

Maori claims to petroleum

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Abstract

The paper will review and consider the potential basis of Maori claims to petroleum. The likely outcome of Treaty settlement negotiations between the Crown and Maori will also be considered.

Introduction

The topic of this paper is “Maori Claims to Petroleum”. There are two terms in this topic which require further preliminary discussion.

“Maori”

It may be assumed that claims to petroleum have been made on behalf of Maori by an organisation or body which represents the collective interests of the Maori people of New Zealand. It is our view that no organisation or body exists which represents the collective interests of Maori in New Zealand. It is important that this is understood at the outset.

Today a number of national bodies do exist but at most these bodies represent particular sectors or interest groups with Maoridom. For instance, the New Zealand Māori Council was created by the National Government in 1962 as a representative body for ariki or chiefs from throughout the country. It made strong submissions in Parliament on amendments to Māori land law and policy. Another body which can be clearly described as “interest group based” is the Federation of Maori Authorities (**FOMA**). Essentially, FOMA represents the interests of its constituent members, which are land holding trusts and incorporations.

Unfortunately, in no case has an organisation or body been mandated by a majority of Maori people and by way of democratic process to represent the collective interests of Maori in New Zealand. We say unfortunately because it is our view that the position of Maori would be significantly enhanced if a united representative Maori voice could be heard.

In terms of claims to Petroleum then, it needs to be understood that various claims have, and are likely to continue to be made by specific Iwi or groups of individuals. These claims can only be made on behalf of those specific Iwi or groups of individuals. A potential problem with the current approach is that if a claim is heard and a finding given then Maori rights, while not being argued “by Maori”, will be settled “on behalf of Maori.”

“Claim”

For the purposes of this paper we assume that a claim means some type of legal right which may entitle Maori to ownership and/or management of petroleum. To date “claims” of varying detail and quality have been filed and heard in the Courts as well as the Waitangi Tribunal (**Tribunal**).

Most recently the potential basis of Maori claims to petroleum has had to be considered by Iwi that have been negotiating with the Crown to settle all claims based on historical breaches by the Crown of the Treaty of Waitangi (**Treaty**). In the context of a Treaty settlement, and contrary to the order in which claims to petroleum/natural resources have generally been discussed in the past, we consider that the issues need to be addressed as follows:

- What law (legislation) if any governs the relevant issues?
- If the law (legislation) is not determinative on the relevant issue, what other sources of law assist in determining the issues, and what is the impact of the Treaty?

We follow the above format in this paper, citing relevant authorities from the courts and Tribunal where relevant. It is useful to begin however by considering a number of claims that have and are likely to be raised by Maori in respect of petroleum.

What claims to petroleum are there?

In July 1999, Thomas Tohepakanga Ngatai on behalf of “all the descendants and rightful successors of the rangatira and people of Nga Hapu o Ruahine” submitted a statement of claim to the Tribunal in accordance with section 6(1) of the Treaty of Waitangi Act 1975 (**Nga Ruahine Claim**). By way of background, Nga Ruahine’s rohe (traditional tribal area) is in South Taranaki, with part of its coastline adjacent to the Taranaki bight.

We consider that the Nga Ruahine Claim sets out most of the bases upon which a claim to petroleum either have or are likely to be made. Accordingly, we set out most of the grounds

of that application below so conference participants are aware of the general issues as viewed by Maori.

The Nga Ruahine Claim states that all petroleum resources, natural gas and other minerals located in their rohe are:

- taonga;
- subject to the customary rights of Nga Ruahine; and
- subject to the native title of Nga Ruahine.

Among other things, the Nga Ruahine Claim states that the Crown has breached the Treaty by:

- failing to recognize Nga Ruahine's customary rights to the resources under their customary laws;
- failing to recognize that the resources are protected as Nga Ruahine's taonga under the Treaty;
- failing to recognize Nga Ruahine's aboriginal or native title to the resources;
- vesting ownership of Nga Ruahine's petroleum and gas resources in the Crown pursuant to the Petroleum Act 1937 and continuing to vest ownership of the resources in the Crown under the Crown Minerals Act 1991;
- failing to ensure that Nga Ruahine controls, owns and manages the resources in accordance with the rights guaranteed under the Treaty of Waitangi, the doctrine of aboriginal or native title and their customary laws; and
- failing to compensate Nga Ruahine after assuming control of the resources through legislation.

