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Re-thinking systemic deprivation sentencing discounts

Oliver Fredrickson*

Hei tīmatanga kōrero – Introduction

This article explores the evolution of sentencing discounts to reflect systemic deprivation in Aotearoa New Zealand ("systemic deprivation discounts").[1] This is a relatively new development in our sentencing jurisprudence and one that was warmly welcomed. The pernicious effects of systemic deprivation play a major role in setting the course of an individual's life and, in a variety of ways, can diminish their relative culpability for criminal offending they may commit. For this reason, sentencing outcomes ought to recognise that people come from different starting points and have different opportunities and choices available to them.[2]

Although this article focuses only on sentencing discounts, they are not the only way that information of systemic deprivation can be used in the sentencing process. Properly understanding and recognising the past systemic deprivation of an offender can also influence a judge's decision on whether or not to award a non-custodial sentence, grant a s 106 discount, or impose a minimum period of imprisonment. In addition, if the sentencing judge demonstrates a nuanced and thoughtful understanding

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PO Box 25433
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New Zealand

T +64 4 472 2667
W māorilawreview.co.nz

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of the offender's background and how it related to the offending, this in itself can help the offender feel as though they have been heard and understood. This, in turn, improves the procedural fairness of the sentencing process and goes some way towards restoring the mana and humanity of the offender.

Looking back and tracking the case law of systemic deprivation discounts, this article identifies the Court of Appeal's decision in *Fane v R* as the source of two undesirable developments, which continue to cause issues and inconsistencies in sentencing courts.[3] These are:

- the requirement that the offender show a "causative link" between their systemic deprivation and their offending; and
- the practice of tempering the extent of a discount due to the seriousness of the offending, often to denounce the offender's conduct or deter similar offending.

Since *Fane*, New Zealand courts have not provided clear guidance on either of these issues.

On the first, judges have adopted a range of terms including "causative link",[4] "causal nexus",[5] "demonstrative nexus",[6] and "causative contribution"[7] without explaining whether there is a material difference between them. As a result, a divergence in approach and thus outcome has emerged.[8] The Court of Appeal took some steps towards addressing these inconsistencies in *Carr v R*, providing the most substantial appellate analysis of systemic deprivation discounts to date.[9] After canvassing the history of systemic deprivation discounts, the Court held that a discount should be available where the offender provides a "credible account of matters which might be considered to have impaired choice and diminished moral culpability so as to establish a causative contribution to offending".[10] Despite this reference to moral culpability, most sentencing courts have focussed on the causation element of this passage and continue to require a causative link between an offender's history of deprivation and their offending. This article argues against a causation requirement. It argues that, rather than undertaking an artificial causation analysis, the fundamental assessment ought to be whether the offender's systemic deprivation impacted their relative culpability. If so, the final sentence should reflect this. An inability to satisfy the court that a causal connection exists between their historical deprivation and the offending decades (if not generations) later should not disqualify the offender from a discount.

On the second issue, some judges have adopted the practice of tempering the quantum of an otherwise-justified discount to reflect systemic deprivation due to the seriousness of the particular offending. In *Carr*, the Court commented that the seriousness of the offending may not justify *denying* a discount, but it may "temper the extent of any discount allowed".[11] This practice is inconsistent with the accepted sentencing methodology and the principle of individual justice. Further, it is not uniformly adopted across the judiciary, meaning that offenders with identical backgrounds who commit identical offending may receive different sentencing outcomes depending on the judge in front of them.

Earlier this year, the Supreme Court heard argument in a pair of appeals, *Berkland v R* and *Harding v R*.[12] The issues on appeal included whether the Court of Appeal in each case applied the correct approach to personal and mitigating factors, and in particular requiring a causal link between the defendants' history of deprivation and their offending. This sets the stage for the Supreme Court to decisively addresses these issues.

Kōrerorero – Discussion

Systemic deprivation

The term "systemic deprivation" is used consistently throughout this article. In this context, it is a catch-all term which encapsulates the pervasive and persistent disadvantage that many offenders have suffered throughout their life.[13] It will often include a cocktail of experiences and hardship, such as: family instability or dysfunction; poverty; experiencing or witnessing family or intimate partner abuse (physical, psychological, or sexual); early exposure to drugs, alcohol, or gangs; inter-generational alcohol or drug abuse; inter-generational cultural dislocation or disconnection; exposure to the care and protection system (including time spent in foster care); an early exit from the education system and absence of formal qualifications.

Systemic deprivation is not limited to one ethnicity or culture. However, the unfortunate reality in Aotearoa is that Māori have suffered – and continue to suffer – significant and widespread systemic deprivation, largely as a result of colonisation. This process saw the loss of land and other natural resources, together with the destruction of traditional social structures, tikanga, culture, and language.[14] For every generation since, Māori have been disproportionately represented in negative statistics spanning across society. The following sobering statistics help illustrate this picture:

- The life expectancy for Māori is 6.5 years lower than non-Māori;[15]
- 57% of the current prison population muster is Māori;[16]
- 61% of all young people in Youth Court are Māori;[17]
- 59% of all children uplifted by Oranga Tamariki are Māori;[18]
- 69% of all children in state care are Māori.[19]

The experiences that constitute systemic deprivation strongly contribute to the course an individual's life will eventually take. Exposure to these experiences can normalise certain criminal behaviours, introduce the offender to empirically proven triggers of criminal offending, and often place them in the "brutalised and traumatised company" of others who have shared the same experiences.[20] Research confirms, unsurprisingly, that systemic deprivation is associated with a higher risk of offending and that the less privileged background, the higher the risk.[21] Collectively, an offender's systemic deprivation can restrict the choices and avenues available to the offender and thus their relative culpability for eventual criminal offending they may commit. As a result, it ought to have an effect on the sentencing outcome.

Systemic deprivation discounts in Aotearoa New Zealand

The history of systemic deprivation discounts in Aotearoa is relatively short. Only a few years ago, the personal, whānau, and cultural background of an offender had little effect on their final sentence. In effect, it did not matter whether the offender grew up in a household marred by drugs, alcohol, family violence, and gang affiliation or one filled with the privilege of social and economic stability. For the purposes of sentencing, their culpability was seen to be the same and, as a result, so was their sentence.

In recent years, the tide has turned exponentially. The following section will track this journey to help contextualise the current position. As with most things within sentencing jurisprudence, it must begin with the Sentencing Act 2002.

Sentencing Act 2002

The Sentencing Act originally sought to establish a "fair, firm and rational sentencing framework to deliver clarity and consistency to sentencing in New Zealand."[22] To this end, it codified, for the first time, purposes and principles for judges to follow at sentencing.[23] These are outlined in ss 7 and 8 respectively.

Section 7 provides a number of purposes of sentencing. The purposes for which a court *may* sentence or otherwise deal with an offender are to:

> (a) hold the offender accountable;
>
> (b) promote a sense of responsibility for that harm;
>
> (c) provide for the interests of the victim;
>
> (d) provide reparation for harm done;
>
> (e) denounce the conduct;
>
> (f) deter the offender or other persons;
>
> (g) protect the community from the offender;
>
> (h) assist in the offender's rehabilitation and reintegration.

These purposes are optional and many contradict one another. These contradictions illustrate Parliament's understandable reluctance to adopt a predominant purpose of sentencing or even establish a hierarchy of sentencing goals.

Section 8 outlines a number of principles that the court *must* take into account when sentencing or otherwise dealing with an offender. Those relevant for the purposes of this article include:

> (a) the gravity of the offending, including the degree of culpability of the offender;

> (e) the desirability of consistency in respect of similar offenders committing similar offences in similar circumstances;
>
> (h) any circumstances of the offender that mean that a sentence that would otherwise be appropriate would be disproportionately severe; and
>
> (i) the offender's personal, family, whānau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose.

Each of these principles may inform the appropriateness and quantum of a sentencing discount to reflect systemic deprivation.

Finally, s 27 acts as the vehicle through which this information about an offender's history of systemic deprivation is brought before the court. At sentencing, an offender is entitled to call upon any person to speak about their personal, family, whānau, community, and cultural background and how that background may have related to the offending.[24] Although it does not require causation, it does establish that relatedness between the offender's background and the commission of the particular offence is relevant. As discussed in depth below, this article argues that "causation" is not (and ought not to be) necessary to satisfy this relatedness. Rather, an offender's background will relate to the offending where it diminished their relative culpability.

Judicial treatment

Despite the permissive wording of the Sentencing Act, discounts to reflect the offender's history of deprivation were not generally awarded for the first ten years of its existence. It is difficult to identify exactly when the tide began to turn, as there was not a single decisive or watershed case. One useful starting point, however, is *Mika v R*.[25]

Relying only on authorities from Australia and Canada, Mr Mika argued that the sentencing judge should have taken into account the unique systemic factors behind Māori offenders appearing in court and that these factors justified a sentencing discount. The Court of Appeal rejected this argument, stating that:[26]

> Parliament could not have intended that a standard discount based on ethnicity should be applied undiscerningly by courts irrespective of whether that factor related to the offender's culpability for a particular crime.

As Mr Mika did not suggest that his Māori heritage diminished his blameworthiness or mitigated against his aggravating factors, a discount was not available. The Court contrasted his position with the case of *R v Nathan*, where a nexus between Māori heritage and culpability was established.[27] At no point did the Court suggest that an offender had to establish a causal nexus between their cultural background and the particular offending for which they were being sentenced. In fact, the Court appears to have rejected this position, stating:[28]

> A judicial evaluation of an offender's culpability is an essential element of the sentencing process without requiring … proof that ethnicity is causally linked to the particular offending.

The following year, in *R v Rakuraku*, Williams J insightfully discussed how, in some cases, there is a causative link between systemic deprivation and criminal offending.[29] In the following passage he said:[30]

> Your anger and aggression is partly a factor of your personality and you made free choices in that regard. But it is also partly a response to the drivers I've discussed that aren't of your making at all; to the way the world responds generally to Māori boys and men from poor backgrounds. We must be honest with ourselves about that. So it comes as no surprise to me that you sought security in the brutalised and traumatised company of those who share your experience and history – the Mongrel Mob. That shared experience has a terrible magnifying effect when it gathers in one place. To deny that as a contributing factor would be to deny that race and history have any part to play in Māori criminality generally today, and therefore in your own criminality.

Williams J commented that the success of Mr Rakuraku's sister, who had attended boarding school on a scholarship, attested to the "causative impact" of his past on his eventual criminality.[31] Despite readily identifying a causative link between Mr Rakuraku's background and his eventual criminal offending, Williams J did not suggest that all future offenders *must* prove such a link in order to gain a sentencing discount to recognise systemic deprivation.

The following year, the Court of Appeal released its decision in *Fane v R*.[32] Mr Fane pleaded guilty to causing grievous bodily harm after an argument with his father-in-law about the custody of his child.[33] He did not allege any systemic deprivation, but rather that his cultural and whānau background was a mitigating factor, either generally or under s 8(i) of the Sentencing Act.[34] In rejecting this argument, the Court went beyond the context of Mr Fane's case and provided two statements of general principle, both of which have had a lasting and perhaps unintended impact.

