LENSES OF COMPARISON ACROSS CONTINENTS: UNDERSTANDING MODERN ABORIGINAL TITLE IN *TSILHQOT’IN NATION* AND *NGATIAPA*

JACINTA RURU†

 Courts across the world continue to build a jurisprudence that explains and justifies the transfer of Indigenous sovereignty and property to European colonial powers. These courts are developing tests for Aboriginal peoples and the Crown to satisfy in order to recognise modern Aboriginal title in land. This article compares these tests in two countries—Canada and Aotearoa New Zealand—to better understand the rationality of the tests and the possibilities for different constructions. The usefulness in this comparative analysis is to provide deeper understanding for achieving pinpoints of hope for more reconciled systems of justice.

INTRODUCTION

According to the *Vancouver Sun*, on 1 July 1967 Chief Dan George silenced a crowd of 32,000 with his poem, “A Lament for Confederation”. The opening lines read: “How long have I known you,

† Associate Professor, Faculty of Law, University of Otago, Aotearoa New Zealand; Centre Associate, Indigenous Law Centre, University of New South Wales; research leadership team, Nga Pae o te Maramatanga (New Zealand’s Maori Centre of Research Excellence). My thanks to Jacinta Grant (LLB and BA student at the University of Otago) for her excellent research assistance, and the helpful comments from the anonymous reviewers. All errors, of course, remain my own.

† See “This Day in History: July 1, 1967”, *The Vancouver Sun* (2 July 2015), online: <www.vancouversun.com>. 
Oh Canada? A hundred years? Yes, and many many seelanum more". Just shy of 50 years later, the Supreme Court of Canada quietened the country with a decision finding in fact Aboriginal title for the first time: *Tsilhqot'in Nation v British Columbia.* 3 *Tsilhqot'in Nation* is a historic judgment to celebrate, albeit one clothed in the travesty of a legal system that is taking so long to “shatter the barriers of our isolation”, as Chief Dan reflected many years ago. 4 As is now known (but perhaps not yet accepted), the expansion of the European empire into the “new world” of the old homes of Indigenous peoples created consistent legal scenarios of arrogantly assumed European sovereignty and property of Indigenous lands. This is true of Canada and countries afar, such as the United States of America, Norway, Sweden, Australia, and my home country Aotearoa New Zealand, too. 5 Many contemporary domestic courts and legislatures are attempting to find palatable answers to the question of how best to reconcile with Indigenous peoples. *Tsilhqot'in Nation* is, in part, an important step in this reconciliation journey for Canada.

This article focuses on exploring how the *Tsilhqot'in Nation* case compares with the leading Aboriginal title case in New Zealand: *Attorney-General v Ngati Apa.* 6 Surface similarities and differences are

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3 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in Nation*].

4 Chief Dan George, *supra* note 2 at 3.


6 [2003] NZCA 117; [2003] 3 NZLR 643 [*Ngati Apa*]. For a more detailed consideration of this case, see Richard Boast, “Maori Proprietary Claims to the
evident: for example, both are unanimous decisions (although Ngati Apa is multi-judgment while Tsilhqot’in Nation is single judgment); Tsilhqot’in Nation was heard by Canada’s top court and Ngati Apa was heard by New Zealand’s top domestic court; both decisions assume European sovereignty was acquired without explanation; and both deny that terra nullius applied in their respective countries. Beyond these observations, one significant difference is that Tsilhqot’in Nation is entirely based on Aboriginal title, whereas the primary question in Ngati Apa concerned whether a lower court—the Maori Land Court—had jurisdiction to hear whether a specific stretch of foreshore and seabed could be deemed Maori customary land (a tenure similar to but not the same as Aboriginal title). In order to answer this statutory question, the Court had to address whether the common law as applied in New Zealand recognized and preserved Maori pre-existing property in the foreshore and seabed after a change in sovereignty. Because this was a core issue for this Court, there is value in comparing Ngati Apa with Tsilhqot’in Nation.

This article posits that Tsilhqot’in Nation is significant in a global comparative context because it confronts head on the pertinent issues for understanding the applicability of Aboriginal title in the modern day. Tsilhqot’in Nation opens with five questions, three of which are


7 See discussion below.

8 See discussion below.

9 This article uses the terminology of “Aboriginal title” to describe the common law doctrine in New Zealand, even though New Zealand mostly uses the terminology of “Native title”. Quoted material that uses “Native title” has remained.

10 A subsequent case of importance in New Zealand is the Supreme Court decision Paki v Attorney-General, [2014] NZSC 118 [Paki]. This case was decided on 29 August 2014, just months after Tsilhqot’in Nation. It is later discussed briefly in this article.
comparatively universal: "What is the test for Aboriginal title to land? If title is established, what rights does it confer? ... [And] how are broader public interests to be reconciled with the rights conferred by Aboriginal title?" Thus the point of this article is to examine how the Supreme Court of Canada answers these questions in contrast with the New Zealand Court of Appeal's modern breakthrough and founding Aboriginal title case, Ngati Apa. This article proceeds with providing some contextual insight into Ngati Apa by introducing New Zealand's legal system and discussing the case generally, and then focuses on a comparative assessment of the two decisions. The comparison is particularly illuminating for highlighting how the two jurisdictional courts discuss (or fail to discuss) the fraught issues of sovereignty and property as a lens into understanding the construction of the contemporary common law Aboriginal title test. This part explores the similarities and differences in how the Aboriginal title test is defined and conferred, as well as the role and impact of public interests. Most importantly, this part then comments on how these two courts have dealt with sovereignty and property (particularly, the concept of terra nullius). This sovereignty and property lens provides the final comparator in this article because it is these two issues that go to the heart of what matters to Indigenous peoples and likewise resonate in Chief Dan George's poem.

OVERVIEW OF AOTEAROA NEW ZEALAND'S LEGAL SYSTEM

New Zealand's government system shares a similar history of origin with that of Canada. Both countries were colonies of Britain and established Westminster-type democratic parliamentary systems of government. Over the years, New Zealand has modified its system of government, creating contrasts with countries like Canada. While New Zealand dabbled with federalism in its early years as a colony, by 1876 it was very much a unitary state, with the British monarch as head

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11 Tsilhqot'in Nation, supra note 3 at para 1.
of state represented by a governor-general and the head of government being the elected prime minister. In 1950, New Zealand abolished its upper house (the Legislative Assembly), leaving the House of Representatives to be New Zealand's single legislative body. Canada created its own Supreme Court in the 19th century and abolished appeals to the Privy Council by the mid-20th century, whereas New Zealand only replaced the Privy Council with its own Supreme Court in 2002. In New Zealand, the hierarchy of appeal courts from lowest to highest is High Court, Court of Appeal, Privy Council (from 1840 to 2002) or Supreme Court (from 2002 onwards). There are several specialist courts of first instance, such as the Maori Land Court, Environment Court, District Court, and Family Court. In contrast to Canada, New Zealand's constitution is described as informal/not entrenched, and consists of several statutes, treaties, and conventions. Under New Zealand's constitutional system, Parliament is supreme and has no formal limits to its law-making power.

