IN THE SUPREME COURT OF NEW ZEALAND

SC 7/2010
[2012] NZSC 50

BETWEEN	JOHN HANITA PAKI, TORIWAI ROTARANGI, TAIHOPA TE WANO HEPI, MATIU MAMAE PITIROI AND GEORGE MONGAMONGA RAWHITI Appellants
AND	ATTORNEY-GENERAL OF NEW ZEALAND FOR AND ON BEHALF OF THE CROWN ("THE CROWN") Respondent

Hearing: 15 and 16 March 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: I R Millard QC and M P Armstrong for Appellants
D B Collins QC, V L Hardy and D A Ward for Respondent

Judgment: 27 June 2012

JUDGMENT OF THE COURT

A The appellants have standing to bring the proceedings in a representative capacity.

B The riverbed adjoining the Pouakani lands is not vested in the Crown under s 261 of the Coal Mines Act 1979 and s 354 of the Resource Management Act 1991.

C Costs are reserved.

REASONS

Para No

ELIAS CJ, BLANCHARD AND TIPPING JJ

(Given by Elias CJ)

[1] Was the Waikato River adjoining land at Pouakani, near Mangakino, a "navigable river" so that it was vested in the Crown under s 14 of the Coal-mines Act Amendment Act 1903? If so, the plaintiffs acknowledge that they cannot succeed in their proceedings in the High Court for declarations that the river bed is held by the Crown under a constructive trust for those they represent. The appeal is brought against a decision of the Court of Appeal[1] upholding a determination in the High Court[2] that the Waikato River "as a whole" was a navigable river and rejecting the contention of the plaintiffs that vesting under the Act takes place only in places where the river is in fact navigable (as they say the river adjoining the Pouakani lands is not). The plaintiffs appeal to this Court.

[2] For the reasons that follow, the vesting accomplished by s 14 of the Coal-mines Act Amendment Act 1903 attached only to those stretches of a river that were navigable in fact. We therefore disagree with the views expressed in the High Court and accepted in the Court of Appeal that a river which is navigable in substantial part has that status throughout. The basis on which the matter was disposed of in the Courts below made it unnecessary for those Courts to determine whether the river in the stretches adjoining the Pouakani lands was navigable (because they considered the question of navigability of the river as a whole). It is therefore necessary for this Court to consider whether the river adjoining the blocks was navigable in 1903 (the date at which such assessment must be made).[3] The answer turns on the meaning of "for the purposes of navigation", but is ultimately a question of fact. For the reasons to be developed, we conclude that the river adjoining the Pouakani lands was not navigable, with the result that the bed did not vest in the Crown under s 14 of the Coal-mines Act Amendment Act 1903.

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1 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 (Hammond, Robertson and Arnold JJ).

2 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) (Harrison J).

3 As is explained at [50].

The appeal

[3] The plaintiffs are kaumatua of Ngati Wairangi, Ngati Moe, Ngati Korotuohu, Ngati Ha, Ngati Hinekahu and Ngati Rakau. They claim, under a representation order made in the High Court, as representatives of the descendants of owners of five blocks of land along the left bank of the Waikato River at Pouakani, near Mangakino, which were transferred to Crown ownership between 1887 and 1899. The blocks of land were Pouakani 1, Pouakani B8, Pouakani C3, Pouakani B10 and Pouakani B6A, all of which were derived from the original Pouakani Block created in 1886 by the Native Land Court on investigation of the much larger Tauponuitia Block initiated by Te Heuheu Tukino and others on behalf of Tuwharetoa. Before 1886, the Native Land Court had granted titles to the land on the right hand bank of the river, which was then sold to private individuals.

[4] In the case of Pouakani No 1, the freehold of 20,000 acres was ordered by the Native Land Court to be vested in the Crown and was declared to be the property of the Crown in September 1887 for payment of survey and other costs amounting to £1,650. (The Crown paid to the owners the £350 difference between the value of the block and the survey costs.) The four other blocks (amounting to some 45,000 acres in total) subdivided out of the remaining Pouakani Block in 1891 (after initial subdivision orders were set aside by legislation) were purchased by the Crown from the Maori owners in 1892 and 1899. Pouakani C3, B8, and B10, purchased in 1892, were contained within a certificate of title issued to the Crown in 1893. Pouakani B6A, purchased in 1899, was vested in that year in the Crown by order of the Native Land Court.[4] Blocks C3, B8 and B10 were declared by notices in the New Zealand Gazette to have been acquired under the North Island Main Trunk Railway Loan Application Act 1886.[5] The parties are in agreement that the Crown obtained with the riparian lands title to the adjacent stretch of river to the middle of the flow, in accordance with a presumption of the common law.

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4 Pouakani B6A was declared to be Crown land in a Gazette notice dated 18 January 1990: New Zealand Gazette (1900) at 105.

5 New Zealand Gazette (1894) at 170.

[5] In proceedings issued in the High Court, the plaintiffs sue the Attorney-General on behalf of the Crown, seeking a declaration that Crown ownership of the river bed to the middle of the river is subject to a constructive trust in favour of the Pouakani Maori owners. The constructive trust sought is described as "either remedial or institutional". It said to arise because the river bed was obtained by the Crown in breach of fiduciary duties owed to the Maori owners arising out of the circumstances of the alienations and the Treaty of Waitangi. It is claimed that the Crown acquisition of the river bed under the common law presumption was not explained to the Maori owners and occurred without their free and informed consent, in breach of the Crown's duties to them.

[6] The Attorney-General contends that the river is navigable and that therefore the bed of the river became the property of the Crown by s 14 of the Coal-mines Act Amendment Act 1903. Section 14 declared that the beds of such rivers "shall remain and shall be deemed to have always been vested in the Crown". The plaintiffs say that the river adjoining the Pouakani lands is not navigable and that s 14 has no application. They accept however that, if the river bed vested in the Crown under s 14, their claim cannot succeed.

[7] If the river is non-navigable, so that s 14 does not apply, the Attorney-General says that the Crown's acquisition of it (under the common law presumption that the transfer of the riparian lands carried the bed of the river to the middle of the flow) was not in breach of any duty which could justify the imposition of a constructive trust. In addition he said in the pleadings that the plaintiffs lack standing and that their claims are barred by the terms of the Pouakani Claims Settlement Act 2000 (which resolved grievances reported on by the Waitangi Tribunal in a report in 1993).[6] The Attorney-General also raises defences based on the lapse of time, invoking the Limitation Act 1950 and the doctrine of laches, and asserting acquiescence by the Maori vendors.

[8] Some portions of the Pouakani riparian lands were sold or transferred by the Crown to others. Some of this land has since returned to Crown ownership by compulsory acquisition under the Public Works Act 1928 for hydroelectricity

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6 Waitangi Tribunal *The Pouakani Report* (Wai 33, 1993).

generation purposes. The implications of these changes in ownership have not been addressed in the present appeal. Nor can it resolve a Crown contention that no trust as claimed can apply to Pouakani 1 where the fee simple title was issued directly to the Crown and never vested in any Maori owner. (Whether Native Land Court title is a necessary pre-condition to the imposition of a trust or whether the preceding investigation and direct vesting of the land in the Crown is sufficient are matters we are not called upon to consider.)

[9] The Crown succeeded comprehensively in the High Court.[7] Harrison J held that the claim was precluded by the terms of the Pouakani Claims Settlement Act and that the plaintiffs lacked standing to bring it in any event.[8] He held, also, that the terms of s 14 of the Coal-mines Act Amendment Act 1903 meant that navigability was to be assessed of the river as a whole and not simply of the portion of the river adjoining the Pouakani lands.[9] Since he found the river as a whole was navigable (on assessment of the overall proportions in which it was navigable), it was "deemed to have been always vested in the Crown" by s 14.[10] The claim based on the original acquisition of the river bed (through application of the presumption that it was transferred with the riparian land) was accordingly overtaken. In any event, the Judge considered that no duty of a fiduciary character was owed by the Crown to the Pouakani people in respect of the land acquisitions between 1887 and 1892[11] and that the claimed relief (declaration of constructive trust) was not available.[12] Finally, the Judge considered that the claim would have been barred by defences based on lapse of time.[13]

[10] The Court of Appeal held that the terms of the Pouakani Claims Settlement Act did not exclude the claim, reversing the High Court on this point.[14] It also expressed some doubt about the conclusion in the High Court that the plaintiffs

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7 A summary of the Judge's findings is set out at [178].
8 At [48] and [55]–[58].
9 At [72].
10 At [86].
11 Harrison J refers to "1887 to 1892", but the acquisitions stretched from 1887 to 1899 when the Pouakani B6A block was acquired by the Crown.
12 At [155] and [166].
13 At [177].
14 *Paki v Attorney-General* [2009] NZCA 584, [2009] 1 NZLR 125 at [19] and [20].

lacked standing.[15] It was, however, unnecessary to resolve the question of standing because the Court of Appeal took the view that the High Court had been right to treat the Waikato River as a whole, from the Huka Falls to its mouth, as navigable for the purposes of s 14 of the Coal-mines Act Amendment Act 1903.[16] The conclusion that the bed of the river was deemed always to have been vested in the Crown was a complete answer to the claim, as the plaintiffs had conceded would be its effect if the river was treated as navigable.

[11] The plaintiffs appeal with leave to this Court.[17] There is no cross-appeal against the Court of Appeal determination that the claim is not barred by the Pouakani Claims Settlement Act, and that question is therefore no longer live. The Court has granted leave in respect of the conclusions in the High Court on which relief would have been denied (referred to at [9] above). Since, however, it was accepted that the questions of standing and the application of the vesting effected by s 14 of the Coal-mines Act Amendment Act 1903, if decided against the plaintiffs, are dispositive of the appeal, the Court indicated that it would hear those two questions first.

[12] In the course of the hearing of the appeal, the Solicitor-General withdrew the Crown objection to the standing of the appellants to bring the claim. It is accepted that the Crown concern is not properly with standing to bring the representative claim but with identification of those who would succeed to the original owners for the purposes of any remedy by way of constructive trust. (If such inquiry is eventually necessary it may be referred to the Maori Appellate Court under s 61 of Te Ture Whenua Maori Act 1993, which permits the High Court to refer to that expert body questions of fact relating to the interests or rights of Maori in any land.) This Court therefore proceeds on the basis that the High Court was wrong on the question of standing (a matter not formally resolved by the Court of Appeal) although the concession of the Solicitor-General makes it unnecessary to provide further reasons.

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15 At [120].
16 At [84].
17 *Paki v Attorney-General* [2010] NZSC 88.

[13] With the abandonment of the standing point, the only issue requiring determination by the Court at this stage is the application of the vesting of s 14 first achieved by the Coal-mines Act Amendment Act 1903. Its effect, if applicable, is not in issue because of the acceptance by the plaintiffs that it would preclude their claim for a declaration that the land is subject to a constructive trust in their favour arising out of the acquisitions in the 19th century. Because it is not claimed that the bed of the river is Maori customary land or Maori freehold land, it is not necessary to consider in the present appeal whether the terms of s 14 would apply to such land (an application doubted in relation to customary land by Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*).[18]

Ownership of river beds

[14] The case concerns ownership of the bed of the Waikato River in the 32 kilometre[19] stretch which formed the boundaries of the five blocks of land acquired by the Crown at the end of the nineteenth century. The river at that point has today been substantially modified by hydro-electricity development. Dams and lakes have transformed the natural watercourse.

[15] It is not in dispute between the parties that the Crown has been the owner of the river bed adjoining the Pouakani blocks since it acquired the riparian lands. They are agreed that ownership of the bed of the river to the middle of the stream (usque ad medium filum aquae) was included in the land obtained by the Crown, in application of a conveyancing presumption of the English common law (more properly, a rule of construction of the terms of conveyance).[20]

[16] The English common law conveyancing presumption applied to non-tidal rivers (irrespective of whether they were used for navigation or not), to lakes, and to roads (in which case it carried the ownership ad medium filum viae).[21] In tidal rivers

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18 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 26 per Cooke P.

19 Figures given are expressed in kilometres throughout (rounded to the nearest whole number) although in evidence some were given in miles.

20 *Maclaren v Attorney-General for Quebec* [1914] AC 258 (PC) at 272–273.

21 The presumption relating to roads was excluded in New Zealand by statute in 1876: see Public Works Act 1876, s 80.

and estuaries, it was ousted by a further presumption of the common law (more properly, a prima facie rule of evidence) that, where navigable, the bed belonged to the Crown[22] (although the strength and antiquity of the presumption has been questioned by scholars).[23] In reality, in England much tidal land (including that under navigable waters) was owned privately (either because of Crown grant or because of presumed grant based on immemorial assertion of ownership). Similarly, the beds of inland waters (including lakes, and irrespective of whether the watercourse was navigable in fact or not) were the subject of extensive private property interests from mediaeval times. Rights of navigation for the public were however also extensive both under statutes and as established by user time out of mind, and could not be interfered with by the riparian landowner.[24] Given the scale of private ownership of land covered by water in England, the principal application of the presumption was in the conveyance of land between vendors and purchasers. It was rebutted by showing that the grantor did not intend to part with the land under water[25] or that the land was not his to grant.[26] Public use rights to navigate or (less commonly) to fish, where secured by statute or user, were not inconsistent with private ownership of the land beneath the water.[27]

[17] In colonial territories, the question of ownership of river beds arose against no such settled historic adjustments of property and public use. The public interest in use of navigable waterways was significant in the largely unoccupied territories opened up in North America with the westward push beyond the old thirteen colonies (where the common law presumption was observed in non-tidal waters,

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22 See, for example, *Fitzhardinge (Lord) v Purcell* [1908] 2 Ch 139 at 166–167. See also SR Hobday *Coulson & Forbes on the Law of Waters: Sea, Tidal, and Inland and Land Drainage* (6th ed, Sweet & Maxwell, London, 1952) at 25–26.

23 Stuart A Moore *A History of the Foreshore and the Law Relating Thereto* (Stevens & Haynes, London, 1888) cited in Glenn J MacGrady "The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water" (1975) 3 Florida State University Law Review 511 at 552–568.

24 Ownership of the bed of navigable rivers and rights of navigation, though related, are distinct concepts: *Maclaren v Attorney-General for Quebec*, above n 20, at 282–283; *Orr-Ewing v Colquhoun* (1877) 2 AC 839 (HL) at 846.

25 *Duke of Devonshire v Pattinson* (1887) 20 QB 263 (CA) at 274.

26 *Ecroyd v Coulthard* [1897] 2 Ch 554 at 568; aff'd in *Ecroyd v Coulthard* [1898] 2 Ch 358 (CA).

27 See *Blount v Layard* [1891] 2 Ch 681 at 689. See also *Coulson & Forbes on the Law of Waters*, above n 22, at 446–447 and 506–507.

whether navigable or non-navigable).[28] Because the watercourses were principal highways in the new lands (and often of vast size and length), the public interest led the courts in a number of American states and Canadian provinces to extend the English presumption of Crown ownership of land under tidal navigable waterways to all navigable waterways. In others, the circumstances of navigability in fact or the scale of the waterway were treated as rebutting the presumption of ownership to the middle of the stream by the riparian owners. These North American developments were known to lawyers especially through the works of Kent and Angell[29] which were influential in New Zealand and discussed in the judgments of New Zealand courts.[30]

[18] The English common law was applied in New Zealand from 14 January 1840 "so far as applicable to the circumstances of the said Colony of New Zealand", as was later confirmed by s 1 of the English Laws Act 1858 (to avoid doubt)[31] and s 2 of the English Laws Act 1908, the effect of which are now preserved by s 5 of the Imperial Laws Application Act 1988. Presumptions of Crown ownership under the common law could not arise in relation to land held by Maori under their customs and usages, which were guaranteed by the terms of the Treaty of Waitangi. Such proprietary interests might include, if established by custom, the beds of rivers, whether or not navigable in fact (as was recognised in *Mueller*[32] and *In re the Bed of the Wanganui River*[33]) and the beds of lakes (as was recognised in respect of Lake Rotorua in *Tamihana Korokai*).[34] (Whether a common law presumption of Crown ownership of tidal lands applied in New Zealand does not arise in the present case but was held by the Court of Appeal in *Attorney-General v Ngati Apa*[35] not to apply

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28 John M Gould *A treatise on the law of waters: including riparian rights, and public and private rights in waters tidal and inland* (Callaghan & Co, Chicago, 1888) at 133–137 discussing *The Propeller Genesee Chief v Fitzhugh* 53 US 443 (1851).

29 See James Kent *Commentaries on American Law* (14th ed, Little, Brown, and Co, 1896) and Joseph K Angell *A treatise on the common law in relation to watercourses* (Wells and Lilly, Boston, 1824).

30 See for example, *Mueller v The Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA) at 94–96 per Stout CJ and at 117 per Edwards J.

31 The background to the passage of this Act is explained in David V Williams "The Pre-History of the English Laws Act 1858: *Mcliver v Macky* (1856)" (2010) 41 VUWLR 361.

32 At 122–123 per Edwards J.

33 *In re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 437 per Cooke J and at 461–462 per North J.

34 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 345 per Stout CJ and at 351 per Edwards J.

35 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [47].

to any such lands held by Maori under customary rights.) No substantive rule that the Crown owned the beds of navigable waters therefore entered New Zealand law in 1840. And application of the common law presumption of riparian ownership to the middle of the flow could not arise until Maori customary interests were excluded (as by purchase or some taking authorised by statute). The Crown had to own the land before it could grant it, providing a foundation for the application of the conveyancing presumption. The presumption of ownership ad medium filum aquae was therefore first applied in interpretation of Crown grants, as in *Mueller*, and then on subsequent alienations of such Crown-granted land.

[19] In New Zealand, the system of Crown grants, from which all European title was derived, was based on surveys pegged out on the land.[36] Despite the accuracy of such measurement, the presumption of ownership ad medium filum was applied in New Zealand where rivers formed the boundary of grants, initially perhaps without critical consideration (as was suggested by Stout CJ in *Mueller*).[37] It would have been easy enough for the Crown to exclude river beds from Crown grants. Or the Waste Lands legislation could have been framed to include such beds (a point that was influential in the conclusion of Stout CJ in *R v Joyce* that the presumption of ownership to the middle line of the stream applied in New Zealand).[38] In respect of roads, the presumption was abrogated in New Zealand by ss 79 and 80 of the Public Works Act 1876, which vested the soil under all roads in the Crown. The same statutory course was not, however, taken in relation to rivers until 1903, and then the abrogation of the presumption related to navigable rivers only with the enactment of s 14 of the Coal-mines Act Amendment Act 1903.