First, the Court concluded that a discount was not available because a nexus between Mr Fane's cultural background and his offending had not been established. This, in the Court's opinion, meant that it could not mitigate his culpability for the offending.[35] Without acknowledging it was doing so, the Court departed from the approach taken in *Mika*, which focussed on whether an offender's particular ethnicity or background related to their overall *culpability*. Instead, the Court introduced, for the first time, a positive requirement upon the offender that they demonstrate a causal nexus between their background and their offending.

Second, the Court held that a discount was nevertheless unavailable due to the serious nature of the offending.[36] Instead, the dominating purposes of the sentence were to: denounce and deter Mr Fane's conduct, hold him accountable for his actions, and protect the community from such acts.[37] The Court offered no authority for this sweeping statement or any guidance as to when a case would be sufficiently serious so as to render irrelevant an offender's background.

In the years following *Fane*, sentencing courts began to award systemic deprivation discounts with increasing frequency. The genesis for this development, to some degree, was the decision of Whata J in *Solicitor-General v Heta*.[38] Although it did not necessarily pave new ground, Whata J's cogent exposition of the normative underpinnings for such discounts certainly grabbed attention. For the first time, Whata J comprehensively traversed the legislative history of s 27 of the Sentencing Act, the effects of colonisation and the consequent systemic disadvantage, and the relevant Australian and Canadian jurisprudence. His Honour accepted that "there must be some evidence identifying the presence of systemic deprivation in the offender's background and linkage to the offending".[39] Applying this to Ms Heta, Whata J conducted an impressive and methodical analysis assessing how Ms Heta's experiences of systemic deprivation were linked to her later offending.

After *Heta*, the frequency of sentencing discounts for systemic deprivation continued to increase. Over this period, the Court of Appeal revisited the matter on a number of occasions and broadly endorsed the approach taken in *Heta*. In *Zhang*, for example, a full Bench of the Court of Appeal said:[40]

> … ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability. Where these constraints are shown to contribute causatively to offending (whether associated with addiction or not), they will require consideration in sentencing.

Nevertheless, discounts to recognise systemic deprivation continued to be awarded in an inconsistent manner. The source of these inconsistencies mirrors the reasoning in *Fane*.

First, in some cases, sentencing judges readily accepted that the offender had suffered systemic deprivation but nevertheless showed a reluctance (or perhaps inability) to identify a "causal nexus" between that deprivation and the offending.[41] One possible reason for this divergence could be that the clear and methodical analysis in *Rakuraku* and *Heta* set an unrealistic expectation for what constitutes a "causal nexus". Reading those decisions, the link between the offender's history of deprivation and their eventual offending seems obvious. However, this is only because Williams and Whata JJ's experience and insight enabled their Honours to engage closely with the offender's lived experiences and, aided by a te ao Māori lens, were able to identify and clearly articulate the linkages that existed. In other cases, sentencing courts cited *Heta* and *Rakuraku* while refusing to award sentencing discounts to offenders who had suffered similar systemic deprivation to the offenders in those cases.[42]

Second, some courts continued the approach set out in *Fane* and refused to award sentencing discounts to recognise systemic deprivation where the offending was "particularly serious".[43] At the same time, however, others continued to award such discounts for even the most serious offending.[44]

Recently, the Court of Appeal attempted to address both of these inconsistencies in *Carr v R*.[45]

The current position – Carr v R

Mr Carr suffered extensive systemic deprivation from a young age. He grew up in poverty and suffered significant abuse at the hands of a family member. This led to him living on the streets at the age of 12 and becoming affiliated with a gang run by individuals much older than himself. He developed a severe drug addiction and became engaged with the criminal justice system soon after. This entrenched systemic deprivation caused Mr Carr to almost entirely disconnect with his Māori heritage.[46]

In the High Court, the sentencing judge acknowledged Mr Carr's history of deprivation but refused to award a sentencing discount as his Honour was not satisfied that there was sufficient linkage between that deprivation and the offending.[47] In doing so, the Judge commented that: "[m]any people with disadvantaged backgrounds do not commit criminal offences, let alone very serious ones, and many law-abiding people remain so despite difficult lives."[48] Further, his Honour said that an offender's history of systemic deprivation will have "little application if any" when the offending is "serious".[49]

On appeal, the Court of Appeal canvassed the relevant authorities – including *Fane*, *Rakuraku*, and *Heta* – and commented that:[50]

> … where a cultural report provided under s 27 of the Sentencing Act contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse including by whānau members, unemployment, educational underachievement and violence as features of the offender's upbringing such matters ought to be taken into account in sentencing.

The Court then addressed the two inconsistencies discussed above. First, it sought to clarify when an offender's past systemic deprivation will justify a sentencing discount. The Court held that a discount will be available if the offender can show:[51]

> … a credible account of matters which might be considered to have impaired choice and diminished moral culpability so as to establish a causative contribution to offending, of the kind envisaged in *Zhang*. Where that is shown, we consider it must have an effect on the sentencing outcome.

In this assessment, the Court said that the history of systemic deprivation need not be the "proximate" cause of the offending.[52]

Second, the Court addressed the relevance of systemic deprivation in relation to serious offending. The Court acknowledged that the gravity of the offending "might temper the extent of any discount" awarded to recognise systemic deprivation but stressed that that is a "different proposition from saying there should be no allowance".[53] Thus, the gravity of the offending could justify the reduction of a sentencing discount but could not justify the refusal to award one altogether.

The stage is set

Earlier this year, the Supreme Court granted leave to hear a pair of appeals, *Berkland v R* and *Harding v R*.[54] In granting leave to appeal, the

Court signaled its particular interest in hearing from the parties whether the Court of Appeal applied the correct approach in requiring Mr Berkland and Mr Harding to establish a causal link between their history of deprivation and the offending.

This provides an opportunity for the Supreme Court to provide clear guidance about systemic deprivation discounts. In particular, it can provide a definitive answer to the following questions:

- Should an offender be required to show a causal connection between their history of systemic deprivation and their eventual offending?
- Should a systemic deprivation discount be tempered in cases involving serious and premeditated violence and drug offending?

The following paragraphs will argue that both questions ought to be answered with "no". Instead, it advocates for the following approach:

- Systemic deprivation discounts should be awarded if the offender's history of systemic deprivation diminished their relative culpability for the relevant offending.
- Systemic deprivation discounts should not be tempered due to the seriousness of the offending.

The "causation" conundrum

On a number of occasions in recent times, the Court of Appeal has emphasised that sentencing must "achieve justice in individual cases".[55] To this end, it remains an evaluative exercise and ought not to be conducted in a mechanistic way. Rather, the "ultimate question" at sentencing is whether the sentence provided is just in all the circumstances.[56]

Requiring an offender to draw a causal link between their offending and events that occurred decades (if not generations) earlier is an artificial and overly mechanistic assessment that is capable of producing sentences that are not just in all the circumstances. Further, the nebulous nature of this assessment means that it continues to be applied inconsistently. The following section will flesh out both of these claims and offer a revised assessment that asks whether the offender's background of systemic deprivation diminished their culpability.

Uncertain and inconsistent application of Carr

In *Carr*, the Court of Appeal intended to clarify when a sentencing discount will be appropriate to reflect an offender's history of systemic deprivation. Although the decision did provide a more refined test for this assessment, it has not resulted in a more consistent approach.

The decision ostensibly made an important shift, replacing the former "causal link" requirement with the phrase "causative contribution". As a result, offenders need not identify a "causal link" between their history of systemic deprivation and their consequent offending. Instead, they must show that that deprivation had a "causative contribution". Unfortunately, the Court does not explain whether this shift in language materially changes the necessary level of linkage that an offender is required to show. At first blush, one might assume that a "causative contribution" would require less linkage than a "causal nexus". However, in earlier cases relating to discounts for addiction and mental health, appellate courts have used the terms "causation" and "contribution" interchangeably.[57] Further, the Court in *Carr* went on to say that the "causative contribution" ought to be "… of the kind envisaged in *Zhang*".[58] However, the Court in *Zhang* used the phrase "demonstrative nexus".[59] Given this reference, it is unclear whether a prospective offender must show a "causative contribution", a "causal nexus", or a "demonstrative nexus" or if there is even any difference between these terms.

In any event, it is difficult to discern a notable shift by sentencing courts since *Carr*. Although most sentencing judges now appropriately refer to the comments in *Carr*, there remains a divergence in how sentencing judges approach the causal link requirement.

Some sentencing and appellate courts have acknowledged the need for a causal link between deprivation and offending but instead appear to substitute that requirement for an assessment as to whether the deprivation influenced the offender's *culpability*.[60] This is a preferable assessment, as will be discussed below, but it is not universally applied. One such example is *Wilson v R*.[61] Mr Wilson was found guilty of aggravated robbery after he and an accomplice conducted an armed home invasion with the intention of robbing the occupant of cannabis.[62] His background had many hallmarks of a systemically deprived upbringing, including: cultural disconnectedness, whānau dysfunction, violence, time spent in various foster homes, limited education, early entry into the criminal justice system, alcohol and other drug exposure and subsequent addiction, and gang exposure and subsequent affiliation.[63] Assessing the relevance of Mr Wilson's systemic deprivation on the appropriate sentence, the Court of Appeal commented:

> It is our view that Mr Wilson's culpability for the offending is diminished by his background circumstances ... we accept that Mr Wilson's background and the profound trauma he has suffered have severely limited his choices, distorted his values, impaired his decision-making and resulted in him coming under the negative influence of the Mongrel Mob gang.

Rather than using the causation-based language or attempting to draw a link between particular aspects of Mr Wilson's background and eventual offending, the Court instead recognised that his systemic deprivation limited his choices, distorted his values and impaired his decision-making, and thus reduced his culpability.[64] This is a subtle but important distinction, as it allows an offender to obtain a sentencing discount without looking back decades (or generations) to draw a specific link between their history of systemic deprivation and their offending.

At the same time, other sentencing courts continue to search for a causative link, but show great willingness to make a range of inferences to identify a link.[65] For example, in *Mau v R*, the Court awarded a discount based only on Mr Mau's pre-sentence report, stating:[66]

> On the basis of the information available to us, we are prepared to infer the existence of a nexus between the offending and the significant economic and cultural deprivation Mr Mau reports having experienced during his upbringing.

These comments can be contrasted again with the approach taken in *R v Jury*.[67] Mr Jury was convicted of murder after an argument with a fellow member of the Mongrel Mob.[68] He was one of 22 children and had suffered "cultural dislocation, poverty", and significant "traumatic physical and sexual abuse as a child and young person."[69] Further, he was subjected to "cruel and grossly abusive treatment" within his family and "physical and sexual abuse while an inmate of an institution to which [he was] sent."[70] Mr Jury argued that there was an "inferential nexus" between this background and his offending". In response, the sentencing judge said:[71]

> While the Court recognises the damaging and enduring effects of your traumatic childhood and the appalling abuses you have suffered, as having a significant effect upon your life choices and your gang membership, there is however no close causal connection between that background and your offending.

