Maori Legal Issues in the Supreme Court 2004-2014: A Critical, Comparative and International Assessment

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I Introduction

I examine four New Zealand Supreme Court (NZSC) cases dealing with Maori legal issues from a critical, comparative and international legal perspective: *Haronga v Waitangi Tribunal & Ors (Haronga)*, *Takamore v Clarke (Takamore)*, *NZMC v Attorney General (NZMC freshwater)*, and *Paki v Attorney General (Paki)* [the final paper may include some analysis also of *Taueki v R*]. I conclude that, from these three perspectives, the NZSC’s decisions are a mixed bag for the recognition and protection of Maori rights: there is some significant success in principle, if not yet translated into practice, although perhaps not to the extent demanded by critical tribal theorists, international law and, in some cases, comparative standards.

I exclude a number of cases that deal with issues that affect Maori but cannot be described as primarily Maori legal issues. Nonetheless, the distinction is somewhat arbitrary. There are many legal issues that have been addressed by the NZSC that impact profoundly and especially on Maori, albeit not exclusively, such as, in particular, in the area of criminal law. Given the disproportionate and alarming incarceration rates of Maori, especially Maori women, it is clear that criminal justice is an issue of immense importance to Maori and is deserving of analysis. Equally, *Omar Hamad* could be viewed as an important “Maori” case in that it deals with the notorious Operation 8 on Tuhoe lands and human rights protection vis a vis state oversight of what might be described as Maori protest activity. Yet it has been excluded from analysis here because the legal questions centre on the admission of evidence rather than distinctly Maori legal issues.

I outline generally the approach taken to critical legal theory and comparative and international law before then analyzing each case in turn from each perspective. Note that there is some overlap between the critical, comparative and international perspectives. For example, a positive critical assessment is influenced by a positive assessment from a comparative and international legal perspective, and vice versa.

II Outline of approach and arguments

A Critical analysis

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5 [2014] NZSC 118.
6 [2013] NZSC 146.
7 Stats.
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A critical tribal perspective, drawing on legal realism, critical legal studies, post-modernism, Marxism, radical feminism and especially critical race theory, seeks to understand and uncover the often invisible biases against tribal peoples underlying and inherent in law, including judge-made law. It is also somewhat anti-liberal in that it maintains that liberalism is biased towards cultural preferences that prioritise the individual and is focused too much on formal rather than substantive equality. For example, a critical tribal theorist may argue that aggressive affirmative action is required to truly level the playing field between Indigenous peoples and the dominant groups in the societies in which they live, given the invisible structural biases towards the dominant groups. Moreover, critical race theorists are often sceptical about the impetus behind advancements in legal recognition of minorities’ interests and rights, maintaining that it can often only be explained by “interest convergence” with the interests of the dominant groups.³ [Ani Mikaere and Moana Jackson arguably most well-known critical tribal scholars in New Zealand.]

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A recent USSC example of a critical race approach to analysis can be found in Sotomayer J’s approach to a case affirming Michigan legislation banning affirmative action in admissions to state universities. Sotomayor J, in dissent, wrote, ¹⁰

The way to stop discrimination on the basis of race …is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.

By way of contrast, Kennedy J wrote, ¹¹

This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this court’s precedents for the judiciary to set aside Michigan laws that commit this policy determination to the voters.]

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A realist and critical analysis of case law can be empirically difficult because it requires an assessment of the personal, professional, social, economic and political factors behind judicial decision making. These are, of course, difficult to ascertain, possibly even for the judges themselves or those close to them. Here I highlight some passages in the NZSC judgments to indicate where biases against Maori or tikanga might creep in in such a way as to suggest some partiality against outcomes in favour of tikanga or Maori rights. To be clear, however, I do not suggest that NZSC judges are not conscious of this potential bias – they function within a system where precedent constrains their approaches to some extent – or that there are malevolent forces at work. It is simply to test whether, given the NZSC judgments, there is a potential for outcomes to favour liberal and

⁹ Derrick Bell.

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¹¹
Western cultural biases over Maori rights, culture and tiknaga (with their focus on the collective).

Drawing on Professor Robert Williams’ analysis of US Supreme Court Indian rights decisions from a critical tribal perspective, the first observation is that Maori have not had much success in terms of outcome on the ground, although some success can be found in legal principle in Paki 2 and arguably, to differing degrees, also in Haronga and Takamore.

The second observation relates to the use of what would be critically described as potentially “racist historical precedent”. In Takamore and Paki 2, for example, we see the NZSC moving away from, and illustrating a sensitivity to, precedent that has functioned to deny recognition of tikanga Maori and Maori property rights, albeit not in to the extent that critical tribal theorists might demand. Takamore might be seen as striking a middle ground between adherence to problematic precedent and promoting recognition of tikanga. Paki 2, and possibly Haronga, on the other hand, might be viewed as more enlightened and stronger cases with respect to Maori rights, including as held under tikanga. However, NZMC freshwater can be seen as potentially a step backwards in its failure to give full effect to precedent upholding the principles of the Treaty of Waitangi and in deferring to political processes where Maori are in a weaker position to ensure protection of their rights.

B Comparative analysis

From a comparative perspective, I compare New Zealand law on Maori rights with Canadian law on Aboriginal and Treaty rights, with a focus on decisions from the Supreme Court in each jurisdiction. The comparison is motivated by Cooke P’s observation in Maririhenua, cited recently by William Young J in Paki 2, that “the idea that the Crown in New Zealand has lesser obligations to its indigenous people than are owed to the indigenous peoples of other jurisdictions, is unattractive.”

The comparison is complicated by, but also interesting because of, the fundamental difference in the level of constitutional protection of Maori rights in New Zealand and Aboriginal and Treaty rights in Canada. Section 35 of the Canadian Constitution Act 1982 recognizes and affirms the “existing aboriginal and treaty rights” of the aboriginal peoples of Canada. The relevance of s 35 should not be understated. It indicates a firm and concrete commitment by the Canadian polity to uphold Aboriginal and Treaty rights in a way that we have simply not seen in New Zealand. However, in New Zealand, Maori arguably have greater political power compared to First Nations largely because Maori make up a comparatively larger proportion of the population but also, possibly,

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12 Like a Loaded Weapon: The Rehnquist Court, Indian Rights and the Legal History of Racism in America (Minneapolis, University of Minnesota Press, 2005).
13 Williams.
14 Te Runanga o Maririhenua Inc v Attorney-General [1990] 2 NZLR 641 (CA) at 655 cited in Paki 2 at para 152.
because of New Zealand’s strong political/legal history and culture of negotiating recognition of Maori rights.

There are a number of observations about the NZSC approach to Maori rights illuminated by comparative analysis based on Canada. If Canada sets an appropriate benchmark, some NZSC decisions, or parts thereof, seem to meet or even exceed that benchmark, seen in a comparison between the approaches to land rights (but not necessarily fiduciary duties) in the Canadian Supreme Court’s decision in Tsilhqot’inn Nation v British Columbia,\(^\text{[15]}\) delivered in June 2014, and Paki 2. Others do not, mostly due to too great deference by the NZSC to political processes and a seeming hesitancy to insert more law into the relationships between iwi and the Crown, such as in NZMC freshwater.

In order from weakest to strongest protection of Maori rights, from a comparative perspective, NZSC cases could be ranked as follows: NZMC freshwater, Takamore and Paki 2. [Haronga is difficult to compare as it relates to a uniquely New Zealand institution, the Waitangi Tribunal, and a unique Treaty settlement process].

C International legal perspective

A remarkable aspect of the NZSC’s decisions in relation to Maori legal issues is the reference to, and corresponding influence of, the United Nations Declaration on the Rights of Indigenous Peoples (Indigenous Declaration. Focusing on outcomes, however, Takamore, NZMC (freshwater) and Paki 2 still arguably fall short of the standards set by the Indigenous Declaration although Paki 2 only to a lesser extent. Nonetheless, there is cause for optimism – that the NZSC will continue to invoke the Indigenous Declaration to ensure, over time, greater conformity between New Zealand law and Indigenous Declaration standards.

III Takamore

A The decision

When Mr Takamore died suddenly, his whanau, against the executor Ms Clarke’s wishes, who was also Mr Takamore’s spouse, buried him in the family urupa in Kutarere in accordance with Tuhoe tikanga. Mr Takamore had left Kutarere some 20 years previously to live in Christchurch with Ms Clarke and their children. Ms Clarke successfully claimed in the High Court and the Court of Appeal that, as executor, she was entitled to determine where Mr Takamore would be buried. The Takamore whanau, appealing to the NZSC, argued that as there is no New Zealand law recognizing the exclusive right of the executor to dispose of the body and the common law should recognize and give effect to tikanga.

