BENJAMIN RALSTON

WHERE SEAS MEET:

RECONCILING INDIGENOUS AND CROWN PROJECTIONS OF MARINE SPACE IN BRITISH COLUMBIA AND AOTEAROA NEW ZEALAND

LLM THESIS



FACULTY OF LAW
UNIVERSITY OF OTAGO

2014

Table of Contents

Table of Contents **1**
Abstract **4**
Word length **4**
Acknowledgements **4**

PART I

I MANAGING A MULTITUDINOUS OCEAN: **6**
A Introduction **6**
B Research Context and Questions **8**
C Methodology **14**
D Overview of Thesis Structure **15**

II DIFFERING PROJECTIONS OF MARINE SPACE: **17**
A Introduction **17**
B Legislative and Policy Framework **17**
1 Haida Gwaii and the Pacific North Coast of British Columbia 17
(a) Divided powers and ownership in marine territory 17
(b) Legislation and policy for integrating marine governance 20
2 The Hauraki Gulf of New Zealand 23
(a) Delegated and centralised authorities over marine territory 23
(b) Legislation and policy for integrating marine governance 25
C Marine Spatial Planning **26**
D Theoretical Framework **29**
1 Postcolonial theory 30
2 Legal pluralism 31
3 Legal geography 35
4 Reconciliation 37
E Conclusion **39**

PART II

III CANADIAN PROJECTIONS OF INDIGENOUS SPACE: **42**
A Introduction **42**
B Honour of the Crown and Fiduciary Duties **43**
C Aboriginal Rights **46**
D Duty to Consult **52**
E Indigenous Space and Crown Sovereignty **55**
1 Crown sovereignty's unstable base in Indigenous territory 55

2 Reconciling Indigenous space with the fact of Crown sovereignty 60
F Conclusion 62

IV ASSERTIONS OF INDIGENOUS SPACE IN CANADIAN LAW: 63
A Introduction 63
B Lax Kw'alaams Claim for Commercial Access 63
C Kwicksutaineuk Ah-Kwa-Mish 67
D Conclusion 71

V JOINTLY PLANNED SPACE IN THE WATERS OF HAIDA GWAII: ... 73
A Introduction 73
B Setting the Stage for Marine Spatial Planning in British Columbia 73
C Planning for the Marine Waters of Haida Gwaii 77
1 Haida Gwaii as an archipelago of disputed jurisdiction 77
2 A plan for certainty as between uncertain claims 79
D Reflections 81
E Conclusion 84

PART III

VI NEW ZEALAND PROJECTIONS OF INDIGENOUS SPACE: 86
A Introduction 86
B New Zealand Law's Construction of the Māori-Crown Relationship 87
C Treaty of Waitangi 88
1 The Treaty in principle(s) 89
2 Judicial statements on Treaty principles 91
3 Tribunal statements on Treaty principles 95
4 The Treaty in force 98
D Legislating Māori Relationships in the Resource Management Act 100
E Customary Rights – Pre-contact Customs in Post-colonial Statutes 102
1 Customary fishing under delegated rangatiratanga 103
2 Customary title on legislated terms 106
F Balancing Power and Sovereignty in New Zealand 110
1 Qualifying kawanatanga 110
2 Reading down rangatiratanga 112
G Conclusion 113

VII ASSERTIONS OF INDIGENOUS SPACE IN NEW ZEALAND LAW: 115
A Introduction 115
B Ngāti Ruahine's Defence of Customary Fishing Grounds 115
C Reweti Whānau's Aquaculture Proposal 118
D Conclusion 120

VIII JOINTLY PLANNED SPACE IN THE HAURAKI GULF: 122

A Introduction 122
B Setting the Stage for Marine Spatial Planning in the Hauraki Gulf 122
1 Integrating marine management – from nationwide to regional 122
2 Contested waters of the Hauraki Gulf/Tikapa Moana 123
3 Uniting the region under one Act 125
4 Seeking opportunities to realize integrated management for the Gulf 128
C Sea Change – a Treaty Partnership for Marine Planning 132
D Conclusion 135

PART IV

IX CONCLUSION: 138

X TABLE OF CASES: 139
Canada 139
New Zealand 142
Australia 145
United States 145

XI TABLE OF LEGISLATION: 146
Canada 146
British Columbia 146
New Zealand 147

XII BIBLIOGRAPHY: 149
Books 149
Essays and Chapters in Books 151
Journal Articles 152
Government Reports, Policies Papers and Others 157
Royal Commissions 159
Law Commission Publications 159
Internet Resources 160
Speeches 161
Transcripts 161
Unpublished Papers 161
Information Requests 163
International Materials 166
Hauraki Gulf Forum Reports 166
Waitangi Tribunal Reports 167
Other 168

Abstract

This paper considers how reconciliation between the differing legal and social constructions of the ocean of Indigenous peoples and the Crown is addressed in Canada and New Zealand's legal systems, with particularly attention to case studies of marine spatial planning processes taking place in each jurisdiction.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 45,000 words.

Subjects and Topics

Comparative Law,
Indigenous Peoples and the Law,
Environmental Law, and
Planning and the Law.

Acknowledgements

Particular thanks to Dr Jacinta Ruru for the generous abundance of patience, insight and encouragement you have provided me with throughout this project; to Shoshanna Paul for your unwavering support and thoughtful input; to Lisa Fong, Ming Song and Ross Wilson for first introducing me to this fascinating and complex area of the law in the Canadian context; and to my friends and colleagues in the postgraduate office for putting up with both my chaotic stacks of books and my incessant need to think out loud.

PART I

The king's right of propriety or ownership in the sea and soil thereof, is evinced principally in these things that follow. The right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the crown; as the right of depasturing is originally lodged in the owner of the coast whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great coast, and as a consequence of his propriety, hath the primary right of fishing in the sea, and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.

- Lord Chief Justice Matthew Hale *De Jure Maris* 1667[1]

[1] As cited in *Martin v Waddell's Lessee* 41 U.S. 367 (1842).

I MANAGING A MULTITUDINOUS OCEAN

A Introduction

Approximately two millennia ago a Greek geographer named Strabo described humanity as "in a certain sense amphibious", being "not exclusively connected with the land, but with the sea as well".[1] Taken out of context, Strabo's geographically, culturally and historically specific musings can be read today as having been globally and universally prophetic. We now know that the world ocean creates half the oxygen we rely on both to breathe and to burn fossil fuels, and absorbs approximately one quarter of the carbon dioxide emitted from our fossil fuel combustion as well as 93% of the heat accumulating in our atmosphere.[2] It also encompasses 99% of the planet's living space, hosts nearly half of all species and provides 20% of the world's protein supply.[3] In a very physical sense we are all connected with the ocean as it plays a key role in sustaining human life.

Over the past decade increased attention has also been given to the declining health of the world ocean and the species it contains.[4] According to a 2012 assessment by the Food and Agriculture Organisation of the United Nations 87% of the world's marine fish stocks are fully exploited, overexploited or depleted.[5] The number of marine fish caught globally has peaked in the mid-1990s and decreased considerably since then in spite of greater levels of overall fishing effort.[6] At the same time, climate change is reducing the suitable living spaces for various marine species with global warming putting pressure on species to migrate towards the poles, ocean acidification putting

---

[1] As cited in Ellen Churchill Semple *The Geography of the Mediterranean Regions: Its Relation to Ancient History* (AMS Press, New York, 1931) at 59.

[2] IPCC *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, 2014) ch 6 at 52.

[3] United States Department of Commerce - National Oceanic and Atmospheric Administration "What percentage of life is estimated to be in the ocean?" <oceanservice.noaa.gov>.

[4] See for example Millennium Ecosystem Assessment *Ecosystems and Human Well-Being: Current State and Trends – Findings of the Condition and Trends Working Group* (Island Press, Washington DC, 2005) at ch 18; IOC/UNESCO, IMO, FAO, UNDP *A Blueprint for Ocean and Coastal Sustainability* (IOC/UNESCO, Paris, 2011); International Programme on State of the World Ocean *State of the Ocean Report* (Oxford, 2013); Global Ocean Commission *From Decline to Recovery: A Rescue Package for the Global Ocean* (Oxford, 2014).

[5] FAO *State of World Fisheries and Aquaculture* (Rome, 2012).

[6] Reg A Watson and others "Global marine yield is halved as fishing intensity redoubles" (2013) 14(4) Fish Fish 493; Boris Worm and Trevor A Branch "The future of fish" (2012) 27(11) Trends Ecol Evolut 594.

contradictory pressure on marine species to migrate towards the equator and decreasing oxygen levels being observed throughout the basins of the open ocean.[7]

Yet at the same time we are also entering a period of unprecedented growth in our economic dependence on the ocean. For example, it is estimated that aquaculture will provide 65% of fish protein production by 2030, seabed mining will provide as much as 10% of the global mineral supply by that time, and offshore deep sea oil production will nearly double its 2013 output by 2035.[8] Marine spatial planning—a marine governance tool addressed in this thesis—has arisen in this context of the ocean's deteriorating health being uncomfortably paired with its growing importance to the global economy, and after only a few short years of conceptual existence it is rapidly becoming "the dominant marine governance paradigm in much of the world".[9]

From a social science perspective, marine spatial planning is a tool to coordinate and reconcile various conflicting social constructions of the world ocean. Our global economic system characterises the ocean in various, often contradictory ways, as: an "asocial space of movement" for marine shipping and free trade; a "social space for development" such as aquaculture and seabed mining; and a "non-possessible space" of nature that must be protected from threats such as pollution and climate change.[10] These incongruous understandings of the ocean are in turn reflected and reinforced in divergent legal obligations for marine territory such as the international right of innocent passage within territorial seas, nation states' sovereign rights over resource development within their exclusive economic zones, and their obligation to provide for the protection and conservation of the ocean's natural resources, flora and fauna.[11]

Marine spatial planning initiatives in Canada and Aotearoa New Zealand are faced with even further complexity as their Indigenous peoples[12] have their own social

---

[7] Jelle Bijma and others "Climate change and the oceans – What does the future hold?" (2013) 74 Mar Pollut Bull 495.

[8] Paul Holthus "Managing the World's Oceans – Securing 'Blue' Growth, Jobs, and a Sound Maritime Environment" in EU-US Conference Series *Sustainable Oceans: Reconciling Economic Use and Protection* (Dräger-Stiftung, Lübeck (Ger), 2013) at 31-34.

9 Stephen Fletcher and others "Effective practice in marine spatial planning: A participatory evaluation in Southern England" (2013) 39 Mar Policy 341; Gonçalo Carneiro "Evaluation of marine spatial planning" (2013) 37 Mar Policy 214.

[10] Philip Steinberg *The Social Construction of the Ocean* (Cambridge University Press, Cambridge, 2001) at 177-188.

[11] United Nations Convention on the Law of the Sea 1833 UNTS 3 (concluded 10 December 1982, entered into force 16 November 1994) at arts 17, 56 and 145.

[12] The term "Indigenous" is used throughout this thesis to describe various societies that predate colonial society in Canada and New Zealand, such as the First Nations, Inuit, and Métis peoples with territory within or overlapping that of Canada, as well as the Māori of Aotearoa New Zealand. For an introductory discussion of the definition of Indigenous Peoples see Paul Keal *European Conquest and*

constructions of the ocean that must be accounted for. In both these jurisdictions Indigenous peoples pursue legal and political claims to access and care for marine spaces and resources that are framed in not only divergent cultural perspectives but unique legal traditions as well. These claims have resulted in the development of interesting and complex areas of jurisprudence, and innovative legislation and policy approaches that will be addressed in this thesis. Most recently marine spatial planning processes are unfolding in both jurisdictions at the time of writing, with the Sea Change – Tai Timu Tai Pari initiative proceeding in the Hauraki Gulf of New Zealand and the Marine Planning Partnership proceeding in the Pacific North Coast region of British Columbia. These two pilot projects are somewhat unique in the world in that each stems from a joint Indigenous-Crown governance model.[13]

The primary legal question explored in this thesis is how reconciliation between the differing legal and social constructions of the ocean of Indigenous peoples and the Crown is being addressed in Canada and New Zealand's legal systems. In particular, this thesis will examine how Canadian and New Zealand law recognises the rights and interests of Indigenous peoples in marine areas and resources, and will analyse where Indigenous involvement in marine spatial planning fits within these legal frameworks through a perspective informed by critical legal theory.

B Research Context and Questions

My interest in this topic stems from experience in private practice related to First Nations involvement in marine spatial planning for British Columbia's Pacific North Coast. Relations between First Nations and the Crown[14] in this region have become increasingly strained due to conflicts over proposals to increase salmon aquaculture and fossil fuel transportation,[15] among others. One of the most interesting aspects of

---

the Rights of Indigenous Peoples: The Moral Backwardness of International Society (Cambridge University Press, Cambridge, 2003).

[13] It is worth noting that other international examples of marine spatial planning initiatives may also develop along the same Indigenous-Crown joint governance model as the New Zealand and British Columbia examples explored in this thesis. See for example Jennifer Hennessy and the State Ocean Caucus *Marine Spatial Planning in Washington: Final Report and Recommendations of the State Ocean Caucus to the Washington State Legislature* (Washington Department of Ecology, Olympia (WA), 2011).

[14] In the context of discussing relations between the Indigenous people of Canada and New Zealand and their relationship with national, federal, provincial or territorial governments, these non-Indigenous governments are typically referred to as the "Crown".

[15] For some background on these conflicts see for example Kathleen M Sullivan "(Re)landscaping Sovereignty in British Columbia, Canada" (2006) 29(1) PoLAR 44 [(Re)landscaping Sovereignty]; and Anthony Swift and others *Pipeline and Tanker Trouble: The Impact to British Columbia's Communities, Rivers and Pacific Coastline from Tar Sands Oil Transport* (Natural Resources Defense Council and the Pembina Foundation, New York, 2011) [*Pipeline and Tanker Trouble*].

these disputes is that First Nations have repeatedly asserted their own legal orders in relation to the governance of marine resources within their territories. For example, many First Nations in British Columbia have issued bans against net pen salmon aquaculture within their traditional territory[16] as well as against a controversial oil sands pipeline project and its related tanker traffic based on their ancestral laws, rights and responsibilities.[17] At the same time, marine spatial planning is delineating significant areas of agreement between First Nations and the government of British Columbia on appropriate marine development for these same disputed territories. Furthermore, the important relationship between the Crown's legal duty to consult Indigenous peoples and planning processes in which Indigenous peoples are engaged is becoming more apparent in Canadian jurisprudence.[18] As pressures for marine resource development mount while spatial planning processes proceed, Canadian courts may be faced with significant new applications of the Crown's duty to consult Indigenous peoples over the next few years.[19] In addition to the controversial development already proposed for the Pacific North Coast of British Columbia, there is pressure to seek out new forms of wealth too, such as offshore oil and gas may spark new disputes.[20]

In 2013 I travelled to New Zealand to learn how another country is working through similar issues with its pilot marine spatial planning project for the Hauraki Gulf. New Zealand's marine territory is under similar conflicting pressures with marine biodiversity loss[21] and environmental pressures being observed,[22] at the same time

---

[16] See (Re)landscaping Sovereignty, above n 15.

[17] See Jessica Clogg and Josh Paterson *Legal Backgrounder: Coastal First Nations Declaration and Save the Fraser Declaration* (West Coast Environmental Law, Vancouver, 2012); see also *Pipeline and Tanker Trouble*, above n 15.

[18] See for example *Da'naxda'xw/Awaetlala v British Columbia* 2011 BCSC 620; and *Squamish Nation v British Columbia (Community, Sport and Cultural Development)* 2014 BCSC 991.

[19] For example, it has been suggested that the Federal Government's abrupt withdrawal from involvement in marine spatial planning for British Columbia's Pacific North Coast might provide grounds for judicial review of the federal government's decision to approve a controversial pipeline proposal based on a breach of the duty to consult. See Andrew Gage "Why Harper's shot at PNCIMA also hit Enbridge in the foot" (15 September 2011) West Coast Environmental Law <wcel.org>.

[20] See Joel Wood *Lifting the Moratorium: The costs and benefits of offshore oil drilling in British Columbia* (Fraser Institute, Vancouver, 2012); *Report of the Public Review Panel on the Government of Canada Moratorium on Offshore Oil and Gas Activities in the Queen Charlotte Region of British Columbia* (Natural Resources Canada, 29 October 2004); Cheryl A Brooks *Rights, Risks and Respect – A First Nations Perspective on the Lifting of the Federal Moratorium on Offshore Oil and Gas Exploration in the Queen Charlotte Basin of British Columbia* (Natural Resources Canada, October 2004).

[21] Royal Society of New Zealand *Ecosystem Services: Emerging Issues* (Wellington, 2011) at 5.

[22] See Alison Macdiarmid and others *Assessment of anthropogenic threats to New Zealand marine habitats* (Ministry of Agriculture and Forestry, New Zealand Aquatic Environment and Biodiversity

that significant new opportunities for resource wealth are being identified.[23] Tensions between the Crown and the Māori over marine resource development became particularly intense in 2003 with the release of the New Zealand Court of Appeal's decision in *Ngāti Apa*.[24] This legal dispute was triggered by difficulties Māori were having in obtaining a stake in New Zealand's growing aquaculture industry.[25] The Court of Appeal in *Ngāti Apa* found that the Māori Land Court had the jurisdiction to hear Māori assertions that specific stretches of the foreshore and seabed remained Māori customary land, but controversial legislation subsequently removed the jurisdiction of the Māori Land Court in this area.[26] Other conflicts have emerged more recently between certain Māori groups and the Crown as offshore oil and gas and mining opportunities are increasingly explored by industry proponents.[27] The evolving Hauraki Gulf marine spatial planning process may provide an important precedent for the adoption of its approach to ocean governance in other parts of New Zealand's marine waters.[28] New Zealand's resource management framework already contemplates extensive planning processes in support of decision making on marine development, including a role for Māori.[29] However, the Hauraki Gulf marine spatial planning project will be unique to date in New Zealand both in its integrative rigour and detail as a spatial plan, and in its joint iwi-Crown governance structure.

From the outset it is important to clarify the commonalities and stark differences between the two legal and political systems addressed in this thesis. The respective constitutional and legal regimes of Canada and New Zealand have much in common

---

Report No 93, Wellington, 2012); in relation to the Hauraki Gulf in particular, see Hauraki Gulf Forum *State of our Gulf: Tikapa Moana – Hauraki Gulf State of the Environment Report 2011* (Auckland, 2011).

[23] Royal Society of New Zealand *Future Marine Resource Use: Emerging Issues* (Wellington, 2012); Robert Makgill "Oil and Gas in the Exclusive Economic Zone" (2014) Resource Management Journal 29.

[24] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643. For general discussion see Richard Boast *Foreshore and Seabed* (LexisNexis NZ, Wellington, 2004) and Taihākurei Edward Durie, Richard Boast and Hana O'Regan *Pākia ki uta, pākia ki tai: report of the Ministerial Review Panel* (Ministry of Justice, Wellington, 2009).

[25] See Catherine Iorns Magallanes "The foreshore and seabed legislation: resource- and marine-management issues" in Claire Charters & Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University of Wellington, 2007).

[26] See the now repealed Foreshore and Seabed Act 2004 and its successor the Marine and Coastal Area (Takutai Moana) Act 2011.

[27] See for example *Trans-Tasman Resources Ltd Marine Consent Decision* EPA EEZ004, 17 June 2014; *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources* [2012] NZHC 1422; and *New Zealand Police v Teddy* [2013] NZHC 432.

[28] Michael V McGinnis *Ocean Governance: The New Zealand Dimension* (Emerging Issues Programme, School of Government, Victoria University of Wellington, 2012) at 26.

[29] Resource Management Act 1991, ss 61(2A)(a), 66(2A)(a) and 74(2A).

as a result of their common heritage in British colonialism.[30] For example, both countries operate under a Westminster style parliamentary democracy and use a common law legal system modeled on that of the United Kingdom. On the other hand, whereas Canada has a federal system of government in which constitutional powers are divided and distributed between provinces and the federal government, New Zealand is a unitary state with legislative and executive power concentrated in one centralized government.

It is important to note from the outset that in Canada provincial and territorial legislation and policy can vary considerably from jurisdiction to jurisdiction across the country. In some cases provincial and territorial courts have even come to different conclusions as to what falls under federal jurisdiction. As one example, fish aquaculture is managed by the federal government on the Pacific coast due to a lower court ruling in British Columbia that found this to be constitutionally a matter of exclusive federal competence.[31] Until this matter is heard before the Supreme Court of Canada, however, this British Columbia Supreme Court decision is not binding in other provinces and on the Atlantic coast provincial authorities continue to manage fish aquaculture based on a contradictory understanding that they have the constitutional authority to do so. As a result of Canada's federal structure this thesis will focus on British Columbia in particular as a comparator to New Zealand.

Another matter of particular relevance to this thesis is the fact that Canada's judiciary is empowered to provide constitutional remedies that may override legislation in certain circumstances, for example by striking it down or finding it to be of no force or effect, whereas New Zealand's is not. Canada's constitutional distribution of powers has always empowered the judiciary to find legislation ultra vires based on principles of federalism. Since patriation of the Canadian constitution in 1982 the judiciary has been further empowered to grant constitutional remedies such as finding legislation to be of no force or effect due to inconsistency with the Charter of Rights and Freedoms as well as the now constitutionally entrenched "[A]boriginal[32] and treaty rights" of Canada's Indigenous peoples.[33] This situation can be contrasted with New Zealand's lack of one single entrenched written constitution and the ongoing

[30] For detailed discussion of the Canadian constitution see Peter W Hogg *Constitutional Law of Canada* (4th ed, Carswell, Toronto, 1997); for detailed discussion of the New Zealand constitution see Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004).

[31] *Morton v British Columbia (Agriculture and Lands)* 2009 BCSC 136; for a recent detailed discussion of this decision and its surrounding circumstances see Alexander Ross Clarkson *The Jurisdiction to Regulate Aquaculture in Canada* (LLM thesis, University of British Columbia, 2014).

[32] The term "aboriginal" is used in this thesis in keeping with its application in Canadian law and policy as a label covering all three groupings of Indigenous peoples in Canada, Métis, Inuit and First Nations.

[33] Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c 11, s 35(1).

insistence by its judiciary that parliamentary sovereignty remains unassailable in the courtroom.[34] Yet in the political realm, Māori hold unique electoral representation in New Zealand through parliamentary seats reserved for Māori that has no analogue anywhere in Canada, and New Zealand's electoral reform to proportional representation has enabled even stronger Māori representation than in the past.[35]

The differing demographics of the Indigenous peoples of British Columbia and New Zealand are also an important distinction to bear in mind for any comparative study as they may impact the level of political enfranchisement for Indigenous peoples in a parliamentary democracy. In Canada, approximately 4.3% of the national population self-identify as aboriginal—of First Nations, Métis or Inuit ancestry—numbering roughly 1.4 million.[36] This proportion differs greatly between the various provinces and territories, ranging from a high of 86.3% in Nunavut to a low of 1.6% in Prince Edward Island, whereas in British Columbia 5.4% of the province's population of approximately 4.6 million self-identify as aboriginal.[37] In contrast, 14.1% of New Zealand's population of approximately 4.2 million self-identify as Māori.[38] There are also important differences in the levels of cultural and linguistic diversity, as well as diversity of governing bodies between British Columbia and New Zealand. British Columbia has arguably the greatest multiplicity of Indigenous cultures and languages of any province or territory in Canada, encompassing 198 First Nations[39] with 32 different languages and approximately 59 dialects.[40] Māori, on the other hand, share a common language across the 96 different iwi (tribes or peoples) in New Zealand.[41]

In spite of the differences between the Indigenous peoples of New Zealand and British Columbia, and the differing political and legal regimes in which they find themselves enmeshed, the legal and policy challenges faced by the two nation states in addressing Indigenous rights and interests have much in common. For example, the two planning processes examined in this thesis show significant parallels to one another. By

---

[34] For a recent New Zealand High Court decision of this view see *Matahaere v Police* [2012] NZHC 2436 para 11.

[35] See Andrew Geddis "A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System" (2006) 5(4) Elect Law J 347; see also Maria Bargh (ed) *Māori and Parliament: diverse strategies and compromises* (Huia, Wellington, 2010).

[36] Aboriginal Affairs and Northern Development Canada "Aboriginal Demographics from the 2011 National Household Survey" (Last updated in May 2013) <www.aadnc-aandc.gc.ca>.

[37] Ibid.

[38] Statistics New Zealand "2013 Census" (Last updated 25 June 2014) <www.stats.govt.nz>.

[39] Aboriginal Affairs and Northern Development Canada "About British Columbia First Nations" <www.aadnc-aandc.gc.ca>.

[40] First Peoples' Heritage, Language and Culture Council *2010 Report on the Status of BC First Nations Languages* (Brentwood Bay (BC), 2010).

[41] Statistics New Zealand "Statistical Standards for Iwi" < www2.stats.govt.nz>.

outlining the distinct legal regimes that govern Indigenous interests in marine areas and resources in each jurisdiction, then examining where marine spatial planning might fit in these systems, it is hoped that this work will provide an interesting point of comparison and contrast to explore more broadly how Indigenous self-determination and planning might intersect from a legal perspective.

As my prior training and experience in law as it relates to Indigenous peoples comes almost exclusively from within British Columbia, my understanding of Māori-Crown legal issues will also inevitably be coloured by my Western Canadian perspective and remain asymmetrical in comparison to my Canadian knowledge base. However, Canada and New Zealand have a rich history of cross-pollination in terms of how their jurisprudence and policies have evolved in response to Indigenous assertions of self-determination and I believe it is both appropriate and useful for Canadian and New Zealand researchers to continue such comparative work.[42] It is hoped that in adopting a comparative approach for this thesis broader insights might be uncovered on the potential role for spatial planning in effecting the goal for reconciliation between Indigenous and non-Indigenous peoples in Canada, New Zealand and elsewhere.

Both the Pacific North Coast region of British Columbia and the Hauraki Gulf of New Zealand have become sites of complex legal and political interactions between Indigenous peoples and state governments in determining how these marine areas are to be used, developed and protected. The primary focus of this thesis is on the challenge of achieving reconciliation between the differing legal and social projections of marine space and resources of these Indigenous peoples and the Crown. The questions that will be explored here are as follows:

- How do the legal systems of Canada and New Zealand make room for Indigenous space within marine territories?

[42] For judicial examples, the Supreme Court of Canada considered New Zealand's seminal Privy Council decision in *R v Symonds* (1847) NZPCC 387 (SC) in its own seminal decisions in *St Catherines Milling & Lumber Co v R* [1887] 13 SCR 577 [*St Catherines Milling*] and *Calder et al v British Columbia* [1973] SCR 313; New Zealand's Court of Appeal in turn cited with approval various Supreme Court of Canada decisions, including *St Catherines Milling* and the more recent *Delgamuukw v British Columbia* [1997] 3 SCR 1010, in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 at [31]. For academic examples, see John Borrows "Ground-rules: indigenous treaties in Canada and New Zealand" (2006) 22(2) NZULR 188; Lisa Ford and Tim Rowse (eds) *Between Indigenous and Settler Governance* (Routledge, New York, 2013); Robert Miller and others *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010); and Matthew Palmer "Constitutional Realism About Constitutional Protection: Indigenous Rights Under a Judicialized and a Politicized Constitution" (2007) 29 Dalhousie LJ 1.

- When Indigenous peoples assert their own legal orders within these state-centred legal systems to seek greater involvement in the governance and allocation of marine territories and resources, to what extent are these differing legal orders accommodated?
- Finally, to what degree do the marine spatial planning processes being jointly pursued between representatives of Indigenous peoples and settler state governments in these two geographic regions provide for greater recognition and accommodation of Indigenous legal orders in the management of marine territories and resources?

C Methodology

The primary methodology of this thesis is to apply critical legal theory in the analysis of legislation, case law, policy and planning documents within the boundaries of the research question. It involves conventional legal research to understand and describe the respective jurisprudence of Canada and New Zealand applying to Indigenous interests in the ocean, as well as research conducted through freedom of information requests that were pursued in both jurisdictions.[43] Due to the broad, open-ended nature of the research question this was not a research problem on which exhaustive or complete research could be feasibly conducted. As is typical of critical legal analysis, the research has been conducted for the purpose of supporting the argument of my thesis, and this analysis will be by necessity qualitative, subjective and prescriptive in nature.

Likewise, due to limitations on the public availability of information on the planning processes in question and their ongoing nature any analysis of these processes must also be qualified by the limits of what is knowable at the time this research is conducted. In the course of pursuing documents under freedom of information legislation for my research I have inevitably been faced with asymmetrical responses. These information requests required high levels of interaction from me as a researcher, such as negotiating the scope of requests directly with government parties and invoking the review powers of a privacy commissioner to ensure necessary information was ultimately obtained. In some cases information requests were narrowly construed by government authorities in their provision of responsive documents and in other cases timelines were imposed that effectively prevented the requested information from being used as part of this thesis project. These

[43] Multiple information requests were made pursuant to Canada's Access to Information Act RSC 1985 c A-1, British Columbia's Freedom of Information and Protection of Privacy Act RSBC 1996 c 165, and New Zealand's Local Government Official Information and Meetings Act 1987 and Official Information Act 1982 between September 2013 and May 2014.

contingencies—inherent in this style of research—contribute to the final form of this thesis and are therefore also worth drawing attention to.[44]

D Overview of Thesis Structure

This thesis consists of nine substantive chapters, which in turn are broken down into four separate parts. In brief, the subsequent chapter, chapter two, will first provide an overview of the current legal and policy frameworks that govern the marine regions addressed in this thesis. Then it will set out a theoretical framework for this thesis, focusing on a theory of reconciliation founded in legal pluralism and related areas of critical legal studies that analyses the struggles between Indigenous peoples and the Crown over marine territory as interactions between differing legal and social constructions of marine space. These first two chapters will constitute the first part of this thesis, setting out the framework for this comparative work.

The third chapter will then examine how Canadian law has developed to accommodate Indigenous space within a state-centric legal system, and the fourth chapter will explore select case studies in which this legal system was faced with assertions of Indigenous legal orders over marine territories. The fifth chapter will then turn to the marine spatial planning process in British Columbia's Pacific North Coast, focusing on Haida Gwaii, one of four regional plans, to examine how this policy approach fits within the existing Canadian legal landscape. These three chapters will constitute the second part of this thesis, focused on an examination of the specific legal and policy context underlying Crown-Indigenous interactions relevant to the Pacific North Coast of British Columbia.

Chapters six to eight will confront the same questions in the context of the Hauraki Gulf in New Zealand, examining in turn New Zealand's legal accommodation of Indigenous space in the sixth chapter, case studies of Māori assertions of Indigenous legal orders to govern marine territories in the seventh chapter, and an examination of the Hauraki Gulf marine spatial planning process as a novel policy approach to these issues in the eighth chapter. Together these will constitute the third part of this thesis, focused on examining the specific legal and policy contexts that structure Māori-Crown interactions in the Hauraki Gulf.

---

[44] For a general overview of the strengths and limitations of using freedom of information regimes for research into government policy see Mike Larsen and Kevin Walby *Brokering Access: Power, Politics, and Freedom of Information Process in Canada* (University of British Columbia Press, Vancouver, 2012); Mike Larsen "Access in the Academy: Bringing ATI and FOI to academic research" (British Columbia Freedom of Information and Privacy Association, Vancouver, 2013); and Steven Price "The Official Information Act 1982: A Window on Government or Curtains Drawn?" (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, 2005).

This thesis will conclude with its fourth part, constituted by chapter nine, which reflects on both the successes to date and remaining challenges in reconciling Indigenous projections of marine space within the state-centred legal systems in each jurisdiction. While important legal and policy innovations have occurred in each jurisdiction, reconciliation remains an ongoing process in both the marine regions that are examined in this thesis. For healthier relationships to develop between Indigenous peoples and the Crown in these heavily contested marine spaces there will be a need for not only policy innovations like marine spatial planning but also further shifts in the legal systems that underpin these processes to ensure mutually agreeable visions of marine protection and development are put into practice.

II DIFFERING PROJECTIONS OF MARINE SPACE

A Introduction

In exploring how Indigenous peoples' distinct legal and social projections of marine space are reconciled within the legal systems of Canada and New Zealand this comparative thesis examines each jurisdiction in turn in its second and third parts. This is to avoid artificially confining my analysis to the identification of "sameness" between the two jurisdictions and to work through the difference of each jurisdiction rather than against it in undertaking a comparative analysis.[1] Before proceeding to an examination of each jurisdiction in detail, however, this chapter provides a brief overview of their respective legislative and policy frameworks for marine resource management. It also provides an introduction to the ocean governance tool of marine spatial planning ("MSP") that is being applied in pilot projects in each jurisdiction. This introductory context is important as there are key commonalities between Canada and New Zealand in terms of how they are exploring opportunities to harmonise their traditional, sectoral approach to marine governance into a more integrated regime. This is the context in which each jurisdiction is now trialling MSP as a tool to achieve integrated management of marine resources, and in which potential new opportunities for the recognition and reconciliation of Indigenous interests are arising. This chapter also sets out a theoretical framework for this thesis that adopts a critical legal pluralist perspective for examining how Indigenous projections of marine space and resources are interpreted, recognised and reconciled within the legal systems of Canada and New Zealand.

B Legislative and Policy Framework

1 Haida Gwaii and the Pacific North Coast of British Columbia

(a) Divided powers and ownership in marine territory

Framed between the Pacific, Arctic and Atlantic Oceans, Canada has the longest coastline (almost 244,000km) of any country in the world, as well as the second largest continental shelf (3.7 million km^2).[2] The vast and varied marine spaces over which Canada claims jurisdiction are subject to an equally vast and varied array of statutes enacted both federally and by the different territories and provinces that have legislative authority over certain marine activities. This section will introduce in brief some of the key statutes that govern this region's marine areas and resources and interact with the rights and interests of Indigenous peoples in the region.

---

[1] See Pierre Legrand "Comparative Legal Studies and the Matter of Authenticity" (2006) 1 JCL 365.

[2] Jon C Day and John C Roff "Planning for Representative Marine Protected Areas: A Framework for Canada's Oceans" (report prepared for World Wildlife Fund Canada, Toronto, 2002) p 2.

Canada[3] has constitutional jurisdiction over many important aspects of natural resource governance for the marine waters of Haida Gwaii and British Columbia's Pacific North Coast including beacons, buoys and lighthouses,[4] navigation and shipping,[5] and the sea coast and inland fisheries,[6] among others. Consistent with these federal heads of power, Canada regulates domestic commercial fisheries and recreational fishing in tidal waters under the federal Fisheries Act[7] and to a lesser extent, regulates foreign fishing within its marine territory under the Coastal Fisheries Protection Act.[8] Among the areas addressed by the Fisheries Act, this statute empowers the federal Minister of Fisheries and Oceans to set out the conditions under which marine fisheries can take place, including licencing, export and enforcement.[9] The Act also prohibits certain forms of marine pollution[10] and activities harming fish,[11] though the latter prohibition has been controversially limited to fish "that are part of a commercial, recreational or Aboriginal fishery, or … that support such a fishery" since 2012.[12]

Since 2010 the federal department of Fisheries and Oceans Canada ("DFO") also regulates fish aquaculture in British Columbia under the Fisheries Act, after the constitutionality of British Columbia's authority over this form of marine development was successfully challenged before the BC Supreme Court in the *Morton* decision.[13] Another key aspect of federal authority over marine areas is in relation to marine shipping and transportation. There are several federal statutes that address oil spills from tankers and terminals,[14] and the Navigation Protection Act requires approval to be sought for activities that substantially interfere with navigation on certain bodies of waters that include Canada's territorial sea within the Pacific

---

[3] Due to the federal structure of the Canadian constitution the term "Canada" is commonly used to denote both Parliament and the federal government as distinguished from provincial executive and legislative branches.

[4] Constitution Act, 1867 RSC 1985 App II No 5 [Constitution Act, 1867], s 91(9).

[5] Ibid, s 91(10).

[6] Ibid, s 91(12).

[7] Fisheries Act RSC 1985 c F-14 [Fisheries Act].

[8] Coastal Fisheries Protection Act RSC 1985 c C-33.

[9] Fisheries Act, above n 7, s 43.

[10] Fisheries Act, above n 7, s 36.

[11] Ibid, s 35.

[12] See Fisheries and Oceans Canada *Implementing the New Fisheries Protection Provisions under the Fisheries Act* (Discussion Paper, April 2013); and Jeffrey A Hutchings and John R Post "Gutting Canada's Fisheries Act: No Fishery, No Fish Habitat Protection" (2013) 38(11) Fisheries 497.

[13] *Morton v British Columbia (Agriculture and Lands)* 2009 BCSC 136; for a recent detailed discussion of this decision and its surrounding circumstances see Alexander Ross Clarkson *The Jurisdiction to Regulate Aquaculture in Canada* (LLM thesis, University of British Columbia, 2014).

[14] See Canada Shipping Act RS 1985 c S-9, Marine Liability Act SC 2001 c 6, and Canada Oil and Gas Operations Act RS 1985 c 0-7, among others.

Ocean.[15] These are just a few highlights among the many federal statutes that govern marine areas and resources in Canada.

British Columbia, in turn, has legislative authority over various other relevant areas including property and civil rights[16] as well as local undertakings and private matters.[17] Although British Columbia lost much of its legislative power to regulate fish aquaculture in 2010, the Province retains a significant role in this industry by regulating the location of aquaculture tenure sites on provincial land, including foreshore and seabed, under the Land Act.[18] The Province also regulates the processing and sale of fish and the harvesting of marine plants under its own Fisheries Act.[19] Likewise, various land-based activities under provincial jurisdiction also potentially impact on marine environments such as forestry and agriculture.

There are also matters over which jurisdiction is ambiguous as between these two levels of government. The most relevant area of overlap for the purposes of this discussion is the environment, which the Supreme Court of Canada has described as "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty".[20] Consequently both Canada and British Columbia have legislation to conduct environmental assessments of certain major development projects,[21] to protect threatened and endangered species,[22] and to create marine protected areas,[23] as just a few examples.

---

[15] Navigation Protection Act RSC 1985 c N-22, s 6. Note that the title to this Act was recently changed from the Navigable Waters Protection Act to its current title to "better reflect the Act's intent" according to the Government of Canada. See Transport Canada "Navigation Protection Act" (last updated 23 June 2014) <www.tc.gc.ca>.

[16] Ibid, s 92(13).

[17] Ibid, s 92(16).

[18] Land Act RSBC 1996 c 245. See also British Columbia *Land Use Operational Policy: Aquaculture* (effective 1 June 2011, amended 1 April 2014).

[19] Fisheries Act RSBC 1996 c 149.

[20] *Friends of the Old Man River Society v Canada (Minister of Transport & Minister of Fisheries & Oceans)* [1992] 1 SCR 3 at 63-64.

[21] Canadian Environmental Assessment Act, 2012 SC 2012 c 19 s 52; and Environmental Assessment Act SBC 2002 c 43. The overlap between these two statutes is to be coordinated between the jurisdictions as set out in the *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (signed 11 March 2004).

[22] Species at Risk Act SC 2002 c 29; and Wildlife Act RSBC c 488 [Wildlife Act].

[23] Federal marine protected areas may be created under various statutes including the Oceans Act SC 1996 c 31 [Oceans Act], the Canada Wildlife Act RSC 1985 c W-9, and the Canada National Marine Conservation Areas Act SC 2002 c 18. Provincial marine protected areas may be created under various statutes including the Ecological Reserve Act RSBC 1996 c 103, the Protected Areas of British Columbia Act SBC 2000 c 17, the Park Act RSBC 1996 c 344, and the Wildlife Act, above n 22. The establishment of marine protected areas under these statues is to be coordinated between the

In addition to matters over which courts have found the Province and Canada share constitutional authority, Canadian jurisprudence has also gradually moved away from treating the division of powers that were once strictly assigned to provincial and federal governments as "watertight compartments", and courts increasingly show openness to both levels of government legislating over the same matters in the spirit of what has been termed "co-operative federalism".[24]

Aside from issues of legislative authority, ownership of marine areas and resources within British Columbia's Pacific North Coast is also divided between the provincial and federal governments. British Columbia owns mineral rights in the seabed of at least some of the narrow inlets and straits falling within the Pacific North Coast region's boundaries,[25] whereas Canada owns mineral rights to the unquestionably open water portions of the Pacific North Coast such as the seaward waters of Haida Gwaii,[26] and ownership as between the two jurisdictions remains unclear for many other portions of this expansive marine area, such as the Hecate Strait between Haida Gwaii and the mainland.[27]

For the purposes of this initial introduction, issues of potential Indigenous jurisdiction and ownership with respect to areas of the foreshore and seabed within the Pacific North Coast of British Columbia have been left aside as these will be addressed in detail in the next chapter. As an introductory matter, however, it is important to understand the complex constellation of federal and provincial powers and claims to ownership that overlap and interact in the marine territory of Haida Gwaii and the Pacific North Coast as these are the context in which both Indigenous claims over marine space and resources have arisen and marine spatial planning is unfolding.

(b) Legislation and policy for integrating marine governance

In addition to the sector-specific statutory regimes set out above, in 1997 Canada also became one of the first countries in the world to have in place comprehensive legislation for oceans management when it brought into force the federal Oceans

---

jurisdictions as set out in the *Memorandum of Understanding Respecting the Implementation of Canada's Oceans Strategy on the Pacific Coast of Canada* (signed 18 September 2004).

[24] See for example *Canada Western Bank v Alberta* 2007 SCC 22; *British Columbia (Attorney-General) v Lafarge Canada Inc* 2007 SCC 23; and *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

[25] *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* [1984] 1 SCR 388.

[26] *Re Offshore Mineral Rights of British Columbia* [1967] SCR 792.

[27] Alexander J Black "Jurisdiction over Petroleum Operations in Canada" (1986) 35(2) ICLQ 446 at 454.

Act.[28] As the summary above should indicate, legislative and executive authority over marine spaces and resources is complex and at times fragmented in Canada. The Oceans Act represents a commitment to a wholly new direction for marine resource management, with its preamble framing this new regime in two key principles on which marine spatial planning is premised, integrated management of oceans and marine resources and an ecosystem approach to conservation "in order to maintain marine biological diversity and productivity".[29] This Act does not consolidate the various ocean policy and law making arms of the federal government into one department nor does it supplant the various statutes that govern individual marine sectors.[30] However, it puts one federal department, DFO, in the lead role for integrated oceans management, placing it in charge of the "big picture" by leading and facilitating the various obligations under the Act, and investing it with the "authority for all ocean matters not assigned by law to any other department, board or agency of the Government of Canada".[31]

The Act obliges DFO to develop and implement a national strategy based on principles of sustainable development, integrated management of activities in estuaries, coastal waters and marine waters, and the precautionary approach.[32] It also commits DFO to develop and implement plans for the integrated management of "all activities or measures" that would take place in or affect any of the estuaries, coastal waters and marine waters under Canada's jurisdiction.[33] Furthermore, DFO is required to develop and implement a national system of marine protected areas throughout Canada's marine territory in order to achieve the purposes of these integrated management plans.[34] As a result of these legislative commitments, integrated management planning for Canadian marine waters is mandated to a certain

---

[28] Oceans Act, above n 23; Fisheries and Oceans Canada "Managing Our Oceans: Our Governments' Roles" <www.dfo-mpo.gc.ca>.

