

N876 NORTHOVER, H. A Bora section 19 challenge to the foreshore...

CONTENTS

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I	INTRODUCTION	3
II	LEGISLATIVE BACKGROUND	4
A	Interrelation of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993	4
B	General Bill of Rights Act Interpretation Principles	5
C	BORA Section 5	7
1	Prescribed by law	7
2	Reasonable limits demonstrably justifiable in a free and democratic society	7
III	THE RIGHT TO FREEDOM FROM DISCRIMINATION IN NEW ZEALAND AND COMPARATIVE JURISPRUDENCE	8
A	Comparative Disadvantage	9
B	Human Dignity Approach	10
IV	BACKGROUND TO THE FORESHORE AND SEABED ISSUE	11
V	A BORA SECTION 19 CHALLENGE TO THE FORESHORE AND SEABED LEGISLATION	14
A	Customary Rights Orders	15
B	Section 5	16
C	Territorial Customary Rights Declarations	18
VI	THE WAITANGI TRIBUNAL REPORT	19
VII	THE ATTORNEY-GENERAL'S VIEW	20
VIII	THE SUBSTANTIVE MERITS OF A CLAIM FOR BREACH OF BORA SECTION 19	23
A	Prima Facie Discrimination	23
1	Comparative disadvantage	24
2	Human dignity approach	24
B	Section 5	26
IX	THE SOUGHT-TO-BE CONSISTENT WITH THE BORA	29
A	CONSISTENCY	29
B	OTHER FACTORS	29
A	BORA Section 6	29
B	Other Possibilities for a Section 19 Challenge	31
C	Other BORA Rights Threatened by the Bill	31
D	Recourse to International Human Rights Bodies	32
X	CONCLUSION	32
XI	BIBLIOGRAPHY	34
A	Table of Cases	34
B	Primary Sources	36
C	Secondary Sources	36

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CONTENTS

I	INTRODUCTION	3
II	LEGISLATIVE BACKGROUND	4
	A Interrelation of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993	4
	B General Bill of Rights Act Interpretation Principles	5
	C BORA Section 5	7
	1 <i>Prescribed by law</i>	7
	2 <i>Reasonable limits demonstrably justifiable in a free and democratic society</i>	7
III	THE RIGHT TO FREEDOM FROM DISCRIMINATION IN NEW ZEALAND AND COMPARATIVE JURISPRUDENCE	8
	A Comparative Disadvantage	9
	B Human Dignity Approach	10
IV	BACKGROUND TO THE FORESHORE AND SEABED ISSUE	11
	A Attorney-General v Ngati Apa	11
	B Title in the Foreshore and Seabed after Ngati Apa	13
V	THE FORESHORE AND SEABED BILL	14
	A Ancestral Connection Orders	16
	B Customary Rights Orders	17
	C Territorial Customary Rights Declarations	18
VI	THE WAITANGI TRIBUNAL REPORT	19
VII	THE ATTORNEY-GENERAL'S VET	20
VIII	THE SUBSTANTIVE MERITS OF A CLAIM FOR BREACH OF BORA SECTION 19	23
	A Prima Facie Discrimination	23
	1 <i>Comparative disadvantage</i>	23
	2 <i>Human dignity approach</i>	25
	B Section 5 Analysis	26
IX	THE COURTS' JURISDICTION TO ASSESS A BILL FOR BORA CONSISTENCY	29
X	OTHER FACTORS TO BE CONSIDERED	30
	A BORA Section 6	30
	B Other Possibilities for a Section 19 Challenge	31
	C Other BORA Rights Threatened by the Bill	31
	D Recourse to International Human Rights Bodies	32
XI	CONCLUSION	32
XII	BIBLIOGRAPHY	34
	A Table of Cases	34
	B Primary Sources	36
	C Secondary Sources	38

CONTENTS

1	INTRODUCTION	1
2	LEGISLATIVE BACKGROUND	2
3	A. Introduction of the New Zealand Bill of Rights Act 1990	3
4	B. General Bill of Rights Act Interpretation Principles	4
5	C. SOA Section 2	5
6	1. Enforced by law	6
7	2. Reasonable limits demonstrably justified in a free and	7
8	democratic society	8
9	III THE RIGHT TO FREEDOM FROM DISCRIMINATION IN NEW	9
10	ZEALAND AND COMPARATIVE JURISPRUDENCE	10
11	A. Comparative theory	11
12	B. Human Rights Approach	12
13	C. Background to the Foreshore and Seared Issue	13
14	1. Attorney-General v Ngāi Tahu	14
15	2. The Bill in the Foreshore and Seared after Ngāi Tahu	15
16	3. THE FORESHORE AND SEARED BILL	16
17	A. Ancestral Customary Orders	17
18	B. Customary Rights Orders	18
19	C. Foreshore Customary Rights Decisions	19
20	IV THE WAITANGI TRIBUNAL REPORT	20
21	A. THE ATTORNEY-GENERAL'S REPORT	21
22	B. THE SUBSTANTIVE MERE BREACH	22
23	C. OF BORA SECTION 19	23
24	1. Prima Facie Discrimination	24
25	2. Comparative analysis	25
26	3. Human rights approach	26
27	4. Section 2 Analysis	27
28	5. THE COURTS' DETERMINATION TO ASSESS A BILL FOR BORA	28
29	CONSISTENCY	29
30	OTHER FACTORS TO BE CONSIDERED	30
31	A. BORA Section 6	31
32	B. Other Provisions for a Section 19 Challenge	32
33	C. Other BORA Rights Threatened by the Bill	33
34	D. Reference to International Human Rights Bodies	34
35	CONCLUSION	35
36	BIBLIOGRAPHY	36
37	A. Table of Cases	37
38	B. Primary Sources	38
39	C. Secondary Sources	39

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I INTRODUCTION

“The foreshore is that area of land which is neither always wet nor always dry due to the ebb and flow of the incoming and outgoing tides.”¹ The seabed is the submerged land between the foreshore and the boundary of New Zealand’s territorial sea. In New Zealand in 2004, title to the foreshore and seabed is the subject of great legal debate and political controversy.

Recent literature on the foreshore and seabed issue² has compared the decision of the New Zealand Court of Appeal in *Attorney-General v Ngati Apa (Ngati Apa)*³ to the decision of Australia’s High Court in *Mabo v Queensland (No 2)*⁴. In Australia, *Mabo v Queensland (No 1)*⁵ decided that an extinguishment of (at that stage hypothetical) native title would be discriminatory. *Mabo v Queensland (No 2)* established the existence of that native title. In New Zealand, *Ngati Apa* has recognised the possibility of native title in the foreshore and seabed, or at least the absence of a general extinguishment of native title. The case yet to be heard is New Zealand’s *Mabo v Queensland (No 1)*, an examination of the potentially discriminatory effect of extinguishment of the rights pointed to by *Ngati Apa*.

Of course, fundamental constitutional differences between Australia and New Zealand mean that the mechanisms for a challenge to discriminatory legislation are markedly different. New Zealand’s Bill of Rights Act 1990 (BORA), far from being supreme law, is a weak piece of legislation gaining much of its force from its symbolism: symbolism of lofty ideals and the moral force of international human rights discourse. This paper explores the potential of a section 19 Bill of Rights Act discrimination challenge to the current Foreshore and Seabed Bill.

¹ Tom Bennion, Malcolm Birdling and Rebecca Paton *Making Sense of the Foreshore and Seabed* (Maori Law Review, Wellington, 2004) 5. While there is variation between the boundaries used to define the foreshore and seabed in different contexts (and resultant issues, for example in relation to Crown grants bounded by the sea), this definition is sufficient for the purposes of this paper. The Foreshore and Seabed Bill 2004 no 129-1 defines the foreshore and seabed, in clause 4, as lying between the mean high water spring tide mark and the outer limits of the territorial sea, from the air space above to the bedrock and other matter below.

² Bennion *Making Sense of the Foreshore and Seabed*, above n 1, 1.

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

⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

The frontier is that area of land which is neither always wet nor always dry due to the ebb and flow of the incoming and outgoing tides.¹ The seabed is the submerged land between the frontier and the boundary of New Zealand's territorial sea. In New Zealand in 2004, title to the frontier and seabed is the subject of great legal debate and political controversy.

