

**IN THE HIGH COURT OF NEW ZEALAND  
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
ŌTEPOTI ROHE**

**CIV-2021-412-00089**

**IN THE MATTER** of an application under the Declaratory Judgments Act  
1908

**BETWEEN** **OTAGO REGIONAL COUNCIL** a regional council under  
Schedule 2 of the Local Government Act 2002

**Plaintiff**

**AND** **ROYAL FOREST AND BIRD PROTECTION SOCIETY  
OF NEW ZEALAND INCORPORATED** an incorporated  
society having its registered office at 205 Victoria Street,  
Wellington

**Defendant**

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**MEMORANDUM OF COUNSEL ON BEHALF OF CANTERBURY REGIONAL  
COUNCIL**  
**5 November 2021**

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**MAY IT PLEASE THE COURT**

- 1 This memorandum is filed on behalf of the Canterbury Regional Council (**CRC**), in order to seek clarity on its potential appeal rights, in light of the Court's Minute dated 29 October 2021, and with reference to the Memorandum of Counsel filed on behalf of the Minister for the Environment on 5 November 2021.
- 2 The CRC understood that it was to be named as a defendant in these proceedings, and therefore would also retain appeal rights (as its appearance was not as an intervenor).
- 3 The purpose of this memorandum is to clarify whether this is the case, or in the alternative seek leave to file a statement of defence to preserve its position.

**CRC's position**

- 4 The CRC is a submitter on the Proposed Otago Regional Policy Statement 2021 (**PORPS**), and as such was served with the proceeding directly on Monday 27 September 2021.
- 5 The service email included a link to the Statement of Claim filed by the Otago Regional Council (**ORC**), Notice of Proceedings, Affidavit of Anita Dawe and Court Directions (being the Minute of Associate Judge Paulsen regarding the telephone conference on 21 September 2021).
- 6 This Minute (and the approved public notice included within) referred to the timeframes within which parties were to file a statement of defence or notice of appearance, and any affidavit sought to be relied on.<sup>1</sup>
- 7 The CRC filed a notice of appearance in this proceeding, in place of a statement of defence, and a supporting affidavit of Andrew Parrish.

**Court's Minute dated 29 October 2021**

- 8 The Court's Minute of 29 October 2021, in seeking to provide clarity on the status of the Minister for the Environment's participation, noted that:
  - (a) Because the Minister was one of the persons directed to be served with this proceeding (like the CRC) he falls within the definition of "defendant" under Rule 1.3 of the High Court Rules 2016;

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<sup>1</sup> Minute dated 21 September 2021, at [4(e)], attached public notice at [11].

- (b) The persons served did not need to be named as defendants, under Rule 18.6 of the High Court Rules 2016; and
- (c) Rule 18.12 provides that a defendant who files a statement of defence or an appearance may also file affidavit evidence.

9 However, the Court went on to note:

[9] I am not immediately aware of the law in relation to appeal rights in this situation. My assumption has been that a defendant (such as the Minister) who files a statement of defence and participates at the hearing is entitled to appeal. My expectation is that a person who merely files a notice of appearance does not have appeal rights. (I appreciate that in proceedings where a person is joined as an interested party or intervenor — as in *Wilson v Attorney-General* (2010) 19 PRNZ 943 — the Court will expressly state the rights that person will have, and in practice frequently excludes appeal rights. But those situations involve directions made by the Court.)

### Consequences for CRC

- 10 For the reasons of the Court as set out above, the question is not whether the CRC is a defendant to the proceedings (as it meets the same requirements of the Minister for the Environment as set out in the Court's Minute), but whether the CRC retains any appeal rights by virtue of filing a notice of appearance instead of a statement of defence.
- 11 The CRC agrees with the legislative background as set out in the Memorandum on behalf of the Minister for the Environment dated 5 November 2021.
- 12 Counsel notes that the position of a defendant has been treated separately from that of an intervenor in case law, where an intervenor is required to apply for leave to appear in the proceedings, and must meet certain tests established through case law (for example in relation to public interest).<sup>2</sup>
- 13 While it is recognised that an intervenor does not have appeal rights, the CRC submits that the status of a party as a defendant should preserve appeal rights, in line with the High Court's decision in *Independent Fisheries*.<sup>3</sup>

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<sup>2</sup> *Seales v Attorney-General* [2015] NZHC 828.

<sup>3</sup> *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1177 at [15](i).

14 In the event that the Court considers otherwise, leave is sought from the Court to file a late statement of defence in this proceeding by **Friday 12 November 2021**. Counsel considers this will not prejudice other parties, on the basis that the CRC has already filed a notice setting out the grounds on which it is interested and seeks to be heard.

**Directions sought**

15 Accordingly, counsel for the CRC respectfully seeks directions as follows:

- (a) The CRC, by virtue of being a defendant in this proceeding, preserves its appeal rights; or,
- (b) In the alternative, leave is granted to the CRC to file a late statement of defence in this proceeding by **Friday 12 November 2021**.

**DATED** this 5<sup>th</sup> day of November 2021



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**P A C Maw**

Solicitor for the Canterbury Regional Council