IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2017-485-770
[2019] NZHC 2360

IN THE MATTER OF	an application by TE RŪNANGA O NGĀTI WHAKAUE KI MAKETŪ INCORPORATED, for an on behalf of NGĀTI WHAKAUE KI MAKETŪ HAPŪ, for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (AND OTHER PROCEEDINGS LISTED IN THE SCHEDULE TO THIS JUDGMENT)

CIV-2017-485-218

IN THE MATTER OF	an application by HORI TURI ELKINGTON as trustee of the NGĀTI KOATA TRUST for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 (AND OTHER PROCEEDINGS LISTED IN THE SCHEDULE TO THIS JUDGMENT)

On the papers:

Counsel:
J Mason for Applicants (CIV-2017-485-398, CIV-2017-485-512, CIV-2017-485-515, CIV-2017-485-513, CIV-2017-485-514, CIV-2017-485-770)
L Thornton (CIV-2017-404-574, CIV-2017-485-387, CIV-2017-485-249)
C Hockly (CIV-2017-485-305, CIV-2017-485-352, CIV-2017-485-228)
A Sykes (CIV-2017-485-299)
T Bennion (CIV-2017-485-253)
J Kahukiwa (CIV-2017-404-572, CIV-2017-404-568, CIV-2017-404-566, CIV-2017-404-569)
B Lyall (CIV-2017-404-556)

C Finlayson QC and A Dartnall for Gold Ridge Marine Farm Group (an Interested Party)
D Ward and Y Moinfar-Young for Crown

Judgment: 18 September 2019

JUDGMENT OF CHURCHMAN J
[Interested Party Participation]

Background

[1] Section 104 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act) provides that:

> Any interested person may appear and be heard on an application for a recognition order if that person has, by the due date, filed a notice of appearance.

[2] Gold Ridge Marine Farm Group (the Interested Party) had filed notices of appearances in relation to some 15 separate applications for recognition orders.[1]

[3] During the course of the case management conferences (CMCs) held in 2018 in relation to all applications under the Act, a number of applicants and interested parties raised issues relating to the basis upon which the Attorney-General would participate in hearings under the Act. In response to the expression of those concerns, the Attorney-General filed a memorandum which satisfied the concerns of many of the applicants.

[4] A minute of Collins J recorded that eight counsel had, on behalf of at least 35 applicants, filed notices under r 10.15 of the High Court Rules (the Rules) seeking a determination of a question of law. That question was described as essentially being to have the Court determine the status of the Attorney-General.[2]

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1 A list of the relevant application numbers and the names of the applicants is set out in Schedule 1 to this judgment.

2 Minute of Collins J in CIV-2016-485-770 and CIV-2017-485-218 dated 17 September 2018.

[5] That minute noted that Seafood Industry Representatives (another interested party) had applied under r 10.15 for a similar determination and that a further interested party, The Gibbs Foundation Limited, had also filed a memorandum in support of that filed by the Attorney-General.

[6] No objection was taken to either of the interested parties filing their memoranda.

[7] The issue of the role of the Attorney-General was again raised during the 2019 CMCs. It became clear that a hearing would be required to address the applications under r 10.15. In a minute of 25 July 2019, I directed that a hearing of the outstanding applications would take place on 7 and 8 October 2019 and set a timetable order in respect of that hearing.[3]

[8] The first matter timetabled was a judicial conference to be held by way of teleconference at 9:00am on Wednesday, 21 August 2019. Participation in that teleconference as limited to parties who had made applications under r 10.15 and who still wished to pursue such applications.

[9] The minute directed that not less than 10 working days prior to the teleconference, the applicants would file and serve memoranda outlining the specific issue or issues in relation to the role of the Attorney-General that they wished the Court to address. The Attorney-General was required to file a memorandum in response not less than five days prior to the teleconference. The minute recorded that at the teleconference the Court would set a timetable order for the filing of submissions. Memoranda were duly received.

The Interested Party's application

[10] On the day before the scheduled teleconference, an application was received from the Interested Party pursuant to r 10.15 seeking an order determining the role and status of the Attorney-General as a preliminary matter. The question posed in that

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[3] Minute (No 2) of Churchman J, CIV-2017-485-218, 25 July 2019.

application was: “Should the Attorney-General adopt the role of contradictor in all applications for recognition orders?”

