
**THE RELATIONSHIP BETWEEN THE NEW ZEALAND
CROWN AND MĀORI:
A FUTURE FOR FIDUCIARY OBLIGATIONS?**

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INTRODUCTION

[R]econciliation of indigenous rights in the judicial forum will always be a rather limited enterprise. Courts are not truth and reconciliation commissions or like vehicles. But if they are to succeed in their modest role of reconciling rights and interests, the persons who resort to the law must be able to be satisfied that at least a measure of justice has been achieved.

-Hammond J, 2009.¹

In New Zealand, the relationship between the Crown and Māori was founded upon the Treaty of Waitangi. This was signed on 6 February 1840, on behalf of the British Crown and the Māori chiefs of New Zealand. New Zealand is unique in this regard.² The constitutional significance of the Treaty remains unsettled, but the Treaty relationship has a continuing influence in New Zealand politics and society and has been described as having a “status perceivable, whether or not enforceable, in law”.³ However, despite this perceivable legal status, the orthodox legal view of the Treaty is that it is not enforceable in a municipal court unless it has first been incorporated into New Zealand law. This principle was espoused by the Privy Council in *Te Heuheu Tukino*,⁴ and the Court of Appeal has not yet departed from it.⁵ It results from the overriding idea that the New Zealand Parliament is supreme

¹ *Paki v Attorney-General* [2009] 1 NZLR 72 (CA), at [116].

² As compared to other post-colonial states that came under British rule. Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007), at 45 and Philip A. Joseph “The Treaty of Waitangi: A Text for the Performance of Nation” (2004) 4 OUCIJ 1, at 6.

³ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC), at 206.

⁴ *Te Heuheu Tukino v The Aotea District Māori Land Board* [1941] NZLR 590 (PC), at 597.

⁵ However, the extent to which this principle is consistent with earlier overseas authorities has been questioned by Professor Alex Frame, who argues that the Privy Council’s formulation of the principle is considerably more restrictive than the its formulation in the authorities relied upon by the Privy Council (Alex Frame “Hoani Te Heuheu’s Case in London 1940-1941: An Explosive Story” (2006) 22 NZULR 148, at 164-165). Also, the Chief Justice has said that despite the fact that the British Crown’s sovereignty was qualified by the Treaty of Waitangi, it has not been treated as qualified in New Zealand law. Further, she stated that it has not yet been authoritatively determined whether there are any limits on the law-making power of Parliament under the constitution (Sian Elias CJ, in her 2003 article “Sovereignty in the 21st Century: Another spin on the merry-go-round” quoted in Mai Chen “The constitutional future of the Treaty of Waitangi: will the courts play a role?” (2006) 36 NZ Lawyer 7, at 7). Further, President Cooke indicated in *New Zealand Māori Council v Attorney General (Lands case)* [1987] 1 NZLR 641, at 667 that the decision in *Te Heuheu* represented ‘wholly orthodox legal thinking, at any rate from a 1941 standpoint’ (emphasis added).

in its ability to legislate. Therefore, express statutory provisions trump any inconsistent Treaty considerations and common law.⁶

The Crown has expressed a commitment to Māori to achieve ‘fair and final’ Treaty settlements through direct negotiation with Māori groups. In this political process, the Crown attempts to resolve historical Treaty grievances in accordance with the Treaty principles.⁷ The Crown prefers to negotiate with large natural groupings such as iwi, as opposed to individual hapu and whanau.⁸ Once a settlement is reached between the Crown and a claimant group, it will usually be given effect through legislation.⁹ Settlements generally contain Crown acknowledgements of Treaty breaches, accompanied by an apology and financial, commercial and cultural redress.¹⁰ In entering negotiations, the Crown states that it aims to achieve fair, achievable settlements that resolve the claimant group’s sense of grievance.¹¹

During the 1980s and 1990s, a distinct Treaty of Waitangi jurisprudence rapidly developed in the New Zealand Court of Appeal. In doing so, the courts became active in defining their perception of the relationship between the Crown and Māori. In describing the aspects of the relationship, they have articulated that the Crown owes Māori obligations akin to fiduciary duties, and that both Treaty partners have reciprocal duties of good faith. However, within political Treaty settlements, the courts have consistently stated that it is not their place to interfere, because legislation must be passed before settlements will have any legal effect.¹² Therefore, courts have said it is not their place to make declarations regarding the legality of a settlement because to do so would interfere in Parliamentary

⁶ An example of this can be seen in s 4 of the Foreshore and Seabed Act 2004, which expressly barred the jurisdiction of the court to hear and determine and rule, principle or practice of common law and equity relating to the foreshore and seabed area. Although, this Act is to be repealed by the Marine and Coastal Area (Takutai Moana) Bill which has passed its first reading in Parliament, and after public consultation, will be back before the consideration of the House of Representatives by February 2011 (Chris Finlayson “Marine and Coastal Area (Takutai Moana) Bill Passes First Reading” 15 September 2010, The Official Website of the New Zealand Government <<http://www.beehive.govt.nz/release/marine+and+coastal+area+takutai+moana+bill+passes+first+reading>>).

⁷ Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: Healing the past, building a future –a Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, Wellington, 2004) (*Red Book*), at 11. Historical Treaty Settlements are claims arising from Crown acts or omissions before 21 September 1992 (*Red Book*, at 27).

⁸ *Red Book* above n 7 at 44.

⁹ *Ibid*, at 77.

¹⁰ *Ibid*, at 85-99.

¹¹ *Ibid*, at 32.

¹² *Te Runanga o Wharekauri Rebohu Inc v Attorney General* [1993] 2 NZLR 301; *Milroy v Attorney General* [2005] NZAR 562.

sovereignty.¹³ Although, the court has indicated that it could consider claims relating to the settlement *process* if a cognisable right or a distinct matter of law is at issue.¹⁴ Further, where issues have arisen within the negotiating process, the courts are likely to look into the Crown's approach to negotiations where the action is founded on an established ground of law, such as error of law, bad faith, fraud or breach of fiduciary duties.¹⁵

It follows, that within their role in the Crown-Māori relationship, the courts have made indications that fiduciary obligations exist between the Crown and Māori. The extent to which this fiduciary idea can be directly applied was not directly addressed by a New Zealand court until 2007.¹⁶ However, these cases merely increased the uncertainty surrounding the fiduciary idea because statements made by the courts were obiter dictum, and both the High Court and the Court of Appeal explicitly disagreed as to the way fiduciary obligations apply to the Crown in its dealing with Māori. Further, in 2009, the Court of Appeal revisited the fiduciary idea, and in another obiter statement, compounded uncertainty by indicating that notions of fiduciary obligations are not suitable in the New Zealand Crown-Māori context.¹⁷ The Court then suggested that New Zealand should instead develop a common law relational duty of good faith to be imposed upon the Crown and Māori. Thus, this paper aims to consider whether legally enforceable fiduciary obligations could be applied between the Crown and Māori in a way that adequately reflects the unique circumstances of New Zealand's constitution and the Crown-Māori relationship.

In attempting to determine whether there is potential for legal obligations to be enforced between the Crown and Māori within the New Zealand context, this paper will first establish the idea of fiduciary obligations and how these operate in private law. A comparative chapter on Canadian Crown-Indigenous jurisprudence will then illustrate how the idea of fiduciary obligations has been drawn upon to create enforceable obligations within a public law context.¹⁸ The current state of New

¹³ *Te Runanga o Wharekauri* above n 12, at 308-309; *Milroy v Attorney General* above n 12, at [17].

¹⁴ *Greensill v The Tainui Māori Trust Board* HC Hamilton M117/95, 17 May 1995, at 11 and 13 (emphasis added).

¹⁵ *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney General* HC Wellington, CP 344/97, 5 February 1999, at 15 and 18.

¹⁶ *New Zealand Māori Council v Attorney-General (Forests case 2007 -HC)* HC Wellington, CIV-2007-485-95, 4 May 2007 and *New Zealand Māori Council v Attorney-General (Forests case 2007 -CA)* [2008] 1 NZLR 318 (CA).

