

Wai 863 #SOC 13

WAI 420

RECEIVED Waitangi Tribunal
28 APR 2003-
Dept For Courts WELLINGTON

Wai 420 #1-1 (c)

IN THE MATTER

of the Treaty of
Waitangi Act 1975

AND

IN THE MATTER

of Warren Chase for
and on behalf of Te
Hika o Papauma

**AMENDED STATEMENT OF CLAIM
DATED 14 APRIL 2003**

1 The Claimants

A) The Claimants are the iwi Te Hika o Papauma.

2 The Claim: The Cause of Action

A) The Claimants say that their claim falls within one or more of the matters referred to in section 6 (1) of the Treaty of Waitangi Act 1975 namely:

- (i) that they are Maori, and
 - (ii) they have been and continue to be or are likely to be prejudicially affected by the various Acts, and other laws and by the various policies, practices, acts and omissions adopted by, or on behalf of the Crown, their agents or their successors; and
- B) That the aforesaid prejudices are inconsistent with the principles of the Treaty, namely by the Crown;
- (i) failing to guarantee the tino rangatiratanga over and rights of ownership to their foreshore and territorial sea within their rohe; and
 - (ii) breaching its duty to actively protect the tino rangatiratanga over and rights of ownership to their taonga; and
 - (iii) failing to guarantee the tino rangatiratanga over their customary fisheries; and
 - (iv) breaching its duty to actively protect the tino rangatiratanga over their customary fisheries.

3 The Foreshore

Particulars: The Facts

- A) Whereas in these pleadings herewith, the term *foreshore* shall mean all that land between the high water mark and the low water mark along the coastal land nowadays known as the Mataikona

Block¹ (sometimes known in the past as the Mataikona Blocks) being approximately eighteen kilometres in length; and

- B) Whereas the tribal members of Te Hika o Papauma were in continuous occupation of the coastal lands comprising the Mataikona Block, before 1840, between 1840 and 1853, between 1853 and 1869 and since 1869², save for some periods when the land was tenanted after 1869; and
- C) Whereas there is no challenge by neighbouring tribes or the Crown to the fact that the claimants and their forebears were and remain continuous occupation as aforementioned; and
- D) Whereas the foreshore forms a continuous part of the land to the Mataikona Block;

Particulars: The Allegations

- E) It is alleged therefore that members of Te Hika o Papauma were in continuous *occupation of the foreshore* of coastal lands comprising the Mataikona Block, before and after 1840³; and
- F) It is further alleged that members of Te Hika o Papauma exercised tino rangatiratanga over the foreshore of coastal lands comprising the Mataikona Block, before and after 1840⁴; and
- G) It is further alleged that members of Te Hika o Papauma were and remain the owners of the foreshore of coastal lands comprising the Mataikona Block, before and after 1840⁵.

¹ See *Wairarapa ki Tararua Inquiry District Map Book*, Foley, Crown Forestry Rental Trust, September 2002, 'Some Native Reserves in the Wairarapa ki Tararua Inquiry' which shows Mataikona 1,2,3.

² Ellis, Dougal, *The Wai 420 Marine Issues Report*, December 2002 (hereafter 'Ellis') p 23.

³ Ellis, p. 23.

⁴ Ellis, p. 23.

Particulars: The Treaty Breaches

H) It is alleged, in particular, that the Crown, through legislation and policy since 1865, has denied or frustrated the claimants and their forebears their tino rangatiratanga over and ownership to the foreshore, and in alleging the same the claimants therefore say that, in terms of Section 6 (1) of the Treaty of Waitangi Act 1975, they have been prejudicially affected by the following, namely, by way of:

Section 6 (a) Acts of the House of Representatives

- (i) The Native Lands Act 1865 (which did not permit the claimants' forebears to have an exclusive proprietary title to their foreshore recognised as a result of the investigation of title of the Mataikona Blocks⁶ when such legislation ought to have permitted the same⁷); and
- (ii) The Harbour Boards Act 1878 (which failed to recognise Maori rights and interests in the foreshore including those of the claimants' forebears); and
- (iii) The Foreshore and Seabed Endowment Revesting Act 1991 (which vests the foreshore of the Mataikona Block 'in the Crown' and which, after the passage into law of the said legislation, has determined, inter alia, the foreshore of the Mataikona Block to be 'land of the Crown'; section 9A).

⁵ Ellis, p. 23.

⁶ Ellis, p. 15.

⁷ Cf. section 2 of the Public Reserves Act 1854.

- (iv) The Resource Management Act 1991 (which prohibits the claimants from occupying the foreshore of the Mataikona Block; section 12 (2)).

