

**CASE MANAGEMENT CONFERENCE
ROTORUA
26 OCTOBER 2018 at 10.00 am**

COURT:

Thank you very much, good morning everyone.

I know just about everyone, but we will go through the process of introductions.

Ms Gillies, good morning

MS GILLIES:

Mōrena

May it please the Court counsel's name is Ms Gillies. I appear for the Attorney-General.

COURT:

Thank you very much.

Mr Sinclair

MR SINCLAIR:

Tēna koe sir. My name is Sinclair and I appear for Ms Edwards, CIV-817. I also appear as agency sir on behalf of Ranfurly Chambers, Mr Charl Hirschfeld for 562, 264, 269, 278, 375.

COURT:

Thank you very much Mr Sinclair.

Good morning Ms Sykes

MS SYKES:

Sir, mōrena

I appear today for 485-299 Mr Rua Rakuraku. I have my clients present, but they've brought a mokopuna so she's not allowed in court so they're just outside waiting sir. She's three years old. It's too hard for them to I think quieten down.

COURT:

I don't mind them being in court but obviously if the child should decide that they know better than anyone else and they might leave.

MS SYKES:

They're quite content. Sir, they've gone to the Fat Dog and they're waiting for our response.

COURT:

Very smart.

Mr Pou's not here. Is there anyone for him? No okay.

Ms Tahana

Mōrena e te rangatira, Ms Tahana for Te Whānau-a-Apanui and on agency instructions for Mr Castle for Ngāi Taiwhakaea.

COURT:

Thanks very much.

Ms Siciliano, good morning

MS SICILIANO:

Mōrena sir, I appear this morning for the descendants of Rangatira Mokomoko, CIV ending 355.

COURT:

Thank you very much.

Ms Zwaan, good morning

MS ZWAAN:

Good morning your Honour, counsel's name is Ms Zwaan. I appear for the Te Ūpokorehe claim. It's CIV ending 201.

COURT:

Thank you very much.

Mr Webster

MR WEBSTER:

Thank you sir, appearing for Te Rūnanga o Ngāti Awa, CIV-196.

COURT:

Mr Williams

MR WILLIAMS:

Mōrena sir, I appear with Ms Clark for the Hillier and Jones matters, CIVs-377, 262, 270 and 272.

COURT:

Thank you very much.

Ms Bartlett, you're appearing on instructions from Mr Bennion, is that correct?

MS BARTLETT:

Yes, good morning sir, appearing on behalf of Mr Hata for the claims by Ngāti Patumoana, CIV ending 253.

COURT:

Thank you very much.

Ms Mason, good morning

MS MASON:

Good morning sir, appearing today for two claims, the Manu Paora Whānau claim, CIV-513 and Maanu Paul, the NZ Wide claim CIV-512, thank you sir.

COURT:

Thank you. And Mr Sharrock, good morning

MR SHARROCK:

Good morning sir, I'm appearing with regards to the CIV ending 0538 for Mr Rihari Dargaville on behalf of members of the New Zealand Māori Council sir.

COURT:

Thank you very much Mr Sharrock.

Now, as people will be aware this is an adjourned case management conference and it was adjourned because Mr Sinclair had only recently become involved on behalf of the Edwards claim and since that adjournment I have conducted first round case management conferences in a number of centres around New Zealand.

Mr Sinclair, I am grateful for the memorandum that you have filed. One of the many challenges of course down the track will be to work out what legal implications flow from the events of 1865 and I don't for one moment pretend that that's going to be a straight forward matter. The challenges seem to be basically two-fold: one of a factual nature and the second are whatever legal consequences flow from that. I wonder if you could just give me a little bit of assistance in educating me. Were the events of 1865 ever sanctioned in legislation? Was there ever a statute that gave effect to the confiscation of the lands?

MR SINCLAIR:

Thank you sir. I'm sure that question sir could be answered by more learned people in this room than myself. However, sir, it is our understanding that that question is a question that needs to be dealt with through a historical legal report commissioned by, as I've mentioned sir,

a suitably qualified legal historian. In regards to that matter sir, it is close to probably one of the core questions.

COURT:

Yes. Now you've indicated some reports possibly being available about March of this next year, is that correct?

MR SINCLAIR:

Sir, the report I refer to in that instance, and I would hazard to say that that regards the historical generic evidence –

COURT:

And more specific historical evidence relating to the events of 1865 are more challenging, are they?

MR SINCLAIR:

Yes, definitely. I'd say the date March is a little adventurous now and I'd say it would probably be pushed out to more like May.

COURT:

But, nevertheless, you're signalling in your memorandum that getting the requisite legal historical report of the events of 1865 is going to be something that you're really struggling with.

MR SINCLAIR:

Definitely sir. The progress I've made regarding that is, of course, a funding issue. I visited the Justice Department OTS Funding officials last night and I've argued that that report is an exceptional report and therefore we'd be able to apply for the funding under the "exceptional status". At this point in time those discussions are oral and they have declined. However, they've come back and stated that if the applicants involved in that particular area, and there's several of them, if they could discuss the matter between themselves and come to a position where some of the research funding each of the applicants could be compiled, collated together and fund such a report. Sir, before approaching and getting a definite costing and quote on such a report, I had to seek first of all whether there was any funding available. Now that that

option is available that needs to be discussed with all parties and therefore the requisite historian can then be approached.

COURT:

Please excuse my ignorance, but has this been the subject of any Waitangi Tribunal inquiry?

MR SINCLAIR:

Sir, not to my knowledge.

