# THE
# RADIO SPECTRUM
# MANAGEMENT AND DEVELOPMENT
# FINAL REPORT

# THE RADIO SPECTRUM MANAGEMENT AND DEVELOPMENT FINAL REPORT

WAI 776

WAITANGI TRIBUNAL REPORT 1999

GP PUBLICATIONS

The cover design by Cliff Whiting invokes the signing
of the Treaty of Waitangi and the consequent interwoven development
of Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

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The Waitangi Tribunal
Wellington

The Honourable Tau Henare
Minister of Maori Affairs

Parliament Buildings
Wellington

Tena koe te Rangatira

This is our final report in this matter. Our interim report was delivered on 26 March 1999, and we were asked to make a final report available within three months of 29 March 1999 – the date on which the auction of management rights to frequencies within the 2 GHz range had been due to commence.

We held a further six days of hearings and had reference, by agreement, to the evidence given at the hearings prior to the delivery of the interim report.

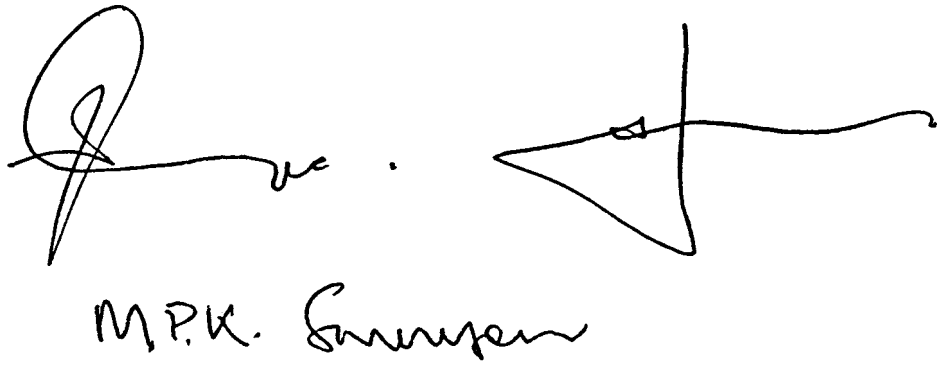
You will see that we remain divided on our findings on both limbs of the claim.

We have, however, by different paths reached the conclusion that there is a breach of the principles of the Treaty.

We have not been able to agree on the nature of the breach or the appropriate recommendations.

The decision of the majority is, of course, the decision of the Tribunal.

Dated at Wellington this 28th day of June 1999



Judge P J Savage (presiding officer), J M Anderson (member), Professor M P K Sorrenson (member)

# LIST OF ABBREVIATIONS

| | |
|---|---|
| AM | amplitude modulation |
| app | appendix |
| BAAP | Buenos Aires action plan |
| *c* | circa |
| CA | Court of Appeal |
| CD | compact disc |
| ch | chapter |
| DLR | *Dominion Law Reports* |
| doc | document |
| DTT | digital terrestrial television |
| F Supp | *Federal Supplement* |
| fig | figure |
| FM | frequency modulation |
| GHz | gigahertz |
| ITU | International Telecommunications Union |
| kHz | kilohertz |
| L Ed 2d | *Lawyers' Edition, United States Supreme Court Reports* (second series) |
| ltd | limited |
| MHz | megahertz |
| MSUAG | Major Spectrum Users Advisory Group |
| NZLR | *New Zealand Law Reports* |
| p, pp | page, pages |
| para | paragraph |
| PC | Privy Council |
| pt | part |
| s, ss | section, sections (of an Act) |
| SCC | Supreme Court of Canada |
| sec | section (of a book, report, etc) |
| SHF | super-high frequency |
| TPK | Te Puni Kokiri |
| TV | television |
| UHF | ultra-high frequency |
| US | *Reports of Cases in the Supreme Court of the United States of America* |
| vol | volume |
| Wai | Waitangi Tribunal claim |
| WTDC | World Telecommunications Development Conference |

# PART I

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

CHAPTER 1

# THE CLAIM

## 1.1 Introduction

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

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

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

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

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

(b) Maori have a right to a fair and equitable share in the spectrum, especially where the Crown has an obligation to promote and protect Maori language and culture.

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

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

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

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

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

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

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

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

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

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

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

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

## 1.2 Findings and Recommendations Sought

The claimant sought recommendations that:

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

with or the agreement of Maori assumed a monopoly over the resource and is in breach of the Treaty of Waitangi;
- the Radiocommunications Act 1989 in so far as it alienates management rights without consultation with Maori is in breach of the Treaty of Waitangi.[2]

She sought further specific recommendations that:

- the current spectrum management policy be discontinued until a negotiated solution with Maori on the issues raised in this claim has been reached;
- the Crown provide funding and other support for Maori to undertake urgent research and consultation amongst themselves into the implications of the government's telecommunication policy on Maori and opportunities for Maori participation in the telecommunications industry;
- . . . the Crown support the active participation by Maori in the telecommunication industry and in negotiation with Maori reserve sufficient radio spectrum to ensure sustained and ongoing development;
- the Crown and Maori negotiate a strategic framework for the long term management of the spectrum;
- the Crown compensate Maori for their share of revenue which has been expropriated by the Crown from:
  - the frequency licences regime operating . . . before the Radiocommunications Act 1989; and
  - the rights to spectrum revenue generated from the sale of management rights in frequencies under the Radiocommunications Act 1989.[3]

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

## 1.3 THE HEARINGS

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

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

2. Claim 1.1, paras 19.1.1–19.1.4
3. Ibid, paras 19.2.1–19.2.5

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

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

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

CHAPTER 2

# BACKGROUND

## 2.1 *Report on the Te Reo Maori Claim* (1986)

In 1986, the Tribunal responded to a claim lodged by Huirangi Waikerepuru and Nga Kaiwhakapumau i te Reo Incorporated (the Maori Language Board of Wellington) asking that the Maori language receive official recognition, 'concentrating in particular on broadcasting, education, health and the Public Service'.[1] The claimants argued that the Crown had failed to protect the Maori language and that this was a breach of the Treaty of Waitangi. The Tribunal found in favour of the claimants. It held that by the Treaty the Crown did promise to recognise and protect the Maori language, and that that guarantee required affirmative action, but that educational policy over many years and the effect of the media in using almost nothing but English had 'swamped' the Maori language and done it great harm. In particular, the Tribunal's broad findings and recommendations pertinent to the current inquiry were that:

- Te reo Maori is vitally important to Maori culture and this is encapsulated in the proverb 'Ka ngaro te reo, ka ngaro taua, pera i te ngaro o te Moa' ('If the language be lost, man will be lost, as dead as the moa').
- 'O ratou taonga katoa' in article 2 of the Treaty covers both tangible and intangible things, and can best be translated by the expression 'all their valued customs and possessions'.
- Te reo Maori, an essential part of Maori culture, must be regarded as a taonga, a 'valued possession'.
- The article 2 guarantee requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence, although it would be more profitable to promote the language than to impose it.
- In its widest sense, the Treaty promotes a partnership in the development of the country and a sharing of all resources, and it is consistent with the principles of the Treaty that the language and matters of Maori interest should have a secure place in broadcasting.
- In formulating broadcasting policy, regard must be had to the fact that the Treaty obliges the Crown to recognise and protect the Maori language.[2]

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1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker's Ltd, 1993, p 3
2. Ibid, pp 1, 7, 20, 41, 51

The Tribunal recommended that te reo Maori should be restored to its proper place by making it an official language of New Zealand, with the right to use it 'on any public occasion, in the Courts, in dealing with Government Departments, with local authorities and with all public bodies'. It also recommended that te reo Maori be widely taught from an early stage in the educational process and that instruction in Maori be available as of right to children whose parents sought it. It called for an urgent inquiry into the way Maori language and culture was taught in schools. It proposed the appointment of a Maori language commission to foster the Maori language, watch over its progress, and set standards for its use. And it sought that bilingualism be a prerequisite for certain State service positions.[3]

Some of the te reo Maori Tribunal's further comments are relevant to the present inquiry. While that Tribunal acknowledged that 'the claimants launched their attack on a very wide front', including the areas of health, broadcasting, and justice, it noted that it had focused specifically on education and broadcasting. It did so because the evidence on education was greater than that in all other matters put together, and the largest body of evidence was directed at radio and television broadcasting.

In addition to this narrowing of the focus of the te reo Maori inquiry, the Tribunal did not feel able to deal with even those topics in other than a general way, despite the many specific recommendations (a large number of them related to education and broadcasting) sought by the claimants. In relation to education, the te reo Maori Tribunal thought itself insufficiently well informed or experienced in the education system. With regard to broadcasting, it was mindful that during its inquiry, while the claimants alleged that the then Broadcasting Corporation of New Zealand had not provided adequately for Maori radio listeners and television viewers, a royal commission was conducting hearings into a wide range of matters relating to broadcasting, and the Broadcasting Tribunal was at that time considering applications for the third television channel (one of the applicants for which had raised directly the extent to which Maori television programmes ought to be broadcast). The te reo Maori Tribunal was anxious not to be seen to interfere in the jurisdictions of those bodies. It decided that, although it had jurisdiction to make detailed recommendations, it would not exercise its power. It would confine itself to broad recommendations only. The Tribunal suggested that it might subsequently make additional recommendations, if necessary, after careful consideration of the findings of the other two bodies.[4]

## 2.2 *The Report on Claims Concerning the Allocation of Radio Frequencies* (1990)

The Tribunal's 1990 *Report on Claims Concerning the Allocation of Radio Frequencies* was in response to claims by Sir Graham Latimer, for the New Zealand Maori Council, and Huirangi Waikerepuru, for Nga Kaiwhakapumau i te Reo Incorporated,

3. *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, pp 1–2, 51
4. Ibid, pp 37–41, 49

objecting to the proposed sale by tender of rights to radio spectrum frequencies for 20 years (Wai 150 and Wai 26 respectively).

Urgency arose through the Crown's proposal to sell AM and FM radio frequencies. The Crown had promised to reserve certain frequencies for Maori and was involved in discussions about the Maori allocation. The claimants said, however, that the reserved frequencies (especially the FM frequencies) were inadequate to fulfil the Crown's obligations to protect the Maori language. The claimants filed a detailed request for an urgent inquiry on whether it was necessary for Maori to have available to them a fair share of the FM frequencies to ensure a secure place for their language and culture in broadcasting in New Zealand. They argued that the disposal of frequencies for up to 20 years would place a 'major impediment' on Maori broadcasting.[5]

The chairperson of the Waitangi Tribunal asked the Crown to postpone the sale of the frequencies pending the Tribunal hearing and report. The Minister of Communications respectfully refused. The claimants commenced an action in the High Court seeking a judicial review of the Minister's decision to proceed with the tender in the light of the claims they made. Their action was successful. On 21 September 1990, Justice Heron, in the High Court at Wellington, declared that the Crown should postpone the sale by tender for six weeks. The declaration was appealed to the Court of Appeal, which heard argument in October 1990. The majority of that court found that the Minister could not reasonably have decided to proceed with the tender without first awaiting the report of the Waitangi Tribunal.[6]

An urgent hearing was held. Two themes emerged. The first was the fragile state of the Maori language. The second was the speed with which consultations and the proposed sale process proceeded. Particular comments made by the allocation of radio frequencies Tribunal as a result of the urgency of the hearing are also of some relevance to us in hearing the current claim. That Tribunal noted, for instance, that its report did 'not attempt to address broadcasting issues as a whole'. But it hoped that 'the matters we have considered in relation to the limited issues before us will be borne in mind when other aspects of Maori broadcasting come up for consideration'.[7] These comments have been taken on board by us in our consideration of the current radio spectrum claim.

Also worthy of note are the statements made by the claimants in the allocation of radio frequencies claim. The Wai 26 claimants noted that the broadcasting issues dealt with in the *Report on the Te Reo Maori Claim* were interim only, and that the Tribunal did not make a final recommendation on those matters. The Wai 150 claimants sought an urgent interim ruling and recommendation that nothing be done to pursue the spectrum management policy embodied in the Radiocommunications Act 1989 until or unless there had been a negotiated resolution of all the issues raised in the claim; the Tribunal had made its findings and recommendations; and any title

5. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990, p 11
6. Ibid, pp 11–13
7. Ibid, p 1

to spectrum products that was created by the Act be subject to a caveat that recognised and protected the Maori interest in radio frequencies. Not dissimilarly to the claim before us now, it sought findings that:

> (a) Maori have rangatiratanga over radio frequency allocation in that:
>
> (i) nothing in the terms of the Treaty of Waitangi allows or foreshadows any authority on the part of the Crown to determine, define or limit the properties of the universe which may be used by Maori in the exercise of their rangatiratanga over tikanga Maori;
>
> (ii) where any property or part of the universe has, or may have, value as an economic asset, the Crown has no authority under the Treaty to possess, alienate, or otherwise treat it as its own property without recognising the prior claim of Maori rangatiratanga;
>
> (iii) where any property or part of the universe has value as a cultural asset, because of its ability to assist or sustain an activity which represents the preservation and sustenance (or undisturbed possession) of tikanga Maori, the Crown has an obligation under the Treaty of Waitangi to recognise and guarantee Maori rangatiratanga over its allocation and use for that purpose;
>
> (iv) the sale of exclusive licenses to propagate radio waves has the effect, de facto, of controlling the activity of broadcasting. It places restrictions and prohibitions upon Maori which prevent their guaranteed freedom to exercise rangatiratanga over tikanga Maori; and
>
> (v) the Crown's kawanatanga does not empower it to create property rights in any part of the universe, or any activity which utilises a special quality of the universe, prior to negotiation with, and the express agreement of, rangatira Maori:
>
> (b) the sale of frequency management licenses under the Radiocommunications Act 1989 without negotiating an agreement with Maori would be in breach of the Treaty of Waitangi and prejudicial to the interests of Maori.[8]

The allocation of radio frequencies Tribunal found that:

- neither Treaty partner was aware of the existence of the radio spectrum as we know it today, nor of the potential use of this resource.
- the portion of the electromagnetic spectrum known as the radio spectrum is a limited natural resource.
- the radio spectrum is a taonga for the whole of mankind; neither Treaty partner can have monopoly rights to this resource.
- management of this resource, and the right, manner, nature, and degree of access, must be the subject of effective consultation between Maori and the Crown on the basis that the Treaty on the one hand guarantees the protection of taonga and on the other declares that its covenants were entered into 'in the full spirit and the meaning thereof'.
- the key principle in the management of the spectrum is partnership, requiring each partner to act reasonably and with the utmost good faith towards the other, and that in turn involves the obligation to consult and cooperate.

8. *Report on the Allocation of Radio Frequencies*, p 9

- the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources (again, neither Treaty partner can have monopoly rights in terms of this resource).
- the Treaty granted sovereignty and the delegation to govern but subject to the limitations of the special interests of tino rangatiratanga. This means that consultation between the partners is vital to the Treaty itself and to its spirit.
- there is a hierarchy of interests in natural resources based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follow those who have commercial or recreational interests in the resource.
- the subject matter of the allocation of radio frequencies inquiry is an 'in between' situation. It is not simply a case where Maori can argue prior ownership before the Treaty. Nor can the Crown argue that Maori have no rights to the spectrum other than a general public right, nor a right only in terms of the language. The use of the radio spectrum is so intimately tied up with the use of Maori language and culture, and the protection and development of these things, that the Maori right to access must amount to more than this.
- tribal rangatiratanga gives Maori a greater right of access to the newly discovered spectrum. In any scheme of spectrum management, it has rights greater than the general public, and especially when it is being used for the protection of the taonga of the language and culture.[9]

The allocation of radio frequencies Tribunal noted that the Crown had already accepted that the Maori language is a taonga recognised and protected by the Treaty and that the guarantee of protection obliged the Crown to act affirmatively. It noted that the Crown had also accepted that, as part of these overall obligations, the Maori language and culture must have a secure place in broadcasting, and that Maori language must be promoted as a living language and as an ordinary means of communication. The Crown had also recognised that it had an obligation to consult Maori.[10]

The sum of these obligations, according to that Tribunal, required that the Maori partner be allocated a fair and equitable access to radio frequencies. But the Tribunal noted that equity in these terms did not mean a percentage or an arithmetically calculated share. Rather, it required an allocation on the basis of need and purpose. The state of the Maori language at the time of that inquiry and report was not that of a living language. The allocation of radio frequencies Tribunal noted that intense effort and special concentration of resources was urgently required.[11]

As to the need to consult, the Tribunal stressed that more time had clearly been needed and that this time must be allowed without the threat of an intervening or coexisting tender process being perceived as removing available frequencies or

9. Ibid, pp 39–43
10. Ibid, p 43
11. Ibid

impeding full, free, and uninterrupted achievement of the goals and obligations that it had mentioned. In that Tribunal's view, it required a concerted approach of both Maori and the Crown to determine the precise extent of present and future needs on the one hand, and realistic obligations on the other, if informed decisions were to be made. That Tribunal found that the Crown had recognised the Treaty obligations in the allocation of radio broadcasting frequencies to Maori interests, but that it had failed to recognise the extent to which consultations with iwi would be necessary and the time that ought to have been allowed for this purpose prior to the Government's announcement of its allocation of frequencies to iwi. As a result, the Crown's decision to reserve frequencies did not adequately consider the needs of the people.[12]

Although the allocation of radio frequencies Tribunal found that the Government and its officials had rushed the consultation stage of the process and that it was too confusing to be effective, leading to a 'legacy of distrust', it also found that the Crown's attempts to be a faithful Treaty partner were 'light years' ahead of any previous attempts. The Government and the Ministry of Commerce, through a series of measures, had 'really tried' to promote Maori interests, including adopting a policy of continuous consultations with Maori broadcasting interests as each block of the spectrum was to be prepared for allocation. In addition to this, further technical analysis was 'still being carried out to identify what possibilities there are for FM assignments as the indications are that in many cases these may be preferred to the AM allocated'.[13] We wonder why these policies and ongoing analyses appear not to have been continued.

Also of relevance to our inquiry are the allocation of radio frequencies Tribunal's comments in relation to the active capturing of the rangatahi (youth) audience. That Tribunal noted that, in the context of the claim, consultation and informed decisions required that, if Maori wanted to use radio and broadcasting to reach young people and saw a need to do more in order to make their culture accessible to the nation and to enhance the status and use of their language, the opportunity be taken and the effort encouraged. The Tribunal also stated that:

> Insufficient attention seems to have been directed to the need to utilise popular, fashionable, 'state of the art' technology to achieve the objectives which the Crown has recognised, and to the desirability of avoiding the perception that the denial of Maori access to FM frequencies in these targeted areas results from a downgrading of the Crown's responsibility to an unacceptable level, and makes way for the traditional perception that Maori are to be left with the 'second class' product.[14]

In relation to Maori economic development, the allocation of radio frequencies Tribunal also had some comment to make. It noted that, at the October 1984 Maori Economic Development Summit Conference, the Crown had undertaken to work over the following decade to eliminate the 'development gap' between Maori and

12. *Report on the Allocation of Radio Frequencies*, pp 44–45
13. Ibid, pp 28–29
14. Ibid, pp 31–32

non-Maori in all areas. It further noted that Koro Wetere, the then Minister of Maori Affairs, had pointed out that:

> the pace of development for Maori had to be two steps to everyone else's one, if they were to catch up to non-Maori. The allocation process in our view did not allow for the extra pace necessary in the development of Maori broadcasting.[15]

These themes re-emerge in the current inquiry.

## 2.3 The Broadcasting Assets Litigation and 25–29 GHz Auction

In 1988, the Crown amended the Broadcasting Act 1976 to restructure New Zealand broadcasting and create State-owned enterprises. Nga Kaiwhakapumau i te Reo and the New Zealand Maori Council made an application to the High Court claiming that such a transfer would breach the requirements of section 9 of the State-Owned Enterprises Act 1986, which specifies that nothing in that Act shall allow the Crown to act inconsistently with the principles of the Treaty.

The applicants argued that the Crown's failure to inform itself, by inquiry, as to the extent of its obligation to protect the Maori language in broadcasting and as to the impact of asset transfers upon that obligation was inconsistent with the Treaty. They alleged that decisions to transfer broadcasting assets were taken by the Crown without consultation, or evaluation against Treaty standards. They claimed that inconsistencies with the Treaty also arose from the Crown's failure to establish a system or process to ensure that asset transfer was consistent with Treaty principles. They also claimed that inconsistencies would arise from such transfers, particularly through the loss of the Crown's capacity to protect the language.

The May 1991 High Court judgment on the case dealt with radio and television broadcasting separately.[16] The court was satisfied that, as long as adequate levels of funding continued, the Crown's proposals regarding radio were sufficient to fulfil its obligations in relation to te reo Maori, and it allowed the transfer of broadcasting assets destined for Radio New Zealand. But it was not satisfied with the Crown's proposals in relation to television. The court noted that, if the Maori language was to survive, it was important that 'some Maori language be heard on television, in prime time, and within a programme format which will be watched, by youth in particular', but that this was not happening.[17] It suggested some possible solutions but noted that the means of discharging Treaty obligations to protect te reo Maori was a matter for the Crown, in consultation with Maori and with regard to existing or future recommendations of the Waitangi Tribunal. The court required the Crown promptly to:

15. Ibid, p 32
16. *New Zealand Maori Council v Attorney-General* unreported, 3 May 1991, Justice McGechan, High Court Wellington CP942/88
17. Ibid, p 84

> make the necessary inquiries and proposed reservation arrangements, seek agreement from Maori if available, and whether or not agreement is available, come back to this Court for a declaratory release of the [Television New Zealand] assets concerned subject to any proper reservations.[18]

It set the date of 26 July 1991 for returning to the court.

This led to a series of Cabinet decisions made in July 1991, which were based on the report of an officials committee that had invited Maori views. Those decisions were that:

- Maori should get favourable access to Television New Zealand and Radio New Zealand production facilities and archives (and a one-off payment of $15,000 to assist in achieving this).
- $13 million be allocated over three years for 'the purpose of promoting Maori language and culture in broadcasting, part or all of which could be used to assist in the development of special purpose Maori television'.
- this funding was to be reviewed before 31 March 1994.
- a Maori broadcasting funding agency, Te Reo Whakapuaki Irirangi (Te Mangai Paho), should be established to manage and disburse this additional funding, including funding for the access to or development of transmission and production facilities that may be required in the development of Maori television.
- the following time-frame for the development of special purpose Maori television and the extension of Maori language programming on commercial television ('mainstreaming') be followed:
  - —by 30 September 1991, the Minister of Communications was to hold a hui in Wellington with invited Maori to discuss the broader themes raised during four regional hui on Maori broadcasting held in February and March 1991 and also during the three meetings on Maori television that were organised as part of the officials committee on Maori television's consultations with Maori.
  - —by 30 November 1991, the Minister of Communications was to publish a paper summarising the discussion at the Wellington hui.
  - —by 31 January 1992, officials were to report to Ministers on proposals for the establishment and initial funding of Te Reo Whakapuaki Irirangi, and other assets of a draft policy for the development of Maori television.
  - —arrangements were to be made for a first meeting of the Maori broadcasting funding agency by 30 April 1992.
  - —by 31 May 1992, the Minister of Communications was to publish a discussion document on options for the development of Maori television.
  - —in June or July 1992, a hui on Maori television was to be held.
  - —Government policies on the development of Maori television were to be announced by 31 August 1992.

