



## **Centre of Full Employment and Equity**

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### ***Hohepa Wi Neera: Native Title and the Privy Council Challenge***

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## Introduction

The Court of Appeal's judgment in *Hohepa Wi Neera v The Bishop of Wellington* (1902)<sup>2</sup> is an interesting one. It was a native title case concerning the same land, under the same grant, that the Court had adjudicated on the previous year in *Solicitor-General v Bishop of Wellington* (1901)<sup>3</sup>. However unlike that previous case, it was decided by the Court of Appeal in full knowledge of the Privy Council's recent ruling on native title in *Nireaha Tamaki v Baker* (1900-01)<sup>4</sup>. Although the Privy Council had delivered this judgment prior to the Court of Appeal ruling in *Solicitor-General v Bishop of Wellington* (1901), nevertheless the decision had not reached the Court of Appeal in time for it to influence their decision in that case.<sup>5</sup> *Hohepa Wi Neera v Bishop of Wellington* (1902) was therefore the first New Zealand case to reflect on native title in full knowledge of the Privy Council's decision.

But why is this significant? The answer lies in the extent to which the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01) broke from established New Zealand precedent on native title and thereby redefined the judicial landscape in relation to it. The reigning New Zealand precedent on native title up to that time was Chief Justice Prendergast's judgment in *Wi Parata v Bishop of Wellington* (1878)<sup>6</sup>. In that case, Chief Justice Prendergast had resolved the native title issue in the interests of the Crown and settler society by insisting that native title matters were entirely a matter for the prerogative powers of the Crown, and were therefore outside the jurisdiction of the municipal Courts.<sup>7</sup> This effectively ensured that the Crown was the "sole arbiter

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<sup>2</sup> 21 NZLR (CA) 655.

<sup>3</sup> 19 NZLR 665.

<sup>4</sup> [1840-1932] NZPCC 371.

<sup>5</sup> As Justice Williams put it in 1903: "The case of *Nireaha Tamaki v Baker* was decided by their Lordships shortly before our decision in [*Solicitor-General v Bishop of Wellington* (1901)] but the judgment had not then reached the Colony." ("*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC, App., 730, at p. 749, per Williams J. My addition).

<sup>6</sup> 2 NZ Jur. (N.S.) S.C. 72.

<sup>7</sup> Chief Justice Prendergast identified native title matters with the prerogative powers of the Crown by insisting that Crown responsibilities regarding native title were akin to treaty obligations, and therefore any actions of the Crown arising from these responsibilities were acts of state. This therefore placed them outside the jurisdiction of the Courts. As Prendergast states, the Crown's duty of protecting the Maori tribes from ".....any infringement of their right of occupancy.....although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation. It is one, therefore, with the discharge of which no other power in the State can pretend to interfere. The exercise of the right and

of its own justice” on native title matters, since a mere declaration by the Crown that native title was extinguished on any particular piece of land was held by Prendergast to be conclusive on the Courts, and Maori native title claimants were denied any judicial appeal against such a declaration given that native title matters fell outside the Courts’ jurisdiction.<sup>8</sup> The result was that no grant of land emanating from the Crown could be impeached by Maori on native title grounds because the grant alone was deemed by the Courts to be sufficient declaration by the Crown that the native title had been extinguished.<sup>9</sup>

The *Wi Parata* precedent therefore ensured that the Crown had the capacity to unilaterally extinguish native title independent of the consent of Maori tribes by simple declaration.<sup>10</sup> It further denied Maori tribes the right of appeal against such actions within the New Zealand Courts. On these grounds therefore, the *Wi Parata* precedent ensured that the land settlement process in New Zealand was safe from

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the discharge of the correlative duty, constitute an extraordinary branch of the prerogative, wherein the sovereign represents the entire body-politic, and not, as in the case of ordinary prerogative, merely the Supreme Executive power.” (Wi Parata v Bishop of Wellington, at 78-79). Prendergast therefore concludes: “Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore are not examinable by any Court.....Especially it cannot be questioned, but must be assumed, that the sovereign power has properly discharged its obligations to respect, and cause to be respected, all native proprietary rights.” (ibid, at 79). Paul McHugh has criticised Prendergast C.J.’s conclusion that the Crown’s dealings with Maori over native title were “acts of state”, on the following grounds: “By 1877 the Maori’s status as British subjects had been long fixed – how then could an ‘act of state’ be made by the Crown against its own subjects?” (Paul McHugh, “Aboriginal Title in New Zealand Courts”, Canterbury Law Review, Vol. 2, 1984, p. 247). McHugh points out that a long line of judicial authority has established “...that as between the sovereign and a subject there can be no act of state on British territory....” (ibid, note 55, p. 247). See also Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), p. 114.

8 As Prendergast C.J. put it: “In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished. For the reason we have given, this implied fact is one not to be questioned in any Court of Justice, unless indeed the Crown should itself desire to question it, and should call upon the Court to lend its aid in correcting some admitted mistake.” (Wi Parata v Bishop of Wellington, at 78). Concerning the Crown as the “sole arbiter of its own justice” on native title issues, Prendergast states: “....in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligations to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.” (ibid).

9 See note 8 above.

10 This was clearly contrary to an earlier New Zealand case dealing with native title, which insisted that native title could only be extinguished by the Crown with the consent of the Native tribes. In *The Queen v Symonds* (1847), Justice Chapman stated: “Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.” (*The Queen v Symonds* (1847) N.Z.P.C.C. (SC), 387, at 390, per Chapman J.).

legal challenge by Maori tribes. It became the ruling authority on native title in New Zealand and defined the New Zealand Bench's subsequent approach to this issue.<sup>11</sup>

### **The Privy Council Departure from *Wi Parata***

It is in these terms that the impact of the Privy Council's departure from the *Wi Parata* precedent in *Nireaha Tamaki v Baker* (1900-01) must be understood. In departing from *Wi Parata*, the Privy Council was producing nothing less than a fundamental upheaval in the New Zealand legal landscape, particularly concerning issues of land settlement. The fact that the Privy Council's departure from *Wi Parata* was only *partial* (as we shall see below), leaving some primary elements of the judgment intact, only heightens the significance of the New Zealand response. *Any* suggestion that the *Wi Parata* precedent was in question was sufficient to arouse the

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11 For subsequent affirmation of the *Wi Parata* precedent as the ruling authority on native title issues in New Zealand, see *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488, per Richmond J; *The Solicitor-General v The Bishop of Wellington and Others* (1901) 19 NZLR 665, at 685-86, per Williams J.; *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR (CA) 655 at 667, per Stout C.J.; and *ibid*, at 671-72, per Williams J.; “*Wallis and Others v Solicitor General, Protest of Bench and Bar, April 25, 1903*”, [1840-1932] NZPCC Appendix, 730, at 732, per Stout C.J.; and *ibid*, at 754-55, per Williams J.