[29] Oceans Act, above n 23; For discussions of the strengths and weaknesses of this legislation and its implementation see Gloria Chao "The Emergence of Integrated Coastal and Ocean Management in Canada's *Oceans Act* – Challenges of Integrating Fragmented Resource Sectors in Georges Bank, Nova Scotia and Hecate Strait, British Columbia" (LLM thesis, Dalhousie University, Halifax, 1999); Peter J Ricketts and Lawrence Hildebrand "Coastal and Ocean Management in Canada: Progress or Paralysis?" (2011) 39(1) Coastal Management 4; Sabine Jessen "A Review of Canada's Implementation of the Oceans Act since 1997-From Leader to Follower? (2011) 39(1) Coastal Management 20; and Murray Rutherford, Megan Dickinson and Thomas Gunton "An evaluation of the national framework for marine planning in Canada" (2010) 37(3) Environments 47.

[30] Ted L McDorman and Aldo Chircop "Canada's Oceans Policy Framework: An Overview" (2012) 40(2) Coastal Management 133 [McDorman and Chircop] at 144.

[31] Oceans Act, above n 23, ss 29-35 and 40; see also ibid.

[32] Ibid, ss 29 & 30.

[33] Ibid, s 31.

[34] Ibid, s 35.

degree, and at the same time legislative foundations have been laid for the development of marine spatial planning.

In 2002, in keeping with the provisions set out in the Oceans Act, DFO released Canada's first *Oceans Strategy* to provide an "overall strategic framework for Canada's oceans-related programs and policies".[35] This strategic document sets out a plan for integrated management of Canada's coastal and marine territory based on principles of harmonisation, collaboration and inclusiveness between different departments and levels of government, Indigenous collectives, stakeholders and interest groups. Then in 2005 Canada created its first *Oceans Action Plan* under the Act and finally allocated considerable resources to carrying out the Act's objectives.[36] British Columbia's Pacific North Coast was identified as one of five Large Ocean Management Areas ("LOMAs") in which integrated management planning would occur as part of Phase I of this Plan.[37]

This region, identified as the Pacific North Coast Integrated Management Area ("PNCIMA"), encompasses approximately 102,000 km^2 of marine area and embraces approximately two-thirds of British Columbia's coast, extending from the Canada-United States border of Alaska at its northern boundary, to Brooks Peninsula on northwest Vancouver Island as its southwest boundary, and to Quadra Island at its southeast boundary.[38] The northwest quadrant of this planning area is comprised of the marine waters of the archipelago of Haida Gwaii. This is the geographic region on which the Canadian portion of this thesis will focus, and in which the marine spatial planning process discussed in the second part of this thesis is ongoing.

As will be addressed in greater detail later in this thesis, the marine spatial planning process for Haida Gwaii and British Columbia's Pacific North Coast has evolved into a partnership between the provincial government and several different organisations representing regional aggregates of coastal First Nations. The federal government is not currently involved in this marine spatial planning process—titled the Marine Planning Partnership or MaPP. Nevertheless, it is being developed to inform the PNCIMA process under the Oceans Act and has evolved out of processes that were in part triggered by the *Oceans Strategy* and the *Oceans Action Plan*. A more detailed background to this planning process and its statutory and policy framework will be set

---

[35] Fisheries and Oceans Canada *Canada's Oceans Strategy: Our Oceans, Our Future* (2002) [*Oceans Strategy*] at 1.

[36] Ricketts and Hildebrand, above n 29, at 10.

[37] Fisheries and Oceans Canada *Canada's Oceans Action Plan: For Present and Future Generations* (2005) at 15.

[38] Fisheries and Oceans Canada "DRAFT Pacific North Coast Integrated Management Area Plan" (27 May 2013) at 9.

out in chapter six. By way of introduction, however, it must be understood that the marine spatial planning initiative addressed in this thesis has developed out of legislation and policies aimed at integrating and coordinating the various regulatory regimes that operate within British Columbia's Pacific North Coast region.

2 *The Hauraki Gulf of New Zealand*

(a) Delegated and centralised authorities over marine territory

As an island nation, marine and coastal territories and resources play a central role in New Zealand's cultural, economic, ecological and legal systems as well. It has an extensive coastline of over 19,000 km in length and the fifth largest exclusive economic zone (EEZ) in the world, with the country's overall marine jurisdiction extending over 3 million km^2 of maritime territory.[39] Although New Zealand is a unitary state without any constitutional division of powers comparable to Canada, certain aspects of regulatory authority for development within coastal and marine areas have been delegated to local and regional authorities while others are retained by the central government. This section will set out some of the key statutes and policies for regulating coastal and marine resource development as relevant to the Hauraki Gulf.

One of the most important statutes in New Zealand governing the development of marine resources and spaces would undoubtedly be the Resource Management Act 1991 (RMA). The RMA replaced and merged the functions of several planning and environmental protection statutes under one Act when it first came into force.[40] This Act provides a comprehensive framework to regulate environmental effects of activities through what has been described as a "three-tier governance structure".[41] At the top tier of this structure the Ministry for the Environment is empowered to establish national policy statements and national environmental standards, and the Minister of Conservation is obliged to prepare and recommend New Zealand coastal policy statements and approve regional coastal plans. At the second level of this structure regional councils are empowered to prepare regional policy statements and regional plans, including coastal plans, and determine whether coastal use permits, water permits, and air and waste discharge permits are granted for proposed activities. Finally, at the lowest tier of this governance structure, territorial authorities engage in

---

[39] Michael V McGinnis *Ocean Governance: The New Zealand Dimension* (Emerging Issues Programme, School of Government, Victoria University of Wellington, 2012) at 13.

[40] Acts replaced by the RMA included the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, the Clean Air Act 1972, the Noise Control Act 1982, much of the Mining Act 1971 and the Petroleum Act 1937. See Derek Nolan (ed) *Environmental and Resource Management Law* (3rd ed, LexisNexis NZ, Wellington, 2005) [Nolan] at 95.

[41] Kenneth Palmer *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012) at 773.

the detailed regulation of land use activities and subdivisions. In this hierarchical system, statements, plans and rules at higher tiers delimit and steer those on lower tiers,[42] and in this way the different layers of regulatory activity are coordinated.

Almost any activity affecting New Zealand's natural and physical resources will be regulated by the RMA, though important exceptions include minerals and hydrocarbons,[43] and all fishing activities, including customary fishing and protective exclusion of fishing.[44] Although the RMA does not control the licensing, siting and allocation for these select activities, it does address the effects that flow from mining and the facilities and infrastructure associated with fishing.[45] In terms of marine resource development the jurisdiction of regional councils only extends to the 12 nautical mile limit of the territorial sea. Activities within New Zealand's exclusive economic zone (EEZ) are instead regulated under other statutes including the recently enacted Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, but that marine area falls outside the scope of this discussion.

The central government holds the primary responsibility for the regulation of marine fisheries in New Zealand through the Fisheries Act 1996. Among other things, this Act allows the Minister of Primary Industries to determine whether fish species or stocks are regulated under its quota management system,[46] designate various quota management areas within New Zealand's marine jurisdiction,[47] determine the total allowable catch for stocks and species managed within these areas,[48] and set various "sustainability measures" such as permissible gear types and fishing seasons.[49] Unlike its Canadian equivalent, New Zealand's Fisheries Act does not prohibit human activities that harm fish, instead allowing these effects to be regulated through the RMA and other statutes such as the Wildlife Act 1953. There are various other statutes setting out discrete powers and responsibilities for central government ministries over marine areas and their flora and fauna such as the self-explanatorily titled Marine Reserves Act 1971, Marine Mammals Protection Act 1978 and Submarine Cables and Pipelines Protection Act 1996.

---

[42] Inga Carlman "The Resource Management Act 1991 through External Eyes" (2007) 11 NZ J Envtl L 181 at 195.

[43] Crown Minerals Act 1991.

[44] Fisheries Act 1996; Māori Fisheries Act 2004; Marine Reserves Act 1971; and Marine Mammals Protection Act 1978.

[45] Robert A Makgill and Hamish G Rennie "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand's Resource Management Act 1991" (2012) 27 IJMCL 135 at 143.

[46] Fisheries Act, above n 44, s 17B.

[47] Ibid, s 24.

[48] Ibid, s 20.

[49] Ibid, s 11(3).

These are just a few of the complex array of statutes that govern marine activities and areas within New Zealand's jurisdiction. For this brief introduction the specific statutes and provisions within this legislative matrix that provide for and protect Māori interests in these resources have been left aside to be addressed in the third part of this thesis. However, the non-exhaustive summary above provides an important legal context in which Māori claims with respect to marine territories and resources take place and marine spatial planning for the Hauraki Gulf is being pursued.

(b) Legislation and policy for integrated marine governance

In many ways New Zealand has been a global leader in embracing innovative approaches to marine governance, including the fishing quota management system it introduced in 1986[50] and the implementation of an integrated coastal management approach under the RMA.[51] In spite of these important legal and policy innovations, however, New Zealand has still faced most of the same key issues for oceans governance that plague other countries such as regulatory gaps, overlaps and inefficiencies, and compartmentalisation between numerous agencies and statutes governing marine ecosystems.[52] As a result, since 1999 New Zealand has been seeking to reform its ocean governance regime in order to achieve overall integrated management of its marine territory, and has looked to examples from other jurisdictions, including Canada's efforts under the Oceans Act, to achieve this ambitious goal.[53]

In the early 2000s efforts were made to adopt an integrated management framework for human impacts in the marine environment through a nation-wide Oceans Policy.[54] This was intended to embrace the relationship between Māori, the Treaty of Waitangi, and coastal and ocean areas and resources as a key policy consideration, and ensure Māori were involved and engaged at all levels of participation.[55] Following the New Zealand Court of Appeal's decision in *Ngāti Apa*,[56] however, rather than embracing

[50] McGinnis, above n 39, at 15; Boris Worm and others "Rebuilding Global Fisheries" (2009) 325 Science 578.

[51] McGinnis, above n 39, at 15; Makgill and Rennie, above n 45.

[52] Parliamentary Commissioner for the Environment *Setting Course for a Sustainable Future* (Wellington, 1999). See also McGinnis, above n 39.

[53] Ibid.

[54] Carolyn Risk "An oceans policy for New Zealand: why, what, how?" (paper presented to the 2002 New Zealand Petroleum Conference Proceedings, February 2002); Angela Foster "New Zealand's Oceans Policy" (2003) 34 VUWLR 469.

[55] Joanna Vince and Marcus Haward "New Zealand oceans governance: Calming turbulent waters?" (2009) 33(2) Mar Policy 412; and John Mansell "The Voyage towards National Oceans Policy in New Zealand – Encountering Rocks and Shoals" (2004) 137 MAST 1.

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

this relationship the New Zealand government sharply terminated the Ocean Policy's development until issues regarding ownership of the foreshore and seabed could be resolved.[57] Since then New Zealand's national efforts towards integrated oceans policy have been limited to the EEZ,[58] such as the recent development of a consenting authority for this marine territory[59] and the Department of Conservation's ongoing development of an ecosystem-based conservation management plan known as PlanBlue.[60]

The Hauraki Gulf, known to tangata whenua by various names including Tikapa Moana and Te Moananui a Toi, has its own unique history of oceans management. This marine region encompasses several islands and a large densely populated coastal region of North Island, including the Coromandel Peninsula, the Firth of Thames, and the north coast of the Auckland Region and extends to the north to encompass Great Barrier Island.[61] This is the geographic region on which the New Zealand portion of this thesis will focus, and in which the marine spatial planning process discussed in the third part of this thesis is developing.

As will be addressed in greater detail later in this thesis, various aspects of the marine area and resources within this region are designated part of a marine park under the region-specific Hauraki Gulf Marine Park Act 2000. This Act has created a multilateral forum that includes representatives of central and local government authorities, as well as representatives of local Māori with interests within the Hauraki Gulf, and one of its primary purposes is achieving integrated management of the region's resources. In order to achieve this purpose the Hauraki Gulf's forum has set in motion a marine spatial planning process that will be addressed in greater detail in chapter eight. At this stage, however, it is important to recognise this spatial planning process as a pilot project for achieving integration of the various management regimes applied within the Hauraki Gulf, and to further note that it has been structured as a partnership between the Crown and local Māori in a manner that closely resembles the model from the Pacific North Coast of British Columbia.

C Marine Spatial Planning

Marine spatial planning is rapidly being adopted across the world as an ocean governance framework for determining and coordinating human activities that impact

---

[57] Vince and Haward, above n 55; McGinnis, above n 39, at 23-24.

[58] McGinnis, above n 39, at 25-26.

[59] Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

[60] See New Zealand Treasury "Financial Review 2011/12 – Supplementary Questions – 116 to 220 - Department of Conservation" <www.treasury.govt.nz> at 8-10.

[61] Department of Conservation *Islands of the Hauraki Gulf Marine Park* (Auckland, 2010).

the marine ecosystems. MSP is commonly defined as "a public process of analysing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process".[62] More simply put, it is a future-oriented activity to inform "what goes where and when" in the ocean.[63] It has been widely endorsed as a more rational and coordinated approach compared to previous sectoral or species-by-species marine resource management approaches that have been blamed for such challenges as over-exploitation of living resources, habitat degradation, pollution and economic underperformance.[64]

MSP is perhaps best understood in relation to other resource management frameworks and concepts. It is similar to the concept of land use planning in that it seeks to coordinate potentially competing human activities and provide an overall comprehensive plan or vision for a geographical region.[65] Yet it differs from traditional land use planning by giving more primacy to ecological perspectives rather than focusing primarily on socio-economic issues.[66] MSP must also contend with the fact that coastal and marine ecosystems tend to be more 'open' to "exchanges of materials, energy and organisms" than their terrestrial counterparts.[67] For example, land use practices that take place in distant upper catchments of rivers can still have significant impacts on the marine ecosystems those rivers empty into.[68] Marine ecosystems also have unique vulnerabilities to climate change that must be taken into account.[69]

MSP should also be understood in relation to the resource management goals it is intended to achieve. The United Nations' Rio Declaration of 1992 included a commitment to integrated management for coastal areas and marine environments.[70]

---

[62] Charles Ehler and Fanny Douvere *Marine spatial planning: a step-by-step approach towards ecosystem-based management* (Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, IOC Manual and Guides No 53, ICAM Dossier No 6, UNESCO, Paris, 2009) at 18.

[63] Robert Pomeroy "Marine Spatial Planning is Coming to an Ocean Near You" (2009) 9 Wrack Lines 2 at 17.

[64] Stephen Fletcher and others "Effective practice in marine spatial planning: A participatory evaluation of experience in Southern England" (2013) 39 Mar Policy 341 at 341.

[65] Pomeroy, above n 63, at 17.

[66] Sue Kidd "Rising to the integration ambitions of Marine Spatial Planning: Reflections from the Irish Sea" (2013) 39 Mar Policy 273 at 275.

[67] Ibid at 274.

[68] Ibid.

[69] See for example Catharina Philippart and others "Impacts of climate change on European marine ecosystems: Observations, expectations and indicators" (2011) 400(1) J Exp Mar Biol Ecol 52.

[70] David Crawford and Richard Kenchington "On the Meaning of Integration in Coastal Zone Management" (1993) 21 Ocean Coast Manage 109 at 110.

Proponents of MSP believe that where marine space is subject to multiple claims a first necessary step towards integrated management will be the ordering of these claims in space and time through the MSP process.[71] MSP has also been promoted as a key tool for the implementation of 'ecosystem-based management' for the marine environment as it allows for cross-sectoral integration and provides a more concrete mechanism for balancing conservation with sustainable resource use.[72] It is being explored for the purpose of remedying the failings of uncoordinated marine protected areas,[73] improving the resiliency of marine environments to climate change,[74] and providing vital data for oil spill risk analysis,[75] among other uses.

For the purpose of this thesis it is important to understand that MSP is typically 'sector neutral' in that it is proposed to have both environmental and economic outputs. It is a tool focussed on not only improved protection of the marine environment but also optimised human use of that environment.[76] There are also two different dimensions to the coordination and integration sought through MSP: horizontal coordination of different maritime sectors (such as commercial fishing, aquaculture and offshore petroleum development) and vertical coordination of different governance levels (from local authorities up to potentially trans-national bodies).[77] Furthermore, due to the fluid nature of the marine environment and the complexity of its legal geography, MSP must coordinate and integrate decision-making at various overlapping scales and jurisdictional levels.[78] MSP produces more than a static spatial plan and generally encompasses a policy cycle that "proceeds through stages of problem identification, intervention planning, adoption and funding, implementation, and evaluation and review".[79] Finally, it should be understood as one tool within a wider integrated management regime for marine resource management

[71] Gonçalo Carneiro "Evaluation of marine spatial planning" (2013) 37 Mar Policy 214 at 214.

[72] Fanny Douvere "The importance of marine spatial planning in advancing ecosystems-based sea use management" (2008) 32 Mar Policy 762 at 765.

[73] Tundi Agardy and others "Mind the gap: Addressing the shortcomings of marine protected areas through large scale marine spatial planning" (2011) 35 Mar Policy 226.

[74] Robin Kundis Craig "Ocean Governance for the 21st Century: Making Marine Zoning Climate Change Adaptable" (2012) 36 Harv Envtl L Rev 305.

[75] Catarina Santos and others "Marine spatial planning and oil spill risk analysis: Finding common grounds" (2013) 74(1) Mar Pollut Bull 73.

[76] Nicole Schaefer and Vittorio Barale "Marine spatial planning: opportunities & challenges in the framework of the EU integrated maritime policy" (2011) 15 J Coast Conserv 237 at 238.

[77] Ibid at 239.

[78] Sue Kidd and Dave Shaw "Reconceptualising territoriality and spatial planning: insights from the sea" (2013) 14(2) Planning Theory & Practice 180.

[79] Carneiro, above n 71, at 214.

and not the entire framework itself.[80]

D Theoretical Framework

The theoretical approach of this thesis is roughly situated within the confines of critical legal studies. As in most interdisciplinary and comparative law projects it is somewhat taken for granted here that law does not exist as an entity separate and distinct from culture or social context, but instead comprises, in the words of Clifford Geertz, "part of a distinctive manner of imagining the real".[81] This thesis will draw in particular upon the work of theorists and academics working within the field of legal pluralism, though it will be necessary to acknowledge related theoretical perspectives of those working under postcolonial theory, legal geography and Indigenous legal theory as well.

One aspect that all strands of critical legal theory have in common is their insistence that "it is both possible and necessary to think differently about the law"[82] and that there is an orthodoxy within legal scholarship that can be challenged and indeed must be challenged to ensure legal scholarship does not confine itself "within a more or less monolithic tradition".[83] In keeping with this critical impetus, legal pluralism and the various related perspectives addressed here converge in their call for an interdisciplinary, contextual analysis of law's role in constituting social relations and reality, and how law is defined, delimited and applied. Likewise, there is some unity between these amorphous and diverse fields of legal study in their critical stance towards, if not explicit rejection of the orthodoxy of traditional liberal positivism. Although this thesis will primarily adopt the perspective of critical legal pluralism, this theoretical perspective cannot be reduced to a monolithic or homogenous theory. Instead it comprises one form of interdisciplinary discourse overlapping with various others, all of which are directed at the analysis of law's relationship to society.

This section provides a brief overview of postcolonial theory, legal pluralism and legal geography, although the focus of this thesis will be to apply a legal pluralism perspective with the other two theoretical perspectives ancillary to this purpose. The premises underlying these theoretical perspectives will inform the overall approach to analysing the legal systems of Canada and New Zealand and the marine spatial planning processes that are developing in each jurisdiction. In the interest of being

---

[80] Kidd, above n 66, at 282.

[81] Clifford Geertz "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, New York, 1983) at 170.

[82] Alan Hunt "The Critique of Law: What is 'Critical' about Critical Legal Theory?" (1987) 14(1) J Law & Soc 5 at 6.

[83] Ibid.

self-critical I recognise my own formal legal training as an actor within the same traditional legal world that critical legal theory is largely directed at analysing and deconstructing might prevent me from truly standing outside this worldview. Nevertheless, it is to be hoped that reference to critical legal theory can provide at least a modicum of critical distance to reflect on the assumptions that reign within that world.

1 Postcolonial theory

Postcolonial theory does not describe one homogenous theory, but instead encompasses an interdisciplinary and hybrid discourse directed at the study of societies existing in the wake of western imperialism.[84] Many postcolonial theorists work in the context of societies where colonial rule has formally ended but "the effects of colonialism have become an inextricable part of the culture and of its legal, educational, and political institutions".[85] However, postcolonial theory is also applied in the context of societies that still remain subject to, or the object of colonialism, such as the Indigenous peoples that remain subsumed within the modern nation states of Australasia and North America.[86] When applying the term 'postcolonial' to the study of Indigenous peoples it is important to recognise that their experience of colonialism may be continual not only in the 'internal' sense that they retain its legacy internalised within their culture and institutions but also in an 'external' sense that they often remain under the direct control of the modern colonial nation states that lay claim to their traditional territories.

One aspect of postcolonial theory that is particularly of assistance to this thesis is the recognition of how colonial narratives have been deployed in the service of "depicting the world's cultures and nations as existing on a linear continuum from the more primitive to the most advanced, with western institutions and values representing the standard by which all others are measured".[87] The complex history of the common law's evolving conception of where the culture and institutions of Indigenous peoples lay in relation to that of their colonisers is not something that will be addressed here, though it provides an important background to this thesis. What will be relevant, however, is the degree to which the law and planning structures in place in Canada and New Zealand today remain founded upon these self-same hierarchies.

---

[84] Alpana Roy "Postcolonial Theory and Law: A Critical Introduction" (2008) 29 Adel L Rev 315.

[85] Margaret Davies *Asking the Law Question* (3rd ed, Thomson Lawbook Co, Sydney, 2008) at 306-307.

[86] Ibid at 307 and Roy, above n 84, at 318.

[87] Davies, above n 85, at 308.

2 *Legal pluralism*

The theory of legal pluralism that arises from the literature of critical legal studies and legal anthropology provides the primary frame of reference for this thesis.[88] Legal pluralism is a term invoked to describe situations where behaviour occurs pursuant to more than one legal order, including situations where Indigenous legal orders co-exist with western legal systems.[89] With its roots in the field of anthropology, legal pluralism seeks a descriptive rather than prescriptive theory of law and in this way challenges the restrictive presumption that "law is and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of state institutions" – what theorist John Griffiths calls "the ideology of legal centralism".[90]

Griffiths distinguishes between what he terms "weak legal pluralism" and "strong legal pluralism". A situation where Indigenous customary law is recognised and incorporated into a unified, state-centred legal system is, under Griffiths' framework, an example of "weak legal pluralism". To Griffiths, this type of arrangement represents a "messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality" as part of a project of smelting heterogeneous populations into a theoretically homogenous nation state.[91] Although weak legal pluralism might acknowledge the existence of unique legal orders among minorities, it attempts to rationalise these alternative legal orders within a framework that assumes the dominant nation state holds absolute jurisdiction within its boundaries.[92]

---

[88] See generally John Griffiths "What is Legal Pluralism?" (1986) 24 J Legal Plur 1; Franz von Benda-Beckmann "Who's afraid of legal pluralism?" (2002) 47 J Legal Plur 37; Gad Barzilai "Beyond Relativism: Where is Political Power in Legal Pluralism?" (2008) 9 Theo Inq L 395; and William Twining "Normative and Legal Pluralism: A Global Perspective" (2010) 20 Duke J Comp & Int'l L 473.

[89] For examples of critical legal pluralism applied in the context of Indigenous legal orders see for example Law Commission of Canada (ed) *Indigenous Legal Traditions* (UBC Press, Vancouver, 2007); John Borrows "Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada" in Law Commission of Canada (ed) *Justice Within: Indigenous Legal Traditions: Discussion Paper* (Government of Canada, Ottawa, 2006); Carwyn Jones "Whakaeke i ngā ngaru – riding the waves: Māori legal traditions in New Zealand public life" in Lisa Ford and Tim Rowse (eds) *Between Indigenous and Settler Governance* (Routledge, New York, 2013) 174; David V Williams "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand" (2006) 14 Waikato L Rev 120.

[90] Griffiths, above n 88, at 3.

[91] Ibid at 7.

[92] Peter Burns *The Leiden Legacy: Concepts of Law in Indonesia* (KITLV Press, Leiden (NL), 2004) at 255.

Griffiths argues that "'recognition' or some form of incorporation or validation by the state is not a prerequisite to the empirical existence of a legal order", and legal pluralism likewise does not require the presence of more than one entire legal *system* but also exists where multiple legal *mechanisms* are present, whether these are in the form of single rules, clusters of rules or institutions.[93] Recognising these mechanisms as legal is to adopt the perspective of strong legal pluralism for which Griffiths advocates. Looking at the world through this perspective a state of legal pluralism is the rule rather than the exception as every society contains multiple "semi-autonomous social fields".[94] Essentially, Griffiths argues that a truly empirical rather than prescriptive definition of law must encompass normative orders that emanate from not only the state and state-sanctioned institutions but from all semi-autonomous social fields that may include kinship-derived collectives, organised religions or even professional associations, to name just a few. In a strong legal pluralist perspective there is no clear distinction between the legal and the non-legal, with law instead existing along "a continuum which runs from the clearest form of state law through to the vaguest form of informal social control".[95]

By attempting an empirical definition of law, legal pluralism "challenges the exclusiveness and self-evidence of any single normative system", meaning that "[c]hoices between legal systems are thinkable" and "[o]rientation at and invocation of one of the alternatives therefore requires an explicit justification".[96] This approach is key to the theoretical framework for this thesis in light of the sustained assertion by Indigenous peoples of the continuing existence and application of their own legal orders and traditions.[97] The theoretical perspective of strong legal pluralism not only rejects any reductionist challenge to such assertions on the basis of a definition of law limited to that which is recognised by the state-centred legal order. A strong legal pluralist perspective goes further to presume the existence of *some* form of ongoing Indigenous legal orders as implicit in the fact that Indigenous peoples continue to self-organise into collectives as 'semi-autonomous social fields'.[98] Strong legal pluralism recognises as law not only the 'normative conceptions' within these social fields, such

---

[93] Griffiths, above n 88, at 12.

[94] Ibid at 38.

[95] Gordon Woodman "Ideological Combat and Social Observation: Recent Debate About Legal Pluralism" (1998) 42 J Legal Plur 21 at 45

[96] von Benda-Beckmann, above n 88, at 69.

[97] See for example Val Napoleon *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria (BC), 2009).

[98] Griffiths, above n 88, at 38.

as the nature of what one *must* do for another, but also "cognitive conceptions", such as what kind of person *is* part of a social organisation.[99]

Where tension exists between nation state law and the law of a separate self-governing social field such as a religion or an Indigenous collective, legal pluralism allows for that scenario to be viewed as "deriving from two forms of law anchored in two different types of projection of social reality" rather than falling into a reductionist view of seeing that conflict from within the confines of only one of those two projections.[100] Although recognition of a 'polycentric' legal reality through this theoretical perspective does not alter the often dominant role that state law plays, the legal pluralist perspective does assist in recognising how that one particular projection of social reality reproduces itself by "multiple mechanisms of acculturation and socialisation".[101] Likewise, the relations between coexisting legal orders in this perspective need not be in conflict or competition but can instead interact or interrelate in a variety of configurations "including symbiosis, subsumption, imitation, convergence, adaptation, partial integration, and avoidance as well as subordination, repression, or destruction".[102]

The attempt that legal pluralism makes to approach law from a broad, empirical perspective is both related to and complementary to the postcolonial theoretical perspective. Margaret Davies argues that what she terms the "Western legal project" has often excluded the possibility of law existing outside its domain yet within its 'own' territory and has also excluded from the idea or concept of law any legal order which is not institutionalised after a Western model.[103] One example of this in Canadian law can be seen in the British Columbia Supreme Court's 1991 trial decision in *Delgamuukw*.[104] Justice McEachern (as he then was) refused to acknowledge Gitksan and Wet'suwet'en customary legal orders as truly constituting law, instead characterising them as "a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves".[105] Similar characterisations of Māori society as lacking "law in the strict sense" can be found in New Zealand.[106] Davies argues that reluctance to recognise Indigenous legal orders

---

[99] von Benda-Beckmann, above n 88, at 69.

[100] Boaventura de Sousa Santos "Law: A Map of Misreading: Toward a Postmodern Conception of Law" (1987) 14(3) J Law & Soc 279 at 294.

[101] Ibid at 298.

[102] Twining, above n 88, at 489.

[103] Davies, above n 85, at 306.

[104] *Delgamuukw v British Columbia* [1991] 3 WWR 97 (BCSC), subsequently varied but affirmed in [1993] 5 WWR 97 (BCCA), then partially overturned in [1997] 3 SCR 1010.

[105] Ibid.

[106] Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou: A New Perspective, Part 2* (Department of Justice, Wellington, 1988) at 37, citing M B Hooker "An Enquiry

indicates how the racial dominance of Indigenous peoples by Western legal systems has been "built into the ideological self-justification" of those legal systems.[107] It is hoped that a theoretical perspective that is open to multiple legal orders and distinguishes the "weak legal pluralism" of recognition within state-centred law from the "strong legal pluralism" of recognising Indigenous law outside and separate from a state legal system can allow for a more nuanced investigation of how Indigenous peoples are situated with respect to colonial societies in both state-centred law and joint planning structures. As noted by legal scholar Boaventura de Sousa Santos, "there is nothing inherently good, progressive or emancipatory about legal pluralism".[108] It is an analytical perspective and not a normative goal. However, this thesis will argue that recognition of Indigenous legal orders, as assisted by the legal pluralist perspective, can contribute to the broader normative goal of reconciliation.

Finally, it must be noted that some commentators argue there is risk to using the word law to describe normative orders different from state law as this could potentially impose a western Eurocentric concept of law on those outside normative orders, thereby distorting them.[109] In fact, in recognition of the lack of a clear "definitional stop" as to what could be seen as law from a legal pluralist perspective, some proponents of legal pluralism have abandoned the term "law" altogether to describe the "forms of normative ordering" with which they are concerned.[110] Canadian Indigenous legal scholar Valerie Napoleon, however, provides her own useful framework that may address this concern when considering Indigenous law. To engage with Indigenous law without recasting it in Western form, she uses the term "legal systems" exclusively to describe the western state-centred legal regimes that are managed by professionals in legal institutions which exist separate and apart from other social and political institutions.[111] In contrast, she describes Indigenous law as existing in either the form of "Indigenous legal traditions" as the explicit legal protocols and laws of Indigenous peoples or "legal orders" to describe law that is

---

into the Function of the Magico-Religious as a Jural Mechanism in Primitive Society" (LLM Dissertation, Canterbury University, Christchurch, 1965) at 65; see also *Wi Parata v Bishop of Wellington* (1878) 2 NZ Jur (NS) SC 72 at 79 where Prendergast CJ refers to Māori customary law as "non-existent" but note that this decision was overturned in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

[107] Davies, above n 85, at 306.

[108] Boaventura de Sousa Santos *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (2nd ed, Northwestern University Press, Evanston (Ill), 2003) at 89.

[109] von Benda-Beckmann, above n 88, at 54, citing Simon Roberts "Against legal pluralism: Some reflections on the contemporary enlargement of the legal domain" (1998) 42 J Legal Plur 95.

[110] Twining, above n 88, at 497.

[111] Val Napoleon *Thinking about Indigenous Legal Orders: Research Paper for the National Centre for First Nations Governance* (National Centre for First Nations Governance, West Vancouver, 2007) at 2.

"embedded in social, political, economic and spiritual institutions", whether Indigenous or not.[112]

This distinction has been incorporated into this thesis in an attempt to avoid artificially homogenising different forms of law. The purpose of this thesis is not to explore the details of the Indigenous legal orders or traditions of Māori or the First Nations of British Columbia. Nevertheless, acknowledgement of the multiplicity of laws that constitute and govern Indigenous societies is important to this work. The research questions explored in this thesis share a similar theme to one of the primary questions posed throughout the legal pluralism literature: how do we deal with difference?[113]

3 Legal geography

The third and final critical legal perspective that will inform this thesis, legal geography, can also be seen as a complementary and related approach to the first two. Like the other strains of critical legal theory adopted here, legal geography has a generally critical orientation towards the state-centred liberal positivist legal tradition.[114] However, the focus of legal geography is particularly directed at the way in which this legal system tends to operate in an abstract, decontextualised manner through heavy application of normative rules and analogies that often fail to recognise society as more than "a homogeneous plain peopled by an abstract *homo juridicus*".[115] For example, a legal prohibition might apply to all individuals within a given jurisdiction but the practicality, enforceability and justice of such a norm could vary greatly depending on the particular circumstances in which it might apply. By linking geography with law this interdisciplinary approach is intended to show the contrast between what Canadian legal scholar Wes Pue forcefully describes as geography's emphasis on "the multiple specificities of territory, locality, community, [and] place" and law's emphasis on the "two-dimensional world of a-social, rational economic maximizers acting in a placeless, cultureless environment"[116]

---

[112] Ibid.

[113] Mariano Croce *Self-sufficiency of Law: A Critical-institutional Theory of Social Order* (Springer Dordrecht Heidelberg, New York, 2012) at 68.

[114] See generally Nicholas K Blomley *Law, Space, and the Geographies of Power* (Guildford Press, New York, 1994); Nicholas K Blomley, David Delaney and Richard T Ford (eds) *The Legal Geographies Reader* (Blackwell Publishers, Oxford, 2001); Irus Braverman and others *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014).

[115] Nicholas K Blomley and Geoffrey Clark "Law, theory, and geography" (1990) 11(5) Urban Geogr 433.

[116] Wes Pue "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11(6) Urban Geogr 566.

Legal geography also rejects the notion that either space or law exists objectively and separate from or prior to the social and political relations in which they are implicated (the notion of space and law as 'pre-political' facts).[117] A legal geography perspective instead views space and law as "relational, acquiring meaning through social action".[118] In this way, legal geography examines not only how geography shapes law but how law shapes geographies.[119] This theoretical perspective builds on the pioneering work of French philosopher and sociologist Henri Lefebvre who viewed space as something political and strategic, "a product literally filled with ideologies".[120] The legal geography perspective recognises otherwise taken for granted aspects of our physical world such as natural landscapes, built environments or the people and objects who inhabit them as not "empty and static terrains upon which power is exercised" but as "power constructs in themselves".[121] This is in essence further recognition that law includes not only "normative conceptions" but "cognitive conceptions" as discussed above. Legal geography rejects the neutrality or objectivity of the practices, processes and order that law inscribes on space, such as jurisdictional boundaries or distinctions between private and public spheres. Instead these legal projections are seen as choices that "promote the expression of certain types of interests and disputes and suppress that of others", as well as allow for a specific manner of "representing, distorting, and imagining reality".[122]

By encouraging the examination of legal struggles between Indigenous peoples and settler states such as Canada and New Zealand over the source and content of these projections of reality, the legal geography perspective can also assist in the postcolonial project.[123] As observed by influential theorist Edward W Said, we are all embedded in the "struggle over geography" and that struggle is "not only about soldiers and cannons but also about ideas, about forms and imaginings".[124] The theoretical approach of legal geography is useful here to the extent that it allows for closer examination of the power relations that are in play when law produces, destroys or differentiates space in the course of these struggles over geography.

---

[117] Nicholas K Blomley and Joel Bakan "Spacing Out: Towards a Critical Geography of Law" (1992) 30 Osgoode Hall L J 661 at 666.

[118] Ibid.

[119] Edward Soja "Symposium: Surveying Law and Borders, Afterward" (1996) 48 Stan L Rev 1421 at 1426.

[120] Henri Lefebvre "Reflections on the Politics of Space" (1976) 8 Antipode 30 at 31.

[121] Irus Braverman "Hidden in Plain View: Legal Geography from a Visual Perspective" (2011) 7 Law, Culture and the Humanities 173 at 175.

[122] de Sousa Santos, above n 100, at 297.

[123] See for example Jacinta Ruru "Settling Indigenous Place: Reconciling Legal Fictions in Governing Canada and Aotearoa New Zealand's National Parks" (PhD thesis, University of Victoria (BC), 2012).

[124] Edward W Said *Culture and Imperialism* (Knopf, New York, 1993) at 7.

4 Reconciliation

Before moving on from a discussion of the theoretical framework to a detailed discussion of the legal and planning regimes at issue in this thesis it is important to first clarify the overall normative thrust of my research questions that are framed by a goal of reconciliation. Reconciliation is a concept often invoked internationally in both political theory and public discourse to describe the construction of peaceful relations between ethnic, cultural and religious communities that have been divided by conflict or oppression.[125] In this international context reconciliation describes the goal of legal and political action directed at moving beyond past conflicts and oppression such as public apologies and the establishment of truth and reconciliation commissions. Similarly, the governments of former British colonies in Australasia and North America have invoked the term reconciliation to describe actions aimed at addressing and moving beyond past injustices and traumatic events.[126] However, in the context of ongoing Indigenous-settler state relations the term reconciliation is more specifically applied to describe the process by which Indigenous struggles over recognition of their rights have in part given way to the equally if not more complex business of determining how these rights are to be managed as an ongoing concern.[127] In setting the parameters within which New Zealand and Canada's legal and planning regimes can be explored for consistency with a goal of reconciliation, it is this latter notion of reconciliation that is intended.

In a comprehensive and detailed historic treatment of Crown-Indigenous relations in Canada and New Zealand, legal scholar Professor Paul McHugh has described "reconciliation" between Indigenous peoples and settler states as a normative theme not premised solely on the need for redress of historical wrongs or the "mending of particular problems".[128] Instead, reconciliation expresses "a deeper commitment to the health of the relationship itself" in a context in which legal recognition of Indigenous rights in relation to the settler state is already irreversibly in train and a

---

[125] See for example Eirin Mobekk "Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation" in Anja Ebnöther and Philipp Fluri (eds) *After Intervention: Public Security Management in Post-Conflict Societies - From Intervention to Sustainable Local Ownership* (Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2005) ch 9; see in general Joanna R Quinn (ed) *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill-Queen's University Press, Montreal, 2009).

[126] For example, as part of the settlement to the Canadian *Re Residential Schools Class Action Litigation* ONSC 00-CV-192059CP the Truth and Reconciliation Commission of Canada has been created <www.trc.ca>. The term reconciliation has also been invoked in Canada and Australia in the context of public apologies to Indigenous peoples.

[127] See especially Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination* (Oxford University Press, New York, 2004).

[128] Ibid at 539.

shift has occurred towards erecting structures for the management of that ongoing relationship.[129] McHugh sources this process of reconciliation as flowing from the broader principle of Indigenous self-determination and argues that it is less an agenda for action than it is a goal influencing the direction of relations between the settler state and Indigenous nations.[130] Although McHugh's work is focussed on historical analysis of the common law's development his description of a forward-looking, ongoing and relationship-focused goal of reconciliation between settler state conceptions of sovereignty and Indigenous self-determination is helpfully normative and will be adopted here.

To give a bit more content to this normative goal of 'reconciliation as relationship management', the theoretical perspectives adopted for this thesis also have much to contribute. Indigenous legal scholars have long problematised the viability of managing the Indigenous-Crown relationship exclusively within the legal, political and cultural framework of a colonial state. Indigenous legal scholar Mary Ellen Turpel, for example, argues that the cultural differences between Indigenous peoples and the Canadian state and its legal system amount to "problems of conceptual reference for which there is no common grounding or authoritative foothold".[131] From her perspective there is no basis for positing Western legal concepts such as the rule of law, human rights and judicial impartiality as universally applicable principles rather than culturally-specific beliefs,[132] save perhaps where these could be independently grounded in Indigenous cultures. Similarly, Indigenous legal scholar Gordon Christie argues that settler societies and Indigenous peoples constitute "distinct meaning-generating peoples" and demands attention to the cultural and historical underpinnings to the concepts applied to Indigenous-Crown relations if we are to see how truly complex their interactions are.[133]

The concerns expressed by both Turpel and Christie are in keeping with the view of legal pluralism that different legal orders may be seen as springing from differing projections of social reality. Likewise, the attention that postcolonial theory and legal geography dedicate to how law produces and reproduces certain projections of social reality can problematise the possibility of a culturally neutral realm in which Indigenous peoples can assert and negotiate their self-determination. Turpel views the way out of this quandary as one based in "tolerance of differences and the recognition

---

[129] Ibid.

[130] Ibid.

[131] Mary Ellen Turpel "Aboriginal Peoples and the Canadian *Charter*" (1989-1990) 6 Can Hum Rts Yrbk 3 at 14.

[132] Ibid.

[133] Gordon Christie "'Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27 Can JL & Jur 259 at 282.

of autonomous or incommensurable communities".[134] Similarly, Christie argues that for critical legal theory to assist in the struggle of Indigenous peoples to find an appropriate place within settler societies it must develop a theory of inter-cultural relations that begins from the imperative of cultural difference.[135] Indigenous legal scholar Dawnis Minawaanigogiizhigok Kennedy makes a similar call for legal professionals and academics to break away from attempting to "reconcile [I]ndigenous and Canadian law *within* Canadian legal orders and reorient themselves towards fostering respect *between* [I]ndigenous and Canadian legal orders".[136] This concept of Indigenous-Crown relations rooted in the imperative of cultural difference can in many ways be seen as synergistic with other commentators' calls for a new Indigenous-Crown paradigm grounded in the equality of peoples,[137] recognition of Indigenous sovereignty[138] or what Canadian political philosopher James Tully terms a 'dialogical approach' to claims for recognition.[139] For the purposes of this thesis, however, a normative concept of 'reconciliation as relationship' grounded in the acknowledgement of Indigenous peoples as autonomous or incommensurable communities should hopefully prove sufficient.

E Conclusion

As this thesis is directed at how the differing legal constructions of the ocean of the Crown and Indigenous peoples can be reconciled, this chapter has sought to first introduce the legal and policy frameworks of Canada and New Zealand that currently govern marine resource management within the regions on which this thesis focuses. In both Canada and New Zealand marine resources and space are subject to complex matrices of regulatory authority emanating from different governance bodies, and British Columbia's marine territories face further complexity due to the nature of Canada's federal structure. For the past two decades each jurisdiction has also explored opportunities to achieve integrated management of its maritime territory and resources, including through the application of marine spatial planning in the pilot initiatives addressed later in this thesis. It is against this background of evolving state-centred legal and policy frameworks that Indigenous peoples in both jurisdictions assert claims to access and care for these same marine areas and resources. The

---

[134] Ibid at 37.

[135] Gordon Christie "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 113.

[136] Dawnis Minawaanigogiizhigok Kennedy *Aboriginal Rights, Reconciliation and Respectful Relations* (University of Victoria (BC), LLM thesis, 2009) at iv.

[137] See for example Michael Asch & Patrick Macklem "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29 Alta Law Rev 498; and Patrick Macklem "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan L Rev 1311.

[138] See Felix Hoehn *Reconciling Sovereignties: Aboriginal Nations and Canada* (University of Saskatchewan, Native Law Centre of Canada, Saskatoon, 2012).

[139] See James Tully "Recognition and dialogue: the emergence of a new field" (2004) 7(3) CRISPP 84.

theoretical perspective adopted in this thesis views these Indigenous claims as arising from distinct social and legal projections of autonomous or incommensurable communities. In pursuing the research questions of this thesis as to how these Indigenous claims can be reconciled in Canada and New Zealand this legal pluralist perspective will guide the analysis of what has already been achieved to date as well as what remains to be attained.

PART II

Chief Moody Humchit addressed the Commission as follows: I would like to say in respect to the Reserves which were set aside for the Bella Bella Indians some time back, that I was with the surveyors at that time, employed by them, and I understood that these Reserves were set aside for the exclusive use of the Indians. I think we ought to enjoy exclusively the hunting, and particularly the fishing privileges, on these reserves and in the vicinity of these reserves, which we do not enjoy at the present time.

