IN THE SUPREME COURT OF NEW ZEALAND SC 7/2010

[2011] NZSC Trans 5

BETWEEN **JOHN HANITA PAKI**

First Appellant

TORIWAI ROTARANGI

Second Appellant

TAUHOPA TE WANO HEPI

Third Appellant

MATIU MAMAE PITIROI

Fourth Appellant

GEORGE MONGAMONGA RAWHITI

Fifth Appellant

AND **ATTORNEY-GENERAL**

Respondent

Hearing:	15-16 March 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	I R Millard QC and M P Armstrong for the Appellants D B Collins QC, V L Hardy and D A Ward for the Respondent

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CIVIL APPEAL

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MR MILLARD QC:

If it pleases the Court, I appear with my friend Mr Armstrong on behalf of the appellants.

ELIAS CJ:

Thank you Mr Millard, Mr Armstrong.

SOLICITOR-GENERAL:

Ms Hardy and Mr Ward with me for the respondent.

ELIAS CJ:

Thank you Mr Solicitor, Ms Hardy, Mr Ward. Yes Mr Millard?

MR MILLARD QC:

As the Court pleases. This case is of course to do with the bed of the Waikato River opposite the Pouakani land blocks. This land was sold, the dry land was sold to the Crown in the 1880s and 1890s as a result of being taken through the Native Land Court. All the deeds, including for Pouakani 1, show the boundary of the land that was being sold stopping at the river. The river was a taonga for all those who lived along the banks of it. The claim is that when they sold the visible land they did not realise that they were selling, at least according to the Crown, the invisible land, that under the water.

The land in question runs from about 59.6 miles downstream from Lake Taupo to about 82.2 miles downstream. It's just a bit downstream of the Waipapa Stream and stops at the Waipapa River.

In the High Court the Court found against the appellants on every ground including that their claim was barred by the Claims Settlement Act. The Court of Appeal overturned that finding that found against the appellants on the grounds of non-navigability. It also expressed reservations about the finding of the High Court on the grounds of standing. Incidentally the Court of Appeal decision has just been reported in the latest part of the New Zealand Law Reports at 2011, 1 at page 125**.** Now in about 1948 the Crown started building Maraetai Dam. That was the first, we say, overt assertion of ownership of the bed, of the river opposite these blocks. The Crown did not take the bed by proclamation. When challenged in these proceedings as to its right of ownership in it its defence says, at paragraph 25, which is at tab 4, page 34, "To the extent that the Waikato River between Atiamuri and Waipapa River

is non-navigable, the Crown acquired title to the bed, or part thereof, of the Waikato River by the principle of ad medium filum. To the extent that the Waikato River between Atiamuri and Waipapa River is navigable, the title to the bed of the river was vested in the Crown by section 14 of the Coal Mines Act Amendment Act 1903."

ELIAS CJ:

Sorry, are you referring to the Court of Appeal decision?

MR MILLARD QC:

I'm referring to the Crown's defence at paragraph 25 on page 34 of volume 1.

ELIAS CJ:

Thank you.

TIPPING J:

You're not suggesting that there's some sort of estoppel or something are you Mr Millard?

MR MILLARD QC:

Well I'm certainly saying –

TIPPING J:

It's a question of law.

MR MILLARD QC:

– that it affected the attitude of the plaintiffs, if I use that expression in terms of the evidence that it was seeking, it was on the basis that it was talking about the extent of the Waikato River between two points and Atiamuri is about, is about –

TIPPING J:

I thought you were relying on the implicit concession in this that part of the river was navigable and part was non-navigable? What are you – why are you – I can't quite follow why we're going here when the real issue is to do with navigability.

MR MILLARD QC:

Well the Crown –

TIPPING J:

What is it that you seek to draw out of the Crown's statement here? Some binding approach or something that we must take into account in what way?

MR MILLARD QC:

What, well – two things. First of all, I'm just trying to establish why the Crown asserts ownership. It doesn't say that it acquired the bed of the river as an independent acquisition from anything else. Secondly, the point that I'm making is that the pleadings that shaped the evidence of the plaintiffs in the High Court was on the basis of a navigation of partial navigability. Navigability opposite the land in question with Atiamuri being –

YOUNG J:

Mr Millard, does it matter though? I mean you're saying the Crown position changed rather before trial. That's right, isn't it?

MR MILLARD QC:

Well this defence was filed just before trial but –

YOUNG J:

Yes, yes, yes, but does it matter? I mean are you saying that it's a pleading point and that we shouldn't deal with it or what?

MR MILLARD QC:

I'm certainly not saying that but the Crown in their submissions sort of say, oh but the appellants accepted the evidence of Mr Parker and they're bound by it and what we're simply saying is, well the case was prepared on the basis that when we're looking at sectional navigation, not navigation of the river as a whole, and to the extent that, to that extent we didn't look at the obstructions in other parts of the river.

McGRATH J:

When was the implied concession withdrawn?

MR MILLARD QC:

Well it was never – it was just in submissions they said, this, you've got to treat the river as a whole.

McGRATH J:

So that was in submissions in the High Court?

MR MILLARD QC:

In the High Court.

McGRATH J:

And that was the first you knew, was it, or?

MR MILLARD QC:

Well the evidence, I'd have to say the evidence of Mr Parker of course did look at the river as a whole but we only focused on this part of the river.

TIPPING J:

What does it matter what the Crown's stance was at this time? We have the point squarely before us now. Are you saying your clients are prejudiced in some way?

MR MILLARD QC:

I'm simply saying that when assessing the evidence one needs to bear –

TIPPING J:

It's an evidential weight sort of point is it?

MR MILLARD QC:

Yes.

TIPPING J:

All right.

ELIAS CJ:

It is striking that this emphasis on the whole river and the vesting attaching to the whole river is not one, in my understanding, ever before put forward by the Crown and one wonders whether it isn't perhaps prompted by the *Nikal* decision because it has never arisen in any other litigation, despite all the litigation that there has been about major rivers in New Zealand.

MR MILLARD QC:

Yes.

TIPPING J:

But as far as your present point is concerned you're wanting to bring to our attention that the evidence should be viewed with some caution, is that it, on account of your clients going to trial on a different premise from that which emerged?

MR MILLARD QC:

Indeed.

TIPPING J:

Right. Thank you.

MR MILLARD QC:

Now this claim to the river as initially raised before the Waitangi Tribunal who dealt with it at chapter 16 of their report which is tab 22 of volume 1 of the bundle of authorities.

McGRATH J:

Sorry just give me the tab number again?

MR MILLARD QC:

Sorry, tab 22.

McGRATH J:

Thank you.

MR MILLARD QC:

And it deals there with the importance of the Waikato River, the role of, page 290, just up from the bottom, the role of water as ritual and the spiritual qualities, the rivers and other water bodies can vary, in expression from tribe to tribe and place to place, however, there is among all tribes, a continuing and all embracing theme acknowledging traditional holistic concepts of water, etcetera, and goes through some of the evidence to support that. And then, coming through to page 295, under 16.4 "Ownership" of the bed of the Waikato River, looked at this in general terms and then says, well all the talks about the ad medium filum principle, all the foregoing discussion was academic if the river could be described as navigable, refers to the

Coal Mines Act Amendment Act and recites the now, what was then the provision 261 of the Coal Mines Act 1979 and said, "The Waikato above Cambridge was not navigable all the way to Taupo, there were sections that could be navigated, but of course the river was broken by a succession of rapids and waterfalls." And they then sort of left the whole issue open but recommended that the Crown give urgent attention to addressing the issues in the national interest.

The evidence was that the claimants tried to raise issues about the river at the time when negotiations with the Crown, it appeared to be too difficult, so it was put to one side, the Crown said it wanted to negotiate with all the hapū. Steps were taken to try to get together a collective of hapū to negotiate with the Crown on that, encouraged by the Crown with discussions about mandate and the like and then in 2000 there was a change of government and – well the change occurred in 1999, but following that in 2000 the Crown indicated that it was no longer prepared to deal with the claimants, and that was the end of that until eventually they issued proceedings in 2004.

Perhaps I could just clear away one point before coming to the questions. I did earlier comment about the purchase or sale of all lands. The Crown in their submissions take the point that Pouakani 1 was awarded to the Crown by the Court, and say, "Ah, that means that there can't be a trust in respect of that land, regardless of anything else". If I can take you to the evidence of Mr Stirling, in volume 2, tab 13, I'm sorry, tab 12, beginning at paragraph 25 through to about paragraph 29, he describes what happened and what the Native Land Court did was award this block for payment of survey and other costs, and the process was with the Native Land Court before orders could be made, you had to have a survey, the Crown put the cost of the survey onto Māori, in this particular case they also put the cost of the public good of triangulation onto Māori, that's sort of setting up the trig stations and the result was that there was liability of three and a half pence per acre and the land at this stage, was assessed to be about 113,150 acres, so the cost was $1,650. The value of this block was set at 2000, based on two shillings an acre and consequently there was a surplus and that was paid to 17 owners. So that, in effect, it was a purchase.

ELIAS CJ:

Well – weren't there provisions under the Native Lands Act, I don't know, is this the 1873 one? Weren't there provisions by which this was all effected, liens for survey charges and so on? Is that right?

MR MILLARD QC:

Yes.

ELIAS CJ:

I'm just wondering about you're saying, why you're saying, "It was a purchase"?

MR MILLARD QC:

I'm saying it was a purchase?

ELIAS CJ:

Yes.

MR MILLARD QC:

Because in effect it was, the Crown was purchasing the block in part satisfaction of the obligations, also in full satisfaction of the obligations owned by Māori, but because the price of the block was more than the obligations, they had to pay an additional sum, which was equivalent to a purchase of this block.

ELIAS CJ:

No, I understand that but –

TIPPING J:

When do we have to worry about this point? Quite a long way downstream, if I may adopt –

MR MILLARD QC:

Quite a long – yes. I just want to – if I could just clear it away, given that it was something that the Crown raised in their submissions.

TIPPING J:

Frankly it's not something which is exercising my mind Mr Millard, at this stage.

MR MILLARD QC:

If I can come on then to the first question, which is the question of standing, and if I could start by looking at the deed of mandate. That appears in volume 3, and in particular at tab 38. What happened was that the Waitangi Tribunal delivered its report in 1993. The Pouakani people endeavoured to interest the Crown in negotiations without success. They then brought a claim, because the disputes before the Waitangi Tribunal were over the boundaries of certain blocks. They then brought a case in the Maori Land Court in regard to that boundary and the Judge found in favour of them, but adjourned the case to allow negotiations to take place and that then did get the Crown engaged. But of course before they proceeded, they wanted to be sure that the people that they were negotiating with, had power to settle the disputes and so a deed of mandate was required, the deed, as I say, is at tab 38, it includes the Pouakani claims recited, beginning at page 839, there's the, first one's the external boundary, it refers in the third paragraph during 1996, the Maori Land Court Chief Justice Isaac determined that the correct boundary is the boundary defined by legislation in 1889, so that was a reference to that case that I was referring to. Land taken for survey, internal –

ELIAS CJ:

Sorry the, determined by legislation, was that the, in 1889 was it? I'm sorry I've lost the place.

MR MILLARD QC:

In 1889.

ELIAS CJ:

Yes. That was the one deeming, or deeming it to be native land still was it? That legislation? And then it went through the Court again, is that right?

MR MILLARD QC:

Ah –

ELIAS CJ:

Look, I may have that entirely wrong. Don't –

MR MILLARD QC:

I think it was something else, but it's not particular – it's not relevant to what we're – importantly the, having looked at the boundaries, then comes the next, the very next

item is the Waikato River, and there's an assertion there that this section of the river was non-navigable prior to the construction of the hydroelectricity dams and then it refers to various other disputes and also to costs. That's on page 841 and in fact there was a High Court proceeding in relation to those costs.

The next tab, the terms of negotiation that were signed between the Crown and the negotiators under the mandate and that recorded that the Crown's acceptance that the necessary pre-conditions, this is in one, paragraph 2.

ELIAS CJ:

Why are you taking us to this because as I understand it's not in issue that the plaintiffs in this case are those left of those who received the mandate?

MR MILLARD QC:

I – the issue, the Crown says this mandate was only for the purposes of negotiation, doesn't give you any status to bring litigation and I just wanted to take the Court through to –

ELIAS CJ:

Yes that's fine, thank you.

TIPPING J:

If the test were whether your clients have a proper interest or something like that in the subject matter of the dispute, are you able to demonstrate that they have? Because I'm just looking ahead slightly to what the Court's approach might be to connection if you like and the idea of proper interest or something like that slightly appeals. Now if that were the approach the Court takes I don't know that you would have great difficulty in establishing that they have a proper interest, whatever the technicalities of the matter might be.

MR MILLARD QC:

Well as I understand the Crown's argument, what they say is if there was a wrong done it was done to the vendors of the land in the 1880s, 1890s and that for you appellants to bring the claim, you've got to show that you are the successors going down the legal line of –

TIPPING J:

That's why I said never mind the technicalities. I know what the Crown's argument is and it doesn't appeal to me very strongly without coming to any final view. If the test was a friendlier one, what do you say the test should be before we get into the interstices of whether you can satisfy it?

MR MILLARD QC:

Well we say in fact the whole issue was resolved by the representation order but if that's not accepted then we would say that all that has been sought is a declaration that our people do have a proper interest in this matter.

YOUNG J:

But your people aren't claiming necessarily to be the successors of the original owners. In fact amongst the complaints referred to in the deed of mandate is that the wrong people were recognised so it's a different sort of case, isn't it? I'm looking at page 840, para 4.

MR MILLARD QC:

Well there is certainly an aspect of that in the original plan but what we are saying is that the representation order was wide enough to cover anything, any issues like that.

BLANCHARD J:

Isn't your better point that the representation order seems to have been a bargain with the Crown?

MR MILLARD QC:

Indeed.

BLANCHARD J:

And that it is dishonourable for the Crown to try to go back on that?

MR MILLARD QC:

Well I certainly wouldn't say that but I did want to just put the representation issue, or the way in which that order came about, into context because in the initial pleadings the plaintiffs pleaded the deed of mandate. The Crown denied, they gave a denial there without great specificity to what they were denying and that led off to a wild goose chase to the Māori Land Court, then back to the High Court and then they

were faced with applications by the Crown requiring service on a whole raft of Waitangi claim – Waitangi Tribunal claimants and the whole matter was resolved. You drop your claim to proprietary rights and confine it to a declaration and we'll agree to the representation order.

BLANCHARD J:

Yes.

ELIAS CJ:

Isn't the only point of taking us to this material to establish what I would have thought was obvious that the plaintiffs are not, or the appellants are not busybodies so if one is looking at it as a question of standing and perhaps borrowing a little bit from public law notions because we're in such an odd area here, that for the purposes of standing they are clearly closely connected and allied to that, going back to the point that Justice Young was raising with you, it's a bit confusing hopping from Waitangi Tribunal claim to the proceedings before the Court because it seems to me that there are three possible claims in respect of this land, there may be more, but there would be, there might be let us say an aboriginal title claim. That's not being put forward, there might be a Waitangi Tribunal claim which could include those who were excluded from the Crown breach, that's not being put forward in these proceedings. What your case is founded on is the wrong done to those who are recognised as the owners through the Māori Land Court and that's all we're concerned with. So in respect of that wrong, really, and against the concession that the Crown seems to have made in terms of the representation order, surely the only matter you need to assure us of is that these are not meddlers. These are people who are closely connected leaving perhaps at the remedy stage the question of who is, in fact, to benefit to be ascertained presumably through the Māori Land Court?

MR MILLARD QC:

Well, that is certainly what we're saying but we do say that our argument's got a little bit more to it than even that and I'm conscious of course the Crown is still to come and maybe it is better addressed in reply but if I perhaps could indulge the Court a little bit just to make two other points.

ELIAS CJ:

Yes but what is the, what are the further legs, you say, that you've got?

MR MILLARD QC:

Well the point that I was going to make in regard to the deed of mandate is that it was a deed of mandate to reach a full and final settlement in the context of litigation that was already on foot in both the High Court and Māori Land Court and we have the odd situation that the Crown says that the deed of mandate was solely for the purposes of negotiation yet what the Crown wanted out of the negotiations was the settlement of all possible litigation. So what they seem to be saying is the negotiators have the power to give away the right to litigate but do not have the power to actually litigate, which in my submission is a nonsense. If they were prepared to deal with these mandated negotiators, and to come up with a full and final settlement of all litigation, it assumes that these people had the mandate to surrender the right to litigate and therefore must have had the right to litigate.

ELIAS CJ:

Well was that against the background of already existing – you're now referring, are you, to the terms of negotiation?

MR MILLARD QC:

Yes.

ELIAS CJ:

Because so far you've taken us to the deed of mandate, and that's in relation to Wai 33 and associated disputes –

MR MILLARD QC:

Yes.

ELIAS CJ:

And now you're talking about, you're saying the Crown agreed to negotiate with all litigation but presumably that's all extant litigation?

MR MILLARD QC:

Well except that it's, it was to be a full and final settlement, in paragraph 12 was the comprehensive full and final settlement of the whole of the Pouakani claims.

ELIAS CJ:

Claim – isn't this Wai 33?

MR MILLARD QC:

Yes, but it – given that there was already in the deed of mandate reference to Court proceedings –

ELIAS CJ:

But there were Court proceedings – it's a bit confusing trying to follow this, but from what you're saying, there were extant Court proceedings about questions of boundary and perhaps mandate?

MR MILLARD QC:

No, there was an issue, there was a claim that there was a contract between the Crown about financing the Waitangi Tribunal hearings and the like, that hadn't been honoured.

ELIAS CJ:

Well they all – that seems to be litigation which is satellite litigation to Wai 33.

MR MILLARD QC:

Yes, but of course what – the end objective that the Crown wanted, was a settlement that precluded not only extant litigation but any future litigation.

TIPPING J:

You've identified two heads, the deed of mandate and all that's associated with it, the representation order and all that's associated with that, is there another discrete head that you say gives your clients a proper interest, or whatever, in this subject matter?

MR MILLARD QC:

Well there was evidence that some of them are direct descendants from the owners.

YOUNG J:

Are you – well I mean – I think it's rather a confused issue, but the point that troubles me, is whether you are saying, "We have a right to the benefits of this claim other than as successors to the original owners. It is sufficient that we, we are descendants, we don't have to worry about establishing that we are the successors of the owners.

MR MILLARD QC:

Using the successors in the terms of legal successors –

YOUNG J:

Yes, exactly.

MR MILLARD QC:

– sort of the executor of a will and so forth, yes.

ELIAS CJ:

No, no, surely it's successors under the – under Te Ture Whenua Māori there'd have to be an investigation under the provisions of that Act wouldn't there?

MR MILLARD QC:

Yes. And of course the remedy that is sought, is simply a declaration on behalf of those who are found by the Māori Land Court –

ELIAS CJ:

Yes.

MR MILLARD QC:

– to be the descendants.

ELIAS CJ:

Well I think that is what you were being asked to clarify and your first answer didn't really clarify it, but your last one does. Are you saying that ultimate – that as non busybodies the appellants are seeking a declaration which would then lead to investigation by the Māori Land Court of those entitled to succeed?

MR MILLARD QC:

Indeed.

ELIAS CJ:

Yes, thank you.

YOUNG J:

But you always say, you said before in answer to the Chief Justice, investigation of the Māori Land Court of who were the descendants, whereas, I mean I may be that I'm missing something, I would've thought the investigation would be into who were the successors.

MR MILLARD QC:

Can I explain, why the words "descendants" were used? If you go to the Pouakani Claims Settlement Act –

ELIAS CJ:

Why do we though, because it's going to be – it's going to be simply a matter of the jurisdiction of the Māori Land Court and in a loose sense, given the strictures on succession under the current legislation, perhaps talking about descendants isn't too far astray, but why do you want to take us to this legislation, which is simply about settling the Waitangi Tribunal claim?

MR MILLARD QC:

Well, with respect it was wider than that, because it settled all claims, as did the deed of settlement subject to litigation, sorry legislation, wasn't just the Waitangi Tribunal claims that were settled.

TIPPING J:

There's quite a big difference, that is to who can actually pursue the claim and for whose benefit the claim might ultimately resound.

ELIAS CJ:

Yes.

MR MILLARD QC:

Yes.

TIPPING J:

That's the issue that frankly doesn't trouble me, but apparently troubles the Crown.

YOUNG J:

It doesn't trouble me, I'd just quite like to understand it. Whether there's a magic – why you are suing on behalf of descendants rather than successors, I mean I have

no difficulty with the view that your clients aren't busybodies, I've no particular desire to see the case get hung up on a, what seems a sort of a pedantic point, but I would quite like to say, know whether you are claiming that there is an entitlement that people have as descendants which arises independently of whatever status they may have as successors.

MR MILLARD QC:

Can I indulge the Court by taking you to the Act for –

McGRATH J:

So where do we find that?

MR MILLARD QC:

It is at volume 2 of the appellant's bundle of authorities, tab 35, and if I could start with section 12. That provides that "the settlement of the Pouakani boundary claims and the Pouakani historical claims to be effected under the deed of settlement and this Act is final, and the Crown is released and discharged from any obligations, liabilities, duties" etcetera. If I could then take you back to the definition of Pouakani historical claims which is in section 10 and that refers to "all claims (whether or not researched, registered or notified)", so it's looking both at extant and future ones, "made at any time by a Pouakani claimant and founded on rights arising from the Treaty, ... the principles of the Treaty ..., statute, common law (including customary law and aboriginal title), fiduciary duty or otherwise", so it clearly contemplated more than just Waitangi Tribunal claims, but it's a claim by the Pouakani claimants, and that's defined in section 9 to mean any of the following, and it refers to Pouakani people as the very first. And you come to the definition of Pouakani people, and it means all individuals who are descendants as determined by the Māori Land Court of the original owners. And then it identifies some of the owners, and then it, in (c) it's got the catch-all in case there were any missed, "any other person accepted by that Court as being a descendant". So the term "descendant" in the representation order, was a very, and the use of the Māori Land Court, was a very deliberate reference back to the Act and if you accept the Crown's proposition that we can't sue because we can't show that we are the successors, as opposed to the descendants, it would mean that if somebody could come along as a successor, who's not a descendant, they're not barred by this Act from bringing a claim, because this only bars claims by or on behalf of descendants, and that –

YOUNG J:

But it doesn't bar the claim anyway, it doesn't bar the claim anyway, because it's for the Waikato River.

MR MILLARD QC:

Yes. Well it specifically excluded the Waikato River, but I'm just simply saying that the concept of descendant is used in the representation order reflected the Act, and was intended to encompass anybody who could possibly bring a claim.

TIPPING J:

Doesn't descendants mean successors there?

MR MILLARD QC:

Well, we would certainly say it's extremely –

TIPPING J:

We're tying ourselves up in knots over something that frankly, I don't think is going to stand in your way. For myself, I'd prefer to see you get on to the more significant part of the case, and come back to this in reply if need be.

MR MILLARD QC:

Well I'm very happy to do that.

TIPPING J:

I don't know whether that's the view of –

YOUNG J:

Fine by me, yes.

MR MILLARD QC:

Well if I can then, come to the issue of section 14 of the Coal Mines Act Amendment Act. In both the Courts below the approach of the Court was to say, "This Act was part of a package to allow hydroelectricity development". This was said with varying emphasis. In the High Court Justice Harrison noted that it was passed at the same time as the Water-Power Act and that aided him in that conclusion. In the Court of Appeal there was a more broad survey of various historical evidence including references to what Richard Seddon as Minister of Works said sometime prior to this

Act and what the member for northern Māori said in Parliament in relation to the Water-Power Act. But very oddly, because it was squarely before the Court of Appeal, there was no reference to Hansard and what Premier Seddon said in introducing the very amendment in question. And we say that the concept that the two pieces of legislation were linked and were part of the Crown's policy to obtain for itself the bed of the river so that it could carry out electricity development, or hydroelectricity development, is simply wrong. It's factually illogical, legislatively illogical and unnecessary and isn't supported by what was said at the time.

If I could take the Court to what was said at the time. The, this is in volume 2, the Coal Mine Amendment Act began as a private members Bill which was later adopted by the government. It was really about the welfare of miners but on 12 November 1903 it was, the Bill had been reported back from the Mines Committee and the Minster of Mines moved a new clause, "That it is hereby declared that all coal and lignite under any river exceeding 33 feet in width is vested in Her Majesty." The passages are under tab 43 where we've given selected parts and it is passages beginning at page 511, and it's on the right-hand column.

ELIAS CJ:

I see it's about –

MR MILLARD QC:

Yes there are various sections that have been put in.

ELIAS CJ:

It's 511?

MR MILLARD QC:

Yes, 511.

TIPPING J:

Mr Fraser, is that right?

MR MILLARD QC:

That's at the top but if you come halfway down the page you get the Honourable Mr McGowan moved the following new clause: "It is hereby declared that all coal and

lignite under any river exceeding 33 feet in width is vested in His Majesty." Divided as to where we put –

ELIAS CJ:

Sorry I can't find it, where is it? Oh McGowan, I see, yes, thank you.

TIPPING J:

So that started off with no reference to navigability at all?

MR MILLARD QC:

No. Simply width of the river and to do with the minerals under the river.

YOUNG J:

So it's not ownership of the river either?

MR MILLARD QC:

No, only ownership of the minerals.

McGRATH J:

And Mr McGowan's the Minister who has charge of the Bill?

MR MILLARD QC:

Well he was certainly the Minster of Mines so presumably did by this stage, having started off as a private member's Bill. Then Mr Massey, if you come to page 512, who was by then leader of the opposition moved to insert after that the words, "subject to existing rights." There's a majority for that. Amendment agreed to and the words inserted. New clause as amended negatived and it's not quite clear just how that happened because they don't refer to a vote so whether the government of the day then simply withdrew I'm unclear.

BLANCHARD J:

The first part is an amendment to the clause being put so it's quite consistent that they might have all voted for that amendment and then when the clause itself was put in amended form, voted against it.

MR MILLARD QC:

They simply don't record the vote though.

BLANCHARD J:

I think that's what happened.

ELIAS CJ:

Because it won't achieve the purpose so one can see that it would be withdrawn with that amendment.

MR MILLARD QC:

If I can bring you through to the very last page in that bundle. So that was, the one that I've just been looking at was the 12th of November. This is 17 November and you'll see the heading, it's page 681, the very last page in the bundle, "The Right Honourable 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," which was Mr Massey, "and other members wished to conserve existing rights. The Government did not wish in the slightest degree to disturb existing rights but there was the difficulty as to how they should avoid that. A new clause had been drafted which he thought would meet the difficulty." "Mr Massey," as I say, was the leader of the opposition, "thought that the clause now proposed would remove the difficulty and, he was sure, would be supported by the House." So the Bill was recommitted and then the Premier moved the addition and you see there what eventually became section 14 of the Coal Mines Act Amendment Act.

ELIAS CJ:

So it's done on the basis that this is the existing law and therefore existing rights are not disturbed by it. It's done on the assumption that *Mueller* is correct, is it?

MR MILLARD QC:

Well that's our submission and you see something of that in the third line of the clause, just staying on that page. "The bed of the river shall remain," and in my submission the words "shall remain" is sort of assuming an existing state rather than creating a new state.

TIPPING J:

Well that's not quite consistent with the deeming always to have been.

MR MILLARD QC:

Yes it's not –

ELIAS CJ:

Well there was a dissenting opinion I suppose.

TIPPING J:

But this is getting very sort of precise, isn't it? As to preserving existing rights, what do you say is the impact of that on the proper construction of what we ultimately find here?

MR MILLARD QC:

Well it was not intended to create wholesale confiscation of land and vesting it in the Crown without compensation.

TIPPING J:

Well I read it as a lay person in this field is saying, this is what will happen unless the Crown has granted the riverbed to someone else.

MR MILLARD QC:

Yes.

TIPPING J:

Now am I missing something? Because there is wholesale confiscation if you like, unless there has been a grant. Now the word "grant" to me means something more than just an existing right, but I may be quite wrong Mr Millard.

ELIAS CJ:

Well the only confiscation then, that would be effected, would be against Māori customary land because everything else is granted.

TIPPING J:

But is the ad medium filum a grant?

ELIAS CJ:

No but –

MR MILLARD QC:

Well it has been held to be so in the Australian case of *Lanyon Pty Ltd v Canberra Washed Sand Pty Ltd* (1996) 115 CLR 342 that we refer to, as to being part of a grant from the Crown. Even although it's not referred to in the –

TIPPING J:

If the Crown grants to the edge it's deemed to grant to the middle?

MR MILLARD QC:

Yes and that too in the *Attorney-General ex relatione Hutt River Board v Leighton* [1955] NZLR 750 (CA) case in the Court of Appeal the Judge is divided and Justice F B Adams said that the grant included there to the middle line –

TIPPING J:

But the others were not of that view –

MR MILLARD QC:

Yes.

TIPPING J:

– were they?

MR MILLARD QC:

There was a strong disagreement from Justice Fair in that case about that approach but he got there a different way. He said the river wasn't navigable so it didn't apply so –

ELIAS CJ:

But the strong point that you're making is that this amendment was not intended to change the existing legal position and it may be necessary to revisit some of the cases to decide what the existing legal position was but this clause was not intended to effect any change?

TIPPING J:

How would it not effect change if it was vesting the bed of the river in the Crown? I mean surely that was intended to have some legal effect, different from what the current position was.

ELIAS CJ:

It was intended to follow the view that the beds of navigable rivers at common law were owned by the Crown.

YOUNG J:

But *Mueller* never said that though.

ELIAS CJ:

Well –

YOUNG J:

Mueller said you could defer, did it? *Mueller* said that as it were you could, as it were, in the particular circumstances of the case, conclude that the Crown grant didn't extend to the riverbed?

MR MILLARD QC:

Yes. The majority, yes the majority in *Mueller v Taupiri Coal-Mines Ltd* (1990) 20 NZLR 89 (CA) said, well looking at the Crown grant there we can easily displace the presumption that it included the riverbed in the particular facts.

TIPPING J:

It was a very fact specific ruling was it?

MR MILLARD QC:

Yes.

TIPPING J:

It didn't seem to me to bear much on these higher level difficulties that we've got.

MR MILLARD QC:

Yes it was certainly looking very much –

TIPPING J:

Well there was a great big red line, it wasn't in the middle of the river, it was on the boundary. It was on the edge.

MR MILLARD QC:

Yes and Justice Williams comments that any lay person looking at it would just assume that it was –

TIPPING J:

Yes, well that's a bit like me in this context Mr Millard.

