

History and Historians before the Waitangi Tribunal

SOME REFLECTIONS ON THE NGAI TAHU CLAIM

'Unless memories are edited by wisdom, it would be almost better to forget.'¹

THE 1985 amendment to the Treaty of Waitangi Act, extending the jurisdiction of the Waitangi Tribunal to hear claims arising from actions by the Crown since 1840, has been considered by many (especially Maori claimants) to be long overdue. It has been considered by others (probably the majority of Pakeha New Zealanders) to be downright careless, in that it opened to judicial scrutiny most of New Zealand's colonial history in a community ill-prepared to handle the possible consequences. There can be no doubt about the seriousness of the process into which professional historians, among others, have plunged, perhaps with overweening confidence. It therefore seems appropriate, after the two-year-long Ngai Tahu claim, to reflect on the uses and perceptions of history in that claim, and the role of professional historians in the Tribunal proceedings. This paper is offered only as a beginning in that process of reflection.

The scope of the Ngai Tahu claim is vast, embracing the 'nine tall trees', which are claims arising from the nine major land purchases in the South Island, south of the Nelson-Wairua area, and numerous 'undergrowth' claims relating mostly to the whittling away of reserves since the major purchases. Paul Temm, counsel for the claimants, has suggested that it was the Crown's policy of corporatization, or transfer to private title of Crown assets, including land, under the State-Owned Enterprises Bill of 1986, which created the urgent necessity to bring all their claims under review.² This action no doubt contributed, but the ambit of the claim was already being shaped by Chief Judge Edward Durie's decision to make manageable the eruption of claims by aggregating them, by and large, on a tribal basis.

The Ngai Tahu have employed professional historians, people from university

1 Winifred Holtby on South Africa and Europe in the 1920s. Cited in Vera Brittain, *Testament of Friendship*, London, 1981, p.220. The following essay is an edited text of a paper presented in the History Department, University of Auckland, 5 October 1989. Some of the commentaries made at the time are appended to this text.

2 'Closing address by Counsel for the Ngai Tahu claimants', 14 August 1989, Claim Wai 27, Document W1, p.2. This and other documents in the Ngai Tahu claim (Wai 27) are held in the offices of the Waitangi Tribunal, Tribunals Division, Department of Justice, Wellington. Copies are also held by the author.

posts, to prepare and present their claims; the Crown has employed them to assess the claims and develop its response; the Tribunal has also employed them to help assess the mass of evidence submitted. This amounts to three metres on my shelves, in the proportion of about one-third argument and analysis and two-thirds photocopy of primary manuscript and printed sources (exclusive of an equal quantity of maps, charts, and non-historical data). The scale and intricacy of the material are such that people without research experience, and not accustomed to reading vast amounts of documents and quickly assessing the meaning and significance of them all, would find the task intimidating, if not overwhelming. Consequently considerable responsibility is being thrown on the professional historians to research and develop, from the primary record, the arguments and the rebuttals presented to the Tribunal, although it rests with counsel for the various parties to highlight aspects of these arguments and relate them to the terms of the Treaty. The Tribunal members themselves, of course, retain the full responsibility for evaluating what the lawyers and the expert witnesses, including their own expert witnesses, have adduced.

The historical profession might reasonably take stock of what the contracted historians are doing and how they are doing it. With varying degrees of interest, academic historians are obliged, some of the time, to reflect on the nature of their discipline, their methods of historical research, the theoretical standpoints of their writings, and the relationship of these activities to explanation or interpretation in the social sciences and humanities generally. But what do they do when they move from their studies and lecture rooms and apply their discipline within one of the important arenas of state authority, a tribunal of the Department of Justice? What theories and methods of their discipline do they bring to bear, and how do these relate to the contributions of other participants in the process? Given that the reassessment of New Zealand's colonial past is a matter of great and immediate importance to Maori claimants, to others affected or likely to be affected by the claims, and to the nation at large, historians have cause to be even more reflective about the nature of their activities in the Waitangi Tribunal. What, in that context, becomes of our concern with the problems of objectivity or relativism, of the controversy about whether history is only opinion (more or less well informed), or whether it aspires to greater certainty? What can the historical profession say about the relationship between the lived past of, say, the 1840s, the various memories of that decade among Maori and Pakeha New Zealanders, and our current reappraisals of those events?

To start with a fairly simple illustration: in one of the hearings in Christchurch a Tribunal member, Bishop Manu Bennett, mentioned during a tea-break that many Ngai Tahu people held a belief that the British had, so to speak, 'softened up' Ngai Tahu for the subsequent land purchases by providing a warship to bring Te Rauparaha and Ngati Toa down to make their terribly destructive raids at Akaroa and Kaiapoi in the 1830s. During the formal presentation of a report on the historical evidence which I was commissioned to compile, Bishop Bennett sought to get the matter on record by asking: 'Is it a fact that the British Navy brought Rauparaha and his Ngatitua warriors down in a warship to attack Ngai Tahu?' I replied in equally positivist terms, 'No, it is not', explaining that Te

Rauparaha was brought down by Captain Stewart in the brig *Elizabeth* in exchange for a cargo of flax, and that this was a well-documented deal because the Crown, far from approving the act, tried to prosecute Stewart in Sydney. The difficulty in asserting the authority of the New South Wales courts over acts committed in the New Zealand islands was one of the contributing factors to the British decision to seek sovereignty over them.³ Here then was a straightforward positivist question, a straightforward positivist answer, and plenty of documentary evidence to support it.

