OFFICIAL

IN THE WAITANGI TRIBUNAL

Wai 1040
Wai 1508
Wai 1757

IN THE MATTER OF	Section 6 of the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	Te Paparahi o Te Raki (Stage 1)
AND	
IN THE MATTER OF	A Claim by the Descendants of and the Rightful Successors to the Rangatira and People of Ngati Torehina ki Mataka Hapu

CLOSING SUBMISSIONS

Dated the 28th day of January 2011

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OPENING REMARKS

1. These submissions are made in contemplation of the claimant's closing arguments for Stage 1 of the *Te Paparahi o Te Raki Inquiry* (**'Inquiry'**) addressing He Whakaputanga and Te Tiriti o Waitangi 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. 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.

3. Nevertheless, whilst this is the first time that the Tribunal has heard our client's plea, we emphasise that Ngati Torehina is simply repeating the karanga of each and every generation or *papa* since 1840.

4. 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 errors of its creator and the Eurocentric system from which it springs.

5. 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 Maori realities to be acknowledged.

6. In essence, our clients ask simply this:

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

SYNOPSIS OF NGATI TOREHINA'S ARGUMENT

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

7.1 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.

7.2 Secondly, they say that on that basis of the first submission, Captain William Hobson's Proclamations of May 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 out of 'thin air' 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; and

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 either existed or could have done.

7.3 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. Further, they say that this has implications for this Tribunal; its function and its 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.

8. 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.

JURISDICTIONAL & PROCEDURAL MATTERS

Jurisdiction Raised

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

10. 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.] "

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

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

11.2 What resulting prejudice such actions have caused to them.

Directions given by Tribunal

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

13. 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."*

14. In exercise of this delegated power in the course of these proceedings, the Tribunal gave directions to the effect that:

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

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

15. 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.[1] 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.

16. 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.

17. 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 2009 (Wai 1040, #2.5.23).

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[1] Refer for example: Memorandum-Directions of the Presiding Officer, dated 10 December 2009 (Wai 1040, #2.5.029); and Memorandum of Counsel, dated 5 November 2010 (Wai 1040, #3.1.374).

18. The issues are set out, as follows:

He Whakaputanga/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?

19. Materially, the Tribunal also limited the historical period which it would consider within the scope of Stage 1 of the Inquiry, and thus the extent to which its jurisdiction will reach by determining:

> "...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."[3]

Remarks as to procedure and jurisdiction adopted

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

21. 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:

    21.1 Firstly, in failing to succinctly articulate the real 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, as affirmed in He Whakaputanga and protected in Te Tiriti; and

        d It is to a large extent immaterial (at the very least in the first instance) for an examination of the parties

[3] Memorandum-Directions of the Presiding Officer, dated 30 May 2009 (Wai 1040, #2.5.23).

"understandings" going in, to be determined. Rather, the correct starting point is what the parties commonly intended, or more accurately agreed, instead of what they hoped to have agreed. To do otherwise is to fail to commence from a robust starting point, and to unrealistically raise expectations on the crowns part that a demonstration of their aspiration for sovereignty might actually count;

21.2 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 correspondingly, without the benefit of knowing precisely what is contended by the 'respondent'.

b We submit 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. (Ultimately, a matter which is crucial to the political reality for Ngapuhi, which, we submit, has had detrimental implications in terms of the Crown's eagerness to engage with *Te Roopu o Te Horonuku.*

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

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

22.2 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.

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

MATTERS GUIDING THE INQUIRY

Elements for Consideration

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

25. Therefore, ultimately our plea for Ngati Torehina, in terms of this stage, is for a finding of fact that:

    25.1 *As at 1840,* that Te Tiriti did not include a principle, term, agreement, inference or otherwise, that sovereignty was acquired (by the Crown) or ceded (by them).

26. 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.

27. In our submission, this will necessarily entail an evaluation of those Proclamations of 1840 made by the Crown, by its agent Captain Hobson, against the principles of *Te Tiriti.*

28. 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.

Clarification of the Grounds of Contention

29. Now that the evidence has been heard and the Inquiry has evolved towards the completion of Stage 1, it is worthwhile, in our respectful

submission, to re-cast what is contended to draw into focus the core areas of contention.

30. In our submission, the Crown contends very little. The Crown does not contend most of the facts - events happened. Rather, divergence seems to garner around the interpretation of those events.

31. The evidence has revealed that:

31.1 The Crown necessarily requires our clients to have a 'sovereignty' to be ceded, in order to be displaced and replaced;

31.2 Prior to *Te Tiriti*, Ngati Torehina, along with the other hapu were, and had been since time immemorial, 'sovereign' in New Zealand;

31.3 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 Eurocentric-ism rather than any fact;

31.4 That for present purposes, the existence of a Maori form of 'sovereignty' capable of being ceded is not in doubt;

31.5 That in 1835, the rangatira signed *He Whakaputanga* and gave notice of their 'sovereignty' to the Crown and world at large;

31.6 That *He Whakaputanga* was accepted by the Crown as being non-contentious, and was acknowledged as such.

31.7 That there is no disagreement 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. Moreover, the Crown does not dispute that *Te Tiriti* records:

> '...ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te kawanatanga katoa o o ratou wenua'.[4]

32. In our submission, the area in which Crown contentions differ from our clients' is that they say that the abovementioned words of *Te Tiriti*, meant (in Te reo Maori) that a cession of sovereignty was effected.

The Real Issue

33. Accordingly, we submit that the real issue raised by this case is simply:

    33.1 Whether, at 31 December 1840, the "sovereignty" or the likes thereof (i.e. Rule, kingitanga, 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?

34. 'Sovereignty' and its retention or transmission, is therefore at the core of this Inquiry.

