

MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011
ROTORUA CASE MANAGEMENT CONFERENCE

14 JULY 2020

Judicial Officer:

The Honourable Justice Churchman

Counsel:

T Sinclair and B Cunningham for CIV-2017-485-817, CIV-2017-485-264,
CIV-2017-485-375, CIV-2017-485-269, CIV-2017-485-278 and CIV-2017-404-562
E Rongo for CIV-2017-485-270 and CIV-2017-485-272
A Sykes and J Chaney for CIV-2017-485-299
T Bennion for CIV-2017-485-253
R Siciliano for CIV-2017-485-355
C Linstead-Panoho and T K Williams for CIV-2017-485-377 and CIV-2017-485-262
H Irwin-Easthope for CIV-2017-485-196
B Lyall for CIV-2017-485-201
N Coates for CIV-2017-485-318
K Feint QC for CIV-2017-485-292
C Leauga for CIV-2017-485-278
M Sinclair for CIV-2017-485-269

Interested Parties:

T Reweti for Opotiki District Council and Bay of Plenty Regional Council
R Roff, G Melvin, R Budd and S Gwynn (by AVL) for Attorney-General; and
P Agnew for Te Arawhiti

HEARING COMMENCES ON TUESDAY 14 JULY 2020 AT 10:10 AM

JUSTICE CHURCHMAN:

Tēnā koutou, tēnā koutou, tēnā huihui mai tātou katoa.

- 5 Welcome to you all. I'm sorry that the logistical arrangements have been less than ideal and I know that some of you have gone to the wrong address. Anyhow, we are all here now and thank you coming. Tēnā koutou ki te whanau.

- Perhaps Mr Registrar, if you could start by calling matters and then we can work
10 out how we're going to progress and deal with the substantive issues.

REGISTRAR:

CIV-2011-485-817 – Edwards on behalf of Te Whakatōhea, as well as CIV ending 264, 375, 269 and 278: Whakatōhea Pakowhai, Hiwarau, Turangapikitoi and Ohiwa of Whakatōhea, Ngāti Muriwai and Whānau a Apanui Hapū.

15 TONY SINCLAIR:

Tēnā koe te Kaiwhakawa, ngā hapū o Whakatōhea, ngā iwi o Whakatōhea, tēnā koutou. Nau mai haere mai ki Te Whare Teitei ki tenei kaupapa te Takutai Moana. Te Rōpū o Te Whare Teitei, tēnā koutou.

- 20 Sir, my name is Sinclair on behalf of my learned colleague Mr Cunningham. We appear today for the Edwards Whakatōhea application as read by the Registrar and the other applications. Sir, I may wish to add one more application we're appearing on behalf of. It's 262 – it's Te Uri o Te Hapū – that's Raymond Parkinson. It's an application which is in the Tauranga area grouping.

25

Sir, there will be memorandum filed soon where Mr Parkinson wishes to remove himself from this particular Takutai Moana issue. I've received instructions recently.

JUSTICE CHURCHMAN:

All right, tēnā kōrua – Mr Sinclair and Mr Cunningham, we'll deal with those substantive issues later.

REGISTRAR:

- 5 CIV-2017-485-270 and 272 – Ngāi Tai and Ririwhenua Hapū.

EVE RONGO:

Tēnā koe Sir, Ms Rongo for Ngāi Tai and Ririwhenua Hapū.

JUSTICE CHURCHMAN:

Tēnā koe Ms Rongo.

10 **REGISTRAR:**

CIV-2017-485-299 – Ngāti Ira o Waioweka Rohe.

ANNETTE SYKES:

- 15 Kia ora e te Kaiwhakawā, koutou mā o Te Whakatōhea, Whānau a Apanui, Te Waka o Mātaatua i tae mai kei waenganui i a Te Arawa ki te whakanui, ki te whaka – whai whakaaro mō tēnei tū āhuatanga e pā ana ki te Papa Moana me te Takutai Moana.

- 20 Kia ora anō koutou ngā kaiāwhina o ngā kaikerēme, kātahi anō i tae mai koe Ms Feint QC, ana i runga i taua tū āhuatanga kai te mihi atu au mai i tēnei hapū ki a koe, ki a koutou o Ngāti Rua i runga i taua tū āhuatanga.

- 25 May it please the Court. It's my pleasure today to appear for Ngāti Ira. I'm accompanied by my learned junior, Mrs Chaney. Sir, I have a parole matter which is significant, and I have an AVL organised at 11.45 which would take me possibly 20 minutes to complete. It has been adjourned for some further investigations. I would be excused for that duration and my learned junior will be here if there are any matters.

I would like to address the Court at an appropriate time, but I do have this added difficulty because it has been coordinated from Wellington, for my appearance.

JUSTICE CHURCHMAN:

Tēnā kōrua Ms Sykes and Mrs Chaney. We should be able to accommodate
5 your arrangements. You'll certainly get an opportunity to address the Court.

REGISTRAR:

CIV-2017-485-253 – Ngāti Patumoana.

THOMAS BENNION (VIA AVL):

Tēnā koe Sir, Mr Bennion appearing on that matter.

10 **JUSTICE CHURCHMAN:**

Tēnā koe Mr Bennion.

REGISTRAR:

CIV-2017-485-355 – Te Uri o Whakatōhea Rangatira Mokomoko.

RENIKA SICILIANO:

15 Tēnā koe te Kaiwhakawa, Ms Siciliano appearing for the Whānau Mokomoko
and I note that one of the applicants is here today as well.

JUSTICE CHURCHMAN:

Tēnā koe Ms Siciliano.

REGISTRAR:

20 CIV-2017-485-377 and 262 – Te Hapū o Titoko Ngāi Tama; and Ngāi
Tamahaua.

CORAL LINSTEAD-PANOHO:

Tēnā koe e te Kaiwhakawā, huri noa ki tō tātou nei whare, ki a mātou katoa kua
tae mai ki roto i te Kōti nei, tēnā koutou nei rā te mihi ki a koutou katoa.

Ms Linstead-Panoho appearing Sir with my learned friend Mr Williams for Ngāi Tamahaua hapū and Te Hapū Tītoko o Ngāi Tama. I know my friend Mr Sinclair mentioned the reference 262, our application for Ngāi Tamahaua Hapū 262, but that may be just similar end numbers, but I just draw that to your
5 attention.

JUSTICE CHURCHMAN:

Tēnā kōrua Ms Linstead-Panoho, Mr Williams.

REGISTRAR:

10 CIV-2017-485-196 – Ngāti Awa.

HORIANA IRWIN-EASTHOPE:

Tēnā koe e te Kaiwhakawā otirā tātou katoa. Sir, Ms Irwin-Easthope for Te Rūnanga o Ngāti Awa mō Ngāti Awa.

JUSTICE CHURCHMAN:

15 Tēnā koe Ms Irwin-Easthope.

REGISTRAR:

CIV-2017-485-201 – Kahukore Baker (Te Ūpokorehe).

BRYCE LYALL:

May it please the Court, Lyall for the applicant.

20 **JUSTICE CHURCHMAN:**

Thank you Mr Lyall.

REGISTRAR:

CIV-2017-485-318 – Te Whānau-a-Apanui.

NATALIE COATES:

Tēnā koe e te Kaiwhakawā. Ki a koutou katoa e huihui nei i raro i tēnei kaupapa. Ko Ms Coates ahau. Kei konei mō Te Rūnanga o Te Whānau.

- 5 If it pleases Your Honour my name is Ms Coates and I appear for Te Rūnanga o Te Whānau on behalf of Te Whānau-a-Apanui and with me today is one of the hapū chairs from Te Whānau a Tūtawake, Mr Delamere, kia ora.

JUSTICE CHURCHMAN:

- 10 Tēnā koe Ms Coates.

REGISTRAR:

For Ngāti Ruatakenga and an appearance for CIV-2017-485-292 – Whakatōhea Māori Trust Board.

KAREN FEINT QC:

- 15 Tēnā koe e te Kaiwhakawā, tēnei te mihi hoki ki a koutou e huihui mai nei i runga i tēnei kaupapa, tēnā koutou katoa.

- Sir, my name is Feint and I'm appearing on behalf of Ngāti Ruatakenga who are an interested party in this matter and I've also been asked by Mr Pou to
20 record an appearance for the Whakatōhea Māori Trust Board.

JUSTICE CHURCHMAN:

Tēnā koe Ms Feint.

REGISTRAR:

- I believe that's all of the applications represented today unless I've missed
25 anybody?

CATHERINE LEAUGA (VIA AVL):

Tēnā koutou katoa. Counsel is Ms Leauga appearing by AVL on behalf of 238, Bella Savage and Waipae Perese on behalf of Te Whānau o Harawaka.

JUSTICE CHURCHMAN:

5 Tēnā koe Ms Leauga.

MOANA SINCLAIR (VIA AVL):

Kia ora, I don't know if you can hear me. Can you hear me? Okay.

JUSTICE CHURCHMAN:

10 If you could just come forward to a microphone because everything is being transcribed. Just make sure the microphone is pointing towards you and then we will have no difficulty picking you up.

MOANA SINCLAIR:

Is that working?

JUSTICE CHURCHMAN:

15 Yes, it's working.

MOANA SINCLAIR:

My name is Moana Sinclair and I appear for Ngāti Muriwai, CIV-2017-485-269.

JUSTICE CHURCHMAN:

Tēnā koe, Ms Sinclair. No interested parties?

20 **REGISTRAR:**

For the Opotiki District Council and the Bay of Plenty Regional Council.

TANIA REWETI:

Tēnā koe e te Kaiwhakawā, otirā ki a koe e te rēhita, otirā ki a koutou katoa, ngā mihi nui ki a koutou.

May it please the Court, counsel's name is Ms Reweti appearing for the Opotiki District Council and the Bay of Plenty Regional Council. Thank you Sir.

JUSTICE CHURCHMAN:

5 Tēnā koe, Ms Reweti.

REGISTRAR:

And for the Attorney-General.

RACHEL ROFF (VIA AVL):

Tēnā koe Sir, counsel's name is Ms Roff, I appear with Mr Melvin, Ms Budd and
10 Ms Gwynn for the Attorney-General.

JUSTICE CHURCHMAN:

Tēnā koutou counsel. Thank you.

Now before we move through to the substantive order today, there are a
15 number of issues which I have identified that we need to address today and in
no particular order these are matters that I would like counsel who are
particularly appearing in the Whakatōhea hearing to consider and address me
on. The first one is pūkenga. You will be aware of the Court's minutes in
respect of that. The issues are as to the identity of the pūkenga and also what
20 specific or questions counsel suggest that the pūkenga should be asked.

There is the question of mapping and I draw to all counsel's attention the minute
that the Court has issued which is on the website that appends to it the draft
practice note that has been developed. It has been developed with the
25 assistance of counsel including Ms Sykes who is here, Mr Melvin who is
attending by AVL link and other counsel, and for those of you who are not
familiar with it, I would encourage you to look at it and if you have any
submissions on it to file those promptly with the Court. The question of funding
and the representatives of the Attorney-General will no doubt have seen some

of the submissions, particularly those of Mr Sinclair and they are matters of concern to the Court which the Court would wish to have some submissions from counsel on.

- 5 The possibility of a judicial settlement conference has been raised. I think we have missed that opportunity, but given that it has been raised, I would invite again I think it is Mr Sinclair to address the Court on that to see whether or not it is in fact a realistic possibility. The issue of the timetabling of the hearing for the Whakatōhea matter and in relation to that it seems from some of the
- 10 submissions recently filed there is a suggestion that COVID issues may put that hearing in jeopardy. There is no application before the Court for an adjournment and I would take some persuading that the matter at this late stage should be adjourned given the inconvenience that will occasion to all of those here and their clients, but given that it has been raised albeit obliquely, I do
- 15 want to hear from counsel about it.

In some of the submissions that have been filed, there seems to be a question raised or the implication that the Court has in the past suggested that customary marine titles cannot co-exist with protected customary rights. I will certainly be

20 speaking to that, but those applicants who have raised that as an issue or concern need to outline why they think that is the case.

A subsidiary issue would be in relation to the conduct in the timetabling of the Whakatōhea hearing. The issue of the evidence of kaumātua and kuia and

25 particularly the question of what in the type of cross-examination that might be appropriate because it does seem to me some counsel have an unrealistic view as to what might be appropriate in that regard.

So, having flagged those as the issues that I need some help with from counsel,

30 there may well be other issues that the parties see as important, but I would hope that those of you who are going to participate in the hearing would let me have your submissions on each of those matters.

In terms of how we proceed, I think it is appropriate to invite Mr Sinclair first Mr Registrar, then we will proceed through that, and I note there has been late filing of memoranda, and while I acknowledge that there will be times when that is inevitable, it does make it very difficult for the Court, and also for the other parties, trying to come to terms with matters where some memoranda I have only just seen within the last hour. So without criticising anybody, it is really important that you try and keep to the timetables that are set for the filing of memoranda, so everybody knows exactly what the issues are going to be.

10 **KAREN FEINT QC:**

Sir, can I just add to the list of issues to address the application that has been made by Ngāti Rua?

JUSTICE CHURCHMAN:

Yes.

15 **KAREN FEINT QC:**

– to file evidence late? I hope that that would be addressed today Sir.

JUSTICE CHURCHMAN:

Well, it will be in that is what I see in terms of the timetabling issues for the hearing itself, it is a matter which you can remind if I do not specifically advert to it at that stage. There is also, I might add Ms Feint, the issue of the status of Ngāti Rua and I want to specifically talk through that with you as to whether it is an interested party or not, and exactly what the relationship with the Whakatōhea Māori Trust Board might be.

25 I also want to hear what, if any, comments the other parties have on that application because if it is opposed, I would need to know the grounds. No-one has filed anything, and it may be simply that is because of the late filing of the application itself. Well at least it came to me relatively late, I assume was

served on the other parties in a similar timeframe. But it is not straightforward, and I will need clarification from you on some of the aspects of it.

KAREN FEINT QC:

I'm happy to address those matters Sir. Obligated.

5 **JUSTICE CHURCHMAN:**

Thank you.

REGISTRAR:

CIV-2011-485-817, Edwards on behalf of Te Whakatōhea and CIV ending 264, Whakatōhea Pākowhai, 365, Hiwarau, Turangapikitoi and Ōhiwa of
10 Whakatōhea, and 278 Whānau a Apanui Hapū.

TONY SINCLAIR:

Tēnā koe Sir, would it be preferable that I stand Sir or that I sit?

JUSTICE CHURCHMAN:

It is appropriate for counsel to stand.

15 **TONY SINCLAIR:**

Thank you.

JUSTICE CHURCHMAN:

You may take your coat off if you wish.

TONY SINCLAIR:

20 Thank you, Sir.

JUSTICE CHURCHMAN:

It is likely to get quite warm in here I expect.

TONY SINCLAIR:

Which matter would you like to start with Sir, first?

Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

JUSTICE CHURCHMAN:

Well, up to you. The order I have set out, again there is no magic in it, is pūkenga so...

TONY SINCLAIR:

- 5 Sir, I am happy to go with your order. Sir, on the matter of pūkenga, we've filed submissions on this matter previously. One of the most important qualities we felt that a pūkenga should have, and the board should take mind of, is one who has experience and a lived experience with the Takutai Moana, and a lived experience regarding Takutai Moana and that tikanga that goes with people
10 who have lived in the Takutai Moana, in particular tribes and hapū, in my opinion Sir, is quite distinct to tikanga and hapū of an inland people.

- One of the distinctions Sir is that – and in particular with the Whakatōhea historical account regards Raupatu 1865 and I've raised this earlier Sir about
15 two years ago about the effect of Raupatu. We're talking displace, dislocation, relocation of peoples. So, in terms of Takutai Moana and the tikanga that goes with that, we look for the qualities of a pūkenga who would be aware of that environment on a coastal people, and the relationships that flow from that type of dislocation and the relationships and the managing of how various groups
20 who were once – had reasonably identifiable boundaries, no longer have them. And we think Sir that the area of Tauranga Moana, whilst not undergoing a similar situation, is in our view the closest analogy to Whakatōhea in our view.

- So the tikanga that operates within the new environment, the new environment
25 is hapūs being moved and dislocated and replaced. It's quite distinct in our view and in the applicant's view Sir, simply conveying their submissions to me. It is quite distinct as opposed to a Ngāti Porou coast where that displacement hasn't taken place, and the tikanga is unchanged for generations and is very much the same as it was then as it is now. That is one of the key points that
30 our people selected, our people, my clients, selected the skills of Kihī Ngatai. Not to set aside the tikanga qualities and abilities of the other names who have

been submitted Sir, but in terms of relative to a coastal people, it is a wide knowledge base that is required for this particular area. I do not mean to start giving evidence from the bar Sir, but within evidence that we have taken, within particular Takutai Moana areas, there are very distinct hapū and very distinct families within those hapū who carry out certain activities within those Takutai Moana rohe. Some will do certain activities that others won't.

So rather than a generic broad-brush approach which a pūkenga who is unaware of these types of relationships, we've felt that a person who has that specific skill of how coastal peoples work among themselves is far preferable to a knowledge of tikanga per say from an acknowledged expert from, for example, Tūhoe.

Sir, one more – and my last point on the tikanga expert, I note there is submissions filed by the counsel suggesting more than one tikanga and suggesting that the person nominated by Whakatōhea Edwards, Mr Kihi Ngatai be part of the panel. Sir, we oppose that submission. We do not accept that a leading tohunga in the area of a, Takutai Moana area, should be placed as a panel member.

