

The Fisheries Settlement Report

6. Abrogation

Abrogation means the repeal or cancellation of rights or interests.

The treaty interest in non-commercial fisheries

6.1 The intention of the settlement, from what we can make of a confusing deed, is that the Treaty interest in commercial fisheries will be extinguished (5.1) while the treaty interest in non-commercial fisheries will be made legally unenforceable and replaced by policies and regulations (3.5, 3.6 and 5.2). The latter interests are thus effectively abrogated. The regulations and policies for non-commercial fisheries however may be reviewed in the tribunal (by inference from 3.5.1.4; though not all counsel agreed with that interpretation).

The question is whether the abrogation of the general treaty right and the substitution of regulations is contrary to treaty principles and prejudicial to the claimants. We consider the provision of regulations to perfect, augment or develop the treaty right is entirely consistent with the Treaty. It is also necessary in our view, that all people should know the more precise extent of them.

However, it is neither consistent with the Treaty nor necessary in our view, to abrogate the general treaty right at all. We see no reason why the regulations should not be made to effect the principles of the Treaty, without abrogating anything. The treaty right is broadly stated, without precise definition, but it is the important yardstick against which the precise regulations are to be assessed. The general treaty right cannot be put down.

A further concern however, and the cause of immediate prejudice to claimants, is the lack of some body to conclusively determine whether the regulations are consistent with the Treaty and provide adequately for Maori treaty interests. The deed leaves doubts whether the tribunal can undertake that role, but assuming that it can, we are not convinced that tribunal recommendations substitute adequately for court determinations, or that the courts should be excluded in cases like this where the function is to assess regulations against certain broad principles.

We think it well established that there is a duty on the Crown to actively protect Maori fishing interests. Active protection requires in our view, access to the courts in appropriate cases. The settlement in this case is contrary to treaty principles in that the regulations proposed or any failure to make them are not subject to court review and Maori interests are not therefore adequately protected. The danger is that Maori interests will become, as they have been before, overly susceptible to political convenience or administrative preference. The defect would be remedied by enabling judicial review against the principles of the Treaty. (A similar position prevails in Canada where aboriginal and treaty rights are constitutionally entrenched.)

Having disposed of this matter in those terms, we need consider only briefly some particular complaints.

It was contended, especially from Rangitane of Wairau, that the treaty right was expansive, providing exemption from fishing laws and immunity from prosecution. We do not agree. The Treaty promised Maori exclusive possession of their fisheries, not an exclusive right to fish, and Maori fishing rights have perforce to acknowledge the rights and interests of others. There accrues to the Maori right also, the duty to protect the resource. All users must be bound by reasonable state laws for overall resource management and protection.

The treaty right was enough, it was also contended, and prescriptive regulations are not needed. We do not agree. The Treaty stated only the broad principle, that Maori fisheries should be protected, but precisely what those fisheries were or how they should be protected had still to be worked out. Regulations should be made to do that.

There were then some fears that certain traditional fishing places might not be protected, in terms of the deed, because they have an intrinsic commercial capacity. Crown counsel demonstrated however, that commercial activity can be accommodated in traditional reserves in suitable cases (see B26, annexure A, para 2).

So too, in our view, the freshwater tribes need not be overly anxious. They have more to gain than lose from the settlement, gaining regulations to acknowledge their fisheries and a source of revenue to protect or develop them. This assumes however that adequate regulations will in fact be provided. It is apparent then, that the negotiations of the freshwater tribes have not been ended by this settlement but will need to continue, in order that their concerns might be incorporated into appropriate policies and regulations.

Similarly, where previous arrangements are set aside, they will, we presume, be reinstated under the new regulatory and policy scheme, provided they are still relevant.

The main concern was that too much power was left in the hands of the Crown, or its departmental agents, to determine the regulations. There was a very real fear that some matters might not be properly provided for, and most especially, that the tribal control, or rangatiratanga, would once more be subverted. We would expect judicial review to guard against that prospect. Certainly it would be contrary to the Treaty in our view, if there were no provision to review the regulations against the Treaty's principles.

