

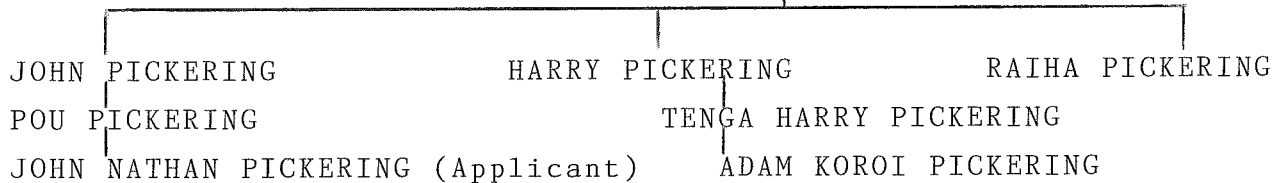
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To the Registrar
Waitangi Tribunal
Tribunals Division
Justice Department
Private Bag
WELLINGTON

OFFICIAL #11

1. APPLICANTS. We, John Nathan Pickering, Proof Reader of Porirua, and Adam Koroi Pickering of Wekaweka Valley, Hokianga, Retired Farmer, C/- Shona Stent, Barrister & Solicitor, Tawa, make this application. We belong to the Te Aupouri, Te Rarawa, and Ngapuhi tribes and make this application on behalf of descendants of our tipuna Rihi Moe Ngaherehere (daughter of Moe Ngaherehere late of Omanaia, Hokianga, who signed the Treaty of Waitangi) and her husband William Nathan Pickering. Our hapu in this matter is Ngai Tupoto of Ngapuhi and our lineage in relation to the land involved is:-

RAHIRI
 KAHARAU
 TAURAPOHO
 TUPOTO
 MIRUITI
 TUATAHI
 TE WEHI
 TE KOPA
 TAKETAKE
 TE KARUPE
 MOE NGAHEREHERE (signed Treaty)
 RIHI MOE NGAHEREHERE = WILLIAM NATHAN PICKERING



2. We claim compensation, either financial or in the alternative land for the wrongful loss of some 30 acres of land situated on our Whanau's ancestral pa, Pingongo, which land is now part of Allotment 39, Parish of Omanaia, over which a Deferred Payment

a Deferred Payment Licence is held by Mr George Stanley.
The land is situated on the western side of the River
Omanaia, Hokianga as shown on attached map marked "A".

PART I HISTORY OF FAMILY'S ASSOCIATION WITH THIS LAND

(index figures refer to information sources listed in PART III
of this claim)

- (1) The 30 acres involved was part of the area known as Pingongo Pa. The last resident chief of Pingongo Pa before it was sold to a European was TAKETAKE, grandfather of Moe Ngaherehere, father of Rihi Pickering. (1)
- (2) All Pingongo Pa was sold to a European named Thomas Poynton in 1839 EXCEPT 30 acres known as Waihoatou, the land in this claim. (1a) In 1837 when Rihi became the wife of William Nathan Pickering an Englishman (known as Nathan Pickering) the chiefs of her whanau gave them the 30 acres known as Waihoatou. (2) Traditionally the purpose of such giving was to secure the welfare of the member of the whanau (Rihi) and any children they would have. (3) It was regarded as a gift even though traditionally the husband in such a case gave goods in return (4) (Nathan Pickering gave goods to the value of £14).
- (3) When the introduction of British law became imminent in 1839 it was known that such gifts would not be recognised as grounds for land claims, so Nathan Pickering in October 1839 obtained a transfer document from his wife's relatives and gave them goods to the value of £16. (5)
(We note at this stage that legislation introduced in 1858 permitted grants to be made where land was "set aside" for Maori wives and children of European husbands by their whanaus (6) and grants were made even though in some cases, the transfer documents were, on the face of it, simply sales to the European husband (eg. Anglem Kennedy J R Kent and other claims) (7).

- (4) In December 1840 Nathan Pickering formally claimed the 30 acres. Before the claim was heard in 1843 he sold the land to one Thomas Honan, but soon after had bought it back. Meanwhile the Crown Grant has been issued to Honan. (8) Nathan Pickering and his family continued to possess and occupy the property for many years - until about the 1920's. (9)
- (5) In 1856 the Land Claims Settlement Act was passed setting up the Land Claims Court, and under which about 194 grants were called in for examination (mostly for uncertainty of boundaries and lack of survey) and most of them, including Honan's, were cancelled. (The claims were not cancelled (10) only the grants)
- (6) When the grants were called in, in 1858, it was apparently Nathan Pickering who handed the grant in, as John White, a Crown Official in Hokianga reported in 1859 that Honan (11) had been
"out of the country for many years"
- (7) In 1859 a fire destroyed Nathan Pickering's house on the property and all his possessions were lost, including the transfer back from Honan. This was reported to the Land Claims Commissioner by John White (12), the Crown representative in Hokianga with surveying work. White is recorded as chosen for the work of accompanying the surveyors because he grew up in Hokianaga, belonged to a Hokianga family, and knew the people and their affairs intimately. (13)
- (8) About 1862, the record of claims in the Land Claims Office was changed from "Honan" to "Honan, NOW PICKERING" (14) Thus the Crown acknowledged in its own records that the claim was once again Pickering's.

