The Fisheries Settlement Report 1992

(Wai 307)

Waitangi Tribunal Report
WELLINGTON
1992

The Honourable Doug Kidd
Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Tena koe e te Minita i o turanga maha. Ka nui te mihi me te tautoko a te iwi.

We have made inquiry into several claims concerning the Crown-Maori settlement on fisheries, September 1992. Particulars of the claimants and of the proceedings are given in an appendix.

The complaint is that the Deed of Settlement, or the Crown policy that it proposes, is contrary to the Treaty and prejudicial to claimants in that it would diminish their rangatiratanga and fishing rights and impose new arrangements that have not been adequately agreed.

1. The Settlement

According to the deed the Crown will:

- pay $150 million to promote Maori commercial fishing thus assisting Maori in a joint venture purchase of Sealord Products Ltd (deed, para 3.1);
- give Maori 20 percent of new species quota (in addition to the 10 percent of previous quota as agreed in 1989) (3.2);
- place Maori on statutory bodies on fisheries management (3.3, 3.5); and
- restructure the Maori Fisheries Commission (which promotes Maori fishing) making it more accountable to Maori, giving it more input to fisheries management and reorganising its membership with appointments to be in consultation with Maori (3.4, 3.5). It will then be called the Treaty of Waitangi Fisheries Commission.

In return, the Maori who signed agree:

- that the settlement "shall discharge and extinguish all commercial fishing rights and interests of Maori" (at sea or inland) and shall satisfy all current and future claims thereto (5.2). Consequentially they agree:
- to discontinue their current court actions relating to fisheries and to take no more proceedings (4.3), to endorse the quota management system (4.2) and to support legislation to give effect to the settlement (4.4); and
- that this tribunal shall have no further say on commercial fishing matters (3.5.1.4).

It is also agreed that:

- customary fishing rights will be replaced by regulations (3.5.1.1, 3.6, 5.2);
- the Treaty of Waitangi Fisheries Commission will develop a procedure to determine who will benefit from the settlement and a scheme for the distribution of benefits (4.5.4.2, 4.5.5);
- previous negotiations and arrangements respecting Maori fishing interests are cancelled, save the Treaty of Waitangi itself (1.3); and
- the settlement will restrict the Crown's ability to meet other claims (4.6).

Thus the settlement affects more than commercial sea fisheries. It affects non-commercial fisheries and inland fisheries and outstanding land and other claims as well.

2. Background

The terms of the settlement are best explained by reference to the background. An inquiry into Maori fishing in Muriwhenua, in 1987, led to court actions concerning the Quota Management System, the primary policy for the regulation of New Zealand commercial fishing. There was some uncertainty within the industry as a result. Fish quota created a property right in fishing, the courts considered, and this was in conflict with the proprietary interests of Maori, which are protected under section 88(2) of the Fisheries Act 1983. Accordingly, the courts placed injunctions on developing the quota management policy, which, to the consternation of various fishing interests, have remained in force ever since.

The proprietary rights of Maori had not been quantified however, and, with goading from the courts, it became necessary that those rights should be settled. That is now what has happened. Maori negotiators were mandated at a national hui in 1988, and subsequently thereafter, to seek a settlement. They were instructed to settle for not less than 50 percent of the quota, in some opinions, on the basis that the Treaty gave a right to 100 percent.

A partial settlement in 1989 provided for the transfer of 10 percent of quota, as it became available, to a Maori Fisheries Commission established to promote Maori fishing. The proposed sale of Sealords this year however, provided the opportunity to overcome a major difficulty that most of the quota had been allocated, for Sealords holds some 26 percent of the quota. This represents a major quota holding and an opportunity unlikely to be repeated. The affidavits of the Maori negotiators, copied to this tribunal, testify to their concern to seize this opportunity.

The settlement was first proposed in an agreement in principle of 27 August 1992, called a Memorandum of Understanding, that was made subject to Maori ratification. It was taken to national hui and some 23 marae throughout the country. The negotiators' report on those hui appears to have satisfied the responsible Ministers that the understanding should be formalised in a deed of settlement.

The negotiators' affidavits consider that the hui were generally supportive of the settlement as proposed in the memorandum while still instructing the negotiators to oppose the inclusion of traditional and freshwater fisheries if they could. As it turned out they could not.