In relation to the claim, Nga Ruahine seek orders from the Tribunal that:

- the resources are taonga and are protected by the Treaty;
- Nga Ruahine has customary rights to the resources in accordance with customary laws and as a natural incident of their rangatiratanga and mana over the rohe;
- Nga Ruahine has native title to the resources under the doctrine of aboriginal title;
- the rights described above are analogous to rights of ownership and ownership of the resources be vested in the iwi; and
- that compensation be provided the by Crown for loss of benefits from the resources suffered by Nga Ruahine.

¹ The Crown's position on the availability of natural resources for use in Treaty settlements has been reproduced, with permission, from *Office of Treaty Settlements: "Healing The Past, Building A Future"* (Office of Treaty Settlements, Wellington 1999), p98.

Crown position on the availability of natural resources for use in Treaty settlements

Not surprisingly, the Crown's position in respect of Maori rights to petroleum is somewhat different to that set out in the Nga Ruahine Claim.

The Crown's stated position, as at October 1999, is that natural resources are not available for general use in settlements in the way that cash or surplus lands are.¹ The Crown has given three official reasons for this:

- There are existing arrangements for allocating and managing natural resources on a national basis (for instance, geothermal energy is managed under the Resource Management Act 1991). It would not normally be appropriate to create different arrangements through Treaty settlements.
- The Crown owns and manages nationalised minerals (including petroleum, uranium, gold and silver) under the Crown Minerals Act 1991, in the national interest. It considers that it should continue to do so. These resources are therefore not available in Treaty settlements.
- Questions of valuation and risk are particularly difficult in relation to transferring ownership or income rights in natural resources. Cash and other types of Crown property enable both the Crown and claimants to make a better assessment of the overall value of the settlement.

The Crown notes instead that Maori, like any other individuals or companies, can use cash received in a settlement to invest in natural resource developments, through the usual market and resource management processes. However, if the Crown or a Crown entity has surplus natural resource-based asset in a claim area – for example a small hydro or geothermal power station – these assets may be considered for use in a settlement. As with other commercial assets, transfer to the claimant group would be at market valuation.

In summary, the Crown position, unless altered by the new government, is that petroleum is not available as part of a Treaty settlement. In discussions to date, the Crown has refused to negotiate about this position, or the policy reasons behind it.

What is the legal (legislative) position?

Legislative framework

Petroleum Act

In 1937, petroleum was nationalised by means of s3(1) of the Petroleum Act 1937 (**Petr oleum Act**). Prior to 1937, the common law position was that petroleum belonged to whomever abstracted it. Ownership of petroleum was, therefore, a natural incidence of land ownership.

Section 3(1) of the Petroleum Act vested the ownership of all petroleum in the Crown. Specifically, that Act provided:

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

“Land” was defined in the Petroleum Act as “all land within the territorial limits of New Zealand, and includes land below the sea and any other water”.

Therefore, all petroleum in situ, on or below the surface of the land, covered or not covered by water out to the limit of the Territorial Sea, was declared to be the property of the Crown. Section 10 of the Crown Minerals Act 1991 (**Crown Minerals Act**) provides that petroleum continues to be the property of the Crown.

Continental Shelf Act

Although s10 of the Crown Minerals Act vests the ownership of all petroleum, on or below the surface of the land, in the Crown, the position in relation to petroleum under the continental shelf is different.

Section 4 of the Continental Shelf Act 1964 (**Continental Shelf Act**) applies all the provisions of the Crown Minerals Act to petroleum in the continental shelf with the exception of s10. Although “land” in the Crown Minerals Act becomes a reference to the seabed and subsoil of the continental shelf,² the effect of the exclusion of s10 is to deprive the Crown of any rights of property in petroleum in situ in the continental shelf and no other person is invested with a right of property in such petroleum.³

Control of the development of the resource is vested in the Crown on behalf of New Zealand.⁴ That does not go so far as vesting rights of property in the Crown.

² Continental Shelf Act, s4(1)(a).

³ D E Fisher “The legal context of petroleum development in New Zealand” in *Petroleum development and New Zealand law* (Victoria University Press, Wellington, 1984) p20.

⁴ Continental Shelf Act, s3.

⁵ Unreported, 17 March 1988, High Court, Wellington Registry, CP 135/88.

⁶ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

⁷ R P Boast and D A Edmunds “The Treaty of Waitangi and Maori Resource Management Issues” in *Resource Management* (Brooker’s, Wellington, 1991), TW11.

Summary – The legislative position

While ownership of petroleum on land within the territorial limits of New Zealand is clearly vested in the Crown, this is not the case for petroleum situated beyond the Territorial Sea. Although s4 of the Continental Shelf Act provides that the minerals regime established by the Crown Minerals Act applies to such petroleum, ownership is not vested.

