Tikanga Māori: an integral strand of the common law of New Zealand

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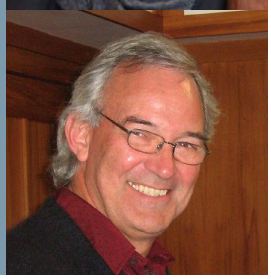

INTRODUCTION

In April 2020, in *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 (*Trans-Tasman* (CA)), the Court of Appeal upheld the decision to reject the approval of an application to mine offshore for iron ore and remitted the application back for reconsideration by the Environmental Protection Agency (EPA). The Trans-Tasman Resources application was the first full hearing by the EPA under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act). However, the findings regarding Māori rights and interests have a number of important implications beyond the EEZ Act. In particular, the appellate Court's findings represent a significant step forward for our understanding of Treaty of Waitangi obligations, the Crown's obligations with respect to as yet unrecognised customary claims and tikanga as a source of common law. This has ramifications for other areas of law where questions of Māori rights are in debate, not least of all with respect to freshwater. This article explores the key findings relevant to Māori and the areas of contention that will need to be addressed on appeal, which at the time of writing is before the Supreme Court.

TREATY OF WAITANGI/TE TIRITI O WAITANGI

The EEZ Act includes a Treaty of Waitangi provision under s 12. However, unlike the Treaty provision under s 8 of the Resource Management Act 1991 (RMA), this is not set out in a general way for decision-makers and the courts to interpret. Instead, s 12 refers to a number of specific sections in the EEZ Act "to give effect to the principles of the Treaty of Waitangi". The Government has indicated its preference for this type of specific Treaty clause since 2000 (see for example, Environmental Protection Authority Act 2011, s 4 and Public Records Act 2005, s 7).

An important question before the Court of Appeal (Kós P, Courtney and Goddard JJ) was whether s 12 of the EEZ Act was exhaustive or whether Treaty principles could be applied more broadly. In the High Court, Churchman J was emphatic that if Parliament had intended for there to be a general obligation to give effect to Treaty principles, the Bill would have been amended to make this explicit (*Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217 (*Trans-Tasman* (HC)) at [241]–[243]).

Goddard J for the Court of Appeal adopted a broad approach, finding that while s 12 appears to be non-exhaustive, as long as the Act's provisions were interpreted and applied in a manner giving effect to Treaty principles, the question was "more apparent than real, and need not be resolved" (at [162]).

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One of the directions under s 12 is that decision-makers must take into account the effects of activities on existing interests. The meaning of existing interests refers to (inter alia) "any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing" (EEZ Act, s 4(a)). In interpreting this provision, the Court found that "rangatiratanga" and "full exclusive and undisturbed possession of lands, estates, forests, fisheries and 'taonga katoa'" are a "lawfully established existing activity" (at [166]). This is a significant acknowledgement that the rights of Māori as defined by tikanga and guaranteed under the Treaty continue today and are legally cognisable.

Also of interest is the way Goddard J centred his reasoning on the text of Te Tiriti o Waitangi/the Treaty of Waitangi as well as on Treaty principles. Article 2 of the Treaty in both Te Reo and English were quoted in full and Goddard J focused on the "guarantees" of rangatiratanga and Māori rights to their lands, resources and taonga (at [165]–[166]). This emphasis on the text of the Treaty itself may reflect an important shift away from a sole focus on Treaty principles (see also, for example, Cabinet Office Circular "Te Tiriti o Waitangi/ Treaty of Waitangi Guidance" (22 October 2019) CO (19)5).

Additionally, Goddard J applied the seminal decision of *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) (at 210) which declared that "the Treaty is part of the fabric of New Zealand society" and provides relevant context for interpreting "legislation which impinges upon its principles". Goddard J noted that "environmental regulation is a sphere in which the Crown's obligations under the Treaty are of particular importance" (at [40]). *Huakina* has remained under-cited and under-applied in the context of environmental law, so this decision may open the door to its further use.

While it is arguable that specific Treaty provisions provide greater certainty than general Treaty provisions, there is concern that, in effect, they declare legislation "complies with Treaty obligations, rather than placing a positive, forward-looking obligation on decision makers in terms of the Treaty and Treaty principles." (13 September 2011) 675 NZPD 21214 (Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill—First Reading, Rahui Katene). The Court of Appeal's reluctance in (*Trans-Tasman* (HC)) to read down the Treaty obligations owed to Māori under such Treaty clauses is significant.

AS YET UNRECOGNISED CUSTOMARY CLAIMS

Another key question was whether applications under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) for customary marine title and protected customary rights are an existing interest under the EEZ Act or alternatively could be considered as "any other matter". The High Court found that the argument that lodged interests should be considered "would do violence to the words of that Act, which refers to protected customary right or customary marine title 'recognised'" (at [233]).

