

IN THE WAITANGI TRIBUNAL

KEI MUA I TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 745/1308

WAI 2561

IN THE MATTER OF

the Treaty of Waitangi
Act 1975

AND

IN THE MATTER OF

The Ngatiwai Deed of
Mandate

AND

IN THE MATTER OF

A claim by Paki Pirihi on
behalf of Patuharakeke Te
Iwi Trust Board and a claim
filed by Ngawaka Pirihi and
others on behalf of the
owners of Pukekauri 1B1,
1B2, 1B3, 1B4 and 1B5 and
Takahiwai 4C, 4D1, 4E, 7A,
7B2 and & on behalf of
Patuharakeke te Iwi

BRIEF OF EVIDENCE OF DR GUY SINCLAIR GUDEx

Dated this 22nd day of August 2016

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INTRODUCTION

1. My name is Dr Guy Sinclair Gudex. On 4 December 2015 my first affidavit was filed in support of the application by the claimants of Wai 745 and Wai 1308 seeking an urgent hearing into the Crown's recognition of the Ngatiwai Trust Board ("**NTB**") Deed of Mandate ("**DOM**") (Wai 745, #A14) ("**First Affidavit**").
2. On 18 February 2016 my second affidavit was filed in reply to the third affidavit of Emily Owen on behalf of the Crown, the affidavit of Kristan MacDonald and the third affidavit of Tania McPherson on behalf of the NTB (Wai 745, #A50) ("**Second Affidavit**").
3. We were pleased when the Tribunal recognised the issues raised by Patuharakeke and the other claimants in respect of the Crown's recognition of the NTB DOM and granted this urgent inquiry.
4. Judge Savage, when granting the urgent hearing on 2 May 2016 provided that the matter to be heard is:
 - a. *Are the claimants themselves, or any group of Maori of which they are a member, prejudicially affected or likely to be prejudicially affected by a policy or practice, act or omission of the Crown that is inconsistent with the principles of the Treaty?*
 - b. *The policy, practice act or omission alleged is the Crown's recognition of a mandate held by the NTB in relation to the hapu referred to in the NTB's Deed of Mandate without the support and consent of those hapu.¹*
5. A substantial amount of evidence has already been placed on the record on behalf of the Wai 745 and Wai 1308 claimants by myself, Ani Ramari Pitman², Jared Paki Pitman³, Ngawaka Haswell Grant Pirihi⁴ and Bronwyn Mackie⁵. I believe that it has been made clear in that evidence that:

¹ Wai 2561. #2.5.8 at 60-61.

² Wai 2561, #A10(b) and #A39.

³ Wai 2561, #A8.

⁴ Wai 2561, #A40 and #A54.

⁵ Wai 2561, #A41.

- a. The Crown failed to require the NTB to demonstrate support and consent from Patuharakeke for their DOM;
 - b. The Crown failed to adequately seek to establish the nature and level of support from Patuharakeke who opposed the NTB DOM;
 - c. The Crown have ultimately failed to protect the position of Patuharakeke and their ability to exercise tino rangatiratanga;
 - d. Patuharakeke did not support and/or consent to the NTB DOM;
 - e. The NTB DOM does not provide representation for Patuharakeke;
 - f. The remedies available under the NTB DOM are not workable;
 - g. Patuharakeke are prejudicially affected and are likely to continue to be;
 - h. The prejudice to Patuharekeke is to the extent that their historical claims are currently due to be settled by a group that does not have their mandate but also that the Crown have failed to engage with Patuharakeke as an autonomous hapu in respect of the settlement of their claims; and
 - i. The Crown's decision to recognise the NTM DOM is inconsistent with the principles of the Treaty of Waitangi/Te Tiriti o Waitangi.
6. This third statement of evidence is filed for the purpose of summarising significant points provided in my first and second affidavit as well as other evidence for Wai 745 and Wai 1308 references above. The purpose of this evidence is to also provide the Tribunal with further evidence as to the failure by the Crown to protect the rangatiratanga of Patuharakeke as a hapu in recognising the NTB DOM in light of Statement of Issues that was released by the Tribunal on 20 July 2016⁶.

