# GOLD, THE *CASE OF MINES* (1568) AND THE WAITANGI TRIBUNAL

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## I LAW'S ENTERPRISE AND MINING FOR GOLD

One feature of law's enterprise is laying down rules relating to the mining of precious metals. This enterprise became fraught with difficulty in a context where mining took place on lands of indigenous peoples in a colonial society. An inevitable aspect of gold mining operations anywhere is that there will be conflicts between the interests of miners in gaining access to land thought to contain minerals and of those with pre-existing property rights in the land. In the resolution of such conflicts, governments are by no means neutral arbiters. In nineteenth century colonial New Zealand, the Government had a political interest in maintaining order in gold fields and an economic interest in controlling gold transactions, particularly at a time when there was a gold standard backing for sterling currency. Numerous Europeans and some Chinese were drawn to New Zealand, and to other countries of what is now known as the Pacific Rim, in search of gold during the latter part of this century. The resulting 'gold rushes' inevitably confronted indigenous populations living in mining districts with sudden and drastic social changes.

As it happened, most New Zealand gold mining districts were in the South Island (then known as the Middle Island) where the Maori indigenous population was very small in number and scattered in locations. Prior to the gold rushes all customary land rights of that population had been extinguished, in the view of colonial law, by a number of 'deeds of purchase' for huge areas of land covering virtually the entire

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island.[1] Therefore South Island mining districts were created by the colonial authorities usually without any perceived need for consultation or negotiation with Maori tribes, let alone obtaining their consent to mining operations. The situation was rather different in the North Island where the Maori population was heavily concentrated and where, during the early colonial period until the 1870s, European settlers were outnumbered. Moreover, Maori tribes were well supplied with modern musketry. In the Coromandel peninsula area of the Hauraki district in the North Island, south-east of Auckland, gold was first discovered in 1852. Although British sovereignty had been proclaimed over the North Island in 1840, twelve years later that area *de facto* remained in the exclusive possession and control of a number of Maori tribes who continued to administer their affairs according to *tikanga Maori* – that is, according to their own customary laws and usages. The focus of this article is on the clash of laws and cultures between the common law of England and *tikanga Maori* in Hauraki district after gold was discovered there.

This is a matter being considered in 2003 by the Waitangi Tribunal, a permanent commission of inquiry established by the *Treaty of Waitangi Act 1975* (NZ). Since amending legislation in 1985, the Waitangi Tribunal has had jurisdiction to inquire into historic grievances of Maori against the Crown from 6 February 1840, when the Treaty of Waitangi was first signed, to the present. The Tribunal may make findings of fact and issue recommendations to Ministers of the Crown for the practical application of 'the principles of the Treaty of Waitangi' in today's circumstances. This article is partly based on my evidence given to the Waitangi Tribunal in 1998.[2] That evidence as a lego-historian was what might be termed advocacy expert witness evidence. I was called as a witness by the Hauraki Maori Trust Board which comprises representatives of 12 tribes with customary rights in the Hauraki region. The Board is the leading claimant in the Tribunal's Hauraki district inquiry. It has facilitated the preparation and presentation of the claim registered as Wai 100. The Statement of Claim for Wai 100 includes many heads of claim put forward by the claimants. Among them is the claim that Crown assertions of royal prerogative rights to control the mining of gold and other extractable natural resources, and parliamentary enactments to the same effect, were and are contrary to the principles of the Treaty of Waitangi.

First I outline some features of the legal and cultural discordance between the common law and *tikanga Maori* and then I offer some views on the relevance of Treaty of Waitangi jurisprudence to addressing this aspect of Hauraki Maori grievances. The difficulty with this type of issue, as the Waitangi Tribunal has pointed out (in relation to colonial ordinances about pre-1840 land transfer transactions between Europeans and Maori), is that 'British constitutional norms

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[1] There has been a modern and critical re-assessment of the Crown's 'Deeds of Purchase': Waitangi Tribunal, *The Ngai Tahu Report* (1991). See also the resulting legislation: *Ngai Tahu Claims Settlement Act 1998* (NZ).

[2] 'Statement of Evidence of David Vernon Williams' (1998) Wai 100, # A16; Wai 686, # A50. The Tribunal's Hauraki district inquiry hearings commenced in 1998 and concluded in 2002. A Tribunal report is expected in 2003.

were as incomprehensible to Maori as Maori societal norms were a mystery to the British'.[3]

## II MAORI SOCIETAL NORMS

The presuppositions of Maori societal norms begin in myth and legend. As Marsden and Henare have pointed out:

> Myth and legend in the Maori cultural context are neither fables embodying primitive faith in the supernatural, nor marvellous fireside stories of ancient times. They were deliberate constructs employed by the ancient seers and sages to encapsulate and condense into easily assimilable forms their view of the World of ultimate reality and the relationship between the Creator, the universe and man.
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> Cultures pattern perceptions of reality to conceptualisations of what they perceive reality to be; of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the 'world view' of a culture. The world view is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system. The world view lies at the very heart of the culture, touching, interacting with and strongly influencing every aspect of the culture.
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> In terms of Maori culture, the myths and legends form the central system on which their holistic view of the universe is based.[4]

When urging the need for a proper study of Maori custom law, Maori Land Court Chief Judge Durie (now Durie J of the High Court) had this to say:

> It may reveal that Maori saw themselves not as masters of the environment but as members of it. The environment owed its origins to the union of Rangi, the sky, and Papatuaanuku, the earth mother, and the activities of their descendant deities who control all natural resources and phenomena. The Maori forebears are siblings to these deities. Maori thus relate by whakapapa (genealogy) to all life forms and natural resources. There are whakapapa for fish and animal species just as there are for people. The use of a resource, therefore, required permission from the associated deity. In this order, all things were seen to come from the gods and the ancestors as recorded in whakapapa.[5]

Evidence presented to the Hauraki hearings of the Tribunal clearly bears out Durie's propositions. The evidence was prepared by the late Taimoana Turoa and presented by his daughter, Airiini Hale. He spoke of the *tipua* or *tupua* [spiritual beings] who manifested themselves in stones, in *paua* [abalone shells], in *pounamu* [greenstone]. He mentioned Tamateahua, guardian-god of *mata-tuhua* or *matea*

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3 Waitangi Tribunal, *Muriwhenua Land Report* (1997) 116.

