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Māori Law Review
A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Editorial

Professor John Borrows joins the Māori Law Review team

We are very pleased to announce that John Borrows, Robina Professor in Law, Public Policy and Society at the University of Minnesota Law School has joined our team of consulting editors. Professor Borrows is a distinguished scholar who is held in high regard in the indigenous law world and we welcome the international perspective that he brings.

Professor Borrows is Anishinabe/Ojibway and a member of the Chippewa of the Nawash First Nation in Ontario, Canada.

He completed a Ph.D. in 1994 at Osgoode Hall Law School and a J.D. in 1990 at the University of Toronto. He also received an M.A. from the Department of Geography and Planning in 1996, an LL.M. in 1991, and a B.A. in political science and history in 1987 from the University of Toronto.

From 2001-2009 he was a professor and Law Foundation Chair in Aboriginal Justice at the University of Victoria. Prior to that he taught law at the University of Toronto and helped initiate the June Callwood Program in Aboriginal Law. He was the first academic director of the First Nations Legal Studies Program at the University of British Columbia. From 1994-96, he taught at Osgoode Hall Law School of York University and was the founder and director of the Lands, Resources, and Indigenous Governance Program.

Professor Borrows is a recipient of the Aboriginal Achievement Award in Law and Justice, a Fellow of the Trudeau Foundation, a Fellow of the Academy of Arts, Humanities and Sciences of Canada (FRSC)—Canada's highest academic honor—and a 2012 recipient of the Indigenous Peoples Counsel (I.P.C.) from the Indigenous Bar Association, for honor and integrity in service to Indigenous communities. New Zealand readers may know Professor Borrows from his time as the Law Foundation Distinguished Visiting Fellow in 2006.

His publications include, Recovering Canada; The Resurgence of Indigenous Law (Donald Smiley Award for the best book in Canadian Political Science, 2002). Canada's Indigenous Constitution (Canadian Law and Society Best Book Award 2011), Drawing Out Law: A Spirit's Guide, all from the University of Toronto Press.

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Contents
(2013) March Māori LR

Editorial 1

Supreme Court

Partial privatisation no material impairment to remedying Treaty breaches (*New Zealand Māori Council v Attorney-General*) 3

Resource management

Māori interests in resource management: 2012 in review 9

Waitangi Tribunal

Future management of Tongariro National Park 14

Legal history

New Zealand's "Lost Cases" – Unreported Colonial Case Law on the Internet 18

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Supreme Court

Partial privatisation no material impairment to remedying Treaty breaches

New Zealand Māori Council v Attorney-General

[2013] NZSC 6
27 February 2013

Report by Jacinta Ruru

Overview and result

The Supreme Court has dismissed the Māori Council's appeal from the High Court's refusal to grant judicial review over the proposed partial privatisation of Mighty River Power.

> "Partial privatisation of Mighty River Power will not impair to a material extent the Crown's ability to remedy any Treaty breach in respect of Māori interests in the river[.]" (At [8].)

The proposed sale of shares is reviewable for consistency with the principles of the Treaty of Waitangi (disagreeing with High Court on this point).

Background

Mighty River Power Ltd, currently fully owned by the Crown, has water permits issued pursuant to the Resource Management Act 1991 to operate hydro generating power facilities along the Waikato River.

In 2012, Parliament enacted amendment legislation to enable the Crown to sell up to 49 per cent of its shares in this company.

The State-Owned Enterprises Amendment Act 2012, when it comes into effect, will remove Mighty River Power from being a State enterprise in the State-Owned Enterprises Act 1986. Mighty River Power will become a mixed ownership model company pursuant to the Public Finance Act 1989.

The Public Finance (Mixed Ownership Model) Amendment Act 2012 inserted a new Part 5A into this 1989 Act. Part 5A includes section 45Q which reads:

> (1) Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi); (2) For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown.

Section 45Q(1) is identical to section 9 of the State-Owned Enterprises Act 1986.

The overriding issue in this case Supreme Court case was whether the sale of up to 49 per cent of the shares in Mighty River Power will be

consistent with the principles of the Treaty of Waitangi? The New Zealand Maori Council argued no; the Crown argued yes.

This case followed a successful urgent hearing in the Waitangi Tribunal.

The New Zealand Maori Council applied to the High Court for judicial review of the Government's action to proceed with the partial share sales. In December 2012, the High Court held that the Crown's decision to proceed with the sales were not reviewable.

A week later the Supreme Court granted the Maori Council and the Waikato River and Dams Claim Trust leave to appeal this judgment directly to the Supreme Court.

The appeal was heard on 31 January – 1 February 2013.

The Supreme Court issued its unanimous single judgment on 27 February 2013.

Discussion

Summary

The Supreme Court's single judgment (consisting of 151 paragraphs) provides an overall win for the Crown (at [8]): "the partial privatisation of Mighty River Power will not impair to a material extent the Crown's ability to remedy any Treaty breach in respect of Maori interests in the river."