Section 6 (c) Policy and Practice

- (v) The Crown's assertion of prerogative ownership of the foreshore from 1869 over the (claimants') foreshore⁸; or in the alternative
- (vi) The Crown's assertion of an irrebuttable presumptive ownership of the (claimants') foreshore from 1869⁹; and
- (vii) The Crown's currently stated position which is authoritatively expressed as being the following, viz., '[a]lthough the foreshore may be granted at English law, it [inter alia, the claimants' foreshore of the Mataikona Block] is presumed to be in Crown possession, subject to public rights and any rights of frontage.'¹⁰

Section 6 (d) Crown Action

- (viii) The Crown, through the Marine Department, directly asserting or purportedly reasserting Crown ownership of the foreshore of the Mataikona Block in 1968¹¹;
- (ix) The Crown, through the Minister of Transport, approving the Dannevirke County Council's foreshore control by-laws in 1986 which¹²:

⁸ Ellis, p. 10.

⁹ Ibid.

¹⁰ Crown Law closing submissions, Hauraki Inquiry Wai 686 #AA1, November 2002, para. 695, p. 194.

¹¹ Ellis, p. 39.

¹² Ellis, p. 51.

- (a) made it illegal for the claimants to prevent vehicles or people moving along the foreshore of the Mataikona block; and
- (b) provided that claimants, inter alia, were to be charged a fee for landing fish and launching or retrieving boats from their own land (the Mataikona Block) in the use of the foreshore (of the Mataikona Block).
- (x) The Crown, through the Department of Conservation, directly asserting or purportedly reasserting Crown ownership of the foreshore of the Mataikona Block in 2000¹³; and
- (xi) The Crown, through the Department of Conservation in relation to foreshore of the Mataikona Block, not taking into account section 4 of the Conservation Act 1987 (the 'Treaty section') in its conduct concerning the said foreshore;

Particulars: The Result of the Prejudice

I) It is alleged that the result of specific prejudice is as follows:

- (i) The loss of opportunity, in 1869, to have title to the foreshore investigated for the explicit purpose of having the claimants' *proprietary interest* in the foreshore legally recognised as exclusively in their ownership (Native Lands Act 1865).
- (ii) The loss or denial of claimants interests in their foreshore including:

¹³ Ellis, p. 57.

- (a) ownership (Crown prerogative right and presumed ownership, the Foreshore and Seabed Endowment Revesting Act 1991, and denial-of-possession policy); and
- (b) use and occupational rights (Resource Management Act 1991, and denial-of-possession policy)
- (c) managerial and conservation rights (Resource Management Act 1991 and denial-of-possession policy).

Particulars: Relevant Principles of the Treaty

- G) The aforesaid prejudices are inconsistent with the principles of the Treaty, namely by the Crown having;
- (i) failed to guarantee to the forebears of the claimants and the claimants their tino rangatiratanga over and rights of ownership to the foreshore to the Mataikona block; and
 - (ii) breached its duty to the forebears of the claimants and the claimants to actively protect their tino rangatiratanga over, rights of ownership to and use of the foreshore to the Mataikona block; and

4 The Territorial Sea (Seabed)

Particulars: The Facts

- A) Whereas in this part of the pleadings herewith, the term *territorial sea* shall mean all that land covered by the sea between the low water mark thence in a straight line seaward for twelve nautical miles from the northern and southern boundaries of the coastal land nowadays known as the Mataikona Block; and

- B) Whereas the tribal members of Te Hika o Papauma were in continuous occupation of the coastal lands comprising the Mataikona Block, before and after 1840 as already stated herein; and
- C) Whereas there is no challenge to that continuous occupation by neighbouring tribes or the Crown; and
- D) Whereas the bed of the territorial sea forms is a continuous and therefore physically connected part of the Mataikona Block albeit covered with seawater;

Particulars: The Allegations

- E) Wherefore it is alleged that members of Te Hika o Papauma were in continuous *occupation of the territorial sea* adjacent to the Mataikona Block before and after 1840¹⁴; and
- F) Wherefore it is alleged that members of Te Hika o Papauma exercised and continue to exercise rights of customary fishing in the territorial sea adjacent to the Mataikona Block before and after 1840; and
- G) It is further alleged that members of Te Hika o Papauma exercised tino rangatiratanga over the territorial sea adjacent to the Mataikona Block before and after 1840; and

¹⁴ See McClean, *Eastern Coromandel Foreshore, Fisheries and Coastal Issues Report*, April 1999, Hauraki Inquiry. McLean's conclusion was that 'the sea has been "occupied" by the indigenous peoples [of Eastern Coromandel] as much as the land was.'

H) It is further alleged that members of Te Hika o Papauma were and remain the owners of the territorial sea adjacent to the Mataikona Block before and after 1840.

