NGATI APA: A COUNTER-REFORMATION

LAURA FRASER* AND JESSE WALL**

Introduction

The Court of Appeal adjudicated a conflict of precedents unique in New Zealand jurisprudence when it decided *Attorney General v Ngati Apa*[1] *("Ngati Apa")* in 2003. The Court had refused to recognise that the doctrine of customary title was a source of the common law sixty years earlier in *Re the Ninety-Mile Beach*[2] *("Ninety-Mile Beach"),* a decision defiantly inconsistent with earlier decisions of the Privy Council.[3] *Ngati Apa* represents a bold, if not wholly unexpected, departure from this earlier Court of Appeal decision and is the most recent end of a significant shift in judicial approach to customary rights in New Zealand. Despite legislative intervention to override the immediate impact of the *Ngati Apa*, the case remains a useful example of the manner in which appellate courts overturn their own prior precedents.

This article looks to explore the latter decision of the Court of Appeal from a jurisprudential standpoint. Part A seeks to describe the change of law in *Ngati Apa* with particular emphasis on the reasoning that led to overturning *Ninety-Mile Beach.* Part B will explore some of the different jurisprudential frameworks that compete to describe such modifications in the law. It will be argued that Realist Positivism provides the most accurate description of the workings of the Court of Appeal in the *Ngati Apa* decision.

A. The Decision in *Ngati Apa*

The essence of the Court of Appeal's decision to reverse its own prior decision of *Ninety-Mile Beach* was a fundamental clash as to whether

* Candidate for BA; LLB (Hons), University of Otago.

** Candidate for BA; LLB (Hons), University of Otago.

1 [2003] 3 NZLR 643 (CA).

2 [1963] NZLR 461.

3 *Nireaha Tamaki v Baker* [1901] AC 561; [1900] NZPCC 371.

Indigenous systems of property ownership were part of New Zealand common law at 1840. This involved clarifying relationships between the common law and statute. While the Court of Appeal in 1963 considered that a positive source of Indigenous rights needed to be found in law, the Court of 2003 felt that Indigenous rights in land continued to exist until expressly abrogated by statute.

1. The Precedent: *Ninety-Mile Beach*

The Court of Appeal had been asked to determine if the Maori Land Court had jurisdiction to investigate and grant title to land within the tidal zone of the Ninety-Mile Beach.[4] The Maori Land Court is a body of limited jurisdiction; the powers of the Court are confined to those conferred on it by Parliament. The Court had been empowered by statute to investigate any claim to a customary interest in land made by Maori with a view to issuing a certificate of title[5]. If this investigatory power was found to extend to areas of the foreshore, then there existed a potential avenue for Maori to claim an interest in some of the last remaining land in New Zealand not subject to freehold title. The Court of Appeal proceeded to analyse the legal question on the assumption that the Maori Land Court had investigated and granted title to lands adjoining the beach, although this fact has subsequently been disputed.[6]

Both North and TA Gresson JJ expressed reservations about the consequences of the Maori Land Court having jurisdiction over the foreshore. North J considered that such a result would be "startling and inconvenient"[7]. Both judges felt that the public interest dictated they decline to recognise any such jurisdiction in the Maori Land Court. Importantly, both judges accepted that the only source of title in New Zealand was the Crown. North J said:

> There is no doubt that it is a fundamental maxim of our laws that the Queen was the original proprietor of all lands in the Kingdom and consequently the only legal source of private title, and that this

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4 *Re the Ninety-Mile Beach,* supra n 2 at 466.

5 Sections 21 and 23, Native Land Act 1965.

6 R P Boast "*Re The Ninety-Mile Beach* Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145-170.

7 Supra n 2 at 467.

> principle has been imported with the mass of the common law into New Zealand; that it "pervades and animates the whole of our jurisdiction in respect to the tenure of land": see *R v Symonds* (1847) N.Z.P.C.C. 387, 388.

