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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 49/2019
[2020] NZSC Trans 19

PETER HUGH McGREGOR ELLIS
Appellant

v

THE QUEEN
Respondent

TE HUNGA ROIA MĀORI O AOTEAROA
Intervener

Hearing: 25 June 2020

Coram:	Winkelmann CJ Glazebrook J O'Regan J Williams J Arnold J
Appearances:	R A Harrison, N R Coates, K D W Snelgar and S J Gray for the Appellant U R Jagose QC, J R Gough, K S Grau and A D H Colley for the Respondent M K Mahuika and H R Irwin-Easthope for the Intervener

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TIKANGA APPEAL

MR MAHUIKA: (MIHI)

Heoi anō rā, tēnā koutou, tēnā tātou katoa. Tēnā koutou ngā Kaiwhakawā o te Kōti, otirā tātou katoa e tau mai nei ki kōnei i tēnei rā, ki tēnei tō tātou Kōti, tō tātou whare me kī. Na reira, kia inoi tātou kia tīmata ai to tātou huinga i tēnei rangi.

KARAKIA TĪMATANGA

WINKELMANN CJ:

So if you introduce yourself, counsel.

MR HARRISON:

Yes, Your Honour. E te Kōti Mana Nui, ko Harrison, Gray, Snelgar me Coates, ngā rōia mō te kaipīra. May it please Your Honour, counsel's name is Harrison and I appear with Ms Gray, Mr Snelgar and Ms Coates and we appear on behalf of the appellant. I would also like to acknowledge to the Court that Mr Mark Ellis and Tania Ellis are present today. They are the brother and sister of the appellant.

WINKELMANN CJ:

Tēnā koutou, and I acknowledge the presence of the Ellis whānau.

SOLICITOR-GENERAL:

E ngā Kaiwhakawā tēnā koutou. Kei kōnei mātou ko Ms Grau, ko Mr Gough, ko Ms Colley mō te Karauna. Your Honours, we appear for the Crown.

WINKELMANN CJ:

Tēnā koutou.

MR MAHUIKA:

Tēnā koutou ngā Kaiwhakawā o Te Kōti. Ko Mahuika tōku ingoa. Kei kōnei māua ko taku hoa, Ms Irwin-Easthope. Ko māua ngā rōia, ngā māngai kōrero, me kī, mō Te Hunga Rōia Māori o Aotearoa. May it please the Court, Mahuika is my name. I appear with Ms Irwin-Easthope and we are here representing Te Hunga Rōia Māori o Aotearoa as the intervener in this matter.

WINKELMANN CJ:

Tēnā kōrua. Before we get under way I'd just like to deal with a couple of preliminary matters. First, I would like to acknowledge the presence in the courtroom today of victims, their whānau and the Court's victim adviser. As already acknowledged, I acknowledge the presence of the Ellis whānau. And I also wish to remind everybody here today that there are suppression orders in place in respect of the names of the victims. It's unlikely we will mention them but just in case everyone is to be assured that there is no publication of those in any way. Right, Mr Harrison.

MR HARRISON:

With the Court's leave I would defer to Ms Coates to start with the part of the submission in respect of tikanga in this application and then I might step in briefly at the end just to address some of the issues raised in the Crown submissions, if the Court pleases.

WINKELMANN CJ:

And Mr Harrison, have counsel discussed the order of how they're going to handle submissions?

MR HARRISON:

In terms of time?

WINKELMANN CJ:

Between the different parties.

MR HARRISON:

Yes, well, I imagine that we would start the Crown next and then the Māori Law Society and then a brief response from the appellant of reply.

WINKELMANN CJ:

Yes, and from the Crown. So reply by the appellant if required.

MR HARRISON:

Yes.

WINKELMANN CJ:

And then a reply from the Crown. Thank you, Ms Coates.

MS COATES:

Tēnā koutou Te Kōti Mana Nui o Aotearoa. Given that tikanga is central to the issue before the Court today I thought it would be appropriate to briefly give a mihi and summary of my submissions in te reo Māori which I will then translate immediately into English.

Kia ora koutou. I te tuatahi, i tautoko au i ngā mihi o tōku hoa, ko Mr Mahuika. He mihi ki te Atua, nāna nei i hanga ngā mea katoa, ā, he mihi ki ngā tāngata kua wheturangihia ki te pō. Ko Mr Ellis tētahi o ērā, haere, haere, haere atu rā.

Huri nei ki te hunga ora, ā, ki a koutou, te Kōti, ngā manu tāiko, te Ture, tēnā koutou. Ki aku hoa o te Karauna me Te Hunga Rōia Māori, tēnā koutou, huri noa ki a tātou katoa e tae mai nei i tēnei rā.

Ko tōku kōrero matua i tēnei rā, e pā ana ki tēnei mea, te tikanga Māori, ā, me haere tonu tēnei kēhi, kāo rānei. Ko te ngako o tōku whakautu ki tērā pātai, ko tēnei. I whai wāhi, i whai tūranga hoki te tikanga Māori i roto i te ture Pākehā. Ahakoa, kua mate a Mr Ellis, he mana tō te tāngata Māori mai, Pākehā mai, i tū atu i te hemonga. He mana tō tōna whānau hoki. He hara kei mua i te aroaro o te Kōti, e pā ana ki te mana, ā, me haere tonu tēnei kēhi, kua ea.

So just by way of way of translation, I firstly just supported Mr Mahuika's initial mihi and then I briefly acknowledged the Atua or whatever greater higher power you may or may not believe in. As then is normal or traditional I then turned to acknowledge those who have passed on and in particular I acknowledge Mr Ellis who is central to the case before the Court today. I then turned to the hunga ora or those who are in the realm of the living and I acknowledge the Court as the leading birds, that always sounds better in Māori, of the law, and then I also acknowledge the Crown, my friends from Te Hunga Rōia Māori and also everyone who is gathered here today.

So my submissions today are in respect of tikanga Māori and the question before the Court is whether this case should continue in light of the death of Mr Ellis. The essence of our submissions are that tikanga Māori has standing as part of the State legal system and can inform the development of legal principle in Aotearoa. In accordance with tikanga everyone, Māori and Pākehā, including Mr Ellis and his whānau, has mana. Mana and the importance of seeking to restore and uphold mana is something that transcends death. A hara or a wrong is before the Court today, or is before the Court, and a door has been opened to seek to redress that. It's necessary for this case to continue to get to a state of ea or finality.

So we were asked to address three different questions. Is tikanga relevant? If so, what aspects of tikanga are relevant and if relevant how should tikanga be taken into account, and I wanted to firstly speak to that question of relevance and I wanted to start my submissions on relevance with a whakataukī or a Māori proverb. This proverb was said by Kingi Pōtatau Te Wherowhero who was the first Māori King and had said this in 1858. Now the idea behind the Kingitanga movement was to unify Māori under a single sovereign, similar to the Queen Victoria. At his coronation to become the King, Te Heuheu, the High Chief of Tūwharetoa, he said to Pōtatau, and I'll just say, he said it in Māori but I'll just say the English version. Pōtatau, this day I create you king of the Māori people. You and Queen Victoria shall be bound together to be one. The religion of Christ shall be the mantle of your protection. The law shall be the whāriki or mat for your feet forever and ever onwards. And Pōtatau responded with the whakatauākī that I'm going to draw on today, and that whakatauākī is, "Kotahi te kohao o te ngira e kuhuna ai te miro ma, te miro pango me te miro whero," which translates as, there is but one eye of the needle through which the white, the black and the red threads must pass. It is my submission, Your Honours, that that whakatauākī can be applied to thinking about the development of the law.

So if we take from that metaphor the whāriki, or the mat, is the fabric of law in Aotearoa. The Courts are one of the kai rāranga, or the weavers that wield the needle that adds to and develops that fabric. It is our basic submission that when you're adding to the fabric of law, or developing the fabric of law in Aotearoa, that not only do you draw upon the thread that it has come from, the common law of England, but that tikanga Māori is also a thread that you can draw from when adding to and thinking about the development of law in a uniquely New Zealand Aotearoa context.

The beauty of that metaphor and that starting point, Your Honours, is that both the Crown and Te Hunga Roia Māori agree with us on that. So I just wanted to point out some of our significant common ground that we had. Firstly, we all agree that tikanga is part of the common law of Aotearoa New Zealand. There's now well-established precedent to that effect. We also broadly

agreed with the different ways that tikanga Māori is part of the common law of New Zealand, and I think it's useful to understand I think the different ways that that intersection can occur. So the first way that we submit is that tikanga is relevant as that source of enforceable rights, interests and obligations by Māori. So, for example, that brings into for proprietary rights is a good example of that. Proprietary rights are a burden on Crown's radical title, and there's a number of different cases which have accepted that point.

I'd also add particular customs have also been recognised as modifying a common law position on that respect as well. So for example in the case of *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) they recognise the custom in relation to a tangihanga, or a funeral. In the case of *Baldick v Jackson* (1911) 13 GLR 298 (SC) they recognised the custom in relation to gathering whales, for example. So there's been, so that's that first tranche.

The second tranche is tikanga has been relevant, as being relevant considerations in that public law sense. So that is the Treaty of Waitangi has been held to be of such constitutional importance that it's been read into areas of law, even when there's no legislative reference to it. So it's been well acknowledged that the Treaty of Waitangi has that significant place, and so it can be a relevant consideration or an interpretive aid.

The Treaty, of course, imports tikanga considerations. Tikanga is both a taonga under Article 2 of Te Tiriti O Waitangi, and also tikanga being highly relevant to rangatiratanga as well. The two are interconnected. So in that sense tikanga has also been read in, in a number of different cases. Now the Crown in their submissions refers to public law. I would just point out that that's public law in that very wide sense of the Treaty of Waitangi meaning, and so tikanga has been read in in environmental law cases, in family law and recently in respect of immigration. So tikanga principles have been imported in that respect as well.

Now the final category, and this is the category that this case falls in today, is that tikanga values are also relevant to informing the interpretation and

development of the common law generally. So that is referring to the whakatauākī that I started with. When we're developing the common law in general Courts should not just be able to draw on that legal thread or packages of thought that originally come from England but that we have an endemic jurisprudence or a *Lex Aotearoa* that is appropriate to our local circumstances and can and should draw on tikanga Māori thought and values. Given that, we have also all agreed that tikanga is directly relevant to the question of continuance that's before the Court today. That is whether this case that has already been granted leave to proceed should proceed in light of the death of the appellant, Mr Ellis. We have also agreed on how tikanga is relevant as well. So our common ground on that is that we both think, or all think, that tikanga means that that starting point is that death does not close the door. We have also all agreed that tikanga can be read into that ends of justice inquiry when looking at this particular case.

Now although we're all agreed on relevance, if the Court would please, I can walk you through five different propositions that get you there, if that would be useful, particularly in light of the fact that Mr Ellis is not Māori.

WINKELMANN CJ:
Yes, go ahead. Yes, very useful.

WILLIAMS J:
Although those customs cases you identified, *Loasby*, *Baldick v Jackson*, and in your submissions I think is the *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198 (PC) case from the Privy Council. The subject matter in all of those cases was Pākehā.

MS COATES:
Yes, I think that's noticeable as well.

WILLIAMS J:
So in fact it's exactly the same situation. The beneficiaries in each of those cases, as with *R v Symonds* (1847) NZPCC 387 were not Māori and Māori

custom was applied in order to ensure that they got the benefit that they were entitled to. So this is no new thing.

MS COATES:
Yes, Your Honour, I'd agree with that. It's not unusual and this is woven into one of these five propositions that I'll put. It's not unusual for tikanga principles to be drawn on by non-Māori.

So I think the first proposition is that tikanga has always been part of our laws. So it was the first law of Aotearoa that arrived with Kupe on Te Waka Ngātokimatawhaorua. It has also been hard-wired into the introduction of the common law is that idea that tikanga continues in some sense and has a transformative effect on the common law and there are a number of pre-1840 cases in a number of different countries that you'll see in our submissions that reflect that point. So that's *The Case of Tanistry* (1608) Davies 28, 80 ER 516, *Campbell v Hall* and I note we've included the wrong *Campbell v Hall* so we've got a different one if that would be useful, and also the *Mayor of Lyons v East India Company* (1836-37) 1 Moo PC case. That's been well accepted in New Zealand as well. Tikanga is part of our laws.

The second proposition is that we're free to develop our laws to suit our uniquely New Zealand circumstance. So tikanga is part of that local circumstance, both as a matter of fact and of law, and I'll refer you, and I don't think you need to go there, I'll just read it out, of a statement that was made in the *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) case which is at tab 20 of our bundle of authorities.

