

# The Pouakani Report 1993

## Appendices

### 15 Legal Submissions on the Beds of Navigable Rivers

By section 261 of the Coal Mines Act 1979, the beds of "navigable rivers" in New Zealand are deemed to be vested in the Crown. The following note discusses the prerogative rights of the Crown to rivers at common law. In part 2 the history of the provision is outlined with reference to New Zealand case law which has impacted on the interpretation of the section. Part 3 provides a summary of the main points of the paper.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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## Appendices

### 15.1 Navigable Rivers at Common Law

The common law rights of the Crown to river beds are less extensive than the rights accorded the Crown by s261 of the Coal Mines Act 1979. That section provides:

(1) For the purpose of this section-

"Bed" means the space of land which the waters of the river cover at the fullest flow without overflowing its banks:

"Navigable river" means a river of sufficient width and depth (whether at all times or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

(2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

Such rights as do exist at common law are best not characterised as proprietary rights to rivers at all but rather are an extension of the prerogative rights attaching to the seas. The common law position is best illustrated by the case of *Murphy v Ryan* where it was held that the Crown has no prima facie right to the bed of navigable rivers beyond the point where the tide ceases to ebb and flow:

The Plaintiffs were riparian owners of land adjacent to the River Barrow. They brought an action in trespass against the Defendants for various torts including breaking and entering their close, being land covered by the River Barrow, and fishing there. The alleged trespass and fishing occurred on part of the river which afforded access by boat but which was not tidal. The Defendants denied trespass and pleaded that as the river was navigable its soil was vested in the King and that in such rivers the public had a right to fish. The Plaintiffs demurred that the public right to fish in an inland river did not extend beyond the point at which the tide ebbs and flows. {FNREF:0-86472-117-XA:Appdx15:1}

The case was heard before O'Hagan J in the Irish Court of Common Pleas where the Plaintiff prevailed. His Honour concluded:

[u]pon a full consideration of all the cases, it will, I think, appear that no river has ever been held navigable, so as to vest in the Crown its bed and soil, and in the public right of fishing, merely because it has

been used as a general highway for the purpose of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is prima facie in the riparian owners and the right of fishing private. {FNREF:0-86472-117-XA:Appdx15:2}

At common law a distinction is drawn between rivers which are capable of navigation or which the public have used as a transport route and the legal meaning of "navigable river". It is only to those rivers which satisfy the legal definition of "navigable" which the Crown is afforded any prima facie common law rights. O'Hagan J expressed the point as follows:

but it will be found that the word has a popular and also a legal and technical meaning, and that, whilst the former would be satisfied by the existence of a public right of transit on the surface of the stream, the latter involves the assumption of the "fluxum et refluxum maris" wherever the royal prerogative and the general right exist. {FNREF:0-86472-117-XA:Appdx15:3}

The authorities relied on in *Murphy v Ryan* attest to the point that the rights of the Crown to navigable rivers are sourced from the prerogative rights to the sea bed. The requirement that the river be tidal is explained as an extension of those rights to the parts of rivers which may be described as the "arms of the sea". In *Comyns A Digest of the Laws of England* it is stated:

the property of the soil in all rivers, which have the flux and reflux of the sea, belong to the King, and not to the lord of the manor adjoining, without grant or prescription ... [a]n arm of the sea is where the sea flows and reflows ... [a]nd every arm of the sea, or navigable river, so high as the sea flows and reflows, belongs to the king, and he has the same property therein as in *altro maris*. {FNREF:0-86472-117-XA:Appdx15:4}

