

7. CONCLUDING CHAPTER

7.1 Right to Develop and the Human Genome Diversity Project

The report on Wai 262 issues by P Dengeat Thrush commissioned by the Tribunal contains this statement:

The attacks on indigenous cultures caused by overcrowding, desertification, and the flight of young people to cities, with a consequent loss of oral tradition, all threaten the loss of valuable cultural and scientific material. While circumstances giving rise to such conditions are to be deplored (and energies devoted to their alleviation) in the interim, not to attempt to save biodiversity (by such as bio-prospecting and the Human Genome Diversity Project) will likely be seen as reprehensible by later generations.

A long history of bio-prospecting may not legitimise it. Nor may it exculpate the Crown from a breach of its Treaty obligations (although it may mitigate it somewhat).

The ability to grant rights in relation to pre-existing plant varieties raises the possibility of a breach of the Treaty. 'Distinctness' is judged under the Plant Variety Rights Act 1987 only by reference to varieties whose *existence* was a matter of common knowledge *when* the application was made. That seems to permit the possibility of a registration in respect of a new discovery of species previously known and used (say, pharmaceutically) but since lost ... [text of Article 2, English text, Treaty of Waitangi] ...I suggest that the genome of the plants and animals of the claim were not, at the time of the signing of the Treaty, legally in existence, on the basis that they are concepts for which even the vocabulary was non-existent and incapable of use or expression at that time. That is, there can be no unknowing 'possession'.¹

These remarks are of considerable concern for two reasons. Although Dengeat Thrush cites an obiter dictum in a Court of Appeal judgment doubting a Treaty right to generate electricity by damming a river, he appears quite unaware of the various occasions upon which the Waitangi Tribunal has carefully discussed the right of development implicit in the

1. P Dengeat Thrush, *Indigenous Flora and Fauna of New Zealand*, Waitangi Tribunal Research Series, no 1, 1995, p 55

Treaty arrangements between Crown and Maori. This was elaborated upon in the *Muriwhenua Fisheries Report 1988*:

11.6.5 New Technologies and the Right to Development

(a) The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.

(b) Access to new technology and markets was part of the quid pro quo for settlement. The evidence is compelling that Maori avidly sought Western technology well before 1840. In fishing, their own technology was highly developed, and was viewed with some amazement by early explorers. But there is nothing in either tradition, custom, the Treaty or nature to justify the view that it had to be frozen.

(c) An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.

It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.

Maori no longer fish from canoes, but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.

(d) The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty. (The Crown has generally accepted these principles).

(e) The right to development is recognised in domestic and international law, in domestic law in *Simon v The Queen* (1985) 24 DLR (4th) 390, 402, for example.

That all peoples have a right to development is an emerging concept in international law following the Declaration on the Right to Development adopted on 4 December 1986 by 146 states (including New Zealand) in resolution 41/128 of the United Nations General Assembly. This includes the full development of their resources. Professor Danilo Turk, a leading drafter of the declaration considered

In other words, states should adopt special measures in favour of groups in order to create conditions favourable for their development. If a group claims that the realisation of its right to development requires a certain type of autonomy, such a claim should be considered legitimate.

The International Symposium of Experts on Rights of People and Solidarity Rights considered:

The right to development is one of the most fundamental rights to which peoples are entitled, for its realisation is the source of respect for most of the fundamental rights and freedoms of peoples.

It was added

Each people has the right to determine its own development by drawing on the fundamental values of its cultural traditions and on those aspirations which it considers to be its own. This right to authentic development is, in fact, three-pronged: economic, social and cultural.²

The Tribunal has reaffirmed the right to development in other reports including *Ngai Tahu Sea Fisheries Report 1992* and *Te Arawa Geothermal Resources Report 1993*.³ I am sure that counsel for the Wai 262 claimants will wish to argue for the right to development in respect of numerous aspects of the claim – not least the use of whatever modern technology and management practices can be relied upon to ensure sustainable ecosystems for indigenous flora and fauna including those species mentioned in the claim.