Of significance to this article, while Canada and New Zealand are homes to Indigenous peoples, the first peoples of New Zealand are one group of people, known today as Maori, who share a single language and similar customs and values. Also in contrast to Canada, the British Crown sought to sign a single bilingual treaty with Maori chiefs throughout the country in 1840. The three short articles of the Treaty of Waitangi accepts that the Maori had sovereignty of New Zealand and property interests in the lands, forests, and fisheries of New Zealand. There are translation differences between the Maori and English versions of the treaty. The Maori-language version, which contains the most signatures (more than 500 Maori chiefs), records that Maori would

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14 Treaty of Waitangi, 6 February 1840, online: <www.nzhistory.net.nz>.
retain tino rangatiratanga (sovereignty) over their lands and treasures, but otherwise gave kawanatanga (governance) rights to the British Crown. The English version, in contrast, states that Maori ceded sovereignty to the British Crown, but retained full exclusive and undisturbed possession of their lands, estates, forests, fisheries, and other properties. The current orthodox judicial position is that the Treaty of Waitangi forms part of New Zealand’s constitution but is not part of New Zealand’s domestic law unless it has been specifically incorporated into domestic legislation.15

Today, Maori own an unknown quantity of general freehold land and own in fee simple about 6% of the country’s landmass in Maori freehold land title. There are no reserves, as in Canada, for its Aboriginal peoples. The colonial beginning point in New Zealand at 1840 was that the Maori owned the land. Following the signing of the Treaty of Waitangi, the British Crown set about acquiring land from Maori and by the early 1860s had become the owner of most of the land in the South Island and the lower part of the North Island (constituting about 60% of New Zealand’s land mass, and where about 10% of Maori lived).16 The Crown then sold this land as general freehold land to the new European settlers. In the 1860s, legislation enabled the Crown to acquire most of the remaining lands in the North Island through outright confiscation and the more subtle (but equally successful) waiver of the British Crown’s right of pre-emption in favour of the creation of what were initially called Native freehold land titles.17 The Native Land Court was

15 See Hoani Te Heuheu Tukino v Aotea District Maori Land Board, [1941] NZLR 590 (PC).

16 Note that many of these early sales included clauses that promised to set aside some land for reserves, but it was rarely done. Even where it was done, Maori were not forced to reside on the reserved lands. See New Zealand, Waitangi Tribunal, Te Whanganui a Tara me ona Takiwa: Report on the Wellington District, Wai 145 (Wellington, NZ: Legislation Direct, 16 May 2003), online: <www.waitangi-tribunal.govt.nz>. See also Richard Boast, The Native Land Court 1862–1887: A Historical Study, Cases and Commentary (Wellington, NZ: Thomson Reuters, 2013).

17 See Native Lands Act 1865 (NZ), 1865/71.
established with the primary purpose of encouraging Maori landowners to transfer their customary holdings into a freehold title that would then enable them to alienate their lands as they wished. This process of determining the owners of Maori customary land transferred that land into Native freehold land. In reality, many owners of the newly titled Native freehold land were forced to sell their lands to pay for financial debt incurred in the transfer process (for example, mandatory court fees and survey costs). Today, there is said to be virtually no Maori customary land remaining. The 6% that is held in what are now referred to as Maori freehold titles is mostly held in multiple tenants in common titles that are not inhabited and are in rural areas with little arable value. Maori freehold land can be alienated, but legislation enacted in 1993 has emphasized new twin principles to help ensure that it is retained in Maori ownership and that it is utilized and developed. There are some remarkable financial success stories, mostly concerning forestry on Maori freehold land, where the Maori trusts or Maori incorporations are returning more than million-dollar profits.

Maori have a strong political presence. Since the 1860s, Maori have had guaranteed representation in the House of Representatives, with four electoral seats set aside for Maori voters. It was not until 1975 that Maori had the choice to enrol in either the Maori or the General roll.

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19 See *Te Ture Whenua Maori Act/Maori Land Act 1993* (NZ), 1993/4 [*Maori Land Act*].


21 The Parliament of New Zealand has two parts. One is the head of state, Elizabeth II, who is represented by the Governor General. The other part is the House of Representatives. This comprises members of Parliament who are elected every third year.


Since the 1990s, when the country moved from a first-past-the-post to a mixed-member proportional voting system, the Maori seats have been adjusted to reflect the number of the persons enrolled in the Maori seats. There are currently seven Maori seats, and an increasing number of Maori are being elected to Parliament on party lists, representing the spectrum of political ideologies. The Maori Party (first established in 2004) has a confidence and supply agreement with the National Party that currently leads the government. One of the benefits of this arrangement is that the co-leader of the Maori Party is the Minister of Maori Affairs.

Since 1975, Maori have had the opportunity to present arguments to the specially created permanent commission of inquiry—the Waitangi Tribunal—on alleged contemporary breaches by the Crown of the principles of the Treaty of Waitangi. From 1985 to 2010, Maori were able to lodge arguments that Crown actions, policies, or laws between 1840 and 1992 breached the Treaty principles. The Waitangi Tribunal consists of both Maori and non-Maori Maori Land Court judges, as well as other notable appointed persons. The Tribunal has released numerous reports on tribe region-specific claims alleging historical breaches throughout the country, and has reported on an array of generic issues, ranging from the use of the Maori language, to customary fishing, to the allocation of radio frequencies, petroleum, aquaculture, and water. In some instances, the government has accepted the Tribunal's recommendations for redress and enacted appropriate legislation (for example, the Maori Language Act 1987), but in other instances it has

25 See Maori Party, online: <www.maoriparty.org> (for information about the party, including this agreement).
denied the Tribunal’s recommendations (for example, the reports on petroleum, and the foreshore and seabed).29

In many instances, Maori are regaining control of their affairs, boosted by Treaty of Waitangi claim settlements. The modern Treaty of Waitangi claim settlement statutes provide the foundation for a new and continuing relationship between the Crown and the claimant group based on the Treaty of Waitangi principles. Settlements contain Crown apologies of wrongs done, financial and commercial redress, and redress recognizing the claimant group’s spiritual, cultural, historical, or traditional associations with the natural environment. Some significant cultural redress examples include the return of pounamu ownership to Ngai Tahu,30 the co-management of the Waikato River,31 and recognizing a large national park as having its own legal personality.32 More than 25 tribal groups have now received Treaty redress.33 In addition, there have been financially notable pan-tribal settlements regarding commercial fisheries, commercial aquaculture, and forestry.34 The increased wealth of


the tribes has enabled Maori to have more national political clout,\textsuperscript{35} and the means to work with their tribal members to grow their tribal assets and provide many social benefits. Nonetheless, despite many modern successes, Maori still constitute a high proportion of the wrong side of statistics for health, education, imprisonment, and unemployment, for example.\textsuperscript{36}

This overall account of Maori and the law is similar in some ways to the general experiences of Aboriginal peoples in Canada. Aboriginal peoples have similarly been dispossessed of much of their lands and treasures and have lost many of their languages and much of their cultural knowledge, but they have retained collective strength in who they are and what they desire. There are of course differences arising in part from the different colonial tools utilized. For instance, in Canada there is the Indian Act\textsuperscript{37} and reserves, a history of residential native schooling, no single treaty, and no judicial institutions similar to the Maori Land Court or the Waitangi Tribunal. This general overview of New Zealand has provided the backdrop to discussing Ngati Apa and, ultimately, to a comparative consideration of Ngati Apa and Tsilhqot’in Nation.

\section*{NGATI APA}

\subsection*{A. BEFORE NGATI APA}

Following the signing of the \textit{Treaty of Waitangi}, the British began to make serious inroads into acquiring large tracts of land for British

\footnotesize{\textsuperscript{35} For example, in 2005 the Iwi Chairs Forum was established. See Iwi Chairs Forum, “Kaupapa”, online: <iwichairs.maori.nz/our-kaupapa>.


\textsuperscript{37} RSC 1985, s I-5.}
settlement. At issue were those Europeans who had purchased land directly from Maori prior to 1840. Many individuals questioned whether Maori held valid title to the land. The purchasers argued that Maori did hold valid title because the British Crown had recognized the sovereignty of Maori (for example, in the Treaty of Waitangi). The purchasers said, therefore, Maori must be deemed to have had “the power to alienate land like any other sovereign.” In 1847, in the R v Symonds test case, the new colonial judiciary provided its first answer to this issue.