35. Again, we submit this question is simply one of fact and everything flows from it: Either "sovereignty" was transmitted to the Crown via Te Tiriti or it was not.

36. 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:

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

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

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

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[4] Article 1, Te Tiriti o Waitangi.

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

SUBMISSION 1: SOVEREIGNTY WAS NEITHER CEDED NOR ACQUIRED

Introduction

37. 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.

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

Working definition of sovereignty

39. 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".

40. 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 a significance and substance that effects the very core of any politically organized society.

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

    41.1 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.

    41.2 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.

41.3 That the Maori principles, 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.

41.4 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.'[5]

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

42. Ngati Torehina held and exercised their Rule (their 'sovereignty') from the times of Rangi-Wheiao and Marokura.[6] The undisputed evidence is that their rangatira held the power of life and death within their territories prior to Te Tiriti.

43. In his evidence Mr Te Hurihanga Rihari graciously explained to you the essence of Ngati Torehina ki Mataka[7]. By the recounting of their ancient histories and whaariki, 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 and *whakapapa* become an assumption that cannot be questioned. In essence, their Rule is to be respected because of that ancient lineage.

44. It is therefore a historical fact that our clients, within the polity of their Hapu, and at all material times, ruled over their territories.

45. 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.

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

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[5] Roscoe Pound, "Jurisprudence" in *The Nature of Law*, Vol 2, Part 3, St Paul, Min. West Publishing Company, 1959, pp. 317 -318.
[6] Te Hurihanga Rihari, Brief of Evidence, dated 3 June 2010, Wai 1040 #B15(a) pp. 1-5.
[7] Ibid

The Making of Te Tiriti

47. We submit that our client's tupuna, in exercise of their Rule, entered into a sacred compact with the Crown recorded by *Te Tiriti* within the following factual matrix:

47.1 Their Rule is traced to antiquity and has been exercised by each and every subsequent generation. Ngati Torehina maintain that it is unthinkable that their Rule would even be considered for relinquishment or extinguishment by such a compact:

> '...In Te Ao Maori, people are not distinct from the land; our conception of being is holistic. Ngati Torehina cannot separate our identity; our mana; or our obligations as kaitiaki from our land. We are mana whenua. We will be here forever. We could not cede sovereignty - as we *could* not give up our mana i te whenua or rangatiratanga. We belonged to the whenua, not the other way around.'[8]

47.2 *Te Tiriti* did not originate, commence, or start a relationship between their tupuna and the Crown: the evidence has shown that was already there;

47.3 Their tupuna, Wharepoaka, declared their Rule via *He Wakaputanga*, and, along with the other rangatira of Ngapuhi, gave notice of such to the rest of the world and formally invited foreign powers to treat with them in trade (outwardly by reference to their Kara.)[9] Any departure from that allegiance would have been entirely undesirable;

47.4 Their tupuna apprehended that their whenua was being rapidly lost and that measures were needed to protect it, and themselves, from unwanted outside interferences, particularly in relation to unruly and dishonest conduct of some of the people of the Crown.

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[8] Hugh Te Kiri Rihari, Brief of Evidence, dated 3 June 2010, Wai 1040, #B13(a), para.76
[9] Ibid, paras. 60-64

48. We submit that our clients were very clear about what they wanted and their purposes for signing *Te Tiriti.*[10]

The 'Negotiation' of Te Tiriti

49. Our client's evidence as to 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 on this aspect outside of that public record.

50. Based on that, a précis of what constituted the 'negotiations' with the rangatira, is as follows:

50.1 The negotiation of the terms between the parties, that is Maori *and* the Crown, was confined to the five or so hours at Waitangi on 5 February 1840;

50.2 The main concern of the Rangatira (whose speeches were 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;

50.3 The Crown made out in such negotiations that its purposes in entering Te Tiriti centred on the following:

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

b That the treaty proposal was an offer of Crown protection which Maori had previously asked for;

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[10] Refer: Hugh Te Kiri Rihari, op. cit., para. 72 - *'...Te Tiriti was intended to ensure: (i) the continuation of the direct relationships begun by our tupuna, Te Pahi and Kawana Kingi, Hongi Hika and the King; (ii) that Te Ao Maori remained supreme;*
(iii) that the substance of the land was protected from foreigners; (iv) that the mana, prestige and godliness of the chiefs was preserved and He Whakaputanga honoured; (v) that trade and commerce opportunities were maximised; and (vi) that the wayward Pakeha settlers were brought to account under the control of a Kawana of the Crown, as in Norfolk Island and Sydney.'

c That the treaty proposal, metaphorically, would be a 'fortress' for them against any foreign power which might desire to take possession of their country;

d That Captain Hobson had been sent by Her to be Kawana, but that he lacked the authority that was essential if he were to be of any benefit in controlling British subjects;

e That the rangatira could give Captain Hobson that authority if they signed the parchment laid before them; and

f That the missionaries fully approved of the treaty proposal and explained it as an 'act of love' towards them on the part of the Queen, to help secure their existing property rights and privileges.

50.4 Materially, the Crown *did not* represent that its treaty proposal was intended to effect a usurpation of their rangatiratanga, mana or Rule. Rather, in our submission, the opposite is true. No factual evidence has been adduced to show that during the negotiation the Crown made it known to the rangatira that the matter of 'sovereignty' was at stake.

50.5 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.

