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Response to Questions. D. Armstrong and E. Subasic, Northern Land and Politics, 1860-1910 (Wai 1040 #A12)

G. Sharrock, Rightlaw. August 16, 2013

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Waitangi Tribunal
12 Sep 2013
Ministry of Justice
WELLINGTON

4. Yes.

5. Yes.

6. The Kohimarama Conference concluded on August 11, 1860. Governor Browne's despatch was written on November 1, 1860.

7. Governor Browne was referring to the position at 1839 and 'some time after'. This period falls outside the scope of our report. We note, however, that although there was provision to establish largely self-governing Maori districts under s71 of the Constitution Act 1852, no such districts were established.

8. Not necessarily. It would probably be more accurate to say that the Crown had not been able to fully extend effective sovereignty into areas beyond the main European settlements, and any extension of Crown authority continued to rely on Maori cooperation and acceptance. As discussed in our report, after 1860 Northern Maori appear to have adopted, or at least partly accepted, some forms of English law and recognised the authority of Magistrates under at least some circumstances, particularly in matters concerning their commercial relationships with settlers and traders. But there was far from a thorough acceptance of other aspects of English law, including criminal law, and Magistrates were only successful when they exhibited a degree of flexibility, acted at least to some extent in conformity with tikanga, and worked closely with the chiefs. Sometimes the law was not rigorously enforced for political reasons or for reasons of expediency.

We also note that Northern Maori expected to join the 'governing councils' of the Colony, and thereby play a key role in developing and administering laws in their own districts, as evidenced by their comments at the Kohimarama Conference and

subsequently. They believed that Te Tiriti/the Treaty had, among other things, guaranteed them that right.

9. In 1839 Normanby had identified certain 'repugnant' customs which should be repressed, including warfare. Governor Browne acknowledged, in November 1860, that warfare persisted and there was little he could do about it. This was an acknowledgement that the Crown, in 1860, still lacked the power to fully extend its authority into predominantly Maori districts. There is no doubt that at 1860 Maori tikanga and self-rule persisted in many areas, including large parts of Northland. As noted, the extent to which English law was enforced depended to a large degree on the cooperation of the chiefs.

10. Governor Browne's comments confirm that the Crown had been unable to establish effective authority over much of the country, and as a consequence warfare among Maori had continued. It is clear, however, that in Northland Maori law and tikanga did indeed prevail outside the European settlements to a large degree, a situation that continued well beyond 1860.

11. It is clear that in many key respects Northern Maori continued to exercise their unfettered rangatiratanga, while at the same time seeking to establish a form of political and economic partnership with the Crown and settlers which they believed had been held out by Te Tiriti/Treaty. Whether this amounted to the exercise of a form of sovereignty, as that term is currently understood, is a question for counsel and the Tribunal.

12. We repeat that Northland Maori continued to exercise rangatiratanga and manage their own affairs for a considerable period after 1860.

13. Yes, the Constitution Act was a part of the political landscape in 1860.

14. No. Our interpretation is that Governor Browne felt there had been an opportunity to create self-governing Maori districts in 1852, but s71 of the Constitution Act still required the suppression of 'repugnant' Maori customs and usages within the districts so created. In Governor Browne's view, this left unresolved the 'difficulty' he had

earlier identified; namely that the Crown, under the terms of s71, would still lack the power to halt 'repugnant' practices (such as warfare), or to regulate intercourse between Maori and settlers. However, it is our view that the failure to create Maori districts under s71 of the 1852 Act was a lost opportunity.

15. Yes, in a very broad sense, but the position was more nuanced than that. The Governor convened the Kohimarama Conference for largely political reasons - to isolate the Kingitanga and strengthen the Crown's relationship with 'loyal' chiefs and iwi. Providing an enhanced role for the chiefs in colonial administration and establishing a degree of local autonomy were seen as key means of achieving these aims. But it seems to us that the Governor sought to draw the Crown and Maori together in a political sense, rather than seeking to 'engage with the Maori legal system'. Within the context of growing conflict with the Kingitanga, the Governor was highly averse to any recognition of sperate Maori authority and control. Any expression of Maori authority agreed at Kohimarama was therefore to be permitted and encouraged within the broader context of Crown sovereignty.