MR MILLARD QC:

Well my principal point is that when you look at Hansard on this they weren't intending to effect wholesale change. What exactly they were trying to achieve is a little bit more difficult to understand but they weren't – but contrary to the findings of the High Court and the Court of Appeal they were not trying to say, oh we must have the bed of the river, of any river that might be used by hydroelectricity power –

YOUNG J:

Why did they move from – I mean there are three different possible issues here, aren't there? There's ownership of the minerals. There's ownership of the riverbed itself and there's I suppose rights of navigation. Though rights of navigation could be just like an easement so you don't need to own the riverbeds to ensure that people can pass up and down it and you don't need to own the riverbed to ensure that the minerals under it belong to the Crown. So what's the reason for this taking the land as opposed to just conferring a right of navigation if that's what they're worried about or seizing the minerals which might be thought to have been what was intended given the *Mueller* context and the Coal Mines Act vehicle.

MR MILLARD QC:

In my submission the primary focus was on coal under the rivers. As you see there, to all minerals including coal shall be the absolute property of the Crown. So that was their primary focus but of course –

McGRATH J:

And the secondary focus are you coming too?

MR MILLARD QC:

Well the second – whether they thought through the consequences of this is a little less clear but we would certainly say that the secondary focus was not on taking land for hydroelectricity works.

McGRATH J:

Yes.

BLANCHARD J:

Well what was the secondary focus? Was there one?

MR MILLARD QC:

There may not have been.

McGRATH J:

Well the *Leighton* case, I think Justice F B Adams suggests the secondary focus was the highway concept.

YOUNG J:

But that could have been just sorted out by conferring effectively an easement.

MR MILLARD QC:

Yes in terms of navigation as I read *Mueller*, you didn't actually need a formal easement in the sense that we would think of it under the Torrens or land transfer system. You just simply, over time they agree to write a passage –

YOUNG J:

But what happens if someone would say well I want the middle of the river attached to my title, kindly give me a new title and then they start sticking a fence across the river?

MR MILLARD QC:

Well in that, in the context of a river that was being used for navigation, as I understand it, they would not be entitled to do that.

McGRATH J:

That's really what Justice Williams was saying in *Mueller* wasn't it?

MR MILLARD QC:

Yes, exactly.

McGRATH J:

There was some sort of fundamental common law principle, the right of the highway, which he reached by analogy with ordinary roads?

MR MILLARD QC:

Yes.

YOUNG J:

There's no right like that in England and Wales. The river, if the river isn't tidal then it will be owned by the adjoining landowners and if they want to stick a fence across it they can, can't they?

MR MILLARD QC:

Well I think if it's being used for navigation, even although it might not be sufficient to vest the title in the Crown, there's still that right of navigation.

YOUNG J:

And catching fish, because I thought the Irish case that was cited was rather against that?

MR MILLARD QC:

Well I think it was Chief Justice Stout as we said in New Zealand there wasn't that concept of fishing rights going with the adjoining owner but he did sort of rather say well that might be because the fish are really of no great use in sort of thinking pre-trout and rather overlooking that the Māori, of course, did take fish from rivers.

YOUNG J:

He mentions eels.

MR MILLARD QC:

Yes.

ELIAS CJ:

I'm surprised that we haven't been given more information about the position at common law. I've just been reading a few articles myself on this but *Hale* for example says that non-tidal rivers were protected as common highways if they were common or public use for carriage of boats and lighters. There's a huge amount of

learning behind this word "navigability". There's Roman law concepts which the common law seems to have picked up too and we don't have any of that. Nobody has –

TIPPING J:

Tabula in naufragio.

ELIAS CJ:

Yes.

TIPPING J:

What I would like from you Mr Millard, if you're able, is what was the purpose of vesting the bed of the navigable river in the Crown that is consistent with your client's argument? Do you understand what I mean?

MR MILLARD QC:

Yes. There was, Justice Edwards raised that, Justice Williams did not comment – commented on it but didn't rule and the others didn't go further, that one of the problems with the Waikato River was that there was shifting sandbars and if the bed was not vested in the Crown then the common law right of navigation could strike a problem if the sandbars moved and prevented the passage of the boats up and down. That if it's vested in the Crown then the Crown could come in and –

TIPPING J:

Do the right thing.

MR MILLARD QC:

To keep the channels open so that one could see –

TIPPING J:

Well I don't quite see how that argument assists your – or that line of thought on the purpose assists your clients?

MR MILLARD QC:

Well it assists to the extent that this was intended to give right to the Crown to keep navigation open but doesn't intended to be wholesale confiscation. The hydroelectricity bit this is.

TIPPING J:

But it was a vesting of the bed. I mean it was a confiscation in that sense if hitherto the bed of the river had belonged to someone else. I mean I can't see how you can avoid it. It's vesting the bed in the Crown where presumably before that it wasn't vested in the Crown, it was vested in someone else, otherwise there's no point in the whole thing.

MR MILLARD QC:

From our perspective what we're saying is that while the Act may have changed some of the rights, it wasn't intended to be a wholesale change of rights, and that when one comes to interpret what is meant by a navigable river, given its confiscatory effect, one should give it a narrow interpretation, rather than the wide interpretation favoured by the Courts below, on the basis that this was part of a package with the hydro electricity.

TIPPING J:

So they were grabbing the minerals, including the coal, in beds of rivers where boats go up and down, but not grabbing them where boats don't go up and down?

MR MILLARD QC:

Basically, yes.

McGRATH J:

A volume thing was it?

MR MILLARD QC:

Well that could be, because of course one of the comments in *Mueller* was that they were taking out huge quantities of coal from underneath the river, and if it was just a small river they may not have been quite so concerned.

TIPPING J:

My brother's way of putting it, demonstrates a very haphazard approach by the Crown to the issue of minerals.

BLANCHARD J:

It could be of course that navigability was just being used as an excuse.

ELIAS CJ:

Yes, pretext.

McGRATH J:

Mr Millard, can I – we were I think, looking at – you were saying that the focus was on coal, it was not on hydroelectricity but do you accept that a secondary focus was on this concept of a public highway and that navigability has some relationship to that?

MR MILLARD QC:

Yes I do.

McGRATH J:

That however, was a secondary focus rather than the primary one.

MR MILLARD QC:

Yes, that would be –

McGRATH J:

That's fine, I know your position on that.

ELIAS CJ:

A lot of the early authors who look at the question of navigability are dealing also with roads, and it is the concept of the public highway that is common to both.

MR MILLARD QC:

At least in the context of the *Mueller* case, the reason for the majority was that this was a public highway and therefore the Crown could not have intended to have granted…

AUDIO STOPS: **11.02 AM**
COURT ADJOURNS: **11:03 AM**
COURT RESUMES: 1 **1.34 AM**

ELIAS CJ:

We're very sorry about that. We've stamped our feet and made a fuss.

MR MILLARD QC:

Before we rose we were talking about the purposes of the Act. In my submission there's no warrant to go beyond saying that it was concerned with taking the – or the vesting the minerals under a navigable river and preserving the right to use rivers that were public highways and dealing with the likes of sandbanks and that sort of thing. That beyond that there's no discernible purpose that would assist in interpretation other than this was of course a confiscatory provision that was intended not to disturb existing rights beyond the two purposes that I've mentioned.

We also take issue with it being a package with the Water-Power Act. The Water-Power Bill began life as a government measure, not like this one which was a private one, and it seems very odd that if you're going to deal with the river in the context of water power, that you put the section in the Coal Mines Act Amendment Act concerned with the welfare of coalminers rather than in the Water-Power Act itself. Justice Harrison in the Court below was assisted to his conclusion in that they were passed at the same time but at paragraph 7.10 of my submissions I set out that that really was only a historic accident because there was this obviously mad rush to get through a whole lot of legislation at the end of the Parliamentary term and you have some 32 out of 42 local Acts passed within three days and 41 out of 95 public Acts. But it's also perhaps more importantly unnecessary for the section to be used for hydroelectricity purposes because the Water-Power Act contained its own provisions that dealt to that.

If I could take you to tab 25 where the Water-Power Act is reproduced. This is volume 2 of the appellant's authorities, tab 25. A commendably short Act, as most of them were in those days, and you'll see section 1 says that it shall "form part of and be read together with" the Public Works Act 1894, which of course had compulsory taking provisions subject to compensation. And then subsection – sorry section 2, "Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty." And subsection (2), "The government may from time to time require as for a public work any existing rights or any lands necessary for utilising water for the generation or storage of electrical power." So that the Crown had the right to acquire the bed of the river under this Act with the constitutional safeguards of the Public Works Act and compensation payable. It did not need section 14 for that purpose.

McGRATH J:

There's nothing, these provisions were looked at in the *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 (CA) case weren't they and there's nothing that would suggest the contrary of that there?

MR MILLARD QC:

No. I do recall that paragraph 16 that although the Court of Appeal referred to some comments by the member for northern Māori, Mr Hone Heke, the – we're going to look at the reply and if one goes to tab 41 in the same bundle and look at the Hansard references on page 798-799, on page 798 on the right-hand column you've got, just four lines down, Mr Heke Northern Māori Districts talking about the Bill and partway through the very first paragraph, "It would not be proper for a Bill like this to take away from Māori owners the use of water power on their lands. There's no telling to what use even Māori may desire to put such water power for themselves."

And if you come directly across the page to the left-hand column on page 799, The Honourable Mr Hall Jones, "If there are vested interests held by natives or others they would be preserved and if required under subsection (2) would be paid for." So they were certainly thinking that land required for hydroelectricity purposes would be taken under the Public Works Act and paid for and that must include the bed of rivers if they were owned by Māori or anybody else. Factually it seems odd that you should put it in the Coal Mines Act and define it in relation to navigable rivers because of course the most desirable feature of – for hydro purposes is the large drop, which is, at least if you adopt a segmented approach, is the very place where you wouldn't have navigation and at the time there was a lot of thought about whether the Huka Falls could be used for hydroelectricity and it's really only in the last few years if you – brave or crazy canoeists have gone over the Huka Falls. One wouldn't have thought it then in ordinary parlance as being navigable.

So if I can turn then from that general background to the section itself and of course the first comment I make is that this provision was confiscatory to the extent that it did disturb existing rights and therefore should be given a narrow approach. That's sort of standard principles of interpretation overlaid in this case by, of course, the Crown's case would have all Māori rights to the beds of the river that were navigable being taken and that gives it an extra overlay.

At paragraph 8.1(c) I did refer to the New Zealand Bill of Rights. Perhaps I sort of more appropriately should have referred to the Universal Declaration of Human Rights, article 17.2, "No one shall be arbitrarily deprived of his property." Which is of course consistent with the approach Courts usually take to confiscatory provisions.

When we look at section 14 we, that in line with the Crown's approach in their defence, that one looks at it on a segmented basis rather than a whole river basis which found favour in the Courts below. The High Court in rejecting that at paragraph 72 of the judgment Justice Harrison said, "I do not accept Mr Millard's proposition of divisibility. In my judgment the reference in s 14(2) to 'a navigable river' describes its status or characteristics as a whole. This is reinforced by the earlier reference in s 14(1) to 'the bed of such river'. Similarly the reference to 'the bed' in section 14(2). A river is either navigable or not, and its bed either belongs to the Crown or not. It is not defined as 'a navigable river in whole or in part' or 'a navigable river to the point where it meets an obstacle to navigation'." So at paragraph 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." I do observe that when it came to looking at the factual issues he did look at its component parts rather than as a unit.

Now we say well that approach gives a very wide meaning to the section but has its own problems. In particular the very opening words of the section are, "Where the bed of the navigable river is or has been granted by the Crown," and in my submission it would be highly unlikely that the Crown would grant the whole bed of a river. It might grant part of the bed of the river but not the whole and therefore that, within the very opening words of the section, indicates a segmented approach.

You then have the problem that if you take the approach of Justice Harrison, and I focus primarily on him because in the Court of Appeal having looked at the basis for holding that it was part of a package, they did not greatly look at the section itself, either as a matter of interpretation or looking at the factual issues. Rather they seemed content to adopt what Justice Harrison said. That if one looks at the approach of saying it's either a navigable river or it's not and the bed either belongs to the Crown or it does not, you get into this difficulty. Does that mean that if you have a river that is 40% navigable, that even up in the upper reaches where you might have a very narrow stream with a farmer owning both sides of the stream, but the farmer doesn't own the bed of the stream itself, that if you take literally the

approach that it's either navigable or its not and the bed is either the Crown or it's not then the bed of the whole river going right up to its very source would then be the Crown's if the Court considered the river is navigable as that's defined. But the other one which impinges very much in light of the *Mueller* decision relates to the Waikato River. If one says, oh 40% of the river was navigable up to Cambridge but not after that, does that mean that even the 40% up to Cambridge, the bed of that didn't vest in the Crown? Now that would have been a staggering thought –

ELIAS CJ:

But why do you say that there should be any – I didn't understand this submission. Why did you say, do you say that there should be some tipping point in terms of percentages because on the highest argument for the Crown it would be if a river is navigable at all, to any extent the whole river becomes treated as a navigable river. Why this 40%?

MR MILLARD QC:

I'm just taking 40% as being my general understanding of the Waikato River. That was simply why –

TIPPING J:

Your point is that if you found that because 40% made it non-navigable that is a nonsense in fact for the 40% that is navigable?

MR MILLARD QC:

Yes, yes. So you're into problems as to how do you define navigability when you're looking at the river as a whole. Is it done on a percentage basis with the consequences, perhaps absorbed consequences, that the majority is not navigable therefore you say the river is not navigable even although parts were, as was the case in the Waikato River.

TIPPING J:

I wonder if the word "where" in saying "where the bed of a navigable river" might reasonably be construed as saved to the extent the bed of a navigable river introducing the idea of extent which then flows through into the rest of it. So it's if "and to the extent that a river is navigable", the where – you understand what –

MR MILLARD QC:

Yes.

TIPPING J:

– I'm suggesting Mr Millard, that the "where" is really in context "to the extent" that because of the point that it's, as you say, it's highly unlikely that the whole of the bed is going to be granted – well it might be but in separate grounds perhaps.

MR MILLARD QC:

Well that could be.

TIPPING J:

But given your point, if it's a sound one, that's an unlikely scenario but it may not be all that unlikely. But you've got to get an extent concept in here, haven't you, by necessary implication?

MR MILLARD QC:

That's certainly our submission –

TIPPING J:

Yes, that yes you can, your submission doesn't –

ELIAS CJ:

Well your submission is that because there's the exception for Crown grants which can only be limited in extent, you do have a segmented approach necessarily?

MR MILLARD QC:

Yes, but I then go further and say that to take vitrioly the concept that you treat the river as one can lead to absurd results in itself –

ELIAS CJ:

Yes.

MR MILLARD QC:

– but even –

TIPPING J:

But where there?

MR MILLARD QC:

– apart from that –

TIPPING J:

Where there is used either in the sense of when or in the sense of a spatial concept and it's, maybe it should be construed as having a spatial connotation save where, that is in the place where or places where. I don't want to over-refine the debate Mr Millard but it is certainly capable of being read in that sense.

MR MILLARD QC:

It is. That soon as you start with saying well, to the extent that the bed of the river is reserved by the Crown or you have been granted by the Crown, rather, that doesn't come in. Then you're sort of adopting a segmented approach and –

TIPPING J:

Yes, quite, quite –

MR MILLARD QC:

– but that seems to allow you to go on and adopt a segmented approach and look, is this river navigable here if it's here, navigable here then the consequences flow.

TIPPING J:

What do the authorities on navigability of rivers say about this question of extent? What's the best case, from your point of view, on supporting the proposition that navigable is to the extent that concept, or are there really no cases that directly touch on this particular point?

MR MILLARD QC:

I'm sorry if I'm, I may not be understanding the question. If you go back to the old common law –

TIPPING J:

No, I think you probably are misunderstanding the question. That's my fault, Mr Millard. Are there any cases to which you can refer, never mind the ad medium filum rule.

MR MILLARD QC:

Yes.

TIPPING J:

But which, in the context of a navigable river, say that that is not a whole concept. It is a piece by piece, if you like, concept.

MR MILLARD QC:

In the context of this section, there's sort of nothing either way, in my submission. In the context of the old common law, the point, you only went up to the point of the title reach.

TIPPING J:

Yes.

MR MILLARD QC:

And so, to that extent, it was a partial one.

TIPPING J:

Yes, but that was on a different premise.

MR MILLARD QC:

Yes, Sir.

TIPPING J:

But in common law terms, did the common law recognise that some rivers were classified as navigable but only a part of them?

MR MILLARD QC:

Only part of them, yes.

TIPPING J:

It did?

MR MILLARD QC:

There were two, there were two possibilities –

TIPPING J:

What were the authorities that support that because for me if there is a clear line of authority saying that you can, and should, adopt a segmented approach, that would be a weighty matter in your favour.

ELIAS CJ:

You don't even need a segmented approach. You need a to the extent of navigability really – it would.

TIPPING J:

Yes, yes, exactly.

MR MILLARD QC:

The –

TIPPING J:

You see, the Canadian case is to some extent against you on this but you'll no doubt be coming to it.

MR MILLARD QC:

Yes.

TIPPING J:

But what I want to know is, what are the cases if any, or the writings if any, that say that the concept of navigability is a kind of term of art which carries with it an extent connotation?

BLANCHARD J:

You refer, in your paragraph 9.10 to *Coleman's* case, which I haven't looked at but from the way you depict it in that paragraph it looks as though it's that sort of case.

MR MILLARD QC:

Yes, I will take you to it. I think in the English cases in terms of ebb and flow, the case at tab 7 –

TIPPING J:

No, the tidal is not going to help.

MR MILLARD QC:

Yes but that's really –

TIPPING J:

The tidal is not going to help. That's a different accessory.

MR MILLARD QC:

In terms of beyond the tidal it was looking at old custom and as I understand it, it was given a, that was given quite a restrictive, meaning you had to bring quite convincing evidence to show it had, for a long time, been used for navigation but it was looking only at the parts that we used for navigation and not at the other parts. No, I'm sorry, perhaps I could –

BLANCHARD J:

Well that rather helps you doesn't it?

TIPPING J:

Yes.

MR MILLARD QC:

Yes.

TIPPING J:

Custom would be not necessarily whole of river. It would be, or is capable at least, of being part of a river.

MR MILLARD QC:

Yes. It was certainly not a whole of river approach.

TIPPING J:

Because if it's not navigable above, in fact, above a certain place, there won't be any custom of it being navigated.

MR MILLARD QC:

The purpose – over the lunch time I could come back –

YOUNG J:

Well no-one's going to want to navigate there anyway.

TIPPING J:

No.

MR MILLARD QC:

Perhaps over lunch I could come back and give you the case because I've got –

TIPPING J:

Because I think this is a key point, Mr Millard, for me at least that you're really – if you can show that you're inviting us not to disturb an existing legal approach, despite *Nikal,* for what *Nikal* may stand for, and that would be important in my mind.

MR MILLARD QC:

Yes, well perhaps I could come back to that point?

TIPPING J:

Yes.

MR MILLARD QC:

And perhaps if I could touch on the Canadian cases at that point? First of all going to *Coleman v Attorney-General for Ontario* (1983) 143 DLR (3d) 608 case which is in volume 1 of tab 5.

The first point that I wanted to make in regard to the Canadian cases is, of course, they were in quite a different geographic context to New Zealand in that you have this vast continent. You certainly have some very high mountains in the Rockies but then you have the great sweep of the prairies and the rivers were used for highways by many of the people in the early days, and they were also used for flotation of logs. That was the prime way of getting your logs from where they were felled down to the mill and then out, was to float them down. We don't seem to have that concept in New Zealand, so in my submission, one should be cautious about transferring Canadian jurisprudence, developed in the hinterland of Canada to New Zealand, because some of the seaboard provinces didn't go down that route.

TIPPING J:

If you look at the head note of *Coleman* and you look under *Hall* and then you look at the one, two, three, four, point 4 seems to help you. "The stream may be navigable as a p – I'm looking at *Coleman*'s case, tab 5, volume 1.

MR MILLARD QC:

Yes, and that's just picking up the points that start at page 613. Perhaps if I could just draw attention at 610? What they were construing there was an ordinance, or an act in 1980, "Where land that borders on a navigable body of water or stream or which the whole or a part of a navigable body of water or stream is situate", et cetera, "has been heretofore or is hereafter granted by the Crown, it shall be deemed in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee."

So they were looking at the expression "navigable body of water or stream" but with no greater assistance as to what was meant and the principles, at least, for the central provinces, and would also include British Columbia, were set out at page 613 through to 615 and there are nine points. The first one, "must be navigable in fact ... by ... small craft, ... as small as canoes, skiffs and rafts drawing less than one foot." Then they look at flotation, and then three, "A river or stream may be navigable over part of its course and not navigable over other parts."

TIPPING J:

What page are you on now?

MR MILLARD QC:

614.

ELIAS CJ:

Number 3.

TIPPING J:

Number 3. Sorry I turned over two pages.

MR MILLARD QC:

"A river may be navigable over part of its course and not navigable over other parts; its capacity for navigation may therefore be determined by the courts independently at different locations."

BLANCHARD J:

I see that there's a reference there to *Fraser* and that that's a Supreme Court case. Have we got that?

YOUNG J:

It's a Quebec case isn't it?

MR MILLARD QC:

Yes, a decision in 1906. No, I'm sorry, we haven't.

TIPPING J:

Well the two cases that are cited there, the one referred to by my brother and the other one, *Leamy* would be pretty important, wouldn't they, in this context?

BLANCHARD J:

Especially if civil law concepts have come through into the law.

TIPPING J:

I mean that's direct authority in your favour, with two cases cited.

MR MILLARD QC:

Yes. I do need to put –

TIPPING J:

Can you get those?

MR MILLARD QC:

We'll certainly get those. I do need to point out point 8 which the Crown does rely on.

TIPPING J:

Oh yes, of course. I mean it's obviously not as simple as that, proposition 3 might initially suggest, but it's – at least it's a good start from your point of view.

MR MILLARD QC:

Yes.

BLANCHARD J:

I don't think there's any suggestion of canals in the area we're looking at.

MR MILLARD QC:

Well certainly there's no evidence of canals being feasible.

McGRATH J:

You've gotten, paragraph 6 the underlying concept of a public highway haven't you Mr Millard?

MR MILLARD QC:

Yes, it's certainly going to come back to that one.

BLANCHARD J:

I like public aqueous highways.

ELIAS CJ:

Yes.

TIPPING J:

What is a copious stream for this purpose Mr Millard, what does copious signify?

ELIAS CJ:

Not much.

MR MILLARD QC:

It comes to however, the difference between a stream and a river, if it is copious I'd have to say.

TIPPING J:

I just noticed that terminology in some of these cases, but it's not helpful for our present purposes.

BLANCHARD J:

I notice that in 5, according to the Quebec decisions "the river or stream must be capable of navigation in furtherance of trade and commerce".

MR MILLARD QC:

Now the Judge does go on to say that in Ontario that doesn't apply.

BLANCHARD J:

Where does he say that?

MR MILLARD QC:

That's –

ELIAS CJ:

Five, is it?

MR MILLARD QC:

That's sort of the latter half of his judgment. He's sort of going through the authorities on that point, drawing on American authorities as well as Canadian.

McGRATH J:

It came up in *Leighton* that point didn't it? That point in *Leighton* I think the first instance?

MR MILLARD QC:

Yes, it's Justice Hutchison who certainly picked up the commercial usage.

McGRATH J:

What do you say about the fourth point, that it "need not in fact be used for navigation so long as realistically it is capable of being so used", is that something that is a concept that applies to us, to our statute?

MR MILLARD QC:

Yes.

McGRATH J:

Page 614, the fourth point.

MR MILLARD QC:

Well I have to accept that the section here does look at the potential use and show to that extent –

BLANCHARD J:

It actually speaks of future beneficial use.

MR MILLARD QC:

Yes.

BLANCHARD J:

Acceptable of actual or future beneficial use. So it's talking about capacity.

MR MILLARD QC:

Yes. It's –

BLANCHARD J:

It has to be a sort of realistic capacity couldn't it, you'd have to say, well this is at least on the cards.

MR MILLARD QC:

Yes.

BLANCHARD J:

You couldn't theorise that you could go blasting your way through the riverbed you would've thought.

MR MILLARD QC:

But we would say reasonably on the cards in 1903, when the Act was passed, rather than sort of – rather than looking with the advantages of hindsight and the advent of –

ELIAS CJ:

Has to be all the speaking – the statute.

TIPPING J:

Its voice has been muted by its successors hasn't it? We then have to start looking, if to the extent it made any difference, if the current legislation would we, I don't know. Everyone's accepting that it's this 1903 version that's –

MR MILLARD QC:

Well if, that was certainly the approach, and otherwise you would have the odd result that you might be sitting, if for instance you were mining under what was a non-navigable river, and suddenly there's, the jet boat is invented, you lose your right to mine, even although you don't know of the jet boat. So that's why it is suggested, if one in this context should be looking at it in 1903, it couldn't have been intended that the status of the land would change as innovations came along.

If one goes through the case –

YOUNG J:

Foreseeable innovations would be –

MR MILLARD QC:

Yes.

YOUNG J:

I mean – and they may be associated with foreseeable areas where people might live or foreseeable farming developments. Foreseeable patterns of settlement. Something that might in the future be of beneficial use for someone who chooses to live on a riverbank?

MR MILLARD QC:

Yes. And of course the foreseeability concept has resonance in law and other contexts. If one looks at the rest of the judgment, they indicated what he does do, is, he decides that even on the basis of the nine principles that he's outlined, this particular Bronte Creek was navigable, but goes on to see whether the test in paragraph 5 was part of the law of Ontario and draws on, as I mentioned, some United States cases. 618 is looking at a decision of the Circuit Court of Appeals, Sixth Circuit, and you will see there that they're talking about its navigability only where they might be used as highways of commerce, and that an inland lake, which isn't used as a highway, was not part of it, part of the navigable river. 619, looking at *Gordon v Hall* and the quote there, "Without entering upon the task of defining

'navigable waters', I think it is clear that the small lake here in question is not a navigable water. In the first place, to be regarded as a navigable water, it must have something of the characteristics of a highway." And a little bit later, "Should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means." And page 620, half way down, the Judge sort of summarises that the lake in that question was in no sense a public highway. He then looks at a decision on *Collins v Gerhardt* in Michigan and over the page 621, about two-thirds the way down, "Thus, it appears in the early history of the State, the common law rule relative to the navigability of the rivers was enlarged to embrace all streams having the capacity to float logs and rafts." And I just mention that because of course that just highlights that you've a different sort of, different environment, and therefore although the Canadian cases maybe of some assistance, they do need to be treated with caution.

McGRATH J:

In that there is a sort of resonance with what Justice Williams was saying isn't it, that it's talking about the necessities of the people?

MR MILLARD QC:

And if it's a public highway by reason of something like prime necessity or some concept like that, that the Court will recognise that, and that seems to be what was being done in this American case.

MR MILLARD QC:

Yes, and we would say that in this context, when one looks at the use around this area, there was not that prime necessity, indeed there wasn't that ability.

TIPPING J:

It's also quite helpful that it's pretty clear that the raft here has the connotation of a group of logs, all lashed together for –

MR MILLARD QC:

Yes.

TIPPING J:

Because otherwise you wouldn't be talking about floating a raft.

ELIAS CJ:

This case, which helpfully traces through the development of the law in Canada, does make it clear that Canada has modified the common law.

MR MILLARD QC:

Yes.

ELIAS CJ:

Because of its circumstances.

MR MILLARD QC:

Yes. With, as I say, there are some exceptions, New Brunswick hasn't, and nor has Newfoundland.

ELIAS CJ:

Yes.

TIPPING J:

I see it has a dimension that we're not worried where that in winter the stream is frequently used for snowmobiling and cross-country skiing.

MR MILLARD QC:

The case that the Crown puts a lot of weight on, is *R v Nikal* [1996] 1 SCR 1013 which is at tab 15 and that case revolved around whether the first nation person who was fishing without a licence should be convicted and amongst other arguments that he ran was that where he was fishing was part of the reserve and because the reserve had been transferred to his tribe or nation it had carried with it the right to the bed adjacent to it and part of the decision was that the Crown grant did not, in fact, include the bed but they also went on to consider whether or not the river itself was navigable such that the grant would not – would be presumed not to include the bed. And that discussion –

ELIAS CJ:

What tab are we at sorry?

MR MILLARD QC:

This is tab 15 and that discussion begins at page 1045 looking first of all at the presumption and when it applies and then on page 1046 refers to the book *Water Law in Canada: the Atlantic Provinces*, the English law was that the owner of the land which a non-tidal stream flows owns the bed of the stream unless it has been expressly or impliedly reserved and if the stream forms a boundary then it's split and then says, "the Courts in Western Canada have not applied this rule to navigable rivers" and refers to the *Iverson* case which was also cited in *Coleman*. "These references to the common law of England indicate clearly to my mind that they are not and never were applicable to conditions in this Province. Here the public right in navigable waters whether under the Hudson's Bay tenure or since 1869 under the title vested in the Crown, was prior to, and superseded all private rights acquired by grant or settlement, upon the banks of a navigable stream. In a country occupied from the earliest days by hunters, trappers, fishers and traders, whose main and almost exclusive highways were the rivers and streams, such laws were contrary to the requirements and necessities of the whole community."

So that it can be seen that why Canada moved away from the English common law was this concept of necessity –

YOUNG J:

Well it wasn't a closely settled country as England was.

ELIAS CJ:

And it wasn't a country in which all the property in the country was owned by the native population as New Zealand was.

MR MILLARD QC:

And you sort of see there that what, it was because these rivers were used as highways out of the necessity to use them that they developed a different law to the English common law and if one was going to apply the Canadian law, one shouldn't divorce it from that – the reason why it developed its concepts and we would say here that the relevant part of the river was not of necessity a highway and indeed wasn't being used as a highway.

McGRATH J:

But you do agree that that's what, the same reasoning applied in New Zealand circumstances that's reflected in Justice Williams' judgment in *Mueller*?

MR MILLARD QC:

Yes in the context of whether the presumption was rebutted by – in the – in relation to the Crown grant in that case, yes.

ELIAS CJ:

I see it, sorry, which paragraph are you referring to?

MR MILLARD QC:

I was referring on the top of page 1047 the quote from *Iverson*.

ELIAS CJ:

Yes, thank you.

MR MILLARD QC:

And you get a similar sort of concept in *Keewatin Power Co v Kenora* (1906) 13 OLR 237 per Anglin J which is referred to at page 1048. "The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the alveus of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of land bordering thereon to the bed of such waters ad medium filum aquae; whereas in this Province such public rights in all rivers navigable in fact have been deemed always existent in the Crown." There's again that reference to the concept of necessity as being something that English law didn't take into account that the Canadians were going to.

Then the next paragraph down refers to the "different conditions prevailing in this country, not merely physical conditions but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question." If you come over to page 150, sorry 1050, then start to look at the Bulkley River itself –

ELIAS CJ:

Sorry I'm just thinking out loud but another circumstance not mentioned there is the one mentioned earlier in the Great – or the *Iverson* case that different circumstances of property in Canada.