The Chairman: Do I understand you to say that as these Reserves were set aside for the Indians, the Indians should have exclusive fishing privileges in all the Inlets on the Sea around here?

A: Yes, everywhere ...

- Bella Coola Agency testimony before the Royal Commission on Indian Affairs for the Province of British Columbia, At Bella Bella, British Columbia, 25 August 1913[1]

[1] Accessed via Union of BC Indian Chiefs "Our Homes Are Bleeding – Digital Collection" <www.ubcic.bc.ca>.

III CANADIAN PROJECTIONS OF INDIGENOUS SPACE

A Introduction

This chapter tackles the first of my three research questions in a Canadian context: namely, how the Canadian legal system makes room for Indigenous peoples' unique projections of marine space within their traditional territories. This chapter examines how Indigenous interests are constructed in Canadian law, focusing to the extent possible on the manner in which coastal First Nations' interests in their traditional marine territories along the North Coast of British Columbia are legally recognised. After setting out the legal doctrines that have been crafted before Canadian courts to recognise and provide for Indigenous projections of space, the manner in which these doctrines strike a balance between Crown sovereignty and Indigenous self-determination will be addressed. The normative concept of reconciliation adopted for this thesis is premised on acknowledgment of Indigenous peoples' social and legal construction of their marine territories and their relationship with these territories as the product of autonomous or incommensurable communities. The analysis in this chapter explores the degree to which the current legal framework is consistent with such this conception of Indigenous-Crown relations. The subsequent two chapters will in turn examine case examples of how this legal framework contends with Indigenous assertions of marine space in practice, and how marine spatial planning could serve to remedy the gaps identified in this current framework.

The aspects of Canadian law touched upon in this chapter are also important to fully understand the marine spatial planning process taking place in British Columbia as they provide some of its essential legal foundations. In order for such a planning process to be successfully implemented within the traditional territories of British Columbia's First Nations it must acknowledge and accommodate the complex substantive and procedural rights Indigenous peoples are afforded under Canadian law. Failure to do so would legally undermine both the marine spatial planning process and its outcomes.

It is also important to note in advance that this chapter will not canvass the rights of Indigenous people set out in modern and historic treaties, as none of the First Nations involved in the marine spatial planning process in coastal British Columbia has yet entered into any such agreement. Although the set of legal principles addressed in this chapter apply in general to all Indigenous peoples across the country, they also interact in complex ways in relation to the differing contexts of historical treaties, modern land claims, or unceded territories in which they apply. This thesis is uniquely interested in the specific circumstances of non-treaty, coastal First Nations in British Columbia.

B Honour of the Crown and Fiduciary Duties

The first legal concept arising from Canadian jurisprudence on Indigenous-Crown relations to be addressed here is the overarching duty placed on the Crown to be fair and honourable in all its dealings with Indigenous peoples, better known as the "honour of the Crown".[1] Canadian courts cite this duty as arising from the historic military strength of Indigenous peoples, which required the Crown to persuade them that "their rights would be better protected by reliance on the Crown than by self-help".[2] These courts are also quick to reject any suggestion that this concept reflects a paternalistic concern over the protection of a "weaker" or "primitive" people.[3] The honour of the Crown is a broad and flexible principle that has provided a source for specific remedies available to Indigenous peoples against the Crown. It does not provide "a cause of action in itself", instead guiding how the Crown's obligations to Indigenous peoples must be fulfilled.[4] Yet whether or not the honour of the Crown has been upheld in any given set of circumstances is a justiciable issue on which Canadian courts may provide at least declaratory guidance as a basis for negotiations.[5]

The specific content of the honour of the Crown is highly fact-dependent, but it has been invoked as a basis for requiring the Crown to both avoid any appearance of "sharp dealing" in its interpretation of treaty rights owing to Indigenous peoples[6] and ensure the intended purposes of treaty and statutory grants to Indigenous peoples are diligently pursued[7] and ultimately fulfilled.[8] Canadian courts have likewise found in the honour of the Crown a basis for Crown compensation to Indigenous peoples for infringement of their Aboriginal rights,[9] a concept addressed in detail later in this chapter, and for an award of increased costs in advance where an Indigenous group is

---

[1] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 [*Haida Nation*] at [32]. Note that Haida Nation is one of the First Nations participating in the marine spatial planning process addressed in the fifth chapter of this thesis and the sub-regional plan covering Haida Nation's traditional territory will be the focus of the case study in that chapter.

[2] Brian Slattery "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 753, cited with approval in *Manitoba Métis Federation Inc v Canada (Attorney General)* 2013 SCC 14 [*Manitoba Métis Federation*] at [66].

[3] Ibid.

[4] *Manitoba Métis Federation*, above n 2, at [73].

[5] *Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)* 2013 FC 669 at [48].

[6] *R v Badger* [1996] 1 SCR 771 at [41].

[7] *Manitoba Métis Federation*, above n 2, at [128].

[8] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69 [*Mikisew*] at [51].

[9] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [*Delgamuukw*] at [169].

pursuing litigation against the Crown in relation to these rights.[10] Courts will not apply this principle so liberally as to prevent the Crown from relying on procedural defences in litigation.[11] However, it may give rise to a fiduciary duty on the Crown when the Crown exercises discretion over Indigenous interests.[12] Furthermore, it provides a basis for the Crown having a duty to consult Indigenous peoples before taking actions that potentially impact as of yet unproven rights.[13] Failure to meet the standard imposed by either duty will result in an actionable claim against the Crown, at least notionally stemming from a failure to live up to the honour of the Crown.

The fiduciary duty imposed on the Crown when it exercises power over Indigenous interests is a related and arguably subsidiary legal concept to the honour of the Crown that warrants brief mention here. The jurisprudence has not always drawn a clear distinction between the honour of the Crown and the fiduciary duty that the Crown owes to Indigenous peoples. In fact, prior to the Supreme Court of Canada's 2004 *Haida* decision,[14] the honour of the Crown was treated as synonymous with the fiduciary relationship between the Crown and Indigenous peoples.[15] Nevertheless, under the current approach espoused by the Court, the honour of the Crown is always at issue in the Crown's dealings with Indigenous peoples whereas the Crown does not always owe them a fiduciary duty.[16] In the 2002 *Wewaykum* decision the Supreme Court of Canada describes this duty as one "called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples".[17] A fiduciary duty will arise whenever the Crown assumes discretionary control over any specifically "Aboriginal" interests of an Indigenous collective.[18] This is to say that Crown action will be tempered by a fiduciary duty only when exercised over interests that Canadian law recognizes as being uniquely "Aboriginal" in nature, such as the Aboriginal rights addressed in this

---

[10] *Xeni Gwet'in v British Columbia* 2002 BCCA 434; *William v British Columbia* 2004 BCSC 610. The history of the costs award in these cases is complex and has been set out in detail in *William v British Columbia* 2012 BCCA 285 [*William*] at [239].

[11] *Canada v Stoney Band* 2005 FCA 15 at [25]-[27]. However, see also *Manitoba Metis Federation*, above n 2, at [133]-[144], where the Supreme Court of Canada declined to apply a limitation period that would bar its ability to make a declaration of constitutionality regarding past Crown conduct based on the honour of the Crown, though these circumstances were distinguished from those in which personal relief is sought, such as a claim to land or damages.

[12] *Haida Nation*, above n 1, at [18].

[13] Ibid at [25].

[14] Ibid.

[15] James I Reynolds "The Spectre of Spectra: The Evolution of the Crown's Fiduciary Obligation to Aboriginal Peoples Since Delgamuukw" in Maria Morellato (ed) *Aboriginal Law Since Delgamuukw* (Canada Law Book, Aurora (ON), 2009) ch 6 at 141.

[16] *Haida Nation*, above n 1, at [18].

[17] *Wewaykum Indian Band v Canada* 2002 SCC 79 [*Wewaykum*] at [79].

[18] *Manitoba Métis Federation*, above n 2, at [49].

chapter. Although to date this fiduciary duty has primarily been invoked in relation to Indigenous interests in land,[19] the jurisprudence on this duty's application continues to grow and evolve.[20]

The equitable doctrine of fiduciary duty requires a fiduciary to act in the best interests of the party on whose behalf it is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that party.[21] Similar to the honour of the Crown, the specific content of the fiduciary duty imposed on the Crown in any given set of circumstances is highly fact-dependent. In particular, it will depend on the nature and importance of the "Aboriginal" interests sought to be protected.[22] What is important to understand for the purposes of this discussion, however, is that a breach of the Crown's fiduciary duty may be actionable in and of itself, and in this way is distinguishable from the honour of the Crown from which it stems.

Both in their source and application the honour of the Crown and the Crown's fiduciary duty to Indigenous peoples affirm the existence of a non-adversarial and "trust-like" relationship between these two parties in the eyes of Canadian law.[23] The honour of the Crown and its subsidiary legal doctrines provide a method by which this relationship can be actively policed by the judiciary. The Supreme Court of Canada has also recently shown a continued willingness to add new content to this principle in furtherance of the goal of reconciliation.[24] By significantly widening the scope for judicial review of Crown actions and inaction, the honour of the Crown has positioned Canadian courts as a mediator in the often-troubled Indigenous-Crown relationship. As a principle with omnipresence throughout the interactions of the Crown and Indigenous people, recognition of the honour of the Crown may also be understood as important impetus for collaborative rather than combative relations between these parties.

---

[19] For a brief overview of Canadian jurisprudence on this fiduciary duty see *Coldwater First Nation v Canada (Indian Affairs and Northern Development)* 2013 FC 1138 at [43]-[60]. Note however that this overview is far from comprehensive, with the fiduciary duty also being invoked by the Supreme Court of Canada in relation to infringement of Aboriginal rights, as discussed below.

[20] See for example its recent application in *Canada v Kitselas First Nation* 2014 FCA 150.

[21] *Manitoba Métis Federation*, above n 2, at [47], citing *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 646-647.

[22] *Wewaykum*, above n 17, at [86].

[23] *R v Sparrow* [1990] 1 SCR 1075 [*Sparrow*] at 1108.

[24] *Manitoba Métis Federation*, above n 2. In this recent case the Supreme Court of Canada issued a declaration that the Crown had failed to implement a constitutional land grant to the Métis people of Manitoba in keeping with the honour of the Crown. It was held that the Crown had not breached any fiduciary duty to the Métis, but the Crown's repeated mistakes and inaction in implementing the land grant at issue had fallen short of upholding the honour of the Crown.

C Aboriginal Rights

Whereas the honour of the Crown and the Crown's fiduciary duty focus on questions of process and conduct, the doctrine of Aboriginal rights extends into a realm of substantive legal entitlements for Indigenous peoples. This doctrine provides for common law recognition of tangible Indigenous interests by translating them into justiciable limits on the exercise of Crown power—in other words, legal rights. Not all Indigenous interests are cognisable under this doctrine, but those that are receive a certain degree of protection in Canadian law. Similar to the other legal doctrines and remedies addressed in this chapter, these rights are unique to Canada's Indigenous peoples—labelled *sui generis* by Canadian courts. And in keeping with an understanding of Indigenous peoples as distinctive communities, these rights are held communally by Indigenous collectives rather than by individual members, regardless of whether they might be exercised individually in practice.[25]

The current legal tests espoused by the Supreme Court of Canada have so far recognised two categories of Indigenous interests as providing a basis for Aboriginal rights. First, where modern Indigenous collectives can prove that certain "practices, traditions and customs" have been both integral to their distinctive cultures and continuously engaged in since before their historic forebears made contact with European cultures, Canadian courts may recognise these as Aboriginal activity rights.[26] Second, where Indigenous peoples can prove their ancestors maintained exclusive occupancy of a tract of land at the point in history when Crown sovereignty was asserted, and can also show a level of ongoing occupation akin to the Australian standard of "substantial maintenance of [a] connection" with this land since then, Canadian courts may recognise their interest as amounting to an Aboriginal land right known as Aboriginal title.[27]

According to the Supreme Court of Canada, Aboriginal activity rights and Aboriginal title represent two points on a spectrum of Indigenous interests potentially recognised within the doctrine of Aboriginal rights.[28] Although Indigenous peoples' claims have been at times framed as broader, unextinguished rights to self-government, Canadian courts have eschewed these assertions in favour of narrower claims to either Aboriginal activity rights or title.[29] Additional points may be charted across the

---

[25] *Behn v Moulton Contracting Ltd* 2013 SCC 26 at [33].

[26] *R v Van der Peet* [1996] 2 SCR 507 [*Van der Peet*] at [44]-[48].

[27] *Delgamuukw*, above n 9, at [143]-[159].

[28] Ibid at [138].

[29] See *R v Pamajewon* [1996] 2 SCR 821 and *Delgamuukw*, above n 8, at [170]-[171]. For further discussion of Canadian courts' treatment of assertions of Indigenous self-government rights see Bradford W Morse "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*" (1997) 42(4) McGill L J 1011; and Senwung Luk "Confounding Concepts: The Judicial

Aboriginal rights spectrum in future jurisprudence, but to date the only Indigenous interests that courts have found to amount to proven, modern Aboriginal rights, aside from Aboriginal title, are rights to engage in traditional practices such as fishing,[30] hunting,[31] and trading in particular resources.[32]

Several of the proven activity rights relate to marine resources in British Columbia, including the Musqueam Nation's right to fish sockeye salmon for "food and social and ceremonial purposes",[33] the Heiltsuk Nation's right to trade commercial quantities of herring spawn on kelp,[34] and the right of the Nuu-chah-nulth First Nations to fish and sell all but one species of fish within their traditional territories.[35] These activity rights protect the means of harvesting resources rather than providing a right in the resources themselves, but by virtue of the fiduciary relationship they often afford an Indigenous collective with a priority in resource allocation to ensure they can meaningfully exercise these rights.[36] However, in the Supreme Court of Canada's view these traditional practices are recognised as Aboriginal rights in order to provide Indigenous societies with cultural security, not economic or food security.[37]

Aboriginal title, on the other hand, had remained a *potential* Aboriginal right rather than a proven one in Canadian law up until a matter of days prior to final submission of this thesis. Canadian jurisprudence contains several high profile cases in which courts described Aboriginal title's legal contours.[38] The Supreme Court of Canada's 2014 unanimous ruling on Aboriginal title in *Tsilhqot'in*, however, marks the first declaration of the legal and factual existence of Aboriginal title in Canadian legal history, and has clarified that Aboriginal title lands are lands in which the Crown has no beneficial interest.[39] As a legal right to the land and all the "benefits associated

---

Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2009) 41(1) Ottawa L Rev 103.

[30] See for example *Sparrow*, above n 23.

[31] See for example *R v Powley* 2003 SCC 43.

[32] See for example *R v Gladstone* [1996] 2 SCR 723 [*Gladstone*]. Note that Heiltsuk Nation is one of the First Nations participating in the marine spatial planning process addressed in the fifth chapter.

[33] *Sparrow*, above n 23.

[34] *Gladstone*, above n 32.

[35] *Ahousaht Indian Band and Nation v Canada (Attorney-General)* 2013 BCCA 300, application for leave to appeal to the Supreme Court of Canada dismissed on 30 January 2014 (34387). Geoduck was the one species excluded from this right by the Court of Appeal.

[36] *Gladstone*, above n 31, at [54]-[68]; *Sparrow*, above n 23, at 1116.

[37] *R v Sappier; R v Gray* 2006 SCC 54 at [33] and [37].

[38] Notable cases in which Aboriginal title is addressed include: *Calder et al v Attorney-General of British Columbia* [1973] SCR 313; *Guerin v Canada* [1984] 2 SCR 335 [*Guerin*]; *Delgamuukw*, above n 8; and *R v Marshall; R v Bernard* [2005] 2 SCR 220 [*Marshall; Bernard*].

[39] *Tsilhqot'in v British Columbia* 2014 SCC 44 [*Tsilhqot'in* (SCC)] at [70].

with the land",[40] Aboriginal title provides an exclusive and proprietary right to natural resources, and in this way is quite unique in comparison with the culture-oriented Aboriginal activity rights previously found to exist by Canadian courts.

Previous to *Tsilhqot'in*, the only Canadian decision to ever purport to declare Aboriginal title was the *Baker Lake* ruling of the Federal Court in 1980, relating to Inuit lands within what is now Nunavut.[41] Yet that lower court's declaration of Aboriginal title did not extend to a right to the land itself, instead referring to a spatially limited bundle of hunting and fishing rights over a defined territory, bearing a closer resemblance to modern Aboriginal activity rights. In *Van der Peet* the Supreme Court of Canada clarified that there are three different legal landscapes in which Aboriginal rights can exist in Canada: reserve lands (lands set aside by the Crown for First Nations during European settlement of their territories), Aboriginal title lands, and Aboriginal right lands (lands over which Aboriginal activity rights may be exercised).[42] In the subsequent *Delgamuukw* decision, the Court decisively rejected the notion that Aboriginal title could amount to no more than a bundle of activity rights as was found in *Baker Lake*. The Court instead found that title is a right to "exclusive use and occupation" of the lands over which it is held.[43]

In *Tsilhqot'in* the Court further clarified how these different legal landscapes co-exist: where an Indigenous group can prove exclusive occupation of land at the time of Crown sovereignty's assertion over Canada this can translate into a right in the land itself, Aboriginal title; and where an Indigenous group can prove regular use of land but not exclusivity of use at the time of sovereignty, this may instead give rise instead to "usufructory Aboriginal rights" such as were declared in *Baker Lake*.[44] In the *Tsilhqot'in* case the Xeni Gwet'in band of the Tsilhqot'in Nation proved Aboriginal rights to hunt, trap and harvest certain resources throughout the entire territory they claimed as traditional territory, whereas they could only prove a proprietary Aboriginal title right to less than half of that claimed territory.

This modern conception of Aboriginal title allows Indigenous peoples to use their title lands not only for practices, traditions and customs, but also for resource extraction activities such as mining or oil and gas production.[45] Although this concept of

---

[40] Ibid.

[41] *Baker Lake v Minister of Indian Affairs and Northern Development* [1980] 1 FC 518 (TD). Nunavut is a Canadian territory created in 1999 as the result of land claims negotiations between the Crown and Inuit Tapiriit Kanatami, an organisation representing Inuit groups.

[42] *Van der Peet*, above n 25, at [42], citing Brian Slattery "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727.

[43] *Delgamuukw*, above n 8, at [109]-[118].

[44] *Tsilhqot'in* (SCC), above n 39, at [47].

[45] *Delgamuukw*, above n 9, at [116]-[124].

Aboriginal title is far less limiting than a bundle of activity rights, it is subject to an "inherent limit" that prevents Aboriginal title lands from being put to non-traditional uses that, in the eyes of Canadian courts, threaten the continuity of an Indigenous people's relationship to these lands, such as paving over a ceremonial site with a parking lot.[46] In *Tsilhqot'in* the Supreme Court of Canada further clarified this limit as meaning that Aboriginal title cannot be alienated in a way that deprives future generations of the control and benefit of the land, though some permanent changes to the land may be possible.[47]

The recent *Tsilhqot'in* decision is also important for the clarification it provides as to the degree to which Aboriginal title is capable of capturing Indigenous peoples' connection to the vast landscapes they claim as traditional territories. What remained uncertain up until the Supreme Court of Canada's final ruling was the level of 'occupation' necessary for land to be recognised as Aboriginal title lands rather than merely Aboriginal rights lands. In the Court's 2007 decision in *Marshall; Bernard* it rejected the notion that Aboriginal title could flow from Indigenous peoples' "occasional entry and use" of their traditional territories, holding that title is meant to protect only tracts of land subject to "regular use or occupancy", while less regularly exploited hunting and fishing grounds will attract protection for Aboriginal activity rights only.[48] Based in part on this statement, the British Columbia Court of Appeal's *William* decision that was overturned in *Tsilhqot'in* had opined that Aboriginal title could only exist in relation to narrowly defined tracts of land, giving examples such as village sites, salt licks and buffalo jumps.[49] The Supreme Court of Canada rejected this narrow view as lacking any basis in either the jurisprudence or scholarship on Aboriginal title,[50] and restored the BC Supreme Court's factual findings that the evidence supported Aboriginal title to an area of over 100,000 hectares based on the use and management of the plants in that territory for food and medicine, and the regular use of its land, rivers, lakes and trails for hunting, trapping, fishing and gathering.[51]

The outcome of the *Tsilhqot'in* litigation may be of particular significance to the interests of First Nations along British Columbia's coastline as it may support the

---

[46] *Delgamuukw*, above n 9, at [125]-[132].

[47] *Tsilhqot'in* (SCC), above n 39, at [15] and [74].

[48] *Marshall; Bernard*, above n 38, at [58]-[590.

[49] *William*, note 10, at [221] and [230], appeal allowed in *Tsilhqot'in* (SCC), above n 38.

[50] *Tsilhqot'in* (SCC), above n 39, at [42].

[51] *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 at [960]. See *William*, above n 10, for an estimate of the quantity of land addressed by Vickers J's advisory opinion.

view that an Aboriginal title claim to marine territory is cognisable in Canadian law.[52] Various claims for Aboriginal title to marine territory have been brought by First Nations in British Columbia already, but no Canadian court has yet ruled on such a claim.[53] Assuming Aboriginal title to submerged lands is legally tenable, while the British Columbia Court of Appeal's test for Aboriginal title in the *William* case was in effect, the potential for Aboriginal title in the seabed and foreshore would have been limited to at most discrete sites of intensive use and occupation such as First Nations' traditional fish weirs and clam gardens. The broader reading of Aboriginal title set out in Supreme Court of Canada's *Tsilhqot'in* decision, however, could reinvigorate this outstanding question and greatly increase First Nations' level of recognition in relation to activities within their marine territory.[54] Most notably, the test for sufficient occupation to prove Aboriginal title now references such contextual factors as the carrying capacity of the land being claimed and the "way of life" of the First Nation claiming title.[55] It remains to be seen how these contextual factors would be interpreted for coastal First Nations that have heavily relied on their marine rather than terrestrial territories for their 'way of life' and sustenance seek to prove title to those territories in court.

No discussion of Aboriginal rights would be complete without mentioning the degree to which these rights are vulnerable to unilateral Crown action. Leading Canadian constitutional law scholar Peter W Hogg contends that Canadian courts can provide remedies for the breach of Aboriginal rights at common law.[56] In keeping with this view, the Supreme Court of Canada has awarded compensation for breach of fiduciary duties where an interest rooted in Aboriginal title was at stake;[57] and in *Delgamuukw* the Court acknowledged a potential entitlement to compensation where Aboriginal title is infringed.[58] Nevertheless, at common law Aboriginal rights remained

---

[52] H W Roger Townshend "Aboriginal Title to the Beds of Water Bodies" (paper presented to the Indigenous Bar Association Conference, Winnipeg, 19 October 2012).

[53] See for example *The Lax Kw'Alaams Indian Band v The Attorney-General of Canada* 2006 BCSC 1463; see also *Ahousaht Indian Band and Nation v Canada (Attorney-General)* 2009 BCSC 1494.

[54] For further discussion of the feasibility of a claim of Aboriginal title to the seabed in Canadian law see C Rebecca Brown & James I Reynolds "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 37(1) UBC Law Rev 449; Paula Quig "Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands – An Overview" (2004) 45 Cah de Droit 659; and Douglas J R Moodie "Aboriginal Maritime Title in Nova Scotia: An "Extravagant and Absurd Idea"?" (2004) 37 UBC Law Rev 495.

[55] *Tsilhqot'in* (SCC), above n 39, at [37]-[38].

[56] Peter W Hogg "The Constitutional Basis of Aboriginal Rights" in Maria Morellato (ed) *Aboriginal Law Since Delgamuukw* (Canada Law Book, Aurora (ON), 2009) ch 1 at 4.

[57] *Guerin*, above n 38, at 349.

[58] *Delgamuukw*, above n 9, at [169]. Although the right to fair compensation upon infringement of Aboriginal title in *Delgamuukw* was discussed in context to constitutionally entrenched title, the right

vulnerable to Crown regulation and can be extinguished by Parliament through legislation so long as its intent to do so is "clear and plain".[59] This precarious position for Aboriginal rights in Canada changed significantly in 1982 with the patriation of Canada's constitution. Unextinguished Aboriginal rights have now been elevated to a superior position in Canadian law through constitutional entrenchment in section 35(1) of Canada's Constitution Act, 1982 where "[t]he existing aboriginal and treaty rights of aboriginal peoples of Canada" are now "recognized and affirmed".[60]

Nevertheless, even constitutionally entrenched Aboriginal rights may be legally infringed by Crown action, though the Crown's ability to do so will be held to a far higher level of judicial scrutiny. The Crown must prove it has a "compelling and substantive purpose" for any such infringement, and the level of infringement must be no more than necessary to achieve this purpose.[61] Likewise, the benefits expected to be gained from the Crown's compelling and substantive purpose must not be outweighed by adverse effects on the "Aboriginal interest" that is infringed in achieving that purpose.[62] The Supreme Court of Canada has provided a broad and open-ended list of what might constitute such a compelling and substantive purpose, providing examples such as mining, forestry and hydroelectric power in the case of infringements of Aboriginal title,[63] and regional and economic fairness in the case of infringements of an Aboriginal right to trade fishery resources.[64] The requirement for proof that the level of infringement is no more than necessary to achieve such purposes, however, has translated into Indigenous groups gaining legal rights to priority allocation of fishery access, and placed obligations on the Crown to consult Aboriginal rights holders on potential infringements of rights even before they are proven.[65]

Finally, the role of Indigenous law in relation to how Aboriginal rights are defined in Canadian law is important for the purpose of this discussion. In the Supreme Court of Canada's majority ruling in *Van der Peet*, Lamer CJ (as he then was) took note of the Australian High Court's reliance on the traditional laws and customs of an Indigenous people as the source and content of "native title" in its decision in *Mabo v Queensland*

---

to compensation does not appear to flow from constitutional recognition so much as the title right itself. See Robert Mainville "Compensation in Cases of Infringement to Aboriginal and Treaty Rights" (LLM thesis, McGill University, 1999).

[59] *Sparrow*, above n 23.

[60] Constitution Act, 1982 (Canada), being Schedule B to the *Canada Act 1982* (UK), c 11, s 35.

[61] *Sparrow*, above n 22.

[62] *Tsilhqot'in* (SCC), above n 39 at [87].

[63] *Delgamuukw*, above n 9, at [165].

[64] *Gladstone*, above n 32, at [75].

[65] See *Sparrow*, above n 23; *Gladstone*, above n 32.

[No. 2].[66] A majority of the Court found this to be an appropriate recognition that Aboriginal rights must be based in Indigenous peoples' pre-existing societies, but at the same time limited these traditional Indigenous laws to evidence of an "[A]boriginal perspective" – a perspective that in their view must be (re)framed in "terms cognizable to the Canadian legal and constitutional structure".[67] Canadian courts approach to Aboriginal rights is said to rely in equal measure on both common law and Indigenous 'perspectives' in order to translate Indigenous interests into a syncretic new form of common law right.[68] Under this model Indigenous law does not constitute a separate, ongoing legal order warranting deference. Although litigants have discretion over the manner in which they frame their claims for Aboriginal rights, Canadian courts remain the ultimate arbiters as to how differing cultural and legal perspectives will coalesce in the scope and nature of the rights they ultimately render.

D Duty to Consult

Built upon the scaffolding of both the honour of the Crown and the doctrine of Aboriginal rights is one final legal concept that warrants discussion here as well, the Crown's duty to consult. Questions of consultation between Indigenous peoples and the Crown have arisen in various contexts in the recent history of Canadian jurisprudence on Indigenous interests. For example, the Supreme Court of Canada has characterised the *Guerin* decision in retrospect as a case in which the Crown's fiduciary duty was breached due to its failure to consult the Musqueam Nation before disposing of a portion of their reserve lands.[69] Likewise, the Court has acknowledged consultation between Indigenous peoples and the Crown as playing a key role in the test for justification of breaches of both Aboriginal activity rights[70] and Aboriginal title.[71] More recently, however, invocation of the Crown's duty to consult has become far more recognisably associated with a pair of decisions delivered simultaneously by the Supreme Court of Canada in 2004, its judgments in *Haida Nation* and *Taku River Tlingit*.[72]

---

[66] *Van der Peet*, above n 26, at [40], citing the Australian High Court decision in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at 58.

[67] *Van der Peet*, above n 26, at [49]

[68] *Van der Peet*, above n 26, at [49]-[50].

[69] *Delgamuukw*, above n 9, at [168].

[70] *Sparrow*, above n 23. See also *Halfway River First Nation v British Columbia (Ministry of Forests)* 1999 BCCA 470.

[71] *Delgamuukw*, above n 9, at [168].

[72] *Haida Nation*, above n 1; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74.

The *Haida Nation* and *Taku River Tlingit* decisions each arose by way of a non-treaty First Nation in British Columbia bringing an application for judicial review against a Crown decision sanctioning resource extraction to proceed within its traditional territory while claims to Aboriginal rights and title over those resources remained unresolved. The primary legal question addressed by the Supreme Court of Canada in these decisions was the degree to which Aboriginal rights warranted protection before being either conclusively proven to exist or resolved through negotiated settlement. As McLachlin CJ noted in the *Haida Nation* decision, limiting Indigenous peoples' remedies to the "post-proof sphere" could mean that by the time their Aboriginal rights and title were finally proven they might find their lands and resources "changed and denuded".[73] A unanimous Supreme Court of Canada found in the honour of the Crown a basis for the Crown to owe Indigenous peoples a duty of consultation, and potentially accommodation, pending proof and resolution of their claims.

Since the *Haida Nation* and *Taku River Tlingit* decisions it has been settled in Canadian law that the Crown is subject to a duty to consult whenever it has knowledge, real or constructive, of the potential existence of Aboriginal rights or title, and contemplates conduct that might adversely affect those interests.[74] The Court in *Haida* considered interlocutory injunctions as an alternative interim remedy to this duty, but found that because of the "all-or-nothing" nature of injunctions, the low incentives they provided for compromise, and the tendency for Indigenous interests to lose out to other concerns in the balance of convenience this remedy offered "only partial imperfect relief" in the circumstances of unproven rights.[75] The duty to consult, on the other hand, made discussions between the parties obligatory, and in certain circumstances could lead to the Crown having an obligation to accommodate the asserted rather than proven Indigenous interests. In this way it was directed at fostering a relationship between the parties that could facilitate negotiations rather than undermine them.[76]

In *Haida* the Supreme Court of Canada cited with approval a succinct and unassuming definition of consultation as "talking together for mutual understanding".[77] In comparison to legally recognised rights, a duty of consultation could mistakenly be dismissed as little more than a toothless point of procedure. In practice, however, this doctrine constitutes one of the most powerful legal tools currently available to the Indigenous peoples of British Columbia for the protection of their interests before Canadian courts. The duty to consult does not amount to a "duty to agree" or a right

[73] Ibid at [33].
[74] Ibid at [35].
[75] Ibid at [14].
[76] Ibid at [38].
[77] Ibid at [43].

of veto for Indigenous peoples over decisions relating to the territories and resources they claim, and its scope and content vary greatly depending on the strength of their claim and the seriousness of the potential adverse effect of the proposed Crown conduct.[78] Where the claim is weak, the right is limited or the potential for infringement is minor, it may suffice for the Crown to merely give notice of its proposed action, disclose information to Indigenous collectives and discuss any issues raised in response to that disclosure.[79] Yet on the other end of the spectrum, where a strong prima facie case is established, the right and potential infringement are of high significance to the Indigenous claimant, and the risk of non-compensable damage is high, Canadian courts may find a need for the Crown to engage in deep consultation aimed at a satisfactory interim solution – in other words, an accommodation of their asserted rights before they are proven.[80]

Proving Aboriginal rights and title before the Canadian courts typically requires years of litigation and success is by no means guaranteed.[81] In contrast, the value in the duty to consult may be found in the more immediate negotiating power it offers Indigenous peoples since a prima facie claim to Aboriginal rights or title is sufficient to trigger its application. As a tool for asserting Aboriginal rights 'pre-proof' it has been applied to assist Crown-Indigenous negotiations in a wide variety of contexts. The duty to consult ensures that the Crown cannot take strictly unilateral action that impacts asserted Aboriginal rights, even when it is proposing accommodation of those rights; instead their interests must be seriously considered, and where appropriate, demonstrably incorporated into the Crown's proposed plan of action.[82] Where the Crown purports to permit extraction of resources from a First Nation's traditional territories, a duty to consult and accommodate provides a basis on which they can negotiate a share of the resources and revenues, as well as the terms on which they might be extracted, with potential for ongoing court supervision of the process as well.[83] Where an exercise of Crown discretion affects the disposition of developed land subject to unproven claims to Aboriginal title, the duty to consult might also provide a basis for accommodation by way of compensation.[84] This duty provides an

[78] Ibid at [39]-[47].

[79] Ibid at [43].

[80] Ibid at [44].

[81] See for example *Lax Kw'alaams Indian Band v Canada (Attorney-General)* 2011 SCC 56, where following a 126 day trial and two appeals the plaintiff First Nation failed to prove any rights, though its claim to Aboriginal title was severed and remains outstanding.

[82] *Mikisew*, above n 8, at [64].

[83] See for example *Huu-Ay-Aht First Nation et al v The Minister of Forests et al* 2005 BCSC 697; *Hupacasath First Nation v British Columbia (Minister of Forests)* 2005 BCSC 1712; and *Gitxsan and other First Nations v British Columbia (Minister of Forests)* 2002 BCSC 1701.

[84] *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)* 2005 BCCA 128 at [98]-[100].

important negotiating tool for First Nations that actively pursue development of their own initiative within their traditional territories, with the duty to consult strongly encouraging the Crown to attempt to accommodate their ambitions.[85] However, if a First Nation steadfastly opposes a proposed development within their traditional territories, the duty to consult may provide a basis for mitigation of the harms it poses to their claimed rights and title, but it will not provide them with a legal basis for preventing such development from proceeding.[86] In this way, although it has proven to be an effective tool for ensuring Indigenous involvement in the development of their traditional territories, it fails to put Indigenous peoples in a position where they are truly determining the future of these territories.

E Indigenous Space and Crown Sovereignty

Having set out in brief the various legal tools that have been fashioned through Canadian courts for the protection of Indigenous interests, it is now important to expand on the broader characteristics of how this jurisprudence has created room for Indigenous projections of marine space. By recognising the Aboriginal rights and title of Indigenous peoples and at least acknowledging a role for their traditional legal orders in informing the content and scope of these rights, Canadian law appears to have initiated a process of recognising Indigenous peoples as incommensurable communities with their own cultural and legal frameworks for viewing the world around them. The honour of the Crown and its associated fiduciary duty that apply to Indigenous space in Canadian law may also be seen as consistent with the understanding that these Indigenous spaces are legal and social projections of communities that are generated outside a framework of Crown hegemony and therefore warrant special legal attention. Yet this brings us to the question of precisely what balance has been struck in Canadian law between the differing projections of space of the Crown and Indigenous peoples over the territories that both lay claim to. The Canadian legal system may provide room for Indigenous space to be asserted but how is this space legally situated in relation to the Crown's own projections over these territories?

1 Questioning the unstable base of Crown sovereignty over Indigenous space

Many commentators have questioned the legitimacy of the Crown's power over Indigenous interests in Canada. For example, legal scholar Mark Walters has argued

---

[85] See for example *Squamish Nation v British Columbia (Community, Sport and Cultural Development)* 2014 BCSC 991; and *Da'naxda'xw/Awaetlala First Nation v British Columbia (Environment)* 2011 BCSC 620.

[86] See for example *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* 2014 BCSC 568.

that the lack of any historical or contemporary agreement for many of Canada's Indigenous peoples to be subsumed into the Canadian state suggests the application of Canadian law to their interests may not be "sufficiently grounded in a reciprocal relationship of respect between the Canadian state and [Indigenous] peoples for it to constitute "law" in a meaningful sense, rather than mere power or force".[87] What is perhaps most remarkable about Canadian jurisprudence, however, is that there is some basis for believing that our judiciary holds similar views.

Since as early as the Supreme Court of Canada's 1973 decision in *Calder* Canada's highest court has acknowledged legal uncertainty with regards to the effect of Canada and British Columbia's assertions of Crown sovereignty over Indigenous peoples and their territories in the absence of conquest or secession.[88] In this seminal case the Court split on the question of whether the plaintiff First Nation's claim to its traditional territory had been lawfully extinguished without treaty, with three justices finding lawful extinguishment had occurred, a dissent of three justices finding against extinguishment, and the final judge dismissing the action for a procedural defect without substantive comment. Almost three decades later the Supreme Court of Canada decisively rejected the position of the first three justices in its ruling in *Delgamuukw*, thus ensuring Aboriginal title's position as a legal concern throughout most of British Columbia. The extensive reasons of the dissenting justices in *Calder*, on the other hand, provide an important glimpse into Aboriginal title's origin in Canadian law: the doctrine of discovery.[89]

Citing the United States decision in *Johnson v McIntosh*, the Court in *Calder* affirmed the basis of Aboriginal title in the theory that British 'discovery' of the Indigenous territories of North America provided the Crown with underlying title and sovereignty and reduced the pre-existing "rights to complete sovereignty" that its Indigenous "independent nations" once held to a mere "right of occupancy".[90] The doctrine of discovery can be contrasted with the more extreme theory of terra nullius, which provides the Crown with unqualified sovereignty over Indigenous peoples based on their traditional territories being legally unowned (*res nullius*) at the time of colonisation—a theory of Crown sovereignty that the Supreme Court of Canada has decisively rejected.[91] The more subtle legal argument that European 'discovery' of North America reduced Indigenous peoples' independence and sovereignty to subordinate status, on the other hand, has never been explicitly denounced. On the

---

[87] Mark D Walters "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 473.

[88] See *Calder*, above n 38, Hall J dissenting at 349.

[89] *Calder*, above n 38, at 383.

[90] *Calder*, above n 38, at 381-382, citing *Johnson v McIntosh* (1823) 8 Wheaton 543. Note that this case is often cited with the alternative spelling of *Johnson v M'Intosh*.

[91] *Sparrow*, above n 23, at 1103; see also *Marshall;Bernard*, above n 38, at [132].

contrary, *Johnson v McIntosh* was cited with approval for this very ratio in the Supreme Court of Canada's 1984 decision in *Guerin* that arguably first set in motion the Court's modern jurisprudence of reconciliation.[92]

Since *Guerin* and *Calder* Canada's Supreme Court has followed a similar train of thought to that of the American Chief Justice Marshall in *Johnson v McIntosh*. The ambiguous state of Crown sovereignty over Indigenous interests has been grounded in the historical relationship between the different political communities from which they descend. In the Supreme Court's retelling of Canada's colonial history British policy towards the Indigenous peoples of North America was "based on respect for their right to occupy their ancestral lands".[93] Britain is understood to have initially recognised the Indigenous societies of North America as "independent nations" that required the Crown to engage in "nation-to-nation" relations, with it being "good policy" to keep these relations "very close to those maintained between sovereign nations".[94] However, the Court found this initial "policy" subsequently gave way to Indigenous peoples' common law rights being "often honoured in the breach", and over time, as Canada's settler societies grew in size and dominance, "virtually ignored".[95] The Supreme Court of Canada's ongoing narration of North American history has gradually stopped citing the legal theory of discovery, instead relying on a history in which Indigenous sovereignty has succumbed to mere majoritarian power of colonial society.

An even more candid treatment of the legal uncertainties flowing from the Crown's historical treatment of Indigenous peoples can be found in the highly influential 1996 report of Canada's Royal Commission on Aboriginal Peoples.[96] Among its extensive and detailed findings, the Commission's report explicitly rejected any reliance on legal theories such as the discovery doctrine and terra nullius for Canadian law and government policy, dismissing these theories as factually incorrect, morally wrong, and carrying "the baggage of racism and ethnocentrism".[97] Likewise, the Commission

---

[92] See *Guerin*, above n 38, at 377-378.

[93] *Delgamuukw*, above n 9, at [200], citing the Royal Proclamation of 1763 RSC 1985 App II No 1.

[94] *R v Sioui* [1990] 1 SCR 1025.

[95] *Sparrow*, above n 23, at 1103.

[96] The Royal Commission on Aboriginal Peoples was a Royal Commission of Inquiry initiated following the failure of the Meech Lake Accord, a proposed package of amendments to the Constitution of Canada, and a confrontation that broke out between Mohawk and the Canadian state at Kanesatake (Oka), Quebec in 1990. The Commission was established on 26 August 1991 and released its 4,000 page final report in 1996, culminating in 440 recommendations for the restructuring of the relationship between Indigenous and non-Indigenous people in Canada. *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol 1* (Supply and Services Canada, Ottawa, 1996).

[97] Ibid at 695.

expressed the view that even where Indigenous peoples entered into historical treaties with "clear words calling for extinguishment" of their legal rights and interests it was highly improbable that these Indigenous peoples had consented to such a result.[98] The Royal Commission's report has not obligated Canadian governments to implement its findings and the majority of its recommendations remain unimplemented to date, some eighteen years later. Nevertheless, the report has been repeatedly cited and relied on by Canadian courts adjudicating Indigenous issues for its extensive research and important arguments, and thus has had an undoubted influence on the direction that adjudication of Indigenous interests has taken.[99]

In keeping with growing concerns over the doctrine of discovery's role in Canadian law, more recent statements from the Supreme Court of Canada in *Haida* and *Taku River Tlingit* have cast even greater doubt on the legitimacy of unilateral assertions of Crown sovereignty and title over Indigenous interests. In each decision the notion that European discovery immediately abridged Indigenous sovereignty to the status of mere occupants appears to have been carefully eschewed, with the Court referring to reconciliation as a need for Indigenous societies' prior occupation of Canada to be reconciled with the subsequent *assertion* of Crown sovereignty and *de facto* control over their territories and resources.[100] Legal scholar Brian Slattery observes that in crafting these decisions the Supreme Court carefully avoided legitimising Crown sovereignty over Indigenous peoples.[101] Rather than being 'acquired', Crown sovereignty is seen as 'asserted', and Crown control over Indigenous territories and resources is described as 'de facto', meaning "illegal or illegitimate but accepted for practical purposes", rather than 'de jure', meaning "rightful, legitimate, just or constitutional" or "in compliance with all legal requirements".[102] As a result, this pair of decisions has been heralded by some leading scholars as representing "a new constitutional paradigm"[103] and "a fundamental re-structuring of Canadian [A]boriginal law"[104]. It has even been suggested that *Haida* and *Taku River Tlingit* might provide the foundations for Canadian law to finally approach Indigenous interests from a perspective of reconciling Indigenous sovereignty with Crown control

---

[98] *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol 2* (Supply and Services Canada, Ottawa, 1996) at 43.

[99] See for example *Makivik Corp v Canada (Minister of Canadian Heritage)* [1999] 1 FC 38; *Corbière v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 at [17]; *Mitchell v Minister of National Revenue* 2001 SCC 33 at [129]-[130] and [134]-[135] [*Mitchell*]; and *R v Gladue* [1999] 1 SCR 688.

[100] *Haida Nation*, above n 1, at [32]; *Taku River*, above n 72, at [42]

[101] Brian Slattery "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433.

[102] Ibid at 437.

[103] Ibid at 436.

