OLUWABUKOLA OYAWALE

CASE REVIEW OF RE EDWARDS (Te Whakatōhea No 2) ON THE RECOGNITION OF CUSTOMARY RIGHTS IN MARINE AND COASTAL AREAS IN NEW ZEALAND

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TABLE OF CONTENT

ABSTRACT

For many indigenous cultures, land means more than just property – it encompasses culture, relationships, ecosystems, social systems, spirituality, and law.[1] Land constitutes an integral part of indigenous peoples' identity and forms part of what keeps them grounded and connected to their origin as a people. For many, land means the earth, the water, the air, and all that live within these ecosystems.[2] Historically, to separate indigenous peoples from their land is to strip them of their sovereignty and identity. Land and indigenous rights are inextricably linked.[3]

The High Court's decision in Re Edwards (Te Whakatōhea No 2)[4] is a unique example of an indigenous application for a recognition order for either customary marine title or protected customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 ("the Act") – Tikanga relevance before the Courts – the intersection between Tikanga and the common law – and meaning of "Exclusive use and occupation" and "substantial interruption."

This paper reviews the Court's approach to the interpretation and application of the statutory tests prescribed in the Act with consideration to the scale of the challenge before the Court and the Crown with thousands of further applications pending. While Re Edwards sets significant precedence for these further applications, this decision sets a standard for the Courts on the assessment of Tikanga evidence in relation to the determination of customary marine title rather than relying on the western proprietary concepts framed in the common law system. This paper briefly examines the Court's approach to expert evidence and managing the consistency of Tikanga evidence in future cases. It also discusses the Court's conclusion on how overlapping groups have been resolved with heavy reliance on a Tikanga model of relationship management and compliance. It raises some questions and further challenges that remain to be resolved in Re Edwards and how the Courts and the Crown will progress in terms of planning how to manage the process and formulating legal issues for resolution.

Word length

The text of this paper (excluding the abstract, table of contents, footnotes and bibliography) comprises approximately 8056 words.

Subjects and Topics

Indigenous people and land ownership

Marine and Coastal area ownership rights

Dispute and overlapping claims

[1] Jeanette Armstrong "Indigenous Foundations: Lands and Rights" 2009 The University of British Columbia <www.indigenousfoundations.arts.ubc.ca>
[2] As above.
[3] As above.
[4] Re Edwards (Te Whakatōhea No 2) [2021] nzhc 1025.

Introduction

Indigenous rights and titles are not derived from authorities external or foreign to their culture but are derived from their own occupation of and relationship with their home territories as well as their ongoing social structures and political and legal systems.[5] For indigenous peoples, the principles around boundaries or extent of ownership are not guarded by hard and fast rules set in written codes but rather defined more by cultural association and interaction between each other, trust and respect for each other's cultural similarities and differences.

In a quick look at territories with colonial history, land domination is one prevalent feature in most territories originally occupied by indigenous peoples. An example is Canada, New Zealand, Australia and the United States of America. Canada for instance, a core issue of contention relating to indigenous peoples' rights in British Columbia has been the subject of Aboriginal rights to fish, and Aboriginal fisheries. Inherent to the indigenous peoples' right to fish, Aboriginal fish farming was linked to the possibility to retain access to their historic and ancestral fishing spots.[6] There are opinions touted post-colonialism that indigenous peoples have weighed themselves down with "a victim mentality" and remained in the past while the world moves on quickly. However, the same people have failed to understand and acknowledge the actions of successive states' disregard for historic treaty promises, government guarantees, and pre-existing indigenous rights.

On 17th February 1995 by Resolution 49/214, the United Nations General Assembly designated a date for recognising and acknowledging Indigenous Peoples and their rights by setting apart 9th August of every year for the commemoration of the International Day of the World's Indigenous Peoples.[7] The essence of the commemoration is to raise awareness within the next decade of the needs and aspirations of indigenous peoples.[8] Ownership of land has always been at the centre of such discussions to improve the socio-economic base of indigenous people.

In September 2007, 144 Member States of the United Nations voted in favour of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). [9] Four Member States- New Zealand, Australia, Canada and the United States voted against the adoption and 11 other member states were in abstention. The four countries later changed their position years later and supported the UN Declaration.[10] It's probably not a coincidence that the four Member States that initially withheld support for the UNDRIP have strong historical antecedents of the colonisation of indigenous peoples and were simply not at a stage in their political structure where they were ready to confront issues relating to indigenous peoples and ownership rights to land.

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[5] Jeanette Armstrong "Indigenous Foundations: Lands and Rights" 2009 The University of British Columbia <www.indigenousfoundations.arts.ubc.ca>
[6] As above.
[7] United Nations General Assembly, Resolution Adopted by the General Assembly – A/RES/49/214, page 1
[8] Above, at 2.
[9] United Nations "Department of Economic and Social Affairs Indigenous Peoples" 2007 United Nations Declaration on the Rights of Indigenous Peoples <www.un,org>
[10] As above.

In the last two decades, the rights of indigenous peoples have become emboldened by these international recognitions and these rights have evolved quickly against the backdrop of these international laws.[11]

We have seen the emergence of domestic legislation giving recognition to the rights of indigenous peoples as well. The Marine and Coastal (Takutai Moana) Act 2011 ("MACA or "the Act"") in New Zealand is one of those legislations that has its roots in issues concerning the recognition and restoration of pre-existing indigenous rights of indigenous peoples of New Zealand.

