



Supreme Court of New Zealand

27 February 2013

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

The New Zealand Maori Council and Others v The Attorney-General and Others
(SC 98/2012) [2013] NZSC 6

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

The appeal concerns restructuring of the Crown’s ownership of the State enterprise, Mighty River Power Ltd. When the provisions of the State-Owned Enterprises Amendment Act 2012 are brought into effect in respect of the company, it will be reconstituted as a “mixed ownership model company” under Part 5A of the Public Finance Act 1989. The result will be to permit the Crown to sell up to 49 per cent of the shares in the company which, as a State enterprise, is currently required by legislation to be wholly owned by the Crown. The Crown has announced its intention to bring the legislation into effect in relation to Mighty River Power and to offer 49 per cent of the shares in it by initial public offering in the first quarter of 2013.

The appellants, the New Zealand Maori Council, the Waikato River and Dams Claim Trust, and the Pouakani Claims Trust were unsuccessful in the High Court when they sought declarations that the proposed Crown actions are contrary to s 9 of the State-Owned

Enterprises Act 1986 and s 45Q of the Public Finance Act 1989, both of which prevent the Crown acting inconsistently with the principles of the Treaty of Waitangi. They claimed that the changes in ownership will be in breach of the principles of the Treaty because they will prejudice Maori Treaty claims to waters. The waters claimed, which include the Waikato River and geothermal waters, are used by Mighty River Power for the generation of electricity under water permits granted under the Resource Management Act 1991.

The Waitangi Tribunal, in an urgent interim determination, found that Maori at 1840 had interests in water in the nature of ownership. It recommended that Crown and Maori should consult on how Maori proprietary interests and the Treaty guarantee of Maori authority in relation to their properties could be provided through shares in Mighty River Power with amplified rights. It considered that, while ordinary shares could as equally be provided after the partial privatisation, what it called “shares plus” could only be available as a remedy if changes to the company constitution were undertaken before the float of shares.

In the High Court, on the appellants’ application for judicial review of the Crown’s proposed Order in Council and sale of shares, Ronald Young J held that the changes to the ownership of Mighty River Power which clear the way for the share float are the consequence of an Act of Parliament which cannot be questioned for compliance with the Treaty of Waitangi in the courts. In addition, he held that the proposed actions of the Crown were not in any event inconsistent with the principles of the Treaty because the sale of shares in Mighty River Power would not materially prejudice Maori claims and interests in the water.

The appellants appealed from the High Court decision. Leave was granted by the Supreme Court to bring the appeal directly to the Court because of the urgency in finalising the public offering of shares.

There were five questions argued on the appeal:

1. Is the proposed sale of shares in Mighty River Power able to be judicially reviewed for breach of the principles of the Treaty?

2. Is Cabinet's decision to bring into effect the legislation making Mighty River Power a mixed ownership model company able to be judicially reviewed by the High Court for inconsistency with the principles of the Treaty of Waitangi?
3. Was the consultation undertaken by the Crown with Maori following a recommendation of the Waitangi Tribunal adequate to comply with the Treaty principles?
4. Is the proposed sale of shares in Mighty River Power in breach of s 64 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (which requires engagement with Waikato-Tainui where the Crown, a Crown entity, a state enterprise, or a mixed ownership model company disposes of an interest in the Waikato River)?
5. Is the proposed sale of shares in Mighty River Power inconsistent with the principles of the Treaty?

The Court is unanimous on all questions on the appeal, its reasons being expressed in a single opinion.

The two questions concerning the jurisdiction of the High Court to judicially review the Order in Council and the proposed sale of a minority interest in Mighty River Power turned on the interpretation of the amendments made in 2012 to the State-Owned Enterprises Act and the Public Finance Act (which introduced the new Part 5A) and on the meaning and application of the Treaty compliance provisions in s 9 of the State-Owned Enterprises Act and s 45Q of the Public Finance Act. In considering the application of the Treaty compliance sections (which prevent the Crown acting in a manner inconsistent with the principles of the Treaty of Waitangi), the Supreme Court has followed and confirmed the approach taken by the Court of Appeal in 1987 in the *SOE case*.

Overtaking the High Court on this point, the Supreme Court has held that the proposed sale of the shares is reviewable by the courts for consistency with the principles of the Treaty. In this determination the Court has rejected the contention of the Crown on the appeal that the Treaty compliance provision under s 45Q had no application to the sale of shares because no power of sale under Part 5A of the Public Finance Act was to be used. Rather, it has

concluded that all Crown actions in relation to the ownership of mixed ownership model companies are subject to s 45Q. Accordingly, the Court has held that the proposed sale of shares was able to be reviewed by the High Court for compliance with the principles of the Treaty.

The Court has held the consultation which followed the Waitangi Tribunal's urgent *Freshwater Report* was not shown to be inadequate. It has held that there was no breach of s 64 of the Waikato River Settlement Act (which requires notification to Waikato-Tainui before disposal of interests in the Waikato River) because Mighty River Power was not disposing of its water permits or other interests in the River.

The appellants' claim that they are prejudiced through the proposed sale of shares in Mighty River Power is the basis on which they claim inconsistency with the principles of the Treaty in the sale. In those circumstances, the Court has found it unnecessary to determine separately whether the proposed Order in Council to bring the legislation into effect was also able to be reviewed for consistency with the principles of the Treaty.

Because of its determination that judicial review was available, it was necessary for the Supreme Court to consider whether the proposed sale of shares would be inconsistent with the principles of the Treaty. The Supreme Court has followed Privy Council authority in holding that the question of compliance with Treaty principles requires the Court to make its own assessment.

It was common ground in the appeal that the Crown proposals will be inconsistent with the principles of the Treaty if they will "impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty". This was the test adopted by the Privy Council in the *Broadcasting Assets* case and which the Supreme Court has applied.

The Court has accepted that the sale will provide some impediment to reparation for Treaty claims in relation to the waters subject to water permits held by Mighty River Power. Whether the impediment is material was treated by the Court as requiring contextual assessment. Factors of significance in that assessment were:

- Crown acknowledgement that Maori have interests and rights in relation to particular waters;
- reviews currently underway which are addressing recognition of Maori interests and rights in legislation concerned with regulating use of water (including Government policy development through the *Fresh Start for Fresh Water* initiative and the *Freshwater* inquiry being undertaken by the Waitangi Tribunal);
- specific acknowledgments and assurances given in the course of the litigation by Ministers that Maori claims to water will not be prejudiced by the sale and that the Crown will not be deterred from making Treaty reparation by the change in ownership;
- the change in the legislative and social landscape since the *SOE case* in 1987 which now includes acknowledgment of and provision for Maori authority in relation to waters in the Resource Management Act and legislation settling historic claims (in particular the settlement relating to the Waikato River, of direct relevance to the waters used by Mighty River Power);
- the views of the Waitangi Tribunal in its urgent interim report in the *Freshwater* inquiry, including its recognition that the shares could only ever be a “proxy” for the waters in which interests and rights are claimed;
- the protection of land preserved under the memorialisation system which is carried over from the State-Owned Enterprises Act into the mixed ownership model legislation;
- the reality of the generating infrastructure and its importance for the country;
- the capacity retained by the Crown to provide remedies.

In this context, the Supreme Court has concluded that the partial privatisation of Mighty River Power will not impair to a material extent the Crown’s ability to remedy any Treaty breach in respect of Maori interests in water.

The appeal has accordingly been dismissed.

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