Sir, the Whakatōhea Edwards applicants are happy with the submission that Mr Kihi Ngatai go forward as the pūkenga.

JUSTICE CHURCHMAN:

Can you just clarify for me the fundamental nature of your objection to a panel as opposed to a single pūkenga?

TONY SINCLAIR:

Sir, no fundamental objection to a panel. What the objection is to Sir, is that the panel issue the report. But if I look at the submissions of counsel Sir, two pūkenga that are submitted do not include Mr Kihi Ngatai. Mr Kihi Ngatai is included in the panel. No fundamental issue with a panel, Sir.

JUSTICE CHURCHMAN:

So, just to make sure I understand what you are saying, if Mr Ngatai was to be included as a panel member with one or more other pūkenga, you would not be opposed to that?

5 **TONY SINCLAIR:**

I would not be opposed Sir, I would be opposed to three Sir. There is no need for three pūkenga, Sir. Two would be more than sufficient, Sir.

JUSTICE CHURCHMAN:

Yes, thank you.

10 **TONY SINCLAIR:**

And Sir, I want to touch something that seems to be arising out of almost every issue that we are dealing with and that this is somehow – some sort of adversarial process in terms of putting arguments forward for a particular pūkenga or not a particular pūkenga. Sir, the applicants simply want a
15 collaborative approach and an agreement on the expertise and the qualities that a particular person brings to the hearing and is able to assist the Court.

One would have thought Sir that a pūkenga who has the minimum requirement, a familiarity and a lived experience with the Takutai Moana would be the first
20 quality that would be required. That's all I have to say on the matter Sir.

JUSTICE CHURCHMAN:

Yes, it is not an adversarial process.

TONY SINCLAIR:

Yes.

25 **JUSTICE CHURCHMAN:**

But in the minute that I issued on 8 July, I set out the parameters. One of the things that I'm constrained by is that the appointment of a pūkenga must be

done in accordance with the High Court Rules and rule 9.36 does have some provisions that are binding on me, and also some instructions as to how I go about identifying them. The rules refer to them as an expert. For the purposes of these hearings they are pūkenga. But I cannot ignore those rules otherwise
5 someone will challenge that and will be over to the Court of Appeal.

TONY SINCLAIR:

Sir I've read those and we are familiar with those.

JUSTICE CHURCHMAN:

Thank you.

10 **TONY SINCLAIR:**

Thank you. Sir, would you like to move on to the next issue?

JUSTICE CHURCHMAN:

Yes.

TONY SINCLAIR:

15 Is that the mapping and timetabling?

JUSTICE CHURCHMAN:

If you have anything specific about the mapping other than reference to the draft practise notes, yes, now would be the time to mention that.

TONY SINCLAIR:

20 Sir, my colleague Mr Cunningham is going to address matters on mapping and the timetabling.

JUSTICE CHURCHMAN:

Thank you.

TONY SINCLAIR:

Thank you.

BRETT CUNNINGHAM:

Sir, Whakatōhea lodged their map before the draft guidelines were issued. The
5 applicants are more than satisfied with the quality of that map, but I'm just
worried about the technical requirements of the draft guidelines, so I don't think
any submissions were made on the draft guidelines. There seems to be a
dearth of other maps available, and on the timetabling, there has been some
discussion on it, but not anywhere near the detail that has been supplied as late
10 as yesterday, so that Whakatōhea have no input into this particular timetable
here, so they probably can spend more discussion on that.

JUSTICE CHURCHMAN:

That is what I am looking for from counsel with help today.

BRETT CUNNINGHAM:

15 There was a suggestion, nine days set aside for a tikanga process that might
be through other suggestions that should be without counsel, the parties
themselves might be **(inaudible 10:43:19)** –

TONY SINCLAIR:

Sir my apologies to my friend, but the timetable he is discussing was circulated
20 on a without prejudice basis. I wonder about the propriety of putting it before
the Court in this manner without having talked to co-counsel about it Sir.

JUSTICE CHURCHMAN:

Right, thank you. Now, just take a seat. Mr Cunningham, the document you
are referring to is not one I have seen. It is now clear why I have not seen it
25 because it was circulated on a without prejudice basis.

Now, I am surprised that the matter, a procedural matter such as how are we
going to address the substance of the hearing is being circulated between

counsel on a without prejudice basis. I do not know why that should be. However, until the without prejudice nature of the document has been changed, it is best you address me in terms of what you would like to see the Court arrange as far as process is concerned and then if other counsel have a
5 different view, they can tell me that and we are not then in breach of any without prejudice communication as between the two of you. So, probably best if you set out to me what your client envisages as being the most sufficient and effective process.

BRETT CUNNINGHAM:

10 Yes, Sir. I take my learned friend's point that there is, I think I can mention, provision for a facilitated tikanga process which would be useful, but discussions with the applicants felt that if counsel would not be useful in a tikanga process and that the applicants themselves might come to an agreement on that. As for the day-to-day order, probably Whakatōhea should
15 go first, they're the priority applicant, and that the other applicants could follow on from that and that the Attorney-General should have some base at various points and interested parties would follow up the rear. So that the two days I would think there'd be submission for a facilitated tikanga process, nine days seems sensible.

20 **JUSTICE CHURCHMAN:**

So one of the difficulties with hearings of this nature is one never knows, until one embarks on it, exactly what the points of agreement are and more importantly what the points of disagreement are. I do not think I am going to be in a position at the end of today's hearing to say that there will be a tikanga
25 process of a particular duration or not. Beyond the fact, we can certainly build in to the hearing the opportunity for a tikanga process. It seems to me that the commencement of the hearing is probably the best place to have that, subject to such submissions as I might receive from other counsel.

BRETT CUNNINGHAM:

Yes, Sir, the priority applicants would envisage that the openings by all the parties would be the first timetabling matter, followed by perhaps the facilitated tikanga process, and then the witnesses for the priority applicant in cross-examination followed by the other parties in order, and the interested parties coming last with the Attorney-General having an opportunity to make submissions or comment in which we, those various applicants' submissions.

JUSTICE CHURCHMAN:

Yes. That is a good basis to start from and we will hear the submissions of other counsel.

BRETT CUNNINGHAM:

Thank you, Sir.

JUSTICE CHURCHMAN:

Thank you Mr Sinclair.

15 TONY SINCLAIR:

Sir, I would like to address now the funding matter.

JUSTICE CHURCHMAN:

Yes, and perhaps if I can help you on that. I read with concern the submissions in your most recent memorandum, I think of last Friday, and really these are matters that are directed to counsel for the Attorney-General. The Court cannot read submissions of that nature and not be concerned. For the moment I am accepting them at face value. You may wish to submit to me that aspects of them might not be the whole picture, but we are about to embark on the first really lengthy and substantive hearing and I acknowledge the *Tipene* case, but that was of a much smaller scope with only, I think, a total of three parties represented. It is absolutely critical that there is appropriate funding in place for this case to proceed. If it is not, it risks becoming a fiasco and a gross waste of funds not simply for the applicant but for all parties who have invested a

considerable amount of time and resources into getting as far as we have got now.

5 Now, Mr Melvin has heard me make similar comments previously, you may also have Ms Roff, and I appreciate it is not anything that you personally can control, but the Court's concern is that we are so close to being able to have these proceedings which deal with the rights of a large group of people, to have them heard. It would be disappointing if critical funding issues meant that the matter somehow miscarried or is not able to be concluded in one hearing.

10

Now, I will give you the opportunity to respond in due course on those issues, but I raise the Court's concerns that the issues that Mr Sinclair has highlighted in his memorandum, to give you a fair warning of the sorts of things that are troubling them.

15

In respect of that topic Mr Sinclair, other than the points that you have set out in your memorandum, are there further issues you want to draw to the Court's attention?

TONY SINCLAIR:

20 Sir, only to re-emphasise again the preparation for the hearing has been absolutely uncertain and in counsel's view has certainly not been up to the standard that one would have required Sir. The level of funding has recently been increased, but payments are highly uncertain, and I am sure other counsel would make submissions on the same matter.

25

Sir, we have a project manager who project manages five applications, and it would be more appropriate if that manager were to give evidence on this matter through affidavit if required.

JUSTICE CHURCHMAN:

Subject to what I might hear from the Crown, at face value I accept the points you raise and it does seem to me that this application, and I suspect a number of other applications that are at a similar stage, are only able to be progressed
5 as a result of the good will that has been extended by counsel and a number of others who have been involved in these proceedings. As a matter of principle, that is not how matters should proceed in the High Court. There should be equality of arms to the extent that there is funding available. It is my view that counsel for the Attorney-General, and I am sure they do make urgent
10 representations to Te Arawhiti, to ensure that, to the extent they are able to, there is appropriate funding. It is simply unacceptable from my perspective to have counsel ultimately have to run these proceedings with no certainty as to when, or indeed if they are going to get paid for them at all.

TONY SINCLAIR:

15 Sir, the other point I would like to make in regard to that is that the clients and in particular negotiations with engaging further legal counsel, have been asked to indemnify the particular firms should there be cost and budget overruns. That's another added prejudice that many of the applicants won't go there Sir. So, that is another point.

20 **JUSTICE CHURCHMAN:**

Yes. It is important that all counsel and parties understand the limits of the Court. The Court cannot direct Te Arawhiti or the Crown or anyone else as to who or what it funds and how it funds it. The limit, unless some counsel wishes to persuade me otherwise, that I see my function is to, as I have done, draw to
25 the attention of counsel for the Attorney-General the concerns that I have as to the apparent lack of or difficulties which funding are having on these cases being able to run and justice dispensed in the manner with which all of us involved in that judicial process would like to see.

I cannot tell the Crown what to do, but I can express my concern as I have, and you have very clearly set out your concerns. I understand them, again, subject to what the counsel might tell me for the Crown. You do not need to file affidavit evidence or go into further detail than you have already set out.

5 **TONY SINCLAIR:**

Thank you Sir. The matters raised in my memorandum was simply to bring to the Court's attention and we sought no orders on most of the matters that we have raised, simply wish to bring to the Court's attention.

10 Sir, on the COVID issue, once again we simply raise the issue. Sought no orders on that. The matter was canvassed with other counsel. At some time, we were suggesting an adjournment to the proceedings. However, the applicants instructed counsel that if there was some sort of health authority that would clear the particular areas being used and guarantee a COVID-free space
15 then it would be a decision for either the health authorities to make and the applicants at the time, and what I mean by the applicants at the time is that we have got a lot of elderly witnesses coming here and, if the COVID issue escalates, cannot guarantee their appearance. But it's simply a matter being raised here for discussion.

20 **JUSTICE CHURCHMAN:**

Well the Court is very alive to that. In terms of venue there has been a development. It appears likely that the Energy Events Centre will be the hearing space. That is a discrete building, it is not attached to anything else. We were going to have it at the Rydges Hotel which at the last moment, despite the fact
25 the Court had had the booking arrangements for over a year, is no longer available to us.

So, the Registrar from the High Court in Wellington is in Rotorua today to inspect the new venue and one of the matters that she will want to be satisfied
30 is it is appropriate for the number and the nature of the people attending. All I

can say is we are doing our best. I do not have a crystal ball, if matters as far as COVID is concerned, in Rotorua in particular, change radically, I would expect counsel to make formal application. But, at the moment on the information available to me, I would need to be persuaded that it was appropriate that we abandon any proceedings because of any risk to do with COVID.

TONY SINCLAIR:

Thank you, Sir. Would there be an update on the facilities at some time that would be available from the Event Centre such as AVL?

10 JUSTICE CHURCHMAN:

At the moment we do not know precisely what facilities there are. If anyone wishes to have witness give evidence by AVL that should be formally notified to the Registrar and the Registrar will do his best. In these conferences around the country, we have managed to have an AVL link, I think in all but Whangarei. So, it is the sort of thing that has been able to be accommodated but you do need to communicate with the Registrar.

TONY SINCLAIR:

Thank you, Sir. The CMT matter and the PCR matter, the co-existing of those two articles. That is a matter that Whakatōhea applicants have discussed for the last two years, they started seminars two years ago. And, some of the Whakatōhea applicants through these proceedings attended those seminars, Sir, and I ran them.

So, there is quite a substantial awareness and knowledge about the issues within the Customary Marine Title present with the Protected Customary Right co-existing in the same marine space and hence is why the Whakatōhea applicants proceed on the basis of a kotahitanga waka position simply because of the issues presented in the Act which in their view are an impediment to the collective nature, collective rights of their hapū in particular areas.

30

So, for some counsel to ask at this late stage that we engage in those discussions and put that sort of pressure on the applicants. I think discussion time is far too late and that period has gone. There's been an extension of invitation month after month to other applicants and to counsel to discuss these matters and indeed Sir, we filed submissions to the Court on the matter and the response was 'leave it to the evidence'. So, the difficulty with that position, the difficulty with leaving it to the evidence is that, in our view, many of the applicants are unaware of the result of leaving it to the evidence.

And as Whakatōhea do not see themselves as litigants against each other, they see themselves as whanaunga and relatives. The division, divisiveness of this particular Act and not understanding its ramifications is what is concerning the applicants to work closely together.

Unfortunately, Sir, if we are going to go into tikanga hui to discuss these matters during hearing, whilst our applicants are not opposed to tikanga hui, what they are opposed to is the lack of engagement over the last two years and now at the last hour seeking some engagement over a serious substantive issue such as CMT and PCRs.

JUSTICE CHURCHMAN:

Well, the Court cannot change the structure of the Act. Just like the parties, the Court has to try and work within it and make sense of it and understand what the meaning of the provisions are. My specific concern was that there seemed to be a suggestion that the Court had said that CMT and PCR were mutually exclusive. That is not Court's view, it is not something that I have said, and my researches have not been able to find either Justice Collins or Justice Mallon, who earlier dealt with this list, have ever said it either. So, I want that to be clear, they are quite different concepts. There may be a situation where CMT is vested in an entity, but PCR or some elements of PCR are vested in another entity. Again, that is a matter we will just have to address when it arises.

TONY SINCLAIR:

That is the sort of uncertainty, Sir with due respect, that's disturbing. When applicants over a territory which has 15 to 20 applicants over the same area concerns them, Sir.

5 JUSTICE CHURCHMAN:

And I cannot, unfortunately, solve that problem at this stage, it is a creature of the wording in the Act and I must simply interpret it as best I am able to.

TONY SINCLAIR:

10 Thank you, Sir. The last matter to address is the late filing. Substantial amount of evidence filed by Ngāti Awa. Sir, that's a concern. The applicant does not wish to deny any party to these proceedings and is not seeking to exclude any party. No orders are sought. Simply bring it to the Court's attention, the added extra burden that is caused to all parties.

15 The application of Ngāti Rua, Sir, you have received our submissions on that point. In the applicant's view and in counsel's view most of these matters are inter-tribal matters that should be dealt with in a tikanga manner and as my learned colleague Mr Cunningham mentioned earlier, our clients are not adverse to tikanga hui. They just don't see the worth of having counsel in those
20 hui as for the last two or so years. There has been very little engagement and they feel that these are tribal matters and should be dealt with tribally by appropriately appointed tikanga facilitators Sir.

JUSTICE CHURCHMAN:

25 Well look, you have heard me previously encourage all parties to address what are essentially tikanga matters and again just as I have explained, I cannot direct the Crown to do what I would like them to do and or, and neither can I, address the parties beyond encouraging them to meet. I know the logistical and financial and all the other difficulties and that is being compounded by COVID issues but ultimately if the parties cannot agree on tikanga issues as
30 between themselves, we are into the litigation process where I will get some

assistance from a pūkenga or a panel of pūkenga and beyond that, the Court is not in a situation where it can make coercive orders directing any party to sit down and talk to, hui with one another, other parties.

- 5 So, I do not have the solution to that problem. You have heard me encourage collaboration, communication and I am grateful that you seem to have taken the initiative to do that. It is a little bit like a judicial settlement conference. It is something that the Court is happy in the appropriate case to facilitate to the extent that it is able to, but the Court is only going to allocate the resources to
- 10 do that if they are justified in the sense it appears that there is likely to be some progress which will either resolve issues or narrow them down. So, you would have the Court's encouragement to engage in a tikanga process with the applicants, but I cannot force that.

TONY SINCLAIR:

- 15 Thank you Sir. You've answered my last issue on a judicial settlement conference. I've got it detailed there at [36]. Sir, as you are well aware, the Edwards application have always raised matters for an agenda and raised matters for judicial conferences, raised matters for all and sundry to discuss. They have been initiated. Unfortunately, got very little in return, and on that
- 20 point, that is the end of my submissions Sir.

JUSTICE CHURCHMAN:

All right. Thank you Mr Sinclair.

REGISTRAR:

CIV-2017-485-270 and 272, Ngāi Tai and Ririwhenua Hapū.

- 25 **EVE RONGO:**

Tēnā koe Sir. By way of update, you all would have read in our memorandum of counsel that evidence was filed for Ririwhenua and Ngāi Tai. COVID-19 threw a bit of a spanner in the mix when we were trying to get our evidence

together, but that was done, and signed affidavits are coming. We hope that provided you have got enough to look through that evidence.

JUSTICE CHURCHMAN:

Just hold that point Ms Rongo, but it seems that some time has passed since
5 the unsigned versions of the affidavits were filed. Is there a particular problem?

EVE RONGO:

Well, all of our witnesses are elderly and they are vulnerable, they live in vulnerable communities. So they haven't had any opportunity to get their affidavits signed. But they are working on it Sir.