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18. *New Zealand Maori Council v Attorney-General* unreported, 3 May 1991, Justice McGechan, High Court Wellington CP942/88, p 90

Although Maori sought some modifications to the Cabinet decisions, the Crown declined to accept any changes. On 29 July 1991, the court stated that it was satisfied that the Crown's protective scheme (the Cabinet decisions) would allow the transfer of assets to broadcasting State-owned enterprises consistent with the Crown's legal obligations. It declared that the Crown could now proceed with its proposed transfer of broadcasting assets.[19]

The following month, the New Zealand Maori Council and Nga Kaiwhakapumau i te Reo Incorporated appealed to the Court of Appeal. That court produced its judgment in April 1992. The appeal was dismissed, with a dissenting judgment from the president of the court.[20] The case was then appealed to the Privy Council, which delivered its judgment in December 1993. This appeal was also dismissed. Passages from the Privy Council judgment are contained in the body of our report.[21] Further litigation initiated by various Maori groups in relation to the 1991 Cabinet decisions, and the development of Maori broadcasting, was unsuccessful.

The auction in late 1997 to early 1998 by the Crown of management rights to frequencies in the 25 to 29 GHz range substantially widened the issues in debate again to include those issues outlined in the claim to the Tribunal on the allocation of radio frequencies. While the above litigation had centred around section 9 of the State-Owned Enterprises Act 1986 and the Crown's obligations in relation to the protection of the Maori language, Maori concern about the auction of management rights to frequencies in the 25 to 29 GHz range centred around the provisions of the Radiocommunications Act 1989 and property rights to the radio spectrum, whether Maori had any economic use for the spectrum to be disposed of, and whether Maori themselves regarded the spectrum as useful for the fulfilment of the Crown's obligations to promote and protect te reo Maori and Maori culture. Identically to their concerns relating to the currently proposed Crown auction of management rights within the 2 GHz range of frequencies, Maori claimed that, prior to any announcement of auctions, they should have been consulted about and in agreement with the Crown on the above matters.

As noted above, Maori requested, in the 25 to 29 GHz auction, that the Crown either postpone the auction process until a negotiated solution to the above issues could be reached or reserve to Maori half of the spectrum to be sold until an accurate assessment could be made as to whether the frequencies would be useful to them. The Crown declined to postpone the auction or to reserve any frequencies (unlike its former practice). It did not agree that Maori interests in the spectrum extended to an economic interest in the resource, and it maintained that, because the frequencies to be auctioned were 'not suitable for broadcasting', they were not useful for the protection and promotion of te reo Maori and Maori culture.

19. Document B48
20. *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA)
21. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC)

## 2.4 *RADIO SPECTRUM MANAGEMENT AND DEVELOPMENT INTERIM REPORT* (1999)

### 2.4.1 The majority finding

Our majority finding on the urgent hearing of this claim was that a prima facie case had been made that the claimant would be prejudiced by breaches of the principles of the Treaty if the Crown proceeded with its proposed auction of the 2GHz range without coming to an agreement with Maori to allow them a fair and equitable portion of the 35 management rights that are (still) due to be auctioned.

This finding agreed with those of the *Report on the Allocation of Radio Frequencies*, set out above. In particular, we noted those aspects of that report involving the principle of Treaty partnership, the concept of a hierarchy of interests in natural resources, and the greater-than-general right of Maori (and concomitant duty of the Crown), especially with regard to the protection of Maori language and culture.[22] We also thought that the current radio spectrum claim was broader than the allocation of radio frequencies claim, including the Crown's responsibility to ensure that Maori obtain a fair and equitable share for commercial, social, and educational purposes in addition to language and culture.

Our majority finding held that the Treaty 'was not intended to fossilise the status quo' and is 'a living instrument' to be applied in the light of developing circumstances.[23] This is especially so in relation to development rights arising from the Treaty.[24] We noted that it had been generally conceded that there was a development right for properties specified in the Treaty (eg, fisheries), but that the position with 'other properties', or 'taonga' (unspecified properties), has been less certain. These have been accepted to include intangibles such as language, but there has been a reluctance to concede to Maori a right of possession or development of properties unknown or little used by them in 1840.

We discussed examples of Crown appropriation of gold, petroleum, coal, geothermal energy, and water power. Our majority finding then noted that this Tribunal is not bound by the implications of Justice Cooke's 1994 judgment that 'however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power'.[25] The Tribunal has exclusive authority to determine the meaning and effect of the two Treaty texts in claims before it.

Our majority finding concluded, in relation to the principle of partnership, that neither partner can have monopoly rights over a resource. It is not reasonable, or in good faith, for the Crown to arrogate to itself the whole resource, as it did the radio spectrum under the Radiocommunications Act 1989, and then alienate portions of

22. *Report on the Allocation of Radio Frequencies*, pp 42–43
23. Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report*, Wellington, Waitangi Tribunal, 1999, p 6; see also Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, Wellington, Government Printing Office, 1989, p 52; *Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641, 656 (CA), per President Cooke
24. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, Wellington, GP Publications, 1998, p 120
25. *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, 24 (CA)

that spectrum without ensuring, through consultation, that Maori received an equitable share of it.

We also found that the Crown has a fiduciary duty in its promise that Maori and their property would receive the Queen's protection. This duty should be observed in any alienation of resources by the Crown, whether they were known in 1840 or were discovered or became available through technology at a later date. We then noted that Maori expected, in signing the Treaty, that European colonisation would allow them to share the benefits, including the technologies, of those peoples. This has been described by the Muriwhenua fisheries Tribunal as the principle of mutual benefit.[26]

We supported the principle that any exercise of kawanatanga needs to be tempered by respect for tino rangatiratanga, and that in this instance it means that the Crown is obliged to consult in relation to a variety of matters concerning the spectrum. Our majority finding was that there was no adequate attempt to consult Maori over the auction of the radio spectrum – the Crown confined its consultation to discussion and consideration of language in a broadcasting context only.

We recommended:

(a) that the proposed auction of 2 GHz on 29 March be suspended and negotiations begun with Maori, with a view to reserving for them a fair and equitable proportion of the management rights before the auction is resumed;

(b) that the claimant make arrangements to create a credible authority to negotiate with the Crown; and

(c) that, in the event of Maori and the Crown being unable to reach agreement, the claim be returned to the Tribunal for substantive hearing and further recommendations.

### 2.4.2 The minority finding

#### *(1) First limb*

The first limb of the claim is that Maori have a right to a fair and equitable share in the radio spectrum resource.

The minority finding in our interim report noted the claimant's allegation that the Crown has created and assigned a property right in a resource (the radio spectrum). It warned that the Tribunal should be wary of ascribing ownership rights to either Treaty partner, unless those rights are within article 2. This Tribunal cannot bind future Tribunals.

Our minority decision noted that radio waves were not known in 1840, and that their use requires technology. It proposed that the claimant's argument under the first limb could progress to a claim to light, or to the air that we breathe, the thrust of the argument being that: the resource exists; the Crown purports to regulate or assign it for money; and Maori are therefore entitled to a share.

The minority finding referred to Professor Winiata's view that the radio spectrum is encapsulated within the concept of 'kainga' (a spiritual construct between

26. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, pp 194–195

Papatuanuku and Ranginui), with 'kainga' containing all of creation. Professor Winiata had argued that it was through this concept that the spectrum was protected in article 2: article 2 protection of kainga allows for tino rangatiratanga over all creation. The minority disagreed that this interpretation was the concept of 'kainga' envisaged in article 2, especially in light of its insertion between 'wenua' and 'taonga', leaving little room for the legitimate exercise of kawanatanga.

Our minority decision found that the *Report on the Allocation of Radio Frequencies* appeared to have had a broader focus than the current inquiry, and that it was not laying down general principles. It was noted that sections 5 and 6 of the Treaty of Waitangi Act 1975 gave the Tribunal the power to deal with only that claim on that matter. In our minority's view, the allocation of radio frequencies Tribunal was clearly centrally concerned with the protection and fostering of te reo Maori – all other matters were obiter. That Tribunal's report was short and not intended to state a principle of such wide consequence. Although previous reports are of assistance, our minority stated that we cannot lock the Treaty or its principles into our particular time slot, and that material placed before another Tribunal may not necessarily be before subsequent ones.

With reference to the statement in the *Report on the Allocation of Radio Frequencies* that the radio spectrum is a taonga, our minority noted that the Treaty refers to 'o ratou taonga katoa'. Our minority understood this to mean that the taonga of Maori is reserved to them, not that the taonga of mankind is reserved to Maori in an appropriate share. That was the province of article 3.

With respect to Treaty development rights, our minority saw this as a right to develop a right; for example, fisheries or te reo Maori. It is not, in the minority view, a bare right to develop (which is a matter for social conscience, social equity, politics, and article 3, and not the business and the area of expertise of this Tribunal). Such a bare right would be contrary to President Cooke's judgment in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* that Treaty rights cannot include the right to generate electricity by harnessing water power.[27] In relation to the allocation of radio frequencies Tribunal's recognition of a 'hierarchy of interests' in natural resources, our minority saw this to be a reference to resources simpliciter, and noted that *Ngai Tahu Maori Trust Board v Director-General of Conservation* did not support this. There, the resource was linked back to recognised rights, and not claimed simply because it was a resource.[28]

In relation to the duty to consult, our minority recognised that there is an obligation to consult. But it found that what the Crown did was adequate in the circumstances. The minority decision concluded that the first limb of the claim was not well founded.

27. *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, 24 (CA)
28. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA)

***(2) Second limb***

The second limb of the claim is that Maori have a right to a fair and equitable share in the spectrum, especially where the Crown has an obligation to promote and protect Maori language and culture.

Our minority decision accepted provisionally that te reo Maori was in a parlous state. It had insufficient evidence that ownership of the radio spectrum is critical to fostering te reo, not simply the communications' content, or that the Crown is not adequately discharging its obligations to protect and foster te reo through education and broadcasting. Our minority concluded that it was unable, at the point of writing that section of the report, to find this limb of the claim to be prima facie well founded.

CHAPTER 3

# THE FIRST LIMB OF THE CLAIM

In our interim report, which is summarised in chapter 2, we supported the first limb of the claim, which is that Maori have a right to a fair and equitable share in the radio spectrum resource. We did this on the basis of the *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* and our understanding of the Treaty principles of partnership, the Crown's fiduciary duty, active protection, mutual benefit, the need to temper the exercise of kawanatanga with respect for tino rangatiratanga, and the right to development.[1]

We accepted that Tribunal's view that under the Treaty Maori have a greater right of access to the newly discovered spectrum than the general public and that this right must be determined through consultation between Maori and the Crown. As a result of this substantive hearing, we see no need to modify our interim findings. We set out the reasons for this below in our summaries and discussion of the claimant's submissions and evidence, the Crown's submissions and evidence, and Treaty principles.

Under the Treaty of Waitangi Act 1975, the Tribunal is required to consider whether claimants have been prejudiced by any acts or omissions of the Crown that are in breach of the principles of the Treaty. We note that the Act refers to the principles, not the provisions, of the Treaty. We believe that it is the principles rather than the strict provisions of the Treaty that need to be taken into account in our findings. We discuss issues of Treaty interpretation more fully below.

## 3.1 Claimant Submissions

In her opening submissions for the claimant, Ms Cull said that the claim was based on two principles of the Treaty.[2] First, she specified the principle of partnership and said that where the Crown asserted exclusive authority over a resource, whether or not that resource was known when the Treaty was signed, it had an obligation to provide for the exercise of rangatiratanga over that resource by Maori. Secondly, she referred to what she called the 'principle of taonga' (valuable properties over which Maori

1. See Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990
2. Document B18

were guaranteed rangatiratanga).[3] The claim was concerned with two taonga: the radio spectrum, which is of value to Maori for economic, social, and cultural development; and the Maori language and culture. The Crown had not fulfilled its obligations to Maori language and culture and had failed to consult with Maori over the benefits that the new technology in the 2 GHz band may offer. In the context of the radio spectrum, Ms Cull argued that the exercise of rangatiratanga meant that Maori had a right to control a fair and equitable share of the resource and to be consulted over management decisions affecting the resource. We consider these arguments below.

In the urgent hearing, the claimant argued that the spectrum was a natural resource that existed within the kainga and was therefore protected by the guarantee of tino rangatiratanga.[4] This concept of the kainga was based largely on evidence by Professor Whatarangi Winiata that was originally heard in the allocation of radio frequencies hearing in 1990.[5] However, counsel's opening submission in the substantive hearing made no reference to the spectrum as part of the kainga. Instead, she relied on the proposition that 'the radio spectrum is a taonga' that was of value to Maori for economic, social, and cultural development.[6] Any alienation of management rights to commercial interests prevented Maori from exercising their rangatiratanga.

The presentation of additional evidence and legal argument has strengthened our findings. We summarise some of the key evidence here.

Dr Howard Frederick, the professor of communications studies at Victoria University, was of the view that Maori need to be involved in what he called the 'knowledge economy', whereby the generation and exploitation of knowledge play a predominant part in the creation of wealth. Since Maori are already disadvantaged socially and economically, he argued, they are 'more likely to miss out on the new economy than other segments of society'.[7] Professor Frederick recommended a 'public set aside' of a portion of the spectrum for use by Maori in line with United States policy following a report of the Office of Technology Assessment in 1995. We discuss this report below. Professor Frederick explained that the set aside of part of the spectrum is regarded in the States as part of a:

> federal trust responsibility in this sense, viewed no differently than lands and other natural resources ceded by [Native American] tribes to the US government over the last 200 years in return for monetary and other compensation.[8]

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3. We do not regard single terms used in the Treaty, such as 'taonga', as stand-alone principles. However, used in conjunction with other words in the Treaty, they can become part of a principle. Taonga, like other resources, is subject to Crown protection and Maori rangatiratanga and can be dealt with under various principles, such as partnership and development (see sec 3.3).
4. Document A25, para 4.4
5. Document A21
6. Document B18, para 1.4.1
7. Document B2, p 3
8. Ibid, p 10

We believe that our Government has a similar trust or fiduciary responsibility under the Treaty of Waitangi, though there was no more mention of the radio spectrum in that Treaty than there was in the Native American treaties.

Professor Frederick is the predominant writer of a just-completed draft report for the Information Technology Advisory Group. The report has a chapter headed 'Matauranga tau Hokohoko – The Maori Dimension of Knowledge'. Although we did not sight this report, Professor Frederick quoted from it a variety of evidence that illustrated the low socio-economic status of Maori. Although they constitute 15 percent of the population, Maori users of the internet amount to only 6 percent of the total users. However, he stressed that it was not sufficient to get Maori knowledge on the 'information superhighway'; it was important for Maori to have control over their knowledge. To do that, it was necessary to have a highly skilled Maori workforce with strong information technology skills, 'well integrated with a Maori focus and cultural identity which draws on a Maori knowledge base'.[9] Finally, Professor Frederick stressed that it was insufficient for Maori to be consumers of telecommunications owned and managed by others; they needed to have ownership of some of the spectrum, perhaps to be operated in joint partnership with others. This view was reiterated by other witnesses, notably Bruce Tichbon.

A copy of Mr Tichbon's report to Te Puni Kokiri, 'Implications of Radio Spectrum for Maori Language and Culture', was submitted as part of the supporting documents to Graeme Everton's evidence at our urgent hearing.[10] However, Mr Tichbon was not available for cross-examination until we held our substantive hearing. His report was necessarily on the use of the spectrum for Maori language and culture, which we discuss in chapter 4, but we note here that the report discussed the use of the spectrum for a variety of broader social purposes, such as distance education and medicine.[11] Under cross-examination, Mr Tichbon noted that he became aware of 'broader needs' for Maori from the spectrum in preparing his report. Asked about the benefits to Maori of the ownership and control of some spectrum frequencies, he compared their situation with Native North Americans, where it was recognised that, if they did not have some of the spectrum, they would not be 'in the game'. It was not sufficient to regard Maori merely as consumers, or to provide them with equipment, or to give them training to work in systems owned by others. He said: 'If you don't have some ownership, some stake, some control, some real impetus to be in the game you are reduced to being a sometime observer or student.' He referred to Canadian Indians, and specifically to their company Blood Hills Communication, as being 'in the game'. Their reservation was connected by a loop from an optical fibre backbone that linked various urban centres; a useful example of ways in which remote communities can share in the benefits of sophisticated telecommunications. Though these Canadian Indians worked with a joint partner and had had some 'leg-ups' from their government, they were in control. Since Maori lacked the resources to operate

9. Ibid, p 22
10. Bruce Tichbon, 'Implications of Radio Spectrum for Maori Language and Culture', report commissioned by Te Puni Kokiri, December 1998 (docs A4, B8).
11. Ibid, p 12

alone, they too would need to form a joint-venture arrangement with one of the 'big players'. Mr Tichbon also provided details of alternative policies being applied overseas in the ownership and management of the 2GHz spectrum. He described the New Zealand model as the 'most laissez-faire' in the world and noted how other governments had provided assistance to consumers or disadvantaged groups. In Israel, for example, the government had awarded the spectrum not to the highest bidder but to the company that promised consumers the lowest call charges. In Canada and the United States, a portion of the spectrum was being used to support affirmative action policies for Native Americans and other disadvantaged groups. Mr Tichbon agreed with a suggestion from the Tribunal that, although this affirmative action policy was not 'treaty driven' in the States, it could be so driven in New Zealand, because 'we have a Treaty of Waitangi'. We discuss affirmative action as part of the active protection principle of the Treaty below.

In his submission, Piripi Walker reminded us, as he had reminded the radio frequencies Tribunal, that it was the Crown's attempts to sell licences to operate portions of the spectrum into private ownership that had provoked Maori claims to the Waitangi Tribunal. Maori were concerned with the Crown's 'commercial approach', which would see the alienation of the resource to powerful corporations.[12] On being recalled for further cross-examination, Mr Walker elaborated on these points. When he was asked by the Crown whether Maori could use all the new technologies without having ownership, he replied 'Yes', but added that Maori believed that they had a right to development under the Treaty. Maori saw the Treaty as a guarantee of their property rights, including their right to the spectrum. They had not transferred this to the Crown. Maori had difficulty with the Crown's assumption of rights to the spectrum but were prepared to share it with the Crown, their Treaty partner. Asked by the Crown whether Maori believed that they had a claim on any asset privatised by the Crown, Mr Walker replied that their claim could vary from one to 100 percent. He did admit that the Crown could use its kawanatanga right to regulate use of the spectrum to prevent interference, but not to sell it. In reply to a question from the presiding officer, Mr Walker said that Maori objections to the selling of the spectrum by the Crown arose from the 'finality' of that process.

Dr Charles Royal, the head of post-graduate studies and research at the Wananga o Raukawa, spoke of the uses of video conferencing and 'narrow-casting' in teaching but argued that, where a non-Maori organisation had ownership and control of the technology, Maori interests were likely to be ignored.

Dennis Sharman, one of few Maori in the information technology industry (he owns Sharman Consulting, a computer consultancy), described an audiographic network experiment that he had established at Ngata Memorial College in Ruatoria for Te Puni Kokiri. He noted how this project had increased technology and computer awareness among the pupils and encouraged several of them to seek careers in the industry. However, he also stressed the need for Maori to have control of spectrum frequencies if they were to have 'real and sustainable' employment in the industry.[13]

12. Document B6, p 2; comment added during the reading of his brief.
13. Document B4, p 4

The claimants submitted a 1995 report by the United States Congress Office of Technology Assessment, *Telecommunications Technology and Native Americans: Opportunities and Challenges*.[14] The report was prepared at the request of the Senate Committee on Indian Affairs. It examined:

> the potential of telecommunications to improve the socioeconomic conditions of Native Americans – American Indians, Alaska Natives, and Native Hawaiians – living in rural, remote areas, and to help them maintain their cultures and exercise control over their lives and destinies.[15]

We cannot adequately summarise the report here but note that it is concerned with Native Americans, whose socio-economic conditions are similar to those of native New Zealanders. In the United States, the Federal Communications Commission is responsible for the allocation of spectrum licences. In 1994, it extended preferences in the auction process to various disadvantaged groups, including Native Americans. The report recommends further affirmative action along these lines. However, preferential licences granted on racial grounds have been overruled by the courts and it has usually been necessary for Native American organisations to compete in the auction market with joint-venture partners. This has slowed the development of telecommunications facilities in reservations. Nevertheless, there have been some success stories, such as the Cheyenne River Sioux Tribe Telephone Authority, which owns and operates telephone, cable television, and satellite broadcast operations.[16] It is significant that the report sees the improvement of socioeconomic conditions and the preservation of language and culture of Native Americans as intimately linked; as we do for the claim before us, though it is being pursued under two heads. Finally, we note that, although the report was prepared by an office of Congress, it was advised by an advisory panel, a majority of whom are Native Americans, and carried out extensive consultations with Native Americans in the field. Though the 350 or so Native American treaties, like the Treaty of Waitangi, do not specifically mention the spectrum as a protected property, it is generally recognised that Congress has a trusteeship obligation to Native Americans that stems from the treaties and other federal law. This is very similar to the Crown's fiduciary responsibility under the Treaty of Waitangi. As we shall argue below, we believe that this fiduciary responsibility obliges the Crown in New Zealand, in giving effect to the principles of the Treaty, to apply affirmative action to Maori.

In view of the importance of the Office of Technology Assessment report to our inquiry, we sought further information on it and subsequent developments from one of the Native Americans consulted by that inquiry. We had a good demonstration of the prowess of new telecommunications when, thanks to the Evison Digital Media Centre, we were able to interview James Casey, a Cherokee attorney, in a

14. United States Congress: Office of Technology Assessment, *Telecommunications Technology and Native Americans: Opportunities and Challenges* (OTA-ITC-621), Washington DC, United States Government Printing Office, August 1995 (doc B17)
15. Ibid, p iii
16. Ibid, p 10

teleconference downloaded from satellite. Mr Casey has been involved in applications for tribal spectrum rights and noted that the Federal Communications Commission had set aside the C block spectrum in the 30 GHz range for minority groups, including several Native American tribes. Mr Casey discussed his involvement with some of these, including a group of Cook Inlet Indians. Nevertheless, he admitted that there had been only a few successful stand-alone allocations and a few joint ventures with outside corporations. Allocations made so far were for given localities, usually reservations, and not America-wide. As a result of the court actions, it had been necessary for the tribes to set up new rules defining themselves as small businesses, which would exempt them from the courts' anti-discriminatory ruling. Asked about the fate of the Office of Technology Assessment report, Mr Casey said that after a period of neglect its recommendations were now being actively considered. Finally, Mr Casey noted, in support of that report, that Native Americans did not separate economic and cultural matters, especially on reservations; the two were intimately related and telecommunications were just another tool for furthering both.

