In the Waitangi Tribunal **Wai 207**

Wai 785

Under **The Treaty of Waitangi Act 1975**

In the Matter of **The Te Tau Ihu Inquiry (Wai 785)**

And

In the Matter of **The 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 RICHARD PETER BOAST

Part Four: Land Transactions and the Native Land Court

Dated 11 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

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1 The Nelson Grant and Ngati Toa

1.1 **Commissioner Spain's investigation and report:** As noted earlier, Commissioner Spain was not enquiring into the validity and fairness of the 1839 deeds as such. Referring to the New Zealand Company's November 1840 agreement he noted that his investigation of the claim "has of course materially been narrowed by the arrangement with Her Majesty's government". This agreement "restricted the selection of land by its Agent in the Colony to certain quantities of land in certain localities". Spain was investigating whether the Company was entitled to receive a Crown grant to the lands it had surveyed in the Nelson area. He concluded that it was, for four reasons:[1]

a. The Ngati Toa chiefs had admitted that they had sold "Taitapu" and "Whakatu" to the New Zealand Company;

b. The New Zealand Company had made an additional payment to local chiefs at the time of the arrival of the Nelson preliminary expedition;

c. Further payments were made in August 1844 by means of the "releases" arranged by Spain and George Clarke;

d. Maori had acquiesced to the establishment of the Nelson Colony.

1.2 **Sale of "Taitapu" and "Whakatu" by Te Rauparaha and Te Rangihaeata:** One reason why the Company was regarded as being entitled to a grant at Nelson was because Te Rauparaha and Te Rangihaeata did at least accept that they had sold "Taitapu" and "Whakatu". Spain interpreted this in a very broad sense to mean that Ngati Toa had in fact agreed to

[1] This analysis is based on the following key passage in Spain's report:
We have seen the admission of the sale of two places, Taitapa [sic] and Wakatu, Massacre Bay and Blind Bay, by the chiefs under who the present claim is advanced (though, be it distinctly remembered, even in these instances the resident Natives were paid over again); and to the occupation by the Company's surveyors and settlers in these districts, no opposition

alienate all of Massacre Bay (Golden Bay) and Blind Bay (Tasman Bay). Thus a key reason why the Company was entitled to a grant was because Ngati Toa had sold it, which involves the obvious corollary that Spain accepted that it was in some sense Ngati Toa's to sell. There are some further points to be made about this part of Spain's analysis:

a. Does Taitapu equate to Golden Bay? Te Taitapu, the sacred coast, is not a generic name for Golden Bay.[2] It is usually understood to be the coast to the south of Whanganui inlet, and this the location of the Taitapu block heard before the Native Land Court in 1883, at which time the block was claimed by Ngati Rarua and unsuccessfully counterclaimed by Meihana Kereopa on behalf of Rangitane/Ngati Kuia and Ngati Apa and by Rawiri Watene on behalf of Ngati Awa.[3]

b. There is no reason to suppose that by "Taitapu" Te Rauparaha was vaguely referring to the whole of Massacre (Golden) Bay. Te Rauparaha knew perfectly well where Te Taitapu was. When giving the names of the places in the South Island to which Ngati Toa laid claim to E J Wakefield Te Rauparaha gave them precisely, and in order: "Taitap, Wanganui, Onetana or Cape Farewell, Pakawao, Takaka, Taomiti, Motueka, Waimea, Okatu, Okapuerka (Whakapuaka)". This indicates that Te Rauparaha understood Te Tataipu as a quite *specific* locality south of Whanganui inlet. There is no reason to believe that Te Rangihaeata's geography was any vaguer than Te Rauparaha's. "Whakatu", so I understand, is the name specifically for Nelson; if he had meant the whole region Te Rangihaeata is much more likely to have used the name "Waimea" (as Te Rauparaha did).

c. It seems that Spain does engage in something of a sleight of hand by (in effect) converting "or" into "and". Te Rauparaha said that Te Taitapu was sold, Te Rangihaeata that Whakatu was (whatever either of them may have meant). Spain interprets this as meaning *both*

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had been offered, up to the date of the sittings of my Court at Nelson, by the original selling parties.

2 If it is right to take the *New Zealand Historical Atlas* as authoritative on this, plate 25 shows "Te Tai Tapu" as a strip of coast on the South Island west coast immediately to the south of Whanganui inlet.

3 (1883) 1 Nelson MB 3.

were, which is obviously problematic as the two chiefs obviously had conflicting understandings as to what had been sold.

d. It is therefore clearly not the case that Commissioner Spain always and invariably believed that only rights of occupation equated to title, as he certainly does accept that part of the foundation for the Nelson grant was the alienation from Ngati Toa. Blind Bay and Massacre Bay were not classed by Spain as areas in Ngati Toa ownership in the sense that the Wairau certainly was, but it is clear that to him Ngati Toa rights in this area were sufficient to create at least *part* of the foundation of a title.

1.3 **Wakefield's presents:** In addition, says Spain, the *resident* Natives "were subsequently paid over again". This was done in two ways. The first of these were the "presents" distributed to local Maori when the first Nelson expedition arrived in Blind Bay in late 1841. The New Zealand Company had taken this stance that this distribution was a "gift" (because the land had already been purchased) rather than a "payment". Spain thought this a bit over-subtle, and here he is probably right.[4]

1.4 **The deeds of release:** The four deeds were the other main means of additional payment. These releases are an important issue for other claimant groups but are not an issue of significance to Ngati Toa.