[20] Although in *Mueller*, the Court of Appeal affirmed application of the conveyancing presumption to Crown grants, it held that the presumption had been rebutted in the circumstances of the grant in issue. The case concerned an application in 1900 by the Commissioner of Crown Lands for the Auckland Land District for a declaration that a portion of the river bed near Mercer (which the

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36 See *R v Joyce* (1905) 25 NZLR 78 (CA) where it is implicit in Edwards J's discussion at 102–103 of the "mathematical certainty" obtained by survey in New Zealand that the greater accuracy might have been a reason not to apply the presumption in New Zealand.

37 At 103.

38 At 88 (referring specifically to the Auckland Waste Lands Act 1858 in this connection).

riparian owner was mining for coal) was land vested in the Crown. The riparian land had been granted by the Crown under the provisions of the New Zealand Settlements Acts of 1863 and 1865 which promoted the taking up by military of land confiscated after the Land Wars. The Court affirmed the application of the common law presumption that the riparian owners shared in the bed of the river which was the boundary of the land granted, in application of the decision of the Privy Council on appeal from Australia in *Lord v Commissioners for the City of Sydney*[39] that the presumption applied in colonial territories. While *Lord* was treated as authoritative, it was noted in *Mueller* that the application of the presumption had already been "tacitly assumed" by the New Zealand courts in a handful of cases.[40]

[21] Although the presumption applied in New Zealand, the Court of Appeal found that it had been rebutted in *Mueller*. The Court was however divided in this result. Stout CJ took the view that the fact that the presumption of riparian ownership of the river bed could not be countered by a presumption of Crown ownership because at common law navigable rivers were confined to those within the tidal reaches. The reasons found for rebuttal by the judges in the majority differed. Edwards and Martin JJ considered that the presumption had been rebutted by the Highways and Watercourses Diversion Act 1858 (with Martin J also relying on the Marine Act 1866) which conferred authority on local authorities to alter and control watercourses.[41] Stout CJ however specifically disagreed with the view that the legislation relied on was sufficient to rebut the presumption,[42] and his view on this point was upheld in the later Court of Appeal decision of *R v Joyce*[43] (in which Edwards J dissented from the decision of the majority comprising Stout CJ, Williams, Denniston, and Cooper JJ). In *Mueller*, Williams and Conolly JJ considered that the circumstances of the grant (particularly that the river was a highway "of necessity", used for commerce and to give access to military settlements[44]) were sufficient to rebut the presumption.

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39 *Lord v The Commissioners for the City of Sydney* (1859) 12 Moo PC 473, 14 ER 991 (PC).

40 At 103 per Stout CJ, citing *Borton v Howe* (1875) 2 NZ Jur 97 (CA), (1875) 3 NZ CA 5, *Costello v O'Donnell* (1882) 1 NZLR CA 105, and *The Jutland Flat (Waipori) Gold-mining Company (Ltd) v McIndoe* (1895) 14 NZLR 99 (CA).

41 At 114–115 per Edwards J and at 126–127 per Martin J.

42 At 111–112 per Stout CJ.

43 *Joyce*, above n 36.

44 At 109 and 113.

[22] *Mueller* authoritatively established that the conveyancing presumption of ownership to the middle of the stream applied in New Zealand. It was however clear that it was rebuttable on the basis of the surrounding circumstances which might show that the grantor (and in particular the Crown) had not intended to part with the bed. Such presumption could more readily be rebutted in the case of a navigable river than one non-navigable. But even in such cases there was no rule of rebuttal simply from the circumstance of navigability. As Edwards J was to point out in *R v Joyce*,[45] *Mueller* did not decide that the common law presumption was rebutted in the case of every navigable river. It established no more than that the presumption might be held rebutted if, at the time of the grant, "the river is used as a highway, and is the only practicable highway to the land upon its banks".[46] Indeed, even that circumstance might be insufficient since there were special features of the case which "serve to distinguish it from other cases in which the facts are not the same" and which "do not apply to many of the navigable rivers in the colony".[47] Key in the result in *Mueller* were the circumstances that the river provided access for military settlements and was a highway used for commerce.

[23] The effect of the decision in *Mueller* was that whether the presumption was rebutted in any case was a matter requiring investigation of the facts and, in the case of dispute, court determination – a prospect of future uncertainty in land titles that cannot have been viewed with equanimity by anyone. This was the state of the law at the time the Coal-mines Act Amendment Act 1903 was adopted and which it must have been designed to address.

[24] It should be noted that the presumption applied in New Zealand in *Mueller* concerned lands freed from Maori customary ownership and granted by the Crown as general land. Whether river bed land was held by the riparian owners of Maori customary land was not in issue in *Mueller* but was treated in other cases as a question of Maori custom for investigation by the Native Land Court.[48] Whether the common law presumption on conveyance of land applies to Maori freehold land (converted from customary ownership by statutory process with the effect of a

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45 At 95.
46 At 95.
47 At 95.
48 At 122–123 per Edwards J and *In re the Bed of the Wanganui River*, above n 33, at 435 per Cooke J.

Crown grant[49] is a matter not settled on existing authority.[50] The present case is not concerned with Maori customary land ownership or with the application of the presumption to customary land converted into Maori freehold land. The parties do not question whether the common law presumption of ownership ad medium filum aquae where riparian land is acquired is applicable in New Zealand, either at all or in relation to alienation of Maori customary land or the freehold title derived from it under the provisions of the Maori land legislation. Nor is it concerned with the circumstances in which the presumption may be rebutted in relation to Maori customary or freehold land. It is no part of the plaintiffs' claim that the presumption did not apply or was rebutted in the case of the alienations of the Pouakani lands. Rather, their case is based on the river bed land having been transferred to the Crown under the presumption that the riparian lands transferred to the Crown extended ad medium filum aquae. The presumption is said to have arisen on the vesting of the Pouakani 1 Block in the Crown and the transfers to Crown ownership following purchase of the remaining four blocks. It would be wrong for this Court to depart from application of the presumption and we were not invited to do so.

[25] The Crown's fall-back position in the litigation is that if it holds the river bed today, not under the vesting achieved in the Coal-mines Act Amendment Act but under the presumption that it acquired the river bed to the middle of the stream in the vesting and transfers in 1887, 1892 and 1899, then it did not acquire the land in circumstances giving rise to a constructive trust. Its first contention however is that basis of acquisition was overtaken when in 1903 the bed of the river was vested in it under s 14 of the Coal-mines Act Amendment Act 1903.

Section 14 of the Coal-mines Act Amendment Act 1903 and its successors

[26] Section 14(1) of the Coal-mines Act Amendment Act 1903 declared that the beds of "navigable" New Zealand rivers "remain" and are "deemed to have always been vested in the Crown", "[s]ave where ... granted by the Crown":

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49 See s 12 of the Land Transfer Act 1885, the provision which was in force at the time that the Coal-mines Act Amendment Act 1903 was passed.

50 The point was reserved by the Court of Appeal in *In re the Bed of the Wanganui River*, above n 33, at 426 per Hutchison J; 437 per Cooke J; and 466–467 per North J. Compare however FB Adams J at 454 and *Hotene v Morrinsville Town Board* [1917] NZLR 936 (SC) at 945.

> **14 Bed of river deemed vested in Crown**
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> (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.

[27] The term "navigable river" was defined by s 14(2):

> (2) For the purpose of this section—
>
> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purposes of navigation by boats, barges, punts or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

[28] It is common ground, and we agree, that s 14 of the Coal-mines Act Amendment Act 1903 was enacted in response to the litigation in *Mueller*. Although the Crown was successful in result in that case, the Court's failure to rule that the presumption of ownership to the middle of the river bed was always ousted if the river was navigable meant that, in all existing Crown-granted land bounded by rivers, ascertainment of ownership depended on an assessment of the grantor's intention from all the circumstances surrounding the grant. Leaving matters on that basis was likely to cause uncertainty into the future which might require litigation to resolve.

[29] The terms of and legislative history of the amendment which statutorily rebutted the presumption of ownership in the case of navigable rivers, and its location in the Coal-mines Act Amendment Act 1903, indicate that Parliament was concerned with both the use of rivers as highways and the ownership of minerals. On that basis, statutory provision of rights of navigation alone would not have achieved the purpose, and continuing doubt about ownership of the river bed would have impeded the Crown's ability to undertake improvements of river highways (for example, by removing obstructions and excavating the channel) and to extract gravel and minerals.

[30] Some solution was clearly desirable. It is clear from the parliamentary debates that there was anxiety about expropriation of existing rights of property.[51] The amendment as eventually framed adjusted private property and the public interest according to whether the river was navigable or not. In using that distinction, it seems likely that sufficient justification was seen in the North American approach, which had been referred to by some members of the Court in *Mueller*.[52] The reference to "the rights of riparian owners in respect of the bed of non-navigable rivers" contained in s 14(2) of the 1903 Act and s 261(3) of the Coal Mines Act 1979 seems likely to be statutory acknowledgement of the presumption of riparian ownership in respect of non-navigable rivers. For present purposes, what is of significance is that a balance was struck in the legislation between private property and public property which protected both. The interpretation of what is a "navigable river" must therefore be respectful of that balance.

[31] Section 14 of the Coal-mines Act Amendment Act 1903 was re-enacted without amendment in s 3 of the Coal-mines Acts Compilation Act 1905. A further re-enactment in s 206 of the Coal-mines Act 1925 replaced the definition of "navigable river" and dropped the reference to beneficial use to residents. It provided that a river is navigable if:

> ... of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

[32] This definition was left untouched and re-enacted as s 261 of the Coal Mines Act 1979. Although s 261 of the Coal Mines Act 1979 has been repealed, s 354(1)(c) of the Resource Management Act 1991 provides that the repeal does not affect any interest in land vested in the Crown and that the Crown's interest in the land continues "as if [s 261] had not been repealed". The terms of s 354(1)(c) of the Resource Management Act make it clear that it is s 261 which is the controlling provision on the present appeal. It provides:

> **261 Right of Crown to bed of navigable river—**
>
> (1) For the purpose of this section—

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51 (17 November 1903) 127 NZPD 681.

52 *Mueller*, above n 30, per Stout CJ at 95 and Edwards J at 117.

> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.
>
> (2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.
>
> (3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

Under s 261, use for the "purpose of navigation" is essential to the classification of a river as navigable or not. Its meaning is considered at [71] below.

[33] The section properly to be considered is the section currently in force. The view expressed by William Young J, that the definition under s 14 of the 1903 Act indicated wider use by residents than is encompassed by the restriction to the "purpose of navigation", makes it appropriate, however to indicate that we do not consider that the 1925 definition, carried through into s 261, changed the meaning of the definition in s 14. William Young J accepts that change cannot have been intended, but would apply the 1903 definition, apparently on the basis that it was that provision that achieved the vesting. It is necessary to express disagreement with this approach.

[34] In the 1903 definition as well as in the 1925 and 1979 definitions, use for "the purpose of navigation" was the governing concept for the balance struck between private property (which continued to be acknowledged in s 261(3)) and public property. It seems highly unlikely that any change to the effect of the legislation was intended by the 1925 amendment to the definition, since it purported to continue a vesting already achieved by the 1903 legislation.[53] That circumstance means that a consistent interpretation should be adopted, unless clearly untenable. If there were any difference in meaning, the correct definition to use, as already indicated, is the definition preserved by s 354(1)(c) of the Resource Management

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[53] This is the view expressed by FB Adams J in *Attorney-General, ex rel Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA) at 788.

Act, that is to say the definition in s 261. The two amendments to the text of the definition in 1925 do not however change the meaning of s 14 of the 1903 Act, when properly understood.

[35] The first change was to substitute for the description of a navigable river as one "continuously or periodically of sufficient width and depth to be used for the purposes of navigation ..." the description "of sufficient width and depth (whether at all times or not) to be used for the purposes of navigation ... ". The more natural sense of the words used in the 1903 definition ("continuously or periodically") is as a reference to the condition of the river over time, rather than along its course. That is as is made clear in the 1925 language. This is significant because the Court of Appeal, as described in [48] below, treated the reference to the river being "periodically" of sufficient width and depth to be navigable as used in a spatial sense rather than the temporal one which is more natural and as is clearly the sense used in the definition as amended in 1925. The meaning preferred by the Court of Appeal (which is excluded by the 1925 definition) was used in support of its conclusion that the question of sufficiency of width and depth was to be assessed for the length of the entire river.[54] It was a misinterpretation of the sense in which the words were used in 1903 (as in the later enactments) and which contributed to the Court of Appeal's erroneous adoption of a "whole of river" assessment of navigability.

[36] The second change was the replacement of the reference to

> ... to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purposes of navigation by boats, barges, punts or rafts ...

with

> to be used for the purpose of navigation by boats, barges, punts, or rafts.

[37] The reference to benefit to residents was rightly treated on re-enactment in 1925 as redundant since such residents would use the river as members of the public for the purposes of navigation. As appears at [65] below, providing access to

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[54] At [73] and [74].

residents is "for the purposes of navigation" (and is not of purely private benefit).[55] It was not therefore necessary to refer to their position separately. In 1903 it may have been politic to make such acknowledgement when legislating to remove potential claims by riparian owners to ownership of the bed of navigable rivers. The legislative history indicates that the section was a last-minute addition after attempts to vest river beds according to the width of the bed were rejected as expropriatory.[56] The redundancy may not have been appreciated in the rush, or it may have been helpful in securing support for the Bill to be didactic in this respect.

[38] More importantly, we do not accept that the structure of the definition in the 1903 Act detaches the words "for the purposes of navigation by boats, barges, punts or rafts" from application to "the residents, actual or future, on its banks", making the reference to the purposes of navigation attach only to "the public" (as is suggested by William Young J). The "purposes of navigation" govern the "actual or future beneficial use" both "to the residents ... " and "to the public". Such construction is not strained or contrary to the text or syntax of the provision.[57]

[39] The sense of the definition is that a "navigable river" is one of sufficient width and depth to be susceptible of "actual or future beneficial use to the residents, actual or future, on its banks ... for the purposes of navigation by boats, barges, punts or rafts" or susceptible of "actual or future beneficial use to the public for the purpose of navigation by boats, barges, punts or rafts". "Actual or future beneficial use" must attach equally "to the public" (because "use" is the peg on which reference "to the public" is hung in the sentence). And if "boats, barges, punts, or rafts" are the means of use envisaged for residents as well as the public (as must be the case, since there would be no sense in withholding from residents the expansive means of use granted to the public), the reference to "for the purposes of navigation" is to the

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55 Purposes of settlement were acknowledged in the Privy Council to be a public interest: *Lord v The Commissioners for the City of Sydney*, above n 39, at 1000.

56 During the Committee stage of the 1903 Coal Mines Bill (No 2), the Minister of Mines moved to add a clause reading "[i]t is hereby declared that all coal and lignite under any river exceeding thirty-three feet in width is vested in His Majesty": see (12 November 1903) 127 NZPD 511. Objections were raised by the Opposition that this clause may interfere with existing rights. The Premier responded that the Government "did not wish in the slightest degree to disturb existing rights, but there was a difficulty as to how they should avoid that": (17 November 1903) 127 NZPD 681. A new clause was added which became s 14 of the 1903 Act.

57 Compare William Young J at [170].

use to which such "boats, barges, punts, or rafts" are to be put equally in relation to residents as well as in relation to members of the public.

[40] This duplication of reference was rightly dropped in 1925, perhaps when any didactic or political reason for it had passed but perhaps also simply because the drafting was less rushed and more dispassionate. The reference to "future" residents was redundant at the start, once "future beneficial use" was admitted (just as reference to a "future" public would have been redundant). It, too, was abandoned in 1925. The requirement of "beneficial use" emphasised utility but was, in any event, implicit in "the purposes of navigation" (the meaning of which is discussed below at [71]) and was also rightly omitted as redundant in the 1925 amendment. For these reasons, we are of the view that the meaning maintained by the 1925 amendment was the meaning of the original definition in 1903, correctly understood. In substance it made no distinction between use by residents and use by members of the public. A navigable river was one capable of use for navigation.

Other legislation affecting the Waikato River

[41] Ownership of part of the bed of part of the Waikato River was the subject of distinct legislation in 1926. The legislation did not affect the stretch of the river in issue in the present appeal but may suggest that the vesting accomplished by the Coal-mines Act Amendment Act 1903 did not extend to the whole of the Waikato River.

[42] Section 14(1) of the Maori Land Amendment and Maori Land Claims Adjustment Act 1926 provided:

> The bed of the lake known as Lake Taupo, and the bed of the Waikato River extending from Lake Taupo to and inclusive of the Huka Falls, together with the right to use the respective waters, are hereby declared to be the property of the Crown, freed and discharged from the Maori customary title (if any) or any other Maori freehold title thereto ... .[58]

[58] The Crown in 2007 transferred ownership of the bed of the river between Lake Taupo and the Huka Falls to the Tuwharetoa Maori Trust Board to hold on trust for hapu from the river and for the common use and benefit of all the people of New Zealand.

[43] The section accomplished more than vesting of the bed of the portion of the river referred to in the Crown. It dealt with use of the waters of the river and cleared the land of any Maori customary title or Maori freehold title. The specific declaration of Crown ownership may have been necessary to effect an expropriation of Maori customary or Maori freehold title (if the land was in such ownership). Certainly, in *Te Ika Whenua* Cooke P expressed the view that the terms of s 14 of the Coal-mines Act Amendment Act were not sufficiently explicit to achieve an expropriation of Maori customary land (a view perhaps turning on use of the word "remain" and the reservation in relation to Crown grants, which could be taken to indicate that s 14 is effective only in respect of land obtained in ownership and subsequently granted by the Crown).[59] But, if not prompted by doubts as to the efficacy of s 14 in relation to Maori customary or freehold land, the specific legislation required in respect of the stretch of the river between Lake Taupo and the Huka Falls may suggest that the river was not seen in 1926 as navigable in those stretches and that a "whole of river" vesting was not thought to have been accomplished in 1903.

The interpretation of "navigable river" in the High Court and Court of Appeal

[44] It is accepted that the Waikato River is navigable from its mouth until just beyond Cambridge, a distance of about 129 kilometres. In those lower reaches of the river it was in 1903 an important means of transport and access to the military and civilian settlements which had been established since the confiscations of the 1860s. Upstream from Cambridge, however, the remaining 193 kilometre stretch of the river contained major obstructions and was not used for continuous travel or transportation.[60] The contention of the plaintiffs on appeal was that "intermittent or sporadic stretches" of navigability above Cambridge "by different craft from those which plied the lower reaches" was insufficient to support the findings in the lower Courts that the river above Cambridge was appropriately classified as navigable.[61] In any event, in the reaches of the river adjoining the Pouakani lands there were substantial gorges, rapids and other obstructions which meant that those stretches of

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59 *Te Ika Whenua*, above n 18, at 26 per Cooke P.