¹⁷ *Paki v Attorney-General* above n 1.

¹⁸ It is recognised that similar obligations have been imposed in the United States between the Government and Indigenous peoples. However, this will not be considered due to word count limitations and also because Indigenous peoples in the United States have a different constitutional status to New Zealand Māori because they are defined as 'domestic, dependant nations' see Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008), at 200.

Zealand law as to the Crown's obligations to Māori will be examined, by first looking at the early jurisprudence in which the ideas developed, and then three recent cases that have considered whether the obligations can be directly enforced. The final chapter will assess the options that have been proposed by the recent cases and attempt to establish the situations in which obligations that draw on fiduciary law, or duties of good faith can be enforced upon the Crown in its conduct with Māori. Thus the paper aims to determine the extent of the court's role in enforcing obligations that draw upon fiduciary law concepts within the Crown-Māori relationship.

CHAPTER ONE

FIDUCIARY OBLIGATIONS IN THE PRIVATE LAW CONTEXT

1.0 Introduction

As the courts have described the Crown-Māori relationship as containing duties that are similar to fiduciary obligations, the purpose of this chapter is to outline the idea and content of fiduciary obligations and the way they arise in private law. In doing so, it is recognised that “[r]ules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case”.¹⁹ Therefore this chapter attempts to establish the fundamental ideas.

Fiduciary obligations are onerous duties of loyalty enforceable in Equity within certain relationships.²⁰ These obligations go beyond common law duties,²¹ and can also be enforced alongside contractual obligations.²² Generally, fiduciary obligations arise within relationships where one party is vulnerable due to placing trust and confidence in the other to act for their benefit or in pursuance of joint interests.²³ The relationship must be of a ‘special’ nature in which there is close proximity between the parties.²⁴ Thus, arm’s length commercial transactions will rarely give rise to such obligations, because parties can be reasonably expected to govern their relationship through contractual terms.²⁵

¹⁹ *Boardman v Phipps* [1967] 2 AC 46 (HL) cited in *Chirnside v Fay* [2006] NZSC 68; [2007] 1 NZLR 439 (SC), at [76].

²⁰ Where fiduciary obligations have been breached, a wider range of remedies are available than what would be offered under the common law. For example, an account of profits, a constructive trust, rescission and equitable compensation (Patrick Parkinson “Fiduciary Obligations” in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, Lawbook Co, Sydney, 2003) 339, at 340). However, an in depth discussion of these remedies are outside the scope of this paper.

²¹ Patrick Parkinson “Fiduciary Obligations”, above n 20, at 339.

²² *Hospital Products Ltd v United States Surgical Corporation* [1984] 156 CLR 41 (HC), at 96, per Mason J.

²³ Patrick Parkinson “Fiduciary Obligations”, above n 20, at 339.

²⁴ *Saunders v Houghton* [2009] NZCA 610 (CA), at [97] and [104].

²⁵ *DHL International (NZ) v Richmond Ltd* [1993] 3 NZLR 10 (CA), at 22.

1.1 Established fiduciary relationships

Some relationships are regarded as being inherently fiduciary in nature, and the obligations are considered to arise automatically.²⁶ These can include relationships between trustee and beneficiary, solicitor and client, principal and agent and doctor and patient. However, it has been held consistently that these categories are not closed.²⁷ Further, not every duty breached within these ‘inherently’ fiduciary relationships will be a breach of fiduciary obligations.²⁸ This is because breach of a fiduciary obligation involves a breach of loyalty, the concept that is central to fiduciary relationships.²⁹

1.2 Fiduciary obligations arising on the facts

Fiduciary obligations can also be held to arise within relationships that fall outside of the ‘inherently fiduciary’ category. Imposition of fiduciary duties within new relationships requires an examination of the facts to determine whether duties can be justified.³⁰ There is no universally accepted test to determine whether the facts will give rise to fiduciary obligations.³¹ Further, the categories of the fiduciary relationship vary, and the different types of relationship can generate different obligations.³² Where a party to a relationship is held to owe a fiduciary duty, this does not necessarily mean that all fiduciary obligations will apply.³³

In order to determine the existence and nature of fiduciary obligations in a relationship, the facts must be examined, such as any express agreement and the actual dealings between the parties.³⁴

²⁶ *Chirside v Fay* above n 19, at [73].

²⁷ *Hospital Products Ltd* above n 22, at 102; *Frame v Smith* (1987) 42 DLR (4th) 81 (SC), at 61 and 97. See also P.D. Finn *Fiduciary Obligations* (Lawbook Co, Sydney, 1977), at 8 and Patrick Parkinson “Fiduciary Obligations”, above n 20, at 340.

²⁸ *Chirside v Fay* above n 19, at [15] and [72].

²⁹ *Ibid*, at [15] and *Bristol and West Building Society v Mothew* [1997] 2 WLR 336 (PC), at 448. For example, it has been held that where a fiduciary breaches their duty to exercise proper skill and care, this will not be a breach of fiduciary obligations, unless it included an intentional breach of good faith, and elements of disloyalty or infidelity. See *Bristol and West Building Society* at 448-450.

³⁰ *Chirside v Fay* above n 19, at [75].

³¹ *Ibid*.

³² *Hospital Products Ltd* above n 22 at 79 and 102.

³³ *Chirside v Fay* above n19, at [76]; *Arkelow Investments v Maclean* [2000] 2 NZLR 1 (PC), at 6. See also Andrew Butler, “Fiduciary Law” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2009) 471, at 477 and 484.

³⁴ Andrew Butler, “Fiduciary Law” above n 33, at 484.

Two methods of establishing fiduciary obligations exist. The first is to consider whether one party has the power to act on behalf of, or for the benefit of another and whether imposing fiduciary obligations can be justified to regulate the exercise of that power.³⁵ The second is to determine whether the characteristics of a fiduciary relationship are present which would indicate that fiduciary standards of loyalty and fidelity should be expected.³⁶

Despite the lack of a set test for determining whether fiduciary obligations arise, certain characteristics can be identified. However, it is recognised that it is “not legitimate...to define or describe the fiduciary principle in unrealistically exact terms”.³⁷ Further, it is possible for fiduciary obligations to be imposed even if not all of the elements are present.³⁸ Also, even where all the characteristics are present, this may not necessarily identify the existence of fiduciary obligations.³⁹

The Privy Council in *Arkelow v Maclean* emphasised that to be regarded as a fiduciary, a party must have undertaken to act on behalf of another in a manner which gives rise to a relationship of trust and confidence.⁴⁰ The decision indicated that the undertaking could be either express or implied, or evidenced by one of the parties having actual or ostensible authority to act on the other’s behalf.⁴¹ However, in the Supreme Court’s decision of *Chirnside v Fay*, Tipping J emphasised that fiduciary obligations require a legitimate expectation that the fiduciary will not use their position in a manner which is prejudicial to the principal’s interests.⁴² He then stated that fiduciary duties need not be expressly undertaken.⁴³ Instead, what is required is that one party, due to a legitimate expectation, is entitled to hold the other in trust and confidence.⁴⁴ It seems that a legitimate expectation will be found by drawing analogies between the facts of the case, and the established categories of fiduciary relationships.⁴⁵

³⁵ P.D. Finn *Fiduciary Obligations* above n 27, at 2.

³⁶ *Ibid* and *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SC), at 62.

³⁷ E.W Thomas “An Affirmation of the Fiduciary Principle” [1996] NZLJ 405, at 405.

³⁸ *LAC Minerals Ltd* above n 36, at 62.

³⁹ *Ibid*.

⁴⁰ *Arkelow Investments* above n 33, at 5. This aspect of the decision was a confirmation and direct application of the definition a fiduciary which was espoused in *Bristol and West Building Society* above n 29, at 449.

⁴¹ *Ibid*, at 5.

⁴² (Tipping also delivered his judgment on behalf of Blanchard J). *Arkelow Investments* above n 33, at 4 and *Chirnside v Fay* above n 19, at [78].

