OFFICIAL

IN THE WAITANGI TRIBUNAL

IN THE MATTER OF	THE TREATY OF WAITANGI ACT 1975
AND	
IN THE MATTER OF	TE PAPARAHI O TE RAKI (NORTHLAND INQUIRY)

RESPONSE OF DR PAUL MCHUGH TO WRITTEN QUESTIONS

Dated 26 November 2010

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Response to questions filed by Mr Hirschfeld and Afeaki (#3.1.364)

Question

[1] *Dr McHugh, on page 73 of your main brief of evidence at paragraph 135 you quote Louis Chamerovzo and in particular his book the New Zealand Question and the Rights of Aborigines published in London in 1848; then on page 74 you use the phrase 'the Maori tribes had enjoyed statehood.*[1] *That Maori enjoyed statehood, is highlighted in a passage from the Appendix to the New Zealand Question in the Pillmore opinion on page 3 of that Appendix*

> *The [British Crown] elevated the chiefs to the rank and condition of a sovereign power and thus by treating and acknowledging them and their tribes as component parts of a separate and independent state they placed them on a known position in the great commonwealth of independent states.'*

[2] *You would agree, would you not, that Maori not only had statehood but also that Maori enjoyed a British recognised statehood at least since recognition by William IV in 1831 (this being in line with the Phillmore opinion on Maori statehood quoted above)?*

Response

I would agree that decision-making within the Colonial Office was premised on the basis that New Zealand was an independent country to the extent that the Crown could not unilaterally erect an *imperium* in the islands. There were signs during the mid-1830s of British willingness to probe the nature of that independence but that tentative and exploratory disposition had disappeared by 1839. Nonetheless Maori consent to any British *imperium* was regarded as necessary, and to that extent certainly there was recognition of Maori independence.

Question

[3] *From the Wollmer opinion from the Appendix to the New Zealand Question (page 28 of the Appendix) do you agree that Maori statehood was independent statehood and that this independence was acknowledged in the 'solemn declaration of King William IV that New Zealand was an independent state'?*

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1 The whole sentence reads: "The Maori tribes had enjoyed statehood despite "certain theorists of over—diluted political sensibility, "who argued contrariwise in "eagerness to promote the advancement of the interests of the civilised nations" at cost to "the natural rights aborigines."

Response

See my answer above. One cannot make any further statement on the official British position towards Maori capacity that is historically accurate because the willingness to explore the consequences of the acknowledgement of Maori independence was overtaken by the force of events, including the *Harriet* incident.

The Harriet Incident

Question

[4] This question deals with the Harriet incident which is referred to in paragraph 66 on page 38 of your main brief of evidence. In your brief of evidence you say 'The ship [Harriet] was wrecked off the Taranaki Coast of the Western North Island, those on board reaching shore where Maori attacked them'.

[5] Would you agree that when the matter (in its totality) was inquired into by the House of Commons Select Committee on Aborigines[2] in 1837, that in fact, the crew and others who were wrecked on Cape Egmont on the 29th of April 1833 were in actuality on the beach for eight days before any incident arose in connection with Maori of the area?

Response

See below.

Question

[6] The Harriet incident was treated with some degree of gravity by the said select committee: do you agree with that?

Response

See below.

Question

[7] You are aware that in September 1834 Governor Richard Bourke of New South Wales dispatched Captain George Lambert of HMS Alligator with a detachment of the Fiftieth Regiment under Captain Johnson to New Zealand on a rescue mission to retrieve relatives of the Harriet's captain (being his wife and child) and other crew held captive for a ransom. Was that dispatch of HMS Alligator and troops authorised by London?

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2 The House of Commons Select Committee on Aborigines (SCOA) began its hearings in 1836. Its chairman was Sir Thomas Powell Buxton, Parliamentary champion of the humanitarian movement that was then at the height of its influence.

Response

See below.