O'Hagan J also quoted the argument for the crown in *Le Case Del Royall Piscarie de le Benne* that:

il y a 2 kinds de rivers; navigable, & nient navigable. Chescun navigable river cy hault que le mer flow & reflow en ceo, est flumen regale, & e le piscarie de ceo est auxy piscarie Royall, & appent al Roy per son prerogative: mes en chescun auter auter river nient navigable, & en les piscarie de tiel river, les tertendants ex utraq; parte aquae ont interest de common droit. Le reason pur que le Roy ad interest en tiel navigable river, cy hault que le met flow & reflow en ceo, est pur ceo que tiel river participate del nature del mer, & est dit brache del met tant avaunt que el flow... Et que le Roy ad mesme le prerogative & interest en les braches del mer, & navigable rivers, cy hault que le mer flow and reflow en eux, que il ad in *altro mari*, est manifest per plusors authorities & records. {FNREF:0-86472-117-XA:Appdx15:5}

Passages from Lord Hale's *De Jure Maris* likewise illustrate the dependence of the Crown's rights to rivers on its prerogative over the sea. {FNREF:0-86472-117-

XA:Appdx15:6} Under the heading of "What shall be said an arm or creek of the sea", for instance, Hale wrote:

that is called an arm of the sea where the sea flows and reflows, and so far only as the sea flows and reflows; so that the river of Thames above Kingston and the river of Severn above Tewkesbury, &c though they are publick rivers, yet are not arms of the sea. But it seems, that, although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in the Thames above the bridge. {FNREF:0-86472-117-XA:Appdx15:7}

In the case of *Carter v Murcott* the same linkage was made. {FNREF:0-86472-117-XA:Appdx15:8}

While the case concerned proof of a prescriptive right to a fishery in a tidal river, the court noted:

navigable rivers or arms of the sea belong to the Crown, and not (like private rivers) to the land owners on each side: and therefore the presumption lies contrary way in the one case, from what it doth in the other. {FNREF:0-86472-117-XA:Appdx15:9}

The case of *Devonshire v Pattinson* provides an illustration of the converse point that the Crown lacks prerogative rights in non-tidal waters. In that case a conflict over a fishery at a non-tidal point of the river Eden came before the English Court of Appeal:

The riparian lands were the subject of a Crown grant in 1629 and the river bed and fishery passed to the grantees of the Crown. In the court below *A J Smith J* concluded that the grantees of the Crown were vested of their exclusive rights by virtue of the exercise of a prerogative. The Court of Appeal reconsidered the legal basis for the rights of the grantees. {FNREF:0-86472-117-XA:Appdx15:10}

*Kay CJ* who delivered the judgment of the Court of Appeal doubted whether the King could hold an exclusive proprietary right by way of the prerogative in the fishery of a (non-tidal) river which flowed over the land of a subject. The court preferred the view that the grantees of the Crown held exclusive rights to fish as successors to the Crown's original rights to the river. Those rights were viewed as not depending on any prerogative but were held to be derived from the King's ownership of the riparian lands.

Public rights to tidal rivers are not abrogated by virtue of the vesting of the beds of tidal rivers in the Crown. On the contrary, the rule has been characterised in texts and in cases as affording protection of the interests of the public in such rivers regardless of any special claims of riparian owners and has been viewed as an aspect of the *parens patriae* of the Crown. Public rights of navigation had also been recognised by the *Magna Carta's* promise that public rivers remain free. In his text, *The Law of Rivers and Watercourses*, *Wisdom* stated "[t]he ownership of the Crown is for the benefit of the subjects who have the public right of fishing and navigation ...." {FNREF:0-86472-117-XA:Appdx15:11}

Other authorities for the proposition might again include Hale who stated in his First Treatise:

in generall by the lawes of England in all things of publique interest which concern all, and not in any one particular person, the law hath transferred the care and provision for such publique matters to the Kinge, and hee doth sustinere personam vindicus et tutris jurim publicorum, as highways, navigable rivers and the like, although the particular interest of franchise or propriety may possibly belong to a private person; and therefor al suits and proceedings in such cases are pro domino Rege. {FNREF:0-86472-117-XA:Appdx15:12}

