IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 123/23

124/23

BETWEEN	**NGĀTI MURIWAI**
	Appellant
AND	**KUTARERE MARAE**
	Appellant
AND	**WHAKĀTOHEA KOTAHITANGA WAKA (EDWARDS), WHAKATŌHEA MAORI TRUST BOARD, TE RŪNANGA O NGĀTI AWA ,TE ŪPOKOREHE TREATY CLAIMS TRUST, and claims brought on BEHALF of NGĀTI RUATAKENGA, NGĀTI PATUMOANA, and NGĀTI IRA** Respondents
AND	**ATTORNEY GENERAL, LANDOWNERS COALITION INCORPORATED, TE WHĀNAU-Ā-APANUI, SEAFOOD INDUSTRY REPRESENTATIVES, CROWN REGIONAL HOLDINGS LIMITED, ŌPŌTIKI DISTRICT COUNCIL, BAY OF PLENTY REGIONAL COUNCIL and WHAKATĀNE DISTRICT COUNCIL** Interested Parties

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Submissions on appeal for Ngāti Muriwai (SC 123/23) and Kutarere Marae (SC 124/23)

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INTRODUCTION

1. These submissions are filed in support of appeals by Christina Davis on behalf of **Ngāti Muriwai** hapū (SC 123/23) and Barry Kiwara representing **Kutarere Marae** (SC 124/23).

2. Joint submissions are filed as the Court of Appeal dealt with two applicant's appeals together and as a result common questions of law arise in the appeals.

SUMMARY OF ARGUMENT

3. The court in the Judgment of Miller J has dismissed the appeals of both appellants on the basis that each "*was not entitled to hold a CMT in its own right"* as "*Neither could show that they had held an area in accordance with tikanga since 1840."*[1] As a **first point** on appeal this finding is appealed on the basis that it does not correctly state the tests for CMT. In particular, Miller J has used a stricter test for *post 1840 exclusive use and occupation without substantial interruption* than the correct test applied by the majority. It is also submitted that both the majority and Miller J applied an incorrect s 58(1)(a) *holding in accordance with tikanga* test in including the requirement of customary control.

4. The **second point** of appeal was that the court in the Judgment of Miller J was in error in relying on the finding of the High Court that **Kutarere Marae** was not entitled to a CMT because it was not an iwi, hapu or whanau group.[2] This earlier finding was stated to be based on the applicant's own evidence when the actual evidence was that it was at least a whanau group.

5. With regard to the finding in the Judgment of Miller J that **Ngāti Muriwai** "was not entitled to a CMT in its own right", it will be argued that this should be interpreted as meaning that the group cannot hold a CMT on its own, and on this basis the finding is not contested. If alternatively, this is interpreted as meaning that Ngāti Muriwai cannot share a CMT with others in Whakatohea iwi then as a

[1] [280]
[2] [283]

third point on appeal it will be submitted that the evidence cited by His Honour in support does not support such a finding.

6. In regard to the further finding regarding **Ngāti Muriwai** they 'may participate in a recognition order granted to an applicant group of which they form part', it is submitted that this should be properly interpreted as meaning that Ngāti Muriwai may share a CMT with other Whakatohea groups. On this basis there is no objection raised. If alternatively, this is interpreted as requiring Ngāti Muriwai to join one of the successful hapu applicant groups awarded shared CMT[3], it will be submitted that as a **fourth point** of appeal that this is incorrect. It is also noted that His Honour appears to have made his finding upon the basis that Ngāti Muriwai was a post 1840 whanau group. While this is not accepted, it will be submitted that this should not make any difference to the outcome.

7. Upon the basis that the previous points on appeal are upheld, **Ngāti Muriwai** seek as a **fifth point** on appeal changes to rehearing directions by the Court of Appeal to allow Ngāti Muriwai to participate in the rehearing for CMT 1 and also that there be a rehearing for CMT 2 they can participate in.

8. Finally, as a **sixth point** on appeal it is argued that there was no basis on the evidence for the court in the Judgment of Miller J to have concluded that Ngāti Muriwai are a post 1840 hapu group.

APPELLANTS

9. **Ngāti Muriwai** are a hapu of Whakatohea iwi with recorded history of their existence before 1840. They were granted one of the reserves near the coast at Opape provided by the Crown following the confiscation of Whakatōhea land in the 19th century. Ngāti Muriwai hapu is currently one of the larger groups in Whakatohea. In the proceedings in the High Court orders were sought that Ngāti Muriwai share in a CMT over the Whakatōhea rohe as part of Whakatōhea iwi. The High Court dismissed the application for CMT but granted PCRs. [4]

[3] The High Court has subsequently adopted this interpretation.
[4] [465]

10. **Kutarere Marae** ('Kutarere') is a community situated near the edge of the Ohiwa harbour and was established in the 1930s by a number of whanau who had been displaced from their traditional lands. Kutarere Marae is the largest Whakotohea marae and while identifying as part of Whakatohea iwi does not affiliate with any particular hapu. Kutarere has applied to the Crown for a CMT agreement and in this capacity participated as an interested party in the proceedings. Despite this limited participation the High Court made findings that they were not eligible for a CMT.

THE COURT OF APPEAL JUDGMENT

11. The relevant rulings on both the Ngāti Muriwai and Kutarere appeals are made within the Judgment of Miller J at [277]-[283].

12. At [278] His Honour noted that the pukenga did not answer the question of whether either of the groups held areas in accordance with tikanga.

13. At [279] His Honour referred to evidence and findings from the High Court relating to each of the groups.

14. Regarding Kutarere Marae reference is made at [279] (a) to a finding by the High court that "*On its own evidence Kutarere Marae came into existence in the 1930s and is not a whānau, hapū, or iwi"*[5]

15. At [279] (b) regarding Ngāti Muriwai, reference was made to certain observations the High Court Judge made about evidence and submissions heard.

16. His Honour then went on to say at [280] that "*I am not persuaded that the Judge was wrong to find that neither group was entitled to CMT in its own right*. *Neither could show that they held an area in accordance with tikanga since 1840".*

17. With Ngāti Muriwai His Honour goes on at [281] to find that they were *at least a whānau group forming part of the iwi* and may *participate in a recognition order granted to an applicant group of which they form part, provided members of that group are able to meet the s 58(1) criteria*".

[5] At [424] of the High Court judgment.

18. His Honour goes on at [282] to say that the Ngāti Muriwai appeal must still be declined because they sought a CMT on the basis that they met the criteria in their own right.

19. At [283] His Honour concluded that the Kutarere Marae appeal should also be declined given that it was immaterial that they participated as an interested party and the findings of the judge on their status was open to him.

