Litigation is an Evil

Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission (HC Auckland, CP 395/93, CP 122/95 & CP 27/95, 4 August 1998, Paterson J)

Background

In 1986, Parliament introduced a fisheries quota management scheme. Maori claimed that this scheme breached both customary and Treaty fishing rights guaranteed by the Treaty of Waitangi. After a period of litigation and negotiation, the Crown and Maori negotiators reached an interim settlement[1] whereby 10 percent of all fishing quotas, and a sum of $NZ10 million, categorised as the "pre-settlement" assets, would be transferred to the Maori Fisheries Commission.[2] The Commission, charged with devising an allocation scheme, called a series of Hui-a-Tau at which it presented its proposals. In 1992 certain resolutions were passed regarding those proposals. In September 1992, the Crown and Maori negotiators entered into a Deed of Settlement[3] ("the Deed") which made provision for the acquisition of a 50 percent shareholding in Sealord Products Limited. The Deed also settled all current and future claims to Maori commercial and non-commercial fishing rights.[4] Maori, in return, agreed to the quota management system; the repeal of s 88(2) of the Fisheries Act 1983;[5] and a halt to all court proceedings. The assets held by the Commission were to be distributed for the benefit of Maori. This was later passed into law by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 ("the Settlement Act"). The decision of the High Court in this case concerns the allocation of those "pre-settlement" fisheries assets to Maori by Te Ohu Kai Moana ("the Commission").[6]

The issue came before the Court after a lengthy judicial process. In 1995 Anderson J ordered that a preliminary decision be determined. In 1996, the Court of Appeal made a declaration that the Commission had a duty, pursuant to the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Maori Fisheries Act 1989, to ensure that any scheme or legislation which it proposed included an equitable and separately administered provision for urban

1 Maori Fisheries Act 1989.

2 This body was reconstituted as "Te Ohu Kai Moana", the Treaty of Waitangi Fisheries Commission by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

3 For further discussion see McHugh, "Sealords and Sharks: The Maori Fisheries Agreement" [1992] NZLJ Oct 1992, 354; Munroe, "The Treaty of Waitangi and the Sealord Deal" (1994) 24 VUWLR 389.

4 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, ss 9 and 10.

5 Section 88(2) states: "Nothing in this Act shall affect any Maori fishing rights".

6 *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* (HC Auckland, CP 395/93, CP 122/95 & CP 27/95, 4 August 1998, Paterson J.

Maori.[7] The Court also determined the meaning of "iwi", as used in the Settlement Act, as "tribes" or "people of the tribes".[8]

On appeal to the Privy Council in 1997, Goff LJ, delivering the judgment for the Board, formulated the following test for the trial judge to consider:[9]

1. Does the Maori Fisheries Act 1989 (as amended by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992) require that any scheme providing for the distribution of the assets held by the Commission before the settlement date, which the Commission includes in a report furnished to the Minister under s6(e)(iv) of the 1989 Act, should provide for allocation of such assets solely to "Iwi" and/or bodies representing "iwi"?

2. If the answer to question 1 is Yes, in the context of such a scheme does "iwi" mean only traditional Maori tribes?

In the High Court, Paterson J answered "Yes" to both questions, holding that the Commission was entitled to allocate the "pre-settlement" assets to iwi and that "iwi" was to be defined, for the purposes of the Settlement Act, as a "traditional Maori tribe".[10]

Reasoning

Is Te Ohu Kai Moana Entitled to Allocate Solely to Iwi?

The Commission holds the view that an optimum allocation method must be based firmly in tikanga Maori and the concept of Maori fishing rights, as opposed to a focus on the social and economic needs of Maori.[11] It is the Commission's view that Maori commercial fishing rights were, in 1840, collective property rights vested in kin-based groups. Therefore, under the guarantee of rangatiratanga in the Treaty of Waitangi,[12] the Commission sought to restore that Treaty right to iwi alone.

The Urban Maori Authorities based their submissions on the premise that an

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7 *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Inc* [1996] 3 NZLR 10, 20.