- (9) The Native Land Court was established in 1865 to deal with Maori land claims. By 1872 the Land Claims Court Clerk, John Curnin was recommending that claims by children of European fathers and Maori mothers should be transferred from L.C.C. to the Native Land Court. (15) Provision for this was made in the Native Land Act in 1873. (16) Such claims were "half caste" claims. Provision was also made for any claim to be referred to the Native Land Court by the Land Claims Court.
- (10) In ^{8².} 1974 the Land Claims Court sought Judge Maning's advice on settling outstanding land claims originally brought (17) in the Land Claims Court. Maning stressed the importance of advising the claimants of what was happening and what was required of them. Accordingly extensive efforts were made to contact claimants, discover the current situation and advise them. However no attempt was ever made to contact Nathan Pickering or his family, even though the Crown's records contained White's report, and "Honan's claim had been changed to "Honan Now Pickering".
- (11) Maning also advised that half caste claims in the Land Claims Court should come into the Native Land Court as "ordinary native claims" and that the claimants should be advised accordingly. A notice was published in the "Waka Maori" (18) stating that half caste claims in the Land Claims Court would be heard as "ordinary native claims" in the Native Land Court. Where half caste and other claims were referred to him, Maning would advise the claimants as to what steps were required (Munhall and Smith claim). (19)
- (12) Nathan Pickering died on December 31st, 1878, (20) after which his children's claim fitted all the criteria applied to a "half caste" claim, that is an "ordinary native claim".

- (13) On December 18th, 1879, the Crown published a notice in the New Zealand Gazette, Wellington that "Honan's" and other claims would be heard in the Native Land Court, Ohaewai, on January 13th next and that if the claimants did not appear their claims would be declared abandoned. (21) This gave claimants less than a month to become aware of the notice, including the Christmas close down, at a time when mail could take weeks to reach parts of New Zealand.
- (14) Accordingly "Honan's" claim was declared abandoned in March 1880 and the 30 acres concerned came into Crown ownership. (22)
- (15) We note that the Native Land Act 1873, under which the claim was transferred to the Native Land Court, required among other things that claimants were to be given individual notice of the hearing time and place, as well as the hearing being advertised. (23) No such individual advice was given to the Pickering family, despite the Crown having recorded that Honan's claim was "Now Pickering" and despite, under the Land Claim Settlement Act, which also applied to the transfer of jurisdiction required proceedings to be according to "justice and equity". (24)
- (16) In the second and third decades of the present century, approaches to the Crown were made by representatives of the family in an endeavour to establish their title, having used the land from time to time for about 70 years. (25) They were advised that the family was not entitled to claim because:-
- i) Nathan Pickering had sold the land to Honan
 - ii) The claim was, in any case, declared abandoned in 1880 and it was therefore impossible to consider it.

As the family's only evidence was oral, plus their long, undisturbed use of the land, they could not dispute the Crown's rejection because they had no access to Crown records.

But so deeply did the family believe the assurances of their parents, Nathan and Rihi, that some relinquished a claim to other land, accepting this 30 acres as their share. (25a)

- (17) About 1938 an officer of the Department of Lands and Survey Auckland told Mr Pou Pickering (father of the present applicant, John Pickering, who was present at the time) that he knew the details of the claim and thought the family could succeed, but would need legal advice.
- (18) Enquiries showed legal costs would be prohibitive, and the onset of World War II, in which members of the family served, postponed the matter.
- (19) In 1954, without any recognition of the family's interest in the land (its "ordinary native claim" as contained in the Crown's own records) the Department of Lands and Survey entered into a renewable lease with the Auchinvole family by which lease (it told our family in 1972) the land was "permanently alienated". The 1954 lease was made under the then recent 1948 Land Act. (26)
- (20) In 1959 one of the present applicants personally approached the Head Office of the Lands and Survey Department about access to the old records and was told they were not available for public inspection. Some of the records however became available in the 1960's, having been deposited in the National Archives.
- (21) In the 1970's the Department of Lands and Survey, having advised of the lease to the Auchinvoles suggested that the Pickering family should enquire again near the time the lease was due for renewal in 1987. However when we enquired again in 1986, we were advised that meanwhile in 1981, the lease had been sold and converted to a Deferred Payment Licence and was thus freehold. (27) These actions were taken without any reference to the family's notified interest: The "ordinary native claim" for many years contained in the Crown's own records.

(22) In 1980 the Department of Lands and Survey investigated the history of the claim and in March 1981 its report was sent to the Pickering family by the Minister of Maori Affairs. (27) This report makes no mention of a number of significant matters contained in the records including:-

- i) that after the cancellation of Honan's grant in 1862 the claim again became Nathan Pickering's as shown by the words "Honan Now Pickering" in the Crown's records.
- ii) that while extensive efforts to have all other claimants contacted and advised by the Crown in the 1870's of requirements with regard to their claims, no attempt was ever made to advise the Pickering family despite the records showing "Honan now Pickering"
- iii) that the only public notice given that "Honan's" claim was to be heard was published in Wellington on December 18th, 1879 advising that the claim would be heard in the Native Land Court at Ohaewai, Bay of Islands on January 13th, 1880. (The total inadequacy of such a notice will be shown below) Nor did the report note that some abandoned claims were later re-opened. (28)

PART II GROUND FOR CLAIMS UNDER TREATY OF WAITANGI

At the outset of this stage of our claim the whanau wishes to pause for the purpose of speaking of why this claim is undertaken. Very simply it is because it was the land of our tipuna, Rihi, and of our tipuna before her from ancient times. Our pakeha tipuna, Nathan, is loved and honoured. Because of the introduction of English Law after the signing of the Treaty, the claim to the land was in his name and under that kind of law that the descendants can be shown to have a claim. Yet we also see the claim as a claim to land indisputably owned by our Maori tipuna, through them to Rihi, and thus entitled, upon the introduction of English Law by virtue of the Treaty, to the full protection of the Treaty. Our belief is that the introduction of English Law deprived Rihi of her rights in the land, contrary to the Treaty, and through omissions, acts and policies of the Crown since has similarly deprived her descendants of their rights.

While our pakeha tipuna Nathan is loved and honoured it is unlikely we would be claiming land in which he alone was involved. (The costs, the stress, the trouble, the time would simply not be worth it) We claim it principally because it was the land of our ancestor Rihi and all of our ancestors before her.

The Crown's actions, omissions, and policies in relation to the family's interest in this 30 acres of ancestral land has breached provisions of the Treaty as well as its principles a number of times. The provisions that will be shown to have been breached are Articles II (guaranteeing Maoris possession of their lands ... and other properties) and Article III conferring all the rights and privileges of British subjects. The principles breached include most notably the Crown's duty to actively protect the Maori interest. In the Court of Appeal case NZ Maori Council v Attorney General, P Cooke said

"the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable".

