IN THE WAITANGI TRIBUNAL

WAI 898
Wai 762
Wai 1499

UNDER	The Treaty of Waitangi Act 1975
And	
IN THE MATTER OF	The Rohe Pōtae Inquiry District
And	
IN THE MATTER OF	A Treaty claim by Harold Kereopa and Evelyn Kereopa on behalf of themselves, their whānau, Te Ihingarangi hapū and Ngati Maniapoto (Wai 762)
IN THE MATTER OF	A Treaty claim by Vernon Houpapa on behalf of himself, his whānau, Ngati Hikairo, Ngati Mahuta, Ngati Maniapoto and Ngati Ngutu, hapū of Ngati Maniapoto (Wai 1499)

MEMORANDUM OF COUNSEL – TRIBUNAL'S JURISDICTION ON COMMERCIAL FISHING

Date: 28 June 2013

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Waitangi Tribunal
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Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL

1. We refer to the Memorandum-Directions of the Presiding Officer dated 27 May 2013, whereby counsel were invited to file legal submissions on the "extent of this Tribunal's jurisdiction to inquire into claims which relate to the impact of commercial tuna fishing on customary tuna fisheries" by Friday 28 June (Wai 898, #2.6.25).

2. This memorandum of counsel is filed on behalf of the following:

> a) Wai 762, a Treaty claim by Harold Kereopa and Evelyn Kereopa on behalf of themselves, their whānau, Te Ihingarangi hapū and Ngati Maniapoto.
>
> b) Wai 1499, a Treaty claim by Vernon Houpapa on behalf of himself, his whānau, Ngati Hikairo, Ngati Mahuta, Ngati Maniapoto and Ngati Ngutu, hapū of Ngati Maniapoto.
>
> ("the Claimants")

3. We submit that based on the proper statutory interpretation of section 6(7) of the Treaty of Waitangi Act 1975, the Tribunal has jurisdiction to inquire into the impact of commercial fishing on customary tuna fisheries. Section 6(7) must be interpreted in light of Parliament's intention and it is clear from context and parliamentary debate on the related legislation, the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 ("the FSCA"), that Parliament did not intend section 6(7) to have such a prohibitive effect. This interpretation is also strongly supported by previous decisions of the Waitangi Tribunal.

Statutory interpretation of section 6(7)

4. The Claimants' Treaty claims concern, in part, their customary eel fishing rights. Their Treaty claims in this respect are about non-commercial fishing rights. Section 6(7) states:

> *the Tribunal shall not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of,— (a) commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983);*[1]

5. For this jurisdictional bar to apply, the words "in respect of" commercial fisheries would have to mean "in respect of, no matter how minimally or tangentially related." We submit that this meaning is too wide and it was not Parliament's intention that it be read in this manner. Rather, we submit that the words "in respect of" should be read to mean "in respect of *claims relating to*" commercial fishing or commercial fisheries.

6. We submit that this interpretation is supported by the title of section 40 of the FSCA. Section 40 amends section 6(7) of the Treaty of Waitangi Act and it is entitled *'Jurisdiction of Tribunal to consider claims'*. If this narrower

[1] Treaty of Waitangi Act 1975, s6(7).

meaning were to be accepted, the Tribunal would not be barred from inquiring into a Treaty claim that cites the impact of commercial fishing as one of several causes for the depletion of customary tuna, in what are essentially claims about rights to *customary* fishing.

Jurisdictional bar to consider commercial fishing claims

7. It is submitted that one of the most important tools to resolving a question of statutory interpretation is to look to Parliament's intention. Section 6(7) of the Treaty of Waitangi Act 1975 was amended by way of section 40 of the FCSA, making section 6(7) integrally linked to the FCSA. Therefore, the parliamentary debate around the introduction of the FCSA is key to understanding Parliament's intention in inhibiting the Tribunal's jurisdiction under section 6(7).

8. The FCSA was the result of a final settlement between Māori and the Crown over Māori rights to commercial fisheries. This context is paramount when interpreting the meaning of section 6(7) as it highlights Parliament's intention to prohibit any further Treaty *claims* by Māori to commercial fisheries. Accordingly, section 6(7) was never intended to be a comprehensive bar to any Treaty claim that merely touched, however lightly, on some or any aspect of commercial fisheries.

