

CHAPTER 4

THE SECOND LIMB OF THE CLAIM

The second limb of the claim asserts that Maori have a right to a fair and equitable share of the spectrum, especially where the Crown has an obligation to promote and protect Maori language and culture.

We have already accepted that Maori have ‘a right to a fair and equitable share of the spectrum’ in relation to the first limb of the claim. It follows that this should be so where the Crown has an obligation to promote and protect Maori language and culture. The two limbs of the claim are linked in that Maori ownership and management of spectrum frequencies would, in our view, give them better control over the uses of those frequencies for promoting – indeed ‘owning’ – language and culture. We shall indicate as this chapter proceeds that there are various ways in which a Maori share of the spectrum could be used to protect and promote Maori language and culture.

4.1 CLAIMANT SUBMISSIONS

In her opening submissions, claimant counsel said that the Crown had breached its obligations to promote and protect Maori language and culture by failing to consult Maori on the benefits that the new technology in the 2GHz band and other telecommunications frequencies may offer. And the Crown had not fulfilled its obligations in relation to Maori culture by restricting its policies to the protection of language only, and that only in the context of broadcasting.¹ She called several witnesses, some of whom had appeared at our previous hearing, in support of those contentions. She used evidence from Professor Howard Frederick and Bruce Tichbon for an explanation of ways in which new telecommunications could be used to support language and culture. She called Piripi Walker, a well-known Maori broadcaster, for evidence on the situation of Maori language and culture in present-day broadcasting services. The Tribunal recalled him for further cross-examination.

In her closing submissions, claimant counsel again complained that the Crown had failed to consult Maori before deciding to proceed with the auction of the spectrum, on the assumption that the sale of management rights to others would not prevent Maori from accessing those services. If it proved necessary, the Government would step in to facilitate Maori access to those services. Only at this stage was the

1. Document B18, para 1.4.2

Government prepared to consider consultation with Maori.² Claimant counsel also complained that the Crown had failed ‘to acknowledge the potential that third generation technology and other non-broadcasting technology may have for Maori language and culture’.³ She denied claims by the Crown that it was fulfilling its obligations in relation to Maori language promotion through broadcasting and education. She quoted from the Privy Council decision in the 1993 broadcasting assets case that, with the language as a taonga ‘in a vulnerable state’, the Crown may well be required ‘to take especially vigorous action for its protection’ in fulfilling its obligations.⁴ If the Maori language was in a ‘vulnerable’ state in 1993, the situation had not improved by 1999. Claimant counsel said that the language was now ‘in a parlous state, is very fragile and at a critical point’.⁵ She referred to evidence from Huirangi Waikerepuru, Professor Hirini Mead, and Mr Walker, and the Te Puni Kokiri publication *The National Maori Language Survey* for confirmation of these assertions. The survey pointed out that, although 59 percent of Maori surveyed had some proficiency in the language, only 8 percent professed themselves to be highly fluent, 43 percent had ‘low fluency’, and another 41 percent did not speak Maori at all. Older Maori were more likely to be fluent speakers, with young Maori also likely to have some ability in the language, but those in the 25 to 44 year age bracket were the least fluent group.⁶ Further information from the survey on fluency levels is included at section 1.5 of our minority finding. Nor is the problem confined to fluency; comprehension, reading, and writing abilities are similarly low. Further evidence submitted to the Tribunal, such as the Law Commission report *Justice: The Experiences of Maori Women*, confirms what claimant counsel called ‘the fragile state of the language’.⁷

Claimant counsel complained of a ‘slippage’ in Crown support for Maori language and culture in broadcasting since 1991. As examples of this, she listed the failure after 10 years to establish a Maori television channel; difficulties for Maori funding likely to arise from the abolition of the broadcasting fee; the shifting of television Maori news programmes to off-peak times; the cancellation of Maori television news during the summer months over the last three years; the plan to stop Maori news broadcasts on National Radio next July; and the proposal to delete the reference to ‘Maori culture’ in section 53E(c) of the Broadcasting Act 1989 under the planned amendment currently before Parliament. Counsel said that there was also ‘slippage’ in education, as seen in the recent fall-off in enrolments at kohanga reo, attributed at least in part to the removal of childcare subsidies, the failure substantially to increase enrolments in kura

