

PART I

THE MAJORITY FINDING,
BEING THE FINDING OF THE TRIBUNAL
(J M ANDERSON, PROFESSOR M P K SORRENSON)

CHAPTER 1

THE CLAIM

1.1 INTRODUCTION

This claim was lodged by Rangiaho Everton (née Paurini). It concerns a part of the electromagnetic spectrum known as the radio spectrum. This is the part exploitable by technology, which at present relates to those frequencies within the spectrum between 3kHz and 60GHz, the upper limit of which will rise with improving technology. Specific bands of the spectrum are allocated for particular uses. These encompass telecommunications and information technology in general, including the internet, cellular phones, video links, and video conferencing. They are not limited to broadcasting.

The Crown currently intends to auction the right to manage the radio spectrum in a specific frequency band – the 2GHz range.¹ The management rights would be for 20 years. They would give successful tenderers the right to issue licences to generate signals either to themselves or to operators purchasing or renting from them. Although in the urgent hearing the claimant sought and obtained what in effect was an injunction in relation to the pending auction of the 2GHz spectrum band, claimant counsel has stated that this claim relates to the whole of the electromagnetic spectrum band, not just that part in the 2GHz range. The provisions within the Radiocommunications Act 1989 relate to a wide range of frequencies: from 9kHz to 3000GHz. The Crown has already auctioned management rights to frequencies in the 25 to 29GHz range (within the super-high frequency, or SHF, range), and it proposes to sell further rights in future. Claimant counsel has argued that Maori should not have to relitigate the same issues and arguments in relation to the same resource every time that the Crown wishes to sell off or auction property rights in the spectrum (the management right being seen as a property right).

Two overarching statements encapsulate the claim. The first is that the claimant asserts that the Crown's actions outlined above (and any action to sell off or auction property rights in the spectrum) are either in breach of the broader Treaty principle of partnership or in breach of article 2 of the Treaty guarantee of protection of taonga or kainga. The second statement is that the claim consists of two main limbs. These are that:

- (a) Maori have a right to a fair and equitable share in the radio spectrum resource;
- and

1. The 2GHz range relates to frequencies between 1.7GHz and 2.3GHz.

- (b) 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.

These statements are elaborated on below and in the body of this report. We now return to the particulars of the statement of claim.

In 1989, the Radiocommunications Act reformed spectrum management along free-market lines. It set up the Crown as the manager of radio frequencies and created a management right, which the claimant refers to as one of implied ownership, of a band of frequencies for 20 years. The Act makes no explicit provision for the Treaty of Waitangi in radio spectrum management matters. Yet, successive governments have acknowledged the importance of broadcasting in the preservation and development of Maori language and culture. And, formerly, the Crown has been in the practice of reserving frequencies for such purposes, just as it does, on public policy grounds, for maritime and aircraft use and emergency communications. The Radiocommunications Act Amendment Bill currently before the House includes a proposal to allow the renewal of a management right period before the expiry date.

The claimant says that the Radiocommunications Act 1989 fails to acknowledge Maori rangatiratanga over the radio spectrum and that, in assuming for itself the exclusive authority to manage the spectrum, the Crown is ignoring the Treaty principle of partnership and failing to establish, in consultation with Maori, adequate principles, policies, and legislative framework for Maori partnership in spectrum management. The claimant alleges that the Crown is continuing to develop and pursue spectrum management policy without Maori participation, and is creating a property right, and selling that right, without consultation with, or the agreement of, Maori. The claimant says that the Crown's retention of the total revenue from the sale of management rights to the spectrum is in breach of the Treaty, as is its proposal of a spectrum management policy that advocates the sale of frequencies and management rights to private interests over the next six years, while remaining silent on Maori rights to radio spectrum resources for purposes other than the protection and promotion of Maori language (and culture) through broadcasting.

In late 1997 and early 1998, the Crown auctioned management rights to frequencies in the 25 to 29GHz range – a non-broadcasting part of the spectrum. The current proposed sale by auction of radio frequency licences and spectrum management rights for the 2GHz range is seen by the claimants to raise similar issues to those identified in the earlier auction. Namely, the claimant alleges that the Crown has breached the Treaty in announcing the auctions without consultation with, and the agreement of, Maori. Specifically, she states that the auction announcements occurred without Maori consultation and agreement on:

- the disposal of the control of the resource by the Crown when neither Treaty partner has a monopoly over it;
- whether Maori had any use for the spectrum to be disposed of for their own economic advancement; and
- whether Maori regarded the spectrum as useful for the fulfilment of the Crown's obligations to promote and protect te reo Maori and Maori culture.

