

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Ngā Whakaturetanga – Legislation

Easing the way for dedicated Māori local government representation – Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021

Ahorangi Professor Andrew Geddis

Tīmatanga kōrero – Introduction

Through amendments made in 2002 to the *Local Electoral Act 2001*, territorial authorities and regional councils gained the power to create Māori wards or Māori constituencies for their respective elections.^[1] For simplicity's sake, this comment will combine discussion of both processes in terms of establishing dedicated Māori local government representation. Such dedicated representation would mirror that existing at the national level, where 7 Māori seats permit those voters of Māori descent who choose to be on the Māori roll to directly elect members of Parliament.^[2] However, attempts since 2002 to actually establish dedicated Māori local government representation regularly were stymied by a “voter-veto” power exercised through a binding referendum process. Of the twenty-four previous proposals to establish dedicated Māori local government representation, twenty-two were rejected by voters.

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Editors

Carwyn Jones
Craig Linkhorn

Publisher

Māori Law Review Ltd
PO Box 25433
Wellington 6146
New Zealand

T +64 4 472 2667

W maorilawreview.co.nz

Associate Editor

Toni Love

Student Editor

Hinemoana Markham-Nicklin

Consultant Editors

Tom Bennion
John Borrows
Judge Craig Coxhead
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Māmari Stephens

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Nevertheless, by the end of 2020 another 9 local government bodies had resolved to establish dedicated Māori representation for the 2022 local government elections. Increased interest in this representative model reflects both ongoing systemic under-representation of Māori on local government bodies,^[3] and the increasing obligations on such bodies to consider Māori interests when making decisions. Concern arose that these decisions might then suffer the fate of previous attempts, with sufficient signatures being gathered to force referendums in relation to at least 7 of them. As a consequence, the Labour Government (supported by the Green Party and Te Pāti Māori) enacted the *Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021* under urgency to remove the voter-veto power. This comment examines why it took this step, how it was accomplished, and whether the use of urgency to do so was justified.

Kōrerorero – Discussion

The 2002 amendments and their discontents

A policy adviser involved in the original 2002 legislative amendments' creation recently outlined their largely benign original intent.^[4] While empowering local governments to establish dedicated Māori representation, the amendments also sought to retain local community oversight of this “principled” decision via referendum process. A local government body could decide by resolution to establish dedicated Māori representation. However, when a local government body did so, it had to notify its community of this decision and that it could be reversed by referendum. If 5 percent of local electors then signed a petition to demand such a referendum on the decision's merits, one had to be held. The result of the referendum was then binding on the local government for the next 6 years (i.e. two electoral cycles). Alternatively, a local government body

could decide to put the question of establishing dedicated Māori representation direct to voters by way of a binding referendum vote, again being bound by the result for a 6 year period.

In defending this approach, comparison has been drawn with a contemporaneous legislative change that enabled local governments to choose between different voting systems to elect representatives. Local electors also can trigger a binding referendum on this decision.^[5] In hindsight, conflating the two issues seems misbegotten. A local government body's choice of voting system may be coloured by incumbents' desire to maintain or improve their position: existing representatives may believe they have a better chance of retaining their seats under the existing voting system; or a majority of councillors may believe they have a better chance of holding on to their majority status in the future by changing the voting system. Having a process whereby voters directly can override that incumbent self-interest and veto change if they believe it to be wrongly motivated (or, enforce change where a local government body will not act) is therefore warranted. However, this is not the case with the creation of dedicated Māori local government representation. In most cases, creating this new form of representation will see some incumbent local government body member(s) actually lose their positions. As such, there is no need for the local electors to be able to directly override incumbent self-interest.

Furthermore, permitting local electors to allow or disallow dedicated Māori local government representation effectively enabled a usually Pākehā majority to decide whether tangata whenua would gain direct representation on local government bodies. As noted above, the consequence of doing so was that referendums functioned to stymie virtually all past attempts to establish dedicated Māori local government representation. Meanwhile, other decisions on local government representation—how, if at all, the electorate should be divided into general wards or constituencies—were not subject to a similar voter-veto process. The creation of a national organisation, Hobson's Pledge, that actively campaigned to overturn local government decisions to create dedicated Māori representation also called into question how "local" such decisions really are.

Consequently, calls to remove the voter-veto power became increasingly loud. In 2016 a petition seeking this change was presented to Parliament by the former mayor of New Plymouth, Andrew Judd, who in 2014 had led a voter rejected attempt to establish dedicated Māori representation on his council. This petition was considered by Parliament's Justice and Electoral Committee, the government members of which "recommend[ed] that the Government consider aligning the process of establishing Māori wards with all wards through representation review".^[6] Furthermore, Local Government New Zealand submitted in support of this petition's aims, which it followed in 2018 with a letter to the leaders of the new coalition government that "seeks your support to remove those sections (s.19ZA to 19ZG) of the Local Electoral Act 2001 that allow for polls of electors on whether or not a city, district or region can establish Māori wards and constituencies." In November of 2020, Local Government

Minister Nania Mahuta promised legislation to achieve this end,^[7] which was then introduced into the House on 5 February.

The amending legislation's passage into law

The *Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill* was presented as an immediate fix to the problems the voter-veto process posed to the 2022 local government elections, to be followed by a second stage of legislative change to “develop a permanent mechanism for local authorities to consider the establishment of Māori wards and constituencies.”^[8] The Bill achieved this end by:

- repealing the provisions in the *Local Electoral Act 2001* that relate to polls on the establishment of dedicated local government Māori representation;^[9] and
- prohibiting binding council-initiated polls on whether to establish dedicated local government Māori representation (while retaining the right of councils to initiate non-binding polls to gauge public sentiment);^[10] and
- establishing a transition period ending on 21 May 2021 in which any local authority may, regardless of any previous decisions or previous poll outcomes, resolve to establish dedicated local government Māori representation for the 2022 local elections.^[11]

Following the Bill's first reading on 9 February, it was sent to the Māori Affairs Committee for what might charitably be called expedited scrutiny. The public was given less than 48 hours following the first reading debate's conclusion to make written submissions, with the Committee then hearing oral submissions over a Friday and Saturday in order to meet the requirement that it report back to the House on 15 February. The stated reason for this urgency was that the Government wished to enact the Bill by 22 February in order to prevent any local government bodies from having to announce that a binding referendum would be held on establishing dedicated Māori representation.^[12] The Māori Affairs Committee met its reporting date, with the Labour and Green Party members recommending the Bill's passage unamended and the National Party members registering their dissent.^[13] However, due to Auckland moving back into a Level 3 lockdown, the Bill only received its second reading on 23 February before passing through all its remaining stages under urgency in that same sitting day. Upon receiving the Royal Assent on 1 March, it became law.