TA Gresson J similarly expressed this sentiment in his judgment,[8] and Gresson P concurred with both. By adopting this position, the Court precluded the recognition of any customary rights in land, as such rights are not derived from the Crown. North J was careful to point out that this did not automatically mean that Maori had no legal rights in the foreshore. Such rights may have been created by statute or derived from a grant of title.

North J acknowledged that there existed no legislative provision limiting the scope of investigations able to be undertaken by the Maori Land Court. This indicated that investigations into the foreshore might initially have been within the Court's statutory jurisdiction.[9] However, North J felt that the Maori Land Court was required to show "due regard"[10] to the common law position that the Crown was entitled to the foreshore. In the immediate case, North J considered that the prior Maori Land Court investigation into the foreshore of the beach and the subsequent granting of title to adjoining land "wholly extinguished"[11] any claims to rights in the foreshore. Further enquiries into ownership of the foreshore were precluded, as the results of the prior investigation impliedly confirmed Crown ownership of this land. In cases where such an inquiry has been undertaken, rights in the foreshore exist only at the Crown's discretion.

North and Gresson JJ also considered that section 12 of the Crown Grants Act 1866 impliedly excluded Indigenous title in the foreshore.[12] This provision specified that where 'the sea' is the stated boundary of a title to land, this meant the high tide mark. Emphasis was also placed on section 147 of the Harbours Act 1878. This provision said that no part of the shore of the sea could be granted or disposed of without the

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[8] Ibid at 475.

[9] *Re the Ninety-Mile Beach,* supra n 2 at 469.

[10] Ibid at 472.

[11] Ibid at 473.

[12] *Re the Ninety-Mile Beach,* supra n 2 at 473 and 478.

special sanction of an Act of the General Assembly. The Court was of the opinion that these provisions removed the residual ability of the Crown to grant title to the foreshore, thereby impliedly excluding any Maori claims to rights in the area.

Most of the reasoning employed by the Court in this case can be traced to earlier decisions of New Zealand domestic courts such as *Waipapakura v Hempton*[13] and *Wi Parata v Bishop of Wellington*[14]. These decisions held that Indigenous rights in land could only be recognised by positive legal authority such as statute, and thus have no basis in the common law. *Ninety-Mile Beach* can be explained as an orthodox application of the reasoning in these earlier cases. The Court did not seriously contemplate the possibility that such rights may not have needed a positive source.

However, there was more than one approach to Indigenous rights alive in New Zealand case law in 1963.[15] The Privy Council observed the existence of Indigenous title in New Zealand common law in cases such as *Nireaha Tamaki v Baker*[16] and this approach was theoretically binding on the Court of Appeal. The decision in *Ninety-Mile Beach* epitomises the approach of New Zealand courts to this authority.[17] For the most part, New Zealand courts failed to recognise the Privy Council as a source of law regarding Indigenous rights relating to land, a position dramatically pronounced in the *Protest of Bench and Bar*[18] issued in the wake of Privy Council decisions recognising customary rights as an encumbrance on the radical title of the Crown.[19] Thus, customary ownership of the foreshore was not recognised by the Court of Appeal in *Ninety-Mile Beach*.

Consequently, the New Zealand approach to Indigenous title was for

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[13] (1914) 33 NZLR 1065.

[14] (1877) 3 NZ Jur (NS) SC 72.

[15] Paul McHugh "Aboriginal Title in New Zealand Courts" (1984) 2 Canterbury Law Review 235-265.

[16] Supra n 3.

[17] *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA).

[18] (1903) NZPCC 730.

[19] The Protest was a response to the 1903 decision of *Wallis v Solicitor-General* (1903) NZPCC 23.

the most part of the Twentieth Century governed by domestic courts. The decision in *Ninety-Mile Beach* became binding authority on legal ownership of the foreshore by default and Indigenous interests in land were only recognised where empowered by statute.