COURT:

I think some people are signalling that it may have been.

MR SINCLAIR:

Sir, the historical account has been definitely reported on down to the raupatu, but this particular matter in our view, given the 2011 s 51 and s 58, to that level sir I stand to be corrected.

COURT:

I just want to explore that a little further. So there had been historical reports prepared in the past for Waitangi Tribunal proceedings in relation to the raupatu of 1865?

MR SINCLAIR:

Exactly sir, and I guess the most well-known one is the one compiled by Dr Bryan Gilling. I've spoken to Dr –

COURT:

– which you've referred, well you've got an outline of in your appendix.

MR SINCLAIR:

I've actually put these questions to Dr Bryan Gilling and –

COURT:

Is he still at Morrison Morpeth?

MR SINCLAIR:

Yes, and he has stated to me that that is outside the scope of the research that he did sir and he has, as well as others, have advised that we go another level.

COURT:

So, is that other level a matter that involves the application of law to facts?

MR SINCLAIR:

It will be sir. It will involve from what I understand the legal historian looking at the legislation of the day and applying it to the facts at the time, 1865, 1866.

COURT:

The only reason I ask that and I ask it very tentatively is that whilst if I were the Judge I would be welcoming the input of historians and experts on tikanga and every other form of factual evidence. Ultimately, the Judge is going to have to decide what the law is and what the impact of the events of 1865 are upon the claim. You have signalled there are all sorts of possible legal arguments that the confiscation should not be held against the applicants for all sorts of reasons but those all involve legal analysis once you know what the facts are. So I'm just testing with you whether or not it's actually necessary to get what you call a legal historian's report as opposed to a historian's report. So, for example, if there was legislation relating to the 1865 events, I just don't know if there was, then that would be provided to the Court as part of legal submissions and submissions would be made about the impact of that legislation on the claim. Now that's not to be confused in any way with a historical account of the events or an explanation from a tikanga perspective of what the implications were of the events of 1865 or any other evidence that relates to customary title, which might be of an evidential nature and from an expert that assists the Court because of their expertise. But I think we have to be just a little cautious about incurring costs and delay where what you're asking somebody to do is to provide a legal analysis which ultimately should be done by lawyers and presented to the Judge as a submission rather than as an expert telling the Judge what the law is.

MR SINCLAIR:

Sir, I think the essence of the historical legal report is the law as it was in 1865 and as it was applied then and it's not as the law as such as applied today and in regard to historical reports put together today, whilst they definitely go through the historical account and facts, in

discussing the matter with Dr Bryan Gilling the legal issues that surrounded those events, legislation applicable at the time whether or not it was created after the 1865 Act, the New Zealand Settlements Act for example, is a question that needs to go a step further than simply an historical account. The reason for that sir is that made in the opening paragraphs sir, s 51 and s 58 make clear the time period of use up to today will have been reached in that time period. So that's what we see sir as the gap in the 2011 legislation. The Review Committee in the 2004 Act never mentioned a typical scenario as this and we believe they overlooked it.

COURT:

Well I have to say that I was oblivious to this particular problem until I started to prepare for today's hearing as with so many aspects of this litigation every day I learn something new.

MR SINCLAIR:

We believe sir that the gap in the law is prejudicial to our clients' case.

COURT:

I can understand that.

MR SINCLAIR:

As I've stated in the submissions, if the confiscations of raupatu back in 1865 was an illegal act of the Crown, then our clients should only have to prove their exclusive use from 1840 to 1865 and that's what's at stake here. It's what we believe is at stake.

COURT:

Well, as I say, it raises some very challenging and interesting issues.

MR SINCLAIR:

Sir, that's the main essence of this submission. I know I've made commentary about other matters.

COURT:

Can I just press you a little further Mr Sinclair on how much time is going to be required to get your evidence together?

MR SINCLAIR:

Sir, on that particular matter?

COURT:

On everything. How long before you're going to be ready to go to Court?

MR SINCLAIR:

Sir, the affidavits we're putting together some have been done already as I've mentioned, but that will be subject to our generic historical account and report and as well as this one. Sir, I would say that if we've had the reports delivered by May probably two months subsequent to May.

COURT:

And how much hearing time do you think that your case will require?

MR SINCLAIR:

Sir, probably about two days sir.

COURT:

Is that all?

MR SINCLAIR:

Sir, it really depends on the historical reports that we commission sir. At the moment, I couldn't give an account of that, but I would say our witnesses sir would be two days.

COURT:

Alright, okay.

MR SINCLAIR:

When I've got at least sir a draft of the historical accounts I would be able to give a better indication to the Court.

COURT:

On those indications, I think really they're not looking at a hearing until probably 2020 I would think.

MR SINCLAIR:

Well, I wouldn't –

COURT:

I'm also speaking from the perspective of someone with an understanding of what Judges' timetables are looking like and if it's of any assistance to you, my timetable for example is basically I'm now booked into 2020. Others are not in that position and it doesn't necessarily have to me doing all of these hearings, but that just gives you an indication as to how the Court's timetable is.

MR SINCLAIR:

Sir, one of the ways that I can assist and I've spoken to counsel this morning, is that there is a desire to get together for a facilitated hui to discuss these reports and also the funding issues. Sir I think we could have that matter dealt with within I'd say the week in terms of facilitated discussions and we could present back to the Court a position regarding how a historical legal report will be funded and if indeed it is supported.

