IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 121/2023
SC 123/2023
SC 124/2023
SC 125/2023
SC 126/2023
SC 128/2023
SC 129/2023
[2024] NZSC 119

BETWEEN	WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS) NGĀTI MURIWAI KUTARERE MARAE TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE UPOKOREHE IWI ATTORNEY-GENERAL NGĀTI IRA O WAIŌWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) NGĀTI RUATĀKENGA Appellants
AND	NGĀTI IRA O WAIŌWEKA, NGĀTI PATUMOANA, NGĀTI RUATĀKENGA AND NGĀI TAMAHAUA (TE KĀHUI TAKUTAI MOANA O NGĀ WHĀNAU ME NGĀ HAPŪ O TE WHAKATŌHEA) TE TĀWHARAU O TE WHAKATŌHEA (FORMERLY WHAKĀTŌHEA MĀORI TRUST BOARD) NGĀI TAI AND RIRIWHENUA TE UPOKOREHE TREATY CLAIMS TRUST ON BEHALF OF TE

UPOKOREHE IWI

TE RŪNANGA O NGĀTI AWA

WHAKATŌHEA KOTAHITANGA WAKA (EDWARDS)

NGĀTI RUATĀKENGA

NGĀTI MURIWAI

KUTARERE MARAE

LANDOWNERS COALITION INCORPORATED
Respondents

AND ATTORNEY-GENERAL

TE WHĀNAU-Ā-APANUI

SEAFOOD INDUSTRY REPRESENTATIVES

CROWN REGIONAL HOLDINGS LIMITED

ŌPŌTIKI DISTRICT COUNCIL

BAY OF PLENTY REGIONAL COUNCIL

WHAKATĀNE DISTRICT COUNCIL

LANDOWNERS COALITION INCORPORATED

TE RŪNANGA O NGĀTI AWA
Interested Parties

Hearing:	26 August 2024
Court:	Glazebrook, Ellen France, Williams, Kós and French JJ
Counsel:	K S Feint KC and N A T Udy for Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea R L Roff and Y Moinfar-Yong for Attorney-General
Judgment:	20 September 2024

INTERIM JUDGMENT OF THE COURT (COSTS)

A The application by Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea for a prospective costs order against the Attorney-General is granted.

B The respondent must pay the applicants prospective costs of $97,500, collectively.

C The respondent must pay the applicants costs on the application of $7,500 together with usual disbursements.

REASONS
(Given by Kós J)

[1] This is an application for a prospective costs order (PCO) brought by Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea (Te Kāhui), being four hapū who are the first to fourth appellants in appeal SC 128/2023. This is one of seven appeals to be heard in November, concerning recognition of customary marine title (CMT) and protected customary rights (PCRs) under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act).[1] The PCO sought by Te Kāhui would in substance restore litigation funding at the level provided by Te Arawhiti | The Office for Māori Crown Relations (Te Arawhiti) at the Court of Appeal stage of these proceedings. Te Arawhiti has substantially revised downwards the level of funding available.[2] This has coincided with the Crown taking a more active role in the proceedings, in particular by directly challenging the decision of the Court of Appeal.[3]

[2] The courts do not however stand in the shoes of the Crown, allocating state funding for litigation purposes. One option open to the applicants might have been to seek judicial review of Te Arawhiti's funding decision in the High Court, alleging illegality in some form. Instead, the applicants seek a PCO from this Court.

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1 The appeal in SC 127/2024 has been abandoned.
2 See narrative below at [8]–[18].
3 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui and Whakatōhea Māori Trust Board* [2023] NZCA 504, [2023] 3 NZLR 252 (Cooper P, Miller and Goddard JJ) [CA judgment].

[3] Costs orders on appeal involve the courts exercising a statutory power. They are usually *retrospective*, made once the merits of the substantive case have been determined. However, *prospective* costs orders may be made pre-emptively, before the merits are determined, though only in exceptional circumstances where necessary in the interests of justice. Costs orders of any kind are seldom fully funding: they normally provide for a "reasonable contribution" to costs, rather than indemnifying parties or giving them all "actual and reasonable" costs.

[4] As we will explain, PCOs directing the payment of costs in advance of the outcome are made only in exceptional circumstances and where necessary in the interests of justice. We explain below at [44] the five considerations likely to determine the necessity of a PCO in a case like the present one.

[5] In this case, we have decided the interests of justice do require the making of a limited PCO in favour of the applicants. We explain why in the balance of this judgment.

[6] Because this application must be dealt with as a matter of urgency, we will keep our reasons brief. We may provide further reasoning in our substantive judgment on the appeals in due course.

Background

[7] The general background to this application is set out in the judgment of the Court of Appeal:[4]

> [2] Some 200 applications for recognition orders have been filed in the High Court. Several have been decided there and the others are pending. The present appeals concern the first substantive judgment to reach this Court. It was also the first case to confront competing applications for CMT over the same area.
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> [3] These appeals are almost entirely concerned with CMT, which the High Court may recognise if satisfied that the applicant group holds a specified area in accordance with tikanga, and that they have "exclusively used and occupied" that area from 1840 to the present day "without substantial interruption". The Court may, and in this case did, take non-binding advice on questions of tikanga from a court-appointed expert (pūkenga).

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4 Footnotes omitted. A recognition order is an order made under the Act giving legal recognition to CMT or PCRs relating to a specified part of the marine and coastal area.