In his judgement of the same case, Casey J, citing and concurring in the Waitangi Tribunal's conclusion in the Manukau Harbour claim said:

"the Treaty obliges the Crown not only to recognise the Maori interests specified in it but actively to protect them..".

It is also noted at this point that in Somers J's judgement in the above case, he said:

"the Court of Appeal's finding on what the principles of the Treaty are, binds the Waitangi Tribunal".

(1) Before examining ways in which the Crown's dealing with the Pickering claim breached the Treaty, it is necessary to refer briefly to the history of claims such as theirs. Essentially these were claims which arose from a customary provision of land for a member of the whanau who married outside the hapu, in these cases to European husbands.

(2) The custom is recorded in various Maori Land Court decisions and various publications. Judge Norman Smith of the Maori Land Court in "Maori Land Law" P36-37.

"It was common practice for owners of land to make a present of a tract of country to a man who married a woman of their tribe, especially if he had no land of his own in the locality...."

(3) Even though it was usually called a gift it was customary for the husband to give goods in return, either as "pakuwha" or compensation for the loss of the wife's role among her relatives, or by means of a "taua" which ritually "attacked" him and received goods. (29)

(4) Examples of specific payment for gifts of land are found in such claims as Henry Southee's, James Berghans and Captain J R Kent's. (30 & 31) These transfers of land were quite different from ordinary sales to Europeans such as Thomas Poynton's purchase of Pingongo pa in which there was no customary provision of land basically for the welfare of the whanau member and her children (Poynton's wife was European). In the customary type, the husband was essentially in a trustee role with a life interest.

(5) After 1840, the Crown initially refused to recognise such transactions as legal unless there was payment in goods or money and the transaction was not specifically a gift. (32)

- (6) By 1858 however, recognition was given to such transfers in Section 13 of the Land Claims Settlement Extension Act which provided that where land had been "set aside" for the children of Maori - European marriages, they could for the first time be heard by the Land Claims Court.
- (7) Subsequently Crown grants were made to the children, even though the transfer need not specifically state that the land had been so "set aside" but where the "sale" was from the whanau to the husband upon the marriage. (Anglem, Kennedy, (33) J R Kent and other claims) In such grants the Crown was in effect, recognising the Maori custom involved.
- (8) The 1873 Native Land Act provided that "half caste" claims begun in the Land Claims Court were to be heard in the Native Land Court. They were to be, in the words of Judge Maning, who advice was followed by the Crown in the matter, "ORDINARY NATIVE CLAIMS" (34) The Act also provided that any claim in the Land Claims Court could be moved to the Native Land Court at the request of the Commissioner.
- (9) Thus upon the death of Nathan Pickering in December 1878, the family's claim became "an ordinary native claim" to be heard in the Native Land Court.

We wish to show how the Crown breached the Treaty's provisions and principles.

- i) In respect of Nathan Pickering's legal claim after his death when it became "an ordinary native claim".
- ii) In respect of Rihi and the family's equitable claim under the Treaty.

1. BREACHES OF TREATY AFTER FATHER'S LEGAL CLAIM BECAME
'ORDINARY NATIVE CLAIM' UPON HIS DEATH

- (1) When Rihi and Nathan's Maori children and descendants (who had an "ordinary native claim") tried to establish their right to claim their ancestral land, one reason the Crown gave for rejecting such right, was that the claim had been declared abandoned in 1880. In rejecting the family's right to claim, on this ground, the Crown ignored instances, in its own records, of abandoned claims having been reopened, and grants made. A European family named Greenway had its abandoned claim reopened in 1912 and a grant issued. (35) (To show that a "half caste" or "ordinary native claim" could also be re-opened there is the Gundry family's case, re-opened in 1882 (36) and a grant made). Further inspection of records would no doubt show other cases. By rejecting our right to claim on grounds that were incorrect according to information in its own records, the Crown committed a breach of Article III of the Treaty of Waitangi which conferred upon Maoris all the rights and privileges of British subjects. Since other claimants had the right to reopen their claims, we should have had a similar right.

Also by rejecting our attempt to claim, without being properly informed from its own records, the Crown failed in its duty to protect the Maori interest; that it had such a duty is declared by the Court of Appeal in NZ Maori Council v Attorney General. In that case, Richardson J found that

"the responsibility of one Treaty partner to act in good faith, fairly and reasonably toward the other puts the onus on a parter, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed

as to the relevant facts and law to say it has proper regard to the impact of the Treaty"

It must be pointed out that the Crown was not unaware when dealing with the family's approaches that it was a Maori claim as the derivation of the claim was always explained. There is ample information in the Crown records to show such claims are "ordinary native claims".

- (2) The Crown similarly failed in its duty to protect the Maori interest when it informed the family that they had no right to claim because Nathan Pickering had sold the land to Honan. The Crown clearly ignored the substantial evidence in its records that Nathan Pickering bought the land back from Honan. (White said so, the family continued to use the land for some 70 years without disturbance, Honan nor any of his family took any further interest, Pickering appears to have had the grant which was handed in, the Crown changed the record to "Now Pickering").
- (3) Again the Crown's duty to protect the Maori interest would require it to consider the circumstances before it declared the claim abandoned. It should have considered particularly two aspects clearly evident in its records. The first, that while prior to finally settling outstanding claims, it made extensive efforts to contact claimants and advise them accordingly, it never sought out the Pickering family despite its records showing Honan's claim as "Honan Now Pickering". Second, it ought to have considered whether the time allowed by the final notice was sufficient, which it most obviously was not. Similarly its duty was to ensure that the requirements of the Acts requiring individual notice to claimants was just, especially as the Acts required proceedings to be undertaken specific "with justice and equity".