10

In terms of the pūkenga, I have received instructions from the applicants that they support Kihī Ngatai in this position. They do acknowledge that the Court may need assistance in this regard to encourage **(inaudible 11:07:11-11:07:16)**.

15

JUSTICE CHURCHMAN:

Could I get you Ms Rongo just to turn the microphone to you, the reason being this is to be transcribed and I get a very unhappy Associate if she cannot hear what is being said.

EVE RONGO:

20

I will speak up as well Sir. In terms of the timetabling for the hearings, we are definitely open to having those discussions with you or the other counsel to get that sorted out and in front of the Court. We're happy with the 17 August date for the hearings to start and wouldn't support any delay in that. The applicants are keen to get started in this. There have been, they put their evidence
25 together quickly, but they are keen to get it heard.

I won't make any submissions on funding, I think that's been covered already.

I did receive instructions from the applicants to request a change in venue from the Rydges given that the health issues surrounding that venue, so we appreciate there has been a change. I am not personally familiar with the new venue, so I will need to get instructions from the clients on that, if there are any.

5 **JUSTICE CHURCHMAN:**

Well it is a large stand-alone building down towards the edge of the lake.

EVE RONGO:

I guess my only concern would be starting in August that it would be warm enough for the witnesses and their support people that come and just those
10 logistics Sir.

JUSTICE CHURCHMAN:

All right. Well I saw the Registrar of the High Court out in the foyer there a moment ago, so maybe in the morning adjournment I will convey to her the need for appropriate heating at the venue.

15 **EVE RONGO:**

Those are all the matters that I have instructions for Sir. So unless you have any questions?

JUSTICE CHURCHMAN:

No, thank you Ms Rongo.

20 **REGISTRAR:**

CIV-2017-485-299, Ngāti Ira o Waioweka Rohe.

ANNETTE SYKES:

Kia ora Sir. We filed a joint memorandum for the Kāhui, which is the five hapū. A supplementary memorandum which I apologise came late to Your Honour
25 yesterday. I might leave my friend to speak to that who filed that from McCaw Lewis if that could be, but can I go back to the principal application we made.

In terms of rule 9.6.3, we are seeking a panel and we are basing that on our experience in other mediated or arbitrated processes like the CNI Forestry issues. In that case, three pūkenga were appointed to assist a facilitated agreement process between the same kind of multiplicity of hapū groups here.

5 They were Dr Moana Jackson, the late Tahu Pōtiki and Dr Wayne Ngata, so I just give that as a precedent of why we're going with a panel approach.

We also want to have gender balance. It's important, we think, that because we're talking about Papatūānuku, with Papa Moana that there be a feminine
10 view that is able to be elicited from the particular evidence, and so we have been trying to find suitable authorities and knowledge keepers and we believe that Dr Hiria Hape who is presently the head or was the Department of Māori Studies Head at Te Whare Wānanga o Awanuiārangī would be a helpful addition to the body of knowledge that I think will be considered in the evidence.

15

It's very clear from the evidence that that feminine perspective, the deity of Papatūānuku and those others that have influence on setting the parameters of tikanga Māori and the lens through which the relationship to the Takutai Moana would be benefitted from.

20

Can I say, we have the greatest respect for Mr – well, he's a supreme kaumātua, Mr Ngatai.

JUSTICE CHURCHMAN:

Mr Kihī Ngatai.

25 **ANNETTE SYKES:**

So, we have no problems with his appointment, but we are seeking a panel and we are really mainly, given the nature of the issues, the age of the pūkenga themselves, the collaborative approach we believe may be helpful. I understand my friend Ms Coates did a similar process but in a different way in
30 the recent case in the Supreme Court, so she may be able to give you another

idea how they utilise a forum of hui for significant knowledge keepers to find an approach, but we have kind of tried to adapt that rule, formalise the application, the discretion of course is to what appointment is made in terms of subsection (2) of that rule.

5 **JUSTICE CHURCHMAN:**

Yes, the discretion is also there as to the precise question or questions that are referred to the pūkenga, and that is something as I indicated in a minute, that I am very keen to get counsel's assistance on because you can make it as narrow or as broad as you like. It may be that ultimately, the specific questions
10 that the pūkenga are asked to comment on, cannot really be finalised until we have had the hearing and identify what specific differences the submissions relate. But, I have set out my view, those questions are broad. It is likely they will be supplemented by more specific questions, but, and I know in your memorandum on behalf of the Kāhui, you set out some additional or different
15 questions, but that is something I also have to grapple with.

ANNETTE SYKES:

Could I ask my learned junior and Mr Bennion, they had a lot to do with the crafting of those issues, because they have analysed the evidence Sir, but we are not unhappy with the approach can I say at this stage, but we would ask
20 further consideration for a panel because we believe the experience of the CNI process is a beneficial model of the kind of approach that would assist.

As Your Honour has already indicated *Tipene* involved three applicants. Here, it's not just cross-hapū applicants, it's cross-iwi applicants and there's the
25 multitude of whānau nuance, hapū nuance and trust board nuance to be guiding any outcome, and I think they would benefit from that collective decision-making process. All of them are very good writers as well, Sir, that is the other matter that we thought about, people that can actually articulate the matters in tikanga terms but can also record that in a simple way and all three are published

authors, so on those perspectives, we commend that approach further, we understand at your discretion.

5 Can I go to the Crown's memorandum about the timetable and then I will move to the maps? We support the Crown's approach.

JUSTICE CHURCHMAN:

Can I just interrupt you there? This is not part of a without prejudice exchange or correspondence?

ANNETTE SYKES:

10 No, no, it is a date Sir. We would like the 28th of July to finalise our distributed draft, can we say that, which is going around at the moment, and to enable engagement with others.

15 The Crown in their memoranda asked for directions, their memoranda of 1st of July I think, that they, and I don't want to be taking my friend's wind out of her sails, but she sought a direction that a draft timetable be filed by the 28th of July. Te Kāhui is simply trying to facilitate that kind of outcome and we have distributed after our Zoom call with the principal applicant. He didn't appear, Mr Sinclair, but his learned junior did, and we discussed there the kind of
20 approach. So, could I move to the novel part of our approach which is the tikanga-focussed two-week engagement?

25 So, we are looking at an eight-week process. We are looking at reply evidence coming in around the 10th to the 14th of August which is very little time to engage Sir with some of the extra evidence that may be able to show where we converge rather than where there's differences. And it was that reason that we suggested that there may be force in less of a formal hearing but a facilitated process between the witnesses to see if we can focus certain approaches as to what kind of issues might be isolated, what agreements were in place at that
30 point Sir.

We have made an informal approach to Te Arawhiti for funding of that. That part we do not see, we have been asking for a judicial settlement conference Sir to do this, but we've now tried to be a bit more flexible, and can I say in this
5 regard we are guided by the recent decision of the Waitangi Tribunal. Their presiding officer made some very, I think, helpful suggestions, and so while my friend may see that this is a new thing that's been hoisted on him, we actually considered the decision which was released last week and we think there is force in his view that there should be facilitated tikanga discussions and ideally,
10 prior to a judicial process of the kind the eight weeks would normally involve. And so we thought if we could do that in the two weeks, we would be looking for independent facilitators, independent to the pūkenga, and we would be trying to isolate from there if there could be agreements. I will give you one example Sir if I could. For example, we might all agree with the applicant that
15 the CMT that we're seeking for the Ōpōtiki Harbour is something we could all work with within the current Act. Not the Ōhiwa Harbour, the Ōpōtiki Harbour, and if that is the case then that of course would save significant evidence. And if my friend from Whānau-a-Apanui agreed with this, then we could all be happy Sir.

20 So, that would be the two principal issues that we would see some value in that facilitated discussion. That's why, can I say at this point, we are absolutely in support of Ngāti Ruatakenga coming in. They are the border tribe, they sit between Whānau-aaApanui and Te Whakatōhea. They are the largest hapū.
25 It's absolutely vital for us. If they're not in the Court, they're in the facilitated Court process. I will just say that at this stage.

JUSTICE CHURCHMAN:

Well if I could just comment on that. They are interested parties and as such they are entitled to be heard. So when you say coming in, they do not need
30 leave, they have applied to be interested parties. The time limits strictly apply to applicants rather than interested parties. So there is no question that, as

interested parties, they can be there. The issue that I want to explore with Ms Feint is the manner in which they advance their claim as claimants. That is a different issue. There are, I think, ways that that might be arranged without infringing the provisions of the Act, but I would want to hear from the Attorney-
5 General. As you will be aware, we have next week in Auckland some strike-out proceedings in respect of other matters where it is being alleged that the Act does not permit the sort of route that has been followed in that case, so it is very much a live issue. I think there are potentially solutions, but you should not be concerned that Ngāti Rua won't be able to have their voices heard, as it
10 were, at least as an interested party.

ANNETTE SYKES:

And so when we get back to the timetable Sir, I'll just use that as an exemplar, then I believe two weeks would enable us to get those issues. There are more vexatious issues, for example, in the Ōhiwa Harbour, and one of those issues I
15 have been instructed is that Tūhoe is absent from the Court proceedings and is absent from the engagement proceedings.

Now we do not want to end up saying that we have satisfied the tikanga Māori test, but we have actually excluded a significant group that we know co-exist in
20 that area with those other groups. We will be breaching the Treaty of Waitangi in the same way that the Native Land Court did not permit applicants who weren't present during Native Land Court hearing processes, and so we are very conscious of trying to facilitate an outcome that is Treaty compliant, that is tikanga compliant that accords with the Act Sir. So, that's why we suggested
25 that process.

JUSTICE CHURCHMAN:

Just remind me, Tūhoe as far as I am aware, have not filed an application under the Act, neither have they sought direct engagement?

ANNETTE SYKES:

No, and there would be an argument that Turangapikitoi is a Tūhoe hapū. If you read the *Te Urewera Inquiry Report*, they certainly claimed there and there is an ongoing dispute around Te Ūpokorehe and I am not going to get involved in that with my friend Mr Lyall, about shared ancestry and shared whakapapa, but then the subsummation of Ngāi Te Ūpokorehe under a Tūhoe identity, which is a live issue and challenged.

JUSTICE CHURCHMAN:

Yes, but all of that potentially raises some issue for the Court. If you are saying to me the Court cannot properly hear this case in accordance with tikanga without a Tūhoe voice, when there are others who whakapapa to or have whakapapa connections with Tūhoe who are the vehicle by which that voice is to be heard.

ANNETTE SYKES:

I am very conscious of that Sir. I also think I have some corroborative support for my position. If you look at the kinds of orders that were made for mandated iwi authorities and organisation in the Fisheries settlement, Tūhoe is located as one of those mandated groups in the Ōhiwa area.

There is also you know, and I just use that to say that I cannot, and nor has my client, to be fair to my hapū applicant, they are very clear in my instructions that we cannot ignore the fact of their presence there in any ultimate outcome.

JUSTICE CHURCHMAN:

All right, well I am not sure what you are inviting me to do, but if it is something significant you may wish to file a memorandum and serve it on other parties and suggest your client's preferred solution to addressing that issue.

ANNETTE SYKES:

Yes, and Sir if we can do that as part of our timetable approach for that two weeks, and my solution would be incorporated into that facilitated approach.

JUSTICE CHURCHMAN:

Yes, just bear in mind, we have been allocated eight weeks, it was not me that came to that. In terms of my own personal sitting commitments. I am booked up solidly through until about the middle of next year.

5 **ANNETTE SYKES:**

I am very conscious of that Sir, but if we could avoid a hearing. Can I say I am that confident, after the CNI's experience, even though there was still some outside issues that still beats the Court, there was certainly an agreement that was by the substantial majority held. So, I just use that as an exemplar.

10 **JUSTICE CHURCHMAN:**

I understand, and the proposal has merit. You have the advantage of being engaged in the correspondence between counsel. I have not seen any of that and I do not want to if it is on a without prejudice basis, but ultimately it is my call, with the assistance of counsel, as to exactly how we do run on a practical basis from here.

ANNETTE SYKES:

So, the short point is, we support the Crown's suggestion of the 28th of July with that memorandum, and can we also say for maps, I've been part of that group. Can I say, Mr Melvin may wish to discuss this. We prepared that approach expecting not to have that mapping approach apply to this particular application. It had gone too far by the time we had come to our conclusions Sir. So, my friend Mr Cunningham has raised concerns where I accept that, but can I say there is force to using the material that Te Arawhiti has helped compile because if they're drawn to scale in the overlapping matters, and I can't thank the Crown enough for that resource.

JUSTICE CHURCHMAN:

There is no question of it having retrospective effect and it is understood that this case can proceed on the basis of the maps already filed, but we can improve clarity for everybody if the principles set out in the draft practice note

are had regard to. I am not wanting to encourage the filing of amended maps, but if applicants think they can clarify and improve their map particularly in relation to overlapping boundaries, I cannot see any reason why such a clarified map should not be filed.

5 **ANNETTE SYKES:**

Sir, I don't wish to make applications for funding. I share my concerns with Mr Sinclair. I am in correspondence as I am sure all counsel are, I will deal with those matters directly with the Minister and Te Arawhiti, but I'd like to talk about motifs and witnesses and the taking of evidence of elderly which are kaumātua
10 that you've suggested. I think you are directing in your very astute way my ability perhaps to cross boundaries of cross-examination which I hope I don't offend. But I do think there is importance in putting different whakapapa to different expert witnesses.

15 If we have this facilitated tikanga approach, that may be the form for that Sir, but there is already some clear differences that I believe have to be reconciled if we're going to have orders that are consistent with tikanga, and how we do that may be by questions in writing. I've been giving it some thought with written responses once we receive the reply evidence from every of those that may
20 seek to make the difference, and also if there is any contentious issues then we may appoint lead counsel to do the cross-examination rather than everybody. That's just a flexible approach that I'm thinking out loud. I'm glad to see we now have a Queen's counsel amongst us, she may be appointed to do that for us Sir, so I'm just suggesting it.

25 **JUSTICE CHURCHMAN:**

Yes. I was not picking on you or any other counsel Ms Sykes, but I tend to follow the approach that was outlined by Justice McGechan in the 2001 Ngāi Tahu case which you are probably familiar with and he made the point that generally, with the sorts of evidence that kaumātua and kuia give, it is not
30 appropriate, as a blanket approach, to expect that they will be subject to

vigorous cross-examination that could affect their mana in front of their iwi, their hapū. It is generally not appropriate. There may be certain parts of their evidence in respect of which it is entirely appropriate, but if they are giving the oral history of their iwi, their hapū, their whānau, one would struggle to see what value there is in the sorts of cross-examination that we commonly see in standard Civil High Court proceedings. It is just so that counsel are aware of that sensitivity and, if a kaumātua or kuia is to be cross-examined, then having one person do it rather than five line up, I would also think is probably more in accordance with tikanga and the status of those witnesses.

10 **ANNETTE SYKES:**

Thank you Sir. Another part about motifs my friend has raised about AVL, I'm a criminal practitioner Sir and AVL in Rotorua is terrible because of the ... so, I just raise that. If we're going to use it then we need to get proper facilities. Even now it's one of the complaints of many of the criminal offenders, they can't be heard or they can't hear the Court proceeding and that's with the limits of AVL. So I just raise that, and I think it's really respectful to the witness that we're able to hear them and they also hear the proceedings. In that respect, we will be making an application though for live streaming of the hearing, I'm just putting that forward so that saving everybody coming to COVID city Rotorua is what I think my friend called us, that we can watch COVID city through the internet. So I'm just raising that as a proposition Sir. It would be no extra cost if we had AVL, and so we use it in the Waitangi Tribunal quite regularly, but I just raise that as a proposition. Can I say the venue –

JUSTICE CHURCHMAN:

25 Well just before you move off that, do not leave that application too late because in terms of my availability, I am completely committed to other things until about a week before we start this case on the 17th of August.

ANNETTE SYKES:

30 Could we have seven days for these extra applications to be made then Sir? Is that going to be helpful?

JUSTICE CHURCHMAN:

You can. I cannot magic time out of the air when I am committed to sitting in other cases – I just raise that for you, if you're going to file an application, file it as quickly as you possibly can.

5 **ANNETTE SYKES:**

Thank you Sir, and the last matter is the venue itself is cold and I will just say that. We've used it regularly for kapa haka performances and it's all right when you've got 4000 people in there, but if there's only going to be 100 or 200, I do think we need to make some appropriate steps for warmth, and that's even
10 using the small room where the kaumātua sit.

JUSTICE CHURCHMAN:

Yes. We are looking at that. There is a smaller conference room there rather than the main room.

ANNETTE SYKES:

15 That's right.

JUSTICE CHURCHMAN:

And one would have thought if we tell them they must have heaters, they will get heaters.

ANNETTE SYKES:

20 Can I say the smaller one may be too small? That's all I'll just say at this stage.

JUSTICE CHURCHMAN:

Well we are lucky they have got a bigger one if that is the case.

ANNETTE SYKES:

That's right, that's right, but those are my – I don't know why Rydges is a
25 problem because Rydges isn't COVID city, so –

JUSTICE CHURCHMAN:

No, it is now.

ANNETTE SYKES:

It is now? Okay.

5 **JUSTICE CHURCHMAN:**

As of last Friday.

ANNETTE SYKES:

Okay. Well I think my friend has got the numbers wrong. There is now 600 people – returnees living different hotels in Rotorua since the filing of his memorandum. And on that point Sir, if I could be excused, Mrs Chaney will follow up with any other issues and I will be back as soon as that other matter is concluded Sir.

