IN THE WAITANGI TRIBUNAL

Wai 2534

CONCERNING the Treaty of Waitangi Act 1975

AND the New Zealand Flag Claim

DECISION OF THE DEPUTY CHAIRPERSON REGARDING APPLICATION FOR AN URGENT HEARING

9 September 2015

Introduction

1. On 17 July 2015, a new claim and accompanying application for an urgent hearing were filed with the Tribunal by Rihari Dargaville, Haami Piripi and Cletus Maanu Paul (Wai 2534, #1.1.1 and Wai 2534, #3.1.1).

2. The applicants allege that the Crown has breached the principles of the Treaty of Waitangi in its decision to review and possibly change the New Zealand flag. Specifically, the applicants allege that they will suffer significant and irreversible prejudice as a result of the following Crown actions and policies:

    a. Failing to recognise the applicants' mana, tino rangatiratanga, and the flag as a taonga to the applicants;

    b. Failing to actively protect the applicants' taonga, namely their tino rangatiratanga and the flag;

    c. Failing to uphold the principles of good faith and partnership when initiating the flag change process; and

    d. Failing to appropriately engage with Māori, including the applicants, in the decision to initiate the flag change process.

Procedural History

The applicants' position

3. On 28 October 2014, Cabinet decided to adopt a process to consider changing the New Zealand flag. The New Zealand Flag Referendums Bill 2015 (the Bill) was introduced into the House of Representatives in March 2015. This Bill provides for the administration of the referendum to change the flag, and specifies the voting process.

4. On 28 February 2015, the Crown announced the creation of the New Zealand Flag Consideration Panel (the Flag panel). The purpose of the Flag panel is to:

    a. Consider and oversee a public engagement process;

    b. Invite New Zealanders to submit designs or ideas regarding the possible alternative flag; and

    c. Shortlist designs for the first postal referendum, which will be held this year using a preferential voting system, inviting voters to rank the designs in order of preference.

5. With regards to the Tribunal's jurisdiction, and in particular the jurisdictional restriction contained in s 6(6) of the Treaty of Waitangi Act 1975 relating to Bills currently before the House, the applicants submit that the claim is not restricted by this section. The applicants submit that the Bill is referred to as background to this claim and the claim

is directed at the Crown's decision to initiate the process that could potentially change the flag.

6. The applicants submit that the Crown has breached the principles of the Treaty of Waitangi by:

   a. Failing to actively protect the applicants' taonga, namely their tino rangatiratanga and the New Zealand flag;

   b. Failing to honour a good-faith partnership; and

   c. Failing to enter into an appropriate level of engagement with the applicants.

7. The applicants state that these breaches have caused, and will continue to cause significant and irreversible prejudice to them.

8. In terms of their submission regarding tino rangatiratanga and the flag as their taonga, the applicants make the following further submissions:

   a. A flag is a fundamental symbol of sovereignty, and a powerful indication of nationhood;

   b. In New Zealand, the tino rangatiratanga and accompanying flag of the applicants was given formal expression;

   c. The history of the flag cannot be viewed in isolation from the tino rangatiratanga of the applicants; and

   d. Any flag that represents the rangatiratanga of the applicants is therefore a taonga of the applicants.

9. The applicants submit that their tino rangatiratanga is a taonga protected under the Treaty of Waitangi. Furthermore, the applicants submit that the flag, as a representation of their tino rangatiratanga, is also a taonga protected under the Treaty.

10. The applicants note that, in accordance with the findings of the Tribunal's *He Whakaputanga me Te Tiriti: The Declaration and the Treaty* report, their tupuna did not cede sovereignty in 1840. For the applicants, the current New Zealand flag symbolises the sovereign authority of New Zealand. They further submit that moves to review and amend the flag are premature and pre-emptive.

11. The applicants submit that the Crown failed to consult with them throughout the flag change process. They further submit that informed consent prior to the decision to initiate the review of the flag is not only reasonable, but is necessary, in order for the Crown to fulfil its obligations of active-protection and partnership. The applicants consider that the onus is on the Crown to properly engage with them over such an important issue.

12. The applicants submit that the decision to initiate process to change the flag is an important constitutional decision. The applicants submit that they should have been involved in the decision making which established the review process.

13. The applicants further submit that there are no alternative remedies available to them and that they are ready to proceed.

14. Finally, in terms of an imminent Crown action, the applicants have included a timeline outlining the Crown's timetable regarding the Flag referendum as follows:

    a. 4 May – 21 August 2015 – public engagement process by the Flag panel;

    b. 21 August 2015 – Flag panel to report back to the responsible Minister;

    c. 14 September 2015 – Cabinet to approve designs and ballot papers;

    d. 28 October 2015 – Ballot paper printing to begin;

    e. 20 November – 11 December 2015 – Referendum 1 and postal voting period;

    f. 3 March – 24 March 2016 – Referendum 2 and postal voting period; and

    g. 31 March 2016 – Final result of referendum confirmed.