There were however some deviations from *Wi Parata* as the dominant New Zealand precedent on native title. Hence in *Mangakahia v The New Zealand Timber Company* (1882), Justice Gillies went so far as to base native title rights on the Treaty of Waitangi. As Gillies J. states: “Theoretically the fee of all lands in the colony is in the Crown, subject nevertheless to the ‘full, exclusive and undisturbed possession of their lands’, guaranteed to the natives by the treaty of Waitangi which is no such ‘simple nullity’, as it is termed in *Wi Parata v Bishop of Wellington*....quoted in argument in this case.” (*Mangakahia v The New Zealand Timber Company* (1881) 2 NZLR (SC) 345 at 350, per Gillies J.). Gillies’ suggestion that the Treaty is a legal guarantee of native rights is a position not only at odds with Prendergast in *Wi Parata*, but also with most subsequent New Zealand judicial authority which argued that the Treaty (and the rights it embodied) had no force in law independent of the Treaty’s embodiment in statute (c.f. “*Wallis and Others v Solicitor General, Protest of Bench and Bar, April 25, 1903*”, [1840-1932] NZPCC Appendix, 730, at 732, per Stout C.J.; *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA), at 354-55, per Chapman J.; *Te Heuheu Tukino v Aotea District Maori Land Board* [1941], NZLR, 590, at 596-97). Nevertheless, almost twenty years later, Justice Edwards affirms this conclusion of Gillies J. (c.f. *Mueller v The Taupiri Coal-Mines (Limited)* (1900) 20 NZLR 89 (CA), at 122, per Edwards J.). Indeed, Edwards J. goes further and argues that the rights embodied in the Treaty of Waitangi, referring to the “full, exclusive, and undisturbed possession” of land, had actually received legislative recognition in the Native Lands Act, 1862 and the Native Rights Act, 1865 (*ibid*). The clear implication of this claim is therefore that these native title rights, because of their legislative basis, are binding on the Crown. Consequently, it is somewhat contradictory for Edwards J., later in the same paragraph, to also affirm the precedent of *Wi Parata*, that native title is subject to the prerogative power of the Crown and so is not binding upon it. Nevertheless he does so as follows: “No doubt....transactions with the Natives for the cession of their title to the Crown are to be regarded as acts of State, and are therefore not examinable by any Court; and any act of the Crown which declares, or, perhaps, merely assumes, that the Native title has been extinguished is conclusive and binding upon all Courts and for all purposes.” (*ibid*, at 123, per Edwards J.). However these departures from the *Wi Parata* precedent are minor ones, because the main line of New Zealand judicial authority, and certainly the one that reached the Privy Council in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371 and *Wallis v Solicitor General for New Zealand* [1903] AC 173, fully affirmed *Wi Parata* as the authoritative precedent on native title in New Zealand.

concern of the New Zealand Bench, given the centrality of this precedent to land title in New Zealand.<sup>12</sup>

In *Nireaha Tamaki v Baker* (1900-01), the Privy Council considered an appeal against a Court of Appeal decision of the same name, decided in 1894. The 1894 case involved a claim by the plaintiff that land which the Crown had put up for sale, belonged to him either under a Native Land Court order of 1871, or on the basis of native title.<sup>13</sup> The Court held that the former basis for title was void, and so the plaintiff was asserting a “pure Maori title” to the land.<sup>14</sup> The two questions which therefore arose for adjudication in the Court of Appeal were:

1. “Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?”<sup>15</sup>
2. “Has the Court jurisdiction to inquire whether, as a matter of fact, the land in dispute herein has been ceded by the Native owners to the Crown?”<sup>16</sup>

The Court of Appeal answered both questions in the negative, upholding the principle of *Wi Parata* that native title matters involving the Crown fell entirely within the Crown’s prerogative powers, and therefore outside the jurisdiction of the Courts. As Justice Richmond, delivering the judgment of the Court, put it:

“The plaintiff comes here.....on a pure Maori title, and the case is within the direct authority of *Wi Parata v The Bishop of Wellington*.....We see no reason to doubt the soundness of that decision.....According to what is laid down in the case cited, the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these Islands; so that Native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to

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12 This centrality is reflected in Justice Richmond’s statement when, in affirming the *Wi Parata* precedent in 1894, he insisted that “[t]he security of all titles in the country depends on the maintenance of this principle.” (*Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488, per Richmond J.).

13 C.f. *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 487-88.

14 C.f. *ibid*, at 488.

15 *Ibid*, at 485.

16 *Ibid*.

determine what is justice. The security of all titles in the country depends on the maintenance of this principle.”<sup>17</sup>

The plaintiff appealed to the Privy Council against this decision, and the same two questions arose for adjudication. The Privy Council reversed the decision of the Court of Appeal on the second question, finding that the Courts do have jurisdiction “...to inquire whether as a matter of fact the land in dispute has been ceded by the native owners to the Crown in accordance with law....”<sup>18</sup> As we shall see, it did so by reserving judgment on the first question, insisting that the issue of the Crown’s prerogative powers, which according to *Wi Parata* barred all Court jurisdiction over native title and therefore any legal challenge to the Crown, did not arise in this case.<sup>19</sup>

Consequently, the Privy Council’s overturning of the *Wi Parata* precedent in *Nireaha Tamaki v Baker* (1900-01) was only partial. It insisted that native title fell within the jurisdiction of the Courts, but reserved judgment on whether this was the case if the Crown’s prerogative powers were involved – i.e. the very principle which was central to *Wi Parata*. Further, the Privy Council actually affirmed the final ruling of Chief Justice Prendergast regarding the facts of the case in *Wi Parata*. It simply disagreed with some of his wider *obiter dicta* on native title.<sup>20</sup> This disagreement was based in particular on Prendergast’s initial denial of the very existence of native title, embodied in Maori customary law.<sup>21</sup> As Lord Davey put it:

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17 Ibid, at 488, per Richmond J.

18 *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 385.

19 Ibid.

20 As Lord Davey stated, delivering the judgment of the Court: "In the case of *Wi Parata v The Bishop of Wellington*, already referred to, the decision was that the Court has no jurisdiction by scire facias or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished.....But the dicta in the case go beyond what was necessary for the decision.....As applied to the case then before the Court however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned Judges." (*Nireaha Tamaki v Baker* (1900-01), at 383-84).

21 Hence at one point in his *Wi Parata* judgment, Chief Justice Prendergast went so far as to assert a terra nullius position that native title did not exist, on the grounds that there was no Maori customary law to sustain it. For instance, after referring to the New South Wales Act, 4 Vic., No. 7, and the Land Claims Ordinance of 1841, Prendergast states: “...These measures were avowedly framed upon the assumption that there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land....” (*Wi Parata v Bishop of Wellington* at 77). Later in his judgment he criticises the reference in the Native Rights Act, 1865, to the "Ancient Custom and Usage of the Maori People", ".....as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts." (ibid, at 79). Such a position was clearly at odds with Prendergast’s insistence elsewhere in his judgment that native title did indeed exist, but was subject to the prerogative

“[I]t was said in the case of *Wi Parata v Bishop of Wellington*, which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognisance. Their Lordships think that this argument goes too far, and that it is *rather late in the day* for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss. 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that 'a phrase in a statute cannot call what is non-existent into being'. It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence.....The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act, and one is rather at a loss to know what is meant by such expressions 'Native title', 'Native lands', 'owners', and 'proprietors', or the careful provision against sale of Crown lands until the Native title has been extinguished if there be no such title cognisable by the law and no title therefore to be extinguished.”<sup>22</sup>

However despite these criticisms of Prendergast’s judgment, the Privy Council stopped short of challenging the central doctrine of the *Wi Parata* precedent – that native title matters involving the Crown were subject to the Crown’s prerogative powers. It was this conclusion which, Prendergast C.J. insisted, placed native title matters outside the jurisdiction of the Courts. Rather than challenging this ruling, Lord Davey simply argued that the question of Crown prerogative did not arise in the present case and so the Privy Council was reserving judgment on it.<sup>23</sup> The Privy Council therefore overturned the decision of the Court of Appeal, and its defence of *Wi Parata*, in the 1894 case, but only on the grounds that the question of the Crown’s prerogative over native title did not arise:

“Their Lordships are therefore of opinion that the order of the Court of Appeal should be reversed, and a declaration should be made in answer to the third and fourth issues of law as follows: That it not appearing that the estate and interest of the Crown in the

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powers of the Crown. Subsequent judicial authority upheld this latter position as the authoritative precedent on *Wi Parata* and tended to ignore the former *terra nullius* position – see note 11 above.  
22 *Nireaha Tamaki v Baker* (1900-01), at 382-83. My emphasis.

subject-matter of this suit subject to such Native titles (if any) as have not been extinguished in accordance with law is being attacked by this proceeding, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in accordance with law.....”<sup>24</sup>

### **Impact on *Wi Parata***

Nevertheless, despite these qualifications, the Privy Council’s judgment was a significant departure from the *Wi Parata* precedent. This was due the identity of the respondent in the case. The respondent was a senior Crown official - the Commissioner of Crown Lands for the Wellington District.<sup>25</sup> It was his authority to sell the lands in accordance with the Land Act, 1892, which was being challenged by the appellant in this case. The appellant insisted that part of the lands proposed for sale by the Land Commissioner were lands upon which the native title had not been extinguished.<sup>26</sup> The Land Commissioner insisted, on the basis of *Wi Parata*, that because native title claims involving the Crown were a matter of Crown prerogative, the Courts had no jurisdiction to determine this claim, and the declaration of the Crown was conclusive on the matter.<sup>27</sup> As we have seen, the New Zealand Court of Appeal had agreed with this latter position, and so had declined jurisdiction over the matter.<sup>28</sup> Yet the Privy Council was able to arrive at the contrary conclusion, by claiming that the Commissioner of Crown Lands, although an official of the Crown,

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23 As Lord Davey put it: “Their Lordships.....express no opinion on the question which was mooted in the course of the argument whether the Native title could be extinguished by the exercise of the prerogative, which does not arise in the present case.” (ibid, at 385).