2. The Change: *Ngati Apa*

Political, social and legal circumstances changed dramatically in the decades following *Ninety-Mile Beach*. Many post-colonial jurisdictions had come to recognise the existence of Indigenous title at common law.[20] In New Zealand, the landmark decision of *Te Weehi v Regional Fisheries Officer*[21] suggested that the New Zealand judiciary was increasingly receptive to recognising Maori customary rights.[22] Importantly, other New Zealand cases such as *Te Runanga o Muriwhenua Inc v Attorney-General* [23] and *Te Runanganui O Te Ika Whenua Inc Society v Attorney-General*[24] had hinted, by analogy, that *Ninety-Mile Beach* was wrongly decided. In 2003 the Court of Appeal had an opportunity to revisit the jurisdiction of the Maori Land Court to investigate customary title to the foreshore and seabed. The opportunity arose in the context of a claim made in the Maori Land Court by the Ngati Apa iwi that they held customary title to the foreshore and seabed of the Marlborough Sounds.

The *Ngati Apa* decision did not address the factual question of whether customary title to the foreshore and seabed could be established in the Marlborough Sounds. It addressed the preliminary legal issue of whether the Maori Land Court had the jurisdiction to undertake an investigation into the foreshore and seabed with a view to declaring the land customary land within the meaning in section 129(2)(a) of Te Ture Whenua Maori Act 1993. In addition, the Court made observations on

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[20] See for example *Mabo v Queensland* (1988) 166 CLR 186; *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

[21] [1986] 1 NZLR 680. Williamson J accepted a defence to a charge of possessing undersized paua based on a Maori customary fishing right given statutory effect by section 88(2) Fisheries Act 1983.

[22] Supra n 6 at 169.

[23] [1990] 2 NZLR 641.

[24] [1994] 2 NZLR 20.

the inherent jurisdiction of the High Court to declare land held under native title.

The case before the Court of Appeal had some factual differences to *Ninety-Mile Beach*. *Ngati Apa* related to both foreshore and seabed of the Marlborough Sounds. Some of the land in question had never been subject to an investigation by the Maori Land Court. However, the majority of the Court did not distinguish *Re the Ninety-Mile Beach* on the facts.[25] Elias CJ preferred the reasoning of the earlier Privy Council decisions to that of the Court of Appeal in *Ninety-Mile Beach*. Elias CJ argued that *Ninety-Mile Beach* relied on decisions that had been "discredited"[26] and consequently was not of precedential pedigree. The Chief Justice was careful to couch her decision in terms of the established precedent of *Nireaha Tamaki,* casting *Ninety-Mine Beach* and the domestic decisions that preceded it as an unfortunate aberration from settled law.

While Elias CJ described the actions of the Court as predicated on established authority, it can be argued that the departure from *Ninety-Mile Beach* in effect represented a new approach for New Zealand courts. The core disagreement with the reasoning in *Ninety-Mile Beach* is clearly explained in the opening paragraph of the judgment of Tipping J:

> When the common law of England came to New Zealand its arrival did not extinguish Maori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not, therefore, acquire wholly unfettered title to all the land in New Zealand. Land held under Maori customary title became known in due course as "Maori customary land".[27]

This approach to customary title was first taken by a New Zealand Court in the decision of *R v Symonds*[28] in 1847. The reasoning behind this approach flows from the Native Laws Act 1868 which provided

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[25] Gault P's judgment is distinguished from the majority on this point: see discussion of his judgment in Part B of this article.

[26] *Ngati Apa* supra n 1 at [14].

[27] Ibid at [183].

[28] (1847) NZPCC 387.

that English common law was applied in New Zealand only in so far as applicable to the circumstances of the colony.[29] The existence of an established regime of sophisticated Indigenous property rights is a circumstance of New Zealand sufficient to modify English common law. Starting from the premise that Indigenous title is capable of recognition at common law, two key flaws are evident in the analysis of the Court of Appeal in *Ninety-Mile Beach*.