Background

Māori – the indigenous peoples of New Zealand have long sought to have their customary rights in the common marine and coastal area recognised, meaning the customary marine title. Such customary interest, if granted, does not allow the land or specified area to be sold/alienated or for the public to be excluded.

In 1997, several Māori groups made applications to the Māori Land Court (MLC) for declaratory orders for specified areas of the takutai moana in the Marlborough Sounds to be recognised as Māori customary land. The Attorney-General objected on grounds that Māori customary title had already been extinguished and ownership of the foreshore and seabed were vested in the Crown.

In the 2003 case of Ngati Apa v Attorney-General[12], the Court of Appeal upheld that the Māori Land Court had jurisdiction to determine whether or not areas of the foreshore were Māori customary land under the Te Ture Whenua Maori Act 1993 *and* whether the customary title was recognised at common law until lawfully extinguished.[13] The assumption prior to this decision was that Crown ownership of the foreshore and seabed was settled, and that customary title was extinguished.[14] The Court of Appeal reaffirmed that the transfer of sovereignty in 1840 did not impact on Māori customary title[15] and found that the title in the foreshore and seabed had not been extinguished.

The New Zealand government led by the Labour Party at the time quickly reacted to the Court of Appeal decision in Ngati Apa. One month after the delivery of that judgement, the Labour government released a proposal for the "protection of public access and customary rights". The proposal sought to recognise and protect Māori customary rights while introducing legislation to ensure that the foreshore and seabed are not subject to ownership, alienation or private rights.[16]

[11] Kelly Buchanan and Elim Hofverberg "New Zealand: Landmark Judgment Recognises Customary Rights in Coastal Marine Area" (2021) 7153 Law Library of Congress.
[12] Ngati Apa v Attorney-General [2003] 3 NZLR 643.
[13] Above, n 643
[14] Above, 204.
[15] Above 138 – 139.
[16] New Zealand Government *Foreshore and Seabed: Protecting Public Access and Customary Rights* (19 August 2003).

Introducing the Foreshore and Seabed Act 2004

The Waitangi Tribunal, following an urgent inquiry into the issue, found that the policy underpinning the legislation breached the principles of the Treaty of Waitangi and, beyond that, "the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and non-discrimination."[17] Notwithstanding the Waitangi Tribunal's recommendation[18] that the proposal breached the Treaty of Waitangi, was discriminatory and a violation of the rule of law and principles of fairness, the proposal progressed through Parliament and passed into what became the Foreshore and Seabed Act 2004.[19]

For context, *the foreshore and seabed* are described as: [20]

> "the 'wet' part of the beach that is covered by the ebb and flow of the tide. It does not include the dry part of the beach. The foreshore and seabed are the areas between the line of mean high-water springs and the outer limits of the territorial sea (12 nautical miles from shore). The foreshore and seabed include the air space and water space above the land, and the subsoil, bedrock and other matters below."

It is essential to note as it was later established in the Marine and Coastal Act 2011, that the creation of Customary Marine Title is rooted in the 1840 Treaty of Waitangi and not the Foreshore and Seabed Act 2004 as affirmed by the Court of Appeal's decision.

As originally proposed, the Foreshore and Seabed Act 2004 reserved existing public access, fishing and navigation rights in the Crown.[21] This resulted in the existing Māori customary title to the foreshore and seabed being officially extinguished. In essence, the Foreshore and Seabed Act 2004 legislation overruled the Ngati Apa, with implications that meant[22]:

- the ownership of the foreshore and seabed was now vested in the Crown (except for the privately owned parts);
- the public has the right of access over the foreshore for recreation, fishing rights and navigation of boats;
- Applicants had to show use and occupation of the area for customary activities to the exclusion of others from 1840 until the commencement of the Act without substantial interruption;
- people who owned dry land next to the foreshore, and who had been using part of the foreshore and seabed since 1840, could claim territorial customary rights and apply to the Crown for redress.

The passage of the Foreshore and Seabed Act 2004 gave rise to large-scale protests and did not last. It became a catalyst and crystallised into the formation of the Maori Party. Following a Ministerial Review that was undertaken pursuant to a confidence and supply agreement with the Maori party in 2009, the National Party government announced the proposed repeal of the

[17] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071, 2014) at xiv – xv.
[18] Above.
[19] Foreshore and Seabed Act 2003, Section 7.
[20] New Zealand Government *Repeals of Foreshore and Seabed Act announced* (15 June 2010).
[21] Foreshore and Seabed Act 2003, Section 13.
[22] Above at Section 32-36

Foreshore and Seabed Act 2004. Subsequently, the Marine and Coastal Area (Takutai Moana) Bill was passed in 2011. The new Act sought to restore the right of Maori to seek the customary title of public foreshore in court and introduce a non-Crown ownership approach to public foreshore and seabed. The Bill sought to:[23]

- restores the right to seek recognition of customary marine title in the common marine and coastal area through the Courts – a fundamental common law right confirmed by the Court of Appeal in the 2003 Ngati Apa *case*, but subsequently extinguished by the Foreshore and Seabed Act 2004.
- sets out tests for proving customary marine title based on the Court of Appeal's decision in the Ngati Apa case. It also sets out the rights customary marine title holders may exercise, such as guardianship and development rights. Public rights of access, fishing rights and navigation remain unaffected under MACA just like the preceding legislation.