[104] Walters, above n 87, at 514.

rather than reconciling Crown sovereignty with Indigenous occupancy.[105] At the very least both decisions suggest that the dissonance between the Crown and Indigenous peoples' competing claims of sovereignty and self-determination over Canada's territories and resources remains an open question. In this context of uncertainty the Court has emphasised the need for these competing claims of sovereignty to be reconciled through honourable negotiation.[106]

In this way Canadian law has shown considerable caution on addressing whether Crown sovereignty over Indigenous interests remains situated upon on a legally "unstable base".[107] In 2013 the Supreme Court of Canada reiterated its view that the reconciliation of Indigenous peoples with Canadian sovereignty remains "unfinished business" of "national and constitutional import",[108] and this goal was invoked throughout the 2014 *Tsilhqot'in* decision. Canadian courts have also been consistent in their prescription for how reconciliation is to be achieved. Although the interests of Indigenous peoples may be pursued through litigation, the Supreme Court has explicitly stated that negotiation between Indigenous peoples and the Crown is a preferable route to this goal.[109] Furthermore, the Court has been clear that negotiation of modern settlement agreements does not represent a final settlement of the Crown's reconciliation obligations.[110] By giving rise to ongoing enforceable obligations on the Crown to negotiate with Indigenous peoples regarding their rights and interests even after land claims settlements are concluded, this theory of reconciliation creates uncertainty for all unilateral Crown actions that impact Indigenous peoples, favouring instead a respectful collaboration between both parties. This could in turn be seen as an important opening for an approach to reconciliation that recognises Indigenous autonomy, as argued for in this thesis. There are various reasons to approach this conclusion with caution however.

---

[105] Felix Hoehn *Reconciling Sovereignties: Aboriginal Nations and Canada* (University of Saskatchewan, Native Law Centre, Saskatoon, 2012).

[106] *Haida Nation*, above n 1, at [20].

[107] John Borrows "Canada's Indigenous Constitution" (University of Toronto Press, 2010) at 15. Borrows refers to the unstable base of Canadian law in a critique of the traditional recounting of Canadian constitutional law by Professor Hogg who fails to address the pre-existence of Indigenous law in Canada:

> … You cannot create an accurate description of the law's foundation in Canada by only dealing with one side of its colonial legal history. When you build a structure on an unstable base, you risk harming all who depend on it for security and protection. ...

[108] *Manitoba Métis Federation*, above n 2, at [140].

[109] *Haida Nation*, above n 1, at [14].

[110] *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53 at [52].

2 *Reconciling Indigenous space with the fact of Crown sovereignty*

In spite of the notable judicial concessions to a postcolonial reading of North American history in the Canadian jurisprudence of reconciliation, to date the courts have also left undisturbed one important implicit constraint on their ability to recognize Indigenous rights and interests: to be recognised and enforced under Canadian law, these must remain subordinate to overarching Crown control. Prior to the Supreme Court of Canada's 2004 decisions in *Haida* and *Taku River Tlingit*, Canadian courts outright refused to question the validity of the Crown's assertion of sovereignty over Indigenous people, as well as its claim to ownership of the underlying title to their traditional territories.[111] Subsequently, although the language of Canadian courts regarding sovereignty and title has been tempered, their decisions still evidence a willingness to reinforce the Crown's asserted sovereignty and de facto control over the historic resources and territories of Indigenous peoples. As pointed out by Indigenous scholar Gordon Christie, the current jurisprudence of reconciliation under the duty to consult simply means that the Crown must "become comfortable with the notion that once a decision is made to engage in some manner of resource development, it must think of those people who have lived for countless generations on the land about to be further exploited, it must discuss the form of exploitation about to be undertaken, and it may have to adjust this form to take into consideration valid concerns of these Aboriginal nations".[112] Nowhere in this formula is the Crown's sovereign right to determine whether or not exploitation should take place actually questioned.

With Crown supremacy as a guiding framework, the courts have taken it upon themselves to translate Indigenous interests into common law doctrines that can be 'reconciled' with an overarching and incontestable concept of Crown sovereignty.[113] Canadian courts may recognise Indigenous peoples as capable of holding Aboriginal title to parts of their traditional territories, but this interest clearly remains a burden on Crown title if it remains potentially subject to a wide variety of infringements by the Crown.[114] It is also clear that the proprietary interest of Aboriginal title remains subject to Crown regulation.[115] This approach to Aboriginal title has been strongly criticised for subjecting Indigenous peoples to "an alien sovereignty" regardless of whether they have entered into a treaty with the Crown or otherwise shown any

---

[111] *Mitchell*, above n 99, at [9].

[112] Gordon Christie "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139 at 184.

[113] Ibid at 149.

[114] *Delgamuukw*, above n 8, at [165], cited with approval in *Tsilhqot'in* (SCC), above n 38, at [83].

[115] *Tsilhqot'in* (SCC), above n 39, at [125].

indication of consent to falling under Crown power.[116] The activity rights of Indigenous peoples to engage in traditional practices are equally subject to an alien sovereignty as they also remain subordinate to the resource management authority of the Crown, even in the absence of treaty or consent.[117] Aboriginal activity rights amount to an obligation on the Crown to ensure Indigenous peoples interests in resources are 'taken seriously',[118] not the protection of these interests from Crown authority.

The Canadian jurisprudence on Indigenous interests has also bestowed a quasi-constitutional standing on the interests of non-Indigenous Canadians in the course of recognising Aboriginal rights. Though Indigenous peoples' relationship with the Crown places them in a unique position compared to non-Indigenous Canadians, it has not rendered them immune from a balancing of their interests against other citizens. On the contrary, the theory of reconciliation articulated by Canadian courts serves to naturalise non-Indigenous Canadians' interests in the resources and territories historically controlled by Canada's First Peoples. In fact, the Supreme Court of Canada has gone so far as to articulate the reconciliation of Indigenous peoples and non-Indigenous peoples and "their respective claims, interests and ambitions" as being the "fundamental objective" of modern Canadian jurisprudence on Indigenous rights.[119]

Indigenous societies are understood to form part of "a broader social, political and economic community, over which the Crown is sovereign", and Canadian courts are willing to enforce limits on the rights of these Indigenous societies "where the objectives furthered by those limits are of sufficient importance to the broader community as a whole".[120] According to the Supreme Court of Canada, Indigenous interests are "necessarily limited by the rights of others" and it is ultimately for government to determine how these rights interact.[121] Non-Indigenous Canadians are understood to have historically relied upon aspects of Canada's resource base, and therefore have interests in these resources that Canadian courts recognise as justifying limits on Indigenous rights and interests.[122] In other words, out of the shadow of the justified infringement of Aboriginal rights arises a right of non-Indigenous Canadians

---

[116] John Borrows "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537 at 565.

[117] See for example *R v Douglas et al* 2007 BCCA 265, leave to appeal to the Supreme Court of Canada refused, 32142 (November 15, 2007).

[118] *Sparrow*, above n 23, at 1119.

[119] *Mikisew*, above n 8, at [1].

[120] *Gladstone*, above n 31, at [73]; *Delgamuukw*, above n 8, at [165].

[121] *R v Nikal* [1996] 1 SCR 1013 at [92].

[122] *Gladstone*, above n 32, at [75].

to their own allotment of the disputed resources. The role of the judiciary branch in effecting this form of reconciliation was described by the British Columbia Court of Appeal in the now overturned *William* decision as respecting the rights of Indigenous peoples "without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal".[123]

F Conclusion

The Canadian legal system has made room for Indigenous peoples to assert space over their marine territories and resources through the legal doctrines of Aboriginal title and rights, the Crown's duty to consult and the overriding restrictions on Crown sovereignty over these interests represented by the honour of the Crown. In this way Canada's jurisprudence of reconciliation provides an illustrative example of at least the weak legal pluralism discussed in the second chapter of this thesis. Canada's state-centred legal system has adapted to recognise Indigenous assertions of different legal orders within its own framework but this state-centred legal system retains the ultimate authority over how such extraneous legal projections are recognised and accommodated. Indigenous legal orders and traditions that can be traced to the earliest period of European settlement of Canada may provide an important perspective as to how Indigenous space is defined but are not in and of themselves definitive. Reconciliation in this vein may recognise Indigenous peoples as unique political collectives, but their communities remain subject to an overarching Crown sovereignty that provides a measure against which their interests are assessed as either cognisable or not. In other words, the Canadian legal system has provided Indigenous peoples with room to assert their own concepts of space within their traditional territories but only to the degree that these fit within the doctrines that have been developed for this purpose. In the following chapter this analysis will be further expanded upon in the context of two recent cases in which Indigenous assertions of marine space were addressed before Canadian courts.

[123] *William*, above n 10.

IV ASSERTIONS OF INDIGENOUS SPACE IN CANADIAN LAW

A Introduction

Building upon the discussion of Canadian law set out in the preceding chapter, this chapter examines in detail two cases in which coastal First Nations within British Columbia have asserted their own legal projections of marine space before Canadian courts. Examining specific case studies is important as the various interwoven legal remedies that Canadian courts have constructed for the recognition of Indigenous interests relate to one another in complex ways. Both of the cases selected here relate to rights claimed within British Columbia's Pacific North Coast region that is undergoing marine spatial planning. The first of these two cases stems from a coastal First Nation's assertion of an Aboriginal right to fish commercially within their traditional territory whereas the second involves a First Nation's claim that the Crown failed to meet its duty to consult when licensing salmon aquaculture within that Nation's territory. Although the two cases have little in common with one another in terms of the specific legal remedies sought or the nature of the Indigenous interest claimed, they provide a useful glimpse into the process by which Canadian law frames and potentially accommodates First Nations' assertion of a role in marine resource management within their traditional territories.

B Lax Kw'alaams Claim for Commercial Access

As noted in the previous chapter, among the Aboriginal rights that Canadian courts have recognised to date, a select few First Nations in British Columbia have been able to successfully assert a right to harvest and trade certain resources from within their traditional territory—most notably the Heiltsuk Nation's right to trade herring spawn on kelp[1] and the recently settled right of Nuu-chah-nulth First Nations to harvest and sell all species of fish within their traditional territories, save for the lucrative geoduck shellfish.[2] The *Lax Kw'alaams* litigation, on the other hand, falls among the more numerous list of unsuccessful attempts of British Columbia's First Nations to affirm such commercial rights before the courts.[3]

The Lax Kw'alaams Band is an Indigenous collective that represents the descendants of nine Coast Tsimshian tribes with their traditional territory on the North Coast of

---

[1] *R v Gladstone* [1996] 2 SCR 723 [*Gladstone*].

[2] *Ahousaht Indian Band and Nation v Canada (Attorney-General)* 2013 BCCA 300 [*Ahousaht*], application for leave to appeal to the Supreme Court of Canada dismissed on 30 January 2014 (34387).

[3] *Lax Kw'alaams Indian Band v Canada (Attorney-General)* 2008 BCSC 447 [*Lax Kw'alaams* (BCSC)], aff'd 2009 BCCA 593 and 2011 SCC 56 [*Lax Kw'alaams* (SCC)].

British Columbia.[4] The Band sought to prove an Aboriginal right for the commercial harvesting and sale of all species of fish within their traditional territory as part of a larger action that included a claim to Aboriginal title, however, the title portion of their claim was severed and did not proceed to trial.[5] In its statement of claim the Band asserted that they had "utilized the fruits of the seas and rivers of their Claimed Territories for food, social, ceremonial and commercial purposes long before the white man came, and would have continued to do so to the present day but for the unjustifiable interference of the Government of Canada".[6]

Satanove J of the BC Supreme Court accepted evidence regarding the social and political organisation of the historic Coast Tsimshian tribes from which the Band's members claimed descent and accepted that the Band was entitled to seek recognition of Aboriginal rights as a representative of these descendants.[7] The Court also acknowledged on the evidence the importance of fishing to the Coast Tsimshian people, stating that "indeed their very existence is attributed to the abundance of marine and riverine foods available to them" and finding that salmon and the smelt known as eulachon were the most important fish of all in Coast Tsimshian culture.[8] The Court accepted evidence that Coast Tsimshian peoples had harvested a wide variety of different marine resources "through an array of fishing techniques".[9] Likewise, the Court heard evidence of traditional Coast Tsimshian law and how this divided ownership of territories for harvesting resources amongst extended family groups; the Crown's witness only contested this evidence to the extent that she testified ownership did not extend to the resource itself and harvesting areas were owned for specific species only.[10]

Yet the Coast Tsimshian economy was found to have been primarily one of subsistence prior to the arrival of fur traders in their territory. The Court was willing to concede that "some form of loosely termed trade" had existed in the form of gift exchange between kin at feasts and potlatches, and in the exchange of luxury goods such as "slaves, coppers, dentalium and eulachon grease".[11] However, the only trade

---

[4] Although Lax Kw'alaams has traditional territory within the area of the Pacific North Coast subject to marine spatial planning by various First Nations and the government of British Columbia, as addressed in the following chapter, Lax Kw'alaams was not involved in the draft plans created through that process. See Marine Planning Partnership for the Pacific North Coast "Draft North Coast Marine Plan: Version Number 3.1" (April 29, 2014).

[5] *Lax Kw'alaams* (SCC), above n 3, at [1].

[6] *Lax Kw'alaams* (BCSC), above n 3, at [3]-[4].

[7] Ibid at [159]-[163].

[8] Ibid at [225].

[9] Ibid at [494].

[10] Ibid at [260]-[266].

[11] Ibid at [494]-[495].

that Satanove J opined might be considered integral to Coast Tsimshian's distinctive culture on the evidence was trade in eulachon grease.[12] The plaintiffs' argument that "ancient trade" in this species had "transmogrified to a modern day right to commercial fishing of salmon, halibut and all other marine and riverine species of fish" was emphatically rejected.[13] Although the Court expressed the view in dicta that the plaintiffs might have been able to establish an aboriginal right to fish eulachon for trade at a specific location outside their traditional territory, no judgment was expressed on this matter as it fell outside what was pled and argued.[14] As an aside, it is worth noting that the eulachon stock within Lax Kw'alaams' territory was listed as a threatened species under federal legislation in Canada at the time of the litigation putting in significant doubt the commercial viability of any such right.[15]

In the alternative to its Aboriginal rights claim, Lax Kw'alaams also claimed a right to harvest and sell fish on a scale akin to commercial on the basis of "trust like" or fiduciary obligations of the Crown to ensure they had commercial fishing opportunities sufficient to earn their livelihood and sustain their community.[16] The plaintiffs relied on the fact that most of the land the Crown had set aside for the Band when creating reserves by way of executive expropriation corresponded to customary fishing sites and were suited for fishing and little else. They argued that the Crown had historically sought to facilitate and encourage Lax Kw'alaams' reliance on commercial fishing, only to subsequently restrict their ability to pursue that enterprise.[17] Yet Satanove J rejected this argument wholesale as she found no evidence of any promise, express or implied, that Lax Kw'alaams' members would not be subject to the same limits and restrictions on fishing as other individuals seeking access to these resources. On the contrary the Court found evidence that Lax Kw'alaams had been expressly told their access to the fishery would be treated on the same basis as non-Indigenous fishermen.[18] Furthermore, Satanove J expressed the view that "[f]ish, as a living, moving, dynamic, and variable resource has always belonged to the public at large" and Canada's administration of the fisheries "has always had to take into account the rights of all Canadians to exploit this resource".[19]

---

[12] Ibid at [495].

[13] Ibid at [499].

[14] Ibid at [500].

[15] Fisheries and Oceans Canada "Aquatic Species at Risk – Eulachon (Nass/Skeena Rivers population)" <www.dfo-mpo.gc.ca>.

[16] *Lax Kw'alaams* (BCSC), above n 3, at [504].

[17] Ibid at [505].

[18] Ibid at [529].

[19] Ibid.

On the basis of Canadian law as it stands and the evidence as reflected in this decision, it is difficult to take issue with the conclusions reached by the Court in this case—in fact, both the BC Court of Appeal and the Supreme Court of Canada unanimously rejected appeals from this decision. From the critical perspective central to this thesis, however, *Lax Kw'alaams* provides an interesting illustration of how Canadian courts address the differing legal orders and geographies asserted by Indigenous peoples in Aboriginal rights litigation.

Based on the legal test set out in *Van der Peet*, the pre-contact traditional laws of Coast Tsimshian are relevant in as far as they indicate an 'Aboriginal perspective' on the right being asserted. For this reason the Court's reasons set out the general terms of the Coast Tsimshian's pre-contact governance structure and resource harvesting practices, acknowledging the existence of a complex Indigenous geography of ownership and rights over fishing within their traditional territories. However, the only legal consequences to this evidence pertain to whether or not trade in fish was integral to a distinctive culture prior to European contact, and the Court opined that only trade in one species might meet such a stringent test. There is no in discussion in *Lax Kw'alaams* as to whether or not the traditional legal order itself, with its complex ordering for the allocation of fishery resources, might be integral to Coast Tsimshian's distinctive culture, nor is there any discussion regarding the extent to which this legal order persists, either wholly or in part, in the modern era. Yet to put forward a case on this basis would almost undoubtedly be rejected as overbroad.[20]

In seeking greater access to commercial fishing within their traditional territory through the doctrine of Aboriginal rights Lax Kw'alaams are also constrained by the evidence of their pre-contact economy. As the evidence put forward in this litigation could not support an Aboriginal right to engage in commercial fishing under Canadian law, Lax Kw'alaams' members are left in the same legal position as any other Canadians interested in taking fish from within their traditional territory for commercial gain. To the extent that Lax Kw'alaams' traditional conception of resource access and ownership was found not to support commercial access to the fisheries, this pre-existing legal order was rendered inapplicable in the face of Canadian law's subsequent assertion that those fishery resources be allocated and managed on the basis of public access, at least for commercial purposes.

Lax Kw'alaams' alternative claim to commercial access by virtue of the fishing stations the Crown allotted to them is equally of interest to our theoretical framework. Satanove J found little reason to doubt that the plaintiff's predecessors did not agree to the reserve allotment process, instead finding the historical records "replete with

[20] *R v Pamajewon* [1996] 2 SCR 821.

complaints, pleas, supplications and threats" from Coast Tsimshian in relation to this process.[21] The Court also found in the evidence that there was no doubt that the Crown was historically aware that coastal First Nations obtained "all their necessities or desires required from the sea and its tributaries", and that in the process of reserve allocation, the Crown made efforts to include all fishing stations that had been pointed out to them by Lax Kw'alaams' ancestors within these reserves.[22] However, Satanove J found that there had been no promise to Lax Kw'alaams that they would be exempt from the common law presumption that fish constitute a resource 'common to all' and her dismissal of the claim turned on this issue. It was found that the honour of the Crown did not exempt Lax Kw'alaams from the brute force of Crown sovereignty in terms of its assertion of common property rights over British Columbia's fishery resources, whether or not these had been previously subject to conflicting claims with the projections of Indigenous legal orders. Instead the honour of the Crown presumes that Crown sovereignty and the expropriation of Lax Kw'alaams control over the fisheries in their traditional territory is legitimate, or at least beyond the Court's purview, and sets procedural safeguards that are limited to operation within this legal framework.

C Kwicksutaineuk Ah-Kwa-Mish Claim for Area-Based Aquaculture Management

Turning to another decision, the Federal Court decision in *Kwicksutaineuk*[23] represents one of multiple claims in which the Crown's duty to consult has been applied in an attempt at influencing environmental management for aquaculture tenures in British Columbia's coastal waters, rather than asserting a stake in these developments. The Kwicksutaineuk Ah-Kwa-Mish First Nation ("KAKM") sought judicial review of a Crown decision to issue licenses for aquaculture tenures within their territory on the basis that the Crown had failed to adequately consult the Nation over the environmental effects that salmon aquaculture was having on wild salmon stocks, and ignored KAKM's proposals for mitigation of these effects. Notably, KAKM relied on an asserted Aboriginal right to fish the wild salmon within their territory for food, social and ceremonial purposes as the basis for this consultation.[24]

KAKM's application represents just one of numerous legal actions that have been brought against net pen salmon farming in British Columbia by First Nations in

---

[21] Ibid at [508].

[22] Ibid at [509].

[23] *Kwicksutaineuk Ah-Kwa-Mish v Canada (Attorney-General)* 2012 FC 517. Kwicksutaineuk Ah-Kwa-Mish First Nation (now known as Kwikwasut'inuxw Haxwa'mis First Nation) has traditional territory within the area subject to the marine spatial planning addressed in the following chapter but is not currently participating in that process.

[24] Ibid at [11].

conjunction with environmental non-government organisations.[25] In the *Morton* case of 2009, the BC Supreme Court rendered a decision that found the legislative authority to regulate fish aquaculture in British Columbia was constitutionally vested in the federal government rather than the provincial government, which was clearly contrary to the Crown's assumptions on this matter as the province had been regulating this industry for a number of years prior.[26] The Court suspended the effect of its judgment in *Morton* to allow the federal government 12 months to create its own legal regime for aquaculture management.[27] During this period of regulatory transition KAKM sought consultation with the federal government as to whether or not existing aquaculture tenures within their traditional territory should be reissued under the new federal regime, and if so, on what terms. KAKM's application for judicial review resulted from their dissatisfaction with the results of that consultation.

KAKM claimed that the abundance and quality of their wild salmon fisheries were in decline, and attributed that decline in part to the presence of open net pen salmon aquaculture within their territory. The Federal Court noted that this had been "a recurrent theme in the consultation with various Aboriginal groups both by provincial and federal authorities since the introduction of farm fishing".[28] The case sets out in detail the process followed by the federal government in order to consult with KAKM and other affected First Nations in the wake of *Morton*, which primarily took place through two representative bodies hosting meetings for these First Nations to attend, though some bilateral discussions occurred as well.[29] The federal government took the position that all expiring provincial licenses ought to be replaced by licenses under the federal regime, whereas all three of the principal organisations representing First Nations across British Columbia vocally opposed such an outcome.[30] KAKM, for their part, expressed an interest in area-based planning for their traditional marine

---

[25] See for example *K'omoks First Nation v Canada (Attorney-General)* 2012 FC 1160 [*K'omoks*]; *Ehattesaht First Nation v British Columbia (Agriculture and Lands)* 2011 BCSC 658, application for leave to appeal dismissed in 2011 BCCA 325; *Blaney et al v British Columbia (The Minister of Agriculture, Food and Fisheries)* 2005 BCSC 283; and *Heiltsuk Tribal Council v British Columbia (Minister of Sustainable Resource Management)* 2003 BCSC 1422.

[26] *Morton v British Columbia (Agriculture and Lands)* 2009 BCSC 136.

[27] Ibid at [200]. The federal government later successfully sought an additional 12 month extension for this regulatory transition to take place, though the issuance of new licenses was prohibited during the latter period, based on the submissions of a representative of KAKM and other First Nations in that action. *Morton v British Columbia (Agriculture and Lands)* 2010 BCSC 100 at [33]-[35].

[28] *Kwicksutaineuk*, above n 23, at [12].

[29] Ibid at [22]-[29] and [36]-[41].

[30] Ibid at [35].

territory, and raised issues with various cumulative effects that they alleged the salmon net pens were having on the wild stocks they fished.[31]

The Court accepted that the Crown had a duty to consult KAKM though it did not express a view as to the exact level of consultation required.[32] In spite of the fact that the federal government ultimately did not adopt any of the recommendations for area-based management that KAKM sought, the Court found that taking into account the various exchanges of information and meetings between the Crown and KAKM, both multilateral and bilateral, the Crown's consultations were genuine and not simply a matter of giving KAKM and other First Nations "the opportunity to blow off steam", and on this basis the application was dismissed.[33]

As noted above, *Kwicksutaineuk* makes for an interesting case study in that the First Nation initiating this litigation used the duty to consult to seek leverage for better environmental regulation of resource development within its territory, rather than seeking an economic interest in that development. By virtue of the anticipatory nature and procedural focus of the duty to consult KAKM was able to convince the Federal Court both that it held a reasonable prima facie claim to an Aboriginal right and that aquaculture tenures posed a potential impact to that right, entitling KAKM to consultation without definitively proving either. However, it is worth considering the fact that KAKM's legal role in the environmental management of their marine territory was uniquely contingent on their asserted right to harvest salmon for food. This asserted right provided them with a right to be consulted on aquaculture licensing within their marine territory as a result of its potential impact on the wild stocks they targeted, but it did not provide them with the right to force the Crown to adopt their position on how environmental planning within their territory should proceed.

It is unclear from the decision alone what evidence and pleadings were before the judge in this judicial review, and there is no mention of the nature of KAKM's claim to their traditional territory or any claim to governance rights over their marine area they might have put forward. However, it is worth questioning whether any greater right to consultation over aquaculture within their territory was available to them on grounds other than a right to fish salmon for food, social and ceremonial purposes. Could they have sought a stronger role in environmental regulation through asserting a claim to Aboriginal title to their marine territory, for example?

A review of related and contemporaneous litigation suggests that First Nations' claims beyond rights to fish for food were not being accepted by the Crown as a strong basis

[31] Ibid at [37]-[45].
[32] Ibid at [116].
[33] Ibid at [125]-[126].

for consultation in this post-*Morton* period of regulatory transfer. For example, insight can be gained from the judicial review brought by the nearby K'ómoks First Nation against shellfish aquaculture tenures within their traditional territory during the fallout from the *Morton* decision; in that case it was clear the federal Crown took the position that Aboriginal title could not be asserted to submerged land, whereas the K'ómoks claimed title to discrete areas it argued were in keeping with the tests set out in *William*, as this now overturned decision was a leading authority on Aboriginal title at the time.[34] The Federal court, for its part, took no position on this dispute as to the strength of K'ómoks' claim.[35] If the Crown position during this period of regulatory hiatus was to not recognise Aboriginal title to marine territory at all, this would have greatly narrowed the manner in which KAKM could assert a right to be consulted over aquaculture impacts within their territory. Likewise it is doubtful that under the narrow concept of Aboriginal title enunciated in the *William* decision an assertion of Aboriginal title over areas outside the foreshore was even legally tenable at the time of this decision, though the Supreme Court of Canada's *Tsilhqot'in* decision has since overturned this decision.

Further insight into the nature of KAKM's relationship to its marine territory can also be gained from a related class action suit that was brought by KAKM's chief, on behalf of all members of KAKM, against salmon aquaculture within this same area. In this action damages and losses were claimed against the government of British Columbia based on the environmental effects of net pen salmon aquaculture on wild salmon stocks within KAKM's traditional territory.[36] What is interesting to note, however, is that the pleadings, as cited by the BC Court of Appeal, include a claim for "the loss of the cultural, ecological, and spiritual integrity of the Wild Salmon habitat and fishing sites, including [the plaintiffs'] ability to maintain cultural practices related to the Wild Salmon harvesting, including *traditional management of the Wild Salmon*".[37] Although this related litigation of the KAKM similarly focuses on the effects of salmon aquaculture on wild salmon, the claim is put forward in part on the basis that KAKM's ability to *manage* their wild salmon stocks has been undermined, not just their access to these fish.

In the duty to consult discussion in the *Kwicksutaineuk* decision there is no inquiry into the source of KAKM's opposition to the salmon aquaculture within their marine territory nor is there an inquiry into the nature of how they traditionally and

---

[34] *K'ómoks*, above n 25, at [41]-[42].

[35] Ibid.

[36] *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Agriculture and Lands)* 2010 BCSC 1699, overturned on appeal in 2012 BCCA 193, application for leave to appeal to the Supreme Court of Canada dismissed on 15 November 2012 (34909).

[37] *Kwicksutaineuk* (BCCA) (emphasis added), above n 3, at [7].

contemporarily manage those stocks. If the basis on which KAKM's members are consulted is limited to the fact that they have an interest in the health of the salmon they harvest, to what extent have they been acknowledged as an autonomous community with its own vision for what constitutes legitimate development within their territory? The KAKM is arguably in a better position than stakeholders such as environmental organisations or commercial fisheries in asserting a role in the management of salmon aquaculture in their territory as they hold a legal entitlement to be consulted. However, this entitlement is limited to their interest in harvesting that resource and does not appear to extend to their potentially incommensurable views as what might be spiritually, culturally or even legally acceptable development within the marine space they claim as their own.

D Conclusion

These case studies provide just two examples of what occurs on the ground when coastal First Nations within British Columbia assert their own legal orders as a basis for defining how the marine space within their traditional territories is allocated and developed. In other cases First Nations have been successful in proving Aboriginal rights to harvest fish for either food, social and ceremonial purposes[38] or, more rarely, commercial purposes.[39] However, these examples do illustrate more generally how the Canadian legal system recognises and accommodates Indigenous projections of marine space within its own state-centred ordering. Where the legal orders and traditions of First Nations indicate different conceptions of how resources are to be allocated and managed this may provide a basis on which Canadian law can show flexibility in defining Indigenous interests. For example, if the Common Law projects wild fish stocks as an invariably public resource, allowing for First Nations in British Columbia to have a greater interest in the commercial exploitation of these stocks on the basis of their pre-existing customs and practices undoubtedly shows some malleability to this legal system in its accommodation of legal and social projections that are external to it. Yet under this model of weak legal pluralism the Canadian legal system has set up strict tests as to the circumstances in which these external legal orders and projections of marine space can influence and fetter the application of Canadian law. Under this model of reconciliation between Indigenous and Crown projections of marine space it is clear that the former are being defined and delimited by reference to the latter, regardless of outstanding questions as to the common ground that stands between them. In the subsequent chapter the marine spatial planning process being undertaken in the Pacific North Coast will be assessed under this same analytical framework to examine whether this new marine governance tool

[38] *R v Sparrow* [1990] 1 SCR 1075.

[39] See for example *Gladstone*, above n 1, and *Ahousaht*, above n 2.

might improve upon this situation and put Indigenous projections of marine space on a more equal footing with those of the Crown.

V JOINTLY PLANNED SPACE IN THE WATERS OF HAIDA GWAII

A Introduction

This chapter provides an overview of the marine spatial planning process taking place for the Pacific North Coast of British Columbia as a joint endeavour between the Province and several participating First Nations. In keeping with the overall critical theory perspective adopted for this thesis, this chapter examines the degree to which this resource management process creates room with the Canadian legal system for Indigenous legal projections of marine space within their territories to be accommodated and reconciled with those of the Crown. The context in which this marine spatial planning initiative came into existence is set out here as this background is important to understand where this spatial plan is situated within Canada's legal system and what its limitations are. Then the discussion will focus on a case study of one sub-regional draft plan from within this complex planning process—that of the April 2014 Haida Gwaii Draft Plan produced out of a joint process between Haida Nation and the Province. By concentrating on the Haida Gwaii Draft Plan it is possible to see how the differing legal orders of Haida Nation and the Province are being reconciled to some degree within a joint spatial plan. In this way the third research question guiding this thesis may be addressed in this Canadian context by examining the degree to which this spatial planning process provides for greater recognition and accommodation of Indigenous legal orders in the management of their traditional marine territories than the legal status quo.

B Setting the Stage for Marine Spatial Planning in British Columbia

As introduced in the second chapter of this thesis, Canada's Oceans Act came into effect in 1997 to provide an integrated management framework for the nation's vast marine territories that are otherwise managed on a largely sectoral basis. This Act commits Canada to develop a national strategy for oceans management based upon principles of sustainable management, integrated management and the precautionary approach and requires the federal department of Fisheries and Oceans Canada (DFO) to develop and implement plans for the integrated management of all activities or measures that take place in or effect estuaries, coastal waters and marine waters under federal jurisdiction.[1] Further, this Act obliges Canada to develop and implement a national system of marine protected areas throughout its marine jurisdiction in order to achieve the purposes of these integrated management plans.[2] This single federal statute has set the stage for marine spatial planning in British Columbia's Pacific North Coast region.

[1] Oceans Act SC 1996 c 31, ss 29-31.

[2] Ibid, s 35.

In carrying out its obligations under the Act, Canada released its first *Oceans Strategy* document in 2002 to provide an overall strategic framework for federal oceans programs and policies across the country. The principles for integrated marine management in this document include harmonisation, collaboration and inclusiveness between different government bodies, Indigenous groups, stakeholders and interest groups. Where integrated planning would take place within Indigenous territories, this document endorsed the need to adopt a co-management approach for those regions that were under the jurisdiction of a "settled land claim" and the need for integrated management processes to remain "without prejudice" where Indigenous claims to land and marine resources remained unresolved.[3] That same year the federal Ministers of Fisheries and Oceans and Indian and Northern Affairs (as it was then known), signed an interim measures agreement with an organisation called the Turning Point Initiative (now known as the "Coastal First Nations"), representing nine coastal First Nations in British Columbia, in order to develop a process for these First Nations to engage in marine use planning in keeping with the commitments set out in the *Oceans Act*.[4] This interim measures agreement represented a step towards negotiated settlements between the Crown and the participating First Nations, and built upon parallel land use planning processes that members of Coastal First Nations ("CFN") were already engaged in.[5]

In 2005 Canada created its first *Oceans Action Plan* under the Act identified the Pacific North Coast Integrated Management Area ("PNCIMA") as one of the five Large Ocean Management Areas ("LOMAs") in which integrated management planning would occur as part of Phase I of this Plan.[6] The lands encompassed by and surrounding PNCIMA include 32 different First Nations communities.[7] In 2008 a subsequent Memorandum of Understanding ("MOU") was entered into between the Minister of Fisheries and Oceans, CFN, and an organisation called the North Coast Skeena First Nations Stewardship Society ("NCSFNSS"), through which an additional five coastal First Nations are represented.[8] Then in December of 2010 the Province of British Columbia signed onto this MOU, followed by the Nanwakolas

[3] Fisheries and Oceans *Canada's Oceans Strategy: Our Oceans, Our Future* (2002) at 11-12.

[4] Fisheries and Oceans Canada and others *Memorandum of Understanding on Pacific North Coast Integrated Management Area Collaborative Oceans Governance* (11 December 2008).

[5] J G Bones Consulting "PNCIMA Issues, Challenges and Opportunities" (discussion paper prepared for Fisheries and Oceans Canada (Pacific Region) on behalf of PNCIMA Secretariat, June 2009) at 18-19.

[6] Fisheries and Oceans Canada *Canada's Oceans Action Plan: For Present and Future Generations* (2005) at 15.

[7] Fisheries and Oceans Canada "DRAFT Pacific North Coast Integrated Management Area Plan" (27 May 2013) at 12.

[8] Fisheries and Oceans Canada and others, above n 4.

Council, representing seven Kwakwaka'wakw First Nations, in January of 2011.[9] Notably, this MOU acknowledges that the PNCIMA initiative involves a government-to-government relationship between First Nations, Canada and the Province that "is of a different character than that between governments and stakeholders".[10] Likewise, this MOU recognizes the "local marine capacity" of many First Nations involved in the process as well as the community level planning being engaged in by First Nations involved in this initiative.[11]

The novel governance structure for PNCIMA is made up of three tiers in which First Nations, such as Haida Nation, participate in the process. At the first level, Haida Nation's highest governing body, the Council of Haida Nation (CHN), leads an internal process within the Nation that includes a Haida Marine Work Group and a three person technical team and involves representatives of various groups within Haida Nation such as a Council of Hereditary Chiefs as well as members of the "Haida public".[12] The second tier of this process is a level as between First Nations and includes a First Nations Governance Committee and Area Technical Teams that represents sub-regions within PNCIMA. Finally, the third tier of this process is between First Nations and the Government of Canada, including an overall PNCIMA Steering Committee representing an even balance between First Nations and federal government representatives.[13] This "proactive approach" to joint decision making outside of a formal settlement between the Crown and these coastal First Nations has been described as a response to the uncertainty generated by the implications of Aboriginal title and the Crown's duty to consult in this area.[14]

In September of 2011, however, DFO nearly sunk the very marine spatial planning process it had set in motion. In its own words, DFO "decided to streamline the integrated planning process for PNCIMA … [resulting] in a reduction in the plan scope and the withdrawal of First Nations from the planning process".[15] As a result, any final plan coming out of the revised PNCIMA process will not include "spatial zoning",[16] as evidenced in the draft plan released to date.[17] According to CFN, these

---

[9] Fisheries and Oceans Canada, above n 7, at 5.

[10] Fisheries and Oceans Canada and others, above n 4, at 7.

[11] At 8.

[12] Russ Jones, Catherine Rigg and Lynn Lee "Haida Marine Planning: First Nations as a Partner in Marine Conservation" (2010) 15(1) Ecology and Society 12 [Haida Marine Planning].

[13] See Fisheries and Oceans Canada *Terms of Reference for the Steering Committee of the Pacific North Coast Integrated Management Area* (DRAFT 21 January 2009); see also Haida Marine Planning, above n 12.

[14] Haida Marine Planning, above n 12.

[15] Fisheries and Oceans Canada, above n 8, at 5.

[16] Northern Gateway Pipeline, Joint Review Panel, Canadian Environmental Assessment, Hearing Transcript (April 23, 2013).

unilateral changes to the PNCIMA process were made to "preclude the possibility that tanker traffic in the area would be restricted" through the marine planning process.[18] The CFN's concerns centred on reports in the media that Canada's streamlining of the PNCIMA initiative had been triggered by the lobbying activities of a pipeline proponent seeking to build a project that would bring diluted bitumen-laden tanker traffic through PNCIMA.[19] Following this impasse CFN and NCSFNSS reengaged with Fisheries and Oceans Canada on its new streamlined direction for the PNCIMA strategic plan, while the Nanwakolas Council chose to permanently withdraw on the basis that the federal government's unilateral revision to the outputs and process for PNCIMA were in violation of the MOU it had signed onto.[20] At the time of writing a draft plan from the streamlined PNCIMA process has been through public consultations and is being revised on the basis of the results of those consultations.[21]

In the wake of the controversy surrounding the removal of marine spatial planning from Canada's PNCIMA plan, the First Nations involved in this initiative signed on to a subsequent letter of intent with the Province of British Columbia in November of 2011 to continue with the development of sub-regional coastal and marine plans for Haida Gwaii, North Coast, Central Coast and Northern Vancouver Island, and the preparation of a broader regional planning document as "a basis for informing the ongoing PNCIMA initiative".[22] Marine spatial planning in British Columbia therefore continues with the participation of the Province of British Columbia, CFN, NCSFNSS and Nanwakolas Council under the moniker of MaPP (Marine Planning Partnership for the North Pacific Coast).[23]

The current intention is for a sub-regional and overall regional planning strategy for all of PNCIMA to provide an "ecosystem-based management framework that addresses, as key priorities, integrated marine economic development strategies, a regional marine protection system, a cumulative effects framework, and an ecosystem vulnerability assessment with guidance for regional marine activities".[24] At the level of the territories of individual First Nations, community level plans have been completed that contain Nation-specific background information, protocols, policies

---

[17] See Fisheries and Oceans Canada, above n 7.

[18] Northern Gateway Pipeline, Joint Review Panel, Canadian Environmental Assessment, Final Argument of Coastal First Nations (31 May 2013) at [117].

[19] David Suzuki Foundation "DRAFT: BC Communities and Stakeholders Shut Out of the PNCIMA Process by the Harper Government" (2011) <www.davidsuzuki.org>.

[20] Dallas W Smith "Re: Nanwakolas Council Withdrawal from the Memorandum of Understanding on Pacific North Coast Management Area Collaborative Oceans" (2 May 2012).

[21] PNCIMA "PNCIMA News" <www.pncima.org/>.

[22] Art Sterritt "Letter of Intent" (17 Nov 2011).

[23] Marine Planning Partnership for the North Pacific Coast "About MaPP" <mappocean.org>.

[24] Nanwakolas Council "Marine Planning" <www.nanwakolas.com>.

and strategies, and spatial zoning designations, with access to this level of information determined by each individual First Nation involved.[25] At the time of writing numerous individual First Nations communities within PNCIMA have completed community-level marine use plans, and draft plans for all four sub-regions have been completed and are undergoing public consultation or revisions based on public consultation in order to be finalised in the coming weeks.[26]

C Planning for the Marine Waters of Haida Gwaii

Haida Gwaii refers to an archipelago of over 150 islands that lie approximately 80km off the coast of British Columbia to the northwest of Vancouver Island.[27] The islands are known for their rich biodiversity, hosting almost 40 species and sub-species found nowhere else in the world and earning them the nickname of the 'Galapagos of Canada'. Moreover, this archipelago is the homeland of the Haida Nation who can point to archaeological evidence of the islands having been inhabited for over 10,000 years as a testament to their long-standing cultural connection to this territory. In terms of the PNCIMA area addressed by marine use planning under MaPP, Haida Gwaii represents the northeast quadrant of the overall planning area. Before addressing the terms of the plan this section will set out some context on the differing legal orders asserted by the Haida Nation, British Columbia and Canada, which all lay claim to the area undergoing marine spatial planning to some degree.

1 Haida Gwaii as an archipelago of disputed jurisdiction

The Council of the Haida Nation (CHN) is a governing body founded in 1974 in order to represent the Haida Nation for the purpose of resolving land claims to the islands and to unite the Nation as one political entity.[28] The CHN has asserted itself as a National government of Haida Gwaii, enacting legislation and policy for various aspects of life on these islands.[29] In 2002 Haida Nation filed a statement of claim asserting Aboriginal rights and title to "the land, inland waters, seabed, archipelagic waters, air space, and everything contained thereon and therein comprising Haida Gwaii", and claiming remedies and damages against the Crown for various alleged

---

[25] Ibid.

[26] Marine Planning Partnership for the North Pacific Coast "News" <mappocean.org>.

[27] See generally Neil G Carey *A Guide to the Queen Charlotte Islands* (Raincoast Books, Vancouver (BC), 1995); Dennis Horwood and Tom Parkin *Haida Gwaii: The Queen Charlotte Islands* (Heritage House Canada, Surrey (BC), 2000); and Ian Gill *Haida Gwaii: Journeys Through the Queen Charlotte Islands* (Raincoast Books, Vancouver (BC), 1997).

[28] Council of Haida Nation "History of the CHN" <www.haidanation.ca>.

[29] Ibid.

wrongs including "unlawful occupation and appropriation of Haida Gwaii" and "unlawful interference with the Haida Nation's use and enjoyment of Haida Gwaii".[30]

The Council of Haida Nation has also enacted the Constitution of the Haida Nation. This document sets out the boundaries of the Haida Nation's territories as including the entire lands of Haida Gwaii, and their surrounding marine waters out to the halfway mark between Haida Gwaii and mainland British Columbia and Vancouver Island, as well as "Westward into the abyssal ocean depths".[31] Their Constitution states that "[a]ll people of Haida Ancestry are citizens of the Haida Nation" and entitles them to "a right of access to all Haida Gwaii resources for cultural reasons, and for food, or commerce consistent with the Laws of Nature, as reflected in the Laws of the Haida Nation", among other things.[32] This document also vests the lawmaking authority of the Nation in a body called the House of Assembly, and sets out various other aspects of the Nation's governance including how elections for the CHN are to be conducted and designating the Nation's official languages. Most notably for the purposes of this discussion, the Constitution sets out the mandate and responsibilities for the CHN as including striving for "full independence, sovereignty, and self-sufficiency of the Haida Nation", the establishment of "land and resource policies consistent with nature's ability to produce", and the regulation of "access to the resources by Citizens of the Haida Nation and other users of Haida Gwaii".[33]

A complex history of disputes between the Haida Nation and the British Columbia over control of Haida Gwaii's natural resources has played out over the past three decades, and the litigation leading up to the establishment of the duty to consult in the Supreme Court of Canada's 2004 *Haida Nation* decision represents just one aspect of a much larger struggle.[34] Although further disputes followed in the wake of the Supreme Court's decision, eventually Haida Nation and British Columbia moved towards a more collaborative relationship. By 2007 they had developed a Strategic Land Use Agreement for Haida Gwaii, which designated protected, special value and operating land use zones, as well as ecosystem-based management objectives for the remainder of the archipelago.[35] Then in 2009 the parties entered into the *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol*, which acknowledged the incommensurably different views of these two parties with regards to sovereignty,

---

[30] Council of the Haida Nation, Statement of Claim, Action No L020662, Vancouver Registry.

[31] Council of the Haida Nation *Haida Nation Constitution* (as amended at the 2010 House of Assembly) at A1.S1.

