In the Waitangi Tribunal **Wai 207**

Wai 785

Under	**the Treaty of Waitangi Act 1975**
In the Matter of	**the Northern South Island Inquiry (Wai 785)**
And	
In the Matter of	**a claim to the Waitangi Tribunal by Akuhata Wineera, Pirihira Hammond, Ariana Rene, Ruta Rene, Matuaiwi Solomon, Ramari Wineera, Hautonga te Hiko Love, Wikitoria Whatu, Ringi Horomona, Harata Solomon, Rangi Wereta, Tiratu Williams, Ruihi Horomona and Manu Katene for and on behalf of themselves and all descendants of the iwi and hapu of Ngati Toa Rangatira**

BRIEF OF EVIDENCE OF PROFESSOR ALAN WARD

Dated 9 June 2003

KensingtonSwan
LAWYERS

89 The Terrace PO Box 10246 DX SP26517 Wellington
Telephone (04) 472 7877 Facsimile (04) 472 2291
Solicitor Acting: D A Edmunds

Counsel: K Bellingham/K E Mitchell/B E Ross

BRIEF OF EVIDENCE OF PROFESSOR ALAN WARD

1 My name is Alan Ward. I am an emeritus professor of history at the University of Newcastle and a contract historian. A full version of my credentials has been given in a previous submission in these proceedings.

Part A – Customary interests in the Port Nicholson area

2 I have been asked by Te Runanga o Ngati Toa Rangatira to submit some observations in these proceedings, particularly on the relevance to Te Tau Ihu of my report on Maori customary interests in the Port Nicholson area. (Wai 145 #M1). I have agreed to the request because the southward heke of the Kawhia and Taranaki tribes in the 1820s and 1830s governed inter-tribal relationships on both sides of the Cook Strait in one integrated pattern. Cook Strait was a highway, not a barrier, for Te Rauparaha, the other Ngati Toa rangatira, and their Taranaki allies, and they took control of key harbours and passages, and dominated the trade to Te Tau Ihu in the southern North Island from their bases in Porirua, Kapiti, Mana, Cloudy Bay, the Marlborough Sounds, and points further west.

3 I also believe that the principles governing the rights to land and water on the Port Nicholson side equally applied to Te Tau Ihu. The specific facts of inter-tribal relationships varied within the Cook Strait region, but I believe the same customary norms or principles which helped shape claims of right were shared by Maori throughout the region.

4 I am writing also out of some concern that in the ferment of renewed consideration of Maori customary patterns of land tenure, new orthodoxies should not be too hastily erected in place of old ones. In this context, I believe there is some risk that *take raupatu* – rights to land derived from conquest – are being diminished, or not receiving the recognition that Maori would have accorded them before 1840.

5 There have been various emphases given to this issue during white colonisation of New Zealand. In 1842-43, the Protectors of Aborigines and the Spain Commission made some serious inquiries as to the bases of customary claims to land. The evidence collected by the Spain Commission remains very valuable, although Spain drew to a considerable extent on English values for the emphasis in his final report on occupation and use of

land, as the foundation of rights. Then for some time, there was an emphasis on conquest, with some extremely crass assertions by some settlers and officials, that Maori rights to land derived just from physical force, the strong arm, *ringa kaha*. Then the Native Land Court distilled out of its many hearings widely-agreed principles or customary norms of *take tupuna, take tuku* and *take raupatu*, each of these needing to be supported by *ahi ka*. Among these *take tupuna*, the tracing of whakapapa connections to early rangatira occupiers assumed a special status. More recently, in the context of claims being heard by the Waitangi Tribunal, there has been a tendency in some statements to go one step further and question the legitimacy of *take raupatu*. Conquest, it is suggested, confers no rights in customary law without either a period of occupation (measured in terms of years or sometimes even generations), or by marriage into the lines of the previous tangata whenua so that the children of the relationship can claim *take tupuna*.

6 For example, Dr Angela Ballara has stated in her report on customary land tenure in Te Tau Ihu, which was commissioned by the Waitangi Tribunal, that:

> "Too much contrary evidence from the Northern South Island and from conquered areas in other parts of the country (to the idea that legitimate claims to land could derive from conquest alone) exists to accept the Ngati Toa formula as expressed in the Land Court."
>
> (Wai 785 #D1, page 60).

