

CHAPTER 7

THE RIVERBED LITIGATION

7.1 INTRODUCTION

The riverbed litigation, which began with the Atihaunui attempts to maintain their river interests through a claim to the courts for the ownership of the riverbed, resolved at least one thing: that, at 1840, Maori possessed the river, and, thus, the riverbed, according to their customs. That point has not been challenged since and was not at issue in these proceedings. It also disclosed that Maori were relieved of the riverbed, not by a conscious and willing disposal, but by the application of statutory law. They were likewise relieved of the control of the use of its waters, by further Government enactments (see secs 2.2–2.3). The question is whether these statutes were contrary to the principles of the Treaty of Waitangi.

Outcome of
litigation

This chapter describes the litigation, which is no small task. The Atihaunui claim, and the further proceedings to which it gave rise, extended over 24 years, from 1938 to 1962. It passed through the Native Appellate Court (1944); the Supreme Court (1949); a royal commission (1950); the Court of Appeal (1953–54); the Maori Appellate Court (1958), and the Court of Appeal again (1960), culminating in a decision in 1962.

Purpose of chapter

In the course of those proceedings, seven judges of the Native Land Court, one of the Supreme Court, and three of the Court of Appeal were all to conclude that, as a matter of law, Maori had owned the riverbed. The Supreme Court noted, however, that the Crown's 1903 amendment to the Coal-mines Act had vested the riverbed in the Crown.

Summation

That conclusion did not end the litigation. Had it done so, the obligation on the Crown to provide relief or amend the Coal-mines Act would have been self-evident. Instead, the Crown brought special legislation to continue the proceedings. It was then effectively determined that the tribal interest in the relevant parts of the river had been extinguished last century, before the Coal-mines Act Amendment Act was passed. Relying on opinions from the Maori Appellate Court, the Court of Appeal held that it was extinguished when the Native Land Court reformed the titles to the adjoining Maori lands.

Extinguishment by
statute

The title reform referred to was itself pursuant to the Government's programme to alter Maori land tenure, a programme that Maori, including Atihaunui, had opposed. Accordingly, once more Maori interests were extinguished, not freely, willingly, and knowingly by the tribes concerned but by the operation of law.

Extinguishment by
statutory process

Figure 13: Representatives of the Whanganui iwi in Wellington in 1945 for a hearing in the Maori Appellate Court of their claim to the ownership of the Whanganui River. Back row (l-r): Kaiwhare Kiriona, Tanginoa Tapa, Tekiira Peina, Tonga Tume, Hohepa Hekenui, Henare Keremeneta. Middle row: Te Rama Whanarere, Hekenui Whakarake, D G B Morison (solicitor), Titi Tihu, Ponga Awhikau. Front row: Taka-te-iwa Anderson, Kahukiwi Whakarake. Photograph courtesy Alexander Turnbull Library (Margaret A Maynard collection, C15422).

More particularly, the courts finally found that, in awarding the adjoining land to individual Maori, the Native Land Court had effectively also awarded the land *ad medium filum aquae*; that is, to the centre line of the river. The bed had thus passed to those individual owners, and from them to the Crown when the Crown acquired the land. It is doubtful that the individual Maori knew that this was so, but in any event, though the Native Land Court purported to determine individual ownership according to Maori custom, no provision was made for the tribal interest.

No free and willing
disposal

The substantive question is whether, in terms of the Treaty of Waitangi, Maori knowingly and willingly relinquished their traditional authority or interests in the river. No answer could have been given to this question by the courts themselves, since the Treaty of Waitangi was outside their purview, but the judgments show that Maori did not. The riverbed passed from their hands because of statutes and principles of English law. There was no cession that was made in a Maori way, by the rangatira of the hapu acting in concert with the views of the people first known.

Maori action to
retain their river
interests

The litigation itself is evidence of the lengths to which Atihaunui would go to keep their river interests. Then, not only had they to bear the burden of the lengthy

litigation, but also they were obliged to frame their case within the rules of English law, as seen by the lawyers of the day.

To do this, they had largely to lose control of the argument, passing the ball to lawyers to play the game by alien rules, reshaping the Maori view to fit the parameters of English legal process and law. Yet, this was a risk they took, trusting in legal advice, for in the political reality of the time they had no choice. By their own law, what they had were more than rights of ownership and use: that is, rights of authority and control. The Government had not recognised Maori authority, however, and if the past was any indication of what the future might hold, the traditional argument was unlikely to enjoy any greater success in a court.

Accordingly, their case to the court was a claim not for authority over the river in the Maori way but to the ownership of the riverbed, as English law was thought at the time to require. Nor could that have been a Maori case, for, in the Maori view, the river was part of an indivisible whole, a resource comprised of the water, the bed, the tributaries, the banks, the flats, and, indeed, the whole catchment area, over which their authority had been traditionally maintained.

The record of the proceedings includes extensive evidence and opinions on Maori law. Here, we enter a caveat from the start. Again, evidence and submissions were contrived to fit the issues as defined by pleadings, Maori custom was manicured to suit the presumptions of another world view and Maori perceptions appear to have been judged or even comprehended not in their own terms but in terms of European culture.

Case cast in terms of English law

Argument adapted to suit

7.2 NATIVE LAND COURT INVESTIGATION, 1938–39

7.2.1 The application

By 1937, the inquiry directed by Parliament seven years earlier, as referred to in the previous chapter, had still not been carried out by the chief judge of the Native Land Court, though he was obliged to report ‘on as early a date as possible’.¹ In the meantime, Hekenui Whakarake and Wharawhara Topine, who had given evidence before the 1916 Scenery Preservation Commission, had consulted D G B Morison, a Wellington lawyer. He advised them to abandon their petition and apply to the Native Land Court for a native freehold order for the riverbed. Between them, Hekenui and Wharawhara traced their whakapapa to the main hapu on the river. Further, they enlisted the help of Titi Tihu, a nephew of the petitioner Piti Kotuku, who had also given evidence before the 1916 commission. In 1962, Titi was still to be involved in the proceedings that flowed from the claim, and as late as 1983, 45 years after he was first involved, he was before a select committee of the House explaining his petition on the same matter.

In any event, on 24 February 1938, Titi Tihu and others applied under the Native Land Act 1930 to the Aotea District Native Land Court to investigate the title to part

Impact of Native Land Court failure to hear petition

1. See s 34 Native Land Amendment and Native Land Claims Adjustment Act 1930 and the schedule

of the Whanganui River and its bed. The part was described in the later amended application as extending from the tidal limit at Raorikia to its junction with the Whakapapa River above Taumarunui.²

Issues as prescribed The application was heard by Judge Browne. By agreement with the Crown, the only question for the first hearing was whether Whanganui Maori owned the bed of the river, according to native custom, at the time of the Treaty of Waitangi in 1840. Morison, for the claimants, indicated that, if the decision was that Maori did not own it at that time, that was the end of the matter so far as the riverbed was concerned, though questions might remain on fishing and other rights.³ If the court held in favour of the claimants, then the second stage would be to determine whether Whanganui Maori still held the riverbed under their customs and usages.⁴ Should the court uphold the claimants on the second stage, then the third stage would be a hearing to determine the riverbed's owners.⁵

Inquiry's limitations It should be noted that, although the application referred to part of the Wanganui River and its bed, it was essentially in respect of the bed alone. The Native Land Act 1931 made no provision for an investigation of the ownership of a river as such, and the court's jurisdiction to inquire was limited to the title to land. As a result, the inquiry did not extend to the river as a total entity comprising its waters, its bed, and its banks. This artificial severance of the bed of the river from its other components meant that the investigation was also artificial and incomplete and excluded a proper appreciation of the Maori concept of the physical, spiritual, and cultural qualities of the river as a unified whole.

Nor was there a discussion of the nature and extent of the rangatiratanga over the Whanganui River as a taonga. This limitation in the jurisdiction of the Native Land Court was reflected in the various proceedings that followed.

Exclusion of Treaty It is stressed that, in the absence of statutory incorporation of the Treaty of Waitangi in New Zealand general law, none of these court proceedings directly involved the claimants' Treaty rights, except for a saving provision of limited application in the Wanganui River Trust Act 1891 (s 11) (see sec 6.2.3(2)). Instead, they were concerned with customary rights and usages in respect of the river, English common law and conveyancing rules, and various New Zealand statutes. Certain evidence, however, is relevant to Treaty rights and thus pertinent to this current inquiry.

7.2.2 The terms of the application

Tidal reaches excluded; nature of Maori case

At the first hearing, beginning on 3 November 1938, counsel for the applicants, Morison explained in opening that the application excluded the tidal waters of the river because of the Supreme Court decision in *Waipapakura v Hempton*.⁶ This case

2. Document A77, vol 4, pp 15–16

3. Ibid, vol 1(1), p 2

4. *The King v Morison and Another* [1950] NZLR 247, 249 (sc) (doc A77, vol 1(4))

5. Document A77, vol 1(2), p 1

6. *Waipapakura v Hempton* (1914) 33 NZLR 1065

was taken as authority that tidal waters were vested in the Crown. The only question to be dealt with at the hearing was whether Whanganui Maori owned the bed of the river at the time of the Treaty of Waitangi. The applicants' case was based on the proposition that the bed of the river in 1840 was customary land, was used, occupied, and owned by the Whanganui tribe according to their customs and usages, and that native custom recognised the ownership of beds of rivers as part of their land just as much as any other part.

7.2.3 The applicants' evidence

Counsel called three witnesses to give evidence on the customary relationship of the Whanganui people with the river – Hekenui Whakaraka, Wharawhara Topine, and Pareta Wereta. These appeared to maintain that the river was a separate entity from the land, because there were different ancestors for each. Three ancestors were given for the river, Hinengakau, Tamaupoko, and Tupoho, but these were not the ancestors who had been cited when the riparian lands were put through the Native Land Court. Counsel argued that the Native Land Court could therefore not have investigated the title to the river when it investigated the title to the abutting land, and the river could not have passed with the land. However, we do not think that the Maori were intending quite that. Rather, they were saying that, no matter what was done with the land, the river should be held as one.

Evidence on
ancestors

This requires some explanation. Maori claimed land rights in the Native Land Court through their mother's or father's use of the land or, to make their case more compelling, through use by a remoter antecedent and down to them. For so long as the Native Land Court was dealing with localised blocks of land, and preferred to work from actual occupations, ancestors particularly associated with that block were chosen. They were consequentially more recent. To go back too far on the genealogical chain would be to include others whose primary residence was elsewhere.⁷

Maori claims based
on ancestry

Had the court been dealing with all the Atihaunui lands as a single block, then Maori would have referred to an even remoter ancestor, the original tribal founder, so as to include all. In brief, the choice of ancestor depended on the matter in hand.

In this case, the witnesses were effectively saying that the river was for all. They could well have used the name of the original founder of the Atihaunui people, but chose instead the children of Tamakehu and Ruaka: Hinengakau, who dwelt in the upper reaches, Tamaupoko of the middle, and Tupoho of the lower part. This was because these were the ancestors most regularly cited in song and legends or carved on houses to show how the hapu of the river were related and how the river was held as one (see sec 2.5.1). Had the same witnesses been talking of who had the

7. Recent antecedents were raised in the Native Land Court, when dealing with particular blocks, for another reason too. It was often presumptuous to speak for other than one's own family when making a claim, unless one was a leader and the occasion otherwise required it. It was usually more appropriate for the individual to call in aid the names of recent family heads.

right to a build an eel weir at a particular place, a much more recent forebear would have been cited – the person who last put one there.

