

THE ROLE OF A MĀORI LAND COURT JUDGE: STORIES AND REFLECTIONS AFTER 18 YEARS – A LECTURE IN HONOUR OF DR NIN TOMAS

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I Introduction

As most of you will know, the whole of New Zealand was once Māori customary land held by the tribes and sub-tribes of this country. Due to the work of the Waitangi Tribunal since 1975, most of you should also know that through a combination of Crown purchasing,¹ war,² land confiscation³ and the introduction of the Native Land Court in 1865,⁴ the majority of this land was alienated by the 1900s. I have footnoted a number of reports that may assist you to review this history, but nearly all the Waitangi Tribunal reports have addressed one or more of these periods of our shared past. Most of the South Island, for example, was sold by 1860, less some reserves and land in the lower south and at the top of that island.⁵ Progress for alienation was slower in the North Island. Figure 1 illustrates the gradual alienation of Māori land in the North Island. From the 1870s, that was primarily due to the impact of the Native Land Court and associated legislation.

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1 Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (pre-publication version, Wai 898, 2018) pts I and II; Waitangi Tribunal *He Maunga Rongo: Report on the Central North Island Claims – Stage One* (Wai 1200, 2008); Waitangi Tribunal *Te Urewera* (Wai 894, 2017); and Waitangi Tribunal *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015).

2 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996); and Waitangi Tribunal *Te Rohe Pōtae Report*, above n 1.

3 Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004); Waitangi Tribunal *The Taranaki Report*, above n 2; Waitangi Tribunal *Te Rohe Pōtae Report*, above n 1; and Waitangi Tribunal *Central North Island Claims*, above n 1.

4 Waitangi Tribunal *Te Rohe Pōtae Report*, above n 1; Waitangi Tribunal *Central North Island Claims*, above n 1; Waitangi Tribunal *Te Urewera*, above n 1; and Waitangi Tribunal *Whanganui Land Report*, above n 1.