Potential bases for a claim by Maori to petroleum in light of the Petroleum Act

Introduction

The issue of Maori claims to petroleum has not been discussed in detail in the courts. In *Love v Attorney-General*⁵, a representative of a number of Taranaki Maori sought an injunction preventing the disposal of the Crown’s shares in Petrocorp, arguing that such a disposal would prejudice the forthcoming Treaty claim by Taranaki Maori.

However, as it was an application for an injunction, the Court did not consider the claimant’s substantive claims to petroleum in detail. Instead, the injunction was refused on procedural grounds, namely that there was no provision in the relevant legislation that gave effect to the Treaty.

There are two well-established grounds upon which Maori claimants could base a claim for the ownership of petroleum: the Treaty and the doctrine of aboriginal title.

It must also be noted that it may also be possible to base an action against the Crown directly upon an alleged breach of the fiduciary relationship between the Crown and Maori. However, there has been little exploration of such an action in New Zealand courts. In any event, it may well be the case that an action based on a breach of this fiduciary relationship would be better received by the judiciary if it was argued under the aegis of the Treaty and its well-developed jurisprudence.

Treaty of Waitangi

Legal basis of the Treaty

The orthodox view is that the Treaty is not directly enforceable in the courts unless it has been expressly incorporated into a statute.⁶ However, many significant statutes specifically refer to the Treaty and have therefore enabled the courts to apply the principles of the Treaty when considering those statutes.

It has been suggested, however, that the Treaty may be developing a kind of independent status in administrative law, and that a failure to take the Treaty into account in an appropriate context may impact on the legality of an administrative decision.⁷

The Waitangi Tribunal

The Tribunal is the other important source of interpretation of the Treaty and its principles. The Tribunal has the power

to inquire into situations where the Crown has acted inconsistently with the principles of the Treaty, leading to prejudice against Maori.⁸ Having considered a claim which has been filed, the Tribunal may then recommend to the Crown possible means of redressing grievances.

However, these recommendations are only binding in limited circumstances. In 1988, the Tribunal was given a binding power to order the resumption of land transferred to a state-owned enterprise in certain defined circumstances,⁹ even where it had been on-sold to a third party.¹⁰ Further binding powers were conferred in 1989 by the Crown Forest Assets Act 1989.¹¹

Despite their generally non-binding nature, the recommendations of the Tribunal are still of enormous value to claimants as they can provide the stimulus for the Crown to begin direct negotiations with claimant groups; the moral and political force of these recommendations should not therefore be underestimated.

Possible claims based on the Treaty

At the time of the passing of the Petroleum Act in 1937, Sir Apirana Ngata, along with a number of other MPs, objected to the Labour Government's plans to nationalise petroleum.¹² He saw petroleum as an incident of land ownership that Maori were now going to be deprived of. The matter was referred to the Solicitor General for consideration as to whether the Act was contrary to the Treaty. The Solicitor-General felt that it was not and the matter did not progress further.¹³

Since the time of Sir Apirana Ngata, Maori claims to petroleum have been based on two main arguments:

⁸ Treaty of Waitangi Act, 1975, s6.

⁹ Treaty of Waitangi Act 1975, s8A.

¹⁰ Treaty of Waitangi Act 1975, s8B; ss 27-27D State Owned Enterprises Act 1986.

¹¹ Treaty of Waitangi Act 1975, s8H.

¹² (1937) 249 NZPD 1044

¹³ (1937) 249 NZPD 1236

¹⁴ H Kawharu *Maori and Pakeha Perspectives to the Treaty of Waitangi* (Auckland, Oxford University Press, 1989), pp319-320.

¹⁵ Joe Williams "Maori Claims to Energy Resources" in Energy and Natural Resources Law Association of New Zealand Inc. *Seminar on Maori Claims and Rights to Natural Resources* (1993).

¹⁶ Working Tribunal *Report of the Waitangi Tribunal on the Muriwhenua fishing claim* (Waitangi Tribunal, Wellington, 1988).

¹⁷ *ibid*, p7.

¹⁸ Waitangi Tribunal *Te Ika Whenua rivers report* (GPPublications, Wellington, 1988) p121.

¹⁹ *ibid*, pp115-121.

1. that petroleum is a taonga guaranteed under the Treaty; and
2. that petroleum is a natural incident of the land that was confiscated.

Inherent in both arguments is the argument that the nationalisation of petroleum in 1937 was a breach of the Treaty.

Petroleum as a taonga

An argument exists that natural resources are taonga and are protected under the Article II guarantee in the Treaty. The English version of the Treaty guarantees to Maori "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it their wish and desire to retain the same in their possession".

