

Chapter 11

The Treaty and Human Rights in New Zealand Law: Will the Common Law Presumptions Help or Hinder?

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In the absence of a legislative “Treaty clause”, distinctive collective Maori interests may be advanced or protected by New Zealand courts by reference to the following: the principle of legality protecting certain fundamental common law rights; the nascent “Treaty of Waitangi¹ presumption” of statutory interpretation; the presumption of consistency with international law (especially human rights law), or finally; the legislative framework offered by the *New Zealand Bill of Rights Act 1990* (NZBORA), (specifically its s 6 direction on statutory interpretation,² coupled with its affirmative action³ and minority rights protections).⁴ To date New Zealand judges have tended to consider the common law presumptions together, alongside the NZBORA, without addressing the possible inconsistencies between them. This feature of New Zealand judicial reasoning contributes to the vulnerability of Maori rights by allowing anti-discrimination principles to qualify legislative protection of Maori interests where arguably the “Treaty presumption” should take precedence. It is not difficult to imagine how the presumptions could yield competing interpretative principles in a case implicating Maori rights. Where a statute (without a Treaty clause) contains an ambiguously worded provision conferring a benefit on Maori, if that provision were to be challenged by a non-beneficiary as

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1 Hereafter “the Treaty”.

2 NZBORA, s 6: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

3 NZBORA, s 19(2).

4 NZBORA, s 20.

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