But in the mass of claims we speedily get beyond such simple questions and answers. The claimants through their counsel, Paul Temm, in their final submission, asked of the Tribunal, 'What we want is a finding by you of what the facts are on each of the various matters raised',⁴ leaving aside recommendations for remedy and other matters for the time being. The Crown, among its statements, used similar expressions. Mr Hearne, their QC, referred to 'placing matters in a factual matrix'.⁵ Shonagh Kenderdine, counsel for the Crown, stated that 'proof of factual matters before the Tribunal must be to the normal civil standard, that is on the balance of probability', with an onus on the claimants to prove a breach of Treaty principles by the Crown.⁶ As a matter of law she may well be right; one of the Tribunal's functions is to establish the standards of proof required. But when lawyers talk about matters of fact on one hand and matters of law on the other, that does not seem to sit very well with the way historians now tend to handle the concept of fact. Most of us would probably agree that the concept of fact is a very slippery one, with 'facts' not being strictly separable from interpretations. Yet there is the Te Rauparaha example; it was Stewart and the *Elizabeth*, not a British warship, that brought him south to attack Ngai Tahu. That many Ngai Tahu believe otherwise is a fact of another kind reflecting, in somewhat mythological language perhaps, their conviction that, whatever the details, the Crown bears overall responsibility for their nineteenth-century disasters.

The group with which I work, the Tribunal's research staff, tried in our historical report to come to grips with the questions of fact or evidence and interpretation by developing a series of principles by which we appraised the evidence.⁷ We suggested of course that there must be a critical assessment of evidence. All evidence is of worth, including the very rich accumulation of recorded oral evidence produced in the claim; all of it discloses something of the understandings of people who created the record at the time they created it. But no evidence is privileged in the sense that it is simply taken at face value; all is under scrutiny, and tested against other evidence, as far as possible, for corroboration or substantiation. It is hazardous to build an edifice of interpretation upon a single text. We further said that evidence created during, or close

3 Wai 27, Transcript of evidence, 13 June 1989.

4 Wai 27, Document W1, p.2.

5 Cited in 'Closing Address by Counsel for the Crown', Wai 27, Document XI, Vol. 1, pp.5-6.

6 *ibid.*, p.11.

7 They are cited in A. Ward et al., 'A Report on the Historical Evidence; the Ngai Tahu Claim, Wai 27', Document T1, pp.4-15.

to, the events concerned is generally more important than evidence created distantly from the events, although we recognized that fresh disclosures about the events can throw light on matters which might not have been clear to the participants at the time. We have said that it is often possible, with professional appraisal of the evidence, to show that parties to an event came away with different understandings of what took place, each set of beliefs being quite genuinely held. Indeed, this is a common aspect of human affairs. We therefore invoked a set of considerations that now commonly govern historical interpretation, namely that parties to an event are always acting within particular cultural contexts. They are necessarily shaped by their culture or sub-culture, affected by its assumptions and values at the time. We listed a number of the sorts of assumptions that prevailed in the Pakeha culture: for example, the assumption of cultural superiority, if not of racial superiority, and the assumption among many Europeans that the Maori were dying out, as most indigenous peoples affected by colonization were thought to be at the time. We noted, among prevailing Maori attitudes, an evident desire to engage with the new order, while maintaining selectivity and control as far as possible. We noted both peoples' concern for considerations of power, which included, in the case of the Maori, a persisting preoccupation with inter-tribal relations.

These are some of the more evident elements of the cultural contexts in which the evidence was created and in light of which it should be evaluated. We also said that, having offered a number of generalizations of a cultural kind, we wanted immediately to qualify them. Not only was New Zealand society changing during the course of nineteenth-century encounters, but it was also changing at different rates and different times according to multiple patterns that contact had created. We tend for convenience to talk of two sides, Maori and Pakeha; however, both were complex societies and cultures and were becoming increasingly more so. There never were just two viewpoints, Maori and Pakeha. Crown officials differed greatly from one another, as did officials from missionaries, and traders as distinct from settlers. John Tuhawaiki's experience and outlook were very different from that of the inhabitants of remote Arahura. So we come down to a precise search for who were saying what and when, and where they came from — in cultural as well as geographic terms — and when they said it. Neither culture was static, neither was entirely 'traditional' by the time the Crown purchases in the South Island were taking place. In seeking to engage with one another as they generally did, they sought to understand each other's terms and often believed they did so. There was some coming together, some hybridization, especially among the leaders of trade and commerce of both races. Likewise, officials and missionaries sought to understand and communicate, and often believed that they had.

But had they? For we have to deal also with the question of misunderstandings, or half-understandings, of concepts only apparently shared. These include the concept of 'owner'. What is involved in being an 'owner' in the European cultural context? What in the Maori/Polynesian context? Then there are concepts of 'sale' and of 'value'. What value is attached to land or to rights in land? How does one assess what is a fair price or an unfair price? There are very

many measures of that. These are the kinds of complexities with which New Zealand historians would be familiar.

The lawyers too, at times, revealed a reflectiveness about fact and opinion. The Crown, in its final submission, raised some very serious questions about the status of oral tradition, partly because it wished to challenge some of the oral evidence recorded in 1879-80 by what is known as the Smith-Nairn commission.⁸ Smith and Nairn took extensive evidence in those years from Ngai Tahu people, some of whom had actually been participants in the transactions of the 1840s and 1850s or were kin to those who had. The Crown, in effect, challenged the suggestion that almost anything was authoritative simply because someone, at some time, said it. They suggested, citing Maori expert witnesses, that certain oral statements made in fairly formal contexts by persons who traditionally held authority were indeed very significant statements within the terms of the meaning system of the participants, and subsequently to others such as the New Zealanders of today. Not everybody's opinion or utterances were of that status, so one had to be careful with the assessment of oral tradition. In support of this, the Crown counsel quoted a statement of 1891 by the Native Land Court judge, H.G. Seth-Smith, cited in Norman Smith's *Maori Land Law*. Referring to traditional evidence Seth-Smith said that 'each case must be determined by its own circumstances and by the weight of evidence which, as Lord Blackburn has pointed out, a very clever eminent English authority, "depends on the rules of common sense"'.⁹

