OFFICIAL

IN THE WAITANGI TRIBUNAL

Wai 745
Wai 1308

CONCERNING the Treaty of Waitangi Act 1975

AND the Patuharakeke Hapū Lands and Resources Claim

AND the Patuharakeke Hapuu ki Takahiwai Claim

DECISION
ON APPLICATION FOR AN URGENT HEARING

12 Paenga-whāwhā 2018

Introduction

1. This application for an urgent hearing is brought by Paki Pirihi (Wai 745) and Ngawaka Pirihi, Paraire Pirihi, Harry Midwood, Patricia Heperi, Crete Milner and Terrence Pirihi (Wai 1308) on behalf of Patuharakeke (Wai 745, #1.1(j); Wai 745, #2.147). The application concerns the Crown's actions in respect of its settlement negotiations with Te Rūnanga o Ngāti Whātua (TRoNW).

Background

2. In his brief of evidence in support of the present application, Gilbert Paki describes Patuharakeke as "a composite hapu who have whakapapa connections to a number of iwi including Ngāti Whātua, Ngati Wai and Ngapuhi" (Wai 745, #A71 at [8]).
3. The two Patuharakeke claims, Wai 745 and Wai 1308, are broad historical claims to interests over a vast area of the eastern sea board, particularly Ruakaka, Takahiwai, One Tree Point, Waipu and Mata. The applicants have presented evidence and submissions in support of their historical claims as part of Wai 1040, the Te Paparahi o Te Raki Inquiry.
4. The applicants submit that Patuharakeke Te Iwi Trust Board (PTB) is the only governance entity that has been mandated by Patuharakeke to progress their historical claims (Wai 745, #1.1(j)). Counsel for the applicants submit that this application for urgent hearing was filed with the support of a Patuharakeke hui-a-hapū (Wai 745, #2.148) and several PTB trustees have submitted briefs of evidence in support of the application for urgent hearing (Wai 745, #A70; Wai 745, #A71; Wai 745, #A75; Wai 745, #A76; Wai 745, #A77).
5. On 18 August 2017, the Crown signed an Agreement in Principle (AIP) with TRoNW. This AIP provided for the partial settlement of the two Patuharakeke claims, Wai 745 and Wai 1308.
6. Patuharakeke's historical claims have also been partially included in the Crown's settlement negotiations with both the Ngātiwai Trust Board and the Tuhoronuku Independent Mandated Authority. The applicants participated in the Tribunal's inquiries into the Crown's negotiations with both those groups.

Procedural History

7. The Tribunal received the present application, along with a joint amended statement of claim and two briefs of evidence, on 29 September 2017 (Wai 745, #2.147; Wai 745, #1.1(j); Wai 745, #A70; Wai 745, #A71).
8. I directed the Crown and any interested parties to respond to the application by 31 October 2017 (Wai 745, #2.150).
9. On 30 October 2017, counsel for TRoNW sought a one month extension to file submissions in response to the application, given the public release of the *Ngātiwai Mandate Inquiry Report* on 31 October 2017 (Wai 745, #2.151). The Crown then requested that this application be adjourned to 20 February 2018 to allow it time to consider the Tribunal's recent findings and recommendations in the *Ngātiwai Mandate Inquiry Report* (Wai 745, #2.152).
10. Counsel for the applicants opposed both the extension and adjournment requests (Wai 745, #2.153; Wai 745, #2.154). I considered, however, that it would be to the benefit of all parties to allow the Crown and its new Ministers time to consider the Tribunal's recent

findings and recommendations in relation to the Ngātiwai mandate (Wai 745, #2.155). Accordingly, I granted the adjournment sought by the Crown.

11. The Crown and TRoNW both responded on 20 February 2018, opposing the application (Wai 745, #2.157; Wai 745, #2.156; Wai 745, #A72; Wai 745, #A73; Wai 745, #A74).

12. On 14 March, the applicant filed submissions and evidence in reply to the submissions of the Crown and TRoNW (Wai 745, #2.161; Wai 745, #A75; Wai 745, #A76; Wai 745, #A77).

Parties' Submissions

Applicants' Submissions

13. The applicants submit that the Crown has breached its obligations to Patuharakeke under the Treaty of Waitangi by recognising the mandate of TRoNW to partially settle their historical claims, namely Wai 745 and Wai 1308, without the support or consent of Patuharakeke. The applicants submit that Crown knows that PTB is the only entity mandated to progress Patuharakeke claims (Wai 745, #2.147; Wai 745, #1.1(j); Wai 745, #A70; Wai 745, #A71).