But there is also a substantive win for Maori: "the proposed sale of shares (on which the claim of material prejudice is based) is reviewable for consistency with the principles of the Treaty" (at [7]).

Issues

The Supreme Court's judgment addresses the 5 issues raised by the Maori appellants.

Issue 1: Is the proposed sale of shares in Mighty River Power reviewable for consistency with the principles of the Treaty of Waitangi?

This issue goes to the heart of the relationship between several statutes including the State-Owned Enterprises Act 1986, the State-Owned Enterprises Amendment Act 2012, and Public Finance (Mixed Ownership Model) Amendment Act 2012. The Maori appellants argued that the Crown is required to act consistently with the Treaty principles when selling the shares because this would be an exercise of the Crown's powers under the new Part 5A of the Public Finance Act, therefore making relevant section 45Q. The Crown, relying on the *New Zealand Maori Council v Attorney-General* (Commercial Radio Assets case) [1996] 3 NZLR 140 (CA), rejected this assertion and argued instead (at [48]) that the "power of the Crown to sell shares was an incident of their ownership and shareholder powers under the common law and the Companies Act 1993."

The Court agreed with the Maori appellants on this issue. The Court held that there was a "crucial difference" between the Commercial Radio Assets case and this case because "In the present case, the continuing statutory restraint upon the Crown when acting in respect of a mixed ownership company must be ascertained in light of the continuation of the Treaty protection provision in s 45Q" (at [51]).

According to the Court, the Crown is presently under a statutory restraint because of section 9 of the State-Owned Enterprises Act and the Crown will continue to be under a statutory restraint because of section 45Q of the Public Finance Act. This transition is, according to the Court, "seamless" (at [51].

The Court stressed that s 9 jurisprudence has established that section is "of great authority and importance to the law concerning the relationship between the Crown and Maori" (at [52]) and "Section 45Q brings with it the heritage of s 9 and this Court, reflecting what is the purpose of Parliament, must invest it with equivalent significance" (at [59].

Issue 2: Is Cabinet's decision to bring into effect the State-Owned Enterprises Amendment Act reviewable?

Because of the Court's finding on issue 1, the Court quickly dismissed this issue.

Issue 3: Was the Crown in breach of s 64 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010?

Section 64, in summary, records an acknowledgment that the Crown and Waikato-Tainui have different concepts and views regarding relationships with the Waikato River, and that the Crown, a Crown entity, state enterprise, or mixed ownership model company must engage with Waikato-Tainui in accordance with the Kiingitanga Accord principles if action is proposed to create or dispose of a property right or interest in the Waikato River.

The Maori appellants argued that the Crown must engage with Waikato-Tainui before pursuing any share sales.

The Court disagreed (at [82]):

> "We are unable to accept that the partial privatization of Mighty River Power constitutes disposal of property or interests held by the Crown in the river. The rights and the associated land in the river bed held by Mighty River Power (which are undoubtedly 'property') are not being disposed of and will continue to be held by it."

Issue 4: The adequacy of the consultation following the Freshwater Report

The Maori appellants argued that the Crown's consultation with Maori following the recommendations of the Waitangi Tribunal in 2012 was "too rushed" (at [83]).

The Court disagreed: "The fact that the Crown ultimately rejected the Waitangi Tribunal suggestion as inappropriate is not a basis from which it can be inferred that the consultation was empty or pre-determined" (at [87]).

Issue 5: Is the proposed sale of shares in Mighty River consistent with the principles of the Treaty of Waitangi?

According to the Court, this is the substantive issue of the case. In reference to the *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) (Broadcasting Assets case), the Court stated:

> "In deciding whether proposed Crown action will result in 'material impairment', a court must assess the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capactiy. So impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect, objectively evaluted, will not be relevantly material. To decide what is reasonable requires a contextual evaluation which may require consideration of the social and economic climage" (at [89]).

The Court then provided this 3 point test to determine this issue (at [90]:

> "(a) Before intervening, the Court must be brought to the conclusion that the proposed privatisation is inconsistent with Treaty principles;
>
> (b) There will be inconsistency, if the proposed privatisation would 'impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty'; and
>
> (c) The Court must address this issue directly and form its own judgment, along the lines discussed in [89]".

The Court then proceeded to discuss a range of factors, including the evolution of the statutory regimes for controlling the use of water, and concluded (at [97]) that the current Resource Management Act "substantially improved the recognition of Maori in relation to the management of waters" (at [97]).

The Court discussed the initiatives that the Crown has implemented in recent years to engage with Maori about water management and water use (e.g. see [103]) and recorded statements made by the Crown, the Deputy Prime Minister and the Attorney-General that recognise Maori do "have interests and rights in relation to particular waters" (at [103]) and the partial sale of shares "will not have a 'chilling effect' on the willingness of the Crown to provide appropriate rights recognition and redress" (at [105]). The Court then cited Treaty of Waitangi settlement legislation specific to water as proof that the Crown, in recent years, has become willing to negotiate new management and use regimes for water that better recognise Maori interests.

