

Mohaka River Report 1992

06 Conclusions and Recommendations

6.1 Principles of the Treaty

CONCLUSIONS AND RECOMMENDATIONS

6.1. Principles of the Treaty

Our jurisdiction is clearly set out in section 6 of the Treaty of Waitangi Act 1975. Under sub-section (1) of that section Maori may submit a claim to the tribunal if prejudicially affected by legislation or a policy, practice, act or omission of the Crown which is inconsistent with the principles of the Treaty. The tribunal then inquires into the claim (sub-section (2)) and if it finds that the claim is well-founded may make a recommendation to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future (sub-section (3)). That recommendation may be in either general or specific terms (sub-section (4)).

Accordingly, before we have power to make any recommendations, we must be satisfied that the present claim is well-founded in that Ngati Pahauwera are, or are likely to be prejudicially affected by past or present legislation, policies, practices, acts or omissions which were or are inconsistent with the principles of the Treaty.

Claimant counsel in opening submissions relied on alleged breaches of the following five Treaty principles:

- The concept of Treaty evolution.
- The Treaty balancing of competing interests.
- The Treaty guarantee of protection for Maori.
- The affirmative obligation of the Crown to protect taonga to the fullest extent reasonably practicable.
- The duty of the Crown to take positive steps in reparation once grievances are established.

We think however that for the purposes of this report it is the fourth of these principles which is crucial. Others are likely to be more relevant to the land claim. The principle that the Crown must actively protect Maori property interests to the fullest extent reasonably practicable was clearly recognised in 1987 in the landmark Maori Council decision by all the judges of the Court of Appeal, albeit in slightly differing terms. The following passages demonstrate this:

Mr Justice Cooke:

Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

Mr Justice Richardson:

In article 2 the English text uses the emphatic words of recognition and obligation "confirms and guarantees" - by the Queen to the Maori of "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties" so long as they wish to retain them - and the emphatic expression "yield" - by the Maori to the Crown of "the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate". The Maori text employs somewhat different language but in relation to land the same two concepts are present: the agreement by the Crown to protect Maori rights and by the Maori to "give to the Queen" the land "the person owning" it is "willing to sell".

Mr Justice Somers:

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future. Now much, claimed to be in breach of the principles and of the Treaty itself, lies in the past. Those signing the Treaty must have expected its terms would be honoured. It did not provide for what was to happen if, as has occurred, its terms were broken.

It is this feature which I think dominates most discussions about the Treaty and which is at the heart of s.9 of the State-Owned Enterprises Act. The primary provision of the Treaty relevant to the present case appears to me, as I have said, to be the guarantee of the full exclusive and undisturbed possession of the property of the Maori of whatever kind so long as they wish to retain it. Breaches of this undertaking have occurred.

Mr Justice Casey:

The Waitangi Tribunal has discussed those principles of the Treaty it saw as relevant to the particular claims it had under consideration. Some of its insights are valuable, and this concept of an on-going partnership can be detected in the Manukau claim in relation to that harbour, and in the Te Atiawa claim. At p.61 of that decision the Treaty was described as "the foundation for a developing social contract". In both cases the Tribunal used this approach to modify exclusive rights to fisheries recognised in the Treaty. At p.95 of the Manukau decision, it drew a number of conclusions, the first being that the Treaty obliges the Crown not only to recognise the Maori interest specified in it, but actively to protect them.

I concur in thinking that this is a principle to be rightly drawn from a consideration of the Treaty provisions in the light of the surrounding circumstances.

Mr Justice Bisson:

The Maori chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the manner in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court.

Accordingly there can we think be no doubt that it is a principle, and indeed a very important principle of the Treaty, that the Crown is obliged to protect Maori property interests to the fullest extent reasonably practicable.

But, far from actively protecting the interest of Ngati Pahauwera in their property the Mohaka river when it was reasonably practicable to do so, the Crown has actively undermined that interest through promoting legislation and adopting practices which have given no or quite inadequate recognition to the position of Ngati Pahauwera. The resultant prejudice is all too clear. It follows that the claim is well-founded and that we have jurisdiction to make recommendations to the Crown.