In her closing submissions, claimant counsel reiterated that the claim was based on the principles of partnership and 'taonga'.[17] On partnership, she quoted from our interim report on 'the responsibility of the Crown to ensure that its Treaty partner obtains a fair and equitable share of spectrum'. She also quoted the *Report on Claims Concerning the Allocation of Radio Frequencies* finding that 'the ceding of kawanatanaga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of the resource.' Finally, she quoted from the *Report on the Te Reo Maori Claim*, that 'In its widest sense the Treaty promotes a partnership in the development of the country and a sharing of all resources'.[18]

Having argued that Maori were entitled to a share of the spectrum under the principle of partnership, claimant counsel then discussed how best to protect that share. First, she considered the Crown argument, supported by Crown witness Katrina Bach, that the Crown was not completely alienating spectrum rights but merely selling management rights for 20 years, after which the original right reverted to the Crown. Claimant counsel argued that 'in fact those rights are more probably going to be subject to a 'roll over' policy'. The incumbent holders of rights would have considerable leverage through their investment in the resource, and this would 'reduce the ability of the Crown to recapture management rights'.[19] In support, Ms Cull quoted Mr Casey, who said that licences granted in the United States for a mere 10 years were typically rolled over to the incumbent holders. We think that this is likely to happen in New Zealand. If Maori are not granted a share of the spectrum resource now, they are unlikely to get any in 20 years' time. As the Privy Council observed in *New Zealand Maori Council v Attorney-General*, 'if, as a matter of

17. Document B46
18. Ibid, paras 2.4–2.6 (quoting Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990, p 42, and *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker's Ltd, 1993, p 41)
19. Document B46, para 2.8

practical politics, once the assets are transferred they are most unlikely to be replaced, the fact that theoretically they could be is of little significance'.[20] Mr Casey told us that 20 years in technological terms is 'an eternity'. It is essential in our view for Maori to be involved in the technological developments arising from exploitation of the 2GHz spectrum from the beginning, not in 20 years' time.

Secondly, claimant counsel examined the question of where Maori stood in a hierarchy of interests. She cited a variety of overseas and New Zealand precedents for this, including the Canadian cases *Jack v the Queen* and *R v Sparrow*, which provided the precedent for the order of priorities listed in the Tribunal's *Report on the Allocation of Radio Frequencies*, which we noted above.[21] This order of priorities means that the Crown, having ensured the proper conservation of a resource, must satisfy Maori Treaty rights before alienating any remaining resources to private commercial or recreational interests.

Thirdly, claimant counsel considered but rejected the notion that the Crown might meet its Treaty obligations by purchasing for Maori 'substitute' assets or other frequencies not included in the present auction proposal. We also do not support the 'substitute' proposal. Maori should be awarded an equitable share of the 2GHz spectrum before it is privatised, and thus get the opportunity to become involved in the telecommunications industry as owners and managers, not simply as employees and consumers. It is not sufficient to 'compensate' them with some other resource.

Claimant counsel's closing submission continued with an elaborate argument over whether the radio spectrum is a natural resource. We regard this issue as largely irrelevant, since the important issue in this claim is what happens to the resource once the Crown has proposed to alienate rights to use it.

However, Maori Treaty rights to a share of the spectrum still need to be discussed. Here, claimant counsel relied on what she called 'the taonga principle'. She quoted a wealth of opinion from previous Tribunal reports to the effect that taonga is not confined to objects of physical or tangible value, but can include intangibles as well. These included te reo Maori, customs, mauri (life force), ancient sayings, and even thoughts. In referring to a statement by Professor Hirini Mead, claimant counsel said, 'One cannot freeze the term taonga at what it might have meant in 1840. Taonga like the Treaty itself is growing and developing as we understand it more.'[22]

Claimant counsel took up this issue in relation to the right of development. As she put it:

> The Waitangi Tribunal has consistently acknowledged a Maori right of development of resources as a treaty right arising from article II. . . . The right cannot be fossilised as at 1840 and limited only to resources known or used back then.[23]

In relation to the development right, claimant counsel argued in a written submission of 14 May 1999 that this had three levels:

20. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 525 (PC)
21. *Jack v the Queen* (1979) 100 DLR (3rd) 193 (SCC); *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC)
22. Document B46, para 5.9.3
23. Ibid, paras 6.1, 6.3

- the right to develop resources to which Maori had customary uses prior to the Treaty (development of the resource);
- the right under the partnership principle to the development of resources not known in 1840 (development of the Treaty); and
- the right of Maori to develop their culture, language, and social and economic status using whatever means are available (development of Maori as a people).[24]

On the first level, claimant counsel observed that this development right had already been acknowledged in previous Tribunal reports; for instance, in regard to traditional fisheries, where it was already accepted that Maori had a right to use new technology to enhance traditional fishing methods. She saw the radio spectrum claim in the same light:

> In the context of the radio spectrum, the evidence has illustrated that Maori had traditional knowledge of and used parts of the electromagnetic spectrum (Mead, Winiata, Waikerepuru). The development of part of that resource through technology able to channel radio waves into intelligible signals is a development to which Maori have a right.[25]

The development right based on the second level applied to resources discovered and developed since 1840. Although the Crown could exercise its kawanatanga right to manage the radio spectrum in relation to such resources, this was 'constrained by the guarantee of rangatiratanga. It is this argument that the claimants rely on to support the application to the principle of partnership.'[26] The exercise of rangatiratanga in the context of the radio spectrum meant that Maori had a right to be consulted over management decisions affecting the resource and a right to a fair and equitable share of access to that resource.

On the third level of development right, claimant counsel appealed to the human rights convention that supported the right of indigenous peoples to develop as peoples. Since that right is not driven by the Treaty of Waitangi, we do not pursue it, though we note that claimant counsel also appealed to article 3 of the Treaty, which guaranteed Maori the same rights and privileges as British subjects. However, she argued that Maori could not access their article 3 right to develop to the level of non-Maori in view of their social and economic disparities compared with non-Maori. In our view, the Treaty as a whole provides support for the Maori right to develop as a people.

Claimant counsel further argued that the Maori right to development could not be effective where an 'untempered' market-based approach was applied to the allocation of radio frequencies so that 'efficient use' predominated over 'equitable access'. We note that this limb of the claim seeks a fair and equitable share of the spectrum for Maori. An equitable share must take into account socio-economic factors. Claimant counsel noted how the ITU had suggested the reservation of some prime frequencies for lesser developed countries. Since New Zealand is member of the ITU, it should be

24. Document C3, para 4.2
25. Ibid, para 4.5
26. Ibid, paras 46–47

aware of this recommendation. As we have noted elsewhere, the American Federal Communications Commission has reserved spectrum licences for disadvantaged groups, including Native Americans.

We discuss partnership, taonga, and the development right more fully in our Treaty principles section below (see sec 3.3).

## 3.2 The Crown's Submissions

In her opening submissions to the substantive claim for the Crown, Ms Hardy rejected the first limb of the claim.[27] She rejected the claim to the spectrum based on either 'o ratou kainga' (though this was not repeated in the claimant's opening submission to the substantive claim) or on the ground that it was a taonga. In rejecting the claim that the spectrum was a taonga, the Crown argued that the management rights to be auctioned 'are rights to artificially generated radio waves', not a 'natural resource' that existed in 1840, and therefore not a resource to which Maori have a development right under the Treaty. As we have said, we regard this argument as largely irrelevant, since it is the economic aspect of the resource that is created by technology and enhanced in value by the Crown's proposal to sell monopoly rights, which the claim is all about. The Crown submission then asserts that:

> The extremity of the claim is that Maori own all resources in New Zealand and that the Crown might manage those resources for the benefit of all New Zealanders only with the agreement of Maori.
>
> . . . . .
>
> This is a radical claim which in essence asks the Tribunal to rework the entirety of the Crown's social and economic policy in a fundamental way . . . That . . . the Government can manage resources only with the agreement of Maori . . . what is really being challenged is the constitutional role of government and government's broad social and economic policy.[28]

In our understanding, these statements distort what is at issue in the claim. It is not the Crown's management of spectrum rights that is being contested, but the Crown's proposal to sell those rights (for a considerable sum) into private ownership, initially for a period of 20 years. The purchaser receives a monopoly to operate particular bands within the spectrum, or to on-sell that right. It is that monopoly that becomes a valuable resource.

More fundamental, so far as this Tribunal is concerned, is that we are only obliged by our principal Act to investigate the claim before us, not some hypothetical claim that might arise in the future. Any such claim would be investigated by another Waitangi Tribunal, specially appointed to hear that claim. It may well be that the claim before us has been provoked by this Government's exercise of a particular policy – the

27. Document B30
28. Ibid, paras 3.1, 4

policy of privatising 'State' assets. However, the claim comes under our purview only if such policy is in breach of the principles of the Treaty, according to section 6 of the Treaty of Waitangi Act 1975. That section allows any Maori who claims to have been prejudiced by any legislation, policies, practices, acts, or omissions of the Crown since 6 February 1840 to submit a claim to the Tribunal. Section 6(1)(c) refers to 'any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown' that may be inconsistent with the principles of the Treaty and therefore could become the subject of a claim to the Tribunal.

It is well known that the policy of privatisation of State assets, which has been carried on by several administrations, has provoked numerous claims to the Tribunal, many of which have been upheld. As we have indicated, the claim before us is in many respects a repeat of the radio frequencies claim. It was lodged because the Crown proposed to privatise another segment of the radio spectrum. The radio frequencies Tribunal found that the Crown's proposal to sell rights to radio spectrum frequencies was in breach of the principles of the Treaty. The claimant witnesses and their counsel in our hearing have complained that they should not have to 're-litigate' their claim every time the Crown proposes to privatise more of the spectrum, when the Tribunal has already found such a policy in breach of the principles of the Treaty. We agree with that view. This raises the question of whether repeated breaches by the Crown, in pursuit of a policy that has already been held to be in breach of the principles of the Treaty, constitute a further breach of the principles of the Treaty in defiance of the Crown's legislation, the Treaty of Waitangi Act. Are such breaches to continue ad infinitum? A similar situation was commented on by the Privy Council in its 1993 judgment *New Zealand Maori Council v Attorney-General* when it said that 'especially vigorous action' may need to be taken by the Crown to fulfil its Treaty obligations for the Maori language. It added:

> This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.[29]

The Crown supported its submission on the first limb of the claim with the following evidence, much of which was brought forward from the urgent hearing.

Dr John Yeabsley, a senior fellow at the New Zealand Institute of Economic Research, argued that privately held spectrum rights were, for most commercial uses, the best way to ensure that spectrum use maximised value to society as a whole. He believed that the auction would be so structured that the rights would end up in the hands of the most efficient users, but added that this objective could be departed from if the Government were to allocate portions of the spectrum to Maori for promoting economic development, language, and culture. He believed that it would be too costly for Maori to develop a separate infrastructure and that it would be preferable for them

29. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

to work with a joint partner. However, Dr Yeabsley did not believe that it was necessary for Maori to own the spectrum to ensure that they got training in the telecommunications industry, or for them to use telecommunications services as consumers. Though he discussed various ways of reserving a portion of the spectrum for Maori, he believed that any such reservation would deter potential bidders for the remainder. As an alternative to reserving the spectrum for Maori, Dr Yeabsley suggested 'simply providing Maori with cash', which they could use to foster economic development.[30] He concluded that anything that hindered the development of effective communications infrastructure would have possibly significant repercussions on the ability of all New Zealanders to participate fully and competitively in the knowledge economy.

Under cross-examination, Dr Yeabsley admitted that the open auction procedure that he favoured might allow one big bidder to get a monopoly and that, if that happened, it would be necessary to rely on the Commerce Commission to police its behaviour. Asked about the effects of Maori control in joint ventures, Dr Yeabsley replied that this would cost the partner something and therefore have a detrimental effect.

Wayne Wedderspoon, who had presented evidence to the urgent hearing, was further cross-examined on that evidence.[31] As a technical expert in the Ministry of Commerce, Mr Wedderspoon answered questions of this nature but was reluctant to comment on Treaty implications of the Ministry's decisions. Such questions were referred to Ms Bach, who also presented evidence to the urgent hearing.[32]

Ms Bach is the director of the Resources Directorate in the Ministry of Commerce and is also the Ministry's principal Treaty adviser. Asked by Crown counsel whether the Government had considered granting Maori management rights to part of the spectrum, she replied, 'Yes, the matter was considered at length and debated vigorously'. The discussions appear to have taken place on several levels – in the Ministry, in an officials' Treaty strategy committee, and in Cabinet – before the Government finally decided not to offer Maori management rights.

Dr Alan Jamieson, an electrical engineer and telecommunications consultant, and Dr Andrew McEwan, the scientific director of the National Radiation Laboratory, also appeared for the Crown. However, their evidence was largely of a technical nature.

In her closing submissions, Crown counsel argued that:

> the first limb [of the claim] can be swiftly rejected. The Treaty simply does not support the proposition that management rights to the radio spectrum are protected under Article 2.[33]

She said that the economic value of management rights was created by the Crown in regulating the resource, a proposition that we accept. But Ms Hardy went on to say that the Maori claimants were asserting ownership rights:

30. Document B15, para 31
31. Document A13
32. Document A15
33. Document B49, para 5

> quite distinct and apart from any interest that the New Zealand community generally might have in the resource. On such a basis, Maori would have a property right to any 'resource' created [by] Crown activity, such as income from drivers' licence fees.[34]

It seems to us that Crown counsel has created a red herring. Maori have not contested the Crown's kawanatanga right to regulate the use of the spectrum (let alone traffic licences); what they are contesting is the Crown's privatisation of management monopolies. Maybe, if the Crown were also to privatise the levying of taxes, including traffic licences, as in the ancient regime of pre-revolutionary France, Maori would also claim a share of that tax farming. But, as we have said, that would be another claim, for another Tribunal.

Crown counsel went on to examine the claimant's use of kainga and taonga as a basis for her claim to the spectrum. Ms Hardy said that there is no historical evidence of nineteenth-century usage of kainga as a description of the space between Ranginui and Papatuanuku. This may be so, but we do not need to pursue the matter since claimant counsel abandoned the kainga justification in her closing submission. Ms Hardy dismissed taonga as a basis for the claim to the spectrum on the ground that the radio spectrum was unknown to 'people' (not just Maori) in 1840 and could therefore not be part of their taonga ('o ratou taonga katoa'). She added that the Maori claim to the spectrum as taonga was no more valid than a claim by them to coal or gold, which also existed but were unexploited by Maori in 1840. The spectrum claim has some analogy to Maori claims to coal and gold, but probably has a better analogy to oil, since in 1840 the technology did not exist to recover oil any more than it existed to utilise the radio spectrum. As we noted in our interim report, the Crown's claim to petroleum was asserted by legislation in 1937. This was contested by Sir Apirana Ngata, who said that Maori had the right to oil under their land. Whether or not Maori have a claim to such resources under the Treaty relates more to the principles than the strict and somewhat ambiguous terms of the Treaty. We discuss this more fully under Treaty principles below.

In her closing submissions, Crown counsel examined the principles of the Treaty under two heads: development right and partnership. She argued, with the support of quotations from President Cooke in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* and *Ngai Tahu Maori Trust Board v Director-General of Conservation*, and the Tribunal's *Kiwifruit Marketing Report 1995*, that the principles of development and partnership apply only when attached to specific provisions, such as 'their taonga' known in 1840, and to extensions of rights based on those words.[35] Crown counsel asked: 'How can an activity and concept unknown in 1840 develop into something that the Treaty now protects?'[36] She quoted a statement from the Tribunal's *Report on the Orakei Claim* that:

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34. Document B49, para 10
35. *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, 24 (CA); *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 559–560 (CA); Waitangi Tribunal, *Kiwifruit Marketing Report 1995*, Wellington, Brooker's Ltd, 1995, pp 11–12
36. Document B49, para 32

> the essence of the Treaty of Waitangi transcends the sum total of its component written words and puts narrow or literal interpretation out of place. . . . A consideration of the provisions of the Treaty in a vacuum is a barren exercise and not calculated to assist in the formulation of the principles of the Treaty.[37]

However, Crown counsel turned that statement on its head and submitted that:

> a consideration of the principles of the Treaty in a vacuum divorced from the words is a similarly barren exercise. The principles of the Treaty must arise from the words of the Treaty if they are to be 'Treaty' principles. To speak of a principle that has no nexus with the words is to demean the mana of the words of the Treaty and the Treaty itself.[38]

But we must ask: which words, and which Treaty texts? We discuss these and other questions of Treaty interpretation below.

Following the completion of the hearing, Crown counsel submitted two written memoranda. The first, of 14 May 1999, was concerned with the question of consultation with Maori prior to the decision to proceed with the spectrum auction. Here, Crown counsel quoted statements by President Cooke and Justice Richardson from their Court of Appeal judgments in *New Zealand Maori Council v Attorney-General*.[39] From these, she had concluded that, so long as it was properly informed about Treaty responsibilities, 'the principles of the Treaty do not require the Crown to consult its Treaty partner on every proposal or policy that might affect Maori interests'.[40] This may be so, but in this claim we consider that, in view of the previous claims and litigation over radio frequencies, the Crown was obliged to consult Maori as fully as was practicable. Although there was some contact with Maori, or at least correspondence between Ian Hutchings of the Ministry of Commerce with Professor Winiata and Mr Everton, that hardly amounted to consultation. It was more in the nature of a confrontation between men with made up minds.

Crown counsel's second written memorandum, of 18 May 1999, was a response to claimant counsel's written memorandum of 14 May 1999. However, this needs little comment, since it once again complained that the claimants had failed to identify the implications of their claim – this time asking whether the claim to the spectrum could also apply to genetic engineering or solar energy. As we have said, such matters are irrelevant to this Tribunal. Replying to the claimant's complaint that she was being required to re-litigate the issue, Crown counsel said that the first limb of the claim was a new claim from the radio frequencies claim, which she said was about only language and culture. Because of the urgent nature of its inquiry, the allocation of radio frequencies Tribunal did not attempt to address broadcasting issues as a whole, but both the Wai 150 statement of claim and the Tribunal's findings (set out in chapter 2 above) make reference to the broader issues involved. We note that the allocation of radio frequencies Tribunal anticipated that the matters it had 'considered in relation

37. Ibid, para 33 (quoting Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed, Wellington, Brooker and Friend Ltd, 1991, p 192)
38. Document B49, para 34
39. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665, 683 (CA)
40. Document C2, paras 2–3

to the limited issues' before it may be of future relevance. It hoped that these matters would be borne in mind when other aspects of Maori broadcasting came up for consideration.

Finally, Crown counsel complained that it was only in her 14 May memorandum that claimant counsel had raised article 3 in support of her claim. Crown counsel replied that, although claimant counsel had argued that article 3 was a guarantee of economic outcomes to New Zealanders, including Maori, the Crown submitted that 'there is no such guarantee of outcome to citizens requiring transfer of economic assets'.[41] What both counsel have ignored in article 3 is that the Queen extended to Maori 'Her royal protection' as well as imparting to them the rights and privileges of British subjects. That royal protection was also extended to Maori 'just Rights and Property' in the preamble to the Treaty. It is the source of the Crown's fiduciary duty to Maori and needed to be observed in any alienation of resources into private ownership by making provision for Maori to enjoy a fair and equitable share. Any action of the Crown that furthered the disparities between Maori and non-Maori would ignore the Crown's fiduciary responsibility. We discuss the fiduciary principle more fully below.

We now discuss the principles of the Treaty in relation to the respective arguments of the claimant and the Crown, previous assessments by the Tribunal and the courts, and our own understanding.

## 3.3 The Principles of the Treaty Revisited

Before proceeding to any re-examination of our statements on relevant Treaty principles in our interim report that may be required as a result of the substantive hearing, we think it necessary to expand on the question of principles, as opposed to provisions, of the Treaty. A *Concise Oxford Dictionary* definition of 'principle' as a noun describes it as a 'fundamental source, a primary element, a fundamental truth as a basis for reasoning'. What, then, are the fundamental sources, the fundamental truths, of the Treaty of Waitangi?

In considering such matters, we have to remember that there is not one Treaty of Waitangi, but two, one written in Maori, the other in English, and neither is an exact translation of the other. As the country's leading scholar of Maori, Professor Bruce Biggs, has reminded us, the Maori text of the Treaty, composed by the Reverend Henry Williams and his son, was written in what another scholar of the Treaty, Ruth Ross, called 'missionary' Maori.[42] As Professor Biggs pointed out, some of the words that were used, including 'kawanatanga' for governorship or sovereignty, were transliterations of English words grafted onto a Maori root (kawana = governor; tanga = ship). Sometimes, traditional Maori words were made to bear new meanings. 'Tino rangatiratanga [full chieftainship] o o ratou wenua [of their lands]' is translated

41. Document c4, para 9
42. 'Humpty-Dumpty and the Treaty of Waitangi,' in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, Oxford University Press, 1989, pp 300–312

as 'full exclusive and undisturbed possession of their lands' in the English text, with no mention of chiefly control over those lands. The two texts promise different things, and English and Maori speakers take different meanings from them.

It is not surprising that the British (Hobson and his officials) and Maori had different expectations of the Treaty. Different expectations were kindled by what was said about the Treaty at Waitangi and at numerous other places where the Treaty was signed by Maori. These expectations have to be taken into account, according to the *contra proferentem* principle, which was enunciated in the *Jones v Meehan* case in the United States Supreme Court in 1899 and is widely accepted in international law relating to treaties.[43] This said that treaties were to be construed 'in the sense in which they would naturally be understood by the Indians'. In other words, in the event of ambiguity, a provision was to be construed against the party that drafted that provision. The relevance of this to the Treaty of Waitangi, and the Tribunal's responsibilities in interpreting it, was pointed out by the Tribunal as long ago as 1983 in the *Report on the Motunui–Waitara Claim*.[44] That report also noted that the Treaty of Waitangi Act 1975 recognised that there were differences between the two texts of the Treaty and gave the Tribunal exclusive authority in claims before it 'to determine the meaning and effect of the Treaty as embodied in those two texts, and to decide issues raised by the differences between them'. The report added that:

> A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.[45]

The legal drafter of the Treaty of Waitangi Act sensibly relied on the principles rather than the provisions of the Treaty in view of the different texts, the different meanings for Maori and Pakeha of many of the words in those two texts, their different understandings and expectations flowing from those texts, and all that was said about them at the time. Somehow we – and all other Waitangi Tribunals – have to steer a middle ground between those two texts and the understandings and expectations of them in our endeavours to find the principles underlying them. Fortunately, there is now a wealth of interpretation in previous Tribunal findings and court judgments for us to refer to. We shall quote only one: the statement by the Privy Council in *New Zealand Maori Council v Attorney-General*, which neatly balances principles against provisions:

> the 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the

43. *Jones v Meehan* 175 US 1 (1899)
44. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989, p 49
45. Ibid, p 47

> Treaty.) With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms.[46]

In giving more emphasis to principles rather than provisions, we are following that advice, though we are bound to do that anyway in terms of the Treaty of Waitangi Act.

We now discuss, and to some extent build on, the relevant principles that we identified in our interim report. We also make some reference to submissions on principles made by the claimant and Crown counsel. It should be noted that the principles we list are not necessarily exclusive and that there is some flow on from one to another.

### 3.3.1 Partnership

Partnership has been so widely described by the Tribunal and the courts as a principle of the Treaty that we hardly need to explain it further. In the claim before us, the argument has been over not the existence of the partnership principle but the rights and obligations of the respective partners. The claimant has asserted that, under the partnership principle and in exercising their rangatiratanga, Maori are entitled to a fair and equitable share of the available spectrum that can be used for commercial, social, and cultural purposes, in addition to language and culture. The Crown, while not unmindful of its obligations to protect Maori language and culture (which we discuss under the second limb of the claim), does not accept a partnership obligation to allocate Maori a share of the spectrum for commercial, social, and cultural purposes. The Crown is of the view that Maori could bid for the spectrum, in competition with others, and that it is not necessary for them to own it, since they could have access to it as consumers.