The Court then concluded this discussion (at [115]) by emphasising the differences between this case and the *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) case as essentially:

> "The Crown will retain substantial capacity to provide redress in the form of shares, if that is seen as appropriate. The Crown will retain at least 51 per cent of the shares and therefore majority control over the company. And, to the extent that the generating assets include land, they remain subject to the resumption regime. As well … in the current legal and social environment, Maori can be confident that their claims will be addressed, something which was not as clear in 1987 as it is now."

The Court also stressed the difference between ownership of land and water rights limited to 35 year terms under the Resource Management Act. The 35 year term of water permits gives opportunities for review on their renewal. The Court thus accepted the Crown's argument that the protection of Maori in waters comes close to the memorialisaton protection put in place for land (at [141]).

Conclusion

The Court dismissed the appeal:

> "[149] As is apparent, we are prepared to accept that privatization may limit the scope to provide some forms of redress which are currently at least theoretically possible. But in assessing whether this amounts to 'material impairment', regard must be had to (a) the assurances given by the Crown, (b) the extent to which such options are substantially in prospect, (c) the capacity of the Crown to provide equivalent and meaningful redress, and (d) the proven willingness and ability of the Crown to provide such redress."

Costs

The Court did not award costs against the unsuccessful Maori appellants because they had succeeded on an "important point of principle, namely that the Crown was bound to comply with the principles of the Treaty before deciding to sell the shares" (at [151]).

Comment

This is a gracious decision. And it is a thoughtful one too. And clever. The Court has:

- Breathed new life into the *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) case – a case to be now known as the SOE case rather than the Lands case. The Court gave weight to the SOE case jurisprudence that vests the section 9 Treaty principles section as a paramount provision that contains a broad constitutional principle. The SOE case is "of great authority and importance to the law concerning the relationship between the Crown and Maori" (at [52]).
- Recognised that water permits are interests in water in accordance with section 122 of the Resource Management Act, and assets within the meaning of the State-Owned Enterprises Act.

- Observed that the United Nations Declaration on the Rights of Indigenous Peoples probably does not add anything significant to the statutory incorporation of the Treaty principles in section 9 and section 45Q (at [92]).
- Acknowledged the different approaches to the issue of commercial redress for use of rivers by the Waitangi Tribunal and the courts [see para 100]. But reflected: "Such interests are however unascertained, including as to their nature and extent. How they may be given effect in modern conditions consistently with Treaty responsibilities and other government obligations is also far from clear" (at [101]).
- Acknowledged that the Maori appellants did not rely on a common law Aboriginal title claim. The Court stated: "So we propose to proceed on the basis that the proposed privatisation will not have any effect on such claims" (at [131]).
- Emphasised that while the Crown can go ahead with the share sales, "This is not to say that the water claims should be parked. The Waitangi Tribunal has emphasised the need for urgency in addressing proprietary claims. It appears from the policy initiatives and from the assurances given in the litigation that the message that there is need for action on these claims has been accepted [by the Crown]" (at [148]).

The decision deserves a very close read and careful reflection. There are weak areas and over the next few days, weeks and months many will explore these. For example, while the Court has readily stated that "the Resource Management Act currently provides substantial recognition of Maori interests" (at [143]), the Court did not engage with the relevant case law. This case law shows a very clear trend that Maori are rarely successful in relying on these provisions to protect the wairua and mauri of water.

Even though the courts often do acknowledge the importance of the Maori provisions in the Resource Management Act, this Act gives equal weight to many other values and interests and it these other values that often trump Maori interests.

In the end this was a case prepared for and heard under urgency. There are issues that have been skimmed over, like this one.

Resource Management

Māori interests in resource management: 2012 in review

Kirsten Hagan and Julia White from Buddle Findlay's environment and Māori law team review natural resource management law affecting Māori in 2012.

Overview

Looking back over 2012, the dominant theme of Resource Management Act 1991 cases dealing with Māori interests was consultation. Individually, the cases provide interesting commentary on common themes. For example the *Wakatu* case discussed below assesses the adverse effects of water extraction on the mauri of the Motueka River. Together the cases confirm that effective engagement with tangata whenua in relation to natural resources remains a challenge for many.

