. Coal was nationalised in 1948 – with full rights of compensation – but was reprivatised by the National Government in 1950.
[43] *Submission of Counsel for Nga Hapu o Nga Ruahine,* para 116.
[44] Ngata must be right here. Suppose, for instance, that the New Zealand Government decided to expropriate all land in the country – the fact that all citizens would be disadvantaged could not make such a step contrary to the Treaty of Waitangi.
[45] *Submission of Counsel for the Crown,* September 2000, paras 54-8.

inquiry is in fact characteristic of the whole Waitangi Tribunal process). In making this argument the Crown relied on the evidence of its two main expert witnesses, Professor Hawke and Dr Yeabsley.

In respect of contemporary issues the Crown argued that the existing legislation, the *Crown Minerals Act* 1991, addressed Maori issues adequately.[46] The Crown argued, also, that petroleum was not suitable as a means for providing redress and might in fact turn out to be a "windfall" for the claimants. It was also unsuitable as it would provide an inconsistent and variable income stream.

CONCLUSION

Although the Tribunal took this claim under urgency and undertook that its report would be ready by the end of December 2000,[47] in fact the Tribunal has not yet reported on the claim and no report can apparently be expected for a number of months. The delays reflect the shortage of resources under which the Tribunal currently labours. The current Government's policy appears to be to deliberately sideline the Tribunal and starve it of resources in order to encourage claimant groups to bypass it and enter directly into negotiations with the Office of Treaty Settlements. The under-resourcing of the Tribunal was sharply criticised by the High Court in a recent case dealing with Maori fisheries.[48] The case showed, said McGechan J, that "the Tribunal is not being resourced to operate, and is not able to operate, in a satisfactory manner".[49]

What the outcome of the petroleum claim will be is thus uncertain, although perhaps an indication of the likely outcome was the comment made by Williams CJ to Crown counsel that if one applied "a robust common sense" it would "seem hard to justify a resource of this magnitude being denied to these people".[50] The interest of the claim legally lies in the difficulty of trying to adequately describe and analyse the effect of resource nationalisation on a fungible resource such as petroleum using the particular discourse of the principles of the Treaty of Waitangi. One can in a way feel some sympathy with the Crown's argument that it makes no sense to attempt to substitute our own present-day judgment for that of the New Zealand Government confronted with the difficult and increasingly threatening international situation in 1937. Yet as claimant counsel

[46] Ibid, paras 78-98.
[47] "Christmas deadline for Maori gas claim", *The Dominion,* Wellington, 20 October 2000, p 2.
[48] *Te Runanga o Ngai Tahu v Waitangi Tribunal & Ors* (unreported, High Court, Wellington, 4 April 2001).
[49] Ibid, p 52.
[50] *The Dominion,* Wellington, 20 October 2000, p 2.

pointed out in reply, such is the Waitangi Tribunal's task: to evaluate steps taken in the past in the light of the obligations imposed by the Treaty of Waitangi. That this process is difficult, contentious, and arguably even unhistorical is beside the point.

The claimants, while awaiting their report, are meanwhile currently facing repeated requests by permit holders to respond to applications for exploration and drilling all over their district. Should the Tribunal issue a report that is supportive of the claim, that will become very relevant to those exercising functions and powers under the statutory law relating to petroleum permits and environmental management. The report will have significant consequences, in other words, not merely on long-term questions of property and compliance with the Treaty, but also on day-to-day management.

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