[11] Filed along with the application was a memorandum in which counsel sought leave to be included in the teleconference scheduled for the following day.

[12] The justification for the Attorney-General adopting the type of role advocated by the Interested Party included:

(a) putting applicants to proof;

(b) ensuring the Court has the benefit of full argument;

(c) representing interests of unregistered parties [sic].

[13] The memorandum noted that the first purpose of the Act was to establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand and it was submitted that the interests of all New Zealanders, including those who would be adversely affected by recognition orders, needed to be represented.

[14] Leave was granted permitting the Interested Party to participate in the teleconference so that the Interested Party could explain their eleventh-hour application. Beyond the fact that counsel had only just been instructed, no explanation was given in the memorandum as to why the Interested Party had not previously filed their application under r 10.15.

Opposition to the Interested Party’s application

[15] During the course of the teleconference, it emerged that some counsel who had filed memoranda ahead of the 7 and 8 October hearing, objected to the Interested Party’s application for leave to participate in that hearing and on that basis, a timetable was set for the filing of submissions in support of their opposition with the Interested Party having a right of reply.

[16] Three memoranda in opposition were received. One of those memoranda was received from Mr Lyall, on behalf of the applicants he represents.[4]

[17] Mr Lyall had not previously filed submissions in this matter and had not participated in the teleconference on 21 August 2019. However, the application by Ngāti Porou ki Hauraki was one of the applications that the Interested Party had filed a notice of appearance in respect of.

[18] The memorandum from Mr Lyall noted that his client had not previously made an application under r 10.15 and, until the application by the Interested Party, had not intended to be involved in the hearing scheduled for 7 and 8 October. Given what was described as the potential "repercussions" for the application by Ngāti Porou ki Hauraki, Mr Lyall sought leave to make submissions. Mr Lyall also asked to be heard should any further fixture be convened. Those applications were not objected to by the Interested Party or any other applicant and are accordingly granted.

Grounds of opposition

[19] The grounds advanced by Mr Lyall were that an applicant under r 10.15 must show that there is good reason to split a preliminary issue from the trial and that it "… must do so individually, and not be allowed to, effectively, piggyback on other applications for orders under rule [10.15] already before the Court."

[20] It was further submitted that the Interested Party was only interested in 15 applications and it was said that those 15 applications must be permitted to manage their applications, not interested parties. It was also submitted that the hearing (presumably the 7 and 8 October hearing) "would take additional time, and applicants would be forced to incur significant costs".

[21] Effectively, Mr Lyall submitted that the role of the Attorney-General was not an appropriate matter to have a preliminary hearing on because a decision one way or another would not end the litigation, and there would be the prospect of multiple

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4 CIV-2017-404-556, John Henry Tamahere, on behalf of Ngāti Porou ki Hauraki.

appeals. Mr Lyall also raised the question of whether the Court had jurisdiction to compel the Crown to act as contradictor.

[22] The other memoranda received were from Mr Kahukiwa[5] and Ms Mason.[6]

[23] Mr Kahukiwa submitted that three issues were raised by the Interested Party's application:

(a) Is the HCR 10.15 question a legitimate one?

(b) Does Gold Ridge have standing?

(c) Is there any issue with Mr Finlayson's appearance for Gold Ridge?

[24] It noted that Gold Ridge had filed no evidence about themselves including reasons for what was described as "their late showing", and that they had not explained how the Attorney-General actually prejudiced their position vis-à-vis the applications filed under the Act.

[25] Mr Kahukiwa submitted that it was constitutionally beyond the powers of the Court for the Court to positively compel the Attorney-General's appearance in the public interest. He claimed that private citizens are unable to advance public law rights unless they were able to show that the interference with the public law right is such that some private law right is thereby interfered with, or that they suffer some special damage peculiar to themselves.

[26] Mr Kahukiwa submitted that the convention that former Judges do not appear in Court once they retire also applied to former Attorneys-General.