7 In the Waitangi Tribunal's Rekohu Report, reference is made to the Native Land Court tendency to distort tikanga Maori by giving too much prominence to conquest and far too little weight to the primacy of whakapapa in tikanga Maori (Rekohu Report, pp 131-51). In particular, the report draws upon the writings of Te Rangi Hiroa (Sir Peter Buck) to suggest that the conquests of the 1820s and 1830s were not yet 'completely valid' but could be made valid or 'legitimated' by the passage of time – several generations in Te Rangi Hiroa's view (page 139).

8 [Justice] Durie in 1994 commented on Norman Smith's text analysing the Maori Land Court, as follows:

> "It is primarily concerned with the statute laws that replaced customary tenure. An early chapter describes original determination of Native title, purportedly according to custom, but there are doubts about the anthropological accuracy of early judicial opinion on which that chapter relies. There was no science of anthropology in those days and the Native Land Court decisions may seem as representing a euro-centric view of Maori evidence. The evidence itself may have been tailored to suit certain pre-conceptions, such as those in the opinions of Maori tenure collated by the colonial administration in the 1850s"
>
> (Durie (1994) p 325, from Sinclair, Wai 64 #G11, page 117).

9 In another article, he has made a similar point in these words:

> "Those who belong to the land, the tangata whenua, are those who trace descent from the original peoples, by whakapapa, or from meticulously preserved genealogies that generally extend over a minimum of 25 generations. The philosophy admits of migrants by incorporation. It admits the children of those who, by marrying into the local community, have sown their seed in the whenua.
>
> Like all theories there were exceptions, but a claim by conquest was probably exaggerated by colonial administrators. The retention of land by the strength of one's arm was a common expression, but described a defensive position. A conqueror's right to land was more regularly claimed by marriages with the conquered."
>
> (Durie (1996), p 452).

10 Dr Angela Ballara has also previously commented on the primacy given to the concept of raupatu within the Native Land Court as follows:

> "The judges wanted to hear who had held mana over the land from the remotest times, who had occupied the land under the mana of its chiefs, details of their various genealogies, the names of every pa, cultivation, resource and wahi tapu. Witnesses recounted details of former disputes concerning the people on the land or the land itself, and judges and witnesses alike kept a kind of running score of 'conquests' and counter 'conquests' or revenges which was intended to establish which party was the eventual winner by 1840."
>
> (Ballara (1991) p 530, from Sinclair, Wai 64 #G11 page 118).

11 In the summary of her report presented during the Te Tau Ihu Inquiry, Dr Ballara concluded that, in respect of customary land tenure, some of the most important rules were that:

> "1. Rights to land could derive from ancestors **who had occupied** the land. These *take* tupuna were expressed in terms of ahi ka (burning fires, fires kept alight) and noho tuturu (permanent occupation). Land rights could not derive from ancestry alone (without occupation).
>
> 2. Rights to land could derive from descent from conquerors of the land, provided these conquerors had **occupied the land**. Raupatu rights could not derive from conquest alone (without occupation).
>
> 3. Conquest was a legitimate way to force a complete exchange of land, provided the conquerors occupied the land, and provided **they completely drove out or destroyed** the former occupants.
>
> 4. If conquerors failed to completely drive out and destroy the former occupants, but allowed them to continue to reside there as a community under their own chiefs, then defeated tribes retained their rights to at least some of the land (that which they occupied, and which was not occupied by the incoming conquerors). The conquerors established their rights to the areas they occupied.
>
> 5. Rights to land could be based on gifts of land. Gifts of land could be made by ancestral chiefs or conquering chiefs if those conquering chiefs occupied the land.
>
> 6. Defeated chiefs could legitimately make gifts of lands to their enemies, provided they had been permitted by those who defeated them to remain on the land as chiefs of their own people, who also continued to occupy as viable communities.
>
> 7. Slaves had no rights to land".
>
> (Wai 785 #D1(a) page 3).

12 Ballara goes on to note that:

> "In the context of Te Tau Ihu, which has a history of invasion and conquest, but which also had a history of resilience, resistance and resurgence by the invaded, the rules of land tenure pertaining to conquest became very important in determining rights.
>
> The maxim that conquest could, before 1840, result in legitimate land claims **provided the conquerors occupied** is important for Ngati Toa in Cloudy Bay and Wairau, and in parts of the Sounds. It is important for Ngati Rarua in Wairau, and Ngati Rarua and Ngati Tama in Golden and Tasman Bays, Te Tai Tapu, and for a while, as far south as Mawhera.
>
> It is also a limiting maxim: it limits the nineteenth century claim of Ngati Toa to be able to sell the whole northern South Island by right of conquest alone; their rights to sell anything but the areas they actually occupied has to be denied"
>
> (Wai 785 #D1(a) page 4).

