IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

TE KOTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2023-485-162

UNDER	Part 30 of the High Court Rules
AND UNDER	Section 2 of the Declaratory Judgments Act 1908 and the inherent jurisdiction of the Court
IN THE MATTER OF	an application for judicial review of a decision made by or on behalf of the Minister for Treaty of Waitangi Negotiations

AND IN THE MATTER OF an application for a declaratory judgment

BETWEEN	**SOLOMON and others** Plaintiffs
AND	**ATTORNEY-GENERAL** First Defendant
AND	**WHAITIRI and others** Second Defendants

AFFIDAVIT (NO. 3) OF THOMAS McCLURG FOR SECOND DEFENDANTS IN SUPPORT OF INTERLOCUTORY APPLICATIONS DATED 28 JULY 2023; AND IN RESPONSE TO THE MATTERS DEPOSED TO BY FRANCISCA SOFIA GRIGGS DATED 26 OCTOBER 2023

Dated: 30 October 2023

Judicial Officer:	Justice Isac
Next event date:	Interlocutory hearing: 1 November 2023

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I, **THOMAS McCLURG** of Wellington, swear:

Pepeha

Ko Te Moana-nui-a-Kiwa, te moana

Ko Wharekauri te motu

Ko Ngāti Mutunga o Wharekauri, te iwi

Ko Whakamaharatanga, te marae

Ko Ngahiwi Dix, ko Wikitoria Kawhe, ko Te Matoha Daymond oku tupuna

Ko Tom McClurg ahau

WAI 64 Rekohu Tribunal Report Section 2.7

Introduction

1. This is my third deposition in this proceeding, dedicated to the interlocutory applications herein (strike out etc).

Affidavit of F S Griggs dated 26 October 2023

2. Under the affidavit of Francesca Griggs, dated 26 October 2023, section 2.7 of the Rekohu Report of the Waitangi Tribunal is attached without elaboration in support of paragraph 5 of the MIST submission dated 26 October 2023. Paragraph 5 asserts that Moriori are a Treaty partner with the Crown notwithstanding the declaration in paragraph 3 of the same submission that "*Moriori have pleaded that they are not Māori (which is objective fact)*".

3. It is important to note that Ngāti Mutunga o Wharekauri are on record before the Māori Affairs Parliamentary Select Committee at its hearing to consider the Moriori Settlement Bill as supporting the Moriori settlement by the Crown; and had agreed to joint redress with Moriori within that settlement. That support and agreement relied upon the inherent proposition that Moriori asserted they

were Māori in order to secure a Treaty settlement with the Crown; and our understanding that Moriori are Māori. The basis of that understanding has now been removed by MIST.

4. Ngāti Mutunga o Wharekauri submit, that as a matter of historical fact, only Māori exercised te tino rangatiratanga within the original (1840) and expanded (1842) boundaries of the colony of New Zealand and that the Treaty of Waitangi relationship is fundamentally between the Crown and those persons who had (in the view of the British Crown "*title to the soil and to the sovereignty of New Zealand*" (Lord Normanby's written instructions given to Captain Hobson on 14 August 1839 in England). Within New Zealand in 1840 (when the Treaty of Waitangi was signed) and 1842 (when Wharekauri was annexed by the Crown) all persons with customary title to the soil and sovereignty were Māori.

5. The NMOW submission to this Court in this proceeding that the Moriori claim based on rights derived from the Treaty is untenable, is not because they are Moriori, but because Moriori now say they are not Māori. Even, if as formerly believed by many Ngāti Mutunga o Wharekauri people, Moriori were (and are) Māori, not all Māori were qualified to sign the Treaty on behalf of themselves or others. Slaves had neither title nor sovereignty and signatories were either chiefs or at least people of recognised mana within groups who exercised te tino rangatiratanga over particular places who were entitled to cede kawanatanga in exchange for a guarantee of their ongoing te tino rangatiratanga.

Treaty of Waitangi Act 1975

6. Section 2.7 of the Rekohu Report (referred to by F S Griggs) contains the Tribunal's explanation of why it accepted that Moriori were and are Māori. This explanation was necessary to justify the decision of the Tribunal to even consider the Moriori claim, given the statutory obligations of the Tribunal under its legislation. Those statutory obligations and context were provided by the Treaty of Waitangi Act 1975 (and amendments). Some relevant excerpts

from that Act are included as Appendix 1. The preamble to the Act states that "*on 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Māori people of New Zealand*" (not Māori and non-Māori).

7. Only Māori (not non-Māori) can make claims to the Tribunal and the Tribunal can only recommend the return of land to Māori (not non-Māori). The Act contains a definition of 'Māori'. "***Maori** means a person of the Maori race of New Zealand; and includes any descendant of such person*". If Moriori are not Māori (as stated by MIST) and are not descendants of a New Zealand Māori, then they are not Māori for the purpose of the Treaty of Waitangi Act 1975. This definition (or very similarly worded definition) is used in a number of New Zealand statutes and it is very clear to NMOW that it would preclude the Waitangi Tribunal from accepting and reporting on a claim from non-Māori, including Moriori, as they now define themselves.