Indeed since the specific requirements of the Native Land Act were not met by the Crown's arrangements, the question arises whether those arrangements were ultra vires, and therefore null and void, and the claim was never declared abandoned. (36a)

Our contention is based on the Court of Appeals finding that Crown land which was or could be subject to a claim under the Treaty of Waitangi should not be alienated without some attention being given to the known Maori interest or "ordinary native claim".

- (4) The action of the Department of Lands and Survey's officers in informing Mr Pou Pickering in the 1930's that the family could have a claim to the land shows that the Crown was aware of the family's interest in the land. (Indeed a proper examination of its own records would have shown a basis for a claim). However no reference to such family interest was made when the Crown issued a renewable lease (thus, in its own view 'permanently alienating' the land) to the Auchinvole family in 1954. Although the Crown's own records contained evidence for a valid family claim (an "ordinary native claim") and although Crown representatives who handled the matter at the local level knew Pickering family members in the local Maori community, no reference to any of them was ever made, before the land was "permanently alienated" by the Crown. Once again the Maori interest was not protected by the Crown, contrary to the principles of the Treaty of Waitangi.
- (5) Following the lease to the Auchinvole family, the Pickering family believed the land was still owned by the Crown, from whom it could still be claimed. Research into such of the recorded history as was available began in the 1960's with a view to claiming but the Department of Lands and Survey advised the family that they had no claim, that the land was "permanently alienated" but suggested another approach should be made prior to the termination of the current period of the lease, in 1987. Following this information some of the family wished to buy back at least the house site, to restore our link with our tipuna. The offer to buy back perhaps half an acre was firmly rejected by the Auchinvoles, so there was no alternative but to persist with the claim to the land, or compensation to buy it, or

as a last resort, alternative ancestral land.

In accordance with the Department's suggestion the matter was resumed in 1986 (after attempts to have a claim recognised by Ministers of the Crown failed) in view of the lease's renewal in 1987. However the family was informed that in 1981 the lease had been sold to Mr George Stanley and converted to a Deferred Payment Licence. (38) Once again this was done without any reference to the family's notified interest, and thus represented a further breach of Treaty principles.

- (6) Successive Ministers of the Crown have rejected the family's claim and have not responded to requests to meet deputations of family representatives, relying instead on defective information from the Department of Lands and Survey. Again amounting to a breach of the Treaty principles.

CLAIM OF RIHI AND CHILDREN UNDER TREATY OF WAITANGI

In the 1830's the majority of transfers of land by Maori to Europeans were outright sales, especially the many sales to speculators from Australia in the 1830's when formal British rule became imminent. However there were a number of transfers that were made upon the marriage of Maori girls to European men; these were, in essence, Maori customary transfers, usually following a marriage according to Maori custom.

As Maori Land Court Judge Norman Smith states in "Maori Land Law"
P36

"It was a common practice for the relations of a woman to make a gift of a piece of land to a man of another tribe who married her". It was also customary - at least in the northern part of Tai Tokerau for the husband to give goods in return, either by a "pakuha" marriage payment or through a token "muru" by the girl's relatives

who received items from the husband. (39)

Such payments did not prevent the transaction from being considered a "gift" and it was understood that the husband's role was that of trustee for the wife and children. (40)

These points are all clearly demonstrated in claims arising from such transactions in the northern Tai Tokerau (e.g. Captain John Smith, Captain Kent, James Berghan, Henry Southee). (41)

In Captains Kent's claim, (42) although other claimants alleged he sold the land to them, Kent's wife's whanau claimed the land was transferred to him for the benefit of his wife and children. (According to Maori custom Kent would thus be a trustee with no right to sell) The Land Claims Court upheld the whanau's claim on behalf of the children.

In Captain John Smith's (43) claim in respect of a similar customary transfer the Land Claims Court issued him a grant for life only, with remainder to his Maori children.

In Berghan's claim (44) the transfer specifically stated it was for the benefit of the children (even though, as in all cases, Berghan gave goods and money in return) and the Commission issued the grant to the children.

Other claims demonstrate likewise the nature of transfers made upon marriage.

Since the Crown's policy for many years was not to recognise such transfers, the above cases were not settled until after legislation, rectifying the situation was passed in 1858.

It was this sort of transfer upon marriage that was made to Nathan Pickering by Rihi's whanau. This was the information given by our knowledgeable kaumatua the late Tau Pickering (45) and it is supported by documentary evidence. Nathan Pickering when first claiming the land on the official letter form provided, stated he had "purchased the land in 1837 for £14. (46) At the hearing in 1843 he produced a transfer showing the land to have been bought in 1839 for £16.

Again, when he claimed the land in 1840, he said it was bought from "Paua and others" but in 1843 evidence was given by himself and others that he bought it only from Paua and Houao (the husband of his wife's sister).

The discrepancies between the two transactions (date, amount, vendors) make it clear the first transaction was as Tau Pickering asserted, according to Maori custom - there being no document and a number of the whanau receiving "payment" - while the second transaction is in accordance with the requirements of imminent English law - a document being necessary, gifts not being recognised, ownership vesting in the European husband.

No mention of provision for children could be made as there were no children who survived, for at least ten years after the marriage. In summary, the first transaction was a Maori customary one in which the land passed to Nathan Pickering as trustee for his wife and any children they would have. The second transaction required under English law, was contrary to the Maori custom, in that it vested ownership in the husband alone. After 1858, in similar claims the Crown recognised the intention to "set aside" the land for the wife and children's benefit, even if the documents did not specifically state this. (Kent, Anglem, Kennedy etc).

Maori Land Court Judge Norman Smith, states in "The Maori People and Us" p57

"When the Pakeha arrived in New Zealand with his English conception of ownership, it was found necessary for Maori customary titles to be reduced to a form that was cognisable in English Law; and in performing this operation some of the essential and original elements of Maori custom had to be modified or dropped altogether".

We will now follow how the Treaty of Waitangi was breached throughout the history of the claim up to the sale to Honan.