13 I concur with a great deal of the comments quoted, particularly with the assertion that some form of 'occupation' was necessary to establish and sustain rights. But I note that it is important to view this comment within the context of Dr Ballara's view that *any* take, including take tupuna, had to be supported by occupation. I suggest that take raupatu was not exceptional in this respect.

14 I also wish to query the proposition that rights derived from *raupatu* are somehow not legitimate – unless supported by ahi ka for a long period, or by other take such as take tupuna. In my reading of Spain Commission evidence and early Native Land Court evidence (including that from Rekohu) I do not recall Maori witnesses arguing that view. On the contrary, they seem to speak much more about the mana that derives from successful conquest, and that appears to operate *immediately ,* from the fact of conquest.

15 The other point that arises from this is that the concept of 'occupation' does not appear to have necessarily required actual physical occupation and cultivation of defined areas. The concepts of 'occupation' and 'ahi ka' appear to have taken a number of different forms. The most important factor appears to have been that the land remained under the influence and mana of the conquering group. In the case of Ngati Toa, this influence and mana was demonstrated by the respect shown for the mana of the chiefs who led the

conquest and deference shown to Ngati Toa by other allied and tributary tribes.

16 Clearly, there was a 'clear and present danger' that the recently defeated groups might reorganise and try to throw out the conquerors. For this reason, among others, it might be thought expedient by the conquering rangatira to take wives from the conquered groups, but I am not aware of evidence that they considered it strictly necessary. Moreover, I suggest that the conquered parties gained as much or more from such marriages as the conquerors.

17 Thus, I believe that the notion of legitimacy, or non-legitimacy, in relation to raupatu is alien to Maori culture. It may have been a norm in Moriori culture: there is some evidence that centuries ago, Moriori leaders (notably the ancestor Nunuku) became so concerned at the self-destructive tendencies in their society that they renounced violence as a way of asserting control over people or resources – and that consequently such assertions conveyed no rights. I know of no such development in Maori culture.

18 While the British are entitled to argue that Christian Maori or Maori citizens of the new state of New Zealand should eschew private violence, they are not in a position to argue that Maori should also forego rights they had acquired by force before 1840. However offensive Maori warfare and conquest might be to British consciences, (perhaps blind to the brutalities of conquests throughout British history), it would be an affront to impose such views upon Maori in respect of rights acquired while they were fully sovereign in these islands, i.e. before 1840.

19 It is, of course, well-known that as a result of the influence of Christianity and the Crown's refusal to accept assertions of right by force after 1840, groups of people who had been conquered in the 18th and early 19th centuries began to take advantage of the new situation and reassert themselves. When land they occupied came before the Native Land Court, they commonly claimed "ownership" of it, as the processes enjoined by the Native Land Act required, and sought to diminish the claims of the conquering tribes and rangatira to whom, before 1840, they had paid deference or tribute, in order to be allowed to continue to occupy and use the land. In the face of these developments, Chief Judge Fenton and other judges developed guidelines for

how to deal with the competing claims – guidelines commonly subsumed, rather misleadingly – under the term "the 1840 Rule". I shall return to this question later.

20 In the meantime, I suggest that the evidence of the Spain Commission and the Otaki and Wellington minute books of the Native Land Court provide ample evidence that Cook Strait Maori, as at 1840, recognised the facts of conquest and recognised the mana of conquerors, both over conquered land the people on that land. However, I have also argued in my Port Nicholson report, that the conquerors did not possess **all** the rights to conquered land. The actual relationships between the conquering rangatira and hapu and those they conquered were complex, varied from place to place, and evolved over time. In Oceanic societies, land rights were not a category detached from the social order as a whole but shaped by the constant flux of demographic change and tribal politics. In all of this, the strength of numbers, on which was based military power, played a significant part.

