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THE ROTORUA LAKES:

A LEGAL HISTORY.

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PART ONE: INTRODUCTION

In recent years, previous settlements between particular *iwi* and the government have been revisited and reviewed.[1] One settlement in need of a similar reassessment took place in 1922 and involves fourteen lakes in the heart of New Zealand's tourist-rich district of Rotorua.[2]

The 1922 settlement between Te Arawa and the government purportedly vested ownership of the Rotorua lakes in the Crown. Legislation was subsequently enacted to ensure that there would be no future controversy surrounding the ownership issue.[3] However, in the 1990s, the settlement which produced the subsequent statute requires a re-examination in light of recently found anomalies in other settlements from the same era. For example, the Taupo lakes settlement in 1926 (three years after the Rotorua lakes legislation) was reinvestigated in 1992. As a result, the beds of the Taupo waters were returned to Ngati Tuwharetoa and managed in joint - partnership with the Crown. Ngati Tuwharetoa asserted that the vesting of the lake beds in the Crown was never intended to be a part of the agreement negotiated in 1926.[4] The Taupo settlement raises a similar issue for Te Arawa. Both settlements originally took place in the 1920s and both involve the question of ownership of large lakes.

This essay seeks to examine the legal history of the Rotorua settlement. It is a historical analysis of both the judicial proceedings leading up to the 1922 legislation

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[1] For example, the Lake Taupo settlement codified in s.14 of the Native Land Amendment And Native Land Claims Adjustment Act 1926 was reopened and renegotiated by the government and Tuwharetoa Maori Trust Board in August 1992. The Tainui settlement in 1946 was reopened in 1995. Ngai Tahu in the South Island are currently renegotiating their 1940s settlement.

[2] These lakes are listed in the Native Land Amendment and Native Land Claims Adjustment Act 1922 as follows: Rotoehu, Rotoma, Rotoiti, Rotorua, Okataina, Okareka, Rerewhakaitu, Tarawera, Rotomahana, Tikitapu, Ngahewa, Tutaeinanga, Opouri, and Ngakaro.

[3] Native Land Amendment and Native Land Claims Adjustment Act 1922.

[4] This is outlined in the deed signed by the Minister of Conservation, Hon.Denis Marshall and representatives of the Tuwharetoa Maori Trust Board on 28th August 1992.

and the Crown's approach to large scale settlements during that era. This essay is based primarily on archival research. It gathers together the large volume of letters and documents contained in government files in order to establish the chronology of events that led to Crown ownership of the Rotorua Lakes in 1922. In so doing, it seeks to give force to the possibility of a legal challenge by Te Arawa through the High Court and Maori Land Court. The focus of this essay is, therefore, on Maori customary title and whether in this case, it has been effectively extinguished by the Crown. Alternative forms of redress through the Waitangi Tribunal or in direct negotiations with the government are available to Te Arawa but fall outside the scope of this research.

Ownership of the bed of a lake has in Common Law attracted a variety of different responses. Where the land surrounding the lake is owned by a particular proprietor, the lake bed is included in the certificate of title. But where more than one registered proprietor owns the land, the issue of ownership becomes more difficult. If the lake is small, the medium filum rule may apply. But the question of ownership of the beds of larger lakes has not been settled. One school of thought argues that navigable lakes, like navigable rivers, belong to the Crown. In addition to this confusion, the water within the lakes is incapable of ownership.[5]

In 1944, the Maori Land Court held that common law rules relating to water and the ownership of lake beds did not affect Maori customary rights of ownership:

> The natives successfully establish their title to Lake Waikaremoana once they satisfy the Court that it was held by them in accordance with their ancient customs and usages...We consider that these rights once established are paramount and freed from any qualification or limitation which would attach to them if the rules and presumptions of English law were given effect to.[6]

In addition, a recent Canadian case held that aboriginal title could only be extinguished by specific intent:

> It would, accordingly, appear to be beyond question that the onus of

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[5] Hinde, McMorland and Sim *Introduction To Land Law* (2 ed, Butterworths, Wellington, 1986) 196, 556.

[6] *Lake Waikaremoana* (1944) 8 Wellington MB 30.

> proving that the sovereign intended to extinguish the Indian title lies in the respondent and that intention must be 'clear and plain'.[7]

These cases suggest that where no legislation exists defeating Maori customary title to certain lakes, the common law rules relating to lake ownership and water will not affect Maori rights to assert their title. However, in the Rotorua district such legislation does exist and its intent to vest ownership of the beds of the Rotorua lakes in the Crown could not be more explicitly stated.[8] Therefore, any claim to the lakes by the *iwi* appears, on the surface, to be without hope of success in a Court of Law.

Maori Customary title is able to be extinguished by legislation due to the nineteenth century philosophy of "Parliamentary Sovereignty" as outlined by Dicey in *Introduction to the Study of the Law Of The Constitution*:

> Parliament has 'the right to make or unmake any law whatever,' and further that 'no person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.' Once a document is recognised as being an Act of Parliament, no English Court can refuse to obey it or question its validity.[9]

If Parliament chooses to transfer ownership of a resource to the Crown through legislation which expressly extinguishes any other claim, then the Crown title is secure. Parliamentary supremacy ensures that the Crown is shielded from any interference by the Courts. Previous owners of the resource may protest but redress is effectively denied.

This argument can be applied against Te Arawa in their claim for ownership of the

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[7] *Calder et al.* v *Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, 210. This decision was upheld in *Mabo* v *State Of Queensland [No.2]* [1991-1992] 175 CLR 1,64: "...native title is not extinguished unless there be a clear and plain intention to do so. That approach has been followed in New Zealand." *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680 also supports this conclusion.

[8] Native Land Amendment and Native Land Claims Adjustment Act 1922, s.27(1): "The beds of the Lakes mentioned in the Second Schedule to this Act, together with the right to use the waters of the said lakes, are hereby declared to be the property of the Crown, freed and discharged from the Native customary title, if any..."

[9] Dicey, A.V *Introduction to the Study of the Law of the Constitution* (10 ed, 1959) chps 1-3 as summarised in O.Hood Phillips and P Jackson *O.Hood Phillips' Constitutional And Administrative Law* (7 ed, Sweet and Maxwell, London, 1987) 49.

Rotorua lakes. Parliament expressly passed legislation which transferred ownership of the lakes to the Crown in 1922.[10] Unless Parliament chooses to repeal the statute, Te Arawa cannot claim against the Crown in the Courts.

However, although there are numerous cases in which the Courts refuse to interfere with the supremacy of Parliament, there is no legal authority for this doctrine.[11] The majority of cases upholding this doctrine have been concerned with relatively minor issues and the courts have never been truly tested on whether they would uphold contentious legislation such as "all blue eyed babies should be killed".[12]

> ...useful as quotations from past cases are in illustrating the attitudes and rhetoric of particular judges and particular courts, they do not establish the present constitutional position or provide a conclusive answer as to how judges in the future in different and more important circumstances ought to behave...[The doctrine] is an example of what is traditionally called a constitutional convention...its real strength lies in the principles underlying it and the views and values which those principles express. Should they change, the doctrine may well turn out to be less sacrosanct than the authorities would have us believe.[13]

In New Zealand, Sir Robin Cooke has also suggested the possibility that legislative power could be limited by the Courts. He believes that there are certain fundamental rights and freedoms in a free democracy that may be protected by the Courts if

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[10] Native Land Amendment and Native Land Claims Adjustment Act 1922.

[11] For an example of cases upholding the doctrine of Parliamentary Sovereignty see: O.Hood Phillips and P Jackson *O.Hood Phillips' Constitutional And Administrative Law* (7 ed, Sweet And Maxwell, London, 1987) 51-53,69. In particular, *Madzimbamuto* v *Lardner-Burke* [1969] 1 AC 645,723. Lord Reid:

> It is often said it would be unconstitutional for the United Kingdom parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But this does no mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid.

[12] G Wilson *Cases And Materials On Constitutional And Administrative Law* (2 ed, Cambridge University Press, Cambridge, 1976) 226.

[13] *Ibid.* at 226.