Thereafter events moved swiftly. It appears the deed was still being finalised when a gathering assembled at Parliament to mark the occasion of the settlement. Some of those present then executed the deed, moments after it was engrossed. Amongst the signatories were 43 from some 17 different iwi and 32 of the Maori plaintiffs in the various fish actions in the courts. Though only the signatories are legally bound to promote the settlement, the support is seen to emanate from the preceding hui.

Reading together the 1989 settlement as provided for in the Maori Fisheries Act 1989, and the terms of this current deed, there is a consistent objective, as it is put in the deed (para 3.1.3.1), to promote "the development and involvement of Maori in the New Zealand fishing industry". As we see it, that goal is

more important than any precise quantification of the Maori proprietary interest.

In return the Crown expects an end to the litigation that has caused uncertainty in the industry and an agreement that further fish quota may now issue. There is no public gain unless those assurances can be given. Mindful of their treaty obligations however, the Crown and Maori make it clear that what is sought is a "just settlement" (preamble L) and "the resolution of an historical grievance" (preamble M).

A complete settlement was nonetheless seen to be necessary. There is "an uncertainty" respecting the whole of Maori fishing rights, preamble C and H declare, and it was the Crown's wish, according to the negotiators' affidavits, that all Maori fisheries should be included and that regulations should be settled to remove the uncertainties (as is provided for in para 3.6). The Maori negotiators have sworn to some diffidence over the broadening of the settlement to include other fisheries but that they eventually had to concede to an all-in settlement. The provision to regulate (and thus regularise) other Maori fishing interests, is nonetheless constrained by the Crown's recognition (in preamble K) of its "Treaty duty" to "develop policies ... for (the) exercise of rangatiratanga in respect of traditional fisheries".

The settlement has rightly been hailed as historic. While it is not the only national settlement, it is the first to extinguish claims (the forestry and state enterprise settlements were but steps along the way); and the first to affect all iwi (Railcorp binds only those who agree). It is significant too in that previously, 'first in, first served' applied, while this settlement proposes the allocation of benefits according to some regular plan.

Nonetheless there are objections. They tell of a division in the Maori community that reflects in part a desire on the one hand to seize the opportunity, and on the other, to maintain the integrity of the Treaty. It reflects as well anxieties over the level of consultation and over the prospective allocation of benefits. But it does not demonstrate a major division in our view. The concerns the claimants expressed are in fact shared by all. The difference was that some would give more emphasis to opportunity while others would give more to conserving customary positions.

3. Complaints

The complaints came mainly after the terms of the deed were studied. Perhaps as a consequence of the inevitable haste, the deed was not packaged well for Maori, in our view. What might have been a noble compact presents like a warranty to protect the manufacturer. There is a poverty of spirit in the operative parts, a burden of legalism that does no justice to the preamble's references to "co-operation and good faith". Also the goals are not clearly stated and the document is difficult to understand. The Court of Appeal, referring to apparently conflicting provisions in the deed, has said:

> This weakness in the Deed and other aspects of it which are criticised by the appellants could be in part accounted for by input into it from different hands. Certainly it is a most unusual document and, perhaps even designedly, obscure in some major respects. [*Te Runanga o Wharekauri Rekohu Inc and ors* v *Attorney-General and ors* (CA 297/92, p 11 judgment 3.11.92)]

The more specific concerns are set out under the following headings:

we would need to report early, covering especially matters generally outside the courts' purview but within ours, like those relating to proposed Crown policy. Therefore we proceeded with our inquiry but resolved, eventually, to defer reporting until the Court of Appeal decision had been given, as we are bound by the findings of the courts, and because a prior tribunal report might prejudice the legal process in this case. That decision has now been given and we are now able to complete this report.

Government intentions

5.3 We considered too whether the inquiry should proceed in view of government's intention to legislate for the settlement in the near future. This would include removing the tribunal's ability to review the settlement itself.

The tribunal must act by what the law is and not in anticipation of what it might be, in our view, and it would be wrong to deny the claimants' present legal right to challenge the government's proposals.

Legality of the settlement

5.4 We did not consider claims that the settlement or proposed legislation would be unlawful as those matters should be addressed in the courts.

6. Abrogation

Abrogation means the repeal or cancellation of rights or interests.

