I ROTO I TE TARAIPIUNARA WAITANGI
IN 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

---

CLAIMANTS' GENERIC REPLY SUBMISSIONS ON 'ISSUE 1: TINO RANGATIRATANGA'

Date: 29 September 2021

TamakiLegal
Barristers & Solicitors

Level 2, 15 Osterley Way, Manukau, Auckland 2104
PO Box 75517, Manurewa, Auckland 2243
P. 09 263 5240
E. darrell@tamakilegal.com

Counsel Acting: Darrell Naden

TABLE OF CONTENTS

MAY IT PLEASE THE TRIBUNAL

Introduction

1. These generic reply submissions are filed in response to the Crown Closing Submissions in Relation to Issue 1: Tino Rangatiratanga ("the Crown closing").[1]

2. The Crown describes the Claimants' constitutional status in a number of different ways. None of the terms are defined:

    a. Mana motuhake (paragraph 5);
    b. Tribal control (paragraph 7);
    c. Māori tino rangatiratanga (paragraph 8);
    d. Māori authority (paragraph 16);
    e. Rangatiratanga (paragraph 13, paragraph 32); and
    f. Tino rangatiratanga (paragraph 67, paragraph 68).

    With respect, it would be preferable if the same terminology were used to describe the Claimants' constitutional status because the various terms referred to above have different meanings. Given that the claim issue being addressed by the Crown concerns the Claimants' tino rangatiratanga, any reference to the Claimants' constitutional status has been taken to be a reference to the Claimants' tino rangatiratanga.

Crown sovereignty was rejected

3. At paragraph 6 of the Crown closing, it is stated that Taihape Māori have not sought historically to reject the sovereignty of the Crown. This is not accepted. Although there is no recorded attendance of Taihape Māori at the great hui at Pukawa near Lake Taupō in 1856, the Rohe Tapu that was laid down included the Mōkai-Pātea region. The Rohe Tapu's southern border stretched from the mouth of the Rangitīkei River to Tītiōkura in the Hawkes

[1] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89.

Bay.[2] The hui was held to establish a Māori king under whom the land would be held. Although the Claimants' Generic Constitutional Issues Closing Submissions ("the Claimants' closing")[3] discussed the inclusion of the Mōkai-Pātea region and its people in the Rohe Tapu ("the Kīngitanga submissions"),[4] the Crown did not refer to let alone address the submissions.

4. The Kīngitanga agenda included the practice of law-making.[5] The capacity to make law was central to Te Paparahi o Te Raki Tribunal's sovereignty definition.[6] All Taihape Māori shared the goal of land retention with the Kīngitanga, including Renata Kawepō. In the Kīngitanga submissions, the hui at Kōkako was looked at through a Kīngitanga lens. Stirling viewed the attendance of Taihape Māori at Kōkako as an exercise in tino rangatiratanga.[7] Tony Walzl saw the hui at Kōkako against a Kīngitanga setting.[8] Te Hau Paimarire and others stated in 1881 that Te Oti Pohe had a role in proposing the hui and that he, along with Ngāti Tama, invited the people.[9] Taihape rangatira pledged their allegiance to the Kīngitanga at Kōkako.[10] By doing so, they rejected the sovereignty of the Crown.

5. We referred in the Kīngitanga submissions to evidence that the Rohe Tapu's southern boundary was upheld for some years after the war in the Waikato had ended.[11] This is significant for it shows that Taihape Māori continued to reject the Crown's assumption of sovereignty following the war.

Acquisition issues

6. At paragraph 11 of the Crown closing, the Crown submitted that sovereignty was established in 1840. Later, the Crown claimed that its establishment of

[2] Richard Taylor, Journals, 14 December 1856, cited in Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 379
[3] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b).
[4] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [312] to [319].
[5] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 379 and 380.
[6] Waitangi Tribunal, *He Whakaputanga me te Tiriti ō Waitangi—The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* Wai 1040, at 9.
[7] Waitangi Tribunal, Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 514, lines 30-31, at 522, line 5, lines 15-18.
[8] Waitangi Tribunal, Hearing Week 1 Transcript, Wai 2180, #4.1.8, at 154.
[9] Te Hau Paimarire, 10 May 1881, Taupo MB 2, at 179, cited in Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 17. Walzl also records attribution to Te Oti Pohe convening Kōkako by Te Hau Paimarire, Winiata Te Pūhaki of Ngāti Rangi and Ihakara Te Raro—see Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 382.
[10] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 19.
[11] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [340].

sovereignty is incontrovertible,[12] meaning, inter alia, that the Crown's assertion of sovereignty cannot be reviewed by the courts. At paragraph 14 of the Crown closing, the Crown submitted that *de jure* sovereignty was achieved by the Crown through a series of constitutional and jurisdictional steps. And at paragraph 67, the Crown stated that the Crown's authority is "in the form of an overarching kāwanatanga or civil government for the whole of the country".[13] We respond to each of these Crown submissions in this section of these reply submissions.