**Interpretation of
the evidence**

This aspect of Maori culture appears to have been misinterpreted. The question became: Were the river ancestors different from those for the land? In truth, we think that they were the same but that different ancestors were used according to the occasion. The substantive question was whether, notwithstanding local uses of the river, the river was also a single entity and, as such, a taonga of the people as a whole. Though the river as a flowing entity was in a category of its own, the same question could in fact have been asked of the land. But since the land court would not admit to tribal ownership or the award of tribal lands as a single block, it could not ask that question.⁸ In referring to more remote ancestors, the witnesses were asserting the tribal overright.

The related question of whether the court included the title to the river when it issued a title to the abutting land is to be addressed according to the facts. If it did, then the question in terms of the Treaty of Waitangi is whether Maori knew of this and agreed, and not just the individual land grantees but the tribe, assuming that customarily a tribal interest were held.

In any event, the witnesses relied on the existence of separate river ancestors more remote than those used to claim specific blocks of riparian land, thereby claiming that the river was held for Atihaunui as a whole. Over the 24 years of proceedings, no Maori is known to have come forward to challenge that position.

**Evidence of Hekenui
Whakarake**

Hekenui Whakarake deposed that he was a direct descendant of Hinengakau, one of the three tipuna from whom all Whanganui Maori could trace rights to the river.⁹ He belonged to several Whanganui River hapu, principally Ngati Ruaka based at Ranana. He defined the territorial boundaries of the Whanganui tribe as including the Whanganui River from its mouth to its junction with the Whakapapa River. The Whanganui tribe was occupying the river up to that point at the time of the Treaty. He named Tamakehu as the greatest tipuna or ancestor for the Whanganui people, and his offspring as the three tipuna for the river: Hinengakau, Tamaupoko, and Tupoho. He said that these three tipuna were for the river, and that their descendants were tipuna for the land. The rights of those living on the river bank lands were traced from the people who had established pa on these lands, not from the three earlier tipuna for the river. In other words, he was asserting that the ancestors to be named for the river were prior forebears, while those who had been named for the land were subsequent ancestors, not ancestors on a separate line.¹⁰

8. The Native Land Court process and its antipathy to tribal interests were considered at section 2.8.2. The vesting of lands in the tribe as a whole, by reference to a remote ancestor, is legally achievable it seems and is more acceptable today. As part of the settlement of the Waikato raupatu claim in 1995, lands may be vested in Te Wherowhero, though long deceased, a radical departure from the Native Land Court law and something of a reversion to customary norms. Significantly, the settlement excludes the Maori Land Court from exercising jurisdiction over those lands.

9. Document A77, vol 1(1), pp 7–19

10. Document A49, p 116

Asked whether there were visits up and down the river in times of peace, Hekenui said that they visited one another by invitation. If they went without permission, there would be strife. The river was not a general highway.

Wharawhara Topine, of Taumarunui, belonged to the Ngatihaua hapu of the Whanganui tribe.¹¹ He confirmed that the territory of the Whanganui people went right down to the sea. At the time of the Treaty of Waitangi, they used and occupied the river. His people came over in the Aotea waka accompanied by three atua, or gods. When they arrived, Tawhirimatea remained in suspense in the air and controlled the weather; Tangaroa remained in the water and had power over all the fish, the stones and soil, and everything else that was in the water, as well as control of the taniwha; Tane went inland and had mana over the forests. Wharawhara also confirmed that the Whanganui people were all descended from the three tipuna named for the river and that these tipuna had never been set up as ancestors for the adjoining land.

Evidence of
Wharawhara Topine

On the basis of information handed down by his elders, Wharawhara gave detailed evidence of the fish that were in the river and of how tuna were caught in the pa tuna. He recounted the names and locations of a great many rapids and the pa tuna on them. All these pa, and all the birds and the fish and the stones in the river, he claimed, belonged to the Whanganui tribe. In pre-Treaty times, if a party of Ngati Tuwharetoa had come down the river in a canoe, there would be war, unless they had made some arrangement. A member of one hapu wishing to take a canoe down the river past the land of another hapu would have to get permission. At every village along the river, the same hapu lived on each side.

Pareta Wereta of Matahiwi, who belonged to five hapu of the Whanganui River, also said that the rights to the river were with the three tipuna.¹² Asked whether these tipuna had ever been set up in claims for land adjoining the river, he answered, 'No, Wanganui is Papatupu [customary] land'. From this, it can be seen that, in his view, the Native Land Court had not investigated the title to the river when it investigated the title to the land.

Evidence of Pareta
Wereta

Asked what had happened to the large number of pa tuna and pa piharau in the river, Pareta said that they had been removed by Pakeha, who came on barges and punts. His people protested and eventually ended up in Wanganui to attend a sitting of the Magistrates Court, but the case was settled out of court.

7.2.4 The Crown's reply

At the next hearing on 27 April 1939, Crown counsel called Eruera Te Aka, who was born in 1851 and died within a week of giving his evidence.¹³ Because he was too old to travel, the court agreed to hear him at Hawera. Eruera belonged to Ngarauru, Ngati Ruanui, and others, and had connections with Whanganui. When young, he

Evidence of Eruera
Te Aka

11. Document A77, vol 1(1), pp 19–31

12. Ibid, pp 30–31

13. Ibid, pp 40–49

had lived at Tawhitinui on the river near Moutoa Island, but he had lived away from the Whanganui district for 60 years.

The Ngarauru, he said, occupied land that reached to the Whanganui River. Whanganui were the main people to work on the river, but a few Ngarauru worked on it too. There were many times when the Ngarauru went up the river, sometimes to a hui, sometimes to visit their relatives and to tangi. As long as they kept on the water and did not interfere with fishing rights, there were no objections. A messenger would be sent to say that they would be coming; sometimes on hearing the news of a death, they would just go.

The river was the Maori road and belonged to Maori, he said, and the other road belonged to the Queen. Asked whether the bottom of the river was of interest to Maori, he said that from the shore right to the riverbed and the land under the river was all of interest to them. If he had a section on the river, he could place a pa in the river. Nobody would object. The land at the bottom of the river would belong to him, but the water above it belonged to everybody. He agreed that Hinengakau, Tamaupoko, and Tupoho were the tipuna of the Whanganui River and that no other tipuna ranked equally with them, 'only their descendants'. From them, the main chiefs of the Whanganui descended. He was unable to say who was the great ancestor of the Whanganui people.

At the third and final hearing commencing at Wanganui on 18 May 1939, Crown counsel called six witnesses. As Judge Browne was later to note, their evidence related mainly to the use made of the river in recent years, and very little of it to the time of the signing of the Treaty.

Evidence of William
Robertson

William Robertson had been employed on the river from 1915 to 1937.¹⁴ His father was European and his mother Ngati Tuwharetoa. He was brought up in Tokaanu, but knew much of the river well. He had not heard of Maori or anyone else being blocked from going up and down the river. It was free for all to use. He had heard complaints of eel weirs being damaged from the erection of stone walls that diverted the river. High floods also broke eel weirs. He did not know what was happening on the river before the Treaty.

Evidence of Andrew
Robertson

Andrew Robertson's father was European and his mother Ngati Kura of Pipiriki, where he was born.¹⁵ He had lived in the district all his life, served on the river for some time, and been captain of one of their boats for the past nine years. He had inherited a lamprey weir in the river at Paparoa that he still used. There were four lamprey weirs at Pipiriki and one eel weir. He did not know about fishing or navigation at the time of the Treaty. He had not heard of any claims to the bed of the river until the previous two or three years. His uncle was made to shift his eel weir back about a chain. He had to rebuild it himself.

Evidence of Arthur
Burgess

Arthur Burgess, a European of Wanganui, first went up the river to Pipiriki in the early 1890s.¹⁶ He claimed that, in those years, no eel weirs blocked it but that later

14. Document A27(f), pp 110–119

15. Ibid, pp 119–27

16. Ibid, pp 127–130

they were extended so far out that they were across the only channel through which the boats could pass. He did not say how many times he had been on the river.

Joseph Tarry, a European, joined the river service in 1908. He was a captain and retired after many years on the river.¹⁷ He ran mainly between Pipiriki, the houseboat, and Taumarunui. There were plenty of eel weirs on that stretch in earlier times, but they were not placed so as to block navigation. He did not hear Maori complain about the boats except, when a groyne was put in, sometimes making it difficult for them to get their canoes through. There were fishing restrictions among Maori on the river. He never heard any expressions or opinions as to the ownership of the river. An act of god (a flood) destroyed some eel weirs in 1913 and 1915. He knew that there was a main tribe and a sub-tribe but did not know which was which. He thought that, in olden times, if people from one hapu wanted to go into the territory of another hapu, they would send a messenger in advance to notify them.

Evidence of Joseph
Tarry

Kuki Wakarua, or Tautahi, a chieftainess of the Ngarauru people of nearby Taranaki, had no interest in any land on the Whanganui River and had never lived on the river.¹⁸ She was not able to say what uses her people made of the river, though they used their canoes for paying visits to their relatives. She could not say whether the fishing rights were owned by individual Maori, or whether the river was for the use of all. She could not speak with authority about anything on the river. She knew the Wanganui end of the river.

Evidence of Kuki
Wakarua

The last Crown witness was Maui Rangihaeata of Ngati Ruanui and Ngarauru of Taranaki, Whanganui, and Ngati Apa of Rangitikei.¹⁹ He was born in about 1876 and lived in the vicinity of Patea for nearly 20 years. He described fishing, the use of stones and gravel, and navigation on the Patea River. Before the Pakeha came, Maori people could go up and down the river if it was for a good purpose, the river being navigable for about 30 to 40 miles. He had never heard his ancestors speak of any use that they made of the Whanganui River. He did not travel in the Whanganui district until the time of the steamers.

Evidence of Maui
Rangihaeata

7.2.5 Judgment

On 20 September 1939, Judge Browne delivered his decision. He ruled that the riverbed in the application, from the tidal limit to the Whakapapa River, was land held by Whanganui Maori under their customs and usages.²⁰ In doing so, the court rejected each of the five grounds relied on by the Crown in support of its contention that Whanganui Maori did not, at the time of the Treaty, own the bed of the Whanganui River. These were as follows.

Findings of Native
Land Court

First, the court disagreed with the Crown's allegations that native custom did not recognise the exclusive ownership of the beds of rivers such as the Whanganui.

17. Ibid, pp 130–139

18. Ibid, pp 139–151

19. Ibid, pp 151–159

20. Document A77, vol 1(2), pp 1–3

Judge Browne found that the bed of the Whanganui River belonged to the Whanganui Maori through whose territory it ran, just as much as the land forming its banks did. The test was that, if one of the outside tribes had claimed to make use of the bed for the purpose of erecting pa tuna on the ground asserted by the Crown to be public property, such a claim would have been strenuously resisted by the local people and would probably have resulted in bloodshed.