Parliament ever attempted through legislation to interfere with them.[14]

This statement by a New Zealand Court Of Appeal judge opens a small window of opportunity for Te Arawa to question the validity of the 1922 legislation on the grounds that there never was an agreement which vested lake ownership in the Crown. The 1922 legislation relies on a purported settlement between Te Arawa *iwi* and *hapu* and the Government for its basis:

> 27. For the purpose of giving effect to an agreement made between representatives of the Government and the representatives of the Arawa Tribe with respect to the ownership of the lakes....
> (1) The beds of the lakes....are hereby declared to be the property of the Crown, freed and discharged from the Native customary title, if any...[15]

If there was no such agreement, is the statute that claims to rely on the settlement for its own legislative existence still valid? If the express purpose of the statute is to give effect to an agreement that never existed, then surely the legislation itself, should come under some scrutiny. In order for Te Arawa to be able to persuade a Court that parliamentary sovereignty should be limited in this case, it would need to prove that the legislation infringed on the fundamental rights and freedoms that are implicit in a free democracy. New Zealand is currently undergoing a reevaluation of the Treaty of Waitangi. It could be argued that the Treaty is a unique part of our democracy and the 1922 legislation infringes the rights and freedoms expressed therein. Article Two of the Treaty guarantees "Lands and estates forests and fisheries and other properties. Article Three provides Maori with the rights and privileges of British subjects. If it can be shown that the Government undermined Te Arawa's ownership of the lakes and acted prejudicially towards a group who were entitled to equal protection under the law, the Treaty has effectively been breached and the rights and freedoms in our democracy have therefore been threatened by the 1922 legislation. However, it is doubtful that a court will be willing to set aside a doctrine of such fundamental importance to our constitution as the sovereignty of parliament when dealing with lake

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[14] RB Cooke "Fundamentals" [1988] NZLJ 158 as reprinted in M Chen and Sir G Palmer *Public Law In New Zealand* (Oxford University Press, Auckland, 1993) 43-50.

[15] Native Land Amendment And Native Land Claims Adjustment Act 1922. s.27.

ownership. In recent times, the Court of Appeal has tended to back away from such controversial rulings after the *New Zealand Maori Council* v *Attorney General* case in 1987.[16]

A second argument may be found in upholding the 1922 legislation but arguing that if the 1922 agreement does not exist or has been breached, then s.27 of the Native Land Amendment And Native Land Claims Adjustment Act 1922 is, through statutory interpretation rendered meaningless. This is a less controversial argument which will therefore be more appealing to the Courts. Parliamentary sovereignty is upheld and the legislation kept in place. However, it is conditional on an agreement between Te Arawa and the Crown before ownership of the lakes vests in the latter. If no agreement exists, the statute simply has not yet taken effect. This would revert the status of the Rotorua Lakes to their original position before 1922. If Te Arawa could convince the Courts of this position, it would then need to apply for an investigation of customary title through the Maori Land Court.

In 1993, section 155 of the Maori Affairs Act 1953 was repealed.[17] Te Ture Whenua Maori Act 1993 now allows Maori customary title to be enforced against the Crown. However, although the harsh section 155 prohibition has been removed, the 1993 Act represents only a small step forward. Sections 360 and 361 of the statute have amended the Limitation Act 1950. An action to recover land under customary title can now only be enforced against the Crown if the cause of action occurred not more than twelve years ago.[18] In Te Arawa's case, the wrong occurred in 1922 and is, therefore, not enforceable in the Courts. However, section 7A(6) of the Limitation Act 1950 preserves the jurisdiction of the Maori Land Court to investigate title. Therefore, Te Arawa would have to seek the issuing of a freehold title to the lakebeds in order to ensure they gain full ownership rights.

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[16] See: *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641; Later rulings narrowed the recognition and enforceability of the Treaty of Waitangi principles in court: *New Zealand Maori Council* v *Attorney-General* unreported, Court of Appeal, 30 April 1992, CA 206/91.

[17] Te Ture Whenua Maori Act 1993 Second Schedule.

[18] Te Ture Whenua Maori Act 1993 ss.360 & 361; Limitation Act 1950 ss.6(1)(1A)(a) & 7A.

A third option for Te Arawa would involve claiming the water rather than the lakebeds.[19] Section 27 of the Natve Land Amendment And Native Land Claims Adjustment Act 1922 specifically refers to the lakebeds only and while water is incapable of ownership under the Common Law, decisions such as *Lake Waikaremoana* allow for customary ownership to be recognised. Section 354(b) of the Resource Management Act 1991 retains Crown control over natural water as outlined in section 21 of the Water and Soil Conservation Act 1967. However, ownership of the water has not been vested in the Crown. Te Arawa could argue they have retained customary ownership over the water of the Rotorua Lakes. The limitations on bringing action to enforce customary title applies only to land, and therefore, Maori customary ownership of water would be enforceable against the Crown in any Court proceedings. This will not restore to Te Arawa their full ownership rights over the lakes, as ownership will not supercede the statute-based right to use the water which is vested in the Crown. However, if Te Arawa can prove ownership of the lakebeds and/or water, this may add weight to a partnership arrangement between the Crown and Te Arawa. In recent times, the Planning Tribunal has shown an increasing unwillingness to extend the duty to consult with Maori over the management of natural resources.[20] However, Te Arawa ownership of the water and/or lakebeds should constitute "special circumstances" which may place a heavier onus on Regional Councils to take into account Te Arawa concerns.

A final argument for Te Arawa links customary ownership of the water with the statutory grant of the lakebeds to the Crown. In a recent Court of Appeal decision, Cooke P discussed the concept of a river as being *taonga*. This concept views a river

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[19] JP Ferguson *Maori Claims Relating To Rivers And Lakes* LLM paper unpublished (Wellington, 1989) 36-38.

[20] *Gill* v *Rotorua District* (1993) 2 NZRMA 604 and *Haddon* v *Auckland Regional Council* [1994] NZRMA 49: Placed an active duty on the councils and Minister of Conservation to consult with Maori. However, later cases dealing with resource consent procedures, sought to restrict this duty placed on the Regional Councils. Limited it instead to a duty on Planning Officers, rather than the Consent Authority, to consult if the natural resources were of special value to local Maori. See: *Ngatiwai Trust Board* v *Whangarei District Council* [1994] NZRMA 269 and *Hanton* v *Auckland City Council* [1994] NZRMA 289.

as a whole entity which is not divided into separate bed and water classifications. According to Cooke:

> The vesting of the beds of navigable rivers in the Crown provided for by the Coal Mines Act Amendment 1903...may not be sufficiently explicit to override or dispose of that concept...[21]

Although an opinion, this statement confirms earlier rulings on the difficulties of attempting to conceptualise indigenous customary title within an English law framework.[22] For Te Arawa, the vesting of the lakebeds in the Crown may not have been sufficient to dispose of their customary claim. The required 'clear and plain' intention to extinguish customary title as outlined in *Te Weehi* v *Regional Fisheries Officer* is, therefore, brought into question.[23] If Te Arawa viewed the lakes as a whole entity incapable of division, then the separation of the lakebeds by the Crown did not extinguish a more general customary claim.

The consequences resulting from a finding in favour of Te Arawa ownership of the lakebeds would impact not only on the use of the surface area of the Rotorua Lakes. Te Arawa geothermal claims would also be strengthened. A recent Waitangi Tribunal report on the geothermal resources in the Rotorua district proceeded on the assumption that the bed of Lake Rotorua was currently vested in the Crown.[24] However, an earlier report linked ownership of the surface to control of the sub-surface geothermal fluid. If ownership in the former has not been extinguished, Te Arawa would be able to claim an interest in the geothermal field lying beneath Lake Rotorua.[25] However, section 354 of the Resource Management Act 1991 maintains the Crown's sole use rights of the energy component of geothermal resources.

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[21] *Te Runanganui o Te Ika Whenua Inc Society* v *Attorney-General* [1994] 2 NZLR 20, 26.

[22] See: *Amodu Tijani* v *Secretary, Southern Nigeria* [1921] 2 AC 399, 403.

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

[24] Waitangi Tribunal *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims - Wai 153* (Brooker & Friend Ltd, Wellington, 1993) 153, 7 WTR.

[25] Waitangi Tribunal *Ngawha Geothermal Resource Report 1993 - Wai 304* (Brooker & Friend Ltd, Wellington, 1993) 304, 7 WTR 98,152.

The 1922 legislation marked the climax of a dispute which lasted two decades concerning the ownership of the Rotorua lakes. This paper seeks to examine the history of this dispute and the validity of the 1922 agreement.

PART TWO: THE HISTORY OF THE ROTORUA LAKES CLAIM

I. 1840-1912: THE ADVENT OF TOURISM.

> Nowhere was any piece of land discovered or heard of...which was not owned by some person or set of persons...There might be several conflicting claimants of the same land; but, however that natives might be divided amongst themselves as to the validity of any one of the several claims, still no man doubted that there was in every case a right to property subsisting in some one of the claimants. In this Northern Island at least it may now be regarded as absolutely certain that with the exception of lands already purchased from the Natives, there is not an acre of land available for purposes of colonisation, but has an owner amongst the Natives according to their own custom.[26]

Between 1840 and 1881, the government made no attempt to establish ownership to the Rotorua lakes. There was an implied acceptance that Maori owned all land not yet expressly appropriated by the Crown. Therefore, Te Arawa *iwi* had no reason to assert their ownership over the lakes.