Hapu Rangatiratanga

⁶ Wai 2561, #1.4.1.

7. The Tribunal has asked at issue 1 to what extent, if any, did the Crown actively protect the position of hapu and the ability for hapu to exercise tino rangatiratanga. In short, not at all, particularly in the case of Patuharakeke.
8. This issue has been discussed in depth in my first and second affidavits as well as in the other evidence filed on the record for the Wai 745 and 1308 claimants.
9. It is apparent that the Crown's application of its Large Natural Grouping policy with respect to settlement in the Whangarei takiwa has been inflexible and has been carried out with minimal or no consultation with hapu - even more extraordinary given that hapu such as Patuharakeke have clearly been the primary body for social and political organisation in the Whangarei rohe - the Crown has chosen a model inconsistent with tikanga.
10. Patuharakeke has had its claims subsumed by iwi groups recognised by the Crown even though Patuharakeke has not consented to that. This significantly undermines the process of hapu rebuilding and hapu rangatiratanga.
11. Not only has the Crown failed to protect the rangatiratanga of Patuharakeke and their ability to exercise it, they appear to fail to understand the concept. In a Crown file note (attached as Appendix 'E' to the second affidavit of Ani Pitman)⁷ the Chief Crown Negotiator James Willis, appointed to the Ngatiwai settlement, stated that he doesn't view the *marae-based issue* to be a problem as hapu are always changing but marae are constant. It is of incredible concern to Patuharakeke that a Crown official who has been allocated a leading role in the negotiation of a settlement that currently includes their claims fails to understand the significance of hapu and their tino rangatiratanga.
12. On 14 June 2016 a number of documents were released by the Crown to claimant counsel as a response to a request made on 12 May 2016.

⁷ Wai 2561, #A39 at 11.

13. Those documents include an email sent from Emily Owen, Settlement Development Manager for the Office of Treaty Settlements ("**OTS**"), to James Willis, Chief Crown Negotiator, dated 16 June 2015. A copy of this email is attached to this affidavit and marked as Appendix "A".
14. In that email Ms Owen states that *"the overall vibe from the meeting was all three groups want to take a united stance against the hapu who they share and who are trying to withdraw from the mandates."*
15. It is my presumption that in that statement Ms Owen is referring to the three mandated authorities; the Tuhoronuku Independent Mandated Authority, Te Runanga o Ngati Whatua and the NTB. I believe this statement demonstrates the flagrant disregard the Crown has demonstrated for Patuharakeke rangatiratanga. As a Treaty partner the Crown has not only acknowledged that this is the position of the three mandated authorities but further than that is enabling them to proceed nonetheless. This certainly provides insight as to what the Crown's attitude towards hapu rangatiratanga is and exacerbates the concerns of Patuharakeke moving forward.

Use of Submissions as Crown Evidence

16. On 27 January 2016 the Crown filed the third affidavit of Ms Owen (Wai 745, #A38). That affidavit of Ms Owen responded to evidence that had been filed in support of the Wai 745/1308 Application for an Urgent Hearing into the Crown's recognition of the NTB DOM.
17. Attached as Exhibits "F", "G" and "H" to Ms Owens affidavit are submissions made by members of the Brown whanau, who note that they affiliate to Patuharakeke and Takahiwai Marae, made in support of the NTB DOM. Also attached as Exhibit "I" to Ms Owen's affidavit was a submission from Mr Ngawaka Pirihi, named claimant for Wai 1308, trustee on the NTB and respected kaumatua of Patuharakeke, made in support of the NTB DOM. These submissions were referred to in the section of Ms Owen's affidavit titled *"Engagement between OTS and Patuharakeke (Wai 745 and 1308)"*.
18. In my view it is necessary to revisit the use of these submissions as evidence by the Crown. They have sought to use these documents to demonstrate

engagement with Patuharakeke and to demonstrate support of the NTB DOM by Patuharakeke as a hapu.

