20. Climate change claim on behalf of New Zealand's indigenous Māori peoples

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In May 2016, a claim was filed in New Zealand's Waitangi Tribunal by representatives of the Mataatua District Māori Council, claiming that the New Zealand government had failed to implement adequate policies to address the threats posed by global climate change to the Māori indigenous peoples of New Zealand.

THE LITIGANTS

Mataatua District Māori Council is one of a number of statutory representative bodies established¹ to promote the interests of the indigenous Māori people in New Zealand. Mataatua District Māori Council has responsibility for an area in the eastern part of the North Island of New Zealand. The Waitangi Tribunal claim was brought on behalf of the Council by Maanu Paul, David Potter and Andre Paterson. Andre Paterson has passed away since the claim was filed. Maanu Paul is a well-known Māori activist, who has been involved with numerous campaigns on behalf of Māori over the decades. For example, he was an original claimant and continues to be involved with claims in establishing Māori interests in fresh water.² Maanu Paul was a former chairperson of the New Zealand Māori Council, and was recently made an Officer of the New Zealand Order of Merit (ONZM).

THE LITIGATION

The claim was brought in the Waitangi Tribunal, which is a tribunal established in New Zealand for Māori to bring claims that the government is acting in breach of its obligations under the Treaty of Waitangi towards Māori.³ The Treaty of Waitangi is a treaty signed in 1840 between the British Crown and Māori chiefs under which the British Crown accepted certain obligations

towards Māori people. This included what has been subsequently interpreted by the courts in New Zealand as an obligation of ‘active protection’, to actively protect Māori interests over their land and resources.⁴

In hearing claims before it, the Waitangi Tribunal acts as a commission of inquiry. Although the tribunal can make recommendations to the government to address found treaty breaches, the findings are not binding, and are generally used by the New Zealand government to negotiate settlements of claims with Māori.

The statement of claim filed⁵ on behalf of the Mataatua District Māori Council alleged that the New Zealand government had breached its obligations of active protection towards all Māori by not adequately responding to the global threat of climate change. In this regard, particular emphasis was placed upon the traditional role of Māori as guardians of the natural environment upon which Māori rely.

In Māori terminology this guardianship role is encompassed within the principle of ‘*kaitiakitanga*’, which has been described as ‘the ethos of sustainable resource management [and] guardianship’.⁶ *Kaitiakitanga* involves living in balance, as part of one ecosystem where all things have the potential to endure, and where possible to thrive. This is often described as the Māori holistic world view, a view that is particularly pertinent with respect to climate change as it has the potential to affect the ecosystem as a whole.

The claim alleged that the New Zealand government had breached its obligations to protect Māori in this guardianship role by failing to ensure that New Zealand bears its fair share as a developed nation in reducing greenhouse gas emissions so as to keep global temperature rises below dangerous levels that would affect Māori in the use of their land and resources.⁷ In this regard, reference was made to: degradation of the natural ecosystem caused by global warming and rising seas, resulting in shortage of water resources for Māori communities, impact on Māori commercial interests, such as in forestry and agriculture, impact on Māori fishing rights and interests, the threat posed to Māori coastal communities by rising sea, and general impacts on Māori health and well-being.

Claims before the Waitangi Tribunal typically take some years before they get to a hearing. Given the perceived urgency in having the claim heard, the claimants filed an application to the Waitangi Tribunal to have its claim heard urgently. On 17 October 2017, the Waitangi Tribunal declined the application for an urgent hearing on the basis that, although the claim raised important issues, the government was still developing its domestic policies surrounding the implementation of the United Nations Paris Agreement, and there remains an opportunity for Māori to participate in that process.⁸

At present, the claimants are continuing in their efforts to have their claim heard and will shortly make a further application to the Waitangi Tribunal to allocate the claim a priority hearing.

POTENTIAL FOR SUCCESSFUL CLIMATE CHANGE CLAIM THROUGH NEW ZEALAND'S WAITANGI TRIBUNAL

Compared with other litigation options, the claim through the Waitangi Tribunal offers perhaps the best option for successfully bringing a climate change claim in New Zealand. An alternative litigation route would be to bring an application for judicial review of government policy through the New Zealand High Court. However, historically, the High Court in dealing with judicial review applications of government policy has been reluctant to interfere with government decision-making.⁹

This is illustrated by recent judicial review proceedings brought by an individual against aspects of the New Zealand government's climate changes policies, resulting in the decision *Thomson v. Minister for Climate Change Issue*¹⁰ While the Court accepted that the Minister for Climate Change should have had regard to the most recent United Nations Intergovernmental Panel on Climate Change (IPCC) AR5 report in reviewing New Zealand's 2050 emission targets, the judge was not convinced that this would have made any difference to the outcome, given the contents of the AR5 report, and the fact that a new government had recently been elected. The judge also rejected the argument that New Zealand's pledged Nationally Determined Contribution (NDC) under the United Nations Paris Agreement of reducing emissions by 2030 by 11 per cent from 1990 levels was unreasonable given that it was not in line with the 2050 target and contributions committed to by other comparable countries. The judge considered that the NDC was not inconsistent with New Zealand's international obligations and could be reviewed at a later date, including by the incoming new government.¹¹ On this basis, the application for judicial review was dismissed.