60 As discussed below at [80].

61 At [103] of the judgment of Harrison J.

the river were not navigable in fact. The evidence relating to the physical obstructions to voyages along the river adjoining the Pouakani lands and the evidence of expeditions undertaken by water in the years before the river was substantially modified are discussed below at [80]–[88].

[45] Harrison J considered that whether a river was navigable for the purposes of s 14 turned on an assessment of its character as a whole:

> [73] The legislature's apparent intention in 1903 was that a river's navigability would be determined as a unit or thing, not by its component parts. And as a matter of policy it seems unlikely that Parliament intended to allow later contested factual inquiries about whether part and, if so, what part of a river was not navigable. ... [A] construction which allowed for a patchwork of private ad medium filum and public ownership along the Waikato River would defeat the purpose and policy of s 14.

He drew support for this approach from the judgment of the Supreme Court of Canada in *R v Nikal*.[62] There it was held that that a physical interruption to a river navigable on both sides of the gorge (in which a member of an Indian band claimed a right of fishery), which required portage, did not affect its characterisation as a navigable river[63] (although the Court indicated that the river ceased to be navigable at the point where its use for passage ended[64]). Harrison J rejected the possibilities both that navigability ceased where a river became incapable of supporting further continuous navigation and that only those portions of the river capable of being navigated in fact were vested in the Crown by s 14.[65] He considered that it was the general characteristic of the river, as a whole, which had to be assessed.[66] As to the meaning of "navigable" in s 14, Harrison J commented that "[t]he terms of the statutory definition ... are unique to New Zealand, and do not attempt to replicate existing common law":

> [87] ... The word "navigation" in this context means, in my judgment, the carriage by water transport of people or goods from one point to another. A "navigable river" is one capable of navigation. While its common law meaning of a public highway is preserved by the express reference to public

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62 *R v Nikal* [1996] 1 SCR 1013 at 1050–1051.

63 At 1051.

64 At 1050–1051, citing with approval the statements of Anglin J in *Keewatin Power Co v Kenora (Town)* (1906) 13 OCR 237 (HC).

65 At [72].

66 At [73] and [86].

use, the meaning of "navigable river" is significantly extended relevantly to this case.

[46] Harrison J concluded on the evidence that the Waikato River was properly characterised as having been navigable in 1903, viewed "as a whole or a unit".[67] He relied on evidence that some 76.8 per cent of the river was the subject of documented actual use.[68] This characterisation of the river as a whole was not negated by the existence of 10 or 12 substantial physical obstructions in its upper reaches because proof of continuous passage throughout the length of the river was unnecessary.[69] In reaching his conclusion, Harrison J regarded three factors as "decisive":[70] the river was navigable continuously for two-fifths of its length (from its mouth to Cambridge); above Cambridge where rapids "physically obstructed any further continuous movement by commercial vessels such as steamers";[71] "most parts of well-defined sections ... were used before 1903";[72] "there was greater use in those same areas after 1903, proving the river's susceptibility of future beneficial use for navigation". (From [78] we indicate disagreement with these characterisations of "navigation" of the river above Cambridge.)

[47] On appeal, the Court of Appeal upheld the High Court determination that the Waikato was a "navigable river" in 1903.[73] It, too, rejected any division of the river according to its navigability in particular reaches. It considered this conclusion was available on "a purely textual analysis"[74] but was "put beyond doubt"[75] by the purpose of s 14 of the Coal-mines Act Amendment Act 1903 when placed in the context of a wider and "overall legislative imperative" for hydro-electric development.[76] Section 14 could be approached "broadly" ("allowing for the hydro-electric developments that were clearly in parliamentary contemplation"), so that "occasional natural obstacles, such as those in the upper reaches of the Waikato

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67 At [104].
68 At [104].
69 At [106].
70 At [105].
71 At [103].
72 At [105].
73 At [84].
74 At [74].
75 At [81].
76 At [59]: including the Water-Power Act 1903, the Electrical Motive-power Act 1896 and the Public Works Act 1894.

River, do not preclude the river being classified as navigable".[77] Alternatively, it could be approached "narrowly", "which would not allow for the breaking up of passage by obstacles".[78]

[48] The Court indicated that "[e]ven on the text alone" it inclined to the broader view: the provision looked to future use "and did not rest on a static view of the river" ("Parliament had in mind future changes which would themselves change the character of the river in places");[79] and "[t]he qualifier that a river only needs to be 'periodically' of sufficient width and depth to be navigable demonstrates that interruptions to a continuous river journey were contemplated".[80] More importantly, the Court considered that, "of overwhelming importance in this case", was the wider contemporaneous legislative context of development, particularly of hydro-electricity generation.[81] The "divisibility argument" was "quite inimical to the purpose of the CMAA 1903, as seen in the larger legislative context in which it ought properly to be seen":

> [81] We think that the appropriateness of the broader textual view we have identified ... is put beyond doubt by the developmental and legislative context which we set out earlier in this judgment. What has happened to the Waikato River is exactly what Parliament had in contemplation at the time of the passage of the CMAA 1903. It was a prospective view that extensive development was likely to take place, and that securing the bed of the river to the Crown was essential to the development of New Zealand.

[49] The Court of Appeal considered that "[t]he only real argument to be made against [the broader interpretation of s 14] is that the effect of the CMAA 1903 was confiscatory, in that it took away existing common law rights".[82] While that would normally be a pointer to reading the legislation down, here however the "legislative purpose is paramount", and the legislation "overrode the common law rights of all New Zealanders".[83] The Court expressed the view that Harrison J had been right to hold that "in 1903 and now, the Waikato River was and is navigable within the meaning of s 14 of the CMAA 1903":[84]

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77 At [74].
78 At [74].
79 At [74].
80 At [73], applying the spatial sense of "periodically" that we regard as unnatural in context.
81 At [82].
82 At [83].
83 At [83].
84 At [84].

> [85] It follows that, on the application of s 14 to the facts of this case, the Waikato River from the foot of the Huka Falls to Port Waikato was a navigable river and vested in the Crown. There is the gloss that from the Huka Falls to the Lake Taupo outlet the bed of the Waikato River is in any event the property of the Crown by virtue of the Māori Land Amendment and Māori Land Claims Adjustment Act and is now entrusted to the Tuwharetoa Trust Board ... .

The date at which navigability is to be assessed is 1903

[50] The parties and the Courts below have proceeded on the basis that the vesting occurred in 1903 and that the question of application of s 14 of the Coal-mines Act Amendment Act 1903 and its successor provisions must be assessed by reference to the condition of the river in 1903 and its prospective use at that date. The terms of s 14 were declaratory of the existing and past position. Its view to future benefit would lead to shifting property interests if required to be reassessed from time to time. That cannot have been the purpose of s 14. It attached an ownership regime which purported to have been in place at least from initial Crown grant. Both the character of the river and its susceptibility for future use for the purposes of navigation are to be assessed as at 1903.

The saving for land granted applies to explicit grant, not presumed grant

[51] Although there is some New Zealand authority which expresses doubt,[85] the better view is that the saving "where the bed of a navigable river is or has been granted by the Crown" refers to explicit grant, not the presumed grant ad medium filum aquae.[86] Were it not so, the vesting would have achieved nothing.

Electricity generation was not an object of the Coal-mines Act Amendment Act 1903

[52] In this Court, the Crown did not strongly support the view of the Court of Appeal that s 14 was properly to be construed as part of a legislative policy of

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85 *Leighton*, above n 53, at 790 per FB Adams J; *Tait-Jamieson v GC Smith Metal Contractors* [1984] 2 NZLR 513 (HC) at 516 per Savage J.

86 *R v Morison* [1950] NZLR 247 (SC); *Leighton*, above n 53, at 772–773 per Fair J.

securing rivers of potential for hydro-electricity generation for the Crown. Rather, it was argued that the Court of Appeal was correct to give weight to the wider legislative context in which Parliament was securing for the public "significant waterways for hydro-electrical and other purposes" and could be seen to be acting, more generally, in belief in the benefit of public control of significant natural resources. The scope of the vesting of "navigable rivers" was to be "seen in this light".

[53] Weight cannot properly be attached in the question of interpretation in issue to such speculation. There is nothing in the legislative history which suggests the linkage relied upon by the Court of Appeal in its reasons.

[54] The purpose of the 1903 legislation appears to have arisen directly out of the litigation in *Mueller*. There, the immediate object of the Crown in the litigation had been to secure the coal resource under the Waikato River. The case exposed however a considerable potential problem about existing private property in river beds. The Court of Appeal's failure to reject completely any application of the presumption in New Zealand meant that considerable private property in river beds was already in existence. Such private ownership of the beds of rivers could only be excluded, following *Mueller*, by a case-by case determination of whether the presumption of Crown grant ad medium filum aquae was sufficiently rebutted by the surrounding circumstances. Leaving rebuttal of the presumption to be determined on a case-by-case basis had implications for both navigation and also access to shingle and minerals.

[55] The statutory solution adopted in 1876 in relation to the same common law presumption in respect of roads was a sensible course to apply to rivers.[87] It allowed rivers which were potential highways (as the roads marked out on survey maps were potential highways only, until formed) to vest in the Crown, leaving intact private property in relation to non-navigable rivers which were not capable of becoming highways. There was sufficient justification in North American case law concerning the beds of navigable rivers to counter charges of expropriation of private property. Such course was of public benefit without being destructive of private property

[87] Public Works Act 1876, s 80.

which, in relation to the beds of navigable rivers could only be regarded as precarious following *Mueller*. The Parliamentary debates which preceded enactment of the 1903 Amendment Act indicate that the purpose of the legislation was to strike an appropriate balance between private and public property, based on the concept of navigability.[88]

"Navigability" must be assessed with respect to particular stretches of a river

[56] Four principal reasons lead us to conclude that s 261 of the Coal Mines Act, like s 14 of the Coal-mines Act Amendment Act 1903 before it, requires the question of "navigability" to be assessed in respect of particular stretches of a river: a "whole of river" assessment of navigability is inconsistent with the text of the legislation; assessment of particular stretches is consistent with the common law context; the legislative history confirms the textual indications that the legislation sought to strike a balance between private and public interests which would be seriously disturbed by a "whole of river" assessment; an interpretation which required the river as a whole to be classified as navigable or not would be highly inconvenient, suggesting that it could not have been envisaged and ought not to be adopted.

(i) The text of s 261

[57] Section 261(1) contains a definition of navigable river, and there are two saving provisions in subsections (2) and (3). Both were present in s 14 of the Coal-mines Act Amendment Act 1903, although the second (relating to the rights of riparian owners) was formerly to be found in the definition in s 14. Section 261 provides:

> (1) For the purpose of this section—
>
> **Bed** means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:

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88 (17 November 1903) 127 NZPD 681, where the Premier is reported to have said that "[t]he Government did not wish in the slightest degree to disturb existing rights" and that "[a] new clause had been drafted which he thought would meet the difficulty".

> **Navigable river** means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.
>
> (2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.
>
> (3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

The definition of navigable river in s 261(1) refers amongst other things to a river of "sufficient width and depth". Questions of width and depth cannot sensibly be assessed except at particular points. This is consistent with the question of navigability being examined on a segmented, rather than a "whole of river", basis. More importantly, neither the saving for Crown grants of the river bed in s 261(2) nor the reservation of the rights of riparian owners in s 261(3) can sensibly be reconciled with a "whole of river" approach to the ownership of river beds which was the concern of the legislation.

[58] Harrison J considered that the purpose and policy of s 14 would be defeated by "a construction which allowed for a patchwork of private ad medium filum and public ownership along the Waikato River".[89] It should be noted that under the common law, with its division of Crown ownership into the stretches of river within the tidal reaches and beyond it and with Crown ownership in tidal reaches attaching only to parts in fact navigable, some segmentation was inevitable. More importantly, "patchwork" of ownership along the course of rivers is not avoided by the terms of the legislation. The exemption of Crown grants indicates that such mixed ownership was indeed envisaged, since it cannot be the case that grants for the bed of an entire river were in contemplation. No doubt grants of river bed may have been unusual, but the legislation contemplated they could have been made and it preserved any such existing ownership through Crown grant before 1903. That militates against a "whole of river" assessment. The saving for Crown grants is consistent with navigability being focussed on navigability in fact in particular stretches of the river.

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89 At [73].

[59] Similarly, the recognition of the rights of riparian owners in non-navigable rivers and the disclaimer of any intention to affect them, contained in s 261(3) (and in the definition in the earlier provisions), would be a protection significantly eroded by a "whole of river" approach to classification. Since Crown grants were specifically exempted, the reservation of the interests of riparian owners in the bed of non-navigable rivers seems clearly a reference to the operation of the common law presumption of ownership to the middle of the flow. On a "whole of river" classification, riparian owners of non-navigable segments of the river would lose any lands within the presumption. It is difficult to see any legislative purpose in treating so differently the riparian owners of land adjacent to non-navigable stretches of rivers navigable in lower reaches and those whose lands adjoin rivers not navigable at all. Such potential confiscatory effect is also a reason why a "whole of river" interpretation is inappropriate.[90]

(ii) The common law context

[60] In English common law the presumption of Crown ownership of the bed of "navigable rivers" required both that such lands be within the tidal reaches and that they be beneath waters navigable in fact.[91] The presumption was therefore inevitably concerned with part only of the river bed: it was excluded from those parts beyond the tidal reach; and it applied only to those tidal parts of the river that were navigable in fact.

[61] In those North American jurisdictions where the presumption of state ownership was extended to non-tidal waters, the single criterion for its application was navigability in fact. In such extension, there was no attempt to adopt a classification of rivers as navigable or non-navigable throughout. Although the respondent relied on the Canadian Supreme Court decision in *Nikal*, that case is not

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90 In light of the general presumption of law that statutes should be interpreted against expropriatory effect: JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 322–323; Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2009) at 846–847.

91 See, for example, *Fitzhardinge*, above n 22, at 146 and 166–167; *Gann v Free Fishers of Whitstable* (1865) 11 HLC 193 at 207, 11 ER 1305 at 1312; *Malcomson v O'Dea* (1863) 10 HLC 593, 11 ER 1155.

authority for a "whole of river" assessment.[92] Indeed, the Court explicitly envisaged that where navigability in fact finally ended on a river, the river was properly treated as non-navigable from then on.[93] This is the position adopted by the Attorney-General on the appeal. He does not seek to argue that a river is treated as navigable to its source. He submits, rather, that an "overall assessment" of the character of the river should be made of the river from its mouth to the point at which navigation ceases entirely. The reasoning of the Court in *Nikal* was that the interruption by the gorge in which the Indian band had riparian lands did not prevent the river being navigable because portage reasonably permitted navigation to continue.[94] *Nikal*[95] approved the approach taken by the Ontario High Court in *Re Coleman v Attorney-General for Ontario*[96] that, on the segmented approach required by the Ontario statute there in issue, rapids that were "readily circumvented" did not prevent the river being "navigable". The Court in *Coleman* also accepted that evidence about the use of the rest of the river was relevant to whether it was navigable in the particular segment.

[62] It may be readily accepted that considerations of navigability in any part of a river must be seen in the context of the rest of the river and its use. Without such context, the significance of an impediment (whether it is an interruption "readily circumvented", not preventing navigation in a particular stretch, or whether it effectively brings travel by water to an end) cannot be assessed. That is not however the same as a "whole of river" classification, such as was adopted in the lower Courts. We were given no authority to suggest that there is any jurisdiction in which an assessment of navigability is based on the relationship the proportion of the river in which there has been some documented use for navigation bears to the total length of the river, such as the High Court here adopted in relation to the Waikato River.[97]

[63] A "whole of river" approach was not taken in any New Zealand authority decided under the common law before 1903 or after the Coal-mines Act Amendment Act was enacted. Although the respondent relied heavily on the decision of the

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92 *Nikal*, above n 62.
93 At 1050.
94 At 1051.
95 At 1051.
96 *Re Coleman and Attorney-General for Ontario* (1983) 143 DLR (3d) 608 at 614.
97 At [104] and [105].

Canadian Supreme Court in *Nikal*, that case is one where portage was considered to be practical.[98] In that context, the stretch of the river in respect of which navigability was assessed properly included the navigable reaches on either side of the obstruction formed by the gorge. In the United States, the approach is to assess whether the particular segment of the river is navigable. Such approach was recently reaffirmed by the Supreme Court in *PPL Montana LLC v Montana*.[99] The Court considered the relevant question to be "whether the segment of the river, under which the riverbed in dispute lies, is navigable or not".[100] It considered the "segment-by-segment approach" to be "well settled".[101]

[64] As already indicated, we would not exclude contextual assessment of the segment in relation to the rest of the river and the opportunity it offers for navigation. But where impediments prevent through-traffic, so that use for the purposes of navigation in different reaches is disconnected, the river may be navigable only in each separate reach and a segment which prevents connection between two navigable parts of the river may be properly regarded as non-navigable. Whether an interruption disconnects navigation or whether it provides no such disruption is a question of fact.

[65] The concept of a highway, which underlies the North American case law on navigable rivers and which was invoked in the litigation in *Mueller*,[102] carries with it the sense of connection. The river may not form the entire highway to such a point of connection, as long as it is a link in a route to such a point.[103] In the circumstances of settlement, such as arose in North America and in New Zealand, connection may not simply have been linkage between two towns or two other public places. There was public interest as well as private interest in giving settlers

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98 *Nikal*, above n 62, at 1050.

99 *PPL Montana LLC v Montana* 565 US ___ (2012), in reaffirmation of the position taken previously in *United States v Utah* 283 US 64 (1931) at 77, *Brewer-Elliott Oil & Gas Co v United States* 260 US 77 (1922) at 85, and *Oklahoma v Texas* 258 US 574 (1922) at 586. The decision in *Montana* was received after the hearing of the appeal and the Court obtained further submissions from the parties addressing it on 30 March 2012.

100 At 14.

101 At 15.

102 *Mueller*, above n 30, at 98 per Stout CJ, 109 per Williams J (with whom Conolly J agreed), 119–121 per Edwards J and at 126 per Martin J.