4 Maori Marsden and Te Aroha Henare, 'Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Maori' (paper for the Ministry for the Environment, Wellington, 1992) 2-3.

5 Chief Judge Eddie Durie, 'Custom Law' (1994) 24 *Victoria University of Wellington Law Review* 325, 328.

[obsidian] and he spoke of varieties of obsidian and other coloured stones such as *kahurangi* (red), *paretao* (dark green). He referred to the inshore islands known because of the obsidian found there as *Tuhua-nui* (Mayor Island) and *Tuhua-iti* (Cow & Calf Island). He spoke of Paretauira, a guardian spirit of a rare rock used to fashion implements, of '*nga para kohatu ki te paritu o te maunga*' [Moehau mountain granite found at Paritu], of the basalt stone deposits at Tahanga and of Hinetua, the greenstone god. For him the '*purakau*' [cosmogonical stories] he related were 'just that - a series of incredible stories - which are simple and direct, which do not attempt to explain the science of natural phenomena, but merely its presence in the lens of the beholder'. He recounted, for example, the tale of a *taniwha* [spiritual being] dragging a woman captive behind him with her husband close on his heels. To slow the progress of his pursuer he took out his greenstone club and slashed down the side of the summit he stood on. This opened up a quartz face in a blazing white wall and the reflection from the rays of the rising sun completely blinded his persistent enemy. The quartz face is named Tokatea, referring to the brightness of the rock.[6]

*Tangata whenua* [people of the land] is now a term of common usage in New Zealand English to refer to Maori people. The connection of people with land is an enduring core element of Maori cultural knowledge systems and Acts of Parliament now recognise this.[7] All the mythological stories which Turoa referred to, and the naming of land features he mentioned, display the deep cultural and spiritual relationships of the *tangata whenua* in Hauraki to the land and its minerals. They contain a clear statement of Maori peoples' connectedness to the land and its resources in all their fullness. The myths integrate into an intricate wholeness all aspects of people, the sea, reefs, islands, foreshore, land, rocks, trees, mountains, caves, minerals, streams, lakes, birds, fish, demi-gods, gods, etc.

That Maori custom law did not and does not divide up the relationships of Maori with land in all its aspects is abundantly clear in the claimants' evidence to the Waitangi Tribunal. It would be palpable nonsense to listen to tribal myths about quartz embedded in rock faces and then to raise questions about whether gold found in quartz was an interest severable from the customary rights to land. There can be no doubt that, within the framework of *tikanga Maori*, aspects of *rangatiratanga* [political authority] and *kaitiakitanga* [guardianship responsibilities] would extend to all manifestations of *whenua* [land] – whether they are cosmological or physical, seen or unseen, known or unknown, knowable or unknowable.

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6 T Turoa, 'Draft: References to Minerals of Hauraki' (1995) tabled at the Waitangi Tribunal hearings by A Hale (1998).

7 See, for example, *Resource Management Act 1991* (NZ) ss 2, 6(e); *Te Ture Whenua Maori/Maori Land Act 1993* (NZ) preamble; *Hazardous Substances and New Organisms Act 1996* (NZ) s 6(d).

## III THE *CASE OF MINES*

English common law and statute was based on principles and reasoning that were and are very different to the presuppositions of *tikanga Maori*. *R v Earl of Northumberland* ('*Case of Mines'*) was decided in 1568.[8] The reigning monarch, Queen Elizabeth I, was greatly worried at that time about the revenue (or lack of it) available for her exchequer and she was concerned about the possibility of renewed war with Spain. Whilst Spain had available an ample quantity of gold plundered from the 'New World' of the Americas, England had little access to gold. When some copper miners found an admixture of gold in copper mined from lands belonging to the Earl of Northumberland, therefore, the Queen's advisers were anxious to claim prerogative rights to the gold. A suit was brought in the Court of Exchequer Chamber and judgment was for the Queen. The Queen's right to mine gold or silver was founded, it was said:

> [In] respect of the excellency of the thing, for of all things which the soil within this realm produces or yields, gold and silver is the most excellent; and of all persons in the realm the King is in the eye of the law most excellent. And the common law, which is founded upon reason, appropriates every thing to the persons whom it best suits, as common and trivial things to the common people, things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all other; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and this is the King.[9]

Whatever we may now think about the English class hierarchy accepted as axiomatic in the reasoning of the Elizabethan court, this case has remained the leading case in New Zealand law on the royal prerogative to the royal metals of gold and silver.[10]

## IV BRITISH IMPERIAL CONSTITUTIONAL NORMS

The reception of the entirety of English law in New Zealand is deemed to have taken place in 1840. Colonial constitutional law stipulated the date of reception to be 14 January 1840.[11] It was on that date in Sydney that Gipps, the Governor of New South Wales, issued a number of proclamations relating to the New Zealand

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8 (1568) 1 Plowden 310 [75 ER 472]. Plowden's extensive report was published some years after the decision.

9 Ibid 315-316 [479-480]. The discussion also covers the royal prerogative to sturgeons and whales.

10 New Zealand commentaries include J C Parcell, *A Thesis on the Prerogative Right of the Crown to Royal Metals* (1960) 10-22; O J Morgan, 'The Crown's Rights to Gold and Silver in New Zealand' (1995) 1 *Australian Journal of Legal History* 51, 53-57.