JUSTICE CHURCHMAN:

All right, thank you Ms Sykes. Yes, you may be excused for the moment. Now I see we are getting by my watch closer to the time we normally take the morning adjournment. Unless counsel wish to persuade me otherwise, I will take a brief adjournment at least for comfort stops purposes. Is anyone opposed to that? Does anyone have time commitments which mean they cannot come back later in the morning? (no response) Well look, on that basis, we will take 15 minutes adjournment.

MORNING ADJOURNMENT: 11:31 AM

HEARING RESUMES: 11.50 AM

REGISTRAR:

CIV-2017-485-253 Ngāti Patumoana.

THOMAS BENNION (VIA AVL):

Thank you, Sir, Mr Bennion here by AVL.

5 **JUSTICE CHURCHMAN:**

Tēnā koe Mr Bennion.

THOMAS BENNION (VIA AVL):

Thank you, Sir. So, just running through the matters before you, on the issue of the pūkenga appointments, various signatories to the memorandum from
10 Mr Ketu and others. So, we support a panel if possible because of the complexities.

Coming to the issue of the timetable, there is a timetable circulating just in the last couple of days that's under discussion and we're generally supportive of an
15 idea which I think is going to get to you of opening submissions probably from all applicants happening and there may be an adjournment for some expert or some kaumātua witness process and in that regard, and this is just my thinking Sir, that the Environment Court, which I'm familiar with and the High Court to an extent too, there is a possibility of some sort of expert witness conference or
20 caucusing and I'd imagine with pūkenga present, they could potentially also be involved. I do not think that would be a problem because they going to produce their own report. But there are certainly possibilities there that I'm sure we will come back to you with some more thoughts in that direction. And of course, those witnesses are –

25 **JUSTICE CHURCHMAN:**

Yes, that is commonly called "hot tubbing" Mr Bennion and it is done most frequently with cases under the Commerce Act, so Rotorua might be an entirely appropriate case to do some hot tubbing.

THOMAS BENNION (VIA AVL):

Thank you, Sir, so I think that's a real, maybe a real possibility here and of some importance if we want to avoid the concern about cross-examination of kaumātua, in fact simply, if there was an agreed statement, a comment that
5 they agree to, they've signed that statement and they support it and then that could deal with a lot of issues. It's a real potential here.

Sir, on the maps, I was part of the group that was involved in putting up the guide, so I think the guides are a wonderful piece of work but certainly we are
10 being – trying to meet it with maps that are produced.

In terms of delay, I think we are in the Court's hands on that, but we've noted the comments already this morning. I think there is a possibility of a pūkenga or a kaumātua conference or conferencing during the hearing might be the best
15 possible path now, given the time that we have.

Sir, on the CMT and PCR issue, something that you noted at the outset, and I did want to make a brief comment on that, I did note in a memorandum to you that there had been some thought that the Court might have said that CMT and
20 PCR could not exist in the same space, and I just for a reference that I should have given in that memorandum, I am not sure if we did give the reference, but it is your minute number 7 of the 27th of November 2019, and [25], and it relate to the Tauranga hearings and the idea for Ngā Pōtiki's claims and the claims of others in the Rangataua Bay area to be given a first step hearing for the
25 Tauranga hearings, and it was just the comment at [25] that the hearing will be confined to the parties' claims for marine title.

Now, I might have read too much into that comment Sir, and if I have, I apologise, but separately, when we have discussed with other groups more
30 extensively than I think Mr Sinclair is saying, and when we've discussed with other counsel how we might go forward on a combined basis, an issue that has come up is as between hapū of the same iwi, and between iwi, whether or not

groups might have said – a group might say, “I only seek a PCR right in this area, because I wish to do that as a way of showing my deference to another group that has, is CMT in that same area.

- 5 And the question that came up for the lawyers was, well what if a PCR and CMT cannot live in the same geographical space, and if that was the case, the effort to recognise the authority of another group by saying, “I only seek a PCR right,” when in fact we are doing the opposite, it would be preventing that group from seeking or obtaining CMT in that place. So, that is how the question arose and
- 10 so long as it remains an uncertainty, which in my submission I think it still remains uncertain legally on the face of the legislation, it creates difficulties for groups trying to navigate from tikanga to the nature of the orders that might be given by the Court, but that’s just to explain that issue Sir.

JUSTICE CHURCHMAN:

- 15 Just on that Mr Bennion, the background to that, the Ngā Pōtiki minute that you referred was, it was the parties themselves who wished to confine the hearing of the application to CMT, and all the Court was doing was reflecting back, as that is what they had asked the hearing be confined to and the Court was happy to do that.

20

The issue is unresolved by the Act and it may well be that this case is the one where that question is squarely put before the Court and has to be resolved. At the moment, I certainly have no view one way or the other and would not want to be taken to having expressed a view that the two are mutually exclusive. It

25 is still a live issue.

THOMAS BENNION (VIA AVL):

- Yes, thank you for that clarification Sir. I guess the point remains that as long as it is uncertain, groups may have to come up with alternative ways of, if they want to co-operate with alternative versions of how they would co-operate,
- 30 depending on what the answer is to that question between CMT and PCR?

JUSTICE CHURCHMAN:

Yes.

THOMAS BENNION (VIA AVL):

It is a complicated factor that I think that we had. So, other than that Sir, I didn't
5 have anything further that runs through I think, or apart from the questions that
you asked in your memorandum that the pūkenga might answer and I just –
well, I might get, my thoughts Sir is just the difficulty of the word “held” in those
questions and the word “hold”. And [21] of your memorandum no. 18, the
10 second question asks, “Which aspects of tikanga should influence the
assessment of whether or not the area in question is held in accordance with
tikanga?” just as long as – I think that’s a general word and that may be
appropriate. I think the answers are possibly going to come back in the nature
of group holding different measures of authority which is possibly the answers
that, or the way from the evidence, it seems that groups would answer a
15 question of that nature.

Perhaps the word “held” is broad enough. And I just have a question about
question D which was “Who in fact are the iwi, hapū or whānau groups that
comprise the applicant group?”, and I assume that that question was directed
20 at the – I put it this way, the mandate, or who on the ground today holds
authority. Do I understand that question correctly, 21(d)?

JUSTICE CHURCHMAN:

Yes, and part of that was also directed towards the issue with Ngāti Rua.
Ultimately the Court is going to have to make some findings as to actually who
25 is being represented and mandate is an issue that can be challenged, and I
suspect may well be challenged. In this case, the Court in *Tipene* dealt with
that very issue, it was the Attorney-General in that case that challenged the
mandate and Ngāi Tahu also initially had, although as the hearing progressed
they seemed to leave that up to the Court. So where it is challenged, authority
30 to represent is a matter that this Court has jurisdiction to consider and indeed

may be compelled to consider where there are competing claims both saying that the different applicants represent the same claimant group or part of the same claimant group.

THOMAS BENNION (VIA AVL):

- 5 Yes, thank you Sir. Those are all the further submissions I have to make.

JUSTICE CHURCHMAN:

All right. Thank you Mr Bennion and I do acknowledge your assistance with the mapping working group, thank you for that.

REGISTRAR:

- 10 CIV-2017-485-355, Te Uri o Whakatōhea Rangatira Mekomoko.

RENIKA SICILIANO:

- 15 Tēnā koe Sir. Firstly, to speak to the matters that are listed, and I appreciate that Ms Sykes earlier mentioned the memorandum filed jointly yesterday and again apologies for the lateness of filing that further memoranda Sir. Ms Sykes did say that she would leave it to me to speak to that memorandum, but I think we've largely covered what is addressed in that memorandum which is essentially that the Te Kāhui parties seek a panel of pūkenga and we have named Dr Pou Temara and Dr Hiria Hape. I'm aware that other counsel may, including Mr Lyall, have filed recent memoranda noting others, so essentially we're in the Court's hands on that matter, but again do consider that a panel is most appropriate.
- 20

- Also mindful Sir that we're five weeks out from an eight-week hearing. I know in *Tipene* where as we've discussed there were only three applicants and a much shorter hearing. I think the *Pūkenga Report* was delivered approximately two weeks prior to the hearing. I'm not sure that's going to be achievable in this circumstance but perhaps a panel may assist in getting through what is quite a volume of evidence.
- 25

JUSTICE CHURCHMAN:

Well that also raised the question of the limits of the role on the pūkenga and it seems to me this case is one where issues of tikanga are likely not to be preliminary issues but to be matters actually raised during the course of the hearing. So my preliminary view is that the pūkenga may or may not file a comprehensive pre-hearing report, but even if they do, they're going to have to consider the issues of tikanga that arise during the hearing itself. So there will be either one comprehensive report at the end on which a counsel will be given the opportunity to comment, or perhaps two, if we have got the time and if we can agree, two reports, one prior to the hearing and one commenting on the, I suspect, contradictory or conflicting evidence that I am likely to hear during the hearing.

RENIKA SICILIANO:

Thank you Sir, that clarity is appreciated. I was also reflecting on what exact role the pūkenga might play here and how that might manifest, so that is helpful and on that basis the issues outlined in your recent minute are supported as well. In particular you will note that those might be refined as needed during the hearing.

JUSTICE CHURCHMAN:

Yes.

RENIKA SICILIANO:

Nothing from me Sir on mapping or funding. In regards to the timetable issue you have heard, there are discussions underway and I think what I would say is I think we are still awaiting any direction regarding the proposed amendments to the timetable from the 8 June memorandum from Te Kāhui. I have a copy here Sir if you need.

JUSTICE CHURCHMAN:

Well look, I have read it. I do not have a copy with me. Didn't they want an official date for the filing? Well in fact let's not speculate, you can tell me what exactly they are after.

5 RENIKA SICILIANO:

Yes Sir. So it was essentially pushing out dates as a result of some of the additional evidence. So it was reply evidence to be filed and served by 31 July, close of pleadings filed and served by 4 August. The parties to file and index of documents to be relied on by 6 August. Chronology of facts for the priority
10 applicant by 7 August with notices of the applications to cross-examine by the same date. Common bundle by the 10th of August. Any other notices of response to the chronology by 12 August together with opening submissions by all applicants by the 12th of August.

JUSTICE CHURCHMAN:

15 Yes. Well, all of those suggestions seem sensible. I have not heard anybody so far take issue with them and if by the end of this CMC no-one has suggested other, they will be the draft directions.

RENIKA SICILIANO:

Thank you Sir, and just on that, also support having a timetable circulated by
20 28 July and we will continue to work with other counsel to work through something that suits, also factoring in the tikanga process which Ms Sykes suggested and also reflecting on your comments regarding cross-examination of kaumātua which we support as well, Sir.

JUSTICE CHURCHMAN:

25 Yes, that might seem a small point but to me I think it is important because for the parties these hearings must proceed in accordance with tikanga and acknowledge the mana of the kaumātua and kuia who are giving evidence.

RENIKA SICILIANO:

Thank you Sir, that's appreciated. Also appreciated your comments regarding a CMT and PCR to have clarity that there is no current view from the Court on that position and appreciate that no doubt that will be the subject of submissions
5 and significant work from counsel at the hearing. And for me, just two other probably logistical comments.

The first with regard to potentially livestream, so support Ms Syke's comments there and acknowledge that the Court need the application filed very swiftly if
10 that is to be made?

JUSTICE CHURCHMAN:

Yes. I can indicate that over the morning adjournment I spoke with the Wellington High Court Registrar who, as I have said, is in Rotorua today
15 about livestreaming and other issues and she is committed to see if it can be achieved and if it can be it will be put in place, obviously subject to an application being received if someone wants it.

RENIKA SICILIANO:

Thank you Sir, and the only other comment from me I think at some stage
20 counsel for the Attorney-General sought an indication as to common bundles and whether those would be electronic or hard copy and just to assist my learned friends with that, just indicating that an electronic bundle would be preferred given the significant volume of evidence and having something that could be readily searchable would be appreciated and have already had some
25 initial discussions with other counsel on that. Happy to continue those Sir.

JUSTICE CHURCHMAN:

Yes, well I would hope that there would be an electronic bundle if at all possible. Just going back to the livestreaming, a lot depends on the availability of technology and during the COVID lockdown periods the Court 'experimented';
30 is probably the right word, with VMR and at the moment the equipment that the
Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

Court has got can have up to 400 participants and it's their other demands on that equipment and some other equipment the Court has can have up to 100 participants. Do you anticipate in terms of a livestreaming requirement that there would be more than 400 people want to take advantage of that?

5 **RENIKA SICILIANO:**

Sir, it is hard to say in these things given the number of people that are represented here, and I am not sure whether any of my learned friends might be able to speak for the numbers experienced on what similar Waitangi Tribunal matters. Sir, I think it is possible that would be the case, but I can't say with
10 any certainty.

JUSTICE CHURCHMAN:

Well at the moment it is early days, but that is one option because we know that it works in terms of having public access to High Court hearings.

RENIKA SICILIANO:

15 Thank you Sir.

JUSTICE CHURCHMAN:

Thank you Ms Siciliano.

REGISTRAR:

CIV-2017-485-377 and 262, Te Hapū o Tītoko Ngāi Tama and Ngāi Tamahaua.

20

CORAL LINSTEAD-PANOHO:

Tēnā koe Sir.

JUSTICE CHURCHMAN:

Tēnā koe Ms Linstead-Panoho.

25 **CORAL LINSTEAD-PANOHO:**

Sir, firstly if I could just address one minor updating matter with regard to our memorandum filed on the 8th of June. We are grateful to the Court for leave to file the sworn affidavit of Mrs Kaa Williams late. We note that was merely a translation of the te reo transcripts already filed, but just to note that that matter
5 has now been attended to on the 26th of June. The other matter in our memorandum was an application with regard to speaking te reo Māori in Court. So I just note that that's also in our memorandum and would be grateful for directions in that regard.

JUSTICE CHURCHMAN:

10 Well you can take it that any such application will be granted. The challenge for the Court is to work out when the te reo speaker will be giving their evidence and that's why I would prefer if counsel after this CMC are able to continue what's obviously been an ongoing process of discussion and set what we could call a batting order and that way the Court, instead of simply having a translator
15 here on the off chance that they might be required can say, "Well you are going to be there in the second week or the third week or whatever period of time." So if that process could be continued by counsel and ultimately a memorandum, hopefully a joint memorandum, but if not, an individual memorandum, be filed indicating where counsel think the te reo speakers are going to give their
20 evidence we can accommodate that, but we cannot easily accommodate it if somebody turns up one day and says, "I am going to speak te reo". That is more difficult.

CORAL LINSTEAD-PANOHO:

Yes certainly Sir, that's noted. With regard to the timetable, I just note there
25 that our applicants support the revised timetable proposed in the Kāhui memorandum and obviously we will continue to engage with the other applicants to coordinate a timetable for the hearing, incorporating those matters that Your Honour has just mentioned as well.

With regard to the pūkenga issue, again our applicants support the panel approach, two pūkenga and in particular the appointment of Professor Temara and/or Dr Hape. In addition to the overlapping interest issues and the complexities involved with giving a tikanga opinion I suppose on those issues
5 in this context. The other important aspect is having the relevant knowledge which you have outlined in your minute as well and I stand to be corrected but I believe both Professor Temara and Dr Hape are affiliated to Tūhoe and as such there is a historical relationship there between, well, our applicants in Whakatōhea and Tūhoe and therefore they would be able to contribute that
10 element of having relevant knowledge in terms of those historical associations.

JUSTICE CHURCHMAN:

Yes, although that is something of a two-edged sword. On the one hand it does provide a benefit, but on the other hand there may be seen to lead to compromised independence. That is why I made the comments in the minute
15 explaining the approach the Court had taken in *Tipene* when Justice Mallon articulated why, unusually for High Court experts, the sorts of strict independence normally required is not essential.

CORAL LINSTEAD-PANOHO:

Yes and the only response to that Your Honour would be that a panel would
20 help to facilitate that issue in my submission.

The only other matter with regard to the pūkenga is in respect of your list of proposed questions and I note there are changes that you have had already with my friend Mr Bennion in particular, but I did – actually, in your indication
25 that they are of a preliminary nature and would likely be supplemented or refined as we progress towards the hearing. But the comment with regard to your question 21(c) in particular, of that list, in my submission that really has, well, that question is addressed by your question (b) there in terms of which aspects of tikanga should influence the assessment of whether or not a group
30 in areas held in accordance with tikanga, and I think with the question (c), that

may be a step too far in terms of it would appear to be the pūkenga answering the legal test which this Court is to answer.

JUSTICE CHURCHMAN:

I am acutely aware of the role of the pūkenga and the role of the Court. They
5 are there to advise me.

CORAL LINSTEAD-PANOHO:

Yes. So I simply raise that for your consideration and also with regard to question (d) there, wondered similarly whether or not that might be reframed in terms of which aspects of tikanga should influence an assessment of who are
10 the groups that hold a specific area in accordance with tikanga. So – because that question is asking the pūkenga to identify who are the groups in this area and maybe taking a step back from that, it's asking the pūkenga to identify what aspects of tikanga would help with assessing who those groups are.

JUSTICE CHURCHMAN:

15 The pūkenga themselves would be addressing that issue and making a recommendation to me. Could I ask that you file a brief memorandum just encapsulating setting out exactly what your comments are? That way there is a greater prospect I will hit the nail on the head when I come to analyse.

