Māori land and surveying

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Whangarei

Mihi

1. Tena koutou te hunga kainga e manaaki nei i a matou. E mihi ana ki a ratou kua mene ki te po. E mihi ana hoki ki a koutou nga kairuri e tau nei. Nga manaakitanga a Ihowa ki a tatou katoa. No reira, kia ora mai tatou.

2. I am pleased to be able to address this hui today. I wish to congratulate those who saw the value of a hui of this nature in Taitokerau after experiencing the national conference in Rotorua earlier this year. It is well overdue as it draws together three groups that have a longstanding connection – the Māori community, the Māori Land Court and the surveying profession.

3. The obvious connection is the land. As the tauparapara has it:

> *Whatungarongaro he tangata toitu he whenua.*
> People vanish but the land remains.

4. While Māori acknowledge the permanence of land, it is people that are said to have pre-eminence:

> *He aha te mea nui o tenei ao? He tangata, he tangata, he tangata.*
> What is the greatest thing in the world? It is people, it is people, it is people.

5. Thus, it is land *and* people that connect us and that are the common focus of the work of the Court and the surveying profession.

Introduction

6. This hui is intended to expose surveyors to aspects of the world of Māori and to shed some light on what is often perceived to be the very opaque world of Māori land and the Māori Land Court. I will be addressing two broad topics.

7. First, when I was approached about the hui I thought that it would be useful to talk a little about the history of Māori and surveying in New Zealand and how that history has influenced Māori perceptions of surveying and surveyors. It is a history that is closely connected to the Court. I will discuss the nature of Māori land tenure and the development of the Court, the historical relationship between Māori and surveying, survey issues in the context of the Treaty of Waitangi and what these factors might mean for surveyors in dealing with Māori and their land.

8. Second, I will fast-forward to today to discuss some of the current survey issues for the Court and the modern role of surveyors in relation to Māori land.

9. Before going further there is one caveat. Judges are not surveyors. We have no expertise in your field. Consequently, I intend to side-step any particularly technical survey issues and, in fact, I hope to be educated by surveyors today. Judges of every Court rely heavily upon the expertise of professionals and expert witnesses. Our Court depends on surveyors in particular to help us to arrive at just solutions to problems of land ownership and use. Judges receive very little, if any, education regarding surveying. After I was appointed as a Judge in 2006 and first recognised the tidal wave of work looming in the form of survey plans for approval (as part of the Māori Freehold Land Registration Project) I asked survey staff from LINZ to provide judges of our Court with some basic training. However, my surveying knowledge remains very rudimentary.

Māori and the surveying profession

Introduction

10. The Māori community and the surveying profession have a longstanding relationship. In fact, it predates the Court's relationship with Māori which only began in 1862 with the establishment of the Native Land Court.[1] The relationship between Māori and surveyors was consummated during a period of great social and political upheaval for Māori. Surveys were considered to be an essential tool for British settlement of New Zealand and surveyors were at the forefront of interaction – and, inevitably, conflict – with Māori. Unwittingly – and, occasionally, wittingly – surveyors were caught up in some of the major land conflicts between Māori and Pākeha settlers and the Crown. While things have changed considerably since then, I believe those conflicts and the role surveying played in the colonisation of New Zealand and the alienation of Māori land continue to influence Māori perceptions of surveying and surveyors. But, you might be relieved to know, surveyors are not alone in this respect and the Court has similarly been criticised for its role in the alienation of Māori land.

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1 Native Land Act 1862.

Māori land tenure and the Native/Māori Land Court

11. Before looking at Māori and the surveying profession I want to briefly place Māori land tenure in its legal context and to talk a little about the history of the Court.

12. Prior to the formal settlement of New Zealand by the British in 1840, and following 1840 where customary title was not commuted, Māori held their land according to their customs. The right of native peoples to their land was recognised by the English common law and, unlike Australia, that legal principle was incorporated in the protections in the Treaty of Waitangi. The Court of Appeal discussed Māori customary title in *Attorney-General v Ngati Apa*[2] where it reiterated that the Crown was not the source of Māori title to customary land[3] and that the Crown had no property interest (dominium) in customary land:

> New Zealand legislation has assumed the continued existence at common law of customary property until it is extinguished. It can be extinguished by sale to the Crown, through investigation of title through the Land Court and subsequent deemed Crown grant, or by legislation or other lawful authority. The Māori lands legislation was not constitutive of Māori customary land. It assumed its continued existence. There is no presumption of Crown ownership as a consequence of the assumption of sovereignty to be discerned from the legislation. Such presumption is contrary to the common law. Māori customary land is a residual category of property, defined by custom. Crown land, by contrast, is defined as land which is not customary land and which has not been alienated from the Crown for an estate in fee simple. The Crown has no property interest in customary land and is not the source of title to it.[4]

13. Land transactions occurred between Māori and Pākeha prior to 1840. Following the Treaty the Crown established commissions to investigate "old land claims" and, where appropriate, to validate the claims and award titles. The nature of the original transactions and the functioning of the commissions in Taitokerau has been discussed by the Waitangi Tribunal in the 1997 *Muriwhenua Land Report*.[5] The report is worth reading for the background to the awards that gave rise to some of the early "OLC" survey plans in this district.