⁴³ *Chirnside v Fay* above n 19, at [82]-[85].

⁴⁴ *Ibid*, at [82]-[85].

⁴⁵ Jessica Palmer and Charles Rickett “Joint Ventures and Fiduciary Law” in P Joseph (eds) *Joint Ventures Law* (University of Canterbury Centre for Commercial Law, Christchurch, 2008) 81, at 85.

For a party to owe a fiduciary obligation they must be in a position where they have power or discretion to affect another person's interests and are required or expected to act in the interests or for the benefit of that other person. Elements of trust, confidence or reliance then arise due to the imbalance of strength, or from the vulnerability of the principal due to the other party's power or discretion.⁴⁶ This vulnerability has been regarded as an 'important, indeed cardinal feature' of the relationship.⁴⁷ However, a relationship which demonstrates aspects of confidence, vulnerability or inequality of bargaining power alone, do not necessarily give rise to fiduciary obligations.⁴⁸

1.3 Contents of the duty

Where it can be established that a fiduciary obligation exists within a particular relationship, the fiduciary will owe 'single-minded loyalty' to the principal.⁴⁹ This loyalty is regarded as the core aspect of the fiduciary relationship,⁵⁰ and requires the fiduciary to act in the best interests and for the benefit of the principal.⁵¹ This loyalty is demanding and has been described in *Bristol and West Building Society*:⁵²

A fiduciary must act in good faith; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit, or the benefit of a third person without the informed consent of his principal.

The fiduciary relationship includes other duties, such as the duty of the fiduciary to act in good faith and to exercise their powers for a proper purpose.⁵³ Where the core duties of the fiduciary are breached then so will these more specific rules.⁵⁴ However, it has been questioned whether a breach of these more specific duties in themselves will constitute a breach of fiduciary duty. This is because the duties to act in good faith and with proper purpose are not unique to the fiduciary

⁴⁶ *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74 cited in *Chirnside v Fay* above n 19, at [83].

⁴⁷ *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 (CA), at 313.

⁴⁸ *Saunders v Houghton* above n 24, at [104] and *Hospital Products Ltd* above n22, at 69-70.

⁴⁹ *Bristol and West Building Society* above n 29, at 449 affirmed in *Arklow Investments* above n 33, at 5.

⁵⁰ *Ibid*, at 449 and Andrew Butler, "Fiduciary Law", above n 33, at 476.

⁵¹ P.D. Finn *Fiduciary Obligations* above n 27, at 15.

⁵² *Bristol and West Building Society* above n 29, at 449 affirmed in *Arklow Investments* above n33, at 5.

⁵³ Andrew Butler, "Fiduciary Law", above n 33, at 476.

⁵⁴ *Ibid*.

relationship and can arise in different contexts.⁵⁵ Further, these more specific duties could be breached without disturbing the more central duties of loyalty.⁵⁶ This idea is reinforced by Elias CJ; “not every breach of duty by a fiduciary is a breach of the fiduciary duty. The *distinguishing obligation of a fiduciary is the obligation of loyalty*”.⁵⁷

1.4 Conclusion

This paper now considers how the fiduciary idea has been applied in the public law sphere of the relationship between the Crown and Indigenous peoples. First Canada will be considered, then New Zealand.

⁵⁵ Matthew Conaglen, “The Nature and Function of Fiduciary Loyalty” (2005) 121 LQR 452, at 456-457 and Robert Flannigan “The Boundaries of Fiduciary Accountability” [2004] NZLR 215, at 217-218.

⁵⁶ Andrew Butler, “Fiduciary Law”, above n 33, at 476.

⁵⁷ *Chirnside v Fay* above n 19, at [15] (Emphasis added).

CHAPTER TWO

THE CROWN-INDIGENOUS FIDUCIARY DOCTRINE IN CANADA

2.0 Introduction

Canada has used the fiduciary idea within the public law context of the relationship between the Crown and Indigenous peoples. This has become a substantive ground which can give rise to Crown liability in relation to the treatment of Indigenous rights and resources.⁵⁸ It has also developed into a restriction on the legislative ability of Parliament. Thus, the Canadian jurisprudence provides an illustration of the application of legally enforceable duties in an administrative law context that draw on private law notions. The Canadian cases are also relevant as they have been directly considered and referred to by New Zealand courts.⁵⁹ This chapter will examine the way the doctrine has emerged and developed in Canada, with reference to the leading cases.⁶⁰ It will consider the source, scope and content of the fiduciary obligations. In particular it will focus on how private law type duties have been imposed upon the Crown in the unique context of State-First Nation relations.⁶¹

⁵⁸ P.G. McHugh *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford University, New York, 2004), at 553.

⁵⁹ New Zealand courts have looked to Canada regarding Indigenous rights generally, see for example *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) as well as the specific Crown-Indigenous fiduciary doctrine, which will be illustrated in chapter three.

⁶⁰ These cases are only a few of the huge body of case law within this area. They have been selected for this chapter primarily because they are decisions of high authority; most are of the Supreme Court of Canada and one is of the Federal Court of Appeal, also they are regarded by the secondary sources as being some of the more noteworthy in terms of the content of the reasoning and the application and extension of the Crown-Indigenous fiduciary doctrine.

⁶¹ This paper recognises that the fiduciary obligations between the Canadian Crown do not involve a direct application of equitable, private law obligations. It is the aim of this paper to explore how the fiduciary idea has been used to enforce these particular obligations within the public law context of Crown dealings with Indigenous peoples. For further discussion as to how the Canadian doctrine deviates from a traditional, equitable fiduciary analysis, see for example, Robert Flannigan “The Boundaries of Fiduciary Accountability”, above n 55, at 240-246.

2.1 *Guerin v The Queen* – Recognition of the Fiduciary Relationship

a) Background

The Canadian Supreme Court's decision in *Guerin* was the first Commonwealth decision to hold that obligations of a private law nature could be enforced within the relationship between the Crown and Indigenous peoples. In this case, the Musqueam Indian band of Vancouver had resolved to surrender part of their reserve land for the Crown to lease to a golf club. The band had agreed to particular terms of the lease under the surrender agreement that they regarded as being for their own benefit.⁶² However, the Crown was unable to obtain an agreement with the golf club and varied the terms so they were considerably more adverse to the band. The band were not informed of the amendments and only received information of the lease terms twelve years later. The court found that had they been aware of these, the band would not have surrendered their land.⁶³

In Canada, Indigenous reserves of land are governed by the Indian Act.⁶⁴ Under this scheme, land is set aside by the Crown and held as reserves by bands of Indigenous peoples. Section 18 of the Act provides:

...reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose which lands in a reserve are used or are to be used is for the use and benefit of the band.

Reserve lands may not be sold, leased, alienated or otherwise disposed of until first surrendered to the Crown by the band for which it was set aside.⁶⁵ The band must first agree to the surrender, and are free to impose conditions.⁶⁶ Thus, the existence of Indigenous interests in a reserve depends upon the Crown first granting such an interest under the Indian Act. After the reserve has been created and set aside for an Indigenous group, the Crown retains a considerable degree of discretion

⁶² *Guerin v The Queen* (1984) 13 DLR (4th) 321, at 329.

⁶³ *Ibid*, at 330.

⁶⁴ Indian Act R.S.C 1952 (Canada).

⁶⁵ Indian Act R.S.C 1952 (Canada), s 37.