We also note that, in the present claim, it would not be necessary to go beyond the wording of the Treaty to establish a breach of the Crown's obligations. For the reasons discussed earlier in this report, we consider that there have been a series of breaches by the Crown of its specific Treaty obligations to permit the continued exercise of te tino rangatiratanga over taonga and to guarantee the retention of properties for so long as a tribe wished to retain them. These breaches of the literal wording of the Treaty would we think be enough in themselves to establish a breach of the principles of the Treaty because (subject again to the gloss of reasonable practicability) we agree with the statement of Mr Justice Somers in the Maori Council case at page 693 that "a breach of a Treaty provision must in my view be a breach of the principles of the Treaty".

Waitangi Tribunal, Department of Justice, Wellington.

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6.2 The Costs of Bringing the Claim

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Ngati Pahauwera have succeeded in large part in establishing their claim. It should we think follow that they be reimbursed by the Crown for their reasonable costs and disbursements of bringing the claim to the extent that these exceed any contribution from the tribunal and the Crown Forest Rental Trust. We have no doubt that these costs and disbursements have represented a significant burden on an impoverished people, particularly because legal aid was not available under the provisions of the Legal Aid Act 1969, and the necessity for an urgent hearing prevented consideration of an application for aid under the Legal Services Act 1991 after that Act came into force on 1 February this year.

The Crown, somewhat to our surprise, opposed the making of any recommendation for the payment of Ngati Pahauwera's costs and disbursements on the ground that there was no justification for seeking an urgent hearing. We cannot agree. It was quite foreseeable that the report by the Planning Tribunal would be completed early this year and would be likely to impact on the Ngati Pahauwera claim to the river, as was the prejudice which would result to the tribe if a water conservation order was then made before this tribunal had considered the claim. It was therefore entirely appropriate that an urgent hearing should be sought.

Waitangi Tribunal, Department of Justice, Wellington.

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6.3 Conclusions

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For the reasons which we have discussed, we have reached the following conclusions on the claim.

- The Mohaka river was a taonga of Ngati Pahauwera when the Treaty of Waitangi was signed in 1840 and remains so today.
- The river was, when the Treaty was signed, a property of Ngati Pahauwera for the purposes of article 2 of the text in English.
- Ngati Pahauwera did not, by signing the 1851 deed, relinquish te tino rangatiratanga over the river.
- The wording of the deed was capable of differing interpretations in its reference to the river and the resultant ambiguity should be resolved in favour of Ngati Pahauwera so as to exclude the river from the sale.
- The parties to the deed would not have intended that the purchase of the land on the south bank would carry with it ownership of the adjacent half of the bed of the river and accordingly the principle of ad medium filum aquae did not apply.
- Whether the position after 1851 is analysed in terms of the text of the Treaty in Maori and te tino rangatiratanga or in terms of the text in English and the relevant legal principles the result is the same - Ngati Pahauwera did not under the deed transfer ownership of the bed or waters of the river.
- Ngati Pahauwera did however by the sale and by their conduct implicitly confer on Pakeha non-exclusive use rights to the river, subject to te tino rangatiratanga guaranteed to Ngati Pahauwera under the Treaty.
- When land was sold on the north bank the boundary was the river bank and Ngati Pahauwera did not sell any interest in the river itself. Again Ngati Pahauwera did not relinquish te tino rangatiratanga over the river and the ad medium filum presumption did not apply. Ownership of the adjacent half of the river bed was not transferred. The earlier grant of non-exclusive use rights was however reinforced.
- All statutory provisions which assumed that the Crown owned the river bed and waters, or appropriated such ownership to the Crown, or conferred exclusive control over the waters on central and/or local government, were therefore in breach of the

letter of the Treaty and the principle that the Crown must actively protect the property of Maori to the fullest extent reasonably practicable.

- Similarly removal of gravel and hangi stones without the approval of Ngati Pahauwera was in breach of the letter and the principles of the Treaty and should not be permitted to continue.

- Although legislation which confers jurisdiction on the Planning Tribunal may be reviewed by the Waitangi Tribunal, the actions of the Planning Tribunal cannot be reviewed because they are not actions by or on behalf of the Crown.