Particulars: The Treaty Breaches

I) It is alleged, in particular, that the Crown, through legislation and policy since 1869, has denied or frustrated the claimants and their forebears in the exercise of their tino rangatiratanga over and their ownership to the territorial sea and their customary fishing rights and interests in that area, and in alleging the same the claimants therefore say that, in terms of Section 6 (1) of the Treaty of Waitangi Act 1975, they have been prejudicially affected by the following, namely, by way of:

Section 6 (a) Acts of the House of Representatives

- (i) The Foreshore and Seabed Endowment Revesting Act 1991 (which vests the territorial sea adjacent to the Mataikona Block 'in the Crown' and which, after the passage into law of the said legislation, has determined, inter alia, the said territorial sea (referred to as seabed) to be 'land of the Crown'; section 9A).
- (ii) The Resource Management Act 1991 (which prohibits the claimants from occupying the seabed or removing any sand, shingle, shell, or other natural material from the seabed adjacent to the Mataikona Block; section 12 (2)).

Section 6 (c) Policy and Practice

- (iii) The Crown's assertion of an irrebuttable presumptive ownership of the (claimants') seabed from 1869¹⁵; and

¹⁵ Ibid.

- (iv) The Crown suspending and then cancelling the Native Land Court's jurisdiction below the high water mark (thus concerning both the foreshore and the seabed) in the 1870s¹⁶; and
- (v) The Crown denying that Maori¹⁷ and therefore the claimants have any 'grant of estate or interest' in the seabed contrary to section 7 of The Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977¹⁸ wherefore such Crown practice and policy is authoritatively stated as being the following, viz., '[T]he Crown does not and has not ever recognised Maori ownership of the seabed.'¹⁹

Section 6 (d) Crown Omissions

- (vi) The Crown omitting to remedy legitimate complaints by the claimants dating from the 1950s and 'concerning the depletion of fishing resources' and the Crown thereby omitting to act to protect the claimants' 'customary fishing rights.'²⁰
- (vii) The Crown's delay in implementing a customary fishing regime as may be provided for under the Treaty Of Waitangi (Fisheries Claims) Settlement Act 1992 (section 10) and the Fisheries Act 1983 (section 89) and thereby a failure to stop or curtail

¹⁶ Ellis, p. 29.

¹⁷ See McClean, *Eastern Coromandel Foreshore, Fisheries and Coastal Issues Report*, April 1999, Hauraki Inquiry, p.29 '... the Territorial Sea[, Contiguous Zone,] and Exclusive Economic Zone Act 1977 vested a massive area of coastal seabed in the Crown. This action was taken without explicit regard to Maori interests or Maori values in the coastal environment.'

¹⁸ Section 7 reads: *Subject to the grant of any estate or interest therein* (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown [Counsel's emphasis].

¹⁹ Crown Law closing submissions, Hauraki Inquiry Wai 686 #AA1, November 2002, para. 695, p. 194.

²⁰ Ellis, p. 58.

commercial fishing thus causing a depletion in crayfish and paua stocks for customary fishing.

Particulars: The Result of the Prejudice

- J) It is alleged that the result of specific prejudice is as follows:
- (i) The loss or denial of claimants interests in their territorial sea including those in connection with:
 - (a) ownership (Crown prerogative right and presumed ownership, policy surrounding the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, the Foreshore and Seabed Endowment Revesting Act 1991, and denial-of-ownership policy); and
 - (b) use and occupational rights (Resource Management Act 1991, and denial-of-ownership policy); and
 - (c) managerial and conservation rights (Resource Management Act 1991, and denial-of-ownership policy); and
 - (d) a delay in achieving a legal customary fishing regime for the claimants.

Particulars: Relevant Principles of the Treaty

- H) The aforesaid prejudices are inconsistent with the principles of the Treaty, namely by the Crown having;
- (i) failed to guarantee to the forebears of the claimants and the claimants their tino rangatiratanga over and rights of ownership to the seabed adjacent to the Mataikona block; and

(ii) breached its duty to the forebears of the claimants and the claimants to actively protect their tino rangatiratanga over, rights of ownership to and use of the seabed adjacent to the Mataikona block.

(iii) failed to guarantee to the forebears of the claimants and the claimants their tino rangatiratanga over and rights to customary fisheries in the territorial sea adjacent to the Mataikona block; and

(iv) breached its duty to the forebears of the claimants and the claimants to actively protect their tino rangatiratanga over, rights to customary fisheries in the territorial sea adjacent to the Mataikona block.

5 Recommendations Sought

- A) The claimants seek the following from the Waitangi Tribunal;
- (i) A finding of the facts in their favour;
 - (ii) A finding that their claim is well founded;
 - (iii) A recommendation that the Crown apologise;
 - (iv) A recommendation for monetary compensation;
 - (v) A recommendation that all commercial fishing be banned on the Mataikona foreshore and off its coast (i.e. within the area of the territorial sea mentioned in these pleadings).

Charl Hirschfeld

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Charl Hirschfeld/Tavake Barron Afeaki
Counsel for the Claimants

To: The Registrar, Waitangi Tribunal
To: Counsel for the Crown