Question

[8] *If yes, by whom? If not why not?*

[9] *The captives were retrieved only after a series of punitive actions in which Maori lives were lost and settlements destroyed, actions which were subsequently criticised by William Marshall, Alligators assistant surgeon in a published an account of the episode in 1836. The actions of HMS Alligator (and therefore the British Crown) in the bombardment of the two pah sites exceeded the contingencies of rescue and technically constituted an act of war by one sovereign nation (Great Britain) against another (New Zealand) the former having already recognised the latter as having a 'known position in the great commonwealth of independent states.'*

Response

See below.

Question

[10] *It is correct, is it not that:*

a. *The actions of HMS Alligator (and therefore the British Crown) in the bombardment of the two pah sites exceeded the contingencies of rescue? and*

b. *Technically this excessive action constituted an act of war by one sovereign nation (Great Britain) against another (New Zealand)?*

Response

The *Harriet* incident occasioned concern in the United Kingdom not least within official circles in London, Parliamentary ones included. The incident demonstrated the issues that concerned London authorities about the absence of any effective means of law and order in the New Zealand islands. In London, various quarters viewed the incident differently and it is simplistic to characterize the incident as a sovereign vs sovereign encounter: For the British authorities (on whose position my evidence was focused) the incident, whatever the detailed rights and wrongs, and no doubt the response was heavy-handed, highlighted the fundamental problem of disorder and the need for formal steps to be taken to establish lawful

authority within the islands. The question that increasingly concerned the Colonial Office was that of how such authority was to be established. The *Harriet* incident was part of a series of events through which the British became convinced that the Maori legal systems could not be deployed to ensure sufficient order (as for example the native courts were then being used in the East Indies).

Question

[11] The conclusion of the select committee was that Harriet incident and the so called rescue had occasioned a great sacrifice of life and that it had been fatal to many innocent Maori (savages in the parlance of the committee). Is that fair comment?

Response

The *Harriet* incident, including the issues of the proportionality of the British response and the tendentious nature of the evidence presented to the Select Committee by the evangelicals, has been the subject of academic enquiry. As representative I invite counsel to consider the informative article written by Jane Samson (available online, for convenience, at http://www.cnrs-scrn.org/northern_mariner/vol03/tnm_3_4_37-47.pdf).

Question

[12] Is it correct that in 1837, the select committee's final report demanded a reappraisal of the Royal Navy's role in the south Pacific and if that is correct what was that nature of the reappraisal demanded?

Response

See above. The Select Committee observed of this incident:

> "The impression left with that tribe of savages must have been one of extreme dread of our power, accompanied with one of deep indignation. The Committee cannot refrain from expressing their regret at this transaction; because it occasioned a great sacrifice of life; because it may be fatal to many innocent persons; and because it seems calculated to obstruct those measures of benevolence with the Legislature designs to native and barbarous tribes."[3]

This indicates that the Select Committee's primary concern was with the episode's potential compromising of the effectiveness of any eventual

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3 Great Britain, Parliament, House of Commons, *Parliamentary Papers [BPP]*, "Report from the Select Committee on Aborigines (British Settlements)" VII (London, 1837), 22.

'measures of benevolence' – the statute protecting the rights of Aborigines – that it hoped the British Parliament would (but did not) legislate. As my evidence indicated, the evangelicals' idea of Maori 'independence' was devised more as a way of ensuring their own monopoly of contact and the exclusion of the would-be non-missionary settlers who would disrupt their Christianising programme. The evangelical aboriginal protection organizations' respect for Maori 'independence' ebbed when that suited their own designs and flowed when it came to resisting their Anglo competitors for ascendancy and priviliged Crown-affirmed status in dealing with Maori.

Question

[13] Do you agree, Dr. McHugh, that the Harriet incident exposed the contradiction of British intentions where on the one hand escaped convicts could operate in New Zealand with impunity without the prospect of arrest but yet on the other hand when Maori appeared to impose themselves upon European sensibilities the British simply took steps of violent retribution?