[Other relevant facts? Not clear what Mr T wanted; cultural misunderstanding when Ms C and children left the body].

\(^{[15]}\) [2014] SCC 44.
The majority in Takamore found, relying on English, Australian and Canadian precedent, that the executor or potential administrator (personal representative) has the overriding right and the duty to determine the manner and give effect to the disposal of a deceased’s body. However, the personal representative,\(^{16}\)

should take account of the views of those close to the deceased, which are known or conveyed to him or her. These will include views that arise from customary, cultural and religious practices, which a member of the deceased’s family or whanau considers should be observed. Any views expressed by the deceased on what should be done are an important consideration. There is no requirement, however, for the personal representative to engage in consultation. That may not be practical in circumstances of urgency. [...] The personal representative is also entitled to have regard to practicalities of achieving burial or cremation without undue delay.

Further, the majority state that he or she must refer to “any tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation.”\(^{17}\) However, “a personal representative, particularly one who is a member of the deceased’s family, who has a personal view of what is appropriate is not precluded from acting in accordance with that view, provided consideration has been given to all relevant factors and viewpoints.”\(^{18}\)

If a person is aggrieved with the decision of the personal representative, he or she may challenge it in the High Court. The Court is not confined to reviewing the decision on the grounds that the discretion was “exercised improperly, capriciously or wholly unreasonably.”\(^{19}\) Rather, the Court “must also respect and permit the recognition of different cultural and other practices, as well as different family and other personal interests within the rubric of the common law decision-making process.”\(^{20}\)

Taking the facts of the case, the majority found that Ms Clarke’s determination had priority. The circumstances considered included, “first, the fact that Mr Takamore made his life in Christchurch with his partner and their children, living there with them for over 20 years until his death in 2007”, referring to the lack of relationship between Mr Takamore’s children and Kutare. “Secondly, Kutare is the place of central importance to Mr Takamore’s Maori family and their custom.” Thirdly, different views were expressed as to Mr Takamore’s own wishes. Fourth, Mrs Clarke and children wanted him buried in Christchurch and finally, although of little weight, that Mr Takamore is buried in Kutare.

\(^{16}\) At [156].
\(^{17}\) At [164].
\(^{18}\) At [158].
\(^{19}\) At [161].
\(^{20}\) At [162]
In contrast, Elias CJ disagreed with the majority’s interpretation of precedent and concludes that there is no established common law rule recognizing a duty and right of personal representatives to determine how and where a body should be disposed of. The difference between the Chief Justice’s decision and that of the majority, then, is that she finds that, where there is a dispute as to burial, parties have standing to bring the case to the High Court to resolve in law under its inherent jurisdiction. In exercising that jurisdiction, the Court is required to take into account tikanga. On the facts, Elias CJ found that Ms Clarke and her children should be left to decide where Mr Takamore is buried.

B Critical analysis

In analyzing Takamore from a realist and critical perspective, I focus on the extent to which there is room for, or potential displays of, a predisposition towards prioritizing the wishes of specific individuals, including the deceased and nuclear family. An alternative approach would be to prioritise the more tikanga consistent wishes of the broader whanau, hapu and iwi – collectives – dictated by values and ideologies behind, for example, mana, mana whenua, whakapapa, ahi kaa, whanaungatanga and tapu. From a critical perspective, the outcome is significant in that the Takamore whanau and tikanga lost.

The majority’s decision illustrates considerable appreciation of the importance of the collective and tikanga. In assessing the appropriate role for custom, the majority state that subject to not being in conflict with statute, “our common law has always been amenable to development to take account of custom.” On the other hand, they rejected the submission that the common law only applies to the extent it is not inconsistent with tikanga.

Striking an apparent middle ground between tikanga and the preferences of the individual and his spouse and children, reflected in the reasoning outlined above, the majority state that, the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation. Personal representatives are required to consider these values if they form part of the deceased’s heritage, and, if the dispute is brought before the Court because someone is aggrieved with the personal representative’s decision, Maori burial practice must be taken into account.

21 Mead. I would add that those for whom tikanga is important might also hold individual preferences inconsistent with the but nonetheless feel bound by tikanga as dictating the “tika”/”right” way of doing things.
22
23 at [164].
However, there are a few occasions in the judgment from which it is possible to suggest that the individual and nuclear family’s views might be more likely to prevail.

First, consider the majority’s statement that, \(^{24}\)

a personal representative, particularly one who is a member of the deceased’s family, who has a personal view of what is appropriate is not precluded from acting in accordance with that view, provided consideration has been given to all relevant factors and viewpoints.

Taking a Sotomayer perspective, with eyes wide open to the effects of the law, where the personal representative is the spouse of the deceased and his or her views are very much inconsistent with the outcome required under tikanga, it would be very difficult for that person to objectively and independently balance his or her own views and tikanga.

Second, if there is a dispute between family members and the matter is to be decided by the courts, the Court is to examine, \(^{25}\)

the nature and closeness of the relationship of the deceased with each family and each location at the time of death. The sensitivities of family and others close are relevant along with cultural, religious and other circumstances that underlie them.

In assessing “closeness” within a family, it might be difficult for judges who are not familiar with whanau relationships and values, and who themselves prioritise their own nuclear families, to appreciate that the broader whanau might, culturally, be at least as close to the deceased. Moreover, it is the closeness to a specific individual, the deceased, that is relevant rather than the tikanga principles that favour the collective.

Third, in deciding on the merits of the specific case, the first factor considered important was “the fact that Mr Takamore made his life in Christchurch with his partner and their children, living there with them for over 20 years until his death in 2007”, referring to the lack of relationship between Mr Takamore’s children and Kutarere. That “Kuturere is the place of central importance to Mr Takamore’s Maori family and their custom” was only the second factor considered, followed by the individual views of Mr Takamore and then his spouse and children. The individual choices of Mr Takamore and his family appeared, in this analysis, to dominate the majority’s approach to deciding the case. Moreover, taking into account the urbanization of Maori over the last century, it might be less likely for tikanga to prevail under such tests.

Elias CJ’s decision provides greater potential scope for the influence of tikanga and allows for a potential fairer balancing between liberal Western values and Maori tikanga values. On numerous occasions, Elias CJ illustrates a sensitivity to other cultures’

\(^{24}\) At [158].
\(^{25}\) At [169].
priorities in the form of a less explicit bias towards the spouse and nuclear family. For example, in the first paragraph of the judgment, she notes that “in all cultures disposal of the dead is of great significance to the living and to the religious and cultural traditions to which the deceased and those who care about the deceased belong.” She also, from the beginning, notes the human rights engaged including dignity, privacy and family. As the below discussion of Elias CJ’s treatment of Loasby also illustrates, she is very clear about the dangers of measuring one culture against the cultural standards of a different legal system. She writes:

the values behind the different positions may be very difficult for the Court to balance in reaching a fair and just result if they are taken from registers which are not commensurable. That will often be the case if the differences of view arise out of distinct religious or cultural value systems.

In requiring the High Court in its inherent jurisdiction to resolve contentious situations such as this arguably injects greater independence and objectivity into the assessment when compared to the situation where the personal representative with the primary decision making authority is also one of the party’s to the dispute.

Moreover, Elias CJ’s approach is arguably more accommodating of the influence of tikanga on the common law more generally. She writes,

Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only “so far as applicable to the circumstances of the ... colony”. It is the approach adopted in Public Trustee v Loasby and, in Australia, in Manktelow v Public Trustee. Maori custom according to tikanga is therefore part of the values of the New Zealand common law.

However, she also notes that, “[a]s in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or fundamental principles and policies of the law.”

Nonetheless, the Takamore whanau lose even under Elias CJ’s approach, and it is difficult to imagine many cases where there facts might more strongly support tikanga prevailing. In making her decision on the facts, she explains the factors that do not determine her view, carefully describing the importance of tikanga in the process and relevant human rights and the Indigenous Declaration. She then simply states that, “weighing up the different and valid claims of the parties as best I can, I have concluded

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26 at [1].
27 At [11].
28 At [94].
29 At [95].
This paper is very much in draft and the conclusions tentative and preliminary. Please do not cite without permission: c.charters@auckland.ac.nz.

that Mrs Clarke and her children should in the circumstances of the case be left to decide where Mr Takamore is to be buried.” Indeed, apart from isolating the factors that did not in and of themselves determine the outcome, the assessment seems to be candidly one of opinion, where the potential for invisible cultural biases to influence is not small.

[Although, in para [103], she explains, that Mr T left etc and made a life elsewhere, children want in him ChCh too, and burying him away “is not consistent with the choices he made in life.”]

