IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CIV-2017-404-305

UNDER	the Marine and Coastal Area (Takutai Moana) Act 2011
IN THE MATTER	of an application for an order recognising Customary Marine Title and Protected Customary Rights
BY	TAMIHANA PAKI on behalf of TE PARAWHAU First Named Applicant
AND	KOROKOTA MARAE on behalf of TE PARAWHAU HAPŪ Second Named Applicant

Continued .../2

Hearing: 12 September 2024

Counsel:
C Hockly for Te Parawhau (CIV-2017-485-000305)
R and M Enright for Korokota Marae on behalf of Te Parawhau Hapū (CIV-2017-485-799)
K Dixon, L Tothill and T Talamaivao for Patuharakeke Te Iwi Trust Board (CIV-2017-485-281)
M Chen and C Saunders for Te Rūnanga o Ngāti Whātua (CIV-2017-404-563)
J P Kahukiwa for Te Waiariki, Ngāti Korora, Ngāi Takapari (CIV-2017-404-566)
J Inns and K van Wijngaarden for Ngāti Wai (CIV-2017-485-283; CIV-2017-404-554)
J Mason, U Kuddus, P Corbett for Ngāti Kawau (CIV-2017-485-398); Ngā-Puhi-nui-tonu (CIV-2017-404-537)
Reti Whānau (CIV-2017-485-515)
T Bennion and O Ford Brierley for Ngāti Pūkenga (CIV-2017-485-250)
C Terei-Tipene for Ngāti Hine (CIV-2017-485-231)
T Afeaki and G Erskine for Ngā Hapū O Tangaroa aki Te Ihu o Manaia tae atu ki Mangawhai (CIV-2017-4047-579)
J Golightly for North Port Limited
J Golightly for Marsden Cove Management Ltd

C Simmons, E Ellis for Channel Infrastructure NZ Ltd
R Roff and Y Moinfar-Yong for Attorney-General

Minute: 14 September 2024

MINUTE OF HARVEY J
[Application for leave to file late evidence]

Continued …

CIV-2017-485-799
CIV-2017-485-2841
CIV-2017-404-563
CIV-2017-404-566
CIV-2017-485-283
CIV-2017-404-554
CIV-2017-485-398
CIV-2017-485-250
CIV-2017-485-231
CIV-2017-485-515
CIV-2017-404-573
CIV-2017-404-579
CIV-2017-404-537

AND

PATUHARAKEKE TE IWI TRUST BOARD
Third Named Applicant

ALAN RIWAKA, Chief Executive of TE RŪNANGA O NGĀTI WHĀTUA
Fifth Named Applicant

PERERI MAHANGA on behalf of TE WAIARIKI NGĀTI KORORA, NGĀTI TAKAPARI
Sixth Named Applicant

NGATIWAI TRUST BOARD on behalf of NGATIWAI
Seventh Named Applicant

KARE RATA on behalf of NGĀ HAPŪ O NGĀTI WAI
Eighth Named Applicant

LOUISE COLLEYR on behalf of NGĀTI KAWAU and TE WAIARIKI KORORA
Ninth Named Applicant

TE TAWHARU O NGĀTI PŪKENGA on behalf of NGĀTI PUKENGA
Tenth Named Applicant

TE RŪNANGA O NGĀTI HINE on behalf of NGĀTI HINE
Eleventh Named Applicant

ELVIS RETI on behalf of the RETI WHĀNAU
Twelfth Named Applicant

MAIA HONETANA on behalf of NGĀ TAHUHU NGĀATI TU KI NGĀTI KUKUKEA
Thirteenth Named Applicant

WAIMARIE KINGI on behalf of NGĀ HAPŪ O TANGAROA AKI TE IHU O MANAIA TAE ATU KI MANGAWHAI
Fourteenth Named Applicant

JOSEPH KINGI on behalf of NGĀPUHI NUI TONU, NGĀTI RAHIRI, NGĀ TAHUHU and NGAITAWAKE

AND

NORTH PORT LIMITED,
MARSDEN COVE CANALS MANAGEMENT LIMITED,
CHANNEL INFRASTRUCTURE NZ LIMITED,
ATTORNEY-GENERAL,
NGĀPUHI HAPŪ and NGĀPUHI-NUI-TONU (MAC-10-10-50)
WAIPU COVE – check all interested parties
Interested Parties

