

# Maori Development Corporation Report

## Appendix 3

### 3.1 - Formation of the MDC

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The Claim of Te Runanga o Te Ika Whenua

The following is a summary of the arguments made by counsel for Te Ika Whenua and the evidence presented in support of the claim.

#### 3.1 Formation of the MDC

Te Ika Whenua emphasised the background to the formation of the MDC, including the commitment of the government of the day to honouring the Treaty of Waitangi and the proposals of the Hui Taumata for a development decade in which the achievement gap between Maori and Pakeha would be closed by progressively shifting government's negative spending upon Maori into the tribal system. (A18:15-16) It was argued that the Crown's entry to the MDC was inspired by awareness of its Treaty obligations to Maori. (A18:17) But even if the Treaty was not the motivating factor, it was said that the Crown could not thereby avoid its Treaty obligations. The jurisdiction of the Waitangi Tribunal, Ms Ertel submitted, is not confined to acts of the Crown where it intends that the Treaty should apply. (2.15:3)

Rejecting the Crown's argument that its decisions to enter the MDC and to depart from it were made on purely commercial grounds, Ms Ertel contended that the Crown invested in Maori economic development, rather than any other commercial investment, because of the special relationship between the Crown and Maori which derives from and is embodied in the Treaty. The claimant acknowledged the commercial operation of the MDC but, emphasising the failure of mainstream financiers to service Maori clients, concluded that the MDC's commercial focus does not preclude it from being "Maori motivated" and able to fulfil the Crown's Treaty obligations. (2.15:2-3) In response to the Crown's suggestion that there is nothing to distinguish it from the original corporate shareholders in the MDC, all of whom have since sold their shares, the claimant observed that the Crown alone signed the Treaty of Waitangi and is encumbered with Treaty obligations. (2.17:3-4)

In sharp contrast to the other claimant group which appeared before the tribunal, Te Ika Whenua's view is that the source of the funds used to purchase the Crown shareholding in the MDC is immaterial. (2.15:5) Because the basis of this claim is that the Crown has a Treaty obligation to promote the economic development of Maori and

and the Crown's involvement in the MDC should be assessed in those terms, Te Ika Whenua also maintain that it is immaterial that the Crown originally advanced its contribution to the MDC by way of a loan which was later converted to shares. In response to the Crown's argument that the commercial manner in which it entered the MDC is to be distinguished from the grant made to establish the Poutama Trust and that only the latter evidences the Crown's achievement of social objectives, Ms Ertel submitted that it was unacceptable to argue that grants are the only method by which the Crown can meet its Treaty obligations. (2.17:3)

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### 3.2 - The Treaty of Waitangi

#### 3.2 The Treaty of Waitangi

A summary of the claimant's view of the Treaty issues relevant to the claim was provided in counsel's closing submissions:

- (a) The Crown has an obligation arising from the Treaty to foster and promote Maori economic development.
- (b) The Crown has an obligation arising from the Treaty to consult with Maori on issues of major significance.
- (c) The Crown has a fiduciary duty to Maori which includes the obligation to act in the best interests of Maori.
- (d) A right of development is a human right and one inherent in the Treaty of Waitangi.
- (e) Maori as the other Treaty partner should not be left to the whim of the administrative fiat in the context of the sale process and the application of the proceeds and future commitment by the Crown to Maori economic development. (2.17:2)

Ms Ertel made detailed argument upon the rights and obligations flowing from the Treaty. Her principal argument is that Articles 2 and 3 guarantee the right of iwi, hapu and whanau to economic development in a manner consistent with Maori customs and preferences and that the Crown has a duty to actively protect and promote that development. (A18:4-11)

In general support of this Treaty duty, counsel for the claimant invoked the tribunal's own statement that the Crown's Article 1 right to govern, its right of kawanatanga, is not absolute:

It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in Article 2. This necessarily qualifies or limits the authority of the Crown to govern. In

exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori -in terms of Article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right. (A18:22-23)<sup>1</sup>

Ms Ertel also relied upon the judicially recognised Treaty partnership principle and the resulting fiduciary duty that has been held to constrain the Crown's exercise of its governmental powers.<sup>2</sup> While acknowledging that judicial statements to date have focused on the Crown's fiduciary duty to actively protect Maori people in the use of their lands and waters, counsel argued that since the Treaty has a commercial component and does not deal solely with land and fisheries, it is logical that the Crown's duty should apply equally to Maori economic activity.

In support, she submitted that the Supreme Court of Canada has recognised a general principle, arising from the legal doctrine of aboriginal title, that the Crown has a fiduciary duty with respect to aboriginal peoples.<sup>3</sup> Such a broadly framed duty would find even stronger roots in the Treaty of Waitangi, Ms Ertel argued, because the Treaty was an express "transaction" for sovereignty containing Crown promises of protection.

