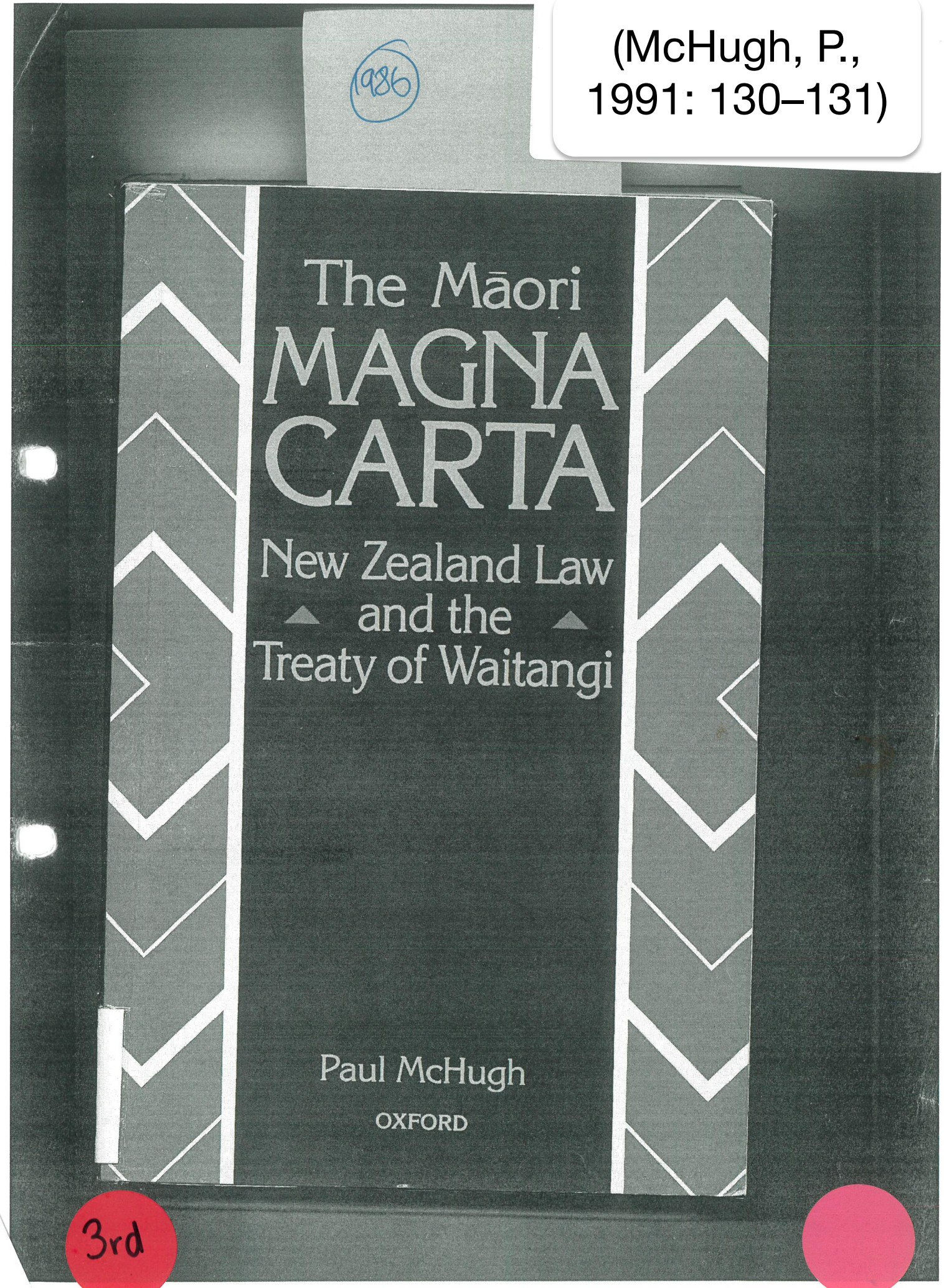
(McHugh, P., 1991: 130–131)

1986



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The Māori Magna Carta

New Zealand Law and the Treaty of Waitangi

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For Pauline

The Supreme Court of Canada has since confirmed its approach in *Guerin*. In *R* v *Sparrow* (1990)) it affirmed that the 'sui generis nature of Indian title and the historic powers and responsibility assumed by the Crown constituted the source of . . . a fiduciary obligation'.[100] The Court proceeded to make comments on the distinction between the *extinguishment* and *regulation* of an aboriginal title, a point discussed later in this chapter.