⁶⁶ Indian Act R.S.C 1952 (Canada), ss 39(1) and 38(2). For commentary on the Indian Act, see *Guerin* above n 62; James Reynolds *A Breach of Duty* (Purich Publishing, Saskatoon, 2005); John Borrows and Leonard Rotman *Aboriginal Legal Rights Issues: Case, Materials and Commentary* (2nd ed, Lexis Nexis Butterworths, 2003).

over that reserve. This discretion, however, is subject the decisions made by the band regarding their reserve.⁶⁷

b) The nature of the Crown-Indigenous relationship

The majority of the Supreme Court in *Guerin* held that the relationship between the Crown and Indigenous peoples can be defined as fiduciary in nature.⁶⁸ This relationship arises from the concept of aboriginal title.⁶⁹ Aboriginal title is a *sui generis* interest in land recognised by the common law, and derived from Indigenous occupation and possession prior to the British Crown's acquisition of sovereignty.⁷⁰ This interest cannot be alienated without first being surrendered to the Crown by the aboriginal title holders.⁷¹ The Crown must then deal with the land on behalf of those who surrendered it.⁷² This common law concept is recognised by s18 of the Indian Act, which acknowledges the bands' beneficial interest in their reserves and the Crown's responsibility to protect that interest from exploitation by prospective purchasers.⁷³

c) The Crown's fiduciary obligations

The discretion for the Crown to act in the best interest of the band was held to transform the Crown's obligation into a fiduciary one.⁷⁴ This is because:⁷⁵

⁶⁷ Indian Act R.S.C 1952 (Canada), s 18.

⁶⁸ The leading decision was delivered by Dickson J, with whom Beetz, Chouinard and Lamer JJ concurred. Wilson J (Ritchie and MacIntyre JJ concurring) wrote a separate judgment that also imposed fiduciary obligations upon the Crown. Her reasoning was very similar to Wilson J's with only her analysis as to the nature of the fiduciary obligations differing. As will be discussed, Wilson J held that a surrender under the Indian Act created a trust, whereas Dickson J preferred to analysis the fiduciary obligations as *sui generis*.

Prior to *Guerin*, provisions such as s18 would have been regarded as an unenforceable trust in the 'higher sense,' unenforceable in the courts, due to the 'political trust' line of cases (For example *Kinloch v Secretary of State for India in Council* (1882), 7 Appeal Cases 619 and *Tito v Waddell (No. 2)* [1977] 3 All E.R. 129 (Ch). See Peter W Hutchins and David Schulze with Carol Hilling "When do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Saskatchewan L.Rev. 97, at 104). *Guerin* distinguished these cases on the basis that section 18 merely recognised a pre-existing interest in land, it did not create anything new (*Guerin*, above n 62, at 331 and 336).

⁶⁹ Ibid, at 334.

⁷⁰ Ibid, at 335 and 339. Dickson J noted that aboriginal title does not depend upon treaty, executive order or legislative enactment. The Royal Proclamation of 1763 recognised aboriginal title, however, the 1973 case of *Calder* confirmed that it did not create this pre-existing interest in land (*Calder et al. v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SC)).

⁷¹ Ibid, at 339.

⁷² Ibid.

⁷³ Ibid, at 357.

⁷⁴ Ibid, at 340.

⁷⁵ Ibid, at 341.

[w]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.

Dickson J, for the majority, was careful to emphasise that s18 does not amount to a trust in a private law sense.⁷⁶ He further distinguished the Crown's fiduciary obligations from private law obligations by stressing that the Crown's obligations are *sui generis*.⁷⁷ They are not strictly a public law duty. However, as aboriginal title in land was not created by either the legislative or executive branches of government, it is not a private law duty either.⁷⁸ So, the duty 'straddles' the two spheres of law. Thus, although these obligations draw on and share similarities with ordinary fiduciary obligations, they are unique.⁷⁹

d) Content and scope of the Crown's fiduciary obligations

In *Guerin*, the Government was held to have breached its fiduciary obligations by ignoring the approved terms of the surrender.⁸⁰ In fulfilling its fiduciary obligations, the Government was required to inform the band that the golf club would not agree to the terms, and seek permission to alter them.⁸¹ However, the exact content and scope of the Crown's obligations were left largely undefined. The court instead focused on defining the breach. Although, the court made it clear that fiduciary obligations will be defined in light of any conditions imposed upon the surrender. Remedies resulting from a breach will be determined "in the same way and to the same extent as if [a] trust were in effect".⁸²

⁷⁶ *Guerin* above n 62, at 334 and 342, per Dickson J. Wilson J preferred to classify the relationship arising from a section 18 surrender as a 'full blown trust' (*Guerin*, above n 62, at 361). However, as this chapter will demonstrate, subsequent cases have not followed this reasoning and instead demonstrate the *sui generis* nature of the Crown's obligations by recognising that the Crown is in a unique position compared to an ordinary fiduciary. See for example, *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746 and *Wewaykum Indian Band v Canada* [2002] 4 SCR 245.

⁷⁷ *Guerin* above n 62, at 341, per Dickson J. See James Reynolds "The Spectre of Spectre: The Evolution of the Crown's Fiduciary Obligation to Aboriginal Peoples Since *Delgamuukw*" in Maria Morellato (ed), *Aboriginal Law Since Delgamuukw* (Cartwright Group, Ontario, 2009) 107, at 138-139 and James Sakej Youngblood Henderson "Commentary" in *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, Ontario, 2002), 82-91.

⁷⁸ *Ibid.*

⁷⁹ David W. Elliot *Law and Aboriginal Peoples in Canada* (5th ed, Capus Press, Ontario, 2005) at 86.

⁸⁰ *Guerin* above n 62, at 361.

⁸¹ *Ibid.*

⁸² *Guerin* above n 62, at 376.

2.2 Subsequent application and development of the *Guerin* fiduciary obligations

a) Content and scope of the Crown's fiduciary obligations

The situations in which the Crown will owe fiduciary obligations to Indigenous groups under the Indian Act have since been extended. Where an Indigenous band decides to surrender part of their reserve land, the Crown has an obligation to scrutinise the proposed transaction and ensure that it is not exploitative before consenting to the surrender.⁸³ This obligation will also be breached through coercion, insufficient disclosure or undue influence by the Crown.⁸⁴ Fiduciary obligations also arise when the Crown exercises its power of compulsory expropriation of reserve land,⁸⁵ and in the creation of new reserves.⁸⁶ The Indian Act governs these powers.

The content and scope of the Crown's fiduciary obligations depend upon a careful examination of the specific relationship in question.⁸⁷ However, after an Indigenous group has surrendered part of their land, the Crown's fiduciary obligations require that the band's interests are advanced to the greatest extent possible, consistent with the terms of the surrender agreement. The standard required by the Crown in managing surrendered resources is "that of a man of ordinary prudence in managing his own affairs".⁸⁸ This obligation exists as long as the Crown continues to have the power to exercise control over that land for the benefit of the Band.⁸⁹ Although this post-surrender duty is a continuous one, limitation periods require a breach to be established as occurring at a specific point in time.⁹⁰ This will usually be the point where a reasonable person would have become aware of their original breach, and exercised their power to remedy it.⁹¹

⁸³ *Blueberry River Indian Band v The Queen (of Canada)* [1995] 4 SCR 344, at 371 and *Semiahmoo Indian Band v Canada* [1998] 148 DLR (4th) 523 (FC), at 536-338 (on behalf of the Court).

⁸⁴ *Semiahmoo Indian Band* above n 83, at 537. See also Bob Freedman "Semiahmoo Indian Band v Canada" (1997) 36 Alta. L.Rev. 218, at 223-225. This arises from the Crown's pre-surrender fiduciary obligations which were found to arise from the 'paternalistic' scheme of the Indian Act in *Blueberry River Indian Band* above n 83, at 371. This pre-surrender fiduciary obligation requires the Crown to respect the autonomy of the Indigenous band if they decide to surrender their reserve, however, the Crown has a duty to refuse consent if that decision is 'foolish or improvident' (*Blueberry River Indian Band* at 371). The *Semiahmoo* decision shows that the band's capacity to consent to the surrender can be fettered by the conduct of the Crown.

⁸⁵ *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746.

⁸⁶ *Wewaykum Indian Band v Canada* [2002] 4 SCR 245.

⁸⁷ *Semiahmoo Indian Band* above n 83 at 538 and *Wewaykum Indian Band* above n 86, at 292.

⁸⁸ *Blueberry River Indian Band* above n 83, at 366 and 401.