Kāwanatanga acquired

7. Very little is recorded about what was said by Crown officials at the treaty signing ceremonies that were held around the country, except for the gatherings at Waitangi, Mangungu and Waimate in February 1840. As discussed in the Claimants' closing, a key evidential finding made by Te Paparahi o Te Raki Tribunal concerned the representations put to the northern rangatira by "Hobson and his agents".[14] They were such that they caused the signatory rangatira to believe that they were not ceding their sovereignty by signing:[15]

> The authority that Britain explicitly asked for, and they accepted, allowed the Governor to control settlers and thereby keep the peace and protect Māori interests

What Governor Hobson established in 1840 was not sovereignty in accordance with British constitutional law and theory. Instead, the authority to administer the settler population was established i.e kāwanatanga.

[12] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at 58.
[13] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at 67.
[14] Waitangi Tribunal, *He Whakaputanga me te Tiriti ō Waitangi—The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 529.
[15] Waitangi Tribunal, *He Whakaputanga me te Tiriti ō Waitangi—The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry,* (Wai 1040, 2014), at 528.

8. Later in its closing at paragraph 70, the Crown set out the following passage from Te Rohe Pōtae Tribunal's report:[16]

> … our conclusion is that through the Treaty the Crown acquired a right to govern and make laws, and thereby to control settlers and settlement, and to manage international relationships with foreign European states. With respect to Māori communities, the power of kāwanatanga provided for the possibility of the Crown governing and making laws, so long as those powers were used in a manner that was consistent with their tino rangatiratanga, and which offered them protection from any harmful effects of settlement or foreign intervention.
>
> ("the Tribunal finding")

The Crown has understood this passage to mean that te Tiriti ō Waitangi "provided for the Crown to govern and have law-making authority with respect to Māori (conditional on that being undertaken consistently with tino rangatiratanga)."[17]

9. It is acknowledged that Te Rohe Pōtae Tribunal is endeavouring to work with present day constitutional arrangements to put belatedly into place a constitutional relationship that is consistent with the principles of te Tiriti ō Waitangi and its historical underpinnings. There are many difficulties with creating a suitable relationship of this nature and there are a range of relational settings. Te Rohe Pōtae Tribunal has proposed one of them in order to develop the discourse that needs to occur between the treaty partners. There are likely to be other constitutional relationship possibilities and they should all be considered. Having said that, it is noted that the Tribunal finding is inconsistent with what Hobson and the northern rangatira agreed to during their February 1840 hui. This is a concern.

10. In any event, the Tribunal finding needs to be read in its context.[18] The mere "**possibility** of the Crown governing and making laws" for the Māori

[16] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at 67.
[17] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [70] and [71].
[18] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, Wai 898, 2018, at 180.

community is proposed. Te Rohe Pōtae Tribunal has not unreservedly sanctioned a broader law-making capacity. In its context, the Tribunal finding contemplates the prospect of the Crown legislating in a functional way in order to protect Māori interests. Compliance with the principle of partnership is necessary and there would have to be adequate consultation. There would also need to be consistency with the Claimants' tino rangatiratanga.

11. Te Rohe Pōtae Tribunal appears to contemplate a law-making role for tangata whenua as well—"[t]hat is not to say, however, that in a functional way, one party could not act on behalf of the other". This prospect is briefly addressed later in these closing submissions.

De facto sovereignty required

12. When Hobson issued the North Island proclamation on 21 May 1840, "the **full sovereignty** of the Northern Island of New Zealand" was vested in Queen Victoria. (emphasis added) Hobson proclaimed "full sovereignty", not "sovereignty", *de facto* sovereignty, *de jure* sovereignty or legal sovereignty. It was submitted earlier that Hobson was aware of the Crown's need to acquire both *de jure* and *de facto* sovereignty,[19] and, it seems, Hobson thought that he had done so in 1840. Submissions in this respect were set out in the Claimants' closing in a section entitled "Circumventing the consent gathering process".[20] Although Hobson had not acquired *de facto* sovereignty by the time he issued the North Island proclamation, his attempt at doing so establishes that it was an official requirement. Since it was a requirement that had to be met before sovereignty could be assumed, and it was not met, the Crown's claim to having established sovereignty in 1840 cannot stand.

13. Hobson was not alone. The first Attorney-General, William Swainson, complained about the absence of *de facto* sovereignty to Acting Governor

[19] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [185] to [189].
[20] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [215] to [226].