4 *Te Weehi* v *Regional Fisheries Officer* (1986)

Section 88(2) of the Fisheries Act 1983 provides that nothing in the statute's regulatory scheme shall affect 'Maori fishing rights'. In *Waipapakura* v *Hempton* (1914) the predecessor to section 88(2) was treated as referring to fishing rights conferred by some statute other than the Fisheries Act. This was the received view of the section until the judgment of Williamson J in *Te Weehi* v *Regional Fisheries Officer*.

In 1984 Tom Te Weehi was collecting pāua at Motunau Beach in North Canterbury. Prior to his fishing expedition he had obtained permission from a local Māori elder. As a member of the Ngāti Porou (East Coast), Tom Te Weehi was outside his own tribal region, so Māori custom required leave of the tāngata whenua. He was convicted of taking excessive undersized pāua and other sea food (kai moana). In defending Tom Te Weehi, his counsel relied on section 88(2) as saving the common law aboriginal title right of fishery. On appeal Williamson J agreed and quashed the conviction.

Williamson's judgment contained reference to *Symonds*, in particular Chapman J's comment that the Treaty of Waitangi did 'not assert either in doctrine or in practice anything new and unsettled'. This case indicated that 'treatment of its indigenous peoples under English common law had confirmed that the local laws and property rights of such peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty'.[101] He then proceeded to cite the case-law mentioned in this chapter, including *Campbell* v *Hall* (1774), *Amodu Tijani* v *Secretary, Southern Nigeria* (1921), and the two Canadian important cases *Calder* v *Attorney-General (British Columbia)* (1973) and *Guerin* v *The Queen* (1984). His Honour was thus able to conclude that legislation had not extinguished the common law right of fishery held by the Māori as part of an aboriginal title. On the contrary, section 88(2) specifically excluded the customary fisheries from the statutory scheme.

Williamson's judgment in the *Te Weehi* case is of immense significance.[102] For a start, it rehabilitated the *Symonds* case, undid the

100. [1990] 4 WWR 410 (SCC) at 434.
101. [1986] 1 NZLR 682 at 687.
102. For comment see F.M. Brookfield 'Māori Fishing Rights and the Fisheries Act 1983: Te Weehi's Case' [1987] *Recent Law* 65; Sharp *Justice and the Māori* 82-4.

Wi Parata reasoning, and admitted the common law as a source of right for Māori fisheries alongside any statutory recognition. The Crown did not appeal the judgment, which was approved and has been followed in several recent District and High Court cases.[103] Most crucially, the case establishes that the Māori have a property right in the coastal fisheries. Interestingly, the Crown and the Fishing Industry Board conceded as much in their submissions to the Waitangi Tribunal in the Muriwhenua (1987) and Ngāi Tahu hearings on the tribal fisheries. This property right is defined by Māori customary law. This means that a Māori gathering fish or sedentary shellfish in breach of Māori custom, as by breaking a rāhui (or ban), cannot claim to be exercising the property right. The property right is limited to acknowledged members of the local tribe (the tāngata whenua) and those who fish with their (retractable) permission and subject to their code. The *Te Weehi* case therefore admits a legal pluralism directly into the New Zealand judicial system *without* the aid of any ushering statute. In finding out whether a prosecution can occur under the Fisheries Act, local courts are required to investigate and enforce Māori customary law.

The cases since *Te Weehi* show the courts struggling to understand the implications of the case, both in its view of the legal source of the fishing right, and the status and character of Māori customary law. Many of the cases consider *Te Weehi* to be founded upon a recognition of *Treaty* fishing rights, whereas the judgment clearly relies on the common law aboriginal title.[104] The case-law spawned by *Te Weehi* also shows how courts have had 'to grapple with a number of complex issues when tikanga Maori (Maori law) intersects with the rules of the State's legal system'.[105] It is clear that proof of Māori customary law is a question of fact for a court considering a prosecution under the fisheries regulations. However, questions of admissibility of tribal evidence and onus of proof still remain unresolved.[106] This case-law is still in a formative stage,[107] but it shows local courts adjusting to an unaccustomed legal pluralism. The nature and extent of the tribal customary law of fishery, the effect of a rāhui, and the status of evidence given by kaumātua (elders) are questions common to fisheries cases – a radical change from the routine prosecutions of tribe members in the days before *Te Weehi*.

These are the immediate implications of the *Te Weehi* case, but it also has wider-ranging consequences which will be discussed soon. It may well

103. R. Boast 'Treaty rights or aboriginal rights?' [1990] *New Zealand Law Journal* 32 discusses the case-law (however he wrongly sees Treaty and common law sources of fishing rights as incompatible).
104. See R. Boast 'Treaty rights or aboriginal rights?' *supra*.
105. D.V. Williams 'Māori Issues II' in [1990] *NZ Recent Law Review* 129 at 131.
106. McHugh 'Probative aspects of aboriginal claims' (unpub. 1989).
107. It is discussed in Boast and D.V. Williams, *supra*.

become one of the most important cases in New Zealand's comparatively short legal history.