2. Document B46, para 7.43

3. Ibid, para 7.1.3

4. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

5. Document B46, para 7.5

6. Te Puni Kokiri, *The National Maori Language Survey: Te Mahi Rangahau Reo Maori*, Wellington, Te Puni Kokiri, c1995 (doc B21), p 60

7. Document B46, para 7.16; see also Law Commission, *Justice: The Experiences of Maori Women – Te Tikanga o te Ture: Te Matauranga o nga Wahine Maori e Pa Ana ki Tenei*, New Zealand Law Commission Report 53, April 1999 (NZLC R53) (doc B23)

kaupapa, and the failure to provide adequate establishment funding for wananga (the subject of a recent Tribunal report).

This 'slippage' has wider social and economic implications. Claimant counsel complained that the failure of the Crown to make available adequate financial resources to fulfil its obligations meant that it was unlikely that Maori would ever achieve comparable benefits to those enjoyed by non-Maori. We received a report prepared by Te Puni Kokiri, *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori*, which provided uncomfortable evidence that there has been no overall progress. As the chief executive of Te Puni Kokiri, Dr Ngatata Love, wrote in the foreword, 'It is disturbing to find that despite improvements for Maori in some areas, gaps have either remained the same or widened'⁸.

While it is evident that our education and broadcasting systems are failing to foster and develop Maori language and education, any failings by the Crown in this respect are only relevant as background to the issue before us. We have to consider whether the radio spectrum rights about to be auctioned are likely to be of value to Maori for the promotion of their language and culture. In coming back to this issue, claimant counsel drew attention to Mr Tichbon's report, especially sections 5.1 and 5.2. These noted the low level of penetration of existing telecommunications services with Maori, the importance in the promotion of language and culture in two-way, face-to-face communication, and ways in which new services using the 2GHz spectrum frequencies could be used to foster language and culture. The latter services included narrow-casting, through terminals in homes, schools, and community centres, video-conferencing, distance education and other social services, and tele-working. Many of these services could be used for remote areas (as well as urban concentrations of population). In cross examination, Mr Tichbon gave further detail of the possibilities of servicing remote areas, and of a gradual reduction in prices of equipment that was making such operations increasingly viable.

Three claimant witnesses, all experts in the teaching of Maori language, Professor Mead, Huirangi Waikerepuru, and Piripi Walker, agreed that the technologies discussed by Mr Tichbon would be extremely valuable in halting the decline of Maori language. James Casey, the Cherokee attorney we cross-examined by teleconference, described how similar technologies were being used in North America for Indian cultural preservation. Claimant counsel also referred to a report by the Ministry of Education, *Interactive Education: An Information and Communication Technologies Strategy for Schools*.⁹ This provided further confirmation of the usefulness of new information communication technologies, some of which would be available on the 2GHz spectrum frequencies, for teaching Maori language and culture. Finally, she referred to the Te Puni Kokiri funded experiment in tele-learning at Ngata Memorial College, also described by Mr Sharman in his evidence, as an example of what could be done with new technology in remote areas. Claimant counsel concluded that 'the

8. Te Puni Kokiri, *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori: A Report to the Minister of Maori Affairs*, Wellington, Te Puni Kokiri, 1998 (doc B38), p 1

9. Ministry of Education, *Interactive Education: An Information and Communication Technologies Strategy for Schools*, Wellington, Ministry of Education, 1998 (doc B40)

use of technologies to promote language and culture by the use of the 2 GHz band has enormous potential'. She accused the Crown of failing to investigate the possibilities of the band for Maori language promotion.¹⁰

4.2 CROWN SUBMISSIONS

In its opening submission, the Crown admitted that 'the conceptual basis of the second limb of the claim has more substance'.¹¹ It accepted that te reo Maori was a taonga. However, the opening submission did not include culture with language as a taonga, though in response to a question from the presiding officer, Ms Hardy said that the Crown did accept culture as a taonga. She added that culture was very broad in content. This hesitation is perhaps a reflection of the Crown's lack of firm action over culture, as distinct from language, over recent years.

