MOTATAU NO. 5O/3

Amokura Kawharu[1]

I. Albert Hepi Rankin

Sometime in late 2008 I had a phone call from my cousin Tene Rankin to tell me that there was a Māori Land Court hearing coming up the following March. The issue, he said, had something to do with our land being taken by the Crown. I was unable to attend the hearing but as it turned out it was a preliminary one and only the first stage in an ongoing saga that even Nin could not have scripted better.

The land at issue is a block of around 67 hectares known in the Māori Land Court records as Motatau No. 5O/3. The land is covered in dense native bush and sits within a large conservation reserve. It had been split into 96.5 shares, with seven Māori owners, in around 1923. All but one of these owners then sold their shares. The remaining owner was Albert Hepi Rankin, my grandfather. Albert was a farmer and, during World War I, a sergeant in the Pioneer Māori Battalion. He returned after five years' service devastated to learn that even more of the family land had been lost into Pākehā ownership and was still being sold. In 2008, only the eldest of his five children was still alive, his son Jim. When I spoke to Uncle Jim about what was happening with the Motatau block, he explained that land sales had caused a lasting rift between Albert and his mother. It seemed that my grandfather had valued our land as a taonga tuku iho (ancestral treasure) and it was not to be sold.

II. The Crown Argues Indefeasibility of Title

When the block was split into shares, title was issued under the Torrens system to the named "Aboriginal Natives of New Zealand" to facilitate its future sale. At the same time, title to the block also continued to be recorded in the Māori Land Court records. Several years ago, the Māori Land Court initiated a major project to reconcile titles held under Te Ture Whenua Māori 1993 (TTWMA) with titles held under the Land Transfer Act 1952. It was discovered during this process that while Albert Rankin was still named as a co-owner of the Motatau land in the Māori Land Court records, the Land Transfer Act title had been cancelled in favour of the Crown, which now apparently owned the entire block and held it as a reserve under the Reserves Act 1977. It was

[1] Ngāti Whātua and Nga Puhi. Associate Professor, Faculty of Law, University of Auckland.

being managed by the Department of Conservation (DoC) as a conservation reserve. Given the discrepancy, the Māori Land Court scheduled the hearing in March 2009 and approached the matter as an application under s131 TTWMA to determine the status of the land.

Over the decades, there had been several transfers of the 84.5 shares in the Motatau block, all the while Albert Rankin was still named as owner of his 12 shares as tenant in common. Then, in 1968, Hilstan Limited purchased the 84.5 shares. Hilstan also acquired around 600 hectares of the surrounding land. The company was owned by the prominent Northland businessman, the late Hilel Korman, who gifted his land interests to the Crown under his will. By mistake – of Korman's solicitors, the Crown's solicitors, and the Land Registry Office (now operated through Land Information New Zealand or LINZ) – the 12 Rankin shares were included in the transfer to the Crown when the gift was completed in 2000.

At a substantive hearing before the Māori Land Court hearing in May 2009, the Crown argued, in opposition to any return of the 12 shares to Albert Rankin's descendants, that:[2]

- the Crown has good title under the principle of indefeasibility;[3] and
- the Rankin family may be entitled to compensation for their loss, in accordance with the usual Land Transfer Act principles. Since only $28,000 was paid to Hilstan Limited as consideration for the transfer of the entire Hilstan land at Motatau, at best, the Rankin family are entitled to be paid a nominal amount.

In early 2010, I went to a meeting with DoC's legal team accompanied by another cousin, Mere Baker, to press for a return of our land. One of DoC's solicitors began by explaining that, in New Zealand, "there is a legal principle called indefeasibility of title". Before she could continue, I replied something like, "thank you, I have been teaching land law at Auckland Law School for some years now." Mere tried hard not to laugh. In our view:

- the Crown received the shares in the land by mistake and the Registrar General of Land has extensive powers under the Land Transfer Act 1952 to correct mistakes;[4]

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[2] Māori Land Court Minutes, 140 Whangarei Minute Book 27 at 30 (22 May 2009).

[3] The Land Transfer Act 1952 overrides Te Ture Whenua Māori Act 1993. See *Warin v Registrar-General of Land* (2008) 10 NZCPR 73 (HC).

[4] Land Transfer Act 1952, s81; *Frazer v Walker* [1967] NZLR 1069, [1967] 1 AC 569, [1967] 1 All ER 649 (PC).

- the Crown is a volunteer in respect of the land and the position in relation to volunteers under the Land Transfer Act remains uncertain in New Zealand. None of the contentious Australian cases on volunteers and indefeasibility involve situations even remotely similar to the one at hand. The rights of volunteers have recently been recognised by the New Zealand Supreme Court, in *Regal Castings Ltd v Lightbody*, in an obiter comment by one of the judges.[5] Like the Australian cases, *Regal Castings* involved a situation where the land was transferred by the registered proprietor to the volunteer. Hilstan was not the registered proprietor of our 12 shares;
- the $28,000 was only gift duty and does not reflect the economic value of the land; and
- anyway, the Crown should know better than to take advantage of its own mistake to deprive Māori of their turangawaewae (place to stand).

The idea of a land swap was mooted but then dismissed as impractical and unprincipled. DoC's view has continued to be that a return of the land to a co-ownership between the Crown and the Rankin family would be technically difficult because of the status of the land as a reserve governed by the Reserves Act 1977. The transcript of a Māori Land Court hearing in 2013 records the following exchange between the Judge and DoC's solicitor:[6]

[DoC] We have a problem in that if we go back to an undivided tenancy in common, the reserve status has to go, because you just can't have an undivided interest in a reserve, because you don't know whether an offence has been committed or not because –

[Court] Say that again? You don't know?