Introduction

[1] Ms Mason, counsel for Eve Vaughan and others, seeks leave to file briefs of evidence for Rhonda Kawiti, John Tana, Wiremu Abraham, Forrester Hilton and a joint brief from Eve and Peter Vaughan out of time. As at the date of filing none of the briefs were signed or alternatively filed in affidavit form. Counsel submitted that due to funding constraints, uncertainty over the hearing proceeding and illness, it has not been possible for this evidence to be filed until now. Ms Mason requests that this evidence be admitted to the record and that the witnesses be permitted to present same during the week commencing 16 September 2024.

[2] Applicants and other interested parties oppose the request. They argue that the evidence is well out of time, given that it was due for filing on 1 April 2024. Counsel also submitted that there had been ample opportunity for Ms Mason and her juniors to raise the issue long before now, to foreshadow that leave would eventually be sought. In addition, it was contended that admitting this late evidence now, much of which was either repetitive or not relevant, would significantly prejudice other applicants and interested parties. That prejudice would include having to prepare and file rebuttal evidence and prepare for cross examination of the proposed witnesses after the final hearing schedule had already been discussed and agreed.

[3] Te Uri o Hau also seek to file late evidence. This concerns updating the Court regarding their negotiations as they have elected not to pursue the High Court pathway. It is also required, according to counsel, because earlier deponents are no longer available. There was no opposition from any party to the admission of this evidence, despite its lateness, and few indications of whether any cross examination is required. Mr Mathias raised the issue of relevance given that CMT is not being sought by Te Uri o Hau and that PCRs are the subject of negotiation. This matter is also considered.

[4] The issue for decision is whether leave should be granted to admit the evidence.

Submissions

[5] Ms Mason in written submissions and Mr Kuddus at the hearing argued that, as foreshadowed, the five briefs of evidence are highly relevant to the proceedings and

that the Court has a broad discretion to allow the evidence. Counsel outlined three reasons in support of their request. First, there had been uncertainty as to when the hearing would proceed, given the stated aims of the government to amend s 58 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). Due to the significant risks for non-payment of costs in the event of amendment, Ms Mason contended that her firm could not devote significant resources to the preparation of the evidence.

[6] Secondly, counsel argued that her firm had already spent considerable resources in preparing for the Stage 1(a) hearing where four separate parties were being represented. Added to that, the firm's location in Wellington compounded the challenge of costs and disbursements. Despite all of the work that had been completed, Ms Mason pointed out that Te Arawhiti had still not paid for those services. As a direct result of this non-payment, counsel reiterated that it was not possible to have staff preparing evidence in such circumstances. They also had other work to deal with at the time. The uncertainty over the hearing proceeding simply compounded those existing challenges.

[7] Thirdly, counsel confirmed that Ms Mason had been unwell, had a medical certificate and, if pressed, was prepared to make that available to the registrar and the Court on a confidential basis.

[8] In addition, Mr Kuddus submitted that arguments from other counsel over delay and prejudice were misplaced. He highlighted how the Golden Bay and Port Nikau joinder application had been granted earlier in the proceeding which resulted in a change to the hearing schedule to accommodate those parties. What was now being sought was for the Court to exercise its discretion in a similar fashion and to, in effect, prevent an injustice to the clients represented by counsel. Further, regarding assertions by Mrs Golightly that Ms Mason and her juniors misled the Court by failing to notify their intention to adduce further evidence, this was rejected. Mr Kuddus requested that an apology be made for such unfounded accusations.

[9] Ms Inns, on behalf of counsel who signed a joint memorandum, submitted that the arguments presented by Mr Kuddus were not sustainable. Counsel pointed out that by a minute dated 4 August 2022 issued by Churchman J, interested party evidence

was due for filing on 1 April 2024. This would mean that the interested party evidence sought to be filed was over five months late. Ms Inns accepted that there had been a number of subsequent changes to the filing timetable permitting Channel Infrastructure and North Port Limited to file on 8 July 2024. Even so, counsel highlighted that at no point over the past six months did Ms Mason or her juniors seek agreement and approval for an extension to the timetable for the late filing of evidence.