As far as Northern Maori were concerned, Kohimarama was a reaffirmation of Te Tiriti/Treaty, and as they understood it the Governor had held out the promise that they would join the governing councils of the Colony as equals. In that sense Maori would be involved in making and applying laws which affected them. The Conference, as an annual event, was therefore seen by the chiefs as a means of creating a new partnership framework which would reflect Maori political and other aspirations. This partnership would no doubt also reflect and provide a means of expressing tikanga and Maori law, but within the context of a partnership. We also note the Northern Maori were highly adaptive, and were prepared to alter or even abandon their own law and tikanga in cases where it served their interests to do so. As noted, Northern Maori generally cooperated with the Magistrates in civil and commercial cases. This was because they understood that customary means of dispute resolution (such as muru) were no longer appropriate and might damage their long term economic prospects.

16. For reasons outlined above we do not agree that the Governor, in his November despatch, saw the failure to set aside Maori districts under the Constitution Act as a

'lost opportunity' which he was attempting to redress in 1860. Nevertheless, although the Governor had convened the Kohimarama Conference for political reasons, the evidence suggests that he and Donald McLean genuinely desired some form of Maori role in the colonial administration, and planned to convene further conferences on an annual basis.

17. Yes, in the sense that he planned to convene annual conferences, which he and Donald McLean believed would result in a deeper political engagement between the Crown and 'loyal' Maori.

18. Yes.

19. No. Although future conferences would have been costly, money was not the issue. Governor Grey abandoned the idea of future conferences for political reasons. He claimed that annual conferences of chiefs were (or might become) inconsistent with the Queen's sovereignty.

20. Perhaps it would be more correct to say that he wanted to create a uniform and consistent system of law. We note that a uniform 'Code of Laws' written by Chief Justice William Martin was circulated at the Kohimarama Conference, and was seriously considered by those present (NL&P, p113).

21. Yes.

22. Not really. Governor Browne envisaged that a Council of chiefs would meet annually to pass laws affecting Maori, and that Runanga would exercise a limited form of 'self rule' in Maori districts, but we think it would be going too far to describe this as Crown recognition of a 'parallel jurisdiction and sovereignty', especially within the context of an emerging conflict with the Kingitanga. The Runanga were to apply laws developed and approved by the Crown, and could not devise new laws without the Governor's approval (NL&P, p115).

24. Yes. It is clear that Northern chiefs saw no conflict between the Queen's sovereignty and the exercise of their own rangatiratanga. They believed that Te

Tiriti/Treaty enshrined this concept. The Queen's authority, expressed through the Governor, and their own authority and rangatiratanga were not, as far as they were concerned, mutually exclusive concepts.

25. Northern Maori expected an equal partnership.

26. We are not sure what is meant by a 'singular social Darwinist absolutist approach'. Governor Grey and Donald McLean (along with many other settlers, Crown officials and politicians) believed in the assimilation (or amalgamation) of the races. By the standards of the 1860s this was considered to be enlightened and humane. F. E. Maning and some other settlers in the north held more extreme views, which we have described in our report as a crude form of social Darwinism. It cannot be said that Maning's extreme views were shared by McLean, Governor Browne or Governor Grey, and they were not generally reflected in official Crown policy.

27. Yes, broadly speaking. It would be more accurate to say that Governor Grey opposed anything, including a reconvened Kohimarama Conference, which might hinder his major policy objective - the extension of real and effective Crown sovereignty throughout the whole of New Zealand. We note that the Kingitanga formed the most obvious and, for the Crown, most dangerous manifestation of 'Maori sovereign power' at this time.