[32] Ibid at A2.S1 & A3.S2.

[33] Ibid at A.8.S2, A.8.S7 and A.8.S8.

[34] See generally Louise Takeda and Inge Røpke "Power and contestation in collaborative ecosystem-based management: The case of Haida Gwaii" (2010) 70 Ecological Economics 178.

[35] Council of the Haida Nation *Strategic Land Use Agreement*.

ownership and jurisdiction over Haida Gwaii, but committed them to "a more respectful approach to co-existence by way of land and natural resource management on Haida Gwaii through shared decision-making and ultimately, a Reconciliation Agreement".[36] Finally, in 2010 the *Haida Gwaii Reconciliation Act* was passed into law in order to implement the *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol*. This Act provides for the five-member Haida Gwaii Management Council, made up of two Haida Nation representatives, two provincial representatives, and a neutral chairperson, to undertake various roles relating to land use activities in Haida Gwaii, including determining the annual allowable cut for logging and approving management plans for protected areas that bind ministerial discretion.[37]

As between the federal and provincial governments, Canada, which is no longer participating in marine spatial planning for PNCIMA, has legislative jurisdiction over several important areas of concern for integrated management within PNCIMA, as introduced in the second chapter of this thesis. These include shipping and navigation, commercial fishing, fish aquaculture and various aspects of the environmental regulation of marine areas. British Columbia, on the other hand, has legislative authority over other relevant areas including decision making on tenures for aquaculture and sports fishing lodges, regulation of marine plant aquaculture and harvesting, and regulation of land use activities with an impact on marine waters. Likewise, British Columbia owns mineral rights in the seabed of some of the narrow inlets and straits falling within PNCIMA's boundaries,[38] whereas Canada owns mineral rights to open water portions of PNCIMA,[39] and ownership as between the two jurisdictions is unclear for many other portions of this expansive marine area.[40]

It is in this context of disputed jurisdictions and authorities that the Haida Gwaii Marine Plan has been drafted.

2 A plan for certainty as between uncertain claims

As might be expected considering the complex constitutional overlaps that exist in British Columbia's marine areas, the Haida Gwaii Draft Marine Plan (the "Plan") is expressly focused on marine areas and uses where as "between [the] Government of British Columbia and Canada, the government of British Columbia has legal

---

[36] Council of Haida Nation *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol*.

[37] Haida Gwaii Reconciliation Act SBC 2010 c 17, ss 5(2) & 6(7) and (8).

[38] *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas* [1984] 1 SCR 388.

[39] *Re Offshore Mineral Rights of British Columbia* [1967] SCR 792.

[40] Alexander J Black "Jurisdiction over Petroleum Operations in Canada" (1986) 35(2) ICLQ 446 at 454.

jurisdiction and regulatory authority".[41] In its cover letter the draft plan makes it clear that it is not intended to address management of uses and activities that the province considers to be federal jurisdiction, save for those topics that are subject to overlap between provincial and federal jurisdictions, and that issues requiring federal involvement will be subject to consultations with the federal government.[42] The plan likewise does not cover "upland areas" addressed in land use plans but "considers the uses, plans, tenures and legal designations that are in place on the land adjacent to marine areas and the seabed".[43]

The purpose of the Plan is directed at identifying acceptable marine uses for Haida Gwaii, and its contents are intended to be relevant for matters falling within the respective constitutional authorities of British Columbia and the Haida Nation, with the former acting pursuant to the Canadian constitution and the latter acting pursuant to the Haida Nation's constitution.[44] The Plan is also intended to complement the Strategic Land Use Agreement between Haida Nation and the province, and contemplates the two parties working together to ensure its objectives and strategies are implemented where these require the support of other agencies.[45] Due to the complex nature of the competing authorities on which the Plan is based it also contains a number of disclaimers against its terms binding the parties in their respective claims, stating for example that it does not "create, define, evidence, amend, recognize, affirm or deny any Aboriginal rights, Aboriginal title and/or treaty rights or Crown title and rights, and is not evidence of the nature, scope or extent of any Aboriginal rights, Aboriginal title or Crown rights and title".[46]

Although the Plan sets out an agreed vision for Haida Gwaii as between the province and Haida Nation, it also hives off five issues on which the two parties could not come to agreement: regulation over aspects of the recreational fishing industry, the possibility of salmon aquaculture tenures in Haida Gwaii waters, offshore oil and gas development, the presence of oil tankers in Haida Gwaii waters, and the sale and trade of fish for economic purposes as part of Haida traditional use.[47]

The body of the Plan details various other complementary planning processes for Haida Gwaii, including PNCIMA, sets out the research informing the Plan, including a study of Haida marine traditional knowledge and a market sector analysis of the

[41] Marine Working Group "Cover Letter" of *Haida Gwaii Draft Marine Plan Version 2.1* (31 March 2014) at 1.
[42] Ibid.
[43] Ibid at 2.
[44] *Haida Gwaii Draft Marine Plan Version 2.1* (April 2014) at ii.
[45] Ibid.
[46] Ibid at iii.
[47] Ibid at 3-4.

marine region, and provides a definition for ecosystem-based management to inform its application. Interestingly, the Plan also describes Haida ethics and values that are said to underlie the approach to marine planning for Haida Gwaii and be considered the foundation of the Plan.[48] The Haida terms describing these ethics and values are translated as respect, responsibility, interconnectedness, balance, seeking wise counsel/intergenerational knowledge, and giving and receiving/reciprocity, and are then paired up with "scientific principles of ecosystem-based management" including the precautionary approach, inclusive and participatory, integrated management, sustainable use over the long term, adaptive management, and equitable sharing.[49] The Plan also sets out a vision and goals for Haida Gwaii, background describing the planning area and the issues it faces, and various goals and strategies for management of the area, like the creation of a representative network of marine protected areas as one example.

In terms of spatial zoning, the Plan sets out candidates for marine protected areas as "protection management zones" to put forward to the federal government, identifies areas of high priority for specific uses as "special management zones" as policy to inform tenuring and other marine use decisions, and allocates the remaining marine space as "general management zones" open to a wide variety of uses under the ecosystem-based management framework.[50] Based on these categories of zoning, the Plan addresses various sub-regions in turn, setting out decision-making frameworks for the various activities that will be permitted in each, and whether or not they will be subject to conditions.

In terms of how the Plan is to be implemented, it is intended to provide policy direction to the province and Haida Nation in the exercise of their respective authorities, but it is also contemplated that some of the Plan's "spatial and aspatial aspects" will be established as legal direction under provincial legislation and Haida laws.[51] In keeping with the precedent set by its complementary land use equivalent, the Plan also contemplates the formation of a technical coordinating body of provincial and CHN representatives to guide and oversee its implementation.[52]

D Reflections

The Haida Gwaii Draft Marine Plan has yet to be finalised and uncertainty remains as to what legal status this document will be given within Canadian law. At this stage,

---

[48] Ibid at 11.
[49] Ibid at 11-2.
[50] Ibid at 54-55.
[51] Ibid at 124.
[52] Ibid.

however, it is still useful to note how Indigenous legal projections of marine space have been incorporated and embodied within the spatial planning process as compared to how these projections fare when asserted before Canadian courts. When approached from the critical perspective espoused in this thesis, the Haida Gwaii Draft Marine Plan provides an interesting example of a projection of marine space that is neither grounded solely in the Canadian legal system's projection of that space nor that of the Haida Nation. This planning document is drafted on the basis that it is without prejudice to the distinctly different legal perspectives of Haida Nation and the Province, which each assert conflicting levels of ownership and jurisdiction over the same marine territory and resources. Yet irrespective of these contradictory legal positions the Plan sets out a framework for decision making that both parties are willing to accept as consistent with their own views on appropriate development of this territory and its resources.

The inclusion of Haida values and ethics to inform decision making under this plan is particularly interesting as a perspective of strong legal pluralism allows these normative principles to be seen as law in and of themselves. Incorporating these principles directly into the decision making framework proposed under the Plan appears to acknowledge an ongoing Indigenous legal order external to Canadian law that can provide a contemporary basis for decision making over marine resource management decisions. This can be contrasted with the second case study examined in the previous chapter, which illustrated the inability of Canadian courts to recognise and uphold First Nations' assertions of a role in the management of marine resources that is framed outside their right to be consulted as a user of certain resources. Although the marine spatial planning process is without prejudice to either party's legal rights it allows both parties to assert independent jurisdiction over the same territory so long as their vision for its development can be consensually reconciled with each other's.

There are clear limitations to the extent that this process can foster mutually agreeable outcomes, as the five marine uses exempted from this process clearly indicate. As addressed in the first chapter of this thesis, net pen salmon aquaculture, offshore oil and gas development, diluted bitumen tanker traffic and expansion of the sports fishing industry are areas of high controversy among many coastal First Nations including the Haida Nation. On the other hand, as identified in the third and fourth chapters of this thesis, Aboriginal activity rights to sell fish have been often claimed and rarely awarded. The fact that a disagreement on sale of Haida Nation's food, social and ceremonial fish allotment has been left aside from this agreement may indicate an unwillingness on the Province's part to concede more to Haida Nation than what they believe would be available through the courts, as well as a reluctance to address an aspect of fisheries management that largely falls within federal

jurisdiction. These five outstanding areas of disagreement may remain live issues that continue to be heard before Canadian courts. Yet at the same time that conflicts and disagreements persist over these controversial areas, greater business certainty has been provided for those developments that enjoy the joint endorsement of the Province and Haida Nation, backed by a process based in science, Indigenous knowledge, wide community consultation and an invocation of Haida ethics and values.

The Province's involvement in this process can facilitate certain forms of development and assist in achieving policy goals such as the establishment of a network of marine protected areas by restructuring and front loading their consultations with First Nations. The jurisprudence on the Crown's duty to consult Indigenous peoples supports the Province's ability to, in some circumstances, engage in joint consultation in which more than one First Nation is consulted at the same time through a multilateral process.[53] The Draft Haida Gwaii Marine Plan is unique as compared to the other regional plans created through the MaPP process in that the various First Nations communities consulted in its development have already self-organised into one Nation under the CHN. The other three sub-regional plans, on the other hand, all involve a number of different First Nations that have harmonised community level marine use plans into larger sub-regional documents.[54] By aggregating regional consultations in this way the Province is able to facilitate its engagement of coastal First Nation communities, potentially at the price of the autonomy of individual First Nations communities.[55] However, recent case law on the Crown's duty to consult in relation to MaPP's land use planning equivalent strongly suggests that this type of multilateral planning process will not displace the Province's duty to consult individual First Nations when they seek subsequent revisions to a plan.[56] Furthermore, the consensual nature of the planning process means that issues on which all participants cannot agree as between themselves may be left aside from the process and remain without prejudice to the differing positions of these participant groups.

---

[53] *R v Douglas* 2007 BCCA 265.

[54] See for example *Draft Central Coast Marine Plan Version 6.1* (June 2014), which was created by collaboration between the Province and the Heiltsuk, Kitasoo/Xai'Xais, Nuxalk and Wuikinuxw First Nations.

[55] For a further development of this line of argument see Morgan E Moffitt *Gitxaała Marine Use Planning: Making Indigenous Jurisdiction in Contemporary Aboriginal-State Relations* (MA thesis, University of British Columbia, 2010).

[56] *Da'naxda'xw/Awaetlala v British Columbia* 2011 BCSC 620.

E Conclusion

In summary, this joint marine spatial planning process provides an important point of contrast to the manner in which the Canadian legal system currently addresses Indigenous assertions of their own legal projections of marine space. Canadian jurisprudence has created room for First Nations to retain unique connections with their traditional marine territories through recognition of Aboriginal rights and, potentially, Aboriginal title within these areas. Thus far these legal doctrines have provided some preferential access to fishing activities as well as rights to consultation on Crown decisions that impact certain targeted fish stocks. If Aboriginal title to marine space is accepted by Canadian courts this may provide a greater interest that could carry with it a more significant role for First Nations in caring for and managing these marine territories, but the viability and specific scope and content of such a right has yet to be directly pronounced upon by any Canadian court. While this outstanding issue remains the subject of significant legal uncertainty, however, marine spatial planning has allowed coastal First Nations and the Province to move forward on charting a shared vision for development of these contested waters, a process in which First Nations are able to exercise final decision making authority that is informed by their own legal projections of marine space. In this way, the marine spatial planning process can be seen as more consistent with a model of reconciliation that acknowledges Indigenous peoples and the Crown as autonomous or incommensurable communities, relying as it does on mutual collaboration between these communities. This thesis will now turn to examine whether New Zealand's experience of marine spatial planning in the Hauraki Gulf is comparable.

PART III

You, the Government, have asked for the gold of Hauraki; we consented. You asked for a site for a town; you asked also that the flats of the sea off Kauwaeranga should be let; and those requests were acceded to. And now you have said that the places of the sea which remain to us will be taken. O friends, it is wrong, it is evil. Our voice, the voice of Hauraki, has agreed that we shall retain the parts of the sea from high-water mark outwards. These places were in our possession from time immemorial; these are the places from which food was obtained from the time of our ancestors even down to us their descendants . . . O friends, our hands, our feet, our bodies are always on our places of the sea . . . The men, the women, the children are united in this, that they alone are to have the control of all the places of the sea . . .

- Petitition of Tanameha Te Moananui and others, Pukerahui, 5 August 1869

VI NEW ZEALAND PROJECTIONS OF INDIGENOUS SPACE

A Introduction

This chapter is directed at my first research question in a New Zealand context, examining how New Zealand's legal system makes room for Indigenous peoples' unique projections of marine space within their traditional territories. This chapter first sets out how Māori interests are constructed in New Zealand law, paying particular attention to how Māori interests are taken into account for marine resource management. Due to New Zealand's unique historical and constitutional circumstances this brief overview will focus primarily on the Treaty of Waitangi and statutes that provide for Māori interests in marine resources. Following this legal overview, the chapter provides a brief analysis of the balance struck in New Zealand law between Crown sovereignty and Māori self-determination in this regime. The current legal framework in place in New Zealand will be examined from the same critical perspective on Indigenous-Crown reconciliation applied in previous chapters. Following this critique of New Zealand's overall legal framework for accommodating Māori interests, the next two chapters address in turn two case examples of how this legal framework address Indigenous assertions of marine space in practice, and the degree to which the Hauraki Gulf's marine spatial planning process might remedy gaps in this framework.

The legal issues addressed in this chapter are also important to set out for practical reasons when discussing marine spatial planning in New Zealand. Much like the situation in Canada, marine spatial planning within the coastal waters of New Zealand must account for the interests and rights of its Indigenous peoples in the marine area in order to be successfully implemented. New Zealand law recognises various Māori interests in marine resources and failure by decision makers to take these into account undermines the likelihood of the recommendations coming out of marine spatial planning in the Hauraki Gulf being successfully implemented.

Similar to the Canadian law chapter, this overview of New Zealand law on Māori interests in marine resources will not address in any detail the nature and scope of iwi-specific negotiated settlements between iwi and the Crown. A future negotiated settlement between the Crown and various iwi with interests in the Hauraki Gulf may involve a co-governance structure for the management of this marine territory,[1] and this could have important implications for the marine planning process. Settlements for iwi with interests in the Gulf that are finalised, however, are peripheral to understanding this process as they have limited effects on marine governance.

[1] See for example Ngāti Hei and the Crown *Agreement in Principle Equivalent* (July 2011) at [22].

B New Zealand Law's Construction of the Māori-Crown Relationship

The relationship articulated in New Zealand is unique in that it is largely mediated through the Treaty of Waitangi/Te Tiriti o Waitangi signed by the Crown and numerous Māori rangatira[2] in 1840. However, as the Indigenous peoples of New Zealand, Māori are also recognised in New Zealand's common law as having rights and interests in their territories and resources that predate both Crown sovereignty and the Treaty of Waitangi and are not premised on either of these for their existence.[3] New Zealand courts acknowledge that during colonisation by the British, New Zealand was not legally treated as terra nullius and the entire country was understood to be owned by Māori according to their customs and until their interests were alienated or otherwise extinguished by the Crown.[4] Similar to the situation of Indigenous peoples within Canada, questions remain outstanding with respect to the legitimacy of unilateral exercises of Crown sovereignty over Māori interests. Yet due to the particularities of the colonial history of New Zealand, this debate is primarily, though not exclusively, situated in the terms of the Treaty of Waitangi and the principles said to flow from these terms. Both within and outside the Treaty of Waitangi, however, the indigeneity of Māori has provided a powerful political and legal basis for the tempering of Crown power over their interests similar to the Canadian situation.

Legal recognition of the unique relationship between Māori and the Crown has primarily taken place by way of statutory recognition of Māori rights and interests, and through the jurisprudence generated in response to these instances of statutory recognition. References to Māori rights and interests can be found in both general legislation and specific negotiated statutes created to resolve the historical grievances of Māori iwi and hapū[5] against the Crown. Likewise, Māori customary rights have been found to persist within New Zealand's common law, although these rights remain susceptible to unilateral extinguishment or redefinition by legislation. Understanding the legal protections for Māori interests in marine resources and areas is key to articulating how these interests must be integrated into marine spatial planning processes. An overview on the Treaty of Waitangi and the manner in which

---

[2] Rangatira is typically translated into English as chief(s). See P M Ryan *The Raupō Dictionary of Modern Māori* (4th ed, Penguin Group, 2012).

[3] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) at [14]-[22] [*Ngāti Apa*].

[4] Ibid at [37].

[5] Iwi and hapū refer to Māori kin groups, and are typically translated as tribe and sub-tribe respectively. However, the relationships between hapū and iwi are "complex and not in a vertical hierarchy of authority". Iwi identifies a "wider district or sometimes regionally based kin group" that claims descent from a single distant ancestor, whereas hapū denotes "a larger village community" (although some villages may include several hapū). Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 42.

it has been incorporated into New Zealand will be set out below. Likewise a description of select instances of statutory recognition for Māori cultural interests in marine areas will be provided, as well as an introduction to some of the legislated customary rights Māori possess with respect to marine resources. Finally, this chapter will conclude with a brief summary on how these various legal recognitions of Māori interests construct an Indigenous-Crown relationship in New Zealand, followed by a more detailed discussion of case examples to illustrate this analysis.

C The Treaty of Waitangi

Legal conflicts and dialogues between Māori and Crown largely centre on a pair of historic documents, the English language Treaty of Waitangi and its Māori counterpart Te Tiriti o Waitangi (the Treaty).[6] Copies of these documents were signed by representatives of the British Crown and approximately 530 Māori rangatira from across New Zealand in 1840, with all but 39 of these rangatira signing a copy of the Māori text rather than the English rendition.[7] The intentions of the parties and the legal effects that flow from the Treaty's execution remain debated to this date.[8] These issues are largely beyond the confines of this thesis. However, as noted by legal scholar Matthew Palmer, its signatories were individuals capable of exercising significant public power in New Zealand in 1840 and the Treaty was clearly addressed at the question of who should exercise public power over the people and territory of New Zealand from the time of its signing onwards.[9]

The terms of the Treaty have been closely scrutinised over the past few decades and notable deviations between the English and Māori texts have provided an important source of debate as to the legitimacy of Crown power being unilaterally exercised over Māori interests. The English text sets out an exchange whereby Māori signatories ceded to the Crown "all rights and powers of Sovereignty" that they might exercise or possess over their territories in exchange for "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties", and "the

---

[6] See generally Claudia Orange *The Treaty of Waitangi* (2nd ed, Bridget Williams Books, Wellington, 2011) [Orange]; and Ruth Ross "Te Tiriti o Waitangi: Texts and Translations" (1997) 6 New Zeal J Hist 124.

[7] Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington, Victoria University Press, 2008) at 54.

[8] Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) [*Māori Magna Carta*]; Michael Belgrave *Historical frictions: Māori claims and reinvented histories* (Auckland University Press, Auckland, 2005) [Belgrave] ch 2; and Sir Ian Hugh Kāwharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989).

[9] Palmer, above n 7, at 31. See also Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).

Rights and Privileges of British Subjects".[10] The appropriate translation of the terms set out in the Māori text, on the other hand, is far from settled. New Zealand's courts have adopted the view that the first article of the Māori text contemplates a cession of "complete government" or "governance" (kawanatanga) to the Crown rather than sovereignty, coupled with a promise that their "unqualified exercise of chieftanship" (tino rangatiratanga) over their land, villages and treasures (taonga) would be respected.[11] How Māori signatories would have understood the terms of the Māori text of the Treaty has been the subject of significant academic analysis. For example, some argue that the Treaty would more likely have been understood as conferring protectorate status upon the Māori rather than ceding sovereignty,[12] whereas others argue that the Māori intention would have been to grant the Crown authority over British settlers only.[13]

New Zealand law has long acknowledged that the two versions of the Treaty do in fact differ substantially.[14] The legal ramifications of their asymmetry and questions this may pose for the legitimacy of Crown power has contributed in part to the complex area of New Zealand law in relation to Māori interests. In what might be the closest analogy to Canada's jurisprudence of reconciliation, New Zealand's legal institutions focus on what are termed the "principles" of the Treaty, described as the "underlying mutual obligations and responsibilities which the Treaty places on the parties", Māori and the Crown.[15] As the Treaty principles have been incorporated into numerous New Zealand statutes and policies and given rise to an important and varied body of jurisprudence over the past four decades, it is important to set out the nature of these principles in some detail.

1 The Treaty in principle(s)

The principles of the Treaty of Waitangi and Te Tiriti o Waitangi, as opposed to their actual terms, have been articulated through a complex dialogue between academics,

---

[10] Treaty of Waitangi Act 1975, sch 1.

[11] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA) [*SOE case*].

[12] Orange, above n 6, at 46; see also *SOE* case, above n 12, at 11 per Richardson J.

[13] Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Melbourne, 2005); Moana Jackson "Māori Law, Pākehā Law and the Treaty of Waitangi" in Project Waitangi and others (eds) *Mana Tiriti: the Art of Protest and Partnership* (Daphne Brasell Associates Press, Wellington, 1991).

[14] See for example Treaty of Waitangi Act 1975, preamble; see also *SOE case*, above n 11. For further context see Belgrave, above n 8.

[15] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*] at 517 per Woolf L. See also *SOE case*, above n 11.

the legislature, the judiciary and the Waitangi Tribunal.[16] The concept of Treaty principles can be traced to the enactment of the Treaty of Waitangi Act 1975, which established the Waitangi Tribunal as a permanent commission of inquiry to "make recommendations on claims relating to the practical application of the principles of the Treaty", and, for that purpose, to determine the Treaty's "meaning and effect", and "whether certain matters are inconsistent with [its] principles".[17] Nothing in the Waitangi Tribunal's enabling statute explicitly sets out what these principles encompass, and the Tribunal has since engaged with this broad mandate to derive principles from the Treaty—a process requiring it to blend both texts and extrapolate principles from the intentions and expectations of both parties as represented in their respective texts.[18] Likewise, through the explicit adoption of Treaty principles in other statutes, New Zealand's courts have also needed to weigh in on the content of these principles. In the courts' view Treaty principles are to be interpreted broadly as "reflect[ing] the intent of the Treaty as a whole" and these principles "include but are not confined to the express terms of the Treaty".[19]

As this thesis is concerned with the relationship between the legal obligations on the Crown with respect to Māori rights and interests in marine areas and the structure of the marine spatial planning process in which both parties are involved, the nuances of the Waitangi Tribunal's complex body of work considering Treaty principles predominantly fall outside the scope of this project, being non-binding on Crown actions as they are. Nevertheless, the Waitangi Tribunal's statements regarding Treaty principles have not been neatly segregated from judicial decisions on these principles. On the contrary, in a decision that has come to be regarded as the "most important foundation for the judiciary's view of the meaning of the Treaty",[20] the Court of Appeal stated that in interpreting the meaning of statutory references to Treaty principles it was necessary for the courts to give "much weight to the opinions of the Waitangi Tribunal" as expressed in its reports, though these opinions are in no way binding on the judiciary.[21] Since Treaty principles were first referenced in New Zealand legislation, the courts have engaged in a long and complex conversation with the Waitangi Tribunal, each citing decisions of the other in turn as matters came

[16] See Janine Hayward "'Flowing from the Treaty's Words': The Principles of the Treaty of Waitangi" in Janine Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Book, Wellington, 2004) [Hayward]; see also Palmer, above n 7, at 179-180.

[17] Treaty of Waitangi Act 1975, preamble.

[18] Treaty of Waitangi Act 1975, s 5(2); Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 189.

[19] *Broadcasting Assets*, above n 15, at 517 per Woolf L.

[20] Palmer, above n 7, 112.

[21] *SOE case*, above n 11, at 29-30 per Cooke P; see also *Ngāi Tahu Māori Trust Board v Attorney-General* HC Wellington CP 559/87, 610/87, 553/87 and 614/87, 12 November 1987 per McGechan J.

before each body for determination. For these reasons, and subject to these caveats, Treaty principles as extrapolated by both New Zealand Courts and the Waitangi Tribunal will be summarised here in brief.

2 Judicial statements on Treaty principles

New Zealand's judiciary has had nearly 40 years to reflect on the content and application of the Treaty of Waitangi's principles while determining the extent to which these principles provide grounds for the review of Crown decisions affecting Māori rights and interests. Nevertheless, judicial statements on these principles to date have been characteristically broad and abstract and so intertwined with one another in their content and application that they are not conducive to being exhaustively listed and discretely addressed. Instead this section sets out various statements from key decisions on the Treaty principles as background to a discussion of their relevance to marine spatial planning.

New Zealand's Court of Appeal was given its first opportunity to determine the Treaty principles in 1987. The New Zealand Māori Council asked the Court to review an exercise of Crown discretion pursuant to legislation that clearly stated "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[22] In finding the Crown action at issue to have been inconsistent with those principles, a unanimous Court of Appeal set out five separate judgments expanding on their content. Cooke P (as he then was) took the view that the Treaty needed to be seen as "an embryo rather than a fully developed and integrated set of ideas" when interpreting its legal impact.[23] He viewed the Treaty as signifying "a partnership between races",[24] putting the court in a position to question "what steps should be taken by the Crown, as a partner acting toward the Māori partner with the utmost good faith" in keeping with the legal obligations of a partnership.[25] Furthermore, he accepted that "the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties", and found that "the duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable".[26] In turn, "the duty to act reasonably and in the utmost good faith" also extended to Māori, who

[22] State-Owned Entreprises Act 1986 [SOE Act], s 9; *SOE case*, above n 11.
[23] Ibid at 35 per Cooke P.
[24] Ibid.
[25] Ibid at 36.
[26] Ibid at 37.

in Cooke P's view had "undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation".[27]

In the same case, Richardson J made the important statement that the Treaty's "history, its form and its place in [New Zealand's] social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise".[28] Richardson J also added further content to the reciprocal duty of the Treaty partners to act reasonably and in good faith towards one another. In his view this duty put an onus on the Crown to be sufficiently informed as to relevant facts and law in relation to the Treaty impacts of its actions, and meeting this standard would in many cases require "some consultation".[29] Speaking to the difficulties of placing a general duty to consult on the Treaty partners, he went on to opine that in some circumstances the partners' duties would give rise to a need for "extensive consultation and co-operation" whereas in other circumstances a Treaty partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty "without any specific consultation".[30]

In a subsequent 1989 decision of the Court of Appeal, addressing a related exercise of Crown discretion pursuant to the same statutory provision, Cooke P further opined on the consultation requirements of the duty to act reasonably and in good faith under Treaty principles. In his view consultation was necessary on "truly major issues" such as the Crown's general decision to sell forestry assets subject to Māori claims in that case.[31] Cooke P noted the complaint of the Māori appellants that the Crown proposal at issue had been presented to them as a fait accompli, and stated that such action "would not represent the spirit of the partnership which is at the heart of the principles of the Treaty" as expressly referenced in the statute at issue.[32]

In 1993 the Privy Council, then New Zealand's highest appellant court, had its own opportunity to weigh in on the Treaty principles for the first time since this concept had been introduced into New Zealand's statutory law. Hearing an appeal on yet another challenge to the transfer of Crown assets, this time relating to public broadcasting assets, the Privy Council recognised the Crown's "solemn" obligation to protect and preserve Māori taonga as constituting the foremost of all Treaty

---

[27] Ibid.
[28] Ibid at 14-15 per Richardson J.
[29] Ibid at 40.
[30] Ibid.
[31] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 [*Forestry Assets*] at 21.
[32] Ibid at 22.

principles.[33] In this case the legal challenge related to the Crown's obligation to protect and preserve te reo Māori, the Māori language, and the Privy Council wholeheartedly endorsed the Waitangi Tribunal's view that this constituted a taonga that attracted protection under the Treaty. However, in Lord Woolf's view this obligation was qualified both by the Crown's role as government of New Zealand and by the relationship between Māori and the Crown, which in his view "should be founded on reasonableness, mutual cooperation and trust".[34] In expanding on the reasonableness aspect of this relationship, Lord Woolf noted that although the Crown's obligation to Māori is constant, "the protective steps which it is reasonable for the Crown to take change depending on the situation that exists at a particular time".[35] By way of example, Lord Woolf noted that in times of recession the Crown may be seen as acting reasonably if it decided against making heavy expenditures in order to fulfil its Treaty obligations. Yet on the other hand, where a taonga is in a vulnerable state, such as that of te reo Māori at the time, the Crown may be required to take especially vigorous action.

In 2002 New Zealand's Court of Appeal endorsed a further interpretation of the Crown's obligation to protect and preserve Māori "properties" or taonga as extending to spiritual and intrinsic values.[36] This case involved a legal challenge to a prison proposal stemming from Māori concerns that the development would impact a taniwha[37] said to dwell at or near its proposed location. Although the Māori appellants were unsuccessful at all levels of appeal, the Court of Appeal did accept that Māori belief in the taniwha was a matter warranting consideration by decision makers under the Resource Management Act.[38] The Court of Appeal and lower courts all accepted the premise that active protection of Māori taonga under this Act "may, in some cases, require decisions to be made according to tenets of Māori spiritual beliefs, where those are significant".[39]

Other related principles, extrapolated from court decisions and reports of the Waitangi Tribunal, are also acknowledged by the courts as being relevant to the interpretation

---

[33] *Broadcasting Assets*, above n 15, at 517.

[34] Ibid.

[35] Ibid.

[36] *Friends and Community of Ngawha v Minister of Corrections* (2002) 9 ELRNZ 67, [2003] NZRMA 272 (CA) [*Ngawha*] at [17].

[37] After considering evidence from various witnesses in relation to the taniwha Takauere, the Environment Court described the taniwha as "not a human person, nor a physical creature" but rather a "mythical, spiritual, symbolic and metaphysical being" for the purposes of its judgement. *Beadle v Minister of Corrections* EC Wellington A74/02, 8 April 2002 at [436].

[38] *Ngawha*, above n 36, at [23].

[39] *Ngawha*, above n 36, at [21], citing *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC).

of statutes incorporating Treaty principles. In *Carter Holt Harvey Ltd v Te Rūnanga o Tūwharetoa ki Kawerau* the High Court attempted to list the Treaty principles as of 2002. Of particular relevance to marine spatial planning, these principles include an obligation for the Treaty to be adapted to modern, rapidly changing circumstances, and the Crown's obligation to recognise rangatiratanga was said to potentially encompass "a tribal right to manage resources in a manner compatible with Māori custom", among others.[40]

Nevertheless, judicial consideration of Treaty principles to date has largely centered on both the Crown's obligation to actively protect Māori interests and the Treaty partners' mutual obligations to act reasonably and in good faith towards one another, as set out above. The precise legal ramifications of these principles continue to evolve. For example, in the recent 2014 High Court decision in *New Zealand Steel Mining Ltd v Butcher* the Court rejected a characterisation of the duties of reasonableness and good faith as amounting to fiduciary obligations in reliance on the Court of Appeal's decision in *Paki v Attorney General*.[41] The Court of Appeal in *Paki* clearly expresses doubts as to the practicality and desirability of adopting a fiduciary standard in the Crown-Māori context, [42] though to say the Court rejected this interpretation may be to overstate the matter. Regardless, as the High Court acknowledged, this legal issue has been argued before the Supreme Court and its final decision on this matter remains reserved.[43] The issue of consultation with Māori has also been the subject of continuing litigation and judicial interpretation since this principle was first articulated by the Court of Appeal.[44]

Although there remains uncertainty as to the exact form and application of the Treaty principles, recent decisions indicate a continued willingness of the courts to review Crown discretion on the basis of these principles so long as they have a statutory basis to do so.[45] The Courts have also indicated their continuing willingness to look directly to Waitangi Tribunal jurisprudence for guidance on how Treaty principles apply in

---

[40] *Carter Holt Harvey Ltd v Te Rūnanga o Tūwharetoa ki Kawerau* [2003] 2 NZLR 349 at 360.

[41] *New Zealand Steel Mining Ltd v Butcher* [2014] NZHC 1552 at [49], citing *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 (CA) [*Paki*].

[42] See *Paki*, above n 41, at [102]-[118]. For a discussion of this aspect of the Court of Appeal's ruling see Ling Yan Pang "Ko Ngā Take Ture Māori: A Relational Duty of Good Faith: Reconceptualising the Crown-Māori Relationship" (2011) 17 Auckland U L Rev 249.

[43] *Paki v Attorney-General* [2012] NZSC Trans 50.

[44] See for example *Trustees of Tuhua Trust Board v Minister of Local Government* [2012] NZEnvC 202; and *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources* [2012] NZHC 1422.

[45] See for example *New Zealand Māori Council v Attorney General* [2013] NZSC 6 [*Water case*] and *Ririnui v Landcorp Farming Ltd* [2014] NZHC 1128, both finding Crown conduct reviewable on the basis of s 9 of the SOE Act, above n 22.

particular circumstances.[46] This highlights the need to acknowledge the Tribunal's views in addition to those of the Courts to fully understand the legal force of these principles in constraining Crown actions.

3 Tribunal statements on Treaty principles

As an administrative tribunal, the Waitangi Tribunal is not bound by its past decisions and these decisions are not subject to any hierarchy between themselves, which has allowed subsequently constituted Tribunals to regularly revisit their predecessors' findings on what constitute Treaty principles.[47] The Tribunal does however consider past authorities and case law in its determinations, acting "very much like a court" in arriving at its decisions.[48] Furthermore, leading New Zealand academics have conducted extensive analyses of the Treaty principles articulated by the Waitangi Tribunal since its inception, and these do indicate some consistency over time even if the doctrine of precedent is not strictly applied.[49] At the time of writing, the most recent Waitangi Tribunal report to set out an extensive summary of Treaty principles was *Te kāhui maunga*, and for the purposes of this thesis its summary will be relied on as the primary source of Tribunal views on these principles.[50]

As a starting point for its discussion of Treaty principles, the Tribunal sets out its endorsement of past Tribunal views on the nature of public power that was ceded to the Crown under the first article of the Treaty, kāwanatanga. According to the Tribunal, kāwanatanga signified the right of the Crown to govern and make laws for the whole of New Zealand, whereas the public power reserved for Māori under the terms of the second article, tino rangatiratanga, constituted Māori signatories' chiefly authority over the affairs of their people. Māori sovereignty is characterised as having been ceded to the Crown in exchange for the protection of tino rangatiratanga, and the interplay between these two sources of public power is said to lie at the core of the Treaty relationship between Māori and the Crown.[51]

In relation to the principle of partnership, as developed primarily in the New Zealand Court of Appeal decisions cited above, the Tribunal goes so far as to state that this principle includes a duty of the Crown to obtain the full, free and informed consent of

---

[46] See *Water case*, above n 45.

[47] Hayward, above n 16, at 40; Palmer, above n 7, at 113.

[48] Andrew Sharp "Recent juridical and constitutional histories of Maori" in Andrew Sharp and Paul McHugh *Histories, power and loss* (Bridget Williams, Wellington, 2001) at 31-33.

[49] See Hayward, above n 16; see also Palmer, above n 7, at 112-120.

[50] Waitangi Tribunal *Te kāhui maunga: the National Park District Inquiry Report* (Wai 1130, 2013) at 14-19.

[51] Ibid at 15.

the correct rights holders in any transaction for their land.[52] This endorsement of language similar to the standard of free, prior and informed consent set by the United Nations Declaration on the Rights of Indigenous Peoples amounts to a far more muscular interpretation of the partnership principle than any statement issued by New Zealand Courts to date.

The Tribunal also recognises a principle of reciprocity. In its view the partnership between Māori and the Crown necessitates that the Crown and Māori develop arrangements between themselves that account for both the Crown's "wider responsibility" and the more specific protection of tino rangatiratanga, with neither form of public power being absolute. The Tribunal went on to cite a previous report's statement that the Treaty arrangements assumed a sharing of natural resources and the development of these resources would inevitably lead to "some modification of taonga", "[b]ut the key was to ensure that both the Crown and Māori had the right to participate in how such development should proceed".[53]

Arising from these two principles, the Tribunal expounds a further Treaty principle of autonomy, which holds that Māori are able to exercise authority over their own affairs within the parameters set out in the principles of partnership and reciprocity. In other words, Māori are to be accorded autonomy within a public power framework of Crown sovereignty and subject to the sharing of natural resources presumed under the principle of reciprocity.

In expanding on the Crown's duty of active protection of Māori rights and interests, the Tribunal states that this principle requires "honourable conduct by, and fair processes from, the Crown". The Tribunal also views this principle as necessitating "consultation with – and where appropriate, decision-making by – those whose interests are to be protected". The Tribunal's robust interpretation of this principle goes so far as to require that "the Crown to ensure that Māori are able to keep their land and taonga for as long as they wish", mirroring the wording of the Treaty's Article Two, and that Māori are able to "retain sufficient land and assistance for their future well-being".[54]

A further relevant and related Treaty principle discussed by the Tribunal is one they characterise as "options". In the Tribunal's view, since the culture, customs and tribal authority of Māori were guaranteed and protected by the Treaty, Māori were intended to have "options" as to the form they would take in the new post-Treaty society. The Tribunal finds that Māori were intended to be free to make their own decisions and

[52] Ibid.

[53] Ibid at 16.

[54] Ibid.

able to opt "to continue their tikanga (customary values and practices) and way of life largely as it was, or to assimilate to the new society and economy, or to combine elements of both and walk in two worlds".[55]

The Tribunal has also extracted a principle of equity from the Treaty that requires the Crown to treat Māori groups and settler society "equally in accordance with the principles of partnership, reciprocity, active protection, and autonomy". This means that the Crown must ensure settlers' interests are not prioritised to the disadvantage of Māori, and where such disadvantage has occurred, the Crown must actively intervene to restore the balance.[56]

The Tribunal extrapolates on further Treaty principles including that of mutual benefit between Māori and the Crown, a principle of equal treatment between Māori groups, a right to development for Māori, a right to redress for past Treaty breaches, and the Crown's right to pre-emption of Māori land under the Treaty, though these are of more limited relevance to Māori involvement in marine spatial planning processes.

Overall, the Tribunal's views on the Treaty principles are of interest to this thesis project for two main reasons. First, they set an important measure for the legitimacy of government action over Māori rights and interests since the Tribunal has the authority to reach non-binding conclusions that legislation or government action breaches these principles. Second, their views may also be relevant to the legality of such government action since Tribunal statements may be expressly adopted and approved by New Zealand's Courts when addressing questions of Crown compliance with Treaty principles. To the degree that the Tribunal's current views on these principles go beyond the limits of the Courts' interpretations it has set out a more potent role for Māori self-determination in the balancing of public power in New Zealand. This is particularly evidenced by their strong interpretations of the role for the principles of partnership and active protection in securing Māori rights and interests, as well as their novel principles of autonomy and reciprocity that support greater involvement in the management of their taonga.

According to legal academic Matthew Palmer, the Tribunal's findings also tend to place "a more hard-edged emphasis on defining and upholding substantive Māori rights and interests under the Treaty than do other institutions that exercise public power" such as the Courts.[57] This is no doubt in part a function of the broader mandate of the Tribunal which allows it to hear Māori claims to substantive rights and

[55] Ibid.

[56] Ibid at 17.

[57] Palmer, above n 7, at 120.

interests in natural resources such petroleum[58] or the foreshore and seabed[59], as well as to greater roles in the governance of those resources[60]. Likewise, it is in keeping with New Zealand courts' traditional orientation towards process rather than outcomes when judicially reviewing the exercise of Crown powers. So long as the Treaty and its principles are not constitutionally entrenched in New Zealand law the Tribunal will play a key role in demarcating substantive rights for Māori, treading where Courts have less jurisdictional ground to stand on.

4 The Treaty in force

The Treaty of Waitangi has been famously described by Sir Geoffrey Palmer as existing "half in and half out" of New Zealand's legal system.[61] This is in part due to the fact that the principles of the Treaty of Waitangi have yet to be recognised by New Zealand Courts as directly enforceable without statutory incorporation, with the judiciary instead deferring to an orthodox view of the Treaty as "a treaty of cession at common law that does not confer common law rights".[62] Yet even outside of acts of Parliament the Treaty principles still permeate New Zealand law as, in the words of the Court of Appeal, "part of the fabric of New Zealand society".[63] New Zealand's courts have accepted the Treaty as an extrinsic aid to the interpretation of legislation "which impinges upon its principles", regardless of whether the Treaty is explicitly referenced.[64] Likewise, Treaty principles may be given "direct impact" in the judicial review of executive action as a mandatory consideration to be taken into account, even absent statutory incorporation.[65] One member of the Court of Appeal has gone so far as to suggest, albeit in dissent, that Treaty principles may be generally relied upon as a basis for a legitimate expectation of Māori that the Crown will act in accordance with these obligations, with failure to do so giving rise to a right to judicial review.[66] Nevertheless, the preponderance of New Zealand's jurisprudence on

---

[58] See Waitangi Tribunal *Petroleum Report* (Wai 796, 2003).

[59] See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004).

[60] See Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) ch 3.

[61] See for example Geoffrey Palmer "The Treaty of Waitangi – Where to From Here?" (2007) 11(3) Otago LR 381 at 383.

[62] See *Takamore v Clarke* [2011] NZCA 587 at [248] fn, citing *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* (1941) AC 308.

[63] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 51.

[64] Ibid; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).

[65] *New Zealand Māori Council v Attorney-General* [2007] NZCA 269 at [66]-[71] in reference to *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 192 (CA) [*Radio Frequencies case*]. Notably the mandatory consideration upon which judicial review was upheld in the 1991 decision was not directly any Treaty principle, but rather a report of the Waitangi Tribunal in relation to, inter alia, Treaty principles.

[66] *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 [*Radio assets* case].

Māori rights and interests under the Treaty has been generated by the Courts in response to express references to the Treaty and its principles in domestic legislation—not surprising considering that over 100 New Zealand statutes contain such references.