Rather than adopting the "causal contribution" standard proposed in *Carr*, the Court appears to have required Mr Jury to show a "close causal connection" between his background and his offending. Given the Court's conclusion that there was no such connection, this appears to be inconsistent with the approaches taken in *Wilson* and *Mau*. Puzzlingly, the Court went on to comment that Mr Jury's background would have justified a sentence discount in the case of a usual sentencing but, as it was a sentence for murder, that was not available.[72] It is difficult to reconcile this with the earlier finding that no "close causal connection" existed.

Similarly, in *Keenan-Fry v R*, the offender had served a custodial sentence at age 14, and was introduced to drugs and gangs at early age.[73] This caused him to disconnect entirely from his Māori culture. By the time of his offending – possession of firearms and methamphetamine and three driving charges – he was addicted to methamphetamine and a member of a gang. Although his offending was closely related to his addiction and gang affiliations, the judge concluded that there was "no clear causal link" and refused to give a discount.[74]

These cases provide a snapshot of the current state of play and illustrate the continued difficulty with the causation requirement. Given the inherent difficulties in drawing linkages between childhood (or even ancestral) experiences and adult offending, it has resulted in inconsistent application across similar cases.

Rethinking the "causative contribution" assessment

Putting the interpretive inconsistencies to one side, it remains unclear whether this focus on causation actually adds any value to the analysis. As noted above, the Court in *Carr* said that a sentencing discount will be appropriate where the offender's deprivation might have "impaired choice and diminished moral culpability, *so as to establish* a causative contribution to offending" (emphasis added).[75] The wording of this test suggests that, if an offender can show that their history of systemic deprivation has impaired choice or diminished moral culpability, it follows that a causative contribution will necessarily exist. Read in this way, the "causative contribution" acts merely as an indicator to identify whether the offender's systemic deprivation reduced their moral culpability. As discussed above, this is not how sentencing courts have applied the wording in *Carr*.

In most cases, the offender will provide evidence of historical systemic deprivation that occurred years, decades, or even generations before the offending took place.[76] Over that period, the threads of deprivation will have impacted the offender's life in a multitude of ways; some obvious and others far more subtle. However, no matter how obvious the manifestations of systemic deprivation may be, it remains a difficult task for the offender to show that their systemic deprivation "caused" (or at least "causatively contributed" to) their offending. This imposes a stiff evidentiary burden onto the offender, as they must traverse back through their life history and attempt to draw indirect and often inferential linkages. The difficulty involved in this exercise is evidenced by the outcomes in *Jury* and *Keenan-Fry* discussed above.

The impact of this evidentiary burden is most pronounced in the District Court, where financial and resourcing constraints often prevent an offender from obtaining a cultural report. Instead, information about an offender's systemic deprivation will often come directly from members of their whānau, community, or iwi.[77] This provides the court with valuable information to better inform the sentencing process. However, the causation requirement requires these individuals to undertake the difficult and somewhat amorphous task of explaining how the offender's history of systemic deprivation "caused" or "causatively contributed" to the offending. In *R v Ipeelee*, the Canadian Supreme Court disposed of the causal requirement, concluding that the interconnections that occur over the course of an offender's life are "simply too complex".[78] Going further, the Court emphasised that the purpose of recognising systemic deprivation is not to explain or excuse the offending. Rather, it is to recognise the systemic background factors that may inform the relative moral culpability of the offender.

An undue focus on whether there was sufficient "causation" between offender's history of systemic deprivation and their consequent offending ultimately distorts the sentencing analysis. Instead of analysing whether the offender's history of systemic deprivation diminished their moral culpability, counsel (and indeed the court) often find themselves conducting intellectual acrobatics trying to prove or disprove that there was a "causal link" between the offender's inter-generational deprivation and their eventual offending.

A focus on culpability instead?

The above paragraphs have discussed the inconsistent application of the "causative contribution" test outlined in *Carr* and cast doubt over its value when determining whether a sentencing discount is appropriate. This begs the question, why not dispense with this nebulous and superfluous "causative contribution" assessment and simply cut straight to the fundamental question: did the offender's systemic deprivation influence their culpability for the offending?

Such an approach does not render irrelevant the existence (or extent) of a causative link. Rather, it means that the inability to draw a specific link should not disqualify an offender from obtaining a sentencing discount. This is the approach adopted by the Canadian Supreme Court in *Ipeelee,* where LeBel J held that:[79]

> Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

This article recommends that the same approach be adopted in Aotearoa New Zealand. If an offender has suffered from systemic deprivation which reduced their culpability for the offending, this ought to be reflected in the final sentence. To refuse to do so on the grounds that there was insufficient causation between the deprivation and the offending would be inconsistent with the principle of individual justice and would ultimately fail to produce a sentence that is "just in all the circumstances".[80]

Discounts in serious and violent offending

As discounts to reflect systemic deprivation become more common, sentencing courts have voiced concerns about their application in particularly serious cases, especially those involving serious and premeditated violence or commercial drug dealing. Addressing these concerns, the Court of Appeal in *Carr* confirmed that, while the gravity of the offending could not eliminate the possibility of the court allowing sentencing discount to reflect systemic deprivation, it may still "temper the extent of any discount allowed for such considerations".[81]

As a result of these concerns and the comments in *Carr*, some sentencing judges have adopted the practice of reducing the quantum of an otherwise justified sentencing discount due to the seriousness of the particular offending. This is unfortunate, as it appears to be inconsistent with sentencing methodology and the principle of individual justice. Worse still, it is not uniformly adopted, meaning that offenders with identical backgrounds who commit identical offending may receive different sentencing outcomes.

Inconsistent with sentencing methodology

In a number of cases, sentencing judges have reasoned that cultural factors will have a lesser effect on sentencing involving serious violence because of the need for "denunciation", and "protection of the community".[82] For example, in *Nuku v R*, the sentencing judge reduced Mr Nuku's discount from 10 per cent to 5 per cent to recognise the need to protect the victim and society's need to denounce repeat domestic violence.[83]

In *Moses v R*, the Court of Appeal outlined the correct approach to sentencing:[84]

> **Step one**: Calculate the adjusted starting point, incorporating aggravating and mitigating features of the offence.
>
> **Step two**: Incorporate all aggravating and mitigating factors personal to the offender, including any guilty plea discount.

It is difficult to see how reducing an offender's systemic deprivation discount due to the seriousness of the *offending* is consistent with *Moses*, which requires the assessment of the seriousness of the offending to take place at step one. By tempering the available discount in this way, the court is using the seriousness of the offending to influence the quantum of a mitigating factor personal to the offender. It does not appear to comply with *Moses* for the court to refer to the seriousness of the offending at step two as a justification to reduce the extent of a sentencing discount that would have been available, but for the seriousness of the particular offending.

In addition, this tempering practice has not been adopted when awarding sentence discounts for other mitigating factors. In particular, untempered discounts remain available to reflect diminished culpability due to youth[85] and mental health[86] for even the most serious and violent offending. The courts have not provided a principled basis for this distinction. If the court accepts that a particular mitigating factor has diminished the defendant's moral culpability, it is difficult to understand why one factor should be "tempered" due to the seriousness of the offending but not another.

Further, this approach rests on an unnatural interpretation of the Sentencing Act. Section 7(1) provides eight purposes for which the court *may* sentence or otherwise deal with an offender, including to "denounce the conduct" and to "deter the offender or other persons from committing the same or a similar offence". It is clear in *Nuku*, for example, that the court reduced the offender's discount for these purposes. However, s 8(1) states 10 principles of sentencing that the court *must* take into account at sentencing, including: the degree of culpability of the offender; the particular circumstances of the offender that means a particular sentence would be disproportionately severe; and the offender's personal, whānau, and cultural background. Under this tempering approach, the court appropriately recognises these mandatory principles but then reduces their value by prioritising the need to denounce the conduct or deter the offender (or other persons). This appears to elevate the optional purposes in s 7 above the mandatory principles in s 8. As noted above, the appropriate place for recognising the seriousness of particular offending is when setting the starting point at step one of the sentencing process.

Inconsistent with individual justice

New Zealand courts have recognised the importance of individual justice in the sentencing process.[87] The principle of individual justice requires each sentence to be tailored to the particular offence and the particular offender. It follows that like cases should be treated alike but, importantly, if there are relevant differences, due allowances should be made for them.[88] As the saying goes, "there is no greater inequality than the equal treatment of unequals".[89]

Reducing the quantum of an otherwise appropriate sentencing discount due to seriousness of the offending is inconsistent with the principle of individual justice. This can be illustrated through an example. Say two individuals commit identical offending, but one suffered from a history of systemic deprivation such that the judge deemed a 10 per cent discount to be appropriate to recognise their reduced relative culpability. However, like in *Nuku* or *Davidson*, the judge then tempered that discount and only awarded a 5 per cent discount. The effect of this temperance would be to insufficiently recognise the relative difference between the two offenders. Although one offender's relatively lesser culpability justified a 10 per cent discount, the final sentence fails to reflect this. This result appears to offend s 8(e) of the Sentencing Act which requires the court to consider the general desirability of consistency with sentencing levels of similar offenders committing similar offences in similar circumstances.

Inconsistently applied

In *Ipeelee*, the Canadian Supreme Court cautioned that attempting to carve out an exception for systemic deprivation for "serious" offences inevitably leads to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be serious'".[90]

In New Zealand, the courts (including the Court of Appeal in *Carr*) have failed to provide a general rule to identify when a case will be sufficiently serious so as to justify reducing a systemic deprivation discount. There is currently no legal test for determining whether certain offending was "particularly serious" and it is difficult to imagine what such a rule would look like. Would it be the particular offence (i.e. category 3 or 4) or the particular characteristics of the offending? Reviewing the cases, it is difficult to discern a consistent approach.

For example, in *Kea v R*,[91] *Nuku v R*,[92] and *Williams v R*[93] the court noted that the extent of the available discount was tempered and thus limited to 10 per cent because of the serious and premeditated nature of the offending (kidnapping, attempted murder, and aggravated robbery respectively). However, in *R v Kingi*,[94] *R v Ruddle*,[95] and *R v A*,[96] which involved kidnapping, manslaughter, and manslaughter, it was not. In each of the second trio of cases, the court granted a 15 per cent discount and made no suggestion that the seriousness of the offending had any tempering effect on that discount.

Perhaps most troubling is that in the cases where the discount is tempered, the court does not refer to other cases or explain why the seriousness of the particular case justified a tempering of the appropriate discount. Instead, in the cases mentioned above, the court simply pronounced that the seriousness of the offending tempered and limited the available discount as if it were a uniformly accepted and applied principle.

Kōrero whakamutunga – Conclusion

When the Supreme Court delivers its decision in *Berkland* and *Harding*, it will have the opportunity to determine conclusively the issues surrounding systemic deprivation discounts. As discussed, this article suggests that systemic deprivation discounts should be awarded if the offender's history of systemic deprivation diminished their relative culpability for the relevant offending. If this is the case, the discount should not then be tempered due to the seriousness of the offending.

