KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF **THE TAIHAPE: RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY**

CROWN CLOSING SUBMISSIONS IN RELATION TO ISSUE 6: ARREST AND EVICTION OF WINIATA TE WHAARO AND DESTRUCTION OF POKOPOKO

9 July 2021

CROWN LAW
TE TARI TURE O TE KARAUNA
Pouaka Poutāpeta PO Box 2858
TE WHANGANUI-A-TARA WELLINGTON 6140
Waea Tel: 04 472 1719
Waea Whakaahua Fax: 04 473 3482

Whakapā mai: **Contact:**
Michael Madden
Michael.Madden@crownlaw.govt.nz

Barrister instructed:
Rachael Ennor

TABLE OF CONTENTS

INTRODUCTION

1. On 18 May 1897 Winiata Te Whaaro was arrested by police for contempt of court. Members of his whānau were evicted and escorted from Pokopoko and on 20 May the Pokopoko kāinga was destroyed under the direction of the Sheriff (under order of the court).

2. The arrest, eviction and destruction of the kāinga were the culmination of protracted title determination process and litigation for the Mangaohāne block (on which Pokopoko was located) in the context of sheep farming being introduced to the area. The eviction itself was the result of a private party enforcing their property rights through civil litigation.

3. These events were inextricably linked to the 19th century Native land laws. Crown actions whilst implementing those laws contributed directly to those events.

CROWN ACKNOWLEDGEMENTS AND CONCESSIONS

4. The Crown acknowledges that the Winiata whānau, and members of Ngāti Hinemanu me Ngāti Paki, have a long-standing grievance over the exclusion of Winiata Te Whaaro (and those he represented) from the Mangaohāne title and the consequences of that for the kāinga, community, and farm developed at Pokopoko. The Crown has heard their views as to the prejudicial effect of Crown legislation having contributed to their loss of land and resources and having failed to protect their interests in Pokopoko.

5. The Mangaohāne title determination process occurred within the 19th century Native land laws. The acknowledgements and concessions made by the Crown regarding those laws (in submissions on Issue 3) are illustrated in the case of Mangaohāne and are thus recorded here also – each of the matters below can be seen in the Pokopoko experience.

> *Impact of the Native Land Laws*
>
> The Crown concedes that the individualisation of Māori land tenure provided for by the native land laws made the lands of iwi and hapū in the Taihape: Rangitīkei ki Rangipo inquiry district more susceptible to fragmentation, alienation and partition, and this contributed to the undermining of tribal structures in the district. The Crown concedes that its failure to protect these structures was a breach of the Treaty of Waitangi and its principles.

The Crown acknowledges that:

> the requirement of Taihape Māori to defend their interests in the Native Land Court significantly damaged relationships between Taihape Māori and their neighbours, and amongst the iwi, hapū and whānau of Taihape, the effects of which are still felt today;
>
> the overall operation of the native land laws, in particular the awarding of land to individuals, undermined tribal Taihape Māori decision making and made their land more susceptible to partition, fragmentation, and alienation;
>
> this eroded Taihape Māori traditional tribal structures; and
>
> the Crown's failure to protect Taihape Māori tribal structures was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.

The Crown further acknowledges that:

> it did not consult Taihape Māori before introducing the Native Land Acts of 1862 and 1865 which imposed a new land tenure system on Taihape Māori that transformed their customary tribal tenure into one based on individual rights;
>
> Taihape Māori had no choice but to participate in this system in order to protect their lands from the claims of others;
>
> between 1875 and 1895 Taihape Māori were frequently required to attend hearings at venues far from their settlements. This imposed a considerable burden on Taihape Māori who sometimes had to attend long hearings with insufficient food supplies and inadequate accommodation, and made it difficult for some Taihape Māori with interests in lands to attend;
>
> Crown actions or errors sometimes extended the duration of Native Land Court hearings, increasing the burden on Taihape Māori; and
>
> Taihape Māori sometimes had to sell land to pay the significant costs associated with Native Land Court processes.

The Lack of Provision for Collective Administration of Land Under Native Land Laws Until 1894

The Crown concedes that it failed to include in the native land laws prior to 1894 an effective form of title that enabled Taihape Māori to control or administer their land and resources collectively. This has been acknowledged previously as a breach of the Treaty of Waitangi and is again acknowledged as such for the Taihape inquiry district.

6. It cannot, at this remove, be known what may have occurred at Pokopoko in the absence of the above breaches having been committed by the Crown.

7. These events occurred in a context of political and commercial contest for the land at Pokopoko within the new economy of wool production. That

contest was between and within tāngata whenua entities, and was strongly affected by commercial relationships with European interests. The eviction of Ngāti Paki from the farm they had developed was the consequence of Winiata Te Whaaro (and those who claimed with him) being excluded from the title in a statutory land titling system that sought to establish certainty of title; and that enabled enforcement to protect those titles once they had been established. The Crown recognises that this fixed form of property rights was in tension with more fluid use rights and non-exclusive collective property rights under tikanga.

8. The Crown further acknowledges that:

8.1 the survey process for Mangaohāne (undertaken by the Crown) had consequences for the title determination process, including:

8.1.1 the Surveyor General's 1881 decision not to rescind the authorisation of the survey (where that authorisation had been made in error) exacerbated tensions between groups competing for their interests in the land to be recognised and lessened the opportunity for groups to reach agreement on which land was in question;

8.1.2 Crown actions contributed to a delay which meant the survey plan was not produced until 1890 – this extended the overall titling process and contributed to the complexity of the litigation undertaken and the outcome of that litigation;

8.2 all those claiming interests in Mangaohāne were required to protect and defend interests in land at Pokopoko through the Native Land Court against the claims of others with interests in those lands[1] significantly damaged some of the relationships between Winiata Te Whaaro and some of his whanaunga, and contributed to tribal structures being undermined or altered;

[1] The broader contest was between Ngāti Whitikaupeka and what would today be described as Ngāti Hinemanu lines. The contest was compounded in the case of Mangaohāne as Winiata Te Whaaro, Airini Donnelly, and Rēnata Kawepō sought to carve out interests in the land distinct from each other notwithstanding their close whakapapa relationships.

8.3 Winiata Te Whaaro and his wider whānau incurred great financial cost in challenging the title decision in the courts, through petitions to parliament, and through Ministers of the Crown;

8.4 in an 1894 decision under remedial legislation[2] the Chief Judge of the Native Land Court found that Pokopoko had been included in the title in error and that Winiata (and those claiming with him) should have had, but did not have, the opportunity to establish their claims through a rehearing and that there was evidence that meant "there was reason to believe, were the Court still open to him, would influence a decision in his favour." The Chief Judge acknowledged some jurisdictional difficulties but concluded that the appropriate remedy was to amend the title by including Winiata (and those who claimed with him) in the list of owners of Mangaohāne block (which the Chief Judge proceeded to do). The Court did not make findings on the extent of those interests relative to others also on the title. The Chief Judge's decision was reviewed and disallowed by the Court of Appeal in 1895 on jurisdictional and procedural grounds – but nonetheless put the Crown on notice that there were matters that appeared not to be capable of resolution without special legislation, and in historical and Treaty terms is to be accorded a degree of weight (albeit legal interests were not established);

8.5 the Court of Appeal (in different decisions) found that the Native Land Court had made errors that adversely affected the interests of multiple parties claiming interests in Mangaohāne No. 2 lands. Legislation provided for some, but not all, of those errors to be remedied and protected some parties from adverse consequences of the court's errors. The adverse effects on Studholme's interests were remedied. Winiata was ultimately unable to establish legal rights in the land – to do so, special legislation would have had to have been introduced to enable a rehearing, but that was not done (and in the absence of that occurring there can be no legal certainty as to what the outcome may have been);

---

2 Native Land Courts Act Amendment Act 1889 section 13.

8.6 Winiata Te Whaaro's access to the courts was specifically protected under one piece of legislation, but that did not ultimately provide a procedural pathway to remedy the errors identified by the Native Land Court in 1894 that affected his interests in Mangaohāne. Special legislation to provide for a rehearing was not enacted;[3]

8.7 Winiata Te Whaaro and the Studholmes negotiated an out of court settlement under which Winiata would secure title to 5,000 acres of land at Pokopoko.[4] The agreement was not able to be legally executed without the consent of a third party – that consent was not forthcoming;[5]

8.8 legal proceedings brought by private parties led to the eviction of Winiata and his whānau from the Mangaohāne land at Pokopoko that they had resided on and farmed for (by the time of eviction) twenty years, and the demolition of the Pokopoko settlement. The community was compelled to leave their settlement, their possessions were removed, and their homes and buildings demolished;

---

3 The Native Land Courts Certificates Confirmation Act 1893 was passed in accordance with validation legislation – it provided for the Studholmes' title to Mangaohāne No. 2 to be validated however, provision was inserted specifically to allow for the Mangaohāne No. 2 legal proceedings to be completed prior to any certificate issuing under the Act.

Winiata's application was taken under the Native Land Court Act Amendment Act 1889 section 13. That section was a remedial provision but did not provide for rehearing to be ordered by court. The CA found in 1895 that a rehearing would have been the correct procedural pathway. However jurisdiction for a rehearing was, by that stage of the proceedings (given three months had elapsed since title had been confirmed in 1893), not available without special legislation being passed – no such legislation was passed.

Native Land Court Certificates Confirmation Act 1893 (utilised by Studholmes and Donnellys). Section 7 preserves access to Court for specified Mangaohāne No. 2 proceedings; Native Land Court Act 1894 s 118 (used by Studholmes to complete Mangaohāne No. 2 title).

1889 s 13 validation provision utilised by Winiata did not provide a remedy for parties who might belatedly be found to have been wrongly excluded from the title.

4 The settlement, under which the Studholmes would provide 5,000 acres to Winiata out of the Kawepō/Studholme land, was agreed between Winiata Te Whaaro and the Studholmes but it also required the Donnellys agreement to discontinue further legal challenges (due in part to the 1892 s 7 savings provision for Mangaohāne No. 2 access to the courts). The Donnellys did not agree and instead challenged the 1893 CJ s 13 decision through to the Court of Appeal.

5 As discussed below, this was also affected by Native Land Court Certificates Confirmation Act 1893 s 7 which, although it was inserted to protect Māori access to court for Mangaohāne No. 2 also had the (unintended) consequence of preventing the Studholmes and Winiata completing their agreed settlement without the Donnellys also agreeing to that settlement.

8.9 the Crown (police) assisted in the eviction, acting under a Court order (after having refused five times, in accordance with Crown policy not to provide state support to enforce civil legal matters);

8.10 the Court officer (Sheriff) who served the eviction order, warned the Pokopoko residents that they would be imprisoned if they did not vacate quietly and made representations as if he were acting on behalf of the Crown. Winiata Te Whaaro and the residents of Pokopoko viewed the Sheriff as acting on behalf of the Crown;

8.11 the arrest of Winiata as part of these proceedings led to his incarceration in Wellington before an agreement was struck releasing him on condition that his whānau would vacate their Pokopoko settlement and farm;

8.12 these events were experienced by the Winiata and related whānau and hapū as an injustice, concerning which the whānau and hapū still carries a strong sense of grievance today;

8.13 cumulatively, the above events had a severe and lasting impact on the economic base and tino rangatiratanga of the Winiata whānau.

Crown approach and summary

9. These submissions are structured in three parts: background; Mangaohāne title determination; eviction and arrest.

10. Dr Young concluded, and the Crown agrees, that unintended errors appear to have been made by Winiata Te Whaaro and/or his legal advisors that materially affected the title determination for Mangaohāne No. 2.[6] These submissions focus, however, on the Crown's actions and omissions that were also of material effect (and which form the context in which those errors were made). These cumulatively prejudiced Winiata Te Whaaro and those he represented in their ability to pursue legal avenues in the Mangaohāne block – and in the subsequent arrest of Winiata Te Whaaro and the eviction of his community from Pokopoko.

---

6 In particular Winiata Te Whaaro's evidence in 1884/85 that Ngāti Hinemanu had no claim to the land and litigation strategy (not introducing new evidence where there was opportunity to do so; opposing the survey plan in 1893; not seeking rehearing after title confirmed).

PART 1: BACKGROUND

11. This section is reasonably comprehensive as it provides critical context to te Tiriti/the Treaty issues arising from Winiata te Whaaro's customary relationship with the land; with the others who also claimed customary relationships with that land; and the establishment of Pokopoko.

12. Throughout much of the evidence Winiata Te Whaaro is often referred to as an individual. These submissions follow that approach but in doing so, the Crown acknowledges that Winiata Te Whaaro was not acting as an individual – the kāinga and farm at Pokopoko, along with his various applications, appearances and representations to the Courts or to the Crown were undertaken in his own right but also on behalf of whānau, hapū, and others he represented. This goes also for others involved including Hīraka and Retimana Te Rango, Noa Huke and Rēnata Kawepō.[7] Rēnata did not act alone in his Mangaohāne dealings either.[8]

Geographic and historical Background

13. Mangaohāne is located between the Awarua, Ōruamatua-Kaimanawa, Ōwhāoko D and Te Koau blocks. Pokopoko is at the southern end of the

---

7 Wai 2180, #A06, at 77. Lease with Maney entered into for Ōwhāoko by Rēnata Kawepō, Ihakara Te Raro, Retimana Te Rango, Noa Huke, Hira Te Oke and Karaitiana Te Rango; Ōwhāoko block:

Wai 2180 #A06, at 35, survey 1873/74; 1875 title application by Rēnata Kawepō and Noa Huke (and "Te Hira Oke" – Hiraka?) – Noa 134. No claimed through Whitikaupeka and Wharepurakau and acknowledged Karaitiana Te Rango's interests.

It is also noteworthy that most, if not all, of those key events occurred during periods when Winiata and Kawepō were aligned. The above chronology suggests that Winiata and Kawepō were largely aligned from 1850 through to Kawepō's death, with the exception of the period between 1877 and 1880/1881 and after the 1885 title determination.

8 Dr Fisher and Mr Stirling state: "He [Kawepō] acted in conjunction with members of Ngati Whiti, Ngati Tama, and Ngati Hinemanu, including leading figures such as Winiata Te Whaaro, Hīraka Te Rango, and Noa Te Hianga/Huke." (Wai 2180, #A06, at 175 - although Winiata is not listed in the report's coverage as one of the people who signed the Ōwhāoko lease or that for Mangaohāne). The Crown notes that none of the key actions for either Ōwhāoko or Mangaohāne (informal leasing to Maney, applying for title determination, renegotiating leases with Studholmes after title revisions following rehearings) were undertaken by Kawepō alone, nor by solely Ngāti Ūpokoiri people. No specific evidence is recorded in any report as to whether the Ōwhāoko informal lease to Maney (subsequently purchased by the Studholmes) included Mangaohāne lands but Hīraka's recall of the Turangarere hui relating to both blocks suggests it was likely to have been. Fisher and Stirling note Riseborough's recording of the conflict between Kawepō et al and Hīraka et all between 1881 and 1884 as relating to Ōwhāoko block. Fisher and Stirling reject that on the basis of the earlier 1874 Ōwhāoko survey having not met with opposition and the timing of the events being proximate to the Mangaohāne title determination – however that timing immediately precedes Stout's 1886 Ōwhāoko report so Riseborough may also be correct. It appears to the Crown that, given that ongoing concerns were also being expressed at the same time about the Ōwhāoko title it is likely that the events related to both blocks (Ōwhāoko Stout report is 1886).

Mangaohāne block.[9] The maunga Aorangi (Awarua) lies immediately to the south of Mangaohāne No. 2 block.

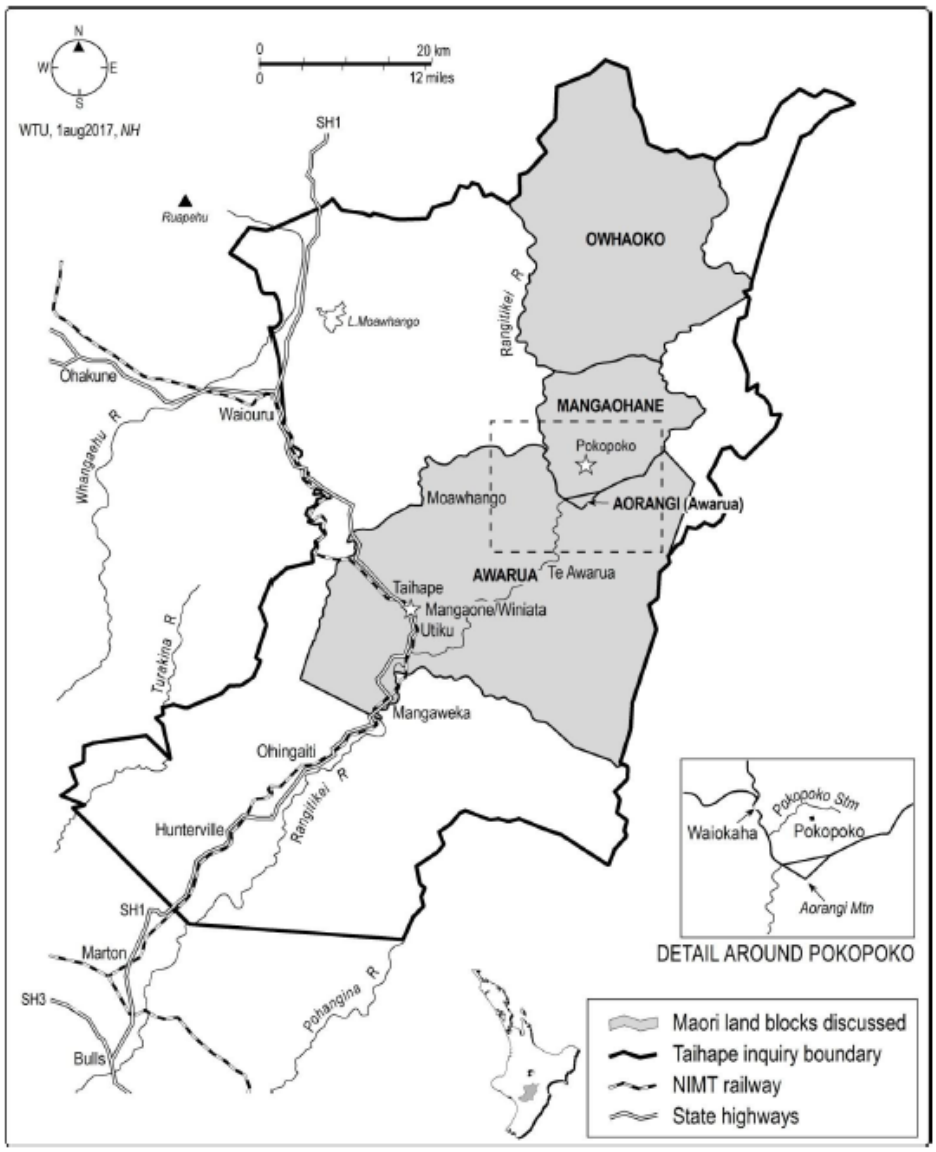


Figure 1: Mokai Patea, showing Winiata Te Whaaro's kainga of Pokopoko and Mangaone

14. The Mangaohāne lands provided "northern food gathering sites" for Ngāti Hinemanu, Ngāi Te Ohuake and (apparently to a lesser extent) Ngāti Whitikaupeka.[10] Seasonal sites close (3-6 km)[11] to Pokopoko forest and the

9 Wai 2180, #A06, at 174.

10 Wai 2180, #A12, at 526, 609, 719–727 and 736. Note Mr Walzl does not record many Ngāti Whitikaupeka ahi ka sites within the Mangaohāne block (one eeling site only – see page 609) – that is somewhat surprising given Hīraka te Rango's relationship with and use of that land (acknowledged and supported by Winiata Te Whaaro at times). The sources for those records by Walzl are the Ōwhāoko, Mangaohāne, Awarua and Te Koau Native Land Court hearings – ie there is no documentary evidence prior to the hearings, and the conflicts within those hearings may colour the evidence presented in them. See also Wai 2180, #B06, joint evidence on Pokopoko at 5 references relationship at Pokopoko from 1870s onwards, not prior.

11 Wai 2180, #A39, at 463 quoting Studholme on this. Pokopoko and Waiokaha each referenced specific places (the site where the Winiata kāinga was established, and the site Waikari Karaitiana established – sometimes also referred to as Shangri La) and the more general areas near them (the Pokopoko forest

subsequent location of Pokopoko kāinga established after 1877 included Te Waiokaha, Akuratawhiti, Te Papaatarinuku and Papapohatu.[12]

15. The Mangaohāne block became highly sought after as sheep farming (for wool production) emerged as an important source of income and a suitable use for the high altitude grassed lands. The climate and topography of Mangaohāne made it useful as "low altitude pasture for lambing" and allowed for winter stock holding and grazing – stated to be a "necessary complement" for the adjoining Ōwhāoko block to be run profitably.[13]

16. The objectives of Taihape Māori for the area were discussed at the Turangarere hui in 1871. Kawepō's proposals regarding a school endowment land and leasing of Ōwhāoko lands were agreed to.[14] Hīraka te Rango and other Ngāti Whiti later stated that they had agreed to Rēnata arranging the survey of the Ōwhāoko (including Mangaohāne) but that once the survey charges had been paid (through raising income off the lands) Mangaohāne was to be defined separately and returned to Ngāti Whiti.[15]

17. Kawepō and others (Noa Huke, Karaitiana Te Rango, Retimana Te Rango, Ihakara Te Raro, Horima Paerau, and Te Hira [Oke]) informally leased Ōwhāoko lands (including Mangaohāne) to Maney in the mid-1860s.[16] There is varied evidence as to whether the lease extended south of the Mangaohāne Stream. There is little evidence of conflict arising at the time of this original lease. Maney's creditors subsequently sold the informal lease to Studholme (as Maney was insufficiently capitalised to make it a going concern).[17] The informal lease was purchased by Studholme in 1876/1877

---

and the Mangaohāne block area). Throughout these submissions their use refers to the specific site unless otherwise indicated.

12 Wai 2180, #A56, at 11 fn 13. See also Wai 2180, #A12, at 736-739 see Map 17D: Northern Food Gathering sites. Mr Walzl records Winiata Te Whaaro "also being associated with" occupation to the West between the Rangitīkei and Hautapu Rivers.