14. The applicants submit that the process leading up to the original recognition of the TRoNW mandate in 2008 and the "refresh" of the mandate in 2016 was not fair, open or transparent. Wai 745 and Wai 1308 were not included in the 2008 TRoNW mandate strategy or any other relevant documents at the time of the postal ballot on the mandate. Wai 745 was then included in the TRoNW Deed of Mandate on 1 July 2008 without consultation with Patuharakeke. The Wai 1308 claim was later included in the AIP of 18 August 2017, again without any consultation with Patuharakeke.

15. Additional procedural issues with the original mandate that the applicants identify are that the Crown did not call for submissions on the TRoNW mandate strategy, that the results of the postal ballot vote had not been received prior to the Crown endorsing the mandate strategy on 23 May 2008 and that the Crown signed Terms of Negotiations with TRoNW in October 2008 prior to recognising the TRoNW Deed of Mandate on 22 December 2008. Further, the applicants submit that the process of determining support for a mandate through a vote of individuals is fundamentally flawed and undermines hapū rangatiratanga. The applicants also note the low participation rate of only 14.09% of the total possible voters participating.

16. TRoNW refreshed its mandate in 2016, but the applicants submit that the Crown failed to ensure the refresh process met the minimum standards set out by the Tribunal in the *Tamaki Makaurau Settlement Processes Report* or the *Ngapuhi Mandate Inquiry Report*, both of which were published prior to the Crown recommencing negotiations with TRoNW in 2016. They submit that the Crown has failed to engage meaningfully with Patuharakeke and consult in good faith and that the Crown accepted the refreshed mandate despite Patuharakeke's opposition. The applicants further submit that the Crown has failed to ensure that TRoNW is accountable to the claimant community and complies with its Deed of Mandate.

17. The applicants submit that the Crown failed to adequately address and resolve the issue of Patuharakeke's opposition to being included in the Deed of Mandate prior to recognising the mandate and signing the AIP. The applicants further submit that although the TRoNW trustees agreed to remove the two Patuharakeke claims from the TRoNW mandate (Wai 745, #A70(a), Exhibit A), the Crown has actively prevented TRoNW from amending the Deed of Mandate accordingly. The applicants have initiated the dispute resolution process pursuant to clause 3.21 of the TRoNW Deed of Mandate, which gives

groups the right to withdraw their mandate from TRoNW, but are not confident that their withdrawal will be acknowledged at the end of this process given the Crown's previous actions preventing the removal of their claims.

18. The applicants submit that the Crown's refusal to allow Patuharakeke's claims to be removed from the TRoNW mandate represents a double standard because the Crown allowed Te Kapotai's claims to be removed from the Ngatiwai Trust Board mandate in similar circumstances. They submit that their whakapapa has been manipulated by the Crown in order justify the inclusion of Patuharakeke claims in the TRoNW mandate and this has caused damage to the whanaungatanga relationships between Patuharakeke and Ngāti Whātua.

19. Finally, the applicants note that they have participated in Wai 1040, the Te Paparahi o Te Raki Inquiry, which is approaching its conclusion. The applicants submit that they may be deprived of their right to seek remedies upon receipt of the Tribunal's findings in that inquiry if their claims are partially settled by TRoNW.

Crown's Submissions

20. The Crown opposes the application for an urgent hearing (Wai 745, #2.157). The Crown submits that there is no imminent risk of prejudice to the applicants because the negotiations between the Crown and TRoNW have only progressed to an AIP and a deed of settlement is scheduled to be initialled in November 2018 at the earliest.

21. The Crown further submits that the applicants have pursued the alternative remedy of utilising the dispute resolution clause in the TRoNW Deed of Mandate and the Crown considers that these discussions may result in the resolution of the matters raised in this application. TRoNW also has a newly elected board which will meet with Patuharakeke after the new board's first meeting on 28 February 2018. The Crown is "supporting these discussions and participating to the extent appropriate" (Wai 745, #2.157 at [11.4]). It would therefore be premature to grant an urgent Tribunal inquiry into these claims.

Interested Party's Submissions

22. TRoNW also opposes the application, primarily on the basis that the applicants have not exhausted the alternative remedy of the dispute resolution process provided for in the TRoNW Deed of Mandate (Wai 745, #2.156).

23. TRoNW submits that the applicants and TRoNW are in the middle of this process, initiated by the applicants, and that this process is tantamount to what the Tribunal recommended in the *Ngātiwai Mandate Inquiry Report* since officials from the Office of Treaty Settlements are also involved. TRoNW submits that this process should be seen to its conclusion and the Crown allowed time to respond before the Tribunal considers whether an urgent hearing is required. It submits that the provisions of the Deed of Mandate ultimately allow a group to withdraw from the mandate should attempts to resolve the dispute through the dispute resolution process be unsuccessful.