Response

As the above passage from the Select Committee indicates, the British regarded the *Harriet* incident as emblematic of the mounting problems of lawlessness and disorder within the New Zealand islands, in which British subjects as well as Maori, with innocent parties on both sides, were implicated. It spoke of the need to do something.

Protectorate

Question

[14] In my viva voce question to you Dr. McHugh we talked briefly about Hawaii being a British protectorate from 1793. The protectorate status that was granted to Hawaii was in effect at least some protection from a British point of view of Hawaiian sovereignty, do you agree with that?

Response

It is important to remember that the protectorate did not develop as a primary instrument in the toolbox of Euro-imperial practice until the mid to late nineteenth century. As a device the protectorate was less concerned with or devised in order to protect local sovereignty, as the above question

implies, than to delineate zones in inter-European imperial rivalry. Whilst the 'protection' of local sovereignty was a collateral outcome, and part of the ostensible justification for such regimes (especially as they developed in the later nineteenth century), they were never the primary objective in the *realpolitik* of imperial competition.

Question

[15] *If that were so and there was originally no consent to the erection of imperial?, in New Zealand, the proper stance of the British from 1835 onwards should have been to protect Maori sovereignty (say in terms of a protectorate), is that right?*

Response

See above. In the late 1830s the more relevant 'protection' arrangements would have been those arranged with the East Indian princely states but these were a consequence of the unique position of the East India Company and inevitably resulted in 'creeping' sovereignty for British authorities.[4] My evidence referred also to James Stephen's perception of Marshall cases on the status of the independent Indian tribes under a form of 'protection' as 'domestic dependent nations.' To the extent that the protectorate was ever 'on the table' in London as a policy option during the late 1830s, it would have been discounted as an option less rather than more likely to facilitate the lawful protection of Maori. By 1839 the Colonial Office was clear that British subjecthood would provide the best legal protection for Maori. Even as it developed as a regime accepted by British imperial practice in the late nineteenth century – and according to the principles set out in *R v Crewe; ex parte Sekgome*, [1910] 2 KB 576 – a protectorate would have licensed British dealings with Maori on the basis of continuous non-justiciable 'acts of state.' Thus even applying the protectorate anachronistically to a setting where it was never in contemplation, its notional application would have generated less rather than more legal protection for Maori. The idea that the protectorate, at any stage of its legal development, would have better suited Maori is illusory: As James Stephen intimated, an arrangement of such a type would have exposed Maori to what would be seen today as a vastly less sympathetic

4 See the extended discussion in McHugh, *Aboriginal Societies and the Common Law* (Oxford: Oxford University Press, 2004) chapter 2.

legal regime than the subjecthood they acquired with British sovereignty. There has been in recent years the persistent suggestion that a protectorate could and should have been selected as the model of British relations with Maori in the late 1830s. Apart from being poorly historicized, the suggestion shows a lack of comprehension of how such a regime would have situated Maori as a matter of law. Legally, they would have been worse off under such a regime.

He Whakaputanga

Question

[16] On the Whakaputanga itself Dr. McHugh you are aware are you not that Colenso printed copies of the Declaration of independence in March 1836?

Response

See below.

Question

[17] Are you aware that apart from a printed copy being sent to the Colonial Office and being received there in May 1836 other printed copies in English were sent to Hawaii and Tahiti as well as New South Wales?

Response

See below.

Question

[18] You would agree with the proposition would you not that the distribution of copies of the Whakaputanga especially to Hawaii indicates an enjoyment of statehood for Maori since it announced its independence in some form and internationally?

Response

It should be noted that the announcement to which counsel refers in the question was printed by British figures and circulated in English. This is more consistent with the goal of warning off other would-be imperial powers and the missionaries aim of maintaining exclusive deaings with Maori than a recognition of Maori statehood in the sense that counsel suggests.

Question

[19] You would agree Dr. McHugh that in the 1830s northern Maori was going through a process of modernisation both politically and economically?

Response

Yes.

