I MUA I TE KOOTI TAIAO O AOTEAROA TĀMAKI MAKAU RAU **ENV-2019-AKL-117**

BEFORE THE ENVIRONMENT COURT
AUCKLAND REGISTRY

UNDER	the Resource Management Act 1991 (the **RMA**)
AND	
IN THE MATTER	of an appeal under clause 14(1), Schedule 1 of the RMA
AND	
IN THE MATTER	of section 274 of the RMA
BETWEEN	**BAY OF ISLANDS MARITIME PARK INCORPORATED V NORTHLAND REGIONAL COUNCIL**
	ENV-2019-AKL-117
	THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INCORPORATED V NORTHLAND REGIONAL COUNCIL
	ENV-2019-1KL-127
	Appellants
AND	**NORTHLAND REGIONAL COUNCIL**
	Respondent

BRIEF OF EVIDENCE OF SIR TĪPENE O'REGAN ON BEHALF OF TE OHU KAI MOANA TRUSTEE LIMITED

21 MAY 2021

WHĀIALEGAL

Solicitor M M E Wikaira
P 027 646 7797
E maia@whaialegal.co.nz
PO Box 910 WELLINGTON 6140
www.whaialegal.co.nz

INTRODUCTION

1. Ka rere atu kā mihi ki te tepu kaiwhakawā i roto o te mahi nei. Ka rere atu anō kā mihi o kā tai awhi o Te Waipounamu ki kā tai awhi o Te Tai Tokerau. Ka mihi anō o taku mauka ariki ki ka mauka o Te Hiku o Te Ika. Ka mihi poroporoaki ki a rātou i tērā taha o Te Arai, anō ki te kanohi ora. Tēnā koutou.

2. My name is Tīpene Gerard O'Regan.

3. I am of Kāi Tahu descent and Ūpoko of Te Rūnaka o Awarua, one of the eighteen constituent Papatipu Rūnaka of Te Rūnanga o Ngāi Tahu (**TRoNT**).

Qualifications and Experience

4. I hold a BA (Hons) from Victoria University of Wellington, a D.Litt (Hon) from the University of Canterbury, a D.Comm (Hon) from Lincoln University and a D.Comm (Hon) from Victoria University of Wellington.

5. I am a Fellow of the University of Auckland. I have served as an Assistant Vice Chancellor of the University of Canterbury and remain an Adjunct Professor in the Ngāi Tahu Māori Research Centre of that University.

6. I served on the Ngāi Tahu Māori Trust Board for 22 years and was Chairman for 13 of those years leading the Ngāi Tahu Claim process before the Waitangi Tribunal from 1986, culminating in the Ngāi Tahu Settlement with the Crown in 1998.

7. I was a primary architect and negotiator of the Treaty of Waitangi Fisheries Settlements in 1989 and 1992 (the **Māori Fisheries Settlements**). In January 1990 I became the founding Chairman of the Māori Fisheries Commission. In 1992 I remained as the Chair of its successor body, the Treaty

of Waitangi Fisheries Commission, now known as Te Ohu Kaimoana.

8. I have been chairman and director of a wide range of entities in the public and private sectors, and have held major board appointments in the heritage, environment and commercial sectors. I served two successive terms on the New Zealand Conservation Authority and had a 28-year term as a member of the New Zealand Geographic Board. I chaired Ngā Pae o Te Māramatanga, the Centre for Māori Research Excellence, based in the University of Auckland from 2008 – 2018. I retain the Emeritus status of Ruānuku in the Centre.

9. I am a Distinguished Fellow of the Institute of Directors and have, over the years, presented a number of papers in that context on the Māori Economy and, in particular on the challenges of Board governance in that economy.

10. In 2019 I was made a Companion of the Royal Society Te Apārangi. I have served on the Society's Advisory Panel on the New Zealand History Curriculum.

11. I currently chair Te Pae Kōrako and Te Pae Kaihika for TRoNT. These two bodies lead the tribe's work in developing the Ngāi Tahu archive, GIS cultural mapping and have the responsibility of maintaining the integrity of the tribal knowledge base.

12. My personal scholarly interest is in traditional history and ethnology of Kāi Tahu and Te Waipounamu, and I have a major academic interest in general New Zealand history and the Māori political economy. I have published and lectured extensively over many years on Ngāi Tahu traditional history, Polynesian migration, Treaty of Waitangi issues, Māori fisheries and the evolution of biculturalism.

13. In respect of my several appointments in the fisheries and

maritime sectors, I have served as the founding Chairman of the reconstituted Sealord Group Ltd (1993-2002), as a Director of Moana Pacific Fisheries Ltd (1990-1995), Chairman of Clifford Bay Marine Farms Ltd (2000-2015) and Clean Seas Aquaculture (Australia) (2000-2005). I further served as Director of The Law of the Sea Institute (USA) (1995-2001) and the Marine Stewardship Council (UK) (2000-2005).

PURPOSE AND SCOPE OF EVIDENCE

14. My evidence speaks to:

(a) The whakapapa of the Māori Fisheries Settlement, and how it gives expression to the Māori relationship with Takaroa.

(b) The affirmation of the relationship with Takaroa through the Treaty of Waitangi.

(c) The erosion of the ability for Māori to give expression to that relationship by successive legislation and Government acts over time.

(d) The significance of the Māori Fisheries Settlement in restoring that relationship.

(e) The importance that the relationship is not further eroded.

THE WHAKAPAPA OF THE MĀORI FISHERIES SETTLEMENT

He koha nō Takaroa

15. To understand the special significance of Māori Fisheries, as confirmed through the 1989 and 1992 Māori Fisheries Settlements, one must return to our origins as a Polynesian people. Māori have an intrinsic relationship with the moana that stems from whakapapa, a genealogical association

linking us with Takaroa, atua of the ocean, and his associated atua and offspring.

16. Creation narratives differ among iwi, though they share common threads. For Kāi Tahu, while Takaroa is the overall atua of the ocean, he derives from the second marriage of Raki to Papatūānuku. Kāi Tahu see ourselves as descending from Raki's first marriage to Poharua o Te Po through Aoraki to Tuterakiwhanoa. This latter atua had, as one of his assistant deities, an atua called Marokura. It was Marokura who endowed the coasts of Te Waipounamu with all the many riches of marine life, including all coastal fisheries. The Kaikoura coasts are known as Te Tai o Marokura in his honour.

17. As Māori, our ability to fish, as confirmed by the Māori Fisheries Settlements, is not simply a property right under the Fisheries Act 1996; it is a right that recognises this relationship, this connection between us, our ancestors, and our atua. The legislation only reflects the current formulation of that right; the right itself is inherent, but it has different formulations over time.

18. The values or concepts that underpin our worldview are shaped by this relationship. While there are distinctions between iwi, the fundamental tenets of our worldview are generally shared. For Māori, the relationship with Takaroa and associated atua incorporates a nexus of beliefs that permeate the spiritual, environmental and human spheres: these include whakapapa, whanaukataka, mana, rakatirataka, tapu, rāhui and kaitiakitaka.

19. The foregoing concepts are inextricably connected with iwi identity and the capacity to protect resources and manage them sustainably on an intergenerational basis. There is no point, for example, in the practice of rāhui if there is no capacity to enforce it. Without the fundamental presence of

kaitiakitaka as a central pou of customary practice there is no basis to constrain resource over-exploitation. For Kai Tahu, these notions have been at the heart of our mahika kai practice – a cornerstone of our identity - and the driving force in that dimension of Te Kerēme (the Ngāi Tahu Claims) since they were initiated by Tiramorehu in 1849. They were central to Kāi Tahu insistence on inclusion of Māori customary fishing across the whole function and regulation of fisheries management in the 1989 and 1992 Māori Fisheries Settlements. It was a critical aspect of achieving a successful Fisheries Settlement for us.

20. Of all values or concepts, kaitiakitaka is one which has found common currency among New Zealanders. Current usage of the term 'kaitiakitaka' tends to emphasise conservation and protection. However, in a similar way to that in which the meaning of 'conservation' has been co-opted to become a synonym for 'prohibition', so too has 'kaitiakitaka' tended to be co-opted in a similar manner, from its original meaning. However, kaitiakitaka embraces not just environmental, but social, cultural and spiritual dimensions. Indeed, kaitiakitaka weaves together threads of identity, purpose and practice. Moreover, kaitiakitaka is a fundamental means by which survival, in spiritual, economic and political terms, is ensured.

21. Thus the concept of sustainable and wise use is a critical feature of kaitiakitaka. It is also about putting the use, development or protection of resources in context. This means considering the relevance of ancestral association with lands, waters and resources, and thus the rights and responsibilities we are required to uphold as Māori, mō kā atua, mō kā tupuna, mō tātou, mō kā uri a muri ake nei (for the atua, for our ancestors, for us, and for generations to come). That is, kaitiakitaka is about managing relationships that transcend time and space: between atua and ancestors

on one hand, and their kaitiaki and generations to come on the other.

22. Indeed, upholding our traditions depends on vibrant fish stocks; which in turn depend on a thriving marine environment. Takaroa and his progeny must both be protected.

Te Tiriti o Waitangi: Ko Te Tuarua

23. The relationship that we have with Takaroa was recognised in Article II of the Treaty of Waitangi 1840, with fisheries expressly referenced in the English text, and incorporated through reference to 'taonga', in the Māori text. Indeed, the Treaty is one of the important foundations of the story of Māori fisheries. It guaranteed to us 'tino rakatirataka' or 'exclusive undisturbed possession' over our fisheries.

24. That involved recognition that the Crown, as an incidence of its kāwakataka (kāwanatanga), has a duty to defend the realm, which includes the natural resources of the realm. As such it has a right to bring in systems which conserve or enhance those natural resources. However, it has a countervailing duty in bringing in such a system to ensure the protection of Māori rights in fisheries secured by Article II of the Treaty.

25. It is well-established that the promises of the Treaty were broken, but the events that followed the signing of the Treaty in respect of fisheries bear explanation, as they form the antecedents to the Māori Fisheries Settlements.

Loss of Control

26. For some 20 years after the signing of the Treaty, non-Māori and Māori fishing largely co-existed without issue. Most non-Māori fishing was for domestic consumption and non-Māori

commercial fishing was largely rudimentary.[1]

27. However, the 1860s marked the turning of a broader political tide. In the wake of a reversal of British Imperial policies as a consequence of a change of government and a surging increase of British settlers gaining political control, the Māori population became outnumbered. That led to the New Zealand land wars and the evolution of laws aimed at repressing Māori participation in the economy. The collective ownership and control of land and natural resources by Māori led Henry Sewell, Superintendent of Canterbury, to declare, "The first plank of public policy must be to abolish the beastly communism of the Maori". Our national history is littered with quotes in similar vein.

28. A series of laws were developed to break Māori control of the resources of land and sea; to break our relationship with Takaroa and his associated atua.

29. The first legislative intervention in the fisheries context was the Oyster Fisheries Act 1866, which was passed without any consultation with Māori.[2] It was followed by freshwater fisheries law in 1867 and the first comprehensive fisheries control measure in the Fish Protection Act 1877.

30. The presumptions fixed in those laws permeate all subsequent legislation, failing to fully respect Māori rights to exercise tino rakatirataka over our fisheries. Such presumptions included that:

    (a) Māori interests should be accommodated by reserving particular fishing grounds for Māori on a subsistence basis ie. non-commercial;

[1] Whereas, in the far South (Murihiku), there was a Māori commercial fishery and potato trade with Poi Hakena (Port Jackson) and Hobart from the late 1820s.
[2] Its impact was that the Māori sale of oysters was disallowed.

(b) Māori fishing has no particular commercial component and grounds reserved must be for domestic or non-commercial needs;

(c) Māori participation in the commercial fishing industry should be on no other terms than those provided for all citizens;

(d) no allowance should be made for Māori fishing methods, gear or rules for resource management;

(e) the regulation and management of fishing should be an act of State;

(f) only Parliament or a department of State should authorise the reservation of fishing grounds;

(g) there should be no provision for the courts to recognise rights on proof of customary entitlement;

(h) some acknowledgement should be made of Māori fishing interests by incorporating words of a general nature in fishing laws.

31. Thus from 1877 onwards fisheries laws recognised the existence of Māori fishing rights, but provided no machinery to have those claims converted to defined rights.

32. From the first fisheries legislation, we voiced strong opposition to these Acts through direct engagement with Crown agents, petitions to Parliament, claims to the Waitangi Tribunal and the initiation of proceedings in the courts. However, Māori fishing rights came to be regarded as little more than a subsistence right to gather seafood for domestic consumption or ceremonial occasions.

Introduction of the QMS

33. By 1980, overfishing of inshore fisheries had become clear and the time for re-appraisal had arrived. The seeds of the quota management system (QMS) were sown in the Fisheries Act 1983. As with previous legislation, the Act had retained a reference to Māori fishing rights in section 88(2): 'provided nothing in the Act shall affect any Māori fishing rights.' Yet again, the Act failed to define such rights and the provision was consequently inoperable.

34. The transforming event was the Fisheries Amendment Act 1986, to introduce the full QMS to New Zealand; a scheme that did not accommodate Māori. The problem was that the Fisheries Amendment Act, in its execution of the QMS, would have resulted in the abrogation and permanent transfer of the Māori fishing rights affirmed under the Treaty.

35. There was also genuine Māori discontent with the QMS. It gave commercial fishing rights to 'commercial fishermen'; essentially full-time fishermen. As a lot of Māori were part-time commercial fishers, they faced cancellation of their permits and being prevented from fishing commercially.

36. This led to a momentum among us for change, to recognise the exclusive fishing rights Māori have to our fisheries.

37. Requests for relief in the Waitangi Tribunal and courts followed, based on claims of breach of the Crown's fiduciary duties to Māori, the common law doctrine of aboriginal title and the Treaty of Waitangi itself.

38. We filed proceedings in the courts in several decisions between 1987 and 1990. It was a war of attrition. As soon as they added new species to the QMS we would file an injunction. I recall that at one time I had 14 separate proceedings afoot in my name. Ultimately, the courts

provided interim relief and restrained further implementation of the QMS.[3]

39. The courts' reasons recognised that at the same time, the Waitangi Tribunal had been considering the Muriwhenua and Kāi Tahu requests for confirmation of their Treaty fishing rights, and it was arguable that the proposed actions of the Minister could have effect contrary to those Māori rights.

40. The Muriwhenua Report was issued by the Waitangi Tribunal in 1988, and found that the QMS, in its then form, was:[4]

> "in fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed."

41. The Ngāi Tahu Sea Fisheries Report followed in 1992. It found that:[5]

> "In legislating to protect and conserve the sea fishery resource the Crown failed to recognise Ngai Tahu rangatiratanga over their sea fisheries and in particular their tribal rights of self-regulation or self-management of their resource, this being an inherent element in rangatiratanga. Their rights were usurped by the Crown without any consultation with Maori and without any recognition of their Treaty rights in their sea fisheries. This denial of Ngai Tahu rangatiratanga over their sea fisheries was in breach of article 2 of the Treaty. … The Act as it stands, constitutes a serious breach of the Treaty."

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[3] *New Zealand Maori Council v Attorney-General* (Unreported, High Court, Wellington, CP 553/87 (Greig J)) and *Ngai Tahu Maori Trust Board v Attorney General* (Unreported, High Court, Wellington, CP 559/87, CP 610/87 and CP 614/87 (Greig J).

[4] Waitangi Tribunal, 1988, p xx.

[5] Waitangi Tribunal, 1992, p 306.

42. In the same period, the 1986 case of *Te Weehi v Regional Fisheries Officer* found that Mr Te Weehi (who had been charged with taking undersized paua under the Fisheries (Amateur Fishing) Regulations 1983), was exercising a Māori fishing right covered by the exemption provision of s 88(2) of the Fisheries Act 1983. I note, as an important elucidation on the matter, that in that case the mana was that of Kāi Tahu not Mr Te Weehi. He was granted a license to fish in our tribal territory. For us, the Te Weehi decision brought with it concerns about the potential implications to Kāi Tahu traditional resources of people misunderstanding Māori customary fishing as creating a free license to fish. As a holding measure, we, the Ngāi Tahu Māori Trust Board, imposed a rāhui aimed at holding the status quo under the regulations while we negotiated an outcome with the Crown. We also funded my whanauka Rakihia Tau Snr to attend Magistrates courts across Te Waipounamu to support prosecutions of violation of the rāhui. This was intended to protect our resource from irresponsible exploitation.

43. The success of these combined actions allowed space to negotiate a settlement of Māori fishing claims that was consistent with the Treaty of Waitangi. There was no precedent nor process for negotiating a settlement on behalf of all Iwi. For Māori, it was pragmatism built on principle – the need to protect our Treaty rights.

The nature of the Māori fishing right

44. It is important to pause here to discuss the nature of the right identified in the above decisions. The most comprehensive exploration of Māori fishing rights and the Treaty was by the Tribunal in the Muriwhenua Fishing Report.[6] At one level the Māori Fisheries Settlement was about the need to provide for

[6] Waitangi Tribunal, *Muriwhenua Fishing Report*. Department of Justice, 1983.

day-to-day subsistence. However, it was also about supporting sustainable, economic activity upon which our survival and future development depends. This was precisely one of the concerns of the Tribunal in the Muriwhenua Fishing Report - that through the failure to recognise Māori fishing rights in the QMS, Māori were being shut out of the economic activity of fishing.

45. The Muriwhenua Report articulated what we already knew; that our Treaty right had an economic dimension. Māori, after all, used a number of methods to catch fish, many of which are available today, albeit in different form. The Tribunal captured what was put to them – that as Māori, our fishing rights were never just about subsistence fishing; they represent protection of a system of utilising and managing the environment in accordance with our tikaka, for the benefit of future generations. This is what tino rakatirataka means.

46. The Māori Fisheries Settlement was also based on a recognition that Māori rights were not to be defined by a particular point in time. The Tribunal highlighted, and affirmed, that they are subject to the Treaty right to development, which allowed us to fulfil the promise of the Treaty in order to meet the changing needs of our communities.

RESTORATION OF OUR RELATIONSHIP: THE FISHERIES SETTLEMENTS

The 1989 (Interim) Fisheries Settlement

47. In 1989, the Crown and Māori negotiators agreed on an interim settlement, which was given effect by the Māori Fisheries Act 1989. This interim settlement saw the creation of a Māori Fisheries Commission, for which I was one of the first Māori Fisheries commissioners and Chairman. The Commission progressively received 10 percent of all fish

species in the QMS and approximately $10 million to hold and manage on behalf of all Māori. The Commission's role was also to promote Māori involvement in the business and activity of fishing. Where the Crown was unable to provide the agreed 10 percent of fish species in the QMS, Māori were provided the equivalent value in further cash.

48. Though the settlement was with iwi, it was inextricably intertwined with whānau and hapū. At the time, I openly acknowledged that the interim settlement was a chance to make a start and get structures in place. The recognition of our Māori rights was one thing. Developing the skill to maintain and hold them for our mokopuna became the next great challenge.

The 1992 Fisheries Settlement

49. Māori fishing claims were finally settled with the signing of a Deed of Settlement in September 1992. The Deed was given effect through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and saw the creation of the Treaty of Waitangi Fisheries Commission, which took over the responsibilities of the Māori Fisheries Commission and enhanced its accountability to Māori. Dame Mira Szazy later gave the Commission the name, "Te Ohu Kaimoana".

50. In the 1992 Settlement, the Crown recognised the full extent of Māori customary (commercial and non-commercial) rights to fishing and fisheries by:

    (a) Agreeing to make regulations to allow self-management of Māori fishing for communal subsistence and cultural purposes. This is a significant part of the settlement, and which I understand is covered by the evidence of Whaimutu Dewes.

(b) providing funds for Māori to assist in buying a 50 percent stake in Sealord Products Limited (now Sealord Group Limited) which, as one of the largest fishing companies in New Zealand at the time, was a major owner of fisheries quota;

(c) undertaking to provide Māori with 20 per cent of commercial fishing quota for all new species brought within the QMS; and

(d) undertaking to ensure the appointment of Māori on statutory fisheries bodies.

51. In return, we agreed:

(a) that all Māori commercial fishing rights and interests were settled;

(b) to accept regulations for customary fishing;

(c) to cease litigation, and

(d) to endorse the QMS.

52. Our involvement in fishing today is deeply shaped by the Deed of Settlement. The Preamble to the 1992 Deed of Settlement recognised that:

> A. By the Treaty of Waitangi the Crown confirmed and guaranteed to the Chiefs, tribes and individual Maori full exclusive and undisturbed possession and te tino rangatiratanga of their fisheries.
>
> B. Section 88(2) of the Fisheries Act 1983 provides: "Nothing in this Act shall affect any Maori fishing rights."
>
> C. There has been uncertainty and dispute between the Crown and Maori as to the nature

and extent of Maori fishing rights in the modern context as to whether they derive from the Treaty and/or common law (such as by customary law or aboriginal title or otherwise) and as to the import of section 88(2) of the Fisheries Act 1983 and its predecessors.

…

K. The Crown recognises that traditional fisheries are of importance to Maori and that the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries.

L. The Crown and Maori wish, by entering into this Settlement Deed, to affirm that they consider the completion and performance of this Settlement Deed to be of the utmost importance in the pursuit of a just settlement of Maori fishing claims.

M. The Crown and Maori wish to express their mutual and solemn acknowledgment that the settlement evidenced by this Settlement Deed marks the resolution of an historical grievance.

53. Key expectations of the Fisheries Settlement were to provide for the Treaty right, recognise the importance of traditional fisheries (commercial and non-commercial) to Māori in respect of both use and management practices, and provide protection and scope for the exercise of tino rakatirataka in respect of traditional fisheries. In so doing, we accepted that fishing rights secured under the Settlement are subject to a responsibility to ensure sustainability of both the fishery and the marine environment, as this accorded with our own expectations passed down through generations.

CONCLUSION: EROSION OF TREATY RIGHTS

54. Our Treaty right to fish has been hard-fought. That should, by now, be clear. A fundamental assumption of the Māori Fisheries Settlement was that there would be no further erosion of Māori fisheries rights (giving effect to the rakatirataka in Article II of the Treaty), and that their regulation would be managed through the fisheries management framework arising under the Fisheries Act and its associated regulations (giving effect to the kāwanataka in Article I of the Treaty).

55. To that end, I consider that protecting the marine environment is not lost in the sophistication of the Fisheries Act and Māori Fisheries Settlement. Importantly, consistent with our rakatirataka and kaitiakitaka, Māori were guaranteed a statutory role in any necessary regulation.

56. In my view, if the Māori right to fish is dealt with under processes other than the fisheries management framework, then those opportunities are lost. The Treaty right is divorced from its modern home, and there is a breach of the Treaty and its principles, leaving in tatters the Māori rights that we have struggled for so many generations to recover.

Tīpene O'Regan Kt.
21 May 2021