Firstly, the Court of Appeal's earlier analysis of the Crown Grants Act and the Harbours Act is flawed insofar as the Court held that these enactments extinguished any existing customary rights. Neither statute expressly excluded the potential for customary title. If Parliament intends to extinguish any customary title by statute then it must use language that is "crystal clear"[30]. In *Ngati Apa* it was asserted in argument by counsel that several other statutory regimes extinguished customary title.[31] The Court found that no New Zealand statutes were of the clarity necessary to extinguish any existing customary title. Equally, the Court held that statutes regulating the use of the foreshore and seabed[32] did not exclude the potential for customary title insofar as customary title is consistent with such regulation.[33] The Court set a high threshold for extinguishing customary rights by statute.

Secondly, the presumption that an earlier Maori Land Court investigation precluded the existence of customary title to the foreshore does not stand if it is recognised that Indigenous title is a part of the common law. This argument rests on the assumption that the foreshore "remains with the Crown"[34] following such an investigation. Such an assumption is "not supported by authority"[35].

Numerous other issues were canvassed in *Ngati Apa* such as the powers of the Maori Land Court under the Te Ture Whenua Maori Act to

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[29] Ibid at [17].

[30] Ibid at [185].

[31] These statutes include the Territorial Sea Acts and the Foreshore and Seabed Endowment Act 1991.

[32] For example, the Resource Management Act 1991.

[33] *Ngati Apa,* supra n1 at [75 - 76] and [192].

[34] Ibid at [84].

[35] Ibid at [85].

confer use rights in land, the meaning of 'land' under the Te Ture Whenua Maori Act, and the ability to hold title to the seabed at common law. Each of these issues was decided in a manner that enabled the Maori Land Court to investigate Indigenous title to the foreshore and seabed. However, the primary effect of the decision was to reverse the approach of the courts to determining Indigenous title. After *Ngati Apa,* it must be shown that customary rights in land have been legally extinguished, rather than that customary rights have been created by statute.

The decision of the Court of Appeal is consistent with earlier overseas decisions recognising Indigenous rights in land, such as the landmark decision of *Mabo v Queensland*[36] in Australia and the long line of Canadian cases on the subject, recently confirmed in *Delgamuukw v British Columbia*[37]. These cases are indicative of broad acceptance of the view that English common law was modified to account for existing Indigenous practice on reception in a colonial setting.[38] However, the courts will not have the opportunity to reflect on the full meaning and significance of the decision in *Ngati Apa* for customary rights and title in New Zealand. The Foreshore and Seabed Act 2004 removed the jurisdiction of the High Court and the Maori Land Court to hear claims of customary rights relating to the foreshore and seabed, substituting the common law for more strenuous statutory procedures. Despite this legislative change, the reasoning in *Ngati Apa* provides a striking example of when and how appellate courts will depart from their own previous decisions. Part B will attempt to explain the approach of the New Zealand Court of Appeal to this difficult question from a jurisprudential perspective.

B. Explaining Change in the Common Law

As we have seen in Part A, *Ngati Apa* changed the common law by recognising the potential for customary native title in the foreshore and

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[36] (1998) 166 CLR 186; (1988) 83 ALR 14.

[37] [1997] 3 SCR 1010.

[38] It is worth noting that recent Australian High Court decisions have minimised the significance of this acknowledgement in that jurisdiction: See *Commonwealth v Yammir* (2001) 208 CLR 1; Ruru J "What could have been? The Common Law Doctrine of Native Title in Land under Salt Water in Australia and Aotearoa/New Zealand" (2006) 32 Mon L R 116-145.

seabed. How one perceives the change in *Ngati Apa* depends largely on how one perceives the concept of law. We suggest that there are three conceptions of law that lead to different explanations of how the common law changed in *Ngati Apa*. Part B will first outline how the change can be explained by three possible conceptions of law: 'Strict Positivism', 'Positivist Realism', and 'Dworkinism'. Secondly, the individual judgments of the Court of Appeal will be categorised as adhering to one of three conceptions of the law. Thirdly, it will be argued that Realist Positivism provides the best explanation for the law change in *Ngati Apa*.