5 Waitangi Tribunal *The Ngai Tahu Report* (Wai 27, 1991).

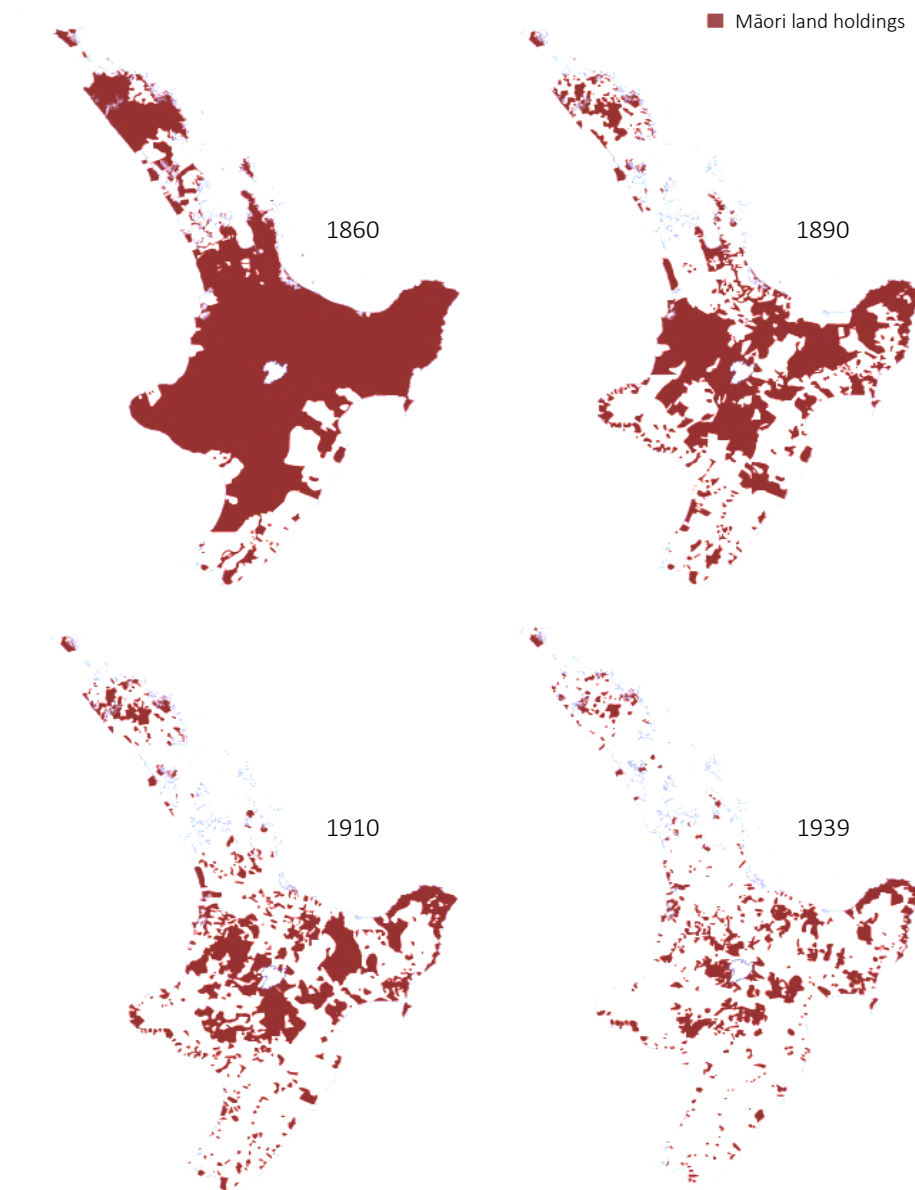


Figure 1. Gradual alienation of Māori land in the North Island. Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) at 318–319.

That Court was charged with the conversion of customary title to Māori freehold land through the allocation of individualised property rights. It systematically worked its way through the country, busting up the tribal estate as it went. Add to that the Native Township legislation, Native Land Boards, rating legislation, and the taking of Māori land for public works and scenery preservation of the early 20th century, and you achieve the result depicted in those maps.

The largest concentrations of this form of land title is to be found in three of the seven districts of the modern Māori Land Court, namely 22 per cent in the Waiariki District, 22–23 per cent in the Tairāwhiti District and 29 per cent in the Aotea District.⁶

I am one of the ten judges of the Māori Land Court and the Māori Appellate Court who have jurisdiction over the remnants of that Māori land, comprising approximately 5.6 per cent of the New Zealand land base. Figure 2 shows the Māori Land Court bench in 2009 following the swearing in of the current Chief Judge of the Māori Land Court, Wilson Isaac, at Tokomaru Bay. Chief Judge Isaac is flanked by the former Chief Justice of New Zealand the Rt Hon Dame Sian Elias QC and the Hon Sir Pita Sharples, and sitting next to Dame Sian is the Hon Dame Georgina te Heuheu, the first Māori woman lawyer. A number of judges from other courts are also present.



Figure 2. Swearing in of Chief Judge Wilson Isaac, Tokomaru Bay, 2009.

6 *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero: 150 Years of the Māori Land Court* (Ministry of Justice, Wellington, 2015) at 98.

Judge Carrie Wainwright and I were appointed in October 2000. I was the first Māori woman. Judge Stephanie Milroy, our second Māori woman judge, was appointed at the close of 2002. Judge Sarah Reeves was appointed in 2010. Thus, four out of 10 of our judges are women and that is one of the highest ratios of women on any court bench, with the exception of the Supreme Court.

Five of our judges hold Masters in Law degrees, and one holds a PhD. All were appointed after being many years at the Bar acting for a range of clients in myriad different cases. Nearly all were specialists in Treaty of Waitangi and/or Māori Land Court matters before their appointments as judges. We also have one Acting Judge. In 2009, Judge Wilson Isaac was appointed Chief Judge of the Court. In 2010, I became the Deputy Chief Judge of the Court.

During our time as Māori Land Court judges, my colleagues and I have decided hundreds of Māori Land Court cases in the seven districts of the Court — Taitokerau, Waikato Maniapoto, Waiariki, Aotea, Tairāwhiti, Tākitimu and Te Waipounamu. We also sit as panels of three in the Māori Appellate Court, where we hear appeals from the districts. Appeals from the Māori Appellate Court go straight to the Court of Appeal. Important judgments of the Māori Land Court, and all the reserve decisions of the Māori Appellate Court, can be found on the Māori Land Court website operated by the Ministry of Justice.⁷

II What Is the Role of the Māori Land Court Judges?