Formalisation of Te Tiriti

51. In our submission there are two material aspects of the formalization of *Te Tiriti* that are proved by the evidence traversed so far:

51.1 Firstly, that the terms of the compact/ agreement are found in the parchment recorded in the claimants' own language and

signed by *both* the rangatira and the Crown. As a matter of logic, the unsigned document in the English language cannot be deemed to also be a record of that compact. As Ngapuhi pou korero, Erima Henare noted at the outset of this 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....'[11]

51.2 Secondly, the parchment, by its operative provisions is explicit that under:

a Ko te Tuatahi - it is 'kawanatanga' that is passing from the Rangatira to the Crown;

b Ko te Tuarua - the Crown affirms that the agreement does not effect the chiefs' 'tino rangatiratanga'; and

c Ko te Tuatoru - the Crown agrees for all Maori of New Zealand to have '...nga tikanga katoa rite tahi ki nga tangata katoa o Ingarangi.'

52. It is the words, used in *Te Tiriti* that record the common intention of Maori and the Crown. If the words are not used, the logical deduction must be that they were not part of the common intention.

53. Submitted further that the concept of *kupu mana* underscores this fact. The Rangatira would only have agreed to words that they could personally commit to. Their word was literally their bond.

54. In our submission there is no transfer or relinquishment by the Rangatira of anything like 'kingitanga', 'mana' or 'rangatiratanga', in terms of the words used, and logically the conclusion must be that such a transfer was not intended by the parties.

55. Consequently, the net effect of *Te Tiriti* was basically as follows:

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[11] Erima Henare, Transcript of Hearing Week 1: 10-14 May 2010, Wai 1040 #4.1.1, p.291

55.1 The Rule of the Rangatira was altered to the extent that they appointed and delegated certain limited powers of 'kawanatanga' to the Crown;

55.2 The Rule of the Rangatira was not extinguished, it was affirmed and thereby implication, affirmed the continuation of *He Whakaputanga*

SUBMISSION 2: THE PROCLAMATIONS WERE IN BREACH OF TE TIRITI AND THE CROWN'S FIDUCIARY OBLIGATIONS

Conduct after the signing: Proclamations

56. On 21 May 1840, a mere four months after the signing of Te Tiriti, the evidence has shown that Captain Hobson proclaimed the Crown's sovereignty over our clients' territories. His proclamation, published in the London *Gazette* in October 1840 stated:[12]

> "...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."

collectively ('**the Proclamations**')

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[12] Text in CO 209/6: 156 (North Island) and 158 (South and Stewart Islands); CO 209/7: 61 and 62.

57. In making the 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.

Breach of Te Tiriti

58. We submit that the Proclamations were wrong in fact – that is they were illegitimate and illegal. 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:

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

58.2 Secondly, that in making the Proclamations and 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.

59. In summation, we submit that the Proclamations:

59.1 Are unreliable, as they are based on the false factual premise that our clients' 'sovereignty' had been displaced and replaced;

59.2 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

59.3 Violated the solemn compact which is *Te Tiriti*, and thus were wholly inconsistent with it's principles.

Relationship of Trust and Confidence

60. It is submitted that, prior to these Proclamations, 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 each reposed trust and confidence in the other.

61. A recount of the key features of Ngati Torehina's history traversed over the range of materials presented to this inquiry already is worth repeating:

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

61.2 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.

61.3 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:

61.4 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 whanaunga on their return journey. The said Kawana 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.

61.5 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.

61.6 In 1802, their rangatira, Te Pahi, and four of his sons, travelled onboard a Crown vessel to Norfolk Island for the ostensible purpose of visiting Kawana King,. 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.

61.7 In 1803, Ruatara, the son of their rangatira, Te Pahi, took up employment on a whaling vessel of the Crown to obtain passage to Sydney, New South Wales and visit Kawana King.

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

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

61.10 Their tupuna were hosted during this visit by Kawana King - staying in his residence for three months; being shown a variety of industries; introduced to the elite of colonial society including the Reverend Samuel Marsden; and engaging in discussions as to the possibility of Maori working in Crown territories such as New South Wales.

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

61.12 In 1806, prior to the departure of their diplomatic party (including Te Pahi) from Sydney, the Governor arranged their return passage to New Zealand aboard the *Lady Nelson* and in addition presented Te Pahi with a large number of sows, boars, an inscribed silver medal, iron tools, fruit trees and all

the materials for a prefabricated 'English-style' wooden cottage.

61.13 During the return passage aboard the Crown ship in 1806, their rangatira, Te Pahi, become ill and was cared for by Mr George Bruce.

61.14 Upon the ship's arrival in Pewhairangi, Te Pahi invited Mr Bruce to stay on to live at Rangihoua.

61.15 Mr Bruce became a valuable asset for their people, acting as an interpreter in trade transactions with Crown ships and in an adoption of their tikanga under-went their practise of ta moko prior to being permitted to marry Atahoe, the daughter of their rangatira.

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

61.17 In 1808, following a series of events in which a number of persons of the Crown had mistreated Maori in Pewhairangi, their rangatira Te Pahi travelled aboard the *Commerce* to Port Jackson, NSW to see Kawana King. During the trip their rangatira became ill and despite the fact that Kawana King had returned to England, upon his arrival, Te Pahi was provided with a room to convalesce at the Crown's Government House.

61.18 In 1809, Ruatara embarked on his return journey to New Zealand from England. Due to his prior poor treatment on a series of commercial vessels, he became extremely ill. The Reverend Samuel Marsden and newly recruited missionaries Messrs William Hall and John King, took personal responsibility to care for Ruatara on this trip and upon arrival

in New South Wales hosted him at their Parramatta residence for 9 months.

61.19 In 1811, their whanaunga Ruatara is discovered abandoned on Norfolk Island by the Captain of the British ship, the *Ann,* and is given passage back to Port Jackson.