Importantly, however, Elias CJ notes that “[h]ad the family connections with Kutarere been maintained, even slightly, the claim based on whakapapa, identity and hapu may well have prevailed.” And,

It is the case that many – perhaps most – New Zealanders may believe strongly that the most important view in a case of disputed burial is that of the spouse of the deceased. That is, as has been indicated, the general approach in the United States cases. It would however be paying lip service to the importance of culture recognised by the New Zealand Bill of Rights Act and in particular the importance of Maori society and culture in New Zealand (derived from the Treaty of Waitangi and recognised in modern New Zealand legislation) to conclude that the wishes of the spouse will always prevail over other interests. It depends on the wider circumstances. Where traditional identity and important cultural values are at stake, preference for the spousal connection may properly yield, as has been recognised in Australia in relation to Aboriginal customary law notions of kinship.

However, it is difficult to imagine a contentious case where tikanga might have a better chance of prevailing.

In conclusion, it remains uncertain whether a New Zealand court with its own authority dependent on the questionable legality and legitimacy of the transfer of sovereignty from Maori to the Crown, and with few judges well versed in tikanga Maori, can find a fair balance between tikanga and non-Maori value systems. Critic tribal theorists might argue that the court is systemically biased towards non-Maori values being based in non-Maori legal traditions. From a realist perspective, it is understandably difficult for non-Maori judges not well versed in tikanga to divorce themselves from their own cultural attachments, possibly including to their own nuclear families, to wholly appreciate the others’ perspectives.

30 At [12].
31 At [105].
32 At [101].
33 Brookfield etc.
34 Ani Mikaere [and Jackson?].
Elias CJ seems to address the potential problems in the courts resolving matters such as this, stating,\textsuperscript{35}

A court-imposed result in such circumstances may not convince the disappointed party or indeed be universally convincing in its own terms. Although the position of a court asked to resolve such differences is not a comfortable one, there is nothing particularly unusual in that. Courts not infrequently have to decide between positions that are not readily comparable.

And, she agrees with “Perry J that it cannot be right to the courts to avoid consideration of emotional, spiritual and cultural factors when they are present, “however inconvenient it may be to do so in the short time which is commonly available to decide these cases.”\textsuperscript{36}

\textit{Precedent: Loasby}

A remarkable aspect of \textit{Takamore} is that the Supreme Court did not squarely consider the \textit{Loasby} decision that had been relevant in the lower courts’ decisions. In the High Court Fogarty J found,\textsuperscript{37} in accordance with \textit{Public Trustee v Loasby},\textsuperscript{38} that custom law could be recognized in New Zealand common law but that the custom relevant here, of taking a body against the wishes of the deceased, did not meet the test of “reasonableness”. His reasoning was that it was inconsistent with the common law to limit Mr Takamore’s individual freedom by subjecting it to “the collective decision-making of tribal custom” against his wishes.\textsuperscript{39}

The majority in the Court of Appeal, finding instead that the evidence did not illustrate that Mr Takamore clearly rejected his Tuhoe background, held instead that the relevant tikanga could not be recognized by the common law because it is unreasonable as inconsistent with the common law principle of “right not might”. Importantly, they rejected Fogarty J’s reasoning because little tikanga could survive. However, as is implicit in their reasoning, the majority also found that tikanga could be recognized under the common law if not abrogated by statute.

The majority in the Court of Appeal illustrate a sensitivity to the impact on tikanga of Fogarty’s finding unreasonable cultural traditions that prioritise the collective over the individual as it would mean, in practice, little tikanga could be recognized. On the other hand, it ultimately endorsed the \textit{Loasby} approach of subjecting tikanga to various tests before permitting recognition under the common law.

\textsuperscript{35} At [11].
\textsuperscript{36} At [86].
\textsuperscript{37} Clarke \textit{v} Takamore [2010] 2 NZLR 525 (HC).
\textsuperscript{38} (1908) 27 NZLR 801 (SC).
\textsuperscript{39} H Ct, Fogarty J, at [86].
As Coates explains, the NZSC’s avoidance of addressing the question whether tikanga could be recognized as common law under *Loasby*, leaves the law in a somewhat confused state. Although all of the Justices found that customary law is clearly relevant in the common law, they did not explicitly address the possibility of customary law being recognized as law based on the doctrine of continuity and the additional tests set out in *Loasby* and the *Takamore* Court of Appeal.

The unaddressed and potentially problematic aspects of *Loasby* include that one legal system, tikanga, is measured against another, the common law, with all the cultural biases implicit in that assessment as well as the priority afforded to common law under that approach. From a critical perspective it is unclear that tikanga should be subjected to tests that ultimately measure its validity against the values of another legal system. If, as the majority in the Court of Appeal state, tikanga continues on the transfer of sovereignty until abrogated by statute, why subject it to the additional tests proposed in *Loasby*.

On the other hand, *Loasby* is arguably relatively accommodating of tikanga in that it is based on the assumption that a transfer of sovereignty does not interfere with the ongoing application of local law until altered by Parliament. In this way, it at least provides and avenue for tikanga to be applied as “mainstream”, common law. Further, as Coates argues, there is potential for the *Loasby* tests to be applied in a manner that is more favourable to recognition of tikanga.

The most important passage, recognizing the problems associated with subjecting tikanga to the *Loasby* tests are these, from the Chief Justice. She here suggests that one cannot be subjected to the other and instead, in a case such, they can only be balanced. And, “both preferences are based on important values derived from different and equally valid cultural frameworks.” For example,

Although Professor Temara and Mr Kruger gave illustrations of how in tribal dispute there have been famous cases where the taking of the body of a deceased against the wishes of others of the family has occurred because of competing claims of whakapapa and cultural association, it has not been suggested that the Court on application to it by someone with standing to seek its help should defer to such outcome. The relevance of such evidence is to show that the Kutarere family in taking Mr Takamore home were acting in conformity with their tikanga, not to pre-empt the decision of the Court on the present application, which is an application for delivery of Mr Takamore’s body to Ms Clarke. The description in the evidence of cultural contest over deceased in other cases does not overwhelm the underlying values of whakapapa and custom in burial which are relevant to

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40 “The Recognition of Tikanga in the Common Law of New Zealand” forthcoming in NZLR.
41 Coates.
42 At [98].
the present claim. That would be to define the important customs and traditions of burial by one observed aspect (which, as the evidence given shows, does not in the event resolve disputes even in cultural terms, until harmony is restored). These underlying values in burial (of connection with whenua and whakapapa) are properly to be taken into account in New Zealand law. They are not unreasonable in law and are rightly weighed by the courts, as can be seen in comparable claims in Australia concerning Aboriginal people.

[97] The role of the Court is not to judge the validity of traditions or values within their own terms. It is concerned with the application of established traditions and values in fulfilling the Court’s own function of resolving disputes which need its intervention. The determination of the Court says nothing about what is right according to the value systems themselves. Indeed, the determination of the Court can only settle the immediate legal claim. The family and tikanga processes may well continue.

Elias CJ is preferring an approach that does not require one legal system being assessed by another but instead an approach that requires the balancing of the two. She also stresses that she reaches decision not because the tikanga by which Mr Takamore has been buried cannot be recognised in law because inconsistent with fundamental values of the common law (as Fogarty J in the High Court and the majority in the Court of Appeal thought to be the case, although on different grounds). Cultural identification is an aspect of human dignity and always an important consideration where it is raised, as are the preferences and practices which come with such identification, as s 20 of the New Zealand Bill of Rights Act 1990 affirms. In the case of indigenous people, the preference for repatriation of the dead is recognised by the Declaration of the Rights of Indigenous Peoples as a matter of great moment.

Precedent: Common law on priority afforded to executor

Reviewing English, Australian, Canadian and New Zealand precedent, the majority held that New Zealand law with respect to the role of the executor is “well-settled” and cited a number of justifications for the rule, including prompt decision as well as clarity and certainty.43 Knowing there is a person who decides where there are different views is “practical and convenient”.44 Moreover, they refer to an observation by McGregor J of the Supreme Court (1965) the duty of the executor to bury the deceased “reflects common practice at least in New Zealand where arrangements for disposal of the body are nearly always settled by the family or friends of the deceased”.45

43 at [143] and [144].
44 Para [153]
45 at [117] citing Re Clarke (Deceased) [1965] NZLR 182 (SC).
On intestacy, the High Court Rules sets out priority: “in most cases they are likely to be those with closest family connections to the deceased. In general terms, the list is headed by the surviving spouse, civil union or de facto partner, followed by the children of the deceased, then parents, siblings, uncles and aunts.”

Elias CJ’s decision is more critical on precedent and New Zealand law, allowing for greater flexibility and more scope for tikanga to determine who has priority in making decisions with respect to a deceased’s body even when a non-tikanga bound executor has been named. In relation to precedent prioritizing the executor in determining the burial of a deceased, Elias CJ finds that they “provide no clear basis for the proposition that an executor has an exclusive right to possession and disposition against the claims of others rightly interested in the question of the proper disposal of the body of the deceased.”

