NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 49/2019
[2022] NZSC 114

BETWEEN	PETER HUGH MCGREGOR ELLIS Appellant
AND	THE KING Respondent

Hearings:	14 November 2019 25 June 2020
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Arnold JJ
Counsel: (14 November 2019)	R A Harrison, S J Gray and B L Irvine for Appellant U R Jagose KC, K S Grau and A D H Colley for Respondent
Counsel: (25 June 2020)	R A Harrison, N R Coates, K D W Snelgar and S J Gray for Appellant U R Jagose KC, J R Gough, K S Grau and A D H Colley for Respondent M K Mahuika and H K Irwin-Easthope for Te Hunga Rōia Māori o Aotearoa | The Māori Law Society as Intervener
Judgment:	1 September 2020
Reasons:	7 October 2022

JUDGMENT OF THE COURT

The application for the continuation of the appeal despite the death of the appellant is granted.

REASONS

SUMMARY OF REASONS
(Given by the Court)

Background

[1] Mr Ellis was convicted of sexual offending against seven complainants in 1993. Two appeals to the Court of Appeal (in 1994 and 1999) were unsuccessful.[1] On 31 July 2019, this Court granted leave to appeal against the Court of Appeal decisions as well as an extension of time to do so. Mr Ellis died on 4 September 2019 before the appeal could be heard.

[2] The Court held two hearings to determine whether the appeal should continue despite his death: one on 14 November 2019 and one on 25 June 2020. The June hearing concerned the relevance of tikanga Māori to the issue of the continuation of the appeal.

[3] On 1 September 2020, this Court issued a results judgment allowing the appeal to continue. These are the Court's reasons for allowing the continuation of the appeal.[2]

[4] A judgment issued contemporaneously contains the Court's decision in relation to Mr Ellis' appeal against conviction.[3]

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1 Except in relation to one complainant who recanted.

2 All of the judges agree with this summary of their reasons. We emphasise that this is a summary only and the full analysis is what appears in the Reasons that follow.

3 *Ellis v R* [2022] NZSC 115.

Continuation of the appeal

The test

[5] The Court accepts that there is jurisdiction to allow an appeal to continue in the event of the death of an appellant in the circumstances of this case (where leave to appeal has already been granted).[4]

[6] The Court decides unanimously that an appeal will abate on the death of an appellant if there is no application for continuance.[5] While there is no presumption against continuance, it will only be granted where there is good reason to allow the appeal to proceed to determination.[6]

[7] The Court holds unanimously that the appropriate test for deciding whether the discretion to allow an appeal to continue despite the death of the appellant is whether this would be in the interests of justice.[7]

[8] The Court (by majority of Glazebrook, O'Regan and Arnold JJ) holds that the factors relevant to the consideration of whether it is in the interests of justice for an appeal to continue are:[8]

(a) whether the appeal will proceed in a proper adversarial context;

(b) the strength of the grounds of the appeal;

(c) the wishes of the appellant and the family of the appellant, and the reputational issues affecting the appellant and their family;

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4 At [48] per Glazebrook J, [154] per Winkelmann CJ, [231] per Williams J and [276]–[277] per O'Regan and Arnold JJ.

5 At [52] per Glazebrook J, [214] per Winkelmann CJ, [243] per Williams J and [294] per O'Regan and Arnold JJ.

6 At [52] per Glazebrook J, [214]–[215] per Winkelmann CJ, [236]–[237] per Williams J and [294] per O'Regan and Arnold JJ. O'Regan and Arnold JJ (at [294]) would have found a presumption helpful, but they are content to adopt Glazebrook J's approach on this point. Note that Glazebrook, Williams, O'Regan and Arnold JJ say there must be "very good reason".

7 At [48] and [57] per Glazebrook J, [152] per Winkelmann CJ, [233] per Williams J and [294] per O'Regan and Arnold JJ.

8 At [57] per Glazebrook J, and [278] and [292]–[293] per O'Regan and Arnold JJ.

(d) the interests of any victims and their families (an important factor);

(e) any public or private interest in the continuation of the appeal, including:

(i) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;

(ii) a systemic issue related to the administration of justice;

(iii) collateral consequences to the family of the deceased or to other interested persons or to the public;

(f) whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal; and

(g) whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.

[9] Glazebrook, O'Regan and Arnold JJ note that these factors are non-exhaustive and other factors may be relevant to the overall interests of justice test, depending on the particular circumstances. The weight accorded to the factors will depend on the circumstances of the particular case.[9]

[10] Winkelmann CJ and Williams J prefer a framework for deciding whether it is in the interests of justice for an appeal to continue that weighs practical considerations, the interest of finality in litigation and the personal and public interest in addressing a potential miscarriage of justice through the appellate process. Tikanga considerations are folded into that framework.[10]

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9 At [58] per Glazebrook J and [292] per O'Regan and Arnold JJ.

10 At [210]–[211] per Winkelmann CJ and [236] per Williams J. See further at [212] per Winkelmann CJ and [238]–[244] per Williams J.

[11] While Glazebrook, O'Regan and Arnold JJ consider tikanga concepts may be relevant, they do not consider that this necessitates a modification of the test set out above at [8].[11]

Decision on continuation of the appeal

[12] The Court, by majority of Winkelmann CJ, Glazebrook and Williams JJ (the majority judges), has exercised its discretion to allow Mr Ellis' appeal to continue despite his death.[12] Both Winkelmann CJ and Williams J apply their framework referred to at [10] above and further say that they would have come to the same conclusion on the continuation of the appeal applying the test set out above at [8].[13]

[13] In coming to their decision, the majority judges were conscious of the very high level of stress and public scrutiny already suffered by the complainants and their whānau over such a long period, including that occasioned by two appeals and a Ministerial inquiry.[14] They were also very conscious of the additional stress that will be occasioned by the hearing of the appeal in this Court.

[14] The majority judges consider, however, that public interest factors in this case mean that it is in the interests of justice to allow the appeal to proceed. In their view, the grounds of appeal are strong and raise systemic issues.[15] There is also a broader public interest in ensuring convictions only follow from fair trials.[16] There has also been long running public concern about the possibility of a miscarriage of justice in this case.[17]

[15] The majority judges comment that, given the intense public interest in this case and the fact this Court has already granted leave to appeal, it is unlikely that not

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11 At [142]–[145] per Glazebrook J and [315] per O'Regan and Arnold JJ.
12 At [79] and [148] per Glazebrook J, [228] per Winkelmann CJ and [274] per Williams J.
13 At n 225 per Winkelmann CJ and n 267 per Williams J.
14 At [76] per Glazebrook J, [218] per Winkelmann CJ and [274] per Williams J.
15 At [25], [63] and [70] per Glazebrook J, [197], [222] and [227]–[228] per Winkelmann CJ and [241] per Williams J.
16 At [55] and [78] per Glazebrook J, [191], [227]–[228] per Winkelmann CJ and [274] per Williams J.
17 At [71] per Glazebrook J, [227] per Winkelmann CJ and [242] per Williams J.

allowing the appeal to continue would in fact have meant finality for the complainants. Public scrutiny would have continued.[18]

[16] The majority judges decided that the appeal is to continue in Mr Ellis' own name.[19]

[17] O'Regan and Arnold JJ are of the view that the Court should not exercise the discretion to allow the appeal to continue.[20] They consider that the interests of the complainants and their whānau outweigh all the other factors in this case.[21] They also see the public interest factors as having less value than attributed to them by the majority judges, especially given the legislative changes that have occurred since Mr Ellis' trial took place.[22]

Tikanga

[18] The reasons of the Court also deal with the place of tikanga in the law of Aotearoa/New Zealand more generally.

[19] The Court is unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant.[23] It also forms part of New Zealand law as a result of being incorporated into statutes and regulations.[24] It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies.[25]

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18 At [77] per Glazebrook J, [218] per Winkelmann CJ and [274] per Williams J.
19 At [62] per Glazebrook J, n 225 per Winkelmann CJ and n 267 per Williams J.
20 At [275] per O'Regan and Arnold JJ.
21 At [309] per O'Regan and Arnold JJ.
22 At [310] per O'Regan and Arnold JJ.
23 At [108]–[110] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O'Regan and Arnold JJ.
24 At [98]–[102] per Glazebrook J, [175]–[176] per Winkelmann CJ, [257] per Williams J and [280] per O'Regan and Arnold JJ.
25 At [103]–[105] per Glazebrook J, [173] per Winkelmann CJ, [257] per Williams J and [280] per O'Regan and Arnold JJ.

[20] O'Regan and Arnold JJ do not consider this a suitable case for the Court to make any pronouncements of a general nature about the place of tikanga in the law of Aotearoa/New Zealand, apart from the points set out at [19] above.[26]

[21] The Court (by majority of Winkelmann CJ, Glazebrook and Williams JJ) holds that the colonial tests for incorporation of tikanga in the common law should no longer apply.[27] Rather the relationship between tikanga and the common law will evolve contextually and as required on a case by case basis.[28]

[22] The majority judges accept that tikanga was the first law of Aotearoa/New Zealand and that it continues to shape and regulate the lives of Māori.[29] In light of this, the courts must not exceed their function when engaging with tikanga.[30] Care must be taken not to impair the operation of tikanga as a system of law and custom in its own right.[31]

[23] The majority judges comment that the appropriate method of ascertaining tikanga (where it is relevant) will depend on the circumstances of the particular case.[32]

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26 At [281] per O'Regan and Arnold JJ.
27 At [113]–[116] per Glazebrook J, [177] per Winkelmann CJ and [260] per Williams J.
28 At [116], [119] and [127] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J.
29 At [107] and [110] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ and [272] per Williams J.
30 At [122]–[123] per Glazebrook J, [181] per Winkelmann CJ and [270]–[271] per Williams J.
31 At [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J.
32 At [121], [125] and [127] per Glazebrook J, [181] per Winkelmann CJ and [261]–[267] and [273] per Williams J.

GLAZEBROOK J

Table of Contents

Introduction

[24] In 1993, Mr Ellis was convicted of 16 counts of sexual offending against seven complainants.[33] The complainants attended the Christchurch Civic Childcare Centre where Mr Ellis worked. He was sentenced to ten years' imprisonment.[34] An appeal against conviction in 1994 was largely unsuccessful.[35] After a reference by the Governor-General pursuant to s 406(a) of the Crimes Act 1961 (now repealed), the Court of Appeal in 1999 dismissed Mr Ellis' second appeal against conviction.[36] A further s 406 application resulted in a Ministerial inquiry in 2001 by Sir Thomas Eichelbaum, which concluded that Mr Ellis' convictions were not unsafe.[37]

[25] On 5 June 2019, Mr Ellis filed an application for an extension of time to apply for leave to appeal to this Court and an application for leave to appeal against the 1994 and 1999 Court of Appeal decisions. On 31 July 2019, this Court granted both applications.[38] This means the Court considered that the appeal grounds were strong enough and had sufficient prospect of success to overcome the long delay in seeking leave. This conclusion was reached against the background of the two appeals to the Court of Appeal and the Ministerial inquiry.[39]

[26] Mr Ellis died on 4 September 2019 before the appeal could be heard. This Court determined that the appeal should proceed despite his death.[40] We indicated in

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33 Mr Ellis was acquitted or discharged on 12 other charges.

34 *R v Ellis* HC Christchurch T9/93, 22 June 1993 (Williamson J).

35 *R v Ellis* (1994) 12 CRNZ 172 (CA) (Cooke P, Casey and Gault JJ) [1994 CA judgment]. Convictions on three counts were quashed but the appeal was dismissed on the remaining counts.

36 *R v Ellis* (1999) 17 CRNZ 411 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ) [1999 CA judgment]. The report in the New Zealand Law Reports ([2000] 1 NZLR 513) is an abridged version of the judgment. For that reason, we refer to the Criminal Reports of New Zealand version.

37 Thomas Eichelbaum *The Peter Ellis Case: Report of the Ministerial Inquiry for the Hon Phil Goff* (Ministry of Justice, Wellington, 2001) [Ministerial inquiry].

38 *Ellis v R* [2019] NZSC 83 (Glazebrook, O'Regan and Williams JJ) [Leave judgment]. This judgment was recalled and reissued on 7 October 2022.

39 See further below at [60].

40 The results judgment was issued on 1 September 2020: *Ellis v R* [2020] NZSC 89 (Winkelmann CJ, Glazebrook, O'Regan, Williams and Arnold JJ).

that judgment that reasons would be given at the same time as the judgment on the substantive appeal and that the reasons would deal with the issues raised at both of the hearings on continuation.[41] These are my reasons for allowing the continuation of the appeal.

Relevant procedural history

Extension of time and leave

[27] Mr Ellis' proposed grounds of appeal when applying for leave were:

(a) the evidential interviews of the complainants fell far short of best practice (even at the time);

(b) there was a strong possibility of contamination of the evidence;

(c) the jury was not appropriately assisted at trial by the expert witnesses;[42] and

(d) unreliable expert evidence was led under s 23G of the Evidence Act 1908 (now repealed).[43]

[28] In support of his application for leave, Mr Ellis filed two affidavits, one from Professor Harlene Hayne (dealing with the evidential interviews) and one from Dr Thelma Patterson (dealing with the reliability of the expert evidence given at trial).

[29] Professor Hayne deposed that the jury was not made sufficiently aware of the factors which might have affected the reliability of the children's evidence, including the potential for contamination prior to the evidential interviews, suggestive interviewing practices and the delay in reporting. Dr Patterson deposed that the behavioural symptoms discussed at trial had no probative bearing on the likelihood that the children were abused and should not have been led.

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41 At [5].

42 At trial, Dr Karen Zelas was a Crown witness and Dr Keith Le Page was called by Mr Ellis.

43 Among other things, this section allowed expert witnesses to testify whether any evidence given during the proceedings relating to the complainant's behaviour was consistent with the behaviour of sexually abused children in the same age group.

[30] As noted above, this Court granted Mr Ellis' application for leave on 31 July 2019 and also granted him an extension of time to apply for leave to appeal.[44] As is the usual practice of this Court, no reasons were given for the decision on leave to appeal. This is because leave is decided at a preliminary stage and full arguments are made and dealt with on appeal.[45] Reasons were given for the extension of time decision. The Court said:[46]

> [15] We give brief reasons for granting Mr Ellis' application for an extension of time to apply for leave to appeal. The touchstone will always be the interests of justice. Relevant factors to be taken into account include whether the delay is adequately explained and whether there are compelling reasons to extend time. In considering whether to grant the application, the Court may have regard to the seriousness of the charges, the strength of the proposed appeal, the impact on others and prejudice to the Crown. Also relevant is whether fresh evidence has come to light.
>
> [16] On the basis of the supplementary affidavit of Professor Hayne, we are satisfied that the research underpinning her evidence was only very recently completed and that the type of empirical analysis of the evidential interviews that she has conducted is a new approach and significantly different from the expert evidence available to the Court of Appeal in 1999. We are also satisfied that her analysis could not have been completed earlier than it was, both because of the magnitude of the task and the availability of comparative data.
>
> [17] In our view the affidavits of Professor Hayne and Dr Patterson raise issues of general and public importance and significant issues specific to Mr Ellis' case. The interest of justice requires that these issues be ventilated on appeal, despite the length of time since the second Court of Appeal decision.
>
> [18] For these reasons, we consider an extension of time for leave to appeal should be granted. …

Preparation for appeal

[31] Before leave was granted, counsel had advised this Court that Mr Ellis had been diagnosed with terminal cancer and asked, if leave were granted, for the hearing of the appeal to proceed as a priority. After leave was granted the hearing of the appeal was accordingly set down for 11 November 2019. However, Mr Ellis died on 4 September 2019 before any evidence or submissions were filed.

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44 Leave judgment, above n 38.

45 *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd* [2010] NZSC 30 at [1]. The Court is required to give reasons when declining leave to appeal: Senior Courts Act 2016, s 77.

46 Leave judgment, above n 38 (footnotes omitted).

Continuation despite death

[32] After it became clear that Mr Ellis would be unlikely to survive until the hearing date, he filed an affidavit asking this Court to allow the proceedings to continue in the event of his death. Soon after Mr Ellis' death, his brother (the executor of his estate) filed an affidavit asking that the appeal proceed either in Mr Ellis' name or in his own name as Mr Ellis' personal representative.

[33] This Court began hearing submissions on whether the appeal should proceed despite Mr Ellis' death on 14 November 2019. At that hearing, the Court raised the issue of the relevance of tikanga to the question of continuance. The hearing was therefore adjourned to allow counsel to prepare further submissions on this issue.

[34] By way of minute dated 15 November 2019, the Court directed that submissions cover:

(a) whether tikanga might be relevant to any aspect of the Court's decision on whether the appeal should continue;

(b) if so, which aspects of tikanga; and

(c) assuming tikanga is relevant, how tikanga should be taken into account.

[35] Counsel for the parties conferred and agreed to convene a wānanga with tikanga experts to discuss the issues in the Court's minute. This was a process agreed between the parties and not one ordered by the Court.

[36] The experts chosen by the parties for the wānanga had no connection to Mr Ellis or the complainants or to their respective whānau. They were simply invited to express independent expert views on the issues identified. The wānanga took place on 10 and 11 December 2019.

[37] An agreed statement of facts pursuant to s 9 of the Evidence Act 2006 was filed following the wānanga. Appended to it was a statement of tikanga (the Statement of

Tikanga) written by Sir Hirini Moko Mead and Sir Pou Temara.[47] All of the tikanga experts who attended the wānanga supported that statement.[48] The Statement of Tikanga does not just cover the questions set out in the Court's minute related to this particular appeal but it also sets out a more general discussion of tikanga and its place in New Zealand law.[49]

[38] With the consent of the parties, Te Hunga Rōia Māori o Aotearoa | The Māori Law Society was granted leave to intervene on 19 December 2019.[50] Representatives of Te Hunga Rōia Māori had been in attendance at the wānanga at various points over the two days to manaaki (care for) the tikanga experts and answer any legal questions.[51]

[39] Submissions on tikanga were filed by the parties and the intervener, and the hearing was reconvened on 25 June 2020. At the resumed hearing, oral submissions were made on the relevance of tikanga in the law of New Zealand generally, as well as covering how tikanga applies to this appeal.

Propensity evidence

[40] For completeness, I note that in October 2020 the Crown applied for leave to adduce propensity evidence pursuant to s 43 of the Evidence Act 2006. The proposed evidence constituted an affidavit from a deponent to the effect that she was sexually abused by the appellant in 1982 or 1983, along with other material that related to the alleged sexual abuse incident. Hearings on whether to admit the evidence took place on 11 November 2020 and 25 March 2021.[52] On 15 June 2021, this Court issued a

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47 The Statement of Tikanga is appended at the end of this judgment and is dated 31 January 2020. The full biographies of Sir Hirini Moko Mead and Sir Pou Temara are contained in it. By way of update, I note that Sir Pou Temara was made a Knight Companion of the New Zealand Order of Merit in 2021.

48 Tikanga experts who attended at various points over the two days included: Te Ripowai Higgins, Kura Moeahu, Professor Rawinia Higgins, Associate Professor Peter Adds, Che Wilson, Mohi Apou and Tamahou Rowe. All of these people are considered to be eminent knowledge holders in the subject matter of tikanga Māori.

49 For the process adopted for the wānanga, see the Statement of Tikanga at [11].

50 *Ellis v R* SC 49/2019, 19 December 2019 (Minute).

51 Representatives included Matanuku Mahuika, Horiana Irwin-Easthope, Māmari Stephens, Natalie Coates (counsel for Mr Ellis), Kingi Snelgar (counsel for Mr Ellis), Jason Gough (senior Crown counsel), Bernadette Arapere (Crown counsel), Rhianna Morar (Crown Law summer clerk) and Rohario Murray (Crown counsel).

52 The first of the two hearings was adjourned to give the respondent time to have further inquiries made about the alleged incident.

results judgment dismissing the application.[53] On 1 July 2021, we provided reasons for that decision.[54]

Structure of reasons

[41] Because of the bifurcated nature of the hearing and the submissions, I propose to deal first with the submissions made at the hearing of 14 November 2019.

[42] I then move to a discussion of the place of tikanga in New Zealand law. This was dealt with in the Statement of Tikanga and the submissions of the parties as a necessary framework for the consideration of whether and, if so, how tikanga is relevant to the issue of whether an appeal should continue despite the death of an appellant.

[43] The last part of these reasons considers how tikanga principles might affect the test that should be applied to decide applications to continue an appeal despite the death of an appellant and then applies the test to this case.

Submissions at November 2019 hearing

[44] Both parties accepted that the Court has jurisdiction to proceed with the appeal. Rule 5(2) of the Supreme Court Rules 2004 provides the Court with discretion to dispose of a case where no form of procedure is prescribed, and where there are no rules affecting similar cases, "in the manner that the Court thinks best calculated to promote the ends of justice". Both parties accepted that the factors set out by the Supreme Court of Canada in *R v Smith* provide a useful guide in the exercise of that discretion.[55]

Submissions for Mr Ellis

[45] Counsel for Mr Ellis submitted that there were compelling reasons to proceed with the appeal. The fresh evidence filed in support of Mr Ellis' application for leave meant the appeal has wider ramifications than simply resolving Mr Ellis' case. It raises

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53 *Ellis v R* [2021] NZSC 63.
54 *Ellis v R* [2021] NZSC 77, (2021) 29 CRNZ 749.
55 *R v Smith* 2004 SCC 14, [2004] 1 SCR 385 at [50]. Binnie J delivered the Court's judgment.

issues of public interest, including how to elicit children's evidence appropriately, how to identify and manage the risk of children's accounts becoming contaminated and the role of experts in assisting the fact-finder to assess the reliability of such evidence. Finally, counsel pointed to the large degree of public interest in Mr Ellis' case.

Submissions for the Crown

[46] The Crown acknowledged the Court's discretion can be exercised to continue a criminal appeal where the appellant has died but submitted that the general rule is that an appeal against conviction abates on the death of an appellant and that the discretion to continue should be used sparingly and in exceptional circumstances. Those circumstances, as submitted, include where an interested party can demonstrate a continuing pecuniary interest in the appeal being determined, where the appeal will lead to a final resolution, such as where there is a real likelihood of the Court being able to conclusively determine guilt or innocence, or where there is a legal issue of principle that transcends the instant appeal.

[47] In the circumstances of this case, the Crown submitted the appeal should not be heard. It submits that the grounds of appeal are weak and that Mr Ellis' challenges have been closely and repeatedly scrutinised by multiple courts. The Crown also noted that Mr Ellis' estate has no pecuniary interest in the appeal which, in its submission, raises only issues specific to the facts of Mr Ellis' case or issues that are of historic interest only. Further, the Crown submitted that, as this Court cannot conclusively determine Mr Ellis' guilt, any potential result would not justify the expenditure of limited court resources, particularly in light of the fact that there have already been two appeals and a Ministerial inquiry. Finally, the Crown submitted that weight should be given to the significant delay on Mr Ellis' part in bringing the final appeal and to the interests of the complainants and their families.[56]

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[56] In its written submissions, the Crown also submitted that the propensity evidence it sought to adduce could not be dealt with "in a proper adversarial context" in terms of the first factor from *R v Smith*, above n 55, at [50] (see below at [49]). This argument fell away when the application to adduce that evidence was declined.

Assessment (November 2019 hearing)

Discretion to allow the appeal to continue

[48] I note first that these reasons only deal with the particular facts of this case: the continuation of an appeal where leave had been granted before the appellant died. The principles would likely also apply also to appeals as of right filed before an appellant died.[57] Against this background, I accept the submission of the parties that there is jurisdiction to continue an appeal despite the death of an appellant and that the overriding consideration in exercising the discretion to allow an appeal to continue is whether continuation is in the interests of justice.[58] This entails taking into account and weighing the interests of any victims and their families, the interests of the appellant and their family, the public interest and the effect on the criminal justice system as a whole. Where the appeal raises an issue that is one of principle or wider importance, that would be an important consideration.

[49] As noted above, the parties agree that the decision of the Supreme Court of Canada in *R v Smith* provides helpful guidance to the exercise of the discretion. The general test postulated in that case was whether there are "special circumstances that make it 'in the interests of justice'" to allow the continuation of an appeal.[59] The Court said that this question may be approached by reference to a non-exhaustive list of factors:[60]

1. whether the appeal will proceed in a proper adversarial context;

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57 As the principles relate to an application for a continuation of an appeal, they cannot apply to an appeal that has not been filed. I do not decide whether the principles apply where an application for leave to appeal or for an extension of time has been filed before the death of an applicant. I comment that the concept of ea, discussed below, may be helpful in any later consideration on this point.

58 The usual practice of the Court of Appeal is to treat an appeal as having lapsed in the event of the appellant's death: *Peters v New Zealand Police* [2014] NZCA 215 at [5]. The Court of Appeal has, however, recognised jurisdiction, referencing r 45 of the Court of Appeal (Criminal) Rules 2001 to allow an appellant's personal representative to continue an appeal in the event of the appellant's death. One factor previously held to justify the Court exercising the discretion to do so is where the representative has a continuing pecuniary interest in the outcome of the appeal: *R v Saxton* [2009] NZCA 61, [2009] 3 NZLR 29 at [15]–[16]. See also *Beri v R* CA456/03, 29 June 2004 at [10] (recognising such a jurisdiction without reference to r 45); and *K (CA354/02) v R* CA354/2002, 1 December 2004 (Minute) at [5]–[6] (leaving the question of whether there was such jurisdiction under r 45 open). Such jurisdiction has also been recognised by the High Court where the appellant's personal representative has a continuing pecuniary interest: see *Walker v Rusbatch* [1959] NZLR 600 (SC) at 603; and *Barrett v Sarten* [1982] 2 NZLR 757 (HC) at 762.

59 *R v Smith*, above n 55, at [50].

60 At [50]–[51].

2. the strength of the grounds of the appeal;

3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:

    (a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;

    (b) a systemic issue related to the administration of justice;

    (c) collateral consequences to the family of the deceased or to other interested persons or to the public;

4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;

5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.

[50] The Supreme Court of Canada said that the above factors and any other relevant factors are then weighed to determine whether, "notwithstanding the general rule favouring abatement, it is in the interests of justice to proceed".[61]

[51] I agree that the factors set out by the Supreme Court of Canada in *R v Smith* provide a useful starting point. I would make two additions and one modification for the reasons explained below at [56].

[52] I accept that appeals abate on death unless there is an application for continuance. Successful applications for continuance will be rare. This is because of the value in our criminal justice system of the principle of finality, especially for victims. I do not, however, consider it helpful to speak of a presumption against continuance or to impose a requirement for "special circumstances" when considering continuance applications. It suffices to say that there must be very good reason for it to be in the interests of justice for an appeal to continue despite the death of the appellant.