This is the English legal tradition speaking. But what are the rules of common sense? The English legal tradition has various tests for this. One of the common ones is to ask, 'what would be the reasonable understanding of the man who rode to work each day on the Clapham omnibus?' Now there is no Clapham omnibus in New Zealand. Is there an equivalent model or metaphor for the average, reasonable New Zealand man or woman? If you are a commuter in Wellington, going in and out of Hutt Valley, you might indeed ride the train, or you might, in predominantly white, urban, 'middle-class' culture, drive your car. But if you were a Maori living in Arowhenua or Ruatoria you might still ride the service car, which many of us have endured as we dragged up and down those country roads when we didn't have enough money to own a motor car. Whose common sense rules are to obtain, therefore, in judging and evaluating evidence? Is the interpretation of evidence mainly an urban 'middle class' affair? Though that is, indeed, the majority culture, where does it leave the typical assumptions of more isolated rural Maori, whose perceptions and traditions, enduring for several generations, shape the claims which their educated urban leaders now bring forward?

Those problems are complicated by the question of the role of the 'expert'. In the British legal tradition, expert evidence is subject to somewhat different tests from non-expert evidence. Rules of hearsay do not apply to the same extent. The expert is deemed to be speaking out of professional experience and deep

8 Wai 27, Document XI, Vol. 1, pp.19-25.

9 *ibid.*, p.22.

association with the evidence. It may be demonstrated, especially in cross-examination, that the witness is *not* indeed expert. The testimony then becomes greatly reduced in status and value. Counsel for both parties have at times sought to discredit historians when they appear to be confused or uncertain of their ground, and this is, of course, a legitimate tactic. Otherwise the 'opinion evidence' of experts is accorded added status. The question is asked, 'in your professional opinion, is it so and so?' The responses have a certain standing in the proceedings. Mrs Kenderdine, for the Crown, has said: 'Status as an "expert" is crucial in relation to the submission of "opinion" evidence. The distinction between "fact" and "opinion" is a grey area. However when the "expert" is making some sort of assessment based upon his or her expertise and professional experience, the point of the distinction is obviated.'¹⁰ So historians and lawyers may not be so far apart after all on this issue. It is precisely because the distinction between fact and opinion is not clear that expert opinion has a special significance.

That is one of the matters that professional historians in Tribunal proceedings would do well to keep in mind. I do believe that where evidence given by historians does genuinely conform closely to the tests which the profession has developed over about the last three centuries — involving all the tests of corroboration, authenticity, the measures of the relative weight or substance or import of a piece of evidence or statement made, all these things which we familiarly work with and pursue each other closely about — where these things are applied we do get closer to an understanding of what happened, and of how people read what happened, both the contemporary actors at the time and others subsequently. If the research has indeed been exhaustive, and the wider contexts in which the evidence was created are known and understood, we get closer to concepts of truth.

Yet when one turns to the literature on what we do, as professional historians, it is easy for one's confidence to sag. Many of us have spent decades actually researching, writing, and publishing history and, only later, have become philosophical about the processes involved. The philosophers of history write about what historians do and we may or may not read their books; the journals on the theory of history are mostly edited and subscribed to by philosophers rather than practising historians. But we are under pressure, from the social sciences, to put our act under scrutiny, and ask ourselves what we are really doing. All the more so as we become involved in practical matters of state, which are of concern to Maori and Pakeha trying to live together, and to create a future together, in these islands.

In quest of recent guides to reflection, I turned to a book published in 1988 by Peter Novick, *That Noble Dream*.¹¹ It is an impressive book, both in the fluency and clarity of the writing and in its range and depth. Novick starts with a broad definition of historical objectivity. It is a large term, he says, a bit like 'social justice' or 'leading a Christian life'. Attempting a broad summary, he says:

¹⁰ *ibid.*, p.28, para. 40.

¹¹ Peter Novick, *That Noble Dream; the 'Objectivity Question' and the American Historical Profession*, Cambridge, 1988.

The principal elements of the idea are well-known and can be briefly recapitulated. The assumptions on which it rests include a commitment to the reality of the past, and to truth as a correspondence to that reality; a sharp separation between knower and known, between fact and value, and, above all, between history and fiction. Historical facts are seen as prior to and independent of interpretation: the value of an interpretation is judged by how well it accounts for the facts; if contradicted by the facts it must be abandoned. Truth is one, not perspectival. Whatever patterns exist in history are 'found', not 'made'. Though successive generations of historians might, as their perspectives shifted, attribute different significance to events in the past, the meaning of those events was unchanging. The objective historian's role is that of a neutral, or disinterested, judge; it must never degenerate into that of an advocate or, even worse, propagandist. The historian's conclusions are expected to display the standard judicial qualities of balance and even-handedness. As with the judiciary these qualities are guarded by the insulation of the historical profession from social pressure or political influence and by the individual historian avoiding partisanship or bias.¹²

This then is the great tradition. Historians' primary allegiance must be to the objective historical truth. Objectivity is held to be at grave risk where history is written for utilitarian purposes. One corollary of all this is that historians, acting in their professional capacity, must purge themselves of external loyalties. Yet historians are working, presumably with commitment, for the claimants, or for the Crown, or for the Tribunal in Waitangi Tribunal proceedings.