WINKELMANN CJ:
You'd take it further and say we're not free to develop our laws to respond to our local circumstance. It's really the nature of our essential task, our duty.

MS COATES:
So at page 317 at paragraph 17, so 317 of our bundle of authorities at paragraph 17 of the case, they articulate it really well. So they say, "In British

territories with native populations, the introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only 'so far as applicable to the circumstances thereof'. The English Laws Act 1858 later recited and explicitly authorised this approach. But from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances."

WINKELMANN CJ:
Sorry, what paragraph are you at?

MS COATES:
So that's paragraph 17 of the *Ngāti Apa* foreshore and seabed case at tab 17.

WILLIAMS J:
Tab 20.

MS COATES:
Sorry, yes, tab 20. So my third proposition is that it's not just customs but tikanga values that are also part of the fabric of our law. This is consistent with the nature of tikanga as comprising both. So in *Lex Aotearoa* Justice Williams refers to some of these key principles and talks about these as mattering more than sometimes just the surface directives. So tikanga is that – those tikanga principles form that important part of tikanga Māori as a whole. It's comprised not just of the actual practices but the big informing values and those are the most important things.

And I'll draw your attention to two cases that go to that point. I'll take you to the case of the *Public Trustee v Loasby* at tab 14 of our bundle of authorities. Now in that particular case a rangatira or a chief passed away, so his name was Hamuera Mahupuku and his wife, when he passed away, her name was Arete, principal wife, I understood he had a number, ordered goods for visitors at the tangi on credit. So they ordered a number of goods on credit from the shop owner, Loasby, who then sought payment from the estate.

And I wanted to draw your attention to some of the findings of fact in that particular case which is at page 226 of our internal bundle, and in that particular case he found that a number of following facts were proved. So first, that the deceased was a Māori chief of high rank. Second, that from an early period in the history of the Māori race, the Māori custom to hold upon the death of a native chieftain a tangi. The number of visitors and the importance and duration of the tangi depended on the rank of the dead chief, and the tangi is, according to Māori custom, inseparable from and part of the burial of that chief. Also found that the status and rank of Mahupuku was such that the great chiefs and many Māoris of rank attended the tangi from different parts of the North Island, the Māori custom is that the costs of a tangi have in the past been levied out of the property of the dead chief in whose honour the tangi has been held, that the omission to hold a tangi would be considered a breach of Māori custom and a great insult to the memory of the deceased chief.

So those were some of the key findings of fact. Now I draw your attention to that for a couple of reasons. On the surface this case is about payment and the custom of who should be liable to pay for these goods, but you can see from those findings of fact directly below that is a number of those key principles operating. So when they're calling it rank, they're talking about mana in that respect and the mana – and there's a number of tikanga principles that are inherently tied up with the tangihanga that are implicitly coming through in this particular case. So there's recognition of mana, the mana of the deceased beyond death. That's why they're holding a tangi for him. That's why they're providing goods for him. That mana is relevant not only to the individual but also the collective. That relates to whanaungatanga obligations.

So I pointed Your Honours to that case to just highlight that, to highlight those principles in operation, not just the custom. Those are sitting just beneath the custom that the Court's actually talking about. I also highlighted that to Your

Honours because it is one of those cases where you have non Māori drawing on a tikanga to try and get payment in that particular case.

I also wanted to draw Your Honours' attention to *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. *Takamore*, of course, was instrumental in embedding the idea that tikanga is part of the values of the common law, and *Takamore* is at page 21 of our common bundle.

WILLIAMS J:
Sorry, tab 21 of?

MS COATES:
Of our bundle, Your Honour. So volume 2, starting at page 367.

WINKELMANN CJ:
You mean tab 21? Right.

MS COATES:
Tab, yes, sorry. *Takamore* is interesting, Your Honours, when you think about the three different categories of intersection that I identified earlier. So in the Court of Appeal and the High Court they treated it in the first instance of it being a source of rights and private source of, a private source of rights and obligations against others, and it was dismissed in that respect. What the Court of Appeal then went on to do was to say, well, let's take a modern approach in how can tikanga be taken into account in any event given it doesn't meet those threshold tests.

The Supreme Court took a different approach. Ultimately they landed the majority where the Court of Appeal did but they didn't go through that first exercise of seeing whether it was a source of enforceable rights and obligations, but they did find that in this particular case, and Chief Justice Elias' paragraph has been well highlighted and well quoted in a number of subsequent cases, is that tikanga forms part of the values of the common law of Aotearoa, and I'll take you to that because I think it's worth reading out in its

entirety. So that's at paragraph 93 and paragraph 94 of the case, and you can just start at the top of page 404.

"This case is one in which the Court has to resolve competing claims based on different values raised by parties with standing to seek the determination of the Court. Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only 'so far as applicable to the circumstances of the…colony'. …Māori custom according to tikanga is therefore part of the values of the New Zealand common law."

Now Chief Justice Elias was, of course, in the minority in that particular decision, but in my submission the main difference between her outcome and that of the majority was just where that balancing takes place. So Chief Justice Elias thought that that should happen at the High Court whereas the majority thought that that should happen in the first instance by the executor and the High Court exercises supervisory jurisdiction in relation to that decision.

The *Takamore* case has been held to be precedent for that idea of tikanga forming part of the values of the law of Aotearoa in that you can draw on those tikanga values where they are material. The Court is now in the process of working out what does that mean on a case-by-case basis. *Takamore* has, of course, been cited in a number of different cases for that precedent.

So that leads me to my fourth proposition. That is that these values and principles have much to offer, particularly when those ideas have broad resonance. They can and should be drawn upon when thinking about the sensible development of the common law, and I'm going to take you to tab 17 which is the *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) case, volume 1, and I'm going to particularly refer you to page 276 at line 18.

ARNOLD J:

Sorry, 200 and what?

MS COATES:

Page, so 276 of our bundle or 221 of the case, at line 17. So this is a passage that they have quoted in full from a Waitangi Tribunal report. That report is the Manukau claim, but I'm just drawing on it because I think this particular paragraph encapsulates part of what we're trying to say. So this says, "When Māori values are not applied in our country, but western values are, we presume our society is monocultural. In our multicultural society the values of minorities must sometimes give way to those of the predominant culture, but in New Zealand the Treaty of Waitangi gives Māori values and equal place with British values, and a priority when the Māori interest in their taonga is adversely affected." So that particular case is, of course, in the Waitangi Tribunal context and is talking about the Treaty of Waitangi. We're talking about that third category, but it does articulate the idea that we're getting to, which is that tikanga has values that are rich and has values that can be drawn upon as well.

WINKELMANN CJ:

Is it part of your claim that although it's part of the values of our society, as you might say many things are, it has a special claim to having attention paid to it?

MS COATES:

Yes Your Honour, because of the reasons that we've worked to it in terms of it being as part of that fabric of law. And just as my fifth proposition on that point, the idea that Māori principles have resonance and can apply beyond Māori is not a new one. So in the Oranga Tamariki Act 1989 you, of course, have relatively new references to the idea of mana tamaiti, whakapapa and whanaungatanga. Those ideas in that piece of legislation, which is applying to of course the activities of Oranga Tamariki and children in State care, were seen or were drawn upon. They're not just specific to Māori, those ideas have been incorporated into that legislation as applying to all children, and it reflects

that idea, or that idea that's reflected in tikanga that the core value of a child, and their location in that broader kinship group, is an idea that resonates broadly, and that is useful more broadly.

I'd also refer you to the Sir Ted Thomas quote at paragraph 92 of our submissions, which I'll just read out. So this is an extrajudicial writing, and this was by the Right Honourable Sir Edmund Thomas. He frames tikanga as being this positive enrichment of the law. So he says, "As tikanga are essentially principles rather than rules, and those principles are not static, tikanga Māori could readily be absorbed into the common law of this country. Again, there is no reason why the Judges should not assimilate its principles in the development of the law generally so as to develop an endemic jurisprudence just as the judges in days gone by assimilated the customs of the times into the growing body of the common law of England. The aim would be to enrich the law by incorporating tikanga as and when appropriate. Māori principles regarding respect for the environment, for example, could have much to offer."

WILLIAMS J:
So the long and short of that overall submission I guess is that we're now comfortably at the point where tikanga is one of the frames through which the common law is to be viewed and developed.

MS COATES:
Yes.

WILLIAMS J:
So the idea of values is really that's' the framework. You interrogate the law, where you can, interrogate the law through that framework.

MS COATES:
Yes Your Honour.

WILLIAMS J:

Whatever kind of law, whatever it applies to.

MS COATES:

Yes.

WILLIAMS J:

Right.

MS COATES:

And in this particular case we're not invoking tikanga as a legal right that's personal to Mr Ellis as a Pākehā, we're talking about the development of an area of the common law as it applies to all New Zealanders in relation to continuance, and the extent to which tikanga values can impact that.

WILLIAMS J:

So here's the test of that. If we look at that passage by Sir Edmund Thomas he says, Judges have always incorporated custom into the common law in common law countries, right? There's a risk there, isn't there, because the common law froze custom when it became essentially Judge-made law, where the local customs that were established by juries in the old system, and then Judges simply applied that custom to the particular facts, as you had with the custom of commercial law and so on, that kind of stopped over time and custom became more positive, positivist law. It relied on an articulation from a Judge for it to be real. What's the danger of that occurring here if we hand this body of law over to Judges to pronounce upon?

MS COATES:

That was recognised as a risk in the Statement of Tikanga clearly and I can take you to that paragraph where they did that.

WILLIAMS J:

Yes, yes, I remember reading it.

MS COATES:

But where they landed with that, where the tikanga experts landed with that particular question, is that tikanga has existed since mai rā anō.

WILLIAMS J:

Since forever.

MS COATES:

Yes, since forever. Despite the trials and tribulations and the impact that the State legal system has had on tikanga, it still exists as a framework for thinking. All we're doing here is asking Judges when they're drawing on law to look at this as being relevant as well, or that it is relevant as well.

Also I think what is relevant is of course when you're drawing on these packages of thought there are certain processes that can be undertaken to ensure that tikanga retains its integrity. So, for example, the process that we went through in relation to getting the Statement of Tikanga is in my submission a highly appropriate one. It involved a wānanga, a two-day wānanga. It involved drawing together. So the Court is called Te Kōti Mana Nui. This is a rōpū mana nui. The supremes of Te Ao Māori, let's say. We've got Sir Hirini Moko Mead, Pou Temara and all of the various people that added their knowledge to this particular case ensuring and talking about the application of tikanga in this particular instance. So I think there are processes, such as that one which was a really good one, to ensure that tikanga is not being misapplied, to ensure that tikanga is not being misinterpreted. They also referred to a couple of other safety mechanisms, such as Te Hunga Rōia Māori o Aotearoa being involved, and I also noted that they referred to judicial education initiatives to ensure that when Judges are receiving that they're understanding that tikanga isn't something that is frozen in time but that it is something that is constantly evolving, as is the common law.

WINKELMANN CJ:

Is the risk that Justice Williams referred to less in the area when you are looking to the fundamental values, the large precepts, I suppose, the fundamental values that shape Māori society are being looked to to frame discussion which is what we're talking about in large part here, I think, is that a lesser risk than the case where you're looking to tikanga to try and form enforceable ground, enforceable rights and duties?

MS COATES:

I think that's right, Your Honour, because those values are common to all Māori. They're big ideas and packages of thought that if you go around anywhere in Aotearoa those are the things that are informing behaviour. How they're interpreted and applied in a particular context is what differs, or what might differ, or you might have regional variation on that particular issue. So when you are drawing on those thoughts and values, in some instances you will still need some of those protective mechanisms to be able to determine how it applies in this particular case as well.

WINKELMANN CJ:

Because part of it also is possibly a habit of thought which is alien, yes, it might be a habit of thought dealing with the concepts.

WILLIAMS J:

The risk, for example, can see this relatively commonly, for example, utu in general community perception is revenge, and mana in general community perception is status or reputation, and it is or can be those things but…

MS COATES:

It's more than that.

WILLIAMS J:

Yes, it's much, they are both much, much bigger than that and the danger is you've got to – you get a Judge who has no instinct about these things simply superimposing that two-dimensional understanding of a much bigger idea.

So I think the process that counsel and others went through was an extraordinarily, if I may say so, positive way of getting to the position that you've got to. I guess you're right, those are the safeguards to stop Judges dumbing down tikanga to something they can get their heads around.

MS COATES:
Yes, and the process that we engaged in I think was integral in ensuring that those tikanga principles are connected back to the base from which they derive.

WILLIAMS J:
Correct, yes.

O'REGAN J:
The circumstance against which the Statement of Tikanga is made depends, as I understand it, on the fact that the Court had already engaged with the case and had granted leave to the appellant, and that that is what has brought the case to a point where tikanga would say it should continue. Am I right about that position?

