The following interview with Queen's Counsel and former Waitangi Tribunal member, Paul Temm, broadcast 22 August 1986, responds effectively to many of the reactions which followed Mr Justice Williamson's decision.

A decision by the High Court in Christchurch has confirmed for Maoris a right guaranteed under the Treaty of Waitangi to take fish from traditional fishing grounds irrespective of laws or regulations covering fishing. The judge upheld a reference in Section 88 of the Fisheries Act 1983 that says that nothing in this Act shall affect any Maori fishing right. The decision has been welcomed by Queen's Counsel and former Waitangi Tribunal member, Paul Temm.

How has the Treaty been regarded in the past by the courts?

Until the Land Wars, the courts recognised the Treaty in the same way that similar treaties had been recognised by Canadian and United States courts and before then by English courts, including the Privy Council on many occasions: which was that a Treaty made between the Crown and an indigenous people was valid and binding in law. The fundamental proposition as I read it from the cases is that when the Crown makes a Treaty it gives its word, and the courts have always been very solicitous to ensure that the Crown should not disavow its own word, that it should not break its word, and they've always enforced that. That's been the case from 200 years before the Treaty was ever signed. Now until the Land Wars, that was the position in New Zealand.

But from 1877, after the Land Wars, there was suddenly a change, and instead of being on the main trunk railway along with the other colonies in the Empire, we took a siding of our own and said the Treaty was a nullity, it was meaningless, because it was not adopted into New Zealand law and international law, and therefore it had no effect. That kind of argument was advanced. Now this decision has thrown the points on the railway track and sent us back on to the main line, so to speak. It's a very important decision.

If we look at this particular decision, though, and if we assume that the Treaty of Waitangi obliges the Crown to protect Maori fishing grounds, taking undersized paua is an infringement of the Treaty.

I don't know why you say that. Taking undersized paua would be an infringement of Maori law. You see Maoris have got their own laws about fishing, and they're very important laws. I'll give you an illustration, it was part of the evidence on the Manukau Harbour case. It is Maori law, as far as fishing is concerned, that if you want to gather shellfish, you should use a kit that is no larger than to get sufficient food for a couple of meals for your household: and further than that, that kit should never be dragged across the surface of a sandbank or something like that, it should always be carried.

Now those laws, and others like them, are designed purely for conservation, they're very sensible. But the bitterness with which some Maoris giving evidence before the Waitangi Tribunal in the Manukau Harbour hearing described the way workmen from the steel mill extension site were gathering, in coal sacks, their shellfish, and dragging the coal sacks across the mud flats, and disturbing the other shellfish and exposing them to the seagulls and so on, the bitterness was intense; especially when they protested to the, mainly migrant, workers, who just told them what they could do with their Maori customs. Now, to say that to give the Maoris their rights under the Treaty is going to mean depredation of the fishing grounds is not sound. They've got their own laws, based upon their own rules of conservation.

Do you think that this decision is going to change anything?

Well, it remains to be seen. I wouldn't be surprised if the Fisheries division of MAF applied for leave to go to the court of appeal. Then the court of appeal would have to consider it, and we'd see what happened then. But as it stands today, it's going to change a great deal because at long last Maori people are going to be able to rejoice in the fact that promises they made, which they have kept, might now begin to be kept by the Crown. Now that's very important to them. And it's very important to us, especially to our grandchildren.

As you mentioned, the Ministry of Agriculture and Fisheries says that they may appeal against the decision. But Fisheries Officers have expressed concern at the decision, because they want to know how they'll identify a Maori, whether that person has a traditional fishing right. Will that be difficult, do you think?

The first thing I'd do is employ Maori Fishery Officers. They'll tell you quick and lively who's a Maori and what their rights are. You see, there's a great dearth of Fishery Officers. The Manukau Harbour finding disclosed how unsatisfactorily the fishing regulations are being policed at the present time. And of course the knowledge that the Ministry had about the Manukau Harbour was extremely slender, largely because they haven't got the money and they haven't had the interest, I suspect. We made recommendations there that I hope will one day be followed.