- Ngati Pahauwera were justified in seeking an urgent hearing of their claim to the river and, having succeeded on the main points of their claim, should be reimbursed for the substantial costs and expenses which they have incurred in taking the claim to a hearing.

Waitangi Tribunal, Department of Justice, Wellington.

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6.4 Recommendations

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In the light of our conclusions, we make the following recommendations:

- The Crown should enter into discussions with Ngati Pahauwera as a Treaty partner with a view to reaching agreement on the vesting of the bed of the river from the Te Hoe junction to the river's mouth in Ngati Pahauwera and on a regime for the future control and management of the river.
- Adequate funds should be made available by the Crown to Ngati Pahauwera to enable them to engage the necessary professional and related administrative services to pursue their negotiations with the Crown.
- A water conservation order should not be made unless and until discussions between Ngati Pahauwera and the Crown result in an agreement on a regime for the control and management of the river, in which event the order should incorporate that agreement.
- Ngati Pahauwera should receive compensation for the past removal of gravel from the river, that sum being based on the estimated royalties which would have been payable since 1963.
- Any removal of gravel or hangi stones in the future should require the approval of Ngati Pahauwera.
- Ngati Pahauwera should be reimbursed for their reasonable costs and disbursements of bringing the claim.

In the event that an agreement cannot be reached within six months of the date of this report, leave is reserved to both Ngati Pahauwera and the Crown to seek from the tribunal more detailed recommendations as to the future control and management of the river.

Waitangi Tribunal, Department of Justice, Wellington.

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6.5 Concluding Comments

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Unfortunately it has been necessary to hear this claim and to prepare this report as a matter of urgency in order that it may be considered by government, together with the report of the Planning Tribunal, before a decision is reached on what if any water conservation order should be made. The necessity for urgency has regrettably meant that the Mohaka river claim has been severed from the Mohaka land claims which will be dealt with as part of the Wairoa ki Wairarapa land claims. The separate hearing and reporting of the river from the land claims has compartmentalised subjects of inquiry which are closely related and which, from Ngati Pahauwera's perspective, are one and indivisible.

Having said this, we must acknowledge the high quality of the research which was carried out and the submissions which were made for both Ngati Pahauwera and the Crown. In preparing this report we have been greatly assisted by the research and the submissions of both parties.

The conclusions which we have reached and the recommendations which we have made should not be seen as a radical or unprecedented extension of the rights of Maori. On the contrary our findings are we believe consistent with long-standing precedents in this country such as the Lake Omapere decision to which we have referred. The approach we suggest also appears consistent with the recent agreement between the Crown and Ngati Tuwharetoa over Lake Taupo.

It is also interesting to note that the High Court of Australia, in its recent landmark decision in *Mabo v State of Queensland* (1992) 66 ALJR 408, arrived, through the application of general legal principles and in the absence of a treaty corresponding to the Treaty of Waitangi, at the conclusion that the claimants had a valid claim because their title to their land had survived the Crown's acquisition of sovereignty. The decision illustrates the developments in recent years in legal thinking about the rights of indigenous peoples under both common and international law.

We also point out that it should not be assumed that conclusions identical or even similar to those which we have reached in this, the first claim of its kind to be considered by the tribunal, will be reached in the other river claims which await consideration by the tribunal. The outcome of those claims will turn very much on the evidence presented in their support.

Finally, we urge Ngati Pahauwera and the Crown, as Treaty partners, to enter negotiations as soon as possible in terms of our recommendations. We are confident that the outcome of such discussions will be an agreement which recognises the

legitimate interests in the river of both Ngati Pahauwera and the other citizens of this country and which demonstrates that the Treaty of Waitangi can be made to work in a sensible and realistic way in its application to a beautiful river which is both an undoubted taonga of Ngati Pahauwera and a great asset to the country as a whole.

References

1 New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, at 664

2 *ibid* at 681

3 *ibid* at 692

4 *ibid* at 702

5 *ibid* at 715

Waitangi Tribunal, Department of Justice, Wellington.