

PART II

THE MINORITY FINDING OF JUDGE P J SAVAGE,
PRESIDING OFFICER

CHAPTER 1

THE MINORITY FINDING

1.1 INTRODUCTION

Because I again dissent and therefore do not take part in the finding of the Tribunal, my decision will be brief.

This decision is to be read in conjunction with my interim decision. That decision forms part of this decision except in one regard. The evidence presented and submissions given to this Tribunal by the claimant and the Crown over the six days of the substantive hearing have meant that I am obliged to deal with the second limb of the claim in a rather different way. I find breaches by the Crown of its obligations in relation to language and culture that ought to be remedied in the context of this claim. On the first limb, however, my *prima facie* view has been borne out.

1.2 THE CLAIM TO A RESOURCE

The exact scope of this part of the claim has changed somewhat during the course of the substantive hearing. In opening, claimant counsel put the claim in this way:

Where the Crown asserts exclusive authority over a resource (*kawanatanga*) whether or not the resource was known about at the time of the Treaty of Waitangi, it has an obligation to provide for the exercise of *rangatiratanga* over that resource by Maori.¹

And further:

Claimant counsel: The claim is wider than just the 2GHz spectrum band as will be evident from the statement of claim and in that regard it is my submission that the evidence that you are about to hear relates to the whole of the spectrum band of which the 2GHz range is but a part and the reason I am raising this is that every time it is the wish of the Crown to sell off or auction property rights in the spectrum, which is what the claimant alleges is happening (the management right is a property right) the claimants should not have to relitigate the same issues and arguments in relation to the same resource.

Tribunal: What spectrum, the radio spectrum or the electromagnetic spectrum?

Claimant counsel: The electromagnetic spectrum of which the radio spectrum is a part.²

1. Document B18, para 1.2

2. Opening submissions of claimant counsel, substantive hearing, 30 April 1999, tape 1

However, in closing, claimant counsel said:

the submissions follow the opening submissions for the claimant in which it was alleged that the Crown [has] breached the principles of the Treaty of Waitangi. This essentially falls into two principal limbs, the first being founded on the principle of partnership and the second under the principle Taonga.

It is submitted that the focus of this enquiry, as has been held by the majority finding of this tribunal is on the responsibility of the Crown to ensure that its Treaty partner obtains a fair and equitable share of spectrum that can be used for commercial, social and educational purposes in addition to language and culture.³

And, finally, in the written submissions received some days after the completion of the evidence:

The partnership principle as espoused by the claimant is that where the Crown vests in itself an exclusive right to access a resource, whether or not that resource was known about at the time of the Treaty, it has an obligation under the Treaty to provide for the exercise of rangatiratanga. Where that exclusive right is then alienated to commercial interests without provision for the exercise of rangatiratanga, Maori will be particularly prejudiced.⁴

What emerges from this is that, while this particular claim relates to a specific part of the radio spectrum, the principles that are claimed to exist would be equally applicable to the entire radio spectrum, the entire electromagnetic spectrum, and resources in general.

1.3 THE MERITS OF THE CLAIM

The task of this Tribunal is to decide if a claim that a principle of the Treaty of Waitangi has been breached is in fact well founded. The exercise here involves, first, reference to express terms and then an examination of broader principles.

1.3.1 Express terms

(1) *Kainga*

In my interim finding, I dealt with the word 'kainga' in article 2. It was the view of Professor Whatarangi Winiata that that was a reference to all of creation. I noted that my fellow Tribunal members in the majority finding on an interim basis were silent in this regard, and it was important to note that other witnesses for the claimant at the substantive hearing were considerably less enthusiastic than the professor for the proposition that he espoused.

3. Document B46, paras 1.1–1.2

4. Document C3, para 2.5

I confirm my earlier reasons and decisions and further say this. If the word ‘kainga’ was intended to refer to the universe, then:

- (a) it would be referred to in the singular as ‘to ratou kainga’; and
- (b) it would be seen as being used in literature of the last century in that sense.

