

MACA CASE MANAGEMENT CONFERENCE
NELSON
13 JUNE 2019 at 10.00 am

COURT:

Tēnā koutou katoa. Ko Justice Churchman ahau.

Thank you for coming to this CMC. Some of you have been to others and I don't think for any of you it will be first.

So, turning to the purpose of what these CMCs are for, it's for the Court to try and maintain control over the proceedings and making sure that things are actually making progress.

There's a limited extent we can do that given the parallel engagement the Crown some of your clients are also involved in. However, given the huge number of these proceedings – 202 current proceedings, it is important that the Court tries to impose some semblance of order.

We now have three matters set down for hearing. They will occupy six months of the Court's hearing time from about August next year.

I have some questions for the Crown but it might be appropriate if we simply work through the various memoranda that counsel, who are here, have filed. So, perhaps Mr Registrar if we could start with CIV-2017-485-251 and work through the others. I have a number of question for counsel in respect of 251.

REGISTRAR:

CIV-2017-485-251 – Rangitāne o Wairau.

MS WADWORTH:

Good morning Sir, counsel's name is Ms Wadworth and I appear for Rangitāne. Rangitāne has filed a memorandum dated 16 May 2019 and within that memorandum it seeks an order recognising the Customary Marine Title and Protected Customary Rights and has set out the application area with maps.

At the previous conference Rangitāne signalled that it wished to pursue engagement with the Crown but has not received any meaningful response in relation to this and so it has made progress in relation to preparing evidence and it anticipates that its evidence can be completed by early 2020.

COURT:

Yes, if I can just interrupt you there. I am somewhat troubled by the comment in your memorandum that there continues to be no meaningful response. Does that mean you are corresponding with the Crown and they're simply not replying, can you just explain what that comment means?

MS WADWORTH:

I understand Rangitāne's representative who has tried to engage with the Crown hasn't had a meaningful response. So, in that regard there has been some response but nothing substantive.

COURT:

Yes, that's a matter I want Mr Melvin to address me on because on the face of things it just doesn't seem good enough.

Have you any further matters you want to cover with me in your oral submissions?

MS WADWORTH:

Counsel has seen Ngāti Koata's memorandum, and also your Honour's minute. Rangitāne does not have an issue with the proposed adjournment and that timeframe it can continue to prepare its evidence so that it will be ready to proceed.

Also, with the Ngāti Koata's engagement with the Crown, Rangitāne anticipates that it will also have some engagement being an interested party and also an overlapping applicant.

COURT:

Well, I'm not sure as to the validity of such assumption. I mean, have you been given that assurance by the Crown?

MS WADWORTH:

No, I haven't been given that assurance sir.

COURT:

Yes, well it does seem to me, given the memorandum filed by Ngāti Koata or on their behalf, that they essentially sought that your claim 251 to be adjourned. We run the risk that the Crown, which does seem to be engaging with Ngāti Koata, may conclude some arrangement with them which would happen before your case had really got off the ground. Given what you say to me that the Crown are simply not engaging in any meaningful way with your client, and Ngāti Koata are asking the Court to adjourn your client's application essentially until it has resolved its engagement with the Crown, these are potential issues.

MS WADWORTH:

On that basis Rangitāne is not prepared to accept adjournment for that length of time. It would just be simply until its evidence has been completed.

COURT:

There will be another round of CMCs of this nature in about 12 months' time. There are also some other CMCs for various other matters scheduled at other times, notably February this year, would you have any objection to your case, 251, essentially being adjourned for 12 months?

MS WADWORTH:

No, I'd have no objection sir.

COURT:

Alright. There somewhat cryptic comment in [5] of your memorandum. You say Rangitāne's maps may be subject to changes. It is appropriate that Rangitāne refines its application, and of course that's what the Court is really keen to see happen. The various applications should be put into their final form because, in terms of overlapping claims, and there are some significant overlapping claims for Rangitāne's application, we really need to know how much of an issue these are.