By contrast with this outcome, there will be a much wider scope for the Waitangi Tribunal to make findings in regard to government efforts to address climate change. The Tribunal has wide jurisdiction to hear any claim by or on behalf of Māori that they are being prejudiced by any legislation, government policy or action.¹² In investigating such claims, it has all the powers and scope of a commission of inquiry in calling and considering evidence. In considering a claim, it can go beyond the restricted jurisdiction of the High Court judicial review to only consider whether government action is illegal and look to the government's broader obligations under the Treaty of Waitangi.

As such, if and when the Mataatua District Māori Council claimants finally have their claim heard there will be no jurisdictional barriers limiting the Waitangi Tribunal in considering the claim that government policy in regard to climate change has been in breach of obligations of active protection towards Māori.

POTENTIAL FOR THE DEVELOPMENT OF INDIGENOUS-BASED PUBLIC TRUST PRINCIPLES

The Mataatua District Māori Council claim also illustrates the potential for indigenous groups globally to bring environmental claims in their capacity as traditional guardians of the natural environment. In this regard, the claimed breach of the duty of active protection towards Māori in their role as guardians of the natural environment has parallels with the ‘public trust doctrine’ argued in climate change cases in the United States of America. In *Juliana v. United States of America* (see Chapter 16),¹³ where the claimants were successful in invoking the public trust doctrine in arguing that inadequate government climate change policies breached the state’s fiduciary obligations to protect the environment that is common property of all citizens,¹⁴ the court found that inadequate climate change policies had such a profound effect on the environment and the community that the government can be considered as being in serious breach of its fiduciary obligation in failing to take adequate steps.¹⁵

In the Mataatua District Māori Council claim, it has been submitted that the approach adopted in the *Juliana* case of applying the public trust doctrine should be followed by the Waitangi Tribunal to find that the New Zealand government has breached its Treaty of Waitangi-based fiduciary obligations towards Māori in failing to put in place adequate policies to deal with the threat of climate change. In further support of this submission, reference has been made to past decisions of the New Zealand Court of Appeal that the Crown’s Treaty of Waitangi obligation of active protection towards Māori ‘creates responsibilities analogous to fiduciary duties’ to Māori people in the use of their lands and resources.¹⁶

This approach of indigenous peoples basing claims upon their traditional roles as caretakers of the environment may well provide indigenous groups around the world with unique standing to bring litigation against governments for failing to adequately protect the environment. For example, Torres Strait Islanders have brought a claim before the UN Human Rights Commission against the Australian government for its failure to take action on climate change issues. Torres Strait Islands are geographically separate from, but legally part of, Australia, and its residents are recognized as indigenous Australians. The Torres Strait Islanders argue that the Australian federal gov-

ernment has failed to uphold human rights obligations and violated their rights to culture, family and life.¹⁷

In New Zealand itself, it has been recently announced by a representative of the Iwi Leaders Group – an organization of leaders of Māori tribes – that they had filed in the High Court judicial review proceedings claiming that the current Labour Party-led government had failed to take adequate steps to address climate change issues.¹⁸ It remains to be seen if the High Court will give this claim any broader consideration than it did in *Thomson v. Minister for Climate Change*, given that the new claim has been brought on behalf of Māori. There is at least the potential that the court could develop New Zealand common law to accommodate the type of indigenous-based public trust principles that have been argued for in the Mataatua District Māori Council claim before the Waitangi Tribunal.

Environmental claims by indigenous peoples based on their traditional guardianship roles can in turn lead to these roles being legally recognized. For instance, past settlements of Treaty of Waitangi claims in New Zealand have led to Māori being given a legally recognized guardianship role in caring for the natural environment. Legislation has been enacted granting a separate legal personality to a river and a geographically significant area, and establishing a board including Māori representatives to make decisions for the protection and promotion of these environmental features.¹⁹ Similarly, in India, the Ganges and Yamuna Rivers have been declared to be legal persons based on the sacred nature of these rivers, with state representatives appointed to protect them.²⁰

POTENTIAL FOR INDIGENOUS GROUPS TO DRIVE COMMUNITY-BASED ENVIRONMENTAL CLAIMS

The Mataatua District Māori Council Waitangi Tribunal claim also illustrates the potential for indigenous groups to drive environmental claims in the interests of local communities in general. Although the claim is ostensibly brought on behalf of the indigenous Māori people in New Zealand, it is based on the premise that Māori are guardians of the natural environment that all in New Zealand rely upon.

Indigenous-led claims could be particularly effective when it comes to climate change issues. This is against the background that the challenge of addressing climate change is considered to be too long term and complex for democratically elected governments to take the initiative in providing effective solutions.²¹ Given this, there will not be any real progress on climate change policy until there is such a broad shift in the view of the public, that such measures are absolutely required for the future of the community, that governments will be forced to act. One way in which such a shift in social norms

can evidence itself and put pressure on governments is by climate change claims through the courts, where the judiciary – the third arm of government – recognize broad community support for more effective government action on climate change.²² Indigenous groups, given their traditional environmental guardianship roles, are ideally placed to bring such claims.