There was considerable writing in Maori at that time, particularly in religious circles, where the terms ‘all of creation’ or ‘all of God’s work’ and like phrases were used, but the claimants were not able to refer me to the word being ‘kainga’ in that sense. For those reasons, and the reasons previously given, I do not regard Professor Winiata’s concept as helpful to the claimant or this inquiry.

(2) *Taonga*

Again it was suggested that the radio spectrum, the electromagnetic spectrum, or resources in general (known or unknown in 1840) were encompassed by the word ‘taonga’ in article 2. We were given evidence that Maori knew of the electromagnetic spectrum, as evident in traditions relating to the snaring of the sun and the ability to shout at long distances, and that those traditions, when allied with the fact that spectra operated in a space above one’s head, were said to give them a tapu element in a way that assisted the claimants. That may or may not be so, but it is a difficult and dubious voyage from those propositions to the finding of a Treaty right.

‘Taonga’ is a word that is used in a number of senses. At the mundane level, it can refer to a prize or trophy. A very well known Maori academic told us:

‘Taonga’, the word used in article 2 of the Treaty applies to tangible or intangible things. A taonga is anything highly valued by iwi.

The spectrum is a taonga of high value and is of high value to iwi.

When pressed, he accepted that what was referred to in the Treaty is not the mundane but something having a spiritual or cultural significance. Having taken that step forward, however, he retraced it by saying that everything has a spiritual or cultural dimension for Maori.

With the greatest respect to him, if he is correct, then he is coming perilously close to saying that the word ‘taonga’ means ‘anything you like’, in both senses of that phrase. The consequence of accepting that that was the meaning of ‘taonga’ in article 2 would make the Treaty so indefinite as to be meaningless and cast doubt as to whether the parties to the compact were ever *ad idem*.

For me, however, it is clear that the Treaty did not reserve to Maori *taonga katou* but *ratou* (their) *taonga katou*. I do not accept, then, that the words ‘ratou taonga’ relate to the radio or electronic spectrum or to resources in general.

This head of the claim is not well founded.

1.3.2 Treaty principles

(1) General principles

The *Concise Oxford Dictionary* defines a principle as ‘a fundamental truth or law as the basis of reasoning or action’.⁵ That is the meaning of that word in section 6 of the Treaty of Waitangi Act 1975.

In *New Zealand Maori Council v Attorney-General*, Justice Somers said:

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed in the circumstances to which those principles are to apply. At its making all lay in the future.⁶

Armed with the above and the claimant’s definition of the claim, one would expect that the principle that is to be relied on in this case (if it in fact exists) would provide a basis of reasoning or action for the Crown and for Maori in relation to the subject of this claim.

It was 13 years ago in *New Zealand Maori Council v Attorney-General* that Justice Richardson spoke of the differences in perception of the principles. One wonders whether there has been a great deal of progress made since then. He said this:

Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are. This was apparent in the rival contentions of the New Zealand Maori Council and the Crown in this case. Mr Baragwanath for the New Zealand Maori Council relied on the terms of the Treaty, particularly the Maori language text, as themselves constituting principles of the Treaty, and in addition submitted that there were 10 implicit principles reflected in these concepts: (i) the duty actively to protect to the fullest extent practicable; (ii) the jurisdiction of the Waitangi Tribunal to investigate omissions; (iii) a relationship analogous to fiduciary duty; (iv) the duty to consult; (v) the honour of the Crown; (vi) the duty to make good past breaches; (vii) the duty to return land for land; (viii) that the Maori way of life would be protected; (ix) that the parties would be of equal status; and (x) where the Maori interest in their taonga is adversely affected, that priority would be given to Maori values.

For the Crown Mr Williams rejected the concept of implied principles altogether as having no basis in the texts nor in the law of treaties. Thus he rejected Mr Baragwanath’s basic proposition that there was a duty to consult on matters affecting Maori people. His submission was that five principles can be identified from analysis of the Treaty and the preamble: (1) that a settled form of civil Government was desirable and the British Crown should exercise the power of Government; (2) that the power of the British Crown to govern included the power to legislate for all matters relating to ‘peace and good order’; (3) that Maori chieftainship over their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed; (4) that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than

5. *The Concise Oxford Dictionary*, 5th ed, Oxford, Oxford University Press, 1964

6. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 692 (CA)

the Crown; and (5) that the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.⁷

It goes without saying that the principles must be discerned and applied reasonably and in good faith. Justice Richardson said:

That basis for the compact requires each party to act reasonably and in good faith towards the other. In this regard there is much force in the observation of Sir Henare Ngata in his evidence in this case that ‘... a contentious matter such as the Treaty will yield to those who study it whatever they seek’. If they look for difficulties and obstacles, they will find them. If they are prepared to regard it as an obligation of honour, they will find that the Treaty is well capable of implementation.⁸

During the course of the hearing, parties repeatedly referred to the hopes and motives of those who entered into the Treaty. This is also referred to in the majority finding in the interim report and is said to be supported by a reference to the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*.⁹

In my view, care should be taken in placing too much weight upon this. The parties’ motivation in entering into the compact is not of primary relevance. One can suppose that the Crown had a general desire to obtain territory, a general humanitarian motive to temper the worst aspects of colonisation, and a particular desire to stave off predatory land-grabbers, as well as having the usual colonial ambition to pre-empt other would-be colonisers. The Maori party to the compact was in part motivated by the desire to share in material wealth and a raised standard of living and to enjoy peace and order. Those were reasons why the parties may have entered into the compact, but to elevate them to terms or principles of the compact is to jumble the concepts involved. It is of course helpful to have reference to the general background, matters such as Normanby’s instructions, and statements made preceding the signing. But the focus must be on the Treaty itself. I am not suggesting that the Treaty is to be construed narrowly, as one would a mere contract. But there is a danger of wishful redrafting in straying too far from the words, phrases, and concepts in the Treaty itself.

To put it another way, it is beyond argument that economic development was a high motivator for Maori in entering the Treaty. No enlightened person today could want Maori to continue to be economically deprived in a general sense. The legacy of disappointment, disaffection, and conflict for our uri (descendants), as we see for others overseas, is a horrifying prospect. That, however, is not the point. The Treaty does not make promises of economic outcomes. It is said that a breach of the Treaty is discernable in relation to resources when the Crown seeks to privatise or create monopolies, and particularly when it seeks to sell to overseas interests. The reasoning seems to run that to do those things is not a proper exercise of kawanatanga and

7. Ibid, p 673

8. Ibid

9. See Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report*, Wellington, Waitangi Tribunal, 1999, p 8, and *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, pp 194–195

therefore lays the Crown open to claim. Whether the doing of those things is prudent or reasonable or good governance is not the point; this Tribunal is not charged to discern unfair or socially unfortunate actions unless they constitute breaches of the principles of the Treaty.

A variant of the errors of converting motives into principles, reading the Treaty as a promise of economic outcome down through the generations, and viewing the Tribunal as reviewing good governance is the espousal of a principle of development per se. This ‘principle’ is said by the claimants to exist independently of any other Treaty principle or right. I do not recognise it. I referred to it in my interim decision.¹⁰

I have since read the Law Commission’s report *Justice: The Experiences of Maori Women*. I drew this to the attention of counsel. It says this:

The principle of *development* is touched on in early reports, and is clearly outlined in the *Ngai Tahu Fisheries* report where the Tribunal said that it was ‘common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development’ (253–254). In the *Maori Development Corporation* report the Tribunal noted that it had ‘no doubt that the Crown’s purpose in establishing and investing in the [Maori Development Corporation] was to promote the economic development of Maori – all Maori – in accordance with the Treaty of Waitangi’.¹¹

With the greatest respect, I do not accept what is said there. The *Maori Development Corporation Report* identified very specific principles, and a principle of development was not one of them. The quote that is referred to does not sit in that part of that report and is merely an introductory remark. The *Ngai Tahu Sea Fisheries Report 1992* is in a completely different category in that it relates to the development of a right rather than the right to develop in a general sense.¹²

So far as the Muriwhenua decision is concerned, if the reference in that report is intended to state a general principle, then I depart from it. I rather doubt that it does, for the report was dealing with principles in relation to fishing. The topic is again dealt with later in the report, particularly in relation to fishing and the development of that right.¹³

Further submissions were sought and received from the claimants on this aspect. They were received in the following form:

The claimants assert that the ‘right to develop’ has three main levels:

1. The right to develop resources to which Maori had customary and traditional uses prior to the Treaty (development of the resource);¹⁴

I accept this absolutely; it is what is referred to in the various fisheries reports.