Discussion

Consultation is important to assist decision-makers to make informed decisions

Even though consultation is not a mandatory requirement for resource consent processes under the Resource Management Act (with the exception of interrelated statutes such as section 62(3) of the Marine and Coastal Area (Takutai Moana) Act 2011), the Board of Inquiry appointed to hear and determine the plan changes and resource consent applications made by the New Zealand King Salmon Company (the King Salmon Inquiry) reiterated the importance of consultation in their final decision:

> …it assists the consent authority and the court to understand the extent to which (amongst other things) assessment of effects on the environment might have been undertaken. That is, it assists the consent authority to decide whether it is confident that actual and potential effects are adequately understood, assessed, and dealt with…(at [188] citing *Crest Energy Kaipara Ltd & Ors v Northland Regional Council*)
>
> …
>
> Iwi consultation [in particular] is important to enable decision-makers to understand the cultural effects of an activity, particularly as regards the matters falling within sections 6(e), 7(a) and 8 of the RMA. [191]

The Board was clear that their assessment encompassed the physical and the spiritual:

> Our task in the assessment of cultural impacts is to focus on:
>
> [a] The breadth of meaning of kaitiakitanga as tangata whenua understand it to be in respect of the areas affected by the proposal; and

> [b] The breadth of relationship of tangata whenua to the particular resources and how that relationship may be affected. [901]
>
> …
>
> The spiritual relationship that tangata whenua hold with their rohe moana, which includes the mauri of its waterways, is less easily assessed, and subject to varying interpretations. **Where there is uncertainty about the environmental effects of the proposal, the spiritual and cultural welfare of the whānau, hapū and iwi is also at risk**. [emphasis added] [908]

Consultation is a two way street…

In the High Court decision of *Greenpeace of New Zealand Inc v Minister of Energy and Resources and New Zealand* [2012] NZHC 1422, Gendall J stated:

> Consultation, and good faith listening to concerns are a two way street, with obligations on Māori interests and the Crown. Each have obligations on the other. [133]

In that case (now on appeal to the Court of Appeal), Greenpeace and Te Whanau-a-Apanui sought judicial review of the Minister of Energy and Resource's decision to grant Petrobras a permit to explore for petroleum in the Raukumara Basin. One of the grounds argued by the applicants was that the Minister had not consulted adequately with Te Whanau-a-Apanui according to the principles of the Treaty of Waitangi. The Crown's response was that they had made numerous efforts over a period of time to consult with Te Whanau-a-Apanui but that Te Whanau-a-Apanui had either ignored their efforts or refused outright to engage with the Crown.

The Court took the view that the Crown had made all reasonable and good faith efforts to consult but the refusal of Te Whanau-a-Apanui to participate did not mean they could subsequently challenge the process as not dealing with their particular concerns – they should have raised their concerns in the consultation process not in the court process:

> In choosing not to actively participate substantively or respond to the request to consult, it cannot complain now. [140]

The 'two way street' sentiment was also adopted in the King Salmon Inquiry.

What these cases show is that it is important for parties who consider themselves affected by a proposal to participate in the related consultation process (if one is available) even if they are fundamentally opposed to the proposal or would like the consultation timeframes extended.

…but it may take you down a side street if not carried out correctly…

Consultation is rarely a straightforward process but it should be kept in mind that the purpose of consultation is not to reach consensus – it is

fundamentally about gathering information with an open mind to changing the proposal in light of new and relevant information. When tangata whenua are involved, an important aspect is recognising and respecting their mana.

However, even the early step of identifying who should be consulted can be challenging as the Court acknowledged in *Hoete v Minister of Local Government* [2012] NZEnvC 267 where the Minister of Local Government was required to consult with the tangata whenua and the iwi authorities of Motiti Island:

> …a great many people whakapapa to the Island. Although Te Patuwai and Tauwhao are two prominent groups, there are significant issues as to how wide this group of persons needs to be [for the purposes of consultation]….Overall then there is…a wide range of groups. From the Minister's point of view therefore, clarifying the group to be consulted beyond those persons registered on the titles to the property is a matter of considerable complexity…[71], [72].

In the reviewed cases, courts also tended to look at the process of consultation from the perspective of tangata whenua. In *Trustees of Tūhua Trust Board v Minister of Local Government* [2012] NZEnvC 202, the Court was concerned at the Minister of Local Government's failure to consult with the Tūhua Trust Board on whether a district plan was required for Tūhua Island (the Minister was acting as the territorial authority as the Island did not fall within the boundaries of a territorial authority):

> [The Court] consider[s] that the Minister failed to consult about whether a plan was required for Tūhua. We are concerned that there may have been a duty for the Minister to meet kanohi ki te kanohi (face-to-face) with the representatives for the iwi (in this case, the Trustees) at the least. We are in no doubt that the owners and trustees of Tūhua saw this failure as a slight to their mana. [36]

Over the course of the proceedings, the Trust Board, the plan drafters and the Department of Internal Affairs worked together to amend the plan to reflect the views of the Trust Board. By the close of the hearing, the Court recognised that the Plan had significantly improved following the Trust's involvement but ordered further minor improvements including a new introduction, preferably in te reo Māori, that clearly identified the Trustees as holding kaitiakitanga and rangatiratanga in respect of the Island. It also ordered that the Trust Board be given "the maximum level of flexibility possible commensurate with health and safety obligations". The Court ordered the Minister to consult with the Trust Board to finalise the changes and that the consultation and Court costs should be met by the Crown.