Question

[20] The Declaration you write (your main brief paragraph 164 at page 94) 'was an outcome of Busby's commitment to collectivise confederate sovereignty'; an Anglo-legal point of view (of the time, the 1830s) would be that Maori who signed the Declaration between 1835 and 1839 were committed to collective confederative sovereignty because they signed the Declaration to that effect. Do you disagree with that proposition?

Response

I am not in a position, nor would ever claim to be, to provide an answer as to what Maori tribes thought or how they would have regarded accession to the Declaration. This is a matter of internal Maori history. I am not a scholar of Maori history professing expertise on Maori sources.

Question

[21] It is a fair inference to draw is it not that Maori Rangatira continued to sign the declaration between 1836 and 1839 (after initial signing in 1835) on the basis of its contents in Maori; any other inference is illogical. Do you disagree with that proposition?

Response

See preceding answer.

Question

[22] Bearing in mind the initial alacrity with which the Declaration was received (your main brief paragraph 71 at page 40) by the Governor of New South Wales, the Colonial Office in London and King William IV, Maori were never later disabused to the contrary by British officials that their Declaration was by 1838 anything other than what it had been acknowledged by British officials in the first place to be. That is what you mean when you say 'The British never disowned it [The Declaration] officially' is that correct?

Response

Counsel will be aware that the Congress of United Tribes is referred to in the English version of the Treaty of Waitangi (which in Brtish official' eyes superceded any residual effect the Declaration might notionally have been regarded as retaining).

Question

[23] It is not wrong therefore, would you agree Dr. McHugh, that it was cynical then that the British never disowned the Declaration officially but were prepared to regard the Declaration as useable for the cession of sovereignty if Maori still believed in the Declaration. This amounts to conduct of less than good faith on the part of the British Crown. Do you disagree with that?

Response

British officials believed they were acting solicitously towards Maori in obtaining their agreement to Crown sovereignty. The frequent avowals to that effect as also steps taken to obtain Maori consent by the constellation of officials and draftees involved were not the statements or action of men who believed they were engaged in a cynical exercise in bad faith or less than good faith.

Question

[24] This is a fair proposition is it not Dr. McHugh; Maori were not really given time to 'grow' their constitutional arrangements the first part of which the Whakaputanga was but a first step in what might have been a journey of decades, similar to say what happened in Tonga. Is that fair comment?

Response

The question requires speculation not historical analysis.

Concluding Discussion

Question

[25] Dr McHugh these propositions are correct are they not?

Question

a. A Maori nation state existed at least between 1835-1840;

Response

My evidence addressed the nature of British recognition of Maori juridical capacity. It is important to historicise and contextualise that inquiry. The above statement, and the following statements, do neither.

Question

b. That Maori nation state was independent;

Response

One cannot speak singularly of a 'Maori nation state' as British approaches were premised upon Maori independence that had the inchoate potential for 'statehood' but which did not materialise, especially in the fractious aftermath of He Whakaputanga. That unrealised potential might have been composite and tribalised, or confderate; butin any even what indpendence the British recognised as being there ws sufficient as to be capable of a grant of *imperium.*

Question

c. The Maori nation state possessed sovereignty;

Response

"Sovereignty' is a human concept and as such lives in time and has meaning in context. Just as one cannot speak simplistically of a 'Maori nation state' one cannot speak simplistically of 'sovereignty' as though it were an enduring and stable concept. To the extent one can apply it to the New Zealand setting of the late 1830s it can mean no more than that the British recognised the juridical capacity of Maori to endorse Crown *imperium.*

Question

d. That sovereignty was formally recognised by the British as early as 1831 and as late as 1836;

Response

See above. The British were prepared to see that independence put on a fuller basis but events showed the impossibility of that option; so the only route that they saw as possible was the establishment of rights of territorial sovereignty in the island. Initially that was conceived on the lines of 'factory' towns with such sovereign title over parts rather than the entirety.