So, all that means that I'm not wonderfully pleased with the suggestion, "well we might change our maps in the future as it suits us". I'd be very keen for the work to be done, I mean you will be doing, or your client will be doing their research now anyway, as soon as possible so that we don't end up with the situation where we set a matter down for hearing and then all

of a sudden we get a quite different claim or different maps put before the Court. That's just going to lead to complication and potentially adjournments.

MS WADWORTH:

Thank you sir. I understand your concern.

COURT:

Yes, so could you convey to your client it's in their interests, and indeed the Court's interests, in expeditiously dealing with this matter for them, if they're going to modify their claim, for them to do it sooner rather than later.

Thank you Ms Wadworth those are the only matters I had for you.

Now CIV-2017-485-167. That's the one in which Mr Castle filed a memorandum last night isn't it?

I assume there is no-one here on behalf of Mr Castle.

Have you seen copies of this memorandum that I've just seen when I walked into Court? Do any counsel have any comment they want to make on Mr Castle's memorandum?

Mr Melvin, there's a paragraph in it that I expressly want you to respond to – not now but your time will come.

Now CIV-2017-485-171, 172, 182, 266.

MS BLACK:

Tēnā koe te Kaiwhakawā. Counsel's name is Ms Black, and I'm here for those applications.

COURT:

Tēnā koe Ms Black.

Now, if we could just work through your filed memorandum.

MS BLACK:

Perhaps note that the new counsel for the 266 application filed a memorandum last night seeking leave not to appear as there hasn't been a response, they've asked me to appear, as agent.

So, we, Ngāi Tuahuriri, have been our clients, they have moved to Chapman Tripp in the last couple of days, Chapman Tripp has asked me to continue to appear for them in this CMC.

COURT:

Now, at page 5 of your memo, there is again the rather cryptic comment, "these remaining applicants that we represent have commenced research and are at varying stages of progress". And that's not wonderfully helpful in terms of giving the Court any sense of really where things are at.

So, are Ngāi Tuahuriri pursuing direct engagement with the Crown?

MS BLACK:

I understand that Chapman Tripp's memo sought an adjournment for 12 months so they could pursue that issue with Ngai Tahu, who do have direct engagement. They, I understand, want to see whether an entire Ngai Tahu approach can be taken, or the hapū of Ngai Tahu.

COURT:

Does their claim overlap with Ngai Tahu's?

MS BLACK:

Yes, it does. It's, I think almost fully enclosed by Ngai Tahu's. My understanding, and I don't represent Ngai Tahu, is that the Ngai Tahu application was a protected application. The Ngāi Tuahuriri application is much more specific, it was their hapū, specifically.

COURT:

It's not an area that I'm familiar with. Can you give me an indication, geographically, of exactly where their claim is?

MS BLACK:

So, they are a hapū rather than an iwi. They're a hapū of Ngai Tahu. Their application starts in the North at the mouth of Wairau River which is just south of the Marlborough Sounds.

And it continues down the coast around Banks Peninsula and south, about a third of the way down that very straight part of the coast.

COURT:

At the northern end, it would overlap with Rangitāne and Ngāti Koata, and probably Te Atiawa.

MS BLACK:

Atiawa – yes, Rangitāne – I’m not sure, Koata – no.

COURT:

Well, I guess if they’ve gone to Chapman Tripp, Mr Registrar have we received a memorandum from Chapman Tripp? I have no memory of it.

MR MELVIN:

There is one sir, I could hand it up if that would assist.

COURT:

Thank you. I’ll just read it. No, we haven’t seen it. It was filed after we all came over here.

Yes, they’re basically asking for a 12-month adjournment.

Ms Black, do you have anything further you want to take me through?

MS BLACK:

My friend has just confirmed that that application does overlap with the Rangitāne’s application that she represents.

COURT:

Well that gets us to 266. What about 182, that’s Henare Tahauroa-Watson, in respect of the Whanganui inlet. We’re now right over north-west Nelson now.

