TRADITIONAL RIGHTS IN MODERN TEMPLATES

The translation of traditional fisheries rights into contemporary Maori fisheries development in New Zealand

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INTRODUCTION

The New Zealand situation in respect of indigenous rights in fisheries offers some comparisons with comparable movements in Canada, United States and Australia where, on the whole, reliance has been on Aboriginal Rights principles as distinct from Colonial Treaties. The issue is open as to the respective rates of progress being achieved through these two basic approaches.

New Zealand's Treaty of Waitangi (1840) is a Treaty of three Articles. Article I provides for the acquisition by Britain of sovereignty of governance. Article II provides for the protection of the "the exclusive and undisturbed possession" of "their fisheries" amongst other items. Article III provides that all individual Maori will be accorded the "rights and privileges of British citizens". The Treaty, which is generally regarded as the basis of the sovereignty of the New Zealand State, has featured in a somewhat rancorous discourse between Maori tribes and Pakeha (non-Maori) from its 1840 signing until the present day.

Considerable attention has been devoted in that discourse to fisheries issues. For the moment, the point to be made is that, just as the rights in their traditional fisheries were secured and guaranteed to Maori tribes by the Treaty in 1840, at the same time the same Treaty conveyed to the New Zealand State the capacity to regulate and manage those fisheries in the national interest. That national interest is expressed in terms of the maintenance of a sustainable resource.

At the heart of the debate in recent years, both before the Waitangi Tribunal and the Courts, has been the question of just what "their fisheries" comprised at 1840 and what they comprise at present. It should be noted that nearly all fisheries legislation in New Zealand has historically made provision for the protection of Maori rights, but has generally failed to give effect to them.

At the time the Treaty was signed in 1840, the territorial sea of New Zealand had a three mile limit in accord with the international custom and law of the period. That has, in more recent years, been extended to twelve miles. The Law of the Sea extended the economic zone to a 200-mile radius which, by the addition of its island territories in the southern ocean, gives New Zealand, for its size, a very substantial area of control over the sea and consequently fisheries. The dramatic enlargement of the zone in which Maori rights in fisheries might be restored has itself provided rich fuel for debate and contention about the nature and extent of the right.

Despite Maori protest, the New Zealand State dealt with the seas as Commons, within the prerogative of itself solely, and it regulated fisheries on that basis. Maori interests contended in vain that the fisheries belonged to them by Treaty right. They argued further that they were entitled to a degree of control over those fisheries. This measure of control, sanctioned by Maori custom, was seen both by the Crown and non-Maori fishers as an intrusion on the sovereign right of the State and was consistently denied.

A NEW FRAMEWORK FOR FISHERIES MANAGEMENT

In 1986 the Crown established a quota management system at the core of which was Individual Transferable Quota or ITQ. The Crown then transferred that ITQ to non-Maori fishers despite the statutory protection of Maori rights in fisheries legislation.

It is now 14 years since the Quota Management System (QMS) was established as the framework for managing the main commercial fish species in New Zealand. Such a period provides a useful opportunity to reflect upon this quite extraordinary and revolutionary change in fisheries and fishing rights and the way we conduct our affairs and our business on the other side of the Tasman Sea.

Most reflection and debate will no doubt centre around what experience with the QMS teaches us about the way to manage fisheries. With little inducement, I can be encouraged to talk on that topic at length. However, the events of 1986 are important to me for another reason. In many ways the introduction of the Quota Management System itself, provided a mechanism by which the Treaty fishing rights of our tribes could finally be given effect. The result has been a huge transfer of rights, by the Crown and by simple operation of the market, to Maori.

That represents a very great irony. Before 1986 a battle had been going on which began shortly after New Zealand's founding in 1840. That battle had been waged, in the courts and by Parliamentary petition, over the nature and extent of Maori fishing rights secured and guaranteed by the Treaty of Waitangi. Another major question was the Crown's duty to protect those rights - what the Courts have called the Crown's duty of "active protection" arising from the Treaty.