Marine and Coastal (Takutai Moana) Act 2011

Looking back for over a century, customary title in land and the marine coastal area had been denied to Māori, and a Court decision in *Wi Parata v Bishop of Wellington*[24] extinguished any possibility of the recognition of customary title in 1877. New Zealand Courts acknowledged Māori customary title as a principle confirmed by the Treaty,[25] however, following the court decision in Wi Parata in 1877, the Courts rejected the approach of Māori customary title in Whenua and takutai moana as a Treaty principle.[26]

Historically, native land is noted to be of two kinds – customary land and Native freehold land.[27] Customary land is land which has never been the subject of a Crown grant and is held by Natives under the customs and usages of the Māori people. It is said to be land on which the ancient customary native title as recognised and guaranteed by the Treaty of Waitangi has not yet been extinguished.[28] Such land remains vested in the Crown since it has not been Crown-granted, however, subject to the customary title of the natives and to their right to have the customary title transformed into a freehold title by the Native Land Court. Customary land was always restricted from alienation except in favour of the Crown. By the Treaty of Waitangi, the exclusive right to purchase such land was reserved to the Crown, and in all statutes since passed, the alienation of customary land to private individuals has been prohibited, and this prohibition is now extended to the Crown.

Moving forward, the MACA 2011 repealed the Foreshore and Seabed Act 2004 which was introduced in response to the 2003 Court of Appeal decision in the Ngati Apa[29] case noted above. Other rights given expression through the Customary Marine Title under the MACA were the right of veto in relation to resource consent activities and conservation activities, the right to be consulted in relation to New Zealand coastal policy statements, and ownership of newly found taonga tuturu.[30] Under the Resource Management Act 1991, Tikanga values and

[23] New Zealand Government *Repeal of Foreshore and Seabed act announced* (15 June 2010).
[24] Wi Parata v Bishop of Wellington [1877] 3 NZ Jur (NS) 72.
[25] See R v. Symonds (1847) NZPCC 387 (SC) at 394.
[26] Re Edwards (Te Whakatōhea No. 2) [2021] NZHC 1025 at [30]
[27] Statistics New Zealand "New Zealand Official Year-Book 1944" <www.stats.govt.nz>
[28] As above.
[29] Above.
[30] Above, Section 62 (1) (e).

Treaty principles need only be taken into account and may always be outweighed by other needs or interests.[31]

In providing recognition of customary rights under the MACA, the Ministry of Justice guidance document clarifies that:[32]

> "the marine and coastal area extend from mean high water springs (roughly the highest point washed by the tide) to 12 nautical miles offshore. It runs along the whole coastline of New Zealand, including off-shore islands.
>
> The common marine and coastal area is the marine and coastal area, except for certain conservation areas and existing private titles. Private titles include any land that is owned by any person other than the Crown. It includes Maori customary land and Maori freehold land.
>
> The Act also creates a special status for the common marine and coastal area, meaning neither the Crown nor any other person can own it."

Re Edwards (Te Whakatōhea No 2)

The first major High Court (Court) ruling under the MACA is the Re Edwards (Te Whakatōhea No. 2)[33] released on 7 May 2021. The claim was brought on behalf of the Te Whakatōhea -Bay of Plenty Iwi along with other Iwi groups making overlapping claims for the same areas of the coastal marine area. The Court jointly granted recognition orders for Customary Marine Title and protected customary rights to a number of Iwi and Hapu groups in three areas- the western part of Ohiwa Harbour and the coastal marine area between Maraetotara in the west to Tarakeha in the east. The orders were made pursuant to the Marine and Coastal Area (Takutai Moana) Act 2011 ("MACA" or the Act) which enables Māori groups to apply for such recognition orders in a specified area of the coastal marine area (the takutai moana).[34]

Re Edwards is the second application to be heard under the Act and it represents a principal statutory precedent in the determination of customary marine title and protected customary rights to the coastal marine area in New Zealand. This case is also the first under MACA to involve overlapping claims. There also remain more than 200 active applications before the court relating to customary marine titles,

This paper seeks to examine a few legal issues discussed by the court, the considerations, and the statutory interpretation of MACA along with the relevance of Tikanga.

[31] Section 7-8, Resource Management Act 1991
[32] Ministry of Justice *Recognising Customary Rights Under the Marine and Coastal Area (Takutai Moana) Act 2011*
[33] Re Edwards (Te Whakatōhea No. 2) [2021] NZHC 1025 at [7]
[34] Above.

Scope of Issues for Consideration in Re Edwards

The court was to determine whether applicants were entitled to recognition orders for either a customary marine title (CMT) or protected customary rights (PCRs) under MACA.[35] The court first sought to establish the purpose of the legislation based on the Supreme Court's direction on ascertaining the purpose of an Act[36] where it said the Court must "have regard to both the immediate and the general legislative context of an Act as well as its social, commercial or other objectives".[37]

The customary marine title creates an interest in land but does not include a right to alienate or dispose of any part of the customary marine title area.[38] As such, public access to such customary marine title boundaries is retained.[39]

For an applicant group to establish a customary title, the applicant group must prove that it has had "*exclusive use and occupation*" of an area from 1840 to the present day without "*substantial interruption*" and holds the area "*in accordance with Tikanga.*"[40] There was no legislative guidance as to what constituted "exclusive use and occupation" "substantial interruption" or "in accordance with Tikanga" under MACA.