In *De Jure Maris* it was further stated that "[t]he jus privatum that is acquired to the subject, either by patent or prescription must not prejudice the jus publicum wherewith public rivers and arms of the sea are affected for public use". {FNREF:0-86472-117-XA:Appdx15:13} In his judicial capacity Hale made a similar point in *Lord Fitzwalter's Case* that:

in the case of a river that flows and reflows, and is an arm of the sea, there prima facie is common to all: and if any will appropriate a privilege to himself, the proof lieth on his side, for in the case of an action brought for fishing there, it is, prima facie a good justification to say, that the locus in quo is brachium maris, in quo unusquisque subjectus dom Regis habet et habere debet liberam piscariam. {FNREF:0-86472-117-XA:Appdx15:14}

While the common law can, in some cases, accommodate the vesting of rights to tidal rivers in private persons, public rights may still be recognised. In *Fitzhardinage v Purcell*, Parker J considered that the statement of Holroyd J in *Blundell v Catteral* that "[w]here the soil remains the King's, and where no mischief or injury is likely to arise from the enjoyment [... of bathing], it is not to be supposed that an unnecessary and injurious restraint upon the subjects would in that respect be enforced by the King, the parens patriae" as possibly extending to the taking of fowl on such a river even in the case of a river which had been granted to a subject. {FNREF:0-86472-117-XA:Appdx15:15} In the latter case, Best J depicted the rights of owners of the soil of the shore of the sea and highways as holding subject to a "public trust" and, from the context, it is clear that His Honour intended the point also to apply to "arms of the sea". {FNREF:0-86472-117-XA:Appdx15:16}

Chitty summarised the extent of the prerogative rights to rivers in his tract, *The Prerogatives of the Crown*, as follows:

The King has an undoubted sovereignty and jurisdiction, which he has immemorially exercised throughout the medium of the Admiralty Courts, over the British seas, that is, the seas which encompass the four sides of the British islands and other seas, arms of seas and navigable (but not non navigable) rivers, within and immediately connected with the territories subject to his sway ... By implication of law the property in the soil under these public waters is also in the King. But in this as in most other instances, the prerogative does not counteract or interfere

with the natural right of the public to fish in the sea, in arms of the sea, and in creeks and navigable rivers, and to take fish found on the sea-shore between high and low water mark. This is the jura publica or communia which never was vested exclusively in the Crown, and of course is not to be considered as a royal franchise. {FNREF:0-86472-117-XA:Appdx15:17}

The thrust of Chitty's analysis is that recognition of prerogative rights over tidal waters by the common law is not comparable with any exclusive proprietary rights.

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### 15.2 Statutory Vesting of River Beds in the Crown in New Zealand

In the New Zealand Court of Appeal decision, *Mueller v The Taupiri Coal Mines Ltd* the proposition that the vesting of lands in riparian owners *ad medium filum aquae* is rebuttable if the river be capable of navigation was considered. {FNREF:0-86472-117-XA:Appdx15:18} In a non-tidal river which is capable of navigation public easement rights of passage have, in some circumstances, been recognised as existing independently of the ownership of the river bed. {FNREF:0-86472-117-XA:Appdx15:19} The *Mueller* case concerned conflicts over the right to mine a non-tidal stretch of the Waikato river:

The Applicant was the Commissioner of Crown Lands for the Auckland District who sought a declaration that certain lands below the Waikato River were vested in the Crown. The Defendants were riparian owners adjacent to the river of land originally granted by the Crown. The Defendants had mined that bed of the Waikato River, justifying their activity by the *ad medium filum* rule. At issue was whether the circumstances surrounding the original crown grant rebutted the presumption.