CORAL LINSTEAD-PANOHO:

20 Yes absolutely Sir, we can do that.

The final matter I just want to address Your Honour on is the memorandum that was filed by Mr Sinclair, in particular referring to our clients and Ngāi Tamahaua not engaging or the inference can be drawn that our clients in particular are one
25 of the groups not engaging with the processes that have been outlined by my friend. I have clear instructions from my clients that one of the key issues has been a lack of understanding with who the Edwards applicant represents and in particular, our clients Ngāi Tamahaua assert that they are applicants in these proceedings and represent their own interests and therefore their hapū is

represented here, so any attempt or suggestion by others to represent their interest, they oppose.

JUSTICE CHURCHMAN:

5 It is a slightly different issue though Ms Linstead-Panoho, isn't it, and if I could start by saying it is not the Court's role or function to apportion blame one way or the other, the Court has no view on it other than there is real advantage to the parties to communicate, but I will not be pointing the finger at anybody.

CORAL LINSTEAD-PANOHO:

10 That is noted thank you Your Honour. The last point then is that our clients are willing and able to engage in any tikanga process to coordinate with the other applicants to see if that could be – that approach can be taken, although they are reluctant with it purely because of the time pressures that we're facing towards hearing and would hope that a clear plan and timeline could be put in place, but it'll be a matter that they'll work through with the other applicants.

15 **JUSTICE CHURCHMAN:**

Well I would encourage you to do that, that is something that the parties are much better placed to manage than the Court is and it is a pretty blunt instrument if I start directing, whereas if you can agree as between yourselves on that process and there is every likelihood that I will also say yes, it is an
20 appropriate way to start the hearing.

CORAL LINSTEAD-PANOHO:

Thank you Your Honour, those are my submissions.

JUSTICE CHURCHMAN:

Yes, thank you Ms Linstead-Panoho.

25 **REGISTRAR:**

CIV-2017-485-278, Whānau a Apanui Hapū.

NATALIE COATES:

Sorry, was that 318, Te Rūnanga o Te Whānau?

REGISTRAR:

No, that was 278 sorry, Ms Leauga, can you hear me?

5 **CATHERINE LEAUGA:**

Tēnā koe Sir, sorry, was that for 238?

REGISTRAR:

278 sorry.

CATHERINE LEAUGA:

10 Sorry Sir, I think we did have an error, our claim number is 238.

JUSTICE CHURCHMAN:

Whoever is acting for Whānau-a-Apanui?

TONY SINCLAIR:

278 is my client Sir.

15 **CATHERINE LEAUGA:**

I think Your Honour, if Ms Coates wants to go first because we were part of a joint memorandum which was filed by Ms Coates, we are happy to follow on after her if you like.

JUSTICE CHURCHMAN:

20 Thank you Ms Leauga. Ms Coates.

NATALIE COATES:

Just a couple of matters from me Your Honour. On the question of the pūkenga, I can confirm that our clients support the appointment of Kihi Ngatai. We have also, in previous memorandums, supported the appointment of Doug Hauraki

as well as Professor Pou Temara and we do not oppose the appointment of Hiria Hape, so we are open to all of those people.

JUSTICE CHURCHMAN:

Yes, that does not greatly assist me.

5 NATALIE COATES:

In terms of the question of the panel, our clients are not opposed to necessarily having a panel. Ms Sykes referred to my engagement relatively recently in the *Ellis* case which was held in the Supreme Court, and just to speak really briefly around the process that we engaged in in that matter, there was a two-day
10 wānanga that was held prior to the proceedings where there were a number of tikanga experts that were gathered. That was of course an out of Court process and that was agreed to by all of the various parties including the Crown on the basis that we could go to the hearing with an agreed joint statement of tikanga. So I think that is slightly different to what is being proposed here, but it did work
15 really well in terms of having a number of different experts to help tease out the various issues. The Court of course wasn't involved in that process.

JUSTICE CHURCHMAN:

No, and can I indicate that from my perspective that would be a suitable process here if for no other reason is that it, if not, has not resolved, has at least clarified
20 the tikanga issues on which there is agreement before the hearing itself starts. Otherwise, the time that would be devoted by the Court to actually hearing the witnesses and lawyers is eaten into by a process that is capable of being resolved or clarified before the hearing starts. So from my perspective that sort of extra Court hearing issue is ideal.

25 NATALIE COATES:

Yes Sir, I just thought I'd clarify that that's what had occurred in that process. I think you have already spoke – I was going to talk to a little bit or seek clarity on the use and function and how the pūkenga might work in terms of having a

report before which would be useful but perhaps impossible now in the timeframes that we are working with.

JUSTICE CHURCHMAN:

Yes.

5 **NATALIE COATES:**

And of course just making the point that if they write a report after it would be useful to make submissions on that, but you have already indicated that.

10 I think the questions that you have addressed are sufficiently broad to cover all the issues that need to be addressed.

On the question of mapping, we will make written submissions on the mapping proposal. The one thing that I wanted to raise in terms of mapping just in general though was that the varied map that was filed by the priority applicant
15 on the 2nd of June of course vastly shrunk the overlap between Whakatōhea and our clients, and so I guess my point on that is that our participation now is more just limited to that area surrounding Whakaari and perhaps questioning a little bit the angle of the line that was drawn, but my point there really is that we're now proceeding on the basis of preparing for the hearing based on that
20 map and any change to that map or boundary would be a great inconvenience going forward.

JUSTICE CHURCHMAN:

Well unless it has completely reduced the overlap and left your client in the clear.

25 **NATALIE COATES:**

Yes of course, that would be helpful.

Just relating to funding, no specific submissions on that Sir apart from the funding question obviously being directly related to timetabling for our client,

given I think the role that the limited scope of the overlap that we now anticipate that we'll be addressing, we are hoping not to attend the full week hearing, the full eight weeks, and so it would of course be useful and I understand those discussions are already occurring amongst counsel to sort that timetable out. I
5 understand that the draft timetable is currently just being circulated internal to the Whakatōhea claimants, so we invite that discussion and also a deadline to be perhaps put on that, we're supportive of that.

JUSTICE CHURCHMAN:

Well again, the Court is reluctant to impose a deadline on a counsel initiative.
10 It seems to be without prejudice and has not involved the Court at all, but the draft timetable that Ms Siciliano read out to me, that seems to be eminently sensible.

NATALIE COATES:

Sorry Your Honour, we're supportive of that, the draft timetable we're just
15 referring to the order of appearance.

JUSTICE CHURCHMAN:

I did understand that, but ultimately if counsel are not agreed on that I will have to determine that and we will do that almost certainly in the week prior to the hearing because we cannot have parties such as yourself who sound like you
20 only want to turn up for a certain period, not knowing whether they should come in the first week or the fourth week or some other time.

NATALIE COATES:

Yes Sir, that would be extremely useful. The final two just minor matters Sir, we of course support a mana enhancing process for cross-examination. And
25 just a final matter just to confirm that Te Whānau-aaApanui are in direct negotiations with the Crown and so we'll be seeking an adjournment of 12 months with the Te Rūnanga o Te Whānau application.

JUSTICE CHURCHMAN:

Yes, thank you Ms Coates.

NATALIE COATES:

Tēnā koe.

REGISTRAR:

5 CIV-2017-485-238, Te Whānau a Te Harawaka.

CATHERINE LEAUGA:

Tēnā koutou katoa, thank you. Yes, so we filed a memorandum on the 8th of June and it was basically just seeking clarification around the extent of
10 our client's participation now given the amended map which, like Ms Coates' 318 clients has greatly reduced the area of overlap. So based on the discussion you just had with Ms Coates, it's our understanding that **(inaudible 12:26:26)** Whakaari Island is discussed. We haven't been part of the correspondence circulating around timetabling, that might be due to a change in counsel, so
15 we've missed, I think, some of the correspondence and also just some of the filing that's been taking place, we seem to be missed of some of the lists, so it would be great if we could be included moving forward. But otherwise, we don't have any further submissions on the matters raised today, we would support being able to appear via AVL if that is necessary.

20 **JUSTICE CHURCHMAN:**

When you say appear by AVL, do you mean at the substantive hearing itself?

CATHERINE LEAUGA:

At the substantive hearings where necessary sorry. Not for the full eight weeks because it doesn't sound like we need to be there, but if we need to be there
25 perhaps for one week where Whakaari Island is discussed, we would be happy to appear via AVL.

JUSTICE CHURCHMAN:

Yes, thank you, I will take that into account and it sounds like we may have to fix, unless counsel can agree, the specific weeks that evidence relating to Whakaari is heard. Can you hear me Ms Leauga?

CATHERINE LEAUGA:

- 5 Yes, thank you Your Honour. So yes, thank you Your Honour, so we are happy to be involved in ongoing discussions around that, but so far we haven't actually been involved in any discussions with other counsel around timetabling, so moving forward we're happy to do so but just need to ensure we are included.

JUSTICE CHURCHMAN:

- 10 Yes, thank you, well counsel have heard that and no doubt will take that on board. Thank you. Is that all?

CATHERINE LEAUGA:

Thank you Sir, I have no further submissions.

JUSTICE CHURCHMAN:

- 15 Thank you Ms Leauga.

REGISTRAR:

CIV-2017-485-196, Ngāti Awa.

HORIANA IRWIN-EASTHOPE:

- 20 Tēnā koe Sir. I just have a few matters to pick up on acknowledging that my client filed a memorandum on the 8th of June which is relatively straightforward, seeks directions, as my friend Ms Coates' clients does, to have the part of the application that overlaps with the priority application adjourned for 12 months.

- 25 However Sir, I would like to address some of the points that you've raised earlier and was prepared to do so, particularly in relation to the pūkenga and timetabling.

My clients Sir is supportive of the panel concept that has been discussed. I have not been intimately involved in those discussions but have sought instructions at the morning break and my client does not have an issue with a panel. My client has previously indicated that it is neutral to the suggestions of the four persons that I understand are being discussed are Professor Temara, Dr Hape, Mr Ngatai and Mr Hauraki, and so my client's confirmation Sir was on the 1st of May in relation to some of those and later in relation to Mr Ngatai.

So in that respect Sir, I only have one very brief comment in relation to the questions that you asked us to think about, is that where you have groups who are electing not to have their claims heard as a part of this process, and I understand there is at least two groups in that category of which my client is one –

JUSTICE CHURCHMAN:

Yes, there are some who are electing to have only the overlap part heard.

HORIANA IRWIN-EASTHOPE:

Yes Sir, and of course my client is electing to participate in this process, so the Court is aware of its interest particularly in relation to Ōhiwa Harbour and Whakaari, and so in that regard Sir, my only comment was to ensure that the pūkenga, and no doubt they will receive a full briefing, are aware of that distinction in this process, and it speaks to a lesser extent to the submissions of my friend Ms Sykes about a particular party Tūhoe not being involved in a particular way, with respect to Ōhiwa, and my client is certainly alive to that issue recognising the overlapping interests in that area in particular.

25

And so Sir, saying that out loud I don't think it's as helpful as I had intended, but it was just to flag to Your Honour that that might be something the pūkenga need to be alive to.

JUSTICE CHURCHMAN:

Yes, well if you can come up with a suggested question that relates to that issue that can be put to the pūkenga or at least can be considered by me as to whether it should be put, I would be grateful for that obviously to circulate all the other parties if you are proposing something of that nature.

5 **HORIANA IRWIN-EASTHOPE:**

Yes, Sir, I am happy to give that some thought and I am not, at this stage, I'm not sure whether it's a question, but more of a comment for them to consider. I do not –

JUSTICE CHURCHMAN:

10 A sensitivity.

HORIANA IRWIN-EASTHOPE:

Yes, I do not want to just sort of overstep in relation to those sensitivities, but it is something that is in the mix.

Moving Sir, and related to the panel or the support for a panel, again taking
15 instructions on the break, my client is supportive of a tikanga process that has been discussed this morning. I have not been again intimately involved in those discussions, but – in my brief discussions with Ms Sykes and others this morning, I am happy to be more involved in those. My client has a level of comfort but would like to be more involved in shaping what that might look like.

20

Sir, I think that that would be a process that could enable discussion to occur between kaumātua experts and guided by the pūkenga or facilitated by the pūkenga in a way that could narrow, as Ms Coates has indicated which is the case in the *Ellis Wānanga*, which would be beneficial to the Court and the
25 parties. So, my clients are supportive of that. When it occurs, I think needs some further thought, but if the suggestion is that opening submissions occur, and then there's an adjournment to allow that process to happen, then my client would be supportive of that approach.

JUSTICE CHURCHMAN:

Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

Yes, as I have attempted to indicate to Ms Coates that would not be my first preference. Ideally, the parties themselves would agree on tikanga issues prior to the hearing as it seems was done in the *Ellis* case, and that just means, I mean I do not know whether this case is going to take eight weeks or 10 weeks or 12 weeks. It will take as long as it takes, but I do not want anything to result in it being, anything avoidable, to result in it being part-heard and with my commitments such that I cannot give you another month or however long it needs until the second half of next year, and that just would not be fair.

HORIANA IRWIN-EASTHOPE:

10 Yes, Sir, and that point is certainly appreciated, and so, in that respect Sir, I think my submission is that my client is supportive of a tikanga process whatever shape that may take, and I will discuss that with counsel that seem to be leading those discussions after the CMC today.

15 My client is supportive of the timetable that Ms Siciliano outlined and that was included in the memorandum of 8 June. My client is also supportive of the Attorney-General suggestion that there be an electronic casebook. I think the Attorney in the memorandum dated 1 July asked for parties to confirm that, and similarly, although I'd just like to be clear on the Attorney's submission with
20 respect to maps and overlap in that memorandum of 1 July, sought the parties views on would it be useful to have the map that shows the overlaps that I understand is now annexed to a brief, and so my client has no issue with that subject to that being accurate of course. But no doubt the Attorney has the appropriate means to do that.

25

And the last point Sir, I'd like to raise on timetabling, distinct from timetable, what I'd say is the batting order is quite important for my client. There is two quite distinct overlaps at different ends of the border, so, my client overlaps with respect to Whakaari and also with respect to Maraetōtara, part of the
30 Ōhiwa Harbour.

Now, if there was a way to structure the evidence geographically from point to point, that would be helpful. I am not sure whether that is what's been discussed between counsel, but certainly, I will seek to have more involvement in the development of that, given my client's limited involvement in other matters.

JUSTICE CHURCHMAN:

Yes, well that seems a sensible suggestion and to a large extent, I am in counsel's hands. Obviously, if counsel agree on an order that focusses on geographic interests, there would need to be some good reason why I would not accept that, and timetable things accordingly.

HORIANA IRWIN-EASTHOPE:

Thank you, Sir. Sir, just moving very briefly to evidence and picking up on a comment my friend Mr Sinclair made although didn't seek any orders from Your Honour in relation to evidence that my clients filed. Just to be clear, my client has filed evidence in accordance with Your Honour's timetable. It was a very brief affidavit to correct an exhibit that was filed last week. Counsel did that out of the abundance of caution for the party's benefit and the Court's benefit rather than leaving the correction to a later stage, but other than that, the evidence has been filed in accordance with Your Honour's directions.

Sir, the last point I raise, I'm not going to speak to funding as I don't need to at this stage, is about livestreaming and so my client's supportive of a livestreaming option or perhaps a delayed streaming option, and if it's beneficial for Your Honour, I'll just note a discussion that I'm actually having with the Rotorua High Court at present in relation to an appeal from an Environment Court matter that is being heard in the last week of July. We are discussing a delayed streaming option that I understand was used in the *Dotcom* proceeding. That was delayed, I think, to ensure that the Court was comfortable that if anything came up they wanted to stop the livestream to address, they could. I mean I understand that was done. It's probably less significant for the

hearing at the end of July, but that is being discussed and I understand is available in Rotorua, but it just will take some organising and logistical support.

JUSTICE CHURCHMAN:

5 Apparently, it is also a question of having the machinery available. The Ministry of Justice does have the technology but is in use in various Courts at various times. And it may already be allocated to some other Court. It will have to be brought here and put into the room that the hearing is ultimately to be held in.

HORIANA IRWIN-EASTHOPE:

10 Yes, Sir. Just checking that I have covered everything that I need to Sir, and I think I have. Thank you Sir.

JUSTICE CHURCHMAN:

Thank you Ms Irwin-Easthope.

REGISTRAR:

15 CIV-2017-485-201, Te Ūpokorehe.

BRYCE LYALL:

Kia ora Sir.

JUSTICE CHURCHMAN:

Kia ora Mr Lyall.

20 **BRYCE LYALL:**

I think we were one of the parties that filed a very late memorandum yesterday and my apologies for that, but it was in reply to the memorandum filed late on Friday, so I will beg your indulgence there.

It sets out our position on the pūkenga as I understood it then. I hadn't received a copy of the Kāhui memorandum until today, so I have had limited time to seek instructions on the panel approach and the members of that panel set out there.

JUSTICE CHURCHMAN:

- 5 What are you asking for, if anything? Do you want to be able to file a memorandum next week on that?

BRYCE LYALL:

Yes, Sir, I think that would be the appropriate way forward.

JUSTICE CHURCHMAN:

- 10 This has grown in something of an organic nature, and again, I am not ascribing fault to people for filing late, but I do think there have been some issues in relation to that which arise, and in fairness to everybody, if people want to make some further submissions on that and focus in particular on pūkenga issues, if they could have that done let us say by noon next Tuesday. And obviously,
15 you serve all other counsel with whatever you have filed.

BRYCE LYALL:

Thank you, Sir, that will speed my submissions along quite nicely as I think I can cover off everything relating to the pūkenga there.

- 20 On mapping, I've discussed the protocol with my clients and they're comfortable with that approach, but obviously happy to hear that it doesn't apply retrospectively. Funding, we are dealing directly with Te Arawhiti, so I won't bring those issues before the Court, but there are some frustrations there. We'd agree on the issue of the judicial settlement conference that that ship appears
25 to have sailed.