Symonds reinforced the sovereign rights of Britain in New Zealand. The facts of the case are similar to those of Johnson v M’Intosh, in which the United States Supreme Court refused to recognize the validity in law of title to land purchased by individuals directly from the Indian owners. The Symonds case involved a British individual who purchased land directly from Maori in accordance with a certificate issued by Governor Fitz Roy allowing him to do so. The question that occupied the courts

38 See e.g. Richard Boast, Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921 (Wellington, NZ: Victoria University Press, 2008).
41 See ibid.
43 [1847] NZPCC 387 [Symonds].
was whether the individual, Mr. C. Hunter McIntosh, had acquired legal
title to the property. Both judges sitting on the case said no, and both did
so by drawing on United States jurisprudence. The case is said to
represent the foundational principles of the common law relating to
Maori. The most famous quote in the case is that stated by
Justice Chapman:

Whatever may be the opinion of jurists as to the strength or weakness of
the Native title, whatsoever may have been the past vague notions of the
Natives of this country, whatever may be their present clearer and still
growing conception of their own dominion over land, it cannot be too
solemnly asserted that it is entitled to be respected, that it cannot be
extinguished (at least in times of peace) otherwise than by the free consent of
the Native occupiers. But for their protection, and for the sake of
humanity, the Government is bound to maintain, and the Courts to
assert, the Queen's exclusive right to extinguish it. It follows from what has
been said, that in solemnly guaranteeing the Native title, and in securing
what is called the Queen's pre-emptive right, the Treaty of Waitangi,
confirmed by the Charter of the Colony, does not assert either in doctrine
or in practice any thing new and unsettled.

The case held that the Queen had the exclusive right of pre-emption to
purchase land from Maori, as articulated in the Treaty of Waitangi.
Justice Chapman observed that the "intercourse of civilised nations" (namely, Great Britain) with Indigenous communities (especially in
North America) had led to established principles of law, namely that the
Crown is the sole source of title for settlers. This was the exact same
outcome as in Johnson, which both judges in Symonds recognized. In

46 Ibid at 388, 390, 392 (per Chapman J), and at 393, 394, 395 (per Martin CJ).
47 See e.g. Mark Hickford, "Settling Some Very Important Principles of Colonial Law":
48 Symonds, supra note 43 at 390 [emphasis added]. For a wider discussion of the early
judgments by Justice Chapman, see Shaunnagh Dorsett, "Sworn on the Dirt of
Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs
in New Zealand in the 1840s" (2009) 30:2 J Leg Hist 175.
49 Symonds, supra note 43 at 388.
Symonds, Justice Chapman observed that in guaranteeing Aboriginal title and the Queen's pre-emptive right, "the Treaty of Waitangi . . . does not assert either in doctrine or in practice any thing new and unsettled."50 However, the strength of this decision was not to be repeated in the courts for a long time. In fact, it was not until Ngati Apa that another court was to hold that Maori have proprietary interests in land despite a change in sovereignty.51

By the late 1870s, the now-named High Court, in line with the new evangelism, began to rewrite history and provide a different answer to the issue than that given in Symonds. Of most significance, in 1877, the High Court in Wi Parata v Bishop of Wellington52 denied that Maori had sovereignty prior to 1840, and thus rejected the Treaty of Waitangi as a valid treaty.

The Wi Parata case concerned a chief seeking to gift land to the Crown so that the Crown would establish a native Maori school on the land.53 In 1848, the chief of the Ngati Toa tribe sought to give tribal land at Whitiareia as an endowment for a school to be established there to educate the tribal children.54 Accordingly, the chief entered into a verbal arrangement with the Lord Bishop of New Zealand.55 In 1850, a Crown grant was made, without the knowledge or consent of the tribe, to the Lord Bishop. The grant stated that the land had been ceded from Ngati

50 Ibid at 390. See also ibid at 395, Martin CJ observing that

[t]his right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it. Whether the assent of the Natives went to the full length of the principle, or (as is contended) to a part only, yet the principle itself was already established and in force.


52 (1877) 1 NZLRLC 14 (HC) [Wi Parata].

53 Ibid at 14.

54 Ibid.

55 Ibid.
Toa for the school.\textsuperscript{56} However, no school of any kind was ever established.\textsuperscript{57} The tribe sued, seeking return of the land.\textsuperscript{58} Chief Judge Prendergast relied on a new version of historical events and ruled in favour of the Crown grant by stating:

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.\textsuperscript{59}

At the turn of the century, the Privy Council had an opportunity to closely reflect on the \textit{Wi Parata} decision, and it did not like what it read. In \textit{Nireaha Tamaki v Baker},\textsuperscript{60} decided in 1901, Lord Davey, in delivering the judgment for their Lordships, began: "This is an appeal... in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised."\textsuperscript{61} The Crown argument, supported by the Court of Appeal, relied on the \textit{Wi Parata} reasoning that there is no Maori customary law "of which the Courts of law can take cognizance". Lord Davey responded:

Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute cannot call what is non-existent into being." It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under

\textsuperscript{56} \textit{Ibid.}
\textsuperscript{57} \textit{Ibid.}
\textsuperscript{58} \textit{Ibid.}
\textsuperscript{59} \textit{Ibid} at 17.
\textsuperscript{60} \cite{[1901] NZPCC 371, [1901] AC 561 [Nireaha Tamaki cited to NZPCC].}
\textsuperscript{61} \textit{Ibid} at 372.
custom and usage which is either known to lawyers or discoverable by
them by evidence."\(^2\)

Moreover, Lord Davey recognized that Chapman J, in deciding the
Symonds case, had made some "very pertinent" observations that
Aboriginal title is entitled to be respected. But the final decision made by
the Privy Council—in favour of the Maori applicant—was dependent on
statutory recognition of Aboriginal title and not the common law
recognition of it.

However, astonishingly, New Zealand's domestic judiciary ignored
the Privy Council's ruling that Wi Parata had gone too far, to the relief of
many New Zealand lawyers and judges who had publicly disapproved of
the Privy Council decision.\(^6\) As recognized by Robin Cooke, who
became President of the Court of Appeal in 1986 and himself a Law
Lord in 1996, this was "the only recorded instance of a New Zealand
Court's publicly avowing its disapproval of a superior tribunal".\(^6\)

In 1962 and 1963, the Court of Appeal rendered two significant
judgments that restricted Maori opportunities to pursue rights to

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\(^2\) *Ibid* at 382 [citations omitted]. For more discussion, see Jim Evans, "Reflections on

\(^6\) See *Hobepa Wi Neera v Bishop of Wellington*, [1902] 21 NZLR 655 (CA). For
commentary, see Mark Hickford, "John Salmond and Native Title in New Zealand:
VUWLR 853; John William Tate, "*Hobepa Wi Neera*: Native Title and the Privy
Council Challenge" (2004) 35:1 VUWLR 73; David V Williams, "Wi Parata is
Property Rights and the Foreshore and Seabed: The Last Frontier* (Wellington, NZ:

\(^6\) Robin Cooke, "The Nineteenth Century Chief Justices" in Robin Cooke, ed,
*Portray a Profession: The Centennial Book of the New Zealand Law Society*
(Wellington, NZ: Reed, 1969) 36 at 46. An excellent book devoted to Wi Parata is
David V Williams, *A Simple Nulility? The Wi Parata Case in New Zealand Law and
History* (Auckland, NZ: Auckland University Press, 2011). See also Grant Morris,
riverbeds\textsuperscript{65} and the foreshore—the foreshore case being the most important precursor to \textit{Ngati Apa}. In this foreshore case, \textit{In re Ninety Mile Beach},\textsuperscript{66} the Court of Appeal held that “once an application for the investigation of title to land having the sea as one of its boundary was determined, the Maori customary communal rights were then wholly extinguished.”\textsuperscript{67} While the Court did not agree with the Crown’s blunt argument that “on the assumption of sovereignty the Crown by prerogative right became the owner of the foreshores of New Zealand”, the Court did hold that:

[j]ust as in the \textit{Wanganui River} case this Court reached the conclusion that the transformation of the communal rights of the Maori people into individual ownership carried the title of the owner \textit{ad medium filum} so I think in the present case we should hold that an investigation of a block of land abutting the sea was complete for all purposes … .\textsuperscript{68}

North J said this about the \textit{Treaty of Waitangi}:

[I]n my opinion it necessarily follows that on the assumption of British sovereignty—apart from the Treaty of Waitangi—the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark. But as we all know, the Crown did not act in a harsh way and from earliest times was careful to ensure the protection of Native interests and to fulfil the promises contained in the Treaty of Waitangi.\textsuperscript{69}


\textsuperscript{67} \textit{In re Ninety Mile Beach}, supra note 66 at 473, North J.

