I TE KŌTI MANA NUI

IN THE SUPREME COURT OF NEW ZEALAND

SC 149/2021

BETWEEN	**MICHAEL JOHN SMITH**
	Appellant
AND	**FONTERRA CO-OPERATIVE GROUP LIMITED**
	First respondent
AND	**GENESIS ENERGY LIMITED**
	Second respondent
AND	**DAIRY HOLDINGS LIMITED**
	Third respondent **cont.**

SUBMISSIONS FOR TE HUNGA RŌIA MĀORI O AOTEAROA (THE MĀORI LAW SOCIETY)

22 JUNE 2022

Counsel certify, in accordance with Supreme Court Submissions Practice Note (24 November 2021), that these submissions are suitable for publication (and do not contain any information that is suppressed).

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AND	**NEW ZEALAND STEEL LIMITED**
	Fourth respondent
AND	**Z ENERGY LIMITED**
	Fifth respondent
AND	**NEW ZEALAND REFINING COMPANY LIMITED**
	Sixth respondent
AND	**BT MINING LIMITED**
	Seventh respondent

MAY IT PLEASE THE COURT:

Introduction

1. The applicability of, and the approach taken to, tikanga in the development of tort law (in the context of climate change) are engaged in this appeal.

2. Te Hunga Rōia Māori o Aotearoa – The Māori Law Society (**Te Hunga Rōia**) was granted leave to intervene in this appeal in relation to the question of the extent to which issues of tikanga are engaged in the tort actions of the kind pleaded in this case.[1]

3. Te Hunga Rōia's submissions address principles relevant to the development of the common law, tikanga more generally, and the recognition of tikanga in the common law of Aotearoa; before addressing the relevance of tikanga in this case.

4. In summary, Te Hunga Rōia submits:

   (a) It is well-established principle that the common law must evolve within the context and "special needs" of the place in respect of which it is being applied. Tikanga forms part of the unique and special context of the common law of Aotearoa and therefore must inform the development of the common law as it applies to Aotearoa.

[1] Minute of Williams J, 31 May 2022.

(b) The recognition of tikanga in the common law is now orthodox. Tikanga has been described as the first law of Aotearoa. Tikanga values have also been held to be part of the values of the New Zealand common law.

(c) The question of whether and how tikanga is engaged is an important one. It is respectfully submitted that the critical questions before this Court are:

(i) *Firstly*, whether tikanga is relevant to the development and application of the well-established torts of public nuisance and negligence, and the development of any new tort?

(ii) *Secondly*, if tikanga is relevant, then how is it relevant and to what effect in terms of the issues presently before the Court?

(d) In response, Te Hunga Rōia submit that tikanga is clearly relevant to the development of the common law. It appears most relevant in this case to the development of any new tort, although it may also have relevance to the application of the established torts of nuisance and negligence. Assessing the application of tikanga and its precise relevance will require an evidentiary inquiry.

(e) Should these matters proceed to trial, evidence (including tikanga evidence) will be critical.

(f) A broad approach, that accords with principles of tikanga Māori, should be applied to standing in a case such as this.

5. Te Hunga Rōia Māori does not take any position on the merits of the substantive matters that would be the subject of the proceeding if all or any of the pleaded causes of action are to continue.

The development of the common law – principles

6. It is well-established that the English common law has always applied in New Zealand *only insofar as it is applicable to the circumstances of New Zealand*.[2] The English Laws Act 1858 provided:[3]

> The laws of England as existing on the 14th day of January 1840, shall, **so far as applicable to the circumstances of the said Colony of New Zealand**, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of Justice accordingly.
>
> [Emphasis added]

7. Consequently, the evolution of the common law in New Zealand must reflect the "special needs" of Aotearoa and its society.[4]

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[2] The English Laws Act 1858, s 1; and English Laws Act 1908, s 2; the effect of these provisions is now preserved by s 5 of the Imperial Laws Applications Act 1988.
[3] The English Laws Act 1858, s 1.
[4] *Takamore v Clarke* [2013] 2 NZLR 733 at [150] (***Takamore***).

8. The common law of Aotearoa, as applied in the Courts, has differed from the common law of England because it reflected *local* circumstances.[5] This "vital rule" was acknowledged by Sir Kenneth Roberts-Wray in his book *Commonwealth and Colonial Law*:[6]

> … when English law is in force in a Colony, either because it is imported by settlers or because it is introduced by legislation, it is to be applied subject to local circumstances; and, in consequence, English laws which are to be explained merely by English social or political conditions have no operation in a Colony.