MS COATES:
You're right in terms of that was what they were looking at. That leave had already been granted. So integral in the tikanga that was being applied in this particular case was that idea that the hara had been probed already, and that that cast that light on the mana of the particular people that were at the for example. So I think that was relevant. I think you would have to ask the question again if leave hadn't already been granted, what tikanga would say about that, because tikanga in this particular case clearly focused on when it had already been granted.

ARNOLD J:
But wouldn't the situation be the same where somebody had exercised a right of appeal and died before the appeal could be dealt with?

MS COATES:

I think some of the key principles would still apply. At least I think that's right.

ARNOLD J:

So does that lead to the view then that to truly reflect the values that you've talked about, one really has to take the view that the death of an appellant is irrelevant.

MS COATES:

That's the tikanga position.

ARNOLD J:

Yes.

MS COATES:

That's accurate.

ARNOLD J:

Now that then raises this point that troubles me a little bit. If you like the big idea of the common law was almost completely antithetical to the tikanga view. The big idea of the common law was that appeals stopped when the appellant died. Similarly in relation to reputational matters, that defamation claims came to an end when the plaintiff died, or if he or she as the appellant died in the course of the appeal, so the common law took the view that yes, there were reputational interests there, they recognised them, but basically took the view that they were overwhelmed by other considerations. So this is my question. If we were to accept the logic of the submission you're making, there is a risk, isn't there, that there's a kind of dissonance in the law, a fracturing that in one context it reflects tikanga values, but in another context, such as now allowing defamation claims to proceed, even though they might involve the reputation, somebody's deepest reputation in that sense engage mana, mana of the family and so on. We don't allow that basically because, well it's now in legislation, so you get a dissonance, a discordance between the principles being applied.

MS COATES:

Yes Your Honour. I recognise that. I guess our broader submission is that tikanga is relevant in that idea of developing the general law, so perhaps, and realising we're confined to the, we're talking about the particular issue before the Court today, but that it might be appropriate to reconsider some of those ideas in cases like defamation, and whether that is appropriate for Aotearoa, in Aotearoa New Zealand to still have that position.

WINKELMANN CJ:

There is definitely an efficiency value that underlines common law to some extent, isn't there, because there's a fear that the Courts will be clogged up with cases for people who have long since been dead, and you would respond to that how?

MS COATES:

Well in the *R v Smith* 2004 SCC 14, [2004] 1 SCR 385 test judicial resources was recognised as one of the prongs, so that might be a relevant consideration for the Courts when addressing that. In this particular case we're talking about a narrow issue where the appeal has been granted and the narrow issue where that the person has had to have lodged, of course, that claim personally, and there's only been a handful of cases in New Zealand that has addressed this, as I understand it. So you're not going to get a floodgates, necessarily, in that respect, but when you are looking at different areas that might be a consideration.

GLAZEBROOK J:

What about, you'd presumably – well actually I probably should put it as a question. One of the issues, especially in criminal appeals, is whether the appeal can be conducted fairly or at all in the absence of the appellant because in some cases it might be an issue of not being able to give instructions on matters of fact that arise during the appeal. So would tikanga have a view on that? I didn't totally get that in terms of the statement of position, and of course the submission that you would have, and I, of course, totally understand that, is that doesn't apply in this case.

MS COATES:

Yes. That particular issue wasn't raised in our discussions with the tikanga experts, and so it doesn't come through. So I'm not sure what the tikanga position would be in the pragmatics, noting that tikanga is inherently pragmatic always and has always adjusted accordingly in relation to pragmatics. So I'm not sure if that answers your question?

GLAZEBROOK J:

No, well the question really was, and I don't think you're saying anything different, that this isn't the sole issue that you would look at, so it's accepted that there are other considerations that may well be relevant to whatever the development of the common law is in this case.

MS COATES:

Yes, because of course the test is that ends of justice inquiry, which we're saying tikanga is central and provides a useful framework for looking at that issue, including that idea of getting to ea in a state of finality, but it may not necessarily be the only consideration and my learned colleague Mr Harrison will talk more to those.

WINKELMANN CJ:

I had thought the framework might have something to say about it because the concept that you can, that there is something to be achieved by probing the hara to reach a state of ea, it assumes it can be effective, so that might, consideration might go within that framework if you can't really effectively consider the issue. So you can't really reach –

MS COATES:

You can't probe the hara.

WINKELMANN CJ:

So if you can't reach a state of ea through that process then it might weigh against continuation.

MS COATES:

I'd accept that Your Honour.

GLAZEBROOK J:

But it wasn't explicitly addressed in the statement so we would be guessing, if you like, what the view would be without, on the basis of the material we have, without the basis of a specific view on that in terms of tikanga.

MS COATES:

Yes.

GLAZEBROOK J:

Which I'm not saying makes a difference by any means but…

O'REGAN J:

The specificity of the circumstance in which the tikanga is being addressed, does that mean that the wānanga, was that really an adjudicative process or was it a –

MS COATES:

So the way that that worked was that – so it was a two day process. So on the first day all of the tikanga experts were gathered to be able to give them time to work through the issue internally. Sitting alongside them were counsel for, Māori counsel for Mr Ellis, the Crown, as well as Te Hunga Roia Māori o Aotearoa. So that allowed, and we were really just there to potentially offer our thoughts, or help guide the discussion from that legal perspective, but they were really the ones generating that tikanga. Day two involved others, so the Solicitor-General and Mr Harrison, coming back here.

O'REGAN J:

I know what the process involved, but what I'm getting at is that there are some aspects of tikanga which are just statements of – no doubt to Māori – of the obvious, but in this case they have been applied to a very specific factual

background which, to my way of thinking, seems to involve an adjudication by experts, and I'm just checking with you that I've understood that correctly.

MS COATES:

It involved ensuring that the you're applying are being applied in the right way, and we adopted an appropriate process to do that. And I think it's important to address the concerns that were raised by Justice Williams, that you do need to in – so there's some principles that are big and broad and generally accepted, their application in particular cases you may need that process to ensure that they're being applied correctly.

O'REGAN J:

So in the end there was effectively a ruling made in the agreed statement, is that how you'd describe it?

MS COATES:

Yes, it was an agreed position of tikanga, and so it gave that tikanga back to the experts to determine, and we worked with them on that.

WILLIAMS J:

So the expert said, "This is what tikanga requires, we think, on these facts"?

MS COATES:

Yes.

WILLIAMS J:

I wonder though whether it was quite right to say, "Death is always irrelevant in tikanga," I wonder whether the position is more subtle than that, it is that because tikanga awaits mana and whakapapa more heavily than would the untrammelled Anglo common law, it's less relevant than would be the position if tikanga didn't apply? Because there are lots of situations where…

MS COATES:

Mana is not engaged.

WILLIAMS J:

Well, yes, where a hara occurs but everyone agrees that it should stop there, particularly post-Christianity, in accordance with tikanga, it's not – you know what I mean? Sometimes even when a wrong has occurred tikanga would nonetheless accept that it is in the interests of all for the whawhai, for the contestation, to end, consistently with tikanga. So it's, you know, not black and white like that, it's a more subtle analysis and, you know, we have some of that from the Crown's submissions which say, "Ah, just a minute, just a minute, take a closer look at this and maybe tikanga isn't as black and white as you say," so there's some contestation around that even if they couldn't get Professor Mead and Professor Temara to agree with them. So there's room to move there, isn't there?

MS COATES:

Yes, I would agree with that.

GLAZEBROOK J:

Is it really adjudicative or – I'm just thinking of the sort of statements of tikanga that were presented in the *Takamore* case, and that was more in line with expert witness that you would have in terms of foreign law, for instance, explaining how the law would apply in a particular circumstance, and that's always been thought of not adjudicative but effectively as an expert witness. Would you see that as something more in this case? I mean, obviously an expert witness that is uncontradicted and therefore absent, I'm not quite sure, but really, really strong views from the Court itself backed up by, I would have thought, high expertise, it would be accepted by the Court. But I wouldn't have said that it was anything different from just an expert witness, and then this case presented as an uncontested agreed statement.

MS COATES:

Yes, I think that's right. I guess the point is you need a process to ensure that you're getting the tikanga right, and so that might be bringing expert evidence, and if it's uncontested that makes it easier. In this particular case we had a process where there was that broad agreement and we had that foundation

upon which to operate, and we didn't necessarily, and even though I think the way that we've interpreted the tikanga might be slightly different – and I'll speak to those points of departure when I talk about the specific tikanga applying in this case – there's that foundational base upon which we agree.

GLAZEBROOK J:

And you might say that that process might actually say something about the general processes for expert witnesses and how they're actually presented to the Courts that might be much more useful than our present more adversarial system on expert witnesses, but that's another topic.

MS COATES:

Well this was certainly a mana enhancing process, and the adversarial process is not always that.

WINKELMANN CJ:

Can I pick up a couple of points that we've been talking about here, because many people who think about this issue who don't have a background in tikanga would say, well look, in Anglo or western society people's reputation after your death really does, is important for their family, that's true in many societies, so it's very, it's incredibly important to many families to have their forebears' reputations reinstated if they're accused of wrongdoing et cetera, and actually the existing test recognises that in some ways because it says, well look, if it can be definitely stated whether or not they're guilty that's a powerful consideration, but this test weighs also this concept of efficiency so I just wanted to ask you to comment on that. If you look at it that way, what extra does tikanga add?

MS COATES:

So I think you're right, in terms of that broad resonance point, and we've got legislation here which illustrates that. So we've got that pardon for soldiers of the great war act 2000 which is similar to, or is similar-ish to what they referred to in the Statement of Tikanga, kind of raising that hara or the impact on mana in terms of the Rua Kēnana Pardon. So I think, one, there is that

broad resonance point. In relation to the second part, could you rearticulate what you meant there Your Honour?

WINKELMANN CJ:

So the test already includes the notion that if it can be, if the appeal, one of the considerations in working out what's annexed to justice is whether or not the appeal can be definitive in determining guilt or innocence, which tends to suggest that the mana of the person and their hara is already weighing in that test. So I'm just, in that context I'm wondering if you look at it that way, how does bringing tikanga in change our approach?

MS COATES:

So in this particular case – so in the Crown submission they refer to the mana of the appellant, and that that can't fully be restored. In our submission though I think tikanga changes that in terms of looking at it through a mana perspective. So the question before the Court goes to that veracity and safety of the evidence, which is vital in his convictions, and of course there are a number of different outcomes that could occur at that next stage. So the convictions could be upheld, they could be set aside, it could be decided that a retrial would have been appropriate. You don't need to – all of the, so mana has an impact or if – sorry, let me rephrase that. If the appellant is successful in getting those convictions set aside potentially that will have an impact on his mana, even though you cannot necessarily get to the point where it says he is innocent. If that answers your question.

WINKELMANN CJ:

Yes, I think it does. So that would tend to mean the definitiveness of the outcome may weigh less heavily on that analysis.

MS COATES:

Yes.

WINKELMANN CJ:

It's the process.

MS COATES:

We've already delved into it quite a lot, but the next part of my submissions were going to talk to the specific tikanga principles that apply in this particular case. So in our submission the interconnected tikanga principles of mana, whakapapa, whanaungatanga, hara and ea all clearly support continuance in this particular case.

One of the central principles of course is that idea of mana. Would the Court like me to talk to some of the key aspects of it or are you comfortable with the statement of tikanga as it explains it?

WINKELMANN CJ:

Well, perhaps if you just outline it briefly, because then it will spur questions if questions are needed.

MS COATES:

So mana, of course there is no easy translation of the word, there is no equivalent concept in English. But a number of the words that have been used to describe mana is "standing", "influence", "power", "prestige", "reputation", so those are some of the words that align with that idea. It, of course, at both that individual and the collective level, so it applies not just in relation to the individual but also the collective from which, the various collectives potentially, from which they come from. That is related to those concepts of whakapapa or genealogy as well as whanaungatanga, which is that idea of the maintenance of relationships between people. So what happens to the individual affects the collective and vice versa.

Another point about mana that was clearly articulated in the statement of tikanga was that it can apply to non-Māori. According to tikanga – because that's how Māori explain the world – everybody has mana, and that concept of mana has infused more broadly throughout Aotearoa. So in this particular case it's clear that Mr Ellis has mana and his whānau was impacted by the allegations, both him and his whānau were impacted by the allegations and

the convictions and the associated stigma of the offences he was convicted of are of course at that more serious end.