In 1881, the government's acceptance of Maori ownership in the Rotorua district appeared to be confirmed with the passing of the Thermal-Springs Districts Act. This statute sought to provide the Governor of New Zealand with a variety of powers to open up the area to colonization and settlement. However Maori ownership of land, once it had been established in the Maori Land Court, could only be made available for this purpose through negotiations between the Crown and tribes. This was also extended to include lakes, rivers and water:

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[26] Sir William Martin, Chief Justice of New Zealand, cited in: *Tamihana Korokai* v *The Solicitor-General* [1912] 15 GLR 95, 103.

> s.5 ...the Governor...may from time to time exercise any of the powers following within the district:
> (3) Treat and agree with the Native Proprietors for the use and enjoyment by the public of all mineral or other springs, lakes, rivers, and waters;...
> s.6. The Governor also may, with the consent of the Native proprietors...do any of the following things:
> (7) Manage and control the use of all mineral springs, hot springs, ngawha, waiariki, lakes, rivers, and waters, and fix and authorize the collection of fees for the use thereof...[27]

However, establishing Maori ownership to lakes in the Maori Land Court highlighted a series of inconsistencies amongst the cases.

Between 1899 and 1900, Judge H.Dunbar Johnston heard a number of cases concerning the Rotorua lakes. A variety of Maori claimants sought to include portions of each lake within their land claims. The Judge refused to include the lakes within any title to land, holding them to be the public property of all New Zealanders and "...it was useless wasting time, discussing the matter."[28] One year later, a different judge in the Maori Land Court approved the Crown's purchase of a portion of Lake Tarawera to be included within the boundaries of Ruawahia No.1 block. In this instance, the Crown and the Court both acknowledged the relevant *hapu* as owners of the lake and the south west border of the block which encompassed Lake Tarawera was purchased by the Crown.[29]

Despite the inconsistencies within the Maori Land Court, Maori believed that the Thermal-Springs District Act was adequate protection of ownership. However, as tourism began to increase in the district, Maori were increasingly concerned that their exercise of ownership was being infringed upon.

Trout was first introduced into Lake Rotorua during the 1880s and as a result, the indigenous fish supply began to decline. As the traditional food source diminished, Maori began to supplement their catches with the new fish. However, the Crown had

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[27] Thermal-Springs Districts Act. ss.5 & 6.

[28] *References as to ownership of Lake, as extracted from the Minutes of the Native Land Court, held at Maketu, from 25/7/99 to 19/12/00, on investigation of title to the Rotoiti Block* CL 200/27, NA Wellington.

[29] See: *Lakes Case*, CL 200/25, NA Wellington; *Crown Purchase Deeds* microfiche AUC 3493 - A, AI & K. DOSLI Wellington.

also implemented trout fishing licences and individual Maori were fined for fishing without a licence in what they had regarded as their own lake.[30] The Crown acknowledged in 1918 that the imposition of fines by the Tourist Department had been a mistake.[31] These actions had, according to Maori, violated the Thermal-Springs District Act which required consultation with Maori proprietors regarding the public use of lakes. Te Arawa felt aggrieved that fines were imposed, limiting their enjoyment of the lake without any prior consultation. However, as lake ownership had not been established in the Maori Land Court, the Thermal-Springs District Act did not apply.

In 1907 a Native Land Commission, headed by Robert Stout and Apirana Ngata, was established to investigate Maori land grievances throughout New Zealand. In 1908, they issued an interim report on lands in the Rotorua district. Tamihana Korokai and several others petitioned the Commission on the issue of fishing rights:

> Subsection (3) of section 5 of that Act empowered the Government, among other things, to 'treat and agree with the Native proprietors for the use and enjoyment by the public of all mineral or other springs, lakes, rivers and waters.' This assumed in us a right to the properties enumerated, for which the Government had to treat with us. We are not aware that we have ever parted with our rights to any of our main lakes.[32]

The Commission recommended that Maori be granted licences free of charge to catch trout for food but not for sale. They made no recommendations regarding the lake ownership issue.

1909 witnessed the advent of the Native Land Bill. Tai Mitchell of Te Arawa wrote to Apirana Ngata, expressing concern over the effects of the proposed Bill on the lake ownership issue. The section that could directly affect Te Arawa's ownership claim made Maori customary title unenforceable against the Crown in any Court. Land vested in the Crown could be proclaimed to be free of all Native customary title and

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[30] *Lake Rotorua Case 1918* CL 174/1. 13-14.NA Wellington.

[31] Hawthorne to Prendeville (Auckland, 5 Oct.1918), CL 174/2. NA Wellington.

[32] *Interim Report Of Native Land Commission, On Native Lands In The County Of Rotorua* [1908] AJHR G-IE.

Native title could be extinguished in circumstances where the Crown had for ten years been in possession of the land. Te Arawa called a meeting on the issue and agreed to petition Parliament to ensure that part IV of the Bill would be excised or made inoperative for the Rotorua district:

> The lake question is a vital one to the Arawa people as you know. You have actively supported the movement of bringing the matter before the proper authorities for investigation and now the whole thing is to be squashed a la back-door fashion and our rights over customary lands guaranteed by a solemn Treaty are to be confiscated without compensation. What argument can possibly justify such an extreme course. Nui atu te pouri me te tangi.[there is great sadness and lamenting].[33]

The imposition of fines and the restrictions recommended by the Native Land Commission in granting licences to Maori to catch fish for direct consumption and not for sale, demonstrated to Maori their increasingly tenuous hold on the ownership of the lakes. They decided to test their ownership in the courts. However, the Native Land Bill 1909 threatened this avenue. Section 100 of the Bill granted the Governor power to prohibit the Maori Land Court from investigating any title to land. This would allow the Crown to maintain a status quo over the lakes. By continuing to exert possessory rights such as the imposition of fines and the management of the use of the lakes, the Crown could try to proclaim the lakes to be Crown land under the ten year possession rule as outlined in section 87. In addition to this, if the Crown prohibited the court from making a freehold order under section 100, Te Arawa would be left claiming customary ownership. Therefore, the Thermal Springs District Act would not protect them as it specifically referred to Maori proprietors as those who had their title confirmed by the Maori Land Court. Section 84 of the Native Land Bill also enabled Crown ownership to encroach onto the lakes. By ensuring that Native customary title would not be enforceable against the Crown in any proceedings, Te Arawa ownership blocked by any judicial recognition under section 100, could not be enforced against

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[33] Tai Mitchell to Apirana Ngata (Rotorua, 22 Nov 1909) AAMK 869/84b. NA Wellington.

Crown interference with the lakes in the Courts.[34] John Salmond explained the intent of section 84 to C.P.Skerret, Counsel for Te Arawa:

> ...it is not the intention of the Government to raise any such objection to the determination of the Supreme Court...so long as you ask for nothing more than a declaration as to the legal position of the lands in question. If the Supreme Court decides that the Native customary title exists in respect of these lands, it will then be for the Government to decide in its discretion whether it will allow proceedings for the issue of freehold orders to be instituted in the Native Land Court. If such proceedings are prohibited under clause 100, the matter will become one for legislation instead of for the law courts.[35]
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> The intention is that when a dispute arises between Natives and the Crown as to the right to customary land, the dispute shall be settled by Parliament and not otherwise. The Native race will have nothing to fear from the decision of that tribunal, and to allow the matter to be fought out in the Law Courts would not, I think, be either in the public interest or in the interest of the Natives themselves.[36]

Salmond was expressing a common early twentieth century perception. It was a paternal belief that Maori needed to be governed for their own benefit. However, the settlement of disputes by legislation rather than by the Courts did little to protect Maori interests. Between 1911 and 1920, approximately 2.3 million acres of Maori

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[34] The Native Lands Act 1909:
S.84: Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other manner.
s.87: The Native customary title shall for all purposes be deemed to have been lawfully extinguished in respect of all land which during the period of ten years immediately preceding the commencement of this Act has been continuously in the possession of the Crown...as being Crown land free from the Native customary title.
s.100: In respect of any area of customary land the Governor may, at any time and for any reason which he thinks fit, by Order in Council prohibit the Native Land Court...from proceeding to ascertain the title to that land or to make any freehold order in respect thereof...

[35] Salmond to Skerrit (Wellington, 23 Dec 1909) AAMK 869,5/13/242.84b.NA Wellington.