The Crown's opening submission admitted that, despite some improved statistics in recent years, further improvement was important. The Crown did consider whether ownership of management rights in the 2 GHz spectrum was required to meet Treaty obligations in relation to te reo Maori but concluded that this was not so. Ownership of management rights was not necessary for Maori to use the technologies, since the content of communication, as with the telephone, was in the hands of the users. Nor was ownership necessary to provide Maori with training and skill. Several Crown witnesses who had submitted evidence and been cross-examined at our urgent hearing were recalled for further cross-examination on that evidence.

In her closing submission, Crown counsel again admitted that the second limb of the claim was 'conceptually more convincing'.¹² The Crown now said that it accepted that 'language and culture are taonga'. Ms Hardy quoted and accepted some statistics from the *National Maori Language Survey* and said that 'The Crown accepts, however, that the statistics are not satisfactory'.¹³ She added that the question before the Tribunal was 'whether management rights in the 2 GHz spectrum are a proper remedy'. The Crown concluded that allocation of such rights was not 'an appropriate or required remedy'.¹⁴ Ms Hardy explained that the Crown addressed the issue of te reo Maori through education and broadcasting. She provided details of what the Government was doing, and planned to do, through its Maori language education plan. She also provided details of Crown funding for broadcasting, noting an increase in funding of Te Mangai Pango from \$3.55 million in 1997–98 to a proposed \$15 million in 1999–2000. She noted that 20 iwi-based radio stations were operating and that a trust had been established to set up a new Maori television channel. She admitted that the Crown had an obligation to revitalise the language and that more

10. Document B46, paras 7.28, 7.42

11. Document B20, para 5

12. Document B49, para 6

13. Ibid, para 41

14. Ibid, paras 42–43

action was needed to achieve that outcome. What the Crown did dispute, however, was the remedy proposed by the claimants – that both the 2GHz spectrum and the ownership of the management rights to it were necessary for the effective protection and promotion of the language and culture. The Crown assumed that existing services were sufficient for these purposes.

4.3 TREATY PRINCIPLES

Since the publication of the Tribunal's *Report on the Te Reo Maori Claim* in 1986, it has been recognised that the Maori language is a taonga and therefore protected by the Treaty. The te reo Maori Tribunal accepted a submission from Professor Mead, who argued that the phrase 'o ratou taonga katoa' in the Maori text of article 2 covered both tangible and intangible things and could best be translated as 'all their valued customs and possessions'. The Tribunal concluded that 'the language is an essential part of the culture and must be regarded as "a valued possession"'.¹⁵ Ever since, it has been accepted that the language is a taonga. The position over Maori culture has been less certain, though as the quotations just used imply, culture is equated with customs, and language is regarded as part of culture. It is appropriate, therefore, to assume that culture is also protected as a taonga.

In addition to that, there is the so-called fourth article of the Treaty, a verbal promise by William Hobson at the Waitangi ceremony that 'the several faiths of England, of the Wesleyans, of Rome, and also Maori custom, shall be alike protected by him'. Hobson made this promise in response to an intervention from the Catholic bishop Pompallier, who wanted a guarantee that there would be freedom of religion, and one from William Colenso, who asked for the protection of Maori custom.¹⁶ In the Maori translation of Hobson's promise, Maori custom was rendered as 'ritenga'. The *Dictionary of the Maori Language* translates this as 'custom, habit, practice'.¹⁷ In international law, verbal promises made in association with treaty signings become part of those treaties. However, there is no need to rely on the 'fourth article', since there is sufficient guarantee for Maori culture as a taonga in article 2. The only problem, as Crown counsel reminded us, is that culture can be very broadly defined.