10. *Radio Spectrum Management and Development Interim Report*, p 16

11. 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), p 132

12. See Waitangi Tribunal, *The Maori Development Corporation Report*, Wellington, Brooker’s Ltd, 1993; *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992

13. *Report on the Muriwhenua Fishing Claim*, pp 194–195, 234

14. Document c3, paras 4.2, 4.2.1

The submissions continued:

2. The right of the partnership principle to develop to include resources not known about or used in a traditional manner at 1840 (development of the Treaty);¹⁵

This somewhat begs the question in this claim. It is descriptive of the interplay between rangatiratanga and kawanatanga and presupposes that the partnership covers all aspects of life for both parties. In other words, it is claimed that it is more of a marriage than a partnership. It is not. I deal with that further.

The submissions then carried on:

3. The right of Maori to develop their culture, their language and their social and economic status using whatever means are available (development of Maori as peoples).¹⁶

I accept that and go further to say that, so far as culture and language (taonga) are concerned, the Crown has a positive duty to assist in the fostering and development of them.

It will be clear, then, that I do not recognise a right to develop as a separate principle.

(2) Partnership

Partnership is the core principle involved in this case. But partnerships have scopes of operation and do not intrude into all areas of the parties' lives. It is, I repeat, a partnership, not a marriage. The Crown must not intrude into the proper realm of rangatiratanga and, likewise, Maori must not intrude into pure matters of kawanatanga, except pursuant to their article 3 rights as citizens. Between those two areas at each end of the spectrum is the area where the partnership between the two concepts and the two peoples has its domain.

The claimants would have it that inherent in the principle of partnership is the principle that Maori have a right to a fair and equitable share in resources over and above those specifically reserved to them in article 2. Nothing in the radio or electromagnetic spectrum marks them out as requiring them to be dealt with in a different way from other assets of mankind. There is no logical reason, then, why such a fundamental truth, or law as a basis for reasoning, or action would not apply to the regulation of the generation of solar electricity, the modification of the structure of DNA (genetic engineering), the licensing of air space, or the licensing of the right to carry passengers for hire or reward in any vehicle of conveyance by land, sea, or air! Would it not also apply to oil and gas? There is an absurdity inherent in this claim when seen in that general context.

If such an important principle was truly contained within the Treaty in 1840 or an honest and generous recasting of it at the end of the twentieth century, then it is peculiar in the extreme that it is left to be discerned as a principle within a principle

15. Ibid, para 4.2.2

16. Ibid, para 4.2.3

(partnership) and not spelt out in the Treaty. Both parties to the Treaty were well aware of the concept and value of resources, for that was what was driving them, in good measure, into contact with each other and to enter into the Treaty.

It should also be noted that, if there were such a principle, then it would stand now and forever. One party of course could not enlarge or diminish it. All resources known and to be known by us would be captured by the principle and it would exist as a sort of constitutional right waiting to be claimed.

The claimant (who did not give evidence before us) referred to various treaties or international agreements where the Crown had referred to the radio spectrum as a resource or natural resource. At the hearing, the Crown's position was that spectra were not a resource and that radio signals in the 2GHz range were not natural. This dispute carried the matter no further for me and I found it irrelevant. What needs to be said, however, is that what one of the parties may or may not have said in this context, even if it is inconsistent, is of no help in discerning a principle of the Treaty. In other words, the parties cannot 'talk up' or 'talk down' a principle. The principle, if it exists, existed in 1840 within the Treaty.

If the principle is as claimed, it seems to me irrelevant that the subject resource was discovered before or after 1840, or whether it was a natural or a man-made resource. The principle to be applied in the management of it is the same now as it was in 1840.

