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Tikanga Māori: The Application of Māori Law and Custom in Aotearoa/New Zealand

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Matter Commented On: *Ellis v The King*, [2022] NZSC 114 (7 October 2022)

In October, New Zealand's highest court released a landmark decision on the relationship between tikanga Māori (Māori law and practice) and the common law (for English translation of Māori terms, I rely on the Glossary in Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, 2016) at xv-xvii). This decision has particular relevance for Canada because the place of Indigenous law in this nation is an emerging issue (Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1). In *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 (CanLII), the Quebec Court of Appeal unanimously upheld the validity (with a couple of exceptions not relevant to our discussion) of federal legislation that acknowledged inherent Indigenous jurisdiction to make laws that would be enforceable in Canadian courts (for a series of ABlawg posts on this reference, see here). As this decision is currently under appeal to the Supreme Court of Canada, it is especially pertinent to consider how the New Zealand Supreme Court has dealt with the application of tikanga Māori.

In 1993, Peter Ellis, a Pākehā (New Zealander of European descent), was convicted on sixteen counts of sexual offences against seven children, none of whom appear to have been Māori. Two appeals in the 1990s were dismissed by the NZ Court of Appeal. In 2019, the NZ Supreme Court granted leave to appeal those decisions. As Mr. Ellis would have completed his ten-year sentence years before, his primary motivation was to clear his name and his family's reputation. And then, five weeks after the Supreme Court granted leave but before the appeal was heard, Mr. Ellis died.

The issue before the Supreme Court was whether the appeal could proceed despite Mr. Ellis's death. By a majority of three to two, the judges decided that the appeal should proceed (in a separate judgment, the Court unanimously allowed the appeal and set aside the convictions: *Ellis v R*, [2022] NZSC 115). At common law, judges have discretion in deciding whether an appeal can continue after an accused has died. For Justices Susan Glazebrook, Mark O'Regan and Terence Arnold, exercise of this discretion depends on whether the interests of justice will be served by allowing continuance, taking into account a number of factors, including the strength of the appeal, the public and private interests involved, and whether it "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" ([2022] NZSC 114, at para 8). Chief Justice Helen Winkelmann and Justice Joe Williams, while not disagreeing, preferred an approach 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" (at para 10).

The majority judges, Winkelmann CJ, Glazebrook, and Williams JJ, decided that the appeal should continue. While "conscious of the very high level of stress and public scrutiny already suffered by the complainants and their whānau [extended family] over such a long period," they thought these factors were outweighed by the strength of the appeal, the systemic issues raised, the "public interest in ensuring convictions only follow from fair trials," and the "long running public concern about the possibility of a miscarriage of justice in this case" (at para 14). Justices O'Regan and Arnold, in dissent, considered that "the interests of the complainants and their whānau outweigh all the other factors in this case" (at para 17).

This comment focuses on the judges' views on the relevance of tikanga Māori to the decision on whether to allow the appeal to proceed despite Mr. Ellis's death. They all agreed 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. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies (at para 19, footnotes omitted).

It is nonetheless worth examining the individual views of the judges, as they vary to some extent.

Justice Susan Glazebrook's lengthy judgment deserves the most attention because aspects of it were relied upon by the other majority judges. She spent almost half of it discussing the relevance of tikanga Māori. She considered the submissions of the parties on tikanga and the common law, the relevant case law, legislative provisions, and public policy, before discussing the place of tikanga in New Zealand law and its application to the case. Although neither the appellant nor any of the complainants were Māori, she thought the principles developed in relation to posthumous appeals had to be able to meet the needs of all New Zealanders, including Māori. Moreover, tikanga could provide valuable insights in developing the appropriate test for determining whether an appeal should proceed in such circumstances. She added:

> 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 (at para 82).

She then proceeded to discuss the relationship between tikanga and the common law. Accepting that tikanga is comprised of both practices and principles, and includes values, standards, and norms, she acknowledged that it was the first law of Aotearoa/New Zealand. As revealed in the case law, it has been part of the common law of the country ever since British sovereignty was acquired in 1840. As the underlying values come from both tikanga and the common law tradition, "consideration of [these] 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" (at para 110).

On the tests for incorporation of tikanga into the common law, Glazebrook J rejected the traditional tests, considering them "to be colonial relics with no place in modern Aotearoa/New Zealand" (at para 113). The colonial tests of certainty and consistency are contrary to the nature of tikanga, which tends "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" (at para 114). Similarly:

> 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 (at para 115; Winkelmann CJ and Williams J explicitly agreed with Glazebrook J on these points at paras 177, 260).

On when tikanga will need to be considered, Glazebrook J said it depends on the circumstances. It need not be considered when it is not relevant or when it would be inconsistent with a statute or binding precedent. In other cases, it may be controlling, as when "Treaty [of Waitangi] principles and/or tikanga have been incorporated into statute in a manner that makes them so, or where the factual context justifies it" (at para 118). Sometimes, tikanga values or principles may be relevant considerations alongside other factors. Tikanga can also be used to reveal the social and cultural framework for Māori actions, and may influence the development of the common law. Where tikanga and the current common law would lead to a different process or result, possibly "due to the traditionally more individualistic nature of the common law and the more relational and communitarian perspective of tikanga, … [t]he methodology of resolving any differences will need to be worked through on a case by case basis" (at para 119).

Turning to the process for ascertaining tikanga, Glazebrook J acknowledged concerns that judges who are not versed in it might "take over the role of adapting and expounding tikanga from those whose responsibility it has been since time beyond memory" and, in doing so, might distort it (at para 120). In the current case, the parties to the action had convened a wānanga (Māori institution of learning) on their own initiative and not by order of the Court, and followed tikanga processes in doing so. The result was a "Statement of Tikanga" (included as an Appendix to the judgment) upon which the Court was able to rely. This Statement discussed "the intersection 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" (at para 159). But Glazebrook J cautioned that this methodology might not be appropriate in all 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. 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 [specialists]. 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 (at para 125).