11 *Supreme Court Ordinance 1844* (NZ) s 8; *English Laws Act 1858* (NZ) s 1, re-enacted in 1908, s 2; *Imperial Laws Application Act 1988* (NZ) s 5.

dependency of New South Wales and swore in Hobson as his Lieutenant Governor.[12]

The English common law, thus deemed by legal fiction to have applied to all of New Zealand from the outset of colonial rule, contained a complex corpus of property law on ownership and possession of realty and personalty. This included notions of ownership that allowed, inter alia, for the divisibility of ownership rights as between land and sea, between lakes and lakebeds and between land and royal metals. The orthodox view of modern New Zealand lawyers is that the prerogative rights of the Crown, including the right to the royal metals (gold and silver), applied as soon as English law was received. As Morgan would have it:

> The prerogative can be said to follow the common law, although it is more correct to say that it travels as part of the common law to those places into which the common law is introduced.[13]

Certainly, there is nothing in the conduct of the affairs of state in the nineteenth century by imperial and colonial officials or legislators to contradict this assumption.

The Royal Instructions issued by the Colonial Office to the incoming Governor in 1846 contained provisions 'On the Settlement of the Waste Lands of the Crown' that empowered the Governor to demise Rural Allotments 'supposed to contain any valuable minerals, reserving to us, our Heirs and Successors a royalty of not less than 15 per centum on the minerals to be raised upon and from any such Lands'.[14]

After the creation of a colonial legislature and the introduction of the principle of responsible government by colonial ministers, the *Gold Fields Act 1858* (NZ) established a statutory regime for the regulation of gold mining in the whole country. In s 43 of that Act the General Assembly proclaimed:

> Nothing in this Act contained shall be deemed to abridge or control the prerogative rights and powers of Her Majesty the Queen in respect of the gold mines and gold fields of the colony.

It should be pointed out that there were no Maori members of Parliament in 1858 and that the franchise to vote depended upon ownership by males of land held under English tenures. Whilst Maori comprised about half of the total population at that time and collectively owned a large proportion of the land in the colony, only a handful of Maori were enfranchised owners of individualised Crown-granted freehold land interests. This was a settler Parliament passing a law for the benefit of the European population. Section 43 was a savings provision and it would stretch

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12 David Williams, 'The Foundation of Colonial Rule in New Zealand' (1988) 13 *New Zealand Universities Law Review* 54, 63-64.

13 Morgan, above n 10, 63. See also Parcell, above n 10, 41.

14 Colonial Government, *Ordinances of New Zealand 1841-1849* (1850) 59-62.

the imagination to suggest that many or any Hauraki Maori knew of its existence at the time. Certainly there was no translation into Maori of the Act nor any attempt to publicise the precise terms of the Act in Maori communities.

Shortly afterwards, from 1860 to 1872, the New Zealand wars began and they had a significant impact on the Hauraki region. By the end of those wars most of the colony (including the Coromandel peninsula) had been brought firmly under the *de facto* sovereignty of the colonial state – although it would be some years yet before actual political control was secured in some of the more remote inland North Island regions. Settler numbers had grown very dramatically and by the 1870s Maori were heavily outnumbered by settlers, even in the North Island.[15]

It is not surprising, therefore, that a dramatic assertion of Crown rights in respect of mining may be seen in the *Resumption of Land for Mining Purposes Act 1873* (NZ). This Act entitled the Crown compulsorily to 'resume' privately owned land for mining purposes on payment of 'full compensation' but in s 2 it was clearly stated that the compensation payable did not include 'auriferous or argentiferous' [gold or silver] values. Behind the notion of this right to resumption of land was an assumption of the radical title of the Crown to all land in New Zealand. That radical title had been asserted first by the New South Wales legislature in *4 Vic No 7* [*New Zealand Land Claims Act 1840*] (NSW).[16] This was re-enacted, after New Zealand was erected as a separate Crown colony, in the *Land Claims Ordinance 1841* (NZ).[17]

Thus from the commencement of colonial rule to the present the Crown has asserted categorically that ownership and control of valuable minerals is a discrete area of law, quite separate from the ordinary rights to ownership and possession of land. The current legislative expression of this paradigm is set out in the *Crown Minerals Act 1991* (NZ) s 10, which states:

> Notwithstanding anything to the contrary in any Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum, gold, silver, and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

## V Circumstances of the Colony: Dominance of Maori Custom Law in 1852

When rumours of gold in the Coromandel region began to circulate in 1852 the Colony of New Zealand was divided into two provinces. New Ulster was the

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15 D Ian Pool, *The Maori Population of New Zealand 1769-1971* (1977); D Ian Pool, *Te Iwi Maori: a New Zealand population, past, present and projected* (1991).

16 See Crown evidence to the Muriwhenua hearings of the Waitangi Tribunal: D M Loveridge, 'The New Zealand Land Claims Act of 1840' (1993) Wai 45 # I 2.

17 David Williams, *'Te Kooti tango whenua': The Native Land Court 1864-1909* (1999) 108-111 discusses the Crown's claims to radical title and to 'waste lands', especially as outlined in the Royal Instructions 1846.

province to the north of a line drawn east from the mouth of the Patea River in the lower North Island. The rest of the country was New Munster. Essentially, New Munster was the southern part of the colony that was dominated by European settlers and where customary Maori title to most of the province had already been extinguished. In New Ulster, however, the situation was very different. Most of the land remained in customary Maori title and settlers were a distinct minority in the province. Wynyard, the Lieutenant Governor of the province was acutely aware of this fact when he wrote to Governor Grey in Wellington on 25 October 1852:

> It having been officially represented to me, on the 18th instant, by a deputation from the 'Gold Reward Committee', that it was believed gold had actually been discovered in the neighbourhood of Coromandel, a harbour in the Firth of the Thames, some fifty miles from Auckland in an easterly direction, I lost no time in sending to the spot the native secretary, armed with a communication direct from me to the native owner or chief of the soil, as in the event of the discovery leading to an available field, I instantly saw it is with the natives of the province (60,000 in number) the greatest prudence and circumspection will be required. As regards the white population (12,000 by last census), my course, I conceive, as Lieutenant-Governor, is simple enough; but with the natives it will be necessary to make them thoroughly understand my proceedings, and convince them I have, on the part of the Government, their interests, their rights, and their welfare at heart in all I may arrange.[18]