That long-drawn history of argument from the Maori side about the destruction of their Treaty rights in fisheries had not been able to be met, other than by pious Parliamentary reference, while the practical reality was that the government assumed the right unto itself and granted access to whomsoever it thought fit. The Maori tribal Treaty partner was not a class generally "thought fit".

When we had the "Commons" out there, everyone who wished to fish went out fishing and the fish belonged to no one until they were caught. The whole model of the "Commons", from our point of view, was a Western device, driven by the power culture, for preventing particular Treaty property rights of Maori being effected. There are interesting parallels with other "public" assets similarly defined as belonging to "all New Zealanders". Restricting the use of the "Commons" by licensing and a host of government regulations, accumulated since the Oyster Fisheries Act 1866, merely confirmed the practical dispossession of Tribes of their ancient fishing rights which had supposedly been secured and guaranteed to them by the Treaty of Waitangi.

A TANGIBLE RIGHT

The great irony of which I spoke earlier was revealed when New Zealand moved towards a model of property rights in fisheries under a quota management system. Although it was a model driven by a whole lot of notions, principally sustainability, it was very much centred on ideas of property as far as the fishers themselves were concerned. The irony was that the model provided a form, for the first time since 1840, in which Treaty of Waitangi rights in fisheries could actually be transferred and given effect to. The right had become, in a legal and economic sense, tangible. It was intended that the rights would be delivered as a form of property to the industry. Maori simply said to the Crown and to the courts - "there are already extant property rights in these fisheries and it is therefore not possible for the Crown to allocate Individual Transferable Quotas (ITQs) without violating those existing property rights". In 1986 the Courts agreed with that view, at least on an interim basis, and a whole new cycle of litigation and negotiation began.

It's important to note here that there had always been statutory protection of Maori rights. However, the rights were "formless" in legal terms whilst they inhabited a context of "Commons" property right. They could not be effected. They were at best, defensive, as the Te Weehi case demonstrated. In the Te Weehi case, the High Court found, on appeal, that the exercise of customary or non-commercial rights was exempt from the relevant fisheries laws as long as particular circumstances were present.[1] Importantly, that particular decision did not turn on Treaty rights as much as on Canadian notions of Aboriginal rights to sustenance.

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1 Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680

A NEW CYCLE OF NEGOTIATION

Without waiting for, or risking, direction from the Courts on this matter, the government stopped the process of allocating ITQ (after ITQ had been allocated in 29 species on the basis of catch history) and commenced a process of negotiation with Maori. These initial negotiations proceeded through 1987 and 1988, culminating in the Maori Fisheries Act 1989.

The Maori property right of which I speak is a collective right belonging to tribes. They are the Treaty "partners".

The concept that there can be a collective private property in fisheries is not a foreign idea to Maori any more than it is to Westerners in the form of a company. To Maori though, it represents a component of *Rangatiratanga*, or chiefly dominion as part of the collective property of a tribe. However, the nature and extent of those rights had not been authoritatively described or established by the Courts and Parliament deliberately avoided it.

The Waitangi Tribunal embarked upon a process of investigation in the 1980s and produced two reports on fisheries claims (Muriwhenua 1988 and Ngai Tahu 1992).[2] These reports provided some common basis for negotiations between Maori and the government, although only the first of these reports was available during the early stages of negotiation.

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2 Muriwhenua Fishing Report (WAI 22) June 1988
Ngai Tahu Sea Fisheries Report (WAI 27) 1992

The outcome of the negotiation process was an interim settlement (driven by an impending General Election) under which the government promised to enter the quota market and re-purchase on a willing buyer-willing seller basis, 10% of ITQ in every species in every fisheries management area and transfer that ITQ to a Maori Fisheries Commission. The Commission, in conjunction with Iwi (tribes), began the development of options for the permanent allocation of those assets to Iwi.

Meanwhile, High Court proceedings were being prepared by Maori to determine the "nature and extent" of Maori fishing rights as a prelude to further claims against the Crown.