MR MILLARD QC:

And you get a sense of that on page 1049 where they refer to, in the paragraph towards the bottom, except in the middle of that paragraph they refer to except in Atlantic Provinces where different considerations may well apply and look it's clear that the law in Canada has developed differently, dependent on the local circumstances. They then, para 72 on page 1050, start looking at the test for navigability for the Bulkley River and say, "It is clear that the ad medium filum aquae presumption has no application to navigable rivers in British Columbia. From the earliest times the Courts and legislatures of this country have refused to accept the application of a rule developed in England which is singularly unsuited to the vast non-tidal bodies of water in this country. It is therefore necessary to determine whether the Bulkley River can properly be considered to be a navigable river. To assess navigability, the entire length of the river from its mouth to the point where its navigability terminates must be considered." That does leave the part beyond where it ceases to be navigable and they do accept that some interruptions may not destroy navigability, referring to the Winnipeg River in the question in *Keewatin.* "It was a river not unlike the Bulkley River in that various falls and rapids necessitated numerous portages between stretches of good water."

Now the reference to portages is of some significance because it carries with it the implication that the river was being used for a continuous journey but you do need to take into, take your boat around the obstructions rather than saying, well you've got this bit of river which is navigable. You've got that bit of river that is navigable. The bit in between people don't actually go from that to that using river craft, even with portage, but you still treat that bit as being part of the navigable river.

Then over at page 1050 in the middle they quote from *Coleman* –

McGRATH J:

If we just look at page – sorry you've moved to 1051 I think haven't you?

MR MILLARD QC:

Yes.

McGRATH J:

Just come back to 1050 and the bit below, which is referring to Justice Anglin, that paragraph seems to me it might be of some significance. The one starting, "But it is argued that … the ad medium rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is not my opinion. Once the navigable character of the river is established, up to the point at which navigability entirely ceases the stream must be deemed a public highway." That is a concept that I think, seeing I've marked it, must be relied on by the Crown.

MR MILLARD QC:

In my submission that's consistent with what I was saying about portage. It's still looking at the concept of a public highway being a highway that is used as such rather than a series of public highways plural.

McGRATH J:

Is it not indicating though that once you identify a river is a highway the fact that the amount of use falls off isn't important, it's a question of – it's only where navigability entirely ceases that's important?

TIPPING J:

And navigability not actual navigation.

MR MILLARD QC:

In my submission it's, you're still not looking at navigability as being a series of different journeys, it's still looking at the concept of a journey along the highway that may need portage to get you there around the obstacles, but up to the point where that ceases.

McGRATH J:

So you say it should be read in the context of the reference to portage?

MR MILLARD QC:

Yes.

McGRATH J:

Thank you, that may well be.

TIPPING J:

I'd like you to address the next paragraph this sort of on again, off again problem that the Judge was a little concerned with.

MR MILLARD QC:

Well in my submission if you, going over the page, "Then again, though navigation at the falls in the east branch of the Winnipeg river is presently impossible, the engineers say that a canal to overcome the natural obstacle which the falls present is quite possible." Now my submission on that is that again it's looking at a single journey that would be aided by a canal, presumably with locks, and of course for that you would need to have the title of the bed so that you could construct the locks. So that is why they're talking about the inconvenience of ownership but it's still in the concept that this is a river that would be used as a public highway for –

ELIAS CJ:

It's interruptions as is made clear in the next quote, that they're dealing with here. Interruptions don't mean that you have a salami approach to Crown ownership. It's only at the extent when navigability ends that people are not using it as a highway, that the riparian owners have rights.

TIPPING J:

And there is no reasonable potential –

ELIAS CJ:

Yes, yes.

TIPPING J:

– for its use as a highway.

ELIAS CJ:

Yes.

MR MILLARD QC:

Yes.

TIPPING J:

And you say that's Cambridge?

MR MILLARD QC:

Yes. Because –

TIPPING J:

That's your client's case. In bringing it home to this case, that's Cambridge or close to Cambridge.

MR MILLARD QC:

Yes, yes.

TIPPING J:

Karapiro or –

MR MILLARD QC:

Yes because it is, it's clear that the steamers did used to go up to Cambridge and could have got a little bit closer up to Hora Hora but –

TIPPING J:

You could get up to the bottom of the Karapiro Dam, I've done it myself.

MR MILLARD QC:

Yes, but beyond that they stopped and you have, at least two of the Judges in *Mueller* saying, Waikato River is navigable to Cambridge. They don't go on and say beyond – anything about what happens beyond but they're looking in terms of that one voyage.

TIPPING J:

But it would be the Karapiro Dam, wouldn't it?

MR MILLARD QC:

Yes, yes. Or it might – I think the –

BLANCHARD J:

Whatever the obstruction was.

TIPPING J:

Well it's a pretty good obstruction, the Karapiro Dam. It wasn't there in 1903 but…

MR MILLARD QC:

I think there were actually some falls or rapids at Hora Hora which is just slightly upriver from Cambridge and it got, there was a power station there that got flooded when Kararpiro was built so – but it's going to be –

TIPPING J:

It's not going – it's not –

MR MILLARD QC:

It's not materially different. The point that if you're looking at the quote in *Keewatin* you've got to also look at the quote from *Coleman* which refers of course to, "By improvements such as canals be readily circumvented." So that was the general concept that they were looking at, at that stage and then the final paragraph on page 1051, "The Bulkley River is navigable both above and below the Moricetown Canyon," which is what they were concerned about here, "and should be considered a navigable river. The fact that it is not navigable at the Moricetown gorge cannot alter that conclusion."

BLANCHARD J:

I assume that there was portage or could be portage through that canyon. Does that appear in the judgment?

MR MILLARD QC:

Not that I could see.

TIPPING J:

So you really had an interruption to your journey?

MR MILLARD QC:

Yes.

BLANCHARD J:

Have you had a look for the lower Court decisions in this case?

MR MILLARD QC:

A lot of these – I haven't –

BLANCHARD J:

It may be that being a criminal case they're not terribly helpful but –

MR MILLARD QC:

And they, there was some analysis of the reasoning beginning at page 1022.

BLANCHARD J:

Yes they are reported. You can see them on page 1019. It may give us more information about the facts on this point.

MR MILLARD QC:

Well certainly the early, the first decision we'd have to get off the Internet but we can try and do that.

BLANCHARD J:

Well it's reported in the weekly, *Western Weekly* that in the Court of Appeal. We have those in this building. In fact it looks as though the first, it's actually several appeals but the British Columbia Supreme Court decision is also in the *Western Weekly*.

MR MILLARD QC:

But if you look at least at paragraph 8 the decision appears to be more in terms of an interpretation of the regulations.

BLANCHARD J:

Yes. it may be that it doesn't give a geographical description but it would certainly be helpful to get a picture of what the physical situation was.

MR MILLARD QC:

None of the earlier decisions seem to focus on this particular issue but they may well have discussed some of the physical aspects of it.

ELIAS CJ:

But you're not seeking to resist the view that interruptions affect the character of a river being navigable or not, are you?

MR MILLARD QC:

We would say, that is, the interruption means that it ceases to be part of a continuous journey, yes, but –

ELIAS CJ:

Yes, I'm just thinking in New Zealand, my, and it's probably quite faulty, recollection is that the Wanganui River, the other teardrop, the Wanganui, I think they had to trans-ship, didn't they, at Pipiriki and the river is certainly navigable to Taumarunui but there are, there were some impediments but it didn't prevent the journey.

MR MILLARD QC:

They did blast out one part of the river and they did use winches to get –

ELIAS CJ:

Yes, to get the boats out.

BLANCHARD J:

But that's an equivalent to portage.

ELIAS CJ:

Yes.

MR MILLARD QC:

Yes.

BLANCHARD J:

It's like they did on the Yangtze.

ELIAS CJ:

Oh did they?

BLANCHARD J:

Oh yes, in a big way.

YOUNG J:

Just so I understand, are you saying that a river is only navigable in relation to such portion as is fully traversable in a single journey or with portage by a single boat?

MR MILLARD QC:

That's –

YOUNG J:

So what do you say? Say there was one obstruction between Cambridge and Taupo, would there be two navigable rivers or no navigable river? So that the journey was interrupted and the only way round the obstruction was on shanks's pony or by car or something else?

MR MILLARD QC:

Well if the evidence was and that people came up to point A upstream, they were then transhipped to point B and continued the journey up to Taupo on the river, so that it was, they can still be regarded as going up the river as a highway, then that one might still say, that the whole of the river was.

YOUNG J:

All right, so if they can go up to point A and then, but never go beyond point A and point – people at the other end go down to point A but never go beyond it and just – so there are two stretches of river, what are they? But that's getting closer to the current situation.

MR MILLARD QC:

Well we wouldn't – it's getting closer, but it's not close, we would say.

YOUNG J:

Well no, because there's more than one point A, but what do you say then? I don't – really I want to understand this traversability is at the heart of your argument.

MR MILLARD QC:

Well we say the concept is one of highway, and if you're not using the river as a highway, because of the, because of the obstructions, and that you have totally

disconnected bits of navigation, then the bit in between, between the totally disconnected bits of navigation shouldn't be regarded as being navigable merely because you've got a little bit of navigation up there and some down there.

YOUNG J:

What about the little bits of navigation, are they navigable? Would you say they're navigable rivers for the purpose of the Coal Mines Act?

MR MILLARD QC:

Well again I would say that one has to look at the quality of what value is for, because at least in – and the only – there are two cases where they've sort of looked at this in great detail. In the *Wanganui* case of course, there's no dispute the boats were being used. In *Leighton's* case there was evidence of skiffs and boats on Waiwhetu Stream, and none of the Judges said it was navigable. Justice Hutchison said it wasn't, Justice Fair said it wasn't, and the other two Judges ducked the issue.

YOUNG J:

Justice Adams, who had a fairly literal approach to the section, couldn't see why it wasn't navigable, but he had a literal approach to the savings provision as well.

MR MILLARD QC:

He said you didn't really need to decide it, because he could decide it on the grant basis.

YOUNG J:

But he rather thought that navigability in the section was a reference to use of boats, that it didn't have, as it were, an overlay of commerciality or substantiality.

MR MILLARD QC:

Yes Sir, I certainly accept that. There is then also the decision in *Tait-Jamieson v G C Smith Metal Containers Ltd* [1984] 2 NZLR 513 (HC) which is at tab 19 and that was a case that occupied about 10 days of hearing, but very short judgment response, and he was looking at the issue of this section, or the – section 261 as it then was, and looks at, looking at page 515 down the bottom line 44, "the first inquiry in my view, should ... be to determine whether the bed of the river has been granted by ,the Crown, for it follows that whether the river is navigable or non-navigable if the bed has been granted the section has no application" and looks at *Leighton's* case,

goes on to say that it was submitted by Mr Lusk, "That it was clear that the Crown had not intended the presumption to apply," this is page 516, line 23, based on *Mueller*. He didn't think that case was appropriate, he thought the case of *The King v Joyce* (1905) 25 NZLR 78 was more appropriate, and 935 or thereabouts, he submitted first that the evidence showed that the river had been used for the purposes of navigation at the time of the grant, to such an extent that it could not be supposed that the Crown intended to part with it.

"I do not accept that. In the first place the fact that a river is navigable does not in itself rebut the presumption" and refers to the decisions of Chief Justice Stout, and Justice F B Adams. "In the second place, the evidence here, principally from Mr Birkie, certainly did not show much use of the river before the date of the grant for the purposes of navigation. In my view, it is very far from the case that the river was shown to be navigable, whatever meaning be attributed to that term." So we don't actually have what use there was, but there was apparently some use of the Manawatu.

YOUNG J:

What's this got to do with what the grant is anyway, why are you talking about presumption? If it's navigable, then subject to the saving clause it was vested in the Crown. I don't really understand the judgment actually.

ELIAS CJ:

Well it depends what navigability means and whether it buys back into the assumption discussed in terms of rebutting the presumption.

MR MILLARD QC:

Yes. If –

YOUNG J:

But he's sort of applying *Mueller's* case isn't he?

ELIAS CJ:

Yes.

YOUNG J:

Right.

MR MILLARD QC:

But what he was saying, was in effect two things. One is, "I don't think the saving words in section 261 apply because this river wasn't navigable in any event, but even if it does apply then there's a presumed grant".

YOUNG J:

I think he's saying there's a presumed grant because *Mueller* doesn't apply and therefore the saving clause applies, then it doesn't matter if it's navigable, but he doesn't think it's navigable.

MR MILLARD QC:

Mmm. Well –

YOUNG J:

I think that is what he's saying.

ELIAS CJ:

Isn't there a problem in that a lot of the cases we've been taken to, particularly the Canadian cases, are about use. Whereas because of the Coal Mines Act provision, we're concerned with property and it may be that you can have fluctuating notions of what is navigable if you start from a, well you can have fluctuating notions of what is navigable but you can't do that if it would cut across existing property rights.

MR MILLARD QC:

Well that would certainly be our submission. That was partly why we say in 1903 and what was reasonably foreseeable in 1903.

ELIAS CJ:

Yes.

MR MILLARD QC:

Because otherwise you do cut across existing property rights, if you've got to fluctuate –

ELIAS CJ:

And what the Canadian cases are saying was that there was never a presumption in Canada, so there's no question of cutting across the property rights –

MR MILLARD QC:

Yes.

ELIAS CJ:

– but what the New Zealand case law shows, is that there was such a presumption in New Zealand and so you know that has implications for the interpretation of the provision.

MR MILLARD QC:

Yes. I accept that. Because it is quite clear from some of the passages that I've already taken the Court to, that they were saying, it was always Crown land and under – whether it be under the Hudson Bay, whatever it was, or, so you didn't have this expropriation factor that we have under the Coal Mines Amendment Act.

BLANCHARD J:

I think you were being a little unfair to Justice Savage in saying it was a short judgment, in fact it's not.

MR MILLARD QC:

Well it was only partially reported.

BLANCHARD J:

It's coming back to me, I recall reading it, there's a great deal said on accretion, which of course if not reported here. There's a – on page 514, it's clear there's a large chunk of the judgment that isn't being reported. Irrelevant, but I thought I should jump to his defence.

MR MILLARD QC:

I did mean to say in terms of the report, that at least on this issue, it's very short, and a little bit opaque.

BLANCHARD J:

Yes, he's quite brusque.

TIPPING J:

Well length isn't necessarily a sign of quality Mr Millard.

MR MILLARD QC:

I agree.

ELIAS CJ:

One of the judgments in *Mueller* talks about the problems for accretion if ad medium filum aquae doesn't apply, doesn't it?

MR MILLARD QC:

Yes. I think that what Chief Justice Stout was referring to was the difference between the Avon River and the Rakaia and the Waitaki and some of the problems there if the presumption doesn't apply.

YOUNG J:

Well do you know what practice has been in relation to those rivers? I mean they're very different rivers from what we're talking about. I mean the Avon perhaps no one cares.

MR MILLARD QC:

Well it's probably, in any event it's rendered academic because of course you've got in most cases you've got streets and public reserves around it.

YOUNG J:

A lot of houses, or some houses anyway.

ELIAS CJ:

Yes one would think that if there is a fluctuating ocean of navigability it might fluctuate the other way according to the reduced reliance on water based transport as roads get developed.

YOUNG J:

But a more significant issue, because there would be an economic component, it would be rivers such as the Waimakariri, the Raikaia, the Rangitata, the Waitaki. Do you know what the practice has been in relation to those rivers, which in one sense are navigable by say jet boat and in other respects more generally navigable.

MR MILLARD QC:

Sorry I can't help on that.

YOUNG J:

There must be vast amounts of shingle that have been taken out of those riverbeds?

MR MILLARD QC:

Mmm.

TIPPING J:

I don’t think you own up to the middle of the Rakaia if you’re adjacent to, just from vague recall of practice, but that’s probably nothing much to go on.

ELIAS CJ:

I think the taking of shingle is regulated by other legislation isn't it?

MR MILLARD QC:

Yes.

TIPPING J:

But your title shows –

YOUNG J:

But you own it though. I vaguely feel here, remember hearing cases where people have grazing licences over some of these riverbeds.

ELIAS CJ:

Yes, you do.

MR MILLARD QC:

It does – certainly some of the banks in the middle of the river would have but it does highlight a point that if you think about the amount of hydroelectricity on the Waitaki River in its upper regions and yet you would hardly have thought of that river because of the roading et cetera as being navigable in 1903.

BLANCHARD J:

But they may have exercised the rights under the Water-Power Act.

ELIAS CJ:

Well they will have, yes.

MR MILLARD QC:

Yes. I'm simply saying in the context of thinking of the 1903 amendment as being for the purposes of preserving hydroelectricity any rights, that would be one where you wouldn't have thought that the government had that river in mind.

ELIAS CJ:

Where do you want to take us to Mr Millard?

MR MILLARD QC:

If I can come back to the wording of the section itself and in particular the definition of "navigable river". The first point that I just wanted to note in respect of that, it means, "a river continuously or periodically of sufficient width or depth," and those words are a little bit ambiguous. Later wording was that –

BLANCHARD J:

I noticed in that Ontario case that Justice Henry used the word "continuously" but he was clearly using it in relation to seasonal fluctuation of flow.

MR MILLARD QC:

Yes. He, as I recall it, he did allow for the fact that at some stages it may not be because of the –

BLANCHARD J:

Yes, yes, and I'm sure that's what it meant here but that's been clarified anyway now in the 1926 Act.

MR MILLARD QC:

Yes.

BLANCHARD J:

Actually that does raise a point. Which Act do we look at because they all backdate. It could well – I don't know that anything turns on this but it could well be that the 1979 Act is the one, is the wording that has to be looked at.

MR MILLARD QC:

It has always been, the Courts, I have to say counsel have always proceeded on the basis that it was the 1903, now I think it was in *Mueller* one of the Judges said that it wasn't intended to change the meaning when they – they were just really simplifying some of the wording and perhaps cutting down on the words.

BLANCHARD J:

It wouldn't have been in *Mueller*.

MR MILLARD QC:

Sorry, did I say *Mueller*, I meant in *Leighton*.

BLANCHARD J:

Yes. Well that's probably right. I'm not sure that there was any difference in meaning but technically I suspect it's the later statute that governs because it's got that, I haven't got it in front of me at the moment –

MR MILLARD QC:

Tab 31.

BLANCHARD J:

It sort of shall remain, shall be deemed to have always been vested in the Crown, same sort of formula.

TIPPING J:

It's a contemporary problem and surely the Act that is extant at the time when the problem has to be addressed is the governing legislation. I raised the same point before Mr Millard on the premise that it probably doesn't matter but I think it's important that we get it right for other reasons.

MR MILLARD QC:

The approach that was taken was that the changes in the wordings weren't meant to disturb the existing rights under the Acts Interpretation Act –

TIPPING J:

Never mind meaning. Which Act?

ELIAS CJ:

It must be the 1979 Act but I don't think it matters because I think the meaning is the same.

BLANCHARD J:

Yes.

TIPPING J:

You can't apply an Act to today's problem which doesn't exist.

BLANCHARD J:

Unless it's one that's curative of the problem and having cured it is then repealed.

TIPPING J:

Yes.

ELIAS CJ:

This is a consolidating provision for whatever.

BLANCHARD J:

This isn't curing a problem.

ELIAS CJ:

No, it's maintaining a state.

McGRATH J:

We would then be proceeding on the basis that the words had been, the wording had been altered purely for reasons of simplification and saving of language which I think was the basis on which F B Adams J saw the provision.

MR MILLARD QC:

Yes and there was also the sort of basis on which as I say in *Leighton*'s case, and I'll get the name right this time, and they certainly didn't think it made any difference.

McGRATH J:

That's the case that I was referring to when I was referring to the judgment of Justice F B Adams. It was he, I think, who said that wasn't it?

MR MILLARD QC:

Yes, um –

McGRATH J:

Don't worry, you can look at it later if you want to, it's page 788.

TIPPING J:

Before we went down this side street, navigable river, if your point here, the definition, is your point here that the definition contemplates that a river will be navigable up to a certain point but not thereafter? That is the Cambridge fulcrum for which you're contending because it may become at all times not of sufficient width or depth but it's still the same river.

MR MILLARD QC:

The, yes. I think the river at all times, so or not, probably intended to deal with the word – qualify depth rather than width.

TIPPING J:

Quite. Well some rivers can change their width but leaving that subtlety aside it does seem to be implicit that it's the same river but it's going to be navigable over part of its length but not over the rest because after a certain point it will never be of a width or depth to be susceptible et cetera.

MR MILLARD QC:

Yes.

TIPPING J:

Is that the point that you're making as to the definition?

MR MILLARD QC:

Well, that is only the point we would make, that it's not an all or nothing approach that simply because part is navigable then the whole is treated as being navigable, which is a point I've –

TIPPING J:

It does suggest that there is a line at which after that it's entirely non-navigable, if you like, and you've got to try and find that line.

MR MILLARD QC:

Given the common law background, where you started at the mouth and worked up, we would say that was the way one works here: work upwards from the point where it starts, until you get to the point where it's no longer navigable, even if –

TIPPING J:

It's neither continuously nor periodically of sufficient width, et cetera.

YOUNG J:

But isn't this one area where the later legislation helps that continuously or periodically is in terms of time, rather than space?

MR MILLARD QC:

Yes.

YOUNG J:

I think that's apparent from the 1925 Act?

MR MILLARD QC:

Yes, and it would certainly say that was what, "Continuous and periodical," was intended to mean, but clarified later. We would also say that it's important to note that it's, "Used for the purpose of navigation by boats, barges, punts and rafts," whichever bit of legislation you're using, rather than simply, "Used by boats, punts and –

YOUNG J:

Well, no, but originally it was just, isn't it just for – what does the original section say on that? I didn't…

MR MILLARD QC:

The original section says, “Means a river continuously or periodically of sufficient width and depth to be susceptible to actual or future beneficial use –

YOUNG J:

Yes.

MR MILLARD QC:

– for the purposes of navigation by boats, barges, punts and rafts.” Now, I have dropped out some words in that, but to get the sense of it it’s – so the original words, “For the purposes of navigation by boats, barges, punts or rafts,” has been –

YOUNG J:

It’s an odd connotation of words, “Boats, barges, punts or rafts,” because “boats” means everything, “barges” looks commercial, “punts” to me looks frivolous and “rafts” is presumably timber.

MR MILLARD QC:

Yes, I’m not sure that I would – I’m mindful although of course of the punts on the Avon, but I don’t know that that was necessarily something that was around in 1903 or what they would have had in mind.

YOUNG J:

Yes.

TIPPING J:

Well, but anyway, I don’t think – and this is a diversion.

MR MILLARD QC:

Yes, it’s –

BLANCHARD J:

Speaking from personal knowledge?

TIPPING J:

Not quite, not quite.

YOUNG J:

But the word "punt", I mean, I think, I mean, there must have been boats that we would classify as punts, which have been used commercially.

MR MILLARD QC:

Yes.

YOUNG J:

I mean, to say it can't – mean exclusively boats used for fun, lolling around on a summer's day, but I would have thought now it predominantly does mean that, and what I'm not very clear is what it meant in 1903. The recreational use of punts was very common in 1903.

MR MILLARD QC:

Well –

YOUNG J:

And perhaps that was what it primarily would refer to then as well as now. But if it were put in jet boats or something, then that would be a rather telling factor against your argument.

MR MILLARD QC:

I'd have to accept –

TIPPING J:

I'm sure Mr Millard is relieved that it's not there.

YOUNG J:

But it may be that "punt" serves the same –

TIPPING J:

William Hamilton hadn't come along by then.

YOUNG J:

Right, well, if he had he was rather young, I think.

TIPPING J:

He was rather young, yes.

MR MILLARD QC:

In 1979 he might have done, but I wouldn't be – but my point was really that it's not just "use" by these craft, whatever you make of these craft, "Use for the purposes of navigation," and that has some relevance, because one of the uses that the Crown relies on is some people all sort of coming down in a daredevil expedition, where over at least these parts of the water they didn't have control, and I'll take the Court to that, probably best after lunch.

BLANCHARD J:

Well, what do you say "navigation" means?

MR MILLARD QC:

Well, in my submission, it denotes a degree of control, to begin with, it sort of –

BLANCHARD J:

So white-water rafting isn't navigation?

TIPPING J:

Oh –

MR MILLARD QC:

Well, I would say not.

YOUNG J:

Well, I think Justice Henry wouldn't agree with you, would he?

MR MILLARD QC:

Mmm.

YOUNG J:

That's in the Canadian case, but –

ELIAS CJ:

But they've moved into recreation. It seems to me that if it's recreational use you have some real difficulties, Mr Millard, but – in fact I would have thought that you need to contend that navigation means a commercial or transportation use.

MR MILLARD QC:

Well, I do put it at 10.5, and we didn't put it in the bundle, but the New Zealand Oxford Dictionary give the definition of "navigate" at, "Manage or direct the course of a ship, aircraft, et cetera," and "navigation", "The act or process of navigating."

TIPPING J:

It would be a bit highbrow to talk about navigating a punt, but "navigation" here surely has a rather more purposive – you're doing something to an end, so to speak, rather than just pottering around in your punt.

MR MILLARD QC:

Yes, or being carried down by the flow of the river without, sort of, you're depending on the flow to get you down there and there's no way of getting back.

TIPPING J:

There is a journey afoot, rather than just a dalliance in the punt.

MR MILLARD QC:

Yes, and that it's – we would also suggest that there is an implication of two-way traffic, it's not just going one way down a river, it's also, because you're navigating a river and, in the English concept, it was the right to pass and re-pass, and of course that entail – implies going both ways.

ELIAS CJ:

You mightn't be in the same craft, though, because after all rafts might only be able to go downstream, they might need a tow back upstream.

YOUNG J:

Well, they'd only go downstream I think.

ELIAS CJ:

I'm just thinking about the Mississippi.

MR MILLARD QC:

Well, that's still the same craft, as opposed to having to have been taken out of the river and taken back up by road.

ELIAS CJ:

Well, I think it really does depend whether the craft are the controlling concept in this definition or whether navigability, using the way that the term has been used at the common law, does import some notion of commercial or more, a less frivolous activity than recreational activity.

MR MILLARD QC:

But it's certainly a purposeful use and, we would say, a use that involves control and implies both up and down the river, even if coming back up it might get towed.

YOUNG J:

But you wouldn't tow a raft up a river.

MR MILLARD QC:

No.

YOUNG J:

So it can't mean up and down, can it, if it's something you do with a raft and a raft, in fact, just is going to drift?

ELIAS CJ:

I'm not sure that that's right, I'm just thinking Huck Finn – no, maybe that's not the right…

YOUNG J:

It's not going to be propelled up a river.

ELIAS CJ:

No, if they did have some sort of shaking, I suppose. All right, I think we should take the lunch adjournment now and we'll resume at 2.15, thank you.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.24 PM

MR MILLARD QC:

Before we rose, a question arose about two Canadian cases that were referred to in *Coleman* and we've had those copied and handed out. The two are, of course, the *Quebec (Attorney-General) v Fraser* (1906) 37 SCR 577 case in 1906 and the *Leamy v The King* (1916) 54 SCR 143 case. If I could just perhaps touch briefly on them? In each case, the Supreme Court held that the land opposite – sorry, the river opposite the relevant land – was navigable, so that that disposed of the riparian claims of the owners of the riverbank. In *Fraser*, if one comes through to about page 594, they set out in the quote what the respondent was claiming about navigability, and then down the foot of the page they say, "And if we add to the above omissions, the facts as stated by Mr Justice Larue, that steamers like 'The King Edward', the 'Lord Stanley', the 'Beaver', the 'Gypsy' drawing from between nine to eleven feet of water, have been able to make regular commerce with Moisie, on the River Moisie, to very near the first rapids and in front of the lots granted to the respondent. I cannot see how it can be contended, that the Moisie was not navigable up to and including the *locus* in question." So they had evidence there of these steamers drawing quite a degree of water making regular commerce in that part. And then over the page, at the top of page 597, "Therefore, it is not necessary that navigation should be continuous, as contended for by the respondent. A river may not be capable of navigation in parts, like the St. Lawrence at the Lachine Rapids, at the Cascades, Coteau and Long Sault Rapids, the Ottawa at Carillon, and yet be a navigable river, if, in fact, it is navigated for the purposes of trade and commerce. The test of navigability is its utility for commercial purposes," but in this case, of course, they didn't actually have to deal with an obstruction because they held that the river was a navigable river up to the first obstruction, and they didn't have to go beyond that first obstruction because that was sufficient to dispose of it, but it's clear that they were treating the river as being navigable, or as being at least segmented into two parts, from the mouth up to the obstruction which prevented navigation, if that was navigable then that affected the rights of the landowners there, and then there was the non-navigable part above which in that case wasn't relevant.

And nor was it relevant in the next case, *Leamy* and the decision of the Chief Justice starts at page 146, at page 149, just towards the end, and this was again a question of whether there had been a grant from the Crown of the bed of the river, because in each case they have proceeded on the basis that the Crown had the bed from the inception of the Dominion, and it was an issue, was whether it had granted the bed,

it's not a case like the present one where we're complaining about what on the Crown case would be expropriation, but at page 149, "In these circumstances, the petition of right must fail on the short ground that the River Gatineau, being a navigable stream at the locus in question, was not included in the grant which is silent with respect to it." And then, Davies J, over the page at the top of page 150, "The second question, necessary to the determination of the first, is whether or not the Gatineau River was a navigable one from its mouth to Ironsides, just above which the first rapids and falls obstructing navigation begin." So, again, they were coming up from the mouth until they reached an obstruction, and that obstruction was upstream from the land in question, it was clear that it was navigable, at least to the first obstruction, even without the benefit of the tide.

Before we broke, I was focusing on the words "navigation", "For the purposes of navigation," in the definition, and saying that when one looks at legislation which is expropriating rights, it is appropriate to say that those words put some limit on the section. It's not enough that you can use boats, barges, punts and rafts, they have to be used for the purpose of navigation. Not exactly clear what navigation means in this context, but I did say something about the right to pass and re-pass and the reference which I gave in the submissions, might just help to go to, is at tab 38 in volume 2 and it is a passage from *Halsbury's Laws of England* about water and waterways, in para 688, it's under the heading, "Meaning of navigation", and the learned author's relying on what Lord Templeman said in *Tait* and *Lyall Industries* says, "The right of navigation has been judicially described as a right to pass and re-pass over the whole width and depth of the water in a navigable waterway, and the incidental rights of loading and unloading". So that at least –

ELIAS CJ:

Did anyone think of having a look at the edition of Halsbury in 1903, or the English and Empire Digest, or something of that sort? You haven't gone back that far?