In a vigorous dissenting judgment, Stout CJ supported the defendants. His Honour opined that, in law, the fact that a river is navigated does not detract from the riparian owners' proprietary rights to the river bed. Of the majority judges, Williams J put the contrary view most forcefully, stating:

[w]here, as in this country, the Crown is in effect a trustee for the public of lands vested in the Crown, comparatively slight evidence of circumstances from which an intention might be presumed on the part of the Crown, as representing the public, not to part with the land in question, ought in my opinion, to rebut the presumption .... {FNREF:0-86472-117-XA:Appdx15:20}

The factors relied on to rebut the presumption included the historical circumstances of the original grant, {FNREF:0-86472-117-XA:Appdx15:21} the impact of other legislative provisions {FNREF:0-86472-117-XA:Appdx15:22} and an assertion that public rights of navigation in non-tidal rivers could not arise by the mere act of navigation but required prescriptive rights to have been established by user or there to have been an express or implied reservation of the land by the Crown for the benefit of all the public. It was doubted whether, in New Zealand, general prescriptive rights could have arisen for the benefit of all the public in waters running over Maori lands. The absence of any *de facto* authority over such rivers, therefore, enhanced the proposition that, once vested of the adjoining lands, the Crown could not be presumed

to have granted the river bed ad medium filum and thereby deny the public rights of navigation.

The Mueller decision is of further interest for its approach to the issue of navigation. It appears from the report that the Court was influenced by the commercial usage of the river. Williams J noted:

[t]he evidence further shows that before the railway was opened all the goods traffic for the Waikato district was by water carriage from the mouth of the river as far as Cambridge, and that sea-going vessels came within the bar and discharged into smaller vessels, which carried the cargoes up the river. The river, therefore, was of an entirely different character from the small navigable creek the bed of which was the subject of the litigation in the case of Lord v Commissioners for the City of Sydney. {FNREF:0-86472-117-XA:Appdx15:23} When the railway was extended to Cambridge in 1886 the trade on the river was to a great extent destroyed, but there are small steamers running to Cambridge up to the present time. The grants of the lands in question were made some years before the railway was constructed and when the river was the only highway for the carriage of goods. {FNREF:0-86472-117-XA:Appdx15:24}

It seems clear that the court would have been less ready to deny the rights of riparian owners had the river not been navigated by commercial vessels. {FNREF:0-86472-117-XA:Appdx15:25} That is consistent with the reasoning of Stout CJ in the 1900 Supreme Court decision, In Re Beare's Application. {FNREF:0-86472-117-XA:Appdx15:26} In that case the rights attaching to riparian lands prevailed against the Crown:

Proceedings were brought to challenge the grant of mining lands in the bed of the Arahura within the boundaries of a Native Reserve vested in the Public Trustee. At issue was whether the bed of the Arahura was Crown land on which licenses to mine for gold, by dredging or otherwise, could be granted.

Of the character of the river, Stout CJ said:

[i]t is clear that the river is not either a public highway or such navigable river as makes the bed of the river Crown lands. At places and at times a canoe or boat may be used on the river, but that is all. At the mouth of the river the tide backs the flowing stream, but even near the mouth it is a shallow river, only fit to be used occasionally by boats or canoes. {FNREF:0-86472-117-XA:Appdx15:27}

His Honour then concluded:

[t]he bed of this stream or non-navigable river is not therefore Crown land, and not being Crown land, the Warden cannot issue any licenses or leases to mine the bed of the river within the said reserve by dredging or otherwise. {FNREF:0-86472-117-XA:Appdx15:28}

These decisions indicate that prior to the enactment of the predecessor to s261 of the Coal Mines Act 1979, the Crown in New Zealand lacked prima facie rights to the beds of non-tidal rivers. In Mueller's case, concerning a river used for commercial purposes, the Crown was able to rebut the ad medium filum due to circumstances surrounding the Crown grant and in Beare's case the Crown was denied any proprietary rights in the bed of a non-tidal and non-navigable river. Both propositions are consistent with the common law limits on the Crown's prerogative. Further, earlier statutory provisions had been held to be inadequate to deny the rights of riparians to the beds of non-navigable rivers ad medium filum aquae. The case of Taranaki County Council v Brough concerned the Public Works Act 1894. {FNREF:0-86472-117-XA:Appdx15:29} By that Act rivers could be brought under the "control" of local bodies. It was held that such control did not extend to denying what was described as "that ownership which at common law extends to the centre of the river bed in non-navigable rivers". {FNREF:0-86472-117-XA:Appdx15:30} Connolly J, following the principle that "a man cannot be deprived of his rights at common law, except by express words or clear implication", decided that the Public Works Act 1894 could not be construed as effecting this. {FNREF:0-86472-117-XA:Appdx15:31}

Against this background the predecessor of s261 of the Coal Mines Act 1979 was enacted. That provision was s14 of the Coal-mines Act Amendment Act 1903:

Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.