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> [8] The specified area under appeal comprises a tract of the marine and coastal area between Maraetōtara, which is west of Ōhiwa Harbour, and Te Rangi to the east. It extends seaward to the 12 nautical mile limit, and it includes the marine and coastal area around Whakaari (White Island, 48 kilometres offshore) and Te Paepae o Aotea (formerly called the Volkner Rocks, five kilometres from Whakaari). It also includes the Ōhiwa Harbour. It is said to represent the rohe moana of Te Whakatōhea and part of the rohe moana of Ngāi Tai. Neighbouring iwi appear to contest the boundaries of the specified area to the west and to contest Whakatōhea claims to CMT at Whakaari and Te Paepae o Aotea.
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> [9] Other appellants and interested parties pursue a wider interest in the legislation; they include the Attorney-General, the Landowners Coalition Inc … and the Seafood Industry Representatives …

[8] In 2013 the Takutai Moana Financial Assistance Scheme was established to support applicant groups with the costs of seeking recognition of customary rights under the Act. It stood apart from civil legal aid and was broader, providing funding for costs of progressing applications for engaging with the Crown as well as the costs of High Court hearings.[5] It was not limited in scope to the cost of legal services. There was no requirement for applicants to repay funding received. The scheme set funding limits for key tasks and milestones, and the upper funding limits were said to represent 85 per cent of the total cost estimated by the Crown for completion. Upper funding limits for High Court applications ranged from $156,750 to $316,750.

[9] In June 2020 the Waitangi Tribunal found that only partially funding costs breached the Crown's duty of active protection under the Treaty of Waitangi. It found that full, flexible and timely Crown funding of all reasonable claimant costs is an essential prerequisite for a Treaty-compliant regime.[6]

[10] The High Court hearing for the Whakatōhea applications was held over an eight-week period in Rotorua, before Churchman J, in August, September and October 2020. We were advised by Ms Feint KC that the level of funding provided under the scheme proved to be insufficient to meet actual costs. The Crown then

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5 From 2016, funding became available to appeal a High Court decision.

6 See Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at xi, xiii and 129. The Crown subsequently considered the recommendations of the Tribunal when reviewing the financial assistance scheme.

agreed to consider funding the Whakatōhea applicants on an actual and reasonable costs basis.

[11] In November 2022, following a Crown funding review, a revised scheme was announced, with applicants being reimbursed for "actual and reasonable" court costs. This included the Whakatōhea applicants, who also had their actual and reasonable costs from the High Court hearing reimbursed.

[12] Churchman J's judgment was delivered in May 2021.[7] Several appeals and cross-appeals were filed, which were heard by the Court of Appeal in February and March 2023. The Court of Appeal judgment was delivered in October 2023, with the Court dividing on the requirements to establish CMT under s 58 of the Act and the recognition of shared CMT.[8] Costs were not awarded. There was no need to do so given the funding arrangements then in place.

[13] On 17 April 2024 the Supreme Court granted eight applications for leave to appeal against the judgment of the Court of Appeal.[9] The Crown had only been an interested party in that Court, but not, Ms Roff submitted, a contradictor as such. That has now changed. Appeal SC 126/2023 is brought by the Crown, challenging the Court of Appeal's interpretation of ss 11(3), 51(1) and 58(1) and (4) of the Act. Other appeals raise related issues.[10] As we note later, the Crown will lead the primary challenge to these findings at the appeal hearing scheduled in November.

[14] On 22 April 2024 the Crown advised (in a memorandum filed in the High Court) that Cabinet had not approved additional funding for the hearings in that Court scheduled in the 2024/2025 financial year (or for subsequent years). Shortly afterwards, on 7 May 2024, the Crown advised the High Court, again by memorandum, that in light of funding difficulties "priority should be given to the hearing of extant appeals" and suggested that fixtures in the High Court may need to be vacated.

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7 *Re Edwards Whakatōhea* [2021] NZHC 1025, [2022] 2 NZLR 772.

8 CA judgment, above n 3, at [360].

9 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea* [2024] NZSC 33 (Glazebrook, Ellen France and Williams JJ). As mentioned above n 1, one appeal has been subsequently abandoned.

10 These being appeals in SC 123/2023, SC 124/2023, SC 125/2023, SC 128/2023 and SC 129/2023.

[15] On 27 May 2024 Ms Sykes, counsel for Te Kāhui, sought an assurance from Crown Law | Te Tari Ture o te Karauna (Crown Law) that the Crown would cover the actual and reasonable legal costs and disbursements of the Māori claimants in the Supreme Court appeals. She noted that if the assurance was not provided, she was instructed to file an interlocutory application in this Court for a "pre-emptive costs order" to that effect.[11] Ms Sykes also noted that court-ordered costs are payable without appropriation, under s 24 of the Crown Proceedings Act 1950.

[16] The response from Crown Law did not give the assurance of full funding sought. In his reply dated 13 June 2024, Crown counsel said:

> As counsel for the Attorney-General has advised applicants via memorandum filed in the High Court, it remains the case that funding will be available in the 2024/[20]25 financial year for the appeals to the Supreme Court.

The letter concluded saying it was regretted no further details could be supplied in response to the inquiry.

[17] On 4 July 2024 this Court allocated an eight-day fixture beginning 4 November 2024. A significant proportion of the hearing will be occupied by the various challenges to the Court of Appeal's interpretation of ss 11(3), 51(1) and 58(1) and (4) of the Act advanced in the Crown and other appeals.

[18] The following day, on 5 July 2024, Te Arawhiti issued a pānui to all applicants seeking recognition orders under the Act advising that effective from 1 July 2024 all applicants would have to work to a budgeted work plan agreed to by Te Arawhiti before funding was provided. The Crown's contribution to court costs would be capped for all scheduled hearings in the 2024/2025 financial year at $140,000 per applicant for substantive hearings, $25,000 for applicants for follow-up hearings, and $30,000 for applicants pursuing appeals. Funding levels within those caps would be aligned with civil legal aid rates. For instance, a "Senior Associate/Senior

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[11] Prospective costs orders (PCOs) are sometimes also called "pre-emptive" costs orders. "Advance" costs orders are a form of PCO seeking indemnity (or partial indemnity) costs in advance of the outcome. "Protective" costs orders are another form of PCO, usually creating an immunity (or partial immunity) from another party's costs: see below at [25]–[27] and [43]; and see *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 at [6].