The Court then adopted an interpretation of "shared exclusivity" from Canadian jurisprudence.[41] Under this principle, the customary title can be shared between applicant groups whose interests overlap within identified customary boundaries. This may entail overlapping interest groups agreeing to a "shared exclusivity arrangement" details of which can be agreed upon between parties.[42]

Statutory test for Protected Customary Rights (PCR)

PCR allows applicants to exercise certain customary rights over the relevant takutai moana without resource consent under the Resource Management Act 1991 (RMA) and grants applicants exemption for payment of certain charges under that Act.[43] The Court highlighted three requirements to be satisfied before applicants can be granted PCR as set out in the Act. A protected customary right is a right that: [44]

i. "Has been exercised since 1840;

ii. Continues to be exercised in a particular part of the common marine and coastal area in accordance with Tikanga by the applicant group, whether it continues to be exercised in exactly the same or a similar way or evolved over time; and

iii. is not extinguished as a matter of law."

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[35] Re Edwards (Te Whakatōhea No. 2) [2021] NZHC 1025 at [7]
[36] Above n 23
[37] Ibid, Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767 at [22]. In relation to the application of the Treaty of Waitangi to the interpretation, see Barton Prescott v Director General of Social Welfare [1997] 3 NZLR 179 (HC) at 184. The case was later affirmed in New Zealand Maori Council v Attorney-General [2007] NZCA 269 and Ngaronoa v Attorney-General [2017] NZCA 351 at [44]-[46]. It is authority for the proposition that, for the purposes of the interpretation of statutes, the Treaty has a direct bearing, whether or not there is a reference to it in the statute.
[38] Section 60(1)(a) of the Coastal and Marine (Takutai Moana) Act 2011.
[39] Hamish Harwood and Lauren Phillips "Takuti Moana Act- key developments from RE Edwards (Te Whakatohea (No 2) and Re Ngati Pahauwera" (April 2022) RMJ 30 at 31
[40] Re Edwards above.
[41] Above n 168.
[42] Above.
[43] Section 52 Marine and Coastal (Takutai Moana) Act 2011.
[44] Above.

Statutory tests for Customary Marine Title (CMT) are:[45]

i. The applicant group holds the specified area in accordance with Tikanga; and

ii. Has, in relation to the specified area:

   a. Exclusively used it and occupied it from 1840 to the present day without substantial interruption; or

   b. Received it, any time after 1840, through customary transfer.

Legal Issues Discussion

a. The standard and burden of proof –

Section 106 MACA provides that:[46]

> "(1) In the case of an application for recognition of protected customary rights in a specified area of the common marine and coastal area, the applicant group must prove that the protected customary right—
> (a)has been exercised in the specified area; and
> (b)continues to be exercised by that group in the same area in accordance with Tikanga.
> (2) In the case of an application for the recognition of customary marine title in a specified area of the common marine and coastal area, the applicant group must prove that the specified area—
> (a)is held in accordance with Tikanga; and
> (b)has been used and occupied by the applicant group, either—
> (i)from 1840 to the present day; or
> (ii)from the time of a customary transfer to the present day.
> (3) In the case of every application for a recognition order, it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished."

Section 106 appears vague on the requirements to be met by applicants for the Court to make an order recognising a protected customary right or customary marine title and shifted the burden away from applicants as to the issue of whether customary rights had been extinguished. The Court's review of this section in Re Edwards substantiated the need for Sections 51, 58 and 98 of MACA to be read together as parts of the element that come together as proof in an application for the recognition order.

Section 106 (3) MACA suggests there's a presumption that "customary interest" is not extinguished if not proved otherwise and Section 58 does not appear consistent with that presumption. The presumption in Section 58 MACA is that "customary

[45] Section 58 Marine and Coastal (Takutai Moana) Act 2011.
[46] Section 106 Marine and Coastal (Takutai Moana) Act 2011.

marine title" exists in a specified area until the applicant groups provide evidence. Based on Section 106 (3) MACA, the principle set by the legislation here is that customary interest exists, however, the ownership of such interest has not yet been claimed by a person or applicant group. Therefore, for the applicant group to lay claim to ownership of that customary interest, it needs to meet the standards set out in Section 58 MACA. In essence, the Court provided clarification on the issues by explaining that while Section 106 presumes 'customary interest' exists, Section 58 does **not** presume 'customary title' accrues to an applicant group until proven based on all the test elements set out in Section 58 MACA. Hence the conclusion that Sections 51, 58, 98 and 106 of MACA need to be read together to form a full picture of the standard of proof for a recognition order for customary interest.

b. Holding the specified area in accordance with Tikanga – (Section 58(1)(a) MACA including the function of Tikanga, and the role of pukenga in interpreting Tikanga under the MACA) - Assessing the tests of Section 58 MACA was more difficult in Re Edwards given the competing applications with each asserting the exercise of rights on an "exclusive basis" and "without substantial interruption"[47] – with Iwi contestants on the one hand and the Attorney-General and Landowners Coalition on the other hand.

Each party has a differing analysis of the evidence that should satisfy the "holding" and "in accordance with Tikanga" test. Dissenting opinions from the Attorney-General and Landowners Coalition opined that beyond establishing a Tikanga system exists in relation to takutai moana, applicants needed to also establish evidence that is valid under western common law proprietorial concepts. The court took the same approach in Re Tipene[48] where the Court noted that customary interests to land and associated waterways were different to English land law concepts.