[53] I do not apprehend that the courts will be overwhelmed by such applications. The appellants who die before their appeal is heard will not be numerous and not all

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61 At [51].

families or executors will be interested in pursuing the appeal. The weighing of the factors themselves, against the background of the value of finality, will also limit the number of appeals that then proceed. Indeed, some of the factors on their own would likely mean that the appeal will not proceed: for example, an application for continuance would almost certainly fail where the grounds of appeal are weak or where the appeal could not proceed in a proper adversarial context.

[54] I do not accept the Crown submission that it is only pecuniary or other private law interests of surviving family members that are relevant.[62] A person is still part of a family even if deceased. Feelings for that person transcend death and there are continuing reputational issues that will affect the whole family.[63] These wider interests of the surviving family members are therefore also relevant, although not decisive. I also consider the wishes and interests of the deceased appellant to be relevant but again, not decisive.

[55] In addition, while the ability to determine guilt or innocence conclusively would be a factor in deciding whether an appeal should continue, I do not think it should be controlling. The justice system as a whole has an interest in ensuring defendants are only convicted after fair trials. This interest remains even if a defendant is deceased and should be weighed as a relevant factor. In any event, it would likely be relatively rare for an appeal to lead to a conclusive determination of guilt or innocence. And of course, the strength of the grounds of appeal will be relevant to a decision on whether or not an appeal should continue.

[56] As to the *R v Smith* factors, I consider there should be two additions. First, I consider that the interests of any victims and their families are important in any balancing exercise regarding the continuation of a criminal appeal and should be explicitly included as a separate factor. Second, it follows from the discussion above that the wishes of the deceased appellant and reputational issues affecting that person

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62 Cases cited to the Court where a pecuniary interest was stated or implied to be the only relevant interest include *Walker v Rusbatch*, above n 58, at 603; *Barrett v Sarten*, above n 58, at 762; *Beri*, above n 58, at [10] (insofar as the Court endorsed *Barrett v Sarten*); and *King-Sorenson v Police* HC Rotorua CRI-2003-077-2816, 7 July 2005 at [10]–[13].

63 I do not agree, as the Supreme Court of Canada appears to suggest in *R v Smith*, above n 55, at [45], that such feelings should not be taken into account.

and their families are also relevant factors to be weighed.[64] These two additions necessitate a change to the first part of the third *R v Smith* factor from "whether there are special circumstances that transcend the death of the individual appellant/respondent" to "any public or private interest in the continuation of the appeal".

[57] Accordingly, the factors I consider are relevant to the consideration of whether it is in the interests of justice to continue an appeal despite the death of an appellant are:

(a) whether the appeal will proceed in a proper adversarial context;

(b) the strength of the grounds of the appeal;

(c) the wishes of the appellant and the family of the appellant, and the reputational issues affecting the appellant and their family;

(d) the interests of any victims and their families (an important factor);

(e) any public or private interest in the continuation of the appeal, including:

(i) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;

(ii) a systemic issue related to the administration of justice;

(iii) collateral consequences to the family of the deceased or to other interested persons or to the public;

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64 I am conscious that actions for defamation do not survive death, although most other actions do survive for the benefit of the estate: Law Reform Act 1936, s 3(1). I do not consider this stops reputational issues being taken into account in this context which is criminal and not civil and where it is accepted that criminal appeals can continue after death (unlike defamation actions).

(f) whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal; and

(g) whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.

[58] These factors are non-exhaustive and other factors may be relevant to the overall interests of justice test, depending on the particular circumstances. I also note that the weight accorded to the factors will depend on the circumstances of the particular case.

[59] Before examining the factors in this case, I make one preliminary comment.

Preliminary comment

[60] As an overarching point, it is significant that this Court has already granted both an extension of time to apply for leave to appeal and leave to appeal in this case. As noted,[65] this means that the Court has already decided that the appeal grounds were strong enough and had sufficient prospects of success to overcome the fact of the long delay in seeking leave. The issue in this case therefore is whether the death of Mr Ellis changes the balance that was struck in the original decision to grant an extension of time and leave to appeal.

Whether the appeal will proceed in a proper adversarial context

[61] Mr Ellis had given instructions on the conduct of his appeal before his death and preparations for the appeal hearing were underway. The grounds of appeal mean that the focus of the hearing will be on the expert evidence and the submissions on that expert evidence. I am satisfied therefore that the appeal will proceed in a proper adversarial context.

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65 See above at [25].

[62] I note the view of the Supreme Court of Canada that "[t]he substitution of a live appellant is important to the retention of jurisdiction" to continue an appeal despite the death of the original appellant.[66] I do not consider it is necessary to make any substitution. If an application for continuing an appeal is granted, it would continue in the name of the deceased appellant: in this case Mr Ellis.

Strength of the grounds of appeal

[63] I do not accept the Crown submission that the grounds of appeal are weak. Leave to appeal would not have been granted had that been the case and particularly after such a long delay. I am cognisant that the Crown has since filed evidence that challenges some aspects of the evidence filed on behalf of Mr Ellis but it was known when granting leave that this would likely be the case.[67] The differences between the experts will be ventilated in the appeal hearing itself.

[64] The Crown also points to the fact that there have been two appeals already and a Ministerial inquiry. It is true that new expert evidence was filed for the Court of Appeal hearing in 1999. It appears, however, that the Court saw its task as examining whether the new evidence filed raised significantly different issues from the evidence heard at trial.[68] It concluded that there was nothing in the new evidence to show that there "were serious flaws or problems which were unknown or unappreciated" at the time of trial.[69] It therefore concluded that the trial had been appropriately conducted, commenting that the Court was not a Commission of Inquiry.[70]

[65] The Court of Appeal in 1999, because it saw its role as constrained by the terms of the reference back, did not grapple with the criticisms raised by the experts and the issues that were raised about the evidence heard at trial.[71] In addition, it was not one

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66 *R v Smith*, above n 55, at [29].

67 Leave judgment, above n 38, at [17], n 17.

68 See discussion in 1999 CA judgment, above n 36, at [30]–[31], [50] and [56]. The Court of Appeal considered this approach was required because it was dealing with a reference back under s 406(a) of the Crimes Act 1961: see at [13]–[19]. See also the Court's earlier decision in *Ellis v R* [1998] 3 NZLR 555 (CA). I note the Court of Appeal's comments on both of these decisions in *Watson v R* [2022] NZCA 204 at [49]–[54].

69 1999 CA judgment, above n 36, at [56].

70 At [57].

71 I accept that the Ministerial inquiry, above n 37, took a wider approach but this appeal is not from that inquiry. The parties also take the view that the Ministerial inquiry is irrelevant to the appeal: see *Ellis v R* [2022] NZSC 115 at [71], n 81.

of the grounds before the Court of Appeal in 1999 whether the expert evidence led under s 23G of the Evidence Act 1908 fell within the scope of that section.[72] While the Court of Appeal in 1994 had engaged with that section, it did so in a brief and unsatisfactory manner.[73] We discuss this further in our judgment on the substantive appeal.

[66] In any event, this Court accepted in its leave decision that the research underpinning Professor Hayne's evidence was a new approach and significantly different from the expert evidence available to the Court of Appeal in 1999.[74]

Interests of the appellant

[67] Mr Ellis expressed his wish that the proceedings continue despite his death. He was thinking not only of his own interests and reputation but also the impact of his convictions on his family. It is also significant that there were allegations that Mr Ellis' mother, while not charged, was involved in some of the alleged offending. She had therefore been the subject of media attention. These are factors weighing in favour of the continuation of the appeal.

Interests of the victims

[68] Criminal trials and the associated appeals are very stressful for the victims, however sensitively they are managed. The complainants in this case and their families have been subjected not only to the trial and the pre-trial processes leading up to the trial but also to two appeals and a Ministerial inquiry, as well as the current applications. There has also been an almost unprecedented amount of public scrutiny and interest from the media and other commentators. There is no doubt that this has exacerbated their stress to what must be an almost unbearable level.

[69] Finality is a value of major importance to victims. That is especially so for the complainants in this case given its procedural history. There is no doubt that the interests of the complainants and their families must be given considerable weight.

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72 On the content of s 23G, see above n 43.
73 1994 CA judgment, above n 35, at 191–192.
74 Leave judgment, above n 38, at [16].

The balance between the interests of the complainants and their families and those of Mr Ellis and his family has changed. As a result of his death, the interests of the complainants and their families must now weigh much more heavily than those of Mr Ellis and his family.

Any public or private interest in the continuation of the appeal

[70] The grounds of appeal in this case raise important issues relating to the proper role of expert witnesses, the effect of possible contamination of evidence, interviewing techniques (especially of children) and memory. These are issues of general and public importance and remain so despite the delay in bringing the appeal. They are also systemic issues. This is a strong factor weighing in favour of continuation.

[71] There is one further factor that weighs in favour of continuation: the fact that there has been extensive public interest in the case over the years. Unease about the safety of the verdicts has been expressed on a number of occasions by a variety of commentators.

Whether the nature of any order justifies expending judicial resources

[72] As noted above, the Crown submitted that, as this Court cannot conclusively determine Mr Ellis' guilt, any potential result would not justify the expenditure of limited court resources. I do not agree. I note first that, if the appeal is successful on some of the grounds of appeal, a retrial would not have been ordered even if Mr Ellis had still been alive.[75] It is true that some of the other grounds of appeal relate to the particular manner in which the trial was conducted and may not have prevented a retrial being ordered had Mr Ellis been alive.

[73] That a successful appeal may, had Mr Ellis been alive, have led to an order for a retrial is a relevant consideration but is not necessarily a reason that the appeal should not continue. Appellate review is a procedural safeguard which serves not only the private interests of the accused, but also the public interest in a justice system that is underpinned by the pursuit of truth and fairness. Public faith in the system could be

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[75] See *H (SC 49/2021) v R* [2022] NZSC 42 at [38] where this Court endorsed the test in *Reid v R* [1980] AC 343 (PC) which sets out the relevant factors in ordering a retrial.

undermined if, due to an appellant's death, the courts are unable to correct potential miscarriages of justice, including those resulting from a serious failure of proper process.

[74] Whether it is worth expending judicial resources on the continuation of a criminal appeal despite the death of an appellant will usually largely depend on the result of the balancing exercise with regard to the other relevant factors. As noted above, successful applications for continuing appeals will be rare. There must be good reason to meet the overall interests of justice test in a criminal justice system that puts a high value on finality.

Whether the Court would be moving outside its normal judicial role

[75] The grounds of appeal are orthodox for a criminal appeal and there is thus no danger of the Court moving beyond its judicial function.

Conclusion (November 2019 hearing)

[76] The issue before this Court is whether continuation of the appeal despite Mr Ellis' death is in the interests of justice. Necessarily, Mr Ellis' death affects the balancing of the various interests at play. While the reputational interests of Mr Ellis and his family continue despite his death, the interest of the complainants and their families in not being subjected to the stress of further proceedings and in obtaining finality must be accorded much greater weight. As noted above, I am very conscious that the level of public scrutiny, as well as the fact there have already been two appeals and an inquiry, has increased the stress on the complainants and their families exponentially. I am also very conscious that the hearing of the appeal will subject them to even more stress.

[77] Unfortunately, given the intense public interest in the case and the fact that this Court had already granted leave to appeal despite the delay, it is unlikely that not allowing the appeal to continue would in fact mean finality for the complainants and their families. If the process ends without a final judgment of this Court on the substantive appeal, public debate would no doubt continue but such discussion would

occur in a vacuum and on an uninformed and speculative basis. This weighs in favour of allowing the appeal to proceed.

[78] Also to be weighed in the balance are the importance of the systemic issues that will be examined in the appeal, the strength of the grounds of appeal and the broader public interest in ensuring that convictions only follow from fair trials.

[79] I have given this matter anxious consideration. In all the circumstances, I consider that it is in the interests of justice to allow the appeal to proceed. I reach this conclusion on the basis that, in the unusual circumstances of this case, the public interest considerations mean that it is in the interests of justice for the appeal to continue. The judgment on the appeal will bring finality in terms of legal proceedings.

June 2020 hearing

[80] As noted above, the Court reconvened in June 2020 to hear argument on tikanga. It is true that the appeal concerns a Pākehā appellant and none of the complainants are Māori as far as we are aware. The principles developed on posthumous appeals must, however, be capable of meeting the needs of all New Zealanders, including Māori. Māori values in relation to the interests of tūpuna or ancestors are different from what are often termed Western values. Further, and more generally, a consideration of tikanga may provide valuable insights into the appropriate test to apply when courts are faced with an application to continue an appeal despite the death of an appellant.

[81] The evidence and submissions the Court received covered not only the effect of tikanga on the application for the continuation of the appeal but also the general place of tikanga in the law of Aotearoa/New Zealand. This was appropriate because it provided a necessary framework for the consideration of whether and, if so, how tikanga applies in this case.

[82] I also accept that the question of the place of tikanga in the law of Aotearoa/New Zealand is one of general importance and that these reasons will have relevance for future cases, including in other areas of law. The law relating to the

place of tikanga in the common law is in a state of transition and it is a good time to take stock.

[83] Before turning to the role of tikanga in this case, I will discuss the place of tikanga in New Zealand more generally. I will begin with the Statement of Tikanga and the submissions of the parties, before reviewing the caselaw relating to the place of tikanga in the common law and the place of tikanga in legislation and policy. I then make some further comments on tikanga and the common law and discuss some of the issues arising.

[84] I thank the tikanga experts, the parties and the intervener for the very full and helpful material they have put before the Court on the general place of tikanga in the law of Aotearoa/New Zealand.

Statement of Tikanga

[85] The culmination of the December 2019 wānanga was a brief series of agreed statements, entitled "Ngā Whakataunga a ngā Mātanga Tikanga i Hui i Te Herenga Waka Marae, i Te Upoko o Te Ika (Ngā Whakataunga a ngā Mātanga Tikanga)". These relate to "the overall place of tikanga in Aotearoa; the intersection between tikanga and the state legal system; the nature of tikanga (and its associated principles); and the key tikanga principles relevant to this case".[76] The nature of tikanga is discussed at [22] to [37] of the Statement of Tikanga. The statement of general principle relating to the overall place of tikanga in the common law is:[77]

> **Ngā Whakataunga a ngā Mātanga Tikanga**
>
> Me whakauru ngā mātāpono o te tikanga Māori ki roto i ngā ture o te whenua.
>
> Tikanga Māori is the first law of Aotearoa.
>
> Tikanga Māori principles are part of the common law of Aotearoa.
>
> Decisions about mātāpono (principles) are always subject to variables such as concepts, practices, and values, as relevant to the circumstances.

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76 Statement of Tikanga at [18].
77 At [19].

Submissions of the parties about tikanga and the common law

Appellant's submissions on tikanga and the common law

[86] Counsel for the appellant argued that tikanga can inform the interpretation and development of the common law, assist in the interpretation of legislation and can influence and modify the common law. Sometimes it can and should be recognised as a source of enforceable rights and obligations. It can also be a source of public law rights and obligations. In the appellant's submission, the Treaty of Waitangi requires that the common law, where possible, be developed to recognise and accommodate tikanga.

[87] It was also submitted that tikanga is part of the fabric of the law of Aotearoa/New Zealand and can apply to non-Māori. Counsel referred to examples in the early colonial caselaw which involved Pākehā parties,[78] and also examples in statutes, such as the Oranga Tamariki Act 1989 where concepts of mana tamaiti (tamariki), whakapapa and whanaungatanga apply to all, Māori and non-Māori.

Crown's submissions on tikanga and the common law

[88] The Crown accepted that tikanga may be used as an interpretive aid to inform the interpretation and development of the common law of Aotearoa/New Zealand. Depending on the circumstances, tikanga values might be relevant to common law decision-making. The Crown noted that there are already a large number of statutes which incorporate tikanga Māori values and concepts and therefore require judges to engage with tikanga. However, tikanga may be of limited relevance where the statute's scheme or purpose limits or clearly precludes the incorporation of tikanga.[79]

[89] The Crown also accepted that tikanga might be a source of private rights and obligations, the best example being the common law's recognition of aboriginal customary title and property rights. Tikanga can also shape public law decision

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78 Including *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

79 The Crown cited the Crimes Act 1961 as an example of extinguishing customary practices within the criminal law, referring to *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464; and *Knowles v R* CA146/98, 12 October 1998. This may be an over-simplification: see below at [98] and [100].

making in a range of ways, as permissible or mandatory considerations, again depending on the context.

Intervener's submissions on tikanga and the common law

[90] Te Hunga Rōia Māori, as intervener, submitted that it is a well-established principle that the common law must evolve within the context and "special needs" of the place in respect of which it is being applied (in this case Aotearoa). In its submission, the development of the common law with respect to the recognition of tikanga is an orthodox progression of the common law in Aotearoa. Tikanga Māori is the first law of Aotearoa and continues to be profoundly important for Māori. Tikanga and its associated values are also increasingly being recognised and accepted within the wider community of Aotearoa, pointing to the example given in the Statement of Tikanga of the commonplace acceptance of rāhui following a death at sea.[80]

[91] In Te Hunga Rōia Māori's submission the weight accorded to tikanga must be considered on a "case by case" basis, depending on the subject matter and context. If the case involves fundamental tikanga principles, tikanga may be determinative.

Caselaw and tikanga

[92] The common law has always recognised local custom as constituting law for that local area, provided it met certain requirements.[81] The common law also recognised the customary laws of indigenous peoples in British colonies unless and until altered by legislation.[82] The tests for recognition were similar to those used to recognise custom in the United Kingdom. Cooper J in *The Public Trustee v Loasby* put the requirements as follows: whether the custom exists as a general custom of

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80 See the Statement of Tikanga at [46]–[47].

81 *Halsbury's Laws of England* (5th ed, 2019, online ed) vol 32 Custom and Usage at [1]. The foundational case for these requirements is *The Case of Tanistry* (1608) Dav Ir 28, 80 ER 516 (KB) at 32.

82 The presumption of continuity is generally attributed to *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 (KB) at 895–896, where Lord Mansfield CJ concluded that "the laws of a conquered country continue until they are altered by the conqueror". Although Lord Mansfield CJ referred to conquered territories, the presumption of continuity was also applied to ceded and settled colonies: Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 83–87.

Māori; whether it is contrary to statute law; and whether it is reasonable.[83] This meant that the common law inherited from Britain was presumptively dominant, with the traditional rules of recognition displaying a certain scepticism toward customary law.[84] Generally colonial courts also required a custom to be certain,[85] consistent, longstanding and not "repugnant to justice and morality",[86] nor contrary to principles at the "root" of the colonial legal system.[87]

Colonial recognition of customary law

[93] There are numerous examples in early New Zealand caselaw of the courts recognising the existence and validity of tikanga.[88] Some of these cases had Pākehā litigants. For example, *Baldick v Jackson* involved a dispute between Pākehā over rights to a whale carcass, *Loasby* considered whether tangi expenses owed to a Pākehā supplier could be paid out of the estate of a rangatira, and *Arani v Public Trustee of New Zealand* involved the rights of a whāngai Pākehā child in the estate of her Māori whāngai mother.[89]

Modern recognition of tikanga

[94] Tikanga has continued to be recognised in modern caselaw.[90] This Court considered the place of tikanga in the common law in *Takamore v Clarke*, where the

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83 *Loasby*, above n 78, at 806. Customs were deemed unreasonable if they were contrary to principles at the "root" of the colonial legal system. See *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore (CA)*] at [124]–[127] per Glazebrook and Wild JJ.

84 Peter Fitzpatrick "Terminal legality: imperialism and the (de)composition of law" in Diane Kirkby and Catharine Coleborne (eds) *Law, history, colonialism: The reach of empire* (Manchester University Press, Manchester, 2001) 9 at 21.

85 For a discussion of the certainty requirement see *Takamore (CA),* above n 83, at [128]–[132] per Glazebrook and Wild JJ.

86 PG McHugh "The Aboriginal Rights of the New Zealand Maori at Common Law" (Doctor of Philosophy Thesis, University of Cambridge, 1987) at 182. For a more detailed discussion see *Takamore (CA)*, above n 83, at [122]–[134] per Glazebrook and Wild JJ.

87 *Takamore (CA)*, above n 83, at [124]–[127] per Glazebrook and Wild JJ.

88 For example *R (on the prosecution of McIntosh) v Symonds* (1847) NZPCC 387 (SC); *Re the Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41; *Loasby*, above n 78; *Arani v Public Trustee of New Zealand* [1920] AC 198 (PC) (commonly cited as *Hineiti Rirerire Arani v Public Trustee*); *Baldick v Jackson* (1910) 30 NZLR 343 (SC); and *Tamaki v Baker* [1901] AC 561 (PC) (commonly cited as *Nireaha Tamaki v Baker*) at 577.

89 Whāngai is Māori customary adoption, usually by close relatives: see Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 525.

90 More modern cases referencing customary law and tikanga include: *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC); *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *Re Edwards*

majority of this Court said that the English common law has applied in New Zealand "only insofar as it is applicable to the circumstances of New Zealand".[91] The majority also said that, subject to conflicting statute law, "our common law has always been seen as amenable to development to take account of custom".[92] They therefore held tikanga to be a relevant factor in deciding on the burial place of a person with Māori whakapapa.[93] Elias CJ in the same case said that "Maori custom according to tikanga is … part of the values of the New Zealand common law."[94]

[95] A recent decision of this Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (*Trans-Tasman)* related to the interpretation of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. That decision also made some important comments on the nature of tikanga, confirming it to be "applicable law" in terms of s 59(2)(l) of that Act.[95] The Court said that "tikanga is a body of Māori customs and practices, part of which is properly described as custom law".[96] It was left open for determination whether tikanga is a separate or third source of law and whether there should be any change to the common law tests for the recognition of customary law as law set out in *Loasby* and discussed in the Court of Appeal decision in *Takamore v Clarke*.[97]

(Te Whakatōhea No 2) [2021] NZHC 1025, [2022] 2 NZLR 772; *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27; and *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1.

91 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore (SC)*] at [150] per Tipping, McGrath and Blanchard JJ and [94] per Elias CJ.

92 At [150] per Tipping, McGrath and Blanchard JJ.

93 At [164] per Tipping, McGrath and Blanchard JJ.

94 At [94] per Elias CJ.

95 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 [*Trans-Tasman*]. See also *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [166] per Elias CJ where the Judge said that English riparian custom concerning a presumption of ownership to the middle of the river's flow could only be recognised by the common law of New Zealand if it was proved to be consistent with Māori custom and usage. The other Judges generally also agreed that the mid-point presumption was only a presumption and would likely be displaced if it did not accord with local Māori custom: at [173] per McGrath J, [223] per William Young J and [318] per Glazebrook J. In *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [77] per Elias CJ: "Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation" (footnote omitted). The other members of the Court did not comment on this point.

96 *Trans-Tasman*, above n 95, at [169] per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and by Winkelmann CJ at [332]. See also the summary by the Court at [9].

97 At [169], n 282 per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and Winkelmann CJ at [332]. In *Trans-Tasman*, it was said that *Takamore (SC)*, above n 91, did not adopt the tests set out in *Loasby*, above n 78, because it was not necessary on the approach taken by the Court in *Takamore (SC)*: at [168] per William Young

[96] It is worth repeating and endorsing comments made by Williams J in *Trans-Tasman*. He cautioned that the issue of statutory interpretation in that case regarding tikanga should not be viewed only through a Pākehā lens.[98] He pointed out that the interests of iwi with mana moana in the consent area in that case reflect the relevant values of the interest holder: mana, whanaungatanga and kaitiakitanga. These relational values are principles of law that predate the arrival of the common law in 1840.[99]

[97] I refer to one more decision of this Court: *Cowan v Cowan*.[100] In that case, the underlying dispute was between a father and two of his children in relation to a property in Wellington which had been the Cowan family home for a number of years. The dispute was yet to go to a substantive hearing. The issue before this Court related to an alleged breach of an undertaking for damages related to a caveat. Tikanga issues were raised. This Court said they were not relevant to the dispute about the breach of the undertaking but recognised that "tikanga principles about the significance of whenua and kāinga may provide some support for [the children's substantive] claim [against the father]".[101] It was earlier noted that those concepts "accord with equity's reluctance to treat damages as an adequate remedy in land disputes".[102]

Legislation and tikanga

[98] The first point is that the application of tikanga in the common law can be limited or excluded by statute, although this requires an unambiguous statutory

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and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296] and by Winkelmann CJ at [332]. See also the *Trans-Tasman* Court's discussion of *Takamore (SC)*, and its endorsement of the comment at [150] of *Takamore (SC)* that "our common law has always been seen as amenable to development to take account of custom": at [166] per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and by Winkelmann CJ at [332].

98 At [297], although Williams J wished to note that he did not see the reasons of William Young and Ellen France JJ reflecting that shortcoming. Glazebrook J also agreed with this point at [237], n 371 of her reasons.

99 At [297] per Williams J.

100 *Cowan v Cowan* [2022] NZSC 43.

101 At [67].

102 At [38].

provision.[103] This does not give the full picture, however. It is generally accepted that there is a presumption that statutes are to be interpreted consistently with Te Tiriti as far as possible.[104] Because the tino rangatiratanga[105] guarantee in Article Two is generally taken to import Māori rights to live by and benefit from tikanga,[106] it has been argued that it follows that statutes should be interpreted consistently with tikanga as far as possible.[107]

[99] Second, the Legislation Design Advisory Committee guidelines specifically require those drafting legislation to consider whether the proposed legislation would affect any practices governed by tikanga.[108] The guidelines also provide that legislation should be consistent with tikanga to the extent possible:[109]

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103 This is also discussed in *Takamore (CA)*, above n 83, at [133]–[134] per Glazebrook and Wild JJ. See also *Trans-Tasman*, above n 95, at [151] per William Young and Ellen France JJ. I note that earlier cases refer to a statute extinguishing tikanga or Māori custom: see, for example, *Takamore (CA)*, above n 83, at [133] and [168] per Glazebrook and Wild JJ. This is of course not correct. Tikanga will continue to exist and develop: see below at [111]. The statute will merely limit or eliminate its operation in the common law.

104 See the cases discussed in Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 684–686. While the Privy Council in *Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) (commonly cited as *Te Heuheu Tukino v Aotea District Māori Land Board*) at 596–597 held that courts cannot directly enforce Te Tiriti unless it is incorporated into statute, subsequent decisions have nevertheless "[dealt] a heavy blow to [*Tukino*]'s crumbling façade": see Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremey Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 65 at 81 discussing *Trans-Tasman*, above n 95.

