BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 169

IN THE MATTER	of the Resource Management Act 1991
AND	of three appeals under section 120 of the Act
BETWEEN	TE RŪNANGA O NGĀTI AWA (ENV-2018-AKL-000133) NGĀTI TŪWHARETOA (BOP) SETTLEMENT TRUST (ENV-2018-AKL-000134) SUSTAINABLE OTAKIRI INCORPORATED (ENV-2018-AKL-000135) Appellants
AND	BAY OF PLENTY REGIONAL COUNCIL WHAKATĀNE DISTRICT COUNCIL Respondents
AND	CRESSWELL NZ LIMITED Applicant
AND	TE RŪNANGA O NGĀI TE RANGI IWI TRUST NGĀTI PIKIAO ENVIRONMENTAL SOCIETY TUWHAKAIRIORA O'BRIEN and NGĀI TAMAWERA HAPŪ KIWIRAIL LIMITED s274 Parties

Court:	Environment Judge D A Kirkpatrick sitting alone under s279 of the Act
Hearing:	On the papers
Date of Issue:	7 September 2018

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT
ON STANDING OF PARTIES UNDER S 274 OF THE ACT

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[1] These three appeals relate to the same matter, being a proposal by the applicant, Cresswell NZ Ltd (**Cresswell**) to expand the Otakiri Springs water bottling plant.

[2] Two decisions relate to this proposal, being:

a) a decision by the Bay of Plenty Regional Council (**BOPRC**) to grant resource consents to increase an existing groundwater take and to authorise related earthworks and discharges (**the regional consents**); and

b) a decision by the Whakatane District Council (**WDC**) to change existing land use consent conditions and to grant resource consents for certain earthworks (**the land use consents**).

[3] Te Rūnanga O Ngāti Awa and Ngāti Tūwharetoa (BOP) Settlement Trust each appeal against BOPRC's decision. Sustainable Otakiri Inc. appeals against both decisions.

[4] Te Rūnanga O Ngāi Te Rangi Iwi Trust (**TRONIT**) and Ngāti Pikiao Environmental Society (**NPES**) have given notice under s 274 RMA to be parties to the appeals: TRONIT to all three and NPES to those by Ngāti Awa and Ngāti Tūwharetoa. Their notices state that their interests include matters of national importance in respect of s 6(e) of the Act and the principles of Te Tiriti o Waitangi under s 8 of the Act as they relate to matters which may affect their relationship with their freshwater taonga.

[5] Cresswell, by a memorandum of its counsel dated 3 August 2018, seeks "direction from the Court on the standing" of TRONIT and NPES. It says:

a) Its application to BOPRC was publicly notified and its application to WDC was limited notified;

b) Neither TRONIT nor NPES made a submission on the application to BOPRC and neither of them were notified of the application to WDC;

c) It is unclear what interests TRONIT and NPES have in the appeals that may be greater than those of the public generally; and

d) If the interests are broad concerns about Maori rights and interests in water, then

those matters are beyond the scope of the appeals and the Court's jurisdiction.

[6] In response, TRONIT filed a memorandum of counsel and an affidavit sworn on 15 August by Reon Roger Tuanau, and NPES filed an affidavit sworn on 15 August 2018 by Raewyn Marcelle Bennett.

[7] Mr Tuanau on behalf of TRONIT says that Ngāi Te Rangi and Ngāti Awa are kin, as Te Rangihouhiri is a descendant of Awanuiarangi. They share the same concerns about water and raise the same relationship issue. With regard to the appeals by Ngāti Tūwharetoa and Sustainable Otakiri, they say that as those raise the same or very similar issues and are likely to be heard together with Ngāti Awa's appeal, it is appropriate to allow TRONIT to be participate in those as well.

[8] Ms Bennett on behalf of NPES says that a number of iwi have cross-over claims or Crown recognition in Ngāti Pikiao's area of interest, including Ngāti Awa, Ngāti Tūwharetoa and Ngāiterangi. She refers to Ngāti Pikiao's claim to the Waitangui Tribunal in relation to the Kaituna River (WAI 4) and other involvement in relation to freshwater issues as evidence of the iwi's concerns and interests being greater than that of the public generally. She deposes that she had heard of Cresswell's application through her family connections with Ngāti Makino but that Ngāti Pikiao would leave it to others such as Ngāti Awa to address the issues. When she learned that consent had been granted notwithstanding the issues raised by Ngāti Awa and Ngāti Tūwharetoa, she was concerned that any decision on the appeal could negatively affect Ngāti Pikiao's Treaty rights, ancestral and contemporary relationships with water and their exercise of kaitiakitanga.