24 Ibid.

25 C.f. *Nireaha Tamaki v Baker* (1894), at 483. In the facts of the case outlined in the 1894 judgment of the Court of Appeal, it says: “The plaintiff took out a summons for leave to join the Attorney-General as a defendant, and, on the order being made for the argument of questions of law, it was agreed between the parties that, if the Court was of opinion that the Attorney-General was a necessary party, the questions should be dealt with as if he had been made a party, and had raised all the defences raised by the defendant.” (ibid, at 485). Justice Richmond held that the Attorney-General was a necessary party to the case, stating: “In our opinion, the Attorney-General is a necessary party to this suit, and, that being so, he is by consent to be considered as a defendant.....” (ibid, at 487). However the Privy Council rejected this ruling on appeal, stating: “The Court of Appeal thought that the Attorney-General was a necessary party to the action, but it follows from what their Lordships have said as to the character of the action that in their opinion he was neither a necessary nor a proper party.” (*Nireaha Tamaki v Baker* (1900-01) at 381).

26 C.f. *Nireaha Tamaki v Baker* (1894), at 483.

27 As Council for the Defense stated for the Land Commissioner: “The Court has no jurisdiction to entertain the suit. The acts and proceedings of the Crown are conclusive that the Native title has been extinguished: *Wi Parata v Bishop of Wellington* [3 N.Z.J.R. N.S. S.C., 72]. The declaration gazetted under section 136 of ‘The Land Act, 1892’, is alone a sufficient exercise of the Crown’s prerogative in this respect.” (*Nireaha Tamaki v Baker* (1894), at 486-87, per Gully).

28 See note 17 above.



was exercising his authority under statutory powers, and not the Crown's prerogative powers. On this basis, the Privy Council argued, the issue of the Crown's prerogative powers did not arise in this case, and so the case was justiciable before the Courts:

"Their Lordships think that the learned Judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown or acting under the authority of the Crown for the purposes of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority the conditions of which (it is alleged) have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes and is confined within the four corners of the statutes. The Governor in notifying that the lands were rural land open for sale was acting and stated himself to be acting in pursuance of s. 136 of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections (as is alleged by the appellant), the respondent had no power to sell the lands, and his threat to do so was an unauthorised invasion of the appellant's alleged rights."<sup>29</sup>

So in ruling in favour of the appellant and his native title claims, and against the Commissioner of Crown Lands, the Privy Council denied that it was overriding the Crown's prerogative powers on native title, on the basis of its claim that such powers did not arise in the present case.<sup>30</sup> Yet this was of little comfort to settler opinion in New Zealand which quickly saw the full implications of the Privy Council judgment for the *Wi Parata* precedent.<sup>31</sup> In effect, the ruling meant that the Crown was no

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<sup>29</sup> *Nireaha Tamaki v Baker* (1900-01), at 380-81.

<sup>30</sup> As Lord Davey put it: "...there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes if such a right still exists." (ibid, at 381-82).

<sup>31</sup> Indeed, according to Paul McHugh, the New Zealand Parliament passed the Land Titles Protection Act (1902) in response to this Privy Council decision (c.f. Paul McHugh, *The Maori Magna Carta*. New Zealand Law and the Treaty of Waitangi. Auckland: Oxford University Press, 1991, p. 118). The long title to the Act described it as "An Act to protect the Land Titles of the Colony from Frivolous Attacks in certain Cases." ("Land Titles Protection Act, 1902, No. 37, 2 Edw. VII, in *The Statutes of the Dominion of New Zealand* (1902) Wellington, 1902, p. 169). Section 2(1) of the Act then proceeded to protect the Crown from any native title claims which the Crown itself did not wish to entertain: "In the case of Native land or land acquired from Natives, the validity of any order of the Native Land Court, Crown grant, or other instrument of title purporting to have been issued under the authority of law which has subsisted for not less than ten years prior to the passing of this Act shall not be called in question in any Court, or be the subject of any order of the Chief Judge of the Native Land Court....unless with the consent of the Governor in Council first had and obtained; and in the absence of such consent this Act shall be an absolute bar to the initiation of any proceedings in any Court

longer the “sole arbiter of its own justice” on native title issues. The actions of Crown’s officials, relating to the extinguishment of native title, could now be adjudicated by the Courts, so long as the Court found that the Crown officials were not exercising the prerogative powers of the Crown, but rather were acting under the statutory authority of Parliament. Whether they were exercising those prerogative powers was clearly a matter of opinion, given that the Court of Appeal had ruled in 1894 that the Land Commissioner was so exercising these powers, and the Privy Council had ruled six years later that he wasn’t.

In other words, the central platform of the *Wi Parata* precedent, and of the land settlement process in New Zealand – that native title matters involving the Crown fell exclusively within the prerogative powers of the Crown and so were outside the jurisdiction of the Courts – was looking extremely shaky. Despite the fact that the Privy Council had denied it was challenging those prerogative powers, in practice the outcome of their judgment was to establish a precedent that native title issues involving the Crown could become subject to the jurisdiction of the Courts. The authority of the *Wi Parata* precedent to protect the land settlement process in New Zealand from native title challenge had therefore been broken. From a settler perspective therefore, the Privy Council’s decision in *Nireaha Tamaki v Baker* had rendered the land settlement process in New Zealand subject to uncertainty and insecurity.

This was clearly recognised by the New Zealand Court of Appeal judges. For instance, two years later, in the Court of Appeal’s Protest against the Privy Council, in the wake of the latter’s judgment in *Wallis v Solicitor-General* (1903), Justice Stout stated that if the dicta of the Privy Council in *Nireaha Tamaki v Baker* (1901) were given effect to, “...no land title in the Colony would be safe.”<sup>32</sup> Similarly, referring to the Privy Council’s decision in *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903), both of which departed from the *Wi Parata* precedent,

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calling in question the validity of any such order, Crown grant or instrument of title, or the jurisdiction of the Native Land Court to make any such order, or the power of the Governor to make and issue any such Crown grant.” (Land Titles Act, 1902, s 2(1), at pp. 169-70) Consequently, the Land Titles Protection Act, 1902, passed soon after the Privy Council’s decision in *Nireaha Tamaki v Baker* (1900-01), was clearly a legislative attempt to defend the Crown’s prerogative powers over native title, which it was believed had been attacked in that case, by giving them a statutory basis. It therefore sought to enshrine the *Wi Parata* precedent, which had protected the Crown from unwanted native title claims, in statutory law.