[36] John Salmond to Apirana Ngata (22 Dec.1909) AAMK 869/84b. NA Wellington.

land was alienated to Europeans.[37]

The Native Land Act 1909 was subsequently passed and Te Arawa's efforts to remove Part IV of the Act failed. Te Arawa proceeded, on advice from Apirana Ngata, to lodge a claim regarding their right to seek freehold title to the lakes. In effect, the 1909 Act ensured that this was their only course of action. Due to section 84 of the 1909 Act, establishing freehold title in the Maori Land Court was the only way in which Maori could protect their lands against state intrusion.

Tamihana Korokai v *The Solicitor-General* was heard by the Court of Appeal in 1912. Chief Justice Stout presided with Judges Williams, Edwards, Cooper and Chapman on the bench. The issue in dispute was whether Tamihana Korokai could go to the Maori Land Court to seek a freehold title to the Rotorua Lakes. The Solicitor-General argued that as he had declared the bed of Lake Rotorua to be owned by the Crown the Maori Land Court could not examine the issue of Maori customary ownership of the lake.

The Court held that from 1840, the Crown had never assumed Maori customary land to be Crown land. Maori customary title had been excluded from investigation by the courts but as the Native Land Act 1909 codified customary title, the courts were now free to examine it. Chief Justice Stout outlined three ways in which the Maori Land Court could be prevented from investigating Maori customary title. a) a proclamation by the Governor that certain land is free from Maori customary title under a particular provision in a statute such as section 85 of the Native Land Act 1909; b) under section 100, the Maori Land Court is prohibited by a proclamation from the Governor from investigating any title to the land and c) evidence that the land has been ceded by the true owners or that a grant has been issued.The Court held that the Solicitor-General had failed to use one of these three methods. By simply declaring the land to be Crown land, himself, was insufficient. A Solicitor-General is a high officer of the State and his function is to provide legal counsel to the Crown. Declaring land to be

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[37] M King "Between Two Worlds" in WH Oliver & BR Williams *The Oxford History Of New Zealand* (Oxford University Press, Auckland, 1981) 285.

Crown land free of customary title, is to go beyond the scope of his duties of office.[38] Te Arawa therefore had a right to go to the Maori Land Court to have their claim investigated.

The Court of Appeal decision was significant. By not rejecting Te Arawa's argument, it implied that the beds of lakes were capable of customary ownership in New Zealand. This would have far-reaching implications for the government as Lake Waikaremoana, Lake Taupo and the Wanganui River were also at this stage without Crown title.

Following this decision, Te Arawa applied in 1912 to the Maori Land Court to seek confirmation of their title. John Salmond, Solicitor-General, advised the Attorney-General that no action by the Government was immediately necessary. The Maori Land Court should be allowed to address the preliminary issue of whether the lakes are subject to customary proprietary title or merely beholden to fishing rights. If the latter is found, no further action would be warranted. If, however, a proprietary title is available, the Governor should issue an Order in Council under section 100 of the Native Land Act 1909 to prohibit the Court from granting any freehold orders. Counsel should also be employed by the Crown to watch over the case and advise the Crown on when to issue the prohibition.[39] Despite this advice, section 100 of the Native Land Act was repealed in 1913.[40] The revised Act now allowed the Maori Land Court to issue a freehold order in respect to land. Salmond advised the Attorney-General that due to the repeal of section 100, it was now urgently necessary that the government pass legislation empowering the Governor "...to proclaim as Crown land, any river, lake or other land covered by water which is not held by freehold tenure...". If this was not done, a freehold title would most likely be issued

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[38] *Tamihana Korokai* v *The Solicitor-General* [1912] 15 GLR 95, 102-106.

[39] John Salmond to the Attorney-General, (Wellington, 4 Nov.1912) AAMK 869/84b.NA Wellington.

[40] Salmond to the Attorney-General (Wellington, 1 August 1914) *Crown Law Opinion* DOSLI Wellington.

to Te Arawa for the lakes.[41] Salmond believed that the Prime Minister did not fully realise the urgency of the situation in Rotorua and its ramifications in terms of ownership for all lakes and rivers in New Zealand. Lake Omapere (Northland), Lake Waikaremoana (the Urewera), Lake Taupo and the Wanganui River were as yet without any Crown title. Salmon was concerned that a freehold title given to Te Arawa for the Rotorua Lakes would impact significantly on Crown ownership claims to the other lakes and rivers. For Salmond, the Rotorua Lakes were important as a test case. The implications of a Maori Land Court finding in favour of Te Arawa extended, according to Salmond, well beyond the boundaries of the Rotorua district. Salmon's advice was, however, ignored and the case proceeded to the Native Land Court.

II. 1912-1920: THE MAORI LAND COURT.

The Maori Land Court could not begin the hearings on the Rotorua Lakes case until the area had been surveyed or an approved sketch was presented to the Court.[42] However, the Lands Department was being instructed to delay the issuing of such a plan:

> [I] would submit that Judge Browne's requisition for survey should not be given effect to, as to approve a plan of a survey or compilation of the lake for the purpose of investigation of title would be tantamount to an acknowledgement on our part of the Natives' claim.[43]

> If the Chief Surveyor at Auckland would exercise a policy of masterly delay in the matter, I could then have time to communicate with the Solicitors for the Natives and suggest that the preliminary question should first be settled as to whether Native customary title extends to

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[41] Salmond to the Attorney-General (Wellington, 1 August 1914) *Crown Law Opinion* DOSLI Wellington..

[42] Judge Browne to Chief Surveyor (17 May 1913) LS 22/2019. DOSLI Wellington.

[43] Chief Surveyor to the Under Secretary for Lands (20 May 1913) LS 22/2019. DOSLI Wellington.

the bed of large inland lakes.[44]

The Crown was hoping to narrow the basis of the Court claim to the larger lakes as they felt that the Crown in this issue was more likely to succeed in defeating any customary ownership claim. The smaller lakes, as they were essentially non-navigable, would have a higher chance in being included in any freehold grant to Te Arawa.

The delaying tactics on the part of the Crown acted prejudicially against Te Arawa. By stretching the time frame of the case, this imposed additional financial costs on the tribe and the Crown in this sense, failed both to protect Maori claims of ownership and treat Te Arawa as an equal citizen, thereby breaching articles two and three of the Treaty of Waitangi. The Government was also deliberately frustrating the Maori Land Court process and in this sense, was obstructing the course of justice.

In 1914, the First World War broke out and the case was further delayed until 1917. During the war years, the government introduced a closed season regarding the fishing of trout in Lakes Rotorua and Rotoiti. This was extended to include a two month prohibition on the taking of indigenous fish. The Government argued that Maori fishing for carp during the closed season, interfered with the trout during their spawning period. As a result, Maori were prosecuted for a variety of fishing offences. This action did little to improve Maori/government relations and Te Arawa argued their right to fish was guaranteed under the Treaty of Waitangi.[45]

In 1917, the case looked set to be resumed in the Court and its importance was underlined by the instigation of proceedings in the Maori Land Court concerning ownership of Lake Waikaremoana, in the Urewera district.

The Solicitor-General, John Salmond, tendered advice to the Government and once again, pointed to the difficulties now faced by the government since the repeal of section 100 of the Native Land Act. He believed the government had lost the power to control the issuing of freehold title to Maori claimants. Since *Tamihana Korokai*

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[44] Ostler to the Under Secretary for Lands (28 May 1913) LS 22/2019. DOSLI Wellington. Te Arawa's lawyer, Earl, threatened to take the Commissioner of Crown Lands to court in order to test his right to refuse the furnishing of surveyed plans. Earl to Ostler (20 June 1913) LS 22/2019. DOSLI Wellington.

[45] Series of letters between Kiwi Amohau and W.H.Herries (June-August 1916) AAMK 869.5/13/242.84C. NA Wellington.

v *Solicitor-General* had opened up the possibility of investigation of title to navigable inland waters, the Crown must ensure that it is represented during the Maori Land Court applications and must dispute the rights of Maori to ownership. He believed this case was of such vital importance that it should be heard by a specially constituted Court in Wellington to decide on the preliminary question of whether Maori could obtain freehold title to lakes. If this point was decided against the Crown, actual investigation of each separate claim could then resume in the respective regions. The government could then make arrangements with the Court to ensure that the making of an actual freehold title would be deferred, in order to give Parliament the opportunity of paying compensation to Maori in lieu of actual freehold title. This suggested that the Court would be willing to delay proceedings so that Parliament could quickly pass legislation denying ownership by Maori.