1.5 **Acquiescence:** The final reason why the Company is entitled to its grant is on the basis of *acquiescence.* "To the occupation by the Company's surveyors settlers in these districts," Spain noted, "no opposition has been noted, up to the date of the sittings of my Court by the original selling parties". . Spain goes on to discuss in the next sentence of his report the opposition to the New Zealand Company surveys at Wairau and Porirua by the "same parties". By "original selling parties" Spain is presumably referring to Ngati Toa. And this, it has to be said, is quite true – Ngati Toa

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[4] Spain's Nelson report, at Macky, I, 56. Spain writes here:

> At the same time it may be remarked that the distinction thus sought to be drawn between a further payment for land and a present was somewhat too fine-drawn for the conceptions of the Natives, and I think Captain Wakefield carried his assumed position too far in claiming the land under a purchase from the conquerors only, and not admitting, to some extent, the title of the Natives whom he found in actual possession.

did not object to the New Zealand Company surveys at Nelson itself, the Waimea plains or complain about the presence of the settlers there.

1.6 **Consequences of this analysis:** To repeat, then, Spain sees the Company as entitled to a grant because it took the steps of separately paying compensation to Ngati Toa *and* the "resident Natives". (The adequacy of this compensation is something that it is not necessary to pursue, but it is obviously an issue). Of course the compensation was not simply in goods and in cash. The compensation was also in the form of the Tenths blocks. Logically Ngati Toa should have shared in the Tenths, as the Company's title derived in part from them. It is elementary that the Tenths reserves were quite separate from the reservation of pas, burial places and cultivations. Spain's recommendation was that the grant to the Company at Nelson should exclude (a) a "true" tenth of the land so granted; and (b) "all the pas, burying-places and grounds actually in cultivation by the Natives" (John Mitchell distinguishes the two categories of reserves as "tenths reserves" and "occupation reserves"; the latter eventually on survey amounting to 3,565 acres). The two categories of reserve are quite distinct and serve distinct purposes, one being an endowment and the other to protect local occupation rights. Ngati Toa should certainly have been entitled to a share at least in the former.

2 The Porirua and Wairau Deeds:

2.1 **Introduction:** Following the capture and detention of Te Rauparaha and the exile of Te Rangihaeata the next blow to fall on Ngati Toa was the loss of nearly all of their lands in both the North and the South Islands. This was as a consequence of the Wairau deed of 18 March 1847, signed by Rawiri Puaha, Matene Te Whiwhi and Tamihana Te Rauparaha, and the Porirua purchase of 1 April, signed by Rawiri Puaha, Te Watarauihi Nohorua, Mohi Te Hua, Matene Te Whiwhi, Nopera Te Ngiha, Ropata Hurumutu and Paraone Toangina. Conspicuous by their absence on either deed are the names of Te Rauparaha and Te Rangiahaeata. The Wairau block covered 608,000 acres for which Ngati Toa was paid L3,000 spread over a period of six years from April 1847 to April 1851.

2.2 **Why did the chiefs sell?** The obvious context of the both the Wairau and the Porirua deeds is the fact that Te Rauparaha was now a prisoner in the

custody of the Crown. The evidence bearing on this key question can be analysed by dividing it into three categories:

a. **Ngati Toa evidence:** It is known that Rawiri Puaha, now de facto leading chief of Ngati Toa, was very concerned about Te Rauparaha, as he wrote to Grey on at least two occasions enquiring about Te Rauparaha's well-being.[5] The Te Kanae MS discusses the capture of Te Rauparaha, but in terms of the actual purchase lays more emphasis on Grey's demands for compensation for the Wairau. "In 1847", according to this source, "Sir George Grey asked Rawiri Puaha and his people to give over Wairau". It was to go to "the queen in compensation for her dead". Grey said: "Give me the land where my dead died". Rawiri and his people agreed "and so passed Wairau even unto Kaikoura on the account of the dead who died in the conflict at Wairau".[6]

b. **Contemporary evidence:** Burns cites a letter from George Clarke jr. to Henry Williams (which I have not seen) that the Wairau had been "*wrung* and *wrested*" from Ngati Toa.[7] On being told that the sale was incomplete without Te Rangihaeata's agreement, "the Govr. said he was a rebel, and would not treat with him". Henry Tacy Kemp has left an account which stresses Rawiri Puaha's wish to make amends for the Wairau. Kemp says that after the capture of Te Rauparaha he was told by Grey to go to Porirua to discuss the matter with Rawiri Puaha who was "a member of the Wesleyan communion, over whom the Revs. J Watkin and S. Ironsides were the esteemed missionaries, and a highly intelligent and honourable man".[8] A few days later Rawiri appeared at Government Office. With him were "certain approved members of his tribe, the Ngatitoas

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5 The correspondence has not been found and is noted only in the Native Department Register books in National Archives. On October 24 1846 Rawiri Puaha wrote to Grey asking him "to release Te Rauparaha from his confinement on board ship": Rawiri Puaha to Grey, October 24 1846, (No 46/145), MA 2/44, National Archives Wellington. In Febuary 1847 Rawiri Puaha again wrote to Grey, asking if he could meet him to discuss Te Rauparaha: Rawiri Puaha to Grey, "wishing to see His Ex. regarding Te Rauparaha", Feb 22 1847, (No 47/33), MA 2/44, National Archives, Wellington.

6 Te Kanae MS, Graham translation, Auckland Public Library transcript, p 16.

7 Burns, *Te Rauparaha,* 284.

8 H T Kemp, *Revised Narrative of Incidents and Events in the early colonizing history of New Zealand,* Wilson and Horton, Auckland, 1901.