9. This 'vital rule' was effectively applied by the Supreme Court Majority in *Takamore* in its consideration of tikanga, where their honours held that "the evolution of the common law in New Zealand reflects the special needs of this country and its society"[7] and "our common law has always been seen as amenable to development to take account of custom."[8] As the former Chief Justice held in *Takamore* "[M]āori custom according to tikanga is therefore part of the values of the New Zealand common law."[9]

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[5] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 at [17] (***Ngāti Apa***).
[6] Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (1966, Stephens Publishing, United Kingdom) at 626.
[7] *Takamore* at [150]. The unique development of the common law to local circumstances can be seen in other examples such as the development of the tort of privacy in Aotearoa; English judges have specifically disavowed the existence of a privacy tort in their common law (*Kaye v Robertson* [1991] FSR 62) instead developing the tort of breach of confidence.
[8] Ibid.
[9] *Takamore* at [94].

The recognition of tikanga in the common law of Aotearoa

10. Moana Jackson described tikanga as follows:[10]

> In simple terms tikanga is a values system about what 'ought to be' that helped us sustain relationships, and whaka-tika or restore them when they were damaged. It is a relational law based on an ethic of restoration that seeks balance in all relationships, including the primal relationship of love for and with Papatuanuku. Because she is the Mother, we did not live under the law but rather lived with it, just as we lived with her.

11. Tā Hirini Moko Mead explains 'tika', meaning 'right' or 'correct', as being the base principle of tikanga. Mead confirms that "[t]here are several ways of looking at tikanga Māori"[11] and notes that "tikanga Māori reaches out to many different aspects of life, pervades and informs whatever we do, and that its tentacles reach far and wide".[12]

12. Ani Mikaere, another well-known Māori academic, frames tikanga as the law, namely the first law of Aotearoa.[13]

13. Other examples of how tikanga might apply in a legal context are provided by (again) Moana Jackson[14] and in the Law

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[10] Moana Jackson, "Where to Next? Decolonisation and the Stories in the Land" in Elkington, Jackson, Kiddle et al *Imagining Decolonisation,* Bridget Williams Books, 2020, Wellington, p 140.
[11] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 6 (***Tikanga Māori***).
[12] Ibid at 8-9.
[13] Ani Mikaere *'The Treaty of Waitangi and the Recognition of Tikanga Māori'* in *Waitangi Revisited – Perspectives on the Treaty of Waitangi* (Oxford University Press, 2005).
[14] New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

Commission's 2001 Report entitled *Māori Custom and Values in New Zealand Law*.[15]

14. In Te Hunga Rōia's submission, the development of the common law with respect to the recognition of tikanga is an orthodox progression of the common law in Aotearoa. *Ngāti Apa and Takamore* provide a platform for the contemporary recognition of tikanga as a part of the common law.[16]

15. Following *Takamore*, tikanga has been consistently affirmed as forming part of the New Zealand common law. The Courts (including this Supreme Court) have recently held:

    (a) That tikanga is "an integral strand" of the common law of New Zealand and it is to be treated as "applicable law" under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[17]

    (b) "In some situations, tikanga will *be* the law, rather than merely being a source of it."[18]

    (c) "… that the law that accompanied Māori to Aotearoa was constituted by tikanga. Many aspects of it are law in New Zealand now: Māori customary law, made by iwi and hapū, governing behaviour of iwi and hapū

[15] Moana Jackson *The Treaty and the Word: the Colonization of Māori Philosophy* (Oxford University Press, Auckland, 1992) at 5.
[16] *Ngāti Apa* at [17] and *Takamore*.
[17] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 at [177]-178].
[18] *Mercury NZ Ltd v The Waitangi Tribunal* [2021] 2 NZLR 142 (***Mercury***) at [103].

and those who belong to them. As such, it is a "free-standing" legal framework recognised by New Zealand law. It does not cease governing an iwi or hapū just because the courts or Parliament or even other iwi suggest otherwise."[19]

(d) "While tikanga Māori is defined in the RMA as "customary values and practices" it has come to be understood as a body of principles, values and law that is cognisable by the Courts."[20]

(e) Tikanga is to be taken into account in the common law where it has not been abrogated by statute.[21]

16. Tikanga is a matter of both fact and law. As is the case with the common law, when engaging in reasoning a decision-maker needs to draw from sources of law because the common law is not codified. Tikanga has similar characteristics to the common law in that respect.