We know, of course, that the great tradition is difficult to sustain. Indeed, Novick's chapter, from which I quoted, is labelled 'Nailing jelly to the wall'. As is well known, the American relativists of the 1920s, Beard and the others, frankly affirmed that history is written out of the concerns of the present. History reflects those concerns and reconstructs the past in terms of the interests and priorities of the present. However much regard is had to the evidence of the past, historians select from that evidence out of present interests and concerns. Then there is the even more fundamental relativism of the 1960s and 1970s, which gives semiotics much greater prominence, and abandons the notion of a single truth claim. More recently there is the association of history with literature by Hayden White, who argues that what historians are doing in creating narrative history is not essentially different from what a novelist is doing when he constructs a coherent account. In our search for coherence we make selections of the data. We don't purport to report everything. We couldn't. It is literally impossible and it would be boring if we tried to do it anyway. In White's view, although a novelist is less bound by having to find some reference point in something that actually happened, both historians and novelists select their facts, choose their perspectives or interpretations, primarily on aesthetic and moral, not epistemological, grounds.¹³

12 *ibid.*, pp.1-2.

13 Hayden White, *Metahistory*, Baltimore, 1973, p.xii.

Notwithstanding all this, I would suggest that in the construction of the narratives of Ngai Tahu's relations with the Pakeha, every sentence, every nuance of the weighting of evidence, has to be grounded in elements of the evidence itself which demonstrate that that was the lived reality, as apprehended by the actors of the time, or as understood by later actors who placed their own constructions on what had happened — these two aspects being carefully distinguished, one from the other.

The emergence of relativism in culture studies and in the power claims that different cultures have made, even within the same nation, has intensified not only cognitive relativism but moral relativism also. What is being said is not only, 'my assessment of the truth is valid because I perceive it thus', but also, 'my values, and the institutions and practices that enshrine them, should be recognized by society as worthy and legitimate because I believe them to be'. Absolute relativism in these senses, both cognitive and moral, has produced an inevitable reaction. Many people who react against them cite the Nazi period of Germany to demonstrate the horrors of what can happen when people assert their sincerely held views belligerently enough. Many other examples come to mind arising from passionate cultural, racial, or religious convictions. This, I believe, is actually the crisis of our times. In discussing bicultural and multicultural societies and what elements should constitute the moral order or the social order, we inevitably confront problems of choice about relative worth; although very often several preferences can co-exist among different groups in society, as matters of private morality, other matters affect the public at large, and the community, from time to time, is obliged to make decisions on what to do about them.

If we say, from an absolute relativist point of view, that all cultural perceptions and valuations are equally valid, that there is no one single truth claim, that there are as many truth claims as there are participants according to their different cultural backgrounds and perceptions, does this not mean that we are doomed to talk past each other in perpetuity?

What happens when we come to a very large issue like the claim of Ngai Tahu for the Otago 'tenths'? This is the claim that, when the Otago block was purchased in 1844, the Maori vendors were promised one in every ten sections of the subsequent subdivision, along the lines of the Wellington 'tenths'. 'Tenths were not, in the end, granted in Otago and have been the subject of claims at least since 1867. When the record is examined, questions of terminology emerge. Certain important 'reserves' (in the English version) were defined in the purchase deed at the Ngai Tahu people's request: the large reserve at the Otago Heads, smaller but important ones on the Taieri plains, and two or three others. They were also marked on the ground. The Maori language deed says that this land was 'kotia' or 'cut away' from the purchase. Was it then a 'reserve', or was it not? The language of all the contemporary English documents which describe the negotiations referred to 'reserves' right up to and through the month that led to the transaction itself. The Otago transaction was a fairly thoroughgoing and careful negotiation, and the word 'reserve' was constantly used, and words like 'puritia' used to translate it. The deed itself, however, uses kotia. What

significance attaches to that is a matter of careful judgement in relation to other evidence. Different cultural perceptions, couched in different languages, increase the possibility of different understandings of the same events.

There is, equally importantly, the significance of actions. In Otago the actions of officials and rangatira together walking boundaries, physically marking boundaries, and reciting boundaries in public meetings, or the action of the ariki Tuhawaiki in exhuming the bones of the dead from land where Port Chalmers now is, speak eloquently. It is largely because of these actions, as well as contemporary records of negotiations, conversations, and agreements, that I believe (though it is for the Tribunal finally to decide) that no contractual obligation to provide 'tenths' arose from the Otago purchase. Ngai Tahu preferred to cut out large portions within the general purchase boundary to retain under their own control, rather than sell all to the New Edinburgh Company and rely on the Company's allocation of 'tenths' — a process that had proved very unsatisfactory to Maori in Wellington. There was, nevertheless, I believe, an obligation on the Crown, arising from solemn public statements by Governor FitzRoy and others, to reserve in its own name, primarily for Maori purposes, one-tenth of the New Edinburgh subdivisions. This was a public undertaking, quite distinct from a contractual obligation with Ngai Tahu, and unfulfilled at the time, though the Crown might be considered to have partly discharged its obligations in other ways subsequently.¹⁴

A substantial issue also emerges in relation to the term *mahinga kai*.¹⁵ A major aspect of the claims arising from H.T. Kemp's purchase in 1848 of the block for the Canterbury settlement is the undertaking in the purchase deed that *mahinga kai* would be reserved in perpetuity to the vendors. Kemp himself translated *mahinga kai* as 'cultivations' or 'plantations'. The claimants translate it as 'gathering places for food', that is, including the hunting and gathering economy, not just the gardening economy. And Kemp himself, in a side arrangement (which he subsequently admitted but did not put in the deed), included eel weirs within the term. So what does *mahinga kai* mean? Linguistic evidence has begun to emerge. The term apparently had considerable usage in the North Island and very little in the South Island before the 1840s. It must, nevertheless, have had some significance in the south in 1848 when the deed was signed. Yet it might have acquired a slightly different sense by 1879 or 1881, when participants were giving evidence at the Smith-Nairn enquiry. These are the sorts of issues that are arising from the Tribunal proceedings, and one of the very important developments is the volume of Maori-language documents which have emerged from the scouring of the archives.