MR MILLARD QC:

I haven't gone back that far. But this – the law in this context I would suggest at least in Britain, appears to have been reasonably well settled and therefore the Lord Templeman, although he gave no authority for his propositions, was not breaking new ground. Some assistance can be also obtained from the case of *Murphy v Ryan* (1868) IR 2 CL 143 which is at tab 13, this is an Irish case, but it has been referred to in several of the later cases as being an authoritative statement. And there they

were concerned with the River Barrow and apparently it was being used for the purposes of navigation beyond its tidal reaches. So the argument that was being put forward was that this therefore meant that the riparian owners did not have the right to fish, that it was basically right. And you see in Justice O'Hagan's judgment, at the bottom of page 147, "we have to deal with the case of a public navigable river, in which there has been, according to immemorial usage, the exercise of the liberty and privilege of fishing by the public, but in which the trespasses complained of were committed at a place above and beyond the point at which the sea ceases to ebb and flow; and the question to be decided is whether, in such a place, though the river be navigable for the purposes of communication, and in that sense may properly be called a navigable river, the public can legally assert a right of fishing," etcetera. Then a little bit further down the page, almost at the bottom he talks about the well established principles of common law and says that the rights of the riparian owners continue, though law secures to the community, the right of navigation upon the surface of that water as a public highway, which individuals are forbidden to obstruct and precludes riparian proprietors from preventing the progress of fish through the river." I see that again gives the concept that you look at the river starting at the mouth and you go up, in terms of looking at navigation, as to whether or not it was used as a public highway, but even if it is, that still doesn't, at least in English law, above the ebb and flow limit, prevent private rights of fishing.

So our submission then is that when you come to this legislation, in its confiscatory form, you should give it a narrow interpretation that disturbs to the least possible amount, the existing rights that might have existed. And that in this context that really only gets the Crown up to, just a bit upstream of Cambridge, because that was where navigation as a public highway ceased. A fallback position would be that even if one looked at navigation above that, one had to do it on a segmented basis, as long as there was no – it wasn't being used as a public highway with portage between the two and this wasn't. And if one does that, then there's no real evidence of use for navigation around this land.

In terms of not being used as a public highway, my cross-examination of Mr Parker, which appears at tab 14, at page 527 in volume 2 – page 527, Mr Parker had produced some maps which weren't actually continuous maps, showing various journeys and at page 20, sorry line 23, I put to him, "And then you show the journeys, not all of those journeys would be ones that were going both ways would they?" "That's correct." "You've not found evidence of the Waikato River being regularly

used as a transport route going upstream from Cambridge as a sort of continuous run to Taupo?" "No." "Does that extend to all periods?" From the Bench, "That extends to as far back as you've been able to find?" "Yes." "And likewise coming downstream it wasn't used as a transport route with portage around the obstacles?" Talking Taupo down to just upstream from Cambridge. Answer, "I found that sections of the river were used, but not the whole river between those points in one journey."

The area in question, so it starts at about 59.6 miles downriver and comes down to 82.2 miles, and includes the Ongaroto Rapids, Whakamaru Gorge and Maraetai Gorge, and in terms of use, there was some evidence of use by the Cox family who were farming, and it's a bit difficult to just date when, certainly post-1914, but the evidence which is at paragraph 177 in Mr Parker's brief, page 458, talked about the family using a 12 foot rowboat on the Waikato River round Ongaroto, but great care was taken not to drift too far down because of the roaring rapids, so that would seem to indicate that it was upstream from the Ongaroto Rapids, at 62.6 miles –

BLANCHARD J:

What use were they making of the river? Were they going from point to point on their own property?

MR MILLARD QC:

As I understand it, yes, but the article that is referred to – it's part of, it's in volume 4 and it's at tab 75, starting at page 172. Sorry, 1072. The particular paragraph which talks about great care is at 1074. But it really doesn't give much indication of what it was to do with but they were farming on that piece of land. In 1933, if I can move on from that, there was also some evidence that a Mr Fisher who was involved with the Ministry of Works in one of its earlier forms in undertaking a survey because he was looking at the land for hydro purposes. And he, Mr Parker, talks about his evidence or his journey at paragraphs 180 through there, but it's very significant to look at what Mr Fisher's comments were and one sees that, at page 489, page 489, and Mr Fisher wrote to somebody who was intending to canoe down the river. And he writes, "As you are attempting to undertake a canoe trip down the Waikato River from Taupo to Cambridge, this is an impossibility in any craft. There are certain sections of the river, usually through uninhabited native land and forestry where a canoe could be used for up to a distance of 10 miles but heavy rapids and impassable gorges divide any section of easy water and the portage of the canoe would be out of

question. I may state that I led a survey party through this country from Cambridge to the source of the Waikato River and took a boat which could be used mostly for crossing the river only at certain accessible points and noted that the Māoris used canoes only for crossing the river and not for travelling. In fact, the Māori names along the river give one an idea of the Māori opinion of the Waikato as a means of transport. 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 a disaster over this section of about 100 miles." Sir, this was his view of the river.

TIPPING J:

But the author of the report has some reservations about the motivation of the writer of that letter.

BLANCHARD J:

Yes but he also says "Relatively easy portage was possible around most of the obstructions on the river," which rather contradicts what he says about portage at various points earlier on where he keeps using the word difficult.

MR MILLARD QC:

Well, when, because the "I" in there is Mr Parker.

BLANCHARD J:

Yes.

MILLARD QC:

Well most instructions in the river are coming back to that issue in the particular area here, in fact I can deal with that now. If you look at paragraph 198?

BLANCHARD J:

That's one of the ones that I –

ELIAS CJ:

What page reference?

MR MILLARD QC:

Well, perhaps I should just start this comment with a preliminary comment. What Mr Parker did was he divided the river up into sections and you perhaps need to start at 184. He's talking there about one particular section, this stretch of the water is adjacent to the former Pouakani B10 block, it lies between 67 miles and 69 miles from Lake Taupo. And then he concludes that section, paragraph 198, by saying, "Portage around this part of the river would be difficult". He then comes to the next section, which is 69 miles down to 76.4, concludes, "That particular section" at 212, "portage around this part of the river would be difficult." You then come to the final section along the Pouakani boundary, 76.4 down to 82.2 and, 228, "Portage around this part of the river would be difficult".

BLANCHARD J:

Well he's consistent.

MR MILLARD QC:

At least consistent.

BLANCHARD J:

But it's a bit hard to square that with what he then says at 355.

MR MILLARD QC:

I think what he's saying at 355 is that there would be other sections higher up the river where portage would be easier but at least around the Pouakani block areas, portage would be difficult.

YOUNG J:

How many, how many interruptions are there in the river as a whole? Up to seven or eight? There are satellites somewhere?

MR MILLARD QC:

Well in our Appendix 1, we've got 14 coming down from Taupo.

TIPPING J:

Down to Cambridge? 14 in that?

MR MILLARD QC:

Yes. The other –

TIPPING J:

To assess navigability, on the basis of having to assess the viability of portage in 14 different places, seems to me to be an exercise that Parliament probably didn't contemplate.

MR MILLARD QC:

Well that would certainly be our submission.

TIPPING J:

Well it could work both ways.

BLANCHARD J:

It's a strange concept of navigability.

MR MILLARD QC:

Well our submission is that there are so many interruptions in this river, as with the semi-official view, Mr Fisher is at least an official who had been on government business, was saying, "No you really can't do it, it's just too difficult and portage is difficult." And this is from somebody who's actually been there, done that, as it were.

TIPPING J:

Well it sounds as though no one would contemplate travelling from Cambridge to Lake Taupo via the Waikato River.

MR MILLARD QC:

That's basically – or the reverse, which might be a bit easier.

TIPPING J:

Or the reverse, well, it doesn't matter which way, really.

BLANCHARD J:

Unless you were setting out on an adventure.

MR MILLARD QC:

Yes. Perhaps I could just touch on that one because you had the, one of the pieces of evidence relied on by the Crown was the Vose expedition in 1950 which Mr Parker deals with at page 196, sorry, paragraph 196, this is in the context of, of the Pouakani blocks he'd already mentioned a bit earlier. But if one goes to tab 59 –

ELIAS CJ:

Of what?

MR MILLARD QC:

Of –

ELIAS CJ:

Oh, the case, is it?

McGRATH J:

Yes.

ELIAS CJ:

Volume 3.

BLANCHARD J:

I love the first paragraph. "Thirty mile hair-raising adventure on an unknown stretch of the Waikato River".

ELIAS CJ:

Well "unknown" says quite a bit really doesn't it?

BLANCHARD J:

Yes.

ELIAS CJ:

I suppose it may be unknown to them.

BLANCHARD J:

The author's got an interesting name too hasn't he?

MR MILLARD QC:

Yes.

BLANCHARD J:

Mr A D Venture.

MR MILLARD QC:

This talks about this particular voyage, planning – talks about how the river drops 400 feet in 30 miles, nearly half the four being in the last seven miles before Whakamaru, which of course is exactly opposite Pouakani block. The few visitors at the Whakamaru Dam site who met the three soaking wet and life-jacketed men, could hardly, would hardly believe their tale of adventure, or that they were soon to shoot through the foaming mass in the river below.

BLANCHARD J:

They claim the section of the river travelled on Labour Weekend, to be tougher than anything ever experienced before, they would not attempt the journey below Whakamaru again, and that's going downstream.

YOUNG J:

But this is effective, they were effectively on what would now be regarded as white-water rafts?

MR MILLARD QC:

Yes, yes exactly. And they had a lucky escape because the – you see in the third column, that it tipped over almost to the point of capsize and one of the party fell out, the other two were underneath the boat. There's another story in similar vein at page 1009 and one of them got their ankle jammed into rocks, he expected to drown, "But fortunately, in a desperate effort I managed to loose my foot and got the boat into shallow water."

TIPPING J:

Well it's the fundamental rule of white-water rafting, I think if you fall out you keep your feet up.

MR MILLARD QC:

Yes.

TIPPING J:

You don't put them down, because that's exactly what happens.

MR MILLARD QC:

Yes, yes. But even then they lose a few on the Shotover. So –

TIPPING J:

What is this actually demonstrating Mr Millard, that it was a pretty dubious concept of navigability over this area that we're talking about here?

MR MILLARD QC:

Yes. And I would say that it's quite clear that they weren't navigating, they were just being carried down under the force of the water without a great deal of control, but with a degree of luck. And that can't have been what was contemplated by the Act and the only other usage opposite these banks, was one described at paragraph 226 of the evidence of Mr Parker and that is the – there's a number of photographs of a barge that was used during the construction of the Maraetai Power Station, the barge was used to house a drilling rig and was pulled upstream and allowed to run downstream by the use of winches, and he notes that the river traffic in Whanganui which is a navigable river, was sometimes assisted by winches to pull them, or lower them over rapids. My submission that is hardly evidence of navigability, it might be evidence of use, but not of navigability. It's one thing if you need to drill a – drilling in the bed of the river for some test purposes of the like, then you might use that sort of method to do that testing. There's a photograph of it at page 1075 under tab 75. But it was essentially part of the construction works.

TIPPING J:

What are the findings of fact in the High Court on this point Mr Millard? Or did they not come through with a precision that you would wish?

MR MILLARD QC:

What His Honour did was he looked at it in two parts, and this is at page 100 in the bundle.

TIPPING J:

Well here he's reciting the evidence.

MR MILLARD QC:

Yes.

TIPPING J:

And then at 103 is it?

MR MILLARD QC:

And then he's talks there, that's his conclusion where he says, "Mr Millard is correct that the entire river was not continuously navigable from outlet to mouth or vice versa. The cessation of steamer traffic in both directions at Cambridge, marked the points where the rapids below what is now Maungatautari Bridge, physically obstructed any further continuous movement by commercial vessels, such as steamers, above that point, as Mr Millard submits, the river was navigable and intermittent or sporadic stretches, but by different craft from those which plied the lower reaches. I'm satisfied that the Waikato River as a whole or a unit in 1903 was a navigable river."

TIPPING J:

Well that goes on to a conclusion of law really, but it's 103, so he's finding that it was navigable in whole up to Cambridge, effectively, or Maungatautari Bridge, and then in part thereafter.

MR MILLARD QC:

Well this is where with respect, he seems to – he wants to treat the river as a whole or a unit, but he looks at different usages rather than looking at it as a whole.

TIPPING J:

I'm just interested at the moment, never mind the legal consequences, of what his findings are as to navigability, which seems to be fully navigable up to the Maungatautari Bridge and then, navigable in part.

MR MILLARD QC:

And then paragraph 105, is – "navigable continuously for two-fifths of its length", which is – use the 40 percent earlier in the day, "most parts of well-defined sections above Cambridge were used before 1903", and "there was greater use in those same areas after 1903, proving the river's susceptibility of future beneficial use". T"he existence of 10 or 12 substantial physical obstructions in the river's upper reaches

does not derogate from this conclusion, given that the statutory definition does not require proof of a continuous access channel throughout the length of the river." Basically his findings were, he was not – he did not look at the test, did not make findings of fact on the test that I'm putting to this Court.

TIPPING J:

Well you could say he drew the wrong conclusion from the findings of fact that he did make, but 103 are findings of fact aren't they, before one gets to the legal conclusion of those findings?

MR MILLARD QC:

Yes.

TIPPING J:

You can argue that he got that answer wrong on that factual premise, but can you go behind that factual premise? Or is it not detailed enough for us to be secure in using it as the factual premise?

MR MILLARD QC:

Well, basically his factual findings are not sufficiently helpful, because first of all he didn't focus on the land opposite Pouakani so much as looking at the whole of the river.

TIPPING J:

But some of that opposite the – your client's land, does appear to have been navigable.

MR MILLARD QC:

There was basically a small section above Ongaroto Rapids, that was used by the Cox family, that was the only evidence which was of course post-1903 but certainly pre the latest amendment.

ELIAS CJ:

Was the evidence of that only that memoir that you took us to?

MR MILLARD QC:

Yes.

ELIAS CJ:

Where it talked about scones and the children playing, that sort of thing?

MR MILLARD QC:

Yes.

BLANCHARD J:

I suppose the question is whether he's looking at the evidence through the correct lens.

MR MILLARD QC:

Well, we would say he wasn't.

TIPPING J:

Are you saying the correct factual conclusion here is that the river was simply not navigable at all above the Mangatautari Bridge, which seems to have been the borderline?

MR MILLARD QC:

Well, I'm putting it in two ways. Firstly, that in terms of the definition it wasn't navigable, even if there were craft using it further up. Secondly, if you're against me on that then you'd say, "Well, you would need to apply a segmented approach," because this was not part of a continuous voyage, even with portage or other…

BLANCHARD J:

Well, I thought you would be saying that one of the reasons why it wasn't part of a continuous voyage was that, on the Crown's own witness, portage was going to be very difficult.

MR MILLARD QC:

Indeed, yes.

BLANCHARD J:

Well, difficult, I shouldn't exaggerate.

MR MILLARD QC:

Difficult, yes. There were some sections where portage was feasible, if you're looking at the whole of the river, but at least in the key ones, in each occasion portage would be difficult.

TIPPING J:

So, not navigable at all above the bridge, if navigable, you have to identify those discrete places where it was navigable?

MR MILLARD QC:

Yes. Say that in terms of interpretation, and of course this is a mixed question of fact and law, there is some support from what happened in 1926 in regard to the part from Lake Taupö down to the Huka Falls, because at that stage the Crown specifically legislated to say that that part of the river was to be the Crown's. And if the Crown was correct in its argument, then that was unnecessary, because there was some evidence of usage, particularly down to the spa from the lake and then a little bit more beneath the lake. I did include in the submissions in appendix 1, where I listed the obstructions and tried to give a start and a finish, I realise, I've been criticised by the Crown on this, I realise that there was a typographical error which I should have corrected, and that is under item 5, Whakaheke Rapids where it got typed as 41.1 instead of 44.1, I doubled the one rather than the four. The other –

TIPPING J:

This is all miles, isn't is –

MR MILLARD QC:

Yes, yes.

TIPPING J:

– because that was the convention, yes.

MR MILLARD QC:

Yes, because of course most of the maps and a lot of the descriptions were in miles. There are some other minor variations, which we say in the first two, if one reads the evidence, fairly, we'd say the results are there, the one where the biggest variation comes is Arapuni Gorge, and if one looks at the evidence of Mr Parker, it is clear –

TIPPING J:

Is it going to matter much whether it was 89.1 or 89.9?

MR MILLARD QC:

Well, it's 89 question mark. The problem is that it's a bit difficult to understand where the gorge begins –

BLANCHARD J:

But, as my brother says, does it matter?

MR MILLARD QC:

Well, I simply raise it because the Crown takes issue but we say that if you look at the Crown's evidence it is clear that there's rapids –

TIPPING J:

I don't imagine the Solicitor-General –

MR MILLARD QC:

– well above where they started from.

TIPPING J:

I don't imagine the Solicitor-General will put this point at the forefront of his argument, Mr Millard.

MR MILLARD QC:

I –

YOUNG J:

But there is – aren't there slightly more significant differences between you and the Crown as to the length of the obstructions in relation to the river as a whole?

MR MILLARD QC:

Not, not really, they take – on my calculations on that one there would be about 12 miles and they say, "Oh, it's only a mile," and, "I've found another 11 miles, so," but it's not, I'd simply say that if one looks at the evidence carefully, and including Mr Stirling at paragraph 99, you see that there were rapids at the beginning of the gorge and it obviously ran for some distance, I'm not putting great weight on the exact length.

The alternative argument is that if one adopts the approach of Justice F B Adams in the *Leighton* case, there he held that because the section was confiscatory he gave a wide meaning to the Crown grant, held that it didn't matter that it was not express in the ground, Justice Savage seemed to prefer that view in *Tait-Jamieson* and at paragraph 13.2 I set out the bases on which Native Land Court grants were made and, in particular, that section 12 of the relevant Act says that, "The certificate of title, once issued, shall have the force and effect of a Crown grant," so in that sense it was a Crown grant.

ELIAS CJ:

But is it, for the purposes in issue here, because this is all about, in rebutting the presumption it's all about the intent of the grantor, and if you have a statutory foundation really, which is what the deemed Crown grant is for the purposes of the Native Land legislation, why is that sufficient foundation for this notional – how do you ascribe the sort of intention that was discussed in the *Mueller* case in relation to that? I don't know why it's necessary for your argument, perhaps I'm floundering a bit on that.

MR MILLARD QC:

Yes, this is very much an alternative argument, our primary argument is that this river was not navigable and it was only if it's held to be navigable then –

TIPPING J:

I would have thought the fact that they found it necessary to say that it shall have the force and effect of a Crown grant means that it's not a Crown grant, looking at it rather simplistically perhaps.

MR MILLARD QC:

In my submission, it's in effect saying that you treat it as a Crown grant for all practical purposes.

TIPPING J:

No, you treat it as if it were. I mean, that may sound pedantic, but if we're getting down to this level of precision.

MR MILLARD QC:

Well, as I say, this is really only a, only if the –

TIPPING J:

Well, I think it's probably a good thing, it's only a fall back.

MR MILLARD QC:

Yes, certainly only a fall back one, and we have to leave it at that.

ELIAS CJ:

But I don't even understand what is the argument. You say that it is a, that there is a grant through the Native Land Court title?

MR MILLARD QC:

Yes, that it's a deemed grant through the Native Land Court title –

ELIAS CJ:

Of the bed of the river?

MR MILLARD QC:

Of – well, the grant of the surface land was a deemed grant, that therefore under the approach taken by Justice F B Adams and favoured by Justice Savage, would include by way of presumption the bed of the river, and that was sufficient to bring you within the opening words of the section, "Save as when granted by the Crown," or, I could paraphrase the opening words, but within the saving provision right at the beginning of the section.

ELIAS CJ:

I thought you wanted to be within the presumption.

MR MILLARD QC:

Well, we were saying that the initial grant to Māori would've carried with it the bed of the river and that that was sufficient to be within the saving provisions, so it didn't matter whether it was navigable or not.

ELIAS CJ:

But as all land in New Zealand is derived either from an actual Crown grant or a deemed Crown grant if it remains Māori land, there would be no impact of the section 14 –

MR MILLARD QC:

Although there's certainly a criticism made by Justice Fair of Justice F B Adams' reasoning.

ELIAS CJ:

Well what's your answer to that?

MR MILLARD QC:

Well the only answer really is the one that Justice F B Adams gave, that this was such a confiscatory provision if you give it –

ELIAS CJ:

Let them do it directly.

MR MILLARD QC:

– that you had to –

YOUNG J:

No effect at all. Well I mean it must be isn't it? I mean the criticism's right, if the saving means what you say it means, then there's nothing to save it from, because the Court has – the section has no effect.

TIPPING J:

The savings swallows up the purported disposition.

MR MILLARD QC:

Well that was certainly the criticism Justice Fair was making, and I just – I don't –

YOUNG J:

And to that criticism there's not an obvious answer.

MR MILLARD QC:

I don't take it any further than that.

TIPPING J:

Mr Millard, just one final thing. If we were with you on your second proposition, in other words, if we held that there was navigability above the Maungatautari Bridge, but a segmented approach should be taken, would it have to go back to the High Court for findings of fact to be made apropos of that inquiry?

MR MILLARD QC:

Unless the parties agreed, yes. I would hope the parties might be able to agree.

TIPPING J:

No, no, but the formal order would then be remissioned to the High Court, but yes.

MR MILLARD QC:

Unless there's anything else?

ELIAS CJ:

No, thank you Mr Millard.

MR MILLARD QC:

Thank you.

ELIAS CJ:

Yes, Mr Solicitor?

SOLICITOR-GENERAL:

Thank you very much Your Honours. I was going to be dealing with the so-called standing issue, Ms Hardy with the navigable issue. I say so-called standing issue, because I do have some reservations about whether or not that is the correct description. I, for the last few weeks, have been reflecting on the Crown's position in relation to this aspect of the case and concede that I have some difficulties with the ways in which it has been presented in lower Courts and also in the written submissions in this Court. I respectfully submit that actually it isn't a question of standing, it's a question of relief, and it had been my intention to make a suggestion to this Court, I'm going to resist saying I was going to take a punt and float something past you.

ELIAS CJ:

I've been resisting doing that.

SOLICITOR-GENERAL:

Yes, but His Honour Justice Tipping has between slipping a few in, so I thought I'd get in first.

TIPPING J:

I'm duly chastened. Have a punt.

SOLICITOR-GENERAL:

I had a solution that I wished to put to the Court. The solution is that if the appellants fail on all other grounds of appeal, that this Court has indicated its willingness to hear and if this Court is satisfied that the appellants did need to establish succession and they have not established succession, then the matter be remitted back to the High Court and there are three reasons for that proposition.

The first is, it would be very unfortunate in my respectful submission if at the end of the day the appellant's case was to fail, simply because through a variety of reasons, the issues of succession had not been properly addressed as a matter of fact in the High Court.

ELIAS CJ:

The High Court has the ability to refer the question to the Māori Land Court doesn't it?

SOLICITOR-GENERAL:

Well, with respect, and this is the one point where I think –

ELIAS CJ:

Oh, I'm sorry, yes.

SOLICITOR-GENERAL:

– I would disagree with Your Honour on, I do think there is a serious question of jurisdiction which I will come on to in just a few moments.

ELIAS CJ:

Yes, but I'm sorry, on that point, there are two ways. One, the Māori Land Court could have jurisdiction, and you're going to look at that, or discuss that, but also if there is a question of jurisdiction and the High Court has jurisdiction, then the High Court can refer the question of who should succeed as a question of fact to the Māori Land Court can't it?

SOLICITOR-GENERAL:

The – I'll need to just explore a little further the second of those propositions.

ELIAS CJ:

Yes, that's fine, yes.

SOLICITOR-GENERAL:

My starting point on that Your Honour, is that we, it is the exclusive jurisdiction of the High Court and I was going to come on and explain the reasons for that –

ELIAS CJ:

I see.

SOLICITOR-GENERAL:

In this particular case.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

So there were two reasons that I was advancing for the suggestion that I was putting before this Court. The first concerned the unfortunate outcome that would occur if, at the end of the day, there was a failure for the appellants simply on the basis of an inability or an oversight for whatever reason, and the Court below, where the question of succession had not been properly addressed –

BLANCHARD J:

That was really my concern.

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

And I would've thought reading the materials last night, that the idea of setting up the representation order was to try to achieve what you're now suggesting. But I may have misunderstood it completely.

SOLICITOR-GENERAL:

Well I also have reflected long and hard and examined in quite some detail, the circumstances surrounding the representation order and I acknowledge that there are some in a memorandum filed by the Crown which preceded the making of the representation order that could clearly have caused some confusion.

BLANCHARD J:

Yes, well it would've confused me.

SOLICITOR-GENERAL:

Yes. I also suggest with respect –

BLANCHARD J:

Maybe that's not a very high test. My brother's easily confused.

SOLICITOR-GENERAL:

I would never have suggested that. But I think the more logical explanation is that what the representation order did, was acknowledge that the appellants are the descendants of the original owners, and that didn't go any further than that, and I will, if it's necessary, take Your Honours to parts of the pleadings and the circumstances surrounding the making of the representation order, where it's quite clear in a number of parts of the memorandum and in the Court's interim judgment and in its ultimate ruling, where it was quite clear the succession was a live issue and it needed to be established.

BLANCHARD J:

But in view of what you're suggesting, we don't need to get into that do we?

SOLICITOR-GENERAL:

I don't think you do need to get into it Your Honours, but I do think I need to address that point which Your Honour the Chief Justice has raised with me, and it goes to that

question of jurisdiction and in order to understand that point I need to just go back right to what it is that the appellants are claiming. They are claiming the existence of five trusts, that could only, if their argument is correct, have come into existence at the time that the Crown acquired the land. It couldn't have occurred prior to that. That's a matter of pure logic. Upon acquisition of the land, the land became Crown land. It wasn't Māori freehold land.

ELIAS CJ:

Mmm, I understand that.

SOLICITOR-GENERAL:

So the jurisdiction for the –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– the Te Ture Whanua Māori Act is in relation –

ELIAS CJ:

Māori freehold land.

SOLICITOR-GENERAL:

– is Māori freehold land.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And it's for that reason that I would respectfully suggest that the appropriate jurisdiction is that of the High Court so that it can make its factual findings as to whether or not succession has been established in accordance with the appropriate standard that would be applicable to this land. And I think that that point was probably addressed quite adequately, and I don't mean to sound in the slightest bit pejorative, by a Full Bench in the Court of Appeal in the *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (CA) case which Your Honour, two of Your Honours

sat on, and Your Honour Justice McGrath appeared in, and that's in the respondent's bundle of authorities, tab 6. And the part of the judgment which I was most focussing upon, is at page 702 of the judgment, where there is a reference to the jurisdiction of the Māori Land Court under section 18(1) which is the general jurisdiction of that Court and the paragraph commencing, "In our view". I think that that paragraph very succinctly summarises why it is that the appropriate Court to consider issues relating to fiduciary claims, based upon Crown land, rather than Māori freehold land, is the High Court. Now that still leaves open the possibility of that factual inquiry being made by way of a reference from the High Court to the Māori Land Court, but I don't know that Your Honour needs to – this Court needs to get into that, because ultimately that would be for the –

ELIAS CJ:

That would be a decision for the High Court.

SOLICITOR-GENERAL:

Absolutely.

ELIAS CJ:

But the ability to make the inquiry as to who should succeed, if the land had not been wrongly taken, necessitating the setting up of trusts, because that's the remedial trust provision. It does seem to me, might be a question of fact, which the High Court could well refer to the Māori Land Court under the brief of the powers it has.

SOLICITOR-GENERAL:

Yes. Your Honour may very, very well be right, but as I say, I don't think it's a question that this Court needs to occupy itself with.

ELIAS CJ:

No, I see, yes.

TIPPING J:

You'd have to go back to the High Court, what the High Court then does –

SOLICITOR-GENERAL:

It's over to it.

TIPPING J:

– is no concern of ours.

SOLICITOR-GENERAL:

But as I say, I think that that still needs to be predicated on the basis that the appellants fail on all other grounds, and this Court has already signalled that it will grant, or has granted leave on six questions, two of which are up for consideration today. There are another four, if the appellants fail on any one of those then their case fails. So, what I am suggesting is that really this issue ought to, I think, notwithstanding the fact that leave has been granted on this very specific point. I think the better course is for that to be parked to one side, to see where this actually ends up. Now I can go in, and spend a lot more time going into the reasons for the position that I've taken.

ELIAS CJ:

I don't think it's necessary to do that, I'm just – I'm just considering whether there is any point that we would have to resolve. You're accepting that there is an inquiry which the High Court would have to undertake?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And that is based –

ELIAS CJ:

If it reaches relief.

SOLICITOR-GENERAL:

If it reaches relief.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And that inquiry is who are the successors to the original landowners acquired by the Crown in the late 1880s early 1890s?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And that's a factual inquiry which has not been undertaken thus far.

ELIAS CJ:

Yes. At the leave hearing it was rather pressed upon us that it would be impossible to undertake that inquiry, and my purpose in referring to the jurisdiction of the Māori Land Court is to indicate that there are mechanisms for that, and indeed many of the inquiries undertaken in that jurisdiction are historic and there are pretty wide –

SOLICITOR-GENERAL:

Complex.

ELIAS CJ:

Yes.

YOUNG J:

How many – does anyone – I know there are numbers of owners for each block identified, but what degree did they overlap? Do we know – how many owners were there? Hundreds?

SOLICITOR-GENERAL:

I can tell you the exact numbers. It's at paragraph 42 of the Crown's submissions Your Honour. One block had one, and I think the largest had 270 – 242.

TIPPING J:

I noticed apropos of this underlying trust allegation, as I read the submissions of the appellants correctly, that they are asserting an institutional?

SOLICITOR-GENERAL:

Yes, yes they are.

TIPPING J:

All right, just so long as that's clearly understood all round. We don't want to start getting slippage into other areas.

SOLICITOR-GENERAL:

Yes. No I've appreciated that.

TIPPING J:

Yes, I'm not saying that's of any great materiality just literally now, but it could be of a significant materiality downstream.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Sorry, so sorry, that was unintentional.

ELIAS CJ:

I'm sorry, I'm just still thinking about the outcome.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

From what you've said, the Crown is conceding standing to bring the claim?

SOLICITOR-GENERAL:

Standing in the sense that it has always been the Crown's position that the appellants are the descendants and representatives of the descendants of the original owners. They still have to prove succession.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

But in terms of standing to bring the claim in the way it's been set up

SOLICITOR-GENERAL:

Yes, I agree, standing is –

ELIAS CJ:

You'd accept that they have standing but as to outcome they'll need to establish who is the – yes thank you.

SOLICITOR-GENERAL:

Yes, and it's for that reason that I have some grave misgivings about the language of standing in this particular context.

ELIAS CJ:

Yes. Yes, it's rather odd to see it, but it may well be because it is in part, such a – I mean there are public law overlays and there is a regime which makes a very narrow focus on people asserting their own proprietary rights, a little suspect. So it may be a notion of standing at least to get the claim under way, is not a bad one.

SOLICITOR-GENERAL:

Well they've got the claim under way.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

The biggest hurdle on this aspect of the case is proving succession.