14. Following 1840, and until the establishment of this Court in 1862, land transactions continued by way of the Crown (and, in some cases, private individuals) negotiating deeds with Māori outside any formal legal process. These transactions met with varying degrees of success and varying degrees of Māori support. For example, transactions in the Wairarapa district in the 1850s and early 1860s were in large part

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2 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.
3 Customary land is also known as Aboriginal title or Native title.
4 Ibid fn 2 at [47].
5 Waitangi Tribunal *Muriwhenua Land Report* (GP Publications, Wellington, 1997).

supported by Māori, though various issues arose as to the nature and extent of the transactions.[6] In contrast, the fraught transactions in the Taranaki district in the late 1850s led to open warfare and the confiscation of over a million acres of Māori land. The Taranaki transactions and the fallout which followed were the catalyst for the establishment of the Court. The basic problem was that the transactions were entered into with people who claimed to hold customary title when in fact their claim was hotly disputed. Thus, the Court was established to investigate and determine customary title, to commute customary title to a title recognisable by law and, ultimately, to enable the orderly sale of Māori land for settlement.

15. The Court has been roundly criticised for its role in the alienation of Māori land contrary to the interests of Māori. These complaints are not of recent origin and go back to the very beginning of the Court. Indeed, the Crown was quite open about its primary objective in establishing the Court being to relieve Māori of their land. In 1870, Henry Sewell, the Minister of Justice, had this to say:

> The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Māoris, and which before the passing of that Act, were extra commercium – except through the means of the old land purchase system, which had entirely broken down – within the reach of colonisation. The other great object was the detribalisation of the Māoris – to destroy, if it were possible, the principle of communism which runs through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of attempts to amalgamate the Māori race into our social and political system. It was hoped by the individualisation of titles to the land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own.[7]

16. Later, T W Lewis, Under-Secretary of the Native Department, had this to say to the Native Land Laws Commission of 1891:

> The whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose, and the Natives would be better without is, as, in my opinion, fairer Native occupation would be had under the Māoris' own customs and usages without any intervention whatever from outside. Therefore, in speaking of the Native Land Court, this test to it must, I consider, be applied – viz, that there should be a final and definite ascertainment of the Native title in such a way

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6 See the Waitangi Tribunal's discussion in Waitangi Tribunal *Wairarapa ki Tararua Report* Volume 1 (Legislation Direct, Wellington, 2010).

7 Henry Sewell, Minister of Justice, 29 August 1870 (Waitangi Tribunal, *Hauraki Report*, volume 2 (Legislation Direct, Wellington, 2006) at p 669).

> as to enable either the Government or private individuals to purchase Native land.[8]

17. Judges of the Court in the 19th century wrote openly about the success of the Court in transferring greater areas of land out of Māori hands than the previous regime:

> A comparison of the area of land purchased, under Crown pre-emption, in the twenty-four years between 1840 and 1864, with that which has been passed under the operation of the Native Land Court in the six years subsequent, will prove that the present system has brought under the congnisance of English law a nearly equal area in this Island. Even did this fact stand alone as the sole result of the establishment of the Court, it would be no trifling evidence of their value; but when to this we add the increased reverence for law, and increased confidence in the judicial tribunals which are intrusted with its administration, it is difficult to calculate the value of the system in its effects upon the Native mind.[9]

18. For a general summary of the Waitangi Tribunal's various findings on the Native Land Court regime see paragraph 10.2 of the Waitangi Tribunal's *Te Urewera Report.*

19. For much of the 19th century Māori saw the Court as acting contrary to their interests. However, from the end of the 19th century and through the 20th century, the Native Land legislation was incrementally amended to shift the focus and purpose of the Court from enabling the alienation of Māori land to promoting its retention, use and occupation by its owners. These changes culminated in Te Ture Whenua Māori Act 1993 ("1993 Act") which, in its Preamble and ss 2 and 17, expressly directs the Court as to how it is to carry out its functions:

> Na te mea i riro na te Tiriti o Waitangi i motuhake ai te noho a te iwi me te Karauna: a, na te mea e tika ana kia whakautia ano te wairua o te wa i riro atu ai te kawanatanga kia riro mai ai te mau tonu o te rangatiratanga e takoto nei i roto i te Tiriti o Waitangi: a, na te mea e tika ana kia marama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, a, na tera he whakahau kia mau tonu taua whenua ki te iwi nona, ki o ratou whanau, hapu hoki, a, [a ki te whakangungu i nga wahi tapu] hei whakamama i te nohotanga, i te whakahaeretanga, i te whakamahitanga o taua whenua hei painga mo te hunga nona, mo o ratou whanau, hapu hoki: a, na te mea e tika ana kia tu tonu he [Te Kooti], a, kia whakatakototia he tikanga hei awhina i te iwi Māori kia taea ai enei kaupapa te whakatinana:
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> Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed; And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their

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8 T W Lewis, Under-Secretary, Native Department, statement in evidence to the Native Land Laws Commission, 1891 (Waitangi Tribunal, *Urewera Report,* (Waitangi Tribunal, Wellington, 2010) Part II, Volume 2, p 501).

9 Letter from Judge Monro to Chief Judge Fenton, 12 May 1871 in Turton (1883), G; pp 53-54 (as quoted in David V Williams *"Te Kooti Tango Whenua" The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).

whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: And whereas it is desirable to maintain a Court to establish mechanisms to assist the Māori people to achieve the implementation of these principles:

2 Interpretation of Act generally

(1) It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the principles set out in the Preamble.

(2) Without limiting the generality of subsection (1), it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Māori land as taonga tuku iho by Māori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu.

(3) In the event of any conflict in meaning between the Māori and the English versions of the Preamble, the Māori version shall prevail.