\textsuperscript{68} \textit{Ibid}.

\textsuperscript{69} \textit{Ibid} at 468. See also \textit{ibid} at 475, Gresson J.
This passage reiterates *Wi Parata*–type sentiments that the fate of Maori property rights in law are at the whim of the government, with no recognition of the doctrine of Aboriginal title guarantees (such as the requirement for clear and plain legislation and attached compensation).

In the 1980s, the High Court began to rectify the *Wi Parata* 1877 precedent and reintroduce a more apt application of the doctrine of Aboriginal title into New Zealand’s common law. This commenced in the 1986 case, *Te Weehi*.

Here, the High Court held that a Maori person had a right to take undersized shellfish, *paua* (abalone), even though it was in contravention of legislation, because no statute had plainly and clearly extinguished the customary right. Judge Williamson distinguished the earlier case law, which employed a *Wi Parata*–type reasoning (namely, the Court of Appeal’s *In re Ninety Mile Beach* decision), by holding that this present case was “not based upon ownership of land or upon an exclusive right to a foreshore or bank of a river.”

Justice Williamson found in favour of *Te Weehi*, recognizing that the establishment of British sovereignty had not set aside the local laws and property rights of Maori, thus concluding that because there had been no plain and clear legislative extinguishment of the fishing right, the right continues to exist: “[i]t is a right limited to the Ngai Tahu tribe and its authorised relatives for the personal food supply.” In reaching this decision, Williamson J recognized the significance of the *Treaty of Waitangi* for New Zealand: “obviously the rights which were to be protected by it arose by the traditional possession and use enjoyed by Maori tribes prior to 1840.”

While *Te Weehi* reintroduced the doctrine, it did so in regard to Aboriginal fishing rights, not title. Williamson J did not feel bound by the earlier *Wi Parata*–type case law, distinguishing those cases from the

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

71 *Te Weehi*, supra note 70 at 692.

72 Ibid.

73 Ibid at 686.
one he was hearing because the right to take undersized pāua was a "non-territorial" claim; Te Weehi was "not based upon ownership of land or upon an exclusive right to a foreshore or bank of a river."\textsuperscript{74} It was important for Williamson J to emphasize this aspect, because otherwise he would have been bound by higher court precedent.

Subsequent case law in the 1990s reinforced the existence of the common law doctrine of Aboriginal title in New Zealand, but did not accept the arguments posed under it. The first of the three prominent cases is the 1990 Court of Appeal case,\textit{ Te Runanga o Muriwhenua Inc v Attorney-General.}\textsuperscript{75} This case concerned processes relating to a Crown-proposed settlement of Māori commercial sea fishing rights. The Court made several observations in \textit{obiter dicta.} For example, President Cooke made extensive reference to the Canadian case law, describing it as "more advanced than our own"; though he recognized that the Canadian jurisprudence was "still evolving,"\textsuperscript{76} he posited that it would likely provide "major guidance"\textsuperscript{77} for New Zealand. He added that New Zealand's courts should give just as much respect to the rights of New Zealand's Indigenous peoples as the Canadian courts give to their Indigenous peoples.\textsuperscript{78} Cooke saw no reason to distinguish the Canadian jurisprudence on the basis of constitutional differences, and he emphasized the analogous approaches to the partnership and fiduciary obligations being developed in Canada (under the doctrine of Aboriginal title) and in New Zealand (under the \textit{Treaty of Waitangi}). This comparison enabled Cooke to confidently conclude that "[i]n principle the extinction of customary title to land does not automatically mean the extinction of fishing rights."\textsuperscript{79}

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\textsuperscript{74} \textit{Ibid} at 692.
\textsuperscript{75} [1990] 2 NZLR 641 (CA).
\textsuperscript{76} \textit{Ibid} at 645.
\textsuperscript{77} \textit{Ibid} at 655.
\textsuperscript{78} \textit{Ibid}.
\textsuperscript{79} \textit{Ibid}.
Four years later, in 1994, the Court of Appeal concluded that under neither the doctrine of Aboriginal title nor the Treaty of Waitangi do Maori have a right to generate electricity by the use of water power. In this case, Te Runanganui o Te Ika Whenua, Cooke referred to Canadian and Australian case law in devising the nature of Aboriginal title. He explained the doctrine:

On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.

Cooke elaborated on the nature of Aboriginal title rights, stating that, first, they are usually communal. Second, Aboriginal title rights cannot be extinguished (at least in times of peace) other than by the free consent of the Aboriginal occupiers. Third, the rights can only be transferred to the Crown. Fourth, the transfer must be in strict compliance with the provisions of any relevant statutes. Fifth, it is likely to be in breach of fiduciary duty if an extinguishment occurs by less than fair conduct or on less than fair terms; if extinguishment is deemed necessary, then free consent may have to yield to compulsory acquisition for recognized specific public purposes, but upon extinguishment proper compensation must be paid. Cooke then explained the scope of Aboriginal title in terms of a spectrum:

The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case. At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law. At the other extreme they may

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80 Te Runanganui o Te Ika Whenua Inc Society v Attorney-General, [1994] 2 NZLR 20 at 25 (CA) [Te Runanganui o Te Ika Whenua].
81 Ibid at 23–24.
82 Ibid.
be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.\textsuperscript{83}

The third of the three prominent cases was decided in 1990: *McRitchie v Taranaki Fish and Game Council.*\textsuperscript{84} Here, the majority of the Court of Appeal held that Maori cannot claim, neither under the doctrine of Aboriginal title nor under the Treaty, a customary right to fish for introduced species. President Richardson, for the majority, discussed the doctrine using the then-leading Canadian and Australian cases—*R v Sparrow*\textsuperscript{85} and *Mabo v Queensland (No 2),*\textsuperscript{86} respectively—for support that Aboriginal rights "are highly fact specific". He explained the test as follows:

The existence of a right is determined by considering whether the particular tradition or custom claimed to be an aboriginal right was rooted in the aboriginal culture of the particular people in question and the nature and incidents of the right must be ascertained as a matter of fact.\textsuperscript{87}

Despite these four 1980s–90s cases not accepting the arguments posed under the doctrine of Aboriginal title, they are historically significant simply because the courts accepted the existence of the Aboriginal title doctrine. This represented a marked change to the legal precedents evident in the *Wi Parata* and *In re Ninety Mile Beach* cases.

B. NGATI APA

In 2003, the Court of Appeal, in *Ngati Apa*, finally reintroduced the full spectrum of the Aboriginal title doctrine, similarly to its articulation in

\textsuperscript{83} *Ibid* at 24 [citations omitted].