(2) For the purpose of this section-  
"Bed" means the space of land which waters of the river cover at its fullest flow without overflowing its banks:

"Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purposes of navigation by boats, barges, punts, or rafts

....

Section 261 of the current legislation achieves the same purpose as this provision, albeit in simpler form. Section 14 of the Act of 1903 was an addition to a controversial enactment concerning miners' medical funding and hours to be worked in mines and received scant attention in the debates in the House of Representatives and Legislative Council. {FNREF:0-86472-117-XA:Appdx15:32} Most attention in parliament and during the committee stages of the Bill was given to the other, apparently more controversial, provisions. {FNREF:0-86472-117-XA:Appdx15:33}

In 1954, in Hutt River Board v Leighton, the provision was considered, by then enacted as s206 of the Coal-mines Act 1925. {FNREF:0-86472-117-XA:Appdx15:34} The case concerned a stretch of the Hutt river used for what Hutchinson J described in the Supreme Court as "casual and unorganised recreation". {FNREF:0-86472-117-

XA:Appdx15:35} In passing, the Supreme Court Judge noted the alteration effected by the section to the common law restrictions on the prerogative rights of the Crown:

[t]he English authorities dealing with navigable rivers do not, in general assist in interpreting the phrase "for the purpose of navigation" in the section, because of the common-law definition of navigable rivers, which restricts those to tidal rivers. {FNREF:0-86472-117-XA:Appdx15:36}

In determining the meaning of "navigable river" in the Coal-mines Act 1925, Hutchinson J was influenced by whether the river was used for commercial purposes. His Honour determined that, as the stretch of the river in question was mostly used for unorganised recreation, it could not be held to a navigable river within the meaning of the section. {FNREF:0-86472-117-XA:Appdx15:37}

In the Court of Appeal in Leighton's case, Fair J described s206 as a "confiscatory provision" and considered that, as such, it ought to be construed no wider than was strictly necessary to achieve its object. {FNREF:0-86472-117-XA:Appdx15:38} His Honour then concluded that the word "navigable" should not be interpreted as applicable to the river in question:

it is, at the very least, doubtful whether the word "navigable" in this context covers such slight, intermittent, and restricted use as that detailed in the evidence of the plaintiffs. Use for wider and different purposes, or more definite evidence of the river's susceptibility for use for such wider purposes, would, in my view, require to be proved to establish that the river was navigable within the meaning of this section. {FNREF:0-86472-117-XA:Appdx15:39}

His Honour then suggested that the section only applied to rivers which were navigable at the time of the enactment of the original provision in 1903. Fair J noted the far-reaching consequences of a Liberal construction of the section:

[t]hat the word navigable should not be given its widest meaning seems clear from the extreme improbability that the Legislature intended that the beds of every one of the innumerable streams in New Zealand which could be used for light pleasure craft, for a considerable distance, should be vested in the Crown. {FNREF:0-86472-117-XA:Appdx15:40}

He continued:

[a]n intention to effect so wide a confiscation of private rights, and so radical a departure from the common law governing such rights, without any necessity for it, or any appreciable advantage to the public, is so highly improbable and unreasonable that it is clearly, in my opinion, inadmissible. {FNREF:0-86472-117-XA:Appdx15:41}

For a river to be considered "navigable" within the terms of the section, Fair J considered it insufficient that it be used merely for recreational purposes and required

something of the character of usage for commercial purposes. Stanton J agreed that not all rivers capable of being traversed would come under the ambit of the section but he did not find the "economic purposes" test helpful. In His Honour's opinion, a river would be "navigable" if it was of:

such a width and depth as would be sufficient to allow the boats or other craft mentioned to pass over a sufficiently continuous length of water as to justify one in saying that the stream or a substantial and continuous portion of it, was available for the passage of any of the craft mentioned. {FNREF:0-86472-117-XA:Appdx15:42}