The Court went on to conclude that:

> "Holding an area of the takutai moana in accordance with Tikanga is something different to being the proprietor of that area. Whether or not an applicant group has established that they held an area in accordance with Tikanga is to be determined by focusing on the evidence of that Tikanga, (i.e. evidence presented by the applicant groups as Tikanga evidence) and the lived experience of that applicant group. The exercise involves looking outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European legal concepts."[49]

This conclusion suggests then that the issue of meeting the requirements of Section 58(1)(a) MACA remains a question of fact in each case as the court will have to make a factual inquiry on the Tikanga-specific applicants and/or specific to the area to determine if the area had been held in accordance to Tikanga.

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[47] Re Edwards n 96
[48] Re Tipene above n 3, at [15] quoting the Waitangi Tribunal in The Whanganui a Tara me ona Takiwa: Report on the Wellington District (WAI 145, 2003) at 2.2.
[49] Re Edwards n 130

The challenge with the open conclusion here is that may cause inconsistencies in the parameters of determining what is in "accordance with Tikanga". The guidance of the court here does not appear to be sufficient.

Hirini Moko Mead noted in his book "Tikanga Māori – Living by Māori Values: [50]

> "Tikanga comes out of the accumulated knowledge of generations of Māori and is part of the intellectual property of Māori. The base consists of ideas, interpretations and modifications added by generations of Māori. Often the modifications are so small as not to be noticed, but in the end, they add to the pool of knowledge about a particular Tikanga…
>
> …It is important to stress that ideas and practices relating to Tikanga Māori differ from one tribal region to another. While there are some constants throughout the land. The details of the performance are different and the explanation provided may differ as well. There is always a need to refer to the Tikanga of the local people."

With such regional variations in the application of Tikanga Māori, it only complicates the challenge before for each court to determine first what Tikanga is and determine if applicants have held the subject in accordance with the recognised Tikanga principles of the region.

A nagging question is what it even connotes for a land to be "held in accordance with Tikanga" -what does that entail? In the court's attempt to unravel the question, it looked at the consideration of the wording by the Māori Land Court in *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board.*[51] There the court noted that it was not appropriate to "make its determination from a Pakeha or Court perspective of Māori customs and usages - from the outside looking in but was required to make its determination according to Tikanga Māori – from the inside."

The Court concluded that:

> "whether or not an applicant group has established that they held an area in accordance with Tikanga is to be determined by focusing on the evidence of Tikanga, and the lived experience of that applicant group. The exercise involves looking outward from the applicant's perspective rather than inward from the European perspective and trying to fit the applicant's entitlements around European legal concepts…Whether a specified area can be said to be "held" in accordance with Tikanga involves a factual assessment that will be heavily influenced by the views of those who are experts in Tikanga"[52]

c. Exclusivity - Section 58(1)(b)(i) MACA requires "exclusive use and occupation" and "without substantial interruption" of the specified area from 1840. in including whether a concept of "shared exclusivity" may exist under the MACA.

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[50] Hirini Moko Mead *Tikanga Māori- Living by Māori Values* (Huia Publishers, Wellington, 2003) at [8-13].
[51] John da Silver v Aotea Maori Committee and Hauraki Maori Trust Board (1998) 25 Tai Tokerau MB 212 (25 TTK 212).
[52] Re Edwards n 130-131

Interpreting the exclusivity requirement of Section 58 meaning applicants to have to show an intention and ability to control the specified area against third parties would be stretching that definition too far. The customary marine title does not equate to ownership or ability to alienate the specified area, it always remains subject to the exercise of substantial rights by other for access to the area, boat navigation and fishing. It's unlikely that was the intention of the parliament for Section 58 as well on the basis that it's only an area carved out for exclusive ownership with the ability to alienate that would have given such a level of control.

An argument on behalf of the government was that applicants with shared exclusivity to an area need to make a combined application or joined as one applicant group. The court shut down the argument and noted such an approach was inconsistent with the intentions of MACA and the notion of holding the area in accordance with Tikanga.

The court considers that even where there are overlapping claims who deny each other's history in claims of title, there is no requirement for competing applicant groups to have been amicable with each other throughout history, but an acknowledgement of each other's interests would suffice. The Court confirmed the focus of Section 58(1) MACA with respect to shared exclusivity will continue to be recognised in New Zealand.[53] In terms of the outworking of shared exclusivity, and to avoid conflicts that may arise between overlapping groups if multiple customary marine titles were issued to each overlapping group, the court concluded that a jointly held Customary Marine Title is more practical for overlapping groups with shared exclusivity. While there might continue to be disagreement between holders of the joint CMT, Tikanga has been relied on in the past for the exercise of a web of overlapping rights[54].

A comment from one of the applicant's kaumatua (elders) reinforces the interplay of Tikanga in shared exclusivity:

> "We have the right to exercise our customary authority (mana and rangatiratanga) in relation to our own seascape. For the same reason, we would not go onto other tribal (iwi) seascapes because we would be challenged. Our customary areas are not as rigid as Western boundaries, however."[55]

A lot of what will be termed as "shared exclusivity" appear to substantially rest in each applicant's tribal application of Tikanga.

Overall, the standard of proof in overlapping interest claims remains unshifted from applicants to first prove on the balance of probabilities that the area has been held in accordance with Tikanga. The work of the court in determining which of the applicant groups indeed holds the area according to Tikanga is a herculean one given by the nature of Tikanga, there are no set/fixed laws in Tikanga practice. For precedence, however, this decision gives structure to the Courts and the Crown's consideration of Tikanga when making decisions on applications.