The extent to which the views of the deceased will be given effect varies in the case-law but they are increasingly considered to be important, reflecting increasing emphasis on human rights. More generally, earlier authority is shifting under more recent affirmation of human rights and the willingness of legal systems to accommodate some measure of plurality especially in terms of cultural and religious preferences.

She concludes,

The New Zealand authorities are few and sparsely reasoned. They proceed on a questionable view of the connection between the duty to bury and the right to possession and disposition. They do not engage with the modern legislative background or recent case-law pointing out that human rights are affected by such decisions. They make no mention of cultural values in New Zealand society which rightly bear on the treatment of the dead, and in particular do not deal with Maori values and cultural preferences. They do not consider the public interest and practical considerations which (for the reasons to be developed) make adoption of the rule suspect. I do not regard them as authoritative in the present case.

She also identifies practical considerations against the executor having primary responsibility including that, in practice, it is often the family/whanau that undertake arrangements for the disposal of the body of a deceased. And, she factors in “wider considerations of cultural diversity and in particular Maori tikanga.” Noting that it is unacceptable for the views of the deceased to be ignored, referencing human rights, she

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46 Para [146]
47 At [53].
48 At [58].
49 At [62].
50 [63] – [67].
51 At [81].
writes, “I do not think it accords with social expectations and the way dead are dealt with in New Zealand for the executor to have control over the disposal of the deceased to the exclusion of others with claims.”

And, further, “I do not think deference to a primary decision-maker (even one subject to the supervision of the court) is sufficient response to the strength of other interests affected in such cases.”

And, “judicial indifference within the margins of a wide discretion to something of such moment as the treatment of human remains seems increasingly out of step with acknowledgements that human rights are engaged in such decisions.”

Elias CJ rejects the idea of judge-made prescription in terms of identifying an order of preference, warning “[s]uch rules may prove too inflexible to meet all circumstances.”

B Comparative analysis

In Canada, much of the recognition of Indigenous peoples’ law has arisen out of settlements between the respective governments and Indigenous peoples. These illustrate a political willingness to allow for pluralistic legal structures. New Zealand, in contrast, illustrates little, if any, taste for pluralism. New Zealand’s attachment to a particularly strong form of unitary power in the form of Parliamentary sovereignty remains. [settlements: Tuhoe? Whanganui River].

The potential remains in Canada that the courts will recognize certain customary practices as aboriginal rights under s 35, although it is yet to do so, in part because a strong case is yet to be argued before the courts. Important dicta in Campbell suggests that there is a possibility that the Courts could recognize the ongoing authority of Indigenous peoples’ inherent self-government rights. Further, as Tsilqot’in illustrates, Aboriginal law regulates Aboriginal title where that title has been recognized.

In the USA, there is comparatively strong recognition of Indigenous peoples’ residual and inherent sovereignty meaning that Indigenous law continues to apply on hundreds of reservations across the USA.

C International legal perspective

In Takamore, Elias CJ refers to the Declaration on the Rights of Indigenous Peoples in an important way. In explaining that her decision is not because tikanga cannot be recognized in law because it is inconsistent with fundamental values in the common law, she remarks that “the preference for repatriation of the dead is recognised by the Declaration of the Rights of Indigenous Peoples as a matter of great moment.” She also describes the approach of the majority decision in the Court of Appeal as focusing on

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52 At [82].
53 At [84].
54 At [85].
55 At [45].
56 For example, Nisga’a and Northern agreements.
57 Pamajewon.
whether Ms Clarke’s decision “was one to which she was entitled to come, in application of common law principles as developed in conformity with human rights norms, the Treaty of Waitangi, and the Declaration of the Rights of Indigenous Peoples (which recognises the interest of many indigenous peoples in the repatriation of human remains and which emphasises the collective nature of the rights of indigenous peoples).”

Relevant articles include right to self-determination.

[Refer to UN Human Rights Committee in Hopu v France. Importantly, the Human Rights Committee has interpreted rights and freedoms in theICCPR consistently with an Indigenous peoples’ perspective. Indigenous Tahitians brought a communication to the Human Rights Committee alleging France breached their right to family under the ICCPR because there were no legal avenues available to prevent hotel developers disrupting a burial site where their ancestors rested. The HRC stated that “cultural traditions should be taken into account when defining the term ‘family’ in a specific situation.” As a result, family was interpreted to include the relationship between the Indigenous complainants and their ancestors, which is consistent with Indigenous Tahitian ideology, and France was found to have breached their right to family under the ICCPR. Takamore: breach of right to family?]

IV NZMC v AG

A The decision

At heart this case involved Maori rights with respect to freshwater under the principles of the Treaty of Waitangi. The case arose out of legislation to be brought into effect by Order in Council to reconstitute state-owned enterprise Mighty River Power Ltd as a so-called mixed ownership model (MOM) company meaning that the Crown would be permitted to sell up to 49% of its shares. The Crown had announced its intention to bring the legislation into effect and offer 49% of the shares in the first quarter of 2013. NZMC submitted that the bringing into effect of the legislation would breach the principles of the Treaty of Waitangi under s 9 of the State-Owned Enterprise Act 1986 and s 45Q of the Public Finance Act 1989.

As the Court pointed out, Maori have long-standing claims to water under the Treaty. Specifically, in this case, claims of breach included “the damming, diversion, and use of the waters for the generation of electricity by Mighty River Power.” The claims drew on findings of the Waitangi Tribunal that Maori interests in water in some places, like the Waikato River, are “in the nature of ownership”, include the right to economic benefit

58

61 at [10].
and are highly important for spiritual and cultural reasons.\textsuperscript{62} The Waitangi Tribunal had also found, as cited by the NZSC, that “the proprietary right guaranteed to hapu and iwi by the Treaty in 1840 was the exclusive right to control access to and use water while it was in their rohe.”\textsuperscript{63} The appellants argued that the Crown has, via a comprehensive legislative regime, exercised control and management of rivers and lakes without their consent, depriving Maori of their benefit, including that of an economic nature.\textsuperscript{64}

[nb: Mighty River Power had resource consents to dam and divert the river for a period of 35 years, although can be reviewed in certain circumstances including when settlements in the area are reached.]

In response to an urgent claim about the MOM privatization, the Waitangi Tribunal found a connection between the shares in the energy companies and Maori interests given that water rights give the energy companies their value. It also found that the MOM privatization would prevent Maori from acquiring greater authority in the company beyond a potential shareholding interest, potentially inconsistent with tino rangatiratanga and Maori ownership rights in water. It considered that “the sale must be delayed while an accommodation is reached with Maori” including consultation, albeit to be undertaken “with all due speed.”\textsuperscript{65}

Finding that the principles of the Treaty applicable to the sale of shares under the relevant statutes, and reiterating the need for a broad interpretation of the principles, the most interesting aspect of the NZSC decision was its use of, and approach to, the “test”, whether the sale “would materially impair the ability of the Crown to act on recommendations of the Waitangi Tribunal”, discussed in more detail below. If so, it was accepted by the parties that they would breach the principles of the Treaty.

The NZSC found that there was no such material impairment of the Crown’s ability to remedy any Treaty breach with respect to Maori water rights. [rough: In assessing material impairment, the NZSC considered the accommodation of Maori interests under the RMA. Also noted the stat regime, including the vesting of sole right to use water for electricity in the Crown. Cited the Red Book re not negotiating water ownership but that the Crown has now indicated a willingness to discuss water, encouragement of joint ventures, co-governance and co-management structures, consultation with Maori including Maori iwi leaders group.]

\subsection*{B Critical perspective}

Again adopting the Sotomayer J approach of assessing the law with eyes open to the results of decisions, the NZSC might be criticized for: relying too much on political assurances from the Crown; and in leaving Maori rights to freshwater to be negotiated

\textsuperscript{62} at [10].
\textsuperscript{64} At [102]
\textsuperscript{65} Freshwater Report, letter of transmittal.
This paper is very much in draft and the conclusions tentative and preliminary. Please do not cite without permission: c.charters@auckland.ac.nz.

with little provision of a legal infrastructure that might provide Maori with much-needed leverage in those negotiations.\textsuperscript{66} The NZSC was influenced by a number of undertakings by the Crown that it would “not rely on the privatization of the generating companies so as to diminish any claimed rights”.\textsuperscript{67} In both instances, it must be remembered that Maori are a minority in New Zealand meaning that their political power, especially where their rights conflict with the interests of the majority, is limited.\textsuperscript{68}

A critical tribal theorist might note the lesser outcome for Maori and with respect to upholding Treaty principles in \textit{NZMC freshwater} compared to that in \textit{NZMC SOE/Lands}.\textsuperscript{69} In \textit{NZMC SOE/Lands} the Court found that the transfer of assets to state-owned enterprises could negatively impact the ability of the Crown to provide reparation for Treaty breaches in that the Crown might not be willing or able to purchase back assets that would otherwise be available for reparations. The Court of Appeal held this to be inconsistent with the principles of the Treaty of Waitangi. The Crown was required to provide a scheme of safeguards to ensure that Maori claims would not be prejudiced by the transfer of assets. As the NZSC in \textit{freshwater} points out, the decision was made despite the Crown assertions of the prejudicial affect of the time lost in devising safeguards before the transfers could go ahead. Agreements were reached on a safeguard mechanism and the SOE scheme then went ahead.