In the case of the 25 to 29 GHz range, Maori had requested that the Crown postpone the auction process until a negotiated solution to these issues could be reached, or reserve to Maori half of the spectrum to be sold until an accurate assessment could be made as to whether the frequencies would be useful to Maori. The claimant noted that the Crown had declined these options, seeing its obligations as lying solely in the protection and promotion of the Maori language through broadcasting.

The claimant says that the Crown has wrongly limited itself to a consideration of its obligations to protect language only, rather than considering the wider issues of the protection and promotion of Maori culture (and how the spectrum resources might be used for that process). She claims that the Crown has restricted its obligations to the protection of te reo Maori in the context of broadcasting, failing to acknowledge the potential that third-generation technology, including that within the 2 GHz range, may have for both Maori language and Maori culture. Even in the fields in which the Crown currently seeks to address its obligations in relation to te reo Maori – that is, broadcasting and education – the claimant alleges that the Crown is failing to make any difference to the state of the language.

This point was later reiterated by claimant counsel, who added that ‘it is a communication issue and not just a language issue’ and that the claimants view the Crown’s obligation as being to ‘actually think wider than simply just the broadcasting and education matters which have been highlighted in the Crown’s evidence’. The claimant sees the Crown’s obligations in relation to spectrum management as reaching beyond the protection and preservation of te reo Maori and Maori culture. She states that subsequent research has shown that the 25 to 29 GHz frequencies would have been extremely effective for Maori purposes, both economically and in the protection and promotion of te reo Maori and Maori culture.

The claimant alleges that the Crown has breached the Treaty by failing to provide a forum where Maori could advise the Government on issues related to the spectrum. She notes that Maori have not been involved in, nor been given a guaranteed place on, the Major Spectrum Users Advisory Group (MSUAG), which provides the Government with advice and direction on policies to be implemented.

In 1998, Te Puni Kokiri commissioned a report by Bruce Tichbon, a member of a telecommunications consultancy firm, to outline the potential benefits of the 2 GHz range for Maori, with particular reference to its application to the protection and promotion of Maori language and culture. The Tichbon report saw considerable potential for Maori advancement and attested to the need for urgent action so that Maori would not be prejudiced if the alienation of radio spectrum by auction proceeded. The claimant says that the Crown breached the Treaty by retaining the Tichbon report without due consultation with Maori on the ramifications of that report, and by obstructing Maori perusal of the report despite its relevance to them. She also alleges that the Crown’s view – that the sale of the 2 GHz range has no relevance to its obligations to protect and promote te reo Maori and Maori culture – was formed despite the findings of the report to the contrary, and that it allowed the proposal to sell the 2 GHz frequencies to proceed, ignoring all the recommendations contained in it.

The International Telecommunications Union (ITU) is a branch of the United Nations that coordinates international government and private sector cooperation in the development of telecommunications programmes, policies, and standards. A part of this union concerned specifically with development, the ITU-D, is responsible for initiatives that advance universal access to telecommunication resources for both developing and developed countries. This branch holds an international conference every four years. The last conference was held in 1998 at Valletta in Malta. The resulting Valletta declaration and Valletta action plan included the initiation of a study question researching the role of telecommunications in the social and cultural development of indigenous peoples. It also made a resolution asking the ITU-D to pay particular attention in its work programmes and activities to the role of telecommunications in meeting the economic, social, and cultural development needs of indigenous peoples. The claimant says that the Crown has breached the Treaty of Waitangi by failing to consider or provide for its international treaty obligations under the ITU for the recognition of the importance of telecommunications to the economic, cultural, and social development of indigenous peoples.

The claimant says that the radio spectrum represents an opportunity for Maori to use spectrum resources to develop economic, cultural, and social opportunities in the telecommunications sector, where Maori are severely under-represented. The claim is concerned with the wellbeing and advancement of Maori culture in its broadest sense. The claimant argues that, while it is widely acknowledged by Maori, the Tribunal, and the Crown that fiscal constraints hinder the Crown's capacity to compensate Maori fully for the losses that they have suffered as a result of Treaty breaches, the spectrum can provide an opportunity for the Crown to address the disparity in the compensation offered Maori in other settlements. In the claimant's view, not only does the Crown have an obligation to recognise and provide for the article 2 interest in the resource but the Crown has the further obligation inherent in fairness, good faith, and partnership to make good, wherever possible, its failure to provide compensation elsewhere.