24. TRoNW emphasises that it has responded to Patuharakeke's concerns in good faith and as soon as it could. It submits that the TRoNW board was only made aware that Patuharakeke was seeking to withdraw from the TRoNW mandate on 11 August 2017 and since this time it has been working in good faith to address the applicants' concerns and the practical implications of the proposed withdrawal (Wai 745, #A72; Wai 745, #A73 & Wai 745, #A74).

25. Finally, TRoNW submits that there is no prejudice if an urgent hearing is not granted, because the Crown, who can withdraw Patuharakeke from the TRoNW mandate, is already in the dispute resolution meetings with Patuharakeke.

Applicants' Reply

26. The applicants reject the Crown and TRoNW's submissions that Patuharakeke's direct engagement with TRoNW is a valid alternative remedy. They also submit that the Crown has been dismissive of Patuharakeke in its response to this application and note that the Crown's submissions do not address Patuharakeke's allegations concerning the undermining of hapū rangatiratanga, the disregard for Patuharakeke tikanga and manipulation of whakapapa or the flaws in the TRoNW mandating process. The applicants also note that although the Crown sought an adjournment of the present application for the purpose of considering the *Ngātiwai Mandate Inquiry Report*, the Crown's submissions in response do not address the findings and recommendations of that report. Counsel submit that the Crown has failed to establish that this application should be declined.

27. In regard to alternative remedy, counsel submit that the applicants are not engaged in a dispute resolution process with TRoNW, as counsel for the Crown and TRoNW have stated. Although Patuharakeke is engaged in the process set out in cls 3.20 and 3.21 of the TRoNW Deed of Mandate, counsel argue that this is not actually a dispute resolution process but rather a provision for information gathering so that TRoNW can then decide whether to engage in an actual dispute resolution process, the details of which are not provided for in the deed and are therefore uncertain.

28. In addition, the applicants submit that cl 3.21 of the TRoNW Deed of Mandate cannot resolve Patuharakeke's claim against the Crown. TRoNW was previously willing to remove Patuharakeke's claims from the TRoNW mandate, but the Crown actively prevented this from happening. Clause 3.21 of the deed provides no role for the Crown, and it is the Crown that is refusing to give effect to Patuharakeke's desire to withdraw.

29. Counsel also submit that cl 3.21 does not provide a workable hapū withdrawal mechanism, as it states that the process for withdrawal must be agreed between the parties. This provides no certainty for Patuharakeke, and even if TRoNW and Patuharakeke do agree, the applicants expect the Crown will actively block Patuharakeke's withdrawal as it had already done before.

30. Finally, the applicants submit that this is not a valid alternative remedy because cl 3.21 is not a Crown process. This clause governs the dispute raised by Patuharakeke directly with TRoNW. The applicants acknowledge that their dispute with TRoNW is interlinked with their dispute with the Crown. The Crown's actions, however, underpin both disputes and applicant counsel submit that their dispute with the Crown can clearly be separated from any resolution that could be achieved with TRoNW. The cl 3.21 process is not a process that can result in the resolution of Patuharakeke's claims against the Crown, which are the subject of this application.

Urgency Criteria

31. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

> In deciding an urgency application, the Tribunal has regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

32. In this case, as with many urgency decisions, it is better that I do not go too far into the merits of these claims. To do so might well muddy the waters for a Tribunal that subsequently hears the claim. The issue is simply whether urgency at this particular time is warranted.

33. I have decided that at this moment the application for urgency is not made out and it is therefore declined. It is clear to me that the parties are still in discussion. There is only an Agreement in Principle with the Crown and this is quite an early stage in the settlement process. Neither the Crown or TRoNW appear determined to thwart the applicants' hopes. The next step, a Deed of Settlement, is six months away at the earliest and the ultimate cut-off date, the presentation of a Bill to the House of Representatives, is much further away again.

34. I can understand that the unease felt by the applicants at the uncertainty in the process provokes them to call on the Tribunal to assist. Uncertainty is something simply inherent in the process and is not sufficient to justify urgency.

35. While the outcomes for these applicants is entirely contingent on the political process and it is not clear what the result will be, the Tribunal must allow the situation to play out in the natural way.

36. While there is nothing that is about to happen in the short term and the application is declined, that is not to say that the Tribunal could not be involved at a later time and under urgency if that becomes warranted.

Decision

37. For the reasons stated above, this application is declined.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification lists for Wai 745, the Patuharakeke Hapū Lands and Resources Claim, and Wai 1308, the Patuharakeke Hapuu ki Takahiwai Claim.

DATED at Wellington this 12th day of April 2018

Judge P J Savage
Deputy Chairperson
WAITANGI TRIBUNAL