[10] Further, counsel underscored that applicant evidence was due on 29 January 2024. As at that date, Ms Inns contended that there was little uncertainty about funding and even less about government policy developments to amend s 58. Counsel then addressed in more detail the arguments advanced by Ms Mason and Mr Kuddus.

[11] Firstly, Ms Inns submitted that the reimbursement regime applicable to the Whangārei Stage 1(b) hearings was announced on 24 May 2024 by Te Arawhiti. So there is no question of uncertainty regarding the funding process. There was also no application to adjourn or vacate the Stage 1(b) hearings. At the case management conference held on 18 July 2024, it was made plain that there would be no adjournment without an application. Counsel highlighted that the government's 25 July 2024 announcement was made several months after the 1 April 2024 filing date. Ms Inns pointed out that Ms Mason had complied with the timetable for her applicant clients.

[12] Secondly, counsel contended that every lawyer involved in the process for non-Māori applicants, apart from the interested parties, had been affected by the funding delays. This was nothing unique to Ms Mason and her firm. Even so, filing deadlines had been met almost without exception.

[13] Thirdly, while Ms Mason's illness is acknowledged, Ms Inns argued that there are four other juniors in the proceedings who might have assisted in the preparation of the evidence during the last five months. Alternatively, there was no request for an extended filing date from Ms Mason's firm which also could have been made in her absence by her juniors.

[14] Fourthly, as to the argument that the evidence is highly relevant to the proceedings, that is contested. Ms Inns submitted that to the degree that the evidence

is filed to support Mr Kingi and Ms Collier, it is unclear why it could not have been filed at the same time as other evidence filed for those applications.

[15] Counsel contended that all of that said, if leave is granted, the prejudice to the other parties would be significant. This is because, at such a late stage of the process, in the penultimate week of the proceedings, no opportunity will have been given for the preparation and filing of any rebuttal evidence, let alone counsel having to properly prepare cross-examination.

[16] Finally, Ms Inns argued that given that over 20 witnesses are scheduled to appear next week, the preparation necessary by parties and the Court is well under way. Adding five significant briefs that include hundreds of pages of attachments, exhibits, or both would be an unfair burden on the Court and counsel at such a late stage in the proceedings. For all of these reasons, Ms Inns contended that the request for late filing must be dismissed.

[17] Mr Mathias endorsed Ms Inns' submissions. He also made the point that it might be said the present approach adopted by Mr Kuddus and his colleagues was part of an effort to circumvent the late filing of applicant evidence. Counsel highlighted that the evidence is not only on behalf of the interested party but also on behalf of other applicants, namely the Collier application. That had been due in the early part of the year. Mr Mathias contended that using the interested party approach to try and get it in at a later date appeared to be a device to, in effect, advantage parties who should have filed this evidence much earlier.

[18] Mrs Golightly contended that Ms Mason's juniors had mislead the Court. This was on the basis that, clearly, they were preparing extensive evidence for their clients yet, being well aware of the filing dates being long expired, failed to alert the Court to the prospect of this late evidence. This was, counsel argued, despite numerous opportunities to do so afforded to all counsel by the Court throughout the proceedings.

[19] In addition, Mrs Golightly underscored that the proceedings were complex and required all counsel to comply with their duties to the Court at all times and without exception. Despite this the Court had been confronted with a "hail" of memoranda,

requests both written and oral, during the Stage 1(a) and 1(b) proceedings and where counsel were given considerable leeway to advance their various issues from time to time. In these circumstances, that Ms Mason's juniors elected not to forewarn the Court at a much earlier stage that this late evidence would be forthcoming does not reflect well on them, she argued.

[20] As to the reference to the earlier joinder process, counsel argued that the circumstances were entirely different and nonetheless involved urgent preparation once the Court had been notified. That preparation, including the filing of an application and evidence, took days, not months as is the case here.