The statement of tikanga also identifies that a hara or a wrong is at play. That is either the offending itself or the conviction of an innocent man. The idea of wrongs is also one that I think is a universal concept that resonates. Now under tikanga where a hara exists an imbalance occurs and there is a need to reach a state of ea or finality to the extent possible. Now when leave was granted that shadow was cast on the veracity of the complainant's evidence and the appellant's convictions and that door was open to probe that hara. Now of course under tikanga death does not close the door, and there is that need to achieve that state of ea, and I referred to before the Rua Kēnana Pardon, and that's an idea that, as you mentioned, Your Honour, resonates more broadly. Death shouldn't affect that need for the issue to be resolved to get to a state of ea. Other factors might, but death doesn't.

One of the things that or one of the elements that the Crown raised was of the course the mana of the complainants, so the mana of the victims, and that their mana can be further damaged if this case continues. In our submissions that misinterprets tikanga somewhat. In the statement of tikanga it was well acknowledged that the victims have mana but they said, "Me haere tonu," this case should continue, and one of the reasons that they said that was that under tikanga it's also because the complainants have mana that the case should continue. Everyone has mana tied up in this. If the matter stops now there will always be that questions lingering whether Mr Ellis would have been successful if he were alive. Having the case heard will assist, or at least to an ea on the question that was raised when leave was granted.

So in our submissions the statement of tikanga could not be clearer that tikanga supports continuance, and I would be happy to answer any further questions on the application of tikanga and then I'll make some concluding comments before handing the rākau or the stick to my learned colleague, Mr Harrison.

O'REGAN J:

The discretion in front of the Court is informed by a number of things and when the Court granted leave to the appellant a significant factor was the fact that there had been such a long delay since the decision that would be subject to appeal and I think in the order of 15 or 20 years. Was that a factor which was regarded as having any significance in the wānanga?

MS COATES:

No, and partly because tikanga is, has that intergenerational idea. So in relation to that for Rua Kēnana example, that happened, I'm not sure of the exact date, but a long time ago and it was still seen as something that needed to be rectified or a better state of ea got to generations later. So the delay was not relevant under tikanga or not given significant weight.

O'REGAN J:

Well, was it considered at all?

MS COATES:

It was considered in the sense that there is that intergenerational aspect but that specific question wasn't put directly to the tikanga experts.

So the final question really is how tikanga should be taken into account and applied in this particular case. So it's our submission that tikanga provides a good framework for answering that interests of justice question and the point at which there is finality. The idea of mana, reputation and standing, that transcends death is one that resonates. It articulates a value and reputation and standing beyond death that is already recognised but that the current law does not value. The idea of a "hara" and "wrong" and the importance of getting to a state of ea or balance and finality is also one that resonates and all of those ideas are implicit within that idea of justice that frames this inquiry.

I just wanted to end my submissions just referring back to that weaving metaphor and the weaving together of diverse threads. Tikanga is a rich source of legal principle that colours the fabric of the common law of

Aotearoa. It always has been or should have been. We are now going through a nation-building process to catch up, to reflect our diverse society that include tikanga as part of our law and in Aotearoa what we are doing now is working out what that means on a case-by-case basis. In our submission, it is time to thread that needle through in a meaningful way. Tikanga principles work well and in this case they support continuance. So it is my submission it is the right thing to do to consider this case so that the matter can be aired and a state of ea reached.

Unless Your Honours have any further questions, that concludes my submissions.

WINKELMANN CJ:
Thank you, Ms Coates.

MR HARRISON:
Your Honours, that was comprehensive and I think answered most of the points that I thought I may have to address the Court on, and I'm conscious also of the time, so unless there is something in the response submissions that the appellant has filed I perhaps would wait until the reply at the end of the other counsels' submissions. I'm conscious that it's a quarter past 11 and we have two other parties to make submissions. So unless there was something in particular in our response submissions that you wanted me to address at this moment?

WINKELMANN CJ:
No, I think that's fine, Mr Harrison. You're right, we did range widely.

MR HARRISON:
In which case I'll stand aside.

WINKELMANN CJ:
Ms Jagose.

SOLICITOR-GENERAL:

Tēnā koutou ano. Your Honours might I pick up a point where you just left with my friend Ms Coates. Your Honour Justice O'Regan's question about the wānanga was that adjudicative. Can I take Your Honours to the statement, the tohunga statement or the Statement of Tikanga. It's the very last paragraph, the second to last paragraph in my submission conclusively answers Your Honour's question.

WILLIAMS J:

Which paragraph?

SOLICITOR-GENERAL:

Paragraph 107 Your Honour. The tohunga say, "Ultimately, we conclude that because a process to come to a final legal position on this issue has commenced, tikanga requires 'me haere tonu' (the case should continue) but we have no position on how the case should continue or the point at which it properly should conclude. That is for the rangatira, in this situation the Court, to decide in accordance with its own principles and rules. Our main point is that, in accordance with tikanga, death itself does not close the door."

So I think the experts did address that question specifically and say, "We are not adjudicating this question. That is for you, the rangatira, in accordance with your own rules and principles, and infused by tikanga and understanding tikanga you come to that conclusion yourselves.? So I just wanted to address that point while it was in Your Honours minds, that question that you put to Ms Coates.

WILLIAMS J:

I guess the difference must have been if they were dealing with a strictly Māori situation, they might well have been of the view that tikanga ought to command the space and this is our view because they were pretty clear about what their view was, but they seem to be saying because there are other factors than tikanga at play here, we now hand it back to you, armed with our view of what tikanga says.

SOLICITOR-GENERAL:

Yes. But it might have been, as Your Honour says, different if this was a matter of custom determining the question, rather than an underlying set of values, mātāpono principles that underpin the framework, as the tohunga say to all custom and conclusory answers that you will find there will be these underlying principles, and that is what, in my submission, this Court needs to take account of when it looks at the common law proposition and does it extend the common law or not. In Mr Ellis' submissions they're pointing out the ground on which the parties, the Crown and Mr Ellis, are agreed, I agree with. That the Crown accepts, of course, it's not even really a matter of accepting, it is the law that tikanga forms, is a source of the common law, forms a part of our common law. But in all, in our whole common law tradition and method the way in which Judge-made law changes what we know to be the law, is incremental and cautious and usually on a case-by-case basis, which will then help us in the future through precedent to come to the next cases, and I'm sorry to, I'm obviously not intending to lecture Your Honours on such a basic point, but I think it is relevant here because this is actually a narrow point we come to with the in 2020 in Aotearoa what I would submit is a pretty unexceptional submission that tikanga is a source of law for this country. How that should be applied, and what that is, are the points on which we differ from Mr Ellis and his counsel. That is where I would like to spend my time with the Court, unless you want to ask me any questions on that sort of starting proposition.

GLAZEBROOK J:

I don't read paragraph 107 as saying that tikanga says it's a decision for us. I mean effectively they've said this is what would happen in tikanga, and then says, well, it's a decision for you because this is not, we are not the adjudicators, so I can understand the submission that they don't say they're adjudicators and that in fact what I've said about being an expert witness is, but an agreed statement of an expert witness is right rather than adjudication, but I don't read that as saying tikanga says we decide. In fact I'd be surprised if that was the view because if it was purely an issue of tikanga then they'd say they should decide, quite rightly I would have thought.

SOLICITOR-GENERAL:
In my submission that is what this statement says but can I go to a different point in the statement to answer that question further, Your Honour, at paragraphs 62 and following, and this is where the tohunga are referring specifically to how do these principles apply to the question of whether the appeal should continue. They say at 55, "We are careful not to consider the substantive merit of the appeal," of course, but they're still not answering Your Honour's question, I understand that. So at paragraph 59, and you've heard something of this already, the concept of "hara" in its simplified form, here I would say, relevantly, the commission of a wrong, the transgression of a tapu, the violation of tikanga resulting in an imbalance, and what is required is the restoration of that balance achieving a state of "ea".

There's an example there that Your Honours will have read and I don't need to go through where the kuia is bitten by the dog, but I want to draw your attention to paragraph 62 and following.

The relevance of the story to this case, "Is that the appeal, as currently granted by the Supreme Court, is unresolved," leave has been granted, currently granted by the Supreme Court, is unresolved, "and a state of ea has not been achieved. Further, it is unclear where the hara sits." As Ms Coates has already said, it may be that the hara was the offending against the victims or it could be the conviction of Mr Ellis as an innocent man. The tikanga position does not pre-determine an outcome on this point.

And, "In terms of the question of continuance, because the Court has already granted leave for Mr Ellis to appeal, the process of addressing a hara is already underway and a further hara may be committed if the matter is not resolved or brought to a conclusion."

64, "the hara affects Mr Ellis and his family and the victims and their families", and I am grateful to my friend for indicating that that is an uncontested point that the victims and their families are affected here, a hara exists against them

because this matter is now left undone. Where an imbalance still exists as seems to be the case here, it needs to be further addressed to achieve ea.

Now, Your Honour, Justice Glazebrook's question is being answered here. "The tikanga position supports the idea of further probing and examination and action with a view that this may assist in resolving the matter and getting to a state of ea." So the tikanga position is that further probing is required before the state of ea can be reached, and in my submission that is for this Court and in my submission this Court could say today this is the probing, we take the tikanga advice, we use the framework, we look at the common law position, we probe the question now, today, in this hearing and ultimate judgment, and we conclude that this matter should not continue to a full hearing. That would, in my submission, be consistent with the tikanga position as set out in the Statement. It supports the idea of further probing to come to an end, to close the sequence.

GLAZEBROOK J:
I thought it was to come to an end to come to a view on the hara, not on the view of whether the hara should or should not be probed, which is the submission that you're making is the hara, after we've looked at it, should no longer be probed and that's in accordance with tikanga which was not my understanding of the statement of position under tikanga that we've got.

SOLICITOR-GENERAL:
That is my submission that that is what the tikanga tells us. That is what this statement tells us, supports –

GLAZEBROOK J:
Well, you might need to show me a bit more clearly why that is the case because further probing, as far as I understood it, was to deal with the hara, not to deal with whether there should or should not be further probing, which is your submission is the second one.

SOLICITOR-GENERAL:

The submission is the second one and it comes out of those same paragraphs, and I won't read them again, but the reasoning that the Crown takes from that is this. Prior to the Court giving leave, the matter was in a state of ea. It's quite clear from the statement from the tohunga that it doesn't matter if one party or another is still unhappy with what happened. Where the rangatira has said, "This is it. This is the answer," then that is ea. That is the closing of the sequence, and it was done for nigh on 20 years after the Court of Appeal's second look at this matter. In my submission, this matter was in a state of ea.

WINKELMANN CJ:

Well, what's said against you is that it's not simply a matter of Mr Ellis being unhappy with the result, he actively agitated against it, so it wasn't in a state of ea.

SOLICITOR-GENERAL:

Well, Your Honour, no doubt that is said, but that would turn the criminal law into a very unsettled state. If after conviction and after, in this case, two appeals unsuccessful against that conviction, the person's not bringing a further appeal until some 20 years later but their own view that they are innocent, cannot upset the fact that they were convicted and that we must say in our system of law that convictions until overturned are the answer.

WINKELMANN CJ:

Yes, I know, but I was just responding to your proposition that things are in a state of balance and set against you is that they weren't in a state of balance. It wasn't just that someone was unhappy, they were actively agitating, so balance had not yet been achieved.

GLAZEBROOK J:

Can I also point that, as I understood it, that foundation of this is even if it was in a state of ea before this Court granted leave, because this Court by granting leave acknowledged the need for further probing, that at that stage

the process of that further probing had been started and should be finished and should not be interrupted for all of the reasons that Ms Coates discussed by the death of Mr Ellis.

SOLICITOR-GENERAL:

I accept that this what this hearing is about and this Court might well come to that view. But it is not, in my submission, it does not necessarily follow from the tikanga that we have here that that is the answer. And if I can point Your Honours to paragraph 104 of the written statement, it might shed light again on this question. At 103, the point I've just made, "We note the state of ea can still be reached even when one or both parties involved in an incident remain disgruntled with an outcome." And the example given there at 104, "In an internal hapū dispute the process for achieving a state of ea might be the rangatira to pronounce what the outcome should be. Once the rangatira has pronounced that course of action, even if one party is still unhappy and does not consider the result fair, the matter can still be ea," and that is what our criminal justice system has delivered to date, a conclusion.

GLAZEBROOK J:

Well, the argument against you would be yes, it did, at the time of the convictions and at the time of that second appeal being dismissed, that Mr Ellis was unhappy with that was the end of the matter. But the argument against you is that now there's been that probing that's been accepted by this Court as having been opened, that that probing has to be brought to a close. And it's not that you don't probe any further because there isn't an outcome at the moment, I think, as Ms Coates said, it's not an outcome for either the victims or for Mr Ellis in the sense that the fact that leave has been granted means that the victims are left in a state of a Court has looked at this and said further probing should be needed. Equally Mr Ellis and now his whānau have been left in exactly the same position.