13 Wai 2180, #A39, at 171; Wai 2180, #E03(a), H Steedman.

14 Wai 2180, #A06, at 33.

15 Napier NLC MB No. 20: 401–402. See also quoted at #A06, at 176.

16 Wai 2180, #A06, at 36.

17 Wai 2180, #B06, at 10 (P Steedman).

from Maney's creditors, with the apparent consent of Kawepō.[18] A formal lease was made in 1878 for Ōwhāoko.[19]

Winiata Te Whaaro relationship with the lands

18. Winiata Te Whaaro was born around 1825–1835 at Te Koutu (10-15 km from Pokopoko) and had his early years near Te Awarua Pa on the bank of the Rangitīkei River.[20] He was relatively mobile after his childhood – primarily within Awarua and, later, to other rohe.[21] Winiata and his whānau gathered food from Mangaohāne seasonally.[22]

19. Winiata Te Whaaro is today identified by the claimants primarily through his Ngāti Hinemanu lines and his Ngāti Paki identification and was also identified through multiple other lines and affiliations.[23] His relationships and affiliations shifted over time due to circumstances and his best attempts to further the interests of his immediate community. He was both aligned with, and opposed to, Rēnata Kawepō (Ngāti Hinemanu Ngāi te Ūpokoiri) and Hīraka Te Rango (Ngāti Whiti) at different points in time.[24]

---

18 Wai 2180, #A06, at 78; Wai 2180, #A43, at 135 states Studholme purchased Ōwhāoko lease 1876; Wai 2180, #B06, at 11 states Mangaohāne 1877. The "apparent consent" is due to the evidence of Kawepō continuing to work with Studholmes towards titling and purchasing the land.

19 Wai 2180, #A06, at 36–37; #A06, at 77 by Rēnata Kawepō, Ihakara Te Raro, Retimana Te Rango, Noa Huke, Hira Te Oke and Karaitiana Te Rango. 21-year term.

20 Wai 2180, #B06, at 9; Wai 2180, #H08, at 3; Wai 2180, #A39, at 11; Wai 2180, #H18 – see also transcript of this being presented Wai 2180, #4.1.11, from 650.

21 Wai 2180, #B06, at 9; Wai 2180, #H18. This appears to have included time in Manawatū following displacement through battles in the inquiry district – although Wi Wheko stated in 1884 evidence to NLC "Winiata's ancestors always lived on this land. When we went to Manawatu some of his people lived on the land. I alone went to Manawatu. Winiata was living at Manawatu and his brother in law went over there to fetch him. In former times Winiata's forefathers kept this land. But in recent times it has been Rēnata's ancestors that have protected it" (see Wai 2180, #A39(f), at 2 – or Wai 2180, #A30(a), Napier MB at 50–51).

22 Wai 2180, #A06, at 77; Wai 2180, #B06, at 10 states first visit 1861 (but other evidence Winiata says visited the lands as a child).

23 Wai 2180, #B06(a), is NHNP record of the various lines he claimed through in the 1884/85 and 1890 hearings. Wai 2180, #4.1.11 at 319 Judge Harvey notes the evidence given to Judge Scannell in 1893 is relevant but is not on the record. Wai 2180, #A56, at 159 – Winiata in 1890 as rangatira of Ngāti Ohuake and Ngāti Hauiti; and Ihakara Te Raro endorses him as conducting the business of Ngāti Whitikaupeka also (along with Hīraka Te Rango).

Wai 2180, #4.1.11, at 654 Jordan Haines-Winiata acknowledged as follows: "So who will continue the claims from the grave. This is just about the ancestors of Hinemanu and Paki. I said these are the ancestors that support Winiata Te Whaaro. They entered into the Native Land Court within, under the mana of Ngāti Hinemanu. They were: Noa Te Hīanga, Irimana Te Ngahoa, Wī Wheko, Paramena Te Naonao, Pirimoana Te Urikahika, Utiku Potaka, Noa Huke, Rena Maikūkū, Hiraka Rāmeka, Pirihia Toatoa, Mātenga Pekapeka, Maiake Rāmeka, Wiki Te Uamairangi, Ānaru Te Wanikau, Rēnata Te Kawepō and Te Hana Hinemanu."

24 For example see Wai 2180, #A56(c), at 4–5: Ms Luiten sets out indicators of customary support for Winiata's Pokopoko endeavours increasing over time – particularly from Ūtiku Pōtaka through Hauiti lens; and Ngāti Whitikaupeka who support Winiata's rehearing application (although they were pursuing separate interests themselves in 1884) and who take an increasingly active supportive role in subsequent petitions and litigation.

20. Winiata lived and worked in and around Ōmahu (the primary base of Rēnata Kawepō) and Ōhiti in Heretaunga from the 1850s–1870s.[25] He and his brothers served "in the military" as part of the militia/war party of Rēnata Kawepō between 1860–1872 – this included some service aligned with the Crown.[26] In the early 1860s he accompanied Rēnata Kawepō and other Ngāti Hinemanu and Ngāi te Ūpokoiri from Manawatu (where they had relocated to during the musket wars) back to Heretaunga at Ōmahu.[27]

21. Between 1875–1877 "Rēnata sent Anaru Wanikau to Manawatu to get Winiata and his brother (Irimana Te Ngāhoa) to drive sheep to Patea." They were based from Mangaohāne from that time, travelling for income earning from time to time (shearing and at Ōmahu).[28]

Pokopoko kāinga and sheep

22. Pokopoko was not an endeavour by Winiata Te Whaaro alone. He was recognised as the rangatira amongst the whānau there who descendants today identify as Ngāti Paki collectively. Irimana Te Ngāhoa and Hori Tanguru (brothers of Winiata Te Whaaro) were closely involved throughout, and by 1897 over twenty people lived there.[29]

23. Sheep farming was introduced into the district through Azim Birch's operations somewhere between 1864 and 1868.[30] In 1873 Hīraka te Rango (in partnership with Batley) "put sheep on Tutapapa" (Awarua) – Winiata acknowledged these as the first sheep on Mangaohāne.[31] Pokopoko was a

---

25 Wai 2180, #B06, at 11 records him living at Ohiti in 1866.

26 Wai 2180, #A56, at 11 Luiten (based on inscription on monument at Ōmahu); Wai 2180, #E03(a), at [20]. Winiata fought with Kawepō in the Waikato, Te Porere, and the Pakiaka war. Kawepō assisted the Crown in its pursuit of Te Kooti Arikirangi Te Tūruki. Wai 2180, #B06, at 10.

27 Wai 2180, #A39(f), Evidence of Irimana Te Ngahoa and Wi Wheko (for Te Whaaro's case), 1884, Napier MB 9, at 50–51. See copies of Minute Books in #A30(a), vol 4.

28 Wai 2180, #B06, at 10. Wai 2180, #A39(f), Winiata and Irimana evidence at 1884/85 title determination.

29 Wai 2180, #A56, at 11, and at 12 fn 22. By the time of the eviction itself, Winiata's primary residence appears to have been at Mangaone, with whānau members resident at and farming at Pokopoko.

30 Wai 2180, #A06, at 139. Wai 2180, #B06, at 10 says Henare Akatarewa took sheep to Pātea in 1868. In 1876 RT Batley drove sheep onto (Mangaohāne No. 2) for Waikari Karaitiana.

31 Wai 2180, #A39(f), evidence from 1884 title determination. See also Wai 2180, #B06, at 10. A collection of Winiata's evidence on this is compiled in P Steedman brief: Anaru and I took our sheep to "Waiokaha". Out of our sheep Karaitiana got his. Hīraka's sheep were running at "Tutapapa" before we bought ours. His were the first sheep on this block. Pirimoana's and Anaru's were the first sheep on "Kaingaroa" Anaru's sheep were taken from "Waiokaha" and Pirimoana's from "Ohiti"(by Matarawi) "I did not hear of any objections to those sheep going there" "I was friends with Rēnata then, Whiu Donnelly was made manager for Rēnata then." "I went over to join Ngati Whiti against Rēnata." "I did not look at Rēnata as being an important man with regard to lands, he was a large sheep owner." *NapMB 9 p 47 1874, Awarua MB p* 29, *JS Ms Nap MB 9 p 220.* In the 1892 Awarua hearing, Winiata stated "He [Rēnata] did not drive me off the land [Mangaohāne] and my sheep always remained on the land until Donnelly and others took possession of them." It is unclear which events this is referencing but may be

new model of settlement based on a new mode of land use. It was one of several such kāinga established throughout Mōkai Pātea at this time, as tangata whenua took advantage of new economic possibilities presented by farming sheep[32]

24. Winiata Te Whaaro and his whānau established the kāinga at Pokopoko.[33]

24.1 The evidence is inconclusive as to the precise timing of its establishment – it was no earlier than 1877 and no later than 1882.[34] Winiata managed Rēnata's flock on Mangaohāne proper, then moved to Waiokaha and (it seems in 1880) moved to Pokopoko itself.

24.2 Hīraka Te Rango filed an application for a survey to be authorised (then in partnership with Donnellys) in September 1880[35] to establish rights and title over Mangaohāne block more generally. The application was not made to challenge Winiata's rights in particular,[36] nonetheless, Pokopoko kāinga had been established for a relatively short time when Native Land Court litigation was commenced to determine relative rights and interests in the land (somewhere between a matter of months or maximum three years).

---

the 1881 court ordered auction (see below) and Hīraka's subsequent driving off of the sheep. It might alternately be in 1876 when Donnelly replaced Winiata as Rēnata's manager.

32 Wai 2180, #A56, at 11 fn 13. See also Wai 2180, #B06, at 11.

There were other kāinga on Mangaohāne (in particular that of Paramena te Naonao at Makokomiko and Anaru Te Wanikau at Waiokaha) See Wai 2180, #A39(f), evidence to the 1884/85 title determination; and Wai 2180, #A39(d), at [4]. Waikari Karaitiana appears to have been located on Awarua, across the river from Waiokahu.

See also #A06, at 243 for example of disputed establishment (Anaru Te Wanikau attempted to establish a similar sheep-farming venture at Awarua, he was apparently driven off by Ngāti Whiti to Ōwhāoko, and from there driven off again to Timahanga).

33 Wai 2180, #4.1.8, HW1 transcript at 626, 647 (J Winiata-Haines): "It is fair to say Ngāti - Winiata Te Whaaro took Ngāti Paki to the Native Land [Court]. He elevated the mana. He lit the fires of Ngāti Paki." And (translated) "We did not see any other person who took Ngāti Paki's claims to the Native Land Court. However, his kin wholeheartedly supported him in that endeavour. They supported the whakapapa he offered as Ngāti Paki stated. His elders were still alive, Noa Huke and others, Te Ihunguru and others it was them, it was that group."

34 Wai 2180, #4.1.11 at 647–652, Wai 2180, #H18. Ms Luiten dates the 'permanent' settlement of 'Winiata Te Whaaro and Ngati Paki' at Pokopoko from 1877 (consistent with Winiata's evidence to the Awarua Commission in 1890). Based on the 1892 rehearing evidence Mr Herbert Steedman's evidence is that he moved to Pokopoko in 1880 (Wai 2180, #E03(a)) as is Patricia Cross's (Wai 2180, #H05, at [36]) and Dr Young's (Wai 2180, #4.1.11, at 481).

35 Wai 2180, #A39, at 18.

36 The larger conflict at the time was between interests related to Kawepō, Ngāti Whitikaupeka, and the Donnellys.

24.3 The reasons given by witnesses in 1884 as to why Winiata moved to Pokopoko included that Noa Huke asked or 'told' him to;[37] that Rēnata made him move due to Winiata not wanting to give the sheep to the Whanganui rangatira;[38] or that Winiata distanced himself after Donnelly was appointed manager.[39] Sir Doug Kidd asked Herbert Steedman:[40]

> Kidd The question is, who gave him [Winiata] permission to go onto the land with those 200 sheep and farm?
>
> H Steedman Well the way in which we have always seen it, was either one of his uncles Wi Wheko or Noa Huke gave him that right to go and take his sheep.

24.4 Ms Luiten helpfully collates a number of pieces of evidence as to the support of other hapū or iwi for the Pokopoko kāinga, and increasing over time.[41]

24.5 The sheep Winiata and Irimana drove from Ōmahu to Mangaohāne were owned by Rēnata Kawepō.[42] Winiata's evidence

---

37 Wai 2180, #A39(f), at 1; see also Wai 2180, #B06, at 10, 12. Winiata's 1884 evidence:

> Rēnata gave me sheep to start a run there, but I have paid for them; any boundary has never been shifted from Mangaohāne; Rēnata did not shift my boundary from Mangaohāne to Upokopoko; he did not drive me off, and my sheep always remained on the land until Donnolly and another took possession of them; […]
>
> I did not understand that Rēnata meant to dispossess me of this land when he told me to take my sheep to Waiokahu [sic]; Rēnata did not turn me off; I went because Noa asked me to go to Pokopoko because there was plenty of firewood there;

38 Wai 2180, #A39(f), at 3. This was the reason given by Irimana Te Ngahou. "It was Rēnata that gave Winiata sheep to take on to this land. Winiata asked Rēnata for them; Rēnata and Winiata quarrelled because Winiata would not give up all his [Rēnata's] sheep to Mete Kingi of Wanganui; and then Rēnata requested Winiata to leave this land; he did not tell Winiata where to go, but just turned him off; and Winiata came to live at Pokopoko. Rēnata had sheep south of the Mangaohāne stream; the whole country was covered with them".

> [Cross-examined by Court:] 'Winiata was living at Waiokaha when Rēnata told him to leave'.

39 Wai 2180, #A06, at 175. George Donnelly and Airini married in 1877. Dr Ballara stated "I think Rēnata in fact told him to leave Waiokaha for some reason. He had some reason he didn't want him there and at that point Winiata moved to Pokopoko." (Wai 2180, #4.1.11, at 240).

40 Wai 2180, #4.1.8, HW 1 transcript at 682.

41 Wai 2180, #A56(c), at 3–4.

42 Dr Young's evidence is that within the tikanga relationship between Rēnata and Winiata "Winiata was sent to occupy or at least farm sheep in that area by Rēnata." (Wai 2180, #4.1.11, at 465).

> Dr Ballara noted Rēnata's practice of presenting rangatira around the country with gifts of flocks of sheep (Wai 2180, #4.1.11, at 465). He Whiritaunoka records "In 1877, Rēnata Kawepō of Heretaunga (Hawke's Bay) gave 2,000 sheep to a leading Whanganui chief (either Mete Kīngi te Rangi Paetahi or Te Keepa te Rangihiwinui) (Waitangi Tribunal He Whiritaunoka 2015 Vol 2 at 976). That evidence accords with Irimana's account above. That does not mean that Winiata's account that he then purchased sheep from Rēnata is not also true. If Rēnata considered Winiata in wrongful possession of the sheep, he had the means to reclaim them: it may be that Winiata's evidence that Donnelly "took possession of" his sheep is evidence of that occurring at one point in time; however, the fact that Winiata and Irimana were registered in sheep returns as owning flocks for some years beyond that point arguably indicates that

in 1884 was that Rēnata 'gave' him some of those sheep and that he purchased them from Rēnata.[43] In 1893 he stated that Noa Huke was also involved.[44]

25. By 1893 the kāinga consisted of a homestead, woolshed, yards and shearing quarters.[45] By the 1890s a substantial flock of sheep were being farmed with a peak of 10,000 – 11,000 sheep (between he and his brothers) in

some level of agreement regarding the sheep (if not the land) was reached between Rēnata and Winiata (either through purchase as stated by Winiata, or through more customary means as discussed with Dr Young by Tā Temara, Judge Harvey and Dr Soutar) (Wai 2180, #4.1.11, at 479, 480, 490).

43 See Wai 2180, #A39(f) at 1, quoted in footnote above. Wai 2180, #4.1.11, at 477, Dr Young responds to Tā Pou that he has not located any evidence as to Winiata purchasing the sheep but that he considers Winiata "was a very successful sheep farmer who was able to, you know, grow a substantial flock from a relatively small start." Tā Temara proposed that the system of ohaoha might have been in operation between Rēnata and Winiata (gifting with return once established).

44 Wai 2180, #A56, at 12. Wai 2180, #H05, at 5. Mrs Cross records evidence from the 1893 hearing before Judge Scannell Winiata said: In the first instance I asked Noa for his sheep and he consulted Rēnata and Rēnata agreed. Then Rēnata gave me some sheep. I paid Rēnata £50 for those sheep and also the wool.

On ownership of sheep: It seems most likely the flock was developed from sheep that had been owned by Rēnata when brought into that district (Wai 2180, #4.1.8, HW1 McBurney at 521; Wai 2180, #A39, at 12.

On sheep ownership: Evidence traverses: whether Winiata and Rēnata had been in partnership and he received or took some sheep (as per Irimana Ngahoa evidence in 1884); whether he purchased them from Rēnata (Winiata 1884 Mangaohāne title evidence was "Rēnata gave me sheep to start a run there but I have paid for them"); McBurney considers paid through shearing business #4.1.8 at 521. Winiata's evidence in 1893 rehearing was that he purchased 50 sheep from Rēnata and then "got Noa's sheep" (one record states he acquired 200 sheep from Noa Huke in or around 1876). Winiata insisted that the sheep belonged to him and he was not a shepherd for Rēnata.

These matters form some context to the dispute throughout the 1880s including with the Studholmes – ie whether Winiata was farming in his own right or on behalf of Kawepō (and if the later, until when and to what extent he was thus bound by decisions made by Kawepō). See Wai 2180, #B06, at 11; Wai 2180, #E03(a); Wai 2180, #A39, at 13.

45 Wai 2180, #A39, at 13: evidence of Winiata at Mangaohāne No. 2 rehearing.

1893,[46] with relatively little debt being carried, although this may have changed subsequently.[47]

26. The relationship between Winiata Te Whaaro and Rēnata Kawepō forms critical context to these events. That relationship is a complex one and varies over time as Winiata's interests aligned and diverged and aligned again with those of Rēnata (who was also in partnership with the Studholmes).[48] The same can be said for his relationships with Hīraka Te

---

46 As above, it seems likely Winiata gained his seed flock in the early 1880s – the Crown does not dispute that Winiata owned his own flock at the time of the eviction. It is less clear how that ownership and development occurred but that is not hugely relevant to Crown actions. For completeness, the following analysis reviews the evidence on record concerning sheep numbers.

Wai 2180, #A39, at 13: 4,000 sheep at Pokopoko in 1884, 10,000 - 11,000 by 1893 according to Dr Young. See also Wai 2180, #A43, at 414; #A46 at 190; #H05, at 8; and #A56, at 12.

On sheep numbers: 1897 newspaper report contemporaneous with eviction records 6,000 sheep (Wai 2180, #A52, at 370). Wai 2180, #A39, at 13–14 states 11,000 referenced to Judge Scannell NLC Minute Book from 1893 Mangaohāne No. 2 hearing in 1893 from Winiata's evidence; Studholme estimate of Winiata flock in 1894 was about 10,000 sheep.

The sheep returns record under Winiata Te Whaaro's name: 1,500 in 1880, 6,000 in 1892, 5,000 in 1893, 4,635 in 1896; **3624 in April 1897 (one month prior to the eviction);** 2,700 in 1898 (under Winiata Te Whaaro's name located at Waiokaha and Moawhango). See Wai 2180, #4.1.8, HW 1 transcript at 609; and Wai 2180, #4.1.8, transcript 352–353 (Sir Doug Kidd and Armstrong agree these figures are accurate).

Irimana Te Ngāhoa and Hori Tanguru (Winiata's brothers) should also be counted in the Pokopoko flock (Wai 2180, #A56, at 12 fn 23; Wai 2180, #H05 at 8–9. Their flocks are recorded in the AJHR sheep returns as between 160 – 1,000 each. There is little record of sheep against their names in the sheep returns in the 1890s (although there are in the 1880s) – Mrs Cross suggests this may be because they are recorded at different locations.

47 On debt: See for example Wai 2180, #4.1.8, HW1 transcript at 539: Sir Doug Kidd and Mr McBurney discuss Winiata carrying only £100 debt in the mid 1890s and the ability of Winiata to discharge the debts claimed against him by the land agent in the early-mid 1890s. This compares to the Studholmes and Hīraka te Rango who were each carrying substantial debts in the 1890s. (Although the estate of Rēnata Kawepō was in credit by that time.) However, by 1897 Stout advised the Studholmes to not seek costs against Winiata as "he had nothing" and all the sheep were mortgaged. Winiata subsequently established a timber mill (perhaps through liquidating his interests in the sheep following the eviction).

This is also important as the overall sheep numbers being farmed from Moawhango in the late 1880s and 1890s has been viewed as an indicator of economic success by technical witnesses without taking into account the relative levels of equity vs debt.

48 These shifts are recorded in #A39, but see also #A06, at 175, 177; and #B06, at 10. As above, Studholmes have formal lease from 1876.

In regards to Winiata and Rēnata:

As set out above, Winiata was closely aligned with Rēnata from the 1850s – they fought together under Kawepō's leadership (Winiata is described as bat man or adjutant or lieutenant to Kawepō);

In 1875/76 Winiata and Irimana drove Rēnata's sheep into inland Pātea on the direction of Rēnata. Fisher and Stirling record Winiata as being "the manager" for Rēnata's sheep run and note Winiata's statement in 1884 that he only opposed Kawepō after Donnelly was brought on as manager (1876-77) – and even then, reconciled soon after.

In 1876/1877 Kawepō and Winiata fell out after Kawepō replaced Winiata as manager with Irishman, George Donnelly. This appears to suggest that at that point Winiata had not been trading on his own account – but increasingly does so from then.

Winiata stated he then "went over to join Ngati Whiti against Rēnata."48 In that same year, Batley (now in partnership with Karaitiana) who had secured some of Kawepō's sheep driven into Patea by Winiata and Irimana drove sheep onto Mangaohāne.