1. Conceptions of Law

For our purposes, H. L. A. Hart provides the best explanation of the positivist account of law. At its core, the law is a union of primary rules of obligation and secondary rules of change and recognition. The former relate to the substance of the law; the latter relates to the procedure for determining the law. The way the law can change, according to Hart, is specified through secondary rules. "The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules […] and to eliminate old rules"[39]. For example, the rule that legislation may introduce new primary rules that defeat primary rules arising out of custom or precedent is a rule of recognition. Moreover, the rule that the Privy Council (prior to the New Zealand Supreme Court) could restate the common law in a way that bound the New Zealand Court of Appeal was another secondary rule.

This concept of law gives rise to the first account of the change in *Ngati Apa*: Strict Positivism. From this perspective, the Court of Appeal in *Ngati Apa* was, by using secondary rules properly, following the superior authority of the Privy Council in *Nireaha Tamaki* which recognised common law native title. Accordingly, *Ngati Apa* remedied the mistake made by the Court of Appeal in *Ninety-Mile Beach* in misapplying the rules of recognition by ignoring the Privy Council.

There is an alternative interpretation of Hart's concept of law. As Hart himself notes, secondary rules of recognition are seldom expressly

[39] H. L. A. Hart, *The Concept of Law*, (1961) 92-93.

formulated as a rule. Although the supremacy of the Privy Council over the New Zealand Court of Appeal has been expressed numerous times in case law, it is contended that Hart's conception of law is more concerned with which secondary rules are followed rather than which secondary rules are stated[40]:

> For the most part the rule of recognition is not stated, but is existence is *shown* by the way in which particular rules are identified, either by the courts or other officials or private persons or their advisors.

One way of reading Hart's conception of law is to treat secondary rules as sociological facts rather than strict legal rules. When the courts say the rule of recognition is one thing but in reality the practice of the courts is contrary to that rule, the widely accepted practice is in fact the rule. This reading gives rise to the second of our conceptual frameworks: Positivist Realism.

From this perspective, *Ngati Apa* effected a counter-reformation in the secondary rules. The initial reformation began with the*1903 Bench and Bar Protest* and was followed by the Court in *Hempton,* which failed to recognise the authority of the *Nireaha* decision. The reformation then continued with the *Ninety-Mile Beach* decision. The reformation changed a secondary rule: instead of the Privy Council being considered superior to the New Zealand Court of Appeal in the area of the law of Indigenous people's proprietary rights, the decisions of the New Zealand Court of Appeal were accorded the highest pedigree. From 1903 to the mid 1980s there was this unorthodox, yet accepted, secondary rule of recognition in this particular area of law. Hence, according to Positivist Realism, *Ngati Apa* effected a change in a secondary rule of recognition. This 'counter-reformation' returned the secondary rule back to the orthodox position based on the court hierarchy, and enabled the 2003 Court of Appeal to affirm the Privy Council position in *Nireaha Tamaki.*

The above two conceptions of law are different interpretations of a Positivist concept of law. Our third conception comes from a very different school of jurisprudence. R Dworkin in 'Is law a system of

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[40] Hart, 101.

rules?"[41] launched a general attack on Positivism and used Hart's version "as a target"[42]. Dworkin argued that the law includes principles and other standards, and that positivism "forces us to miss the important roles of these standards that are not rules"[43]. Using this framework, our task of explaining how the law came to change in *Ngati Apa* forces us to cast our net wider than the legal rules that were stated and assumed in the case law, or at least in the case law directly relevant to the foreshore.

There are two key characteristics of Dworkinian principles. The first key characteristic is that principles may have to be weighted and balanced against competing principles. It may be that one of the competing principles is certainty of law which requires attention to be paid toward promulgated rules. But that principle of certainty may be trumped in a particular case by a competing principle. Principles are never fully deprived of legal validity. When they conflict, one principle is held to be more important than the other in a particular context, but the defeated principle is not excluded from our legal system. It is simply that in that particular case, the principle was outweighed by another. According to Dworkin, rules do not have this characteristic: "If two rules conflict, one of them cannot be a valid rule."[44]

The second key characteristic is that Hart's rules of recognition cannot identify principles and cannot balance and prioritise them. This requires a normative assessment of the competing principles derived from moral or political theory. Hence, Dworkinian principles are well outside the mechanical rule-based concept of law that legal positivists defend.