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5 On the behalf of the applicants in CIV-2017-404-572, CIV-2017-404-568, CIV-2017-404-566, and CIV-2017-404-569.

6 On the behalf of the applicants in CIV-2017-485-398, CIV-2017-485-512, CIV-2017-485-515, CIV-2017-485-513, and CIV-2017-485-514.

[27] Ms Mason's memorandum contained what was, in substance, a new application under r 10.15 determining the following question: "In-principle, what approach will the Court take on the issue of costs in these proceedings?"

[28] The memorandum noted that Ms Mason had received instructions to oppose both the Gold Ridge's application and the involvement of Mr Finlayson QC as counsel but did not explain the grounds of opposition. It sought an adjournment of the 7 and 8 October hearing and said that she reserved the right to file the submissions opposing the involvement of Mr Finlayson and Gold Ridge once a determination on the in-principle costs application had been made.

Adjournment and request to extend scope of August hearing refused

[29] By minute of 5 September 2019,[7] I refused the request to extend the 7 and 8 October hearing to include a consideration of the "in-principle costs" issue and confirmed that the October hearing would not be adjourned.

The Interested Party's submissions

[30] On 6 September 2019, a memorandum of counsel for the Interested Party was received from Ms Dartnall.

[31] That memorandum submitted that Gold Ridge's involvement in the hearing scheduled for 7 and 8 October would not affect the time allocated to hear the matter, nor change the focus of the hearing. It noted that the jurisdiction of the Court as to the orders it could make, did not affect the validity of Gold Ridge's application under r 10.15. It noted that, in relation to the Ngāti Porou ki Hauraki's application, that the next event date scheduled was for a CMC on 8 July 2020, and this would not be delayed by the Interested Party's application.

[32] In response to Mr Kahukiwa's memorandum, it was noted that what Gold Ridge sought was an order from the Court determining, as a preliminary matter, the role and status of the Attorney-General in applications for recognition orders under the Act. It was noted that this was not dissimilar to the nature of the orders sought by the

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7 Minute (No 3) CIV-2017-485-770 and CIV-2017-485-218, 5 September 2019.

various applicants that were to participate in the 7 and 8 October hearings although it was acknowledged that the specific question asked was different.

[33] In relation to the argument that its involvement would merely be a duplication of the Attorney-General's involvement, it noted that as the Attorney-General had yet to file submissions and nor had Gold Ridge, there was no basis for assuming that Gold Ridge's position would simply mirror that of the Attorney-General. The memorandum denied that Mr Finlayson's prior role as Attorney-General affected his right to appear in these proceedings.

Analysis

[34] Counsel were agreed that the underlying purpose of r 10.15 was to expedite proceedings by limiting or defining the scope of the trial in advance or obviating the need for a trial altogether. It is not necessary that both of these purposes be achieved and, in relation to the various applications made by the applicants under r 10.15, none have suggested that the need for a hearing of any of the applications would be avoided. All rely on the alternative objective of limiting or defining the scope of the trial in advance.

[35] I conclude that the clarification of the role of the Attorney-General in relation to applications for orders under the Act is a matter that does have the potential to expedite proceedings by limiting or defining the scope of hearings.

[36] Notwithstanding Mr Lyall's submission to the contrary, I am satisfied that the issue of the role to be played by the Attorney-General in the hearing of applications under the Act is a matter that is properly the subject of an application under r 10.15. The resolution or clarification of that issue is likely to satisfy the underlying purpose of r 10.15 in that it will expedite applications under the Act by limiting or defining the scope of the individual hearing.

[37] The issue that is the subject of the Interested Party's application under r 10.15 is the same issue that has been raised by the various applicants and set down for hearing on 7 and 8 October, namely what is the proper role to be played by the Attorney-General. It makes no sense for there to be a duplication of hearings in

relation to this matter, and it is difficult to see how the involvement of the Interested Party in the scheduled hearing is likely to have any significant effect on the duration of that hearing, or to disadvantage any other party.

[38] Mr Lyall's submission that the Interested Party should not be permitted to "piggyback on the other applications … already before the Court" is difficult to understand. The most expeditious and efficient manner of dealing with applications under r 10.15 that seek determination of the same issue is to determine them at the one hearing. It is not a question of "piggy-backing" but of addressing issues expeditiously.