\textit{NZMC freshwater} is arguably a step backwards for Maori from \textit{NZMC SOE/Lands} in that it was open to the Court to, as in \textit{SOE/Lands}, issue a declaratory judgment that the Crown first implement a system of safeguards to protect Maori interests in water before implementing the mixed-ownership model. Justifications suggested for not making a similar declaration included that “the trend since the SOE case should provide reassurance that Maori claims are not being ignored.”\textsuperscript{70} Moreover, “Maori can be confident that their claims will be addressed, something which was not as clear in 1987 as it is now.” Also notes that in \textit{SOE/Lands}, there was the clear potential that land could be put beyond the claim. Here, potential redress with shares, Crown maintains majority control, etc.

In defining the test to be applied to assessing whether there was a breach of the Treaty principles, the NZSC relied on the Privy Council’s test in the \textit{Broadcasting Assets} case:

\begin{quote}
The answer depends on whether the transfer of the assets could now or in the foreseeable future impair, to a material extent, the Crown’s ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty.
\end{quote}

\textsuperscript{66} Jeremy Webber on need for courts to provide Indigenous peoples with leverage.
\textsuperscript{67} in a letter from Ministers to the Tribunal. Additional affidavits given in the court proceedings that won’t chill government willingness to provide appropriate rights recognition and redress. Settlements re water eg Waikato.
\textsuperscript{68} CC Waldron paper and “Do Maori Rights Discriminate against Non-Maori?”.
\textsuperscript{69} [1987] NZLR.
\textsuperscript{70} At [148]
In answering this question, the Court states, \textsuperscript{71}

In deciding whether proposed Crown action will result in “material impairment”, a court must assess the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity. So impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect, objectively evaluated, will not be relevantly material. To decide what is reasonable requires a contextual evaluation which may require consideration of the social and economic climate.

The court must also consider potentially equally effective forms of redress. It took into account “(a) assurances given by the Crown, (b) the extent to which such options are substantially in prospect, (c) the capacity of the Crown to provide equivalent and meaningful redress, and (d) the proven willingness and ability of the Crown to provide such redress.”\textsuperscript{72}

In balancing, the Court recognized that Crown ownership and control will be diminished, which, \textsuperscript{73}

might preclude or limit the possibility of some options for redress which would otherwise be possible: for instance, the “shares plus” proposal, or royalty regimes which are particular to the State enterprise power-generating companies, or reparation out of the water assets of the State enterprise.

The Court then went on to consider, in making its determination: the wider importance of power generation for NZ; that courts should be slow to interfere in the Government obtaining full value given the cost of power infrastructure; that changes to regulation might be more appropriate to provide for Maori use and control; the limited water rights issued to Mighty River Power with their 35 years time limitation; that the Crown can buy back shares; the potential inadequacy of the shares plus option from a reparative perspective; that a royalty regime would be problematic and increase costs for the wider public; and the ability of the Crown to provide compensation instead.

From a critical perspective, the test is itself arguably weak with respect to the protection of rights belonging to Maori under New Zealand’s founding constitutional document, as will also be discussed below from a comparative legal perspective. Impairment must be to a “material extent” to any potential “reasonable” action which it is under an obligation to undertake in order to comply with the principles of the Treaty. Arguably, the test permits the Crown considerable leeway to prioritise non-Maori interests where those rights are at stake.

\textit{C. Comparative analysis}

\textsuperscript{71} At [89].
\textsuperscript{72} At [149].
\textsuperscript{73} At [135].
Once recognized, Aboriginal and Treaty rights in Canada have greater legal force than Maori rights in New Zealand given their constitutional entrenchment. Nonetheless, where principles of the Treaty of Waitangi have been incorporated into legislation, there is the potential, realized in *NZMC v Attorney General (SOE Lands)*, that the courts will give significant legal protection to Maori rights. However, the NZSC, in *NZMC freshwater*, deferred, as explained above, to political undertakings, resulting in comparatively substandard protection of Maori rights and weakening of Maori political power to the detriment of their negotiating position vis-à-vis the Crown. The NZSC could do more to ground the protection of Maori rights in law, thus providing a platform from which Maori rights can be better balanced against the political imperatives of a majoritarian-driven legislature, coming closer to the type of protection offered in Canada. As Gunn points out in the Canadian context, one of the reasons behind Indigenous advocacy for constitutional recognition of Aboriginal and Treaty rights was that “the political arena failed to provide for recognition of inherent rights or sufficient protection against State action.”

Second, a comparative bias towards the Government becomes apparent when the NZSC’s test of “impairment to a material extent” is compared to the Canadian Supreme Court’s approach where Treaty rights at stake. Once it is found that the Indigenous peoples have a particular Treaty right the Crown must justify any limitation on that right in accordance with strict tests that engage the honour of the Crown, set out in the leading case of *Sparrow*:

(1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group

The question as to what would constitute a breach of the Treaty principles, accepted by all parties to the litigation, was from a comparative perspective differently framed to the detriment of recognition of Maori rights in freshwater and success in this case. Instead of assessing whether Maori water rights are protected by the principles of the Treaty, which the Waitangi Tribunal has established, and then assessing, whether the Crown’s actions could be justified, with the onus on the Crown to so prove, the Court simply noted competing interests: “[Irrespective of whether privatization occurs, the current power-generating infrastructure and its significance for the wider New Zealand economy are facts on the ground which will not be ignored.” [cf NZMC 1987] and [136] The Court should be slow to insist on measures which would prevent the Crown from obtaining full value – for the benefit of the country as a whole – when the shares in the mixed ownership companies come to to be sold.”

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74 Brenda Gunn

75 as cited in Tshilqot’in at [77]. See, also, *R v Badger; Mikisew* and the recent *Grazy Narrows* decisions.
Further, the NZSC, with respect to redress options it considers unreasonably, further limits the political leverage of iwi and Maori entering into negotiations with the Crown with respect to freshwater.

Finally, the NZSC seemed remarkably unconcerned about the real issue that once shares in Mighty River Power are available to the public, the public temperament for recognizing any Maori rights with respect to its interests in water could be negatively affected and the Treaty principles would not apply to the company or shareholders: 76

It is true that s45Q only applies to Crown acts and not to the acts of the company or any third party shareholders once any sale has taken place. But for the reasons we have given, we are satisfied that s 45Q applies to the sale of shares by the Crown.

[whether Crown’s action re Order in Council bringing legislation into effect was reviewable? The Court accepted that, consistent with precedent, “the courts should ensure that there is not “an unwarrantable intrusion into the function of Parliament.”” 77 The Crown submitted that preventing the Crown from fixing a date when legislation comes into force would be “tantamount to giving the courts and the Executive the function of reviewing the substance of primary legislation, which is inconsistent with New Zealand’s constitutional arrangements.” 78 The Court found that as “the only thing that occurs on the commencement of the mixed ownership model legislation is the transfer of companies from the State enterprise regime to a mixed ownership model regime.” And, as the Treaty principles apply seamlessly under both pieces of legislation, the transfer “does not alter the Crown’s obligations to act in accordance with the Treaty.” 79]

[US on tribes’ water rights: Winters doctrine. Australia: can claim water under Native Title Act].

D  International legal perspective

The NZSC did not consider the Declaration beyond citing the appellants’ arguments based on it and setting out article 28(1) on the right to redress. It stated that it did not find it necessary to consider the Declaration further, importantly noting that “we doubt if the Declaration adds significantly to the principles of the Treaty statutorily recognized.” However, it accepted “that the Declaration provides some support for the view that those principles should be construed broadly. In particular, it supports the claim for commercial redress as part of the right to development there recognized.” 80 This is an important statement in suggesting that the Declaration provides support for

76 At [76].
77 At [71] citing Commercial Radio Assets case.
78 At [73].
79 At [75].
80 At [92].
construing the Treaty principles broadly, as does the citation and direct quote from an article in the Declaration. It is less clear, however, that the Declaration in fact supports the claims for commercial redress.