21 It will be apparent from this that any attempt to analyse Maori land rights in terms of "ownership" of land or "title" to land – implying that virtually **all** the rights were held by one group to the near total exclusion of other groups, would introduce rather rigid and inappropriate European categories and be quite misleading. It is more fruitful to think of Maori owning **rights** in land than "owning land". Various kinds of rights were held by different levels of society – individual, family, hapu and iwi – in the same land. I would refer the Tribunal to chapter 1 of my Port Nicholson report for an elaboration of these views. It follows also that Commissioner Spain, in focusing his inquiry on trying to decide whether the possession and control of land lay with the conquering or "overlord" chiefs and tribes, or with the "resident" chiefs and tribes, was pursuing something of a false dichotomy. Both groups, I suggest, had rights in varying strengths and degrees on both sides of Cook Strait. The difficulty is to ascertain their proper weighting, for that varied from area to area according to facts and circumstances. I shall try to enlarge on some of these points.

22 My Port Nicholson Report (Wai 145 #M1) discusses in some detail the way various tribes acquired rights to land and waters on the north side of Cook Strait. The dominant mode was conquest followed by apportionment and occupation of conflict territory. Other modes included occupation of vacant

land, gift, *ohaaki* (oral will), and the spilling of chiefly blood on the land (see Wai 145 #M1 pp 152-62).

23 The pattern of relationships that then developed between the hapu concerned varied considerably:

a. There was complexity in the relationships even among the various Ngati Toa hapu, some of whom had stronger marriage ties with Te Atiawa and some with Ngati Raukawa;

b. There were close relations, but not wholly untroubled relations between Ngati Toa and their Ngati Tama and Ngati Mutunga allies. When Ngati Tama encroached too far on Ngati Toa territory at Waikanae and Porirua and tried to take control of Paremata, they were forcibly sent away to the Ohariu coast and Whanganui a Tara. Later, many went to Wharekauri with Ngati Mutunga. Those who remained helped Te Rangihaeata resist the British in Heretaunga (the Hutt Valley). Ngati Tama chiefs always acknowledged a debt to Ngati Toa, as leaders of the heke and conquest of the whole region. Heretaunga was treated by the leaders of both groups as Ngati Toa territory. Te Rauparaha eventually took payment from the British for the "release" of the Hutt Valley, but also told the officials that they must come to terms with Te Kaeaea (Taringa Kuri) as the "elder man of the resident natives". In their own eyes, the leaders of the conquest and the leaders of the resident group both had mana in Heretaunga. Te Rangihaeata had also continued to claim interests in the Ohariu coast (occupied by Ngati Tama, not Ngati Toa) and gifted those rights to Topine te Mamaku (of Whanganui River but linked to Ngati Tama and Rangatahi) at his deathbed. Te Mamaku in turn was paid by the British to relinquish those rights;

c. Ngati Mutunga and Te Atiawa moved into Whanganui a Tara and into Ngati Kahungunu territory in the Wairarapa with the encouragement of Te Rauparaha. They became increasingly at odds with Ngati Toa as Ngati Raukawa moved southwards to Otaki and Te Rauparaha sided with them in developing rivalry for control of territory;

d. Tensions were increased rather than resolved by the battle of Haowhenua (circa 1834). Te Atiawa remained the dominant tribe in Whanganui a Tara, which they claimed possession of in their own right. They were very nervous of possible attack from Ngati Toa and Ngati Raukawa and their northern associates. It was expedient for the Te Atiawa chiefs to seek alliance with the British as they entered Cook Strait, partly in order to secure guns;

e. Ngati Rangatahi may have had old associations with Heretaunga, but had not maintained these. They entered (or re-entered) the valley as the tributary allies of Ngati Toa. The Ngati Toa chiefs regularly told the British officials that Ngati Rangatahi were cultivating Ngati Toa land, and the British said that Ngati Rangatahi acknowledged as much. They therefore paid Te Rauparaha, not Ngati Rangatahi for the Ngati Rangatahi cultivations in Heretaunga.

24 It is evident then that even among allied tribes and hapu there was a distribution of rights and authority (mana) as between the leaders of the heke and conquest, and the resident groups. Occupation and cultivation obviously conferred rights, as in the case of Ngati Tama and Ngati Rangatahi. But this does not mean that the residents possessed the right to control the alienation of the land. That right originally lay with the allied leaders of the conquest. As the various allied hapu settled across the land, the more powerful ones assumed greater autonomy; the less powerful could not, although they probably aspired to it. Ultimately, the ability to assert autonomy rested on control of military power. I have noted in my Port Nicholson report, following mention of the British payment to Te Rauparaha for Ngati Rangatahi's cultivations that:

> "Ngati Rangatahi seemed to have concurred very reluctantly indeed, refusing to receive Te Rauparaha after he accepted the British payment and left them to fend for themselves, and fighting for their rights when the soldiers and settlers looted their gardens and property. In short, they behaved very much like possessors. The evidence is in fact replete with examples of continuous cultivation and occupation conferring rights amounting to possession, in the hapu or whanau concerned, *when that occupation or possession took place within a portion of the wider tribal demesne*.
>
> With the advent of the British and the land market, this got to be called "ownership". This is as true for Moturoa at

> Pipitea as for Ropata Hurumutu at Porirua. As part of "ownership" the non-Ngati Toa groups also claimed the right to alienate land without reference to Ngati Toa. The Ngati Toa chiefs denied that the residents and cultivators had that right of alienation, at least without their consent. They could not easily sustain their veto in the case of sizable, independent groups like Te Atiawa but they could in respect of the their tributary groups, such as Ngati Rangatahi."
>
> (Wai 145 #M1, page 177).

25 If this is the situation in respect of allied tribes and hapu, it would follow that the conquering chiefs would allow only very limited autonomy to the conquered hapu. This is certainly the case, within the Port Nicholson area, of Muaupoko, some of whom remained in the Porirua/Pukerua area paying regular tributes of produce to Ngati Toa chiefs. (Te Hira, who identified himself as of Ngati Apa, was left by Te Rauparaha as 'caretaker' of gardens at Motuhara. He acknowledged the mana of Te Rauparaha and Te Rangihaeata over the land (see Wai 145 #M1 page 102)). The other previous tangata whenua groups had been driven out of the area or killed. They could not possibly have returned, except under the mana of Ngati Toa or Te Atiawa.

26 Ngati Toa, not surprisingly, were very concerned to maintain the control of their trading empire in Cook Strait. They attacked a Te Atiawa hapu at Arapawa Island in 1839 and left six dead. They insisted on sharing payment from the British for Port Nicholson. They asserted their control over the lower Wairau Valley against the New Zealand Company in 1843. They continued to assert control over British settlement in the Hutt Valley beyond the Te Atiawa actual area of residence, and the Ohariu coast. They continued also to demand payment for interests purchased by the Crown in Te Tau Ihu in the late 1840s and 1850s (a demand refused by Ropoama Te One in respect of Queen Charlotte Sound but in part accepted by Te Koihua of Te Atiawa in respect of Pakawau in 1851/52).

27 As noted earlier, continued occupation of course gave substantial rights to the occupiers. This started from the months in which they planted and harvested crops, had children born on the land, or buried their dead on the land. I am not aware from my reading of nineteenth century documentary evidence that that there was a magic number of years in which these rights

became operative; they just grew over time, with or without intermarriage with previous occupants. But ultimately mana lay with those who controlled the physical power. A statement by Wi Tamehana te Neke of Ngati Atiawa and Taranaki in the Land Court in respect of Himatangi expresses well the principle which I believe applies:

> "The Ngati Apa "mana" was never "tinei" [extinguished] – it would not have been right for Ngatiraukawa to sell that land without Ngati Apa Remember the [battle of] Kuititanga – Ngatiraukawa was beaten there "Mana" of Ngatiawa and Ngatitoa equal "Mana" in these "Whawhai" [fights] – It would not have been right for Ngatiraukawa and Ngatiapa without assent of Ngatitoa and Ngatiawa – they would speak to Ngatitoa and Ngatiawa about sale – that would be on account of "mana", it would be right for Ngatitoa and for Ngatiawa to take a portion of [the] purchase money – they have done so. I have signed and received money."
>
> (Otaki Native Land Court Minute Book 1D, page 421, cited Wai 145 #M1 page 182, footnote 69).

This quotation shows how mana could be distributed. It did not depend wholly on physical occupation by the holders of mana over the whole territory, but upon their authority by victory in battle and the consequent power to control the occupation of the territory concerned.

28 It is necessary, I believe, to adopt a Maori perspective of this kind, rather than focus on the British search for "ownership" of land. Otherwise one gets in the absurd situation that either Te Rauparaha's undoubted mana as a war-leader entitled him to "own" the entire region, with everyone else having subsidiary rights on his "estate"; or (if that could not be accepted) that his mana as war-leader entitled him to virtually nothing, and that all he could claim as "owner" were the gardens he or his servants actually cultivated. Some other basis of analysis would seem to be necessary to avoid this absurdity. Moreover, it must be recognised that Te Rauparaha's empire was largely a trading empire, a maritime empire, involving control of considerable wealth and great prestige (see Dr Ann Parsonson's account cited in Wai 145 #M1 pp 104-5). His near monopoly of Cook Strait trade from the Maori side was undermined after 1840 not only by the advent of land purchase, in the European sense, but by the British assertion of Crown and public rights to the harbours and foreshores.