Question

e. *From an Anglo-legal point of view contemporaneous with the time (the 1830s) what was recognised by British officials as making manifest the Maori nation state were such matters as (Maori) exclusive territorial jurisdiction (in New Zealand), flag recognition internationally or at least throughout the British Empire, and the ship's register;*

Response

Those steps were emblematic of the British willingness to work through Maori independence, a route not unlike that taken with the Indian princely states in the East Indies (via the East India Company). However events in the late 1830s convinced British authorities that enlarging that potential represented an unrealistic and discredited route and that the better lawful protection of Maori, as well as British interests, necessitated the acquisition (with Maori consent) of British sovereignty.

Question

f. *You cannot say that Maori sovereignty did not survive the Treaty despite the British believing that it did not.*

Response

This sentence contains a triple negative and is impossible to understand grammatically.

Question

g. *Two sovereignties, even from an Anglo-legal point of view can exist side by side, and the federal-state divide is but one example of dual sovereignty existing at the same time in the same territory.*

Response

A federal arrangement, at least as it would have been understood in the 1840s, was seen as dividing a single sovereignty rather than collocating two or more separate sovereignties (as, one infers, counsel is suggesting). A federal state (such as Canada became in 1867) entailed the constitutional division of powers between federal and state legislatures – a federal Crown and state (or, in Canada) provincial ones. Whilst there was a very intense interest in Anglo-American political thought during the 1830s on the nature of federal government there was never any suggestion such a model might be tried in New Zealand.

Response to questions filed by Mr Kahukiwa and Ms Bates (#3.1.374)

Consent

Question

1. *Assuming for a moment that `a consent' to something at 1840 was given by the Chiefs of New Zealand via Te Tiriti:*

   1.1 Is it your position that such a consent to whatever was irrevocable?

   1.2 If yes, what evidence do you rely on for considering the Chiefs consent as irrevocable?

Response

My position is that to the extent British officials turned their mind towards the matter, they would have regarded Maori consent as irrevocable, just as they would have considered Crown consent to be irrevocable. The revocability for either party of the agreement reached at Waitangi and later acceded to by other tribal signatories was not a matter that occupied official attention.

Question

2. *In your view, did officials consider the Crown's consent, again to whatever by Te Tiriti was also irrevocable? And what do you rely on for your answer, with reference to the effect (or not) of the Crown's prerogatives?*

Response

As indicated and in response to the first question above, to the extent that official attention would have considered the matter – and there is no evidence that I have seen to indicate offical attention was turned to this point , Crown consent would also have been regarded as irrevocable. Indeed, there is a generally understood, though largely untested, proposition of English law that the Crown can only cede its own territory (and thereby divest the population of British subjecthood) by Act of Parliament. There is no prerogative capacity to cede away British territory.

The second part of the question makes no sense. Counsel does not indicate the particular Crown prerogative power of which they are inquiring. It is elementary that the prerogative comprises a series of powers recognized by the common law as vested in the Crown and that each of these is subject to the particular construction given it by the common law, which construction

itself has to be situated historically. Important prerogative powers have evolved over time, as for example the constituent power explained in the famous case of *Campbell v Hall* (1774).

Question

3. *What evidence is there that the following was disclosed by officials to the Chiefs on the 5th and 6th of February 1840 at Waitangi?:*

3.1 Crown's prerogatives;

Response

See above. Which prerogatives is counsel referring to?

Question

3.2 Acts of State;

Response

It is elementary that the Crown can commit no 'act of state' against its own subjects: *Entick v Carrington* (1765). By becoming British subjects Maori became protected by this principle. To have explained the 'act of state' rule to them would therefore have been superfluous, since it was a doctrine rendered inapplicable by their entering into the Treaty. Of course, Chief Justice Prendergast famously held otherwise in *Wi Parata v Bishop of Wellington* (1877) a position that is now regarded as legally indefensible. (and which my evidence certainly did **not** seek to defend).

Question

3.3 Crown constitutional principles;

Response

To what particular constitutional principles is counsel referring? There is a vast constellation of principles in the present and as they existed in British legal thought at a particular moment in time (i.e British constitutional history). The Crown has always been the key organizing notion of British constitutional thought and practice, as it has evolved through the centuries.