COURT:

The final thing I wanted to ask you Mr Sinclair was this. Don't let me cut you off if there's anything else you want to say please do so. I'm assuming that your clients' case will have to go to trial. It is unlikely that the Crown is going to be able to reach an agreement with you in light of the legal issues that arise through the events of 1865, is that your understanding?

MR SINCLAIR:

Sir, we're quite willing to have a discussion with the Crown as with all other parties. It appears sir that it will go to trial.

COURT:

Yes. I'm just trying to be as practical and as realistic as possible. It did strike me that it was likely that this case would have to probably go to trial.

MR SINCLAIR:

Sir, in concluding, if I could inform the Court within 10 working days of the position of both reports and after discussion with my colleagues and the Justice Department I should be able to give you a very clear indication of where we are going in our timetable.

COURT:

So you'll file a memorandum to that effect.

MR SINCLAIR:

I will do that sir.

COURT:

Thank you very much.

MR SINCLAIR:

Thank you sir.

COURT:

Ms Sykes

MS SYKES:

Mōrena sir

There is legislation that's quite relevant. The New Zealand Settlement Act 1863. Some very comprehensive submissions were made by Queen's Counsel, Mr Rodney Harrison, as part of the Ngāti Awa Wai 48 claims as to the illegality or unlawfulness of that. I was hoping my friends would concede, as they did in the Ngāti Awa settlement, to his submission that that Act was unreasonable and unlawful. In the context of Ngāti Awa, I would argue that that precedent would then be of equal application for Ngāti Ira, who like Ngāti Awa, suffered significantly as a result of the impact of that legislation, which may avoid a significant part of the inquiry in legal terms as the applications of s 51 and s 58 because if we could get a statement of agreement between counsel for the Crown and all of us, because all of us have different groups within that broad isthmus of the eastern Bay of Plenty, I think my friend is right we then could focus

evidence on two matters. One is the existence of customary rights that weren't extinguished and subsisted since time in memorial for my claimants and can I say in this regard, I'm a bit more optimistic than my friend about the Crown's response because they've actually just negotiated an agreement in principle with a group, which we challenged has the mandate to do that, which accepts that they can have agricultural rights in that area and I am wondering the consistency of an approach where we're litigating in this forum that there is no particular rights that need to be compensated for in an agreement when we're entering in this parallel, you know this is the other part of this negotiation process, which allocates agricultural rights almost exclusively to a mandated group that is challenged. If we could get over that hurdle and back to the gravamen of the case I think that we might find that the legal issues actually become much more narrower than your discussion with my friend suggested. If, however, the Crown does take a difficult approach, then my friend is very optimistic when he says that they're going to be having two days. I was a very young lawyer in the eastern Bay of Plenty inquiry and my friend behind me will talk about it, he was younger than I, but I think we're grey now but I recall something like a three-month hearing just on those legal issues alone. With having had the contextual factual matters agreed to in the main, they were cross-examined on them but I don't think they were largely challenged by the Crown. This legislation was, as to its legality and its simple civility, and it's got of course the Compensation Courts Act and anything else that followed. But, notwithstanding that, I've read this morning – can I say I'm critical of my friend, he forgets to serve me, I think they think I'm too old – so I never received his memorandum while I was in Ngāruawāhia yesterday. That's as much as a criticism. They just keep putting me of their lists I'm not too sure why. I would have put this in a memorandum for your Honour's benefit if I had had a little bit more notice, I've just come back this morning cross-examining Attorney-General for the Ministry of Health so I'm sorry that I haven't done any. But getting back, it could be a narrow hearing if we could get a memorandum together that set out the agreements that were actually negotiated not just between Ngāti Awa but also subsequently with the peoples of Tūhoe, who also have interests in this area and that piece of legislation is commented on in a number of Waitangi Tribunal reports beyond Wai 48. The Taranaki report also is apposite. I think they are two important pieces of jurisprudence in the history of our country in the way they deal with this travesty of injustice this piece of legislation. The gravamen would be the segue way of that finding and the factual requirement to show that with all the upheaval that occurred between 1863 and onwards, did we maintain contiguous relationships to those places and I'm saying we do because the Crown's recognising

it now in a negotiation process where an ARP's available to everybody that recognises those rights and while that's contested, the fundamentals aren't.

If we could get an approach. I'm very conscious of court time on this sir. I'm 57 now. I don't want to be here at 65 arguing it sir. That's what I can see in this particular case, because that's what happened the first time around and I'm just wondering we do need to have a pragmatic outcome I think for these kinds of matters.

COURT:

So the confiscations of 1865 were purported to be done pursuant to the 1863 legislation, is that it in a nutshell?

MS SYKES:

Yes, and that legislation has been agreed to in settlements by the Crown and a number of parties as being unlawful. So, I'm wondering you know, if we're going to litigate that and I agree that the Waitangi Tribunal's not binding on this Court I'm very conscious of that, but it will surely inform this Court as to an approach and can I say the legal arguments were exquisite at the time. Mr Harrison QC, Ngāti Awa had their own Queen's Counsel and I think in the Taranaki inquiry there was similar very experienced counsel and I think although I can't recall I think it might have been Mr Davidson for the Crown, but it was very well argued looking at the constitution on legality of those matters in that early period and I'm sure we could resurrect those arguments to assist us all in finding a common approach between the Crown and us as a way forward.