Consequently, the voter-veto process has been removed entirely from the *Local Electoral Act 2001*. As this repeal was given retrospective effect,^[14] those local bodies that had received petitions with sufficient signatures to trigger a referendum on establishing dedicated Māori representation were required to cancel that process.^[15] Furthermore, local government bodies were given an extended period (until 21 May) in which to decide whether to establish dedicated Māori representation, while those 9 local government bodies that already had decided to do so may revisit their decision. The rationale for this extended decision-making period is that some local government bodies may have been reluctant to establish

dedicated Māori representation due to concerns about the likelihood of a voter-veto occurring, while some of those that had done so might believe the removal of a potential voter-veto undermined their decision.

It should be noted that although the *Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021* was promoted as creating parity between a decision to establish dedicated Māori local government representation and other decisions relating to forms of representation, this actually is not the case. A local government body resolution to establish dedicated Māori representation does not have to be notified to the public, and is not subject to a requirement to enable and consider public submissions, in the same way as are other proposed representational changes.^[16] Furthermore, the Local Government Commission cannot consider objections to a resolution to establish dedicated Māori local government representation.^[17] No doubt this discrepancy will be addressed in the Government's promised second tranche of legislative reform. However, it does mean that local government body decisions to establish dedicated Māori representation for the 2022 elections — a decision that then will remain in place for at least the next two electoral cycles^[18] — requires less public input and is subject to less oversight than is the case with other decisions on representation.

Was the use of parliamentary urgency justified?

There are strong substantive reasons for abolishing the voter-veto process in relation to dedicated Māori local government representation. Despite its goal of enabling considered local decisions on forms of representation, it has in practice sparked divisive, often acrimonious, and sometimes openly racist conflict. It also divorces the question of Māori representation from other representation decisions, such as whether to have multiple wards within a local government body. And at a fundamental level, it makes the right of Māori to be represented as *tangata whenua* on local government bodies contingent on the permission of non-Māori living in the area.

Nevertheless, the process used to effect the voter-veto repeal is at least somewhat questionable. The use of urgency to race the legislation onto the statute books meant that while the select committee received 12,508 written submissions and heard 118 oral submissions on the Bill, there still will have been some members of the public left unable to have their say on this matter. The fact that the legislation dealt with a matter of electoral law, on which the legitimacy of local government bodies rests, only heightens the problems associated with enacting it under urgency. Of course, there is precedent for Parliament speedily altering local government representation arrangements. The *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* — which replaced the existing members of Environment Canterbury with appointed commissioners and cancelled the election of new members — was passed through the House of Representatives in a single day with no select committee process at all. However, while this action may raise questions regarding the consistency of some of those criticising the present legislation,^[19] earlier potential wrongs do not thereby make a later action right.

The counter argument is primarily pragmatic in nature. Unless and until the voter-veto provisions were repealed, those local government bodies where enough signatures were received to trigger a referendum had to begin the process of enabling one to go ahead. While the legislation's retrospective effect would put a halt to such actions, and even deem any vote in such a referendum void, it still represents a potential waste of public resources. Furthermore, the issues around the voter-veto process had received quite some airing over a period of time, with the Labour Government having concluded that the original legislative approach had been a mistake. Consequently, judgment on the appropriateness of using urgency to address the issue largely rests on how the *Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021* is viewed: is this legislation simply a swift "fix-it" response to a proven earlier legislative error; or does it represent a significant change in the way in which local government representation will be decided that the New Zealand people ought to have had a full opportunity to contribute to?

Ngā kupu āpiti – Notes:

* Andrew Geddis is Ahorangi Professor in the Faculty of Law at Te Whare Wānanga o Ōtago (the University of Otago).

[1] Local Electoral Act 2001, ss 19Z-19ZH.

[2] Maria Bargh, "The Māori seats" in Janine Hayward (ed), *New Zealand Government and Politics* (6th ed, OUP, 2015) 300.

[3] Jack Vowles, "Local government's Māori representation gap" (22 February 2021) Newsroom <https://www.newsroom.co.nz/ideasroom/local-governments-Māori-representation-gap>.

[4] Gavin Beatty, "How the law on Māori wards was drawn up" (17 February 2021) Stuff <https://www.stuff.co.nz/national/politics/local-government/124258793/how-the-law-on-mori-wards-was-drawn-up>. This claim is strengthened by the fact that the current Minister for Local Government, Nanaia Mahuta, actually spoke in favour of the 2002 amendments in the House before voting for them to become law.

[5] Local Electoral Act 2001, s 29.

[6] Justice and Electoral Committee, "Inquiry into the 2017 General Election and 2016 Local Elections (Including Petition of Kim Robinson for Deaf Action New Zealand and Petition 2014/60 of Andrew Mark Judd)" (December 2017) *AJHR* 1.7A 40.

[7] Susan Botting "Mahuta vows to clear obstacles to creating Māori council wards" (6 November, 2020) RNZ <https://www.rnz.co.nz/news/national/430010/mahuta-vows-to-clear-obstacles-to-creating-maori-council-wards>.

[8] Hon Nanaia Mahuta, "Government supports councils to increase Māori representation" (1 February 2021) Press Release <https://www.beehive.govt.nz/release/government-supports-councils-increase-māori-representation>.

- [9] Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill, cl 7.
- [10] Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill, cl 5.
- [11] Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill, cl 9.
- [12] 749 NZPD 608 (9 February 2021).
- [13] Māori Affairs Committee, “Report on the Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill” (15 February 2021) https://www.parliament.nz/resource/en-NZ/SCR_107983/2c24a3f5cb1067263cc444f8e32210e43304acc5.
- [14] Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill, cl 9.
- [15] See, e.g., Tauranga City Council, “Māori ward poll formally cancelled” (5 March 2021) press release <https://www.tauranga.govt.nz/council/council-news-and-updates/latest-news/artmid/456/articleid/6363>.
- [16] Compare Local Electoral Act 2001, sched 1, pt 1, cl 2 with Local Electoral Act 2001, s 19M.
- [17] Local Electoral Act 2001, ss 19Q-S.
- [18] Compare Local Electoral Act 2001, sched 1, pt 1, cl 3(b).
- [19] Hon. Nick Smith, who in the House labelled the Local Electoral (Māori Wards and Māori Constituencies) Amendment Bill a “bad bill” being “pushed through under an awful process”, was the Minister responsible for introducing the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 into the House.

Te Kōti Matua – High Court

Judicial review – interim orders refused – Deed of Settlement ceremony – Ngāti Paoa Trust Board

The Ngāti Pāoa Trust Board v Attorney-General

[2021] NZHC 580
19 March 2021

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

Unsuccessful application for interim orders by the Ngāti Pāoa Trust Board to prevent the imminent signing of the Deed of Settlement between the Crown and the Ngāti Pāoa Iwi Trust.

