OFFICIAL

WAITANGI TRIBUNAL **Wai 898**

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF The Rohe Potae District Inquiry

CLAIMANT GENERIC OPENING SUBMISSIONS RE PRE-EMPTION

6 MARCH 2013

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May it please the Tribunal

1.1 Lord Normanby's instructions in August 1839 to Captain Hobson included this injunction:[1]

> All dealings with the natives for their lands must be conducted on the same principles of sincerity, justice and good faith as must govern your transactions with them for the recognition of Her Majesty's sovereignty in the Islands. Nor is this all: they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves.

1.2 In 1907 Commissioners Robert Stout and Apirana Ngata observed in their report on the Rohe-Potae (King Country) District, that "[w]hile restricting private alienation" in 1884 the New Zealand Parliament had reserved the right of the Crown to purchase "on such terms as might be agreed upon between the Crown and the owners". "This was a fiction", they concluded:[2]

> "In practice the Crown bought on its own terms; it had no competition to fear; the owners had no standard of comparison in their midst, such as the rents of land under lease or profits from farming might have afforded; they had been reduced by [the] cost of litigation and surveys, [and] by the lack of any other source of revenue, to accept any price at all for their lands."

1.3 They concluded that:[3]

> The price paid was a recognition of the aboriginal rights, and a necessary step in the extinction of those rights, but the Government kept steadily in view the welfare of the colony. The price was, in our opinion, below the value. It was the best possible bargain for the State. It was in accordance with the will of Parliament, and it opened up a vast territory to the land-seekers. The Executive, no doubt, conceived it was furthering the interests of general settlement, even ... [if] it rated too low the rights of the Maori owners and its responsibility in safeguarding their interests.

1.4 The Crown historian, Dr Loveridge, has appropriately noted:

> Simple arithmetic indicates that, if a valuation process had

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[1] Colonial Office Instructions 14 August 1839.
[2] Dr Loveridge Wai 898 # A68 "In Accordance with the Will of Parliament". The Crown, the Four Tribes and the Aotea Block, 1885-1899 p16.
[3] Ibid p204.

> required the Crown to pay an average price of, say, 8s. per acre in the Aotea Block rather than the 4s. actually paid for land and interests purchased before 1900, then landowners would have received something like £140,000 more for those 687,789 acres.

1.5 But, he adds, "arithmetic, simple or otherwise, cannot tell us if so much land would have been permanently alienated if the pre-emption restrictions had not been in place during the 1890s."

1.6 The Crown accepts that it said it would not impose pre-emption and did. It accepts that lesser prices were paid than should have been.[4] How much less will be ascertained from the evidence.

1.7 But there is much more to this issue than a matter of valuation. Rohe Potae Maori have long maintained that their future was profoundly damaged when the railway went through their lands. That issue has never been addressed.

1.8 In March 1883 Rohe Potae leaders, under intense pressure from the Native Minister, agreed to a survey of the route of the North Island Main Truck Railway through their lands on the understanding that construction of the railway would not occur until further terms had been agreed. The government hounded the Rohe Potae leaders over three years to let construction occur because, as Native Minister Bryce urged in November 1882, "the construction of such public works will greatly enhance the value of everybody's land through which they pass, as well as benefit others, both Maori and Europeans."[5] Or as Native Minister Ballance put it in February 1885 to Rohe Potae leaders at Kihikihi, there were:[6]

> "large blocks of land in this country which have really no value at all, because there are no roads or railways through them, and if they had to sell this land at the present moment they would not receive more then three or four shillings an acre, whereas if railways or roads were made through it it would sell for many pounds an acre."

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[4] Crown Statement of Position and Concessions, Wai 898 #1.3.1 para 20.5.1-3, Tribunal Statement of Issues #1.4.003 p76.
[5] Marr Te Rohe Potae Political Engagement 1864 – 1886 Wai 898 #A78 p701.
[6] AJHR 1885 G1 p17.

1.9 He reassured them:[7]

> Great powers will be placed in the hands of the Natives to deal with their own land, when their land will be enormously increased in value through the construction of this railway and roads. I therefore call upon you all to assist the Government in carrying out these works.