This framework would appropriately recognise the different starting points that defendants come from and the impact that this can have. A background of systemic deprivation (with features such as generational alcohol and drug abuse, familial criminal offending, and gang affiliation) can normalise violence, drug use, and criminal offending in the life and mindset of an individual.[97] This can lead them on a path towards criminal offending and deprive them of the resources and support necessary to correct course. As a consequence, they will frequently be placed in high-stress and hyper-criminalised situations where unstable and chaotic environments often impair their ability to constrain impulses. Collectively, these factors reduce their culpability relative to an individual who did not face this deprivation and made an uninhibited choice to offend. To reflect this, our sentencing process should ensure that a sentencing discount is available, and should not be withheld simply because the offender is unable to draw a "causative link" between the deprivation and their offending. Similarly, the quantum of the discount should not be reduced solely due to the seriousness of the offending. This should instead be recognised at stage one of the sentencing process when setting the starting point.

The aim of these developments is not solely to reduce the disproportionate incarceration rate of those who suffer systemic deprivation, as we must acknowledge that sentencing behaviours by courts are not a silver bullet. Sentencing is part of the wider societal context, with similar inequities present across the health, housing, and education sectors. As such, it should not be considered the sole – or even the primary – means of reducing over-incarceration. Nevertheless, that should not underplay the integral and uniquely direct role that sentencing judges play in affecting outcomes in the criminal justice system. Judges directly determine whether an individual will receive a custodial sentence (and for how long), or whether other sentencing options may be more appropriate.

For that reason, it is encouraging to see the recent judicial shift towards more individualised[98] and solution-focused justice.[99] The suggestions proposed in this article align naturally with these developments and help ensure that sentencing outcomes recognise the different culpability that offenders from different backgrounds may have.

Ngā kupu āpiti – Notes:

* Oliver Fredrickson has recently completed an LLB(Hons)/BCom at Victoria University and works as a Clerk to the Chief District Court Judge Heemi Taumaunu. Views expressed are his own.

[1] I would like to thank Emily Blincoe and Māmari Stephens for their immensely useful comments reviewing earlier versions of this article. Views expressed are the author's own.

[2] Heemi Taumaunu, Chief District Court Judge, "Mai te po ki te ao mārama: the transition from night to the enlightened world" (Norris Ward McKinnon Lecture, University of Waikato, 11 November 2020) at 35.

[3] *Fane v R* [2015] NZCA 561.

[4] See: *Wineera v R* [2021] NZHC 900 at [34]; *Miller v R* [2021] 1104 at [39] and [46]; *Mau v R* [2021] NZHC 1290 at [20].

[5] See: *Hammond v R* [2021] NZHC 1064; *James v R* [2020] NZHC 2134.

[6] See: *Zhang v R* [2019] NZCA 507 at [162]; *Campbell v R* [2020] NZCA 631.

[7] See: *Carr v R* [2020] NZCA 357 at [65]; *Cooper v R* [2020] NZCA 510.

[8] See: Oliver Fredrickson "Systemic Deprivation Discounts and Section 27 Report: Progress but not Perfect" (2020) September Māori LR.

[9] *Carr v R* [2020] NZCA 357.

[10] At [65].

[11] At [65].

[12] *Berkland v R* [2020] NZSC 125; *Harding v R* [2020] NZSC 127.

[13] See the discussion in *Solicitor-General v Heta* [2018] NZHC 2453.

[14] At [40].

[15] Statistics New Zealand "Growth in life expectancy slows" (20 April 2021) Accessible at https://www.stats.govt.nz/news/growth-in-life-expectancy-slows.

[16] Department of Corrections "Prison Facts and Statistics – March 2021" (March 2021). Accessible at https://www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/prison_stats_march_2021 .

[17] Ministry of Justice *Child and Young People in Court: Data Notes and Trends for 2020* (2020) at 3. Accessible at: https://www.justice.govt.nz/assets/Documents/Publications/5apvjw-Children-and-young-people-data-notes-and-trends-dec20-v1.0.pdf.

[18] Ministry of Justice *Improving outcomes for Tamariki Māori* (2020) at 28. Accessible at: https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Report-and-releases/Section-7AA-Report/S7AA-Improving-outcomes-for-tamariki-Māori.pdf.

[19] At 30.

[20] *R v Rakuraku* [2014] NZHC 3270.

[21] Susanne Alm and Felipe Estrada "Future Prospects, Deprivation, and Criminality – A Longitudinal Birth Cohort Study" (2018) 39:10 Deviant Behaviour 1280.

[22] Government of New Zealand *Sentencing and Parole Reform Bill meets with approval* (2001, Justice Matters) at 1.

[23] Julian Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" ANZJ Crim 36 (2003) 249 at 254.

[24] Sentencing Act 2002, s 27(1)(a)-(b). The speaker may also talk about any processes have been tried to resolve underlying issues of the offending and how the offender's support networks may help prevent future offending.

[25] *Mika v R* [2013] NZCA 648.

[26] At [10].

[27] At [11], citing *R v Nathan* (1989) 4 CRNZ 369. Like a number of other courts, the Court in *Mika* erroneously called this case *Nishikata v Police* HC Wellington AP 126-8/99, 22 July 1999. The reason for this widespread confusion is unknown.

[28] At [10].

[29] *R v Rakuraku*, above n 20.

[30] At [56]-[58].

[31] At [57].

[32] *Fane v R*, above n 3.

[33] At [1].

[34] At [43].

[35] At [46].

[36] At [45].

[37] At [45].

[38] *Solicitor-General v Heta*, above n 13.

[39] At [50].

[40] *Zhang v R* [2019] NZCA 507 at [157].

[41] See: *R v Patangata* [2019] NZHC 744; *R v Carr* [2019] NZHC 2335; *R v Duff* [2018] NZHC 2690.

[42] See: *R v Patangata*, above n 41; *R v Carr*, above n 41; *R v Duff*, above n 41.

[43] See: *R v Arona* [2018] NZCA 427;*R v Patangata*, above n 41; *R v Carr*, above n 41; *R v Duff* above n 41.

[44] See: *Carroll v R* [2019] NZCA 172; *R v Nepia* [2019] NZHC 1932; *R v Beattie* [2019] NZHC 3108.

[45] *Carr v R* [2020] NZCA 357.

[46] At [63].

[47] *R v Carr*, above n 41.

[48] At [61].

[49] At [60]-[62].

[50] *Carr v* R, above n 45, at [60].

[51] At [65].

[52] At [64].

[53] At [65].

[54] *Berkland v R* [2020] NZSC 125; *Harding v R* [2020] NZSC 127.

[55] See: *Zhang v R*, above n 40, at [48]; *Orchard v R* [2019] NZCA 529 at [28]; *Crump v R* [2020] NZCA 287 at [101].

[56] *Moses v R* [2020] NZCA 296 at [49].

[57] See: *R v Jarden* [2008] NZSC 69, (2008) 3 NZLR 6123; *E (CA689/2010) v R* [2011] NZCA 13, (2011) 25 CRNZ 411.

[58] *Carr v R*, above n 45, at [65].

[59] *Zhang v R*, above n 40, at [162].

[60] This approach aligns with that originally outlined in *Mika v R*, above n 25.

[61] *Wilson v R* CA380/2019 (and appeal in *Poi v R* [2020] NZCA 312).

[62] At [2]-[5].

[63] At [34].

[64] At [36]. Similarly, in *Clarke v R* [2021] NZCA 96, the Court noted that Mr Clarke's history of systemic deprivation had likely impacted his

choices and diminished his moral culpability and then simply concluded that “We are therefore satisfied that the necessary causative link”.

[65] *R v Kingi* [2021] NZHC 140.

[66] *Mau v R* [2021] NZCA 106 at [33]. Albeit with less explicit language, the same approach was adopted in *R v Asipnall-Su’a* [2020] NZHC 3022.

[67] *R v Jury* [2020] NZHC 2618.

[68] At [1]-[5].

[69] At [54].

[70] At [54].

[71] At [56].

[72] At [56].

[73] *Keenan-Fry v R* [2021] NZHC 562.

[74] At [32].

[75] *Carr v R*, above n 45, at [65].

[76] See *R v Karaitiana* [2020] NZHC 91.

[77] See Oliver Fredrickson *Getting the Most out of Section 27 of the Sentencing Act 2002* (2020) October Māori LR.

[78] *R v Ipeelee* (2012) SCC 13, [2012] 1 SCR 433 at [83].

[79] At [83].

[80] *Moses v R*, above n 56.

[81] *Carr v R*, above n 45, at [65].

[82] See, for example: *Keil v R* [2017] NZCA 563; *Arona v R* [2018] NZCA 427; *Davidson v R* [2020] NZCA 230; *Nuku v R* [2021] NZHC 410.

[83] *Nuku v R*, above n 82.

[84] *Moses v R,* above n 56, at [46]. Originally outlined in *R v Taueki* [2005] 3 NZLR 372, (2005) 21 CRNZ 769.

[85] See: *Churchwood v R* [2011] NZCA 531. This involved the brutal and premeditated murder of a 78 year old woman.

[86] See: *E (CA689/10) v R* [2011] NZCA 13. This involved the manslaughter of a 13-month-old child.

[87] See: *Singh v Police* [2021] NZCA 91, (2021) 29 CRNZ 665.

[88] *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ) (emphasis added), citing *Lowe v The Queen* (1984) 154 CLR 606, 610 – 611.

[89] As noted in *Dennis v United States* (1950) 339 US 162, 184 per Frankfurter J.

[90] *R v Ipeelee*, above n 76, at [86], citing R Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001) 39 Osgoode Hall L.J. 469 at 479.

[91] *R v Kea* [2021] NZHC 2753.

[92] *R v Nuku*, above n 82.

[93] *R v Williams* [2020] NZHC 3104.

[94] *R v Kingi* [2021] NZHC 140.

[95] *R v Ruddle* [2020] NZHC 1983.

[96] *R v A* [2021] NZHC 502.

[97] *R v Millwood* [2012] NSWCCA 2 at [69].

[98] *Zhang v R*, above n 40; *Orchard v R*, above n 55; *Crump v R*, above n 55; *Moses v R,* above n 56.

[99] See: Heemi Taumaunu, Chief District Court Judge, "Mai te po ki te ao mārama: the transition from night to the enlightened world" (Norris Ward McKinnon Lecture, University of Waikato, 11 November 2020) at 35.

Te Kōti Matua – High Court

Licences – lake owner licensing commercial activities

Tūwharetoa Māori Trust Board v Taupō Waters Collective Limited

[2021] NZHC 1871
23 July 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

The Tūwharetoa Māori Trust Board sought declarations from the Court about its rights to license commercial activities using Taupō Waters. The

Court made declarations confirming the Board's ability to operate a commercial licensing regime for Taupō Waters.