19. Notwithstanding their affiliation with Patuharakeke hapu and Takahwai Marae, I wish to highlight for the Tribunal the fact that those submitters of Exhibits "F", "G" and "H" have clearly only ticked the first box which says "*I represent myself*". Accordingly, these submissions cannot be considered as evidence supporting engagement with and/or support by Patuharakeke hapu.
20. There are a number of documents on the record for this inquiry which contain both evidence and submissions on the issue of Mr Pirihi's submission by counsel and witnesses for the Wai 745 and Wai 1308 claimants.⁸ This issue is very significant for Patuharakeke and reflects the Crown attitude towards hapu rangatiratanga.
21. I wish to clarify the fact that, as with the other aforementioned submitters, only the first box that says "*I represent myself*" was ticked by Mr Pirihi. The additions that were made to Mr Pirihi's submission, which infer that he was making his submission on behalf of both Takahiwai marae and Patuharakeke hapu, were confirmed to be additions made by Tania McPherson, Treaty Claims Manager for the NTB, by Ms McPherson herself⁹ as well as by Handwriting Analyst Mike Maran.¹⁰
22. Accordingly, the submissions of the Brown whanau, and the submission of Mr Pirihi were made as individuals and do not provide evidence of any meaningful engagement between the OTS and Patuharakeke as a hapu nor the support of the NTB DOM by Patuharakeke hapu.
23. I believe that there is compelling evidence that the Crown has failed to meet any of its Treaty obligations to Patuharakeke. The Crown can't evade its' obligations under the Treaty by conferring authority on another body.

⁸ Wai 745, #2.11, #A39, #A51, #A52.

⁹ Wai 745, #A64.

¹⁰ Wai 745, #A49.

24. How has the Crown met its obligation of good faith partnership, active protection of hapu rangatiratanga and need to compromise and to consult with respect to Patuharakeke? As a "border" hapu, I believe that the Crown had a duty to consult particularly early on directly with Patuharakeke, given that it started discussions regarding direct negotiations with iwi such as Ngatiwai as early as 2009. It is clear that the Crown did not meet with Patuharakeke until 2014 and that meeting was at the request of Patuharakeke.

25. The Tribunal in the Ngapuhi Mandate Report outlined the minimum standards they considered the Crown should adhere to when making a decision to recognise a mandate. These are set out below:

"1. Allow for an appropriate weighing of interests of groups many recognised mandated entity, one that takes into account factors including the number and size of hapu, the strength of affected hapu, and the size and location of the population;

2. Recognise that the structure of the mandated entity must allow for hapu interests to be tested and heard; and

3. On the basis of this assessment, protect actively the rangatiratanga and tikanga of those hapu who are opposed to their claims being negotiated by the mandated entity, and weigh this protection of hapu with that of non-hapu interests in the modern context."¹¹

26. That Report was released September 2015. The NTB DOM was recognised by the Crown on 21 October 2015. The Crown had sufficient time to review that Report and act accordingly, however they decided to completely ignore those findings and recommendations and proceed with recognition of the DOM regardless – when will they learn?

¹¹ Waitangi Tribunal *The Ngapuhi Mandate Inquiry Report* (Wai 2490, 2015).

27. It is my position that the decision by the Crown to recognise the NTB DOM following the release of the Tribunal findings on hapu rangatiratanga with respect to the Ngapuhi Mandate Inquiry was deliberate and insulting to Patuharakeke. The principles of mandate are simple and clear. The representative group (in this case the NTB) must provide proof of their authority to represent. Patuharakeke has not given authority to any other group and has reiterated that repeatedly.
28. The Tribunal has previously found that *"to attain true reciprocity there must be consultation and negotiation in practice as well as in name, and flexibility in the application of policies where shown to be strictly necessary."*¹² This has not happened in the case of Patuharakeke.
29. By placing such importance on the four individual submissions made in support of the NTB DOM the Crown have demonstrated its clear lack of respect and understanding of hapu tikanga. Decision-making regarding Treaty settlement processes for Patuharakeke have been by hui-a-iwi, consultation with kaumatua and discussion with and support from all three formal governance entities within Patuharakeke as recently as May 2016 (namely the Patuharakeke Te Iwi Trust Board, the Takahiwai Marae Committee and the Takahiwai Marae Trustees).
30. It has been demonstrated that there is clear Patuharakeke claimant opposition to the NTB DOM.