61.20 Upon arrival at Port Jackson, Ruatara, is again cared for by Reverend Samuel Marsden, as well as being given gifts and passage back to New Zealand in 1812. Prior to his departure Ruatara requests that the Crown provide a teacher to improve the ability of their people to read and write.

61.21 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:[13]

a Recognised the mana of their rangatira by requiring the consent of the same before any of their whanaunga could leave New Zealand on board a British ship; and

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

i ill-treated their people,

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

iii refused to pay wages owing to them; or

iv removed them from New Zealand without the consent of their rangatira and parents.

61.22 On 10 June 1814 the brig *Active*, (recently purchased by Crown appointed Chaplain of NSW, Rev. Samuel Marsden) anchored

[13] Refer: Crown Chronology, Wai 1040 #3.1.145(a) at 778

off their coast near Rangihoua pa carrying Messrs Kendall and Hall of the Church Mission Society of England. These people of the Crown were met by their tupuna Nganga, Te Uri O Kanae and Wharemokaikai and were taken ashore. The manuhiri passed over a gift of a steel mill and sieve 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'[14]

61.23 In late July 1814, in fulfilment of the aforementioned 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. By this time Marsden had been appointed to the Crown positions of Principal Chaplain, Principal Magistrate and Principal Agriculturalist of New South Wales, and they invited him to establish a settlement on their lands.

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[14] Robert McNab, *From Tasman to Marsden*, J Wilkie & Co, Dunedin, 1914, p.165

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

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

b invested their rangatira Ruatara, Korokoro and Hongi with the power and authority of the Crown to impose and enforce, the terms of the order;

c required all persons to whom the Order had reference to obey those rangatira so empowered;

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

e 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 rangatira to remove them from New Zealand;

f prohibited the landing or discharge of sailors in New Zealand without the permission of the rangatira of that locale and certification of such by the Resident Magistrate.

61.25 On 19 November 1814, their Rangatira and whanaunga, along with Reverend 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.

61.26 In the course of the trip their rangatira, via Ruatara, raised concerns with Reverend 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...'[15]

61.27 Reverend Marsden, in response to their concerns:

a explicitly told their rangatira, Ruatara, that he would '...never more think of holding intercourse with his country...' if he were to believe such statements;

b 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...'; and

c threatened to return immediately to Sydney should Ruatara hold any further doubts.

61.28 Following this undertaking, their rangatira requested that the ship and people of the Crown proceed to their pa forthwith.

61.29 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.

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

61.31 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:

61.32 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'.

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[15] Robert McNab, *op cit.*, p.171

61.33 Their rangatira, Ruatara, then explained his plans for the relationship with the Crown and the establishment of a settlement under he and Hongi's care.

61.34 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.

61.35 In the early part of 1815, prior to Reverend Marsden's departure, their rangatira Ruatara was approached to ask if some land across the Waitohoa stream at Hohi 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.

61.36 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.

61.37 On 24 February 1815, the people of the Crown presented their rangatira with 12 axes as a gift to reciprocate the land made available out of aroha. 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.

61.38 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 had been made a pupil teacher.

61.39 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.

61.40 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:

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

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

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

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

61.42 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:

a In 1832 the Waikapu block;
b In 1834 the Te Koutu block;
c In 1835 the Matapuratahi block;
d In 1836 the Tapuaiti block;
e In 1838 the Poukoura and Hawai Blocks; and
f In 1839 the Putanui block.

61.43 On or about 1830 (after 16 years of the people of the Crown living at Rangihoua), three of their tamariki were given as whangai to further consolidate the relationship between their hapu and the people of the Crown, being:

a Ewhora [sic], the daughter of their rangatira Ruatara, and his chief wife Rahu; granddaughter of their tohunga Raakau;

b Witirua [sic], the eldest daughter of their rangatira Wharepoaka; and

c Following the death of Whitirua [sic] in 1834, a second daughter of their rangatira Wharepoaka.

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

61.45 Busby brought with him an official letter dated 14 June 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 Ngapuhi 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."[16]

61.46 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.

61.47 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**"), which was notified and recognized by the Crown.

Recognizable Relationship of Mutuality

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

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[16] Crown Chronology, Wai 1040 #3.1.145(a) at 777

62.1 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; and audience with the King in England;

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 (including maize, wheat and potatoes);

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 station at Hohi and Te Puna;

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

vi electing and gazetting a trading flag for their vessels.

e fraternization, inter marriage and whangai of their tamariki to/ with people of the Crown;

f hosting people of the Crown on their lands;

g the provision of land for use by people of the Crown; and

h acceptance of the presence of the Crown's representative, British Resident James Busby.

Fiduciary Relationship essential to Crown Colonisation

63. We submit that it was the special nature of the Crown's relationship with our clients that ultimately enabled the Crown to instigate their policy of colonisation.

64. Indeed, it was as a direct consequence of the relationship with Ngati Torehina, that the Crown was able to 'scout out' the land and resources, develop the desire to expand its territories, and establish a permanent settlement in New Zealand, evidenced as follows:

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

a Granted Rev. Samuel Marsden 4 months leave from his various positions to visit our client's pa and kainga to help establish a settlement under the protection of their rangatira; and

b 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'.

64.2 On 17 November 1814, upon the instructions of Governor Macquarie, the Colonial Secretary, J T Campbell, wrote to Reverend Samuel Marsden (who simultaneously held the positions of Principal Chaplain, Principal Magistrate and Principal Agriculturalist of the Colony of New South Wales) appointing him, on an agency, to scope out and report back on the viability of New Zealand for settlement and requiring that he make an Official Report of his Voyage to His Excellency upon his return, directing 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.'[17]

65. We note that it was at this point that the request of our client's tupuna for a visit from Reverend Marsden assumed greater proportions.