The treaty interest in commercial fisheries

6.2 The treaty interest in commercial fisheries is simply extinguished (5.1). The purpose, we presume, is to put an end to all claims affecting the commercial fishing industry, but we think it was neither necessary nor desirable to extinguish the right in order to the end the actions. It is clearly inconsistent with the Treaty, and indeed, the terms of the settlement suggest the nature of treaty obligations are not properly understood.

The principle of the Treaty is that Maori fishing interests will be safeguarded. The Crown is obliged to actively protect. Counsel for the Runanga o Ngati Porou referred to this passage from the recent Canadian decision in *R v Sparrow* (1990) 70 DLR (4th) 385, 408 per Dickson C J:

The relationship between the government and aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Quoted by counsel for Runanga o Ngati Porou.]

To this the Court of Appeal has added (*supra* at page 12):

clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty.

In New Zealand the Treaty of Waitangi is major support for such a duty. The New Zealand judgments are part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement.

The deed does not capture this responsibility. Maori interests can be bought off, it assumes, using the language of last century when land rights were said to be extinguished by Crown purchase. Yet in this case nearly every essential for a sale is lacking.

What was required was not an extinguishment but an affirmation, in our view, an affirmation that Maori do have interests in commercial fisheries, and an acknowledgement that any current responsibility on the Crown to provide for those interests has now been satisfied by the arrangements made. There are passages in the affidavits of the Maori negotiators suggesting that they too expected the deed would be presented as performing the Treaty's terms rather than extinguishing the Crown's obligations.

It is necessary to dispose of one particular contention however, that in this settlement Maori were giving away too much of their commercial fishing interests. We do not agree. Most especially we do not accept the view that Maori are entitled to 100 percent of the fishery and should compromise at nothing less than 50 percent. That view does not derive from the tribunal's findings, despite assertions to the contrary. The Maori interest has not been quantified, may not be quantifiable and the tribunal has said simply that there should be such fair shares as might be negotiated, or failing negotiation, as might eventually be recommended. We are not convinced there is a compromise in the quota aspects of this settlement, at least on the Maori side.

The Crown interest in Maori fisheries; the settlement as a whole

6.3 That leads to the point that in terms of the Treaty, the Crown has an interest in Maori fisheries, to provide a protection for so long as Maori wish to keep them. That interest, or obligation, cannot be traded off, unless all agree. By its very nature, it is not an obligation that can be acquitted at any one moment in time.

Questions of extinguishment apart, it would be difficult not to say that the Crown has acted well to secure a place for Maori in the commercial fishing industry. We quote these passages from the recent Court of Appeal decision:

The proposal of the Crown and the Maori negotiators to endeavour to obtain a substantial Maori interest in Sealord is thoroughly consistent with the approach of this Court in previous cases The Sealord opportunity was a tide which had to be taken at the flood

and:

a responsible and major step forward has been taken. [Te Runanga o Wharekauri Rekohu Inc and ors v Attorney-General and ors (supra pp 12,13 and 18)]

It is thus appropriate and reasonable in the circumstances that the Crown should now legislate to end the present actions and stop all others, for at least so long as the current conditions pertain.

Who can predict the future however? Circumstances change. The protection needed for today may be different for tomorrow. The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome. It is about the maintenance of principle over ever-changing circumstances. Accordingly, the abrogation of the treaty interest, and the implicit responsibility of the Crown that goes with it, is a contradiction of the Treaty's terms.

To overcome the difficulty, it is appropriate that treaty settlements of this kind should not be expressed in finite terms but defined by reference to goals. If the object is to get Maori into the business and activity of fishing, with compensation for past losses, then that, in our view, should be stated, and provisions should be made for regular checks, and for adjustments if the goals are not being achieved.

The alternative is to provide for judicial review, specifically enabling the courts to assess the Crown's protection of treaty fishing rights against its treaty obligations. It would be reasonable nonetheless to restrict some actions for some time, in view of the recent history and the commercial imperatives. No such term should exceed one generation, or 25 years, in our view, having regard to some Maori customary opinion.

We have reviewed then, the complaints and claims concerning the settlement deed. Some are well founded in our view, but are capable of remedy, and ought not to invalidate the main proposals.

There were other contentions however that the settlement as a whole should not proceed, for example, because consents were not given by appropriate representatives or because it was not otherwise properly ratified.