Judge Browne further held that the general use made of the river in recent years without any proper agreement or arrangement with Whanganui Maori was, in the court's opinion, largely resulted from the fact that those living on its banks, owing to their want of unity and the absence of a powerful and influential leader, were not strong enough to offer an effective resistance. It also resulted from the Crown's mistaken assumption that the river was a main highway available to everyone. He found that Whanganui Maori had used the bed of the river from time immemorial for the erection of eel weirs and other fish traps, yet, apparently without any right or justification, these were indiscriminately destroyed or done away with to provide a passage for river steamers. Any protests by the unfortunate people who owned the eel weirs remained unheeded.²¹

Secondly, the court dismissed the Crown's allegation that native custom related solely to rights of fishing, navigation, and ordinary domestic use of the river waters. Judge Browne found the rights of the Whanganui Maori in the river followed as a matter of course and were incidental to the ownership of the bed. They could not in any way be separated from the ownership.

The judge went on to say that, in all his experience of Maori land and the investigation of the title to such land, he had never heard it asserted by any Maori claimant that the ownership of the bed of a stream or river, running through or along the boundaries of the land subject to investigation, whether navigable or not, was in any way different from the ownership of the land on its banks.²²

Thirdly, Judge Browne considered the Crown's contention that such rights as Maori had in relation to the Whanganui River did not confer rights of ownership upon which freehold orders could be made to the bed of the river. Holding as he did the opinion that the rights to water were incidental to the ownership of the bed over which water flows, or on which it lies, he could not see why freehold orders should not be issued for the bed of a river in the same manner as they had already been issued for the bed of a lake.²³

Fourthly, Judge Browne considered the Crown's argument that, at the time of the signing of the Treaty, 'land' meant land in the common acceptance of the term and not in the highly legal sense. To a Maori mind, he ruled, 'land' at that time meant

21. Document A77, vol 1(2), p 2

22. We note here that this observation of Judge Browne is referred to by the judges of the Maori Appellate Court in their answers to certain questions referred to them by the Court of Appeal by order of 7 May 1956. These answers were recorded in a memorandum dated 6 June 1958: doc A77, vol 2(9), pp 1–11. We defer our comments on this observation until we consider the second Maori Appellate Court hearing in 1958 (see sec 7.7).

23. Document A77, vol 1(2), p 2

the whole of the territory within the tribal boundaries over which the tribe had complete control, whether covered with water or not.

Fifthly, Judge Browne unhesitatingly disagreed with the Crown's contention that the rights of sovereignty referred to in the English version of the Treaty included the rights of ownership of access over the country and its navigable waters. He cited English common law authority in support of his finding. In addition, he made the perceptive comment that:

this matter of general access is so foreign to Maori ideas that any proposal to grant a concession of the kind claimed by the Crown would, the Court is absolutely certain, have been most strenuously objected to by the Chiefs who were invited to sign the Treaty as leading to an unwarranted interference with their rights and might if persisted in, have in the end wrecked the Treaty.²⁴

7.3 THE NATIVE APPELLATE COURT, 1944

Judge Browne's decision was a crushing defeat for the Crown, which, not surprisingly, appealed to the Native Appellate Court. The appeal, however, was not heard by the court until 1944, presumably due to the exigencies of the Second World War.

Crown appeals

Chief Judge Shepherd presided over a court of six Native Land Court judges. The Crown contended that native custom did not recognise exclusive native ownership of beds of navigable rivers, nor that the bed of a river or lake was land covered with water. Further, the Crown contended that it was not in fact true that every foot of land in New Zealand, apart from such land as may have been alienated, belonged to some Maori tribe or hapu. No further witnesses were called.

Crown argument on appeal

The six judges issued separate judgments on 20 December 1944.²⁵ All six upheld Judge Browne's decision and added little to his judgment.

Chief Judge Shepherd, in a brief judgment, dismissed the Crown's contentions.²⁶ The Crown, he held, had failed to show that Judge Browne's decision was wrong.

Shepherd's judgment

Judge H H Carr also dismissed the Crown's contentions.²⁷ As to the first, he said that 'The water and the land beneath it are to the Maori indivisible' and that, to Maori, the water would be the predominating factor and the exclusive use of the water would carry with it everything below. He saw little point in the second contention because the case was not concerned with every foot of land in New Zealand. It had been sufficiently established to Judge Browne's satisfaction that the Whanganui tribe exercised an exclusive right of ownership over this body of water, and over its bed of land below, in accordance with their customs and usage. The right to fish came through, or under, the general right of ownership of everything

Carr's judgment

24. Ibid, p 3

25. Document A77, vol 1(3), pp 1-13

26. Ibid, pp 1-2

27. Ibid, pp 4-5

within the tribal boundaries – the tribal right was an absolute one. He considered that the Crown appeal should fail.

Harvey's judgment

Judge J Harvey stated that the evidence before the lower court proved that a section of the Maori people of New Zealand (the Whanganui tribe) had occupation of the bed of the river under ancestral rights. These had been preserved against all other sections by means of the 'strong arm', and such occupation and ancestral rights justified the decision appealed from.²⁸

Dykes's judgement

Judge R P Dykes invoked the judgment of Justice Edwards in *Tamihana Korokai v Solicitor-General* and provisions of successive Native Land Acts as giving the court jurisdiction to investigate land covered with water as much as land covered with forest.²⁹ He pointed out that witnesses giving evidence in 1939 of matters occurring before 1840 could give to the court only the stories handed down to them by their elders: 'That is how the claims to interest in Native land are established and as such are accepted by the Courts on investigation to any title,' he said. He held that the Crown appeal failed.³⁰

Beechey's judgment

Judge E M Beechey upheld the judgment of Judge Browne.³¹ In the course of considering the nature of the Whanganui tribe's interest in the river, he did not think that the Maori mind adverted to the question of the ownership of riverbeds as opposed to the use of the waters. He wrote:

As long as they had exclusive occupation of the land adjoining the navigable river they would be content to use the waters and the bed of the river just in so far as either one or the other would serve their purposes, either for transport or for the maintenance of their food supplies.

Judge Beechey was the only one of the six appellate judges to advert expressly to the evidence of ancestors for the riverbed separate from those given for the land. He commented that he could not understand why different take (the basis for a claim) were being advanced for the river as distinct from the land but did not think this was relevant to the question then before the court.

Whitehead's judgment

Judge A A Whitehead also affirmed the decision of the court below, holding it to be well established that, by native custom, all the land within the tribal boundaries of each tribe, including land covered by water, whether navigable or not, belonged exclusively to the tribe.³²

28. Document A77, vol 1(3), pp 5–7

29. *Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321

30. Document A77, vol 1(3), pp 7–9

31. Ibid, pp 9–12

32. Ibid, pp 12–13

7.4 THE SUPREME COURT, 1949

7.4.1 Supreme Court proceedings

Following the success of the Whanganui claimants, the Crown instituted proceedings in the Supreme Court for the issue of writs preventing Whanganui Maori from obtaining a title for the riverbed from the Maori Land Court.³³ In the meantime, counsel for Whanganui Maori, D G B Morison, had been appointed chief judge. In this capacity, he was named first defendant in the Supreme Court proceedings, while Titi Tihu was named second defendant.

Crown moves to
stymie action

The case was not heard until May 1949, when it came before Justice Hay. The proceedings are known as *The King v Morison and Another*.³⁴

7.4.2 The evidence for the Maori defendants

Several affidavits were filed on behalf of the Maori defendants. By then, the question of whether the Maori Land Court had extinguished the customary title to the riverbed in its investigation of the adjoining lands appears to have been uppermost in legal counsel's thoughts.

Hekenui Whakarake stated on oath that:

Evidence of Hekenui
Whakarake

- He was one of the leaders of the Whanganui tribe and had acted as an agent for them in the investigation and administration of their lands for 22 years.
- He was a direct descendant of Hinengakau, whom the whole of the Whanganui tribe acknowledged to be one of three ancestors or tipuna from whom were derived the rights to the Whanganui River. The other two ancestors were Tamaupoko and Tupoho, all three being children of Tamakehu and Ruaka, who were both prominent rangatira of the tribe. These ancestors had rights in the Whanganui River, and their descendants had continued to exercise these rights and occupy the river down to the present time.
- He had an intimate knowledge of the blocks of land adjoining the Whanganui River and of the investigation of title to the land. No application had been made or heard to investigate the title to the Whanganui River prior to the application for investigation filed in the Native Land Court at Wanganui on 22 February 1938.
- Applications had been made at various times during the previous 80 years or more, and investigations of title had been conducted and completed in respect of all lands on both banks of the Whanganui River.
- Upon completion of the investigations and the court's finding, the land ceased to be Maori customary land held under the customs and usages of the Maori people and became instead Maori freehold land.
- He had caused searches to be made of the records of the Maori Land Court relating to the investigation of the title to all blocks of land adjoining the Whanganui River on both banks from the Kaiwhaiki reserve (a little below the

33. In 1947, the Native Land Court was renamed the Maori Land Court.

34. *The King v Morison and Another* [1950] NZLR 247 (sc)

Figure 14: Titi Tihu of Taumarunui and D G B Morison on the occasion of the 1945 hearing in the Maori Appellate Court. Morison was the solicitor and counsel prosecuting the claim. The cloak that he is wearing was especially made to commemorate the case by Titi Tihu's mother. Photograph courtesy Alexander Turnbull Library (Margaret A Maynard collection, C15421).

Raorikia tidal limit) to Taumarunui, and was present when his searches were checked at the office of the Aotea District Maori Land Court at Wanganui.

- The names Hinengakau, Tamaupoko, and Tupoho did not appear in such records as having been put forward by the claimants as the ancestors or ‘tipuna’ in respect of any such blocks.
- Except for a block of land known as Ohutu 1, no block extends to include land on both banks of that portion of the Whanganui River referred to in the application to the Native Land Court of February 1938.
- It was quite common for the same group of Maori or hapu to occupy land on both banks of the Whanganui River. When it was investigated by the court, the title was, with the one exception referred to above, dealt with as though it were a separate block, with a separate name. It was separately surveyed and was the subject of a separate application.
- He explained that, in the case of the Ohutu block, which was claimed by the Ngati Poutama hapu, the reasons for the inclusion of an area on the right bank in the main portion of the block on the left bank arose from particular circumstances. These were that a large pa named Hikurangi and a burial ground, which were sacred to Ngati Poutama, were situated on the right bank of the river. Ngati Poutama lived on both sides of the river. Ngati Pamoana, another Whanganui River hapu, were claiming as part of their blocks all the land surrounding Hikurangi Pa. It was agreed between the two hapu that the area surrounding the pa and burial ground would be set aside for Ngati Poutama. Accordingly, this land was included in the Ohutu block. At no time was the Whanganui River or any part of it included in the Ohutu block as a result of this arrangement, nor was it intended to be included.³⁵

Neville Simpson, a solicitor and partner in the Wellington law firm of Morison Spratt and Taylor, deposed that:

Evidence of Neville
Simpson

- He had lengthy experience in Maori land practice, and following the appointment of Morison as chief judge of the Maori Land Court, he assumed responsibility for the greater part of his firm’s extensive Maori practice.
- In January 1938, at the Wanganui Native Land Court, he searched the title to all the blocks of land on both banks of the Whanganui River from the Kaiwhaiki reserve to Taumarunui. Only one block, namely Ohutu 1, was shown as intersected by the river.
- He had recently searched the Maori Land Court minutes of the application for investigation of title to the Ohutu block in the year 1897 and also to a number of other blocks on the banks of the Whanganui River. In no case did he find any reference or evidence to the effect that the bed of the river or any part of it was included in the investigation of any such block.
- In the case of the Ohutu block, the claim was based on ancestry and occupation, and at least 12 persons were named as ‘take tipuna’ (or ancestral root of title).