Winiata re-formed his alliance with Rēnata by 1881 in opposition to the partnership Hīraka Te Rango had formed by then with the Donnellys.48 That alliance and opposition continued up to the 1884 title determination hearing (discussed further below);

At the 1884/85 Mangaohāne title hearing Winiata set out his own case and stressed his authority to be on the land arose in his own right, not through Kawepō;

Rango (including their respective relationships with Airini and George Donnelly).[49]

> Winiata's chief antagonists were Airini Tonore and her husband G.P. Donnelly and the Studholme brothers. All pursued litigation against Winiata. Rēnata Kawepō was involved in the initial hearings but it was his solicitor, W.L. Buller, who generally pursued his interests and Rēnata died prior to the most significant proceedings from the late 1880s.

27. Of most relevance to Mangaohāne in the 1890s, the Donnellys and Studholmes appear to have reached a degree of accommodation and cooperation – to the detriment of those based at Pokopoko by then.[50]

28. None of the people above are agents of the Crown - the Crown was not directly involved in the events at Mangaohāne for example, as a purchaser. The Crown, in the broader sense used in the Tribunal jurisdiction, was responsible for the Native land laws and had an interest in their implementation. The impact of Native land laws on these relationships, and the impact of that on tribal structures, is acknowledged above,[51] and addressed in more detail in the following section.[52]

After Kawepō's death in 1888, Te Whaaro dealt with Kawepō's creditors for interests in Mangaohāne No. 2 (the Studholmes); and Kawepō's administrators and successors (Broughton's and Donnellys et al);

Winiata's 1892 evidence (in the context of a contested hearing) was that Rēnata had been a "big sheep owner but not a big man on the land".

49 Wai 2180, #A39, at 16–17. The Crown considers the Donnellys role to be key. In the 1890s Studholme wished to discontinue the litigation and came close to reaching a settlement with Winiata (under which Winiata would get 5,000 acres off Studholme). This failed due to the Donnellys preferring to pursue further litigation.

50 Wai 2180, #A06, at 78. Fisher and Stirling record an 1890 agreement between Donnellys and Studholmes to oppose the rehearing of Mangaohāne title (amongst other matters).

51 At [5] and [8.2] above.

52 The changes in Kawepō, Airini Donnelly and Winiata Te Whaaro's relationships over time are evidence of tribal structures in operation – and of the impact of Native land laws on them as acknowledged at the beginning of these submissions:

In earlier times Winiata Te Whaaro recognises, works within, and upholds the leadership and interests of Kawepō as rangatira – including against others (both in warfare and in farming terms). Kawepō's initial lease to Maney, and the introduction of sheep by Kawepō onto Mangaohāne occur in this period - there is no evidence of Winiata protesting or opposing Kawepō's actions in that period.

Dr Soutar discussed with Dr Young that in 1869 at the battle at Te Porere Kawepō's word is final and queried how it is that by 1883 Kawepō's survey instructions are challenged – including by Winiata (Wai 2180, #4.1.11, at 490). The relationship shifts to one of increasing complexity as Winiata and his whānau develop their own interests with increasing independence from Kawepō – Winiata and Kawepō are aligned at times, at others they are in direct contest and opposition to each other (including through attempting to advance whakapapa at the 1884/85 title determination hearing to distinguish between their customary interests). These changing relationships occur in the context of changing land use to sheep farming and the tenurial revolution enabled by the Native land laws. Individualised titles raise opportunities and risks for both Kawepō and Te Whaaro – and result in a sharper definition of their relative roles and interests than may have been necessitated under tribal structures previously. These changes are exacerbated by the commercial imperatives and the personal relationships between Winiata and Kawepō – and those with others (most notably the Donnellys).

29. The changes in Kawepō, Airini Donnelly and Winiata Te Whaaro's relationships over time are evidence of tribal structures in operation – and of the impact of Native land laws on them as acknowledged at the beginning of these submissions:

29.1 In earlier times Winiata Te Whaaro recognises, works within, and upholds the leadership and interests of Kawepō as rangatira – including against others (both in warfare and in farming terms). Kawepō's initial lease to Maney, and the introduction of sheep by Kawepō onto Mangaohāne occur in this period - there is no evidence of Winiata protesting or opposing Kawepō's actions in that period.

29.2 Dr Soutar discussed with Dr Young that in 1869 at the battle at Te Porere Kawepō's word is final and queried how it is that by 1883 Kawepō's survey instructions are challenged – including by Winiata.[53] The relationship shifts to one of increasing complexity as Winiata and his whānau develop their own interests with increasing independence from Kawepō – Winiata and Kawepō are aligned at times, at others they are in direct contest and opposition to each other (including through attempting to advance whakapapa at the 1884/85 title determination hearing to distinguish between their customary interests). These changing relationships occur in the context of changing land use to sheep farming and the tenurial revolution enabled by the Native land laws. Individualised titles raise opportunities and risks for both Kawepō and Te Whaaro – and result in a sharper definition of their relative roles and interests

---

These three (and those they acted on behalf of) share close whakapapa. It cannot be known how their relative interests and farming/commercial aspirations would have been worked through under tikanga. What is known is that, in order to secure title to Mangaohāne, they each progressed separate whakapapa bases – ie the law enabled and encouraged a division of relationships and interests.

Other contributing factors include land use changes, commercial opportunities, intergenerational shifts, developing expertise and aspirations, and personalities) on those tribal structures Wai 2180, #4.4.11 at 530 Dr Young discussed with Dr Soutar and with Ms Bartlett that the change in status of Rēnata in the 1880's appears to have represented in part an intergenerational shift over authority between himself and Airini Tonore/Donnelly.

Dr Young: "The Native Land Court would have been one consideration in that [the change in relationship between Winiata and Rēnata] but I think there would have been other factors as well. … As time passed and Winiata grew in experience and expertise he would have developed greater independences as well. So I mean the Native land Court is one consideration but I think that you know these sorts of relationships between rangatira naturally evolve over time in relation to external events and pressures and the Native Land Court is certainly one of those."

53 Wai 2180, #4.1.11, at 490.

than may have been necessitated under tribal structures previously. These changes are exacerbated by the commercial imperatives and the personal relationships between Winiata and Kawepō – and those with others (most notably the Donnellys).

29.3 These three (and those they acted on behalf of) share close whakapapa. It cannot be known how their relative interests and farming/commercial aspirations would have been worked through under tikanga. What is known is that, in order to secure title to Mangaohāne, they each progressed separate whakapapa bases – ie the law enabled and encouraged a division of relationships and interests.

29.4 Other contributing factors include land use changes, commercial opportunities, intergenerational shifts, developing expertise and aspirations, and personalities) on those tribal structures. Dr Young discussed with Dr Soutar and with Ms Bartlett that the change in status of Rēnata in the 1880s appears to have represented in part an intergenerational shift over authority between himself and Airini Tonore/Donnelly.[54]

> Dr Young: … the Native Land Court would have been one consideration in that [the change in relationship between Winiata and Rēnata] but I think there would have been other factors as well. … As time passed and Winiata grew in experience and expertise he would have developed greater independences as well. So I mean the Native land Court is one consideration but I think that you know these sorts of relationships between rangatira naturally evolve over time in relation to external events and pressures and the Native Land Court is certainly one of those.

PART 2: MANGAOHĀNE TITLE DETERMINATION

30. There is already considerable material in these proceedings on the record which there is no need to duplicate in these submissions.[55] Mangaohāne No. 2 title determination was, by any reckoning, an exhaustive proceeding.[56]

---

54 Wai 2180, #4.4.11, at 530.

55 Wai 2180, #A39, and Wai 2180, #A56. in particular. Counsel will of course respond to any queries of the Tribunal concerning particular aspects of the proceedings that are not addressed in these submissions.

56 Interlocutory title determination 1885 but certificate of title not issued lawfully until 1893.

The Crown cannot at this remove, and should not (for constitutional propriety reasons), second-guess the decision making of any of the courts, caution before doing so should also be exercised by the Tribunal.

31. For these reasons, the following submissions focus on Crown actions, the analysis of technical witnesses in evidence to this inquiry, and Tiriti/Treaty implications of the court's own findings (including the Crown's response to those findings).

32. A key issue addressed in the following submission relates to the question of the southern boundary of Mangaohāne No. 2 in the initial proceeding and subsequently. A particular issue was whether parties in the initial proceeding understood that Pokopoko was included or excluded in the block. Counsel for the Ngāti Hinemanu me Ngāti Paki Heritage Trust submitted that Winiata understood Pokopoko to be excluded at the point of the initial hearing, and when it became apparent this was not the case he sought a rehearing. The Crown's understanding of the issue is that the evidence is less clear cut in a number of ways:

    32.1 the initial sketch plan did not provide certainty about whether Pokopoko was included or excluded;

    32.2 an 1885 rehearing application found that Pokopoko was included and that all parties were aware of that – an 1894 judicial report confirmed that view – but the matter was far from clear;

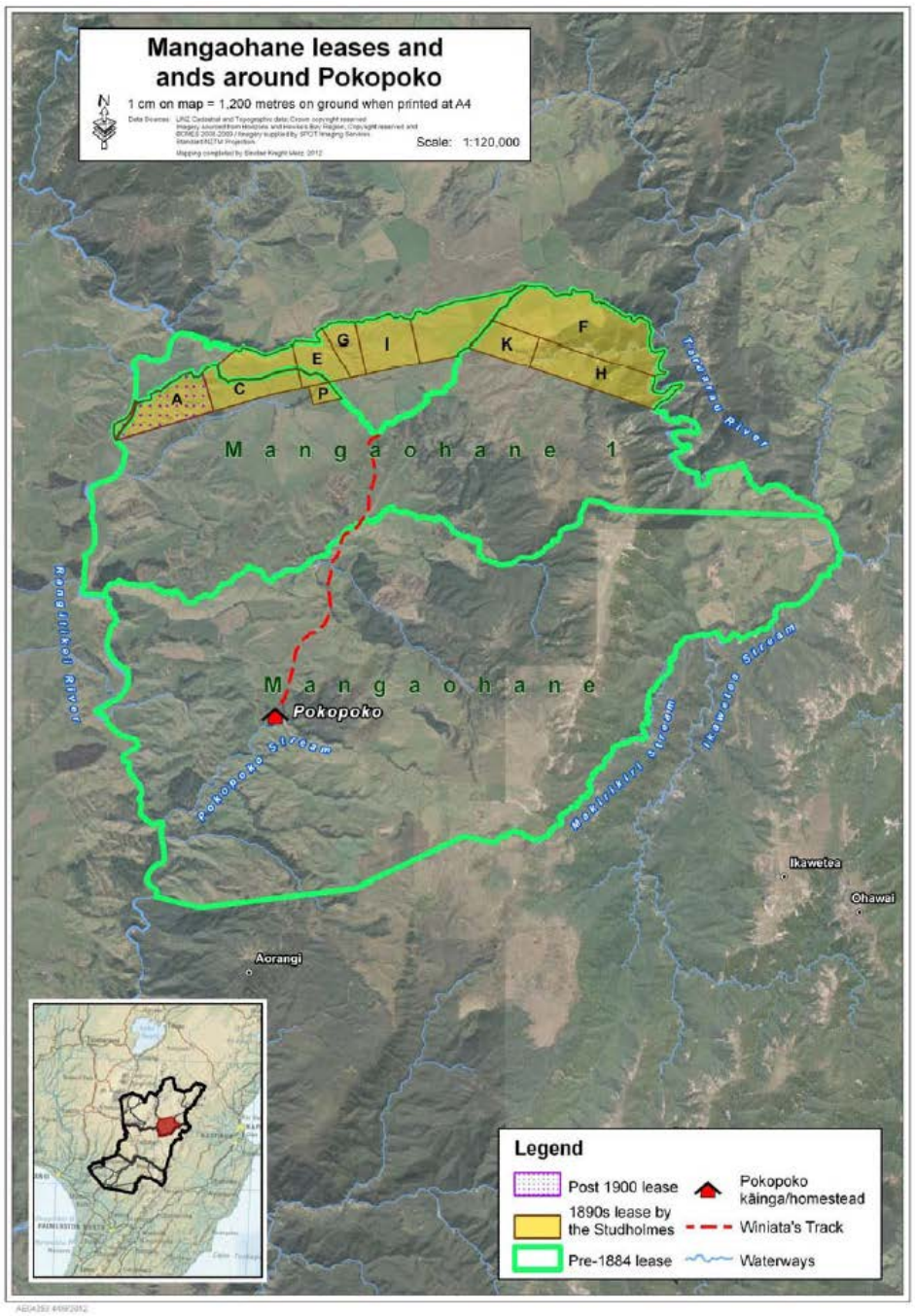
    32.3 there are a range of possible reasons for the approach Winiata took in his evidence in the initial proceeding;

    32.4 Judge O'Brien, a Judge at the original title determination conveyed different views on the matter over time;

In the intervening time multiple rehearing applications were made, considered and declined, these were followed by multiple petitions to Parliament and representations made to Ministers. From 1890-1895 intensive intersecting litigation concerning the original title determination, partitioning, and use of remedial provisions involved multiple Native Land Court proceedings and repeated recourse to the Supreme Court and Court of Appeal (*In RE Mangaohāne* 1891 (CA); *Airini Tonore and others v Makay and others* 1893 (SC); *Winiata Te Whaaro and others v Davy and others* 1894 (CA).

Litigation also involved recourse to (and subsequent appeal of) validation jurisdiction by both Studholmes and Te Whaaro: (Report under the Native Land (Validation of Titles) Act 1892 in 1893 and the final title determination in 1895 (under Native Land Court Act 1894 under s 118). That in turn was partially disallowed in 1894 by Native Land Court Chief Judge under Native Land Acts Amendment Act 1889 s 13 powers to correct errors, however the 1894 Chief Judge's decision was overturned by the Court of Appeal (*Winiata Te Whaaro v Airini Tonore and another* (1895) 14 NZLR 209 (CA).

32.5 the focus of later rehearings was not just on the southern boundary issue but also other issues, including the rights of Winiata to the northern part.



Survey authorisation

33. Surveys or sketch plans were required by the Native land laws to be certified as correct by the Crown (the Surveyor-General or authorised delegate) in order to be used in title investigations. As the Court was entitled to, and did, rely on approved survey plans, their accuracy and integrity was critical. The Native land laws had the effect that the court was not required to

inquire beyond a plan before it if that plan was certified as correct by the Surveyor-General.[57] This means the actions of the Surveyor-General and his office are of critical import.[58] Surveys could be either commissioned directly by the Crown, or be commissioned by private parties (but Surveyor-General approval of them was required before they carried any weight in court).[59]

1881 survey authorisation – made in error, not revoked

34. There was a three-way tussle to conduct the Mangaohāne survey. Hīraka's group (see below); Rēnata's group;[60] and in March 1883, Winiata's group (which by this time included Ūtiku Pōtaka) each applied for authorisation to conduct a survey.[61] That is, there was not opposition to a survey being conducted, but there was significant contest as to who should control the survey process – in particular in the southern part of the block.

35. The Crown's authorisation of a survey of Mangaohāne lands in January 1881 was given despite clear knowledge that the survey had potential to seriously exacerbate local tensions. Further, the Crown did not rescind that authorisation when the Crown officials reiterated the risks and protested against the decision. As set out above, the survey exacerbated tensions between groups claiming interests in the lands (survey parties were met with armed resistance) and that likelihood was known to the Crown.

    35.1 The first application for authority to conduct a survey of Mangaohāne was made in 1880 on behalf of Hīraka Te Rango and others (Ngāti Whiti and Donnelly).[62] The authority sought was initially declined because the district Land Purchase officer advised that:[63]

---

57 Native Land Court Act 1880 s 39.

58 For the avoidance of any doubt, the Crown accepts that the Surveyor-General was part of the Crown.

59 Wai 2180, #A06, at 71. 1. A number of surveys were undertaken in the area in the 1870s. The D Munro survey of Ōwhāoko in 1877 was commissioned directly by the Crown. The remainder (by Reardon, Kennedy and Mitchell) for both Ōwhāoko and Mangaohāne were privately arranged.

60 Wai 2180, #A39, at 21: In 1882 Rēnata (through his counsel Buller) sought approval to survey. It was declined given Kennedy already had approval and that had not been rescinded. A hearing was begun in 1882 on the basis of the Hīraka/Kennedy plan but adjourned when that plan was not produced to the Court.

61 Wai 2180, #A39, at 22.

62 Wai 2180, #A39, at 18. Hīraka Te Rango, Retimana Te Rango, Ihakara Te Raro, Hirama Paerau, Hakopa Te Hotemutu, Karaitiana Te Rango and others.

63 Wai 2180, #A39, at 18.

> I find that the survey of the land in question would cause very serious disturbance. I find that Rēnata Kawepō is one of the principal claimants. His mother and several other relatives are buried on the block, and he has a numerous following claiming through the same channel. It will not be safe to make the survey until all parties are agreed.

35.2 The Chief Surveyor declined the application and informed the private surveyor acting on behalf of Hīraka et al (Kennedy) of these concerns and advised him to discuss the matter with the Land Purchase officer.

35.3 The private surveyor resubmitted the application – apparently without having conducted further discussions with either the Land Purchase officer or the parties opposing the survey.[64]

35.4 The resubmitted application was granted by a junior official within the survey office. It was granted without the approval of either the Land Purchase officer or the Chief Surveyor (who had declined the application only weeks prior). This is considered by the Crown to have been an error.

35.5 When the Chief Surveyor and the District Officer learned that it had been granted, they raised their concerns with the Surveyor-General and advocated for the survey authorisation to be suspended given the circumstances in which it had been granted.[65]

35.6 The Chief Surveyor appears to have viewed the (private) surveyor's actions in resubmitting the application as questionable, and the junior official's action as having been a mistake.

35.7 The Land Purchase officer advised he had received further complaints and reiterated the seriousness of the opposition.[66] His

---

Even though the survey was a private survey, authorisation by the Crown was required for it to be able to be used in Court once completed. Seeking the District Officer's view on any application was a normal part of the process – intended to capture any local information that was relevant to the decision to authorise survey

64 Wai 2180, #A39, at 18 (see also original in supporting documents). There is no direct evidence of whether such discussions did or did not occur however the subsequent reaction of Kawepō and statements of the Land Purchase officer indicate that they did not.

65 Wai 2180, #A39, at 19 - due to the concerns raised by the land purchase officer and given his earlier correspondence with the surveyor which had advised the surveyor of those concerns and instructed him to discuss them with the Land Purchase officer.

66 Wai 2180, #A39, at 18: "I have made further inquiries and find that majority of claimants are opposed to survey and hearing until the whole of the owners have had a conference on the subject and a protest

suggestion, and that of the parties opposing the survey, was that the survey (and hearing) should not proceed until the "whole of the owners have had a conference on the subject".

35.8 The Surveyor-General did not agree with his Chief Surveyor's views and concluded that the authorisation for survey should not be rescinded. His reason was that, as it was a private survey, any risks to the survey being able to be completed (for example due to opposition on the ground) were to be borne by the surveyor and the applicants rather than the Crown – and thus no action was warranted.[67]

35.9 The survey was commenced but was unable to be completed due to "very violent opposition" on the ground (including by armed parties).[68] This opposition is discussed further below.

36. The Surveyor-General did not take into account the degree of conflict between the parties; the potential effects of a survey on those tensions; what other interested parties wanted; and practical methods for resolution/de-escalation of conflict. The Chief Surveyor and the Land Purchase officer did. They appear to have understood that suspending the survey could have enabled the disputes and the title determination to proceed in a more constructive fashion. The Surveyor-General, however, did not give much weight to these considerations and decided against rescinding the authorisation (or implementing any other constructive measures).

37. The Crown considers that the Surveyor-General's decision not to rescind the authorisation given that error exacerbated the conflict between the parties.

38. This survey was not completed at that time, nor was it approved for use as a sketch plan able to be used in court.[69] The partial plan did, however, serve

---

against this survey being made when I was last in Napier. Will minute application and forward by mail. Natives are most excited about this affair. Rēnata Kawepō reports that Baker has authorised the survey in spite of my protest."

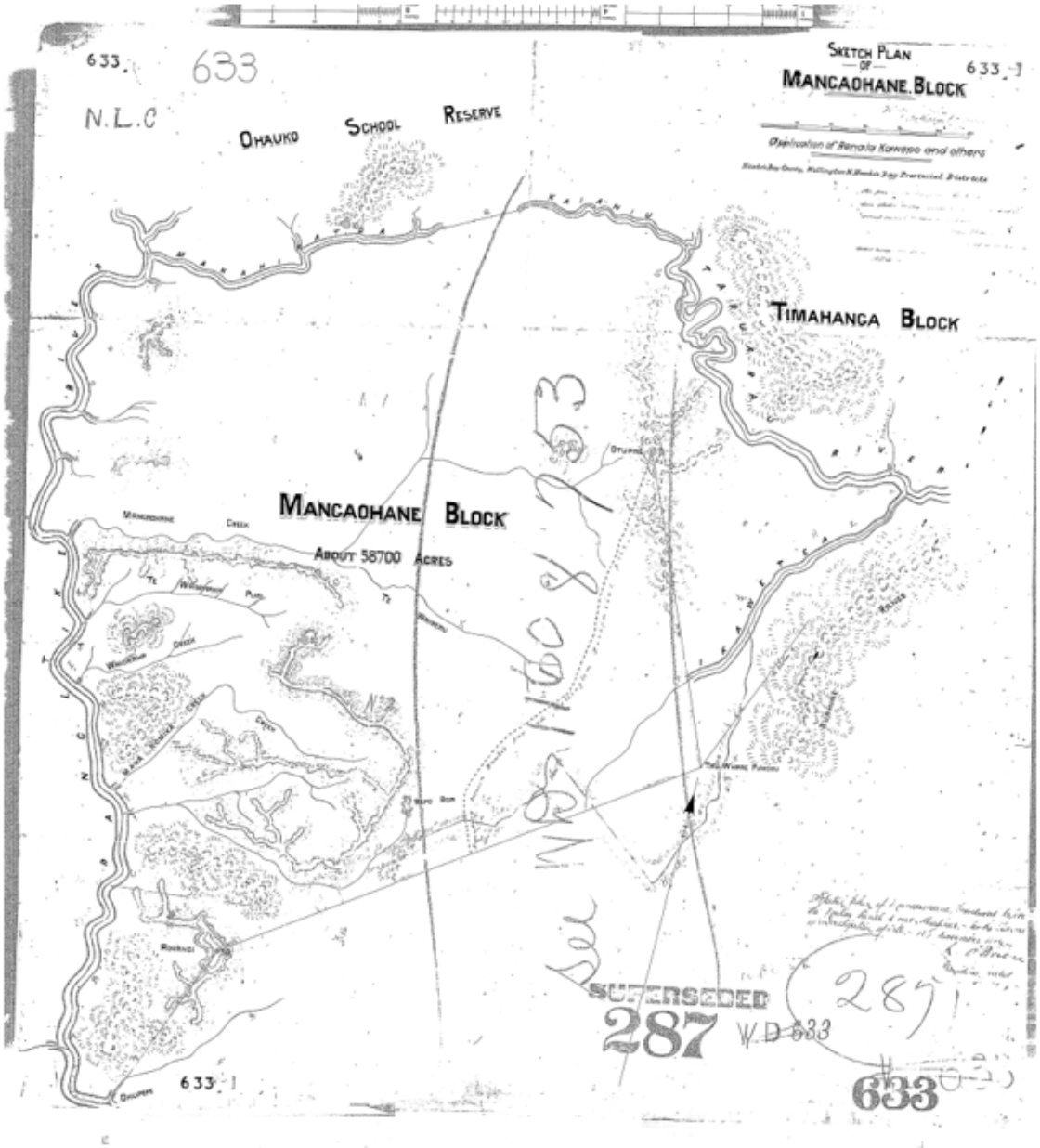
67 Wai 2180, #A39, at 19, 55.