Extent and Nature of Fiduciary Obligations

66. By 1 January 1840, the relationship of trust, confidence and mutuality between our clients and the Crown was such that, in our submission, the relationship could correctly be categorised as being fiduciary in both nature and extent.

67. We refer you to the decision in *Chirnside v Fay* [2004] 3 NZLR 637, which we submit clarifies that the legal principles of fiduciary obligations that are available and applicable to the facts of Ngati Torehina's case.

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[17] Robert McNab, *op cit.*, p.170

68. The Court of Appeal made the following illuminating comments in its decision:

> '... 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...'[18]
>
> '...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...'[19]
>
> '...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 at 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"...'[20]
>
> '...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...'[21]

69. The Court of Appeal then went on to adopt the dicta of Henry J in *Arklo Investments Ltd v McLean* [2000] 2 NZLR 1 which followed the

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[18] *Chirnside v Fay* [2004] 3 NZLR 637, 646 at 48.
[19] Op. cit at 50.
[20] Op cit, 647 at 51.
[21] Op. cit, 647 at 52.

dictum of Millett LJ (as he then was) in *Bristol and West Building Society v Motheu* (1998) CH1, 18, that:

> '... 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.'[22]

70. Submitted that materially, based on this conception of a fiduciary, such obligations were present and owed by the Crown to Maori prior to the making of *Te Tiriti.* And further, that such obligations were not, in our submission, the same as the 'analogous obligations' often quoted as arising from Lord Cooke's dicta in what is colloquially referred to as the 1987 *'Lands Case'*.[23]

71. Rather, the fiduciary obligations between our clients and the Crown transcended *Te Tiriti.*

72. In terms of legal effect, those pre-existing fiduciary obligations were enhanced by the *Te Tiriti*, and operated to inform the parameters of the transaction effected by its terms.

Breach of Fiduciary

73. The Proclamations, as an action of the Crown, amounted to a violation of those fiduciary obligations owed to our clients, on the basis that:

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[22] *Chirnside v Fay* [2004] 3 NZLR 637, 647 at 53.
[23] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641

73.1 The Proclamations were promulgated without reference to our clients:

a In being a "new thing" not hitherto contemplated, the Crown was required to confer with our clients (in compliance with the concomitant duty of good faith) prior to taking such actions.

b That the Crown did not do so, but rather chose to unilaterally make such Proclamations and breach their fiduciary obligations.

73.2 Second, and more importantly, the intended effect of the Proclamations was to do something, that the Crown hitherto, knew that it did not have the authority or the agreement to do, that is, to relinquish our client's Rule, which fundamentally was not affected by Te Tiriti, and displace and replace it wholly with its own; and

73.3 That by taking such actions, the Crown placed itself in a position that conflicted with its existing duty of loyalty (which had not been terminated) with our clients in relation to its objective of unilaterally controlling our client's country on its own terms.

SUBMISSION 3: THE JURISDICTION CREATED BY THE 1975 ACT IS A BREACH OF TE TIRITI

74. 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.

75. 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.

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

77. 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.

78. 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.

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

80. Our client's thus seek in interpreting the Act in this Inquiry, the Tribunal:

    80.1 'Have regard' to the (English) Treaty without attributing it any weight;

    80.2 Keep their inquisitorial and interpretative lens sharply focused on *Te Tiriti*; and

    80.3 Make a recommendation that the 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

81. It is, in our submission, worthwhile to briefly address the arguments made and evidence adduced by the Crown. We note our preliminary responses to their case, as follows.

Two versions of Te Tiriti:

82. The Crown's case starts from the presumption that there are two documents. 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*:

> '...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.'[24]

That sovereignty was ceded/ acquired

83. 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.'

84. 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:

84.1 Firstly, there is no word in *Te Tiriti*, used (in any operative way) to describe, define, or communicate what they alledge was being exchanged by the rangatira or given over to the Queen (i.e. sovereignty). We enlarge:

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[24] Hugh Te Kiri Rihari, Brief of Evidence, dated 3 June 2010, Wai 1040, #B13(a), para. 75

a 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. Further, the Crown maintains that a natural incidence of this was the ability or capacity for the Sovereign to protect the tino rangatiratanga and whenua of the rangatira.

b 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.

c With respect this assertion is a contrivance, unsupported by the facts, and designed to meet (what can only be viewed as) the Crown's aspirations.

d As noted by linguistic expert Patu Hohepa the Crown's attempt to manipulate the meaning of *kawanatanga*, is 'Humpty Dumpty-esque' and in the vein of Lewis Carroll's *Through the Looking Glass*:

> '...When I use a word it means exactly what I choose it to mean, no more, no less.'[25]

e Indeed, if sovereignty was to be displaced and replaced and both parties intended that to be the outcome, then logic, or at least common sense, demands that the written form of their agreement would have said that.

f It is a well established principle of rational interpretation that save for any extraneous evidence which could show a mistake or error (of which we submit there is none), the written words used are,

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

prima facie, conclusive evidence of their intended purpose and effect of the parties' agreement.[26]

g "Kawanatanga" was used because that was all that was principally intended by the rangatira and more importantly it is all that was accepted by the Crown.

h The evidence of our claimants is that *kawanatanga* is a lesser form of authority, and this being so, was able to be delegated to the Crown without disturbing the Rule, mana or sovereignties of the rangatira.[27] 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'[28]

i Further, as a matter of fact the Crown was already aware of the rangatira's understanding/use of phrases to describe their Rule; their 'tino rangatiratanga'. Indeed, throughout *He Whakaputanga* (1835) various words are used in Te reo Maori to denote the chiefly authorities of Ngapuhi rangatira. In each instance the

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[26] Refer to the following examples re the principle in action:

(I) 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.*";

(II) 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.*"

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

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

Rangatira carefully describe their Rule in terms of 'te kingitanga' and 'te mana'. They do not record the pronouncement of their absolute authority under the concept of 'kawanatanga'.

j 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-à-vis* Lord Glenelg in 1836) then once again Te Tiriti, and the rangatira, would have explicitly used those terms. Logically if those terms were not used, then 'sovereignty' was not therefore contemplated by its terms or its provisions. Indeed, for the Crown today to suggest it was is, with respect, mischievous.