However, controversy is equally possible over the meaning to attach to words in English. For example, in the Otago purchase, something like 12,000 acres of land was reserved for the 100 or so Ngai Tahu people who lived within the confines of the purchase; that is approximately 120 acres per head, which is larger by far than most of the areas reserved in the South Island purchases. This area was believed by the British officials, probably in all sincerity given the

14 Wai 27, Document T1 (Historical Report), pp.97-116.

15 *ibid.*, pp.167-78.

demographic knowledge of the time, to be adequate for Otago Ngai Tahu's then and future needs. But adequate for what? A whole range of possible measures might be employed. Adequate for the traditional subsistence economy? Certainly there was no question about that, for Ngai Tahu culture was at least as much sea-based as land-based. The reserves were adequate even for some participation in the commercial economy, because the one at Otago Heads included the whalers and sealers who had made substantial commercial arrangements with Ngai Tahu leaders both before and after 1840. One of the main reasons why Ngai Tahu would not sell the land at Otago heads was that they had their own little township beginning there. But the land reserved was not adequate, in a larger sense, to enable Ngai Tahu to engage fully in a capitalist economy, where the ability to raise capital on the security of real estate is the crucial motor of much of what happens. Maori in the South Island never had enough reserves to raise sufficient capital for their aspirations, at least from the 1870s when the pastoral economy really got going and when the Maori demographic upsurge also began. From what standpoint then should the officials' actions in 1844 be judged? In the historical report we have said that it would be misleading to impute to participants in events of the past the understandings that arose later. But just what degree of foresight could reasonably have been expected of them? The Crown certainly had a Treaty responsibility to protect Maori interests. We have suggested that this implied taking care to see that Ngai Tahu were not reduced to economic marginality,¹⁶ and the Crown itself has tended to adopt that view also. However, that judgement probably does involve some hindsight, as it was scarcely the norm in those days for colonizing Europeans to admit 'natives' to full access to the capitalist economy.

Matters of interpretation thus arise constantly, and the professional historians are constantly being asked to give their opinion on these sorts of matters. And it is opinion. Let us consider the wastelands controversy which was a background or accompaniment to purchases in the South Island. Many officials and settlers, both in New Zealand and England, believed that the recognition of Maori customary land rights should not extend to more than their cultivations and residences. As is well known, instructions accompanying the 1846 Constitution directed the Governor to register all unclaimed land as Crown land. Although George Grey set that aside under pressure from Maori themselves, and from missionaries and the Protectorate Department, the evidence still shows a reluctance by senior officials, in London as well as New Zealand, to admit that the inhabitants of the small villages that clung around the coast of the South Island 'owned', in the full sense of the European freehold, all that vast interior of the South Island. This attitude showed in the instructions that were written to Kemp, who was subsequently reprimanded by Lieutenant-Governor Eyre for negotiating with Ngai Tahu as though they were proprietors of that vast interior.¹⁷

Much of the controversy in the South Island claims rests on the nature of the Kemp purchase. In a document of about six lines Ngai Tahu apparently sold that

¹⁶ *ibid.*, p.26.

¹⁷ *ibid.*, pp.118-20.

vast area, defined in an accompanying map as stretching from coast to coast. But apart from the brief mention of the mahinga kai, reserves were to be left until later. Is a purchase in which crucially important matters are left till later a valid purchase or not? Apparently the received law does admit that possibility. However, we have argued that a catch-all purchase, involving all the rights, coast to coast, between the Wairau in the north and the Otago block on the south, would not have been understood by Maori participants as complete of itself, without discussion, description, and boundary-marking of important areas within the general boundary.¹⁸ Supporting statements can be found, for example, in the opinion of the Chief Protector, George Clarke, on the basis of his considerable experience in the first years of the Colony, that Maori would not knowingly sell land except in specific and precisely defined areas.

We are thus constantly involved in contentious matters, possibly involving different interpretations from different cultural standpoints, on which the Tribunal invites our professional opinions. I have suggested that we can resolve many issues by the critical use of evidence, by using all the professional tests which historians customarily apply; and we can elucidate the matters of opinion and interpretation by laying bare the intricacies of the contemporary cultural matrices. But does this relieve us from, or only compound, the problem arising from the collapse of consensus about objectivity, which Novick highlights by taking as the theme of his chapter 16 the last verse of the Book of Judges: 'There was no king in Israel; every man did that which was right in his own eyes.'¹⁹ Novick himself offers some avenues of relief from such an extreme position. He cites, for example, Dominick LaCapra, who takes issue with Quentin Skinner's search for what Novick calls 'closure in authorial intention' — definitive descriptions of the intentions and contemporary meanings of statements at the time they were made. LaCapra considers this to be an insufficient objective, though presumably a worthy one in the first instance. He says that the ending of an argument is not possible and that historians' statements should be 'as informed, as vital and as automatically open to counter-argument as possible. A good interpretation, while resolving those documentary questions capable of resolution, should seek not closure but rather an opening to new avenues of criticism and self-reflection'.²⁰ In the New Zealand context can the culturally-derived division between Maori understandings of the past and Pakeha understandings of the past be moderated, not by seeking 'closure' on what exactly went on in Otago in 1844 or in Akaroa in 1848, but by asking all parties to accept scholarly criticism and self-reflection about the meaning of the events then, and the meaning of them subsequently?