⁸⁹ *Semiahmoo Indian Band* above n 83, at 543.

⁹⁰ *Ibid*, at 546.

⁹¹ *Ibid*.

b) Accommodation of the Crown's unique position as fiduciary

The Crown has been held to owe fiduciary obligations to Indigenous peoples where those interests conflict with other groups whose interests the Crown must also have regard. The existence of competing interests does not permit the Crown to avoid its fiduciary obligations,⁹² but the content of the duties will vary according to the circumstances.⁹³ Where the Crown owes fiduciary obligations to two Aboriginal groups whose interests conflict, the Crown must go further than merely acting as an honest referee.⁹⁴ It must preserve the true legal interest of each group.⁹⁵ In *Semiahmoo*, the Crown faced conflicting political pressure as a result of divergent policies.⁹⁶ Thus, the court found that the Crown was arguably in a position of a conflict of interest in selling the surrendered land.⁹⁷ The court indicated that in this situation the fiduciary obligation required the Crown to obtain a reasonable sale price for the Band, and this duty would only be held to be breached if the Band could adduce evidence that the sale price was in fact unreasonable.⁹⁸

In *Wewaykum*, the Supreme Court acknowledged that the “Crown wears many hats and represents many interests, some of which cannot help but be conflicting”.⁹⁹ When it is exercising its power to create reserves, the Crown is required to consider the interests of all affected parties, not simply those of the Indigenous peoples.¹⁰⁰ At this stage of the relationship, the fiduciary obligation is limited to requiring loyalty, good faith and full disclosure, but once the reserve is created, the Crown must preserve and protect the band's interests from exploitation.¹⁰¹ It has been recognised that in promoting the public purpose, the Crown may seek surrender of reserve land. However, in doing so, it must actively ensure that the rights of the affected Indigenous Band are affected as little as possible

⁹² *Wewaykum Indian Band* above n 86, at 298.

⁹³ *Blueberry River Indian Band* above n 83, at 379. See also David W Elliot *Law and Aboriginal People in Canada* above n 79, at 94.

⁹⁴ *Wewaykum Indian Band* above n 86, at 298.

⁹⁵ *Ibid.*

⁹⁶ One policy favoured the retention of Indigenous land. But on the other hand, there was a policy to make it available for distribution to veterans, due to a programme instituted by the federal government under which agricultural land was to be made available to veterans at the end of WWII. *Blueberry River Indian Band* above n 83, at 346.

⁹⁷ *Blueberry River Indian Band* above n 83, at 380.

⁹⁸ *Ibid.* See also Bob Freedman, “*Semiahmoo Indian Band v Canada*”, above n 84.

⁹⁹ *Wewaykum Indian Band* above n 86, at 293.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, at 292 and 295.

and ensure appropriate safeguards are put in place such as conditional terms for surrender, or reversionary clauses.¹⁰²

The Indian Act confers power on the government to compulsorily acquire reserve land for public purposes.¹⁰³ Fiduciary obligations arise as soon as the decision is made to exercise this power, despite the government's conflicting duty to act in the public interest.¹⁰⁴ In balancing these conflicting duties, the fiduciary obligation requires the Crown to expropriate only the minimum interest required for the public purpose, to ensure minimal impairment of the Indigenous group's use and enjoyment of the land.¹⁰⁵ The implication is that the Crown has an obligation to reconcile interests which often compete, instead of the public interest being automatically permitted to trump the Indigenous interest.¹⁰⁶

c) Limitations of the Crown's Indigenous fiduciary obligations

In order to address the "flood of 'fiduciary duty' claims by Indigenous bands across a whole spectrum of complaints",¹⁰⁷ the Supreme Court in *Wewaykum* expressed the specific limitations of the duty. Binnie J, on behalf of the full court, emphasised that fiduciary obligations are not a source of plenary Crown liability, applicable to all aspects of the Crown-Indigenous relationship.¹⁰⁸ They only arise in relation to specific Indigenous interests.¹⁰⁹ The Crown must have first assumed discretionary control over an identified Indigenous interest for fiduciary obligations to arise.¹¹⁰ These limitations are likely to exclude the application of fiduciary obligations from governmental programs for Indigenous peoples which are not based upon land interests or other constitutionally protected rights.¹¹¹

¹⁰² *Semiahmoo Indian Band* above n 83, 523 at 538-340.

¹⁰³ Indian Act R.S.C 1985 (Canada), s 35.

¹⁰⁴ *Osoyoos Indian Band* above n 85, at [52].

¹⁰⁵ *Ibid.*

¹⁰⁶ Leonard I. Rotman "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004) 37 UBC Law.Rev. 219, at 226.

¹⁰⁷ *Wewaykum Indian Band* above n 86, at 287. These earlier cases had included claims, for example, to the provision of social services, to require legal aid funding and to rewrite negotiated provisions. Binnie J withheld from making judgment as to the correctness of those cases, but ensured that he carefully articulated the limits of the fiduciary doctrine.

¹⁰⁸ *Ibid.*, at 286.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, at 288-89.

¹¹¹ James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* above n 66, at 115.

d) Problems with the Canadian doctrine

While the Crown's fiduciary obligations to Indigenous peoples have become an important substantive cause of action for holding the government to account, the doctrine is not without problems or critique. One of the most noted problems is the lack of judicial guidance as to the content of the Crown's fiduciary obligations. The doctrine has been described as "the spectre of spectra – a haunting presence of ghostly concepts without clear form. It remains to be seen if the courts can give them substance".¹¹²

Rotman describes the doctrine as largely embryonic.¹¹³ This is because *Guerin* merely described the Crown-Indigenous relationship as being fiduciary, and then established a breach on the particular facts of the case.¹¹⁴ The court did not undertake the more onerous task of explaining the obligations, so it provided little guidance for future navigation of the doctrine.¹¹⁵ The problem has since been compounded by subsequent cases which have tended to apply *Guerin* without offering any further explanation of the contents of the fiduciary obligations. Thus, the Crown-Indigenous fiduciary relations are treated as axiomatic, and judges have failed to flesh out the meaning and implications of describing the Crown-Indigenous relationship in this way.¹¹⁶ The cases after *Guerin* have tended to apply fiduciary obligations upon the Crown, then assessed whether a breach has occurred on the facts at hand, rather than offering a clear set of principles which could be applied from one case to another with some degree of certainty.¹¹⁷

¹¹² James Reynolds "The Spectre of Spectre" above n 77, at 144.

¹¹³ Leonard I. Rotman, "Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years After *Guerin*" (2003) 22 Windsor Yearbook of Access to Justice 364, at 365.

¹¹⁴ *Ibid*, at 366.

¹¹⁵ *Ibid*, at 366 and Leonard I. Rotman, "*Wewaykum*: A New Spin", above n 106, at 222.

¹¹⁶ Leonard I. Rotman, "Crown-Native Relations as Fiduciary", above n 113, at 366.

¹¹⁷ Bob Freedman, "*Semiahmoo Indian Band v Canada*" above n 98, at 236.

2.3 Emergence of a second strand of the Crown-Indigenous relationship within the Constitution Act

Section 35(1) of the Constitution Act 1982 recognises and affirms ‘existing aboriginal and treaty rights of the aboriginal peoples of Canada’.¹¹⁸ The Supreme Court in *R v Sparrow* injected substantive legal force into s35(1) through application of the fiduciary obligation, creating a new constitutional strand of the fiduciary doctrine.¹¹⁹ This strand requires any legislative infringement of s35(1) rights to meet the test of justification set out by the court.¹²⁰ In order to be justified, the infringing legislation must further a ‘substantial and compelling’ purpose.¹²¹ Where a recognised right has been justifiably infringed, the infringement must be to the most minimal extent possible and compensation must be paid to the Indigenous peoples affected.¹²²

The constitutional strand of the fiduciary doctrine exists due to express constitutional recognition and affirmation of Indigenous and treaty rights within a statute of elevated authority. Thus, in jurisdictions which lack constitutional protection of Indigenous rights, such as New Zealand, this particular form of fiduciary duty will not be enforceable against the Crown. Therefore, Parliament will remain legally unfettered in its ability to legislate and infringe Indigenous rights. However, the constitutional difference between Canada and New Zealand would not necessarily preclude certain principles being drawn from this strand of the Canadian doctrine, for example the ideas of consultation and minimal infringement. However, it is unlikely that these concepts could be applied with any real force in the absence of express statutory incorporation of Treaty of Waitangi principles.