The Crown's position

15. The Crown opposes the application for urgency on the following grounds:

    a. The Bill is currently before the House, and is expected to receive Royal assent by 24 August 2015. The claim relates to the process the Crown has adopted in regarding the Flag consideration process, and the Bill is an inextricable part of this process. As such, and pursuant to s 6(6) of the Treaty of Waitangi Act 1975, the Tribunal does not have jurisdiction to consider this claim while the Bill remains before the House. Furthermore, if the Bill is passed into legislation, further legislation would be required to amend or stop the referendum process;

    b. The applicants have delayed in bringing this application. This application was filed on 17 July 2015, one day after the public engagement process concluded;

    c. The applicants have not demonstrated that they will suffer significant and irreversible prejudice if the claim is not heard urgently; and

    d. The applicants have had, and continue to have, alternative remedies available to them by participating in existing Crown processes.

    <u>Jurisdiction</u>

16. The Crown submits that the Tribunal does not have the jurisdiction to inquire into the Bill as its jurisdiction has been removed by s 6(6) of the Treaty of Waitangi Act 1975.

17. While it might be said that the Crown's initial decision to initiate the flag reconsideration project is open to inquiry and not preclude by s 6(6), in the circumstances such an inquiry would be in respect of the pending Bill.

18. The Crown also states that upon enactment of the Bill, the processes noted in the Bill could only be countermanded by further legislation.

Timing

19. The Crown highlights the timeline of the Flag consideration process, which has been in the public domain since 11 March 2014. They also highlight the fact that this urgency application was not lodged until 17 July 2015. The Crown submits that the delay weighs against the granting of urgency.

No significant and irreversible prejudice – the Crown's process has been Treaty compliant

20. The Crown submits that the decision to initiate consideration of the New Zealand flag was a proper exercise of the Crown's kāwanatanga right under Article One of the Treaty of Waitangi. The Crown also submits that the principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to pursue its chosen policy.

21. The process adopted allows for meaningful engagement with Māori, and for Māori to have the opportunity to articulate their interests in the Flag consideration project.

Treaty-compliant engagement process

22. The Crown submits that the Flag panel's engagement process with Māori was treaty compliant.

23. The Flag panel represented a cross-section of New Zealand society, and has an understanding of all that goes into making up New Zealand's sense of national identity.

24. The Flag panel is required to act in accordance with the Crown's Treaty obligations in leading the engagement process.

25. The Flag panel's approach to engagement with Māori included:

    a. The early appointment of a senior advisor responsible for the Flag panel's engagement with Māori;

    b. Early contact with organisations which the panel considered could assist it in effectively engaging with communities, including iwi and hapū;

    c. Seeking to engage with Māori at an iwi level, and seeking advice from Te Puni Kokiri on appropriately and effectively engaging Māori in the process;

    d. Attending the Iwi Chairs forum and the New Zealand Māori Council conference;

    e. Co-hosting six Māori engagement hui throughout the country with local Māori;

    f. Engaging professional facilitators and cultural advisors to guide and support panel members; and

g. Utilising a wide array of mainstream and Māori specific media to inform Māori of the process.

Applicants' engagement with the process

26. The Crown submits that the applicants' failure to participate in consultation processes the Crown has provided diminishes significantly any complaint about the effectiveness of those processes.

27. The Crown further highlights that even though it was open to the applicants to participate in the Māori and wider consultation opportunities, at no point did the applicants raise the issues contained in this application with the Flag panel or in any other official channels.

Alternative remedies

28. The Crown submits that the applicants have had, and continue to have, opportunities to pursues alternative remedies. These include the two referenda noted above.

Applicants' submissions in reply

29. On 19 August 2015, the applicants filed their submissions in reply to those of the Crown (Wai 2534, #3.1.2).

30. In summary, the applicants have made the following submissions in reply:

a. The Tribunal does have jurisdiction to inquire into this matter, as the Bill merely enables Crown policy;

b. The grounds for urgency have been met; and

c. The timing of the application weighs in favour of granting urgency, as the criteria for an urgent hearing have already been met.

Jurisdiction

31. The applicants submit that their grievance and concerns directly relate to the Government's initial decision to consider a flag change. Their concern is not directly with the processes set out in the Bill.

32. In terms of the Crown's submission that the Bill, once enacted, can only be countermanded by legislation, the applicants disagree. They submit that clause 13 of the Bill provides the government with discretion as to whether or not the responsible Minister provides the choice of the four flags.

33. Furthermore, even though clause 13 would compel the Governor-General to make an order in council, he would do so only upon the recommendation of the responsible Minister. The Minister can choose whether or not to make a recommendation.

34. The applicants submit that the circumstances in this instance are analogous to those faced by the Tribunal in Stage 1 of the National Freshwater and Geothermal Resources Inquiry. In that instance the Tribunal found that it could not undertake inquiry into the provisions of the Mixed Ownership Model Bill while it remained before the House of Representatives.

Timing of the application

35. In terms of the Crown's submission that this application could have been made as early as March 2014, the applicants note the meeting that the Flag panel had with the New Zealand Māori Council on 30 May 2015. At no time during that meeting did the Flag panel ask those in attendance whether or not they supported the potential change in the flag.

36. The applicants also submit that if they had lodged this application in March 2014, the Crown would have opposed the application on the grounds that it would have been premature.