THE "SEALORD" SETTLEMENT

These proceedings were forestalled and then superseded by further complex negotiations which led to the so called "Sealord" settlement of 1992.

Under this Deed of Settlement, the Crown agreed to fund Maori into a 50/50 joint venture with Brierley Investments Limited to bid for Sealord Products Limited - New Zealand's largest fishing company and the then holder of some 28% of the New Zealand Total Allowable Commercial Catch (TACC). In return, Maori agreed that all their current and future fishing claims in respect of commercial fishing rights would be fully satisfied and discharged.

The Deed of Settlement also promised Maori 20% of quota for all species not yet in the Quota Management System, which is a system of fisheries management given explicit support by Maori under that deed. In addition, special regulations which would protect and control Maori customary non-commercial fishing rights were to be produced. These and other key elements of the Deed of Settlement were reflected in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Upon its passage, the Maori Fisheries Commission was reconstituted as the Treaty of Waitangi Fisheries Commission which has a wider range of statutory functions than its predecessor.

THE TASK OF THE TREATY OF WAITANGI FISHERIES COMMISSION

The Commission was faced with the primary function of gathering the resource won from the Crown and allocating the resultant bundle of assets to the rightful tribal owners after first determining *"the optimal mode of allocation"*.

The development of that *"optimal model"* offered considerable technical challenge in translating 1840 aboriginal rights into a modern transferable property right in what is essentially a usufruct. It offered considerable cultural challenge given that the 1840 aboriginal right had, in the intervening century and a half, become encrusted with a blend of both old and more recent cultural perception and emergent custom. It offered huge political difficulty in securing agreement on account of the intrusion on more recent notions of equitable distribution among the tribes. This latter area has dominated public and media discussion and therefore appears in the frontal lobe of political perception.

The Waitangi Tribunal findings had found that Maori possessed exclusive fishing rights out to the twelve-mile territorial limit and a development right which extended beyond that to the edge of the Economic Zone. Some Maori groups considered that the Interim Settlement of 1989 and the "Sealord deal" did not adequately reflect the strength and value of these rights.

Partly as a consequence of this belief that the agreement was short on quantum, the Deed of Settlement expressly allowed for Maori to continue to strengthen their position in the fishing industry through use of their own resources. Consequently, the Commission has developed something of a tradition of using its own resources to achieve strategic improvements to the overall Maori position in the fishing industry by further acquisition.

PRUDENT STEWARDSHIP

The result of this activity is that the Commission now manages the following assets on behalf of Maori:

- 10% of all ITQ in all quota species (approximately 57,000 tonnes).

- 50% of Sealord Products Ltd which owns, processes and exports approximately 24% of New Zealand's quota and in which Maori hold a pre-emptive right to acquire the interests of Brierley Investments Ltd should they wish to sell.

- 74% of Moana Pacific Ltd.

- 100% of Prepared Foods Processing Ltd - New Zealand's largest processor of abalone.

- 100% of Chathams Processing Ltd - operator of the main processing facilities on the Chatham Islands.

- 100% of Pacific Marine Farms - producer, processor and exporter of Pacific oysters: projected 1996 production of 1 million-dozen oysters.

- Cash reserves of approximately $71 million.

As of last June, the Commission has succeeded, between 1989 and 1999, in converting some $190 million worth of assets received from the Crown into approximately $800 million worth of Maori-owned assets. By any measure that must be regarded as prudent stewardship.

As well, a number of tribes have acquired significant volumes of quota in the market in their own right.

Even though these Commission-held assets have not yet been allocated to Iwi, there has in recent years been a dramatic growth in Maori presence in the "business and activity of fishing". Since 1990, 55 new Iwi fishing companies have been established and nearly 20% of Iwi own or operate their own processing and/or marketing capacity. Much of this activity has been facilitated by Commission policies of making the 10% quota it owns available to Iwi through discounted annual leases.[3]

The accumulated value of these quota lease discounts, since 1993/94, is said to be in the order of $51 million. In addition the Commission funds approximately $1 million per annum for training and scholarships to assist Maori gain employment in, or improve technical or management skills applicable in any aspect of, the fishing industry.