32 Ibid at 746, per Stout C.J.

Justice Edwards articulates a similar sentiment, stating that “.....the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation; and.....if that interpretation were acted upon, and carried to its legitimate conclusion in future cases, the titles to real estates in this Colony would be thrown into irretrievable doubt and confusion.”<sup>33</sup>

### **Hohepa Wi Neera v Bishop of Wellington (1902)**

So how did the Court of Appeal deal with this direct challenge to their authority? The answer lay in their response to a native title case which arose the following year, *Hohepa Wi Neera v Bishop of Wellington* (1902). In normal circumstances, this case would have fallen directly within the precedent of *Wi Parata* and have been decided in identical terms to that case. This is because the facts of the case were the same as *Wi Parata*, involving the same land and the same grant of land to the Bishop of Wellington. The case therefore provides a clear test of the extent to which the New Zealand Court of Appeal was willing to depart from the *Wi Parata* precedent given the Privy Council’s judgment in *Nireaha Tamaki v Baker* (1900-01) the previous year. As we shall see, much of the Court of Appeal’s reasoning in this case can be understood as a clear attempt to preserve central elements of the *Wi Parata* precedent from the Privy Council’s departure in *Nireaha Tamaki v Baker* (1900-01). The case therefore provides a clear instance of the extent to which the Court of Appeal was willing to defy a superior Court in order to maintain a cherished New Zealand precedent on native title.

#### ***The Facts of the Case***

The facts of the *Hohepa Wi Neera* case were the same as those arising in *Wi Parata v Bishop of Wellington* (1878) and *Solicitor-General v Bishop of Wellington* (1901). Indeed Williams J. states: "It is difficult to distinguish the present case from the case of *Wi Parata v The Bishop of Wellington*, which dealt with the same subject-matter."<sup>34</sup> While the judgment of the Court of Appeal in *The Solicitor-General v The Bishop of Wellington* (1901) was being appealed in the Privy Council, a member of the Ngatittoa tribe, Hohepa Wi Neera, brought another action against the Bishop of

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<sup>33</sup> Ibid, at 757, per Edwards J.

<sup>34</sup> *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR (CA) 655, at 671, per Williams J.

Wellington and the Solicitor-General. He claimed that he was the successor to one of the native parties who had signed an 1848 letter ceding land to the Bishop of Wellington for the building of a college in the area of Witireia.<sup>35</sup> In this action, ".....he sought to have it declared that the Crown grant [to the Bishop] was void, and, further, that the land had never been ceded by the Natives, that the Native title had never been extinguished, and that the land was still owned according to Native custom by the successors of those entitled in 1848."<sup>36</sup>

### ***Stout C.J. and the Recognition of Native Title***

Chief Justice Stout begins his judgment by referring to chapter xii, section 9 of the Imperial Instructions of 1846, which he says allows land claims of aboriginal inhabitants to be admitted to statutory land courts (as distinct from municipal Courts) if "...the claimants or their progenitors or those from whom they derived title had actually had the occupation of the lands so claimed, and had been accustomed to use and enjoy the same either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustentation of life by means of labour expended thereon."<sup>37</sup> He also points to the Native Rights Act of 1865 with its reference to "...titles to land held under Maori custom and usage...."<sup>38</sup> Both of these statements seem to be a clear recognition, on the part of Stout C.J., of customary occupation and use of land as a legitimate basis for land title among the indigenous population. In other words, they are an effective recognition of native title.

Stout C.J. then points to the establishment of statutory procedures for the investigation of native title, beginning in 1862, and involving the establishment of a Native Land Court in 1865. He states: "There has since 1865 ever been a Native Land Court to investigate Native title; and the uniform rule has been, until such investigation was determined the Supreme Court did not recognise the title of any Native to sue for possession of land uninvestigated by the [Land] Court."<sup>39</sup> While this is clearly an affirmation of the *Wi Parata* principle that native title, in and of itself, lies outside the

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35 Ibid, at 655.

36 Ibid, p. 655. My addition.

37 Ibid, pp. 664-65, per Stout C.J.

38 Ibid, p. 666, per Stout C.J.

39 Ibid, p. 665, per Stout C.J. My addition.

jurisdiction of the municipal courts, it is not a denial of the existence of native title. Indeed, it is precisely such title that the Land Courts were established to investigate.

Finally, Stout C.J. points out that under the terms of the Instructions of 1846, "...lands not claimed by or on behalf of the Maoris were deemed the demesne lands of the Crown."<sup>40</sup> Again, this is an implicit recognition of native title, since in the absence of native title, *all* land would be demesne lands of the Crown, until ceded by grant to settlers.<sup>41</sup>

Nevertheless such a recognition of native title was in no way a departure from previous cases which had upheld the *Wi Parata* precedent. As we have seen, although at some points within the *Wi Parata* judgment, Chief Justice Prendergast had articulated what seemed to be a *terra nullius* doctrine by denying the existence of native title altogether, at other points he fully affirmed the existence of native title but confined it entirely within the prerogative powers of the Crown. It is this second aspect of the *Wi Parata* precedent which was upheld by subsequent New Zealand judicial decisions on native title. In this sense, Chief Justice Stout's recognition of native title above does not depart from this second aspect, particularly in so far as he too upholds the principle that native title, in and of itself, falls outside the jurisdiction of the municipal Courts.

### **The Impact of *Nireaha Tamaki v Baker* (1901)**

As we have seen, the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01) departed from the *Wi Parata* precedent by insisting, on the statutory basis of the *Native Rights Act*, 1865, that native title issues involving Maori and the executive government did fall within the jurisdiction of the municipal Courts, though it reserved judgment on issues of Crown prerogative. As discussed above, despite this qualification concerning Crown prerogative, the Privy Council's decision was still

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40 Ibid, at 664, per Stout C.J. C.f. *ibid*, at 663, per Stout C.J.

41 This was the inevitable conclusion of the *terra nullius* doctrine, which applied in the absence of native title. This doctrine held that upon the acquisition of sovereignty over newly discovered territory, the Crown acquired all land as demesne lands of the Crown. Justice Brennan articulated this doctrine, as asserted by the defence in the *Mabo* case, as follows: "On analysis, the defendant's argument is that, when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory so that the colony became the Crown's demesne and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown." (*Mabo v Queensland* [No. 2] (1992) 175 CLR 1, at 26, per Brennan J.).

understood in New Zealand as a threat to the *Wi Parata* precedent. This was due, not least, to the fact that the Privy Council had held that the Commissioner of Crown Lands was not able to rely on Crown prerogative to oust the jurisdiction of the Court. Consequently, Crown officers were clearly now subject to the jurisdiction of the municipal Courts on native title matters, which was entirely contrary to the spirit of *Wi Parata*.

In *Nireaha Tamaki*, the Privy Council further departed from the *Wi Parata* precedent in their interpretation of the *Native Rights Act*, 1865. In *Wi Parata*, Prendergast C.J. had insisted that the Crown was not bound by the *Native Rights Act*, 1865, because it was not specifically mentioned in the Act.<sup>42</sup> Yet this was the very Act which the Privy Council relied on in *Nireaha Tamaki* to insist that the officers of the Crown were subject to the jurisdiction of the Courts on native title issues, and could not merely resolve the matter in the Crown's favour by declaring the native title extinguished. As Lord Davey put it:

“By s. 5 it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in Native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specifically constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act....”<sup>43</sup>

### **Stout's Reponse**

Given the above, Stout C.J. clearly recognises the threat which the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01) poses for the *Wi Parata* precedent. In particular, it is the Privy Council's ruling that the Supreme Court could take cognisance of native title matters *prior* to the Native Land Court issuing a freehold title to the land, that was perceived as the greatest threat. The Privy Council had concluded that the Supreme Court itself “...has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in

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42 As Chief Justice Prendergast put it: “The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished....If this prerogative be left intact, and we hold it is, the issue of a Crown grant must still be conclusive in all Courts against any native person asserting that the land therein comprised was never duly ceded.” (*Wi Parata v Bishop of Wellington*, at 80).