In *Wakatu Inc v Tasman District Council* [2012] NZRMA 363 (EnvC) the Court stated that the manner in which initial consultation had been carried out may have had adverse effects on the appellant's ability to exercise kaitiakitanga over Motueka River. Wakatu was an appeal against an application by Tasman District Council to take ground water from an aquifer connected to the Motueka River. The appellants argued

that the mauri of the river would be desecrated by the transport of water away from its original catchment and this would subsequently impact the ability of tangata whenua to exercise kaitiakitanga and rangatiratanga over their resources.

The Court adopted the orthodox evidential approach in determining whether the mauri of the River would be adversely affected. This approach was set out in the Environment Court's decision in *Winstone Aggregates Limited v Franklin District Council* (A80/2002):

> In any enquiry involving concepts of tikanga Maori there are three states of inquiry before the Court. The first is to determine, as best as we are able in the English language, the meaning of the concept. The second is to assess the evidence to determine whether it probatively establishes its existence and relevance in the context of the facts of a particular case. If so, the third is to determine how it is to be recognised and provided for.
>
> At all stages of inquiry the decision-maker is required to consider the evidentiary basis and burden required. There is an evidentiary burden on a party who makes an allegation to present evidence tending to support the allegation. [248], [249]

This statement reaffirms the importance of probative evidence put before the decision-maker.

In *Wakatu*, the Court observed that in the *Waihi Gold* decision (EnvC A146/1998) (relied on by counsel for the appellants), the finding of more than minor adverse environmental (physical) effects enabled the concept of mauri to be weighed against positive effects. The Court found no evidence that the proposed abstraction or use of water would diminish the life supporting capacity of the River or its vitality or its ability to exist. The Court found that the biophysical effects of the proposed activity were "insignificant" and that any metaphysical effects could be remedied by imposing conditions on the consent. Accordingly, the Court approved the consent with the addition of conditions as outlined below.

The Court was critical of the initial consultation process carried out by the Council and this was compounded by a number of factors including the history of the Crown's treatment of the appellants in relation to the River. While the Court was careful to state that these failures should not result in the refusal of part of the consent as a penalty, the Court in *Wakatu* granted the application subject to conditions to remedy those effects, namely conditions that would ensure iwi views were "fully provided for in the implementation and monitoring of the proposal." [113]. The Court recommended that consultation also be undertaken on the "proper kawa to be observed in implementing the scheme." [74].

Even where clear statutory guidance is provided, applicants can find that achieving an effective consultation process is hampered because of business factors. In the King Salmon Inquiry, the Board observed that:

> The relevant provisions set out in the statutory documents [including Policy 2 of the Coastal Policy Statement] provide a clear direction around consultation and engagement with tangata whenua to ensure that consultation is early, customary values

> and views of tangata whenua are heard and understood and that the function of kaitiakitanga is taken into account…of particular importance is achieving engagement that is early, meaningful and in accord with the tikanga of the tangata whenua of the place. [192], [193]

Although King Salmon had rightly placed great weight on early engagement with tangata whenua, the commercial value of the proposed aquaculture sites prevented the company from revealing the exact location of the sites in their consultation process. This was clearly problematic for some of the groups who were consulted but the Board took into account the hearing process (where the sites were revealed and could be commented on) as well as the genuine efforts and early engagement from the company in finding that although the consultation process was not ideal, the Board had heard enough information about the views of tangata whenua to make an informed decision. It should not be taken from this case that commercial sensitivities would, in all cases, provide for limitations in consultation (see, for example *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 where the Council's statutory obligation to consult overrode any commercial concerns it had in revealing information to Waikato Tainui ahead of public notification).

…the right map is critical to manoeuvring through consultation

These 2012 cases further illustrate what the Courts consider to be best practice consultation under the RMA.

Understanding what statutory obligations apply, whether under the RMA or associated statutory documents such as the Coastal Policy Statement, is only the first step. It is imperative for potential applicants under the RMA to develop a comprehensive consultation strategy for understanding tangata whenua views and concerns at the outset.

Early and genuine engagement with tangata whenua matters in the eyes of the court. A consultation strategy should enable the applicant to develop a robust relationship with tangata whenua well ahead of the lodging of any application (or for Councils well ahead of notifying any plan changes or variations) and lay a pathway to a smoother hearing process.

Applicants need to be informed, prepared and proactive.

Waitangi Tribunal

Future management of Tongariro National Park

Te Kāhui Maunga: The National Park District Inquiry Report (pre-publication edition)

Waitangi Tribunal (Wai 1130, 2012)
24 December 2012

Report by Jacinta Ruru

Overview and result

At the heart of this inquiry are matters of national importance: whether the creation and management of the Tongariro National Park and the Tongariro Power Development scheme are in breach of the principles of the Treaty of Waitangi.

The Waitangi Tribunal has agreed with the Māori claimants that the Crown has been, and continues to be, in breach of Treaty principles, and that substantial restitution is due. The Tribunal has recommended the Crown enter promptly into negotiations to heal these Treaty breaches.

