OFFICIAL

IN THE WAITANGI TRIBUNAL

Wai 1040
Wai 1508
Wai 1752

IN THE MATTER OF	Section 6 of the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	Te Paparahi o Te Raki (First Stage)
AND	
IN THE MATTER OF	A Claim by the Descendants of and the Rightful Successors to the Chiefs and People of Ngati Torehina ki Mataka Hapu

Closing Submissions and Argument

Dated the 21st day of January 2011

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Introduction

1. These submissions are made in contemplation of the claimant's closing arguments for this first stage of Te Paparahi o Te Raki Inquiry ('**Inquiry**') for and on behalf of the hapu of Ngati Torehina ki Mataka ('**Ngati Torehina**'), whose claims are registered with as Wai 1508 and Wai 1757.

2. While this is the first time that the Tribunal has heard our client's plea, we must emphasis that Ngati Torehina is simply repeating the karanga of each and every generation or "*papa*" since 1840.

3. Irrespective of their experiences with the obstinate and unwilling 'ears' of Crown institutions to date, our clients remain readily hopeful that at this enlightened time, the Tribunal can overcome the Eurocentric errors of its creator and the system from which it springs.

4. Ngati Torehina urge this Tribunal to be courageous in its engagement with these submissions; to engage critically in its consideration of them; and have the strength to make findings which allow for the truth to be heard and the realities of Maori to be acknowledged.

5. In essence, our clients ask simply this:

    5.1 That the legal and factual truth of Te Tiriti o Waitangi, in all its glory, be revealed by this Tribunal for the Crown and the people of Aotearoa to see, free from consideration for any political consequences that may ensue.

Synopsis of Ngati Torehina's Argument

6. Our client's case is deceptively simple and is comprised of three key submissions:

    6.1 Firstly, they say that as a matter of fact, as at 31 December 1840, and by virtue of their entry into Te Tiriti, it cannot be said that either their rangatira ceded their "sovereignty" or that the Crown acquired their

"sovereignty" so that She could effectively displace their Rule with Her own.

6.2 Secondly, they say that on that basis of the first submission, Captain William Hobson's Proclamations made in May of 1840 were made, again as matter of fact, as an overreach of the Crown's authority to do so, and are therefore unreliable and correspondingly:

(a) In violation of the principles of Te Tiriti;

(b) Were carried out in contravention of their relationship of mutuality, and therefore in breach of the fiduciary duties and whakautu responsibilities arising and already in existence, and enhanced by Te Tiriti, not created by it

(i) We note that this is a wholly new concept for this Tribunal, and submit, a range of commentary on the subject to date.

(ii) We will contend that Te Tiriti, as a relationship, at least for our clients, did not materialize from nothing on 6 February 1840. Rather, their relationship with the Crown originated with Captain Cook, and by 1840 had evolved and developed to the point of being a relationship of recognizable mutuality.

(iii) This, relationship of trust, confidence and mutual reliance, gave rise to fiduciary duties on the part of the Crown to our clients that transcend Te Tiriti;

(c) Were carried out fraudulently and dishonestly by purporting to claim an advantage in relation to them and their territories when Captain Hobson knew or ought to have known that none existed or could have existed:

6.3 Thirdly, they say further on the basis of the first submission, and in relation to this Tribunal's jurisdiction, that their agreement with the Crown is recorded in a single document in Te Reo Maori, referred to as

Te Tiriti O Waitangi, and further that this has implications for this Tribunal and its function and jurisdiction under the *Treaty of Waitangi Act 1975*, which is founded on the false factual premise that their agreement was recorded over two texts or versions.

7. Prior to enlarging on each of our clients submissions, we wish to briefly address a number of jurisdictional, procedural and conceptual matters relating to the Inquiry.

Jurisdiction and Procedure in relation to claims

8. The jurisdiction raised by our clients claims against the Crown, is that prescribed by Section 6 of the *Treaty of Waitangi Act 1975* ('**Act**').

9. The Act provides as follows:

> *"6 Jurisdiction of Tribunal to consider claims*
>
> [(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or
>
> (b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection ; or
>
> (c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.]
>
> [(2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—
>
> (a) the claim is submitted contrary to section 6AA(1); or
>
> (b) section 7 applies.]
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the

Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

(4) A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

[(4A) Subject to sections 8A to 8I of this Act, the Tribunal shall not recommend under subsection (3) of this section,—

(a) The return to Maori ownership of any private land; or

(b) The acquisition by the Crown of any private land.]

(5) The Tribunal shall cause a sealed copy of its findings and recommendation (if any) with regard to any claim to be served on—

(a) The claimant:

(b) The Minister of Maori Affairs and such other Ministers of the Crown as in the opinion of the Tribunal have an interest in the claim:

(c) Such other persons as the Tribunal thinks fit.

[(6) Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8 of this Act.]

[(7) Notwithstanding anything in this Act or any other Act or rule of law, on and from the commencement of this subsection the Tribunal shall not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of,—

(a) Commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983); or

(b) The Deed of Settlement between the Crown and Maori dated the 23rd day of September 1992; or

(c) Any enactment, to the extent that it relates to such commercial fishing or commercial fisheries.]

[(8) Despite anything in this Act or in any other Act or rule of law,—

(a) the jurisdiction of the Tribunal is subject to the enactments listed in Schedule 3; and

(b) without limiting paragraph (a), the Tribunal does not have jurisdiction, in relation to licensed land (within the meaning of the Crown Forest Assets Act 1989) in the takiwa of Ngai Tahu Whanui, to make a recommendation for compensation or for the return of the land to Maori ownership.] "

10. In making the claim that they have, our client's are entitled to legitimately expect the Tribunal will exercise its jurisdiction and enquire into:

10.1 How the Crown has acted (or omitted to act) in a manner that is inconsistent with the principles of the Treaty of Waitangi; and

10.2 What resulting prejudice such actions have caused to them.

11. In exercising its jurisdiction the Tribunal is further empowered by the Act to determine how it goes about its business of enquiring into such claims.

12. Clause 5(9) of Schedule 2 of the Act provides as follows:

> "9. Except as expressly provided in this Act, the Tribunal may regulate its procedure in such manner as it thinks fit, and in doing so may have regard to and adopt such aspects of Te Kawa o Te Marae that the Tribunal thinks appropriate in the particular case, but shall not deny any person the right to speak during the proceedings of the Tribunal on the ground of that person's sex."

13. In exercise of this power, in the course of these proceedings, the Tribunal determined that:

13.1 the time and opportunity for claimants to present evidence would be strictly limited; and

13.2 the time and means by which Counsel could cross examine evidence led by the Crown would be abrogated in the interests of efficiency.

These measures were allegedly taken because of the shear scale of the Inquiry (an amalgamation of a series of districts) which in total included in excess of 600 registered claims. Again, we submit that, the Tribunal's challenges around resourcing ought not to have, in any way, reduced the claimants' entitlement to a fulsome inquiry into their claims.

14. In a further exercise of that power and mindful again of resourcing, the Tribunal determined that this Inquiry would proceed in two parts. At the outset, it sought to confine or limit the first stage of such proceedings to interlocutory type issues relating to Te Tiriti o Waitangi and He Whakaputanga, that is, issues fundamental to any further stage of inquiry.

15. In structuring this part of the Inquiry, the Tribunal directed that evidence adduced, and argument made, must be focused on the 'Statement of Issues' annexed as 'Appendix A' to the Memorandum-Directions of the Presiding Officer dated 30 May 2003 **(Wai 1040, #2.5.23)**.

16. The issues are set out, as follows:

He Wakaputanga/The Declaration

(a) How did Maori understand He Wakaputanga/The Declaration? And, therefore, what was the nature of the relationship and the mutual commitments they were assenting to in signing He Wakaputanga/The Declaration?

(b) How did the Crown understand He Wakaputanga/The Declaration? And, therefore, what was the nature of the relationship and the mutual commitments it was assenting to in signing He Wakaputanga/The Declaration?

(c) What then was the effect of He Wakaputanga/The Declaration at 1835?

Relationship between He Wakapuntanga/The Declaration and Te Tiriti/The Treaty

(d) What, if any, was the relationship between He Wakaputanga/The Declaration and Te Titiri/The Treaty?

Te Tiriti/The Treaty

(e) How did Maori understand Te Tiriti/The Treaty? And, therefore, what was the nature of the relationship and the mutually commitments they were assenting to in signing Te Tiriti/The Treaty?

(f) How did the Crown understand Te Tiriti/The Treaty? And, therefore, what was the nature of the relationship and the mutual commitments it was assenting to in signing Te Titiri/The Treaty?

(g) What then was the effect of Te Tiriti/The Treaty in 1840?

17. That Te Tiriti is fundamental to this part of the Inquiry and to this Tribunal's jurisdiction, is in our submission axiomatic. Thus it is noteworthy and somewhat confounding that this is the first time that the signatories of Te Tiriti have been heard by the Tribunal.

18. Materially, the Tribunal also limited the historical period which it would consider within the scope of Stage 1 of the Inquiry, and therefore the extent to which its jurisdiction will reach. In the aforementioned directions, the Tribunal directed that:

> "...Matters such as the Northern War 1844-1846 and the Treaty today will be the subject of future hearings in the Te Paparahi o Te Raki inquiry. Our initial hearings must be focused on He Whakaputanga and Te Tiriti. Any evidence that has no causal relationship with what happened in either 1835 or 1840 must be heard later."

19. We submit, with respect, that by constraining the proceedings in this way our client's have been bullied by a process which was at best tokenistic; poorly resourced (by the Crown in all its guises); and failed to have proper regard for the principles of *audi alteram partem* and natural justice.