17 General objectives

(1) In exercising its jurisdiction and powers under this Act, the primary objective of the Court shall be to promote and assist in –

(a) the retention of Māori land and General land owned by Māori in the hands of the owners; and

(b) the effective use, management , and development, by or on behalf of the owners, of Māori land and General land owned by Māori.

(2) In applying subsection (1), the Court shall seek to achieve the following further objectives:

(a) to ascertain and give effect to the wishes of the owners of any land to which the proceedings relate:

(b) to provide a means whereby the owners may be kept informed of any proposals relating to any land, and a forum in which the owners might discuss any such proposal:

(c) to determine or facilitate the settlement of disputes and other matters among the owners of any land;

(d) to protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority;

(e) to ensure fairness in dealings with the owners of any land in multiple ownership;

(f) to promote practical solutions to problems arising in the use or management of any land.

20. Accordingly, the Court evolved over time from a body which presided over the steady alienation of Māori land to one which is today charged with the duty of promoting the retention of the remnant of the tribal land estate.

Conflict between Māori and surveyors

21. As mentioned, the Crown considered surveys to be an essential tool to the settlement of New Zealand: settlement depended on robust land titles which depended on robust surveys. Consequently, surveyors were literally at the frontline of implementing transactions – purported or real – and implementing the confiscation of Māori land. Unsurprisingly, for Māori, surveyors and their work became synonymous with conflict over disputed land transactions and the unwanted extension of Crown authority.

22. Māori routinely disrupted survey work in disputed territories. Often, the disruption was peaceful – the uprooting of pegs and the confiscation of survey equipment became almost ritual – as was the case initially in Taranaki.[10] But on occasions violence did erupt and surveyors were killed. The Wairau Massacre in 1843 in the Wairau Valley, southeast of Nelson, was the result of Te Rauparaha's attempts to halt the survey of land that had purportedly been sold prior to the Treaty. Most of these incidents occurred prior to the advent of the Court or prior to the Court making rulings on customary title.

23. Surveying became more clearly associated with the negative aspects of colonial rule when surveyors were called in to define the confiscated districts in Taranaki, Poverty Bay, Eastern Bay of Plenty, Tauranga and Waikato in the 1860s. It was easy enough for Crown officers to draw lines on maps showing the confiscated areas, but it was quite another thing for surveyors and their chainmen to translate those lines on the ground. There were many instances of hostilities, including killings, as a result of Māori resisting the confiscation of their lands.

Māori grievances over surveys

24. In addition to the incidences of outright conflict between Māori and surveyors, Māori came to hold grievances over the direct and indirect consequences of surveying.

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10 Waitangi Tribunal, *Taranaki Report, Kaupapa Tuatahi* (GP Publications, Wellington, 1996) at para 2.4.1.

There are several aspects to these grievances, many of which the Waitangi Tribunal has reported on.

25. First, the survey of Māori land was the pre-cursor to applications to the Court for investigation of title: a survey plan was a prerequisite to the filing of an application. Furthermore, as an individual Māori was entitled to file an application for an investigation of title, the actions of one individual could draw in a huge number of Māori into a disputed application, regardless of the merits of the individual's claim. Often, the appearance of surveyors on the ground was the first anyone knew of the claim. The surveyor invariably bore the brunt of the owners' anger and opposition to a claim as, if the survey could be frustrated, then so too might the claim be frustrated.

26. In the *Te Urewera Report* the Waitangi Tribunal commented on the initiation of surveys and applications undermining tribal decision making:

> Crown processes which allowed individuals to pull land into the court without the mandate of their hapu were reflected in the survey regime itself. Any claimants were able to embark on a survey. The fact that authorisation of surveys was an issue in several of these blocks underlines the lack of provision for community decision-making and consensus on starting surveys.[11]

27. For Māori, surveys were a symbolic and real manifestation of the often unwanted extension of the Crown's and the Court's authority into their tribal domains. Preventing survey was of strategic importance. Tuhoe, who resisted the reach of Crown authority and the operation of the Court for longer than any other iwi, identified early on from the experience of other iwi that there were four "ills" of the colonial powers that would lead to their tribal authority being undermined. Surveying, was one of those:

> *Hei aha te ruri,*
> *Hei aha te rori,*
> *Hei aha te rihi,*
> *Hei aha te hoko.*
>
> There shall be no surveys,
> There shall be no roads,
> There shall be no leases,
> There shall be no sales.

28. Second, it follows that as surveying went hand-in-hand with the determination of ownership of customary land and the commutation of customary title, which invariably led to the individualisation of land interests, surveying became strongly

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11 Waitangi Tribunal, *Urewera Report*, (Waitangi Tribunal, Wellington, 2010) at p 744.

associated with the destruction of tribal authority. That is, the undermining of the collective. That association remains to this day. Although the role of surveyors in the Court's investigation of ownership of land diminished over time as less land remained to be investigated, their role changed to implementing partitions of land. These could be just as controversial. In some instances, individuals sold their interests against the wishes of the collective and the purchasers then sought to carve out what they had bought. In other cases, individual Māori owners sought to partition their interests into a title that could be used without the constraint of the collective or, as sometimes occurred, that could then be sold. Thus, partitions – which surveys were mostly concerned with in the 20th century – came to represent, in a general sense, the victory of the individual over the collective. This was quite against Māori ethos.