In our interim report, we noted the finding of the *Report on the Allocation of Radio Frequencies* that partnership was 'the key principle in the management of the spectrum'. That report also said that the partnership principle required each partner to act 'reasonably and with the utmost good faith' towards the other, and that 'the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources'. 'Neither Treaty partner,' it said, 'can have monopoly rights in terms of the resource.'[47] This is accepted by the Wai 776 claimant, who has said that under the partnership principle the Crown had a duty to consult Maori, amongst other things, over the allocation to them of a share of the spectrum.[48] The *Report on the Allocation of Radio Frequencies* proposed a hierarchy of interests in the allocation of resources and said that tribal rangatiratanga gave Maori greater rights of access to the newly discovered spectrum than the general public. We agree with those findings and think that they are equally applicable to the claim before us. However, in its handling of further spectrum allocations since the radio frequencies report, the Crown has ignored the findings of that report. If it were to proceed with

46. *New Zealand Maori Council v The Attorney-General* [1994] 1 NZLR 513, 517 (PC)
47. *Report on the Allocation of Radio Frequencies*, p 42
48. Claim 1.1

the proposed auction of 2 GHz spectrum rights, without giving prior consideration to Maori rights, the Crown would be in breach of its partnership obligation.

The *Report on the Allocation of Radio Frequencies* said that the obligation of the Treaty partners to act 'reasonably and with the utmost good faith' towards one another 'involves the obligation to consult'.[49] As we have noted above, the Crown in its memorandum of 14 May 1999 does not consider that the principles of the Treaty require it to consult its Treaty partner on every proposal affecting Maori interests.[50] So far as the proposed auction of further frequencies within the spectrum was concerned, the Crown considered it sufficient to be 'properly informed', through its officials, of any Treaty obligation before proceeding with the auction. Since the officials decided that Maori had no claim under article 2 of the Treaty to the spectrum frequencies to be auctioned, they advised Cabinet to go ahead with the auction. Professor Winiata was not consulted but informed of an established position. Consultation between Treaty partners acting reasonably and with the utmost good faith to one another required, in our view, fully fledged discussion, preferably in an atmosphere that respected Maori tikanga, with every attempt to find an agreed position that was in accord with Treaty principles. In view of the background to the proposed alienation of further spectrum rights, and especially the *Report on the Allocation of Radio Frequencies*, we believe that the Crown was obliged to consult Maori as fully as practicable before proceeding with the auction of more spectrum rights.

### 3.3.2 Rangatiratanga

Rangatiratanga and kawanatanga have sometimes been regarded as stand-alone principles of the Treaty, but it is inappropriate to consider them separately. The Tribunal has usually taken the view that the Crown's exercise of kawanatanga, or governance, needs to be tempered by respect for rangatiratanga, or chieftainship. The meaning of 'rangatiratanga' has been variously interpreted. It certainly means more than 'possession' (the translation used in the English text of the Treaty) and includes chiefly authority and self-management. The cession to the Crown of kawanatanga did not, in the words of the *Report on the Allocation of Radio Frequencies*, 'involve the acceptance of an unfettered legislative supremacy over resources', or give either Treaty partner monopoly rights over them.[51] In our view, the Crown was entitled to use its kawanatanga authority to manage the spectrum in the public interest; for instance, to ensure that there was no jamming of frequencies according to international standards. However, it was not entitled to sell management rights without consideration of Maori rangatiratanga rights. This required, in our view, full consultation and negotiation from an early stage to ascertain the Maori interest and ensure that Maori secured a fair and equitable proportion of the spectrum before the remainder was auctioned. Though it is acknowledged that the Crown sometimes has

49. *Report on the Allocation of Radio Frequencies*, p 42
50. Document C2, para 2
51. *Report on the Allocation of Radio Frequencies*, p 42

difficulty in finding a mandated Maori authority with whom to negotiate, we note that the New Zealand Maori Council has had a long involvement with radio frequency claims and was an appropriate starting point.

### 3.3.3 Fiduciary duty

As we have noted above, the preamble to the Treaty and article 3 impose on the Crown a duty to protect Maori 'just Rights and Property'. That fiduciary duty is also carried over to article 2 with its guarantee (in the English text) of 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties ... so long as it is their wish and desire to retain the same in their possession'. Where there was doubt over what was included as taonga (or 'other properties'), the Crown had an obligation to ascertain Maori views to see what they regarded as 'their taonga' and, under the fiduciary obligation, to ensure that they were protected. Although there was provision for a Crown right of pre-emption to acquire such land as Maori were willing to sell, there was no provision for the acquisition by the Crown of 'other properties'. It is difficult to sustain an argument that the Crown therefore had a right under the Treaty to other, unspecified (or indeed undiscovered) properties, no matter what other rights it might claim under English common law. When the Treaty was negotiated, Maori were not told that under the common law the Crown would claim the radical title to all land in New Zealand, despite what the Treaty said. Nor were they told that, under the common law, 'royal metals' were reserved for the Crown, as were the seas below the high-water mark to a limit of three miles. Later, where the common law was insufficient, the Crown was to establish title to other properties by legislation, including the Petroleum Act 1937 and the Radiocommunications Act 1989. Such encroachments on properties undefined in the Treaty not only used the Crown's right of kawanatanga to overcome Maori rangatiratanga but defied the Crown's fiduciary obligation under the Treaty to protect Maori 'just Rights and Property'.

### 3.3.4 Active protection

It might be said that the Crown's fiduciary obligation to protect Maori rights and property is not merely a passive obligation to protect Maori while also actively promoting European colonisation of the country. The Crown's fiduciary obligation meant that it had actively to protect Maori from spoliation during that process of colonisation. It failed to do so, and many of the claims before the Waitangi Tribunal are a consequence of that failure. A good many of those claims have been heard and reported on by the Tribunal or dealt with by direct negotiation between the Crown and claimants, and settlements reached. The Crown deserves credit for settlements that have been concluded. These have done much to restore or compensate for lost resources. However, there is also a need for affirmative action directed towards correcting an imbalance in the socio-economic situation of Maori compared with non-Maori, which is a long-term consequence of colonisation and the loss of Maori

resources. An equitable share of the spectrum could help to correct the present imbalance. The Crown's duty of active protection continues today when resources to which Maori assert a Treaty-based claim are alienated into private ownership. It is important that the Crown in handling such issues does not itself provoke more Treaty-based claims such as the one before us.

### 3.3.5 Mutual benefit

In our interim report, we drew attention to the expectation of many Maori, when they signed the Treaty, that by allowing European colonisation to proceed they would share in the benefits, including new technologies, that foreigners brought to their shores. We quoted an extract from the Tribunal's *Report on the Muriwhenua Fishing Claim* to this effect.[52] That report called this sharing of new technologies the principle of mutual benefit. We think that it applies particularly to the claim before us. However, it must be a real sharing, in which Maori participate as owners and managers, possibly in joint partnerships, and not merely as consumers.

### 3.3.6 Development

As we noted in our interim report, there have been differences between the courts and the Tribunal, and indeed between different Tribunals, over the extent to which the Treaty allowed development rights. While it has been generally accepted that there is a development right (which includes the use of technology unknown in 1840) for properties specified in the Treaty, such as land, forest, and fisheries, there has been little agreement over the unspecified 'other properties' or taonga. The Crown accepts the development right for specified properties, such as fisheries, and some taonga, such as language and culture. However, it does not accept that the radio spectrum was a Maori taonga in 1840 and therefore does not accept that Maori have a special right to share in the use of the spectrum that subsequent technology has made possible. The claimants, on the other hand, say that Maori knew of the existence of the electromagnetic spectrum, regarded it as a taonga, and are entitled to share in the exploitation of those parts of the spectrum that post-1840 technology has made possible. As we have said, we do not need to get into the argument of whether the radio spectrum is a 'natural resource'. It is sufficient to say that radio waves existed in nature – as light and sound – and could be captured to a certain extent by humans through their eyes and ears. But in 1840 there were few technical devices that could be used to extend human sight and sound. Maori were aware of the existence of various natural phenomena, made good use of some of them – for instance, the use of light emitted by stars for navigation – and incorporated them into their own philosophical world view. One example of this cited by Professor Mead was Tawhaki climbing the heavens to bring to earth knowledge, education, and sacred incantations for the

52. Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report*, Wellington, Waitangi Tribunal, 1999, p 8 (quoting Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, p 195)

spiritual wellbeing of the people.[53] Maori were therefore using radio waves for their own purposes, though they (along with all others) lacked the technology that we have today to enhance sight and sound.

We therefore accept claimant counsel's submission of 14 May 1999 that 'Maori had traditional knowledge of and used parts of the electromagnetic spectrum', that it was in these ways their taonga, and that they have a Treaty right to the development of that taonga through technology that has subsequently become available.[54] We also accept the second level of claimant counsel's submission that Maori have a right under partnership and other principles specified above to the development of resources that were not known about in 1840 or that were used in a traditional manner. In doing so, we note the opinion of previous Tribunals and court judgments that the Treaty must not be fossilised at 1840 but be interpreted to meet new and changing circumstances. We also note that the radio frequencies Tribunal concluded that there were 'many kinds of taonga' and that they may include 'things which are not yet known'. However, that Tribunal said that the 'taonga of the spectrum is different in essence . . . from any other taonga known by or used by any of the tribes', including 'taonga tuku iho i nga tupuna' (taonga handed down from the ancestors). Since the spectrum was a 'natural resource' enveloping the whole of the earth, it could not be possessed by any one person or group; it was 'a taonga to be shared by the tribes and by all mankind'. Neither of the Treaty partners could have monopoly rights to it.[55] We agree with those conclusions.

Finally, we comment on development rights today. Commenting on the same issue in 1990, the *Report on the Allocation of Radio Frequencies* picked some comments from the even earlier 1984 Maori Economic Development Summit Conference, which had undertaken to work over the following decade to eliminate the 'development gap' between Maori and non-Maori in all areas. Koro Wetere, the then Minister of Maori Affairs, had said that 'the pace of development for Maori had to be two steps to everyone else's one, if Maori were to catch up with non-Maori'. The radio frequencies Tribunal said that the allocation process in radio frequencies did not allow for that extra pace necessary for the development of Maori broadcasting.[56] All those observations are as true today as they were 10 or 15 years ago. It is equally necessary for Maori to have frequency allocations in the 2 GHz spectrum if they are to take those extra steps forward.

53. Document B10, para 3.8.1
54. Document C3, para 4.5
55. *Report on the Allocation of Radio Frequencies*, pp 40–41
56. Ibid, pp 31–32

CHAPTER 4

# THE SECOND LIMB OF THE CLAIM

The second limb of the claim asserts that Maori have a right to a fair and equitable share of the spectrum, especially where the Crown has an obligation to promote and protect Maori language and culture.

We have already accepted that Maori have 'a right to a fair and equitable share of the spectrum' in relation to the first limb of the claim. It follows that this should be so where the Crown has an obligation to promote and protect Maori language and culture. The two limbs of the claim are linked in that Maori ownership and management of spectrum frequencies would, in our view, give them better control over the uses of those frequencies for promoting – indeed 'owning' – language and culture. We shall indicate as this chapter proceeds that there are various ways in which a Maori share of the spectrum could be used to protect and promote Maori language and culture.

## 4.1 Claimant Submissions

In her opening submissions, claimant counsel said that the Crown had breached its obligations to promote and protect Maori language and culture by failing to consult Maori on the benefits that the new technology in the 2GHz band and other telecommunications frequencies may offer. And the Crown had not fulfilled its obligations in relation to Maori culture by restricting its policies to the protection of language only, and that only in the context of broadcasting.[1] She called several witnesses, some of whom had appeared at our previous hearing, in support of those contentions. She used evidence from Professor Howard Frederick and Bruce Tichbon for an explanation of ways in which new telecommunications could be used to support language and culture. She called Piripi Walker, a well-known Maori broadcaster, for evidence on the situation of Maori language and culture in present-day broadcasting services. The Tribunal recalled him for further cross-examination.

In her closing submissions, claimant counsel again complained that the Crown had failed to consult Maori before deciding to proceed with the auction of the spectrum, on the assumption that the sale of management rights to others would not prevent Maori from accessing those services. If it proved necessary, the Government would step in to facilitate Maori access to those services. Only at this stage was the

1. Document B18, para 1.4.2

Government prepared to consider consultation with Maori.[2] Claimant counsel also complained that the Crown had failed 'to acknowledge the potential that third generation technology and other non-broadcasting technology may have for Maori language and culture'.[3] She denied claims by the Crown that it was fulfilling its obligations in relation to Maori language promotion through broadcasting and education. She quoted from the Privy Council decision in the 1993 broadcasting assets case that, with the language as a taonga 'in a vulnerable state', the Crown may well be required 'to take especially vigorous action for its protection' in fulfilling its obligations.[4] If the Maori language was in a 'vulnerable' state in 1993, the situation had not improved by 1999. Claimant counsel said that the language was now 'in a parlous state, is very fragile and at a critical point'.[5] She referred to evidence from Huirangi Waikerepuru, Professor Hirini Mead, and Mr Walker, and the Te Puni Kokiri publication *The National Maori Language Survey* for confirmation of these assertions. The survey pointed out that, although 59 percent of Maori surveyed had some proficiency in the language, only 8 percent professed themselves to be highly fluent, 43 percent had 'low fluency', and another 41 percent did not speak Maori at all. Older Maori were more likely to be fluent speakers, with young Maori also likely to have some ability in the language, but those in the 25 to 44 year age bracket were the least fluent group.[6] Further information from the survey on fluency levels is included at section 1.5 of our minority finding. Nor is the problem confined to fluency; comprehension, reading, and writing abilities are similarly low. Further evidence submitted to the Tribunal, such as the Law Commission report *Justice: The Experiences of Maori Women*, confirms what claimant counsel called 'the fragile state of the language'.[7]

Claimant counsel complained of a 'slippage' in Crown support for Maori language and culture in broadcasting since 1991. As examples of this, she listed the failure after 10 years to establish a Maori television channel; difficulties for Maori funding likely to arise from the abolition of the broadcasting fee; the shifting of television Maori news programmes to off-peak times; the cancellation of Maori television news during the summer months over the last three years; the plan to stop Maori news broadcasts on National Radio next July; and the proposal to delete the reference to 'Maori culture' in section 53E(c) of the Broadcasting Act 1989 under the planned amendment currently before Parliament. Counsel said that there was also 'slippage' in education, as seen in the recent fall-off in enrolments at kohanga reo, attributed at least in part to the removal of childcare subsidies, the failure substantially to increase enrolments in kura

2. Document B46, para 7.43
3. Ibid, para 7.1.3
4. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)
5. Document B46, para 7.5
6. Te Puni Kokiri, *The National Maori Language Survey: Te Mahi Rangahau Reo Maori*, Wellington, Te Puni Kokiri, *c*1995 (doc B21), p 60
7. Document B46, para 7.16; see also Law Commission, *Justice: The Experiences of Maori Women – Te Tikanga o te Ture: Te Matauranga o nga Wahine Maori e Pa Ana ki Tenei*, New Zealand Law Commission Report 53, April 1999 (NZLC R53) (doc B23)

kaupapa, and the failure to provide adequate establishment funding for wananga (the subject of a recent Tribunal report).

This 'slippage' has wider social and economic implications. Claimant counsel complained that the failure of the Crown to make available adequate financial resources to fulfil its obligations meant that it was unlikely that Maori would ever achieve comparable benefits to those enjoyed by non-Maori. We received a report prepared by Te Puni Kokiri, *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori*, which provided uncomfortable evidence that there has been no overall progress. As the chief executive of Te Puni Kokiri, Dr Ngatata Love, wrote in the foreword, 'It is disturbing to find that despite improvements for Maori in some areas, gaps have either remained the same or widened'.[8]

While it is evident that our education and broadcasting systems are failing to foster and develop Maori language and education, any failings by the Crown in this respect are only relevant as background to the issue before us. We have to consider whether the radio spectrum rights about to be auctioned are likely to be of value to Maori for the promotion of their language and culture. In coming back to this issue, claimant counsel drew attention to Mr Tichbon's report, especially sections 5.1 and 5.2. These noted the low level of penetration of existing telecommunications services with Maori, the importance in the promotion of language and culture in two-way, face-to-face communication, and ways in which new services using the 2GHz spectrum frequencies could be used to foster language and culture. The latter services included narrow-casting, through terminals in homes, schools, and community centres, video-conferencing, distance education and other social services, and tele-working. Many of these services could be used for remote areas (as well as urban concentrations of population). In cross examination, Mr Tichbon gave further detail of the possibilities of servicing remote areas, and of a gradual reduction in prices of equipment that was making such operations increasingly viable.

Three claimant witnesses, all experts in the teaching of Maori language, Professor Mead, Huirangi Waikerepuru, and Piripi Walker, agreed that the technologies discussed by Mr Tichbon would be extremely valuable in halting the decline of Maori language. James Casey, the Cherokee attorney we cross-examined by teleconference, described how similar technologies were being used in North America for Indian cultural preservation. Claimant counsel also referred to a report by the Ministry of Education, *Interactive Education: An Information and Communication Technologies Strategy for Schools*.[9] This provided further confirmation of the usefulness of new information communication technologies, some of which would be available on the 2GHz spectrum frequencies, for teaching Maori language and culture. Finally, she referred to the Te Puni Kokiri funded experiment in tele-learning at Ngata Memorial College, also described by Mr Sharman in his evidence, as an example of what could be done with new technology in remote areas. Claimant counsel concluded that 'the

8. Te Puni Kokiri, *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori: A Report to the Minister of Maori Affairs*, Wellington, Te Puni Kokiri, 1998 (doc B38), p 1
9. Ministry of Education, *Interactive Education: An Information and Communication Technologies Strategy for Schools*, Wellington, Ministry of Education, 1998 (doc B40)

use of technologies to promote language and culture by the use of the 2 GHz band has enormous potential'. She accused the Crown of failing to investigate the possibilities of the band for Maori language promotion.[10]

## 4.2 Crown Submissions

In its opening submission, the Crown admitted that 'the conceptual basis of the second limb of the claim has more substance'.[11] It accepted that te reo Maori was a taonga. However, the opening submission did not include culture with language as a taonga, though in response to a question from the presiding officer, Ms Hardy said that the Crown did accept culture as a taonga. She added that culture was very broad in content. This hesitation is perhaps a reflection of the Crown's lack of firm action over culture, as distinct from language, over recent years.

The Crown's opening submission admitted that, despite some improved statistics in recent years, further improvement was important. The Crown did consider whether ownership of management rights in the 2 GHz spectrum was required to meet Treaty obligations in relation to te reo Maori but concluded that this was not so. Ownership of management rights was not necessary for Maori to use the technologies, since the content of communication, as with the telephone, was in the hands of the users. Nor was ownership necessary to provide Maori with training and skill. Several Crown witnesses who had submitted evidence and been cross-examined at our urgent hearing were recalled for further cross-examination on that evidence.

In her closing submission, Crown counsel again admitted that the second limb of the claim was 'conceptually more convincing'.[12] The Crown now said that it accepted that 'language and culture are taonga'. Ms Hardy quoted and accepted some statistics from the *National Maori Language Survey* and said that 'The Crown accepts, however, that the statistics are not satisfactory'.[13] She added that the question before the Tribunal was 'whether management rights in the 2 GHz spectrum are a proper remedy'. The Crown concluded that allocation of such rights was not 'an appropriate or required remedy'.[14] Ms Hardy explained that the Crown addressed the issue of te reo Maori through education and broadcasting. She provided details of what the Government was doing, and planned to do, through its Maori language education plan. She also provided details of Crown funding for broadcasting, noting an increase in funding of Te Mangai Pango from $3.55 million in 1997–98 to a proposed $15 million in 1999–2000. She noted that 20 iwi-based radio stations were operating and that a trust had been established to set up a new Maori television channel. She admitted that the Crown had an obligation to revitalise the language and that more

10. Document B46, paras 7.28, 7.42
11. Document B20, para 5
12. Document B49, para 6
13. Ibid, para 41
14. Ibid, paras 42–43

action was needed to achieve that outcome. What the Crown did dispute, however, was the remedy proposed by the claimants – that both the 2GHz spectrum and the ownership of the management rights to it were necessary for the effective protection and promotion of the language and culture. The Crown assumed that existing services were sufficient for these purposes.

## 4.3 Treaty Principles

Since the publication of the Tribunal's *Report on the Te Reo Maori Claim* in 1986, it has been recognised that the Maori language is a taonga and therefore protected by the Treaty. The te reo Maori Tribunal accepted a submission from Professor Mead, who argued that the phrase 'o ratou taonga katoa' in the Maori text of article 2 covered both tangible and intangible things and could best be translated as 'all their valued customs and possessions'. The Tribunal concluded that 'the language is an essential part of the culture and must be regarded as "a valued possession"'.[15] Ever since, it has been accepted that the language is a taonga. The position over Maori culture has been less certain, though as the quotations just used imply, culture is equated with customs, and language is regarded as part of culture. It is appropriate, therefore, to assume that culture is also protected as a taonga.

In addition to that, there is the so-called fourth article of the Treaty, a verbal promise by William Hobson at the Waitangi ceremony that 'the several faiths of England, of the Wesleyans, of Rome, and also Maori custom, shall be alike protected by him'. Hobson made this promise in response to an intervention from the Catholic bishop Pompallier, who wanted a guarantee that there would be freedom of religion, and one from William Colenso, who asked for the protection of Maori custom.[16] In the Maori translation of Hobson's promise, Maori custom was rendered as 'ritenga'. The *Dictionary of the Maori Language* translates this as 'custom, habit, practice'.[17] In international law, verbal promises made in association with treaty signings become part of those treaties. However, there is no need to rely on the 'fourth article', since there is sufficient guarantee for Maori culture as a taonga in article 2. The only problem, as Crown counsel reminded us, is that culture can be very broadly defined.

Since the Crown has also agreed that language and culture are taonga and therefore that it has a responsibility to protect and enhance them, we need spend no time arguing that case. Nor do we need to discuss Treaty principles at any length. It is sufficient to say that the principles outlined in the previous chapter apply equally to the protection and enhancement of Maori language and culture. From the evidence submitted to us, it is clear that the Crown could do more to promote language and culture through the existing education system and broadcasting – and through other fields. The 2GHz spectrum is one of those fields where the Crown could facilitate its

15. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker's Ltd, 1993, p 20
16. Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin New Zealand Ltd, 1987, p 53
17. H Williams, *A Dictionary of the Maori Language*, 6th ed, Wellington, Government Printer, 1957

obligations with regard to language and culture through Maori ownership and management of some of the frequencies. We take up this question in our findings and recommendations.

We believe that the evidence submitted demonstrates that the Crown has not been adequately fulfilling its obligations in relation to Maori language and culture, especially since 1991, when there has been some slippage in the Crown's commitment to, and support for, them in education and broadcasting. We also note that, while the Crown has remained committed to the protection and enhancement of the language, it appears to be trying to shed its commitment to culture – for instance, by the proposed deletion of the reference to 'Maori culture' in the Broadcasting Act 1989.