On the other hand, it is abundantly clear that the Human Genome Diversity Project (HGDP) is certainly not one of those modern developments which the claimants wish to embrace. On the contrary, outrage at the aims, purposes and methods of the HGDP has been expressed by indigenous peoples from all around the world and in Aotearoa. Indeed, very specific recommendations in the Mataatua Declaration 1993 dealt with this issue, including recommendations 2.8 and 2.9 (directed to states, national and international agencies) and 3.5 (directed to the United Nations):

2.8 A moratorium on any further commercialisation of indigenous medicinal plants and human genetic materials must be declared until indigenous communities have developed appropriate protection mechanisms.

2. Waitangi Tribunal, *Muriwhenua Fisheries Report 1988*, pp 234–235; on international law materials, see B Kingsbury 'The Treaty of Waitangi: Some International Law Aspects', in I H Kawharu (ed), *Waitangi*, Auckland, 1989, pp 139–143

3. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992; and Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993

2.9 Companies, institutions both governmental and private must not undertake experiments or commercialisation of any biogenic resources without the consent of the appropriate Indigenous Peoples....

3.5 Call for an immediate halt to the ongoing 'Human Genome Diversity Project' (HUGO) until its moral, ethical, socio-economic, physical and political implications have been thoroughly discussed, understood and approved by Indigenous Peoples.⁴

It is precisely the HGDP notion of biodiversity and sustainable development which may appeal to many developed nation governments and commercial enterprises. That is not the notion of biological ecosystem diversity which is the focus of this claim. A brief description of the HGDP and the public statements of its prime movers makes it obvious why the project needs to be stopped internationally and certainly should not be allowed to operate in this country. It also indicates the absolute importance of intellectual property law reform in a direction which will uphold the rights of indigenous peoples:

4.2 Human Genome Project and Human Genome Diversity Project

As the implications of life patenting were seeping into public consciousness, an international initiative called the Human Genome Diversity Project was launched, and became a lightning rod for many of the concerns that people were raising about life patenting in general, and human patenting in particular. Initially the independent brainchild of Northern anthropologists and geneticists, The Human Genome Diversity Project was adopted in 1993 as a project of the multimillion dollar Human Genome Project, which in turn is governed by the Human Genome Organization, known as HUGO.

The Human Genome Project is a collaborative endeavour among geneticists worldwide, whose objective is to 'map the human genome' – by using new technologies to describe the chemical composition of each of the estimated 100,000 genes that control the inherited part of every human being's makeup. The initiative began in 1988–89 as a celebrated example of scientific cooperation across international borders. It erupted in controversy in 1989, however, when Craig Venter, a scientist working on the project, and his employer, the US government's National Institutes of Health, staked a US patent claim on 9,750 DNA fragments from the human brain which Venter had characterized, but

4. A T P Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific', paper presented to Inaugural Indigenous Peoples of the Pacific Workshop on the United Nations Draft Declaration on the Rights of the Indigenous Peoples, Suva, 2–6 September 1996

whose functions in the body were unknown. Nobel laureate James Watson described the claim as 'sheer lunacy'. The patent claim was rejected because it failed to meet the basic criteria for patentability (see 'patents' in glossary) but not before it had sparked a virtual bidding war among genetic researchers. The UK's Medical Research Council followed Venter's lead, and filed for similar patents on human DNA fragments of unknown function which they had described. In response, French scientists working on the Human Genome Project unveiled a first generation map of about 90 per cent of the human genome, stressing that they would continue make their research freely available. The British Medical Research Council then announced it would no longer seek patents on gene segments discovered as part of the Human Genome Project. Craig Venter, in the meantime, became a multi-millionaire – one of many publicly funded scientists who have set themselves up in private business – in an effort to profit from new human genome technologies. The legal repercussions of Venter's patent claim are likely to be played out in the courts for years to come; the policy debate that it provoked has just begun.

The Human Genome Diversity Project was announced against the backdrop of this controversy. Its stated purpose was to broaden the study of the human genome beyond the DNA of Europeans and North Americans, and to gather genetic samples that would help geneticists and social scientists trace the early migration of peoples around the globe. It initially proposed to collect some 15,000 tissue samples (blood, hair and cheek scrapings) from 729 distinct ethnic groups around the globe, whom they dubbed 'isolates of historic interest'. Not surprisingly, the initiative aroused anger and concern among its 'targets' – the majority of them indigenous peoples – none of whom had been informed or consulted about the project's intentions to sample and analyse their body tissues. Their concerns about the initiative went far beyond a concern over intellectual property. But one of their fears was that indigenous people's genes would eventually be patented, and generate corporate profits in the North. As if to confirm their worst fears, three patent claims by the US government on cell lines from indigenous people in Panama, Papua New Guinea and the Solomon Islands were unearthed in late 1993, and sparked outrage and protest among indigenous peoples around the world.