Let us now view the position of the Court of Appeal in *Ngati Apa* through the Dworkinian lens. The rule in *Ninety-Mile Beach*, that property title must be derived from the Crown or from statute, might be supported by certain principles. There is the principle that the public interest is best served by not disrupting the established property regime by recognising non statutory sources of title,[45] as well as the principle in

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[41] R Dworkin, 'Is the law a system of rules?', *The Philosophy of Law* (1977).

[42] Ibid. 43.

[43] Ibid.

[44] R Dwokin, *The Philosophy of Law*, 48.

[45] North J considered that non statutory land rights would be "startling and

Wi Parata; that Maori (during the establishment of crown sovereignty) were (in the words of Prendergast CJ) "incapable of performing the duties, and therefore of assuming the rights, of a civilised community"[46] and thus incapable of possessing property rights prior to Crown sovereignty.

On the other hand, there was conflicting authority from the Privy Council in *Nireaha Tamaki*, which was supported by different principles. For instance, there is the principle (affirmed in *Te Weehi*) that for any property right to be extinguished, there must be explicitly clear statutory language to that effect. These principles were also later affirmed in analogous cases, such as *Te Weehi*, *Muriwhenua* and *Te Ika Whenua*.

The conflicting rules seem irreconcilable. However, from a Dworkinian perspective, there is more to law than rules. There are principles that are not found in the most directly relevant precedents that suggest that a court may recognise customary rights in the foreshore and seabed. These principles constitute part of the legal fabric which enabled the Court of Appeal in 2003 to prioritise the principles to find common law native title in the foreshore and seabed. The change in *Ngati Apa* can be thus viewed as an example of wider principles setting aside directly appropriate precedent, striking a better balance in the law than in *Ninety-Mile Beach*.

Therefore, there are different ways of explaining the change of law in *Ngati Apa* depending on the particular lens through which we view the decision. We shall now consider the conceptual frameworks the Judges of the Court of Appeal adopted in the *Ngati Apa* decision.

2. Elias CJ, Keith and Anderson JJ

Elias CJ seems to have subscribed to the Strict Positivist conception of legal change in *Ngati Apa*. The joint judgment of Keith and Anderson JJ purports to adopt this approach. The Chief Justice's view that *Ninety-Mile Beach* should be overturned on the grounds that it was contrary to

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inconvenient", *Re the Ninety-Mile Beach* at 467.

[46] *Wi Parata*, 77.

the Privy Council's decision in *Nireaha Tamaki* is clear from paragraph 13 of the judgment:

> …*Re Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based upon developing insights since 1963. The reasoning the court applied in *Ninety-Mile Beach* was contrary to other higher authority and indeed was described at the time as "revolutionary".

Under this approach, the Court in *Ninety-Mile Beach* in 1963 misused the secondary rules of recognition to apply the rule in *Wi Parata* as the primary rule. The court in *Ngati Apa* cured this defect by applying *Nireaha* as the primary rule that flows from the correct application of secondary rules.

However, Elias CJ later states at paragraph 61 that *Wi Parata* is "contrary to common law and the successive statutory provisions recognising Maori customary title". Moreover, Keith and Anderson JJ state in their joint judgment at paragraph 154:

> …native property rights are not extinguished by a side wind, in this case by a general statute concerned harbours. The need for "clear and plain" extinguishment is well established and is not met in this case. In the Ninety-Mile Beach case, the Court did not recognise that principle of interpretation. Accordingly, for both reasons, we consider that the court seriously misread the provisions in the harbours legislation.

What these extracts suggest is that *Wi Parata* and *Ninety-Mile Beach* were contrary to other aspects of the established fabric of the legal system. In other words, they adhered to rules that are displaced by other principles in the legal system. The relevant principles may be derived from (i) the statutory recognition of Maori customary title in legislation, (ii) common law recognition of customary rights from analogous case law (such as *Muriwhenua*), and (iii) general principles of statutory interpretation.