20. At [360] Cooper P and Goddard J in their majority judgment state that they agree with the disposition of all of the appeals by Miller J. and they "*agree with much of the reasoning in his judgment".*

FIRST POINT ON APPEAL - INCORRECT CMT TEST APPLIED

21. The tests applied by Miller J and the majority to for CMTs under S 58 can be summarised as follows.

Test applied by Miller J

22. At [136]-[139] Miller J rejected the argument the two parts of s 58(1) need to be applied independently. His Honour then states there is a single test, after citing Canadian and Australian authorities that the court *must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights*.[6]

23. His Honour then examined the elements of the *s 58(1).* With s 58(1)(a) *holding in accordance with tikanga,* His Honour made reference to Maori Land Court decisions that land was *kept in accordance with tikanga*[7] and went on to conclude that the test would require *evidence of activities that show control or authority over the area …distinguishing "holding" the area from use of it to gather a particular resource.*[8] His Honour then went on to interpret the S 58(1) (b) *exclusive use and occupation* test as involving essentially the same *control*

[6] [138] Referring to *Tsilhqot'in Nation v British Columbia 2007 BSCS* 1700 **(BOA Tab 1)**at [32].
[7] John *da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212 **(BOA Tab 2)**, at 217.
[8] [140]

requirement, but at 1840 and continuing to today. His Honour goes on to explain that *s 58(1) establishes a single composite test.*[9]

24. Although His Honour does not at that stage express what this single composite test is, when he later applied it to Ngāti Muriwai and Kutarere Marae, it is expressed as assessing whether the group *had held an area in accordance with tikanga since 1840.*[10]

25. His Honour then goes on to reject the view of the High Court that *exclusivity* is not compatible with tikanga and goes on to refer to instances of Maori assuming the right to control and exclude others from their land, including evidence in the case and the *Ninety Mile Beach* decision of the Maori Land Court.[11]

26. His Honour further concluded that "*exclusivity of use and occupation requires both an externally-manifested intention to control the area as against other groups and the capacity to do so".* [12]

27. However, in this respect, His Honour considered that the historic failure to legally recognise and enforce Maori rights to exclude others from their land was not to be taken into account in assessing *exclusivity*.[13] In assessing *substantial interruption*, Canadian , that breaks in continuity of possession caused by failure to legally enforce customary rights should be disregarded, were supported .[14] His Honour also considered that s 58(3), that public navigation and fishing do not of themselves prevent a CMT, was also consistent with this approach.[15] But he accepted that these third party activities could still constitute *substantial interruption* depending on 'scale, extent and duration'.[16]

Majority approach

28. The approach of the majority to the test of *holding in accordance with tikanga* under s 58(1)(a) was essentially the same as that adopted by Miller J. In adopting

[9] [145]
[10] [280]
[11] [144]-[160] *Wharo Onoroa a Tohe (90 Mile Beach)* (1957) 85 Northern MB 126 (85 N 126) **(BOA Tab 3)**
[12] [162]
[13] [170]
[14] [175]
[15] [180]
[16] [181]

the test that there must be a degree of customary *control* the majority accepted submissions from the Crown and others that there must be a territorial 'holding' to distinguish from rights to only to gather a particular resource.[17] It was stressed that there should be a *focus on the group's intention and ability to control access to an area, and the use of resources within it, as a matter of tikanga.*[18]

29. With the first part of S 58(1)(b) – exclusive use and occupation at 1840- the majority, like Miler J, essentially repeated the test of customary ability to control access by others as applied to the holding in accordance with tikanga test under s 58(1)(a).[19] In this regard it was accepted that the test essentially follows the Canadian aboriginal test of pre- sovereignty control, but in a way that is *undertaken in a culturally sensitive manner that focuses on the customs and usages of the relevant groups.* [20] The majority stressed that this was more than use rights and *there must be a "strong presence" in the area, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the area in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.*[21] The Canadian concept of shared exclusivity was accepted.[22]

30. With regard to the second leg of s 58(1)(b) *exclusive use and occupation without substantial interruption since 1840,* the majority considered that this *needs to be approached having regard to the substantial disruption to the operation of tikanga that resulted from the Crown's exercise of kāwanatanga, and having regard to the scheme and purpose of MACA.* [23] In this regard, reference was made to Maori rights to the seabed and foreshore historically not being legally recognised and the public allowed access which Maori could not resist. The court considered that *Anglocentric assumptions on the part of those third parties about their right to do so that Māori were unable to resist, should not be seen as relevant interruptions of the customary rights that found CMT*.[24] They considered arguments to the

[17] [400]-[401]
[18] [403]
[19] [421]
[20] [419]
[21] [422]
[22] [425]
[23] [426]
[24] [426](f)

contrary would allow *by a side wind, create a form of "adverse possession" regime in respect of customary land that would be novel and unprecedented, inconsistent with the common law, and inconsistent with the Treaty.*[25]

31. In this regard the majority noted that this approach was consistent with principle of common law customary title, as established in Ngāti Apa and other cases, that customary title can only be extinguished by clear legislation.[26] The view by Miller J that s 58(3) relating to public access and fishing rights represented legislative adoption of this approach was supported.[27]

32. The majority then went on to discuss what would constitute *substantial interruption.*

33. Firstly it is noted that it applied *where a group has ceased to use and occupy a relevant area for such an extended period that ahi kā roa is no longer maintained by that group as a matter of tikanga*. [28] In this regard it was noted that in these circumstances the area would also be considered to be *held in accordance with tikanga* under s 58(1)(a).

34. Secondly it was considered that *Use or occupation of the area by another person in a manner that was expressly authorised by an Act of Parliament could substantially interrupt the use and occupation of the area by the applicant group*. An example of a port was given that *excludes the applicant group from access to certain parts of the common marine and coastal area, would preclude the grant of CMT in respect of those parts of the area*. [29]

35. The overall tests under s 58 are then summarised[30] at as:

> *(a) Whether the applicant group currently holds the relevant area as a matter of tikanga.*

[25] [427]
[26] [428] n 462
[27] [426](f)
[28] [432]
[29] [433]
[30] [434]

(b) Whether in 1840, prior to the proclamation of British sovereignty, the group (or its tikanga predecessor(s)) used and occupied the area, and had sufficient control over that area to exclude others if they wished to do so. This inquiry essentially parallels the inquiry required by common law to establish customary title as at 1840.

(c) Whether post-1840 that use and occupation ceased or was interrupted because the group's connection with the area and control over it was lost as a matter of tikanga, or was substantially interrupted by lawful activities carried on in the area pursuant to statutory authority.

36. The majority then go on at [435] to agree with Miller J that s 106 only requires applicant groups to bear the onus to prove that they held the area in accordance with tikanga and has been used and occupied the area from 1840 to the present day. But with shared exclusivity at [440] departed from Miller J in finding that all the sharing groups need not agree.

Differences between the approaches

37. There is a difference in interpretation of s58 between majority and Miller J. Miller J considers there is a single test of *holding the area in accordance with tikanga since 1840.* By contrast, the majority break it down to a three part test – one for s 58(1)(a) and one each for each part of s58(1)(b) – at 1840 and to the present.

38. In substance, the majority and Miller J interpret s 58(1)(a) and the first part of s 58(1)(b) the same, as requiring to *control in accordance with tikanga* at present and at 1840 respectively.

39. The differences in approach occur with the second part of s 58(1)(b) – exclusive use and occupation from 1840 to the present- Miller J in his judgment criticised the majority approach as not applying the tests of *exclusivity* and *substantial interruption*. He stated:

> [187] I respectfully consider that the majority judgment leaves both the requirement for exclusive use and occupation since 1840 and the concept of substantial interruption with no work to do. The substance of the majority approach is that an applicant group who can show that they held an area in accordance with tikanga at 1840 will obtain CMT unless (a) their rights have been extinguished in law through action expressly authorised by statute or (b)

the group abandoned the area after 1840 or ceded control of it to another Māori group as a matter of tikanga.[31]

Was the CMT Test applied to Appellants Correct ?

40. For the purposes of these appeals the issue is whether the CMT test as applied by the Court of Appeal to Ngāti Muriwai and Kutarere Marae was correct at law.

Was the s 58(1)(a) test applied correctly?

41. In this regard it is submitted that the s 58(1)(a) *holding in accordance with tikanga* test as applied by Miller J, and which the majority adopted the same approach to, was incorrect in as far as it requires *customary control*.

42. It is submitted that the court correctly clarified that s 58(1)(a) adopts the criteria for defining Maori Customary Land under *Te Ture Whenua Act 1993*. The majority stated:

> *[397] The first limb of s 58(1) requires the applicant group to show that it holds the specified area in accordance with tikanga. This requirement appears to reflect the definition of Māori customary land in Te Ture Whenua Maori Act 1993: "land that is held by Māori in accordance with tikanga Māori". In relation to this provision the Māori Land Court has observed that: "The important word here is 'held'. There is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Māori.*

43. In support of these principles the Maori Land Court decision in *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board*[32] was referred to. This decision was also referred by the High Court in *Re Reeder* .[33] In this decision Powell J rejected a Crown argument that s 58(1)(a) required a proprietary like holding of the specified area in order to distinguish this with non-territorial rights.[34] Powell J observed that the court in *John da Silva considered the meaning of "held in accordance with tikanga" and concluded that the term "held" reflected the continuity of the customary relationship with the land rather than the imposition of European concepts of ownership*. [35] Upon this basis His Honour concluded that

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[31] [187]
[32] *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board (1998) 25 Tai Tokerau MB 212 (25 TTK 212)***(BOA Tab 2)**. This case was also referred to by Miller J. at [140]
[33] Re Reeder [2021] NCHC 2726 **(BOA Tab 4)**. In the same context n *Ngāti Apa* it was observed that "The Maori lands legislation was not constitutive of Maori customary land. It assumed its continued existence" (470
[34] [23]-[24]
[35] [27]

it cannot be correct to imply "proprietary-like" concepts to holding in accordance with tikanga in the first part of the test for CMT.[36]

44. Despite the distinction between *holding in accordance* with tikanga with proprietary concepts in *John da Silva,* both the majority and Miller J, after citing the case then went on to link the concept with proprietary principles of *control.*[37] In both decisions this was rationalised as distinguishing *holding* from use rights. For the reasons expressed by Powell J in *Re Reeder*, this interpretation was contrary to the approach taken by the Maori Land Court. Nor was it necessary. In this regard, reference is made to the decision in the *John De Silva* case, where the group who were found to be *holding* the land were found to do so on behalf of another group.[38]

45. In further support of the Maori Land Court approach being adopted, it is noted that the parliamentary reports leading up to the passing of MACA suggested that the *holding in accordance with tikanga* was intended to operate as an initial threshold test for applications for a CMT.[39] As noted by Powell J in Re Reeder, it is at the second part of the CMT test that proprietary concepts are introduced.[40]

46. Further, the reference to the same *control* test in both the s58(1)(a) and s 58(1)(b) tests does not make sense from the point of view of how the overall test would practically operate. It leads to similar analysis being carried out in each part of the test. This can lead to confusing results. For example, the resulting similarities in the tests seems to have led Miller J to conclude that all the elements of S 58 can be collapsed into a single test of 'holding in accordance with tikanga since 1840'.

47. Lastly, it is noted that Miller J taking a proprietary approach to *holding,* would seem to run counter to his warning about "*distorting the Aboriginal perspective by forcing*

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[36] [28]
[37] Majority [400]-[401], Miller J [140]
[38] *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212 at 242 **(BOA Tab 2)**
[39] **BOA Tab 10** Marine and Coastal Area (Takutai Moana) Bill, Departmental Report, 4 February 2011

[40] [28]

ancestral practices into the square boxes of common law concepts".[41] But this may relate to his view that Maori tikanga was consistent with a proprietary approach to land ownership.[42] In this regard it is noted that Powell J in Re Reeder takes the opposite view that tikanga "*may appear to an outside observer to have "proprietary-like" elements, that is an essentially coincidental consequence of the tikanga*". [43]

48. As such, it is submitted as a **point on appeal** that an incorrect and stricter test under s 58(1)(a) was applied to Ngāti Muriwai and Kutarere Marae.

Was the post S 58(1)(b) test applied correctly?

49. With regard to the s 58(1)(b) test it is submitted that this was correctly stated by the majority of the Court of Appeal and the test stated by Miller J is incorrect.

50. As a result, the CMT test applied to Ngāti Muriwai and Kutarere Marae was not correct. In substance, this meant the *exclusive use and possession without substantial interruption from 1840 to the present* test was incorrectly applied in that under Miller J's approach this required stricter tests of *exclusiveness* and *substantial interruption*. This is raised as a **point of appeal** against the decisions.

51. It is submitted that the majority approach is soundly rationalised in a way that is consistent with the legislation. In addressing this submission it would be relevant to address the criticisms levelled at the majority approach by Miller J.

52. Miller J in his judgment is critical of the majority for adopting essentially a common law based test.[44] His view is that the CMT criteria was a statutory test distinct from the common law. Specifically:

> " *the legislature adopted a customary rights scheme, initially in the 2004 Act and now in MACA, which supplants the common law. In my view it is a matter of historical fact that the statutory scheme was largely drawn from Yarmirr. Its common law origins are visible in ss 27 and 28, which correspond to the common law rights of navigation and fishing. Section 26 creates new individual rights of*

[41] [138]
[42] [144]
[43] [25]
[44] [185] where he states that the test should not be "an additional requirement drawn from the common law of England".

access and recreation without charge, but it too may be said to find a source in Yarmirr." [45]

53. In this regard, the reference is to *Foreshore and Seabed Act* scheme appears to be to the *territorial customary rights* orders test that applied in addition to the common law customary title test.[46] This included an *exclusive use and occupation without substantial interruption test*, and exceptions for public navigation.

54. With regard to the decision of the Australian High Court in *Yarmir,*[47] in Miller J's view the statutory tests from the *Foreshore and Seabed* and MACA Acts, with provisions that public access and fishing did not prevent customary title, were intended to adopt the minority decision of Kirkby J in *Yamirr* , that common law rights to that effect should not prevent customary title.[48] This followed findings by the Waitangi Tribunal in the *Foreshore and Seabed report* that the common law would have followed the majority view to the contrary.[49]

55. It is submitted that Miller J's is essentially correct in his analysis that the legislature intended to impose a test that was not based on the common law and intended to address some of the issues with common law customary title on issues such as public access. But equally, with respect, he was not correct in considering that the majority took a different approach based on the common law.

56. In this regard, at 1840 the majority, as did Miller J., applied Canadian concepts of pre- sovereignty title, which is not a common law concept.[50] With the post 1840 test the majority focused on how the terms in s 58 should be applied in terms of the wider statutory scheme.[51] This could not be based on the common law as post sovereignty *exclusive use and occupation* is not a common law concept. In applying a statute-

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[45] [192]
[46] Foreshore and Seabed Act s 32.
[47] *Commonwealth v Yarmirr* [2001] HCA 56, (2001) 208 CLR 1 **(BOA Tab 5)**
[48] [163] citing an article by Richard Boast at n 263
[49] [48] Although there were indications in *Ngāti Apa* that a *qualified* approach was intended. Tipping J., in discussing the submission that the objective of public access to the coastal marine area under the *Resource Management Act,* commented that *"Public access is not, however, so necessarily inimical to the existence of Maori customary title of some kind as to entitle the Court to draw the inference of intended extinguishment*[190]

[50] It is concept developed for applying the recognise aboriginal interests under the Canadian constitution.
[51] [426]

based test they do on occasion refer to common law approaches for guidance, but this did not form the basis of their interpretation.[52]

57. In this regard, there does seem to be fairly clear indications that parliament did intend that common law based concepts as a guide for the courts. For example, in *Hansard,* the minister sponsoring the bill stated that: T*he bill provided guidance for the courts based on the remarks of the Court of Appeal in the Ngāti Apa case, the experience of Commonwealth experiences such as Canada …" [53].*

58. Overall, it is submitted that while both the majority and Miller J have approached their interpreted the CMT test differently in some respects, both approaches are conceptually correct. Both have applied the terminology of the statutory test by referencing how they were developed in other jurisdictions, but in a manner that was consistent with the legislation.

59. In this regard, as noted by Miller J in his judgment[54], the terminology from the case law was applied in the context that they were developed as being *sui generis* to recognise customary interests and need not be applied by their strict property law meanings. This included taking into account public policy and any underlying legislation. In this regard, Miller J referred to the Canadian decision in *Delgamuukwv,* where it was considered that to take into account a break in continuity caused by failure to legally recognise aboriginal rights, would undermine the objectives of constitutional provisions under aboriginal title was recognised under.[55]

60. In the same sense it was open, and appropriate for the Court of Appeal, to take into account the purposes and objectives of the MACA Act, including those noted by the majority at [426], to give post 1840 *exclusivity* and *substantial interruption*, the interpretations they arrived at in their decisions that differed from the strict literal or property law meanings of these terms.

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[52] Such as [428] where Ngāti Apa is referred to regarding extinguishment of title
[53] *Hansard* Vol 670 Second Reading 16981 **(BOA Tab 6)**
[54] [138]
[55] *Delgamuukw v British Columbia* [1997] SCR 1010 **(BOA Tab 7)**

61. The fact that the majority and Miller J have taken fundamentally the same approach to interpreting the CMT test is reflected in the fact that there appears to be little difference in the outcomes. The approach of Miller J to *exclusivity* and *substantial interruption* seems essentially the same as the majority in that the results of the inability of Maori to legally enforce their rights is not taken into account. As a result, there needs to be legislation expressly overriding Maori exclusive and occupation rights, as clarified by the majority. Apart from this, both the majority and Miler J are agreed that Maori groups must exercise control as a matter of tikanga from 1840 to the present.[56]

62. As such, it is submitted that Miler J is incorrect that the majority did not apply the concepts of *exclusivity* and *substantial interruption* at all. Rather, like Miller J, the majority have not applied the criteria when the reason for non- compliance is the historic failure of the law to enforce Maori rights.[57] In this regard however, given the degree that these rights were ignored, the tests may come down to solely the issue of whether there control in accordance with tikanga was being exercised.

63. Lastly, it is noted that the majority approach to S 58(1)(b) *exclusive use and occupation without substantial interruption from 1840,* is essentially in line with the approach that was argued for by Ngati Muriwai and Kutarere Marae in the Court of Appeal. As such, it is submitted that Miller J was not correct in stating that no applicant group contended for the approach.[58]

FINDING THAT KUTARERE WAS NOT ENTITLED TO A CMT

[56] Although the majority express the test on the basis of maintaining a connection, they state what is required is *demonstrating that the area in question either belonged to, or was controlled by, or was under the exclusive stewardship of the claimant group [422]*

[57] See [422] where the 'strong presence' the group must have includes demonstrations of control. Also, with the majority's approach to the onus of proof under s 106 at [436] they leave it open for another party to prove post 1840 that the groups customary interests *have ceased to have the necessary character or been substantially interrupted after 1840, as explained above*. Also as discussed above, the majority also require control to be proven at the present day as part of the s 58(1)(a) *holding in accordance with tikanga* test.

[58] [188]

64. The **second point on appeal** challenges the finding that Kutarere Marae were not entitled to a CMT.

65. The full finding dismissing the Kutarere CMT application at [283] reads:

The appeal of Kutarere Marae will also be dismissed. It seems immaterial that as a formal matter they participated in the hearing as an interested party. The Judge clearly understood that they also sought to be recognised as a hapū. His finding that they are neither a hapū nor a whānau group, and so are ineligible for CMT, was open to him.

66. In reaching this finding Miller J refers the High Court judgment at [424] which states:

On its own evidence, Kutarere Marae is not a whānau, hapū or iwi. It was not in existence until the 1930s. It therefore cannot meet the statutory test in s 58 of the Act as having exclusivity held and occupied a specified area of the takutai moana from 1840 to the present day.

67. In the High Court the relevant parts of the evidence given by **Barry Kiwara** on behalf of Kutarere are summarised at [422]-[423] of the High Court Judgment. This includes that the Marae was established in the 1930s by Mr Kiwara's father, rejecting a suggestion that Kutarere was a marae of Upokorehe, and that Kutarere 'aspires' to be a hapu of Whakatohea.

68. Further relevant evidence provided by Mr Kiwara at the hearings was that the marae is made up of 18 founding whanau who continue to be involved with administrating the Marae **t**hrough each whanau having a representative trustee.[59] He refers to these whanau as 'blood kin groupings. He also produced documents showing that the Marae area has been gazetted a Maori reservation for *Nga Turanga hapu of Tuhoe and Maori people of the district generally*. [60]

69. Against this evidential background, it is unclear what the High Court Judge was referring to in stating that *'on its own evidence'* Kutarere is not a whanau, hapu or iwi. While Mr Kiwara's evidence does not claim Kutarere to be an iwi, and is equivocal as to its hapu status, he does state that it is made up of group of whanau.

[59] Affidavit of Barry Kiwara 14 August 2020 **(COA Tab 804)**[27]-[28].
[60] **Transcript Tab 419** Evidence of Barry Kiwara 108.04386

70. On the basis of the evidence it is also submitted that Kutarere Marae meets the definition of an *applicant group* under the MACA Act of "*1 or more iwi, hapū, or whānau groups*"[61] in that it consists of a number of whanau groups seeking a recognition order.[62]

71. In these circumstances it is submitted that the appeal should be upheld and the finding by the High Court that Kutarere Marae is not eligible for a recognition order overturned.

72. Even though Kutarere Marae were only participating as an interested party, this findings will still be meaningful as it will allow them to continue to negotiate with the Crown for recognition orders without obstacle of the court's findings as to their eligibility.[63]

FINDING THAT NGĀTI MURIWAI WERE NOT ENTITLED TO A CMT IN THEIR OWN RIGHT.

73. The **third point** on appeal challenges the finding that Ngāti Muriwai *were not entitled to a CMT 'in their own right'* as it *could show that they held an area in accordance with tikanga since 1840.*[64]

74. It is not clear what His Honour means by his decision. As he compresses the CMT criteria into a single test it not apparent what part of the s 59 criteria is not satisfied. This is not made any clearer by the evidence that His Honour relied on in making his findings.

75. Possible clues as to the meaning of the ruling may be found in the following part of His Honour's Judgment concerning Ngāti Muriwai being able to a participate in a CMT with other groups as part of a combined applicant group. The resulting explanation being that His Honour in determining that Ngāti Muriwai is not *entitled to a CMT 'in their own right* in that they cannot hold a

[61] Section 9(1).
[62] Through the Crown engagement pathway.
[63] Although if a Whakatohea Iwi title is granted Kutarere Marae has instructed that it will consider coming under that CMT order.
[64] [280]

CMT on its own.[65] If this is the ruling Ngāti Muriwai would not take issue with this, given that they have always only applied to be included in a Whakatohea CMT.

76. Also, of possible relevance is the presumption that His Honour appears to make in the next section Ngāti Muriwai was a post 1840 whanau group. However, he does not mention this to be a factor in the current ruling.

77. As such on this basis Ngāti Muriwai can only out of abundance of caution make submissions on the basis the ruling is in effect that Ngāti Muriwai cannot be involved with a CMT in any capacity – either on its own or shared with others.

78. On this basis it is noted that Miller J, after referring to some of the contents of the Pukenga report at [278], then states at [279] that he does not need to address the pukenga report because the High Court Judge did not rest his conclusions on it, and he had already held that they did not answer the question as to who held the area in accordance with tikanga. He then[66] refers to 'findings' of the High Court in relation to Ngāti Muriwai that the High Court relied 79.But are not actual findings but observations of the evidence made in the High Court. These are:

Ngāti Muriwai did claim to have been a hapū since 1840, independent of Ngāti Ruatakenga with whom they acknowledged a close association, but there was no evidence of their presence in the Whakatōhea region between 1840 and 1870. They were allocated land at Ōpape reservation between 1870 and 1881, following the raupatu and after a dispute with Ngāti Ruatakenga over grazing. There was some evidence that Ngāti Muriwai had become moribund and was revived in the 1990s after Claude Edwards lost his seat on the Board following a failed Treaty settlement process.[67]

[65] Then again this may not square up with His Honour overall dismissing the Ngāti Muriwai appeal purely because they are not *entitled to a CMT 'in their own right at [279]*

[67] [279](b)

79. His Honour then at [280] refers to findings of the High Court Judge that Ngāti Muriwai did not show that they held an area in accordance with tikanga, which he 'was not persuaded was wrong". He goes on to refer to the "Judge's factual findings to that effect" and that counsel's criticisms "did not manage to detract from their substance".

80. The footnoted references to the findings are that the High Court Judge "shares conclusions reached by the pukenga" that certain groups, including Ngāti Muriwai, have not established that they "held an area in accordance with s 58(1)(a)". [68] However, this finding is completely undermined by Miller J determining that the Pukenga had in fact had not made any findings about groups holding areas in accordance with tikanga.[69]

81. As such, in the end the only evidence relied on by Miller J as the basis for findings against Ngāti Muriwai is that which he summarises[70] as noted above. In detail this evidence is as follows.

82. In this regard the reference to the *claim by Ngāti Muriwai of having been a hapu since 1840 r*elates to the evidence referred to in the High Court Judgment that[71]:

> [443] They referred to evidence that, at an unspecified time prior to 1840, a group known as Ngāti Muriwai had gone from within the Whakatōhea rohe to Te Kaha within the Whānau-a-Apanui rohe to assist Whānau-a-Apanui but had returned at some unspecified time in the early 19th century to live in the Waiaua area.

83. The reference to t*here being no evidence of their presence in the Whakatōhea region between 1840 and 1870,* in the High Court Judgment relates to a submission by counsel that *there was not a great deal of evidence of how Ngāti Muriwai lived immediately after they returned to the Waiaua area in the early 19th century.*[72]

[68] Re Edwads [2021] NZHC 1025 at [465]
[69] [266]-[267]
[70] At [279](b)
[71] [443]
[72] [444]

84. The reference to the allocation to Ngāti Muriwai of *land at Ōpape reservation between 1870 and 1881, following the raupatu and after a dispute with Ngāti Ruatakenga over grazing* is further detailed in the High Court Judgment at [446]-[449].

85. The reference *that Ngāti Muriwai had become moribund and was revived in the 1990s* is detailed in [464] in the High Court Judgment as referring to the comment by Dr Ranginui Walker in his book *Ōpōtiki-Mai-Tawhiti* as the reviving the "moribund Ngāti Muriwai hapū" in the 1990s.

86. It is submitted that the evidence relied upon[73] would provide the basis for a finding that Ngati Muriwai did not satisfy any of the parts of the CMT test. Specifically there is evidence that Ngāti Muriwai could satisfy:

(a) s58(1)(a) in that as a group within Whakatohea iwi they have a continuing customary relationship with the relevant MACA area -and participate exercise customary control over the area.[74]
(b) S 58(1)(b) First leg in that at 1840 they were as a group with Whakatohea iwi exercising control over the area in accordance with tikanga- but not exercising control on their own;
(c) S 58(1)(b) second leg in that since 1840 as a group with Whakatohea iwi they have continued with customary uses and control in the area.

87. As such it is submitted that regardless of which of the possible interpretations of Miller J's rulings is adopted, it should not be seen as impacting on Ngāti Muriwai's position that it is entitled to seek a CMT along with other Whakatohea groups.

[73] In this regard Miller J refers to but properly does rely on the comments by the Pukenga that Ngāti Muriwai could seek recognition as hapu. This is in the context that this was in answer to a question and the Pukenga in their report did make any assessments as to the status of any group. Similarly, Miller J properly did not have regard to by the High Court Judge that "it is clear that other hapu of Whakatohea do not accept their claimed status"[460] when the only refers to three individuals.
[74] If this court decides that this is properly part of the test.

FINDINGS THAT NGĀTI MURIWAI ARE ONLY ELIGIBLE FOR A CMT THROUGH ANOTHER GROUP

88. The **third point on appeal** relates to this further finding by Miller J that Ngāti Muriwai were entitled to hold a CMT as part of another group. Once again there is some ambiguity in the ruling.

89. After finding that Ngāti Muriwai were not entitled to a CMT in their own right, His Honour then went on to make findings that nether the less they could hold a CMT as part of another group[75]:

[281]However, Ngāti Muriwai are at least a whānau group forming part of the iwi. They cannot meet the s 58(1) criteria themselves, but I accept Mr Sharp's submission that they should not be disregarded when it comes to the issue of a recognition order for Whakatōhea. As explained above at [204], they may participate in a recognition order granted to an applicant group of which they form part, provided members of that group are able to meet the s 58(1) criteria. Their participation in CMT ought to be resolved among a successful applicant group of which they form part and in accordance with tikanga.

90. Miller J explains this ruling by reference to the earlier part of his judgment at [204] which reads as follows:

[*204] MACA recognises that members of an applicant group may enjoy differing degrees or kinds of mana over the area specified in their application. That is implicit in the ability to claim through a member group. They may nonetheless share — if they so choose — in a single CMT over that area. It is a necessary condition of such a recognition order over a specified area that one or more of the group's member groups has exclusively used and occupied each part of the area since 1840. Subject to that requirement, MACA claims can accommodate changes in iwi, hapū or whānau groups since 1840.*

91. It is important to clarify the terminology used by His Honour in setting out principles at [204]. The comment comes within a discussion about how a number of '*member groups*' of iwi, hapu or whanau make up an '*applicant group'* to make a 'single collective application' for a CMT.[76]

[75] [281]
[76] [203]-[205] and in particular [203](a)

92. As such, it is submitted that when His Honour applies these principles to Ngāti Muriwai at [281], this should be interpreted as discussing that Ngāti Muriwai could be a *member group* of an *applicant group* made up of a number of iwi, hapu or whanau within Whakatohea who will share a CMT.

93. The meaning of the ruling is further clarified by His Honour's comments that with Ngāti Muriwai "*I accept Mr Sharp's submission that they should not be disregarded when it comes to the issue of a recognition order for Whakatōhea".* The submission made by counsel referred to was that, even if the argument put forward that Ngāti Muriwai was a whanau group was correct, then they are still entitled to be included in a Whakatohea CMT as they have as a separate group been exercising customary rights as part of iwi.[77]

94. If the meaning of His Honour's ruling is that Ngati Muriwai could join with other Whakatohea groups to form an applicant group to hold a CMT for the iwi, then Ngati Muriwai would have no issue with this.

95. However, subsequently the High Court in dealing with the orders for rehearing has taken a different view. That being that the directions of Miller J require Ngāti Muriwai to join one of the successful Whakatohea hapu applicant groups in order to participate in a CMT.[78]

96. These directions were made by Churchman J after referring to the directions by Miller J[79] that the rehearing for Whakatohea offshore CMT 1 will only involve the 6 successful applicant groups from the original hearing.[80] Based on this order the High Court has subsequently directed that at the rehearing Ngāti Muriwai would not participate as a party. The High Court further directed *that the resolution of any role Ngāti Muriwai may have under tikanga is a matter to be resolved directly between Ngāti Muriwai and the successful applicant group*

[77] *Synopsis of Submissions on Appeal Ngāti Muriwai and Kutarere Marae* 16 December 2022 **(BOA 11)** [95]-[100]
[78] *Re Edwards* Minute of Churchman J 8 March 2024
[79] At [287]
[80] [287]

that they maybe a part of. That is not an issue that will be determined at the rehearing.[81]

97. This interpretation by the High Court does not in substance change Ngāti Muriwai's situation from what it was under the earlier High Court awards – where any participation in the Whakatohea CMT would have to be through one of the successful groups.
98. If it is found that this is the correct interpretation of Miller J's ruling then it is submitted is that the ruling is incorrect, given that Ngāti Muriwai is entitled to share a CMT with other Whakatohea groups. It is on this basis that the following further submissions are made.

Presuming that Ngāti Muriwai is a post 1840 whanau group

99. It this context it is relevant to note the Miller J in making the ruling at [281] regarding Ngāti Muriwai's participation in a CMT, seems to be treating them as a group that has evolved since 1840. Specifically, in making the directions His Honour refers to his discussion at [204] which related to accommodating changes in groups since 1840 within CMT orders. Also, in other parts of his Judgement His Honour has treated Ngāti Muriwai as a post 1840 whanau group. For example in dismissing the appeal against PCRs awarded to Ngāti Muriwai Miller J referred to Ngāti Muriwai as a "*new and apparently substantial whanau group'.*[82]

100. However, it is submitted that even if Ngāti Muriwai was a post 1840 hapu group, that given the Court of Appeals overall approach to including post 1840 groups in recognition orders, Ngāti Muriwai still would have been entitled to participate in a Whakatohea CMT.

Court of Appeal's approach to post 1840 Groups

[81] *Re Edwards* Minute of Churchman J 8 March 2024 [46]. Ngāti Muriwai was however granted interested party status for the rehearing.
[82] [341]

101. As referred to above, Miller J has a general principle stated that a number of applicant groups can combine to form a single group to apply to a CMT as long as one of the groups satisfied the CMT test at 1840. By way of clarification His Honour then states: *Subject to that requirement, MACA claims can accommodate changes in iwi, hapū or whānau groups since 1840*.[83]

102. In addition, the majority Judgment of the court, while not specifically discussing recognition of post 1840 groups in CMTs, in the summary of their general approach to CMTs noted that the use and occupation from 1840 to the present day test allows for t*uku, and for changes in composition and identities of customary groups.*[84]

103. There were also relevant rulings by the court in regard to PCR orders awarded to Ngāti Muriwai in the High Court. Ngāti Ruatakenga had argued that this award was not appropriate as Ngāti Muriwai had split from Ngāti Ruatakenga after 1840 and as such as a matter of tikanga the protected customary rights awarded[85] were Ngāti Ruatakanga's. In rejecting the Ngāti Ruatakenga appeal Miller J ruled as follows:

> [341] *In my view that concern must yield to the scheme of s 51, which contemplates multiple overlapping rights and allows any iwi, hapū or whānau group to obtain a PCR if the right has been exercised since 1840 and the applicant group continues to exercise it in accordance with tikanga. The legislation contemplates that PCRs may be recognised for groups which did not exist in 1840, so long as someone to whom the applicant has a relevant connection has continuously exercised the relevant customary right in the particular area since then and has done so in accordance with tikanga. That policy decision may be taken to reflect post-1840 changes in Māori society which are well illustrated in these appeals. There were once 22 hapū of Whakatōhea and only six (counting Te Ūpokorehe) of those remain today. At the same time, as Mr Bennion, for Ngāti Patumoana, pointed out, new and apparently substantial whānau groups have established themselves. Ngāti Muriwai are such a group. They say that they affiliate to the area and the iwi, but not to Ngāti Ruatakenga.*[86]

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[83] [204]
[84] [435](b)
[85] Whitebaiting and collecting wood and shells.
[86] [341]. His Honour has mistakenly referred to Mr Bennion making these submissions which counsel had made.

Correct application of post 1840 group principles to Ngāti Muriwai

104. It is submitted that by applying the approaches of the Court of Appeal to post 1840 groups, it would be appropriate for Ngāti Muriwai be considered as being able to participate as group within a Whakatohea CMT even if it was a post 1840 whanau group.

105. In the particular circumstances of Ngāti Muriwai, this would seem to be in line with the ruling of Miller J to the PCR orders made in their favour. His Honour has found that Ngāti Muriwai as a post 1840 whanau group who have split from Ngāti Rua exercise customary rights as part of the iwi not as part of Ngāti Rua.[87] This view would apply equally to customary rights underpinning a CMT. It would be contrary to this view to require Ngāti Muriwai to exercise CMT rights through Ngāti Rua or any other hapu group.[88]

106. This approach would also be inconsistent with the wider statutory scheme. Section 9(1) provides that one or more iwi, hapu or whanau groups can seek a CMT. Also, s 59(3) which was put in place to accommodate post 1840 groups evolving in accordance with tikanga through *customary transfers*. Also s 4 includes the purpose of recognising *the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua.*[89]

107. It is also submitted that the approach of recognising traditional groups that have evolved since sovereignty in customary titles has support within the Canadian jurisdiction.[90] In the decision of the Canadian Supreme court in *Tsilhqot'in* [91]

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[87] [341]

[88] In this regard it stressed the same approach would not apply to a whanau group who form part of a hapu group, whose CMT rights would be through that hapu.

[89] In this context the requirement set by Miller J that a post 1840 group would have to share a CMT with at least one 1840 group would not seem to be correct. For example, post 1840 all the pre 1840 groups may have come to an end been replaced by new groups.

[90] Which was raised in submissions in the Court of Appeal

[91] *Tsilhqot'in Nation v British Columbia* 2007 BSCS 1700 [457] **(BOA Tab 1)**. Which to date seems to be the only aboriginal title finalised by the Canadian courts.

the court determined that title should be issued to Tsilhqot'in Nation and not individual traditional Bands from the area. In doing so the court observed that while the nature and identity of bands and self-identification of people had fluctuated since sovereignty – particularly influenced by the creation of reserves and the people put on the reserves what remained consistent was the people continuing to share customs, traditions, history and language as the Tsilhqot'in nation.

108. It is submitted that there are striking similarities between the historical background in *Tsilhqot'in nation* and that with Whakatōhea iwi. In each case the evolution of the traditional 'tribe' has been heavily influenced by government actions confiscating land and moving tribal members onto reserves. As noted in Miller J's findings in Ngāti Muriwai PCRs referred to above, with Whakaothea in 1840 there being 22 hapū, by the time of the allocations for reserves in 1880s following the confiscation of much of Whakatōhea land, only 7 groups were allocated reserves.[92] The evidence called showed that over time further groups within Whakatōhea had evolved for the iwi members, which did not always comply with traditional structures. These often centred around where they were able to live – such as Kutarere Marae- and perhaps in Miler J's view Ngāti Muriwai.

109. It is submitted that excluding such groups from a CMT for the iwi that they currently form part of would not only be contrary to the legislation but also with tikanga.

110. **Overall,** as with the previous point, given the issues in interpreting the ruling, it is difficult to form submissions in response. However, as best as can be put the position of Ngāti Muriwai is:

(a) The ruling should be interpreted as meaning that Ngāti Muriwai can participate in a CMT making up a Whakatohea iwi CMT with other groups;

[92] *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* (Penguin Books, North Shore, 2007) Ranginui Walker **(BOA Tab 8**) p 136.

(b) Alternatively, if the ruling is that Ngāti Muriwai has to join another hapu group to participate in a CMT then this is incorrect.

SUBMISSIONS ON SUGGESTION THAT NGĀTI MURIWAI ARE A POST 1840 WHANAU GROUP

111. The **final point of appeal** is that the Court of Appeal through the Judgment of Miller J was in error in apparently reaching conclusion that Ngāti Muriwai was a post 1840 whanau group.

112. In this regard it is noted that a substantial part of the High Court hearings was taken up with dealing with the sustained challenge to the status of Ngāti Muriwai brought by the interested party on behalf of Ngāti Ruatakenga who maintained Ngāti Muriwai was a whanau of Ngāti Ruatakenga. There was very little in the way of evidence and submissions of the other Whakatohea groups on the issue. As such it will be convenient to traverse the relevant evidence called and submissions made by interested party on behalf of Ngāti Ruatakenga and Ngāti Muriwai on the central areas of dispute.

113. For convenience the interested party on behalf of Ngāti Ruatakenga will be referred to in these submissions as *Ngāti Rua*. However, it should be noted in this context that Ngāti Muriwai do not consider the **Meriana Hata** as the interested party has the mandate of Ngāti Rua in these proceedings. It is considered that the Ngāti Rua kaumatua **Robert Edwards** has the hapu's mandate. In this regard the submissions made by the WKW appellants on mandate are supported.

114. From Ngāti Muriwai's perspective, A convenient starting point on the evidence on Ngāti Muriwai's history is the writings of Dr Ranginui Walker, an esteemed expert on Whakatohea history, in his history of Whakatōhea Iwi, *Opotiki- Mai – Tawhiti.* In discussing the hapu of Ngāti Muriwai being allocated land in the Opape reserves in the 1870s, he commented that Ngāti Muriwai had been at

Te Kaha[93] but after being driven out of there by Te Whanau- A – Apanui, had found refuge with Ngāti Rua through their connections with that hapu.[94]

115. From Ngāti Muriwai's perspective, A convenient starting point is the writings of Dr Ranginui Walker, an esteemed expert on Whakatohea history, in his history of Whakatōhea Iwi, Opotiki- Mai – Tawhiti. In discussing the hapu of Ngāti Muriwai being allocated land in the Opape reserves in the 1870s, he commented that Ngāti Muriwai had been at Te Kaha95 but after being driven out of there by Te Whanau- A – Apanui, had found refuge with Ngāti Rua through their connections with that hapu.

116. This reference was followed up by Dr Tony Walz who was an historian called as a witness by Ngāti Muriwai. In his evidence he went back to the Native Land Court minute references provided by Ranginui Walker. Dr Walzl found supporting evidence from Native Land Court minutes that Ngāti Muriwai after leaving the Whakatohea area to support Te Whanau- a – Apanui at Te Kaha, later suffered defeats in battle and were then brought by Whakatohea back to Waiaua. Dr Walzl estimated that these events would have occurred between 1800 and 1830.[96] He concluded that this was consistent with Ranginui Walker's evidence that this was the same Ngāti Muriwai that was in the area in the 1870s.[97]

117. The High Court Judgment refers to this evidence at [463] where he goes on to refer to cross- examination evidence of Dr Walzl that without whakapapa evidence there was no way of linking the group at Te Kaha with the present day Ngāti Muriwai and because of the fame of Muriwai there was more than one Ngāti Muriwai. With respect, this is not an accurate description of the evidence

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[93] Te Kaha being about 100kms further along the East Cape from Opotiki.

[94] **COA Tab 613** R Walker *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* (Penguin Books, North Shore, 2007) p 137. 501.00024

[96] The relevant background during this period was that much of Whakatohea had left their rohe for surrounding districts during the musket wars. (Dr Des Tahana Kahotea *Ngāti Muriwai and Marine and Coastal Area Claims* **BOA Tab 284** P 17)

[97] **Transcript Tab 136** 3 September 2020, pp 76-77, Evidence in Chief of Tony Walzl at 103.01584

of Dr Walzl while being cross examined by counsel for Ngāti Rua. When asked whether whakapapa evidence was needed to tie the 2 groups together Dr Walzl replied to the effect that he had gone as far as he could on the material and time he had been given .[98] In this context however Dr Walzl did accepted the evidence, that the Ngāti Muriwai at Te Kaha were brought from and returned to Whakatohea in the 1830s, only raises the possibility that they were the same as the Ngāti Muriwai that existing from the 1870s.[99]

118. There was also varying accounts of how the Ngāti Muriwai and Ngāti Ruatakenga people came to be living together at Omarumutu Marae. In the High Court Judgment reference was made to the evidence of a Ngāti Muriwai witnesses Nepia Tipene that Ngāti Ruatakenga were invited there by Ngāti Muriwai there after their marae at Whitikau burnt down. The court further noted that this 'is clearly incorrect ' given the evidence for Ngāti Ruatakenga that their previous Marae was at Puketapu.[100] However, location aside, the further evidence at the hearings was is that Ngāti Rua did move to Omarumutu dislodging Ngai Tai, after the Puketapu Pa was burnt down, in the time frame suggested by Nepia Tipene, being in the mid -18th century.[101] It is accepted however, that this evidence does not specifically mention the existing presence of Ngāti Muriwai there.

119. Whatever the preceding background, there is also evidence that Ngāti Muriwai and Ngāti Rua were living together at Omarumutu in the 18th Century before the Opape reserves were allocated. This includes the judgement of the Maori Land Court placing Omarumutu Marae into a reserve in 1976.[102] This judgment records evidence given by Ngāti Ruatakenga witnesses that Ngāti Muriwai and Ngāti Rua coalesced at the marae as Ngāti Muriwai a Rua up until

[98] **Transcript Tab 138** Tony Walzl Cross Examination by Karen Feint QC 103.01586
[99] Above 103.01586 -7
[100] High Court Judgment [449]. Affidavit of James Nepia Tipene **(COA Tab 44)** [25]
[101] **COA Tab 284** Dr Des Tahana Kahotea *Ngāti Muriwai and Marine and Coastal Area* at 304.01527

[102] **COA Tab 80** Handwritten version and **BOA Tab 81** typed extract.

the time of the Opape reserves being allocated in the 1870's when they split into Ngāti Muriwai and Ngāti Rua.[103]

120. The response to this evidence from the Ngāti Rua witnesses was that the hapu had no history of a Ngāti Muriwai – a- Rua. Apart from this it has been suggested that Maori Land Court minutes are hard to read – despite there being a clearly typed transcript.

121. Despite the split at the time of the reserve allocations, the evidence is that subsequently the two groups continued to share Omarumutu Marae. But on the evidence of members of Ngāti Muriwai, each group had its own separate wharekai, up the early 1960s when marae was rebuilt.[104]There was no rebuttal evidence to this by the Ngāti Ruatakenga interested party.

122. The 1975 Maori Land Court hearings concerned an application by the court to out the marae land into a reservation. The court minutes show that initially it was thought that the marae was on Ngāti Muriwai's 3A block, but on investigation it was found to be on Ngāti Rua's 3 block. When the court convened on the marae to make a decision the Ngāti Rua Tiwai Amoamo said that although the 'original name was Ngāti Muriwai -a – Rua' they asked that the Marae be 'set aside for Ngāti Rua only'.[105] After this was done the evidence of Ngāti Muriwai has been that they felt that they have been excluded from their marae.[106]

123. The general argument of the Ngāti Rua was that those who say they are Ngāti Muriwai are just a whanau of Ngāti Ruatakenga. In this regard it is pointed out that those identifying as Ngāti Muriwai have whakapapa lines common with Ngāti Rua. However, within that whakapapa line Ngāti Muriwai had a history of distinguishing themselves from Ngāti Rau by identifying with the older

[103] **COA Tab 80** Typed Court Minutes pp 2 and 4
[104] **Transcript Tab 82** Cross Examination of Julie Te Urikore Lux at 104.02162-3
[105] **COA Tab 80** Typed Court Minutes p 2
[106] Affidavit of James Nepia Tipene **(COA Tab 44)**

Panenehu Hapu.[107] Also, the evidence of the Ngāti Muriwai witnesses was that they had separate whakapapa through their tipuna Eru Panoho that links them with the neighbouring Ngai Tai iwi.[108] Those links allowed Ngāti Muriwai to claim interests in the inland Whitikau block in the 1880s, against opposing claims by Ngāti Rua and others in Whakatohea. 109

124. Another argument of the Ngāti Rua was that Ngāti Muriwai was created from a Ngāti Rua whanau to obtain a separate reserve in the Opape reservation in the 1880s, because they had an argument with the rest of Ngāti Ruatakenga over sheep grazing on the whenua. However, from Ngāti Muriwai's perspective, this was not correct as they were already recognised on the Whakatohea tribal register in 1874 well before the dispute over the sheep arose.[110] Also, Tony Walzl in his evidence clarified that Brabant provided for a reserve for Ngāti Muriwai in 1881 after being advised that Ngāti Rua and Paku Eruera had reached an agreement – not to settle any dispute.[111]

125. It has also been argued on behalf of the Ngāti Rua that Ngāti Muriwai has only recently been revived. In this regard reference was made to Ranginui Walker in his book describing the "moribund Ngāti Muriwai hapu" being revived during 2003 hui amongst Whakatohea.112 From the Ngāti Muriwai perspective the comment by Ranginui Walker is consistent with his view in other parts of his book that Ngāti Muriwai historically have been a hapu of Whakatohea. They do not accept that have been moribund, but they have developed into one of the larger groups in Whakatohea.

126. A final relevant issue is that Ngāti Muriwai were not granted a seat on the Whakatohea Maori Trust Board when it was formed on the 1950s. From Ngāti Muriwai's perspective, this was as a result of the Crown once again making a

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[107] D Kahotea Ngāti Muriwai and the Marine and Coastal Area Claims **(COA Tab 317)** at 304.01512 and 304.01515
[108] **Transcript** evidence of Robert Edwards **(Tab 151)** at 104.02140 and Cross examination by K Feint **(Tab 152)** at 104.02144, 104.02146 and Exhibit A to Affidavit Christina Peters **(COA Tab 314)** at 304.01496.
[109] T Walzl Ngāti Muriwai and the Common Marine and Coastal Area 1865-2019 **(COA Tab 317) at** 304.01588
[110] R Walker *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* **(BOA Tab 8)** p 237.

[111] **Transcript Tab 138** Tony Walzl Cross Examination by Karen Feint QC 103.01590
[112]R Walker *Opotiki- Mai – Tawhiti: Capital of Whakatōhea* (Penguin Books, North Shore, 2007) **(COA Tab 742)** p 142-3.

decision on the structure of Whakatohea. It is also a major factor in divisions developing between Ngāti Muriwai and some of the other hapu.

127. As stated above, this summary is not presented for this court to resolve any of these issues but outline the competing arguments in regard to the status and history of Ngāti Muriwai. Rather the purpose was to illustrate that there was not clear evidence for Miller J to reach a presumptive finding that Ngāti Muriwai's were a whanau group that arose after 1840.

DIRECTIONS SOUGHT REGARDING REHEARINGS

128. If this upholds the appeals of Ngāti Muriwai then the further directions regarding rehearings are sought.

(a) That Ngāti Muriwai participate as an applicant group in any ordered rehearing for CMT 1.
(b) Further, that if there is to be a rehearing for CMT 2 in Ohiwa harbour that Ngāti Muriwai also participate as Whakatohea applicant group.

Dated: 20 September 2024

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M J Sharp
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