105 Translated as "self-determination, sovereignty, autonomy, self-government, domination, rule, control, power" in Te Aka | Māori Dictionary <www.maoridictionary.co.nz>, but see the entry "Rangatiratanga" in Benton, Frame and Meredith, above n 89, at 331–334 which discusses different perspectives on how "tino rangatiratanga" can be understood, especially in the context of Te Tiriti.

106 Whether it is as a matter of tino rangatiratanga as in self-determination (see Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 9) or as an incident of the concept of taonga (see Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa New Zealand" (2009) 17 Wai L Rev 74 at 76–77).

107 See Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Oxford, 2005) 330 for a discussion on Te Tiriti and tikanga. See also *Trans-Tasman*, above n 95, at [154] per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and by Winkelmann CJ at [332]. The summary of *Trans-Tasman* noted at [8] that "all members of the Court agreed that a broad and generous construction of such Treaty clauses … was required" with the exception being only where Parliament made it quite clear that that presumption of consistency with Treaty principles did not apply. See also at [150]–[151] per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296] and by Winkelmann CJ at [332].

108 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at [5.3].

109 At [3.4].

> New legislation should, as far as practicable, be consistent with fundamental common law principles and tikanga (which may require appropriate consideration of Māori language, customs, beliefs and the importance of community, whānau, hapū and iwi).

[100] Modern legislative practice has been to incorporate tikanga principles into a wide range of statutes where considered relevant.[110] This is a trend that shows no sign of abating. For example, the Resource Management Act 1991 has "tikanga Maori" as a defined term and it is then used throughout the Act.[111] In the criminal field, while the Sentencing Act 2002 does not explicitly reference tikanga, under s 27, an offender may request the court to hear any person to speak on the cultural background of an offender. Similarly, restorative justice processes, which may incorporate tikanga practices, can be considered by the sentencing judge.[112]

[101] Many of the statutory references impose tikanga obligations or considerations on non-Māori as well as Māori. For example, tikanga-based principles will affect non-Māori applicants for resource consents. Further, some legislation allocate the benefits of tikanga principles to non-Māori. The Oranga Tamariki Act, for example, places weight on recognising mana tamaiti (tamariki), whakapapa, and the practice of whanaungatanga" for *all* children and young persons.[113]

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110 Colonial-era ordinances such as the Native Exemption Ordinance 1844 7 Vict 18 and the Resident Magistrates Court Ordinance 1846 10 Vict 16 also incorporated tikanga principles. Note, however, criticism of these ordinances as taking a colonial viewpoint on tikanga: see Te Aka Matua o Te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [93]–[96]; and Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis NZ, Wellington, 2022) at [1.2.2.3](a).

111 Resource Management Act 1991, s 2(1) defines "tikanga Maori" as "Maori customary values and practices". Subsequent references to tikanga include ss 14(3)(c); 34A(1A); 39(2)(b); 42(1)(a); 149K(4)(a)(iii); 199(2)(c); and 269(3). Other specific tikanga concepts are also referenced, such as kaitiakitanga in s 2 and then subsequently referred to in s 7 as a matter that must be taken into account in exercising the powers and functions of the Act. Other modern statutes, such as the Education and Training Act 2020, have provisions addressing both the Treaty of Waitangi and tikanga. There are sections of Te Ture Whenua Maori Act 1993, such as s 114A, where tikanga is determinative. Other statutes including tikanga principles include the Oranga Tamariki Act 1989, the Trade Marks Act 2002, ss 17 and 178 and the Patents Act 2013, ss 15 and 226.

112 Sentencing Act 2002, s 27(1)(c). I note, however, there has been criticism that, notwithstanding efforts to recognise Māori cultural values in the criminal justice system, these efforts are not directed at recognising tikanga as a system of law. Nor do they represent any fundamental transformation of legal doctrine or process: Tolmie and others, above n 110, at [1.2.3.2](a).

113 Oranga Tamariki Act, s 4(1)(g). See further ss 4(1)(a)(i) and 5(1)(b)(iv). Section 2(1) of the Act defines "mana tamaiti (tamariki)" as "the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person".

[102] Finally for completeness, tikanga and tikanga principles, as one might expect, are also regularly incorporated into Treaty settlement legislation to recognise the tikanga that underlies the connection between the land and the mana whenua.[114] One of the more important developments in protecting taonga is the recognition of the legal personality of natural resources,[115] notably Te Urewera[116] and the Whanganui River.[117]

Policy and tikanga

[103] Tikanga principles are also now incorporated into the policies of many public and private entities. Adopting the principles of consultation and partnership derived from Te Tiriti,[118] many Government departments and entities have guidelines for tikanga-consistent engagement with Māori communities.[119]

[104] It is now also recognised by many agencies that the best way to engage with Treaty principles is to adopt tikanga-based policies and strategies to improve outcomes for Māori. For example, the District Court of New Zealand is now moving to adopt a new operating model, Te Ao Mārama.[120] It proposes to:[121]

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114 See, for example, the Hauraki Gulf Marine Park Act 2000, s 7(2) and the reference to the "life-supporting capacity" or mauri of the Hauraki Gulf.

115 I note that there have been criticisms that this conceptual framing remains anthropocentric and inconsistent with tikanga: Anne Salmond, Gary Brierley and Dan Hikuroa "Let the Rivers Speak: thinking about waterways in Aotearoa New Zealand" (2019) 15(3) Policy Quarterly 45.

116 Te Urewera Act 2014, s 11.

117 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

118 I note, however, criticism of the notion of the principles of the Treaty as judicial rewriting of Te Tiriti at the expense of what was actually agreed: Ani Mikaere "Seeing Human Rights Through Māori Eyes" (2007) 10 Yearbook of New Zealand Jurisprudence 53 at 57. See also Jane Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Allen & Unwin, Wellington, 1990) at 217. Sir Ken Keith, extrajudicially, has discussed Te Tiriti as a direct source of rights and duties: Kenneth Keith "The Treaty of Waitangi in the Courts" (1990) 14 NZULR 37 at 46–48.

119 See, for example, Te Puni Kōkiri | Ministry of Māori Development *Te Hanga Whanaungatanga mō te Hononga Hāngai ki te Māori | Building Relationships for Effective Engagement with Māori* (October 2006) accessible at <www.tpk.govt.nz>. See also Te Arawhiti | The Office for Māori Crown Relations *Guidelines for engagement with Māori* accessible at <www.tearawhiti.govt.nz>; New Zealand Petroleum & Minerals *Best Practice Guidelines for Engagement with Māori* (August 2014) accessible at <www.nzpam.govt.nz>; and Waka Kotahi | NZ Transport Agency *Hononga ki te Iwi // our Māori engagement framework* accessible at <www.nzta.govt.nz>.

120 See Heemi Taumaunu, Chief District Court Judge of New Zealand, "Mai te Pō ki te Ao Mārama | The Transition from Night to the Enlightened World: Calls for Transformative Change and the District Court Response" (Norris Ward McKinnon Annual Lecture 2020, University of Waikato | Te Whare Wānanga o Waikato, Hamilton, 11 November 2020) accessible at <www.districtcourts.govt.nz>.

121 Chief Justice of New Zealand *Annual Report for the period 1 January 2020 to 21 December 2021* (4 March 2022) at 36.

> … draw upon the tikanga concept of community responsibility for both the victim and the offender. It involves coordination between support agencies and court participants, and much wider community, iwi, and stakeholder engagement in the court process.

[105] This sits alongside other tikanga-based justice programmes such as the Rangatahi Courts[122] and Te Pae Oranga.[123] It is also significant that Te Ao Māori and tikanga will soon form a compulsory part of the curriculum for a law degree.[124]

The place of tikanga

[106] In this section of these reasons, I first provide a summary of the current position of tikanga in the law of Aotearoa/New Zealand, and in particular, its place in the common law. I also make some comments on points left open in *Trans-Tasman*: whether tikanga is a separate or third source of law, and the suitability or otherwise of the colonial tests for incorporation of customary law into the common law. I then comment on when and how tikanga may be relevant in future cases. Finally, I discuss the process of ascertaining tikanga before making some concluding remarks.

Tikanga and the common law

[107] I adopt the Statement of Tikanga's discussion of the nature of tikanga as including all the "values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct".[125] I also adopt the Statement of Tikanga's description of tikanga as comprising both practice and principle.[126] I acknowledge that tikanga Māori was the first law of Aotearoa.[127]

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122 See Te Kōti-ā-Rohe o Aotearoa | District Court of New Zealand "Rangatahi and Pasifika Youth Courts" <www.districtcourts.govt.nz>. Rangatahi Courts also provide access to tikanga learning programmes.

123 Ngā Pirihimana o Aotearoa | New Zealand Police "Te Pae Oranga Iwi Community Panels" <www.police.govt.nz>. See also Coates, above n 104, at 78–79.

124 New Zealand Council of Legal Education "Te Ao Māori and Tikanga Māori" <www.nzcle.org.nz>. See further Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree: Phase One – Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Ngā Pae o te Māramatanga, 2020); and Joe Williams "Decolonising the Law in Aotearoa: Can we start with the law schools?" (2021) 17 Otago LR 1.

125 Statement of Tikanga at [26].

126 At [27].

127 At [19] and [22].

[108] As shown by my discussion of both old and more modern caselaw, that tikanga as law is part of the common law of Aotearoa/New Zealand is a longstanding and uncontroversial proposition.[128] It has been recognised by the courts since 1840 and has been recently confirmed by this Court in *Trans-Tasman*.[129]

[109] The modern recognition and application of tikanga principles by the common law has not developed in a vacuum. Rather, it must be seen in the context of the history of the application of tikanga in the common law, the obligations under Te Tiriti, the modern social context and statutory engagement with tikanga. As noted above, the courts have been increasingly called upon to apply tikanga principles in statutes and tikanga also permeates government policies.

[110] It is worth saying something more about values. 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. We share some of these values with other nations, especially those founded on the common law tradition. Other relevant values may be unique to our nation's history and circumstances. Tikanga and kaupapa Māori belong to this latter category and are of particular importance as tikanga is the first law of Aotearoa/New Zealand and Māori are tangata whenua: tikanga is part of the values of the New Zealand variety of the common law.[130] The consideration of common values is important when applying the common law to new or novel situations or when considering the need (or otherwise) to develop or modify the common law.

Separate or third source of law

[111] This Court in *Trans-Tasman* left open whether tikanga is a separate or third source of law.[131] I do not intend to discuss this in detail. I just note that tikanga (as accepted earlier) includes all the "values, standards, principles and norms that the

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128 I use the term "tikanga as law" to recognise that tikanga as law is a subset of the customary values and practices which constitute tikanga: see *Trans-Tasman*, above n 95, at [169] per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and by Winkelmann CJ at [332]. I note also my comments below at [114].

129 See above at [95].

130 *Takamore (SC)*, above n 91, at [94] per Elias CJ.

131 *Trans-Tasman*, above n 95, at [169], n 282 per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and by Winkelmann CJ at [332].

Māori community subscribe to, to determine the appropriate conduct".[132] This will continue to be the case, meaning tikanga will continue to be applied by Māori and will continue to develop, independent of its place as part of the common law or as contained in legislation and policy. In this sense, tikanga is a separate or third source of law.

Test for incorporation

[112] This Court in *Trans-Tasman* left open the question of whether the colonial tests for incorporation of custom into the common law should continue to apply.[133]

[113] It is significant that the incorporation tests do not apply when a requirement to apply tikanga is contained in a statute. This Court in *Trans-Tasman* said that the tests set out in *Loasby* were not necessary on the approach taken by this Court in *Takamore* (where tikanga was seen as a relevant factor but not controlling).[134] It seems to me, against this background, that there would need to be a good reason to retain the incorporation rules in other contexts in the common law. Far from there being a good reason for retention, for the reasons set out below, I consider the tests to be colonial relics with no place in modern Aotearoa/New Zealand.

[114] The requirements for custom to exist as a general custom[135] and to be certain and consistent do not accord with the nature of tikanga. Traditional legal systems tend to be more focused on values and principles rather than rules oriented. Further, one of the essential strengths of tikanga is its ability to adapt to new conditions and to have local variations as appropriate. These tests for certainty and consistency, being contrary to the very nature of tikanga, are therefore clearly inappropriate.

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132 See above at [107].

133 *Trans-Tasman*, above n 95, at [169], n 282 per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and by Winkelmann CJ at [332]. In *Takamore (CA)*, above n 83, Glazebrook and Wild JJ (at [254]) had suggested a "more modern" approach to tikanga to "try to integrate it into the common law where possible rather than relying on the strict rules of colonial times".

134 *Trans-Tasman*, above n 95, at [168] per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296]–[297] and by Winkelmann CJ at [332]. The tests for incorporation were not mentioned in *Takamore (SC)*, above n 91.

135 On the "old" requirement for a custom to be general, see *Takamore (CA)*, above n 83, at [170]–[174] per Glazebrook and Wild JJ.

[115] In a similar vein, the requirements for a custom to be reasonable and not repugnant to justice and morality were based on colonial attitudes that are artefacts of a different time. They import notions of "judging" tikanga and operate on the assumption of the superiority of Western values and a view that the common law inherited from the United Kingdom should be presumptively dominant.[136] I therefore do not consider these requirements for the recognition of custom have any place in the contemporary common law of Aotearoa/New Zealand. In any event, they are very narrow restrictions and are unhelpful for courts where they need to consider the role of tikanga in modern conditions.

[116] For all the above reasons, I do not consider the traditional incorporation rules should continue to apply. I do not attempt a reformulation of the test for the inclusion and application of tikanga in the common law.[137] At this point in the development of the law, which is in a state of transition, it suffices to reiterate that tikanga as law is a part of the common law of Aotearoa/New Zealand. As I discuss below, what this means in practice will need to be worked out on a case by case basis in terms of the normal common law method of incremental development.[138]

When and how tikanga will need to be considered

[117] As an overall comment, tikanga will need to be considered where it is relevant to the circumstances of the case. It will not have to be considered in cases where it is not relevant or where consideration of tikanga will not or cannot assist, such as when it would be contrary to statute[139] or contrary to binding precedent.[140] In terms of the usual common law method, prior authorities on tikanga will be useful in ascertaining when tikanga may be relevant in future cases.

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136 See generally Fitzpatrick, above n 84, at 21.

137 Indeed, I doubt that any single test will ever be formulated, given the nature of tikanga and the many ways it might be relevant to the common law as discussed below at [118].

138 On the common law method, see Glanville Williams *Glanville Williams: Learning the Law* (ATH Smith (ed), 17th ed, Sweet & Maxwell, London, 2020) at 75–106. The place of tikanga is also currently being examined by Te Aka Matua o te Ture | Law Commission. This project plans to explain tikanga Māori, as well as "map" tikanga Māori as a system of law, drawing, among other things, on its expression in the courts and the Waitangi Tribunal with the aim of providing a framework for engagement with tikanga within Aotearoa/New Zealand's legal system: see <www.lawcom.govt.nz> for more information.

139 But note my comment above at [98] relating to the argument that statutes should be interpreted consistently with tikanga as far as possible.

140 Unless that precedent can be distinguished.

[118] In some cases, tikanga and its principles may be controlling: for example, where Treaty principles and/or tikanga have been incorporated into statute in a manner that makes them so, or where the factual context justifies it. In other cases, tikanga principles or values may be relevant considerations alongside other relevant factors.[141] Tikanga may be relevant to explain the social and cultural framework for the actions of Māori parties.[142] In still other cases tikanga principles and values may have an influence on the development of the common law. They can also provide a new vocabulary or new way of thinking about new concepts of law or a new intellectual framework for those concepts.[143]

[119] Challenging issues may arise where there may be a difference between the process or result indicated by tikanga principles and that under the current common law. Such issues may arise due to the traditionally more individualistic nature of the common law and the more relational and communitarian perspective of tikanga. That does not necessarily mean the two are irreconcilable or necessarily by default sit in opposition. The methodology of resolving any differences will need to be worked through on a case by case basis.

Process of ascertaining tikanga

[120] The Statement of Tikanga expressed concern that unintended consequences could arise if the courts are able to draw on tikanga in making decisions and, in particular, that this could lead to tikanga being distorted when applied by courts insufficiently familiar with the subject matter.[144] Ultimately the Statement of Tikanga

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141 For example, in *Takamore (SC)*, above n 91, at [164], the majority noted the common law of New Zealand requires "reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation". See also the comments in *Cowan*, above n 100, discussed above at [97].

142 But note the caution expressed in *Deng v Zheng* [2022] NZSC 76 about stereotyping at [80]–[82]. See also the general observations in that case at [78]. While the Court in *Deng v Zheng* said at [77] that these comments do not address tikanga, many of the observations will still have resonance in this situation.

143 This paragraph is not intended to be a full analysis of the ways tikanga might be taken into account. As noted above at [82], the law is in a state of transition.

144 See [51] of the Statement of Tikanga. Annette Sykes argues that it is necessary that judges (non-experts in tikanga Māori) have the assistance of a tohunga (specialist knowledge-keeper) to guide the assessment of tikanga: Annette Sykes "The myth of tikanga in the Pākehā law" (7 February 2021) E-Tangata <www.e-tangata.co.nz>. See for a practical example Jacinta Ruru "Taonga and Family Chattels" [2004] NZLJ 297 at 298.

supported tikanga as one of the many sources of New Zealand law,[145] but not without expressing concern about the risk that the courts might take over the role of adapting and expounding tikanga from those whose responsibility it has been since time beyond memory. The experts were confident that tikanga has survived to date and will always continue to inform and regulate Māori behaviour.[146] But they stressed that the courts must use processes and practices that help preserve the integrity of tikanga as a cohesive system of substantive law and legal process.[147] I acknowledge the importance of these concerns.

[121] This leads to the issue of the appropriate way of ascertaining the relevant tikanga. I do not wish to be prescriptive as appropriate methodologies will be developed by the courts in future cases.[148] I do offer some preliminary comments.[149]

[122] The concerns in the Statement of Tikanga must be taken seriously.[150] Tikanga must inform and, in appropriate cases, control how decisions about tikanga in the common law are made and how tikanga may develop to meet new circumstances.

[123] I recognise that in general the sources of tikanga and those vested with the expertise and authority to expound on it will be external to the courts.[151] As the Statement of Tikanga sets out:

> 35. Knowledge of tikanga is passed down through sources such as: wānanga (institutions of learning), whaikōrero (oratory); karanga (call); waiata (songs); mōteatea (traditional chant or lament); whakapapa recitations

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145 At [52](c).

146 For a fuller discussion see [49]–[54] of the Statement of Tikanga and see my comment above at [111] on whether tikanga is a separate or third source of law.

147 The Statement of Tikanga gives some examples of these at [53] and I agree these are sensible measures. See generally Coates, above n 104, at 84–85 for a discussion on the challenge of retaining the integrity of tikanga while recognising tikanga in the common law.

148 For example, Te Aka Matua o te Ture | Law Commission's tikanga project will no doubt provide insights and recommendations on this issue: see above at n 138.

149 As noted above at n 142, while the case of *Deng v Zheng*, above n 142, said at [77] that it does not address tikanga, the comments in that case may nevertheless be of relevance in this context.

150 Courts will have to be careful "to know where [they do] not have the cultural right to venture and what the limits of [their] knowledge and expertise are": Tolmie and others, above n 110, at [1.2.3.2](b).

151 I note also that Elias CJ in *Takamore (SC)*, above n 91, at [95] said tikanga is a question of fact. Foreign law is generally treated as a question of fact: see Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [3.43]–[3.44]. As tikanga is part of the common law, it is not foreign law. It is thus not appropriate to refer to it as having to be proved as a question of fact. Because of the nature of tikanga, however, it may need to be established and ascertained by evidence or through another suitable process, as discussed below.

> (genealogy) whakatauākī (proverbial sayings) and pūrākau (stories). It is also learnt through exposure to its practice in everyday life.
>
> 36. The foundational notions of tikanga are widely known. However, some tikanga might be tapu (sacred) and kept confined to certain expert people. For example, certain karakia (ritual incantations) would be only used by a small group of experts who have the appropriate training, expertise and standing.
>
> 37. Given the nature of tikanga, being law that is comprised of principle and the custom and practice of people, we consider that the convening of this hui and forum of tikanga experts to be an appropriate way of determining the relevant tikanga that applies to an issue at hand.

[124] There would not be many judges or indeed counsel who could lay claim to such expertise.[152] I commend the parties in this case for convening the wānanga and conducting that wānanga in accordance with tikanga processes. I agree with the intervener that "this type of process is not only positive for the parties but also highlights the strength of tikanga from a procedural perspective".

[125] It is important to acknowledge, however, that the methodology used in this case will not be suitable or even possible for all or even for many cases. The best approach will be contextual, depending on the issues, the significance of tikanga to the case as well as matters of accessibility and cost. In simple cases where tikanga is relevant and uncontroversial, submissions may suffice.[153] In other cases, a statement of tikanga from a tikanga expert may be appropriate. Another mechanism is for the relevant court to appoint independent expert witnesses or pūkenga.[154] I also note that, where questions of tikanga arise in the High Court, that Court may state a case and refer it to the Māori Appellate Court, with the decision binding the High Court.[155]

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152 Tolmie and others, above n 110, at [1.2.3.2](b).

153 See, for example, the comments in *Deng v Zheng*, above n 142, at [84]. Published sources may be helpful (see s 129 of the Evidence Act 2006) – I note, for example, Benton, Frame and Meredith, above n 89; and the previous Te Aka Matua o te Ture | Law Commission paper on Māori custom and values, above n 110. The forthcoming Law Commission tikanga project (discussed above at n 138) will also no doubt be a valuable future resource, as will *Te Rauhī i te Tikanga—A Tikanga Companion* currently in development at Te Kauhanganui Tātai Ture | the Faculty of Law at Te Herenga Waka | Victoria University of Wellington: see Te Herenga Waka | Victoria University of Wellington "Developing a tikanga Māori 'digital companion'" (26 August 2022) <www.wgtn.ac.nz>.

154 Marine and Coastal Area (Takutai Moana) Act 2011, s 99(1)(b); and High Court Rules 2016, r 9.36. In *Te Whakatōhea No 2*, above n 90, the Judge appointed two independent pūkenga: see process discussed at [313]–[314]. The pūkenga report was attached as an appendix to the judgment.

155 Te Ture Whenua Maori Act, s 61; and the Marine and Coastal Area (Takutai Moana) Act, s 99.

Concluding remarks

[126] This case has provided an opportunity for this Court to synthesise and describe the current state of the place of tikanga in the common law and to offer some comments on future developments. Any discussion needs to be viewed in the context of the widespread incorporation of tikanga principles, concepts and values into statutes and policies of government. This means that 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. This is a manifestation of Te Tiriti, particularly in relation to Article Two, and also highlights Aotearoa/New Zealand's commitment to the United Nations Declaration on the Rights of Indigenous Peoples.[156]

[127] I stress that the common law is in a state of transition. The caselaw to date on tikanga as part of the common law has been relatively limited. Further development will be gradual as cases arise. Certainty, consistency and accessibility are strong values in our legal system. Precedent will still bind as it does conventionally, unless distinguishable. This is why the common law method is generally for the law to develop incrementally as it will continue to do with regard to the application of tikanga in the common law.

Tikanga and this case

[128] I now turn to the application of tikanga in this case and start by outlining the relevant tikanga (derived from the Statement of Tikanga). In relation to this case, the Statement of Tikanga says:[157]

> Mana tangata, and by implication, whakapapa and whanaungatanga, is impacted by the allegations of hara. Consequently, this continues after the death of the person.

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156 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007), art 34: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards." See also art 19 which provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

157 Statement of Tikanga at [20].

Tikanga requires further probing in these circumstances.

[129] The Statement of Tikanga went on to elaborate on this general principle by explaining the relevant tikanga principles to be applied to Mr Ellis' case: hara, mana, whakapapa, whanaungatanga and ea. As the Statement of Tikanga notes, these concepts are interrelated and cannot be understood in isolation.[158]

[130] The concept of hara at a simplified level means: the transgression of tapu, the commission of a wrong and the violation of tikanga resulting in an imbalance. This requires a restoration of balance or the achieving of a state of ea. In this case, the hara could either be the offending against the complainants or the wrongful conviction of an innocent man. Ea needs to be achieved, both for Mr Ellis and the complainants. Otherwise, the hara carries on. It does not die with Mr Ellis.

[131] There are two key forms of mana:

(a) Mana tuku iho: this is mana inherited from ancestors. Under tikanga, everyone is born with mana by virtue of having a whakapapa (genealogy) and being born into a collective whether that be a whānau (family), hapū (sub-tribe) or iwi (tribe); and

(b) Mana tangata: mana derived from one's actions or ability.

[132] Mana can be gained and lost depending on one's actions and reputation and is not extinguished at death. Relevant in the current case is Mr Ellis' ongoing mana, the separate but related mana of his whānau, the mana of the complainants and the separate but related mana of their respective whānau.

[133] The experts agreed that through whakapapa, the whānau of Mr Ellis and the whānau of the complainants are impacted by the alleged hara committed by him. Responsibility falls on all of the families to restore any mana that may have been lost.

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158 At [58].

[134] Whanaungatanga is fundamental, creating rights and responsibilities within and between whānau. Whanaungatanga focuses upon the maintenance of properly tended relationships. Whanaungatanga means that, when hara is committed, it not only impacts the individuals involved (offenders and victims), but also the broader collectives of these individuals including whānau, hapū and iwi, that is, their communities. A community is always responsible to some degree for the wrongdoing of its members because they too are part of the community. It also means that a community must share the burden borne by any of its members who are victims of offending.

[135] The notion of ea indicates the successful closing of a sequence and the restoration of relationships, or the securing of a peaceful outcome, although a state of ea can still be reached even when one or both of the parties remain unhappy with the outcome. The Statement of Tikanga says in this case that this Court granting leave to appeal meant that the door was opened to a process for the further probing of the hara with a view to achieving a state of ea.

Submissions on tikanga in this case

Submissions for Mr Ellis

[136] Counsel for Mr Ellis submitted that tikanga is New Zealand's first law and is still part of the common law.[159] It is acknowledged that Mr Ellis was not Māori, but in this case, tikanga should inform the interpretation and development of the common law. This would also give effect to New Zealand's commitments under the United Nations Declaration on the Rights of Indigenous People.

[137] In this case, tikanga values lead to the conclusion that death alone does not mean the end of Mr Ellis' interests in a criminal appeal. His mana transcends death and his mana, and that of his family, would be positively affected if the appeal succeeds. Although where the hara sits in this case is unclear, given that it may be the offending against the victims or the conviction of an innocent man, to achieve a state of ea, further probing is required and the appeal should continue.

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[159] Counsel referred to a number of the cases I cite above at [92]–[97].