\textsuperscript{84} [1999] 2 NZLR 139 (CA) [*McRitchie*] (note that Justice Thomas gave a strong dissent).

\textsuperscript{85} [1990] 1 SCR 1075, 70 DLR (4th) 385.

\textsuperscript{86} [1992] HCA 23, [1992] 175 CLR 1 [*Mabo*].

\textsuperscript{87} *McRitchie*, supra note 84 at 147. Thomas J, in dissent, interestingly found in favour of a Maori customary right to fish for introduced species by basing his decision entirely on New Zealand law—no reference was made to overseas decisions.
Symonds. The factual situation of this case saw the Court accepting the possibility that Aboriginal title could encompass land that was either permanently or temporarily under salt water.\textsuperscript{88} In brief, Maori tribes at the top of the South Island (an area already known for its successful commercial aquaculture) sought resource consents from the local government authority to commercially farm aquaculture. The tribes were denied resource consents to establish these aqua farms. Instead of appealing the local government decision in the usual manner in the Environment Court, the tribes went to the Maori Land Court seeking a declaration that the relevant foreshore and seabed was Maori customary land. The case eventually made its way to the Court of Appeal. All five judges in the Court of Appeal agreed that theoretically this was possible and, in doing so, overruled \textit{Wi Parata}.

Significantly, the \textit{Ngati Apa} decision explicitly foresaw the possibility of the doctrine of Aboriginal title by recognizing Indigenous peoples’ exclusive ownership of the foreshore and seabed following a change in sovereignty. For example, Chief Justice Elias stated: “Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature” and “[t]he content of such customary interest is a question of fact discoverable, if necessary, by evidence.”\textsuperscript{89} Elias CJ explained that “[a]s a matter of custom the burden on the Crown’s radical title might be limited to use or occupation rights held as a matter of custom.”\textsuperscript{90} The Chief Justice then quoted from a 1921 Privy Council decision, \textit{Amodu Tijani v Secretary, Southern Nigeria},\textsuperscript{91} stating that Aboriginal title rights might “be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative


\textsuperscript{89} \textit{Ngati Apa, supra} note 6 at para 31 [citations omitted].

\textsuperscript{90} \textit{Ibid}.

\textsuperscript{91} [1921] 2 AC 399, 90 LJPC 236 [\textit{Amodu Tijani} cited to AC].
interference.” Elias CJ substantiated this possibility with reference to Canada by stating:

The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to exclusive ownership with incidents equivalent to those recognised by fee simple title.”

The other four justices discussed the common law doctrine of Aboriginal title in similar terms. For example, Justice Tipping began his judgment with the words, “[w]hen the common law of England came to New Zealand its arrival did not extinguish Maori customary title . . . title to [Maori customary land] must be lawfully extinguished before it can be regarded as ceasing to exist.” Justices Keith and Anderson, in a joint judgment, emphasized that “the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain.” Finally, President Gault expressly recognized the uniqueness of New Zealand in the existence of the common law jurisdiction of Aboriginal title and the statutory jurisdiction of Maori customary land status, and stated that he preferred to “reserve the question of whether it is a real distinction insofar as each is directed to interests in land in the nature of ownership.”

Interestingly, the judges refer back to Johnson. Elias CJ quotes Johnson, recognizing that, according to the Supreme Court of the United States, Aboriginal title rights “were rights at common law, not simply moral claims against the Crown.” Justices Keith and Anderson relied

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92 Ngati Apa, supra note 6 at para 31, citing Amodu Tijani, supra note 91 at 410.
93 Ngati Apa, supra note 6 at para 31 [emphasis added, citations removed]. The Canadian case cited was Delgamuukw v British Columbia, [1997] 3 SCR 1010, 153 DLR (4th) 193 [Delgamuukw].
94 Ngata Apa, supra note 6 at para 183, 185.
95 Ibid at para 148 [citations omitted].
96 Ibid at para 103.
97 Ibid at para 19.
extensively on the early United States jurisprudence and cited Johnson at length, including the following from Chief Justice Marshall's opinion in that case:

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. 98

Ngati Apa poignantly recognizes the interests of Indigenous peoples. For example, Chief Justice Elias stated:

The common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different. 99

According to Ngati Apa, the common law of New Zealand is unique. Elias CJ stressed this reality by stating:

In British territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only "so far as applicable to the circumstances thereof". . . . [F]rom the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances. 100

The Court did not proceed to answer whether specific tribes exclusively held land under salt water because the case turned on the issue of whether the Maori Land Court had jurisdiction to determine if the foreshore and seabed were Maori customary land (a land status rather

98 Ibid at para 135, citing Johnson, supra note 44 at 505.
99 Ngati Apa, supra note 6 at para 86.
100 Ibid at para 17.
than an Aboriginal title issue). All five judges held that the Maori Land Court did have the necessary jurisdiction to consider an application from Maori asserting that specific areas of the foreshore and seabed were Maori customary land.\footnote{101} While Parliament enacted law that removed the possibility of Maori pursuing these claims in the courts, Ngati Apa remains undoubtedly New Zealand’s most significant contemporary case. Importantly, it banished the \textit{terra nullius} precedent evident in \textit{Wi Parata} and that continuing judicial mindset that was prevalent in \textit{In re Ninety Mile Beach}.

C. AFTER \textit{NGATI APA}

While the Court of Appeal held that the Maori Land Court did have the necessary jurisdiction to consider an application from Maori that asserted that specific areas of the foreshore and seabed were Maori customary land,\footnote{102} Maori never had the opportunity to take a case to court. This was because the Labour-led government immediately announced its intention to enact clear and plain legislation asserting Crown ownership of the foreshore and seabed.\footnote{103} In response to the government’s position and in protest of the policy,\footnote{104} many Maori groups lodged an urgent claim with the Waitangi Tribunal. At the Waitangi Tribunal, the Maori groups argued that the policy, if enacted, would constitute a serious breach of the \textit{Treaty of Waitangi} principles and wider

\footnote{101} Note that in this decision there is extensive reliance on Canadian case law, and the Australian case \textit{Mabo}, supra note 86. No post-\textit{Mabo} Australian case was cited, including a case arguably on point, \textit{Commonwealth v Yarmirr}, [2001] HCA 56, 208 CLR 1. For a discussion on this, see Jacinta Ruru, “What Could Have Been?: The Common Law Doctrine of Native Title in Land under Salt Water in Australia and Aotearoa/New Zealand” (2006) 32:1 Monash UL Rev 116 [Ruru, “What Could Have Been?”].

\footnote{102} See Ngati Apa, supra note 6.

\footnote{103} See New Zealand, Department of Prime Minister and Cabinet, \textit{Summary of Foreshore and Seabed Framework} (Wellington, NZ: Department of Prime Minister and Cabinet, 2003), online: <www.beehive.govt.nz/foreshore/summary.php>.

\footnote{104} See \textit{ibid} (outlining the government’s policy).
norms of domestic and international law. The Tribunal agreed. It stated, in its March 2004 report, that the policy gave rise to serious prejudice toward the Maori groups by “cutting off their access to the courts and effectively expropriating their property rights, [and putting] them in a class different from and inferior to all other citizens.” Despite the Tribunal’s strong recommendations for continued consultation between the government and Maori, the government rejected the report’s central conclusions as based on “dubious or incorrect assumptions.” Furthermore, the government stressed the notion of parliamentary sovereignty—the idea that New Zealand’s Parliament is supreme and is unhindered in its law-making abilities.

The Foreshore and Seabed Act 2004 (since repealed) preserved “the public foreshore and seabed in perpetuity as the common heritage of all New Zealanders”, vested the public foreshore land in Crown ownership “as its absolute property”, replaced the Maori Land Court’s jurisdiction to issue land status orders with a new jurisdiction to issue customary rights orders, and replaced the High Court’s jurisdiction to hear and determine the common law doctrine of Aboriginal title with a new jurisdiction to determine territorial customary rights.