Judicial review – interim order – declined – Deed of Settlement ceremony – Ngāti Pāoa Trust Board	
Date	19 March 2021
Case	Ngāti Pāoa Trust Board v Attorney-General (230 KB PDF)
Citation	[2021] NZHC 580
Court	Te Kōti Matua – High Court
Judge(s)	Van Bohemen J
Earlier/later decisions	
Legislation cited	High Court Rules 2016, Part 30; Judicial Review Procedure Act 2016, s 15.
Cases cited	Waitangi Tribunal, Decision on Application for Urgent Hearing , 20 January 2021 (Wai 2982, #2.5.10); <i>Carlton & United Breweries Ltd v Minister of Customs</i> [1986] 1 NZLR 423 (CA).
Overview and result	The day before a Deed of Settlement was due to be signed between Ngāti Pāoa and the Crown, the Ngāti Pāoa Trust Board (the Trust Board) applied without notice for interim orders prohibiting the Ngāti Pāoa Iwi Trust (the Iwi Trust) from signing the Deed, and for a declaration that the Crown should not sign. The Trust Board asked that these orders be issued and maintained while it pursues a judicial review application concerning actions of the Crown and iwi negotiators in relation to the negotiation of the Deed of Settlement. The Trust Board previously held the mandate to negotiate a Treaty Settlement with the Crown, however it lost this mandate after a period of inactivity in 2015-2016. The Post Settlement Governance Entity – the Iwi Trust – effectively took over negotiations.

	A ratification process was held between January and March 2020, with iwi members voting in support of the Deed of Settlement. The Trust Board unsuccessfully applied to the Waitangi Tribunal for an urgent hearing in July 2020. It has also unsuccessfully pursued relief in the Māori Land Court. Counsel for the Trust Board argued (among other things) that signing the Deed would result in a loss of mana for the Trust Board and it would lose its status as mandated entity for Ngāti Pāoa. The Attorney-General argued that relief would interfere with the legislative process, and the orders are not necessary to preserve the Trust Board's position. Held, the Court declined to make the orders. Section 15 of the Judicial Review Procedure Act 2016 allows the court to make an interim order to preserve the position of the applicant. Counsel for the applicant acknowledged that "the Trust Board's legal position with respect to its substantive claim would not be significantly prejudiced if the signing ceremony proceeded as scheduled." (At [43].) The Judge echoed the sentiments of the Waitangi Tribunal when that body declined to inquire urgently – "this is really a dispute about representation when the people who matter are the people themselves." (At [45].) The divisions between the two entities would not be healed by the prevention of the signing ceremony. Further, it would cause considerable prejudice to Ngāti Pāoa to delay the ceremony. The Court held that it was not reasonably necessary to preserve the position of the applicant in this case by granting interim orders.
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Te Kōti Whenua Māori – Māori Land Court

Māori Reservation – trustee removal – non-attendance at meetings

Tait v Kruger – Tauarau Block

(2021) 252 Waiariki MB 180 (252 WAR 180)
21 April 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

The Court declined to remove trustees where removal was sought for failure to attend trustee meetings. There was a particular context to the present dispute the Court took account of concerning different viewpoints about using the mechanism of a Māori reservation operating under Te Ture Whenua Māori Act 1993.

Māori Reservation – trustee appointments – trustee removal – non-attendance at trustee meetings	
Date	21 April 2021
Case	Tait v Kruger – Tauarau Block (303 KB PDF)
Citation	(2021) 252 Waiariki 180 (252 WAR 180)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Coxhead
Earlier/later decisions	
Legislation cited	Te Ture Whenua Māori Act 1993, ss 239, 240, and 338(7); Te Ture Whenua Māori (Succession, Disputes Resolution and Related Matters) Amendment Act 2020.
Cases cited	<i>Mikaere v Smallman – Mangatawa No 8A</i> (2021) 213 Waikato Maniapoto MB 277 (213 WMN 77); <i>Perenara v Pryor – Matata 930</i> (2004) 10 Waiariki Appellate MB 233 (10 AP 233); Hill – Otakanini Māori Reservation (2015) 108 Taitokerau MB 76 (108 TTK 76); <i>Ropiha v Tipene-Matua – Porangahau No 2B No 10 (Runanga) Block and others (Rongomaraeroa Marae)</i> (2020) 86 Tākitimu MB 84 (86 TKT 84); Amoroa – Omuriwaka Māori Reservation (2017) 163 Waiariki MB 93 (163 WAR 93).
Overview and result	This application sought to appoint replacement trustees in place of trustees who have resigned. It also sought removal of several trustees for non-attendance over a number of years at meetings of trustees responsible for the marae reservation known as Tauarau Marae. (The Court noted there is an ahu whenua trust responsible for adjacent land with kaumatua flats and discussed subsequently how affairs of both had become mingled to an extent. At the conclusion of judgment in this case the Court made orders on its

	own motion for trustee appointments to that trust – see [54]-[55].) A 2019 AGM meeting for the trust saw seven nominees for appointment (by the Court) as trustees. Subsequently signed consent forms were received from five of those persons. These five persons were nominated in the present application to be appointed as trustees. Other persons had resigned at the time of the 2019 AGM. There was no discussion at that meeting about seeking removal of three further trustees for non-attendance at meetings. In December 2019 the Court appointed eight persons as trustees subject to timely receipt of meeting minutes to demonstrate attendance at the five most recent meetings of the trustees. The appointments and related application for removal came to be heard subsequently by the Court in October 2020. Held, the Court declined to remove the trustees. The applicants seeking removal of trustees submitted those persons had not attended trustee meetings and have therefore failed to carry out the duties of responsible trustees. The trustees who opposed their removal submitted there is a level of dysfunction at the Tauarau Marae, with a split between those who want to operate under trustees and those who want to operate by hapū ahi kaa. "[28] In this context, the respondents say they have not been openly invited to participate in trustee meetings and have received no notice. They also claim the applicants have provided no evidence that they have failed to carry out their duties satisfactorily or that they have been on prolonged absence. The respondents do not dispute that they have no confidence in the trust structure and the trust chairperson, which is widely known. However, they seek to remain as trustees now that it has been made clear that the role of the marae trustees is to care for the marae lands and buildings and that the trust does not govern the hapū, the hapū governs themselves. They also seek an adjournment of the application for six months to allow them time to develop further legal submissions and to talk with the numerous marae of Tūhoe regarding governance arrangements." The Court reviewed authorities on the serious step of trustee removal (at [31]). Further, the Court noted that s 240 of Te Ture Whenua Māori Act 1993, dealing with removal of a trustee, has been amended from 6 February 2021. Regulation 3 of the Māori Reservations Regulations 1994 makes clear the Court can remove a trustee from a Māori Reservation and where this occurs the person is not eligible for reappointment (see [34]).
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	On the face of it, it appeared to the Court that, despite receiving notice of meetings, the three trustees failed to attend trustee hui and offered no apologies, over an extended period of time. If trustees continually fail to attend trustee meetings without reasonable explanation or excuse, those trustees are failing to carry out their duties satisfactorily. (See [35]-[41].) "[49] As it currently stands, the Māori reservation is in place and the trustees have the legal responsibility for its administration and management under the provisions of the Act and the Regulations. If it is the clear decision of Ngāti Rongo to move away from the Māori reservation structure, an application to cancel the Māori reservation can be made and such evidence presented to the Court." "[50] As noted in the relevant authorities, the removal of trustees of a Māori reservation is an extreme remedy and there is a high threshold to surpass. In failing to attend trustee meetings without reasonable explanation or excuse, trustees fail to carry out their duties satisfactorily. They also render their removal desirable for the proper execution of the trust, given they repeatedly refuse or fail to act as trustees. However, the non-attendance in the present case must be seen within the context of this trust, where the ongoing debate as to the role of the reservation trustees and the overlap between marae and hapū leadership appears to be at the heart of the respondents' actions. The respondents say that now that it has been made clear that the role of the reservation trustees is to care for the marae lands and buildings and that the trust does not govern the hapū, the hapū governs themselves, they wish to remain as trustees." In the context of the present dispute, the Court declined to remove these trustees but did indicate (at [52]) that those trustees "should be on notice however, that they must now act, together with the other trustees, and carry out their duties as trustees, including attending trustee meetings. If they fail to do so without reasonable excuse, they run the risk of being removed as trustees."
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Alienation – gift – assessment of fair value