MS BLACK:

The only application that overlaps is the Te Atiawa application.

COURT:

Yes, again, the comment is simply you are at various stages of progress. What does that mean?

MS BLACK:

So, for the 171, 172 and 182 clients, it means that research is well underway and, at this stage, expected to be completed by December this year.

COURT:

So, in terms of adjournment, 12 months' appropriate or you're seeking something else?

MS BLACK:

That would be fine with our client sir, and they'll be very happy to fit in with other people's timetabling, or the applicants' timetable.

COURT:

And in respect of those claims, are your clients also seeking Crown engagement or not?

MS BLACK:

They are sir, yes.

COURT:

And progress with that?

MS BLACK:

No, not so far. I do have a matter to discuss with Mr Agnew afterwards on that, but at this stage, certainly no, no substantive engagement no. I understand that Crown is not intending to revisit its current work streams until 2021?

MR AGNEW:

Your Honour my name is Peter Agnew, I am the Senior Analyst at Te Arawhiti, and I'm here mainly as the key, from the Crown engagement's perspective. Probably further to CMC in Wellington, Te Arawhiti are currently working on a strategy for progressing our Crown engagement applicants. We're hoping to have that completed within the next few months and to be in touch with all Crown engagement applicants towards the end of this year. So, I expect that we would be able to inform Ms Black's clients of our intentions.

COURT:

Yes, well that gives me some comfort but I'd have to say it's a very common theme that's coming through that the Crown simply has not engaged, other than with one or two, and obviously given, it seems most of the applicants do wish to engage with the Crown, and there's potential for significant injustice, in my view, if, where there are directly overlapping claims, as there are here for example, in respect of Rangitāne, Ngāti Koata and a number or the other iwi, that one is being engaged with and not the others.

So, it is a matter of concern to me and it ultimately it may end up significantly altering how the Court is able to deal with matters. So, all I can do is really encourage you to progress that as speedily as possible.

MR AGNEW:

We do appreciate that sir.

COURT:

Yes, thank you.

Now, anything further from you Ms Black?

MS BLACK:

No, I think in respect of adjournments, Ms Houra has a matter to address you on, and I'll just say that we're in support of her proposition.

COURT:

Thank you.

Now CIV-2017-485-365.

MS HOURA:

May it please your Honour, counsel's name is Ms Houra. I appear for Te Ātiawa o Te Waka-a-Māui Trust.

Preparations are, or presentation of, this application is well underway. We have assigned and approached a historian, to prepare a report on the rohe, and the applicants have undertaken considerable research themselves.

In respect of the mapping, as directed in the 16 May 2019 memorandum, we submit unchanged maps for the application area and note that the map filed for this initial application remains the same. It is my submission that the idea that Te Ātiawa would like to pursue, is the collaborative approach. And what concerns Te Ātiawa at this point of time, is that there are a number of iwi in Te Tau Ihu iwi that have not submitted submissions. And, I think it's appropriate they are just a name, a couple, Ngāti Toa, Ngāti Kuia, that they haven't submitted applications so therefore they are interested parties and have the potential to possibly create a halt in the validity of the Court process and we would like to at least they be included, or considered, as interested parties.

COURT:

There are some issues with that. There were time limits within which interested parties were supposed to make their position clear and they've missed the boat on that.

MS HOURA:

I appreciate that sir. I'm not speaking on their behalf but it has the potential to cause possibly problematic complex issues further down the track. For those parties who wish to go to Crown engagement and/or the High Court process, and particularly where there's overlapping interests, it would have the potential to hold the process up. And we're trying to avoid that, and work collaboratively. And I think a way forward in this Court setting is to at least give them an indication that they are an interested party and simply that they can may be file a response to that.

We don't want, we are placed in a situation where we prepared for it, our evidence, and we've progressed and got to a certain point and then it's held up again because they might be feeling that they're affected.