Licences – lake owner licensing commercial activities – declaratory judgment – Taupō Waters – 2007 deed between the Crown and landowner	
Date	23 July 2021
Case	*Tūwharetoa Māori Trust Board v Taupō Waters Collective Limited* (481 KB PDF)
Citation	[2021] NZHC 1871
Court	Te Kōti Matua – High Court
Judge(s)	Gwyn J
Earlier/later decisions	
Legislation cited	Declaratory Judgments Act 1908, ss 3, 10, 349; Māori Trust Boards Act 1955, s 10; Māori Land Amendment and Māori Land Claims Adjustment Act 1926, s 14; Te Ture Whenua Māori Act 1993, s 18(1)(a); Maritime Transport Act 1994, ss 33M, 33W(4), 33(R); Ngāi Tahu Claims Settlement Act 1998; Te Arawa Lakes Settlement Act 2006; Ngāti Rangi Claims Settlement Act 2019; Te Awa Tupua (Whanganui River Claims Settlement Act) 2017; The Land Act 1948, s 172; Land Act 1924, s 13; Lake Taupō (Crown Facilities, Permits, and Fees) Regulations 2004; Reserves Act 1977, ss 17, 30, 41, 53, 54 and Schedule 1.
Cases cited	*Canterbury Regional Council v Attorney-General* [2009] NZAR 611; *Malthouse Ltd v Rangatira Ltd* [2018] NZCA 621; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444; *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84; *Pouwhare v Kruger* HC Wellington CIV-2009-485-976; *Paki v Attorney General* [2012] NZSC 50, [2012] 3 NZLR 277; *Marshall v Ulleswater Steam Navigation Co* (1871) LR7QB 166; *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321; *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd* (1976) SC 30 (HL); *Mueller v Taupiri Coalmines Ltd* (1900) 20 NZLR 89; *Attorney General v Ngāti Apa* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Ngāti Whatua o Ōrākei v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
Overview and result	The Tūwharetoa Māori Trust Board sought declarations from the Court about its rights to license commercial activities using Taupō Waters owned by Tūwharetoa in light of a 2007 deed recording agreements made between the Trust Board and the Crown. **Held**, the Court declared that the Trust Board has the right to require commercial users to obtain from the Trust Board rights to occupy or use parts of Taupō Waters for commercial activities and to charge commercial users for the same. Further, in the absence of specified exemptions or an occupation or use right granted by the Trust Board, commercial users have no lawful right to occupy or use any part

	of Taupō Waters for commercial activities. Other declarations were made that holders of permits for berthing are not exempt from obtaining an occupation of use right and that the Board was not obliged to grant such rights for any specified term. Finally, a grant of a resource consent to a Commercial User in relation to a commercial activity on Taupō Waters does not exempt a Commercial User from obtaining an occupation or use right from the Trust Board as the owner of Taupō Waters and the Trust Board may grant occupation or use rights notwithstanding a management plan promulgated by the Taupō-nui-a-Tia Management Board.

Kōrero whānui – Background

This case was about the interpretation of a 2007 deed between the Crown and the Tūwharetoa Māori Trust Board (Tūwharetoa). The 2007 Deed contains agreements reached between Tūwharetoa and the Crown about rights and interests vested in Tūwharetoa and held by the Crown and the public over the land comprising the bed of Taupō Moana (Lake Taupō), the bed of Te Awa o Waikato (Waikato River) from Lake Taupō to Huka Falls, and the beds of some associated waterways, collectively referred to as “Taupō Waters”.

Taupō Moana is a taonga of Ngāti Tūwharetoa, and embodies the mana and rangatiratanga of Ngāti Tūwharetoa (see [15]).

Tūwharetoa applied to the Court for declarations about the meaning and effect of the 2007 deed.

Outlining the subject matter of the case, the Court said (at [4]):

> The public’s general freedom of entry to and access of Taupō Waters for non-exclusive, non-commercial recreational use is not in dispute. It is the rights of the Trust Board in relation to various entities and other persons who presently occupy and/or use parts of Taupō Waters for commercial activities (Commercial Users) that are in dispute. The Trust Board seeks the declarations in the context of negotiations between the Trust Board and Commercial Users of Taupō Waters (including the users represented by the respondent, Taupō Waters Collective Limited (the Collective)), regarding a proposed commercial licensing regime for Taupō Waters. The Trust Board seeks declarations to clarify the nature and extent of its rights under the 2007 Deed, in particular, its rights to: (a) grant rights of occupation or use ... (licences), in respect of commercial activities and certain private structures in or on Taupō Waters; and (b) charge for such licences.

Participants

The Trust Board is the fee simple owner of Taupō Waters, which has the status of Māori freehold land under Te Ture Whenua Māori Act 1993.

The Collective is a representative body for certain Commercial Users of Taupō Waters. It ended up not participating directly in the hearing.

However, the Court appointed a lawyer to make arguments to contradict the position advanced by the plaintiff.

The Attorney-General also took part in this case as an intervenor. The Crown's submissions supported the Tūwharetoa position on the issues.

Circumstances leading to the 2007 deed and Tūwharetoa proposals to licence commercial users of Taupō Moana

> [16] Negotiations between Ngāti Tūwharetoa and the Crown led to an agreement in 1926 whereby, among other things, the general public were to be allowed access to the Lake Taupō fishery (the 1926 Agreement). The bed of Lake Taupō and the bed of the Waikato River extending from Lake Taupō to and inclusive of Huka Falls, together with the right to use the respective waters, were subsequently declared to be the property of the Crown under s 14 of the Māori Land Amendment and Māori Land Claims Adjustment Act 1926 (the 1926 Act). By proclamation on 7 October 1926 (as amended by further proclamation on 18 February 1927) under s 14(4) of the 1926 Act, the beds of the rivers and streams flowing into Lake Taupō (as described in the schedule to the proclamation) were declared to be Crown land.
>
> [17] Ngāti Tūwharetoa disputed that the agreement negotiated with the Crown in 1926 included the vesting of title to the bed of Lake Taupō and the Waikato River extending from Lake Taupō to and inclusive of the Huka Falls or the beds of rivers and streams flowing into Lake Taupō, and sought the return of those lands. The Crown and the Trust Board agreed, by the 1992 Deed, that ownership of Taupō Waters should be revested in the Trust Board to be held in trust in accordance with the terms of the 1992 Deed.
>
> [18] By the cumulative effect of orders made by the Māori Land Court on 22 September 1993, 14 December 1999, 27 February 2001, 23 August 2001 and 14 April 2003, Taupō Waters was vested in the Trust Board; and Taupō Waters was declared to be Māori freehold land under the Te Ture Whenua Māori Act 1993. On 7 December 2004, certificates of title as Māori freehold land were issued in the name of the Trust Board for the Taupō-nui-a-Tia Block and the Te Awa o Waikato ki te Toka o Tia Block.
>
> [19] On 10 September 2007, following negotiations regarding the nature and extent of the Trust Board's rights under the 1992 Deed, the Crown and the Trust Board entered into the 2007 Deed. The 2007 Deed records (among other things) that it is an agreement to clarify legal issues, and that it revokes and replaces the 1992 Deed. Clause 1.3 of the 2007 Deed recites, that, through the 1992 Deed, the Crown agreed that ownership of the Taupō Waters should be vested in the Trust Board to be held in trust (in accordance with the 1992 Deed) for:
>
>> (a) in relation to the bed of Lake Taupō, the beneficiaries of the Trust Board;
>>
>> (b) in relation to the beds of the specified part of the Waikato River and certain rivers or streams flowing into Lake Taupō, the members of the Ngāti Tūwharetoa hapū who adjoin such rivers or streams; and

> > (c) in relation to all such beds, the common use and benefit of all the peoples of New Zealand to continue to have freedom of entry to, and access upon, such beds as set out in the 1992 Deed.
>
> [20] On 24 March 2009, the Taupō Waters Trust was established by order of the Māori Land Court to, among other things, administer the land comprising Taupō Waters. The Trust Board is the trustee of the Taupō Waters Trust. The Taupō Waters Trust presently operates under an amended trust order dated 20 November 2015.
>
> [21] The Taupō-nui-a-Tia Management Board (the Management Board) was established to manage Taupō Waters in partnership between the Trust Board and the Crown, and the Trust Board appoints four of the eight members of the Management Board. As part of its functions under the 2007 Deed, the Management Board is to determine a management plan for Taupō Waters. The Management Board issued its first management plan in June 2011.
>
> [22] As already noted, Commercial Users, including members of the Collective, presently occupy and/or use parts of Taupō Waters for commercial activities. Some of the commercial activities undertaken on Taupō Waters relate to specific events, others to year-round activities, and some relate to structures. Some Commercial Users have agreed licences with the Trust Board.
>
> [23] The Trust Board wished to take a staged approach to the development and introduction of a licensing regime for commercial activities involving Taupō Waters. It focused initially on major commercial entities and annual events operators. It then moved to engagement with Commercial Users who operate commercial vessels, or occupy structures, on Lake Taupō (Transitory and Structure Users), which included some members of the Collective. As at the date of hearing, it had not commenced substantive engagement with commercial operators on the waterways flowing into Lake Taupō or with commercial fly-fishing guides.
>
> [24] In early 2013, the Trust Board requested various Transitory and Structure Users, including members of the Collective, to register with the Trust Board if they were undertaking commercial activities on Taupō Waters.
>
> [25] Between 2013 and March 2017, there were discussions between the Trust Board and Commercial Users concerning the terms and conditions on which the Trust Board would grant rights by way of written licence to the Transitory and Structure Users, to enable them to occupy and/or use parts of Taupō Waters for commercial purposes.

Tūwharetoa commenced this case in 2017 to assist it to engage with commercial users of Taupō Moana over licensing.

Kōrerorero – Discussion

Relevant portions of the 2007 Deed relied on by the Trust Board

Tūwharetoa stressed that the public's general freedom of entry to and access for non-exclusive, non-commercial recreational use of Taupō Waters is not in dispute. (See [27].)

The 2007 deed confirms that, with some exceptions, Tūwharetoa has the right to grant rights of occupation or use for commercial and private structures and other activities, and to charge for these rights. (See [27]-[36].)

The Court recorded the declarations sought by Tūwharetoa:

> [37] The Trust Board seeks the following declarations in respect of the 2007 Deed:
>
> > (a) A declaration that the Trust Board has the right under cl 2.5.1 of the 2007 Deed to:
> > (i) require the Commercial Users to obtain from the Trust Board rights to occupy or use parts of Taupō Waters for commercial activities; and
> > (ii) charge Commercial Users for the same.
> >
> > (b) A declaration that in the absence of:
> > (i) an exemption under cl 2.5.5 of the 2007 Deed; or
> > (ii) an occupation or use right granted by the Trust Board under cl 2.5.1 of the 2007 Deed;
> > the Commercial Users have no lawful right to occupy or use any part of Taupō Waters for commercial activities.
> >
> > (c) A declaration that Commercial Users who hold permits under cl 2.5.5(c) of the 2007 Deed are not exempt from obtaining an occupation or use right from the Trust Board under cl 2.5.1 of the 2007 Deed to undertake the commercial activities on Taupō Waters.
> >
> > (d) A declaration that the provisions of the Reserves Act 1977 do not require the Trust Board to grant an occupation or use right for a term of 33 years or any other specific term.
> >
> > (e) A declaration that the grant of a resource consent to a Commercial User in relation to a commercial activity on Taupō Waters does not exempt any such Commercial User from obtaining an occupation or use right from the Trust Board as the owner of Taupō Waters.
> >
> > (f) A declaration that the Trust Board may grant occupation or use rights under cl 2.5.1 of the 2007 Deed notwithstanding the establishment, enforceability and/or validity of any management plan promulgated by the Taupō-nui-a-Tia Management Board.
> >
> > (g) A declaration that the occupation or use of any part of Taupō Waters for commercial activities:
> > (i) does not constitute the exercise of any public right of navigation over Taupō Waters; and

> (ii) is not incidental to the exercise of any public right of navigation over Taupō Waters.