For the purposes of this thesis, the two most relevant statutory references to Treaty principles in New Zealand's legislation are contained in section 4 of the Conservation Act 1987 and section 8 of the Resource Management Act 1991 (RMA). Broadly speaking the Conservation Act sets out a legislative framework for management of New Zealand's conservation estate, including coastal and marine components, and establishes a corresponding administrative regime. The RMA sets out a framework for decision-making applicable to almost any use of land, air or water within New Zealand's full sovereign jurisdiction, which includes developments within marine and coastal territories such as aquaculture tenures and ports. Section 4 of the Conservation Act broadly states that the Act is to be "interpreted and administered as to give effect to the principles of the Treaty of Waitangi", whereas section 8 of the RMA requires persons exercising functions or powers under that Act to "take into account" these principles. Both provisions constitute what legal academic Matthew Palmer describes as "unelaborated legislative references to the Treaty" that leave discretion for the Courts to work out their meaning in context to individual cases.[67] In Palmer's estimation, although the statutes contain different formulations of the legal force afforded to these principles, the actual outcomes of their application will be more influenced by the facts and contexts of the cases in which they are invoked.[68]

The Conservation Act is particularly relevant to marine spatial planning in New Zealand due to the various subordinate pieces of legislation set out in Schedule 1 of this Act, with significant inclusions being the Marine Mammals Protection Act 1978 and the Marine Reserves Act 1971. The RMA provides for the comprehensive regulation of almost any development that is proposed to take place on land or in marine waters within the limits of New Zealand's territorial sea, including the entirety of the Hauraki Gulf. Due to the highly context dependent manner in which the Treaty and its principles are applied under these two statutes, rather than attempting a comprehensive outline of their application it may be of more use to focus on a few relevant case examples in the next chapter. First, however, the incorporation of specific Māori cultural interests into the RMA warrants some prior explanation, as does the incorporation of Māori customary rights into other statutory schemes in New Zealand. As will be illustrated in the cases explored at the end of this chapter, these

[67] Palmer, above n 7, at 182-183.
[68] Ibid at 183.

various locations of statutory recognition for Māori interests overlap and interact in any given case and are not conducive to discussion in isolation from one another.

D Legislating Māori Relationships in the Resource Management Act

As noted above, the RMA sets out the primary decision making framework for environmental planning and management within the confines of New Zealand's full sovereign jurisdiction. Parliament has set out the purpose of the RMA as promoting the 'sustainable management' of New Zealand's natural and physical resources, which it defines as enabling "people and communities to provide for their social, economic, and cultural well-being" while (among other things) "avoiding, remedying, or mitigating any adverse effects of activities on the environment".[69] The 'people and communities' whose cultural well-being must be provided for under the RMA include specific Māori peoples or communities such as iwi and hapū.[70] In order to achieve this vision of sustainable management, including cultural well-being, Parliament has designated territorial authorities,[71] regional councils,[72] the Environmental Protection Authority,[73] and the Environment Court[74] as relevant decision making bodies for almost any proposed activity with effects on New Zealand's natural or physical resources. Section 33 of the RMA provides for the potential delegation of a local authority's powers to an iwi authority, but a survey conducted in 2010 indicates that even 19 years after the RMA came into effect no single transfer of power under this provision had yet occurred.[75] As a result, for the purpose of ensuring Māori cultural well-being is provided for in resource management decisions to be met, Māori must rely heavily on the decision-making bodies empowered under the RMA and their ability to take into consideration the relationship between Māori and rohe and taonga..

In keeping with this approach, the RMA has explicitly provided guidance to decision makers under the Act as to how Māori culture ought to be taken into consideration through two key provisions. First, section 6 of the Act requires decision-makers to "recognise and provide for … matters of national importance" that include "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga"[76] and "the protection of protected customary

---

[69] S 5(2).

[70] *Aqua King (Anakoha Bay) v Marlborough District Council* EC W71/97, 30 June 1997 at 13.

[71] Resource Management Act 1991 [RMA] at s 31.

[72] Ibid at s 30.

[73] Ibid at s 42C.

[74] Ibid at part 11.

[75] Nicole McCrossin "Intention and Implementation: Piecing Together Provisions for Māori in the Resource Management Act 1991" (MA thesis, Otago University, Dunedin, 2010) at 69.

[76] RMA, s 6(e).

rights" when exercising functions and powers under the RMA.[77] Second, decision-makers must "have particular regard to …kaitiakitanga" when exercising functions and powers under the RMA.[78] Within these two provisions are a wide variety of Māori cultural concepts that require some further explication as well.

The ancestral lands of Māori under s 6(e) have been broadly defined as "land which has been owned by ancestors".[79] Ancestral water has yet to be defined in the jurisprudence though it could readily be understood by analogy as water(s) owned by Māori ancestors. It has been applied to acknowledge the national importance of customary shellfish harvesting sites of Māori.[80] Wāhi tapu is a term frequently translated into English as 'sacred place'.[81] Rather than defining the term, decision makers under the RMA apply a test to determine whether a specific site constitutes wāhi tapu;[82] however, one description that has been accepted for this Māori cultural concept is "physical features of phenomena, either on land or water, which have spiritual, traditional, historical or cultural significance to Māori people".[83] On the other hand, it has been suggested elsewhere that only spiritual or religious sites may be so classified rather than secular sites of historic Māori occupation.[84] This term is also described by New Zealand's legislation for the administration of Māori land interests as "a place of special significance according to tikanga Māori".[85]

The term taonga in the RMA corresponds with Article 2 of the Treaty and is not defined in the Act. As addressed earlier in this chapter, it can extend to physical and cultural resources of Māori, including their language, or even spiritual or intrinsic values. Kaitiakitanga, on the other hand, has been defined in the RMA as "the exercise of guardianship by the tangata whenua of an area (the iwi or hapū with customary authority over an area) in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship".[86] This concept is particularly interesting as it has been interpreted as requiring ongoing involvement of Māori in the management of development within their traditional area or rohe in

---

[77] Ibid, s 6(g).

[78] Ibid, s 7(a).

[79] *Cammack v Kapiti Coast District Council* [2009] NZEnvC 222 at [186].

[80] *Te Rūnanga O Taumarere v Northland Regional Council* PT A108/95, 24 November 1995 at 56.

[81] See for example *Ngāi Tumapuhiaarangi v Carterton District Council* HC Wellington AP6/01, 25 June 2001 [*Ngai Tumapuhiaarangi*].

[82] *Winstone Aggregates Ltd v Franklin District Council* EC Auckland A80/02, 28 April 2002 at 62.

[83] *Land Air Water Association v Waikato Regional Council* EC Auckland A11/01, 23 October 2001.

[84] Ibid at 111. See however *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 at 370 for a more expansive application of the concept.

[85] Te Ture Whenua Māori Act, s 338(1)(b).

[86] RMA, s 2(1).

order to ensure kaitiakitanga is exercised in accordance with tikanga Māori or Māori customs and practices.[87]

Much like the application of the Treaty provision at section 8 of the RMA, the manner in which these various statutory incorporations of Māori cultural concepts into the RMA are dealt with in practice is best illustrated through the discussion of specific case examples in the subsequent chapter. As a general introduction, however, these references to Māori culture must be understood as constituting just a selection among numerous other considerations that are considered together by the decision makers under the RMA.

The RMA jurisprudence of the Environment Court has described the relationship between the Act's sustainable management purpose (s 5), matters of national importance such as the relationship between Māori and certain cultural attachments (s 6), other matters such as kaitiakitanga (s 7), and the principles of the Treaty (s 8) as forming a hierarchy, with sustainable management sitting at the top of this hierarchy.[88] Decision makers must "weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole" when determining whether a specific development with effects on Māori interests is appropriate.[89] In this process of weighing and balancing the cultural references in these provisions against other considerations under the Act, such as the "social and economic wellbeing" component of sustainable management's definition in s 5, Māori cultural references are "important but not decisive even if the subject matter is seen as involving Māori issues".[90] As one decision stated the matter, these cultural references do not confer on Māori a right of veto to development.[91] The Privy Council has nevertheless characterised them as "strong directions" to those exercising discretion under the Act.[92]

E Customary Rights - Pre-contact Customs in Post-colonial Statutes

One of the most notable differences between the legal systems of New Zealand and Canada in terms of how the relationship between Indigenous peoples and Crown

---

[87] *Tautari v Northland Regional Council* PT Auckland A55/96, 24 June 1996; *Minhinnick v Minister of Corrections* EC Auckland A43/04, 6 April 2004.

[88] *Waikanae Christian Holiday Park v Kapiti Coast District Council* HC Wellington CIV-2003-485-1764, 27 October 2004 at [99], followed in *Heybridge Developments Ltd v Bay of Plenty Regional Council* (2011) 16 ELRNZ 593, [2012] NZRMA 123 (HC) at [64].

[89] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 295 (CA) at 305, followed in *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [56].

[90] Ibid.

[91] *Ngāi Tumaphuiaarangi*, above n 81, at [35].

[92] *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].

power has been constructed is the relevance of statutory law to that relationship. As Indigenous rights are constitutionalised in Canada statutory attempts at constraining or defining these rights are at risk of being found of no force or effect by the courts and can act as a lightning rod for litigation, with the result that most Canadian jurisdictions avoid a legislative approach. The strong sense of parliamentary sovereignty embraced in New Zealand's jurisprudence, on the other hand, makes legislation the primary locus at which Māori interests are given legal shape and effect in the common law. Although the two countries' respective jurisprudence overlaps somewhat with respect to the recognition of common law customary rights, in New Zealand these are subject to significant legislative restructuring. This section will briefly outline the manner in which potential Māori customary fishing rights and marine title have been first partially recognised as pre-sovereignty interests, then subsequently reshaped and constrained by statute.

As noted earlier in this chapter, New Zealand's jurisprudence has acknowledged that Māori held a form of customary title to the majority of New Zealand's land base prior to European contact that shared the same common law roots as the concept of Aboriginal title recognised in Canada. However, over the course of New Zealand's colonial history Māori title to New Zealand's dry land base was progressively almost entirely extinguished through expropriation and conversion of collective land titles into fee simple by operation of the Native Land Court (now the Māori Land Court)—an institution that the Waitangi Tribunal has described as "designed openly to destroy tribal titles" and "flatten out the network of rights in Māori tenure" in reference to its historic manifestation.[93] The Māori Land Court and its enabling statute, Te Ture Whenua Māori Act 1993, have been reformed to promote retention of what remains of the Māori land base and provide detailed provisions as to how these lands are to be managed and developed. Disputes over land that is no longer under Māori ownership, on the other hand, are more often focused on historic breaches of the Treaty in terms of how these lands were expropriated or converted or are addressed through recognition of Māori ongoing cultural connections to these ancestral lands. Nevertheless, some important legal conflicts and evolutions in the Māori-Crown relationship have been fuelled by the reassertion of customary rights within the interstitial spaces of New Zealand's statutory law.

1 Customary fishing under delegated rangatiratanga

In the 1980s New Zealand's courts recognised the possibility of customary fishing rights for Māori that parallel the Aboriginal activity rights of First Nations acknowledged by Canadian courts. One case in which such a right was found to exist

[93] Waitangi Tribunal *Turanga Tangata, Turanga Whenua: The Report on the Tūranganui a Kiwa Claims, Vol II* (Wai 88, 2004) at 436.

is the 1986 High Court decision of *Te Weehi v Regional Fisheries Officer*.[94] This was a case in which a customary fishing right was successfully relied upon by a Māori individual as a defence in a prosecution for harvesting undersized paua (abalone). Among the domestic and comparative sources of common law jurisprudence that the High Court relied upon in *Te Weehi*, several Canadian decisions were cited with approval for the principle that Indigenous customary rights survive Crown sovereignty unless extinguished by way of "specific legislation that clearly and plainly takes away the right".[95] The statute in place to regulate New Zealand's fisheries at that time specifically exempted "Māori fishing rights" from its purview, giving the Court some legal space to conclude that such a standard had not been met.

In several subsequent cases customary fishing rights were raised as defences to similar charges under New Zealand's fisheries legislation with variable success.[96] Courts were unclear as to whether such rights arose by virtue of the Treaty or a concept similar to the Canadian doctrine of Aboriginal rights, though they held the distinction to be of little practical effect.[97] During this same period, a consortium of Northland iwi that relied heavily on fishing for their subsistence brought a major claim to the Waitangi Tribunal with respect to infringements of their fishing interests as protected under the Treaty.[98] These developments happened to coincide with an extensive reform of fishing licencing in New Zealand to a quota management system. The quota management system purported to create a property right in the fisheries at the very same time that dominion if not ownership over these fisheries was actively being contested between Māori and the Crown. Māori were able to obtain an injunction against allocation under this new fisheries management scheme[99] and a complex intersection of litigation, Waitangi Tribunal claims, and negotiations were undertaken to resolve this dispute, resulting in a complete overhaul of fisheries management in New Zealand, the specifics of which go well beyond the scope of this thesis.[100] What is relevant to this discussion, however, is that the ultimate form of

---

[94] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

[95] Ibid at 691, citing *Baker Lake v Minister of Indian Affairs and Northern Development* [1980] 1 FC 518 (TD); *Calder et al v Attorney-General of British Columbia* [1973] SCR 313; and *Guerin v The Queen* [1984] 2 SCR 335.

[96] See for example *Ministry of Agriculture and Fisheries v Love* [1988] DCR 370 (DC); *Ministry of Agriculture and Fisheries v Hakaria* [1989] DCR 289 (DC); *Green v Ministry of Agriculture and Fisheries* [1990] 1 NZLR 411 (HC); and *Taranaki Fish and Game Council v McRitchie* [1997] DCR 446 (DC) [*McRitchie*].

[97] *McRitchie*, above n 91, citing *Te Rūnanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) [*Muriwhenua*] at 655.

[98] Waitangi Tribunal *Muriwhenua Fishing Report* (1988, Wai 22).

[99] See *Muriwhenua*, above n 97.

[100] See generally Michael Robinson "The Sealord Fishing Settlement: An International Perspective" (1993) 7 *Auckland University Law Review* 557; Aroha M Wactford "Treaty of Waitangi (Fisheries

Māori commercial and customary fishing rights in New Zealand law today is the product of statutes enacted as a negotiated settlement to this complex political and legal dispute.

One important aspect of this settlement is the significant interest in commercial fishing it vested in Māori. Arising from an interim settlement of this dispute, the Crown first transferred 10% of existing commercial fishing quota to a commission charged with distributing these assets to Māori under the now repealed Māori Fisheries Act 1989.[101] Three years later a final settlement was agreed upon and implemented through the now partially repealed Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which included a further transfer of 20% of the total allowable catch for any additional fish quota to Māori as well as provision of funding for Māori to purchase a half share of what was then the largest fishing company in New Zealand. The primary statute now in place in relation to Māori commercial fishing interests in the Māori Fisheries Act 2004 that manages the allocation and distribution of these settlement assets and income earned from them as between various Māori groups.

In terms of customary fishing rights this settlement has also provided two key mechanisms under which Māori may obtain delegated authority for fisheries management. First, under sections 174-185 of the Fisheries Act 1996 it is possible for Māori to propose that certain limited areas of New Zealand's coastal waters ("estuarine or littoral coastal waters") are designated 'taiāpure-local fisheries' and set aside for delegated management by iwi or hapū. These proposals must establish the customary reliance of an iwi or hapū on these areas as either a source of food or for spiritual or cultural reasons,[102] and explain the policies and objectives proposed for the management of that area.[103] Whether such a proposal is accepted will depend on an exercise of the Minister of Primary Industries' discretion for which they must have regard to both the proposal's size and its impacts on others' interests.[104] Likewise, although the iwi or hapū proposing the taiāpure-local fishery nominates members to sit on a management committee for this fishery, appointments are ultimately under the Minister's authority.[105]

Claims) Settlement Act 1992" (1993) 7 Auckland U L Rev 402; Randall Bess "New Zealand's indigenous people and their claims to fisheries resources" (2001) 25(1) Mar Policy 23; and *Māori Magna Carta*, above n 8, at 130-131.

[101] Māori Fisheries Act 1989 (repealed), s 40

[102] Fisheries Act 1996, ss 174, 176(2)(a) and 177(3)(a).

[103] Ibid, s 177(3)(b).

[104] Ibid, s 176(2).

[105] Ibid, s 184.

A second form of delegated authority to Māori over customary fisheries was achieved at a more advanced stage of settlement for Māori fisheries claims through the creation of two regulations under the Fisheries Act 1996: the Fisheries (Kaimoana Customary Fishing) Regulations 1998 applying to the North Island and the Chatham Islands; and the Fisheries (South Island Customary Fishing) Regulations 1999 applying in the South Island and Stewart Island/Rakiura. These regulations provide for iwi or hapū to manage customary food gathering within their rohe moana (marine territory) through the appointment of Tangata Kaitiaki/Tiaki (local guardians) that oversee the issuance of customary fishing authorisations for each rohe moana.[106] The regulations provide Tangata Kaitiaki/Tiaki with opportunities to prepare planning documents for customary fishing within their rohe moana,[107] as well as input into sustainability and management measures for these areas.[108] Furthermore, these regulations allow for Tangata Kaitiaki/Tiaki to propose that areas within their rohe moana be declared mātaitai reserves in which commercial fishing is excluded unless otherwise specified.[109] Whether the Minister of Primary Industries accepts a proposal for a mātaitai reserve similarly requires satisfactory evidence of a special relationship between an iwi or hapū with the marine area in question, as well as consideration of the proposed reserve's size and impact on others' interests.[110] However, the Minister retains no discretion over the appointment of the Tangata Kaitiaki/Tiaki nominated under these regulations,[111] and the process for obtaining a declaration of a mātaitai reserve has proven to be far faster and more efficient than the taiāpure process.[112]

2 Customary title on legislated terms

Between 1997 and 2004 New Zealand's courts were again faced with Māori claims to unextinguished customary rights, this time in the form of customary title to portions of the foreshore and seabed,[113] with this litigation culminating in the New Zealand

---

[106] Fisheries (Kaimoana Customary Fishing) Regulations 1998 [Kaimoana Regulations], ss 5-11; and Fisheries (South Island Customary Fishing) Regulations 1999 [South Island Regulations], ss 5-11.

[107] Ibid, s 14.

[108] Ibid, s 16.

[109] Kaimoana Regulations, above n 100, ss 18-29; South Island Regulations, above n 100, ss 17-26.

[110] Kaimoana Regulations, above n 100, s 23(1); South Island Regulations, above n 100, s 20(1).

[111] Kaimoana Regulations, s 24(1); South Island Regulations, s 21(1).

[112] Randall Bess and Ramana Rallapudi "Spatial conflicts in New Zealand fisheries: The rights of fishers and protection of the marine environment" (2007) 31 Mar Policy 719.

[113] See generally Claire Charters and Andrew Erueti (eds) *Māori property rights and the foreshore and seabed: the last frontier* (Victoria University Press, Wellington, 2007); Tom Bennion, Malcolm Birdling and Rebecca Paton *Making Sense of the Foreshore and Seabed* (Māori Law Review, Wellington, 2004); Randall Bess "New Zealand's Treaty of Waitangi and the doctrine of discovery: Implications for the foreshore and seabed" (2011) 35(1) Mar Policy 85; Richard Boast *Foreshore and Seabed* (LexisNexis NZ, Wellington, 2004); and Nin Tomas "Māori Land Law: The Coastal Marine (Takutai Moana) Act 2011" (2011) 1 NZ L Rev 381.

Court of Appeal's 2003 decision in *Ngāti Apa*.[114] This litigation arose due to concerns that eight South Island iwi had with the manner in which aquaculture was being regulated within their rohe moana in the Marlborough Sound. In order to seek greater involvement in the management of aquaculture within their territories, these iwi brought an application before the Māori Land Court seeking declaratory orders that certain submerged lands in the Marlborough Sounds constituted Māori customary land under the terms of the Court's enabling statute, Te Ture Whenua Māori Act 1993. If the submerged lands in question were instead found to be Crown land, the iwi applicants sought a declaration in the alternative that the lands were held by the Crown in a fiduciary capacity for their benefit.[115] Before this claim could be heard on its merits, however, the Attorney-General brought a preliminary objection that the matter could not succeed as a matter of law and was bound to fail, claiming that any potential Māori customary property in land below the high water mark had already been extinguished in New Zealand. The Māori Land Court rejected these preliminary objections, rejecting the argument that the Crown's legislative assertion of sovereignty over the territorial sea had extinguished any such rights and distinguishing the precedent of *In re Ninety Mile Beach* relied upon by the Crown.[116] The Attorney-General then appealed this interim decision to the Māori Appellate Court,[117] which in turn stated a case to the New Zealand High Court that eventually found its way to the New Zealand Court of Appeal.

The Court of Appeal in *Ngāti Apa* unanimously upheld the Māori Land Court's interim decision. In its view, any customary title that *might* be proven to exist in the seabed or foreshore in New Zealand had yet to be unequivocally extinguished. Yet before any court of New Zealand had the opportunity to investigate whether customary title to portions of the foreshore or seabed *did* in fact exist Parliament unilaterally enacted legislation to vest "full legal and beneficial ownership of the public foreshore and seabed in the Crown".[118] The swiftly enacted Foreshore and Seabed Act 2004 essentially legislated an answer to the claims put before the Māori Land Court, negating the possibility of Māori proving any customary title[119] or fiduciary obligation of the Crown[120] in relation to foreshore and seabed. The Act also created a process by which Māori could prove that 'but for' the terms of the Act they

---

[114] *Ngāti Apa*, above n 3.

[115] Ibid at [3].

[116] *Marlborough Sounds* (1997) 22A Nelson MB 1 (22A NEL 1), distinguishing *In re Ninety Mile Beach* [1965] NZLR 461.

[117] See *Attorney-General v Te Tau Ihu Iwi (Marlborough Sounds)* [1998] NZMAC 11 (19 October 1998).

[118] Foreshore and Seabed Act 2004 (repealed), s 4(a).

[119] Ibid, s 12.

[120] Ibid, s 13(4).

would have held customary title at common law to particular portions of the seabed or foreshore, and made this the exclusive process through which redress or compensation from the Crown could be negotiated.[121]

The controversial Foreshore and Seabed Act was the subject of sustained opposition from Māori across the country. It resulted in a complaint to the United Nations Committee on the Elimination of Racial Discrimination that confirmed its discriminatory impact on Māori property interests,[122] and encouraged the formation of a new Māori political party intent on seeking its repeal,[123] among other repercussions. Then in 2009 a Ministerial Review Panel was appointed by a newly elected government to review and report on the Act. This panel also came out strongly against the Act, recommending its repeal and the formulation of new framework that engaged Māori as active participants in the governance of New Zealand's marine and coastal areas.[124]

In 2011 Parliament passed the Marine Coastal Area (Takutai Moana) Act 2011 (MCAA) to replace the beleaguered Foreshore and Seabed Act. This Act differs starkly from its predecessor in that it provides for some recognition of Māori property rights in the foreshore and seabed in the form of customary marine title[125] and protected customary rights.[126] The Act defines customary marine title in a manner that parallels the hallmarks of the Canadian test for Aboriginal title of sufficiency, continuity and exclusivity of occupation.[127] To prove marine title an applicant group must show exclusive use and occupation of a specified area without substantial interruption since Crown sovereignty was asserted over New Zealand in 1840.[128] The test for protected customary rights under the Act, however, is simpler than its Canadian counterpart, requiring rights to have been continuously exercised since 1840 in accordance with the applicant group's tikanga (customs and practices) and to remain unextinguished as a matter of law.[129]

The customary title and rights that can be accommodated under the MCAA have the potential to increase the degree to which Māori visions for coastal and marine

---

[121] Ibid, ss 32-38.

[122] United Nations Committee on the Elimination of Racial Discrimination *Decision 1 (66): New Zealand Foreshore and Seabed Act* CERD/C/DEC/NZL/1 (2005).

[123] Tomas, above n 113, at 383.

[124] Ibid; Taihākurei Edward Durie, Richard Boast and Hana O'Regan *Pākia ki uta, pākia ki tai: report of the Ministerial Review Panel* (Ministry of Justice, Wellington, 2009).

[125] Marine and Coastal Area (Takutai Moana) Act 2011 [MCAA], s 58.

[126] Ibid, s 51.

[127] *Tsilhqot'in v British Columbia* 2014 SCC 44 at [25].

[128] MCAA, above n 117, s 58.

[129] Ibid, s 51.

development within their rohe moana are accommodated. For example, protected customary rights can be exercised without the need for consent under the RMA,[130] and these protected rights enjoy a greater level of protection from the effects of other activities approved under that statute.[131] Obtaining a declaration of customary marine title, on the other hand, affords iwi and hapū a greater say over the manner in which marine protected areas are set out,[132] rights to certain minerals,[133] opportunities to create planning documents[134] and the potential for stronger of marine wāhi tapu locations within title areas.[135]

These legal interests are by no means absolute, however. Protected customary rights remain subject to controls set by the Minister of Conservation.[136] Likewise, marine title under the Act remains vulnerable to various "accommodated activities" that can occur without the consent of the title-holders,[137] somewhat similar to the justified infringements of Aboriginal title that are recognised by Canadian courts.[138] In light of these restrictions, Māori legal scholar Nin Tomas has assessed the Act as being "principally designed to squeeze Māori into the existing resource management legislative regime with as little disturbance as possible to its framework or to other potential interest holders".[139] To date no declarations of protected customary rights or customary marine title have been issued under the MCAA though several claims have been lodged with the Crown for negotiation or filed with the New Zealand High Court to be adjudicated.[140]

As the legal dispute that gave rise to the *Ngāti Apa* litigation was triggered by the concerns of certain iwi with how aquaculture tenures were being managed within their rohe it also must be noted that since that dispute first arose the Crown has transferred 20% all space for aquaculture tenures within the territorial sea to Māori.[141] This transfer came about as part of a settlement of Tribunal claims in a manner similar to the settlement of Māori commercial fishing claims.

---

[130] Ibid, s 52.

[131] Ibid, s 55(2).

[132] Ibid, ss 71-78.

[133] Ibid, s 83.

[134] Ibid, s 85.

[135] Ibid, ss 78-79.

[136] Ibid, s 56.

[137] Ibid, s 64.

[138] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [165].

[139] Tomas, above n 113, at 391.

[140] New Zealand Ministry of Justice "Marine and Coastal Area Act applications" <www.justice.govt/nz>.

[141] Māori Commercial Aquaculture Claims Settlement Act 2004; see also New Zealand Ministry of Fisheries *Details of the Māori Commercial Aquaculture Claims Settlement* (2006).

F Balancing Power and Sovereignty in New Zealand

The overview set out above presents only a very summary introduction to some of the complex ways in which New Zealand law has evolved over the past three decades to be more inclusive of Māori difference and the unique aspirations of iwi and hapū. Nevertheless, it does allow for some general observations to be made regarding the legal relationship between Māori and the Crown in New Zealand, particularly in terms of how the balance between Crown sovereignty and Māori claims to self-determination and tino rangatiratanga has been addressed in this legal system. The differing and at times conflicting views of New Zealand's courts, the Waitangi Tribunal and Parliament have already been canvassed above. This section will seek to summarise these conflicting views on the degree to which New Zealand law provides for the exercise of Crown sovereignty over Māori interests in their rohe moana, assessing this against the reconciliation framework of this thesis.

1 Qualifying kawanatanga

New Zealand has much in common with Canada in terms of the "crisis of legitimacy" it faces as a nation state with uncertain foundations in colonial precepts that have since been largely discredited.[142] If legal scholar Mark Walters has doubts as to whether Canadian law's application to Indigenous peoples amounts to law rather than mere power or force,[143] he ought to have equal if not greater misgivings about a legal system that tolerates the unilateral expropriation of Indigenous property rights under colour of law, as occurred in the case of New Zealand's ill-fated Foreshore and Seabed Act. As the discussion above may demonstrate, however, the matter is far more complex than a case of unconstrained Crown power over Māori. New Zealand law appears to be advancing into a post-colonial era with the same softened and uncertain sense of Crown sovereignty that can be observed in Canada, complicated somewhat by the bifurcation of jurisprudence on Māori-Crown relations between the courts and the Waitangi Tribunal.

The modern view of New Zealand's courts is in many ways harmonious with Canada's jurisprudence of reconciliation and has similarly disowned some of the more explicitly racist theories of British colonialism while maintaining some semblance of

---

[142] Noel Cox "The Legitimacy of government and the normative influence of the Crown" (paper presented at 43rd Association of Law Teachers Conference, Oxford, March 2008) at 12. See also Paul Keal *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, Cambridge, 2003).

[143] See Mark D Walters "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470, cited in chapter III of this thesis.

the doctrine of discovery in place.[144] In the courts' ever presentist gaze the doctrine of terra nullius that would conceive of pre-colonial New Zealand as a legal vacuum has been resolutely rejected as playing any role in the foundations of Crown sovereignty. Prior to the arrival of Europeans in New Zealand the islands of Aotearoa were undoubtedly owned by Maori[145] and subject to the Indigenous legal orders of their tikanga Māori in the eyes of the judiciary.[146]

At the same time, the courts hold fast to the legal fiction that upon the Crown's putative acquisition of sovereignty through the Treaty the Common Law was imposed across this territory and its Indigenous inhabitants. However, this European introduction took on a syncretic form that "adapted to reflect local custom" and recognised the pre-existing "property rights" of Māori.[147] As noted by Māori legal scholar Robert Joseph, this continuity of tribal title as defined under Māori customary laws acknowledges that "Māori Rangatira (leaders) retained at least a certain amount of legally recognised de jure power" in New Zealand's post-Treaty common law.[148]

The qualifications on Crown sovereignty in New Zealand are also deeply embedded in the Treaty itself. As canvassed earlier in this chapter, this historic pact between Māori and the Crown represents a negotiated balance of public power between these two partners even if the precise balance has never been clearly articulated. Courts have found in the Treaty a basis for procedural fetters on Crown sovereignty such as fiduciary-like obligations and a requirement for consultation on (at least) truly major issues that arise between these partners. The very legal metaphor itself of a partnership between Māori and the Crown is clearly consonant with a view of Māori as a semi-autonomous, meaning-generating community.

The non-binding reports of the Waitangi Tribunal have gone even further in articulating space for Māori autonomy and rangatiratanga over their affairs and interests as restrictions on the Crown's kawanatanga. Where stark incongruities arise between the views of the Crown and the Tribunal on any given issue of Māori interests unilateral Crown action may be neutralised by the courts on administrative law grounds, as occurred in relation to the sale of state-owned assets in the 1980s, or otherwise delegitimised by extra-judicial means, as occurred in relation to the Foreshore and Seabed Act.

---

[144] For further discussion of how the Doctrine of Discovery persists in Canada, New Zealand and other former English colonies see Robert J Miller and others *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2012).

[145] *Ngāti Apa*, above n 3, at [37].

[146] *Proprietors of Wakatu Incorporated v Attorney-General* [2012] NZHC 1461 at [191].

[147] Ibid, citing *Ngāti Apa*, above n 3, at [17].

[148] Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Waikato L Rev 74 at 75.

The importance of the Treaty to the legitimacy if not legality of Crown action is also reinforced by the manner in which New Zealand's courts have been loath to interpret Parliament's intentions so as to violate its terms. The ambiguous place that the Treaty holds in New Zealand law indicates that reconciliation between Crown sovereignty and Indigenous self-determination remains as much a work in progress in New Zealand as in Canada. Although New Zealand courts will acknowledge breaches of the Crown's obligations under the Treaty in certain circumstances, they have shown a similar desire to that of Canadian courts for reconciliation to take place through negotiation between Treaty partners rather than litigation. As noted by Cooke P speaking on behalf of the Court of Appeal, "the precise path to be followed" by the Crown in honouring its Treaty obligations is not exclusively for the courts to define.[149] Arguably some space may exist for Māori to be recognised as a semi-autonomous community within New Zealand law as it currently stands, given the legal uncertainty that flows from both the Treaty's broad principles and ambiguous terms and the continuity of interests grounded in tikanga Māori. However, there are also aspects of New Zealand law that can be seen as inimical to the theory of reconciliation at the heart of this discussion.

2 Reading down rangatiratanga

In many ways the treatment of Māori by New Zealand's legal system can also be seen as a prime example of weak legal pluralism as described by John Griffiths in the introduction to this thesis.[150] New Zealand's legislation has adopted a remarkably wide array of concessions to Māori worldviews, with the unitary state's "ideology of legal centralism" reaching compromises with the "recalcitrant social reality" of Indigenous difference when it comes to issues of environmental management and customary rights in marine resources, among others. Without a doubt such compromises as the inclusion of kaitiakitanga in the RMA and the recognition of customary marine title under the MCAA are bringing about positive changes for Māori in New Zealand law. Even without implementation these statutory references at least acknowledge a unique connection between Māori and their rohe moana simply by legislating to accommodate this fact. Yet there are significant limits on the degree to which New Zealand's "sympathetic legal regime" has been willing to accommodate the "cultural disposition" of Māori.[151]

From Griffiths' perspective of "strong legal pluralism", Māori legal orders may empirically exist without recognition and incorporation into New Zealand's legal

---

[149] *Radio Frequencies case*, above n 65, at 135 per Cooke P.

[150] John Griffiths "What is Legal Pluralism?" (1986) 24 J Legal Plur 1 at 7.

[151] Paul McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination* (Oxford University Press, New York, 2004) at 55.

system. Since New Zealand courts view Māori legal orders as both preceding the introduction of the Common Law in New Zealand and to some extent surviving its imposition, there is every reason to believe that tikanga Māori would meet the test of empirical existence. Rather than acknowledging this alternative legal order as a challenge to the self-evidence of Crown sovereignty, however, New Zealand law appears to demote tikanga Māori into a source of cultural perspective similar to the approach of Canadian courts. For example, Māori legal orders may provide evidence in support of the potential existence of customary marine title, but the precise contours of this particular manifestation of legal geography have been carefully articulated by Parliament rather than left to the determination of groups operating within those Indigenous legal orders. Kaitiakitanga, on the other hand, is defined in the RMA by external reference to tikanga Māori, thereby providing a certain amount of deference to this separate Indigenous legal order.[152] However, this incorporation of tikanga Māori is greatly limited in its impact by the fact that decision making bodies under the RMA remain the ultimate arbiters as to how kaitiakitanga is incorporated into any given proposal, if at all.

New Zealand law has acknowledged iwi and hapū as unique political collectives and accommodated some aspects of their unique "cultural disposition". Yet similar to Canadian law, there is no question that the various rights and interests afforded to Māori all remain subject to overarching Crown authority and control. Māori projections of what constitutes legal ownership or appropriate development, for example, are assessed as either cognisable or not from within a framework of Crown supremacy. Even where projections of Indigenous legal orders are acknowledged, they remain legally (even if not politically) vulnerable to extinguishment or unilateral redefinition, as evidenced from the foreshore and seabed debate.

F Conclusion

New Zealand's legal system has provided significant room for Māori to assert their own projections of marine space within its framework. The role of the Treaty and its principles in guiding the Crown relationship with Māori has tempered Crown sovereignty over their interests and provided a basis for more respectful relations between Māori and the Crown as to some degree incommensurable communities. Consistent with this tempering of Crown sovereignty, legislation such as the RMA has provided mechanisms through which Māori legal orders can be engaged in decision making on questions of appropriate resource management. Furthermore, through negotiated settlement legislation, Māori have obtained a significant level of

[152] For further discussion of New Zealand law's interactions with tikanga Māori see Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 U T L J 135.

participation in marine development activities such as commercial fishing and aquaculture, and delegated authority over the management of their customary fishing activities through such mechanisms as taiāpure-local fisheries and mātaitai fishing reserves. These novel accommodations are consistent with at least a form of weak legal pluralism being facilitated within New Zealand's legal system. Ultimately, however, the New Zealand legal system retains a high degree of authority over the degree to which Māori projections of marine space are accommodated within its structure. Much like in Canada, Māori are provided room to assert their own conceptions of marine space within their marine territories but only to the extent that these conceptions can be framed within New Zealand law and even then subject to ultimate Crown authority. The next chapter will develop this analysis further by addressing two recent cases of Māori assertions of marine space being addressed by New Zealand courts.

VII ASSERTIONS OF INDIGENOUS SPACE IN NEW ZEALAND LAW

A Introduction

In order to illustrate how the various sites of legal recognition for Māori interests in their marine territories are addressed by the courts in practice this chapter examines in detail two recent cases in which Indigenous legal projections of marine space were asserted before New Zealand courts. As set out in the fourth chapter of this thesis in the Canadian context, these case examples are important as the various sites of recognition for Indigenous interests in New Zealand law can interact in complex ways. In this chapter only one of the two case studies takes place within the Hauraki Gulf marine planning area, though the other case takes place just outside this region in an area of significant industrial development that can be seen in some respects as analogous to the Hauraki Gulf. These cases differ from one another greatly in terms of the type of interest being asserted and the manner in which this interest is ultimately addressed by the courts, but together they provide an important illustration of how New Zealand's legal system frames and potentially accommodates Māori projections of marine space.

B Ngāti Ruahine's Defence of Customary Fishing Grounds

As ought to be clear from the previous chapter's discussion, New Zealand law has produced a complex array of provisions that recognise and provide for iwi and hapū involvement in the management of their moana rohe. What is less clear, however, is the manner in which these overlapping sites of recognition interact in the context of any given dispute over marine development. The decision of the High Court in *Ngāti Ruahine v Bay of Plenty Regional Council*[1] and the underlying Environment Court decision it upheld[2] provide a useful illustration in this regard. This litigation centred on a dispute over resource consents sought for the expansion of the Tauranga Port in North Island in which an array of the statutory references to Māori culture in the Resource Management Act 1991 (RMA) were invoked and impacts on a recognised mātaitai reserve were at issue. In spite of what the High Court considered to be "careful and sympathetic attention to the cultural evidence" in this case, statutory provisions for Māori recognition were insufficient to enforce their own vision of appropriate development within their rohe moana.

This litigation took place as a result of the application of a public company operating New Zealand's largest port by volume, the Tauranga Port, for various consents under

[1] *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 [*Ngāti Ruahine*].

[2] *Te Rūnanga o Ngāi Te Rangi Iwi Trust & Ors v Bay of Plenty Regional Council* [2011] NZEnvC 402 [*TRONTRIT*].

the RMA that would allow for future expansion of that port. The consents sought cover various alterations of the sea bed through dredging in order to deepen and widen several of the Port's marine channels and create a basin in which large ships could turn around, as well as other activities such as discharging sediment and depositing boulders for an artificial reef.[3] These activities involved interference with pipi (shellfish) beds as well as widening of a channel that passed through a mātaitai reserve that had been established for Māori customary fishing activities. The High Court accepted that although the consents sought and the motivation behind them were understandable from an economic standpoint they had huge adverse effects "[f]rom a Māori standpoint".

The decision of the Environment Court in this litigation is remarkable in the degree to which it sets out contextual information on the cultural impacts of the proposal. The Court relies on Waitangi Tribunal reports for a considerable narration of the history of how Tauranga Port's development has undermined Tauranga Māori's links to the ancestral lands and waters that "remain the source of their cultural identity".[4] The Court also summarises in some detail the evidence that Māori witnesses had provided of the "cultural landscape" that would be impacted by the proposed development,[5] ranging from customary marine food gathering sites to spiritual and cultural understandings of the importance of certain physical features such as a waterway passage by which it was believed that "the spirits of the dead leave on the outgoing current".[6] Evidence canvassing a Māori worldview that linked Māori to both animate and inanimate aspects of their territory through a "web of kinship" was also incorporated into this decision.[7] Ultimately, however, the Court recommended that the consents be granted, subject to conditions for the mitigation of adverse effects on cultural and spiritual values that included the establishment of a trust for this purpose, "renourishment" of a beach, the creation of a Māori reference group and the establishment of a scholarship programme.

The Environment Court's decision was appealed to the High Court on various bases, including alleged failures to recognise and provide for the relationship of local Māori with their ancestral lands, waters and sites under section 6(e) of the RMA, to appropriately address and consider kaitiakitanga under section 7(a) of the Act, and a failure to take into account the Treaty principles under section 8 of the Act, particularly with respect to impacts on the mātaitai reserve.[8] As the mātaitai reserve

[3] *Ngāti Ruahine*, above n 1, at [8]-[10].
[4] *TRONTRIT*, above n 2, at [14]-[28], cited in *Ngāti Ruahine* at [18].
[5] *TRONTRIT*, above n 2, at [178]-[190], cited in part in *Ngāti Ruahine* at [19].
[6] *TRONTRIT*, above n 2, at [185].
[7] Ibid at [186].
[8] *Ngāti Ruahine*, above n 1, at [30]-[36].

was created under legislation that resulted from the settlement of Treaty claims to Māori fisheries, it was argued by an intervenor Māori group that the Crown had a duty under the Treaty to actively protect this reserve to the fullest extent possible.[9]

The High Court ultimately upheld the Environment Court's decision in its entirety. It cited with approval the interpretation of the RMA that ss 6, 7 and 8 of the Act are subordinate to its overall sustainable management purpose and of "descending significance" to one another, though the Court doubted "whether much significant hangs on the hierarchy".[10] The High Court saw the Environment Court's role as weighing many factors in an overall evaluative assessment consistent with the purpose of the RMA, and found that this role was carried out in a "fully informed and sensitive way".[11] The conditions imposed on the consents were seen as part of the balancing exercise and the hearing process itself was seen as having "forced the parties into a greater degree of consultation" with one another.[12] Interestingly, both courts acknowledged that "as a matter of tikanga and tipuna (ancestors)" the appellants could never agree to the consents sought, but the High Court held that this "cultural consideration" did not change ss. 6-8 of the RMA into a "veto power".[13]

This case provides interesting insight into the practical significance of the statutory references to Māori culture contained in the RMA when development proposals have significant impacts on Māori and therefore encounter significant Māori opposition. In these circumstances section 6, 7 and 8 of the RMA have a similar effect to the duty to consult under Canadian law: they ensure that Crown decision makers take into account certain impacts on Indigenous interests but they cannot be relied on to incorporate the decision making of Indigenous peoples themselves on development proposals. In a practical sense the requirement for cultural impacts to be taken into account may serve as leverage for Māori to negotiate the terms on which development proceeds so that proponents can avoid litigation, but this leverage will not amount to a decision making role when no such remedy would be available from the courts.

The reference to tikanga Māori is particularly poignant for this discussion. The courts acknowledge the possibility of a concurrent Indigenous legal order that will not tolerate the development proceeding. However this is dismissed as a cultural consideration under the RMA rather than a legal conclusion warranting any degree of deference. There may be a role for manifestations of Indigenous legal orders such as

---

[9] Ibid at [39]-[51].

[10] Ibid at 66, citing *Freda Pene Rewiti Whānau Trust v Auckland Regional Council* HC Auckland CIV-2005-404-356, 9 December 2005 [*Freda Pene* (HC)].

[11] *Ngāti Ruahine*, above n 1, at [70].

[12] Ibid.

[13] Ibid at [76].

tikanga Māori and kaitiakitanga in ensuring cultural impacts are understood and mitigated. Ultimately, however, decision making power is irretrievably out of Māori hands. The role of Māori in such a process is limited to that of a (culturally distinct) stakeholder, providing evidence of impacts on their interests.

C Reweti Whānau's Aquaculture Proposal

The provisions of the RMA are relevant to Māori not only when they find themselves in a position to oppose development within their rohe moana, but also when they themselves are proposing such development. As an example of how the statutory recognition of Māori culture is engaged in these circumstances the High Court's decision in *Reweti Whānau Trust v Auckland Regional Council*[14] and its underlying Environment Court decision[15] provide an interesting illustration. In this litigation the Freda Pene Rewiti Whānau Trust, a Māori collective, had sought a coastal permit from the Auckland Regional Council in order to conduct mussel aquaculture in an island bay within the confines of the Hauraki Gulf Marine Park that will be the focus of the next chapter. The Council rejected the Trust's application, and this rejection was unsuccessfully appealed to both the Environment Court and the High Court.

The Environment Court's decision addresses a complex array of planning documents created under the RMA, putting particular focus on both the New Zealand Coastal Policy Statement in place at the time, a national planning document applying to coastal areas across the country, and the Council's more localised coastal regional plan. The Trust was seeking to a permit for aquaculture to proceed in an area that fell outside specific zones that the Council had designated for this purpose.