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

l 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 the meaning of the claimants' language, as it did with Dr Parkinson.

m By doing so the Crown has implied that Ngapuhi are ignorant of their own language. Accordingly we submit that the Crown's case and evidence on this point ought to be disregarded, with the claimants' evidence being well preferred.

84.2 Second, 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) that 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:

a The Crown appears to assert, with misguided certainty, that Captain Hobson would, without doubt, have discussed sovereignty and the implications of 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."[29]

b The difficulty with this, is that the Crown is guilty of pure speculation. The observations of that period of 'negotiation' can only be described as extremely short and reveal no discussion of sovereignty. Indeed, in our submission the most revealing comment (by persons of the Crown) was that made by Colenso, prior to the actual signing of *Te Tiriti*, in which he vocalised his concerns that Maori might not understand the Treaty being proposed.[30] We submit this comment was made in reference to the Crown's aspiration of gaining sovereignty, as Captain Hobson responded that he had '...expended all means in order

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

to achieve full Maori comprehension.' As Claudia Orange makes 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.'[31]

c Colenso's apprehension was clearly not in relation to any misunderstanding of the articles in *Te Tiriti*, but rather that the Crown had not made clear what its true intent and aspiration as to sovereignty was.

d In that sense, Colenso provided the Crown with a very public opportunity - a last chance of correcting the situation, and of making a full and frank disclosure of their aspirations. Notably, Captain Hobson and then Busby instead opted to 'fudge' the matter, deferring to the opinion of the missionaries that '...all that needed to be done, had been done...' with the result that the assembled rangatira were none the wiser.

e 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.

f Although, the Crown's witnesses' have loyally postulated that it would be 'inconceivable' for a person such as Captain Hobson (in 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. Crown witnesses' have been unable to point to any fact that plainly and unequivocally evinces this from the records the negotiation that have

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[31] Claudia Orange, *The Treaty of Waitangi*, Allan & Unwin, Wellington, 1987, p.54

endured. This is, in our submission, because it did not happen and no amount of 'expert opinion' is able to change that fact.

g 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.'[32]

h 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.

i Before moving on from this point, we look to address the attempt by Professor Loveridge, for the Crown, to recast this argument using different language. He posits 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.[33]

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[32] Colenso's account of Rewa's speech, quoted in Dame Anne Salmond, Brief of Evidence dated 17 April 2010, Wai 1040, #A22, p.40

[33] Dr Donald Loveridge, *Summary/ Response*, dated September 2010, Wai 1040, #A18(a), p.37

j The argument of the Crown subsequent to this evidence, has been being that in discussing 'independence' the Rangatira were in fact considering the relinquishment of their Rule, their sovereignty.

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

i The records and accounts of the speeches made by the various rangatira on 5 February 1840 are about whether the Crown ought to be accepted as Governor and to what extent such a governorship would impact on their sovereign independence; and

ii That this is quite a different thing to asserting that the Rangatira had discussed, considered and debated the displacement and replacement of their sovereignties with the Crowns.

84.3 Thirdly, the only reasonable deduction that can be made from the facts of the *negotiation* of Te Tiriti is that a form of authority, less than our client's ultimate Rule, was what was at issue:

a 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;[34]

b 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);

c 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

d 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.

84.4 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 much more lengthy and rigorous process.

Contradiction

85. We therefore 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.[35] Instead, we submit that there is every contradiction, ultimately because the Crown's claimed authority is irreconcilable with the facts.

86. The Crown has effectively and unilaterally sought to reverse the roles intended and effected by *Te Tiriti.* The rangatira intended the Crown to be the delegatee or subordinate authority; however, by May 1840,

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[34] Hugh Te Kiri Rihari, *Brief of Evidence*, dated 3 June 2010, Wai 1040, #B13(a), paras. 65-70
[35] Refer: Opening submissions of the Crown, dated 13 October 2010, Wai 1040, #3.3.1

the Crown had taken the view that the rangatira were the delegatee or subordinate authority.

Reluctant Actor

87. The Crown also contends that it was a reluctant actor, and indeed was drawn to colonize New Zealand for humanitarian reasons rather than for anything else. Again, we submit that such a contention, at least to the extent that was the priority or prevailing motivation, is not supported by the facts. We enlarge:

87.1 The facts are that:

a The Crown (Queen Victoria) by her own hand commissioned Captain Hobson on 30 July 1839 to acquire any territories within the islands commonly called New Zealand that he could in Her sovereign name;[36]

b This was the first definitive Crown action toward certain 'colonisation' and annexation, and is the source of the power (even mandate) upon which Her officials subsequently rely and act upon in preparing and executing *Te Tiriti*. Notably in that commission there is no mention of either:

i humanitarian motives; or

ii native consent.

c The 'commission' is coloured by the simple truth that expansion of Her territories was the central focus and thus it is absolute in its objective: Acquire as much of their territory as you can.

[36] Notably, 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.