The respondent, the Collective, opposed these declarations and had sought its own, competing, set of declarations to the effect that holders of berths and landing permits do not have to pay a fee to occupy or use Taupō Waters, there is no basis arising from the 2007 deed to enable the Trust Board to require payment to issue consent to operate a commercial business on Taupō Waters, that some recreational activities provided for commercial gain by operators are within the recreational use exemption agreed in the 2007 deed, the management board is obliged to produce a management plan for both commercial and non-commercial recreational use (and to produce such a plan in accordance with s 41 of the Reserves Act 1977), that as water is excluded from the meaning of Taupō Waters in the 2007 deed any charges by the Board must only be for actual infringements of the bundle of rights vested in the Board and not for use of the water itself. (See [38]-[40].)

Approach to interpretation

The Court described its approach as interpretation of a contract, rehearsing common law about the use of background materials to address any ambiguity.

Upholding the rights of a landowner was a particular focus of Tūwharetoa in this case. The case does not engage in any detail with Tūwharetoa rights and obligations in the exercise of its tino rangatiratanga over Taupō Waters beyond being a landowner, or whether Tūwharetoa does in fact have rights akin to ownership rights over the water above the bed of the land described as Taupō Waters and the regulatory impact of these interests on members and non-members of the iwi. In that sense the case leaves unexplored, for another time possibly, Te Tiriti o Waitangi dimensions of Tūwharetoa interests that go beyond the 2007 deed it entered into with the Crown and the revesting of the lands comprising Taupō Waters in Tūwharetoa.

The Court described the landowner rights approach thus:

> [43] The revesting of freehold title to Taupō Waters in the Trust Board was a significant element in addressing the long-standing grievances of Ngāti Tūwharetoa in relation to Lake Taupō and associated waterways. In the Trust Board's submission, in those circumstances, where the fundamental intent is the restoration of title to Ngāti Tūwharetoa, in the absence of express words to the contrary, the 2007 Deed should be construed in a way that minimises the limitations that are placed on the Trust Board's ability to exercise the full legal rights of a landowner, including the power to grant rights of occupation and use.

Declaratory judgments proceedings under the Declaratory Judgments Act 1908 give a discretion to the court to decide whether or not to make declarations sought. Further, s 349 of Te Ture Whenua Māori Act expressly preserves the jurisdiction of the High Court under the Declaratory Judgments Act notwithstanding that the land at issue is Māori freehold land where rights of use and occupation would normally be addressed in the Māori Land Court. Here the Court was satisfied it was appropriate to address the declarations sought by Tūwharetoa. (See [44]-[50].)

Issues for determination

The Court addressed the case through deciding six issues posed by the parties:

> [56] The parties agreed on a statement of the issues which the Court must consider in order to determine whether or not to grant the declarations sought by the Trust Board, or the alternative declarations sought on behalf of the Collective. These issues relate to:
>
> > (a) first, the nature and extent of the Trust Board's legal title;
> >
> > (b) second, whether a common law right of public navigation exists in respect of Taupō Waters;
> >
> > (c) third, the Crown's power to license;
> >
> > (d) fourth, whether an exemption for holders of berthing and launching permits exists;
> >
> > (e) fifth, recreational use activities that exclude the general public; and
> >
> > (f) sixth, the role of the Management Board, the management plan, and the Reserves Act.

Nature and extent of the Trust Board's title

The first issue turned on whether the Trust Board's ownership of the lakebed and other lands comprising Taupō Waters excluded ownership of the space above the land occupied by the water column of the lakes and waterways. By the time of the hearing, this issue was not advanced by the Collective in opposition to Tūwharetoa. (See [57]-[59].)

Common law right of public navigation

The second issue was whether a common law right of public navigation exists in respect of Taupō Waters? Had a public use right of navigation become established for the waters running over the lands known as Taupō Waters? (This section of the judgment is from [60]-[107].)

Counsel assisting the Court submitted that a common law right of public navigation can be established in respect of non-tidal waters, such as Lake Taupō, in particular where there has been a long public use for a given purpose. However, counsel assisting conceded that if the Court were to find there was no common law right of public navigation before 1926, it is unlikely that a right arose by use during the period of Crown regulation of Taupō Waters.

The Attorney-General submitted that, unlike a tidal water way, there is no general common law right of public navigation in non-tidal rivers or inland lakes; a navigable, non-tidal river or a navigable lake may become a highway for the purposes of navigation if there has been an express or implied dedication by the owner of the bed or where, together with statutory or other recognition, the bed is vested in the Crown by a long period of public use for that purpose. Generally in New Zealand, legislation has provided for use of lakes. The Crown submitted that the 1992 and the 2007 deeds agreed between the Crown and Tūwharetoa proceeded on the basis there had been no dedication of Taupō Moana as a highway and clauses in those deeds are inconsistent with dedication as highway. Any acquiescence by Tūwharetoa in use of Taupō Waters by the public should not be interpreted as indicating a diminution of Tūwharetoa ownership rights.

The Trust Board submitted that there was clear evidence that commercial use of Taupō Waters was not free but was licensed and regulated by the Crown. Further that it was for the Collective to prove that a common law right of public navigation had been established and this was not the case here. Further, (at [81]), "[t]he power to license and charge for commercial use now sought to be exercised by the Trust Board as the fee simple owner of Taupō Waters is directly analogous to the power that the Crown had in respect of commercial activities upon Taupō Waters." The predominant mechanism used in New Zealand for lake access has been legislation reflecting an absence of an assumption or presumption of a pre-existing public right of use. The only dedication for public use in the 2007 deed is for non-commercial recreational use by the public free of charge, itself constrained in important respects by detailed provisions in the deed. The Trust Board submitted, at [84], that:

> There is no right of access for commercial navigation or other commercial purposes protected by the 2007 Deed. To the contrary, the 2007 Deed proceeds on the basis that the Trust Board can license and charge fees for commercial activities and private structures, except where an express exemption is provided in the Deed.

The Court agreed with the Attorney-General and the Trust Board that there is no evidence a common law right of public navigation existed before 1926 and that, had such a right existed, it is highly likely it was extinguished noting the 1926 legislation (Act and harbour regulations), s 172 of the Land Act 1948 (no rights against the Crown created by user only) and the history of continuous Crown regulation. The Court noted (at [94]) that "[a]lthough the 1992 and 2007 Deeds themselves could not have extinguished a common law right, had one existed, nonetheless they appear to be drafted based on the presumption a common law right did not exist." And:

> [95] Even if a common law right of public navigation did exist, the right to navigation is not necessarily a right to navigate for all purposes and without charge when deriving an economic benefit from the activity.
>
> [96] While the Trust Board acknowledged in the 1992 Deed that recreational use and enjoyment has always been acceptable to Ngāti Tūwharetoa – and that is reflected in the provisions for non-commercial recreational access and use in both the 1992 and 2007 Deeds – since 1992 it has taken active steps to make it clear that Commercial Users do not have an unconstrained right to use and engage in commercial activity on Taupō Waters without the

> Trust Board's consent. There has been no express or implied dedication by the Trust Board in the period since 2007.

No inference could be drawn from the circumstances of Lake Rotorua, itself within the domain of a different iwi. Further, *Tamihana Korokai* established that acquiescence to allow recreational use did not amount to surrender of rights.

Harbour legislation was evidence of regulation and control rather than a right of free commercial navigation (at [102], citing *Ngati Apa*).

The Collective pointing to recreational activities on the lake having the status of "permitted activities" under the RMA did not advance matters. The effect of designation is that a resource consent is not generally required to carry out the activity but it does not impact on the need to obtain the approval of the landowner (at [104]).

The Court considered, but did not decide, a submission by Tūwharetoa that there were unextinguished customary rights that affected whether a right of navigation was established (see [86] and [97]).

Concluding on the issue of whether a right of navigation was established at common law the Court said:

> [105] To the extent that there may have been a common law right of public navigation in favour of the public prior to 1926 that extended to personal use, which I do not accept has been established on the material before me, any such right was extinguished or overridden by:
>
> > (a) the statutory declaration in the 1926 Act that the beds of Taupō Waters, together with the right to use the respective waters, are the property of the Crown; and
> >
> > (b) the Crown's subsequent licensing of the operation of commercial vessels on Taupō Waters.
>
> ...
>
> [107] It is implicit ... that the Trust Board's powers in relation to Commercial Users are not limited by an asserted common law right of public navigation. ... However, I emphasise my conclusion that a common law right of public navigation has not been established, and the Collective needs to do more than simply assert one may exist, in order to rebut the clear meaning of the 2007 Deed.

Crown power to license

The Court declined to determine a pleaded, but un-argued, issue about whether or not Crown regulatory power was preserved under s 14 of the 1926 Act to the exclusion of Tūwharetoa rights of control as landowner. (See [108]-[111].)

Exemption for holders of berthing and launching permits

Next the Court examined whether members of the Collective were exempt from licensing because of cl 2.5.5 of the 2007 Deed. After setting out the

Board's right as owner to grant rights of occupation a number of exceptions are specified for persons who do not have to obtain any right of occupation or use from the Board:

> (a) persons on Taupō Waters pursuant to clause 2.2.1, including non-commercial anglers and non-commercial boaters from whom the Crown may charge and collect fees;
>
> (b) the Crown in respect of existing structures listed in Schedule 3;
>
> (c) the holders of berthing or launching permits issued by the Harbourmaster, in respect of berths, wharves or ramps or other structures, details of which structures are set out in Schedule 3;
>
> (d) the owners of the existing private structures listed in Schedule 5, in respect of such structures, provided they comply with clause 2.5.2; and
>
> (e) the holders of mooring permits issued by the Harbourmaster, in respect of such moorings, details of which moorings are set out in Schedule 6.

Also relevant was the fact that the Crown, by cl 2.4 of the 2007 Deed, does not have to obtain a right of occupation for its existing structures (including their maintenance, repair and replacement).

Tūwharetoa sought a declaration that Commercial Users who hold permits under cl 2.5.5(c) of the 2007 Deed are not exempt from obtaining an occupation or use right from the Trust Board under cl 2.5.1 of the 2007 Deed to undertake commercial activities on Taupō Waters. (See [115].)

The Court determined that holders of berthing or launching permits were not wholly exempt from Tūwharetoa licensing by reason of the exception contained in cl 2.5.5(c) of the 2007 Deed. The scope of the exception was limited to the occupation and use of the specified kinds of structures and not all commercial activities carried out on Taupō Waters. (See [126]-[139].)

Role of the Management Board, the management plan, and the Reserves Act

Managing Taupō Waters as if it were a recreation reserve under the Reserves Act 1977 was the next issue. The Collective submitted (at [144]) the Management Board, as the administering body of Taupō Waters, must prepare a management plan; and when doing so, must include conditions and/or restrictions for the management and regulation of the commercial use of Taupō Waters, and must follow the procedural requirements in s 41 of the Reserves Act.