SOLICITOR-GENERAL:

I accept Your Honours' point that the door being opened with the granting of leave, as the experts tell us, there is a further hara will be committed if

something is not done to complete that sequence, yes, the door is opened. The point at which I disagree with Your Honour, with respect, is how that door might be closed. Is it from hearing a full appeal? The Crown says no, the door can be closed by this Court now taking an interests of justice approach to the question, what is best in the interests of justice to be done? And, in the Crown's submission, once those principles are brought to bear, infused with tikanga, all the other relevant circumstances of the case, and I'll mention just before the break the enduring impact of the hara on the victims and their whānau, the fact that continuation won't conclusively resolve the issue, of the full appeal, and the practical obstacles continuation would bring, in the Crown's submission are determinative and the ends of justice, we say, are met by revoking leave. Having looked, having probed now, with tikanga in the frame, it's no longer the case that death alone closes the door. Is there something else that means the door should be closed? The Crown says yes, there is.

GLAZEBROOK J:

I can understand that submission. The submission I was having difficulty with is that tikanga says that you can end a probing by deciding not to probe. I can understand the submission that there are other factors that must be taken into account that might outweigh the tikanga in this particular case, I just wasn't sure what the…

SOLICITOR-GENERAL:

And I might not convince Your Honour, but can I just clarify my submission? It's not to say you can close the door without probing, I say this is the probing, this hearing in which the Court comes to the question should we continue this to a full appeal now knowing actually rather a lot about what the appeal will bring. You've got the expert evidence, you've got Mr Ellis's full written submissions on appeal, you have the tikanga understanding that is open and the Crown's submission to say death alone doesn't end this. This is the probing. So I accept Your Honour's point to the extent that the submission isn't that you can finish it without probing. That doesn't mean a full appeal. Your Honours, I see the time. Perhaps that's a good time for a break?

WINKELMANN CJ:

Yes, we'll take the morning adjournment.

COURT ADJOURNS: 11.31 PM

COURT RESUMES: 11.48 AM

SOLICITOR-GENERAL:

Thank you Your Honour. I was at the point of this is the probing. This Court is now probing this question because as the tohunga tell us –

WINKELMANN CJ:

You're saying it can be the probing?

SOLICITOR-GENERAL:

It can be, yes, thank you Your Honour. As the tohunga say death alone or death itself hasn't closed the door. Your Honour Justice Williams engaged in a question with my friend Ms Coates before the break about, a subtle point that, if I may, that I'd like to pick up on, is to question about I think Your Honour was saying tikanga doesn't tell us that death is always irrelevant and with respect if that was the comment then I agree with it. It's not saying that, I don't understand tikanga statement to be saying, makes no difference. It might well practical differences and differences of principle. The Crown's position prior to this hearing had been death did make all the difference. Death, that was it. There was nothing, there was no interests left to balance in the question of whether the appeal should continue after death. Now the Crown says there is something that continues. We accept that an interest, that a tikanga look at that question allows the common law to develop to the point that there is something, there is interest both of Mr Ellis and of his whānau to consider. That is, of course, just one aspect of the case, and as is recognised by the tohunga, the victim and their whānau also have mana and interests that need to be balanced and considered when this Court asks the question, "What best serves the ends of justice now?" Victims and their families, victims, now adults, and their whānau continue to bear the intergenerational shame of the appellant's crimes, the hara that they have suffered, as well as the stigma they face from the continued public challenges to their credibility, despite a criminal system that has, at least three times, examined those very same challenges and found them wanting, found the

challenges wanting. That is a very strong interest in finality and resolution that this Court has to consider, in my submission, and it is relevant that the appellant's challenge that he wishes to bring, that he has been given leave to bring, is the same that has been previously scrutinised and rejected in pre-trial applications by the trial Judge, by the jury in many of the convictions that they, or charges that they found proven, twice on appeal and in a Ministerial Inquiry. These are not light matters to be dismissed on the basis that the interests of justice might require, having started a process, we need to run it all the way to the end, and the Crown submissions the interests of the victims and their whānau are weighty matter for this Court. Yes, they need to be balanced against the continued interest of the appellant and his whānau, and the Crown submits that they outweigh that interest.

One of the significant reasons for saying that is that the appellate court, this apex court, if it hears the appeal, cannot come to a final position on guilt or innocence, and that is a very relevant factor, in my submission, but also through the cases that, the common law cases that have looked at this question of posthumous criminal appeals. If this Court hears the appeal to the end, at best, for Mr Ellis, the Court will set aside one or more of the 13 convictions. Let's say, at best, it sets them all aside. In my submission that will forever leave this matter, for the victims, in a state of unbalance, and the hara that they have suffered will forever be left unattended, unprobed because as a matter of fact Mr Ellis cannot be retried. Again that is a significant matter in the weighting of all of the factors that go to the interests of justice. And the appellant acknowledges in his submissions that an appeal will not conclusively resolve the question of guilt or innocence, and it can't, of course, in this case. There might be, of course, a different case in which there is some specific evidential or other matter that would allow this court to come to that view. DNA evidence, I think, I made that submission to Your Honours last time, but in my submission a further appeal will not conclusively resolve the question at the heart of the appeal.

The first point about the interests of justice factor. The second one, and it is a repeat of the submissions that the Crown made I think it must have been last

year in this question, that the appeal itself is weak and the grounds are not new, and I don't, I anticipate I don't need to go back through that argument, Your Honours. I think you have it from last time, it's set out in the written submissions.

GLAZEBROOK J:
Well it was also an argument that was lost when leave was granted so I'm not sure that it is at all worth going back over that.

WINKELMANN CJ:
I think you indicated that last time.

SOLICITOR-GENERAL:
Yes.

WILLIAMS J:
Well I guess you can say that these factors are matters that would or ought to be relevant in tikanga terms. That if the grievance, let's call it that, is a weak one, tikanga is less likely to be sympathetic to its continuation, that's just common sense really. But I'm not sure whether that gets you any further than you already are.

SOLICITOR-GENERAL:
No, thank you, Your Honour, I think that's right. That submission is already made and understood.

WINKELMANN CJ:
But the point is that the Court has satisfied itself there is sufficient merit to justify the grant of leave.

SOLICITOR-GENERAL:
Yes and my submission is that if something did happen, and that appellant died, and the Court does have to think about so, what now. Because it isn't the case that the death of a criminal appellant is simply not relevant and the

appeal will roll on unimpeded. The Court must stop and think, that is what this court is doing, and in my submission, the Court must again weigh in the balance the interests of justice, because there will be times in a criminal appeal, maybe in this one, where matters come up which simply cannot be deal with in the absence of the appellant.

WILLIAMS J:

I guess it'll come down ultimately to this, Professors Mead and Temara and the others who participated said now that you've started this process tikanga says you've got to keep going in order to attempt to get to ea. Having got to that point, in tikanga terms, leave having been granted, is death a reason to stop in tikanga terms? That's what we're talking about, right? Isn't a pretty clear steer from the tohunga that in this case it ain't? Having started, don't stop. If you hadn't started, may be different. But having started, don't stop, because death is less important as a locked door in tikanga Māori as against tikanga Pākehā, and given that tikanga Pākehā says in terms of the leave grant that the appeal should go ahead, you've got a bit of an uphill walk, haven't you?

SOLICITOR-GENERAL:

Well, Your Honour, certainly the tikanga issue or question, sorry, the tikanga answer, is that having opened the door you need to close it. You need to do something rangatira to close the door. But in my submission it's quite express in this statement that there's no position taken on how the case should continue or the point at which it should properly conclude. Tikanga is not being given as the answer to that question. That question is for you.

WILLIAMS J:

But my point is really the arguments that you are running now are really the same arguments that didn't work before Mr Ellis died and the tohunga said death is not fatal, excuse the bad – death doesn't end it in tikanga terms. What are you left with? You have to say, well, tikanga doesn't end it but it weakens the interests involved. The problem is the tohunga don't really agree with that.

SOLICITOR-GENERAL:

Well, my submission to that answer is to say that death is not necessarily the end. In my submission, death is relevant to the proper running of an appeal. It is actually a relevant factual matter that the appellant is unable to answer any new matters that might arise.

WILLIAMS J:

Yes, I'm pretty sure tikanga would agree with that.

SOLICITOR-GENERAL:

It's also relevant that at the end of that process if those convictions are set aside it has to be left in that state, and I take from the statement, so this is my submission, that tikanga values and asks the process, the rangatira, to help get to ea as best it can and in my submission, although I accept I'm now repeating my submission, leaving this matter to the end of an appeal which at best leaves the victims with unanswered allegations, unanswered serious allegations which can never be put or tested, tells against continuing.

WINKELMANN CJ:

Which is existing in, consideration exists in the current common law test if we adopt *R v Smith*.

SOLICITOR-GENERAL:

Yes, that's right, and Your Honour, the Chief Justice, was asking a question of my friend about sort of the efficiency of the common law. Of course, the common law, I'm hopefully not mis-repeating what Your Honour said, as I understood it was that there is something in the common law helping the system understand what's going to happen next. I accept my friend's answer that this isn't a – there's no floodgates here. This is a very specific, quite narrow point at which in the apex Court further leave has been given and then the appellant dies. I have to accept that those very narrow facts that come in, there isn't a floodgate question. But finality in the law is a critical part of our common law and of upholding confidence in the judicial system. If the next step going all the way to the end actually goes no further than leaving things

uncertain. In my submission, tikanga allows you to stop it now, to shut the door now and to say, “That is it. There is a weak case ahead of us. At best we leave matters unbalanced, we revoke leave, we will not hear the appeal,” that is the Crown’s submission properly and –

WILLIAMS J:

The logic of that, unless you’ve got a slam dunk like DNA, the logic of that is that death would always end the process because you can’t ever re-try if they’re successful.

SOLICITOR-GENERAL:

That might not be the only case, it might not be a slam dunk like DNA, it might also be, as in *Jetté*, well, I suppose it’s the same sort of analogous slam dunk to Your Honour’s example, where the question, where it became evident after death that the single strand of evidence or the single piece of evidence, his own admission, on which he was convicted couldn't stand in the fact of the police officer’s confession that he had lied under oath. So there might be a, but I think that is similar, analogous to the DNA. There might also be time when posthumous appeals go on because there is a greater question to be answered…

WILLIAMS J:

You mean for the general law?

SOLICITOR-GENERAL:

For the general law, yes, that might be another reason, but for the person.

WILLIAMS J:

Unless the evidence either demonstrates conclusively guilt or innocence, there’s no way posthumous appeals will proceed on that analysis.

GLAZEBROOK J:

Can I just add to the mix when you're thinking about that, what about a major issue in terms of fair trial? So perhaps not being allowed to call any defence evidence or having major witnesses excluded –

SOLICITOR-GENERAL:

Yes.

GLAZEBROOK J:

– which may, which would never resolve the question – well, it could resolve the question in some instances but…

WINKELMANN CJ:

And is it fair, is it's a serious, something serious that goes wrong at trial, in those circumstances the person who hasn't had a fair trial, and although it may not be on this counterfactual possible to say whether or not they're guilty or innocent at the end of it, if they haven't had a fair trial where does the presumption of innocence weigh in that consideration?

SOLICITOR-GENERAL:

Well, I say several things to that in sequence. To Your Honour Justice Williams, is it only guilt or innocence, is that the only question? And I answer to that what about if there was some transcending issue. It might be a separate point that Your Honours Justice Glazebrook and the Chief Justice are now asking about, or what about some major procedural trial error that, I could put that under the same head as some transcending issue that needs to be dealt with, or put it into a third head where fair trial, which is so critically part of not just the individual person's experience of trial but so much part of our system of justice that fair trials must be what is delivered and seen to be delivered, whether that's a transcending issue or the individual issue perhaps I don't need to put it into a particular box. So we can see three reasons already why a posthumous appeal might continue: the slam dunk guilt or innocence point from Justice Williams, a really clear and obvious fair trial problem – now just to address that point, here, in my submission, that is not the situation

here, because in the Crown's submissions, as Your Honours know, these same challenges were put pre-trial at trial to the jury, to Court of Appeal one, to Court of Appeal two and to a civilly put-together Commission of Inquiry, and have found to be wanting as challenges to the conviction. But, in any event, I accept as a matter of principle that if there was something that so plainly showed a fair-trial issue, posthumous appeal might continue. And the third point being, you know, there might be some transcending issue for the general law that needs it to continue.

