

CHAPTER 15

TREATY PRINCIPLES

15.1 INTRODUCTION

15.1.1 Claims before the Tribunal

The claims before the Tribunal essentially relate to the taking by the Crown of a substantial area of ancestral land under the Public Works Act 1928 and the Turangi Township Act 1964. The claims call for a review of these statutes in terms of the Treaty and Treaty principles, and for a consideration of the ways in which the Crown exercised its statutory powers in the light of its Treaty obligations to Ngati Turangitukua.

15.1.2 The Treaty of Waitangi in New Zealand law

At the risk of stating the obvious, it should be noted that the Treaty of Waitangi has yet to become legally binding as part of the New Zealand constitution, of which it was undoubtedly a founding instrument. It is part of New Zealand law for very limited purposes. As a consequence, the Crown and the New Zealand Government are not legally bound, save in exceptional circumstances, to act in accordance with Treaty provisions. It follows that, as a strict matter of law, the Crown is not constrained by the Treaty (including article 2) in exercising its legal sovereignty.

15.1.3 The Treaty of Waitangi Act 1975

The Treaty of Waitangi Act 1975 is, however, one of the few instances in which the New Zealand Legislature has incorporated the Treaty into New Zealand domestic law. The Act enables the Waitangi Tribunal to inquire into, and report on, claims by Maori under the Treaty, with the expectation that the Crown will grant a remedy in the case of all well-founded breaches of the Treaty. In reaching a decision on claims before it, the Tribunal must have regard, among other matters, to the concession of the power to govern made by Maori to the Crown under article 1 and the guarantees made to Maori by the Crown under article 2, which qualified in very important respects the extent of the concession of the power to govern given to the Crown. The sovereignty of the Crown under article 1 is less than absolute; it is qualified by, and subject to, the guarantees to Maori under article 2.

15.1.4 Previous Tribunal reports

In chapter 4 of the *Ngai Tahu Report 1991*, the Tribunal discussed in some detail the status of the Treaty, the rules of Treaty interpretation, the constitutional status of the Treaty, and Treaty provisions.¹ These were again briefly addressed in the *Ngai Tahu Sea Fisheries Report 1992*.² While the subject-matter of those reports differed from the present claims, certain of the Treaty principles enunciated in those reports are equally applicable here. We accordingly adopt them as a touchstone for evaluating the grievances of Ngati Turangitukua.

We believe the claims before us should be evaluated in the light not only of the Treaty itself, but of two major principles which are applicable to many Treaty claims. We discuss each in turn.

15.2 THE CESSION OF SOVEREIGNTY WAS IN EXCHANGE FOR THE PROTECTION OF RANGATIRATANGA

15.2.1 An overarching principle

(1) Importance of this Treaty principle

As the Tribunal has stressed in the *Ngai Tahu Sea Fisheries Report 1992*, the principle that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance.³ It should be seen as overarching and far-reaching because it is derived directly from articles 1 and 2 of the Treaty itself. Inherent in or integral to this basic principle is:

- the Crown obligation actively to protect Maori Treaty rights;
- the duty to consult; and
- redress for past breaches.

Implicit in this principle is the notion of reciprocity. Under article 1, Maori conceded to the Crown kawanatanga, the right to govern, in exchange for the Crown guaranteeing to Maori under article 2 tino rangatiratanga, full authority and control over their lands, forests, fisheries, and other valuable possessions (taonga), for so long as they wished to retain them.

Conditional cession of sovereignty

It is clear, therefore, that the cession of sovereignty to the Crown by Maori was conditional; the Crown guaranteed to Maori their full authority over their land and all other taonga, notwithstanding their concession to the Crown of the right to govern. The confirmation and guarantee of rangatiratanga by the Queen in article 2 necessarily qualifies or limits the authority of the Crown to govern.

If the Crown is to avoid acting in breach of the Treaty or Treaty principles it must recognise that its power to govern is constrained in important ways by its Treaty obligation to respect and give effect to the critically important guarantee of Maori rangatiratanga in terms of article 2.

There can be no doubt that, had the rights of Maori to retain tino rangatiratanga in terms of article 2 not been recognised and guaranteed in the Treaty, Maori would not have ceded kawanatanga to the Crown in article 1, and there would have been no Treaty.

The limited grant of sovereignty acquired by the Crown under the Treaty does not create a constitutional problem. Few, if any, western governments enjoy unqualified sovereign power. Apart from the legal constraints imposed by entrenched constitutions, where these exist, the powers of modern States are being increasingly constrained by international agreements. The Government of the United Kingdom, for instance, is now constrained in important ways by the rules and organs of the European Community of which it is a member, as is the New Zealand Government by, for instance, its membership of the World Trade Organisation (the successor to the GATT).

Crown powers limited

The Treaty principle under discussion is seen to be of fundamental importance because it has its genesis in the very terms of the Treaty. It was recognised by Justice Somers in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at page 693 that a breach of the Treaty must be a breach of the principles of the Treaty. This raises the question of whether the Crown can ever be justified, when exercising its right to govern in terms of article 1, in doing so in a way which is inconsistent with the rights guaranteed to Maori under article 2.