Recent literature on the frontier and seabed issue² has compared the decision of the New Zealand Court of Appeal in *Attorney-General v Ngati Apa* (Ngati Apa)³ to the decision of Australia's High Court in *Mabo v Queensland (No 2)*.⁴ In Australia, *Mabo v Queensland (No 2)* decided that an extinguishment of (at that stage hypothetical) native title would be discriminatory. *Mabo v Queensland (No 2)* established the existence of that native title. In New Zealand, Ngati Apa has recognized the possibility of native title. The frontier and seabed, or at least the absence of a general extinguishment of native title, has yet to be heard in New Zealand's *Mabo v Queensland (No 2)* as an examination of the potentially discriminatory effect of extinguishment of the rights pointed to by Ngati Apa.

Of course, fundamental constitutional issues exist between Australia and New Zealand since that the mechanism for a challenge to discriminatory legislation is markedly different. New Zealand's Bill of Rights Act 1990 (BORA) is far more robust than law, it is a weak piece of legislation compared to its force from its symbolic evolution of legal rights and the moral force of international human rights discourse. This paper explores the potential of a section 19 Bill of Rights Act determination challenge to the current Frontier and Seabed Bill.

¹ John Gordon, *Maritime Boundaries and Rights* (London: Routledge, 1997) 10. The frontier is the boundary between the land and the sea. The seabed is the submerged land between the frontier and the boundary of New Zealand's territorial sea. In New Zealand in 2004, title to the frontier and seabed is the subject of great legal debate and political controversy. The frontier and seabed, or at least the absence of a general extinguishment of native title, has yet to be heard in New Zealand's *Mabo v Queensland (No 2)* as an examination of the potentially discriminatory effect of extinguishment of the rights pointed to by Ngati Apa.

² *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

³ *Attorney-General v Ngati Apa* [2003] NZAR 443 (CA).

⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

In this paper, an introduction to the relevant human rights legislation, the Bill of Rights Act 1990 and Human Rights Act 1993 (HRA), will be given. Background to the foreshore and seabed issue and the Foreshore and Seabed Bill (the Bill)⁶ currently before the House will follow. Assessments of the Bill's (non)discriminatory nature will be examined. The Waitangi Tribunal said the Bill was not fair. The Attorney-General vetted the Bill and found the prima facie discrimination it contained to be a reasonable limit on the right to freedom from discrimination. This paper will look at the factors the Court may consider when determining a BORA challenge to the Bill. Practical concerns such as jurisdictional issues and other options available for rights vindication will be addressed.

II LEGISLATIVE BACKGROUND

A Interrelation of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993

The New Zealand Bill of Rights Act 1990 lists a series of rights that citizens hold against the government, but none of these rights is absolute. Rights are subject to reasonable limitation under section 5 of BORA. The Bill of Rights Act is not supreme law and accordingly gives the court no power to overturn inconsistent legislation. If a statute is found to breach a right even after that right has been subjected to the maximum limitation justifiable under section 5, the court can make a declaration of inconsistency.⁷

The Human Rights Act functions as a "detailed working out of section 19 of the Bill of Rights" for the purpose of State actors.⁸ BORA section 19 states the right of all New Zealanders to freedom from discrimination on the grounds set out in Part 2 of the Human Rights Act 1993 (HRA). One of the prohibited grounds of discrimination set out in that Part is "race".⁹ Legislation breaching the BORA section 19 right to freedom from discrimination can be challenged through the Human Rights Act or directly under BORA.

⁵ *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

⁶ Foreshore and Seabed Bill 2004, no 129-1.

⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

⁸ Paul Rishworth, G Huscroft, S Optican and R Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 19.

The same BORA standard of reasonable limitation applies to the right whether it is investigated under the HRA or under BORA.

Due to the importation of the BORA standard under the HRA, the essential differences in a complaint brought under the HRA and a complaint brought under BORA are procedural.¹⁰ The material difference is that the ability of the Human Rights Review Tribunal to make a declaration of inconsistency, and the effect of such a declaration, are made explicit in the HRA. Section 92K(1) of the HRA, like section 4 of BORA, provides that the inconsistent enactment is not affected by a declaration. However, HRA section 92K(2) requires the Minister responsible for the inconsistent Act's administration to report to the House that there has been a declaration and to give the House advice on the Government's response to the declaration. Whichever Act a challenge is brought under, the standards and precedent applied will be those developed in BORA case law.

B General Bill of Rights Act Interpretation principles

There is extensive BORA case law setting out the general principles of BORA interpretation. There is a well-established principle of broad generous interpretation of rights in accordance with the democratic values they represent.¹¹ The Treaty of Waitangi

⁹ Human Rights Act 1993, s 21(1)(f).

¹⁰ Part 1A of the HRA provides in section 20L that BORA rights are to be subject to section 5 BORA limitations whether they are investigated under BORA or under the HRA. This is an implicit importation of BORA case law. Part 3 of the HRA sets out the procedure to be followed when the Human Rights Commission receives a complaint. The Commission is to provide a dispute resolution and mediation service. On receipt of a complaint about Crown discrimination, the Commission is to inform all involved parties, including the Attorney-General, of the fact of the inquiry and of the process to be followed. The Commission is also required to inform the Attorney-General of the substance of the complaint and allow for a response from the Attorney-General to the complaint. If settlement cannot be negotiated, civil proceedings can be brought before the Human Rights Review Tribunal. These proceedings can be brought by the complainant, by an aggrieved person, or by the Commissioner on behalf of an aggrieved person or class. Section 92J specifically provides the Human Rights Review Tribunal with the power to make declarations of inconsistency. Section 92J provides that a declaration of inconsistency is the only remedy available for a finding of discrimination in an enactment.

¹¹ Cooke P has stated that, "Courts will be expected to try to approach the Bill of Rights Act with a sense of the democratic values for which the Bill of Rights Act stands." *Ministry of Transport v Noort* [1992] 3 NZLR 260, 271 (CA). Cooke P also cited Lord Wilberforce's well-known exhortation to avoid "the austerity of tabulated legalism". *Ministry of Transport v Noort* [1992] 3 NZLR 260, 258 (CA), citing Lord Wilberforce giving the judgment of the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319, 328. See also *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440 (CA), where Cooke P in the judgment of

has relevance as an interpretation aid to BORA to the same degree it has for any other statute in New Zealand, arguably more so because of the constitutional nature of both BORA and the Treaty, particularly when the issue is one of Maori-Crown relations. Rishworth suggests that there is room for the Treaty of Waitangi to influence the definition of the scope of the right to freedom from discrimination contained in BORA section 19(1).¹² The Treaty is also relevant as part of the fabric of New Zealand's section 5 "free and democratic society".¹³

International human rights jurisprudence is relevant to interpretation, particularly because of the Bill of Rights Act's origins. In *Quilter v Attorney-General (Quilter)*, Thomas J (dissenting in part) cited the Long Title of BORA's partner Act, the Human Rights Act, as evidence of the relevance of international human rights instruments and jurisprudence as aids to BORA interpretation.¹⁴ The long title describes the HRA as an Act "to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights." Thomas J approved Cartwright J's earlier inference from BORA's international heritage of a requirement of broad and generous interpretation.¹⁵

International jurisprudence is particularly relevant to the interpretation of section 5, because New Zealand's section 5 is modelled on section 1 of the Canadian Charter of Rights and Freedoms, which in turn is derived from International Covenant on Civil and Political Rights provisions.

the Court held Lord Wilberforce's approach to interpretation of constitutional documents to apply to BORA.
¹² Paul Rishworth "Seminar Report: The Treaty of Waitangi and Human Rights" [2003] NZ Law Rev 261, 277.

¹³ Chilwell J stated, "There can be no doubt that the Treaty is part of the fabric of New Zealand society" in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 (HC).

¹⁴ *Quilter v Attorney-General* [1998] 1 NZLR 523, 530 (CA).

¹⁵ *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, 232-235 (HC) Cartwright J.

C BORA Section 5

Section 5 provides that the rights and freedoms contained in BORA "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This is recognition that while no right is absolute, rights must be given effect as fully as is reasonable. There is extensive international precedent on the application of such limitation clauses, and New Zealand jurisprudence has developed along similar lines.

1 Prescribed by law

In *Ministry of Transport v Noort (Noort)*, Richardson J¹⁶ and Cooke P¹⁷ suggested that New Zealand follow Canadian jurisprudence on the meaning of "prescribed by law". Accordingly a limitation will be considered to be prescribed by law if it is express or necessarily implicit in the terms of a statute or regulation, or in the application of a common law rule. This element of section 5 is not at issue in the case of the foreshore and seabed legislation.