When confronted with the concern that human genes collected by the Project could fall under patent monopoly, the Human Genome Diversity Project has failed to allay the fears of many indigenous leaders, who continue to call for a halt to it. The World Council of Indigenous Peoples, signatories to the Mataatua Declaration, three international conferences of indigenous peoples on biodiversity, intellectual property rights and indigenous peoples' knowledge (representing indigenous peoples organisations from 41 countries), and many national organizations of indigenous peoples have called for an end to the Project. In struggling to address the issue of patenting, the Project has repeatedly shifted its position. In 1993, for example, while acknowledging that collected tissue samples would 'provide valuable information on the role played by genetic factors in the predisposition or resistance to disease', they maintained that the material was unlikely to have any commercial value. They nonetheless agreed (in the unlikely event that the material proved commercially useful) that the HGDP itself would not seek patent protection. Next they proposed, however, that if human DNA collected by the project did have a commercial application, the peoples involved should benefit financially. Observers found it hard to keep up with the shifting assumptions behind these statements, and questioned how, in the absence of any laws to enforce it, the HGDP proposed to control what others would do with the tissue samples once they became publicly available. But observers had no trouble understanding the January 1995 conclusion of an international meeting of human genome scientists held in Paris. Attended by HUGO's president, the meeting agreed that the patent system was the 'mechanism of excellence' for commercialising the results of the Human Genome Project.⁵

A Maori perspective on this issue not surprisingly puts emphasis on whakapapa issues. A. Te P Mead and N. Tomas write:

Whakapapa – The Human Gene

A fundamental question for Maori is whether human genetic research should occur in the first place. There are two terms used to describe the human gene; 'Iratangata' and 'Whakapapa'. Iratangata has been described as the life principle of mortals. Whakapapa is often used to describe both the physical process by which one entity emerges from another and the metaphysical context within which it occurs. Various meanings have been attributed to the term, including 'to lie flat', 'place

5. J Christie, 'Biodiversity and intellectual property rights: Implications for indigenous peoples,' *Ecopolitics IX: Conference Papers and Resolutions*, pp 73–74

in layers, lay one upon another', 'genealogical table' and 'recite in proper order'.

Maori consider it important to maintain the cultural integrity which they consider inextricably linked to their whakapapa and genetic materials. Within Maori society a customary right for Whanau and Hapu to require individuals to uphold this responsibility still exists.

The ease with which western scientists are able to deconstruct objects and then treat each component part as independent of its counterparts is not readily acceptable to the Maori mind. In the western mind a rock for instance, is considered to be without life. To Maori a rock, by virtue of its very existence, has a mauri (life force) which it retains regardless of changes to its physical form. Maori always refer to the 'mauri factor' – the life-force, the spiritual connection between heritage and a place, site or object, when speaking about taonga such as land, people and other resources.

To Maori the whole of nature exists in a delicate balance of life which ought not to be disrupted unnecessarily. To remove, collect and reproduce any genetic material artificially lies at one end of the spectrum of unacceptable interference. Transgenic research involving the introduction of human genes into non-human species, considered reprehensible and offensive by most Maori, lies at the other end. Both activities and those in between would be considered unethical research by some Maori.

Western property rights do not protect the integrity of objects in their natural form. Intellectual property rights only recognise and protect the results of human innovation. Both reflect western thinking which is at odds with Maori and other indigenous attitudes to the environment. This reductionist mentality is reflected in Pakeha 'laws' which divide up and apportion exclusive rights in objects to individuals. The right of a Maori person to participate in genetic research and/or therapy must be distinguished from the right of Maori individuals to allow for commercial exploitation of genetic materials or research outcomes on the basis of wider, generic application or identification.