My second point is, I'm with Mr Sinclair though, my clients are elderly. I've already had one of my main claimants pass away and I can't afford the luxury of saying "let's wait till 2020". I may have no clients left and the biggest problem is affidavit evidence I capture and then it's cross-examination on that and the reality that some of them are now you know fading memories, having dementia and some of them are very ill, so I've been on everybody's case for these maps you see because that for me is why I want to crystallise the overlapping interests, the 1840 interests to the 1860, I'd have three different maps at different periods so that I could use the tohungatanga, the mātauranga, of those claims that I have that are still alive to assist me in doing those. I'm very conscious of the recent memorandum from the Crown about mapping, but it's very late. We have been writing to them almost weekly about maps. I got

that memo yesterday as well. Mr friend Mr Ward did serve me, but he didn't say how we're going to fund the maps. He assumes in his memoranda that funding is available from the current allocated funds. We've looked at it and the funds that are available are not targeted towards mapping. They're targeted towards traditional research and technical research and no mapping.

COURT:

Again, you'll have to educate me. Is this a policy position that has been adopted by OTS?

MS SYKES:

Yes sir. So, it's a very complex process. You have to apply and then you get assessed as to the relative complexity of your claim and you fall within three particular paradigms and then they allocate with it each of those allocations. If you're a \$250,000 you could spend so much on research, so much on legal appearances, so much on traditional research in the tagged funding and you can only uplift that funding if you can show that you've taken steps to achieve that. Of course, if you're a more complex claim, which I believe this one is, then you can apply for more and there's greater amounts that you can get. In our searching of those policies last night, we could see no specific allocation for mapping. Now, unless they're calling that under the rubric of technical research, which I would not suggest is actually what we would normally understand we've had to do. Certainly, in the Waitangi Tribunal there's always separate funding for mapping from research requirements. We have been working, my friend, Ms Bartlett, will talk about it, with senior counsel at the bar to look at a co-operative approach on mapping and Mr Bennion, as I've explained to you is our photographer and Mr Hirschfeld. Don't ask me anything about that, but we're quite happy to allow, say, two counsel, to work with a mapper that the Crown provides so we can get all of our bits and pieces done. There's been no movement on that since we came before your Honour earlier this year and I see resistance from the Crown for funding of this. I understand that the obligations of MACA are now to be moved to the new Ministry of Māori Crown Relations: Te Arawhiti. So, again, we are unsure as to the policy parameters of any change there because of course they're going to be co-located in a new environment. It's a bit difficult for us to assess what time delays may occur to that. But I am going to seek again directions for mapping and a meeting with the Crown and our nominated representatives from the bar to get a common set of maps and then I can use that to form my affidavit evidence to show why we say our part, exclusive rights is wherever in that mapping zone, and we could also give affidavit evidence of the kind of

Mr Williams' memo and highlight of the contiguous customary relationships that have been maintained in those territories. I think we can all get on this really, except the ones for Ngāti Awa but that's all I can say. I think that our friends over here may be feeling a bit lonely at the end of this but you know that collegiality I think will assist us in timetabling sir. But I was hoping we could get –

COURT:

So, you really want a hearing in 2019?

MS SYKES:

I want it timetabled so that we're exchanging affidavits by at least August 2019. I accept your proposition. Ms Tahana's much more knowledgeable but the criminal courts here. We're never going to get a hearing here before 2021.

COURT:

Well, let's not tie ourselves up too much in terms of physical location. We need a building, we need a Judge and we need a place for the lawyers and for the parties.

MS SYKES:

I was hoping we might settle it sir. This is how confident I am –

COURT:

Really?

MS SYKES:

If they get their settlement strategies right okay, but the propositions aren't disputed at a high level. Where they become entangled is who has the mandate to do what and so that may be a factual finding that we need from you on certain matters about you know the overlapping interests. I'm enamoured though by what happened in Australia with their courts and approaches. I would prefer that to what happened in fisheries. I'm a survivor of that sir, that was 12 years and I don't want that repeated here. So, I would every much implore the Court that we try and find a way to look at statements of memoranda that confine issues and statements of agreement between Crown and us about what are the disputed issues. I can't talk

for my friend. If they are going to dispute the findings of the Waitangi Tribunal about that legislation then that is going to be a very long legal argument.

COURT:

I appreciate there is some futility in this question, but how much hearing time do you think realistically I should be setting aside?

MS SYKES:

Six weeks sir.

COURT:

Thank you.

MS SYKES:

And, I would say, that in the room here most of us would require for tangata whenua and our technicals, three to four days depending on the cross-examination of the Crown, but at least six weeks and then of course, we would be wanting time, the Crown may not be able to do theirs in a week. Normally they do their's in a week in the Tribunal, but in this context they may ask for more time I think if they're going to contest firstly, the questions or the proposition about the legality of that legislation; secondly, about the contiguous nature of relationships notwithstanding that legislation, and then thirdly, the narrow issue which I think we should be all arguing is how we – the segue way between ss 51 and 58 and the tangata whenua evidence on these points.

COURT:

Thank you very much Ms Sykes.

Ms Tahana

MS TAHANA:

Thank you sir. In respect of Te Whānau-a-Apanui, they have a very, quite a limited interest in the proceedings before the Court and their interest relates to merely to Whakaari (White Island). They have filed an application to adjourn their MACA application and they are choosing to

deal with that in their Treaty settlement negotiations. But they do want to be heard in respect of these proceedings in respect of Whakaari.

COURT:

Are there other applicants for White Island?

MS TAHANA:

I couldn't tell you sir.

COURT:

I've looked at the map and it does get a bit confusing.

MS TAHANA:

I'm told everybody sir.

COURT:

Certainly the map that I looked at suggested that there were at least eight other claims that I could identify to White Island. If this matter does proceed to trial, from your perspective how much hearing time do you think will be required?