Shortland in 1842—"as regards the aborigines, our title to the sovereignty over the whole of New Zealand appears to be incomplete".[21]

14. Professor Brookfield's concerns with the limits on the Queen's writ were such that he attempted to address it by positing the doctrine of acquiescence—the notion that sovereignty was acquired by the Crown over time as the Māori population acquiesced to Crown rule.

15. Dr McHugh's evidence in Te Paparahi o Te Raki inquiry was that the acquisition of legal sovereignty was completed by October 1840.[22] He also stated that "one must distinguish the Crown's effective sovereignty or the physical capacity to make its writ run throughout the islands (sovereignty de fact, as it were) – something that New Zealand historian believe the Crown did not achieve for many decades – from its legal sovereignty under its own constitutional law and theory, . . .".[23] The reference to "constitutional law and theory" is not sourced. It was not sourced at hearing either when Dr McHugh presented his evidence. Despite numerous research efforts, counsel is yet to find authority for the proposition that the acquisition of *de jure* sovereignty can precede the acquisition of *de facto* sovereignty. We have not yet located authority for the proposition that *de facto* sovereignty need not be acquired at the same time as *de jure* sovereignty in a territory where neither forms of sovereignty exist beforehand.

16. In his text, *Waitangi & Indigenous Rights: Revolution, Law & Legitimation*,[24] Brookfield discusses politico-legal revolutions and how they have been treated by the law. The typical revolutionary held *de facto* sovereignty over a territory first, usually by force, **and then** they acquired *de jure* sovereignty across time. Although they did not have *de jure* sovereignty, a revolutionary's actions whilst a *de facto* sovereign could remain valid even if a *de jure* monarch was restored.[25]

---

[21] Cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006), page 108.
[22] Crown Law, *Closing Submissions of the Crown*, Wai 1040, #3.3.33, at [508].
[23] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, at [132].
[24] F.M. Brookfield, *Waitangi & Indigenous Rights: Revolution, Law & Legitimation*, 2006, Publishing Press Ltd, Auckland.
[25] F.M. Brookfield, *Waitangi & Indigenous Rights,* 1999, updated in 2006, Auckland University Press, Auckland, page 20.

Office not discharged

17. Before Te Paparahi o Te Raki Tribunal, Dr McHugh's evidence was that the Crown's claim to sovereignty is incontrovertible.[26] According to Dr McHugh, once Hobson had discharged his duties for the acquisition of sovereignty ("the office discharge thesis"), sovereignty was transferred and incontrovertibility was achieved. By arranging for the cession treaty's signing and by issuing the May proclamations, Hobson is said to have discharged his duties for the purpose of acquiring sovereignty and with that, legal sovereignty was acquired. Submissions were made in the Claimants' closing on incontrovertibility[27] and on the manner in which Hobson discharged his office.[28]

18. Sir James Stephen was Permanent Under-Secretary of the Colonial Office from 1836 to 1847. Dr McHugh's evidence echoed Stephen's response to Attorney-General Swainson's complaint in 1842 (see above).[29] Stephen's rebuke was that the Crown's claim over the whole of New Zealand was "done" and that "it is sufficient to say that Her Majesty has pursued it."[30] In other words, Hobson need only embark on the process of acquiring sovereignty and that was sufficient.

19. In terms of consent gathering, which was the purpose of the cession treaty signings, Hobson set himself the goal of "universal adherence":[31]

> Availing myself of the **universal adherence** of the native chiefs to the Treaty of Waitangi, as testified by their signatures to the original document in my presence, or to copies signed by me in the hands of those gentlemen who were commissioned and authorised by me to treat with them, I yielded to the emergency of the case arising out of events at Port Nicholson, and without

[26] *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, at [12].
[27] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [435] to [437].
[28] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [179] to [184], [198] to [201], [215] to [234].
[29] Cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006), page 108.
[30] Cited in Brookfield, *Waitangi & Indigenous Rights: Revolution, Law, & Legitimation,* (2nd ed, Auckland University Press, Auckland, 2006), page 108.
[31] Hobson to Russell, 25 May 1840, CO 209/6: 146 at 150, cited in the *Brief of Evidence of Paul McHugh*, Wai 1040, #A21, paragraph 128.

> waiting for Major Bunbury's report proclaimed the sovereignty of Her Majesty over the Northern Island.
>
> (emphasis added)

It was shown in the Claimants' closing that universal adherence was not achieved because of the large number of North Island rangatira who did not consent to the cession of sovereignty, including 216 northern rangatira.[32] Thus, *against his own standard*, Hobson failed to achieve sufficient consent to the transfer of sovereignty. Hobson failed to discharge his office with regard to the gathering of consent to the transfer of sovereignty and so legal sovereignty was not established in 1840.