F B Adams J, while suggesting that Stanton J may have isolated a relevant consideration preferred the view that navigable in the section ought to be given its "ordinary" meaning; in his view, the economic purposes test was unhelpful. In F B Adams J's view, if a river were capable of use for even rowing boats, its bed would be deemed vested in the Crown. Following Startton J, he added the qualification that:

it would not be enough that one could be rowed a few yards up or down the stream if the limits were such that no sensible person would want to do so. {FNREF:0-86472-117-XA:Appdx15:43}

In *Tait-Jamieson v Smith Metal Contractors* it appears that Savage J took a limited view of the concept of navigability in the Act. {FNREF:0-86472-117-XA:Appdx15:44} His Honour opined that the characteristics of the Waikato river which influenced the court in *Mueller* had no application to the stretch of the Manawatu river at issue. It was neither used as a public highway nor had military significance. It appears from the report that the evidence of counsel who invoked the section was insufficient for the section to apply.

In *The King v Morison*, one of many cases concerning ownership of the bed of the Whanganui river, Hay J considered the wording of the section to be "plain and unambiguous". {FNREF:0-86472-117-XA:Appdx15:45} In His Honour's view, unless the section is to be construed as vesting the beds of navigable rivers in the Crown it was difficult to determine any purpose for the section. Although the case was reheard in the Court of Appeal, Hay J's explanation of the law on this point was left unchallenged by the second decision. {FNREF:0-86472-117-XA:Appdx15:46} The upshot of the final decision of the Court of Appeal on this question is, for present purposes, simply that but for s14 of the Coal-mines Act Amendment Act 1903, title to the length of the Whanganui river in question would vest in the riparian owners *ad medium filum aquae*. {FNREF:0-86472-117-XA:Appdx15:47}

While many legislative provisions impact on rights to riverbeds, of most immediate interest is the Native Land Amendment and Native Land Claims Adjustment Act 1926. {FNREF:0-86472-117-XA:Appdx15:48} By s14 of that Act, the bed of Lake Taupo and the bed of the Waikato river from the lake to the Huka Falls was declared to be the property of the Crown "freed and discharged from Native Customary title (if any)". Section 14(4)(a) empowered the governor general to proclaim any part of the bed of any river or stream flowing into the lake to be Crown land. {FNREF:0-86472-117-XA:Appdx15:49} Section 14(4)(b) further empowered the governor general to grant a right of way to licence holders over adjacent lands to a distance of one chain's

length from the river. The parliamentary debates indicate that the principal purpose of the provisions was to prevent the vesting of exclusive fishing licences in foreigners. Though the necessity for the provision with respect to the lake bed was questioned, no member seemed concerned that the bed below the river's navigable stretches was already vested in the Crown. {FNREF:0-86472-117-XA:Appdx15:50} As the point was not addressed, no conclusions impacting on the correct interpretation of s14 of the Coal-mines Amendment Act 1903 may be drawn from the enactment of the later provision.

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### 15.3 Summary and Conclusions

At common law the Crown's prerogative rights to the beds of rivers extended only so far as the tide ebbed and flowed. Such rights as the Crown holds at common law are subject to public rights such as navigation and fishery. The Crown holds as trustee for the public. When compared with the common law, s261 of the Coal Mines Act 1979 appears confiscatory.

In other rivers and other parts of rivers the *ad medium filum aquae* rule applies. A riparian owner is vested of the bed of the river to its mid point. That presumption may be rebutted in a number of instances including where the bed of the river is reserved expressly or impliedly in the original grant and where the circumstances preclude its application. It has been suggested that the *ad medium filum aquae* rule may be rebutted by "comparatively slight evidence". {FNREF:0-86472-117-XA:Appdx15:51} Rights to navigate non-tidal waters may exist independently of the ownership of the soil of the river bed.