The ordinances establishing the law under which the land claims were investigated were initially passed in New South Wales (47) (of which New Zealand was a dependency) and then by Governor Hobson in New Zealand. (48) These ordinances followed instructions from Her Majesty's government in England which were dated August 1839. An important detail was that all purchases of land from the Maori prior to 14 January 1840 were NULL AND VOID until they had been heard by the Land Claims Commissioners and a Crown Grant was issued.

Since the claims were not heard until after the signing of the Treaty and were null and void when the treaty was signed the hearings should have been subject to the treaty. Under the Treaty, the customary rights of Rihi and her children in the land should have been recognised and her express approval required for any transaction concerning the land.

This view is endorsed by the fact the Crown in 1858 made provision for grants to half caste families where their mother's relatives had "set aside" land for them - such grants were made even when the documents did not specifically state the land was set aside but the circumstances showed it was a customary transaction to provide for the wife and children.

There is no doubt that the transfer to Nathan Pickering was of a customary nature and was for the purpose of setting aside land for Rihi and her children. Apart from the evidence quoted above, the size of the land involved, 30 acres, indicates that it was not acquired for business operations such as timber selling (common in Hokianga) nor speculation for subdivision as, for example, part of Poynton's purchase of nearby land was. The land could only have been for residence and basic subsistence for the family in typical customary Maori style.

Hence the first breach of provisions and principles of the Treaty of Waitangi occurred when the Land Claims Commissioners did not recognise the rights of Maori wives and children when making grants to European husbands alone in respect of land set aside for the family as a whole. (It must be reiterated that after 1858 the true nature of such transfer was recognised, but for some families it was too late).

Again, since Rihi's marriage to Nathan Pickering was, till 1846, a Maori customary one, under the introduced English law, she had no status and no rights. The principles of the treaty providing that Maori taonga would be protected.

'Taonga' include customs according to the Court of Appeal case NZ Maori Council v Attorney General. Bisson J said lands

"and other property guaranteed under the Treaty
includes customs and culture"

yet Maori customary marriages were not recognised.

In 1948 the Royal Commission on Surplus Lands, (48a) the majority decision accepted the Maori Council's view that "The Crown expressed intention prior to the Treaty of Waitangi of protecting the rights of property of the Maori and the letter and spirit of the Treaty itself cast an onus or moral obligation on the Crown so weighty and paramount that the slightest element of unfairness could not be justified or supported".

There is no doubt that the English law which denied Rihi her rights in her ancestral land, contrary to Maori custom, and which refused to recognise her Maori customary marriage, amounted to more than "the slightest element of unfairness" and could not be "justified or supported".

Thus there is substantial evidence to show that Rihi had an equitable interest in the land under the Treaty of Waitangi.

In tracing the progression of her equitable interest or claim, the first event to be considered is the sale of the property by Nathan Pickering to Thomas Honan in 1843. The late Mr Tau Pickering believed that the property was in fact transferred as security for a loan. It must be asked whether after investing a total of £50 in the property (£14 + £16 purchase, £20 in improvements) he would sell it outright for a mere £10)

Also it would be a peculiar sale that was reversed in less than three years (Nathan Pickering was in possession of the property again by 1846 (49) while Honan had left the country).

Thus the late Tau Pickering's belief that the land was transferred to Honan only to secure a loan, seems to be supported by all aspects. It would also be supported by comparing the details of Captain J R Kent's case where witnesses said the deeds were transferred by Captain Kent to one Mitchell as security for a debt. (50) The Land Commissioners must have accepted this, because they found in favour of Captain Kent's half caste children.

Another factor against it being an outright sale to Honan would be the certainty of Rihi's opposition to such a transaction. (In the sources of evidence section attached, her granddaughter Mrs Carrick (51) says Rihi would "pine" for her land whenever she and the family were away from it, and that at least one of her infant children died and may have been buried there. Tau Pickering said that these circumstances, plus that as the daughter of a man who signed the Treaty, Rihi would know her customary rights,

made it virtually impossible to believe she would ever agree to the land's outright sale).

Thus, though Rihi and her children had a clear equitable interest in the land under the Treaty of Waitangi, there is no evidence whatever to show that she approved of the sale to Honan, if indeed it was a sale.

At this point in the history of Rihi's equitable claim to the land there had been breaches of the Treaty's provisions and principles at two points:

1. When the Crown policy failed to recognise the customary nature of the transfer to Nathan Pickering, which gave Rihi and her children, whose interest the Treaty was supposed to protect, rights in the land.
2. When or if there was an outright sale to Honan, no evidence of Rihi's approval was required, despite her clear right under the Treaty.

(If the Treaty has been observed, the Crown would have required evidence to be produced of Rihi's approval)

Whatever happened later there were already grounds for an equitable claim under the Treaty. In any event the land was soon bought back, and remained in the family's use for some 70 years.

In terms of the Treaty, this recovery of the land restored the rights of Rihi which were unjustly ignored by English law. In other words, it may be contended that in terms of Rihi's rights under the Treaty, the sale to Honan was null and void (as any purported direct purchase by Europeans from Maori after the signing of the Treaty was, because it was in breach of the Treaty's bestowing the pre-emption to the Crown).

Hence, it is our contention that Rihi's equitable interest in the land was never lost, and when the land was recovered, it simply continued. Rihi was already dead when Nathan Pickering died in

December 1878. Their claim then passed to their children who were entitled to have it heard in the Native Land Court as an "ordinary native claim", that it was not so heard was entirely due to the Crown's failure to carry out certain actions as described in the first section of the present claim.

Also having become "an ordinary native claim", it would have been directly entitled to the protection of the Treaty of Waitangi.