Conclusion

20. The Crown's approach to acquiring legal sovereignty is untenable and a breach of the principles of te Tiriti ō Waitangi. There was no consultation with rangatira about the arbitrariness of Hobson's crucial role. There was no advice that the sovereignty acquisition process could not be challenged. Large swathes of the country were bypassed by the signing process but subjected to te Tiriti ō Waitangi nevertheless, in circumstances where no idea was had as to what the signing process meant.

Acquisition of *de facto* sovereignty

21. At paragraph 14 of the Crown closing, it is claimed that "*[d]e facto* sovereignty was acquired by the Crown across time".[33] In reply, the Claimants complain that acquisition by the Crown of *de facto* sovereignty came about through the use of coercion, fear of force, oppression and undemocratic means. The Claimants' closing includes submissions in this regard.[34] A test for legality was applied, one that judges in common law jurisdictions have increasingly measured revolutionary conduct against. The Waitangi Tribunal was not asked to apply the test for legality. Rather, the

[32] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [202] to [214].
[33] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [14].
[34] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [275] to [428].

test was set out in order to assist the Tribunal with measuring the Crown's conduct against the principles of te Tiriti ō Waitangi. There is no intention to repeat those submissions here other than to state that throughout the last half of the 19th century, Taihape Māori fought to maintain their tino rangatiratanga through the prohibition of land sales, support for the Kīngitanga, engagement with rūnanga and komiti Māori, repudiation of the Native Land Court and support for the Kōtahitanga. Whilst it is possible to state that not all Taihape Maori were so engaged, it cannot be denied that there was consistent, often enthusiastic activity in this regard and, typically, there were high levels of organisation to bring about the objectives. These ongoing and manifested expressions of tino rangatiratanga establish that the Crown's sovereign purport was not accepted. Taihape Māori did all they could to uphold their rights under te Tiriti ō Waitangi but the Crown thwarted them at almost every turn. Politically marginalised, poverty stricken, ravaged by disease, socially dislocated, dispossessed of their lands and conscious of the Crown's willingness to resort to violence, Taihape Māori were coerced into acquiescing to the will of the Crown. The Crown has nothing to be proud of here. It has much ground to make up. It can begin to do so by recognising and giving effect to the Claimants' tino rangatiratanga.

Working out the details

22. The Crown submitted as follows:[35]

> The precise details of how its governing authority was to be exercised, and the institutional structures and relationships that would support it, were matters that remained to be worked out through further debate and discussion.

With respect, there was no such thing as working matters out through "further debate and discussion". A **small selection** of Crown failings in this regard are set out below to illustrate how the Crown's governing authority was formed exclusive of any input or involvement from tangata whenua.

[35] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [16].

23. By way of the Charter of 1840, Hobson established unrepresentative government with a 4-member Executive Council and a 7-member Legislative Council. There was no Māori participation with regard to promulgation of the Charter of 1840 and no participation in the government that was formed. The capital city was moved from Okiato, near Russell in the Bay of Islands, to Auckland in March 1841 without any consultation with northern rangatira. When the General Assembly was established pursuant to the New Zealand Constitution Act 1852, there was no consultation about its establishment and no Māori representation in it. Professor Sinclair linked the beginning of the Kīngitanga to the racial segregation that was authorised by the 1852 Act. The Māori Representation Act 1867 provided for four members of the House of Representatives to represent the Māori race. Māori quite rightly saw that the districts were too large and the four members were too few to carry any weight. Cathy Marr concluded:[36]

> The overall thrust of government policy during this time, however, was to reject recognition of Māori authority within the colonial state even with some of the limited concessions offered.

No consent to British sovereignty

24. Although 4 signatories to te Tiriti ō Waitangi may have signed on behalf of Taihape Maori, they being Te Hāpuku, Wī Te Ota, Rāwiri Paturoa and Te Tohe, the Crown acknowledged that te Tiriti ō Waitangi "was not signed by the majority of Taihape rangatira".[37] This further undermines Crown purport to have established sovereignty in the Taihape region in 1840. It means that the requisite consent was not gained from rangatira of the Mōkai-Pātea region. The importance of the consent of tangata whenua to the cession of sovereignty was discussed in the Claimants' closing.[38]

25. The Williams treaty facsimile includes Te Ota and Paturoa in the "Kapiti, Ōtaki, Manawatū" section.[39] Both Te Ota and Paturoa signed in the

[36] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, 295.
[37] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [30].
[38] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [174] to [184].
[39] https://nzhistory.govt.nz/media/interactive/henry-williams-treaty-copy

Manawatū and they have Rangitāne heritage. It is possible that they signed te Tiriti ō Waitangi on behalf of Rangitāne given that Rangitāne are associated with the Manawatū, amongst other regions. Furthermore, if Te Ota and Paturoa did indeed sign te Tiriti ō Waitangi on behalf of Taihape Māori in the Manawatū, it is unlikely that the pair consulted with Taihape Māori before they signed. In conclusion, although Te Ota and Paturoa had whakapapa ties to the Mōkai-Pātea, it is not clear that they signed te Tiriti ō Waitangi on behalf of the Mōkai-Pātea people.