This would be an example of the Court revising the balance of principles in the legal system to effect change in law: an example of a

Dworkinian conception of law. However, Elias CJ rejects the notion that *Ngati Apa* is a modern revision of the law "based upon developing insights". Hence, the Chief Justice's decision is best understood as an exercise in Strict Positivism. As for the joint judgment of Keith and Anderson JJ, their jurisprudential perspective is unclear. They purport to subscribe to Elias CJ's Strict Positivism, yet they also seem to be re-balancing principles to arrive at the same conclusion.

3. Gault P

In one sense, Gault P's decision in *Ngati Apa* can be seen as a dissent. Although Gault P arrived at the same outcome as the remainder of the Court of Appeal, the avenue which his Honour took to reach the result is unique and difficult to reconcile with the other judgments. Instead of overturning the decision in *Ninety-Mile Beach*, Gault would have narrowed the scope of the decision at paragraph 121:

> But I consider that those conclusions are consistent with the intended application of the provisions of the successive Native Lands Acts. Interests in native lands bordering the sea, after investigation by the Native Land Court (which encompassed ascertaining interests of any other complaints), were extinguished and substituted with grants in fee simple. It does not seem open now to find that there could be have been strips of land between the claimed land bordering the sea and the sea that were not investigated in which the interests were not identified and extinguished once the Crown grants were made….Of course, if it is shown that the land investigated was not claimed as bordering the sea the position might be different. The Court in *Ninety-Mile Beach* case did not rule on that factual situation.

Although this approach was unique in *Ngati Apa*, it is common place for an appellate court to constrain prior precedents to limited circumstances so as to be free from the constraints of difficult precedent. The important question for our purposes is what concept of law drove Gault P to such a narrow view of *Ninety-Mile Beach*?

Gault P must have felt constrained by the precedent value of *Ninety-Mile Beach* if his Honour was unwilling to make findings with regard to the kind of strips of land that were adjudicated upon in 1963. Therefore, in showing deference to the 1963 Court of Appeal, Gault P's decision must be premised upon Positivist Realism. Namely, that

the Court of Appeal's decision in 1963 has the requisite pedigree in this particular area of the law to accurately state the substantive law. Gault P perceives his judgment in *Ngati Apa* as addressing a slightly different question than that was determined in the *Ninety-Mile Beach* decision, whilst assuming the validity of Ninety-Mile Beach. Hence, Gault P tended towards a Positivist Realist perspective, whilst not joining the counter-reformation of secondary rules.

This approach may seem counter-intuitive, but can be understood when one considers the practical impact of reversing *Ninety-Mile Beach*. Gault P's decision reflects a Formalist concern for negative impacts of retrospective change in settled law. The change in law in *Ngati Apa* had a retrospective effect, as it had the potential to attach new legal consequences to past events.[47] This is an insult on the rule of law, as those with interests in the seabed and foreshore could reasonably have relied upon the law as stated in the 1963 Court of Appeal decision. When the 2003 Court of Appeal changes the status of the law, the new law applies to past, present and future conduct which may detrimentally impact on *bona fide* interests.

4. Tipping J

Tipping J also seemed concerned about the disruption of settled law. The judgment of Tipping J recognised explicitly the change in the common law that was brought about by the *Ngati Apa* decision. Tipping J held that the Court in *Ninety-Mile Beach* did not adequately recognise the fundamental point that the Crown acquired sovereignty in New Zealand subject to Maori customary title.[48] Tipping J also recognised that although the "decision in Ninety Mile has stood for 40 years"[49]it was necessary to overturn it. At paragraph 215:

> I was initially hesitant but am now satisfied that the case for overruling *Ninety-Mile Beach* is clearly made out […] while the case has stood for a long time, it is better in the end that the law now be set upon the correct path.

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[47] See Elmer A Dreidger, Statutes: Retroactive Respective Reflections (1978) 56 *Canadian Bar Review*, 268.