[21] Mrs Golightly then submitted that the proposed evidence is either repetitive, irrelevant, or both. It does not address the matters that the Court may consider relevant. Counsel contended that the evidence does not for example address why in the Stage 1(b) area Ngāpuhi iwi has sovereignty instead of the hapū. The evidence does not address with particularity areas where customary practices are undertaken in accordance with the tikanga of Ngāpuhi. That said, Mrs Golightly accepted that there is arguably one exception concerning Taranga and Marotere, where one of the briefs suggests that the witness fishes there. Yet even this evidence may only be of peripheral relevance when the evidence of many other witnesses is considered.

[22] Counsel submitted that if the five briefs are admitted, then there would be prejudice to Northport because one of the witnesses referred to making submissions on the Northport application for the Eastern Expansion. Mrs Golightly pointed out that there are thousands of pages of submissions that the parties made in opposition and in support of the Northport Eastern Expansion decision. Allowing that evidence in — when it relates to the Stage 1 (a) hearing area, would require a review of the voluminous submissions for the process to ascertain the context for that submission, and then an assessment of what other submissions parties made including in these proceedings. That would be a fraught process according to Mrs Golightly and one that the proposed evidence did not justify.

Legal principles

[23] Section 105 of the MACA Act provides:

105 Evidence

In hearing an application for a recognition order, the Court may receive as evidence any oral or written statement, document, matter, or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible.

[24] Section 7 of the Evidence Act 2006 provides:

7 Fundamental principle that relevant evidence admissible

(1) All relevant evidence is admissible in a proceeding except evidence that is—

(a) inadmissible under this Act or any other Act; or

(b) excluded under this Act or any other Act.

(2) Evidence that is not relevant is not admissible in a proceeding.

(3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

Discussion

[25] In short, the principal issue for determination is whether relevance trumps delay and consequential prejudice to affected parties. On the issue of delay and related matters, I agree with Mr Hockley and Ms Inns that Churchman J scheduled the filing dates well in advance of the hearing. As a result, there has been ample opportunity for the evidence to have been prepared on time. Secondly, as highlighted, counsel had months to foreshadow this late evidence filing request before now — less than a week out from the hearing of that proposed evidence.

[26] Moreover, the explanations provided the for delays are unconvincing. This is because at the relevant time the Stage 1(a) hearings were nearing a conclusion, had been in progress since 12 February 2024 and indeed, due to careful hearing management, had progressed ahead of the confirmed hearing timetable. Put another way, there was no relevant uncertainty over the government's legislative amendment plans at the end of March and around 1 April 2024 that might have affected the filing deadline. While I acknowledge that there were financial considerations for all counsel, as highlighted, it is telling that others were able to comply despite being in the same position as Ms Mason's firm.

[27] In addition, the claim that acting for four separate groups somehow makes for extra work does not withstand scrutiny either. This is particularly the case when the

actual evidence that has been filed is considered. In other words, counsels' burden here has been no lesser or greater than those lawyers representing the primary applicants in these proceedings. In summary, I am not persuaded that the reasons articulated for the delays in filing the proposed evidence are sufficient to justify the prejudice to the other parties in circumstances where the relevance of that evidence is uncertain. The next step is to then undertake an assessment of that evidence as contrasted against the background of the evidence already on the record, that has been subjected to rigorous testing through cross-examination.

[28] The legislation cited at [23] and [24] underscores that the priority must be on reliability and relevance. Turning then to the proposed evidence, first is the brief of Wiremu Abraham. At [3] he confirms his affiliations. I note that while referring to unnamed "others" he does not appear to make any significant reference to Te Parawhau, Patuharakeke, Ngāti Kahu, Ngāti Tu or any of the Ngāti Wai affiliated hapū including Te Waiariki, Ngati Takapari and Ngati Korora. Mr Abraham then refers at [6] to his connection to Ngāti Tamaoho. He goes on to refer to Ngāpuhi before turning to ecological concerns. Finally, he says that orders for CMT and/or PCR must include Ngāpuhi-nui-tonu.

[29] This is followed by the brief of Forrester Hilton, who confirms his whakapapa is to Ngāpuhi. At [3] he says that he is offering his whānau history and whakapapa as chiefs and ancestral owners of Whangārei and the foreshore and seabed. At [5] and [6] Mr Hilton refers to He Whakaputanga – the Declaration of Independence 1835 while mentioning Te Parawhau of Ngāi Tāhuhu/Ngāpuhi origin being the "dominant tribe" in a triangle he says that includes Whangārei Harbour.

