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Attention: Ian Peterson

Dear Ian

OPOTIKI POLICE STATION

Thank you for your prompt response in this matter.

I have now had the opportunity to look more closely at the issues and it appears that Whakatohea do have a justiciable claim to restrain the Crown obtaining a land transfer title to this property for the purposes of disposal.

In this instance, the fiduciary - like obligation of the Crown is clearly principled and involves some very important issues which, in my opinion, require close consideration.

Before addressing that, the record suggests that the Crown does not possess a land transfer title to the property.

As I may have indicated to you, the property was originally papatipu or customary land. It was included in an area of land taken by the Government in 1866 in terms of the provisions of the New Zealand Settlements Act 1863.

The Crown's right to possession of this property, as indeed for most of the Whakatohea land, is founded upon an expropriation by Order in Council dated 7 January 1866 under New Zealand Settlements Act 1863.

No subsequent action was taken to formalise the occupation of the property by various Government Departments until 1925 when by Proclamation the area was permanently reserved as a site for public buildings of the General Government. No attempt was made at that time to allocate individual lots to the Departments occupying the sites.

In 1948 a survey to redefine the areas in terms of occupation was undertaken and the Courthouse site is now described as Allotment 447 Town of Opotiki.

The property is a Public Reserve subject to the Reserves Act 1977 and was classified for Government purposes in 1982.

Any proposal by Government to dispose of the property will need to take account of the property's Reserve status.

In terms of Section 24 of the Reserves Act 1977, the Minister of Lands (assuming that no other Minister is in charge of the property) will need to give his approval to revoke the Reserve status.

The issue that prompted me to call you after talking to Claude is whether Whakatohea's territorial title to this property is completely extinguished in consequence of Government's expropriation.

I will put to one side an argument of whether Whakatohea's territorial title (papatipu) to the property is extinguished and concentrate instead on the remnants if any of that title that may exist on the assumption that the customary title was validly extinguished.

In essence the law is that extinguishment of customary title either by tribal relinquishment or statute can be partial or complete in its effect. A complete extinguishment removes all the attributes of customary title whereas partial extinguishment leaves some remnants of the original title.

It is important to appreciate that what may seem a complete extinguishment might not have such an effect. For instance, a statute which extinguishes customary title will leave a right to compensation unless that too is taken away.

That is merely in accord with the principle that proprietary rights are not to be taken away by statute without compensation. Belfast Corporation v O.D. Cars Ltd [1960] AC 490. It is arguable that the right to compensation thus survives even if a statute has rendered inexercisable the right of occupation under the customary title.

Under the New Zealand Settlements Act 1863, the Governments right of expropriation reserved to those persons found "innocent" the right to compensation.

Persons eligible to compensation under that Act could accept either land or scrip in satisfaction of any claim against the Government.

The Courts in this country have interpreted the award of land to Maori under that Act as no more than a restoration of their entitlements had not the Government expropriated their property.

In effect, the intention of the Act was not to interfere with property rights of the innocent but to forfeit the lands of those found guilty of been engaged in rebellion.

The enactment of the Treaty of Waitangi Act 1975 has enabled Maori to re-address their rights to compensation arising from actions of the Government found to be in breach of the principles of the Treaty of Waitangi. That includes, obviously the right to compensation arising from the confiscation of land under the New Zealand Settlements Act 1863.

The rights to compensation arising from breaches in this instance is at the sufferance of Government. Nevertheless the right arises from expropriation of property and which the Government has acknowledged will address.

As owners and descendants of the customary title expropriated by Government, Maori are excluded by Section 155 of the Maori Affairs Act 1953 to commence litigation in any Court to obtain the legal protection of their property and contractual rights. That right, nevertheless, is restricted within the confines of the Treaty of Waitangi Act 1975.

In this situation there is in my opinion a fiduciary duty on the Crown that survives beyond Whakatohea's loss of occupation or actual physical enjoyment of the land in question.