– i.e. brave men". Grey expressed to Rawiri "in felicitous language" his wish "to wipe out the memory of so sad an event, and in such a way as to make it acceptable to the feelings of both races". Rawiri Puaha "at once complied, leaving it entirely to His Excellency's discretion as to the best way of accomplishing the matter".

c. **Grey's report and evidence to the Smith-Nairn Commission:** Of course Grey was operating under instructions from the British government to ensure that the New Zealand Company settlers who had been allocated land at the Wairau and at Porirua would be put into possession. He does not appear to have explained that to Rawiri Puaha, and nor does his report to London say anything at all about the Wairau, utu, or the Queen's dead, all of which was obviously principally a negotiating ploy on his part. In his report to the Whig Colonial Secretary (Earl Grey) Governor Grey stressed, firstly, the need to eliminate Ngati Toa as a military threat, and, second, the need to place the New Zealand Company purchasers on the lands they had purportedly purchased.[9] In his report Grey also stressed the value of the Wairau district, and the fact that he had acquired the land at a bargain price: the block was "so large that, in reference to its quantity and value, the payment made for it cannot but be regarded as small".[10] This report, however, was meant for official consumption at the time. Much more revealing, and more interesting, is Grey's evidence given much later to the Smith-Nairn Commission on December 5 1879.[11] This gives quite a bit more information about the purchase, and largely comfirms – and amplifies – the Ngati Toa account and Kemp's narrative. Grey here explains that the purchase was "almost entirely a friendly transaction".[12] He mentions that along with Rawiri Puaha, Matene Te Whiwhi and Tamihana Te Rauparaha were also instrumental in the purchase. They were "anxious to make atonement for [the Wairau affair]" and "I regarded

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9 Grey to Earl Grey, 26 March 1847, Mackay vol 1, 202; original on CO 209/51, DB 1484-1505.

10 Ibid.

11 Evidence of Sir George Grey relating to the Wairau deed, MA 67/4, National Archives, Wellington (see transcription in Appendix 3 to my *Ngati Toa and the upper South Island,* pp 367-370)..

12 Ibid, 367.

it more as a giving up of the land for the good of both races".[13] Puaha "was one of the best men I have ever known in my life".[14] Grey notes the importance of missionary advisers, but while Kemp notes the role of the Wesleyans, Ironside and Watkin, Grey notes the influence of Bishop Selwyn and of Octavius Hadfield. The purchase had contained, as Grey noted, key safeguards as well: generous provision for reserves, and a right to repurchase the land within the block at a discount (both these points will be considered further as they are both important). Another interesting point in Grey's evidence is that in his recollection the purchase was intended as an extinguishment of not only Ngati Toa interests but also those of Ngati Raukawa and possibly others: "I made a large purchase from the Ngatitoa, Ngatiraukawa and other tribes in the Middle Island, including a large district".[15]

d. **Summary and analysis:** Clearly the stress placed on making "atonement" for the Wairau was a vital part of the discussions, mentioned by Ngati Toa, by Kemp and by Grey himself. Also, of course, there was the context of Te Rauparaha's capture – Rawiri Puaha was obviously worried about him – and Te Rangihaeata's exile. The sources do not appear to suggest that it was a simple matter of Grey threatening to keep Te Rauparaha in custody unless the Wairau and Porirua blocks were sold, but there was an obvious coercive context to the negotiations. Nor did Grey trouble to try to obtain Te Rangihaeata's or Te Rauparaha's agreement to either of the two deeds.

2.3 **The Wairau Reserve:** The provision for reserves in the Wairau deed was very substantial. Mackay calculated that the area of the reserve was 117,248 acres.

2.4 **Ngati Toa repurchase rights:** One key aspect of the 1847 Wairau deed, mentioned by Grey himself but not (as far as I am aware) in any other

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13 Ibid, 368.

14 Ibid.

15 Ibid, 368. This may seem implausible, but of course Matene Te Whiwhi and Tamihana Te Rauparaha were both leading chiefs of Ngati Raukawa in their own right. Ngati Raukawa had played an important role in the conquest of Te Tau Ihu of course.

source, is that Ngati Toa were given an option to repurchase land within the area sold at the amount of 10s. per acre. As a part of this "buy-back" scheme Ngati Toa would have been able to have some of the area purchased re-granted by means of a secure Crown-granted freehold.[16] Grey says that "I explained to them carefully that in selling the land they only relinquished it to the public, and that they retained the same right as the rest of the public did in the land".[17] However he thought that there was "an express arrangement" that Ngati Toa could re-purchase which had been reduced to writing. However on his return to New Zealand in 1861 the Ngati Toa chiefs went to see Grey and passed on some disturbing information:

> When I returned to New Zealand some of the natives came to see me and complained they had applied for portions of the land and were not allowed to purchase; and the reason distinctly given was that the Europeans in the neighbourhood did not wish to have natives near them….At that time I satisfied myself that the statement was perfectly true, and that they had not been allowed to buy land because of the objection I state, and I consider that a very grievous wrong had been inflicted on them. With regard to the Ngai Tahu purchase, I have no recollection of the boundaries of that block, except that I thought the purchase had been loosely made, and I objected.

2.5 **Boundaries:** The boundaries of the Wairau purchase were stated very vaguely. The coastal boundary ran from "Wairau" to "Kaiapoi" ("beginning at Wairau, running along to Kaiparatehau [sic] (Te Karaka) or Cape Campbell, running along to Kaikoura until you come to Kaiapoi"/"ko Wairau haere atu Kaparatehau, Te Karaka, haere rawa atu Kaikoura, Kaiapoi atu"). When Sir George Grey was asked by the Smith-Nairn commission in 1879 whether he thought that he was buying land "with certain defined limits" Grey's response was:

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16 There had been some experimentation with such buy-back schemes elsewhere. One, mentioned by Loveridge, was the Hua block in Taranaki in 1854: here the buy-back was apparently very successful: D M Loveridge, *The Origin of the Native Lands Acts and the Native Land Court in New Zealand,* unpublished report to the Crown law office, October 2000, 53-55; see also Ann Parsonson, "The Pursuit of Mana" in W H Oliver and B R Williams (eds), *The Oxford History of New Zealand,* Oxford University Press, Auckland, 1981. 140-167, at 153.