[39] Mr Lyall argues that the 15 applicants whose application the Interested Party has filed a notice of appearance in, should be "permitted to manage their own applications, not interested parties seeking orders under r 15.5 [sic]." The ruling that the Court will make following the hearing on 7 and 8 October on the role of the Attorney-General will be of significance to all applications. That will be the case whether or not the Interested Party participates in that hearing. Therefore, the involvement of the Interested Party in the hearing has no impact on the ability of any applicant (including Mr Lyall's client) to "manage their applications".

[40] Mr Lyall's claim that the hearing on 7 and 8 October "… would take additional time, and applicants will be forced to incur significant costs" is unfounded. The hearing has already been scheduled and the involvement of the Interested Party will not delay it. The involvement of the Interested Party will have no impact at all on the hearing of the application for orders under the Act by Mr Lyall's client.

[41] As to the application causing Mr Lyall's client to incur significant costs, the involvement by the Interested Party in the hearing on 7 and 8 October will not appreciably change the costs incurred by any party who wishes to participate in that hearing.

[42] Mr Lyall submits that the consequence of permitting the Interested Party to participate in the hearing on 7 and 8 October could be "An appeal by either the Attorney-General, Gold Ridge, or one of the 202 applicants." He does not explain why the Attorney-General might be more likely to appeal if the Interested Party

participates. To date, the Attorney-General has not expressed a view either way as to whether the Interested Party should be able to participate in the hearing and appears to abide the decision of the Court.

[43] The claim that any one of the 202 applicants might be liable to appeal is incorrect. Those parties having appeal rights in relation to the hearing on the r 10.15 applications are the parties who participate in that hearing. That number will increase by one if the Interested Party participates.

[44] Mr Lyall's memorandum also addressed the substance of the Interested Party's application, in particular, the jurisdiction of the Court to grant the relief sought. However, that is not a matter which goes to the issue of whether the Interested Party should be permitted to participate in the hearing. Rather, it is relevant to what the substantive outcome of the hearing should be.

Other grounds of opposition

[45] Turning now to Mr Kahukiwa's arguments and, to the extent that they are different, Ms Mason's arguments. Mr Kahukiwa's first point was that the question posed in the application by the Interested Party was not "legitimate one". However, as discussed in [44] this confuses the nature of the application with the relief sought. The application was for "… an order determining the role and status of the Attorney-General as a preliminary matter in advance of hearing the substantive applications listed in the Schedule." That is the same issue that the other parties who have filed r 10.15 applications have sought to have the Court address.

[46] Mr Kahukiwa submitted that as the Attorney-General was representing the public interest any involvement by the Interested Party in the October hearing would "only result in additional and unnecessary costs that joint applicants can ill afford".

[47] As discussed above, whether or not the Interested Party participates in the October hearing, each of the other parties are already committed to preparing and presenting their own cases and will incur those costs in any event. The real issue is whether or not it is more efficient for the Interested Party's application under r 10.15

to be dealt with at a separate hearing, or whether it should be dealt with as part of the October hearing.

[48] As discussed above, the answer to that question favours the Interested Party being permitted to join the scheduled hearing.

[49] Separately to his submissions in opposition to the Interested Party being permitted to join the October hearing, Mr Kahukiwa objects to them being represented by Mr Finlayson. It is not easy discern in the precise nature of the grounds for this objection. Mr Kahukiwa submits:

> It is also to be inferred that the position that the Attorney-General takes in response to the Joint Applicants' applications for recognition orders, in not only opposing their pleas, but also going further asserting that any such applications were not factually and legally compliant, they were in effect, untenable under the Act, was initiated under his [Mr Finlayson's] term of office.

[50] Mr Kahukiwa also submits:

> Mr Finlayson's appearance therefore raises questions. It raises questions about whether there will be influence, in having the former Attorney-General appear in Court advocating in relation to the present Attorney-General, and inevitably (it is submitted) the work done by him during his time, the risk of him having a platform to justify his past work, and whether in overall terms the hearing will be seen to be fair.