¹¹⁸ Prior to *R v Sparrow* [1990] 1 SCR 1075, there was concern that there was no mechanism to protect these rights allowing them to be extinguished or infringed by arbitrary government action, because the section was not entrenched. See James Reynolds “The Spectre of Spectre”, above n 77, at 114.

¹¹⁹ *R v Sparrow* above n 118, at 1108. This was confirmed and applied by the majority of the Supreme Court in *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

¹²⁰ *Ibid*, at 1109.

¹²¹ *Delgamuukw v British Columbia* above n 119, at [161]. The Court also listed examples of legislative objectives which would meet this test of justification, at [165]. This included, for example, the development of agriculture, forestry, mining, and hydroelectric power, general economic development, protection of the environment or endangered species and the building of infrastructure.

¹²² *Ibid*, at [162] and The Constitution Act 1982 (Canada), s 35(1). Also see generally David W. Elliot *Law and Aboriginal People in Canada* above n 79, at 94-95 and 135.

Haida Nation v British Columbia (Minister of Forests) (2004) SCC 73 stated that the Crown cannot be held to account for infringing s35(1) rights until a claimant group has established the existence of their particular rights before a court. Where the court has not identified the right in question, then the honour of the Crown will impose a free-standing duty upon the Crown to consult with the affected group. However it will not require the justification test to be satisfied.

2.4 Conclusion

In Canada, the classification of the Crown-Indigenous relationship as being fiduciary in nature has led to the development of an enforceable legal doctrine which can be used to generate a remedy in instances where the Crown has acted unconscionably or infringed Indigenous rights. This doctrine has proved to be an extremely important tool for rectifying injustice cause to Indigenous peoples by the Crown. However, there is room for improvement in the courts' analysis of the content and implications of the fiduciary obligations. This is necessary to enable the identification of clear principles that can be applied in a more universal way. The next chapter considers how New Zealand courts have used the fiduciary idea within the relationship between Crown and Māori.

CHAPTER THREE

THE CROWN-MĀORI FIDUCIARY RELATIONSHIP –EARLY JURISPRUDENCE

3.0 Introduction

The State-Owned Enterprises Act 1986 was New Zealand's first example of express legislative incorporation of the principles of the Treaty of Waitangi.¹²³ The following year, this enactment sparked the 1987 case of *New Zealand Māori Council v Attorney General* (the *Lands* case) which led to a burgeoning body of Treaty of Waitangi and Māori rights jurisprudence.¹²⁴ Within this jurisprudence, the Courts have been actively defining what they perceive to be the relationship between the Crown and Māori. A significant aspect of this relationship has been the notion that it is characterised by fiduciary-like obligations. This concept of fiduciary obligations between the Crown and Māori has been framed by the courts as existing within the context of the Treaty of Waitangi, Treaty principles and the Treaty relationship. This chapter examines the way that fiduciary ideas have emerged in the Crown-Māori context, and how the courts have applied them. First, the *Lands* decision is discussed, and the subsequent cases through until the early 2000s. Four different categories frame this discussion: statutory interpretation, obiter discussion, extinguishment of customary title and public law actions.¹²⁵

¹²³ The Treaty of Waitangi had first been recognised in legislation in the Treaty of Waitangi Act 1975. However, this served the very different purpose of establishing the Waitangi Tribunal, a statutory body charged with the purpose of investigating claims of breaches of the Treaty of Waitangi, which had, at the time, a purely recommendatory function. See Treaty of Waitangi Act 1975, ss 4 and 5. The State-Owned Enterprises Act 1986 was the first example of Parliament utilising the Treaty of Waitangi within legislation in a way that purported to fetter the actions of the Government.

¹²⁴ *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (*Lands* case).

¹²⁵ The classification of these different categories is drawn from the categories used to analyse this jurisprudence in Damen Ward "Towards a duty of Active Protection: clarifying the Crown's fiduciary and fiduciary-like obligations to Māori" (LLB(Hons) Dissertation, University of Otago, 1998).

3.1 The *Lands* case: the basis for the recognition of Crown-Māori fiduciary obligations in New Zealand

a) The principles of the Treaty of Waitangi

The court's interpretation of the principles of the Treaty of Waitangi arose within the context of the State-Owned Enterprises Act 1986. Section 9 provides: 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'.¹²⁶ In analysing the relationship between the Crown and Māori arising from the Treaty of Waitangi, the Court emphasised the notion of partnership between Māori and the Crown.¹²⁷ Every member of the court classified the relationship as one in which each party must act in good faith.¹²⁸

According to Cooke P, this partnership creates duties that are 'analogous to fiduciary duties' that require the Crown to actively protect Māori resources to the fullest extent reasonably practicable.¹²⁹ Richardson J stated that "no less than under the settled principles of equity as under our basic partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty".¹³⁰ The court asserted that these principles were an articulation of the concept of the 'honour of the Crown' which underlies all treaty relationships.¹³¹ The orthodox principle of *Te Heuheu Tukino* was upheld.¹³² The Treaty principles were held to be incapable of unreasonably restricting an elected government to carry out its chosen policy.¹³³

b) Significance of the *Lands* decision

In defining the Crown-Māori relationship arising from the Treaty principles, *Lands* was the first judicial decision that accorded significance to the Treaty in New Zealand for over a century.¹³⁴ The

¹²⁶ State-Owned Enterprises Act 1986, s 9.

¹²⁷ *Lands* case, above n124, at 693, per Somers J.

¹²⁸ *Ibid*, at 604 per Cooke P, 682 per Richardson J, 693 per Somers J, 703 Casey J, 715 per Bisson J.

¹²⁹ *Ibid*, at 664, per Cooke P.

¹³⁰ *Ibid*, at 682, per Richardson J.

¹³¹ *Ibid*, at 703, per Casey J.

¹³² *Te Heuheu Tukino* above n 4. This was emphasised by the Court of Appeal in the *Lands* case, at 655, per Cooke P, and 691, per Somers J.

¹³³ *Lands* case above n 124, at 665, per Cooke P.

¹³⁴ Up until this point the Treaty had been regarded as a legal nullity after the decision of *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC), at 78.

Treaty was no longer to be viewed as legally ineffective, but now, because of statutory incorporation, it had capacity to be used as legal leverage.¹³⁵ The case generated the negotiation and settlement process between the government and Māori and the principles established in *Lands* have since governed that relationship.¹³⁶ For the first time, the court willingly undertook responsibility for supervising high level government policy, by acting as an arbiter between the state and Māori.¹³⁷

The principles elicited in the case are firmly set within statutory incorporation of the principles of the Treaty of Waitangi. The fiduciary-like relationship that characterised the Treaty obligations was not suggested to be capable of forming the basis for an independent action if breached by a Treaty partner.¹³⁸ However, the reasoning of the court left some scope for these obligations, along with the other Treaty principles, to be indirectly utilised as tools for interpreting statutes as long as there is no clear legislative indication to the contrary.¹³⁹ This is because Cooke P accepted that in interpreting ambiguous legislation “the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty”.¹⁴⁰

A significant aspect of the fiduciary relationship as described in *Lands* is that it is founded upon the idea of equality, due to the partnership principle. This contrasts with the Canadian doctrine that emphasises inequality, due to the underlying notions of control and correlating vulnerability.¹⁴¹ However, it has been noted that if the obligations under the fiduciary relationship were to arise within a situation not governed by statutory incorporation of Treaty principles, then Parliamentary supremacy in New Zealand would likely result in a fiduciary relationship similar to that of Canada.¹⁴²

¹³⁵ Phillip A Joseph, above n 2, 72.