2 Reasonable limits demonstrably justifiable in a free and democratic society

The current test used in New Zealand for a reasonable limit justifiable in a free and democratic society was stated in *Noort* by Richardson J. After quoting Canada's Chief Justice, Richardson J presented his version of the Canadian test.¹⁸ A materially similar test appears in the judgment of the Court in *Moonen v Film and Literature Board of Review (Moonen)*, again using Canada's *R v Oakes* test.¹⁹ The proportionality test was summarised

¹⁶ *Noort*, above n 11, 283, citing *R v Therens* (1985) 18 DLR (4th) 655, 680.

¹⁷ *Noort*, above n 11, 272, citing *R v Thomsen* (1988) 63 CR (3d) 1, 10.

¹⁸ Richardson J deemed section 5 to require a "consideration of all economic, administrative and social implications" of both the legislative objective to be achieved by infringing on the right and of the infringement itself. He recast the test from *R v Oakes* [1986] 1 SCR 103, 138-139 by indicating that New Zealand's section 5 required a balance of:

- 1 the significance of the values underlying the right;
- 2 the importance of the public interest in the intrusion on the right;
- 3 the degree of the limitation being imposed on the right; and
- 4 the effectiveness of the intrusion on the right in achieving its public interest objective.

Noort, above n 11, 283-284.

¹⁹ The original Canadian *Oakes* test requires:

by Tipping J's memorable statement that "A sledgehammer should not be used to crack a nut."²⁰ The Waitangi Tribunal's *Petroleum Report* provides a succinct summary of the section 5 test:²¹

[T]he statutory objective must be sound; the interference in the fundamental right must be proportionate to the objective; there must be a proper connection between the interference and the objective; and the limitation must be no more than is absolutely necessary.

In *Quilter*, Thomas J looked to the 1984 Siracusa principles²² on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights as authority for the proposition that the term "in a democratic society" was to be interpreted so as to make it more difficult for rights to have limitations placed on them - rather than allowing the democratic society as a justification for infringement on rights to allow majority rule.²³

III THE RIGHT TO FREEDOM FROM DISCRIMINATION IN NEW ZEALAND AND COMPARATIVE JURISPRUDENCE

New Zealand case law on the freedom from discrimination is limited. *Quilter v Attorney-General* is the leading New Zealand case dealing with BORA section 19(1), but

-
- 1 a sufficiently significant legislative objective; and
 - 2 the intrusion on the right to be proportionate to the legislative objective, that is:
 - a a rational connection between the infringement and the objective;
 - b as little infringement on the right as possible; and
 - c the infringement to be justified in light of the objective.

R v Oakes, above n 18, 138-139.

In *Moonen*, above n 7, 16, Tipping J stated that, taking into account the importance of the legislative objective, the Court must be satisfied that:

- 1 there is a rational connection between the infringement and the objective;
- 2 the infringement is proportional to the objective;
- 2 the infringement on the right is minimal; and
- 4 the infringement is justifiable in light of the objective.

Tipping J's test is more comprehensive than Richardson J's and better reflects the *Oakes* test. For further comment on the requirement of minimum infringement, see *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939, 954 (PC).

²⁰ *Moonen*, above n 7, 16.

²¹ Waitangi Tribunal *Petroleum Report: Wai 796* (Legislation Direct, Wellington, 2003) 60.

²² United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985).

²³ *Quilter*, above n 14, 540-541.

does not provide particularly substantial guidance on the application of the section and is of little use in the foreshore and seabed context. However, some of the observations made by the Court in their judgments are relevant to this case. Gault J defined discrimination as generally "understood to involve differentiation by reference to a particular characteristic (classification) which characteristic does not warrant the difference."²⁴

In *Quilter* the Court considered whether the restriction of marriage to opposite-sex couples was discriminatory under BORA section 19. The Court looked to the way similar anti-discrimination provisions had been interpreted in other jurisdictions in relation to same-sex couples. Following this precedent of legal methodology, the Court considering a BORA section 19 challenge to the foreshore and seabed legislation would need to look at the ways discrimination and native title have interacted in comparative jurisprudence.

A Comparative Disadvantage

Quilter imported the 'comparative disadvantage' test from Canadian discrimination case law. Tipping J discussed the use of a comparator group - a group which would be in a position materially the same as that of the group alleging discrimination were it not for the alleged discrimination.²⁵ By comparing the effect of the alleged discrimination on both the complainant group and the comparator group, the court should be able to determine whether there is in fact a detrimental effect, and therefore prima facie discrimination. As Thomas J framed it:²⁶

The key question, then, is not whether there is a distinction but whether the distinction which exists is based on the personal characteristics of the individual or group and has the effect of imposing burdens, obligations, or disadvantages on that individual or group which are not imposed on others.

The comparative disadvantage test overcomes any distinction between direct and indirect discrimination by looking past discriminatory intent straight to the effect, but to be

²⁴ *Quilter*, above n 14, 527.

²⁵ *Quilter*, above n 14, 573.

²⁶ *Quilter*, above n 14, 573.

effective the test relies on the selection of a valid comparator group. Tipping J described the need for a "logically relevant" group.²⁷

B Human Dignity Approach

Canada's courts have developed the human dignity approach to interpretation of human rights legislation.²⁸ This can be seen as a purposive approach, returning to the core purpose of human rights as a means of recognising and promoting human dignity. In returning to the right's genesis, the Canadian Court viewed the right to freedom from discrimination as "a guarantee against the evil of oppression," "designed to remedy the imposition of unfair limitations upon opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping."²⁹ This reference to historical disadvantage allows the Court to consider not only the discrimination allegedly suffered by the complainant on the facts of the case at bar, but also discrimination and disadvantage suffered by the complainant's group historically and in contemporary society generally. The approach allows for an examination of "powerlessness and vulnerability" within society and emphasises "the importance of examining the surrounding social, political, and legal context in order to determine whether discrimination exists".³⁰ The adoption of the human dignity approach in New Zealand would be of great significance for Maori. It would mean that the historical disadvantage of Maori³¹ would strengthen claims to the right to freedom from discrimination.

The human dignity approach to the right to freedom from discrimination is summarised in *Law v Canada*:³²

²⁷ *Quilter*, above n 14, 573. *Law v Canada* [1999] 1 SCR 497 is authority for allowing the Plaintiff to select the comparator group, as happened in *Corbiere v Canada* [1999] 2 SCR 203, and allowing the court to "refine" or further define it, as happened in *Lovelace v Ontario* [2000] 1 SCR 950.

²⁸ There is a useful discussion of the authorities in *Law v Canada*, above n 27, 525-531.

²⁹ *Law v Canada*, above n 27, 525, citing *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 180-181 McIntyre J.

³⁰ *Law v Canada*, above n 27, 526.

³¹ See Te Puni Kokiri statistics <<http://www.tpk.govt.nz>> (last accessed 28 August 2004).

³² *Law v Canada*, above n 27, 529.

It may be said that the purpose of [the guarantee of freedom from discrimination] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of [...] society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose [...] where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of [...] society.

IV BACKGROUND TO THE FORESHORE AND SEABED ISSUE

A Attorney-General v Ngati Apa

While *Ngati Apa* is the foreshore and seabed case, it is not New Zealand's first. In *Kawaueraua* in 1870³³ and *Ngakororo* in 1942³⁴ the Native Land Court and the Native Appellate Court, respectively, considered title to the foreshore and seabed without finding it necessary to distinguish the relevant law from the law applied to dry land. More recently, native title to the foreshore and seabed has been precluded by *Re the Ninety-Mile Beach*,³⁵ now overruled by *Ngati Apa*.

The *Ngati Apa* proceedings began in 1997 at the instigation of eight iwi from the top of the South Island who were dissatisfied with the development of marine farming under the control of local government. The case progressed through the Maori Land Court, Maori Appellate Court, High Court and Court of Appeal. The key issue dealt with in the Court of Appeal decision was essentially whether the Maori Land Court has jurisdiction to investigate title to the foreshore and seabed. The significance of the Court of Appeal's finding that the Maori Land Court has jurisdiction is that the Maori Land Court can declare customary title in the foreshore and seabed under section 131 of Te Ture Whenua Maori

³³ *Kawaueraua* (1870) 4 Hauraki MB 236, reprinted (1984) 14 VUWLR 227.

³⁴ *Ngakororo* (1942) 12 Auckland NAC 137.

³⁵ *Re the Ninety-Mile Beach* [1963] NZLR 261 (CA).

1993, and can convert that customary title into freehold title under section 132.³⁶ This power creates the possibility of Maori gaining freehold title over parts of the foreshore and seabed where customary title can be established to the satisfaction of the Maori Land Court.