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[53] Re Edwards n 168
[54] Re Edwards n 170
[55] Re Edwards n 175

As rightly noted by Hannah Yang in her article, "Exclusivity, Substantial Interruption and the Burden of Proof in Re Edwards (Te Whakatohea No 2),[56] the Court or the Crown will either come to one or two conclusions when considering overlapping applications:

i. That neither of the applicant groups holds the area in accordance with Tikanga; or

ii. That one overlapping group holds the area in accordance with Tikanga and the other group does not; or

iii. Both all groups hold the area in accordance with Tikanga jointly as the Court found in this case with respect to the poutarāwhare entities.

iv. That one group holds the area in accordance with Tikanga and can be granted a recognition order while another group can be granted PCR to carry on activities permitted under such orders.

v. That groups have not substantiated the proof of holding the specified area in accordance with Tikanga, however, can be granted PCR for permitted activities.

d. Substantial interruption

Part of the role of the Court in, in this case, is to give interpretation to what constitutes "substantial interruption" given the MACA does not define it. As part of the test for the claim for Customary Marine Title, Section 58(1)(b) of MACA requires applicants to have exclusively used and occupied the specified area from 1840 "without substantial interruption".

Given the consistency of evidence provided to the Court by applicants and expert historians, the Court ruled out raupatu (confiscation of substantial areas of Māori land by the government after the New Zealand wars of the early 1860s) as a cause of substantial interruption for the applicants holding of takutai moana in accordance with Tikanga.[57]

In considering other factors that might amount to substantial interruption, the Court also considered the legislative intent of Section 58(2) of MACA on the issue of resource consent granted in the marine and coastal area at any time between the commencement of the MACA and the effective date. The Court concluded that nothing in the Resource Management Act shows an intention to extinguish Māori customary rights over marine and coastal areas.[58] Activities pre-dating the commencement of MACA, carried out pursuant to a resource consent are also not deemed to constitute "substantial disruption" of the exclusive use and occupation of the takutai moana by the claimant groups. [59]

In general, the grant of Customary Marine Title is usually subject to rights of navigation, fishing and access. As such, the fact that third parties undertake commercial or recreational fishing activities in the specified area does not amount to a substantial interruption of the holding of the area in accordance with Tikanga.

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[56] Hannah Z. Yang "Exclusivity, Substantial Interruption and the Burden of Proof in Re Edwards (Te Whakatohea No 2)" (2021) 27 Auckland University Law Review 415 at 425.
[57] Re Edwards n 203.
[58] [58] Re Edwards n 227
[59] As above.

There are obviously other factors that could constitute substantial disruption that didn't fall within the scope of the Court's consideration in Re Edwards. For example, there was no guidance by the Court to quantify the length of time the disruption needed to have occurred for in order to constitute "substantial disruption".

Assessing the Court's approach further, there are aspects of the applicant's requirement to discharge the burden of proving "substantial interruption" that are not quite practical. For instance, an applicant is either required to prove that an unidentified list of interrupters did not exist or identify all the interruptions that did exist since 1840 and show why those were not substantial or do both.[60] Proving this on an on-going basis would be extremely difficult and inconsistent in the way other courts would this approach.

Considerations on Co-existence of Customary Marine Title and Protected Customary Rights

Applicants making claims for a PCR recognition for a specified area do not have the near-impossible task of proving they have had exclusive use and occupation of the property since 1840. The statutory test for a PCR is that the right or specific activity must have been exercised by the Applicant group since 1840, and continues to be exercised in a particular part of the common marine and coastal area in accordance with Tikanga. There is no statutory requirement for a PCR Applicant to show exclusivity or absolute control over the customary rights and activities exercised in that area but to prove that those rights were and continue to be grounded in Tikanga.

Assessing this requirement through an equitable lens, a PCR applicant might be disadvantaged by this interpretation given that it's more likely that a CMT applicant would have more evidence that substantiates their use and occupation of a specified area. An Applicant claiming a CMT recognition order would likely have exercised some form of control and established a physical footprint in the specified area if they are claiming to have used and occupied the specified area in accordance with Tikanga without substantial interruption since 1840. Where a CMT applicant's evidence is juxtaposed with a PCR applicant's with respect to the same area, the evidence of a CMT applicant will be overwhelming compared to a PCR applicant's and could unfairly impact the weight attached to the PCR applicant's evidence. This could come through in the decision maker's consideration while determining boundary allocation or whether there are competing PCR applicants.

In summary, it will be far more practical for multiple PCRs to co-exist over a specified area rather than for a PCR and CMT to co-exist. This position also anticipates a circumstance where there is multiple CMT and PCR recognition application over the same specified area. The Court took a broad-stroke approach when it considered the issue of multiple overlapping PCR claims by stating that:[61]

> "the principle of whanaungatanga emphasises inclusiveness and collectiveness which is contrary to the exclusionary exercise of rights which often forms the basis of the common law system, suggesting here that if those rights were grounded in Tikanga, recognising them on a purely exclusionary

[60] Hannah Z. Yang "Exclusivity, Substantial Interruption and the Burden of Proof in Re Edwards (Te Whakatohea No 2)" (2021) 27 Te Mata Koi: Auckland University Law Review 415 at 425.
[61] Re Edwards n 397

> basis by refusing to grant a PCR to more than one group when it is established on the evidence that multiple groups exercised these rights, would be unreasonable."

What the Court might not have taken into account in this approach is the practicality of granting multiple recognition orders for PCR and at the same time CMT for applicants that have made claims for the same area. It might end up both unreasonable and impractical altogether.