Question

3.4 Various aspects of the Crown, in terms of who exactly the Chiefs were dealing with (eg titular head, executive, parliament); and

Response

The chiefs dealt with Captain Hobson who had been commissioned as Consul to enter into treaty relations with them. He presented himself on that basis to the chiefs. In the Crown colony form there was weak separation of powers, with the executive and legislative functions fused. In indicating his intention to govern Maori in a beneficent manner and being himself aware of the constitutional form that would facilitate that, he plainly felt no need to explain to Maori the distinction between purely executive and legislative forms of governance.

Question

3.5 Imperium.

Response

The term *imperium* refers to rights of governance (the erection of forms of executive, legislative and judicial bodies) erected under royal warrant. Maori consented to this step.

Question

4. If there is an absence of such disclosure, (and a follow up meeting), would you accept that, given the circumstances as we know them to be, that there is a case to say that:

4.1 Hobson, by omission, misled the Chiefs?;

4.2 That there was a deception of the Chiefs?

Response

British officials believed they acted with great solicitude towards Maori and went to careful lengths to ensure their consent was obtained to British sovereignty. I have seen no evidence to indicate these officials and the draftees believed they were deceiving or misleading the chiefs. Indeed, the evidence strongly indicates their belief that they were acting in good faith and with concern for Maori interests.

Question

5. *If there is an absence of say adequate consent to the ceding of sovereignty, would you accept that, as a matter of general constitutional principle, and given the circumstances as we know them to be, that there is a case to say that:*

   5.1 *Hobson misled his superiors? (by, for instance, reporting back on the 17 February 1840 that his efforts were able to be relied on when he said:- "I have obtained the almost unanimous assent of the Chiefs" and "I considered on the conclusion of the Treaty of Waitangi the sovereignty of Her Majesty over the northern districts was complete.", when in fact the results at best were ambiguous?); and*

   5.2 *The May 1840 Proclamations would be a usurpation of the Chiefs authorities?*

Response

There was not, in British eyes, an absence of adequate consent. Given that belief, any attempt to respond to those questions would be speculative. I am not in a position to answer what the position would have been had there been a different set of facts or belief to that which plainly existed.

Territorial Exclusive Sovereignty

Question

6. *Turning to Joseph Chitty (Jun. Esq.), 'A Treatise on the Law of the Prerogatives of the Crown and the relative duties and rights of the subject' London, 1820, page 30 (refer attached extract marked "A") Chitty states as follows:*

> *'If an uninhabited country be discovered and peopled by English subjects,* ***they are supposed to possess themselves of it for the benefit of their Sovereign****, and such of the English laws then in force, as are applicable and necessary to their situation, and the condition of an infant colony; as for instance, laws for the protection of their persons and property, are immediately in force. Wherever an Englishman goes he carries with him as much of English law and liberty as the nature of his situation will allow.'?*
>
> *(Our emphasis added)*

7. As to that passage:

7.1 Since you rely on Chitty for your contribution in this inquiry, are you in turn relaying the proposition that English adventurers and emigrants were a sort of agency (or de facto agents) of Crown territorial expansion?

Response

I refer counsel to the discussion of the constitutional status of colonies in my evidence. Chitty above adverts to the nature of 'settled' colonies (drawing on a phrase associated with *Blankard v Galdy* (1796) and a well-known Law Officers opinion of 1720. He is discussing the character of the law that is to be applied within communities of English people abroad. I refer counsel to my article "The common law status of colonies and aboriginal 'rights': how lawyers and historians treat the past" (1998), 61(2) *Saskatchewan Law Review* 393 – 429 which deals with this question comprehensively.

Question

7.2 The principle of Discovery' seems to legitimate the possibility of the unbridled expansion of Empire by way of Her subjects travels, in that the Crown could by such exploits simply exercise the prerogative and assume Her sovereignty over them and all that they were possessed of. Do you agree?