[30] He refers to Ngāti Whātua at [6] and the conflicts with that tribe and what he claims is their tribal district. Mr Hilton emphasises his strong Ngāti Whātua whakapapa while underscoring the rights and interests of Ngāpuhi and Te Parawhau. At [9] Mr Hilton then outlines connections with Patuharakeke at Ruakākā, Te Parawhau as well as Ngāti Hine and Ngāti Wai. At [10] he says Ngāti Tu was in the harbour but "held little sway". In any event, Mr Hilton emphasises that "our chiefs" led by Te Parawhau, "gave shelter to Ngāti Tu."

[31] At [11] and [12] Mr Hilton refers to maps from 1851 emphasising again at [13] that Te Parawhau held mana over the Whangārei Harbour and coast area. Mr Hilton then goes on to talk about fishing practices in and around the harbour and along the coast, noting the importance of "female tohunga mystics". At [15] he suggests that Ngāpuhi had little internal conflict highlighting that the Ngāpuhi territories started at Kawakawa to Waitangi to Kaikohe including Moerewa, Te Hokianga to the Mangamuka Gorge and then Kaitaia.

[32] At [17] Mr Hilton noted that Ngāti Rangi, Ngāti Wai, Ngāti Tu and Patuharakeke were maintained "in a supporting relationship". Once again at [18] Mr Hilton emphasises Te Parawhau having the mana whenua and acknowledging that Ngāti Hine, Ngāti Wai and Ngāti Tu, along with others, moved freely around the rohe. He emphasises however that the foreshore was available on a daily basis only to Patuharakeke, Te Parawhau, Ngāti Wai and Ngāti Hau.

[33] John Tana's brief confirms his whakapapa to various iwi and hapū while emphasising Te Waiariki. He outlines that his grandfather connects with Ngāti Hine and his grandmother is from Ngunguru. Much of his brief is then taken up with his life story with an emphasis on waka ama, moving around the district, and taking on various employment and community roles. While there is some reference to customary fishing and related practices, waka ama appears to be the predominant subject discussed. In the second half of his evidence Mr Tana refers to environmental issues before moving to Poor Nights Islands.

[34] This is followed by the joint and lengthy brief of Eve and Peter Vaughan. Their evidence repeats earlier claims to their whakapapa from Tāwhiro, Te Tirarau and Te Iwitahi and their links through Ngāti Ruangāio, Te Parawhau and Ngāpuhi. Reference is also made to the Declaration of Independence 1835 and the Treaty of Waitangi 1840. At [8] the claimed distinction is made to describe Te Iwitahi and his son Manihera of Te Parawhau where the deponents assert that they are sometimes referred to as "Te Parawhau tuturu".

[35] Then at [10] Mr and Mrs Vaughan say that Te Parawhau individuals identifying with Ngāti Whātua in these proceedings are incorrect. Their evidence is that Te Tirarau

Kukupā is not the common ancestor for Te Parawhau. At [11] and [12] Mr and Mrs Vaughan then emphasise their connection with Te Parawhau, Ngāpuhi and Ngā Puhi-nui-tonu to identify "their rightful place" within Te Parawhau hapū. To avoid doubt, at [13] Mr and Mrs Vaughan say that they are representing the "senior chiefs" of Te Parawhau hapū and are "therefore representing Te Parawhau katoa."

[36] Reference is then made to links with the Pacific, Manaia and the Te Wharetapu o Ngāpuhi. Further whakapapa connections are given from Ngāi Tahu, Rahiri, Uenuku and Karearikí at [18]. A lengthy history of whakapapa, hapū and their various interactions then follows between [19] and [25]. There is then reference to Taranga, Whatupuke and Marotere followed by evidence concerning Mair and Marsden reefs, Ruakākā and the Piroa blocks. At [65] mention is made of the Waipu Caves, Waipu Cove, Lang's Beach and Te Paepae o Tu. Then at [72] a history is given of Te Parawhau along the coast from Poupouwhenua down to Te Paepae o Tu. According to Mr and Mrs Vaughan, Ngāti Manaia and Ngāi Tāhuhu occupied and held mana over the lands and the sea and evolved into Ngāti Ruangāio and then by inter-marriage and conquest into Ngāpuhi.