It is necessary to remember that Maori tribes possessed considerable numbers of modern muskets and were skilled in the use of them. Indeed in 1844-5, only 7 years prior to this dispatch, imperial armed forces had been lucky to escape from the Northern War with what Belich called a 'paper victory' over Maori forces. After that war none of those who fought against the Crown were threatened with the confiscation of land. No criminal or civil proceedings were taken against them. Wisely, in the circumstances, no penalties were imposed on them for their blatant defiance of and active war against the Queen, their nominal sovereign.[19] Wynyard's official could not have gone to Coromandel with safety if he had announced – relying on the terms of the *Case of Mines* – that Her Majesty Queen Victoria was the most excellent person in all the province of New Ulster, and that she and she alone was entitled to any gold which the soil of Hauraki contained.

## VI Relevance of the Treaty of Waitangi

Wynyard was acutely aware that he had to be most circumspect in his dealings with Hauraki Maori. In particular, he was concerned as to how Maori would respond to any Crown actions that might be interpreted as a breach of the Treaty of Waitangi 1840. By article 2 of this Treaty the British Crown in 1840 guaranteed continuing Maori rights and *rangatiratanga* [political authority] in respect of *whenua* [land]

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18 Hauraki Maori Trust Board, *The Hauraki Treaty Claims* (1997) vol 5, part 1, doc 6 [Wynyard to Grey, 25 October 1852].

19 James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (1988) 58-70.

and *taonga katoa* [all treasures] (in the original Maori text), and aboriginal title rights in respect of lands and estates, forests, fisheries and other properties (in the English text).[20] Modern debate has canvassed the important discrepancies between the two versions of the Treaty, but what Wynyard knew in 1852 was that the land guarantees in the Treaty were of the utmost importance to Maori tribes. They featured significantly in the official debate on how to respond to the news from the 'Gold Reward Committee'.

The minutes of the New Ulster Executive Council, which met in Auckland on 19 October 1852, indicate that a range of options were put and discussed before the Council decided on an appropriate Crown policy. The first option was totally to disregard the Treaty of Waitangi and to insist on the royal prerogative:

> To assert and enforce the right of the Crown and to work the Gold-Fields - or to license others to do so, independently of and without reference to the Native owners of the soil.

The second option was to give full faith and credit to the land guarantees of the Treaty:

> To abandon the Royal Prerogative leaving the Native Owners of the Soil either to work the Gold Field themselves, or to make their own terms for allowing the public generally to work it.

The third option was to follow a compromise course - that is a course of action which would strictly apply neither the royal prerogative rights and nor the Treaty of Waitangi. This would be a practical approach that Maori might be encouraged to agree to:

> To enter into an arrangement with the Natives by which they should be induced to entrust the management of the Gold Field to the Government on the condition that the Native owners of the Land should be allowed to work themselves, and that they should receive also a fair proportion of the proceeds of the Licence Fees to be imposed by the Government.

The key section of the minutes reads:

> Although the Crown is entitled to all gold wherever found in its natural state the Council is unanimously of the opinion that it would be inexpedient to attempt fully to enforce Her Majesty's Prerogative rights in the case of gold found on Native land because it would be impossible to satisfy the owners of the particular land in question - or the Natives of New Zealand generally, that such a proceeding on the part of the Government is consistent with the terms of the Treaty of Waitangi which guarantees to them the undisturbed possession of their lands, estates & c.,

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20 *Treaty of Waitangi Act 1975* (NZ) First Schedule (as amended in 1985). For details on the circumstances surrounding the signing and later history of the Treaty of Waitangi, see Claudia Orange, *The Treaty of Waitangi* (1987).

> and because in the opinion of the Council, no proceeding could be taken by the Government which the Natives might deem to be an infringement of the spirit of the Treaty (however insignificant might be the tribe or party concerned) without exciting the suspicion of the whole Native People and without danger to the Peace of the Colony.[21]

It is apparent that the circumstances of the colony, as the Executive Council wisely understood, rendered it impossible to insist upon the royal prerogative to gold. Indeed it would not be wise even to mention publicly that the Crown claimed powers to override land rights, for fear of exciting suspicion and provoking a war that would seriously endanger the entire future of the colony.

## VII The Patapata Agreement

The implementation of the Council's third option culminated in a 4 day meeting at Patapata in November 1852 and the signing of a mining cession agreement. Arguably, as Richard Boast has suggested, formal agreements such as this between the Crown and Maori tribes should be seen to have the character of a treaty binding on the parties. Similar agreements in North America are certainly accorded the status of treaties.[22]

What is abundantly clear about the Patapata cession agreement is that all the leading European figures of New Ulster were present and at this meeting of about 1000 members of the Hauraki tribes. The agreement was a consensual outcome signed by Lieutenant Governor Wynyard for the Crown and 36 chiefs of the Ngati Whanaunga, Ngati Paoa and Patukirikiri tribes. At the request of Maori, Chief Justice Martin, Bishop Selwyn and local missionary Thomas Lanfear were in attendance. The meeting 'was possibly considered of greater significance by Hauraki iwi [tribes] than the ceremonies around the Treaty of Waitangi had been'.[23] Whilst permitting gold exploration and digging by licensed miners, the agreement or treaty was unambiguous in asserting 'property of the land to remain with the Native owners; and their villages and cultivations to be protected as much as possible' (clause 8). Bearing in mind the strong presence at the gathering of chiefs from other tribes, including the powerful Ngati Tamatera, who did *not* wish to open up their lands to mining, it is important also to note the concern of ceding tribes for the rights of those other tribes. Clause 9 read:

> If any of the tribes of the Peninsula decline this proposal, their land shall not be intruded upon till they consent.[24]

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21 Hauraki Maori Trust Board, above n 18, doc 7 [Extract from Minutes of the Executive Council, 19 October 1852].