Background

On 23 September 1887, Horonuku Te Heuheu entered a deed of conveyance that purported to 'gift' specific mountains to the Crown for the establishment of a national park. But the creation and subsequent management of that park (and the later building of the Tongariro Power Scheme) have deeply troubled the mana whenua of this area.

The National Park inquiry district was officially constituted in February 2004 (p. 4). The inquiry encompassed 41 separate claims brought by Ngāti Tūwharetoa, Ngāti Hikairo, Ngāti Rangi, Ngāti Hāua, and others (see pp. 7-8). On 24 December 2012, the Waitangi Tribunal released in pre-publication form its long awaited National Park District Inquiry report. It is a characteristically comprehensive report. The report consists of 16 chapters and more than 1,500 pages of analysis. The report is divided into five parts.

Discussion

Part One – The District, People, and their Claims

Part 1 incorporates chapters 1 – 2.

Chapter 1 begins with an explanation of the Māori name of this report, Te Kāhui Maunga. The name translates as the chiefly cluster or company of mountains. The three mountains at the heart of this inquiry are Tongariro, Ngauruhoe and Ruapehu. As the Tribunal explained, Aotearoa New Zealand's first national park would not have been created here but for these mountains, and the Tongariro Power Scheme would not have been built but for the water that runs from these mountains.

Moreover, the claimants often referred to themselves as 'ngā iwi (or ngā hapū) o te Kāhui maunga.'

This chapter sets out the general arguments of the Māori claimants. It also touches briefly on those issues that the Tribunal decided not to deal with in this Inquiry (for example, local government issues, see p. 33).

Chapter 2 shares a wealth of knowledge about those who whakapapa to these mountains, and their relationships with the relevant mountains, waters, wāhi tapu, fish, birds, and plants. This imparting of knowledge allowed the Tribunal to find that even though this district area was never permanently occupied, there still existed "complex customary titles" to the area (p. 130).

Part Two – Kawanatanga and Rangatiratanga

Part 2 incorporates chapters 3 – 4.

These chapters provide pivotal background context for understanding the 1887 'gift' and are mostly focused on the military and political engagement between the Crown and ngā iwi o te Kāhui maunga in the later part of the nineteenth century (p. 135).

Chapter 3 focuses mostly on the wars of the 1860s and questions as to responsibility for the wars and the resulting destruction.

Chapter 4 focuses on negotiations between the Crown and Māori in the 1870s and 1880s.

Part Three – Land Issues and the Establishment of the Tongariro National Park

Part 3 incorporates chapters 5 – 10.

The topics covered in these chapters are extensive and range from the operation of the Native Land Court and Crown purchasing in the 19th century, the 1887 'gift' of Tongariro and subsequent creation of the Tongariro National Park, 20th century land alienation and development issues, and public works takings issues.

Part Four – Management and Development of Natural Resources and the Environment

Part 4 consists of chapters 11 – 15.

The first two chapters in this Part focus on the administration of the Tongāriro National Park.

Chapter 11 covers the time span from 1887-1987, and Chapter 12 from 1987-2007. The 1987 date is significant because of the enactment of the Conservation Act 1987, and in particular section 4 that requires the Treaty of Waitangi principles to be given effect to in the interpretation and administration of the Act.

In regard to the Tongariro National Park, some of the claimants' arguments included:

- The Crown failed to recognise and protect the tino rangatiratanga of tangata whenua within the legislative framework governing the national park (p. 965);
- The Crown imposed a European concept of a 'national park' on tangata whenua that was irreconcilable with their tikanga and values (p. 965);
- According to Ngāti Tūwharetoa specifically, the Crown failed miserably to fulfil the conditions of the 1887 'gift' (p. 965); and
- Several uses violated the tapu of the maunga and caused the mauri of the maunga to suffer, including tramping, climbing and skiing on the mountain (p. 968).

The Tribunal noted that:

> "In the history of the park, we do not think that Ngāti Tūwharetoa wanted to stop recreation on the mountains altogether. … But what Ngāti Tūwharetoa sorely needed was the ability to control the extent and rate of development on their taonga" (p. 1047).

The Tribunal identified four key areas of early prejudice caused by Crown actions or omissions: over-development of taonga within the park; inadequate protection of wāhi tapu; removal of Māori customary rights to Indigenous flora and fauna without consultation; and, inadequate responses to threats to native birds and flora (p. 1066).

The Tribunal concluded Chapter 12 with what it has identified as several prerequisites for a better way forward for the Tongāriro National Park. One such prerequisite is "One which recognises the importance of Tongāriro National Park for ngā iwi o te Kāhui maungā, for all New Zealanders, and for the global community" (p. 1167).

The Tribunal then proceeded to propose a set of recommendations for how the Tongariro National Park ought to be managed. Essentially, new legislation should deem the Park to be held jointly owned by the Crown and ngā iwi o te Kāhui maunga (the Treaty partners) in a Treaty of Waitangi title. A new Statutory Authority should be established with these Treaty partners responsible for jointly managing the Park (see p. 1168). These recommendations followed analysis by the Tribunal of increasing resort to co-governance and co-management models for natural resources.