It is not sufficient for the Crown to rely on existing methods and technologies in existing institutions. In view of the crisis in Maori language, every means must be employed to ensure the survival of the language. Maori have only a very limited involvement as owners or managers of existing telecommunications services. Even as consumers – for instance, in the possession of telephones – they are less endowed than non-Maori New Zealanders. We believe that this imbalance will be exacerbated if the same regime prevails with the auction of the 2GHz frequencies, since, without help from the Crown, Maori will be unable to purchase these in competition with the large corporations that are predicted to prevail. We believe that if the Crown is properly to fulfil its Treaty obligations, it must reserve a fair and equitable portion of the spectrum frequencies, as it has done to some extent with the issue of previous licences for radio and television frequencies. What we have said in our previous chapter on the need for Maori to have control of frequencies for economic and social purposes applies equally to linguistic and cultural purposes: Maori need to have the means whereby they can manage and 'own' their language and culture.

The Crown has suggested that it could compensate Maori for the failure to reserve any of the frequencies about to be auctioned by granting them frequencies elsewhere. We believe that this would be an inadequate alternative.

We now consider what value the new technologies likely to be used to exploit the 2GHz spectrum frequencies could have for Maori language and culture. We have been told that the frequencies are most likely to be used for short-distance telecommunication, especially by cellphone. It is said that they will be most lucrative in densely populated areas and far too costly to provide for remote, sparsely populated rural areas. For this reason, the Crown and its advisers appear to have decided that the new services will be of little use to Maori, and that it would be sufficient for Maori to use them as consumers. We do not accept that this decision is correct, or advisable, in view of the Crown's Treaty responsibilities. We heard from Mr Tichbon that it is already possible and not prohibitively expensive to download information from satellites and retransmit it from local sites in remote areas. He added that the equipment was likely to become considerably cheaper in the near future. We heard from Mr Casey how various reservation Native Americans in the United States and Canada are 'getting on the loop' for telecommunications. We believe that, where there is a will, there will be a way to get telecommunications, using some of the 2GHz frequencies, to Maori communities, whether urban or rural. The

trouble has been a lack of will, and perhaps a lack of commitment to Treaty obligations, in the Ministry of Commerce. Officials seem to have been content to take the easy, and for the Crown the potentially lucrative, way of auctioning the spectrum frequencies to the highest bidders. When questioned, most of the witnesses admitted that the successful bidders are likely to be foreign multinationals. If we can judge by the performance of such owners of existing services – for example, TV3 and TV4 – their commitment to Maori language and culture is likely to be minimal.

We conclude that, if the Crown's obligations under the Treaty principles relating to partnership, rangatiratanga, fiduciary duty, active protection, mutual benefit, and development are to be effectively fulfilled for the language and culture of Maori, as well as for their social and economic wellbeing, it will be necessary for the Crown to facilitate the fuller involvement of Maori in the telecommunications industry through the ownership and management of spectrum frequencies. In this respect, the two limbs of the claim are tied together. Maori language and culture can hardly thrive in a situation of endemic Maori poverty.

CHAPTER 5

# FINDINGS AND RECOMMENDATIONS

## 5.1 Findings

We find both limbs of the claim to be well founded and believe that the claimant would be prejudiced if the Crown were to proceed with the proposed auction of 2 GHz frequencies without previously reserving for Maori a fair and equitable portion of those frequencies.

We also find that the Radiocommunications Act 1989, in so far as it allows the Crown to alienate management rights to the spectrum from 9 kHz to 3000 GHz, without consultation with Maori and without allowing them a fair and equitable share of those rights, is in breach of the principles of the Treaty of Waitangi.

Our finding on the first limb of the claim follows the reasoning of the allocation of radio frequencies Tribunal (which also considered Crown proposals to allocate different parts of the spectrum). We also accept the claimant's argument that the electromagnetic spectrum, in its natural state, was known to Maori and was a taonga. And we accept that they have a right under Treaty principles to the technological exploitation of that spectrum after 1840, just as the Wai 26 and Wai 150 claimants had a right, in the view of that Tribunal, to a fair and equitable allocation of the radio frequencies then being offered by the Crown. Our finding on the second limb of the claim follows the reasoning of the *Report on the Te Reo Maori Claim*, which accepted that Maori language and culture were taonga, which the Crown was bound by article 2 of the Treaty to preserve.[1]

The operative Treaty principles, which are applicable to both limbs of the claim, are as follows:

*Partnership:* whereby the Crown was obliged to protect the properties of its Treaty partner and, in any attempt to convert a regulatory regime into a property right, was required to consult and negotiate with its partner a fair and equitable share of that property.

*Rangatiratanga:* the Crown cannot use its kawanatanga right, which allowed it to regulate the resource in the public interest, to convert that right into private property (albeit technically for only 20 years) without considering the Maori rangatiratanga right to both own and manage that resource.

*Fiduciary duty:* the Crown has an additional fiduciary duty, running right through the Treaty, to protect Maori 'just Rights and Property' and, in the event of Maori

1. See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker's Ltd, 1993

being adversely affected by the process of colonisation, to correct that imbalance by affirmative action.

*Mutual benefit:* Maori expected, and the Crown was obliged to ensure, that they and the colonists would gain mutual benefits from colonisation and contact with the rest of the world, including the benefits of new technologies.

*Development:* Maori expected and were entitled to develop their properties and themselves and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments. The Treaty – or rather the two Treaties that the parties agreed to – needed to evolve to meet new and changing circumstances.

## 5.2 Recommendations

We recommend, as we did in our interim report, that the Crown suspend the auction of 2 GHz frequencies until such time as it has negotiated with Maori to reserve a fair and equitable portion of the frequencies for Maori. In our view, such an arrangement is preferable to some form of compensation by the Crown in lieu of spectrum frequencies. Maori must have hands-on ownership and management if they are to foot it in the 'knowledge economy', as we believe they must in the coming millennium. Once again, we do not attempt to prescribe what the Maori share should be, since that is a matter for negotiation between the Treaty partners. We are also reluctant to specify what Maori should do with their share of the spectrum, though we consider that they should retain a substantial ownership stake, even if they decide to lease some of it or to enter into joint partnerships either with the Crown or with private enterprise.

We again recommend that the claimant make arrangements with her iwi and a national Maori body to negotiate with the Crown for the reservation of a portion of the spectrum. Although the earlier te reo Maori and allocation of radio frequencies claims were lodged by individuals, they were backed by wider Maori organisations and were regarded as national Maori claims. The allocation of radio frequencies claim was backed by the New Zealand Maori Council, which has merely had an observer status during our inquiry. We think that the council or one of the other national bodies should step forward, since this too is essentially a claim that concerns 'all Maori'.

Because this is in effect a national Maori claim, we recommend that the Crown and Maori consider establishing a Maori trust, somewhat along the lines of the Crown Forestry Rental Trust, as Professor Winiata appeared to suggest in our hearing, but without that trust's responsibility to use income to research Treaty claims. Any income that a Maori spectrum trust received – say, from the development or lease of frequencies – could be used to develop infrastructure for remaining Maori frequencies or to educate and train Maori staff for employment in that infrastructure or elsewhere in the telecommunications industry.

The claimant has sought recommendations from us that the Crown provide funding and other support for Maori to undertake urgent research and consultation amongst themselves into the implications of the Government's telecommunications policy for Maori, and on opportunities in the telecommunications industry. She has also sought a recommendation that the Crown and Maori negotiate a strategic framework for the long-term management of the spectrum. While we believe that these requests deserve support, they need to be reordered. It would be appropriate at this stage for the Crown to provide some assistance to Maori to sort out a properly mandated national body to negotiate with the Crown for the reservation of the spectrum – a matter of considerable urgency. Once that body has been selected and the two Treaty partners have negotiated an appropriate reservation for Maori of spectrum rights, as we have recommended above, we think that the two Treaty partners could then work out a long-term plan for the management of future allocations of spectrum rights. As we have suggested above, the ownership and management of spectrum frequencies, perhaps in joint-partnership operations, could facilitate Maori participation in the telecommunications industry.

The claimants have asked that the Crown compensate them for 'their share' of revenue 'expropriated' by the Crown from the sale of frequency licences before and after the passing of the Radiocommunications Act 1989. We cannot see that they have a good claim for revenue from licences before the Act came into force, but suggest that they may have some claim to revenue from licences after it came into force. However, any such claim would have to be offset against the value of licences that have already been granted to Maori.

Finally, the claimants have asked for costs for the bringing of this claim. We recommend that these be granted.

# PART II

## THE MINORITY FINDING OF JUDGE P J SAVAGE, PRESIDING OFFICER

CHAPTER 1

# THE MINORITY FINDING

## 1.1 Introduction

Because I again dissent and therefore do not take part in the finding of the Tribunal, my decision will be brief.

This decision is to be read in conjunction with my interim decision. That decision forms part of this decision except in one regard. The evidence presented and submissions given to this Tribunal by the claimant and the Crown over the six days of the substantive hearing have meant that I am obliged to deal with the second limb of the claim in a rather different way. I find breaches by the Crown of its obligations in relation to language and culture that ought to be remedied in the context of this claim. On the first limb, however, my prima facie view has been borne out.

## 1.2 The Claim to a Resource

The exact scope of this part of the claim has changed somewhat during the course of the substantive hearing. In opening, claimant counsel put the claim in this way:

> Where the Crown asserts exclusive authority over a resource (kawanatanga) whether or not the resource was known about at the time of the Treaty of Waitangi, it has an obligation to provide for the exercise of rangatiratanga over that resource by Maori.[1]

And further:

> Claimant counsel: The claim is wider than just the 2GHz spectrum band as will be evident from the statement of claim and in that regard it is my submission that the evidence that you are about to hear relates to the whole of the spectrum band of which the 2GHz range is but a part and the reason I am raising this is that every time it is the wish of the Crown to sell off or auction property rights in the spectrum, which is what the claimant alleges is happening (the management right is a property right) the claimants should not have to relitigate the same issues and arguments in relation to the same resource.
>
> Tribunal: What spectrum, the radio spectrum or the electromagnetic spectrum?
> Claimant counsel: The electromagnetic spectrum of which the radio spectrum is a part.[2]

1. Document B18, para 1.2
2. Opening submissions of claimant counsel, substantive hearing, 30 April 1999, tape 1

However, in closing, claimant counsel said:

> the submissions follow the opening submissions for the claimant in which it was alleged that the Crown [has] breached the principles of the Treaty of Waitangi. This essentially falls into two principal limbs, the first being founded on the principle of partnership and the second under the principle Taonga.
>
> It is submitted that the focus of this enquiry, as has been held by the majority finding of this tribunal is on the responsibility of the Crown to ensure that its Treaty partner obtains a fair and equitable share of spectrum that can be used for commercial, social and educational purposes in addition to language and culture.[3]

And, finally, in the written submissions received some days after the completion of the evidence:

> The partnership principle as espoused by the claimant is that where the Crown vests in itself an exclusive right to access a resource, whether or not that resource was known about at the time of the Treaty, it has an obligation under the Treaty to provide for the exercise of rangatiratanga. Where that exclusive right is then alienated to commercial interests without provision for the exercise of rangatiratanga, Maori will be particularly prejudiced.[4]

What emerges from this is that, while this particular claim relates to a specific part of the radio spectrum, the principles that are claimed to exist would be equally applicable to the entire radio spectrum, the entire electromagnetic spectrum, and resources in general.

## 1.3 The Merits of the Claim

The task of this Tribunal is to decide if a claim that a principle of the Treaty of Waitangi has been breached is in fact well founded. The exercise here involves, first, reference to express terms and then an examination of broader principles.

### 1.3.1 Express terms

#### *(1) Kainga*

In my interim finding, I dealt with the word 'kainga' in article 2. It was the view of Professor Whatarangi Winiata that that was a reference to all of creation. I noted that my fellow Tribunal members in the majority finding on an interim basis were silent in this regard, and it was important to note that other witnesses for the claimant at the substantive hearing were considerably less enthusiastic than the professor for the proposition that he espoused.

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3. Document B46, paras 1.1–1.2
4. Document C3, para 2.5

I confirm my earlier reasons and decisions and further say this. If the word 'kainga' was intended to refer to the universe, then:

(a) it would be referred to in the singular as 'to ratou kainga'; and

(b) it would be seen as being used in literature of the last century in that sense.

There was considerable writing in Maori at that time, particularly in religious circles, where the terms 'all of creation' or 'all of God's work' and like phrases were used, but the claimants were not able to refer me to the word being 'kainga' in that sense. For those reasons, and the reasons previously given, I do not regard Professor Winiata's concept as helpful to the claimant or this inquiry.

***(2) Taonga***

Again it was suggested that the radio spectrum, the electromagnetic spectrum, or resources in general (known or unknown in 1840) were encompassed by the word 'taonga' in article 2. We were given evidence that Maori knew of the electromagnetic spectrum, as evident in traditions relating to the snaring of the sun and the ability to shout at long distances, and that those traditions, when allied with the fact that spectra operated in a space above one's head, were said to give them a tapu element in a way that assisted the claimants. That may or may not be so, but it is a difficult and dubious voyage from those propositions to the finding of a Treaty right.

'Taonga' is a word that is used in a number of senses. At the mundane level, it can refer to a prize or trophy. A very well known Maori academic told us:

> 'Taonga', the word used in article 2 of the Treaty applies to tangible or intangible things. A taonga is anything highly valued by iwi.
>
> The spectrum is a taonga of high value and is of high value to iwi.

When pressed, he accepted that what was referred to in the Treaty is not the mundane but something having a spiritual or cultural significance. Having taken that step forward, however, he retraced it by saying that everything has a spiritual or cultural dimension for Maori.

With the greatest respect to him, if he is correct, then he is coming perilously close to saying that the word 'taonga' means 'anything you like', in both senses of that phrase. The consequence of accepting that that was the meaning of 'taonga' in article 2 would make the Treaty so indefinite as to be meaningless and cast doubt as to whether the parties to the compact were ever ad idem.

For me, however, it is clear that the Treaty did not reserve to Maori *taonga katou* but *ratou* (their) *taonga katou*. I do not accept, then, that the words 'ratou taonga' relate to the radio or electronic spectrum or to resources in general.

This head of the claim is not well founded.

### 1.3.2 Treaty principles

#### *(1) General principles*

The *Concise Oxford Dictionary* defines a principle as 'a fundamental truth or law as the basis of reasoning or action'.[5] That is the meaning of that word in section 6 of the Treaty of Waitangi Act 1975.

In *New Zealand Maori Council v Attorney-General*, Justice Somers said:

> The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed in the circumstances to which those principles are to apply. At its making all lay in the future.[6]

Armed with the above and the claimant's definition of the claim, one would expect that the principle that is to be relied on in this case (if it in fact exists) would provide a basis of reasoning or action for the Crown and for Maori in relation to the subject of this claim.

It was 13 years ago in *New Zealand Maori Council v Attorney-General* that Justice Richardson spoke of the differences in perception of the principles. One wonders whether there has been a great deal of progress made since then. He said this:

> Regrettably, but reflecting the limited dialogue there has been on the Treaty, it cannot yet be said that there is broad general agreement as to what those principles are. This was apparent in the rival contentions of the New Zealand Maori Council and the Crown in this case. Mr Baragwanath for the New Zealand Maori Council relied on the terms of the Treaty, particularly the Maori language text, as themselves constituting principles of the Treaty, and in addition submitted that there were 10 implicit principles reflected in these concepts: (i) the duty actively to protect to the fullest extent practicable; (ii) the jurisdiction of the Waitangi Tribunal to investigate omissions; (iii) a relationship analogous to fiduciary duty; (iv) the duty to consult; (v) the honour of the Crown; (vi) the duty to make good past breaches; (vii) the duty to return land for land; (viii) that the Maori way of life would be protected; (ix) that the parties would be of equal status; and (x) where the Maori interest in their taonga is adversely affected, that priority would be given to Maori values.
>
> For the Crown Mr Williams rejected the concept of implied principles altogether as having no basis in the texts nor in the law of treaties. Thus he rejected Mr Baragwanath's basic proposition that there was a duty to consult on matters affecting Maori people. His submission was that five principles can be identified from analysis of the Treaty and the preamble: (1) that a settled form of civil Government was desirable and the British Crown should exercise the power of Government; (2) that the power of the British Crown to govern included the power to legislate for all matters relating to 'peace and good order'; (3) that Maori chieftainship over their lands, forests, fisheries and other treasures was not extinguished and would be protected and guaranteed; (4) that the protection of the Crown should be extended to the Maori both by way of making them British subjects and by prohibition of sale of land to persons other than

5. *The Concise Oxford Dictionary*, 5th ed, Oxford, Oxford University Press, 1964
6. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 692 (CA)

> the Crown; and (5) that the Crown should have the pre-emptive right to acquire land from the Maori at agreed prices, should they wish to dispose of it.[7]

It goes without saying that the principles must be discerned and applied reasonably and in good faith. Justice Richardson said:

> That basis for the compact requires each party to act reasonably and in good faith towards the other. In this regard there is much force in the observation of Sir Henare Ngata in his evidence in this case that '. . . a contentious matter such as the Treaty will yield to those who study it whatever they seek'. If they look for difficulties and obstacles, they will find them. If they are prepared to regard it as an obligation of honour, they will find that the Treaty is well capable of implementation.[8]

During the course of the hearing, parties repeatedly referred to the hopes and motives of those who entered into the Treaty. This is also referred to in the majority finding in the interim report and is said to be supported by a reference to the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*.[9]

In my view, care should be taken in placing too much weight upon this. The parties' motivation in entering into the compact is not of primary relevance. One can suppose that the Crown had a general desire to obtain territory, a general humanitarian motive to temper the worst aspects of colonisation, and a particular desire to stave off predatory land-grabbers, as well as having the usual colonial ambition to pre-empt other would-be colonisers. The Maori party to the compact was in part motivated by the desire to share in material wealth and a raised standard of living and to enjoy peace and order. Those were reasons why the parties may have entered into the compact, but to elevate them to terms or principles of the compact is to jumble the concepts involved. It is of course helpful to have reference to the general background, matters such as Normanby's instructions, and statements made preceeding the signing. But the focus must be on the Treaty itself. I am not suggesting that the Treaty is to be construed narrowly, as one would a mere contract. But there is a danger of wishful redrafting in straying too far from the words, phrases, and concepts in the Treaty itself.

To put it another way, it is beyond argument that economic development was a high motivator for Maori in entering the Treaty. No enlightened person today could want Maori to continue to be economically deprived in a general sense. The legacy of disappointment, disaffection, and conflict for our uri (descendants), as we see for others overseas, is a horrifying prospect. That, however, is not the point. The Treaty does not make promises of economic outcomes. It is said that a breach of the Treaty is discernable in relation to resources when the Crown seeks to privatise or create monopolies, and particularly when it seeks to sell to overseas interests. The reasoning seems to run that to do those things is not a proper exercise of kawanatanga and

7. Ibid, p 673
8. Ibid
9. See Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report*, Wellington, Waitangi Tribunal, 1999, p 8, and *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, pp 194–195

therefore lays the Crown open to claim. Whether the doing of those things is prudent or reasonable or good governance is not the point; this Tribunal is not charged to discern unfair or socially unfortunate actions unless they constitute breaches of the principles of the Treaty.

A variant of the errors of converting motives into principles, reading the Treaty as a promise of economic outcome down through the generations, and viewing the Tribunal as reviewing good governance is the espousal of a principle of development per se. This 'principle' is said by the claimants to exist independently of any other Treaty principle or right. I do not recognise it. I referred to it in my interim decision.[10]

I have since read the Law Commission's report *Justice: The Experiences of Maori Women*. I drew this to the attention of counsel. It says this:

> The principle of *development* is touched on in early reports, and is clearly outlined in the *Ngai Tahu Fisheries* report where the Tribunal said that it was 'common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development' (253–254). In the *Maori Development Corporation* report the Tribunal noted that it had 'no doubt that the Crown's purpose in establishing and investing in the [Maori Development Corporation] was to promote the economic development of Maori – all Maori – in accordance with the Treaty of Waitangi'.[11]

With the greatest respect, I do not accept what is said there. The *Maori Development Corporation Report* identified very specific principles, and a principle of development was not one of them. The quote that is referred to does not sit in that part of that report and is merely an introductory remark. The *Ngai Tahu Sea Fisheries Report 1992* is in a completely different category in that it relates to the development of a right rather than the right to develop in a general sense.[12]

So far as the Muriwhenua decision is concerned, if the reference in that report is intended to state a general principle, then I depart from it. I rather doubt that it does, for the report was dealing with principles in relation to fishing. The topic is again dealt with later in the report, particularly in relation to fishing and the development of that right.[13]

Further submissions were sought and received from the claimants on this aspect. They were received in the following form:

> The claimants assert that the 'right to develop' has three main levels:
> 1. The right to develop resources to which Maori had customary and traditional uses prior to the Treaty (development of the resource);[14]

I accept this absolutely; it is what is referred to in the various fisheries reports.

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10. *Radio Spectrum Management and Development Interim Report*, p 16
11. Law Commission, *Justice: The Experiences of Maori Women – Te Tikanga o te Ture: Te Matauranga o nga Wahine Maori e Pa Ana ki Tenei*, New Zealand Law Commission Report 53, April 1999 (NZLC R53) (doc B23), p 132
12. See Waitangi Tribunal, *The Maori Development Corporation Report*, Wellington, Brooker's Ltd, 1993; *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992
13. *Report on the Muriwhenua Fishing Claim*, pp 194–195, 234
14. Document C3, paras 4.2, 4.2.1

The submissions continued:

> 2. The right of the partnership principle to develop to include resources not known about or used in a traditional manner at 1840 (development of the Treaty);[15]

This somewhat begs the question in this claim. It is descriptive of the interplay between rangatiratanga and kawanatanga and presupposes that the partnership covers all aspects of life for both parties. In other words, it is claimed that it is more of a marriage than a partnership. It is not. I deal with that further.

The submissions then carried on:

> 3. The right of Maori to develop their culture, their language and their social and economic status using whatever means are available (development of Maori as peoples).[16]

I accept that and go further to say that, so far as culture and language (taonga) are concerned, the Crown has a positive duty to assist in the fostering and development of them.

It will be clear, then, that I do not recognise a right to develop as a separate principle.

***(2) Partnership***

Partnership is the core principle involved in this case. But partnerships have scopes of operation and do not intrude into all areas of the parties' lives. It is, I repeat, a partnership, not a marriage. The Crown must not intrude into the proper realm of rangatiratanga and, likewise, Maori must not intrude into pure matters of kawanatanga, except pursuant to their article 3 rights as citizens. Between those two areas at each end of the spectrum is the area where the partnership between the two concepts and the two peoples has its domain.

The claimants would have it that inherent in the principle of partnership is the principle that Maori have a right to a fair and equitable share in resources over and above those specifically reserved to them in article 2. Nothing in the radio or electromagnetic spectrum marks them out as requiring them to be dealt with in a different way from other assets of mankind. There is no logical reason, then, why such a fundamental truth, or law as a basis for reasoning, or action would not apply to the regulation of the generation of solar electricity, the modification of the structure of DNA (genetic engineering), the licensing of air space, or the licensing of the right to carry passengers for hire or reward in any vehicle of conveyance by land, sea, or air! Would it not also apply to oil and gas? There is an absurdity inherent in this claim when seen in that general context.