Lett – Waipu 4A3E1 and others

(2021) 431 Aotea MB 100 (431 AOT 100)
30 April 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

The Court adjourned an application for a vesting order to give effect to a proposed gift of interests in land, directing that further evidence be provided. The decision explains the Court's role in assessing the fair value of land proposed to be gifted.

Alienation – vesting order – gift – assessment of fair value – directions issued and application adjourned	
Date	30 April 2021
Case	Lett – Waipu 4A3E1 and others (264 KB PDF)
Citation	(2021) 431 Aotea MB 100 (431 AOT 100)
Court	Te Kōti Whenua Māori – Māori Land Court
Member(s)	Judge Harvey
Earlier/later decisions	
Legislation cited	Te Ture Whenua Māori Act 1993, s 164.
Cases cited	Matthews v Matthews – Estate of Graham Ngahina Matthews [2015] Māori Appellate Court MB 512 (2015 APPEAL 512); Phillips v Ashby – Oromahoe 17B2 (2006) 6 Taitokerau Appellate MB 271 (6 APWH 271); Barnes – Te Horo 2B2B2B Residue (2008) 125 Whangarei MB 11 (125 WH 11); Northcroft v Northcroft – Tauhara Middle 4A1L1B1A (1995) 9 Waiariki Appellate MB 49 (9 AP 49); Sinner v Harawira – Maryanne Harawira [2016] Chief Judge's MB 207 (2016 CJ 207); Assets Company Ltd v Roihi [1905] AC 176, (1905) NZPCC 275.
Overview and result	This application sought a vesting order to give effect to a proposed gift of interests in two land blocks. The reason for the gift being "to help with funds, assistance and accommodation with friendship over a lifetime." At issue was whether fair value was required to be assessed or satisfied in the exercise of the Court's discretion in effecting the alienation by way of gift through a vesting order (s 164/93). The land interests sought to be gifted are presently vested in an executor who raised questions with the estate beneficiaries about whether they were properly informed of the fair value of the interests proposed to be gifted. The Court began its discussion with a reminder of the Court's involvement over time in previously failing to ensure owners received fair value for lands transacted, meaning the task is all the more important now:

"[14] The records of this Court, and its predecessor, the Native Land Court, are littered with evidence of Māori land owners not receiving fair value for their interests. Regrettably, that also includes alienations to members of their own whānau, extended whānau and even the wider hapū. Despite the efforts of governments over generations to ensure that Māori land transactions are conducted transparently, on an informed basis and for a fair value, like the records of the Court, the Waitangi Tribunal is also full of examples over many decades, where sometimes unethical, unfair and simply fraudulent transactions have deprived Māori land owners, their whānau and hapū, of a fair value for their lands."

The Court expressed its concern at what was proposed, asking whether the parties had been completely forthcoming in disclosing the context for the proposed gifting. Saying, at [18], "If there have been some collateral transactions ..., then the Court needs to be made aware of the details of those transactions. If that evidence is not forthcoming, then it is difficult for me to assess whether or not Mr Lett is receiving a proper and fair value for his interests, notwithstanding the assertions of a "gift"."

It may seem strange to see a gift as requiring assessment of fair value as if there was consideration. However, the Court's role includes considering whether or not valuation of the land is required. (Section 164(6) also provides: Where a vesting order is sought to effect a gift of any land or share having a value in excess of \$2,000, the court may decline to make the order without evidence in support of the application from the alienor ...)

The application was adjourned and a direction issued that "Mr Lett and Mr Waitai to file as soon as possible the details, including with supporting evidence, of any collateral transactions or arrangements that they have entered into concerning the alienation of this land from Mr Lett to Mr Waitai. They have one month from the date of this decision to provide that evidence. Failing that, it may then prove appropriate that the application, in the absence of further submissions, should be dismissed." (At [19].) The same point was reinforced by the Court in the orders it made (at [20]).

Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal

Waitangi Tribunal procedure – urgent inquiry declined – Criminal Proceeds (Recovery) Act 2009

Decision on application for an urgent hearing

Waitangi Tribunal (Wai 3007, #2.5.5)
12 March 2021

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

Application declined for an urgent inquiry into forfeiture orders granted by the High Court over four properties and into the Criminal Proceeds (Recovery) Act 2009.

Waitangi Tribunal procedure – application for urgent inquiry refused – claim not in respect of Crown action – Criminal Proceeds (Recovery) Act 2009	
Date	12 March 2021
Case	Decision on application for an urgent hearing (531 KB, PDF)
Citation	Wai 3007, #2.5.5
Tribunal	Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal
Member(s)	Chief Judge Isaac
Earlier/later decisions	
Legislation cited	Treaty of Waitangi Act 1975, s 6; Criminal Proceeds (Recovery) Act 2009, ss 5, 18, 92; Commissions of Inquiry Act 1908, s 4A(1); Te Ture Whenua Māori Act 1993, s 129; Te Ture Whenua Māori Amendment Act 2002, s 19.
Cases cited	<i>The Commissioner of Police v Valentine Barclay Nicholas</i> [2016] NZHC 1913; <i>Valentine Barclay Nicholas v Commissioner of Police</i> [2017] NZCA 473; <i>Valentine Barclay Nicholas – Lot 5 DP 34349 Blk IV Maketu SD</i> (2017) 176 Waiariki MB 273 (176 WAR 273).
Overview and result	On 17 August 2016, forfeiture orders were granted by the High Court in respect of four properties owned by the applicant's brother. After failing in his appeal of the forfeiture in the general courts, and to change the status of the properties in the Māori Land Court, the applicant applied to the Waitangi Tribunal for an urgent inquiry into the forfeiture orders.