35. Document A27(f), pp 51–54

- In his search of the title to the blocks of land lying on the banks of the Whanganui River and of the Maori Land Court's minutes relating to such blocks, he found no reference to the named Hinengakau, Tamaupoko, or Tupoho, nor could he find that these persons had been named as the tipuna or common ancestors in respect of any block of land.³⁶

Evidence of Norman
Stevens and John
Caradus

Affidavits were also sworn by Norman Stevens on 4 May 1949 and John Caradus on 19 May 1949.³⁷ Stevens, prior to his retirement in 1946, was the native land draughtsman at the Lands and Survey Department in Wellington. He reinspected the plan attached to the order of the Native Land Court of 20 July 1897 relating to Ohutu 1 and registered in the District Land Registry at Wellington. In his opinion, the plan wrongly included portions of the Whanganui River, whereas all three plans in the possession of the Lands and Survey Department in respect of Ohutu 1 agreed in excluding the Whanganui River from the boundaries of the block.

Caradus, prior to his retirement in 1948, was Registrar-General of Lands for New Zealand. The Whanganui River is shown on certificate of title for Ohutu 1 as passing through the block.³⁸ In February 1939, when the district land registrar at Wellington, and at the request of Morison (then a practising solicitor) in Wellington, he examined the plans in the possession of the Lands and Survey Department and in the Wellington Land Registry Office relating to Ohutu 1. These were the plans from which the plan on the certificate of title had been compiled. He was satisfied, as a result of this examination, that the land described in the certificate of title did not include any area of land of the bed of the Whanganui River.

7.4.3 The judgment

Court's judgment

With reference to Ohutu 1, Justice Hay accepted early in his judgment that the plan endorsed on the certificate of title for the block had been drawn in error. This plan showed the boundary lines continuing across the river, as if to include a portion of the river within the block.

Two main contentions had been relied on by the Crown in support of its claim that neither the Maori Land Court nor the Maori Appellate Court had jurisdiction to investigate the title to the riverbed. The first was that there had already been a complete investigation of the bed of the Whanganui River as part of the investigation of the adjoining land. The second was that, in consequence, the bed of the river was vested *ad medium filum aquae* in the riparian owners. Therefore, no part of the river was held by Maori, or their descendants, under the customs and usages of the Maori people.

The second defendant, Titi Tihu, by his counsel agreed that there was no longer any land upon the river banks that had not been investigated by the Native Land Court and had hence ceased to be Maori customary land. But Titi Tihu did not

36. Document A27(f), pp 56–58

37. Ibid, pp 54–55, 58–59

38. Certificates of title, vol 135, fol 186, Wellington Registry

concede that such investigation of title to the land had also completed investigations of title to the riverbed. This remained one of the main subjects of controversy in the proceedings.

Justice Hay held that there was nothing to show that, in any of the investigations of title throughout the years in regard to lands on the bank of the river, the Native Land Court had ever adverted to the question of the riverbed or given any consideration to the possible effect of its orders upon the title to the bed.

On whether the customary title had been extinguished by the Native Land Court

He then considered at some length the Crown's first contention that the English doctrine of *ad medium filum aquae* was necessarily incorporated in the various orders of the Native Land Court. Before this doctrine could be applied, much fuller information as to the surrounding circumstances would need to be placed before the court. He found it somewhat singular that the Crown in this case was invoking the doctrine of *ad medium filum aquae*, whereas it had successfully opposed its application in the Waikato River case (*Mueller v Taupiri Coal-Mines Ltd*).³⁹

Justice Hay decided, however, that, for the purposes of his judgment, it was not necessary to determine whether the *ad medium filum aquae* rule applied, in view of the conclusion that he had reached on the Crown's second contention that the bed of the river for its relevant length was vested in the Crown by virtue of section 206 of the Coal Mines Act 1925 (originally, section 14 of the Coal-mines Act Amendment Act 1903). It was common ground between the parties that, for much of its length, the river was navigable and was a 'navigable river' within the meaning of section 14, and that the bed had not been granted by the Crown.

Justice Hay concluded that the language of section 206 of the Coal Mines Act was plain and unambiguous as expressing an intention on the part of the Legislature that the beds of all navigable rivers were to be deemed always to have been vested beneficially in the Crown, except in cases where such beds had been expressly granted by the Crown to someone else. In short, the court held that, as a result of that Act, the bed of the Whanganui River was Crown, not Maori land. The judge stated that, unless his interpretation of section 206 was adopted it was difficult to see what purpose was to be served by passing the legislation at all.

The Supreme Court decision was, in part at least, a vindication for the Crown. The Crown, as a consequence of the Coal Mines Act provision, owned the bed of the Whanganui River, and, in the opinion of Justice Hay, it had not acted in a confiscatory manner in so acquiring it. Justice Hay rejected the contention that the Crown had confiscated the river, because under section 14 of the Coal-mines Act Amendment Act 1903, the beds of all 'navigable' rivers were deemed to have 'always' been vested beneficially in the Crown, and that, while the conscience of the Crown was to be directed by part IV of the Maori Land Act 1931, it was 'bound primarily by the welfare of the State as a whole'.⁴⁰

For the sake of completeness, we note that the High Court reached a different conclusion on a much later case in 1984. In *Tait-Jamieson v G C Smith Metal Containers Ltd*, it ruled that section 261 of the Coal Mines Act 1979 (the former

Another opinion in a later case

39. *Mueller v Taupiri Coal-mines Ltd* (1902) 20 NZLR 89

40. *The King v Morison and Another*, pp 266–267

section 206 of the 1925 Act) did not affect the presumption that the Crown grant of land bordering a river conveyed the bed to the middle line.⁴¹ If the presumption was not to apply as a consequence of section 261, the Crown grant had expressly to exclude the riverbed.

Unfortunately, the decision of Justice Hay in *The King v Morison and Another* was not cited or referred to in the judgment. The Law Commission, in commenting on *Tait–Jamieson*, observed that, if *Tait–Jamieson* were correct, there would be little to which section 261 of the Coal Mines Act 1979 could apply, and its purpose becomes difficult to understand.⁴² This reflects the view of Justice Hay.

7.5 THE 1950 ROYAL COMMISSION

7.5.1 Purpose

Maori response

Maori responded quickly to Justice Hay’s decision. On 11 October 1949, two weeks after the judgment was delivered, their representatives met at Parliament with senior Government Ministers. It was suggested that, instead of requiring Maori to pursue their legal remedies in the Court of Appeal and, if necessary, the Privy Council, the question of their continued ownership of the bed of the river might be referred to a royal commission.⁴³

On 25 January 1950, the Governor-General appointed Sir Harold Johnston, a retired Supreme Court judge, to a royal commission to:

- (a) advise whether, but for the Coal-Mines Act Amendment Act 1903 provision, Maori were owners of the Whanganui River according to their custom and usage;
- (b) inquire whether Maori had suffered any loss in respect of the riverbed as a result of the 1903 provision that ‘in equity and good conscience’ entitled them to compensation;
- (c) recommend the amount, to whom, and on what terms any such compensation should be paid; and
- (d) report whether any rights should be abandoned or surrendered in return for compensation.⁴⁴

7.5.2 The evidence

The royal commission commenced its hearing in Parliament Buildings on 26 April 1950. F C Spratt, counsel for Titi Tihu, Hekenui Whakarake, and associated

41. *Tait–Jamieson v G C Smith Metal Containers Ltd* [1984] 2 NZLR 513

42. New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries: Mataitai – Nga Tikanga Maori Me Te Tiriti o Waitangi*, preliminary paper no 9, Wellington, March 1989, pp 75–76

43. ‘Notes of Representations Made to the Right Honourable P Fraser, Minister of Maori Affairs, at Parliament Building, 11 October, 1949’, MA5/13/188, pt 2, NA Wellington (doc A49(d), pp 222–227)

44. Sir Harold Johnston, ‘Report of Royal Commission Appointed to Inquire into and Report on Claims Made by Certain Maoris in Respect of the Whanganui River’, AJHR, 1950, G-2 (doc A77, vol 1(6)), pp 1–3

Whanganui Maori, made lengthy opening submissions and then called his witnesses.⁴⁵

Hekenui Whakarake, aged 67 or 68, said that he was one of the leaders of the Whanganui tribe. He was appointed by all the elder chiefs of the 12 hapu, who wanted him to represent them. The 12 hapu he named as Ngatihaua, Ngatipeketuroa, Ngatikura, Ngatihau, Ngatiruaka, Ngapoutama, Ngatipamoana, Ngatituwera, Ngapaerangi, Ngatitupoho, Ngatirangi, and Ngatiuenuku.⁴⁶

Evidence of Hekenui
Whakarake

As agent, he had acted in the investigation of titles and the administration of lands for tribal interests for about 32 years. His cousin, Titi Tihu of Taumarunui, made application for the investigation of the Whanganui riverbed before Judge Browne. Titi was the financier for the case, but Hekenui did the actual work. In so doing, Hekenui had the support of the people of the tribe and travelled to the various marae and settlements of the people. Each hapu appointed a chief to represent them on a committee for the people as a whole. When Titi Tihu said that he applied on behalf of all concerned, he meant all of the Whanganui people.

The Whanganui people originally owned the land on both sides of the river from its mouth right up to the Whakapapa River, but in 1848, the land on both sides of the river from its mouth to about Raorikia was ceded to the Crown. He did not know of any investigation of the title to the river itself before Titi Tihu's application. Asked how the people looked upon the river, he said that 'Everybody . . . who lived along the river – well, it was the mana'.⁴⁷

'Take tipuna', Hekenui said, gives the right to the river. It is acquired by going back to ancestry. When there is an investigation (by the court) of a block of particular concern to a hapu, those on the block show a tipuna in the application. They go back to a common owner, but not right back to the three ancestors who started off beside the river, from whom the 12 hapu he named were descended. These hapu were all on the river.

Hekenui explained that in pre-European times the tribe held the land but portions would be allotted; that is, given to individual families for special purposes, such as cultivations. When the land was worked out, they would move elsewhere; indeed, they were working round all the time. In the bird-snaring season, some would go into the forests for two or three weeks and on their return share out the catch with the rest of the people. In the same way, those who went fishing in the river would share out the fish and eels.

In pre-European times, most of the Whanganui people, being descendants of the three tipuna, lived alongside the river, but they claimed land miles away from it. Whole stretches were shown on the maps. They marked out the boundaries of their own pieces of land and they claimed through the court by their right of occupation.