17 Grey evidence, MA 67/4, transcription in Boast, *Ngati Toa and the Northern Southern Island,* p 369.

> No. The impression on my mind was, that I purchased all that they had a right to.

And further:

> There were no regularly defined boundaries. They were laid down merely verbally.

2.6 **The Porirua deed:** The other transaction, or rather the other part of essentially the same transaction, was the Porirua deed of 1 April by which Ngati Toa alienated to the Crown an extensive area from Ohariu (Makara) in the north to Wainui (Paekakariki) in the north and bounded on its eastern side by "the line determined by Mr Commissioner Spain for the Port Nicholson block". Grey needed this area for two reasons, to place the Company purchases onto their Porirua sections, and in order to take control of the strategically important Porirua basin. There were reserves in this block as well, including the Aotea and Whitireia Blocks (the latter has, of course, a well-known legal history involving appeals to the Judicial Committee of the Privy Council).

3 Ngati Toa and the Te Waipounamu Deeds:

3.1 **McLean as Land Purchase Officer:** In 1848 the young Donald McLean scored his first big success when he sorted out complex problems relating to boundaries and reserves at Wanganui, and drew up a new deed executed at an elaborate ceremony executed in May.[18] At this time McLean was still an 'Inspector of Police' – this was how he signed his correspondence at this time – but following this he became increasingly entrusted with the difficult and arduous task of conducting Native land purchases. In the late 1840s and early 1850s McLean was actively engaged in land purchase activities on both sides of Cook Strait, including the Rangitikei purchase from Ngati Apa in 1849, the Pakawau purchase (1852) and the Te Waipounamu deeds (1853-1856).

3.2 **The Rangitikei purchase: Ngati Apa and Ngati Toa:** This purchase is interesting in showing the division of opinion on the extent and nature of Ngati Toa's rohe and on the softening of strict customary understandings due to missionary influence.The Rangitikei-Manawatu area was bitterly

contested between Ngati Apa, Muaupoko, Ngati Raukawa and Ngati Toa, the latter two groups acting in concert. Ngati Toa and Ngati Raukawa disputed Ngati Apa's rights, but were divided as to where Ngati Apa might be allowed to sell. Typically it was Te Rangihaeata who was most intransigent. He denied that Ngati Apa had the right to sell anything south of the Whangaehu, but was embarrassed to find that most of Ngati Raukawa and some of Ngati Toa were willing to allow Ngati Apa to sell land between the Whangaehu and Rangitikei rivers.[19] While the older generation of rangatira, Rauparaha and Te Rangihaeata, insisted on a strict application of custom, a younger group of missionary-influenced chiefs were willing to be a bit less uncompromising and agreed to the sale after a great deal of debate.[20] Representatives of the CMS mission also played an important role in persuading Ngati Toa to agree. Te Rangihaeata was very unhappy about it and tried up to the last minute to dissuade Ngati Apa from selling, but to no avail.[21] In 1852 Grey attempted to persuade an obviously still angry Te Rangihaeata to sell land at Waikanae to the Crown, but Te Rangihaeata would not do so. Indeed – according to the missionary Richard Taylor – he "flatly and rudely refused", telling Grey to his face that "you have had Porirua, Ahuriri, Wairarapa, Wanganui, and the whole of the Middle Island [the South Island] given up to you and still you are not contented. We are driven into a corner."[22] Attempts to paint Ngati Toa as some kind of stalking horse for the Crown to induce other tribes to sell land are in my view simply ludicrous. Te Rangihaeata was bitterly and grimly opposed.

3.3 **"It is not a question of money, but of chieftainship": Pakawau:** The Pakawau block is located in the top northwest corner of Te Wai Pounamu. The purchase was arranged by the Superintendent at Nelson (Richmond) and the interpreter at Nelson (Tinline). The main value of the block lay in its coal deposits. The coal seam, Richmond thought, was of "great extent".[23] Richmond conducted preliminary discussions with a local chief named Te Koihua, who lived locally at Pakawau, and who presumably was Ngati

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18 Luiten, *Whanganui ki Porirua,* 12-13.

19 McLean to Colonial Secretary, MS 32/3, ATL Wellington.

20 See evidence of Rawiri Te Whanui (Ngati Raukawa), Himatangi case, (1868) 1 C Otaki MB 231-2.

21 McLean to Principal Agent, NZ Co, Wellington, 12 April 1849, NZ Co 3/10, NA Wellington (copy in Luiten, *Whanganui ki Porirua,* Document Bank II, 377-80),

22 Richard Taylor, *Te Ika a Maui,*

23 Richmond to Colonial Secretary, 5 Jan 1852, NM 8/52/680 [DB 3130-33].

Rarua, but he may have belonged to the Kurahaupo tribes (W.A. Chambers, however, states that Te Koihua, or Te Kohua, was a "sole survivor of Te Rauparaha's invasion of the 1820s"[24]). On 11 December 1852 a number of Ngati Toa chiefs, including Rawiri Puaha, Matene Te Whiwhi, Hohepa Tamaihengia and Ropata Hurumutu wrote to Grey to express "our great concern about being encircled by Ngati Rarua".[25] My view is that this letter arose out of Ngati Toa concerns about the Pakawau deed, but it must be admitted that the circumstances are a little murky in that I am not sure that Te Kohua actually was Ngati Rarua.