20. Consequently, we posit that in defining the issues for inquiry and exercising the statutory powers afforded to it, the Tribunal has failed the claimants in two regards:

20.1 Firstly, in failing to succinctly articulate the real central questions to be answered and causing the efforts of the parties to be misdirected to matters immaterial and indeed outside the scope of the Tribunal's jurisdiction. For instance, notwithstanding that this Tribunal has set itself an 'issue' in respect of He Wakaputanga, we submit that:

(a) Its jurisdiction, in a purposive sense, does not allow such;

(b) Such inquiry clearly goes beyond an examination of claims against the principles of the Treaty/ Te Tiriti; and

(c) The 'issue' ought to more properly be conceived as whether certain Crown actions were in breach of Maori tino rangatiratanga affirmed in He Whakaputanga and protected in Te Tiriti; and

20.2 Secondly, that the Statement of Issues was set:

(a) Without the Crown being compelled to respond to specifically to our clients claim (or indeed any other genuine claim made within the Inquiry capture area); and

(b) Correspondingly, without the benefit of knowing precisely what is contended by the 'respondent'.

20.3 We submit further, that without such a compulsion the Crown has been allowed to determine to whom it is answerable and which claims and parties it views as credible. A matter which is crucial to the political reality and that we submit has had detrimental implications for Ngapuhi in

terms of the Crown's willingness to engage with Te Roopu o Te Horonuku.

21. Nevertheless, within those parameters constructed by the Tribunal, the boundaries of this part of the Inquiry can be succinctly distilled as follows:

21.1 It is an inquiry into the making of Te Tiriti;

21.2 It is limited to anything that occurs up until 31 December 1840, and thus, is an inquiry into the immediate effect (or meaning) of the Treaty.

22. Our submissions and argument are thus carefully calibrated to be within the limitations of this part of the Inquiry as determined by the Tribunal.

Elements of this Inquiry

23. The Tribunal, by its jurisdiction, is asked to arbitrate as a matter of fact on whether a claim is made out.

24. Therefore, ultimately our plea for Ngati Torehina, in terms of this stage, is for a finding of fact *as at 1840,* that Te Tiriti does not include a principle, term, agreement, inference or otherwise, that sovereignty was acquired (by the Crown) or ceded (by them).

25. Following its finding in relation to that factual issue, we submit that the Tribunal must then evaluate the Crown's most proximate conduct after Te Tiriti (within the confines of the inquiry) and what prejudice was caused to our clients.

26. In our submission, this will necessarily entail an evaluation of those Proclamations made by the Crown, by its agent Captain Hobson, against the principles of Te Tiriti.

27. We ask the Tribunal to have this narrow lens over its eye as it views our client's case. And further, repeat our initial submission - that in making its determination, the Tribunal is not entitled to consider the consequences or effects which may flow from such a factual finding.

Clarifying the grounds of contention

28. Now that the evidence has been heard and the Inquiry has developed and evolved towards the completion of this stage, it is worthwhile, in our respectful submission, to re-cast what is contended to draw into focus the core issue and areas of contention.

29. In our submission, the Crown contends very little. The Crown does not contend most of the facts. Events happened. Divergence seems to occur around the interpretation of those events.

30. The evidence has revealed:

    30.1 That the Crown necessarily requires our clients to have a 'sovereignty' to be ceded, in order to be displaced and replaced.

    30.2 That prior to Te Tiriti, Ngati Torehina, along with the other hapu and rangatira were, and had been since time immemorial, sovereign in New Zealand.

    30.3 That whilst the Crown may prefer to categorise Ngati Torehina's 'sovereignty' prior to Te Tiriti as being in a less developed, bare or mere form, it is readily apparent to the objective observer that this contention springs from the Crown's inherent eurocentricism rather than any fact and that for present purposes, the existence of a Maori form of 'sovereignty' capable of being ceded is not in doubt.

    30.4 That in 1835, the rangatira signed He Wakaputanga and gave notice of their 'sovereignty' to the Crown and world at large.

    30.5 That the Rangatira's Declaration via He Whakaputanga was accepted by the Crown as being non-contentious, and was acknowledged as such.

    30.6 That there is no contention as to what exactly was written on the parchment of Te Tiriti (ie. the text in te reo Maori) signed by the parties on 6 February 1840. That is, the Crown does not dispute that what was

signed records under the second of the Articles "*...ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te kawanatanga katoa o o ratou wenua*".

31. Rather, in our submission, the area which the Crown's contention differs from our clients' is that those words in Maori meant that a cession of sovereignty was effected.

The Real Issue

32. Accordingly we submit that the real and central issue raised by this case is simply this:

32.1 Whether, at 31 December 1840, the "sovereignty", or the likes of "sovereignty" (eg. their Rule, their kingitanga, their mana) hitherto held by our clients, was either given over to the Crown by our clients, and/or acquired from our clients by the Crown?

33. "Sovereignty" and its retention or transmission, is therefore at the core of this Inquiry. And again, this question is simply one of fact and everything flows from it. Either it happened as a matter of fact, or it did not.

34. In order to examine and determine this central question by reference to matters of relevance in a chronological and sequential order, we submit that the Tribunal ought to adopt the following four-part framework of analysis:

34.1 The relationship between the parties pre-dating the making of Te Tiriti;

34.2 The discussion and negotiation between the parties dedicated to the making of Te Tiriti;

34.3 The formalization of their agreements (or their common intention) in documentary form; and

34.4 Their conduct immediately after and within the timeframe prescribed by this Tribunal up until 31 December 1840.

First Submission: That Sovereignty was not ceded nor acquired

Introduction

35. As at 31 December 1840, our clients say that by Te Tiriti their "sovereignty" was not ceded, and that the facts are overwhelmingly and compellingly probative of that proposition.

36. Equally, and correspondingly, they contend that it is wrong for the Crown to insist that their "sovereignty" was acquired.

Working definition of sovereignty

37. What do we mean when we talk of 'sovereignty'? Prior to fleshing out our submission necessity compels us to provide a working definition of "sovereignty".

38. Sovereignty is not a trivial, inconspicuous or inconsequential thing. Even colloquially, the "sovereign" is the "maker of all rules". Hence, 'Sovereignty' or its approximation, in whatever language, carries significance and substance that effects the very core of any politically organized society.

39. Our conception of "sovereignty", for the purposes of the argument, has been formulated as follows:

    39.1 That the modern concept of "sovereignty", in terms of English constitutional legal and historical legal theory, simply did not exist or was not present (in the same form) within our client's sphere of understanding as at 1840.

    39.2 That this being so, we submit there is an approximation located in certain principles and concepts of Te Ao Maori, that can be put up for the purposes of this Inquiry, as being as near to that concept as possible.

    39.3 That the principles for Maori, closest to those of sovereignty are (as used in He Whakaputanga) "kingitanga", "mana" and as later used in Te Tiriti "tino rangatiratanga". To be clear, these are not put up as substitutions,

but more in the sense of comparable concepts to enable our argument to be conceived.

39.4 Further, we submit that the American jurist Roscoe Pound affords a very workable definition that this Tribunal may wish to consider. In his seminal work published in 1959, *Jurisprudence*, he proffered the following definition:

> "Sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity "of making, declaring and amending the law ... without reference to any other authority and without any legal limit to its own power." It has generally been the view of English analytical writers that uncontrolled lawmaking is what constitutes sovereignty. This is a theory in terms of the British Parliament and goes back to Coke and why way of Bracton to the commentators and the law books of the Eastern Roman Empire. Others, especially the French writers, until some new ideas sprang up in France in the present century, argued that it was not so much uncontrolled lawmaking that was the distinguishing feature of sovereignty as legal unaccountability for all acts done in the capacity of sovereign. In the 18th century in England uncontrolled lawmaking power was in Parliament. At that time, in France, legal unaccountability was in the King and those who acted in his name. Thus an 18th century writer who constructed or verified a theory by comparing England and France, could very well hold that there must be somewhere in every government "some person or body of persons", analogous to the British Parliament and the French King, with uncontrolled lawmaking power and legal accountability. Accordingly Blackstone says: "There is and must be in all governments a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii or the rights of sovereignty reside.""[2]

Preface to the making of Te Tiriti: Acknowledgment of their sovereignty

40. Ngati Torehina held and exercised their Rule, their "sovereignty" from the times of Rangi-Wheiao and Marokura.[3] The undisputed evidence is that their rangatira held the power of life and death within their territories prior to Te Tiriti.

41. In his evidence Mr Te Hurihanga Rihari graciously explained to you the essence of Ngati Torehina ki Mataka[4]. By the recounting of their ancient histories and

[2] Roscoe Pound, "Jurisprudence" 1959 St Paul, Min. West Publishing Company. Vol 2 Part 3 The Nature of Law. Pp. 317 -318.

[3] Te Hurihanga Riahri, Brief of Evidence 3 June 2010, Wai 1040 #CB15(a) pp, 1-5.

whariki, we submit that Mr Rihari more than substantiated the longevity of their time here, and the fact that their Rule has been exercised since before the times of the fifteenth century. The source of their Rule is so old that it has by custom following and *whakapapa* become an assumption that cannot be questioned. In essence it is their Rule is to be respected because of that ancient lineage.

42. There is therefore the very historical fact that our clients, within the polity of their Hapu, and at the material times, ruled over their territories.

43. It is also a matter of historical fact that there was a relationship between their tupuna and the Crown that pre-dated Te Tiriti by at least some 35 years, and which was characterized by regular interaction, mutuality, reliance, trust and confidence.

44. Materially, we submit that the Crown does not dispute our Ngati Torehina'a "sovereignty". With respect, how could it?

Te Tiriti- the Making

45. Submitted therefore, that in exercise of their Rule, they entered into the transaction that was to be recorded by Te Tiriti with the Crown. Submitted further that key features of the factual matrix are worth referencing:

45.1 First, at the risk of repeating the evidence, because their Rule is traced to antiquity, being exercised by each and every subsequent generation, it is unthinkable that their Rule would be considered for relinquishment or extinguishment in such a transaction. In short, the evidence shows that their Rule would not ever be something they were willing to or even needed to give up;

45.2 Second, Te Tiriti did not originate, commence or start a relationship, for on the evidence that was already there;

45.3 Third, they were already acting in adherence of He Wakaputanga, the declaration to the rest of the world of their authorities, and formal invitation to other foreign powers that they were prepared to trade,

[4] Te Hurihanga Riahri, Brief of Evidence 3 June 2010, Wai 1040 #CB15(a) pp, 1-5.

outwardly by reference to their flag. Symbolically their tupuna Paratene te Manu was the first person to fly the Kara, the Flag at Pataua[5]. Again it is unthinkable that any departure from that allegiance would have been contemplated, even necessary;

45.4 Fourth, they apprehended that measures were needed to protect themselves and their lands from outside unwanted interferences, particularly in relation to land and criminal conduct of British settlers.