The significance of the Court's decision is sometimes understated when viewed purely as a matter of statutory interpretation. Although not a declaration, the decision was tantamount to an admission that the foreshore and seabed were subject to native title in the absence of any beneficial title in the Crown or private individuals. Customary title is governed by, and exists in accordance with, tikanga Maori, but is recognised by the common law. The existence of customary title is a question of fact for the Maori Land Court to determine based on criteria broadly entailing a traditional connection with the land which is maintained today. This connection will be by custom and usage. Customary rights are held according to tikanga Maori and may extend as far as customary title in areas where that degree of customary interest is present on the facts. The Court in *Ngati Apa* left open the possibility of extinguishment of native title in any specific area and ruled out only a general extinguishment. It ruled that the Crown's established title in the foreshore and seabed was only a radical title.

Another important aspect of the *Ngati Apa* decision was the finding that customary title to the foreshore and seabed was not automatically extinguished when title to contiguous dry land was extinguished. This finding required the overruling of the Court's decision in *Re the Ninety-Mile Beach*. The Court found that the cession of sovereignty gave the Crown only the radical title (or imperium) over land, including any foreshore and seabed land to which Maori may have held customary title. Where Maori had customary title, that title existed as a burden on the Crown's radical title. Customary title can only be extinguished by consent or in accordance with express statutory authority. However, the Court recognised that this would by no means make customary title easy to establish. The Court of Appeal judgments downplayed the significance of the decision, in light of the

³⁶ See Andrew Erueti "Translating Maori Customary Title into a Common Law Title" [2003] NZLJ 421.

limited question the Court was answering.³⁷

Nevertheless, the significance of the decision was that the claims of Maori to customary title in the foreshore and seabed were found to be within the jurisdiction of the Maori Land Court and could, and would, be heard, unless the government legislated to preclude this occurrence or won an appeal to the Privy Council. The Crown chose not to take an appeal or to allow the claims to play out in the court system and instead began to develop policy with a view to legislating.³⁸

B Title in the Foreshore and Seabed after *Ngati Apa*

Following *Ngati Apa*, the status of foreshore and seabed land is unclear, as are the processes for clarifying it.³⁹ Both the Maori Land Court and the High Court have jurisdiction to determine the status of foreshore and seabed land. The Maori Land Court has exclusive jurisdiction to effectively convert Maori customary land into Maori freehold land.⁴⁰ Maori Land Court precedent suggests that the Court was willing and able to deal with foreshore and seabed land on the same basis as dry land.⁴¹ However, Tipping J adverted to the possibility that the Maori Land Court could have declined to make vesting orders creating Maori freehold in the foreshore and seabed, or could have done so only in very limited circumstances or with conditions on the title.⁴²

The Maori Land Court and High Court would develop tests for the declaration of customary title, and for its conversion to freehold in the instance of the Maori Land Court. The likely form of these tests is a matter of much dispute and was considered before the Waitangi Tribunal in its urgent hearing on the Government's foreshore and seabed

³⁷ *Attorney-General v Ngati Apa*, above n 3, para 129 Keith and Anderson JJ.

³⁸ However, another respondent, Port of Marlborough, lodged an appeal with the Privy Council which remains live.

³⁹ See Richard Boast "Maori Proprietary Claims to the Foreshore and Seabed after *Ngati Apa*" (2004) 21 NZULR 1, 10-11.

⁴⁰ There is dispute as to whether the Maori Land Court's power under section 131 to declare Maori customary land status is a constitutive power. See "Maori Proprietary Claims to the Foreshore and Seabed after *Ngati Apa*", above n 39, 11.

⁴¹ See *Kauwaeranga*, above n 33, and *Ngakororo*, above n 34.

⁴² *Attorney-General v Ngati Apa*, above n 3, para 196.

policy.⁴³ In his evidence before the Tribunal Paul McHugh advanced the likelihood of a “bundle of rights” approach to native title, as applied in Australia. The Waitangi Tribunal also accepted McHugh’s evidence that the test for native title applied in New Zealand would likely retain the preservative nature of the doctrine of native title and accordingly some form of continuity test, but not so strict a test as to freeze customary rights in their 1840 position.

These tests are of little moment if McHugh’s prediction of the significance of *Commonwealth v Yarmirr*⁴⁴ for determinations of native title in the foreshore and seabed is accepted. Before the Waitangi Tribunal, McHugh forecast that New Zealand courts would follow the majority decision in *Yarmirr* that exclusive native title in the sea and seabed was unrecognisable at common law.⁴⁵ One dissenting judgment in *Yarmirr* denied the possibility of common law recognition of any customary rights in the seabed and is highly unlikely to be adopted in New Zealand given the position articulated in *Ngati Apa*. In another dissent, Kirby P proposed the possibility of exclusive title qualified by common law rights of public access and so forth. McHugh predicted, and the Waitangi Tribunal agreed, that New Zealand’s Court of Appeal would be unlikely to adopt Kirby P’s approach.⁴⁶ This prediction was essentially based on the nemo dat principle: the Crown’s inability to grant seabed title that it does not itself hold at common law. The requisite underlying assumption that the seabed is a “special juridical space” was challenged by claimant counsel in the Waitangi Tribunal. There are arguments against the conclusiveness of English common law on the possibility of exclusive title, especially when seeking to apply it in the New Zealand context where the Treaty relationship is relevant.

V THE FORESHORE AND SEABED BILL

In essence, *Ngati Apa* raised the possibility of Maori still holding native title in some areas below the high tide mark, potentially convertible into freehold title. While this

⁴³ Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071* (Legislation Direct, Wellington, 2004) 49-61.

⁴⁴ *Commonwealth v Yarmirr* (2001) 184 ALR 113 (HCA).

⁴⁵ Paul McHugh “Brief of Evidence to the Waitangi Tribunal Inquiry into Foreshore and Seabed Issues” (13 January 2004) 25-29.

decision came as no surprise to much of the academic and legal community, the government reacted in shock. In what has been described as an appearance of a lack of understanding of the decision,⁴⁷ the government made hasty comments on the decision before producing a discussion document. The discussion document released in August 2003 set out the four main principles on which the government planned to base foreshore and seabed legislation. These four principles were access, regulation, protection and certainty.⁴⁸

The release of the discussion document was followed by a round of hui, presented by the government as consultation hui but derided by critics as a charade.⁴⁹ Rejection of Crown policy at these hui was near unanimous. In December further details of the policy were released.⁵⁰ The Foreshore and Seabed Bill as introduced represents in large part the substance of the policy documents with little alteration.

The key features of the Bill are the extinguishment of all customary rights in the foreshore and seabed, the substitution of different statutory rights, the vesting of the foreshore and seabed in the Crown, and the alteration of the High Court and Maori Land Court jurisdictions accordingly. The foreshore and seabed vested in the Crown is the "public foreshore and seabed", defined by the Bill to mean all foreshore and seabed land not subject to a specified freehold interest.⁵¹

The Bill extinguishes all rights and interests in the foreshore and seabed held at

⁴⁶ *Report on the Crown's Foreshore and Seabed Policy*, above n 43, 50-56 and 60.

⁴⁷ See Jim Evans "Untangling the Foreshore" (25 May 2004) <<http://www.publicaddress.net>> (last accessed 28 August 2004).

⁴⁸ Meaning access for all New Zealanders, regulation by the Crown, protection of Maori customary rights, and certainty for the Crown and for users of the foreshore and seabed. Office of the Deputy Prime Minister "The Foreshore and Seabed of New Zealand: Protecting Public Access and Customary Rights" (18 August 2003).

⁴⁹ Maori are faced with a difficult dilemma over whether or not to participate in hui which might be seen as farcical. The hui are an opportunity to state a viewpoint and potentially engage with the government as required by the Treaty partnership principle, but if the good faith is one-sided participation in the hui may simply give legitimacy to an inadequate policy formulation process.

⁵⁰ The December policy details contained few changes from the August document. The extinguishment of title other than native title was no longer being considered. Office of the Deputy Prime Minister "Foreshore and Seabed: A Framework" (17 December 2003).

⁵¹ Foreshore and Seabed Bill 2004, no 129-1, cl 4.

common law and Maori customary law and removes the corresponding jurisdiction of the Maori Land Court and High Court to rule on these rights and interests. The Bill instead “establishes a comprehensive framework for recognising rights and interests in the foreshore and seabed”.⁵² There are three different forms of statutory right created under the Bill: ancestral connection orders from the Maori Land Court, customary rights orders from either the High Court or the Maori Land Court, and territorial customary rights declarations from the High Court.