[DoC] You won't know whether an offence, for example, has been committed on the reserve because the owners will have rights as land owner.

[Court] Yes.

[DoC] And then the right to prove those same rights as well. So the reserve status is at risk and it's part of a whole reserve. There's a 700 hectare reserve and this is a part of it.

[Court] I see.

Further on in the transcript, the Crown finally acknowledges the mistaken transfer.[7]

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[5] *Regal Castings Ltd v Lightbody* [2008] NZSC 87 (SC) per Tipping J at [133]-[136].

[6] Māori Land Court Minutes, 73 Taitokerau Minute Book 62 at 72 (19 November 2013).

[7] At 73.

III. Lost in the Bush

For whatever reason, Crown Law largely dropped out of the picture and the matter was taken up by the Northland Conservator, Chris Jenkins. Without hesitation, Jenkins (who has since retired) accepted that the land interests should be returned and DoC's legal team is now very focused on that outcome. Meanwhile, the Māori Land Court appointed the law firm Wackrow Williams & Davies to provide legal support to the family. The parties are working towards identifying a portion of the land to be partitioned. Although LINZ has not formally committed to paying for the survey, the expectation is that the Crown will cover the survey costs under the compensation provisions of the Land Transfer Act 1952 in final settlement of the Crown's responsibility under those provisions.[8]

Because the land can only be accessed through neighbouring forestry land with a permit from the forest owner, DoC has guided us on our two site visits to date (a third and final one is planned). The first site visit took place in 2014. There was another visit in January 2015, during which a cousin somehow became lost in the bush. (*Blimmin' Māori*...). Over two dozen police and search and rescue people came out to look for him and, sometime after midnight, they found him not far from the Tokawhero stream. His "bush walk", as he likes to call it, adds to the korero we are building up around the Motatau block and we are looking at whether the partitioned section might even include part of the stream. Since the stream is some distance from the legal road, we may need an easement along either the northern or southern boundary to ensure legal access to the partitioned area.[9] (See map below.)

Apart from its value as ancestral land, the land is also significant in terms of its unique biodiversity. It includes high altitude podocarp and broadleaf forest, which is rare in Northland, with both regenerating and established native species such as horoeka, kohekohe, parataniwha, ponga, puriri, rata, rimu, supplejack, taraire, totara, towai and many others. The area is home to native fauna including brown kiwi, kukupa, the forest ringlet butterfly and several species of native fish. The options for the proposed new block include vesting it in the family,[10] or vesting it subject to a kawenata,[11] or as

[8] Letter from LINZ to Wackrow Williams & Davies dated 12 August 2014 (on file with author).

[9] Either under Part 3B of the Conservation Act 1987 or TTWMA, s315(1)(a).

[10] A simple vesting under s134 TTWMA.

[11] The Minister of Conservation would need to apply to the Māori Land Court for a vesting order in the Rankin family subject to a kawenata under s77 or s77A of the Reserves Act 1977.

a Māori reservation with continued DoC management.[12]

IV. The Printer in Building 803

Nin and I worked on the same floor at law school. Nin's office was next to the printer, and sometimes I would stop for a chat on my way to collecting my printing. She was keenly interested in what had happened at Motatau, and how we were dealing with it all. Uncle Jim has since died, Nin has left us, and even the printer has been moved to another part of the floor. Nin made the most of the time she had. She was a person who persevered, and I can only hope that we will too. Takoto mai e hoa i roto i te rangimarie o te runga rawa.

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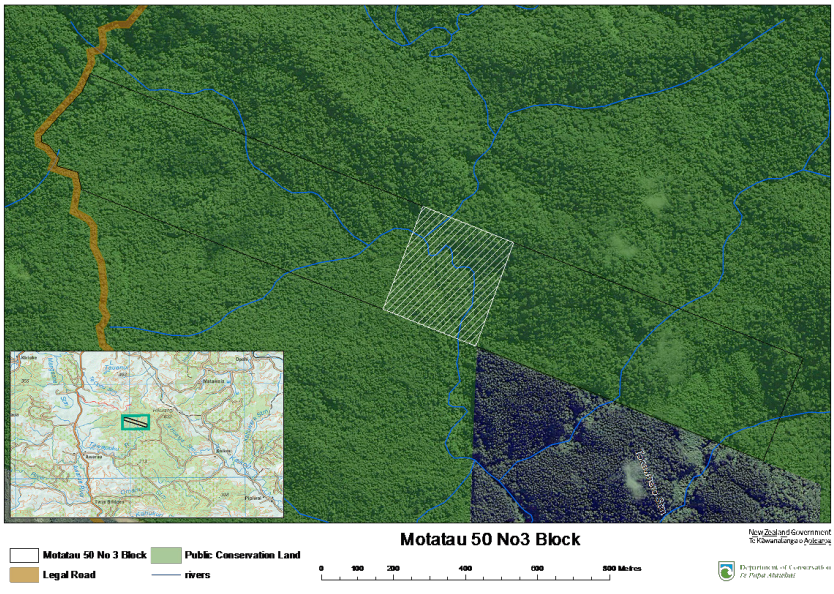

[12] The Minister of Māori Affairs would apply for the land to be vested on this basis under TTWMA, s339.