Māori Land Court judges exercise jurisdiction under Te Ture Whenua Maori Act 1993, also known as the Maori Land Act 1993. In exercising our jurisdiction, we are required to recognise that Māori land is a taonga tuku iho (treasure handed down) and we must promote the retention and utilisation of the remnants of Māori land in the hands of Māori owners, their whānau and their hapū.⁸

7 See Māori Land Court “Māori Land Court Decisions” Ministry of Justice <www.maorilandcourt.govt.nz>.

8 Te Ture Whenua Maori Act 1993 [TTWMA], preamble, and ss 2 and 17.

Our role under the legislation, or by implication, involves:

- *Presiding in a title Court.* The powers of the Māori Land Court are exercised by any judge sitting alone, or any two or more judges sitting together.⁹ The Court, and therefore the judges, must protect its record and ensure its accuracy. The law facilitates this by requiring that changes to title and ownership are subject to formal application to the Court. Thus, nothing can be done to a title without an order from the Court and these are always transmitted to Land Information New Zealand (LINZ).
- *Facilitating access to records of ownership.* This relates to the historical record of evidence given in the original title investigation applications from 1865–1930, changes to title hearings and the whakapapa record which derives from successions over the generations. The Court record has been recognised as a taonga and has been registered by the UNESCO’s Memory of the World Register as part of the New Zealand Memory Register alongside the Treaty of Waitangi and the Women’s Suffrage Petition. The Court is thus a repository of valuable whānau, hapū and iwi knowledge. In addition, all block titles and individual interests are to be found in our records, as well as all orders that have ever affected those titles or interests. Anyone can access details of ownership interests, locations of titles, governance information and lists of owners through the “Māori Land Online” website.¹⁰
- *Case managing and adjudicating civil disputes.* The judges (with registry staff) case-manage the applications filed in the Court — they hear those applications and determine disputes between the parties. The judges may also hear disputes based on contract or tort law.¹¹ In terms of trusts over Māori land, the Court has all of the powers of the High Court to enforce the obligations of trust.¹² The Chief Judge also exercises special jurisdiction with respect to the Māori Fisheries Act 2004 and the Māori Commercial Aquaculture Claims

9 Section 38.

10 “Māori Land Online” Māori Land Court <www.maorilandonline.govt.nz>.

11 TTWMA, s 18.

12 Section 237.

Settlement Act 2004. All the judges exercise jurisdiction upon application under the Protected Objects Act 1975.

- *Mediating family disputes.* Generally, we deal with property or property-related disputes between members of the same kin group — usually, but not always, at the whānau or hapū level. In such cases, we try as far as possible to mediate family issues where the facts warrant that approach. Although we have no direct mediatory powers for general applications, we can order reports from the Registrar using expert witnesses who are mediators,¹³ or we undertake pre-hearing conferences as a mechanism where we use mediation to identify the issues that must go to hearing. It is our role to encourage owners, their whānau and hapū to participate in decision-making in respect of their land or fisheries.
- *Using and applying tikanga and te reo Māori.* The judges must have a good understanding of tikanga and te reo Māori in order to ensure decisions are culturally appropriate in keeping with the twin principles of retention and utilisation.¹⁴ In fact, the judges of the Māori Land Court are appointed on the basis that they are suitable having regard to their knowledge and experience of te reo Māori, tikanga Māori and the Treaty of Waitangi.¹⁵

III What Do the Judges Administer?

There are 27,343 individual Māori land titles under the jurisdiction of the Māori Land Court with 2.9 million ownership interests.¹⁶ The reason why there are so many ownership interests (described as shares) is because a Māori land owner may have interests in multiple titles which they own as tenants in common with multiple owners. Upon death, the succession to those interests is usually (although not always) devolved according to an owner's will.¹⁷ Where there is no will, the interests will devolve in

13 Sections 40 and 68.

14 Preamble, and ss 2 and 17.

15 Section 7(2A).

16 *150 Years of the Māori Land Court*, above n 6, at 98.

17 TTWMA, s 108.

accordance with the equal shares rule whereby all children of the deceased take in equal shares — and if none, then to brothers and sisters — and if none, then to those listed in the legislation.¹⁸ Note that in all cases, the interests cannot go to people other than the classes listed. Thus, a spouse can only receive a life interest in the Māori land owned by their husband or wife.¹⁹ Strict rules also apply where an owner wishes to sell their shares and where titles are to be sold. Generally, such sales must be approved by the Court unless captured by the exceptions listed in Part 7 or other Parts of Te Ture Whenua Maori Act.