[51] These submissions assume that somehow that Mr Finlayson will be able to influence counsel representing the current Attorney-General in an improper way. It also assumes that Mr Finlayson would wish to use his position as a Barrister to make political points. There is no valid foundation for either assumption. They are also not matters that the Court would countenance.

[52] The Attorney-General is represented by senior and able counsel who take their instructions from the Attorney-General, not from Mr Finlayson.

[53] This case is not about the former Attorney-General "justifying his past work". It addresses a legal issue that arises in respect of all applications under the Act.

[54] Mr Kahukiwa raises, by analogy, the convention that retired Judges do not appear before the Court. The basis for that convention is that the appearance of unfairness would be created if a former Judge appeared as counsel in the Court that they were formerly a member of.

[55] While, as Mr Kahukiwa correctly notes, there are times when an Attorney-General is required to act in an impartial and even a quasi-judicial way,[8] the Attorney-General is not a Judge. The Attorney-General's role is that of Chief Legal Advisor to the Government. Sometimes they are referred to as the Senior Law Officer of the Crown (with the Solicitor-General being known as the Junior Law Officer). While holding that office, they are entitled to appear in Court, both in New Zealand and internationally in fora such as the International Court of Justice.

[56] There is no convention parallel to that relating to Judges which dictates that a former Attorney-General is prohibited from appearing in Court or practicing as a barrister or solicitor after they cease to be Attorney-General.[9]

[57] Prior Attorneys-General such as Sir Geoffrey Palmer have practiced as both a solicitor and a barrister since leaving office.

[58] Both Mr Kahukiwa and Ms Mason rely on the case of *Black v Taylor* in support of a submission that Mr Finlayson has a conflict of interest which would disqualify him from appearing as counsel.[10]

[59] The case of *Black v Taylor* involved a lawyer acting against a former client in circumstances where he had received confidential information as a result of the solicitor-client relationship that was relevant to the matter at hand, and where there was a real risk that such information could be used to the prejudice of the former client.

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8 See *The Office of the Attorney-General,* Rt Hon Sir Elwyn Jones [1969] CLJ 43 at 50.

9 Neither is there any such prohibition on the Junior Government Law Officer, the Solicitor-General. The most recent former Solicitor-General, Michael Heron QC, upon leaving that office, resumed active practice as a barrister.

10 *Black v Taylor* [1993] 3 NZLR 403.

[60] The Court of Appeal upheld the original decision of McGechan J and also noted that on this fact scenario, there may well also have been a potential breach of the fiduciary duty owed by the lawyer to his former client.

[61] Obviously, none of the applicants under the Act could be said to be former clients of Mr Finlayson, so he could not have acquired confidential information as a result of a solicitor-client relationship. The real question is whether some of the broader principles articulated in *Black v Taylor* can be applied by analogy in the present instance.

[62] It is asserted by Ms Mason that:

> Mr Finlayson would have been privy to a substantial amount of confidential and privileged information relating to Māori interests generally, and specifically in relation to the MACA, and it is improper for that information to now be used to support elements of the marine farming industry in a manner which is diametrically opposed to Māori interests, and to the applicants' interests.

[63] No examples of such confidential information are given.

[64] The issue for determination in October is the legal question of the role to be played by the Attorney-General in applications under the Act. It is a generic issue not focusing on any individual applicant. There will be no examination by the Court of any individual application nor will the Court make any findings of fact about any individual application.

[65] In *Black v Taylor*, the Court emphasised that in that particular case, issues of credibility were potentially crucial and the knowledge of the personality of the former client gained through acting for him as his solicitor, was relevant. It was noted that in those circumstances a former client would have a fear that they might be cross-examined from the position of superiority.

[66] In the hearing in October, there will be no oral evidence and no question of cross-examination. That fact also distinguishes this case from *Black v Taylor*.

[67] Significantly, the Attorney-General has not taken any objection to Mr Finlayson appearing on behalf of the Interested Party. While the position of the Attorney-General vis-à-vis Mr Finlayson, is not directly analogous to that of the lawyer's former client in the case of *Black v Taylor*, it is arguably closer than that of any of the applicants.