[9] Against that background, the parties agree that the Court should determine, on the papers, whether TRONIT and NPES have standing to be parties under s 274 of the Act.

[10] For present purposes, Section 274 relevantly provides:

> **274 Representation at proceedings**
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> (1) The following persons may be a party to any proceedings before the Environment Court:
> . . .
> (c) the Attorney-General representing a relevant aspect of the public interest:
> (d) a person who has an interest in the proceedings that is greater than the interest that the general public has, . . .
>
> (2) A person described in subsection (1) may become a party to the proceedings by giving notice within 15 working days after—

(a) the period for lodging a notice of appeal ends, if the proceedings are an appeal:

. . .

(2A) A notice given under subsection (2) must be given to—
(a) the Environment Court; and
(b) the relevant local authority; and
(c) the appellant, in the case of an appeal, or the person who commenced proceedings, in any other case.

(2B) The person giving notice under subsection (2) must, no later than 5 working days after the deadline for giving that notice, give the same notice to all other parties.

(3) The notice given under subsection (2) must state—
(a) the proceedings in which the person has an interest; and
(b) whether the person supports or opposes the proceedings and the reasons for that support or opposition; and
(c) if applicable, the grounds for seeking representation under subsection (1)(c) or (d); and
(d) an address for service.

(4) A person who becomes a party to the proceedings under this section may appear and call evidence in accordance with subsections (4A) and, if relevant, (4B).

(4A) Evidence must not be called under subsection (4) unless it is on matters within the scope of the appeal, inquiry, or other proceeding.

. . .

(5) A person who becomes a party to the proceedings under this section may not oppose the withdrawal or abandonment of the proceedings unless the proceedings were brought by a person who made a submission in the previous proceedings on the same matter.

(6) For the purposes of determining whether a person has an interest in proceedings greater than the interest that the general public has, the Environment Court must have regard to every relevant statutory acknowledgment (within the meaning of an Act specified in Schedule 11) in accordance with the provisions of the relevant Act in that schedule.

(7) Subsections (2) to (2B) are subject to section 281.

[11] The central question is whether TRONIT or NPES is *a person who has an interest in the proceedings that is greater than the interest that the general public has.*

[12] Prior to its amendment in 2009,[1] the list of persons who may be a party included:

(c) a person who has an interest in the proceedings that is greater than the public generally:
(d) a person representing a relevant aspect of the public interest:

[13] The 2009 amendment, among other things:

- added to the list in s 274(1):

(c) the Attorney-General representing a relevant aspect of the public interest:

[1] On 1 October 2009, by section 128(1) of the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

- deleted:

  (d) a person representing a relevant aspect of the public interest:

- and replaced:

  (c) a person who has an interest in the proceedings that is greater than the public generally: with

  (d) a person who has an interest in the proceedings that is greater than the interest that the general public has, . . .

[14] It is not obvious that "an interest in the proceedings that is greater than the public generally" is substantially different from "an interest in the proceedings that is greater than the interest that the general public has." Perhaps Parliament was concerned that the earlier formulation was elliptical and so clarified the nature of the interest.

[15] The leading case on the application of s 274 of the Act is the Court's decision in *Purification Technologies v Taupo District Council.*[2] This case was decided under the earlier version of s 274, but for the reasons in the previous paragraph, I consider it remains authoritative. The relevant reasoning is set out in the following oft-cited passage:[3]

> Parliament has chosen to limit those who may be heard in Planning Tribunal proceedings to the classes of persons described in section 274. Parliament is to be taken to have intended the established meaning at law of reference to an interest in proceedings. The section has to be construed to give meaning to Parliament's evident intent to restrict the classes of persons entitled to appear and call evidence in proceedings before the Tribunal.
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> ... [W]e hold that on the true interpretation of the section, the interest in the proceedings greater than that of the public generally which qualifies a person to appear and call evidence must be one of some advantage or disadvantage, such as that arising from a right in property directly affected, and which is not remote. We also hold that an interest in proceedings in seeking to enforce the public law as a matter of principle, a belief that activity of a particular kind ought to be prevented, or as part of an endeavour to achieve the objects of an association, or uphold the values which it was formed to promote, would not be an interest in the proceedings greater than that of the public generally. Nor would an interest in the preservation of a particular environment, or an intellectual or emotional concern, the satisfaction of righting a wrong, an interest in upholding a principle, a sense of grievance or the risk of being ordered to pay costs. In our view a more liberal interpretation of the phrase "interest in the proceedings" would not be giving effect to the new regime of the Resource Management Act but would be reverting to the more liberal regime of the former legislation which

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2 *Purification Technologies Ltd v Taupo DC* [1995] NZRMA 197.