MS TAHANA:

I'd agree with my friend in terms of the –

COURT:

You've got two friends here.

MS TAHANA:

– six weeks, sorry Ms Sykes, the six-week duration. In terms of Te Whānau-a-Apanui's part in that I would have thought half to a day max. I also agree with the proposed, you know taking a common approach and where we can get an agreed statement that makes sense, also agree with the collaborative approach towards the mapping, that makes absolute sense. My instructions are they had only anticipated a hearing for 2019 and that was really in response to Mr Sinclair's memorandum indicating sort of a March/May date for the report. So we haven't

sort of confirmed 2020 with our clients as yet. So the preference would be certainly the exchange of evidence to get started in 2019.

COURT:

That is the very least I want to achieve.

MS TAHANA:

And preferably a hearing, acknowledging the constraints of the Court of course. In respect of Ngāi Taiwhakaea, my instructions are that they will be ready to go when the hearing is set down.

COURT:

Thank you very much Ms Tahana.

Ms Siciliano

MS SICILIANO:

Thank you sir. I am probably fall somewhere in between my two learned friends in terms of optimism with regards to settlement, so sir I certainly agree with Ms Sykes' submission that there should be scope for us to limit the legal issues and at least reach some agreement on certain issues to narrow the scope of those issues and so, with that said I also agree with the six-week total hearing timeframe. I suspect, subject to where we get to on those limiting the issue and legal issue, that uri o Mokomoko would need approximately three days hearing time and our clients would certainly support an August 2019 date for final exchange of evidence until the hearing whenever that may be.

COURT:

Thank you very much Ms Siciliano.

Ms Zwaan

MS ZWAAN:

Thank you Honour. My clients are in a bit of a slightly difficult position as they don't see themselves as part of a pool here. They see themselves as a separate iwi so there may be issues

around those concerns in terms of collaborating with counsel on particular issues. That said, I agree with Ms Sykes that as counsel we work quite collaboratively together and I will endeavour to do as much as possible on behalf of my clients, but just signalling that that may not be as smooth sailing as some of the other counsel in the room. That said, my clients have indicated that they would prefer a 2020 hearing as there's no current Waitangi Tribunal historical reports align they still need to commission his evidence and everything else required and the constraints around funding to date on that. Obviously, if the Court sets a deadline of August 2019 we will work towards that deadline in terms of exchange of evidence. I agree that a six-week hearing time sounds appropriate for the amount of issues that are currently on the table for this hearing, but if there could be a concession from the Crown around the confiscation that would obviously alleviate some of the legal issues that would need to be discussed in hearing. I have also had indications from my clients that they would need three to four days to present their evidence, including cross-examination on that.

COURT:

Thank you so much Ms Zwaan.

MS ZWAAN:

Thank you your Honour.

COURT:

Mr Webster

MR WEBSTER:

Yes, thank you sir. My friend took me back to a bygone era when my friend Mr Williams had more hair. It is correct that the eastern Bay of Plenty area was confiscated under the New Zealand Settlements Act just to carry on a bit from where my friend left you. There is, of course, land returns and they are caught under these investigations subsequent to that and then there's further legislation that then validates those particular actions because at times they may well have been unlawful under the New Zealand Settlements Act. So there's a range of factual and legal issues that do apply but the main I think factual issue is the extent to which a confiscation actually touched upon the Marine and Coastal Area and from my recollection it didn't but the issue of contiguous ownership of land of course is a matter that needs to be considered.

COURT:

Just go back one sentence. Are you saying that the confiscation didn't actually affect the foreshore?

MR WEBSTER:

Yes, that's correct sir. So it goes to, as far as I can recall, the mean high water springs. That's the boundary of the confiscation.

COURT:

Inland?

MR WEBSTER:

Inland, yes sir, yes.

COURT:

By some distance I presume?

MR WEBSTER:

But that's where the factual issues come in as the extent to which the proclamation, how far did it extend but I think usually it says the mean high water springs or something of that nature. I'm still off the top of my head but that's my recollection. So one has to look at the extent to which any confiscation proclamation extended beyond that or was limited to that or even further back from that. So there are those factual issues and then of course there are the land returns, which occurred in this case mostly around 1866. So if there was any interruption to the occupation by the iwi at that time, it was a very short period. But it was only in a legal sense, I mean they still lived on these properties –

COURT:

They still were physically present –

MR WEBSTER:

Yes.

COURT:

Is that so for all hapū and iwi?

MR WEBSTER:

No, there's some were dislocated because of the battles that occurred, the invasion by the Crown. There were for some, for example, one of the Ngāti Awa hapū lost most of its leaders to trials, there were executions and so forth, and their people then had to move here and there. Sometimes your hapū may not have received the same land you had so you had to shift to other lands. So it is a bit of a period of upheaval for the people and that's why I say there is a sort of complicated factual matrix to go through. I think from Ngāti Awa we have the benefit of having had an inquiry and the Tribunal's produced its raupatu report so they have a fairly extensive document bank on the raupatu events, and so forth. So they can rely on that.

In terms of, also following on, my friend indicated around Dr Harrison's submissions, that the Ngāti Awa raupatu report and the Taranaki raupatu report base their findings on the legality of the confiscations on an opinion done by Professor Jock Brookfield and seemed to have been the major piece of legal advice that was relied on at that time, so probably leaning more towards your Honour's indication that I think there is sufficient legal material there for us to rely on and make submissions on without the need necessarily for a legal historical kind of set of evidence required or some advice required of that nature, but I haven't looked into it in any depth but that's my recollection of what is currently available to us already.