29 It is relevant to note in this context the remarks of the Native Land Court judges in respect of Porirua foreshore in 1883. They said that the local hapu had collected pipi from the foreshore but never exercised any other kind of right there – an absurdity in the face of the importance of the harbour's points of entry and exit, anchorage, shelter and storage, all the things that go with the life of a seafaring and trading people. (Wai 145 #M1 pp 185-6) Actual occupation and cultivation of land, nor even the specific fishing rights that whanau and hapu developed, do not fully encompass the kind of authority Te Rauparaha had from his control of access to harbours and seaways. It is partly for this reason that I have preferred Professor Ron Crocombe's concept of "ownership of rights in land [and sea]" rather than "ownership of land", although this of course entails close study of what kinds of rights are held by the various interest groups and levels of society.

Part B – Relevance of "the 1840 Rule"

30 The so-called '1840 rule' has been strongly criticised in the Rekohu report as imposed an overly rigid set of rules on the interpretation of Maori tikanga regarding land, and obscuring some of the subtleties of tikanga. In many respects perhaps it does, but I wish to suggest that we should be careful to examine closely actually what is meant by "the 1840 Rule" and once again guard against too strong a swing of the pendulum. Dr Fergus Sinclair's submission on the 1840 Rule (Wai 64 #G11) has been referred to in the Rekohu report but aspects of it deserve closer attention I believe. I have referred to the subject in relation to rights acquired by raupatu in my submission on Te Atiawa in Te Tau Ihu, (Wai 785 #D4, Wai 607 #A7) discussed by the Tribunal in Waikawa in January 2003, but wish to draw attention to particular elements of Sinclair's evidence.

31 It is well known that Fenton and his fellow judges laid down the rule that since English law was introduced in New Zealand in 1840 no interest in land could be acquired by conquest or seizure by force. From his examination of cases before the court, Sinclair comments that:

> "The "rule" was generally applied as a guide to interpreting the evidence, or formed a rebuttable presumption that the owners in 1840 were the correct persons to be awarded title."
>
> (Wai 64 #G11 page 3).

This does not seem to me to be a particularly rigid approach.

32 It is also generally known that rights could be acquired after 1840 with the consent of the owners as at 1840, (e.g. by gift or general agreement). The pattern of rights was thus not frozen at 1840, but changes had to be peaceful and with the consent of the owners as at 1840. Again no necessary rigidity is implied.

33 What is less well known is Sinclair's next point, as follows:

> "An important corollary of the rule was that owners of land in 1840 ought not to be penalised for their lack of resistance if non-owners (without agreement) sought to restore or acquire rights after annexation."
>
> (Wai 64 #G11 page 5, paragraph 2).

34 Fenton evolved this view when he heard, but declined to accept, the claims of groups which had been conquered by Te Taou hapu (the core of Ngati Whatua) in the 18th century and which now, under the pax Britannica, tried to reassert control of Orakei land:

> "It would be a very dangerous doctrine for this Court to sanction that a title to native lands can be created by occupation since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be deprived "pro tanto" of their rights. The precedents are all the other way, and founded in reason. And as no Court existed in the country by which such trespassers could be tried and the true ownership of land ascertained, a peaceful protest against the occupation, or an assertion of hostile or concurrent right made at a sufficiently early period, must be held to have been all that the counter-claimant was required to do to keep alive his rights, and indeed all that he should lawfully do."
>
> (Fenton, *Important Judgments* pp 94-95, quoted in Sinclair, Wai 64 #G11 page 12).

35 Judge Mackay's decision in respect of Hauaru Block in Waiapu is to the same effect:

> "It would be a dangerous doctrine also to sanction that a title to Native land can be created by occupation only since 1840, as that would be tantamount to deciding that tribes who had not used force to expel the squatters must be deprived of

> their rights. All the bona fide owners could legally do under the circumstances as no Court existed by which trespassers could be tried would be to make a peaceful protest, at a sufficiently early period to keep alive the right."
>
> (Wai 64 #G11 page 6).