In order to manage titles owned by multiple owners, Māori reservations may be used for reserving areas of significance, and trusts or incorporations may be used to facilitate development.²⁰ Most marae and associated cemeteries, for example, are administered as Māori reservations. There are approximately 5,835 trusts, 2,276 reservation trusts and 159 incorporations covering the management of 1,106,625 hectares or 78 per cent of all Māori land.²¹ Such entities are created upon application and order of the Court. These governing entities determine how, in practical terms, Māori land is utilised or developed. The Court is not involved in management decisions concerning utilisation unless an application is made for review of decisions made by trustees, committees of management for incorporations, or Māori reservation trustees.

Approximately 22 per cent of Māori land has no management structure. In such cases, owners may make application to the Court to determine occupation or approve long-term leases, but the decisions made regarding how the land is used are made by the owners.

III What Assistance Does the Māori Land Court Registry Provide?

The judges could not function without the staff of the Māori Land Court registries. The registries receive anywhere between 5,000–6,000 applications per annum for

18 Section 109.

19 Sections 108(4) and 109(2).

20 *150 Years of the Māori Land Court*, above n 6, at 98–99.

21 At 98–99.

processing. Staff, with the judges, case-manage those applications. In addition, the staff per annum:

- respond to more than 7,000 written enquiries;
- deal with more than 49,000 phone and counter enquiries;
- spend an average of 24 minutes at public counters responding to client requests *kanohi ki te kanohi* (face to face);
- spend an average of 13 minutes responding to phone enquiries;
- hold up to 200 clinics across the country; and
- receive and dispose of more than 5,500 applications.

To carry out these responsibilities, there are approximately 130 staff working across seven registry offices in Whangārei, Hamilton, Rotorua, Gisborne, Hastings, Whanganui and Christchurch, a dedicated information office in Auckland, and a National Office in Wellington.

Māori Land Court staff are well-known for their down-to-Earth and personal interaction with owners. They have an average length of service of 20 years and usually have strong connections to the community within which they work. People work in the Court because it is a vocation and they want to make a difference for the owners, their *whānau* and other people who use the Court.

IV What Do the Chief Judge and Deputy Do?

The Chief Judge has specific functions under Te Ture Whenua Maori Act, mostly concerned with the appointment of judges, allocation of work and his review function under s 45 of the Act. Over and above that, there are administrative functions that all heads of bench exercise, including judicial administration. The Chief Judge may delegate any of these functions to me as the Deputy.

He and I are also the resident judges for the Tairāwhiti District. The district covers a land area of approximately 1.2 million hectares of steeply-dissected hill country. Of that, 275,823 hectares is Māori Land, or 22–23 per cent. The boundaries of

Tairāwhiti start north at Pōtikirua and end south at the Mōhaka river. The district runs inland to Matawai and down to Tuai at Waikaremoana. We conduct Court hearings in Wairoa, Gisborne and Ruatoria.

There are 5,347 Māori freehold block titles in this district with a total of 362,472 individual owners recorded across all blocks, or an average of 67 owners per block. An astounding 68 per cent of titles in this district are not vested in a management structure. However, there are still a high number of governance entities: 962 Ahu Whenua Trusts, 63 Māori Incorporations, 261 Māori Reservations, 5 Whenua Tōpu Trusts, and 27 other forms of trusts.

In the Tairāwhiti Registry per annum:

- the judges, with the Tairāwhiti staff, process approximately 600 applications;
- the staff, with the judges, case-manage and title search the 550–600 applications filed;
- the staff receive and complete in excess of 200 written inquires, respond to an average of 3,500 phone or counter inquiries, and spend an average of 30 minutes at public counters responding to client requests kanohi ki te kanohi;
- the advisory staff complete on average 20 clinics, and 20–25 hui and information seminars, and numerous meetings of owners;
- the staff complete up to 73 Trust and Incorporation file review updates; and
- the Land Registry Team completes and enters on average 460–470 orders of the Court, with the majority of those registered online with LINZ.