The court is correct to conclude that the fact another applicant group holds CMT in an area does not automatically preclude another group from obtaining an order for PCR in respect of the same area. The challenge is first whether the PCR applicant will not be disproportionately disadvantaged on grounds of evidence and boundary determination; and whether the Court's approach will still be practical where there are multiple layers of PCR and CMT applicants seeking recognition for the same area. The Crown and the Court might need to manage these considerations carefully to ensure a new scope of grievances does not emerge from determinations relating to recognition orders.

Reactions to Re Edwards Decision in the Legal Community

Some strong opinions have come through on the Re Edwards decision majorly on the ability of an applicant to presumably plead the application of "Tikanga" in litigations involving Māori and non- Māori interests by anyone claiming Māori antecedence.

There is an argument that implies that once Tikanga has been validated by the courts as Re Edwards did, it will choke the Common Law foundations and be replaced with "anybody's guess presumably based on ill-defined ancient spiritual and cultural values as claimed by less than 15% of the population of New Zealand."[62] The writer went on to state that:[63]

> "It may be possible that these notions of conduct have some continuing interpersonal Maori relevance, but it is simply not tenable to import spiritual beliefs and ancient codes of conduct into the fabric of the contemporary common law of New Zealand. The law must be certain, readily available to all and obeyed by all…
>
> …One can well envisage that future commercial contracts will contain clauses, as is the case of much overseas commercial litigation ensuring that any disputes will be governed by the Common Law of England which remains free of these fanciful notions: this coupled with a dramatic rise in recourse to arbitration. And what of non-commercial matters such as trusts or property relationship agreements? Will it be sufficient for a disaffected beneficiary or a party claiming a smidgen of Maori blood to subvert the clear intention of the parties by pleading that the outcome is not in accord with Maori customary values and practices? The implications of this judgement are deeply disturbing. It is to be hoped that the appellate courts will restore some sanity and certainty to the common law and at least confine the notion of Tikanga

[62] Anthony Willy "Notes on the Judgement of Churchman J. in the case of Re Edwards" (2021) New Zealand Centre for Political Research 1 at 1
[63] As above.

> to the historical relationships and understandings of those seeking a right to the foreshore of New Zealand greater than that enjoyed by the public at large."

Re Edwards case is one of the major New Zealand case laws that give a place of recognition in the Common law courts to the indigenous principles of the Māori in line with the Treaty of Waitangi. It's too early to see the performance of Tikanga at play and there will be several opportunities for the courts to refine and standardize its practices where Tikanga is concerned. There are hundreds more applications before the Courts and more lodged with the Office of Māori Crown Relations for recognition of Customary Marine Title and Protected Customary Title. These cases will continually test the Court's approach to Tikanga in Re Edwards and over time, it is expected the Court will develop a body of rules based on consistent interpretation and application of Tikanga. It won't be perfect and might be fraught with some risks in the initial, if it's given time to be tested and refined in court processes, it will considerably revolutionise the New Zealand legal framework.

Further, Section 99 of the Act provides guidance on how the Court/Crown would interact with expert advice on Tikanga. The Court will likely have to deal with questions of Tikanga in most applications for a recognition order. This Section gives the Court the liberty to obtain advice either from a Māori Appellate Court or a Court expert (a pūkenga). Section 99(2) moderates the weight to be attached to each type of evidence – "The opinion of the Māori Appellate Court is binding on the Court but the advice of a pūkenga is not".[64]

The concern for some legal experts is the uncertainty around the extent to which Tikanga would go to upset the legal status quo to be incorporated into the common law, given that the Court itself concluded that it was impossible to give any hard and fast definition of what constitutes "customary values and practices". The concern extends far beyond the Court's approach to Tikanga in Re Edwards on issues of marine and coastal matters, but more about how Tikanga is plead in court moving forward in, for instance, family law, contract law, employment law, tax law, commercial law, finance, competition law, criminal law, corporate law, intellectual property law and much more. Some of these concerns are valid and there are no simple ways to address them, the next couple of years will test the courts as far as Tikanga recognition is concerned and the court's approach will shape the strength of what will become "New Zealand customary values and acceptable practices."

Conclusion

The Court has adopted a staged approach to the hearing of applications for recognition orders, with the first stage identifying which applicant groups have met the statutory tests for recognition orders and the second stage focusing on the specific terms of the order and determination of coastal boundaries. The complexities of issues to be determined in CMT and PCR under MACA makes the two-staged approach a reasonable step to exhaustively deal with the novel issues in Re Edwards.

[64] Section 99 Marine and Coastal (Takutai Moana) Act 2011

In affirming the statutory status of the existence of customary interests as pre-existing, this High Court's approach in Re Edwards follows the line of the Court of Appeal's recognition of pre-existing rights based on the Treaty of Waitangi in the *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board*[65]. In that case, the Court noted that:[66]

> "This provision of the Treaty contains an unqualified guarantee to the rangatira and hapū of New Zealand of "rangatiratanga" (in te reo Māori) and "full exclusive and undisturbed possession" (in English) in relation to their lands, estates, forests, fisheries and "taonga katoa". The exercise of those guaranteed rights and interests is a "lawfully established existing activity" for the purposes of the EEZ Act.106 Indeed the exercise of these rights and interests can fairly be described as the most long-standing lawfully established existing class of activities in New Zealand. Those rights were not affected by the acquisition of sovereignty by the British Crown in 1840, as this Court explained in Attorney-General v Ngati Apa.[67] Article 2 of the Treaty recognises the continued existence of these rights and interests. This approach to the "existing interest" is supported by the express inclusion within that term of settlements of historical and contemporary claims under the Treaty of Waitangi. Customary interests are not derived from Treaty settlements, rather they are pre-existing interests that are recognised by the Treaty settlements. MACA provides a formal mechanism for recognising certain customary interests in marine and coastal areas and for giving contemporary expression to those interests. Customary rights and interests are not less deserving of recognition, and cannot be disregarded as "existing interests" merely because they do not conform with English legal concepts."