ELIAS CJ:

Yes, yes.

SOLICITOR-GENERAL:

And, as I say, I think from the Crown's perspective, it would be best if it got to that, and that was the sole issue that was left that would determine the outcome of the

case, that they're bound to be given the opportunity to see if they can establish succession as required by law.

ELIAS CJ:

Yes, I'm sorry, I'm just thinking again about what you said about the trust. The trust is a remedial trust.

SOLICITOR-GENERAL:

It's an institutional trust actually, Your Honour.

ELIAS CJ:

It's an institutional one.

SOLICITOR-GENERAL:

There are five of them.

TIPPING J:

Yes, it's not one that they're saying the Court will impose by way of relief –

ELIAS CJ:

Oh I see.

TIPPING J:

It is one that arose by operation of equity upon the Crown acquiring the title.

SOLICITOR-GENERAL:

Acquiring the land, yes. The title, I'm sorry.

TIPPING J:

Well that's why I was rather precise about it just a moment ago.

ELIAS CJ:

I wonder whether that is – we're not at that point, but I wonder whether that is accurate, whether it isn't in fact telescoping matters to say that it's an institutional one. It does seem to me that it may be a remedial trust, effectively, in the end.

TIPPING J:

Well they might have to amend if they're going to go down that route. Because that would suggest that there's no pre-existing trust, but the Court should simply impose one by way of relief.

BLANCHARD J:

But surely the plea is, you are holding in trust and you always have been holding in trust.

TIPPING J:

Yes, exactly.

BLANCHARD J:

Wholly inception.

TIPPING J:

Exactly.

SOLICITOR-GENERAL:

Holding in trust –

YOUNG J:

Holding what?

TIPPING J:

Well, that's part of the issue.

ELIAS CJ:

Mmm.

TIPPING J:

But as a creature –

SOLICITOR-GENERAL:

And on behalf of whom, that's the major issue.

BLANCHARD J:

So it's not – I don't think it's remedial, but anyway we shouldn't detain this hearing with that dispute.

ELIAS CJ:

Mmm, no, no we shouldn't.

SOLICITOR-GENERAL:

So I'll leave Ms Hardy now to deal with the question of navigability if that's convenient to the Court.

ELIAS CJ:

Yes, thank you.

MS HARDY:

Thank you Your Honours. My task in the Crown submissions is to address the second question that has been posed amongst the six that the Court has established for hearing and the question is, "Did section 14 of the Coal Mines Act Amendment Act 1903 vest title in the riverbed adjoining the Pouakani lands in the Crown?" I wanted to dwell on that question briefly because of the discussion that Your Honours had with counsel earlier today about what the relevant provision should be in relation to testing this question of navigability and I think Your Honours that there was a sound approach in your suggestion that perhaps the proper section here is the 1979 Act, section 261. Because of that I wanted to make two points about the text and about the interpretation of 261.

TIPPING J:

Where's a good place to find 261, sorry?

MS HARDY:

It should be –

ELIAS CJ:

It's volume 2 –

MS HARDY:

Volume 2 of the authorities, that's the pink volume.

ELIAS CJ:

We've got yellow.

TIPPING J:

I tore it out of volume 2, so it's somewhere there.

YOUNG J:

Tab 31.

TIPPING J:

Thirty-one.

MS HARDY:

Tab 31 in the second page there.

TIPPING J:

Yes.

MS HARDY:

Which sets out the test as at 1979, of course has that deeming and retrospective aspect. There is a departure there, this is exactly the same language as the operative provision in the 1925 legislation, but it does differ from section 14 in two respects. The first is in relation to the definition of navigable river, which here, in 1979 says, "Means a river of sufficient width and depth, whether at all times or not" and that's the piece that clarifies the time aspect of that, "Whether at all times or not". And then, "To be used for the purpose of navigation by boats, barges, punts, or rafts". And Your Honours will note that missing is that language of susceptibility which was in section 14 and then in relation to the beneficial use of the land by residents as well as the public. So that's dropped away as well.

But the Crown's submission is that the intention behind this legislative shift, was not to make substantive changes to the rights that were characterised in section 14, and that's the point that the Court made in *Leighton* which Your Honours have been referred to already, and I think it also, Your Honours, relates to a point raised by the Chief Justice, that one would have to be cautious here when talking about property rights and considering approaches that might shift the nature of those property rights. So, in the Crown's submission the vesting that is at play here, occurred in 1903

through that legislation. What we have is a continuity through the subsequent legislation as recognised in the *Leighton* case and it's in the Crown submission that those ingredients of the test through section 14, should inform the interpretation of this section.

BLANCHARD J:

They've just streamlined it a bit, by removing words that are really surplusage.

MS HARDY:

That's right. But Your Honour I wouldn't want to lose sight of the context that's carried in the section 14, which is about susceptibility. I think that's a matter of emphasis because the very term "navigability" itself suggests some sense of forward looking or susceptible notion.

BLANCHARD J:

Sufficient to be used, is forward looking.

MS HARDY:

Yes, exactly Your Honour.

ELIAS CJ:

And both susceptibility and benefit, if navigability is as – seems to be the case, an established term, are wrapped up in that term.

MS HARDY:

Yes Your Honour. Just really marking the connections between –

ELIAS CJ:

Yes, yes, no thank you.

MS HARDY:

– the origins. I propose to run through a brief summary of the Crown's case, the purpose of interpretation of section 14 or the subsequent sections which as Your Honours will be aware, is a focus on the character of the river as a whole and not to a segmented approach. And then facts about navigation and finally addressing Mr Millard's point which is the proviso but which Mr Millard dealt with briefly. So in summary, the Crown contends that the character of the river is, as a

whole, is what is decisive in determining navigability in this particular case. And what we say is that Parliament did not intend to produce a patchwork of private and public ownership of the Waikato River, which is of course a major river and it is New Zealand's longest river.

YOUNG J:

Do we need to focus on the Waikato River or not?

MS HARDY:

Well, the section is to provide a national scheme Your Honour –

YOUNG J:

Yes.

MS HARDY:

– so no the Crown's submission is that clearly here the intention can't have been to carve up the Waikato River but that would apply to other major rivers of the same kind. The reason that the Crown says that –

ELIAS CJ:

Why not?

MS HARDY:

Sorry Your Honour?

ELIAS CJ:

Why can it not have, what's Parliament's purpose on the purpose of the Coal Mines Act, it was to secure to the Crown the benefit of – I just don't quite follow why you say it can't have been Parliament's intention to carve up the bed when the banks have all been carved up.

MS HARDY:

That really goes to the purpose of the section which is revealed –

ELIAS CJ:

Yes it does.

MS HARDY:

– from the *Mueller* case –

ELIAS CJ:

Yes.

MS HARDY:

– which I intend to get to but briefly in summary it's because there are several purposes to be achieved building off the *Mueller* case –

ELIAS CJ:

Yes.

MS HARDY:

– there's obviously the acquisition of minerals but as Mr Millard stated in his submission, there's another purpose there which is the one of navigation and when I take you to the *Mueller* decision it's not simply extant navigation, it's about susceptibility and the ability to say widen channels or achieve navigation in the future, so there's that bundle of purposes and if one were to carve off, I think Your Honour said, "a salami approach," to the river if one were to have small blocks of the river in a patchwork of private and public ownership, then certainly that potential to achieve navigation purposes and to improve navigation would be defeated. Justice Young put a question to my friend which was, well what would the situation be if you had an impediment, a single impediment in the middle of a river that prevented navigation, what would the property consequences of that be, would it be two rivers or one river and would the central piece that was the impediment be a private landholding, those are potentially practical questions and the Crown's answer is that the intention in order to achieve the navigability purpose and into the future as well as the present, the intention behind the legislation is to treat that river generally as navigable and it builds off the kinds of commentary in the Canadian cases which have it – they're in a different setting but they have the same purpose behind them of –

TIPPING J:

How much of it has to be navigable before the whole is navigable?

MS HARDY:

That's a good question Your Honour and it's one that produce – the appellants identify as one that produces problems. The Crown's response is that the test is one of looking at the river as a whole rather than adding up particular percentages and the character, it's a flexible approach which means that it can accommodate the different configurations of rivers. If, for instance, Your Honour there was a river that had say 40 percent of a navigable stretch and then no more capacity to navigate whatsoever, the question would be, does that navigable portion become one treated in law as navigable or because it's under 50 percent does it not and the Crown's –

TIPPING J:

Very, very difficult to get a handle on that as to, you know there are difficulties both ways I appreciate in this case –

MS HARDY:

Yes.

TIPPING J:

– but that strikes me as being, it's very impressionistic isn't it, be in the eye of the beholder?

MS HARDY:

Well Your Honour, there are tools through the case law to assist in answering what, admittedly are, very difficult questions of matching a legal test with the happenstance of geography but, for example, the *Nikal* case stands with the proposition that you look at the whole of the river until it reaches a terminable, terminal navigable point so for instance if it were the case, which we dispute on the facts, that there were no capacity to navigate beyond Cambridge here, then the *Nikal* case would suggest that a practical inquiry, taking into account the whole of the river, would nevertheless accommodate a determination that the first and clearly navigable portion was navigable in law and the remainder might not be.

McGRATH J:

So segmented with two segments?

MS HARDY:

Well it's really treating the river navigable as just one stretch with the terminal point, that's the *Nikal* analysis.

McGRATH J:

That's the navigable –

TIPPING J:

I thought you were going to say that if enough of it was navigable, the whole lot was navigable?

MS HARDY:

Well essentially that's in some, the Crown's approach to the Waikato River here that there are portions –

ELIAS CJ:

But that's as a matter of fact. If it were the case as you said, that from Cambridge South, it's not navigable, is your position that it's a navigable river to Cambridge and that the bed vests only to Cambridge?

MS HARDY:

Yes we would say that inquiry was informed by looking at the character of the river as a whole, not simply looking at a portion in isolation and then cases such as the *Nikal* case stand for the proposition that while an impediment stopping in the middle, a navigation is not sufficient to –

ELIAS CJ:

Yes.

MS HARDY:

– discount navigability. If you then proceed to find a river that has a terminal point then it doesn't make sense to try to carve up the percentages and say well it can't be navigable because we've only got 40%.

ELIAS CJ:

Yes, it's – the bed vests for all portions which are navigable to the point where the river becomes non-navigable?

MS HARDY:

That's correct.

YOUNG J:

Your argument otherwise that, where there are obstructions, navigable portions – obstructions, that you look at the character of the river as a whole, would avoid, would create one big impressionistic decision that has to be made, is it a navigable river, but would avoid the need to make lots of impressionistic decisions as to where each particular lateral boundary sits.

MS HARDY:

That's right Your Honour and it's really a response to my friend's question of the Crown which was, well what's, where would one draw the line, what would your percentage be for identifying a navigable river. My response is if you're going for the segmented approach, where would you draw the line as to what becomes a non navigable stretch, a small impediment, how many miles, how many kilometres and –

ELIAS CJ:

Well it's a question of fact which in the end is probably going to be best informed, as I think some of the cases say, by use. What use are people actually making of it, are they using it to navigate?

MS HARDY:

Certainly use will demonstrate navigability –

ELIAS CJ:

Yes.

MS HARDY:

– but Your Honour with the caution that the statutory provision is also for susceptibility and development –

ELIAS CJ:

Yes I understand that yes.

MS HARDY:

– so the absence of use does not necessarily demonstrate lack of navigability.

TIPPING J:

So the real inquiry is where does this river cease to be navigable at all?

MS HARDY:

Well Your Honour that's one of the inquiries. If it ceased to be navigable at all, then it would fit into the *Nikal* analysis of rivers but it's clear from the evidence and I'm going to take you to that later, but it's clear from the evidence that there was navigation at the upstream sections –

TIPPING J:

I said where, the question is where does it cease to be navigable within the meaning of the section? I think we are either at cross purposes or –

ELIAS CJ:

I think you're in agreement.

TIPPING J:

– I think we're in agreement actually.

MS HARDY:

Definitely.

TIPPING J:

But you were rather addressing as if I, you didn't agree with me.

MS HARDY:

Your Honour I thought you were restricting your commentary to the, to the end point, the terminal point of navigation but if your question is –

TIPPING J:

Well in a sense you are, you have to say don't you on the approach that you're advocating, its navigable, never mind actual navigation, up to a certain point but up to a certain point but after that it's completely non navigable. Otherwise I don't understand where you're at, I'm sorry, and it's probably me.

YOUNG J:

I think you'd say it's never, it's never gone all the way won't you, so that maybe we're –

TIPPING J:

Well the answer then is nowhere.

MS HARDY:

Yes Your Honour.

TIPPING J:

Yes.

MS HARDY:

The answer for the Waikato River is –

TIPPING J:

Is nowhere.

MS HARDY:

– that there isn't a – from, from Lake Taupo to the mouth –

TIPPING J:

But the question in principle is I've, as I've indicated it, but your answer on this river is it's navigable throughout its whole distance?

MS HARDY:

That's correct.

TIPPING J:

Right.

McGRATH J:

And is that because navigability never entirely ceases?

MS HARDY:

That, that's because –

McGRATH J:

Is that your argument?

MS HARDY:

We've got evidence of navigation basically from beginning to end with a couple of impediments at Maraetai and Whakamaru Gorges rather than a terminal point from which navigation ceases –

McGRATH J:

Yes.

ELIAS CJ:

But you haven't got the same navigation going on all the time, you've got use of the river at different points.

MS HARDY:

That's right and that, and that takes us to the question of what ingredients are required for a navigation and the questions that have been addressed in terms of –

ELIAS CJ:

Yes.

MS HARDY:

– commercial use and so forth. Can I, before developing further those questions about the test of navigation and the detail, simply canvass some preliminary points about the nature of the appellants' case that I think informs the approach to interpretation that is appropriate and the first point is one that was, has been touched on already which is that this is simply not a case of an aboriginal title claim that is being made here, it's about a property right through the Native Land Title Orders and by deploying the common law and ad medium filum test and it's important here that, of course, the appellants don't argue for a rebuttal of the ad medium filum test, they rely on the kind of case law that emerged in *In re the Bed of the Wanganui River* [1962] NZLR 600 which actually, if you like, buckles on the ad medium filum presumption to an award of native title through the Māori Land Court.

ELIAS CJ:

Well that's why we segmented this hearing because of concern that that has much wider implications in which a lot of other people may be interested potentially but – so we do understand that.

MS HARDY:

Just to finish that point. Mr Millard took Your Honours to the *Pouakani Report* and what the Tribunal said about the river backdrop to his claim and perhaps because Your Honours repeated the point but at paragraph or at page 297 of that decision, the Tribunal said, "The repeal of section 261 of the Coal Mines Act 1979 does not resolve the issue of ownership of the beds. We consider the conflict between Māori rights, the Crown and the public interest in general over the ownership and use of rivers has implications far beyond the scope of the claims before this Tribunal. We therefore recommend that the Crown gave urgent attention to addressing these matters in the national interest." And Mr Millard deployed that decision of the Tribunal to argue that the Crown should have continued on in negotiations with Pouakani and failed to do so and that was the prompt for the litigation. That's not the case. What the Tribunal was saying is that there are broader Māori and public rights at play here that need to be attended to and that was the precursor to the two pieces of legislation enacted last year. The Waikato-Tainui settlement and the Tuwharetoa, Raukawa and Te Aroha settlement which set out regimes for managing the river as a whole –

ELIAS CJ:

But those are political settlements and the appellants as you say, are bringing a legal claim so why is that relevant?

MS HARDY:

I say that because in terms of the interpretation of section 14, this is not a question of confiscating customary interests or –

ELIAS CJ:

But it could equally be run like that. The appellants aren't running it but the same sort of argument might be entertained based on aboriginal title and the Coal Mines Act not being effective to constitute an expropriation but these appellants are running it on the basis of the Māori Land Court title.

MS HARDY:

That's right Your Honour and the reason that that's relevant to the interpretation task before the Court today is that the appellants endeavour to deploy arguments about

the relevance of the Treaty of Waitangi and The Declaration on the Rights of Indigenous People to foster a favourable interpretation –

ELIAS CJ:

Well we can get into that, we can get into that later in the development of your argument. I'm just trying to understand – I understand that the appellants are not contending for Aboriginal title, shouldn't we really deal with the case that they are trying to put forward?

TIPPING J:

Their case is one of hard law, not soft law.

ELIAS CJ:

Well, if they have soft edges I suppose that's what Ms Hardy is trying to sort –

TIPPING J:

Well yes but the soft edges don't weigh with me, speaking for myself.

ELIAS CJ:

Well I don't know.

TIPPING J:

Unless it can be shown they have some real relevance, but here they're saying, we have got ownership of the bed of the river, because this Act didn't take it away. Isn't it just like that?

MS HARDY:

That's how the Crown sees it but the reason, the reason I've emphasised the point is that in the appellants' efforts to persuade the Court to its interpretation of section 14, they deployed, if this is the right terminology, the soft law of the Treaty, the Declaration and in the setting of standing the notion that descendents might suffice in the shoes of successors –

TIPPING J:

Well why don't we just stick to what they're actually claiming?

ELIAS CJ:

Well you may need to get onto this –

TIPPING J:

Yes.

ELIAS CJ:

– because for myself I don't necessarily accept that the Treaty, which after all is mentioned in our constitutive statute, is soft law and that its ambit is only within the Waitangi Tribunal processes but I'm more concerned about where quite we're going to on the argument that's been put to us here. And I should flag that I am concerned that this case can't be seen just as a case affecting Māori interests because it will have implications for every riparian owner in New Zealand and if a lot of New Zealand's history has been on the basis of ownership ad medium filum aquae then I think we need to be very careful not to realise the implications of what we're doing simply because this case might be one run with a Treaty of Waitangi background.

TIPPING J:

That's rather what I would suggest –

ELIAS CJ:

Yes.

TIPPING J:

– that's as what – this is not just because these plaintiffs have a Māori, if you like, connotation to it. This is across the whole of the rivers of New Zealand, it could apply to somebody on the banks of the Rakaia couldn't it, theoretically?

MS HARDY:

Yes exactly Your Honour and the approach to the interpretation therefore needs to be placed in that setting.

YOUNG J:

There must be some material on administrative practice in New Zealand over the last 108 years because the District Land Registrars will have had to deal with these issues won't they and presumably there are rating issues and there must be issues about grazing on riverbed and removal of shingle – perhaps they're covered by other

statutes but I find it hard to believe that for 108 years there's been this sort of almost vacuum in which everyone's been operating with no definitive views on what it all means expressed?

MS HARDY:

Well it is curious Your Honour as you say and I think the question from the Court earlier in the day was, what does the New Zealand case law tell us about this issue of whether there have been choices made about the segmentation versus the whole of river approach and perhaps remarkably, the cases don't readily disclose tackling the issue directly and –

YOUNG J:

Well what do we mean by "navigation" is it sufficient that a little boat can get up a river, up and down a river or does it have to be a boat that's carrying goods or passengers for hire?

ELIAS CJ:

And it may be that in fact in New Zealand on that sort of analysis, not many rivers have been – or have been regarded as navigable.

MS HARDY:

As I say, it's surprising how seldom it's come to the Courts for a resolution of the issues.

BLANCHARD J:

Is this the last piece of the Waikato River that remains unsettled?

MS HARDY:

In Treaty settlement terms?

BLANCHARD J:

Yes.

MS HARDY:

The, there's been a discrete settlement with Waikato-Tainui that I mentioned –

BLANCHARD J:

Yes.

MS HARDY:

– that was enacted last year –

BLANCHARD J:

And Tuwharetoa?

MS HARDY:

And Tuwharetoa don't have a settlement yet but they have legislation which allows them to participate in the management regimes that emerged out of the Waikato-Tainui settlement. It's important that those settlements don't address the issue of title –

BLANCHARD J:

Yes.

MS HARDY:

– they don't address aboriginal title issue, they deal with the health of the river from a management regime.

YOUNG J:

Just to go back to my own cracked record, there may be material in terms of the way in which the coalmining regime was administered because that, I mean that's where it all started in a way, and it may be there are, there are materials as to how that was applied in relation to mining that was adjacent or under riverbeds. My sort of vague recollection from West Coast coalmining practice was that navigable did perhaps have a broad meaning but I mean I can't be specific on that – or was seen in that context, it didn't have to be a very navigable river to be treated as navigable now but there must be material on this?

MS HARDY:

Your Honours can I move onto one preliminary point, we're near the –

ELIAS CJ:

Yes.

MS HARDY:

– end of the day. The second point was simply, again the framing of the appellants' case which was that they agreed at the outset that if the river were found navigable, that would dispose of the case and they agreed to this in the agreed statement of facts. I won't take you to that at this point Your Honours but it's in the second volume of the case on appeal at tab 7 in paragraph 7. So it's only late in the piece now that the appellants in this Court are relying on the proviso, the proviso about Crown grants to provide an alternative argument.

TIPPING J:

This is a bit of sauce and goose and gander isn't it?

MS HARDY:

That's right Sir. Very broadly, the Crown's approach is that you need an express grant and the Court has already commented on this point earlier, that if one were to assume that ad medium filum weren't rebutted –

TIPPING J:

But you changed course at one stage, now you're saying they are changing course.

BLANCHARD J:

It was an obstruction in the river.

TIPPING J:

Yes.

ELIAS CJ:

Well some old plans, in fact, which were part of the Crown grants might, in fact, include whole rivers.

MS HARDY:

They certainly might include portions in rivers or they might define an acreage that might include riverbed.

ELIAS CJ:

Yes exactly.

MS HARDY:

Your Honours I've come to the end of those preliminary points and would plan to move back to the point of most concern which is the question of the purpose of interpretation of section 14 –

ELIAS CJ:

Yes.

MS HARDY:

– so I'd suggest that I could pick that up –

ELIAS CJ:

In the morning?

MS HARDY:

– in the morning.

ELIAS CJ:

That would be helpful.

COURT ADJOURNS: 3.59 PM

COURT RESUMES ON WEDNESDAY 16 MARCH 2011 AT 10.00 AM

ELIAS CJ:

Thank you Ms Hardy.

MS HARDY:

Thank you Your Honours. To recap very briefly, the thrust of the Crown's argument about navigability is for a test which is flexible so as to accommodate the range of variations amongst rivers in New Zealand. Our submission is that assessing the character of the river as a whole, as the starting point, accommodates terminal points of navigation where a river is configured such as the one in *Nikal*, it deals with interruptions – again as in the case in *Nikal,* it avoids an impractical patchwork and in the Crown submission it goes some distance to limiting the need for a mile by mile analysis of rivers.

ELIAS CJ:

So when you say you need flexibility in the test, is the test – what is the test in your submission. Is it simply that whether a river is navigable is a question of fact to be assessed in all the circumstances?

MS HARDY:

Yes and taking into account the entirety of the river in making any assessment about a particular claim.

ELIAS CJ:

Yes.

TIPPING J:

Do you – is it part of the Crown's argument that the concept of navigation has commercial and highway overtones?

MS HARDY:

No the Crown submission is that the New Zealand legislation doesn't require demonstration of commercial overtones, that it's about susceptibility to navigation and while commercial use might demonstrate that, one could also demonstrate appropriate use through non-commercial use.

TIPPING J:

Well like just recreational use for example?

MS HARDY:

Yes and Your Honour I'd submit that it's very difficult to delineate the difference in navigation between recreational and commercial use so that –

TIPPING J:

I see.

MS HARDY:

– fishing or canoeing and kayaking could well have either a commercial or a recreational use and I'll go to some of the cases that are relevant to that proposition.

YOUNG J:

Can we just – on that, the word, the collection of words has puzzled me because it's an odd collection of navigable craft, boat general, barge which I think must be a reference to non-propelled boats, boats that aren't self propelled, the sort of boats that would be pushed or pulled along a river or a canal – punt – now I would be very surprised if a punt was used in 1903 other than for killing waterfowl, fishing or pleasure or possibly being pulled across a river on a pulley –

ELIAS CJ:

Ferries –

YOUNG J:

Yes.

ELIAS CJ:

Ferries as a principal means –

YOUNG J:

Across, well – but that's something that those are, those meanings and it, the word "navigation" is presumably something you can do with a raft which is characteristically not propelled at all other than by the current of the river and it's something you can do with a punt which is normally used for fun. A barge which isn't propel – which is a boat that isn't propelled and then start at the other end and boat

which includes, by reference to what's gone before, everything that floats. Have you analysed what those, if there's any particular meaning that those words might have had in 1903?

MS HARDY:

Well not particularly pitched at 1903 but our analysis is that that clustering of craft actually as Your Honour points out, does seem to cover the ambit of both commercial and recreational use and when you combine that with the provision that the intention is to achieve beneficial use to residents, actual or future, or to the public, then that notion of residential use, in our submission, supports the breadth of the description of "craft" as traversing both commercial and non-commercial activity.

TIPPING J:

I personally, at the moment, am inclined to think that navigation controls the vessels rather than the other way round.

ELIAS CJ:

I was interested, just if one looks at those collection of words, in "susceptible," because it does seem to be quite close to a decision of the US Supreme Court which you're probably going to take us onto, and I did have the thought last night which Justice McGrath also had, that it is not impossible that Sir John Salmond was aware of, I don't know whether he was involved in drafting this provision and I've asked for his –

McGRATH J:

I don't think he became, went into the statute drafting business until 1907 –

ELIAS CJ:

Until then, 1907?

McGRATH J:

Yes.

ELIAS CJ:

Yes, oh well that would answer that. But I wondered whether in his text on jurisprudence there is any discussion since he had an interest in waters, of concepts of navigability but it does seem to me that it is not possible to entirely avoid some sort

of historical reconstruction of these terms and their derivation because of the effect on property interests. Because as you said yesterday, I think quite rightly, it can't be that there is a fluctuating or changing property interest and while one has to factor in susceptibility, looking to the future, it's really susceptibility in, at an earlier point in time that we're concerned with.

MS HARDY:

Yes Your Honour as I say we haven't explored the detail of interpretation of the craft as at 1903 but to look at the words themselves, they seem to, as well as the points made by Justice Young, to look at boats of a fairly shallow depth, if you like, that would accommodate traversing fairly shallow rivers and then there is that combination of punts, when one thinks of punts traditionally, punting on the Cam, one certainly is thinking of recreation in the past –

ELIAS CJ:

I think you have to look much further back than that and the Oxford English Dictionary has the derivation from pontoon and specifically mentions ferry and commercial use of punts, so I'm not sure that these weren't already concepts. The concept of navigability didn't have an accepted meaning, perhaps, at the time this word was used.

McGRATH J:

Ms Hardy can I just ask you this, I understand from what you've said this morning by way of summary that the Crown suggests it's whether in substance it's a navigable river, and I understand that you want to avoid a patchwork form of analysis but do you accept that at some point every river will cease to be a navigable river, as you move upstream?

MS HARDY:

Yes and in that case the geography is dealt with by the *Nikal* analysis that if you're talking about the headwaters and you've got streams entering the river, then that would fit the terminal point analysis in *Nikal*.

McGRATH J:

Yes so that in terms of, I know what you mean and we were taken to – you took us to the passages yesterday and we discussed them, but you're clearly not engaging with the whole river analysis which I think was Justice Harrison's approach. Because I

think he was really looking from source to mouth if you, if in substance it was a river, it was a river from source to mouth.

MS HARDY:

Yes though of course he didn't look up at the Tongariro River which would be the feeder into the Waikato –

McGRATH J:

Well I don't want to get into that particular refinement but if we could just keep it in a more broad approach –

MS HARDY:

Yes.

McGRATH J:

– you do accept that for the purposes of the Act, a navigable river will cease to be navigable and you say that the *Nikal* principles will help us ascertain where?

MS HARDY:

Yes and the Crown would prefer to characterise the test as looking at the overall character of the river, rather than perhaps calling it a whole of river test.

McGRATH J:

Overall character of the river?

MS HARDY:

Yes.

McGRATH J:

Right, thank you.

MS HARDY:

I will return to questions of interpretation but I thought it would help to locate the particular case in the facts of navigation and that I would take you through that first and then go back to section 14 to examine how those facts relate to the tests that the Crown is proposing apply.

TIPPING J:

Are you asking us to be an ultimate fact-finder in this respect, because I don't see anything in the judgments in the Courts below that find facts according to the test which you are propounding.

MS HARDY:

No Your Honour I want to take you to Justice Harrison's decision and then to the facts themselves to simply demonstrate the use of the river, to use a –

TIPPING J:

You're not answering my question –

MS HARDY:

A more neutral term.

TIPPING J:

– you're not answering my question. Are you relying on facts found below or are you asking us to find facts according to your propounding text?

MS HARDY:

I'm relying on facts found below but it's for this Court to make, of course, the legal assessment –

TIPPING J:

The proper use of.

MS HARDY:

– of whether that amounts to navigability.

TIPPING J:

Right, thank you.

MS HARDY:

So can I start Your Honours with the High Court decision which is in the first volume of the case and it's at tab 6, page 102. And the paragraphs which are relevant are 104 and 105. Essentially there is the primary finding of Justice Harrison where he states he was satisfied that the Waikato River, as a whole, in 1903 was a navigable

river. Mr Parker's table shows that about 156 miles or 76.8 percent of the river was actually used or navigated at that time, representing about 75 miles or 60 percent of the 120 mile stretch above Cambridge. His table was based on documented travel so no doubt other journeys were taken, it does not take into account the river's susceptibility for future use. And then he lists what for the Judge were the decisive factors, which are that the river was navigable continuously for two-fifths of its length, through to Cambridge. Most parts above were used, there was greater use in those same areas after 1903. So those were His Honour's findings.

Can I next take you to –

ELIAS CJ:

Are you going to take us, because it's not terribly clear to me what is meant by the findings he makes at two and three, are you going to take us to the evidence on –

MS HARDY:

Yes I am Your Honour.

ELIAS CJ:

Thank you.

MS HARDY:

Can I first take you to a map which helps orient the detailed evidence and this is in volume 4 of the case at tab 76. These are maps prepared by Mr Parker in support of his evidence for the Crown and exhibit D1 is a sketch of the river running from Taupo through to Cambridge. The marking of significant places along the way. The Pouakani block which is the 22 mile stretch at issue here, isn't marked here but it runs from the Waipapa River which is marked as "Waipapa," and it ends below Atiamuri roughly around the "U" and "R" of the labelling of Atiamuri on the map.

Then if Your Honours were to turn to the next exhibit, exhibit D2, as titled this is Mr Parker's sketch that sets out where all evidence of use of water transport has been located in this stretch of the river. So you'll see there are six areas and in all of those, Mr Parker maps evidence of actual use of the river. And the maps which sit behind exhibit D2 are the detail which supports that rendition.

TIPPING J:

And the black line is the line demonstrating what part of the map, for example, on D3 has been found in his evidence to be subject of navigation as he would call it?

MS HARDY:

That's right. So Your Honour area 1 marked there is the stretch Taupo to Aratiatia and there are maps that support that sitting behind the document.