JUSTICE CHURCHMAN:

I think realistically, it has. The Court was prepared to basically move heaven and earth to make it happen but is not going to do that if there is a significant group of applicants who say, "We're not interested in participating."

BRYCE LYALL:

- 5 Yes, I think for my clients, it was a matter of having a firm agenda articulated before they could agree to a judicial settlement conference and that just never eventuated.

JUSTICE CHURCHMAN:

- 10 The reasons do not matter. I see it as an opportunity lost, we will just have to move on.

BRYCE LYALL:

- On the issue of the timetable, in particular the Ngāti Rua participation, my clients are yet to form a solid view on that. They're awaiting the map and clarification of the area in which orders would be sought. So, I think we would need to
15 reserve our position on their participation until we've seen that.

JUSTICE CHURCHMAN:

- Well, just on that, as I indicated earlier I think to Ms Sykes, they have a right for which they do not need the leave of the Court to participate as an interested party. So, there is no doubt that they will be there. The more difficult issue,
20 which I am sure Ms Feint will address me on is the extent to which they can participate basically under the Whakatōhea Māori Trust Board. I understand the theory behind that, it is theoretically possible, but I am going to need a bit more help to have that clarified for me, but no-one should think they will not be there, they will be there. The question is, in which capacity?

- 25 **BRYCE LYALL:**

And I think my comments were directed at capacity. It is whether such a late filing of evidence that would prejudice are the parties and how we might mitigate that as between ourselves.

JUSTICE CHURCHMAN:

Yes, well a lot depends on what the evidence is. If it is simply kaumātua evidence giving the history of that particular part of Whakatōhea, I would need to be persuaded that it is adverse to anyone else's interests.

5 **BRYCE LYALL:**

Kia ora Sir, on that, I support your comments about overly aggressive cross-examination of kaumātua/kuia, and that is a practice that, yes, we certainly encourage, and I did want to ask as the evidence has been filed by affidavit, if there is no request for cross-examination, would the Court be
10 requiring those witnesses to attend, or would the evidence be able to be accepted into the Court?

JUSTICE CHURCHMAN:

What I suggest the course you follow there, if you have a particular witness who has given that sort of evidence, tikanga evidence, and they do not feel like they
15 want to attend, I do not want to exclude anybody, but I suggest you circulate their name to other counsel and if you can agree, I personally, while it is always very pleasant to listen, particularly if they are giving their evidence in te reo, I am certainly not going to understand a lot of it. So, I am happy to dispense with their appearance, but what I would not do is if someone has a genuine reason
20 for wanting to question such a witness, and to me it seems there will be occasions where it is appropriate, I am not going to exclude that and it may well be that the person has to turn up at an arranged time, knowing that they are going to be questioned about certain paragraphs or topics in their evidence.

25 So, again talk to your colleagues and as a matter of principle, if there is agreement, no difficulty in dispensing with their appearance.

BRYCE LYALL:

Certainly, so the Court would be assisted by a fairly thorough request for cross-examination and the subject matter and reasoning for that with
30 kaumātua/kuia witnesses?

JUSTICE CHURCHMAN:

But given the comments that I have made today, I would anticipate that where counsel do have a legitimate reason for wanting to question, and I cannot imagine anyone would want to cross-examination on every paragraph in
5 tikanga evidence, but there are topics where counsel say, “Look, this strays a little bit beyond the traditional sort of tikanga evidence,” which is tracing whakapapa down and then giving essentially historical perspective, I would expect to be notified of that in advance. It is not open season on kaumātua and kuia.

10 **BRYCE LYALL:**

Thank you, Sir. While I am addressing evidence, I think in the Crown memorandum, they have asked for confirmation of how the Court would like to manage the expert evidence, some of which is quite long, would the Court be assisted by a summary that that witness presents or how do you propose to
15 deal with that?

JUSTICE CHURCHMAN:

Well, a summary is always helpful. Ultimately, the Court has to read every paragraph of every brief and obviously I am not in the position to have done that in advance. I have read some of the evidence filed, but there is a limit to
20 the time that I can spend on this in addition to what is required at the hearing.

So, if you feel like a summary is helpful, yes, that would be useful for me. It is not necessary, and it will not mean that I will not read every paragraph of the evidence.

25 **BRYCE LYALL:**

And when it comes to presentation of the evidence, would the Court expect that would be presenting the witness and then having the larger evidence taken as read in terms of cross-examination or?

JUSTICE CHURCHMAN:

Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

I do not think in advance that you can say that, and it may be that there are categories of evidence. What my experience is, that generally it is the historian or professional witnesses that are subject to the most detailed or intense cross-examination, that is their job, but they must expect that. If they set out
5 an opinion, they must be able to justify that.

If counsel have no questions for a, particularly a kaumātua/kuia witness, they should advise the Registrar in advance and I will simply acknowledge their presence. It is unlikely I would have any direct questions for them. Maybe the
10 pūkenga will, I do not know. It depends to the extent to which we can resolve issues with the pūkenga beforehand. So I do not think I can give you one size fits all direction, but it is certainly possible that we may get to the stage where some witnesses are not required to go through and read all their evidence, should they not wish to do so. For other witnesses that is an important part of
15 their contribution to the hearing and they actually want to do that.

BRYCE LYALL:

Thank you, Sir, beyond supporting my friend's comments about support for availability of livestreaming facilities, and hopefully we'll get a request filed as soon as possible on that, and support for an e-casebook. I think I have covered
20 off all of the points I wish to raise, unless you have any questions, those are my submissions.

JUSTICE CHURCHMAN:

Thank you, Mr Lyall.

BRYCE LYALL:

25 Thank you Sir.

REGISTRAR:

For Ngāti Ruatakenga and for the Whakatōhea Māori Trust Board, CIV-2017-485-292.

KAREN FEINT QC:

May it please the Court, is it convenient Your Honour if we deal with the matter of Ngāti Rua's status first?

JUSTICE CHURCHMAN:

5 Yes, please.

KAREN FEINT QC:

So, I set out in my memorandum the process that has been filed thus far, and may I say it is a text book example of the complexity and confusion that has been created by the MACA Act which the Waitangi Tribunal was highly critical
10 of in its report which it released a fortnight ago.

JUSTICE CHURCHMAN:

Yes, I have read that.

KAREN FEINT QC:

Yes, and indeed the lack of coherence between the dual pathways is ultimately
15 what has unfooted Ngāti Rua. My client Mereaira Hata was mandated by the hapū at a hui at the hapū marae to file an application for customary marine title and PCR. She did so under the engagement pathway with the Crown without realising that that did not give her the right to appear before this Court.

JUSTICE CHURCHMAN:

20 Yes, I did discuss that with her last year at this CMC, which she appeared at in person.

KAREN FEINT QC:

Indeed, and prior to that conference, she filed a notice of appearance, so as Your Honour has already intimated, she does have status as an interested
25 party. What she did not understand then was that what Your Honour was suggesting was that she could make use of the Trust Board application.

JUSTICE CHURCHMAN:

Well, that was up to Mr Pou as well. He needed to consent to that.

KAREN FEINT QC:

5 Indeed, but that became complicated as a result of issues that have been dealt with by the Waitangi Tribunal in relation to the Treaty settlement processes and who's in whose camp, and it also became complicated by the fact that Te Arawhiti had written to Ms Hata to explain the pathway for funding that would be made available to her to appear as a party before this Court.

JUSTICE CHURCHMAN:

10 That is the email she did not get?

KAREN FEINT QC:

Yes, yes indeed because they spelt her name wrong. So as a result of all that it is slightly chaotic but at the last minute she has formed the view that the approach that the Edwards application has taken is prejudicial to Ngāti Rua's interest, in particular because of the map that was filed in June, I believe, by that application and which cuts across the Ngāti Rua rohe, and so what we have done is talk to the Trust Board about how we can couple her interest of party status for Ngāti Rua with the Trust Board application and I think that is available under the Act. So the only stipulation in the Act by which Your Honour is absolutely bound is the statutory deadline for filing the MACA applications under section 100 and the Trust Board did that and when it did that its application says it's on behalf of the whānau, hapū and iwi of Whakatōhea and Ngāti Rua is undoubtedly one of the recognised hapū of Whakatōhea so it is covered by the Trust Board application.

25

The Trust Board has had difficulty in getting instructions from its hapū as to who wanted to be represented by it, but now that it has received the formal request from Ngāti Rua to represent it with its application, it has passed a resolution at the end of June determining that it will advance its application on behalf of Ngāti Rua as well as the other hapū that it considers are not represented

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already before this Court by their own hapū applications, they mean Ngāti Ngahere and Ngāti Patumoana.

JUSTICE CHURCHMAN:

5 The key issue is that people who want the Trust Board to represent them must fall within the definition of the Trust Board's application because as you may or may not be aware, next week in Auckland we are having a hearing about the two so-called national applications and a strike-out application that has some parallels with this, albeit I think some potentially significant differences.

10 So what I have not heard is any opposition from anyone present in this room or by AVL to the interpretation that you have put forward and that is likely to influence me as to the conclusion that I come to, but the critical thing you said was that the only provision of the Act that was relevant was that I was bound by section 100. I am also bound by the provisions in the Act which stipulate
15 who an applicant can be and you have to read a number of them together to get that, but it seems to me that while any representative, and the representative can be a trust board, a post-settlement body or anything of that nature, it can only advance an application on behalf of an iwi, a hapū or a whānau, and if they are not doing that then they cannot expect the Court to give
20 them either customary marine title or protected customary rights. They can only be vested in a hapū, an iwi or whānau.

KAREN FEINT QC:

Absolutely Your Honour and that reflects the fact that it's only whānau, hapū and iwi that can have customary rights according to tikanga. But in my
25 submission, the Trust Board application is in quite a different position from that of the Māori Council because it is for – the Trust Board did not make its application on behalf of itself but explicitly on behalf of the whānau, hapū and iwi of Whakatōhea.

JUSTICE CHURCHMAN:

30 And I accept that.

Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

KAREN FEINT QC:

– and there is no doubt that Ngāti Rua fall within that description.

JUSTICE CHURCHMAN:

5 The challenge for you if I might say is linking the conduct of the case, and this is the point I am not quite clear on, I think in your memorandum you say you are wanting to pursue it under the mantle of the Trust Board application. Now, you can do that, but it is not a matter of having two separate cracks at it. You would need to cooperate with Mr Pou and essentially jointly present your part of the case at the same time he presents.

10 **KAREN FEINT QC:**

That is right and what is envisaged Your Honour is that it is the Trust Board's application, so it is up to the Trust Board to advance it. But it's proposed that Mr Pou advances the Trust Board's application by adopting the evidence and submissions filed by Ngāti Rua as an interested party.

15 **JUSTICE CHURCHMAN:**

And I presently, and subject to what counsel might want to say to me, I see no difficulty with that course, provided it is expressly done.

KAREN FEINT QC:

20 And there will be a need for the Trust Board to amend its pleadings by filing a map that indicates the area over which Ngāti Rua seeks customary title.

JUSTICE CHURCHMAN:

Yes, that is the second leg of the double. It has not happened yet, it needs to happen immediately.

KAREN FEINT QC:

25 So if I may hand up to the Court Your Honour, we have had a draft map prepared. I understand from Ms Sykes that this will need to be modified to meet the practice note guidelines that have been set down. So we can certainly do

that, but this map shows the territorial area over which Ngāti Rua seeks to establish customary marine title. So it is proposed that the Trust Board will file that map to advance its application on behalf of Ngāti Rua and I understand from Mr Pou that he also intends to file maps on behalf of the other hapū that
5 he thinks need to be represented because they don't have their own independent hapū applications.

JUSTICE CHURCHMAN:

Well it would be greatly of assistance to the Court if the maps were consistent one with the other, so you can look at them and they hopefully dovetail in and
10 do explain where the boundaries are. That is the most confusing issue at the moment in terms of such maps as there are.

KAREN FEINT QC:

I will certainly take that on-board Sir. So if I may make two points in response to Mr Sinclair's submissions, he has said, "Well there is no need for Ngāti Rua
15 to be given leave to file evidence late because Ngāti Rua is represented by his clients," and I think there are two points that can be made in response to that. The first is that although there are undoubtedly people of Ngāti Rua whakapapa who are giving evidence on behalf of the Edwards application such as Robert Edwards is the kaumātua to whom Mr Sinclair pointed. If you read his
20 evidence, he does not give that evidence from the perspective of Ngāti Rua, in fact he doesn't even mention Ngāti Rua. So in terms of establishing the whakapapa, traditional history and traditional boundaries of Ngāti Rua, it is not evidence that will assist the Ngāti Rua case, and therefore it is insufficient, in my submission, to establish Ngāti Rua's interest which makes that absolutely
25 essential that Ngāti Rua is permitted to file evidence that sets out the Ngāti Rua understanding of its relationship with the Takutai Moana.

We have two witnesses that we are proposing to file evidence on behalf of. The first is Te Riaki Amoamo who is a renowned tribal historian who will be able to
30 give that traditional evidence, and then Ms Hata herself who has spent many

years researching the oral history of Ngāti Rua and is therefore also learned on the subject.

JUSTICE CHURCHMAN:

Are you anticipating her evidence will be different to the affidavit of 6 July that
5 has been filed in the Court?

KAREN FEINT QC:

Well it will be more extensive Sir because it will need to establish the take by which Ngāti Rua holds mana moana over the Takutai Moana.

JUSTICE CHURCHMAN:

10 When do you propose this evidence is going to be filed?

KAREN FEINT QC:

Well I proposed in my memorandum that we would file that by the 24th of July which is next Friday which is a very tight deadline indeed, but we – I think it's incumbent upon us to get this evidence together as urgently as we can.
15 Perhaps for the benefit of hindsight I would have sought another week in addition to that, but...

JUSTICE CHURCHMAN:

I would not have given you another week given the imminence of the hearing and the potential prejudice to the other parties.

20 **KAREN FEINT QC:**

Well 24th of July it is then Sir. The second point I wanted to make in response to Mr Sinclair's evidence is that there is no indication in the evidence that he has filed that Mr Edwards has sought a mandate from Ngāti Rua in the normal tikanga-based process of attending hui-ā-hapū and the hapū deciding who they
25 wish to represent them.

JUSTICE CHURCHMAN:

That is ultimately a matter that I cannot resolve or should not really even comment on today. As I indicated in my very opening comments, normally it is for the parties to set out who represents who, and it is only if the mandate has been challenged that the Court has any role in resolving that issue. I think it is clear that it is a live issue or potentially a live issue in this case. We just going to have to wait until the hearing until I have heard it. I cannot make any sensible ruling on that today.

KAREN FEINT QC:

No, I understand that Sir, but I was putting that forward as a – to support my submission that Ngāti Rua needs to be heard directly, and if I may frame it this way, I think the issue that is emerging from the multiple applications before the Court is that there is a contest between who in tikanga terms holds the customary title and my understanding is that – and certainly the understanding of the Waitangi Tribunal in terms of its jurisprudence, is that ordinarily customary rights are held by the hapū as the main political unit that exercised traditional mana over their territory in traditional times. So, it appears that one issue, one tikanga issue that is going to need to be debated through the Court process is whether rights can be held at an iwi level and advanced at an iwi level or whether it is properly the hapū that are the representatives and hold customary title.

JUSTICE CHURCHMAN:

That is an issue in most of the major hearings.

KAREN FEINT QC:

Indeed, which is not a surprise and it is not to say that rights are necessarily mutually exclusive either. There may be rights at different levels. So, did Your Honour have any other questions about Ngāti Rua's status before we move on?

JUSTICE CHURCHMAN:

No, I understand what you have said in the memorandum that you filed on 6 July.

KAREN FEINT QC:

Thank you, Sir. So, in relation to the other issues that have been discussed
5 today, in general terms I adopt the submissions of my learned friend Ms Sykes. My clients are generally in alignment with her approach.

On the question of the pūkenga, I would say I've had some experience of having
heard tikanga evidence being given by tikanga experts before and I think an
10 important point is that there's the distinction between people who are steeped
in knowledge and experience of tikanga within their ao Māori world view, and
those who are good at explaining it to a Pākehā audience, and that ability to
explain in written terms simply what the conceptual framework is about, it is a
real skill in itself. So, I'd invite Your Honour to think about that in terms of
15 considering who should be appointed as pūkenga.

JUSTICE CHURCHMAN:

Well, there is a problem with that submission in that at the moment in respect
of two of the people who have been nominated I have a very brief thumbnail
sketch. I have no personal way of assessing whether they are good at writing
20 and I see they both have significant academic experience, but I have really not
got a principled way of deciding that one or another is a better writer and that
should carry the day.

KAREN FEINT QC:

No, indeed Sir, but I was going to say we do know that Professor Pou Temara
25 is an academic as is Dr Hiria Hape. I've seen tikanga evidence that
Professor Temara has given and he's certainly skilled at explaining principles
of tikanga to the Court.

I personally can't comment on the ability of those other proposed pūkenga to
30 do so, but I mean there's certainly no argument that all of them are
Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

knowledgeable and experienced in tikanga. But I think having a panel as Ms Syke's has proposed is one way of ensuring that you have a combination of skills and experience and the ability to properly assist this Court.