Another complexity is that some of the chiefs who Rawiri Puaha was to later insist were entitled to receive the money were Ngati Rarua (Pukekohatu). At any rate Rawiri certainly insisted on Ngati Toa's rights to participate in the negotiations, and was advised by his old friend the Reverend Samuel Ironside, now a Methodist minister in Nelson. Ironside explained in a letter which must have been sent to Richmond that Rawiri had given him a list of names of people who were entitled to the money: "he has given the list of names…whom he wishes to have the money paid to, and they will take it and hand it over to Wiremu Te Kohua and his party".[26] Ironside explained that "it is not a question of money, but of chieftainship".[27] Rawiri gave the names of those who should receive the money as himself, Pukekohatu, Te Wirihana, Hemi Kepa Te Iti, Maka Tarapiko, Wiremu Katene and Tamati Marino. The contract was finalised by Richmond in May 1852. On May 26 he reported that that purchase had been completed "to the satisfaction of the Natives residing in the district as well as all others who we could learn had any interest in the land".[28] The deed was signed by a number of Ngati Toa chiefs including Hohepa Tamaihengia and Wiremu Te Kanae.

3.4 **The Ngati Toa Te Waipounamu Deed, 10 August 1853:** Grey played an important role in this transaction. The government wanted this area mainly in order to "throw open" lands for mining.[29] Shortly before he left Wellington on his way to take up his new position Ngati Toa and representatives of

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24 Chambers, *Samuel Ironside in New Zealand,* 203.
25 Biggs, "Two Letters".
26 Ironside (to Richmond?), 13 May 1852, SSD 1/5/108.
27 Ibid.
28 Richmond to Col.Sec, 21 May 1852, NM 8/52/680, National Archives, Wellington (DB 3147-49).
29 See report of Domett to Richmond, 12th August 1853, NP 5/1, DB 3376-84.

some other tribes assembled to meet him and also to farewell him. According to McLean:[30]

> In addition to the Ngati Toa chiefs, who are acknowledged by the Natives generally to have the principal claim to these districts, several other influential chiefs from the Ngati Rarua, Ngati Tama, Rangitane and Ngati Awa tribes were present, and took part with the Ngati Toa at several conferences heard with his Excellency Sir George Grey respecting the sale of the Country.

The Crown had already extorted the Wairau block from Ngati Toa in 1847. What was left to them, apart from the iwi's general raupatu interest, was the very substantial Wairau reserve and their lands in Te Hoiere (Pelorus Sound). Ngati Toa did not want to part with the latter. This, says McLean, was "a district they had great reluctance in ceding".[31] In fact the Government had considerable difficulty in getting its way. Grey reported to Newcastle that the area was one that the tribes had till then "declined to sell".[32] However "after considering the subject for two or three days" they then "gave way", apparently – Grey claims – "from a desire to meet my views". McLean also speaks of "repeated meetings and discussions". Exactly how Grey and McLean managed to talk Ngati Toa into the alienation of the region, which they certainly were reluctant to part with, is not at all clear. As an inducement Grey offered the Ngati Toa chiefs an unusual item of compensation: fifteen of the principal chiefs were to be awarded scrip worth L50 which they could use to select freehold grants from Crown lands anywhere in the Colony. In addition Grey agreed, as McLean put it, that 26 of the "Native Claimants were also to have Two hundred acres each, out of the lands thus ceded…in such places at the Governor might set apart for this purpose". The final details of the deed were left to McLean.

3.5 **Ngati Toa versions:** The Te Kanae manuscript contains an account of this transaction which is somewhat different from official sources. According to

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30 See McLean's report of 11 August 1853, copy on MA 13/17, National Archives, Wellington. I believe it has been suggested that McLean was lying about the presence of other tribes, which seems to be to be very difficult to accept – why would McLean lie about this? My impression of McLean was that he was a skilled negotiator who had a good grasp of Maori politics, but I find it difficult to accept that he would tell lies in official correspondence. Such an assertion comes uncomfortably close to disbelieving a source for no better reason than it fails to fit with a preconceived interpretation.

31 McLean, ibid.

this text, in 1852 "the wife of Ropata Hurumutu sinned with a certain man of Te Hoiere". Ropata was "grieved" and "announced that that land at Te Hoiere should be sold." The chiefs of Ngati Toa agreed, and "L2000 was accepted from the Commissioner, Makarini (McLean) in that year 1852". Then:

> Te Wahapiro bethought him of the land where died Te Puoho, at Tuturau. He considered that owing to the desire of Sir George Grey when he asked for Wairau for payment for his dead. So he spoke in the presence of Ngati-Toa and the chiefs approved of that sale and the boundaries of the land sold. Tuturau was the boundary to the South, Kahurangi the boundary on the East beyond Whanganui. The money agreed upon for that area was L5000.

This source seems to indicate, however, that there was a further round of negotiations in 1853.

> In 1853 the eastern part of the Island of Waipounamu was settled for with the Queen, by the hand of McLean and the chiefs of Ngati-Toa-Rangatira. The total sum of money agreed upon by Commissioner McLean was L7000. The money paid out to Ngati Toa was L3000. The money paid out to Ngati Rarua was L1000. L3000 was unaccounted for owing to the adept doings of Te Makarini.

This appears to suggest that Ngati Toa were under the impression that they were to be paid L7000 in total, L2000 for Te Hoiere, and L5000 for the balance of their interests. Of this sum, they actually received L3000, and Ngati Rarua – there is no suggestion here that the latter were not entitled to it – which left L3000 unaccounted for. McLean then used the money to buy out the interests of others:

> In 1853 McLean bought some areas at Whakatu. That money L3000 was spent in connection with those areas, being money which had been duly arranged for those other lands in respect of which the boundaries and the price had been determined. Such were the methods of the servants of the Government as carried out in New Zealand.