In terms of the process, obviously my clients agree with the collaboration in terms of proceeded hearing. They're in this interesting position where they're caught in the middle of two priority applications. They're the Ngā Pōtiki one, which seems to be having a knock-on effect down the coast and then of course the Edwards application. So I think the issue around the scope of the hearing will depend very much on the nature and extent of our participation in that hearing, whether it's just as interested parties responding to the evidence or whether it's more efficient to hear Ngāti Awa at the same or similar time or close to it so that you're not hearing the same evidence twice. If only I can give an indication on what the answer to that is today because much will depend on the extent of the Whakatōhea applications, how far they extend to and that kind of thing and you know the readiness of my clients to proceed, but no issue with the timetabling that's been proposed. In terms of hearing time I suspect Ngāti Awa's going to need at least a week to two weeks. The reason I say that is, I'm currently involved in a Tribunal

inquiry for Motiti Island alone and we're already heading into week three and I'm taking that entire week for Ngāti Awa and where we're kind of just really scratching the surface in some respects so I think we could be, while I think refining it to days is very ambitious. I think it's a matter of weeks required and Ngāti Awa will have a substantial bank of evidence to present.

COURT:

I had been wondering about how I might try to ensure that this particular priority application gets heard at least hand in glove with the Tauranga one and then I, figuratively speaking, threw up my hands in despair as I realised well if I did that I'd probably would have to deal with eight priority applications simultaneously around the country. It's going to be messy. There's not going to be a clean solution. All we can do is honestly try to work towards mitigating as much mess as possible.

MR WEBSTER:

I agree that some co-operation and collaboration, whatever the views of our clients, is going to be necessary to make this work and I think it's incumbent on us as counsel to try and find some answers to that easy way forward for the Court to adopt. So that's my best estimations at the current time sir.

COURT:

I'm very grateful to you. Thank you, Mr Webster.

Thank you, Ms Bartlett

MS BARTLETT:

Thank you sir. I don't have much more to add other than Ngāti Patumoana supports the position advanced by my friend, Ms Sykes, in respect of the timetabling and mapping. Their preference is sooner rather than later. Mr Hata, who is the main advocate of this application is elderly and relies heavily on his daughter. In respect of the mapping, I have been engaged in discussions with Mr Apiti, who was proposed as the regional mapper for this application by Ms Sykes and he is also anxious to confirm matters as a way forward and to some extent has been engaged in discussions with his counsel, Ms Piripi.

That's all for this morning sir, thank you.

COURT:

Thank you so much, Ms Bartlett.

Mr Williams. I'm sorry for having –

MR WILLIAMS:

Yes, that's fine sir. Sir, it appears that I'm the only one, apart from Mr Sinclair, whose actually done any work and filed anything in writing so you'll have –

COURT:

Just before you get too confident I haven't seen any maps from you.

MR WILLIAMS:

Exactly sir, I was about to hit that very point. Well sir, I mean you would have heard Ms Sykes this morning and our clients' position is very similar analogous with that of Ms Sykes so they propose to repute what she's already gone through for you. Certainly I do propose that we take a collaborative approach on mapping. I think it's essential in order for this process to go forward so it's a matter which is also supported by our particular applicants. Similarly, with the evidence it's going to take some time once that is available. There is, and I find myself in the unusual position of agreeing with Mr Webster, that in terms of the research which should be made available I have to agree with both Mr Webster and Ms Sykes that the research that should be available in this process, you'll see from my memorandum they should be on the documentary sources so I take it into perspective that it should be more a historical research report as opposed to a legal one because as you've indicated, which I agree with that those legal positions should come from us as counsel. There is a wealth as both my colleagues have indicated of legal submission around the point around the New Zealand Settlements Act and so on and subsequent legislation in order for us to be able to I think put coherent submissions to the Court for you to consider. That said, in terms of the confiscation component, again I agree with my friend, Mr Webster, that the impact of the legislation of itself I don't consider had the overarching effect, which my friend Mr Sinclair indicates that it had on the people who actually continued to live on the land and you'll see that from the memorandum I filed and which is before you.

In terms of timeframe I would be expecting my clients would need at least a week in order to provide evidence to the Court and certainly keen on having the matter dealt with before the end of next year. Happy with the August 2019 indication for exchange of evidence.

Sir, unless there's anything further that pretty much covers the position.

COURT:

Thank you so much, Mr Williams. I'm very grateful to you.

Ms Mason

MS MASON:

Sir, the instructions from Mr Paul in terms of his whānau claim are to co-ordinate with the iwi which is Ngāti Awa. So his approach is to have an iwi and hapū and whānau co-ordinating together with a view to look at it in terms of two separate phases, one about whether is an interest at all and that's a matter of the application of the law to the facts as firstly establishing at tikanga what the interest was and then ascertaining what the facts are in a particular area and then it is sir for this Court and agree with my friend, Mr Williams, it's for this Court and legal submissions and the opinion of your Honour as to what facts or factors might have extinguished their title. It is the position of Mr Paul that confiscations –

COURT:

If it was in fact extinguished.