68 Wai 2180, #A39, at 21.

69 Wai 2180, #A39, at 19: The surveyor (Kennedy) requested that – given the degree of resistance on the ground - a sketch plan be approved for use in the Court. This was declined "as it is contrary to the new Act, at best the Court could only take it for what it is worth."[69] The Native Land Court Act 1880 in fact did not prohibit a hearing being conducted (Native Land Court Act 1880 ss 26 – 33). It did however

as the basis for a later compilation sketch plan. The compilation plan was approved for use in the 1884/85 title determination hearing. The Court issued its interlocutory order in 1885, and the survey was completed in 1886. However, - for reasons set out below – the final confirmation of the survey plan did not occur until 1893, eight years after the 1885 interlocutory order for title had been made.

Pokopoko within ML.633 Sketch Plan present in court in 1884/85



prevent a certificate of title being issued if a surveyed plan had not been in the court during the hearing - until the survey had been completed, notified, made available for inspection, any objections be considered, and time elapse for a rehearing application to be able to be made. As such, the chief surveyor's response to the surveyor was not technically accurate. It seems possible that the chief surveyor's response may have been due to him being unimpressed with the surveyor's earlier conduct; and due to his ongoing concern about the survey proceeding in those circumstances.

Factual background to title determination

39. Between 1880 and 1884, tensions in the Mangaohāne area heightened as the different parties attempted to conduct surveys,[70] make applications to the Native Land Court for title,[71] and to establish sheep flocks (and, in 1881, to re-establish flocks after they had been removed from the land under a Court order arising from the dissolution of the business relationship between the Donnellys and Kawepō (each of whom were in partnership with other parties also).[72]

40. According to newspaper reports of the time:[73]

    40.1 In 1880 Hīraka Te Rango (at this point acting in partnership with the Donnellys) sought and gained authority to undertake a survey of Mangaohāne (addressed below).

    40.2 In 1881 Rēnata sent an armed party (including Ihakara te Raro and Winiata Te Whaaro) to stop the survey ordered by Hīraka Te Rango.

    40.3 Hīraka retaliated immediately by "sending his own armed group to turn Rēnata's sheep off of the land. While Rēnata's men were in church on a Sunday, Te Rango's men took their weapons and then escorted them [the men presumably] back to Heretaunga."

    40.4 In early 1883 Donnelly threatened Winiata, Pirimona, Irimana and Arona "from Pokopoko on behalf of Ngāti Hinemanu" to send police to arrest them from obstructing his survey;

    40.5 In 1883 Rēnata or his supporters sent a group to "turn some of Hiraka Te Rango and Donnellys sheep off the land. One of Hiraka and Donnellys barns, along with some sheep, were burned in the process";

---

70 Wai 2180, #A39, at 18–22. First application on behalf of Hīraka authorised, second application by Rēnata et al declined, third application (March 1883) by Winiata et al also declined, compiled sketch plan (Ellison for Kawepō building on Kennedy's for Hīraka) authorised for court use in August 1883.

71 Wai 2180, #A39, at 20–21. Applications were made first by Hīraka Te Rango et al; then by Kawepō.

72 Wai 2180, #A06, at 176: Conflict regarding the dissolution of Kawepō and Donnellys business arrangements resulted by 1881, in the court ordering that all the sheep on Mangaohāne be sold by public auction. Rēnata (recently in partnership with Studholme), and Hīraka te Rango in partnership with Donnelly were forced to 'repurchase' the sheep at auction.

73 Wai 2180, #A06, at 176–178; Wai 2180, #A39, at 22.

40.6 In 1884 a notice was published in the *Whanganui Herald*, "This is a notice from all of us, in respect of the sheep of Messrs George Donnelly and Hiraka te Raro [sic]...the sheep must be driven off within two weeks, otherwise we all, who have signed our names below [Te Whaaro, Utiku Potaka, Noa Te Hianga [Huke], Hori Tanguru, and others], will proceed to drive them away ourselves." Rēnata is not a signatory however the declaration appears to have been a continuation of 1883 action in which he was involved.

41. These events form the immediate context of the Mangaohāne title investigation.[74]

Interlocutory title determination 1885 (hearing commenced in late 1884)

42. The claims investigated in the 1884/85 title hearing were between hapū (rights as between Ngāti Whitikaupeka and Ngāti Hinemanu/Ngāti Ūpokoiri) and claims between people who could equally whakapapa to the same tupuna yet sought to distinguish their interests from each other.

43. These submissions do not question the whakapapa involved nor seek to second-guess the court itself. However, the Crown notes both the close whakapapa relationships between many of the parties involved, and the complex tribal, legal, and economic contexts within which they operated. Winiata, Rēnata and Airini shared a commonality in whakapapa (at least according to Noa Te Hianga in his 1890 petition there could be no basis in whakapapa for recognising the interests of Honomokai without also recognising those of Ngāti Hinemanu or Te Ohuake given the commonality of whakapapa).[75] The advancement of different lines by each may point to their intentions to be seen as distinct from each other (given their different contemporary alliances and objectives for the land) given the tenurial system imposed by the Crown through the Native land laws.[76] Boast also observes that the Mangaohāne case was "overshadowed by the complicated legal feud between two members of the Hawke's Bay chiefly aristocracy."[77]

---

74 The notice was published in September 1884, the hearing began in November 1884.

75 Wai 2180, #A30, at 62 fn 140.

76 Wai 2180, #4.1.11, at 75–76 Dr Jackson on the flux in relationships between rangatira.

77 Boast, Native Land Court Vol 1 at 1052.

44. The separation between these three parties resulted from changing land use (sheep farming meant a new relationship with land and commercial opportunities), intergenerational change, and the personalities involved – as Boast noted above, the competition between leaders for mana and authority took place in this new forum and economic means that were made available through European influence. Raniera Te Ahiko stated "these divisions were never heard of until the late disputes about sheep."[78] The evidence of Irimana Ngahou, was that conflict between Rēnata and Winiata began with a dispute about sheep ownership.

45. The hearing proceeded on the basis of a sketch plan. That was lawful, however, the title could not be completed until further steps to finalise and approve the survey plan were taken (that process is addressed below). The sketch plan that was in court is reproduced below.

46. As noted above, it is unclear on the evidence whether all parties in the initial proceeding understood Pokopoko to be included or excluded. On the face of it Pokopoko was not clearly identified on the sketch plan. However, there were other geographic markers including creeks which do not resolve uncertainties about whether Pokopoko was understood by the parties in Court in 1884/85 to be included or excluded.

Evidence at the 1884/85 hearing

47. The 1884/85 title determination was far from cursory. Approximately 30 witnesses presented evidence and over 200 pages of evidence are recorded in the minute book. Each party presented substantial evidence.

48. Winiata Te Whaaro's case was presented in full to the court with four witnesses in support. Their case took three days to present and was assessed on its merits. Winiata te Whaaro presented his own evidence in full (including through cross examination and recall by the Assessor).[79] Wi Wheko, Pirimoana Te Urukahika, Irimana te Ngahou and Ūtiku Pōtaka appeared as witnesses in support of Winiata Te Whaaro's case. His case included evidence of both historical associations with the land and with the

78 Wai 2180, #A39, at 39.

79 Wai 2180, #A39(f).

more recent contested events concerning sheep farming and the establishment of Pokopoko.

49. Winiata claimed interests in Mangaohāne through Ohuake and Ngāti Paki. Under cross examination by Airini Donnelly he stated: [80] "I am a descendant of Hinemanu but she has no right to this land … the descendants of Ohuake are the rightful owners of this land."

50. The Assessor (Hemi Meihana)[81] did not initially concur with the Judge's view that Honomōkai and Ngāti Whiti claims were the only ones to have been proven. The Assessor's concern about Ngāti Hinemanu potentially being left out of the title resulted in Winiata Te Whaaro being recalled to test and confirm the evidence he had given that Ngāti Hinemanu had no claim – "but after Winiata Wharo had been recalled at his request and had stated that Hinemanu had no claim to the land south of the Mangaohāne Stream" Meihana concurred with the decision.[82] Winiata's evidence on recall was consistent that Hinemanu did not have interests "Yes I do not claim through Hinemanu for these lands".[83] Hamuera Mahupuku later recalled Pene Te Umairangi having informed him following the hearing "[t]hat when Winiata said what he did before the Court, they all knew that their case was lost".[84]

51. The evidence given by Winiata on this point was critical to subsequent judicial and Crown decisions – it is not overstating matters to say that this evidence, along with other matters discussed below (including uncertainty as to the location of Pokopoko relative to the sketch plan in court), was fatal to his case in 1884/85 and to the subsequent attempts to be inserted on to

---

80 The evidence given by Winiata Te Whaaro (and those in support of his claim and some others) at the hearing is set out at #A39(f).

81 The Tribunal asked Dr Young to clarify whether any issue arose from Hoani Meihana Te Rangiotu having been relieved as an assessor during the Hastings sitting. His answer is at Wai 2180, #A39(g), at 1–2 – the Tribunal's question arose from comment in #A39, at 71–72 that Assessor Meihana had "been replaced" (see also transcript Wai 2180, #4.1.11, at 472. 1. Dr Young has concluded that it appears that Hone Meihana was a member of the Court during its full title determination investigation into Mangaohāne (18 November 1884 – 27 February 1885) including completing the lists of names for the title (completed by 10 March). Mr Meihana and Judge O'Brien appear to have left Hastings on 29 March 1885 to attend hearings elsewhere – ie after Mangaohāne matters were completed in full.

82 Wai 2180, #A39, at [177].

83 Wai 2180, #A39, at 71–72. Judge William's recall of this is supported by the minutes (in which that exchange is recorded) and by Hamuera Mahupuku who relieved Assessor Meihana soon after they had completed the Mangaohāne title determination. See also Wai 2180, #A52, at 265.

84 Wai 2180, #A39, at 72.

the title as Ngāti Hinemanu.[85] In the Crown's respectful view, it would be unusual for a Court to find an applicant had interests that the applicant themselves had explicitly and repeatedly denied.[86] Boast states "it makes no sense to criticise the Native Land Court for relying strictly on evidence given in Court as the basis for its decisions." He asks "What else should a court rely on?" and notes the criticism that would – rightly and justifiably – ensue if a court were to reach decisions not based on the evidence it had heard.[87]

52. Two different strands emerged, one premised on the 1884 evidence and the other taking later evidence also into account:[88]

52.1 Rehearing applications, petitions, Judge Butler's 1889/s 13 1894 report, and the 1895 Court of Appeal decision against Winiata Te Whaaro each hark back to the 1884 evidence as the only relevant evidence for the decision to be premised on.

52.2 In 1894 the Chief Judge reached the opposite view and found that Winiata Te Whaaro had been prejudicially affected by the Court's original decision, and inserted Winiata (and the others claiming with him) on to the title – but did not define the relative interests of those admitted onto the title at that time (this decision was disallowed by the Court of Appeal). He did so only after considering the substantial (and different) evidence presented in associated litigation between 1890 and 1893. He acknowledged that in doing so he was taking a more "equitable jurisdictional" approach – although he considered the section 13 remedial jurisdiction wide enough to do so – the Court of Appeal disagreed.

---

85 For example, The Chief Judge's report on Noa Huke's rehearing application was forwarded to the Native Minister and even the Premier (Stout) for consideration. The Premier had the Chief Judge's report forwarded to Noa's solicitors and stated "in face of that report government cannot further interfere." The allegations had been looked into closely. The Minister met with the petitioners multiple times. Stout was quite capable of finding Crown actions wanting (see Ōwhāoko Commission coverage in Issue 3 submissions). However, the evidence given in 1884/85 ultimately counted against the application. Stout (Wai 2180, #A39, at 72).

86 Wai 2180, #4.1.11, at 488–489 Judge Harvey confirmed with Dr Young that he had not analysed the evidence given by Winiata and others to Judge Scannell in the 1893 rehearing. Dr Young stated he focussed on what the court did rather than the customary interests issues.

87 Boast Native Land Court Vol 2 at 112.

88 *Winiata Te Wharo v Airini Tonore and another* (1895) CA at 209 sets out the full case history – the 1894 application by Winiata, the 1894 report from Judge Butler and Chief Judge Davy's determination, and the 1895 Supreme Court and Court of Appeal disallowance of CJ Davy's determination.

Views on why Ngāti Hinemanu interests in the land were denied

53. All of which begs the question of what led Winiata to disavow rights of Ngāti Hinemanu in the land in question during the initial hearing. Winiata's 1884 denial of Ngāti Hinemanu interests is at tension with Ngāti Hinemanu claims made in subsequent proceedings (and with Winiata's litigation strategy as it evolved over time). Ms Luiten considered that Winiata's evidence in relation to Pokopoko itself at the hearing indicated he thought Pokopoko was to excluded from the title (which presumably would have been made through Ngāti Hinemanu).

54. Ms Luiten attributed it to Winiata advancing Ohuake for Mangaohāne No. 2 but not making claims or giving evidence in relation to Pokopoko itself at the hearing as indicating Winiata thought Pokopoko was to be excluded from the title (which presumably would have been made through Ngāti Hinemanu). However, the Crown notes that extensive evidence about Pokopoko itself was given by or on behalf of Winiata during that hearing.

55. However, the evidence indicates there may have been other reasons for Winiata's approach to the case. The Crown notes that extensive evidence about Pokopoko itself was given by or on behalf of Winiata during that hearing.

56. Mr Lewis Winiata's view is that Winiata could, and did, use valid whakapapa lines through Ohuake without needing to bring Hinemanu in. Mr Winiata's view is that strategy was crafted to distinguish his claims from those of Rēnata and Airini:[89]

> Now my second point. I believe Winiata didn't use Punākiao, because he was also ensuring that the fact of Punākiao going away with Taraia II wasn't going to be an issue as well; if he used that whakapapa it would bring a lot of other people into his list and open the door for others to lay claim. Winiata knew that Airini and Rēnata did not have occupation rights either.
>
> My third point, I believe he was also trying to keep Airīni, Honomōkai and Mahuika out in the 1884 case. He continuously says, "You never saw Honomōkai on the land". If he used Punākiao and her whakapapa, he would have brought a whole lot more people into the equation.

89 Wai 2180, #A52, at 265–266. The Crown makes no assessment on whakapapa matters or on second-guessing the Court's assessment but notes that Dr Young and Dr Ballara considered Judge O'Brien's 'inability' to understand Winiata's evidence (of Ohuake interests) was "an example of a faulty and uninformed judgement by a Native Land Court Judge". Wai 2180, #4.1.11.

57. The first sentences of the 1885 judgment accord with this premise (to some extent):[90]

> We regret that this case has taken so long a time, but in that we hold ourselves not to blame, personal feelings have been imported into the discussion. This we regret. In our judgment we shall avoid such topics, and base it upon what in our opinion, are the true abstract rights of the parties.

58. The 'personal feelings' refer to the conflict between the three parties represented respectively by Rēnata, Winiata, and Airini.[91] The Court considered such matters irrelevant as they related to contemporary relationships arising out of commercial interests, and to contemporary occupation of land that had not been historically occupied. The Court viewed its task as determining the 'true abstract rights' ie to focus on historical use and ancestral relationships with the land.

59. Whilst that was indeed the Court's task – no such pure distinction was realistic. Evidence presented to the Court, by all parties, was crafted to further the purposes of the party presenting that evidence. It was the job of the Court to see through those strategies and determine (to the best of its ability on the evidence before it) what the historical customary rights were.

60. The Crown asked Dr Young for his view on how to reconcile Winiata's evidence at the 1885 hearing with him subsequently including Ngāti Hinemanu in his rehearing application, petitions, and his 1894 application (under 1889 s 13). Dr Young was at pains to point out the mismatch between the flexibility of customary law and the uniformity and consistency required under the law – in that, because all claims could not be provided for under the law, issues that might have been able to be worked through under tikanga escalated into conflict in which the three people claimed different whakapapa lines to distinguish themselves from each other. He stated:[92]

> In relation to Mangaohāne, multiple legal processes played out in widely divergent contexts over nearly two decades. Arrangements which informed claims at the title investigation may have been altered by 1889 so that Winiata could argue his claim in a different way. I do

---

90 Wai 2180, #A39, at 26.

91 Wai 2180, #A39, at 35: Judge O'Brien report on Winiata rehearing application "There is no doubt that personal dispute unhappily introduced and fomented have at these people by the ears."

92 Wai 2180, #A39(d), at [25] in response to Crown question 8.

> not recall any specific evidence to explain this shift in the way Winiata argued his claim but I would anticipate it arose out of his relationship with Rēnata Kawepō (who had passed away in the meantime). [After 1890] It is also possible that the clearer definition of the southern boundary of the block by survey showed the block encroached onto land associated with Hinemanu and that this had not been known to Winiata at the initial title investigation.

61. The Crown considers that its concessions and acknowledgements on the impacts of the Native land laws are relevant here.

Outcome: Winiata's claims unsuccessful for Mangaohāne

62. Full evidence was also presented by other parties. The Court awarded interests to Rēnata and Airini through Honomōkai. Winiata's claim was not successful. The Court stated "We leave the part south of Te-Papa-a-tarinuku to be decided on a future application."[93] This statement was to become closely scrutinised – particularly after 1890 when the survey plan was finally made public - what precisely had the court intended to leave off the title, and which part was Pokopoko in?

63. Winiata filed a rehearing application (along with others).[94] The first reason advanced contested the court's decision to exclude any section of the block from adjudication: "[t]he whole block was not decided upon; a portion of it being excluded from the judgment, although the evidence was equal as to all the parts of the block." Ngāti Hinemanu was not mentioned. The application was considered in court with all parties in attendance but was declined by the Chief Judge on substantially the same grounds.

64. Each of Winiata Te Whaaro's representations between the interlocutory title determination and the 1895 final judgment sought his inclusion on the title – rather than the exclusion of Pokopoko.[95] This may be because he

---

93 Wai 2180, #A39, at 28.

94 Wai 2180, #A39(g), at 5–6. The application has a Ngāti Whitikaupeka focus "Reason VII. This block Mangaohāne adjoins the O[w]haoko Block. On that block the ancestor through whom we claim, that is Whitikaupeka was found to be possessed of the title. The same tribes inhabited and occupied by O[w]haoko and Mangaohāne blocks and we cannot see why the claim which was correct upon the adjoining block should be held bad in respect of this block. We are the same people who occupied as upon O[w]haoko."

95 Wai 2180, #A39, at 165 for example (Morison "The facts are not in dispute. We admit that boundary is nearly enough correct." "I don't apply for amendment of the description. The application I have made is for the inclusion of names in the title."

Whilst the 1894 s 13/1889 case alleged Pokopoko had been wrongly excluded, even there the relief sought was for Winiata (and others) to be included in the title rather than to have the boundary adjusted or Pokopoko cut out of the block.

considered Pokopoko was not in the block – it may also indicate a change in strategy once the survey was made publicly available in 1890.

Impacts of Native land laws on tribal structures related to Mangaohāne

65. As above, Winiata, Rēnata and Airini and those they each represented were closely related, however, Winiata was required to distinguish his interests from those of Rēnata and Airini in a land tenure system that fixed rights – and excluded those whose rights were not recognised from the land. Judge O'Brien stated:[96]

> There is no doubt that formerly and in ancient times especially these people pulled together. Now owing to quarrels each party is put upon it rights to prove them. In a case like this block it is difficult to say where rights exactly begin and where they end. Inter-marriage admits of Protean shapes and a claimant may belong to many hapus. But electing (on a hearing) an ancestor and his hapū he stands or falls by them so far as the finding of the Court in their favour or otherwise goes.

66. In terms of Crown actions, the need for Winiata to defend his interests against his whanaunga did not only result "from quarrels". Although of course personalities were involved, those quarrels, and the necessity for all parties to defend their interests, were significantly influenced by changing land use and land tenure, and the Native land laws.

67. The Crown has acknowledged that the requirement of Taihape Māori to defend their interests in the Native Land Court significantly damaged relationships between and amongst the iwi, hapū and whānau of Taihape – and that it failed to protect tribal title through that system.[97] The above aspects of the 1885 Mangaohāne title determination process serve as an illustration of this.[98]

Events following the 1885 interlocutory title determination

Exclusion of Pokopoko and exclusion of Winiata et al: 1885 - 1895

68. Whether Pokopoko had or had not been intended to be included in the title determination became a key issue. Although lawful, in the absence of a full survey plan at the 1884/85 hearing, there was some doubt on the matter.

---

96 Wai 2180, #A39, at 37.

97 See 5 and 8 above.

98 This is so especially for the three parties represented by Winiata, Rēnata and Airini – whilst they shared some whakapapa and also had some distinct lines – their whānau and hapū had, for some decades prior to these events, operated closely together as whanaunga.