Significant and irreversible prejudice

37. The applicants submit that they have suffered, and will continue to suffer, significant and irreversible prejudice as a result of the Crown's failure to sufficiently consult, or at all, in relation to the flag change process.

38. They submit that there were two distinct stages at which the Crown had a Treaty duty to consult with Māori, namely:

    a. When it made its decision to initiate the flag change process; and

    b. Throughout the flag change process itself.

39. The applicants make reference to the Tribunal's *Final Report of the MV Rena and Motiti Island Claims*, and in particular the Tribunal's findings with regards to informed decisions and consultation with Māori.

40. The applicants submit that the decision to initiate the flag change process was in breach of the Treaty principles of partnership and mutual benefit. Furthermore, the applicants submit that the Crown has failed to act reasonably, honourably and in good faith towards Māori.

41. The applicants note that the Crown has not made any submissions disputing or rejecting the proposition that the flag is a taonga for all New Zealanders. They therefore submit that the Crown accepts that tino rangatiratanga, and a national flag as a symbol of that tino rangatiratanga, are taonga.

42. The applicants also submit that the consultation which did occur was undertaken by a non-Crown entity, and was not sufficient to meet the Crown's Treaty obligations.

Alternative remedies

43. The claimants submit that there have not been any alternative remedies available to them that it would be reasonable, in the circumstances, for them to exercise.

44. They state that the opportunity to comment on the Bill during the select committee phase is not an alternative remedy, as this claim is not concerned with the provisions of the Bill.

45. The applicants also note that the flag change process has been about a new design for a flag, and has not touched on the Crown's decision to initiate the flag change process.

46. In terms of participating via the two referenda, the applicants submit that neither of these two referenda will alleviate the prejudice which they will suffer.

Further submissions

47. On 28 August 2015 counsel for the applicants filed a memorandum with the Tribunal, seeking a determination as soon as possible.

48. On 1 September 2015 the Crown notified the Tribunal that the New Zealand Flag Referendums Act 2015 came into effect on that day.

49. On 4 September 2015 counsel for the applicants filed a further memorandum seeking a determination on this matter as soon as possible.

Relevant law

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

> In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:
>
> - The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
> - There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
> - The claimants can demonstrate that they are ready to proceed urgently to a hearing.
>
> Other factors that the Tribunal may consider include whether:
>
> - The claim or claims challenge an important current or pending Crown action or policy;

- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

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

Discussion

51. The Crown's point that there was a Bill before the House of Representatives is no longer relevant. The New Zealand Flag Referendums Act 2015 is now in force and orders in Council have been promulgated. The dates upon which the referendums close have been set for the 24th of December 2015 and 24th of March 2016.

52. There are many issues in this matter. The most effective way to obtain a result on this application for urgency is to pass straight to the issue which is decisive for me. I therefore will presume, for the sake of argument, that the applicants will obtain a finding that the Crown's acts or omissions are inconsistent with the principles of the Treaty.

53. Therefore the focus is prejudice. This Tribunal has consistently ruled, that in considering an application for urgency, the applicant will have to establish or demonstrate that they, or those they represent, are suffering or are likely to suffer significant and irreversible prejudice as a result of current or pending Crown action.

    This general principle is not written in stone and I recognise there will be exceptional cases, which do not precisely meet that test. But this is not one of them.

    A high threshold is required to recognise that urgency is an exceptional procedure. Granting urgency does not simply involve the parties to the application, the Crown and the Tribunal. I have a duty to consider a fourth and unrepresented group, namely claimants who have waited years, often decades for the Tribunal to be able to direct its resources to them. I therefore must give some weight to those others waiting in a substantial queue while this claim attempts to jump the queue.

54. In deciding this application I must assess what is lost if urgency is not granted. To an extent that entails a subjective judgement.

55. The claimants assert that the existing flag is a taonga and a symbol of their rangātiratanga. As against that, I have vivid memories of the flag being shot at Ruatoki during the course of the hearing of a claim. The flag of course is but a symbol. But the nature and strength of the symbolism and what it evokes can vary from person to person or from group to group. For some it has been to live, struggle and if necessary die for. For others it is simply a logo. I suppose they are two ends of a spectrum. In a

similar vein for some, it is a symbol of nationhood. For others, it is a symbol of oppression past or present.

56. I must therefore ask myself when reaching this decision, what practical effect on the lives of Maori will it have if the claim is heard in the ordinary way as a kaupapa claim?

In my judgment the answer must be that it will not have a prejudice of the high level that is required upon the lives of Māori in a practical, cultural or spiritual sense. I do not believe that it can be argued that there will be significant or irreversible damage to Māori culture or well being.

I make this finding purely in the context of an urgency application and on the evidence and submissions that are presently before me. I do not intend at all, to prejudge the claim on its merits when it is ultimately heard.

Decision

57. The application for urgency is therefore dismissed.

The Registrar is to send this direction to all those on the notification list for Wai 2534, the New Zealand Flag claim.

DATED at Rotorua this 9th day of September 2015

Judge P J Savage
Deputy Chairperson
WAITANGI TRIBUNAL