46. Submitted that one can be clear that our clients were very clear about what they wanted to achieve by the transaction of Te Tiriti, and equally, they were very clear as to what the transaction would not entail.

Te Tiriti- Negotiation

47. Our client.s evidence of the negotiation of Te Tiriti is in the main referenced to the general public record disclosed to this inquiry. For completeness they did not lead evidence of anything on this aspect outside of that public record.

48. Based on that, a pre'cis of what constituted the negotiation for our clients we submit is as follows:

48.1 The negotiation of its terms between the parties, and therefore inclusive of the Crown, was confined to the 5 or so hours at Waitangi on 5 February 1840;

48.2 The main concern of the Rangatira whose speeches are recorded over the course of the negotiation, and in the context of what we know them to be, was how the delegation of "kawanatanga" would operate in relation to their Rule;

48.3 The Crown was also clear that its purposes of Te Tiriti centred on the following:

(a) The Queen was concerned for the welfare of both Maori and British subjects in New Zealand;

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[5] Ibid at page 11.

(b) That Hobson had been sent as governor. But since the country was outside the Queen's Dominion, he lacked the authority that was essential if he were to be of any benefit in controlling British subjects;

(c) That the Chiefs could give Hobson that authority if they signed the treaty laid before them;

(d) That the treaty proposal was also an offer of Crown protection which Maori had often asked for;

(e) That the missionaries fully approved of the treaty proposal and that it was an act of love towards them on the part of the Queen who desired to secure to them their property rights and privileges;

(f) That the treaty proposal, metaphorically, was as a fortress for them against any foreign power which might desire to take possession of their country.

48.4 Materially, the Crown *did not* represent that its treaty proposal was intended to effect a usurpation of their Rule. We submit that the opposite is true: there is no conclusive fact that in the negotiation the Crown made it known that the matter of sovereignty for the Rangatira was at stake;

48.5 In reliance on what was traversed in the negotiation, we submit that the Rangatira and the Crown moved to formalize their agreements, which materially *did not* include a cession or acquisition of any sovereignty.

Te Tiriti- Formalisation

49. In our submission there are two material aspects of the formalization of Te Tiriti that are proved by the evidence traversed so far. Firstly, the terms of this transaction are found in one document, one parchment being the document recorded in the claimants own language. That is the document that was signed: by both sets of parties. A document in the English language was not signed and thus, as a matter of logic, even common sense cannot for your claimants be deemed to also be a record of the treaty.

50. Secondly, the parchment by its operative provisions is explicit as follows:

50.1 Under the first part, Ko te Tuatahi, in which the exchange to the Crown is recorded, it uses the word "kawanatanga" as the thing that is passing from the Rangatira to the Crown;

50.2 Under the second part, Ko te Tuarua, in which it is affirmed by the Crown that what is not affected is their "tino rangatiratanga"; and

50.3 Under the third part, Ko te Tuatoru, in which the Crown agrees for all Maori of New Zealand to have "nga tikanga katoa rite tahi ki nga tangata katoa o Ingarangi"

And thus, it is submitted, as there is no transfer or relinquishment by the Rangatira of anything like "kingitanga" "mana" or "rangatiratanga", in terms of the words used, the only logical conclusion is that it was not intended by the parties. Put another way: as the words used record the common intention, if the words are not used, the logical deduction is that they were not part of the common intention. Submitted further that the concept of *kupu mana* would also underscore this fact. Your claimants Rangatira would only use words that they would personally commit to. Their word was literally their bond. Again, if they did not use it, it is perfectly fair to assume that they did not mean it.

51. Further, it is submitted that the net effect of Te Tiriti was basically as follows:

51.1 It did alter the Rule of the Rangatira. It did this by giving over, by way of a delegation, the authority of "kawanatanga";

51.2 It did not extinguish the Rule of the Rangatira. Instead it affirmed it, and thereby, by implication, affirmed the continuation of He Wakaputanga

Second Submission: The Proclamations

Conduct after the signing: Proclamations

52. On 21 May 1840, a mere four months after the signing of Te Tiriti, the evidence shows that Captain Hobson proclaimed the Crown's sovereignty over their territories. His proclamation, published in the London *Gazette* in October 1840 stated:

> "...all rights and powers of sovereignty over the said Northern Island were ceded to Her Majesty the Queen of Great Britain and Ireland, absolutely and without reservation....Now Therefore I William Hobson, Lieutenant Governor of New Zealand, in the name and on behalf of Her Majesty, do hereby proclaim and declare to all men that, from and after the date of the abovementioned Treaty, the full sovereignty of the Northern Island of New Zealand vests in Her Majesty Queen Victoria, her heirs and successors, for ever."; and
>
> "...Now Therefore I William Hobson, Lieutenant Governor of New Zealand, do hereby proclaim and declare to all men that, from after the date of these presents, the full sovereignty of the Islands of New Zealand....vests in her Majesty Queen Victoria, her heirs and successors, for ever."

53. In making these Proclamations, Captain Hobson purported that, by an act of cession by the rangatira, the Crown was permitted to displace and replace our client's Rule, with that of the Crown.

54. We submit that such proclamations however were wrong in fact: no such cession of our clients territories had been achieved by the making of Te Tiriti, as has been demonstrated as a matter of fact and this has implications for the Crown on two counts:

54.1 Firstly, Hobson's proclamations are therefore an overreach of any authority that was legitimately acquired under Te Tiriti, rendering them unreliable; and

54.2 Secondly, that in making the proclamations and further acting to 'gazette' them to perfect their announcement, with the knowledge that such steps were being taken without having obtained the agreement of the Rangatira to do so, the Crown acted fraudulently and dishonestly.

55. In summation, we submit that the Proclamations:

55.1 are unreliable being based on a false factual premise that "sovereignty" had been displaced and replaced;

55.2 were carried out fraudulently and deceitfully by purporting to claim an advantage in relation to them and their territories when none existed or could have existed; and

55.3 violate the solemn compact which is Te Tiriti, and thus were wholly inconsistent with it's principles.

Fiduciary

56. It is submitted that the history between Ngati Torehina and the Crown evidences a relationship of mutuality, that few other Hapu can legitimately lay claim to. One could even go as far as correctly contending that it was a relationship of intimacy in which both reposed trust and confidence in the other.

57. A recount of the key features of that history traversed over the range of materials presented to this inquiry already is worth repeating:

57.1 In November 1769 Captain Cook, an emissary official of the Crown, disembarked on their shore near Matakaa when sheltering in Pewhairangi from rough seas.

57.2 In exercise of their Rule, including *manaakitanga* and *arohatanga* Ngati Torehina assisted some of the crew who were unwell and fully provisioned them with food and water.

57.3 Following Cook's visit, and again in exercise of their Rule, they began to host more people of the Crown and engage with them on an increasingly regular and more intimate basis. Examples are:

(a) In 1793, following the return of Tuki and Huru who had been taken by a British vessel to Norfolk Island, they met Governor Philp Gidley King who had escorted their whanuanga on their return journey. The said Governor King held the Crown appointment of Governor of Norfolk Island, and by way of diplomatic exchange, gifted their rangatira, Te Pahi, an assortment of tools, nails, potatoes, and seeds.

(b) From 1801 they engaged in trade with those British sealing and whaling vessels operating in the South Pacific who anchored in Pewhairangi. Their hospitality encouraged vessels of the Crown to begin calling regularly at the shores below their pa, Rangihoua, for provisioning (to obtain fresh water and food supplies), refitting (via the purchase of naval spars and flax), and recruiting additional crew.

(c) In 1802, their chief, Te Pahi, and four of his sons, in an attempt to visit Governor King, travelled onboard a Crown vessel to Norfolk Island. Upon their arrival at such, they were informed he had already departed but had taken up the Crown appointed position of Governor of New South Wales.

(d) In 1803, Ruatara, the son of their chief, Te Pahi, took up employment on a whaling vessel of the Crown to obtain passage to Sydney, New South Wales to visit Governor King.

(e) Upon his arrival in Port Jackson in 1805, Ruatara was presented by Governor King with tools and other gifts in recognition of their hospitable reputation amongst commercial vessel's flying the flag of the Crown.

(f) In response to the generosity of the people of the Crown and specifically Governor King, Te Pahi and his sons travelled to Port Jackson later in 1805 to reciprocate the gifts received and consolidate the developing diplomatic relationship.

(g) They were hosted during this visit by Governor King, staying in his residence for three months, and in addition were shown a variety of industries; introduced to the elite of colonial society including Reverend Samuel Marsden; and engaged in discussions as to the possibility of some Maori working in Crown territories such as New South Wales.

(h) About late 1805, their whanaunga, Ruatara, set out on board a ship to work to obtain passage to London, England with the intention of meeting King George III.

(i) In 1806, prior to the departure of their diplomatic party (including Te Pahi) from Sydney, the Governor presented Te Pahi with a large number of sows, boars, an inscribed silver medal, iron tools, fruit trees and materials for a small prefabricated wooden cottage and arranged their return passage to New Zealand aboard the *Lady Nelson.*

(j) During the return passage of 1806 their rangatira, Te Pahi, aboard the Crown ship, he become ill and was cared for by Mr George Bruce, and upon arrival in Pewhairangi Te Pahi invites Mr Bruce to stay with their people. Mr Bruce became a valuable asset for their people, acting as an interpreter in trade transactions and subsequently under-went their traditional practice of ta moko and was permitted to marry the daughter of their rangatira, Atahoe.