22 Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History* (1995) 133-134. The North American doctrines on treaties and the notion of dependent nations have not featured in New Zealand's Treaty jurisprudence.

23 Robyn Anderson, 'The Crown, The Treaty, and The Hauraki Tribes 1800-1885' in Hauraki Maori Trust Board, *The Hauraki Treaty Claims* (1997) vol 4, 82.

24 Hauraki Maori Trust Board, above n 18, doc 12 [Agreement with Maori, 20 November 1852].

Crown representatives present on that occasion were made well aware of Maori claims that they should and would control access to gold bearing land as part and parcel of their tribal *rangatiratanga* [political authority]. No-one on the Crown side stood to say that gold is a royal metal owned by the Crown even when found on customary Maori land. The government of New Ulster in 1852 did not wish to risk its relationships with Maori by making such an assertion. Yet these circumstances were not considered relevant when superior courts of the colony later came to consider the applicability of royal prerogative powers in New Zealand.

## VIII Court Cases on 'The Circumstances of the Colony'

The superior courts have always, of course, been bound by the jurisdiction bestowed on them to follow rules of common law, doctrines of equity and statutes of general application derived from English law. However, even within colonial law there is the possibility of an argument that not all English common law nor all aspects of the royal prerogative had to be applied in New Zealand. *The English Laws Act 1858* (NZ) s 1, retrospectively declared that English law applied in New Zealand from 14 January 1840 'so far as applicable to the circumstances of the Colony of New Zealand'.

The interpretation of this caveat to the reception of English law in relation to gold mining was discussed in a Court of Appeal decision in 1875 after hearing extensive legal argument. Chapman J gave a lengthy account of the relevant law and concluded:

> Taking all the cases to be found in the Reports, they are too few in number to establish any exhaustive general rules as to suitableness or applicability of English Statutes to the colonies; and, therefore, 'what shall be admitted and what rejected, must in cases of dispute, be decided, in the first instance by the provincial (ie. colonial) judicature, subject to the revision and control of the King in Council'. [25]

Thus empowered by Blackstonian doctrine, the conclusion arrived at by the Court was to apply the royal prerogative to gold in New Zealand. In doing so it followed the leading English case on the matter:

> The auriferous deposits belong to Her Majesty, subject to the gold fields laws of the colony; but Her Majesty could not, therefore, be entitled to foul streams beyond the gold fields to the detriment of grantees of the Crown. In the case of *Mines*, report in *Plowden*, it was held that the King had the right to cut timber on the freehold of a subject so far as was necessary for working a Royal mine under the land. But it would be going beyond the decision in that case to hold that the Sovereign would be entitled to cut timber, if necessary for working the mine, on other closes than that in which the gold was found. A freeholder can maintain an action for polluting, by gold mining, a stream flowing *past his freehold*, unless the

[25] *Borton v Howe* (1875) 3 CA 5, 14 quoting William Blackstone.

> freehold be within the gold field, and the pollution be justified by the regulations made under the Gold Fields Act.[26]

It is not obvious to me that a 1568 decision arising from the particular historical context of Elizabethan England should be applied to a dispute between sheep farmers and gold miners in Otago in 1875 over the fouling of streams by gold mining operations. However, that was the decision of the New Zealand court. Moreover, similar reasoning in two opinions of the Privy Council in following years applied this royal prerogative to a colony in the Australian continent and to British North America.[27]

There are in fact very few New Zealand cases in which it has been held that some rule of common law or an English statute was *not* applicable to the circumstances of the country. Surprisingly perhaps, one of these few cases is *Baldick v Jackson* in which it was decided that a 1324 statute[28] deeming whales to be a 'royal fish' as part of the royal prerogative was not in force in this country.[29] Stout CJ took into account the extensive private commercial whaling in New Zealand since 1829 and his own personal knowledge of Greenland whaling customs (derived from his upbringing on the Shetland Islands).[30] He also pointed out that the Treaty of Waitangi assumed the existence of Maori fishing rights, that the Maori were accustomed to engage in whaling and that a royal prerogative right to whales would thus disturb Maori rights in respect of fisheries.

The Treaty's article 2 protective guarantee over fisheries helped the Chief Justice to his decision refusing to apply the royal fish doctrine to New Zealand. Surely then, by parity of reasoning, the same article's protective guarantee for lands and estates would point to a decision that the royal metals prerogative was inappropriate to the circumstances of the colony. That proposition should have been assisted by a New Zealand Supreme Court decision in 1901. It had been held in New South Wales that a mining claim was a mere chattel interest but the New Zealand court rejected that approach and held that 'a mining claim is an interest in land'.[31] However, just a year after his *Baldick v Jackson* decision Stout CJ made no reference to it or to the Treaty when making this comment on the *Mining Act 1908*:

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26 Ibid 18.

27 *Wooley v A-G of Victoria* (1877) 2 App Cas 163; *Attorney-General of British Columbia v A-G of Canada* (1889) 14 App Cas 295.

28 17 Edw II c 2.

29 *Baldick v Jackson* (1910) 30 NZLR 343. [No comment was made on the fact that whales are mammals, not fish!]

30 David Hamer, 'Robert Stout, 1844-1930, Lawyer, politician, premier, chief justice, university chancellor' in Department of Internal Affairs, *The Dictionary of New Zealand Biography, Volume Two, 1870-1900* (1993) 484.

31 *Mason v McConnochie* (1901) 19 NZLR 638, 641. See also *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) where coal mining interests were held to be an interest in land. Remarks by Cooke P in this case urged the Crown to negotiate a settlement of Tainui grievances over confiscated lands. See now the *Waikato Raupatu Claims Settlement Act 1995* (NZ).