In the Maori version of the Treaty, the word "taonga" is used to express the concept of "other properties". In his English translation of the Maori text,¹⁴ Professor Sir Hugh Kawharu translates "taonga" as "treasures".

Description of taonga

The concept of taonga embodies all things that are highly valued and prized. It includes both tangible and intangible things. It relates not only to fishing grounds, harbours and foreshores but also to Te Reo (the Maori language) and the mauri (life force) of a river.¹⁵ The Tribunal has already accepted that fisheries are taonga guaranteed to Maori in the Treaty.¹⁶

Much debate has focused upon whether the term taonga, as guaranteed under Article II of the Treaty, is static and therefore fixed in time in 1840 or whether it is organic and capable of developing with time and with changes to the cultural and social organisation within which it exists.¹⁷ The Tribunal strongly supports the view that the Treaty "did not simply preserve the status quo as at 1840 but that it must be adapted to meet changing needs and circumstances – in other words, it must allow a right of development."¹⁸

A right to development

The right of Maori to develop their resources under the Treaty has been recognised by both the Court of Appeal and the Tribunal.¹⁹ This flows directly from the recognition of the Treaty as a living instrument and that the obligations thereunder are ongoing and evolving as conditions change. It follows, therefore, that the rights to property and taonga guaranteed under the Treaty include a right to development.

Although there has been a divergence of opinion between the Court of Appeal and the Tribunal about the nature of this development right, there is a growing acceptance of the concept, both in New Zealand and in other jurisdictions.

It is not possible to analyse the scope of this concept in this paper. However, it should be noted that there certainly appears to be sufficient support for the concept to argue that petroleum is a taonga under the Treaty and that Maori have a right to

develop this resource using current technology. The nationalisation of this resource on land, and the failure to compensate for the loss of this resource, are arguably breaches of the Treaty.

Land confiscated – petroleum a natural incident to ownership of land

Another argument is that the petroleum resource is a natural incident of the land that was confiscated from Maori, principally in the Taranaki region. If this land had not been unjustly confiscated, Maori would have been the common law owners of significant petroleum reserves prior 1937. The nationalisation of the resource compounded this injustice.

The response from the Crown to this argument has always been that the whole of the resource was nationalised and therefore affected everyone equally. However, it is arguable that Maori were more prejudiced by the Petroleum Act than pakeha because of the prevalence of petroleum in Taranaki, most of which could well have been in Maori ownership but for the confiscations.

Therefore, the confiscation of Maori lands guaranteed under Article II, and the subsequent nationalisation of petroleum that was an incident of those lands, were arguably breaches of the Treaty.

Petroleum on the continental shelf as a taonga

An alternative argument exists in relation to petroleum that lies outside the territorial sea. As petroleum on the continental shelf was not nationalised in 1937, this argument is based on the Crown's failure to protect Maori ownership of a taonga guaranteed to Maori under the Treaty.

The Crown's imposition of a legislative regime that regulates the use of the resource, and the royalties derived therefrom,

is arguably a breach of the Treaty because it deprives Maori of control of this taonga.

Aboriginal title

Description of doctrine

The doctrine of aboriginal title is a common law doctrine. It holds that the rights of indigenous peoples to their lands survive a proclamation of sovereignty by colonising powers but that these rights can be validly extinguished in certain circumstances.

The exact nature of aboriginal title is dependent upon the existing law and/or lore of the indigenous people. The rights in question can best be thought of as a spectrum of rights that may range from the exclusive use and occupation of land at one end, to a non-territorial, non-exclusive right to engage in a site-specific activity that is not sufficient to support claim of title to the land, at the other end.²⁰

Aboriginal title cannot be explained by "normal" fee simple principles: it is an inalienable title that cannot be transferred, sold or surrendered to anyone other than the Crown.²¹ It is also unique in that aboriginal title is held communally and cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.²²

Extinguishment

Aboriginal title may be extinguished either voluntarily or by legislation that evinces a "clear and plain" intention to do so.²³ Therefore, the mere regulation of an aboriginal activity does not amount to its extinguishment.²⁴ Legislation inconsistent with the continued enjoyment of aboriginal rights was not sufficient to meet the extinguishment threshold. The "clear and plain" test for extinguishment, as a result, requires quite a high standard and the onus of proving extinguishment is on the party alleging it.²⁵

Where aboriginal title is extinguished other than by free consent, there have been suggestions that compensation may be required.²⁶ However, this requirement has been rejected in the United States²⁷ and by the majority judgments in *Mabo No.2*²⁸, in Australia. The Supreme Court of Canada has indicated support for the idea of compensation in two significant cases²⁹ but it is uncertain whether these comments will be adopted as a general rule.