(k) In return for the further kindness of the people of the Crown, their rangatira Te Pahi sent back to Port Jackson a number of taonga, timber spars and some seed potatoes (to assist with the endemic famine in the Crown's colony of New South Wales).

(l) In 1808, following a series of events in which a number of persons of the Crown had mistreated Maori in Pewhairangi, their chief Te Pahi travelled aboard the *Commerce* to Port Jackson, NSW to see Governor King. During the trip their chief became ill and upon arrival was permitted to convalesce at the Crown's Sydney Government House, despite the fact that Governor King had returned to England.

(m) In 1809, Ruatara embarked on his return journey to New Zealand from England and due to his poor treatment aboard commercial vessels became extremely ill. Their ill whanaunga is cared for by the Reverend Samuel Marsden and newly recruited missionaries

Messrs William Hall and John King, and upon arrival in New South Wales is hosted by Marsden at his Parramatta residence for 9 months.

(n) In 1811, Ruatara is abandoned on Norfolk Island whilst attempting to return to New Zealand. Their whanaunga is discovered by the Captain of the *Ann* and is given passage back to Port Jackson.

(o) Upon arrival at Port Jackson their chief, Ruatara, is again cared for by Rev. Samuel Marsden, and given gifts and passage back to New Zealand in 1812. Prior to his departure Ruatara requested that the Crown provide a teacher to improve the ability of their people to read and write.

(p) On 1 December 1813, the Crown by Governor Macquarie of NSW, issued an instrument entitled 'Government and General Order: Natives of the South Sea Islands' to all British vessels and crew, which in brief:

(i) Recognised the mana of their chiefs by requiring the consent of the same before they could leave New Zealand on board a British ship; and

(ii) Imposed a penalty of £1,000 and a threat of further punishment where British vessels or crew:

A ill-treated their people,

B trespassed on their gardens, lands, habitations or burial grounds;

C refused to pay wages owing to them; or

D removed them from New Zealand without the consent of their chief and parents.

(q) On 10 June 1814 the brig *Active*, purchased by Crown appointed Chaplain of NSW, Rev. Samuel Marsden, anchored off their coast near Rangihoua pa carrying Messrs Kendall and Hall of the Church Mission Society of England. The people of the Crown were met by their tupuna Nganga, Te Uri O Kanae and Wharemokaikai and taken ashore. A gift of a steel mill and sieve was given from the Reverend to their chief, Ruatara, along with a letter dated 9 March 1814, which read:

> "Duaterra [Ruatara], King
>
> I have sent Brig *Active* to the Bay of Islands to see what you are doing, and Mr Hall and Mr Kendall from England. Mr Kendall will teach the boys and girls to read and write. I told you, when you were at Paramatta, that I would send you a gentleman to teach your Tamoneekees (boys) and Keoteedos (girls) to read. You will be very good to Mr Hall and Mr Kendall. They will come to live in New Zealand, if you will not hurt them; and they will teach you how to grow wheat, and to make houses and every thing. Charles has sent you a cock, and Mrs Marsden has sent you a shirt and jacket. I have sent you some wheat for seeds, and you must put it in the ground as soon as you can. If you will come in the *Active* to Parramata, I will send you back again. Send me a man or two to learn to make an axe and every thing. I have sent a jacket for Kowheetee [Kawiti]. Tell him to assist you and Terra to lade the ship. You will be very good to all my men and not hurt them, and I will be good to you…I am your friend.
>
> Samuel Marsden"

(r) In late July 1814, in fulfilment of the aforementioned letter's request, and the simple compact which had been made, their rangatira Ruatara, Korokoro and Hongi, along with several other of their whanaunga, sailed back to Sydney aboard the *Active* to stay with Reverend Samuel Marsden, who had been appointed to the Crown position of Principal Chaplain, Principal Magistrate and Principal Agriculturalist of New South Wales, to invite him to establish a settlement on their lands.

(s) On 9 November 1814, the Crown, by its Governor Macquarie of NSW, issued a further instrument entitled 'Government and General Order, Civil Department' which:

(i) appointed Resident Magistrate, Thomas Kendall, to assist them to control citizens of the Crown in New Zealand;

(ii) invested their rangatira Ruatara, Korokoro and Hongi with the power and authority to impose and enforce, the terms of the order;

(iii) required all persons to whom the Order had reference to obey those rangatira so empowered;

(iv) reiterated the sentiments of the 1813 Order stressing the need for 'fair intercourse of trade…productive of mutual advantage';

(v) prohibited the forcible removal of 'natives' and required the Resident Magistrate in the Bay of Islands to certify in writing whether permission had been given by a chief to remove them from New Zealand;

(vi) prohibited the landing or discharge of sailors in New Zealand without the permission of the chief of that locale and certification of such by the Resident Magistrate.

(t) On 19 November 1814, their Rangatira and whanaunga, along with Rev. Samuel Marsden, Messrs John Nicholas, William Hall, Thomas Kendall, John King and their families and others; left Sydney Cove to embark on establishing the settlement of people of the Crown at Rangihoua.

(u) In the course of the trip their chiefs, via Ruatara, raised concerns with Rev. Samuel Marsden, that the people of the Crown going to New Zealand:

> '…would be followed by others, and that they would soon become so powerful that they would possess New Zealand and reduce her people to slavery as they had done to the Australian black…'[6]

[6] Robert McNab, From Tasman to Marsden, J Wilkie & Co, Dunedin, 1914p.171

Reverend Marsden told their chief, Ruatara, that he would 'never more think of holding intercourse with his country' if the chiefs were to believe such statements; gave every personal assurance that he was not actuated by 'ambition or avarice' but that the motives of the mission were simply of 'benevolent solicitude for the happiness of the New Zealanders', threatening to return immediately to Sydney should Ruatara hold any further doubts.

(v) Following this undertaking, their chiefs requested that the ship and people of the Crown proceed to their pa forthwith.

(w) The *Active* arrived at Pewhairangi on the afternoon of 21 December 1814 and the following day was guided into a safe anchorage in their bay adjacent to their pa, Rangihoua.

(x) On 24 December 1814 the people of the Crown were formally welcomed to their land by way of a powhiri involving in excess of 400 of their warriors lead by their rangatira, Ruatara, Hongi, Korokoro and Tui and Ruatara's chief wife Rahu.

(y) On the morning of 25 December 1814, approximately 400 of their people from Rangihoua, along with the newly arrived people of the Crown attended a hui on the flat lands at Te Puna. The Reverend Marsden addressed the hui in English and read extracts from the Bible of the Church of England, including from St Luke: 'Behold I bring you tidings of great joy'. Their rangatira, Ruatara, then explained his plans for the relationship with the Crown and the establishment of a settlement under his and Hongi's care.

(z) In January of 1815, their rangatira, Ruatara and Reverend Marsden inspected the proposed site for the township on their land at Te Puna and planned the road layout and site of a Church and a nearby extensive cultivation of wheat for export to Port Jackson.

(aa) In the early part of 1815, prior to Reverend Marsden's departure, their rangatira Ruatara was approached to ask if some land at

Hohi across the Waitohoa stream could be used for the Mission houses to be built. Ruatara advised that the mana of the land in the aforementioned place was held by their whanaunga Te Uri o Kanae and Wharemokaikai.

(bb) Reverend Marsden then approached their whanaunga with a proposal to use the land in exchange for some tools. Te Uri o Kanae and Wharemokaikai agreed to the arrangement out of aroha for their nephew Ruatara.

(cc) On 24 February 1815, the people of the Crown presented their rangatira with 12 axes and in exchange part of the nose moko of their whanaunga Wharemokaikai, Te Uri o Kanae was drawn by Hongi Hika and affixed to a paper deed which had been written by the Crown in Sydney.

(dd) In August 1816, the Crown appointed Justice of the Peace, Mr Thomas Kendall, opened a school on their land for the benefit of their tamariki. By the end of 1817 their rangatira, Te Pahi's, son became a pupil teacher.

(ee) In 1818 further land at Te Puna was made available by their tupuna Wharepoaka, Manuwiri, Waikato, Marupainga and Pani, for the use of the people of the missionary families and a paper to record this was prepared by the people of the Crown.

(ff) In March of 1820 their rangatira, Hongi and Waikato travelled with the Crown appointed Justice of the Peace and Church Missionary Society missionary, Thomas Kendall, to England for diplomatic purposes:

(i) Firstly, to establish a personal relationship with 'the Crown' by way of meeting King George the IV kanohi ki te kanohi;

(ii) Secondly, to assess the resources and industry of the Crown and invite the King's skilled subjects to come to their lands; and

(iii) Thirdly, to provide their expertise, guidance and assistance to a scholar of the Crown, Professor Lee, of Cambridge University in understanding their language.

(gg) Upon meeting with the King, and presenting him with a korowai, their rangatira were gifted guns, armour and a helmet.

(hh) Between 1832 and 1839, a further seven blocks of land were made available by their hapu for the use of people of the Crown, including:

(i) In 1832 the Waikapu block;
(ii) In 1834 the Te Koutu block;
(iii) In 1835 the Matapuratahi block;
(iv) In 1836 the Tapuaiti block;
(v) In 1838 the Poukoura and Hawai Blocks; and
(vi) In 1839 the Putanui block.

(ii) On or about 1830 to 1834, three of their tamariki were given as whangai, to further consolidate their relationship, to the people of the Crown, being:

(i) Ewhora, the daughter of their rangatira Ruatara, and his chief wife Rahu; granddaughter of their tohunga Raakau;

(ii) Witirua, the eldest daughter of their rangatira Wharepoaka; and

(iii) Following the death of Whitirua in 1834, a second daughter of their rangatira Wharepoaka.