MS MASON:

Yes, if it was. All of it might have been extinguished or none of it and so we don't know that and that is the contentious legal position that I suspect the views between the Crown and the claimants is too far apart to be able to negotiate because from indications so far that the Crown considers that the customary title exists in small discrete areas and things like the ongoing ownership of adjacent land are very relevant matters. But sir the legislation doesn't actually say that. The legislation says that ownership of contiguous land may be relevant and it is the position of Mr Paul that in fact depending on the factual situation it's not relevant at all. So, as my friend has said, there might be places where land has been confiscated, but the tangata whenua have continued to occupy and use that area in the way that they always have and so

those sorts of questions may not need a lot of evidence. So that's the position of Mr Paul, but much of the argument is as between the different parties and the submissions of Mr Paul are that that matter can be sorted out at a later phase so long as all the parties feel assured that they're involved in the evidence. So they don't want someone saying "oh well, we were the only ones here" and because someone's later or wasn't able to participate their interests wasn't put on the table, which goes towards all of the parties co-ordinating in the instructions for historical or any other evidence and working together so there's support for Mr Sinclair calling facilitated hui.

Sir, one matter that's been raised before has this issue of funding. For instance, with the test case that we've put up for Ngāpuhi area, the Crown has said there's no funding for test cases. So there are real issues around funding and the way that that's administered. So, anyone who tries to do anything that's outside of the square that's not focused on your application proceeding in a certain way is penalised so the efforts of people to try and be creative, to try and be efficient are not actually being rewarded. So, I just wanted to say that.

So Mr Paul's claim, his iwi is Ngāti Awa and so his instructions are for counsel to work with my friend here representing the rūnanga and try and co-ordinate all the research. We're aiming for mid-next year for the evidence to be filed and Mr Paul also is elderly, he's 80 in a couple of weeks and he would like the matter to be heard next year and agree with my friend, Ms Sykes, that it would be useful to have timetabling now so we could all start panicking about what needs to be done. Sir, just to reiterate the submissions of Mr Williams and others and your comments sir, so the legal submissions really should be made by counsel and there's not really any need for legal historians. A lot of these matters are the legal matters for what the test of extinguishment is and should be as applied in New Zealand.

Those are my submissions, thank you sir.

COURT:

Thank you very much, Ms Mason.

Mr Sharrock

MR SHARROCK:

Sir, principally I agree with Ms Sykes with regards to (a) the amount of timing and issues of that. However, when it comes to the issue of – there's a certain piece of evidence that I think a legal historian would be of use and I've been in conversations with a number of counsel, I am thinking about Dr Frame because of his particular expertise in what I call the collision of jurisprudence where he has tried in various books like Iwakau and Grey to pass out the tikanga and has also been involved in the book on Māori Legal Words and Phrases to Find. The other thing that Dr Frame brings is a strong comparative understanding of customary title and the other islands of the Pacific so that what is there can be used to sort of reinforce understandings of what you believe is the tikanga here. That being said, I'd also like to say sir that I believe there needs to be a case to look at shall we say laminas of interference that almost started from 6 February in terms of acts of the Crown that interfered with enjoyment of Māori of the Foreshore & Seabed through regulations, orders, creation of Government offices, etc. So I just put that forward.

As to the amount of time depending upon whether Dr Frame's evidence is to be given, we have at the moment, effectively a "watching brief" in this area sir, and one of the hearings or in all of the hearings Dr Frame would probably take a day to deliver evidence. On the issue of funding, I am currently funding it because the system that the Crown seems to have does not sort of lead to sort of honest dealings in terms of making people do research and getting them paid within a reasonable period. So I'm just adding that footnote to the pain that I'm sure my brethren are expressing.

Thank you sir.

COURT:

Thank you Mr Sharrock.

Ms Gillies

MS GILLIES:

Thank you sir. In terms of mapping the Attorney-General's position is as we filed yesterday. I have instructions that the current funding applications do include a contribution to mapping.

I can seek further instructions on which part of the funding rubric that is if that's not already clear, but my understanding is that a contribution to mapping is currently included.

COURT:

So you'll take further instructions from OTS on that? How long does the MACA programme remain within OTS before it gets relocated into the new entity?

MS GILLIES:

I'm not certain of that timing at the moment, but I can take instructions on that as well.

COURT:

Because Ms Sykes does raise an interesting point that the changes in bureaucratic status causes other problems for parties trying to organise themselves for a hearing.

MS GILLIES:

Certainly, I understand that would be problematic. I can confirm what the timetable of that shift is and as I say I can confirm where the mapping funding currently sits within the funding allocations but my understanding is that a contribution does exist and otherwise as the Crown put in its memo yesterday we welcome the idea of a collaborative approach to mapping where possible.

COURT:

What do you say about the proposal from Mr Sinclair for a legal historian?

MS GILLIES:

I have no instructions on legal historians, that is historian in terms of that report. What I can say is that the Crown would consider its position as the case develops. Currently there's no evidence filed so in terms of whether or not the Crown might make any concessions in those areas that is something that I don't currently have instructions on and the Crown will consider

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COURT:

It sounds as if quite a lot of work has been done in at least two tribunal hearings possibly more, that could greatly assist the parties and the Crown in preparation and it certainly would assist

the Court if so much work has already been done on what is clearly a very fraught and difficult issue.

MS GILLIES:

Yes sir. My instructions are at the moment that it's for the applicant to satisfy the statutory test and whether the statutory test is met will depend on the evidence and the Crown will consider its position as the case develops and that evidence is filed.

COURT:

And what the legal implications are of the evidence. There may be a high degree of agreement ultimately on the facts after so many inquiries. It may be possible that there is a high degree of agreement on the facts, but the legal consequences which flow from that might be quite contentious.