Submissions for the Crown

[138] The Crown submits that the "ends of justice" inquiry is itself shaped by various factors and the common law so that, on a case by case basis, different factors will be weighed in the balance. Mātāpono (principles) drawn from tikanga Māori may be relevant, although not dispositive. They should be weighed alongside all other relevant circumstances of the case in undertaking this inquiry. The relevant factors in this case include: the mana of Mr Ellis, the complainants and their respective whānau; the complainants' interests in finality; the weak basis for the appeal; the fact that continuation would not resolve Mr Ellis' guilt or innocence; and the practical difficulties in hearing the appeal given Mr Ellis' death.

[139] The Crown submitted that the Court should now "close the door" opened by the granting of leave to appeal and revoke the grant of leave. Revoking leave would, in the Crown's submission, restore the state of ea which had been disturbed through this Court's grant of leave to appeal.

Submissions for the intervener

[140] Te Hunga Rōia Māori expresses a "cautious" view that tikanga Māori supports the appeal continuing. In its submission, tikanga should be weighed as part of a balancing exercise against other relevant considerations. Its importance will depend on the particular context and in some cases may be determinative, especially where fundamental principles of tikanga are involved.

[141] In the instant case, Te Hunga Rōia Māori submits that fundamental tikanga principles such as mana, whakapapa and whanaungatanga are engaged and should be accorded significant weight. These principles recognise that the appellant's reputation survives his death and influences the mana of his whānau and potentially others close to him. As the appellant never admitted any wrongdoing, the complainants' mana is also impacted. Ultimately, ea requires that the appeal, where leave was granted before the appellant's death, be allowed to continue.

Effect of tikanga on the test for continuance

[142] I am conscious that the tikanga approach is not to balance competing considerations in the same way as under the common law interests of justice test outlined above. While the appellant and intervener suggested considerable weight should be afforded to tikanga given the fundamental principles of tikanga involved, neither suggested that the tikanga approach should be controlling in this case. The submission was rather that relevant tikanga principles should be taken into account by this Court.

[143] I gave consideration to whether the test outlined above should be modified by adding tikanga as an additional factor but decided that isolating tikanga principles for separate consideration is not appropriate. The balancing test assessing the factors set out above therefore remains the appropriate test.[160]

[144] Tikanga considerations may, however, be taken into account if and when relevant in assessing each of the factors. The tikanga principles of mana, whanaungatanga, whakapapa, hara and utu referred to in the Statement of Tikanga may be relevant when considering the interests of the appellant, the victims and their whānau, particularly if any of the parties involved are Māori. The concept of ea may be useful in assessing the prospect of achieving substantive finality posthumously and therefore in assessing whether continuing the appeal is in the interests of justice.

[145] I comment that the submissions on tikanga were also beneficial in that they helped to clarify my view on the appropriate test in cases such as this by making explicit values underpinning the factors outlined in *R v Smith*. The consideration of tikanga solidified my decision to add to the *R v Smith* factors the reputational issues relating to the deceased appellant, the deceased appellant's whānau and the interests of the victims and their whānau.[161]

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160 See above at [57].

161 I apprehend, however, that the tikanga approach, as set out in the Statement of Tikanga, may be perceived as more evenly balanced between the interests of the victims and their families as compared to the interests of an appellant and their family. This contrasts with the greater weight I consider should be accorded to the interests of the complainants in this case: see above at [69].

Application to this case

[146] In this case, the principles and further guidance provided in the Statement of Tikanga leads to the same conclusion as that reached without considering tikanga: that the appeal should continue. The addition of the tikanga considerations of mana, whanaungatanga, whakapapa, hara and utu supported and strengthened my conclusion on the factors where they were relevant and, in particular, when considering the interests of Mr Ellis and his family and those of the complainants and their families.

[147] In the overall balancing, I found the desirability of reaching a state of ea helpful in assessing the interests of justice. I do not accept the Crown's submission that a state of ea would be achieved by revoking leave. I accept the submission made by Mr Ellis and the intervener that tikanga requires that the process started by the grant of leave should be allowed to continue, or, as the Statement of Tikanga puts it, "me haere tonu" (the case should continue).[162]

Result

[148] The application for the continuation of the appeal despite the death of the appellant is granted.

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[162] The position may have been different if there had been no judicial decision: for example, if an appeal could be filed without leave. It may be too that not all grants of leave would mean that a state of ea had not been achieved.

WINKELMANN CJ

Table of Contents

Introduction

[149] In September 2020 this Court granted an application for the continuation of the appeal following the death of Mr Ellis, with the indication that reasons for that decision would be given at the same time as the judgment in the substantive appeal.[163] I now give my reasons as to why I considered that the appeal should be allowed to continue following the appellant's death.

[150] The issue of whether an appeal against conviction can continue following the death of the appellant has previously been addressed by the Court of Appeal. In the absence of any statute or rule of court regulating the position, the Court of Appeal has stated its practice to be that it will treat the appeal as lapsed.[164] But the Court of Appeal has also recognised a discretion to allow the appeal to continue, although describing it as a power to be used sparingly, or in exceptional circumstances.[165] The usual context

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163 *Ellis v R* [2020] NZSC 89.

164 *K (CA354/02) v R* CA354/02, 1 December 2004 (Minute); and *Peters v New Zealand Police* [2014] NZCA 215.

165 *R v Saxton* [2009] NZCA 61, [2009] 3 NZLR 29; and *Peters*, above n 164.

in which the discretion has been exercised is where there is a continued pecuniary interest in the outcome, such as where financial penalties or reparation orders apply.[166]

[151] This is however the first time that this Court has been asked to address the issue. There is no statutory provision or rule of court which directly addresses whether an appeal, once commenced in the Supreme Court by grant of leave, may continue after the death of the appellant. There is no prohibition on the Court hearing an appeal for which leave was granted before the appellant's death. Rule 5(2) of the Supreme Court Rules 2004 provides that in any case for which no procedure is prescribed in the rules, and for which there are no rules that can be applied by way of analogy, the Court may dispose of the case "in the manner that the Court thinks best calculated to promote the ends of justice".

[152] Since there are no rules that can be applied by way of analogy, it is necessary to decide the issue in the manner most calculated to promote the ends of justice. Another way of expressing this would be to use the more common phrase, to decide the issue in accordance with the interests of justice, and I therefore use those phrases interchangeably. Many procedural matters in the criminal context are decided by reference to the interests of justice. The decision as to that must be reached in accordance with legal principle. I differ from Glazebrook J and from O'Regan and Arnold JJ in how I formulate that test.[167] The test that I formulate and apply is explicitly tied to the values that I explain should underpin an assessment of what the ends of justice require in this circumstance. Applying the principles-based approach I set out below, however, I agree with both Glazebrook and Williams JJ that the appeal should be allowed to continue.

The context in which the issue arises

[153] At the time that leave to appeal was granted it was known that Mr Ellis was unwell. It soon became clear that he was unlikely to survive until the hearing of his appeal. Mr Ellis filed an affidavit asking that the appeal continue following his death.

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166 *Saxton*, above n 165; *Peters*, above n 164; and *Beri v R* CA456/03, 29 June 2004. See also *Walker v Rusbatch* [1959] NZLR 600 (SC); *Barrett v Sarten* [1982] 2 NZLR 757 (HC); and *King-Sorenson v Police* HC Rotorua CRI-2003-077-2816, 7 July 2005.

167 The test governing continuation proposed by Glazebrook J above at [57] and agreed to by O'Regan and Arnold JJ below at [278] and [292]–[293] commands a majority of this Court.

He said that he wished the appeal to be determined not just for his own name to be cleared, but also for his family who had been affected by his conviction. He said his mother had been named as involved in some of the alleged events, something which had been reiterated in the media in recent years. After Mr Ellis' death his brother, as executor of his estate and family representative, filed an affidavit confirming that the appellant had repeated that wish prior to his death.

[154] It was common ground between the appellant and the Crown that the Court had jurisdiction to continue hearing the appeal, but the Crown opposed the appeal continuing. While accepting that the guiding principle for the Court in deciding whether to continue is what will best promote the interests of justice, the Crown proposed a restrictive framework to guide the exercise of that discretion, arguing that a posthumous appeal should only be heard where:

(a) an interested party can demonstrate a continuing pecuniary interest in the appeal;

(b) there is a matter of exceptional principle at issue, such that it is a matter of general public importance for the court to determine the appeal; or

(c) final resolution can be given by the courts, for example where the court can conclusively confirm innocence or guilt.

[155] The Crown argued that none of these categories applied in this case. It submitted that with the death of the appellant the appeal was moot. The grounds of appeal traversed material already thoroughly explored in earlier appeals and through a Ministerial inquiry and, said the Crown, the appellant had failed by a distinct margin to raise any matter worthy of further appellate consideration. It also pointed to the extraordinary delay in bringing the final appeal, and the interests of the complainants that the proceedings be brought to an end. All of this, it said, meant that the interests of justice clearly favoured the revocation of leave, bringing the appeal to an end.

[156] Argument before us focused on the relevant factors the Court should take into account in deciding what was in the interests of justice and how those factors should

be weighed. One of these factors was the interests of the appellant's family in clearing the appellant's name — the appellant's family making clear that they wished the appeal to continue. In the course of argument a question from the Court raised the issue of how tikanga might factor into this analysis.[168] Both parties then sought leave to file further submissions in relation to that issue and the hearing was adjourned to enable this to occur. The Court directed that submissions cover:

(a) whether tikanga might be relevant to any aspect of the Court's decision on whether the appeal should continue;

(b) if so, which aspects of tikanga; and

(c) if relevant, how should tikanga be taken into account.

[157] Following the hearing Te Hunga Rōia Māori o Aotearoa | The Māori Law Society sought and was granted leave to intervene, with the consent of both parties.

[158] The hearing of the application stood adjourned for some time while a wānanga[169] of tikanga experts was convened for the purpose of assisting counsel involved in the appeal to gain understanding of the tikanga principles applicable to the question of continuance of the appeal, and so that information could be submitted to the Court.[170] Attending the wānanga along with counsel were tikanga experts Sir Hirini Moko Mead, Professor Pou Temara, Te Ripowai Higgins, Kura Moeahu, Professor Rawinia Higgins, Associate Professor Peter Adds, Che Wilson, Mohi Apou and Tamahou Rowe.

[159] Subsequently, counsel for the parties and for the intervener sought a further hearing to address the issues on which the Court had requested submissions. For the purposes of the hearing they filed an agreed statement of facts. Appended to that was a document entitled Statement of Tikanga (the Tikanga Statement) which had been prepared by Sir Hirini Moko Mead and Professor Pou Temara following the wānanga. In the Tikanga Statement Sir Hirini and Professor Temara discuss the intersection

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168 The meaning of "tikanga" is discussed below at [168]–[170].
169 In this context, a wānanga is a gathering of experts to discuss an issue.
170 This was a process initiated by the parties.

between tikanga and the State legal system, the nature of tikanga, the key tikanga principles which could be relevant to the case and their possible application to it.

[160] This case raises for consideration the place of tikanga in the common law in a particularly stark way. This is because the appellant is not Māori, and nor is his family. Nor are any of the complainants (as far as the Court is aware). Nor did counsel for the respondent seek to raise tikanga values or concepts as relevant to assessing how the interests of the complainants should be weighed. Nevertheless, for the reasons I now address, I have concluded that tikanga assists with the formulation of the principles applicable in this case, and with their application.

The common law and the common law method

[161] As already noted, the Court in this case is required to identify the relevant principles to apply in determining what the ends of justice require in accordance with r 5(2) of the Supreme Court Rules. Its task in this regard is to develop these principles with an understanding of New Zealand conditions, history and traditions and in a manner which serves all parts of New Zealand society.[171]

[162] Inherent in the argument we heard as to the place of tikanga in this work is just how the Court should go about the task of settling principles which may come to be applied, including in cases where the interests of Māori are not directly engaged.

[163] In this part of my reasons, I discuss the methodology courts use when required to decide a case such as this where there is no binding authority and no statutory provision or court rule that expressly addresses the issue to be resolved. In doing so I distinguish between the common law and the common law method. The common law is the principles that can be extracted from the body of case law. The common law method is the process that courts use to decide the case before them which may, in a case such as this, require them to develop the common law to enable them to do that.

[164] The common law method proceeds on a case by case basis to create law that serves its society. It entails a search of statute or case law for a statutory provision or

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[171] Supreme Court Act 2003, s 3, as continued by s 66 of the Senior Courts Act 2016.

common law principle which will decide or assist in deciding the case before the court. Sometimes the statute or case law describes a value or concept which the judge must apply to the facts of each case to make a decision. In the criminal context, that value judgement is, not infrequently, what is in the interests of justice. It is common ground that this is the ultimate issue that arises in this case.

[165] Sometimes statute or case law will not provide all the answers — there will be gaps. The common law method allows that various sources may be considered when there is a gap in the law, or when there is a need for the law to develop to meet a different or changed situation. The judge will have reference to any principles in other areas of the law that can be applied by way of analogy, and to underlying values that emerge from the case law and which assist with deciding the case. But they may also look elsewhere for values, and sometimes for detailed rules. They may look to the values in the society — which are of course themselves shaped by the law, but are also shaped by other forces at work in our society.[172] In this regard judges look to relatively permanent values within society, and not to "transient notions" which may emerge in reaction to a particular event.[173] They may look to customary practices within society, and also to international conventions and charters to which New Zealand is party.[174] They may also look to other sources for ideas and inspiration — such as the values expressed in statute law, the law of other jurisdictions and academic writing.

[166] This method itself serves certain values: fairness (including the procedural and substantive fairness provided by a fair hearing), certainty and predictability in the law. Each of these values makes an essential contribution to stability within society.

[167] The task of developing the law through the common law method is therefore incremental in its essence, in the sense that it proceeds on a case by case basis. An

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172 The Supreme Court of New Zealand was established for the purpose, amongst other things, of enabling important legal mattes to be resolved "with an understanding of New Zealand conditions, history and traditions": Supreme Court Act, s 3.

173 *R v Hines* [1997] 3 NZLR 529 (CA) at 538–539 citing *Dietrich v The Queen* (1992) 177 CLR 292 at 319 per Brennan J.

174 *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96]; *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [165] per Glazebrook J; *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [116] per Winkelmann CJ; and *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [92] per Winkelmann CJ and O'Regan J.

approach that is appropriate in one situation may not be appropriate (to use the common law language, may be distinguishable) in another circumstance. A statement of principle which is expressed to have broad and sweeping effect may be shown in later cases to work unexpected injustice.

The relationship between tikanga and the common law

[168] Tikanga was the first law to be applied in these lands. As is described in the Tikanga Statement, it is "the law that grew from and is very much embedded in our whenua (land)".[175] Tikanga regulated the lives of Māori when the first European settlers arrived in Aotearoa New Zealand. It has never ceased to do so.

[169] The Tikanga Statement provides great assistance in describing tikanga principles and how tikanga operates in Māori society. Sir Hirini and Professor Temara explain that tikanga includes "all of the values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct". Tikanga is both social and legal in nature and its force as a source of regulatory principle will be dependent on context. Moreover tikanga is not fixed, but changes and evolves across time, to meet new situations. What is "tika" (right) in any situation may need to be discussed and negotiated between those expert in tikanga. As is stated in the Tikanga Statement "[d]ecisions about mātāpono (principles) are always subject to variables such as concepts, practices, and values, as relevant to the circumstances". What this means is that while the core principles and values of tikanga are enduring and readily identifiable, the particular manifestation of those principles in any given context is subject to change.

[170] From this explanation it seems that as a system of law, tikanga shares similarities with the common law method. Indeed the experts describe it as "the Māori 'common law'". Tikanga itself is not just a set of rules that can be rigidly applied, just as the content of the common law is not prescriptive nor to be divorced from context. Moreover, applying tikanga to new issues requires drawing on historical precedent and how tikanga has been recognised in similar situations. However, a key point of divergence is the source of law. While the common law is generated by the work of

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175 At [22] of the Tikanga Statement.

the courts, tikanga flows out of the matrix of iwi, hapū and whānau relationships that fundamentally frame the Māori world.

[171] But while each system is therefore grounded in its own cultural and constitutional context, there is a growing relationship between them. This Court has acknowledged on previous occasions, that tikanga is relevant to the development of the common law.[176] There are several reasons why that is so.

[172] First, tikanga is relevant because it was the first law of New Zealand and was not displaced or extinguished by the arrival of the English common law, the latter applying "only insofar as it is applicable to the circumstances of New Zealand".[177] In Te Ao Māori (the Māori world) tikanga has continued to shape and regulate the lives of iwi, hapū and whānau down to the present day. The tikanga that continues to operate in society reflects values that are older than our nation.

[173] Secondly, inevitably tikanga concepts and values have shaped and contributed to the social norms and values of our broader society, particularly in relation to attitudes to the environment and to family. It has come to regulate the behaviour of non-Māori in many contexts, including through concepts such as rāhui and tapu.[178] Glazebrook J also discusses the extent to which tikanga principles are incorporated into the policy and practices of many public and private entities.[179]

[174] Thirdly, tikanga is relevant to the development of the common law because the common law must serve all in society. Indeed the protection of the law was guaranteed

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176 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 [*Ngāti Whātua* (SC)] at [77] per Elias CJ; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ and [164] per Tipping, McGrath and Blanchard JJ. For a post-2020 example, see *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [163]–[172] per William Young and Ellen France JJ.

177 See the discussion of this Court in *Trans-Tasman*, above n 176, at [166] per William Young and Ellen France JJ citing: *Takamore*, above n 176, at [150] per Tipping, McGrath and Blanchard JJ; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ, Blanchard and Tipping JJ and [105] per McGrath J; and *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [13] and [17] per Elias CJ, [134]–[135] per Keith and Anderson JJ and [183]–[185] per Tipping J. See also English Laws Act 1858, s 1; and English Laws Act 1908, s 2, the effect of which is preserved by the Imperial Laws Application Act 1988, s 5.

178 A rāhui is a means of prohibiting specific human activity from occurring through the use of tapu (making something sacred).

179 See the reasons of Glazebrook J above at [103]–[104] with whom the other Judges expressed agreement: below at [257] per Williams J and [280] and n 275 per O'Regan and Arnold JJ.

to Māori under Article 3 of Te Tiriti o Waitangi. The common law as developed and applied in New Zealand must therefore serve Māori. It must serve all in our society.

[175] Looking to tikanga in the development or application of the law is not to break with the continuity of the common law.[180] Tikanga has been applied as a source of enforceable rights by Te Kooti Whenua Māori | Māori Land Court in the exercise of its statutory jurisdiction since the inception of that Court.[181] Tikanga has been applied in other New Zealand courts as the source of enforceable rights — even when invoked by Pākehā in support of their claims.[182] Although these latter cases were initially infrequent, outside of courts of law tikanga continued to shape and regulate social, environmental and economic interactions and values. In the last thirty years the role that tikanga plays in society has been acknowledged by Parliament through the inclusion of tikanga into various statutes as a mandatory or permissible consideration for decision-makers. These statutory frameworks have in turn required courts to apply tikanga concepts and values, this work itself providing content for the common law.[183] Statutory frameworks have of course also shaped attitudes and values within society.[184] Certainly even without express statutory reference to tikanga, the courts have interpreted statutes to take account of tikanga values and interests.[185]

[176] Tikanga has already found its way into the common law along each of these pathways.[186] It has been held to be a source of values,[187] but also to be a source of rights which are directly enforceable in the courts.[188] Tikanga has provided different

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180 As also acknowledged by Glazebrook J, above at [92] and n 82.

181 Although noting that in its original inception as the Native Land Court, those tikanga rights were in general recognised for the purpose of their extinguishment: see David V Williams '*Te Kooti Tango Whenua': The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).

182 *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); and *Arani v Public Trustee* [1920] AC 198 (PC) (commonly cited as *Hineiti Rirerire Arani v Public Trustee*).

183 See the reasons of Glazebrook J above at [100]–[102] for examples of key statutes that incorporate tikanga.

184 Statute law is looked to as a source of values and ideas that can be incorporated into the common law: see the discussion in Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 732–740.

185 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; and *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [38]. See also *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 [*Ngāti Whātua* (HC)] at [358] and [587]; and *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at [104] for a post-2020 discussion.

186 See the reasons of Glazebrook J above at [94]–[97].

187 *Takamore*, above n 176.

188 *Ngāti Whātua* (SC), above n 176, at [77] per Elias CJ; *Trans-Tasman*, above n 176, at [154] per William Young and Ellen France JJ and [296]–[297] per Williams J; and *Ngati Apa*, above n 177.

frameworks, and different questions to ask when applying statutory tests and standards, particularly to date in the family and environmental fields.[189] As I come to, in this case it has provided new concepts that help shape the principles to be applied. It has also provided a new vocabulary for existing concepts within the common law, and by providing that vocabulary, produced fresh insights.

[177] Against this background, I agree with Glazebrook J at [113]–[116] and Williams J at [260] that the colonial tests for the incorporation of custom into the common law are inappropriate for the context of modern Aotearoa New Zealand law and should not be retained.

[178] Counsel for the appellant, the Crown and for the intervener Te Hunga Rōia Māori o Aotearoa all submitted that tikanga was relevant to the issue before the Court. The Tikanga Statement records that the tikanga experts gathered at the wānanga:

> … support tikanga as one of the many sources of the New Zealand common law which informs the common law's development and evolution;
>
> … 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 …

[179] While the relationship between tikanga and the common law of Aotearoa New Zealand is of vital importance, describing how that intersection will play out in the law is by no means straightforward. Difficulty arises from the fact that the development of the common law with reference to tikanga has been much delayed. For over one hundred years, there was little resort to tikanga, its rules, its concepts or its values, when the courts applied or developed the law.[190] Lawyers and judges instead looked to England for the case law, or to other commonwealth jurisdictions. Prior to the 1970s the cases in which mainstream courts were called upon to decide or

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189 See, for example, the reference to kaitiakitanga in s 2 of the Resource Management Act 1991 and the inclusion of tikanga principles in the Oranga Tamariki Act 1989.

190 The key exception is the Native Land Court, and later Te Kooti Whenua Māori | Māori Land Court, because of the statutory jurisdiction to determine customary title according to tikanga. However, engagement with tikanga in these forums was historically often with a view toward extinguishment of customary title: see above at n 181. See also Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts 1840–1852* (Auckland University Press, Auckland, 2017). More recently, since its establishment in 1975 the Waitangi Tribunal has engaged extensively with tikanga.

consider issues of tikanga were few indeed. Accounts of this delay in engagement have been written elsewhere and I will not traverse them here.[191]

[180] Defining the intersection between tikanga and the common law is further complicated because of the nature of tikanga. As noted above, tikanga is itself a complete system, and care must be taken not to pick and choose elements, thereby depriving it of its essential value or distorting the concepts. Professor Temara and Sir Hirini explain that tikanga is a system of law providing predictability and templates and frameworks to guide actions and outcomes. While core tikanga concepts may be expressed and explained (for example, concepts such as manaakitanga, whanaungatanga and mana), the fundamental concepts of tikanga "are intertwined and cannot be defined in isolation or translated by a simple English word. They exist in an interconnected matrix."

[181] As cases such as this proceed, it is therefore important to acknowledge that the task for the courts is limited. It is not to pronounce on or develop the content of tikanga. Tikanga remains rooted in its own world. I agree with Glazebrook and Williams JJ that the cautions expressed in the Tikanga Statement toward protecting the integrity of tikanga must be taken seriously.[192] I also agree that the appropriate method of ascertaining tikanga will depend on the circumstances of the case.[193]

[182] Finally, the task of describing how tikanga will contribute to the development of the common law is not straightforward because of the infinite variety of factual circumstances in which it may arise for consideration. There may be circumstances in which tikanga values or concepts have no relevance. Tikanga values or concepts may clash with other values in society, existing principles within the common law or indeed with statutory provisions.[194] That conflict will have to be worked through.

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191 See, for example, Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1. Whata J has referred to the renaissance of "Māori issues" jurisprudence post 1970s as a "Cambrian explosion": see Christian Whata "Biculturalism in the Law: The *I,* the *Kua,* and the *Ka*" (2018) 26 Wai L Rev 24.

192 See Glazebrook J's reasons above at [120] and [122] and Williams J's reasons below at [270]–[272]. The reasons of O'Regan and Arnold JJ are also alive to these concerns: see below at [285] and n 283.

193 See Glazebrook J's reasons above at [121]–[125] and Williams J's reasons below at [273].

194 See Glazebrook J's reasons above at [119] and Williams J's reasons below at [266].

[183] For all of these reasons, it is not appropriate or possible to attempt a comprehensive statement of when tikanga will be relevant to the application or development of the common law. The role that tikanga will play in the development of the common law is best addressed on a case by case basis, as has been the approach in recent case law. The case by case approach of the common law is well-suited to dealing with this complexity. It is the approach that I adopt in this case.

What principles should guide the Court in deciding whether to allow the appeal to continue after Mr Ellis' death?

[184] In assessing just what is in the interests of justice I look to relevant principles of tikanga, existing principles in the common law, and also the approach taken in other jurisdictions.

Tikanga

[185] The Tikanga Statement describes how the following fundamental principles of tikanga are engaged by the issue of continuance of this appeal:

(a) Hara — the commission of a wrong, the violation of tikanga resulting in an imbalance.

(b) Ea — the state achieved when balance is restored. As the Tikanga Statement puts it, "[t]he notion of ea indicates the successful closing of a sequence and the restoration of relationships, or the securing of a peaceful outcome".

(c) Mana conveys concepts of power, presence, authority, prestige, reputation, influence and control. While mana is one of the most valuable and important things a person can have, an allegation of a hara alone may result in a corresponding loss of mana. It applies at both an individual and collective level, so that a hara does not occur against the individual only but can impact the whānau, hapū or iwi. There are two relevant types of mana here:

(i) Mana tuku iho — mana inherited from ancestors; and

(ii) Mana tangata — mana derived from actions or ability.

(d) Whakapapa — is often translated as genealogy.[195] Māori place great importance on genealogy and kinship relationships with the concept of whakapapa being central to Māori and identity. This creates responsibilities of manaaki (care and nurturing) within the whānau. When the mana of an individual within a whānau increases or decreases, so too does the mana of the whānau. And when a whānau member commits a hara, the responsibility to restore ea is the responsibility of the whole whānau.

(e) Whanaungatanga focuses upon the maintenance of properly tended relationships. It reminds people that they exist in a matrix of relationships and collectives. It goes beyond just whakapapa and includes non-kin people who become like kin through shared experiences. It means that when a hara is committed it not only impacts the individuals, but also the broader collectives of whānau, hapū and iwi. As the tikanga experts put it, "[i]t means that a community is always responsible for their wrongdoers because they are kin. It also means that a community is impacted as victims when offending occurs."