Had the Crown met its obligations with regard to bringing the claim into the Native Land Court, one of the purposes would have been to establish the family's right to the land by establishing the rights of Rihi's family to transfer it. This would have presented no difficulty as on two occasions it was publicly stated that no Maori with a right to dispute the transfer had done so. The first occasion was the hearing of the claim in 1843, (52) the second when the survey of Poynton's land was being carried out in 1859. On the latter occasion John White reported that Maoris were disputing a number of claims in the district; he also reported that Nathan Pickering's claim had never been disputed. (53)

A hearing in the Native Land Court would also, of its very nature, have established Rihi's right in the land - a right that under the Treaty of Waitangi should never had been obscured.

However, since the Crown's actions and omissions prevented the claim being heard in the Native Land Court the claim which the children inherited from their mother Rihi remained an equitable one, and all the Crown's actions since, breaching the Treaty in respect of the family's "ordinary native claim" have likewise been breaches under the equitable claim inherited from Rihi.

PART II EVIDENCE IN SUPPORT OF CLAIMS

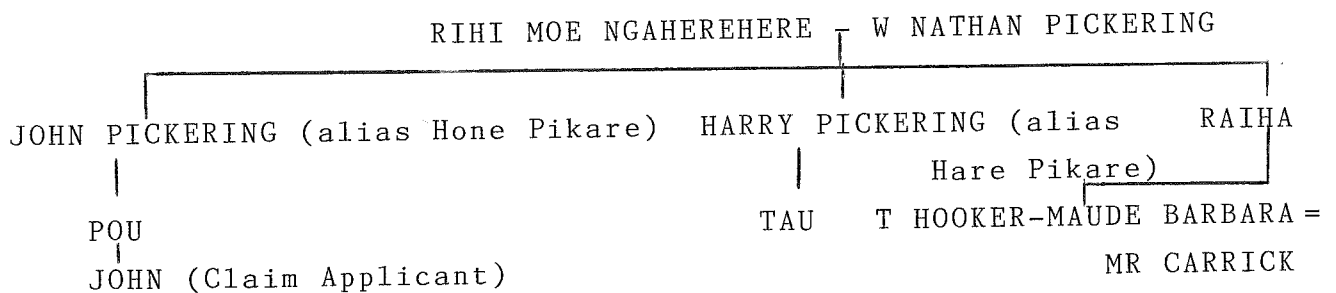
Evidence is both oral and documentary: While items of oral evidence have been contributed by many relatives and others, it will be principally based on information contributed by three elders with whom discussions were held in the 1970's.

These elders were in particularly significant roles for the purpose, as follows:-

Mr TAU PICKERING. As a child he was selected by his kaumatua and kuia of Omanaia, Hokianga to learn the history of the family. His knowledge, together with a long lifetime in the district was particularly comprehensive on certain aspects relating to the present claim.

Mrs BARBARA CARRICK. At the age of 86 in the 1970's, Mrs Carrick was the eldest living representative of the children of Rihi and Nathan's only daughter, Raiha. The information Mrs Carrick contributed, having been obtained from Rihi's daughter, was complementary to that of Mr Tau Pickering.

Mr TOM HOOKER (Senior). Mr Hooker was 92 when the discussions with him were held in the 1970's. As the husband of Raiha's eldest daughter, Maude, he had lived some time in Omanaia where some of his children were born. His information related especially to family attempts to obtain title to the 30 acres, and to arrangements concerning family land. He was also the oldest living member of the family. These principal informants (now sadly, all deceased) were related thus:



1. ORAL: Tau Pickering could point out the 30 acre area on Pingongo and relate accounts of ancestral association with Pingongo e.g. a great taiaha fight between our tipuna, Te Kumenga (Chief of Pingongo as husband of Te Kopa) and a famous Bay of Islands warrior, Maungakiekie.

DOCUMENTARY: Various Maori Land Court cases e.g. Hokianga MB 8 p163 Rewiri Whakarongouru states "Paungaungau Pa belonged to Te Kopa" (Pinganga is an alternative spelling).

Judge Puckey's MB 5 p76 Hauraki Kaipo says:

"Te Haunui, Te Kopa and Taketake were the chief owners of Omanaia being descendants of Tupoto".

Moengaherehere's children were represented in grants of several blocks, by Rihi's brother, Winiata (known as Winiata Moengaherehere, or Winiata Te Kawau e.g. Hokianga MB 2/225; Northern MB 43 p301). In Judge Puckey's MB 5 p66 Hone Mohi Tawhai states:

"Winiata Te Kawau was descended from TAKETAKE not Haunui. He also is in Mangawhero (Omanaia) through his descent from TE KOPA").

- 1a John White in Archives File OLC 4/8 states that Nathan Pickering's claim was "in the middle of claim 197D". The latter claim, by Thomas Poynton was called "Pengue" (correctly Pingongo) and its boundaries included Pingongo stream and part of Pingongo Pa (Archives File OLC 390). One of the two chiefs who signed the transfer to Pickering was Houao, brother-in-law of Rihi (husband of her sister Peata). The other was Paua, chief of her whanau. That the transfer was entirely correct in Maori terms as to original rights to the land, is shown in two reports that it was "never disputed" (OLC 377 and OLC 4/4)

2. ORAL: Tau Pickering said the 30 acres was originally given to Rihi and Nathan in accordance with Maori custom ("in the Maori way").

DOCUMENTARY: Archives file OLC 377 records the transfer by Rihi's whanau to Nathan Pickering in 1839 but the original transfer was prior to this, in 1837 which was according to Maori custom and referred to in Nathan Pickering's claim notice published in the NSW Gazette 6 April 1841. (The second transfer was to comply with English law, about to be introduced).

3. ORAL: According to Tau Pickering the traditional Maori view would be that the children of Rihi and Nathan Pickering would claim the 30 acres by right of their mother. To explain this, he gave the example of the "famous" marriage of our tipuna, Te Kopa chieftainess of Pingongo Pa, with a Taheke/Waima chief, Te Kumenga. Te Kumenga thus became the chief of Pingongo, but his children claimed land there and elsewhere in Omanaia, by right of Te Kopa.