Salmond also outlined a variety of possible legal arguments for the Crown in the event that the Maori Land Court agreed to investigate Te Arawa's claim. He believed that the government could not limit Maori customary title to dry land. The Crown should also concede the inclusion of small and unnavigable streams and lakes in customary ownership. However, this concession should not extend to larger lakes and waters. In *Waipapakura* v *Hempton*,[46] the Supreme Court ruled that tidal water was not or ever had been classified as Maori customary land. The Treaty of Watangi had not by implication intended to include such waters in its guarantee to protect Maori land as it would be unreasonable to suggest that the government had intended to deny public access to the sea. Salmond proposed to extend this argument to inland navigable waters as it would be equally unreasonable to impute an intention in the Treaty that denied the rights and interests of the Crown and the public in the navigation of such waters.

In *Mueller* v *Taupiri Coal Mines Company*, the Court of Appeal upheld the public interest rationale when limiting a Crown grant to the edge of the Waikato River, a non-tidal navigable inland water.[47] Salmond believed that the same prinicple which applied to a Crown grant should also apply to a statutory grant under the Native Land

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[46] *Waipapakura* v *Hempton* (1914) 33 NZLR 1065.

[47] *Mueller* v *Taupiri Coal Mines Company* (1900) 20 NZLR 89.

legislation. However, navigation is a matter of degree. The public interest clause does not apply to all navigable waters and therefore, large non-tidal navigable inland waters would have to be assessed on a case-by-case basis.

Salmond was arguing for a preliminary hearing in order to stop all Maori claims to lake ownership by denying any such customary rights ever existed. If this were successful, no case-by-case analysis would occur. In this preliminary hearing, the Crown would acknowledge Maori fishery rights but deny the Maori customary ownership claim. Justice Edwards in *Tamihana Korokai* had indicated he was in favour of such an argument.[48] However, Salmond's suggestion for a separate preliminary hearing in Wellington was rejected by the government.

Salmond's initial concern that the Rotorua Lakes were important as a test case for other lakes and rivers in New Zealand was soon to be realised. In 1917, the ownership of Lake Waikaremoana was being contested in the Maori Land Court in Wairoa. By 1918, the Judge in that case issued portions of the lake to a number of tribes and/or *hapu* as freehold land.[49] The Crown immediately appealed.[50]

In that same year, an application was made in the Maori Land Court to investigate title to the bed of Lake Okataina, belonging to the Ngatitirawahi *hapu* of Te Arawa. Mr Earl was both the *hapu* lawyer as well as being the lawyer for Te Arawa claiming all the Rotorua district lakes. He wanted Okataina to be used as the lakes test case. The Crown had never exercised any rights of ownership over this lake and due to its small size, it was the one most likely to succeed. Skeet, chief surveyor in the Department of Lands and Survey, argued that the Crown use Rotorua and Rotoiti

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[48] John Salmond to The Under-Secretary for Lands (11 June 1917) *Crown Law Opinions* DOSLI Wellington.

[49] *Lake Waikaremoana* (1917) 29 Wairoa MB 175 & (1918) 29 Wairoa MB 270. NA Wellington.

[50] The Maori Appellate Court later upheld the decision made in the lower Court. See: *Lake Waikaremoana* (1944) 8 Wellington MB 30. The lake was eventually leased to the Crown to be included in the Urewera National Park. See: The Lake Waikaremoana Act 1971.

instead and seek an adjournment for Okataina.[51]

In October 1918, the Rotorua case was finally reopened under Judge Wilson. Any appeal on the Waikaremoana case was delayed until a decision had been issued regarding the Rotorua claim.

The Crown argued four points: a) Maori custom did not recognise any exclusive ownership of navigable waters but merely rights of fishery and navigation; b) if it did recognise customary ownership, Court decisions in such cases as *Waipapakura* v *Hempton* and *Taupiri Coal Mines Company* v *Mueller* and Native Land legislation would not give legal recognition to this claim; c) the Crown claims possession under section 87 of the Native Land Act 1909, regarding the ten year rule and d) Maori customary title, if any, is limited to those portions of the lake that can be proved to have been the subject of exclusive fishing rights.[52] At the beginning of the trial, the Crown Solicitor was already expressing doubt as to the success of some of these arguments. The ten year possession claim lacked sufficient proof. While the public had used the lake for cargo and passenger hire, the government did little to control navigation and the introduction of trout had been initiated by a private body and not the Crown. There was also insufficient evidence regarding when license fees were first issued.[53] Prendeville was advised to drop the ten-year possession claim and instead, concentrate on the argument that Maori custom whilst acknowledgng fishing rights,

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[51] Skeet to Under-Secretary for Lands (27 May 1918) CL 174/2. NA Wellington. The adjournment did not take place and lawyers for the Crown and Te Arawa argued during the 1918 Rotorua case on whether all thirteen lakes could be discussed. Prendeville, Crown Solicitor, argued that Skerret (Te Arawa counsel) had agreed with the Solicitor-General to limit the case to Rotorua and Rotoiti only. However, Earl counter-argued that Skerrett had never consulted him on this issue and therefore, he would not be bound to uphold it. Judge Wilson allowed Earl to continue to use all thirteen lakes in his opening address with the proviso that Prendeville could apply for more time to meet the points raised, at a later date. See: *Lake Rotorua Case 1918* CL 174/1. NA Wellington.

[52] CL 174/2. NA Wellington.

[53] Prendeville to Salmond (17 Oct 1918) CL 174/2. NA Wellington.

never recognised lake ownership. This was intended to weaken Te Arawa's claim.[54] The argument was supposedly supported by Elsdon Best, a prominent New Zealand Ethnographer. He was requested by the Crown to comment on certain Te Arawa manuscripts held in Governor Grey's Collection in Auckland:

> ...where Hinemoa rested in Rotorua was a post erected in a shoal part of the lake. To these stakes were secured cords where lobster pots were attached and lowered to the lakebed...
> When a Chief of high rank gains possession of land he possesses it on shore and in the lake, hence it is said that some of his lands are ashore and some in the water. The rows of stakes...was ranged along the margin of the deepest hole (part) of Rotorua.
> [Written by Wi Maehe Te Rangikaheke, Te Arawa][55]
> These remarks look like claiming the land under waters of the lake, but the idea in a Maori's mind would undoubtedly be associated with, not the submerged land, but the food supply in the waters.
> [Elsdon Best][56]

Elsdon Best's claim that the legends referred to fishing rights rather than ownership of the lakebed is a rather strange interpretation, given that Te Rangikaheke specifically refers to the concept of possession extending to land covered by water. The Maori claimants also provided further examples of Maori customary recognition of lake ownership and their oral testimonies focussed on the division of Lake Rotorua among various *hapu*. Earl's opening address in the Maori Land Court stressed the loyalty of Te Arawa towards the Crown during the New Zealand Wars. He discussed the guarantee of protection in the Treaty of Waitangi and examples of private lake ownership in England. Earl also pointed to New Zealand examples where the Crown had accepted Maori lake ownership in the past.[57] Prendeville agreed that these inconsistencies concerning title grants to lakes or portions of lakes such as Lake

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[54] Hawthorne to Prendeville (5 Oct 1918) CL 174/2 NA Wellington.

[55] Wi Maehe Te Rangikaheke was a well-known Te Arawa writer in the 1840s. Sir George Grey's book on Maori mythology was based on Te Rangikaheke's writings. See: G.Grey *Polynesian Mythology And Ancient Traditional History Of The New Zealanders* (Auckland,1956).

[56] Hawthorne to Prendeville (5 Oct 1918) CL 174/2 NA Wellington. These comments were written by Elsdon Best and attached to the letter.

[57] *Lake Rotorua Case 1918* CL 174/1. NA Wellington.

Tarawera, Okauka, Rotokakahi, Rotokawau and Wairarapa, raised significant difficulties for the Crown.[58]

By October 1918, the Crown was also forced to concede Maori navigational rights. The opening of the Maori Land Court proceedings had shaken the government's confidence:[59]

> Briefly I told him [Guthries, Minister for Lands] that I did not like the look of the case and that unless Salmond could assure him that he had some crushing legal arguments which could flatten the Maoris claim out that we had better try to compromise and get them to withdraw and that if we succeeded then issue a general proclamation under section 7 Native Lands Act 1909 over all the North Island Lakes. I made various suggestions as to the means we should employ in tryng to arrange for a withdrawal including backsheesh if necessary and offered to undertake the negotiations.[60]

The suggestion of withdrawing the case came at an opportune time for the Crown. Towards the end of 1918, Judge Wilson died from influenza. The case was then subject to continual delays and adjournments. Te Arawa had begun proceedings in 1912 and by 1918, it seemed they were no closer towards their aim of establishing ownership to the lakes. On the other hand, the government was content to sit and wait:

> ...he [the Solicitor-General] is relying upon tiring the Natives out and so disheartening them with delay and expenses that they will at length chuck up the sponge, he seems to be trying to bluff them that he has a royal flush...[61]

The Minister for Tourist and Health Resorts, MacDonald, provided an alternative option for the Crown and suggested the possibility of a settlement: "The Natives are

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[58] Prendeville to Salmond (18 Oct 1918) CL 174/2.NA Wellington.