[186] As to the application of these principles in this case, the analysis of the experts was as follows:

(a) Leave to appeal having been granted in this case means that a process had been opened to determine where the hara lies — was it the offending against the complainants or could it be the wrongful conviction of Mr Ellis? The appeal not yet having been concluded, a state of ea has not been achieved.

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[195] As the Tikanga Statement notes, whakapapa literally means to "lay one thing upon another". In this case, it is to lay one generation upon the next.

(b) This imbalance affects the appellant and his whānau and the complainants and their whānau. Achieving ea is needed for both.

(c) Even though Mr Ellis has died the hara has not died with him.

(d) Mr Ellis as an individual has mana. The mana of Mr Ellis and his broader whānau were affected by the allegation of offending.

(e) The complainants and their whānau also have mana.

[187] These values and concepts provide a framework for considering the issue of continuance. Allowing the appeal to continue provides an opportunity for a state of ea to be reached. However, bringing the appeal to an end at this point may result in an imbalance, leaving the hara unaddressed. The concepts of mana (both mana tuku iho and mana tangata) demonstrate that the hara, and as a consequence the state of imbalance, is one which can persist after the death of one of the parties.

Common law principles

The practicality of continuing

[188] The first issue to address here is the most prosaic. Does the death of the appellant mean that the appeal cannot now be run as a conventional appeal? For example, if the appellant has died without providing adequate instructions for the appeal to continue, that would be a strong indication that the appeal should be discontinued. So too if cross-examination of the appellant would be required to allow resolution of the appeal in an adversarial context. The court will of course have to take these practical considerations into account.

[189] Depending upon the grounds of appeal advanced, it may also be relevant that the death of the appellant means that a re-trial is no longer possible.

Personal and public interest in addressing a potential miscarriage of justice

[190] The personal and the public interest in addressing and correcting potential miscarriages of justice must be weighed. The purpose of the appellate process in

respect to conviction appeals is of course to establish whether there has been a miscarriage of justice. If it is held that the death of the appellant ends the appellate process then that finding will not be able to be made. That is the context for the discussion which follows.

[191] The personal interest of an appellant in being able to argue through the appellate process that a miscarriage has taken place is obvious. As a society we acknowledge that conviction and its consequences should only follow after a fair trial. We acknowledge also that a person should not carry the burden of conviction, nor be subjected to imprisonment or other punishment for an offence they have not committed.

[192] This personal interest might be thought to cease on death. However the law in New Zealand already acknowledges that this is not the case where the appellant's family has a financial interest in the outcome of the appeal — the financial interest of the family of the appellant is allowed to weigh in favour of continuation.[196] There is a strengthening recognition in society generally that whānau have an interest in the restoration of a wrongly convicted person's reputation, an interest not confined to financial considerations. That has been reflected in the practice of posthumous pardons, enshrined in legislation, including the Pardon for Soldiers of the Great War Act 2000, Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 | Te Ture mō Mokomoko (Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga) 2013, and Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana 2019 | Rua Kēnana Pardon Act 2019.[197] Moreover, the statutory discretion of Te Kāhui Tātari Ture | Criminal Cases Review Commission to decide to take no action if an applicant dies presupposes that the review could otherwise continue.[198] And as is evident from the discussion of tikanga above, this societal value accords with the concept of mana — one of the foundational tikanga concepts, and one which is now firmly understood in broader New Zealand society.[199]

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196 See above at n 166.

197 See also Ngāti Rangiwewehi Claims Settlement Act 2014, s 11; and the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018.

198 Criminal Cases Review Commission Act 2019, ss 4, 21 and 24.

199 I express no view on how the interests of those who are not whānau of the deceased appellant may affect the decision to continue an appeal. That issue was not before us and is better dealt with if and when it arises.

[193] How do the wishes of the appellant factor into this picture? The appellant may have provided instructions prior to their death that they do not wish the appeal to continue. Those instructions would normally be respected — given the personal nature of the right, the rules require the appellant's consent for the commencement of an application for leave to appeal.[200]

[194] Before I leave this point it is important to address the issue of how the recognition of a continuing personal interest in pursuing a conviction appeal following the appellant's death fits with other areas and principles in the law — important because the courts must be conscious of the overall coherence of the law. In the law of defamation, the plaintiff's interest in their reputation is said to end with their death, such that their personal representatives may not then continue or commence the action in defamation.[201] While first appearances may suggest that the harm to the whānau of a convicted person is similar to the harm caused to the whānau of a person who is defamed (in that it is harm flowing out of damage to the reputation of the deceased person) there are differences that justify a different approach. Civil defamation is different in kind to the harm caused to reputation and to an individual's mana by a wrongful conviction, in that in the latter case it is the State that has caused the damage to the reputation. Secondly the harm caused by the miscarriage of justice will usually be different in magnitude given the very considerable stigma that society attaches to criminal conviction. I consider these differences justify a different approach in the area of criminal appeals.

[195] There is also a public interest in addressing concern that there has been a miscarriage of justice through the appellate process. Such an unaddressed concern may corrode confidence in the administration of justice. There is in addition a systemic interest in understanding how miscarriages of justice came to pass. To maintain its legitimacy a system must learn from previous miscarriages of justice in order to avoid them occurring in the future.

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200 Supreme Court Rules 2004, r 12(1) and sch 1.

201 *Hagaman v Little* [2017] NZCA 447, [2018] 2 NZLR 140. The common law rule is continued by the Law Reform Act 1936, s 3(1).

[196] Since it is plain that the public interest in correcting a miscarriage of justice continues after death, any test applied to determine whether an appeal should abate on the death of the appellant must reflect that. As with the personal interest in correcting miscarriages of justice, a narrow focus upon financial interests in determining whether to allow an appeal to continue does not sit well with the public interest identified.

[197] Just how powerful the consideration of the public interest is must be addressed on the facts of each case. The strength of the grounds of appeal will of course be a potent consideration. Relevant also, is the nature of the alleged miscarriage — is it a miscarriage with apparent systemic significance, or which, if left unresolved, may undermine confidence in the administration of justice? If the offending is very minor, or the grounds of appeal weak, then there may be little public interest in the appeal continuing. Equally, the question of whether the appeal could have a bearing on the future application of the law will affect this assessment.

Finality as a common law value

[198] Another principle that runs through the common law is the value in finality in litigation. This value is highly relevant to the issue of whether this appeal should continue. The principle of finality finds expression in various ways in the common law. Examples in the criminal context include the high threshold before a court will recall its earlier judgment and the lack of jurisdiction to hear an appeal from a decision declining recall.[202] It is also expressed by requiring that those convicted of crime pursue available appeal grounds with diligence and reasonable expedition and also by prohibiting successive appeals to the same court on the same grounds.[203] The value that the common law attaches to finality serves the interest of the complainants — so that they are free to move on with their lives without being harried by continuing proceedings.[204] In this case the interests of the complainants are particularly in focus, given the nature of the convictions, and the protracted appeal and related processes, which I come to shortly.

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202 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286.

203 *R v Smith* [2003] 3 NZLR 617 (CA) at [36] and [48]; and *Uhrle*, above n 202. See the statutory framework for criminal appeals in pt 6 of the Criminal Procedure Act 2011 which reflects the same values as those underpinning the appeal framework in pt 13 of the Crimes Act 1961 (under which this appeal is being prosecuted).

204 *Uhrle*, above n 202, at [24] and [28].

[199] Finality in litigation also serves the interests of the system — it avoids the courts being clogged by successive and delayed appeals.[205] Nevertheless the common law also acknowledges that the interest in finality must give way where necessary to allow consideration through the appellate process of whether there has been a miscarriage of justice.[206] Our system of justice places a very high value upon avoiding and addressing miscarriages of justice. In weighing up delay, the court therefore takes into account the extent of the delay and the reasons for it, but also the strengths of the proposed grounds of appeal.

[200] These principles and values converge with the concepts of tikanga I have discussed above. The personal interest in correcting a miscarriage of justice survives beyond death through concepts of mana, both mana tuku iho and mana tangata, and the implications for whānau of damage to the appellant's mana and indeed to their own.

[201] The concept that the grant of leave to appeal has unsettled the state of ea and that resolution of the appeal is needed to restore balance also provides a useful perspective or way of explaining why it is necessary to weigh the interest in finality against the personal and public interest in addressing miscarriages of justice when determining whether the appeal should continue. If, for example, the appeal had little prospect of success then it might be concluded that the fact of the grant of leave to appeal had not unsettled the state of ea, so that the interest the system places upon finality would be determinative of the application.

The approach in other jurisdictions

[202] Australian authorities have consistently taken the position that a right of appeal is personal to the appellant and abates on their death. The courts have reasoned that

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205 *Marteley v R* [2021] NZCA 636 at [37].

206 See Lord Atkin's famous observation that "[f]inality is a good thing, but justice is a better" in *Lal v The King Emperor* [1933] All ER Rep 723 (PC) at 726. See also *Smith*, above n 203 at [36] and [48] citing *The Ampthill Peerage* [1977] AC 547 (HL) at 569; and *Uhrle*, above n 202, at [26]–[27].

rights of appeal are sourced in statute, construing the relevant legislation to give a right of appeal only to a party to the appeal.[207]

[203] Until the mid-1990s the approach of the courts in the United Kingdom was that the appeal abated unless an interested person could establish a legal interest (usually a financial interest) in the appeal continuing, and as long as the right of appeal was not expressed as a personal right in statute or rules of court.[208] An amendment to the Criminal Appeal Act 1968 (UK) in 1995 removed these limitations by explicitly providing for the substitution of a personal representative in an appeal.[209] Section 44A of the Act now provides that an appeal may be commenced or continued by a surviving spouse or partner, a personal representative (as statutorily defined) or any other person appearing to have "by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of a relevant appeal relating to" the deceased. This leaves the test for continuation broader than that which has been applied by the Court of Appeal in this country to date (limited as it has been to circumstances of pecuniary interest), although the broadening of the test is the result of legislation.

[204] The issue of whether an appellant's appeal can continue following their death was considered by the Canadian Supreme Court in *R v Smith*.[210] The Supreme Court affirmed earlier authority to the effect that there is discretion to proceed with a moot appeal, provided the discretion is exercised in accordance with judicial principle.[211] Binnie J, writing for the Court said the discretion is to be exercised:[212]

> … only in exceptional circumstances where the death of the appellant is survived by a continuing controversy which, notwithstanding the death of the

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207 *Sen v The Queen* (1991) 30 FCR 173 (FCAFC); *Johnson v Lapham* (1992) 6 WAR 359 (WASC); *Quartermaine v R* [2002] WASCA 345; and *R v Rimon (deceased)* [2003] VSCA 136, (2003) 6 VR 553. It is implied in some of these cases that the situation may be different if a fine had been imposed.

208 See, for example, *Regina v Kearley, dec'd (by his agent Sharman)* [1994] 2 AC 414 (HL); and *Regina v Jefferies* [1969] 1 QB 120 (CA). Note the discussion in *Jefferies* at 123–124 of two earlier cases, which did not engage with the question of whether statutory authority limited an appeal right to a personal right, and instead saw the availability of continuance as an exercise of the court's inherent power: *Regina v Rowe* [1955] 1 QB 573 (Crim App); and *Hodgson v Lakeman* [1943] 1 KB 15 (Divisional Court).

209 Criminal Appeal Act 1995 (UK), s 7.

210 *R v Smith* 2004 SCC 14, [2004] 1 SCR 385.

211 At [4] citing *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 at 358.

212 At [4].

individual most directly affected by the appeal, requires resolution in the interests of justice.

[205] It is a discretion to be sparingly exercised and leave was not granted for the continuation in that case.[213] The Court set out the following principles to guide the exercise of the discretion, noting that not all will necessarily be present in a particular case and their strength will vary according to the circumstances:[214]

1. whether the appeal will proceed in a proper adversarial context;

2. the strength of the grounds of the appeal;

3. whether there are special circumstances that transcend the death of the individual appellant/respondent, including:

   a) a legal issue of general public importance, particularly if it is otherwise evasive of appellate review;

   b) a systemic issue related to the administration of justice;

   c) collateral consequences to the family of the deceased or to other interested persons or to the public;

4. whether the nature of the order which could be made by the appellate court justifies the expenditure of limited judicial (or court) resources to resolve a moot appeal;

5. whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing, legislative-type pronouncements more properly left to the legislature itself.

[206] In both the United Kingdom and Canada then there is recognition that family (and others with family-like connections) may have an interest in the continuation of the appeal, which should be weighed. Neither jurisdiction limits that interest to a financial interest. That is an approach which accords with the principles and values I have outlined above in connection with the personal and public interest in an appellate process which allows claimed miscarriages of justice to be addressed.

[207] The Canadian Supreme Court decision in *Smith* provides a list of considerations to weigh, which has been largely adopted in the reasons of Glazebrook J.[215] I agree that the listed matters are relevant, but for the most part they

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213 At [20].
214 At [50].
215 See the reasons of Glazebrook J above at [49]–[51]. These factors have also been adopted

add little if anything to the principles I have identified as relevant to assist in deciding what is in the interests of justice — principles of ea, hara and mana and the manner in which they converge with the need for finality in litigation and the public and private interest in addressing miscarriages of justice. For example, the issue of whether "continuing the appeal would go beyond the judicial function" is relevant both to the strength of the appeal and to the public interest in its determination.

[208] It seems to me that a list of matters such as this, unconnected to the underlying principles risks obscuring those principles, even though they are undoubtedly at work in the *Smith* test. Moreover keeping the test at the level of these framework principles enables the Court to respond to many different factual circumstances that may arise. The approach I have outlined for the formulation of the relevant principles also enables the values in our society to shape that framework from the outset, rather than requiring that they be fitted into a test developed elsewhere.

[209] I agree with Glazebrook J that there is no need or reason to add the additional limitation adopted by the Canadian Supreme Court — that of special circumstances.[216] That risks distorting the fundamental inquiry, which I consider is best approached as I have set out.

A framework for decision

[210] To sum up to this point. Consideration of the relevant rule (Supreme Court Rules, r 5(2)), tikanga principles, existing common law principles and relevant authority from overseas suggest that in determining what is in the interests of justice in the context of continuation, the following considerations should be weighed:

(a) Practical considerations. Is it possible to conduct the appeal in a proper adversarial manner in the absence of the appellant? Would a re-trial be ordered were the appeal to succeed?

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generally in the reasons of O'Regan and Arnold JJ: see below at [292].

[216] See Glazebrook J's reasons above at [52] and William J's reasons below at [235]–[236]. See also the reasons of O'Regan and Arnold JJ where they state their preference for a special circumstances test: below at [294].

(b) The interest in finality in litigation. This includes the general public interest that there should be an end to litigation. It also includes the interest of the complainants and their families that they should be free of the stress that allowing the proceeding to continue brings.

(c) The personal interest in having a miscarriage of justice addressed through the appellate process. That personal interest is informed by mana and may include not just that of the appellant, but also, following the appellant's death the interest of whānau in the determination of the appeal. The interest of whānau is not limited to financial interests but may include clearing their family member's name and the impact of that upon mana tangata and mana tuku iho.

(d) There is also a public interest in addressing concern that there has been a miscarriage of justice — failure to do so may result in undermining confidence in the administration of justice. And there is a public interest in identifying any systemic causes which have led to the miscarriage of justice (if one is ultimately found to exist).

[211] The strength of the grounds of appeal will be critical to assessing the personal and public interest in the appeal continuing. Do they raise a real risk that a miscarriage of justice has occurred in this case, such as to engage the personal and public interests discussed above? The nature of any systemic issues raised by the appeal will also be relevant to this assessment. This includes whether the appeal could have an impact upon the future application of the law.

[212] This framework therefore represents the development of common law appropriate for New Zealand, drawing on appropriate sources of legal influence. It reflects an interpretation of r 5(2) consistent with tikanga and with the existing principles of the common law, as expressed both here and in overseas jurisdictions. Indeed it is appropriate to acknowledge that the issue for the Court could in essence be expressed as which course of action — continuing to determine the appeal, or discontinuing it — is most likely to restore ea.

[213] As to the application of these principles, I agree with Glazebrook J that they will also probably apply where an appeal as of right is already on foot.[217]

[214] There are also issues of court practice to be addressed. I agree with Glazebrook J that the appeal should not automatically abate on death, but that it will abate if there is no application for continuance.[218] I also agree that it is unhelpful to frame the issue in terms of a presumption against continuance. Upon death, opportunity will need to be provided for the court to hear whether the appellant, or the appellant's family seek to have the appeal determined.[219] In the absence of such an indication the appeal will abate.

[215] I do not see the approach I have described as likely to lead to a significant number of cases being pursued posthumously. The issue does not frequently arise, and the framework set out above will also ensure that the appeal will only proceed to determination where there is good reason to allow it to do so as discussed above.

Application of these principles in this case

Practicality of proceeding with the appeal

[216] In considering whether the appeal should be allowed to continue, I weighed that there was no practical impediment to proceeding with the appeal following the appellant's death. The legal team instructed were prepared to continue and had adequate instruction to do so. The appeal did not require the appellant to provide further evidence or to be cross-examined. It was common ground that if the appeal was successful, there could be no re-trial.

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[217] See above at [48] per Glazebrook J. It may be that these principles also apply where an application for leave to appeal or for an extension of time has been filed before the death of an applicant. However those issues are not before us, and in each of those situations other considerations may be relevant.

[218] See above at [52] per Glazebrook J with whom Williams J (below at [243]) and O'Regan and Arnold JJ (below at [294]) agree with.

[219] I do not address the situation where it is someone other than the appellant or appellant's family seeking to continue the appeal as that issue is not before us.

Interest in finality in litigation

[217] Relevant to this particular application is the extent of the delay that had already occurred in the prosecution of the appeal and its effect on the complainants.[220] The appellant had already sought an extension to the time usually allowed for appeal. This appeal has been much delayed. It concerns convictions entered in 1993 which in turn related to events said to have occurred still earlier in time. Preceding the appeal to this Court were decades of failed attempts by the appellant to have his convictions overturned — appeals, applications to the Governor-General for the Royal prerogative of mercy, and a Ministerial inquiry.[221]

[218] The protracted nature of these challenges overall, followed by this further, much delayed, appeal, has added stress to the complainants. They were small children when the investigations began. They have lived almost the entirety of their lives in the shadow of procedural steps challenging the convictions, or public controversy concerning them. But I also took into account that refusing to continue with the appeal was unlikely to end that controversy — rather in my assessment it would set it firmly in place in the public narrative that is undoubtedly connected with the convictions. As counsel for the appellant submitted, the grant of leave had already reopened the question of where the hara lies and unsettled the state of ea.

[219] In assessing how to view such extensive delay the Court has to address the reason for it. In his affidavit in support of the application for leave and extension of time, the appellant addressed the reason for the delay in advancing this appeal. He explained that he had always relied upon counsel to advance his appeal, but that counsel had been required to work unpaid. In the decision granting the extension of time, and leave to appeal, the Court noted the appellant's evidence that he has "always maintained [his] innocence in this matter and [has] always asked for the matter to be brought to either the Privy Council or the Supreme Court".[222] There was no finding that the delay was attributable to fault on the appellant's part.

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220 See above at [199].

221 The appellant was convicted following trial in 1993, against which he appealed to the Court of Appeal in 1994 and again in 1999 following a reference from the Governor-General under s 406(a) of the Crimes Act. In 2000 Sir Thomas Eichelbaum was appointed to conduct a Ministerial inquiry into the case.

222 *Ellis v R* [2019] NZSC 83 [SC leave judgment] at [11].

Public and personal interest in addressing a potential miscarriage of justice

[220] As set out above, the merits of the proposed appeal, and the issues raised by it are critical to the assessment of the personal and private interest in addressing the claimed miscarriage of justice. The appellant sought leave to appeal on the following grounds:

(a) The evidential interviews fell far short of best practice (even at the time) and there was a strong possibility of contamination of evidence.

(b) The jury was not appropriately assisted at trial by the expert witnesses.

(c) Unreliable expert evidence was led under s 23G of the Evidence Act 1908 (now repealed).

[221] In support of his application the appellant filed two affidavits. The first was from Professor Harlene Hayne, whose affidavit addressed the first two issues. The second was from Dr Thelma Patterson, who dealt with the issue of the evidence led under s 23G which related to the significance of behaviours the complainants had exhibited, which the prosecution had relied upon as evidence corroborating the complaints.

[222] When the Court granted the applications for an extension of time, and for leave to appeal, it meant that the Court considered the appeal grounds were strong enough and had sufficient prospect of success to overcome the very long delay in seeking leave.[223] Inherent in this was the assessment that the issues that the appeal raised were suitable for determination on appeal. The Court said:[224]

> In our view the affidavits of Professor Hayne and Dr Patterson raise issues of general and public importance and significant issues specific to Mr Ellis' case. The interest of justice requires that these issues be ventilated on appeal, despite the length of time since the second Court of Appeal decision.

[223] The grant of leave itself was therefore an indication that the Court considered there were serious issues to address. Given the nature of the grounds of appeal in this

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223 See the reasons of Glazebrook J above at [25] and [63] and Williams J below at [241].
224 SC leave judgment, above n 222, at [17].

case, this assessment links back to the earlier point — the point that a refusal to allow the appeal to continue was unlikely to achieve finality because public debate about whether there had been a miscarriage of justice would very likely continue. This is because the assessment that these were serious issues to be addressed unsettled the balance (the state of ea) that had previously applied. It meant that it was no longer clear where the mamae [harm] lay — was it exclusively with the complainants, or did it also lie with the appellant?

[224] It is important to clarify in this regard that were the appellant to succeed, it would not follow that the mamae suffered would lie exclusively with the appellant. The complainants and their whānau have been through many years of trauma consequent upon the investigation and subsequent proceedings. There has never been any suggestion in this proceeding of fault on their part in connection with how this chain of events, which now has spanned nearly 30 years, was set in motion.

[225] The consequences of a claimed miscarriage of justice are also relevant to the assessment of the personal and public interest in addressing it. In this case, I weighed that if there had indeed been a miscarriage of justice it has had terrible consequences — consuming most of the life of the appellant, and trapping the complainants and their families in a controversy which, it seems clear, would not abate, even with the death of the appellant. The appellant was convicted of very serious offending, spending nearly 7 years in prison, and on his release, living a very constrained life. It is not to over speak to say that the events dominated the appellant's life and in a damaging way, from 1992 until his death. His personal interest in seeing the appeal determined was considerable.

[226] At the point leave was granted, the Court was aware that the appellant was no longer imprisoned, nor subject to any restrictive sentencing conditions. His interest in pursuing the appeal was purely in seeing his name cleared, and the public record corrected. That interest did not entirely abate on his death; the mana of the appellant and of his family continue to be engaged. As noted above, I consider that his family have a significant interest in the determination of the appeal. The seriousness and nature of the charges and accompanying controversy have inevitably affected them. Especially so since the narrative that emerged from some complainant interviews, and

which was the subject of publicity, implicated the appellant's mother in the offending — although those allegations were obviously discounted by the Police, with no charges being laid.

[227] The very considerable public interest in seeing this appeal determined is also to be weighed. The public interest in this case is to see addressed what would be, if established, a miscarriage of justice and in doing so maintain public confidence in the administration of justice. The convictions have been the subject of great public interest, and have engendered some public disquiet. If a miscarriage of justice was established, there was also a further public interest in understanding how it came to pass that the investigation and prosecution of the various charges against the appellant produced such a miscarriage of justice.

Conclusion on continuation

[228] Taking all of these matters into account, I concluded that it was in the interests of justice that the appeal should continue to determination.[225] The leave Court had already determined that the appeal raised matters of general and public importance, as well as issues specific to the appellant's case, and that the interest of justice required that those be ventilated on appeal notwithstanding the delay. The appellant's death did not alter this fundamental conclusion. His individual interest continues to be engaged through the impact of these events on his mana. And although his death meant that the appellant would not live to see his appeal determined, his family had a continuing and strong interest in continuing with the appeal, given the impact that the convictions had on them and their mana. In this case there was also a powerful public interest in addressing a potential miscarriage of justice and understanding how it came to pass.

[229] I weighed the interests of the complainants but in my view, those interests were not such as could justify discontinuing the appeal. The complainants' interest in finality ultimately must give way to the interests in addressing grounds which suggested the possibility of a miscarriage of justice. I was also satisfied that in the

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[225] I would have reached the same conclusion that the appeal should continue were I applying the test formulated by Glazebrook J. I also agree with Glazebrook J (above at [62]) and Williams J (below at n 267) that the appeal should continue in Mr Ellis' name .

particular context of this proceeding, revoking leave would not have resulted in an end to the controversy.

[230] On each occasion, when the Court granted leave to appeal, and then later when the Court granted the application for continuance, it was satisfied that to do so was in the interests of justice. In reaching that view, again on each occasion the Court took into account the great importance that our system of justice, indeed our society as a whole, attaches to addressing miscarriages of justice. Having done so it determined that the interests in finality must give way to the need to address whether or not a miscarriage of justice had occurred in this case.

WILLIAMS J

Table of Contents

[231] In 2019, Peter Ellis was granted leave by this Court to appeal against successive decisions of the Court of Appeal,[226] this despite an interval of almost 20 years since the most recent decision.[227] But Mr Ellis was suffering from a terminal illness which by the time of granting leave was already well advanced. He did not survive to prosecute his appeal before this Court. His death has raised two questions for this Court. The first is: what principles should guide the Court in determining whether to allow the appeal to continue (there being no doubt as to the existence of the jurisdiction to do so)? The second is a subsidiary issue: what role, if any, should tikanga Māori play in that determination?

[232] The procedural and other circumstances in which these issues arose are fully described by Glazebrook J in her reasons. I need not repeat that detail here.

Continuation and the common law

[233] There is no controversy over the terms of what may be described as the applicable meta-test: will continuing with Mr Ellis' appeal, despite his demise, "promote the ends of justice"? The test is contained in r 5(2) of the rules of this Court, but even if it were not, this would still be the standard instinctively adopted by the common law. We must then break down what is meant by "the ends of justice" in posthumous appeals. That is not always straightforward.

[234] The common law has traditionally been reluctant to allow the posthumous continuation of appeals in the absence of exceptional circumstances.[228] Such

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[226] *Ellis v R* [2019] NZSC 83 (Glazebrook, O'Regan and Williams JJ). This judgment was recalled and reissued on 7 October 2022.

[227] The most recent Court of Appeal decision was given on 14 October 1999: *R v Ellis* (1999) 17 CRNZ 411 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ).