Chapter 13 is focused on waterways and customary fisheries, Chapter 14 on the Tongāriro Power Development Scheme, and Chapter 15 on the Geothermal Resource.

In regard to water, the Tribunal made several findings including that the Crown's assumptions of control of water under the Water and Soil Conservation Act 1967 (now repealed) and the Resource Management Act 1991 are in breach of the principles of the Treaty of Waitangi (p. 1221). The Tribunal made several findings concerning customary fisheries namely that the Crown breached Treaty principles in introducing species such as trout into waterways without the consent of ngā iwi o te Kāhui maunga (see pp. 1271-1273).

In regard to the Tongariro Power Development Scheme (TPD) (built between 1964–1984), the claimants argued that the TPD had impacted on their waters including Lake Rotoaira. In particular, the claimants

argued that the Crown had breached Treaty principles in planning the TPD construction, and continues to breach Treaty principles in operating and regulating the TPD. The Tribunal recognised that the claimants do not seek the removal of the TPD but "the increase of flows in some streams, the restoration of habitat, and the restoration of native fish species" (pp. 1395-1396). The Tribunal found that the claimants "have suffered economic, ecological, cultural, and spiritual losses when rivers have been dammed or diverted and …. used for water storage systems" (pp. 1396-1397).

The Tribunal made several recommendations for the Crown to remedy prejudice resulting from breaches including that the trustees of Lake Rotoaira, representing Māori beneficial owners, "be compensated, not just for damage done, but also for the value of the lake for water storage from the date of commercialisation" (p. 1397). Other relevant recommendations are that the Crown fund the preparation of an iwi management plan for these waters (see p. 1398) and that the Crown prepares a National Policy Statement for Māori Participation in Resource Management (p. 1399).

The Tribunal made this poignant reflection:

> The interest of the owners in their lake undoubtedly remains. If the circumstances of the use changes, as has happened, then the Crown is bound to reconsider the interest of the owners. It seems quite unacceptable that commercial profit can be made from the owner's interest in the lake and its water without any form of compensation. The considerations that might be addressed in appropriating property for cooperative use, such as in the case of a state-owned power system run to maximise national benefit (through keeping prices down), as opposed to commercial use operating essentially to maximise profit for the sole (Crown) shareholder could be markedly different. (At p. 1336)

Chapter 15 focuses on the geothermal fields and features of the Taupo Volcanic Zone that extend into this inquiry district. Ngāti Tūwharetoa claimed that the geothermal resources are their sacred taonga (p. 1409) and that Treaty principles protect their right to "develop their taonga as they see fit" (p. 1464). The Tribunal recommended that the Crown create a joint management regime for the geothermal fields involving the Crown, iwi, hapū and Environment Waikato (p. 1508).

The Tribunal concluded this Chapter with an important observation. The Tribunal stated that the geothermal resource issue goes much wider than the National Park District Inquiry and "looks likely to grow in importance in terms of the nation's economy" (p. 1509). The Tribunal relayed the Crown's argument that legislation regulates any existing Māori customary rights to geothermal water (p. 1510). The Tribunal queried this stance and made a plea that both the Māori and the state legal systems and world views must be analysed, and negotiation should occur, for example, "Where there is not congruity between the systems, how can some or all of the differing attributes best be accommodated?" (p. 1510). The Tribunal concluded this discussion by saying "Given the complexity of the geothermal resource, it seems to us important to ensure that both

partners are fully involved so as to be able to draw on the best of what each partner has to offer" (p. 1510).

Part Five – inquiry summary

Chapter 16 provides a 21 page summary of the Inquiry and the Tribunal's conclusions.

Comment

This Report contains rich information and insights into the Tribunal's current thinking about many politically contentious issues concerning environmental ownership, governance and management of land, water and geothermal resources. The Tribunal's findings here are pivotal to issues that are dear to my own research (including my postgraduate thesis work on national parks) so of course the Report interests me greatly. But the topics discussed in this Report will be of utmost interest to many New Zealanders as we, as a country, attempt to create 'a better way forward' to embracing the reality of a bicultural country founded in the Treaty of Waitangi.

I hope that this Report will be widely read and carefully considered by us all. It deserves to be. The Tribunal's respectful recommendations build on decades of close thinking about the implications that the principles of the Treaty of Waitangi ought to have in our country.

It will be interesting to see how the Government responds to this Report and how its responses align or not with the proposed settlement with Ngāi Tuhoe concerning Te Urewera National Park (see (2012) October *Maori LR*).

Legal history

New Zealand's "Lost Cases" – Unreported Colonial Case Law on the Internet

Report by Dr Damen Ward

Overview

The New Zealand Lost Cases database has recently been added to the New Zealand Legal Information Institute website (http://www.nzlii.org/nz/cases/NZLostC/). The database contains details of all New Zealand Supreme Court and Court of Appeal cases from 1842 to 1869, a period when there were no official law reports.