103 *Campbell v Lang* (1853) 1 Macq 451 (HL) at 453 (a case about a public right of way rather than a highway).

access to the coast or to larger settlements downstream, even if there was no upstream town to connect with. The interest in promoting settlement was recognised in *Lord* as a circumstance that might rebut the presumption of ownership to the middle of the flow[104] and was referred to in *R v Joyce*[105] and *Mueller*.[106] Such public interest was specifically invoked in the reference to the interests of residents in the definition of "navigable river" in the 1903 legislation, but was, in any event, inherent in the concept of navigability. A navigable river provided a link for people and goods.

[66] This was the background which was behind the balance struck between private and public ownership in the 1903 Act. Justification for adjustment of the common law presumption of riparian ownership to the middle of the flow was found in a public interest in ensuring that navigable rivers are of beneficial use for the purposes of transportation. The common law provides no basis for Crown or state ownership of waters not navigable in fact. The Coal-mines Act Amendment Act is properly to be interpreted as achieving the same balance, along the lines of the adjustment reached in North America. The balance is not served by a "whole of river" classification.

(iii) The legislative history

[67] It is clear that the uncertainty about ownership of river beds on the basis of *Mueller* was the reason for legislative intervention in 1903. None of the Judges in *Mueller* considered the case except on the basis of the characteristics of the river at the particular location. Reference was there made to the section of the river in question having been navigated for commercial purposes.[107] While the Coal-mines Act Amendment Act 1903 was also undoubtedly concerned with ownership of minerals in river beds, the legislative history, referred to in [29] and [30], indicates concern to strike a fair balance between the rights of riparian owners and the public

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104 *Lord*, above n 39, at 1000.

105 At 91 per Williams J and 94–95 per Edwards J.

106 At 105–106 per Williams J, 113–114 per Edwards J, and 125–126 per Martin J.

107 The importance of the river for trade and as a highway was emphasised by the members of the Court. See, for example, at 107 and 109 per Williams J, 119 and 120 per Edwards J and at 125 per Martin J.

interest. Against the background of the common law approaches in North America, referred to in the judgments in *Mueller*, such balance was found in the concept of rivers as highways with Crown ownership of the soil beneath. The existing common law and its development in North America (in circumstances comparable to those in New Zealand) were treated as providing sufficient justification to enable the claim to be made that the effect was not expropriatory. The speeches in Parliament and the acknowledged difficulties of achieving a fair balance suggest that a principled basis for Crown ownership was where rivers were navigable in fact.

[68] There is nothing in the circumstances of enactment of s 14 which suggests that the concern was other than with waters navigable in fact in the particular location (and therefore of use to riverains as well as to other members of the public for transport) or that a "whole of river" assessment was meant. A "whole of river" approach would have the effect that, where rivers were incapable of navigation in fact where they abutted particular lands, riparian owners would be deprived of property in circumstances where no one could benefit from navigation. The contemporary disclaimers of intention to expropriate property in the enactment are inconsistent with the categorical approach to a river as navigable or not for its entire length. Nor is there any discernible public purpose in treating so differently riparian owners according to whether or not their lands abutted a river navigable in lower (or higher) reaches.

(iv) Inconvenience in a "whole of river" interpretation

[69] An approach which classifies a river according to the proportion of its length that is navigable in fact could well undermine the public benefit sought to be obtained by both the common law presumption and the statutory adaptation of it. A river of great importance for navigation in its lower reaches only may be of such length that it could not be classified as navigable on a proportionate basis. That would seem an odd result.

[70] Navigability in fact in a particular stretch of the river is a more certain standard in application than a "whole of river" approach, which depends on classification by a court. Navigability in fact can be assessed according to actual use

and (where there is no actual use and potential use must be assessed) according to the physical characteristics of the river in the particular place. The underlying justification for public ownership at common law (that such rivers are highways for the purposes of trade and transportation) does not apply where a river is incapable of use for navigation, perhaps because of natural obstructions. It may be readily accepted that not all natural obstructions will cause a river to be non-navigable: if portage is practised or is practical an obstruction may not prevent the use or potential use of the river as a highway. The key then may be the practicality of portage or the potential for improvements to remove the impediment to navigation.

"For the purposes of navigation"

[71] As is implicit in the reasons for rejecting a "whole of river" assessment of navigability, "the purposes of navigation" are the purposes of highway. They are concerned with connections for transport and trade.[108] That is the meaning given to navigability in Roman law, upon which the English common law drew.[109] In the context of settlement, access by riparian dwellers was not seen as a private benefit only,[110] as the original wording in s 14 made explicit (but as is implicit in any event in the meaning of "navigation"). In England, a highway (on water as on land) provides connection for people and goods,[111] including connection to the coast in the case of a river.[112] In the United States, rivers are navigable in fact "when they are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water".[113] While the emphasis on commerce in the United States federal case-law may reflect federal jurisdiction, the notion of "trade and travel" carries on a consistent theme from earlier origins recognised by the common law and as discussed in the judgments in *Mueller*. The same idea is to be seen in the language of "*beneficial* use" in the 1903 definition and the language of

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108 *Wills' Trustees v Cairngorm Canoeing and Sailing School* [1976] SC 30 (HL) at 124–126 per Lord Wilberforce, at 143–145 per Lord Hailsham and at 164 and 165 per Lord Fraser.

109 MacGrady, above n 23, at 530.

110 *Lord*, above n 39, at 1000.

111 *Wills' Trustees*, above n 108, at 125 per Lord Wilberforce. Although a case concerning the law of Scotland, Lord Hailsham in the same case indicated that the law of England was no different on this point.

112 At 125 per Lord Wilberforce and at 167–168 per Lord Fraser.

113 *The Daniel Ball v The United States* 77 US 557 (1870) at 563.

"navigation" in the 1903 Act and its successors, rather than simply the language of "use".

[72] If the concept of navigability, as has been suggested, imports connection, navigability cannot be assessed solely by reference to the condition of the river immediately adjoining the riparian lands. The ability to float a craft of the type described in the section at that particular point will not render the river navigable unless it provides a connection for the purposes of transportation. That is the appropriate segment to be considered for the purposes of navigability. This has implications for the suggestion made by William Young J that "navigability" is established by river crossings. River crossings by ferry, which may well themselves form part of a highway, do not make the river crossed "navigable". There seems to be no authority which treats such crossings as being "for the purposes of navigation". And such meaning is not the usual sense of the word, which looks to travel along a water highway. As used of rivers, it means travel up or down the river.

[73] It can be accepted that the types of craft identified in the legislation are capable of operating in shallow waters, even when laden. That no doubt reflects the reality that in New Zealand, as in North America, transport of goods and people was frequently carried out in canoes and similar vessels (although it should be noted that canoes are not mentioned in the definition in the New Zealand legislation).[114] The reference to these types of craft does not, however, mean that any use of them is sufficient to make the river a highway. That would be to deprive the words "for the purposes of navigation" of any meaning. In *Re Application by Beare and Perry for Mining Area in the Arahura River*, Stout CJ considered that it was insufficient for the purposes of navigation that "at times a canoe or boat may be used on the river".[115] The use must be *for the purposes of navigation*.

[74] The type of use that amounted to navigation was a matter considered by the House of Lords in the Scottish case of *Wills' Trustees v Cairngorm Canoeing and*

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114 *Attorney-General of the Province of Quebec v Fraser* (1906) 37 SCR 577 at 594–597; *Leamy v R* (1916) 54 SCR 143 at 152.

115 *Re Application by Beare and Perry for Mining Area in the Arahura River* (1900) 2 GLR 242 at 243.

Sailing School. There, a public right to use canoes arose only if the river was otherwise navigable.[116] Rights of navigation arose under the common law by use for commerce or transport "for a substantial period of time on a substantial scale openly carried on".[117] A "bare possibility of accommodating occasional craft" was not enough.[118] Nor did "the fact that some stretch of water is navigable or passable by some acrobatic tour de force" support a public right of passage.[119] "[B]oth capacity and use" were required to establish a right of public navigation (anything else would be too destructive of riparian ownership rights):[120]

> It would not, for example, include operations which would be more like acrobatic feats than navigation, or operations that resulted in a substantial proportion of the vessels or the floated objects being so damaged before they reach their destination as to be unmarketable. Nor do I consider that it would include passage along the river by revolutionary new types of craft that may some day be invented. Subject to these limitations, it is a general right of navigation up to the full capacity of the river.

[75] Once public rights of navigation were recognised the river was treated as a public river for all uses, recreational as well as commercial.[121] The public right of passage was protected even though the beds of non-tidal rivers (unless separately granted) were vested in the riparian owners by the presumption of ownership to the middle of the flow.[122] Recreational use could be *evidence* both of continued exercise of established public rights of navigation[123] and could be evidence of the capacity of the river to support navigation for the purposes of transport and trade.[124]

[76] The vessels described in the s 14 definition ("boats, barges, punts or rafts") are all types of craft which had been used for commerce in New Zealand.[125] Use for

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116 At 148 per Lord Hailsham.

117 At 146.

118 At 146.

119 At 124 per Lord Wilberforce.

120 At 169 per Lord Fraser.

121 At 145 per Lord Hailsham; at 153 per Lord Salmon and at 169 per Lord Fraser.

122 At 142 per Lord Hailsham.

123 As in *Wills' Trustees* at 156 per Lord Fraser, referring to the use of canoeing on the Spey since the 1920s (public rights of navigation having already been held in the 18th century after 50 years of litigation over cruive fishing to have been established on the basis of long-standing user for commercial purposes of rafts of logs and some transportation of produce, all of which commercial use had ended in the 1880s).

124 At 166 Lord Fraser expressed the view that he saw "no reason why actual use for recreation should not be as effective *to prove navigability as use for transporting goods*" (emphasis added).

125 See the views expressed by Hutchison J at first instance in *Leighton*, above n 53, at 755.

the purposes of commerce or trade is the best evidence that a river is navigable.[126] Such use was significant in *Mueller*. Whether it is *necessary* to show commercial use or its potential was doubted by two members of the Court of Appeal in *Leighton*.[127] It is not necessary to go as far. But if not for commerce or trade, the use of the river must be for the purpose of transport connection to a terminus on the river or to the sea.[128] Purely local use, not for trade or transportation purposes (because the stretch able to be used is too short), was held not to render the river navigable in *Maclaren v Attorney-General for Quebec*.[129] The use by rowboats of a stretch of water leading nowhere, to which there was no public access and which had not been used "for the purposes of commerce" or by "any wayfarer" was insufficient to establish a public right to use the river in *Bourke v Davis*.[130] Still less does the sort of "messing about in boats" involved in use of the Waiwhetu Stream in *Leighton* constitute use "for the purposes of navigation". We agree with the view expressed in that case in the Court of Appeal by Fair J that "navigation" is not appropriately used to cover "slight, intermittent, and restricted use" of a kind only jocularly referred to as "navigation".[131]

[77] We are confirmed in the interpretation we consider the natural meaning of the definition by the inconvenience of an interpretation which would allow any non-purposeful or non-"beneficial" use to amount to being "for the purposes of navigation". Similar inconvenience would attach to treating navigation as entailing no more than a crossing of a river. Any small piece of water capable of floating a craft of the sort described would amount to a navigable river, if the purposes of navigation do not require travel from place to place or if a crossing of the water were sufficient. On that basis, very many waterways would fulfil the definition, confounding the expectations of riparian ownership affirmed for "non-navigable rivers" by the legislation.

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126 *Wills' Trustees*, above n 108, at 126 per Lord Wilberforce.
127 At 778 per Stanton J and at 788 per FB Adams J.
128 *Wills' Trustees*, above n 108, at 125 per Lord Wilberforce and at 143 per Lord Hailsham.
129 *Maclaren v Attorney-General for Quebec*, above n 20, at 278. See also *Sim E Bak v Ang Yong Huat* [1923] AC 429 (PC) at 434.
130 *Bourke v Davis* (1889) 44 Ch D 110 (Ch) at 118.
131 At 769–770.

The Waikato River adjoining the Pouakani blocks was not capable of use "for the purpose of navigation"

[78] Because of the modification of the Waikato River adjoining the Pouakani lands, the evidence as to the navigability of the river in 1903 and its future susceptibility for use for the purposes of navigation was largely given by historians from published sources. Evidence of historical use was given by James Parker for the Crown and Bruce Stirling for the plaintiffs. Because of the age of the materials drawn on, most measurements are given in miles.[132]

[79] At some 350 kilometres in length from Lake Taupo to the sea, the Waikato River is New Zealand's longest river and a major waterway for commerce and transport in its lower reaches. It is not a river where boating ceases entirely in its upper reaches. The river opens out of Lake Taupo as a deep and broad stream. It was used for boating in the stretches between the Lake and the Huka Falls, and below the Huka Falls until the Aratiatia Rapids. Whether such use (which seems to have been confined to fishing and pleasure boating) in the upper reaches was properly seen as "navigation" within the meaning discussed is something we are not called upon to determine in the present case.

[80] Although in the "middle reaches" of the river (in which the Pouakani lands are situated) there are major obstructions to river traffic and comparatively little recorded use (such use as there was is discussed below), the upstream sections already described (from Lake Taupo to the Huka Falls, and from below the Huka Falls until the Aratiatia Rapids) and the lower reaches (from the rapids below the Maungatautari Bridge, above Cambridge, to the mouth) were used by water-craft within the contemplation of the legislation. Indeed, from the Maungatautari rapids to the mouth of the river, it is accepted to have been in 1903 an important highway for commerce and transport and clearly navigable within the meaning of the legislation.

[81] Bruce Stirling, the historian who gave evidence for the appellants in the High Court, reviewed accounts of travel in the Waikato from the 1840s until the 1930s,

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132 As indicated, these have been converted into kilometres.

before hydro-electric power projects altered the nature of the river. Most use of boats on the relevant sections of the river in these accounts was for the purpose of crossing the river or undertaking short trips on water as part of a journey otherwise over land. Most early accounts emphasise the deep gorges and fast rapids.

[82] Travellers Best and Dieffenbach detailed significant rapids on the Waikato River in the vicinity of the of the Poukani blocks, Dieffenbach noting that navigation between Taupo and the Waipa River (at the southern end of the Poukani blocks) "is yet rendered difficult by rapids, and the country through which it flows is bad above Mauga-Tautari".[133] Geologist Ferdinand von Hochstetter wrote in 1867 that "the numerous rapids of the Waikato [River] after its leaving Lake Taupo, it seems, are the impediment prevent the migration of eels to the [Taupo] lake" and that "[a]long the whole distance from Lake Taupo to Maungatautari the river is innavigable on account of its numerous rapids".[134] Sergeant Chitty of the Armed Constabulary at Cambridge wrote in 1872 that "[t]he [Waikato] River is not navigable higher than Cambridge. Beds of rock extending almost across, although a steamer did on one occasion ascend as far as Pukekura [near what is now Karapiro, downstream from the Pouakani lands] it was attended with great danger".[135] This was a view shared with the Public Works Department Engineer, James Stewart, who reported in 1872 that the Waikato River was navigable only below Cambridge.[136]

[83] Apart from early exploration parties and one recorded adventure expedition (the Vause party mentioned below), there is no evidence of through traffic along the river after Maungataurari, just upstream from Cambridge.[137] The river from Cambridge to Taupo was not used for transport or trade. There is no evidence of actual portage associated with passage by water. At most there is evidence of

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133 E Dieffenbach *Travels in New Zealand 1843* (Capper Press, Christchurch, 1974) at 334, cited in Bruce Stirling's brief of evidence at [70].

134 Ferdinand von Hochstetter *New Zealand: Its Physical Geography, Geology and Natural History* (JG Cotta, Stuttgart, 1867) at 383 and 390, cited in Stirling's brief of evidence at [78]. However, as James Brent Parker notes at [351] of his brief of evidence, Hochstetter's description is almost certainly inaccurate to the extent that other evidence shows boats could be used in some sections of the river for limited transport and with portage.

135 Sergeant Charles Chitty "Report on his District" P1/29a Archives New Zealand, cited in Stirling's brief of evidence at [79].

136 AJHR 1872 D-5 at 5–6, cited in Stirling's brief of evidence at [80].

137 Certainly David Johnson, in his history, *New Zealand's Maritime Heritage* (William Collins, Auckland, 1987) describes at 98 the "head of navigation" on the Waikato as being at Cambridge.

unconnected and unorganised local use of boats for pleasure. Nor is there evidence of extensive use of this description, except perhaps in the reaches close to Taupo. There were 14 major obstructions on the river between Taupo and Cambridge. Some of the obstructions were extensive and not easily circumvented.

[84] The Pouakani lands start about 96 kilometres from Lake Taupo and end about 132 kilometres from Lake Taupo. There is no record of any continuous journey along the length of the Waikato River linking the Pouakani stretch of river with the upper and lower reaches. Nor is there evidence that the Pouakani stretch or any part of it was used as a highway, either for local access or to give access to either the upper or lower stretches of the river. The stretch of the river alongside the Pouakani lands extends for 36 kilometres. In this stretch there were rapids at Ongaroto and gorges at Whakamaru and at Maraetai. Although Mr Parker, the historian who gave evidence for the Crown, expressed the opinion that portage around these obstructions was possible, he accepted that portage around the Whakamaru Gorge and the Maraetai Gorge would have been "very difficult".[138] The stretch of river affected by the Whakamaru Gorge alone extended some 7 kilometres, between 109 kilometres and 116 kilometres from Lake Taupo. The Gorge was within high sheer cliffs and the river within it was turbulent, being described by WM Fisher, a hydrological surveyor who worked on the river in the 1930s, as "a succession of rapids with scarcely any extent of smooth water".[139] Following the Whakamaru Gorge was a short stretch of smooth water before (at about 120 kilometres from Lake Taupo) the Moanakarakia Rapids began and ran through to the Maraetai Gorge. Parker notes that he could find no evidence of watercraft being used in this section of the river.[140] Further, portage would have been difficult in this section of the river as for the most part it ran at the bottom of deep gorges.[141] Portage around the Ongaroto Rapid, however, he suggests, would have been "easy" because the rapid itself was of short length and there was a formed road nearby.[142]

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138 Parker's brief of evidence at [326].
139 Stirling's brief of evidence at [109].
140 Parker's brief of evidence at [211].
141 Parker's brief of evidence at [321].
142 Parker's brief of evidence at [320].