Goddard J took a different position, noting that while claims not yet granted under MACA are not naturally seen as 'existing interests', this was beside the point. This was because "MACA does not bring the underlying customary interests into existence. Rather, it provides a mechanism for recognising them" (*Trans-Tasman* (CA)) at [168]). On this basis, Goddard J avoided the issue that the EEZ Act refers to the customary right or customary marine title "recognised" by referring to the definition of 'existing interest' under s 4(a). It was found that, "pending such recognition, tangata whenua with customary interests continue to have and enjoy those customary interests, and those customary interests qualify as existing interests …" (at [168]). Consequently, there was an obligation to engage with the full range of customary rights, interests and activities identified by Māori as affected by the proposal and to consider the effect of the proposal on those existing interests (at [170]).

The finding that customary rights must be respected before they are legally proven has implications for other areas where Māori rights and interests are yet to be given legal form, particularly freshwater. It suggests that decision-makers need to be cognisant of customary claims and should consider what those claims are and how they may be impacted by proposed activities.

While the Court of Appeal's findings were framed by the New Zealand context, the approach taken finds support in overseas jurisprudence. In Australia, groups who have made customary claims that have not yet been legally proven hold special rights of consultation and negotiation with respect to proposed activities affecting those claims (Native Title Act 1993 (Cth), ss 25–44). In Canada, in *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511, the Supreme Court found that when the Crown is aware of aboriginal claims, the Crown cannot run roughshod over these claimed rights (at [27]). The Crown's honour required it

respect these potential, but yet unproven, interests, through a duty to "consult and accommodate". The right is not one of veto for the concerned Indigenous groups, and the Crown must balance the potential impact of the decision on the asserted claim with other societal interests. Notwithstanding, cases such as *Clyde River (Hamlet) v Petroleum Geo-Services Inc* 2017 SCC 40, [2017] 1 SCR 1069 have established a high standard on the Crown's duties.

Goddard J's findings reflect this approach in that it was found that the protection to be given to these rights was not absolute but at the very least required that reasons be given to justify a decision to override existing interests, absent of the free and informed consent of affected iwi (at [171]). The adequacy of those reasons could then be assessed by reference to assurances given by the Crown to Māori under the Treaty and the express provision under the Act to give effect to the principles of the Treaty (at [171]). Given the Court's emphasis on Treaty guarantees to Māori of their lands, resources and rangatiratanga, the bar for justification was arguably set high.

While the duty to consult in Canada is linked to the constitutional protection of aboriginal title, it also relates to more general legal principles affirmed in New Zealand, including that the honour of the Crown demands recognition and protection of the property rights of the original inhabitants of the land (*Paki v Attorney-General (No 2*) [2014] NZSC 118, [2015] 1 NZLR 67 at [152]–[153]). Furthermore, in *Trans-Tasman* (CA), Goddard J stressed that the Treaty principles of partnership (including good faith) and active protection were "intrinsically relevant" matters to customary claims (at [171]).

TIKANGA AND CUSTOMARY RIGHTS

A further argument raised by iwi was that decision-makers were required to consider tikanga Māori as 'any other applicable law' and that 'kaitiakitanga' was an existing interest under the EEZ Act.

Drawing upon the Court of Appeal's findings in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), Goddard J stressed that Māori customary property rights and interests depend on the customs and usages (tikanga Māori) which gave rise to those rights and interests. At [177], he noted that:

> *The continued existence of those rights and interests necessarily implies the continued existence and operation of the tikanga Māori which defines their nature and extent. As Tipping J said in Attorney-General v Ngati Apa, "Maori customary land is an ingredient of the common law of New Zealand". The same can be said of the tikanga that defines the nature and extent of all customary rights and interests in taonga protected by the Treaty.*

Thus "it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand" (at [177]). On this basis, the relevant aspects of tikanga needed to be identified and taken into account in so far as relevant to the proposal (at [178]).

Drawing extensively on the extra-judicial writings of Williams J, the Court considered the relevant tikanga and in particular, recognised that kaitiakitanga and the interrelated concept of whanaungatanga are foundational to tikanga Māori and of key importance in this case (at [172]–[174]). Goddard J acknowledged that tikanga did not always align with English legal concepts but this did not mean they could be disregarded or shoe-horned into an English property law framework (at [169]).

The strong statements in *Trans-Tasman* (CA) are arguably the clearest recognition of tikanga as a source of common law to date. However, it builds on the momentum of previous case law from *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 to *Mason v R* [2013] NZCA 310, *Paki v AttorneyGeneral (No 2)* [2012] NZSC 50, [2012] 3 NZLR 277 and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116. Most recently, the scope of tikanga in New Zealand law arose in the appeal heard by the Supreme Court after the death of appellant Peter Ellis (*Ellis v R* [2020] NZSC 89). Arguably, under tikanga, mana and tapu remain important after a person's death and a case should not be discontinued on a litigant's death. Both the *Trans-Tasman* and *Ellis* appeals will require the Supreme Court to address the scope, nature and extent of tikanga in our national law.

CONCLUSION

In the Court of Appeal's *Trans-Tasman* decision, we have the makings of a fundamentally different way of conceiving of the nature of Māori rights and the extent to which they can be recognised by the courts. How the Supreme Court deals with these arguments will have significant implications for law in 21st-century New Zealand.