Discussion

Social and economic insights beyond the litigation

In the period before official law reports, case notes were made by court staff, judges, or journalists watching the cases. Colonial newspapers often reported litigation in great detail, publishing full transcripts of evidence, detailed descriptions of witnesses' demeanour, and

observations on the judge and jury. Because of this, the database offers insights to social and economic life in the colony beyond the particular litigation. As the project leader Professor Shaunnagh Dorsett has noted "It isn't just about law – you can see from these cases how society looked and operated. It's about commerce, family, life and death, all those things. Through these cases you can find much out about how society functioned."

The Lost Cases work has highlighted a depth to colonial legal practice and culture. Professor Dorsett observes, "litigation exploded in the 1860s, especially civil litigation. A significant portion of those cases covered complex issues that would have been difficult for an English judiciary, let alone the bench in a small colony. It's clear people would litigate at the drop of a hat, and the public awareness of, and dispute over, complex legal issues seems to have been very high. That has some important implication for how we view colonial societies. Legal historians need to pay more attention to what these cases might tell us about our ancestors, and ourselves."

Database searches

The NZLII website allows more effective keyword searching than has been possible in the past. A separate searchable source database covers Court records between 1840 and 1883. The database joins a growing volume of historical case law which is available on the internet. The New Zealand cases will form part of a collection of historical case law being compiled by Austlii with support from the Australian Research Council. Historical cases from New South Wales, South Australia and other Australian jurisdictions are already available through http://www.austlii.edu.au/au/special/legalhistory/.

Scholarship flowing from use of the Lost Cases database

The Lost Cases project has led to a number of important academic publications, including studies on:

- The customary law of the colonial New Zealand whaling industry.[1]
- Colonial litigation on promises to marry.[2]
- Colonial law on married women's and widows' property rights.[3]
- The colonial courts' approach to native title and the statutory regulation of disputed titles;[4] and
- The impact of civil procedure rules on legal disputes in the Crown Colony period.[5]

Academics at Victoria University of Wellington and elsewhere are just beginning to test the depths of the database's treasures. Among some of the interesting cases relating to Māori that project members hope will receive attention in the future are:

- *R v Aparo* (1863); Aparo was convicted for his role in the seizure of the Moke Moke Pihoihoi newspaper's printing press at Te Awamutu. The taking of the press was an important moment in the "Paper War" between the government and the Kingitanga in the Waikato. It precipitated the removal of Resident Magistrate John Gorst from the district.[6] The evidence given at trial (and set out in the database entry) includes discussion about the political situation in

the Waikato, Gorst's relationship with local iwi and hapū, and notions of communal and individual responsibility for actions.

- *Scott v Grimstone* (1848); one of a series of cases about disputed land titles in Wellington. The court heard evidence from William E Tako (Wi Tako) about early land sales.
- *R v Caroline* (1844); Caroline appears to have been the first Māori woman brought before the Supreme Court in a criminal matter. Caroline was charged with receiving stolen goods. The case failed to get past the grand jury stage: the Crown abandoned the case after the Martin CJ questioned the adequacy of the evidence presented at the hearing. Newspaper reports also included criticism of the standard of translation services in the court.

Victoria University of Wellington Law Review is interested in publishing articles or case notes discussing cases in the database. Please contact the editor, Nessa Lynch, at law-review@vuw.ac.nz. The Lost Cases database will also remain available on the VUW website.

Notes

[1] Stuart Anderson, "Commercial Law on the Beach: Shore Whaling Litigation in Early Colonial New Zealand: Macfarlane v Crummer (1845)" (2010) 41 VUWLR 453. Stuart Anderson, "Harris v Fitzherbert: Customary Rights of Labour on a Shore Whaling Station" (2011) 42 VUWLR 639.

[2] Megan Simpson, "The Action for Breach of Promise of Marriage in Early Colonial New Zealand: Fitzgerald v Clifford (1845)" 41 VUWLR 473.

[3] Charlotte Macdonald, "Land, Death and Dower in the Settler Empire: the Lost Cause of "The Widow's Third" in Nineteenth-Century New Zealand" 41 VUWLR 493.

[4] Bruce Kercher, "Informal Land Titles: Snowden v Baker (1844)" 41 VUWLR 605. Ned Fletcher and Sian Elias, "A Collusive Suit to "Confound the Rights of Property Through the Length and Breadth of the Colony"?: Busby v White (1859) 41 VUWLR 563.

[5] Shaunnagh Dorsett, "Making up the issue: The Judges' Role in Formulating Actions in the Crown Colony Period: Pharazyn v Smith (1844)" 41 VUWLR 427.

[6] Evelyn Stokes, Wiremu Tamihana: Rangatira, Wellington, 2002, 324-335. Damon Ieremia Salesa, Racial Crossings: Race, Intermarriage, and the Victorian British Empire, Oxford, 2011, 216-217.