29. Third, the most common complaint amongst Māori was that surveying was inordinately expensive and invariably resulted in the loss of land, contrary to the protections of the Treaty. As I have mentioned, surveys were a prerequisite to applications to the Court for investigation of title. The applicants or those who were determined to be the owners were obliged to meet the survey costs. Often, Māori had no choice but to sell land and so sales took place at the time of the investigation of title or shortly afterwards. Where the survey costs could not be met, survey liens were imposed and resulted in the inevitable sale of land. The loss of land to survey costs is one of the major grievances in the Waitangi Tribunal. The Tribunal has reported on several claims to date.

30. In the *Pouakani Report*[12] the Tribunal considered a range of survey issues in relation to the Pouakani and related blocks in the Central North Island. The claimants complained about inaccuracies and errors in the survey plan and the loss of land to survey costs. The Tribunal observed:

> We conclude that Māori paid a disproportionate cost for Pākeha settlement, but little provision was made for Māori participation in the suggested benefits of the introduction of capital and settlers. Indeed, the system of Native Land Court investigation of title and individualisation of interests in land, which could be sold piecemeal, contributed largely to social disruption, dissension over issues of mana and territory, massive debts, costly mistakes in survey boundaries in some cases, and failure to survey in others, and costly litigation.
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> We have particular concern about the way large areas of land were acquired by the Crown in payment of survey costs. We accept the need for survey to identify boundaries for title purposes. We question why Māori were required to pay so substantially for the whole cost of surveys, including minor triangulation, in the Rohe Potae. If the Crown had accepted Māori proposals to work out the areas to

12 Waitangi Tribunal, *Pouakani Report* (Brookers, Wellington, 1993).

> be sold or leased for Pākeha settlement, and administer their lands themselves, there would not have been the need for so many surveys of subdivisions of blocks. Perhaps there would have been fewer disputes and certainly less expense in prolonged litigation. The Crown also charged interest on unpaid survey liens, even when the Crown was sole purchaser and it had been agreed that survey costs would be paid in land.
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> There is nothing in the Treaty of Waitangi which required the transmuting of traditional Māori forms of land tenure into titles cognisable in British law. By imposing requirements for survey and associated costs, fees for investigation of title in the Native Land Court, and other costs such as food and accommodation while attending lengthy Court sittings, many Māori were forced into debt. That there had to be a fair system of establishing ownership when a sale was contemplated is accepted. The legislation under which the Native Land Court operated went much further than that and required that all Māori land be passed through the Court with all the attendant costs of that process. When the debts were called in, Māori paid in land.[13]

31. In the *Hauraki Report* the Tribunal commented as follows:

> The costs of surveys and of attendance at court were undoubtedly high, especially for people who had little or no reliable income stream. Survey costs usually had to be met by selling land, often in a restricted market. The titling of Hauraki land was usually a prelude to its sale rather than to its development. Some Maori right owners may have gained some potential benefits through having boundaries defined and disentangling their interests from those of rival hapu and iwi. They also received immediate payment for sales though much of that was commonly subsumed in covering debts already accrued in putting the land through the Court and in day to day living expenses. But it is difficult to see what Maori gained in the medium and long term from having their land surveyed and passed through the court: most commonly it was the prelude to a succession of partitions and sales. On the other hand the purchasers of land including the Crown and the general community gained from putting Maori under the obligation of having full surveys made of their land. [14]
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> The costs of survey and titling Maori land should have been shared more equally between Maori owners, private purchasers and the Crown than was in fact the case. [15]

32. In the *Te Urewera Report*[16] the Tribunal examined a range of survey issues. The Tribunal commented on survey costs:

> We agree that, where Maori embarked on dealing in their lands, they should have made some contribution to the survey costs; but that it should not have exceeded a relatively small share of the land concerned. The survey costs in only one of the inquiry district blocks were under 5 per cent. It is clear that figures of over 10 per cent were too high, and that, where costs amounted to over 50 per cent of the land, this was completely unacceptable.[17]

33. The Tribunal's general conclusion was as follows:

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13 Ibid at pp 307-308.
14 Waitangi Tribunal, *Hauraki Report*, volume 2 (Legislation Direct, Wellington, 2006) at pp 779-780.
15 Ibid at p 780 bullet point 2.
16 Waitangi Tribunal, *Urewera Report*, (Waitangi Tribunal, Wellington, 2010).
17 Ibid Part II chapter 10.8.3 at p 742