87.2 We submit that this principal goal of simply expanding Her territories was continued by Her officials:

a In his instructions of 14 August 1839, Lord Normanby first articulates to Captain Hobson that the reason for his commission is, as succinctly put in the 3rd paragraph of his lengthy directive, for the "*national advantage*".[37] This is said in the context of his reference to land and resources of New Zealand being in the economic interests of the Crown.

b In the third paragraph of those instructions Normanby reveals the main purpose of the Crown's objectives:

> "...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."[38]

87.3 These reasons are put "up front" in the instructions (and thus by logic they are the most important) factors driving the Crown's commission. Thus whilst Normanby's instructions do make mention of humanitarian considerations, it occurs much further through the bulk of his instructions and accordingly it can hardly be said to be the primary driver for annexation.

87.4 We submit that a fairer interpretation of such instructions is that at the 'nerve-centre' of the Crown, the thinking centred on the prospect of gaining further land and the resources.

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[37] Refer Lord Normanby's Instructions to Captain Hobson dated 14 August 1839 in Dr Loveridge's Document Bank, p.649

[38] Op. cit.

And, further that it was this imperative that underpinned the Crown's aspiration of displacing the existing sovereignties of Maori with Her own.

87.5 T L Buick in his 1914 work, *The Treaty of Waitangi* corroborates such a submission. The period leading up to *Te Tiriti* is marked, in Buick's summation, by the frenzy of land speculators in New Zealand who had been curbed from transacting such large land tracts in Australia by Governor Gipps[39]. He likens the time to a "gold rush" (only that it was land that being pursued) driven by a purely altruistic impulse, which he quite neatly called "the love of gain"[40].

87.6 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 that the drive of the Crown for economic expansion (as much as for that of empire) cannot be underestimated. Indeed, we submit that it was "gain" that was the primary motivation of the Crown, with every other reason being incidental to, or ancillary to that.

Dr McHugh's opinion:

88. The Crown confidently asserts that Te Tiriti was a valid instrument of cession of sovereignty, for the most part in reliance on the evidence of Dr Paul McHugh. For the reason that such an assertion runs counter to our clients' case, we are obliged to respond:

88.1 Notwithstanding Dr McHugh's legal argument, his thesis relies on the presence of certain facts. As we have previously submitted, neither Dr McHugh, nor Professors Ward or Loveridge, or Dr Parkinson, or indeed any other person, can change the facts.

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[39] T L Buick, *The Treaty of Waitangi or How New Zealand became a British Colony*, 1914, S & W Mackay Lambton Quay , pp.1-36, particularly pages 30-33.
[40] Ibid, p. 30.

88.2 In our submission, Dr McHugh's opinion is premised on a factual scenario in which the Rangatira allegedly consented to the displacement of their Rule and replacement of it with that of the Crown. The cohesiveness of Dr McHugh's entire argument is utterly reliant on this factual pre-requisite of 'rangatira consent'. However, (worryingly) he accepts that factual premise unreservedly; without question or further investigation despite the significant *korero tuku iho* given by Ngapuhi in this Inquiry to the contrary.

88.3 It is of even greater concern, that a similar approach of analysis is also often adopted by the Courts. For example, in his decision in the 1987 Court of Appeal 'Lands case',[41] Justice Richardson held that Crown sovereignty was *authoritatively established* by the Crown's gazetting of the acquisition of New Zealand in the London Gazette on 2 October 1840. With respect, he carried out only a meager analysis and there is, notably, an absence of any reference to the facts underlying the action of gazetting.

88.4 Without wanting to belabour the point, we emphasise that fact that the pre-requisite; the very factual premise of Dr McHugh's argument; has repeatedly been shown to be absent as at 6 February 1840. Indeed, even as at 31 December 1840, the Rangatira had not consented to the replacement of their Rule with that of the Crown.

88.5 Accordingly, on that simple, but very significant basis, we submit that the opinion of Dr McHugh is of questionable relevance and thus, limited application in this instance.

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[41] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, See also Crown Law position in the Whanganui inquiry, Crown Closing Submissions, Issue 1: Constitutional Issues 30 November 2009, Wai 903 #3.3.115, p. 2.

88.6 Cursorily, it would seem that Dr McHugh may have a contingency, 'Plan B' to his theory, which concludes: [42]

a That notwithstanding Rangatira consent or the lack thereof, the simple exercise of the Crown prerogatives in 'proclaiming' the New Zealand territory to be under the sovereignty of the Crown, would be sufficient in any case under English constitutional law; and

b That 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.

89. The depiction of the prerogatives in that way is based on the Crown's Eurocentric 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 tupuna is obvious and cannot hold true.

The matter of sovereignty being untouchable

90. The Crown also 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.

91. In our respectful submission, we once again beg to differ. We submit as follows:

91.1 You have established that the scope of your inquiry is effectively to 31 December 1840.

91.2 We submit that on the claimants case as presented to you that it is open to find that as at 1840 sovereignty was *neither* ceded nor acquired;

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[42] Dr Paul G McHugh, Brief of Evidence, dated 16 April 2010, Wai 1040 #A21.

91.3 The source or basis of the Crown's sovereignty appears to be a vexed question in any event. The learned authors, Wade and Bradley, in their text *Constitutional Law*, sum up the conundrum as:

> "Basis of sovereignty
>
> 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."[43]

91.4 Thus the source of the Crown's sovereignty appears to be ostensibly explained by reference to the 'murkiness of history which has been in more recent times embodied by a tacit acceptance of: "that's the way it is, since that's the way its always been". In our submission, a similar approach appears to be adopted by the Crown here.

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[43] ESC Wade and G Phillips, *Constitutional Law*, 8th Edition, 1970, Longman.

91.5 The Crown will have you believe that the facts as to Maori understanding; consent; and appropriate word usage in Te Tiriti are so 'murky' that at some point a 'clear line' has to be drawn from which to move forward.