In all of that I say this matter is a small, narrow – sorry, not small – a narrow point and, as with our usual tradition of common law, this Court can address this matter without necessarily having to pin down every other aspect of what might happen when a criminal appellant dies. Because the statute might be – well, I'm going to a separate point – the statue might be in the way, the criminal appeal being a matter of statutory right there might be all sorts of steps that the person needs to take. Again, I come back to cautious and slow incremental adaptation of the common law, accepting tikanga is the law of this country and it can be accommodated here. I come to a different point than my friends in the conclusion and how having probed that this Court should decide.

WILLIAMS J:
I guess then the two propositions are in terms of getting to ea you would say if you can't get to ea the process should stop. What ea might be, might be the subject of debate. But anyway if you can't get to ea on the facts the process should stop, and that's what you say is the situation here, and –

GLAZEBROOK J:
I think that's subject to fair trial and systemic issues I think you've said, isn't it?

WILLIAMS J:
That's the next point I was going to make, that there's ea for the case and ea for the law, that if a matter needs to be resolved because it's some fundamental right, such as the right to a fair trial, was abrogated, or there's an issue, a transcendent issue, as you say, at large that needs to be resolved,

then there's an ea requirement for those things too because they're fundamental to the common law and not necessarily unfundamental to tikanga. How's that?

SOLICITOR-GENERAL:

I can accept almost all of that, Your Honour, except if I can go back to the start when Your Honour said if we can't factually get to ea then we should stop only to interpose there that that itself is ea. That itself, if the rangatira say, "No, this is it," that is ea. But I accept that it might be ea for the person, might be some point for the law or for criminal justice and for confidence in that system that does play into the question. None of that, I say, plays into the question here. This is, in my submission, a case where a person continues to say, "I challenge those convictions."

GLAZEBROOK J:

Can I just check where fair trial and other – where the line is? One can understand fair trial with denial of natural justice in major procedural errors but if in fact, and I'm not – perhaps take something totally outside of this case where there's been a retraction of the major evidence given by a complainant in a case and a retraction that doesn't appear to be on its face coerced or anything of that nature. There is an issue then as to the evidence that one was convicted on and whether in fact there's a fair trial. Well, another example may be absolutely flawed informant evidence in a prison informant case that's now shown to be flawed. It's difficult to make that distinction, and of course one might still never know whether in fact that informant's evidence was true or not or the other evidence was sufficient to convict. So one mightn't be able to have a –

SOLICITOR-GENERAL:

Well, I mean I have to accept that those might all play into a question in a particular case although I'm bound to say that here we are really only addressing this narrow question and I don't think that the Crown should make the submission, nor should the Court determine how we deal with this in every

other case because that isn't how the common law works. We creep ahead in our common law tradition cautiously and in circumstance by circumstance.

WINKELMANN CJ:

Yes, but the law still looks around it to work out where the path they're setting out on might end.

SOLICITOR-GENERAL:

Yes, and some of the factors that are relevant here are the 30 years that have passed since trial, the nearly 20 years that have passed since the last appeal Court looked at it. Some of the example that Your Honour, Justice Glazebrook, was putting to me, well, I actually think it's not helpful for me to try and put them all into a frame here but some of those questions you might say, well, a 30 year old thing that we might have thought on day 5 after that trial bothered us but 30 years later we let it lie, we can't really actually usefully extemporise on how many different situations there might be where the Court says actually that's a fair trial point for which we are not prepared to leave it alone. I accept that those situations will arise.

WINKELMANN CJ:

You're quite right, we can't try and bolt it all down into place.

SOLICITOR-GENERAL:

I'm conscious of time, unless Your Honours have got anything else for me?

WINKELMANN CJ:

Are those your submissions?

SOLICITOR-GENERAL:

Those are the Crown submissions. Kia rite, ki te pai o te Kōti, as the Court pleases.

WINKELMANN CJ:

Kia ora.

WILLIAMS J:
Kia ora.

WINKELMANN CJ:
Mr Mahuika.

MR MAHUIKA:
As the Court pleases, tēnā koutou. Perhaps before starting I was listening to the last exchange with my friend. Te Hunga Roia Māori is of course an intervener in this appeal. We do set out in the submissions a view on how we think the tikanga will apply, although of course have no stake in the merits of this, and our role is to be of assistance to the Court. There are two propositions that we would advance. The first proposition is that given that tikanga is recognised as part of the common law of New Zealand in our submission it is clearly relevant and secondly, as we said in our written submissions, given the tikanga we say are engaged in this situation, we think that they should be given considerable weight by the Court.

The way that we have proposed to deal with the submissions is that my friend Ms Irwin-Easthope, I almost got her name wrong again, was going to deal with that. She had a few additional points, although the majority of that has already been covered by my friend Ms Coates, and I was then going to deal with the question about how might the tikanga be applied, or how might the Court look at it. But also conscious that there has already been a lot of dialogue. We're very much in the Court's hands as to how you would wish us to proceed.

WINKELMANN CJ:
No, we're happy for you to proceed as you proposed.

MR MAHUIKA:
Thank you Ma'am. In which case I will swap places with my friend Ms Irwin-Easthope to deal with the first of the two questions about the

relevance of tikanga, and then I will come back to deal with the second of the questions.

MS IRWIN-EASTHOPE:
Tēnā koutou e ngā Kaiwhakawā, as Your Honours please. Like my friend Ms Coates I'd like to start my submissions with a brief mihi e te reo, in Māori, and then I'll briefly translate that and then move into what I see is two very discrete submissions that I hope won't take me too long at all.

I te tuatahi, kei te tautoko au i ngā mihi kua mihia. Ki a koutou, kua huihui mai nei. Ki ngā whānau o Mr Ellis, ki ngā whānau o ngā kaiwhakapai, ki ngā whānau o te Karauna, ki ngā whānau o Te Hunga Rōia Māori, tēnā koutou, ōtira, tēnā koutou katoa. Tēnā koutou.

E rua aku kaupapa i tēnei wā. Ko te tuatahi, ko tēnei mea e pā ana ki te tikanga i roto i te ture, ko tēnei mea tuatahi. Ko te mea tuarua, he aha ngā tikanga ki roto nei?

So to Your Honours by way of brief explanation I have acknowledged those here in the Court and I have acknowledged Your Honours and have said that I have two very brief submissions to make, and the purpose of, as my friend Mr Mahuika outlined of this first submission is to really touch on the place of tikanga within the common law and now I'd like to tighten the strands of the whāriki that Ms Coates has already laid down and perhaps not –

WILLIAMS J:
A little loose for you were they?

MS IRWIN-EASTHOPE:
No, of course not Your Honour. Of course not. But certainly not wishing to unwind. So where I'd like to start though is to make some discrete points that I think Te Hunga Roia particularly has a stake in, in relation to this particular matter of tikanga in the common law, so that's the first point, and that point we've actually termed as the "orthodoxy" submission.

The second point is very briefly to touch on the tikanga that are at play but recognising that my friend, Mr Mahuika, will take you to those in much more detail and grapple with how they may or how we say they apply in this case and how we say actually they should be afforded considerable weight in the context of the tikanga at play, and so taking the whakataukī, the proverb that my friend, Ms Coates, began with with the whāriki and the weaving and the importance of the strand of tikanga within our common law as actually something that is now orthodox for our common law, and so that's our fundamental starting point but it is one that Hunga Rōia has a particular stake in, as I've said, but also is very important for Te Hunga Rōia Māori.

The second, don't want to split the strands, but acknowledging that the tikanga at play here are of fundamental importance within Te Ao Māori. We're talking about whanaungatanga, the glue that holds our whānau together, we're talking about mana, and so that is something that within that strand places considerable importance within the context of this particular question.

Your Honours, I won't take you to the Statement of Tikanga but perhaps highlight for you to go back to if you wish that this was expressed very clearly by the tikanga experts, by the pūkenga, by the tohunga, at paragraphs 52(c) and 52(d) in particular, and what Te Hunga Rōia Māori says about the importance of those statements is that it's a critical lens for the starting point, and so when we're talking about the whāriki as the framework, where do you start, and what we say is the whāriki is so critically imbued with tikanga Māori that that is the appropriate starting point for the analysis and so when you're thinking about what is the common law, well, the common law is imbued by tikanga and –

GLAZEBROOK J:

Sorry, can we, just to totally understand that, can we perhaps go to that statement so I can – just to –

MS IRWIN-EASTHOPE:

The Statement of Tikanga? Sure.

GLAZEBROOK J:

Yes, just exactly what you were referring us to.

MS IRWIN-EASTHOPE:

Sure. So that was at paragraphs 52(c) and (d). And so what the tikanga experts there, in my submission, are doing, Your Honours, is saying, and I will read them out, "We support tikanga as one of the many sources of the New Zealand common law which informs the common law's development and evolution;" and, "We support the proposition that tikanga principles should embed and influence the general development of applicable legal principle in Aotearoa, that is, we think the common law should not only draw on principles and precedent from the English legal tradition but also more generally be able to draw from tikanga principles;" and so what Te Hunga Rōia Māori submits is when we're thinking about this whāriki, which I think is a useful way to conceptualise our common law in New Zealand, that the thread of tikanga is there. And from a conceptual perspective, that matters because it changes the starting point from which we start and if we get to the point where, of course, I don't wish to make this obvious submission, but, of course, the common law applies equally to us all, then in that regard, and we haven't spent too much time on this matter, Your Honours, but it is something that seemed to at least have some debate in the first leave appeal hearing then it makes the matter much less significant as to whether or not that person has whakapapa Māori. If the starting point is that the common law is imbued with tikanga then it then becomes a point of application as to weight and how that's applied, and perhaps if I could close that point while still acknowledging where we've got to with the whāriki and the strands and think about it perhaps slightly a little bit differently in terms of the common law itself and what that means for us as people to whom look to the common law to solve problems and who it applies to. Actually, he waka eke noa. This is something that we can all embark on. This is a canoe for all of us and there are different facets of that. And so that's the first principle submission that I'd like to make to

Your Honours on behalf of Te Hunga Rōia Māori which, of course, builds on what actually both my friends Ms Coates and Ms Jagose have said this morning, but perhaps puts it as a starting point proposition.

GLAZEBROOK J:
Can I just check with you whether you would accept, and just perhaps going back to Ms Coates' three or four ways, I can't remember, three I think, as to how tikanga might be relevant. Would you accept that in certain circumstances, and especially the first way I think where they were legal principles what whakapapa Māori might be actually important in terms of how tikanga applies?

MS IRWIN-EASTHOPE:
Yes, I would agree with that Your Honour. I would agree with where you have situations where, particularly the recognition of legal rights that flow from tikanga, I would agree with that submission, yes.

What I would like to do is just highlight some specific points in the case law that give weight to that submission, or at least the one that I made earlier, but again I don't particularly think I need to take Your Honours there, given we're talking about *Takamore* and *Ngāti Apa*. But certainly from Te Hunga Roia Māori's perspective in terms of the way in which the previous Chief Justice framed the vital rule of the common law and applying insofar as applicable, of course that's emphasised at *Ngāti Apa*, and that's at paragraph 28. *Ngāti Apa* I think is in a range of bundles before you, and of course the very well cited proposition now from *Takamore* that the evolution of common law in New Zealand reflects the special needs of this country and its society.

Your Honours, that is what we say is the orthodox position in the first part of my submission before you. The second part, and I would like to be careful not to traverse into my friend's strand of the argument, Mr Mahuika, is just to emphasise this point, that all parties are in agreement that the relevance or that there is relevance here of tikanga for the Court's consideration, Mr Mahuika –

WINKELMANN CJ:

Can I just take you back to the first part. So I think it's your submission that makes the point that this is a continuity, the role of tikanga in the common law and that there was a short period of time, historically a short period of time in which we diverge from that but we're now just coming back to the situation that applied in the first 50 years of European settlement of Aotearoa.

MS IRWIN-EASTHOPE:

Yes, Your Honour, that is the submission that we're making, and why we make that in a natural progression argument, an orthodoxy argument, is that we seem to have, or almost be coming back full circle in acknowledging the phases that are stepped out in *Lex Aotearoa*, I think where we're in a different phase but we're paying perhaps more respect to that first phase than the second phase did.

WILLIAMS J:

That demonstrates, doesn't it, the pragmatism of the common law. It's not rocket science why tikanga was applied rather thoroughly in the first 50 years because the power dynamic between the two founding races was so very different to what it was for the following 100 years. What's happening now following the Treaty settlement process is a shift in that dynamic, and the law is responding to that.