It is indeed asking a lot, but it is very evident that by the mid-nineteenth century Maori, especially the younger generation, were no longer dwelling within a wholly traditional epistemology and value-system, important though these still were, but were rapidly apprehending the key features of the western economy and seeking to maximize their opportunities within it.

18 *ibid.*, pp.17-19 ('Overview', section 3b, 'The Kemp purchase').

19 Novick, pp.573ff.

20 *ibid.*, pp.605-6.

To illustrate, we might consider the Princes Street reserve in the Ngai Tahu claim.²¹ This refers to a small block of land between Princes Street and the former water-line in Dunedin town, near Manse St, set aside by Walter Mantell in 1853 for a hostelry where the Ngai Tahu people could land their canoes and vend their produce. Thus they could continue to engage with the growing commercial order — a manifestly important concern of Ngai Tahu since the advent of the whalers, sealers, and first settlers. Unfortunately the Mantell reserve was not of much use for a landing stage or hostelry, partly because of a steep cliff or bank leading to the water. The Maori people therefore continued to land their canoes on the shore a little further north, at a traditional landing point near Rattray St, where the Toitu creek entered the foreshore. A hostelry was ultimately built there between 1860 and 1862. But that site was not formally reserved and, when the gold rushes occurred in Otago and Dunedin was flooded with immigrants, the hostelry was pulled down. Subsequently, from about 1866, the Ngai Tahu people, encouraged by Mantell, focused on that other piece of land which he had reserved in 1853, and which came to be called the Princes Street Reserve. In the growing town of Dunedin the reserve had become extremely valuable and had accrued rents in the order of £6000. Ngai Tahu's claim for both the reserve and the back rents was contested by Otago Provincial Council and lost in the Supreme Court, largely because of a technical weakness in the procedure by which the reserve was made. The Ngai Tahu leaders — a younger generation than that which sold the Otago block — prepared to take the case to the Privy Council. They were, at various times, offered alternative sites to build a hostelry but declined them. For they now realized, as much as any Pakeha urban property owner, the importance of the capital value of the land and the accumulated rents. Eventually a settlement was made, with Ngai Tahu leaders of the day accepting £5000 for the land and about £5000 of back rent. £1000 of back rent was held over to cover various costs. Appeals and negotiations went on about that sum (and its interest) for decades, despite the 'final settlement'. The matter is still a grievance, now before the Tribunal.

The Crown can argue that there is no basis of claim there. The land had never been Maori land in fee simple. It had been part of the original Otago purchase; it had been designated a Crown reserve for Maori purposes, but never used for the hostelry; the Maori people had declined an alternative hostelry site, and had accepted large capital sums in settlement; nothing more is due. On the evidence that seems indeed to be the hard fact of the matter. Yet somehow it does not seem to be the full story. And when one stands back a little and asks why Ngai Tahu were so determined about the balance of the rent or the rather shadowy claim for the land and are not interested in hostelries any more, it appears that a new awareness had emerged among the younger generation of Ngai Tahu — that of the late 1860s. They were no longer satisfied with clinging to the margins of small-time commerce. Already they were aware of a larger context, of an evolving capitalist society where what was important was access to capital, to large sums of money which could be transmuted into development programmes,

21 Wai 27, Document T1 (Historical Report), pp.423-8.

such as buying flocks of sheep. Society had evolved, times had changed since 1844 when the mercantile business with the townfolk was selling fish and other produce. Gold and a thriving town and experience in the wider world had quickly produced a different sense of values among Ngai Tahu. So what perspective does one take? Against what context does one assess Ngai Tahu's claim and possible loss? What is the Crown's responsibility today in all of this? Perhaps Ngai Tahu, in declining an alternative hostelry site, had really exercised their option under the Treaty and the matter is closed. The Tribunal may find that way. However, they may wish to consider that from another point of view the Pakeha were doing very nicely out of their legal rights, resting firmly on the deeds of the Otago purchase and the Kemp purchase, with the South Island acquired, hunter-gatherer rights almost eliminated and nothing left for Ngai Tahu but an average of about ten acres a head of reserve. In that context Maori were grabbing any handle at all they could get hold of, whatever shadowy basis of legal right or political leverage that could get them back towards the proportional share of the action they had enjoyed in the 1840s.

That, I believe, is what the claims are largely about: maintaining access to, and some control of, the socio-economic processes which govern the lives of all New Zealanders. The Tribunal has certainly shown an awareness of that perspective, that aspiration. Indeed it has been founded on the assumption that the technicalities of rights under the received law can miss the larger point — the point of the Treaty considered in its spirit. Not all Pakeha New Zealanders accept the openness, and lack of precision or finality, implied by that approach. Yet, as LaCapra has implied, there is much community to be gained if, in weighing New Zealand's historical past, both Maori and Pakeha come to consider issues from a variety of standpoints and indeed be open to self-criticism and self-reflection.

It might be added here that the procedures of the Waitangi Tribunal, which are still largely adversarial procedures, are not altogether well adapted to scholarly self-reflection and the emergence of consensus. While it may be necessary, in the search for justice and redress, for claimants to press claims to their fullest extent, and for the Crown to rebut them when it believes it is entitled to, there appears to be room — indeed an expressed desire on the part of many of the participants, Maori and Pakeha alike — to move to a more reflective stage, in which various perceptions can be shared, discussed, and negotiated about, rather than that parties stick with adversarial arguments which result in 'winning' and 'losing'.