Since the Crown has also agreed that language and culture are taonga and therefore that it has a responsibility to protect and enhance them, we need spend no time arguing that case. Nor do we need to discuss Treaty principles at any length. It is sufficient to say that the principles outlined in the previous chapter apply equally to the protection and enhancement of Maori language and culture. From the evidence submitted to us, it is clear that the Crown could do more to promote language and culture through the existing education system and broadcasting – and through other fields. The 2GHz spectrum is one of those fields where the Crown could facilitate its

15. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker's Ltd, 1993, p 20

16. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin New Zealand Ltd, 1987, p 53

17. H Williams, *A Dictionary of the Maori Language*, 6th ed, Wellington, Government Printer, 1957

obligations with regard to language and culture through Maori ownership and management of some of the frequencies. We take up this question in our findings and recommendations.

We believe that the evidence submitted demonstrates that the Crown has not been adequately fulfilling its obligations in relation to Maori language and culture, especially since 1991, when there has been some slippage in the Crown's commitment to, and support for, them in education and broadcasting. We also note that, while the Crown has remained committed to the protection and enhancement of the language, it appears to be trying to shed its commitment to culture – for instance, by the proposed deletion of the reference to 'Maori culture' in the Broadcasting Act 1989.

It is not sufficient for the Crown to rely on existing methods and technologies in existing institutions. In view of the crisis in Maori language, every means must be employed to ensure the survival of the language. Maori have only a very limited involvement as owners or managers of existing telecommunications services. Even as consumers – for instance, in the possession of telephones – they are less endowed than non-Maori New Zealanders. We believe that this imbalance will be exacerbated if the same regime prevails with the auction of the 2GHz frequencies, since, without help from the Crown, Maori will be unable to purchase these in competition with the large corporations that are predicted to prevail. We believe that if the Crown is properly to fulfil its Treaty obligations, it must reserve a fair and equitable portion of the spectrum frequencies, as it has done to some extent with the issue of previous licences for radio and television frequencies. What we have said in our previous chapter on the need for Maori to have control of frequencies for economic and social purposes applies equally to linguistic and cultural purposes: Maori need to have the means whereby they can manage and 'own' their language and culture.

The Crown has suggested that it could compensate Maori for the failure to reserve any of the frequencies about to be auctioned by granting them frequencies elsewhere. We believe that this would be an inadequate alternative.

We now consider what value the new technologies likely to be used to exploit the 2GHz spectrum frequencies could have for Maori language and culture. We have been told that the frequencies are most likely to be used for short-distance telecommunication, especially by cellphone. It is said that they will be most lucrative in densely populated areas and far too costly to provide for remote, sparsely populated rural areas. For this reason, the Crown and its advisers appear to have decided that the new services will be of little use to Maori, and that it would be sufficient for Maori to use them as consumers. We do not accept that this decision is correct, or advisable, in view of the Crown's Treaty responsibilities. We heard from Mr Tichbon that it is already possible and not prohibitively expensive to download information from satellites and retransmit it from local sites in remote areas. He added that the equipment was likely to become considerably cheaper in the near future. We heard from Mr Casey how various reservation Native Americans in the United States and Canada are 'getting on the loop' for telecommunications. We believe that, where there is a will, there will be a way to get telecommunications, using some of the 2GHz frequencies, to Maori communities, whether urban or rural. The

trouble has been a lack of will, and perhaps a lack of commitment to Treaty obligations, in the Ministry of Commerce. Officials seem to have been content to take the easy, and for the Crown the potentially lucrative, way of auctioning the spectrum frequencies to the highest bidders. When questioned, most of the witnesses admitted that the successful bidders are likely to be foreign multinationals. If we can judge by the performance of such owners of existing services – for example, TV3 and TV4 – their commitment to Maori language and culture is likely to be minimal.

We conclude that, if the Crown's obligations under the Treaty principles relating to partnership, rangatiratanga, fiduciary duty, active protection, mutual benefit, and development are to be effectively fulfilled for the language and culture of Maori, as well as for their social and economic wellbeing, it will be necessary for the Crown to facilitate the fuller involvement of Maori in the telecommunications industry through the ownership and management of spectrum frequencies. In this respect, the two limbs of the claim are tied together. Maori language and culture can hardly thrive in a situation of endemic Maori poverty.