Response

As my evidence made plain, the Crown disavowed any claim to sovereign title over New Zealand by right of discovery.

Question

7.3 Would you accept that this proposition of Chitty is convenient to and self-serving of a Crown interest that desires territorial expansion?

Response

I do not accept the conclusion 7.3 above. Chitty is talking about the laws that govern the relations of English communities abroad in their relations *inter se*. Conclusion 7.3 misapprehends what he is talking about.

Question

8. *Looking now to the second sentence of this extract: '...Wherever an Englishman goes he carries with him as much of English law and liberty as the nature of his situation will allow.: Would you accept that as a matter of both fact and law that the existence of another legal system in the other country would nonetheless and fundamentally "trump" the English man's presumed right to carry and exercise the laws of his homeland, and, notwithstanding the exercise by the Crown of Her prerogatives?*

Response

I refer counsel to my evidence on the common law status of colonies and, again to my article "The common law status of colonies and aboriginal 'rights': how lawyers and historians treat the past" (1998), 61(2) *Saskatchewan Law Review* 393 – 429.

Imperium:

Question

9. *At paragraph 139 of your Report you refer to Native Exemption Ordinance made on 16 July 1844, a copy of which is appended hereto and marked "B". We ask as follows:*

9.1 This Ordinance was repealed on 7 November 1846, with this change coming into effect on 1 May 1847. Whatever point you are making by reference to this Ordinance, it can hardly be said that its time in existence was for very long? Instead it's fairer to say, isn't it, that its time in existence was for a more limited period?

9.2 You refer to this 1844 Ordinance as an example of the imperium's (or Crown's) recognition of Maori customs which continued so long as they were not repugnant to universal laws of morality (eg cannibalism), don't you?

9.3 If you agree to the previous question, we ask you further in particular as follows:

(a) Is the 1844 Ordinance evidence that Maori control of Maori was in existence at the time it was enacted?

(b) Was the enactment of this Ordinance a unilateral Crown action?

(c) Does the 1844 Ordinance basically look to manage and administer the imposition of a criminal code infra Maori relating to property rights?

(d) It says, in effect in the preamble, that it is intended to replace Maori relations and dealings amongst themselves (as to property) with the laws and customs of England?

(e) In that regard it is intended to be regulatory of Maori property rights, but more importantly, by way of displacement/replacement, isn't it?

(f) Conversely, it can't fairly be said can it, that this Ordinance has anything to with universal laws of morality, in that it is about English concepts of property, its transaction, lawful possession etc?

Response

My reference to the Native Exemption Ordinance was used as illustrative of the principle that the British were in princiople prepared to recognize and facilitate the continuity of Maori customary law. My evidence did not otherwise explore the detail of the Ordinance or embark upon an inquiry into its administration, longevity or capaciousness.

Question

9.4 In the making of Te Tiriti, what evidence, what fact or facts, can you point to during the 5th and 6th February 1840, where the resounding intention of the Chiefs as conveyed to Hobson was to displace/replace their property code, the one they were operating amongst themselves for some hundreds of years, with that of England?

Response

Presumably counsel is referring to the transformation of Maori customary title into individualized tenancy-in-common under the aegis of the Maori Land Court from 1865 onwards, because that represents the 'displacing' and/or 'replacing' legal regime that supplanted their customary system with a new one. Maori customary tenure continued until that time when a calculated attempt was made to transform it. Hobson, in negotiating the

Treaty in 1840, could hardly be taken to have known of a system of tenure to be introduced by a settler legislature twenty-five years later.

Question

9.5 Turning back to the time period in which this Ordinance was in existence, it would follow by the Crowns repeal of it that either:

(a) The Crown recognised the province of the Chiefs and reverted to the situation of 1840; or

(b) That the Crown intended that the Chiefs no longer had any role in the administration of the property code amongst their people, and that their displacement was complete?

Of those 2 alternatives which do you prefer and why? If your election is (ii), how do you reconcile that with the Chiefs exercise of their tino rangatiratanga as per Te Tiriti?