Moreover, if the Crown's fiduciary duty did not apply to Maori economic activity, an unwarranted distinction would be created between the Treaty rights of Maori and the rights flowing to aboriginal peoples from the doctrine of aboriginal title. (A18:19-22)

In further support of a Treaty duty to promote Maori economic development, it was argued that the right to economic development is a human right, recognised by the United Nations General Assembly and supported by New Zealand, and that the Treaty includes or must be interpreted in light of human rights norms. (A18:10) Reliance was also placed upon statements made by this tribunal in the 1988 Muriwhenua Fishing Report, including the following passage which is couched in both Treaty and human rights terms:

A Treaty that denied a development right to Maori would not have been signed.

It is the inherent right of all people to develop and progress in all areas. No one has seriously suggested that Maori could not develop their lands on Western lines and sell the produce of their industry.

The Treaty envisaged that Maori would gain greater development opportunities from settlement and access to new markets. (A18:10)<sup>4</sup>

It was also argued that the principle that the Crown must redress past and continuing breaches of the Treaty is relevant in the present context. Attention was focused on the Waitangi Tribunal's previous findings of breaches of Article 2's guarantee of tino rangatiratanga and its conclusion that these have caused adverse economic, social and cultural impacts on the Maori nation. (A18:12) Further, it was submitted that the

Treaty's Article 3 guarantee to Maori, of royal protection and the rights and privileges of British subjects, gives rise to an obligation upon the Crown to ensure equity of outcome between Maori and Pakeha which, if not achieved, gives rise to a right of redress. (2.17:4)

Finally, counsel for the claimant relied upon the Crown's duty to consult with its Treaty partner, arguing that consultation was required upon the important matter of how the Crown should actively protect and promote Maori economic development. A Memorandum prepared for a Cabinet meeting early in 1987 by the then Minister of State Services was relied upon as evidence of the Crown's acknowledgement that consultation is imperative upon issues of such magnitude as Maori development. (A18:28 referring to A1:40-41) Observing that the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665 rejected as elusive and unworkable the concept of a detailed or unqualified duty to consult, Ms Ertel maintained nevertheless that consultation was necessary in the present situation where the seriously disadvantaged economic position of Maori would be aggravated by the Crown's proposed sale of its MDC shareholding. (A18:27-28)

On the general matter of the standard of protection required by the Crown to discharge its Treaty duties, counsel referred to a letter written in 1845 by the Secretary of State for the Colonies, Lord Stanley, to the newly appointed Governor Grey, quoted by the tribunal in its Orakei Report. There, in the name of the Queen, Lord Stanley firmly denied any notion that treaties entered into by Her Majesty were "a mere blind to amuse and deceive ignorant savages" and instructed the Governor to "honourably and scrupulously fulfil the conditions of the Treaty of Waitangi." Counsel submitted that the Crown remains bound to this standard of performance of its Treaty duties. (A18:23-24)

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### 3.3 - Alleged Breaches of the Treaty and Prejudice to the Claimant

#### 3.3 Alleged Breaches of the Treaty and Prejudice to the Claimant

A summary of the Treaty breaches alleged by the Te Ika Whenua, and an indication of the prejudice this group of claimants claim to have suffered thereby, was provided in counsel's closing submissions:

(a) The Crown has an obligation pursuant to Article II to ensure the unimpeded exercise by Maori of rangatiratanga. This necessarily includes a right of development. Maori have not enjoyed the level of development that they should have and this is directly attributable to breaches of Articles II and III of the Treaty. These breaches require remedy. While more is needed, MDC was one way of delivering remedy.

(b) The Crown has an obligation pursuant to Article III of the Treaty to ensure equity of outcome between Maori and Pakeha. The Crown acknowledges that Maori suffer from an achievement gap. Gwenda Paul's evidence (document A15) presents material showing that the achievement gap still exists today. This requires redress, one of the methods of redress being employed is MDC. It is submitted, that to redress Treaty breaches (even if only in part) is consistent with the Treaty. To stop redressing is obviously contrary to the Treaty. This is the position the Crown finds itself in.

(c) The Crown has an obligation to provide appropriate ways to meet its obligations under the Treaty. This position is supported by Dr Robert Mahuta, one of the Crown's witnesses (see Document A35 pages 8-9).

(d) The Crown has an obligation to consult its Treaty partner on major issues (The SOE case). (2.17:4-5)

It merits emphasis that, at the heart of Te Ika Whenua's allegations that the proposed sale of the Crown's shareholding in the MDC will breach the Treaty of Waitangi, is their view that the Crown's involvement in the company is a measure by which the Crown discharges its Treaty duties to promote and actively protect Maori economic development and to redress past Treaty breaches. Importantly however, Te Ika Whenua do not assert that the Crown must retain its MDC shareholding in order to continue acting consistently with the Treaty. The basis of the claimant's allegations of Treaty breach is that the Crown's proposal to sell its MDC shares is being pursued in isolation, without a commitment to a pre-arranged mechanism to take the place of the Crown's shareholding.