[85] There is no documented record of travel along the river which attempted the portage suggested to be possible. There was slight evidence of sporadic use of boats on the river in stretches adjoining the Pouakani lands above and below the Ongaroto Rapids (referred to in [87]). And some use of boats downstream of Pouakani above the Aniwhaniwha rapids (between the Waipapa River and Maungatatari Bridge), which Mr Parker said could be portaged.[143]

[86] Both Stirling and Parker drew on the accounts of WM Fisher, a surveyor involved in investigating the feasibility of hydroelectric projects on the river, who spent the early part of the 1930s surveying the river. Although he used a dinghy for undertaking some of the surveys on sections of the river of interest, such purpose did not entail travel and was for the particular purpose of survey. A letter from Fisher to a man who was proposing to canoe the river from Taupo to Cambridge contains his assessment that the trip was "an impossibility in any craft":[144]

> There are certain sections of river, usually through uninhabited native forestry plantations, where a canoe could be used up to a distance of 10 miles [about 16 kilometres], but heavy rapids in impassable gorges divide any section of easy water and portage of the canoe would be out of the question. … The river is a succession of deep gorges and heavy rapids absolutely impassable in a boat and must be missed even when walking. The idea of such a trip, after the experience of two years walking and surveying to cover the length of the river between Cambridge and Taupo, is foolhardy to say the least and would only result in disaster over this section of about 100 miles [about 161 kilometres].

[87] There are four accounts only of river use by watercraft in the stretch of river adjoining the Pouakani blocks:

(a) Sometime in 1914 there is evidence of use by the Cox family (who lived on the banks of the river) of a 12 foot row boat just upstream from the Ongaroto Rapids.[145] These were recreational family excursions for picnics and the like.

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143 Parker's brief of evidence at [338].

144 Letter from WM Fisher to AJ McLennan 23 March 1937, cited in Parker's brief of evidence at [354].

145 Charles Cox "A History of Ongaroto" circa 1998, 2003-005-4/06, Alexander Turnbull Library, Wellington, at 2–3, cited in Parker's brief of evidence at [176]–[179].

(b) Mr Fisher, the surveyor, took a trip along the river for a short distance in a dinghy while conducting a survey in 1933. He could not manage to travel upstream from the Waipapa River and expressed the view that the river was not navigable.[146]

(c) In 1950 a small expedition led by Lew Vause travelled by rubber dinghy from Orakei Korako in the upper reaches of the river, downstream to the Whakamaru power station site, then under construction.[147] This expedition was accurately described by Mr Millard for the appellants as "daredevil".

(d) In 1952 a barge was used as a platform for drilling during the construction of the Maraetai Dam. It was winched over the rapids to get it into position.[148]

[88] A surveyor who gave evidence for the appellants, Mark Dyer, described the steep gradient of the Waikato River adjoining the Pouakani lands. At approximately 1:200 the gradient of the river between Whakamaru and Maraetai is the steepest on the river, apart from that at the Aratiatia Rapids.[149] In reviewing the surveys of the stretch of the river adjacent to the Pouakani block undertaken in the 1930s and 1940s for the purposes of the hydro-electricity projects, Mr Dyer remarked on the "difficulties encountered in the surveying of the river bank, including the infrequent crossings". They suggested to him that "safe navigation of the river in the vicinity of the Pouakani Blocks will have been difficult if not impossible".[150]

[89] We are unable to accept that the sporadic, extremely sparse, and local use of the river described by the evidence indicates that it was susceptible of use or future use for the purposes of navigation, within the meaning discussed at [71]–[77]. Such use was slight, intermittent and restricted. There is no record of transportation of people or goods. The natural impediments in the river and the development of roads by 1903 (referred to in the evidence of Mr Parker in support of his assessment of

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146 See Parker's brief of evidence at [354].
147 See Parker's brief of evidence at [153].
148 See Parker's brief of evidence at [226].
149 Mark Graham Dyer's brief of evidence at [95] and [99].
150 Dyer's brief of evidence at [102].

whether portage was feasible)[151] meant that there was no realistic susceptibility of the river to be used in these reaches for the purposes of navigation. We conclude that the river adjacent to the Pouakani lands was such that it was not navigable within the meaning of the legislation.

McGRATH J

[90] In its judgment of 19 July 2010[152] this Court gave the appellants leave to appeal against the Court of Appeal's judgment in *Paki v Attorney-General*.[153] The approved grounds of appeal were:

> (i) Did the applicants have standing to bring the proceeding in a representative capacity?
>
> (ii) Did s 14 of the Coalmines Amendment Act 1903 vest title in the riverbed adjoining the Pouakani lands in the Crown?
>
> (iii) If not, did the Crown acquire title to the claimed part of the riverbed through application of the presumption of riparian ownership *ad medium filum aquae* by reason of its acquisition of the riparian lands?
>
> (iv) If so, in the circumstances in which the Crown acquired the claimed part of the riverbed, was it in breach of legally enforceable obligations owed to the owners from whom title was acquired?
>
> (v) If so, have the applicants lost their right to enforce such obligations by reason of defences available to the Crown through lapse of time?
>
> (vi) If not, what relief is appropriate?

[91] The Court subsequently heard argument on the first two grounds of appeal and now delivers judgment on those issues. On the first ground, I agree with the orders and reasons for them appearing in the reasons of the Chief Justice, Blanchard and Tipping JJ.[154]

[92] The second ground raises a question concerning the meaning and effect of s 14 of the Coal-mines Act Amendment Act 1903. This point of statutory interpretation has implications for riparian owners generally. It is to be addressed by

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151 See for example [283], [285], [288], [299], [317], [322], and [328] of Parker's brief of evidence.

152 *Paki v Attorney-General* [2010] NZSC 88.

153 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125.

154 At [12] of the reasons given by the Chief Justice.

reference to the text of the relevant successive statutes, read in context, having regard to their purpose, and by applying the legislation, so read, to the evidence indicating whether the river was navigable. For the reasons set out below, I am satisfied that neither the 1903 Act nor its successors applied to the riverbed adjoining the Pouakani lands because that section of the Waikato River was not "navigable river" in terms of either the 1903 Act or successor legislation. It is not necessary at this time to determine whether or not the usque ad medium filum aquae presumption applies to rivers that could potentially be held by Maori under their customs and usages for, as the Chief Justice points out, the plaintiffs do not argue against its application in the case of the alienations of the Pouakani lands.

***Mueller's* case and the legislative response**

[93] At common law, where a non-tidal river was the boundary of land, there was a presumption that the grantee took the bed of the river to the middle line.[155] The presumption did not apply to the area over which there was tidal ebb and flow where the public had a right of passage and incidental rights of navigation. Where the presumption did apply, it was rebuttable.

[94] In 1900, the Court of Appeal in *Mueller v The Taupiri Coal-Mines (Ltd)*[156] had to decide whether grants of Crown lands, which were bounded by the Waikato River, passed title in the bed of the river to grantees in accordance with the common law principle. The Commissioner of Crown Lands for the Auckland Land District had brought proceedings seeking a declaration that the section of riverbed in issue was vested in the Crown. The defendant, which owned land at Huntly on both sides of the river, had tunnelled under the riverbed in order to mine coal. The river was navigable for a considerable distance beyond Huntly. In order to decide the case, the Court was required to consider whether Crown grants of the land adjoining the river, made between 1867 and 1880, carried title to the middle line in accordance with the presumption, or whether, in the circumstances, the presumption was rebutted. Four of the five judges of the Court of Appeal decided that the

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155 Reflecting the English common law principle usque ad medium filum aquae, which had been applied in New South Wales by the Privy Council in *Lord v The Commissioners of the City of Sydney* (1859) 12 Moo PC 473, 14 ER 991 (PC).

156 *Mueller v The Taupiri Coal-Mines (Ltd)* (1900) 20 NZLR 89 (CA).

presumption had been displaced. Stout CJ dissented from that view. He would have held that ownership of the riverbed was vested in the adjoining owners.[157]

[95] The circumstances leading the majority to decide that the presumption was rebutted varied between the majority judges. One factor was that the original grants had been made by the Crown to military settlers. The river was the only means by which goods traffic could be carried over the particular stretch of river and beyond it as far as Cambridge. It was the only practicable highway to the settlements.[158] This meant that the Crown, at the time of the grants, would have wished to keep the river open as a highway, and had an interest in retaining the capacity to deepen or alter the channel,[159] to remove sandbanks and to straighten the course of the river so that it continued to be navigable.[160] The legislative scheme for settlement of the region could only take effect if the presumption were rebutted. But there was a divergence among the majority as to the factors which operated to exclude the presumption and no precise test emerged from the judgment.

[96] *Mueller* accordingly left considerable uncertainty over the law as to ownership of riverbeds in non-tidal areas. All that was clear was that whether the usque ad medium filum aquae presumption of ownership of land applied would always turn on the circumstances of the particular adjoining land's use and the function of the river in relation to that land.

[97] In this context, legislation, which became the Coal-mines Act Amendment Act 1903, was introduced, amended and eventually enacted. Section 14 provided:

> **14 Bed of river deemed vested in Crown**
>
> (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.
>
> (2) For the purpose of this section—

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157 At 103–104.
158 At 109 per Williams and Connolly JJ and at 125 per Martin J.
159 At 110 per Williams and Connolly JJ.
160 At 126 per Martin J.

> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts; ...

[98] The 1903 statute was succeeded by subsequent legislation enacted in 1925, which it is necessary to address; however, the present appeal must be determined by application of the current legislative provision.[161] But in interpreting its language, considerable contextual assistance is given by s 14 of the 1903 Act and its legislative history.

Legislative history of s 14

[99] In the course of debate on the Coal-mines Bill (No 2), in Committee, the Minister of Mines moved that a new clause be included in the Bill:[162]

> It is hereby declared that all coal and lignite under any river exceeding thirty-three feet in width is vested in His Majesty.

The Committee resolved by 35 votes to 27 that the new clause should be read a second time, following which Mr Massey moved an amendment inserting after "that" the words, "subject to existing rights". The amendment was carried 34 votes to 27 so that these words were inserted. The new clause as amended, however, was negatived.

[100] The Coal-mines Bill returned to the House five days later when Hansard records the following exchange:[163]

> COAL-MINES BILL (No 2)
>
> The Right Hon. Mr. SEDDON (Premier) moved, That the Bill be recommitted for the purpose of considering a new clause. There was a clause on a Supplementary Order Paper which called forth considerable controversy. The member for Franklin and other members wished to

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161 Resource Management Act 1991, s 354, preserving the effect of s 261 of the Coal Mines Act 1979.

162 (12 November 1903) 127 NZPD 511–512.

163 (17 November 1903) 127 NZPD 681.

> conserve existing rights. The Government did not wish in the slightest degree to disturb existing rights, but there was a difficulty as to how they should avoid that. A new clause had been drafted which he thought would meet the difficulty.
>
> Mr MASSEY (Franklin) thought that the clause now proposed would remove the difficulty, and, he was sure, would be supported by the House.
>
> Bill recommitted.

[101] Subsequently, when the House was in Committee, the Premier moved the addition of a new clause in the form of what became s 14 of the Act. That clause was agreed to by the House, the Bill reported and read a third time.[164]

[102] It is plain that s 14 of the 1903 Act was Parliament's response to the *Mueller* judgment and the uncertainty it had created. The legislative history indicates the government initially sought to address the issue by vesting coal and lignite within the bed of every river in the Crown. While that was unacceptable to the House, it subsequently adopted the provision that became s 14 whereby the bed of every navigable river, including all minerals within it, was deemed to be, and always to have been, vested in the Crown.[165]

[103] In this context the following textual points can be made in relation to particular passages in s 14(1) and (2) of the 1903 Act:

(a) "*Save where the bed of a navigable river is or has been granted by the Crown...*". This opening clause addresses the concern expressed in Parliament by Mr Massey MP over protection of existing rights of land owners. The government wished to revisit the amendment to the original proposed provision which made it "subject to existing rights". In this context, the words "granted by the Crown" must refer to grants expressly transferring ownership of the riverbed and not to situations where the ownership of a riverbed may have been acquired through the application of the common law presumption of usque ad medium filum when the adjoining land was granted. Otherwise the opening words of

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164 (17 November 1903) 127 NZPD 681.

165 I agree with the other Judges that the development of hydro-electricity was not material to, or an object of, the legislation: see [52]–[53] and [161].

s 14 would be so wide as to make the enacting words nugatory.[166] On this point, I accordingly agree with other members of the Court.

(b) The words, "*the bed of such [navigable] river shall remain and shall be deemed to have always been vested in the Crown*" are declaratory of Parliament's view of Crown ownership of riverbeds under the law preceding the legislation coming into force. This expression and affirmation of the view that beds of navigable rivers always vested in the Crown indicated that Parliament did not regard the legislation as confiscatory.[167] Only explicit grants of title to the riverbed created "existing rights". It follows that the legislation is not to be read as affecting property rights.

(c) The expression of the definition of "navigable river" as "*a river continuously or periodically of sufficient width and depth to be susceptible of ...*" indicates that the qualifying characteristics of "navigable" rivers under the definition are to be assessed by reference to width and depth of a river. This language is to be contrasted with that used in the original supplementary order paper of 17 November 1903 which had referred to "any river exceeding 33 feet in width". So in both versions the width of a river was a key element, to which its depth was added in the final provision. That version goes on to define the qualifying width and depth by reference to what is sufficient for particular uses by either residents or the public (elaborated in (d) below). The addition of "periodically" in the final version appears to contemplate that seasonal fluctuations in the capacity of a river, which at times is of sufficient width and depth to be susceptible to the specified usage, will not alter its qualifying status as a navigable river. The focus on sufficient width and depth for specified uses indicates that s 14 is not addressing width and depth along the whole length of the river, but at particular parts of the river. This of itself demonstrates that

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166 See Fair J in *Attorney-General, ex rel Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA) at 770.

167 As recognised by FB Adam J at 791–792.

the legislation was to be applied to segments of the river rather than the river as a whole as the lower courts have determined in this case.[168]

(d) "*[S]usceptible of actual or future beneficial use to the residents, actual or future, on its banks...*" makes clear that the navigability is to be determined by reference to the present actual use when the legislation was enacted, or its susceptible use in the future by either residents on its banks or the public for the purposes of navigation by supported craft. In its ordinary sense, the term "navigable" describing a river naturally means a river capable of being navigated from one point to another. But in s 14 "navigable river" was a defined term. Reading the text of the definition literally, there is force in the view that, in relation to residents on the banks, s 14 referred simply to any "beneficial use" arising from the sufficient width and depth of the river. But that does not reflect the purpose of s 14, which was to provide for Crown control of the riverbed when the functions of the river so required. Read purposively, any qualifying beneficial use to residents had to be a beneficial use of substance rather than one which was slight or intermittent. Accordingly, I am satisfied that in relation to beneficial use to residents, s 14 was to be read as restricted to "rivers likely to be of real use for purposes of commercial, or economic, or general purposes of transport".[169] Accordingly, although I agree with William Young J that the position of residents under s 14 had to be considered separately from that of the public, the type of use to residents required to make a river navigable was similar in nature to that referred to by the Chief Justice, Blanchard and Tipping JJ.[170]

(e) The words "*or to the public for the purposes of navigation by boats, barges, punts, or rafts*" provides an alternative test for determining if a river is of sufficient width and depth to be navigable. It is included to protect the ability of the public to use the river as a highway, with

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168 *Paki*, above n 153, and *Paki v Attorney-General* [2009] 1 NZLR 72 (HC).
169 As Fair J concluded in respect of the 1925 Act in *Leighton*, above n 166, at 770.
170 At [71]–[77].

vessels travelling between points. Protection of this type of use was a concern of the majority of the Court in *Mueller.*

(f) The broad reference to the various types of craft emphasises that whether a river is navigable is not to be confined to particular types of craft such as commune vessels.

[104] The text and legislative history of s 14 as recorded in Hansard all support these conclusions as to the meaning of that provision.

United States common law context

[105] Finally I refer to the position in the United States of America at the time that the 1903 legislation was enacted. Prior to the American Revolution, the common law tide-based distinction for title to the riverbed was adopted in the Colonies. Early in the 19th century a number of States decided that a tidal rule of navigability was inappropriate because of the major inland rivers in the United States on which navigation could be sustained.[171] Applying the principle that "only such parts of the common law as are applicable to our condition are binding on our courts",[172] these jurisdictions concluded that the title to riverbeds of all navigable rivers, whether subject to tidal influence or not, was held presumptively by the State.[173]

[106] In 1842 the United States Supreme Court declared that the 13 original States held the right to all navigable waters, and the soil underneath them, subject only to the constitutional powers of the Federal government.[174] This principle was later extended to all States and assumed federal constitutional character under the equal-footing doctrine of the United States Constitution.[175]

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171 Starting with *Carson v Blazer* 2 Binn 475 (Pa 1810).

172 Louis Houck *A Treatise on the Law of Navigable Rivers* (Little, Brown and Company, Boston, 1868) at 27. This principle was part of the common law and was reflected in New Zealand in s 1 of the English Laws Act 1858.

173 At 32. See also *PPL Montana LLC v Montana* 565 US __ (2012) at 11.

174 *Martin v Lessee of Waddell* 41 US 367 (1842) at 410; *PPL Montana LLC*, above n 173, at 11.

175 *PPL Montana LLC*, above n 173, at 11–12.

[107] In 1894 the Supreme Court referred to what it called "the now prevailing doctrine in this country as to the title in the soil of rivers really navigable"[176] above the ebb and flow of the tide. In *Shively v Bowlby* the Court approved, and applied to riverbeds and their soil, an earlier statement of a State supreme court that:[177]

> ... the common law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers.