The Crown does not propose to forensically examine this issue. The critical evidence for current inquiry purposes – in historical and Treaty terms - is the various statements made by Judge O'Brien on this point between 1885 and 1895, the Chief Judge's 1894 decision (and the Court's subsequent overturning of that).

Process to complete survey after interlocutory order

69. Following the 1885 interlocutory title determination:

69.1 Those left off the title made rehearing applications, direct petitions to parliament, and direct requests to the government for intervention on their behalf. These requests resulted in the Chief Judge (in the case of the rehearing application), and the government (based on the petitions), seeking reports from the Court on the title determination. Judge O'Brien, who had heard the issue, provided a lengthy report to the Chief Judge. Based on those reports, the Chief Judge declined the rehearing application, but only after also hearing from all parties in open court on the matter, and the government concluded further action was not warranted.

69.2 Those who had been recognised by the Court as owners, took steps to complete the required survey. Those steps were opposed on the ground by those who had not been recognised by the Court as being owners.[99]

70. In November 1885, Enoka Te Aweroa and Hori Tanguru had been arrested for obstructing the survey.[100] The charges against them were dismissed by the Supreme Court.[101] The court found the survey had not been authorised

---

99 Wai 2180, #A39, at 56–58.

100 Wai 2180, #A6, at 196; Wai 2180, #A39, at 55, 59, 67. Note Wai 2180, #4.4.11, at 472 Dr Ballara asked for the names of those arrested – Dr Young was unable to provide those names however they are recorded in Wai 2180, #A06, as referenced in this footnote.

101 Wai 2180, #A39, at 55. The Chief Judge considered that the surveyor needed not only to be authorised but also employed by the Surveyor-General, and that surveys were to be authorised by the Surveyor-General, not the Chief Surveyor as had been the case for Kennedy's 1881 authority. New authority was provided to Kennedy by the Surveyor-General in February 1886.

by the correct official, and the surveyor was not 'employed' as required by the legislation.[102]

71. The parties who had been recognised on the title sought government assistance – to overcome that opposition, including requesting the assistance of constables.[103] The government refused those requests.[104] The survey was subsequently re-authorised and completed without further opposition on the ground in 1886, however, further petitions continued to be made in opposition to the survey and the title.[105] The completed survey showed Pokopoko as being within the Mangohāne block.

Sketch plan in court for title determination

72. It was lawful have undertaken the 1884/85 title determination hearing on the basis of a sketch plan rather than a completed.[106] However, where a sketch plan was used, the legislation proscribed a mechanism to ensure title could not be completed until claimants had further opportunity to test the final survey.[107] The survey was completed in 1886 (despite the opposition of those left off the title). However, the remaining steps to complete it were – through the events described below – to take a further seven years. The survey was not finally approved for the Mangaohāne certificate of title to be lawfully issued until 1893, eight years after the original title determination.[108]

73. That survey process for Mangaohāne (undertaken by the Crown) had consequences for the title determination process, including:

---

102 Wai 2180, #A39, at 55 Native Land Act 1880 section 39. The Court found the survey was required to be made by surveyors employed by the Surveyor-General "not only authorised". How "employed" was defined for these purposes is uncertain.

In 1883 the chief surveyor had used this provision to stop a private party undertaking an unauthorised survey and appears (given that they had earlier approved a different private surveyor to conduct a survey) to have considered official authorisation of the survey to satisfy the requirement for employment (see Wai 2180, #A39, at 22–23).

It appears that Kawepō's composite sketch plan may have been prepared ahead of authority being granted (see #A39, at 21) – Buller applied on Kawepō's behalf in April 1882 but there is no record of that application being granted. Buller then submitted a compiled plan for provisional certification in August that year – at which time it was approved.

103 Wai 2180, #A39, at 57.

104 Wai 2180, #A39, at 57.

105 Wai 2180, #A39, at 58.

106 Native Land Court Act 1880 ss 26 and 27 and confirmed by Court of Appeal for Mangaohāne in 1891.

107 Native Land Court Act 1880 ss 27–33.

108 Wai 2180, #A39, at 138.

73.1 the Surveyor General's 1881 decision not to rescind the authorisation of the survey (where that authorisation had been made in error) exacerbated tensions between groups competing for their interests in the land to be recognised and lessened the opportunity for groups to reach agreement on which land was in question;

73.2 Crown actions contributed to a delay which meant the survey plan was not produced until 1890 – this extended the overall titling process and contributed to the complexity of the litigation undertaken and the outcome of that litigation.

Crown role in delay

74. The delay was due to errors and misunderstandings by the court, the Crown, and the Studholmes. The survey was completed in 1886, within a year of the interlocutory title determination being issued but - as above - was not made public until 1890 and was not finally approved until 1893.

75. Strenuous opposition to the court's decisions (title determination and decline of rehearings) and to the completion of the survey continued. Retimana Te Rango and Ūtiku Pōtaka each repeatedly sought intervention from the Native Minister. The words of Retimana Te Rango to the Native Minister, written in December 1885 were supported by Ūtiku Pōtaka, and preface similar language being used by Winiata Te Whaaro a decade later when being evicted:[109]

> Our pain and sorrow are very great at the thought that the land of our ancestors, on which they were wont to tread, is to become the property of strangers who have no claim to the land. Listen, we cannot bear to live quietly and to allow the survey to go on, for we know the result. We have already sent several applications to the Chief Judge of the Native Land Court for a second hearing of Mangaohāne, and we sent them in pursuance of our just claims; but they were all dismissed by him, and all the petitions to Parliament were served in the same way, upon this we thought 'Well we have tried all means in respect to law, but without notice being taken,' for our desire is that another hearing should take place before our land becomes the property of another person, that is a second investigation of right and wrong; But think that after one hearing only, our land becomes the property of another, all, because wrong decision.

109 Wai 2180, #A39, at 52 (December 1885).

> We write to inform you that this trouble will increase, or summons had come to us this very day with reference to our proceeding. Listen, we will not stop though we die, it will only be, 'We die for our land.' Granting a second hearing is a mere trifle, whereas that has been denied to us: this will cause grievous trouble to us. This affair will never cease until perhaps blood has been spilt on the soil, and then the end may come, for then the people living on it will be exterminated.

76. As above, after charges were dropped against those opposing the survey, in February 1886, the Crown issued a new authorisation to the surveyor and, in doing so, made the previously private survey a Crown survey.[110] The amount required to complete the survey was lodged with the Crown as a surety prior to the Crown agreeing to take responsibility for the survey.[111] The Studholmes lodged that surety but also sought surety for the amount already expended on the survey. Both sureties were registered against the land[112] (but ultimately discharged – no land was taken by the Crown from Mangaohāne for survey).[113]

77. Although it was the court's responsibility under the legislation to fulfil the requirements to approve a survey plan after a sketch plan had been used in

---

110 Wai 2180, #A39, at 57. Following the 1886 Supreme Court finding, a further authority was made by the Surveyor-General to Kennedy (Surveyor) to remedy this defect notwithstanding Kennedy remaining in private practice. The Surveyor-General did exercise some closer scrutiny of Kennedy based on this provision in later stages of the survey process. A further finding was that the survey could only be authorised by the Surveyor-General - in accordance with the office's general practice, the Mangaohāne survey had been authorised by an official working under the Chief Surveyor. Dr Young suggests that the survey application may have been lodged prior to the 1880 Act coming into force and thus may have been authorised under the 1873 Act provisions – which did not require the surveyor to be employed. The Crown does not take this matter further as it does not appear hugely material to the current issues.

Wai 2180, #A39, at 57; and Wai 2180, #A39(g), at [10]–[11]. The Crown has not located the specific authorisation terms or investigated how the further authority met the legislative test of employment but given the re-authorisation followed the Supreme Court proceeding the Crown proceeds on the basis that the authorisation was intended to remedy the defects identified by the Court. Dr Young (at [11]) raises the possibility that the liens was duplicated (by the Crown and by Studholme) but – as set out in this paragraph, that does not appear to be the case.

111 Wai 2180, #A39, at 57. See also Wai 2180, #A39, at 60 fn 132.

112 The survey cost the Crown £462 directly, the Crown charged £1,108 against the title. Concerns were raised by claimant counsel and panel members that this was improper (transparency, £646 discrepancy between actual cost and amount charged, and fairness to claimants concerns) do not appear to be borne out (Wai 2180, #4.1.11, at 510).

The 'actual costs' incurred by the Crown directly appear to be the remaining cost required to complete the survey. The total rate charged against the land was the scheduled rate in the Native Land Court Regulations and was published in the Gazette (and the 'actual cost' incurred is disclosed with each mention of the costs at the time).

It appears the balance between £462 and £1,108 was paid prior to the Crown assuming that role. Wai 2180, #A39, at 60 fn 132, states £587 for the original survey had been paid to Kennedy for the original survey but doesn't state who by – Hīraka Te Rango was his initial client – or how Ellison's contribution (the sketch plan built on Kennedy's work) was paid for; Donnelly and Warren had paid £50 and £75. Together with the further £462, this totals £1,174 – ie very close to the total charged. This makes sense as, even when operating privately, the surveyor would have been paid at scheduled rates when working on Crown authorised plans.

113 Wai 2180, #A39(g), at [9], [12]. Wai 2180, #A39, at 59 see quote "in accordance with …"; and at 77. Note, the charge was against the title so only those ultimately admitted on to the land would have incurred cost (ie not Winiata et al).

court, the Crown had a role in certifying that plan for the Court's use.[114] Confusion ensued as to the relative rights the Crown and Studholmes had over the survey given its hybrid genesis between private and Crown survey. A key question became whether the consent of Studholme was required in order for it to be viewed by others, and or used in Court as any Crown survey was able to be.[115] These matters, and miscommunication between the Crown (the survey office), the Studholmes and the Court (registrar), resulted in substantial delay.[116]

Crown action in response to the delay – including representations to the Court by senior Ministers

78. In April 1889 the Studholmes complained to Crown Ministers about the delay.[117] Over the next twelve months Crown Ministers and officials made enquiries about the case status. Once it was realised, in April 1890, that the completed survey plan and a certificate of title were necessary for the partition hearing to proceed but had not been issued – and allegations were made that the Crown might be part of the cause for that delay - increased efforts were made to identify the cause of the delay and to resolve matters.[118]

79. The delay led to both the Native Minister and the Premier conveying their concerns to the court itself, with the Minister going so far as to suggest the Mangaohāne partition should precede an upcoming Awarua hearing (ie advising the Court on the Crown's preference for Court hearing scheduling).[119] The correspondence shows them ensuring that the Crown is

---

114 The Surveyor-General's role was an impartial technical position and even though the role was inimical to the conduct of the court, the Surveyor-General is an officer of the Crown.

115 Wai 2180, #A39, at 78, 80, 82, 84, 85. The irony that the Studholmes (and Donnellys) were the parties most inconvenienced was not lost on the people involved at the time.

116 Wai 2180, #A39, at 78. The Studholmes' consent was sought in 1888 but their response was ambiguous and interpreted by the Crown as declining consent – no action was taken at the time to further clarify that situation and, as at 84–85 appears to have been confusing to the officials themselves.

117 Wai 2180, #A39, at 78. At the time the Studholmes did not hold title to the land – they did however hold Deeds of Purchase that were contingent on title being completed (which had been negotiated following the Court authorising private negotiations) and were substantial creditors to the people included in the 1885 interlocutory title. Rēnata Kawepō had died in 1888, Broughton's and Donnellys were contesting his will – the Crown is not aware who at this point was acting as administrator of Kawepō's estate.

118 Wai 2180, #A39, at 82–83.

119 Wai 2180, #A39, at 80, 82.

Under-Secretary of Native Affairs to Chief Judge:

> "The Hon. the Premier wishes me to ascertain from you whether anything is likely to interfere with hearing of Mangaohāne case on 16th instant. He considers with you there should be no further postponement or delay. Please kindly communicate with judges and reply urgent."

Native Minister to Chief Judge:

not the cause of any delay. The correspondence clearly conveys their view that "there should be no further postponement or delay" and that "that the partition hearing should proceed as soon as possible".[120]

80. Similar concerns were conveyed within the Crown, eg "the importance of seeing that no technicality was allowed to prevent the Mangaohāne case" proceeding. Those comments are appropriately caveated by any Crown actions to assist in removing difficulties would occur "without interference with the rights of parties."[121] Obstacles that had, unintentionally, been caused by the Crown were rapidly 'fixed' so that the completed survey plan was available for the partition proceeding (including clarifying the requirement for obtaining Studholme's consent, and then gaining it). In that rush, errors – albeit relatively minor – were made.[122]

81. The Premier and Native Minister's concerns appear to be motivated both by the representations that had been made by Studholme,[123] and, given the delay there had been between 1886 and 1890, anxiety to avoid further delay being caused by the Crown. The correspondence advocates for procedural matters only (there is no encouragement for a particular outcome). Dr Young confirmed his view that the correspondence was clear that the Court was to be left to undertake its role – without interference by the government.[124] However the Minister's query of the Court "Could you not take steps to have certificate issued at once" appears to have had no regard to the legislative requirements. Nor did the Court's subsequent action - the

---

"Yesterday Judge O'Brien telegraphed asking if government had any claim on Mangaohāne and intimated that certificate had not issued. Native Minister directs me to wire to you who are aware of the urgent necessity that there shall be no hitch in the progress of this case to completion. It is strange that the non issue of certificate was not brought to notice before. **Could you not take steps to have certificate issued at once. There should be no break in proceedings of Court till case is finished if it can be avoided.** Government have no claim and have not so far as this department is concerned interfered with the issue of title."

120 Wai 2180, #A39, at 80.

121 Wai 2180, #A39, at 83.

122 Crown officials were inconsistent as to whether it was necessary to have the district boundary recorded on the survey plan prior to the plan being presented to the Court to finalise the title. In April 1890 the Chief Surveyor said it was necessary; two weeks later it was considered acceptable to forward them without that boundary being inserted. The legislative test was that a "sufficient plan and description" and be "certified as correct" by the Surveyor-General (or delegate) of the block itself (ie having the district boundary may have been preferred but not necessary) (Native Land Act 1880 ss 26, 27 and 39).

The survey office forwarded the plan to the Court with some differences between how the partitions were named and an error in the list of names (Wai 2180, #A39, at 86).

123 Wai 2180, #A39, at 83 "As the Government in consequence of the representations made to it has urged upon the Native Land Court in the interests of all parties that there should be no delay in dealing with the partition of this block […]."

124 Wai 2180, #A39(d), in response to Crown question 10.

certificate was issued without the plans being displayed for inspection or notified as required of the Court under legislation (or time for objections or rehearing applications being provided). This led to the partition orders for Mangaohāne No. 2 being quashed by the Court of Appeal in 1891 (and to partial rehearings). Such correspondence would not be appropriate today.[125]

Implications of delay

82. In the Crown's view, the delay between the 1886 survey being completed and it being certified in 1893, had the effect of:

82.1 undermining the certainty the parties (and the court) had as to the land included in the title (in particular whether Pokopoko was in or out of the title) and the advocacy options that could therefore be employed whilst the initial hearing was still fresh in the minds of the parties and the court;

82.2 extending the period in which the title determination could be challenged (but also the costs involved in mounting those challenges);

82.3 contributing to a very complex procedural history in which procedural errors were made which caused prejudice to all parties and which contributed materially to the outcome of Winiata Te Whaaro being excluded from the title.

83. This last point is discussed further below.

Litigation following the public release of the survey plan in 1890

84. As above, the survey plan was only made public in 1890 – for the Mangaohāne partition hearing and only after the misunderstanding about Studholme's consent had been resolved. Even though the survey had been completed in 1886, it had not been seen by any parties – once it was, further litigation ensued concerning the inclusion of Pokopoko (up until that time

125 For completeness, claimants and technical witnesses point to the Studholmes or their counsel talking with Judges directly. Whilst that also would not be appropriate by today's standards, the practice was not limited to the Studholmes. Ūtiku Pōtaka and Te Rina Mete Kingi met with the Chief Judge (Te Rina to present her rehearing arguments to him in person – with other interested parties not being present) Wai 2180, #A39, at 46 and 74 respectively. Access to the Premier and Ministers also seems to be relatively open – eg Counsel for Noa Te Hianga stated "I have to thank you very much on behalf of the Natives interested, for the interest and trouble you have taken in the matter"; and rehearing reports were routinely forwarded to the Premier who at times corresponded directly with the rehearing party.

all of Winiata et al's challenges were based on them being wrongfully excluded from the title – not Pokopoko being wrongfully included).

85. The southern boundary was not confirmed until February 1893 (ie authorised, notified, tested in a 'boundary court', and accepted in accordance with the statutory process required where sketch plans had been used). At that point it was confirmed without opposition. Dr Young attributes the fact that Winiata did not oppose the survey at that point to legal advice from his counsel Morison.[126] Morison was in court representing Winiata in the rehearing for Mangaohāne No. 2 at the time the 'boundary court' sat to hear any objections to the survey plan and an objection "could have been raised in the circumstances but it was not".[127] In terms of the legal process – it would seem this was the perfect time to raise any concerns that arose out of the survey (eg the inclusion or exclusion of Pokopoko).

86. The Native Land Court later queried Morison at length about this decision, and it was put to the Supreme Court by the Donnellys' counsel in 1894.[128] H D Bell, the Studholmes' counsel at the time, advised his clients that "they had obtained an advantage over Winiata because Morison had decided to deal with the matter under s 13.[129] Morison's repost was that his clients accepted that "The facts are not in dispute. We admit that boundary is nearly enough correct" in that it traverses the place names recorded by the 1884/85 interlocutory hearing. Morison contended that the error that required remedy was not capable of being fixed by the boundary court – the inclusion of Pokopoko within those boundaries, and the exclusion of his clients from that title.[130] Counsel for the Donnellys, McLean, rebutted these points vociferously. The fact that the southern boundary was substantially correct and had been confirmed without objection subsequently formed one plank in Judge Butler's 1894 report as to why Winiata's claim should

126 Wai 2180, #A39(d), response to Crown question 11.

127 Wai 2180, #A39, at 164 – Counsel for Donnellys testified that that boundary case was called in the presence of Morison but no objection was lodged.

128 Wai 2180, #A39, at 164.

129 Wai 2180, #A39, at [437]; Wai 2180, #A39(d), response to Crown question 11.

130 Wai 2180, #A39, at 165–166.

not succeed (and influenced the 1895 Court of Appeal decision).[131] Dr Young views this matter as a potential mistake by Winiata's legal counsel.[132]

Judge O'Brien's recall of Court's intentions regarding Pokopoko

87. Judge O'Brien's evidence on whether Pokopoko was intended to have been included in the 1884/85 interlocutory title decision shifted over time.[133]

88. In his 1885 report to the Chief Judge on Winiata's rehearing application, he stated five times that the court's title decision did not include the area in occupation by the Ngāti Hinemanu/Ngāti Paki claimants:[134] He included a handdrawn sketch in which he showed Pokopoko as being on the southern boundary.

> We declined to adjudicate on the part lying south of Papa o Tarinuku going through or by Pokopoko forest, leaving it or a part of it out of our judgment, for reasons which satisfied us that it should be the subject of a future investigation. The evidence seemed to point that that part and the land adjacent to the south and east belonged to these people, Ngāti Pake [sic]and Ngāti Hinemanu.

89. In 1892, Judge O'Brien was called to give evidence for the Mangaohāne No. 2 rehearing.[135] Although he was considerably more equivocal about his own recall (and the sketch he made in 1885),[136] he stated that his views had

---

131 Wai 2180, #A39, at 167.

132 Wai 2180, #4.1.11, at 494 "Morison was very clear in why he did that later on but I am not sure if that was a strategic mistake on his part and I think that HD Bell certainly …. Legal advice to Winiata was wrong on that occasion."

133 See for example Wai 2180, #A39, at 179–180 NLC CJ dismissal of statement by Judge O'Brien.

134 Wai 2180, #A39, at 35–40; Wai 2180, #A56, at 2.

"Q. 'Then I suppose these boundaries had now effect?' A. 'Yes I consider they had. Pokopoko is my only place of residence within this block'. Memo. It was here we drew our boundary line leaving out part of land in our judgement."

"Irimana Ngahou next witness for Ngāti Pake say 'I reside at Pokopoko' (this is where the judgment draws the line)."

"Again he says 'Rēnata request Winiata to leave Waiokaha (whither Rēnata had sent him with sheep) where he was pasturing sheep on this block. Winiata did so and came to live at Pokopoko', that place where our judgment draws the boundary."

"Noa Te Hianga and these same 'people told me that Pokopoko was a place where all the people assembled to hunt rats and snare birds'. Pokopoko is where our judgement draws the boundary line as complained in reason 1."

135 It is noted that this is not an approach that would be taken today.

136 Wai 2180, #A39, at 129:

"A. My remembrance of this was that the cutting out of a piece was in reference to Ngati Hinemanu claim, that it either belonged to them or was so doubtful that we cut the piece out. The two judges were agreed but assessor was doubtful as well as I remember returned to Court and asked question."

"The sketch on the memorandum is no value as against plan as it was drawn from memory at Marton. It cannot be taken as of any value or an estimate of what was intended to be cut off. There was an uncertainty about the position of Pokopoko."