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106 Ibid.


108 Foreshore and Seabed Act 2004 (NZ), 2004/93, s 3 [Foreshore and Seabed Act], as repealed by Marine and Coastal Area (Takutai Moana) Act 2011 (NZ), 2011/3, s 5 [Takutai Moana Act].

109 Foreshore and Seabed Act, supra note 108, s 13(1). Section 5 defined the “public foreshore and seabed” as meaning the foreshore and seabed but without including any land that was subject to a specified freehold interest.

110 Ibid, Parts 3–4. For commentary on this Act and its background, see generally FM (Jock) Brookfield, “Maori Claims and the ‘Special’ Juridical Nature of Foreshore and
The government's handling of the foreshore and seabed issue, including the resulting *Foreshore and Seabed Act*, angered many Maori. Protests included a successful claim to the United Nations, whereby the United Nations Committee on the Elimination of Racial Discrimination condemned the Act;\textsuperscript{111} a political protest *hikoi* (march) of about 20,000 Maori on Parliament grounds; and a resignation of a Maori Labour Cabinet Minister, Tarina Turia, followed by her re-election to the New Zealand Parliament as a representative of the newly formed Maori Party. The new statutory tests to fulfil in order to seek customary rights orders and territorial customary rights were widely regarded as nonsensical and unattainable, even if the rights were desired (which was not evident on a large scale).\textsuperscript{112} The National Party agreed to review the *Foreshore and Seabed Act* as part of the Maori Party's agreement to support the National-led government, which was commencing its 3-year term in Parliament in 2008. The review panel released its recommendations in 2009.\textsuperscript{113} Parliament then enacted the new *Marine and Coastal Area (Takutai Moana) Act 2011*.\textsuperscript{114} This Act neutralizes the ownership issue by declaring that "[n]either the Crown nor any other person owns, or is capable of owning, the common marine and coastal area".\textsuperscript{115} The Act recognizes the possibility for Maori to claim protected customary rights in the common marine and coastal area\textsuperscript{116} and the possibility to seek

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\textsuperscript{112} For a critique of this Act, see e.g. Ruru, "What Could Have Been?", supra note 101.


\textsuperscript{114} *Takutai Moana Act 2011*, supra note 108.

\textsuperscript{115} *Ibid*, s 11(2).

\textsuperscript{116} See *ibid*, ss 51–57.
customary marine title in a specified area of the common marine and coastal area, which would allow a Maori group to hold that land in accordance with *tikanga Maori* (Maori customary values and practices). Maori have been more receptive to this Act, as the statutory tests are not quite as onerous and the benefits in seeking a successful recognition of these rights and title are comparatively more enticing. This is not to say that the 2011 Act represents what Maori want, but it is a pragmatic solution that has created comparatively less friction than the 2004 Act.

The most significant case to discuss the boundaries between the common law and Maori rights in property since *Ngati Apa is Paki v Attorney-General*. The *Paki* case involves complex facts: Essentially at issue was whether, at the time the Crown acquired specific land from the Maori owners in the 1890s, the common law presumption that the Crown simultaneously became the owner of the bed of the river to the middle of the flow took effect even though this *usque ad medium filum aquae* doctrine was unknown to Maori and, if so, whether the Crown now held the riverbed as constructive trustees. Multiple appellate courts heard this case, which involved close consideration of historic legislation and the common law. Aboriginal title was not at the centre of the case, but the courts, including the Supreme Court, made some statements about the common law and Maori reinforcing *Ngati Apa*. For example: “The Court held unanimously in *Ngati Apa* that native property continues until lawfully extinguished and that the onus of proof of extinguishment lay on the Crown in contending that it owned all land below high tide in New Zealand”. In *Paki*, the Chief Justice stated in relation to the facts of this case that

117  See ibid, ss 58–93.
120  *Paki No 2*, *supra* note 118 at para 67.
the Pouakani people may have been sellers of part of their lands, but they retained other land and were not leaving the area. It may not have been the case that interests in the river according to Maori custom were confined to those whose occupation of the riparian lands entitled them to title to those lands in the Native Land Court.121

This is because “[i]n the case of Maori land, the importation of this rule of the common law is not self-evidently dictated by similar considerations of 'common sense', even in circumstances where the riparian owners undoubtedly have the bed of the river or lake.”122

Ngati Apa is undoubtedly New Zealand’s most important milestone case, and it is thus this case that forms the prime comparative material against which to reflect on Tsilhqot’in Nation.

NGATI APA AND TSILHQOT’IN COMPARED

Both Ngati Apa and Tsilhqot’in Nation are important landmark cases for their respective countries: Ngati Apa accepts the theoretical possibility of Aboriginal title in New Zealand common law; Tsilhqot’in Nation accepts and finds in fact Aboriginal title in a specific geographical region in Canada. Do the cases thus discuss modern Aboriginal title similarly and, therefore, understand alike the history of contentious Indigenous/Crown sovereignty and property issues?

A. ABORIGINAL TITLE TEST

Tsilhqot’in Nation asks in its opening paragraph, “what is the test for Aboriginal title to land?” and rephrases this later in the judgment as “[h]ow should the courts determine whether a semi-nomadic indigenous group has title to lands?”123 The Chief Justice, in delivering the judgment for the Court, accepts the Delgamuukw124 test that developed

121 Ibid at para 65.
122 Ibid.
123 Tsilhqot’in Nation, supra note 3 at para 24.
124 See supra note 93.
three criteria for Aboriginal groups to successfully claim Aboriginal title—sufficiency, continuity, and exclusivity—as “useful lenses though which to view the question of Aboriginal title”, but cautions that “the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts”. The Chief Justice added: “Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.”

In *Ngati Apa* and other New Zealand cases, the starting point and inquiry are different, and thus this type of criteria detail is missing in the New Zealand judicial decisions (but evident in the foreshore and seabed legislation). In New Zealand, as the Chief Justice of the Court of Appeal in *Ngati Apa* stated, “From the beginning of Crown colony government, it was accepted that the entire country was owned by Maori according to their customs and that until sold land continued to belong to them.” New Zealand has had a long judicial history of determining Maori ownership of land with the creation of the Native/Maori Land Court in 1862. The Land Court was tasked with ascertaining the correct owners of Maori customary land and thereby transferring the land into a fee simple title—Maori freehold land. The statutory direction to the Court was to ascertain by such evidence as it shall think fit the right title estate or interest of the applicant and of all other claimants to or in the land respecting which notice shall have been given as aforesaid and the Court shall order a certificate of title to be made and issued which certificate shall specify the names of the persons or of the tribe who according to Native custom own or are interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate or the Court may in its discretion refuse to order a certificate to issue to the claimant or any other person.

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125 *Tsilhqot’in Nation*, *supra* note 3 at para 32.
126 *Ibid* at para 32.
127 *Ngati Apa*, *supra* note 6 at para 37 [citations omitted].
128 *Native Lands Act 1865* (NZ), 1865/71, s 23.
Today, the modern version of this statute is the *Te Ture Whenua Maori Act 1993*. This Act defines Maori customary land as “land that is held by Maori in accordance with tikanga Maori.” The Act mandates that the Maori Land Court determine every title to and interest in Maori customary land “according to tikanga Maori.” The Act defines “tikanga Maori” as “Maori customary values and practices.”

The *Ngati Apa* judgment accepts the history of the Native/Maori Land Court doing this work and accepts as evidence “that New Zealand legislation has assumed the continued existence at common law of customary property until it is extinguished.” The Chief Justice in *Ngati Apa* provides that the only criteria for determining Aboriginal title is an assessment “according to tikanga Maori.”