BENEFITS FOR THE WIDER FISHERY

All of this change has been unsettling for others in the New Zealand industry. The introduction of the QMS followed by six years of negotiations with Maori provided both licence and quota holders with considerable uncertainty over the quality of their rights. Not surprisingly perhaps, licence holders feared that a government which had admitted some responsibility for the expropriation of Maori rights might seek to remedy that situation by expropriating some of theirs.

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[3] Bevin J & Boyd R — Review of the 1995/1996 Wetfish/Paua Lease Distribution
Report prepared for Te Ohu Kai Moana June 1996

Bevin J & Boyd R — Survey of the Status of Iwi Fishing Operations
Report prepared for Te Ohu Kai Moana, June 1996

So far those fears have proved groundless and the pre-eminent position of Maori in the industry, now it has been achieved, is one of the major sources of security in the legal framework of property rights represented by the QMS. The transfer has taken place at no cost to other industry players and a number have used the opportunity to exit the fisheries sector on terms which would not have been possible without Individual Transferable Quota.

The use of ITQ as the means of settling Treaty claims to commercial fisheries was critical to the removal of resource rents from ITQ in 1994. Those rents were designed by the Crown to remove so called super profits. The potentially debilitating effect of those prospective rents arose from the fact that it was not at all easy to distinguish super profits from normal profits which had been generated from investments in the production chain. This extends from fisheries management and enhancement, through processing to marketing. As a result, the theoretical incentives on quota owners to invest in projects which benefited their fishery (and thereby increased the value of ITQ) would have been undermined. The defeat of the proposal by Maori on Treaty rights grounds has been an important factor in reshaping Industry attitudes to the Maori pressure.

A NEW CHAPTER IN THE QMS STORY

The situation today is that the first chapter in the story of the QMS is drawing to a close. That chapter saw the establishment of the system and its integration with Maori commercial interests. Now, the more interesting issue is how that system is going to evolve. I suggest that we will see two trends. The first will involve greater direct involvement by quota owners in the purchase and provision of management services for their fisheries.

The second is a continual refinement in the ecological understanding of fisheries which will be reflected in the setting of Total Allowable Catches (TACs). The latter is particularly consistent with Maori cultural perspectives on natural resources and fisheries in particular. This second effect is taking longer to manifest itself than the former.

The QMS has reached a stage in its development where quota owners have sufficient maturity and strong incentives to take more direct responsibility for the management of commercial fisheries. New Zealand quota owners pay the full costs of fisheries management services carried out by government but have little influence over the nature of these services or the efficiency with which they are delivered.

Consequently, there is considerable potential to deliver more value from the $50 million or so spent each year on fisheries research, administration and enforcement. If that potential is to be realised, there must be a closer relationship between the funders of these services (quota owners) and the deliverers of those services who, where possible, should be exposed to the disciplines of a contestable market.

Critical standards and specifications can still be set, audited and enforced by government, but quota owners would be able to consider spending on fisheries services to be a normal investment rather than a form of taxation.

RE-ORGANISING FISHERIES MANAGEMENT

For this to occur, a dramatic re-organisation is required across the fishing industry. That re-organisation is already being manifest in the establishment of fisheries management companies or quota owner organisations.

These companies can be expected to have four primary functions, including:

- collecting funds to finance fisheries management activities
- developing and imposing of management rules affecting shareholders
- representing shareholders in TAC setting and other management cycles, and;
- protecting harvesting rights and promoting quota owners' management rights.

Currently these companies draw heavily on consensus as their normal mode of operation. Consensus about fishing, of course, is never easy and that has confronted the industry with the uncomfortable fact that consensus now means obtaining substantial agreement with Maori.

However, I am confident these new arrangements will continue to evolve and will ultimately flourish because the effect of these debates is to clarify the common interests of all quota owners, Maori or non-Maori, in the future health of the fisheries that we share and in the economic performance of the export industry to which we belong.