45. Document A77, vol 1(5), pp 1–30

46. Ibid, pp 31, 35

47. Ibid, p 33. At page 34, answers to a critical question were given in Maori and are unrecorded since no interpreter was present. The record notes at page 36 that, when the commission resumed on the second day, counsel for the Whanganui Maori advised the commissioner that the witness Hekenui was having difficulty with some of counsel's expressions and sought an interpreter. The commissioner agreed to an interpreter being available as required.

Asked whether the various hapu owned any particular part of the river, Hekenui replied, 'No. This was left to the Native Land Court. The river has never been investigated so therefore it belonged to everybody.'⁴⁸ By everybody, he said that he meant all the hapu that were descendants of the three tipuna. He personally had never claimed any portion of the river as being his, nor had he known of anybody who had done so.

Asked about passage on the river, Hekenui said that the river was the highway for members of the tribe – they went by canoe.⁴⁹ Outside tribes were not recognised as having any rights to travel up or down. Whanganui hapu members usually sent a messenger and obtained permission from the hapu that they wished to visit. This was because there were outside (non-Whanganui) tribes that could constitute a threat. If Ngatihaua, for instance, wished to go right down the river, they would have sent a messenger to other hapu because of the fear of outside tribes. It was common for members of one hapu to visit another on the river.

Following some discussion of fishing practices, Hekenui was asked whether the hapu member who built a pa tuna, perhaps with the help of others, was responsible for it and took the catch from the eel weir. He agreed, but added that the catch would be shared and regarded as a hapu catch. Some might be preserved and put into a store house, a pataka. Catches were hapu catches, whether they were on the land or the river.

On re-examination about the Ohutu block being on both sides of the Whanganui River, Hekenui gave in substance the same explanation that he had previously given in paragraph 13 of his sworn affidavit in connection with the earlier Supreme Court proceedings. No part of the river was included in the Ohutu block. 'They left it in the usual way of the river belonging to everybody,' he said.⁵⁰

Finally, a series of questions were put to Hekenui concerning the nature of claims that might be made on an investigation of title to a block of land adjoining the river by the Native Land Court. He agreed that one man might support his claim by the fact that he lived on a part of the block and cultivated land on it. Another might rely on his living there and being engaged in snaring activities in the bush. Yet another man might say that, while living on the block, he looked after or owned a pa tuna on the river. Any one of these claims might be made on an investigation of title to a piece of land on the banks of the river.

Evidence of Joseph
Tarry

Joseph Tarry of Auckland, a retired ship's master, was called by counsel for Whanganui Maori.⁵¹ He amplified the evidence that he had given for the Crown in the proceedings before Judge Browne. He had spent some 25 years in service as a captain on riverboats. On his section of the river, which was some 80 miles between Pipiriki and Kaukapanui, there were five permanent pa tuna. But he had counted the remains of 200 or more on that section. Groynes were put in the river, and these affected the eel weirs. He had heard objections from Maori who referred

48. Document A77, vol 1(5), p 39

49. Ibid, p 44

50. Ibid, p 69

51. Ibid, pp 70–76

to the Treaty of Waitangi. The Reverend Henry Keremeneta was one of the staunchest of the Whanganui River people on rights under the Treaty. Every wall that was put in meant hours of labour for Maori to pole up the river, whereas the riverboat was using cables and an engine to steam up the river. So Maori had a hard job to pole their canoes up after the walls were put in. There were complaints from Maori about loss of fishing.

Titi Tihu was called next.⁵² He was assisted by an interpreter. He confirmed that there were 12 hapu of the Whanganui tribe having as their tipuna between them Hinengakau, Tamaupoko, and Tupoho: 'For the river those are the three ancestors, but for the land there are others also.'⁵³ He also gave lengthy evidence about the destruction of some eel weirs in 1905 and 1906, the methods of catching tuna and piharau, and the taking of gravel.

Evidence of Titi Tihu

Albert Davey, a farmer living at Jerusalem (Hiruharama) who had associated with Maori in the district for over 40 years, was the next witness. He first went to Jerusalem in about 1909, by which time the eel weirs there had been seriously affected through the building of groynes by the Wanganui River Trust Board. There appeared to be considerable dissatisfaction among Maori concerning the erection of these structures. They had the effect of diverting the current on to the eel weirs, thus rendering them more or less useless. He had seen as many as 1000 to 1200 piharau caught in the one pa in the river. They were a great delicacy among Maori. In the construction of these breakwaters, many of the pa piharau were destroyed. Work had gone on right up to the time that the river trust ceased operations about 10 or 12 years previously. He knew of only one pa piharau on the river at the time that he was giving evidence.⁵⁴

Evidence of Albert Davey

He was followed by Rufus Oxley, a Ministry of Works highways overseer for part of the Wanganui River Road. The part of the road he was responsible for included Koroniti, where he lived.⁵⁵ Oxley belonged to the Ngatipoumoana hapu. He had been employed in connection with the River Road since 1935. The roads that he supervised required a great deal of metalling, the bulk of which was obtained from the bed of the Whanganui River. The metal from the river was greatly superior to the metal in pits on land by the road. The metal for use on the roads was excavated from the river by loader and bulldozer and put through a crushing plant. At the time of giving evidence, metal was being extracted from Pitanga and Jerusalem. Prior to that, metal had been obtained from the river at Koroniti, Rauparau, Kaiwaka, Te Puha, and Pipiriki. This had been used to metal the road from Pipiriki to Raetihi. On occasion, the whole of the road was scoured away at places and the road had to be reformed with metal. His department would have details of the amount of metal from the river used on the roads. So far as he was aware, the department had not paid Maori any royalties for metal taken from the river.

Evidence of Rufus Oxley

52. Ibid, pp 76–80

53. Ibid, p 78

54. Ibid, pp 89–95

55. Ibid, pp 96–104

Figure 15: Kaumoa on the Whanganui River.
 Photograph courtesy Alexander Turnbull Library (Tesla Studios collection, G23315½).

Asked by the commissioner whether the young Maori of his generation whose families were from the river wanted to stay in the area or leave, he said that a lot of the younger men definitely wanted to stay but were more or less compelled to leave by the older people. This was because there was not a living for them on the river. He spoke of their emotional reaction when they returned to the river after a period away.

Evidence of Derisley
 Hobbs for Crown

Derisley Hobbs, a senior fishing officer with the Marine Department, was called by Crown counsel. In written evidence which referred to published work by Mair, Downes, and Elsdon Best, he stated that, in former times, Maori exploited eels on a considerable scale and took lamprey and smaller fish. He also produced evidence of a progressive decline in the use of pa tuna on the Whanganui River. He cited Best as showing that a few more eel weirs were used in the 1920s than the two that Downes claimed remained in use in 1917. The falling away in the pursuit of eels and other freshwater fish by Maori was general in both islands. He attributed this to the greater variety of foodstuffs that became available following European settlement, and changes in the social and economic condition of the Maori people. The available facts suggested that, if the Maori fishery in indigenous fish in the Whanganui River had suffered at all, then:

the only general loss could have been of exclusiveness of enjoyment of what the Maoris, themselves, have for long been unwilling to make appreciable use of, and

also of what Europeans do not seek to use today and are unlikely to use in the future.⁵⁶

Counsel for Whanganui Maori called a witness who provided some information about royalties collected by the Lands and Survey Department for the 10 years since 1940, when the department had taken over from the Wanganui River Trust.⁵⁷ He also called a public accountant, who produced a computation of compensation for gravel taken from the river and for the loss of fisheries.⁵⁸

Evidence on
compensation
payable for gravel

Crown counsel also called a retired Valuer-General and a former Deputy Valuer-General to discuss the effect of the Coal-mines Act Amendment Act 1903 on the value of the adjoining riparian lands.⁵⁹ As this valuation and related evidence is discussed in some detail in the report of the royal commission, it is not reproduced here.

7.5.3 The report

Commissioner Johnston made his report on 18 July 1950. He had no hesitation in accepting the opinion of Judge Browne and the judges of the Native Appellate Court that the bed of the Whanganui River for the relevant stretch, whether navigable or not, was held by the Whanganui Maori under their custom and usage and was customary Maori land. He also accepted their finding that the river was not a main highway available to everyone in 1840, citing various extracts from the judgments of the Native Land Court judges in support.⁶⁰

That Maori had
owned the riverbed

He went on to consider the application of the *ad medium filum aquae* rule. The presumption that it applied might be rebutted by proof of surrounding circumstances, which negated any intention that any portion of the river should pass to the transferee of any adjoining land:

That customary title
to bed had not been
extinguished by
Native Land Court

Considering the use of the river by the Maoris, considering the river itself with its rapids and its numerous eel-weirs, it is, in my opinion, clear that there should be no presumption that the bed of the river passed to the transferees of the land and that the owners of the weirs lost their right to the bed of the river.⁶¹

In short, he considered that the facts rebutted any *ad medium filum* presumption.

In coming to this conclusion, it appears that he was reassured by his conviction that a comparable outcome would arise from the application of English law. He thought that:

no other than a right recognised in English law need be claimed by the Maoris in their claim to the bed of the river as I think it clear that if Europeans had used the

56. Document A77, vol 1(5), pp 125, 130

57. Ibid, pp 105–109

58. Ibid, pp 209–219

59. Ibid, pp 119–124

60. 'Report of Royal Commission'

61. Ibid, p 9

river in the same way and ownership were in European hands they would have made the same claim as now made by the Maoris.⁶²

Here, the commissioner was referring to a common law rule that the owner of a several fishery (which could be a weir or something of that kind), is presumed to be the owner of the soil under the fishery. More particularly, he was referring to remarks of Lord Herschell in *Attorney-General v Emerson* in relation to eel-weirs:

they are constructions or erections by which the soil is more or less permanently occupied and that it is this occupation of a portion of the soil which leads Lord Hale to say that they are ‘the very soil itself’.⁶³

He considered that ‘no more imaginative concept of ownership is needed to establish the Maori title arising from the erection of their eel-weirs than is in accord with English presumption in like cases’.⁶⁴

After expressing the view that the Crown had not paid sufficient regard to the principles of tribal administration and organisation, which are matters of history and could be gleaned from the Native Land Court judgments, he concluded that:

it was not until the Coal-mines Act of 1903 – a matter which was not raised in the Maori Land and Appellate Courts – that legislation vested the title of the bed of the river in the Crown. That being so, I answer the first question by saying, but for the Coal-mines Act, the bed of the river would be owned by the Whanganui Maoris, as it was at the time of the signing of the Treaty of Waitangi.⁶⁵

**Conclusion on
compensation**

As to compensation, the commissioner answered the second question of the terms of reference by saying that, in his opinion, a court endowed with power to determine questions according to equity and good conscience would find the claimants entitled to compensation for the loss of their right to the bed of the river.⁶⁶

Counsel for Whanganui Maori had advanced claims for compensation under two heads: first, for the loss of their fishery resource, including the eel weirs, and, secondly, royalties for gravel taken from the bed of the river.