[37] From [77] onwards overlaps with Ngāti Whātua are discussed along with mention of the Waitangi Tribunal's reports. Various land transactions are discussed from [83] onwards but not before the claim is made that Te Parawhau hapū was and is Ngāpuhi. The rest of the brief concerns fishing practices from [99] and then a return to the concept of Te Wharetapu or Ngāpuhi or Ngā Puhi-nui-tonu from [106] to [113]. At [114] reference is made to alliances with the Ngāpuhi rūnanga, Ngāpuhi-nui-tonu claimant rōpu, Ngāti Tu ki Ngāpuhi and Ngāti Kahu o Torongare. Patuharakeke Trust Board is singled out as, in effect, having ignored Mr and Mrs Vaughan's requests for engagement.

[38] As can be seen from this summary review of the evidence sought to be filed, much of it is repetitive, has already been given or is of limited relevance to the matters currently before the Court. Put another way, the cases for Te Waiariki and Te Parawhau to use two examples, have already been extensively canvassed in considerable detail by those parties. Indeed, Te Parawhau including Korokota Marae, is represented twice. The same characterisation could arguably be made for the Ngāti Wai Trust

Board on the one hand and Te Waiariki, Ngāti Korora and Ngāti Takapari on the other. I cannot see how adding a further layer of evidence, such that it is, to the material now before the Court can assist in the determinations that are required under the legislation.

[39] Ms Mason in her written submissions and Mr Kuddus in his oral presentation on 12 September 2024 emphasised how this evidence was critical to their clients' claims. I disagree. The arguments of the majority of applicants in the Stage 1(a) hearing to date regarding the position of the Ngāpuhi-nui-tonu was encapsulated on 12 September 2024 in Ms Chetham's response to Mr Johnson's question: Ngāpuhi are represented by their hapū who are tangata whenua of Whangārei Terenga Parāoa and the Whangārei coast including the islands. While there is considerable force in that argument, that is not to say that the Ngāpuhi iwi are somehow an irrelevancy. Several applicant groups have highlighted their links and commonality with Ngāpuhi. Their role, depending on the circumstances, and which hearing area is being considered, Stages 1 (a) or 1 (b), may be characterised more accurately as one of support.

[40] Even so, I am not satisfied that the majority of the proposed evidence is relevant for the reasons outlined. The one exception is Rhonda Kawiti's brief. While that too is repetitive, there are parts that, at first blush, may have some relevance to the interested party claims. In addition, it provides a more coherent overview and summary of much of the other proposed evidence. I allow that evidence in on the basis that some of the content may be of relevance to the Court's determinations under the Act. Overall, I am not persuaded that the request to admit five late briefs of evidence is justified. With the one exception set out above, leave is declined to admit the rest of the proposed evidence.

[41] Regarding the evidence for Te Uri o Hau, as mentioned, there is no opposition to this updating evidence being filed despite its lateness. I understand that it will be brief and will simply refer to the discussions between Te Uri o Hau and applicant groups in this proceeding including for example, Patuharakeke.

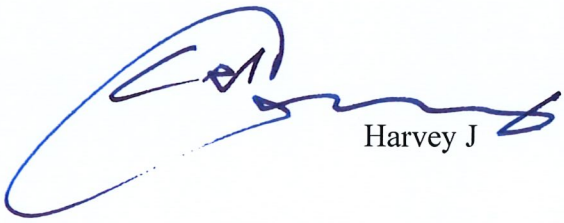
[42] One final point. My last direction outlined that evidence would be in affidavit form and be taken as read, subject to a limited range of exceptions. Ms Kawiti's evidence and that of Te Uri o Hau must comply with that direction.

Decision

[43] Leave is granted for the filing of a sworn affidavit from Rhonda Kawiti.

[44] Leave is declined to admit the four remaining briefs.

[45] Leave is granted for the filing of a sworn affidavit for Te Uri o Hau.



Harvey J