Central to the present case is a claim that certain legislation, namely, the Public Works Act 1928 and the Turangi Township Act 1964, was and is fundamentally inconsistent with the basic guarantee in article 2 of the Treaty that Maori could keep their land until such time as they wished to sell it at a price agreed with the Crown. The statutes in question authorise, inter alia, the taking of Maori land for certain purposes without notice to, or the consent of, the Maori owners.

Maori insistence on their right to retain tino rangatiratanga over their land resulted in the inclusion of article 2 in the Treaty, and was a measure of the depth and intensity of their relationship to their land and other natural resources. It follows that if the Crown is ever to be justified in exercising its power to govern in a manner which

is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.

We have adopted this formula from the recent *Ngai Tahu Ancillary Claims Report 1995*.⁴ There, the Tribunal, after considering whether the Crown's compulsory acquisition of land over and above the objections of the Ngai Tahu owners was in breach of Treaty principles, expressed the provisional view that the power of compulsory acquisition for a public work should be exercised only in exceptional circumstances and as a last resort in the national interest. It proposed further limitations which we will consider later in chapter 20. This was felt to be the only time when the Crown was justified in exercising this power.

We consider that a lesser test than that used by the Ngai Tahu Tribunal, such as that a Government proposal is in the public interest or is justified for reasons of convenience or economy is insufficient. It implies that the solemn guarantee in article 2 guaranteeing Maori property rights may be overridden if the Crown considers this to be justified. The Tribunal is unable to reconcile this with the express terms of the Treaty or with the principles which underly them.

Crown counsel invoked the following passage (C3:2) from the judgment of the president of the Court of Appeal, Sir Robin Cooke, in the *New Zealand Maori Council* case at pages 665 and 666:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles.

We do not infer from this statement that the Crown would be acting reasonably if it enacted legislation which was clearly contrary to the principles of the Treaty of Waitangi and inconsistent with the guarantee to Maori under article 2.

In our view, the Crown would be acting reasonably only if any such legislation were confined in its application to meet exceptional circumstances and as a last resort in the national interest. We consider this question further in the context of our

discussion of the Public Works Act 1928 and the Turangi Township Act 1964 in chapters 16 and 20.

We turn now to consider certain of the Crown obligations which are inherent in the Treaty principle under discussion.

15.2.2 Crown obligation actively to protect Maori Treaty rights

(1) Previous endorsement of this obligation

The Tribunal has on various occasions stressed the obligation of the Crown actively to protect Maori Treaty rights. See, for instance, the *Ngai Tahu Sea Fisheries Report 1992*.⁵ This obligation was endorsed by the president of the Court of Appeal in the *New Zealand Maori Council* case at page 664:

Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

(2) Context of the present claims

In the context of the present claims, which involved the exercise of statutory powers for the compulsory acquisition of the claimants' lands, the first question must be whether such takings could be justified on the grounds of exceptional circumstances

and as a last resort in the national interest. If the answer is yes, the next question is whether, in exercising its statutory powers, the Crown has done so in a way which actively protects the Maori owners' Treaty rights to the fullest extent reasonably practicable. In short, whether no practicable alternative to the compulsory acquisition of the freehold was available, such as, for instance, mutually acceptable leasehold arrangements.

Distinction between the conservation and expropriation of Maori resources

There is an important distinction between laws for the conservation and protection of land and other valuable resources and laws empowering the Crown to expropriate such resources belonging to Maori. In the *Ngai Tahu Sea Fisheries Report 1992*, the Tribunal said:

The Crown in the exercise of its powers of governance in the national interest clearly has a right, if not a duty, to make laws for the conservation and protection of valuable resources such as the sea fisheries. But such power should be exercised with due regard to the interests of the owners of such resources. In the case of their sea fisheries guaranteed to Maori by the Treaty, the Crown should first consult with Maori on proposed conservation measures and ensure that Maori interests are not adversely affected, except to the extent necessary to conserve or protect the resource. Failure by the Crown to so act is inconsistent with Maori tino rangatiratanga over their sea fisheries.⁶

Conservation legislation, provided it conforms with these guidelines, is clearly intended for the protection of Maori resources and is compatible with article 2. By contrast, legislation which empowers the Crown to compulsorily acquire Maori land will require exceptional circumstances to justify it as a last resort in the national

interest. There is a critical difference between the control or management of a resource on the one hand and its expropriation on the other.

15.2.3 Duty to consult

The second of the Crown obligations inherent in the Treaty principle that the cession by Maori of sovereignty to the Crown was in exchange for the protection of Maori rangatiratanga (see para 15.2.1) is the duty of the Crown to consult with Maori. This duty does not exist in all circumstances. In the *New Zealand Maori Council* case, Justice Richardson, after discussing the problems in postulating an absolute duty of consultation with Maori in all circumstances, said at page 683:

In truth the notion of an absolute open-ended and formless duty to consult is incapable of the practical fulfilment and cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonable towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.