A Ancestral Connection Orders

Under the Bill, ancestral connection orders will be available from the Maori Land Court, or directly from the government as a result of negotiation.⁵³ They will recognise a group’s ancestral connection to a certain area with a view to having that group take part in decisions about that area. Clause 39 of the Bill sets out the test to be met to qualify for an ancestral connection order:

- (1) The Maori Land Court may make an ancestral connection order only if it is satisfied that the order will apply to an established and identifiable group of Maori-
 - (a) whose members are whanaunga; and
 - (b) that has had since 1840, and continues to have, an ancestral connection to the area of the public foreshore and seabed specified in the application.
- (2) The Maori Land Court must have regard to tikanga Maori when exercising its jurisdiction under subsection (1).

The stated test is by no means clear, especially the undefined term “ancestral connection”, and will require a great deal of development by the Court. It appears to be a fairly high threshold relative to that used in comparable overseas jurisdictions, particularly the Canadian “right to land” approach which has as its start-point aboriginal title by virtue of occupation at acquisition of sovereignty.⁵⁴

⁵² Foreshore and Seabed Bill 2004, no 129-1 (explanatory note) 1.

⁵³ See generally Foreshore and Seabed Bill 2004, no 129-1, cls 35-56.

⁵⁴ See *Delgamuukw v British Columbia* [1997] 3 SCR 1010. See also Jim Evans’ comments in Bruce Ansley “Stakes in the Sand” *The Listener* (6 May 2004) New Zealand.

The value of an ancestral connection order has been questioned. Writing for Te Ope Mana a Tai, Annette Sykes suggests that ancestral connection orders offer Maori nothing new.⁵⁵ References to ancestral connection holders are being added to parts of the Resource Management Act where iwi authorities currently have rights.⁵⁶ This indicates to Sykes that iwi authority status already provides all that ancestral connection orders might. Similarly, the clause 111 provision for ancestral connection orders to be negotiated directly with the Crown is cited as evidence that the same recognition is currently available through the Treaty settlement process.

B Customary Rights Orders

Customary rights orders will be declarations from the Maori Land Court (for Maori)⁵⁷ or the High Court (for Maori whose claim cannot be brought before the Maori Land Court and for non-Maori)⁵⁸ of a customary use right, not equivalent to any form of title. To qualify for an order the applicants must prove that they are an identifiable group who have continued to carry out a practice integral to their culture (tikanga Maori in the case of applicants to the Maori Land Court) in accordance with their custom, largely uninterrupted since 1840.⁵⁹ The test in the Maori Land Court has an extra hoop: Clause 42(2)(b)(iii) provides that a right is considered extinguished if any right legally inconsistent with the right claimed has been established.

The need for customary rights orders is questionable. If the practice is not illegal, then no order should be needed to make it possible to continue that practice. Equally, Maori interests, including rights of customary practice, should be considered under the Resource Management Act as it stands. Additionally, the standard of proof is stringent, especially the requirement that the practice be integral to the applicant group's culture. This is a standard some customary practices may not meet. The test also does not take into

⁵⁵ Annette Sykes "Analysis of the Foreshore and Seabed Bill" <<http://www.kahungunu.iwi.nz>> (last accessed 28 August 2004).

⁵⁶ Foreshore and Seabed Bill 2004, no 129-1, cls 79-87.

⁵⁷ See generally Foreshore and Seabed Bill 2004, no 129-1, cls 35-56.

⁵⁸ Foreshore and Seabed Bill 2004, no 129-1, cls 59-61.

⁵⁹ See clause 42 for the criteria to be met in the Maori Land Court, and clause 61 for those to be applied in the High Court.

account the developments in the common law relating to customary rights – especially the right to development of customary practice.⁶⁰ The Bill's standard effectively freezes customary practice as it was in 1840.

C Territorial Customary Rights Declarations

Territorial customary rights declarations are declarations the High Court can make stating that “a collection of rights” amounting to “a right to exclusive occupation and possession of a particular area that is included in the public foreshore and seabed” would have existed at common law had the Bill not been enacted.⁶¹ This provision was added to the Bill after controversy caused by the removal of the High Court's inherent jurisdiction under the initial policy proposals. Although this is not the same as a statement that the claimants would have been entitled to a conversion of title to fee simple under *Te Ture Whenua Maori*, it is the Bill's recognition of aboriginal title. The Attorney-General and Minister of Maori Affairs are obligated to “enter into discussions” with holders of territorial customary rights declarations to “consider the nature and extent of any redress that the Crown may give”.⁶² This is the full extent of the Bill's provision for redress for loss of what would at common law have been a right to exclusive occupation and possession. The Waitangi Tribunal discussed the use of the term redress, and the difference between redress and compensation, considering redress to be an unacceptable remedy for a contemporary removal of property rights.⁶³

The usefulness of a territorial customary rights declaration is questionable because negotiation with the government can equally be entered into directly without such a declaration. Nevertheless, the presence of this clause in the Bill is an implicit acknowledgement that there could have been native title rights to exclusive possession, an admission that the Crown is generally reluctant to make.

⁶⁰ The Bill departs from established international jurisprudence, for example *R v Van der Peet* [1996] 2 SCR 507, and New Zealand jurisprudence on the right to development *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

⁶¹ See generally clauses 28-34. The quotations come from clause 28.

⁶² Foreshore and Seabed Bill 2004, no 129-1, cl 33.

The use of the term "collection of rights"⁶⁴ is evocative of the Australian "bundle of rights" approach to native title. The list in clause 31 of matters the High Court may take into account when determining territorial customary rights declarations includes considerations like those used in Australian courts to test for native title. However, these references cannot be taken to indicate a complete importation of Australian case law. The possibility of the existence of exclusive native title in the foreshore and seabed is contrary to the majority decision in *Yarmirr* that there could not be exclusive native title in the seabed. While the Bill points to the application of an Australian bundle of rights approach, this is not explicit and there is still uncertainty about the standard of proof set by the Bill.

VI THE WAITANGI TRIBUNAL REPORT

The Waitangi Tribunal's urgent hearing and resultant *Report on the Crown's Foreshore and Seabed Policy*⁶⁵ focussed on the substance of the policy rather than the process followed to develop that policy. While the Tribunal was looking at the Bill from the point of view of consistency with the Treaty of Waitangi, much of its reasoning may equally be applied to a section 19 discrimination determination.

The Waitangi Tribunal dealt with the Treaty of Waitangi consistency of the government's foreshore and seabed policy before it had reached Bill stage. The changes made and detail added in the transition from policy to Bill are sufficiently insignificant that the Tribunal's report remains relevant, despite the fact that many of the changes were at least partially in response to the Tribunal's report.⁶⁶ The most significant alteration to the

⁶³ *Report on the Crown's Foreshore and Seabed Policy*, above n 43, 114 footnote 95 and 136.

⁶⁴ Foreshore and Seabed Bill 2004, no 129-1, cl 28.

⁶⁵ *Report on the Crown's Foreshore and Seabed Policy*, above n 43.

⁶⁶ The Bill abandoned the unclear concept of vesting in the "public domain" that had appeared in the policy and substituted the vesting of the foreshore and seabed in the Crown. Vesting in the Crown rather than vesting in the undefined "public domain" is more likely to import Treaty principles and obligations and other Crown duties (perhaps the developing fiduciary duty doctrine). The Bill refers to ancestral connection and not to customary title to avoid the implications of customary title which clearly were not intended by the term's use in the Bill. The Bill abandons both the proposed roving commission on Maori customary title and the proposed working groups on Maori involvement in coastal marine management, in favour of more direct approaches. Customary use rights are available via the High Court to non-Maori who meet the stringent criteria (being an identifiable group who have exercised a right integral to that group's character without substantial interruption since 1840). Customary use rights are decoupled from ancestral connection orders in the Bill. The interrelation of the Bill and the Resource Management Act 1991 was also (immaterially)

Bill since the report is perhaps the addition of the territorial customary rights provisions purportedly facilitating redress for claims of rights that would have amounted to territorial customary rights but for the Bill.⁶⁷

In its report the Tribunal did not expressly state that it found the government's foreshore and seabed policy to be discriminatory. It instead used the term "unfair", stating:⁶⁸

The policy is unfair because it treats Maori customary property rights in the foreshore and seabed differently from all other rights. [...] All other existing private and public rights are protected. Where other classes of private rights amount to ownership there is every indication that the rights will be bought following negotiation, or their owners compensated for their forcible removal.

The Tribunal summarises this point:⁶⁹

The policy is in violation of the rule of law, because it takes away the right of only one class of citizens to have their property rights defined by the courts, without consent or a guarantee of compensation.