The average length of service of the managers in the office is 35–40 years, and the two resident judges are respectively the Chief Judge (appointed in 1994) and Deputy Chief Judge of the Court (appointed in 2000).

V Reflections

When I reflect on my role as a Māori Land Court judge, I am always struck by the range and diversity of our workload. It is frankly an awesome job.

In terms of my reflections on the law, many owners of Māori land, and the best-performing trusts and incorporations, have flourished under Te Ture Whenua Maori Act. The legislation has not been an impediment to the development of their land.

While it is true that many land blocks remain under-utilised, and some trusts and incorporations have languished, that has much to do with the geographical location of their land, the lack of access to development finance or the need for good governance training. It has little to do with the legislative regime.

In terms of my reflections on the Māori Land Court, it has evolved since the enactment of Te Ture Whenua Maori Act. That statute changed the ethos of the Court from one associated with colonisation and land alienation, to an institution for the owners, their whānau and their hapū. Like it or not, the modern Māori Land Court has become synonymous with Māori people and their land. After all, its users are almost all Māori. The majority of the judges are Māori. The last three chief judges have been Māori. The majority of its staff are Māori. The issues it confronts are almost always Māori, and its emphasis remains focused on the owners, their whānau and hapū.

There is a degree of trust in the Court that few other institutions impacting on Māori receive. In addition, for those concerned with protecting what little land there is left, the fact that the Court must promote retention of that land invokes a high degree of comfort.

The Registry of the Court has also become more efficient, and more transparent. Combine that with the fact that the fees associated with filing applications remain reasonable, and having a lawyer is not a necessity, it remains a forum providing access to justice for a community that would not normally be able to access the mainstream courts.

That brings me to the issue of reform. I have been in office now through several reviews of Te Ture Whenua Maori Act, the enactment of amendments to the legislation and one attempt to completely overhaul the current system. That last attempt failed because the proposed legislation did not appear to receive enough popular Māori

support. To be more precise, most Māori did not support the greenfield approach adopted to reforming the law and the introduction of a new regime governed by new principles.²² The fear appears to have been that the new regime would have resulted in years of uncertainty in the law. Even those owners, or trusts and incorporations, who are flourishing under the current regime were worried about the level of uncertainty and a number of them sought exemptions from the proposed legislation. Obviously, some reform is warranted as the system is not perfect, but the wide-ranging nature of the last Government's reforms posed many risks and the reforms have been dropped.

My final reflection is that while more can be done to improve the Māori land system, I consider that the Court or some reincarnation of it will remain an integral part of our justice system.

VI What Else Do the Judges Do?

The Māori Land Court judges also sit as presiding officers for the Waitangi Tribunal.²³ As presiding officers, we have been responsible for many inquiries and reports. While the following is a list of my work, my colleagues are equally productive and the list is meant to be indicative of the workload we handle:

- Aquaculture claims which resulted in *Ahu Moana: The Aquaculture and Marine Farming Report* in 2002;²⁴
- Te Arawa mandate and settlement disputes leading to *The Te Arawa Mandate Report* in 2004, *The Te Arawa Mandate Report: Te Wahanga Tuarua* in 2005, and *The Te Arawa Settlement Process Reports* in 2007;²⁵
- The Central North Island historical claims resulting in *The Preliminary Report on the Haane Manahi Victoria Cross Claim* in 2005 and the *He Maunga Rongo:*

22 Te Ture Whenua Maori Bill 2016.

23 Treaty of Waitangi Act 1975, sch 2, s 5(1)(a)(ii).

24 Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, 2002).

25 Waitangi Tribunal *The Te Arawa Mandate Report* (Wai 1150, 2004); Waitangi Tribunal *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wai 1150, 2005); and Waitangi Tribunal *The Te Arawa Settlement Process Reports* (Wai 1353, 2007).

Report on Central North Island Claims – Stage One report in 2008.²⁶ The latter led to the settlement of the Kaingaroa Forest — the largest exotic forest in the southern hemisphere;

- The Kōhanga Reo claim resulting in *Matua Rautia: The Report on the Kōhanga Reo Claim* in 2013;²⁷
- The New Zealand Māori Council claim resulting in *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake – Report on the Māori Community Development Act Claim* in 2015;²⁸
- The Porirua ki Manawatū historical claims resulting in the release of the first volume priority report for that inquiry covering the Muaūpoko claims — creatively named *Horowhenua: The Muaūpoko Priority Report* in 2017.²⁹ I continue to preside in this district with a further round of hearings from August 2018 to the end of 2019; and
- The writing of *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* with two parts released in August 2018.³⁰

VII What about Māori Land Court Judges Working in Other Jurisdictions?