28. Yes, in one sense, but Northern Maori did not necessarily see it in this way at that time. As far as they were concerned the Kohimarama Conference was a reaffirmation of the te Tiriti/Treaty partnership, rather than the expression of their independent authority. Northern Maori did not begin to demand separate political institutions and political autonomy until the late-1870s, when it became clear that promises of partnership had not been honoured by the Crown, and were not likely to be honoured in the future.

29. Governor Grey's 'new institutions' provided a form of self-government in Maori districts, but he maintained strong indirect control and the activities of the Runanga were circumscribed. The Governor saw political advantages for the Crown in establishing a limited form of self-government in the north as a means of undermining

the Kingitanga. For him it was desirable in that sense. Northern Maori saw it as a welcome expression of the Te Tiriti/Treaty relationship.

30. Yes, it is broadly consistent with paragraph 13 of Governor Browne's despatch.

31. Yes, broadly speaking. Governor Grey did not favour an annual Kohimarama Conference as in his view this would be inconsistent with the Queen's sovereignty. On the other hand, a Runanga system under his own (albeit indirect) control did not, as far as he was concerned, present any such challenge. Rather than a 'complete u-turn', it is probably more accurate to say that Governor Grey retained the idea that a form of local Maori administration controlled by himself was acceptable and would serve Crown interests, but he was not prepared to provide Maori with a role in developing colonial policy.

32. By 1865 the Crown no longer saw the need to conciliate or work with Northern Maori, and any manifestation of 'separate treatment' or 'separate institutions' (including Runanga) were dispensed with. This represented a very significant 'u turn' and a lost opportunity.

33. Yes. Despite the Crown's actions Northern Maori continued to try and honour the terms of Te Tiriti/Treaty. That is one of the most striking features of the period after 1865.

34. Yes.

35. This is evidence of the Crown's ongoing inability to exercise effective sovereignty in the north.

36. This remark reflects a continued Maori belief that Crown sovereignty and the exercise of their own rangatiratanga were not mutually exclusive concepts. The Crown was unable to universally apply English law for a considerable period after 1860, and despite the Crown's failure to recognise or support Maori autonomy, a parallel system of Maori law continued to prevail in many instances - especially in

relation to criminal law. This situation continued until the 1880s, when settler numbers began to increase and the 'balance of power' shifted from Maori.

37. We agree that for a considerable period after 1860 the Crown was unable to impose its full authority in the north. Whether or not one could go so far as to say that this was evidence of the existence of a 'parallel' Maori sovereignty is a matter we leave to counsel and the Tribunal.

D. Watkins. July 29, 2013

i). We do not recall saying during our cross-examination that storekeepers were 'Crown agents'. The passage at p823 of our report refers to two separate issues

- the cost of food supplied by Crown purchase agents (not store-keepers) forming a charge on the land, and
- the profit made by store-keepers (not Crown agents) during a September 1880 Whangarei Native Land Court

ii) We agree that the lack of Government financing to Maori owners under the 1905 legislation was unreasonable and unfair. Whether this represents a breach of Te Tiriti/Treaty is a matter best left to counsel and the Tribunal.

C. Revell. August 5, 2013

2.1. (a-b). There were a number of Native Land Acts operative in the North during the period 1860-1910. We will focus on the most important of them: the Native Lands Act 1862, the Native Lands Act 1865, and the Native Land Act 1873. The 1873 Act was by far the most significant within the Northland context.

Our short answer is that the extent to which northern Maori could control the land alienation process and exercise rangatiratanga was progressively undermined between 1862 and 1873. The 1862 Act permitted Maori communities to exercise a good deal of control up until the point the land was alienated. The 1865 Act provided for the award of land to ten or fewer individuals owners, who could theoretically choose to

alienate or occupy the land. When a Certificate of Title was issued by the Native Land Court under the 1873 Act, the exercise of mana whenua and tino rangatiratanga was virtually impossible.