TIPPING J:

But the black line that's under the river, is that demonstrating where the navigation took place, in that stretch, a whole stretch?

MS HARDY:

Through the whole stretch of the black marking.

TIPPING J:

Yes.

McGRATH J:

Is that referring to fisherman though, is –

TIPPING J:

Well that's what I wanted to clarify.

MS HARDY:

Your Honour, you're looking at D3?

TIPPING J:

I am.

MS HARDY:

Yes, so there is a key there, the black line links to the use by fishermen –

TIPPING J:

But what does fishermen et cetera mean? That's the red line right by the outlet from the lake is it, I presume?

MS HARDY:

The red line is for fishermen in, for the trip taken by the Graces in 1863 and by fishermen. That's the red line. And then the black line is another tranche of evidence –

TIPPING J:

Is he relying on very isolated journeys rather than sort of reasonably continuous usage?

MS HARDY:

Well the lines mark the journeys, so here, for instance, we've got a journey that runs the red line from beginning to end –

TIPPING J:

One journey?

MS HARDY:

A gap, sometimes more than one journey. The evidence describes the detail and I'm going to take Your Honours to that evidence –

TIPPING J:

All right, sorry I'm probably jumping ahead, I'm sorry.

MS HARDY:

So, but Your Honour is correct, that when one goes through the other exhibit Ds, there are markings and a key describing the journeys and these relate back to Mr Parker's second brief of evidence where he narrates the detail of all of those journeys that are depicted here.

TIPPING J:

Is there some sort of a summary somewhere so we can just get the weight of it summarised or does one have to go through his evidence in some detail?

MS HARDY:

Your Honour I can take you to an exhibit that endeavours to summarise these points and I'll do that now. That –

ELIAS CJ:

But the evidence isn't very lengthy though is it and you are going to have to take us there so.

MS HARDY:

So if we start with appendix 1 to Mr Parker's second brief, that's also in volume 4 of the case and it's at tab 73. Essentially these pages list each of the journeys linked to a geography and giving a mileage and describe the nature of the craft that was used and as I've mentioned, links to paragraph numbering in the brief of evidence. What I can do, if Your Honours would like, is run through that detail and refer Your Honours to the paragraphs for your own reference in the evidence and also to some of the photographs in the evidence that are relevant.

So the first five of those entries relates to area 1 on that map D2 which I just took Your Honours to and the first entry is a canoe trip by the Grace family and it was for family transport. The second is fishing which is referred to a paragraph 92 of Mr Parker's evidence and that involved a hired fishing boat. The next one is a launch which involved fishing tourists and just to give you a flavour of the references, that's at paragraph 93 of Mr Parker's evidence and he refers also to relevant photographs which are at exhibit, his series of exhibit B which are at tab 75 of the same bundle that Your Honours are dealing with. And relevant photographs are B3 and B4 which show the craft sitting in a reasonably broad area of water.

The next entry is Mr Jenks from the Public Works Department –

ELIAS CJ:

Sorry where are you?

MS HARDY:

Sorry, the fourth entry in Mr Parker's appendix.

ELIAS CJ:

The exhibits – no?

MS HARDY:

Oh sorry I've left the exhibits Your Honour and returned to –

TIPPING J:

Page 103 Your Honour.

ELIAS CJ:

103.

MS HARDY:

Yes. So this is the entry, Jenks, he was from the Public Works Department, he was in a motor boat and he was carrying out survey work for the public purpose of looking at hydro development in this area. The next section is area 2 from that D2 map, round Huka Falls and we've got Mr Hunt referred to at page 105 of Mr Parker's evidence. This was a motor boat for hire and fishing and there's a reference to the photograph B6 at tab 75 which depicts that, so again the motor boat located in the breadth of the river. The next entry is –

TIPPING J:

Is that the photograph where it appears to be approaching a waterfall or something like that?

MS HARDY:

Yes so it's, bottom of the Huka Falls is the entry. The next entry is fishermen, which is referenced at page 104 of Mr Parker's evidence. And that's a motor boat which is described in the evidence as trawling up and down the sporting stretch of the river and it was for hire. The next entry is –

TIPPING J:

Is this all in the area that's now indisputably vested in the Crown?

MS HARDY:

Well this is the area outside of the claim of the Pouakani blocks themselves.

TIPPING J:

Yes.

McGRATH J:

But below the Huka Falls?

MS HARDY:

But below the Huka Falls.

ELIAS CJ:

But vested in the Crown under that hydro legislation was it?

MS HARDY:

The Huka Falls up, is vested in the Crown via the 1926 legislation –

ELIAS CJ:

Huka Falls up, yes.

MS HARDY:

– the rest the Crown is relying on section 14 for vesting.

TIPPING J:

Yes sorry, I had it the wrong way round. I didn't realise this was below the Huka Falls.

MS HARDY:

The final entry on that first page is an entry again, it's ministry officials doing public inquiry work on the river, the vessel is a launch and it was for hydro inspection. Over the page, –

McGRATH J:

Your – where there's a relevant photograph or exhibit as in 75, you're telling us that aren't you?

MS HARDY:

Yes I'll run through that for Your Honours. The next page begins with the Fulljames Camp, that was a place where people went to stay for fishing excursions for payment, a tourist operation. The reference to Mr Parker's evidence is paragraph 122, this was a launch being used for hydro inspection and I'll take you to the last of the photographs –

ELIAS CJ:

Sorry which ones – oh, this is the ministry, yes I see.

MS HARDY:

Yes.

McGRATH J:

So is this, this is not Ohakari, is it or have I got the wrong, I think I've turned over a page too many, sorry. We're at page 1031?

MS HARDY:

That's right Your Honour. And if we briefly look at photographs B7 and B11, behind tab 75, this is B7 through to B –

McGRATH J:

I'm afraid I'm – speaking of B11 I can't quite interpret it in a way that would be helpful, what is one looking at or for?

MS HARDY:

These are photographs which were taken in relation to this particular trip that is recorded –

McGRATH J:

They don't show any actual boats, it's –

MS HARDY:

No.

McGRATH J:

– just the way it looked.

MS HARDY:

They show the breadth of, in configuration, of the river.

ELIAS CJ:

So these are 1937 photographs are they?

MS HARDY:

Yes. The next entry which refers to Grace and Māori on the stretch of the river is referenced at paragraph 115 of Mr Parker's evidence.

ELIAS CJ:

Was that the same trip as the earlier one? 1863 one, from the Lake Taupo outlet.

MS HARDY:

Yes Your Honour I think that's a continuation of the trip –

ELIAS CJ:

Yes.

MS HARDY:

– through the two areas depicted in D2. Their vessel was a canoe and the description in Mr Parker's evidence relates to transport to the Pukawa Mission in Taupo so while there's no detail one might extrapolate people, goods being carried for a purpose.

ELIAS CJ:

Sorry which one, this is the Grace and Māori?

MS HARDY:

Grace and Māori.

ELIAS CJ:

That's explained in the text is it?

MS HARDY:

Yes 115 and following in Mr Parker's evidence. Then Broadlands, this is referred to at paragraphs 136 to 139 of Mr Parker's evidence. Again the text there indicates there was a port and photographs on the river. The next entry the junction with the Torepatutahi. That's referenced at page 140 of Mr Parker's evidence and it's reference to the use of flax barges operating in relation to a flax mill. The next entry –

BLANCHARD J:

Where were those barges going? Were they going up and down the river or across the river, and for what sort of distance?

ELIAS CJ:

It says localised in the question –

MS HARDY:

The information is scant Your Honour and the directions unknown as is recorded there so it's really just a brief reference to flax barges in that local area.

ELIAS CJ:

And which area is this one, if we go back to the –

MS HARDY:

We're still in Area 2.

ELIAS CJ:

Sorry what page again was that?

MS HARDY:

That's at tab 76 and it's the second map in D2. The next entry, and we're back at the appendix at tab 73, the next entry is around the Mihi and this was a New Zealand Canoe Association trip referenced at paragraph 152 of Mr Parker's evidence. Clearly that was recreational and involved canoes and rubber dinghies. The next is the Vose trip which Your Honours were referred to by Mr Millard, that's referred to at page 153 of the, sorry paragraph 153 was a rubber dinghy trip and I should make it clear that the 76.8% calculation that Justice Harrison relies on, excludes the Vose trip for the portion that it doesn't overlap other trips because of its – the daredevil nature of the trip which my friend pointed out –

ELIAS CJ:

Was there some portion that does overlap, it sounded fairly daring all the way?

MS HARDY:

It traversed the whole of the Pouakani block –

ELIAS CJ:

Yes.

MS HARDY:

– and as I recall was roughly a 25 mile trip. When one takes out the overlap, one's left with nine miles, that is the – demonstrates the same area that's traversed as the other evidence so my point is –

ELIAS CJ:

There's an overlap of nine miles which is within Harrison's J calculation but the balance of the 22?

MS HARDY:

Twenty five roughly.

ELIAS CJ:

Of the 25 is excluded?

MS HARDY:

That's right.

TIPPING J:

That level of hair-raisingness must have altered.

MS HARDY:

The next page, we're moving into area 4 on that D2 map and there's Mr Jenks with a public works department activity, referenced at paragraph 151 of Mr Parker's evidence. So that was for the public purpose of looking at hydro issues. The next, the juncture with Mangaharakeke is referenced at paragraph 165, that's a very early trip, looks like an exploratory canoe trip. The next one and this is near Ongaroto and is within the Pouakani blocks now is the Cox family, and that's a dinghy, a sailed skiff, being used for moving passenger for pleasure, and there are photographs which I think you've already been taken to a B23 and B24. The next entry, which is near Te Papa, is also within the Pouakani block, and that's the Fisher travel, referred to at paragraph 180 of Mr Parker's evidence. Again, public works activity. The next, the Maraetai Power Station, also within Pouakani, is more public works department activity referred to at paragraph 226 of Mr Parker's evidence, and that involved a barge which held a drilling rig, there's a photograph at B25. The next stretch is area 5 from map D2 and it departs the Pouakani block –

ELIAS CJ:

It's not in the Pouakani block?

MS HARDY:

So not in the Pouakani block. Waiotu Bridge, again, a launch and a barge being deployed for dam construction, referred to at paragraph 241 of Mr Parker's evidence. Then Maungatautari Bridge, referred to at –

TIPPING J:

Maungatautari, is it? Is that the same one that we were referring to before, the bridge?

MS HARDY:

That's right, so we're heading downriver now. That's referred to at paragraphs 254 and 264 and related to canoes being used for transport. The next entry is near that bridge, at paragraph 260 of Mr Parker's evidence. We don't have a reference for the kind of vessel used but Mr Parker has speculated it was probably for use of canoes.

ELIAS CJ:

But it's not in dispute that from Maungatautari Bridge to the mouth is navigable, yes.

MS HARDY:

That's right, Your Honour, and the final page covers that area, so I won't take Your Honours through that detail, given that it's accepted.

ELIAS CJ:

So the evidence relating to the Pouakani block is the Cox family, Fisher and the Public Works Department hydro investigations?

MS HARDY:

Yes, that's the evidence of actual use.

ELIAS CJ:

Yes.

TIPPING J:

From which you would ask for an inference that it was capable of use?

MS HARDY:

Yes, beyond the actual use. Another issue is obviously in this case the question of physical interruption and what impact that has on navigability. There are broadly about 14 interruptions, rapids, in the whole of the river, and Mr Parker has given detailed evidence about the capacity to portage those obstructions. The reason for that is linking into the case law which indicates that portage is a satisfactory response to determining navigability.

TIPPING J:

This 14, is that above the Maungatautari Bridge, or it is the whole, from mouth to Taupo.

MS HARDY:

Where the rapids are above the bridge, rather than below, but I'll take Your Honour to the chart.

TIPPING J:

I just wanted to know generally, the 14 you're speaking of are above that bridge, the interruptions?

ELIAS CJ:

They must be.

TIPPING J:

They must be, one assumes, although, you know, there could be some portaging below, but I have assumed not.

MS HARDY:

The *Mueller* case itself identifies a problem with navigability below Cambridge, quite close to the mouth, where there are –

ELIAS CJ:

Shoals and shifting sandbanks.

MS HARDY:

Exactly and, despite that, determines that the stretch is navigable. So the rapids are more the, up, up from Cambridge dimension. The portage evidence is given in Mr Parker's brief, which is in the second volume of the case, at tab 14.

BLANCHARD J:

Just before we leave volume 4, what's on exhibit G, the CD that we've been given?

MS HARDY:

The CD is photographs of the entirety of the river, that depict the river's configuration…

BLANCHARD J:

At the moment?

MS HARDY:

I'm just checking the date. They were photographs made in the 1930s in the public works activity of looks for dam development.

TIPPING J:

Were they taken from the boat, as they were going – I know we didn't have moving pictures then, at least I think…

YOUNG J:

I think we did, actually.

TIPPING J:

Did we? Oh, all right, it just shows what a Luddite I am. I think I'll withdraw gracefully, Ms Hardy.

MS HARDY:

Is it, aerial survey, Your Honour, there were planes, I think. So, to take you on to volume 2 of the case, this is Mr Parker's evidence at tab 14. At page 476 of the case Mr Parker goes through considerable detail, analysing each of the rapids which are relevant, and I can summarise, Your Honours, that he says that all of them could be portaged, the reservation he expresses is about the Whakamaru and Maraetai gorges, and he deals with that at paragraph 321 of his evidence, that there would be

– and 326 – it would be difficult to portage those gorges, but all of the other impediments, he indicates, would be readily portaged.

BLANCHARD J:

That strikes me as highly theoretical, but with so many interruptions it's very unlikely that anyone would want to make a journey other than simply as an adventure.

ELIAS CJ:

Messing around in boats.

BLANCHARD J:

Well, you'd be messing around all right. If you had to get out and somehow get yourself to another point on the river, 14 times, when even in 1903 I imagine there were much more convenient ways of doing things by road.

MS HARDY:

Well, the Crown's contention is that what section 14 requires is not a continuous journey that requires repeated portage.

BLANCHARD J:

I understand that –

MS HARDY:

Yes.

BLANCHARD J:

– but there's comes a question of practicability, we can't depart from reality here. How can we say that something is navigable if, in practical terms, though you could do it, no one's going to do it?

MS HARDY:

Well, the Crown relies on the evidence that people did navigate through stretches of the river or –

BLANCHARD J:

Through stretches?

YOUNG J:

Well, it's not the Crown case that people went from Taupo to Cambridge –

MS HARDY:

No, Your Honour.

YOUNG J:

– or were ever likely to do, absent a reconfiguration of the river, perhaps associated with hydro development.

MS HARDY:

That's accepted.

YOUNG J:

So that's not the navigation you're talking about?

MS HARDY:

No.

TIPPING J:

There was enough navigability, is that the general idea, within that stretch as a whole, to create the whole as navigable, it's an extent of navigability issue, is it? Because, a bit like my brother Blanchard, I just, it feels a little unreal to say this stretch as a whole was navigable, when you've got to get out 14 times.

ELIAS CJ:

And if it is, why hasn't the Crown done anything about making it more suitable in the intervening years if it had a…

BLANCHARD J:

I suppose it has by putting in dams.

YOUNG J:

It has now.

ELIAS CJ:

I suppose so, yes.

YOUNG J:

Well, it's completely navigable now, I take it, isn't it, except for some dams?

MS HARDY:

Well, yes, there –

YOUNG J:

How many dams are there? Three?

MS HARDY:

Two, two alongside Pouakani and six along the entirety of the stretch.

TIPPING J:

And this has covered these problematical gorges, has it? It's filled them up.

MS HARDY:

That's right.

YOUNG J:

So now there are no rapids, is that right?

MS HARDY:

Well, there remain rapids and falls like the Huka Falls, of course.

YOUNG J:

Yes, yes.

MS HARDY:

So there are still some rapids but the gorges at Maraetai and Whakamaru have been refigured by the damming.

TIPPING J:

So if you did it as of today, you'd be inclined to say it is clearly navigable right the way up.

YOUNG J:

You'd have to take the boat out at each of the dams and circle round the dam presumably.

TIPPING J:

You'd put your boat on your trailer, would you?

YOUNG J:

Put on a boat trailer?

MS HARDY:

Yes, well, clearly there are impediments through the dams –

TIPPING J:

Yes, quite.

MS HARDY:

– of significance. There remain some aspects of the gorges and there are some rapids further up.

TIPPING J:

But if it's not navigable now, it certainly wasn't navigable then.

MS HARDY:

Well, Your Honour, that goes to the question of the test which this Court will determine as to what navigability is, and as Justice Young made the point, the Crown's contention isn't that there was a continuous journey from Taupo to Cambridge and beyond. It is that if you look at the character of the river as a whole, it is substantially a navigable river, it is used by the public for commercial and recreational purposes, and that that, given the language of section 14, was the intention of Parliament.

ELIAS CJ:

How do you reconcile that with your acceptance that when a river becomes non-navigable you don't seek to say that overall it's navigable, as Justice Harrison said? I mean, there must be some limit to the characterisation of the river as navigable, based on the parts that clearly were used for continuous journeys.

MS HARDY:

Your Honour, it goes back to one of the reasons the Crown is promoting the general character test, which is that the alternative is unattractive if it produces a sort of patchwork of public and private rights and a need for a mile by mile analysis of every river to determine property rights.

BLANCHARD J:

But if you look at the overall practicability from Karapiro upwards, you would probably look at that all together and say well, given the number of interruptions, can it be said in practical terms that this was navigable? If the answer to that is no, then you have the river divided into two bits. That's not difficult.

MS HARDY:

Well, yes, Your Honour, that would involve the Court determining that the Crown owned through section 14 up to Cambridge and the rest of the entirety of the river is privately owned –

BLANCHARD J:

Yes.

MS HARDY:

– or was.

BLANCHARD J:

Yes.

MS HARDY:

But the Crown supports the reasoning in the High Court and Court of Appeal decisions which is that if you look at the character as a whole and use the information about actual use, you get a good 76.8% of actual use, and if you add on inferences as to susceptibility, that ratio increases. We can say that because we don't accept that the cases indicate one needs a continuous journey from Taupo to the mouth.

TIPPING J:

If one were looking at it as of today, there would be – did you say two or three dams – blocking you.

MS HARDY:

Two adjacent to the Pouakani block.

TIPPING J:

But throughout the whole –

MS HARDY:

Six –

TIPPING J:

Six –

MS HARDY:

– throughout the whole.

BLANCHARD J:

And the Huka Falls.

TIPPING J:

And the Huka – yes.

YOUNG J:

Why did the Crown actually buy the Pouanaki blocks, do you know? Is there evidence of that?

MS HARDY:

It would be covered in the Pouakani Tribunal report. I mean, it was significant Crown activity at the end of the 19th century buying up large tracts of Māori land and that Pouakani block was part of a huge – so it wasn't for a particular public purpose, it was the Crown acquiring land for broad settlement uses in, across New Zealand. The –

YOUNG J:

But it was not later sold, or was it?

MS HARDY:

A combination of events, some of the land was made into pastoral leases and a big area of the land was actually transferred to Wairarapa Māori in settlement for a claim about Wairarapa moana, the Wairarapa lakes, so another, those people are Ngati Kahununu, and they received what's called, "Pouakani number 2 block" in 1915, which is adjacent to the riverside. And again, Mr Parker's evidence traverses all of the history of the acquisitions that have happened since the end of the 19th century.

TIPPING J:

If we're sitting today administering this section 261, and a river was shown to be non-navigable, clearly, back in 1903, but clearly navigable today, what would the answer be?

MS HARDY:

I think that the answer would be, Your Honour, that the 1979 Coal Mines Act has been repealed by the Resource Management Act, section 261, and what it has done is preserved existing rights but, if you like, the transformation of newly-found navigable rivers isn't at play because of that repeal, I'd submit.

TIPPING J:

I follow, thank you, I'd overlooked that point. So at the very latest we might look at it would be the date of the repeal, or just before the repeal?

MS HARDY:

Yes.

ELIAS CJ:

Although I had thought that you were saying yesterday that you couldn't take it as late as that because property rights attached at the time of, well, really, attached in 1903.

BLANCHARD J:

I think it has to be taken as being confirmatory –

ELIAS CJ:

Yes.

BLANCHARD J:

– of 1903, with tidied-up language, otherwise I think it would be chaotic.

MS HARDY:

I'd submit that's right, Your Honour, they're vesting in the Crown. That event was in 1903, so that's when property rights crystallised and –

BLANCHARD J:

Yes, and you have to look at what was going on in 1903 and what was in reasonable contemplation in 1903, otherwise you get – and this doesn't affect this river so much as the South Island rivers – otherwise you get jet boats being factored in.

ELIAS CJ:

Yes.

BLANCHARD J:

And, as somebody said yesterday, an effect on existing rights.

TIPPING J:

Yes, I'd agree with that, absolutely.

ELIAS CJ:

And, indeed, the Supreme Court of the United States seems to have come to that view in a – or text writers have, I'm not sure which now, I can't remember what I've read – in relation to the idea of recreational boating being the new commerce in Florida, that you couldn't have changing circumstances of navigability.

TIPPING J:

Because you couldn't vest and divest, if you like –

ELIAS CJ:

No.

TIPPING J:

– sort of as you're going along, in time, no.

MS HARDY:

The American cases, the United States cases I'm aware of, point to potential for recreational use to be a signifier of –

ELIAS CJ:

Some, some.

MS HARDY:

Yes.

ELIAS CJ:

But I think that follows state law, and the federal test – I mean, I really don't think it's directly comparable, but it's interesting that they've grappled with some of these issues and in, as I understand it, the US, in its application of federal law, has said that you don't look to developing – I mean, they do continue to apply a commerce test, probably because they're dealing with the commerce clause in the constitution, but they have said there that you don't say, "Well, actually, tourism now is a big commercial operation," for the same sort of reason that that wasn't the concept of commerce when these land sales took place, so you can't have flickering property right.

TIPPING J:

Would everyone, well, would you accept, Ms Hardy, that if you look at it in 1903, no question of development to the points of the dams and so on was reasonably foreseeable?

MS HARDY:

No, Your Honour, we haven't factored into the Crown's case the reconfiguration which –

TIPPING J:

I just want to make sure that we're not –

MS HARDY:

Yes.

ELIAS CJ:

Hydro was being talked about then of course, wasn't it?

TIPPING J:

It was being thought about, but it would be a long vision, if you like, to see what happened. "Susceptible" must mean, as others have said, "Reasonably foreseeable," if you like, as of the date you're standing…

BLANCHARD J:

And lawful as well.

TIPPING J:

And lawful, yes.

MS HARDY:

Well, 1903, the activity relating to dam development was quite early, and the Court of Appeal traverses that, in Justice Hammond's narrative of the background in the Court's decision –

ELIAS CJ:

Are you relying on that?

MS HARDY:

I don't question the account.

ELIAS CJ:

No, but I can't remember really whether the Crown is saying that that's determinative of meaning.

MS HARDY:

Well, the Crown argues that a purposive interpretation of section 14 is appropriate and that the broad context –

ELIAS CJ:

Yes.

MS HARDY:

– to the extent it assists, is relevant.

TIPPING J:

I'm just trying to get a feel for how much foreseeability adds to the actual, as of 1903.

YOUNG J:

Well, it might have been – well, one issue might be how many people were going to be living on the riverbanks, because it depends – I mean, if you're looking for navigation, traversing from Taupo to Cambridge, then you're unlikely ever to have found that to have been in anyone's mind, but it may be material in terms of how many people were living there, whether they want to get to the other side of the river, whether they wanted to get –

ELIAS CJ:

Whether there were roads.

YOUNG J:

Whether there were roads, which might cut both ways, it might make some of the problems easier but, on the other hand, it would obviate the need for river movements.

MS HARDY:

The section itself certainly talks about, "Residents actual and future," so it's contemplating development, and if one thinks broadly about the Waikato, this is not like the *Leighton* case of the Waiwhetu Stream in Lower Hutt, this is about one of New Zealand's major waterways. So, in my submission, that context and that understanding of susceptibility suggests that Parliament was intending that a river such as the Waikato, at least up to, you know, an end point, would be in the public domain for public purposes.

ELIAS CJ:

But the concept of susceptibility, I don't think it can be a coincidence that the very word is used, and it's used about foreseeable developments like the building of canals or the building of locks, or those sort of things generally, when it's been applied, in determining what's navigable in the past.

MS HARDY:

And the Crown's submission would be that the government, the Parliament, was reserving to the Crown the capacity in major waterways such as the Waikato to contemplate doing that kind of activity.

ELIAS CJ:

But it wasn't realistic on this stretch, nobody could possibly suggest it was realistic on this stretch.

MS HARDY:

Well, there has been realistic use on this stretch, there has been the damming that's been done for public purposes.

ELIAS CJ:

Right, thank you. What do you want to take us to now?

MS HARDY:

I propose to take Your Honours to more detail about the Crown's approach to that purpose of intent, which I touched on yesterday, and make the point that it's without contention that it's the *Mueller* decision that is seen as the origins for this legislation. So I'd like Your Honours to go to that case. It's in the appellants' authorities, volume 1, at tab 12. And if I can take Your Honours to page 106 of that decision, the Court there says, "If the facts had shown that a probable use to the Crown of the bed might have been contemplated, the presumption of an intention to grant would have been rebutted."

ELIAS CJ:

Where are you?

MS HARDY:

Page 106 –

ELIAS CJ:

Yes.

MS HARDY:

– about eight lines down, "The inference to be drawn from the…"

ELIAS CJ:

Yes, thank you.

MS HARDY:

"If the facts had shown that a probable use ... might have been contemplated" seems to be the notion of intention there, or susceptibility. Then on page 109 –

ELIAS CJ:

Sorry, whose judgment is this?

BLANCHARD J:

Williams.

ELIAS CJ:

Williams, thanks.

MS HARDY:

Justice Williams, yes. 109, around the final third of that section, "It is inconceivable that the Legislature could have contemplated" –

TIPPING J:

"Conceivable," not "inconceivable."

MS HARDY:

Sorry, "It is conceivable that the Legislature could have contemplated that, if in any such district there was a river that was the only practicable highway for military purposes and for every purpose, the Crown should by virtue of that Act grant away the bed, and so deprive itself of the right to interfere with the soil and improve the navigation" –

TIPPING J:

But it's a question, "Is it conceivable that…

MS HARDY:

That's right.

TIPPING J:

You rendered it as the answer.

MS HARDY:

So I was jumping ahead, Sir.

BLANCHARD J:

And it is also dealing with practicability.

MS HARDY:

Well, that's the “practicable highway” notion.

BLANCHARD J:

Yes.

MS HARDY:

Yes.

BLANCHARD J:

I mean, I appreciate this is not the statute –

MS HARDY:

Yes.

BLANCHARD J:

– and it precedes the statute, but there is that element about is this a practicable highway?

MS HARDY:

There is that element in the case, Your Honour, and I’ll move on to the section that rests on this soon.

TIPPING J:

But the problem with this is that the very bottom part of that, where the Judge says the Waikato River was a highway and practically the only highway of the district, he doesn’t say what parts of the river or all of the river that he’s talking about.

ELIAS CJ:

Well, we know that it wasn't above Cambridge.

TIPPING J:

Well, that was the context.

BLANCHARD J:

Well, actually, interestingly, if you go to page 107, he talks about, "Up to and beyond the Town of Cambridge," but he doesn't give any indication, other than the fact that it's at least 50 miles higher up than Huntly. He's the only one of the Judges who makes reference to "beyond".

MS HARDY:

Yes, Your Honour, and while we're there, that same page, in the middle, is the reference to Tuakau, which is below Huntly, but where there were difficulties with navigation.

ELIAS CJ:

The above, the town of Cambridge, is to the bridge, isn't it?

BLANCHARD J:

I would think so.

ELIAS CJ:

Yes.

MS HARDY:

That would make sense.

TIPPING J:

And if – yes. Well, you would get approximately where he was thinking of by measuring 50 miles up from Huntly.

ELIAS CJ:

We've got enough measurements in this case.

MS HARDY:

Can I take Your Honours to page 112, and this is the sentence, it's about two-thirds of the way down, "It is, I understand, suggested by my brother Edwards." This is really responding to an earlier point raised by the Court yesterday, why perhaps wouldn't one simply construct an easement for navigation rather than vest title in the Crown, and this gives the explanation that you would have difficulties with the right of the owner to extract navigation unless there was a public right – sorry, this is actually the point that there was no public right in New Zealand by prescription at the time, so there had to be, if ad medium filum applied, then you had private property rights and you had trespass. The point I was –

McGRATH J:

He says it's arguable there –

MS HARDY:

Yes, but certainly an uncertainty that, I would suggest, section 14 is clarifying. So, in 1903, the Parliament was endeavouring to address the issues raised by *Mueller* at a national level beyond the Waikato River. The Crown would submit that it's clear from *Mueller* that navigation was a test for public ownership for the bed for broader purposes but, in a way, navigation is being used as a signifier for the public interest, and that capacity, susceptibility, is more important than actual navigation which, I would suggest, modifies the issue of whether you needed an extant notion of a public highway, it's talking about susceptibility. And then, of course, the majority in *Mueller* thinks that the Crown needed beneficial title to be able to maintain and improve navigation, as well as accessing minerals, and that's what section 14 reflects. To be practical, the Crown says that if there were to be on major rivers such as the Waikato a patchwork of private and public rights, determined by the happenstance of navigation, in small areas, then this would impede the purpose of section 14. So if purposes behind section 14 are access to coal, dredging, enhancing the ability to use the river for navigation, then would need to acquire that land, it would be a potential trespass on private properties if the Crown were to extend any of its activity beyond the Crown tranche of land held under section 14.

There is, Your Honours, another thread of background to informing the reading of section 14, which is the common law, and my submission is there's a clear departure from English common law principles in the breadth of section 14. I'd like to refer you to the case of *Attorney-General v Simpson* [1901] 2 Ch 671 (CA), which is referred to in the *Leighton* case – Your Honours have the *Leighton* case in the Crown's

bundle of authorities – at tab 5, and page 754 of the judgment. Around line 20 you'll see the English common law situation being described there, "Now, the question whether a non-tidal river is navigable or not depends, not on the question of possibility of navigation, but on the proof of the fact of navigation." When we move from that to the language of section 14 –

ELIAS CJ:

This is quoting Farwell?

MS HARDY:

Yes, in *Simpson*, in the case of *Simpson.*

TIPPING J:

Well, it was because it was essentially a prescriptive concept which looked to the past, not to the future, from the little reading I've done during the hearing. The distinction you make is entirely correct, it was a prescriptive concept in England, whereby if there was usage of sufficient volume it was then deemed by prescription, as Justice Williams said in the passage –

MS HARDY:

Mmm.

TIPPING J:

– "to be a public highway." But that had nothing to do with what might be going to happen in the future, as you point out the section does, however.

MS HARDY:

Yes, so quite a distinct regime –

TIPPING J:

Yes.

