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CHAPTER 13

MINORITY OPINION

13.1 General Finding

I agree with the claim that the Crown breached the principles of the Treaty of Waitangi, as I understand them, in relation to the taking of land for public works, and also a native reserve at Helensville (secs 8.2.6; 8.4.5). Further, I support the report's recommendation at section 11.2.7 that the Crown should move to remedy harm caused to southern Kaipara Māori, notwithstanding the fact that I believe that the extent of that harm was less than is suggested in this report. I support the Tribunal's recommendations at section 5.8.4 rejecting the claims of Wai 619 and 620. And I support the Tribunal's finding in: section 5.9.4 in relation to the Mangawhai lands; section 8.3.6 in relation to the Kaipara railway; section 11.7.6 regarding Te Kawerau a Maki; and section 12.3.3 regarding constitutional issues. I am unable to agree with the report's finding on the Te Kopuru lands at section 4.4.7, or with the finding regarding the Elmsley–Walton grants at section 4.6.7.

There are several points in the report where the Tribunal in my view failed adequately to take into account some of the evidence presented to us. The report does not grapple adequately with the overall historical background to these claims. While the Crown failed Māori in several respects, many Māori failed their own descendants with actions they took during the nineteenth century.

13.2 Unique Features of the Kaipara Case

The Kaipara case is unlike any other that I have been associated with for several reasons. The historical background of the Kaipara area is unusual:

- The landholdings of Māori in the Kaipara area in 1840 were probably greater than were enjoyed by Māori anywhere else except in the South Island. Because of the intertribal wars in the early years of the nineteenth century, there were relatively few Māori (between 700 and 800) left in an area variously estimated to cover between 750,000 and one million acres of land. At the time of the first European settlement, Māori landholdings averaged 1250 acres for every man, woman, and child.

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- The large open spaces were a problematic asset. Ever since Te Ika ā Ranganui in 1825, another outbreak of violence between Ngāti Whātua and Ngā Puhi lurked as a possibility, and many Māori shifted south and east out of fear. It is clear that some parts on the eastern side of the claim area were largely deserted for many years after 1825. Ngāti Whātua invited Governor Hobson to establish his capital in Auckland in the hope that a settler presence in the wider area would contribute to their greater security. It quickly became clear that there were other advantages from a European presence. As a result of their first sales to the Crown, the city of Auckland mushroomed on the northern portion of the isthmus, creating trading opportunities for Māori. Many Ngāti Whātua appear to have gone to Orakei, where market gardening to supply the town thrived into the late 1860s. Evidence was provided that many of them made a living from this trade. During this period, they inclined towards accepting approaches from settlers desirous of buying their largely abandoned western lands.
- By the early 1860s, most Māori chiefs appear to have understood what was at stake in the European concept of 'sale' and to have made a conscious choice to sell land deemed surplus to requirements. Enough evidence was supplied to us to show that settlers paid money to Māori willing to sell. Māori in turn were active in assisting the Native Land Court after 1865 with the process of establishing their rights to sell. Much intermarriage between the races took place. Some Māori appear to have used the proceeds of sales to help them meld into settler society. Everywhere in New Zealand Māori populations declined after 1840 as disease decimated numbers. It is often overlooked that others intermarried to the point where the law as it then stood meant that their descendants could no longer be classified as Māori. The 'integration' process seems to have been particularly rapid in and around Auckland. By 1900, the number of people still legally deemed to be Māori within our claimant area appears to have been no more than 270.

Understanding these points is essential to appreciating the fate of Kaipara Māori in this case.

13.3 Consequences of these Realities

Claimant groups experienced considerable difficulty mounting credible arguments that the Crown was responsible for the steady erosion in the amount of land retained in Māori hands. Claimant submissions cited a warning from the Governor to chiefs in or around 1844 that land was not an inexhaustible possession and that Māori needed to be mindful of their possible future needs. However, such was the surplus land in Kaipara Māori's hands that they continued to sell. To cover for this historical reality, some claimants mounted an argument that something akin to a 'contract' existed between the Crown and Ngāti Whātua whereby

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Māori would sell in return for the Crown caring for all their needs – an argument that at times sounded like some form of permanent welfare, albeit in an era when the concept was unknown. The Tribunal rightly dismissed this claim for want of supporting evidence.