COURT:

Well my preliminary view on this is, while they are, in a general sense, interested to the extent that as I understand the two iwi you mentioned are engaging, or attempting to engage with the Crown, they're not interested parties in the term that the Act uses that concept because they haven't filed any notice of appearance as interested parties and now it's too late for them to do that. So, to the extent that I'm able to control what happens in a procedural sense, I would not be reacting well to a suggestion that they might be able to adjourn or hold

up your application. My preliminary view is that they've had their chance to participate in the litigation process and have not done that.

However, there is certainly a good basis for a collective approach to be taken by the Te Tau Ihu iwi. I mean they've essentially co-operated in the northern South Island inquiry, as it was, and there's a history of them, perhaps being less adversarial one to the other than is the case in many other parts of the country. It's all relative.

I'm not quite sure what you've got in mind.

MS HOURA:

Essentially sir, what I am steering towards is that there are complex relationships in Te Tau Ihu iwi and you'll find that in any environment of this nature. And, what I'm suggesting is that, even if these interested parties that have not filed submissions, even at a Crown engagement level, that also can be prejudicial to my clients if that engagement has, they're not included as interested parties, so we can sort out mapping issues and boundaries at the outset. And, otherwise it can possibly hinder any process either way with the Crown engagement and/or the High Court process.

COURT:

I do know something of the background of the overlapping issues. I was counsel in the case that went to the Privy Council challenging Ngai Tahu's claim that there couldn't be any overlapping interests, although that's nearly 20 years ago now.

All I can do is commend such an approach to you. It seems eminently sensible, it's likely to be more productive in terms of the ultimate outcomes, and it's certainly likely to get the matter resolved much more quickly than if there are genuinely adversarial overlapping claims. I don't know it's the Court's role to take it any further, but to the extent you need encouragement, I think that's an eminently sensible approach.

Are there any directions or observations you want the Court to make that would be of assistance to your client?

MS HOURA:

Not at this stage sir. I'll need to confer with my client further but those were the main concerns at this stage.

COURT:

All right. Thank you Ms Houra.

Mr Melvin, now I don't seem to have a memorandum from you specifically in relation to this CMC, am I missing something?

MR MELVIN:

No sir. The memorandum we filed last Friday, it was intended to cover all the CMCs.

COURT:

Is that all throughout the country for the next couple of weeks?

MR MELVIN:

Yes, unless there are some specific issues that arise.

COURT:

Well you've heard my exchanges with counsel this morning, and I have to say I was very disappointed to hear from Ms Wadworth that she hadn't had a meaningful response. To some extent that's been ameliorated by the additional information we've received. I know it's not your personal fault but when so often this Court is hearing that the claimants requesting Crown engagement are simply being ignored, the applicants who wish to engage with the Crown, that is a matter of real concern.

MR MELVIN:

Well, with respect sir, I understand that it's not a case of the Crown ignoring the Crown engagement application, and the applicants wish, and preference, to engage with the Crown, but it is taking the Crown some time to develop a strategy. It signalled at CMCs last year that it would take 12 to 18 months.

COURT:

Well the 12 months, the end of that is now up.

MR MELVIN:

That's right, and as Mr Agnew has indicated to your Honour this morning, it's expected that, within 18 months, before the end of the year, there will be a detailed strategy. It will be

communicated to applicants, and I understand that applicants will then be in a much clearer position as to the Crown's programme for Crown engagement.

I can also add that counsel are meeting with Te Arawhiti officials on Friday.

COURT:

Counsel for who?

MR MELVIN:

Crown counsel. And specifically, to discuss this issue sir and maybe, I don't know, there can be some further information that can be passed onto the Court and to applicants.

COURT:

That would be helpful.

MR MELVIN:

I understand that sir.