5 The nature of an aboriginal title

It has sometimes been argued that aboriginal title extends only to lands in the 'actual occupation' of the indigenous claimants. This argument, raised at various times in the early days of the North American colonies, found some support in the Bible, as well as more explicit authority in the likes of Vattel, Locke, and More. Despite occasional attempts by colonial authorities in America during the seventeenth and early eighteenth century, the limitation of aboriginal title to lands 'actually occupied' did not succeed. The recognition of Indian hunting grounds in the Royal Proclamation 1763 itself indicates that. In *Mitchel* v *United States* Justice Baldwin stated:[108]

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals . . .

Similarly Chief Justice William Martin, speaking extra-judicially (1860), noted that every square mile of New Zealand was subject to some Māori claim, which claim was recognized by the local authorities.[109] Indeed an attempt in the mid 1840s to read down the Māori's aboriginal title to those lands in their actual occupation was expressly repudiated by the Crown.[110] The argument that aboriginal peoples took an aboriginal title only over the land over which they had by their labour an immediate and exclusive control never prevailed. The common law relied not on the likes of Locke[111] and the mid nineteenth century muscular Christian and sometime popular philosopher Thomas Arnold.[112] An individual's property derived not from the input of labour but, in the case of tribal populations, its possession and occupation according to the tribal customary law. This criterion was one which admitted forensic legal inquiry—whereas the concept of 'labour' was nebulous and in the end too theoretical for a common law rooted in experience rather than elusive, vague

108. (1935) 9 Pet 711 (USSC) at 746.
109. 'Opinions of Various Authorities on Native Tenure', *supra*, 3 and in his pamphlet *The Taranaki Question* (1860), 1-3.
110. McHugh *Aboriginal rights*, 252-263; Adams *Fatal Necessity* 179 *et seq*; Orange *Treaty of Waitangi* 98-100.
111. *Second Treatise of Government*, chap. 5.
112. Notably, 'The Labourers of England' in *The Englishman's Register* (No 6), 11 June 1831. Reprinted in *Miscellaneous Works* (1845), Vol. VII, 155 at 156-7.

conceptualism.[113] An aboriginal title thus includes the fishing, hunting, and foraging grounds of the tribe.

One question which has arisen in the United States is whether mineral and timber rights are included in the aboriginal title. More often than not, these resources were not part of the pre-contact tribal economy so their exploitation could hardly be said to be in that sense 'traditional'. The Supreme Court of the United States considered this question in *United States* v *Shoshone Tribe* (1938). The Court stated that the tribe's aboriginal title gave it 'the right of occupancy with all its beneficial incidents'; . . . the right of occupancy being the primary one as sacred as the fee'. The Court then referred to what has been seen as the Crown's fiduciary duty in relation to ancestral land:[114]

> . . . although the Unites States had legal title to the land and power to control and manage the affairs of the Indians, it did not have the power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.

The Court noted that the treaty of 3 July 1868 had guaranteed the Shoshone Tribe's 'absolute and undisturbed use and occupation' of their remaining tribal lands. The reservation recognized by this treaty was not however the source of the Tribe's right to minerals and timber. The treaty guaranteed their peaceable and unqualified possession of land they already owned. The aboriginal title, or 'the right of perpetual and exclusive occupancy of the land is no less valuable than full title in fee'. 'Minerals and standing timber are constituent elements of the land itself', the Court said, and for 'all practical purposes, the tribe owned the land'. This case indicates that minerals and energy resources are part of an aboriginal title.[115] This is consistent with the common law rule that an owner of land holds everything on or below the surface, including minerals (*cujus est solum, ejus est usque ad coelum et ad infernos*).

An additional, unique characteristic of aboriginal title is that its format in any given situation is idiosyncratic to the particular native claimants' situation. In the *Kruger and Manuel* case (1977) the Supreme Court of Canada did not delve into the question of aboriginal title, resting its decision on other grounds although the Court did make this observation:[116]

> Claims to aboriginal title are woven with history, legend, politics and moral

113. This is McNeil's conclusion in *Common Law Aboriginal Title*, *supra*.
114. (1938) 304 US 11.
115. See J.D. Leshy 'Indigenous Peoples, Land Claims and Control of Mineral Development: Australian and US Legal Systems Compared' (1985) 8 *University of New South Wales Law Journal* 271.
116. (1977) 75 DLR (3d) 434 at 437 per Dickson J.