3.6 **Te Waipounamu deed reserves**: As I pointed out in my evidence in the 'generic' issues hearing, I believe that a vitally important question is why the

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[32] Grey to Newcastle, 13 August 1853, CO 209/117, DB 1349-57.

very substantial reserves made in the 1847 Wairau deed were more or less obliterated by the later Waipounamu deeds, in which the provision for reserves appears to be grossly inadequate. Or rather, *no* provision was made for reserves; this was left for the surveyors to mark out on the ground. The deed states merely:[33]

> Now, certain places are agreed to by the Queen of England to be reserved for our relations, residing on the said land, which has been sold by us, but the Governor of New Zealand reserves to himself the right of deciding on the extent and position of the lands to be so reserved, and certain other portions of land have also been agreed upon by the Governor of New Zealand to be granted to some of our chiefs.

There was a general reservation of cultivations and areas required for subsistence, and that Rangitoto (D'Urville) was wholly excluded from the purchase. According to McLean:[34]

> These reservations consisted of the cultivations and lands required for the susbsistence of the Natives resident in the District, it being always distinctly understood that Rangitoto or D'Urville Island was excepted from the sale.

There is a memorandum in the printed correspondence in Mackay's *Compendium* from McLean which gives some indication of the reserves to be made in the Wairau area:[35]

> The fishing reserves for the Natives of the Wairau District is bounded to the North by Te Akiroa on to the range above the bay, and descends to a red cliff called Te Karaka where there is a small stream of water. The boundary is to run back so as to include some land behind this reserve until it reaches the Pukaka stream, where they desire to fish eels and plant potatoes. Te Kana Pukekohatu and Wiremu Nera [sic] Te Kanae are to have 50 acres each at Wairau. Pukekohatu's land has been laid off by Mr Budge, who was instructed also to lay off Te Kanae's.

3.7 **Exclusions from the Deed:** As well as the two 50-acre sections for Te Kana Pukekohatu and Wiremu Neera te Kanae a further 2939 acres were ultimately reserved in the Wairau district.[36] There were a number of reservations or exclusions from the 1853 deed (all of which have to be identified from subsequent correspondence). These were (a) Rangitoto in its entirety; (b) "cultivations and lands required for the subsistence of the Natives" (under which heading the fishing and other reserves at the Wairau

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33 Using English translation in Mackay, *Compendium,* vol 1, 308.

34 McLean to Gore Browne, 7 April 1856, CO 209/135, DB 1557-85.

35 Memorandum of instructions from Donald McLean, 24 April 1856, in Mackay, *Compendium,* vol 1, 306

36 A Mackay to Under-Secretary, Native Department, 1 October 1873, MA 13/17,

were later surveyed off); (c) scrip awards for 15 named individuals of Ngati Toa; (d) 200-acre awards to 26 named individuals of Ngati Toa to be selected "out of the land thus ceded by them".

3.8 **Brunner and Jenkins Survey:** Difficulties had quickly become apparent when Brunner and Jenkins began surveying out the reserves within the Te Waipounamu block in November 1854 (i.e before the remaining Waipounamu deeds were drawn up). The survey team had been given a scale of some kind to assist in the allocation of the reserves, the details of which are not clear. It was however based on population numbers, so must have been on the basis of an allocation of a fixed number of acres per head. The survey encountered a great deal of local opposition, so much so (as McLean puts it) that "they were unable (except in a few instances) to effect any permanent adjustment of the reserves and boundaries".[37] Brunner had found that he was able to survey off the reserves in Pelorus Sound without much difficulty, but it was a different matter at the Wairau.[38] He learned from his colleague Jenkins that “Rawiri”, (Rawiri Puaha, presumably) had told the locals not to part with their land in any circumstances. The fact that the survey could not be completed seems to have convinced McLean that separate transactions would have to be made with the people in residence in the Upper South Island. But this was not the only problem. One of the outcomes of the Te Waipounamu transactions was to dramatically contract the areas of reserve at the Wairau; and there was now some significant opposition to that once the implications had become clear.

3.9 **Rawiri Puaha changes his mind:** Subsequently there was some kind of resolution of the survey issue at the Wairau. Rawiri Puaha had by this time apparently been persuaded by McLean to allow the survey of the Wairau reserves to proceed, but this had not quite resolved the matter. Rawiri Puaha had had some reservations about the implications of the Te Waipounamu deed at the Wairau, but evidently by this time he had been persuaded to change his mind. It is unclear why, however. As his behaviour over the original Wairau deed indicates, Rawiri was susceptible to arguments that it was important to eliminate sources of antagonism between Maori and

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National Archives, Wellington.

37 McLean to Gore Browne, 7 April 1856, CO 209/135, DB 1557-85, at 1565.

38 Thomas Brunner to Commissioner of Crown Lands, Nelson, 11 January 1855, enclosure in Gore-Browne to Labouchere, CO 209/135, DB 1586-95.

Pakeha; and there certainly had been friction between incoming Pakeha runholders and Maori people in the Wairau area. Possibly McLean had emphasised this. Grey had also earlier held Rawiri Puaha, Tamihana Te Rauparaha and Matene Te Whiwhi personally responsible for the 1847 deed and had threatened that if Maori continued to trespass on to settler land the government would cease making payments, which may have impressed on the chiefs the importance of clarifying the boundaries, even if this meant having to settle for a smaller area.

3.10 **Wiremu Te Kanae:** Rawiri's change of mind did not however end local Ngati Toa opposition. Wiremu Te Kanae of Ngati Toa had then again sent the surveyors away. Exactly when that occurred is unclear, but presumably this happened in late 1854 or early 1855. By February 1855, however, Wiremu Te Kanae had agreed that Brunner and Jenkins could now return to complete the survey:[39] In January 1856 McLean returned to the South Island and went to Cloudy Bay accompanied by the leading chiefs of Ngati Toa, including Rawiri Puaha, Hohepa Tamaihengia, Matene Te Whiwhi and Tamihana Te Rauparaha.[40] McLean described in his report the reserves surveyed off at the Wairau by the official survey party in December 1855-January 1856.