However, because of the political aftermath to *Ngati Apa*, Parliament has codified the common law doctrine of Aboriginal title in the foreshore and seabed, and in doing so has created a statutory test that does articulate criteria similar to those found in *Tsihqot'in Nation*. The now-repealed *Foreshore and Seabed Act 2004* gave the High Court jurisdiction to hear and determine the common law doctrine of Aboriginal Title, with a new jurisdiction to determine “territorial customary rights”, defined to mean

> a customary title or an aboriginal title that could be recognised at common law and that (a) is founded on the exclusive use and occupation of a particular area of the public foreshore and seabed by the group; and (b) entitled the group, until the commencement of this Part, to exclusive use and occupation of that area.

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129 _Maori Land Act_, *supra* note 19.
130 _Ibid_, s 129(2)(a).
131 _Ibid_, s 132(2).
132 _Ibid_, s 4.
133 _Ngati Apa_, *supra* note 6 at para 47.
134 _Ibid_ at para 46.
135 *Foreshore and Seabed Act*, *supra* note 108, s 32(1).
Sufficiency, continuity, and exclusivity were all core components of this Act. Subsection 32(2) of that Act read:

For the purposes of subsection (1)(a), a group may be regarded as having had exclusive use and occupation of an area of the public foreshore and seabed only if—

(a) that area was used and occupied, to the exclusion of all persons who did not belong to the group, by members of the group without substantial interruption in the period that commenced in 1840 and ended with the commencement of this Part; and

(b) the group had continuous title to contiguous land. 136

This 2004 Act was modelled on the strict adherence to these criteria in line with the Australian Aboriginal title case law up until that point. 137 The current foreshore and seabed statute is the Marine and Coastal Area (Takutai Moana) Act 2011. 138 This Act continues the statutory presumption of any Aboriginal title claim in the now-defined common marine and coastal area. 139 In accordance with this 2011 Act, the High Court has jurisdiction to find "protected customary rights" and "customary marine title" in the common marine and coastal area. 140 In contrast to the 2004 Act, but in line with Ngati Apa, the primacy of the criteria in the 2011 Act is "in accordance with tikanga Maori". Sufficiency, continuity, and exclusivity remain part of the overall criteria, but they serve to flesh out the inquiry that is to be based on tikanga Maori. The two relevant sections of the 2011 Act read:

136 Ibid, s 32(2) [emphasis added].

137 See Ruru, "What Could Have Been?", supra note 101.

138 Supra note 108.

139 Ibid, s 6.

140 Ibid, s 98(4) (stating that "[o]n and after the commencement of this Act, the jurisdiction of the Court to hear and determine any aboriginal rights claim is replaced fully by the jurisdiction of the Court under this Act"). See also ibid, s 98(5).
51 Meaning of protected customary rights

(1) A protected customary right is a right that—

(a) has been exercised since 1840; and

(b) continues to be exercised in a particular part of the common marine and coastal area in accordance with tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way, or evolves over time; and

(c) is not extinguished as a matter of law.

...

58 Customary marine title

(1) Customary marine title exists in a specified area of the common marine and coastal area if the applicant group—

(a) holds the specified area in accordance with tikanga; and

(b) has, in relation to the specified area,—

(i) exclusively used and occupied it from 1840 to the present day without substantial interruption; or

(ii) received it, at any time after 1840, through a customary transfer in accordance with subsection (3).\(^\text{141}\)

Tikanga is defined in the 2011 Act as meaning “Māori customary values and practices.”\(^\text{142}\) The High Court has yet to decide any cases under the 2011 Act.

\(^{141}\) Ibid, ss 51(1), 58(1) [emphasis added].

\(^{142}\) Ibid, s 9(1).
The legislative codification of Aboriginal title relevant to the foreshore and seabed illustrates that Parliament has considered the criteria for proving Aboriginal title more closely than the New Zealand courts, which simply stress *tikanga Maori* as the deciding evidential criteria. The new 2011 Act better aligns with this jurisprudence than the 2004 Act did, and seems to make sense in a comparative Canadian context, especially with the *Tsilhqot’in Nation* case also accepting that, while the three criteria are important, they are but useful lenses to shed light on how to find Aboriginal title in land today.\(^{143}\) The Court in *Ngati Apa* was also adamant to stress that the common law of England is not necessarily the common law of New Zealand: it differed because “it reflected local circumstances.”\(^{144}\) This reflection of local circumstances, in the New Zealand context, is *tikanga Maori*. The *Tsilhqot’in Nation* case does not similarly stress specifically Aboriginal law, custom, or values as the overriding test for contemporary Aboriginal title. In New Zealand, the test for Aboriginal title in lands and waters not encompassed in the common marine and coastal area is whether the land or water is held in accordance with *tikanga Maori* today, and so long as the land or water is not held in freehold title and there is no clear and plain legislative extinguishment of Aboriginal title, then Aboriginal title ought to be found.

B. ABORIGINAL TITLE RIGHTS CONFERRED

A second key question *Tsilhqot’in Nation* asks is this: If title is established, what rights does it confer? There is substantially more detail on this issue in *Tsilhqot’in Nation* than in *Ngati Apa*. In *Tsilhqot’in Nation*, the Chief Justice explains that Aboriginal title

confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the

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\(^{143}\) See *Tsilhqot’in Nation*, supra note 3 at para 32.

\(^{144}\) *Ngati Apa*, supra note 6 at para 17.
right to the economic benefits of the land; and the right to pro-actively use and manage the land.\footnote{145}

The Chief Justice further states:

Aboriginal title, however, comes with an important restriction—it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes—even permanent changes—to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.\footnote{146}

In \textit{Ngati Apa}, the assumption is that Aboriginal title would be held in accordance with \textit{tikanga Maori}. Customary land (or Aboriginal title) is “property recognised by New Zealand law which is not owned by the Crown.”\footnote{147} Moreover, “[t]he Crown has no property interest in customary land and is not the source of title to it.”\footnote{148} \textit{Tsilhqot’in Nation} accepts this too in the Canadian context. But \textit{Ngati Apa} does not go further and suggest that there would be limits on how the land could be used. The judicial indication is simply that the land would not be subject to, or entitled to the benefits of, New Zealand law. For example, Maori who continued to own land protected by Aboriginal title could not seek a mortgage from a New Zealand bank, but also would not be liable for local government rates on the land. The land would be subject to a different legal system: \textit{tikanga Maori}, and wholly so. The New Zealand courts would not have oversight of this land.

However, New Zealand’s Parliament has certainly specified what rights a customary marine title would confer. The \textit{Marine and Coastal}

\footnote{145} \textit{Tsilhqot’in Nation}, supra note 3 at para 73.
\footnote{146} \textit{Ibid} at para 74.
\footnote{147} \textit{Ngati Apa}, supra note 6 at para 41.
\footnote{148} \textit{Ibid} at para 47.
Area (Takutai Moana) Act does state that the customary marine title is still subject to many of New Zealand's laws. This legislative codification is specific but still contrasts with Tsilhqot'in Nation. Paragraph 60(1)(a) provides for the scope and effect of a customary marine title: Essentially, a customary marine title provides an interest in land (not including a right to alienate or otherwise dispose of any part of the customary marine title area), rights (but only those listed in the Act), and an ability to delegate rights and transfer title (but only in accordance with tikanga).\textsuperscript{149} The Act states that a customary marine title group

may use, benefit from, or develop a customary marine title area (including derive commercial benefit) by exercising the rights conferred by a customary marine title order or agreement, but is not exempt from obtaining any relevant resource consent, permit, or approval that may be required under another enactment for the use and development of that customary marine title...\textsuperscript{150}

This Act does not prohibit the holders of a customary marine title from using their land in a way that might stop succeeding generations from benefiting from the land.