The treaty interest in non-commercial fisheries

6.1 The intention of the settlement, from what we can make of a confusing deed, is that the Treaty interest in commercial fisheries will be extinguished (5.1) while the treaty interest in non-commercial fisheries will be made legally unenforceable and replaced by policies and regulations (3.5, 3.6 and 5.2). The latter interests are thus effectively abrogated. The regulations and policies for non-commercial fisheries however may be reviewed in the tribunal (by inference from 3.5.1.4; though not all counsel agreed with that interpretation).

The question is whether the abrogation of the general treaty right and the substitution of regulations is contrary to treaty principles and prejudicial to the claimants. We consider the provision of regulations to perfect, augment or develop the treaty right is entirely consistent with the Treaty. It is also necessary in our view, that all people should know the more precise extent of them.

However, it is neither consistent with the Treaty nor necessary in our view, to abrogate the general treaty right at all. We see no reason why the regulations should not be made to effect the principles of the Treaty, without abrogating anything. The treaty right is broadly stated, without precise definition, but it is the important yardstick against which the precise regulations are to be assessed. The general treaty right cannot be put down.

A further concern however, and the cause of immediate prejudice to claimants, is the lack of some body to conclusively determine whether the regulations are consistent with the Treaty and provide adequately for Maori treaty interests. The deed leaves doubts whether the tribunal can undertake that role, but assuming that it can, we are not convinced that tribunal recommendations substitute adequately for court determinations, or that the courts should be excluded in cases like this where the function is to assess regulations against certain broad principles.

We think it well established that there is a duty on the Crown to actively protect Maori fishing interests. Active protection requires in our view, access to the courts in appropriate cases. The settlement in this case is contrary to treaty principles in that the regulations proposed or any failure to make them are not subject to court review and Maori interests are not therefore adequately protected. The danger is that Maori interests will become, as they have been before, overly susceptible to political convenience or administrative preference. The defect would be remedied by enabling judicial review against the principles of the Treaty. (A similar position prevails in Canada where aboriginal and treaty rights are constitutionally entrenched.)

Having disposed of this matter in those terms, we need consider only briefly some particular complaints.

It was contended, especially from Rangitane of Wairau, that the treaty right was expansive, providing exemption from fishing laws and immunity from prosecution. We do not agree. The Treaty promised Maori exclusive possession of their fisheries, not an exclusive right to fish, and Maori fishing rights have perforce to acknowledge the rights and interests of others. There accrues to the Maori right also, the duty to protect the resource. All users must be bound by reasonable state laws for overall resource management and protection.

The treaty right was enough, it was also contended, and prescriptive regulations are not needed. We do not agree. The Treaty stated only the broad principle, that Maori fisheries should be protected, but precisely what those fisheries were or how they should be protected had still to be worked out. Regulations should be made to do that.

There were then some fears that certain traditional fishing places might not be protected, in terms of the deed, because they have an intrinsic commercial capacity. Crown counsel demonstrated however, that commercial activity can be accommodated in traditional reserves in suitable cases (see B26, annexure A, para 2).

So too, in our view, the freshwater tribes need not be overly anxious. They have more to gain than lose from the settlement, gaining regulations to acknowledge their fisheries and a source of revenue to protect or develop them. This assumes however that adequate regulations will in fact be provided. It is apparent then, that the negotiations of the freshwater tribes have not been ended by this settlement but will need to continue, in order that their concerns might be incorporated into appropriate policies and regulations.

Similarly, where previous arrangements are set aside, they will, we presume, be re-instated under the new regulatory and policy scheme, provided they are still relevant.

The main concern was that too much power was left in the hands of the Crown, or its departmental agents, to determine the regulations. There was a very real fear that some matters might not be properly provided for, and most especially, that the tribal control, or rangatiratanga, would once more be subverted. We would expect judicial review to guard against that prospect. Certainly it would be contrary to the Treaty in our view, if there were no provision to review the regulations against the Treaty's principles.

The treaty interest in commercial fisheries

6.2 The treaty interest in commercial fisheries is simply extinguished (5.1). The purpose, we presume, is to put an end to all claims affecting the commercial fishing industry, but we think it was neither necessary nor desirable to extin-

guish the right in order to the end the actions. It is clearly inconsistent with the Treaty, and indeed, the terms of the settlement suggest the nature of treaty obligations are not properly understood.