3.11 **Summary of Reserve areas:** At this stage the Wairau Reserves comprised:

a. An estimated 770 acres[41] on the left (i.e. north) bank of the river;

b. an area of about 200 acres at White's Bay;

c. 50 acres belonging to Ngati Toa chief Wiremu Nera Te Kanae;

d. 50 acres belonging to Te Kana Pukekohatu.

3.12 **Contraction of the Reserve areas:** The Te Waipounamu deeds were intended by Grey and McLean to extinguish such native title as still existed in the northern South Island. Henceforth Maori were to be confined to their reserves, and thus the main question which has to be addressed is the

39 Wiremu Te Kanae to Richmond, 24 Feb 1855, MA 13/51, WNA.

40 McLean to Gore Browne, 7 April 1856, CO 209/135, DB 1557-85, at 1572.

41 Or 670 (the figures words and numbers in the original differ). But both figures were only estimates. These reserves were not surveyed until circa 1892 and the reserved area turned out to be somewhat larger; the interests of the individual grantees were

adequacy of the reserves that were set aside. The Waipounamu deeds did not only extinguish native title over previously unceded areas but also had a dramatic impact on existing reserves. This is especially true at the Wairau, where the reserves were contracted from a substantial area which may have been over more than 100,000 acres down to barely 1,000 acres: a 99% reduction, or possibly more (supposing Mackay's calculations to be correct). It is not very clear why this was agreed to, or even if it was. Rawiri Puaha seems to have had his doubts, but in the end agreed to the smaller reserve boundaries. Wiremu Te Kanae had also had his doubts as well, and had refused to allow the survey to proceed, but then following a letter from McLean and Rawiri Puaha decided to drop his opposition. Perhaps this was in order to preserve good relations with the settlers, perhaps it was due to declining populations, or perhaps it is to be explained by the scrip awards and other inducements.

3.13 **Later history of the Reserve area:** The 200-acre awards to 26 Ngati Toa individuals did (at least in theory) set aside a further 5200 acres in the South Island for Ngati Toa. Whether the compensation that was paid represented any kind of fair consideration for the huge contraction of the reserve areas at the Wairau may be doubted all the same. The mixed Ngati Toa-Rangitane-Ngati Rarua community at the Wairau now found itself confined to about 1000 acres of land. It is this area which forms the origin of such Maori freehold land as now exists in the Wairau area. This is a very small area and cannot have served as a sufficient land base for such Maori as still lived in the region. As well as being small the reserved land at the Wairau was of mediocre quality. In 1889 Judge Mackay conducted an investigation of the reserve area and divided it between Ngati Toa, Rangitane and Ngati Rarua on the basis of residence. The larger part of the reserve went to Ngati Rarua (315 acres), the next to Rangitane (270 acres) and the smallest portion to Ngati Toa (183 acres). In his directions to the surveyors Judge Mackay noted "the uneven character of the soil which renders a large portion of the Reserve unsuitable for cultivation".[42] The land at the Wairau was also very susceptible to flooding. There were particularly severe floods in 1923 and 1939.

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then adjusted pro rata.

42 Mackay, memo of 5 July 1892, MA W 2218 Box 21 [Miscellaneous South Island Papers], Wairau Court Correspondence, National Archives, Wellington (not in Document Bank).

4 The Ngati Toa Trust Issue:

4.1 **Introduction:**There is a large file at National Archives (MA 13/17) which deals with the Ngati Toa trust issue. This relates to the very protracted aftermath of the agreement made by Grey in 1853 to grant 200 acres to each of the 26 individuals of Ngati Toa. By 1868 nothing had been done to implement this arrangement. In that year Alexander Mackay, then Native Commissioner at Nelson, wrote to McLean, by this time Member for Napier and Provincial Superintendent of Hawke's Bay, enquiring as to what had happened. Mackay was concerned that there was a rapidly-diminishing supply of Crown land available, testimony in its own right as to how rapidly the Nelson and Marlborough provincial governments had granted lands to settlers.[43] McLean, who had his hands full with Pai Marire and Te Kooti in Hawke's Bay, did not respond.

4.2 **The 'Hole in the Middle':** In 1873 the issue of the extinguishment of Native title in the Northern South Island was placed into sharp focus by the "hole in the middle" claim put forward by Ngati Rarua and other groups. The argument was put on the basis that when the land was first sold to the New Zealand Company "they pointed out the land as that along the sea coast, and in the second sale to the Government such lands as were situated along the sea coast were again pointed out as the lands included in the sale".[44] The tribes making this claim, which has affinities with a similar argument put forward by Ngai Tahu, raised it in the first place with McLean, now Native Minister in the Fox-Vogel government. The government in turn commissioned a long report from Mackay, who filed a very detailed memorandum carefully going through all of the Te Waipounamu purchases on 1 October 1873. His report was accompanied by a comprehensive map which showed that, at least to his satisfaction and the government's, the "hole in the middle" argument was without foundation.

4.3 **Resolution of the Ngati Toa Trust issue:** The hole in the middle issue seems to have led to a renewed interest on the part of the government in finally settling such outstanding issues as still remained regarding the extinguishment of native title in Te Tau Ihu. By 1875 there were no suitable

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[43] Mackay to McLean, 28 August 1868, MA 13/17, National Archives Wellington.

areas left where Ngati Toa could have their land. In 1878 and 1879 the Ngati Toa wrote to the government indicating that they had decided to accept a monetary settlement in lieu of the land. By 1879 there were only seven of the original 26 grantees still alive. There were further delays: in October 1879 Ngai Tahu filed a petition with the government asking that the matter of whether Ngai Tahu was entitled to the money be investigated.[45]