MS HARDY:

– in New Zealand. I then propose to talk briefly about the *Nikal* case, which Your Honours have already been taken to. This is at the appellants' authorities, their volume 1, tab 15.

ELIAS CJ:

Are you going to deal any further with what Hutchison J says in *Leighton*, or just…

MS HARDY:

No, I didn't propose to at this juncture.

ELIAS CJ:

But you don't adopt it?

TIPPING J:

Well, the Court of Appeal somewhat departed from Justice Hutchison –

ELIAS CJ:

Yes.

TIPPING J:

– but I don't think there was any argument about the point you've just drawn attention to.

MS HARDY:

Yes, Your Honour.

ELIAS CJ:

Sorry, what was – the point was that the English common law has been departed from in the legislation, is that right?

MS HARDY:

Yes.

ELIAS CJ:

Yes.

MS HARDY:

And we've got a combination of the *Mueller* case responding to that, and then expanding out –

ELIAS CJ:

Yes.

MS HARDY:

– from the common law.

ELIAS CJ:

Yes.

MS HARDY:

Nikal is obviously, it's a Canadian case, and there's been some discussion about whether the concepts can be appropriately transported into the interpretive task here. My submission is that the concepts there can be, and that is because the Court in *Nikal* is looking at the same sorts of purposes, public purposes, to try to determine navigability, as Justice Williams was looking at in *Mueller.* So, the tasks in both cases are about trying to look at public purpose relating to navigability and properly distinguishing between public and private rights. I think the key points from *Nikal* are that the Court was looking at a general character test, and at paragraph 82 proposes – this is at numbered paragraph 2 – "The correct test for an assessment of navigability is to consider the entire length of the river."

BLANCHARD J:

I'm sorry, I'm lost.

MS HARDY:

Sorry, Your Honours. Page 1055 of the *Nikal* case –

ELIAS CJ:

Oh, yes, it's a long paragraph.

MS HARDY:

– and then there's a numbered paragraph 2 there –

BLANCHARD J:

Yes.

MS HARDY:

– which talks about the general character test. And *Nikal* also stood for the proposition that one looks at whether a river is substantially navigable throughout, up to a point beyond which all navigation ceases, and that interruptions such as the Morristown Gorge, which was on that bulky river, do not mean that there can be no navigability.

TIPPING J:

Interesting that they put it "does not necessarily render either the river as a whole or that section non-navigable," so they do have a kind of sectional possibility approach in their minds.

MS HARDY:

That would certainly fit the terminal point conception.

TIPPING J:

I think it is consistent with the terminal point, yes.

MS HARDY:

Yes.

TIPPING J:

By, "That section," meaning, "That section up to the terminal point."

MS HARDY:

Yes, exactly.

TIPPING J:

And I think that's probably the way one has to read it.

McGRATH J:

So this is your main authority, is it, for saying no patchwork type of analysis should be required?

MS HARDY:

Yes, it's authority linked to the response of section 14 to the *Mueller* case, yes.

McGRATH J:

Yes.

MS HARDY:

Your Honours alerted counsel to two cases that are referred to in the Canadian case of *Coleman* yesterday, which Mr Millard provided to the Court, as being potentially cases which might assist on that segmented or patchwork analysis, and they were the cases of *Leamy* and *Fraser*. In my submission, both those cases are about this concept of navigability to a terminal point. So, for example, in the *Leamy* case, if Your Honours have that before you, at page 5, paragraph 29, the Court comments, "The result –

BLANCHARD J:

Sorry, page 5 – oh, you mean the fifth page of the report?

MS HARDY:

The fifth page of my printout at para 29?

TIPPING J:

Well, we've got no other page – we've got no paragraphs here.

ELIAS CJ:

No.

MS HARDY:

I'll come back to that, I'll read the piece and then in the break double check whether I have the – I can give you the appropriate citation. This is Justice Davies…

TIPPING J:

How far into his judgment?

MS HARDY:

About two pages? Your Honours, I'll read the point and I'll locate it for you after the break. The point that the Judge was making was that the result, in the analysis of the facts of this case, was that, "Navigability of some miles of a river from its mouth, which is found and held, and the legal consequences which flow from that finding cannot be affected by the fact that, higher up, the river becomes, by reason of falls

and rapids, unnavigable and capable only of carrying floating logs." So this was an analysis of a river –

BLANCHARD J:

Oh, it's on page 153.

MS HARDY:

Thank you, Your Honour. Oh, yes.

TIPPING J:

You're saying that that clearly supports the terminal point –

MS HARDY:

Analysis.

TIPPING J:

– analysis, yes.

MS HARDY:

And similarly, if one looks at the *Fraser* case, there's a discussion there at paragraph 596 –

BLANCHARD J:

We don't have – we have pages but not paragraphs. There is a page 596.

MS HARDY:

Yes, sorry, Your Honour, I meant page 596, at the bottom of that page. It's talking there about the St Lawrence, saying "before the construction of canals, for at least 50 years, steamers were navigating different parts of the St. Lawrence, but were prevented from ascending above Montreal by huge rapids and falls, and yet can it be said seriously that these rivers were not at all times navigable? Therefore, it is not necessary that navigation should be continuous, as contended for by the respondent. A river may not be capable of navigation in parts, like the St Lawrence, ... the Ottawa at Carillon" and so on. It goes on to talk about a trade and commerce test. But the point is that these cases referred to in *Coleman* don't stand for the proposition that a piecemeal, segmented approach is the appropriate one.

ELIAS CJ:

But they don't support Justice Harrison's approach.

TIPPING J:

Well, they get – they're moving in that direction but perhaps don't quite get there. It's a matter of degree, isn't it, in the end? It's very hard to be dogmatic about it.

MS HARDY:

Which I think is the attraction of the general character test. It does allow a flexible test with guidelines rather than any effort to figure out in advance percentages.

TIPPING J:

My knowledge of Canadian geography is pretty slender but we're talking about long stretches and so on here, aren't we, even with some blockages. What strikes me here is that we've got a relatively short distance with 14 blockages. I mean you've got –

ELIAS CJ:

And it doesn't go anywhere after that.

TIPPING J:

And you've got to sort of see it in scale, if you like, when you're referring to rivers like the St Lawrence, which is one of the longest rivers in the world.

MS HARDY:

Well, the Crown's submission is that standing back and looking at a whole, the Waikato River is the longest river in New Zealand. It's a substantial river. It's not a stream. We're not talking about the Waiwhetu Stream.

ELIAS CJ:

Well, it's clearly a navigable river. Everyone accepts that. It's a navigable river, but the point is that navigability ended before the Pouakani blocks stretch and whether that means it wasn't navigable in those stretches.

TIPPING J:

Or from there on up.

MS HARDY:

Well, the options that are put by the appellants, its either – options include that the river is not navigable from Cambridge or the bridge up, or that one takes a segmented approach and at least the Pouakani block, its 22 miles is not navigable, and leaving at large, I guess, what other claims might be made about private property rights for the rest of that stretch so that –

TIPPING J:

Can one encapsulate the essential issue for us as, is the terminal point here the bridge, the Maungatautari Bridge, or the Huka Falls, or somewhere in between, and if so, where?

ELIAS CJ:

Well, it might be Lake Taupo.

YOUNG J:

Well, you'd probably say Lake Taupo, wouldn't you, except that, or that then invites another argument about –

TIPPING J:

You don't need to go above the Huka Falls, do you? You've got above the Huka Falls, at least as far as the outlet at Lake Taupo.

MS HARDY:

That's, yeah, the 1926 –

TIPPING J:

And we're not engaged in the Tongariro problem, or are we?

MS HARDY:

Well, we shouldn't be. The appellants have belatedly raised the question of whether the total mileage to be assessed for this question of whole character of a river should take into account the stretch of the lake and the Tongariro River up to its origins on Mt Ruapehu.

ELIAS CJ:

Which used to be called the Waikato. I've picked up –

TIPPING J:

Did it?

ELIAS CJ:

Yes.

MS HARDY:

But the Crown's position is that that was never proffered at trial and it was accepted that the –

TIPPING J:

That's a fundamentally different basis from which the trial Judge, for example, did all his apportionings and what not.

MS HARDY:

Absolutely, and both the High Court and the Court of Appeal record that it was accepted that what we're talking about is the stretch between the outlet at Taupo and the mouth at Waikato.

TIPPING J:

You say, for present purposes, that the terminal point is the Huka Falls. Mr Millard, as I understand it, says the terminal point is the Maungatautari Bridge, to the extent he adopts the terminal concept, so that's really the crunch dispute, isn't it? The possibility that it could be somewhere in between hasn't really been –

ELIAS CJ:

Well, a lot of the evidence has directed it from the outlet from Taupo to the Huka Falls so presumably you are actually saying it's from there.

TIPPING J:

Perhaps I should have said that I was taking into account the fact that there's no dispute as to the ownership of the bed but maybe I think the Chief Justice may be right.

MS HARDY:

Yes, Your Honour. Geographically –

TIPPING J:

Yes, geographically.

MS HARDY:

– we're talking about Taupo.

TIPPING J:

Yes, yes.

MS HARDY:

So yes, that's one characterisation of the difference between the two cases, the terminal point, though it is the case that the appellants proffer an alternative argument which is a segmented one that creates a patchwork for the length of the river.

TIPPING J:

Yes, quite. Quite.

MS HARDY:

Your Honours, I was going to move on to some of the detail of the language in section 14. Would now be an appropriate break?

ELIAS CJ:

Yes, we'll take the adjournment now. You are going to come on to talk about – you've talked about characterisation of the river but key in that, of course, is the concept of navigability and you're going to rehash – I can't remember what the Crown position is on that.

MS HARDY:

I wanted to address the issues of commercial use in more detail in particular.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.52 AM

MS HARDY:

I propose to look more closely now at the language of section 14, in particular address the issue of the – what the term for the purpose of section 14, "navigation", might be, so for the purpose of navigation. The appellants contend that there should be a narrow reading of this provision, restricting it to navigability which has commercial overtones, they say, at paragraph 10 of their submissions. The Crown's submission, that section 14 makes no reference to commercial use, and our submission is that commercial use might be evidence of navigability but it's not the only possible evidence. In support of that broader approach contended for by the Crown, is the case of *Coleman*, which is in the authorities, the Canadian case, at volume 1, tab 5, of the appellants' authorities. And if the Court goes to page 616 of the judgment, this is the first full paragraph, the Court there says, "I conclude that at the time of the Crown grant of the Colemans' lands, Bronte Creek, at that site, was commercially floatable; it is probable that it was also capable of seasonally moving farm produce and articles of commerce in shallow boats, scows or rafts, had the developed road system not provided a better alternative. The stream was therefore navigable." So that indicates that, going back to the notion of highway, the fact that there's been a development of roading doesn't mean that the test of navigability is defeated. And then, if Your Honours go to page 619, the end of that first paragraph rehearses the common law, "Under the common law as I see it, navigability for commercial purposes was simply evidence that the watercourse was navigable in fact; it was not an essential condition of navigability in law." So the Crown relies on those propositions.

ELIAS CJ:

Is it really satisfactory to rely on these scattered dicta, of low authority, when in *Mueller* they did attempt something a little bit more ambitious, by going to a Privy Council decision, and even here the Judge is citing *Angell* –

BLANCHARD J:

And *Halsbury.*

ELIAS CJ:

And *Halsbury.* I mean, shouldn't we go to these sources, isn't it important for us to know whether there is a common law concept which would have been in the minds of the drafters in 1903?

MS HARDY:

Well, yes, Your Honour, I'd submit that that summary of the common law concept is a correct one, there's not –

ELIAS CJ:

Well, don't we have to be satisfied of that, don't we need to look at some of these sources?

MS HARDY:

Well, Your Honour, what we've done is look at some of the Canadian sources, and I've got another, given Your Honour's mention of the American situation, it's actually, it's a New York Appeal Court decision which talks about this issue as well. Essentially, I suppose, these cases from other jurisdictions are fleshing out the ideas, but we're focused of course on the language of section 14. With section 14 the Crown's key submission is that there isn't reference there to anything commercial, as there are in some of the Canadian statutes –

ELIAS CJ:

No, but section 14 doesn't come out of a clear sky. It has antecedents in the common law, it's prompted by the *Mueller* decision, quite clearly. The *Mueller* decision looks to what the common law position is, from the UK, well, from Britain, and how it may be modified by New Zealand conditions, which is why looking to other new countries is helpful. But don't we have to understand whether there was any common understanding of navigability as a concept of the common law, which is what you're saying?

MS HARDY:

Yes.

ELIAS CJ:

But you're not taking us back to review where the common law of New Zealand was in 1903.

MS HARDY:

No, Your Honour, I've taken you to that brief summary and, to the extent that the English law developed concepts of navigability, it was really, as Your Honour appreciates, limited to tidal stretches, so it was more often the focus on the tidal

stretch and the question of prescriptive use, rather than this commercial recreation distinction, which –

TIPPING J:

The problem in Canada is exacerbated by the fact that different approaches were taken in different provinces –

ELIAS CJ:

Yes, that's right.

TIPPING J:

– and if there's some sort of underpinning concept that comes out of historical review from Roman times onwards – and I'm not saying there is or there isn't – that might well illuminate what our drafters were trying to get at in this. You see, because it's "navigable" in one part and then "navigation" in another, and the two may not necessarily be identical in concept. Whether a river is navigable may be one thing, but whether it is for the purpose of navigation – I mean, this sounds very pedantic, but they obviously found it necessary to add in, "For the purpose of navigation," and I know they were defining the word "navigable", so you have that circularity risk. But my understanding of "navigation" is that it has some public connotation. I can't put it more precisely than that but some public connotation. It's no good if people are just pottering around on the river for their private purpose. Now is that wrong, is that wrong?

YOUNG J:

Can I – the pottering around on the surface for their private purposes, they're doing so illegally unless it's a publicly owned riverbed. Is that –

TIPPING J:

Well unless they –

ELIAS CJ:

Well –

TIPPING J:

– ownership up to the, and they stay on their side of the river.

YOUNG J:

Yes, yes, sorry. They can't pop around on someone else's bit of river, can they?

ELIAS CJ:

Well it depends on what the common law of navigation permits.

TIPPING J:

It's an extension of the sea historically.

ELIAS CJ:

Yes.

TIPPING J:

And then it developed from that and the public had rights of use of the sea traditionally right back, way way way back.

ELIAS CJ:

Some of the commentators make the point that there is a confusion of ideas here. There is a confusion in terms of use of the highway and the question of ownership which crops up in particular in connection with fishing rights and I'm not sure that it is correct to say that you can't pass over – well perhaps if it, if the bed is vested Justice Young is right, you don't have a right of navigation.

MS HARDY:

No and Your Honour I took the Court to the statement in *Mueller* earlier where Justice Williams made the point that, and I think Justice McGrath thought it was a little ambiguous, but it was that there certainly was no clear right to navigation on non-tidal rivers and so navigation for whatever purpose, recreational or commercial, would be a trespass if the half of the riverbed was to be placed in private hands.

ELIAS CJ:

If that part of the common law is applied in New Zealand. You see you haven't taken us to the, I don't know, I suppose it's the Imperial Laws Application Act?

MS HARDY:

The Laws of England Act in local circumstances?

ELIAS CJ:

Yes.

MS HARDY:

Yes.

ELIAS CJ:

But surely we have to – well maybe we don't have to because we can start with the statute but what I'm still unclear about is whether the statute in using a term such as "navigable" which is dealt with in common law cases, whether it's a, there is a technical concept which the draftsmen were employing.

MS HARDY:

All I can say, Your Honour, is that our research didn't find such a technical concept but it's certainly the case that in New Zealand the Courts have said that the common law about ad medium filum was brought into New Zealand law and of course that's precisely what the appellants rely on for their property right argument here rather than arguing a rebuttal or an absence of a rule because of local circumstances.

ELIAS CJ:

I suppose the best thing you have is, not the best thing you have, but the best thing we have, is the *Mueller* case because it does grapple with these concepts. It does refer to Hale I think. It does talk, some of the judgments talk about commercial activity and so on.

MS HARDY:

Yes and I think it does stand for quite an indigenous approach to the issue of public ownership. Just to round off that issue of commercial activity I would like to refer the Court to another American case which is the New York Court of Appeal's case called *Adirondack League Club v Sierra Club* 706 NE 2d 1192 (NY 1998). Has the case been handed up? This is a case about state rights in relation to riverbeds so it's not a federal commerce constitutional provision but it is of interest in its discussion of commercial activity in that setting. If I can ask Your Honour to look at what is page 170, it's on the second page of the document, and in the second paragraph there the Court says, "We hold the evidence of a river's capability for – "

ELIAS CJ:

Sorry, you're losing us. Page 100…

MS HARDY:

It's got a page blank on the second page of the judgment headed page 170.

ELIAS CJ:

Well where's the judgment? Where does that start?

BLANCHARD J:

You referred to a page number. It was clearly not correct.

ELIAS CJ:

Is it page 6 of ours that the opinion of the Court starts?

MS HARDY:

Yes I'm sorry Your Honour I had a different –

ELIAS CJ:

Yes.

TIPPING J:

It's at the bottom of page 7, left-hand column, I think is the passage you started to read. Page 7 of what we've got. It's under Roman I, "The parties differ," and then the next paragraph, "as a general principle."

MS HARDY:

I'm on, Your Honour I think your page 7, at –

BLANCHARD J:

Why haven't you got the same as we've got?

MS HARDY:

I hope I have now Your Honour. Page 7, paragraph numbered 1, the Court says, "We hold, however, that evidence of the river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has a practical utility for

trade or travel." So there it's linking recreation with the notion of commerce and then –

BLANCHARD J:

Well – yes, all right.

TIPPING J:

Well I find that passage a little awkward because it seems to be equating recreational use with trade or travel.

MS HARDY:

Well it's saying it's in line with that and that there shouldn't really be a profound distinction between recreational use and trade and travel.

ELIAS CJ:

Well if you are able to use it for trade and travel purposes you can also use it for recreation purposes. Is that what it's saying?

YOUNG J:

Aren't they saying that recreation is sufficient? Trade or travel.

BLANCHARD J:

It has to have a practical utility for trade or travel.

TIPPING J:

That's their definition if you like of recreational use which looks a bit counter-intuitive.

MS HARDY:

Well Your Honour I think that they're saying that there isn't – that –

BLANCHARD J:

I think the problem here is we're trying to deal with this passage without looking at the evidence that they are looking at. They're talking about a traditional test of navigability. That is whether a river has a practical utility for trade or travel and they're saying that the evidence of this particular river's capacity for recreational use is in line with that test. But until we look at the evidence we really don't, it's very, very difficult to follow what they're driving at.

ELIAS CJ:

It is interesting, however, that they say that the traditional test of navigability is whether a river has practical utility for trade or travel. Now that must be drawing on common law concepts which conceivably – well which do seem to have been current, even in 1903.

BLANCHARD J:

Presumably that would encompass private travel as well.

ELIAS CJ:

Yes.

MS HARDY:

Well Your Honour they're not drawing on common law concepts of the requirement for commercial use and what they're saying in this case is that looked at now there shouldn't be a distinction between recreational and commercial. That recreational should satisfy the test.

YOUNG J:

Of course recreation can be commercial.

ELIAS CJ:

Yes.

MS HARDY:

Yes and the case goes on to say that so rafting, canoeing could either be, is the Court going to make a distinction between whether someone has paid to hire a boat and a fishing rod or not. In my submission the language in section 14 which talks about residential use, helps to bolster the argument that recreational use is contemplated by Parliament.

McGRATH J:

It's the residents on the banks?

MS HARDY:

Yes, current and future.

YOUNG J:

The issue that I was raising before about whether private ownership of the riverbed would stop any use of a river is discussed quite extensively in *Mueller*. Perhaps not entirely definitively but they are inclined of the view that it would, in New Zealand.

MS HARDY:

Yes Your Honour. The next point I intended to address was the issue of the type of watercraft –

McGRATH J:

Just before you go on. Just going back to the passage you were, just below the passage we were looking at in the *Adirondack* case. Is that – have you had a look at that decision *Morgan v King* which is the third from the bottom paragraph, page 7, left-hand side. It's just an interesting statement of the principle I thought. It said not long standing.

MS HARDY:

This is the general principle statement?

McGRATH J:

Yes.

MS HARDY:

Yes, yes.

McGRATH J:

If you know that decision of *Morgan v King* which seems to be an older decision of some substance on the point.

MS HARDY:

No Your Honour I'm not familiar with that decision but it looks like it stands for that general principle on which *Mueller* is based.

ELIAS CJ:

Yes.

McGRATH J:

Yes.

ELIAS CJ:

Yes and the US Supreme Court case that I was referring to or which is currently the first to formulate a definition of navigable waters, was an 1870 decision, and again they – they're repeating, or they're – it seems to be the language is repeated and seems to be constant that it's susceptible of being used in the ordinary condition as highways for commerce conducted in the customary modes of trade and travel, which in New Zealand one would think – if that's declaratory of the common law, which it may not be, but in New Zealand that would have to include canoe travel.

MS HARDY:

Yes.

ELIAS CJ:

But it's still linked to a purpose of trade and commerce or travel.

MS HARDY:

Or trade or commerce or travel that –

ELIAS CJ:

Not messing about in boats.

MS HARDY:

Well going back just to the ordinary definition of navigation is to travel along water so I'd accept – and messing about in boats is a difficult one for the reason that that could be commercial. So does messing about in rafts with the Huka Falls Rafting Company count or does it not count.

ELIAS CJ:

Well you have to look at it as at 1903 as I think we agreed.

YOUNG J:

There was a tourist industry then on the river?

ELIAS CJ:

Yes there was and there was certainly a tourist industry on the Wanganui River for example.

MS HARDY:

And here we have the Fulljames Fishing Camp and launches that are traversed in the evidence.

ELIAS CJ:

But whether they are travelling or simply just getting people out to fish and in quite a short stretch of water there.

MS HARDY:

Well again Mr Parker's evidence does map the nature of the trips which look like travelling on the river, fishermen travelling routes. Your Honour if I can go to the next point which you've touched on is whether canoes are covered in this definition and the appellants say at their submissions at paragraph 10 that they are not. Our submission is that the language of boats, barges, punts or rafts does encapsulate the mention of a canoe. It would be bizarre in New Zealand if that were not the case and just to support that the Chief Justice in *Mueller* said he treats canoe travel as being evidence of navigability in the *Mueller* case. So in our submission there isn't really a strong contention to the alternative that canoes can't count.

TIPPING J:

Well a canoe would be a boat, wouldn't it, for this purpose because taking a proper contextual approach to this it would be very ridiculous if you said, well this sort of floating means of propulsion wasn't a boat.

ELIAS CJ:

And in New Zealand circumstances where the common law had to be modified to fit local conditions, of course the use of canoes must have been in contemplation.

MS HARDY:

The next textual point was on the "continuously or periodically" but I understand that –

TIPPING J:

There's no dispute about that.

MS HARDY:

There's no dispute about that. That's about time.

YOUNG J:

You accept that that's a reference for time?

MS HARDY:

Yes. There's a broad legislative package argument that the appellants have made emerging from the Court of Appeal's decision in particular which was to look at the Water-Power Act and context. The Crown really says that the importance of the context is that at the time of the Coal Mines Act Amendment Act there was Parliamentary activity in acquiring and controlling property for national purposes so the idea of, to the extent that this is a confiscatory piece of legislation, that's in tune with the broader approach –

ELIAS CJ:

That was with compensation.

MS HARDY:

Well no the Public Works Act provided for compensation. The Water-Power Act, which provides for use of water, admittedly resting on the common law view, I suppose, that no one owns water –

YOUNG J:

Well you may do, they had to acquire the land under which the hydro schemes would be built and if they didn't own it already then they would have to acquire it under the Public Works Act. Isn't that what the Water-Power Act said?

MS HARDY:

Well the Water-Power Act provides that the Public Works Act can be used for the kind of acquisition, yes, so the Crown –

YOUNG J:

Your argument on this is that it would be possible to achieve all the public purposes that might have been in issue following *Mueller* without vesting the riverbed in the Crown because all they had to do was give an easement over any river that had

been navigable to the extent to which that was thought right and to vest minerals in the Crown and that answers the particular *Mueller* problem and then associated with that the issue of *Mueller* about whether people can go on the water of a riverbed that's privately owned and why is it that the statute also refers to river as taking a riverbed as well. So that's really the only real link with the Water-Power Act, isn't it?

TIPPING J:

The vesting was unnecessary.

YOUNG J:

Yes there's no point. Well what's the point of owning the riverbed?

MS HARDY:

The – one of the points is touched on in *Mueller* in that aside from water power and hydro issues, the *Mueller* judgment talks about the public interest in improving channels for –

YOUNG J:

Oh I see.

MS HARDY:

– navigation and so forth.

YOUNG J:

Whereabouts does it say that?

MS HARDY:

The case is at tab 12.

ELIAS CJ:

Is it Edwards' judgment?

MS HARDY:

I think it's page 109. It was at –

ELIAS CJ:

Was that the – oh that's Williams J.

MS HARDY:

So it's that section that I referred to earlier. "Is it conceivable", which is about a third of the way up on 109, "that the legislature could have contemplated" a grant not reserving the right to interfere with the soil and improve navigation.

YOUNG J:

Right, okay, yes.

ELIAS CJ:

But this is for the purposes of navigation and really what Justice Young has put to you is that for the purposes of hydro development there was no need to vest the bed of the river, which would suggest that the Court of Appeal analysis which links these two bits of legislation, is wrong.

MS HARDY:

The Crown would submit that the link is in the legislative theme of acquisition and public control –

ELIAS CJ:

Public good.

MS HARDY:

– not the discrete necessity to have in place legislation to give effect to the Water-Power Act.

ELIAS CJ:

But that's the way it was used in the lower Courts. That this was a package and the Crown doesn't support that approach.

MS HARDY:

The Crown sees it as a package, the liberal government dealing with infrastructure and public control but we don't go so far as to say that the Water-Power Act could not function without being buckled together with the Coal Mines Act Amendment Act.

YOUNG J:

Justice Edwards also refers to the consideration that if the land went to Mr Mueller the Crown would have given up the right to improve the bed of the river for navigation.

MS HARDY:

Your Honours, I have final points which are broad ones about interpretation that I think I can deal with shortly. The first one is the reliance by the appellants on Hansard which was the then Premier's comment in the debates that there was no intention to interfere with rights and we've gone through that argument to make the point that if that were the case section 14 would be devoid of any effect at all so it must have had an impact on rights and both the language of the section and its practical effect point to that. I wouldn't go further with that point unless Your Honours had questions?

ELIAS CJ:

Well I thought that point was directed at the Crown grant argument but are you saying that, because I had understood the Crown not to be disagreeing with the view that this was not to affect existing rights because it was based on the *Mueller* decision. It wasn't an expropriation. Is the Crown saying it was an expropriation?

MS HARDY:

No it's more nuanced than that Your Honour. Assuming, building on *Mueller*, *Mueller* stands for the proposition that we've got a navigable river. The ad medium filum resumption is rebutted so the statute, if you like, is securing that as a general national proposition.

ELIAS CJ:

Yes.

MS HARDY:

So what I was responding to was the argument of the appellants that you somehow read down a section as a whole so that ad medium filum rights, as Your Honour points out, included in a grant and not as seen from the operation of section 14 and it's our submission that –

BLANCHARD J:

But that's the proviso point?

MS HARDY:

That's the proviso point, yes.

YOUNG J:

To treat the legislation as confiscatory might be inconsistent with its form that it's expressed to be declaratory. Was that your, is that – well it's going to be more of a question to Mr Millard but if one wanted a statute of this to be construed narrowly you would say, well from henceforth there is expropriated to the Crown these assets. If you want it construed liberally you will say, we declare that from all time in the past and looking forward to the future the land has this status.

MS HARDY:

Certainly that's, there's a debate as to whether the section is confiscatory or declaratory –

ELIAS CJ:

Well what's the Crown position on that?

MS HARDY:

The Crown's position is that section 14 both cements in *Mueller* but to some extent extends the tests of the common law, as it does with the point I made about the case of *Simpson*, that it's about susceptibility to use so –

ELIAS CJ:

But what I think may well be the position is that the susceptibility to use was already part of the common law. I really don't see how we can get away from looking at what the common law position was in 1903.

MS HARDY:

Well as expressed in *Mueller* the English common law was that one needed to demonstrate actual use not susceptibility and so we –

YOUNG J:

It all turned on the grant didn't it? It turned on – it was all turned on construction of the grant?

ELIAS CJ:

Yes, it did.

YOUNG J:

So it is owned by the riparian owners unless one can construe the grant as excepting out the riverbed. That's right isn't it?

MS HARDY:

Mmm.

YOUNG J:

And they follow the Privy Council judgment, is it the Privy Council judgment in *Lord*.

TIPPING J:

Is it possible, Ms Hardy, that they thought they weren't expropriating because of the proviso, the saving, but to make any sense of it there has to be some expropriation. Because otherwise they'd be doing nothing.

MS HARDY:

To make –

ELIAS CJ:

Confirming.

MS HARDY:

To make section 14 non-expropriatory you would require a very good match between – you would accept that *Mueller* represented the New Zealand common law which departed from the English common law and that the section matched that and simply reflected it. That's possible but another way of looking at it is that the section does that but also by securing a test, a general test that hasn't quite been elaborated to that point by the Courts, it may be, perhaps on the margins seen as a confiscatory section. It's why I say it's a slightly nuanced position.

TIPPING J:

Well they clearly thought from the Parliamentary history that they weren't taking away existing rights. I don't think –

YOUNG J:

Well doesn't the Prime Minister say, well it's all very well but it's not that easy to do that. Wasn't that the last word, his last word on it?

TIPPING J:

Well I, toying with the thought that what they were doing was satisfying the people on the existing rights point but actually doing something.

BLANCHARD J:

Weren't they, in fact, trying to declare the result of *Mueller* with some elaboration. In other words where the river was navigable, in the sense of being a public highway, *Mueller* would have said that the ad medium filum rule didn't apply and they're confirming that, with a little bit more detail.

ELIAS CJ:

Which may well have been derived from their knowledge of case law in other former colonies including the United States because there was a lot of traffic in American case law in New Zealand and *Kent's Commentaries* pick up the early Supreme Court decisions on navigability. I find it very odd that there's this coincidence in the use of the word susceptibility. It just seems to me that we might have more thinking around the concept as at 1903 because certainly the Judges in the *Mueller* case purport to be drawing on common law, the common law of New Zealand as they conceive it to be.

BLANCHARD J:

You said a few moments ago that section 14 cements in *Mueller*, I'm inclined to agree with that, and you said it extends the tests of the common law. I think what the Chief Justice is saying is actually it may not have been an extension at all.

ELIAS CJ:

Yes.

MS HARDY:

Or as Your Honour put it, an elaboration from *Mueller*.

ELIAS CJ:

Yes.