The commissioner rejected the first claim. He could see no cause for compensation for a change from what he characterised as ‘an uneconomic way of life on their traditional lands by the river to an economic one [in Whanganui and elsewhere]’, or for a change of diet, ‘to a great extent voluntary’.⁶⁷

He found, however, that the Maori owners were entitled to compensation for the loss of gravel from the riverbed. Owing to insufficient evidence, he was unable to

62. ‘Report of Royal Commission’

63. *Attorney-General v Emerson* [1891] AC 649. Later, in the same vein, he cites from the headnote to another English case, *Hanbury v Jenkins* (1901) 2 Ch D 401. Both are quoted in ‘Report of Royal Commission’, p 9.

64. ‘Report of Royal Commission’, p 11

65. *Ibid*, p 13

66. *Ibid*, p 14

67. *Ibid*, p 15

assess the loss and recommended that the potential value of the gravel at 1903 (when the Coal-mines Act Amendment Act took effect) should be assessed by a panel of three, including an assessor appointed by the claimants. Before this occurred, and finally to dispose of the whole matter, he recommended that the Maori owners of the riverbed at the time of the passing of the amendment Act of 1903, or their successors, should be ascertained by the Maori Land Court. As that court was then prohibited by the Supreme Court decision of Justice Hay from entering into any such investigation, he wrote that legislation might be required to permit the Maori Land Court to act in the matter.

While the commissioner accepted the opinion of Judge Browne and the Native Appellate Court that the riverbed was held by Whanganui Maori owners according to their custom and usage, and that it was customary Maori land, he nevertheless resorted to the more familiar concepts of English common law rules as the basis for his finding on the first question. On that basis, he had no need to refer to the argument on separate ancestors. Rather, he related the use of pa tuna in the river to the English notion of a several fishery and applied what he considered to be the relevant English common law to the Maori interest in the Whanganui River.

We note, however, the opinion of a recent legal commentator that the English cases invoked by the royal commissioner have their basis in a completely different legal history of land tenure, and rested on specific grants by the riparian owner to another person. This, in his view, makes the application of the English rules inappropriate to Maori customary ownership of land and fisheries in New Zealand.⁶⁸

None the less, the commissioner rejected the proposition advanced by the Crown that Whanganui Maori had abandoned their rights in the river.

Commentary on the
application of
English law

7.5.4 Government reaction

The Crown's legal advisers were not happy with the royal commission report, notwithstanding that compensation was limited to gravel extraction only.⁶⁹ In April 1951, Hekenui Whakarake, Titi Tihu, Rangi Mawhete, and several other representatives of the Whanganui people, and their solicitors, met with the Minister of Maori Affairs to discuss it. They sought to short-circuit the further hearing on gravel compensation recommended. Instead, in the interests of the Maori people, they urged an early settlement. They proposed a payment of £19,000 to meet expenses incurred by Hekenui Whakarake and Titi Tihu, and associated costs of 45 full-scale meetings and other out-of-pocket expenses. They also claimed an annual payment of £6500 in perpetuity to a trust board representative of the hapu of Whanganui for the benefit of the tribe as a whole.⁷⁰

How Government
stymied the report

68. Document A49(d), pp 266, 275

69. Document A49, p 132

70. 'Notes of Representations Made to Minister of Maori Affairs (Hon E B Corbett) at Parliament Buildings on 16 April 1951', MA5/13/188, NA Wellington (doc A49(c), pp 582–584)

In a memorandum of 26 June 1951 to the Minister of Maori Affairs from the under-secretary of the Department of Maori Affairs, the Whanganui tribe's proposals for settlement were characterised as 'so exaggerated as to be ridiculous' and were seen to preclude all possibility of a settlement for any reasonable sum.⁷¹ Instead, the Government's attitude should be that:

in the light of the inherent defects in the Commissioner's view of the claim, and the practical impossibility of carrying out its recommendations . . . Government . . . [should] seek a full determination of the questions involved by referring them, by means of legislation, to the Court of Appeal, providing for a possible appeal by either party to the Privy Council.

On 16 October 1951, representatives of the Whanganui people again met with the Minister of Maori Affairs, and Hekenui Whakarake asked whether the Government had made a decision on their April 1951 representations to the Minister. They were advised that the Government proposed to refer certain questions to the Court of Appeal for determination.⁷² In the event, this was done without reference to the Whanganui tribe or their counsel, by section 36 of the Maori Purposes Act 1951. It authorised the Court of Appeal to determine certain questions relating to the soil of the bed of the Whanganui River.

7.6 COURT OF APPEAL, 1953–54

The proceedings in the Court of Appeal are recorded as *In re the Bed of the Whanganui River*.⁷³

7.6.1 The hearing

Terms of reference

The statutory reference to the Court of Appeal required it to determine two issues:

- (a) Whether, immediately prior to the Coal-mines Act Amendment Act 1903, Maori, under their customs and usages, held the soil or any other rights to the bed of the Whanganui River between the tidal limit at Raorikia and the junction of the Whanganui and Whakapapa Rivers above Taumarunui; and
- (b) to what Maori, hapu, tribe, or other groups of Maori (if any), the riverbed or other rights belonged.⁷⁴

Declarations sought by the Crown

Before hearing argument, the court – comprising five judges – sought notice of the questions upon which relief was sought. The Crown responded by filing a motion asking the court to declare:

71. Memorandum from T J Ropiha to Minister of Maori Affairs, 26 June 1951, MA5/13/188, NA Wellington (doc A49(c), pp 582–584)

72. 'Re Notes of representations Made to Minister of Maori Affairs (Hon E B Corbett) at Parliament Buildings on 16 April 1951', 30 September 1951, MA5/13/188, NA Wellington (doc A49(c), p 578)

73. *In re the Bed of the Wanganui River* [1955] NZLR 419 (doc A77, vol 2(7))

74. Ibid

- (a) that the bed of the river between the tidal limit at Raorikia and the junction of the Whanganui and Whakapapa Rivers above Taumarunui had, ever since the Treaty of Waitangi, been a navigable public highway, and not land held by Maori under their custom and usages;
- (b) that any rights possessed by Maori were only rights of fishing and ordinary domestic uses of the waters exercisable in respect of each settlement only by hapu occupying the settlement, and navigation rights in common with all other persons; and
- (c) that, on the acquisition of sovereignty, the riverbed became the property of the Crown subject only to the rights referred to in (b).

Alternatively, the court was asked to declare that, immediately before the passing of the Coal-mines Act Amendment Act 1903:

- (d) where the title to any riparian block fronting the river had been investigated, the bed adjoining that block became *ad medium filum aquae* a part of the block and the property of the owners of the block or of the Crown, if acquired from such owners; and
- (e) that the bed of the Whanganui River was confirmed as being Crown land by the passing of the Wanganui River Trust Act 1891.⁷⁵

7.6.2 Court's conclusion

The Court of Appeal, presided over by Justice Northcroft, heard the case from 6 to 10 July 1953. Before the court's decision was delivered a year later, on 15 July 1954, Justice Northcroft had died.

The remaining four judges, Justices Hutchison, Cooke, Adams, and North, were unanimous in declining to make the declaration sought in paragraph (e) above. They declared instead that the passing of the Wanganui River Trust Act 1891 and its amendments did not affect whatever rights in the riverbed that Maori then possessed.

As to the declarations sought in paragraphs (a), (b), and (c) above, the court held, by the majority decisions of Justices Hutchison, Cooke, and North, that the motion should be declined, and that it should be declared that the bed of the river within the limits stated was, at the time of the Treaty of Waitangi and upon the acquisition of British sovereignty, land held by Maori – namely the Whanganui tribe – under their customs and usages.

Justice Adams did not agree that Maori owned the bed of the river at 1840 and accordingly dissented from his colleagues. He also differed from the Native Land Court judges in the earlier proceedings on the grounds that there was no proof:

that the customs and usages of the Maori as a people recognized ownership of the bed of a river such as the Wanganui; or, alternatively, that the customs and usages of the Maoris of the Wanganui tribe in particular, recognized ownership of the bed of this river.⁷⁶

**Finding that Maori
had owned the
riverbed**

75. Ibid, pp 419–420

76. Ibid, p 440

Native Land Court
extinguishment
deferred

This left the remaining paragraph (d), where a declaration was sought that, where the title to any riparian block fronting the river had been investigated by the Native Land Court, the bed adjoining that block became *ad medium filum aquae* a part of the block and the property of the owners of the block or of the Crown, if acquired from such owners. The court held that, at present, no such declaration should be made, but that all matters covered by the paragraph should be adjourned for further consideration to enable additional information relating to this question to be obtained and placed before the court.

Separate judgments were given, however, and we review those of the three who constituted the majority.

Judgment of Justice
Hutchison

Justice Hutchison generally agreed with the views of Justices Cooke and North on paragraphs (a) and (b) and substantially for the reasons given by them.⁷⁷ He considered that the contrary view expressed by Justice Adams called for a standard of proof that was impossible to achieve and was unreal to expect.⁷⁸

The judge observed that the Solicitor General may have been right to say that the claim by Whanganui Maori to the riverbed was an afterthought. However, even if it was, the claim was still entitled to consideration. He added that the fact that the actual ownership of the river, as claimed from 1938, was not made an issue earlier might be highly relevant to a question of compensation for the confiscation of riverbed rights. But in his view it did not, in all the circumstances, afford very strong evidence against the claim itself.⁷⁹

We note that the judge was almost certainly unaware of the various claims to the river made by Whanganui Maori last century, and at times this century, prior to 1938, when the matter went to the Native Land Court.

Judgment of Justice
Cooke

Justice Cooke referred to the suggestion of the Solicitor General of inconsistencies in the evidence of Hekenui Whakarake before the royal commission as to the fishing rights of the respective hapu, and the claim of the tribe as a whole to the soil of the riverbed. After considering the other evidence before the commission as well, Justice Cooke concluded that the proper inference was that there were domestic arrangements inside the tribe as to fishing rights that were not inconsistent with a tribal holding of the bed. He added that he thought that the stretch of the river in question was a highway, but only for the tribe.⁸⁰

Justice Cooke later concluded that the reasonable inference from the material before the court was that, immediately before the signing of the Treaty, and after its signing and implementation by legislation, the bed of the river throughout the stretch in question was held by the Whanganui tribe under their customs and usages.⁸¹ He added, 'Indeed, one is tempted to ask who owned the bed of the river at the time if the Wanganui Tribe did not, and to suggest that there is no satisfactory

77. *In re the Bed of the Wanganui River*, p 424

78. *Ibid*, p 439

79. *Ibid*, p 424

80. *Ibid*, p 433

81. This appears to be a reference to the Native Land Acts of 1862 and 1865: see *In re the Bed of the Wanganui River*, pp 462–463, per Justice North.

answer to that question.⁸² He was also careful to mention that, while at the time of the Treaty the Whanganui tribe owned the stretch of the bed in question, he was not expressing any opinion on whether, on an application made before 1903 for investigation of title to any part of the bed, any Maori or group of Maori could have established a claim to a separate title to any part of it.⁸³