> [156] Clause 1.7.2 of the 2007 Deed provides the Management Board is to manage Taupō Waters “as if” it were a recreation reserve. The general role to be carried out by the Management Board is set out at cl 2.3.1 of the 2007 Deed:
>
> > ***2.3 Management of Taupō Waters***
> > 2.3.1 Management of Taupō Waters as if a reserve shall be by the Taupō-nui-a-Tia Management Board comprising

> eight members, four of whom shall be appointed by the Minister having regard to the interests of the Crown, conservation, recreation, tourism and freshwater sciences to represent the public interest and four of whom shall be appointed by the Board to represent Ngāti Tūwharetoa's interests.

> [157] While cl 1.7.2 requires the Management Board to manage Taupō Waters "as if" it were a recreation reserve, that obligation is qualified by a number of specific provisions in the 2007 Deed. Those qualifications significantly impact on the extent to which the provisions of the Reserves Act can be applied to the Management Board's role, both in terms of substantive powers and obligations and procedural requirements. Those qualifications include:
>
> > (a) "subject to the provisions of this Deed" in cl 2.3.4(a);
> >
> > (b) "as far as practicable, and where not inconsistent with this Deed" in cl 2.3.4(b);
> >
> > (c) "taking into account the provisions of this Deed" in cl 2.3.4(c); and
> >
> > (d) "perform such further functions as are mutually acceptable to the parties to this Deed" in cl 2.3.4(e).
>
> [158] As to the Management Board's substantive role, first, the functions of the Management Board at cl 2.3.4(d) do not include any reference to the Management Board considering and deciding applications for commercial activities. Pursuant to cl 2.3.4(e), any Management Board functions beyond those in cl 2.3.4 (a)-(d) must be "acceptable to" the Trust Board and the Crown.
>
> ..
>
> *Conclusion*
>
> [167] While it is correct that the 2007 Deed requires the Management Board to prepare a management plan for Taupō Waters, I do not accept the Collective's argument that it is required to do so in accordance with all of the provisions of s 41 of the Reserves Act, where to do so would be inconsistent with the 2007 Deed. I conclude there is nothing before me about the Management Board or the management plan to prevent the declaration sought by the Trust Board.
>
> [168] I also conclude that the Management Board is not required to prepare a management plan that includes conditions and/or restrictions for the management and regulation of the commercial use of Taupō Waters. To do so would be inconsistent with the provisions of the 2007 Deed.

Recreational use activities that exclude the general public

The final issue for the Court was recreational use activities that exclude the general public. The Collective had raised an argument that the Management Board regulated these. The Court disagreed finding, at [184], that the Trust Board, and not the Management Board, has power and responsibility to approve (and charge for) all commercial activities on Taupō Waters, including commercial recreational activities.

Ngā whakahaere rauemi – natural resource management – assessment of cultural effects – consideration of alternatives

Tauranga Environmental Protection Society Incorporated v Tauranga City Council

[2021] NZHC 1201
27 May 2021

Report by Tom Bennion

Whakataunga – Overview and result

Ngā whakahaere rauemi – natural resource management – appeal – error of law – assessment of cultural effects wrong – effects on Ngāti Hē – consideration of alternatives wrong	
Date	27 May 2021
Case	*Tauranga Environmental Protection Society Incorporated v Tauranga City Council* (920 KB PDF)
Citation	[2021] NZHC 1201
Court	Te Kōti Matua – High Court
Judge(s)	Palmer J
Earlier/later decisions	*Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2020] NZEnvC 43.
Legislation cited	Resource Management Act 1991, ss 2, 3, 5, 6(e), 7(a), 8, 32, 43, 45, 58, 62(3), 67(3), 75(3), 104, and 299; New Zealand Settlements Act 1863; Tauranga District Lands Act 1868; Māori Affairs Act 1953, s 439; State-Owned Enterprises Act 1986; Treaty of Waitangi, art. 2; Interpretation Act 1999, s 5; Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; Civil Aviation Act 1990; High Court Rules 2016, r 20.19.
Cases cited	*Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 72; *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA); *Edwards v Bairstow* [1956] AC 14 (HL); *Hu v Immigration Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508; *SKP Incorporated v Auckland* Council [2018] NZEnvC 81; *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879; *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593; *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283; *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1; *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA); *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768; *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577; *Trans-Tasman Resources Ltd v Taranaki-*

	Whanganui Conservation Board [2020] NZCA 86, [2020] NZRMA 24; *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC); *Wellington International Airport Ltd v New Zealand Air Line Pilots Association Inc Industrial Union of Workers* [2017] NZSC 199, [2018] 1 NZLR 780; *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387; *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki* Kawerau [2003] 2 NZLR 349; *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388.
Overview and result	Appeal from an Environment Court decision upholding the grant of consents for relocation of overhead powerlines from an existing site adversely affecting Māori land to a new site near a marae and kōhanga reo. **Held**, the Environment Court wrongly concluded that there were minimal adverse cultural effects at the new site despite the affected hapū saying otherwise. Also, the Environment Court failed to properly analyse and apply planning documents which required a rigorous assessment of alternatives where Māori cultural interests were adversely affected by a proposal. The matter was referred back to the Environment Court for reassessment and possible further evidence on alternatives.

Kōrero whānui – Background

Ngāti Hē hapū is a hapu of Ngāi Te Rangi of Tauranga. The lands of Ngāi Te Rangi were confiscated in 1864 and two blocks were "awarded" back to Ngāti Hē in 1884 at the Mangatapu Peninsula near central Tauranga. (See [4].)

Some of this land was lost under public works legislation for a motorway and electricity transmission lines and some further land was lost through inability to pay rates. A Treaty settlement in 2013 recorded these events and their negative impact on Ngāi Te Rangi. (At [5]-[6].)

One of these impacts occurred in 1958 when overhead electrical lines (the A-line) were installed despite opposition from hapu of Ngāi Te Rangi. The main impact of the A-line was on lands belong to the Ngāi Tūkairangi hapu of Ngāi Te Rangi which the lines passed over. The taking for the electricity lines was not adequately notified and the owners never applied for compensation (at [11]).

In 1995 a second set of electrical lines (the B-line) were installed along or below the ground, with the expectation that the old overhead A-line would eventually be removed.

In 2017 Transpower duly applied for resource consents to move the overhead A-line away from Ngāi Tūkairangi lands. But instead of undergrounding the lines, Transpower proposed to move them to new poles over 30 metres high, several hundred metres away from the existing poles, but now passing over land belonging to Ngāti Hē containing their main marae (Maungatapu) and a kōhanga reo (early learning Māori language school). In particular, one pole 34.7 metres tall would be placed at one end of a beach which the marae faced onto.

After commissioners approved the Transpower proposal, an appeal was brought by The Tauranga Environmental Protection Society (TEPS), with Maungatapu marae trustees, Ngāi Te Rangi and Ngāi Tūkairangi joining as s 274 parties. Ngāi Tūkairangi supported the new location for the overhead line, the marae was opposed.

The Environment Court upheld the decision of the commissioners, finding that moving the A-line to a new overhead site removed old negative impacts but created some new negative effects, but that the alternative of laying the A-line "on or under the seabed, or in ducts attached to the bridge, "appear from the evidence to be impracticable", while technically feasible, was very costly, and the National Coastal Policy Statement and regional and district planning documents did not, when read as a whole, require the proposal to be declined. (See [25].)

Kōrerorero – Discussion

The High Court decided the case through examining five issues.

Issues

(a) Was the Environment Court wrong to "bundle" the effects together?

The Environment Court had not erred in considering positive effects on Ngāi Te Rangi of removing the existing A-line alongside the negative effects of moving to a new site over the Maungatapu marae. At [35]:

> The effects on Matapihi and Maungatapu seem more independent of each other. Perhaps they could be separately considered. But that is not the argument advanced here.

(b) Was the Environment Court wrong in its findings about adverse effects?

The Environment Court erred in two respects. Having noted that Ngāti Hē considered the cultural and visual effects on them would be adverse, the court was not entitled to conclude: "we do not find the proposed realignment to have cumulative adverse cultural effects on Ngāti Hē" on the basis that impacts from the existing A-line location would be removed (at [48(p)]). Nor was it open to that court to find that visual effects on the marae and bay would be 'de minimis' given the height of the new lines parallel with the state highway. (At [50], [61].)

> [62] The evidence is that, in Ngāti Hē's view, Pole 33C will have a significant and adverse impact on their use and enjoyment of the Marae and on their cultural relationship with Te Awanui, even taking into account the removal of the existing adverse effects. For the purposes of IW 2, this constitutes a significant adverse effect on Rangataua Bay, an "area of spiritual, historical or cultural significance to tāngata whenua" identified in ASCV 4. For the purposes of NH 4, taking into account the considerations in NH 4A, it constitutes a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3. I consider those are the

> true and only reasonable conclusions. Even though cultural effects may be intangible, they are no less real for those concerned, as the evidence demonstrates.

The High Court continued:

> [65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.
>
> [66] Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Incorporated v Auckland Council*, approved by the High Court in 2018 that:
>
>> … persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

In addition, the regional coastal plan noted that "Decision makers shall recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua." (At [67].)

(c) Did the Environment Court err in its approach to Part 2 of the RMA?

Yes. The Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*] at [10] and [30] and the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 have directed decision-makers to undertake a very close textual analysis of relevant plans and policy statements if it appeared that there was conflict between them, and then only if the conflict remained unresolved, to refer to Part 2. The EC had identified a conflict but had not undertaken the close analysis that these decisions required, instead, the Court had jumped to a conclusion that "the proposal was "more appropriate overall" than the status quo." (At [88].)

(d) Did the Environment Court err in interpreting and applying the planning instruments?

The Court noted recent cases confirming the importance that the RMA places on properly assessing Māori cultural relationships with ancestral lands and waters when they are adversely affected by proposals:

- *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [29].
- *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].
- *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248. (under appeal)
- And *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd* [2020] NZHC 2768 which said:

> [102] … where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e), 6(g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. …

The Environment Court erred in finding that there was a conflict between directions to 'avoid' effects in the New Zealand Coastal Policy Statement (NZCPS) and a directive to provide for infrastructure in the National Policy Statement on Electricity Transmission (NPSET) but then not undertaking the necessary careful analysis of the provisions of the planning documents before moving to an 'overall' assessment (at [118]). The Court ought to have considered the comprehensive Bay of Plenty Regional Coastal Environment Plan (RCEP) and its application of both the NZCPS and NPSET and iwi management plans (at [124]).

Given that the only available finding on the evidence was that the proposal would have a significant adverse effect on cultural values (as noted above), policies in the RCEP that reconciled the NZCPS and NPSET came into play, and they required this outcome to be avoided 'where practicable' and unless there were "no practical alternative locations available” (at [129]).

(e) Was the Environment Court wrong in its assessment of alternatives, including the status quo?

Given the above errors, the Environment Court's assessment of alternatives on a 'may be relevant' basis was an error. It had to consider "the practicability, practicality, and possibility of alternatives". The Court was "required to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal” under the RCEP which required avoiding the significant cultural effects if alternatives met these tests. (See [143].)