We all accept or should accept that the Treaty is not locked in time or current knowledge or technological capacity. But it seems to me that the principle contended for by the claimants goes further to the point of attempting a new edition of the Treaty. I note the reference to the speech given by Sir Apirana Ngata in the debate relating to the 1937 Petroleum Bill contained in the majority interim finding. A reading of that, however, discloses that Ngata was concerned with the rights of Maori landowners in their capacity as landowners and was not, at any point, claiming a right to a share in petroleum that might be found irrespective of that property right. He was certainly not contending for a principle even remotely related to the logical basis for this claim.

In my interim decision, I referred in somewhat negative terms to the proposition that 'the Tribunal has developed a consistent discourse dealing with the hierarchy of interests in natural resources'. Claimant counsel has referred to three Canadian decisions: *R v Sparrow*, *R v Gladstone*, and *R v Van der Peet*.¹⁷ I am of the view that those cases do not assist in this regard. They have as their focus existing customary rights or existing Treaty rights and do not purport to deal with resources in the general sense, as the claimant would have it. In other words, first establish your right, then perhaps apply these cases.

I therefore find that this limb of this claim is not well founded.

17. *R v Sparrow* (1990) 70 DLR (4th) 385 (scc); *R v Gladstone* (1996) 137 DLR (4th) 648 (scc); *R v Van der Peet* (1996) 137 DLR (4th) 289 (scc)

1.4 THE SECOND LIMB OF THE CLAIM

The claim as originally postulated was ‘Maori have a right to a fair and equitable share in the spectrum especially where the Crown has an obligation to promote and protect Maori language and culture’. In so far as that is but a variant of the first limb of the claim, it would have been difficult for me to answer it in a different way. But the focus of this part of the claim did change during the course of the hearing so that it was the breach in relation to te reo Maori and Maori culture that was spotlighted rather than the resource.

So, then, for me the question is ‘Does a breach exist in relation to te reo Maori and Maori culture and if so is the Crown bound in good faith to remedy it in the context of this claim?’

The Waitangi Tribunal’s *Report on the Te Reo Maori Claim* was delivered in April 1986, the span of half a generation ago.

The broadcasting litigation was settled by a consent order in 1991.

The Privy Council began its advice in *New Zealand Maori Council v Attorney-General* (the broadcasting assets case) in December 1993 with the following words:

The Maori language (Te Reo Maori) is in a state of serious decline. It is an official language of New Zealand, recognised as such by the Maori Language Act 1987. It is ‘a highly prized property or treasure (taonga) of Maori’ (Cooke P [1992] 2 NZLR 576, at p 578 in the Court of Appeal) and it is also part of the national cultural heritage of New Zealand.¹⁸

The Crown has therefore been told, warned, and exhorted.

It should have been expected that by now, at least in the case of te reo Maori, one would have seen a renaissance seeded by funding and resources from the Crown. The recently published *National Maori Language Survey: Te Mahi Rangahau Reo Maori* paints a very different picture. The following tables are highly illustrative.

Age	Non-speakers	Speakers			Total
		Low fluency	Medium fluency	High fluency	
16–24	39	53	7	—	100
25–34	46	45	—	—	100
35–44	45	41	—	—	100
45–59	34	34	12	19	100
60+	30	24	—	32	100
All ages	41	43	8	8	100

— Amount too small to be expressed

As a result of rounding, rows may not add up to 100

Fluency levels of Maori adults, by age (percent). Source: Te Puni Kokiri, *The National Maori Language Survey: Te Mahi Rangahau Reo Maori*, Wellington, Te Puni Kokiri, c 1995 (doc B21), p 35, table 4.

18. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 514 (PC)

RADIO SPECTRUM FINAL REPORT

Age	Frequency with which Maori is spoken correctly			Total
	Very rarely or rarely	Sometimes	Usually or nearly always	
16–24	60	32	—	100
25–34	64	25	—	100
35–44	58	23	19	100
45–59	33	27	39	100
60+	—	—	68	100
All ages	51	26	23	100

— Amount too small to be expressed

As a result of rounding, rows may not add up to 100

Frequency with which Maori is spoken correctly by Maori speakers, by age (percent).

Source: *The National Maori Language Survey*, p 38, table 6.