If such an important principle was truly contained within the Treaty in 1840 or an honest and generous recasting of it at the end of the twentieth century, then it is peculiar in the extreme that it is left to be discerned as a principle within a principle

15. Ibid, para 4.2.2
16. Ibid, para 4.2.3

(partnership) and not spelt out in the Treaty. Both parties to the Treaty were well aware of the concept and value of resources, for that was what was driving them, in good measure, into contact with each other and to enter into the Treaty.

It should also be noted that, if there were such a principle, then it would stand now and forever. One party of course could not enlarge or diminish it. All resources known and to be known by us would be captured by the principle and it would exist as a sort of constitutional right waiting to be claimed.

The claimant (who did not give evidence before us) referred to various treaties or international agreements where the Crown had referred to the radio spectrum as a resource or natural resource. At the hearing, the Crown's position was that spectra were not a resource and that radio signals in the 2GHz range were not natural. This dispute carried the matter no further for me and I found it irrelevant. What needs to be said, however, is that what one of the parties may or may not have said in this context, even if it is inconsistent, is of no help in discerning a principle of the Treaty. In other words, the parties cannot 'talk up' or 'talk down' a principle. The principle, if it exists, existed in 1840 within the Treaty.

If the principle is as claimed, it seems to me irrelevant that the subject resource was discovered before or after 1840, or whether it was a natural or a man-made resource. The principle to be applied in the management of it is the same now as it was in 1840.

We all accept or should accept that the Treaty is not locked in time or current knowledge or technological capacity. But it seems to me that the principle contended for by the claimants goes further to the point of attempting a new edition of the Treaty. I note the reference to the speech given by Sir Apirana Ngata in the debate relating to the 1937 Petroleum Bill contained in the majority interim finding. A reading of that, however, discloses that Ngata was concerned with the rights of Maori landowners in their capacity as landowners and was not, at any point, claiming a right to a share in petroleum that might be found irrespective of that property right. He was certainly not contending for a principle even remotely related to the logical basis for this claim.

In my interim decision, I referred in somewhat negative terms to the proposition that 'the Tribunal has developed a consistent discourse dealing with the hierarchy of interests in natural resources'. Claimant counsel has referred to three Canadian decisions: *R v Sparrow*, *R v Gladstone*, and *R v Van der Peet*.[17] I am of the view that those cases do not assist in this regard. They have as their focus existing customary rights or existing Treaty rights and do not purport to deal with resources in the general sense, as the claimant would have it. In other words, first establish your right, then perhaps apply these cases.

I therefore find that this limb of this claim is not well founded.

17. *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC); *R v Gladstone* (1996) 137 DLR (4th) 648 (SCC); *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC)

## 1.4 THE SECOND LIMB OF THE CLAIM

The claim as originally postulated was 'Maori have a right to a fair and equitable share in the spectrum especially where the Crown has an obligation to promote and protect Maori language and culture'. In so far as that is but a variant of the first limb of the claim, it would have been difficult for me to answer it in a different way. But the focus of this part of the claim did change during the course of the hearing so that it was the breach in relation to te reo Maori and Maori culture that was spotlighted rather than the resource.

So, then, for me the question is 'Does a breach exist in relation to te reo Maori and Maori culture and if so is the Crown bound in good faith to remedy it in the context of this claim?'

The Waitangi Tribunal's *Report on the Te Reo Maori Claim* was delivered in April 1986, the span of half a generation ago.

The broadcasting litigation was settled by a consent order in 1991.

The Privy Council began its advice in *New Zealand Maori Council v Attorney-General* (the broadcasting assets case) in December 1993 with the following words:

> The Maori language (Te Reo Maori) is in a state of serious decline. It is an official language of New Zealand, recognised as such by the Maori Language Act 1987. It is 'a highly prized property or treasure (taonga) of Maori' (Cooke P [1992] 2 NZLR 576, at p 578 in the Court of Appeal) and it is also part of the national cultural heritage of New Zealand.[18]

The Crown has therefore been told, warned, and exhorted.

It should have been expected that by now, at least in the case of te reo Maori, one would have seen a renaissance seeded by funding and resources from the Crown. The recently published *National Maori Language Survey: Te Mahi Rangahau Reo Maori* paints a very different picture. The following tables are highly illustrative.

| Age | Non-speakers | Speakers | | | Total |
|---|---|---|---|---|---|
| | | Low fluency | Medium fluency | High fluency | |
| 16–24 | 39 | 53 | 7 | — | 100 |
| 25–34 | 46 | 45 | — | — | 100 |
| 35–44 | 45 | 41 | — | — | 100 |
| 45–59 | 34 | 34 | 12 | 19 | 100 |
| 60+ | 30 | 24 | — | 32 | 100 |
| All ages | 41 | 43 | 8 | 8 | 100 |

— Amount too small to be expressed

As a result of rounding, rows may not add up to 100

Fluency levels of Maori adults, by age (percent). Source: Te Puni Kokiri, *The National Maori Language Survey: Te Mahi Rangahau Reo Maori*, Wellington, Te Puni Kokiri, *c* 1995 (doc B21), p 35, table 4.

18. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 514 (PC)

| Age | Frequency with which Maori is spoken correctly | | | |
|---|---|---|---|---|
| | Very rarely or rarely | Sometimes | Usually or nearly always | Total |
| 16–24 | 60 | 32 | — | 100 |
| 25–34 | 64 | 25 | — | 100 |
| 35–44 | 58 | 23 | 19 | 100 |
| 45–59 | 33 | 27 | 39 | 100 |
| 60+ | — | — | 68 | 100 |
| All ages | 51 | 26 | 23 | 100 |

— Amount too small to be expressed As a result of rounding, rows may not add up to 100

Frequency with which Maori is spoken correctly by Maori speakers, by age (percent). Source: *The National Maori Language Survey*, p 38, table 6.

| Age | Conversations able to be carried out as well in either English or Maori | | | |
|---|---|---|---|---|
| | Almost none | A few | Half or more | Total |
| 16–24 | 33 | 45 | 21 | 100 |
| 25–34 | 35 | 34 | 31 | 100 |
| 35–44 | 30 | 35 | 35 | 100 |
| 45–59 | 19 | 23 | 58 | 100 |
| 60+ | — | — | 72 | 100 |
| All ages | 29 | 33 | 38 | 100 |

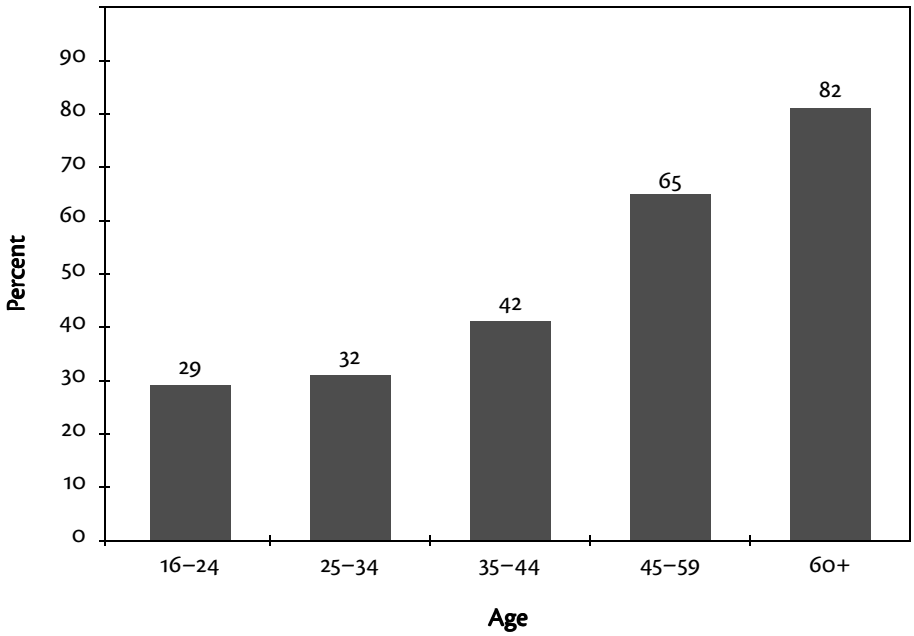
— Amount too small to be expressed As a result of rounding, rows may not add up to 100

Number of conversations Maori speakers can conduct equally well in either English or Maori, by age (percent). Source: *The National Maori Language Survey*, p 39, table 8.

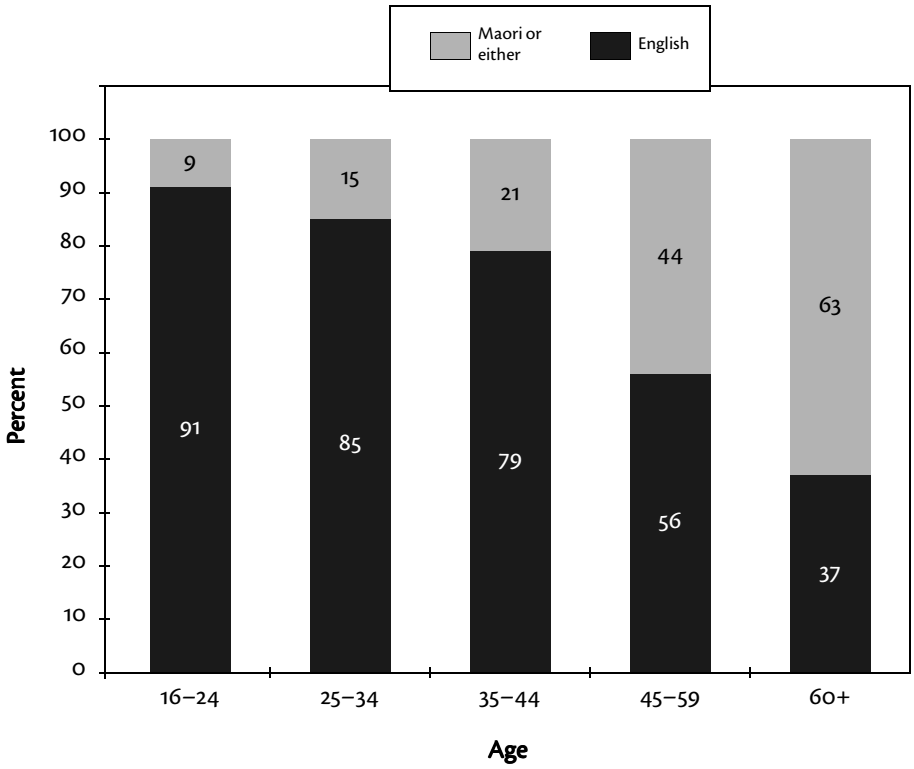
| Age | Frequency with which thoughts can be expressed in different ways | | | |
|---|---|---|---|---|
| | Almost never or rarely | Sometimes | Usually or nearly always | Total |
| 16–24 | 60 | 32 | — | 100 |
| 25–34 | 49 | 32 | 19 | 100 |
| 35–44 | 41 | 35 | 24 | 100 |
| 45–59 | 23 | 32 | 44 | 100 |
| 60+ | — | — | 63 | 100 |
| All ages | 42 | 32 | 26 | 100 |

— Amount too small to be expressed As a result of rounding, rows may not add up to 100

Frequency with which Maori speakers can express the same thought in a variety of ways in Maori, by age (percent). Source: *The National Maori Language Survey*, p 38, table 7.




Proportion of Maori speakers able to converse easily in Maori, by age.
Source: *The National Maori Language Survey*, p 37, fig 9.




Language easiest for Maori speakers to converse in, by age.
Source: *The National Maori Language Survey*, p 37, fig 10.

These tables are by no means exhaustive but are representative indicators of decline.

The report indicates a loss of 750 kaumatua every year and comments that 'the opportunities for transmission of the Maori language and culture are rapidly diminishing'.[19]

In 1993, the Privy Council said:

> This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.[20]

It appears to me that, in terms of that judgment, the economy is not in recession but reasonably buoyant. The Maori language is in a particularly vulnerable state, and this can in part be attributed to past breaches by the Crown of its obligations, and that factor increases the Crown's responsibility.

The Crown appears to have had fair warning but has not remedied the breach sufficiently. It is therefore an aggravated breach and must be remedied as a matter of high priority. This breach is merely another example of the social ills that Maori are stricken with, and it is demonstrated in a number of recent reports to Ministers of the Crown. An example is the *Annual Report on Maori Education, 1997/98*, which demonstrates inter alia that 20 percent less Maori infants are involved in pre-school education than non-Maori, and the proportion in early childhood services who are Maori is even reducing.[21] On average, Maori are three times more likely to be suspended from school than non-Maori and they receive much lower marks in school certificate and bursary. Forty-one percent of Maori males and 34 percent of Maori females left school in 1997 with no qualifications. This is to be contrasted with 15 percent of non-Maori males and 11 percent of non-Maori females.

Averaged between male and female, those figures disclosed that, in 1993, 33 percent of Maori children left school with no qualifications. That figure was bad enough, but

19. *The National Maori Language Survey*, p 64 (doc A22)
20. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)
21. Ministry of Education, *Annual Report on Maori Education, 1997/98, and Direction for 1999*, Wellington, Ministry of Education, 1998 (doc B37)

in 1997 the figure had grown to 37 percent. Maori children were 10 to 15 percent less likely to attend further education after secondary school than their non-Maori counterparts. And on and on it goes.

So much for an investment in Maori education and a Maori future.

Article 3 appears to me to be important. It is easy and perhaps convenient to read it as simply conferring the rights and privileges of British subjects upon the Maori people but that is not what it says. It reads in the English text: 'In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.'

I could not regard the words 'royal protection' as simply a flowery embellishment of what follows. The word 'tiakina', as appears in the Maori text, imparts a similar sense of favoured protection. In other words, Maori people were to be a favoured people in their land and their rights were to be actively protected.

It is also clear that, in a general sense and across the board, Maori are not developing at the same pace as non-Maori. Dr Ngatata Love, in his foreword to the report entitled *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori*, said this:

> The historical disadvantage faced by Maori in the areas of education, employment, economic and health status has been well documented. However this is the first time that data from across the sectors has been drawn together to assess whether the gaps between Maori and non-Maori are closing. It is disturbing to find that despite improvements for Maori in some areas, gaps have either remained the same or widened.[22]

The report bears close reading, and to say that it is 'disturbing' is understatement indeed. It graphically demonstrates the sad, and in many cases growing, disparities in education, health, economic status, employment, and so forth.

One could understand a delay between effort and result in relation to language and culture if the Crown could say that it were moving all areas for Maori forward across a broad front. What is demonstrated very clearly in the reports to which I have referred is that Maori are losing ground across a broad front.

This claim relates to communication.

Communication is the life force of language and culture.

I accept that the Crown is continuing an aggravated breach of the Treaty in relation to te reo Maori and culture.

It is fitting and right that the remedy is in some way provided from the communication field.

I listened carefully to the arguments that the claimant mounted that the proper way to provide Maori with an outcome in this area was through ownership of part of the spectrum. I do not accept that that is so, particularly in relation to this portion of the spectrum, which has to do with mobile telecommunication. To do so would be to use the Treaty for an improper purpose.

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22. Te Puni Kokiri, *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori: A Report to the Minister of Maori Affairs*, Wellington, Te Puni Kokiri, 1998 (doc B38), p 1

Various Government officials who would know opined or agreed to the proposition that $100 million was the likely figure to be achieved at auction. One plumped for a somewhat lower figure. I am conscious that this fund is a one-off (at least for 20 years). It is not for the sale of an asset in the conventional sense, in that there is no asset in the books of accounts. Not even as an intangible such as good will.

We were solemnly told that the acquisition of the money was not the object of the auction at all. It was merely collateral to it. The officials told us that the current wisdom was that the object of the auction was to discover the most effective user of the spectrum and that would be the entity that valued it most and that that would be discovered by the highest bid. For the Crown, the money was not the object but the mechanism of discovery.

I do not comment on the logic or sense of this. It does, however, establish that, for those involved at high Government level, there is a fund that is almost created from nothing, as a mere by-product of a search for efficiency. The fund is to be created in an area where there is a manifest and aggravated Treaty breach. To that, I add that the fund is not earmarked for any particular project or vote. It will be submerged into the Crown bank account.

There is therefore a breach that cries out for remedy and a fund that, if wisely used, could go a long way to meeting that cry.

The first task must be to discover, in an objective way, the means of remedying the breach.

My recommendations would, therefore, be:

(a) That the auction of this particular band of the radio spectrum not be delayed.

(b) That the Crown recognise that its breach in relation to te reo Maori and Maori culture is continuing and aggravated. It has not done enough in this area or what it has done has not been effective or both.

(c) That all or a generous portion of the net proceeds of the auction of the 2GHz spectrum be devoted to promoting, developing, and protecting te reo Maori and Maori culture.

(d) That that fund be invested and the interest earned be used to conduct an inquiry to establish the best means of remedying the breach and, for that purpose, to access experts, both local and international, to prepare the appropriate plans.

(e) That, when such a plan has been prepared and approved, it be actioned, using all or the appropriate part of the fund referred to.

## 1.5 Conclusion

We were told, and I accept, that indigenous languages and cultures are passing out of being almost as a matter of routine. That is still a real possibility for Maori. Were either the language or the culture to suffer that fate, then the Treaty and our nation itself would be mortally damaged.

Dated at Wellington this 28th day of June 1999

Judge P J Savage, presiding officer

J Anderson, member

Professor M P K Sorrenson, member

THE SEAL OF THE WAITANGI TRIBUNAL

APPENDIX I

# STATEMENT OF CLAIM

IN THE WAITANGI TRIBUNAL WELLINGTON

WAI 776

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF a claim by Rangiaho Theresa Everton (née Paurini) in respect of Maori Radio Spectrum Management and Telecommunications Development

## STATEMENT OF CLAIM

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## STATEMENT OF CLAIM

### 1. Te Tiriti o Waitangi

**1.1** The Treaty of Waitangi legitimised the Crown's governorship of New Zealand by establishing in Article I of the Treaty the principle of kawanatanga subject to the fulfilment of the guarantees in Article II.

**1.2** Article II guaranteed to the Chiefs and Tribes of New Zealand and the families and individuals of those tribes the full exclusive and undisturbed possession of their taonga.

**1.3** Maori exercised rangatiratanga over all that came within the domain of Ranginui and Papatuanuku, including the natural resources of Te Ika a Maui and Te Wai Pounamu, and all things in their kainga, whether below, upon and above the surface.

**1.4** The Treaty imposes a continuing obligation on the Crown to take active steps to assist in the preservation of te tino rangatiratanga o te Iwi Maori in respect of their taonga.

## PART ONE – THE SUBJECT MATTER OF THE CLAIM

### 2. The radio spectrum

**2.1** The claim relates to a natural resource called the radio spectrum. The spectrum is the backbone for all modem communications. It has been said that 'no other natural resource has such an immediate impact on modern civilisation as the electro-magnetic spectrum' (Christian J Herter Jnr, 'The Electromagnetic Spectrum – A Critical Natural Resource' (1985) 25 *Natural Resources Journal* 651.

**2.2** Electro-magnetic radiation is a form of oscillating electrical and magnetic energy capable of traversing space without the benefit of physical interconnections. This includes radiant heat, light and radio waves. The medium on which the electrical waves fluctuate through space is the electromagnetic spectrum.

**2.3** The part of the spectrum known as the 'radio spectrum' can be defined for the purposes of this claim as spectrum exploitable by technology. The majority of the radio spectrum is used for communication purposes in one form or another. At the present moment this relates to spectrum between 3 kHz and 60 GHz. With improving technology this upper limit will rise.

**2.4** Specific sectors or bands of spectrum are allocated for particular uses. These bands consist of frequencies for a wide range of services from radio and television broadcasting to mobile phones and satellites.

**2.5** The term 'radio spectrum' should not be confused with that part of the spectrum used for radio (AM/FM) broadcasting. The way 'radio' is used in this claim is much wider than that, and encompasses telecommunications and information technology in general, with broadcasting itself a subset of that.

**2.6** Under national and international conventions, the spectrum has been divided into bands of frequencies. The frequencies start from approximately 3 kilohertz (kHz) – one thousand cycles per second – and progress up to megahertz (MHz) – one million cycles per second – to gigahertz (GHz) – one billion cycles per second and beyond.

### 3. Radio spectrum management in New Zealand

**3.1** Until 1989, the New Zealand spectrum was managed under a radio-licensing regime administered by the New Zealand Post Office. Under this system users were granted a licence to transmit at a particular frequency or frequencies on a first come first served basis.

**3.2** In the 1980's, New Zealand saw a radical reform of spectrum management as part of a broader re-orientation of New Zealand's economic policy. From 1984–1989, the fourth Labour Government introduced a decisive turn away from State interventionism and in favour of the free market. Heavily regulated industries, including finance, communications, and transport, were liberalised or de-regulated.

**3.3** In the communications sector, this de-regulation was achieved at a great pace. The state-owned Post, Telephone and Telegraph monopoly and a monopolistic public broadcasting corporation were all de-regulated.

**3.3.1** In 1987, the telecommunications business was separated from the New Zealand Post Office, to become a State owned enterprise, Telecom Corporation of New Zealand Ltd (Telecom);

**3.3.2** In 1990, Telecom was sold to two American telephone companies, Ameritech and Bell Atlantic for US$2.4 billion;

**3.3.3** In 1989, Broadcasting Corporation of New Zealand (BCNZ) split into Television New Zealand and Radio New Zealand;

**3.3.4** Also in 1989, the Radiocommunications Act was passed.

**3.4** In drafting the reform plans, the New Zealand Government relied heavily upon the 'Spectrum Economics' literature developed in the United States, and in particular on a report commissioned from the British/American Consulting firm National Economic Research Associates (NERA). The NERA report blueprinted a radical reform of spectrum management along free-market lines. The report proposed creating permanent private property rights to the spectrum, tendering them off to private users, and permitting market exchanges among property owners to achieve a fair allocation of frequencies. The reform process was to be concentrated on the bands between 44 MHz and 3.6 GHz. The report became the basis for the new Radiocommunications Act 1989.

## 4. Radiocommunications Act 1989

**4.1** The New Zealand government developed a strategic framework for radio spectrum management based on a *tradeable spectrum rights regime*. The framework is designed to facilitate competitive access to key radio frequency spectrum bands for the development of commercial telecommunications and broadcasting services.

**4.2** The Crown's commitment to this strategy is contained within the Ministry of Commerce paper *A Strategic Framework for Radio Spectrum Management in New Zealand* (Wellington, September 1997, Document PB17, page 6):

> 'The New Zealand Government has stated that its objective is to establish and maintain efficient markets in telecommunications goods and services. To this end it has adopted policies and promoted statutory measures to facilitate competitive entry into those markets, and to maintain the conditions for effective competition. The key statutory provision in respect of spectrum is the Radiocommunications Act 1989. While facilitating the continuation of the traditional licensing regime based on technical regulation, the Act also provides for the establishment of tradeable, long term access rights to frequency bands.'

**4.3** The Act defines 'radiocommunication' as 'any transmission, emission, or reception of signs, signals, writing, images, sounds, or intelligence of any nature by radio waves'. The radio waves referred to are frequencies between 9kHz and 3000GHz. Current technology in radiocommunications can only usefully exploit radio waves up to a limit of 30GHz.

**4.4** The Act establishes a Register of Radio Frequencies which records all management rights and particulars of frequency transfers. Section 10(2) requires the Registrar to record all management rights (and transfers of management rights) upon application of the Secretary of Commerce.