The original predecessor of s261 of the Coal Mines Act 1979 was enacted shortly after the Court of Appeal decision of *Mueller v Taupiri Coal-Mines Ltd.* {FNREF:0-86472-117-XA:Appdx15:52} There, the *ad medium filum aquae* rule was rebutted in favour of the Crown, but the stretch of the river at issue had been used extensively for commercial navigation.

The extent of the Crown's rights to the beds of rivers in New Zealand is uncertain. English authorities are unhelpful due to the specialised meaning of "navigable" at common law. In New Zealand the Crown's rights to river beds under s261 depend on the meaning of "navigable" within that section. Controversy surrounds whether the term imports a requirement that the river be used for economic purposes or whether casual use by even very small boats is sufficient for the provision to operate. One writer has preferred the latter approach and has suggested that with the modern development of jet boats, more rivers are today navigable than was contemplated when the section was originally enacted. {FNREF:0-86472-117-XA:Appdx15:53}

### References

1. (1867) 2 IR Rep CL 143
2. *ibid* 152
3. *ibid* 153
4. Sir John Comyns (first published 1762-1767): *A Digest of the Laws of England* (Knapton, Longman and Horsfield, London, 1822) vol 5, pp 151-152
5. (1610) Davis 55; 80 ER 540, 541. The passage is translated in *Murphy v Ryan* to read "There are two kinds of navigable rivers - navigable and not navigable. Every navigable river so high as the sea ebbs and flows in it is a royal river,

and the fishing of it is a royal fishery, and belongs to the King by his prerogative; but in every other river not navigable and in the fishery of such river, the ter-tenants on each tide have an interest of common right. The reason for which the King hath an interest in such navigable rivers so high as the sea ebbs and flows, is because such river partakes of the nature of the sea, and is said to be a branch of the sea so far as it flows... And that the King hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea ebbs and flows in them which he hath in *altro mari*, is manifest by several authorities and records". It should be noted that *Le Case del royal Piscarie de le Banne* is no strong authority even for the limited rights of the Crown to the beds of tidal rivers. Of this case S A Moore *History of the Foreshore and the Law Relating Thereto* (Stevens and Haynes, London, 1888 3rd ed) wrote "this case would seem at first sight to establish the proposition that a royal fishery and the soil of it belonged to the King by virtue of the prerogative as one of the flowers of the Crown; but the facts so far as we can ascertain from the report, indicate that the fishery of the Banne was an ancient several fishery in gross and an ancient and separate hereditament, distinct from the adjoining land, which had been in charge of the Crown in ancient times until the possession had been usurped by the intruding riparian owners; and the decision of the case does not support the proposition that it belonged to the Crown by reason of the prerogative, but only that it was an ancient fishery in gross, parcel of the Crown's possession held in severalty by the Crown".

6. Sir Mathew Hale *De Jure Maris*. In Moore 1888.
7. *ibid* 378
8. (1768) 4 Burr 2162; 98 ER 127
9. *ibid* 128-129
10. (1887) 20 QBD 263
11. A S Wisdom *The Law of Rivers and Watercourses* (Shaw and Sons, London, 1970)
12. Sir Mathew Hale's First Treatise. In Moore 1888, 336
13. In Moore 1888, 389-340
14. (1672) 1 Mod 105; 86 ER 776
15. (1908) 2 Ch 139, 168; (1821) 5 B & A 268, 300; 108 ER 1190, 1202
16. *ibid* 1197; in *Orr Ewing v Colquhoun* (1887) 2 AC 839,852 Lord Blackburn in the House of Lords cited Lord Deas' comment in the court below that "[t]he Crown holds the solum of the tidal part of the river as trustee for the whole public, but in the remaining portion of the river the proprietors of the banks are the proprietors of the solum of the whole river"
17. Chitty J 1820 *A Treatise on the Law of the Prerogatives of the Crown* (Butterworth, London, 142)
18. (1900) 20 NZLR 89; At common law riparians owned river beds adjoining their land to the mid point of the river. The Privy Council, on appeal from New South Wales, acknowledged the rule in *Lord v Commissioners For the City of Sydney* (1859) 12 Moo PCC; 14 ER 991; in *St Francis Hydro Electric Co Ltd v The King* [1937] 2 All ER 541,543 it was said that the *ad medium filum* rule applies to a nontidal river "whether the river were navigable or not".
19. above n18, 98 (per Stout C J): Hale *De Jure Manis* in Moore 1888, 374 states "and as the highways by land are called *altae viae regiae* so these publick rivers are called *fluvii regales*, and haut streams *le Roy* not in reference to the