Age	Conversations able to be carried out as well in either English or Maori			Total
	Almost none	A few	Half or more	
16–24	33	45	21	100
25–34	35	34	31	100
35–44	30	35	35	100
45–59	19	23	58	100
60+	—	—	72	100
All ages	29	33	38	100

— Amount too small to be expressed

As a result of rounding, rows may not add up to 100

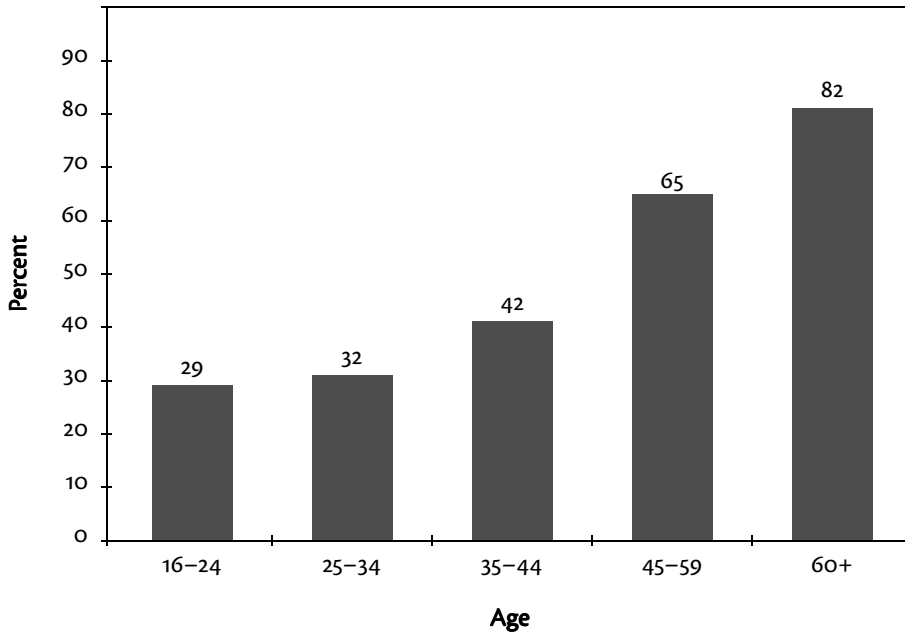
Number of conversations Maori speakers can conduct equally well in either English or Maori, by age (percent). Source: *The National Maori Language Survey*, p 39, table 8.

Age	Frequency with which thoughts can be expressed in different ways			Total
	Almost never or rarely	Sometimes	Usually or nearly always	
16–24	60	32	—	100
25–34	49	32	19	100
35–44	41	35	24	100
45–59	23	32	44	100
60+	—	—	63	100
All ages	42	32	26	100