> We conclude that the survey costs regime was flawed, and that there was little concern on the part of the Crown about its impact on Māori communities. This was not always true; but occasional examples of official flexibility in relation to survey charges are somewhat eclipsed by a more evident lack of interest – over a prolonged period – in how Māori owners coped with the loss of land involved. By contrast with official indifference, the peoples of Te Urewera were deeply concerned about survey charges. The extent of Crown purchasing activities in blocks where the owners had to pay off their survey liens in land underlines the fear of 'disastrous' survey costs that would be so strongly expressed when Seddon visited Te Urewera. The remarkable thing is that while the Crown was addressing those fears in practical terms in the Urewera District Native Reserve, the attempts of its officials to secure survey charges, and interest on them, in the rim blocks, continued unabated. We referred at the beginning of this section to the issue debated by the Crown and claimants as to whether Māori – or the public- benefitted from surveys of Te Urewera land. We have found that between 1881 and 1930 the Crown purchased nearly 60 per cent of the land in the rim blocks awarded to claimants in our inquiry; and that it achieved this by disempowering hapu through its legislation and its purchase policies. More than 82 per cent of the land passed into Crown or settler hands. This was, as the Crown so often explained, the purpose of Crown policies. TW Lewis put it in precisely these terms to the Native Land Laws Commission in 1891: the Native Land Court system was designed to facilitate the transfer of land from Māori to settlers (see sec 10.2).
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> It is in this context that we have to consider the imposition of a survey regime which required Māori to bear the costs of survey of their lands. As surveyors moved into Te Urewera for the first time, taking measurements and marking boundaries on their plans so that blocks could be recorded on colonial maps, the process of 'opening up' the country to settlement and creating transferable titles got under way. This, clearly, was seen as a public good. The peoples of Te Urewera should not have borne more than a small part of these costs.
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> For their own purposes, when Māori were ready to go to the court to have their titles confirmed (which in our view should have followed their own title determination process), sketch plans would have been adequate. The costs of surveys sufficient for land transfer title were a different matter. It was for the Crown to consider the allocation of those costs, and the extent to which it carried them or passed them on to settlers..
>
> We find ourselves in agreement with the Hauraki tribunal that: 'it is difficult to see what Māori gained, in the medium and long term, from having their land surveyed and passed through the court: most commonly it was the prelude to a succession of partitions and sales. On the other hand, the purchasers of land, including the Crown and the general community, gained from putting Māori under the obligation of having full surveys made of their land.'[18]

34. One example of survey liens that the Te Urewera Tribunal encountered was the Matahina C, C1 and D blocks. Each of the blocks comprised 1000 acres. In 1907 the Crown took 667 acres from Matahina C, 667 acres from Matahina C1 and 920 acres from Matahina D for survey liens.[19] One of the lead claimants for the Matahina C and C1 claim, Mr Tama Nikora, an experienced surveyor who worked for the Department

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18 Ibid at p 749-750

19 Ibid at p 743.

of Lands and Survey from the 1950s to the 1970s, commented on the absurdity of the situation (as quoted by the Tribunal):

> Mr Nikora, himself a surveyor for many years, argued that in the case of the Matahina C blocks:
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> it just did not make any sense to carry out a survey to accuracy in length of 0.02 metres when the end result was to lose two thirds of the land. A magnetic survey would have been satisfactory. A full legal title survey in 1885 was just not necessary because Patuheuheu were not wanting to sell their land.

35. Thus, for Māori, surveys were often seen as having little benefit and simply another method by which their land was taken from them.

36. Fourth, Māori often complained about the standard of surveys undertaken. Interestingly, these complaints cover the spectrum of issues with surveys being too particular, inaccurate and incomplete. As mentioned, in the *Te Urewera Report* the complaint was that the surveys were unnecessarily precise, of no practical use and resulted in an unreasonable cost burden on Māori, particularly where the survey was for the purpose of defining boundaries between Māori ownership groups. The *Pouakani Report* concerned complaints that surveys were simply wrong. The *Te Roroa Report,* which related to lands stretching from Kaihu to Waimamaku, concerned the failure of the Crown to set aside and protect reserves for Te Roroa due in large part to defective survey plans. The complaint in the *Wairarapa ki Tararua* inquiry, which related to transactions negotiated in the 1850s and 1860s, was that the Crown should have completed the surveys prior to completion of the transactions:

> *We find* that the Crown's failure to survey land before the sale was finalised, or indeed within a short period thereafter, compounded the breaches already identified. Deeds signed without survey, and where the price was arrived at without information about the number of acres involved, were deficient purchases.
>
> The Crown knew that purchases conducted in this way were deficient. Crown officials regularly acknowledged that survey was a priority, and necessary to make sure that reserves were protected and owners received their Crown titles. But nevertheless, purchasing continued without survey information. This conduct breached the Crown's obligation to act towards its Treaty partner in good faith.
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> Only at Castlepoint were boundaries at all defined before the purchase was undertaken. Subsequent deeds routinely purported to transfer land ownership even though the boundaries of the land to be transferred were undefined and uncertain. Purchases arranged like this lacked informed consent, because the vendors did not know – and could not know – what they were agreeing to. This is a clear breach of article 2.

> The lack of surveys meant that there was no overall picture of the dimension of the Crown's purchases until it was too late. By the time realisation dawned and a reaction started in the early 1860s, well over 1,500,000 acres had been sold to the Crown. The absence of maps and plans deprived Māori of the ability to monitor what was happening across the district, and protect themselves from selling too much land. Likewise, Crown officials, lacking survey information, could not act to protect Māori from excessive land sales even if they had been so minded. This breached the Crown's duty of active protection and the guarantee of te tino rangatiratanga.[20]

What are surveyors to take from this?

37. I have not relayed this history to cause you discomfort or to put you off working with Māori land. There are two points I would like you to take away.

38. First, be aware that for Māori, surveyors carry historical baggage. Some of it is negative, but not all. In particular, be aware that, depending on the district in which you work, surveys may have a negative connotation because of their association with disputed land transactions, the confiscation of land, the loss of land to survey costs, breaking up land from the control of the tribal collective and, in a general sense, unwanted change being foisted on Māori.

39. Second, Māori are culturally different from the majority Pākeha New Zealanders. That is especially so when it comes to land. It is important that surveyors, and other professionals, are sensitive to those cultural instincts. This may mean observing Māori rituals of meeting and greeting; acknowledging the importance of the marae as the gateway to the community and the key forum for discussion; being sensitive to owners' ancient association with land and grievances over land loss; and being respectful of particular Māori sensitivities regarding land, such as wāhi tapu.