The relevance of tikanga generally in the development of novel torts

17. The relevance and significance of tikanga is dependant on context.[22] However, as this Court has heard previously, application of tikanga in any given context is guided by a core

[19] *Ngāti Whātua Ōrākei Trust v Attorney General* [2022] NZHC 843 at [355].
[20] *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] 3 NZLR 352 at [64].
[21] *Te Ara Rangatu o te Iwi o Ngāti Te Ata Waiohua Inc v Attorney General* [2019] NZAR 12; [2018] NZHC 2886.
[22] *Mercury* at [103].

set of principles. In that regard it does not differ greatly from the way that the common law generally applies a set of established principles to different factual circumstances.

18. Therefore, depending on the circumstances of a case, there are a range of ways in which tikanga may be relevant and applied. For example, as a source of private rights and obligations,[23] as a public law consideration,[24] and as a separate body of law.[25] Whether or not tikanga will be relevant in the development and application of the existing torts of nuisance and negligence, or the development of novel torts, will depend on the context.

The relevance of tikanga in this case

19. At the outset of its judgment, the Court of Appeal framed the key issue raised by the appeal as "[W]hat should be the response of tort law to climate change?"[26]

20. In terms of an overarching question for the relevance of tikanga, the question in this case can be framed as "[H]ow might tikanga be relevant when considering a tort law

[23] *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA); *Ngāti Whātua Ōrākei Trust v Attorney General* [2019] 1 NZLR 116 (SC) at [77].
[24] For example, as an interpretive aid (as was the case in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC); and *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318).
[25] See *Mercury* at [103]. As also conceptualised by Ani Mikaere "The Treaty of Waitangi and the Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited – Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) and Moana Jackson "The Treaty and the Word: the Colonization of Māori Philosophy" in Graham Oddie and Roy Perrett (eds*) Justice, Ethics, and New Zealand Society* (Oxford University Press, Auckland, 1992). .
[26] *Smith v Fonterra Co-operative Group Ltd* [2022] 2 NZLR 284 at [1].

response to climate change?" Te Hunga Rōia submits that there are two central questions for the Court's consideration in examining whether and how tikanga might be relevant in this case:

(a) *Firstly*, whether tikanga is relevant to the development and application of the well-established torts of public nuisance and negligence, and the development of any new tort?

(b) *Secondly*, if tikanga is relevant, then how is it relevant and to what effect in terms of the issues presently before the Court?

The Appellant's submissions on tikanga

21. The Appellant has confirmed in this case that he is not alleging that the Respondents "directly owed, or violated, any obligations under tikanga Māori."[27] However, the Appellant "does rely on principles of tikanga Māori to inform the basis of the pleaded causes of action and the development of the common law of Aotearoa New Zealand."[28]

22. Te Hunga Rōia notes that whilst the Appellant's submissions say at [55] that "[T]he relevant tikanga principles and the implications of those will be addressed in the substantive arguments below, particularly in relation to the third novel tort", tikanga is addressed substantively in relation to the

[27] Draft Amended Statement of Claim, 15 June 2022 (**ASOC**) at [82].
[28] Ibid.

third pleaded cause of action being described as the "new tort".[29]

23. Based on the Appellant's revised pleadings, and submissions, the Appellant appears to be arguing that tikanga is relevant:

    (a) Generally, in the context of the development of the common law and this area of law as it concerns tort law and climate change (particularly in relation to the development of a new tort).

    (b) Specifically, as a matter of evidence, should all or any of the three causes of action as pleaded proceed to trial.

24. This is an application for strike-out. The Court therefore does not have before it evidence on matters of tikanga. Whilst tikanga has both factual and legal elements, it is important for Courts to have evidence of matters of tikanga. The revised pleadings reference the following tikanga principles:

    (a) obligations that are grounded in whakapapa and whanaungatanga (kinship and community relationships);[30]

    (b) obligations of kaitiakitanga (obligations to care for the environment and resources);[31]

[29] Other than the general framing section on tikanga at the outset of the submissions.
[30] ASOC, at paragraph 82(b).
[31] ASOC, at paragraph 82(c).