	The applicant submitted that the land is ancestral, was not obtained from the profits of crime and had not been used for crime. In relation to the Criminal Proceeds (Recovery) Act 2009, the applicant submitted that it “allows the Crown to confiscate Māori land...in the absence of charges being laid, a prosecution occurring, and without a resulting criminal conviction.” (At [26].) In addition, when determining whether the property is to be forfeit (because it was obtained by or used for crime), the civil standard of the balance of probabilities is applied, rather than the criminal standard of beyond reasonable doubt. The Crown opposed the application for an urgent inquiry and submitted that the properties have already been made forfeit by orders of the High Court. It submitted that there was no impending Crown action because the “actor responsible for investigating and taking proceedings under the Act is the Commissioner of Police, acting independently of the Crown”, and the “High Court, not the Crown, decides whether land should be forfeited and sold.” (At [55].) The Crown did not oppose inquiry by the Tribunal into the Act itself because it acknowledged that there were important questions regarding how the Act balances the public policy issues of retention of Māori land with the punishment and deterrence of crime. It also noted there was the potential for the Tribunal's kaupapa inquiry programme to group this claims with other like claims for inquiry in the future. Further, the Crown submitted there have been and are alternative remedies available to the claimant, as there have been multiple proceedings on this matter before the High Court, Court of Appeal, and Māori Land Court. The claimant did not rebut the suggestion that there was no pending Crown action here, instead submitting that the Crown has failed in its duty of active protection, and to “protect Māori from police bias, inequitable conviction rates, imprisonment, and property confiscation in regard to cannabis.” (At [60].) Held, application declined. The Waitangi Tribunal's jurisdiction is clear – the claim is not about a Crown action, so the Tribunal cannot grant relief in respect of the forfeiture. The Tribunal also noted that there are alternative remedies available as proceedings have recently been heard before the Māori Land Court and have been appealed to the Māori Appellate Court. The appeal process should be left to take its course. However, the Tribunal did note that the issues raised in respect of the Act are an example of what Māori
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	have to go through in the wider justice system, and it would be appropriate to deal with these as part of inquiry into claims grouped into a future Justice System Kaupapa Inquiry.
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Ngā ture o ngā iwi taketake – Rights of Indigenous Peoples

Wishes are not laws – *McGirt v Oklahoma* – one of the most important US Supreme Court cases of all time?

McGirt v Oklahoma

Supreme Court of the United States 140 S.Ct 2452 (2020)
9 July 2020

Report by Dr Stephen Young

Tīmatanga kōrero – Introduction

In July 2020, the United States Supreme Court held that a significant portion of eastern Oklahoma, a state in the United States of America, remains Indian Country. By a 5-4 decision, it held that Congress never disestablished the Muscogee Creek Reservation, which, along with other reservations, covers approximately 19 million acres, or for context, an area equivalent to one-fifth of the landmass of Aotearoa New Zealand. This case attracted significant attention. *TulsaWorld*, a newspaper from Tulsa, Oklahoma, reported that it “is the most important decision in Oklahoma history in terms of sovereignty for the state of Oklahoma and sovereignty for the five tribes”.^[1] For *The Atlantic*, Julian Brave NoiseCat wrote that *McGirt v Oklahoma* “might be one of the most important Supreme Court cases of all time”.^[2]

This case note describes why *McGirt* is significant, but also why it might not be “one of the most important Supreme Court cases of all time”. Justice Gorsuch, a Trump appointee, authored the majority decision, which Justices Ginsburg, Beyer, Sotomayor and Kagan joined. Chief Justice Roberts authored the dissent, which Justices Alito and Kavanaugh joined. Justice Thomas agreed with the dissent but authored a separate opinion. Although the result of *McGirt* is beneficial for the tribes and there is an abundance of modish rhetoric, the method of arriving at that decision has raised eyebrows. As NoiseCat notes, “what is most intriguing is the way the Court arrived at this decision. Gorsuch, a westerner with experience in

Indian law, who is no liberal, applied a conservative textualist approach to the reading of treaty law and statutes.”^[3]

At issue in *McGirt* is the State of Oklahoma’s jurisdiction to convict Jimcy McGirt. To understand the claim, why it is so significant, and why the legal method of the majority might be problematic requires some familiarity with the background of the case as well as United States Federal Indian Law.

Kōrero whānui – Background

In 1997, the State of Oklahoma convicted and sentenced Mr McGirt to 1,000 years plus life in prison for, what the Court calls, “serious sexual offenses.”^[4] Following a 10th Circuit decision, *Murphy v Royal*,^[5] McGirt raised a pro se appeal of his conviction. On appeal to the United States Supreme Court, *Murphy* was left undecided, and it is presumed that the Justices came to a 4-4 conclusion after Justice Gorsuch recused himself.^[6] Mirroring the *Murphy* litigation, McGirt argued that the State of Oklahoma did not have jurisdiction to try or convict him, because the federal Major Crimes Act 18 USC § 1153 (‘MCA’) provides the Federal Government with the exclusive jurisdiction for all major crimes on Indian Country. Hence, when appealed through Oklahoma’s court system to the Supreme Court, the *McGirt* decision also resolved *Murphy*.

In some sense, McGirt’s argument is somewhat like the defendant’s argument in *Berkett v Tauranga District Court*.^[7] In both, a criminal defendant argued that a state lacks jurisdiction to prosecute them. The main difference between these cases is the existence of a federal structure. Based on the 10th Circuit’s holdings in *Murphy*, McGirt argued that the State of Oklahoma did not have jurisdiction because the Federal government did, as codified in the MCA. The overarching question was not, like *Berkett*, whether the courts have jurisdiction over an Indigenous person, but whether McGirt’s criminal actions were on a reservation and, therefore, under exclusive federal jurisdiction. Whether McGirt’s acts occurred on a reservation and would therefore fall under federal jurisdiction involves a complex and fraught history.

In 1832, the Creek Nation entered into a Treaty with the United States. Essentially, the Creek and several other tribes were forced to exchange their ancestral lands in current day Georgia and Alabama with lands “west of the Mississippi”.^[8] The United States’ forced removal of the Muscogee Creek, along with the Cherokee, Seminole, Chickasaw, Choctaw and Ponca peoples to (contemporary) northeastern Oklahoma is infamously known as the Trail of Tears. In 1856 and 1866, the United States entered into treaties with the Creek Nation, which promised them a “permanent home” and a right of self-government, but reduced the size of land set aside for the Creek.^[9] The jurisdictional issues in *McGirt* revolve around the consequences of those treaties, as well as some late 19th Century legislation that subsumed tribes to Congressional Plenary powers (United States terminology that is akin to ‘parliamentary sovereignty’). It developed through a series of Acts and cases that are directly relevant to *McGirt*.