MS GILLIES:

Indeed. That's correct sir. The Crown will consider its position as things develop. Otherwise in terms of timing no evidence has been filed yet. The applicant has indicated that they are currently compiling evidence that that might be filed some time between March and May next year. Obviously, that time needs to be provided for that evidence to be filed and then there needs to be a time for the Attorney to prepare and file evidence in response. Otherwise the only other thing to add is that the Attorney welcomes the suggestion that the applicant and other applicants and interested parties might have a hui to discuss overlapping issues to the extent that any overlapping issues can be discussed and agreed in advance of any hearing that seems like a good thing.

COURT:

That would be very helpful. As I said in my standard minute I'll be encouraging people to reach agreement as much as they possibly can on mapping. I think Ms Sykes and others have been absolutely right when they say that mapping is going to be the key to a lot of these problems.

MS GILLIES:

Yes sir. Otherwise I don't think I have anything further to add at this stage.

COURT:

Thank you so much Ms Gillies.

Now, does any other counsel wish to say anything in response to anyone else has said? Mr Sinclair, you've been quietly listening.

MR SINCLAIR:

Thank you sir. In response sir let me say that the 2019 proposed timetable period would be supported by the applicant sir. The collaborative approach to mapping is supported. The issue of funding, whether the Crown is going to fund or not sir is at this moment uncertain. As far as we were concerned sir we did not feel that that was included in the current matrix of funding. However, we stand being corrected and have that matter clarified.

Sir, facilitated meetings and hearings with counsel going forward sir I would propose that the first one take place after this hearing if my learned colleagues would agree to that. Very difficult to get us all together in one teleconference so I put that to the table today sir.

Sir, when I mentioned a two-day hearing timetable sir I meant that the witnesses.

COURT:

Your evidence.

MR SINCLAIR:

Yes, the witnesses that we currently have sir and one of the main reasons for that sir I should have made it clear, that several of our witnesses sir have passed on. Their evidence is with us and we have recorded tapings of some of those that have passed on. In regard to the overall hearing period sir I have not discussed that with my other colleagues but certainly a six-week time period would be in the ballpark.

Regarding the legal historian report sir, I'm not convinced by my colleagues relying on past Waitangi reports. Sir, in my view the Crown are only interested sir in whether my applicant, my client sir meets the test in 55 and 56 and I want to be very certain sir that if my clients are going to be put to that test that that period of 1865 when they were removed from whether its access to their coastal lands or whether the coastal lands itself were confiscated, sir I believe

that's still a grey area and until work is done on that I'll maintain that position. Sir, it may not require a full historical report as I've suggested, but it's certainly something more sir than relying on submission taken from Waitangi Tribunal reports relating to other areas.

Sir, I am mindful, and we have discussed the issue that many in Whakatōhea have continued on exercising customary rights and purporting to have authority over a particular area. Sir, the test of that is whether they could do and have such rights over that area to the exclusion of others. In fact sir, to exercise such rights over that area of land, such as a purported owner would exercise. That sir is the test that we're looking at and being removed to a small reservation sir, such as Ōpape and other reservations, well frankly sir it doesn't help my clients. They have been removed to reservations sir. That purported reservation land is not traditional land sir. So these are some of the sorts of issues and discourse that we want to address sir and my clients cannot rely on facilitated meetings with the Crown in coming to some sort of agreements of agreed areas that would somehow come to a position where we've agreed that they were confiscated lawfully or unlawfully when really s 51 and s 58 is the final test that we'll have to get our clients across sir.

Sir, in regard to the map for the applicants. Sir there has been no definitive map as yet and I've been instructed sir the reason for that was very deliberate. They were going to rely on the research that is going to be carried out by a historian to do that. Now the map sir that's been put forward by the Whakatōhea Trust Board at the moment which goes in a basically triangle shape which goes out to include White Island sir is certainly not indicative of the map that our clients will be forwarding to the Court. White Island certainly will be included in my clients' mapping.

Sir, if there's no further questions that ends the submissions for the applicant.

COURT:

Thank you very much, Mr Sinclair.

Is there anyone else who wished to – Ms Sykes?

MS SYKES:

Sir, only a couple of matters. So we exchange evidence but I'm wondering if we could also be thinking about timetabling on two kind of judicial conferences. I am still optimistic that the Crown and ourselves will narrow issues and that would need to occur after the evidence so that kind of conference. I'm also wondering if we don't facilitate ourselves into a position of agreement in the overlapping situation whether we could use a mediated assistance of the Court. I'm just trying to avoid that becoming the focus of the hearing. I am mindful of comments my friend, Ms Mason, made. So, I was just thinking that if we are and if we did that and you know with the greatest respect to all of us I don't think we'll have any hearing in 2019 if those two extra interlocutory arrangements were factored into our thinking. In all realism, I think we'd be 2020 for those matters to be disposed of first. That's the only matter I forgot to raise and it was Ms Mason that's triggered that comment sir.

Thank you very much Ms Sykes.

Does anyone else wish to say anything?

COURT:

If not, I thank you all for coming. I will issue a minute. It probably won't be until towards the end of next week and I will do my very best to put in place a timetable. Mid-way through next year I will hold another case management conference. We may need to monitor progress in getting the evidence together and making sure that all other interlocutory matters are able to be addressed and locked down hearing times so that we can all move forward hopefully in a systematic way.

Ms Mason, I know in relation to another matter you sought an extension of time for filing further submissions which I granted. Do you need any more time?

MS MASON:

No sir. We're just waiting on a witness on some evidence to be put in an affidavit and the person was away overseas but next Friday is fine.

COURT:

Next Friday is fine?

MS MASON:

Yes sir.

COURT:

Excellent. Thank you very much.