Justice Glazebrook concluded her general discussion of tikanga by stressing that the common law on this matter is in a state of transition and will develop incrementally, consistent with common

law methodology. She then applied the principles and guidance provided by the Statement of Tikanga in deciding that the appeal should proceed, which was the same conclusion she said she would have reached without considering tikanga.

Chief Justice Helen Winkelmann prefaced her judgment with a discussion of common law methodology. Where a case reveals gaps, judges have to formulate the law by taking into account underlying legal values, analogous principles from other areas of the law, values expressed in statutes and international instruments, societal values and practices, law from other jurisdictions, and academic writing. Turning to the relationship between tikanga and the common law, Winkelmann CJ was guided by the Statement of Tikanga. She noted that "[t]ikanga 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" (at para 169). Tikanga's adaptability while relying on historical precedent makes it similar to the common law, with this major difference: "While the common law is generated by the work of the courts, tikanga flows out of the matrix of iwi [Māori nation/people], hapū [Māori kin community] and whānau relationships that fundamentally frame the Māori world" (at para 170).

Although tikanga and the common law each have their own cultural and constitutional contexts, Winkelmann CJ acknowledged the growing relationship between them. She accepted that tikanga was the first law of Aotearoa/New Zealand and has continued to regulate Māori society. Additionally, "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" (at para 172). As the common law has to serve everyone, it is therefore appropriate for tikanga to contribute to the development of the common law.

Like Glazebrook J, the Chief Justice was conscious of the difficulties judges face in incorporating tikanga into the common law. She noted that "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" (at para 180). She agreed that caution is necessary and that it is not up to judges to pronounce on the content of tikanga. Accordingly, she thought it inappropriate "to attempt a comprehensive statement of when tikanga will be relevant to the application or development of the common law," preferring the matter to be "addressed on a case by case basis" (at paras 180, 183).

Relying on "relevant principles of tikanga, existing principles in the common law, and also the approach taken in other jurisdictions," Winkelmann CJ concluded that "it was in the interests of justice that the appeal should continue to determination" (at paras 184, 228).

Justice Joe Williams, a Māori judge, also addressed the issue of the place of Tikanga in the common law of Aotearoa/New Zealand. He acknowledged that this was an unlikely case to consider the issue, given that neither the accused nor the complainants were Māori. Interestingly, he noted that "counsel had given no thought to the relevance of tikanga principles until prompted, as an aside, by the bench" (at para 246). He spent more time on the content of tikanga and the relevant principles than the other judges, concluding that they:

> 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 (at para 256).

Justice Williams addressed the issues of when tikanga principles should be taken into account in legal actions and, if relevant, how much weight they should be given, concluding that it will depend on the context. Statutes may make tikanga and Treaty of Waitangi principles relevant, either expressly or by implication. In common law contexts:

> tikanga will be relevant when the facts suggest it is and the common law has not otherwise excluded it. Alternatively, … 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 (at para 265, footnote omitted).

Weight can depend on whether the parties are Māori and whether they expect tikanga principles to govern. If a dispute arises at the intersection of Māori and non-Māori interests, "careful weighing of common law and tikanga principles according to facts and the needs of the case" will be required (at para 267).

Justice Williams also noted that, although judges have the authority to declare and develop the common law, they lack the expertise and mandate to declare tikanga's content. They "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" (at para 271).

On how tikanga should be introduced in court cases, Williams J expressed some discomfort with resorting to the method for proof of foreign law by the testimony of experts. The wānanga process used in the current case is an option. Learned texts or reports of the Waitangi Tribunal can also be relied upon. But he also observed that, through legal education if not practice, it is increasingly likely that New Zealand lawyers will have had some exposure to tikanga and the Treaty of Waitangi. Taking a practical approach, he said that "[w]e 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" (at para 273).

Applying the common law and tikanga values to the facts, Williams J concluded that the appeal should proceed. He nonetheless expressed profound regret that this was necessary, given the ongoing impact on the complainants and their families.

Justices Mark O'Regan and Terence Arnold, dissenting on the issue of whether the appeal should continue, accepted "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" (at para 279). They acknowledged that tikanga has been incorporated into statutes and public bodies' policies and processes, and may be relevant to the exercise of discretion. They also noted that "fundamental concepts of the common law have been adapted so as to give effect to core values of tikanga Māori in particular contexts," citing the example of legislation stating that Te Awa Tupua (the Whanganui River) is a "legal person" (at para 280).

However, they were of the view that this was not "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" (at para 281). They were particularly concerned that the matter of the application of tikanga had come up for the first time in the Supreme Court as a result of a question from one of the judges. Also, as counsel had all accepted the relevance of tikanga to the exercise of the discretion, the Court did not have the benefit of contrary arguments and did not have an adequate opportunity to address the complex legal and constitutional issues. They preferred "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" (at para 290).

The Supreme Court's decision – especially the unanimous view that tikanga Māori is part of the common law of Aotearoa/New Zealand – has direct relevance for Canada where the status of Indigenous law is being actively debated. It is particularly significant that a majority of the Court found tikanga to be applicable in a case that did not involve any Māori people. In Canada, John Borrows has similarly argued that Indigenous law is applicable broadly and should be integrated into, and contribute to, the development of Canadian law (John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010)). The *Ellis* decision is a powerful precedent that the Supreme Court of Canada should consider in determining the status of Indigenous law in this country.

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