[59] Salmond to Prendeville (24 Oct 1918) CL 174/2. NA Wellington.

[60] Knight to Prendeville (28 Feb.1920) CL 174/2 NA Wellington.

[61] Knight to Prendeville (21 Oct 1919) CL 174/2. NA Wellington. Delays are a feature of New Zealand lake ownership cases concerning the government and Maori claimants. Lake Omapere in Northland was first discussed in the Maori Land Court in 1929. The government appealed that decision and in 1995, legal title remains doubtful. See: JP Ferguson *Maori Claims Relating To Rivers And Lakes* LLM paper unpublished (Wellington,1989) 24-26. Lake Waikaremoana ownership remained unsettled from 1918 until 1944.

apparently tired of the litigation, of its costs and are anxious to settle the matter."[62]

During the years 1912-1920, Te Arawa were faced with a difficult dilemna. While the Crown's argument against Maori ownership continued to weaken throughout the court hearing, Te Arawa were in no better position. The eight year court battle strained their finances and the government had deliberately manipulated this by delaying the issuing of survey maps to the Court. The tribe, also, essentially faced a "catch 22" situation. If they relied solely on their customary ownership claim, they could not enforce their rights against the Crown under section 84 in the Native Land Act 1909. However, if they proceeded with their claim to the Maori Land Court, this would result in the issuing of freehold title to Te Arawa under section 92 of the 1909 statute. The issuing of freehold title had in the past resulted in a fragmentation of Maori ownership and many New Zealand historians argue that this fragmentation was responsible for increasing the rate of Maori land alienation in New Zealand during the late nineteenth and early twentieth centuries.[63]

III. THE SETTLEMENT.

On 29 April 1920, the Solicitor-General conceded that the result of litigation in the Maori Land Court would most likely favour Te Arawa. He believed it was a matter of public policy that Te Arawa should be prevented from establishing permanent ownership to the lakes and agreed to seek a voluntary settlement which would confer ownership in the Crown through statute. At this point, he did not know if Te Arawa would be willing to settle but suggested a compromise through the recognition of their fishing rights.[64] The Minister of Lands subsequently authorised Prendeville to treat

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[62] MacDonald to Attorney-General (12 July 1919) CL 174/2. NA Wellington.

[63] For example: MPK Sorrenson "Modern Maori" in K Sinclair (ed.) *The Oxford Illustrated History Of New Zealand* (Oxford University Press, Auckland, 1990) 329; M King "Between To Worlds" in WH Oliver & BR Williams *The Oxford History of New Zealand* (Oxford University Press, Auckland, 1981) 284.

[64] Salmond to the Under Secretary for Lands (29 April 1920) *Crown Law Opinions* DOSLI Wellington.

with Te Arawa on the following conditions:

> I will agree to granting free fishing rights to the Natives without license...provided that the fish is used for their own consumption and is not sold, and provided also that it is not taken out of season. I will also undertake to indemnify the Natives for costs and expenses already incurred. The Natives for their part to abandon their claims to the bed of the lake, admitting the Crown's title to the same subject to any fishing rights reserved in the Treaty of Waitangi.[65]

The conditions for settlement offered little to Te Arawa then that which had already been recommended by the Native Land Commission in 1908. Te Arawa had also already been approached by Mr Knight (from the Lands Department) concerning the settlement and Apirana Ngata sought clarification from the Minister of Lands as to Mr Knight's authorisation. Prendeville replied by suggesting that Te Arawa had instigated the settlement discussion. Prendeville was engaging in politics and deliberately made this suggestion:

> I felt it was essential as far as possible to make the overtures for settlement come from the other side...For the present I think that it would be unwise to make any definate offers until we get an idea of their views on settlement.[66]

The negotiators for the settlement were now officially Knight and Prendeville for the Crown (both had been actively involved in the Maori Land Court hearings) and Apirana Ngata, Earl and Skerret for Te Arawa. Apirana Ngata was from Ngati Porou but he was also the MP for Eastern Maori, which included Te Arawa in its constituency. His association with the lakes case began in 1908 with the Native Land Commission. He also had encouraged Te Arawa to seek their claims in both the Supreme Court and the Maori Land Court. Earl and Skerret had been Te Arawa's lawyers in both trials.

At issue is the time frame between the proposal for settlement by Salmond on the 29th of April and the issuing of Te Arawa's terms by Ngata on the 20th of May. There is no record that Te Arawa met and agreed to these terms and the quick response by Ngata casts some doubt that Te Arawa *hapu* had sufficient time to meet and discuss

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[65] Guthrie, Minister of Lands to Prendeville (12 May 1920) CL 174/2. NA Wellington.

[66] Prendeville to Commissioner of Crown Lands (14 May 1920) CL 174/2. NA Wellington.

this proposal fully,especially as Prendeville was only authorised to discuss a settlement on the 12th of May.

The terms for settlement issued by Ngata on the 20th May, included the following points: a) Maori freehold rights over the lakes to be admitted by the Crown; b) Court costs of Maori claimants to be refunded; c) Claimants will surrender their claims on several conditions. Firstly, upon recognition by the Crown of their rights, they agree to deal as one tribe. Secondly, all compensation will be used for the benefit of the whole tribe and thirdly, the Crown will provide financial assistance to establish two secondary schools, three nurses cottages, funding for scholarships, the establishment of a Maori Art Institute and assistance for housing plans. In addition to these proposals, Lake Rotokakahi should be excluded from any settlement and Maori fishing rights, landing berths, burial grounds and areas of traditional importance will be preserved on the lakes.[67]

Many of these terms were similar to Ngata's personal political aims. From 1911, Ngata had been advocating a consolidation scheme for farming. The stipulation to treat with Te Arawa as one homogenous group rather than as individual *hapu* fitted neatly with this ideal. The Art Institute also reflected Ngata's ambition to promote Maori carving and crafts. In addition, education and health were important issues to him.[68] Without any documentation on discussions between Ngata and Te Arawa, it is difficult to speculate on whether these terms were equally advocated by the tribe. Although Francis Bell in December 1920 stated that Ngata did not have Te Arawa's approval, instead Ngata merely believed that the tribe would support his proposals.[69] Later discussions with Prendeville and Knight also suggest that Ngata was pursuing his own agenda for what he thought was for the good of Te Arawa without the necessary tribal authorisation.

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[67] *Memorandum Containing The Proposals Of The Arawa Claimants For A Settlement Of The Case Re Lake Rotorua And Other Lakes In The Thermal Springs District* (20 May 1920) MA 1 5/13/242. NA Wellington.

[68] R Walker *Ka Whawhai Tonu Matou Struggle Without End* (Penguin Books, Auckland, 1990) 178-179,188.

[69] Bell. Speeches from the Meeting (13 Dec 1920) AAMK 869/84C. NA Wellington.

The Crown responded to Ngata's terms by refuting the underlying basis of the proposal:

> The first of your suggested terms of settlement namely the admission by the Crown of freehold title of the Arawa in the beds of the lakes cannot be agreed to. Such an admission would bind the government in similar claims to other lakes. The only basis of negotiation for settlement could be that the right to the beds of the lakes is sufficiently doubtful both to claimants and Crown as to be the subject of reasonable compromise.[70]

The Crown was negotiating by bluff. Having been convinced earlier that the Maori Land Court would award the lake to Te Arawa, they were now claiming the title as "sufficiently doubtful". This was an indication that the Crown was viewing this settlement in terms of a general New Zealand government policy on lake ownership. The Rotorua district was to be treated as a test case, rather than negotiated on the merits of this particular situation.[71] The failure of the Crown to take account of the peculiarities of Te Arawa's relationship to the lakes, could be argued as a breach of article Two of the Treaty of Waitangi regarding the Crown's duty to protect individual tribes and their resources.

A conference was arranged between Te Arawa and the Government to take place in December 1920. The evening before the conference, the Attorney-General (Sir Francis Bell), Prendeville, Knight, Earl and Ngata met at the Grand Hotel in Rotorua. At this meeting, Ngata expressed concern over growing divisions within the tribe regarding a unitary settlement. He argued that when he submitted the proposals Te Arawa, with the exception of a section of Ngatipikiao, had agreed with the terms. However, now *hapu* claiming Lakes Tarawera and Rotomahana were voicing their own objections.