CONCLUDING COMMENTS

In New Zealand there remains a real and immediate need for the Mataatua District Māori Council claimants to obtain a hearing for their claim as soon as possible. Leading up to the 2017 general elections, the Labour Party leader Jacinda Ardern declared that climate change was her generation's 'nuclear-free moment' that a Labour-led government would "tackle head on".²³ However, subsequent to the Labour Party-led government being formed, its climate change policies to date have failed to live up to earlier aspirational rhetoric of the current prime minister. Although the government enacted legislation that essentially duplicates the UK approach of establishing a climate change commission and emissions budgets,²⁴ there is little progress in formulating policies that will drive down future emissions. In the meantime, amongst developed nations, New Zealand continues to have among the highest levels of emissions per capita and is one of the few whose greenhouse gas emissions are still increasing.²⁵ The climate change monitoring organization Germanwatch, in its 2020 report, ranked New Zealand's climate change policies as 30th out of 61 developed nations.²⁶

New Zealand's Paris Agreement NDC of reducing net greenhouse gas emissions in 2030 by 11 per cent from 1990 gross emission levels²⁷ has been assessed by the climate change policy monitoring organization Climate Action Tracker as insufficient compared with what will be necessary to meet the Paris Agreement objectives of keeping global temperature increases within 1.5°C, and New Zealand's current climate change policies as being 'insufficient' to meet the NDC in any case.²⁸

It is against this background that claimants in the Mataatua District Māori Council Waitangi claim are continuing their attempts to have their claim heard within the next year or so to obtain recommendations from the Waitangi Tribunal that the government enhance New Zealand's final NDC before it comes into effect in 2021.

NOTES

1. Maori Community Development Act 1962.
2. National Fresh Water and Geothermal Resources Inquiry Wai 2358.
3. Treaty of Waitangi Act 1975.

4. *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641.
5. Wai 2607 #1.1.1. This and other claim documents can be found through the Waitangi Tribunal website, www.waitangitribunal.govt.nz, and by searching under inquiry documents with the claim reference WAI2607.
6. G.R. Harmsworth and S. Awatere (2013), in J.R. Dymond (ed.), *Indigenous Māori Knowledge and Perspectives of Ecosystems*, Lincoln, NZ: Manaaki Whenua Press, p. 284.
7. Statement of Claim dated 30 May 2016, WAI2607 #1.1.1, paragraphs 52–53.
8. Decision on application for an urgent hearing, WAI2607 #2.5.4.
9. Palmer, G. (2018), 'Can judges make a difference? The scope for judicial decisions on climate change in domestic New Zealand law', paper presented at Pacific Oceans, Pacific Climate Conference, Wellington, 21–23 February 2018.
10. *Thomson v. Minister for Climate Change Issues* [2018] 2 NZLR 160.
11. *Ibid.*, paragraph 176.
12. Section 6, Treaty of Waitangi Act 1975
13. *Juliana v. United States of America*, Case 6:16-CV-01517-TC Opinion and Order 10 November 2016 in the United States District Court for the District of Oregon, Eugene Division.
14. *Ibid.*, p. 38.
15. *Ibid.*, pp. 51–2.
16. *New Zealand Maori Council v. Attorney-General*, p. 38.
17. Client Earth (2019), 'Human rights and climate change: world-first case to protect indigenous Australians', 12 May, accessed 8 June 2020 at <https://www.clientearth.org/human-rights-and-climate-change-world-first-case-to-protect-indigenous-australians/>.
18. Neilson, M. (2019), 'Iwi leader suing government over "failure" to protect Maori from climate change', *New Zealand Herald*, 16 July.
19. Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in regard to the Whanganui River; Tūhoe Claims Settlement Act 2004 with regard to Te Urewera Area.
20. Safi, M. and agencies (2017), 'Ganges and Yamuna rivers granted same rights as human beings', *The Guardian*, 21 March, accessed 8 June 2020 at <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>.
21. R.H.J. Cox (2012), *Revolution Justified: Why Only the Law Can Save Us Now*, Maastricht: Planet Prosperity Foundation.
22. *Ibid.*
23. Claire Trevett (2017), 'Jacinda Ardern's rallying cry: climate change the nuclear free moment of her generation', *New Zealand Herald*, 20 August.
24. Climate Change Response (Zero Carbon) Amendment Act 2019.
25. Ministry for Environment (2019), *New Zealand Green House Gas Inventory 1990–2017*, New Zealand Government.
26. Germanwatch (2020), 'Climate Change Performance Index, results 2020', Germanwatch, Climate Action Network and New Climate Institute, p. 17.
27. Which the Labour-led government confirmed as an 'ambitious target' at COP24 at Krakow in 2018.
28. Climate Action Tracker (2019), *Warming Projections Global Update*, December, p. 11.