- 5 And I agree with Your Honour that, in terms of the questions that you have asked, that broad questions are appropriate. It may be premature to frame them at this stage. I think there is merit in having a pretrial report from the pūkenga and the reason I say that is because I think if you think about tikanga as a body of customary law and sometimes in legislation such as the
- 10 Te Awa Tupua Act, tikanga is defined as customary law rather than merely customary practices and I think that is the context within which the term tikanga has been used in the MACA Act, and so the question for the Court to assist the Court in hearing the evidence is what is the conceptual framework that tikanga develops in terms of customary law that will help Your Honour identify the
- 15 sources under that tikanga by which hapū establish their mana moana to the Takutai Moana, and so the question pre the hearing for the pūkenga might be, what those principles are that are relevant to establishing customary title and customary rights.

JUSTICE CHURCHMAN:

- 20 I think with the best will in the world we are now so close to the hearing that commissioning and getting such a report looks unrealistic and we are largely a victim of COVID. I had raised the issues of pūkenga with counsel prior to March and effectively there was no progress during COVID. So I understand your submission. It has merit. I am not sure practically I can make it happen.

25 **KAREN FEINT QC:**

Well I wonder whether in that case Sir a better way to do it might be through opening submissions because there is a body of jurisprudence from the Waitangi Tribunal that counsel can draw on to assist Your Honour.

JUSTICE CHURCHMAN:

Yes, there is certainly scope for submissions from counsel as to both the role of the pūkenga and what specific questions are to be put to them. At the moment, what I have set out in my minute is my view of what is likely to be most helpful. I am not suggesting that it is written in stone and as I have indicated to
5 other counsel, I think it is likely there will be some issues that come up that we have not anticipated that I do want a view from the pūkenga on. I am very reluctant to be too prescriptive at this stage which would, or might, have the possibility of eliminating some assistance that pūkenga can give us on topics we are not yet quite sure about.

10 **KAREN FEINT QC:**

And if I may say that, I think that's a wise approach Your Honour. So perhaps the only other point I would make in relation to the questions for the pūkenga is I think that question A could be reframed because that question is relevant but it's framed in terms of tikanga being matters of practice, whereas I think that the
15 question becomes prior to that is what are the principles of tikanga that are relevant in customary law to establishing those rights.

JUSTICE CHURCHMAN:

Yes.

KAREN FEINT QC:

20 So practices may be manifestations of the tikanga principles.

JUSTICE CHURCHMAN:

Yes, I think I said to Ms Linstead-Panoho, if you have a suggestion on that, it would be helpful for me for you to put it in writing and file it promptly so I understand exactly what it is you are submitting.

25 **KAREN FEINT QC:**

I will do so Sir. So in terms of the other matters, I don't think I've got anything that's useful to add. We will get this map filed certainly before next Friday, and

in terms of the timetabling, I haven't – I'm still in the dark as to what's going on frankly because I haven't been copied in to most circulation lists, so...

JUSTICE CHURCHMAN:

Again, I am equally as in the dark as I should be, but if you could just
5 communicate with other counsel.

KAREN FEINT QC:

Yes, I will be in other counsel's hands and heavily reliant on Ms Sykes. But those are all the submissions I had on behalf of Ngāti Rua and the Trust Board Sir.

10 **JUSTICE CHURCHMAN:**

Thank you Ms Feint.

KAREN FEINT QC:

As it pleases the Court.

JUSTICE CHURCHMAN:

15 Now counsel, we have reached the point in the day where normally we would stop for a lunch break. Now we still have two, I think, more applicants to hear from. Plus we have the Attorney-General and it is possible that there may be a need for a right of reply. Are there any counsel who are not able to come back this afternoon before we adjourn for lunch?

20 **THOMAS BENNION (VIA AVL):**

Sir, it's Mr Bennion here. My arrangements at this office are going to terminate, but I think I've made the submissions.

JUSTICE CHURCHMAN:

Yes, well thank you for that. I think you have probably been as helpful as you
25 always are on the matters that I need help from you on, so no disrespect if you do not come back after lunch.

THOMAS BENNION (VIA AVL):

Thank you Sir.

JUSTICE CHURCHMAN:

5 Given I do not hear anybody else vigorously protesting, I am available fortuitously for the rest of the afternoon, so we will adjourn. Would 2.15 be an acceptable time for counsel to come back? All right. We will adjourn. That is the normal start of the afternoon session, so thank you to the parties who have come along. We are now going to ask Mr Registrar to adjourn the hearing for 2.15 and we have still got two applicants and the Crown to go. Thank you.

10 **LUNCH ADJORNMENT: 1.12 PM**

HEARING RESUMES: 2.18 PM

REGISTRAR:

CIV-2017-404-562, Te Uri a Tehapū.

JUSTICE CHURCHMAN:

15 Perhaps just before you start Mr Sinclair, I did not acknowledge Mr Agnew of Te Arawhiti who is present. He was late, but he is here now, so we do acknowledge his presence as well, and no doubt he will report back to Te Arawhiti some of the comments that have been made by all parties and counsel. Mr Sinclair.

20 **TONY SINCLAIR:**

Thank you Sir, I've received instructions from Mr Ray Parkinson regarding his application and Mr Ray Parkinson has had discussions with his community regarding the extent of the territory originally claimed.

JUSTICE CHURCHMAN:

25 Yes.

TONY SINCLAIR:

Which came down into the Ōhiwa Harbour and into Ngāti Awa and Whakatōhea territory.

- 5 The discussion regarding aspects of the Act, Sir, they seek to inform the Court that they would like to amend the map and withdraw from this particular hearing Sir.

JUSTICE CHURCHMAN:

- 10 When you say, "Amend the map," is that to such an extent that there is no longer an overlap with the Whakatōhea claim?

TONY SINCLAIR:

Correct, Sir, correct.

JUSTICE CHURCHMAN:

- 15 Right, thank you. Well, yes you have the leave of the Court to file such a map and also the leave of the Court to be excused from further attendance in this hearing.

TONY SINCLAIR:

Thank you, Sir. That concludes my matter Sir.

JUSTICE CHURCHMAN:

- 20 Thank you.

REGISTRAR:

CIV-2017-485-296, Ngāti Muriwai.

MOANA SINCLAR:

- 25 Tēnā koutou. To start with I probably say that where the –

JUSTICE CHURCHMAN:

Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

Counsel, if I could just, normally the protocol here is we stand when we are –

MOANA SINCLAIR:

Pardon me?

JUSTICE CHURCHMAN:

- 5 If you could stand up while you address the Court, that's the tikanga of this Court.

MOANA SINCLAIR:

That will be a trick and a half.

- 10 Okay, firstly I want to say that the next venue needs to have enough seats, given the number of counsel that are turning up, that would be helpful.

- I have four main submissions. My claimants support the priority applicant's submissions, that is the first one. Second, funding; my claimants support the
15 memorandum on funding. The issue is that we are wanting to engage more lawyers but unsure about the funding, so clarification and confirmation would be also helpful.

- Three, timetabling – we will take instructions from my clients regarding the
20 timetabling proposed to date, but we will submit a memorandum on this Your Honour, and lastly, wish to make a submission on the pūkenga issue later, perhaps early next week before Thursday, which I understand is the deadline as you directed this morning. Your Honour those are my submissions for CIV 269, Ngāti Muriwai.

- 25 **JUSTICE CHURCHMAN:**

Thank you. I thought I had intended to direct Tuesday, but if I said Thursday, so be it. It does not matter, but probably of greater moment Ms Sinclair is that I issued a minute on 22nd of May asking all counsel if they would file a memorandum. As far as I am aware, we have not had a memorandum from
Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

you. It assists greatly in the smooth disposition of this business if we do get a memorandum, even if you simply say, "We're working away diligently, we are not going to be ready. We want to be adjourned for 12 months," and often if that is all that your applicant wants, we can arrange for that to be done on the
5 papers and I can issue a minute in advance and avoid counsel unnecessarily having to travel if they do not wish to turn up.

Now, will your client be participating throughout the Whakatōhea hearing?

MOANA SINCLAIR:

10 Yes.

JUSTICE CHURCHMAN:

Right, and in terms of filing your evidence, has that all been completed and in hand?

MOANA SINCLAIR:

15 It is underway Your Honour. I was newly appointed as counsel and was sort of in catch up really, given COVID and all the other drama, we're in catch up. But as I say, the funding issue is critical as to whether we bring more soldiers on board, it's critical.

JUSTICE CHURCHMAN:

20 Yes, there is also a timetable. I fully appreciate some of the difficulties that you will have been having, but it is important that to the extent possible, you comply with the timetable because it has a ripple effect if one counsel is late then other counsel can reasonably say, "Well, if we are replying to that we need to have our timetable varied," and before you know it, we have got to the hearing where
25 parties still have not filed their evidence. What sort of evidence is still outstanding?

UNSPECIFIED SPEAKER:

Excuse me Sir, if I may, all the evidence for Ngāti Muriwai has been filed Sir.

JUSTICE CHURCHMAN:

Has been filed, all right, well that solves that problem.

MOANA SINCLAIR:

Yes, and in essence we support, as I said, the priority applicant. So, they've
5 put their evidence in, we're alongside that. We're supportive of it.

JUSTICE CHURCHMAN:

All right, thank you, that's very helpful by way of clarification, thank you.

MOANA SINCLAIR:

Thank you.

10 **JUSTICE CHURCHMAN:**

Yes, I think we just have the Regional Council and then maybe finish with the
Crown.

REGISTRAR:

For Ōpōtiki District Council and Bay of Plenty Regional Council.

15 **TANIA REWETI:**

Thank you, Sir. I won't take up too much of the Court's time. I just have a
couple of matters that I would like to make some comments on Sir.

Firstly, in relation to the appointment of pūkenga, there is no objections from
20 the Regional Council to any of the suggested pūkenga and the Council will
support the use of the panel of experts in that regard Sir.

Secondly, on the issue of mapping, again noting that we filed a memorandum
in May of this year just updating the Court and the other parties on the
25 availability of a new mapping tool by the Regional Council's website and that
particular mapping tool allows for the coastal resource consent within the entire

Bay of Plenty Region to be mapped, including expired and historical resource consents.

5 The tool is also referred to in the Court's draft practice note and Council endorses the draft practice note, and we do not have any further submissions to make on that draft, Sir.

10 Just a related matter in relation to the matter of Ngāti Rua Sir, the map that is sought to be filed on behalf of Ngāti Rua was actually prepared in conjunction with the Regional Council and Council has agreed to allow that map to be submitted as part of that application. They just wanted to reiterate that the Council's position is not in any way represented by that map. It was just a map that was prepared as part of a separate proceeding, and the Council's position remains in relation to all of the applications that it's neutral and neither supports
15 nor opposes any particular application.

Sir, just quickly in relation to the suggestion by my learned friend Ms Sykes regarding the livestreaming, again that's something that our clients would strongly support in terms of allowing for attendance remotely, and it would be
20 of great assistance to my clients in tandem with that if there was confirmation of a batting order and the suggestion by my learned friend Ms Irwin-Easthope if that potentially could be done by area would also be extremely useful given that there are some areas that are of great interest than others that perhaps not so important.

25

The electronic casebook is another matter that my client strongly supports Sir. We're still awaiting service of some of the evidence I understand, and also a full list of what's been filed so far, and I just note that we aren't at present confident that we have actually been served with everyone's evidence. So, it
30 would be useful if a full list of what's been filed could be made available prior to the hearing Sir. Unless Your Honour has any questions, those are my submissions, Sir.

JUSTICE CHURCHMAN:

Just one topic I wanted to see what had happened on. Last year as I recall it, I think you indicated there had been some requests for information under the Local Government Information Act, and possibly other statutes as well, what
5 has been progressed, if any, in dealing with those or have there been no further requests?

TANIA REWETI:

Yes, Sir, there were from memory three or four requests that we received, and all of those requests have now been dealt with including one from the Crown
10 Sir, and all of the information as I understand has been provided to all of those parties in answer to those requests.

JUSTICE CHURCHMAN:

All right, thank you Ms Reweti.

TANIA RĒWETI:

15 Thank you, Sir.

REGISTRAR:

And for the Attorney-General.

RACHEL ROFF (VIA AVL):

Good morning Sir, Ms Roff here for the Attorney. I am intending to take you
20 through the issues that have been raised in the Attorney's memorandum and then I will handover to Mr Melvin who will deal with the issue provision.

JUSTICE CHURCHMAN:

Yes, thank you.

RACHEL ROFF (VIA AVL):

25 Yes, thank you Sir. The first issue is in relation to the appointment of a pūkenga and the Attorney filed a memorandum on this point on the 4th of June Sir, and

the Attorney does not have any objections or any particular pūkenga being appointed, but there are several notes and points in that memoranda setting out what would be preferable in terms of the pūkenga who is actually appointed. And one of the notes Sir in that memoranda says that a suggestion that the
5 Court should be cautious in appointing a current member of the Waitangi Tribunal.

I just note that Professor Temara is currently a member, but that's my understanding Sir. But really in the hands of parties and the Court in terms of
10 who is ultimately appointed.

The Attorney doesn't have any objection to a panel being appointed but just pointing out that it may be a process that would be required to be reached if there was to be any disagreement between the parties so that could be worked
15 through.

And also, from the Attorney's point of view, it would be useful to have a pre-trial report that the parties could have in advance of the hearing and that it's important that the party will **(inaudible 14:30:38)** or just be brought to their
20 attention.

THE COURT ADDRESSES MS ROFF – AUDIO ISSUES

Can I stop you there Ms Roff. You're breaking up on us. Could you just start the last sentence again and speak slowly and clearly. It's not your fault, the link is not perfect.

25 RACHEL ROFF (VIA AVL):

Yes, Sir. The point I was just making Sir, is that the Attorney does not have in terms a pre-trial report that would be preferable, but I appreciate Your Honour the timing issues now and how close we are running to the hearing commencing, so whether or not that's possible, it may not be now. But Sir, just
30 suggesting that it could be, if that was possible, it would be preferable and

then – but completely appreciate that there may be other issues that arise during the course of the hearing that may be able to be addressed by the pūkenga as and when Your Honour would seek assistance from them on.

- 5 Sir, that was the only points that I wanted to make in terms of the appointment of the pūkenga, unless Your Honour had any questions?

JUSTICE CHURCHMAN:

- Well, you will have seen what I suggested in the last minute as to the possible questions that might be put to the pūkenga. Do you have any additions, or do
10 you take any issue with any of those questions?

RACHEL ROFF (VIA AVL):

No, Sir, we don't have any issue with those suggestions, but it may be that along with the other parties, we could reconsider them and then file a memorandum by next Tuesday if it was appropriate.

- 15 **JUSTICE CHURCHMAN:**

Yes, well if you wish to do that, Tuesday is an appropriate time to have it filed by.

RACHEL ROFF (VIA AVL):

- Thank you, Sir. So, the other issue that I wanted to raise was raised in the
20 Attorney's memorandum dated the 8th of June, and that really concerns the confused uncertainty regarding the precise nature of the priority applicant by a claim.

- And I set out Sir in that memorandum, a number of matters that appear to be
25 **(inaudible 14:33:24 – 14:33:29)** in relation to the several if you like memoranda that have been filed by the priority applicant. And it would be useful Sir if the Edwards claimants could file an amended or replacement application that consolidated the amendment that have been highlighted in the various

memoranda in order that the Court and the parties are just working from one document.

5 And there are a number of issues Sir that I have raised that it would be helpful as well as if they were able to be addressed in terms of the nature of the rights that have been claimed in respect of Whakaari Island and also Ōhiwa Harbour. That's not clear in my submission Sir on the current second amended application that has been filed.

10 The third document, the further memorandum filed by the Attorney on the 1st of July that also raises again the uncertainty around the nature of the scope – nature of the rights claimed by the Edwards claimants. So, really just raising these concerns Sir because it is becoming more difficult to actually, for the parties and for the Attorney, prepare for this hearing now, because the level
15 of uncertainty around the nature of the claim.

So, Sir, if there was and if there is a direction that Your Honour could make in respect of that, I will be grateful. The other point Sir is in relation to the extension of the slightly extended timetable raised by the Te Kāhui Group, the
20 Attorney is agreeable to that and has no objection.

As also set out in the memoranda, the Attorney is also encouraged by the level of support for the use of an electronic bundle that has been raised by and confirmed by the parties today, so I will look at progressing that Sir in order that
25 that can be utilised at the hearing. But this is on the understanding though that the priority applicant will take responsibility for the provision and service and filing of any hard copy documents that are required.

In terms of a timetable, the Attorney hasn't been included in any of the
30 correspondence yet in terms of any proposed batting order, but more helpful to be involved in that and offer any suggestions in terms of that, but I have to suggest Sir that a draft timetable be circulated by the 28th of July and that's

really just a suggestion because an ongoing concern that this matter get ready for Court. We are only four weeks away now from the hearing and it does seem that there are a lot of matters that have not been resolved or agreed yet and so, just really trying to encourage the parties if at all possible to get that agreed in order that we can all prepare adequately for the hearing itself.

Sir, in terms of the application by Ngāti Rua, Your Honour referred to a strike-out application that has been heard next week, and I was – Sir there are a number of differences between that application and this application by Ngāti Rua.

The Attorney does not object to the Ngāti Rua appearing at the hearing and having the status of an applicant and the difference between this application and the hearing that has been applied – that the Attorney is applying to strike out next week is really, yes, the Trust Board in its application at the outset specified the group if you like, or the groups so it would be represented. And also, the Trust Board is doing or advancing the interests of a recognised hapū, so that's the three fundamental differences I see Your Honour in terms of this application and the one that's being heard next week.

I thought on that basis Sir, the Attorney doesn't have an objection to Ngāti Rua having status as an applicant – sorry, the Trust Board as the applicant that is pursuing Ngāti Rua's interests at the hearing.