3 *Idem* at 204.

> Parliament has chosen not to continue.

[16] The *ratio* of this passage is that a qualifying interest in the proceedings must be one of some advantage or disadvantage which is not remote. A property interest is an example of a relevant interest[4] but is not a pre-requisite to having a sufficient interest.[5] Equally, merely having property interests in a district is not a sufficient basis on which to assert an interest greater than the interests that the general public has.[6] Importantly for present purposes, the discussion of proprietorial interests has recognised the special position in the Act accorded to the interests of Maori in land:[7]

> If the meaning is to be restricted in some way to some proprietorial interest in the land or the site then that puts a focus on European concepts and ignores the particular and special Maori relation and association with land ...

[17] From the context of the *Purification Technologies* decision, and in particular the discussion of the concept of remoteness in relation to relevant Australian and United States authorities,[8] the reference to remoteness relates to principles of causation, including foreseeability. For present purposes, the reference to remoteness does not alter or extend the assessment of whether there is some advantage or disadvantage such as that arising from a right or interest in property directly affected.

[18] The existence of an issue relating to one or more of the matters of national importance in s 6 of the Act does not, by itself, bring a person who is interested in that issue within s 274(1)(d), but a person with special knowledge, such as a scientific researcher, may have more than a mere "intellectual" interest in a proceeding about the area, and so may have a sufficient interest in the proceeding to be a party.[9] By analogy, it would be equally appropriate to treat a person with special customary knowledge of a matter relevant to the proceeding as having a sufficient interest in it.

[19] Considering the facts here, I conclude that both TRONIT and NPES have sufficient interests in these appeals to be parties to them under s 274(1)(d) for the following reasons. Both assert ancestral connections to the land and its water resources, which

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4 *Meadow 3 Limited v van Brandenberg* [2008] NZHC 2360; (2008) 14 ELRNZ 267; at [34].

5 *Ngatiwai Trust Board v New Zealand Historic Places Trust* [1998] NZRMA 1 at 10 (HC).

6 *The HB Protection Soc Inc v Hastings DC* W021/2009; and *Federated Farmers of NZ Hawkes Bay Province v Hastings DC* [2016] NZEnvC 141.

7 *Ngatiwai Trust Board v New Zealand Historic Places Trust* [1998] NZRMA 1 at 10 (HC).

8 In particular, *Re McHattton v Collector of Customs* (1977) 18 ALR 154 and *Empire Gas Fuel Co v Railroad Commission of Texas* (1936) 90 So West Rep (2D) 1240.

9 *Treble Tree Holdings v Marlborough District Council* [2012] NZEnvC 88; [2012] NZRMA 497 at [22] - [25].

are matters that the Court must recognise and provide for under s 6(e) of the Act. These connections are not things which could be said to be those of the public generally. Based on those connections, it is possible that both may have customary knowledge that would assist in making decisions on these appeals. These are not necessarily broad issues that would render the involvement of these two entities something contrary to Parliament's intention in limiting those who may be heard. They may well be the same or similar as the interests of the appellants, but in terms of the principles of Te Tiriti o Waitangi / the Treaty of Waitangi which the Court must take into account under s 8 of the Act, the iwi whom TRONIT and NPES represent are entitled to their own recognition. These are matters of advantage or disadvantage to these iwi.

[20] Any question of remoteness will likely depend on the particular issues to be addressed at a substantive hearing and on the positions that the parties may take on those issues. All parties can expect that the Court will be concerned to ensure that the scope of the issues will be defined in good time prior to the hearing so that the appeals are resolved in a timely and cost-effective manner, as required by s 269(1A) of the Act.

[21] The notices given by TRONIT and NPES therefore are confirmed for the purposes of making those entities parties to the appeals to which their notices relate.

D A Kirkpatrick
Environment Judge