- proprietary of the river, but to the public use ... and (are) under the King's special care and protection, whether the soil be his or not".
20. *ibid* 106. Cases concerning the *ad medium filum* rule should not be viewed as necessarily in conflict with the line of decisions considered in part 1 of this paper. The latter group concerns the Crown's prerogative rights whereas the *ad medium filum* rule is more a rule of conveyancing; see *Hutt River Board v Leighton* (1955) NZLR 750, 783 (per FB Adams J)
  21. The Crown became vested of the land and was empowered to grant it under the confiscatory provisions of the New Zealand Settlements Act 1863. Williams J questioned "[is] it conceivable that the Legislature could have contemplated that, if in any such district there was a river which was the only practicable highway for military purposes and for every purpose, the Crown should by virtue of that Act grant away the bed, and so deprive itself of the right to interfere with the soil and improve the navigation?".
  22. Analogies were drawn with the Crown's control of highways to support the proposition that the Crown could not be presumed to have divested itself of comparable rights to waterways used as highways.
  23. above n18 107
  24. above n 18
  25. R I Cross "Legal Interpretation of the Definition of River Boundaries" in A S D Evans, (ed) *The Law Relating to Watercourses, Water and Soil - Miscellaneous Publication No 86*, Wellington (National Water and Soil Conservation Authority, Wellington, 1985)
  26. (1900) 2 GLR 242, 242-243
  27. *idem*
  28. *ibid* 243
  29. (1901) 2 GLR 160
  30. *ibid* 161
  31. *idem*. A similar approach was taken in *Kingdom v Hutt River Board* (1905) 25 NZLR 145 to the River Boards Act 1884 where a river bed was vested in the appellants but such rights were limited to "such property and right only as is necessary for the carrying-out by the Board of its duties and jurisdiction as a River Board" (at p165).
  32. see, for instance, (1903) 127 NZPD 681
  33. For committee discussion of the other provisions see AJHR 1902 I-4A and AJHR 1903, I-4A
  34. (1955) NZLR 750
  35. *ibid* 753
  36. *ibid* 754
  37. *ibid* 755
  38. *ibid* 768
  39. *ibid* 769-770
  40. *ibid* 770
  41. *idem*
  42. *ibid* 778
  43. *ibid* 789
  44. (1984) 2 NZLR 513
  45. (1950) NZLR 247, 267
  46. *In Re Bed of the Wanganui River* (1955) NZLR 419
  47. *In Re Bed of the Wanganui River* ( 1962) NZLR 600

48. above n31 and accompanying text
49. The writer has been unable to find instances of confiscations effected under this provision.
50. (1926) 211 NZPD 283-284
51. above n20
52. above n18
53. R I Gordon Land Adjacent to Water: Public and Private Rights and Restrictions unpublished LLM thesis, Otago University, 1973, but now cf Tait-Jamieson v Smith Metal Contractors above n44

Other general works referred to but not cited specifically are:

Coulson, H C and Forbes, U A The Law Relating to Waters, Sea, Tidal and Inland (Sweet, London, 1880)

New Zealand Property Law and Equity Reform Committee 1983 The Law Relating to Water Courses: Interim Report (Property Law and Equity Reform Committee, Wellington, 1983)

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*Waitangi Tribunal, Department of Justice, Wellington.*