To come back to your question, how will they tell a Maori? Very simple: once you identify a Maori fishing ground, they are easily identified I believe, then get Maoris to police them and they'll soon sort it out - don't you think?

There's also been concern from the Federation of Commercial Fishermen, at the implication that the ruling will allow the taking of undersized fish.

Well, that's setting up a straw horse to knock it down, isn't it? As far as the commercial fishermen are concerned, the temptation is to make a rather tart reply but in the interests of reasoned debate one can say that really they should recognise and acknowledge the complaints that Maoris have been making about their activities for a long time, especially in the Manukau. To assume that because Maoris exercise a right that the Crown promised to them, something bad is going to happen, is not a reasonable assumption.

I think that they should accept the fact that if somebody's got a right to do something, you can expect them to do it sensibly and to protect their own interests. It is not in the interests of Maori people to deplete their own fishing grounds, and to say that they'll take undersized paua is really to make an assertion to try to justify an objection to the use of a right which is quite clear: and again I say, if you want to protect a Maori fishing ground, leave it to the Maoris and they'll protect it beautifully.

The important thing also to bear in mind is that the Maoris aren't, and didn't in this case demand an exclusive right, which the Treaty gives them, they just said that they want to exercise the right to get fish on their own customary fishing grounds. They're not trying to prevent other people from getting fish there too. They've been extremely broad and generous, as we've said more than once in the Tribunal. Maori policy is always to share. The European tradition is not to share, that's the catch, and that's why the commercial fishermen are perhaps raising these objections, because they're looking at it in a European way. I suggest they stop and look at it in a Maori way, and they won't see quite the same difficulties that they're raising at the moment, I suspect.

Do you feel at all that this particular case was an unfortunate test case in that a conviction for having undersized paua was quashed by the judge? Now a report prompted by the Waitangi Tribunal and its decision on claims by the Te Ati Awa of Taranaki that their rights were being violated by pollution from Motunui concluded that laws on Maori fishing rights were a mess, but the report said that proper recognition of Maori rights wouldn't mean their interests would always come first. Now in this particular instance, doesn't this mean that Maori interests do come first, no matter what?

It depends what you mean by Maori interests. If you acknowledge that it is in the interests of Maoris to preserve fishing grounds, then one needn't worry too much about the question of the size of the fish they take, because they won't take fish, shellfish, that are going to deplete the fishing ground, that's a foolish thing to do. In this particular matter, the customary right that was proved in the court, and accepted by the High Court Justice who considered it, was a right to take fish of a reasonable size in a reasonable quantity: in effect, for a couple of meals. Now, what's a reasonable size is a matter of looking at the nature of the fish, the kind of fish in that locality, and all that sort of thing. To talk about some arbitrary limit laid down by some regulation is one thing, but to talk about Maori customary fishing rights is to recognise the laws which the Maoris have themselves.

So, in effect, there would be two parallel laws governing fishing grounds?

Well, you'd have a law for everybody who didn't have the right to go on to that particular customary fishing ground - that would cover Maori and European and Yugoslav and Vietnamese and Chinese and everybody else. But for Maoris in a particular place, who had their own fishing ground, then they'd be entitled to get that fish for their food. Which is an important thing for Maoris. And that's what the Treaty intended, and that's what the promise was, and that's the promise which the High Court Justice concerned has acknowledged.

Putting aside European depredation of the environment, though, are you saying that Maori tribes should have sole rights to their fishing grounds, no matter what the larger ecological consequences were of what they did with them?

I don't know quite what that means, but all one can say at the moment is that the Treaty has given them certain rights in respect of their fishing grounds, and the Court has now acknowledged those rights. Now the consequences of that you'd have to look at case by case and place by place. But what I am asserting is that this is a return to the position that used to be the law in New Zealand before the Land Wars, and it's a return to the position that has been held in Canada for several hundred years, and in the United States for an equal length of time, right back to the American colonies, right back to the very beginning. It goes back to the seventeenth century. Now, to start at shadows about environmental damage seems to me to be like the fishermen saying they'll take undersized paua. Let's look at the principle first, ask ourselves: what is the right? then ask ourselves: should we allow this to be enforced?