> There is no doubt that the Mining Act proceeds on the presumption that at common law precious metals belong to the Crown, and the Crown has a right to mine for them: See *Reg v Earl of Northumberland.* This will explain, no doubt, the interference with private property in mining districts.[32]

It may be pertinent to observe that Stout first sought employment as a surveyor on the New Zealand gold fields when he arrived in New Zealand in 1864. Then he turned his attention to the practice of law and the field of politics, reaching the highest office of the colonial hierarchy in both.[33] As counsel for the gold miners in *Borton v Howe*, Stout would have been fully familiar with the arguments on the application of the *Case of Mines* to New Zealand circumstances. Clearly he was content that New Zealand law had adopted uncritically the quaint and archaic reasoning of the 1568 English decision.

## IX 'THE TREATY OF WAITANGI IS THE FOUNDING DOCUMENT OF NEW ZEALAND'

Law is not static. Elsewhere I have detailed the untidy legal process by which New Zealand was annexed to the British Empire as a dependency of New South Wales and then erected as a separate colony during 1840 to 1841. In this process, I argued, the Treaty of Waitangi was, at best, of marginal legal relevance to those responsible for the proclamations of British sovereignty.[34] As noted above the reception of English law is deemed to have taken place in New Zealand on 14 January 1840 *before* the Treaty of Waitangi was negotiated. When Stout CJ delivered his comments on the *Case of Mines* in 1911, the received view in New Zealand law was that the Treaty of Waitangi 'must be regarded as a simple nullity' because the 'Maori tribes were incapable of performing the duties and therefore assuming the rights of a civilised community'.[35] The Chief Justice himself took extreme umbrage and led a vigorous protest by the colonial bench and bar in 1903 when the Privy Council asserted that the existence of Maori customary rights to land was part of the common law of New Zealand.[36]

Controversy continues to flourish as to whether the original basis for British sovereignty in New Zealand lay in settlement, cession or usurpation. It remains contentious whether the Treaty of Waitangi really was a treaty valid in international law. If it was valid, was it merely a treaty to cede Maori sovereignty, or a treaty of cession qualified by ongoing guarantees to Maori, or a treaty that affirmed the autonomy and rights of the indigenous people? If there are continuing obligations of

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32 *Skeet and Dillon v Nicholls* (1911) 30 NZLR 623.

33 Hamer, above n 30, 484.

34 David Williams, 'The Annexation of New Zealand to New South Wales in 1840' (1985) 2 *Australian Journal of Law & Society* 41.

35 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, 77-78. The 1877 authority was cited without disapproval by the Court of Appeal as late as 1963: *In re the Ninety-Mile Beach* [1963] NZLR 461. These cases have now been overruled by the Court of Appeal: *Ngati Apa v Attorney-General*, CA 173/01, 19 June 2003.

36 *Wallis v Solicitor-General* [1903] AC 173, 188; 'Protest of Bench and Bar' (1903) NZPCC 730.

the Crown to Maori relevant to modern conditions, what are they?[37] From the 1970s onwards there was a wave of Maori political protests, leading in the 1980s to significant Maori successes in litigation that forced governments to negotiate out of court settlements and new legislative protections for Maori claimants. In the 1990s Maori penetration of the corridors of political power increased and governments devised a range of policies designed to encourage direct negotiations between the Crown and Maori to settle historical land grievances.[38]

Since the establishment of the Waitangi Tribunal in 1975, the Treaty has well and truly emerged from the oblivion to which the courts and governments had consigned it for many decades. By 2001 a government ministry publication began an overview discussion of the constitutional significance of the Treaty of Waitangi with the assertion that 'The Treaty of Waitangi is the founding document of New Zealand'. It went on to state that the Treaty is 'an integral part of New Zealand's constitutional arrangements and a key source of the government's moral and political claim to legitimacy in governing the country'.[39] Readers unfamiliar with the historical background and texts of the Treaty, the development of 'principles of the Treaty of Waitangi' since the *Treaty of Waitangi Act 1975* (NZ) and the place of the Treaty in New Zealand law today would be well advised to consult this useful publication. An appendix lists the more than 30 Acts of Parliament that now include references to the Treaty.[40]

Has there been a paradigm shift in state structures and in the legal landscape of New Zealand common law, or a mere cultural re-positioning without any significant devolution of political or economic power from colonial, settler dominated structures to Maori tribes and communities? Only time will tell. My intention in writing this article is to urge the Waitangi Tribunal to move the debate beyond the limits arbitrarily laid down by Government policy. Hauraki claimants oppose government-determined parameters that unilaterally prohibit Maori negotiators from challenging the ownership of Crown minerals when engaging in Treaty

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37 For a variety of views see Moana Jackson, *The Maori and the criminal justice system: a new perspective/He whaipainga hou* (1988); I H Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989); Jane Kelsey, *A question of honour? Labour and the Treaty 1984-1989* (1990); Paul McHugh, *The Maori Magna Carta: New Zealand law and the Treaty of Waitangi* (1991); Hineani Melbourne, *Maori sovereignty: The Maori perspective* (1995); Carol Archie. *Maori sovereignty: The Pakeha perspective* (1995); Andrew Sharp, *Justice and the Maori* (2nd ed, 1997); Mason Durie, *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination* (1998); F M Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (1999).

38 Office of Treaty Settlements, *Crown Proposals for the Settlement of Treaty of Waitangi Claims* (1994). For a Maori critique see Mason Durie and S Asher (eds), *The Hirangi Hui: A report concerning the Government's proposals for the Settlement of Treaty of Waitangi Claims and Related Constitutional Matters* (1995).

39 Te Puni Kokiri [Ministry of Maori Development], *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* (2001) 14-16.

40 Ibid 111.

settlement negotiations. A first step would be a critical assessment of the application of the *Case of Mines*.