8. In Section 2.7.4 of its report, as referred to by F S Griggs the Tribunal recognises "*that only Maori may bring claims. However ,'Maori' means no more than the native people of New Zealand, and that includes Moriori unless the context requires otherwise.*" The context does 'require otherwise'. Under the Treaty of Waitangi Act 1975, **Maori** means what the definition in that Act says it means and the Tribunal is not able to re-draft or ignore that definition; it is bound by it. Neither can any differences between the H.W. Williams *Dictionary of the Maori Language* definitions of 'Maori' and the definition within the Act be taken to over-ride that statutory definition.

Section 2.7 and the Treaty of Waitangi

9. Section 2.7 of the Tribunal Report referred to by F S Griggs makes no reference to the wording of the actual statutory definition of 'Māori' which the Waitangi Tribunal is obliged to apply. Rather, it makes two (very debatable) points relating to the text of the Treaty of Waitangi and the historical context in which the Treaty was drafted. These are that (i) the Treaty "*barely refers to Māori*" and (ii) "*the Treaty was meant to apply to the whole of the indigenous people*

of such parts of New Zealand as might be annexed" (and therefore included Moriori accordingly). Individually and collectively these points do not add up to a coherent rationale for why the Waitangi Tribunal should ignore the definition of 'Māori' within its own legislation.

10. With regard to the first claim. It is not true that the Treaty "*barely refers to Maori*". The preamble in the Te Reo Māori version of the Treaty contains two references to *'tangata Maori'* and one to '*Rangatira maori'*. (see appendix 1). These references are to Māori people and Māori chiefs respectively. One of the references refers to '*Tangata maori o Nu Tirani*' (the Māori people of New Zealand). The second reference ("*ki te tangata Maori ki te Pakeha*") shows that '*tangata Maori'* is being used as a term of ethnic or racial differentiation from the term '*pakeha'* which is being used in the same ethnic or racial sense.

11. In 2.7.3. of its report the Tribunal states: "*the English text of the Treaty did not use "Maori' and the Maori text used it in the old way, with a lower case 'm'. (There is one possible exception, but it depends on how one interprets the handwriting*)". First, no conclusions relating to the Treaty of Waitangi status of Moriori can be drawn from the uncontroversial observation that the English version of the Treaty of Waitangi uses English words and the Māori version of the Treaty uses Māori words. Second, no great weight can be placed upon the slightly idiosyncratic use of capitals in the Treaty (as hinted at by the Tribunal itself). 'Rangatira maori' has a capital R and lower-case m. One reference to 'Tangata maori' has a capital T and a lower-case m; the other reference has a lower-case t and a capital M.

12. The assertion of the Tribunal (following Williams) that 'Maori' did not mean 'Maori race' until after 1850 is contradicted by the Treaty itself. As noted above, the Treaty (1840) contains the phrase "*ki te tangata Maori ki te Pakeha*" where 'tangata Māori' is clearly being used in that way. The Tribunal's assertion that "*before 1850, 'maori' and 'moriori' meant the same*" is fatuous in the context of Wharekauri (which is the only context that really matters). From early in 1836, on Wharekauri, 'Māori' meant Ngāti Mutunga o Wharekauri: the people who held te tino rangatira over the entirety of

Wharekauri as a result of conquest and ongoing subjugation (enslavement) of the original inhabitants there as distinct from 'Moriori' who had been so conquered and subjugated. Furthermore, this clear distinction has profound implications for the respective rights under the Treaty of Waitangi of Māori and Moriori respectively on Wharekauri.

13. Finally, the Tribunal tries to make something out of the fact that the phrase 'native chiefs and tribes' could include non-Māori people and 'the native population' could theoretically include non-Māori people. The use of plural language by the Crown reflects (an accurate) contemporary understanding of the structure of Māori society. This understanding was reflected in Normanby's instructions to Hobson (see Appendix 2). "*I have already stated that we acknowledge New Zealand as a sovereign and independent state so far at least as is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even deliberate in concert.*" Clearly the British understanding was that New Zealand was inhabited by a people organised in many tribes – hence the need to employ plurals when describing those tribes.

14. This raises the question of what the British had in mind when they used the term 'New Zealand' in the context of the Treaty. While there was doubt as to how many signatories would be obtained to the Treaty, and their geographical location, on 30 January 1840, Captain Hobson issued a proclamation defining the four boundaries of 'New Zealand' by latitude and longitude. From that date, the geographical definition of the Colony of New Zealand was clear. The co-ordinates were:

- North 34^0 30' south
- South 47^0 10' south
- East 179^0 0' east
- West 166^0 5' east.

15. These four co-ordinates delineate a very tight rectangle around North, South and Stewart island (so tight in fact, that it excludes the south-western tip of

Fiordland). These co-ordinates were attached to the two proclamations issued by Hobson on 21 May 1840. These proclaimed British sovereignty over the North Island on the ground of cession by Treaty and over the whole country (including South and Stewart Islands). The co-ordinates therefore defined both the area and the inhabitants to whom the Treaty applied. Incidentally, the same co-ordinates were used to delineate the Royal Charter issued to the New Zealand Company in 1841.