43 *Nireaha Tamaki v Baker* (1900-01), at 382-83.

accordance with law....”<sup>44</sup> However, according to Stout C.J., the settled principle in New Zealand was the contrary one - that the Supreme Court had no such jurisdiction until the Native Land Court itself had extinguished the native title and issued a freehold certificate for the land. As Stout C.J. put it:

"There has since 1865 ever been a Native Land Court to investigate Native title; and the uniform rule has been, until such investigation was determined the Supreme Court did not recognise the title of any Native to sue for possession of land uninvestigated by the [Native Land] Court. It has always been assumed - at all events up to the decision of *Tamaki v Baker* [1901] A.C. 561 - that [this]....was a true declaration of the law. The earliest decision of the Supreme Court on the subject is, I believe, that of *McIntosh [sic] v Symonds* [*N.Z. Gazette* (1847), p. 63]. In the very able and learned judgment of the late Mr. Justice Chapman, approved of by the Chief Justice Sir William Martin, it was held that the Supreme Court could not recognise any title not founded on the Queen's patent as the source of private title. This decision was followed in several cases, the most important of which was *Wi Parata v. The Bishop of Wellington*...."<sup>45</sup>

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44 Ibid, at 385.

45 Hohepa Wi Neera v Bishop of Wellington, at 665-66, per Stout C.J. My addition. Stout C.J.'s claim in the passage above concerning *The Queen v Symonds* (1847) is based on a selective reading of that judgment. On the one hand, in line with Chief Justice Stout's comments above, Justice Chapman clearly states in *R v Symonds* that "...the colonial Courts have invariably held (subject of course to the rules of prescription in the older colonies) that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorised to make grants), verified by letters patent" (*The Queen v Symonds* (1847) N.Z.P.C.C. (SC), 387, at 388, per Chapman J.). However as the following will show, Chapman J. intends such a statement to only apply to non-native settlers, who are bound by the Crown's exclusive right of pre-emption over native lands.

Both Justice Chapman and Chief Justice Martin were at pains to defend the Crown's exclusive right of pre-emption in *The Queen v Symonds*, insisting that the Courts would refuse to recognise any settler's title to land deriving from direct purchase from the Maori tribes themselves, independent of confirmation by Crown grant (c.f. *ibid*, at 389-90, 391, per Chapman J.; *ibid*, at 393-95, per Martin C.J.). Hence in regard to settlers claims to land title, both judges insisted that the Courts would only recognise titles deriving from the Crown, as consistent with the Crown's exclusive right of pre-emption over native lands (*ibid*). It is in this context that their statement above must be read – as a statement defending the Crown's exclusive right of pre-emption over native lands by insisting that the Courts would only recognise title to land deriving from this source. But it is a statement applying only to those who are subject to the Crown's exclusive right of pre-emption – the settlers themselves. In relation to native tribes, Chapman J. states that the Crown's exclusive right of pre-emption leaves them "...to deal among themselves, as freely as before the commencement of our intercourse with them...." (*ibid*, at 391, per Chapman J.). Consequently, since the native tribes are not subject to the Crown's exclusive right of pre-emption (it operating "only as a restraint upon the purchasing capacity of the Queen's European subjects" – *ibid*) Chapman J. insists that in relation to native claimants, the Courts will take cognisance of sources of land title not deriving from the Crown, by which he means native title (which derives from Maori customary law). As Chapman J. states: "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their

Stout C.J. also communicates what he believes is the legal uncertainty produced by the Privy Council's decision in *Nireaha Tamaki v Baker* (1901) by emphasising the extent to which he believes the Privy Council's interpretation of the *Native Rights Act*, 1865 in that case departs from all previously known legal authority in New Zealand. As we have seen, the Privy Council fundamentally departed from the interpretation of this Act upheld by Chief Justice Prendergast in *Wi Parata*, insisting that this statute *did* bind the executive Government on native title matters and placed them within the jurisdiction of the Courts. Stout C.J. reflects the uncertainty produced by such a break with New Zealand precedent when he states:

“The interpretation of the Native Rights Act given by the Privy Council may have an effect not dreamed of by the Legislature that passed it, nor understood by the Judges of the Supreme Court since it was enacted.”<sup>46</sup>

Indeed, Stout C.J. goes so far as to reject the Privy Council's interpretation of the *Native Rights Act*, 1865, thereby reasserting the *Wi Parata* view that the Crown is not bound by this statute. As he states:

"I may further point out that so far as the Native Rights Act is concerned it could not bind the Crown. Our 'Interpretation Act, 1888' is very explicit. It says that no Act must be read 'in any manner or way whatsoever to affect the rights of the Crown unless it is expressly stated therein that the Crown is bound thereby'....I mention these facts, as they are not referred to in the judgment of *Tamaki v Baker*, and the Privy Council does not seem to have been informed of the circumstances of the colony when - and for many years afterwards - the Act was passed.”<sup>47</sup>

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dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.” (ibid, at 390, per Chapman J.). Justice Chapman's judgment in this respect was fully accorded with by Chief Justice Martin (c.f. ibid, at 393, per Martin C.J.).

Consequently we see that Stout C.J.'s claim above in *Hohepa Wi Neera* that the New Zealand Supreme Court, in *The Queen v Symonds* (1847), insisted that the Courts could only recognise land titles deriving from the Crown, and therefore could not recognise native title, was based on a very selective reading of that judgment. It ignores the very different situation regarding Court jurisdiction which Chapman J. held to apply to native applicants.

46 *Hohepa Wi Neera v Bishop of Wellington*, at 667, per Stout C.J.

47 Ibid.



### ***The Court of Appeal's Strategy***

So we see that Stout C.J. critically confronts the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01) at various points, disputing its claims and re-asserting the principles of *Wi Parata* in the process. Yet a deeper reading of this judgment reveals how both Stout C.J. and Williams J. also adopt a broader, more subtle strategy in their defence of *Wi Parata*. Rather than confronting the Privy Council decision head-on, disputing its claims and effectively placing themselves in clear opposition to the ruling of a superior court, this broader strategy attempts to minimise the impact of the Privy Council's departure from the *Wi Parata* precedent, either by insisting that the Privy Council's decision was not a significant departure from *Wi Parata* (Stout), or by insisting that the Privy Council's decision is not directly relevant to the facts of the present case (Williams).

As we have seen, the facts of the present case were those that confronted Prendergast C.J. and Richmond J. in *Wi Parata*.<sup>48</sup> The main difference between Prendergast and Richmond's deliberations on these facts in the 1870s, and the Court of Appeal's deliberations in the present case, is that the Court of Appeal is now faced with a Privy Council decision which departs significantly from the *Wi Parata* precedent at various points, and so mitigates against a direct application of the *Wi Parata* precedent to the present case. Consequently, a basic feature of their judgment below is an attempt to limit the extent to which the Privy Council decision in *Nireaha Tamaki v Baker* (1900-01) prevents a direct application of the *Wi Parata* precedent to the facts of the present case.