In 1883, the Supreme Court ruled that the federal government did not have jurisdiction to try a Native American man accused of murdering another on a reservation.^[10] In response, Congress passed the MCA in 1885 to give

the federal courts jurisdiction over ‘major crimes’, including Indian-on-Indian crimes on Indian Country, which includes on reservations. In *US v Kagama*, the Supreme Court affirmed Congress’ plenary authority to pass that legislation.^[11] The decision created Congressional Plenary power over Indian tribes on the basis that tribes are domestic dependent nations, as *Cherokee Nation* established.^[12] That enabled Congress to pass the General Allotment Act or “Dawes Act” in 1887. The ‘plenary power’ of Congress was upheld in *Lone Wolf v Hitchcock*, finding that Congress has the unilateral authority to abrogate treaty obligations with tribes.^[13] It held that the “authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the juridical department of the government”.^[14]

McGirt argued that his criminal action occurred on a reservation and was, therefore, subject to the Federal jurisdiction. That argument is consistent with the legal history of the United States’ subsuming of tribes to Congress’s plenary authority. The main question was whether Mr McGirt’s actions occurred on a reservation or the Reservation was somehow disestablished so that the MCA would not apply in Oklahoma.^[15]

The parties did not dispute that McGirt’s crimes were committed on lands described as the Creek Reservation in treaties and statute,^[16] or that “Indian Country” includes “all land within the limits of any Indian reservation”.^[17] However, if a reservation has been diminished, then land owned by non-members within the historic boundaries of a reservation is no longer Indian Country. Similarly, land is no longer considered Indian Country where a reservation has been entirely disestablished. The dispute in *McGirt* is whether the lands described as the Creek Reservation under the treaties and federal statute are reservation lands today and, hence, considered Indian Country for purposes of the MCA. If those lands remain Creek Reservation, then the MCA applies and the State of Oklahoma did not have jurisdiction to prosecute Mr McGirt for his crimes.

The McGirt Case

Writing on behalf of the Court, Justice Gorsuch notes that multiple treaties established the Creek Reservation and, in an analysis that is consistent with *Kagama* and *Lone Wolf*, states that only Congress has the power to abrogate treaties or break promises enacted in legislation.^[18] The Court also noted precedent that Congress must legislatively express its intention to disestablish a reservation.^[19] This indicates that without legislation expressing Congress’s intention to disestablish the Reservation, the Creek Reservation exists, and the State of Oklahoma did not have jurisdiction to prosecute Mr McGirt.

After holding that the relevant legislation had not explicitly disestablished the Creek Reservation the Court considered Oklahoma’s six counter-arguments. The first four revolved around the establishment or disestablishment of the Creek Reservation, while the final two focused on the MCA. The Court did not accept any of them.

Oklahoma’s first argument was that when Congress passed the Allotment Acts, including the Dawes Act, it forced the tribes to abandon their

communal lifestyles and parceled lands into smaller lots. Allotment occurred in the 1890s and early 1900s, which is after the relevant treaties. But the Court held that passing laws for allotment failed to disestablish the Creek Reservation.^[20] For Justice Gorsuch, allotment laws provided tribal members with the ability to sell lands and opened reservations to settlement. Importantly, the statutes at issue do not state that the reservation is disestablished. Even if allotment was the first step in a plan that “ultimately aimed at disestablishment”, Gorsuch writes “wishes are not laws, future plans aren’t either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.”^[21]

Oklahoma’s second argument was that Congress intruded on Indian rights when it abolished tribal courts and cut away their autonomy, which was claimed as proof of disestablishment.^[22] The Court agreed that Congress had intruded on those rights, but those intrusions do not necessarily or fully eliminate tribal interests in land or disestablish a reservation.^[23] Throughout the early 1900s, the United States cut away at the Tribe’s authority, but by the 1930s Congress authorised the Creek to adopt a constitution and bylaws, which the Creek did.^[24] That matters as it shows how the history of Tribal and United States relations is more complicated than Oklahoma or the dissent maintain. At one time, Congress explicitly pursued tribal termination, but the Federal government later embraced Tribal self-determination without termination. Since then, the Creek Nation has ratified a new constitution and established a self-governing democracy within the United States.^[25] Congress did not dissolve the Tribe or disestablish the Reservation even if, at times, the United States took steps towards disestablishment of the Reservation and termination of the Tribe.

Oklahoma’s third argument was that historical and demographic practices prove disestablishment of the Reservation.^[26] Essentially, Oklahoma argued that after the formation of the State of Oklahoma, people did not act or believe that the Reservation existed. The problem for the Court, as Justice Gorsuch articulated, is that those extratextual considerations are irrelevant since they should only be considered when statutes are ambiguous. Here, the terms of the statutes are clear.^[27] So even if some people or a majority of the population believed that the Creek Reservation was disestablished and that Oklahoma has always disregarded the authority of the MCA, or that now there is a “vibrant city with expanding aerospace, healthcare, technology, manufacturing and transportation sectors”, that does not mean the Reservation is gone.^[28] Oklahoma overstepped its authority in not applying the MCA, white people moved onto the Reservation, and Creek believed the United States threatened their Reservation. These events, however, never disestablished the Reservation.^[29]

Oklahoma’s fourth argument was that Congress never established a reservation. Instead, Congress created a “dependent Indian community” when it granted the tribe fee simple rather than inalienable land.^[30] Even if Congress granted the tribe fee simple rather than inalienable land, the Court maintained that granting fee simple in lands would still be Indian Country and that there are no required words to establish a reservation.^[31]

Furthermore, to believe otherwise would “require us to stand willfully blind before a host of federal statutes” recognising the status of the Reservation.^[32]

The fifth and sixth arguments were not about the status of the Reservation but focused on whether the MCA applied in Oklahoma. The fifth argument is that the MCA, as a practical matter, never applied in Oklahoma due to the language of the Oklahoma Enabling Act of 1906 (the Act that formed the State).^[33] Oklahoma argued that enforcing it now would create a gap in jurisdictional powers between federal/state/tribal jurisdictions. On the contrary, the Court held that the MCA applied when Oklahoma achieved statehood, even if Oklahoma never complied with it.^[34]

Oklahoma's sixth and final argument was a policy argument.^[35] It argued that enforcing the MCA now would unsettle an untold number of convictions and it would frustrate the State's ability to prosecute crimes. It also argued that if the Court found that Congress had not disestablished the Reservations, other tribes might seek to enforce treaty promises and that almost half of Oklahoma's non-Indian residents might, without their knowledge, be living on an Indian Reservation. The Court did not find these arguments persuasive. Regarding the majority of convictions, Justice Gorsuch wrote that the vast majority of convictions will not be affected, and the “thousands” of convictions the State is concerned about is speculative. The State did not produce information on how many convictions were at stake, and “many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver”.^[36] Additionally, the State's “dire warning” does not provide a “license for us to disregard the law”.^[37] Instead, “the magnitude of a legal wrong is no reason to perpetuate it”.^[38] If problems arise from this decision, then tribes can work with states and enter into agreements with them to overcome them, and “should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time”.^[39]

Essentially, the Court held that the State of Oklahoma (as well as the dissenters) did not point to any Congressional language disestablishing the Reservation. Therefore, the Creek Reservation still exists. Justice Gorsuch wrote:^[40]

To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress ... [T]he Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties ... But that power, this Court has cautioned, belongs to Congress alone.