MS IRWIN-EASTHOPE:

Absolutely Your Honour, and perhaps I would add one more thing to that. I think the common law is seeing real value in the process that tikanga can provide, and perhaps we've talked a little bit this morning, and particularly your conversation with Ms Jagose, about certainty and finality, and I think what tikanga does provide for in particular circumstances is a process by which you can get to a state of ea, and now the tikanga experts are very clear that ea doesn't necessarily mean that everybody is happy, but a process has been undertaken and that is stopped, and so I am transgressing a little bit into the second part of our argument, but one thing that I would like to perhaps emphasise before handing over to Mr Mahuika is the importance of the

tikanga that are engaged in this issue, and so we've said tikanga are relevant. The experts, the tikanga experts, and this is at paragraph 28 of our legal submissions, which is at paragraph 19 of the statement of the tikanga experts, is in their view how they frame relevance of tikanga, or the tikanga that are engaged – sorry, Your Honours, that's paragraph 19 of the statement of experts – is mana tangata and, by implication, whakapapa whanaungatanga, is impacted by the allegations of hara. Consequently this continues after the death of the person. And so what the tikanga experts in our submission are telling us is that here are the tikanga that are relevant and death – to pick up on Your Honour Justice Williams' point earlier – does not close that door.

I'd like to perhaps now hand over to Mr Mahuika because that is a nice segue point for our argument to move on from, but I'm happy to answer any questions, if there are any, on the first, on the two points that I've noted.

WINKELMANN CJ:
Thank you, Ms Irwin-Easthope.

MS IRWIN-EASTHOPE:
As Your Honours please.

MR MAHUIKA:
May it please the Court. I've got the task of perhaps discussing the, not perhaps, but of discussing the second of the propositions: so, if tikanga is relevant, how is it relevant? And I'll admit that there were some challenges in considering this point, partly because when I turned my mind to it I thought about it as a Māori person would think about it, and then felt like I had to unpick that somewhat to explain it and be able to discuss.

So the first proposition however is that it is uncontroversial that tikanga is relevant and it is part of the common law of New Zealand. The challenge with it has consistently been around the application of that principle. There was a challenge for the Court in *Takamore*, and there is clearly a challenge for the Court in this current context.

But the proposition however is that if the common law is to, is indeed involving so that tikanga Māori is a relevant consideration, then at some point it's meaningful in the development of legal principle and in the future development of the common law, so it's not just a factor that gets considered alongside a number of other things, it is actually something which is capable of leading to a meaningful conclusion in a criminal case such as this. And I actually don't know whether this is a good point to make or not, but I'm going to make it and we'll find out, and that is that, so we do look to overseas jurisdictions, we look to what they say in the Courts in Australia, we look to what they say in the Courts in Canada or the United States, other common law jurisdictions, not necessarily societies that these days are that similar to New Zealand other than by virtue of the fact that they have the same colonial heritage, but we seem to be, in my respectful submission, more uncomfortable with grappling with how tikanga might apply in the law of New Zealand when that is in fact indigenous.

Now the example I thought about was – and I know this is not meant to be literal – but the law relating to reasonableness, and the classical statement of it is about what would the reasonable man on the Clapham omnibus think? And when you think about the origin of that statement it points to some of our challenge because we're talking about a man on a bus in Clapham, and so that talks to the, sort of the origin.

O'REGAN J:
I think that was changed in New Zealand to the man on the Island Bay bus, wasn't it?

MR MAHUIKA:
Well, I'm not aware of that.

WILLIAMS J:
Should there be such a reasonable man on that bus.

O'REGAN J:

Potentially a Māori man.

WINKELMANN CJ:

That's a new challenge.

MR MAHUIKA:

I'm not aware of that, Sir, but I'm happy to take guidance on, and I do that to illustrate that this is one of, this is the issue that we're grappling with here, is that we have the origins of the common law that we have inherited, and we are trying to apply it to uniquely New Zealand circumstances.

WINKELMANN CJ:

So your point is that we should be careful not to just to make tikanga squeeze into tiny little gaps. It should be given full weight not just something which is constantly being balanced away.

MR MAHUIKA:

Yes, or it's even assumed that it is something that ought to be balanced.

WINKELMANN CJ:

Or distorted by that balancing.

MR MAHUIKA:

So there are two ways that you could look at tikanga in my submission Ma'am in the present case. So first of all, as my friend says, there are fundamental notions of tikanga that are engaged here. Mana, whanaungatanga, whakapapa and they're fundamental because they engage matters to do with a person's reputation, but when you talk about whanaungatanga and whakapapa you think about a person as being not an individual that stands alone by him or herself, but you think about a person as part of a community of people. So you think then about reputation, not as something which is entirely personal to that person, but you think about reputation as something which does go beyond that individual to the community that he or she exists

within. And it is perhaps, you know, one of the things that led the tikanga experts to say, look, death in and of itself doesn't bring this matter to an end because although the person against, well Mr Ellis who was convicted of these very serious crimes, is no longer alive. He has family and other people whose reputations, whose mana is also affected by the fact of those convictions, and so thinking about it from that point of view you then approach the question of death differently, or you think about the impact of death differently than you would if you were taking an entirely personal approach to the issue. And, in fact, the common law itself doesn't take that view when it comes to the matter, the issue with continuance anyway. *R v Smith* is authority for the notion that actually there is a discretion to continue after a person has died, and the test that gets applied in that situation is the interests of justice.

So even though, and I recall from the previous hearing some questions by Your Honour Justice Arnold about the personal nature of the criminal law, and of course, you know, that's true. Sanctions are visited on an individual person for his or her acts, but notwithstanding that the common law even recognises that there are circumstances when an appeal might continue. So even though there is that personal character to it, the common law itself is amenable to the idea of in certain circumstances a proceeding continuing. Defamation is a similar situation. I've read the case very quickly, that is the case, Ma'am, that you sat on in the Court of Appeal. The situation there is that you can have an appeal after a person has passed away. The reason that the appeal wasn't allowed in that instance was there was no verdict, so therefore you could not have a trial in respect of the particular issue, but the issue of death in and of itself wasn't something which brought to an end the, even a defamation claim. It was about the circumstances needed to be considered in the round.

So there are two ways, in my respectful submission, that tikanga can be looked at here, and excuse me I am not…

O'REGAN J:

Can I just ask you about the tikanga applying to the victims and their whānau?

MR MAHUIKA:

Yes.

O'REGAN J:

As I read your submissions you're really counterbalancing the tikanga in relation to the appellant with the common law, but there is that third factor in this case, isn't there?

MR MAHUIKA:

Absolutely Sir, yes. Yes, and I will come to that aspect of it. I was going to say that there are two ways that you can approach the issue of tikanga here. So you can take a limited view of it, so in other words what is the impact of the death of the appellant on the continuation of this matter, given that a large number of the other issues that have been debated here have already in fact been considered in the context of the granting of leave? So the question is, you know, does the death of the appellant in and of itself bring this matter to a conclusion, given that that is the intervening act that's occurred here? And so you could say from a tikanga Māori point of view, for the reasons that I've explained, your answer would be no, because reputations survive, the issue of mana continues, there are still the whanaungatanga and whakapapa notions that continue beyond the death of the appellant. So that's looking at it simply in terms of that being the intervening act that we are focusing on.

There is a broader way that you could look at the application of tikanga to this particular appeal and that is, thinking about it more broadly, as Your Honour Justice O'Regan has indicated, about how do we balance all of the different factors? Because it's correct, and I think we do acknowledge it in our submissions. So we say there has been a hara, one way or another, there is no getting past that. It is either actions that were perpetrated by Mr Ellis or it is the fact that an innocent person has been convicted of these very serious actions. But there is no getting past the fact that there has been a hara that has occurred in this instance.

And all parties have mana in this situation. So I've talked about it in terms of Mr Ellis not because it's our intention to emphasise that, but because it is the matter of his death that has brought us to be having this hearing. But of course, yes, the families and those, I think I used the expression "kai whakapai", so the complainants, you know, the people that were victims of the acts that he was convicted of perpetrating, so all of the parties have that. So there is a balancing process that you go through.

Relevant to that also becomes the fact that leave has been granted, that in terms of the process or the legal process and the process of this Court a decision has been made to grant leave for an appeal to proceed with, and it's acknowledged I think, as part of the previous judgment, significant practical issues that would arise, even if Mr Ellis was alive, were that appeal to succeed, given the passing of time, the ability to call those witnesses again, all of those sorts of things. So these are all factors that you weigh. And the way that ultimately I thought about it is we talk about ea as if it is something different from the interests of justice. So ea, if I could translate it, and I'm sure His Honour Justice Williams will correct me if I'm wrong, the by ea it talks about, it's more than something being completed, it's about something being fulfilled, it's about reaching a resolution of some sort. So although we talk in the context of the tikanga process, about these important aspects of tikanga Māori, mana, whakapapa, whanaungatanga, the concept of ea in and of itself is important, and it's important because it talks about the fulfilment, and it's not blind to the other considerations.

O'REGAN J:
So would you take issue then with the Solicitor-General's submission that a decision to terminate the process at this stage could itself be ea?

MR MAHUIKA:
I think the difficulty with that is that the process is underway. From a tikanga Māori point of view you would be concluding the process not for a reason which has to do with the other merits which have already been discussed, but just because Mr Ellis has died all of the other things that have been discussed

remain the same. And although there are obviously going to be challenges if the appeal is successful, those challenges existed anyway. But the tikanga view of it is to continue to probe as far as you are able to probe to get the best information to try and reach a conclusion or a resolution of the matter, accepting that in this instance that resolution is very difficult.

GLAZEBROOK J:

So if I understand the real basis of the submission whether you're looking at it on a broad basis or a narrow basis at this stage is the fact that there's already been leave granted, and just to ask a question really because obviously tikanga doesn't quite apply in the same way that it would if you were looking at traditional society where tikanga was effectively being applied, and the reason I say that is that tikanga, if it was being applied in a traditional context, would be what one might call first instance, so the first trial as against an appellate process, because as the agreed statement says that there will be a resolution and in some instances not a negotiated and accepted solution. It may be an imposed solution and, of course, in our trials we tend to have imposed solutions probably as against negotiated positions. But that would be the end of the matter if that had been done. So it's being applied in a context that wouldn't arise in a traditional sense or may arise, I suppose, if something additional had come up later to show that the resolution was wrong, I guess. So not an appellate but a…

MR MAHUIKA:

Yes, Ma'am, I understand the question. I would say two things in answer to that. First of all, the dispute resolution process is not an unusual thing in Māori society. It would have happened in a slightly different way but the idea of bringing parties together in order to try and seek a resolution, and ultimately imposing a resolution, is not an alien concept.

The other thing I would say is that tikanga needs to be thought about in two different levels, and this is referred to by the experts. The first is there is the practice of it. So what are the steps that are taken? So if I pick an easy example. On the East Coast if you have a pōwhiri you usually speak first and

afterwards you shake hands. In Taranaki in Te Āti Awa you do the handshaking first and then you do the speeches. So that would be the practice of it. But then you have the underlying values which are consistent and permeate but are expressed in different ways. So these are the things that the experts talk about, such as mana, such as whanaungatanga, such as whakapapa, and so these are Māori expressions of these things but my respectful submission about it is that these are not things that are distinct to Māori people. These are values that I think most peoples and most societies have. So in my submission they're not things to be mystified. They're not things that are necessarily complicated or that we don't all understand or doesn't have some resonance with all of us. But what we're talking about here is what sort of values should we be applying in making a determination here as to whether the death of Mr Ellis is an intervening factor which is of such significance that this matter should conclude now, and the essential position from a tikanga point of view is that, actually, death in and of itself doesn't bring to an end a person's reputation or the need to, if you can, vindicate that.

So when that's weighed alongside all of the other considerations which were already weighed in the context of granting leave in the first instance then, in our respectful submission, that is what takes you to the conclusion that death in and of itself doesn't bring the process to an end.

WILLIAMS J:
Just taking that point that the intervening event is death, I wonder whether the model of analysis is quite as static as you suggest. The question is really this, I think this is the Crown argument, how does death affect the weighting, as in heaviness, not the other kind of waiting.

MR MAHUIKA:
I understand.

WILLIAMS J:
The other weighting applied to the mana of the victims. In other words –

MR MAHUIKA:

Yes, I understand Sir.

WILLIAMS J:

Yes. What would tikanga say about that? Is there a shift or does it stay the same?

MR MAHUIKA:

Well, it actually becomes, arguably becomes a more important consideration to defend the reputation of a person that's passed.

GLAZEBROOK J:

Sorry, I didn't catch the first part of that?

MR MAHUIKA:

I beg your pardon Ma'am. I said arguably the passing of a person actually makes it a more important consideration to do something around their reputation.

WILLIAMS J:

Around whose reputation?