VII THE ATTORNEY-GENERAL'S VET

Section 7 of the Bill of Rights Act requires the Attorney-General to "bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms in [the] Bill of Rights". In the case of a government Bill like the Foreshore and Seabed Bill, section 7 requires that the report is made on the Bill's introduction to Parliament. Practice has developed that the Attorney-General will not alert the House to every prima facie breach of a BORA right or freedom, but will instead report only breaches that are not considered to satisfy the section 5 requirement of demonstrable justifiability in a free and democratic society. Although

changed. Other changes relate to the appeals process, esplanade reserves and reclamations.

⁶⁷ But see Part V C Territorial Customary Rights Declarations regarding the Waitangi Tribunal's comments on redress.

⁶⁸ *Report on the Crown's Foreshore and Seabed Policy*, above n 43, 124.

formal reporting to the House under section 7 is rare, every Bill put before the House is analysed by the Attorney-General and her staff for BORA consistency.

In her analysis of the Foreshore and Seabed Bill, the Attorney-General found that "there is a significant argument for a prima facie breach"⁷⁰ of the BORA section 19 right to freedom of discrimination in that the Bill discriminates against Maori on the grounds of race by treating "the holders of "specified freehold interests" and Maori customary landowners differently (the [latter's] rights are extinguished while the [former's] rights are preserved)".⁷¹ In applying the test for comparative disadvantage, the Attorney-General compares the positions of holders of foreshore and seabed land under "specified freehold interests" and under common law customary Maori title. This choice of comparator groups may be obscuring the degree of discrimination. By referring to those who own Maori customary land, rather than to those who might, but for the Bill, have been able to gain freehold title in the foreshore and seabed, the Attorney-General is making reference to a group with lesser interests than the maximum available after *Ngati Apa*.

The Attorney-General then goes on to justify the discrimination in the Bill as a justified limit on the right to freedom from discrimination, as allowed by BORA section 5. She states the test she applies as: "whether the law or action infringes the right in question 'as little as is reasonably possible'".⁷² The Attorney-General makes a questionable claim that this test is consistent Richardson J's extra-judicial statement that section 5 requires:⁷³

[A] utilitarian assessment of the public welfare in determining whether setting reasonable limits on a protected right is justified. On its face, that involves a Brandeis brief inquiry where the Court undertakes an extensive empirical examination supported by economic,

⁶⁹ *Report on the Crown's Foreshore and Seabed Policy*, above n 43, 124.

⁷⁰ Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990 (6 May 2004) <<http://www.justice.govt.nz>> (last accessed 28 August 2004) para 2.1.

⁷¹ Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70, para 56.

⁷² Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70, para 50.

⁷³ Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70, para 83, citing Sir Ivor Richardson "Rights Jurisprudence – Justice

statistical, and sociological data, makes a cost-benefit analysis of the effects of various policy choices and chooses the solution which best reflects a balancing of the values involved.

The Attorney-General's section 5 analysis of the Bill seems to be based much more on Richardson J's cost-benefit analysis than on the minimal infringement test well established in New Zealand and international human rights jurisprudence.⁷⁴

In her report the Attorney-General makes reference to Canadian and Privy Council decisions suggesting that the courts display deference to the legislature on matters of policy.⁷⁵ However, the Attorney-General recognised United States jurisprudence approved in New Zealand in *Quilter* that where "the proscribed ground of discrimination in issue is race, the scrutiny applied by the courts is more searching and, correspondingly, the margin of appreciation allowed to the government is narrower".⁷⁶

New Zealand's High Court has ruled that the reporting in accordance with section 7 is a proceeding of Parliament and is accordingly not judicially reviewable.⁷⁷ However, a BORA challenge to the foreshore and seabed legislation would effectively be a consideration by the Court of the same substantial matters as considered by the Attorney-General. The Court could easily question the weight the Attorney-General places in her vet on the need for certainty without providing substantial evidence of costs of uncertainty.⁷⁸

for All?" in P Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 82.

⁷⁴ See Part II C 2 Reasonable limits demonstrably justifiable in a free and democratic society.

⁷⁵ Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70, paras 49-51.

⁷⁶ Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70, para 52.

⁷⁷ *Mangawaro Enterprises Ltd v Attorney-General* [1994] 2 NZLR 451 (HC).

⁷⁸ The Attorney-General refers to the "substantial uncertainties created by the Court of Appeal's decision" (para 3), stating, "Much policy-making in relation to the foreshore and seabed has, in the past, been based on the analysis of the Court in *Ninety-Mile Beach*" (para 4). Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70.

VIII THE SUBSTANTIVE MERITS OF A CLAIM FOR BREACH OF BORA SECTION 19

A Prima Facie Discrimination

1. Comparative disadvantage

The prima facie breach of section 19 would appear not to be in issue, given the Attorney-General's admission in her report on the Bill.⁷⁹ However, Deputy Prime Minister Michael Cullen has emphasised that the Attorney-General conceded only that a prima facie breach *may* exist.⁸⁰ The Deputy Prime Minister argued that the line of reasoning finding the Bill to be discriminatory "rests upon an assumption that the Crown will not negotiate in good faith."⁸¹ Because negotiation with the Crown is the only way to gain redress for lost property rights, redress is indeed dependent on good faith. The Deputy Prime Minister's argument appears to invert the reasoning supporting a finding of prima facie discrimination. Even without making the assumption Dr Cullen refers to, Maori are being treated differently to the general population in that redress for lost customary title is reliant on good faith negotiation, meaning compensation is not guaranteed. This weakens customary title, increasing its vulnerability relative to specified freehold interests.

Dr Cullen argues that the limited and incomplete nature of the sorts of Maori customary interests that the Bill removes makes their dollar-value difficult to determine, rendering negotiation of a combination of financial and other forms of redress most appropriate. This argument is likely to be accepted by all parties to a discrimination challenge. The Deputy Prime Minister then reasons that negotiation must be at the Crown's discretion without the veto of a third party because cession of ultimate decision-making power to an independent body would "inevitably" reduce the flexibility of redress options. Accepting this argument requires the prioritisation of the flexibility available to the Crown

⁷⁹ Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70, para 2.1.

⁸⁰ Hon Michael Cullen (Address at Human Rights Commission Speakers Forum: Human Rights and the Foreshore and Seabed, Wellington, 1 June 2004).

when negotiating directly and unsupervised with Maori, over the benefit to Maori of the guarantee of redress offered by the authority of a third party to enforce redress. This prioritisation is difficult to accept. The parallel Dr Cullen draws with the good faith demonstrated by successive governments in Treaty settlement negotiation is also unpalatable. Here Dr Cullen seeks to justify the enforcement of a new loss by pointing to negotiations that have taken place for past losses. No other sector of society is asked to accept so fragile a reward for loss of interests.

Once discrimination is established, it is necessary to determine the extent of the discrimination, by discerning the effect of the legislation on Maori and comparing that effect with the effect on a relevant comparator group. To ascertain the effect of the legislation on Maori a comparison needs to be made between the position Maori are in before the passage of the Bill and the position they would were the Bill to be enacted in its current form.

Deputy Prime Minister Michael Cullen said, "If a bird in the hand is worth more than two in the bush, it is most certainly worth more than a mythical bird whose existence is very much in doubt."⁸² While exactly what Maori are to lose under the Bill is unclear, the Waitangi Tribunal expressly rejected the Crown contention that the Bill benefits Maori.⁸³ After *Ngati Apa*, Maori have no actual title declared in the foreshore and seabed, but the potential for that title exists. After *Ngati Apa*, Maori have the opportunity to take claims in the foreshore and seabed to the Maori Land Court or High Court for a declaration of customary title. Based on the evidence of Paul McHugh in the Waitangi Tribunal, the Courts would develop tests for native title drawing on those used in comparable jurisdictions, most likely a combination of Canadian and Australian tests, requiring a degree of continuity of connection to the claimed land. McHugh's evidence on the strength of the *Yarmirr* precedent against native title in the foreshore and seabed was approved by the Tribunal, but ultimately the Tribunal found that if a declaration of customary title was obtained, it could under certain circumstances be translated to Maori freehold title by the

⁸¹ Hon Michael Cullen, above n 80.

⁸² Hon Michael Cullen, above n 80.

Maori Land Court under Te Ture Whenua Maori 1993.⁸⁴ Under the Bill, this inchoate freehold title becomes at best a territorial customary rights order, entitling the holder to enter discussions with the Attorney-General and the Minister of Maori Affairs. The only Maori property rights in the foreshore and seabed under the Bill are those recognised by customary rights orders.