The principle of the Treaty is that Maori fishing interests will be safeguarded. The Crown is obliged to actively protect. Counsel for the Runanga o Ngati Porou referred to this passage from the recent Canadian decision in *R* v *Sparrow* (1990) 70 DLR (4th) 385, 408 per Dickson C J:

> The relationship between the government and aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Quoted by counsel for Runanga o Ngati Porou.]

To this the Court of Appeal has added (supra at page 12):

> clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty.
>
> In New Zealand the Treaty of Waitangi is major support for such a duty. The New Zealand judgments are part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement.

The deed does not capture this responsibility. Maori interests can be bought off, it assumes, using the language of last century when land rights were said to be extinguished by Crown purchase. Yet in this case nearly every essential for a sale is lacking.

What was required was not an extinguishment but an affirmation, in our view, an affirmation that Maori do have interests in commercial fisheries, and an acknowledgement that any current responsibility on the Crown to provide for those interests has now been satisfied by the arrangements made. There are passages in the affidavits of the Maori negotiators suggesting that they too expected the deed would be presented as performing the Treaty's terms rather than extinguishing the Crown's obligations.

It is necessary to dispose of one particular contention however, that in this settlement Maori were giving away too much of their commercial fishing interests. We do not agree. Most especially we do not accept the view that Maori are entitled to 100 percent of the fishery and should compromise at nothing less than 50 percent. That view does not derive from the tribunal's findings, despite assertions to the contrary. The Maori interest has not been quantified, may not be quantifiable and the tribunal has said simply that there should be such fair shares as might be negotiated, or failing negotiation, as might eventually be recommended. We are not convinced there is a compromise in the quota aspects of this settlement, at least on the Maori side.

The Crown interest in Maori fisheries; the settlement as a whole

6.3 That leads to the point that in terms of the Treaty, the Crown has an interest in Maori fisheries, to provide a protection for so long as Maori wish to keep them. That interest, or obligation, cannot be traded off, unless all agree. By its very nature, it is not an obligation that can be acquitted at any one moment in time.

Questions of extinguishment apart, it would be difficult not to say that the Crown has acted well to secure a place for Maori in the commercial fishing industry. We quote these passages from the recent Court of Appeal decision:

> The proposal of the Crown and the Maori negotiators to endeavour to obtain a substantial Maori interest in Sealord is thoroughly consistent

with the approach of this Court in previous cases .... The Sealord opportunity was a tide which had to be taken at the flood

and:

a responsible and major step forward has been taken. [*Te Runanga o Wharekauri Rekohu Inc and ors* v *Attorney-General and ors* (supra pp 12,13 and 18)]

It is thus appropriate and reasonable in the circumstances that the Crown should now legislate to end the present actions and stop all others, for at least so long as the current conditions pertain.

Who can predict the future however? Circumstances change. The protection needed for today may be different for tomorrow. The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome. It is about the maintenance of principle over ever-changing circumstances. Accordingly, the abrogation of the treaty interest, and the implicit responsibility of the Crown that goes with it, is a contradiction of the Treaty's terms.

To overcome the difficulty, it is appropriate that treaty settlements of this kind should not be expressed in finite terms but defined by reference to goals. If the object is to get Maori into the business and activity of fishing, with compensation for past losses, then that, in our view, should be stated, and provisions should be made for regular checks, and for adjustments if the goals are not being achieved.

The alternative is to provide for judicial review, specifically enabling the courts to assess the Crown's protection of treaty fishing rights against its treaty obligations. It would be reasonable nonetheless to restrict some actions for some time, in view of the recent history and the commercial imperatives. No such term should exceed one generation, or 25 years, in our view, having regard to some Maori customary opinion.

We have reviewed then, the complaints and claims concerning the settlement deed. Some are well founded in our view, but are capable of remedy, and ought not to invalidate the main proposals.

There were other contentions however that the settlement as a whole should not proceed, for example, because consents were not given by appropriate representatives or because it was not otherwise properly ratified.

7. Representation

Complaints that the settlement had not been adequately agreed raised questions about who could agree; and most especially about who held customary fishing rights, about who could decide and about who could represent the decision makers. At issue were three aspects of representation:

- which descent group(s) represent the holders of customary fishing rights in a district? (customary representation);
- at what level should descent groups be represented in this case? (level of representation); and
- what authority represents the persons at that level? (institutional representation).