## X AN OPPORTUNITY TO REVISIT THE APPLICATION OF THE *CASE OF MINES*

It is my view that the application of the royal prerogative on royal metals was always inconsistent with the circumstances of the New Zealand colony in which the indigenous people can point to explicit treaty guarantees for the recognition of their rights to land and natural resources. Despite this, it is obvious that the ordinary courts are required to apply and interpret the *Crown Minerals Act 1991* (NZ) and are obliged by the rules of precedent to follow the *Case of Mines*. Current orthodoxy continues to affirm the opinion of the Privy Council in 1941: 'Treaty rights cannot be enforced in the Courts except in so far as they have been given recognition by statute'.[41] The forum of the Waitangi Tribunal, however, provides an opportunity to revisit and reconsider the appropriateness of laws that have prejudicially affected Maori.

There is nothing in the Treaty of Waitangi that deals explicitly with mineral rights or sub-surface natural resources. Nevertheless, there are instances where the Tribunal, Government and Parliament have recognised that Maori claims to active protection of their land rights under article 2 of the Treaty do extend to natural resources for which there is evidence of traditional usages and cultural and spiritual values. Examples are the legislation on *pounamu* [greenstone] mining rights in the South Island and reports on the use of geothermal waters.[42] In regard to gold, there is no available evidence to support a proposition that Maori traditionally placed a separate value on gold as such nor that it was used in any particular way. An issue in the present case, therefore, is whether gold and other natural resources, which may not have been specifically used by Maori in pre-Treaty times, are protected by the Treaty guarantees relating to land rights and *taonga*. That is a question of principle and treaty interpretation. For those more interested in practical political outcomes the question might be this. Do the principles of the Treaty requiring the Crown and Maori to act in partnership with each other, and the reciprocal duties to act reasonably, honourably and in good faith lead to the conclusion that ownership of gold is a question for negotiation in future Treaty settlement negotiations?[43]

## XI WAS THE ROYAL PREROGATIVE ON GOLD 'CONTEMPLATED BY THE TREATY'?

In a memorandum submitted by Crown counsel to the Waitangi Tribunal in the Huaraki district inquiry, the position was put in these words:

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41 *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) 603 (McKay J) following *Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC) 324.

42 *Ngai Tahu (Pounamu Vesting) Act 1997* (NZ). Waitangi Tribunal, *Te Arawa Geothermal Resource Claims* (1993) and *Ngawha Geothermal Resource Report* (1993).

43 On 'principles of the Treaty of Waitangi' see Te Puni Kokiri, above n 39, 73-106.

6.1 The prerogative right attaching to gold and silver attaches to the British Crown. On assumption of sovereignty, in 1840, the prerogative applied to these minerals in New Zealand.

6.2 Once the prerogative is established, the most the legislature is entitled to do is to restrain its operation or regulate its disposition, including the right to waive its application. The prerogative remains, and the power to operate it will remain in the Crown.

6.3 The Crown denies that the prerogative itself was in breach of the principles of the Treaty, it being an integral part of the sovereignty extended by the British Crown over New Zealand and contemplated by the Treaty. The issue is not who owned the gold, rather whether arrangements the Crown made with Maori in respect of gold and the legislation subsequently enacted, were in breach of the Treaty principles. [44]

Crown counsel's contention is that the royal prerogative on gold is ‘an integral part’ of British sovereignty and that its application was ‘contemplated by the Treaty’. This is similar to a more general proposition advanced by the government in 1989. A statement of the principles of the Treaty of Waitangi that guide the Crown in applying the Treaty today asserted a ‘principle of equality’ in these words:

> The third Article of the Treaty constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also. [45]

Yet a selection of the English common law system is not at all obvious from the historical context of a tiny body of British officials and settlers arriving in a land then controlled by Maori and organised according to the principles of Maori custom law. The government of New Zealand as a dependency of New South Wales led by Lieutenant Governor Hobson initially comprised only seven officials. The armed might available to them were the sailors and soldiers on just one Royal Navy ship, at a time when settlers were outnumbered by about 2,000:150,000 and when, as noted above, most Maori tribes were well armed with modern musketry.

There is nothing in the primary Maori text of the Treaty - with its article 2 guarantees of *te tino rangatiratanga* [full political authority] and its article 3 guarantees of *nga tikanga katoa* [all laws] to point to a ‘selection’ of English common law. Nor are there any words in the English text that advert directly to the selection of English law. Article 3 refers to ‘the Rights and Privileges of British Subjects’, but in many parts of the British Empire (and within the United Kingdom itself) Her Majesty's royal protection and the rights and privileges of British subjects were not incompatible with the continuing operation of a great variety of

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[44] Crown Counsel, ‘Memorandum for the Tribunal Concerning Statement of Factual Issues’ (1998) *Wai* 686.

[45] Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (1989) 13; Office of Treaty Settlements, *Healing The Past, Building A Future* (1999) 19.

non-English legal systems. In addition, there were a number of representations made by Crown representatives in 1840, during the course of Treaty negotiations, explicitly promising respect for Maori custom law. I have discussed these promises to recognise Maori custom law in more detail elsewhere.[46]

It is a remarkably monocultural perspective to assume that only English law doctrines on tenure of land and on royal prerogatives should have applied to land and minerals in the New Zealand. There is no doubt that the preferred approach of imperial and colonial officials indeed was to insist upon this monocultural perspective. There is no evidence, however, that they directly communicated this to Maori in Hauraki, or anywhere else. Anyway it would have been impossible to implement that law in 1840 and, as noted above, it was still impossible to implement it in 1852. Furthermore, as Durie, former Chairperson of the Waitangi Tribunal, has put it in extra-judicial remarks 'the question is not whether Maori used minerals, but whether they had the prior right to all that was within their territory'. His suggestion, contrary to the Crown's insistence that Maori must prove their customary rights in courts established by the Crown, is that the Crown should 'have the larger burden of establishing its right, without reliance on legal presumptions still clanking in medieval chambers, or without recourse to legal fictions'.[47]

Durie's starting point that Maori law and customary tenure continued to apply unless the Crown can show that Maori rights had been consensually extinguished is, in my view, the proper general approach to this matter. The question in the Hauraki region is whether the Crown can show, without reliance on the royal prerogative established by the *Case of Mines*, that control of the gold fields and ownership of gold was freely vested in the Crown by Maori. Do the mining cession agreements and land transactions from 1852 onwards amount to an extinguishment of Maori rights in a manner that is consistent with the Crown's fiduciary duty of good faith to Maori? An answer to this question requires a thorough inquiry into all aspects of Crown-Maori transactions over a long period of time. That inquiry ought not to be short-circuited by reliance on a dubious legal presumption that the prerogative right to gold was 'contemplated by the Treaty'.