16. This is significant as it demonstrates that all Treaty references to 'natives of New Zealand', 'aborigines' of New Zealand, 'chiefs and tribes of New Zealand' refer to inhabitants of that narrow rectangle of territory that excluded the Chatham Islands. As a historical fact, all of those people exercising te tino rangatiratanga were New Zealand Māori. Whatever those terms were understood to mean in 1840, they did not mean or encompass 'Moriori' because Moriori were not resident in the colony of New Zealand. There is absolutely no evidence that the Colonial Office drafted the Treaty of Waitangi with an intention of 'future proofing' it to cover the possibility that other non-Māori people added to New Zealand by territorial expansion would automatically become 'Māori' for the purposes of the Treaty Waitangi.

17. Ngāti Mutunga o Wharekauri agree with the Tribunal that nothing should be made of the fact that Moriori were not signatories of the Treaty of Waitangi. When Wharekauri was annexed by the Crown by issuing letters patent in April 1842, which were gazetted in November 1842, no attempt was made to engage with the residents of Wharekauri prior to either action. However, if such an effort had been made, in all likelihood, Moriori would not have been offered an opportunity to sign the Treaty for the same reason that representatives of the New Zealand Company did not engage with Moriori in April 1840. That reason was that Moriori in 1840 and in 1842 did not hold any customary title or rights over any lands, forests, fisheries or other things on Wharekauri and exercised no tino rangatiratanga there.

18. As a historical footnote, in 1842, the Crown declined to recognise the purported 1840 land purchases of the New Zealand Company on Wharekauri because

(among other reasons) the Chatham Islands were outside of the boundaries of the Royal Charter held by the New Zealand Company.

19. It is not clear whether Section 2.7 of the Tribunal report supports or contradicts paragraph 5 in the MIST submission. Section 2.7 accepts that Moriori are not Māori but then simultaneously says that Moriori are Māori for the purposes of the Treaty of Waitangi Act 1975. Ngāti o Mutunga o Wharekauri reject the notion that people can be simultaneously Māori and non-Māori or that non-Māori can be Māori for Treaty settlement purposes.

SWORN at Wellington this)
30th day of October 2023)
before me:)

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A Solicitor of the High Court of New Zealand

Oliver Philip Novak
Solicitor
Wellington

Appendix 1.

Treaty of Waitangi Act 1975

Preamble

Whereas on 6 February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand:

2 Interpretation

Maori means a person of the Maori race of New Zealand; and includes any descendant of such a person

Treaty means the Treaty of Waitangi as set out in English and in Maori in Schedule 1

6 Jurisdiction of Tribunal to consider claims

(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—

6AA Limitation of Tribunal's jurisdiction in relation to historical Treaty claims

(1) Despite section 6(1), after 1 September 2008 no Maori may—

(a) submit a claim to the Tribunal that is, or includes, a historical Treaty claim; or

(b) amend a claim already submitted to the Tribunal that is not, or does not include, a historical Treaty claim by including a historical Treaty claim.

8A Recommendations in respect of land transferred to or vested in State enterprise

(2) Subject to section 8B, where a claim submitted to the Tribunal under section 6 relates in whole or in part to land or an interest in land to which this section applies, the Tribunal may,—

(a) if it finds—

(i) that the claim is well-founded; and

(ii) that the action to be taken under section 6(3) to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty, should include the return to Maori ownership of the whole or part of that land or of that interest in land,—

include in its recommendation under section 6(3), a recommendation that that land or that part of that land or that interest in land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land or that interest in land is to be returned);

8G Public notice

(d) invite any Maori who considers that he or she, or any group of Maori of which he or she is a member, has grounds for a claim under section 6 in relation to the land or interest in land, to submit that claim to the Tribunal before a date specified in the notice…

Schedule 1 The Treaty of Waitangi

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(The Text in English)

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of

those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W HOBSON
Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the

same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[*Here follow signatures, dates, etc.*]

(The Text in Maori)

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te Tuatahi

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te Tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) William Hobson,
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

Appendix 2

Lord Normanby's written instructions given to Hobson on the 14th of August 1839 in England

On the other hand the Ministers of the Crown have been restricted by still higher motives, from engaging in such an enterprise. They have deferred to the advice of the Committee of the House of Commons in the year 1836 to enquire into the state of the aborigines residing in the vicinity of our colonial settlements, and have concurred with that Committee, in thinking that the increase in national wealth and power, promised by the acquisition of New Zealand, would be most inadequate compensation for the injury which must be inflicted on this kingdom itself by embarking on a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people whose title to the soil and to the sovereignty to New Zealand is indisputable and has been solemnly recognised by the British Government.

I have already stated that we acknowledge New Zealand as a sovereign and independent state so far at least as is possible to make that acknowledgement in favour of a people composed of numerous dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act or even deliberate in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's predecessor, disclaims for herself and Her subjects every pretension to seize on the Islands of New Zealand, or to govern them as a part of the Dominions of Great Britain unless the free intelligent consent of the natives, expressed according to their established usages, shall first be obtained.