[228] See, for example, *Peters v New Zealand Police* [2014] NZCA 215.

circumstances have generally been restricted to cases where there remains something tangible in the contest — usually cash or assets, the rights to which will be affected by the result in the appeal. The New Zealand cases have generally been to this effect.[229]

[235] The 2004 decision of the Canadian Supreme Court in *R v Smith* adopted a less constrained, multi-factorial approach while still accepting that continuation will only be permitted where there are "special circumstances that make it 'in the interests of justice' to proceed".[230] This (in somewhat modified form) is the approach preferred by Glazebrook J. Her approach is supported by O'Regan and Arnold JJ — essentially because it continues to present a relatively high barrier to continuation. Glazebrook J dropped the "special circumstances" threshold, but replaced it with a requirement that there must "be very good reason" to continue.[231] As with *R v Smith*, multiple factors are to be considered, including the interests of the victims.[232]

[236] I agree a very good reason will always be required to justify continuation, but I prefer the Chief Justice's principles-based approach to determining whether one exists.[233] That approach seems to me, at least, to reflect more accurately and transparently the way in which courts reason their way through what will promote the ends of justice whenever that is the relevant threshold, including in relation to posthumous continuation of appeals. It keeps to the fore of the assessment *why* it is that a very good reason is required.

[237] It follows that I consider a presumption against continuation to be unnecessary. Posthumous continuation issues arise infrequently in this country. And following the establishment of Te Kāhui Tātari Ture | Criminal Cases Review Commission they may

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229 See *R v Saxton* [2009] NZCA 61, [2009] 3 NZLR 29; *Beri v R* CA456/03, 29 June 2004; *Barrett v Sarten* [1982] 2 NZLR 757 (HC); and *Walker v Rusbatch* [1959] NZLR 600 (SC).

230 *R v Smith* 2004 SCC 14, [2004] 1 SCR 385 at [50].

231 See Glazebrook J's reasons above at [52], and O'Regan and Arnold JJ's agreement with that test below at [294].

232 See Glazebrook J's reasons above at [57] where she outlines factors she considers relevant to whether a posthumous appeal should continue. Of course, when considering victims' interests, their preferences may cut both ways. If, for example, new evidence demonstrates that the appellant was innocent, the victims' interests may be in triggering reinvestigation by the authorities in order to find the actual perpetrator.

233 See the framework set out in Winkelmann CJ's reasons above at [210]–[211].

be expected to be very rare indeed.[234] There will be no opening of the floodgates, and even if there were, appellate judges are instinctively unenthusiastic about deploying scarce judge time on cases for which there is no longer a good reason to proceed.[235]

[238] I will come to the place of tikanga in the assessment, but at this point I record my agreement with the Chief Justice that the following values (which I have expressed as propositions) are likely to be engaged when deciding what the ends of justice require in continuation cases:

(a) The need to be satisfied continuation is still practicable.

(b) The need to understand and acknowledge the personal interests of those most directly affected by the decision.

(c) The need to acknowledge the role of appellate review in protecting the integrity of the justice system.

(d) The need to recognise the importance of finality.

[239] I need only make a few comments of my own in addition to those of the Chief Justice. First, it is to me at least, important to situate the issue of posthumous continuation of appeals within the wider context in which a deep value such as the ends of justice is the touchstone. That context can reveal something about what might underpin the ends of justice generally and how and when those underpinnings should apply in difficult circumstances, such as the continuation discretion.

[240] Finality (proposition (d)) is an example of this point. Finality is an important value in the common law just as it is in any legal system.[236] Finality promotes certainty and it allows, indeed, encourages, the affected parties to move on from a state of conflict. It also ensures that scarce taxpayer-provided resources are not wasted on

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234 An applicant to Te Kāhui Tātari Ture | Criminal Cases Review Commission must be alive at the lodgement of their application; Criminal Cases Review Commission Act 2019, ss 4 and 21. But, the Commission retains discretion to either continue or take no further action on the application should the applicant subsequently die before any investigation is completed: s 24.

235 For example, in the different context of recall see *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286, a decision which reflects judicial reluctance to displace finality.

236 See, for example, *Uhrle,* above n 235.

disputes that have already been fully aired and resolved according to law. Although not always a bright line, the finality value helps us to avoid process for its own sake. In most instances, finality, once reached, will be the principle that best promotes the ends of justice.

[241] Even though Mr Ellis had not yet reached the procedural end of the road in 1999 (he could have sought leave to appeal to the Privy Council, but he did not), the delay in bringing his application to this Court would in most cases have been too great. The ends of justice seen from the perspective of the victims would generally present too significant an obstacle even when Mr Ellis was alive. Yet despite this weighty consideration, it was plain on the face of his application that Mr Ellis' grounds of appeal had real merit. That is why this Court took the unusual step of granting leave despite the delay.

[242] This exemplifies another common law value: that of protecting the integrity of the justice system (proposition (c)). Its effect is that finality, though important, will not always predominate. There are, and perhaps always will be, cases in which concern entertained by a convicted person's whānau or defence team over the justice of a conviction persists even after all orthodox avenues of review have been exhausted. That concern about possible injustice may come to be shared more widely as it has in this case. Such concern is not just for the convicted person and their family, but ultimately for the integrity of the system itself. Our system of justice relies on community confidence that, although it is a human system and therefore fallible, it is also principled and ethical. It is willing to accept the possibility that mistakes leading to injustice may be made, and if they are detected, then it is committed to correcting them. Mr Ellis' case is potentially such a case. Despite two appeals and two independent inquiries (none of which found for Mr Ellis), there remains genuine concern that justice may have miscarried.

[243] But where, as here, an appellant did not survive to bring his appeal, his ongoing interests are said to become less direct and tangible: the interests shifting to addressing the stain on the deceased's reputation that is still felt by surviving family members. And although family may have an ongoing desire to clear the appellant's name, it will often be the victims' interests that come to predominate in the rebalancing that follows

such an event. Victim interests will usually support finality. That is why, in the absence of an application for continuation, appeals will generally abate on the death of an appellant.[237]

[244] Yet there will be other values to consider. If the integrity of the system is genuinely in play, continuation may simply be *required*, despite the potential for ongoing trauma for victims, this because community confidence in the system is often seen as an even weightier consideration. The paradigm examples are where the appellant can now show that he or she is innocent.[238]

[245] What then is to be done in a case such as Mr Ellis', where there was sufficient merit in the appeal to overcome the long delay in bringing it, and there is ongoing public concern, yet no suggestion that his innocence can be definitively demonstrated? Is finality, and the interests of the victims which it engages, to be the decisive principle or are Mr Ellis' reputation and the maintenance of system integrity through (possible) self-correction more important? It is my view that tikanga helps in that assessment.

Tikanga

[246] It might be said that this is an unlikely case in which to discuss the developing place of tikanga Māori in the common law of Aotearoa. After all, Mr Ellis was a Pākehā and, as far as I am aware, so were all of the victims. And understandably, counsel had given no thought to the relevance of tikanga principles until prompted, as an aside, by the bench, in the November 2019 hearing on continuation. But then again, perhaps Mr Ellis' case is no more unlikely a context for the issue than that which arose in 1847 between two English settlers minded to test which of them had the better title to land formerly owned by Māori;[239] or the 1908 claim by a grocer against the estate of Hāmuera Tamahau Mahupuku, administered by the Public Trustee, for the cost of goods supplied for his tangihanga;[240] or indeed the dispute between two whaling

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237 See, for example, *Peters*, above n 228.

238 See, for example, *R v Jetté* [1999] RJQ 2603 (QCCA) (a Canadian case referred to in *Smith*, above n 230). For a more recent example post-2020 see *Hall v R* [2022] NZSC 71.

239 *R (on the prosecution of McIntosh) v Symonds* (1847) NZPCC 387 (SC). There were no Māori interests engaged in the case at all. See the discussion in David V Williams "The Queen v Symonds reconsidered" (1989) 19 VUWLR 385. In the American context, an analogous scenario arose in *Johnson v M'Intosh* 21 US 543 (1823).

240 *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC). The Court held that tikanga Māori

companies over who had the better claim to a whale carcass found floating in Cook Strait.[241] None of them involved a dispute with a (living) Māori, and two of them involved no Māori interest at all, not even in the background. In fact, in the whale case, tikanga-based rights do not appear to have been raised until the appeal.[242] Yet these cases are held out as leading examples of the willingness of our colonial courts to recognise and apply tikanga.

[247] In any event, and to their considerable credit, counsel for all parties including the intervener set about exploring the issue. They invited mātanga tikanga (experts in tikanga) to a wānanga.[243] It was held at Te Herenga Waka Marae in Wellington over two days. Details about the wānanga are fully set out in the reasons of Glazebrook J and there is no need to repeat that detail here.[244] It is sufficient to record that the wānanga produced a statement of tikanga prepared by Sir Hirini Moko Mead and Sir Pou Temara.[245] It was endorsed by the seven other mātanga also in attendance. Sir Hirini and Sir Pou are pre-eminent scholars and practitioners of tikanga Māori. The credentials of the other mātanga present and participating are equally beyond question.[246]

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required that chiefs such as Mahupuku be farewelled at elaborate tangihanga, the cost of which would generally fall to the estate of the chief. But in this case, Loasby the grocer should have sued the widow (who was not a party) as she placed the order and left it to her to seek recompense from the estate. He therefore failed on a procedural technicality.

241 *Baldick v Jackson* (1910) 30 NZLR 343 (SC). Stout CJ held that Māori fishing rights under the Treaty of Waitangi, among other reasons, meant an English statute declaring title to all whales to be in the Crown did not apply in this colony. No party was Māori, nor were Māori rights invoked. See also other similar cases: *Re The Lundon and Whitaker Claims Act 1871* (1872) 2 NZCA 41; and *Arani v Public Trustee of New Zealand* [1920] AC 198 (PC) (commonly cited as *Hineiti Rirerire Arani v Public Trustee*). In the last-mentioned case the Privy Council commented at 204–205 that "[i]t may well be that…the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi legislative internal authority which can modify it".

242 *Jackson v Baldick* Magistrate's Court Blenheim, 3 December 1910 reported in *Marlborough Express* (Blenheim, 5 December 1910) 2.

243 In this context, a wānanga is a gathering of experts to discuss an issue.

244 See the reasons of Glazebrook J above at [35]–[38].

245 I note (as Glazebrook J did in her reasons above at n 47) that Sir Pou Temara was made a Knight Companion of the New Zealand Order of Merit in 2021, after the Statement of Tikanga was provided to the Court.

246 The other mātanga in attendance over the two-day wānanga were Te Ripowai Higgins, Kura Moeahu, Professor Rawinia Higgins, Professor Peter Adds (previously Associate Professor), Che Wilson, Mohi Apou and Tamahou Rowe.

[248] The statement of tikanga was produced to the Court. The mātanga agreed as follows:

> Mana tangata, and by implication, whakapapa and whanaungatanga, is impacted by the allegations of hara. Consequently, this continues after the death of the person.
>
> Tikanga requires further probing in these circumstances.

[249] They explained why. The term "hara" refers to a violation of tikanga resulting in harm to the affected party, including harm to their mana, and thus an imbalance is created between those involved. The restoration of balance becomes a matter of mana for both sides. In the present case, the mātanga said, the hara may be Mr Ellis' offending against the victims or it may be the conviction of an innocent man. The important point, according to the mātanga, was that by granting Mr Ellis leave to appeal, this Court signalled that in its view, all prior proceedings had not finally resolved that imbalance — that is, had not yet reached a state of "ea" (I discuss that concept below at [253]) — and that the matter deserved further inquiry. In the appeal, mana is therefore at stake — the mana of the appellant and his wider whānau, and that of the victims and their whānau.

[250] Mana transcends death, the mātanga advised. They said that this has always been the case in tikanga, but they noted that the modern State understands this too. They referred to the 2019 example of the posthumous pardon granted by the legislature to the Tūhoe prophet Rua Kēnana.[247] The pardon was granted in part to remove the continuing injury to the mana of Rua and his descendants as a result of his treatment at the hands of the law. There are other legislative examples.[248]

[251] And Mr Ellis has mana, the mātanga explained. That is, his own standing, dignity and authority. Death does not extinguish that mana because, the mātanga explained, mana is not an individualistic phenomenon. It exists because of

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247 Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana 2019 | Rua Kēnana Pardon Act 2019.

248 Mokomoko (Restoration of Character, Mana, and Reputation) Act 2013 | Te Ture mō Mokomoko (Hei Whakahoki i te Ihi, te Mana, me te Rangatiratanga) 2013; Pardon for Soldiers of the Great War Act 2000; and Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018. Although the posthumous, or at least potentially posthumous, pardons that are not focused on particular Māori individuals are not framed in mana terms, they still proceed on the basis that the stain of unjust criminalisation remains after death.

relationships with others in accordance with the principles of whanaungatanga and whakapapa. Such mana-sustaining relationships do not end at death, even if they are changed by it.

[252] Two further concepts discussed in the statement are also of importance in my view. The first is whanaungatanga, or kinship. Whanaungatanga, the mātanga said, "creates rights and responsibilities within and between whānau and reflects the importance of community". To put it another way, whanaungatanga provides that individuals, whether offenders or victims of offending, are never just individuals; and hara are always, in the end, a community responsibility.

[253] The second is the concept of ea or — loosely — a state of balance. It is akin, perhaps, to common law ideas of justice and finality. In tikanga, ea is the point. It can be achieved by agreement or imposed by someone with the mana to impose it. Tikanga too, has no time for process without end.

[254] Mana, whanaungatanga and ea are, the mātanga suggested, tikanga lenses through which to consider the prospect of further inquiry into a hara. And they are interconnected. Mana occupies the same space as common law principles of individual dignity and integrity, but it is a more woven, less individualistic concept; and, because of this, its posthumous influence is stronger than that of the common law conception of individual reputation. Whanaungatanga places great value on the maintenance of community cohesion, though this is framed in terms of kinship.[249] In Te Ao Māori (the Māori world), for obvious reasons,[250] kinship and community are co-extensive ideas. Sometimes the judgement of whanaungatanga will be to put a problem behind us and sometimes it will be that the problem cannot be ignored. As with the common law, context is important. Ea is both the objective and the key. It asks whether balance has already been achieved between the mana of those affected and the needs of community, or whether more must be done to restore balance. As the

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249 The mātanga noted that the concept of whaunangatanga is not just limited to kinship relationships but can extend to those who "become like kin through shared experiences".

250 Traditionally physical communities constituted of hapū, the members of which were, by definition, all related by common descent, usually from a named ancestor. See Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 71.

mātanga noted, achieving a state of ea does not necessarily mean that all parties are happy with the outcome.

[255] The mātanga considered that, since leave had been granted in this case, more must be done to restore balance.

[256] It is plain, at least to me, that these tikanga principles provide a very helpful perspective on the issues in this case. This is not because they provide any particular answer. Rather it is because the Māori legal tradition, whose values are so different from those of the common law, still echoes, in its own way, the underlying considerations which the common law takes into account. Relevant tikanga considerations are first: the mana or personal interests of the appellant, the victims and their respective whānau; second: the wider community interest in ensuring that, as far as possible, justice is done and injustice is addressed; and third: in both legal traditions, the task of the decision-maker is, by applying principle to context, to determine whether *whaka*-ea[251] or the ends of justice allow the controversy be laid to rest with the appellant, or whether, in truth, that is not yet possible.

Tikanga and the common law: managing the dialogue

[257] Glazebrook J has fully and helpfully summarised the multiple ways in which, over the last 45 years, tikanga Māori has been woven back into modern New Zealand law and policy.[252] I readily adopt her discussion in that regard. I would add only that these developments reflected, and continue to reflect wider, deeper social change: both a growing appreciation of the indigenous dimension in our identity as a South Pacific nation, as well as broad support for the Māori desire to maintain and strengthen their distinct language, culture, economic base and tribal institutions.[253]

[258] That is why, when contemporary courts have played a part in the law's post-colonial reacquaintance with tikanga, it has generally been at the instruction of

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251 The process of creating a state of ea.

252 See Glazebrook J's reasons above at [94]–[105].

253 The growing recognition of that dimension has been reflected in case law. See, for example, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [the *Lands* case]; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 223; and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 185.

the legislature whose make up has increasingly come to embody these social changes.[254] Indeed as Glazebrook J explains, the legislative space currently occupied directly or indirectly by tikanga principles has broadened and deepened considerably over the last 45 years.[255] So, informed observers would not have been at all surprised when, in 2012 in *Takamore v Clarke*, this Court acknowledged that tikanga is a part of the values of the common law and contributes to its ongoing development.[256]

[259] It is of course true, at one level, that the Court in *Takamore* was simply reminding us that the common law had always made room for custom,[257] and that tikanga is, after all, just local custom. But that should not distract attention from the fact that the reminder came in the context of the prevailing legislative (and social) environment I have described. Equally, this wider context was apparent when, in the present case, this Court raised the potential relevance of tikanga to the issue of continuation. After the wānanga was held and the statement of tikanga was adduced, counsel made submissions about tikanga. Without exception, submissions related to *how* tikanga might affect the continuation decision. No party suggested that tikanga was irrelevant. The common law tends not to develop in leaps and bounds, but it must also respond to social change if it is to maintain relevance.[258]

[260] With the foregoing in mind, I agree with Glazebrook J that the antiquarian incorporation test,[259] deployed for centuries in colonial law to determine whether a rule of custom should be applied by the court in a local case, should no longer be applied in this country in so far as tikanga is concerned. Indeed, in my view the test was implicitly abandoned by the Supreme Court in *Takamore* and has at any rate been

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254 See especially the *Lands* case, above n 253, at 668 per Cooke P.

255 See Glazebrook J's reasons above at [100]–[102].

256 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ, [150] and [164] per Tipping, McGrath and Blanchard JJ.

257 See, for example, *The Case of Tanistry* (1608) Dav Ir 28, 80 ER 516 (KB); and *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 (KB).

258 See *R v Hines* [1997] 3 NZLR 529 (CA) at 538–539 citing *Dietrich v The Queen* (1992) 177 CLR 292 at 319 per Brennan J. See also the comment of Elias J in *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 45: "the application of established principle to new situations or to developing social context, particularly in parallel with contemporary statutes and other trends, is the essence of the common law, which develops by analogy, case by case … the contemporary legislative and social background needs to be considered if the common law is to keep abreast with the expectations of modern society". The High Court decision was upheld in *Lange v Atkinson* [1998] 3 NZLR 424 (CA).

259 See *The Case of Tanistry*, above n 257; and *Loasby*, above n 240.

abandoned in fact, largely because it has been overtaken by events. As Glazebrook J notes, the attitudes underpinning it belong to a time when notions of (British) racial superiority were orthodox and "native" customs were treated with suspicion.[260] Such notions were wrong then, just as they are now. In any event, in my view it would bring the common law of New Zealand into disrepute if the courts continued to apply the old incorporation test while the adjacent policy and legislative spheres have, for decades, incorporated and applied tikanga and the Treaty of Waitangi as a matter of routine.

[261] So, if that test is set aside, when will tikanga principles be relevant in a legal dispute governed in whole or in part by the common law? And, if relevant, how much weight should those tikanga principles be accorded? It may seem a little unhelpful to answer that both when and how much, will always depend on context, but there is no getting past that fact.

[262] I pause to note that there are now many statutory contexts in which these same issues arise. In fact they arise wherever statutory language or context makes some aspect of tikanga or Treaty principle relevant in a public law sense. The statute may do that expressly or it may be by implication only.[261] The courts are therefore familiar with the task of assessing factual and legal context (in the latter case by reference to statutory language) to determine whether tikanga principles may be relevant in some way in resolving the controversy.[262]

[263] The process in the common law context ought not to be dissimilar. There will first be the factual context of the case to consider. That will raise relevant questions: is there a tikanga context to the dispute — whether due to the identity or expectations of the parties, the dispute's particular setting or for some other reason? Alternatively, does the nature of the dispute give rise to considerations of broad policy import for which a tikanga perspective may assist in resolving the dispute? In almost all cases, these questions will be raised by the parties themselves. It will not usually be for the

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260 See Glazebrook J's reasons above at [115].

261 See, for example, Sentencing Act 2002, s 27; Care of Children Act 2004, s 5; and the Resource Management Act 1991, ss 6(e), 7(a) and 8.

262 See, for example, *Huakina Development Trust*, above n 253; and *Barton-Prescott*, above n 253.

court to promote them, although tikanga's relevance was initially raised by the Court in this instance.

[264] Then there will be the legal context of the dispute to consider. Relevant questions arising will include: is there room among the relevant common law rules or principles for tikanga to play a part? Or are there binding authorities or principles of long-standing that leave no room for tikanga principles to operate? Is the law in the particular area developing, and would recourse to tikanga principles assist in setting its future direction?

[265] The result is that tikanga will be relevant when the facts suggest it is and the common law has not otherwise excluded it.[263] Alternatively, picking up the last question above, it may be relevant where the common law in a particular area is developing, and such development would benefit from a consideration of relevant tikanga principles.

[266] The common law is structurally more sensitive to the context of the case than is legislation, so even if there appears to be no space for tikanga to apply, it may also necessary to ask whether space should now be made. Resolving this question will involve the application of ordinary common law reasoning. That is, considering whether the particular context of the case renders the leading authority distinguishable on the point or justifies adjustment of the relevant principle.

[267] The more difficult task is in determining the weight the relevant tikanga principle should carry in the determination. Should it be the controlling rule or principle or merely an ingredient in a more multi-layered analysis? Again the best guide will be context. A dispute taking place entirely within Te Ao Māori or one in which the disputants' expectations are that tikanga should be the controlling law is likely to be resolved according to tikanga, whether it is resolved by the community or by the courts. This is for example how the Native (and later Māori) Land Court

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263 Of course, if it is an area of common law to which legislation also applies, then any exclusions in legislation must be considered — although unambiguous statutory language will be required to exclude tikanga: see *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151] and [154] per William Young and Ellen France JJ and agreed to by Glazebrook J at [237], by Williams J at [296] and by Winkelmann CJ at [332]. See also above at [98] per Glazebrook J.

awarded customary title between competing hapū.[264] On the other hand a dispute taking place at the point of intersection between Te Ao Māori and the wider community is likely to require careful weighing of common law and tikanga principles according to facts and the needs of the case. This is the kind of controversy that is more likely to come to the courts. Here tikanga will be an ingredient in a broader analysis in which the common law has already developed relevant rules or principles that must be taken into account. The significance of any contest between these competing considerations (if in fact they are in competition) will depend on the case. This considering and weighing of sometimes incommensurable principles will be familiar to environmental and family lawyers, among others.

[268] In the event, applying these principles to the present case was made easier because the parties accepted that mana, whanaungatanga, whakapapa and ea were all relevant to the exercise of this Court's discretion to grant continuation, even if the parties disagreed on the implications of them for this particular case. It is nonetheless plain that the interests of a deceased person and their whānau in continuing that person's extant appeal raises important questions of principle for the development of the common law, and is a matter of deep interest to tikanga. This is therefore an appropriate matter for the common law and tikanga to engage in respectful mutually advantageous dialogue.

[269] Finally on this aspect, I note that this case demonstrates two important practical lessons: first, tension between tikanga Māori and the common law is not a given; and second, the tikanga-as-an-ingredient approach will often do the work required in terms of ensuring the common law of Aotearoa develops along a path that is mindful of both legal traditions.

[270] It is appropriate to make one final comment about the nature of what I have called the dialogue between tikanga and the common law. Judges develop and authoritatively declare the common law. They do this in judgments. On the other hand, while judges must increasingly work with tikanga, they have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga. As with

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[264] Native Lands Act 1865. See, for example, *Tamaki v Baker* [1901] AC 561 (PC) (commonly cited as *Nireaha Tamaki v Baker*), among many others.

legislation, those roles belong in another place. The mātanga were alive to the risks presented by greater dialogue between tikanga and the common law:

> We understand that the intersection between tikanga and the common law is one of the legal questions before the Court in this case.
>
> At our hui we spent a significant amount of time discussing the broader philosophical question of whether, as Māori, we consider it to be appropriate for tikanga to be among the sources of the common law of New Zealand.
>
> There was some caution expressed about this and the unintended consequences that might arise in courts being able to draw on tikanga in making decisions. In particular, there was a fear that tikanga Māori might be misappropriated and wrongly applied in the court system.

[271] In the result the mātanga were satisfied that tikanga has its own integrity and will continue as a force in the lives of Māori people and communities with or without the common law. Yet they embraced continued dialogue between the two systems because of a belief that the common law of Aotearoa should develop bi-jurally. In such a system judges must be comfortable engaging with tikanga principles yet understand that they cannot change tikanga. And while they may apply tikanga in appropriate cases they must also understand that they cannot authoritatively declare it for general purposes.

[272] There are cases before the courts where these issues may be raised more directly so it is not appropriate to discuss them in any detail. I simply wish to acknowledge that tikanga Māori continues to operate as law in the lives of Māori people and communities today; and that the risks to tikanga's integrity of dialogue with the common law are real enough and need to mitigated. But, like the mātanga, it is my view that the development of a pluralist common law of Aotearoa is both necessary and inevitable.

[273] How then should the courts receive assistance about tikanga relevant to the disputes before them? I am aware that the orthodox approach is to treat the proof of "foreign" law as a question of evidence and to call experts to give such evidence. I suspect the evidential approach was simply a convenient and efficient way of getting unfamiliar material before the judge who had then to apply it. But I confess to being somewhat uncomfortable with its application to indigenous law. In this country, there are multiple available techniques for assisting courts to understand and, if necessary,

apply tikanga. Mātanga may be appointed as independent experts reporting directly to the High Court under r 9.36 of the High Court Rules 2016; the wānanga process, as adopted in this case, may be pursued; or where required, experts can be called by the parties to give evidence about both the relevant tikanga and how it should apply. But the courts are no longer entirely tikanga-naïve. Some specialist jurisdictions deal with tikanga regularly — either because of the nature of their work or their controlling statutes, and we are at a stage in our development where lawyers are increasingly likely to have had some exposure to the Treaty of Waitangi and tikanga in legal education if not in practice.[265] In some contexts it may be sufficient simply to refer to learned texts or reports of the Waitangi Tribunal.[266] We must, after all, recognise that the issues in the particular case as well as the time and the resources of the parties, will not always require or permit more elaborate procedures.

Application to the facts

[274] Having considered the issue of continuation through the frames of common law and tikanga values, I agree with the mātanga that the matter must continue.[267] This is to be greatly regretted. The victims in this case (and they will remain victims whatever the result in the appeal)[268] will once again have what they said 30 years ago as very young children, placed under a forensic microscope. I am alive to the ongoing disruption of this proceeding for them. More significantly, I am alive also to the retraumatising effects of it on the victims, on their parents if they are still alive, and on the victims' own families if they now have them. After so long, and after Mr Ellis' passing, it would have been better to treat the appeal as abated if at all possible. But

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265 Te Ao Māori and Tikanga Māori will be a compulsory part of the curriculum for a law degree from 2025: New Zealand Council of Legal Education "Te Ao Māori and Tikanga Māori" <www.nzcle.org.nz>.