The Native Affairs Committee decided, however, that Ngai Tahu could have no possible claim to these monies: "the rights of the Ngati Toa tribe to the lands in question have been recognised for over a quarter of a century". An inquiry into who was entitled to receive the money on behalf of the original grantees was finally established in October 1880. The Commissioners were Thomas Heaphy and Alexander Mackay. Mackay prepared a list of the original 26 grantees, including the names of their descendants in the event of their having died, and the relevant places of residence. The five still left alive (Nopera Te Ngiha, Wi te Kanae, Tungia, and Matene Te Whiwhi) were all living at Porirua at this time, as were the descendants of most of others. Some of those entitled lived at Wakapuaka, Croixelles, and D'Urville. The sum settled on was L5200, but then Ngati Toa was dismayed to find that the government decided to pay the lump sum to the Public Trustee, and the various individuals entitled be paid interest on an individual basis. This was not at all acceptable to Ngati Toa who clearly greatly resented this paternalistic interference in their affairs

4.4 **Ngati Toa petition, 1881:** On 14 January 1881 representatives of Ngati Toa petitioned the Governor-General (Sir Arthur Gordon) requesting that the compensation be paid out in full and in cash. The petition was signed by Ngahuka Tungia, Wi Parata, Hohepa Horomona, Raiha Puaha, Mere Te Rau, He Te Rei and others.[46] Nopera Te Ngiha and Wi Parata went to see the Native Minister (Bryce) about it. Nopera Te Ngiha pointed out that Ngati Toa had had to wait for nearly 40 years for the government to keep to its promise and that the iwi was now almost landless: "it was very hard that

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44 Pirimona Matenga Te Aupouri and others to McLean, 29 August 1873, MA 13/17. The groups making this claim were Ngati Rarua, Ngati Tama, Ngati Awa, and "Mitiwai".

45 Petition from Ngai Tahu of Kaiapoi, 20 October 1879, MA 13/17, National Archives, Wellington.

46 Petition by Ngati Toa to the Governor-General, 14 January 1881, MA 13/17, National Archives, Wellington.

having lost their land, they should lose the benefit of their land also".[47] He added:

> If the money were paid out as the Hon. Native Minister suggested, certain individuals only would get the benefit of it. But if it was paid as the Maoris wanted, it would be divided out amongst them. Otherwise the tribal feeling would be broken up, and the money would be paid to individuals.

Bryce however felt that his hands were tied, and Ngati Toa's request was declined.

5 Ngati Toa and the Wellington and Nelson Tenths

5.1 **Introduction:** The Wellington and Nelson Tenths case both arose under the same procedure, that is by means of reference by the Public Trustee under s 16 of the Native Reserves Act. The Wellington Tenths case was heard in 1888 and the Nelson Tenths case in 1892. Both were heard by Judge Mackay.

5.2 **Wellington Tenths:** This is covered in my report on *Ngati Toa and the Colonial State,* pp 115-116.

5.3 **The Nelson Tenths case:** This case is the counterpart to the Court's investigation of the Wellington Tenths lands, heard under the same procedure at Wellington in 1888, with similar results for Ngati Toa in both cases. This is covered in my report on *Ngati Toa and the Upper South Island,* pp 285-294. It is important to note that Ngati Toa did not present any evidence in this case in its own right, and the case therefore lacks a distinctive 'Ngati Toa voice'. This should be kept in mind when considering evidence presented by other iwi claimants from the Nelson Tenths case.

The conductor for the Koata-Toa case was Hohepa Horomona, who was Ngati Toa himself and lived at Porirua. He asked for an adjournment "to allow his party to arrange their case" but this was presumably refused: certainly the Court simply went on with the hearing. Other parties to the case seem to have been in similar difficulties. As the hearing was at Nelson and was initiated by a notice from the Public Trustee, Ngati Toa may not have heard bout the case until it was too late.

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47 The minutes of the discussions are on MA 13/17.

Hohepa Horomona seems to have done his best by using Ihaka Tekateka's evidence to support a joint claim by Ngati Toa and Ngati Koata, and by cross-examining witnesses at various points, however he certainly did not have the opportunity to bring a comprehensive Ngati Toa case before the Court.

Judge Mackay found that the Ngati Toa had rights only in Marlborough, not Nelson (the Toa localities according to him were Cloudy Bay, the Wairau and Pelorus Sound). Mackay found that:

> In the opinion of the Court the Members [7] of the hapus who took place in the conquest under Te Rauparaha who did not occupy the land within the Nelson settlement up to the year 1840 lost their right to it as no rights of ownership were exercised by such persons as would confer a proprietary right to the soil, it being a recognised principle of Native custom that conquest along without occupation confers no right.

Regardless of whether MacKay is right regarding the extent of Ngati Toa settlement west of Nelson (which seems incorrect based on the documents reviewed), Mackay did not have any justification for basing the claim to the Nelson Tenths on *occupation* at all. The Nelson Tenths were not in fact established to reflect occupation (areas in actual occupation were separately excluded from the grant). They were supposed to be in the nature of a general endowment for all Maori with interests in the region. This *had* to include Ngati Toa, as one of the principal reasons for Spain's allowing the grant in the first place was on the basis of the purchase from the Ngati Toa chiefs.

In addition, the Tenths were supposedly part of the compensation for the extinguishment of Maori title *as governed by Maori customary law as at 1840.* If the beneficial interests in the Tenths had been fixed at 1840 or soon afterwards when Ngati Toa was still a powerful presence with the authority of the chiefs recognised over a wide region, it is impossible to imagine the same result.

5.4 **Native Land Court cases at Wairau:** The Wairau reserve area was divided between Ngati Toa, Ngati Rarua and Rangitane by Mackay in 1889 on the basis of residence. There were a sequence of partition and succession cases relating to the area in the 19th and 20th centuries, covered in *Ngati Toa and*

the Upper South South Island pp 294-9. Ngati Toa, along with Rarua and Rangitane maintained a strong presence continued presence and interest in these cases.