[68] Irrespective of whether a case falls within the factual scenario of *Black v Taylor*, the Court has an inherent power to restrain a barrister from acting in any particular case where the interests of justice so require. In *Hana New Zealand Ltd v Stephens*, Asher J said:[11]

> An aspect of the inherent jurisdiction is that the Court may control a particular proceeding to ensure that justice is administered properly, to preserve confidence in the judicial system. The Court has an obligation to ensure a fair hearing, and as part of that concern it has the ability to determine who should appear before it as an advocate.

[69] In exercising that inherent power, the Court must also balance the rights of the party who wishes to retain the barrister whose participation is being challenged and the obligations on the barrister him or herself.

[70] In the case of *Clear Communications v Telecom Corporation of New Zealand*, Fisher J said, "Litigants should not be deprived of counsel of their choice without good reasons."[12]

[71] He went on to say, "that something "truly extraordinary" was required before removal of counsel could be ordered."

[72] The Interested Party's solicitors wish to retain Mr Finlayson. He has an ethical obligation to accept briefs that are within his area of practice and where he does not have a conflict of interest.

[73] In the present case, I am satisfied that there is nothing relating to the Court's obligation to ensure a fair hearing that would disqualify Mr Finlayson from appearing

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11 *Hana New Zealand Ltd v Stephens* [2007] 1 NZLR 833 at [11].
12 *Clear Communications v Telecom Corporation of New Zealand* (1999) 14 PRNZ 477 at 483.

for an Interested Party in the hearing on the preliminary question to take place on 7 and 8 October in this matter.

Outcome

[74] The Interested Party's application to participate in the preliminary hearing is granted.

[75] Mr Finlayson is permitted to appear as counsel for the Interested Party in the hearing on 7 and 8 October 2019.

[76] Costs are reserved.

Churchman J

Solicitors:
Phoenix Law, Wellington
Lyall & Thornton, Auckland
Hockley Legal, Auckland
Annette Sykes & Co Ltd, Rotorua
Corban Revell, Auckland
Bennion Law, Wellington
Franks Ogilvie, Wellington
Crown Law, Wellington

SCHEDULE 1

Application Number	Applicant Name
CIV-2017-485-187	Veronica Bouchier on behalf of Taumata B Block Whānau owners
CIV-2017-485-188	Veronica Bouchier on behalf of the following applicant groups: Pakiri G-Block 308 11 owners; Omaha 1 and Omaha 2 owners; Hauturu (Little Barrier) owners; Mahuki Island (Gannet Island) owners; Motairehe 2B1 and 4B1 owners; Motutaiko Island owners
CIV-2017-485-222	Nicholas Hiwi Singh, Russell Charles Karu, Kerry Karu, Phyllis, Mott, Bessie Gage and Amelia Amy Tuihana Williams as trustees of Ngāti Tara Tokanui Trust on behalf of Ngāti Tara Tokanui
CIV-2017-485-250	Ngāti Pukenga represented by Te Tawharau o Ngāti Pukenga
CIV-2017-485-276	Arapeta Hamilton for and on behalf of Ngāti Rongo o Mahurangi
CIV-2017-404-480	Joseph Davis of Wharekaho, Whitianga on behalf of Ngāti Hei Charitable Trust Incorporated
CIV-2017-404-482	Wanda Brljevich of Coromandel
CIV-2017-404-483	Edward Shaw of Rotorua
CIV-2017-404-518	Jasmine Whakaarahia Cotter-Williams and Faenza Bryham on behalf of Ngāti Taimanawaiti
CIV-2017-404-528	Kenneth John Linstead of Auckland
CIV-2017-404-538	Rihari Dargaville
CIV-2017-404-556	John Henry Tamihere on behalf of Ngāti Porou ki Hauraki
CIV-2017-404-564	Ngāi Tai ki Tāmaki Trust on behalf of Ngāi Tai ki Tāmaki
CIV-2017-404-574	Michael John Beazley on behalf of Ngāti Rehua/Ngātiwai ki Aotea and related hapū
CIV-2017-404-582	Te Whānau-a-Haunui (Royal Family)