"Q. Was it intended to follow the names of places in your judgment or to leave out Pokopoko? A. I would ask the Court to follow the evidence in the case and not anything I may have said in my memorandum which is an opinion."

altered due to hearing further evidence in 1890 on the matter in a related but separate proceeding – and he now considered Winiata's claim more favourably:[137]

> Mr Morison. Q. Do you wish at this distance to qualify anything you stated in the Report you made to Chief Judge Macdonald? [referring to Judge O'Brien's 1885 report for the Chief Judge when considering Winiata's rehearing application).
>
> A. I might. The report conveyed accurately what I thought at the time. **I have reason now to think I was mistaken.** Winiata made a claim which was dismissed. Because at a subdivision about two years ago, **Winiata was called by Ngati Whiti for the northern part during the course of which, he showed a much clearer claim than at the first hearing and I came to the opinion that his claim was clear than I thought** and I said so. He may not have been cross-examined. P[arliamentary]. Committee wished me to give evidence but I was sitting in Awarua and could not attend but I sent a memorandum (referred to in Winiata's affidavit in Court of Appeal case as telegram). [Emphasis added]

90. In 1895 Judge O'Brien made a further statement as to the intention of the Court in fixing the southern boundary – apparently taking a contrary view to his 1892 view quoted directly above.[138] The Chief Judge considered that statement was rejected as inadmissible on procedural grounds (it was presented by a party and Judge O'Brien himself did not appear in regards to it) and on the basis that "it certainly would not outweigh" the effect of Judge O'Brien's 1892 statements "of a contrary tendency".[139]

91. This approach, that on the evidence put to the Court in 1884 the correct decision had been reached, but that further or different evidence might have resulted in a more favourable outcome for Winiata *et al* had it been available to the Court in 1884/85, gained traction in subsequent judicial consideration.

1894 Application under remedial provision (s 13/1889)

92. In 1894 Winiata lodged an application under section 13 of the Native Land Courts Acts Amendment Act 1889 - an early validation provision - that alleged an error had been made by the court in 1884/85 and should be remedied.

---

137 Wai 2180, #A39, at 129.

138 Wai 2180, #A39, at 179–180.

139 Wai 2180, #A39, at 179–180.

93. The Chief Judge referred the application to Judge Butler for a report. Judge Butler conducted a hearing with an Assessor and all parties present. His report back to the Chief Judge concluded there had been no errors in the 1884/85 title determination itself but that:[140]

> evidence given on partition of Mangaohāne No. 1 and on rehearing of Mangaohāne No. 2 block was stronger in support of Ngāti Hinemanu and Ngāti Paki claims to Mangaohāne No. 2 block than that given at the investigation of title to the Mangaohāne block and if it had been brought out might have affected the judgment of the former Court in their favour.

94. Judge Butler considered that could not be remedied under section 13 powers as any error was "the fault of the parties themselves that the whole of the evidence was not available to the Court" and thus not an error of the court.

95. Chief Judge Davy took a different approach. He thought section 13 was wider than Judge Butler thought. Section 13 states "any error or omission committed or made in any decision or order of the Court." After hearing from all parties[141] and considering Judge Butler's report (but not sitting with an Assessor), Chief Judge Davy concluded that:[142]

95.1 Pokopoko had been included in the block in error or misunderstanding;

95.2 Winiata (and those claiming with him) had been prejudicially affected by that error and had not been able to put evidence to the Court "which there is reason to believe, were the Court still open to him, might influence a decision in his favour";

95.3 that a rehearing would be the appropriate vehicle to reassess matters but, under the s 13/1889 Act jurisdiction was not available to be ordered by him as a remedy; and

95.4 that s 13 conferred an equitable jurisdiction [ie a fairness test] which was sufficiently broad to allow him to include Winiata and

---

140 Wai 2180, #A39, at 167: "That the evidence given before the Court at the investigation of title to the Mangaohāne block does not justify the allegation of Winiata Te Whaaro that his interests and those of his hapus the Ngāti Hinemanu and Ngāti Paki were prejudicially affected by the judgment of that Court."

141 H D Bell appearing for Donnellys, Sir Robert Stout and Morison for Winiata et al. Note, Studholmes were defendants in this matter (having refused to support the Donnellys in pursuing prohibition).

142 Wai 2180, #A39, at 169. *Winiata Te Wharo v Airini Tonore and another* (1895) 14 NZLR 209 at 214-215.

those who claimed with him, in the title (with relative interests between all owners to be determined amongst themselves or through recourse back to the court);

95.5 and included Winiata (and those claiming with him) into the title on that bases (albeit with relative interests undefined).

96. Chief Judge Davy's decision was overturned by the Supreme Court and the Court of Appeal.[143] The senior courts concurred with the approach that Judge Butler had taken and overturned the Chief Judge's decision on both procedural and jurisdictional grounds.[144] Although the s 13 power was broad, the Court of Appeal considered CJ Davy had overreached – s 13 did not provide for "errors or mistakes in the conduct or proceedings of the court to be remedied" including errors made by parties.[145] The senior courts agreed with the Chief Judge on one matter – a rehearing would have been the correct procedural pathway but that jurisdiction was not available to order one under the 1889 remedial legislation.[146]

97. The legal result of the Court of Appeal decision was that the 1894 Native Land Court Chief Judge's decision is of no legal effect. In the particular circumstances of the Mangaohāne title determination, the Crown nonetheless considers that the Native Land Court Chief Judge's decision can bear weight in historical and Tiriti/Treaty jurisprudence terms. The Government was on notice through these events that there was a significant issue that hadn't been squarely addressed in the court. For a rehearing to have been made available at that time, special legislation would have to have

143 "In the present case the Chief Judge is shown on the face of the proceedings to have declared the applicant and his followers to be owners in Mangaohāne No. 2 on his own motion, without, investigation, and consequently without giving the parties whose interests are affected by such decision an opportunity of being heard. He has done so, as we have before pointed out, not as having himself erroneously decided, on the evidence, that they have proved themselves to be such owners, or even that the error lie had to correct was the not declaring them such owners, but as deciding that declaring them such owners was the only way to compensate them for a failure by the Court to investigate their claims to ownership. To do this he has assumed a right to, in effect, constitute himself a Court for investigating titles."

144 Only evidence available to the Court in 1884/85 was admissible. By reaching a different finding than that reached by Judge Butler (who had been delegated the task of inquiry, had sat with an Assessor, and heard from all parties). The correct course would have been to refer any questions he had back to Judge Butler for further consideration or to conduct his own hearing with an assessor.

145 Wai 2180, #A39, at 185. *Winiata Te Wharo v Airini Tonore and another* (1895) 14 NZLR 209: "the error should be one which, at the time it is made, could have been rectified by the Court without further inquiry had it been made aware of the error."

Leave was granted to appeal to the Privy Council but there is no evidence that was pursued.

146 Wai 2180, #A39, at 186.

been passed. It wasn't – there is no evidence on the record of any further petition being made on this matter, nor of the Crown considering whether special legislation was warranted.

Potential settlement

98. Following the Chief Judge's 1894 decision to insert Winiata and other claimants into the Mangaohāne No. 2 title (and prior to the 1895 Court of Appeal decision quashing that), serious negotiations towards a settlement occurred between the Studholmes, Donnellys, and Winiata Te Whaaro.[147]

99. Studholme accepted the Chief Judge's decision (for pragmatic reasons rather than legal ones) and pushed for an out of court settlement between he, Donnelly, and Winiata as he wished to bring matters to a conclusion once and for all. [148] Studholme was proposing 2/3 of the land for settlement come from 'his' section with the remaining 1/3 from Donnelly. When Donnelly refused this proposal Studholme continued negotiations utilising solely 'his' land (ie no Donnelly land) and stated "I now propose to each of the three other parties to No 2 that if they will agree not to oppose our application [under s.4/1893] we will be prepared to retire from the contest with 14000 instead of 19000 acres."[149]

100. He was willing to settle with Winiata and the "Tamakorakos" having 5,300 acres if they accepted him being able to complete his title to the balance of the 19,000 acres (ie 14,000 acres).

101. Studholme was sufficiently serious about this proposal that applications were made to the court and various correspondence entered into. However, settlement required the agreement of Donnelly, Winiata and the Tamakorako's to also suspend their rights to take legal proceedings – ie to ensure that Studholme would indeed be able to secure a completed title. They were prevented from doing so due to the 1893 s 7 provision which prevented completion of any certificates of title whilst litigation over Mangaohāne No. 2 remained alive – without the agreement of all of them,

147 See Wai 2180, #A39, at 171–172; and #A56(c), at 7–8.

148 Wai 2180, #A39, at 171. Studholme was not opposed to further challenge of the matter on legal grounds (which he thought they still retained a strong legal position) but in order to resolve the "unfair position we at present occupy". That position was that Mangaohāne was critical to the profitable working of his entire run (Ōwhāoko) and the cost of unsecured credit while the title remained unsettled and avoid further delay.

149 Wai 2180, #A56(c), at 8.

this provision (intended as a protective measure for Winiata and other claimants) meant the settlement could not be implemented.[150]

102. The Donnellys did not agree, instead they took the final legal step in the title determination process, alone. Studholme, although considering there was legal merit in the prohibition proceedings, did not support the Donnellys challenging the Chief Judge's 1894 decision which inserted Winiata on to the title. Studholme and was joined as a respondent along with Winiata et al, and the Chief Judge.[151]

Relative provision of remedial measures in legislation - allegations of bias

103. The full procedural history is not set out in the submissions above. The fact that various courts found that errors had been made is relevant to the submissions below.[152]

104. Claimants have argued strongly that the sequence of events demonstrates bias or collusion (or even corruption). Dr Young's evidence is that the

---

150 Wai 2180, #A39, at 171.

151 Indeed, the Studholmes, were joined by the Donnellys as defendants in those proceedings - along with Winiata Te Whaaro, the Chief Judge of the Native Land Court.

152 The Court found it made the following errors:

- Court of Appeal 1891: Errors affecting all: using sketch plan in court and failing to take steps required by statute to then finalise survey plan (1880 ss 26-33) prior to issuing certificates of title in 1890; dismissing rehearing applications without hearing from parties. Court of Appeal quashed the 1885 title on these grounds (1891).

Subsidiary effect of those errors: Court issued notice for Mangaohāne in 1886 allowing private parties to deal with land (under NLLAA 1883 s 7). Studholmes negotiated Deeds of purchase (subject to titles being completed) on that basis but they were rendered invalid following the CA 1891 title quash. Remedied under validation provision as bona fide transaction.

- NLC CJ in 1893 found 1885 title intended to exclude Pokopoko but did not exclude it (subsequently overturned).
- Court of Appeal 1895 found: NLC CJ 1893 acting outside jurisdiction of 1889 s 13 error validation provision in Winiata's favour (procedural error not referring back to Judge Butler or conducting own inquiry with an assessor; jurisdictional error in inserting Winiata on to title). Require rehearing to remedy but not available.

152 Native Land Court Act Amendment Act 1889 section 13 was utilised by Winiata but did not provide for rehearing to be ordered by court. The CA found in 1895 that a rehearing would have been the correct procedural pathway. However jurisdiction for a rehearing was, by that stage of the proceedings (given three months had elapsed since title confirmed), not available without special legislation being passed – no such legislation was passed.

Native Land Court Certificates Confirmation Act 1893 (utilised by Studholmes and Donnellys). Section 7 preserves access to Court for specified Mangaohāne No. 2 proceedings; Native Land Court Act 1894 s 118 (used by Studholmes to complete Mangaohāne No. 2 title).

1889 s 13 validation provision utilised by Winiata did not provide a remedy for parties who might belatedly be found to have been wrongly excluded from the title.

152 The settlement, under which the Studholmes would provide 5,000 acres to Winiata out of the Kawepō/Studholme land, was agreed between Winiata Te Whaaro and the Studholmes but it also required the Donnellys agreement to discontinue further legal challenges (due in part to the 1892 s 7 savings provision for Mangaohāne No. 2 access to the courts). The Donnellys did not agree and instead challenged the 1893 CJ s 13 decision through to the Court of Appeal.

various mistakes that were made were just that – mistakes. He, however, considers that: [153]

> Winiata's legitimate interest that was recognised by the Chief Judge could not be recognised, could not be validated if you like, … whereas those of the European purchaser could be constituted as differential treatment that "goes to the heart of what happened with Mangaohāne.

105. The legislation provided procedural paths to remedy some of the errors but not all of them. The Studholmes ultimately finalised their title through validation legislation, which remedied errors that had been made by the Court (by issuing notice in 1886 that private dealings could be commenced). However, there was ultimately no jurisdiction for Winiata Te Whaaro to secure a rehearing at the time it may have made a material difference to the outcome. However, the Crown is cognisant that:

105.1 the procedural issues and concerns faced by the Studholmes and by Winiata Te Whaaro were of an entirely different character;

105.2 Dr Young considers the conditional Deeds of Purchase negotiated between the Studholmes and those included in the interlocutory title in 1885 and 1886 were unlawful in that they breached a prohibition on negotiations in any Māori land[154] and were thus entered into 'in error' by the Studholmes. However, the Chief Judge of the Native Land Court had issued a notice under that Act removing that prohibition for Mangaohāne prior to those negotiations commencing.[155] The 1891 Court of Appeal decision quashing Mangaohāne partition titles due to errors in procedure confirmed that the notice had been issued prematurely but that was the court's error, not the Studholmes'. The Deeds were ultimately confirmed under a validation provision accordingly.[156]

105.3 Allegations that validation legislation was created with the Studholmes in mind and to the purposeful detriment of Winiata

153 Wai 2180, #4.1.11, at 476.

154 Native Land Laws Amendment Act 1883 section 7.

155 Wai 2180, #A39, at 45.

156 That validation only occurred following further inquiry by the court as to the ongoing consent of those who had entered into the Deeds in 1885/1886.

Te Whaaro are not made out.[157] Although Rees[158] and a member of the opposition advocated for an amendment to protect Studholmes interests,[159] the government rejected that proposal in full.[160] The government in fact inserted a clause to preserve access to the Courts for Winiata Te Whaaro - title could not be validated until Mangaohāne No. 2 litigation was completed:[161]

> 7. No certificate under section four of this Act shall be issued in respect of the block called Mangaohāne No. 2, or any part thereof, until the final determination of the several

---

157 Technical evidence on this point, and claimant questioning, placed too much weight on Rees advocacy being to further the Studholmes' interests. They were not his clients at that time. Rees had been pursuing such matters as a result of his activities on the East Coast (with Wi Pere).

For completeness:

An allegation was made that H D Bell was acting for Studholmes, including whilst an MP; Bell however acted for the Donnellys not the Studholmes. In the brief period when he was the MP for Wellington (1893 – 1896) however he was an independent MP ie was not part of the government. WJ Gardner, 'Bell, Francis Henry Dillon', from the Dictionary of New Zealand Biography, Te Ara – the Encyclopedia of New Zealand, http://www.TeAra.govt.nz, accessed 10 April 2021).

Stout acted for Winiata in the superior courts after leaving Parliament.

158 For completeness on Rees see also Wai 2180, #A39(g), at [20]:

Dr Young corrects the record regarding Rees' travel with Judge Butler was actually with Judge Barton (who did not adjudicate on Mangaohāne).

Dr Young also addresses Rees' meeting with Chief Judge G B Davy at Otaki (March 1895). Rees' advised his prospective clients (Studholmes) that he had spent time with the chief judge and discussed recourse to the validation court for the Mangaohāne case with the chief judge. Dr Young concludes that it is unsafe to read too much into Rees' claims as to his discussion with the Chief Judge on this occasion as "The letter, in its entirety, reads as an effort by a lawyer to emphasise his value to an important client in circumstances where Rees appears to think Studholme is unhappy with or dissatisfied by advice provided by Rees".

He states: "I am wary of the accuracy of it in the context of this letter (and especially in light of the chief judge's earlier determination in favour of Winiata Te Whaaro, which remained in force at the time of this conversation as it was not finally determined by the Court of Appeal until July)."

159 Wai 2180, #A39, at 117–127: Rees and Richardson (an opposition member) proposed an amendment to the Bill that (although it was not personalised to Mangaohāne was clearly focussed on it) would have had the effect of limiting Winiata's participation in the rehearing (and of limiting the effect of any adverse judgment on the Studholmes. The Richardson amendment proposed was roundly rejected by the government – it was not supported by Cabinet, or the Minister, and it did not pass.

It should be noted that a paper by Morison (Winiata's solicitor) was also read to the House – Rees was not the only person with airtime that day.

Seddon (still MP not yet Premier at the time) in rejecting Rees/Richardson's proposed amendments stated (Wai 2180, #A39, at 126): "There are two sides to the question. There are two parties, and I think one party might fairly say it was surprised, and that we had passed legislation to the prejudice of its position."

160 1. Wai 2180, #A06, at 206; #A39, at 112: The Studholmes petitioned Parliament in 1892 following the 1891 Court of Appeal judgment (which had quashed the 1885 Mangaohāne title determination). Rees presented that petition to the House of Representative. However, as above, the Studholmes' petition was not the primary motivator for the Validation legislation, nor did Parliament or the Crown intervene to stop the Native Land Court conducting its rehearing following that petition.

2. Rees' expression of support for the Studholmes (in the quote above) was not specific solely to the Studholmes but speaks instead to his longstanding efforts in the administration of Māori lands (particularly on the East Coast). Boast points to Rees' broader interests being in play – he states the Validation jurisdiction was "one of the main outcomes" of the 1891 Rees-Carroll report. Rees was to become the primary applicant to the Validation Court – seeking certainty for titles he had been part of creating earlier for the extensive lands (putatively) held by the Carroll-Pere Trust. Boast, Buying the Land, Selling the Land (2008) VUP at 196; Boast, Native Land Court Vol 2 at 100, 147, 151. Boast notes that Rees' criticisms of the Native Land Court and legislation including in the 1891 need to be taken with an 'especially large grain of salt' given that Rees himself contributed to the complexity with his litigation.

161 Native Land Court Certificates Confirmation Act 1893 s 7.

> matters specified in a memorandum signed by the solicitors of the several parties, and filed in the office of the Native Land Court, at Wellington, on the eleventh day of September, one thousand eight hundred and ninety-three.

105.4 The ability to contest the boundary and to seek a rehearing upon the certificate of title being granted were available in 1893 but not utilised (ie within three months after certificate of title being issued). Winiata's legal counsel did not pursue those pathways.

105.5 Winiata Te Whaaro also availed himself of a remedial provision (Native Land Court Acts Amendment Act 1889 section 13).

106. Mangaohāne was on the mind of legislators when validation legislation was being drafted – it was the only case determined by the Court of Appeal and thus the effect of that judgement was closely considered by the Attorney-General, the Native Minister, the select committee considering petitions on the matter, and in the House when validation legislation was being debated.

107. However, the issues to be addressed by the validation jurisdiction were alive prior to the 1891 Court of Appeal decision on Mangaohāne No. 2 – they were not a response solely to Mangaohāne No. 2, nor were they some attempt of the legislature to discriminate against Winiata. The purpose and the powers provided in the legislation reflect these broader concerns.[162]

108. Some balance is to be brought to these allegations:

108.1 A number of procedural safeguards were built into the legislation. The failure of the Court to meet some of those safeguards were the basis on which the Court of Appeal quashed the certificate of title in 1891 (rehearing applications to be heard; certificate not to be issued until survey plan completed, notified, available for inspection, opportunity to object provided and rehearing window has elapsed).

108.2 Recourse to the executive through petitions, select committee inquiries, served as a substantive check and balance on the

---

162 Boast, Native Land Court Vol 2 at 103: Boast summarises the purpose of the Court as being:

> to validate invalid titles and contracts and thus facilitate the registration of affected titles under the Land Transfer Act. The Court was there not to legitimise fraud, but to overcome problems arising from technical invalidities.

operations of the court. Here, in the same year that Stout reports on Ōwhāoko (which led to the subsequent Commission) it can be seen that petitions for rehearing were taken seriously - see for example the lengths gone to investigate Noa Huke's petition about Mangaohāne.

108.3 Much attention has been drawn by witnesses and claimants to an opposition MP unsuccessfully proposing an amendment to protect the Studholmes' interests and to an MP acting for Studholmes upon leaving Parliament, Little attention has been placed on the failure of the opposition MP's proposal; the clause inserted instead by the government that specifically preserves Winiata's access to the Courts; or the fact that Premier Stout himself acted for Winiata in the senior courts after leaving the House.

108.4 Parliamentary oversight was also expressed through a number of legislative amendments. For example, in 1881 an amendment required the Court to consider applications for a rehearing. (This proved material to the Court of Appeal 1891 decision to quash the issuing of title.)[163]

109. Even with all this in mind, the Crown acknowledges that Winiata did not ultimately have access to a forum to establish his legal rights at a point in time where two Judges of the Native Land Court considered that there was evidence that "there was reason to believe, were the Court still open to him, might influence a decision in his favour."

Crown correspondence with the Court

110. The Crown made the following procedural requests of the Native Land Court in relation to Mangaohāne:

110.1 In 1886, the premier and Attorney-General, Robert Stout, asked the NLC to stop partition proceedings until the Native Affairs Committee could inquire into a petition (from Noa Te Hianga seeking a rehearing of the Mangaohāne titles). The Chief Judge

163 Native Land Acts Amendment Act 1881 s 2; relied on by Court of Appeal at 753.

declined the request, saying that he was without legal power to do this;[164]

110.2 In 1890, the Native Minister (Mitchelson) had a message sent to the chief judge that the government wanted the Mangaohāne No. 1 partition hearing to precede the Awarua hearing.[52] The Premier was also involved in the message train, communicating to the court the government's view that there 'should be no further postponement or delay'. (the delay was eventually identified as sitting with the Surveyor-General's office and the applicant party);[165]

110.3 The Native Minister corresponded with the Chief Judge of the Native Land Court regarding the timing of the Mangaohāne No. 2 1892 rehearing.[166] The Chief Judge did not act on the Minister's views, and there is no evidence of the Minister overriding the Chief Judge's view (the rehearing was set down on the timing the Chief Judge considered appropriate).[167]

111. Further correspondence internal to the Crown about Government's wish for partitions to occur in 1890 is explicitly caveated that any Crown action (in this case to work out what the delay with the survey was given it had been provided to the Surveyor-General in 1886) should not interfere with the rights of the parties:[168]

> As the Government in consequence of the representations made to it has urged upon the Native Land Court in the interests of all parties that there should be no delay in dealing with the partition of this block it might be desirable to ascertain from Mr Marchant and the Native Land Court what is the exact position and whether there is any difficulty in the way of the Court's adjudication **which the Government could assist to remove without interference with the rights of the parties**.

112. The correspondence suggests Ministers felt it important that the Court was aware of the Government's views, and perhaps suggest a Ministerial expectation that the Government's views would be carefully considered.