Conclusion

Indigenous peoples are now placing greater emphasis on creating indigenous research structures and methodologies and participating in local and national research bodies. There is also greater emphasis on moni-

toring and contributing to the ethical debate on research proposals in the wider community.

Maori cultural and ethical values relating to human genetic research are quite straightforward in terms of definition, but complex in the practical determination of differentiating the rights of Maori individuals from the rights and responsibilities of the Maori collectives of Whanau, Hapu and Iwi. Even if an acceptable consent procedure is developed, there still remains the question as to how many and who has the right to give consent to research which could affect the wider collective.

It is clear that consideration of the ethics of any proposal and the implications for Hapu-Iwi/Maori, need to be addressed on a case-by-case basis. There is no single formula and no state structure which could carry out this function.⁶

The Tribunal's attention is also drawn to the 1996 Ministry for the Environment document raising issues concerning genetically modified organisms.⁷

It is suggested that the right to development needs elaboration in the context of this claim, and that it must include the right to refuse to participate in developments which are unethical from a Maori understanding of kaitiakitanga. Whilst Maori ought not to be restricted to 1840 technology in the implementation of Treaty rights, and whilst they ought not to be left out of development which is fully consistent with developing modern understandings of tikanga Maori, neither should they be compelled to agree to every proposal for bio-prospecting involving indigenous flora and fauna, for example, even if substantial financial rewards are offered for their participation. Many Treaty breaches in the past involved the Crown insisting that Maori must participate in development in precisely the manner determined by the Government regardless of their wishes to retain kaitiakitanga and rangatiratanga over their lands on their own terms. The wars and raupatu of the 1860s are the most obvious examples but the work of the Native Land Court, the Maori Land Councils/Boards, Land Development Schemes, etc. frequently involved forced participation by Maori in the modern economy whether they liked it or not. The many significant failures of the pastoral farming focus of most of those compulsory development projects ought to be a lesson that traditional ecological knowledge may well be a much surer guide to appro-

6. A Mead and N Tomas: 'The Convention on Biological Diversity: Are Human Genes Biological Resources?', *New Zealand Environmental Law Reporter*, July 1995, pp 130–131

7. Nici Gibbs, *Genetically Modified Organisms and Maori Cultural and Ethical Issues*, Wellington, Ministry for the Environment, 1996

priate development technologies than the rapacious development of this country at the expense of almost all indigenous ecosystems. A right to development cannot be a right to self determination if it involves an enforced duty to develop regardless of the wishes of the kaitiaki of the species and ecosystems.

7.2 Outstanding Issues and Matters for Further Research

There remain a number of issues mentioned in the research commission which have not been fully covered or covered at all in this report. Physical taonga in particular are dealt with by a range of laws and policies which are quite distinct from the focus of this report. The *Te Roroa Report 1992* of the Tribunal extensively examined issues relating to some physical taonga and made a number of findings on the violation of taonga. However, there is need for a thorough review of laws, policies and practices concerning physical taonga, the role of Crown-owned museums, and the development of policies for the repatriation to iwi and hapu of taonga held in overseas collections of artefacts.

Another range of issues of vital significance to some iwi and hapu are canvassed by a 1996 report from the office of the Parliamentary Commissioner for the Environment on 'Historic and Cultural Heritage Management in New Zealand'. As I write there are media reports of unauthorised modification or destruction of stonefield cultural heritage sites in South Auckland. The Parliamentary Commissioner has highlighted the complex and uncoordinated structures presently in place and there may need to be further submissions and further research on this topic. A summary of the report by the Parliamentary Commissioner's team sets out the issues as follows:

The team found that significant losses of historic and cultural heritage are continuing eg 50% of all pa in the Auckland metropolitan area have been modified or destroyed since city development began, with 6% of known archaeological sites in the Auckland region being destroyed between 1979–94. Only 13 places have been registered as waahi tapu under the Historic Places Act 1993. There are 1012 archaeological sites on the HPA register, but no assessment of their importance to Maori has been undertaken. Nor has there been any assessment of the

49,000 sites on the NZ Archaeological Association files. Waahi tapu are defined in the HPA 1993 but not in the Resource Management Act 1991, so councils have adopted varying approaches to the protection of sites in their regions. It is not known if the Official Information Act might make HPA records of sensitive sites public on request. Confidentiality versus the need to identify sites for protection has already struck problems in cases like *Greensill v Waikato Regional Council* W17/95 involving a waahi tapu in Raglan harbour.