## XII Treaty Settlement Policies on Natural Resources

Whatever the outcome of the Tribunal hearings, a future major stumbling block for the Hauraki claimants is that under current policy, as established since 1994, the Crown identifies four main types of interests in natural resources: ownership, use,

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46 Williams, above n 17, 116-119. See also N Z Law Commission, *Maori Custom and Values in New Zealand Law* (2001) 72-74.

47 Chief Judge Eddie Durie, 'Native Title Re-established' (Paper presented at the International Bar Association, 25th Biennial Conference, Melbourne, 13 October, 1994) 16-17. See also Richard Boast, '*In re Ninety-Mile Beach* Revisited: The Native Land Court and the Foreshore in New Zealand Legal History' (1993) 23 *Victoria University of Wellington Law Review* 145, 169.

value and regulatory interests. Prior to negotiations or consultation with Maori, the Government had stipulated unilaterally that it 'does not consider that Article II of the Treaty guaranteed to Maori the ownership of natural resources in 1840' and that the Crown has 'the sole right to regulate for the common good'. The Government will only consider claims based on natural resources in relation to 'their uses and their cultural and spiritual values' and those values 'are guaranteed only if they existed in 1840 or were reasonably foreseeable developments of those uses'.[48] There is still gold mining taking place in the Coromandel area. Any existing private property rights are beyond the reach of Maori claimants as only Crown assets are available for Treaty settlements. Nevertheless, the Government's blanket refusal to discuss ownership of natural resources looks remarkably like a modern version of the old common law presumptions. Hauraki claimants do not wish to accept that there will be no negotiations about the future ownership of gold or direct Maori involvement in the regulation of mining.

The 2000 version of government policy on direct negotiations with the Crown lays down a set of six principles 'to ensure that settlements are fair, durable, final and occur in a timely manner'. The negotiating principles are 'good faith, restoration of relationship, just redress, fairness between claims, transparency and Government-negotiated'.[49] These appear to be well-intentioned principles, and yet I have to question whether it is really a good faith mode of 'negotiation' if key issues have been decided in advance by presumptions laid down by the Crown alone?

## XIII DOES NEW ZEALAND LAW COME FROM TWO STREAMS?

In previous reports the Waitangi Tribunal has found that a number of common law rules and presumptions are indeed inconsistent with the principles of the Treaty of Waitangi. Rules found to be incompatible with Treaty principles include: the presumption of Crown ownership to the bed a lagoon that was an arm of the sea;[50] the assumption that Crown ownership of coastal lands extinguished rights to adjacent customary fisheries;[51] the application of the *ad medium filum aquae* maxim to riverbeds;[52] the application of the common law rule that water (including geothermal energy) is incapable of being owned until abstracted.[53]

The Tribunal in its Hauraki report must assess the actions of the Crown in that district from 1852 onwards. Its statutory jurisdiction requires it to consider this history from a modern Treaty jurisprudence perspective. Academic historians have expressed difficulty with the 'presentist' approach of the Tribunal in its retrospective re-assessments of past history in the light of 'principles of the Treaty'

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48 Office of Treaty Settlements, above n 38, *Summary* 21-22, *Detailed Proposals* 18-24.

49 Office of Treaty Settlements, *Healing The Past, Building A Future* (2nd ed, 2002) 30.

50 Waitangi Tribunal, *Te Whanganui-A-Orotu Report* (1995).

51 Waitangi Tribunal, *Muriwhenua Fishing Report* (1988); *Ngai Tahu Sea Fisheries Report* (1992).

52 Waitangi Tribunal, *Mohaka River Report* (1992); *Whanganui River Report* (1999).

53 Waitangi Tribunal, *Ngawha Geothermal Resource Report* (1993); *Te Arawa Geothermal Resource Claims Report* (1993).

created by judges and lawyers since 1987.[54] For the reasons set out above, however, I have no difficulty in suggesting that the application of the royal prerogative on royal metals in New Zealand was indeed a breach of the Treaty of Waitangi's land guarantees and of promises to respect Maori custom law. It is my hope and expectation that the Tribunal will find that the Crown's steadfast reliance on this prerogative was and is inconsistent with the principles of the Treaty.

More broadly speaking, it is my hope that the Tribunal report will address the broad legal policy questions posed by Chief Judge Durie in his 1996 Guest Memorial lecture which he aptly entitled 'Will the settlers settle?':

> Was New Zealand settled, ceded, annexed or conquered? If it was settled are we to assume that Maori had no settled law? The debate on that matter is not helpful for it exists in a monocultural paradigm. I would rather ask whether the settlers will settle. Will we recognise the laws of England or the laws of New Zealand and if the latter, will we hone our jurisprudence to one that represents the circumstances of the country and shows that our law comes from two streams?[55]

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54 W H Oliver, 'The Future Behind Us' in Andrew Sharp and Paul McHugh (eds), *Histories, Powers and Loss* (2001) 9. It should be noted, however, that Oliver has also given evidence to the Waitangi Tribunal for a number of claimant groups, including the Hauraki Maori Trust Board.

55 Chief Judge Eddie Durie, 'Will the Settlers Settle? Cultural Conciliation and Law' (1996) 8 *Otago Law Review* 449, 462.