This became known as the doctrine of "state sovereign title" in the soil of such rivers. It applies to inland rivers which were navigable in fact.[178]

[108] In New Zealand, the common law did not adjust to local conditions in this way, in part because of the Privy Council decision in 1859 in *Lord v The Commissioners of the City of Sydney*,[179] which was applied in New Zealand, in particular in *Mueller*. But the very fact that, in response to the Court of Appeal's judgment, the New Zealand government in 1903 proposed, and Parliament enacted, a provision under which the navigability of a river would rebut the presumption of adjoining owners' title to the middle line of the riverbed above tidal influence, itself clearly indicates the awareness in government circles at that time of the approach taken to ownership of the beds of navigable rivers in the United States by the Courts.[180]

[109] As well, at this time, there was also a general awareness of the law of the United States among lawyers in New Zealand, as Sir Kenneth Keith has pointed out.[181] Indeed, it is clear that the judges who decided *Mueller* were aware of the argument that the navigability of a river could rebut the middle line presumption. Edwards J referred to the second edition of Houck's writing on *Rivers*.[182] Stout CJ addressed the American rivers jurisprudence but decided it was not of assistance in

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176 *Shively v Bowlby* 152 US 1 (1894) at 31.
177 At 32. See also *PPL Montana LLC*, above n 173, at 11.
178 *PPL Montana LLC*, above n 173, at 11.
179 *Lord*, above n 155.
180 *PPL Montana LLC*, above n 173, at 11.
181 Kenneth Keith "The Impact of American Ideas on New Zealand's Educational Policy, Practice and Theory: The Case of Law" (1988) 18 VUWLR 327 at 333. See also, Jeremy Finn "New Zealand Lawyers and Overseas Precedent 1874–1973 – Lessons From The Otago District Law Society Library" (2007) 11 Otago L Rev 469.
182 At 119.

deciding *Mueller*.[183] In *R v Joyce*, which was decided in 1905 and which held that the common law presumption applied to non-navigable rivers, there are full discussions of the American approach to that issue.[184]

[110] The state of the law in the United States at the time accordingly provides helpful context, along with the judgment in *Mueller*, the English common law which it addresses and the legislative history I have outlined. Together they facilitate an understanding of the legislative policy and assist in the interpretation of the language of the 1903 Act. But I see nothing that indicates that the law in other jurisdictions provides relevant context.

The meaning of s 14

[111] Seen in this light, by legislating to acquire or affirm Crown ownership of riverbeds according to a concept of the navigability of the river, Parliament was assuming control of those rivers which were or might frequently be used for purposes of travel and transport. The context and legislative history indicates that it was principally, if not solely, for this reason that all minerals within the bed were Crown owned under s 14(1). The approach, conveniently, avoided arguments of interference with private property rights in respect of such minerals which would have arisen if the problem had been dealt with by enacting statutory rights of navigation over such rivers. I do not agree with suggestions that this was merely a secondary objective.[185] The statute displaced the common law of England with a statutory regime which drew in particular on the recent developments in the common law of the United States, although defining "navigable rivers" in a way that suited the New Zealand Parliament's purposes.

[112] I have previously indicated that the reference in s 14(2) to sufficient width and depth favours a segmented approach to navigability of rivers under the 1903 statute rather than one that looks at the whole of the river. A segmented application

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183 At 95. This is unsurprising given that he was the only Judge in *Mueller* to hold that the presumption was not displaced.

184 See in particular *R v Joyce* (1905) 25 NZLR 78 (CA) at 87 per Stout CJ and at 89–90 per Williams J.

185 This was the view of Fair J in *Leighton*, above n 166, at 771.

of the legislation is also consistent with the approach previously taken by the common law to allocation of riverbed title, whereby each landowner owned the riverbed and soil in the segment adjacent to his or her property. It would have been natural for Parliament to wish questions of Crown title to the beds of navigable rivers to be determined by reference to conditions in particular sections of a river.[186] This supports the view that the Act was to be applied in that way as opposed to one by reference to the rather artificial concept of navigability of the whole river.

The 1925 Act

[113] Legislation in 1905 and 1908 re-enacted s 14 without material alteration. In 1925 Parliament rewrote the definition of "navigable river",[187] making two changes. First, the reference to "a river continuously or periodically of sufficient width and depth" became "a river of sufficient width and depth (whether at all times so or not)". I see no alteration of meaning in this amendment. The new language continued to address seasonable variations in width and depth of a river. If anything, the new version gives stronger support than that of 1903 to the view that the Act's approach is one concerning navigability of particular segments of a river. A test based on width and depth otherwise does not make sense.

[114] Rejecting the whole river approach in applying s 14, however, does not mean that the river in its context generally is not taken into account when ascertaining whether particular sections of it are navigable where small impediments or interruptions are present. The United States Supreme Court in *PPL Montana LLC* accepted that there is a de minimis exception to the segment by segment approach.[188] Therefore, the necessity of some portages on an otherwise navigable stretch of river may not defeat its navigability. Nevertheless, like the Chief Justice, Blanchard and Tipping JJ, I agree that where the impediments are such that they prevent a connection between two navigable stretches of a river, those segments are not navigable.[189]

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186 The Supreme Court of the United States made the same point in *PPL Montana LLC*, above n 173, at 16.

187 Coal-mines Act 1925, s 206(2).

188 At 17.

189 See [62]–[64] above.

[115] The second change was to alter the description of what was required for a river to be navigable from one of sufficient width and depth for the river to be:

> ... susceptible of actual or future beneficial use to the residents actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts.

to a test of sufficient width and depth for the river:

> to be used for the purpose of navigation by boats, barges, punts, or rafts.

[116] The new version was narrower than that of the 1903 Act, as the susceptibility of the river to beneficial use to the residents ceased to be a criterion for determining the sufficient width and depth question. The effect of this change is to prevent argument that casual use of a river by residents for their benefit suffices to make the river navigable. The United States developments provide no assistance for the view that actual or potential recreational use of itself could help establish that a river was navigable. Navigability was rather concerned with the river's usefulness for trade and travel and, unless recreational use had a bearing on that, it was not relevant.[190] I have earlier in this judgment expressed that view that, on a purposive reading of s 14, a qualifying beneficial use by residents had to be a use for commercial economic purposes or general purposes of transport. The new language, in confining the use to a purpose of navigation, conveys a similar idea and arguably a requirement of an economic type purpose.[191] So read, the 1925 amendment simplified the section without changing the meaning.[192]

The current legislation

[117] The 1925 provision was re-enacted without change in s 261 of the Coal Mines Act 1979. This was expressed in identical terms to its predecessor set out below:[193]

> **261 Right of Crown to bed of navigable river—**
>
> (1) For the purpose of this section—

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190 *PPL Montana LLC*, above n 173, at 21–22 and cases cited.
191 Compare *Leighton*, above n 166, at 755 per Hutchinson J.
192 As FB Adams J said in *Leighton*, above n 166, at 788.
193 Except that the order of the two subsections is reversed.

> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.
>
> (2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.
>
> (3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

Although the Coal Mines Act has now been repealed, the operation of s 261 is preserved by s 354 of the Resource Management Act 1991.

Application

[118] Applying the segmented approach to navigability as outlined above, I agree with the conclusion of the Chief Justice, Blanchard and Tipping JJ that the sections of the Waikato River adjoining the Pouakani lands were not capable of use for the purpose of navigation in 1903 or subsequently. While it is accepted that the river is navigable from the Maungatautari rapids to its mouth, the section of river in dispute contained rapids at Ongaroto, and gorges at Whakamaru and Maraetai. There is no documented evidence of travellers along this part of the river attempting portage and, in any event, Crown historian, Mr Parker accepted that, at least around the gorges, it would have been "very difficult".[194] I agree with the Chief Justice, Blanchard and Tipping JJ, that slight evidence of sporadic use of boats of the river in stretches adjoining the Pouakani lands above and below the Ongaroto Rapids does not mean that the river was susceptible of use for the purposes of substantial navigation as contemplated by the legislation.[195]

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194 See [84]–[85].
195 See [80]–[89].

WILLIAM YOUNG J

Overview of my approach

[119] For reasons which I will shortly explain, I see the appeal as turning on the definition of "navigable river" in s 14 of the Coal-mines Act Amendment Act 1903. It was in these terms:

> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts …

[120] I construe this definition in the following way:

(a) What is significant is the physical capacity of the river to be used for the purposes specified, an assessment which is to be made having regard to its "width and depth".

(b) Consistently with this, the reference to "actual or future beneficial use" means that the application of the definition is not controlled by the absence of actual relevant usage prior to, or at, 1903.

(c) The adjectival phrase "actual or future" applying to "residents" means that the application of the definition is not controlled by the 1903 pattern of riverbank development and settlement.

(d) The structure of the definition means that it was intended to encompass the use of rivers by "residents" on their banks for their private purposes (including for access) as well as the "public".

(e) The words "barges, punts, or rafts" in addition to "boats" show that the underlying concept of "navigation" was broad and extended to cross-river journeys.

[121] Applying this approach I conclude, albeit with reservations in relation to certain portions, that the Waikato River adjacent to the Pouakani blocks was navigable and thus became vested in the Crown under the 1903 Act.

[122] The views expressed in [120] largely rest on my construction of the statute. That statute, however, cannot sensibly be interpreted without regard to the background provided by *Mueller v The Taupiri Coal-Mines Ltd*,[196] the relevant legislative history and the common law as to navigable rivers.

[123] Accordingly, before I come to explain my interpretation of the definition of "navigable river" in s 14 in detail, I will explain why s 14 is the controlling provision, discuss the uncertainties associated with *Mueller*, and review the law as to navigable rivers.

Section 14 of the Coal-mines Act Amendment Act 1903 is the controlling provision

[124] Section 14 of the Coal-mines Act Amendment Act 1903 was re-enacted without essential change in s 3 of the Coal Mines Acts Compilation Act 1905 and the Coal Mines Act 1908. Section 206(2) of the Coal Mines Act 1925 amended the definition of "navigable river" in the respects which I am about to discuss and the recast provision was enacted as s 261(1) of the Coal Mines Act 1979. Its effect is preserved today by s 354(1)(c) of the Resource Management Act 1991.

[125] The first of the changes to the definition of "navigable river" made in the 1925 Act involved the phrase "continuously or periodically" being replaced by "whether at all times so or not". The words "continuously or periodically" in the 1903 Act are most easily construed in terms of time rather than space and for this reason I do not see this change as being significant. In this respect, I agree with the Chief Justice.[197]

[126] The other changes are associated with a simplification of language, with the original wording:

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196 *Mueller v The Taupiri Coal-Mines Ltd* (1900) 20 NZLR 89 (CA).

197 At [35] of the Chief Justice's judgment.

> to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation ... .

being replaced with:

> to be used for the purpose of navigation ... .

[127] I can see no reason why the latter wording cannot be treated as meaning exactly the same as the former wording. Indeed it would be quite extraordinary if the legislature intended to change the meaning of the vesting provisions. As to this:

(a) The words "to be susceptible of actual or future beneficial use" were replaced by "to be used". I see no change of substance in this respect. Under both forms of wording, what matters is the capacity of the river, given its "width and depth", to admit of beneficial use.

(b) The explicit reference to riparian residents was deleted as was the reference to the public. It is fair to say that I see the reference to "residents" as being a significant part of the s 14 definition. But I do not consider that the subsequent deletion of this reference is of any moment as the 1925 wording was plainly intended to be to the same effect as the original definition.

(c) The reference to "future" use was deleted. Again, as is obvious, I do not see this as significant.

[128] Although I see the 1925 (and subsequent) provisions as having the same meaning as s 14 of the 1903 Act, I prefer to approach the case on the basis of the language of s 14 which I see as most likely to capture all the nuances associated with the purposes of the 1903 legislation.

Mueller – what it decided and what it left unresolved

[129] It is clear that s 14 was a legislative response to *Mueller*.[198] That judgment turned on a very fact-specific consideration of the Waikato River downstream of Cambridge and the circumstances obtaining at the time of the original grants of title to the land which adjoins the river. Although the case was determined in favour of the Crown, the judgments left a number of issues unresolved.

[130] The usque ad medium filum aquae rule was not an obvious candidate for adoption in newly established colonies whether in Australasia or North America. In the United Kingdom,[199] the common law had been in place for centuries. Where public use of rivers and streams was practicable and useful, there were likely to be associated rights established by long usage, as I will shortly discuss. Public rights were also sometimes secured by statute,[200] as well as the strong prima facie rule that the beds of all tidal navigable rivers were vested in the Crown and available for use by the public for navigation and fishing.[201] The predominantly gentle topography of much of the United Kingdom and its very long established network of roads (later supplemented in the eighteenth and nineteenth centuries by canals and railways) were in marked contrast to the circumstances which obtained in Australasia and North America when first settled by Europeans. It is unsurprising therefore that courts in some North American jurisdictions rejected the wholesale application of the rule.[202]

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198 *Mueller*, above n 196.

199 I say United Kingdom advisedly because the law of Scotland in this regard is the same as the common law of England and Wales and of Ireland. As to this see, *Orr Ewing v Colquhoun* (1877) 2 AC 839 (HL) at 854 and following per Lord Blackburn and *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30 at 147 per Lord Hailsham.

200 See Glenn MacGrady "The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that don't Hold Water" (1975) 3 Fla St U L Rev 511 at 571–572.

201 See for example *Fitzhardinge (Lord) v Purcell* [1908] 2 Ch 139 at 166–167, William Howarth and Simon Jackson *Wisdom's Law of Watercourses* (6th ed, Sweet & Maxwell, London, 2011) at [1-31] and fn 233 below.

202 As discussed by Stout CJ in *Mueller*, above n 196, at 95 after citing James Kent *Commentaries on American Law* (14th ed, Little, Brown & Co, Boston, 1896) as correctly laying down the usque ad medium filum aquae rule. Kent's *Commentaries* at 430–431 notes that certain States had rejected or deemed inapplicable the common law ad filum medium aquae principle, for example Pennsylvania in relation to its "great inland rivers" (*Carson v Blazer* 2 Binney 475 (PA 1810) and South Carolina (*Cates v Wadlington* 1 McCord 580 (SC 1822)).

[131] All of the five judges who sat in *Mueller* accepted that the usque ad medium filum aquae rule had been received into New Zealand law.[203] This is because they considered that they were bound by *Lord v The Commissioners for the City of Sydney*, a judgment of the Privy Council where the rule was applied to a stream in New South Wales.[204] I have reservations as to whether they were right to do so:

(a) In *Lord*, counsel for the respondents (who was resisting the application of the rule) had not contended that the rule had no application in New South Wales and the judgment of the Privy Council simply assumed that the rule applied.[205]

(b) Even if *Lord* was authority for the proposition that the usque ad medium filum aquae rule was generally applicable to British colonies, the particular circumstances of New Zealand provided a reasonable basis for concluding that it was not applicable in New Zealand, at least in relation to rivers which were significant to Maori. This consideration is developed at length in the report of the Waitangi Tribunal into the Whanganui River and particularly in its discussion of the convoluted litigation over the riverbed which took place between the late 1930s and the early 1960s.[206]

These reservations are of no direct materiality given that the applicability of the rule to New Zealand must be taken to have been established by *Mueller*.[207] But, as will become apparent, I think that dissatisfaction with this applicability affected the way in which *Mueller* was resolved.

[132] Although the Judges in the majority all concluded that the bed of the relevant portion of the Waikato River was owned by the Crown, they reached this result by different routes. Williams J (with whom Conolly J agreed) closely examined the very particular circumstances associated with the grants in question and held that

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203 *Mueller*, above n 196, at 95–96 per Stout CJ, 104–105 per Williams J, 113–114 per Edwards J and 125 per Martin J.

204 *Lord v The Commissioners for the City of Sydney* (1859) 12 Moo PC 473, 14 ER 991 (PC).

205 At 497–498.

206 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999). The history of the litigation is discussed in ch 7.

207 *Mueller*, above n 196.

these circumstances displaced the operation of the rule.[208] The other two Judges (Edwards and Martin JJ) accepted that the rule had initially applied in New Zealand but considered that it had been overtaken by subsequent legislative developments. Edwards J found that the rule had no applicability to Crown grants made after the enactment of the Highways and Watercourses Diversion Act 1858.[209] Martin J appears to have taken the same view, albeit that he also relied on the Marine Act 1866.[210] Stout CJ specifically addressed the possible significance of the Highways and Watercourses Diversion Act 1858 and concluded that it did not displace the rule.[211] Williams and Conolly JJ did not express a view on the approach favoured by Edwards and Martin JJ.

[133] All of this leaves me with the impression that Williams, Conolly, Edwards and Martin JJ were uncomfortable with the application of the rule in New Zealand, but rather than confront *Lord* directly, preferred to address the case by reference either to the particular factual circumstances associated with the Waikato River (which was the approach of Williams and Conolly JJ) or the effect of the Highways and Watercourses Diversion Act 1858 and the Marine Act 1866 (which was the approach of Edwards and Martin JJ). These confession and avoidance techniques sufficed to deal with the dispute at hand. But the diversity of approach meant that the case was of little precedential value for the future.

[134] In the course of argument in *Mueller*, counsel for the Crown maintained that in construing the grants, the Court should have regard to the fact that the river was being used as a highway. His contention was that if the bed of the river was vested in the adjoining owners, members of the public would not be able to use the river for navigation unless such a right had been obtained by user.[212] Opposing counsel answered this point by arguing that if there were public rights of navigation at the time the grants were made, the titles obtained by the grantees would continue to be subject to such rights. So he maintained that Crown ownership of the river bed was

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208 At 106–110.
209 At 114 and 117.
210 At 126–127.
211 At 99–100.
212 At 91.

not fundamental to public rights of navigation.[213] Although I will discuss the relevant law in more detail later, this aspect of the argument in *Mueller* requires a little explanation at this point.

[135] Where there was a history of long public usage, the common law recognised rights of navigation in non-tidal rivers. Such rivers were "highways by water" as Hale put it.[214] The possible application of this concept to the Waikato River was discussed in the judgments in *Mueller* but in an inconclusive way.

[136] Edwards J was of the view that such a right could not have been established while the land (including the river bed) remained in customary Maori ownership (which was until shortly before the grants were made).[215] Accordingly, at the time those grants were made, there could have been no public right of way to which they were subject. Construing the grants as extending to the bed of the river would thus have been inconsistent with any public right of passage along or across the river.

[137] Stout CJ concluded that the river was a public highway at the time of the grants but did not directly engage with the reasoning of Edwards J. It would appear from his reasons that he considered that Maori usage of the river was relevant to its status as a highway.[216]

[138] Williams J acknowledged the possible significance of the history of Maori ownership and was inclined to agree with Edwards J that at the time of confiscation, the river was not a public highway. He, however, was of the view that the river was a "highway of necessity" on the basis that the Crown, by granting land in a district which was otherwise inaccessible, could be taken to have dedicated the river as a highway.[217]

[139] The judgment of Martin J did not directly engage with this issue.

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213 At 92–93.

214 See Hale "De Jure Maris" in Stuart A Moore *A History of the Foreshore and the Law Relating Thereto* (3rd ed, Stevens & Haynes Law Publishers, London, 1888) at 374. Not all the incidents of a "highway by water" are the same as those of a highway on land, see fn 236 and [155] below.

215 *Mueller*, above n 196, at 121–124.