(jj) On 17 May 1833, their rangatira attended a hui in Paihia in which they met with James Busby, who had been appointed by the Crown as British Resident in New Zealand. Busby brought with

him an official letter dated 14 June 14th 1832 from Lord Viscount Goderich, one of the Principal Secretaries of State to His Majesty King William IV, which responded to a petition sent to His Majesty by their whanaunga in 1831 , which stated:

> 'Friends,
>
> I am commanded by the King to acknowledge the receipt of the letter, which you addressed to His Majesty, and which you entrusted to Mr. William Yates to forward to England.
>
> The King is much gratified to find that the cause for alarm, which appears to have existed at the time when your letter was written, has entirely passed away, and he trusts that no circumstances may occur in future to interrupt the internal tranquillity of New Zealand, which is so necessary to the maintenance of a close commercial intercourse between its inhabitants and those of Great Britain.
>
> The King is sorry for the injuries, which you inform him, that the people of New Zealand have suffered from some of his subjects; but he will do all in his power to prevent the recurrence of such outrages, and to punish the perpetrators of them according to the laws of their country, whenever they can be apprehended and brought to trial, and the King hopes that mutual goodwill and confidence will exist between the people of both countries.
>
> In order to afford better protection to all classes, both natives of the Island of New Zealand and British subjects who may proceed or may be already established there for purposes of trade, the King has sent the bearer of this letter, James Busby, Esq., to reside amongst you, as His Majesty's Resident, whose duties will be to investigate all complaints which may be made to him. It will also be his endeavour to prevent the arrival amongst you of men who have been guilty of crimes in their own country, and who may effect their escape from the place to which they may have been banished, as likewise to apprehend such persons of this description as may be found at present at large.
>
> In return for the anxious desire which will be manifested by the British Resident to afford his protection to the inhabitants of New Zealand against any acts of outrage which may be attempted against them by British subjects, it is confidently expected by His Majesty that on your part, you will render to the Resident that assistance and support which are calculated to promote the object of his appointment and to extend to your country all the benefits which it is capable of receiving from its friendship and alliance with Great Britain.'

(kk) On 24 March 1834, with the assistance of the Crown's representative, Busby, their rangatira assembled along with other

northern Maori to select a kara or flag for the purposes of flying on naval vessels and once chosen gave Busby the authority to gazette a notice of this flag in a publication of the Crown.

Recognizable Relationship of Mutuality

58. In our submission, it is open for you to hold that by 1840:

58.1 Our clients had established a secure and recognizable relationship of mutuality with the people of the Crown as a result of their on-going:

(a) care of people of the Crown;

(b) diplomatic visits and gifts to Norfolk Island and New South Wales;

(c) assistance in the supply and refreshment of the Crown's vessels;

(d) joint ventures with the Crown's representatives:

(i) growing and trading primary produce;

(ii) procuring timber, flax, crew and other resources for vessels;

(iii) maintaining order amongst vessels and crew of the Crown coming into Pewhairangi;

(iv) planning the initial settlement, cultivations and mission at Hohi and Te Puna;

(e) fraternization/inter marriage with people of the Crown;

(f) hosting of people of the Crown on their lands.

59. Submitted further that as a direct consequence of the relationship with them, and the desire to expand His territories for economic reasons, the Crown became interested in being more permanently established in New Zealand, including in relation to their territories and properties. Put another way, the Crowns relationship with our clients, the fact that they trusted them made it possible to

instigate a policy of colonisation. Evidence in support includes the following facts:

59.1 On 17 November 1814 the Crown appointed Reverend Samuel Marsden, who simultaneously held the positions of Principal Chaplain, Principal Magistrate and Principal Agriculturalist of the Colony of New South Wales (NSW) on an agency to scope out and report back on the viability of New Zealand for such an establishment.

(a) On 12 November 1814, the Crown by Governor Macquarie of NSW, by the instrument of a 'General Order':

(i) granted Rev. Samuel Marsden 4 months leave from his various positions to visit their pa and kainga to help establish a settlement under the protection of their rangatira; and

(ii) appointed Thomas Kendall 'one of His Majesty's Justices of the Peace in the Bay of Islands of New Zealand and throughout the Bay of Islands and those immediately contiguous thereto'.

59.2 Their request for the visit from Rev. Marsden, thus assumed greater proportions upon the instructions of Governor Macquarie who directed the Colonial Secretary, J T Campbell, to write to Reverend Marsden requiring that he make an Official Report of his Voyage to His Excellency upon his return, the letter dated 17 November 1814 directed as follows:

> 'Rev. Sir
>
> Being now on the eve of your departure for the Islands of New Zealand; and his Excellency the Governor, being anxious to promote the interests of the Crown, conjointly with those of the Christian Religion on this occasion, wishes to avail himself of your superior activity, zeal, and intelligence.
>
> For this purpose his Excellency desires that you will explore as much of the Sea Coasts and the interior of those Islands, as your limited time, a due regard to your personal safety, and that of your associates, and the other circumstances of your Mission will reasonably admit.

> By these means you will be enabled to form a correct judgement of the nature and quality of the soil, its various productions and its general capabilities; and your observations with regard to the Coats will furnish you with means of appreciating the relative advantages of the Harbours as connected with the productions of the interior. Those Harbours which possess plentiful supplies of fresh water with safe anchorage for shipping, will necessarily claim your particular attention.
>
> Should a satisfactory report be made to his Excellency, on the foregoing particulars, he will feel it his duty to represent to his Majesty's Government, which may probably be thereby induced to form a permanent establishment on those islands; and, under these considerations, his Excellency desires your particular attention to the foregoing circumstances, and that, on your return hither, you will make him a full report in writing of your progress and observations, together with the success which may attend you Mission.'

59.3 By 1835:

(a) Our clients foreign trade relations had increased in volume and were economically significant to the extent that they committed to its sustainability for generations to come by investing in crops for export including maize, wheat and potatoes; and the election of a flag to fly on their vessels for the purposes of recognition by other international vessels and the Crown.

(b) With the greater influx of visitors, they were concerned however for the protection of their lands and their people by un-wanted interferences, as people of the Crown were now alleging that they had not simply made available land for use but rather 'sold' or alienated it permanently;

(c) Their relationship of mutuality with the people of the Crown had nonetheless been further enhanced by the passage of time, again as a result of their on-going:

(i) care of people of the Crown;

(ii) diplomatic visits and gifts to Norfolk Island and New South Wales; and audience with the King in England;

(iii) assistance in the supply and refreshment of the Crown's vessels;

(iv) joint ventures with the Crown's representatives:

A growing and trading primary produce;

B procuring timber, flax, crew and other resources for vessels;

C maintaining order amongst vessels and crew of the Crown coming into Pewhairangi;

D planning the initial settlement, cultivations and mission at Hohi and Te Puna;

(v) developing and teaching the written form of Te Reo Maori; and

(vi) the election of and gazetting of a trading flag for their vessels.

(d) fraternization, inter marriage and whangai with people of the Crown;

(e) the provision of land for use by people of the Crown;

(f) hosting of people of the Crown on their lands; and

(g) acceptance of the presence of the Crown's representative, British Resident James Busby.

59.4 On 28 October 1835, their rangatira Wharepoaka and Waikato, along with others, and in the presence and knowledge of the Crown's representative, Busby, made and declared certain truths, in the main relating to relations with foreigners, under a document entitled "He Wakaputanga o te Rangatiratanga o Nu Tireni" ("**He Wakaputanga**").

60. In our submission, by 1 January 1840, the relationship between our clients and the Crown was such that obligations of a fiduciary had arisen between them. They had an established relationship of trust and confidence.

61. Submitted that as a matter of law, the relationship can be correctly categorised as being fiduciary in nature and extent. Reference is made to the Court of Appeals decision in *Chirnside v Fay* [2004] 3 NZLR 637, in which we submit, the following legal principles are available on these facts:

62. At page 646, para 48 of the judgment the Court of Appeal said:

> "... that a fiduciary relationship can arise between parties who have not reached, and who may never reach, agreement about the consents, the terms which are the governing relationship."

63. At page 646, para 50 of the judgment the Court of Appeal said:

> "We do not accept Mr Whiteside's argument that there could not or should ever be a fiduciary relationship between parties negotiating towards a joint venture. For many years now New Zealand law has accepted in principle that, whist there is some well defined and long established categories of fiduciaries (trustees/beneficiaries; solicitors/clients; and the like) a fiduciary duty may nevertheless be raised upon the special facts of a given case. There is no reason in principle why that doctrine should not apply to an evolving joint venture."

64. At page 647, para 51 of the judgment the Court of Appeal said:

> "Fiduciary law is not concerned with private ordering. That is, it is not the function of fiduciary law to mediate between the various interests of parties dealing with each other. That is for contract law. Fiduciary law serves to support the integrity and utility of relationships in which the role of one party is perceived to be the service of the interests of the other. It does so by imposing a specific duty of loyalty. As La Forest J said (for the majority) in *Hodgekinson v Simms* (1994) 117 DLR (4th) 161 (SCC) at page 176:
>
> > "The question to ask is whether, given all the surrounding circumstances one party could reasonably have expected that the other party would act in the form his best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non exhaustive examples of evidential factors to be considered in making this determination.""

65. At page 647, para 52 of the judgment the Court of Appeal said:

> "It follows that, in doctrinal terms, the starting point must always be whether there was a relationship of mutual trust and confidence between the parties giving rise to an obligation of loyalty."

66. At page 647, para 53 of the judgment the Court of Appeal adopted the dicta of Henry J in *Arklo Investments Ltd v McLean* [2000] 2NZLR 1 in which the dictum of Millett LJ (as he then was) in *Bristol and West Building Society v Motheu* (1998) CH1 at page 18 said:

> "... a fiduciary is someone who is undertaking to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. Distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.

> This core liability has several facets. The fiduciary must act in good faith; he must not make a profit out of this trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work Fiduciary Obligations (1997), page 2 he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

67. Submitted that materially, these fiduciary obligations were present in point of time therefore before Te Tiriti. They are not therefore the same as the analogous obligations, often quoted and arising from Lord Cooke's dicta in the *1987 Lands Case*. In our submission these obligations transcended Te Tiriti, and in terms of legal effect, were enhanced by the Te Tiriti, and operated to inform the parameters of the transaction effected by its terms.