Justice North thought it plain that, before the signing of the Treaty of Waitangi, the territory held by the Whanganui tribe had to be regarded in its entirety as tribal property. Both dry land and land covered by water were tribal territory and both had their uses and served the needs of the tribe. He also considered that the conception of a river through tribal territory being a public highway (as submitted by the Solicitor General for the Crown) would be entirely foreign to the Maori mind.⁸⁴

Judgment of Justice
North

Later, he rejected submissions of the Solicitor General that the Wanganui River Trust Act 1891 showed that the riverbed had been Crown property since sovereignty was first asserted.⁸⁵ He next adverted to a further Crown submission that, in some way or another – how, he was not certain – the 1891 statute was akin to a proclamation that the riverbed had ceased to be customary Maori land. After citing New Zealand and Privy Council case law he stated:

in the view of their Lordships in the Judicial Committee of the Privy Council, the Native title cannot be extinguished except by the free consent of the Native owners, or by virtue of a statute, and in strict compliance with its terms, or by a proclamation which has been gazetted in accordance with the provisions to that effect contained in the various statutes commencing with s 105 of the Native Land Act 1873 . . .⁸⁶

Justice North reached no conclusion on whether the common law *ad medium filum aquae* rule applied in respect of grants issued by the Crown consequent upon a Native Land Court investigation of title to riparian land. If it did, he would still need to consider whether the surrounding circumstances were sufficient to rebut that presumption, and he appeared to doubt that the presumption could apply in this case. If Whanganui Maori could freely use the river, not as members of the public but as members of the owning tribe, and if they were still doing so when the Native Land Court investigated the title to the riparian land, why would the court or the Crown intend to confer a title on individual Maori *ad medium filum aquae*?⁸⁷

7.6.3 Outcome

Thus, the Crown failed on all issues before the Court of Appeal, save whether the *ad medium filum aquae* rule should be presumed to apply, and on that the court

Deferral of
extinguishment
question

82. *In re the Bed of the Wanganui River*, p 434

83. *Ibid*, p 435

84. *Ibid*, p 461

85. *Ibid*, pp 463–464

86. *Ibid*, 465. He cited *The Queen v Symonds* (1847) NZPCC 387, 390, per Justice Chapman, and its adoption 50 years later by the Privy Council in *Nireaha Tamaki v Baker* (1901) NZPCC 371.

87. *In re the Bed of the Wanganui River*, p 470

required more information. It proposed that the Government pass legislation for this to be obtained. As a result, section 36 of the Maori Purposes Act 1951 was amended in 1954 to enable the Maori Appellate Court to take further evidence on such questions as might be submitted to it by the Court of Appeal about Maori custom and usage.⁸⁸

7.7 THE MAORI APPELLATE COURT, 1958

7.7.1 The evidence

The Maori Appellate Court was constituted to comprise five judges presided over by Judge Ivor Prichard. None had been members of the earlier Maori Appellate Court that heard the appeal from the decision of Judge Browne in 1944. In 1958, the court began a three-day hearing of evidence and submissions on 13 questions referred by the Court of Appeal.

Much of the first day was spent discussing the relevance of the Native Land Court's minute books for the title investigations of the riparian blocks. Extracts from some were read. None of these made a reference to eel weirs but a list of those that did was later put in by the Lands and Survey Department.⁸⁹ Crown counsel thought that the list should go in as evidence, but he did not know that it carried the matter any further.⁹⁰

The Crown also produced plans showing the various riparian blocks investigated by the Native Land Court before 1903 and a list of the deeds of Crown purchase.

Maori evidence

In opening for Whanganui Maori, senior counsel F C Spratt advised the court that only one witness, Titi Tihu, would be called, since, with the passage of time, elders who had been connected with the claim had died or were too old or infirm to attend. During the Court of Appeal hearing in July 1953, an affidavit had been produced to the effect that Titi had the authority of all the hapu to represent them in the litigation. It also recorded that Titi's uncle, the leading chief Piki Kotuku, who presented the 1927 petition to Parliament, had died before 1937, and that Hekenui Whakarake had died in 1952.⁹¹

Titi Tihu's evidence-in-chief before the Maori Appellate Court was brief, troubled by interpretation difficulties, and punctuated by questions from certain judges. As to the river ancestors, he confirmed the names of the three tipuna and that there were different tipuna for the land adjoining the river.⁹² He also related the tradition of the plaited rope. It was Hinengakau who plaited the rope of which the

88. Section 6 of the Maori Purposes Act 1954, which added section 36(5)(a)–(h) to the Maori Purposes Act 1951.

89. Document A77, vol 2(8), p 25

90. Ibid

91. Affidavit of Titi Tihu, 9 July 1956, CA file 20/53, AAOM W3558, NA Wellington (doc A27(k), pp 1–4)

92. Document A77, vol 2(8), pp 35–36

Figure 16: Skipper Andy Anderson watches as a passenger boards the riverboat. By the 1950s, the riverboats were smaller than those of the 1920s; this picture was taken in February 1955. Photograph by E P Christensen. Courtesy Alexander Turnbull Library (F19757½).

three tipuna were the strands, and that was the beginning of understanding and peace among the river peoples.⁹³

Later, in the course of a lengthy cross-examination by Crown counsel characterised by interpretation problems, Titi referred to the ancestral tribal name of Te Atihaunui-a-Paparangi as associated with the Hawaiki-Nui canoe. The three tipuna for the river retained this name, and their descendants retained their names as names for the sub-tribes under Te Atihaunui-a-Paparangi.⁹⁴

7.7.2 The court's advice

The Maori Appellate Court's answers to the Court of Appeal's questions were delivered on 6 June 1958.⁹⁵ From these, it is not clear how much of the Maori evidence in earlier hearings was taken into account. It is also apparent that there was no evidence before the court of the Maori protests over the river in the nineteenth century, or of their various parliamentary petitions.

93. Ibid, p 37

94. Ibid, pp 44–45

95. Document A77, vol 2(9), pp 1–11

On separate
ancestors

Much of the court's relatively brief discussion focused on the first question, whether the ancestral right to the river was separate or different from that to the riparian lands; and, if so, what (if any) was the significance of the distinction.

Counsel's
arguments

Spratt submitted that the evidence of Titi Tihu and Hekenui Whakarake, with certain unspecified documentary evidence, provided a rational basis for the claim that the ancestral right to the river was different from that to the adjoining lands.

Crown counsel's response was brief. It was prefaced with an invitation to the court to:

depreciate any attempt to introduce matters of Maori mythology into a mundane matter like this. Those matters are entirely irrelevant. I am not going to make any reference beyond that to such matters as plaited ropes and the mana of rivers and things like that.⁹⁶

It was not exotic concepts like mana that were important in his view, but *ad medium filum aquae*. It made no difference if there were river ancestors separate to those for the riparian land, he submitted, in the light of the historical circumstances relating to investigation of the titles of riparian blocks. As a result of this process, he contended that the division of tribal lands amongst various sections of the tribe and the subsequent conversion of these interests into freehold titles meant that the river *ad medium filum* had gone to the riparian owners and did not remain in the original tribal ownership, the tribe as a whole.

Counsel for Whanganui Maori replied that nowhere in the history of the matter, from the first hearing before Judge Browne down to the present, was there any suggestion of proof of the recognition by Maori of the *ad medium filum* rule. He submitted that:

The Maoris say this being a matter of presumption, European law could not have applied to the bed of the Wanganui River, the aboriginal owners of which knew nothing about the notions of *ad medium filum* whether in the Latin or in the English or in the Maori tongue.⁹⁷

Maori would not be concerned to identify the middle line of the river when navigating canoes or erecting pa tuna, he added.⁹⁸ The direction and strength of the current, the position of the rapids, and the depth or shallowness of the water would determine where they were put.

However, Crown counsel found the eel weirs of little if any relevance:

In Judge Smith's book [Norman Smith, *Maori Land Law*] he points out that the setting of an eel weir is one of the acts that is commonly put forward as supporting the claim for an ancestral right. It has to be conceded that in this case there is no express instance we can find where such a claim was put forward to an interest in a

96. Document A77, vol 2(8), pp 75–76

97. Ibid, p 61

98. Ibid, pp 63–64; see doc A49(d), p 279

block. There is no express claim. These eel weirs were discussed at length at various places but they didn't seem to – it is very difficult to get anything conclusive from them.⁹⁹

The court noted that only Titi Tihu had appeared before it on any question of Maori custom. His evidence, it said, was directed to showing that, in the symbolic or metaphysical regard that the Whanganui tribe had towards its territory, the land came from Tane, the god of land, and the river from Tangaroa, the god of waters.

Court's answer on
separate ancestors

Added to this was the story of the rope plaited by Hinengakau to bring peace and unity among the peoples of the river and the submission (which it accepted) that the river had a special significance and 'mana' in the minds of the Whanganui tribe. But it concluded that the principal merit or significance that evidence of this kind possessed was to provide, at most, 'a background to an understanding of the general and cosmogenic conceptions which the ancient Maori had towards his property'.¹⁰⁰ It considered that claims to the court should be 'tied more to the foundations of practical realism rather than to those of mere symbolism'.¹⁰¹

The court continued that nothing in the evidence showed that a separate take to the river had ever been claimed until the proceedings had been brought in 1938. The court thought it reasonable to suppose that such an assertion would have been made long since and recorded in the minute books. When he was before the 1950 royal commission, Hekenui Whakaraka was asked whether the hapu owned any particular part of the river, the court noted. He had replied, 'No. This was left to the Native Land Court. The river has never been investigated so therefore it belongs to everybody'.¹⁰² By everybody, Hekenui meant all the hapu, descended from the three tipuna of the river.

The court observed that Hekenui had also testified that the names of these three did not appear in the Native Land Court records of investigations of title as having been put forward as ancestors or take tupuna in respect of any of the lands.¹⁰³ The court found, however, that, although they do not adjoin the river, Tamakehu was put forward as an ancestor in respect of the Tawhitinui and Morikau blocks.

The court found that assertions made in and since 1938 were of insufficient value, standing alone, upon which it could express an opinion in favour of the Maori claimants.

The court then speculated that, if ownership of the river and land were separate, at some time when a Maori claimed an area on the river bank and his proof was his right to the use of an eel weir opposite, then some opponent would surely have stood up and said most clearly: 'The river is owned by the tribe, so user of the eel

99. Document A77, vol 2(8), pp 75–77

100. Ibid, vol 2(9), p 2

101. Ibid

102. Ibid, vol 1(5), p 39

103. We note that this evidence of Hekenui was confirmed by a solicitor, N F Simpson, in an affidavit dated 11 May 1949: 'In the Matter of a Reference to the Court of Appeal of New Zealand under Section 36 of the Maori Purposes Act 1951 of Certain Questions Relating to the Bed of Portions of the Wanganui River' (doc A27(2), p 58).

weir comes from the tribe, and does not confer any rights to land on the bank.’ But they had found no evidence of this ever having happened.¹⁰⁴

It also endorsed Judge Browne’s 1938 statement when he rejected the Crown’s contention that:

‘Native Custom relates solely to rights of fishing, navigation, and ordinary domestic uses of water.’ In the Court’s opinion, so far as the Maoris are concerned, these rights, in the case of this River, follow as a matter of course and are incidental to the ownership of the bed of the river and cannot in any way be separated from that ownership. This Court, in all its experience of Native land and the investigation of the titles thereto, never once heard it asserted by any Maori claimant that the ownership of the bed of a stream or river, running through or along the boundaries of the land the subject of investigation, whether that Stream or River was navigable or not, was in any way different from the ownership of the land on its banks. Nor has it ever heard it denied that the tribes or hapus that owned the land on the banks of a stream or river had not the exclusive right to construct eel weirs or fish traps in its bed or exercise rights of ownership over it. The river bed being a source of food in ancient time would be looked upon as a highly important asset to any tribe and the right to it would be very jealously guarded by the members of that tribe.¹⁰⁵

Agreeing with that statement, the Appellate Court went on to say that the:

rights of ownership and use of the river for various purposes by the hapus on its banks were subject to the right of passage, of other hapus or groups of the tribe. To that extent, it seems to us [the court] that such original or ‘papatipu’ right of passage of the tribe existed over the whole river . . .