McGRATH J:

One interesting strand in *Mueller*, page 95 and Chief Justice Stout's judgment is the observation that in relation to the common law that some authorities in America have made a distinction between rivers capable of navigation though not tidal and rivers not navigable. He then stops and says, we can't go down that track but it may have been that *Mueller* was picking it up –

MS HARDY:

Mmm.

McGRATH J:

– and following it.

TIPPING J:

But what then, Ms Hardy, is the substance or force of the saving. Was it for the abundance of caution? *Mueller* was being cemented in with perhaps a bit of a nudge, but making it very clear that that wasn't in any way to disturb a grant of the bed of a navigable river?

MS HARDY:

Yes.

TIPPING J:

It really is, perhaps, an abundance of caution type provision, is it?

MS HARDY:

Well it would seem appropriate to identify express grants as not being captured by the broad language that would otherwise be sitting in section 14.

TIPPING J:

Yes, yes.

YOUNG J:

Well it may be that whoever Mr Massey was worried about had an express grant.

ELIAS CJ:

Yes that's right.

BLANCHARD J:

But they are being pretty cautious here because when they defined navigable river they add that nothing herein shall prejudice it or affect the rights of riparian owners in respect of the bed of non-navigable rivers, which is really quite unnecessary although Parliament has repeated it in subsection (3) of section 261.

TIPPING J:

Yes I think that's a good point. The drafting here is very belt and braces.

MS HARDY:

Yes well that final phrasing would suggest that rights were being affected in relation to navigable rivers, wouldn't it, so I take the point.

TIPPING J:

Well no one would have read it, it was affecting non-navigable rivers but they just wanted to make that abundantly plain.

YOUNG J:

I think the point you're making, Ms Hardy, is that it does rather suggest that rights to navigable rivers were being affected.

ELIAS CJ:

Well they're being declared, aren't they?

TIPPING J:

It's a pretty awkward piece of drafting. We've just got to make the best we can of it.

BLANCHARD J:

Well it's perhaps explained by the fact they were doing it in a rush and they wouldn't have had time to research the whole area. They probably thought they were, in your words Ms Hardy, cementing in *Mueller* but they couldn't be quite sure in the way they were doing it they weren't going beyond *Mueller* and beyond the common law so –

MS HARDY:

Yes.

BLANCHARD J:

They're a bit ambiguous in the way in which they expressed themselves.

MS HARDY:

Briefly on the broad interpretation questions, I canvassed this yesterday, was the deployment of the Declaration on the Rights of Indigenous People to support this case but the, I understand the Court to be viewing this case as a property rights case running along orthodox lines and so it's for that reason that the Crown says the Declaration hasn't got anything to say there about the resolution of the case.

ELIAS CJ:

Well save that there will be Māori who are riparian owners.

TIPPING J:

But I think your point is they're in no different case –

ELIAS CJ:

No.

TIPPING J:

– from anyone else.

ELIAS CJ:

Yes.

MS HARDY:

That's right. Finally the Courts asked for more information about the background to the development of the law about navigability and starting even with the Roman law concepts through. I simply wanted to conclude by referring the Court to footnote 82 of our written submissions which references – this is on page 19 of the Crown's submissions. There's a reference there to *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* (1976) SC 30 (HL) case and that is a case which does traverse much of that background.

ELIAS CJ:

Yes I'd marked that to look at that case but then –

TIPPING J:

Is that a Scottish case? It's a House of Lords decision clearly.

MS HARDY:

Yes. *Cairngorm Canoeing* –

TIPPING J:

Yes it must be, yes of course.

MS HARDY:

If Your Honours please those are the submissions for the Crown unless there are any further questions?

ELIAS CJ:

No thank you Ms Hardy. Mr Millard?

MR MILLARD QC:

May it please the Court. Perhaps if I could just deal with the standing issue first and the solution proposed by my learned friend Mr Solicitor. It will of course be noted that the Crown concedes standing is not an issue, at least at this stage, and came up with a possible solution of referring it back to the High Court. We have some concerns about that proposal. In particular what we say is that the representation order was a consent order designed to solve the issue and of course it did that by mimicking the Pouakani Settlement Act under which I did endeavour to show that the words "descendents" are key there but must encompass successors. So what we would say is that as a result of that representation order, which was a consent order, jurisdiction has in fact been conferred on the Māori Land Court by consent to resolve it. So rather than referring it back we simply give the declaration and leave it to the Māori Land Court to sort out.

ELIAS CJ:

How do you say that jurisdiction has been conferred by the representation order?

MR MILLARD QC:

By – in effect it was a consent order by the – consented to by the Crown, the appellants and, or plaintiffs as they then were, and in effect they're saying, let the Māori Land Court resolve it.

ELIAS CJ:

But it can't resolve it if it doesn't have jurisdiction.

MR MILLARD QC:

Well can I just touch on that one?

ELIAS CJ:

Yes.

MR MILLARD QC:

Of course this only becomes relevant if the Court has found that there was indeed a breach of duty by the Crown, a breach of fiduciary duty and therefore the land in relation to the riverbed is held in trust by the Crown. So to that extent it is not Crown land and the original character of the land, being Māori land, should continue into the trust and thereby still leave the Māori Land Court with jurisdiction.

TIPPING J:

Why can't we park the standing point altogether until we reach a point where it really matters?

MR MILLARD QC:

Well I'd be happy with that too.

TIPPING J:

A jury simplistic.

ELIAS CJ:

If it really matters surely taking on board the Solicitor-General's point, I haven't overnight re-read through Te Ture Whenua Māori Act to see what else is in there that might be pressed into service, but surely the High Court, if it needed to, could request the opinion of the Māori Land Court on who would have been the successors had this been Māori freehold land.

MR MILLARD QC:

Well that's certainly true and – but I think for present –

ELIAS CJ:

It might be necessary in order for the High Court to perfect any orders it would then make. It would have to go back, I would think.

MR MILLARD QC:

Well from our point of view the important thing is that the Crown concedes that there is standing, at least in this Court, and –

TIPPING J:

On this present issue?

MR MILLARD QC:

Yes and it may be that it is best to perhaps look at this more closely –

TIPPING J:

I think we're against you on this issue. Nothing else matters, does it?

MR MILLARD QC:

Quite.

TIPPING J:

I'm not forecasting anything. I'm just –

MR MILLARD QC:

Yes, yes, well I certainly accept that and maybe it's better to just park this issue given that there is this concession that we've got standing at least at this stage.

ELIAS CJ:

Oh I think it's parked.

MR MILLARD QC:

On that basis can I come to the main area of contention which is the scope of this section 14 of the Coal Mines Act Amendment Act. Both yesterday and again today

there was a comment made about various treaties not being relevant. I simply pick up the point that was made in response by the Court today that we're not pleading any special position based on our clients being Māori. We accept that section 14 of the Coal Mines Act Amendment Act and its successors, to the extent applicable, apply to both Māori land and European – freehold land held by Pakeha and there shouldn't be a different test. Nevertheless we say that as this Act, at least the way the Crown was trying to apply it here, was confiscatory and such confiscation applies to both European and Māori land, and to the extent that it applies to Māori land in breach of the Treaty, this indicates a narrow approach to the section. In other words it should be read down if that is reasonably possible.

ELIAS CJ:

Well I suppose it was confiscatory in – *Mueller* really only decided the ad medium filum aquae approach in relation to Crown granted land and in the context of the Waikato River and the wharves and so on. At that time there may well have been land not brought within – well not arguably brought within the – there may have been customary land and it may still have been arguable that land brought within the native land title system as well would have different considerations apply to it. So I suppose at least section 14 puts beyond doubt the position in respect of Māori land and if it's different from the *Mueller* position it could have a confiscatory effect. Sorry that's a long-winded way of –

MR MILLARD QC:

Well can I – in my submission the Act must have had some confiscatory effect. The extent to which it had effect – sorry can I restart. Can I submit what in the appellants' view the Act was trying to do. If you look at *Mueller*'s case it is this very case that the Court accepted the English common law applied in New Zealand. They all referred to the Privy Council case, *Lord v Commissioners for City of Sydney* (1859) 12 Moo PC 473, 14 ER 991, and said well that's the highest Court, because it was the Privy Council, it must apply to this colony. The English common law was that navigable rivers were vested in the Crown to the point of the ebb and flow. There was then a further possible right of navigation if the river had been used, in the English context, from time immemorial. There was a third possibility of navigation and that is when the riparian owners had granted rights, and if I could just, slight diversion there, that of itself indicates that latter right could well give rise to a patchwork effect. If you see, if you look at, I know he's dissenting but I don't think that his judgment on this point is any different from what the other Judges

considered. Chief Justice Stout at page 95 in *Mueller*, which is tab 12, having referred to the interesting reference of what the United States cases might be, and said, "Reference to American cases is therefore of little use" because of the *Lord* case and "we cannot speculate as to whether this rule of the common law should or should not have been applied to New Zealand. The Privy Council … has decided that if in a colony a grant from the Crown describes land as bounded by a stream", then prima facie you get the stream out to the mid-point. And I've paraphrased there.

Now in the second – the last sentence in the complete paragraph he said, "If a river is navigable– though non-tidal – by boats, canoes or small steamers, it is said that this rule of common law should not apply." And he goes on to reject that. But what, of course, *Mueller* decided was in this particular case, with this particular Crown grant, the common law presumptions that had been said to apply to the colony because of the *Lord* case, had been rebutted so that it was, in a sense a factual decision based on the particular facts. But the facts are important because they were talking about this river being a navigable river in the sense that it was being used as a highway and in my submission what Parliament was doing was trying to avoid the need to have to rebut the resumption in each case of a navigable river like the Waikato in its lower reaches. It was not trying to expand the definition of navigable river in a way that took it out of the general concepts that you find in the judgments in *Mueller*. And that, of course, had the advantage, not only did the Crown not have to apply it but because the Crown then had ownership of the bed of the river it could, if necessary, carry out the works to maintain navigation.

BLANCHARD J:

It also ensured that if some other landowner decided to take a *Mueller* type case to the Privy Council, that the Chief Justice's view would not be upheld.

MR MILLARD QC:

That's certainly right. Yes. Of course what Justice Edwards, one of his concerns was that if the bed was vested in the owner then the – of the riparian land then the owner could alter the ground and that could cause an obstruction. Justice Williams didn't actually come to a concluded view on that but did note that. They were obviously concerned, in my submission, that if they held that the Crown grant carried with it the right to the mid-point then the Crown's ability to keep the river open for navigation could be affected.

TIPPING J:

So in the case of navigable rivers they simply removed any possibility of the ad medium filum rule applying?

MR MILLARD QC:

Yes under the presumption.

TIPPING J:

Under the presumption, yes.

ELIAS CJ:

Aren't we struggling with some of the consequences of this? What the Crown achieved vis à vis Māori lands, it seems to me, is that it, by the vesting under section 14, was that it precluded Māori who had sold land or arguably Māori who had gone through the Native Land Court and their lands had been segmented. It precluded their arguing against the Crown the argument that they hadn't intended to grant the river lands ad medium filum aquae.

MR MILLARD QC:

Well it would actually go further than that because it would mean that even if they hadn't granted the land, if the river was navigable they didn't own the riverbed.

ELIAS CJ:

Even if they hadn't granted the land?

MR MILLARD QC:

If they simply got their Native Land Court title and were sitting on the land beside the river and the river was navigable –

ELIAS CJ:

Yes, yes, yes that's right but I'm postulating a possible argument not dealt with in *Mueller* that simply dividing up the land, or establishing title through the Māori Land Court, would not have the effect of alienating the river. I'm thinking of the case *In re the Bed of the Wanganui River* –

MR MILLARD QC:

Yes.

ELIAS CJ:

– where arguably section 14 did effect a confiscation because it precluded the former owners and the existing owners along the riverbank saying that they had not alienated the river.

MR MILLARD QC:

And of course the Wanganui River was non-tidal for much of the area which was navigated and in terms of being confiscatory –

ELIAS CJ:

Although even on that it also precluded the argument that the New Zealand common law had to be adapted in its application to New Zealand circumstances by Māori proprietary interests.

MR MILLARD QC:

Yes.

ELIAS CJ:

So that the question of navigability may not have had any effect.

MR MILLARD QC:

Yes as long as the river was within the expression navigable. Native rights linked.

ELIAS CJ:

Yes, yes, thank you.

MR MILLARD QC:

And if you think of it in the context of this particular case, the Crown does not assert that it bought from Māori the aboriginal title, as such. What it says is either we got it when we purchased the riparian land or we got it under this Act and if you come back to the *Mueller* case, it would have been a surprise for the Judges in the *Mueller* case to have the Crown say, oh but we already own the bed of the river up as far as Pouakani and beyond.

ELIAS CJ:

Yes thank you.

MR MILLARD QC:

So to that extent it must be a confiscatory piece of legislation and on ordinary principles of construction aided by the Treaty of Waitangi it should be given a narrow meaning and we say that, of course, not – across the broad sweep of it.

TIPPING J:

What is confiscated is the ability to rely on the presumption, is that right?

MR MILLARD QC:

Well it's –

ELIAS CJ:

It's the ability to rebut the presumption too.

TIPPING J:

Well it's the Crown that's – the riparian owner would ordinarily be able to rely on the presumption of ad medium filum.

MR MILLARD QC:

Yes.

TIPPING J:

But what you're saying Parliament was taking away was the ability to do that by making it clear that in all circumstances, in the case of an navigable river, the Crown owned it, no questions asked.

MR MILLARD QC:

Yes.

TIPPING J:

So it was that ability to rely on the presumption, if you like, that was the existing right that was being taken away. I'm just trying to get a handle for what precisely it is that's been confiscated here.

MR MILLARD QC:

Of course this is not what Your Honour is meaning but of course it's the bed that has been confiscated whether that bed has never been alienated because it's still within native customary ownership or because the bed was part of a title even if the title stopped at the bank because –

TIPPING J:
Because of the –

MR MILLARD QC:
– because of the presumption.

TIPPING J:
Yes, because of the presumption, yes.

MR MILLARD QC:
So there's two aspects of it. It deals even with land to which the presumption wouldn't ordinarily apply because it's not being part of any sort of grant or actual finding of title but clearly is still within aboriginal title.

TIPPING J:
Do you say that the saving has to be given an interpretation that's consistent with that purpose?

MR MILLARD QC:
Well consistent with the purpose of really getting around the problems that somebody else is - His Honour Justice Blanchard said might take a *Mueller* type case to the Privy Council or that somebody else might be able to find some facts that were a little bit different from the Waikato River but not greatly different and persuade the Court that the Crown grant that they got did carry – did include the land presumptively given.

Now one of the questions the Court did raise is what was meant by navigation of navigable rivers and I've indicated the common law had these three possible types of rights of navigation. The one from the title, the one from time immemorial use and the one from grants. The rights of navigation didn't carry with it the bed of the river. If you got a grant – sorry. If you got a grant from a riparian owner it didn't carry with it the bed. So to that extent the law could also have been confiscatory. The only

previous use that I'm aware of, of the expression "navigable" occurs in the Harbours Act 1878, which is at tab 23, section 147, and that says that no part of the shore or of the sea or of any creek, bay, arm of the sea or navigable river communicating therewith where insofar as to the tide flows and re-flows nor any land under the sea or under any navigable river except as may already have been authorised by or under any Act or ordinance shall be leased, conveyed, granted or disposed of to any Harbour Board or any other body," et cetera, "without special sanction of an Act of general assembly."

TIPPING J:

But that's for tidal?

MR MILLARD QC:

Yes that certainly ties back into the English common law tidal sense. I'm not sure that I can provide much more guidance but that certainly does tie it back into the English common law. Quite a bit of play was put on the susceptibility of –

ELIAS CJ:

Mr Millard, can I just, sorry can I interrupt. How long do you expect to be because I don't want you to be pressed but if you were close to concluding we might sit on but we don't need to and I don't want you to be under pressure in this.

MR MILLARD QC:

Well possibly another 15 or so minutes.

ELIAS CJ:

We'll take the adjournment.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.20 PM

MR MILLARD QC:

If the Court pleases. The Court did raise issues about the origins of the word "navigation" and what it meant in the common law and some reference was made to Roman law. The best that I can assist the Court on at this stage is in *Murphy v Ryan* (1868) IR 2 CL 143 which is at tab 13. Justice O'Hagan at page 109 – sorry 149, talks there about, about halfway down the page, "Various principles have governed

the jurisprudence of various countries as to these private and public rights. The Roman law gave to the public larger privileges than the law of England, recognising their property in all rivers which had a continual flow of water, and in the fishing of them, and in the use of their banks. The same principle appears to be recognised by the modern codes of France and other continental countries, which have been largely inspired by the civil law, and also by the local tribunals of several of the American States, although in others of them the common law doctrine is in full force, even in relation to great rivers like the Mississippi. According to our ancient system, the public had not a right to fish in all waters, even if continually running, but only in those *publici juris* as being in the sea, or an arm or estuary of it, or in a public navigable river. The true question before us is, whether a navigable river, for the purposes of the common and public right of fishing, may be a river merely capable of navigation by ships or boats, or must be a tidal river in which the sea ebbs and flows?" And then went on to hold that in that case it was where the river ebbs and flows.

One other reference which I haven't got for the Court I'm afraid, in a House of Lords case, *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, Lord Hatherley, Lord Chancellor talked about the two separate rights, one was the right of property and the other was the right of navigation and went on to say, "I must treat the claim of the defendant therefore as if it were a claim to establish a right of highway on dry land." So he was obviously equating the river to a highway.

The Crown earlier today referred to the *Adirondack League Club* case which in turn cross-referred to what they described as the seminal case of *Morgan v King* and we have had handed out the case of *Morgan v King* which is the short four page one from LexisNexis.

ELIAS CJ:

Sorry was that just, oh I see. Now I have it.

MR MILLARD QC:

That was a case where the plaintiffs operated a saw mill. The defendants upstream had a dam and were interfering with their logs coming down the river so the plaintiffs brought an action to try and have that obstruction removed to let their logs come down to them. They actually failed in this case but it was sent back for a re-trial because of a change of the law and there were some rights to have the dam of the defendants modified to allow the logs to come down on payment of compensation.

The passage that I wanted to take the Court to is on page 3 of the printout at the top. There the – this is a – the Court decision is given by Justice Swift, said, "By the common law of England, those rivers are navigable in which the tide flows and re-flows; all others are not navigable. Upon this distinction is based a very important rule relating to the ownership of the bed of the stream and the right of fishery in its waters, ... that navigable or tidal rivers, so far as the tide ebbs and flows in them, belong to the king; and rivers are not navigable, that is, freshwater rivers, belong to the owner of the adjacent soil. The distinction has no reference, however, to the right to use the stream for the purpose of passage or transportation, the rule in that respect being that the public have not only a right to all tide waters, but also a right of way or easement paramount to the rights of the riparian owners, in all rivers which, though not tidal or navigable in the sense of the former rule, are navigable in fact. And, by the same law, a river is, in fact, navigable, on which boats, lighters or rafts may be floated to market."

So that was the definition of navigable that was seen to be the law of – or common law of England. They cite two authorities, I'm afraid we have not been able to get those in the time available, but I do note that the authority of Hale *De Jure Maris* was referred to be three of the four Judges in *Mueller* who gave substantive judgments. Not on this point but obviously it was a work available to the Judges at the time. Chief Justice Stout at page 94, Justice Williams at page 108 and Justice Edwards I think, I must have a wrong reference to the Justice Edwards in that Justice Edwards referred – he referred to it at 117. So that – if there was material available to the draftsperson in my submission the inference has to be that they would at least have had Hale *De Jure Maris*.

And the case is – this case of *Morgan v King* goes on to say well the Racket River wouldn't under that rule be deemed to be navigable but then in the next paragraph on the same column in that page, "There can be no doubt that the rule of the common law, as to what degree of capacity renders a river navigable, in fact, should be received, in this country with such modifications as will adapt to the peculiar character of our streams, and the commerce for which they may be used." And then proceeds to do that adaption but still comes to the view that it's the idea of getting goods to market and being able to do that with a degree of safety.

TIPPING J:

It's interesting, are you going over onto the next page Mr Millard? I just noticed that in this middle paragraph of the next page there's a ratification, if you like, that the concept of continuous is a time one and then the Judge talks about, it's got to be navigable for "a sufficient length of time to make it useful as a highway." So one could extrapolate from that it's got to be navigable to the extent, in a spatial sense, to make it useful as a highway. Perhaps.

MR MILLARD QC:

Yes. Of sufficient length – sorry sufficient length of time –

TIPPING J:

Well that's, we're talking about time here but I'm suggesting that by analogy one might also say, is it useful as a highway –

MR MILLARD QC:

Yes.

TIPPING J:

– with all these obstructions on it?

MR MILLARD QC:

Well we would certainly adopt that approach and in this case, coming down to the next paragraph, in regard to the relevant site, said "it was not capable of floating even single logs, except during seasons of high water, which were about two months in the year, and the logs so floated had to be aided in their passage by men in skiffs, canoes or on the shore. The current was so broken and impeded by rapids and rocks, that, from 1810 to 1850, logs, lumber and square timber, in small quantities only, and but occasionally, were floated" and that was held not to be sufficient. The relevance of 1850 was at that stage there was some publically funded changes to the river and that was why it was sent back, to see whether they affected the rights of the plaintiffs, provided they paid compensation to have their logs come down the river.

TIPPING J:

On the next page, "A floatable capacity, so temporary, precarious and unprofitable." All this is really directed to the character –

ELIAS CJ:

Stale and unprofitable.

McGRATH J:

It really failed, I gather, because there just weren't enough logs going down –

MR MILLARD QC:

Yes.

McGRATH J:

– and it was really trying to extend the principle of boats and craft to logs going down the river but it was only a couple of months of the year or something of that kind when it happened.

MR MILLARD QC:

The reference to logs should be read with the comment at the top of page 3, second column, where they talk about "in many cases, large tracts of land bordering upon their banks were originally covered with dense forests, the valuable products of which would have had no avenue to market if the public easement in the streams had been restricted to navigation by boats or rafts". So that's why the concept of logs is important in North America but in my submission that's the North American circumstance that doesn't translate to New Zealand.

BLANCHARD J:

There is an interesting point on page 3 in the right-hand column, the paragraph at the top, it says, "Nor is it necessary that the stream should be capable of being thus navigated against its current, as well as in the direction of its current." So one way navigation can be enough according to this.

MR MILLARD QC:

I would suggest that is in the context of the North American log type market.

YOUNG J:

But it must be in New Zealand. Rafts don't go upstream.

BLANCHARD J:

It's a more general statement than that because it follows the statement about the true rule which clearly isn't related just to the log market.

TIPPING J:

Then it goes on, is to be a public use in the transportation of property and so on. All these are clues to the sort of general concept that we're talking about. I've always thought that there was a public dimension to this concept of navigation.

MR MILLARD QC:

We could certainly support that. I also had handed up the case of *Nikal* in the Court below, the one – that's a much more bulky one. And if I could just take the Court through one or two points of that. Justice Macfarlane, at page 260, beginning of around line 48 – or paragraph 48 rather. "The pertinent facts may be summarised in this way," and paragraph B, "no finding was made as to whether the Bulkley River was navigable. But the evidence showed that the terrain was such that the canyon itself was not navigable," and then he made the assumption for the purposes of judgment that it wasn't navigable but still found against Mr Nikal because of the – it wasn't part of the grant to give the waters – sorry give the bed to the Indian reservation.

Justice Wallace looked at the matter in more detail and at page 271, paragraph 94, begins his discussion about "is the Bulkley River a navigable river?" Notes that "the fishing site is located at the foot of turbulent rapids where the river passes through the Moricetown Canyon. The question arises whether this impediment to navigation turns an otherwise navigable river into one that is properly characterised at law as 'non-navigable'." So he starts on the assumption that it is otherwise navigable.

At paragraph 100 he refers to –

ELIAS CJ:

Sorry, I'm just drawing attention to the quote from Anglin J in the *Keewatin* case about the Winnipeg River. About the general rule.

MR MILLARD QC:

They're talking about –

ELIAS CJ:

And over the page up to the point at which navigability entirely ceases.

MR MILLARD QC:

Which of course is one of the –

ELIAS CJ:

Yes.

MR MILLARD QC:

– points the Crown –

ELIAS CJ:

Yes.

MR MILLARD QC:

Then at paragraph 100 and *Coleman*, refers to *Coleman* in the passage that was also cited in the Supreme Court on appeal from this judgment. In paragraph 101 "the question of whether the Bulkley River was navigable was not raised at trial or before the summary appeal Court. The evidence at the trial discloses that a railway line runs along the southerly side of the Bulkley River and a highway runs along the northerly side." And it was based on that that Justice Wallace held that the river was navigable because the obstacle could be easily circumvented.

ELIAS CJ:

"Easily portaged", in 104.

MR MILLARD QC:

You see that at paragraph 104 "although a few intrepid souls have kayaked through the canyon itself, at low water, it has been regarded for most purposes as non-navigable. The canyon, however, is easily portaged." 105, the evidence –

BLANCHARD J:

No, no, there's a key thing in paragraph 103. "Fishing and river guides, utilising jet boats, drift boats, inflatable rafts and other craft travel the Bulkley River for many miles on either side of the Moricetown Canyon."

MR MILLARD QC:

Yes. I'm presuming looking at lengthy journeys on either side of what is a relatively small obstruction and – one obstruction.

McGRATH J:

So the obstruction in that case did not indicate the termination of navigability. That's a point you emphasise isn't it?

MR MILLARD QC:

Yes.

McGRATH J:

Whereas you say that in your circumstances navigability has terminated before you get to your clients' land?

MR MILLARD QC:

Indeed. Which perhaps bring me on to the evidence of use that was touched on this morning. The preliminary point, some emphasis was placed on susceptibility although I think it was accepted that that should be judged as at 1903 and in this case of course that's quite some time ago and it was approximately 50 years before the first modification of the river around this point occurred with the Maraetai Dam opening so you had 50 years in which susceptibility could be tested and the evidence relied on by the Crown, of course, includes all evidence of use both pre and post 1903. The Crown doesn't dispute that this – that you couldn't use the river for continuous purposes. They haven't asserted that above the Hora Hora Rapids it was not treated as a highway and they accept that there are 14 obstacles from that point up to the outlet before you even look at anything like, for instance, the Tongariro River. Now they do accuse us of raising that late but the very first question I put to Mr Parker in cross-examination, which can be seen at page 527, was that he had not considered the Tongariro River. It's always part of the case that if you were going to go beyond the pleading then where do you describe the river but at least if you're working up to the last point of navigation then the Tongariro River can be disregarded.

TIPPING J:

Are the Hora Hora Rapids and the Maungatautari Bridge virtually synonymous Mr Millard?

MR MILLARD QC:

I think the difference is about, I think the Mangatautari Bridge is –

TIPPING J:

I know where that is –

MR MILLARD QC:

Is about 2.5 miles further downstream.

TIPPING J:

Quite close.

MR MILLARD QC:

Yes, very close. For present purposes we can treat them as synonymous.

TIPPING J:

Yes.

MR MILLARD QC:

Reference was made this morning to their exhibit D which begins at tab 76. D2 was described as showing areas where navigation occurred. I just want to point out two things about that. First of all if you look at it you see that even just looking at that map there are big areas and in particular a big area on either side of Mangakino which of course is relevant to the Pouakani dispute where there's simply no evidence of use being shown at all. But it could be a bit misleading to think of the black lines on this plan as representing navigation at least along the length of the river within the black lines. If you come over the page there are six maps which correspond with Areas 1, 2, 3 and so forth through to 6 and you see the first one up is labelled Area 1 and if you look at that you will see that starting at the Lake Taupo outlet there's a red line which is described as being fishermen et cetera then there's a big gap around the Huka Falls and the black line fishermen et cetera down to Aratiatia Rapids. So that even within the areas that are labelled in D2 you've got the gaps in navigation. And another key one is you've got D7 which is Area 5 and that one is solely this barge – was described as barge traffic but in my submission if one looks at the evidence about the barge it was basically one that was winched and was being used to drill presumably testing foundations and the like for the river rather than – over the dams rather than for a – for navigation for its own sake. You could hardly say that the barge was being used for the purpose of navigation, it was being used for the purposes of construction.

If I could just clear off one other, when one comes to D8 some reference is made by the Bench to a comment in I think it was Justice Williams' decision about the steamer traffic going up 50 miles downstream from Huntly to beyond Cambridge and you see there in the red line is the steamer traffic and you can see where the red line stops which is quite a bit short of the obstruction that we rely on.

McGRATH J:

What page are you on now?

MR MILLARD QC:

Exhibit D8.

McGRATH J:

D8, thanks.

BLANCHARD J:

Do you reckon that's where the 50 mile stops?

MR MILLARD QC:

That would be my submission, yes. We don't unfortunately have measurements of the river going down as far as Huntly but if you sort of think of the roads from Huntly to Cambridge and then allow for the loops et cetera of the river that would be, and of course the 50 miles would be a fairly approximate one.

TIPPING J:

That's actually just about where the dam now is. The Karapiro Dam.

MR MILLARD QC:

You can see – it's just a little bit further downstream from the end of the red line. If you look closely you –

TIPPING J:

I know where the Karapiro Dam is Mr Millard, I'm just saying that this red line goes a bit above the site of the present dam.

MR MILLARD QC:

Oh sorry, yes, yes.

TIPPING J:

Not that that means anything I suppose.

MR MILLARD QC:

Some play was made on the issue of portage and of course we do not accept the portage is relevant but it was certainly accepted by the Crown that portage around Whakamaru and Maraetai Gorges was very difficult. It was implied that portage was feasible in every other obstruction. I simply invite the Court to read the evidence of Mr Parker on for instance portage around the Ongaroto Rapid and you see that there's a great deal of speculation in that. He's having, I can understand his difficulty, but is, of course, trying to look back from whenever his evidence was done to somewhere around 1903 and having to draw some conclusions and in my submission the much better evidence of portage would be the comments of Mr Fisher in the letter at paragraph 354 that I took the Court too where he said impassable gorges divide any section of easy water and portage of the canoe would have been out of the question.

McGRATH J:

Sorry what was the paragraph of Mr Parker's evidence you wanted us to look at?

MR MILLARD QC:

The portage ones that I was referring to are 316 to 320 and 354 for the latter.

McGRATH J:

Thank you.

MR MILLARD QC:

And our basic submission is that when you look at all the obstacles going upstream from the Hora Hora Rapids and look at the lack of evidence of any transportation there, let alone transportation in the form of commercial public use, use as a highway, this river was not navigable opposite Pouakani.

That's really all I wanted to say in reply unless the Court has any questions.

ELIAS CJ:

No, thank you Mr Millard. We'll reserve our decision in this matter. It may be that when we have taken time for consideration we may need to reconvene to discuss progress but for the moment we'll reserve our decision.

COURT ADJOURNS: 2.46 PM