A leading Canadian decision, Kruger v The Queen [1985] 17 DCR (4th) 591 (FCA), involved a situation of the extinguishment of Indian title by expropriation for public works under statutory authority. In that case, the Crown owed a justiciable fiduciary duty to the Indian owners through and subsequent to the extinguishment.

In that case the majority found that the expropriation of the Indian title (reserve land vested in the Crown) was lawful. The Court found that the fiduciary duty did not arise simply where there was a surrender (extinguishment) of the customary title but arose from the special relationship between the tribe and the Crown.

The observance of the statutory procedure for the expropriation of land for public works did not discharge the Crown from its special obligations. In this instance, the Indians had a right to further compensation for any shortfall in the amount awarded and could, if they wanted, pursue this option. In other words, Whakatohea's claim for compensation is merely an extension of the original claim under the New Zealand Settlements Act 1863 and preserved to them by the Treaty of Waitangi Act 1975.

The notice of this fiduciary duty was explained in Guerin v The Queen [1984] 13 DCR (4th) and referred to in the NZMC v The Queen (1987) NZLR.

In my opinion that duty is exemplified by what is called the land bank concept recognised by the Court of Appeal (Richardson J in particular) in the NZMC case. By that concept the Crown is obliged to retain in its capacity the ability to return land in respect of which there is a claim. The Court was also concerned that any wholesale disposal:

"Would preclude or impede making reparation from other land in lieu of land previously disposed of by the Crown" (pg 683).

The Court of Appeal noted:

"The Crown must be satisfied that any disposition to a State Owned Enterprise would not preclude or unreasonably impede giving effect to any recommendation of the Waitangi Tribunal for the return of Crown land."

The land bank concept is relevant in a general sense to any disposition of Crown properties. The duty referred to is a fiduciary duty (Richardson J described it as a fiduciary of soughts whereas the Court in Guerin established it has a specific head) owned by the Crown to Whakatohea that stems from and survives the expropriation of the property in question.

The duty entails the Government not to dispose of the property if by doing so would likely impede Whakatohea's claim to compensation.

I have gone to some length perhaps more than necessary to clarify which I consider the law in identifying the nature of the caveatable interest. What I have stated is no more than a cursory illustration of the principle but is sufficient in my mind to establish in equity the interest claimed.

I suggest the wording of the caveat read with the effect:

"TAKE NOTICE that WHAKATOHEA MAORI TRUST BOARD of Opotiki, a body corporate under the Maori Trust Boards Act 9155 claiming an estate or interest as cestui que trust by virtue of a constructive trust by Her Majesty the Queen arising by Order in Council dated 17 January 1866 taking land belonging to the Whakatohea people of which the land in the schedule forms part and from the unresolved claim of the Whakatohea people for compensation arising from the said taking and which claim is before the Waitangi Tribunal.

The fiduciary duty may, as suggested be a constructive trust as it is raised in equity in order to satisfy the demand of justice. The Canadian Court has defined the fiduciary obligation as a trust.

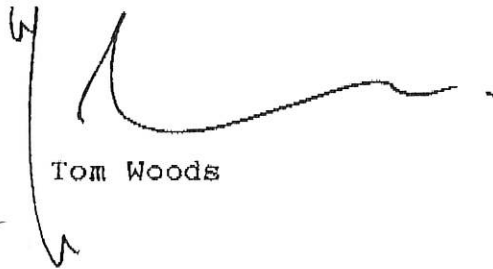
Feel free to change or modify the wording and proceed to register the caveat. All that I am trying to indicate is that there is a fiduciary relationship between Whakatohea and the Crown in respect of the property and that the issue of a title for the purposes of sale will breach that trust.

In the process of writing I am informed that the Minister of Justice has instructed that the sale not proceed until there is a satisfactory arrangement worked out with the Crown and

Whakatohea. Until we receive formal notification of that the lodging of a caveat should proceed.

I agree that the primary purpose of the caveat is to prevent the registration of the land under the Land Transfer Act. Whether in fact the caveat discloses sufficient detail to prevent the Crown dealing with the land is a matter perhaps best to address once it is registered.

Yours faithfully



Tom Woods

c.c. Claude Edwards Fax No. 07-315-7968