With respect to the court's approach to Tikanga in Re Edwards, the Court of Appeal reflected that "it should be unquestionable that Tikanga Māori defines and governs the interests of Tangata Whenua in the taonga protected by the Treaty as an integral strand of the common law of New Zealand."[68]

> "The incidents and concepts of Māori customary property rights and interests depend on the customs and usages (Tikanga Māori) which gave rise to those rights and interests.[69] The continued existence of those rights and interests necessarily implies the continued existence and operation of the Tikanga Māori which defines their nature and extent. Māori customary land is an ingredient of the common law of New Zealand. The same can be said of the Tikanga that defines the nature and extent of all customary rights and interests in taonga protected by the Treaty."

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[65] Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board [2020] NZCA 86 [3 April 2020]
[66] Above n 147
[67] Attorney-General v Ngati Apa [2003] 3 NZLR 643 (CA) at [13]–[47] per Elias CJ, [133]–[149] per Keith and Anderson JJ and [183]–[185] per Tipping J.
[6868] See Attorney-General v Ngati Apa, above n 107, at [13]–[20] per Elias CJ; Paki v Attorney-General [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ, Blanchard and Tipping JJ; and Ngāti Whātua Ōrākei Trust v Attorney-General [2018] NZSC 84, [2019] 1 NZLR 116. See also Williams, above n 114, at 32–34; Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95] per Elias CJ, [150] and [164] per Tipping, McGrath and Blanchard JJ; Public Trustee v Loasby (1908) 27 NZLR 801 (SC); and Baldick v Jackson (1910) 30 NZLR 343 (SC).
[69] Attorney-General v Ngati Apa, above n 107, at [184].

In September 2022, the Supreme Court upheld the Court of Appeal's decision in *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* where the court gave Tikanga values legal substance and elevated its significance by stating that interest connected to mana, whanaungatanga and kaitiakitanga are not just cultural values but principles of law that predate the arrival of common law in 1840. As such, decisions relating to takutai moana must consider the impact on Māori interests, as enshrined and codified in Tikanga.

In October 2022 as well, the Supreme Court again set a pattern for the recognition of Tikanga in *Peter Hugh Mcgregor Ellis v The King*[70] where in this instance, none of the parties involved was Māori or had any connection to Māori. In the case, the court relied on Tikanga experts on the concepts of hara and ea meaning the transgression of tapu, the commission of a wrong and the violation of Tikanga, resulting in an imbalance and requiring restoration of balance- a state of ea. In elaborating on the Tikanga concepts, Justice Joe Williams noted that "Hara results in harm to the affected party including harm to their mana and this an imbalance is created between those involved." In justifying the basis for Tikanga, the Court affirmed that:[71]

> "Tikanga Māori is the first law of Aotearoa and its principles rightly inform the interpretation and development of the common law of Aotearoa. It is the function of this Court to declare the law of Aotearoa/New Zealand and we must do so mindful of the values that in combination give us our own sense of community and common identity. . . . Tikanga is part of the values of the New Zealand variety of the common law. We are now at a point, where Tikanga and/or Tikanga-derived principles are part of the fabric of Aotearoa/New Zealand's law and public institutions through legislation, the common law and policy."

Given the statutory recognition that Tikanga has received at the Supreme Court, it gives an indication that Tikanga is here to stay and influence New Zealand statutory frameworks moving forward. So if there was a likelihood of an appeal for Re Edwards, it's unlikely to be on the basis of the High Court's approach to Tikanga.

Broadly, as highlighted in Re Edwards (Whakatohea Stage Two) decision published on 13th October 2022, the legal issues considered by the Court in Re Edwards include:[72]

- The boundaries of the common marine and coastal area, especially in relation to records of title within the takutai moana with respect to substantial interruption and 'holding of the specified area in accordance with Tikanga;
- The Court's jurisdiction in relation to issues of 'accommodated infrastructure' and provision of guidance on the term;
- The requirements of the Act as to draft orders, particularly in relation to mapping, who is to hold the orders, mandate, and the shared exclusivity approach adopted in the decision;

[70] Peter Hugh Mcgregor Ellis v The King [2022] NZSC 115.
[71] Above.
[72] Re Edwards (Whakatohea Stage Two) No. 7 [2022] NZHC 2644.

- The requirements of the Act as to wahi tapu, particularly in relation to location boundaries, evidence, the enforceability of proposed prohibitions and restrictions, and the reasons for those proposed prohibitions and restrictions;
- Wahi tapu located on land adjacent to the toakutai moana; and
- The limitations on PCR orders

Stage 2 of the judgment focuses on the requirements of Section 109(1) of MACA which applicants that have succeeded in Stage 1 must adhere to in order to have a draft recognition order for CMT and/or PCR approved by the Court. Discussion of Stage 2 of the judgment will not fit within the scope of the current paper and will be assessed separately.

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