¹³⁶ PG McHugh “What a difference a Treaty makes –the pathway of aboriginal rights jurisprudence in New Zealand public law” (2004) 15 PLR 87, at 92.

¹³⁷ R P Boast “New Zealand Māori Council v Attorney General: The case of the century?” [1987] NZLJ 240, at 244.

¹³⁸ Ibid, at 245.

¹³⁹ *Lands* case, above n 124, at 656. See also R P Boast “New Zealand Māori Council v Attorney General” above n 137, at 245 and Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 251.

¹⁴⁰ *Lands* case, above n 124, at 656, per Cooke P.

¹⁴¹ Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* above n 139, at 247.

¹⁴² Ibid, at 247.

3.2 Application and development of the concept of the fiduciary –like relationship

a) Application due to statutory incorporation

The *Lands* principles have been applied in subsequent cases involving statutory incorporation of Treaty principles. In some of these cases the courts have clarified the contents of the Crown obligations within the Treaty partnership, sometimes without expressly discussing the fiduciary relationship. Thus, the Court of Appeal in the 1989 *New Zealand Māori Council v Attorney General* (*Forests* case) held that good faith inherent in the Crown-Māori partnership requires the Crown to consult with Māori on all ‘truly major issues’.¹⁴³

The *Tainui Māori Trust Board* case also involved an assessment of whether the transfer of Crown coal interests was consistent with section 9.¹⁴⁴ Cooke P stated that the principle of partnership does not necessarily go so far as to require equal sharing of all resources.¹⁴⁵ Nevertheless, the evidence before the court demonstrated the serious impact that the Crown’s past Treaty breaches had on Tainui’s welfare, economy and development. This meant the Crown had an obligation to uphold the honour of the Treaty through the payment of real and constructive compensation.¹⁴⁶ Despite the lack of explicit use of the term ‘fiduciary’, the idea seems implicit within the framework of Treaty ‘principles’.¹⁴⁷

There is a hesitance, however, to extend the application of the fiduciary idea beyond the statutory framework. In 2004, Ngai Tahu brought a judicial review claim to the High Court.¹⁴⁸ This challenged the Minister of Fisheries’ acceptance of the Treaty of Waitangi Fisheries Commission’s proposal for the allocation fisheries assets arising from the 1989 and 1992 settlements. Ngai Tahu alleged breach of fiduciary obligations under the Treaty of Waitangi, the 1992 Deed of Settlement, the Māori Fisheries Act 1989 and the Settlement Act 1992.¹⁴⁹ However, McGechan J refused to accept that either the Treaty or the Deed of Settlement could be a source of directly enforceable

¹⁴³ *New Zealand Māori Council v Attorney General* [1989] 2 NZLR 143 (CA) (*Forests*), at 152, per Cooke J, on behalf of the Court.

¹⁴⁴ *Tainui Māori Trust Board v Attorney General* [1989] 2 NZLR 513, State-Owned Enterprises Act 1986, s 9.

¹⁴⁵ *Tainui Māori Trust Board* above n 144, at 527, per Cooke P.

¹⁴⁶ *Ibid*, at 528.

¹⁴⁷ Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* above n 141, at 254-255.

¹⁴⁸ *Te Runanga o Ngai Tahu v Attorney General* HC Auckland, CIV 1113-03, 6 November 2003.

¹⁴⁹ Treaty of Waitangi (Fisheries Claims Settlement) Act 1992.

obligations in themselves. At the most, he said the documents had a background role in the interpretation of the two statutes.¹⁵⁰

b) Obiter statements regarding the applicability of Canadian law

Cooke P has also made obiter statements indicating that the Canadian fiduciary doctrine may be of guidance in New Zealand. In the 1990 case of *Te Runanga o Muriribenua Inc v Attorney General*,¹⁵¹ Cooke P embarked in an obiter discussion of the principles that could potentially apply to the later, substantive hearing. He recognised that in some circumstances, fiduciary duties are imposed upon the Canadian Crown where customary rights may be extinguished. He also indicated that the judgments in *Guerin* are likely to be major guidance in New Zealand as the obligations do not appear to turn on the constitutional differences between the two jurisdictions.¹⁵² Cooke P considered that the *Lands* principles of partnership and fiduciary analogies are consistent with the Canadian law.¹⁵³ Further, he stated that in interpreting legislation and common law, the New Zealand courts must 'lean against any inference that in this democracy the rights of the Māori people are to be less respected than the rights of aboriginal peoples are in North America'.¹⁵⁴

Three years later, in *Te Runanga o Wharekauri Reboho Inc v Attorney General* Cooke P noted that the Treaty created an enduring relationship of a fiduciary nature akin to partnership, with each party accepting a positive duty to act in good faith, fairly, reasonably and honourably.¹⁵⁵ He said that in New Zealand the Treaty of Waitangi is 'major support' for the fiduciary duty which is widely accepted in the Commonwealth as existing between the Crown and Indigenous peoples.¹⁵⁶

¹⁵⁰ *Te Runanga o Ngai Tahu v Attorney General* above n 148, at [8].

¹⁵¹ *Te Runanga o Muriribenua Inc* [1990] 2 NZLR 641. The case arose within the fisheries litigation, in which some procedural points needed to be determined before the substantive hearing.

¹⁵² *Ibid*, at 655.

¹⁵³ *Ibid*, at 655.

¹⁵⁴ *Ibid*, at 655.

¹⁵⁵ *Te Runanga o Wharekauri Reboho Inc* above n 12, at 304.

¹⁵⁶ *Ibid*, at 306.

c) Potential application of fiduciary obligations to extinguishment of customary title

In an obiter statement in *Te Runanganui o Te Ika Whenua Inc Society v Attorney General*,¹⁵⁷ Cooke P suggested a context in which the fiduciary idea could generate damages that did not require statutory incorporation. He stated that extinguishment of aboriginal title by the Crown on 'less than fair terms' will breach the Crown's fiduciary obligation to the aboriginal title holder.¹⁵⁸ He also suggested that if the Crown interferes with un-extinguished Treaty or customary rights without consent, then this may give rise to a claim based upon breach of fiduciary duty.¹⁵⁹ In either instance, a breach by the Crown would require payment of compensation to the aboriginal rights holder.

This compensation requirement is likely to exist in the common law doctrine of aboriginal title, without the need for a fiduciary analysis. In *R v Symonds*, the Privy Council stated that aboriginal title was entitled to be respected, and was to be upheld by the Crown, unless extinguished with the free consent of the Indigenous occupiers of the land.¹⁶⁰ Inherent in this is a presumption that compensation would be required where aboriginal title is extinguished.¹⁶¹ Further, in countries such as Canada, which have a considerably developed body of case law surrounding aboriginal title, fair compensation will usually be required when aboriginal title is infringed.¹⁶² Thus, Cooke's fiduciary analysis in the aboriginal title context is unlikely to add anything further to what already exists in the common law.

d) Public law actions –fiduciary duties and public decision making

Treaty principles and fiduciary ideas have also emerged as a distinct judicial review consideration in cases that involve the exercise of decision-making powers. The Treaty of Waitangi can become a basis for judicial review in situations where it has been expressly legislatively incorporated, or

¹⁵⁷ *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 21 (CA).

¹⁵⁸ *Ibid*, at 24 He based this on Chapman J's acceptance that the doctrine of aboriginal title applied in New Zealand in *R v Symonds* (1847) NZPCC 387.

¹⁵⁹ *Ibid*, at 24.

¹⁶⁰ *R v Symonds* above n 158, at 390. The application of the *R v Symonds* doctrine has recently been affirmed by the New Zealand Court of Appeal in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

¹⁶¹ Damen Ward "Towards a duty of Active Protection", above n 125, at 25.