C. PUBLIC INTERESTS

The third universal question raised in Tsilhqot'in Nation is this: "[H]ow are broader public interests to be reconciled with the rights conferred by Aboriginal title?"\textsuperscript{151} Once again, Ngati Apa does not go into this issue in any detail. There are no hints in Ngati Apa that Aboriginal title should be limited in any manner by broader public interests. The question is whether clear and plain legislation has been enacted to extinguish the Aboriginal title under consideration. Ngati Apa does reiterate the common law (as well as constitutional) position in New Zealand that New Zealand's Parliament is supreme and can enact, by majority,

\textsuperscript{149} See supra note 114, s 60(1)(a).
\textsuperscript{150} Ibid, s 60(2)(a).
\textsuperscript{151} Supra note 3 at para 1.
legislation to extinguish Aboriginal title. Parliament is not stopped constitutionally from doing this even if the courts might perceive such action to be unjustified. The history of what happened after Ngati Apa is important on this point because, of course, New Zealand’s Parliament took the stance that broader public interests could not be reconciled with rights conferred by Aboriginal title in land permanently or temporarily under salt water. Parliament enacted the Foreshore and Seabed Act 2004, and while many protested this even at an international level, Maori had no recourse in the courts. Recourse did come through parliamentary elections when a new governing party took office and Parliament repealed the 2004 Act, replacing it with the Marine and Coastal Area (Takutai Moana) Act 2011.

The only suggestion in New Zealand case law that the broader public interests might be relevant is, as first stated in the 1847 Symonds case, that in times of war, public interests might necessitate the need to compulsorily acquire Aboriginal title land. In a different context, however, the courts and the Waitangi Tribunal have considered broader public interests when determining if the Treaty of Waitangi ought to limit in any manner Parliament’s supremacy. The Tribunal asserts that Parliament should only permit the needs of others to trump Treaty interests in these situations: 1) in exceptional circumstances such as war; 2) for peace and good order; 3) in matters involving the national interest; 4) in situations where the environment or certain natural resources are so endangered or depleted that they should be conserved or protected; or 5) where Maori interests in natural resources have been fully ascertained by the Crown and freely alienated.152 The Tribunal’s stance is that “the national interest in conservation is not a reason for negating Maori rights of property.”153 The courts, in comparison, do not go this far and instead stress the Crown’s right to govern: “The rights


and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to that overriding authority. But this Treaty reasoning ought not to be replicated in the common law of Aboriginal title context. In the future, New Zealand’s courts might be persuaded, for instance, by the reasoning in Mabo that recognition of Aboriginal title ought not fracture the skeletal framework of the contemporary legal system, but, even so, Ngati Apa itself does not hint at this.

D. SOVEREIGNTY AND PROPERTY

Tsilhqot’in Nation is important for not only defining and finding Aboriginal title, but also for delineating the powers of the federal and provincial governments. This article has focused merely on the interpretation of Aboriginal title, as it is this component that makes the most sense to compare with New Zealand jurisprudence. New Zealand does not have a federal system of government. Without going into any detail about this part of Tsilhqot’in Nation, it is still important to conclude with some brief general comments about the two issues that go to the heart of relationships between Indigenous peoples and governments: sovereignty and property.

On the sovereignty point, Tsilhqot’in Nation and Ngati Apa are entirely similar in that neither doubt Crown or Parliamentary sovereignty. For example, Ngati Apa does not canvass the possibility that sovereignty may still legitimately lie with some Maori tribes. Even though the courts might not be able to advance this argument too far because their own constitution derives from Parliament, the judicial assumptions of sovereignty are stark. No assumptions on any points, including those concerning property, are made in favour of the first peoples, whereas on the most significant point possible the courts simply assume Crown sovereignty. But, in New Zealand, the Waitangi Tribunal

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has recently refuted this assumption, stating in 2014 that the Maori chiefs in Northland, where the Treaty of Waitangi was first signed,

did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Maori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the [Maori chiefs] did not surrender to the British the sole right to make and enforce law over Maori. It was up to the British, as the party drafting and explaining the treaty, to make absolutely clear that this was their intention. Hobson's silence on this crucial matter means that the Crown's own self-imposed condition of obtaining full and free Maori consent was not met.  

The sovereignty point is of course serious, and Parliament, or the courts, may well need to pay more attention to it. Several academics in Canada are certainly raising the sovereignty issue as critical. The silent assumptions in Tsilhqot'in Nation and Ngati Apa ought to be revisited by the courts in the future.

On the property point, Tsilhqot'in Nation and Ngati Apa are again entirely similar in that both claim that terra nullius was never applied in their respective countries. Ngati Apa does this with grace and purpose: The finding is not to rewrite or skew history, but to justify overriding a historic case that enabled subsequent courts to cling inappropriately to terra nullius. The Chief Justice in Ngati Apa wrote:

New Zealand was never thought to be terra nullius (an important point of distinction with Australia). From the beginning of Crown colony government, it was accepted that the entire country was owned by Maori


156 See e.g. Felix Hoehn, Reconciling Sovereignties: Aboriginal Nations and Canada (Saskatoon: Native Law Centre, 2012).
according to their customs and that until sold land continued to belong to them.\textsuperscript{157}

This finding enabled the Court to overrule $Wi$ Parata and the line of cases that had since relied on $Wi$ Parata, namely $In$ re Ninety Mile Beach. Whereas the Chief Justice in $Tsilhqot'in$ Nation writes:

The doctrine of \textit{terra nullius} (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the \textit{Royal Proclamation} of 1763. The Aboriginal interest in land that burdens the Crown’s underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.\textsuperscript{158}

So, according to Ngati Apa, at the date of change of sovereignty (1840), Maori owned “the entire country”. In comparison, according to $Tsilhqot'in$ Nation, at the date of change of sovereignty (1763), the Aboriginal peoples held an “independent legal interest” that burdened the Crown’s underlying title. The language here is different and provides a context for understanding why and how the property question resulted in different property answers in these two countries. In Canada, the history of Aboriginal property became mostly one of Indian reserves; in comparison, in New Zealand it became mostly one of Native/Maori freehold title. \textit{Terra nullius}, as one academic has at least stated, lives on in Canada through $Tsilhqot'in$.\textsuperscript{159}

CONCLUSION

In 1967, Chief Dan George had hope for the future: “I shall see our young braves and our chiefs sitting in the houses of law and government, ruling and being ruled by the knowledge and freedoms of our great land”\textsuperscript{160}. His final line reinforces this vision: “So shall the next hundred

\textsuperscript{157} Ngati Apa, supra note 6 at para 37 [citations omitted].

\textsuperscript{158} Tsilhqot'in Nation, supra note 3 at para 69.


\textsuperscript{160} Chief Dan George, supra note 2.
years be the greatest in the proud history of our tribes and nations."\footnote{161} *Tsilhqot'in Nation* is certainly a significant step towards such a vision, especially for the Tsilhqot'in Nation peoples. This article has sought to understand this case in a comparative context. The comparison with *Ngati Apa* demonstrates that while overall there are similarities in approach, there are significant differences in the details. The Aboriginal title test is more narrowly defined in Canada, although in some ways this conclusion is unfair because much of the discussion in *Ngati Apa* about the Aboriginal title test was *obiter*. Eventually, what matters most is of course who has sovereignty and who has the property. *Tsilhqot'in Nation* and *Ngati Apa* simply demonstrate that both Canada and New Zealand are still in the early phases of a long journey of determining these issues as these countries work towards more reconciled systems of justice.

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\footnote{161} *Ibid.*