### ***Stout C.J.***

Although Stout C.J. does not say so in so many words, it is clear that his strategy for minimising the impact of *Nireaha Tamaki v Baker* (1900-01) on the *Wi Parata* precedent is to minimise the extent to which the Privy Council's decision is perceived to depart from that precedent. As mentioned earlier, although the Privy Council

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48 The basis upon which the plaintiff attempted to impeach the Crown's grant to the Bishop of New Zealand was "...that the land has never been legally ceded to the Crown, that the Crown grant of the land in 1850 to the Bishop of new Zealand....was null and void, and that the land was still Native land, the property according to Native custom of the successors of those who were so entitled in 1848...." [*Hohepa Wi Neera v The Bishop of Wellington* (1902), at 656. See also *ibid*, at 660-61]. Further, the plaintiff claimed on separate grounds that the failure to establish a school on the site as anticipated in the grant rendered the grant void and so the land in question should revert to the original native donors. (*ibid*, at 658). These were effectively the same grounds as those relied on by the plaintiff in *Wi Parata v*

criticised significant elements of Chief Justice Prendergast's *dicta* on native title in *Wi Parata*, and moved against the spirit of that judgment by insisting that Crown officials dealing with native title were exercising statutory authority and so were subject to the jurisdiction of the Courts, it actually affirmed the conclusions Prendergast arrived at in his *Wi Parata* judgment, where a Crown grant was taken as conclusive evidence that the native title on the land had been extinguished.<sup>49</sup> Stout C.J. therefore insists that the present case once again involves those same legal questions, and so the precedent of *Wi Parata* can be directly applied to it, irrespective of the Privy Council's criticism of the wider *obiter dicta* in that case. As Stout C.J. puts it:

"It does not, however, seem to me necessary to inquire how far the decision in *Tamaki v Baker*.....has set aside the law and procedure of the Supreme Court in dealing with the claims of Maoris to land the titles of which have not been ascertained by the Native Land Courts.....The important point in that decision bearing on this case seems to me to be that it declares that *Wi Parata v The Bishop of Wellington* was rightly decided, though it disapproves of certain *dicta* in the judgment. It is affirmed [in *Tamaki v Baker*] that the Supreme Court has no jurisdiction to annul the grant for matters not appearing on its face, and that 'the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished'. In my opinion, this Court should follow the decision in *Wi Parata v The Bishop of Wellington*.....and, following it, an answer adverse to the plaintiff....must be entered."<sup>50</sup>

Now as we have seen, both in the present case and in his Protest the following year, Stout C.J. made clear the extent to which he believes the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01) was a threat to the stability and security of land title in New Zealand.<sup>51</sup> It was perceived to be a threat precisely because of the extent to which this decision departed from the *Wi Parata* precedent – the precedent upon which the legal settlement of land title in New Zealand had been based since the late 1870s. Yet in the passage above, Stout C.J. adopts the opposite tack, minimising the extent to which the Privy Council's decision could be seen as a departure from the *Wi Parata* precedent. In so doing, he minimises the wider implications of that departure

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Bishop of Wellington (1878) – c.f. *Wi Parata v Bishop of Wellington*, at 73-76, per G.E. Barton for the plaintiff.

<sup>49</sup> See note 20 above. On Prendergast C.J.'s view in *Wi Parata* that a Crown grant is conclusive evidence that the native title has been extinguished, see note 8 above.

<sup>50</sup> *Hohepa Wi Neera v The Bishop of Wellington* at 667, per Stout C.J. My addition.

by insisting that it does not prevent the direct application of the *Wi Parata* precedent to the facts of the present case. Rather, he argues that in so far as the Privy Council affirmed Prendergast's conclusions concerning the strict legal issues arising in *Wi Parata*, Prendergast's judgment applies to the present case because those same legal issues also arise here. Hence by minimising the Privy Council's departure from *Wi Parata*, Stout C.J. is still able to claim that the latter is the authoritative precedent to be applied in the present case.

### **Williams J.**

Justice Williams' strategy for minimising the impact of *Nireaha Tamaki v Baker* (1901) on the present case is somewhat different from that of Chief Justice Stout. At one level, Williams J. seems to fully accept the new legal situation on native title ushered in by the Privy Council, in particular the Privy Council's rejection of the *Wi Parata* precedent that the Courts had no jurisdiction over native title. He states that the Privy Council's decision in *Nireaha Tamaki v Baker* (1901) "...decided that by virtue of 'The Native Rights Act, 1865', a suit could be brought upon a native title, and therefore that a native holding under such a title, if his title were put in jeopardy by an officer of the Crown acting outside his statutory authority, could bring a suit to restrain the officer from so acting."<sup>52</sup>

He seems to further affirm this new legal situation when he cites the Privy Council's following departures from the *Wi Parata* precedent without criticism (and therefore with apparent approval):

"The judgment further states, at page 576, that, as at the present time the exclusive right of pre-emption by the Crown over Native lands and of extinguishing the Native title is exercised by the constitutional Ministers of the Crown, on behalf of the public, in accordance with the provisions of statutes in that behalf, the Court has jurisdiction to decide whether the provisions of those statutes have been complied with, and the Native title extinguished in accordance with them."<sup>53</sup>

"The judgment states (p.576) that in the case then before the Court there was no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes, and questions whether such a right still exists. But the doubt as to

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51 See notes 32 and 46 above.

52 *Hohepa Wi Neera v Bishop of Wellington*, at 670, per Williams J.

the existence at present of a prerogative right to extinguish the Native title obviously rests on the fact that the extinguishment of Native title is stated by the Privy Council to be now regulated by statute.”<sup>54</sup>

Williams J. does not challenge these Privy Council findings in any way, even though they clearly depart from the direction which the Court of Appeal has followed since *Wi Parata*. However what he does do is to argue that none of the above is applicable to the present case, because the facts informing that case occurred at a time *prior* to the enactment of the statutes on which the Privy Council relied in coming to its conclusions in *Nireaha Tamaki v Baker*. As Williams J. states:

"In the present case, however, we have to deal with transactions which took place before New Zealand became a self-governing colony, and long before the statutes now regulating the rights of Natives and the ascertainment of title to and the disposition of Native lands were in existence.....There were no statutes regulating the acquisition of Native rights of occupancy by the Crown, whether by purchase, gift from the natives, or otherwise. If the question arose in any particular case whether Native rights had been ceded to the Crown, it must have been for the Governor of the colony, the only channel through which in a Crown colony the cession could have been made, to say whether they had been ceded or not, and whether the Crown had accepted such cession. No Court would have had jurisdiction to consider the question. The Crown itself, through its Responsible Ministers in England, might have reversed the action of the Governor as a matter of administration, but not as acting judicially."<sup>55</sup>

Therefore by insisting that the Privy Council in *Nireaha Tamaki v Baker* (1901) had relied on statutes regulating native title which were enacted *after* the circumstances which gave rise to the present case, Williams J. was able to minimise the applicability

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53 Ibid.

54 Ibid.

55 Ibid, at 670-71. In his Protest against the Privy Council, where he defends the Court of Appeal's judgment in *Solicitor-General v Bishop of Wellington* (1901), Williams J. follows the same strategy of rejecting the relevance of *Nireaha Tamaki* to the issues at hand by insisting that the statutes upon which the Privy Council relies to affirm the Courts' jurisdiction over native title arose after the relevant circumstances of the Crown's grant to the Bishop of Wellington (i.e. the subject matter of the present case): "At the time of the transactions in question there.....were no statutes regulating the extinction of Native title. The Native Rights Act referred to in the case of *Nireaha Tamaki v Baker* was not passed till 1865." ("Wallis and Others v Solicitor General, Protest of Bench and Bar, April 25, 1903", at 749, per Williams J.).

of this Privy Council decision. He is therefore able to follow Stout C.J. in reaffirming the continuing relevance of *Wi Parata* to the present case:

"It is difficult to distinguish the present case from the case of *Wi Parata v The Bishop of Wellington*, which dealt with the same subject matter. The decision in that case was approved by the Privy Council in *Tamaki v Baker*, although certain dicta in the judgment were disapproved of. If the decision of this Court in *the Solicitor-General v The Bishop of Wellington* is upheld on appeal, *Wi Parata's case* indicates that the land would revert not to the natives, but to the Crown; the estate the Crown parted with would go back to it. If it is not upheld the estate granted by the Crown will remain in the grantees....On the authority, therefore, of *Wi Parata's case*, and upon general principles, I think that our judgment should be for the defendants...."<sup>56</sup>

### **Colonial Consciousness**

We can therefore see a clear strategy at work in the judgments of Stout C.J. and Williams J. in *Hohepa Wi Neera*. Faced with a new Privy Council decision on native title which effectively overturned much of the *Wi Parata* precedent which had provided the framework for New Zealand judicial reflection on native title for so long, both judges adopted strategies aimed at minimising the relevance of this new state of affairs to their deliberations in the present case. In so doing, they were able to retain their allegiance to *Wi Parata* by insisting on its continuing authority to the facts before them.