States cannot reduce federal reservations, as that would be unconstitutional, and neither can courts.^[41] As such, because the Creek Reservation has not been disestablished, only the Federal government has jurisdiction to prosecute Mr McGirt under the MCA.

Justice Gorsuch ends the Court's decision with a compelling final paragraph:^[42]

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation ... But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

Chief Justice Roberts' dissent (Justices Alito, Kavanaugh and Thomas joining) seeks to convince readers that the Court's decision employs questionable legal interpretive methodologies. The dissent believes the Court has hobbled the prosecution of serious crimes, will require convictions to be thrown out, and "unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation".^[43] For Roberts, the truth is simple: "What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation."^[44] For the dissent, wars fought between tribes and the United States were followed by settlement and the establishment of the State of Oklahoma, which dismantled tribal governments and extinguished the Creek Nation's title to the lands.^[45] The dissenters declare:^[46]

... Congress made no secret of its intentions. It created a commission tasked with extinguishing the Five Tribes' territory and, in one report after another, explained that it was creating a homogenous population led by a common government.

Under this view, allotment and the processes of state-formation disestablished the Reservation. In adopting this purposive approach, the dissent accuses the Court of "viewing each of the statutes enacted by Congress in a vacuum".^[47] No sole act disestablished the Creek Reservation, but "all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress' intent to disestablish the reservation".^[48] Roberts continues, "there is no 'magic words' requirement for disestablishment", and "we recognize that the language Congress uses to accomplish its objective is adapted to the circumstances it confronts".^[49] Allotment sought to integrate the Creek Nation within a new political community, the state of Oklahoma, which terminated the Reservation.^[50] With this integration, Oklahoma had grounds for prosecuting McGirt.

The dissent believes there are several reasons why it is a "fantasy" that Congress did not "complete" disestablishment.^[51] It considered Congressional intention and Tribal understandings of Congress's intent by pointing to evidence produced by the Dawes Commission. There, some tribal representatives believed that allotment sought to "wipe out the line of political distinction between an Indian citizen and others".^[52] Additionally, for the dissent, the Court assumes that the State "overstepped its authority" in prosecuting cases that should have been under federal jurisdiction.^[53] However, the dissent views that stance as problematically

undermining the presumption that government officials comply with the law, and the dissent found it difficult to believe that the Tribes never raised this issue.^[54] Lastly, considering the subsequent treatment of the area in question, the State's unquestioned exercise of jurisdiction "confirms that the Creek reservation did not survive statehood".^[55] To support this view, the dissent cites Felix Cohen (original author of the *Handbook of Federal Indian Law*),^[56] tribal leaders, as well as precedent saying that the Creek Reservation no longer exists or there are "'former' lands of the Creek Nation".^[57] Lastly, the dissent is concerned with the "thousands" of State prosecutions for major crimes that the Court downplays.^[58]

Justice Thomas joined the dissent but authored a sole opinion to point out that the federal court does not have jurisdiction to review adequate and independent state criminal matters when the matters were not raised at trial.^[59]

Kōrerorero – Discussion

There are many interesting aspects of this very complex case. *McGirt* is remarkable, in part, because it occurred within a United States context that is mired in racial injustices stemming from overt as well as structural racism and policing. That context, however, is not addressed in *McGirt*. Justice Gorsuch's decision for the Court does not address any context. The decision is pure textualism. "Extratextual" evidence about the context of those acts, the purposes they seek to effect, Congress's intention, or how Tribes understand them is, simply, irrelevant. If Gorsuch's textualist approach is followed in subsequent cases, it will be a departure from the approach established in previous reservation boundary cases.^[60]

Unquestionably, texts are centrally important for contemporary legal practice. An ongoing debate that extends far beyond Federal Indian Law or United States borders is the 'proper' approach or method of legal interpretation. Should we only examine the text, and upon discovering an ambiguity then consider context, purpose, or use? Instead of canvassing the multiple views, I merely consider Matthew Fletcher's theorisation of Indian law textualism.^[61]

McGirt demonstrates that textualism has the potential to benefit Mr McGirt (assuming that the outcome of the Federal prosecution is favourable to him), the Creek Nation (assuming that United States recognition of the Reservation has positive changes or effects), and, as the State of Oklahoma worries, other tribes that seek to enforce treaty promises. Despite those potential benefits, there is a problem with textualism. Fletcher argues that a textualist interpretation "will see judges prioritize the public understanding of the privileged white men in power at the time of the framing of the ... text".^[62] The real problem here is that textualism is paired in opposition to purposivism, which fails to provide a meaningful alternative. Under a purposive approach, one will see "judges engage with the legislative history of the statute, [and] they will engage with the public understanding of the legislations who enacted the law, again, largely privileged white men".^[63] The dissent demonstrates how a purposive approach would operate to the detriment of Mr McGirt, the Creek Nation and potential other tribes. It centralises the views of the "largely privileged white men" (and Roberts demonstrates how to centralise those views and

use citations from tribal representatives' fears about United States intentions to do so) and, in effect, it would undermine Mr McGirt's claims. In short, whether textualism or purposivism, the interpretive method will reflect the "public understanding" of "privileged white men".^[64]

However, Fletcher argues that textualism and purposivism do not fill the field of potential interpretive methods. For Fletcher, *McGirt* misses a crucial interpretation. That is, it does not consider:^[65]

... how the Muscogee (Creek) Nation, its citizens, and perhaps most importantly, its local governments (known as tribal towns) understood the relevant texts ... [I]t seems relevant, even potentially dispositive, that the tribal towns continued governing as *if nothing had changed* during the entire history of the federal government's termination of the tribe's national government.

To be clear, *McGirt* re-asserts the *Kagama/Lone Wolf* approach that Congress has plenary authority over Tribes (so it can unilaterally alter or abrogate Treaties). Despite the finding that the Creek Reservation still exists, it confirms that Tribes are subjects of Congress's Plenary power, rather than sovereign equals or partners. But within this system, Fletcher's method may provide a potential corrective:^[66]

One important first step, and perhaps the biggest step, is to acknowledge as a matter of law that Indian tribes are domestic sovereigns that participate in federal legislative processes, usually initiating and later guiding Congress's Indian affairs enactments.