Response

I prefer neither alternative.

Question

9.6 The 1844 Ordinance incentivises the Chiefs to turn their own people over to the Police, for allegations of English property transgressions, in return for money?

Response

To repeat, my evidence refers to the Ordinance as indicative of British willingness to recognize the continuity of Maori customary law under British sovereignty and steps taken to that effect. My evidence is directed towards the recognition of that principle and NOT to the effectiveness of such recognition.

Question

9.7 If you agree with the previous statement, we ask further:

(a) This then suggests that there was resistance by Maori to the administration of such a code doesn't it?

Response

See above. I do not agree with that statement which asks me to discuss aspects of the Ordinance that were not raised by my evidence.

Question

(b) And, its possible isn't it that a reason for this is because of Te Tiriti, the Chiefs and Maori did not consider that as between themselves they were the subject of such a code?

(c) It also suggests doesn't it that the 1844 Ordinance was put up as a method to "buy" with pound notes the acquiescence of the Chiefs (and their subjects) to the effective imposition of and displacement by such a code of their own systems?

Response

I cannot usefully comment on those statements as they lie outside the scope of my evidence and invite speculation.

Question

9.8 Would you accept that if Te Tiriti affirmed (by agreement) the situation of the Chiefs continuing their own property code amongst themselves, that this Ordinance, as a unilateral Crown action, would be an over-reach of that agreement?

Response

To repeat, the Ordinance was an example of Crown recognition of Maori customary law very soon after its establishment of sovereignty. My evidence does not analyse the Ordinance further than than as an early example of such recognition.

Question

9.9 Finally:

(a) In the round, therefore, its fair to say isn't it that the 1844 Ordinance is not a great example of what you say it is?

(b) In fact it is a better example isn't it of the claimants case that Te Tiriti signified not the acquiescence by the Crown of sovereignty,

but the Chiefs continuation, without interruption, of their mama and tino rangatiratanga as they had always done?

Response

See above.

Response to question filed by Mr Watkins (#3.1.381)

Question

I would like to ask a question of you in relation to the issue of free and intelligent consent. In your appearance as a witness in the week four hearings the issue of intelligent consent arose in the cross -examination. You made it clear that Stephens instructions to Hobson was that he was to obtain free and intelligent consent of the Chiefs to the cession of sovereignty. You also said that after Hobson had completed the process of gathering signatures he reported to the Colonial Office that he had succeded in carrying out his instructions — had obtained the Chiefs free and intelligent consent to cession of soverengty by treaty.

If I remember it correctly, you said in giving your evidence that once Stephens had received this report and because this report was coming from and ex- navy man of impecable character that he accepted the report without question, and as far as the Colonial Office were concerned and therefore the British Government, thee process of cession of soverengty of New Zealand to Queen Victoria was complete. I put it to you that Governor Hobson did not obtain the free and intelligent consent of the Chiefs (although he may have honestly believed that he did). No matter what might be said about his honourable character and no one seems to dispute that he nonetheless being ex-navy had a mind set of Queen and Country first. That in its self would have allowed him to convince himself that what he was claiming was correct even though he knew there were Chiefs who had signed Te Tiriti that were unclear or confussed as to the meaning of Te Tiriti / The Treaty. Examples of these people would include Hone Heke. (Paragraph 257 of your main brief and others). Hone Heke was a chief who was an astute highly respected politically awaire and politically minded person and therefore the inference that is to be drawn is that if he was struggling with the meaning of Te Tiriti then there would have been a lot of other Rangatira in the same situation. Would you like to make a comment on this?

Response

I presume counsel is referring to James Stephen, Under-Secretary to the Colonial Office at the time the Treaty was concluded. I believe my evidence sets out fully the grounds for the belief in London that the full consent of Maori had been obtained to the Crown's sovereignty over New Zealand. I am not in a position to comment upon inferences that might be

drawn from cultural evidence as to the Maori comprehension of events. My evidence related to the official perception of the character of Maori consent.