The tribe was seen as an ‘aggregation of separate, though to some extent, independent sub-tribes each of which exercised immediate rights of ownership and control over the section of the river that lay within its boundaries’.¹⁰⁶

The Appellate Court then considered that if the whole tribal territory, even though most extensive, had been investigated as one block, the Native Land Court might well have been disposed to issue a freehold order for title to the territory. Such orders would have been founded upon the claims made by the tribe according to its ancestral rights and other rights under Maori custom. The claims of hapu to their respective territories could have been determined later.

It pointed out, however, that this procedure was not followed either by Whanganui Maori or by the court. Instead, hapu or smaller groups themselves made separate applications to the court to be awarded the respective areas of the tribal lands in their occupation according to the ‘internal rules’ of the tribe as

104. Document A77, vol 2(9), p 3. We assume that the court was here postulating a situation where such a claimant did not also point to his belonging to the whanau or hapu that occupied the adjoining block and his occupation of part of such a block. This would have been the normal situation, rather than relying on a single factor such as a connection with an eel weir in the river.

105. Document A77, vol 2(9), p 4; doc A77, vol 1(2), p 2

106. Document A77, vol 2(9), p 4

found by the court. The appellate court noted that all this took place over a period of years extending from the year 1866 to the end of the century:

In the practical result, therefore, the original or tribal right, not being insisted upon by the tribe, was being converted by these processes into the recognised rights of the sub-tribes or smaller groups as they obtained freeholds in fee simple from the Court.¹⁰⁷

The Maori Appellate Court concluded, in answer to the Court of Appeal's first question, that the ancestral right to the Whanganui River was not separate or different from that to the riparian lands. The implication, in light of the previous discussion, was that any customary interests in the river were held by the owners of the riparian lands; and it was that which most put paid to the Maori riverbed claim.

A critique of the appellate court's answer to this question is given at section 9.2.2.

The court stated that the riverbed title had not been decided by the Native Land Court prior to the 1938 consideration and that there was no record of earlier claims. The river frontage of the part of the river in question amounted to 142½ miles on the left bank and 143 miles on the right, and only two miles 25 chains, within the Pukehika block (1907) and the Mangapukatea 2 block (1914) had not been investigated before 1903. Small communities owned all eel weirs and fishing structures, although others were sometimes allowed use rights. Even though hapu usually occupied both sides of the river, what determined the placing of a weir was the best site, not which side of the river the owners lived on. There was evidence that people fished outside their lands, although it was important when they did so to acknowledge the people of that part of the river. The court was not able to determine whether there was any stretch of the river where there was no fishing. No example could be found where the Maori Land Court had been asked to determine the ownership of eel weirs, although they were often cited as evidence of occupation for determining adjacent land ownership. In general, the river owners did not allow others to travel along the river without their permission and so it could not have been termed a highway. The court reiterated its view that occupation of riparian lands would have an important, if not decisive bearing, along with other customary river uses, on any determination of riverbed ownership in 1840. Finally, the court reflected on the fragmented nature of customary rights and the relationship of these rights to the Maori Land Court process.¹⁰⁸

7.7.3 Outcome

The Maori Appellate Court's answers to the questions from the Court of Appeal were a turning point in the litigants' fortunes. Since 1938, Whanganui Maori had received favourable responses to the effect that the riverbed was Maori land at 1840,

¹⁰⁷. Ibid

¹⁰⁸. Document A77, vol 2(9)

or at least until the Coal-mines Act Amendment Act 1903, from the Native Land Court, the Native Appellate Court, the Supreme Court, and the royal commission. The Crown had sought to negate these views, appealing from the Native Land Court, applying to injunct the Native Appellate Court, appointing a royal commission to obviate further litigation, and then enacting special legislation for further court hearings after a response unfavourable to it was received.

In the first Court of Appeal hearing in 1953, the court, with one dissenting judge, held against the Crown on three of the four matters it had advanced, finding yet again that, at 1840, the riverbed in question was land held by the Whanganui tribe under their custom and usages. This left the remaining contention of the Crown as to whether the riverbed became part of the titles of the adjoining land, *ad medium filum aquae*, when titles were investigated. To determine that, questions were put to the Maori Appellate Court. The critical question was answered in favour of the Crown.

The matter passed back to the Court of Appeal.

7.8 THE COURT OF APPEAL, 1960–62

Constitution of court

None of the judges who sat on the first hearing of the Court of Appeal in 1953 was a member of the 1960 court. That court comprised Justices Gresson (the president of the Court of Appeal), Cleary, and Turner. The hearing took place from 10 to 12 August 1960.

The decision

The decision was issued 19 months later, on 2 March 1962.¹⁰⁹ The court held that, where a block of land fronting on a non-tidal river has been held by Maori under their custom and usages and later the title has been investigated and separate titles issued, the bed of the land adjoining the river becomes *ad medium filum* a part of that block and the property of the respective owners of that block.

The court considered that, while a whole tribe may have exercised a right of passage over the river, and that eel weirs and fishing devices placed by individuals or hapu were not rigidly limited to the portion of the river immediately adjacent to their land, this did not negate the application of the *ad medium filum* rule.¹¹⁰

In reaching their decision, the three judges relied principally on the Maori Appellate Court's answer to the first question, that the ancestral right to the river was not separate to, or different from, that to the riparian lands. Having adopted this answer, it was a relatively short step to their conclusion that, upon investigation and the award of land adjoining the river to Maori claimants, they acquired the right to the middle line (*ad medium filum*) of the river.

Justice Turner expressly found that, whatever was originally the nature of the customary title to lands that had come before the Maori Land Court for investigation, the incidents of the title which the same court had issued and

109. *In re the Bed of the Wanganui River* [1962] NZLR 600 (CA) (doc A77, vol 2(10)), pp 600–627

110. *Ibid*

certified were, and always had been, the incidents of English freehold title.¹¹¹ In the same vein, Justice Cleary stated:

It is obvious that this process of the transformation of Maori customary rights into freehold titles involved conferring on the ascertained owners rights of a nature which had never been present to the Maori mind. It was stressed in argument that the presumption of a conveyance carrying title *ad medium filum* could not be made to apply to the grant of freehold titles based on Maori custom, when neither the idea of conveyance nor the notion of ownership *ad medium filum* had any place in Maori conceptions. To my mind this argument loses force when it is borne in mind that the whole notion of a fee simple estate owned by a limited group of ascertained persons was foreign to the Maori mind, and I do not see why the transformation of customary rights into freehold titles should result in the exclusion of the *ad medium filum* rule any more than that it should exclude any other incident attaching to a grant of freehold, however alien such incident may have been to the Maori.¹¹²

Though the Native Land Act 1865 had provided that the title to customary land was to be determined in accordance with Maori custom, the decision made clear that the incidents of the new title were those of the laws of England.

In opening legal submissions, counsel for Maori had stressed that, in reviewing the investigation of lands by the Native Land Court Maori, customary titles had properly to be seen as Maori saw them. He referred to the warnings of the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria* and *Oyekau v Adele*.¹¹³ In the first of these, the Privy Council had said:

Later judicial
comment

in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.¹¹⁴

It was to no avail, but the point has since been taken up in a unanimous judgment of five judges of the Court of Appeal in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, reported in 1994. After adverting to findings of the Waitangi Tribunal in *Te Ika Whenua – Energy Assets Report 1993* and *The Mohaka River Report 1992*, in which the Tribunal adopted the concept of a river as a taonga, the court commented:

One expression of the concept is ‘a whole and indivisible entity, not separated into beds and banks and waters’. The vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Act Amendment 1903 and succeeding legislation may not be sufficiently explicit to override or dispose of that concept, although it is odd that the concept seems not to have been put forward in quite that way in the line

111. Ibid, p 624

112. Ibid, pp 618–619

113. *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 402–403; *Oyekau v Adele* [1957] 2 All ER 785

114. *Amodu Tijani v The Secretary*, pp 402–404

of cases concerning the Wanganui river, the last of which was the decision of this Court in *Re the Bed of the Wanganui River* [1962] NZLR 600. Perhaps the approach which counsel for Maori argued for in that line of cases, emphasising the bed and the adjacent land more than the flow of water, is an example of the tendency against which the Privy Council warned in *Amodu Tijani* (at p 403) of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law. Similarly, as the Waitangi Tribunal bring out in their *Mohaka River Report* at pp 34–38, the *ad medium filum aquae* rule applied in the 1962 case is inconsistent with the concept and may well be unreliable in determining what Maori have agreed to part with.¹¹⁵

7.9 THE TREATY ISSUE

The matter before the Court of Appeal was not the same as that now before us. The question here is whether extinguishment was consistent with the principles of the Treaty of Waitangi. The central issue is whether Maori knowingly and willingly relinquished their river interests or their traditional authority over the river as a whole. Conversely, Treaty principles were not in issue before the courts at that time.

No conscious
disposal of river
interests

We can find nothing in the extensive evidence before the courts to suggest that Maori knowingly and willingly relinquished their river interests or their traditional authority over the river as a whole. There is no record of some conscious act, positive averment, or free consent.

There is no compelling evidence that, on the title investigations or subsequent land sales, they consciously and positively saw themselves as individualising and alienating their river interests as well. Rather, the inference from the evidence is the other way. Maori were involved in applications to determine the ownership of parcels of land, not parcels of river – the survey drawings encompassed only land, the applicants' minds were not directed to the river, and the Native Land Court did not advise that customary river interests were affected. Indeed, the matter does not appear to have entered the court's mind either.

No tribal consent

Nor could there have been the general tribal consent that was required – a meeting of the leading rangatira acting in consultation with their respective hapu. At best, individual interests were affected. There could have been no general consent for the extinguishment of the tribal interest as part of the court's process, for each land case involved only the local people.

No consent to the
process

More telling is that, acting collectively, the leading persons of Atihaunui had opposed the Native Land Court process as a whole, and had set up proposals of their own for dealing with their land. This was to no avail (see secs 5.3.2–5.3.3). The method by which the Native Land Court 'got in', to use the expression of the time, has been described (see secs 2.8.2, 5.4). The people had no option but to submit to it. An overview of the 1938 to 1962 litigation is given at section 9.2.

115. *Tē Runanganui o Tē Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 26, 26–27