Release of Te Kapotai from the Deed of Mandate

31. Willow-Jean Prime in her evidence dated 17 August 2016 in support of the Wai 2548 and Wai 1464/1546 claimants has addressed the removal of Te Kapotai from the NTB DOM.
32. In her evidence Ms Prime discusses how, despite the level of evidence filed by both the Crown and the NTB seeking to justify the inclusion of Te Kapotai

¹² Waitangi Tribunal *The Te Arawa Mandate Report (Wahanga Tuarua)* (Wai 1150, 2005) at 71.

in the NTB DOM, the NTB DOM was amended and Te Kapotai were removed in June 2016.¹³

33. Ms Prime's evidence further shows that the process by which Te Kapotai were removed was by way of NTB resolution on 27 May 2016. That resolution was to amend the DOM and remove Te Kapotai as a shared hapu and the Wai 1464 and Wai 1546 claims.
34. The NTB DOM provides at page 40 that "*The NTB will have authority to amend this Deed of Mandate to make management of negotiations more effective.*" It is not clear that this is the purpose behind the removal of Te Kapotai.
35. Counsel for the NTB in her letter attached as Appendix A to Ms Prime's evidence says that "*these amendments result from the Board's consideration of information received through the Waitangi Tribunal process.*"
36. An assessment of what hapu are legitimately included in the NTB DOM is an assessment that should have been undertaken *prior* to the DOM being finalised by the NTB and recognised by the Crown, not some months following that under the pressure of an impending urgent hearing before the Waitangi Tribunal.
37. Had the NTB followed a correct process and engaged appropriately with those hapu that were being included in the DOM it would not have taken evidence filed in the Waitangi Tribunal to clarify that hapu have been wrongfully included in the NTB DOM.
38. A letter from Crown counsel to counsel for Te Kapotai attached as Appendix C to Ms Prime's evidence states that the Crown "*supports Te Kapotai's removal from NTB's deed of mandate. Ultimately, the deed of mandate is Ngatiwai's document and it is for NTB to make amendments to it.*"

¹³ Wai 2561, #A62(a).

39. The Crown is a treaty partner. The Crown cannot continue to remove themselves from matters that affect hapu whom they have a duty to actively protect.
40. The Crown have clearly not taken the appropriate steps to ensure that the document that they recognised on 21 October 2015 is correct. That is a failure to protect the rangatiratanga of hapu who have been wrongfully included. This is a clear breach by the Crown in my opinion of the principle of equity and equal treatment.
41. I urge both the Crown and the NTB to undertake that same assessment of evidence that has been provided for the Wai 745 and Wai 1308 claimants and reconsider the inclusion of Patuharakeke in the NTB DOM. I urge the Crown not to let this prejudice to Patuharakeke continue.
42. It is my understanding that as of 21 October 2015 the NTB DOM was recognised by the Crown as it stood yet it appears that the Crown are allowing subsequent amendments to be made by the NTB as they see fit. This amendment to the NTB DOM is clearly evidence that the DOM is not the robust document that the Crown and the NTB argue it to be.
43. We are pleased for Te Kapotai and we seek that Patuharakeke be afforded that same courtesy and be removed from the NTB DOM.
44. On 15 July 2016 the Patuharakeke Te Iwi Trust Board received a response from the Crown to their letter dated 11 November 2015, a completely unacceptable interval of 8 months. Copies of both letters are attached and marked as Appendices "B" and "C". That letter confirmed that despite the concerns and clear opposition of Patuharakeke, the NTB DOM will continue to represent Patuharakeke, and include the Wai 745 and Wai 1308 claims insofar as Patuharakeke and those claims relate to Ngatiwai. What does that mean in practice? Who has the power to decide *how far* Patuharakeke and those claims relate to Ngatiwai?
45. That letter from the Crown further confirmed that *"no funding has been approved for withdrawal from a deed of mandate."*