266 For example the text by Benton, Frame and Meredith, above n 250; Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 769, 2011); Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011); and, in a different context which was not intended to apply to tikanga, *Deng v Zheng* [2022] NZSC 76 at [79]–[84] acknowledged different ways in which relevant cultural information could be brought before the court.

267 I would have come to the same view on the basis of the considerations in the test propounded by Glazebrook J and approved by O'Regan and Arnold JJ. I agree also that the appeal should continue in the name of Mr Ellis.

268 I have used the term victims throughout these reasons fully mindful of the fact that Mr Ellis proclaimed his innocence. I have done so because they have suffered considerable harm. This may have been at the harms of a perpetrator or at the hands of a system that has struggled under the weight of this uniquely complex and difficult case. Either way this harm must be recognised and I have chosen to do so by continuing to use this terminology.

it is not possible. Its unique factual context has caused this case to live on in controversy for decades. Successive appeals and inquiries have failed to quiet concerns. The grounds of appeal to this Court reflect those concerns substantively. This is so clearly a case in which the integrity of the justice system is in question that ea or the ends of justice can only now be achieved by continuing. As I have said, I come to this view with great regret.

O'REGAN AND ARNOLD JJ
(Given by O'Regan J)

Table of Contents

[275] We did not agree with the Chief Justice, Glazebrook and Williams JJ that the appeal should be allowed to continue despite the death of the appellant. We would have declined to make an order for the continuation of the appeal after the appellant's death. We now set out our reasons.

Rule 5(2) of the Supreme Court Rules 2004

[276] Mr Ellis was given leave to appeal against his convictions in July 2019. He died in September 2019, before the scheduled hearing of his appeal. There is no statutory provision regulating whether a criminal appeal should be allowed to continue after the death of an appellant. It is clear that a criminal appeal cannot be commenced on behalf of a dead person; nor can an application for leave to appeal be made. That is because the right of appeal is personal to the appellant. Equally, however, there is no statutory provision preventing the Court from hearing an appeal for which leave was granted before the appellant's death.

[277] After the appellant died, the question faced by this Court was therefore whether the Court should permit the appeal to continue. That is a discretionary decision. The

parties agreed that r 5(2) of the Supreme Court Rules 2004 applied; that provides for the Court to dispose of any case for which no procedure is provided for in the Rules "in the manner that the Court thinks best calculated to promote the ends of justice". We agree that under this provision the Court has a discretion to allow an appeal to continue despite the death of the appellant and that the Court should exercise this discretion in a manner that promotes the ends of justice.

[278] As we discuss later in these reasons, we are content to adopt the test for continuance set out in the reasons of Glazebrook J. But for reasons we will come to, we reach a different conclusion when applying it. Before we get to that, we will first address the tikanga issues that were the subject of argument at the second hearing on 25 June 2020.

Tikanga

[279] We accept the essential proposition that tikanga Māori has been, and will continue to be, recognised in the development of the common law of New Zealand in cases where it is relevant to the matters in issue. McGrath J, delivering the judgment of the majority, said in *Takamore v Clarke*:[269]

> The English common law has always applied in New Zealand only insofar as it is applicable to the circumstances of New Zealand. Consequently, the evolution of the common law in New Zealand reflects the special needs of this country and its society. The New Zealand common law can never be in conflict with its statute law, but with that qualification, our common law has always been seen as amenable to development to take account of custom.

In her reasons, Elias CJ also acknowledged that Māori custom according to tikanga was part of the values of the New Zealand common law[270] but went on to say that "the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law."[271]

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269 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150] per Tipping, McGrath and Blanchard JJ (footnotes omitted). While not articulating a general principle, William Young J accepted that tikanga was important in resolving the dispute before the Court: see [213].

270 At [94].

271 At [95].

[280] Tikanga Māori also forms part of New Zealand law as a result of being incorporated into statutes[272] and regulations;[273] it may be a relevant consideration in the exercise of discretions;[274] and it is also incorporated in policies and processes of public bodies.[275] In addition, fundamental concepts of the common law have been adapted so as to give effect to core values of tikanga Māori in particular contexts. This is demonstrated by legislation stating that Te Urewera is a "legal entity"[276] and that Te Awa Tupua (that is, "the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements")[277] is a "legal person",[278] in each case, with "all the rights, powers, duties, and liabilities of a legal person".

[281] However, despite this acknowledgement, we do not consider this is a suitable case for the Court to make pronouncements of a general nature about the incorporation or application of tikanga in New Zealand's common law.

[282] In saying this, we mean no disrespect to those involved in the production of the Statement of Tikanga and the counsel who addressed us at the June 2020 hearing. The process adopted for the production of the Statement of Tikanga is described in the reasons of Glazebrook J. We express our gratitude to the tikanga experts for the work they undertook and the clarity of their evidence as to the tikanga considerations bearing on the situation before the Court and to counsel for the parties and the intervener for their submissions.

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272 By way of example, see Te Ture Whenua Maori Act 1993, s 129(2)(a); the Resource Management Act 1991, ss 2(1) (definitions of "kaitiakitanga", "mana whenua", "tangata whenua", "taonga raranga", "tauranga waka" and "tikanga Māori"), 6(e), 7(a), 14(3)(c), 34A(1A), 39(2)(b), 42(1)(a), 149K(4)(a)(iii), 199(2)(c) and 269(3); the Property (Relationships) Act 1976, s 2 ("taonga" is excluded from the definition of "family chattels"); the Oranga Tamariki Act 1989, ss 2(1) (definitions of "mana tamaiti (tamariki)", "whakapapa", "whanaungatanga" and "tikanga Māori"), 4 and 5; and the Marine and Coastal Area (Takutai Moana) Act 2011, the Preamble to which states that the legislation translates intrinsic, inherited rights of iwi, hapū, and whānau, derived in accordance with tikanga into legal rights and interests that are inalienable, enduring, and able to be exercised so as to sustain all the people of New Zealand and the coastal marine environment for future generations.

273 For example, the Fisheries (Kaimoana Customary Fishing) Regulations 1998.

274 The Supreme Court decision in *Takamore*, above n 269 is an apt example.

275 See above at n 119 per Glazebrook J.

276 Te Urewera Act 2014, s 11.

277 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 12.

278 Section 14.

[283] The consideration of the issue in this case was prompted by a question from one of the Judges about tikanga at the first hearing on 14 November 2019. The Court then adjourned to allow counsel to consider the matter and counsel embarked on the process described in the reasons of Glazebrook J, culminating in the production of the Statement of Tikanga. Before then, neither party had suggested tikanga had any relevance to the continuation issue.

[284] Because this matter has come up for consideration for the first time in this Court, we do not have the benefit of decisions from lower courts. And, as all counsel accepted at the June 2020 hearing that tikanga was a factor that was relevant to the Court's exercise of the discretion as to whether to allow Mr Ellis' appeal to continue, we had no contrary argument.

[285] So the tikanga issue has come before the Court in an uncontested environment and in circumstances where the Court has not had to address a number of difficult issues of both legal and constitutional significance. These include: how the Court can identify when tikanga is relevant to the case at hand and when it is not; if it is relevant, how it should be addressed;[279] whether tikanga is a separate or third source of law;[280] how the relevant tikanga should be brought to the Court's attention (noting the acknowledgment in the reasons of Glazebrook J that the process used in this case, though commendably thorough and authoritative, will not be able to be followed in more run-of-the-mill cases);[281] how the application of tikanga in one area of the law affects the common law in another area;[282] and how to avoid tikanga being distorted when applied by courts.[283] Also, as this Court is not bound by earlier precedents

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279 An issue that was left open in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801, which was argued and decided *after* the decision in this case was delivered: see at [169], n 282 per William Young and Ellen France JJ and agreed to by Winkelmann CJ at [332], Glazebrook J at [237] and Williams J at [296]–[297]. See also the discussion of *Trans-Tasman* in the reasons of Glazebrook J in this case above at [111]–[116]. In the present case, the majority overrule the established test for incorporation of custom into the common law, but without saying how it will be replaced: see above [112]–[116] per Glazebrook J, [177] per Winkelmann CJ and [260] per Williams J, although we acknowledge Williams J does address the issues at [261]–[265]. We consider that the test set out in the incorporation cases should not be overruled without the Court being in a position to articulate what replaces it, especially as no counsel argued that it should be overruled.

280 See above at [111] per Glazebrook J. This was also left open in *Trans-Tasman*, above n 279.

281 See above at [123]–[124] per Glazebrook J.

282 See above at n 64 and n 140 per Glazebrook J.

283 See above at [120] per Glazebrook J. See also the discussion of this risk above at [181] per Winkelmann CJ and [270]–[272] per Williams J.

relating to continuance, it was not necessary to address how such precedents are affected by arguments that tikanga should be taken into account when it was not taken into account in an earlier decision.

[286] We think that it is important to acknowledge the fundamentally different approach in tikanga Māori and under the common law to conduct that has wronged others or disrupted social order.

[287] Moana Jackson described the difference as follows:[284]

> While the Māori community shared the universal abhorrence for acts which did violence to people, property, or good order, their methods of expressing this abhorrence were quite different to those enshrined in Pākēha law. The individual-based English system stressed that an offender was solely to blame for [their] crimes which, perhaps paradoxically, were considered acts against society, not another individual – the Crown was the aggrieved agent which sought redress.
>
> This, of course, conflicted with the Māori system which was shaped by ideals of kinship obligation. Because Māori possessed individual rights but collective responsibilities, offenders were never regarded as solely to blame for their crimes. Rather their whānau were deemed equally liable for their actions which were held to have aggrieved not just another individual but another whānau. Redress was therefore sought not by some distant symbol of "the Crown", but by the whānau involved – both the victim's and the offender's. There was thus a very real and close relationship between the offender, the victim, and the "judge and jury" – a relationship which could be retributive, rehabilitative, and a deterrent. …
>
> These varied ideals of group/individual responsibility and methods of redress illustrate obvious systemic differences between the Māori and Pākēha concepts of "crime control". …

As a consequence, incorporating tikanga Māori values in a criminal process which proceeds on very different set of values is not straightforward, at least in some contexts.[285]

[288] In addition, we are also conscious that Te Aka Matua o te Ture | Law Commission is in the process of producing a detailed study paper examining

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284 Moana Jackson *The Māori and the Criminal Justice System: He Whaipaanga Hou – A New Perspective* (Department of Justice, Study Series 18, 1988) pt 2 at 110–111.

285 The criminal process can and does incorporate tikanga-like values and processes in some contexts, for example, restorative justice processes; but in other contexts, the fundamental differences between tikanga Māori and the criminal process as reflected in legislation make that difficult or impossible. There are, therefore, risks in proceeding on a piecemeal basis.

tikanga Māori and its place in the legal landscape of New Zealand.[286] We think it is better to allow that process to proceed without the intervention of obiter pronouncements from this Court, given the factors just discussed.

[289] Finally, it is apparent from the reasons of Glazebrook J that the consideration of tikanga did not, in fact, change her view on the outcome in this case.[287] We acknowledge that is not the case in relation to the reasons of the Chief Justice and of Williams J, as their approach incorporates aspects of tikanga.[288]

[290] We prefer to allow the law to develop in cases where the consideration and application or incorporation of tikanga in the decision affects the outcome and, preferably, where there has been an adversarial process in relation to those issues.

[291] We now turn to the application of the common law to the continuance issue. After we have discussed that, we will revert to the issue of tikanga in the context of the present case.

The common law test for continuance

[292] We agree with Glazebrook J that the decision of the Supreme Court of Canada in *R v Smith* provides helpful guidance.[289] In that case, the test being applied was whether, in light of the interests of justice, the Court should exercise its discretion to hear the appeal despite it being rendered moot by the death of the appellant. As can be seen, this is not materially different from the "ends of justice" test in r 5(2). We also agree with Glazebrook J that it is appropriate to add to the factors set out in *Smith* the interests of any victims and their whānau.[290] As *Smith* was a murder case, the victim was deceased so it is perhaps unsurprising that the interest of victims was not identified

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286 Te Aka Matua o te Ture | Law Commission "Tikanga Māori" <www.lawcom.govt.nz>. As noted by Glazebrook J above at n 138, the study paper plans to explain tikanga Māori, its sources and its expression in the courts and the Waitangi Tribunal, with the aim of providing a framework for engagement with tikanga Māori within Aotearoa New Zealand's legal system.

287 See above at [146] per Glazebrook J.

288 See above at [184]–[185], [210] and [216]–[228] per Winkelmann CJ and [274] per Williams J.

289 See above at [49]–[51] per Glazebrook J, referring to *R v Smith* 2004 SCC 14, [2004] 1 SCR 385 at [50]–[51] per Binnie J who delivered the Court's unanimous judgment.

290 See above at [56] per Glazebrook J.

as a relevant factor in that case. In any event, the Court made it clear in *Smith* that its list of factors was not intended to be exhaustive.[291]

[293] Glazebrook J also adds a further factor dealing with the wishes and reputational interests of the appellant and the appellant's whānau.[292] This is done in the course of Glazebrook J's consideration of the case before tikanga issues are addressed. In *Smith*, one of the relevant factors identified is special circumstances that transcend the death of the appellant, including "collateral consequences to the family of the deceased or to other interested persons or to the public".[293] The Court pointed out that if the stigma attaching to an appellant who committed a serious crime (and the family of such an appellant), coupled with serious grounds of appeal were sufficient to justify the continuation of an appeal, continuation would become the rule rather than the exception.[294] We agree. But we do not see that as preventing the Court from considering the position of an appellant and their whānau altogether. So we agree with Glazebrook J that it is appropriate to consider reputational interests of an appellant and their whānau, though we see that as inherent in the factors set out in *Smith*.

[294] Glazebrook J accepts that appeals abate on death unless there is an application for continuance.[295] We agree. However, she does not consider it helpful to describe this as a presumption against continuance or to impose a requirement for special circumstances when considering continuance applications, as was done in *Smith*.[296] For our part, we see the presumption that an appeal will not continue after the death of the appellant and the requirement for special circumstances as appropriately highlighting the fact that it will be only in exceptional cases that an appeal will be allowed to continue after the death of an appellant. However, we consider it is important that there is an agreed approach by a majority of this Court and in those circumstances we are content to adopt the approach set out by Glazebrook J: that is, "there must be very good reason for it to be in the interests of justice for an appeal to

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291 *Smith*, above n 289, at [50].
292 See above at [56] per Glazebrook J.
293 *Smith*, above n 289, at [50].
294 At [45].
295 See above at [52] per Glazebrook J.
296 See above at [52] per Glazebrook J; and *Smith*, above n 289, at [50]–[51]. See also Winkelmann CJ's reasons above at [214].

continue despite the death of the appellant".[297] We note Glazebrook J's assessment that, applying this test, successful applications for continuance will be rare.[298]

Our assessment

[295] We now turn to apply the test for continuance to this case, focusing in particular on the factors set out in Glazebrook J's reasons and our response to her assessment.

Significance of extension of time and leave having been granted

[296] We agree with Glazebrook J that it is significant that this Court has already granted an extension of time to apply for leave to appeal.[299] But we see it as significant for a different reason. As we see it, the Court's decision to grant the appellant an extension of time to apply for leave to appeal after a delay of about 20 years since the delivery of the second appeal judgment and 18 years after the release of the Eichelbaum Report was exceptional.[300] Lengthy extensions of this kind are rare. In our view, the application for continuation was essentially a request that this Court take the exceptionally rare step of allowing continuation in circumstances where the Court had already granted an exceptional extension of time.[301]

Proper adversarial context

[297] We agree that there is no need to substitute an appellant if continuation of the appeal is permitted.[302]

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297 See above at [52] per Glazebrook J. See also above at [235]–[236] per Williams J, agreeing with Glazebrook J that a "very good reason" will always be required to justify continuation.

298 See above at [52] per Glazebrook J.

299 See above at [60] per Glazebrook J. Winkelmann CJ (above at [222]) shares the view that the Court's earlier grant of an extension of time weighs in favour of allowing continuance.

300 *R v Ellis* (1994) 12 CRNZ 172 (CA) (Cooke P, Casey and Gault JJ); *R v Ellis* (1999) 17 CRNZ 411 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ); and Thomas Eichelbaum *The Peter Ellis Case: Report of the Ministerial Inquiry for the Hon Phil Goff* (Ministry of Justice, Wellington, 2001).

301 It is relevant to note that the Justice and Electoral Committee *Report on Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others and Petition 2002/70 of Gaye Davidson and 3346 others* (8 August 2005) recorded that the appellant had decided to seek leave to appeal to the Privy Council and recommended: first, that the Attorney-General not oppose (or oppose only in principle) an application by Mr Ellis for leave to appeal to the Privy Council; and second, that the Legal Services Agency use their discretion to grant legal aid for the appeal: see at 15–17. This course was not pursued, however.

302 See above at [62] per Glazebrook J, with whom Winkelmann CJ (above at n 225) and Williams J (above at n 267) agreed.

Strength of grounds of appeal

[298] We agree with Glazebrook J that the grounds of appeal were considered to be sufficiently arguable to justify the extension of time and the grant of leave.[303] However, there is an important difference between this case and *Smith*. In *Smith*, the appellant had filed an appeal against his conviction for murder, but for various reasons it did not proceed to a hearing. When he died, there had been no appellate assessment of his proposed appeal grounds. That can be contrasted with the present case where there has been an appeal to the Court of Appeal, a further Court of Appeal consideration of the case on a reference under s 406(a) of the Crimes Act 1961, and the Eichelbaum inquiry.

The wishes of the appellant and reputational issues of the appellant and his whānau

[299] We accept that the appellant made it clear before he died that he wished the appeal to continue. We also acknowledge the interest of his whānau in challenging his convictions, albeit the only outcome possible in the appeal would be a ruling that the trial miscarried, rather than the establishment of innocence. We accept that these are relevant considerations.

Interests of the victims and their whānau

[300] We agree with Glazebrook J that the protracted court processes have led to an unprecedented level of public scrutiny, which will have led to significant stress for the complainants and their whānau.[304] Those processes commenced with pre-trial applications and included a lengthy depositions hearing, a six-week trial, an appeal and a reference back to the Court of Appeal under s 406(a) of the Crimes Act. In addition, there were non-court processes, in particular the Eichelbaum inquiry and the subsequent petitions to Parliament (both petitions were addressed by the Justice and Electoral Committee in a 2005 report[305]).

[301] Unlike the situation in *Smith*, the complainants in this case were key Crown witnesses. The grounds of appeal, such as the contamination ground, are such as to

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303 See above at [63] per Glazebrook J.
304 See above at [68]–[69] per Glazebrook J.
305 See above at n 301.

call into question the reliability of the evidence they gave at trial and the conduct of members of their whānau in relation to that evidence. So the stress for the complainants and their whānau is not confined to the trauma normally experienced by victims of crime; it is exacerbated by the ongoing challenge to the reliability of their complaints against the appellant.

[302] The distress that these factors inevitably cause is considerably amplified in this case by the very significant delay in bringing the appeal to this Court. There does not appear to have been any impediment to the appellant taking his case on further appeal to the Privy Council after the second Court of Appeal decision. After 2004, the option of directing the further appeal to this Court became available (assuming the Crown agreed to the choice of this Court, which it has done in the present appeal).[306] The complainants were young children when the conduct leading to the appellant's convictions occurred; they are now in their 30s. They have lived the great majority of their lives under the shadow of this case. In our view, that makes their interests of much greater significance in the context of the continuation application than that of the appellant's whānau.

Any public or private interests in the continuation of the appeal

[303] We agree with Glazebrook J that the appeal raises issues about interviewing techniques, and contamination of evidence.[307] It is also clear that issues about the proper grounds of evidence given under s 23G of the Evidence Act 1908 will be a major focus of the appeal. Section 23G, however, has long since been repealed (and not replaced by a similar provision) and the practice in relation to interviewing children has also changed. The issue of children's evidence is now addressed in the Evidence Act 2006 (especially in s 125) and in the Evidence Regulations 2007 (in reg 49). We see that as significantly diminishing the legal significance of some of the grounds of appeal.

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306 Supreme Court Act 2003, ss 50–51. The transitional provisions in the now repealed Supreme Court Act are preserved by cls 3–4 of sch 5 of the Senior Courts Act 2016.

307 See above at [70] per Glazebrook J.

[304] We accept that this case is very high profile and that there have been long-standing public concerns that the appellant did not get a "fair go" and that a miscarriage resulted. This is a weighty factor in favour of allowing continuance.[308]

Whether the nature of any order justifies expending judicial resources

[305] It is common ground that the appeal will take approximately two weeks' hearing time and involve significant viva voce evidence and cross-examination. That is a particularly long hearing by the normal standards of second appeals, and in addition, the judgment that will be required will take considerable time and effort.

Whether the Court would be moving outside its normal role

[306] We agree that the Court would not need to move outside its normal role in order to deal with the appeal.[309]

Conclusion

[307] Glazebrook J acknowledges the significant impact of the continuation of the appeal on the complainants and their whānau. However, having given the matter anxious consideration, she concludes that public interest considerations mean that it is in the interests of justice for the appeal to continue.[310] She observes that it is unlikely that not allowing the appeal to continue would mean finality for the complainants and their whānau.

[308] The Chief Justice accepts the delay in bringing the present appeal has added stress to the complainants, but considered that not allowing the appeal to continue would not end the controversy in relation to the appeal.[311] Having weighed the interests of the complainants, she concluded they are not such as to justify the declining of leave to continue: their interests had to give way to the interests of addressing the possibility of a miscarriage of justice.[312]

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308 See above at [71] per Glazebrook J.
309 See above at [75] per Glazebrook J.
310 See above at [79] per Glazebrook J.
311 See above at [218] per Winkelmann CJ.
312 See above at [229] per Winkelmann CJ.

[309] We consider the interests of the complainants and their whānau outweigh all of the other factors in this case. As indicated earlier, we think the Court needs to recognise the extreme toll on the complainants, who have lived most of their lives with the periodic challenges to the evidence they gave at trial and the conduct of their parents in relation to the investigation. The delay of nearly 20 years has prolonged the trauma for the complainants to a considerable extent. The appellant has already had the benefit of an exceptional decision to allow him to initiate the appeal before he died despite the lengthy delay. We do not think a further exceptional decision to allow the appeal to continue is justified.

[310] As we indicated earlier, the assessment of the interests of the complainants and their whānau is the major difference between us and the majority. But we also see the public interest factors as having less value than attributed to them by the majority. In our view, the balance favours bringing the matter to an end. Achieving finality is an important objective in itself. In this case, it is especially so given the interests of the complainants, which outweigh the interests of the now deceased appellant and his whānau.

Comments on the reasons of the Chief Justice

[311] As will be apparent, we do not adopt the Chief Justice's framework for decision.[313] In part, this is because of our approach to tikanga, explained earlier, which contrasts with the adoption of tikanga principles in the Chief Justice's framework. That said, we see considerable commonality between her approach (and also the approach taken by Williams J) and that adopted by Glazebrook J and us. In particular (adopting the format of [210] of the Chief Justice's reasons):

(a) We agree that practical considerations are important.

(b) We agree that finality is an important interest in litigation, but we see this as being recognised under our approach by the starting point that an appeal abates on death and the need for very good reason to justify continuance.

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313 See above at [210] per Winkelmann CJ.

(c) We agree on the interests of the deceased appellant and their whānau being a factor to be considered.

(d) We agree that, if it is apparent at the time of the continuance decision that there is likely to have been a miscarriage of justice, then this would be a factor in favour of continuance. But we do not consider this was sufficiently apparent at the time of the continuance decision in this case for this consideration to be a major factor.

Tikanga in this case

[312] The tikanga approach to the continuation of the appeal differs substantially from that of the common law. As we read the Statement of Tikanga, and as submitted by counsel for the appellant, the experts' view was that in a case where the Court has granted leave, the hara remains unresolved and, where possible, the hara must be further addressed to achieve ea, otherwise a further hara may be committed. That suggests a default position of continuance. This can be contrasted with the common law position (on our approach and that of Glazebrook J) that successful applications for continuance will be rare and there must be a very good reason for continuance.[314]

[313] These differences in approach do not necessarily mean that there is no room for tikanga in a decision such as the present. Indeed, as noted earlier, all parties agreed it was relevant. The fact that the appellant was not Māori and none of the complainants is Māori did not affect that. Glazebrook J concludes that tikanga considerations should be taken into account if and when relevant to assessing each of the factors applying to the continuation decision.[315] But it does not appear that, apart from the general references to tikanga principles being sound and useful, tikanga considerations are material to her decision.

[314] The Statement of Tikanga makes it clear that the appellant has mana, despite his death, because mana does not cease when an individual dies.[316] So, in this case, both the appellant and the complainants and their whānau have mana, both the whānau

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314 See our discussion above at [294].
315 See above at [143]–[144] per Glazebrook J.
316 Statement of Tikanga at [85].

of the appellant and the whānau of the complainants feel the impact of the hara, and all have an interest in achieving ea, that is, closure and the restoration of relationships: "Achieving ea is needed for both Mr Ellis and the victims."[317] In a tikanga process, the complainants and their whānau would play an active part in the process of achieving ea. This does not occur in a criminal appeal, however.

[315] As indicated earlier, Glazebrook J's conclusion on the continuance issue was, ultimately, unaffected by the consideration of tikanga, albeit her decision to add to the *Smith* factors the reputational issues relating to the appellant and the complainants and their respective whānau was solidified by the consideration of tikanga.[318] We also accept that tikanga considerations would support the personal reputational issues relating to the deceased appellant being taken into consideration. As the tikanga experts put it, "death itself does not close the door".[319] But those considerations do not lead us to a different conclusion on the continuance issue.

[316] The Statement of Tikanga does note that a state of ea can be reached even where one or both parties involved in an incident remain disgruntled with an outcome, and in some cases, to achieve a state of ea, the rangatira should pronounce what the outcome should be.[320] The conclusion of the Statement of Tikanga was:[321]

> [it] 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.

[317] While we accept that death does not necessarily close the door, we consider that the Court should decide to bring this proceeding to an end.

[318] It is for these reasons that we would not have allowed the appeal to continue.

Solicitors:
Crown Law Office, Wellington for Respondent
Kāhui Legal, Wellington and Whāia Legal, Wellington for Intervener

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317 At [62] and discussed further at [101]–[105].
318 See above at [145] per Glazebrook J.
319 Statement of Tikanga at [107].
320 At [103]–[104].
321 At [107].