26. Likewise, Te Hāpuku may have signed te Tiriti ō Waitangi on behalf of Te Whātū-i-Āpiti as opposed to the Mōkai-Pātea hapū he had ties to.

Māori understandings of te Tiriti ō Waitangi

Renata Kawepo

27. In paragraphs 39 to 51 of the Crown closing, Renata Kawepo is depicted as a leading rangatira of the Taihape region who supported the Crown militarily and who acknowledged its sovereign purport. It is not accepted that because Renata acknowledged the Crown's sovereign purport, Taihape Māori as a whole or in part were also acknowledging thereof. It is clear that Renata's views did not always hold sway. We set out some known instances of this below.

28. Renata claimed to have expelled Te Heuheu, Ngāti Pikiahu and Ngāti Waewae from Pātea in 1849.[40] However, both Ūtiku Potaka and Ihakara Te Raro rejected the idea that pressure from Renata led to the groups leaving Ōtara for Te Reureu.[41] Furthermore, there is evidence that Ngāti Pikiahu and Ngāti Waewae assisted Te Oti Pohe and others with erecting the post at Te Houhou in 1850 to ward Donald McLean off. That evidence establishes that the hapū were still in the area at the time, which is consistent with Ūtiku and Ihakara's version of the alleged expulsion events.[42] The establishment of the pou at Te Houhou was discussed in the Claimants' closing.[43]

[40] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 857.
[41] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 858.
[42] Walzl, T., *Tribal Landscape Overview*, Wai 2180, #A12, at 859.
[43] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [304] to [310].

29. We have considered already the inclusion of the Mōkai-Pātea region in the Kīngitanga's Rohe Tapu at Pukawa in 1856. If Renata was against the Kīngitanga then, his views did not hold sway at Pukawa.

30. At Kōkako just four years later, the Rohe Tapu's southern boundary was moved from the Rangitīkei River mouth to Te Houhou to allow Whanganui and other Māori to sell their land in the area now excluded from the Rohe Tapu. Despite the boundary adjustment, the Mōkai-Pātea region remained within the Rohe Tapu.44 Renata attended Kōkako. If he was against the Kīngitanga then, his views in that regard did not prevail.

31. The Crown referred to Renata's participation in military action for the Crown during the 1860s, "along with several Taihape Māori". 45 Cathy Marr recorded that during the 1860s, the aukati was upheld in the Mōkai-Pātea a number of times. For instance, Pākeha runholders trying to move into the Rangipō and Murimotu areas to obtain extensive leases were "stopped by aukati implemented to control entry into the King territory from this area."46 Marr's record is set out in the Claimants' closing.47 These particular events establish that Renata's decision to take up arms for the Crown doesn't mean that the rest of the people were willing to do so. In fact, some Taihape Māori did the complete opposite.

32. The Crown stated that Renata "sometimes supported and sometimes opposed the Repudiation Movement". 48 Despite Renata's equivocation, Mōkai-Pātea Māori and hundreds of others attended the first large Ngāti Hokohē hui held at Pākōwhai in July 1872.[49] That same month, Retimana Te Rango and Ngāti Tama submitted a petition from Te Riuōpūanga (Moawhango) to the government in which they stated their opposition to the

[44] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [304] to [314] to [319].
[45] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [51].
[46] Marr, *Te Rohe Potae Political Engagement 1864, 1886*, Wai 898, #A78, at 85.
[47] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [340].
[48] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [41.7].
[49] Waitangi Tribunal, Hearing Week 3 Transcript, Wai 2180, #4.1.10, at 475, lines 20-21, per Bruce Stirling—It may not have been known as or referred to as the Repudiation Movement in 1872.

Native Land Court.[50] Whereas Renata acknowledged the Crown's sovereign purport, "which he said, had been accepted long ago",[51] the stated aspiration amongst attendees at the Pākōwhai Repudiation hui held in June 1876 was to establish a Māori Parliament.[52] On its face, a law-making Māori Parliament is inconsistent with recognition of sovereignty being vested in the Queen.