**4.5** Section 11(1) provides:

> 'Every record of management rights constituted under Section 10(2) of this Act shall, when recorded *name the Crown* acting by and through the Secretary *as the manager of the frequencies* to which the record of management rights relates.' (emphasis added)

**4.6** A management right, as created under the Act, implies ownership of a nationwide band of frequencies for twenty years, and involves the legal right to issue licenses to use frequencies within a specified band (known as spectrum license rights). The nature of management rights is defined as in Part IV of the Act. They are tradeable, and can be mortgaged, or be subject to caveats, in a scheme very similar to the Land Transfer Act 1952.

**4.7** Therefore, whatever subsequent transfers of rights may occur under the Act, the initial and underlying 'radical title' to the spectrum itself is vested in the Crown. (See also section 33(1): upon the expiry of the management right period, currently a maximum of twenty years, all rights are once again vested in the Crown.)

**4.8** The only reference in the Strategic Framework document PB17 to the Crown's obligations under the Treaty of Waitangi can be found at section 3.4.2:

'The Radiocommunications Act 1989 makes no explicit provision for the Treaty of Waitangi in radio spectrum management matters. However successive governments have acknowledged the importance of broadcasting in the preservation and development of Maori language and culture, and in this context, it has been the practice of government to reserve frequencies for such purposes.'

**4.9** Frequencies are also reserved on 'public policy grounds' for maritime and aircraft use, and emergency communications. The government also has international obligations as a member state of the International Telecommunications Union (ITU).

**4.10** The auctioning policy, and the creation of management rights in the Crown under the Radiocommunications Act 1989 in general, was the subject of intense opposition by Maori groups in 1989, and in particular, the New Zealand Maori Council. That claim and its relevance to the present claim is addressed in Part Two of this statement of claim.

## 5. Radiocommunications Act Amendment Bill

**5.1** Amendments to the Radiocommunications Act 1989 are proposed in the Radiocommunications Act Amendment Bill which is currently before the House. The most contentious amendment for the purposes of this claim is the proposal to create a management right of much longer duration than the current maximum of twenty years, and even a provision which will allow the renewal of a management right period before the expiry date. The Crown wishes to reduce the administrative costs of auctioning rights at regular intervals, and increase the value of the right for the purposes of development and investment.

## 6. The auction process

**6.1** The government intends to progressively convert the spectrum identified as having commercial potential from the old radio-licensing regime to the new spectrum management rights regime. In some cases, only spectrum licences are issued and the management rights themselves are retained by the Crown. On the whole, the management rights over the spectrum bands themselves are to be allocated to the private sector by way of *multiple round auctions*.

**6.2** The auctioning process is in six stages:

**6.2.1** The Ministry of Commerce issues a call for expressions of interest in the frequency band under consideration.

**6.2.2** An engineering plan is formulated to define the rights, including the protection limits, the band size, transmission sites etc.

**6.2.3** Cabinet approval for the tender is obtained, and the management or license rights are created. This involves a formal application to the registrar of radio frequencies.

**6.2.4** A call for tenders is issued. The current auctions are being conducted via the Internet.

**6.2.5** The bids are processed and the results announced. The results are subject to Commerce Commission clearance under the Commerce Act 1996 on competition policy grounds.

**6.2.6** The management or license rights are transferred to the successful tenderers.

**6.3** Since the Act was introduced, the Crown has created a limited number of licence rights and allocated them to private interests by tender. The majority have been for frequencies suitable for broadcasting.

**6.4** Last year the Crown disposed of actual management rights to the non-broadcasting spectrum, as opposed to spectrum licence rights. These rights applied to spectrum in the 'Super High Frequencies' (SHF) which range from 3–30 Gigahertz.

### 7. Auction of frequencies 25–29 GHz – February 1998

**7.1** On 22 November 1997, the Ministry of Commerce announced in the media that there was to be a sale of management rights in the 25–29 GHz range. The frequencies transmit and receive data via a local wireless data and communications distribution system known as LMCS/LMDS.

**7.2** In American literature the term Local Multipoint Distribution Service (LMDS) means the same as Local Multipoint Communications Service (LMCS/LMDS) which is used mostly outside of America. New Zealand has generally adopted the term InterActive Multimedia Services (IMS) to describe the frequency band in which LMCS/LMDS reside.

**7.3** A LMCS/LMDS distribution system is comprised of multiple low powered transmitter/receivers, each covering an area of approximately 2 to 5 kilometres. The coverage area of the tower and the transmitter/receiver channels are known as cells. A number of cells can be combined together to extend coverage over a larger area.

**7.4** To date LMCS/LMDS has been extensively used overseas for subscription multi-channel television distribution, similar to services provided by cable networks. With the increasing demand for high speed data services to the home and advancements in technology a range of new digital services are due to be offered in the near future. These include telephone services, video teleconferencing, high-speed data access and interactive services.

**7.5** Correspondence between Professor Whatarangi Winiata and the Minister of Communications had revealed that Maori were very concerned with the attitude of the Crown in proceeding to dispose of rights to the 25–29 GHz frequency range without addressing the wider issues of Maori participation in spectrum management. It was clear from correspondence that the Maori Treaty partner did not regard the Crown's obligations in relation to spectrum management as solely one of ensuring that frequency reservations were available for the preservation of te reo and Maori culture.

**7.6** Repeated requests were made to the Crown (including requests from other Maori Members of Parliament) to postpone the auction process until a negotiated solution to these issues had been reached, or to reserve to Maori half of the spectrum to be sold until an accurate assessment could be made as to whether the frequencies would be useful to Maori.

**7.7** The Crown refused to postpone the auction, or to reserve any frequencies, saying that it 'rejected' the notion that Maori could have any interest in the spectrum beyond that of the

preservation of the language. Furthermore, because the sale related to frequencies 'not suitable for broadcasting', there was no need to consult with Maori to determine whether the frequencies might have been useful for the protection and promotion of te reo and culture.

**7.8** In fact subsequent research (including a report commissioned by the government) has shown that the frequencies would have been extremely effective for Maori purposes, both economically, and in the protection and promotion of te reo and the culture.

### 8. The 2GHz band of frequencies

**8.1** In 1997, the Ministry of Commerce (MOC) produced a draft management plan for the progressive sale of frequencies within the 2GHz range (Ministry of Commerce, DP8). The 2GHz spectrum band is defined by MOC as frequencies between 1,700,000,000 Hertz (1.7GHz) and 2.3GHz.

**8.2** The 2GHz spectrum is an extremely valuable economic resource, and has enormous commercial potential. It is part of a limited range of spectrum used to support advanced fixed and mobile cellular services.

**8.3** The 2GHz band is of great importance and value because cellular technologies are the next significant development of telecommunications overseas and in New Zealand. These developments are known as:

**8.3.1** DCS 1800 – a second generation PCS (Personal Communication Service) cellular mobile system (Europe);

**8.3.2** PCS 1900 – a second generation PCS cellular mobile system (USA);

**8.3.3** IMT 2000 – a third generation cellular system developed by the ITU.

**8.4** All three systems will provide advanced new services described below:

**8.4.1** The quality of the service will equal that of a fixed network;

**8.4.2** A diverse range of cellular technologies presently available can be unified under the new technology to give better service to users;

**8.4.3** The equipment used in this band is mass-produced and so is cheaper and therefore more widely accessible to customers;

**8.4.4** The integration of terrestrial and satellite services will provide extended opportunities for development and cheaper access to satellite technology;

**8.4.5** Mobile terminals (even as small as pocket-size) will support fully operational video, multimedia, computing, and broadcasting facilities;

**8.4.6** The capacity of existing spectrum services can be vastly increased (for example, digital TV has four times the capacity of one standard TV channel).

## Part Two – The Tribal Interest in the Resource

### 9. Hierarchy of interests

**9.1** The Tribunal has developed a consistent discourse dealing with the 'hierarchy of interests' in natural resources. This is based on the concept that the Crown's right of

governance is limited by the guarantees under Article II of the Treaty and derives support from North American and Canadian jurisprudence.

**9.2** First in the hierarchy is the Crown's right, and duty, to manage or regulate resources in the interests of conservation and public safety. Second is the tribal interest in the resource. Third are the commercial and recreational interests in the resource.

**9.3** The Crown has a right to regulate the radio spectrum in accordance with its interactional obligations, to protect against interference, omissions, and provide reservations of frequencies for emergencies, and public utilities like aircraft, ships, CB radio and the like. That is an accepted function of the right of kawanatanga.

**9.4** The disposal of rights in the radio spectrum resource to private interests is a recognition of, and provision for, the commercial interest.

**9.5** This claim concerns the nature of the tribal interest in the resource. The Crown regards the reservation of broadcasting frequencies for the protection and promotion of 'te reo and culture' as satisfying the tribal interest as guaranteed under Article II.

**9.6** However the tribal interest is not, and has never been, so narrow.

## 10. Wai 26/Wai 150 report

**10.1** The Waitangi Tribunal has already heard extensive evidence on the nature of the spectrum resource and its significance for Maori (*Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* Wai 26 and Wai 150). The statement of claim filed in the Wai 150 claim described the claim as 'in respect of the Maori language, culture and people in broadcasting.'

**10.2** The Wai 26/150 report stated clearly in the introduction that its recommendations did not attempt to address broadcasting issues as a whole. Moreover the report did not traverse the wider issues of spectrum management. The recommendations were confined to the concerns which prompted the urgent hearing, namely, the allocation of AM and FM radio frequencies, and the threat to Maori language and culture under those circumstances.

**10.3** However, in reaching its decision on those matters, the Tribunal analysed, and made actual findings on the nature of the Treaty relationship in regard to spectrum management (See Chapter 8: The Treaty, pages 39–44). Essentially, the Tribunal found that Maori had a tribal interest in the natural resource known as the spectrum, rooted in Article II of the Treaty. That tribal interest was above that of commercial or recreational interests.

**10.4** The Tribunal's findings are a matter of record, and are summarised below:

**10.4.1** No other natural resource has such an immediate and extensive impact on modem civilisation as the electromagnetic spectrum. (page 39)

**10.4.2** That portion of the electromagnetic spectrum known as the radio spectrum is a limited natural resource and, at least for the present, a scarce resource. (page 39)

**10.4.3** Equitable and careful management of the resource is therefore crucial at domestic and international levels. (page 39)

**10.4.4** Even though the spectrum was not evident at the time of the signing of the Treaty, it has been part of the universe since the time of creation. (page 41)

**10.4.5** In this way it is similar to the offshore fishery resource. Its use was to be a matter of negotiation between Maori and the Crown. (page 41)

**10.4.6** The spectrum is a taonga to be shared by the tribes and by all mankind. Neither of the Treaty partners can have monopoly rights to this resource. (page 41)

**10.4.7** The responsibility for the management of this resource is as important as the right of access, and the manner, nature and degree of the access must be the subject of effective consultation between the tribes and the Crown. (page 41)

**10.4.8** The key principle in the management of the spectrum is partnership. (page 42)

**10.4.9** The ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights over this resource. (page 42)

**10.4.10** There is a hierarchy of interests in natural resources based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource. (page 42)

**10.4.11** Tribal rangatiratanga gives Maori a greater right of access to the newly discovered spectrum. In any scheme of spectrum management it has rights greater than the general public, and especially when it is being used for the protection of the taonga of the language and the culture. (page 43)

**10.5** The Tribunal's findings clearly apply to the radio spectrum as a whole and were not intended to be restricted to matters of language and culture only.

**10.6** The recommendations contained in Chapter 9 apply these principles to the matters that were under urgency – the protection of Maori language and culture in broadcasting (radio and television).

**10.7** It is contrary to the spirit of the Treaty and contrary to the context of the Report to restrict the Tribunal's findings on the spectrum as a whole to matters solely concerning the protection of language and culture in broadcasting.

## 11. Application of Tribunal's report to present claim

**11.1** This claim does not seek to re-litigate the findings made in the Wai 26/Wai 150 claim. Correspondence from Maori to the Minister of Communication consistently requests that those findings on 'partnership' and the 'hierarchy of interests' be given effect.

**11.2** The claimant seeks from this Tribunal confirmation of those findings to force the Crown to negotiate with Maori over spectrum management. The matter is of urgency because the Crown insists on hastily pushing through its policy of privatisation.

## 12. Crown attitude to the tribal interest

**12.1** The Tribunal findings have been consistently ignored by the Crown in its framing of its allocation strategy for radio spectrum.

**12.2** The claimant apprehends there are four major elements to the Crown's attitude:

**12.2.1** Firstly, the view of the Crown is that the Tribunal's report in Wai 26/150 does not refer to special provision for Maori in the radio spectrum itself, other than its use for broadcasting, and only then in relation to the protection of language and culture.

**12.2.2** Secondly, the Crown has insisted that the exercise of the Secretary of Commerce's powers under the Radiocommunications Act 1989 in creating management rights and access rights to the spectrum is merely the right of regulation and the Crown was not asserting any authority or ownership beyond that.

**12.2.3** Thirdly, the general right of Maori to enjoy the benefits of scientific and technological advances since the Treaty stem from Article III which granted Maori the same rights as British subjects. Maori should therefore tender for the spectrum with the rest of the population.

**12.2.4** Finally, the Crown believes that 'consultation processes' in relation to the allocation of frequencies are in accordance with the Tribunal's findings on the partnership that should exist between Crown and Maori in the management of the spectrum.

**12.3** The Maori view is to the contrary:

**12.3.1** The Crown's refusal to acknowledge and discuss radio spectrum issues for Maori other than those that relate to the protection of language and culture through the medium of television and radio broadcasting is an unduly narrow interpretation of the Treaty partnership and not in accordance with the obligations of good faith.

**12.3.2** The disposal of frequency by sale for 20 years (and possibly beyond) is not a regulatory or management role of the kind appropriate to kawanatanga, but more akin to the exercise of a proprietary right of ownership contrary to the Treaty guarantees of tino rangatiratanga and the Tribunal's findings. Because the resource was not known about at the time of the Treaty *neither* party can have monopoly rights in terms of the resource.

> 'As we see it, the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of this resource. Maori interests in natural resources are protected by the distinctive element of tino rangatiratanga' (Page 42).

**12.3.3** The assertion that the Maori interest in the radio spectrum resource is an Article III right along with the rest of the population was relied on by the Crown in the Wai 26/150 hearings, but specifically rejected by the Tribunal (page 42–43):

> Nor can the Crown argue that Maori have no rights to the spectrum other than a general public right, nor a right only in terms of the language . . . Tribal rangatiratanga gives Maori a greater right of access to the newly discovered spectrum. In any scheme of spectrum management it has rights greater than the general; public, and especially when it is being used for the protection of the taonga of the language and culture.

## 13. The Major Spectrum Users Advisory Group (MSUAG)

**13.1** In deciding on its policy, the government sought advice from a wide range of commercial interests involved in the industry. That group, later known as the Major Spectrum Users Advisory Group (MSUAG), met first in May 1997, and continues to provide the government with advice and direction in terms of the policies to be implemented. Maori have not been involved with MSUAG or in any other spectrum advisory role, nor have Maori been invited to participate in this way. Oral entreaties have been made by Mr Graeme Everton to officials of the Ministry of Commerce but to no avail. The tribal interest in the resource has been effectively ignored, in favour of the commercial interest.

## 14. Benefits to Maori from the spectrum resource

**14.1** The radio spectrum represents an opportunity for Maori to use spectrum resources to develop economic, cultural and social opportunities in the telecommunications sector.

**14.2** Currently Maori are severely under-represented in the telecommunications field. No coordinated effort has been made to ensure Maori participation. The Crown's continued denial of Maori rights to spectrum resources risks alienating Maori permanently from becoming established in the telecommunications industry. Therefore while the claim is not specifically directed at the protection of language, it is concerned with the wellbeing and advancement of Maori culture in its broadest sense. Access to and the management by Maori of a reasonable share in the radio spectrum will enhance and promote Maori economic, social and cultural development.

**14.3** Moreover it has been widely acknowledged by Maori, the Tribunal and the Crown that fiscal constraints hinder the Crown's capacity to fully compensate Maori for the losses they have suffered as a result of the multiple breaches of the Treaty. Recent tribal settlements reflect perhaps 3% of the total estimated loss suffered. The spectrum, a relatively new resource to which the Crown and Maori have a legitimate interest, can provide an opportunity for the Crown to address the disparity in the compensation offered Maori under other settlements. Thus, not only does the Crown have an obligation to recognise and provide for the Article II interest in the resource, but the Crown has the further obligation to make good wherever possible, the lack of overall compensation. Such an obligation is inherent in the nature of the Treaty relationship of fairness, good faith and partnership.

### *Benefits of LMDS/LMCS frequencies*

**14.4** LMDS/LMCS offered Maori the opportunity to not only deliver Maori programming to homes but the ability to offer enhanced services such as voice and data communications and Internet access. Based on emerging high frequency wireless technology, LMDS/LMCS offered a fast cost effective means for Maori to make a realistic investment in the telecommunications industry.

**14.5** For example using wireless technology allows new entrants to set-up a network quickly and at a lesser cost compared to a conventional wire/cable network. In the case of LMDS/LMCS technology Maori could have initially invested in developing a network in a high-density population/central business area for the best investment return.

**14.6** The physical network could consist of a multi-node wireless transmitter/receiver system, spread throughout a defined area to achieve the widest coverage. The transmitter/receivers could be situated on either buildings or towers similar to cell towers and like cell phones offer a convenient and effective means of communicating. As connections are wireless based homes and business covered by the network would only require the installation of a small antenna and desktop box to receive services. Therefore customers could be set up quickly and at less cost compared to a wire/cable option. As wireless technology provides for high-speed data connections, this makes it possible for the network provider to offer a wider range of enhanced services from multi-language broadcasting to CD quality music play.

**14.7** Assessing the potential uses and benefits of new technology is to a degree speculative, however the above examples illustrate that proper research needed to be conducted into the implications for Maori of the frequencies before the Crown could dismiss the tribal interest so categorically.

***Benefits of the 2 GHz range***

**14.8** The Ministry of Maori Development (TPK) has commissioned a report by a Telecommunications Consultancy firm specifically to address the potential benefits of the 2 GHz range for Maori. That report has been obtained under the Official Information Act 1982 after considerable pressure was placed on Ministry officials who did not want the report released. This claim relies on the report's findings which are canvassed in the next section.

## 15. Commissioned report to Te Puni Kokiri

**15.1** The Ministry of Maori Development commissioned a Telecommunications Consulting Company to undertake a report on the uses and implications of the 2 GHz radio spectrum and other frequencies generally, and more particularly as they apply to the protection and promotion of Maori language and culture. The report was presented in December 1998 (Te Puni Kokiri, *Implications of Radio Spectrum for Maori Language and Culture*, December 1998).

**15.2** Despite the restrictions placed upon the consultants that the report should still focus on the te reo and culture aspects of Maori advancement, the report makes the following recommendations:

- *Spectrum and telecommunications are major issues for Maori, and the situation is rapidly evolving. Immediate action is recommended to develop a comprehensive policy on telecommunications issues as they affect Maori language and culture. Policies for broadcasting and telecommunications should be harmonised.*
- *The 2 GHz auction is an important step in determining the direction of telecommunications for the next 20 years. It is a 'one off' opportunity for Maori which should be acted on immediately. Long term strategies to enable Maori to position for future spectrum auctions outside 2 GHz, or for other structural changes in the industry, are also recommended.*
- *Research into the telecommunications services currently available to Maori and their current and future needs to be recommended.*

- *Further research into overseas precedents on the provision of radio spectrum to indigenous peoples is recommended.*
- *It is recommended that TPK participate in the MSUAG (Major Spectrum Users Advisory Group).*

**15.3** The report vindicates the claimant's stance that the 2GHz frequency range does have enormous potential for the advancement of Maori.

**15.4** The report also highlights the urgency of the situation, and the prejudice that Maori will suffer if the alienation by auction proceeds.

## 16. International obligations

**16.1** The International Telecommunications Union (ITU) is a branch of the United Nations that coordinates international government and private sector co-operation in the development of telecommunication programmes, policies and standards. The ITU consists of three sectors. These are:

- Radiocommunications (ITU-R)
- Telecommunications (ITU-T)
- Development (ITU-D)

**16.2** Of the three sectors the ITU-D is responsible for developing initiatives which advance universal access to telecommunication resources for both developing and developed countries. As part of its operation the ITU-D holds an international conference every four years called the World Telecommunications Development Conference (WTDC). The conference brings together both member states and sector members to develop policies and programmes which are then implemented by the ITU-D in the four-year period between conferences.

**16.3** The first WTDC conference was held in Buenos Aires in 1994 and resulted in the Buenos Aires Declaration and the Buenos Aires Action Plan (BAAP). Both the declaration and action plan set the frame work for development of international telecommunication policy, while providing the impetus for a number of international research projects and co-operative ventures assisting both developing and developed countries.

**16.4** The second conference was held in Valletta Malta from the 23 March 1998 to the 1 April 1998. A paper (document 113) submitted by Professor Whatarangi Winiata was presented to the conference asking delegates to consider the plight of indigenous people when developing telecommunication policy. This was later followed by a paper (document 174) submitted by the New Zealand delegation asking the ITU-D to initiate a study question researching the role of telecommunications in the social and cultural development of indigenous people. It also proposed a resolution asking the ITU-D to pay particular attention in its work programmes and activities to the role of telecommunications in meeting the needs for economic, social and cultural development of indigenous people.

**16.5** Both the study question and the resolution were adopted by the conference for inclusion in the final Valletta Declaration and Valletta Action Plan. The final draft was ratified at the ITU Plenipotentiary meeting in October 1998.

## PART THREE – RELIEF

### 17. Breaches of the Treaty of Waitangi

**17.1** The claimant states that the actions, omissions and policies of the Crown and its agents as referred to in this statement of claim have had prejudicial effects on te iwi Maori.

**17.2** Radiocommunications Act 1989

**17.2.1** failing to acknowledge te tino rangatiratanga residing in whanau, hapu and Iwi Maori over the radio spectrum;

**17.2.2** assuming for itself the exclusive authority to manage the spectrum and in so doing ignoring the principle of partnership;

**17.2.3** failing to establish, in consultation with Maori, adequate principles, policy and legislative framework for Maori partnership in spectrum management;

**17.2.4** continuing to develop and pursue spectrum management policy, excluding the legitimate participation of Maori;

**17.2.5** vesting in itself through the provisions of the Radiocommunications Act 1989 and its amendments the sole authority to create a property right in the form of a management right in the first instance and to sell that right on an exclusive basis and without consultation with or the agreement of Maori;

**17.2.6** vesting in itself through the provisions of the Radiocommunications Act 1989 and its amendments the total revenue from the sale of management rights to the spectrum;

**17.2.7** proposing a spectrum management policy which advocates the sale of frequencies and management rights to private interests over the next six years, while remaining silent on the rights of Maori to guaranteed access to radio spectrum resources for purposes other than the protection and promotion of Maori language and culture through broadcasting.

**17.3** Disposal by Auction of Frequencies 25–29 GHz

**17.3.1** Announcing in 1997 the sale by auction of frequencies in the 25–29 GHz range without informed consultation with and agreement of Maori on any of the following:

(a) The disposal of the control to the resource itself, which neither Treaty partner has a monopoly over;

(b) Whether Maori had any use for the spectrum to be disposed of, for their own economic advancement;

(c) Whether Maori, in their own wisdom, regarded the spectrum as useful for the Crown's obligations to promote and protect te reo Maori and the culture.

