1854

Te Reo Maori Claim

4 Jurisdiction

4.3 Proof Of Prejudice

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4.3.1 When a claimant proves that he is entitled to bring a claim, and that the subject of the complaint is covered by the Treaty, these facts alone do not give us jurisdiction. Such a claimant must go further and prove that he (or they) are prejudiced or are likely to be prejudiced in one of the ways specified by s.6(1) of the Treaty of Waitangi Act 1975.

4.3.2 Many illustrations have been given in the claim of ways in which the claimants say that they have been prejudiced (para 4.2.2); for present purposes we are content to focus on one issue only, viz. that no Maori may use his language in the Courts of New Zealand if he can speak English. In other words he may not, according to our law use his native tongue even to speak on his own behalf.

4.3.3 This conclusion was reached by the High Court in 1979 and confirmed by the Court of Appeal in Mihaka v Police [1980] 1 NZLR 453. The appellant had been prosecuted in the District Court where he claimed the right to address the Court in Maori. He was refused permission to do so and appealed unsuccessfully to the High Court. He then applied to the Court of Appeal for special leave to appeal which he argued in person. It seems that no amicus curiae was present. He based his claim on the Treaty of Waitangi.

4.3.4 The Court of Appeal said:

"... The appellant has argued with dignity and restraint that his rights as a Maori New Zealander entitle him to have the hearing conducted in Maori. The use of the Maori language in New Zealand is a matter of public importance but it does not follow that it raises a question of law in the circumstances of the present case. The Treaty of Waitangi to which reference was made does not deal with the legal point now in issue..." (p. 462)

In concluding as it did that the Treaty did not cover the right to use Maori in the Courts, the Court of Appeal was declaring the law as it now exists. As to whether the law as it now exists is inconsistent with the principles of the Treaty is the very point we have to consider.

4.3.5 In deciding that the Treaty does not confer this right we gather that the Court probably did not have the benefit of full argument as to the meaning of the Treaty and most likely had regard to the English language version only. That version provides in Article II that the Crown guarantees to the Maori people of New Zealand "... full, exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties..." Reading that passage on its own, one might easily conclude that the Royal guarantee of protection related to land and land matters, fishing rights and no more. But the equivalent provision in the Maori version is a guarantee of "the fullness of control" (te tino rangatiratanga) over "... their lands, their villages and all the things they value highly" (o ratou wenua o ratou kainga me o ratou taonga katoa). By ordinary legal principles applicable to the interpretation of treaties where neither is superior to the other, any variation between the two versions must be

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resolved having regard to both languages.

4.3.6 Taking the two versions side by side it will become at once apparent that the Maori guarantee is significantly wider than the English version of that guarantee, which leads us to say that the right to use the Maori language would have been one of the rights expected to be covered by the Royal guarantee by those chiefs who signed the Treaty. Taking into account all the circumstances as they existed when the bargain was made we think that it is unlikely that many Maori signatures would have been obtained if it had been said by Captain Hobson that the Royal guarantee of protection would not include the right to use Maori in any public proceedings involving a Maori.

4.3.7 As to taking surrounding circumstances into account when interpreting treaties, the legal principles are well-settled especially in North America where the Courts have frequently been required to interpret treaties, many of them similar to our own and made long before it. The Ontario Court of Appeal interpreted an Indian Treaty made in 1818 in the case of The Queen v Taylor and Williams (1981) 62 CCC (2nd) 227. The terms of the treaty in question did not provide for the reservation of hunting and fishing rights but there was written evidence of the circumstances that existed when the treaty was signed. The Court declared:

"... The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned. Further if there is any ambiguity in the words or phrases used not only should the words be interpreted as against the framers and drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible. . . . Finally if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term of terms..." (p. 235)

4.3.8 To the extent that the Court of Appeal has decided that the Treaty of Waitangi does not guarantee and protect this right we accept at once that that is the law today because it has said so. But to the extent that the law ought to protect that right because of the terms of the Treaty, we conclude that the law is in conflict with the Treaty and we must make a finding to that effect.

4.3.9 We have already concluded that the language is a "taonga" of Maoridom. The Crown by Article II of the Treaty guaranteed its protection of the language. As we said in the Manukau Harbour Finding:

"The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests but actively to protect them (para 8.3, sub para 1; and see para 4.2.7 above)

It is a denial of that protection for the Crown to refuse a Maori the right to use his language in the Courts especially when some persons who appear before the Courts may be able better to express themselves in Maori rather than English. We think it is no answer to say that if a person can speak and understand English justice will be done to him if the proceedings are conducted in English. That, to us, is not the point. The real point is whether the recognition and protection guaranteed to the language by the Treaty is denied if a Maori person is prohibited from using it when he wants to do so.

4.3.10 The point is also that while in earlier years the right to use Maori in the Courts may have been argued on the ability of a person appearing to speak and understand English, that is not the main problem today. Perhaps the understanding between two people that the Treaty sought to endorse will not be complete until it is the judges themselves who are bilingual. We understand that at present there is only one High Court Judge who is able to speak the Maori language fluently. We would see great advantage in the instruction of judges in the Maori language as well as in the maintenance of the right to speak the language in the Courts. He who speaks the language will understand the movements of the mind.

4.3.11 For now we can come only to the conclusion that a prohibition on the use of the language in the Courts is completely inconsistent with the guarantee of recognition given by the Crown under the Treaty. It may also be less than just, especially when the person concerned feels that his Maori expression is superior to his facility in English. Because of the Courts' decision in this matter the rule that a Maori person who can speak and understand English may not use Maori in the Courts is a matter of law, and the law as it exists is a policy of the Crown. As such we find that policy to be inconsistent with the principles of the Treaty and we uphold the claim that the claimants are prejudiced thereby.

4.3.12 The decision of the Courts is based upon an English statute passed over six hundred years ago, the Pleadings in English Act, 1362 (36 Edw. 3, c15). This statute became part of our law by virtue of the English Laws Act 1858 when our legislature adopted all the laws of England that were in force on January 14, 1840. The 14th Century statute seems to have been passed at a time when it was decided that the indigenous language (English) should be preferred and perhaps protected against the incursions of the language of government (Norman-French). It is ironical, say the claimants, that over six centuries later the same statute should be invoked to protect the language of government (English) against the indigenous language of New Zealand (Maori). We refrain from comment.

4.3.13 We therefore come to the conclusion that on this ground alone we have jurisdiction to deal with this matter. We leave for later discussion the effect on te reo Maori of the Maori Affairs Act 1953 (s. 77A) and other statutes referred to by the claimants as the foundation for their claim. We point out that we are not empowered to intervene in respect of any act or omission by the Crown that occurred before October 10 1975 (s. 6 (6) (a)). The state of the law was explained by the Court in 1980 and has not been altered by the Crown since the matter was brought to attention. The law on this question has been in conflict with the principles of the Treaty at least since that time, and the omission to rectify the position by removing that conflict is an omission of the Crown. Since this has been the case at least from 1980 onwards the omission has occurred since October 10, 1975 and so the matter is within our statutory competence.

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