MR MAHUIKA:

Well in other words it doesn't diminish, I don't think, the issue of mana. What it does, I think, is it emphasises it further. It makes it a more significant consideration.

WILLIAMS J:

I can certainly see that, but what do you say about the death of the, up until now, convicted offender, how does that affect the weighting one would apply to the victim's mana? Is there a shift?

MR MAHUIKA:

I don't know that a, I mean the challenge for the weighing exercise is you have a number of considerations, and you have to weigh all of them. I don't think it

diminishes the importance of that. It's never been my submission that it diminishes the importance of that. That has always been an important consideration from a tikanga point of view.

WILLIAMS J:

But do their interests, does their mana become a more powerful factor when the offender is no longer present in the flesh, as it were.

MR MAHUIKA:

Sir, no I don't think it does.

WILLIAMS J:

Okay, why not.

MR MAHUIKA:

I would say, and the mana of the victims has always been an important consideration. It is a consideration for the tikanga experts when they look at this issue. But they also consider that leave was granted for Mr Ellis to appeal. It is assumed, I think, they're not lawyers, there was merit in doing so, and so therefore there is an incomplete process that ought to be completed.

GLAZEBROOK J:

So is the submission that in deciding on starting that process the weighting of the mana of the victims and Mr Ellis had been taken into account and that death hasn't actually changed the weighting that was taken into account at the leave stage.

MR MAHUIKA:

Yes.

GLAZEBROOK J:

Is that…

MR MAHUIKA:

That would, I think that is.

GLAZEBROOK J:

And that the tikanga would require that the process that was started, having taken into account that weighting, has finished?

MR MAHUIKA:

Yes.

GLAZEBROOK J:

That in fact there's not a re-weighting.

MR MAHUIKA:

Ma'am I wouldn't say there was a re-weighting. We're straying a little bit into the territory that is probably more the territory of the tikanga experts than me, but that would be my answer to that question.

GLAZEBROOK J:

But that probably wasn't explicitly put to the, in the statement of facts? Or would you say it's just implicit from the fact that they say that death doesn't make a difference to whatever has been happening before?

MR MAHUIKA:

I would say it's more than implicit because it is a factor that they're mindful of, the mana of the victims.

WILLIAMS J:

I rather got the impression they said that the mana of all parties requires proper conclusion.

MR MAHUIKA:

Yes that's correct Sir.

WINKELMANN CJ:

Yes.

MR MAHUIKA:

Bearing in mind that one outcome here is that the appeal is unsuccessful.

WINKELMANN CJ:

So on that analysis it's the grant of leave which is very important.

MR MAHUIKA:

Yes, well I think it is Ma'am because there is an unconcluded process and that is the essence of the position that the tikanga experts say. And Sir the reason I focus on the fact of death as an intervening event is because if Mr Ellis was still alive we wouldn't be here, and so that is why I assume the tikanga experts focused on that in particular, and that's why I say there are two ways of looking at it. One is to consider specifically how would you look at the fact of Mr Ellis' death from a tikanga point of view but also say actually, if you look at it in the round, tikanga also gives you some guidance as to how you might proceed in relation to a matter such as this.

WILLIAMS J:

And your measure there is not the reasonable man on the Clapham or the Island Bay omnibus –

MR MAHUIKA:

No.

WILLIAMS J:

– but the reasonable person on a horse in Tikitiki?

MR MAHUIKA:

Well, yes, Sir, if there is such a person.

WINKELMANN CJ:

But your point is also I think that tikanga provides a framework for the interests of justice…

MR MAHUIKA:

It does.

WINKELMANN CJ:

It's not just a bunch of random concepts we might pull out and weigh up here and there, it's actually a framework.

MR MAHUIKA:

Yes, it does. And the concept of ea – I would argue with any particular authority for it but I would argue it anyway – that the concept of ea is another way of just saying the interests of justice, they are interchangeable notions.

WILLIAMS J:

Yes, it's the Māori conception of justice, isn't it?

MR MAHUIKA:

It is, it is. But nevertheless although we have emphasised, because of the focus on Mr Ellis and his passing, notions of mana, so of reputation, of the whanaungatanga, of whakapapa, because of his connection to his family, of their desire to continue with the appeal, in considering this, even tikanga Māori doesn't stop the investigation at that point, which I think was – I don't recall who that was, which one of Your Honours I think asked the question along those lines earlier on. But that's the essence of it, it is actually broader and capable of considering the whole range of additional factors that this Court has already considered.

WILLIAMS J:

I guess you might say that ea is the Māori conception of justice where what's at issue is a hara?

MR MAHUIKA:

Yes.

WILLIAMS J:

Because there might be another word for justice in other contexts, but where you have a wrongdoing ea is your justice?

MR MAHUIKA:

Yes.

WILLIAMS J:

Right.

MR MAHUIKA:

Or it's the state of having fulfilled or reached a resolution or reached a settlement or some other similar type of word that you might use to describe it.

WILLIAMS J:

Yes, so…

MR MAHUIKA:

Because of course Māori notions of justice are tied up in the notion of reciprocity, you know, the notion of utu is about repaying a harm that's been done to you. The notion of muru is about inflicting a harm on someone else who has done something wrong, but it is – I mean, it's quite Old Testament in some respects – but it is very much about trying to strike a balance. And you see similar notions in, you know, in other Polynesian cultures. The one that comes to mind is the process of ifoga that you apply in Samoan culture, which is about a public apology, not by the person who committed the offence but by the family of that person, recognising that there is a broader community that is connected to the offending. It does, Your Honour, speak to some of the challenges about the personal nature of our criminal law and how that notion diverges from the idea of community responsibility, but that is an aspect of tikanga Māori that is important and is perhaps why you view death of an individual differently, differently because that person doesn't stand alone, as it were, that person exists as part of a community of people.

WILLIAMS J:

So you used the phrase that ea is not a conclusion – let me get this right – but "a fulfilment", am I right?

MR MAHUIKA:

Yes.

WILLIAMS J:

So the gist of that is that whatever ea is, it's substantive and it's a substantive response?

MR MAHUIKA:

Yes, it is, Sir, yes.

WILLIAMS J:

Right, thank you.

MR MAHUIKA:

And in this instance, if you think about the passing of Mr Ellis, because from a Māori point of view that actually doesn't bring to an end this process, in the sense that his reputation and other things survive his death, then stopping now is an arbitrary point. So it's doing it for a reason which actually isn't connected to any other principle than that it's convenient to stop at this point, which is not the way that your tikanga would look at it, because that doesn't lead to state of settlement, fulfilment or whatever other synonym you might use for those concepts.

WILLIAMS J:

So I guess you might say that on that analysis you need a powerful countervailing factor to stop fulfilment.

MR MAHUIKA:

Yes, I think that's correct.

WILLIAMS J:

And the Solicitor-General has argued what are the Crown's submission powerful countervailing factors, but your point is they need to be powerful?

MR MAHUIKA:

Yes.

WILLIAMS J:

Right.

MR MAHUIKA:

And from that the fact that Mr Ellis' death is not significant enough because his mana, his reputation, his connection with people that have an interest in his reputation, remains, even after he's passed away.

There was one other matter that I was wishing to touch on, and that relates to the question Your Honour Justice Williams asked about the risk of incorporating tikanga into the law. So the risk of incorporating tikanga into the law, and whether that should be an issue, and I'm not sure, I don't think that anything turns on that proposition for present purposes, but in my respectful submission it is a situation where the Court has a stark choice. And what I mean by that is that it has a choice to either do what the Courts have been saying for some time, which is recognise that it's relevant and then seek to apply it or not, and in my submission it is an issue because perhaps Māori values are not as well understood by the Courts, or well explained by us as counsel as perhaps they could be. But if we are to do what the Courts wish to do, and that is to imbue the law with tikanga Māori, then that is what we ought to do, because the alternative is that we don't do that at all through fear of getting it wrong.

WINKELMANN CJ:

And we just have to find a way to do it.

MR MAHUIKA:

Yes, Ma'am, that's correct. And we have –

WILLIAMS J:

Without killing it in the process.

MR MAHUIKA:

Yes, yes. The story that comes to mind is when Ngarimu's VC was to be awarded, Ngata wrote to Timutimu Tawhai from Te Whānau-ā-Apanui asking for the whakapapa of Ngarimu. The reply that he received was from Timutimu Tawhai, said this troubles my Māori mind to give you such sacred information that you might disclose it, and Ngata's response to Timutimu Tawhai was that if these things are to have future into the future, then we need to be prepared to take that risk, and to record them, and in my respectful submission that is the same position when it comes to the recognition of Māori values, tikanga Māori within the common law of New Zealand. Because it is, those are values which are part of the values of New Zealand. Ma'am, unless there are any further questions, those are my submissions.

WINKELMANN CJ:

Thank you Mr Mahuika. Mr Harrison, did you have anything by way of reply?

WILLIAMS J:

Could I just ask, I just need a clarification for when you referred to Ngata. I know we probably should have given you a bible and sworn you in Mr Mahuika..

MR MAHUIKA:

Look I apologise Sir, I was really trying to think of a way to illustrate the point.

WILLIAMS J:

It was useful. Ngata was speaking to who?

MR MAHUIKA:

I think, Sir, it was Timutimu Tawhai from Te Whānau-ā-Apanui.

WILLIAMS J:

Thank you.

MR MAHUIKA:

It is in one of the, the investure booklet or something like that, from the time of the award of the Victoria Cross.

GLAZEBROOK J:

So you may be able to give us the reference?

MR MAHUIKA:

I will try and find the reference. I did try and find the reference actually before I came, because it occurred to me that I might mention that, but I'm afraid, Ma'am, I wasn't able to.

WINKELMANN CJ:

But you will find it for us?

MR MAHUIKA:

I will find it.

WILLIAMS J:

Yes that's tikanga.

MR MAHUIKA:

Yes it is.

WILLIAMS J:

She's the boss.

MR MAHUIKA:

There is no doubt about that, Sir, yes. Yes, Ma'am, I will endeavour to find that reference. It's probably a simple enquiry, I just didn't have access to the person I needed to ask when I thought about this at some late hour last night.

WINKELMANN CJ:

Thank you Mr Mahuika.

O'REGAN J:

You should say I'll get my junior to find it.

MR MAHUIKA:

Yes, I'm not brave enough to say that Sir. So those are my submissions as it pleases Your Honours.

WINKELMANN CJ:

Thank you. I'm looking at the time and thinking Mr Harrison and Ms Jagose, are you going to be long by way of reply, or should we press on?

SOLICITOR-GENERAL:

I have heard nothing that I need to reply to Your Honour.

WINKELMANN CJ:

Mr Harrison?

MR HARRISON QC:

Very briefly Your Honour. Two minutes.

WINKELMANN CJ:

Yes, we'll carry on then.

MR HARRISON QC:

The only matters that I would raise is that when the principle of tikanga applies and the fact that because someone has died that is not the end of the matter, the Crown have indicated that they believe that a state of ea cannot be

reached if there is an overturning of the verdicts, and the matter possibly sent back for trial. That's only one of the possible outcomes that could come of this matter being heard, and that would be also that the Court may decide that that evidence was so compelling that the verdicts may be confirmed, and if that was the case that state of ea would be said. Similarly the Court may also look at that evidence and decide, as which will be the appellant's argument, that the evidence should never have been in front of the Court, and so the convictions must be overturned and there wouldn't be a retrial. Alternatively there might be another ground that it would give us a different situation. The fact that there are a number of options there shouldn't be a situation where we don't proceed.

I don't know if there are any other matters that was raised by my learned friend that the Court would like me to address but I think there are no other matters that I feel need to be raised.

WINKELMANN CJ:
Thank you Mr Harrison.

MR HARRISON QC:
As Your Honour pleases.

WINKELMANN CJ:
Well that concludes the formal part of the hearing. I would like to thank all counsel, and those they consulted in preparing the case for us, for the extreme care and for the value of the information they have put before the Court. We have been greatly assisted by the written material and by the submissions we've heard today. We're going to reserve our decision and retire, but before we do I understand that counsel wish to sing a waiata.

MR MAHUIKA:
Ma'am, as I understand it the families were wanting to sing the hymn Te Aroha but there were technical reasons as to why that wasn't possible. With your leave I was going to maybe just say the grace and conclude the

hearing in that way, which is a brief prayer and then propose that that just be sung as a hymn, if you like, to round off the proceedings?

WINKELMANN CJ:
Go ahead Mr Mahuika.

KARAKIA WHAKAMUTUNGA

HĪMENE:
Te aroha. Te whakapono. Me te rāngimarie. Tātou tātou e.
Te aroha. Te whakapono. Me te rāngimarie. Tātou tātou e.

COURT ADJOURNS: 1.05 PM