8 Ibid, 19. See also Kawharu, "Urban Iwi: The New Tribes of Maoridom?" (1996) 8 Auckland U L Rev 209; Tunks and Heremaia, "The "Iwi Status" Decision: Clash of Ethics in the Allocations of the Maori Fisheries Resource" (1996) 1 NZELR 168.

9 *Treaty Tribes Coalition, Te Runanga o Ngati Porou and Tainui Maori Trustboard v Urban Maori Authorities* [1997] 1 NZLR 513, 523.

10 Supra at note 6, at 78.

11 Te Ohu Kai Moana, *Proposed Optimum Method for Allocation Consultation Document* (Wellington: Treaty of Waitangi Fisheries Commission, 1997) 7.

12 The English text of Article 2, of the Treaty of Waitangi, states: "Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full and exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession".

allocation to iwi would deny those Maori with little or no tribal contact living in urban areas access to the benefits of the "pre-settlement" assets. They argued that individual Maori have their commercial fishing rights guaranteed by the Treaty of Waitangi and that allocation to iwi would not compensate such individuals. Moreover if the right to fish was a communal right, there is a presumption in law that compensation would be made to each individual Maori for the loss suffered as a result of the appropriation of communal property.

Justice Paterson agreed that, at the time of the signing of the Treaty, commercial fishing rights were held under the control of whanau and hapu. It was those rights which had been infringed by the Quota Management System and which the Crown had removed. The beneficiaries of the settlement were therefore those hapu who had succeeded to Treaty or customary rights. The Court acknowledged that Maori, both collectively and individually, had suffered from the extinguishment of commercial fishing rights.

Despite this, Paterson J determined that the allocation to iwi would not inhibit access by urban Maori to those resources. He held that there was no legal reason why an allocation to iwi would prevent iwi from setting up structures to ensure that all their members benefited from the assets, wherever they may live and regardless of how strong their tribal link might be. His Honour went on to say;[13]

> The form and structure of such a body is, in my view, of little relevance if the allocation contains adequate safeguards to ensure that the benefit of the settlement reaches those who are entitled to share in it and are not dissipated on the way.

The Commission had elected to use iwi structures as the method of allocating assets. That intention had been given statutory recognition in Schedule 1A of the Maori Fisheries Act 1989. Therefore, as a matter of statutory interpretation, it was the duty of the Commission to allocate its assets to iwi, notwithstanding its obligation to ensure that all Maori received the benefits. This included those without close ties to their tribes. Justice Paterson reiterated his warning to the Commission:[14]

> If the Commission were to include...a scheme of allocation which is exclusive rather than inclusive, the matter is in the hands of the Minister. He will then need to consider whether he intervenes either under the provisions of s 9(4) of the Maori Fisheries Act, or by legislation. Not to intervene may well expose the Crown to further claims on the grounds that Maori who have rights protected by the Treaty taken from them, have been excluded from the settlement given in exchange for the abrogation of those rights.

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13 Supra at note 6, at 65.

14 Ibid, 61.

What is a Traditional Maori Tribe?

After discussing the considerable evidence on this point, the Court held that given developing national circumstances and the changes in Maori society, a traditional tribe comprised Maori claiming descent from a common ancestor and whose ancestors were at some time in the past recognised as living in a particular tribal area. It was also necessary that the traditional tribe must have been recognised by other sections of Maoridom. Such a tribe may be a conceptualisation of common kinship at a high level; it need not be a functioning social structure.

Is Iwi a Traditional Tribe?

The word "iwi" appears in Schedule 1A of the Maori Fisheries Act 1989 which sets out the resolutions passed at the Hui-a-Tau in 1992. There are also references to iwi in the Preamble to the Settlement Act. The only reference in the Deed of Settlement to iwi appears in Annexure A, where the word "iwi" is used as synonymous with "tribe".

It can be argued that the use of the word "Maori" instead of "iwi" in the Deed meant that iwi was in fact synonymous with Maori, a more general term. Further, they argued that at the time of the signing of the Treaty, "iwi" meant "people". Therefore, in the resolutions passed at the Hui-a-Tau, "iwi" was also intended to mean "people". Even if "iwi" may have meant "tribe" in 1840 it was not the primary meaning then and it may not be so now.