(c) hara or take (an issue or a cause) where tikanga has been breached, [32] recognising that hara has both a collective and an individual dimension both as to who is responsible for causing harm and as to who suffers harm;[33]

(d) utu (an appropriate response or steps to be taken where tikanga has been breached);[34]

(e) tapu (in the use of rāhui to prohibit specific human activity through the use of tapu, or making something sacred);[35]

(f) ea (restoring a state of harmony or balance);[36]

(g) mana (in that harm to the environment can create corresponding harm to those with responsibilities to the environment, kaitiaki and mana whenua, and results in an impact on their mana).[37]

25. Te Hunga Rōia agrees that these principles are central to tikanga and are likely to be relevant to the issues before the Court if this matter proceeds to trial. However, it will be important for evidence to be adduced on these tikanga principles and how they specifically apply in these circumstances.

[32] ASOC, at paragraph 82(d).
[33] ASOC, paragraph 82(g).
[34] ASOC, paragraph 82(d).
[35] ASOC, paragraph 82(f).
[36] ASOC, paragraph 82(d).
[37] ASOC, paragraph 82(e).

Te Hunga Rōia submissions on tikanga

Whatungarongaro te tangata, toitū te whenua
People disappear but the land remains

26. Returning to the questions posed at paragraph 20, Te Hunga Rōia say that the answer to the first question is relatively straight forward; tikanga Māori is clearly a relevant factor in the on-going development of the common law.[38] The importance of the environment and maintaining it for future generations is exemplified in the saying "Whatungarongaro te tangata, toitū te whenua" (people disappear but the land remains). This saying emphasises the ephemeral nature of human existence compared to the enduring nature of land (and the environment). This saying reflects the core Māori belief that, because human existence is ephemeral, there is, accompanying the right to use the land and its resources, an obligation to preserve the land and its resources (and therefore the broader environment) for future generations. Actions that jeopardise the ability for future generations to enjoy the use of the land and resources are contrary to this core belief and therefore to tikanga.

27. The second question, namely if tikanga is relevant, then *how* is it relevant and, importantly, to *what effect* in terms of the issues presently before the Court; is a more challenging one.

[38] Noting all of the authorities cited at paragraph 15 support this contention, albeit in slightly different ways.

28. As a matter of law, tikanga will potentially be relevant to both the application and development of the existing torts of nuisance and negligence. It will also be relevant to the development of any new tort.

29. The law of public nuisance and negligence are well established and have their own whakapapa (genealogy). Tikanga may be relevant to establishing whether a public nuisance has occurred or whether it might be said that a duty of care is owed to the Appellant. However, it is less clear how tikanga might assist the Court in forming a view on causation and the apportionment of risk (and therefore liability). The result is that it is not clear how tikanga might lead to any (or any significant) departure from the general approach to these torts beyond an evidentiary inquiry. This appears to be the approach taken by the Appellant in his written submissions.

30. Tikanga could (and we would say it should) help to guide any new tort that may be developed in the context of environmental harm caused by climate change. However, tikanga shouldn't be seen as providing an easier route for these matters to be considered. Rather, tikanga provides a lens and a set of principles through which any new tort might be considered. Given the broad ambit of the proposed new tort, as currently pleaded, tikanga may be of assistance in conceptualising wrongs (and who they are committed against given harms to the environment are also at issue here) and who (if anyone) should be held responsible where there are multiple tortfeasors.

Standing

31. Finally, on standing,[39] Te Hunga Rōia submits that the approach taken by former Chief Justice in *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 (***Wakatū***) is helpful for considering standing in this context.[40] Counsel submits that the approach taken by the former Chief Justice illustrates how principles of tikanga, such as mana (of rangatira), can assist. Te Hunga Rōia notes the dicta of Elias CJ in considering whether a wider approach to standing ought to be considered in particular cases:[41]

> Subject to the discretion of the court, any person with an interest in the outcome of the proceedings may have standing. Such relaxation may be appropriate in cases which equitable obligations are sought to be enforced. Any they may have particular value in cases concerning group rights, such as the property interests of native peoples.

32. Consistent with the dicta in *Wakatū*, it is submitted that a broad and flexible approach should be taken to standing in this type of case where it is at a strike-out stage and the Appellant is seeking to bring a claim in a quasi-representative capacity.

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[39] Te Hunga Rōia does not take particular issue with the Appellant's submissions on standing and does not seek to repeat those here.
[40] Acknowledging the different and unique context of that case.
[41] *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 at [490]. Her Honour noted here that the wider approach in some English cases was at least where declaratory relief only was being sought.

33. Counsel is available to present orally before the Supreme Court if required.

DATED at Wellington this 22nd day of June 2022

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Counsel for Te Hunga Rōia