B Section 5 Analysis

This loss for Maori is to be compared with the effect of the Bill on a relevant comparator group. If the holders of "specified freehold titles" in the foreshore and seabed⁸⁵ are used as the comparator group (as is most obvious) it is clear that Maori are suffering a comparative disadvantage. Specified freehold titles are not affected by the Bill. Fair consideration will be received if they are sold to the Crown.

2 Human dignity approach

Adoption of the Canadian human dignity approach to rights interpretation would further strengthen the case for a declaration. The Canadian Supreme Court stated in *Law v Canada*:⁸⁶

Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within [...] society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

A human dignity approach to the foreshore and seabed legislation could take into account the generations of disadvantage and prejudice suffered by Maori in New Zealand with Crown sanction. A human dignity approach to interpretation would allow for the Treaty relationship to become more significant to the determination of discrimination.

⁸³ *Report on the Crown's Foreshore and Seabed Policy*, above n 43, xiii.

⁸⁴ *Report on the Crown's Foreshore and Seabed Policy*, above n 43, 75.

⁸⁵ These title holders can include Maori.

⁸⁶ *Law v Canada*, above n 27, 530.

Taking account of the historical circumstances would mean viewing the Bill in the context of alienation of Maori land by Treaty breach.⁸⁷ Also relevant would be the past of the Maori Land Court and its use as a tool of land alienation, making alterations to its jurisdiction when it appears to be working in favour of Maori particularly unfair.

B Section 5 Analysis

Proceeding on the basis that the Bill is prima facie discriminatory, the issue to be decided by the Court would be whether the limit on the right to freedom from discrimination contained in the Bill is a reasonable limit justifiable in a free and democratic society. This would require the balancing of the extent of the discrimination on one hand and the public interest goals to be met by the Bill on the other. This balancing exercise has to take place in light of the nature of New Zealand's free and democratic society.

Once the Court had established the extent of the infringement on the right, as detailed in the initial step of determination of prima facie discrimination, the significance of the values underlying section 19 would need to be considered. The values underlying section 19 are of great importance to New Zealanders and to all free and democratic societies. Freedom from discrimination is based on democratic ideals of equality and fairness. The right to freedom from discrimination requires accordingly fierce protection. The significance of these values makes a Court less likely to approve infringement on this right than on other rights underscored by less fundamental values.

The next factor for the Court to consider in a section 5 reasonable limitation analysis is the significance of the legislative objectives of the Bill. The aftermath of the release of the *Ngati Apa* decision showed that public access to the foreshore and seabed (although often inaccurately and emotively presented as access to beaches) is considered by the wider New Zealand public to be a matter of great importance, indeed a "right".⁸⁸ Another goal of the Bill is to remedy uncertainty by clarifying title in the foreshore and

⁸⁷ Especially the raupatu of the 1860s.

⁸⁸ As illustrated by the "Beaches for All" campaign mounted by the National Party.

seabed in order to facilitate management of the area under the Resource Management Act 1991 and other controlling statutes. The significance of this goal is disputed. The Crown contends that the costs associated with waiting for certainty to be achieved without legislation will be great.⁸⁹ While this is a matter on which no conclusive evidence is available, some concrete fears have been expressed about the economic risks associated with the foreshore and seabed fracas.⁹⁰ Deputy Prime Minister Michael Cullen spoke of threats to the operation of the Resource Management Act posed by claims hapu and iwi.⁹¹ In the explanatory note to the Bill it is stated that 2500 coastal permits are issued annually under the Resource Management Act 1991. The explanatory note states that concerns that without legislation these consents would be decided against an uncertain legal background with regional councils not knowing whether they could grant consents before the resolution of title.

It is interesting to note that in British Columbia analysis has shown that it is economically viable for the government to take the requisite time to negotiate Treaty settlements acceptable to the local indigenous population, even taking into account revenues forgone in the interim on Crown land subject to negotiation.⁹²

Broadly, the Bill achieves all the policy goals set out in the August policy proposals, satisfying the requirement of "effectiveness of intrusion". The achievement of these goals is not, however, as absolute as government representations might suggest. The right of access contained in clause 6 is limited to the "public" foreshore and seabed, excluding all areas of the foreshore and seabed covered by specified freehold interests. Notably, the access right is a right "in, over, or across" the public foreshore and seabed, not an access

⁸⁹ *Martin v Tauranga District Court* [1995] 1 NZLR 491, 497-498 (HC) Blanchard J is authority for the proposition that administrative convenience or budgetary constraints are not justification for abrogating a right.

⁹⁰ Kevin Taylor "Government Moves to Allay Fear Over Seabed Bill" (10 August 2004) *The New Zealand Herald* Auckland.

⁹¹ Hon Michael Cullen, above n 80.

⁹² See Government of British Columbia Treaty Negotiations Office <<http://www.prov.gov.bc.ca/tno/>> (last accessed 28 August 2004), where Premier Mike Harcourt is quoted as saying on 1 December 1995 in an address to the Premier's Working Session on Treaties, Vancouver, British Columbia, "It is clear to me that the benefits ... in self-reliance for aboriginal communities, in certainty and security for us all ... in a fairer, economically more-prosperous province ... far outweigh the costs."

right "to" the foreshore and seabed (much to the relief of Federated Farmers as a representative of the owners of much of the land adjacent to the foreshore and seabed).⁹³ Clauses 21 and 24 of the Bill allow for the Crown to place regulatory limitations on access. Clause 12 allows the alienation of the foreshore and seabed by special Act of Parliament or under certain Resource Management Act provisions.⁹⁴

Accepting the intrusion's effectiveness, there is an issue as to the degree of intrusion on the right. Issues of proportional and minimal intrusion would come to the fore.

In looking at the proportionality of an intrusion on a right in relation to the interest the intrusion serves, it is necessary to consider other ways in which the public policy interest could have been met with less or no infringement on the right at issue. Numerous suggestions have been put forward. The Waitangi Tribunal made six suggestions.⁹⁵ The first was a "longer conversation": delaying decision making to allow for consultation and consensual compromise. The second was to "do nothing", allowing the claims for title to play out without legislative intervention. The third option was more limited legislative intervention, legislating perhaps only for public access and inalienability. The Tribunal's third suggestion was an improvement to the Courts' "tool kit" – perhaps by creating a customary interest registration system. The Tribunal also adopted Sir Hugh Kawharau's recommendation of the method used in Ngati Whatua's rohe to recognise the mana of the iwi in a management framework for land. The Tribunal's sixth suggestion was the adaptation of the schemes used for lakebeds.

The lack of guaranteed just compensation under the Bill for the loss of rights is a further discriminatory aspect and does not go towards achieving any of the stated legislative objectives.⁹⁶ Compensation on just terms could be guaranteed by the

⁹³ Clause 6(2) contains the words "in, over, or across". The reaction of Federated Farmers President Tom Lambie is reported in Bruce Ansley, above n 54.

⁹⁴ Clause 12 is framed as a prohibition on the alienation of the foreshore and seabed with these two exceptions. Arguably parliamentary sovereignty precludes Parliament from binding future Parliaments not to alienate the foreshore and seabed and this clause is just recognition of that reality.

⁹⁵ *Report on the Crown's Foreshore and Seabed Policy*, above n 43, 138-143.

⁹⁶ See *Report on the Crown's Foreshore and Seabed Policy*, above n 43, 143.

introduction of independent arbitration.

On this analysis the Courts would have ample room to declare the foreshore and seabed legislation inconsistent with BORA section 19. A declaration of inconsistency is the primary remedy available for legislation found to breach a BORA right.⁹⁷ While jurisprudence is developing regarding awards of damages for BORA breaches,⁹⁸ there is no indication that damages would be considered for breach of BORA by valid legislation.

IX THE COURTS' JURISDICTION TO ASSESS A BILL FOR BORA CONSISTENCY

In *Te Runanga o Wharekauri Rekohu Inc v A-G (Wharekauri)*, the Court of Appeal found "an established principle of non-interference by the Courts in parliamentary proceedings."⁹⁹ The Court in *Wharekauri* did not provide decisive guidance on the basis and status of the principle or rule, but was certain that it extended to preventing the Court from interfering in the presentation of a Bill to Parliament by a Minister.¹⁰⁰ Because the Foreshore and Seabed Bill has already been introduced, the *Wharekauri* ratio is not directly on point. The relevance of the decision in *Wharekauri* to the jurisdiction of a New Zealand court to make a determination on the BORA status of a Bill lies in the basis of the rule, which can be seen discussed in *Eastgate v Rozzoli*.¹⁰¹ In a comprehensive survey of the relevant authorities in common law jurisdictions, Kirby P acknowledged that it is not unheard-of for the courts or the legislature to intrude on the other's internal arrangements but stated that it was rarer (and likely to remain so) for the intervention to be on the part of the courts.¹⁰² The Court in *Wharekauri* (citing *Eastgate v Rozzoli*) stated that "the proper time for challenging an Act of a representative legislature, if there are any relevant

⁹⁷ Moonen, above n 7.