The key here is that, under the Declaration, Indigenous peoples have the right to self-determination and “[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Moreover, there are strong rights with respect to Indigenous peoples’ resources, including water, and, especially importantly, under article 32(2):

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The Crown had consulted with iwi leaders before the introduction of the bill into the House, explaining the continuation of the land resumption provisions of the 1987 SOE settlement and also that settlement monies could be used to purchase share in the mixed-ownership model companies. Moreover, in response to the message that the principles of the Treaty should continue to govern Crown actions with respect to the MOM companies, the principles were included in relevant legislation/bill. Negotiations on Maori rights to freshwater and related policy development also commenced. After the Waitangi Tribunal issued its report with respect to the MOM privatization, the Crown, led by the Deputy Prime Minister, consulted with specific iwi rather than nationally, holding hui over 10 days in different locations on a “shares plus” option (not other options that had been suggested by the Waitangi Tribunal), which received a “luke-warm” response. The Crown concluded that the Crown’s capacity to recognize rights and provide redress would not be impaired by the MOM privatization and a shares plus scheme might negatively affect the value of the shares.

The appellants argued that the consultation after the Waitangi Tribunal’s recommendations were inadequate for being too rushed, too narrow in scope and predetermined. The NZSC concluded that the fact they were rushed and narrow was consistent with the Waitangi Tribunal’s recommendations. “The fact that the Crown ultimately rejected the Waitangi Tribunal suggestion as inappropriate is not a basis from which it can be inferred that the consultation was empty or pre-determined.”

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81 Article 25 states, Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

82 Nb also Waikato Settlement Act: have to consult before disposing of property rights or interests. Court: privatization is not a disposal of Crown’s property or interests. Rights held by MRP not being disposed of. If they are, has to consult.

83 At [83].

84 At [87].
concluded privatization didn’t impair recognition of Maori interests in water, difficult to infer consultations were inadequate.

The Crown’s approach to consultation falls short of the Indigenous Declaration, which includes strong provisions on the need to consult with Indigenous peoples and, in some cases, to obtain their free, prior and informed consent, as most starkly seen in Article 32(2) above.\textsuperscript{85} International jurisprudence in the area is also well developed having been considered by a number of the UN human rights treaty bodies, the UN Special Rapporteur on the rights of indigenous peoples, the UN Permanent Forum on Indigenous Issues, the UN Expert Mechanism on the Rights of Indigenous Peoples and a number of other non-Indigenous-specific institutions.

[Business obligations under the UN Guiding Principles on Business and Human Rights?]

\section*{V Paki 2}

\subsection*{A Decision}

The NZSC considered the appellants’ claim that the Crown’s acquisition, and subsequent use, of parcels of riverbed under the common law presumption of \textit{usque ad medium filum aquae} breached fiduciary and/equitable duties owed to them. The alleged breach was sourced in the Crown’s failure to explain the effect of the presumption, which could not have been understood by the appellants. The Crown, also assuming it had lawfully acquired the riverbed parcels under the presumption, denied that it owned a fiduciary or equitable duty, denied any breach and also pleaded that the claim was time barred. [Ownership in parts transferred to Mighty River Power or subject to agreement to transfer to Mighty River Power: link to \textit{NZMC freshwater}]

The NZSC in four separate judgments found against the appellants.

Elias CJ and Glazebrook J found that the common law presumption of \textit{usque ad medium filum aquae} does not automatically apply in New Zealand,\textsuperscript{86}

\begin{quote}
English common law rules affecting property (such as the presumption of Crown ownership of tidal lands considered by the Court of Appeal in \textit{Ngati Apa}) could not apply to lands held by Maori according to custom unless consistent with those customs. The Court held unanimously in \textit{Ngati Apa} that native property continues until lawfully extinguished and the onus of proof of extinguishment lay on the Crown in contending that it owned all land below high tide in New Zealand.
\end{quote}

\textsuperscript{85} SR consultation report and EM on participation in decision making.

\textsuperscript{86} At [67]
Similarly, McGrath J also held that the presumption could be rebutted and that “[t]he circumstances to be considered may extend to relevant customs and practices of Maori.”

William Young also questions the applicability of the presumption in this way:

The history, social conditions, transport networks and topography of England from which the presumption emerged were very different from those of 19th century New Zealand. And in particular, given the significance of rivers to Maori, their lack of familiarity with common law concepts, the informality which tended to surround land purchases from Maori and the limitations of contemporary surveying practice, there was good reason for not applying the presumption to rivers which were significant to Maori.

Elias CJ addressed the decision in *Re the Bed of Wanganui River*, where it was held that ownership of non-navigable rivers to their mid-point were included in investigations of title to the riparian dry land. She found that *Re the Bed of Wanganui* related only to the peculiar circumstances there where it was found that the common law presumption was consistent with the custom of the relevant Whanganui hapu.

Elias CJ held that the appellants’ case could not succeed. If Pouakani custom was similar to Whanganui in that ownership of the riverbed follows the riparian dry land, then the Crown could not be in any breach of any equitable duty. However, on the other hand,

If ownership to the middle of the flow does not accord with the custom and usage of the Pouakani riparian owners, I consider that no presumption that the riverbed was conveyed with the riparian lands applies as a matter of NZ law. On that basis, the status of the riverbed is undetermined and may be investigated by the Maori Land Court to establish whether it continues as unextinguished customary land.

Given the hypothetical nature of the claim – that the claimants had not established a central plank in which their case rested, namely the application of the presumption, and the importance and difficulty of the fiduciary duty claims, Elias CJ, and Glazebrook J in similar reasoning, did not think it appropriate to determine them and dismissed the appeal. McGrath similarly found that the claim depended on two inconsistent propositions i.e., the mid-point presumption applied, which might only follow if consistent with Pouakanu custom, and that it was inconsistent with the Pouakani understandings of ownership. Given that inconsistency, and the constitutional nature of

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87 at [173].
88 At [223].
89 At [25].
90 At [179].
91 At [178].
the litigation, the Court could not deal with the case. William Young J found similarly that in either situation, the case “might be thought to fail”.92

As a result of the decision, the ownership of riverbeds of non-navigable rivers or portions thereof is potentially still vested in the former or current Maori owners of riparian lands, unless the Crown can prove otherwise, and Maori claimants can apply to the Maori Land Court for customary title to the riverbed. [Could unsettle subsequent transfers by Crown to third parties or use rights]

Elias CJ, McGrath J and William Young J made obiter comments on the fiduciary and equitable claims. Elias CJ expressed “considerable reservations” with respect to the negative approaches of the lower courts to the fiduciary duty claims,93 suggesting that it is possible for duties to arise in such circumstances. McGrath noted that precedent in relation to any such duties was in the context of the application of the principles of the Treaty,94 and that “the unique nature of the relationship between the Crown and Maori may mean it is appropriate to recognize the existences of a sui generis fiduciary duty”.95 Any potential inconsistency with Parliamentary sovereignty would need to be considered [nod to s 35 Canada].96

William Young J devoted the most attention to the question of fiduciary or other equitable duties owed by the Crown to Maori and generally expresses some difficulties with their application in cases such as these, including in relation to restoration of the parties to their previous positions.97 He concluded also, on the assumption that the riverbed passed with the sale of the riparian lands, the Crown could not be shown to be in breach and that the claims “are barred by limitation and the defence of laches and acquiescence is made out.”98

[Notably, claims had originally been made for investigation of title but not pursued in part be assumption that Re the bed of Wanganui River applied.]

B Critical analysis

First, Paki 2 is an important success from a critical perspective in that it subjects the application of common law doctrine to the relevant circumstances and law of the land at the time of sovereignty transfer, namely tikanga.

Second, accordingly, the presumption of usque ad medium filum aquae was found by to be “inconsistent with New Zealand law and traditions,”99 at least with respect to Maori land
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held in accordance with tikanga.\textsuperscript{100} Whether dry land conveyed wet land, in the case of rivers to the mid point, depends on “whether it is shown that the riparian owners whose titles were investigated by the Native Land Court had themselves the property in the riverbed upon which the presumption depends.”\textsuperscript{101} Consistently with the decision in \textit{Ngati Apa},\textsuperscript{102} this approach opens the door for Maori claims to riverbeds where the Crown cannot prove lawful transfer of them.