Māori land survey issues

Overview

40. The nature of survey work in relation to Māori land has changed considerably over the years. For much of the 19th century surveyors were called upon to define boundaries for the purpose of land transactions, title investigation and the confiscation of Māori land. From the end of the 19th century and throughout most of the 20th century the survey work turned to title reconfiguration, mainly the partition

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20 Waitangi Tribunal, *Wairarapa ki Tararua* (Legislation Direct, Wellington, 2010) volume 3, chapter 15.2.1(2) at p 1047-1048.

of land but also the amalgamation of titles and the creation of new titles following consolidation schemes.

41. The Māori Freehold Land Registration Project was implemented in 2006 to complete an enormous amount of Māori land title surveys that had never been completed. This situation was due to a combination of factors including Māori land owners not engaging surveyors because of the cost, the Court being able to issue titles without relying on full surveys and Māori land titles not finding their way into the land transfer system.

42. Today, there is less prospect of partitions and major title reconfigurations requiring survey work. Instead, I believe that surveyors will be called upon more and more to assist as "land use professionals" and to provide less expensive services than the traditional title definition plans.

Māori land titles

43. The Court has an extensive jurisdiction over Māori land, which includes Māori customary land (which is rare) and Māori freehold land. In addition, the Court has a limited jurisdiction in relation to a hybrid class of land known as "General land owned by Māori". These various statuses of land are defined in s 129 of the 1993 Act:

> **129 All land to have particular status for purposes of Act**
>
> (1) For the purposes of this Act, all land in New Zealand shall have one of the following statuses:
>
> (a) Māori customary land:
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> (b) Māori freehold land:
>
> (c) General land owned by Māori:
>
> (d) General land:
>
> (e) Crown land:
>
> (f) Crown land reserved for Māori.
>
> (2) For the purposes of this Act,—
>
> (a) Land that is held by Māori in accordance with tikanga Māori shall have the status of Māori customary land:
>
> (b) Land, the beneficial ownership of which has been determined by the Māori Land Court by freehold order, shall have the status of Māori freehold land:
>
> (c) Land (other than Māori freehold land) that has been alienated from the

> Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by [a Māori or by a group of] persons of whom a majority are Māori, have the status of General land owned by Māori:
>
> (d) Land (other than Māori freehold land and General land owned by Māori) that has been alienated from the Crown for a subsisting estate in fee simple shall have the status of General land:
>
> (e) Land (other than Māori customary land and Crown land reserved for Māori) that has not been alienated from the Crown for a subsisting estate in fee simple shall have the status of Crown land:
>
> (f) Land (other than Māori customary land) that has not been alienated from the Crown for a subsisting estate in fee simple but is set aside or reserved for the use or benefit of Māori shall have the status of Crown land reserved for Māori.
>
> (3) Notwithstanding anything in subsection (2) of this section, where any land had, immediately before the commencement of this Act, any particular status (being a status referred to in subsection (1) of this section) by virtue of any provision of any enactment or of any order made or anything done in accordance with any such provision, that land shall continue to have that particular status unless and until it is changed in accordance with this Act.

44. Section 129(3) is important to bear in mind as, unless the status of the land has changed under the 1993 Act, it retains its earlier status. Consequently, land may be Māori freehold land by reason of a definition contained in an earlier Act.[21]

45. The Court is primarily responsible for the creation and alteration of titles to Māori freehold land. There is an anomaly in the current regime whereby new titles can be created by way of subdivision, which takes the matter beyond the view of the Court, however that is quite rare.

46. The Court creates or alters titles by order. Pursuant to rule 63 of the Māori Land Court Rules 1994 the Court must approve any survey plan relating to a title order:

> **63 Survey plan to be approved by Judge**
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> Every survey plan from which a plan to be endorsed upon or annexed to an order is to be prepared, shall be approved by a Judge and minuted by the Judge as approved, before the plan prepared from that survey plan is endorsed upon or annexed to the order.

47. Section 300 reiterates this requirement in relation to partition:

> **300 Plan approved by Court prerequisite to partition of Maori land**
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> No partition of Maori land shall be effected (whether by the Court under this Part of this Act or otherwise) except in accordance with a plan approved by the Court.

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21 See the discussion in *Faulkner v Deputy Registrar – Lot 5 Parish of Tahawai* 2010 Māori Appellate Court MB 643 (2010 AP 643) at [37]-[113].

48. Rule 62 contemplates that a full survey plan is required:

> **62 Orders requiring plan**
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> Every partition order and every freehold order and every other order that requires a plan of the land comprised therein to be endorsed on or annexed to the order shall have endorsed or annexed to it a plan of the land sufficient for the purpose of registration under the Land Transfer Act 1952.

49. However, s 124 sets in place an exceptions regime whereby a title order may be provisionally registered in the absence of a plan sufficient for full registration:

> **124 Special provisions where insufficient survey plan**
>
> (1) Where any order to which this Part of this Act applies is presented for registration under the Land Transfer Act 1952, the District Land Registrar shall, if the order is not supported by a plan defining the land affected by the order and sufficient for the purposes of the registration of that order under that Act, embody the order in the provisional register as a separate folium, and, subject to subsection (2) of this section, all the provisions of that Act relating to provisional registration shall thereupon apply accordingly.
>
> (2) Where any order to which this Part of this Act applies is, in accordance with subsection (1) of this section, embodied in the provisional register as a separate folium, any person in whom the beneficial ownership of land or any interest in land is vested by that order may, in accordance with section 167(5) of the Land Transfer Act 1952, and in accordance with the regulations in force in that behalf, deposit a plan in relation to the land or interest in land to which the order relates, which plan shall define the pieces of land affected.