Solicitor/Barrister" in the Supreme Court would be funded at an hourly rate of $178.00.

[19] It was that communication which resulted in the present application being filed by Te Kāhui. That occurred on 12 July 2024.

[20] The application was heard before us on 26 August 2024. Following the hearing the Court issued a minute asking the applicants to clarify the approaches they had made to their relevant iwi and hapū authorities seeking funding to continue the conduct of these appeals, along with any other information relevant to the Court's assessment of their financial capacity to continue the conduct of the appeals. Affidavit evidence was filed on behalf of the Te Kāhui applicants. Confidentiality orders have been made in respect of certain affidavits. It will suffice for present purposes to say that we are satisfied the applicants do not have access to funding of their own sufficient to meet their reasonable needs to pay for legal representation at the forthcoming hearing in November, and that such funds could not be obtained elsewhere with reasonable diligence. We note that there was some possibility indicated by those applicants that Te Tāwharau o Te Whakatōhea (Te Tāwharau), the iwi-authority recipient of the 2024 Whakatōhea settlement reached with the Crown, might make some contribution.[12] The applicants wrote to Te Tāwharau collectively on 27 August 2024, and had received a reply from it on 30 August 2024. However, that reply indicated Te Tāwharau would not be able to make a decision until November at the earliest.

[21] We also find that the revised funding offered by the Crown, which amounts to $120,000 in total across the four Te Kāhui applicant parties, is substantially less than a reasonable contribution to the costs of the appeal, measured by the costs awards ordinarily made by this Court.[13]

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12 See Whakatōhea Claims Settlement Act 2024.
13 See below at [51].

Prospective costs orders

[22] The first case in which a PCO was made appears to have been *Jones v Coxeter*, in 1742.[14] The plaintiff was impoverished and could not afford to bring the case on to a final decree. Lord Hardwicke LC, noting that costs in equity (as opposed, at that time, to common law) were entirely discretionary, went on to say:[15]

> Here is a suggestion to the court, that the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time.
>
> Therefore, according to the prayer of the petition, let the Master tax the costs decreed to be paid by the defendant to the plaintiff, and when it is so taxed, let them be paid to her, to empower her to go on with the cause.

[23] PCOs have been made or contemplated in three discrete areas: equity and trusts, family law and public-interest litigation. We consider each in turn.

PCOs in equity and trusts

[24] As PCOs are familiar in equity and trusts cases, and because the Crown placed some reliance on them, it is worth surveying that jurisdiction briefly, first. These cases tend to concern trustees or beneficiaries either initiating or responding to proceedings relating to the management of trust assets. There tends also to be a fund within those assets from which trustee (and sometimes beneficiary) costs may be met.

[25] In the case of trustees, *Beddoe* orders may be sought before the merits are determined. These orders give judicial approval to trustees bringing or defending proceedings at the cost of the trust.[16] It is in effect an advance costs order for indemnification of the applicant's expenses from the trust fund. As trustees ordinarily have an entitlement to indemnity for their own costs properly incurred as a consequence of the discharge of trustee duties, the purpose of the *Beddoe* application

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14 *Jones v Coxeter* (1742) 2 Atk 400, 26 ER 642 (Ch). See Mark Friston (ed) *Friston on Costs* (4th ed, Oxford University Press, Oxford, 2023) at [1.65].

15 *Jones v Coxeter*, above n 14, at 642.

16 *Re Beddoe* [1893] 1 Ch 547 (CA); and see *McCallum Jnr v McCallum* [2021] NZCA 237, (2021) 32 FRNZ 851 at [1]–[3] and [37]–[41].

is to obtain judicial confirmation that costs in that case will be properly incurred.[17] However, as the Court of Appeal noted in *McCallum Jnr v McCallum*, a *Beddoe* order will not normally deal with party-and-party costs—that is, costs between the applicant trustees and the other parties to the substantive proceedings.[18] And because the trustees remain at risk for those costs, they may also seek a PCO.

[26] PCOs are sought by beneficiaries (and sometimes trustees), either directing advance costs (by indemnity or partial indemnity) or protecting against other-party costs risk (by immunity or partial immunity). The relevant principles were gathered by the High Court in *Woodward v Smith.*[19] PCOs are seldom made in hostile trust litigation, other than in cases involving substantial pension funds where the applicant's participation may be characterised as truly derivative.[20] In other hostile cases the norm is to allow costs to be resolved by the trial Judge retrospectively. The Court said:[21]

> Only in very exceptional cases, after having regard to the strength of the party's case, the likely costs order at trial, the justice of the application and any special circumstances, will a PCO be made. Care is needed in considering each potential aspect of such an order: the indemnity aspect (essentially funding the plaintiff's own costs) and the immunity aspect (protecting the applicant [from] liability for other party's costs). Some cases may justify one or the other, and, very exceptionally, both. It may well be the case, for instance, that the granting of pre-emptive indemnity orders will be sufficient in itself to meet the justice of the case.

[27] Although the Crown relied on these principles in support of its opposition to the order sought here, we think limited assistance is gained from them in any case. They are particular to the trusts context, and often concern a fund in respect of which litigants have either an entitlement or an expectation to be paid their reasonable costs according to orthodox equitable principles.