The Trust's appeal was put forward on the basis that the Council's rejection of their request failed to taken into consideration the factors set out in sections 6, 7 and 8 of the RMA. The Trust provided case law in support of its contention that the special relationship of Māori with their ancestral water as a source of seafood was a factor that supported their proposal under section 6(e) of the Act[16] and that kaitiakitanga required decision makers to have particular regard to Māori views as to how land is used.[17] Furthermore, the Trust cited a Waitangi Tribunal report that found Māori to have an interest in marine farming as an incident of their relationship with the coastal marine area in support of its argument that granting its application would demonstrate

---

[14] *Freda Pene* (HC), above n 10.

[15] *Freda Pene Rewiti Whānau Trust v Auckland Regional Council* (2004) 11 ELRNZ 235, A166/2004 [*Freda Pene* (EnvC)].

[16] Ibid at [51].

[17] Ibid at [54].

the Court was taking into account the Treaty principles incorporated through section 8 of the Act.[18]

The Court received evidence on behalf of the Trust that the entire island and its surrounding waters fell into the rohe of the whānau it represented.[19] The Court also acknowledged the Trust's undisputed evidence as to the importance of this area for fishing by that whānau and how "[f]rom a tikanga point of view" mussel farming would allow for a continuing spiritual connection between the whānau and the island's marine resources.[20] Groups submitting against the Trust's application did not challenge the tikanga basis for its application, but disputed the economic value of the mussel farming proposal and argued that the same benefits could be achieved by siting it elsewhere.[21] In terms of the overall relevance of Māori cultural references in the RMA, the Court found that there was nothing special about the particular site for which the application was proposed as compared to other areas in the appellant's rohe.[22] The Court noted the Trust was concerned that pending variations to the Council's coastal regional plan would limit all subsequent aquaculture applications to locations where aquaculture developments already existed in this area, but found this to be a factor it could not address for the appellant.[23]

In addition to the Māori cultural factors, the Court took into account extensive evidence of the natural character of the proposed site and its characterization under the Council's coastal regional plan as an "outstanding" landscape. The Court found in favour of one witness's view that the proposed 3 hectare mussel farm would result in "more than minor adverse visual effects" in the location for which it was proposed, particularly considering its cumulative effects in the context of various marine farms that already existed in its vicinity.[24] Furthermore, the Court found that the proposal would have various other effects such as limiting the access of recreational boats to their preferred anchorage and impacts on the scenic qualities of the area.[25] In its ultimate weighing of the different considerations under the Act, the Court ultimately found against the proposal, and this decision was upheld on appeal to the High Court.

This case provides an illustrative counterpoint to *Ngāti Ruahine* in that it involves a Māori proposal for economic development that was successfully blocked by non-Indigenous groups opposed to that development due to alleged cultural impacts it

[18] Ibid at [56].
[19] Ibid at [60].
[20] Ibid at [61].
[21] Ibid at [64]-[67].
[22] Ibid at [69].
[23] Ibid at [67].
[24] Ibid at [106].
[25] Ibid at [136]-[137].

would have on the area's intangible recreational values. One of the most interesting arguments put forward by the Trust in its High Court appeal was that from a Māori perspective "a mussel farm is a beautiful object as it means food, … employment and an opportunity to return home and restore mauri (spiritual integrity) to the whānau".[26]

The fact that the Auckland Yacht & Boating Association, among other intervenors, was successful in defeating the application on the basis of cultural impacts should not be taken to imply that they were given a veto over the development. Under the weighing and balancing exercise that takes place under the RMA, the Court merely found in favour of their contentions, based in part on the scant evidence of the economic significance of the proposal. However, the case does bring into stark relief how the statutory recognition of Māori culture under the RMA is not unique and various other cultural perspectives are weighed against one another in any given application.

The undisputed evidence as to tikanga Māori in this case is also interesting for the purposes of this thesis. Once more, this Indigenous legal order was accepted as evidence of the particular cultural perspective of the Māori applicant group, but the Court found no need to defer to this perspective as it was not site-specific. All parties accepted that the Trust had a valid purpose in seeking to develop economic opportunities for itself in its rohe moana that were in keeping with this unique Indigenous legal order. However, this particular proposal was defeated based on the cultural projections of another group over the same contested marine space.

D Conclusion

These case studies are only two isolated examples of how New Zealand law is able to address Māori assertions of their own legal and social projections of marine space when determining how marine resources are allocated, exploited or conserved. Māori have in other circumstances successfully challenged marine development projects that were inconsistent with their own views on appropriate development within their rohe moana.[27] However, these decisions do provide a more general illustration of the manner in which Indigenous projections of marine space are recognised and accommodated in New Zealand's legal system. The fact that tikanga Māori was taken into consideration in each decision as a factor relevant to how the ultimate decision making authority exercised its power indicates a significant degree of recognition for Māori as a unique meaning-generating community in New Zealand and flexibility on the part of this legal system to acknowledge what a strong legal pluralist perspective

[26] *Freda Pene* (HC), above n 10, at [93].

[27] See for example *Trans-Tasman Resources Ltd Marine Consent Decision* EPA EEZ004, 17 June 2014, though note that at the time of writing this decision is undergoing an appeal to the High Court.

would describe as legal orders existing outside it. However, in practice it remains a primarily a Crown decision making body that construes and applies the degree to which Māori projections of marine space can be given legal effect. If one is to apply Indigenous legal scholar Mary Ellen Turpel's argument that the cultural differences between Māori and the New Zealand system may amount to "problems of conceptual reference for which there is no common grounding or authoritative foothold",[28] an approach in which a Crown entity in the form of the judiciary makes binding decisions as to the degree of relevance to Māori social and legal projections is problematic. In the subsequent chapter the marine spatial planning process being undertaken in the Hauraki Gulf will be examined in detail and analysed within the same theoretical framework as a potential model for improving upon this situation by providing a more equitable position for Indigenous projections of marine space in New Zealand law.

[28] See Mary Turpel "Aboriginal Peoples and the Canadian *Charter*" (1989-1990) 6 Can Hum Rts Yrbk 3 at 14, cited in chapter II of this thesis.

VIII JOINTLY PLANNED SPACE IN THE HAURAKI GULF

A Introduction

This chapter examines a case study of the joint Indigenous-Crown marine spatial planning currently underway in the Hauraki Gulf off the North Island of New Zealand. This ongoing project has developed along similar lines to the PNCIMA process in British Columbia and its successor MaPP by adopting a joint governance model where ultimate decision making authority is shared between government and council representatives and representatives of the region's tangata whenua. Consistent with the overall theoretical framework of this thesis, this chapter assesses the degree to which this planning process creates room within the New Zealand legal system for Indigenous legal projections of marine space within their marine territories to be accommodated and reconciled with those of the Crown. The complex context from which this marine spatial planning process has emerged will be set out in detail here, but a final spatial plan is only expected to be complete by September of 2015 and is therefore not available for analysis at this time. Furthermore, even following the spatial plan's completion it will undoubtedly be a matter of months if not years before the full legal impact of the spatial plan process is settled. Nevertheless, it is hoped that examination of the planning process to date, particularly its governance structure and its intended outcomes, will allow for a principled discussion of what this new model of oceans governance can mean for the recognition and advancement of Māori interests in the Gulf. The analysis will focus on how this governance structure, much like that adopted for the Haida Gwaii Draft Plan, can reconcile the differing legal orders of various iwi involved in this process with that of the Crown. The research question addressed here is the degree to which this spatial planning process provides a greater recognition and accommodation of Indigenous legal orders than the status quo otherwise available to these iwi.

B Setting the Stage for Marine Spatial Planning in the Hauraki Gulf

1 Integrating marine management – from nationwide to regional

As noted in the second chapter of this thesis, New Zealand has been gradually attempting a shift towards an integrated management approach for its marine territory over the past few decades. Arguably the most important achievement to date as part of this regulatory shift is the implementation of an integrated coastal management

approach through the Resource Management Act 1991 (RMA).[1] New Zealand has also been working towards the goal of integrating the various sectoral based resource management authorities that exercise jurisdiction over its marine territory outside the RMA in the same way Canada has sought to achieve integrated marine management under a nation-wide approach.[2] Since the New Zealand Court of Appeal's decision in *Ngāti Apa*,[3] the New Zealand government's pursuit of a national ocean policy has been put on hold[4] and national efforts towards integrated oceans policy have been refocused on the EEZ.[5] The marine spatial planning process being conducted for the Hauraki Gulf, on the other hand, represents a unique pilot project for the development of an "integrative planning and decision making framework at regional levels of governance" for New Zealand.[6] To date this project is unique in New Zealand and it has the potential to provide an important model for other highly subscribed and contested marine and coastal regions throughout the country.

2 *Contested waters of the Hauraki Gulf/Tikapa Moana*

The Hauraki Gulf, also known as Tikapa Moana and Te Moananui a Toi, has a unique history of oceans management both from within the framework of New Zealand's legal system and predating its existence.[7] In 1967 Parliament first designated the Gulf as a marine park under the Hauraki Gulf Maritime Park Act 1967 in order to preserve and protect its island reserves under one management board, and this board had approved an integrative management strategy for the entire region by 1982.[8] When New Zealand's resource management regime was drastically reformed in the early 1990s, however, this statute and the board it brought into being were abolished.[9] Subsequent efforts were made to re-establish a marine park for the Gulf, but without the support of local Māori as they were concerned by the lack of regard for tangata whenua interests in this process.[10]

---

[1] McGinnis, above n 1, at 15; Robert A Makgill and Hamish Rennie "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand's Resource Management Act 1991" (2012) 27 Int'l J Marine and Coastal L 135.

[2] Ibid.

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

[4] McGinnis, above n 1, at 23-24.

[5] Ibid at 25-26.

[6] Ibid at 26.

[7] For discussion of pre-European governance of select portions of the Hauraki Gulf see generally Waitangi Tribunal *The Hauraki Report: Vol I* (Wai 686, 2006) ch 2; and Waitangi Tribunal *The Hauraki Report: Vol III* (Wai 686, 2006) ch 22.

[8] Waitangi Tribunal *The Hauraki Gulf Marine Park Report* (Wai 728, 2001) [Wai 728] at 7-8.

[9] Ibid.

[10] Ibid.

By 1992 several iwi with mana whenua (customary territorial authority) over the Gulf gathered together for a hui (meeting) on Motutapu Island where they collectively asserted their ownership to the Gulf as a taonga that they had used for centuries.[11] These assembled iwi issued a declaration demanding that the Crown return control and management of this taonga to them in recognition of their tino rangatiratanga and expressed their desire for a new management structure to be created to manage and control the Gulf while observing principles to be negotiated with the tangata whenua.[12]

By the late 1990s the New Zealand central government was developing legislation to create a new marine park for the Gulf.[13] Likewise, the Auckland Regional Council (as it then was) had established a collaborative group with representatives from both local councils and authorities and the central government known as the Hauraki Gulf Forum that was intended to provide coordinated management for the entire Gulf region.[14] The Hauraki Māori Trust Board, on the other hand, had lodged an application with the Māori Land Court in 1998 claiming ownership of foreshore and seabed within the Gulf and sought to have any attempt at establishing a marine park delayed until this claim had been determined.[15] Negotiations between local Māori and the Crown over the terms of the marine park legislation led to some concessions to Māori concerns, including an increase of tangata whenua representatives from three up to six on the Hauraki Gulf Forum, which was to be given statutory authority under the Act.[16] Then in 2000, the Crown finally brought the legislation into force as the Hauraki Gulf Marine Park Act 2000.

In the lead up to this statute's enactment the Hauraki Māori Trust Board, representing many but not all of the Māori groups claiming mana whenua over the Gulf, brought a claim to the Waitangi Tribunal against the proposed terms of the Act while it was still in draft.[17] The Board claimed that the management regime under the Act was inconsistent with the Crown's duty to actively protect the rangatiratanga and kaitiakitanga of the iwi it represented and therefore constituted a breach of the Treaty.[18] Furthermore, the Board asserted that the Act prejudiced its claims to customary title and rights in the foreshore and seabed, and took issue with the Act's

[11] Hauraki Māori Trust Board and others *Statement from Hui at Motutapu Island* 14-15 November 1992.
[12] Ibid.
[13] Wai 728, above n 8, at 10.
[14] Ibid.
[15] Ibid at 11.
[16] Ibid at 12.
[17] Ibid at 11.
[18] Ibid at 1.

limitations in terms of the representation and participation it provided for the Board's members and the protection it provided for their interests.[19] In the end the Tribunal ruled against the Board's claims and refused to make findings on ownership of the foreshore and seabed, finding that this was "a matter of national concern" and "not confined to the Hauraki Gulf".[20] The Tribunal also noted that the Forum was merely an advisory body rather than a governing body or local authority for the Gulf and expressed the view that the opportunity it provided for tangata whenua to communicate with local authorities ought to be welcomed.[21] Further, it noted that the Forum could provide for greater tangata whenua through its power to "appoint such subcommittees as it considers appropriate".[22] Ultimately the Tribunal expressed the view that it was premature to decide whether the management regime under the Act would impact ownership of the foreshore and seabed[23] and encouraged all parties to focus on what they agreed on: "the need for the Hauraki Gulf environment to be protected for future generations".[24]

3 Uniting the region under one Act

As a statute directed at protecting the Gulf for future generations, the Hauraki Gulf Marine Park Act 2000 was enacted with the following express purposes: integrating the management of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments (the Gulf); establishing the Hauraki Gulf Marine Park; establishing objectives for the management of the Gulf; recognising the historic, traditional, cultural, and spiritual relationship of the tangata whenua with the Gulf; and providing statutory authority for the establishment of the Hauraki Gulf Forum.[25]

The key sections of the Act for the purposes of resource management within the Gulf under New Zealand's legal system are sections 7 and 8.[26] These two sections provide binding directives for the various planning and policy documents prepared by regional and territorial councils under the RMA and are mandatory considerations for decision makers on resource consent applications within the Gulf.[27] Likewise they are considerations that the Minister of Primary Industries (Fisheries) must have regard to

---

[19] Ibid at 1.
[20] Ibid at 32.
[21] Ibid at 41.
[22] Ibid.
[23] Ibid at 43.
[24] Ibid at 44.
[25] Hauraki Gulf Marine Park Act 2000, s 3.
[26] See generally Kenneth Palmer "Hauraki Gulf Marine Park Act 2000, The Legislation Note" (2000) 4 NZJEL 271; Hauraki Gulf Forum *Governing the Gulf: Giving Effect to the Hauraki Gulf Marine Park Act through Policies and Plans* (Auckland, 2009) [*Governing the Gulf*].
[27] Ibid, ss 9-10.

when setting or varying sustainability measures for the Gulf,[28] such as setting catch limits, prescribing fishing seasons, and prescribing spatial areas from which fish may be taken.[29]

Section 7 of the Act recognises the Gulf's life-supporting capacity to provide for the historic, traditional, cultural, and spiritual relationship of tangata whenua and the social, economic, recreational, and cultural well-being of people and communities, among other things, as a matter of national significance.[30] Section 8 sets out objectives for the Gulf's management that include protection and enhancement of its life-supporting capacity and its natural, historic, and physical resources, including those with which tangata whenua have an historic, traditional, cultural, and spiritual relationship,[31] and maintenance and enhancement of its contribution to the social and economic well-being of the people and communities of the Gulf and New Zealand, as well as their recreation and enjoyment.[32] While the guidance that these sections provide for decision makers under the RMA and Fisheries Act is helpful, it still ultimately remains up to individual regional councils, territorial authorities and government agencies to ensure that the purposes of the Act are met in the course of their activities.[33]

The Hauraki Gulf Forum is created for the purpose of integrating the management of the Gulf, facilitating communication, cooperation, and coordination between its constituent parties in relation to the Gulf, and to recognise the historic, traditional, cultural, and spiritual relationship of tangata whenua with the Gulf.[34] Its membership is composed of six tangata whenua representatives, three central government representatives, and twelve representatives from district and regional councils.[35] Among the Forum's functions are obtaining, sharing, and monitoring information on the state of natural and physical resources in the Gulf, receiving reports from tangata whenua on the development of iwi management plans and iwi development plans, promoting and advocating the integrated and sustainable management of the Gulf, and commissioning research in relation to its functions.[36] Its powers include considering issues related to its purpose, receiving reports from its constituent parties, making recommendations to its constituent parties, providing advice upon request and

---

[28] Ibid, s 12.

[29] Hauraki Gulf Forum *Fishing the Gulf: Implementing the Hauraki Gulf Marine Park Act through Fisheries Management* (Auckland, 2010) [*Fishing the Gulf*].

[30] Ibid at s 7(2)(a).

[31] Ibid, ss 8(a)-(c).

[32] Ibid, ss 8(e) & (f).

[33] See *Governing the Gulf*, above n 26.

[34] Ibid, s 15.

[35] Ibid, s 16.

[36] Ibid, s 17(1).

commissioning or undertaking any other activities that are necessary to achieve its purpose.[37]

The Hauraki Gulf Marine Park created under the Act sets higher management standards to apply to certain portions of the Gulf designated as part of the Park. The Park consists of the Gulf's seawater, as well as public marine and coastal lands under Crown control within the Gulf, such as wildlife refuges, marine mammal sanctuaries, and marine reserves. [38] With consent of affected parties, the Park can also incorporate private lands,[39] public lands under local council jurisdiction,[40] and mātaitai reserves and taiāpure-local fisheries within its boundaries.[41] The Act also provides for either the Crown or local authorities to acknowledge the particular historic, traditional, cultural and spiritual relationship of the Gulf's tangata whenua with any piece of land, foreshore or seabed within the Park through a deed of recognition that identifies specific opportunities for their contribution to the management of that land.[42] Inclusion of any portion of the Gulf in the Park, whether voluntarily or automatic in the case of seawater and Crown estates, imposes the additional requirement that the management of those lands and waters recognises and gives effect to several statutory purposes for the Park.[43] The Park's purposes are similar to the principles recognised in sections 7 and 8 of the Act, but put a greater focus on the protection and sustainability of the environment and natural and historic resources within the Park, and omit any reference to the social and economic well-being of the Gulf's inhabitants.[44] As seawater forms part of the Park, it has been suggested that the Crown's management of fisheries within the Gulf must be consistent with these more sustainability-oriented purposes.[45] However, the only litigation to date in which fisheries management within the Gulf has been challenged under the Act resulted in findings that ministerial decisions on fisheries sustainability measures within the Gulf must have particular regard to sections 7 and 8 of the Act, but makes no mention of any need for these decisions to comply with a higher threshold of recognising and giving effect to the Park's purposes.[46]

---

[37] Ibid, s 18(2).
[38] Ibid, s 33(2).
[39] Ibid, s 34.
[40] Ibid, s 35.
[41] Ibid, s 36.
[42] Ibid, ss 44-45.
[43] Ibid, s 37.
[44] Ibid, s 32.
[45] *Fishing the Gulf*, above n 29, at 38.
[46] *Sanford Limited, Sealord Group Limited and Pelagic and Tuna New Zealand Limited v The New Zealand Recreational Fishing Council Inc and New Zealand Big Game Fishing Council Inc and others* [2008] NZCA 160, upheld on appeal in [2009] NZSC 54.

In summary, the Act's approach to achieving integrated management for the Gulf is three-pronged. It involves legislating binding policy directives for the conduct of resource planning and management within the region by decision makers operating under other statutes, the creation of a multilateral communication and governance body to facilitate achieving the Act's purposes, and the creation of a marine park within the Gulf, consisting of Crown land and other voluntary inclusions, that is subject to stronger binding policy directives for resource management. Although the Act shares one of the primary purposes of marine spatial planning in seeking to integrate coastal and marine management for the Gulf, it does not specifically require or authorise a marine spatial planning process. It also does not restructure what agencies and authorities have control over resource management decision making within the Gulf.

4 Seeking opportunities to realise integrated management for the Gulf

Since its inception, the Hauraki Gulf Forum has produced a number of reports to assess the ecological status of the Gulf[47] and to provide recommendations as to how the purposes of the Act could best be achieved through management of the Gulf.[48] Several of the Forum's recommendations in support of integrated management prescribe activities that are consistent with marine spatial planning. For instance, the Forum recommended that for the purposes of resource management under the RMA, regional policy statements and regional coastal plans should identify, "spatially where possible", significant interrelationships and elements which can contribute to the ecological health and productivity of the Gulf.[49] The Forum noted that the provisions of the RMA legally enabled two or more regional councils to create a combined plan for the Gulf;[50] however, other provisions of the RMA were more restrictive of integration, such as what the Forum deemed to be the legal impossibility of a joint regional policy statement being created between councils.[51] In terms of potential reforms for fisheries management within the Gulf, the Forum also recommended investigation of such spatial strategies as the creation of a network of marine protected

[47] See for example Hauraki Gulf Forum *Hauraki Gulf State of the Environment Report* (Auckland, 2004); Hauraki Gulf Forum *Tikapa Moana – Hauraki Gulf State of the Environment Report* (Auckland, 2008); and Hauraki Gulf Forum *State of Our Gulf: Tikapa Moana – Hauraki Gulf State of the Environment Report 2011* (Auckland, 2011).

[48] See for example Hauraki Gulf Forum *Co-operation, Capacity, Charisma: Enhancing the Hauraki Gulf Environment through Non-Regulatory Approaches* (Auckland, 2010); Hauraki Gulf Forum *Spatial Planning for the Gulf: An International Review of Marine Spatial Planning Initiatives and Application to the Hauraki Gulf* (Auckland, 2011) [*Spatial Planning for the Gulf*]; *Fishing the Gulf*, above n 29; and *Governing the Gulf*, above n 26.

[49] *Governing the Gulf*, above n 26, at 60-64.

[50] Ibid at 43-45, citing ss 78A and 80 of the RMA.

[51] Ibid at 52-53.

areas throughout the region,[52] and the exclusion of commercial access to certain fishing zones in favour of recreational access.[53] Ultimately, however, these spatial strategies were for individual resource management agencies and decision makers to adopt and implement on their own, without a clear role for the Forum to guide this process overall.

In 2010, however, three key institutional changes occurred in the Gulf that provided further impetus for an overarching integrated marine spatial planning process to be adopted throughout the region. First, legislative amendments were passed that amalgamated seven territorial authorities and a regional council into one unitary authority for the entire Auckland region, the Auckland Council.[54] Part of the statutory mandate for this new authority included a requirement for the development, adoption and implementation of a spatial plan for its entire region,[55] of which almost 70% comprises coastal marine areas.[56] Although the first spatial plan for Auckland needed to be produced in too short of a timeframe for detailed marine spatial planning to be conducted, the Forum saw this as a potential opportunity for Auckland's spatial planning and Gulf-wide spatial planning to inform each other moving forward.[57]

Second, the Minister of Conservation released a revised New Zealand Coastal Policy Statement (NZCPS) under the RMA that was intended to provide councils with "clearer direction on protecting and managing New Zealand's coastal environment", encourage local councils to "produce plans that more clearly identify where development will need to be constrained to protect special areas of the coast", plan for aquaculture "in appropriate places", and plan for the development of ports.[58] The NZCPS is a national planning document that constrains decision makers under the RMA by requiring regional policy statements,[59] regional plans[60] and district plans[61] to give effect to its policies and objectives.[62] The NZCPS released in 2010 contained several policies and objectives that were clearly consistent with marine spatial

---

[52] *Fishing the Gulf*, above n 26, at 55-56.

[53] Ibid at 59.

[54] See generally Jenny Rowan "The Role and Governance of Sub-National Government: Impact of the 'Super-City'" in Caroline Morris, Jonathan Boston and Petra Butler (eds) *Reconstituting the Constitution* (Springer, London, 2011).

[55] Local Government (Auckland Council) Act 2009, ss 79-80.

[56] *Spatial Planning for the Gulf*, above n 48, at 1.

[57] Ibid at 36-37.

[58] Office of the Minister of Conservation "New Coastal Policy Statement released" (28 October 2010) <www.doc.govt.nz>.

[59] RMA, s 62(3).

[60] Ibid, s 67(3)(b).

[61] Ibid, s 75(3(b).

[62] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [91].

planning such as: providing for integrated management for the coastal environment across administrative boundaries between marine and land resources, different local authorities and iwi and hapū, and other bodies with functions relevant to resource management;[63] the protection of representative or significant natural ecosystems;[64] the spatial identification of appropriate places for aquaculture and port development;[65] and the identification, assessment, protection and management of areas and sites of significance or special value to Māori.[66]

Third, the New Zealand government passed an omnibus Bill that would promote more aquaculture development in New Zealand's coastal and marine areas by amending various statutes under which it was regulated.[67] These amendments removed a previous restriction that limited aquaculture activities to areas designated as "aquaculture management areas" under regional coastal plans, provided a greater role for the central government in determining aquaculture tenures and streamlined other impact assessments for these developments.[68] As a result of this omnibus Bill new forms of aquaculture would be possible with the Gulf and some new locations for fresh tenures would become available, therefore requiring spatial planning to ensure new developments were appropriately sited.[69]

Following these significant policy changes the Hauraki Gulf Forum produced a report to assess the viability of marine spatial planning being adopted as a multilateral process for the entire Gulf and synthesise various relevant international precedents.[70] The Forum identified marine spatial planning as a tool that could be of assistance in achieving its statutory purposes by promoting an integrated management approach between various agencies and authorities, the conservation and sustainable management of the Gulf's resources, less conflict over the use of those resources, a closer working relationship between statutory managers, and a means through which tangata whenua's relationship with the Gulf could be better recognised.[71] The Forum noted that such a marine planning process would be supportive of the Auckland Council's spatial planning process, as well as the recent changes to the NZCPS and

[63] New Zealand Coastal Policy Statement 2010, Policy 4. See also *Spatial Planning for the Gulf*, above n 48, at 23-24.
[64] Ibid, objective 1.
[65] Ibid, objectives 8 and 9.
[66] Ibid, policy 2(g)(ii).
[67] Aquaculture Legislation Amendment Bill (No 3) 2010.
[68] New Zealand Parliament "Aquaculture Legislation Amendment Bill (No 2) (2011 No 232-2): Bills Digest No 1861" <www.parliament.nz>.
[69] *Spatial Planning for the Gulf*, above n 48, at 22-23 and 30.
[70] *Spatial Planning for the Gulf*, above n 48.
[71] Ibid at 20.

aquaculture management reforms.[72] Furthermore, marine spatial planning was identified as a tool for informing the various RMA planning documents of councils with resource management jurisdiction within the Gulf,[73] implementing integrated and ecosystems-based management for fisheries in the Gulf,[74] and identifying candidates for marine protected areas.[75] The Forum's discussion contemplated a collaborative model for marine spatial planning that would have the Forum's constituent members engage with stakeholders but maintain their own ownership and control over the plan rather than have consensus between stakeholders become a requirement.[76] The Forum members would jointly oversee the plan's development, jointly endorse its spatial plan output and agree to incorporate this plan into their own respective statutory plans.[77]

The Forum stated that this marine spatial plan could potentially set out the spatial identification of ecologically important marine areas and their connections, different uses and values attached to the Gulf including cultural, social and economic; areas of conflict between different catchment activities, marine users and ecologically important marine areas; as well as marine areas to be managed for specific purposes to manage those conflicts, with more detailed zoning set out in regional coastal plans.[78] It was also proposed that this spatial plan could identify various areas of cultural importance to Māori including marine wāhi tapu sites, resources of special value to tangata whenua, traditional waka moorings, and resources of importance to contemporary iwi development.[79] Likewise, the spatial plan could support effective communication with and inclusion of tangata whenua, allow for a diversity of tangata whenua views, and ensure that "concepts such as mauri (life force) guide the plan's development" and "mātauranga Māori (Māori knowledge) has its importance recognized".[80]

By December of 2012 the Hauraki Gulf Forum had endorsed a proposal for just such a marine spatial plan to be developed for the Gulf, and the project was subsequently approved by Auckland Council, Waikato Regional Council, the Ministry of Primary Industries, the Department of Conservation and mana whenua.[81]

---

[72] Ibid at 22-28.
[73] Ibid at 22.
[74] Ibid at 28-29.
[75] Ibid at 29-30.
[76] Ibid at 31-32.
[77] Ibid.
[78] Ibid at 34-35.
[79] Ibid at 35.
[80] Ibid.
[81] Hauraki Gulf Forum "Hauraki Gulf Marine Spatial Plan Update" (23 September 2013).

C Sea Change – a Treaty Partnership for Marine Planning

The joint marine spatial planning project for the Gulf was officially launched in September of 2013 under the working title "Sea Change",[82] later updated to "Sea Change – Tai Timu Tai Pari".[83] In keeping with the Forum's initial vision, the joint marine spatial planning project for the Gulf is intended to allow for both conservation and development within the Gulf, identifying areas for protection, restoration and enhancement, as well as areas that are appropriate for use and development.[84] The spatial plan created through this process is currently anticipated to be a non-statutory (and therefore non-binding) document that includes action plans and informs the work of its various participants, including review of regional coastal plans.[85] It is possible however that the Sea Change plan will be afforded statutory authority through legislation following its completion.[86]

Even as a non-statutory planning document, the information set out in this plan is intended to sit alongside iwi management plans developed individually by the mana whenua groups of the Gulf and to inform revisions to various statutory planning documents including unitary, district, regional and coastal plans, land use plans for catchments draining into the gulf, and relevant policies, rules and regulations.[87] In fact, it is expected that the Sea Change process will "front-load" the stakeholder and community discussions required for subsequent RMA plan changes in order to reduce the time and cost involved in revising those documents.[88] In this way even a non-statutory marine spatial plan will translate into tangible changes to the manner in which activities within the Gulf are managed under the RMA. Outside of the RMA this spatial plan will also be used to identify important recreational areas and to develop sustainability measures under the Fisheries Act 1996 such as aquaculture plans.[89]

---

[82] Ibid.

[83] Sea Change *What is Sea Change – Tai Timu Tai Pari?* (May 2014) <www.seachange.org.nz>.

[84] Waikato Regional Council, Group Manager – Policy and Transport "Report to Council: February 2013 – Decision Required – Hauraki Gulf Marine Spatial Plan – Objectives and Governance Structure" (14 February 2013) at 3.

[85] Ibid.

[86] Waikato Regional Council "Agenda Package for Strategy and Policy Committee meeting" (8 May 2014) at 22.

[87] Ibid; SeaSketch "Sea Change: Comprehensive Planning in the Hauraki Gulf, New Zealand" <www.seasketch.org>.

[88] Ministry for Primary Industries Aquaculture Planning Fund "APF Project Web Summary – Sea Change: Hauraki Gulf Marine Spatial Plan" <www.fish.govt.nz>.

[89] Ibid.

One of the most notable features of the Sea Change process for the purposes of this discussion is its three tiered governance and operation structure, which consists of a Stakeholder Working Group, a Project Management and Expert Advisory Team, and a Project Steering Group.[90] The Stakeholder Working Group (SWG) consists of stakeholders representing recreational interests, community groups, environmental groups, industry and business interests, tangata whenua and local and central government.[91] This group is tasked with the overall drafting and development of the plan. It receives and provides information, discusses and debates the issues and aspirations of its members, and ultimately seeks to resolve conflicts and achieve consensus on an overall plan for the Gulf.[92] The Project Management and Expert Advisory Team consists of officers from the regional districts of Waikato and Auckland, and from the central government agencies of the Department of Conservation and the Ministry of Primary Industries.[93] This body is tasked with managing the project and engaging technical specialists in natural and social sciences as well as mātauranga Māori as necessary to fill information gaps and answer questions raised by the SWG.[94] Finally, the Project Steering Group (PSG) provides overall leadership and strategic direction for the plan, receiving proposals for the plan from the SWG tasked with its development.[95] This group seeks consensus on the final form of the marine spatial plan for delivery to the relevant statutory authorities.[96]

The most notable feature of Sea Change's governance structure for this thesis is that the PSG is comprised of an even split between eight mana whenua representatives and eight agency representatives.[97] The agency representatives include the Chair of the Hauraki Gulf Forum, two representatives from Auckland Council, two from Waikato Regional Council, one Department of Conservation representative, one from the Ministry of Primary Industries, and one representative for the combined territorial authorities of Thames-Coromandel, Hauraki, Waikato and Matamata-Piako District Councils.[98] The PSG not only provides leadership and strategic oversight for the plan, it also holds ultimate authority over the plan's approval and is responsible for ensuring the plan is implemented by the various organisations it represents.[99] This

[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Hauraki Gulf Forum "Open Agenda: Hauraki Gulf Marine Spatial Plan Update" (25 March 2013) at 42.
[98] Ibid.
[99] Hauraki Gulf Forum "Hauraki Gulf Marine Spatial Plan Update" (23 September 2013), Attachment A at 49.

partnership model for the governance of Sea Change is particularly interesting considering that the level of representation for tangata whenua on the Hauraki Gulf Forum was one of the key complaints brought to the Waitangi Tribunal by the Hauraki Māori Trust Board against the Forum's governing legislation.[100] The Board had specifically argued for "one tangata whenua representative for every Crown/Statutory delegate member" in the Forum in its claim before the Tribunal.[101] Although the Board has thus far been unsuccessful in obtaining such a change to the Forum's governance structure,[102] this even split between Indigenous and non-Indigenous representatives has been implemented for governance of the marine spatial planning process.

As one further element of context, it must be noted that at the same time this marine spatial planning process is proceeding as a partnership between mana whenua and local and central government agencies several tangata whenua of the Gulf also remain in negotiations with the Crown for settlement of historic Treaty breaches, a number of which are anticipated to be settled within the year.[103] The marine spatial planning process is expected to feed into the outcome of these negotiations,[104] and one issue that may be addressed in the resulting settlement will be co-governance arrangements for the Gulf.[105]

At the time of writing the Sea Change initiative has just completed its first phase of information gathering through public forums, surveys and other outreach efforts.[106] The next phase will involve the development of different options for the plan for which feedback will be sought.[107] Finally, starting in January of 2015, the SWG is scheduled to begin the actual drafting and development of the plan, and it is anticipated that a complete plan will be finalised by September 2015.[108]

---

[100] Wai 728, above n 8, at 36-37.

[101] Ibid at 36.

[102] Note that issues relating to the representation of Hauraki Māori Trust Board members on the Hauraki Gulf Forum is still potentially the subject of Treaty settlement negotiations. See for example Ngāti Hei and the Crown *Agreement in Principle Equivalent* (July 2011) at 21(b) [Ngāti Hei AIPE].

[103] Rt Hon John Key "Prime Minister's Waitangi Day Speech 2014" (06 February 2014).

[104] Waikato Regional Council "Update on Sea Change – Tai Timu Tai Pari" Report of Strategy and Policy Committee, Waikato Regional Council Agenda (29 May 2014) at 83; Waikato Regional Council "Agenda Package for Strategy and Policy Committee meeting" (8 May 2014) at 22.

[105] See for example Ngāti Hei AIPE, above n 102, at [22].

[106] Sea Change Stakeholder Working Group "Meeting Notes SWG Meeting 2" (12 February 2014).

[107] Ibid.

[108] Peter Singleton "Sea Change: Hauraki Gulf Marine Spatial Plan" Kaimai Mamaku Catchments Forum (June 2014).

D Conclusion

Much like its Canadian analogues in the Pacific North Coast of British Columbia, the ultimate legal status of the Hauraki Gulf Marine Plan remains a subject of significant uncertainty at this time. The pilot project taking place in New Zealand has yet to even result in a draft plan for examination similar to the Haida Gwaii Draft Plan assessed in the fifth chapter of this thesis. Nevertheless, the governance structure and anticipated outcomes from this process warrant analysis as a potentially divergent model from how New Zealand's legal system currently addresses Māori assertions of their own marine space. Similar to the Canadian marine spatial planning process examined in chapter five this process has provided Māori with equal representation in a governance body that ultimately authorises or rejects the contents of the spatial plan that will be prepared.

It remains to be seen what status Māori normative values are given in the ultimate decision making framework derived from this process, but the plan's governance structure has clearly indicated that Māori matauranga will provide one of the sources of knowledge on which the plan will be developed. Furthermore, the representatives of mana whenua that co-govern this process must ultimately agree to the final plan and therefore have an ability to decide themselves what aspects of it could be inconsistent with Māori normative values and legal orders. In the case studies examined in the previous chapter Māori assertions as to acceptable and desirable development within their rohe moana based on tikanga Māori were analysed and balanced within a decision making process over which they had no ultimate control. In this way tikanga Māori was given a significant role as an expression of cultural perspective and connection between Māori and their rohe but was not deferred to as a legal ordering that was in any way binding. A consensus-based approach to determining acceptable development for the Hauraki Gulf, on the other hand, could mean that marine development scenarios Māori see as irreconcilable with tikanga Māori, such as the Tauranga port expansion, are either not addressed in the plan and left to outside dispute resolution mechanisms, as was the case of areas of ongoing contention in the Haida Gwaii Draft Marine Plan, or mitigated through direct negotiation between the members of the governing committee.

The ultimate legal impact of the Hauraki Gulf Marine Plan on marine development in this region remains speculative at this point. Yet the governance model proposed for this process does suggest that greater space is being provided for Māori to assert their own legal projections of marine space in this region. New Zealand's legal system provides room for Māori to retain and foster unique legal, social and cultural connections with their rohe through various statutes such as the RMA, and this legislative framework even provides a role for Māori to develop their own planning

documents setting out their vision for the management of their territories.[109] Yet under New Zealand's legal system Māori projections of marine space remain vulnerable to being recharacterised and balanced against other interests by Crown decision makers. Although joint marine spatial planning process does not purport to drastically overhaul the manner in which marine resource development is undertaken in the Hauraki Gulf, a strong consensually endorsed final plan can provide an important shared vision for development within this region to guide future development activities, fostering those that are consistent with this vision. By providing Māori with final decision making authority over the content of this expression of a shared vision, this marine spatial planning process can be seen as more consistent with a model of reconciliation that acknowledges Māori as autonomous or incommensurable communities in a manner similar to the Haida Gwaii process. By addressing marine development of shared and contested territories through mutual collaboration between Māori and the Crown this process may help bring about a form of development more consistent with both parties' distinct legal orders.

[109] See for example Resource Management Act 1991, ss 61(2A)(a), 66(2A)(a) and 74(2A).

PART IV

Discourse on the geography of the sea, particularly by political geographers, frequently revolves around lines of division: How is a boundary line calculated? How is it communicated? What activities should be permitted behind the line? ... Whatever the precise lines drawn across the sea, and whatever goals these lines are designed to serve, a line in ocean space, like ocean space itself, does more than simply divide terrestrial land spaces that "matter". ... By drawing lines across the sea, geographers not only assert divisions and connections; they also impose a social imprint. Oceans may connect or divide, or they may be implicated in more radical strategies for the social organization of space that lie outside the norm of state stewardship that has traditionally guided social intervention in marine space. By rethinking the relationship of the ocean to land, to society, and to marine resources, geographers can contribute to a new era of marine-and global-governance.

- Philip Steinberg[1]

[1] Philip Steinberg "Lines of Division, Lines of Connection: Stewardship of the World Ocean" (1999) 89(2) Geographical Review 254 at 261-263.

IX CONCLUSION ON SHARING LEGAL MARINE SPACE

Almost two decades ago, former Chief Judge of the Māori Land Court Edward Taihakurei Durie posed a question with regards to the future of New Zealand's legal system that strongly resonates with the theme of this thesis: "will we hone our jurisprudence to one that represents the circumstances of the country and shows that our law comes from two streams?"[1] This is a question that is as urgent and difficult in a Canadian context as it is in New Zealand. The Indigenous peoples of each of these jurisdictions continue to assert their own legal orders as a basis on which their territories and interests ought to be governed, but how these legal orders can be reconciled with the state-centred legal systems they interact with remains a difficult and complex question. This thesis has sought to explore some of the ways in which Canada and New Zealand's legal systems have attempted to accommodate and reconcile themselves with Indigenous legal orders to date in the context of marine resource governance. As the allocation and management of marine territories is undergoing rapid development and evolution in each jurisdiction opportunities are also arising for new approaches to be developed. One area in which both New Zealand and British Columbia have made interesting advances is with respect to joint planning processes that create a mutually acceptable vision for the development of marine spaces. Although these processes are ongoing and early in their development it is to be hoped that they might provide one new perspective on how two or more streams of law and potentially incommensurable projections of marine space might be accommodated and reconciled through the charting of a shared path forward.

[1] Sir Edward Taihakurei Durie "Will the settlers settle? Cultural conciliation and law" (1996) 8(4) Otago L Rev 449.