1.10 In March 1885, following these visits, the Rohe Potae leaders approved construction. That is the context for the government decision to re-impose pre-emption and exercise it over a vast area.[8]

1.11 All parties understood that pre-emption was inextricably tied into the issue of who had governance of the Rohe Potae district. Former Chief Judge Fenton, appearing before the Native Affairs Select Committee in 1885, considered the issue of such constitutional significance, that he thought Maori would have to agree to its re-imposition, as a modification of the terms of the Treaty of Waitangi.[9] Pepene Eketone and 163 others, in their petition on behalf of Ngati Maniapoto, Ngati Hikairo, Ngati Raukawa, Ngati Tuwharetoa and Whanganui in October 1891 complaining about the effects of pre-emption, ended with a call "for the constitution of a Maori Council under the provisions of Section 71 of the Constitution Act of New Zealand 1852".[10]

1.12 Did Rohe Potae leaders approve of pre-emption initially because of its

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[7] Page 24. And Ballance at Ranana in January 1885, urged Whanganui Maori to consider leasing over selling for its long term advantages, saying "the Government will give to you the right to say whether you will sell or lease your lands, and assist you in carrying out whatever decision you may arrive at." The Government he said, “brings all the machinery of the law and their own power to assist you in carrying out your own decision." Land currently worth "not more than five shillings an acre will be worth five pounds an acre when the railway runs through the land." AJHR 1885 G-1 p4.

[8] Boulton Wai 898 #A67 p67. Ballance in 1886 stated that there were 4 million acres under pre-emption. This is larger than the size of modern East Timor and Northern Ireland (4 million acres is 16187.4 square kilometres. East Timor 14,874 km2, Northern Ireland 13,840 km²).

[9] “I find that in this Bill what is called the "pre-emptive right" of the Crown is preserved. As a question of law, of constitutional law which possibly the Committee may not wish me to say anything about. I am very doubtful whether that right can be resumed by the Crown. As a matter of law - I do not know whether the powers of Parliament are or not here subject to any supervision, such as they have in America, but I suppose that is a point which cannot be determined, not here, at any rate - I must say I do not see how, having abandoned that right, given under the Treaty of Waitangi in 1862, Parliament, without the consent of the Natives, could ever resume it. …. 538. Sir G. Grey. You mean that the Queen, having absolutely waived her right, cannot resume it? Yes; without consent. We may say what we please about it, but the Treaty of Waitangi was made by the British Government as with a "foreign Power." AJHR 1885 I2b p32.

[10] Boulton A67(a) (V1) pp33-47.

protective effect? Perhaps.[11] But it was never used protectively. It was instead used to turn Maori hopes, and government assurances, on their head. The draft letter of June 1889 of TW Lewis to Wahanui, Taonui and Hauauru, informing them of the intention of the Government to purchase lands in Rohe Potae, could not have been clearer:[12]

> "it is not the desire of the Government that the Native Owners should be denuded of their lands, but on the contrary care will be taken to see that sufficient reserves are made for them.
>
> It is however not at all in the interests of the Natives owners that their land should be allowed to remain waste and unoccupied; and by disposing of their surplus lands they will find that the portion they retain will be greatly increased in value by the progress of settlement upon the area disposed of.
>
> I hope that you will give the Government your valuable assistance in connection with the acquisition by the Crown for settlement purposes of the surplus Native Lands in your District.

1.13 So the Maori 'valueless' lands as Ballance called them, would remain just that. The promises of 1885, the very basis on which the railway was even allowed to proceed, appear to have been a cruel trick. The government policy by 1889 has the appearance of little more than a scheme for removal of the Maori population and resettlement on reserves to make way for a prosperous railway district.[13]

1.14 This must lead the tribunal to consider, did the Crown through pre-emption essentially defraud Rohe Potae Maori of the expected benefits from the railway and destroy their plans for the future of the region? Otherwise, how did it come about that, despite the government undertakings, Rohe Potae Maori not only lost control of their customary lands, but received it seems no recompense for giving

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[11] See Wai 898 #3.3.34(a) Responses to Questions of Clarification of Dr Donald Loveridge (3 Dec 2012) Q12. At page 8 you say: "In the end the Crown's right of pre-emption –initially applied to the railway district in 1884 as a temporary protective measure – came to be employed during the 1890s to place pressure in Maori in the Aotea blocks to sell large quantities of land to the Crown at low prices." Can you expand on this statement and explain: 1. If the measures were ever used protectively?; ...DML: As applied in 1884 pre-emption protected Rohe Potae Maori by banning all private transactions until titles had been ascertained. (The Native Land Laws Amendment Act of 1883 had prohibited all private negotiations for the alienation of Maori lands prior to the ascertainment of title and for forty days after it was awarded). According to Ballance this restriction "had met with the approval of ... Wahanui."

[12] Boulton A67(a) (V1) p103-104.

permission for the most significant piece of infrastructure in New Zealand history to pass through them?

DATED at Wellington this 6th day of March 2013

T H Bennion

[13] Even the 'on-sale' price that the government expected does not appear to have been a true market price for the land on the open market, but a level sufficient to cover government expenses while encouraging settlement, with Maori receiving a residual sum of that after expenses - see Boulton A67 p354 and 362-3.