Appendix: Statement of Tikanga

I TE KŌTI MANA NUI

IN THE SUPREME COURT OF NEW ZEALAND

SC 49/2019

BETWEEN	**PETER HUGH MCGREGOR ELLIS**
	Applicant
AND	**THE QUEEN**
	Respondent

STATEMENT OF TIKANGA OF SIR HIRINI MOKO MEAD AND PROFESSOR POU TEMARA

31 January 2020

We, SIR HIRINI MOKO MEAD, Professor, of Ngāti Awa (based in Wellington), and Pou Temara, Professor, of Tūhoe (based in Hamilton) say:

INTRODUCTION

Sir Hirini Moko Mead

1. My name is Hirini Moko Mead. I am of Ngāti Awa descent and acknowledge my whakapapa connections to Ngāti Tūwharetoa and to Tūhourangi.

2. I was the founding professor of Māori Studies at Victoria University of Wellington, the first department of Māori studies in the country. I was also closely involved in establishing, Te Whare Wānanga o Awanuiārangi, at

Whakatane.

3. I was the chief negotiator for the Ngāti Awa Treaty settlement claims, the Chairperson of Te Rūnanga o Ngāti Awa and have been the Chairperson of the Council of Te Whare Wānanga o Awanuiārangi since 2003.

4. I am a scholar of Māori language and culture and have written over 70 books, papers and articles including the book “Tikanga Māori: Living by Māori Values (2003)”.

5. I was appointed to the Waitangi Tribunal in 2003 and was made a Distinguished Companion of the New Zealand Order of Merit in 2007 for my services to Māori and to education.

Professor Pou Temara

6. My name is Pou Temara. I am of Tūhoe descent, and have been involved in the Māori world for my entire life. I am a native speaker of Māori and trained in tikanga Māori under the guidance of tohunga (experts) such as Hikawera Te Kurapa, Tamahou Tinimeene, John Rangihau of Tūhoe and Sir Hirini Mead of Ngāti Awa.

7. Until recently I worked with Dr Wharehuia Milroy and Sir Timoti Karetu as directors and teachers of Te Panekiretanga o te Reo Māori – the Institute of Excellence in the Māori Language – an institute that teaches excellence in the Māori language and tikanga under the auspices of Te Wānanga o Aotearoa.

8. I have held senior teaching posts at Victoria University, Te Whare Wānanga o Awanuiārangi and currently hold positions at The Ministry of Culture and Heritage as Chair of the Advisory Panel for the Repatriation of Māori Remains from overseas institutions (administered by Te Papa Tongarewa) and the University of Waikato where I am a Professor of reo and tikanga. I have been a member of the Waitangi Tribunal since 2008.

OVERVIEW

9. In early December 2019 we received an invitation from the Solicitor-General to attend a wānanga (meeting) of some tikanga experts in order that all Counsel involved in the Peter Ellis appeal to the Supreme Court (both the Crown and counsel for Mr Ellis) might jointly gain an understanding of the tikanga principles applicable to the question of continuance of an already granted application for leave to appeal.

10. We understand that Counsel have been asked by the Supreme Court to address:

    (a) whether tikanga might be relevant to any aspect of the Court's decision on whether the appeal should continue;
    (b) if so, which aspects of tikanga; and
    (c) if it is relevant, how tikanga should be taken into account.

11. The wānanga occurred on 10 and 11 of December 2019. The process adopted for this wānanga was:

    (a) Day one: the experts met to discuss the relevant tikanga and the place of tikanga in New Zealand law, supported by Māori lawyers. This day allowed for free exploration and discussion of the tikanga as a rōpū (group).

    (b) Day two: the experts, supported again by Māori lawyers, met with all Counsel to talk through and assist with their understanding of the tikanga issues in their case.

12. The other tikanga experts that were in attendance at various points over the two days included:

    (a) Te Ripowai Higgins;
    (b) Kura Moeahu;
    (c) Professor Rawinia Higgins;
    (d) Associate Professor Peter Adds;

(e) Che Wilson;
(f) Mohi Apou; and
(g) Tamahou Rowe.

13. Each of these people is well versed and considered to be eminent knowledge holders in the subject matter of tikanga Māori.

14. Also in attendance at various points over the two days were representatives from Te Hunga Rōia Māori o Aotearoa, the Māori Law Society (Te Hunga Rōia Māori) including:

(a) Matanuku Mahuika;
(b) Horiana Irwin-Easthope;
(c) Māmari Stephens;
(d) Natalie Coates (counsel for Peter Ellis);
(e) Kingi Snelgar (counsel for Peter Ellis);
(f) Jason Gough (Senior Crown Counsel);
(g) Bernadette Arapere (Crown Counsel);
(h) Rhianna Morar (Crown Law Summer Clerk); and
(i) Marcia Murray (Crown Counsel).

15. Te Hunga Rōia Māori representatives were there both days to manaaki (care for) our group and assist in answering any legal questions that we had.

16. Further Counsel in attendance on Day 2 as described at paragraph 11(b) above included:

(a) Una Jagose QC (Solicitor General);
(b) Allanah Colley (Assistant Crown Counsel);
(c) Rob Harrison (counsel for Peter Ellis); and
(d) Sue Grey (counsel for Peter Ellis).

17. The culmination of this hui was a brief series of agreed statements that were assisted by an eminent group of knowledge holders of matauranga Māori. We have entitled this “Ngā Whakataunga a ngā Mātanga Tikanga

i Hui i Te Herenga Waka Marae, i Te Upoko o Te Ika (Ngā Whakataunga a ngā Mātanga Tikanga)".

18. The agreed series of statements speak to: the overall place of tikanga in Aotearoa; the intersection between tikanga and the state legal system; the nature of tikanga (and its associated principles); and the key tikanga principles relevant to this case.

19. These statements are as follows:

> ***Ngā Whakataunga a ngā Mātanga Tikanga***
>
> *Me whakauru ngā mātāpono o te tikanga Māori ki roto i ngā ture o te whenua.*
>
> *Tikanga Māori is the first law of Aotearoa.*
>
> *Tikanga Māori principles are part of the common law of Aotearoa.*
>
> *Decisions about mātāpono (principles) are always subject to variables such as concepts, practices, and values, as relevant to the circumstances.*

20. In relation to this particular case, the agreed statement is:

> *Mana tangata, and by implication, whakapapa and whanaungatanga, is impacted by the allegations of hara. Consequently, this continues after the death of the person.*
>
> *Tikanga requires further probing in these circumstances.*

21. To assist the parties and the Court we expand on these statements below and provide further comment on:

    (a) the nature of tikanga;

    (b) the intersection between tikanga and the common law; and

    (c) our statement of tikanga as applicable to the question of continuance.

THE NATURE OF TIKANGA

22. Tikanga is the first law of Aotearoa. It is the law that grew from and is

very much embedded in our whenua (land).

23. Tikanga Māori came to the shores of Aotearoa with our Māori ancestors, starting with Kupe and those on board the waka (canoe) Matahourua. In some traditions, tikanga merged with that already present. Tikanga operated effectively for around a millennia before Pākēha arrived.

24. Tikanga is the Māori "common law". It is a system of law that is used to provide predictability and are templates and frameworks to guide actions and outcomes.

25. The term 'tika' means 'to be right'. Tikanga Māori therefore means the right Māori way of doing things. It is what Māori consider is just and correct.

26. Tikanga Māori includes all of the values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct.

27. Tikanga is therefore comprised of both practice and principle. That is, it includes both the rules (what you should and should not do) as well as the principles that inform the practical operation and manifestation of the rule.

28. The customs or rules of tikanga are acknowledged when they are maintained by the people and are observed in fact.

29. Tikanga principles, concepts, practices and values include (but are not limited to):

    (a) manaakitanga and whanaungatanga;

    (b) mana;

    (c) tapu;

    (d) utu;

    (e) noa and ea;

(f) whakapapa; and

(g) kaitiakitanga.

30. These fundamental concepts are intertwined and cannot be defined in isolation or translated by a simple English word. They exist in an interconnected matrix. This will become evident in our description of the operation of these principles in the current context, below.

31. The values and principles that underlie tikanga are common among Māori. They are universally accepted and are a constant. The practice and the manifestation of these principles in particular contexts can vary between different iwi, hapū and whānau.

32. Tikanga has a flexible dimension to it. Like all law, it is not static and can evolve over time and adapt to new situations. Tikanga has, for example, developed as a consequence of European contact including the influence of Christianity. This can be clearly seen in the creation of faiths such as the Ringatū and Rātana churches.

33. Importantly, however, when a new matter or issue arises for resolution, recourse is always had to the fundamental principles that underlie tikanga as well as drawing on historical precedent and how tikanga has been recognised in similar situations.

34. Unlike legislation, tikanga is not compiled in a tidy collection of written books. Although there is increasing published material on tikanga, it is lived and exists as unwritten conventions.

35. Knowledge of tikanga is passed down through sources such as: wānanga (institutions of learning), whaikōrero (oratory); karanga (call); waiata (songs); mōteatea (traditional chant or lament); whakapapa recitations (genealogy) whakatauākī (proverbial sayings) and pūrākau (stories). It is also learnt through exposure to its practice in everyday life.

36. The foundational notions of tikanga are widely known. However, some tikanga might be tapu (sacred) and kept confined to certain expert

people. For example, certain karakia (ritual incantations) would be only used by a small group of experts who have the appropriate training, expertise and standing.

37. Given the nature of tikanga, being law that is comprised of principle and the custom and practice of people, we consider that the convening of this hui and forum of tikanga experts to be an appropriate way of determining the relevant tikanga that applies to an issue at hand.

Impact of colonisation on Tikanga Māori and Tikanga Today

38. We note that tikanga and Māori society more generally, have been subject to the devastating impact of colonisation on its institutions and practices. This has meant that for many Māori they have become alienated from their lands, culture and are unfamiliar with tikanga.

39. Whare wānanga and marae have been a key institute to ensure the survival of tikanga Māori. They remain an important Māori cultural space for gatherings such as birthdays, weddings, meetings, funerals and schooling. Marae remain the central community space within Māori society today.

40. Despite the impact of colonisation, tikanga has always existed as a framework for regulating behaviour, is undergoing revitalisation, and continues to play a valued and relevant role today for both Māori and non-Māori.

41. New Zealand society today is increasingly infused with tikanga, both practice and principle. This can be seen not only at a state legal system level (such as the now many legislative references to tikanga) but also at the grass-roots community level.

42. For example, it is becoming increasingly common for people to introduce themselves in formal settings with references to the collectives to which they belong and the significant geographical features that they associate with. This is a Māori practice based on the principles of whakapapa and

whanaungatanga (explained further below).

43. The practice of rāhui is also now widely understood and generally adhered to by the broader community when they are placed. A rāhui is a means of prohibiting specific human activity from occurring through the use of tapu (making something sacred). Two common types of rāhui are:

    (a) environmental rāhui; and

    (b) death related rāhui.

44. An example of an environmental rāhui is in late 2017, in response to the threat of kauri dieback disease, Te Kawerau ā Maki laid a rāhui over the Waitākere forest to prevent human access. This was unilaterally imposed in response to perceived central and local government inaction, to ensure the risks to kauri were mitigated until effective and appropriate research, planning and remedial work was completed.

45. The rāhui on the Waitakere ranges was generally respected and followed by the entire community. This was for a variety of reasons including the practice of rāhui becomingly increasingly known and the rangatiratanga (authority) or the iwi being respected. However, it was also because the *principles* behind the rāhui of kaitiakitanga (guardianship) and environmental protection was clearly conveyed and supported by the community. Kaitiakitanga was an ethic and principle that people could understand and that resonated.

46. A recent example of a death-related rāhui is the response to the eruption of Whakaari (White Island) on 9 December 2019. The eruption resulted in the death of at least 18 people, including two people whose tūpāpaku (bodies) have not been recovered and are believed to be in the moana (ocean).[322] A number of iwi, including Ngāti Awa, initially placed a total ban on all maritime activities in the ocean (including swimming), this was then later changed to a ban only on fishing and the gathering of seafood.

[322] This is the official death toll as of 16 January 2020.

47. Even though the Eastern Bay of Plenty is a strong beach and ocean based community, people overwhelmingly respected the rāhui. This is the case despite the rāhui having a negative commercial and fiscal impact on businesses and affecting usual pre-Christmas and holiday ocean activities. Similar to the Waitakere ranges, this was at least in part because people broadly understood and agreed with the principles underlying the rāhui including respect for the mana and tapu of the deceased that had not been recovered and returned to their whānau (families).

48. It is important to understand that tikanga in practice and in principle still exists and is relevant not only for Māori that clearly subscribe to and live in accordance with tikanga, but that it is also increasingly infused within Aotearoa/New Zealand more broadly.

THE INTERSECTION BETWEEN TIKANGA AND THE COMMON LAW

49. We understand that the intersection between tikanga and the common law is one of the legal questions before the Court in this case.

50. At our hui we spent a significant amount of time discussing the broader philosophical question of whether, as Māori, we consider it to be appropriate for tikanga to be among the sources of the common law of New Zealand.

51. There was some caution expressed about this and the unintended consequences that might arise in Courts being able to draw on tikanga in making decisions. In particular, there was a fear that tikanga Māori might be misappropriated and wrongly applied in the court system.

52. The ultimate group consensus, however, was that:

    (a) we affirm that tikanga was the first law of Aotearoa and is a source and form of law;

    (b) we are confident that tikanga has survived to date and will always continue to inform and regulate Māori behaviour. Some tikanga will

also serve to regulate non-Māori behaviour (as discussed in the case of rāhui above). We acknowledge this to be so, and that some elements of tikanga are recognised, protected, or sometimes side-lined by the state legal system before the Courts;

(c) we support tikanga as one of the many sources of the New Zealand common law which informs the common law's development and evolution;

(d) 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;

(e) we therefore support the notion that, where appropriate, tikanga principles as accepted by the common law should apply to all people; and

(f) we consider Courts must still, when tikanga comes before Courts, use processes and practice that encourage the preservation of the integrity of tikanga.

53. On this last point, by way of example, the Court can: call for tikanga experts to provide a statement of tikanga; encourage judicial training on tikanga and its application in judicial proceedings; and permit Te Hunga Rōia Māori to intervene and make submissions when there is a question of tikanga Māori.

54. In our view, there are three propositions that result from our consensus:

(a) As is currently the case, tikanga Māori comprising a set of laws, obligations and practices that can be recognised and protected by the common law, with sufficient evidence. Sometimes the common law may refuse to recognise tikanga Māori.

(b) Whānau, hapū and iwi continue to exercise tikanga Māori, a distinct

set of laws, obligations and practices, when and as appropriate and possible, and regardless of the state legal system, including the Courts. Sometimes people who are not Māori will follow and respect some tikanga Māori. It is therefore appropriate to consider tikanga Māori as a unique source of New Zealand common law.

(c) It is possible to identify broader tikanga principles derived from the laws, obligations and practices of tikanga Māori that can both form part of the common law in New Zealand and influence it. At the same time, it remains necessary that the specific laws, obligations and practices can also continue to be recognised by and protected by the common law.

TIKANGA AND CONTINUANCE

55. We were specifically asked to discuss how tikanga principles apply to the question of whether an appeal should continue after death. In doing this we took care not to consider the substantive merit of the appeal.

56. As set out above, the relevant part of Ngā Whakataunga a ngā Mātanga Tikanga is:

> *Mana tangata and by implication, whakapapa and whanaungatanga, are impacted by the allegations of hara. Consequently, this continues after the death of the person.*
>
> *Tikanga requires further probing.*

57. The following concepts, principles and values are relevant to this case:

(a) hara;

(b) mana;

(c) whakapapa;

(d) whanaungatanga; and

(e) ea.

58. We reiterate that although we discuss each of these concepts in turn, they are inextricably interconnected and cannot be understood fully in isolation.

Hara

59. The concept of "hara" at a simplified level means: the transgression of tapu; the commission of a wrong; and the violation of tikanga resulting in an imbalance. This requires a restoration of balance or the achieving of a state of "ea".

60. We consider it is useful to start with an example that illustrates this. The following example is from Tūhoe, Ruatāhuna.

> *One day a kuia (elderly woman) went and visited a family.*
>
> *When the kuia got to the home, the dog of the family that she was visting attacked her. The dog drew blood from her leg and tore her flesh.*
>
> *The owners of the dog rushed outside, took the dog away and then tended to the injuries of the kuia.*
>
> *It was a hara on behalf of the dog owners for the dog to have attacked the kuia. The shedding of blood is significant as it meant there was a transgression of tapu (as blood is sacred). The offence also resulted in mana became imbalanced.*
>
> *The owners of the dog knew that they had committed a hara and that there had been a breach of tikanga.*
>
> *In response, they went to their waka huia (treasure box) and brought out a pounamu (greenstone) that had significant value. They gave this to the kuia as compensation for the hara.*
>
> *The kuia had every right to impose a muru (ritual plundering and restorative justice process that entails the redistribution of wealth). However, she accepted the pounamu as payment for the wrong that had been committed.*
>
> *This meant that the issue became ea (satisfied, settled, mana rebalanced).*

61. This shows the successful resolution of a hara. A hara was committed by the dog biting the kuia and action was required to address the hara and achieve a state of ea. The notion of ea indicates the successful

closing of a sequence and the restoration of relationships, or the securing of a peaceful outcome.

62. The relevance of this story to the case of Mr Ellis is that the appeal, as 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. It may be that the hara was the offending against the victims or it could be the conviction of an innocent man. The tikanga position does not pre-determine an outcome on this point.

63. 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. These hara affect both Mr Ellis and his family and the victims and their families. Where an imbalance still exists as seems to be the case here, where possible, the hara needs to be further addressed to achieve ea. Achieving ea is needed for both Mr Ellis and the victims.

65. The tikanga position therefore 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.

66. This is particularly the case because under tikanga, disputes or the requirement for resolution are not impacted by the death of an individual (either an offender or a victim). Rather, the hara remains and is carried onto the next generation.

67. In this case, even though Mr Ellis has died, any hara that exists does not die with him.

Intergenerational impact of hara

68. A contemporary example that illustrates this intergenerational need for a state of ea to be reached is the Rua Kēnana Pardon Act 2019 (the **Act**) that was granted Royal Assent by the Governor General in a ceremony

at Maungapōhatu on 21 December 2019.

69. The reo Māori (Māori language) title for the Act is: “Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana.” Literally translated this means “the Law that discharges the hara that was inflicted upon Rua Kēnana”.

70. Rua Kēnana was a Tūhoe Prophet that in about 1906 established the “New Jerusalem” in the Urewera and led the Iharaira (Isralite) faith. Rua Kēnana was convicted of “moral resistance” to an attempted arrest and served 18 months in prison. The Iharaira faith went into a serious decline after the events arising from Rua’s arrest. These events have been a source of grievance since they occurred.

71. The Crown in s 7(2) of the Act acknowledges that:

    (a) the arrest, detention, conviction and sentence of Rua Kēnana caused lasting damage to his character, mana, and reputation and to the character, mana and reputation of Ngā Toenga o Ngā Tamariki a Iharaira (the remnants of the children of Israel); and

    (b) Ngā Toenga o Ngā Tamariki a Iharaira, including the descendants of Rua Kēnana, have suffered deep hurt, shame, and stigma as a result of the Maungapōhatu invasion.

72. The Crown unreservedly apologises for:[323]

    (a) the lasting damage to the character, mana, and reputation of Rua Kēnana, his uri (descendants), and Ngā Toenga o Ngā Tamariki a Iharaira; and

    (b) the deep hurt, shame, and stigma suffered by them as a result of the invasion of Maungapōhatu.

73. The law pardons Rua Kēnana for the conviction he sustained for moral resistance.[324] The pardon specifically states that:

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[323] See s 8 of the Act.
[324] See s 9 of the Act.

The restoration of the character, mana, and reputation of Rua Kēnana, his uri, and Ngā Toenga o Ngā Tamariki o Iharaira Faith is declared.

74. This example shows:

(a) a hara was committed (by the Crown) against Rua Kēnana;

(b) this impacted not only the mana of Rua Kēnana himself but also had an impact on the mana of his descendants; and

(c) despite the death of Rua Kenana, a state of ea still needed to be reached many years later (hence the reason for the pardon and restoration of mana to the individual and his descendants).

75. There are examples rife throughout Māori history where a hara has been committed and the requirement for resolution has been passed down through the generations.

Mana

76. “Mana” is one of the fundamental principles of tikanga. Words that have been used to convey the principle of mana include: power, presence, authority, prestige, reputation, influence and control.

77. The concept of mana is complex and there are different types of mana.

78. Two key forms of mana are:

(a) Mana tuku iho: this is mana inherited from ancestors. Under tikanga, everyone is born with mana by virtue of having a whakapapa (genealogy) and being born into a collective whether that be a whānau (family), hapū (sub-tribe) or iwi (tribe); and

(b) Mana tangata: this is mana that is derived from actions or ability.

79. Mana is one of the most valuable and important things a person can have.

80. Mana can be gained and lost depending on actions. For example, gaining particular skills or ability may increase mana, whereas, the commission of a hara will mean a corresponding loss of mana.

81. We note that an allegation of a hara alone can result in the loss of mana.

82. Mana applies at both an individual and collective level, and the application of mana at either level can affect the other. This is because of the concept of whakapapa and the associated principle of whanaungatanga (described further below). A hara therefore does not occur against the individual only but can impact the whānau, the wider hapū and even iwi.

83. In the example of the kuia attacked by the dog, the wider whānau of the kuia were entitled participants were the hara not resolved. This is because their mana was also affected by the hara.

84. In the example of Rua Kēnana, the mana (as well as character and reputation) of his descendants was expressly acknowledged to have been impacted by the hara that occurred to Rua Kēnana by the Crown.

85. Mana does not cease when an individual dies. This is why, long after his death, it was seen as being important to restore the mana of Rua Kēnana and his descendants. It is also why Māori make claims of association and right over the deceased (as seen in the well-known case of Mr Takamore). The process of a collective claiming a body is to enhance the mana of the deceased.

86. Further, it is common practice for Māori to reference the mana of significant ancestors such as Rahiri of the Ngāpuhi iwi or Sir Apirana Ngata of Ngāti Porou. Ways to honour the mana of those that have passed include the handing down of names to descendants and recitation of whakapapa to highlight the connection to the revered individual.

87. The concept of mana is grounded in tikanga and te ao Māori. However,

because tikanga is the framework by which Māori see the whole world, these concepts apply beyond those that subscribe to and practice tikanga. Also, the concept of mana has infused Aotearoa as a whole.

88. For example, it is well accepted that people such as Jacinda Ardern, Richie McCaw and the Rt Hon Dame Sian Elias all have a form of mana because of their achievements, ability and positions they have held. Through Māori eyes, everyone has a form of mana.

89. In the context of this case:

    (a) Mr Ellis as an individual has mana;

    (b) the mana of Mr Ellis and his broader whānau (through the concepts of whakapapa and whanaungatanga explained further below) were affected by the allegation of offending;

    (c) this mana did not cease when he died; and

    (d) the victims and their whānau also have mana.

Whakapapa

90. Whakapapa is often translated as genealogy. The meaning of whakapapa is to 'lay one thing upon another.' In this case to lay one generation upon the next.

91. Māori place great importance on genealogy and kinship relationships and the concept of whakapapa is central to being Māori and to identity. The world and everyone in it is part of a huge interlocking family tree.

92. Whakapapa and knowledge of relationships between people is pivotal to the Māori world and tikanga Māori. Whakapapa is a prized form of knowledge and great effort is made to preserve memory of it.

93. It is through whakapapa that kinship ties are cemented and mana is inherited and intimately connected. As described above, mana is not just an individual prerogative but it is connected by whakapapa to broader

collectives. When mana increases or decreases by actions – the whakapapa collectives (whānau, hapu and iwi) are correspondingly affected.

94. Whakapapa also creates responsibilities of manaaki (care and nurturing) within the whānau. Like all these concepts, that are inextricably linked, whakapapa is closely linked to the concept of whanaungatanga.

95. As applied to this case, through whakapapa, the whānau of Mr Ellis and the families of the victims are also impacted by the alleged hara committed by him. Responsibility falls on both families to restore any mana that may have been lost.

Whanaungatanga

96. Whanaungatanga focuses upon the maintenance of properly tended relationships. The concept of whanaungatanga is fundamental and is the glue that holds the Māori world together. It creates rights and responsibilities within and between whānau and reflects the importance of community.

97. Whanaungatanga reminds a person that they exist as part of a matrix and web of relationships and collectives. The whanaungatanga principle goes beyond just whakapapa and includes non-kin persons who become like kin through shared experiences.

98. Whanaungatanga means that when a hara is committed it not only impacts the individuals involved, both offender(s) and victim(s), but also the broader collectives of these individuals including whānau (family), hapū (sub-tribe) and iwi (tribe).

99. It means that a community is always responsible for their wrongdoers because they are kin. It also means that a community is impacted as victims when offending occurs.

100. In the context of this case, the wider whānau of Peter Ellis would also feel the impact of the hara as do the whānau of the victims.

Ea

101. The notion of ea indicates the successful closing of a sequence and the restoration of relationships, or the securing of a peaceful outcome.

102. In the example of the dog attack above, getting to a state of ea was relatively easy. The guilt or the offending hara was admitted, action was taken by the offending party, that action was accepted as restoring balance and so a state of ea is achieved. All parties were satisfied with the result.

103. We note that a state of ea can still be reached even when one or both parties involved in an incident remain disgruntled with an outcome.

104. For example, in an internal hapū dispute, the process for achieving a state of ea might be for the rangatira (chief) to pronounce what the outcome should be. Once the rangatira has pronounced the course of action, even if one party is still unhappy and does not consider that the result "fair" the matter can still be "ea". That is, it has been put to bed and resolved.

105. As applied to the Peter Ellis case, the fact that the Supreme Court granted a hearing means that the door was opened to a process to continue to probe the hara with a view to achieving a state of "ea".

Conclusion on tikanga principles:

106. As applied to the question of the relevance of tikanga Māori to this case:

    (a) Tikanga Māori is the first law of Aotearoa. Not only does it mean that Māori have particular rights and interests but it represents common values, processes and principles that are of relevance to wider Aotearoa.

    (b) A fundamental part of tikanga is ensuring balance and making things correct. If uncorrected, the hara remains and is passed onto the next generation until it is corrected or a resolution found.

(c) The mana of a person and the associated collectives to which they belong continues when someone dies. Like the example of Rua Kēnana, it turns on the descendants and whānau to restore mana where a hara is committed.

(d) Hara or wrongs can be done to non-Māori and the mana of non-Māori and their whānau can be impacted by those wrongs. These are tikanga principles that resonate broadly.

(e) These tikanga principles can usefully be drawn on in this case as informing the general development of the common law position on continuance that applies to everyone.

(f) Tikanga requires that there is further probing.

107. 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.

Support

108. All the tikanga experts that attended the hui on 10 and 11th of December 2019 support this statement.