In this context I find myself increasingly at odds with the extreme cultural relativism which is part of modern reaction to imperialism of all kinds and which, for that reason, is often strongly supported by liberals of the majority culture. It is manifest that extreme cultural relativism can and does lead to moral nihilism, to fanaticism, to oppression and savagery. We see it constantly in Europe, in the Balkans, and in the Middle East. I therefore find myself, with many of my generation, accepting a moderate relativism, which places considerable worth on the values and perceptions of as many cultures as there are in the community, but questions the claim to automatic recognition of all customs simply because some group wants them. Novick, addressing the question of cognitive relativism,

quotes Thomas Haskell, as another, like LaCapra, who can lead us out of a possible impasse. Haskell quotes Charles S. Peirce, a central figure in the late nineteenth-century movement towards relativism. Peirce had defined truth as 'the opinion which is fated to be ultimately agreed on by all who investigate'.²² Haskell has pointed out that a strict interpretation of Peirce's criterion was pessimistically fatalistic. Truth cannot be known until the end of time. However, Haskell has reworked Peirce's statement. 'A slightly loosened reading is dramatically different', notes Novick. 'Recognising the fallibility of all truth claims, act in accordance with the best current opinion of the existing community of enquirers.' This sort of approach embodies a moderate relativism, applicable both to cognitive and moral questions. The basic issue becomes a political one — in the large sense. The fundamental question we come to is: 'What is the community of enquirers?'

This I think is the heart of the matter for New Zealand, as for all communities where several races or cultures seek to co-exist. The existing community of enquirers for our present context is the New Zealand people. It is a people comprising two main communities, which we conveniently, but very roughly, divide into 'Maori' and 'Pakeha'. These communities are related to each other by various constitutional arrangements, by the Treaty of Waitangi, and by some law designed to give effect to the principles of the Treaty. The role of the bodies set up by the New Zealand people — the Parliament, the law courts, the Tribunal itself — has been to elucidate and try to define the way New Zealanders conduct their disputes, hear their differences of opinion, weigh competing claims of merit or right, and define the balance from time to time. This is a process which reflects, among other things, the changing mores, the demography, and the intellectual and professional power of the various groups of society. Recognizing that, it is clearly important that, as far as possible, Maori and Pakeha share the institutional structures which mediate the process. It is important indeed that the Waitangi Tribunal comprises Maori and Pakeha members, and that the viewpoints from both streams of culture are assessed by members of both cultures joined in the body charged by the community with the authority to help disentangle the whole complex of relative claims of right.

The particular importance of the restatement of New Zealand history in the Tribunal proceedings has been that it has brought to the fore the largely overlooked Maori dimension. This challenge to established history has provoked enquiry of unprecedented range and depth, and interaction between the historians representing all participant groups. That can only be healthy, though too few professionally-trained Maori historians are as yet involved in the process. A by-product is that all New Zealanders, Maori and Pakeha, might even modify preconceived ideas. That, of course, is another important sense of the term objectivity — that one is prepared to listen to the alternative point of view, recognize one's own biases, and be prepared to change one's mind. To quote our historical report: 'The history of Maori and pakeha in these islands is a complex one and we are all shaped by it. To avoid reading that history in depth, to

22 Cited Novick, p.570.

oversimplify it, would be a failure of both peoples to come to terms with themselves as well as with each other.²³ In this context it is indeed fortunate that the Tribunal mainly comprises members who have participated, in varying degrees, in both Maori and Pakeha cultural traditions.

To reiterate, the historians appearing for the various participants clearly carry heavy responsibility in shaping and articulating the points of view presented, and in seeking to influence the Tribunal. Time precludes my dealing in any greater depth with theoretical considerations that might be involved; this paper has essentially been about history as it is in fact being practised in a public forum. But putting it very briefly, the professional historians' assistance to the Tribunal and the nation will be the greater, I believe, if they keep in mind the basic distinctions between the various levels of reality with which they deal. It is, of course, entirely possible to determine, within a positivist epistemology, such matters as whether Te Rauparaha was taken southward in a naval or a merchant ship. It is also possible, though more difficult, to identify, with some precision, the various understandings that contemporary actors had of the events in which they participated. It is possible, too, to show how later generations perceived those same events and the changing meanings and values they attached to them. It will be of the greatest assistance to members of the Tribunal if the historians bear in mind and show that these are essentially separate, though related, orders of reality — all very important, and all contributing to the present concerns discussed before the Tribunal. The present, via the tribal spokespersons, the historians, and the lawyers who present claims will shape the demands and the questions to be resolved, and the Tribunal will seek to provide today's answers. The historian's craft, carefully brought to bear on the evidence, will go far towards elucidating what the past says about the matters raised, in the three levels of analysis (or orders of reality) that I have proposed, and the relationship between them. Clearly this will often be a matter of fine judgement, of informed opinion, as to the weight of evidence, and debate between historians will intensify as the issues become more sharply focused. This is no bad thing. On the contrary, such informed debate is needed, as never before, in the service of the New Zealand people.

ALAN WARD

University of Newcastle

COMMENTARIES

I From my perspective I think that the problem for even a moderate relativist is even more fundamental than the one you describe, because in the case of the Tribunal it seems to me that what you are dealing with are two different epistemological systems. In the case of tribal or kin group histories you really have got different genres of history. Maori culture includes korero, whakatauki, waiata and whakapapa for example; the Maori narrative style of history is quite

different from that of the Pakeha. The authority structures are also different, the contestability of accounts is different, to some extent. The context in which accounts are held up for proof or testing is different. It seems to me that, within the context of the Tribunal, the weight is in the direction of law and European forms of knowledge still, because you've got a predominance of lawyers and professional historians. The epistemological power, it seems to me, is still predominantly European, and if you did have a thorough test of relativism going on in the Tribunal it seems to me that it would be a problem. There is also a problem in aggregating claims in the way that they have been aggregated, because one of the things that is characteristic of those hapu korero is that they are in fact relating to particular groups, kin groups, particularly whakapapa lines, particular experts that have authority by virtue of those whakapapa, and you would have a hard job taking a whole island and kicking that all into one, in terms of that particular system of knowledge, in that way of operating with the past. So how can you in fact be a relativist in this sort of situation unless — and I don't know if it is possible myself — you can become thoroughly expert in both traditions? Because unless you are in that position, how can you test, thoroughly test, the validity of accounts that are coming out of both? I'm not sure that it is possible to be both myself and I'm not sure that it is possible for the Tribunal to bridge that gap either.

