IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2011-485-817

IN THE MATTER OF	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	the late Claude Augustin Edwards (deceased), Adriana Edwards and others on behalf of **Te Whakatōhea**

On the papers:

Counsel:	B Gilling and T Sinclair for Applicants A Sykes for Ngāti Ira o Waioweka
Minute:	27 August 2019

MINUTE (NO 2) OF CHURCHMAN J

The application

[1] The application filed on behalf of Te Whakatōhea by the late Claude Augustin Edwards for recognition orders under the Marine and Coastal Area (Takutai Moana) Act 2011 ("the Act") is one which has statutory priority.[1]

[2] This arises from the fact that the proceedings were in existence at the time the Act came into effect and, as a result, were accorded priority in relation to the allocation of a hearing as compared with the 200+ applications filed under that Act.

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1 Marine and Coastal Area (Takutai Moana) Act 2011, s 125(3)(a).

[3] The case has been set down for an eight-week hearing in Rotorua to commence on 17 August 2020. A number of timetable orders have been made in an attempt to achieve the orderly progression of the case towards hearing.

[4] The case was called in the case management conference (CMC) held in Rotorua on 19 June 2019, with the applicants and interested parties making submissions as to a further timetable order. The Court issued a minute containing a varied timetable order on 25 June 2019.

[5] Pursuant to leave granted at the Rotorua CMC, Ms Sykes, counsel for an overlapping claimant, Ngāti Ira o Waioweka, filed a memorandum which, among other things, suggested an amendment to the timetable directions set out in the minute of 25 June 2019.

[6] The principal changes to the timetable order that were proposed was the suggestion of a judicial settlement conference on 27 March 2020 pursuant to HCR 7.79(1) for the purposes of attempting to obtain a negotiated agreement on the overlapping claimed areas of exclusive interest. It was proposed that such a conference take place on 27 March 2020.

[7] The memorandum also sought to postpone the date upon which the Crown will file and serve evidence from 13 March 2020 to 24 April 2020.

[8] Upon receipt of the memorandum raising the possibility of a judicial settlement conference, I checked to see whether the Court could administratively accommodate such a conference. If such a conference is to proceed, it could be accommodated on Monday and Tuesday 23/24 March 2020 in Rotorua.

[9] On 5 August 2019, the Court received a memorandum from counsel for the applicants responding to the memorandum filed by Ms Sykes. No other memoranda have been received from any of the other parties involved in this hearing, either in response to Ms Sykes' memorandum or that of Mr Gilling and Mr Sinclair.

[10] The memorandum filed by counsel for the applicants covered a range of disparate issues, and I will deal with each separately.

Mapping

[11] The memorandum filed on behalf of Ngāti Ira had noted that their counsel was liaising with Te Arawhiti in relation to a proposed National Dataset Working Group. The applicants seemed to see something inappropriate in this and referred to the map it had filed in support of its claim.

[12] As has been raised at all the CMCs in respect of claims under the Act, the Court has encouraged the applicants and the Crown to work together to produce a consistent set of maps covering all claims. To date, that goal remains unrealised. However, there is no suggestion that applicants who wish to put before the Court their own maps are in any way inhibited from doing so. The fact that counsel for Ngāti Ira may be discussing the National Dataset with Te Arawhiti, does not in any way disadvantage the applicants or bind them to rely on a particular map. They are free to rely on whatever map that they wish to.

Dates for applicants' evidence

[13] At the CMC in Rotorua, the applicants had submitted that their evidence would be ready for filing on 28 October 2019.

[14] After considering the submissions made by the other parties, the Court directed that the applicants and such other Whakatōhea claimants who have agreed with the applicants to follow a joint evidential approach, should file and serve their evidence no later than 27 September 2019.

[15] In the memorandum of 2 August 2019, counsel for the applicants says that this simply cannot be achieved. Essentially this was said to result from a combination of witness unavailability, the need to hold a number of wananga and funding issues.

[16] After stating that the completed Whakatōhea casebook report and available accompanying evidence would be filed on 28 October 2019, the memorandum of counsel said:

> Regarding any outstanding witness briefs for the Whakatōhea Edwards application not being ready for filing by 28 October 2019, counsel would seek leave as early as possible for those additional briefs to be filed on or before 28 December 2019, as they were complete.

[17] Given the applicants' position that it is impossible for them to have their historical evidence and casebook filed before 28 October 2019 and in the absence of any opposition, the timetable directions issued in the minute of 25 June 2019 are amended so that the applicants' evidence and that of the other Whakatōhea applicants adopting a joint evidential approach, are to be filed no later than 28 October 2019.

[18] In relation to what seems to be a request that "other" briefs be filed on or before 20 December 2019, it is most efficient that these be dealt with on a case by case basis. 20 December 2019 should not be regarded as the default date by which the applicants' evidence should be filed.

[19] If the applicant is not able to file all of its briefs of evidence by 28 October 2019, it will need to file an application for leave which contains an explanation as to why the timetable order should be further varied to permit additional evidence to be filed.

Contemporaneous exchange of evidence

[20] The applicant complains that the preparation of its evidence is much more burdensome for it than will be the case for overlapping applicants whose claims may be focused on a relatively constricted geographic area. Counsel submitted that the various overlapping applicants were deliberately holding back from undertaking their own research and would get some inappropriate benefit from being able to read the product of the Whakatōhea research. The particular submission was:

> Given the body of historical evidence from 1840 does not exist for Whakatōhea, the Whakatōhea Edwards applicants are at this moment assembling such evidence. Not only is this an unfair burden, but it is apparent that every other MACA applicant hapū in Whakatōhea is waiting for that evidence to be filed to either adopt, reject or ignore.