To summarise, the first evolutionary trend then, I would say that we will move from a position where Maori and non-Maori share the harvesting rights in commercial fisheries resources to the point where we share real responsibility for the management of those resources. The incentives unleashed by the improved security of ITQ property rights in the post-settlement era provide the foundation for new roles both for government and quota owners in the management of fisheries.

INTEGRATED SPECIES MANAGEMENT

The second evolutionary direction I predict is in the priority which must be given to fisheries research to operate the QMS better. In its present form, a whole lot of important linkages in the food chain - in the inter-relationships of species and a range of biological and geographical factors - have been, to a large extent, excluded from consideration. In my view, that exclusion must be rectified.

Such factors need to be included in the process of refinement so the system becomes much more reflective of the actual biological, geographical and physical characteristics of the resource and its environmental context. These are plainly serious questions to be asked of a uniform management model imposed on species as diverse as squid, hoki, abalone, flounders and crayfish. This is one area where "one rule for all" does not function well. The system can be said to work, but it remains a crude tool, indeed, in respect of the diversity of species and their inter-relationships.

A simple example is the relationship between kina (sea urchins), paua (abalone) and the seaweeds on which they compete for food, and the species that predate upon the kina. There is a fundamental relationship in the ecological balance between those resources.

If you don't manage them as a set then you tend to destroy the productive balance of those resources, particularly the paua. Unfortunately, there seems to be some perverse law of nature that if we disrupt that balance, the most valuable species appear to be the ones which suffer most.

That is just one example. There are plenty of others. An explosion of paddle crabs as a result of the predating species being overfished has the potential to damage the treasured bi-valve shellfish on which they, in turn, predate. Similarly, we need to understand better the relationship between juvenile hoki and hapuka (groper). We don't manage these inter-relationships of species very well, within the system. We need to develop this to a much more refined level - and promptly.

In many ways, a lot of the Maori criticism of the QMS has been based on the Maori traditional view of species relationships and their management. That has given rise to criticism and cynicism about the model itself. The alleged single species focus of the QMS undermines its perceived status as a sustainability weapon. This is perhaps an ill-conceived limitation because there is no reason why TAC setting procedures cannot make better use of more sophisticated ecological understanding as it becomes available.

MAORI LEADERSHIP

It should also be noted that Maori now have far more capacity to shape this modern, but still emergent, fisheries management system than at any previous time. An important feature of the settlement is that statutory provision has been made for Maori representation and involvement across the whole consultative infrastructure of the industry at the national, sector and local level. The Maori interest, as owners, increases as management control passes increasingly into quota owner control.

This representation in the management process of the New Zealand fishery is seen as reflecting, to some extent, the provision in the original Treaty for the control implied by the phrase *"exclusive and undisturbed possession"* in respect of fisheries.

In the end, we still need to control the level and pattern of harvest of all species. What I suggest is that we will see the emergence of both better ecological understanding and a more sophisticated approach to TAC setting than a slavish adherence to the objective of maximum sustainable yield in single species.

CONCLUSION

To conclude, let me come back to the nature of the property right. The very fact of having that right, the right of access to fish in the form of transferable property has meant that New Zealand's age-old struggle over Treaty fishing rights has been able to be settled.

One of the most interesting points to be made is that, on the whole, this very large transfer of assets to Maori which has taken place as a result of bringing in the quota management system has really been accomplished without any great pain. Certainly, that is, compared to the pain that could have been created.

That is a very considerable political achievement. It is also a very considerable economic achievement. There is, though, a long way to go. The system itself, as I said, needs to be refined and will continue to evolve. We have righted an historic wrong, or have gone a very substantial way towards doing so. We have created a new economic base for Maori in this sector and we have at the same time, established a world class model for fisheries management. That is, in national terms, perhaps even in international terms, a considerable achievement.

The quota management system was not invented, developed and conceived to give effect to Treaty rights. It did however provide, conceptually, the key to that historic resolution. In New Zealand history, that may yet stand as its greatest triumph and most important legacy.

ENDS.