COURT:

You might recall, in terms of Ms Wadworth's understanding of the potential interaction between claimants who are engaging with the Crown and those who have tried but haven't managed to do that in any meaningful way, somehow those other claimants would become involved before the Crown settled anything with one of the parties that it is engaging with. It's not my understanding that's the process.

MR MELVIN:

The Crown engagement process includes a step within it. I think it's termed third-party inquiry process, so, there's certainly is a step within the Crown engagement process where other applicants with overlaps will be able to present evidence and indeed other interested parties whether they're applicants or not, will also be able to provide evidence to.

COURT:

Do you use that word 'interested party' in the sense that it's used in the Act? In other words, entities or people who have formally advised the Court that they're interested in a particular claim?

MR MELVIN:

They may be interested parties in that formal sense, or they may be other parties with an interest in it, who simply have an interest in the matter.

Because with the Crown engagement there isn't the same process that there is for High Court matters to register an interest as an interested party. But there's certainly a step in the Crown engagement process for anyone who claims to have an interest in the application that is the subject of engagement, to present evidence about their interest.

COURT:

And the Crown is actively advising those sorts of parties, what stage the engagements at, or the likely outcome might be? Or does it wait right until the very end and they say here's what we're going to do with this particular claimant?

MR MELVIN:

I think, my understanding is it doesn't wait until the very end but at the same time it, in the earlier stage, it is not feeding out information to those parties. It takes engagement to a certain point and then at that point, which is not at the end, but some steps, somewhere in the middle, that's when it's communicates with the rest of the parties.

COURT:

Does the Crown yet have a policy or process as to what might happen where you have, for example in this case, one iwi that seems to be well underway with its engagement with the Crown, other overlapping iwi that would wish to, but have not yet been able to do that, is the Crown going to look at attempting to come to a settlement with all of those overlapping claimants at the time it deals with the first one, or serially further down the track?

MR MELVIN:

My understanding sir is that it will be approached on a case by case approach.

COURT:

Well you risk exactly the same problem that occurred with the passing of the Ngai Tahu Claims Settlement Act which Ngai Tahu said "this is our line in the sand" and, in particular it was the V on the map and they said no-one has the right to claim any interest over those lines that were drawn on the map attached to the Settlement Act, which created an enormous amount of litigation and ill-feeling, particularly amongst the Te Tau Ihu iwi.

And that just seems to me to be a real problem here particularly in respect of claimants in this group. If one iwi gets through direct engagement, a settlement, which prejudices other iwi.

MR MELVIN:

The Crown will be very alert to that potential issue and will be doing its best ensure that no such prejudice arises. And it would not, as I understand it sir, conclude an engagement, so enter into an agreement, unless those kinds of issues were adequately resolved.

COURT:

Thank you for those comments. Is there anything else you wanted to address me on that I haven't raised with you?

MR MELVIN:

In terms of the memorandum Mr Castle filed and his comment about Crown, his difficulties in securing Crown funding for his High Court application, I haven't been able to take, receive instructions on that so far this morning. I have asked but I don't have specific instructions on that. I will do what I can to ascertain what the issue is. And if it's appropriate for Crown counsel to, in some way, oil their wheel, then counsel will do what counsel can. But, I'm not sure what the problem is.

COURT:

No, he's fairly vague in saying he wants the Court to make such directions as it considers appropriate to ensure that the expected funding will be made available. That's asking the Court to do something that has no jurisdiction to do. The Court can't direct the Crown to make funding available, it has no idea what the expected funding might actually be.

So, I'm not going to be making an order in the nature sought, but, having said that, as you've heard me say today and earlier in the week, I am concerned that there do seem to be some impediments to the Court resolving these matters in a timely fashion.

MR MELVIN:

That's understood sir.

COURT:

Thank you Mr Melvin.

Unless any counsel have any matters arising from the questions that I put to Mr Melvin, we'll now conclude these proceedings.

So, thank you for your input and thank you Mr Agnew for attending.

Mr Registrar, the Court will now adjourn.

CMC CONCLUDES – 10:39AM