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17 See for example *McCallum Jnr v McCallum*, above n 16, at [29]–[32]; *Butterfield v Public Trust* [2017] NZCA 367, [2017] NZAR 1439 at [20]; *Re Grimthorpe (decd)* [1958] Ch 615 (Ch) at 623; and Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) vol 2 at [48–005]. See also Trusts Act 2019, s 81.

18 *McCallum Jnr v McCallum*, above n 16, at [41].

19 *Woodward v Smith* [2014] NZHC 407, [2014] 3 NZLR 525 at [23] and [39].

20 See for example *McDonald v Horn* [1995] ICR 685 (CA).

21 *Woodward v Smith*, above n 19, at [39].

PCOs in family litigation

[28] Family law makes provision for interim orders in the course of proceedings.[22] These orders primarily concern interim maintenance and property allocations, rather than costs. In *Biggs v Biggs*, however, the Court of Appeal ordered the husband in that case to make an interim property distribution that would substantially fund the wife's litigation costs.[23] An equivalent order has been made in at least one subsequent case.[24] Again, this line of authority, based on a very specific statutory jurisdiction and (usually) the existence of an undivided pool of relationship assets, is of little direct relevance to the issues in this application.

PCOs in public-interest cases

[29] This Court has not previously considered PCOs in a public-interest context. The matter was referred to obliquely in the judgment of Elias CJ and William Young J in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, but that case concerned costs after the event, rather than a PCO.[25] The Court of Appeal considered but rejected the making of a PCO in *Berkett v Cave*.[26] In doing so it set aside a PCO that had been made in the High Court. Counsel referred us to two other instances in which PCOs had been made by the High Court in public-interest cases.[27]

[30] In *Berkett v Cave*, proceedings were brought by electricity consumers who were beneficiaries of the Hutt Mana Energy Trust. The proceedings alleged that the trustees had exceeded their powers and failed to act with the prudence and care required of such office-holders. In the High Court, Wild J made an order for advance costs, requiring the Trust to pay indemnity costs to the plaintiffs for the whole of the proceeding, irrespective of the result. The trustees appealed against that order and succeeded. The Court of Appeal set aside the PCO made in the High Court but

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22 See for example Family Proceedings Act 1980, s 82; and Property (Relationships) Act 1976, s 25(3)–(4).

23 *Biggs v Biggs* [2020] NZCA 231, [2020] NZFLR 87 at [43]–[44]. For the Canadian approach, see the discussion in *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, [2003] 3 SCR 371 at [33].

24 *Malina v Hensley* [2020] NZFC 4249.

25 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 167, (2014) 25 PRNZ 637 at [18].

26 *Berkett v Cave* [2001] 1 NZLR 667 (CA).

27 See below at [34].

accepted that there would be cases, "exceptional for whatever reason", where the Court could properly make a PCO in public-interest litigation.[28] At a minimum, three things needed to be demonstrated:[29]

(a) the case mounted is clearly arguable;

(b) there is a substantial public interest in obtaining a decision of the court on the point or points at issue, irrespective of the result; and

(c) it would be unduly onerous for the plaintiff to be expected to fund the litigation even in the interim.

[31] The Court of Appeal concluded that it was "difficult to envisage a case qualifying for an advance order for indemnity costs unless the applicant can demonstrate at least these three points".[30] And it continued:[31]

> Such demonstration will take the case along the way towards being a qualifying one, but ultimately the outcome will depend on the Judge's appreciation of whether it is appropriate, against all relevant factors, for such an order to be made.

[32] We note that the Court of Appeal in *Berkett v Cave* did not suggest that the successful applicant need have no individual or private interest whatsoever in the outcome. Such a stipulation was laid down by the English Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry*.[32] That stipulation has been criticised here, in a New Zealand Bill of Rights Act 1990 context.[33] The English case law has subsequently moderated, so that the mere fact a personal interest may also be involved does not necessarily bar the grant of a PCO in a public-interest case.[34] However, the English courts have set their face against PCOs

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28 *Berkett v Cave*, above n 26, at [13].
29 At [13].
30 At [14].
31 At [14].
32 *R (Corner House Research) v Secretary of State for Trade and Industry*, above n 11, at [74].
33 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [33.3.35].
34 *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012, [2015] 1 WLR 62 at [42].

for advance costs, as opposed to orders protecting the applicant from full other-party costs.[35]

[33] In *Berkett v Cave* the beneficiaries could not have disclaimed the existence of an individual or private interest. That case crossed the divide between trust and public-interest litigation. It is clear that a measure of individual or private interest does not preclude the making of a PCO in a public-interest case. However, the greater the individual or private dimension, the less likely it is that a PCO will be made.

[34] PCOs appear to have been made by the High Court in two other public-interest cases. Recently, in *Gordon v Attorney-General (No 2)*, Palmer J made an order that was protective against other-party costs, rather than for advance costs, in a case concerning the interpretation of provisions of the Mental Health (Compulsory Assessment and Treatment) Act 1992.[36] The more relevant decisions are those of Anderson J in 1997, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission.*[37] There, judicial review proceedings had been brought by Māori applicants against the Commission regarding its proposals as to disposition of certain fisheries assets. Application was made for a PCO for advance costs. In a preliminary judgment, Anderson J noted an available analogy with trust cases. He continued:[38]

> The analogy is to some extent apt but the context of the application is specifically indigenous. These proceedings are concerned with vast assets which belong to and are managed by the Commission on behalf of all Māori. The fiduciary obligations are really wider than those which affect trust law. It is well arguable that the Commission is constrained by much broader considerations of equity than those which bind the conscience of trustees of private trust funds. I need not elaborate. The history of the litigation and the debate demonstrates the essential validity of my observation.
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> The questions to be determined represent an issue for all Māori and bear on assets which are held for all Māori. The Court's opinion is being sought, and, as Mr Barton points out, sought at the request of the Commission. It is important to all Māori that the answer be the right answer. Our adversarial process has the benefit of identifying all relevant arguments for and against a

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35 *R (Corner House Research) v Secretary of State for Trade and Industry*, above n 11, at [77].