9. This point is illustrated by the speeches of Members of Parliament as the FCSA passed through the House of Representatives. The Minister in charge of the Bill and the Minister of Fisheries at the time was Sir Doug Kidd. When referring to the limitations to be put on the Waitangi Tribunal's jurisdiction during the debate, the Minister stated that the limitation related to commercial fishery *claims*. The Minister did not state that the limitation on the Tribunal's jurisdiction encompassed Treaty claims *in respect of* commercial fisheries. During the introduction of the Bill, the Minister said:

> *The Crown's obligations to Māori are to be declared to be free from further judicial inquiry. All claims, current and future, are declared to be settled. The capacity of the Waitangi Tribunal to investigate and report on claims concerning rights to commercial fisheries is ended.*[2] (underlining added)

10. Members from other parties illustrated the same understanding with regard to the jurisdictional bar. New Zealand First's Member for Tongariro, Ian Peters, stated the following when the Bill was introduced:

> *The Bill before the House seeks to extinguish all treaty rights as they pertain to commercial fishing, and, in doing so, to abolish section 88(2) of the Fisheries Act 1983. It follows that the jurisdiction of the Waitangi Tribunal to hear and make recommendations on any Māori commercial-fishing claims will be denied.*[3] (Underline added)

[2] Parliamentary Debates (Hansard) Vol 532 Dec 1 – Dec 17, Treaty of Waitangi (Fisheries Claim) Settlement Bill, First Reading, p12820.
[3] Ibid, pp12834-12835.

11. That the Tribunal's jurisdiction would be limited with respect to any commercial fishing *claims* better reflects the overarching purpose of the FCSA. The preamble of the FSCA states that:

> *the implementation of the deed through legislation and the continuing relationship between the Crown and Māori would constitute a full and final settlement of all Māori claims to commercial fishing rights.*[4]

The purpose of the legislation was to settle Māori claims to commercial fishing rights, not to end any Treaty claims that may affect and/or involve some aspect of commercial fishing.

Explicit recognition of non-commercial customary fishing rights

12. Parliament's explicit recognition of non-commercial customary fishing rights means that Parliament never sought to prevent the Tribunal from upholding non-commercial customary fishing rights. Parliament's intention in this respect is made clear by the FCSA's explicit recognition of customary fishing rights at section 10 and by the Parliamentary debate on the FSCA around customary fishing rights. Section 10 states:

> *It is hereby declared that claims by Māori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983 – (a) shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown;*[5]

13. Again, Sir Doug Kidd's comments help to clarify Parliament's intention. At the Bill's introduction he stated:

> *Traditional rights continue to be subject to the principles of the Treaty and give rise to Treaty obligations on the part of the Crown. Claims in respect of Māori non-commercial fishing rights are declared to have no legal effect except as provided under the regulations that will be promulgated. The Waitangi Tribunal will continue to be able to hear claims in respect of non-commercial fishing rights.*[6] (underlining added)

14. The Minister in Charge of Treaty of Waitangi Negotiations at the time, Sir Doug Graham, added:

> *In so far as non-commercial Māori fishing rights and interests are concerned, it is important to note that the Treaty obligations of the Crown continue; that the Tribunal has jurisdiction and can make recommendations in that regard;*[7]

Later in the passage, he continued:

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[4] Treaty of Waitangi (Fisheries Claim) Settlement Act 1992, Preamble.
[5] Ibid, s10.
[6] Parliamentary Debates (Hansard) Vol 532 Dec 1 – Dec 17, Treaty of Waitangi (Fisheries Claim) Settlement Bill, First Reading, p12820.
[7] Ibid, p12824.

> *Those are very important provisions, and they will affect a great number of people. It is important that the Māori people in particular are aware of what they state.*[8]

When commenting on concern voiced about how the Bill would affect customary fishing rights, Sir Graham stated:

> *The second category of opposition relates to the effect of the settlement on non-commercial traditional fishing rights, especially those in freshwater fisheries . . . It was never part of this settlement that those rights now should be taken away.*[9]

15. The FCSA was clearly meant to strengthen Māori customary fishing rights and the Treaty obligations on the Crown that they give rise to. Clearly Parliament meant to protect Maori customary fishing rights on the one hand and so preventing the Tribunal from inquiring into customary fishing rights where they are affected by commercial fishing is illogical. Furthermore, it is submitted that if Parliament meant that section 6(7) could limit the Waitangi Tribunal's jurisdiction to such a degree, Parliament would have or should have explicitly said so.