36 Sinclair elaborates on this as follows:

> "This aspect of the rule calls for further explanation. The paramount reason for the rule was the prevention of violent disputes over title to land. This objective would be comprised by permitting those who could not be deemed owners at 1840 to improve claims to land which were not theirs. If the Court entertains such claims, it would encourage situations in which disputes might occur. In such cases, the usual customary response on the part of the bona fide owners would be to resist; but after annexation this option was supposedly unavailable because of the imposition of British law. It seems to have been the Court's position that owners who abided by the law should not have their rights to land reduced."
>
> (Wai 64 #G11 page 6).

37 The relevance of these comments to the rights of Ngati Toa in Te Tau Ihu, or any other conqueror group in the country, against the claims of resurgent conquered groups, is apparent. Of course the facts of who could be deemed "owners" in 1840 would still have to be determined, and I have already commented on the difficulty of applying the English concept of "ownership".

38 Fenton also stated:

> "We do not think it can reasonably be maintained that the British Government came to this Colony to improve Maori title or to reinstate persons in possession from which they had been expelled before 1840 or which they had voluntarily abandoned previously to that time".
>
> (Oakura judgement, 1866, cited Ward, Wai 785 #D4 page 104, and Sinclair Wai 64 #G11 page 11).

In other words, whatever one might think of the pre-1840 distribution of rights, and how it had been arrived at, it was not the function of the Crown to meddle in or rearrange those rights. Even allowing that rights recently acquired (by conquest or any other take) matured over time, this must be as true as of events one year before

1840, as of events 20 or 100 years previously. As previously stated, however, the Court had no difficulty in recognising peaceable rearrangements of rights agreed by the Maori parties concerned. These considerations too are obviously as relevant to Te Tau Ihu as to many other districts in New Zealand.

39 It nevertheless remains something of a difficulty to show, from the contemporary evidence, whether a conquering group had agreed to the reassertion of the rights of previous owners or did not agree, but were merely refraining from the use of force to suppress the resurgent group, out of respect of Christian principles or the rule of law. An example of the latter comes from the Land Court's hearing of the Horowhenua block in 1873. Kawana Hunia of Muaupoko and Ngati Apa, and others, submitted a very long list of sites which were in the occupation and used of their people, undisturbed by Ngati Raukawa. Ngati Raukawa leaders were in no doubt, however, that the other tribes would not have become 'whakahi' but for the influence of Christianity and the government. Henare Te Herehau said:

> "If they had shewn themselves before my hands were tied by the gospel I should have killed them or sent them off to some other Island"
>
> (Otaki Minute Book 1C page 207, cited Ward Wai 145 #M1 page 128).

40 Here the speaker was not agreeing to the reassertion of Ngati Apa's claims but made his protest and looked to the Court to uphold Ngati Raukawa rights. I believe they should have done, by Fenton's own guideline of not penalising those groups in control at 1840 for refraining to use force to suppress the previously subordinate groups who had become 'whakahi'. Their occupation, allowed by the conquering Ngati Raukawa, did not eliminate Ngati Raukawa's mana. Rather it reflected that mana. By the same token I believe that all of Ngati Toa rights which existed on either side of Cook Strait at 1840 should have been respected, unless they were voluntarily relinquished by Ngati Toa.

41 But the issue goes beyond Ngati Toa claims. It is obviously relevant to a number of situations where tribes have migrated from their original territory and established themselves through conquest and occupation elsewhere. Nineteenth century examples which come to mind are Ngati Raukawa

moving to Horowhenua-Manawatu and Ngati Mutunga moving to the Chatham Islands. There are many examples in the eighteenth century, including the movement of the Marutuahu tribes into Hauraki.

42 There is a danger that the state processes adjudicating upon pre-1840 customary rights could decide that the migrants have severed their links with their original territory, yet (if take raupatu was not adequately recognised) deny them rights clearly established in their new domicile by 1840. Ngati Raukawa felt that that was precisely the situation they found themselves in through the Native Land Court decision on Himatangi block, an injustice about which they (and Archdeacon Hadfield among their pakeha supporters) strenuously protested until all avenues of legal appeal had been exhausted. Human sympathy for conquered groups naturally arises, but tribes engaged in heke and conquest acquired rights too – rights reflected in the mana of dominant chiefs who led the conquests and controlled the distribution of conquered lands. The Crown's responsibility under Article 2 of the Treaty suggests that such rights must be fully recognised, if tino rangatiratanga was not to be infringed.