[21] The reality is that the only application with statutory priority in this area is the Whakatōhea application. The Court is obliged to give it priority. The practice adopted by the Court throughout the country where applications with statutory priority are overlapped by other claims, is to give the overlapping claimants the opportunity of having their cases heard along with the case with statutory priority. This is by far the most effective way of the Court being able to resolve the overlapping claims.

[22] Counsel for Whakatōhea quite properly point out that the overlapping claimants are not "respondents" to the Whakatōhea claim. They are applicants pursuing their own claim.

[23] However, Whakatōhea chose to bring this claim. It was their decision to frame the claim to cover as broad or narrow a geographic area as they saw fit. The fact that their claim is broader and more complicated than the claims of overlapping applicants is because they chose to advance the claim of such a broad area.

[24] The concept of kotahitanga adopted by Whakatōhea (meaning the co-operative preparation of a casebook report) is a sensible one, and will no doubt be of benefit to those Whakatōhea hapū who have joined with the applicants in that endeavour. However, it is the choice of the various applicants whether they chose to participate in that process or not. The Court cannot compel them to do so, neither can the Whakatōhea applicants.

[25] In relation to the casebook, the applicants' submission says:

> It is not for the use of others and does not advocate for other applications. Other Whakatōhea applicants are entitled to speak for themselves only and are supported as such to do so by the Edwards applicants.

[26] Obviously, the casebook will be developed to reflect the interests of those hapū who have co-operated to produce it. To that extent, it advances their cases and not the cases of overlapping applicants. However, the submission that "it is not for the use of others" goes too far.

[27] All evidence filed in these proceedings is available for review by all of the parties to the proceeding. Other than for evidence about things like traditional fishing grounds

which might possibly be the subject of confidentiality orders, any party is free to use another party's evidence in any way they see fit.

[28] The applicants' memorandum sets out the difficulties that the applicants are experiencing with funding. Funding for this application is apparently now "on hold". The memorandum says no payment has been received by counsel for the previous 12 months and, if payments continue to be "on hold" until the end of the year, there will be an 18-month gap with no payment.

[29] It is also said that prior legal counsel for the applicants have been waiting some 24 months for payment of invoices. All of this is deeply concerning for the Court. It appears that unless there are immediate and significant developments in relation to funding, the eight-week hearing scheduled to commence in August next week will be jeopardised. If the hearing is unable to proceed, there will inevitably be significant wasted costs. Other applicants who are ready to proceed will be denied an early opportunity to do so.

[30] The Court cannot direct the Crown on matters of funding, but it can express its concerns at what it is hearing about what seem to be extreme delays in funding.

[31] The applicants submit that the other applicants who have co-operated in preparing the casebook (Whakatōhea Kotahitanga Waka)[2] should not be required to file their evidence prior to 20 December 2019, that being the date that the other overlapping applicants are required to file their evidence.

[32] The reason that the Court made the direction that the Whakatōhea Kotahitanga Waka applicants should file their evidence at the same time as the applicants was its understanding that, because they were co-operating with the applicants, their evidence would be ready at the same time.

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[2] CIV-2017-485-264 Pakowhai; CIV-2017-485-269 Ngāti Muriwai; CIV-2017-485-817 Hiwarau C; and CIV-2017-485-278 Whānau A Apanui.

[33] I am prepared to vary the direction made in the minute of 25 June 2019 so that the Whakatōhea Kotahitanga Waka applicants can file their evidence either at the same time as the applicants or no later than 20 December 2019.

Judicial settlement conference

[34] In response to Ngāti Ira's request for a judicial settlement conference, counsel for the applicants notes that the Whakatōhea applicants have held many hui and without prejudice wananga to date, and that despite having been invited, Ngāti Ira have not attended one.

[35] Whakatōhea applicants are to be commended for their efforts in attempting to address and resolve issues of overlapping claims. A successful resolution to such claims is far more likely to result from the co-opertive efforts of the overlapping claimants than it is from a decision of the Court.

[36] The Court is prepared to facilitate the mediation process by way of scheduling a judicial settlement conference. The appropriate time for such a conference would be after all of the applicants' evidence has been filed and served.

[37] However, the Court will not impose such a conference on the parties unless there is a realistic prospect that it is likely to be of assistance. At the moment, the Court is not convinced that is so.

[38] If, following the 20 December 2019 filing of evidence, there is a consensus among the applicants and overlapping claimants, that a judicial settlement conference would be beneficial, the Court is prepared to consider a fresh request. However, there can be no guarantee that the dates presently available of the 23 and 24 March 2020, will still be available.

Outcome

[39] The timetable directions set out in the minute of 25 June 2019 are varied as follows:

(a) the applicants will file and serve their evidence no later than **28 October 2019**;

(b) those overlapping applicants who are part of the Whakatōhea Kotahitanga Waka have the option of filing and serving their evidence at the same time as the applicants or no later than **20 December 2019**;

(c) all other overlapping applicants will file and serve their evidence no later than **20 December 2019**;

(d) any interested parties who wish to file evidence will file and serve it no later than **28 February 2020**;

(e) the Crown will file and serve its evidence by **24 April 2020**;

(f) the applicants will file and serve any evidence in reply to the evidence of the overlapping applicants or the Crown by **26 June 2020**; and

(g) any overlapping applicants who wish to file and serve evidence in reply to the Crown will do so by **26 June 2020**.

Churchman J