Status in New Zealand

The concept of aboriginal title is now firmly established in the law of New Zealand. Although early formulations of the doctrine stretch as far back as Chapman J's judgement in *R v Symonds*,³⁰ the approach to the doctrine had been somewhat fragmented and confusing. The status of the law in New Zealand has now been clarified by the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc Soc v A-G*³¹ in the recent judgement of Blanchard J in *Faulkner*.³²

However, it must be noted that the New Zealand Court of Appeal's analysis of the doctrine is somewhat at variance

²⁰ *R v Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289 (*Van der Peet*).

²¹ *R v Delgamuukw* [1997] 35CR 1010, 1088; 153 DLR (4th) 193, 246 (*Delgamuukw*).

²² *ibid*, 1088; 246.

²³ *ibid*, 1120, 271.

²⁴ *ibid*, 1120; 271.

²⁵ *ibid*, 1120; 271.

²⁶ *Te Runanganui o Te Ika Whenua Inc Soc v A-G* [1994] 2 NZLR 20, 24; *Delgamuukw* 1113; 265.

²⁷ *Te-Hit-Ton Indians v US* 348 US 272 (1955).

²⁸ *Mabo v Queensland (No.2)* (1992) 175 CLR1.

²⁹ *Calder v A-G of British Columbia* [1973] SCR 313; *Delgamuukw*.

³⁰ (1847) NZPCC (SC) 387.

³¹ [1994] 2 NZLR 20, 23-24.

³² [1996] 1 NZLR 357 (HC).

with more orthodox analysis in other commonwealth jurisdictions.³³ In particular, Cooke P's comments that compensation may be required where aboriginal title is extinguished other than by free consent. As noted above, this requirement has not been adopted in the United States, or Australia and the position is still unclear in Canada.

Test for aboriginal title

Having briefly described the nature of aboriginal title, and noted its status in New Zealand, it is necessary to examine some of the aspects of the doctrine in more detail before an assessment can be made as to the validity or merit of an Aboriginal title claim to petroleum.

Although various analyses of aboriginal title have been conducted in recent years, the pronouncements by the Supreme Court of Canada in *R v Delgamuukw*³⁴ are highly significant and warrant particular attention given their possible impact on claims for petroleum.

The Delgamuukw decision

The appellants (representatives of two Indian bands or tribes) claimed separate portions of 58,000 square kilometres in British Columbia. The appellants' claim was based on their historical use and "ownership" of one or more of the territories. The State Government of British Columbia counter-claimed for a declaration that the appellants had no right to, or interest in, the territory. Alternatively, they claimed that the appellants' cause of action ought to be for compensation from the federal government.

For the purposes of this paper, the key substantive issues in the appeal were:

1. the content of aboriginal title; and
2. what is required to prove aboriginal title.

Content of aboriginal title

The court stated that aboriginal title encompasses the right to the "exclusive use and occupation" of the land held pursuant to the title for a variety of purposes, which need not

be aspects of those aboriginal practices, cultures and traditions which are integral to distinctive aboriginal culture.³⁵

By concluding that aboriginal title amounts to the right to occupy and possess lands, it follows that, once that occupation or title is established, the rights that go with it are not limited to those derived from custom and included rights to minerals.³⁶ As Teehan states:³⁷

The right to exclusive occupation must be related to aboriginal custom, but once the occupation is established, the only limitation on use is the second leg of [the test in *Delgamuukw*]: the uses cannot be irreconcilable with custom or the nature of the attachment to the land.

This limitation on aboriginal title was justified by the court because of the unique nature of that title. According to the court, the common law seeks to protect 'in the present day' and in to the future, the special connection with land enjoyed prior to sovereignty. It is for this reason that the title is inalienable and its inalienability gives it a non-economic element. Actions that would threaten that special connection would be inconsistent with the protection afforded by the common law.³⁸

It is this formulation of aboriginal title that is at the heart of the distinction between the legal consequences of aboriginal title as opposed to an aboriginal right. Previously, the test for establishing that a particular activity was an aboriginal right was the test laid down in *Van der Peet*,³⁹ namely that the activity must be 'integral to the distinctive culture of the aboriginal group claiming the right'.⁴⁰ In differentiating between aboriginal title and aboriginal rights, the court in *Delgamuukw* described aboriginal title as a species of aboriginal rights, but set out three different types of aboriginal rights:⁴¹

1. aboriginal title, as defined above;
2. aboriginal rights which might be connected with, or derived from, a particular piece of land which do not amount to title because of the lack of exclusivity; and
3. aboriginal rights which are unconnected with land.