1.2 FINDINGS AND RECOMMENDATIONS SOUGHT

The claimant sought recommendations that:

- the findings in the [*Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*] did not apply merely to where Maori language or culture is at stake in broadcasting, but to the tribal interest in telecommunications generally;
- Maori have a guaranteed right under the Treaty of Waitangi to participate in spectrum management and are entitled to benefit economically, culturally and socially from its management;
- the Radiocommunications Act 1989 in so far as it vested in the Crown all management rights to the spectrum from 9kHz to 3000GHz without consultation

with or the agreement of Maori assumed a monopoly over the resource and is in breach of the Treaty of Waitangi;

- the Radiocommunications Act 1989 in so far as it alienates management rights without consultation with Maori is in breach of the Treaty of Waitangi.²

She sought further specific recommendations that:

- the current spectrum management policy be discontinued until a negotiated solution with Maori on the issues raised in this claim has been reached;
- the Crown provide funding and other support for Maori to undertake urgent research and consultation amongst themselves into the implications of the government's telecommunication policy on Maori and opportunities for Maori participation in the telecommunications industry;
- . . . the Crown support the active participation by Maori in the telecommunication industry and in negotiation with Maori reserve sufficient radio spectrum to ensure sustained and ongoing development;
- the Crown and Maori negotiate a strategic framework for the long term management of the spectrum;
- the Crown compensate Maori for their share of revenue which has been expropriated by the Crown from:
 - the frequency licences regime operating . . . before the Radiocommunications Act 1989; and
 - the rights to spectrum revenue generated from the sale of management rights in frequencies under the Radiocommunications Act 1989.³

The claimant also sought such other recommendations as the Tribunal thinks appropriate and costs.

1.3 THE HEARINGS

The claim was received on 9 March 1999 and registered the next day. On 15 March, it was the subject of an urgency conference presided over by Judge Heta Hingston. This was directly followed by an urgent hearing of the claim by the current Tribunal. That hearing commenced on Friday 19 March and continued through the following Tuesday and Wednesday (23, 24 March). The subject of the hearing was to ascertain if a *prima facie* case had been disclosed that the claimant would be prejudiced by breaches of the principles of the Treaty if the Crown proceeded with its proposed auction without coming to an agreement with Maori to allow them a fair and equitable portion of the management rights in the 2 GHz range due to be auctioned.

Maui Solomon and Leo Watson appeared for the claimant. Martin Dawson appeared for the New Zealand Maori Council and Nga Kaiwhakapumau i te Reo. Virginia Hardy, Helen Carrad, and Andrew Irwin appeared for the Crown. The claimant sought an urgent interim recommendation that the proposed auction by the

2. Claim 1.1, paras 19.1.1–19.1.4

3. *Ibid*, paras 19.2.1–19.2.5

Crown of 2GHz management rights, commencing on 29 March 1999, be postponed until a negotiated agreement with Maori on these issues had been reached.

The interim finding of this Tribunal, by its majority, was that prima facie the claim was well founded. We made recommendations, which included that the auction be suspended and that negotiations be commenced with Maori, with a view to reserving for them a fair and equitable proportion of the management rights before the auction was resumed. Although our majority had recommended that a substantive hearing of the claim be held only in the event of Maori and the Crown being unable to reach agreement, the Crown decided immediately to delay the proposed 29 March auction for a three-month period, specifically to allow for the substantive hearing to take place, the Tribunal to produce its report, and the Crown to consider that report. The claimant still wished to proceed with the proposed negotiations but the Crown viewed it to be inappropriate at that time to begin them, and the hearing of the substantive claim was set. Both counsel agreed that evidence from the urgent hearing was to be available to the Tribunal at the substantive hearing.

The substantive hearing commenced on Friday 30 April 1999 and continued on the Monday and Tuesday (3, 4 May) and the following Monday through Wednesday (10–12 May). Helen Cull QC and Leo Watson appeared for the claimant. Martin Dawson observed and made a brief appearance for the New Zealand Maori Council and Nga Kaiwhakapumau i te Reo. Virginia Hardy, Helen Carrad, and Andrew Irwin appeared for the Crown.