---

164 Wai 2180, #A39, at [161], [589].

165 Wai 2180, #A39, at [208].

166 Wai 2180, #A39, at 115.

167 Wai 2180, #A39, at 115.

168 Wai 2180, #A39, at [218].

However, the Court did not do what the Crown requested of it in any of the situations above, and no adverse consequences followed them exercising their independence. This correspondence, whilst it would not occur today between the judiciary and the executive, is limited to procedural matters; does not represent the Crown exercising undue influence over the court or preventing the court from making its own decisions; and does not advocate for the interests of any particular party.

Allegations of corruption or collusion not made out

113. Dr Young, whose experience and expertise was emphasised during claimant cross examination of him, considered the allegations made of collusion, 'dishonest practice', or corruption carefully. These are serious matters and findings of such significance should only be made where there is a strong case for them. That is not present here.

114. Dr Young concludes the evidence does not support such claims:[169]

> Having reflected further, particularly on the questions put to me by Mr Bennion, on these matters, I remain of the view that there is no evidence of corrupt or dishonest practice on the part of judges and officials to obtain titles for Studholme. Indeed, such an interpretation suggests skill and expertise in administering the land and the legislation far beyond that indicated by the evidence. In my view, the evidence demonstrates incompetence. The repeated errors by judges and Crown officials emphasise their lack of skill or care. Their actions frequently prevented Studholme from obtaining a title and prolonged the process, often by providing space for Winiata to participate in the process which was attempting to exclude him. I note too that there is no evidence of complaints of corruption by those involved at the time. […]
>
> As I indicated at the hearing, I did not locate evidence which suggested corrupt practice on the part of judges and officials in their dealings with Mangaohāne and Winiata and I am confident that, had there been such evidence, I would have found it. The papers I had access to were not generally publicly available at the time of the communications and the judges were generally candid with each and court officials regarding their activities. Studholme and his legal advisors were particularly candid in their communications.
>
> In the absence of any clear evidence of corruption, I prefer to explain the errors made in dealing with the Mangaohāne block as arising from the confusing and complex statutory framework judges and officials had to administer. As I have indicated elsewhere, there is no question that Studholme used his connections to advance his interests and that judges and officials were very keen to assist him. There was also considerable pressure from the premier and senior government

169 Wai 2180, #A39(g), at 7–8.

> ministers. However, the manner in which events unfolded shows their efforts were often counter-productive and mistakes were made creating further opportunities for Winiata to pursue, at great expense, remedies for the injustice he had suffered.
>
> I describe these circumstances as mistakes because they generally inhibited Studholme obtaining a valid title of the land because judges and officials failed to discharge their functions according to the legislation by which they were bound. It is remarkable that these situations arose in the context of a statutory framework which was designed to facilitate the alienation of Maori land to settlers. The same statutory framework provided little protection for Winiata's interests in Mangaohāne or a remedy for the fundamental mistake the Court had made, as determined by the chief judge, to Winiata's great detriment.

115. As above, Dr Young nonetheless concludes that:[170]

115.1 Winiata Te Whaaro and those he represented were wrongfully excluded due to incompetence, repeated errors, and lack of skill or care on the part of both the Court and Crown officials; and

115.2 this arose from "the confusing and complex statutory framework officials had to administer."

116. Dr Ballara asked a witness directly about the actions of the Crown:[171]

> Ballara Well the point of it was, can you point to any direct primary evidence that Ministers of the Crown and Crown agents took part in illegal acts to assist Studholme in Owhaoko or Mangaohāne?
>
> Luiten No I don't think I can.

117. Dr Young noted that the Studholme private papers have been available and analysed closely for this inquiry. Dr Young noted how candid those papers are and stated (as an expert of 20 years standing in this area) that if it occurred, he would have expected to see evidence of corruption in those papers between Studholme and people in power but stated "I don't think there was even a – well I didn't come across anything that pressed me in that direction." He acknowledges Studholme's relationships and

---

170 Wai 2180, #A39(g), at 7–8.

171 Wai 2180, #4.1.11, at 235. 1. In getting to that answer, Ms Luiten confirmed that allegations concerning Locke and McLean arranging leases unlawfully on Ōwhāoko were hearsay (at some remove of years); and allegations that Carroll as a member of Parliament was involved in early litigation for Kawepō were unsubstantiated as Carroll was not a member of government at the relevant times.

communication with people in power to advance his interests but states those efforts were generally unsuccessful.[172]

118. Collusion, corruption or dishonest practices by Crown officials would constitute breaches of te Tiriti/the Treaty. The Crown concurs with Dr Young and Ms Luiten that the evidence does not support findings of such egregious actions. This is not to say that Tiriti/Treaty principles are not involved here – as set out in the acknowledgements at the beginning of these submissions – they are.

PART 3: ARREST OF WINIATA TE WHAARO AND THE EVICTION, DESTRUCTION OF POKOPOKO KĀINGA

119. Once the title to the block was completed, the Studholmes sought to gain full possession of the land. A year after having gained title, they had not succeeded in negotiations to move Winiata off the land and they commenced legal proceedings to evict Te Whaaro from what was by that time, in law, their land.[173] They did so through the provisions civil legal jurisdiction. The court issued multiple writs:

119.1 the writs of ejectment and possession enforced property rights: they enabled the Studholmes to enforce the eviction of Pokopoko and to take clean possession of the land;

119.2 the writ of attachment enforced the court's powers and the rule of law: it enabled the arrest of Winiata Te Whaaro for contempt of court (for not complying with its earlier writs).

120. Judge Harvey queried whether the short point is that the title determination did not go in his favour – with the implication that what followed was simply a consequence of that loss.[174] To some extent that is how it was seen by Studholme, the courts, and the Crown at the time.[175] The ejectment process is a process of law which does not take any of the previous history into consideration – it is premised on the right to enjoy legal property rights

172 Wai 2180, #4.1.11, at 532–533.

173 The Studholmes gained secure title to the land in early 1896. In March 1897 preparations were taken to remove Winiata Te Whaaro et al from the land at Pokopoko.

174 Wai 2180, #4.1.11, at 264.

175 Wai 2180, #4.1.11, at 225. Government officials of the time made comments such as "Tell him he should obey the law".

(and if necessary enforce the ability to do so) by attaching to legally secure property interests.

121. Ms Luiten's response was that the "short point" was too short and failed to consider the background sufficiently or the significance of Chief Judge Davy's 1894 decision (albeit subsequently disallowed by the Court of Appeal).[176] The Crown accepts that the matter is not that straightforward, however, in terms of the Tribunal's jurisdiction. Conduct which was entirely lawful may, on consideration, be seen to be inconsistent with the principles of te Tiriti/the Treaty. The Crown notes:

121.1 At the time, the executive Government – by refusing five times to provide police assistance – in line with a longstanding policy, recognised the sensitivity of the matter (at least to some extent). Rather than the Crown's "disassociation" from the civil law process pointing to a lack of care or concern (as suggested by Ms Luiten) the Crown's view is that its caution points the other way – to the Crown's strong preference that matters be solved peacefully, and that the executive ought to respect the lawful orders of a Court.

121.2 The Crown today acknowledges that Winiata Te Whaaro and his people as a consequence of the title processes in Mangaohāne, were unable to formalise undefined customary interests that were recognised by the Chief Judge of the Native Land Court but disallowed by the Court of Appeal.

121.3 A particular legal outcome was arrived at through the extensive title determination process between 1880 and 1896. The actions of the Crown at the time must be assessed in light of the legal status of the land at the time and the Crown's knowledge at that time.[177] Distinctions between executive government and Parliament should also be kept in mind.

---

176 Wai 2180, #4.1.11, at 264.

177 See for example Sir Doug Kidd's comments at Wai 2180, #4.1.11, at 253, that basically there were several legal processes and jurisdictions that all had their individual functions or purposes, and the Crown was not about to interfere in these: the last process, re attachment for contempt of Court was part of the Court's inherent jurisdiction, for example.

122. The Crown's responsibility in Tiriti/Treaty terms for the title determination is assessed in the preceding section. The Crown's responsibility for the events following title determination must be assessed in light of the acknowledgements made concerning the title determination. Whether there are Crown acts and omissions disclosing a Tiriti/Treaty breach in relation to the arrest and eviction, must be assessed closely given that the eviction order was sought and enforced as a civil law matter. The constitutional separation between the court and the Crown may not have been appreciated by, those at Pokopoko – however that separation is nonetheless relevant to assessing Crown conduct under the Tribunal's jurisdiction. We consider this point further below.

123. The Crown views the following conclusions of Ms Luiten about the eviction itself as being accurate and reasonable. She concludes that documentary evidence (including contemporaneous evidence from Hune Rāpana) does not support allegations of excess force being used or wanton destruction or immediate stock loss resulting from the eviction:[178]

> There seems little question that this was a forceful eviction, and that the settlement was destroyed as a result. What is not clear from the documentary record available, is that excess force was used, or that wanton destruction of property ensued. Warren's reassurance of careful regard for Ngāti Paki's possessions is supported by Hune Rāpana's finite list of destroyed property. The outcome of Winiata Te Whaaro's complaint about his possessions is not known. Nor has evidence been found to support claimant allegations of immediate stock loss resulting from the eviction. Studholme throughout seems to have taken care to follow the letter of the law, no doubt to ensure the success of his legal action. Indeed, such care with process, the report suggests, points to the political significance of these civil proceedings in frontier New Zealand, resulting as they did in the eviction of a Māori community from a working farm of 20 years.

Issue 6.1: What was the nature of the Crown's involvement in the arrest of Winiata Te Whaaro and the razing and/or removal of property from the Pokopoko settlement?

Arrest

124. The Crown arrested Winiata Te Whaaro when ordered to by the Court under a writ of attachment. The Crown had refused all requests to become involved in the civil dispute between the Studholmes and Winiata Te Whaaro - expressly rejecting five requests by the Sherriff to assist by

178 Wai 2180, #A56, at 225.

providing police, in accordance with its longstanding policy not to intervene in civil disputes – especially those concerning Māori.[179] Luiten states:[180]

> Indeed, the Crown official had to spell it out five times to the Court officer on the ground that the state would not enter the fray unless there was a breach of the peace.

125. However, once the Court issued the writ of attachment to the Crown and the matter became about the contempt of court (rather than enforcement in a civil dispute) the Crown was required to comply with that order of the Court. Luiten again:[181]

> As it happened, the government's policy of studied non-intervention came undone when Chief Judge Prendergast issued a writ of attachment for Winiata Te Whaaro's arrest to the police constables of New Zealand.

126. The writ of attachment was issued by the Court after Winiata Te Whaaro refused to comply with previous orders of the Court (including when requested to do so by the officer of the court – the Sheriff). That refusal was assessed by the court as constituting contempt of the court – that is, by not complying with earlier writs issued by the court, Winiata was no longer only in a civil dispute with the Studholmes – he was rejecting the authority of the court itself.

127. The writ of attachment was an exercise of the Court's inherent jurisdiction – ie it was not a creation of the Crown in the sense of policy or legislation.[182] The writ of attachment was issued by the Court to serve two purposes: enforcement of the property rights protected through civil law proceedings and remedies; and upholding the rule of law and compliance and respect for the Court and its powers. In legal jurisprudential terms this is referred to as general deterrence and individual deterrence.

128. For the Crown to have refused to have complied with the writ issued to it by the Court would have constituted contempt of the Court – and would

---

179 Wai 2180, #4.1.11, at 228: Luiten suggests/argues that the existence of Police Circular 4/1884 directing non-interference of police in enforcement of civil suits 'without the Minister's express consent' was an 'irrefutable acknowledgement of the highly politicised nature of civil proceedings in frontier New Zealand'. The Crown considers the clearer reason is that the Police did not see their role as being involved in the enforcement of private actions (and remain reluctant to do so through to this day).

180 Wai 2180, #A56, at 169.

181 Wai 2180, #A56, at 169.

182 Wai 2180, #4.1.11, at 251 Sir Doug Kidd.

have represented a serious constitutional breach.[183] Ms Luiten considers the writ of attachment raised 'constitutional issues over competing authorities' and in particular whether the Court writ trumped Ministerial directive re police non-involvement.[184] There is no question. The Crown is not above the law, it has a constitutional duty to maintain the rule of law, and, it was bound to obey the court's order.

129. The writ of attachment (an order to satisfy a judgment issued by the court, which enabled the court to bring a person before the Court for contempt of court) was issued by the Court to Sergeant Cullen, stationed at Whanganui, and to "to all Constables in the Colony of New Zealand".[185] The Court's direction to the police was a matter within the Court's civil jurisdiction. It had nothing to do with Executive government discretion.

130. Winiata Te Whaaro was subsequently arrested on 18 May 1897 by Sergeant John Cullen and constables Shearman and Black.[186] Sheriff Thompson attended, with an interpreter.[187] The oral history suggests Te Whaaro was arrested at his residence at Pokopoko.[188] The Sheriff's record of events, described in the sale register, suggests the Sheriff went from Whanganui, arrested Winiata, went on Taihape and then on to Pokopoko after Te Whaaro was arrested.[189] This indicates Te Whaaro was arrested at his residence at Mangaone – he was then escorted to Wellington by Cullen. As acknowledged by Ms Luiten Mangaone was Winiata's primary residence by 1897 (with younger whānau actively working the land at Pokopoko).[190]

---

183 Wai 2180, #A56, at 100, Ms Luiten states: "Contrary to his assertion to the Under-Secretary of Justice, Sheriff Thomson did have the option of non-execution: there was precedent enough within Mōkai Pātea, the established government policy regarding police involvement giving the court official ample justification for not proceeding further…". The Crown says that statement is not warranted: the Sheriff was required by statute and/or the Supreme Court Rules to execute the writs. Government policy instructing police not to be involved is irrelevant to the issue of execution of court orders. Ms Luiten's statement conflates two different issues.

184 Wai 2180, #A39, at 80.

185 Wai 2180, #A56, at 80. Allegations that the court issued the writ to Cullen due to his reputation as an 'enforcer' are not substantiated. The Te Whaaro arrest occurred prior to the events through which gained that reputation. Ms Luiten considered he would have been known as a 'hard man' by that time due to his police activities in relation to 'sly grogging' but that the writ was issued to him simply because he was the senior police officer in the Whanganui district at the time. See Wai 2180, #4.1.11, at 258–259, 270. Ms Luiten also confirmed – for completeness – that there was no political interference in the appointment of Cullen by the Court (Wai 2180, #4.1.11, at 315).

186 Wai 2180, #H20(a).

187 Wai 2180, #H20(a).

188 See, for example Wai 2180, #A56, at 58.

189 Wai 2180, #H20(a).

190 Wai 2180, #4.1.11, at 219, 297.

131. As above, once the writ was issued to him, the Sergeant had little choice other than to comply with the Court's order. The police acted with legal authority and there is no evidence they acted inappropriately. No official account of the arrest of Te Whaaro has been found. Mr Parker, Senior Historical Researcher for the Crown, was unable to locate a record (nor was any other researcher).[191] However, there is no evidence of any sort that that the constables used any more force than necessary when arresting Te Whaaro. Warren (Studholme's agent) was not present at the time of the arrest. Ms Luiten's evidence is that the arrest was undertaken by Sergeant Cullen and two of his constables (Sherman and Black). Sheriff Thomson was present but evidence has now confirmed that Warren's men were not.[192]

132. Te Whaaro was then taken to Wellington by Cullen. Robert Stout negotiated his discharge.[193] The Crown was involved in this negotiation, to the extent that the then acting Colonial Secretary James Carroll was present.[194] Carroll's role is unclear.

Eviction, destruction and removal of property

133. After Winiata Te Whaaro had been arrested, the Sheriff proceeded to Pokopoko with Constable Jones to execute the writ of sale and possession, on 20 May 1897,[195] which authorised the removal of the community at Pokopoko, and their possessions. There is no clear evidence of the nature and extent of Jones' involvement.

134. It was the Sheriff, an officer of the Court (and not an agent of the Crown) who was legally responsible for the eviction at Pokopoko. The Crown was not responsible for actions of the Sheriff, or the courts. As acknowledged by Jane Luiten, the Sheriff was the enforcer of the law, not of the Crown.[196]

---

191 Wai 2180, #H20(b).

192 Wai 2180, #4.1.11. Ms Luiten amended her report based on further evidence provided by the Crown concerning the execution of the writ. She acknowledged in discussion with the Tribunal that this is in some tension with oral evidence of the arrest (which says that Warren and 8 or 9 of his men were also present).

193 Wai 2180, #A39, at [612].

194 Wai 2180, #A39, at [549], [551].

195 Wai 2180, #H20(a).

196 Wai 2180, #4.1.11, at 297.

In exercising the writ, the Sheriff was entitled to gain entry by force.[197] He was able to use reasonable force to eject the occupants,[198] but it appears force was not required.[199]

135. Direct Crown involvement in the eviction and destruction or removal of property from Pokopoko, and arrest of Winiata Te Whaaro was limited. As acknowledged by Ms Luiten (the primary technical witness on these issues), the Crown was reluctant to involve itself in a civil matter such as this.[200]

136. The Crown's reluctant involvement was limited to providing Constable Jones to accompany the Sheriff when executing the writ of ejectment and possession. There is no evidence as to what Constable Jones did during the eviction but there is no evidence of any particular complaints being made as to his conduct or to him having acted aggressively.[201]

137. It is possible that Constable Jones was required by Sheriff Thompson to attend in accordance with his powers under the Sheriffs Act 1883 in which case the constable would not have been acting in his role as constable.[202] Alternatively, if he was simply asked by the Sheriff to assist, the participation of Constable Jones would have been reflective of his role in preserving the public peace and upholding the rule of law.

138. The available evidence indicates that the community at Pokopoko was then escorted to Waiokaha.[203]

139. As noted by Jane Luiten, care had been taken to ensure the ejectment was conducted lawfully.[204] While Te Whaaro later expressed his bitterness about the eviction in a letter to James Carroll, he made no complaint that his people had been mistreated.[205] The Crown acknowledges one description

---

197 Semayne's Case (1604) 5 Coke Rep 91a; Keith, Podevin and Sandbrook, *Execution of sheriff's warrants*, at 104.

198 Keith, Podevin and Sandbrook, *Execution of sheriff's warrants*, at 104; see also see *Hemmings v Stoke Poges Golf Club* [1920] 1 K.B. 720.

199 Wai 2180, #A56, at 83.

200 Wai 2180, #4.1.11, at 297.

201 Wai 2180, #4.1.11, Transcript at 301.

202 It appears, as has been noted by Peter McBurney, the eviction at Pokopoko was a *posse comitatus*, and to the extent the police were involved, they would not have been acting in an official capacity as police (Wai 2180, #A52(c), at 35).

203 Wai 2180, #A56, at 86.

204 Wai 2180, #A56, at 166.

205 Wai 2180, #A56, at 88.

of sensitive events being made concerning treatment of children based on oral evidence.[206] The Crown regrets there is insufficient evidence to reach any conclusions on this matter but acknowledges the mamae with which that evidence was presented.

Issue 6.2 and 6.3: To what extent, if at all, did the destruction of Pokopoko undermine the tino rangatiratanga of Winiata Te Whaaro and his people, and the tikanga of Taihape Māori?

140. The Crown acknowledges that:

140.1 The Chief Judge of the Native Land Court found that Winiata Te Whaaro had customary interests in the land (although the extent and character of those interests was not defined and that finding was subsequently disallowed by the Court of Appeal).

140.2 Winiata Te Whaaro and those involved in Pokopoko were determined to retain the land and the farm they had developed – as is clearly demonstrated by the efforts made to establish or defend or establish legal rights over the land between 1880 and 1897.

140.3 Although evidence has not been located of the costs of the litigation, the Crown does not dispute technical and tangata whenua evidence that the proceedings were likely to have been costly to Winiata et al. Whilst some of those costs would have been funded through income from the farm, it is likely that some of those costs were funded through sales of other land.[207]

140.4 Whilst the Te Whaaro kāinga at Winiata/Mangaone remained a significant Māori presence in the Taihape district (as it does today), by 1900, the Winiata whānau retained only 514 acres of land in the inquiry district. Mr Walzl's analysis of the experience of the Te Whaaro and Tanguru whānau shows the two whānau were considerably worse off than the other five whānau focussed on in

206 Wai 2180, #4.1.6, at 120.

207 Wai 2180, #A56, at 148.

his other case studies.[208] In 1904, the Te Whaaro whānau of six members held 514 acres in a single block.[209]

141. Mr Watson put the following question to Mr McBurney concerning the effects of these events:[210]

> Q. So I get a sense from the Crown sometimes that there is an acknowledgement at times of inadequacies, deficiencies but there's a question mark over the causative effect of all the consequences of marginalisation that then occur and I'm just interested in your comment. Can you see a cause and effect relationship between what was occurring to Winiata and his family, as we've discussed in the 1890s and onwards, to the sense of displacement and marginalisation that the whānau are feeling and crying out for today?
>
> A. Yes definitely.

142. In the context of this commission of inquiry, the Crown notes that questions of historical causality, extending across over 130 years, can be fraught: the impacts of multiple factors shape the experiences of individual whānau and hapū. Legal analysis of causality uses notions of proximity and direct impact that are unsuited to historical events. Further, there is limited evidence that connects the events of the title determination and eviction to the loss of tikanga as such. The Crown therefore has caution regarding the language of causality. For the avoidance of doubt, the Crown acknowledges the harm done to Winiata Te Whaaro and his people through the events of period remain keenly felt among Te Whaaro's descendants, by Ngāti Hinemanu and by Taihape Māori generally.

Issue 6.4: What other parties, key tūpuna, hapū and/or whānau were involved in the eviction at Pokopoko? To what extent were the interests of other parties, hapū and/or whānau affected by the eviction of Winiata Te Whaaro and his people from Pokopoko?

143. John Studholme Jr, his employees and solicitors, the sheriff at Wanganui, and Sergeant Cullen and his constables were either directly or indirectly involved in the eviction at Pokopoko; and G P Donnelly and Airini

208 Wai 2180, #A46, at 601–602.

209 Wai 2180, #A46, at 601–602; Mr Walzl has a detailed narrative of the subsequent title histories of the Te Whaaro and Tangaru blocks, #A46, at 1017–1041, 1042–1053, respectively. Although smaller areas relative to totals owned by other whānau, there was substantial amounts of partitioning and some leasing and house and property development on these lands.