X TABLE OF CASES

Canada

Da'naxda'xw/Awaetlala v British Columbia 2011 BCSC 620

Squamish Nation v British Columbia (Community, Sport and Cultural Development) 2014 BCSC 991

Morton v British Columbia (Agriculture and Lands) 2009 BCSC 136

St Catherines Milling & Lumber Co v R [1887] 13 SCR 577

Calder et al v British Columbia [1973] SCR 313

Delgamuukw v British Columbia [1997] 3 SCR 1010

Friends of the Old Man River Society v Canada (Minister of Transport & Minister of Fisheries & Oceans) [1992] 1 SCR 3

Canada Western Bank v Alberta 2007 SCC 22

British Columbia (Attorney-General) v Lafarge Canada Inc 2007 SCC 23

Tsilhqot'in Nation v British Columbia 2014 SCC 44

Reference re Ownership of the Bed of the Strait of Georgia and Related Areas [1984] 1 SCR 388

Re Offshore Mineral Rights of British Columbia [1967] SCR 792

Delgamuukw v British Columbia [1991] 3 WWR 97 (BCSC)

Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73

Manitoba Métis Federation Inc v Canada (Attorney General) 2013 SCC 14

Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development) 2013 FC 669

R v Badger [1996] 1 SCR 771

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage) 2005 SCC 69

Xeni Gwet'in v British Columbia 2002 BCCA 434

William v British Columbia 2004 BCSC 610

William v British Columbia 2012 BCCA 285

Canada v Stoney Band 2005 FCA 15

Wewaykum Indian Band v Canada 2002 SCC 79

Coldwater First Nation v Canada (Indian Affairs and Northern Development) 2013 FC 1138

Canada v Kitselas First Nation 2014 FCA 150

Lac Minerals Ltd v International Corona Resources Ltd [1989] 2 SCR 574

R v Sparrow [1990] 1 SCR 1075

Behn v Moulton Contracting Ltd 2013 SCC 26

R v Van der Peet [1996] 2 SCR 507

R v Pamajewon [1996] 2 SCR 821

R v Powley 2003 SCC 43

R v Gladstone [1996] 2 SCR 723

Ahousaht Indian Band and Nation v Canada (Attorney-General) 2013 BCCA 300

R v Sappier; R v Gray 2006 SCC 54

Guerin v Canada [1984] 2 SCR 335

R v Marshall; R v Bernard [2005] 2 SCR 220

Baker Lake v Minister of Indian Affairs and Northern Development [1980] 1 FC 518 (TD)

Tsilhqot'in Nation v British Columbia 2007 BCSC 1700

The Lax Kw'Alaams Indian Band v The Attorney-General of Canada 2006 BCSC 1463

Ahousaht Indian Band and Nation v Canada (Attorney-General) 2009 BCSC 1494

Halfway River First Nation v British Columbia (Ministry of Forests) 1999 BCCA 470

Taku River Tlingit First Nation v British Columbia (Project Assessment Director) 2004 SCC 74

Lax Kw'alaams Indian Band v Canada (Attorney-General) 2011 SCC 56

Huu-Ay-Aht First Nation et al v The Minister of Forests et al 2005 BCSC 697

Hupacasath First Nation v British Columbia (Minister of Forests) 2005 BCSC 1712

Gitxsan and other First Nations v British Columbia (Minister of Forests) 2002 BCSC 1701

Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management) 2005 BCCA 128

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations) 2014 BCSC 568

R v Sioui [1990] 1 SCR 1025

Makivik Corp v Canada (Minister of Canadian Heritage) [1999] 1 FC 38

Corbière v Canada (Minister of Indian and Northern Affairs) [1999] 2 SCR 203

Mitchell v MNR [2001] 1 SCR 911

R v Gladue [1999] 1 SCR 688

Beckman v Little Salmon/Carmacks First Nation 2010 SCC 53

R v Douglas et al 2007 BCCA 265

R v Nikal [1996] 1 SCR 1013

Lax Kw'alaams Indian Band v Canada (Attorney-General) 2008 BCSC 447

Lax Kw'alaams Indian Band v Canada (Attorney-General) 2009 BCCA 593

Kwicksutaineuk Ah-Kwa-Mish v Canada (Attorney-General) 2012 FC 517

K'omoks First Nation v Canada (Attorney-General) 2012 FC 1160

Ehattesaht First Nation v British Columbia (Agriculture and Lands) 2011 BCSC 658

Blaney et al v British Columbia (The Minister of Agriculture, Food and Fisheries) 2005 BCSC 283

Heiltsuk Tribal Council v British Columbia (Minister of Sustainable Resource Management) 2003 BCSC 1422

Morton v British Columbia (Agriculture and Lands) 2010 BCSC 100

Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Agriculture and Lands) 2010 BCSC 1699

Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Agriculture and Lands) 2012 BCCA 193

New Zealand

Attorney-General v Ngāti Apa [2003] 3 NZLR 643

Trans-Tasman Resources Ltd Marine Consent Decision EPA EEZ004, 17 June 2014

Greenpeace of New Zealand Incorporated v Minister of Energy and Resources [2012] NZHC 1422

New Zealand Police v Teddy [2013] NZHC 432

Matahaere v Police [2012] NZHC 2436

R v Symonds (1847) NZPCC 387 (SC)

Wi Parata v Bishop of Wellington (1878) 2 NZ Jur (NS) SC 72

New Zealand Māori Council v Attorney General [1987] 1 NZLR 641 (CA), "the SOE case"

New Zealand Māori Council v Attorney-General [1994] 1 NZLR 513 (PC), "the Broadcasting Assets case"

Ngāi Tahu Māori Trust Board v Attorney-General HC Wellington CP 559/87, 610/87, 553/87 and 614/87, 12 November 1987

New Zealand Māori Council v Attorney-General [1989] 2 NZLR 142, "the Forestry Assets case"

Friends and Community of Ngawha v Minister of Corrections (2002) 9 ELRNZ 67, [2003] NZRMA 272 (CA)

Beadle v Minister of Corrections EC Wellington A74/02, 8 April 2002

Bleakley v Environmental Risk Management Authority [2001] 3 NZLR 213 (HC)

Carter Holt Harvey Ltd v Te Rūnanga o Tūwharetoa ki Kawerau [2003] 2 NZLR 349

New Zealand Steel Mining Ltd v Butcher [2014] NZHC 1552

Paki v Attorney-General [2009] NZCA 584

Trustees of Tuhua Trust Board v Minister of Local Government [2012] NZEnvC 202

New Zealand Māori Council v Attorney General [2013] NZSC 6, "the Water case"

Ririnui v Landcorp Farming Ltd [2014] NZHC 1128

Takamore v Clarke [2011] NZCA 587

Hoani Te Heuheu Tukino v Aotea District Māori Land Board (1941) AC 308

Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC)

Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179 (HC)

New Zealand Māori Council v Attorney-General [2007] NZCA 269

New Zealand Māori Council v Attorney-General [1991] 2 NZLR 192 (CA), "the Radio Frequencies case"

New Zealand Māori Council v Attorney-General [1996] 3 NZLR 140, "the Radio assets case"

Aqua King (Anakoha Bay) v Marlborough District Council EC W71/97, 30 June 1997

Cammack v Kapiti Coast District Council [2009] NZEnvC 222

Te Rūnanga O Taumarere v Northland Regional Council PT A108/95, 24 November 1995

Ngāi Tumapuhiaarangi v Carterton District Council HC Wellington AP6/01, 25 June 2001

Winstone Aggregates Ltd v Franklin District Council EC Auckland A80/02, 28 April 2002

Land Air Water Association v Waikato Regional Council EC Auckland A11/01, 23 October 2001

TV3 Network Services Ltd v Waikato District Council [1998] 1 NZLR 360

Tautari v Northland Regional Council PT Auckland A55/96, 24 June 1996

Minhinnick v Minister of Corrections EC Auckland A43/04, 6 April 2004

Waikanae Christian Holiday Park v Kapiti Coast District Council HC Wellington CIV-2003-485-1764, 27 October 2004

Heybridge Developments Ltd v Bay of Plenty Regional Council (2011) 16 ELRNZ 593, [2012] NZRMA 123 (HC)

Watercare Services Ltd v Minhinnick [1998] 1 NZLR 295 (CA)

Ngāti Ruahine v Bay of Plenty Regional Council [2012] NZHC 2407

McGuire v Hastings District Council [2002] 2 NZLR 577 (PC)

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

Ministry of Agriculture and Fisheries v Love [1988] DCR 370 (DC)

Ministry of Agriculture and Fisheries v Hakaria [1989] DCR 289 (DC)

Green v Ministry of Agriculture and Fisheries [1990] 1 NZLR 411 (HC)

Taranaki Fish and Game Council v McRitchie [1997] DCR 446 (DC)

Te Rūnanga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641 (CA)

Marlborough Sounds (1997) 22A Nelson MB 1 (22A NEL 1)

In re Ninety Mile Beach [1965] NZLR 461

Attorney-General v Te Tau Ihu Iwi (Marlborough Sounds) [1998] NZMAC 11 (19 October 1998)

Proprietors of Wakatu Incorporated v Attorney-General [2012] NZHC 1461

Te Rūnanga o Ngāi Te Rangi Iwi Trust & Ors v Bay of Plenty Regional Council [2011] NZEnvC 402

Freda Pene Rewiti Whānau Trust v Auckland Regional Council HC Auckland CIV-2005-404-356, 9 December 2005

Freda Pene Rewiti Whānau Trust v Auckland Regional Council (2004) 11 ELRNZ 235, A166/2004

Sanford Limited, Sealord Group Limited and Pelagic and Tuna New Zealand Limited v The New Zealand Recreational Fishing Council Inc and New Zealand Big Game Fishing Council Inc and others [2008] NZCA 160

Sanford Limited, Sealord Group Limited and Pelagic and Tuna New Zealand Limited v The New Zealand Recreational Fishing Council Inc and New Zealand Big Game Fishing Council Inc and others [2009] NZSC 54

Environmental Defence Society Inc v New Zealand King Salmon Co Ltd [2014] NZSC 38

Australia

Mabo v Queensland [No. 2] (1992) 175 CLR 1

United States

Martin v Waddell's Lessee 41 U.S. 367 (1842)

Johnson v McIntosh (1823) 8 Wheaton 543

XI TABLE OF LEGISLATION

Canada

Canada Oil and Gas Operations Act RS 1985 c 0-7

Canada National Marine Conservation Areas Act SC 2002 c 18

Canada Shipping Act RS 1985 c S-9

Canada Wildlife Act RSC 1985 c W-9

Canadian Environmental Assessment Act, 2012 SC 2012 c 19

Coastal Fisheries Protection Act RSC 1985 c C-33

Constitution Act, 1867 RSC 1985 App II No 5

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c 11

Fisheries Act RSC 1985 c F-14

Marine Liability Act SC 2001 c 6

Navigation Protection Act RSC 1985 c N-22

Oceans Act SC 1996 c 31

Royal Proclamation of 1763 RSC 1985 App II No 1

Species at Risk Act SC 2002 c 29

British Columbia

Ecological Reserve Act RSBC 1996 c 103

Environmental Assessment Act SBC 2002 c 43

Haida Gwaii Reconciliation Act SBC 2010 c 17

Land Act RSBC 1996 c 245

Park Act RSBC 1996 c 344

Protected Areas of British Columbia Act SBC 2000 c 17

Wildlife Act RSBC c 488

New Zealand

Aquaculture Legislation Amendment Bill (No 3) 2010

Clean Air Act 1972 (repealed)

Crown Minerals Act 1991

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

Fisheries Act 1996

Fisheries (Kaimoana Customary Fishing) Regulations 1998

Fisheries (South Island Customary Fishing) Regulations 1999

Foreshore and Seabed Act 2004 (repealed)

Hauraki Gulf Marine Park Act 2000

Local Government (Auckland Council) Act 2009

Māori Commercial Aquaculture Claims Settlement Act 2004

Māori Fisheries Act 1989 (repealed)

Māori Fisheries Act 2004

Marine and Coastal Area (Takutai Moana) Act 2011

Marine Mammals Protection Act 1978

Marine Reserves Act 1971

Mining Act 1971 (repealed)

Noise Control Act 1982 (repealed)

Petroleum Act 1937 (repealed)

Resource Management Act 1991

State-Owned Entreprises Act 1986

Te Ture Whenua Māori Act

Town and Country Planning Act 1977 (repealed)

Treaty of Waitangi Act 1975

Water and Soil Conservation Act 1967 (repealed)

XII BIBLIOGRAPHY

Books

Bargh, Maria (ed) *Māori and Parliament: diverse strategies and compromises* (Huia, Wellington, 2010)

Belgrave, Michael *Historical frictions: Māori claims and reinvented histories* (Auckland University Press, Auckland, 2005)

Bennion, Tom, Birdling, Malcolm and Paton, Rebecca *Making Sense of the Foreshore and Seabed* (Māori Law Review, Wellington, 2004)

Benton, Richard and others *Te Mātāpunenga: A compendium of references to the concepts and institutions of Māori customary law* (Victoria University Press, Wellington, 2013)

Blomley, Nicholas K *Law, Space, and the Geographies of Power* (Guildford Press, New York, 1994)

Blomley, Nicholas K, Delaney, David and Ford, Richard T (eds) *The Legal Geographies Reader* (Blackwell Publishers, Oxford, 2001)

Boast, Richard *Foreshore and Seabed* (LexisNexis NZ, Wellington, 2004)

Borrows, John "Canada's Indigenous Constitution" (University of Toronto Press, 2010)

Braverman, Irus and others *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press, 2014)

Burns, Peter *The Leiden Legacy: Concepts of Law in Indonesia* (KITLV Press, Leiden (NL), 2004)

Carey, Neil G *A Guide to the Queen Charlotte Islands* (Raincoast Books, Vancouver (BC), 1995)

Charters, Claire and Erueti, Andrew (eds) *Māori property rights and the foreshore and seabed: the last frontier* (Victoria University Press, Wellington, 2007)

Croce, Mariano *Self-sufficiency of Law: A Critical-institutional Theory of Social Order* (Springer Dordrecht Heidelberg, New York, 2012)

Davies, Margaret *Asking the Law Question* (3rd ed, Thomson Lawbook Co, Sydney, 2008)

de Sousa Santos, Boaventura *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (2nd ed, Northwestern University Press, Evanston (Ill), 2003)

Durie, Mason *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998)

Ford, Lisa and Rowse, Tim (eds) *Between Indigenous and Settler Governance* (Routledge, New York, 2013)

Geertz, Clifford "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, New York, 1983)

Gill, Ian *Haida Gwaii: Journeys Through the Queen Charlotte Islands* (Raincoast Books, Vancouver (BC), 1997)

Hoehn, Felix *Reconciling Sovereignties: Aboriginal Nations and Canada* (University of Saskatchewan, Native Law Centre of Canada, Saskatoon, 2012)

Hogg, Peter W *Constitutional Law of Canada* (4th ed, Carswell, Toronto, 1997)

Horwood, Dennis and Parkin, Tom *Haida Gwaii: The Queen Charlotte Islands* (Heritage House Canada, Surrey (BC), 2000)

Larsen, Mike and Walby, Kevin *Brokering Access: Power, Politics, and Freedom of Information Process in Canada* (University of British Columbia Press, Vancouver, 2012)

Kāwharu, Sir Ian Hugh (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989)

Keal, Paul *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press, Cambridge, 2003)

McHugh, Paul *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination* (Oxford University Press, New York, 2004)

McHugh, Paul *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1989)

Miller, Robert and others *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010)

Nolan, Derek (ed) *Environmental and Resource Management Law* (3rd ed, LexisNexis NZ, Wellington, 2005)

Orange, Claudia *The Treaty of Waitangi* (2nd ed, Bridget Williams Books, Wellington, 2011)

Palmer, Geoffrey and Palmer, Matthew *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004)

Palmer, Kenneth *Local Authorities Law in New Zealand* (Brookers, Wellington, 2012)

Palmer Matthew S R *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington, Victoria University Press, 2008)

Quinn, Joanna R (ed) *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill-Queen's University Press, Montreal, 2009)

Reynolds, James I "The Spectre of Spectra: The Evolution of the Crown's Fiduciary Obligation to Aboriginal Peoples Since Delgamuukw" in Morellato, Maria (ed) *Aboriginal Law Since Delgamuukw* (Canada Law Book, Aurora (ON), 2009) ch 6

Ryan, P M *The Raupō Dictionary of Modern Māori* (4th ed, Penguin Group, 2012)

Said, Edward W *Culture and Imperialism* (Knopf, New York, 1993)

Semple, Ellen Churchill *The Geography of the Mediterranean Regions: Its Relation to Ancient History* (AMS Press, New York, 1931)

Steinberg, Philip *The Social Construction of the Ocean* (Cambridge University Press, Cambridge, 2001)

Essays and Chapters in Books

Hayward, Janine "'Flowing from the Treaty's Words': The Principles of the Treaty of Waitangi" in Janine Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Book, Wellington, 2004)

Hogg, Peter W "The Constitutional Basis of Aboriginal Rights" in Maria Morellato (ed) *Aboriginal Law Since Delgamuukw* (Canada Law Book, Aurora (ON), 2009) ch 1

Jones, Carwyn "Whakaeke i ngā ngaru – riding the waves: Māori legal traditions in New Zealand public life" in Lisa Ford and Tim Rowse (eds) *Between Indigenous and Settler Governance* (Routledge, New York, 2013) 174

Magallanes, Catherine Iorns "The foreshore and seabed legislation: resource- and marine-management issues" in Charters, Claire & Erueti, Andrew (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University of Wellington, 2007)

Mikaere, Ani "The Treaty of Waitangi and Recognition of Tikanga Māori" in Belgrave, Michael, Kawharu, Merata and Williams, David (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Melbourne, 2005)

Mobekk, Eirin "Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation" in Ebnöther, Anja and Fluri, Philipp (eds) *After Intervention: Public Security Management in Post-Conflict Societies - From Intervention to Sustainable Local Ownership* (Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2005) ch 9

Rowan, Jenny "The Role and Governance of Sub-National Government: Impact of the 'Super-City'" in Morris, Caroline, Boston, Jonathan and Butler, Petra (eds) *Reconstituting the Constitution* (Springer, London, 2011)

Sharp, Andrew "Recent juridical and constitutional histories of Maori" in Sharp, Andrew and McHugh, Paul *Histories, power and loss* (Bridget Williams, Wellington, 2001)

Journal Articles

Agardy, Tundi and others "Mind the gap: Addressing the shortcomings of marine protected areas through large scale marine spatial planning" (2011) 35 Mar Policy 226

Asch, Michael and Macklem, Patrick "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29 Alta Law Rev 498

Barzilai, Gad "Beyond Relativism: Where is Political Power in Legal Pluralism?" (2008) 9 Theo Inq L 395

Bess, Randall "New Zealand's indigenous people and their claims to fisheries resources" (2001) 25(1) Mar Policy 23

Bess, Randall "New Zealand's Treaty of Waitangi and the doctrine of discovery: Implications for the foreshore and seabed" (2011) 35(1) Mar Policy 85

Bess, Randall and Rallapudi, Ramana "Spatial conflicts in New Zealand fisheries: The rights of fishers and protection of the marine environment" (2007) 31 Mar Policy 719

Bijma, Jelle and others "Climate change and the oceans – What does the future hold?" (2013) 74 Mar Pollut Bull 495

Black, Alexander J "Jurisdiction over Petroleum Operations in Canada" (1986) 35(2) ICLQ 446

Blomley, Nicholas K and Bakan, Joel "Spacing Out: Towards a Critical Geography of Law" (1992) 30 Osgoode Hall L J 661

Blomley, Nicholas K and Clark, Geoffrey "Law, theory, and geography" (1990) 11(5) Urban Geogr 433

Borrows, John "Ground-rules: indigenous treaties in Canada and New Zealand" (2006) 22(2) NZULR 188

Borrows, John "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537

Braverman, Irus "Hidden in Plain View: Legal Geography from a Visual Perspective" (2011) 7 Law, Culture and the Humanities 173

Brown, C Rebecca and Reynolds, James I "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 37(1) UBC Law Rev 449

Carlman, Inga "The Resource Management Act 1991 through External Eyes" (2007) 11 NZ J Envtl L 181

Carneiro, Gonçalo "Evaluation of marine spatial planning" (2013) 37 Mar Policy 214

Christie, Gordon "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139

Christie, Gordon "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67

Christie, Gordon "'Obligations', Decolonization and Indigenous Rights to Governance" (2014) 27 Can JL & Jur 259

Crawford, David and Kenchington, Richard "On the Meaning of Integration in Coastal Zone Management" (1993) 21 Ocean Coast Manage 109

de Sousa Santos, Boaventura "Law: A Map of Misreading: Toward a Postmodern Conception of Law" (1987) 14(3) J Law & Soc 279

Douvere, Fanny "The importance of marine spatial planning in advancing ecosystems-based sea use management" (2008) 32 Mar Policy 762

Durie, Sir Edward Taihākurei "Will the settlers settle? Cultural conciliation and law" (1996) 8(4) Otago L Rev 449

Fletcher, Stephen and others "Effective practice in marine spatial planning: A participatory evaluation in Southern England" (2013) 39 Mar Policy 341

Foster, Angela "New Zealand's Oceans Policy" (2003) 34 VUWLR 469

Geddis, Andrew "A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System" (2006) 5(4) Elect Law J 347

Griffiths, John "What is Legal Pluralism?" (1986) 24 J Legal Plur 1

Hunt, Alan "The Critique of Law: What is 'Critical' about Critical Legal Theory?" (1987) 14(1) J Law & Soc 5

Hutchings, Jeffrey A and Post, John R "Gutting Canada's Fisheries Act: No Fishery, No Fish Habitat Protection" (2013) 38(11) Fisheries 497

Jessen, Sabine "A Review of Canada's Implementation of the Oceans Act since 1997-From Leader to Follower? (2011) 39(1) Coastal Management 20

Jones, Russ, Rigg, Catherine and Lee, Lynn "Haida Marine Planning: First Nations as a Partner in Marine Conservation" (2010) 15(1) Ecology and Society 12

Joseph, Robert "Re-Creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Waikato L Rev 74

Kidd, Sue "Rising to the integration ambitions of Marine Spatial Planning: Reflections from the Irish Sea" (2013) 39 Mar Policy 273

Kidd, Sue and Shaw, Dave "Reconceptualising territoriality and spatial planning: insights from the sea" (2013) 14(2) Planning Theory & Practice 180

Kundis Craig, Robin "Ocean Governance for the 21st Century: Making Marine Zoning Climate Change Adaptable" (2012) 36 Harv Envtl L Rev 305

Lefebvre, Henri "Reflections on the Politics of Space" (1976) 8 Antipode 30

Legrand, Pierre "Comparative Legal Studies and the Matter of Authenticity" (2006) 1 JCL 365

Luk, Senwung "Confounding Concepts: The Judicial Definition of the Constitutional Protection of the Aboriginal Right to Self-Government in Canada" (2009) 41(1) Ottawa L Rev 103

Macklem, Patrick "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan L Rev 1311

Makgill, Robert A "Oil and Gas in the Exclusive Economic Zone" (2014) Resource Management Journal 29

Makgill, Robert A and Rennie, Hamish G "A Model for Integrated Coastal Management Legislation: A Principled Analysis of New Zealand's Resource Management Act 1991" (2012) 27 IJMCL 135

Mansell, John "The Voyage towards National Oceans Policy in New Zealand – Encountering Rocks and Shoals" (2004) 137 MAST 1

McDorman, Ted L and Chircop, Aldo "Canada's Oceans Policy Framework: An Overview" (2012) 40(2) Coastal Management 133

Moodie, Douglas J R "Aboriginal Maritime Title in Nova Scotia: An "Extravagant and Absurd Idea"?" (2004) 37 UBC Law Rev 495

Morse, Bradford W "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*" (1997) 42(4) McGill L J 1011

Palmer, Geoffrey "The Treaty of Waitangi – Where to From Here?" (2007) 11(3) Otago LR 381

Palmer, Kenneth "Hauraki Gulf Marine Park Act 2000, The Legislation Note" (2000) 4 NZJEL 271

Palmer, Matthew "Constitutional Realism About Constitutional Protection: Indigenous Rights Under a Judicialized and a Politicized Constitution" (2007) 29 Dalhousie LJ 1

Pang, Ling Yan "Ko Ngā Take Ture Māori: A Relational Duty of Good Faith: Reconceptualising the Crown-Māori Relationship" (2011) 17 Auckland U L Rev 249

Philippart, Catharina and others "Impacts of climate change on European marine ecosystems: Observations, expectations and indicators" (2011) 400(1) J Exp Mar Biol Ecol 52

Pue, Wes "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11(6) Urban Geogr 566

Quig, Paula "Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands – An Overview" (2004) 45 Cah de Droit 659

Ricketts, Peter J and Hildebrand, Lawrence "Coastal and Ocean Management in Canada: Progress or Paralysis?" (2011) 39(1) Coastal Management 4

Roberts, Simon "Against legal pluralism: Some reflections on the contemporary enlargement of the legal domain" (1998) 42 J Legal Plur 95

Robinson, Michael "The Sealord Fishing Settlement: An International Perspective" (1993) 7 *Auckland University Law Review* 557

Ross, Ruth "Te Tiriti o Waitangi: Texts and Translations" (1997) 6 New Zeal J Hist 124

Roughan, Nicole "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 U T L J 135

Roy, Alpana "Postcolonial Theory and Law: A Critical Introduction" (2008) 29 Adel L Rev 315

Rutherford, Murray, Dickinson, Megan and Gunton, Thomas "An evaluation of the national framework for marine planning in Canada" (2010) 37(3) Environments 47

Santos, Catarina and others "Marine spatial planning and oil spill risk analysis: Finding common grounds" (2013) 74(1) Mar Pollut Bull 73

Schaefer, Nicole and Barale, Vittorio "Marine spatial planning: opportunities & challenges in the framework of the EU integrated maritime policy" (2011) 15 J Coast Conserv 237

Slattery, Brian "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433

Slattery, Brian "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727

Soja, Edward "Symposium: Surveying Law and Borders, Afterward" (1996) 48 Stan L Rev 1421

Steinberg, Philip "Lines of Division, Lines of Connection: Stewardship of the World Ocean" (1999) 89(2) Geographical Review 254

Sullivan, Kathleen M "(Re)landscaping Sovereignty in British Columbia, Canada" (2006) 29(1) PoLAR 44

Takeda, Louise and Røpke, Inge "Power and contestation in collaborative ecosystem-based management: The case of Haida Gwaii" (2010) 70 Ecological Economics 178

Tomas, Nin "Māori Land Law: The Coastal Marine (Takutai Moana) Act 2011" (2011) 1 NZ L Rev 381

Tully, James "Recognition and dialogue: the emergence of a new field" (2004) 7(3) CRISPP 84

Turpel, Mary Ellen "Aboriginal Peoples and the Canadian *Charter*" (1989-1990) 6 Can Hum Rts Yrbk 3

Twining, William "Normative and Legal Pluralism: A Global Perspective" (2010) 20 Duke J Comp & Int'l L 473

Vince, Joanna and Haward, Marcus "New Zealand oceans governance: Calming turbulent waters?" (2009) 33(2) Mar Policy 412

von Benda-Beckmann, Franz "Who's afraid of legal pluralism?"

Wactford, Aroha M "Treaty of Waitangi (Fisheries Claims) Settlement Act 1992" (1993) 7 Auckland U L Rev 402

Walters, Mark D "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470

Watson, Reg A and others "Global marine yield is halved as fishing intensity redoubles" (2013) 14(4) Fish Fish 493

Williams, David V "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand" (2006) 14 Waikato L Rev 120

Woodman, Gordon "Ideological Combat and Social Observation: Recent Debate About Legal Pluralism" (1998) 42 J Legal Plur 21

Worm, Boris and Branch, Trevor A "The future of fish" (2012) 27(11) Trends Ecol Evolut 594

Worm, Boris and others "Rebuilding Global Fisheries" (2009) 325 Science 578

Government Reports, Policies, Papers and Others

British Columbia *Land Use Operational Policy: Aquaculture* (effective 1 June 2011, amended 1 April 2014)

Brooks, Cheryl A *Rights, Risks and Respect – A First Nations Perspective on the Lifting of the Federal Moratorium on Offshore Oil and Gas Exploration in the Queen Charlotte Basin of British Columbia* (Natural Resources Canada, October 2004)

Canada-British Columbia Agreement for Environmental Assessment Cooperation (signed 11 March 2004)

Council of the Haida Nation *Haida Nation Constitution* (as amended at the 2010 House of Assembly)

Council of Haida Nation *Kunst'aa Guu – Kunst'aayah Reconciliation Protocol*

Council of the Haida Nation *Strategic Land Use Agreement*

Department of Conservation *Islands of the Hauraki Gulf Marine Park* (Auckland, 2010)

Draft Central Coast Marine Plan Version 6.1 (June 2014)

Durie, Sir Taihākurei Edward, Boast, Richard and O'Regan, Hana *Pākia ki uta, pākia ki tai: report of the Ministerial Review Panel* (Ministry of Justice, Wellington, 2009)

Fisheries and Oceans Canada *Canada's Oceans Action Plan: For Present and Future Generations* (2005)

Fisheries and Oceans Canada *Canada's Oceans Strategy: Our Oceans, Our Future* (2002)

Fisheries and Oceans Canada "DRAFT Pacific North Coast Integrated Management Area Plan" (27 May 2013)

Fisheries and Oceans Canada *Implementing the New Fisheries Protection Provisions under the Fisheries Act* (Discussion Paper, April 2013)

Fisheries and Oceans Canada and others *Memorandum of Understanding on Pacific North Coast Integrated Management Area Collaborative Oceans Governance* (11 December 2008)

Fisheries and Oceans Canada *Terms of Reference for the Steering Committee of the Pacific North Coast Integrated Management Area* (DRAFT 21 January 2009)

Hennessy, Jennifer and the State Ocean Caucus *Marine Spatial Planning in Washington: Final Report and Recommendations of the State Ocean Caucus to the Washington State Legislature* (Washington Department of Ecology, Olympia (WA), 2011)

Haida Gwaii Draft Marine Plan Version 2.1 (April 2014)

J G Bones Consulting "PNCIMA Issues, Challenges and Opportunities" (discussion paper prepared for Fisheries and Oceans Canada (Pacific Region) on behalf of PNCIMA Secretariat, June 2009)

Jackson, Moana *The Māori and the Criminal Justice System: He Whaipaanga Hou: A New Perspective, Part 2* (Department of Justice, Wellington, 1988)

Macdiarmid, Alison and others *Assessment of anthropogenic threats to New Zealand marine habitats* (Ministry of Agriculture and Forestry, New Zealand Aquatic Environment and Biodiversity Report No 93, Wellington, 2012)

Memorandum of Understanding Respecting the Implementation of Canada's Oceans Strategy on the Pacific Coast of Canada (signed 18 September 2004)

New Zealand Coastal Policy Statement 2010

New Zealand Ministry of Fisheries *Details of the Māori Commercial Aquaculture Claims Settlement* (2006)

New Zealand Parliament "Aquaculture Legislation Amendment Bill (No 2) (2011 No 232-2): Bills Digest No 1861"

Ngāti Hei and the Crown *Agreement in Principle Equivalent* (July 2011)

Parliamentary Commissioner for the Environment *Setting Course for a Sustainable Future* (Wellington, 1999)

Report of the Public Review Panel on the Government of Canada Moratorium on Offshore Oil and Gas Activities in the Queen Charlotte Region of British Columbia (Natural Resources Canada, 29 October 2004)

Royal Commissions

Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol 1 (Supply and Services Canada, Ottawa, 1996)

Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol 2 (Supply and Services Canada, Ottawa, 1996)

Law Commission Publications

Borrows, John "Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada" in Law Commission of Canada (ed) *Justice Within:*

Indigenous Legal Traditions: Discussion Paper (Government of Canada, Ottawa, 2006)

Law Commission of Canada (ed) *Indigenous Legal Traditions* (UBC Press, Vancouver, 2007)

Law Commission of New Zealand *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001)

Internet Resources

Aboriginal Affairs and Northern Development Canada "Aboriginal Demographics from the 2011 National Household Survey" (Last updated in May 2013) <www.aadnc-aandc.gc.ca>

Aboriginal Affairs and Northern Development Canada "About British Columbia First Nations" <www.aadnc-aandc.gc.ca>

Council of Haida Nation "History of the CHN" <www.haidanation.ca>

David Suzuki Foundation "DRAFT: BC Communities and Stakeholders Shut Out of the PNCIMA Process by the Harper Government" (2011) <www.davidsuzuki.org>

Fisheries and Oceans Canada "Aquatic Species at Risk – Eulachon (Nass/Skeena Rivers population)" <www.dfo-mpo.gc.ca>

Fisheries and Oceans Canada "Managing Our Oceans: Our Governments' Roles" <www.dfo-mpo.gc.ca>

Gage, Andrew "Why Harper's shot at PNCIMA also hit Enbridge in the foot" (15 September 2011) West Coast Environmental Law <wcel.org>

Marine Planning Partnership for the North Pacific Coast "About MaPP" <mappocean.org>

Marine Planning Partnership for the North Pacific Coast "News" <mappocean.org>

Ministry for Primary Industries Aquaculture Planning Fund "APF Project Web Summary – Sea Change: Hauraki Gulf Marine Spatial Plan" <www.fish.govt.nz>

Nanwakolas Council "Marine Planning" <www.nanwakolas.com>

New Zealand Ministry of Justice "Marine and Coastal Area Act applications" <www.justice.govt.nz>

New Zealand Treasury "Financial Review 2011/12 – Supplementary Questions – 116 to 220 - Department of Conservation" <www.treasury.govt.nz>

Office of the Minister of Conservation "New Coastal Policy Statement released" (28 October 2010) <www.doc.govt.nz>

PNCIMA "PNCIMA News" <www.pncima.org>

Sea Change *What is Sea Change – Tai Timu Tai Pari?* (May 2014) <www.seachange.org.nz>

SeaSketch "Sea Change: Comprehensive Planning in the Hauraki Gulf, New Zealand" <www.seasketch.org>

Statistics New Zealand "2013 Census" (Last updated 25 June 2014) <www.stats.govt.nz>

Statistics New Zealand "Statistical Standards for Iwi" <www2.stats.govt.nz>

Transport Canada "Navigation Protection Act" (last updated 23 June 2014) <www.tc.gc.ca>

Union of BC Indian Chiefs "Our Homes Are Bleeding – Digital Collection" <www.ubcic.bc.ca>

United States Department of Commerce - National Oceanic and Atmospheric Administration "What percentage of life is estimated to be in the ocean?" <oceanservice.noaa.gov>

Speeches

Rt Hon John Key "Prime Minister's Waitangi Day Speech 2014" (6 February 2014)

Transcripts

Northern Gateway Pipeline, Joint Review Panel, Canadian Environmental Assessment, Hearing Transcript (April 23, 2013)

Paki v Attorney-General [2012] NZSC Trans 50.

Unpublished Papers

Chao, Gloria "The Emergence of Integrated Coastal and Ocean Management in Canada's *Oceans Act* – Challenges of Integrating Fragmented Resource Sectors in

Georges Bank, Nova Scotia and Hecate Strait, British Columbia" (LLM thesis, Dalhousie University, Halifax, 1999)

Clarkson, Alexander Ross *The Jurisdiction to Regulate Aquaculture in Canada* (LLM thesis, University of British Columbia, 2014)

Cox, Noel "The Legitimacy of government and the normative influence of the Crown" (paper presented at 43rd Association of Law Teachers Conference, Oxford, March 2008)

Hooker, M B "An Enquiry into the Function of the Magico-Religious as a Jural Mechanism in Primitive Society" (LLM Dissertation, Canterbury University, Christchurch, 1965)

Kennedy, Dawnis Minawaanigogiizhigok *Aboriginal Rights, Reconciliation and Respectful Relations* (University of Victoria (BC), LLM thesis, 2009)

Mainville, Robert "Compensation in Cases of Infringement to Aboriginal and Treaty Rights" (LLM thesis, McGill University, 1999)

McCrossin, Nicole "Intention and Implementation: Piecing Together Provisions for Māori in the Resource Management Act 1991" (MA thesis, Otago University, Dunedin, 2010)

Moffitt, Morgan E *Gitxaała Marine Use Planning: Making Indigenous Jurisdiction in Contemporary Aboriginal-State Relations* (MA thesis, University of British Columbia, 2010)

Napoleon, Val *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria (BC), 2009)

Napoleon, Val *Thinking about Indigenous Legal Orders: Research Paper for the National Centre for First Nations Governance* (National Centre for First Nations Governance, West Vancouver, 2007)

Risk, Carolyn "An oceans policy for New Zealand: why, what, how?" (paper presented to the 2002 New Zealand Petroleum Conference Proceedings, February 2002)

Ruru, Jacinta "Settling Indigenous Place: Reconciling Legal Fictions in Governing Canada and Aotearoa New Zealand's National Parks" (PhD thesis, University of Victoria (BC), 2012)

Townshend, H W Roger "Aboriginal Title to the Beds of Water Bodies" (paper presented to the Indigenous Bar Association Conference, Winnipeg, 19 October 2012)

Information Requests

"Anticipated focus for provincial engagement in PNCIMA process" (20 December 2010) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

"Background Materials RE: Issues of Marine Planning Initiatives, Multi-party Marine Governance Committees, and Internal Resourcing and Capacity" (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Chopik, Kathy "Memo to Natural Resource Sector Board of Directors RE: Provincial Participation in the Pacific North Coast Integrated Management Area (PNCIMA) Marine Planning Initiative" (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Department of Conservation "Fact sheet for Hauraki Gulf Forum Tangata Whenua Representatives" (September 2011) DOCDM-816197 (Obtained under Local Government Official Information and Meetings Request Act 1987 Request to Auckland Council)

Department of Conservation "Fact sheet for Hauraki Gulf Forum Tangata Whenua Representatives' Technical Officer Support" (September 2011) DOCDM-816194 (Obtained under Local Government Official Information and Meetings Request Act 1987 Request to Auckland Council)

Diggon, Steve and others "Marine Planning in the North Coast of BC" (22 February 2013) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

"Draft PNCIMA Plan for Internal Review (Information)" (29 August 2012) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Government of Canada and Province of British Columbia Canada – British Columbia Marine Protected Area Network Strategy (2012) FNR-2014-001441 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Hauraki Gulf Forum "Hauraki Gulf Forum Governance Statement" (adopted by the Forum March 2011) (Obtained under Local Government Official Information and Meetings Request Act 1987 Request to Auckland Council)

Marine Planning Partnership Deck (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations "2011/2012 Estimates Debate: Pacific North Coast Integrated Management Area (PNCIMA)" (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations "2012/2013 Estimates Debate: Marine Planning in British Columbia" (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations "2013/2014 Estimates Debate: Marine Planning in British Columbia" (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations "Advice to Minister: Confidential Issues Note: Pacific North Coast Integrated Management Area (PNCIMA)" (5 October 2010) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations "Decision Note" (24 June 2011) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations “Information Note” (7 November 2012) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations “Information Note” (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations “Section 25 Project Request Form” (2 August 2011) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations “Transition Note” (12 September 2012) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Ministry of Forests, Lands and Natural Resource Operations “Transition Note” (6 May 2013) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Resource Management Objectives Branch “Marine Resource Planning Team Newsletter” (Fall 2012) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

Sea Change “Hauraki Gulf Marine Spatial Plan Project Steering Group: Open Agenda” (30 September 2013) (Obtained under Local Government Official Information and Meetings Request Act 1987 Request to Auckland Council)

Short, Charlie “Marine Planning in British Columbia” (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

“Q & A – Marine Planning Partnership for the North Pacific Coast (MaPP) and Engagement of Non-Signatory First Nations” (17 April 2012) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c

165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

"Q & A – Marine Planning Partnership for the North Pacific Coast (MaPP) Pacific North Coast Integrated Management Area (PNCIMA)" (undated) FNR-2013-00337 (Obtained under Freedom of Information and Protection of Privacy Act RSBC 1996 c 165 Request to British Columbia Ministry of Forests, Lands and Natural Resource Operations)

International Materials

Ehler, Charles and Douvere, Fanny *Marine spatial planning: a step-by-step approach towards ecosystem-based management* (Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, IOC Manual and Guides No 53, ICAM Dossier No 6, UNESCO, Paris, 2009)

FAO *State of World Fisheries and Aquaculture* (Rome, 2012)

Global Ocean Commission *From Decline to Recovery: A Rescue Package for the Global Ocean* (Oxford, 2014)

International Programme on State of the World Ocean *State of the Ocean Report* (Oxford, 2013)

IOC/UNESCO, IMO, FAO, UNDP *A Blueprint for Ocean and Coastal Sustainability* (IOC/UNESCO, Paris, 2011)

IPCC *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, 2014)

United Nations Committee on the Elimination of Racial Discrimination *Decision 1 (66): New Zealand Foreshore and Seabed Act* CERD/C/DEC/NZL/1 (2005)

United Nations Convention on the Law of the Sea 1833 UNTS 3 (concluded 10 December 1982, entered into force 16 November 1994)

Hauraki Gulf Forum Reports

Hauraki Gulf Forum *Co-operation, Capacity, Charisma: Enhancing the Hauraki Gulf Environment through Non-Regulatory Approaches* (Auckland, 2010)

Hauraki Gulf Forum *Fishing the Gulf: Implementing the Hauraki Gulf Marine Park Act through Fisheries Management* (Auckland, 2010)

Hauraki Gulf Forum *Governing the Gulf: Giving Effect to the Hauraki Gulf Marine Park Act through Policies and Plans* (Auckland, 2009)

Hauraki Gulf Forum *Hauraki Gulf State of the Environment Report* (Auckland, 2004)

Hauraki Gulf Forum *Spatial Planning for the Gulf: An International Review of Marine Spatial Planning Initiatives and Application to the Hauraki Gulf* (Auckland, 2011)

Hauraki Gulf Forum *State of our Gulf: Tikapa Moana – Hauraki Gulf State of the Environment Report 2011* (Auckland, 2011)

Hauraki Gulf Forum *Tikapa Moana – Hauraki Gulf State of the Environment Report* (Auckland, 2008)

Waitangi Tribunal Reports

Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011)

Waitangi Tribunal *Petroleum Report* (Wai 796, 2003)

Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004)

Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988)

Waitangi Tribunal *Te kāhui maunga: the National Park District Inquiry Report* (Wai 1130, 2013)

Waitangi Tribunal *The Hauraki Gulf Marine Park Report* (Wai 728, 2001)

Waitangi Tribunal *The Hauraki Report: Vol I* (Wai 686, 2006)

Waitangi Tribunal *The Hauraki Report: Vol III* (Wai 686, 2006)

Waitangi Tribunal *Turanga Tangata, Turanga Whenua: The Report on the Tūranganui a Kiwa Claims, Vol II* (Wai 88, 2004)

Other

Clogg, Jessica and Paterson, Josh *Legal Backgrounder: Coastal First Nations Declaration and Save the Fraser Declaration* (West Coast Environmental Law, Vancouver, 2012)

Council of the Haida Nation, Statement of Claim, Action No L020662, Vancouver Registry

Day, Jon C and Roff, John C "Planning for Representative Marine Protected Areas: A Framework for Canada's Oceans" (report prepared for World Wildlife Fund Canada, Toronto, 2002)

First Peoples' Heritage, Language and Culture Council *2010 Report on the Status of BC First Nations Languages* (Brentwood Bay (BC), 2010)

Hauraki Gulf Forum "Hauraki Gulf Marine Spatial Plan Update" (23 September 2013)

Hauraki Gulf Forum "Open Agenda: Hauraki Gulf Marine Spatial Plan Update" (25 March 2013)

Hauraki Māori Trust Board and others *Statement from Hui at Motutapu Island* 14-15 November 1992

Holthus, Paul "Managing the World's Oceans – Securing 'Blue' Growth, Jobs, and a Sound Maritime Environment" in EU-US Conference Series *Sustainable Oceans: Reconciling Economic Use and Protection* (Dräger-Stiftung, Lübeck (Ger), 2013)

Jackson, Moana "Māori Law, Pākehā Law and the Treaty of Waitangi" in Project Waitangi and others (eds) *Mana Tiriti: the Art of Protest and Partnership* (Daphne Brasell Associates Press, Wellington, 1991)

Larsen, Mike "Access in the Academy: Bringing ATI and FOI to academic research" (British Columbia Freedom of Information and Privacy Association, Vancouver, 2013)

Marine Planning Partnership for the Pacific North Coast "Draft North Coast Marine Plan: Version Number 3.1" (April 29, 2014)

McGinnis, Michael V *Ocean Governance: The New Zealand Dimension* (Emerging Issues Programme, School of Government, Victoria University of Wellington, 2012)

Millennium Ecosystem Assessment *Ecosystems and Human Well-Being: Current State and Trends – Findings of the Condition and Trends Working Group* (Island Press, Washington DC, 2005)

Northern Gateway Pipeline, Joint Review Panel, Canadian Environmental Assessment, Final Argument of Coastal First Nations (31 May 2013)

Pomeroy, Robert "Marine Spatial Planning is Coming to an Ocean Near You" (2009) 9 Wrack Lines 2

Price, Steven "The Official Information Act 1982: A Window on Government or Curtains Drawn?" (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper 17, 2005)

Royal Society of New Zealand *Ecosystem Services: Emerging Issues* (Wellington, 2011)

Royal Society of New Zealand *Future Marine Resource Use: Emerging Issues* (Wellington, 2012)

Sea Change Stakeholder Working Group "Meeting Notes SWG Meeting 2" (12 February 2014)

Singleton, Peter "Sea Change: Hauraki Gulf Marine Spatial Plan" Kaimai Mamaku Catchments Forum (June 2014)

Smith, Dallas W "Re: Nanwakolas Council Withdrawal from the Memorandum of Understanding on Pacific North Coast Management Area Collaborative Oceans" (2 May 2012)

Sterritt, Art "Letter of Intent" (17 Nov 2011)

Swift, Anthony and others *Pipeline and Tanker Trouble: The Impact to British Columbia's Communities, Rivers and Pacific Coastline from Tar Sands Oil Transport* (Natural Resources Defense Council and the Pembina Foundation, New York, 2011)

Waikato Regional Council "Agenda Package for Strategy and Policy Committee meeting" (8 May 2014)

Waikato Regional Council "Update on Sea Change – Tai Timu Tai Pari" Report of Strategy and Policy Committee, Waikato Regional Council Agenda (29 May 2014)

Waikato Regional Council, Group Manager – Policy and Transport "Report to Council: February 2013 – Decision Required – Hauraki Gulf Marine Spatial Plan – Objectives and Governance Structure" (14 February 2013)

Wood, Joel *Lifting the Moratorium: The costs and benefits of offshore oil drilling in British Columbia* (Fraser Institute, Vancouver, 2012)