The team found:

- ▶ a need to develop a national strategy linking all aspects of the management of Maori heritage and supported with adequate levels of funding from government (the Waitangi Tribunal having identified a government responsibility for Maori heritage protection);
- ▶ the current range of mechanisms for protection have not been fully utilised and developed;
- ▶ the HPA 1993 is deficient in its treatment of Maori values – containing no reference to the Treaty – and the Maori Heritage Council lacks sufficient authority to act in decisions affecting Maori;
- ▶ there are potential gaps in archaeological site provisions between the HPA 1993 and the RMA 1991 and also between the HPA 1993 and the Antiquities Act 1975 re disposal of artefacts found at sites;
- ▶ there is no guaranteed protection of confidential site information.

Accordingly, the team recommended that the Maori Heritage Council in association with the Minister and Historic Places Trust Board convene hui to address these issues.⁸

Another area of omission concerns the use of Maori cultural images, particularly when the use involves commodification of Maori images by non-Maori with resulting commercial benefits to the user but without consultation with the kaitiaki of the images. Attached to this report is a research proposal by M Whaanga and T Engels-Schwarzpaul. They have the expertise and the desire to do a significant research report on this topic. Their proposal involves a modest outlay of Tribunal funds and it would seem to be very relevant to the cultural heritage aspects of the claim.

8. *The Maori Law Review*, July 1996, p 12

7.3 Concluding Remarks

In addition to the lack of detail in relation to cultural heritage objects and sites, there is, as noted earlier, a distinct lack of information on historical evidence concerning Maori use of technological developments. Archival research will be needed to fill that gap in addition to evidence which may arise in oral evidence. On the other hand there is a substantial body of evidence concerning traditional associations of iwi and hapu with their taonga and the importance of matauranga Maori to contemporary Maori is also well documented. It may be a matter for counsel's submissions as to whether this is the type of claim which requires exhaustive historical and archival research. The clash between the current laws and Crown policies on intellectual property rights and the tino rangatiratanga rights of iwi and hapu under the Treaty are, it is suggested, plain enough from the Statement of Claim and this research report and its associated documentation. The Tribunal hearing will provide an opportunity for the claimants to transmit their issues directly to the Tribunal in oral evidence. If the Crown insists on its present position, then it may be that the more detailed historical research will have to be done, in which case funding will have to be obtained.

The gap between current Crown policy and the Wai262 claim is readily apparent in the words of a government spokesperson speaking about intellectual property rights:

We must be sensitive not only to the needs of Maori as the indigenous people, but also to the needs of other New Zealanders. Providing exclusivity in some cases may in actual fact be detrimental to the cultural development and progress of the nation. The good of the wider community has to be taken in account.⁹

The question for the Tribunal is whether in intellectual property law reform the Treaty rights of Maori to all their taonga must be subsumed to the benefit of the wider community. Must the tangata whenua yet again be forced to forego all that is most important to them in the doubtful pursuit of development which in the not very long term will most likely prove to be non-sustainable, but by that time all that has remained of matauranga Maori may well have been lost forever just as finally as all those countless species which development policies have forced into extinction in the recent history of Aotearoa/New Zealand.

9. J Belgrave (for Minister of Commerce), 'Kiwi Culture: Alive and Growing in Foreign Laboratories', Wellington District Law Society Chateau Seminar, 25 June 1994, p 18

At the end of the day, the Wai 262 claim brings into focus the fact that te reo Maori, matauranga Maori, taonga Maori and all indigenous flora and fauna have but one home on this increasingly fragile planet. That home is this country of Aotearoa/New Zealand. If all that is distinctive and important and only found in Aotearoa is to survive and maybe to flourish again, then it must happen here. *Ex situ* conservation of species must almost always be a second best option. For Maori as an indigenous people there is and can be only one land which sustains them. The Waitangi Tribunal has the opportunity to refocus the Government's attention upon these facts as intellectual property law reform is considered, rather than give undue attention to globalisation of universalised norms to promote rapid advances in the new frontier of bio-technological scientific development.