Third, the application of \textit{Re the bed of Wanganui River} is, at least under Elias CJ and Glazebrook J’s judgments, confined to the specific facts, namely the specific tikanga of Whanganui River. Elias CJ goes on to state that even if, contrary to her view, it expresses a rule of law of general application, she would not follow it.\textsuperscript{103} Her reasons include that “the institutional protections for Maori property which have always been a feature of New Zealand law.”\textsuperscript{104} Such an approach limits the application of unfriendly precedent for the recognition of Maori rights to wetland, as did the rejection of \textit{Ninety Mile Beach} in \textit{Ngati Apa}.\textsuperscript{105}

Finally, there are a number of statements on which the decision is based that affirm Maori rights to their lands, territories and resources such as, for example, that Maori owned all land pre-Treaty under their customs and usages.\textsuperscript{106} Moreover, “[t]he cession of sovereignty to the Queen of England in 1840 did not affect the property of Maori”, citing article 2 of the Treaty. Elias CJ states,\textsuperscript{107}

> Until acquired by the Crown by purchase or until otherwise lawfully extinguished under statutory authority, all land remained the property of Maori held under their customs and usages. It was held communally but was allocated among hapu and individuals according to tribal custom, for cultivations and other use.

[The case also, like \textit{Haronga}, indirectly involved the Crown’s large natural grouping policy in that the original application for investigation of title was only pursued when the Crown preferred dealing with larger groupings instead of Pouakani hapu.]

On the other hand, there remains some potential concern from a critical perspective. First, the decision, like all from the NZSC, does not question the general application of common law in New Zealand, which critical tribal theorists do on the basis of arguments that British sovereignty over New Zealand was not legally or legitimately acquired. From a critical tribal perspective, tikanga should be the law of the land. Second, there is the potential, albeit seemingly unlikely, that the Maori Land Court might impose tests to be met before it will find wet riverbed land Maori customary land, possibly consistently with

\textsuperscript{100} Consistently with \textit{Ngati Apa}.
\textsuperscript{101} At [24].
\textsuperscript{102} \textit{Ngati Apa}.
\textsuperscript{103} At [26].
\textsuperscript{104} At [26].
\textsuperscript{105} \textit{Ninety Mile Beach}
\textsuperscript{106} At [22].
\textsuperscript{107} At [68].
much criticized common law aboriginal title tests. However, comments by Elias CJ seem to mitigate against the use of such restrictive tests to limit recognition of Maori ownership of river bed land: the means to ascertain native custom includes “the study of history of a particular community and its usages in each case”,108 and that “such custom may be proved by evidence”,109 and “that the existence and content of customary property is determined as a matter of custom and usage by the particular Maori community.”110 Finally, as William Young J points out, proving either land rights under tikanga or extinguishment of those rights can be difficult. On the one hand, “[t]he appellants cannot prove what their ancestors thought as to the ownership of the river and, in particular, whether they believed that they had rights which would survive the sale of the riparian land.” On the other hand,111

the Crown cannot establish that its agents did not knowingly acquire title to the riverbed with an appreciation that the vendors did not realize that this would be consequence of the sale of riparian land. So, leaving aside any defences associated with the effluxion of time, the case comes down to who bears the onus of proof on the critical issues.

[As Erueti points out the nature of claims such as this before the courts can make it difficult to decide them fairly. There is an important question whether courts are indeed the appropriate forum to determine issues such as this].

C. Comparative analysis

I compare Paki 2 and the recent Tsilhqot’in decision of the Supreme Court of Canada handed down in June 2014. It is interesting as a comparison to Paki 2 as it deals with similar issues, albeit in response to rather different facts and pleadings: recognition of extant Indigenous title to lands, territories and resources and the type of duties owed, including fiduciary, by the Crown with respect to such titles.

The fundamental differences in the legal and constitutional contexts should be noted, first, to identify the extent to which they are, or are not, comparable: in Canada, Aboriginal and Treaty rights are constitutionally protected under s 35 of the Constitution Act 1982; and in Canada the common law doctrine of Aboriginal title regulates the recognition of extant Indigenous title to land and there is a relatively well developed jurisprudence on the content of Crown duties with respect to those lands. In contrast, in New Zealand, there is no explicit constitutional recognition of Aboriginal and Treaty rights. Further, while Aboriginal title is applicable, extant Indigenous title to land is largely regulated by successive legislation such as, currently, the Te Ture Whenua Maori Act 1993, and jurisprudence on the nature and enforceability of Crown duties with respect to that title, unproven or proven, is relatively undeveloped.

108 17 citing Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399 (PC) at 404 per Viscount Haldane.
109 Citing Nireaha Tamaki v Baker [1901] AC 561 (PC) at 577.
110 Tamihana Korokai v Solicitor General (1912) 32 NZLR 321 (CA) at 351
111 at [255].
The Tsilhqot’in Court found, for the first time in Canada, Aboriginal title to be proved, in this case by the Tsilhqot’in peoples to an area of land in British Columbia.

The Paki 2 Court held that Native Land Court investigation of land adjacent to a river does not by implication include the adjacent riverbed unless, as a matter of customary law, the riparian land interests include the riverbed. The NZSC’s approach places the burden on the Crown to illustrate that land rights in riverbeds were legally extinguished meaning the default position is that Maori land rights continue unless the Crown can prove otherwise. In contrast and comparison, under Canadian approach to Aboriginal title, Indigenous claimants must meet difficult tests to establish ongoing rights to their lands meaning that the default position is that they belong to the Crown unless proved otherwise.

In Canada, the tests for determining aboriginal title can be difficult for Indigenous peoples to meet, evidenced in the fact of Tsilhqot’in being the first peoples to successfully obtain a declaration of Aboriginal title. They are, as explained by McLachlin CJ, “sufficient occupation”, continuity of occupation where present occupation is relied upon, and exclusive historic occupation.\footnote{Tsilhqot’in at [50].}

McLachlin CJ held that occupation does not need to be proven to be very intensive: something less than permanent and constant occupation suffices, depending on the circumstances and the particular culture of peoples involved.\footnote{Tsilhqot’in [41] – [42].}

In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question – its laws, practices, size, technological ability and the character of the land claimed – and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession – which requires and intention to occupy and hold land for the purposes of the occupant – must be considered alongside the perspective of the aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

[…] a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is “sufficient” use to ground Aboriginal title, provided that such use, on the facts of the particular case, evinces an intention on the part of the Aboriginal groups to hold or possess the land in a manner comparable to what would be required to establish title at common law.
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On the basis of Bernard; Marshall she finds that “nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. Based on Delgamuukw: “regular use of definite tracts of land for hunting, fishing and otherwise exploiting resources” could suffice.114 Moreover, “for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times.”115 With respect to the exclusivity requirement, it is met where there is “intention and capacity to retain exclusive control” (Delgamuukw), taking into account the “characteristics of the claiminst group, the nature of other groups in the area, and the characteristics of the land in question.”116 “Even the lack of challenges to occupancy may support an inference of an established group’s intention and capacity to control.”117

The tests to establish Aboriginal title can be criticized, especially from a critical tribal approach. Would it not be more appropriate for the baseline assumption to be aboriginal title over all of Canada, as suggested in Paki 2, with the onus placed on the Crown to prove it has legitimately and legally extinguished the title. This switching of the burden would be significantly fairer in recognizing to a greater extent Indigenous title over lands prior to colonization, especially when one considers that the broader legal structure within which recognition takes place is imposed and non-Indigenous.

The New Zealand process for recognizing Maori title is arguably simpler and more efficient. The court of first instance in Tshilqot’in sat for 339 days over 5 years to hear the case. Such lengthy and undoubtedly expensive cases are to no one’s benefit: neither Indigenous peoples nor the taxpayer.

The Canadian courts have explored to a greater extent than New Zealand courts the nature of Indigenous title once proven including the nature of the aboriginal title and limitations on Crown actions with respect to that title. If applied to Maori customary land recognized under Te Ture Whenua Maori Act 1993, they would limit Crown action considerably, including with respect to the use of rivers in power generation.

Based on Delgamuukw, the incidents of Aboriginal title include,118

the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes”, including non-traditional purposes provided these can be reconciled with the communal and ongoing nature of the group’s attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which land is put and to enjoy its economic fruits.

Indeed, those rights are similar to those associated with fee simple, including,119

114 [44].
115 [46].
116 [48].
117 [48]/
118 [67].
the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

However, the land must be held “for all succeeding generations”, meaning it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations from using and enjoying it. Nor can the land be developed and misused in a way that would substantially deprive future generations of the benefit of the land. Some changes – even permanent changes – to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.”

The Tshiłqot’in Court also addressed the Crown’s duties in relation to Aboriginal lands protected under s 35 of the Canadian Constitution Act 1982. If the Crown seeks to limit aboriginal rights, it must first meet the tests first elaborated in Sparrow, outlined above. They are: “compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owned by the Crown to the group.”

Consent is necessary for developments.