13.4 Crown Action Affecting this Case

Without waiting for any Tribunal findings, the Crown suddenly announced in early 2000 that it was prepared to negotiate directly with the northern section of the Kaipara claimants known as Te Uri o Hau. The Crown asserted that it had been 'historically proven' that claimants had been adversely affected by many Crown actions in the Kaipara area. No such thing had been 'proven', yet the Crown proceeded to settle with Te Uri o Hau and passed the Te Uri o Hau Settlement Act 2002 containing many acknowledgements that were based on no more than untested assertions. The Kaipara Tribunal found itself presented therefore with a fait accompli covering the north-west corner of the claimant area. It is entirely possible that, had the Tribunal been given time to weigh the claimant arguments before the Act was passed, it might well have been less sweeping with its findings against the Crown than was the legislation. In the report to which this minority finding is attached, doubts are expressed about any 'alliance' between Kaipara Māori and the Crown, although such an acknowledgement appears to underlie section 8 of the 2002 Act. Legislating history will always be a murky business.

In my opinion, the procedure adopted by the Crown in this instance bordered on irresponsibility. Tribunal members were left with no option but to decide that in fairness they must ensure that southern Kaipara Māori were treated with the same level of generosity as Te Uri o Hau. Careful readers of this report will notice that its findings against the Crown are less extravagantly worded than the Crown's own findings against itself in the 2002 Act.

In particular, in section 8(d), (e), and (f) of the Te Uri o Hau Claims Settlement Act 2002, the Crown accepted responsibility for 'failures by the Crown' that were not proven. For instance, in section 8(d), the Crown appears to accept the blame for the failure to set aside adequate reserves of land for Māori and to protect those reserves from alienation no matter what opinions Māori might have expressed at the time. This is a sweeping finding that appears to exclude Māori from any responsibility for their ultimate landlessness. It is a judgement that fails to take into account the evidence supplied to us that some Māori stressed their Treaty right to sell their land as early as the 1850s. Moreover, in section 8(e) of the Act, the Crown appears to hold to the dubious notion that it would have been possible for it in perpetuity to have prevented individual Māori from gaining title to their share of their lands, and then to sell. How this would have sat with article 3 of the Treaty, which guaranteed Māori 'all the Rights and Privileges of British Subjects', is nowhere explained by

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the Crown. Nor is there an explanation of the extraordinarily heavy-handed paternalism implicit in preventing Māori from engaging in the free sale of their surplus assets. Having spent several years listening to claimant evidence, I formed the impression that Kaipara Māori were only occasionally passive victims of Crown actions, and that the inferences that can reasonably be drawn from section 8 of the 2002 Act are unduly patronising of Māori. As a result, I am unconvinced by the Tribunal's finding at section 8.6 regarding the operations of the Native Land Court.

13.5 Conclusion

While this report is commendably less censorious of the actions of the Crown than the Te Uri o Hau Claims Settlement Act 2002, it contains assertions in chapter 11 that go beyond what I believe to be a reasonable reading of the history of Kaipara Māori. The Crown did warn Kaipara Māori about the undesirability of treating their lands like an inexhaustible bank account. Those warnings should have been much more frequent than they were. However, whether such warnings would have deterred chiefs like Te Hemara Tauhia, who readily disposed of nearly every piece of land to which he could establish title, is another matter altogether. Article 2 of the Treaty reserved rights to chiefs in relation to their lands, and the Crown could have been in default of its obligations had it prevented chiefs practising what Māori custom acknowledged was their right: to dispose of land in the name of their hapu or iwi.

For some reason, neither the claimants nor this report fastened sufficiently on the key role played by chiefs in the alienation of Māori land. In my view, the actions of chiefs contributed ultimately to the collapse of their status, and, more than any other factor, that gradual occurrence contributed to the break-up of traditional Māori society and to a feeling of helplessness experienced by some Kaipara Māori by the early twentieth century. I am unconvinced, therefore, by the Tribunal's fourth finding at section 6.7.4 regarding Crown purchases in general.

Neither the claimants nor the Tribunal examined adequately the extent to which many Kaipara Māori succeeded in 'integrating' into Auckland's settler society. I formed the distinct impression that for every Māori who 'lost' land in Kaipara after 1840 there was at least one other who benefited from the proceeds of sales, and who used the money to integrate into the world of settler culture that was developing in their midst.

Notwithstanding my reservations about the depiction of the Crown's role in this case, and my feeling that there are inadequacies in the report as it is here tabled, I favour a settlement on a pro-rata basis that would not disadvantage Māori in southern Kaipara in comparison with Te Uri o Hau.

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Dated at Wellington this 9th day of January 2006

Michael Bassett, member

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