⁹⁸ See for example *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

⁹⁹ *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 307 (CA). See the extra-judicial comments of the Rt Hon Dame Sian Elias in Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (Address to the Institute for Comparative and International Law, University of Melbourne, 2003) 12-13.

¹⁰⁰ *Wharekauri*, above n 99, 308.

¹⁰¹ *Eastgate v Rozzoli* (1990) 20 NSWLR 188 (CA).

¹⁰² *Eastgate v Rozzoli*, above n 101, 193.

limitations, is after the enactment."¹⁰³

It could be argued that because the Court would only be making a declaration of inconsistency under BORA, and not exercising a power to strike down legislation or asserting a power to prevent the passage of a Bill, the reasoning in the above cases is less applicable. This argument is likely to be unappealing to a New Zealand Court, especially taking into account pragmatic concerns like the increased assertion of parliamentary sovereignty by the House and the apparent fragility of constitutional conventions supporting the separation of powers. In *Eastgate v Rozzoli* Kirby P considered the fact that the Court might have "grave difficulty" enforcing an order restraining the Parliament from presenting a Bill for the Royal Assent.¹⁰⁴ This practical consideration indicates the high degree of pragmatism likely to be at work in judgments involving potential interference in the realm of another branch of government.

It would appear that the earlier in the progress of the Bill through Parliament a declaration of inconsistency was available, the more useful that declaration would be to the legislative process. However, the role of checking for BORA consistency before enactment has been given to the Attorney-General under BORA. Because this is a non-reviewable power, a Court challenge to the foreshore and seabed legislation can only proceed after enactment.

X OTHER FACTORS TO BE CONSIDERED

A BORA Section 6

A BORA-consistent reading of the legislation may be attempted in accordance with BORA section 6. This is unlikely to be successful because the discriminatory aspects of the Bill are integral parts of it. A meaning adopted under section 6 in order to read a provision as consistent with BORA must not be a "strained" meaning.¹⁰⁵ The wealth of external aids to interpretation of the legislation – including the Bill's explanatory note – precludes any

¹⁰³ *Wharekauri*, above n 99, 308.

¹⁰⁴ *Eastgate v Rozzoli*, above n 101, 193.

interpretation of the legislation that does not contain its discriminatory aspects.

B Other Possibilities for a Section 19 Challenge

There are wider issues that could be considered in the scope of a challenge to the foreshore and seabed legislation on discrimination grounds. The essentially weak nature of common law native title and its deference to conflicting interests is a significant issue – perhaps of a more global nature. Within the Bill the prominence of conflicting non-indigenous rights over Maori customary rights is perhaps independent cause for challenge on grounds of discrimination. A discrimination challenge may also be possible on the grounds that the Bill places some iwi at a disadvantage relative to other iwi. Due to the preservative nature of native title at common law, the Bill will ultimately provide stronger claims to the coastline for iwi who have retained ownership of the contiguous land. Those iwi who have lost contiguous land through Treaty breaches will have the effect of the historical loss intensified because it will translate to a weaker claim in the foreshore and seabed under the Bill. While this comparative disadvantage stems more from the nature of native title than from the provisions of the Bill, this is no justification for the Bill's perpetuation of this discriminatory effect. The Bill establishes "a new legal scheme"¹⁰⁶ which surely has room for innovative approaches to issues of discrimination in the common law.

C Other BORA Rights Threatened by the Bill

Other BORA rights potentially affected by the Bill are the section 20 right to minority culture, the section 21 right to freedom from unreasonable seizure and the section 27 right to natural justice. The Attorney-General has dismissed these potential breaches much more easily than she dismissed the prima facie breach of section 19. She did so by interpreting section 20 as satisfiable without title, section 21 as a protection of privacy rather than property and section 27 as a guarantee of merely procedural equality. The Attorney-General's easy dismissal of these potential breaches is an indication that these claims have a more limited likelihood of success than does a section 19 action.

¹⁰⁵ *Noort*, above n 11, 272 (CA) Cooke P.

D Recourse to International Human Rights Bodies

Maori recourse to international human rights bodies is obviously a possibility considered by the Attorney-General.¹⁰⁷ The Bill is already being challenged in international human rights protection fora. In its sixty-fifth session, the United Nations Committee on the Elimination of Racial Discrimination¹⁰⁸ sent a letter to the New Zealand government requesting information on the Bill by 20 September 2004.¹⁰⁹ This is a strong indication that the Committee will pass comment on the Bill. The potential breaches of human rights contained in the Bill have also been brought to the attention of the United Nations Permanent Forum on Indigenous Issues,¹¹⁰ the United Nations Working Group on Indigenous Populations¹¹¹ and the United Nations High Commissioner on Human Rights.¹¹² International attention to human rights breaches raises the international and domestic profile of the discriminatory action and puts pressure on the government.

It is beyond the scope of this paper to consider the prospects for challenges to the legislation other than under BORA section 19, but these possibilities are being considered and pursued by iwi advocates and need to be taken into account when contemplating challenges to the legislation.

XI CONCLUSION

While certainly a landmark judgment, *Ngati Apa* did not have to become the kind of

¹⁰⁶ Foreshore and Seabed Bill 2004, no 129-1, cl 3.

¹⁰⁷ Advice provided to the Attorney-General on the consistency of the Foreshore and Seabed Bill 2004 with the Bill of Rights Act 1990, above n 70, para 102.

¹⁰⁸ The Taranaki Maori Trust Board made a submission to this Committee in early August. "Taranaki Maori Take Seabed Issue to UN" (10 August 2004) <<http://www.stuff.co.nz>> (last accessed 28 August 2004).

¹⁰⁹ United Nations "Committee on the Elimination of Racial Discrimination Concludes Sixty-Fifth Session" (20 August 2004) Press Release.

¹¹⁰ Ngai Tahu were heard at the Forum earlier this year. Te Runanga o Ngai Tahu "Ngai Tahu Takes Case to the United Nations" (11 May 2004) Press Release.

¹¹¹ The Aotearoa Indigenous Rights Trust has tabled an intervention with the Working Group. Aotearoa Indigenous Rights Trust "Aotearoa Indigenous Rights Trust, Tuhoe Nation and International Indian Treaty Council Joint Statement" (23 July 2004) Press Release.

¹¹² Mana Motuhake representatives contacted the Commissioner in May with a view to an investigation "Seabed Issue to be Considered by UN Body" (4 May 2004) *The New Zealand Herald* Auckland.

decision that breeds talk of civil war. The intense politicisation of the issues raised has lifted the stakes in the debate beyond those of foreshore and seabed control. In this environment, a section 19 Bill of Rights Act challenge to the discriminatory aspects of the Government's Foreshore and Seabed Bill is without doubt an option being considered.

The Human Rights Commission declined to address a complaint under the Human Rights Act before the Bill was introduced, and the Courts would almost certainly refuse to hear a challenge until after the Bill's enactment. On the analysis contained in this paper, a section 19 challenge to the legislation would be successful after enactment. The Foreshore and Seabed Bill is an unnecessary sledgehammer when so many other nut-cracking devices are available and there is not consensus that the nut needs to be cracked at all. Adoption of the Canadian human dignity approach to rights interpretation would only increase the chances of the complainants' success by increasing the perception of infringement on the right to freedom from discrimination, thereby making the infringement extremely difficult to justify.

Should the Court find a breach of the Bill of Rights, a declaration of inconsistency would be the only remedy available. In itself, a declaration is only a "lawyers' remedy". Ultimately the importance of a declaration would be the Government reaction. It is possible that the Government would elect to follow the steps set out in the Human Rights Act for responding to declarations and would draw the matter to the attention of the House and recommend action. The Government response would be of constitutional significance, especially in light of the trend towards assertions of parliamentary sovereignty by MPs' words and by Government action.

In essence, a BORA section 19 challenge to the foreshore and seabed legislation probably has very little to offer Maori. After the Bill is enacted it would be too little, too late. The value of a declaration would its usefulness as evidence – in international human rights fora, in the media, and in the future. Instead, progress needs to be made before the passage of the Bill. The CERD Committee's request to the Government for information on the Bill is a sign of such progress.

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