**17.4** Proposal to Auction 2 GHz range

**17.4.1** announcing on the 22 December 1998 the sale of radio frequency licenses and spectrum Management Rights for frequency bands 1.7 to 2.3 GHz, planned auction in the first three months of 1999 and frequencies in the UHF band suitable for Digital Terrestrial

Television (DTT), planned auction for August 1999, without informed consultation and agreement with Maori any of the following:

(a) The disposal of the control to the resource itself, which neither Treaty partner has a monopoly over;

(b) Whether Maori has any use for the spectrum to be disposed of, for their own economic advancement;

(c) Whether Maori, in their own wisdom, regard the spectrum as useful for the Crown's obligations to promote and protect te reo Maori and the culture.

**17.5** MSUAG/Maori Advisory Group

**17.5.1** Failing to provide for any forum where Maori could advise the government on issues related to spectrum;

**17.5.2** Failing to provide a guaranteed place on MSUAG, the industry advisory body to the government.

**17.6** The Tichbon Report

**17.6.1** The retention of vital information on the implications of the 2GHz spectrum for the benefit of Maori language and culture without due consultation with Maori on the ramifications of the report;

**17.6.2** Maintaining that the sale of 2GHz has no relevance to Crown's obligations to protect and promote te reo and the culture in the face of the report which established the exact opposite;

**17.6.3** Obstructing the right of the Maori to peruse the report, even in the face of an Official Information Act request, and knowing that the Maori would be directly affected by the contents of the report;

**17.6.4** Allowing a sale of those frequencies that are the subject of the report to proceed, and ignoring all of the recommendations contained in the report.

**17.7** International Obligations

**17.7.1** Failing to consider or provide for its international Treaty obligations under the ITU for the recognition of the importance of telecommunications to the economic, cultural and social development of indigenous peoples.

## 18. Interim relief

**18.1** The claimant seeks an urgent interim recommendation that the proposed auctions by the Crown of 2GHz management rights commencing on 29 March 1999 be postponed until a negotiated agreement with Maori on these issues has been reached.

**18.2** The grounds for such relief are:

**18.2.1** Significant prejudice will be caused to Maori if the proposed auctions proceed without a full and deliberate determination of the issues in this claim. The auctions will effectively alienate management rights in the 2GHz spectrum range to commercial interests, for a period of at least 20 years;

**18.2.2** Through the denial of their rightful place in the partnership to the spectrum resource, Maori will lose their share of the valuable economic benefits to be gained from

participation in the telecommunications industry, and will lose their share to the revenue gained from the sale of the rights;

**18.2.3** The Tichbon report has illustrated that urgent action is needed by TPK to protect Maori interests before the sale proceeds, however the recommendations have been ignored;

**18.2.4** Maori have no resources with which to fully consult amongst themselves as to their aspirations for the use of the telecommunications spectrum, and the alienation of management rights in the higher spectrum frequency bands will deny them the opportunity to do so;

**18.2.5** No great prejudice will be suffered by the Crown if the auctions are postponed. The policy of commercialisation and privatisation is at its early stages of implementation, and there is no need for haste in the pursuing of the policy;

**18.2.6** The exercise of restraint by the Crown rather than pushing through its policy without justifying the underlying basis of their right to do so, will avoid costly and time-consuming legal challenges in the future;

**18.2.7** There is no contractual obligation on the Crown to tender on that specific date or within such a tight timeframe. It is unlikely that third party interests will therefore be significantly affected;

**18.2.8** There is a precedent for the situation where the Crown has postponed an auction. In January 1998, the auction of frequencies in the 25–29GHz range was postponed due to technical failures (The Maori request to postpone was rejected).

## 19. Relief

**19.1** The claimant seeks recommendations that:

**19.1.1** the findings in the Wai 26/150 report did not apply merely to where Maori language or culture is at stake in broadcasting, but to the tribal interest in telecommunications generally;

**19.1.2** Maori have a guaranteed right under the Treaty of Waitangi to participate in spectrum management and are entitled to benefit economically, culturally and socially from its management;

**19.1.3** the Radiocommunications Act 1989 in so far as it vested in the Crown all management rights to the spectrum from 9kHz to 3000GHz without consultation with or the agreement of Maori assumed a monopoly over the resource and is in breach of the Treaty of Waitangi;

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

**19.2** And further, the claimant seeks recommendations that:

**19.2.1** the current spectrum management policy be discontinued until a negotiated solution with Maori on the issues raised in this claim has been reached;

**19.2.2** the Crown provide funding and other support for Maori to undertake urgent research and consultation amongst themselves into the implications of the government's telecommunication policy on Maori and opportunities for Maori participation in the telecommunications industry;

**19.2.3** that the Crown support the active participation by Maori in the telecommunication industry and in negotiation with Maori reserve sufficient radio spectrum to ensure sustained and ongoing development;

**19.2.4** the Crown and Maori negotiate a strategic framework for the long term management of the spectrum;

**19.2.5** the Crown compensate Maori for their share of revenue which has been expropriated by the Crown from

(a) the frequency licences regime operating since before the Radiocommunications Act 1989; and

(b) the rights to spectrum revenue generated from the sale of management rights in frequencies under the Radiocommunications Act 1989; and

**19.2.6** other recommendations the Tribunal thinks appropriate.

**19.2.7** The claimants also seek costs.

## 20. Amendments

**20.1** The claimant reserves the right to amend or add further to the claim as appropriate.

APPENDIX II

# RECORD OF INQUIRY

## RECORD OF HEARINGS

### The Tribunal

The Tribunal constituted to hear claim Wai 776, concerning radio spectrum management and telecommunications development, comprised Judge Patrick John Savage (presiding), Josephine Anderson, and Professor Keith Sorrenson.

Judge Heta Hingston presided over the 15 March 1999 conference to hear the application for urgency.

### Counsel

The counsel who appeared were Helen Cull QC, Maui Solomon, and Leo Watson for the claimant; Virginia Hardy, Helen Carrad, and Andrew Irwin for the Crown; Wayne Wedderspoon for the Ministry of Commerce; and Martin Dawson for the New Zealand Maori Council and Nga Kaiwhakapumau i te Reo.

### Tribunal Staff

The Tribunal staff who assisted were Elizabeth Cox (research), Rose Daamen (research and report writing), and Turei Thompson (claims administration).

### First Conference

The first conference was held at the Waitangi Tribunal's offices, 110 Featherston Street, Wellington, on 15 March 1999 and considered the claimant's application for urgency.

### Second Conference

The second conference was a teleconference on 17 March 1999 and concerned the urgent hearing.

### Third Conference

The third conference was a teleconference on 31 March 1999 and concerned the substantive hearing.

### Fourth Conference

The fourth conference was a teleconference on 7 April 1999 and concerned the substantive hearing.

### Urgent Hearing

The urgent hearing was held at the Waitangi Tribunal's offices, 110 Featherston Street, Wellington, on 19, 23, and 24 March 1999. Submissions and evidence were received from Graeme Everton, Maui Solomon, and Professor Whatarangi Winiata (for the claimants) and Katrina Bach, Virginia Hardy, Wayne Wedderspoon, and John Yeabsley (for the Crown).

### Substantive Hearing

The substantive hearing was held at the Waitangi Tribunal's offices, 110 Featherston Street, Wellington, on 30 April, 3 and 4 May, and 10, 11, and 12 May 1999. Submissions and evidence were received from Helen Cull QC, Dr Howard Frederick, Hirini Mead, Dr Charles Royal, Dennis Sharman, Bruce Tichbon, Huirangi Waikerepuru, Piripi Walker, and Professor Whatarangi Winiata (for the claimants) and Katrina Bach, James Casey, Virginia Hardy, Alan Jamieson, Andrew McEwan, Roger Perkins, Beau Reweti, Wayne Wedderspoon, and John Yeabsley (for the Crown).

## RECORD OF PROCEEDINGS

### 1. Claims

#### 1.1 Wai 776

A claim by Rangiaho Everton concerning radio spectrum management and telecommunications development, undated

### 2. Papers in Proceedings

**2.1** Directions of deputy chairperson registering claim 1.1 and instructing registrar to schedule conference to hear application for urgency, 10 March 1999

**2.2** Notice of claim 1.1, 11 March 1999
List of parties sent notice of claim 1.1, 11 March 1999

**2.3** Application for urgency from claimant counsel, 8 March 1999

**2.4** Paper 2.4 refiled as document A1

**2.5** Paper 2.5 refiled as document A2

**2.6** Paper 2.6 refiled as document A3

**2.7** Paper 2.7 refiled as document A4

**2.8** Paper 2.8 refiled as document A5

**2.9** Letter from Wai 681 claimants to registrar supporting application for urgency, 15 March 1999

**2.10** Submissions of Crown counsel concerning urgency application, 15 March 1999

**2.11** Memorandum from claimant counsel concerning administrative matters, 16 March 1999

**2.12** Direction of chairperson constituting Tribunal (Judge Patrick Savage, Josephine Anderson, Professor Keith Sorrenson), 17 March 1999

**2.13** Memorandum of registrar certifying that notice of urgent hearing given, 17 March 1999
Notice of urgent hearing, 17 March 1999
List of parties sent notice of urgent hearing, 17 March 1999

**2.14** Minutes of oral decision of Tribunal on urgency application, 15 March 1999

**2.15** Minutes of 17 March 1999 teleconference concerning urgent hearing, undated

**2.16** Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report*, Wellington, Waitangi Tribunal, 26 March 1999

**2.17** Letter from Crown counsel to registrar advising Tribunal of Crown's three-month deferral of auction of radio spectrum management rights, 26 March 1999

**2.18** Letter from claimant counsel to Crown counsel concerning resolution of claim by negotiation, 30 March 1999

**2.19** Letter from Crown counsel to claimant counsel in response to paper 2.18, 30 March 1999

**2.20** Minutes of 31 March 1999 teleconference concerning substantive hearing, undated

**2.21** Minutes of 7 April 1999 teleconference concerning substantive hearing, undated

**2.22** Memorandum of registrar certifying that notice of substantive hearing given, 12 April 1999
Notice of substantive hearing, 12 April 1999
List of parties sent notice of substantive hearing, 12 April 1999

**2.23** Memorandum of registrar certifying that amended notice of substantive hearing given, 15 April 1999
Amended notice of substantive hearing, 15 April 1999
List of parties sent amended notice of substantive hearing, 15 April 1999

**2.24** Application of claimant counsel for issue of summons for Bruce Tichbon, 19 April 1999

**2.25** Waitangi Tribunal summons for Bruce Tichbon, 22 April 1999

**2.26** Direction of Tribunal concerning family connection between presiding officer and Wai 681 claimant and amalgamation of Wai 681 with Wai 776, 22 April 1999

**2.27** Direction of deputy chairperson registering amendment to Wai 681 and declining request for Wai 681 to be heard with Wai 776, 22 April 1999

### 3. Research Commissions

**3.1** Direction of Tribunal authorising claimant counsel to commission Professor Howard Frederick and Tiotira Hapeto to prepare report concerning nature and value of radio spectrum and role of Maori in telecommunications, 9 April 1999

**3.2** Direction of Tribunal authorising claimant counsel to commission Bruce Tichbon to prepare report concerning implications for Maori of obtaining share in radio spectrum management, 9 April 1999

## RECORD OF DOCUMENTS

### A. Documents Received up to End of Urgent Hearing

**A1** Brief of evidence of Professor Whatarangi Winiata in support of application for urgency, 8 March 1999

**A2** Supporting documents to document A1, consisting of assorted correspondence concerning the radio spectrum, 15 April 1996 – 5 November 1998

**A3** Brief of evidence of Graeme Everton in support of application for urgency, 8 March 1999

**A4** Supporting documents to document A3
'Statement of Claim: Wai 150', appendix 2 of Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990, pp 49–68
'The Treaty', chapter 8 of *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, pp 39–44
Ministry of Commerce, *A Strategic Framework for Radio Spectrum Management in New Zealand*, Wellington, Ministry of Commerce, September 1997
Bruce Tichbon, 'Implications of Radio Spectrum for Maori Language and Culture', report commissioned by Te Puni Kokiri, December 1998

**A5** Brief of evidence of Graeme Everton, 15 March 1999

**A6** Letter from Ministry of Commerce to Graeme Everton concerning request under Official Information Act 1982 for Ministry documents relating to the radio spectrum claim, 9 March 1999
Minutes of 18 December 1998 Cabinet meeting concerning outstanding issues in the auction of radio spectrum rights in 2GHz band (CAB(98)M48/23)
Minutes of 16 December 1998 Cabinet Economic Committee meeting concerning outstanding issues in the auction of radio spectrum rights in 2GHz band (ECO(98)M36/3), undated
'Auction of Radio Spectrum in the 2GHz Band (1710–2300MHz) – Outstanding Issues', Cabinet Economic Committee paper, undated
Ministry of Commerce briefing paper for Minister of Communications concerning outstanding issues in the auction of radio spectrum rights in 2GHz band, 11 December 1998

**A7** Brief of evidence of Graeme Everton, 18 March 1999

**A8** Opening submissions of claimant counsel, 17 March 1999

**A9** Te Wananga o Raukawa, *Studies in Matauranga Maori: Prospectus 1999*, Otaki, Te Wananga o Raukawa, 1999, pp 35–36

**A10** Table entitled 'Electromagnetic Spectrum', undated

**A11** 'Section B: Documents', papers submitted to the World Telecommunication Development Conference, Valletta, Malta, 23 March – 1 April 1998

**A12** Indicative synopsis of evidence of Huirangi Waikerepuru, undated

**A13** Brief of evidence of Wayne Wedderspoon, March 1999

**A14** Brief of evidence of John Yeabsley, March 1999

**A15** Brief of evidence of Katrina Bach, March 1999
**(a)** Ministry of Commerce, *Draft Management Plan 2GHz Band (1.7–2.3GHz)*, Wellington, Ministry of Commerce, June 1997

**A15**—*continued*
**(b)** Letter from Minister of Communications to Office of the National Maori Organisations concerning creation of management rights for 2GHz and 25–29GHz frequency ranges, 20 November 1997
**(c)** Cabinet Economic Committee paper from the Office of Minister of Communications concerning the auction of radio spectrum in the 2GHz band (outstanding issues)
**(d)** Minutes of 18 December 1998 Cabinet meeting concerning outstanding issues in the auction of radio spectrum rights in 2GHz band (CAB(98)M48/23)
**(e)** Letter from the Minister of Maori Affairs to the Treasurer concerning Te Puni Kokiri report *Implications of Radio Spectrum for Maori Language and Culture*, 15 December 1998
**(f)** 'Minister of Communications Announces Radio Spectrum Auction', New Zealand Executive Government news release, 22 December 1998
**(g)** Correspondence concerning Graeme Everton's request under the Official Information Act 1982 for Te Puni Kokiri and Ministry of Commerce documents relating to the radio spectrum claim, 22 January 1999–12 March 1999

**A16** Letter from the Ministry of Commerce to Graeme Everton concerning ITU-D study question 14/1, 13 January 1999
Letter from the Ministry of Commerce to the International Telecommunication Union concerning ITU-D study question 14/1, 13 January 1999
Letter from the Ministry of Commerce to Graeme Everton concerning ITU-D study question 14/1, 12 February 1999

**A17** Opening submissions of Crown counsel, undated

**A18** Printouts of an overhead projector presentation concerning the radio spectrum, radio communications, the ITU International Radio Regulations, and the Radiocommunication Act 1989, undated

**A19** Christian A Herter jnr, 'The Electromagnetic Spectrum: A Critical Natural Resource', *Natural Resources Journal*, vol 25, July 1985, pp 651–663

**A20** Wayne Wedderspoon, 'Radio Spectrum Management: The New Zealand Approach', speech given in Sydney, October 1995

**A21** New Zealand Maori Council and Nga Kaiwhakapumau i te Reo, 'Maori Views on the Radio Spectrum', unpublished paper, October 1989

**A22** Te Puni Kokiri, *The National Maori Language Survey: Te Mahi Rangahau Reo Maori*, Wellington, Te Puni Kokiri, *c*1995, p 64

**A23** The Broadcasting Amendment Bill (No 2) 1998 and explanatory note

**A24** Extracts from Dr Graham Butler, *Impact 2001: How Information Technology Will Change New Zealand*, Wellington, Communications Arts Wellington Ltd, 1996 (printout of parts of http://www.moc.govt.nz/itag/impact/impact.html)

**A25** Closing submissions of claimant counsel, 24 March 1999

**A26** Closing submissions of Crown counsel, undated

## B. Documents Received up to End of Substantive Hearing

**B1** Document removed from record

**B2** Brief of evidence of Dr Howard Frederick, 19 April 1999

**B3** Brief of evidence of Te Ahukaramu Royal, 19 April 1999

**B4** Brief of evidence of Dennis Sharman, 19 April 1999

**B5** Document removed from record

**B6** Brief of evidence of Piripi Walker, undated

**B7** Victoria University of Wellington, 'The Staff of the New Zealand Internet Institute: Dr Howard Frederick' (printout of http://www.nzii.org.nz/about/howard_frederick.html, 16 October 1998)
List entitled 'Relevant Publications [of Dr Frederick] in the Last Five Years'

**B8** Bruce Tichbon, 'Implications of Radio Spectrum for Maori Language and Culture', report commissioned by Te Puni Kokiri, December 1998

**B9** Briefs of evidence of Huirangi Waikerepuru, 20 April 1999

**B10** Brief of evidence of Professor Hirini Mead, 20 April 1999

**B11** Brief of evidence of Professor Whatarangi Winiata, 20 April 1999

**B12** Brief of evidence of Andrew McEwan, 23 April 1999

**B13** Document removed from record

**B14** Brief of evidence of Alan Jamieson, 25 April 1999

**B15** Brief of evidence of John Yeabsley, 26 April 1999

**B16** Curriculum vitae of John Yeabsley, undated

**B17** United States Congress: Office of Technology Assessment, *Telecommunications Technology and Native Americans: Opportunities and Challenges* (OTA-ITC-621), Washington DC, United States Government Printing Office, August 1995

**B18** Opening submissions of claimant counsel, 30 April 1999

**B19** Curriculum vitae of Bruce Tichbon, undated

**B20** Brief of evidence of Huirangi Waikerepuru, undated

**B21** Te Puni Kokiri, *The National Maori Language Survey: Te Mahi Rangahau Reo Maori*, Wellington, Te Puni Kokiri, *c*1995

**B22** Te Puni Kokiri, *The National Maori Language Survey: Summary Report*, Wellington, Te Puni Kokiri, *c*1995

**B23** Law Commission, *Justice: The Experiences of Maori Women – Te Tikanga o te Ture: Te Matauranga o nga Wahine Maori e Pa Ana ki Tenei*, New Zealand Law Commission Report 53, April 1999 (NZLC R53)

**B24** H H Turton, *Province of Auckland*, vol 1 of *Maori Deeds of Land Purchases in the North Island of New Zealand*, 2 vols, Wellington, Government Printer, 1877, pp 142–149, 152–153 (deeds 104–111, 114)

**B25** Ken Stevens, *Te Pouaka Whakaako ki te Kareti o Ngata: Telelearning and Contexts of Awareness at Ngata Memorial College*, Wellington, Te Puni Kokiri, 1998

**B26** Te Wananga o Raukawa, 'Summary Schedule of Courses, Hours, & Credits', in *Master of Maori and Management MMMgt*, Otaki, Te Wananga o Raukawa, 1999, pp 45–47

**B27** Professor Whatarangi Winiata, 'Hapu and Iwi Resources and their Quantification', *The April Report: Report of the Royal Commission on Social Policy*, 3 vols, Wellington, Royal Commission on Social Policy, April 1988, vol 3, pt 2, pp 791–803

**B28** 'Canadians Redraw the Map: Nunavut Is Born', *Dominion*, 27 April 1999, p 12

**B29** Mason Durie, *Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination*, Auckland, Oxford University Press, 1998, p 170

**B30** Opening submissions of Crown counsel, 4 May 1999

**B31** *Adarand Constructors Inc v Secretary of Transportation and Others* 515 US 200; 132 L Ed 2d 158 (1995)

**B32** *Adarand Constructors Inc v Secretary of Transportation and Others* 965 F Supp 1556 (1997) (District Court of Colorado)

**B33** Transcript of handwritten notes of claimant counsel questioning on 30 April 1999 of Bruce Tichbon concerning evidence of John Yeabsley, undated

**B34** Summary of evidence of James Casey, undated
Curriculum vitae of James Casey, undated

**B35** Three PC disks containing Quicktime format Ericsson promotional video clip concerning wideband code division multiple access technology

**B36** Brief of evidence of Beau Reweti, 10 May 1999

**B37** Ministry of Education, *Annual Report on Maori Education, 1997/98, and Direction for 1999*, Wellington, Ministry of Education, 1998

**B38** Te Puni Kokiri, *Progress towards Closing Social and Economic Gaps between Maori and Non-Maori: A Report to the Minister of Maori Affairs*, Wellington, Te Puni Kokiri, 1998

**B39** Monitoring and Evaluation Unit, Te Puni Kokiri, *Review of the Ministry of Education: Service Delivery to Maori*, Wellington, Te Puni Kokiri, 1997, pp 27–30

**B40** Ministry of Education, *Interactive Education: An Information and Communication Technologies Strategy for Schools*, Wellington, Ministry of Education, 1998

**B41** Letter from Ministry of Education to New Zealand Council of Social Services concerning proposed amendments to section 181 of the Education Act 1989, 2 February 1999
**(a)** Letter from Te Wananga o Raukawa to Ministry of Education concerning proposed amendments to section 181 of the Education Act 1989, 22 March 1999

**B42** Brief of evidence of Roger Perkins, 10 May 1999

**B43** Alex Orange and John Mackie, 'Radio Spectrum Allocations in New Zealand', colour poster, Ministry of Commerce, undated

**B44** *International Telecommunication Convention, Nairobi, 1982: Final Protocol, Additional Protocols, Optional Additional Protocol, Resolutions, Recommendation and Opinions*, Geneva, General Secretariat of the International Telecommunication Union, pp 23, 88, 123
Pages 256 and 303 of unidentified book (referring to article 33 of the International Telecommunication Union convention)

**B45** Monitoring and Evaluation Branch, Te Puni Kokiri, *Review of the Ministry of Commerce: Service Delivery to Maori*, Wellington, Te Puni Kokiri, July 1998

**B46** Closing submissions of claimant counsel, undated

**B47** Additional pages to document B46

**B48** Order of 29 July 1991 concerning transfer of assets to broadcasting State-owned enterprises, Justice McGechan, High Court Wellington

**B49** Closing submissions of Crown counsel, 12 May 1999

## C. DOCUMENTS RECEIVED SUBSEQUENT TO SUBSTANTIVE HEARING

**C1** International Telecommunications Union, 'International Mobile Telecommunications 2000 or Future Public Land Mobile Telecommunication Systems (FPLMTS)', brochure, undated (printout of http://www.itu.int/imt/1-info/articles/brochure/index.html)

**C2** Further submissions of Crown counsel, 14 May 1999

**C3** Further closing submissions of claimant counsel, 14 May 1999

**C4** Submissions of Crown counsel in response to document C3, 18 May 1999