As noted above, the crucial distinction is the legal consequences that follow a determination that a particular usage amounts to aboriginal title; the rights that go with that title are not limited to those derived from custom and include rights to minerals.

Proof of aboriginal title

Three major criteria are identified for proof of title:⁴²

1. The land must have been occupied prior to sovereignty.
2. If present occupation is relied upon as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation.
3. At sovereignty, that occupation must have been exclusive.

The Court stated that occupation should be proved by evidence of actual physical occupation and by reference to the traditions and culture of the group itself that demonstrate

³³ R P Boast and DA Edmunds "The Treaty of Waitangi and Maori Resource Management Issues" in *Resource Management* (Brooker's, Wellington, 1991), TW16(b).

³⁴ [1997] 3 SCR 1010; 153 DLR (4th) 193.

³⁵ *ibid*, 1083; 243.

³⁶ *ibid*, 1084; 244.

³⁷ M Teehan "Delgamuukw v British Columbia" (1998) 22(3) MULR 763, 773.

³⁸ *Delgamuukw* 1088-90; 246-8.

³⁹ *R v Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289.

⁴⁰ *ibid*, 554; 341.

⁴¹ M Teehan "Delgamuukw v British Columbia" (1998) 22(3) MULR 763, 773.

⁴² *Delgamuukw* 1097; 253.

the group's connection with the land. These references should show that the land was 'of central significance to their distinctive culture'.⁴³

In relation to the second component, the Court stated that an "unbroken chain of continuity" is not required as it is likely that the nature of the occupation may have changed but 'as long as a substantial connection between the people and land is maintained', the claim to title could succeed.⁴⁴

The third element for proof of title is that occupation must have been exclusive at sovereignty: there must have been the ability to exclude others from the land.⁴⁵ The Supreme Court suggested that actual proof of this should give equal weight to the common law and aboriginal aspect: there must be factual evidence of the actual occupation but this must 'also take into account the context of aboriginal society at the time of sovereignty'.⁴⁶

It follows that there might be evidence of other groups occupying the land, but this may be examined in accordance with aboriginal custom. For example, was the secondary group occupying the land by permission or agreement? The key issue is 'the intention and capacity to retain control'.⁴⁷

The Court also suggested that a joint exclusive title might be possible. That is, the shared right to exclude others except the joint titleholder might amount to exclusive possession.⁴⁸ This issue was not considered in detail as it was not relevant to the case. However, the possibility of joint title means that the mere fact that more than one group occupied land will not be determinative of a claim for aboriginal title; practice and custom will still need to be explored in order to determine the issue of exclusivity.⁴⁹

Relevance to New Zealand

Although the doctrine of aboriginal title has been established in New Zealand through decisions such as *Te Runanganui* and *Faulkner*, the extent to which New Zealand courts might adopt the pronouncements from the Supreme Court of Canada in *Van der Peet* and *Delgamuukw* is far from clear.

⁴³ *Delgamuukw* 1099-1101; 255-6.

⁴⁴ *Delgamuukw* 1098; 253.

⁴⁵ M Teehan "Delgamuukw v British Columbia" (1998) 22(3) MULR 763, 775.

⁴⁶ *Delgamuukw* 1104; 259.

⁴⁷ *ibid*, 1104; 259.

⁴⁸ M Teehan "Delgamuukw v British Columbia" (1998) 22(3) MULR 763, 775.

⁴⁹ *ibid*, 775.

⁵⁰ R P Boast and D A Edmunds "Indigenous Claims to Petroleum Resources" (1991) p7.

⁵¹ *Te Runanganui o Te Ika Whenua Inc Soc v A-G* [1994] 2 NZLR 20, 24.

The characterisation of aboriginal title vis-à-vis aboriginal rights was undoubtedly influenced by the provisions of the Constitution Act 1982. However, the Canadian approach can be generally characterised by its reliance on common law concepts rather than the statutory framework that exists in Canada. Therefore, that approach could be readily adopted by a New Zealand court seeking to apply the doctrine of aboriginal title to a New Zealand situation. In addition, *Delgamuukw* only decided substantive issues, not evidential ones, so there is still scope for a New Zealand court to take its own direction in terms of evidential principles and tests.

The basis of a claim

So what kind of circumstances might give rise to a successful aboriginal title to petroleum in New Zealand? Due to the legislative framework outlined above, this question is best answered in two parts.