46. It appears that the Crown has no issue with funding a body, such as the NTB, to establish a DOM that includes hapu who neither consent to or support it, yet they are not willing to assist those hapu in seeking to withdraw. Again, an absolute failure by the Crown to protect the rangatiratanga of Patuharakeke.

The Crown's Failure to Protect the Hapu Rangatiratanga of Patuharakeke

47. I am firm in my position that the Crown has not and will not protect the rangatiratanga of Patuharakeke. The intervention of the Waitangi Tribunal at this stage is necessary to ensure that the Crown, as a treaty partner, is stopped in its trampling of the mana, tikanga and rangatiratanga of Patuharakeke on the Crown's path towards a settlement with the NTB.

48. How can Patuharakeke feel secure that their rangatiratanga is being actively protected by the Crown when the Crown has left the future of Patuharakeke's historical claims in the hands of the NTB and further when the accountability measures for the NTB to the Crown are virtually non-existent.

49. The NTB DOM under the heading "Accountability Measures" provides that NTB has made provision to ensure regular three monthly reporting to the OTS on maintenance of the mandate.¹⁴ This is then elaborated further to say,

"The NTB will provide regular three monthly reports to OTS to maintain the mandate. It will include information about:

- *communications with Ngātiwai (i.e. newsletter/e-panui, hui or wananga, website and facebook updates),*
- *any AGMs or SGM held within the reporting period, and*
- *any other points of interest related to the progress of negotiations.*¹⁵

¹⁴ Ngatiwai Trust Board Deed of Mandate dated 8 July 2014 (amended 7 August 2015) at 18.

¹⁵ Above at 39.

50. It is my contention that there is a higher level of accountability expected of NTB by the Crown in order for the Crown to ensure that it is complying with its obligations and duties under the Treaty of Waitangi/Te Tiriti o Waitangi. Those obligations and duties include actively protecting the rangatiratanga of those hapu whose interests the NTB seek to represent. Three monthly reporting does not suffice and this only leaves Patuharakeke feeling further aggrieved.
51. The preliminary analysis of PSGE models by Fathom Consulting Ltd¹⁶ concluded that while a Ngatiwai Post-Settlement Governance Entity (“PSGE”) could in theory be based on any of the electoral models outlined in the report (being marae, hapu, individuals, takiwa and a combination approach), the report went on to say that,

"91. If the existing marae-based electoral model works well for Ngātiwai there may be no compelling reason to change it, although the establishment of the PSGE could provide an opportunity to fine-tune some of the process steps for selecting representatives at a marae level. If, on the other hand, there is a groundswell for changing the representation basis of Ngātiwai, a hapū-based electoral model is a seemingly obvious alternative. However, the establishment of a PSGE based on voting at hapū level would require additional steps to be taken including:

- Collection of accurate information on the hapū affiliation of registered members for voting purposes; and*
- Explicit consideration of the status of Ngāti Manuhiri and Ngāti Rehua – Ngātiwai ki Aotea within the PSGE.*

92. Individual voting is likely to be less challenging to implement than a hapū-based electoral model as it can more easily represent Ngātiwai members affiliated with hapū involved in separate settlements with the Crown. Either individual voting or a takiwā approach may also be capable of bridging the gap between

¹⁶ Ngatiwai Trust Board Preliminary Analysis of PSGE Representative Models. Nici Gibbs, Fathom Consulting Ltd, 21 September 2015.

competing support for marae-based and hapū-based electoral models.