50. Historically, provisional registration was common for Māori freehold land because full survey plans were not completed. That is why many titles were "PR" titles. These are now registered as "CIR" titles. The bulk of Māori land titles remained equitable titles, recorded in the Court's system only, and had not achieved registration within the land transfer system. As Bob Adam will explain, the Māori Freehold Land Registration Project was devised to achieve registration of all Māori freehold land titles. Most titles registered under the Project are CIR titles and rely on computed plans and not full survey plans. Consequently, surveyors may still be called upon by Māori land owners to complete survey plans so that their land may achieve a full "CFR" title. In that case, the Cadastral Survey Rules 2010 will apply.

Partitions

51. The partitioning of Māori land is far less common today. That is due to the changing needs and aspirations of Māori land owners and the statutory hurdles that stand in the way of the Court granting partition. The primary statutory hurdle is s 288(4) of

the 1993 Act which provides that the Court "...must not make a partition order unless it is satisfied that the partition order is... necessary to facilitate the effective operation, development, and utilisation of the land...". Where alternatives to partition are available to achieve the owners' plans for the land, such as occupation orders, partition cannot be granted. Partition is not a right.

52. The Māori Appellate Court summarised the situation as follows:

> It can be seen at once that partition is treated under the Act as of being the utmost gravity – akin in some ways to alienation. This sea change in attitude from the Māori Affairs Act 1953 to Te Ture Whenua Māori Act 1993 reflects an acceptance by the Legislature that title fragmentation through partition is contrary to Māori economic and cultural interests and should not now be encouraged if there are reasonable alternatives to it. The bar has been set intentionally high.[22]

53. Surveyors are unlikely to receive a lot of work from Māori land owners wishing to partition their interests. Nevertheless, as the Court looks for solutions to issues of land ownership and use, surveyors may be called upon to assist with other title innovations. In a matter that came before me last year I concluded that the Court can grant what I termed a "hybrid partition".[23] That is, the Court can divide the land into separate titles in the same ownership but with the rights of use of particular titles being awarded to different owners through a combination of trust orders and occupation orders. I have since made orders following this model in another matter.[24] The other innovation under the 1993 Act is occupation orders, which I discuss below.

54. It is not widely appreciated that where the Court grants a hapu partition – where the parcels are held by owners who are members of the same hapu – the Court is not bound by the subdivision requirements of the Resource Management Act 1991.[25] These provisions recognise that subdivision restrictions should not automatically apply to Māori land when the ownership is to remain with the hapu.

55. Finally, as the Cadastral Survey Rules 2010 grant a dispensation from marking boundaries in relation to Māori land (Rule 7.1), it is important that surveyors advise the Court of their professional opinion on whether marking is necessary in relation to a particular plan. In fact, I always find it helpful if surveyors include their survey report with any plan submitted for approval.

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22 *Reid v The Trustees of Kaiwaitau 1 Trust – Kaiwaitau 1* (2006) 34 Gisborne Appellate Court MB 168 (34 APGS 168) at [15].

23 *Heta – Taiharuru 4C3B* (2010) 13 Taitokerau MB 203 (13 TTK 203).

24 *Selwyn v Hobson – Henry Rangitawhiti Hobson and Maxwell Grant Lot 4* (2011) 18 Taitokerau MB 1 (18 TTK 1).

25 Section 11(2) Resource Management Act 1991 and ss 301 to 304 of Te Ture Whenua Māori Act 1993.

Occupation orders

56. Occupation orders were a new feature of the 1993 Act.[26] The Court may issue an occupation order which grants exclusive use and occupation of part of multiply owned Māori land that is otherwise held by the owners as tenants in common. An occupation order enables the Court to allocate land amongst the owners without affecting the underlying title. It creates a statutory interest in the land that LINZ is able to register against a title, though the interest cannot be alienated.[27] However, an occupation order may be succeeded to in the same manner as the land.[28]

57. The Court has to date granted occupation orders in reliance upon fairly rudimentary sketch plans drawn up by the owners. These are invariably handwritten, not to scale and endeavour to define the boundaries by reference to features on the land and approximate measurements. The situation is less than ideal, particularly as land comes under increasing pressure from multiple users.

58. I see occupation orders as a key area where surveyors can assist Māori land owners and the Court. Surveyors should be able to prepare relatively inexpensive scheme plans for such papakainga that show the boundaries of the occupation sites, access ways and communal facilities. Full boundary definition is not needed: GPS co-ordinates should be sufficient. In the Whangarei district, in particular, surveyors are likely to be needed to assist in the preparation of Papakainga Development Plans in terms of the requirements of the Whangārei District Council's Plan Change 95.

59. As I see it, this type of work represents a change from the traditional survey work of precisely defining boundaries of primary parcels and lesser interests to producing less expensive scheme plans to show land use areas.

Wāhi tapu

60. Surveyors who have worked with Māori land owners will have an appreciation of the significance of wāhi tapu to Māori. Wāhi tapu may comprise urupa (graves), places where whenua (afterbirth) are buried, other sacred sites and sites of significance in general. Land blocks often contains wāhi tapu and these sites should be treated respectfully and appropriately.