216 At 98.

217 At 112–113.

[140] The judgments of Edwards and Williams JJ reviewed the law as to the ownership of roads in New Zealand.[218] Williams J noted that s 80 of the Public Works Act 1876 had enacted "that all roads are hereby declared to be and are hereby vested in Her Majesty". As will become apparent, I suspect that the drafting of s 14 of the 1903 Act may owe something to this section. And in this regard, it is significant that Williams J commented on this and associated sections (which permitted stopped roads to be sold to adjoining neighbours):[219]

> These enactments must be considered to be declaratory of what was considered by the Legislature to be the existing law – viz, that the Crown had never parted with the highway. If that were not so the Legislature would have confiscated land belonging to the adjoining owners without compensation, and then, if it were found that the land was not wanted for public purposes, have made the owners pay the full value of it to get it back again.

[141] Drawing the threads of all of this together:

(a) the Court accepted that the usque ad medium filum aquae rule was part of the law of New Zealand;

(b) with the exception of Stout CJ all judges considered that the rule had been displaced in relation to the Waikato River;

(c) the conclusion of Williams and Conolly JJ depended on the very particular facts associated with the grants of land in question;

(d) if Edwards J was right in relation to the significance of Maori customary ownership of land (as Williams J was inclined to think he was), use of a river as a highway while the adjoining land was in customary ownership would not have sufficed to establish public rights of navigation; and

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218 At 115–117 per Edwards J and at 110–112 per Williams J.

219 At 112.

(e) if Edwards and Martin JJ were right, the usque ad medium filum aquae rule did not apply to grants of land made after 1858.[220]

Parliamentary history of s 14 of the Coal-mines Act Amendment Act 1903

[142] Hansard provides only limited assistance as to the parliamentary processes associated with the enactment of s 14. I have however been able to supplement what appears in Hansard by reference to contemporary newspaper coverage.[221] Putting it all together, as best I can, what happened appears to be as follows.

[143] On 12 November 1903 while the Coal-mines Bill (No 2) was going through its Committee stages, the Minister of Mines moved that a clause be added to this effect:[222]

> It is hereby declared that all coal and lignite under any river exceeding thirty-three feet in width is vested in His Majesty.

This attracted objections to which the Premier, Mr Richard Seddon, responded by asserting that it would not interfere with existing rights.[223] The clause was carried 35 votes to 27.[224]

[144] At this point, according to *The Evening Post*:[225]

> The Premier then moved to amend the clause so as to make it read that all such rivers navigable by small boats or steamers are declared to be highways, and the coal or lignite under such rivers are vested in His Majesty.

[145] According to *The Evening Post* account:[226]

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220 As it turned out, they were not right, as a majority of the Court of Appeal was soon to hold in *R v Joyce* (1905) 25 NZLR 78. The outcome of *R v Joyce*, however, could not have been predicted with confidence when s 14 was enacted.

221 As far as I am aware, the New Zealand authorities as to what may be legitimately looked at as part of an exercise in statutory interpretation do not exclude such sources; see JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at ch 9.

222 (12 November 1903) 127 NZPD 511.

223 "Parliament – House of Representatives – Mining Bills" *The Evening Post* (Wellington, 13 November 1903) at 2.

224 (12 November 1903) 127 NZPD 511.

225 "Parliament – House of Representatives – Mining Bills" *The Evening Post* (Wellington, 13 November 1903) at 2.

226 At 2.

> Exception was taken to this, and the Premier substituted for it another amendment to provide that in respect to all rivers exceeding 33 ft in width that can be navigated by small boats or steamers, all coal or lignite under such rivers is vested in His Majesty.
>
> The Leader of the Opposition characterised this as an iniquitous proposal, as there was no provision to protect existing rights. He moved to insert in the clause the words "subject to existing rights".

[146] This amendment was carried by 34 votes to 27. Again according to *The Evening Post*, what followed was this:[227]

> Mr McNab urged that by the inclusion of these words the clause was now useless. No further rights would be created in future, and existing rights existed outside the clause.
>
> The Premier said the clause would lead people with supposed rights to go on with litigation, and thereby cause the colony a severe loss.

This resulted in, what is referred to in Hansard as:[228]

> New clause as amended negatived.

[147] An account in the *Otago Witness* discussed the proceedings in this way:[229]

> Members, especially Opposition members, strenuously opposed the clause on the ground that it interfered with the existing rights of landowners, and though there was no disposition to challenge the principle that for the future the Crown should retain the right to coal and lignite under navigable rivers, a strong effort was made to prevent confiscation of existing rights. The Premier declared that there was no intention to interfere with existing rights, and he turned his clause upside down and inside out, with the object, as he put it, of meeting the views of the Opposition, but he carefully avoided the insertion of any phrase which would conserve existing rights.
>
> The leader of the Opposition moved to insert the words "subject to existing rights," and Mr Guinness suggested the addition of the words, "provided that this action shall not apply to or affect the riparian rights of the owners of land alienated before the coming into operation of the act". The Premier would not accept either, but on a division the motion of the leader of the Opposition was carried by 34 votes to 27, although at a previous stage there had been a majority in favour of the clause as it stood in the bill. The Premier protested against the result, and said it would be better to drop the clause altogether, and as this seemed to meet the views of all parties the objectionable clause was dropped out of the bill.

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227 At 2.

228 (12 November 1903) 127 NZPD 512.

229 "N.Z Parliament – Thursday November 12 – Riparian Rights" *Otago Witness* (Dunedin, 2 December 1903) at 12.

[148] When the Coal-mines Bill (No 2) came on for a third reading on 17 November 1903, what became s 14 was proposed as a new clause on a supplementary order paper. The Premier moved that the Bill be recommitted for the purpose of considering this new clause and he is reported in Hansard as saying:[230]

> The member for Franklin [Mr Massey, the Leader of the Opposition] and other members wished to conserve existing rights. The Government did not wish in the slightest degree to disturb existing rights, but there was a difficulty as to how they should avoid that. A new clause had been drafted which he thought would meet the difficulty.

Mr Massey is recorded as saying that he:[231]

> … thought that the clause now proposed would remove the difficulty, and, he was sure, would be supported by the House.

[149] So the Bill was recommitted, the new clause was inserted and the Bill was reported back to the House where it was read for the third time.[232]

[150] It is clear that s 14 represented a compromise. The drafting is reasonably sophisticated; distinctly more so than the drafting of its precursors. The enactment of s 14 was presumably preceded by an analysis of the law as to rights of navigation on rivers and the way in which that law might be practically applied in New Zealand – an analysis would presumably have been shared with those of both sides of the debate and would have influenced the form which s 14 eventually took. Given this, I think it is worthwhile discussing the law as to navigable tidal and non-tidal rivers.

The law as to navigable tidal rivers and "highways by water"

[151] The general position at common law was that the river bed of a river which was both "navigable in fact" and affected by the ebb and flow of the tide was vested in the Crown and the public had the right to use the river for both navigation and fishing.[233] I note in passing that nearly 200 years ago the use by pleasure craft of

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230 (17 November 1903) 127 NZPD 681.

231 At 681.

232 At 681.

233 See *Murphy v Ryan* (1868) 2 IR 2 CL 143 (Comm Pleas) at 149–154, subsequently followed in England in *Ilchester v Rashleigh* (1889) 61 LT 477 (Ch) at 479. The development of this rule is

such a river was seen as material to its navigable character.[234] And in the 1871 Scottish case *MacBraire v Mather*,[235] the navigable status of the lower (and tidal) reaches of the Tweed River seems to have been established by evidence as to usage which was confined to pleasure boats.

[152] Of rather more significance in the present context is the law as to when a non-tidal river might be in the nature of a public highway[236] and the character of the associated public rights.

[153] The navigability of rivers often depended upon physical improvements such as cuttings, stanches and locks. Although Hale refers in general terms to the overarching supervisory powers of the Crown in relation to such improvements,[237] in practice they were provided privately and funded by tolls on commercial traffic. Rights to do so were granted by royal charter. But by the late nineteenth century, with improvements in land transport and particularly the development of railways, commercial traffic on rivers was diminishing with the result that those who owned and operated locks were facing diminution in toll income.[238] As a result, continued operation (and perhaps expansion) of such improvements to navigation required public control, which was often provided for under statutory conservancy systems.[239]

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discussed in detail in MacGrady, above n 200, at 569–587. See also the discussion and authorities cited in S Reginald Hobday *Coulson & Forbes on The Law of Waters (Sea, Tidal, and Inland) and Land Drainage* (6th ed, Sweet & Maxwell, London, 1952) at 102–103.

234 See *Miles v Rose* (1814) 5 Taunt 705, 128 ER 868 (Comm Pleas).

235 *Macbraire v Mather* (1871) 9 M 913 at 918 where the Judge observed, "It has been proved that the Tweed is a tidal river at the locality in question, and as far as Norham Castle, being three miles higher up. It has also been proved that the river up to and beyond the locality in question is used by the public, and that pleasure-boats, with parties on board, are in the frequent practice, and in considerable numbers, of sailing up and down the river as matter of right, without let or hindrance." This was in support of the conclusion that this portion of the Tweed was a "public navigable river" of which the bed belonged to the Crown. There was no reference in the judgment to any other boats using this section of the river.

236 Public rights of navigation in respect of non-tidal rivers are usually said to depend upon the river being a public highway, following Hale's phrase, "highway by water" in Hale, above n 214. There are, however, differences between a "river highway" and an ordinary highway over land. As to this, reference can usefully be made to *Attorney-General ex rel Yorkshire Derwent Trust Ltd v Brotherton* [1992] 1 AC 425 (HL) at 434 per Lord Oliver and at 444–446 per Lord Jauncey. See also [155] below.

237 Hale, above n 214, at ch 2.

238 This problem is apparent from the judgments of the High Court and Court of Appeal in *Attorney-General v Simpson* [1901] 2 Ch 671. The judgment of the Court of Appeal was reversed by the House of Lords in *Simpson v Attorney-General* [1904] AC 476.

239 This is mentioned in the speech of Lord MacNaghten in *Simpson v Attorney-General* [1904] AC 476 (HL) at 495–496 where he observed, "If this navigation is worth maintaining ... it seems tolerably plain that statutory powers must be obtained and the navigation placed under

As commercial traffic on rivers diminished, recreational use increased. This was associated with technological developments (such as the emergence of motor launches) and changes in social conditions (in particular increased leisure time). The common law rules as to navigability on non-tidal rivers had not been developed in the context of recreational use.[240]

[154] If a river was a highway, it could, presumably, be used for pleasure boating.[241] But could a history of messing about in boats on a non-tidal river turn it into a highway? This was in issue in *Bourke v Davis*,[242] which concerned the river Mole, a non-tidal tributary which opens into the Thames near Hampton Court, and its use for recreational boating by the defendant or more particularly, those to whom he hired out small boats. At the time of the litigation it was much used for this purpose and it was accepted by the plaintiff that the riparian owners had associated private rights of way over the river.[243] The Court considered that the defendant's claim, which was made as a member of the public, had to be treated as if it were a claim to establish a right of highway on dry land.[244] In the end, the case was resolved against the defendant because the river was not used as a link between public places.[245] I note in passing that such linkage is no longer seen as fundamental.[246]

[155] The broader question whether recreational use of a non-tidal river could give rise to public rights of navigation (as opposed to being permitted where a river was

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the management of a public body." Although this observation (which was in August 1904) came some nine months after the enactment of s 14, the underlying sense of it was apparent from the judgments of the lower courts. The conservancy of navigation is discussed in Hobday, above n 233, at 552–572. According to *Coulson*, the conservancy of nearly all English rivers had come to be placed in the hands of corporate bodies constituted by statute, exercising functions and duties akin to those originally devolving on the commissioners of sewers. Under these Acts, conservators were generally considered guardians of navigation and protectors of riverbeds and soils for the purposes of navigation, obligations which were not imposed at common law independent of statute (citing *Simpson v Attorney-General*, above n 238) see 552–554, 557 and 559–560.

240 A point which is illustrated by *Simpson*, above n 238.

241 Although this seems to be a reasonably obvious proposition, I am unaware of express authority to support it prior to *Wills' Trustees*, above n 199, where it was argued that public navigability rights established by the practice of floating rafts of logs down the River Spey in the 18th and 19th centuries could not be availed of in the 1970s for the purposes of recreational canoeing. The argument was dismissed.

242 *Bourke v Davis* (1889) 44 Ch D 110 (Ch).

243 At 112.

244 At 120, referring to *Orr Ewing*, above n 199.

245 At 121. It is a usual characteristic of a public highway that it provides such a link; see *Campbell v Lang* (1853) 1 Macq 451.

246 This point emerges from *Wills' Trustees*, above n 199.

otherwise navigable) had not, to my knowledge, otherwise been addressed specifically as at 1903. It did, however, arise in the comparatively recent Scottish case, *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd*,[247] where the primary issue was whether previous use of the River Spey for the purpose of floating logs and rafts of logs for commercial purposes (which stopped around 1885) created public rights of navigation which encompassed the use of the river in the 1970s by canoes for recreational purposes. There was, however, a subsidiary question as to whether recreational use of the river by canoes would be enough to create rights of navigation.[248] All the Scottish judges[249] who addressed the issue and a majority of the House of Lords[250] answered the question in the affirmative. It was put this way by Lord Fraser in the House of Lords:[251]

> Mr Jauncey for the appellants argued that the only use that could establish a public right of navigation was use for commercial purposes such as transporting goods, and that use for purposes of mere recreation such as canoeing would not do. But I see no reason why actual use for recreation should not be as effective to prove navigability as use for transporting goods. The material point is not the purpose of the navigation but the fact of the capacity of the water for use in navigation ... .

For the sake of completeness I note that Lord Fraser went on to say:[252]

> In any event I do not consider that the respondents' canoeing has been proved to be merely recreational. They carry on their canoeing activities as a business and, for aught that we can tell, some of their pupils may be servicemen or others who are learning to canoe for professional reasons and not merely as a recreation.

[156] In the reasons prepared by the Chief Justice at [75], there is the assertion that:

> Recreational use could be *evidence* of continued exercise of established public rights of navigation and could be evidence of the capacity of the river to support navigation for the purposes of transport and trade.

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247 *Wills' Trustees*, above n 199.

248 The argument that such use would create rights of navigation was advanced to cover the contingency that the courts might hold that the rafting in the eighteenth and nineteenth centuries could not be relied on by Cairngorm Canoeing and Sailing School Ltd because either (a) the use had been discontinued for nearly 100 years or (b) was different from the activities carried on by the company.

249 Lord Maxwell, at first instance in the Court of Session at 57 and 58 and in the Inner House, the Lord President (Lord Emslie) at 86–87 (subject to qualifications as to the user's right of access to the river upstream), Lord Cameron at 107 and Lord Johnston at 109.

250 Lords Wilberforce and Salmon agreed with Lord Fraser but on this point Lord Hailsham disagreed at 148. Viscount Dilhorne did not expressly address the issue.

251 At 166.

252 At 166.

(Citations omitted)

The implication is that recreational use is not sufficient at common law to establish public rights of navigation where navigation for "transport and trade" is not practicable. As is apparent, I disagree. The passage from the speech of Lord Fraser in *Wills' Trustees*, which I have just cited (which was supported by two other judges) is not just an indication, but an assertion, that public rights of navigation can be established by recreational use. This was in the context of a case where, if the evidence of eighteenth and nineteenth century rafting of timber was put to one side (as it had to be for the purpose of this argument),[253] the only use of the river which was postulated was recreational. As well, there are the authorities earlier discussed[254] as to the significance of recreational usage in establishing the navigability of tidal rivers.

[157] To anticipate a point which I will discuss shortly, the River Spey is not dissimilar to how the Waikato River would now be had it not been modified for electricity generation, albeit with rather less white water. The Spey is currently used for adventure recreational activities involving canoeing and white water rafting, presumably in reliance on the House of Lords decision which I have been discussing. The practicability of using the Waikato River for similar purposes was established by the Vause expedition discussed by the Chief Justice.[255]

[158] I see *Bourke v Davis*[256] (and more importantly the supposed principle on which it was based, namely that a highway must connect two public places) as being of potential significance and inconvenience in relation to non-tidal New Zealand rivers. On the basis of this supposed principle, the use of a river by residents for the purposes of access to their properties, public places or the properties of their neighbours or more generally for recreation would not be sufficient to result in the river becoming a highway. And because of New Zealand's then short legal history (that is, as at 1903), private rights of way might be hard to establish. As will become

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253 See above n 248.
254 See [151] above.
255 At [87] of the Chief Justice's judgment.
256 *Bourke*, above n 242.

apparent, I think that this provides a possible explanation as to why s 14 referred to "actual or future beneficial use to the residents, actual or future, on its banks".

[159] The use of a river by the public for cross-river journeys (providing these were from one public place to another) could be sufficient in itself to result in that portion of the river becoming a highway.[257] Also relevant to this is the reality that the common law concept of a "highway by water" was not confined to rivers but also extended to lakes[258] and the Norfolk Broads.[259] In light of this, there could be no basis for concluding that "highways by water" could be established only by navigation up and down rivers.

[160] A New Zealand lawyer (or member of Parliament) looking at the relevant law as it was in 1903 would have been left with a number of other impressions:

(a) The rights of landowners and the public in relation to rivers in the United Kingdom had been adjusted in ways which were firmly grounded in the relevant legal, political and economic histories of the relevant jurisdictions (England and Wales, Ireland and Scotland) and their topographies.

(b) By the late nineteenth and early twentieth centuries, the common law principles were coming under pressure as a result of economic, social and technological changes which were resulting in changing patterns of river use and increasing public control.

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257 See *Hammerton v Earl of Dysart* [1916] 1 AC 57 (HL) at 79 per Lord Parker: "A ferry may thus be regarded as a link between two highways on either side of the water, or as part of a continuous highway crossing the water". Reference can also be made to Howarth and Jackson, above n 201, at [7–01] and [7–02].

258 *Marshall v The Ulleswater Steam Navigation Co* (1871) LR 7 QB 166 (QB) at 172. See also *Bristow v Cormican* (1878) 3 AC 641 (HL) at 651 which concerned fishing in Lough Neagh in Ireland in respect of which it was common ground that the Lough Neagh was a publicly navigable lake. See the later case on the same issue, *Johnston v O'Neill* [1911] AC 552 (HL) at 572 per Lord Ashbourne. In *Bloomfield v Johnston* (1867) IR 8 CL 68, which concerned fishing in Lough Erne, the same assumption was made. In these cases there was no resolution of the issue of whether the usque ad medium filum aquae rule applied to lakes.

259 *Micklethwait v Vincent* (1892) 67 LT 225 (Ch) which was primarily addressed to rights to fish and shoot but where Romer J concluded at 230 that the public right of way over the broad in issue was not confined to the channel.