93. Iwi developing PSGE proposals are advised to "keep it simple" as complex PSGE models often just add to the costs of establishing and operating the PSGE without necessarily improving the quality of representation."

52. It appears that a hapu-based electoral model has been identified as being one of the more "difficult" electoral models for a Ngatiwai PSGE. The NTB DOM process to date has not provided for the interests of hapu and Patuharakeke have no faith in the NTB or the Crown ensuring that hapu interests are served at the PSGE stage.
53. The Crown has not upheld its end of the Treaty/Te Tiriti partnership. In the recent months, with the exception of that July 2016 letter, the Crown have been absent from any discussions with Patuharakeke. The NTB have been seen to be organising and holding a variety of hui, with no involvement from the Crown. In fact, one of those hui that took place on 1-2 July 2016 was initially advertised as being held at Takahiwai Marae, the marae of Patuharakeke. The purpose of this hui was described in the panui as being a Trustee quarterly review of activities, and a shared session regarding the Treaty Claims process followed by workshops.
54. There was no discussion or consultation from NTB with Patuharakeke Te Iwi Trust Board regarding this planned hui – surprising given that NTB was well aware PTB has the mandate to settle Patuharakeke claims and further direct evidence of failure to protect hapu rangatiratanga
55. Patuharakeke were not going to allow a group they don't support or mandate to discuss the settlement of their claims through a process they don't consent to or support on their own marae. I note that the NTB's marae booking at Takahiwai was cancelled and the hui was ultimately held at Te Whanau O Rangiwhakaahu Marae, Matapouri.
56. Instances such as this have the potential to further damage hapu and iwi relationships and the Crown has caused this.

57. The fact that Patuharakeke have been included in the deeds of mandate for *three* separate mandated authorities, being the Tuhoronuku Independent Mandated Authority, Te Runanga o Ngati Whatua and the NTB, is a failure by the Crown to protect the ability for Patuharakeke to exercise its rangatiratanga. Patuharakeke should be afforded the right to decide, in accordance with their own tikanga, how their claims will be negotiated and settled.
58. Further, the inclusion of Patuharakeke in those three deeds of mandate is an absolute failure by the Crown to ensure provision for adequate redress for Patuharakeke.
59. It is my position that Patuharakeke have well-founded claims, particularly in respect of the confiscation of Poupouwhenua and the Crown purchase of Ruakaka with a failure to protect reserves. There is substantial evidence on the record of inquiry for Te Paparahi o Te Raki (Northland) Inquiry (Wai 1040) regarding this, however as the Tribunal will be aware we are reaching the completion of Stage 2 and will then need to await the Tribunal's report on those matters.
60. Not only have Patuharakeke provided extensive evidence for the Tribunal in that inquiry but they have also filed both urgent proceedings in the Waitangi Tribunal¹⁷ and also proceedings in the High Court. These proceedings were lodged in an attempt to protect lands within Poupouwhenua and Ruakaka from being sold by Mighty River Power to overseas investors which would place that whenua even further from the possibility of Patuharakeke ever having it returned to them.
61. Crown Law recently advised by way of Memorandum on 29 July 2016 that the *"Office of Treaty Settlements purchased two properties at Marsden Point, subject to memorials under s 27B State-Owned Enterprises Act 1986, from Mighty River Power. The properties are the site of the decommissioned Marsden Point power stations on Sime road and a smaller site also on Sime road."* A copy of this Memorandum is attached and marked as Appendix "D".

¹⁷ Wai 745 Patuharakeke Lands and Resources Claim.