91.6 Indeed, we submit that by using phrases such as "...the stuff of legend" academics such Dr McHugh add to this 'murky' mystery by advancing the proposition that it is a futile exercise to examine that mysterious place in which Crown sovereignty is sourced or based[44].

91.7 The Crown and its experts appear to resolve the 'murkiness' by identifying the making and issuing of the Proclamations of October of 1840 as a 'clear starting point' from which to recognize Crown Sovereignty.

91.8 With respect, Ngati Torehina ki Mataka do not accept that approach, or indeed that proposition:

a They do not accept that the facts are murky. They are clear, along with the other claimants of Ngapuhi, that as at 1840 their ancestors did not cede sovereignty. Their *korero* evidences as much.

b In the face of their evidence, they find it difficult to see why such 'mystery' is continued and indeed may begin to infer that the 'mystery' has been conjured up over time to conceal or further obfuscate the truth.

c Our clients are not prepared to accept, that 'sovereignty was ceded' in 1840, simply to find a politically expedient explanation for the situation that they find themselves in today. We emphasize, that in Stage 1 of this Inquiry, such 'conversation' falls

[44] Dr Paul G McHugh, Brief of Evidence, dated 16 April 2010, Wai 1040 #A21 and #A21(a)

outside the determined ambit of issues, and is more appropriate for another time.

Racial superiority

92. It is also material that the Crown and the people of the Crown in the time of *Te Tiriti* generally regarded Maori, in racial terms, as less than they were.

93. In much of the evidence of the 19th century Crown officials, including the likes of Lord Normanby and Captain Hobson, Maori are regarded as being uncivilized or under-civilized and their very existence effectively trivialized. A notable example of such being that the consent of the rangatira for cession of their sovereignty could even be propitiated by presents or other pecuniary arrangements.[45]

94. We submit that it is open to this Tribunal to find that the standard of conduct in the negotiations of *Te Tiriti* would be less than that expected when dealing with other white people because it was believe Maori were in effect inferior.

Fiduciary

95. As to fiduciary duty, we foresee that the Crown will defer to dicta of its contemporary Courts. In 2007 the Court of Appeal held:

> '...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

[45] Refer Lord Normanby's Instructions to Captain Hobson dated 14 August 1839, which state: '...If it should be necessary to propitiate their consent by presents or other pecuniary arrangements, you will be authorized to advance at once...' in Dr Loveridge's Document Bank, p.649

> 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."[46]

96. It is our submission, that this judgment does not exculpate the Crown from fiduciary duties owed to MAori. The Court's dicta relies on two premises which we submit are obviously "problematic":

96.1 Firstly, that there is a conflict inherent between the public as a whole and Maori; and

96.2 Secondly, that the Crown is not ultimately impartial.

97. We remain hopeful that this Tribunal will reconsider and distinguish the judgment of that court.

Who is the Crown?

98. From the outset, the people of Ngapuhi have repeatedly asked the Crown: '*Who are you?*'

99. In our submission, none of the answers given by the Crown have been satisfactory:

99.1 Sometimes it is the titular head, at others it is the legislature; the executive; the judiciary; so-and-so 'in right of' this; or so-in-so as 'an extension of' that.

99.2 There is little doubt that these artificial constructions - 'imagined realities' and 'separations of powers' of the Crown were as confounding for our client's tupuna as they are for our clients today.

100. It is important to emphasise that Crown 'agency' was an extremely blurry notion in early 19th Century New Zealand. Those 'on the frontier' were appointed to a variety of positions, with seemingly

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[46] *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318; [2007] NZAR 569 (CA), para. 81

conflicting duties, and as Crown expert, Dr Paul McHugh acknowledges, in the early days of the Crown's presence here, the separation of powers was "fused".[47] For example:

100.1 Revered Samuel Marsden, with whom Ngati Torehina nurtured an intimate relationship, was simultaneously an 'impartial' missionary, as well as the Crown appointed chaplain, principal agriculturalist and magistrate for New South Wales.

100.2 Indeed, unbeknownst to their tupuna, prior to setting sail to Te Puna in 1814, Marsden was directed by his Governor to scope out New Zealand for the purposes of a colony, and even when Ruatara openly questioned him as to whether he was motivated by 'gain', he gave every assurance to the contrary.[48]

101. Consequently, it is impossible to expect that Maori rangatira could determine and distinguish in what capacity the colonial 'agents' were acting.

102. In our submission, the agents were supposedly 'honourable' people representing the Crown, and Maori entered *Te Tiriti* in reliance on their assurances. Therefore, the Crown must be held to account.

Final comments

103. The Crown's case, albeit shrouded in polite diplomacy, is (in effect):

103.1 That the history told by the claimants and asserted by them as true, is wrong.

104. With respect to our learned friends, that response is as demeaning as it is insulting. We submit that the Crown's contentions are fabrications and contrivances designed to conceal away the truth and to achieve the Crown's own ends.

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[47] Response of Dr Paul McHugh to Written Questions, dated 26 November 2010, p.16
[48] Robert McNab, *From Tasman to Marsden,* Wilkie & Co, Dunedin, 1914, pp.168-170

CONCLUDING REMARKS

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

106. 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.

107. 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;* and support a meaningful and inclusive dialogue of reconciliation.

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

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

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

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

108.4 In an ultimate act of disrespect, 'instruct' Maori as to 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).

109. 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 FINDINGS SOUGHT

110. We urge the Tribunal to have the courage to find the facts and reveal the truths, that:

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

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

Dated this 28th day of January 2011

John Pera Kahukiwa/ Georgia Kate Bates
Counsel for the claimants