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[70] Guthrie, Minister of Lands, to Ngata (22 May 1920) MA 1 5/13/242. NA Wellington.

[71] This is further supported by correspondence between the official Crown negotiators: Knight to Prendeville (21 May 1920) CL 174/2.NA Wellington:

> ...that when we have arrived at a basis for settlement, that you and I should meet him (Earl) and his dingbats at Rotorua and finally and formally dispose of the affair, it being your duty to draw up any necessary agreements, which should be of such character and so worded as to be applicable to lakes other than Rotorua and Rotoiti and suitable for being embodied in statute to prevent any further cases of this nature.

Ngata believed that "...the most intelligent of the Natives recognised that the public must have the lakes", and felt that even if the Maori Land Court found in favour of Te Arawa, this would result in protracted litigation and lead to conflict over rival tribal claims. Sir Francis Bell agreed and stated the only difference between himself and Ngata was the question of money.[72] Ngata's suggestion that many in Te Arawa believed the public should have the lakes is surprising considering Te Arawa's long battle to have their ownership recognised in the Courts.

On the following day, the conference between the Crown and Te Arawa took place at Ohinemutu. Sir Francis Bell maintained the government's willingness to continue the Court battle, despite his own misgivings regarding the outcome:

> The Government is not afraid of the law. The Government pocket is full, and it has able lawyers to represent it in the Courts. You will never frighten the Government by threatening it with the law, and even if you could frighten the Government you certainly could not frighten the Attorney-General.[73]

Bell told Te Arawa, the government was willing to settle simply because Ngata's proposals promised significant benefits to Te Arawa. The Attorney-General's speech was both patronising and paternalistic. It ensured that the negotiations leading up to the settlement were never instituted on an equal basis. Fully aware of Te Arawa's financial problems due to the long court battle, the Crown attempted to deceive Te Arawa regarding its own bargaining strength.

The Crown was also facing additional pressure to settle. The Waikaremoana case was delayed by the Maori Land Court until the Rotorua agreement was settled. Lakes Omapere and Tangonge also now became the subject of Maori ownership claims and as a result, government drainage operations were delayed on these lakes.[74]

Divisions within Te Arawa concerning a unitary settlement continued to grow. Ngati Tura and Ngati Te Ngakau *hapu* indicated their unwillingness to part with their

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[72] (12 Dec 1920) MA 1 5/13/242. NA Wellington.

[73] F Bell. Speeches from the Meeting (13 Dec 1920) AAMK 869/84C. NA Wellington.

[74] Knight to Prendeville (9 Feb.1921) CL 196/72. NA Wellington.

portions of Lake Rotorua and Ngati Pikiao demanded a separate agreement.[75] On 29 January 1921, at a meeting held at Otaramarae, Ngati Pikiao outlined their proposal. They advocated an agreement between Ngati Pikiao and the Crown with the following terms. Firstly, the Crown would protect their landing places on the lakes and navigational rights. Secondly, fishing rights would be maintained and thirdly, a sum of fifty thousand pounds would be given by the government in consideration of the lakes to be distributed to Ngati Pikiao returned soldiers and landholders to develop their lands and also to assist the Ngati Pikiao as a whole. They argued that the separate agreement was necessary to ensure their members received compensation directly. They had earlier contributed to an East Coast fund for returned soldiers and when they had asked for a portion of this fund to be spent on Ngati Pikiao soldiers, Ngata had refused.[76] Bell declined to deal with individual *hapu* and Earl, Ngati Pikiao's lawyer, agreed. However, he was reminded that as Ngati Pikiao paid his fees, he was to follow their directions and not dictate terms.[77]

At the end of 1921, Te Arawa met and compromised on their proposals in order to achieve a unitary settlement. A lump sum of one hundred and twenty thousand pounds was to be paid to a board who would distribute the funds to Te Arawa as a whole. However, if individual *hapu* became dissatisfied with the administration of these funds, they could apply to the government to have their share of the payment alloted directly to them.[78]

The final meeting between the Crown and Te Arawa was held at Tarawera on 2 March 1922. Mr Earl opened the conference and reminded Bell that Te Arawa had other grievances apart from the lakes, such as reparation promises made by previous governments concerning Te Arawa's services during the New Zealand wars and land grievances in the district. Bell responded and suggested that any financial arrangement

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[75] Rauika Taua, Enoka Karita, Honatana Patene and others to Maui Pomare (26 Jan.1921) MA 1 5/13/242. NA Wellington.

[76] Meeting at Otaramarae (29 Jan 1921) AAMK 869/84C. NA Wellington.

[77] Knight to Prendeville (9 Feb.1921) CL 196/72. NA Wellington.

[78] Earl to Bell (28 Oct 1921) *Arawa Lands, Confidential Papers* 226 Box 5(b). DOSLI Wellington.

with Te Arawa would be less than what had been expected in 1920. The government no longer had the financial capacity to met Te Arawa's demands. He also reiterated the underlying premise of the Crown's argument. Any payment would not be made on the basis that Te Arawa had anything to sell, instead it is "...an arrangement under which there would be no further question of ownership". Bell offered two alternative options for Te Arawa to decide upon. Either agree to the proposed settlement or have all past grievances dealt with by a Royal Commission. Earl asked if the Commission would inquire into the ownership of the beds of the lakes. Bell responded in the negative. The Commission would assume that the lakes belonged to the Crown. As a result, Earl recommended Te Arawa support a settlement and due to the financial constraints on the government, advocated the payment of an annual amount rather than a lump sum. However, he asked the government to recognise that this annuity should increase proportionately with any increase in the government's financial capacity.[79] In the meantime, Bell advised Cabinet, that due to Lake Waikaremoana, the Rotorua Lakes should be settled immediately even if this would involve a considerable sum. The risk of continuing litigation and an adverse result for the government, would raise serious difficulties for fishing and electricity.[80]

By 24 March 1922, Bell reported to Cabinet the proposed Te Arawa settlement. Earl, Ngata and Levin were appointed by Te Arawa to arrange the settlement with the Crown. It is not recorded whether or not, Te Arawa assented to the terms of the proposal, or simply relied on Ngata and the others to negotiate the terms with the Crown. Levin had taken the place of Skerret and assisted Earl. According to Bell, he was anxious for Te Arawa to settle because he owned land on the shores of Rotoiti.[81]

This settlement document is the only recorded settlement between Te Arawa and the government. It was signed by Earl, Ngata, Levin and Bell. No member of Te Arawa signed this document and no record exists on whether Te Arawa assented to its terms. The settlement outlined the following conditions: a) the Crown accepts the rights of

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[79] Notes on the Conference (13 March 1922) MA 1 5/13/242. NA Wellington.

[80] Memorandum for Cabinet (21 March 1922) MA 1 5/13/242. NA Wellington.

[81] Memorandum For Cabinet (21 March 1922) LS 22/2019. DOSLI Wellington.

Te Arawa in respect to their burial grounds and fishing rights, in return for the fee simple of the lakes; b) a special board to be appointed to control the surroundings of Lake Rotokakahi and the island in it; c) Te Arawa to be granted forty licenses to fish for trout at a minimal fee; d) no trading of indigenous fish will be permitted; and e) six thousand pounds will be paid annually to a board for the benefit of the whole tribe. The Crown would also pay the litigation costs of Te Arawa.[82]

In June, the settlement was sent to the Law Draftsman to draw up the legislative clause. Copies were then to be sent to Ngata, Earl and Levin for approval.[83] The drafting process continued through to October. Yet again, the Rotorua Lakes were discussed within the general New Zealand lake ownership context, rather than on its own terms:

> ...but in view of the fact that the question of titles of other similar lakes are still to be decided, it would be better if a title which was not apparently an admission that the Arawas owned the lakes were used. e.g 1. A specific declaration that the beds of the lakes and the right to the borders on them are to be deemed Crown Land free from Native customary title (if any)...[84]

Apirana Ngata also visited Rotorua and discussed the draft Bill with Te Arawa.[85] The draft was then altered in accordance with his discussions in Rotorua. The lakes were to be specifically mentioned in the Act. Te Arawa also wanted *wahi tapu* sites reserved as well as landing places. Indigenous fish were also allowed to be caught and sold if granted a permit by the newly constituted Arawa Trust Board. Any fines in contravention of these permits would be paid to the Board. Finally, Mr Earl would be paid for his litigation costs.[86]

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[82] Memorandum For Cabinet (24 March 1922) CL 174/2. NA Wellington.