But why would both judges go to such lengths to maintain the *Wi Parata* precedent in the face of Privy Council challenge? The answer lies in the extent to which *Wi Parata* ensured that the land settlement process in New Zealand was entirely free from legal challenge by native tribes. By placing the entire authority over native title within the prerogative powers of the Crown, and assuming that a mere declaration by the Crown that native title was extinguished was binding on the Courts, the *Wi Parata* judgment ensured that the land settlement process was entirely within the control of the Crown. From the Crown and settler's perspective, this ensured stability and security to the land settlement process because no Crown grant could subsequently be impeached by native tribes on the ground that the native title had not been extinguished. The Crown grant itself was held to be sufficient evidence, by the Courts, that this title had been

extinguished.<sup>57</sup> The extent to which these principles, established by *Wi Parata*, were seen as central to the stability and security of land tenure in New Zealand, is demonstrated by the extent to which New Zealand judges themselves insisted that any departure from them would produce instability and insecurity.<sup>58</sup>

Consequently, we can see that both Stout C.J. and Williams J., in adopting explicit strategies within their judgment to maintain the authority of the *Wi Parata* in the face of the Privy Council's departure from it, were defending what they saw as necessary to maintain the existing conditions of land settlement in New Zealand. Such a position was not impartial, since it was clearly to the detriment of Maori tribes' capacity to bring suits of native title against Crown officials within New Zealand municipal courts – a capacity which the *Wi Parata* judgment denied and the Privy Council's judgment upheld, on the proviso that such officials were exercising statutory authority rather than Crown prerogative powers.

I believe this absence of impartiality on the part of the New Zealand judges, reflected not least in their overarching desire to maintain *Wi Parata* in the face of Privy Council precedents, reveals a “colonial consciousness” on their part. This “colonial consciousness” can be defined as an allegiance to the colonial interests of the Crown and settler society regarding land settlement, which given the legal foundations of that settlement at the time, was clearly at the expense of Maori tribes. The statements by some of these New Zealand judges, cited above, which point to the extent to which they believed any departure from *Wi Parata* must be understood as a “threat” to the security and stability of land tenure in New Zealand, is clear evidence of this allegiance to colonial interests.<sup>59</sup> The imputation of this “colonial consciousness” to the New Zealand judges in *Hohepa Wi Neera* therefore provides us with some basis for explaining the motivation behind their deliberate attempts to circumvent and minimise the impact of the Privy Council departure from *Wi Parata*, and so maintain the authority of that precedent to the facts before them in the present case.

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56 *Hohepa Wi Neera v The Bishop of Wellington*, at 671-72, per Williams J.

57 See note 8 above.

58 See notes 32, 33, and 46 above.

59 C.f. *ibid.*

## Did *Nireaha Tamaki* Make a Difference?

Yet despite these attempts to minimise the impact of *Nireaha Tamaki* on the *Wi Parata* precedent, did the Privy Council decision make a difference to the way in which the New Zealand Court of Appeal now approached the issue of native title? I think so. The extent of the difference can be seen in the fact that, although the facts of the case in *Hohepa Wi Neera* were largely identical to those which arose in *Wi Parata*, the judges in *Hohepa Wi Neera* adjudicated on them in a very different manner to the way in which they were dealt with in *Wi Parata* itself.

The very manner in which both Stout C.J. and Williams J. adjudicated in *Hohepa Wi Neera* reveals the profound difference which the Privy Council's judgment in *Nireaha Tamaki v Baker* (1901) made to the New Zealand judicial environment on native title. One of the central strategies of Prendergast C.J. when confronted with the same facts as the present case some twenty-five years before was to simply deny the Court's jurisdiction over the matter, on the grounds that native title issues involving the Crown fell within the confines of the Crown prerogative.<sup>60</sup> Despite facing the same facts in the present case, the Court of Appeal did not resort to this strategy, even though the Court of Appeal's *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901) the previous year seemed to provide some support for doing so.<sup>61</sup> Rather than accepting the Crown's declarations concerning native title as binding on the Court, as the *Wi Parata* precedent would require, the judges in *Hohepa Wi Neera* weighed the evidence of the Crown against those of other claimants in the case before reaching a conclusion.<sup>62</sup> *Hohepa Wi Neera* therefore showed that the Crown no longer had a

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60 See note 7 above.

61 In *Solicitor-General v Bishop of Wellington* (1901), the Court of Appeal delivered *obiter dicta* on an amended statement of defence submitted by the Solicitor-General which gave strong support to the principle that the Court had no jurisdiction over native title matters involving Maori tribes and the Crown. As Justice Williams put it, delivering the judgment of the Court: "In the present case there are, however, circumstances which make the question of exercising the jurisdiction more difficult. The land, as appears from the grant, was ceded by Natives to the Crown. Mr. Bell, who appeared for the Solicitor-General, the representative of the Crown, made a statement at the bar as from the Crown that the terms of the cession by the Natives were such as to preclude the administration of the gift otherwise than in the direct terms of the grant.....[T]he Crown therefore asserts that it has duties towards the Natives who ceded the land which could not be performed if the Court administered the trust *cy-près*. This would place the Court in a considerable difficulty. What the original rights of the Native owners were, what the bargain was between the Natives and the Crown when the Natives ceded the land, it would be difficult, if not impossible, for this Court to inquire into, even if it were clear that it had jurisdiction to do so." (*The Solicitor-General v Bishop of Wellington* (1901), 19 NZLR 665, at 685-86).

62 Consequently, in coming to his conclusion, even though Williams J. follows his line of reasoning above that in the absence of statutes regulating the extinguishment of native title, a Crown grant must

privileged position reserved for it in *Wi Parata*, where its declaration alone could oust the jurisdiction of the Court on native title matters.

So the biggest difference between *Wi Parata* and *Hohepa Wi Neera* is that the Court of Appeal accepted jurisdiction in the later case, when the Supreme Court had clearly rejected jurisdiction, on the basis of the same facts, some twenty-five years before. Surely the difference can only be explained by the impact of the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01) which had moved strongly against the *Wi Parata* precedent, and its exclusion of the Courts' jurisdiction over native title.

The difference made by *Nireaha Tamaki v Baker* is also evident in the way in which the *Wi Parata* precedent is affirmed in the present case. Previously, the New Zealand Courts had affirmed *Wi Parata* in its broadest sense, including the *obita dicta* of Prendergast C.J. on native title. It was on this basis that the Crown's declarations on native title were always accepted by the Courts as conclusive.<sup>63</sup> Yet in *Hohepa Wi Neera*, the *Wi Parata* precedent is affirmed in its narrowest sense, in terms of the strict legal questions which it decided. Why? Because as both Stout C.J. and Williams J. state above, the Privy Council in *Nireaha Tamaki v Baker* affirmed Prendergast's conclusions on these strict legal questions, but clearly rejected his wider *obita dicta* on native title.<sup>64</sup> Consequently both Stout C.J. and Williams J. affirmed *Wi Parata* on the only grounds made available to them by the Privy Council in *Nireaha Tamaki v*

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be considered conclusive evidence of such extinguishment, nevertheless this is still an instance of a municipal court adjudicating on native title claims involving the Crown and weighing the Crown's evidence against those of other parties (rather than denying its jurisdiction in the face of declarations by the Crown). Hence Williams J.'s conclusion is as follows: "I think the issue of the Crown grant in 1850 is conclusive evidence that any native rights then existing in the land had been ceded to the Crown, and that the cession had been accepted by the Crown. The execution of such an instrument by the only officer who could accept a cession on behalf of the Crown necessarily implies that there has been a cession and that the Crown has accepted it." (ibid, at 671). Here Williams J. has weighed the evidence against the Crown, rather than accepting the Crown's claims at face value, as the *Wi Parata* precedent upholding Crown prerogative over native title would require.