DOCUMENTARY: Customary "gifting" of land to a couple on marriage is described in various sources e.g Maori Land Court Judge Norman Smith in his book "Maori Land Law" states (p36)

"It was a common practice for owners of land to make a present of a tract of country to a man who married a woman of their tribe..."

4. DOCUMENTARY: Even where the transfer document specifically states the land was a gift (according to custom) to the couple or their children, the husband in accordance with custom still have goods or money in respect of the transfer. See Berghan's claim (OLC 1362) or Southee's claim (OLC 875-6-7).

would have been planted by the family in the 1880's)

John Pickering, (alias Hone Pikeri) grandfather of the present applicant was married to Ellen Arihia Sweeney in the church at Omanaia. (Native Land Court MB Kaipara 15 p23) That was in the early 1880's (church records destroyed by fire, Rawene 1931)

10. DOCUMENTARY: See OLC 5/3 P139 refers to the Report of Select Committee on Outstanding Land Claims 1856 and says that of about 350 grants issued only 42 conveyed land which had been surveyed (and thus) "the rest may be said to be imperfect and probably invalid" (The 1856 Act provided for calling in such "imperfect" grants for rectifying action) P164 Court of Claims memo concerning the Land Claims Settlement Act 1858 says 194 grants had been called in.

11, 12 & 13

DOCUMENTARY: John White reported to the Land Claims Commissioner in 1859 that Nathan Pickering had bought back the land from Honan. (OLC 4/4) It is important to note that John White was a local man who knew the Hokianga people and their affairs intimately. Indeed it was for this knowledge that he was selected by the Crown for the work (OLC 8/2 Land Claims Commissioner to Colonial Secretary).

Thus in reporting that Nathan Pickering had bought the land back from Honan who had been out of the country for many years, JOHN White appears to be speaking of his own knowledge. He does not state that this is what Pickering told him. White had an outstanding reputation for integrity (Dictionary of NZ Biography, Vol II, p296

"he had an untarnished reputation as a public man and was highly respected in his private life"

14. OLC 5/11 Photocopy attached.

In Berghan's case the land was made over to his wife for the benefit of the children by her relatives. Commissioner Godfrey said he had no power to make a grant in such a case. The Colonial Secretary said "Her Majesty's instructions are imperative (that such "gifts" would not be recognised).

5. DOCUMENTARY: There are a range of claims showing that customary gifts were not recognised e.g. Berghan's and Southee's above, and other such as Fanny Wing's (OLC 1015) The land was given to Captain Thomas Wing for his daughter Fanny; the chief who gave it was the brother of Fanny's mother. The Attorney General found that a "title from the Crown can not be granted ... as no consideration was given for it".
6. Land Claims Settlement Extension Act, 1858, Sec 13.
7. Anglem (OLC 19A) Kennedy (OLC 273) Captain J R Kent (OLC 23A)
8. OLC 377
9. ORAL: Barbara Carrick (granddaughter of Rihi, and daughter of Rihi's daughter Raiha) said that after fire destroyed the family's home in 1858 or 1859, they would go away from Hokianga from time to time as Nathan sought employment. They always returned, one reason being that Rihi always "pined" for this land on Pingongo - at least one of her infant children had died and perhaps was buried there.

Tom Hooker, husband of Barbara Carrick's eldest sister Maude, said that Rihi and Nathan Pickering's children and grandchildren would visit and use the land regularly. (Tom Hooker's daughter Norrie was born at Omanaia in 1908 and John Pickering's son, Pou, in 1901, birth certificates attached). Tom Hooker said members of the family would "camp" on the land, go on fishing trips from there, and pick fruit from the trees (a horticulturist said the quince trees there would be about 100 years old in 1987 and so

15. OLC 5A James Coffee: Curnin to Commissioner of Land Claims Court 6/3/1872. (On 12 March 1874 L.C.C. Clerk George Fannin suggests to the Commissioner that half caste claims (in the L.C.C.) be settled in the Native Land Court - OLC 4/38).

16. Native Land Act 1873, Sec 109-111.

17. OLC 4/38 Maning to Land Claims Commissioner, 28 April 1874.

"I think it necessary and would beg to suggest that all claimants whose claims have been transferred from the Court of Land Claims to the Native Land Court may be informed of the fact from your office..."

OLC 4/38 Maning to Land Claims Commissioner, 28/4/1874

"the best way to settle half caste claims is for them to come (to the Native Land Court) as ordinary native claims which the law allows them to do"

OLC 4/38 shows what extensive efforts were made to contact and advise claimants, but not Nathan Pickering and his family.

The Munhall and Smith claim (OLC 1361) a half caste claim, was stated by George Fannn in 1876 to have been referred to Judge Maning who had "instructed claimants how to proceed".

18. August 25th, 1874.

19. OLC 1361

20. Death Certificate (Attached)

21. NZ Gazette December 18th, 1879, p 1370 (Attached)

22. OLC 377

23. Native Land Act 1873, sec 36.

24. e.g. Sec 50 Land Claims Settlement Act 1856: "all proceedings to be conducted not according to strict law but according to equity and good conscience".
25. See (9) above. "Roll of Early Settlers and Descendants in the Auckland Province Prior to End of 1852 "(Turnbull Library, Wellington) lists Nathan Pickering at Hokianga in 1846 but not Honan, whom John White said in 1859 had been out of the country for many years. Thus it seems Nathan Pickering had recovered the 30 acres by 1846 and the family used and occupied it from time to time till about 1920. (Tom Hooker said that in about 1920 when the family tried to establish their title, Crown representatives told them they had no right to claim, as Nathan Pickering had sold the land to Honan, and the claim was abandoned).
- 25a ORAL: Tom Hooker said certain members of the family surrendered their claim to other land because they firmly believed the 30 acres was theirs, and accepted it as their share. Pou Pickering, father of the present applicant, said that his father John had mentioned similarly surrendering his claim to certain land at Omanaia.
26. Letter Minister of Maori Affairs to J Pickering 11th December 1974 refers to these negotiations with Lands and Survey in 1972. (Attached)
27. Letter Lands and Survey to J Pickering. We note the transfer of the lease from Auchinvole to Stanley was registered on 11th April 1981 (see copy below) that is, after the Pickering family's notification of its interests in the 1970's and 1980. (Attached)
28. Two examples: Greenway's claim (OLC 616) and Gundry's half caste claim (OLC 1370)

Greenway's claim was reopened in 1912 and a grant was issued; Gundry's was reopened in 1882 and grants issued.