In 2009, I became one of the first two Māori Land Court judges to hold warrants as Alternate Environment Court judges.³¹ Judge Clark was the other. This work has some symmetry with the work of the Māori Land Court. I list below the range of cases that I have been involved in so that those of you who are keen can look them up and see the range covered:

26 Waitangi Tribunal *The Preliminary Report on the Haane Manahi Victoria Cross Claim* (Wai 893, 2005); and Waitangi Tribunal *Central North Island Claims*, above n 1.

27 Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013).

28 Waitangi Tribunal *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake – Report on the Māori Community Development Act Claim* (Wai 2417, 2015).

29 Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017).

30 Waitangi Tribunal *Te Rohe Pōtae Report*, above n 1.

31 Resource Management Act 1991, ss 249–250 sets out the criteria and appointment process. Note s 252 determining when an Alternate Environment Court judge may act.

- *Te Rangatiratanga o Ngāti Rangitahi Inc v Bay of Plenty Regional Council*;³²
- *Heybridge Developments Ltd v Bay of Plenty Regional Council*;³³
- *Te Rūnanga o Ngāi Te Rangi Trust v Bay of Plenty Regional Council*;³⁴
- *Te Puna Matauranga o Whanganui v Whanganui District Council*;³⁵
- *Heybridge Developments Ltd v Bay of Plenty Regional Council*;³⁶
- *Sustainable Matatā v Bay of Plenty Regional Council*;³⁷
- *Ngāi Te Hapū Inc v Bay of Plenty Regional Council*;³⁸ and
- *Maungaharuru-Tangitū Trust v Hastings District Council*.³⁹

Judge Clark's list includes the following cases:

- *Ngāti Mākinō Heritage Trust v Bay of Plenty Regional Council*;⁴⁰
- *Purewa Māori Ancestral Land Unincorporated Group v Whangarei District Council*;⁴¹
- *Mahanga E Tū Inc v Hawkes Bay Regional Council*;⁴²
- *Te Rakato Marae Trustees v Hawkes Bay Regional Council*;⁴³ and
- *Wairoa District Council v Hawkes Bay Regional Council*.⁴⁴

32 *Te Rangatiratanga o Ngāti Rangitahi Inc v Bay of Plenty Regional Council* EnvC Auckland 092/2009, 6 October 2009.

33 *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2010] NZEnvC 195.

34 *Te Rūnanga o Ngāi Te Rangi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402.

35 *Te Puna Matauranga o Whanganui v Whanganui District Council* [2013] NZEnvC 110.

36 *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 269.

37 *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90, (2015) 18 ELRNZ 620.

38 *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73.

39 *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79.

40 *Ngāti Mākinō Heritage Trust v Bay of Plenty Regional Council* [2017] NZEnvC 72.

41 *Purewa Māori Ancestral Land Unincorporated Group v Whangarei District Council* [2016] EnvC 94.

42 *Mahanga E Tū Inc v Hawkes Bay Regional Council* [2014] NZEnvC 83; and *Mahanga E Tū Inc v Hawkes Bay Regional Council* [2014] NZEnvC 248.

43 *Te Rakato Marae Trustees v Hawkes Bay Regional Council* [2011] NZEnvC 231.

44 *Wairoa District Council v Hawkes Bay Regional Council* [2011] NZEnvC 97; and *Wairoa District Council v Hawkes Bay Regional Council* [2010] NZEnvC 420.

Judge Clark and I have not been able to respond to every request to participate in Environment Court proceedings due to our own workloads. I am pleased to announce that this month (November 2018), Judges Harvey and Doogan have been made Alternate Judges in the Environment Court and we look forward to sharing the load with them.

The symmetry in the Environment Court is replicated in the Pacific. We have four judges sitting in Pacific jurisdictions, namely Chief Judge Isaac and Judges Savage, Reeves and Coxhead. Judge Wainwright also spent a number of years on the District Court bench.

By extending the experience of the judges, we are broadening the ability of the Court to serve the Māori people.