210 Wai 2180, #4.1.8, at 575.

Donnelly were closely involved in the proceedings which led up to the award of title to the land to Studholme.[211]

144. Ms Luiten records more than 25 people being part of the Pokopoko kāinga by 1897. She confirms there is no evidence as to how many of these people were present at Pokopoko on the day of the eviction. Winiata himself was arrested at Mangaone kāinga (developed in 1894) which by 1897 was his primary residence.[212]

Issue 6.5: What were the Crown's perceptions of Winiata Te Whaaro prior to the entrance of the police expedition onto the site of Pokopoko, and how, if at all, did this impact upon the dynamic of its dealings with Te Whaaro during hearing proceedings and following his eviction and arrest?

145. The Crown was not involved in the civil proceedings that led to the eviction at Pokopoko. As noted by Jane Luiten, the Crown was, in a direct sense, "dissociated" from what was a private dispute.[213]

146. The Crown was not unsympathetic to Te Whaaro's situation, however, they did not view themselves as being able to intervene in the legal process.[214]

Issue 6.6: Was the decision to send a police expedition to Pokopoko to apprehend Te Whaaro and his people a reasonable and fair one? To what extent can this be considered the direct responsibility of the Crown?

147. Enforcing the writs of possession and ejectment was the duty of the Sheriff as the officer of the court. There was no decision by the Crown to "send a police expedition to Pokopoko to apprehend Te Whaaro and his people". In fact, there was no police expedition at all – the phrasing of this question raises pictures of multiple police being assembled (as occurred in other situations). The police intervention in relation to Pokopoko is not at that scale.

148. With regards to the court's decisions and the actions of the Studholmes - Ms Luiten confirmed that the Pokopoko eviction was dissimilar to some other the others she studied in the degree of attention to legal detail and compliance undertaken by the Studholmes to follow the letter of the law in taking measures to gain possession of the land following the title having

211 Wai 2180, #A39(c), at [14].

212 Wai 2180, #A56(c), at 5–6.

213 Wai 2180, #A56, at 55.

214 Wai 2180, #A39(c), at 16; #A56, at 101.

been completed.[215] The Sheriff had tried and failed to execute the writ of sale and possession. Sheriff Thompson visited Pokopoko twice prior to the eviction itself, to give effect to the Court's orders.

149. As noted by Jane Luiten, there is little information about the attachment proceedings.[216] Particular queries were made during the hearing as to whether the apprehension of violence (required for the writ to be issued) that informed the Court's decision was reasonable. Again, the Crown notes that it was not involved in the application to the court and did not give this evidence. Winiata Te Whaaro and the Sheriff's two day negotiation in person the month prior to the eviction was cordial however Winiata made it clear that he was not going to give up possession,[217] and the Sheriff's apprehension (conveyed in the application for a writ made to the court)[218] that Winiata would not leave and that there would be resistance accorded with Winiata's representations.[219]

Issue 6.7: What, if any, were the legal justifications for the authorisation of entrance by a police expedition into Pokopoko, the arrest of Winiata Te Whaaro, and the eviction of his whānau and their property?

150. The eviction was authorised through writs being issued by the Court under civil ejectment law (as above, it was not a 'police expedition').[220] The writs were part of civil jurisdiction's inherent powers of compulsion.

151. Of the 308 civil writs of ejectment issued between 1877 and 1900, Luiten concluded 20 involved Māori.[221] That is, such writs were utilised in dealings between Europeans enforcing their property rights more than they were in relation to Māori occupiers of lands.

152. The constitutional separation between the Court and the Crown is clearly defined and observed in the ejectment proceedings. The Crown accepts

---

215 Wai 2180, #4.1.11, at 311.

For completeness: Wai 2180, #A56(d), correction page 62 of #A56: Evidence concerning some of the Studholmes' actions has been corrected on the record. Ms Luiten has clarified that an effort to "press" Winiata through debt recovery was not related to the ejectment proceedings/eviction (it occurred earlier and in Ms Luiten's view was related to the financial position of the Studholmes in 1885 and to earlier legal proceedings).

216 Wai 2180, #A56, at 79.

217 Wai 2180, #A56, at 80.

218 Wai 2180, #A56, at 71.

219 Wai 2180, #4.1.11, at 302.

220 Wai 2180, #A56, at 171.

221 Wai 2180, #A56, at 40.

that this constitutional distinction would have been irrelevant to Winiata Te Whaaro and those evicted from Pokopoko – who are unlikely to have viewed the Sheriff as distinct from the Crown as an officer of the Court.

153. However, the Tribunal's jurisdiction requires the Tribunal to assess the actions of the Crown ie the executive. The writ of ejectment was enforced by the Sheriff as an officer of the court.[222] The Sheriff was the enforcer of the law (ie part of the Court). At law a Sheriff is not part of the Crown. This was also so in policy and in practice. Clear instructions were made repeatedly by the Crown that police ('constables') should not assist a Sheriff executing a civil writ of ejectment in accordance with Crown policy in place since 1884 – including as recorded above in relation to Pokopoko.[223] That policy was premised on the Crown's reluctance to become embroiled in civil disputes (ie avoiding being put in the position of 'acting for one side' in a civil dispute) and in cognisance of the sensitivities of using coercive state powers against Māori.

154. Luiten suggests that prior to civil law methods being enforced to the point of forcible eviction, there should have been some protection measures exercised by the Crown so that Māori aren't dispossessed from their homes and kāinga based on the indefeasibility of confirmed titles.[224] The extensive course of checks and balances set up between courts, rehearings, appeals, and petitions relating to the title; and the substantial efforts required in order to secure a writ of ejectment from the Court; were intended to provide for this.

155. To the extent that the law relating to eviction might have provided protection to Te Whaaro, the applicable law did enable the matter to go to trial,[225] but Te Whaaro did not oppose the application and judgment was

222 The TSOI questions are inaccurate when they describe the Sheriff and the posse comitatus he convened as a police expedition. The Crown provided one constable only – and then only when to refuse to do so would have constituted contempt of court.

223 Wai 2180, #A56, at [141] 1844 Circular; Bryce 1880s instruction reiterates. Also discussed and confirmed at transcript at 300.

224 Wai 2180, #A56, at 166.

225 Supreme Court Act 1882, Schedule 2, rr 245–266.

obtained by default.[226] There is no evidence as to why Te Whaaro did not do so.[227]

156. Ms Luiten states: "As the officer of the court, Sheriff Thomson was acting as Studholme's agent in the civil proceedings: it was his job to see that the original writ of sale and possession was carried out…"[228] This is incorrect and fundamentally misunderstands the role of the parties. The Sheriff, in executing a writ, is acting as an officer of the Court not as an agent of any party. The actions taken are to uphold the integrity of Court determinations.

157. There is no evidence as to Studholme's solicitor, H D Bell's argument to convince Chief Justice Prendergast to issue the writ to the police rather than the Sheriff, and so it is not possible to ascertain the legal justification for the issuance of the writ to the police rather than the Sheriff, however it is reasonable to infer that the Court took Te Whaaro's resistance seriously, as noted above.[229] The Supreme Court Act 1882 authorised the officer to whom the writ of attachment was directed to execute that writ,[230] and the Act did not define "officer", the forms required to be used for attachment proceedings as set out in the 1882 Code of Civil Procedure contemplated the writ would be usually be issued to the Sheriff.[231] While the issuing of the writ of attachment to the police rather than the Sheriff was perhaps unusual,[232] as noted in *Laws of New Zealand*,[233] "Constables have the long-held responsibility for executing warrants issued or orders made by a court."[234]

158. The issue of the writ to the constables was not unlawful. It is well established that the High Court has inherent jurisdiction to make any order necessary to enable it to act effectively even in respect of matters regulated

---

226 Wai 2180, #A56, at 63.

227 Wai 2180, #4.1.11, at 298.

228 Wai 2180, #A56, at 100.

229 Wai 2180, #A56(c), at 16.

230 Supreme Court Act 1882, s 378.

231 Supreme Court Act 1882, Schedule 1, Rule 355; Form 33.

232 Wai 2180, #A56, at 80.

233 Laws of New Zealand, Part II Duties and Responsibilities - Duties and Responsibilities under Policing Act 2008 and Common Law (online ed) at [8].

234 See, for example, the Magistrates Court Act 1893, ss 178 and 193; Magistrates Court Act 1928, ss 199; District Court Act 1947, s 121; District Court Act 2016, ss 66(2) and 226.

by rules of Court so long as it does not contravene those rules.[235] While the 1882 Act didn't specifically provide for a writ to be issued to a constable (but rather to an "officer"), it would not have been inconsistent with that Act to have done so. As noted by Rule 355, form 33 was a suggested form only, and any appropriately drawn form could have been used as the circumstances required. Rule 561 allowed variations as required.[236] A variation to form 33 to issue the writ to the constables was permitted. It is notable that Robert Stout, who acted for Te Whaaro following his arrest, did not seek to challenge the decision to issue the writ to the constables.[237]

159. While there is no evidence of Sheriff Thompson having formally requested the assistance of Constable Jones in accordance with his powers as Sheriff, he was nonetheless authorised to request the assistance of the constable to assist under the Sheriffs Act 1883. As correctly noted by Sheriff Thompson,[238] a sheriff had the same powers and privileges, duties and responsibilities as a Sheriff in England as a ministerial officer of the courts.[239] While the general peacekeeping role of the sheriff no longer applied, which included to ability to call upon a *posse comitatus* to aid in keeping the peace, it was the sheriff's duty to request assistance if it was required in the execution of ministerial duties, including in the execution of a writ.[240]

160. The power to raise a *posse comitatus* is today equivalent to requesting the police to attend to prevent a breach of the peace. The officer would be entitled to expect the same protection and assistance as would be afforded to any member of the public who experienced interference in the conduct of their duty, and no more.[241] While there no evidence of the nature the Constable's actual involvement, it is a reasonable to infer that Constable

---

235 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA).

236 The law is essentially the same today, as provided by r 17.83 of the High Court Rules 2016, form E 9, and r .1.21 (variation of forms).

237 Wai 2180, #A56, at 99.

238 Wai 2180, #A56, at 73–74.

239 Sheriffs Act 1883, s 9.

240 This was a longstanding common law right on the part of the sheriff, dating back to the Statute of Marlborough 1267 and the Statutes of Westminster I and II of 1275 and 1285 respectively, which in turn confirmed the common law position. In England and Wales it was further confirmed by s 8(2) of the Sheriffs Act 1887 (England and Wales), which is still in force.

241 John Krue, *Enforcement Law Reform and the Common Law*, Civil Justice Quarterly Vol 27(4) 2008, 494, at 503; Keith, Podevin and Sandbrook, *Execution of sheriff's warrants*, at 107–108.

Jones afforded the Sheriff an appropriate level protection and assistance, consistent with his peace-keeping role.

161. Circular 4/1884 had been issued by the Defence Minister which stated police were not to participate in the execution of civil writs without the express consent of the Defence Minister.[242] The circular applied to all writs of ejectment, not just those involving Māori,[243] and reflected a concern by the Crown that it did not want to become involved in private civil proceedings because of understandable fears of embroiling government authority in private disputes and be seen to be acting for one side in a civil; disputes.[244] It reflected the view that the appropriate role of the police is to prevent breaches of the peace.[245] The use of coercive state powers was to be avoided where possible – state control was to rest on benign policing and the law rather than overt force – care was required to bring this about. Ministerial authorisation was not given, however as noted by Sheriff Thomson, the Police were not exempted from being called upon as part of the *posse comitatus*,[246] notwithstanding the intention of the circular.

Issue 6.8: Was the destruction of Pokopoko lawful and appropriate in the circumstances and did those actions, in turn, breach the Crown's obligations to Taihape Māori under the Treaty?

162. The evidence indicates that Studholme's manager, Warren, demolished the settlement acting under the Sheriffs instructions.[247]

163. The Sheriff was accompanied to Pokopoko for the eviction by one constable. Tā Pou Temara clarified with Ms Luiten who destroyed the buildings and on what authority:[248]

---

242 The circular was only intended to apply to writs of ejectment (and not writs of attachment). It didn't prevent the Courts from making orders to allow the Court act effectively.

243 Wai 2180, #4.1.11, at 300.

244 As is the situation today, the Commissioner and the Police, by convention, have constabulary independence from the government of the day. There is a constitutional separation of the Police from the Government. It is an aspect of the ideal of the rule of law: if people are to be treated equally, political intervention is undesirable. As police have coercive powers over society, it is undesirable to have politicians dictating who the police use their powers against. The convention that police officers are independent from politicians derives from common law that goes back to the origins of the constabulary in England in 1361. The New Zealand Commissioner's role was created in 1886, and the New Zealand Police Force was established as a single national force under the Police Force Act 1886. The Commissioner held office at the pleasure of the Governor. The Defence Minister was not able to direct the Commissioner.

245 Wai 2180, #4.1.11, at 300.

246 Wai 2180, #A39, at [545].

247 Wai 2180, #A56, at 86.

> Q. Let me draw you back to Pokopoko then. The Sheriff is there. He's accompanied by one policeman. But the people who actually take to dismantling Pokopoko is Warren and his men?
>
> A: Yes
>
> Q: They are acting under the authority of the Sheriff?
>
> A: Yes
>
> Q: They can do that?
>
> A: It seems so, yes.

164. It is possible the Sheriff stepped outside the parameters of the writ by "ordering" Warren's men to destroy the buildings at Pokopoko, if that is indeed what occurred. While it would have been within the authority of the landowner to order the destruction of the buildings, it may not have been appropriate for the Sheriff to have taken this step. However, as it was the Sheriff's role to deliver the land specified in the writ and eject anyone from the land, it may have been necessary in order to ensure successful execution of the writ, as the execution is not complete until quiet possession has been delivered to the plaintiff. This appears to have been the Sheriff's understanding given his motivation in ordering the destruction the houses was to prevent Te Whaaro from returning. [249]

Issue 6.9: To what extent did the eviction and the destruction of Pokopoko result in the damage or loss of wāhi tapu, taonga and property (including sheep stock)?

Sheep

165. Ms Luiten concluded that claimant allegations of immediate stock loss resulting from the eviction – although strongly and sincerely held - are not made out.[250] Although the flock of sheep at Pokopoko peaked in 1893 at 11,000 the flock size had decreased by 1897. 3,624 sheep were recorded for Winiata Te Whaaro in the sheep return taken just weeks prior to the eviction.

166. Mr McBurney has recorded Mr P Steedman as having stated that the sheep had been driven over the southern boundary of Mangaohāne into the

248 Wai 2180, #4.1.11, at 261.

249 Wai 2180, #A56, at 88.

250 Wai 2180, #A56, at 91–93. Wai 2180, #4.1.11, at 225, 241 "I know that the sheep issue is strongly felt but I couldn't find evidence to support that."

Mātiretire Valley, to a place called "Wild Sheep's Spur".[251] In contrast, Studholme mentioned that it was planned to drive the sheep off the block across the Rangitīkei River.[252]

167. The Sheriff records that the sheep were mustered and drafted and "driven across the boundary."[253] As noted by Ms Luiten, correspondence between Stout and Studholme indicated that Te Whaaro still had possession of the sheep several months after the eviction; and that there had been no complaint of stock loss by Te Whaaro at the time.[254]

168. Ms Luiten suggests the most likely scenario is that the sheep were mustered and taken to Waiokaha (where Te Whaaro's whanaunga were farming)[255] ie "they ended up at Waiokaha with the rest of the possessions."[256] Dr Young broadly concurs.[257]

169. This also accords with the annual return for the following year indicates that by April 1898 Winiata Te Whaaro's flock of 2,700 sheep were located at Waiokaha.

170. The Sheriff records in a separate entry "possession given to Warren at 1 pm".[258] Claimant counsel queried whether this indicated that possession of the sheep were given to Warren. Both Dr Young, and Ms Luiten (and the Crown) consider that this entry in the register refers to clear possession of the land itself[259] – ie the objective of the writ of possession was not to transfer sheep to Warren (which – aside from not being supported on the evidence - would have been illegal and contrary to the agreements entered into between parties).

Houses, wharepuni, and urupa

171. Hune Rapana's contemporaneous account raises concerns about the destruction of houses. Whare puni are not mentioned in that record. Ms

---

251 Wai 2180, #A52, at 378.

252 Wai 2180, #A39, at 200.

253 Wai 2180, #H20(a).

254 Wai 2180, #A56, at 92.

255 Wai 2180, #A56, at 92.

256 Wai 2180, #A56, at 91–93. Wai 2180, #4.1.11, at 272.

257 Wai 2180, #A39(c), at [28].

258 Wai 2180, #H20(a).

259 Wai 2180, #4.1.11, at 271–272 (Luiten); at 537–538 (Young).

Luiten however concludes that a whare puni was present, and was destroyed. That conclusion is based on her assessment of the strength of oral evidence on this matter and the 1893 evidence Winiata Te Whaaro gave of a whare puni forming part of the kāinga at Pokopoko.[260]

172. Bell's account of negotiations following Te Whaaro's arrest noted that an urupā at Pokopoko was to be fenced by Studholme. Te Whaaro subsequently stated that he would bring away his dead, although this appears not to have been undertaken.[261] The evidence indicates that the fencing around the graves was removed sometime later in order to prevent a potential desecration of the graves – this continues to be experienced as a deep sadness for the claimants.[262]

173. The buildings at Pokopoko were broken down and destroyed.[263]

Personal property

174. In the course setting some of the buildings on fire, some of the property of Te Whaaro and his whānau (including property of the children) may have been destroyed.[264] Hune Rapana, Te Whaaro's son-in-law, recorded that one tub, 50 bags of wool, two boxes of soap for washing wool and two tins of paint were destroyed in the fire.[265] Te Whaaro also stated that two guns were taken by Warren.[266]

175. The Sheriff refuted this, stating that he had not seen any bags of wool and noted that eight bales had been sent to Waikari Karaitiana at Waiokaha and that the other items might also have been with the rest of the contents taken to Waiokaha. He reported that a number of guns were found but these were also transported to Waikari.[267] Warren similarly noted that all of the personal property was taken to Waikari.[268] P M Harrison, who supplied the bullock drays used to transport the possessions, stated that "There was

260 Wai 2180, #4.1.11, at 244.
261 Wai 2180, #A56, at 88–89.
262 Wai 2180, #A45, at 351.
263 Wai 2180, #A39, at [556], [560].
264 Wai 2180, #A39, at [558].
265 Wai 2180, #A39, at [558].
266 Wai 2180, #A39, at 204.
267 Wai 2180, #A39, at [560].
268 Wai 2180, #A39, at [561].

not a single article broken or injured; both the Sheriff and myself superintended the removal of everything from the huts…".[269]

176. It is not possible to reconcile these differing accounts at this remove.

Issue 6.10: Was the process of trial for Te Whaaro fair and proper?

177. Following his arrest, Te Whaaro was kept in custody pending a hearing. As noted above, following negotiation between his legal representative, Robert Stout, and Studholme's solicitor, Bell, Te Whaaro was discharged having undertaken to no longer oppose Studholme,[270] and so he avoided trial.

178. As there was no trial, this question cannot be answered.

Issue 6.12: What prejudice, if any, did Winiata Te Whaaro and Taihape Māori suffer as a result of the treatment of Te Whaaro, including the loss of sheep stock?

179. After the arrest, eviction, and release (on terms) there is no record of any further petitions, letters or representations made by Winiata Te Whaaro or members of his whānau to the Government about Pokopoko – until of course this inquiry.[271] Both Ms Luiten and Mrs Cross note that the absence of representations to the Crown concerning the alleged loss of sheep weighs against the oral traditions of the sheep being driven across the boundary and scattered at 'Wild Sheep's Spur' or being taken by the Studholmes upon their possession of the land.[272]

180. The civil law applied to anyone who held legitimate property interests, regardless of whether they were Māori or Pākehā – although we know that in the inquiry district, by 1900, more land was owned by Pākehā than by Māori. While Winiata Te Whaaro and Taihape Māori suffered as a result of the direct effects of the civil law, it cannot be said that the civil law and its processes were necessarily biased against Winiata Te Whaaro and Taihape Māori. Although, the Crown acknowledges that the Native land laws were geared towards the creation, and then protection of, property rights.

---

269 Wai 2180, #A52, at 374.

270 Wai 2180, #A39, at [612].

271 Wai 2180, #4.1.11, at 266 Judge Harvey: Ms Luiten.

272 Wai 2180, #H05, at [49], [52].

181. Claimants record intergenerational effects on their whānau as including land loss, economic loss, and opportunity loss (for example with the Awarua lands Winiata sold in part to fund farm development and litigation).[273] They also gave evidence of the deep cultural, spiritual grievance experienced. Mr R Steedman described "120 years of heartbreak" and pointed to the impacts on whānau, hapū, and iwi relationships and tribal structures that are experienced through to today.[274] The Crown and Tribunal have, sadly but unquestionably, witnessed that ongoing grievance throughout this inquiry.

CONCLUSION

182. The eviction and destruction of Pokopoko was the culmination of a civil dispute but occurred within a constitutional and legal system that included the Native land laws. The law relating to ejectment is not particularly complex: it allows a legal owner to seek the ejectment of people who do not hold legal title. The law that was applied is essentially that same today. The Crown's acknowledgements and concessions about the impact of the Native land laws are of direct relevance and application to the events at Pokopoko (see Issue 3).

183. The title determination process took fifteen years and illustrates many of the issues contributed to by the 19th century land laws, including matters that the Crown has acknowledged were in breach of te Tiriti/the Treaty (eg failing to protect tribal structures and the absence of effective mechanisms for the collective management of lands).

184. The eviction process came at the end of a lengthy and complex litigation over title – during which the Crown made some errors that contributed materially to the outcome. That outcome was that Winiata Te Whaaro and those he represented were unable formalise legal rights over their (acknowledged but undefined) customary interests.

---

273 Wai 2180, #A56, at 141–164; Wai 2180, #H05.

274 Wai 2180, #H18, discussed at Wai 2180, #4.1.11, at 648.

185. The Crown recognises that these solemn and substantial matters will be discussed in settlement negotiations.

9 July 2021

R E Ennor / MGA Madden
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel