KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 1750**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the North-Eastern Bay of Plenty Inquiry

MEMORANDUM OF CROWN COUNSEL REGARDING WHAKAPAPA CONNECTIONS OF JOHN MCLELLAN TO HAPŪ INVOLVED IN THE INQUIRY

19 Pipiri 2020

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MAY IT PLEASE THE TRIBUNAL:

Introduction

1. The Presiding Officer has invited submissions on an issue that has arisen concerning whakapapa connections between Tribunal-commissioned researcher John McLellan and hapū involved in this inquiry.[1]

Background

2. The Tribunal has commissioned one of its employed researchers, John McLellan, to prepare an overview research report on raupatu as implemented in this inquiry district in the period 1865–1871.[2] Mr McLellan's draft report is presently with inquiry participants in draft form for comment before it is finalised by 3 July 2020.

3. In due course Mr McLellan will be called as a witness by the Tribunal to present his finalised report to the Tribunal and will be questioned on this research.

4. In a brief autobiographical passage at the start of his draft report Mr McLellan says:[3]

> I am a Pākehā historian from Wellington, having grown up in Auckland. I also whakapapa to Ngāi Tamahaua of Whakatōhea, and Te Ngare of Ngāi Te Rangi. However, these connections have in no way impacted my impartiality or influenced the outcome of my research for this report.

5. In releasing Mr McLellan's draft report to inquiry participants for comment the Presiding Officer said:[4]

> It has just been drawn to my attention that Mr McLellan has indicated a potential conflict of interest that was not made apparent to me at the time I directed his commission. At the time Mr McLellan was commissioned he was only aware in a general sense that past generations of his family had lived in the Bay of Plenty and some distant relations still do. He regards himself as Pākehā. In the course of preparing his report he came across more information which led him to make further inquiries of his family connections and he learned

1 Wai 1750, #2.3.3 at [6].

2 Wai 1750, #2.3.1.

3 John McLellan, *Raupatu and Compensation in the North-Eastern Bay of Plenty 1865–1874* (Draft report), 5 June 2020, at page i.

4 Wai 1750, #2.3.3 at [5].

> more of his whakapapa connection to iwi of the district. He felt he should make that known in his author statement for his report. The details as Mr McLellan understands them are that he has whakapapa links on his father's side to Ngāi Tamahaua of Whakatōhea and Te Ngare of Ngāiterangi through his great, great, great grandmother Huihana Te Arawaere Te Wheko who married his great, great, great grandfather, John Callaway, (of British descent) in the early 1850s. I now draw this to the attention of the parties.

Submissions

Overview

6. Mr McLellan's whakapapa connections to Ngāi Tamahaua mean that he has an interest in the inquiry and whatever recommendations and outcomes might result from the inquiry. However, the fact of this interest does not mean his report should be ruled as inadmissible. Taking appropriate account of his interest is a matter going to the weight that the Tribunal can decide to place on his report and evidence.

7. What is required is that Mr McLellan's impartiality is not affected by reason on his interest in the inquiry.

An interest in the inquiry does not render expert evidence inadmissible

8. Mr McLellan has been commissioned to prepare a research report that will be heard in due course in this inquiry as supporting material and analysis for expert evidence he will be called to give.

9. One of the types of unconscious bias the law recognises is interest bias. Interest bias occurs where an expert has an interest in the proceeding beyond that of a mere witness. An interest in the proceeding could come from having a relationship with a party to the proceeding or an interest in the proceeding's outcome, among other things. An interest in the outcome of a proceeding is not restricted to financial interests.[5]

10. Mr McLellan has discovered that he has whanaungatanga relationships with inquiry participants.[6] This submission assumes that, on the basis of his

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5 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 discusses apparent bias and *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL) makes clear that interests of association, going beyond direct financial interests, are enough to qualify for presumptive bias in some cases. For discussion applicable to expert witnesses see John Katz *Expert Evidence in Civil Proceedings* (Thomson Reuters, 2018) at chapter 30 (Expert Bias).

6 Wai 1750, #2.3.3 at [5].

whakapapa, Mr McLellan would be entitled to register as a Ngāi Tamahaua member of Whakatōhea. In those senses it can be said that he has interest in the proceeding and its outcomes that goes beyond that of a person called as an expert witness with no connections to the hapū and iwi.

11. As noted above, Mr McLellan regards himself as Pākehā notwithstanding his descent from Ngāi Tamahaua tipuna. This is a means of acknowledging his connections through whakapapa while also signalling that he is not an adherent or active member of the hapū. The Tribunal has previously considered this distinction in the context of appointing a panel member to inquire into whether claims were well-founded. There the Tribunal decided that the fact of descent by itself did not make that person apparently or presumptively biased in support of the iwi whose claims were being inquired into.[7] What was required was active identification and affiliation.

12. Mr McLellan's disclosure of his connections means that his interest in the proceeding falls to be weighed by the Tribunal in due course when it considers his evidence as part of its deliberations. The fact of this interest alone is not a basis to render his evidence inadmissible.[8]

Code of conduct for expert witnesses in civil proceedings

13. What is required of Mr McLellan, despite his interest in the proceeding, is that he is impartial in the evidence he will give as an expert.

14. The code of conduct for expert witnesses requires impartiality and makes clear this is owed to the court/tribunal.[9] In any evidence given by an expert witness, the expert witness must, among other things, acknowledge that they have read the code and agree to comply with it.

> 1. An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.

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7 Wai 215, #2.137, 9 February 1998. See (1998) Feb Māori LR at page 2 for a report of this decision and (2005) May Māori LR for discussion of the decision and related issues.

8 *Prattley Enterprises Ltd v Vero Insurance NZ Ltd* [2016] NZCA 67 at [99]. See also *Jarden v Earthquake Commission* [2015] NZHC 204 at [21(c)] and the discussion in John Katz *Expert Evidence in Civil Proceedings* by John Katz QC (Thomson Reuters, 2018) at page 320 (Unconscious Bias), pages 328–344 (In-house Experts – Independence) and page 356 (Conflict of Interest – Disclosure).

9 High Court Rules, sch 4.

> 2. An expert witness is not an advocate for the party who engages the witness.

15. One way of thinking about the requirement for impartiality is to ask whether the evidence would be the same no matter which inquiry participant called the expert to give evidence.

16. Mr McLellan's draft report states, in the introductory autobiographical paragraphs, that he considers his impartiality has not been impacted by his whakapapa connections to hapū in the inquiry. The Tribunal will be well placed, in due course, to assess that and decide whether its assessment will affect the weight it is prepared to put on Mr McLellan's evidence.

19 Pipiri 2020

Craig Linkhorn / Daniel Hunt
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal

AND TO: Claimant Counsel