33. Avid support amongst Taihape Māori for the Kōtahitanga movement during the late 1880s and 1890s goes against the notion that Taihape Māori accepted the Queen's authority given the centrality of a Māori law-making body to Kōtahitanga.

34. It is not disputed that Renata was an influential rangatira. These particular submissions are not intended to undermine his willingness to lead and support his people. Rather, they have been made to counter the Crown's suggestion that because Renata acknowledged the Queen's sovereign purport, so too did Taihape Māori as a whole or in part. Since Renata's leadership was not always followed, his decision to accept the Crown's sovereignty need not mean that Mōkai-Pātea Māori accepted it as well.

35. The Crown referred in its closing to a letter to Queen Victoria in 1861 "from Taihape rangatira and others", including Renata, wherein there is recognition of the Crown's sovereign purport.[53] Although Renata was associated with the letter, for the reasons discussed above, this does not necessarily mean that Taihape Māori supported the letter's content. This view is enhanced by the fact that the letter emanated from Napier and most of the rangatira who were associated with it were from the Hawkes Bay. Furthermore, less than a year beforehand at Kōkako, Taihape rangatira continued to include the Mōkai-Pātea region in the Rohe Tapu.

[50] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 237.
[51] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [42].
[52] Stirling, B., *Taihape District Nineteenth Century Overview*, Wai 2180, at 245.
[53] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [47] to [50].

No jurisdiction submissions from the Crown

36. At paragraph 57 of the Crown closing, the Crown declined to submit on whether or not te Tiriti ō Waitangi transferred *de jure* sovereignty to the Crown, saying that "there is not a sufficient evidential basis in this inquiry for the Crown to posit a substantially different position from that advanced in Te Paparahi on the overarching constitutional issues".[54] In reply, it is submitted that there are some significant evidential differences between the two inquiries and so the Crown's basis for not filing submissions on the jurisdiction topic cannot be reasonably maintained. We discuss the evidential differences briefly below.

37. As discussed, the majority of rangatira in the Taihape inquiry district did not sign te Tiriti ō Waitangi and those with whakapapa ties to the region may have signed on behalf of other groups to whom they affiliated. On the other hand, in Te Paparahi o Te Raki inquiry, numerous rangatira signed te Tiriti ō Waitangi. These circumstances represent a significant factual difference between the two inquiries.

38. The Crown submitted that "events in 1840" "are of national effect and apply to Taihape Māori whether they signed te Tiriti ō Waitangi or not.55 Although the Crown submitted on the signatory/non-signatory issue, it appears that the Crown did not regard the issue as enough of a factual difference between the two inquiries to engage with "the overarching constitutional issues".56 As we shall see, the Waitangi Tribunal has treated non-signatories in different ways and so there should have been good faith Crown engagement.

39. In the Rekohu inquiry, the Tribunal found that the Crown's acquisition of sovereignty bound the Crown to a unilateral declaration of rights. Te Tiriti ō

[54] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [57].
[55] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [62].
[56] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [57].

Waitangi was taken to have applied in all places when sovereignty was assumed, even where there were no signatories:[57]

> Nor is anything to be made of the fact that Moriori were not signatories. Certainly, the Colonial Office took the view that the Treaty applied to all, whether they had signed it or not. The Treaty was primarily an honourable pledge on the part of the British to the people of such lands as might in fact be acquired or annexed. The consensual nature of its drafting, and to a large extent its completion, does not prevent its application as a unilateral undertaking where required, as much binding upon the honour of the Crown as a Treaty to which there was full consent.

40. The Central North Island Tribunal considered te Tiriti ō Waitangi to be equally binding on Māori whether they signed or not. Furthermore, the guarantees are binding on the Crown as a unilateral declaration and promise of intent.

41. In the Urewera inquiry, Tūhoe questioned the source and nature of the Crown's authority in relation to iwi that did not sign te Tiriti ō Waitangi.[58] It was claimed that sovereignty was not ceded to the Crown as the iwi did not sign te Tiriti ō Waitangi. It was also claimed that the obligations that the Crown owes to Maori under te Tiriti ō Waitangi still apply to iwi that did not sign. The Urewera Tribunal found that as the Claimants' tīpuna knew nothing about te Tiriti ō Waitangi, it could not, in any real sense, take effect to bind them to its terms.[59] This included the term that ceded kāwanatanga to the Crown. The Urewera Tribunal also found that, compared with the situation in most other parts of New Zealand, by 1840 the peoples of Te Urewera had little knowledge of or experience with the peoples of Great Britain. The Tūhoe people of Te Urewera were not offered the opportunity to make a deliberate and informed decision on the matter.[60] Since the Claimants' rangatira did not sign te Tiriti ō Waitangi and they were not given the

[57] Waitangi Tribunal, *Rekohu : A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands*, 2001, Wai 64, at 30.
[58] Waitangi Tribunal, *Te Urewera,* 2009, Wai 894, volume 1, at 125.
[59] Waitangi Tribunal, *Te Urewera*, 2009, Wai 894, at 141.
[60] Waitangi Tribunal, *Te Urewera*, 2009, Wai 894, at 140.

opportunity to do so, Tūhoe did not owe any duties to the Crown.[61] Te Tiriti ō Waitangi was in force as a unilateral set of promises made by the Crown:[62]

> In our view, when the 'effect' of the Treaty for non-signatories is in issue, the actual circumstances of their dealings with the Crown are of paramount importance, not the law's gloss on those circumstances.

42. In *He Whiritaunoka: The Whanganui Land Report*, the Waitangi Tribunal considered the Rekohu and Urewera Report findings and agreed that "where certain Māori groups did not consent to the Treaty, the Crown nevertheless owed Treaty duties."[63]

43. The Te Rohe Pōtae Tribunal agreed that the Crown was obligated to all groups, signatories or not:[64]

> We agree with other Tribunals that the Crown acquired obligations to all hapū and iwi in the district irrespective of whether they had signed the Treaty. To that extent, our conclusions about the Treaty's meaning and effect will apply to all hapū and iwi in the district.

44. In accordance with the Tribunal findings above, the Crown has obligations to all groups in the Mōkai-Patea region even though te Tiriti ō Waitangi was not signed there. The experience that Taihape Māori had as non-signatories mirrors that of the Tūhoe people. It is known that the great majority of Taihape rangatira did not sign. As previously discussed, it is not known whether those who signed who had affiliations with Taihape whānau-hapū actually signed on behalf of their Taihape whanaunga. Since Crown agents such as Henry Williams did not travel to the Mōkai-Pātea for signatures, Taihape Māori had no opportunity to discuss its terms and meaning, including the term that ceded kāwanatanga to the Crown. In accordance with the findings of the Urewera Tribunal, it is submitted that the Claimants did

[61] Waitangi Tribunal, *Te Urewera,* 2009, Wai 894, volume 1, at 152.
[62] Waitangi Tribunal, *Te Urewera,* 2009, Wai 894, volume 1, at 146.
[63] Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 2015, Wai 903, volume 1, at 143.
[64] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, Wai 898, 2018, at 148.

not consent to the cession of sovereignty to the Crown. They owed no duties either.

45. Another significant difference between Taihape and Northland was the amount of pre-treaty contact that was had between the respective Māori populations and tauiwi. A brief discussion about pre-treaty contact in the north is included in the Claimants' closing.[65] Despite many decades of contact, missionary teachings, economic development and the acquisition of numerous arms, northern rangatira refused to cede their sovereignty to the Crown. This is telling. It means that despite the many years of contact, Northland Māori were unwilling to entrust their tino rangatiratanga with the Crown. It is submitted that Māori groups with little to no pre-treaty contact would have been even less willing to do so.

46. These two factors alone—non-signatories and pre-treaty contact—create an evidential basis upon which the Crown could posit a substantially different position than the Te Paparahi one. There are other significant differences. The signing of te Tiriti ō Waitangi in Te Taitokerau was preceded by the signing of He Whakaputanga. There was no equivalent document in Taihape or activity associated with such an event. The Northern war was fought across 1844 and 1845. At around the same time, the people of Taihape were receiving their first missionary visits. Northland Māori were not Kīngitanga adherents whereas there is evidence in this inquiry of Kīngitanga adherence during the 1850s and 1860s.

Cession finding

47. The Crown submitted that the Claimants relied on a "selective rendering" of a Te Paparahi o Te Raki Tribunal finding "as being authority that the Crown does not exercise authority today".[66] We set it out below:[67]

> The rangatira who signed te Tiriti in February 1840 did not cede their sovereignty to Britain. That is, they did not cede their

[65] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [234].
[66] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [59].
[67] *Generic Constitutional Issues Closing Submissions* dated 12 October 2020, Wai 2180, #3.3.54(b), at [24].

> authority to make and enforce law over their people or their territories.
>
> The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests.
>
> ("the cession finding")

48. The cession finding was extracted from Te Paparahi o Te Raki Tribunal's 'Summary of Conclusions'. It is an exact record. No "selective rendering" has been carried out. If anything, the cession finding is not as favourable to the Claimants as the finding the Crown provided "for the sake of completeness":

> Our essential conclusion, therefore, is that the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the rangatira did not surrender to the British the sole right to make and enforce law over Māori. It was up to the British, as the party drafting and explaining the treaty, to make absolutely clear that this was their intention. Hobson's silence on this crucial matter means that the Crown's own self-imposed condition of obtaining full and free Māori consent was not met.

49. Furthermore, the Claimants did not contend that the cession finding means that the Crown does not exercise authority today. More specifically, the position is that the Crown does not exercise legitimate authority today because coercion, fear of force, oppression and undemocratic means were used by the Crown to acquire it.

He Whiritaunoka revealed

50. At paragraph 64 of its closing submissions, the Crown relies on an extract from page 145 of *He Whiritaunoka: The Whanganui Land Report* for support from the Waitangi Tribunal that the Crown acquired sovereignty in 1840. We refer to and adopt paragraph 9 of the Closing Submissions in Reply for Mōkai Pātea claimants dated 27 September 2021, wherein the extract from *He Whiritaunoka* that is relied on by the Crown is placed in its full context so that its proper meaning can be understood.

Meaning of tino rangatiratanga

51. Later at paragraph 67 of its closing, the Crown stated that "Māori authority or tino rangatiratanga [would be] exercised at the local tribal level of hapū over lands, settlements and other tāonga."[68] Elsewhere in its closing submissions, the Crown referred to the "tribal control" that Taihape Māori sought to exercise over their lands[69] and the Crown now accepts that tino rangatiratanga means more than the English text's guarantee of property rights.[70] There was also acknowledgment that te Tiriti ō Waitangi has resulted in two kinds of authority—the Crown's kāwanatanga and tino rangatiratanga.[71]

52. The meaning of 'tino rangatiratanga' has been evolving since the earliest Tribunals sat and heard their inquiries. It continues to evolve with pronouncements about its substance and meaning in successive Waitangi Tribunal reports rendered this century. The Crown's understanding of tino rangatiratanga is evolving as well. An aspect of its meaning is captured above with reference to it being a land-based sphere of influence. But there is probably more to it than that, such as the right to self-government for the purpose of, inter alia, administering a nationally based Māori health authority for instance, or a Māori education system, a Māori freshwater commission

[68] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [67].
[69] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [7].
[70] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [8].
[71] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [8].

or a commercial fisheries commission. An important outcome sought at the recently held Oranga Tamariki inquiry (Wai 2915) was a 'by Māori, for Māori' entity to provide the requisite levels of care for those who find themselves subject to the Oranga Tamariki Act 1989. The Claimants should be able to apply their tino rangatiratanga as a check on executive or legislative excess so that, for instance, legislation such as the Marine and Coastal Area (Takutai Moana) Act 2011 is never enacted. A law-making capacity can be envisaged where, for instance, tikanga Māori is developed and applied to, inter alia, environmental management, dispute-resolution, land management and to the administration of central and local government.

53. The Crown ponders whether the principles of te Tiriti ō Waitangi should be changed because of Te Paparahi o Te Raki Tribunal's Stage One report.[72] It is submitted that there should be a change in order to recognise and give effect to the Claimants' tino rangatiratanga. That is, we should see the advent of the rangatira principle.

Conclusion

54. Despite the Crown's assertion to the contrary, there is evidence that Crown sovereignty was rejected by Taihape Māori. Their rejection thereof was manifested when their rohe was committed to the Kīngitanga's Rohe Tapu in 1856 and again in 1860. It is possible to contend that committed involvement by Taihape Māori in Ngāti Hokohē and Te Kōtahitanga also manifested a rejection of Crown authority.

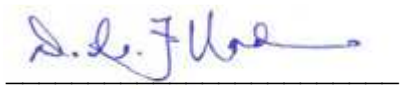
55. The Crown occasionally submitted that its sovereignty was established in 1840. In so saying, the Crown appears to lose sight of what Governor Hobson agreed to at Waitangi, Mangungu and Waimate during the late summer of 1840. The English common law, including British constitutional law, adjusts when it travels. A key element in the judgment of Chief Justice Elias in the *Ngāti Apa* case was adopted from a text of English constitutional lawyer and academic Sir Kenneth Roberts-Wray:[73]

[72] Crown Law, *Crown Closing Submissions Regarding Issue 1: Tino Rangatiratanga*, dated 21 May 21, Wai 2180, #3.3.89, at [69].
[73] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at [28].

> [It is a] vital rule that, when English law is in force in a Colony, either because it is imported by settlers or because it is introduced by legislation, it is to be applied subject to local circumstances; and, in consequence, English laws which are to be explained merely by English social or political conditions have no operation in a Colony . . .

The locally adapted sovereign power that the Crown wields in Aotearoa is a normal and consequential part of the colonisation process.

DATED at Auckland this 29th day of September 2021.



Darrell Naden
Counsel Acting