68. In our submission, the Proclamations, as an action of the Crown, amounted to a violation of those fiduciary obligations. This is because:

68.1 Firstly, they were promulgated without reference to our clients. And in being a "new thing", a matter not hitherto contemplated, we submit that in compliance with the concomitant duty of good faith, the Crown was required to confer first with our clients. That it did not do so, but rather chose to unilaterally take such a step breach that obligation;

68.2 Second, and more importantly, the intended effect of the Proclamations was to do something, that hitherto, She understood that She did not have the authority or the agreement to do: to relinquish their Rule, which fundamentally was not affected by Te Tiriti, and displace and replace it wholly with Her own. And to do so was to place Herself in a position that conflicted with Her existing duty of loyalty (which She had not terminated) with our clients in relation to Her objective of unilaterally controlling the country on Her own terms.

Third Submission: Jurisdiction and the *Treaty of Waitangi Act 1975*

69. Our third submission is that Nga Puhi's assertion that there is only one version of Te Tiriti has implications in terms of the statutory framework embodied in the *Treaty of Waitangi Act 1975* and from which this Tribunal springs forth.

70. In our view, the very essence of the Act relies on the premise that there are in fact two versions of the same agreement (which are in some ways at variance with one another). With respect, this premise is false.

71. Our client's position creates, in our submission, inherent and irreconcilable difficulties in interpreting your jurisdiction as prescribed by s.5(2) of the Act. Indeed, one could observe that your statutory function is questionable given it subsists within a conception of 'reality' that is, in fact, erroneous and therefore is in.

72. In our submission, it can not possibly have been the intention of parliament for the Tribunal to give weight to the English text (The Treaty) where to do so would be in breach of the 'Treaty principles' that the Act purports to uphold.

73. Further, in this Inquiry, for the Tribunal to have more than a bare regard for 'The Treaty' would be for the Tribunal to discount the korero tuku iho given by the kaikorero of Ngapuhi and perpetuate a farcical account of history whereby the common intention lies somewhere in the muddle of The Treaty and Te Tiriti.

74. Ngati Torehina, again say, only Te Tiriti was signed by their tupuna, only Te Tiriti is relevant for determining were the parties were ad idem.

75. Our client's thus seek:

75.1 (in interpreting the Act in this Inquiry) that the Tribunal:

(a) 'have regard' to the (English) Treaty without attributing it any weight; and

(b) keep their inquisitorial and interpretative lens sharply focused on Te Tiriti; and

75.2 a Tribunal finding that legislature make an immediate change to the Act, insofar as the Act assumes that there are two versions of the Treaty, and insofar as the Act might apply to Ngapuhi going forward.

Response to the Crown's Argument

76. It is, in our submission, worthwhile to briefly address the evidence adduced by the Crown and our preliminary responses to their case, as follows.

Two versions of Te Tiriti:

76.1 The Crown's case starts from the presumption that there are two documents.

76.2 With respect, this relies on an erroneous factual premise, about which we submit the claimants in this Inquiry have clearly and unequivocally expelled: for Ngati Torehina there is only Te Tiriti.

76.3 As Hugh Te Kiri Rihari stated in his evidence:

> '...There is only one valid or relevant version of that agreement and that is the Maori text – Te Tiriti. The words, recorded in te reo Maori, explained by the missionaries, and understood by our Tupuna, were what we agreed to. We only put our waitohu on the document that correctly set out our whakaaro with the Crown.'[7]

76.4 Similarly, Ngapuhi pou korero, Erima Henare noted at the outset of the Inquiry:

> '...it is to Tiriti that our ancestral tupuna, tohu tapu, were signed. The other text is the English language version. It is not the same as Te Tiriti o Waitangi, it is an English language version which meant absolutely nothing to our tupuna....'[8]

That sovereignty was ceded/acquired

76.5 The Crown also asserts that sovereignty was ceded and that Maori understood that the Crown's replacement sovereignty (conceived as an absolute, unitary authority) was the cardinal effect of the rangatira signing Te Tiriti. To paraphrase the colloquial summation of this by our learned friend Mr Sharrock: 'one day the chiefs made all the rules, and the next they did not.'

76.6 But, we ask, how can that be so? The Crown's case on this crucial matter is simply not substantiated by the facts, rather in our submission the facts tell against the Crown in three key respects:

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[7] Hugh Te Kiri Rihari, Brief of Evidence, dated 3 June 2010, Wai 1040, #B13(a), para. 75
[8] Erima Henare, Transcript of Hearing Week 1: 10-14 May 2010, Wai 1040 #4.1.1, p.291

(a) Firstly, there is no word in Te Tiriti used (in any operative way) to describe, define, or communicate what was being exchanged by the rangatira or given over to the Queen that is even close to sovereignty.

(i) Rather the word used was "*kawanatanga*" and the Crown asserts that this word is the conduit by which Maori agreed to the introduction of the English rule of law and the achievement of peace and good order,. Further they maintain that a natural incidence of this was the ability or capacity for the Crown to protect the tino rangatiratanga and whenua of the rangatira.

(ii) To rephrase for clarity, the Crown says that this term "*kawanatanga*" impliedly permitted the Crown to assume Maori sovereignty, because that is then only way that She could adhere to Her 'end' of the bargain.

(iii) With respect this assertion is a contrivance, unsupported by the facts, and designed to meet what can only be said is the Crown's aspiration

(iv) As noted by linguistic expert Patu Hohepa the Crown's attempt to manipulate the meaning of *kawanatanga*, is Humpty Dumpty-esque as per the character in Lewis Carroll's *Through the Looking Glass*, who states:

> '...When I use a word it means exactly what I choose it to mean, no more, no less.'[9]

(v) We enlarge further. If sovereignty was to be displaced and replaced and both parties intended that to be the effect of their compact, then logic, or at least common sense, demands that the agreement would have said that. Indeed, we submit it is a well established principle of rational interpretation tha,t save for any extraneous

[9] Patu Hohepa, Brief of Evidence dated 22 September 2010, Wai 1040, #D4, para. 59

evidence which could show a mistake or error (of which we submit there is none), the written words used are prima facie conclusive evidence of their intended purpose and effect.[10]

(vi) "Kawanatanga" was used because that was all that was intended, principally by the chiefs, more importantly, accepted by the Crown.

The evidence of our claimants is that *kawanatanga* is a lesser form of authority, and being so was able to be delegated to the Crown without disturbing the Rule, mana or sovereignties of the rangatira.[11]

(vii) Indeed, as articulated by Dr Hohepa:

> '...Maori would understand the meaning of Kawanatanga as "governor-ship"...meaning the governor will govern Pakeha people (in the preamble) and any lands obtained by or given to the Queen...governing through a government would not be known or experienced'[12]

(viii) Further, as a matter of fact the Crown was already aware of the chiefs' use of the phrase "tino rangatiratanga". Indeed, on numerous occasions throughout He Wakaputanga of 1835, various words in te reo Maori are used to denote the chiefly authorities of Ngapuhi rangatira. In each instance the rangatira carefully describe their Rule in terms of "te kingitanga" and "te mana". They

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[10] Refer for example of the principle in action in two examples as follows: First, the Court of Appeal's dicta in the *Mair* Case (Attorney General v Mair [2009] NZCA 625. At paragraph 69 of the judgment (Chambers & O'Regan JJ) that Court stated: "*We are unable to accept that argument. We think it clear beyond any doubt that Dr Harrison's first suggestion suggested manual of s5(2) is the correct one. If Parliament had intended to introduce such a sweeping interpretive overload to the Treaty of Waitangi Act, as Dr Harrison's preferred interpretation requires, it would surely have done so in a much less oblique fashion. One might also have expected it to spell out the principles which were to apply, especially if they are intended to be, as Dr Harrison suggested, mandatory considerations, even down to the level of case management decisions.*"; Second, in *Attorney-General v Maori Land Court & Others* CA107/98 9 December 1998 where the Court in that case when faced with an issue of statutory interpretation said: "*Section 18(1)(i) had really been intended to effect such a remarkable change, which went unheralded during the Act's passage through Parliament, it might have been expected that this would have been done explicitly, by words directly spelling out that that paragraph was to apply beyond Maori land.*"

[11] Hugh Te Kiri Rihari, Brief of Evidence, dated 3 June 2010, Wai 1040, #B13(a), paras. 73 and 76

[12] Patu Hohepa, Brief of Evidence dated 22 September 2010, Wai 1040, #D4, para. 116(17)

do not record the pronouncement of their absolute authority under the concept of "kawanatanga".

(ix) We submit that if one were giving up the equivalent of sovereignty, which must surely bear a relationship to the concepts of "kingitanga" and "mana" already familiar to the Crown *vis a vis* Lord Glenelg in 1836, then once again Te Tiriti, and the chiefs, would have explicitly utilized those terms. Logically if those terms were not used then they were not therefore contemplated by its terms or its provisions. For the Crown today to suggest is, with respect, mischievous.

(x) The fact that the words of Te Tiriti are in our client's tongue is, we submit, argument enough that on a balance of probabilities, what the claimants say that a word means, *it means*. It is *their* word, *their* concept. It is in the language that conveys *their* meaning.

(xi) Submitted that it is therefore bizarre and the height of arrogance for the Crown to lead evidence of a linguistic nature in this inquiry pronouncing on the meaning of the claimants language, as it did so with Dr Parkinson's opinion.

(xii) By implication the Crown has contended that Ngati Torehina are effectively ignorant of their own language. Accordingly we submit that the Crown's case and evidence on this point is appropriately disregarded, with the claimants' evidence being well preferred.

(b) Second, in refuting that sovereignty was ceded, we submit that it is apparent from the observances of what was discussed at the only "negotiation" of Te Tiriti (being the five hours on 5 February 1840 or at the hui at Waitangi the next day) the Crown simply did not raise or communicate the matter of "sovereignty"

in the way it was aspired to. There are a number of points here of note:

(i) The Crown appears to speculate, with misguided certainty, that Captain Hobson would have discussed sovereignty and the implications the cession of such with the rangatira on 5 and 6 February 1840. Indeed, in their opening submission, the Crown argued:

> "Hobson could hardly have omitted dealing in some way with the meaning of sovereignty and the implications of its cession – his own instructions from the Secretary of State for the colonies had warned him that Maori might "be unable to comprehend the exact meaning, or the probable results", of the Crown's proposition, and ordered Hobson to do his best to overcome this impediment. If, as seems fairly certain, Hobson did offer explanations, it is equally certain that Williams translated what he said."[13]

(ii) The difficulty with this is that the Crown is guilty of pure speculation. The observations of that period of negotiation, which can only be described as extremely short, reveal no discussion of sovereignty. If anything the only notable remark (by persons of the Crown) is that of Colenso, prior to the actual signing of Te Tiriti, that Maori might not understand the Treaty being proposed.[14] A comment, which we submit was made in reference to the Crown's aspiration of gaining sovereignty, as Captain Hobson responded that he had '…expended all means in order to achieve full Maori comprehension.' Note:

> '…Colenso refused to be so easily dismissed, claiming that some chiefs had 'no idea whatsoever to the purport of the Treaty, and that it was imperative that they should understand it to constitute it's legality.'

(iii) We assert that Colenso's apprehension was clearly not in relation to any misunderstanding of the articles in Maori of Te Tiriti, but rather that it was directed at the fact that

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[13] Opening submissions of the Crown, dated 13 October 2010, Wai 1040, #3.3.1, para. 41.4
[14] Refer: Claudia Orange, *The Treaty of Waitangi*, Allan & Unwin, Wellington, 1987, p.54

the Crown had not made clear what its true intent and aspiration as to sovereignty was. In that sense, Colenso provided the Crown with a very public opportunity, a last chance of correcting the situation, of making a full and frank disclosure of their aspiration.

(iv) Captain Hobson and then Busby instead opt to 'fudge' the matter, deferring to the guidance of the missionaries that all that needed to be done, had been done, with the result that the assembled rangatira were none the wiser. This failure to seize this opportunity is now ultimately to the Crown's detriment. We submit that if "sovereignty" *as a matter of fact* was not proffered, it could not have been possibly have been agreed to.

(v) Although, the Crown's witnesses' have loyally postulated that it would be 'inconceivable' for a person such as Captain Hobson, in the discharge of his solemn office, to have failed to execute his duty and not fully explain Crown aspirations to Maori in accordance with his instructions. Those witnesses' are unable to point to any fact that plainly and unequivocally evinces this from the array of observations of the negotiation that have endured. This is, in our submission, because it did not happen and no amount of 'expert opinion' is able to change that fact.

(vi) By contrast, the claimants' evidence, the *kupu mana* of the rangatira at the signing, clearly demonstrates that even as to *kawanatanga*, many rangatira present were suspicious and reluctant. For example, the successor to Hongi Hika, Manu Rewa was recorded by Colenso as saying:

> '…This is mine to thee O Govr. – go back. Let the Govr. Return to his own country…What do native men want of a Govr. – we are not whites nor foreigners – this land is ours – but the land is gone – but we are the Govr. – we the chiefs of this our fathers

> land. I won't consent to the Govr's rem.g. No, return: What! This being like Port Jackson, and other lands seen by the English.'[15]

(vii) Submitted that the logical inference to be drawn from the fact that the rangatira were struggling to agree to the appointment of a Kawana limited by their tino rangatiratanga, is that the absolute authority of their Rule, their sovereignty, was simply not 'on the table' at that time of Te Tiriti.

(viii) Before moving on from this point, we look to address the attempt by Professor Loveridge, for the Crown, to recast this point using different language: that the central question debated during the negotiation was whether or not Maori should give up their independence and whether the benefits of such would outweigh the costs.[16] Their argument being that in discussing "independence", the Rangatira were in fact considering the relinquishment of their Rule, their sovereignty.

(ix) In our submission Dr Loveridge's opinion and the Crown's submission on this point conveniently, but again wrongly, conflates two important matters and that independence is likened to sovereignty is misconceived. We submit again, such an interpretation is simply not available on the facts, notably:

A The accounts of the speeches made by the various chiefs on the 5th February 1840 are about whether the Crown ought to be accepted as governor and to what extent a governorship would impact on their sovereign independence; and

B That this is quite a different thing to asserting that the Rangatira had discussed, considered and

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[15] Colenso, quoted in Dame Anne Salmond, Brief of Evidence dated 17 April 2010, Wai 1040, #A22, p.40
[16] Dr Donald Loveridge, Summary/ Response dated September 2010, Wai 1040, #A18(a), p.37

debated the displacement and replacement of their sovereignties with the Crowns.

(c) Thirdly, the only reasonable deduction that can be made from the facts of the process of the *negotiation* of Te Tiriti is that a form of authority, less our client's ultimate Rule, was the core subject at issue. Moreover if the Rule of each of the rangatira was truly 'on the table', we submit that, as a matter of logic, the importance of the subject matter would have given rise to a more lengthy and rigorous process. Specifically:

(i) the evidence confirms that before Te Tiriti Ngati Torehina held their Rule (exercising tino rangatiratanga and mana) and they were not immediately threatened or weakened in that rule. In other words they were not accountable or beholden to anyone (except rangatira) at 6 February 1840[17];

(ii) the entire process of drafting, negotiating and executing the agreement took mere days, from Captain's Hobson's arrival in their territories to the signing of the one parchment of Te Tiriti in te reo Maori;

(iii) the time in which the negotiation, if any, was concluded was effectively 5 or 6 hours, on the 5th of February 1840 and no changes were made to the treaty proposal following the korero of the rangatira; and

(iv) that "sovereignty" as a concept, and more specifically the authority of the rangatira that the Crown aspired to displace, was not raised in the discussions.

76.7 **Contradiction**: At best therefore we submit that it is a contrivance on the part of the Crown to suggest that there is no contradiction between the Crown's claimed authority and tino rangatiratanga [source- crown law

[17] Refer Hugh Te Kiri Rihari, Brief of Evidence, dated 3 June 2010, Wai 1040, #B13(a), paras. 65-70

opening]. Instead, we submit that there is every contradiction, and ultimately because it is irreconcilable with the facts. This is because in doing so the Crown has effectively and unilaterally sought to reverse the roles intended and effected by Te Tiriti: the chiefs intended the Crown to be the delegatee or subordinate authority; by May 1840, the Crown had taken the view that the chiefs were the delegatee or subordinate authority.

76.8 **reluctant actor**: The Crown also contends that the Crown was a reluctant actor, encouraged more to colonize New Zealand for humanitarian reasons than for anything else. Again, we submit that such a contention is not strongly supported by the facts, or at least to the extent that was the priority, or prevailing motivation. We enlarge:

(a) The facts are that the Crown (Queen Victoria) by her own hand commissioned Hobson on 30 July 1839 to acquire any territories within the islands commonly called New Zealand that he could in Her sovereign name. This was the first initiation of Crown action. It is the source of the power (even mandate) upon which Her officials subsequently rely and act upon. Notably in that commission there is no mention of that commission being motivated or encouraged for humanitarian reasons. Indeed, it does not even mention that Hobson should only proceed if the natives consent. Rather, in our submission, it is every flavour that the simple expansion of her territories is the central focus. It is a commission that is absolute in its objective: acquire as much of the territory of the place called New Zealand as you can. Notably we submit, the Crown did not lead any evidence in this inquiry as to the extent to which Queen Victoria was actually engaged in the process, save for executing the commission;

(b) We submit that this principal goal of simply expanding Her territories was continued by Her officials. In his instructions of 14 August 1839, Lord Normanby's first articulation to Hobson of the reason for his commission is succinctly stated in only the 3rd paragraph of his lengthy directive as being for the "*national advantage*". This is said in the context of his reference to land and

resources of New Zealand being in the interests of Great Britain in Australia. In the third paragraph of his instructions he evidences the main purpose of the Crown's objectives. He says:

> "We have not been insensible to the importance of New Zealand to the interests of Great Britain and Australia, nor unaware of the great natural resources by which the country is distinguished, or that its geographical position must in seasons, either of peace or of war, enable it, in the hands of civilized men, to exercise a paramount influence in that corner of the globe. There is, probably, no part of the earth in which colonization could be effected with a greater or surer prospect of national advantage."

(c) These are the "up front" articulations (and thus by logic the most important) of the Crown's reasons for the commission. While his instructions touch on humanitarian consideration further on, being much further on, we submit that his instructions to Hobson can hardly be said to be driven by that matter. Rather, we submit that a fairer interpretation of the thinking of the Crown was the prospect of gaining the land and the resources. And, we submit that this imperative underpinned the Crowns aspiration of displacing the existing sovereignties with Her own.

(d) Submitted that T L Buick in his work "The Treaty of Waitangi" (1914) corroborates such a submission. In the period leading up to Te Tiriti, Buick highlights the frenzy of land speculators in New Zealand at that time, having hitherto been curbed from transacting large land tracts in Australia by Governor Gipps[18]. He likens the time to a "gold rush" (only that it was land that being pursued) that was being driven by a purely altruistic impulse, which he quite neatly called "the love of gain"[19]. Taking that further, we submit that the Crown can be equally categorized as possessing an impulse of gain, just on a larger scale. We submit

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[18] Buick T L "The Treaty of Waitangi or How New Zealand became a British Colony" (1914) S & W Mackay Lambton Quay at pages 1-36, particularly pages 30-33.
[19] Ibid at page 30.

that the drive of the Crown for economic, as much as imperial or empire expansion can not be underestimated. Rather, we submit that it was the primary motivation of the Crown, with every other reason being incidental to, or ancillary to that.

76.9 **Dr McHugh's opinion**: The Crown's asserted confidence that Te Tiriti was a valid instrument of cession of sovereignty continues in reliance (for the most part) on Dr McHugh's evidence, and for the reason that such assertion runs counter to our clients case, we are obliged to respond:

(a) Notwithstanding Dr McHugh's legal argument, it is elementary that his thesis relies on the presence of certain facts. And, as we already mentioned, neither Dr McHugh nor Professors Ward or Loveridge, or Dr Parkinson, or indeed any other person can change the facts.

(b) In our submission, for Dr McHugh's opinion to hold true, it must be the case that the Rangatira of our clients consented to the displacement and replacement of their Rule with that of the Crown's. That is the pre-requisite condition, or the factual premise of his entire argument, but which he unreservedly assumes and accepts without question. A similar approach has been adopted by the Courts. In his decision in the 1987 Court of Appeal Lands case, Justice Richardson, as Crown Law reminded us in the Whanganui inquiry, held that Crown sovereignty was *authoritatively established* by the Crown's gazetting of the acquisition of New Zealand in the London Gazette on the 2nd October 1840. A meager analysis is provided, and indeed there is an absence of any reference to the facts underlying the action of gazetting something. Without wanting to belabour the point however, that fact, that pre-requisite, that premise, as we have shown, is simply not present: as at 6 February 1840, as at 31 December 1840, the Rangatira had not consented. Accordingly we submit that the opinion of Dr McHugh is challenged and challengeable on that very simple, but significant basis.

(c) Cursorily, it would seem that Dr McHugh may have a contingency, a Plan B to his theory. If we understand his evidence correctly he appears to conclude that notwithstanding Rangatira consent, the simple exercise of the Crown prerogatives in proclaiming the New Zealand territory to be under the sovereignty of the Crown would be enough in any case an English constitutional law context[20]. This is because in his opinion the Crown's exercise of the prerogatives is, at least in theory, able to be exercised without reference to any consent of those persons residing in the territories over which that prerogative is exercised. In our submission the depiction of the prerogatives in that way is based on the Crown's own perception of its omnipotence and absolute authority and being answerable to no one. In our submission the absurdity and arrogance of that contention in relation to our clients, their Rangatira and their ancestors is obvious and cannot hold true.

76.10 **The matter of sovereingnty being untouchable**: Finally the Crown appears to be of the view that ultimately the matter of sovereignty is beyond doubt, and that being so, the source of the sovereignty is also beyond doubt. In our respectful submission, we once again beg to differ, suggesting that now is not the time avoid engaging in revealing the truth of a very important part of this country's history. We submit as follows:

(a) You have established that the scope of your inquiry is effectively to 31 December 1840. We submit that on the claimants case as presented to you that it is open to find that as at 1840 sovereignty was not ceded or acquired;

(b) The source or basis of the Crown's own sovereignty also appears to be a vexed question in any event. The learned authors ECS Wade and AW Bradley in the text "Constitutional Law 8th edition" sum up the conundrum at page 59 of their text:

"Basis of sovereignty

[20] Need reference to McHugh opinion here**********

> Dicey has shown that political expediency in practice operates to limit the working of the legal rule. To the lawyer, however, there ought to be an explanation of why the courts enforce without question all acts of parliament. No one can point to any statute which says that this is the rule. The answer then would seem to be found in the common law. Yet the common law is not infrequently changed by statute. Can parliament change this rule of the common law like all other such rules? At first light the answer would seem to be that there is no difference between this rule and all others. Is there something in the rule requiring judicial obedience to statutes which makes it sacrosanct? For this we must turn to history rather than to the law reports. An authoritative view is that source of the rule is historical only and not legal; but no statute can confer this power upon parliament; that would be to assume and to act on the very power that is to be conferred. If no statute can confer, similarly no statute can abolish the rule; it must then be a rule of the common law but unlike all other rules of the common law, it is an ultimate political fact upon which the whole system of legislation hangs. This means that if there is a change, that change can only be brought about by political events not by legislation. There is plenty of evidence in the history of the 17th century of the courts recognizing the authority of parliament, although the very character of parliament underwent radical changes in 1649, 1660 and 1689."

The basis or source of the Crown's sovereignty appears therefore to be excusably explained by reference to the murkiness of history which has been in more recent times clarified by the proposition or acceptance: "that's the way it is, since that's the way its always been". With respect again, we submit that a similar approach is adopted here in this country by the Crown. The facts, the Crown will have you believe are murky, so, at some point a clear line has to be drawn. As to the murkiness of the basis of sovereignty, we submit that writers or people like Dr McHugh add to the mystery but also the notion that it is a futile exercise to examine that mystery in phrases like "...the stuff of legend"[21]. The Crown says that it's solution is a clear starting point which is the making and issuing of the proclamations by October of 1840. With respect, your claimants do not accept that approach, that proposition. First they do not accept that the facts are murky. They are clear that as at 1840, their ancestors did not cede sovereignty. Their *korero* evidences as much. For our clients no such mystery exists.

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[21] D McHugh evidence reference**********

> In fact one may infer that the mystery is conjured up to conceal or further obfuscate the truth. Second, they are not prepared to accept as fact a proposition of 1840 that is perhaps more designed to logically explains the situation that they find themselves in today. That is a conversation for another time. It is not a conversation for this stage of this inquiry. It is not a conversation that you have determined is within the scope of this stage of your inquiry.

76.11 **Racial superiority**: It is also material that the Crown and the people of the Crown generally regarded Maori, in racial terms, as less than they were. In much of the evidence of the 19th century Crown officials, the likes of Lord Normanby and Hobson, as being uncivilized or under civilized and to effectively trivialize their very existence, notably by the fact that the consent for cession of their sovereignty could even be propitiated by presents or other pecuniary arrangements. We submit that it is open to this Tribunal to find that the standard of conduct in the Treaty negotiations would be less than that expected when dealing with other white people because these people were in effect inferior.

76.12 **Fiduciary**: As to fiduciary duty at this point in this country's history it is likely that the Crown will defer to dicta of the Crown's own Courts regarding fiduciary duties. In 2007 the Court of Appeal had this to say[22]:

> The decisions of this Court contain clear statements to the effect that the Crown's duty to Maori is analogous to the fiduciary duty and we see no proper basis for us to revisit them. The law of fiduciary forms the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty: good faith, reasonableness, trust, openness and consultations. But it does so by analogy, not by direct application. In particular, we see difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Maori and to the Treaty, has a duty to the population as a whole. The present case illustrates another aspect of this problem: the Crown may find itself in a position where its duty to one Maori claimant group conflicts with its duty to another. If Gendle J was saying that the Crown has a fiduciary duty in the private law sense that is enforceable against the Crown in equity, we respectfully disagree."

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[22] Reference*****

76.13 On the basis of that judgment, in our submission the Court's dicta relies on two "problematic" premises:

(a) First that there is a conflict inherent between Crown and Maori;

(b) Second the Crown is not ultimately impartial.

The problems with those premises are obvious.

76.14 **Who is the Crown?**: From the outset, a constant question put to the Crown has been, who are you? In our submission, of the answers given, none has been quite satisfactory. Sometimes it is the titular head, other times it is the legislature, other times it is the executive, other times it is the judiciary, other times it is in right of this, or an extension of that New South Wales jurisdiction. Other times still the agency can be blurred, as seems to be the case with the Church and Marsden's appointment in 1814. Indeed, Dr McHugh acknowledged that in the early days of the Crown's presence here, the separation of powers was "fused". In all, we submit that the situation is confusing for your claimants, and certainly not a situation that we submit could be fairly said to have been contemplated by Te Tiriti.

76.15 **Final remark**: A final response to the Crown's case is warranted. In effect, albeit in a polite and diplomatic way, the Crown's case is that the history told by the claimants and asserted by them as being true, is instead told back to them as being wrong. With respect that response is demeaning, as it is insulting. On the central question we submit that the Crown's contentions are not legitimate. They are, in our submission, fabrications and contrivances designed to conceal away the truth and to achieve the Crown's own ends.

Concluding Remarks

77. In conclusion, we submit that the facts overwhelming favour the case and contentions of Ngati Torehina, and the hapu of Ngapuhi nui tonu.

78. Not only is it a sad indictment on this country that we continue to debate the fundamental meanings of Te Tiriti, but it is indicative of the failure of non-Maori to face up to the truth. Indeed, the Crown's approach to Te Tiriti, is that the truth needs to be avoided at all costs, because it is perceived that to agree to the truth, is to give up too much.

79. This Inquiry and the events surrounding it, *in toto,* have been demonstrative of an unwillingness of the Crown to stand up honestly and boldly to confront the reality of their history; address our clients' *mamae* or support a meaningful and inclusive dialogue of reconciliation.

80. We have borne witness to a dominant monoculture that, under the guise of academic argument and principle, still feels entitled to:

80.1 Perpetuate the historical injustices, insidious racial hierarchies, and norms of a Eurocentric Crown;

80.2 Suffocate the voices of Ngapuhi by suggesting that to recognise their version of Te Tiriti would inequitably favour one party;

80.3 Retrospectively legitimate the location of power by performing legal gymnastics; and

80.4 In an ultimate act of disrespect, tell Maori the meaning of their mother tongue; manipulating 'kawanatanga' into a sharp blade that attempts to carve an implication into Te Tiriti that was never intended and cut away at Maori tino rangatiratanga.

81. Once former Chief Judge, Joe Williams, likened the Waitangi Tribunal to a truth and reconciliation commission. Let that be the case for Nga Puhi.

Key Finding Sought

82. We urge the Tribunal to have the courage to find the facts and reveal the truths.

82.1 For Nga Puhi, there is only one treaty, it is Te Tiriti.

82.2 For Nga Puhi, their Rule, their mana, their rangatiratanga, their sovereignties were never taken from them by Te Tiriti.

Dated this 21st day of January 2011

John Pera Kahukiwa/ Georgia Kate Bates
Counsel for the claimants