16. It is apparent from the parliamentary debate that took place around the passing of the FSCA that Parliament only meant to restrict the Tribunal's jurisdiction with respect to commercial fishing ***claims*** and that Parliament intended the FSCA to provide for the continued recognition and protection of non-commercial customary fishing rights.

Waitangi Tribunal Precedent

17. Parliament cannot have meant for section 6(7) to have such a wide meaning, and the Waitangi Tribunal has not interpreted it as such in the past. In fact, the Tribunal has a history of interpreting section 6(7) in a way that has allowed the Tribunal to inquire into customary fishing claims, even when they plainly involve an investigation into the impact of commercial fisheries.

18. The Te Ika Whenua Rivers claim (Wai 212) and the Whanganui Rivers claim (Wai 167) were primarily concerned with rivers and associated claim issues. Nevertheless claim issues regarding the eel fisheries in these rivers were collaterally raised. In Te Ika Whenua Rivers Report the Waitangi Tribunal found commercial fishing operations had depleted eel stocks.[10] In making a finding that affected commercial eel fishing, the Waitangi Tribunal did not consider that such matters were outside of its jurisdiction. Nor did the Waitangi Tribunal consider that because these claims affected commercial eel fishing, it was excluded by section 6(7) of the 1975 Act from inquiring into them.

19. Te Ika Whenua Rivers claim concerned not only rangatiratanga rights to the Rangitaiki, Whirinaki and Wheao rivers, it was also about the non-commercial customary rights of Māori to the eel fishery within these rivers.

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[8] Ibid.
[9] Ibid, Second Reading, p12930.
[10] Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: GP Publications, 1998), sec 11.3.2. p137.

Although the exercise of these rights places encumbrances on commercial fishing, the Waitangi Tribunal was not only prepared to consider the eel fishery issue, findings and recommendations were made to uphold such rights.[11]

20. For instance, the Waitangi Tribunal made the following recommendation:

> *(f) That the Crown enter negotiations and discussions with Te Ika Whenua to establish a suitable regime of management and control of the native fishery in the rivers that involve Te Ika Whenua and that recognises and takes into account the Treaty guarantees of tino rangatiratanga over and protection of taonga, Te Ika Whenua customary fishing rights and practices, and the impact of any fishing laws or regulations on those rights and practices.*[12] (underlining added)

21. It is interesting to note that the Waitangi Tribunal recommends that the Crown recognise the "impact of any fishing laws and regulations" on customary fishing rights and practices. Use of the phrase "any fishing laws and regulations" must include laws and regulations relating to commercial fishing. As such, it is clear the Waitangi Tribunal is prepared to uphold non-commercial customary fishing rights over commercial fishing interests, where the latter impinges on the former. If this is the case, there is no doubt the Waitangi Tribunal may inquire into non-commercial customary fishing, even if this means the diminution of commercial fishing interests.

22. In the Whanganui River claim (Wai 167) the Waitangi Tribunal readily discussed the many and varied fisheries within the Whanganui River, including the eel fishery and eel weirs.[13] In addition, the Waitangi Tribunal heard evidence on fish depletion, including evidence in relation to eel depletion.[14] Although commercial eel fishing was merely suggested, inter alia, as a reason for the decline in eel numbers, the Waitangi Tribunal was not compelled to preclude itself from considering this aspect of the Whanganui River claim simply because commercial fishing contributed to eel depletion.

23. Even more recently in the Wairarapa ki Tararua Report, the Tribunal directly considered its jurisdiction to consider customary fishing claims. Under the heading "The Tribunal's Jurisdiction", the Tribunal stated as follows:

> *The measures enacted in the Māori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 together constitute a full and final settlement of all Māori claims to commercial fishing rights. The Tribunal's jurisdiction to inquire into or make findings on any claim that relates to Māori commercial fishing rights was removed by this legislation. However, there is no jurisdictional bar to the Tribunal considering claims relating to Māori non-commercial fishing rights, as the settlement legislation*

[11] Ibid, sec 11.3.2, 11.5.2, 11.7, pp137, 142-145.
[12] Ibid, sec 11.7, pp143-145.
[13] Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), sec 3.2.4, pp59-66.
[14] Ibid, sec 3.2.5, pp67-70.

specifically states that these rights continue to give rise to treaty obligations on the part of the Crown.[15] (underlining added)

24. The Tribunal made reference to the FSCA again later in the chapter, highlighting the negotiators' intentions to protect customary fishing rights:

> *While the events described above were unfolding, and proposals for taiāpure were being made within and beyond Wairarapa ki Tararua, the Crown and iwi reached agreement on the allocation of commercial fish quota. A deed of settlement was signed and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 was passed. The negotiators on both sides were careful to ensure that non-commercial customary uses and the exercise of kaitiakitanga over these fisheries were confirmed, not curtailed, by the legislation.*[16]

25. The Tribunal went on to examine the Claimants' experiences under the current regulatory regime, including an analysis of whether or not the current regime is doing enough to fulfil the Crown's treaty obligations. The Tribunal stopped short of making specific recommendations on managing customary fisheries to allow the Crown time for their new initiatives in this area to "show their effectiveness". However they repeatedly criticised the fact that the regime does not prioritise Māori customary fishing rights far enough above other stakeholders *including commercial fishers*. At page 1020, the Tribunal said:

> *The fishing resource is valuable and hotly contested by interest-holders. Both the recreational fishing and commercial fishing lobbies are motivated and powerful. Requiring Māori to negotiate sufficient space for their customary interests in this environment may simply not be a viable way of providing for their customary fishing rights under the Treaty. Establishing a clear and enforceable priority for an appropriate level of Māori customary interest would not be popular, but it may prove to be necessary. It would involve the Crown taking on the task of managing the competing interests itself, rather than requiring Māori to do it.*[17]

26. This assessment of the Crown's Treaty obligations towards Māori customary fishing rights required the Tribunal to ask whether or not the current regime allowed Māori enough control over commercial fishing in their customary fisheries. Although the report did not directly involve tuna fisheries, the Tribunal yet again showed no hesitation in inquiring into the impact of commercial fishing on customary fishing rights.

27. In 2000, out of extreme concern over the rapid depletion of their customary tuna fisheries, Wai 762 claimants lodged an application for urgency with the Waitangi Tribunal. The issue of whether or not the Tribunal had jurisdiction to hear the claim was raised by Chief Judge Williams. In his Memorandum-Directions dated 4 May 2000 the Chief Judge stated:

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[15] Waitangi Tribunal, *Wairarapa ki Tararua Report* (Wellington: Legislation Direct, 2010), sec 13B.3, pp1005-1006.
[16] Ibid, sec 13B.4.2, p1009.
[17] Ibid, sec 13B.3, 13B.4.4(2) pp1013-1015, 1020.

> *The essence of this claim appears to be that commercial eel fishing operations are unfairly depleting the resource, thereby prejudicing non-commercial customary eel fisheries. It is difficult to see how an inquiry into the effects of commercial over-fishing is not an inquiry into commercial fishing. If this preliminary view is correct, then section 6(7) of the Treaty of Waitangi Act 1975, prohibits such inquiry.* [18]

28. The Chief Judge then asked for submissions from claimant counsel on how the inquiry would differ from an inquiry into commercial fishing. In a memorandum dated 29 August 2000[19] it was submitted that the Tribunal did have jurisdiction to inquire into the claim. The contention coursed much along the same lines as the present memorandum. In response to counsel's submissions in reply, the Chief Judge issued a direction wherein he stated:

> *I consider that the information that is now before the Tribunal would be sufficient for the Tribunal to consider the application for an urgent hearing.*[20]

29. It is submitted that the Chief Judge's direction implies that there is no jurisdictional issue i.e that section 6(7) is no bar to inquiry by the Tribunal into the effect that the Wai 762 eel claim may have on commercial eeling.

Conclusion

30. From the context of the commercial fisheries settlement (known as the 'Sealords deal') and from the Parliamentary debate on the FSCA, it is clear that Parliament's intention in enacting section 6(7) was to prevent Māori bringing any further *claims* to commercial fisheries before the Tribunal. The intention was *not* to prevent Māori bringing customary fishing claims that incidentally involve aspects of commercial fishing.

31. Furthermore, the Waitangi Tribunal has consistently interpreted 6(7) in accordance with our submissions, in reports issued as recently as 2010.

32. For these reasons we respectfully submit that the Tribunal is not barred by section 6(7) of the Treaty of Waitangi Act 1975 from inquiring into the impact of commercial fisheries on customary tuna fisheries.

DATED this 28th day of June 2013

Darrell Naden
Counsel

[18] Memorandum-Directions of Chief Judge Williams dated 4 May 2000, Wai 762, #2.5.
[19] Wai 762, #2.9.
[20] Memorandum-Directions of the Deputy Chairperson dated 4 October 2001 (Wai 762, #2.10).