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26 Sections 328-331.
27 *Bidois – Te Puna 154D3B2B* (2008) 12 Waiariki Appellate Court MB 102 (12 AP 102).
28 Section 109A.

61. One of the issues that the Court and surveyors face from time to time is whether wāhi tapu should be identified on plans or maps. There are two schools of thought. Some Māori say that wāhi tapu should be shown to ensure that people know where they are so that they are not desecrated. For other Māori, wāhi tapu should not be disclosed. Sometimes this is because the knowledge that is associated with the wāhi tapu is intended to remain within a small group who have the responsibility of looking after the wāhi tapu and handing on the knowledge to a future generation. It may also be because of more practical considerations and, in particular, the fear that fossickers will desecrate the wāhi tapu. Both schools of thought are valid. The Court and surveyors should always enquire of the owners as to how they wish to treat wāhi tapu.

62. This brings me to one final point. In the course of the Māori Freehold Land Registration Project, I was required to decide whether to order the survey of two titles, one of which was a wāhi tapu, in circumstances where those associated with the wāhi tapu did not want it defined by survey. The wāhi tapu was contained within a separate title, undefined as to area. In the end, I decided that survey was inappropriate and declined to order one. I concluded that in terms of s 124, LINZ could issue CIR titles for the two blocks of Māori freehold land by describing them as undefined areas within the former parent title (which was defined by survey).[29] To outsiders, ordering undefined titles might seem contradictory and an odd solution. However, as the owners of both blocks had not asked for their boundaries to be defined and their undefined titles had happily co-existed for almost 70 years, there was no problem. I have since taken the same approach in another case concerning wāhi tapu.[30]

Māori land appellations

63. Māori land titles are described by reference to what is normally the original block name and an alpha-numeric reference that signifies the subsequent partitions of that original title, for example Taupo 24A. Whenever the Court creates new titles it follows the same system of appellation. Unfortunately, on the occasions where Māori land titles have been changed by subdivision plans not approved by the Court, this system has not been followed and the land has been described by reference to the lot and plan reference. This is a significant problem.

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29 *Waima North B1 and Waima North B2* (2010) 5 Taitokerau MB 211 (5 TTK 211).
30 *Parangiora 1 (wāhi tapu) and Parangiora 2 Blocks* (2010) 6 Taitokerau MB 238 (6 TTK 238).

64. First, the land loses its historical appellation and link with the parent block. Land names are of great cultural and historical significance to Māori and contain associations with historical places, events and people. The Court always endeavours to maintain those associations in its titles.

65. Second, the land ends up out of sync with the rest of the blocks within the Court system. This poses problems for staff and owners researching blocks.

66. Third, the land becomes anonymous. This is a particular problem as the Māori community needs to be informed via the monthly *Panui* of blocks that are coming before the Court for hearing. A reference to "Lot 1 DP 1234567" is meaningless.

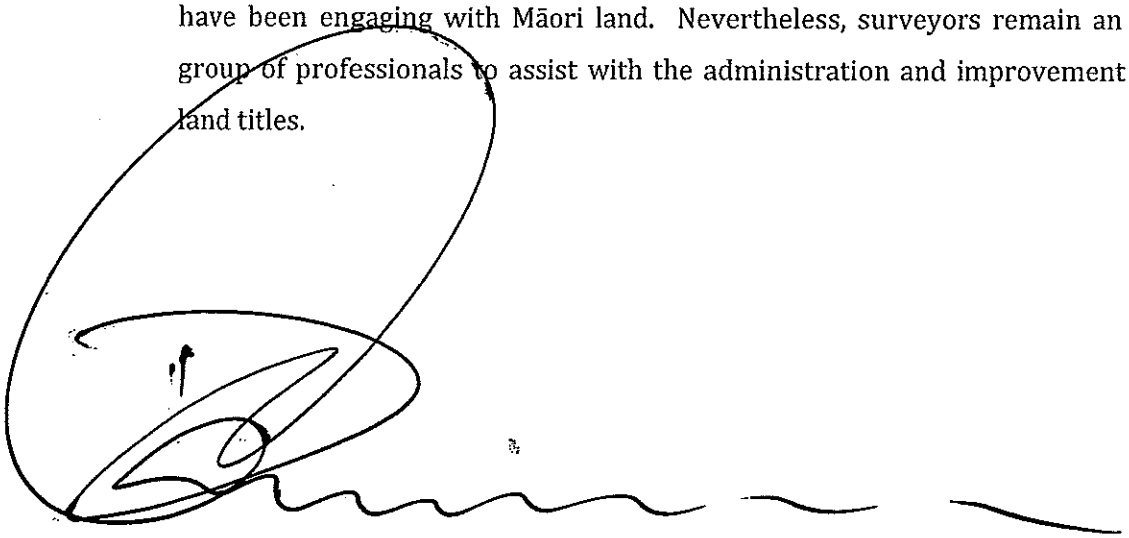
67. The Court has the power under s 125A of the 1993 Act to alter a land appellation. I understand from LINZ that Māori land appellations should no longer be lost and that all ML plans are required to follow the Court's appellation system.

Court appointments

68. Finally, surveyors should be aware that from time to time the Court appoints surveyors to act as expert witnesses and to prepare plans. The Court has a limited fund, known as the Special Aid Fund, from which surveyors' reasonable costs are met.

Conclusion

69. The nature of survey work has changed in the more than 170 years that surveyors have been engaging with Māori land. Nevertheless, surveyors remain an essential group of professionals to assist with the administration and improvement of Māori land titles.



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