It follows from Justice Richardson's discussion that in some areas more than others consultation will be highly desirable or, indeed, essential. If the Crown wishes to acquire Maori land, full discussion with the owners or, to use Justice Richardson's

expression, ‘extensive consultation and co-operation’ on the part of the Crown will be necessary.

15.2.4 The right of redress

The right of redress for past Treaty breaches is the third of the Crown obligations inherent in the Treaty principle that the cession by Maori of sovereignty to the Crown was in exchange for the protection of Maori rangatiratanga (see para 15.2.1) which is relevant to the present claim. If a failure by the Crown to protect a tribe’s rangatiratanga guaranteed by article 2 results in detriment to Maori, there is an obligation on the Crown to make redress. Justice Somers in the *New Zealand Maori Council* case so held at page 693:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle . . . That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.

Sir Robin Cooke also accepted in that case that if the Waitangi Tribunal found merit in a claim and recommended redress the Crown should grant at least some form of redress, unless grounds existed justifying a reasonable partner in withholding it – which he thought ‘would be only in very special circumstances, if ever’.

We turn next to consider the second main principle applicable to this claim.

15.3 THE PRINCIPLE OF PARTNERSHIP

We repeat here what the Tribunal said in the *Ngai Tahu Sea Fisheries Report 1992* at page 642 concerning the principle of partnership:

This principle is now well established. It was authoritatively laid down in the *New Zealand Maori Council* case where the Court of Appeal found that the Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith.

We reiterate the following statement by the Muriwhenua Tribunal as to the basis for the concept of a partnership:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.⁷

We propose in subsequent chapters to apply these principles in deciding whether, and to what extent, the Crown has acted consistently or inconsistently with them in relation to the taking of the claimants' land for the Turangi township and related matters.

15.4 FIDUCIARY OBLIGATIONS OF THE CROWN

In her final submissions on behalf of the claimants, claimant counsel Ms Wainwright sought to show that fiduciary obligations can be argued as arising from, as being enacted in, or as arising independently from the Treaty of Waitangi (C2:108). Counsel submitted that if a fiduciary obligation on the part of the Crown can be established as arising at general law in relation to the claimants and their situation then the fiduciary obligation on the Crown extends to an obligation to comply with the recommendations of the Tribunal in this regard.

Ms Wainwright made an extensive and erudite review of leading American, Canadian, Australian, and New Zealand decisions. She noted that, to date, the New Zealand courts have not considered the existence of an aboriginal fiduciary obligation independently of statutory reference to the principles of the Treaty of Waitangi. In deference to the courts, whose function it is to declare the common law, this Tribunal must await an authoritative decision from them on the question.

In the *New Zealand Maori Council* case, Sir Robin Cooke stated that ‘the Treaty signified a partnership between races’. At page 664, he went on to hold that:

Treaty Principles

the issue becomes what steps should be taken by the Crown, as a partner acting toward the Maori partner with the utmost good faith which is the characteristic obligation of partnership to ensure that the powers in the State-Owned Enterprise Act are not used inconsistently with the principles of the Treaty.

After further discussion, he stated on the same page that what had already been said ‘amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties’. We note that here the president speaks of responsibilities ‘analogous’ to fiduciary duties.

Ms Wainwright cited a passage from a later decision of the New Zealand Court of Appeal in *Te Runanga o Wharekauri Rekohu Incorporated v Attorney-General* [1993] 2 NZLR 301, at page 304, where Sir Robin Cooke summarised the decision in the *New Zealand Maori Council* case as holding:

that the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards each other.

Here the president speaks of a relationship ‘of a fiduciary nature akin to a partnership’. In each case, the court finds the responsibilities of the parties, which are said to be ‘analogous to fiduciary duties’ or ‘of a fiduciary nature’, to have their genesis in the Treaty. There is no suggestion that they arise independently of the Treaty or have their source in the common law. We do not, of course, foreclose the possibility that at some future time the New Zealand Court of Appeal may so hold.

The jurisdiction of the Tribunal arises from the Treaty of Waitangi Act 1975 and its amendments. It does not extend to anticipating the courts by purporting to declare the scope of the common law and the duties arising from it. It should suffice that, as stated in paragraph 15.3, the Tribunal considers the second main Treaty principle applicable to this claim to be the principle of partnership. This principle requires each party to the Treaty to act towards the other reasonably and with the utmost good faith.

References

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1. Waitangi Tribunal, *Ngai Tahu Report 1991*, Wellington, Brooker and Friend Ltd, 1991, vol 1, pp 215–233
 2. Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd,

Treaty Principles

1992, pp 267–268

3. *Ibid*, p 269
4. Waitangi Tribunal, *Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brooker's Ltd, 1995, p 11
5. *Ngai Tahu Sea Fisheries Report 1992*, p 269
6. *Ibid*, p 272
7. *Ibid*, p 273