Native Lands Act 1862

The Native Land Court which operated under the 1862 Act was primarily a Maori body, comprising a panel of chiefs supervised by a European magistrate. Applications to the Court could be made by individuals or communities, although it was acknowledged at the time by those who drafted the Act that the vast bulk of land was held communally, and would be subject to tribal applications. The first task of the Court was to declare customary entitlements. If titles were found to be tribal or community titles they remained so until such time as the tribe or community subsequently applied to subdivide their lands under a Crown grant for the purposes of alienation or their own occupation. There was no compulsion. This system - although short-lived - provided an opportunity for a substantial degree of hapu and iwi control of the land title adjudication and alienation process. In that sense it allowed for a significant expression of rangatiratanga.

Native Lands Act 1865

Under the 1865 Act title was immediately transformed into individual entitlements without any intermediate step. Up to a maximum of ten individuals would be named by the Court in a Certificate, after which the Governor would issue a Crown grant to those named in the Certificate. Although the ten named owners were supposed to act as trustees for the wider community, there was no legal requirement for them to do so. Maori communities, iwi and hapu, as opposed to the individual grantees, were in a legal sense thus unable to exercise any form of rangatiratanga upon the issue of a Crown grant, although the named owners were able to alienate or occupy the land.

Native Land Act 1873

Under the 1873 Act the Native Land Court identified all owners (as opposed to ten, under the 1865 Act) and listed them on a Memorial of Ownership. This did not reflect

a form of collective or tribal control. It was merely a list of individual Maori who possessed undefined interests. These undefined interests were alienable to the Crown or settlers. They could be acquired piecemeal by the Crown or private purchasers without the need to deal with or obtain the assent of the community of owners. The Memorial of Ownership did not result in an allocation of land interests on the ground, in the form of individual or whanau land allotments or farms, but rather created alienable 'paper' shares. The aim was land alienation, not Maori possession of farms or the exercise of Maori agency or rangatiratanga. The form of tenure delivered by the Native Land Court after 1873 was of little utility to Maori for any purpose other than alienation to the Crown or settlers.

Section 48 of the Act prohibited alienation except by lease for a period up to 21 years. Section 49 states that s48 would not, however, prevent the sale of land if all the owners agreed, or prevent a partition of the land 'in the manner hereinafter provided, if required'. Section 65 accordingly permitted the partition of the interests of sellers and non-sellers ('dissentients') in cases where agreement could not be reached and when a majority 'in either case' desired it. In other words, a bare majority of sellers could apply for a partition, irrespective of tribal preferences.

Marama Waddell. August 27, 2013.

2. We have relied on Hone Peti's letter to Chief Judge Fenton (December 5, 1870). The original can be found in our supporting papers (see footnotes 638-639, p389). Thank you for providing the correct spelling. The evidence available to us does not reveal the location of these lands. Our report, in conformity with our instructions from CFRT, is an 'overview' covering five Tribunal hearing districts between 1860-1910. It addresses broad historical themes, and the events referred to are included as part of a wider discussion. Our report does not (except in a few cases) provide detailed 'block histories'. This would have been impossible, given the extent of the area under consideration and the extensive time period covered - 50 years. Our approach and methodology in this regard is fully explained in the introduction to our report (pp2-3). We note, however, that this issue relates to an Old Land Claim. Further information may have been provided by Stirling and Towers. Perhaps a question could be directed to them.

3a-c. There is no confusion between pages 388-389 and page 968. A careful reading of our report reveals that the comments on pages 388-389 relate to a dispute involving a pre-Tiriti/Treaty Old Land Claim, which were raised by Hone Peti in 1870, while the comments on page 968 relate to Wiremu Hau's reported intention to sell land to the Auckland Provincial Government in 1874. As far as we can tell they are separate matters. The source of our information relating to the 1874 events can be found in the footnotes on pages 967-969 of our main report. We do not know the location of these lands. If a sale took place it may be possible to locate further information (including the location of the lands) in Paula Berghan's *Block History Narratives*.

David Armstrong, E. Subasic
September 12, 2013