Crown duties arise even in relation to unproven aboriginal title based on the “honour of the Crown doctrine”, the source of sui generis equitable duties owned by the Crown to Indigenous peoples. They include duties to consult and accommodate … Where the Crown breaches such duties, remedies can include injunctive relief, damages, order that consultation and accommodation be carried out. [Compare William Young J’s concerns in Paki 2]

D International analysis

In Paki 2, Elias CJ refers, when making obiter comments on potential duties in equity owned by the Crown to Maori, to the Declaration’s provisions with respect to redress for lands, territories and resources taken from indigenous peoples without their free, prior and informed consent. Further, she cited the support provided by the Declaration for restitutionary remedies where possible. Glazebrook J also refers to the Declaration in the context of suggesting that “[m]uch more research has been done since Re the Bed of Wanganui River “on the history of land transactions and on Maori custom.”

119 [73].
120 [74].
121 [81].
122 Haida Nation.
123 Haida Nation.
124 at [89].
125 At [158].
126 At [164].
127 At [317].
Relevant Indigenous Declaration articles include article 32(2), set out above, and article 26, which states,\textsuperscript{128}

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

\textbf{VI Haronga}

\textit{A Decision}

In Haronga the NZSC reviewed the 2008 Waitangi Tribunal decision to deny urgency to Mr Haronga’s claim for the Waitangi Tribunal to recommend the return of a portion of Mangatu Forest lands to Mangatu Incorporation using its resumption powers under the Crown Forest Assets Act 1989. The Waitangi Tribunal had already found, in 2004, that the Crown’s acquisition of the lands from Mangatu Incorporation was contrary to the principles of the Treaty but had, instead of making recommendations for redress, left it to the Crown and claimants to negotiate a settlement. In the intervening period negotiations had indeed been underway with an umbrella entity representing the district as a whole, including Mangatu. By 2008, it became clear that the relevant portion of Mangatu forest lands would be available, under an agreement, for purchase by a larger group instead of Mangatu Incorporation specifically, from whom the Crown had originally acquired them. Mr Haronga sought, under urgency, the return of the lands to Mangatu from the Waitangi Tribunal. The Waitangi Tribunal had denied Mr Haronga’s claim for urgency for a remedies hearing.

The NZSC considered whether the Waitangi Tribunal could, as a matter of discretion, decide to deny a claimant a remedies hearing.

The majority took the unusual step of overturning the Waitangi Tribunal’s decision to deny urgency to Mr Haronga and ordered it to conduct a remedies hearing and to consider whether its powers of resumption should be invoked here. In so doing, the NZSC placed considerable weight on the Crown Forest Assets Act 1989 (and the agreement with respect to forest assets reached in 1989 and the safeguards for Maori

\textsuperscript{128} Consider: Awas Tingni, Sawhoyamaxa, Yakye Axe, Saramaka, Endorois, Erueiti on international law and Indigenous land rights, Charters OUP chapter on rights to lands, territories and resources.
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interests agreed therein, especially with respect to resumption). The fact that the Waitangi Tribunal’s rights to resumption were in play was considered relevant, stating:129

The legislative history of the 1989 amendments make it clear that this jurisdiction was enacted as significant redress and as part of a bargain in which the Crown also gained something of value to it. It would not be in the spirit of the legislation or its policy of providing greater scrutiny to Maori claimants in obtaining return of land to treat the loss of opportunity as irrelevant. It was itself a right of real value. The decision not to grant urgency was flawed by the failure to weigh this powerful factor. Properly taken into account, it is close to being determinative itself.

On the question of urgency, it stated, “[h]ad the matter been viewed on its merits, an urgent hearing could not have been withheld because of the likelihood the proprietors of Mangatu Incorporation would lose the right of adjudication of their claim.”130 In turn, this would constitute “significant and irreversible prejudice.” Further, the majority held that the fact that Mangatu might benefit from any settlement with the larger group did not address the application for urgency as it “does not remove their right to the Tribunal’s investigation and adjudication as to remedy in respect of the specific prejudice and breach suffered by them in their capacity as owners in 1961.”131

The majority stated, “[w]hile the Tribunal is not obliged to recommend a remedy for all claims it has decided are well founded, it is required to determine whether it should do so.”132

In his dissent William Young J held that the Waitangi Tribunal has the discretion not to grant urgency to convene a remedies hearing and that the Waitangi Tribunal could leave remedies to be addressed through negotiation between the Crown and relevant Maori parties. [Noting also that Mangatu could also address Parliament on concerns, including mandate, when that settlement legislation came before it.]

[Maj v Min judgments: different approaches to the statutory context. Maj = SOE resumption legislation = more important/gloss on WT powers. Min = WT discretion]

B Critical

The majority in the Haronga decision goes to the heart of the Crown’s much criticized, including by international human rights bodies,133 Treaty settlements policy to negotiate with large natural groupings.134 The outcome favours the protection of the interests of

129 At [105].
130 At [100].
131 Para 99.
132
133 UN Special Rapporteur on the rights of indigenous peoples; CERD?; Human Rights Committee?
134 Malcolm Birdling.
smaller groups sometimes subsumed by the interests of the larger natural grouping. It also enhances individuals’ access to justice but requiring decisions on remedies.

The underlying fairness of the Treaty settlements process can be questioned. The fact that the Crown is both responsible for the policy behind Treaty settlements and a negotiating partner suggests the process is biased towards the Crown. Further, there is a sense that the parameters of the negotiations are largely negotiable, such as its large natural groupings policy, although some creativity in settlements has been seen in recent years. Moreover, the lack of judicial oversight of Treaty settlement processes is problematic as it can function to deny access to justice for individuals and iwi with legitimate concerns about the process and substance of Treaty negotiations. The Waitangi Tribunal’s independence in assessing settlement negotiations and settlements against the principles of the Treaty has also been questioned:

The Tribunal has limited resources to conduct proceedings and its funding is controlled by the Crown via the Budget. Moreover, its jurisdiction and functions can be amended by Parliament, at the initiative of the Crown. So it is not easy for the Tribunal to achieve full independence from the Crown. The Tribunal has hundreds of claims before it. New claims are still coming in, and older ones are frequently amended. It must ruthlessly prioritise its workload and somehow do so in a manner that is within the law and that achieves fairness between those seeking a new inquiry and those seeking a further remedies hearing.

By essentially requiring remedies hearings when claims have been successfully made out, the Waitangi Tribunal will be providing, in practice, more guidance to the parties in their settlement negotiations. Further, it will be required to consider appropriate remedies for smaller groupings even where their claims are being politically dealt with through a larger grouping. As Dawson notes, “The Tribunal could not simply leave all remedies to negotiations, denying specific groups the benefits of the mandatory remedial regime deliberately enacted in the late 1980s.”

On the other hand, the majority decision in Haronga arguably also limits the freedom with which the Crown and iwi can negotiate their settlements and organise their representative structures. It increases the potential for Waitangi Tribunal involvement in settlements, by more or less requiring it to undertake remedies hearings, and therefore restricts, to some extent, its authority to instead instruct the Crown and Maori parties to negotiate a remedy. The potential for Waitangi Tribunal involvement in negotiations is even greater where the remedies potentially involved include resumption of land under the 1988 SOE

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135 Eg Whanganui, Waikato River and Tuhoe.
136 Cases denying judicial oversight. Birdling.
138 Dawson at 410-411.
settled legislation and the Crown Forest Assets Act 1989 as the facts and outcome of this case illustrate.

C Comparative analysis

Comparison is difficult with Canada and it does not have a body similar to the Waitangi Tribunal. Nonetheless, it should be noted that there is the potential for more judicial oversight of settlements between Indigenous peoples and the state in Canada given that, at all times, Indigenous peoples can, instead of taking the political route of negotiations, seek legal recognition of their Aboriginal and Treaty rights in the courts. Moreover, bodies such as the British Columbia Treaty Commission have been established to provide some independence to negotiation processes. ¹³⁹

Overall, in NZMC freshwater, the NZSC deferred considerably to political factors and political undertakings in denying a remedy to Maori claimants. In that case the NZSC seemed comfortable to facilitate and not interfere with a political process. On the contrary, in Haronga, the NZSC essentially inserted more “law” and “process” into the Treaty settlements process.

D International legal perspective

Relevant articles in the Declaration include:

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

¹³⁹ http://www.bctreaty.net.
More consistent with international human rights criticism of the large natural groupings policy.

VII Taueki?

[Taueki: arguably, the failure to recognize Mr Taueki’s right to possession of the lands, territories and resources surrounding Waipunahau would conflict with article 26 of the Declaration on the Rights of Indigenous Peoples].

VIII Tentative conclusions

Paki 2 and Haronga potentially mitigate against the negative aspects of NZMC freshwater. in Haronga, the NZSC inserted more law into negotiations and Paki 2 recognises Maori land rights in riverbeds, which could profoundly and positively impact Maori claims to freshwater.