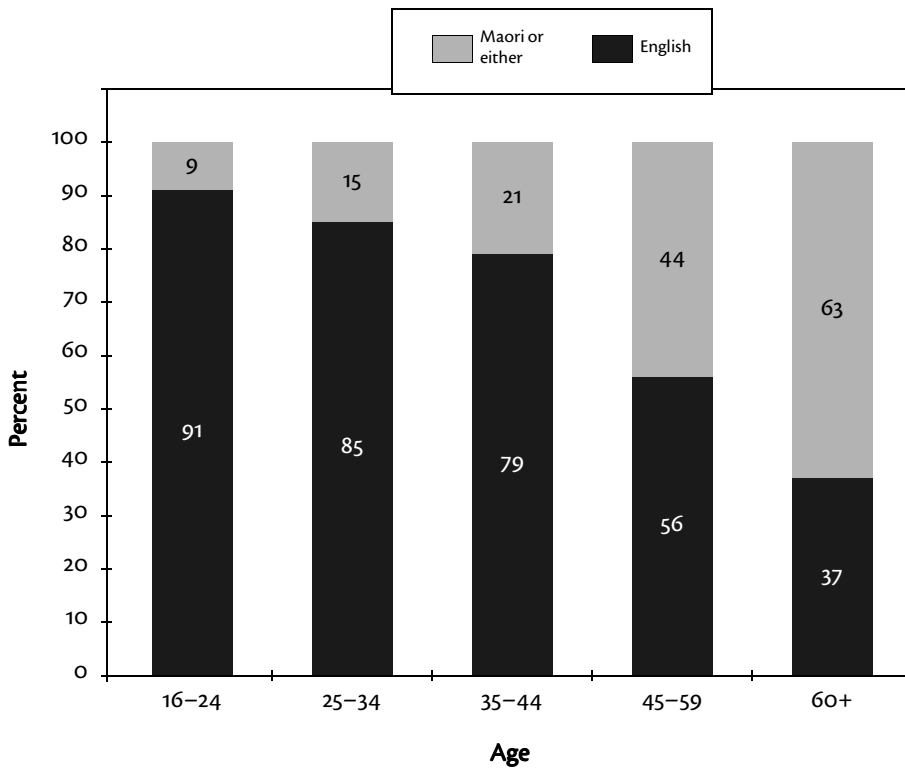
— Amount too small to be expressed

As a result of rounding, rows may not add up to 100

Frequency with which Maori speakers can express the same thought in a variety of ways in Maori, by age (percent). Source: *The National Maori Language Survey*, p 38, table 7.



Proportion of Maori speakers able to converse easily in Maori, by age.
 Source: *The National Maori Language Survey*, p 37, fig 9.



Language easiest for Maori speakers to converse in, by age.
 Source: *The National Maori Language Survey*, p 37, fig 10.

These tables are by no means exhaustive but are representative indicators of decline.

The report indicates a loss of 750 kaumatua every year and comments that ‘the opportunities for transmission of the Maori language and culture are rapidly diminishing’.¹⁹

In 1993, the Privy Council said:

This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown’s responsibility.²⁰

It appears to me that, in terms of that judgment, the economy is not in recession but reasonably buoyant. The Maori language is in a particularly vulnerable state, and this can in part be attributed to past breaches by the Crown of its obligations, and that factor increases the Crown’s responsibility.

The Crown appears to have had fair warning but has not remedied the breach sufficiently. It is therefore an aggravated breach and must be remedied as a matter of high priority. This breach is merely another example of the social ills that Maori are stricken with, and it is demonstrated in a number of recent reports to Ministers of the Crown. An example is the *Annual Report on Maori Education, 1997/98*, which demonstrates inter alia that 20 percent less Maori infants are involved in pre-school education than non-Maori, and the proportion in early childhood services who are Maori is even reducing.²¹ On average, Maori are three times more likely to be suspended from school than non-Maori and they receive much lower marks in school certificate and bursary. Forty-one percent of Maori males and 34 percent of Maori females left school in 1997 with no qualifications. This is to be contrasted with 15 percent of non-Maori males and 11 percent of non-Maori females.

Averaged between male and female, those figures disclosed that, in 1993, 33 percent of Maori children left school with no qualifications. That figure was bad enough, but

19. *The National Maori Language Survey*, p 64 (doc A22)

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

21. Ministry of Education, *Annual Report on Maori Education, 1997/98, and Direction for 1999*, Wellington, Ministry of Education, 1998 (doc B37)

in 1997 the figure had grown to 37 percent. Maori children were 10 to 15 percent less likely to attend further education after secondary school than their non-Maori counterparts. And on and on it goes.

So much for an investment in Maori education and a Maori future.

Article 3 appears to me to be important. It is easy and perhaps convenient to read it as simply conferring the rights and privileges of British subjects upon the Maori people but that is not what it says. It reads in the English text: ‘In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.’

I could not regard the words ‘royal protection’ as simply a flowery embellishment of what follows. The word ‘tiakina’, as appears in the Maori text, imparts a similar sense of favoured protection. In other words, Maori people were to be a favoured people in their land and their rights were to be actively protected.

It is also clear that, in a general sense and across the board, Maori are not developing at the same pace as non-Maori. Dr Ngatata Love, in his foreword to the report entitled *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori*, said this:

The historical disadvantage faced by Maori in the areas of education, employment, economic and health status has been well documented. However this is the first time that data from across the sectors has been drawn together to assess whether the gaps between Maori and non-Maori are closing. It is disturbing to find that despite improvements for Maori in some areas, gaps have either remained the same or widened.²²

The report bears close reading, and to say that it is ‘disturbing’ is understatement indeed. It graphically demonstrates the sad, and in many cases growing, disparities in education, health, economic status, employment, and so forth.