On land

The Petroleum Act vested the ownership of petroleum in the Crown and stipulated that no compensation would be payable. At common law, petroleum belongs to whomever abstracts it. However, by s3 of the Petroleum Act, the entire resource was expropriated and vested in the Crown. Boast writes that there is no doubt that s3 amounted to a valid extinguishment of aboriginal title to petroleum.⁵⁰ Although s10 of the Crown Minerals Act provides that petroleum continues to be the property of the Crown, there is no equivalent in the Crown Minerals Act to s39(5) of the Petroleum Act, which provided that compensation would not be payable.

As there is no longer a statutory bar to compensation, the issue becomes whether compensation is payable on the extinguishment of any aboriginal title to petroleum. As discussed above, there have been indicia from the New Zealand Court of Appeal that an extinguishment by "less than fair conduct or on less than fair terms" could give rise to an obligation to compensate Maori land owners.⁵¹ Although the judicial trend in the United States and Australia has been against an obligation to pay compensation there have been developments in Canada in this respect so it is not inconceivable that a New Zealand court could find sufficient support for the establishment of such an obligation.

Continental shelf

Title to petroleum resources beyond the 12 mile limit has not been vested in the Crown. Because of the exclusion in s4 of the Continental Shelf Act 1965, all of the provisions of the Crown Minerals Act apply in relation to petroleum on the Continental Shelf, except s10 which vests title in the Crown.

However, the Canadian authorities are clear that this is not sufficient to extinguish aboriginal title: the mere regulation of an aboriginal activity does not amount to its extinguishment.⁵²

Having established that there is no statutory bar to an aboriginal title claim to offshore petroleum, how could such

a claim be made? Depending on the circumstances, there appear to be two main avenues to which such a claim could proceed.

1. An aboriginal title claim based on an iwi's traditional use and occupation of fishing reefs beyond the 12-mile limit.

If the test in *Delgamuukw* was adopted by New Zealand Courts, it is quite foreseeable that claimants could then adduce sufficient evidence to prove each element of the test. For example, the Motunui Report, prepared by the Tribunal in 1983, documented the traditional use of the Kawa (reefs) in North Taranaki.

If such use and "occupation" was exclusive and occurred prior to the Crown's declaration of sovereignty over New Zealand, and a substantial connection between the people and the land had been maintained, then the elements of the *Delgamuukw* test would be satisfied. It would then be up to a New Zealand court to determine the tests and principles for such evidentiary finding.

2. An aboriginal rights claim based on an iwi's traditional fishing practices in a particular area

The position becomes less clear where a claim is based on the exercise of a customary right to fish in a particular area of the sea, as opposed to the use of identifiable reefs. As the aboriginal right claimed would be based on an activity in a certain area, rather than the use of the land per se, the principles in *Van der Peet*, rather than *Delgamuukw*, would apply.

The legal consequences of this distinction are significant. The *Delgamuukw* test for aboriginal title provides that once a connection with the land is established an aboriginal title is proven, it is of no consequence that the rights and/or customs that the aboriginal peoples are seeking to establish, did not occur at the time of sovereignty. The rights are a natural incidence of the title to the land.

However, in the case of an aboriginal rights claim, as per the principle in *Van der Peet*, this is not the case. Accordingly, it will almost certainly be necessary to argue that, once a connection with the land has been proven, an aboriginal people's right to development is the basis from which they are able to claim rights over resources which were not customarily used or exercised at the time of sovereignty.

⁵² *Delgamuukw* 1120; 271.

⁵³ *Office of Treaty Settlements* "Healing The Past, Building A Future" (Office of Treaty Settlements, Wellington 1999), pp129-30.

Recent developments - Ministry of Commerce protocol

Background

The Crown has recently proposed that protocols in relation to petroleum be entered into between the Ministry of Commerce and certain claimant groups as part of their Treaty settlements. An example of what might be contained in such a protocol (**Ministry of Commerce Protocol**) can be found in the Heads of Agreement signed on 7 September 1999 between the Crown and Ngati Ruanui (**Ngati Ruanui Heads**). A copy of the relevant text is *attached*.

The Ministry of Commerce Protocol is still be negotiated between the relevant Iwi and the Crown so its contents can not be discussed in detail here. We do however briefly examine the proposal for a Ministry of Commerce Protocol in the Ngati Ruanui Heads. Central to that is a prior understanding about the nature and scope of protocols in general.⁵³

What is a protocol?

A protocol is a statement issued by a Minister of the Crown or other statutory authority, setting out how a particular government agency intends to:

- exercise its functions, powers and duties in relation to specified matters within its control in the rohe (tribal area) of the claimant group; and
- interact with a claimant group on a continuing basis and enable that group to have input into its decision-making process.

How do protocols work?