62. This land was subject to the proceedings both in the Waitangi Tribunal and the High Court. Should the Crown continue to refuse to acknowledge Patuharakeke's autonomy and should their claims be settled by the three mandated authorities, it is only those three mandated authorities that will have the resources to purchase that land from the landbank. The prospect that this will occur for the benefit of Patuharakeke given its monetary value is unlikely.
63. The preferred remedy sought in that Wai 745 inquiry was not for the land to be landbanked, due to that very reason above, but was instead preliminary findings from the Tribunal as to the claim being well-founded in order for Patuharakeke to be in a position where they could make an application for the resumption of that land.
64. Patuharakeke were the *only* group to appear before the Waitangi Tribunal and the High Court to oppose the sale of the land within Poupouwhenua and Ruakaka by Mighty River Power. Why is that? Because all other groups recognise that Patuharakeke hold mana whenua over that area.
65. At paragraph 67 of my first affidavit I refer to an email between members of the NTB, Tania McPherson, Jim Smillie and Haydn Edmonds, to the OTS. That email discusses strategies for NTB to have lands within the Patuharakeke rohe that could potentially be landbanked included in their *"settlement negotiations."*
66. I should note the date of this email, 18 June 2013, over three years prior to the NTB's DOM being recognised by the Crown. Both the NTB and the Crown failed to discuss this with Patuharakeke. In fact, Patuharakeke were not aware of this until the document came to light as the result of a request under the Official Information Act 1982. In addition to that, although a significant part of that document was redacted, there is no mention of Patuharakeke's mana whenua over or interest in that land.
67. So while Patuharakeke are undertaking costly and time consuming processes in order to attempt protect their whenua, the NTB are engaged in "back door" correspondence with the Crown regarding it.

68. Patuharakeke has been left with a meagre 5 acres of land in hapu ownership and yet the Crown intends to distribute the only land available for return in the rohe as settlement assets to iwi entities that do not have mana whenua in the rohe – Patuharakeke has mana whenua. This is contrary to “tribal restoration”
69. This principle of hapu kaitiaki was supported by proposed amendments to the Ngai Tahu settlement when Sandra Lee stated

“I think that the committee should focus its mind on the fact that the tangata whenua-the real tangata whenua-should be given the right to be the kaitiaki of these properties, because it was those hapu who had the properties taken from them and were denied access to their food gathering reserves in the first place. It was not a corporate body that was denied access, it was actual hapu that were denied the right to their reserves in the first place.”¹⁸

70. It is Patuharakeke who have had this land taken from them and were denied the right to exercise kaitiakitanga over it, not the NTB. It is Patuharakeke who I believe have well-founded claims over this land and have fought hard to uphold that, not the NTB.

No Alternative Remedy

71. The Crown has argued that the NTB DOM provides alternative remedies for the claimants, including provision for a dispute resolution process and withdrawal mechanism.
72. The Tribunal has asked at issue 4 whether the remedies available under the NTB DOM are workable.
73. Judge Savage at paragraph 302 of his decision¹⁹ stated that *“The alternative remedies are not really alternatives because they propose that the claimants consider themselves bound by the deed of mandate and use the structures in the deed to achieve their ends. There is an understandable unwillingness*

¹⁸ (17 September 1998) 571 NZPD 12117.

¹⁹ Above n ??? at 58.

to proceed in that way because the claimants say their hapū have never given a mandate and it would be inconsistent for them to operate under the terms of the deed."

74. The remedies are not workable and in any case should not apply to Patuharakeke. As Judge Savage has said it would be inconsistent for Patuharakeke to operate under the terms of the NTB DOM given that they have never given that mandate to the NTB.
75. Judge Savage in that decision further recognised that the mandate amendment and withdrawal process provided clause 57 of the NTB DOM *"cannot be said to be simple or user friendly. It is near to unworkable, and appears entirely inappropriate when a hapu simply says that they are not part of that structure."*²⁰
76. His Honour goes on to acknowledge the similarity to the process that was provided in the Tuhoronuku Deed of Mandate. As was the case in that Ngapuhi Mandate Inquiry (Wai 2490), Patuharakeke are being forced to enter into a costly and onerous process in order to attempt to a withdraw from the NTB DOM when there is no reliable evidence to demonstrate that Patuharakeke have ever supported or consented to their inclusion in it.