Regarding statutory interpretation, Fletcher would "require the judiciary in every case in which an Indian affairs text is being interpreted to consider how affected Indians and tribes understand the meaning of that text".^[67]

While Justice Gorsuch has previously "relied exclusively on evidence of the understanding of that treaty by the Indians who negotiated that treaty, and representations made by those on the American side *consistent* with the Indian understanding",^[68] he did not in *McGirt*. This indicates several things. Even if *McGirt* is a positive outcome and is a slight departure from the approach established in previous cases, the Court has not embraced a consistent method. Crucially, it does not consistently consider how affected tribes view and interpret statutes (not just treaties). *McGirt* is a significant case for establishing that the Muscogee Creek Reservation was not disestablished. Therefore, the Federal government has jurisdiction for major crimes that occur on Muscogee Creek Reservation under the MCA, and the State of Oklahoma does not. Without a consistent method that considers the views of affected tribes that is entirely consonant with *Kagama/Lone Wolf*, it is unclear how other tribes can use this reasoning to their benefit. *McGirt* may represent a new direction for the Court. Time will tell whether it is, in fact, "one of the most important Supreme Court cases of all time".

Ngā kupu āpiti – Notes

[1] Curtis Killman “Tribal law expert calls Supreme Court’s *McGirt* ruling ‘most important’ in state history” *TulsaWorld* (online ed, Tulsa, Oklahoma, United States, 10 July 2020).

[2] Julian Brave NoiseCat “The *McGirt* Case is a Historic Win for Tribes” (July 12 2020) *The Atlantic* <www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071/>.

[3] NoiseCat, above n 2.

[4] *McGirt v Oklahoma* 140 S.Ct 2452 (2020) at 2459.

[5] *Murphy v Royal* 876 F 3d 896 (10th Cir 2017).

[6] *Sharp v Murphy* 598 US __ (2019). Gorsuch recused himself because *Sharp v Murphy* was a 10th Circuit case (which includes Oklahoma) when Gorsuch was on the US Circuit Court of Appeals.

[7] *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC).

[8] Treaty with the Creeks, arts 1 and 14, 7 Stat 366 at 368 (1832).

[9] *McGirt v Oklahoma*, above n 4, at 2461.

[10] *Ex Parte Kan-gi-shun-ca (Crow Dog)* 109 US 556 (1883).

[11] *US v Kagama* 118 US 375 (1886).

[12] *Cherokee Nation v Georgia* 30 US 1 (1831).

[13] *Lone Wolf v Hitchcock* 187 US 553 (1903).

[14] At 565.

[15] *McGirt v Oklahoma*, above n 4, at 2459–2460.

[16] At 2460.

[17] At 2459, citing Major Crimes Act § 1151(a).

[18] At 2460–2462.

[19] At 2462, citing *Solem v Bartlett* 465 US 463 (1984) at 470 (“only congress can divest a reservation of its land and diminish its boundaries”). *Solem* creates a multi-stage test to determine whether a reservation remains Indian Country.

[20] At 2464.

[21] At 2465.

[22] At 2465, citing Curtis Act of 1898 § 28, 30 Stat 495 at 504–505.

[23] At 2465.

[24] At 2466–2467.

[25] At 2466–2468.

[26] At 2468–2469.

- [27] At 2469.
- [28] At 2470.
- [29] At 2473–2474.
- [30] At 2474.
- [31] At 2475, citing *Minnesota v Hitchcock* 185 US 373 (1902) at 390.
- [32] At 2474.
- [33] At 2476.
- [34] At 2477–2478.
- [35] At 2478–2479.
- [36] At 2479.
- [37] At 2481.
- [38] At 2480.
- [39] At 2480–2481.
- [40] At 2462, citing *Lone Wolf v Hitchcock*, above n 13, at 556–568.
- [41] At 2462, citing *Solem v Barlett*, above n 19, at 470 (“only congress can divest a reservation of its land and diminish its boundaries”).
- [42] At 2482.
- [43] At 2482.
- [44] At 2482.
- [45] At 2483–2485.
- [46] At 2484.
- [47] At 2485.
- [48] At 2487.
- [49] At 2489.
- [50] At 2490–2493.
- [51] At 2494.
- [52] At 2495, citing P Porter and A McKellop *Printed Statement of Creek Delegates*, reprinted in *Creek Delegation Documents* 8–9 (9 February 1893).
- [53] At 2497.
- [54] At 2497.
- [55] At 2498.
- [56] Nell Jessup Newton (ed) *Cohen’s Handbook of Federal Indian Law* (LexisNexis, New Providence, 2012).

[57] At 2500.

[58] At 2500.

[59] At 2502–2504.

[60] *Solem v Bartlett*, above n 19; *Hagen v Utah* 510 US 399 (1994); *Nebraska v Parker* 577 US 481 (2016).

[61] Matthew LM Fletcher “Textualism’s Gaze” (2020) 25 MJR&L 111 at 135–43.

[62] At 112.

[63] At 112.

[64] Fletcher also criticizes the structural issues. That is, parties in Indian Law cases all too often ask the Court to decide cases on institutionally weak grounds that are better addressed through legislation, like public policy, and the difficult and cumbersome legislation processes often reinforce the Court’s behavior as a “common law court”: at 115, 130.

[65] At 114 (emphasis in original). “Indian affairs enactments” means all Federal statutes pertaining to or affecting Indian affairs, which, in many cases, are negotiated agreements: at 116.

[66] At 138.

[67] At 139 (emphasis in original).

[68] At 136 (emphasis in original), citing *Washington State Department of Licensing v Cougar Den* 139 S.Ct 1000 (2019) at 1016 (Gorsuch J concurring).

Paenga-whāwhā 2021 – additional content online

Te Kōti Whenua Māori – Māori Land Court

[Chief Judge’s powers](#) – succession – whāngai – bloodline connection – *King v Te Aretoa – Succession to Puti Green* (2021) Chief Judge’s MB 132 (2021 CJ 132) – Hinemoana Markham-Nicklin

[Chief Judge’s powers](#) – succession order amended – *Ellison v Jones – Estate of Daniel Ellison* (2021) Chief Judge’s MB 150 (2021 CJ 150) – Hinemoana Markham-Nicklin

[Status of land](#) – refusal to change status – no whakapapa connection – *Toia – Section 67 Town of Tokatoka* (2021) 227 Taitokerau MB 226 (227 TTK 226) – Hinemoana Markham Nicklin

[Trusts](#) – enforcement of trustee obligations – *Stowers v Short – Tumu Kaituna 14* (2021) 251 Waiāriki MB 144 (251 WAR 144) – Hinemoana Markham-Nicklin