The only issue I see Sir is the lateness of the evidence being filed, and any prejudice that that might cause depending on the nature and extent of the evidence that is ultimately filed.

JUSTICE CHURCHMAN:

So, they are your submissions?

RACHEL ROFF (VIA AVL):

Yes Sir, unless Your Honour has any further questions.

JUSTICE CHURCHMAN:

Well, you will recall at the start of the hearing, I did raise my concerns at the
5 issue of funding, and the particular focus of those concerns was the information
set out in the very recent memorandum that had been filed by Mr Sinclair and
to the extent and I know that it is not your personal responsibility, and we do
have Mr Agnew from Te Arawhiti here now, but it does seem to me that if there
are major funding obstacles of the scale that Mr Sinclair has outlined, that it
10 would be very much in the interest of the Crown, as the Crown as a whole, not
just the Attorney-General, for those to be addressed to the extent that they can
be addressed so that, we have a case which is able to proceed in full and the
wheels do not fall off part-way through or we do not have to adjourn and have
to try and reconvene later on because certain evidence was not able to be
15 obtained or whatever.

So, it is a matter that I would commend to you to take instructions on, and of
the obvious issues of concern are those that Mr Sinclair has outlined. I am
conscious it is not the Court's role to interfere with funding issues, but it is my
20 role to try and ensure that, first of all there is a fair hearing and fairness is for all
parties involved, and that the hearings are conducted in as expeditious, which
includes economical, fashion as can be obtained. So, to the extent that
Te Arawhiti has a role, its role may well assist in that regard by first considering
the issues that Mr Sinclair has raised, and indeed some of the other counsel
25 have raised in their various memorandum.

RACHEL ROFF (VIA AVL):

Yes, Sir.

JUSTICE CHURCHMAN:

Yes, and just before I hear from Mr Melvin, just finishing off on one of the points
30 you raised, yes, I acknowledge there is potential prejudice in the late filing of
Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

evidence on behalf of Ngāti Rua, and I think the best way, instead of trying to anticipate what that might be and make adjustments to the timetable order now, if there is some particular prejudice or disadvantage to any cross-applicant or interested party in respect of that late filing, I would hope that is something that the Court can address at the actual hearing itself. And what I have got in mind is reserving to a party leave to file further evidence or to make further submissions on a particular point of prejudice that has arisen.

Given the nature of the evidence that we have been told is going to be filed, it seems to be there is possibly not a huge scope for prejudice, but I accept that that is a possibility and I think that is the best way of dealing with it on an issue by issue basis but the Court is certainly open to the possibility that Attorney-General or any other party may say, "If only I had known that issue was going to be put before the Court, I would have called A, B, and C" and if there is an application to call A, B and C, it is likely to receive favourable consideration.

RACHEL ROFF (VIA AVL):

Yes, Sir.

JUSTICE CHURCHMAN:

Yes, thank you Ms Roff. Now, I think Mr Melvin wanted to say something to me.

GEOFFREY MELVIN (VIA AVL):

Tēnā koe Sir. I have listened to Your Honour's comments about funding and we will certainly relay those to Te Arawhiti. I have taken instructions on Te Arawhiti in relation to points Mr Sinclair set out in his memorandum filed on Friday, would Your Honour like me to take you through those bits that is a response to those points that Mr Sinclair made?

JUSTICE CHURCHMAN:

I am always conscious of the fact I am stepping on the toes of the branch of Government responsible for this and that is why I have not directed the Crown to do anything or indeed I cannot the direct the Crown or Te Arawhiti, but if there
5 are issues that you feel it is important for the Court to understand more fully relating to what has been in Mr Sinclair's memorandum, you are at liberty to address me on those.

GEOFFREY MELVIN (VIA AVL):

Well certainly Sir, it's the Crown's objective that funding issues not compromise
10 the proper and orderly hearing on these applications. Mr Sinclair or the applicants that Mr Sinclair represents and the other applicants that he lists in [1] of his memorandum filed on Friday, they've all had funding confirmed and have been receiving funding. The Edwards application itself has been assessed at very high complexity and it has received the maximum of the
15 funding limit that is available.

Last year the Crown realised that the upper funding limits weren't going to cover the costs of an eight-week hearing and as a consequence secured additional funding. I am instructed it's a total of \$6.372 million for the, to cover additional
20 costs that all applicants involved in this Edwards proceed are going to incur. That means that there's additional funding for all applicants, varying as I understand it between, I think, \$111,000 and approximately \$130,000, so the Crown has taken steps to increase the funding available to meet the additional costs that will be incurred as a result of the upcoming eight-week hearing.

25

In terms of the particular that Mr Sinclair set out in his memorandum, there are some matters that the Crown simply doesn't understand and in particular the reference to a debt of \$70,000 that he refers to, my friend refers to in [11] of his memorandum, Mr Sinclair would need to provide further information about that
30 before a response could be, or before we could understand what his particular issue is and before a response can be made. But I am instructed Sir that there

are no outstanding reimbursement requests going back 18 months as my friend suggests in his memorandum.

5 I'm instructed that in terms of the Edwards application itself, Te Arawhiti has recently processed the 27th reimbursement request. So there has been a substantial amount of funding paid to those applicants and it is continuing Sir and Te Arawhiti is currently processing a most recent reimbursement request.

10 So those are instructions that I have Sir. As I say, I will relay your comments to Te Arawhiti again, and as Your Honour has noted, Mr Agnew from Te Arawhiti is present at the CMC today and he is available to talk to counsel if they have any particular funding issues that they would like to raise with him today. Otherwise, all counsel Sir, if they have funding issues, are strongly encouraged to contact the funding administrators at the MACA funding at tearawhiti.govt.nz email address to discuss those concerns. Unless Your Honour has any
15 questions, those are the points I wish to make in respect of funding.

JUSTICE CHURCHMAN:

Thank you Mr Melvin, that is helpful information. If I could encourage you and Mr Sinclair to liaise on such issues that Mr Agnew might not be able to resolve
20 when he takes the opportunity of talking to Mr Sinclair this afternoon. As I have said, they are not matters that the Court has any jurisdiction to involve itself and beyond encouraging parties to talk to one another. So thank you, and thank you Ms Roff for your submissions too.

GEOFFREY MELVIN (VIA AVL):

25 As Your Honour pleases.

RACHEL ROFF (VIA AVL):

As Your Honour pleases.

JUSTICE CHURCHMAN:

Yes. Now Mr Registrar, have we missed anybody out? I would hate that to be the case. No? We have covered that. Mr Sinclair, yes.

TONY SINCLAIR:

5 Could I have a right of reply Sir?

JUSTICE CHURCHMAN:

Yes, I indicated to you at the start that you would get that. I just wanted to make sure there was not any other claimant that we had inadvertently left out. So yes, you are now able to reply.

10 **ANNETTE SYKES:**

Sir, before my friend replies, there's one matter with the Crown, I think Mr Ngatai is also a member of the Waitangi Tribunal, he's on the panel for the Northland inquiry. We disagree fundamentally with the proposition, knowledge keepers of this ilk are rare in the Māori world and I do not think that just because
15 by virtue of the fact they are appointed to the Waitangi Tribunal that should disqualify them. None of the people proposed are on the urgency for Takutai Moana, none of them, so there is no basis for recusal, even in Pākehā law and certainly tikanga Māori would find quite offensive what is being suggested that because we're in one forum, that disqualifies our knowledge in another forum.

20 **JUSTICE CHURCHMAN:**

Yes, thank you for that Ms Sykes. In my minute I have already addressed what I see, based on the Court's previous judgments, to be the different position in terms of the standard of independence that is applied, and I intend following those broad guidelines outlined by Justice Mallon in that case and that I think it
25 is unrealistic to expect complete independence and, in some way, will be counter-productive. But those are matters that I need to consider ultimately when I look at who should be appointed. Now Mr Sinclair, back to you.

TONY SINCLAIR:

Thank you Sir. If I may address the matter of Crown funding Sir. Sir, if it's necessary, the project management of these claims who takes care of all funding has provided a detailed spreadsheet of the costs for the priority
5 applicant going back I think two years and I am aware that Te Arawhiti have those documents.

Outstanding invoices for priority applicant Sir, one being myself and another senior counsel. The priority applicant as made out in my submission,
10 information I've received and the costs that were incurred from 1999 through to 2017 debit from the grant funding. It was granted in 2017 that every applicant **(inaudible 14:53:54)**. Sir, that has created a substantial prejudice. That's one point.

JUSTICE CHURCHMAN:

15 Just before we move on from that, those are matters that I'd encourage you to talk in the first instance to Mr Agnew about because while I can express views and occasionally thump the table, I have no jurisdiction to make directions.

TONY SINCLAIR:

Thank you Sir, and that matter has been discussed several times. I'll leave it
20 at that Sir.

The Crown has indicated that hard copy from the bundle of documents will be the responsibility of the priority applicant. Sir, without the funding and without guarantee of accounts being paid, that will not be possible.

25 **JUSTICE CHURCHMAN:**

Yes, well again, that is something that I would urge you to talk to Mr Agnew about and I can indicate for the benefit of counsel on behalf of the Attorney-General that if funding for the preparation of such a bundle is an impediment, I would sincerely hope that the Crown may be able to assist in that
30 regard.

TONY SINCLAIR:

Yes, I wish to bring to the Crown's attention and Your Honour that law firms are not taking responsibility for the preparation of documents and the funding of documents Sir. It's a project management. It is the claimants themselves, the
5 applicants.

At the moment they have an outstanding account to a third-party contractor of \$9000 Sir, printing documents. I will move on to the next matter.

JUSTICE CHURCHMAN:

10 And again, just before we do. I made my position very clear, as I have indicated to counsel for the Attorney-General, it is that sort of disbursement which is of benefit not only to all the applicants but of critical benefit to the Court, that I would hope that some accommodation can be met because without it, the hearing would not be a shambles, but it would be less organised and productive
15 and efficient that it might otherwise be.

TONY SINCLAIR:

Thank you, Sir. Another matter that I'd like to deal with briefly is earlier on my learned colleague Ms Sykes raised the matter of Tūhoe not being engaged in this hearing, and mentioned the hapū Turangapikitoi, one of the applicants that
20 we were acting for Mr Dean Flavell, 2017-485-375, Mr Dean Flavell and others on behalf of Hiwarau C, Turangapikitoi and Ōhiwa of Whakatōhea.

Turangapikitoi are included in there and Ōhiwa in the Hiwarau C application, Dean Flavell.

25 **JUSTICE CHURCHMAN:**

Thank you.

TONY SINCLAIR:

Yes. Sir, on the matter of Ngāti Rua, and the submissions of counsel for Ngāti Rua, so I have received instructions that the application for Ngāti Rua
Marine and Coastal Area (Takutai Moana) Act 2011, Rotorua CMC, 14 July 2020

would be opposed and Sir, that I be granted to leave to file submissions on opposing the Ngāti Rua application Sir.

5 Just briefly Sir, the matter of tikanga and the matter of whether the representative in 2015 to Mr Robert Edwards for Ngāti Rua had the mandate to file an application as a representative of Ngāti Rua that's been raised here by counsel for Ngāti Rua Sir.

10 The amended application which I filed to the Court along with my submission Sir, in 2015, was filed to the Māori Land Court on the 18th of May 2015, [3], as a date of filing this application already confirmed mandated hapū representatives are Rita Wordsworth for Ngāi Tamahaua, John Hata for Ngāti Patu and Robert Edwards for Ngāti Rua.

15 Sir, that was filed in the Māori Land Court 2015 after an extensive mandating and tikanga based tribal process. My client wishes to make further and fuller submissions on this particular matter.

JUSTICE CHURCHMAN:

Yes well, when do you think you might have those?

20 **TONY SINCLAIR:**

Sir, Tuesday next week and the same submissions as pūkenga. Turning to the map, it has been submitted today, which my clients have had time to look at over the lunch period, they struggle to see how this map can be helpful for Whakatōhea as a collection of hapū, and the map crosses so many boundaries
25 of other hapū territory. Sir, my submission will address the territorial boundaries of Whakatōhea as a collection of hapū.

The Whakatōhea application was filed by representatives of hapū, collating as an iwi to overcome the very issues that maps are causing internally and difficulty
30 of Whakatōhea to meet and overcome the exclusive test in the Act. And whilst

they've got no issue with accommodating and including whānau, and I am a representative of those hapū who are excluded from the Whakatōhea Trust Board structure. They've got no problem with including hapū Sir. What they wish to raise is that these particular hapū are not excluded and they are already
5 included. These are my submissions on that matter Sir.

JUSTICE CHURCHMAN:

Yes, well just before you move on to the other topic, I think you heard me say previously that issues as to mandate if they are challenged are substantive matters that the Court will decide upon in the same way as it addresses the
10 other issues. What the Court is not in the position to do is to pre-empt those on a preliminary basis and decide whether or not a particular mandate is in fact authentic, but you have raised that as an issue and the other parties will know to the extent that it relates to their client that the Court will expect submissions on that point and to be pointed to their evidence that is relevant in respect of a
15 claim that the mandate either is or is not a genuine one.

TONY SINCLAIR:

Thank you, Sir. On the matters of timetabling, my good colleague Mr Cunningham is taking responsibility for liaising with other counsel regarding the timetable.
20
Sir, we have got no further matters to raise.

JUSTICE CHURCHMAN:

One matter I did want to put to you, you heard Ms Roff for the Attorney-General indicate that she still sees some ambiguity in your application and has asked
25 whether it could be clarified. The last time I looked at your second amended application I understood, in general terms, some of the points she was making. So, it is going to be critical for all parties that we have as much clarity as we can possibly have, so I commend to you to reflect on your application and see whether or not there is some scope for clarifying and setting out exactly what

the features of the application are, what interests more particularly your client is claiming in the particular areas that it is claiming those in respect of.

TONY SINCLAIR:

Thank you, Sir, the applicants have considered the Crown's submission, and
5 they've looked at their application. Their main focus, and their main interest is their combined collective effort of Whakatōhea to ensure the Takutai Moana territory that they are claiming is successfully concluded. So, whilst the priority application is one application, the applicants are looking at all of the applicants as a combination of Whakatōhea Takutai Moana evidence. Sir, I take your
10 point. I will refer that back to the applicants again.

JUSTICE CHURCHMAN:

Well, the applicants probably need your professional input to understand the nuances and clarity in particular of what remedies you are seeking from the Court in respect of what areas. So, merely leaving it to the applicants
15 themselves may not give us the degree of precision that is going to help everybody to understand precisely where they are in conflict and when they are actually in agreement with you.

TONY SINCLAIR:

Thank you, Sir, that ends my submissions.

20 **JUSTICE CHURCHMAN:**

Thank you, Mr Sinclair. Ms Feint?

KAREN FEINT QC:

Your Honour, can I just say by way of comment it is somewhat unusual for my friend Mr Sinclair to raise for the first time instructions to oppose Ngāti Rua's
25 application in his reply submissions, because that gives me the difficulty in replying to him, and without wanting to prolong matters unnecessarily, it would be orthodox for me to have a right of reply to his submission.

JUSTICE CHURCHMAN:

Yes, it would be. The history of a particular point taken, in other words, whether or not it has been opposed and counsel on the other side clearly put on notice prior to the hearing, is obviously a matter that the Court will regard as going to the weight of a particular application. It does not exclude it from being made, but it is a relevant factor. You have not in particular or specifically asked for a particular right in terms of reply, but I am just conscious that we can end up going round and round the mulberry bush. I understand your client's position. As yet I have not had articulated to me what Mr Sinclair's position will be.

10

I do not wish to see us arguing over this right up until the door of the hearing. I want to be able to make a ruling promptly to say what the answer is.

KAREN FEINT QC:

Well, out of an abundance of caution Your Honour, if I could undertake to reply within 24 hours of receiving his submissions, if it is necessary to do so, if there are points that he raises that I have not covered today, I mean I can say immediately Mr Sinclair pointed you to the application made in 2015 to point out that it states there that Robert Edwards is a mandated hapū representative for Ngāti Rua. I am not contesting that he asserts to represent Ngāti Rua. What I am saying is if you review the evidence filed by Ngāti Rua by the Edwards application, you won't find in evidence from a Ngāti Rua perspective.

20

JUSTICE CHURCHMAN:

You have made your point and I picked up on that.

KAREN FEINT QC:

25 Thank you, Sir.

JUSTICE CHURCHMAN:

It is against my better judgment, but I will give you 24 hours, should you need it, and if you do not, you simply file a memorandum and say, "Nothing further to add."

KAREN FEINT QC:

Understand Sir, as the Court pleases.

JUSTICE CHURCHMAN:

5 All right. Well, thank you counsel for your submissions, I think we have had a
productive day. I am under no illusion that there is a lot of work yet to be done
ahead of the Whakatōhea hearing. Time is very brief. Much of that work, the
heavy lifting is going to be done by counsel who are here and are participating
by AVL. I commend that to you. The prospects of a successful outcome for all
10 of the applicants I think is largely going to be determined on the extent to which
you can address the tikanga issues satisfactorily before you end up having to
invite me to make a decision on it.

So, thank you for your efforts today, please keep up the good work. Please
continue to talk to one another and I am expecting a number of you will be filing
15 memoranda as we have talked about. As soon as you can file those, it just
makes the Court so much easier.

Nō reira tēnā koutou, tēnā koutou, tēnā koutou katoa.

20 We will now adjourn Mr Registrar.

HEARING CONCLUDES: 3.08 PM