(c) Disputes over public rights of navigation in the United Kingdom could be hugely expensive to resolve, perhaps involving the tracing of titles back for hundreds of years[260] and intricate analysis of centuries of local history.[261] Conceivably, broadly similar exercises might have been required in New Zealand (despite the lack of written records), at least on the approach of Stout CJ in *Mueller* which left open the possibility that public rights of navigation on New Zealand rivers might depend on the way in which they had been used by Maori. At the very least, as *Mueller* showed, such disputes would require intense analysis of the economic, political and possibly military circumstances associated with the original land grants.

(d) More generally, the associated legal concepts were not easy to apply in New Zealand because of its short legal history, particular topography and social and economic conditions.

Analysis of s 14 of the Coal-mines Act Amendment Act 1903

The purpose of s 14

[161] There is nothing in the legislative history to suggest a concern about anything other than coal and lignite on the one hand and rights of navigation on the other. In other words, the legislative history thus suggests that ambitions about the development of hydro-electricity were not material to the legislation as was suggested by the Court of Appeal.[262]

[162] Prior to the enactment of s 14, the owners of land adjoining navigable rivers had potential claims to ownership of the river bed. If ownership was established this might be of value to the owner in two relevant respects:

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260 For example, in *Smith v Andrews* [1891] 2 Ch 678 (Ch) at 693, the plaintiff traced her title back more than 700 years. *Bristow*, above n 258 and *Simpson*, above n 238, also involved extensive consideration of ancient titles and an associated examination of local political and economic history. In *Bristow*, above n 258, the plaintiffs had only traced their title back to 1660 which, as it turns out, was not far enough. So when the same issue was relitigated some decades later, the plaintiffs went even further back; see *Johnston*, above n 258.

261 As in *Simpson*, above n 238.

262 Compare *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [45]–[62].

(a) subject to any specific legislation to the contrary, the owner would be entitled to the ownership of minerals under the river bed, shingle in the bed and perhaps fishing rights in that section of the river only; and

(b) such owners would also have had the right to control (and restrict) access to and on the river, a right which would be subject to arguments about whether the river was a public highway and possible private rights of way vested in other riparian owners.

But for most riparian owners, title to a portion of the river bed would be of no value. And where ownership might be of economic value, a riparian owner could expect a claim to ownership to be challenged resulting in uncertain litigation. Importantly, as at November 1903, when the proposed legislation was under consideration, there could be no certainty as to which of the approaches proposed in *Mueller*[263] would prevail.

[163] The establishment of public ownership of the beds of navigable rivers was potentially of distinct benefit to riparian owners. Such an owner, more than other members of the public, could be expected to wish to use the river for the purposes of fishing, other recreation and travel (which might be as limited as crossing to the other side of the river or visiting the properties of others in the neighbourhood). And such owners could also expect to benefit from improvements in transportation which would be facilitated by public ownership and likely to be hindered by a patchwork pattern of private ownership.

[164] The reality is that the usque ad medium filum aquae rule had never been a good fit for the circumstances of New Zealand, the history of customary Maori ownership, the topography and the way in which the country came to be developed in the second half of the nineteenth century. This was recognised by the Court of Appeal in *Mueller* but the different ways around the rule adopted by the four judges in the majority, while resolving the dispute at hand, did not provide a clear way forward, which is why the legislature had to intervene.

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263 *Mueller*, above n 196.

The statutory text

[165] Before turning to an analysis of s 14, it is – despite the partial repetition – convenient to set out the section in full:

> **14. Bed of river deemed vested in Crown**
>
> (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.
>
> (2) For the purpose of this section —
>
> "Bed" means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:
>
> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts …

The words, "Save where the bed of a navigable river is or has been granted by the Crown"

[166] Counsel for the appellants contended that this proviso extends to river beds which, as at 1903, were owned by riparian owners under the usque ad medium filum aquae rule. This proposition finds some support in the authorities,[264] but I think it is clear that the proviso applies only if the relevant grant expressly encompasses the river bed.[265] If the appellants' argument were correct, s 14 would have had practically no effect. On this point I agree with the Chief Justice.[266]

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264 See the remarks of FB Adams J in *Attorney-General, ex rel Hutt River Board, and Hutt River Board v Leighton* [1955] NZLR 750 (CA) at 782 and 787–791 and *Tait-Jamieson v G C Smith Metal Contractors Ltd* [1984] 2 NZLR 513 (HC) at 515–516.

265 See *R v Morison* [1950] NZLR 247 (SC) at 267 and the remarks of Fair J in *Leighton*, above n 264, at 772–773.

266 At [51] of the Chief Justice's judgment.

The words, "the bed of [a navigable] river shall remain and shall be deemed to have always been vested in the Crown"

[167] This is declaratory language and I suspect that whoever came up with it was aware of the remarks made by Williams J in *Mueller* about ownership of roads to which I have already referred.[267] Given this language and context, it is obvious the legislature did not intend s 14 to be construed as confiscatory and thus read down.

The words, "a river continuously or periodically of sufficient width and depth"

[168] This reference to the width and depth of the river indicates strongly the view that it is the practical ability to use a boat in the river, assessed by reference to the physical state of the river (rather than the existing pattern of development on its banks), which is important rather than the purposes for which a boat might be used. As well, and as already noted, I agree that this language was intended to encompass temporal rather than spatial considerations.[268]

The words, "to be susceptible of actual or future beneficial use"

[169] This makes it clear that contemporary (as at 1903) use of a river was not a prerequisite to Crown ownership of the river bed.

The words, "to the residents, actual or future, on its banks"

[170] The approach of the Chief Justice is to construe s 14 as if it read:

> "Navigable river" means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to:
>
> (a) the residents, actual or future, on its banks, or
>
> (b) the public,
>
> for the purposes of navigation by boats, barges, punts or rafts …

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267 See [140] above.
268 See [125] above.

But if effect is to be given to all the words used in s 14 and the syntax, it might be thought that the section should be construed as applying to rivers which were:

> continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use:-
>
> (a) *to* the residents, actual or future, on its banks; or
>
> (b) *to* the public for the purposes of navigation by boats, barges, punts or rafts
>
> (Emphasis added)

This gives effect to the repeated use of the word "to" preceding "the residents" and "the public". Otherwise one of them is surplusage. As well, on the first interpretation, it might be thought that the words, "the residents, actual or future, on its banks" are redundant as such residents are necessarily just a subset of "the public".

[171] Given the context, namely that the language in question forms part of the definition of "navigable river", the "actual or future beneficial use" contemplated for "residents" must involve the use of boats (as it does for the public). So there is little, if any, actual difference in meaning between the two interpretations just proffered. What then is the reason for the slightly awkward language and syntax?

[172] As will already be apparent, I think that the reference to "residents" may have been intended to address the legal principles exemplified by *Bourke v Davis*.[269] Since the most beneficial use of a river for a riparian owner would usually include obtaining access to and from, say the other side of the river, some other public place or from nearby properties, s 14 must have been intended to facilitate such access even though, in the absence of s 14, an argument based on the law of highways would not have been sustainable, as the law was understood to be in 1903. Given this legal context, I think that the reference to "residents" was to make it clear that a potential for usage of a private character – for the benefit of residents and not necessarily the public – was sufficient to engage the definition. I see the aspects of the language and structure of the section to which I have drawn attention as intended to emphasise this point.

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269 *Bourke*, above n 242.

The words, "susceptible of ... use ... for the purpose of navigation by boats, barges, punts, or rafts"

[173] The scope of s 14 was not confined to rivers which were already public highways. This is clear from the words "susceptible of actual or future beneficial use". But given the context provided by *Mueller*[270] and the parliamentary history I have discussed,[271] the legislature must have intended s 14 to capture any rivers (or portions of rivers) which were already, or might in the future, be used as public highways. As I have explained, at common law the use of small boats, including for trips across as well as up and down a river, could result in the relevant portion of a the river becoming a public highway.[272] It follows that, to use the language of Hale, a "highway by water" could go across a river. It seems to me to follow from this reason alone that the concept of "navigation by boats" invoked by the legislature encompassed navigation for the purpose of river-crossing.

[174] The conclusion just reached is reinforced by the very particular list which follows the word "navigation". Breaking down the language used into its component parts shows that the legislature envisaged "navigation by boats", "navigation by barges", "navigation by punts" and "navigation by rafts". "Navigation" implies human control over the direction of the vessel concerned. There is no difficulty with "navigation by boats" as navigation necessarily encompasses the use of boats. In contradistinction, what the legislature envisaged by "navigation" by "barges', "punts" and "rafts" warrants some discussion. As will become apparent, I think that the references to "barges", "punts" and "rafts" are included because the legislature envisaged the use of such craft in respects which might not be within the ordinary meaning of "navigation by boats". It is the potential for such use which is the common feature of the particular craft referred to.

[175] Although a wide range of vessels may be described as "barges", I see "barges" in s 14 as referring to vessels which are not self-propelled and cannot be steered. A self-propelled and steerable barge is so obviously a boat as not to warrant separate identification in s 14 and likewise the use of such a barge is obviously

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270 *Mueller*, above n 196.
271 See [142]–[150] above.
272 See [159] above.

encompassed by the expression "navigation by boats". In contradistinction, the concept of "navigation" by a non-self-propelled and non-steerable barge is not entirely natural. But such vessels are often used on rivers. So it is understandable the legislature, for the avoidance of doubt, made specific reference to barges.

[176] The word "punt" also carries a range of meanings. It most commonly denotes a narrow flat-bottomed boat of shallow draft with a square bow and stern which is propelled by a pole. Pole-propelled punts are used for general recreation (of a "messing-about-in-boats" kind) as well as for fishing and the despatch of water fowl. A number of the late nineteenth century cases refer to "punts" in contexts which make it clear that vessels of this kind were in mind.[273] If the reference in s 14 is to this sort of punt, it necessarily means that the concept of "navigable river" is very broad indeed, encompassing very shallow water used for recreational purposes. For reasons I will explain, however, I consider that the intended reference to "punts" in s 14 was to vessels of a different character.

[177] Vessels propelled by poles can also be used to transport people and goods and sometimes were so used in early New Zealand. I do not, however, see "punts" in s 14 as referring to such vessels and usage. In part this is because the use of such vessels for transportation is so obviously within the concept of "navigation by boats" as not to warrant separate mention in s 14. As well, punts used for transportation purposes were distinctly less significant in the nineteenth and twentieth centuries[274] than the punts which I am about to describe and which I am sure must have been in the mind of the legislature in 1903.

[178] These punts operated as ferries. They were characteristically self-propelled and consisted of two (or more) pontoons, a flat deck and a river-spanning cable. The punt would be propelled across the river by the force of the river operating on the angled pontoons and the restraint provided by the cable. With the pontoons angled the other way, the punt would then travel back across the river. The cable ferry at

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273 See *Bourke*, above n 242, at 117 and *Smith*, above n 260, at 698 (in the context of a "right to fish from boat or punt only").

274 Such usage would presumably have been largely confined to calm and shallow water, light loads and either down-stream journeys or at most short passages up-stream. I would be surprised if there was appreciable usage of punts for this purpose by 1903.

the Tuapeka Mouth of the Clutha River is the only punt of this kind still operational but such punts were once extremely common and provided a safe method[275] for crossing unbridged rivers.[276] River-crossing punts operated on the Waikato River at Hamilton and Ngaruawahia, Huntley, Tuakau and Cambridge and there may well have been more.[277] I appreciate that the locations just mentioned are all downstream of the Pouakani blocks. But in the 1930s a self-propelled punt was installed at Orakei Korako[278] (which is upstream) and as well when hydro-development began near Mangakino[279] after the Second World War, a punt was used there.

[179] The use of such punts was not confined to the Waikato River and I imagine that they were probably used on most major New Zealand rivers. I can illustrate this by reference to the position in Westland, which is peripherally material as the principal proponent of s 14 of the 1903 Act was the Premier, Mr Seddon, who throughout his long career in the legislature always represented West Coast electorates. He would thus have been well aware of the use of river-crossing punts on the Hokitika,[280] Grey[281] and Buller[282] Rivers. More generally, given their significance in the development of New Zealand, I consider that in 1903, a reference to "punts' in the context of significant rivers would most naturally be taken to denote ferry-punts. In this context, doubt whether the use of a cable-controlled vessel propelled only by the force of the current would be within the ordinary meaning of "navigation by boats" explains why the legislature saw it as necessary to make particular provision for "navigation by ... punts".

[180] It follows that the concept of "navigation by punt" in s 14 encompasses river-crossing journeys.

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275 At a time when death by drowning associated with river crossings was so common as to be known as "the New Zealand death".

276 For discussions of this, see AR Tyrell *River Punts and Ferries of Southern New Zealand* (Otago Heritage Books, Dunedin, 1996) and James Cowan *New Zealand Centennial Publications: Settlers and Pioneers* (Department of Internal Affairs, Wellington, 1940) at ch 17.

277 See Cowan, above n 276, at ch 17.

278 "History" The Hidden Valley Orakei Korako: Cave and Thermal Park <http://www.orakeikorako.co.nz/Orakei-Korako-Geyserland/History_IDL=4_IDT=1336_ID=7748_.html>.

279 Arnold Pickmere "Obituary: Jim Mckay" *The New Zealand Herald* (online ed, 29 June 2002).

280 "Lecture" New Zealand as it was and is" *The Southland Times* (29 April 1880) at 2.

281 "The Grey River Argus" *The Grey River Argus* (29 December 1870) at 2.

282 "Story: Ferries - Buller River Punt" <http://www.teara.govt.nz/en/ferries/1/4/1>.

[181] Rafts are not susceptible to much, if any, control, may not have a person on them and will go only downstream. I suspect that the word "raft" appears in the list because of North American[283] and Scottish jurisprudence[284] as to whether the floating of rafts of logs down a river made it navigable. A raft of timber is not, at least to my way of thinking, a boat and sending such a raft downstream (especially if it is unmanned) is not "navigation" in any ordinary sense. The point I am trying to make is illustrated by the following extract from the judgment of Lord Maxwell in *Wills' Trustees*.[285] That Judge referred to a contention by counsel that navigability did not encompass the use of rafts, as a raft of logs was no more a navigable vessel than its component logs would be if unattached. He then went on to say:[286]

> I think there is force in this argument and if I were asked whether the river was shown to be "navigable" merely because such rafts had been floated downstream only, I would be inclined, without authority, to answer in the negative ...

[182] Although "navigation" and cognate words sometimes connote lengthy voyages and large vessels and perhaps commercial purposes, it follows that I do not see s 14 in such a context. And, as an aside, I note that in 1904, just a year after s 14 was enacted, Lord MacNaghten had no difficulty using the word "navigation" in a case which was predominantly about the use of pleasure boats in the river Ouse between St Ives and St Neots.[287]

Whole of river or segmented approach

[183] I agree with the views expressed by the Chief Justice as to the appropriateness of a segmented approach to navigability.[288]

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283 See *The Montello* 87 US 430 (1874) and *United States v Rio Grande Dam & Irrigation Co* 174 US 690 (1899).

284 Early Scottish cases are discussed in *Wills' Trustees*, at n 199.

285 *Wills' Trustees* (Outer House), above n 199.

286 At 55.

287 See *Simpson*, above n 238.

288 See [56]–[70] of the Chief Justice's judgment.

Applying s 14 to the Waikato River

[184] Although there was evidence of the Government in 1903 commissioning Mr PS Hay to report on the possibility of hydroelectric developments and his identification of sites of interest on the Waikato River at the Huka Falls and the Aratiatia Rapid, there was no specific evidence of proposals extant at 1903 for physical changes to obstacles to navigation in the Waikato River adjoining the Pouakani blocks. For this reason, I propose to assess the navigability of the relevant section of the river on a basis which allows for the existence of those obstacles.

[185] Given the width and depth of the relatively lengthy stretches of the river between these obstacles, these portions of the river were plainly capable of being used for navigation in the broad sense contemplated by s 14. Because the focus of s 14 is on the physical capacity of the river – and not existing usage – I see the very limited nature of proven use of the river as beside the point.

[186] I have had rather more difficulty in relation to the various rapids which provided obstacles to navigation. This is in part a consequence of my difficulty envisaging with confidence the relevant sections of the river as they were prior to the modifications associated with electricity generation. As well, I confess to having experienced some conceptual difficulty as to the timing of the required assessment. Obviously s 14 must be applied to the circumstances of the river (and in particular its width and depth) as they were in 1903. On the other hand, I think that s 14 (and its successors) should be applied as at the time a question of ownership of a particular river bed arises. So if the river had never been modified and an issue now arose – and for the first time – as to ownership of the river bed, I think that it would have to be determined by reference to whether the river was presently susceptible of beneficial use involving navigation. And if the river was now being used for adventure recreation of the type involved in *Wills' Trustees*, I am inclined to think that this would be sufficient to establish navigability in the manner envisaged by Lord Fraser in *Wills' Trustees* in the passage set out above in [155].

[187] This is quite an awkward issue and I can see the force in the view of the majority that the whole assessment must be made from a 1903 standpoint.[289] But there are some potential problems with this approach. A logical corollary of making the assessment only from a 1903 standpoint is that the status of a river could be controlled forever by a potential use which was foreseen in 1903 but which never eventuated and which, by the time ownership comes to be determined, will plainly not eventuate.[290] Given this I see some practical advantage in an approach which focuses on the circumstances as they are when the issue falls for determination. So where susceptibility to beneficial use has been established by the time the question of ownership arises for the first time, I am at least inclined to think that such use would be within the concept of "future use" as provided for by s 14.

[188] On the assumption that the view I have just expressed is correct, I am also inclined to think that the entire section of the river in question was navigable. The impression I have from the evidence is that if the river had not been modified it would most likely now be used for adventure recreation involving kayaking, white water rafting and similar activities. That the unmodified river could be used for those purposes seems to have been established by the Vause expedition to which I have referred.[291] I consider that such usages are within the common law concept of "navigation" given the approach favoured in *Wills' Trustees*.[292] The physical characteristics of the river as at 1903 made it susceptible to use for such purposes, which to me is the critical consideration.

Solicitors:
Aurere Law, Rotorua for Appellants
Crown Law Office, Wellington for Respondent

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289 See [50] of the Chief Justice's judgment.

290 For instance by reason of particular channel works which may have been planned in 1903 but were rendered uneconomic by the development of alternative road and rail transport links.

291 At [151] above.

292 *Wills' Trustees*, above n 199.