

IN THE SUPREME COURT
OF NEW ZEALAND

SC 67/2023

I TE KŌTI MANA NUI
O AOTEAROA

BETWEEN

**PAKI NIKORA on behalf of TE KAUNIHERA
KAUMĀTUA O TŪHOE**

Appellant

AND

**TAMATI KRUGER on behalf of TŪHOE TE URU
TAUMATUA TRUST**

Respondent

OUTLINE OF ORAL SUBMISSIONS OF TE HUNGA RŌIA MĀORI O AOTEAROA

DATED 27 FEBRUARY 2024

*Counsel for the intervenor certify that this outline contains no suppressed information
and are suitable for publication.*

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TĒNĀ E TE KŌTI –

Introduction

1. Te Hunga Rōia Māori o Aotearoa Inc (**Te Hunga Rōia**) does not take a position on the disposition of this appeal. Te Hunga Rōia seeks to assist the Court in its consideration of the issues.
2. Te Hunga Rōia submits that:
 - (a) Tikanga plays a role in interpreting the meaning of “owned by Māori” in s 236(1)(c) of Te Ture Whenua Māori Act 1993 (**TTWMA**).
 - (b) When tikanga is considered it may provide a perspective that means ‘ownership’ could be broader than how that term is used under traditional common law and equity.
3. The interpretation exercise requires consideration of the text in the light of its purpose and its context, which will include but is not limited to tikanga considerations.

Tikanga principles (Submissions at [10]-[19])

4. Acknowledge Tūhoe have their own tikanga as concerns their whenua.
5. In a general sense, tikanga places importance on land and collective rights to share and care for it:
 - (a) Whenua is something to which Māori belong and a taonga tuku iho.
 - (b) The word “whenua” can mean placenta, ground, country and state.
 - (c) Whenua as the placenta sustains the life of a baby in the kōpū and at the end of a person’s life they return to Papatūānuku, to the whenua.
 - (d) This relationship with whenua is about bonding to the land and having a place upon which to stand with confidence.
 - (e) Land was not regarded as a personal, individual asset in the Western sense.
 - (f) Tikanga had concepts of property holding (take tūpuna, take raupatu, take tuku) but rights were held collectively rather than individually, and by members of the community to maintain obligations and advance their collective interests.
6. This specific way of looking at and dealing with land ‘ownership’ is a reflection of broader tikanga values, with which the Court is familiar including whakapapa, whanaungatanga, mana, kaitiakitanga, tapu.

TTWMA and how tikanga may inform this matter (Submissions at [29]-[37])

7. In the context of a statute designed to address the relationship between Māori and their whenua a tikanga-consistent approach is appropriate.
8. The Preamble contains clear principles regarding ownership of land as a taonga tuku iho of special significance to Maori people:

... ā, nā te mea e tika ana kia mārama ko te whenua he taonga tuku iho e tino whakaaro nuitia ana e te iwi Māori, ā, nā tērā he whakahau kia mau tonu taua whenua **ki te iwi nōna, ki ō rātou whānau, hapū hoki**, a, a ki te whakangungu i ngā wāhi tapu hei whakamāmā i te nohotanga, i te whakahaeretanga, **i te whakamahitanga o taua whenua hei painga mō te hunga nōna, mō ō rātou whānau, hapū hoki** ... (emphasis added)
9. *John da Silva v Aotea Māori Committee*: “This use of "hunga" clarifies the meaning of the earlier "iwi" as applying in that context to tribal identity (or identities) rather than the alternative 'owners'.”
10. The Preamble recognises the traditional relationship of Māori with their land in its tribal significance rather than ownership in an individualised sense.
11. TTWMA’s broader textual context reflects that tikanga is an integral part of its operation. It is a statute about land and as such tikanga provides an important interpretive overlay to the whole Act.
12. The Act makes specific reference to tikanga throughout, for example:
 - (a) requirements for judges of the MLC to have knowledge and experience of tikanga, and lay members may be appointed having regard to their knowledge and experience of tikanga.
 - (b) Part 3A provides for dispute resolution processes to resolve issues “in accordance with the relevant tikanga of the whanau or hapū”.
 - (c) Section 129(2)(a) of the Act recognises land held by Māori in accordance with tikanga as having the status of “Māori customary land”.
13. TTWMA should be read in a manner that recognises and promotes tikanga. It follows, that tikanga — particularly that relating to whenua — should be considered when interpreting the meaning of the words used in s 236(1)(c).

Consideration of tikanga is appropriate in this case (Submissions at [5]-[6])

14. Te Hunga Rōia submits that this Court taking account of tikanga as part of the interpretive exercise required for s 236(1)(c) is appropriate:
 - (a) Tikanga, as the first law of Aotearoa New Zealand, needs to be considered where, as here, it is relevant to the circumstances and context of the case.
 - (b) This appeal concerns an important question as to the status and governance of land, which tikanga treats as fundamental to Te Ao Māori

and which is held on behalf of a large group of Māori as part of a Treaty settlement.

- (c) Tikanga forms part of the values of New Zealand's common law, and generally legislation should be interpreted consistently with the common law where the words of a statute permit. Tikanga is to be taken into account in the common law where it has not been abrogated by statute.
- (d) Legislation should also be interpreted consistently with Te Tiriti o Waitangi and, it is argued, tikanga, as an implication of the tino rangatiratanga guarantee contained in Article Two for Māori to live by and benefit from tikanga.
- (e) Te Hunga Roia acknowledges that tikanga has not been previously raised in this matter. However, it is submitted that that does not mean tikanga should not be considered by this Court, nor does it provide a barrier to doing so. As confirmed by this Court in *Ellis*, the development of the common law also includes tikanga (and in *Ellis* the Court, having identified tikanga as possibly relevant, raised it for consideration).
- (f) Careful consideration of all aspects of the common law, including tikanga, is important given this Court's role in defining the law in matters of public importance.
- (g) During the 'transitional' phase of the common law that this Court identified in *Ellis* – especially for matters commenced prior to the *Ellis* decision – it can be expected that there will be situations where tikanga was not raised before lower courts but may have relevance to the issues this Court needs to consider. It is respectfully submitted that the Court should consider tikanga in such circumstances.

Underpinnings of the English common law approach

- 15. The requirement at English common law for a beneficial estate to include the ability to alienate is rooted in the concern over perpetuities.
 - (a) The rule against perpetuities was founded in a desire to promote the best interests of the community.
 - (b) Perpetual restrictions on the use of land were seen as harmful to the community and its development.
- 16. Both the tikanga (land is inalienable) and common law (land must be alienable) approaches are rooted in a desire to promote the best interests of the community. They arrived at different end points, reflecting the different societal underpinnings and structures.