It is the absence of such a replacement mechanism that will, it is alleged, cause the claimant to suffer two major prejudices. First, the "disappearance" of the MDC share sale proceeds into the Consolidated Fund will cause a net diminution in the Crown's involvement in Maori economic development. (2.15:6) Secondly, Te Ika Whenua will be particularly adversely affected by the loss of a "market Treaty delivery mechanism"

providing development funds to Maori because, it was said, their economic position is dire and they have not accessed MDC funds to date. (A18:29)

In elaborating the nature of this latter prejudice, counsel stated that upon the sale of the

Crown's MDC shares, the company will "lose its Treaty component, which is contingent on and attaches to the Crown-Maori relationship". (2.17:6) Regardless of who might purchase the Crown's shares then, the claimant's argument is that the Treaty

partnership aspect of the MDC's operations will be destroyed by the sale. Since, the claimant argues, this will occur at a time when Maori economic development is still lagging, the need remains for a Treaty-based market mechanism such as the MDC.5 As

a result, the Crown's proposal to sell in the absence of a commitment to a pre-arranged

replacement vehicle will breach all of the Treaty duties posited by claimant's counsel.

A third prejudice which it was alleged the claimant could suffer, although less emphasis was placed upon it, arises from the claimant's view that the Maori Trustee's shareholding in the MDC is connected to that of the Crown. As has been stated earlier,

the Crown owns 13 million of the MDC's 26,000,004 shares and the Maori Trustee owns 7,000,004. The claimant argued that, together, the shareholdings of the Crown and Maori Trustee represent a considerable majority within the MDC and that the sale of the Crown's shares might reduce the Maori Trustee's control and his ability to ensure

the best return on the investments made by the company. Further, if the MDC was to collapse or have its assets stripped, any resultant loss to shareholders would be felt by the Maori Trustee and thus by Te Ika Whenua as his beneficiaries. (A18:31) Maanu Paul elaborated upon this last point when he stated that the Waiariki District, of which Te Ika Whenua is part, has been a significant contributor to the Maori Trustee's funds. (A19:2)

Rejecting the Crown's submission that the claimant's arguments amounted to a request that the tribunal dictate how the Crown should spend its money, counsel explained that

Te Ika Whenua do not argue that there is a Treaty principle requiring the provision of cash for Maori business. Rather, they seek the tribunal to confirm that there is a Crown

duty to actively promote Maori economic development. Such a duty, it was said, might

be discharged by means of a raft of facilities available to the Crown. (2.15:6) Counsel also rejected any suggestion that the role of Te Puni Kokiri in relation to Maori development sufficed to discharge the Crown's Treaty obligations. It was said that the

role of that government agency does not answer the claimant's point that the Crown's net involvement in Maori development will be diminished by the sale of the Crown's MDC shares and, further, that Te Puni Kokiri does not and cannot deliver funds in the Treaty-based, market manner which characterises the MDC's operations. (2.17:5)

As well, counsel rejected the Crown's assertion that it is up to it how it meets its Treaty obligations. Observing that the Treaty is a compact between two parties, Ms Ertel recalled her earlier argument that the Crown's freedom to govern is constrained by the need for compliance with the whole of the Treaty. The Crown could not therefore govern in a manner which amounted to a unilateral exercise of its Article 1 powers to the detriment of Articles 2 and 3. (2.15:6-7)

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 3.4 - Findings and Recommendations Sought

#### 3.4 Findings and Recommendations Sought

The recommendations and findings sought by Te Ika Whenua are set out in counsel's opening submissions:

Negotiation, in the true spirit of the Treaty, between the Crown and Maori is imperative so that solutions can be developed which are consistent with the Treaty. In the context of this urgent hearing recommendations are required that inform the Crown of its obligations to Maori of development and the restoration of tino rangatiratanga. Such recommendations require findings that:

- (a) The Crown has an active duty to protect the claimants' interests pursuant to the Treaty of Waitangi and that it has failed to discharge that duty.
- (b) Material Crown actions, to date, have prima facie not scrupulously adhered to the principles of the Treaty of Waitangi.
- (c) The Treaty embodies obligations on the Crown which include, in today's context, an obligation to provide appropriate mechanisms to service economic development to Maori as a specific group.
- (d) The Crown's sale of its MDC shares signifies a withdrawal from its obligations to Maori development and is therefore in breach of the Treaty.
- (e) A pre-arranged replacement development vehicle is required if breach is to be avoided.
- (f) If any replacement vehicle is to be effective consultation with iwi Maori is required. (A18:33-34)

#### References

1. Report of the Waitangi Tribunal on the Ngai Tahu Sea Fisheries Claim (Wai 27), (Brooker & Friend 1992), p 269
2. New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641, 664 per Cooke P
3. R v Sparrow [1990] 70 DLR 385, 408 per Dickson CJ and La Forest J
4. Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22), (Waitangi Tribunal, Wellington 1988) p 235
5. The evidence of Mrs Paul focused on the disadvantaged position of Maori

compared with other New Zealanders in the areas of education and housing  
(A15)

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*Waitangi Tribunal, Department of Justice, Wellington.*