ANNE SALMOND

University of Auckland

II Well, I could try to turn that on its head by suggesting that the Tribunal, by its composition, is the best possible body to bridge the gap and close these separate worlds — by the very nature of the sorts of people that comprise the Tribunal. Yes, ideally, it would be tremendous if one could have access to the full range of all relevant systems of knowledge, including that deriving from the high Maori culture. Some of the Maori members of the Tribunal, I believe, do have such knowledge in respect of their own communities, and find themselves a little puzzled that the Ngai Tahu people haven't actually brought forward as much of their own whakapapa as was expected, and that is perhaps regrettable. We are all prisoners of the process in the sense that the Tribunal depends mainly upon what claimants bring forward, and of course Tribunal researchers, though they might try to cover gaps, are unlikely to have the specific knowledge or viewpoints that belong to the local communities. But, supposing such knowledge was brought forward to the fullest extent, what is also being brought forward is a lot of evidence from Maori sources from people who are not solely of one world or the other. They are themselves people who have participated for a very long time, to a greater or lesser extent, in the European culture and its epistemological system. And so, too, have the Tribunal members themselves, such as Georgina Te Heuheu (trained in the European legal system), Bishop Manu Bennett (a Christian), Monita Delamere (who spans a religious tradition that is part-indigenous, part-Christian), and of course Chief Judge Durie himself. In effect I think such people are as well placed as any to make sense of a changing people's changing perceptions. We are not talking about two totally fixed and

separate world orders. They were not that even in 1840. So I am inclined to be more positive and optimistic because the Tribunal includes people who are attuned to the different elements that make up the Maori side of New Zealand culture. That may be a little too rosy, but I don't think there is much sense in driving ourselves into insoluble paradoxes of this nature; society does go on, individuals in the community do relate to each other, they actively seek out ways of achieving a relationship, even if they seek to alter the balance of the relationship substantially.

ALAN WARD

III I am interested in the question of land acquisition involving the Maori. I don't know whether the Maori on the Tribunal have ever really addressed the question of the Maori attitude towards land. The Maori believed that they belonged to the land, rather than that the land belonged to them, and that sort of attitude would have had real significance in their involvement in land transactions. It would have coloured their attitude to 'selling' land and then saying that we really haven't 'sold' the land — we want it back. Why? Because they belong to the land. Because of that attitude they went with the land; they had the responsibility of handing that land down to issue and they therefore had no right to alienate it in a Pakeha way — that system was alien to them. However, they developed very quickly an appreciation for the new system and learned how to deal with the system and eventually how to manipulate it. I did wonder whether this aspect has ever emerged in the thinking of the Maori members of the Tribunal: because they are very much tuned into the Pakeha way of thinking — learning how to handle that.

MERIMERI PENFOLD

University of Auckland

IV The proposition that you made — that 'we belong to the land rather than the land belonged to us' — I have heard in the context of Tribunal discussions. I don't recall precisely who said it; it might have been Monita Delamere — he is the sort of person who would have said it. However, one thing that has emerged very strongly in the Ngai Tahu statements and evidence is that in a transaction which, from the Pakeha perspective, has all sorts of elements of finality about it, it is very clear that Ngai Tahu expected an ongoing relationship not only with the land, but with Pakeha, with the transacting party. There was a kind of agreement that the settlers and the officials would come into this land and that they would set up a new kind of relationship on that land, but Ngai Tahu were certainly not going to be excluded henceforth. There was, for example, a witness to the Smith-Nairn commission discussing the mahinga kai, the eel-fishing and so forth. He was asked, 'but you expect all this to go on, on this land, these vast areas of swamps and bird-runs?' He answered, 'Yes'. 'What land have you sold to the Pakeha then?' He replied, 'The same land'. There was no problem in that for him. The two different sets of usages could coexist, within the broad boundaries of the Kemp purchase.

ALAN WARD

V Of course, mahinga kai, the modern view of that is an actual segregated area, where they have their kumara plantations. But I think mahinga kai would have meant areas where they gathered and fished the rivers, however far was necessary, because these came in seasons, so that mahinga kai area would only be sought out when the season came around. Especially in the South Island, seeing that certain eels only came at certain times of the year and that all that area would have been regarded as 'mahinga', the 'working on' or 'hunting of' food.

MERIMERI PENFOLD

VI I wish I could get your authoritative opinion on that in the Tribunal. It's a view I certainly believe is correct on the evidence I have read. One of the best illustrations of it we've actually had is a document Michael Belgrave found very late — a sketch-book made by Walter Mantell, who was supposed to be making the reserves. Kemp had made this deed, which purportedly purchased the whole of Canterbury, coast to coast; the reserves were to be made later, which was a breach of Kemp's instructions. Mantell noted in the sketch-book that Ngai Tahu had requested big areas for pigs, big areas for gathering pigeons, or for weka and so on. Mantell refused them all, except some eel runs and fishing accesses. He clung, in effect, to Kemp's narrower definition of mahinga kai as cultivation.

ALAN WARD



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