[48] *Ngati Apa*, paragraph [197].

[49] *Ngati Apa*, paragraph [209].

Tipping J, by recognising that *Ngati Apa* was a change in law, adopts a non-Dworkinian concept of law. From a Dworkinian perspective, the rules and principles that determined whether there was a common law customary title in the foreshore and seabed would have always been a part of the fabric of the law, despite the failure of previous courts to properly identify them. A Dworkinian judge would not 'change' the law, but merely declare the true state of the law by relying on both rules and principles. Instead, Tipping J viewed *Ngati Apa* as setting the law upon a different path.

Furthermore, it is difficult to reconcile the Strict Positivistic account of Ngati Apa with the concession that the Court is changing the law. If it is the case that the Court of Appeal in *Ninety-Mile Beach* merely misused the secondary rules of a legal system, then it would be surprising that such an error would stand for 40 years. Under a Strict Positivist conception, ever since the Privy Council's findings in *Nireaha* the common law has recognised customary title. The decision of a subordinate court could not have the requisite pedigree to overturn the Privy Council decision. Therefore, to concede that *Ngati Apa* represents a change in the law is to view the decision in *Ninety-Mile Beach* as a reformation and the decision in *Ngati Apa* as a counter-reformation of secondary rules: the Positivist Realist conception.

5. Which conception of the law provides an adequate account of *Ngati Apa*?

A complication for both a Strict Positivism and a Dworkinian conception of law is that both conceptions are premised upon a declaratory theory of judgment. Namely, that the court does not change the law, rather declares the true nature of the law. This declaration may be made upon the basis of primary and secondary rules or following a balancing of established principles. Nonetheless, it is an unstable premise from which to explain the law. As Lord Browne-Wilkinson notes in *Kleinwort Benson Ltd v Lincoln City Council*:

> …the theoretical position has been that judges do not make the law; they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed; its true nature is disclosed, having existed in that form

> all along. This theoretical position is… a fairy tale in which no one believes. [50]

Hence, it is problematic for these concepts of law that *Ninety-Mile Beach* has been viewed as good authority for forty years before *Ngati Apa*. A descriptive conception of law needs to be able to account for this. Strict Positivism fails to account for the change in *Ngati Apa,* as the 40 year reign of *Ninety-Mile Beach* can only be explained as a failure of the secondary rules.

A Dworkinian conception could explain the change in terms of new principles and policies being introduced into the legal system after 1963, or by reference to a re-balancing of older principles against the rules. But *Ngati Apa* would not be a *change* in law, it would be a *declaration* of the law as a result of rules and principles that have always been the law. Therefore, the Dworkinian conception of law provides an adequate explanation of *Ngati Apa,* although it requires us to believe in the declaratory theory of judgment.

Positivist Realism also provides an adequate explanation of the change in *Ngati Apa*. In the words of the Chief Justice, Ninety-Mile Beach was "revolutionary". It was revolutionary as it, along with the *1903 Protest of Bench and Bar*, marked a reformation in the secondary rules of recognition in a particular area of New Zealand law. It seemed to establish that in the area of Indigenous land law, the New Zealand Court of Appeal had higher pedigree than the Privy Council. The change in 2003 was thus a counter-reformation, reverting back to the orthodox rules of recognition. This, in our opinion, is the best way to explain the change in law effected by *Ngati Apa*.

Conclusion

Ngati Apa was a case that finally brought to an end a unique disagreement between New Zealand domestic courts and the Privy Council in the area of Indigenous rights. From a jurisprudential standpoint it provides a useful illustration of the possible applications for the different classical conceptions of law, in particular, an illustration of how the conceptions of law are able account for change

[50] [1998] 3 WLR 1095 at 1100.

in law. A Dworkinian conception of law can adequately describe *Ngati Apa* as a re-balancing of legal principles, but it is constrained from describing *Ngati Apa* as a change in law. If we view *Ngati Apa* as changing the law with regard to customary rights in the foreshore and seabed, then we must to view the decision as a counter-reformation of rules of recognition.