One could understand a delay between effort and result in relation to language and culture if the Crown could say that it were moving all areas for Maori forward across a broad front. What is demonstrated very clearly in the reports to which I have referred is that Maori are losing ground across a broad front.

This claim relates to communication.

Communication is the life force of language and culture.

I accept that the Crown is continuing an aggravated breach of the Treaty in relation to te reo Maori and culture.

It is fitting and right that the remedy is in some way provided from the communication field.

I listened carefully to the arguments that the claimant mounted that the proper way to provide Maori with an outcome in this area was through ownership of part of the spectrum. I do not accept that that is so, particularly in relation to this portion of the spectrum, which has to do with mobile telecommunication. To do so would be to use the Treaty for an improper purpose.

22. 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

Various Government officials who would know opined or agreed to the proposition that \$100 million was the likely figure to be achieved at auction. One plumped for a somewhat lower figure. I am conscious that this fund is a one-off (at least for 20 years). It is not for the sale of an asset in the conventional sense, in that there is no asset in the books of accounts. Not even as an intangible such as good will.

We were solemnly told that the acquisition of the money was not the object of the auction at all. It was merely collateral to it. The officials told us that the current wisdom was that the object of the auction was to discover the most effective user of the spectrum and that would be the entity that valued it most and that that would be discovered by the highest bid. For the Crown, the money was not the object but the mechanism of discovery.

I do not comment on the logic or sense of this. It does, however, establish that, for those involved at high Government level, there is a fund that is almost created from nothing, as a mere by-product of a search for efficiency. The fund is to be created in an area where there is a manifest and aggravated Treaty breach. To that, I add that the fund is not earmarked for any particular project or vote. It will be submerged into the Crown bank account.

There is therefore a breach that cries out for remedy and a fund that, if wisely used, could go a long way to meeting that cry.

The first task must be to discover, in an objective way, the means of remedying the breach.

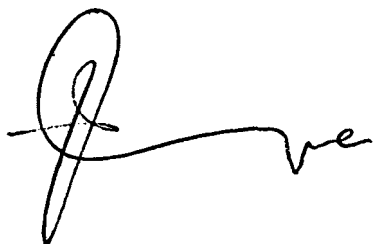
My recommendations would, therefore, be:

- (a) That the auction of this particular band of the radio spectrum not be delayed.
- (b) That the Crown recognise that its breach in relation to te reo Maori and Maori culture is continuing and aggravated. It has not done enough in this area or what it has done has not been effective or both.
- (c) That all or a generous portion of the net proceeds of the auction of the 2GHz spectrum be devoted to promoting, developing, and protecting te reo Maori and Maori culture.
- (d) That that fund be invested and the interest earned be used to conduct an inquiry to establish the best means of remedying the breach and, for that purpose, to access experts, both local and international, to prepare the appropriate plans.
- (e) That, when such a plan has been prepared and approved, it be actioned, using all or the appropriate part of the fund referred to.

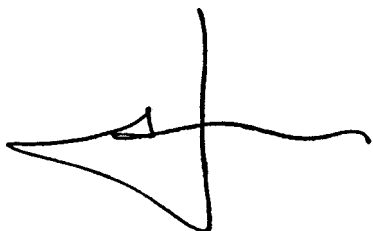
1.5 CONCLUSION

We were told, and I accept, that indigenous languages and cultures are passing out of being almost as a matter of routine. That is still a real possibility for Maori. Were either the language or the culture to suffer that fate, then the Treaty and our nation itself would be mortally damaged.

Dated at Wellington this 28th day of June 1999

A handwritten signature in black ink, appearing to read 'P J Savage', with a large, stylized initial 'P'.

Judge P J Savage, presiding officer

A handwritten signature in black ink, appearing to read 'J Anderson', with a large, stylized initial 'J'.

J Anderson, member

A handwritten signature in black ink, appearing to read 'M.P.K. Sorrenson', with a large, stylized initial 'M'.

Professor M P K Sorrenson, member