Recommendations Sought

77. The Tribunal has asked at issue 9 that should they conclude that Patuharakeke claims are well-founded, what, if any, practical recommendations they should make.
78. For the reasons as set out in all of evidence on the record of inquiry for the Wai 745 and Wai 1308 claimants, Patuharakeke seek a recommendation from this Tribunal that the NTB DOM be revoked completely and that the Crown begins a process of engaging in a meaningful way with hapu in order to settle their claims.

²⁰ Above n ??? at 59-60.

79. Patuharakeke seek a further recommendation that in doing so the Crown act in accordance with their duties and obligations to hapu under the Treaty of Waitangi/Te Tiriti o Waitangi.

Conclusion

80. Patuharakeke do not dispute their affiliation to Ngatiwai. This was clearly set out in the affidavit of Jared Pitman²¹. Patuharakeke also acknowledge their affiliation to Ngati Whatua, NgaPuhi and others

81. Patuharakeke respects the whakapapa that affiliates them to those iwi but Patuharakeke are also a separate people in their own right

82. This multi-iwi affiliation is common with hapu such as Patuharakeke occupying a rohe as it does on the border of other larger hapu and iwi. It has been achieved largely through inter-marriage.

83. There are strong similarities in this respect between Patuharakeke and Ngati Hineuru as described in the Mohaka ki Ahuriri report – *"a buffer zone between geographical regions and only a people who could claim relationship with all of those regions could survive there...."*

84. Nevertheless Patuharakeke has worked tirelessly over 175 years since the signing of Te Tiriti to uphold their rangatiratanga and kaitiakitanga and ahi ka roa. Patuharakeke have been severely prejudiced by Crown actions and this is reflected by the fact that Takahiwai Marae is the only marae in the rohe and is the only marae in the coastal margin from Pakiri in the south to Whangarei in the north.

85. Against this background of 175 years of hapu rangatiratanga the Crown should be reminded that the existence of Ngati Wai and other iwi as political and corporate entities in Taitokerau is a relatively recent phenomenon- Patuharakeke has always maintained its autonomy in these matters.

²¹ Wai 745, #A13.

86. This culminated in recognition by the Crown of Patuharakeke in 1990 under the Runanga Iwi Act as an iwi- because Patuharakeke met all the criteria required including recognition by other iwi
87. The mana whenua and mana moana of Patuharakeke was acknowledged in writing by Ngati Wai, Ngati Whatua and Nga Puhi during the 1998 Port Corp appeal and in subsequent Memoranda of Understanding with local government including the Whangarei District Council.
88. The Crown have duly failed in their duty to actively protect the rangatiratanga of Patuharakeke. Rangatiratanga is the essence of Patuharakeke political and social organisation and the failure of the Crown to recognise it's tikanga based leadership and decision making is unacceptable.
89. This action by the Crown has been deliberate and calculated in my opinion, a result in part of the highly specific and well researched claims of Patuharakeke particularly with respect to the confiscation of Poupouwhenua.
90. By continuing to fail in its duty to consult and engage appropriately with Patuharakeke, the Crown runs the real risk of proceeding with a settlement that does not extinguish the highly specific and well researched grievances of Patuharakeke
91. The Tribunal has previously found that the Crown's application of the Large Natural Grouping policy must be flexible and practical yet applied in a natural way taking into account issues of whakapapa, tikanga and historical matters.²²
92. Furthermore, the Tribunal found that consultation with all affected claimants and early engagement with opponents to a mandate were minimal requirements for the application of that policy to remain treaty compliant.²³
93. Patuharakeke will continue to fight until its rangatiratanga and autonomy is appropriately acknowledged and adequate redress has been provided for the

²² Waitangi Tribunal *The Te Arawa Mandate Report* (Wai 1150, 2004).

²³ Waitangi Tribunal *The East Coast Settlement Report* (Wai 2190, 2010) at 57.

significant historical prejudices suffered by Patuharakeke at the hands of the Crown.

Dated this 22nd day of August 2016

A handwritten signature in black ink, appearing to read 'Guy Gudex', written in a cursive style.

Dr Guy Gudex