In the Lands and Survey report, page 2, penultimate paragraph says "Mr Pickering was given the opportunity to object..." and "He did not dispute this claim...". This is clearly wrong when taken in the context of White's report on the claims in the district. What was not disputed was in fact, Pickering's claim. Other claims nearby were being disputed by the chiefs who had sold land to Poynton and others. The Lands and Survey report completely mistakes the intention of White's sentence. (See attached copy of letter)

29.

30 & 31. Southee (OLC 875-6-7) Berghan's (OLC 1362) Captain Kent (OLC 23A)

32. See 4 and 5 above

33. Anglem (OLC 19A) Kennedy (OLC 273) Kent (OLC 23A)

34. See (17) above

35. OLC 616

36. OLC 1370

30a The utter inadequacy of the Gazette Notice of December 18th 1879, allowing less than a month, including the Christmas closedown, is illustrated by two cases particularly in Munhall and Smith claim (OLC 1361) the half caste family made every effort to ensure they were taking the necessary steps; John Curnin reported that Native Land Court Judge Monro, who was acquainted with the claim "admits the claim to be a good one", yet the family were never advised that the claim would be heard on January 13, 1880 (except by the inadequate notice of December 1879) and their claim was declared abandoned. In the Coldicutt claim (OLC 1365) Curning noted that "this seems to be a good claim" and referred it to the Native Land Court. Again due to the family not being notified adequately they lost their land.

The very real injustice of such proceedings is demonstrated when compared for example with the reasons for introducing the 1856 Land Claims Settlement Act. The previous attempt to settle the claims was "Quieting Titles Ordinance of 1849". One reason this was unsuccessful was ignorance of its provisions by the distant and widely scattered individuals affected according to the Select Committee in 1856. Here, the pakeha claimants are being given another chance to claim SEVEN YEARS after they were supposed to settle their claims, yet the half caste claimants in 1879 were given LESS THAN A MONTH, when some were not even aware of what was happening. (OLC 5/3 p135 ff)

37. See 27 above.

38. See 26 above - 11th December 1974, Letters Minister of Maori Affairs to J Pickering 26th March 1981, and Minister of Maori Affairs to J Pickering 25th March 1987 attached.

39, 40 & 41. See following 3 references

42. Kent OLC 23A

43. Smith OLC

44. Berghan OLC 1362

45. See above (2)

46. NSW Govt Gazette, 6th April 1841 (OLC 5/3 p60)

47. NSW Act 4 Victoria No 7 (OLC 5/3)

48. Sess I, No 2 Vict (1841)

48a AJHR 1864 E2

49. See above (25)

50. Kent OLC 23A

51. See 9 above where Barbara Carrick says Rihi would "pine"
for this land when the family was away from it.

52. OLC 377

53. OLC 4/4

COMPENSATION SOUGHT

Our land speaks to us, it calls. Our ancestors speak to us saying that we are lost until we embrace again the land that they embraced

This is only a small piece of land. It will never sustain the many descendants economically. But it will sustain us spiritually because it is the strongest link with our tipuna, and a remnant of our ancestral pa, Pingongo.

- i) Believing that we lost our land through Crown actions contrary to the Treaty of Waitangi (signed by our ancestor Moe Ngaherehere) we desire above all else, to regain the land itself. Therefore our first objective is compensation sufficient to buy back the land. Together with compensation for the loss of the land for many years, and the extensive legal work that will be involved we estimate this sum to be \$200,000.
- ii) Should regaining of the land on Pingongo be impossible, our next objective would be to purchase an area of equivalent value, of formerly ancestral land, for which we estimate the compensation required to be again \$200,000.
- iii) If no such land as in (2) is available, then we seek an area of equivalent value in land now Crown Land which was formerly land with which our ancestors were associated. (genealogies may be provided as required). Examples in the district are Takahue State Forest and Department of Conservation areas, Okorihi State Forest, Tapuwae Scenic Reserve.

All these lands (except the last) are less well situated less accessible and of less value than the Pingongo area. Nor are they our special family land as the 30 acres is.

For these reasons land of equivalent value in Crown Land would need to be larger, about 100 acres, and allowance made for finance to meet legal work survey, fencing.

~~iv) Other compensation as may be agreed to.~~

OTHER PERSONS OR ENTITIES THAT MAY BE AFFECTED BY THE CLAIM

1. Mr George Stanley, Wharekawa Road, Rawene, Hokianga
- 1a. Omanaia Marae Committee
2. Landcorp
3. Department of Survey and Land Information
4. Forestcorp
5. Department of Conservation
6. Hokianga County Council

NOTICES TO CLAIMANT SHOULD BE SENT TO: S Stent, Barrister and Solicitor, P O Box 51102, Tawa.

Finally, in closing our claim we think our yearning for this small piece of our ancestral heritage, for which our tipuna Rihi always "pined" when away, is expressed in the words of the late Te Rangi Hiroa, Sir Peter Buck:

"Captives in distant lands have begged for a pebble, a bunch of leaves, or a handful of earth from the home land that they might weep over a symbol of home. It is the everlasting hills of one's own deserted territory that welcome the wanderer home and it is the ceaseless crooning of the waves against a lone shore that perpetuates the sound of voices that are still".

John Nathan Pickering

JOHN NATHAN PICKERING

Adam Koroï Pickering

ADAM KOROÏ PICKERING

pp 201

24 April 1989

DATE