> [146] The Court misdirected itself in law by not interpreting and analysing the “practicable”, “possible” and “practical” in the context of the policies and the proposal. It erred in failing to recognise that

> the practicability, practicality or possibility of alternatives are directly relevant to whether the proposal could proceed at all.
>
> [147] The "practicability" of avoiding adverse effects in Policy IW 2 relates to cultural values. The emphasis on the Treaty of Waitangi and cultural values, and potential for cultural bottom lines in the RMA and planning instruments suggests that cultural values should not be underestimated. Issue 7 of the RCEP suggests they are "often not adequately recognised or provided for". It is always difficult to put a price on culture, which is what is implied in a finding that the cost of an alternative is "too" high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not of the applicant. But the cost of network infrastructure is eventually felt by all electricity consumers, as well as the Crown. I do not consider, in this context, that cost must be irrelevant to practicability or to practicality.

The High Court did not rule out the possibility that the Environment Court might ultimately reach a conclusion that the cost of alternatives was too high to be 'practicable'. But it had not undertaken that analysis. (At [148].)

In this case RCEP policies directed the Court to focus closely on whether alternatives were possible which did not have significant cultural effects – and such possibilities did exist (such as placing cables on or alongside the existing bridge). This was not a directive to focus simply on cost. (At [149].)

There were other alternatives such as a different location of the offending new pole away from the marae. (See [151].)

> [153] Finally, Mr Gardner-Hopkins submits Transpower has an obligation to address the location of the transmission lines as an ongoing breach of the Treaty of Waitangi. Mr Beatson submits it does not. This was not fully argued before me and the issue is not part of the appeal, so I do not comment further. Neither do I further consider how it might affect the obligations on the decision-maker in relation to the proposal. But there is no doubt that further discussion between Transpower and Ngāti Hē over these issues would be consistent with the principles of the Treaty of Waitangi, given the unhappy history of the transmission lines at issue.

Ngā tākupu – Comments

Assuming it survives any appeals, this decision is significant for three reasons:

How cultural effects are treated

The case is complex because while the proposal would have positive effects in removing existing overhead lines from Ngāi Tūkairangi hapu lands, it would impose new effects on Ngāti Hē because the new line would appear near their marae. But the High Court approach to how adverse cultural effects should be assessed is in fact relatively straightforward. Ngāti Hē cultural experts stated that the effect on Ngāti Hē would be significant even after they considered the positive effects of removing existing lines. That was uncontested evidence and should not therefore have been 'read down' by the Environment Court. The significance is in the clarity of the High Court statements about how expert cultural evidence should be treated and in particular this comment:

> [66] Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA.

Approach to consideration of alternatives

Under the RMA, whether alternatives have to be considered, and the approach to considering alternatives is governed first, by settings within the Act itself depending on the nature and effects of the activity, and second, by planning instruments. For example, if adverse effects of an activity are significant, if there is a discharge of contaminants, or if a designation is sought, alternatives must be considered.

An example of a planning instrument requiring alternatives to be considered is policy 23 of the NZ Coastal Policy Statement 2010 which provides:

> Policy 23 Discharge of contaminants
>
> (2) In managing discharge of human sewage, do not allow:
>
> (a) discharge of human sewage directly to water in the coastal environment without treatment; and
>
> (b) the discharge of treated human sewage to water in the coastal environment, unless:
>
>> (i) there has been adequate consideration of alternative methods, sites and routes for undertaking the discharge; and
>>
>> (ii) informed by an understanding of tangata whenua values and the effects on them.

In this case involving powerlines and their visual effect, the obligation to consider alternatives arose primarily from the fact that some adverse effects would be significant and the regional coastal plan requiring protection of outstanding features and landscapes which included Rangataua Bay and the avoidance of adverse effects. (At [135].) This included determining that there were "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable". The Environment Court took the approach that, despite these strong directives, the assessment of alternatives was largely a matter for the applicant to satisfy themselves of. It said (at [135(c)]):

> [A]n applicant is not required to undertake a full assessment or comparison of alternatives, or clear off all possible alternatives, or demonstrate its proposal is best in net benefit terms.

And

> All that is required is a description of the alternatives considered and why they are not being pursued.

The High Court's key concern about the way in which alternatives were approached was that the strong directives from the planning document required a more intense level of assessment by the decision-maker than the Environment Court suggested, and perhaps most important, the mere fact that alternatives had a very high cost may not be definitive in ruling out that alternative if significant cultural impacts would be avoided by taking that alternative. The 'price of culture' had to be part of the calculation of the cost of alternatives.

In this case, the costs of alternatives were said to be 10 to 20 times higher than the proposal that the commissioner had approved (at [134]).

Assuming this part of the decision stands, this might see more discussion about the general economic value of protecting and enhancing culture in future applications and cases.

Approach to reconciling planning instruments

Before the Supreme Court decision in *King Salmon* concerning a plan change, and the Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council*, which applied the *King Salmon* approach to resource consents, decision-makers used to make an 'overall judgment' as to whether to grant consents or not, which gave them a wide discretion to balance directives in planning documents against other matters, such as the positive effects of a proposal. The Supreme Court decision provides that an 'overall judgment' may be made only if, after a close analysis of the planning documents, there are plainly gaps in relation to the proposal that the decision-maker is considering or the planning documents contradict each other.

In this case, the High Court was critical of the Environment Court for finding a prima facie contradiction between two national policy statements, and moving to an 'overall judgment' before considering whether the regional coastal plan provided guidance on reconciling the apparent contradiction in the high level documents. This part of the decision is a reminder that decision-makers must take seriously statements in national and regional planning documents about the need to protect Māori values.

Concluding comment

Whether this decision results in a better overall development from a cultural point of view remains to be seen. Transpower has said it will walk away from the realignment project if the appeal is granted and then strengthen or replace its infrastructure on Te Ariki Park, which does not require further consent. (See [48](o).)

Te Kōti Whenua Māori – Māori Land Court

Procedure – stay pending appeal – Tūhoe – Te Uru Taumatua

Trustees of Tūhoe – Te Uru Taumatua v Nikora

(2021) 260 Waiariki MB 103 (260 WAR 103)
17 August 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

Partially successful application for a stay of judgment pending appeal. Underlying the appeal about an election process is a question about whether the Land Court has jurisdiction over the trustees of Tūhoe's post-settlement governance entity.

Procedure – stay pending appeal – granted in part – elections – Court jurisdiction over Tūhoe – Te Uru Taumatua	
Date	17 August 2021
Case	*Trustees of Tūhoe – Te Uru Taumatua v Nikora* (236 KB PDF)
Citation	(2021) 260 Waiariki 103 (260 WAR 103)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge C T Coxhead
Earlier/later decisions	*Nikora v Trustees of Tūhoe – Te Uru Taumatua and Te Komiti o Runga – Tūhoe – Te Uru Taumatua* (2021) 252 Waiariki MB 157 (252 WAR 157).
Legislation cited	Te Ture Whenua Māori Act 1993, s 58.
Cases cited	*Hoete v Faulkner – Motiti North C No. 1* (2017) 140 Waikato Maniapoto MB 1 (140 WMN 1); *Tahere v Trustees of Rangihamama X3 A and Omapere Taraire E Trust* (2015) 118 Taitokerau MB 194 (118 TTK 194); *Nicholls v Nicholls – Part Papaaroha 6B* [2013] Māori Appellate Court MB 515 (2013 APPEAL 515); *Nicholls v Nicholls – WT Nicholls Trust* (2013) 55 Waikato Maniapoto MB 288 (55 WMN 288); *Taueki – Horowhenua 11* (2012) 279 Aotea MB 101 (279 AOT 101); *Tito v Tito – Mangakahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 527 (2011 APPEAL 527); *Proprietors of Maraeroa C v New Zealand Forest Products Ltd* (2007) 121 Waikato MB 258 (121 W 258); *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC); *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* [2019] Māori Appellate Court MB 265 (2019 APPEAL 265).
Overview and result	Partially successful application for a stay pending appeal. **Held**, stay ordered in part. The Court had previously made orders requiring the trustees of a post-settlement governance entity,

	Tūhoe – Te Uru Taumatua, to hold election processes for two trustees in response to an application alleging failures on the part of trustees about elections. (In the same case the Court had declined the part of the application that sought removal of trustees.) The Tūhoe trustees did not take any part in those earlier proceedings. The Tūhoe trustees applied to the Court to stay its earlier judgment while the trustees appealed the decision. The trustees contended a stay was necessary to avoid appeal rights being rendered nugatory because it would take some time to obtain judgments on appeal. The trustees contended that at the Māori Appellate Court their appeal would likely be dismissed on the basis that the Court's judgment in *Moke* applied to the situation (court having jurisdiction over a trust over General land owned by Māori). However, the trustees indicated they planned to continue, if that outcome occurred, and pursue a second appeal to the Court of Appeal to have that court rule on the correctness of the approach to jurisdiction adopted by the Appellate Court in *Moke*. The court follows common law when considering whether to issue a stay of judgment, including the following factors: (a) If no stay is granted, will the applicants' right of appeal be rendered nugatory? (b) The bone fides of the applicants as to the prosecution of the appeal; (c) Will the successful party be injuriously affected by this stay? (d) The effect on third parties; (e) The novelty and importance of the question involved; (f) The public interest in the proceeding; and (g) The overall balance of convenience. Considering these factors the Court decided to grant a partial stay of the orders being appealed from: "[16] Given the current timeframes for Tāmati Kruger's term, if the Court was to stay the orders as requested until sometime in the first quarter of 2022, it would in effect be extending Mr Kruger's term as a trustee beyond November 2021. The election process as stated by counsel would usually commence in August 2021, and may have already started. I consider therefore, that the election process in relation to Tāmati Kruger's position should commence as proposed and as ordered by the Court. [17] With regards to Patrick McGarvey's position, I am satisfied that a stay of proceedings should be granted. I think it is clear that the applicants' right of appeal is likely to be rendered nugatory in terms of Mr McGarvey's position. If fresh elections were held prior to the Māori Appellate Court issuing their decision, and the applicants were then successful

	with their appeal, potentially a new trustee would be occupying the position held by Patrick McGarvey for up to nine months. [18] The stay is granted with regards to the fresh election to Patrick McGarvey's position until further order of this Court or the Māori Appellate Court."

Here-turi-kōkā 2021 – additional content online

Te Kōti Pīra Māori – Māori Appellate Court

Injunction – appeal – decision-making vested in trustees – *Baker – Tataraakina C Trust* [2021] Māori Appellate Court MB 308 (2021 APPEAL 308) – Craig Linkhorn

Costs – *Nicholas v The Official Assignee – Lot 6 Deposited Plan South Auckland 34349* [2021] Māori Appellate Court MB 312 (2021 APPEAL 312) – Elizabeth Derby

Ownership of dwelling – *Ratana v Tihi – Ruatoki B Sections 23 and others* [2021] Māori Appellate Court MB 290 (2021 APPEAL 290) – Hinemoana Markham-Nicklin

Te Kōti Whenua Māori – Māori Land Court

Costs – amicable whānau relationships – *MacDonald v MacDonald – Wairau Block XII Section 6C 2C* (2021) 72 Te Waipounamu MB 227 (72 TWP 227) – Elizabeth Derby