Justice Paterson's response was based on traditional principles of statutory interpretation. He considered that whilst it was normal to give a word its plain and ordinary meaning, it was also necessary to give a word its meaning in the context of the statute as a whole -"its exact shade is coloured by context".[15]

The first use of "iwi" arose in the resolution of the 1992 Hui-a-Tau. The resolution became Schedule 1A of the Maori Fisheries Act 1989 in accordance with the Government's intentions recorded in the Deed of Settlement. At all relevant times the word "iwi" was, in the Commission's collective mind, pronouncements and written documents, synonymous with "tribes". While this fact does not preclude the word "iwi" having another meaning, the history makes other meanings very unlikely. Justice Paterson was clearly of the opinion that regardless of the fact that the Deed was a compact between the Crown and Maori, as opposed to between the Crown and iwi, it would be quite "unrealistic" to interpret the meaning of "iwi" as anything other than "tribes" because of the clear intention on the part of both the Government and the Commission.

15 Ibid, 74.

Comment: The Lessons of History

There were concerns raised in this case that the Maori fisheries settlement could have the same "debilitating"[16] effect as the Native Land Court, in it could lead to the fragmentation of the Maori fishing interest. The Court responded by explaining that there was a difference because the settlement sought to restore rights "albeit in somewhat different form"[17] whereas the Native Land Court had been expressly designed to strip Maori of their title to land for the purposes of colonial settlement.[18] But despite apparent differences in purpose, there are significant and alarming parallels.

In both cases the courts and the Crown have used their inherent jurisdictions to dissolve Maori customary and Treaty-based rights in favour of an individualised and transferable title. The purpose of the Native Land Court was to individualise title in order that the land would become easier to acquire for settlement. The Quota Management System allows for the individual holding of specific, transferable quota rights. Both processes transform customary rights into tenure derived from the Crown. Both processes commodify an otherwise shared and communally owned resource.

There are also similar issues concerning representation and mandate. In the past those Maori with an individualised title to land, but without mandate from the hapu or iwi, could sell sections of land to the Crown. Others entitled to the land were thus stripped of their rights. This similarity is brought into sharper focus when considering the extinguishment of Maori customary non-commercial fishing as well as commercial fishing rights.[19]

Conclusion

The outcome of this case was eagerly awaited by the Maori community. How urban Maori are to be considered and catered for is a serious issue given that up to 25 percent of all Maori either do not know, or choose not to affiliate with, their iwi.[20] The Court has said that this fact should not preclude urban Maori from the benefits of the "pre-settlement" assets. The question remains as to how this is to be achieved.

Essentially, the courts are not the place for determination of fundamental tikanga Maori issues. Pihama describes the difficulty with which the courts deal with te reo Maori, let alone the political complexity of tikanga Maori.[21] If recourse to Pakeha courts is an attempt to legitimise Maori concerns, it is a

16 Ibid.

17 Ibid, 65.

18 Williams, *Te Kooti Tango Whenua The Native Land Court 1864 – 1909* (Wellington: Huia Publishing, 1998).

19 Supra at notes 3 and 4.

20 Supra at note 6, at 35.

21 Pihama, "Courts no place to define Maori custom" *New Zealand Herald*, 7 August 1998, A11.

futile attempt. [22] Courts are confrontational, designed to produce a winner and loser. Maori must seek mechanisms for unification rather than division. As Pihama states,"[a]ny real sense of being Maori has been historically denied in the existing legal system in this country and this case is no different. No matter how many Maori are involved, the debate is both controlled and driven by the dominant group, Pakeha. That is the nature of the system".[23]

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22 Durie, M, "Beyond Treaty of Waitangi Claims: The Politics of Positive Development" Te Hunga Roia Maori o Aotearoa Hui-a-Tau, Kirikirikoa Marae, Kirikirikoa, August 1998.

23 Supra at note 21.