Protocols set out processes, not results. For example, a protocol issued by the Minister of Conservation might state that requests from the claimant group for the customary use of cultural materials will be considered, but it will not guarantee that the requests will be granted. This is because protocols are issued subject to the Minister's and the agency's legal and policy obligations; they do not restrict those obligations.

Since protocols set out administrative processes, they will be enforceable by way of judicial review (that is, the courts can consider how a protocol should have affected the way in which a decision was made). But damages are not available as compensation for the fact that decisions were not made in accordance with protocols. Protocols are statements made by the Crown, and not contracts; so they are not enforceable as contracts.

It may become necessary or desirable, because of changes in law or policy, or for some other reason, to amend or cancel a particular protocol. But if the relevant Minister or statutory authority wants to make such changes, they must first consult the claimant group and have regard to their views.

Ministry of Commerce protocol

As can be seen from the general description above, protocols are essentially about building a relationship between the government agency and the claimant group. The main focus of the Ministry of Commerce Protocol to be signed between Ngaati Ruanui and the Crown is therefore on improving the communication between both parties, primarily by increased consultation with the claimant group.

Although the consultation obligations are largely taken from the current Petroleum Minerals Programme, it should be noted that this is not the final form of the protocol – it is a proposal that will be expanded upon after negotiations between the two parties.

The final forms of these protocols have the potential to greatly enhance not only the relationship between the Crown and claimant groups, but also between the industry and claimant groups. One effect of these protocols will hopefully be to clarify exactly who must be consulted by the industry in relation to each area, something that is often fraught with difficulty at present.

Conclusion

A claim by Maori to petroleum based on a breach of the Treaty on land faces a number of significant hurdles, primarily the nationalisation of the resource by the Petroleum Act. However, if there are further developments in New Zealand with regard to the right to development or on compensation for the extinguishment of aboriginal title, it is certainly possible that a Treaty claim could be successful.

In addition, it may be possible to base a claim on the Crown's failure to protect Maori ownership of petroleum on the continental shelf as a taonga guaranteed to Maori under the Treaty.

An aboriginal title claim to petroleum on land is also limited to a claim for compensation. However, title to the resource itself can be claimed on the continental shelf. A claim would primarily depend on the recognition of an iwi's aboriginal title over a particular area. Alternatively, a customary association with a particular area could be sufficient if a right to development is established. The evidential requirements for both of these claims could be onerous.

Notwithstanding the difficulties Maori are likely to face in succeeding with claims to petroleum, the willingness of the Crown to enter into the Ministry of Commerce Protocol with Iwi is encouraging. It is hoped that such protocols will prove to be the stepping stone for those iwi to become more involved

Author

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in a resource, the ownership and management of which many consider was never extinguished.

Attachment - Ministry of Commerce protocol – Ngaati Ruanui

“4.5 The Crown proposes that the Deed of Settlement will provide for, and Settlement Legislation will enable, the Minister of Energy to issue on the Settlement Date a protocol to Ngaati Ruanui (the “**Ministry of Commerce Protocol**”) in relation to consultation with Ngaati Ruanui concerning the Crown's administration of petroleum resources in the rohe of Ngaati Ruanui. That Protocol will be consistent with legislation, policy and practice with respect to petroleum and will cover consultation over the following matters in relation to the rohe of Ngaati Ruanui:

4.5.1 the preparation of the Minister of Energy of new minerals programmes in respect of petroleum in accordance with the Crown Minerals Act 1991;

4.5.2 the planning by the Ministry of Commerce in respect of any petroleum exploration permit block offer (being a method of allocating available acreage for petroleum exploration by public tender under s 24 of the Crown Minerals Act 1991);

4.5.3 applications for petroleum exploration permits allocated under the Crown Minerals Act 1991 (“**Petroleum Exploration Permits**”) except where consultation has already taken place under **clause 4.5.2**; and

4.5.2 applications for amendments to Petroleum Exploration Permits to extend the land or minerals to which the Permits relate.

4.6 The Ministry of Commerce Protocol will:

4.6.1 recognise the Crown's obligations under the Crown Minerals Act 1991 (as provided for in the minerals programme for petroleum) to consult with parties whose interests may be affected by petroleum exploration;

4.6.2 confirm that, if petroleum exploration in the rohe of Ngaati Ruanui may affect the interests of Ngaati Ruanui, the Ministry of Commerce will consult with Ngaati Ruanui;

4.6.3 not restrict the ability of the Ministry of Commerce to consult with other entities in addition to Ngaati Ruanui under the Crown Minerals Act 1991 (as provided for in the minerals programme for petroleum); and

4.6.4 be in accordance with **part 1** of the **Cultural Redress Schedule**.”