36 *Gordon v Attorney-General (No 2)* [2022] NZHC 2801, (2022) 13 HRNZ 773. When the applicants failed at trial, a further PCO was refused for their appeal: *Gordon v Attorney-General* [2024] NZCA 327, (2024) 26 PRNZ 563. Leave to appeal has been sought in this Court.

37 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* HC Auckland CP395/93, 30 October 1997 [*Te Waka Hi Ika o Te Arawa* October judgment]; and *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* HC Auckland CP395/93, 18 December 1997 [*Te Waka Hi Ika o Te Arawa* December judgment].

38 *Te Waka Hi Ika o Te Arawa* October judgment, above n 37, at 8–9 (macrons added).

> proposition and by such process truth is revealed. On an issue of such importance the Court should have the benefit of the arguments of each side. It is common ground that the litigation, even in respect of the questions, will be expensive and demanding of time and expertise. The applicants come before the Court with limited funds, some in fact in debt, in the pursuit of claimed rights. It is not in the interests of Māori generally that these issues should seem to be decided on the basis of arguments which only one or some parties would ever have the means to present. It is also plainly in the interests of all parties that grievances should not smoulder interminably. If people seem to have been cut out of argument because they have no funds and their opponents have vast funds, whatever answer the Court gave to the questions might continue to be a source of smouldering resentment and anguish. The transparency of the process requires that it be argued appropriately for each side and only the Commission really has the funds to do this. As I have said, it holds the funds for Māori, for whose benefit and in the discharge of its responsibilities it has asked the questions.

[35] Anderson J reiterated those observations in a second judgment two months later, noting:[39]

> On 30 October 1997 I gave a clear indication that I favoured an interim payment in respect of costs because the issue to be dealt with by way of a preliminary trial is of acute concern to Māori and the resolution of that issue must be both final and accepted by Māori. Acceptance of the decision will depend in no small way on the opportunity to have argued what the right answer should be. Nothing cuts deeper than the lash of injustice or the perception of it, and the Courts are well aware and society is generally that an abiding grievance is carried by those who feel they have not been properly heard. In this case we are dealing with financial assets of perhaps $400 million but we are also dealing with the mana of the participants to the dispute. It is of crucial importance that the argument be fully ventilated and that the Judge who decides the preliminary question be fully informed.

Ultimately, and without attempting close numerical analysis, Anderson J made interim PCOs in favour of the two primary interest groups of $150,000 each ($282,000 in today's money), to be paid by the Commission.[40] These he saw as "interim injections of capital for the purpose of conducting the litigation".[41] They were without prejudice to the making of further orders for costs after the event.[42]

[36] The PCO public-interest jurisdiction is most developed in Canada, in a series of decisions of the Supreme Court of Canada. The first of these is in *British Columbia*

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39 *Te Waka Hi Ika o Te Arawa* December judgment, above n 37, at 4 (macrons added).
40 Other applicants received lesser amounts.
41 At 5.
42 At 5.

(Minister of Forests) v Okanagan Indian Band.[43] In that case members of four Indian bands commenced logging on Crown land without authorisation under the relevant legislation. The provincial minister issued stop-work orders under that legislation, followed by proceedings to enforce the orders. The bands, claiming aboriginal title, sought a PCO that their costs be paid by the Crown in any event. The Supreme Court of British Columbia refused that order but was reversed by the British Columbia Court of Appeal. The grant of a PCO was upheld by six to three on the Province's appeal to the Supreme Court of Canada. LeBel J, for the majority, observed:

> [36] There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. …

[37] His Honour said, further, that although a litigant seeking a PCO must establish a strong enough case to reach the preliminary threshold of being worthy of pursuit, "the order will not be refused merely because key issues remain live and contested between the parties".[44] He continued:[45]

> … it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case.

[38] LeBel J then summed up the operative principles:

> [40] With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for

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43 *British Columbia (Minister of Forests) v Okanagan Indian Band*, above n 23.
44 At [37].
45 At [38].

> bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.
>
> [41] These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. … Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. …

[39] In two subsequent decisions the Supreme Court of Canada has clarified (and, to a degree, restricted) access to PCOs in public-interest cases. It is sufficient to refer directly to the second of them, *Anderson v Alberta*.[46] In that case, a PCO had been set aside by the Court of Appeal of Alberta on the basis that the applicant had not established impecuniosity. The Supreme Court of Canada unanimously set aside the Court of Appeal's decision, but in doing so said (referencing *Okanagan* and the other decision, *Little Sisters Book and Art Emporium*):[47]

> [21] But this Court has also emphasized that "*Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs" and that "[c]oncerns about access to justice must be considered with and weighed against other important factors". Indeed, as this Court explained in *Little Sisters*, notwithstanding obstacles to access to justice such as underfunded and overwhelmed legal aid programs and growing instances of self-representation, the Court in *Okanagan* "did not seek to create a parallel system of legal aid or a court-managed comprehensive program". Rather, *Okanagan* applies to those rare instances where a court would be "participating in an injustice — against the litigant personally and against the public generally" — by declining to exercise its discretion to order advance costs. To award advance costs outside those instances would amount to "imprudent and inappropriate judicial overreach".

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46 *Anderson v Alberta* 2022 SCC 6, 466 DLR (4th) 391. The other decision is *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* 2007 SCC 2, [2007] 1 SCR 38.

47 Citations omitted. See *British Columbia (Minister of Forests) v Okanagan Indian Band*, above n 23; and *Little Sisters Book and Art Emporium*, above n 46.

[40] The principle of separation of powers underlay that caution, with the allocation of public resources being "a policy and economic question" requiring "a political decision".[48] This meant:[49]

> [23] Where, therefore, an applicant seeks to have its litigation funded by the public purse, courts must be mindful of the constraints of their institutional role. Those constraints necessarily confine a court's discretion to grant such an award to narrow circumstances. It must be a "last resort", reserved for the "rare and exceptional" case and where, again, to refrain from awarding advance costs would be to participate in an injustice.
>
> [24] In further keeping with these concerns, the test for advance costs is rigorous. *Okanagan* states three "absolute requirements" that must be satisfied: impecuniosity, a *prima facie* meritorious case, and issues of public importance. Further, while meeting these requirements is necessary, doing so does not automatically entitle an applicant to an advance costs award. Where the requirements are satisfied, a court — having considered all relevant individual circumstances of the case — retains residual discretion to decide whether to award advance costs, or to consider other ways of facilitating the hearing of the case.

[41] Ms Roff also emphasised the separation of powers and institutional competence in her argument for the Crown. However, some caution is needed here. The function of a court in making a PCO is wholly a judicial, not executive, one. It arises, here, as part of the Court's statutory power in s 79 of the Senior Courts Act 2016:[50]

> **79 General powers**
>
> (1) On an appeal in a proceeding that has been heard in a New Zealand court, the Supreme Court—
>
> (a) may make any order or grant any relief that could have been made or granted by that court; and
>
> (b) even if the proceeding has not been heard in the Court of Appeal, has the powers the Court of Appeal would have if hearing the appeal.
>
> (2) In a proceeding, the Supreme Court may, as it thinks fit, make—
>
> (a) any ancillary order; and
>
> (b) any order or decision on an interlocutory application; and

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48 At [22] citing *Ontario v Criminal Lawyers' Association of Ontario* 2013 SCC 43, [2013] 3 SCR 3 at [43].

49 Citations omitted.

50 See also Supreme Court Rules 2004, r 44(1).

(c) any order as to costs.

[42] As both *Jones v Coxeter* and *Berkett v Cave* demonstrate, a PCO is not an order directed to the Crown per se, but simply to an opposing party—which may or may not be the Crown.[51] In those cases, it was not; in *Gordon v Attorney-General (No 2)*, it was.[52] Exposure to liability for costs is simply an incident of participation in litigation. That liability does not depend upon voluntary submission. The Court is not acting as a legal aid authority in granting a PCO. Nor were the courts doing so in *Jones v Coxeter* in 1742, long before legal aid was developed, when Lord Hardwicke LC made the first PCO. As he recognised, the power to do so arose from the court's inherent jurisdiction to do what was just in the circumstances of the case,[53] a power likewise replicated by statute in s 79 of the Senior Courts Act.[54]

[43] With those qualifications, we consider the analysis in the Canadian authorities most consistent with the position that should apply in this country, adding to the vestigial analysis of the Court of Appeal in *Berkett v Cave*, but without actually contradicting it as the English jurisprudence would.[55] It follows that a PCO in a public-interest case, just as in the equitable jurisdiction, may involve either a protective order (protecting the applicant from an award of costs to another party) or advance costs (that is, requiring pre-emptive payment of costs to the applicant before the final outcome is known). The major difference from PCOs in equity, where there are usually trust assets to fund the order, is that advance costs orders in a public-interest case generally thrust the burden on the opposing party.

[44] The making of a PCO in this type of public-interest case where advance costs, rather than a protective order, are sought in advance will be exceptional and will

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51 *Jones v Coxeter*, above n 14; and *Berkett v Cave*, above n 26.

52 *Gordon v Attorney-General (No 2)*, above n 36.

53 See above at [22].

54 In *Okanagan* the Supreme Court of Canada granted a PCO in exercise of its equitable jurisdiction: *British Columbia (Minister of Forests) v Okanagan Indian Band*, above n 23, at [35]. It is not suggested the power to do so in this case is equitable. The ordinary position is that costs are the creatures of statute: *Garnett v Bradley* (1878) 3 App Cas 944 (HL) at 962 per Lord O'Hagan; *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70 at [8]; and David Bullock and Tim Mullins *The Law of Costs in New Zealand* (2022, LexisNexis, Wellington) at 1.

55 See above at [32].

depend on the necessity for such an order being made in the interests of justice.[56] Necessity will likely depend on five considerations. First, the case must raise an issue of very significant general or public importance. While the additional presence of some individual or private interest does not exclude the possibility of a PCO, the greater the individual- or private-interest dimension, the less likely it is that a PCO will be made. Secondly, the applicant's stance on the relevant issue or issues must be seriously arguable. Thirdly, the applicant must be genuinely impecunious, in that it is unable with reasonable diligence to raise the funds required to make its argument effectively on those issues, and therefore unable to do so without the order being made. Fourthly, in standing back to consider whether an order is necessary to avert injustice, the position of the respondent is relevant, including its conduct in the litigation, any broader responsibilities it may have, and any unjust advantage likely to accrue to it absent the order. It must, therefore, be just that the respondent be made to bear the burden of a PCO before the merits have been determined. Finally, the court must consider all reasonable alternatives to the making of the order, and any appropriate limits on its extent and duration. Where a PCO is made, the amount awarded should be no more than is necessary to avert injustice.

[45] We mention here *New Zealand Māori Council v Attorney-General* (the *SOE case*).[57] The judgment of Cooke P concluded with the observation:[58]

> The Māori Council has therefore been vindicated in bringing this case. There may well be ground for ordering the Crown to pay the Council's full costs on an indemnity basis. Or the Crown may so agree. But the question of costs should be left until any necessary negotiations and further hearing are concluded, when the whole conduct of the matter on both sides can be reviewed.

That was a case which might also have been described, as the Privy Council later put it, as one in which the appellants were "pursuing the proceedings in the interest of taonga, which is an important part of the heritage of New Zealand".[59] That later case, concerning the transfer of state broadcasting assets, was one in which the

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56 Where the order is protective against the applicant being liable for other-party costs, a slightly lower threshold may however apply.

57 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*SOE case*]. This case is also widely known as the *Lands case*, but see *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [15], n 25.

58 *SOE case*, above n 57, at 668 (macron added).

59 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525.

Privy Council ordered that costs lie where they fall, which protected the appellants against liability for costs to the Crown. But, like the *SOE case* and *Environmental Defence Society* appeals, it did not directly concern a PCO; all these cases concerned costs after the event, where the substantive merits had been resolved (in the *SOE case*, in favour of Māori; in the broadcasting one, against). However, they do raise as a relevant consideration the responsibility of the Crown to give active protection to the rights of Māori under the Treaty "in the use of their lands and waters to the fullest extent practicable".[60] We will return to that point.

Application of principles here

[46] We now consider how the five general principles set out above at [44] apply here.

[47] First, it is plain that the proper construction of the Act—and of ss 11(3), 51(1) and 58(1) and (4) in particular—raises primary issues of general and public importance, for which this Court has given leave to appeal. The remaining, secondary issues including as to the particular factual application of the Act to the areas of foreshore and seabed in issue are also ones of general and public importance, which likewise have been the subject of leave to appeal.

[48] That simple jurisdictional description however takes no account of the intensity of importance of the issues on appeal here, nor the intensity of disagreement they have generated over a century and a half. Few matters have caused greater division and dissensus between Pākehā and Māori, and between Māori and Māori, than rights of title and access to New Zealand's coastline. Time and again branches of government have wrestled with the subject, but without much success in settling it. The courts wrestled with CMT in Chief Judge Fenton's decision in *Kauwaerenga* in 1870.[61] There, the Chief Judge recognised as easements the claimants' fishing rights in the Thames foreshore. Two years later, the Governor issued a proclamation pursuant to s 4 of the Native Lands Act 1867 suspending the jurisdiction of the Native Land Court over any land within the Auckland Province situated below the

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60 *SOE case*, above n 57, at 664 per Cooke P.

61 *Kauwaeranga* (1870) 4 Hauraki MB 236. For the reprinted version of the case see Alex Frame "Kauwaeranga judgment" (1984) 14 VUWLR 227.

mean high-water mark. The government of the time explained that Māori claims to the foreshore would proliferate unless the prospect of marine title was suspended.[62] The Court of Appeal returned to the issue in *Re The Ninety Mile Beach* almost a century later, the effect of which was to foreclose the possibility of CMT either because Native Land Court terrestrial awards ended at the mean high-water mark or, if the Court had not investigated title to the adjoining land, then by the exclusionary effect of s 147 of the Harbours Act 1878.[63] *Re The Ninety Mile Beach* was then found to have been wrongly decided on both counts by the same Court in *Attorney-General v Ngāti Apa* in 2003.[64] That decision was itself overturned by legislation, the Foreshore and Seabed Act 2004, which in turn gave way to the present Act in 2011.

[49] The present appeals are the first test at the level of this Court of Parliament's most recent attempt to provide for customary marine rights. The importance of the issues may be measured by the Crown's recognition hitherto of an obligation to fund the participants' legal costs on an indemnity basis. That might reflect a recognition of the Crown's responsibilities to give active protection to rights of Māori under the Treaty "in the use of their lands and waters to the fullest extent practicable".[65] Latterly, in its revised financial assistance scheme, it responded to the finding of the Waitangi Tribunal that only partially funding the costs of applicant groups had breached that obligation of active protection, significantly prejudicing the protection of customary rights.[66] It might also have reflected the line drawn by Anderson J in an analogous dispute concerning fisheries assets over 25 years ago, in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*—discussed above at [34]—where PCOs were ordered because, as the Judge put it, "[t]he transparency of the process requires that it be argued appropriately for each side" in a case of deep, enduring significance with the potential for perceived injustice to fester across generations.[67] What was true over 25 years ago in the context of fisheries is all the

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62 The 1872 proclamation had lapsed with the enactment of the Native Lands Act 1873. See the full discussion of the background in *Re The Ninety Mile Beach* [1963] NZLR 461 (CA) at 471; and see Fergus Sinclair "Kauwaeranga in Context" (1999) 29 VUWLR 139 at 148.

63 *Re The Ninety Mile Beach*, above n 62.

64 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

65 *SOE case*, above n 57, at 664 per Cooke P.

66 Waitangi Tribunal, above n 6, at xi, xiii and 129.

67 *Te Waka Hi Ika o Te Arawa* October judgment, above n 37, at 9.

more applicable today in the context of customary rights to the marine and coastal area.

[50] Secondly, we accept that Te Kāhui's stance on the primary issues is seriously arguable. It is enough for present purposes to observe that the Court of Appeal itself divided on the requirements to establish a CMT under s 58, and on the grant of shared CMTs.[68]

[51] Thirdly, as we observed above at [20], we are satisfied the Te Kāhui applicants do not have access to funding of their own (or otherwise obtainable with reasonable diligence) sufficient to meet their reasonable needs to pay for legal representation at the forthcoming appeals in November. We are satisfied, too, that the payment to each applicant of a sum not exceeding $30,000 will not remotely meet the likely level of legal costs reasonably incurred. As we note shortly, it is a fraction of the reasonable contribution awards this Court would likely make in the event of success in an eight-day appeal.

[52] Fourthly, we bear in mind that for the first two stages of this litigation, the Crown had agreed to fund the applicants fully. The Crown has now become an appellant in its own right. Its appeal is not confined to s 58(1); it extends to the Court of Appeal's conclusions on ss 58(4) and 11(3) (regarding navigable rivers) and 51(1) (concerning the test for PCRs). This is a broad canvas of dissatisfaction, and these primary issues (including other related issues advanced by other parties) will consume a significant proportion of the time allotted for the hearing of the seven appeals.

[53] This development has come at the very point when the Crown has, because of the level of appropriations allowed to it by Parliament, altered the basis on which it will fund those opposing its appeal. This alteration represents a substantial disadvantage in effect now imposed by one litigant upon another, at the final stage of proceedings, despite that litigant having previously recognised the responsibility to ensure all sides of the argument before the courts could be advanced with full and adequate funding.

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68 CA judgment, above n 3.

[54] While it would have been preferable for this application to have been able to be addressed in the Courts below, so that appeal rights applied and this Court was not forced to deal with it at first instance, the position we find ourselves in now is the simple consequence of the lateness of the change to funding in the proceedings. We do not condemn the Crown's change of funding stance, which is the result of parliamentary appropriations. However, having regard to the combined effect of advantage to the Crown, the subject-matter concerning customary rights, and the disadvantage to the Te Kāhui applicants who cannot now make alternative funding provision at this eleventh hour, we consider this the exceptional case in which it is necessary in the interests of justice to make a PCO for advance costs, the burden of which the Crown should justly bear. In these exceptional circumstances, the Crown's responsibility to see the proceedings completed without undue disadvantage does not depend on the existence of trust or settlement assets which are the subject of the claim. The effect of our conclusion is that we will make a costs order now, rather than only at the end of the hearing, on the basis that it is necessary to do so in the interests of justice.

[55] Fifthly, we turn to the scale and extent of that order. As explained above at [44], advance costs awarded should be no more than is necessary to avert injustice. The sum we order by way of advance costs will not be refundable in the final event. It will however be credited against any further award of costs made against the Crown, should such an order be made, costs now being back on the table in the absence of full funding.

[56] Ngāti Ruatākenga, the Te Kāhui applicant that has engaged Ms Feint, will of necessity undertake the heaviest lifting. A successful party engaging senior and junior counsel for an eight-day appeal would receive costs after the event in this Court of the order of $110,000. We consider the great public significance of the issues Ms Feint will be dealing with, in response to the Crown's arguments, means a PCO for advance costs of three-quarters of that amount is required. That is $82,500. We consider the other three Te Kāhui applicants, having individual party status but essentially supporting the arguments advanced by Ms Feint, require a PCO for no more than two-thirds of costs after the event, but based on single counsel (which, based on

$70,000, would be $45,000 each). In each case the amount the Crown has undertaken to provide must then be deducted to reach the final amount of each PCO.

[57] A PCO will therefore be granted in the sum of $97,500, being the total of the sums set out in the preceding paragraph ($217,500) less the $120,000 which the Crown has in any case undertaken to provide to the four applicants collectively and in respect of which no provision by this Court is therefore needed.

The position of other parties

[58] As we indicated to parties in our minute of 4 September 2024, as at that date the Court had received a PCO application only from the four Te Kāhui applicants. Other parties had indicated support for that application, on the evident premise that they too might be treated in the same fashion. Formal orders will however require an application, and would depend upon the extent to which further funding beyond the orders made in this judgment is necessary to ensure the primary issues are ventilated. Any parties now seeking PCOs should address their concerns first to Crown counsel. We have no doubt the Crown will act responsibly, in accordance with the principles set forth in this judgment. Where the threshold is met, consent orders are to be encouraged.

Result

[59] The application by Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea for a prospective costs order against the Attorney-General is granted.

[60] The respondent must pay the applicants prospective costs of $97,500, collectively.

[61] The respondent must pay the applicants costs on the application of $7,500 together with usual disbursements.

Solicitors:
Ngātahi Law, Auckland for Whakatōhea Kotahitanga Waka (Edwards)

Te Aro Law, Wellington for Te Upokorehe Treaty Claims Trust on behalf of Te Upokorehe Iwi
Whāia Legal, Wellington for Te Rūnanga o Ngāti Awa
Te Haa Legal, Ōtaki for Ngāti Muriwai and Kutarere Marae
Annette Sykes & Co, Rotorua for Ngāti Ira o Waiōweka, Ngāti Patumoana, Ngāti Ruatākenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau me Ngā Hapū o Te Whakatōhea), Ngāti Ruatākenga and Te Whānau a Tītoko
Tu Pono Legal Ltd, Rotorua for Te Tāwharau o Te Whakatōhea (Formerly Whakātōhea Māori Trust Board)
Oranganui Legal, Paraparaumu for Ngāi Tai and Ririwhenua
Franks Ogilvie, Wellington for Landowners Coalition Inc
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Attorney-General
Kāhui Legal, Wellington for Te Whānau-ā-Apanui, and Ngā Hapū o Ngāti Porou as Intervener
Chapman Tripp, Wellington for Seafood Industry Representatives
Cooney Lees Morgan, Tauranga for Crown Regional Holdings Ltd, Ōpōtiki District Council and Bay of Plenty Regional Council
Brookfields Lawyers, Auckland for Whakatāne District Council
McCaw Lewis, Hamilton for Te Whānau a Mokomoko