63 Hence in *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, Justice Richmond, delivering the judgment of the Court, upheld the *Wi Parata* precedent in the widest terms as follows: ".....the case is within the direct authority of *Wi Parata v The Bishop of Wellington*. We see no reason to doubt the soundness of that decision.....According to what is laid down in the case cited, the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these Islands; so that Native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on the maintenance of this principle." (*Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488, per Richmond J.).

64 See note 50 and 56.



*Baker*. Once again, this demonstrates the profound impact which this Privy Council decision had on the deliberations of the judges in this present case, despite their attempt to minimise its relevance.

This impact of the Privy Council decision on the deliberations of the New Zealand judges in *Hohepa Wi Neera* shows the extent to which *Nireaha Tamaki v Baker* (1901) altered the judicial landscape on native title in New Zealand established twenty-five years earlier by *Wi Parata*. As mentioned above, the year prior to their decision in *Hohepa Wi Neera* the Court of Appeal had provided *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901) which seemed to once again confirm that they had no jurisdiction over native title cases involving the Crown.<sup>65</sup> Yet in the present case, one year later, considered in the wake of the *Nireaha Tamaki* judgment, the Court of Appeal fully affirmed its jurisdictional capacity in these matters.<sup>66</sup>

That the Court of Appeal so quickly reflected this altered landscape produced by the Privy Council's departure from *Wi Parata* is somewhat ironic given that the year after its *Hohepa Wi Neera* judgment, the Court engaged in a Protest against the Privy Council whose entire sub-text was a defence of the *Wi Parata* precedent in its broad sense, *obiter dicta* and all, against the departures of the Privy Council in *Nireaha Tamaki* and *Wallis v Solicitor-General* (1903).<sup>67</sup> This shift from their position in

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65 See note 61 above.

66 Both *Solicitor-General v Bishop of Wellington* (1901) and *Hohepa Wi Neera v Bishop of Wellington* (1902) involved the same land and Crown grant first arising in *Wi Parata*. But the broad facts of each case were quite different. In *Solicitor-General v Bishop of Wellington* (1901), there was no native claimant to the land in question. Rather, the case involved a dispute between the Bishop of Wellington and the Crown concerning the purposes for which the land originally ceded for the building of a school could now be used, and whether the land reverted back to the Crown for the failure to fulfill the initial terms of the grant involving the building of a school.

67 The ostensible reason for this Protest was what the Court of Appeal perceived as the Privy Council's injudicious use of language and the imputation of improper motives to the Court of Appeal, as expressed in the Privy Council judgment of *Wallis v Solicitor-General* (1903) AC 173 (c.f. "*Wallis and Others v Solicitor General, Protest of Bench and Bar, April 25, 1903*", at 730, 745, 746, per Stout C.J.; *ibid*, at 747, 755-56, per Williams J.; *ibid*, at 757, 759, per Edwards J.). However the Court of Appeal judges went further within their Protest and accused the Privy Council of demonstrating ignorance concerning New Zealand land law and other matters. As Chief Justice Stout put it: "At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest." (*ibid*, p. 746, per Stout C.J.). Justice Williams goes even further, writing that the Privy Council, "...by its imputations in the present case, by the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice, and by its long-delayed judgments, has displayed every characteristic of an alien tribunal." (*ibid*, p. 756). That it was primarily the difference of opinion between the respective Courts on native title that informed these charges is evident from Justice Edwards' comment, when he states: "...the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation; and.....if that interpretation

*Hohepa Wi Neera* can be partially explained by the fact that in their Protest, the Court of Appeal were defending a decision - *Solicitor-General v Bishop of Wellington* (1901) - which was delivered prior to *Hohepa Wi Neera* and prior to the Court of Appeal gaining access to the Privy Council's judgment in *Nireaha Tamaki v Baker* (1901). Further, they were also defending this decision from a Privy Council judgment, *Wallis v Solicitor-General* (1903), which went even further than *Nireaha Tamaki v Baker* (1900-01) in its rejection of the *Wi Parata* precedent.<sup>68</sup> Nevertheless, within this Protest, the Court of Appeal's revelations of the depth and breadth of its commitment to *Wi Parata*, and its frustrations with the Privy Council decisions which departed from it, clearly indicate that their Protest was more than simply a retrospective defence of *Solicitor-General v Bishop of Wellington* (1901), and more a defence of *Wi Parata en bloc*.

Given this broader context, as demonstrated by its Protest the following year, the Court of Appeal's response to the Privy Council in *Hohepa Wi Neera* seems somewhat conciliatory by comparison. Rather than overtly defending the *Wi Parata*

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were acted upon, and carried to its legitimate conclusion in future cases, the titles to real estates in this Colony would be thrown into irretrievable doubt and confusion." (ibid, at 757, per Edwards J.). Thus we see that underlying the Court of Appeal's Protest against the Privy Council in 1903 was a strong criticism of the extent to which the Privy Council had departed from the established New Zealand precedents on native title.

68 As we have seen, the Privy Council's departure from the *Wi Parata* precedent in *Nireaha Tamaki v Baker* (1900-01) was qualified by the fact that it reserved judgment on the question of Crown prerogative (see note 23 above). Hence it did not directly challenge the *Wi Parata* principle that native title matters involving Crown prerogative were outside the jurisdiction of the Courts (see note 24 above). It was precisely this principle which the Privy Council in *Wallis v Solicitor-General* (1903) did challenge. In *Solicitor-General v Bishop of Wellington* (1901), the Solicitor-General had provided an amended statement of defence in which he claimed that the terms of cession of the native land to the Crown precluded the land being administered in the ways suggested by the representatives for the Bishop of Wellington (see note 61 above). The Court of Appeal responded by implicitly upholding the *Wi Parata* precedent, suggesting that it didn't have the jurisdiction to question this claim by the Solicitor-General since native title matters involving the Crown were arguably outside the jurisdiction of the Courts (c.f. ibid). The Privy Council thoroughly rejected this suggestion as follows: "The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand, or even to the intelligence of the Parliament. What has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive? Why should the executive Government take upon itself to instruct the Court in the discharge of its proper functions? Surely it is for the Court, not for the executive, to determine what is a breach of trust." (*Wallis v Solicitor-General* [1903] AC 173, at 188). With this statement, the Privy Council is implying that any suggestion by the Crown that native title matters fall outside the jurisdiction of the Courts, due to the Crown prerogative powers, is not to be accepted at face-value by the Courts themselves. In other words, from the Privy Council's perspective, a mere declaration by the Crown concerning native title matters is no longer binding on the Courts, as Chief Justice Prendergast had assumed in *Wi Parata*. Rather, all matters involving native title and the Crown were now, according to the Privy Council, justiciable within the Courts. With this claim, the last remnant of *Wi Parata*, on which the Privy Council had reserved

precedent as they do in their Protest one year later, the Court of Appeal adopts a series of subtle strategies which attempt to minimise the impact of the Privy Council's departure from that precedent, and so maintain the authority of *Wi Parata* to the facts before them.<sup>69</sup> Nevertheless the fact that the Court of Appeal would adopt such strategies at all is revealing enough. Such strategies were nothing less than an attempt by the Court to circumvent the ruling of a superior court, and its willingness to do so indicates the lengths to which the Court was prepared to go in order to defend a cherished local precedent on native title which had guided New Zealand judicial law-making for the previous twenty-five years. Such actions can only be explained by a colonial consciousness pervading the judicial outlook of the Court of Appeal, through whose lens *Wi Parata* was viewed as a precedent whose concerted defence was necessary for the "stability" and "security" of land settlement in New Zealand.

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judgment in *Nireaha Tamaki v Baker* (1900-01), was overturned. The Crown could no longer assert prerogative powers over native title to exclude the jurisdiction of the Courts.

<sup>69</sup> Although as we have seen, Chief Justice Stout does openly defend some *Wi Parata* principles against the Privy Council's ruling at various points within his *Hohepa Wi Neera* judgment. See the section entitled "Stout's Response" above.