[83] Coates to Guthrie (14 June 1922) LS 22/2019. DOSLI Wellington.

[84] Under Secretary to Native Minister (3 Oct 1922) MA 1 5/13/242. NA Wellington.

[85] There are no records outlining who Ngata met with, the entire tribe or representatives of Te Arawa?

[86] Ngata to Coates (17 Oct 1922) AAMK 869/84b 5/13/242.NA Wellington.

IV. THE 1922 LEGISLATION.

The Native Land Amendment and Native Land Claims Adjustment Act 1922 differed in a variety of ways from the negotiations, settlement and draft bill.

The section 27 preamble stated its purpose was to give effect to "...an agreement made between the representatives of the Government and representatives of the Arawa Tribe..." The lakes were specifically mentioned in the second schedule and fee simple was vested by statute in the Crown. All islands situated within the lakes were reserved to Te Arawa and any right to navigate on the waters of the lakes in order to reach the islands was also conceded by the Crown. However, *wahi tapu* sites and landing berths were not specifically reserved. Instead, the Governor-General had the power to reserve lands in the lake bed or on the borders for the use of Te Arawa. The right to fish was confirmed for private consumption and permits to sell the fish could be granted by the Arawa Trust Board. The Trust Board also was to receive any revenue from fines in contravention of this provision. An annuity of six thousand pounds was to be paid by the Crown to the Board. But no mention was made of the ability to increase this sum should the economy grow. The remainder of the provisions dealt with the establishment of the Trust Board.

The 1922 legislation was supposed to conclude the issue of ownership concerning the Rotorua Lakes. However, during discussions of the Bill and subsequently, the Act, some members of Te Arawa continued to argue that they had never agreed to the settlement proposals.[87] While the Te Arawa Trust Board and Apirana Ngata viewed the settlement as a success, the petitions to Parliament suggest that the representatives who signed the settlement did not have the concensus required to extinguish any

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[87] Te Tauhu Kingi to Maui Pomare (27 Dec 1922) MA 1 5/13/242. NA Wellington. Mentions petitions from Morehu Te Kirikau and others. Taima Te Ngahue to Native Minister (28 March 1923) MA 1 5/13/242. NA Wellington. Te Miri O Raukawa Tauwahika to the Governor-General (28 May 1923) MA 1 5/13/242. NA Wellington. He did not agree to sell the lake and there was no deed. Earl, Ngata and Pomare have ruined the Maori. Under Secretary to Native Minister (11 April 1923) MA 1 5/13/242. NA Wellington. At a meeting in Whakarewarewa, some members of Te Arawa complained about the settlement but "...the advisors of the Natives...appear well satisfied..."

investigation into customary title.[88] Since the 1840s, the Crown was fully aware that communal agreement was necessary but in this case, it appears that the government was willing to ignore Te Arawa petitioners and uphold an agreement made with representatives, none of whom belonged to Te Arawa tribe. Although no records exist regarding the extent of authority given to these representatives by Te Arawa, it is likely that Ngata, Levin and Earl did receive consent from a large proportion of the tribe. However, when dealing with a communal system, the question remains whether majority approval has the right to extinguish minority concerns. The lack of any deed signed by Te Arawa members supports this question.

PART THREE: CONCLUSION.

> 27. For the purpose of giving effect to an agreement made between representatives of the Government and the representatives of the Arawa Tribe with respect to the ownership of the lakes...
> (1) The beds of the lakes...are hereby declared to be the property of the Crown, freed and discharged from the Native customary title, if any...[89]

The above legislation purportedly ended a protracted battle between the Crown and Te Arawa over the ownership of the Rotorua District lakes. However, given the history of this battle, should this statute have been implemented?

From 1900 to 1912, Te Arawa were consistently put under pressure by the Crown through the imposition of fines for fishing in the Rotorua Lakes. In 1909, the government enacted Maori land legislation which further sought to disassociate the lakes from Te Arawa's claim. The 1909 Native Land Act circumvented the Crown's Treaty of Waitangi obligations under Article Three by establishing a series of prohibitions which denied Maori access to the judicial system for the redress of grievances. Article Two of the Treaty was also breached by the 1909 Act whose

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[88] H.Tai Mitchell to Coates (1924) AAMK 869/84C 5/13/242. NA Wellington. AT Ngata *The Te Arawa Tribe - A History* MA 31/8. NA Wellington.

[89] Native Land Amendment And Native Land Claims Adjustment Act 1922. s.27.

provisions sought to weaken, rather than protect, Maori lands and resources.

These actions by the government forced Te Arawa to institute Court proceedings, first in the Supreme Court in *Tamihana Korokai* v *The Solicitor-General* and then in the Maori Land Court. The government did little to facilitate these cases. In 1912, aware of the requirement for surveyed maps, the government deliberately delayed presenting the maps to the Court. The Maori Land Court proceedings were then interrupted by World War One and the influenza epidemic. Fully aware of the financial strain placed on Te Arawa, the government did little to ensure the case would be quickly resumed after the death of Judge Wilson. In essence, the actions of the government during these years ensured that the negotiations for settlement was the only viable option for Te Arawa.

The negotiations took place, therefore, on an unequal footing. The Crown stressed its ability to use the judicial system in order to delay any settlement of the ownership issue even though it was aware that the Court would probably find in favour of Te Arawa. In turn, Te Arawa could not afford the lengthy appeal process which marked the Lake Waikaremoana case.

These pressures on Te Arawa also resulted in hasty negotiations and settlement. Although it is likely that Te Arawa's representatives had received authorisation from the majority of the tribe, there is no record of such authorisation and the petitions delivered to Parliament after the settlement suggest a significant minority were excluded from these decisions. The 1922 legislation which purportedly vested ownership of the lakebeds with the Crown, simply ignored the protests despite an awareness in 1922 that land alienation required a communal consent process. The absence of any deed signed by Te Arawa members is also highly unusual given the history of such documents in New Zealand land settlements. In addition, the Act, itself, also made no provision for an increase in the annuity despite such an increase being discussed during the negotiations.

In a recent Court of Appeal decision, Cooke P noted the increasing willingness of Courts in different jurisdictions to recognise the "justiciability of the claims of

indigenous peoples."[90] The fiduciary duty concept is being linked not just to the Treaty of Waitangi but also to native customary title in general. "Extinguishment by less than fair conduct" and the payment of proper compensation are now being viewed as tests on which to judge a possible breach of the Crown's fiduciary obligations.[91] The delaying tactics of the Crown at the beginning of the Maori Land Court proccedings and the use of bluff during the negotiations provide examples of the Crown's failure to uphold its duty in the Te Arawa case. The annuity of six thousand pounds which has never managed to keep pace with inflation also calls into question the notion of proper compensation.

These factors together with the financial pressure placed on Te Arawa and the lack of adequate documentation proving Te Arawa fully understood and agreed to the settlement, should provide adequate force to the possibility of a legal challenge by the Tribe through the High Court and Maori Land Court.

It can be argued that the rights expressed in the Treaty of Waitangi are fundamental rights within our democracy, and the Native Land Amendment And Native Land Claims Adjustment Act 1922 represents the culmination of a series of significant interferences by the Crown with these rights. The seriousness of this case demands a departure from the doctrine of parliamentary sovereignty. However, it is unlikely that this would occur, given the doctrine's importance to New Zealand's constitutional framework.

A second legal alternative exists for Te Arawa in claiming ownership to the Rotorua lakes in the 1990s. Simply argued, the 1922 legislation, though valid, has never been put into effect. Section 27 relies on the purported agreement between the Crown and Te Arawa. The history of the Rotorua lakes claim adequately demonstrates that such an agreement has never yet been achieved. Without any agreement, section 27 is rendered meaningless and has yet begun to operate.

The history of the Rotorua Lakes ownership dispute is also a timely reminder of the

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[90] *Te Runanganui o Te Ika Whenua Inc Society* v *Attorney-General* [1994] 2 NZLR 20, 27.

[91] *Ibid.* at 24.

risks inherent in large-scale settlements. In the 1990s, the government is yet again looking to the possibility of redressing grievances through the use of such settlements. For example, the Sealord's deal, Tainui and Ngai Tahu agreements and negotiations. The Te Arawa case demonstrates the pitfalls of urgent and hurried solutions. If the requirement of "full and final settlement" is to be fulfilled and able to stand the test of time, the government's approach must also be tempered with a willingness to seek full consent from *hapu* members. In order to meet the obligations of its fiduciary duty, the Crown must also facilitate rather than obstruct Maori rights to redress and acknowledge the concept of "proper compensation".

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