¹⁶² *Delgamuukw v British Columbia* above n 119, at [169].

through contextual review.¹⁶³ Contextual review enables the Treaty principles to be incorporated where the statute granting the decision making power is silent as to them, but where the context of the decision enables the principles to be imported.¹⁶⁴ Where these principles are imported into review of decision making, the court has regard to the principles of active protection, fiduciary duty and the concepts of utmost good faith and the honour of the Crown.¹⁶⁵

In 1995, in *Ngai Tahu Māori Trust Board*,¹⁶⁶ Treaty principles had been expressly incorporated into governing legislation.¹⁶⁷ The Court of Appeal held that the Treaty principles required decisions made under the legislation to give a reasonable degree of preference to Māori groups, where the decisions were sufficiently linked to taonga.¹⁶⁸ This preference meant that Ngai Tahu's interest had to be given actual weight, as opposed to being treated as a mere aspect of procedure.¹⁶⁹ The implications of the *Ngai Tahu* case are that, in the context of judicial review of public decisions, the fiduciary idea influences the range of decisions that could properly be reached, but does not compel the decision-maker to reach a particular decision.¹⁷⁰ However, this conclusion could have been reached through recourse to the Treaty principles such as good faith, active protection and partnership. There was no apparent connection between fiduciary law and the public nature of the decision-making power, where the decision-making process was governed by statute which incorporated the principles of the Treaty of Waitangi.

¹⁶³ Phillip A Joseph, *Constitutional and Administrative Law in New Zealand* above n 2, at 873.

¹⁶⁴ Ibid, at 874. The Treaty of Waitangi can be seen as being incorporated within contextual review in *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 and *Huakina Development Trust v Waikato Valley Authority* above n 3.

¹⁶⁵ Phillip A Joseph, *Constitutional and Administrative Law in New Zealand* above n 2, at 873.

¹⁶⁶ *Ngai Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 (CA).

¹⁶⁷ The decision in *Ngai Tahu* was made by the Director-General of Conservation under the Marine Mammals Protection Act 1978. However, that act was listed in the schedule of its parent Act, the Conservation Act 1987 which directly incorporated Treaty principles in the administration of the Conservation Act.

¹⁶⁸ *Ngai Tahu Māori Trust Board v Director General of Conservation* above n 166, at 560, per Cooke P (on behalf of the Court). Also see Claire Charters, "Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004: How Does it Compare and What Have Māori Lost?" in Andrew Erueti and Claire Charters (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victorian University Press, Wellington, 2007) 143, at 164.

'Taonga' is guaranteed under Article 2 of the Māori version of the Treaty of Waitangi (See the Treaty of Waitangi Act 1975, Schedule 1). It has been translated as meaning 'treasures' and includes both tangible and intangible resources, for example te reo Māori in *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513 (CA), at 517.

¹⁶⁹ This decision was reached despite Ngai Tahu having no Treaty rights in the whale-watching licences that were the subject of the decision (*Ngai Tahu Māori Trust Board v Director General of Conservation* above n 166, at 561, per Cooke P (on behalf of the Court)). However, the cases was described as being limited to its particular facts, so its value as precedent for future cases is limited (*Ngai Tahu Māori Trust Board v Director General of Conservation*, at 562).

¹⁷⁰ Damen Ward "Towards a duty of Active Protection", above n 125, at 31.

In the context of settlement negotiations, Dooge J in *Kai Tohu Tohu*,¹⁷¹ indicated that a breach of a fiduciary duty could be a sufficient ground to identify an error of process by the Minister in conducting negotiations with iwi.¹⁷² The High Court in 2001 implicitly accepted that in negotiating with an iwi, the Crown had a fiduciary duty to ensure the recognition of hapu interests.¹⁷³ Further, Anderson and Paterson JJ in 1993 indicated that in a case such as the Māori Fisheries litigation, which was of such public significance involving “issues of equity in the broadest sense of the word, and concepts of Trusts on a public scale, a court might have recourse to a full armoury of jurisprudential principle to do justice”.¹⁷⁴ Such recourse was unnecessary in the case as the plaintiffs were unable to establish a wrong for which relief could be granted.

3.3 Conclusion

Unlike in Canada, the early New Zealand cases did not apply the fiduciary idea as a fully enforceable basis of Crown liability. Instead, the notion existed largely as a tool of statutory interpretation and used in judicial review proceedings to ensure that decision-makers act fairly, with propriety and with adequate consideration of the Treaty and the unique relationship arising from it. It appears that in these cases, the ‘fiduciary’ label has been applied in a way that has no real connection to private law fiduciary relationships and instead, is used more as judicial shorthand to denote the expected conduct of the Crown within the Crown-Māori relationship.

¹⁷¹ *Kai Tohu Tohu o Puketapu Hapu Inc v Attorney General* above n 15.

¹⁷² *Ibid.*

¹⁷³ *Watene and Anor v The Minister in Charge of the Treaty of Waitangi* HC Wellington, CP120/01, 11 May 2001, at [37].

¹⁷⁴ *Te Waka He Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* HC Auckland, CP395/93, 7 March 2003, at [11].

CHAPTER FOUR

RECENT DEVELOPMENTS IN NEW ZEALAND LAW

4.0 Introduction

In two recent cases, the question of whether the fiduciary aspect of the Crown-Māori relationship can be enforced as a ground of Crown liability has come before the New Zealand courts. These are the first cases to address the question of whether the Crown's fiduciary obligations to Māori can be applied in a private law sense, as has been applied in Canada. Thus, these cases will go some way towards determining whether the fiduciary idea can be directly applied as a stand-alone enforceable duty. This chapter focuses on these cases.

4.1 *New Zealand Māori Council v Attorney General (Forests case 2007)* –The High Court decision¹⁷⁵

a) Background to the claim

In 1989, a settlement was reached between the Crown and the New Zealand Māori Council (NZMC) and the Federation of Māori Authorities (FOMA) regarding the transfer of Crown forestry assets under the State-Owned Enterprises Act 1986.¹⁷⁶ The settlement provided that the Crown would retain its freehold interest in the land and only sell forestry rights,¹⁷⁷ until the Waitangi Tribunal had determined the Māori interests in the land. This agreement was embodied in legislation,¹⁷⁸ as well as a Trust Deed and Consent Order.¹⁷⁹

Under the Crown Forestry Rental Trust, the rentals from the forestry rights were to be accumulated and held on trust, payable only to a 'Confirmed Beneficiary.' Where the Waitangi

¹⁷⁵ *Forests case 2007* -HC above n 16.

¹⁷⁶ The Deed of Settlement, 20th July 1989.

¹⁷⁷ In return for the payment of an annual rent, the purchaser of the forestry rights obtained the rights to cut and mill the particular area of land to which the rights applied.

¹⁷⁸ Crown Forest Assets Act 1989.

¹⁷⁹ Crown Forest Rental Trust Deed, 30th April 1990.

Tribunal had determined land should be resumed to Māori, that Māori group would be the Confirmed Beneficiary of the rentals applicable to their land. If the land was not to be resumed, then the Crown would become the Confirmed Beneficiary to those rentals.

In 2006, the Crown reached a settlement with the Te Arawa iwi.¹⁸⁰ The settlement proposed that a certain portion of 'Settlement Licensed Land' would be transferred to Te Arawa, along with the accumulated rentals held by the trust through the use of a provision deeming Te Arawa to be the Confirmed Beneficiary.¹⁸¹ The settlement also provided Te Arawa with an option to purchase 'Deferred Licensed Land.' If this option was exercised, the Crown would be deemed to be the Confirmed Beneficiary of the rentals relating to that land. The settlement and its mechanisms were conditional on legislation being enacted to give it effect.

b) The claims before the court

NZMC, FOMA and Ngati Tuwharetoa opposed the 2006 Te Arawa Settlement.¹⁸² They alleged that the Crown was in a position of a conflict of interest between its own interests, Te Arawa's interests and the interests of the cross-claiming groups. Also, they claimed that the Crown, by taking the accumulated rentals applicable to the Deferred Licensed land under the Settlement, was in breach of the 1989 Settlement, the Act and the trust deed, depriving cross claimants of future benefits.¹⁸³ This is because the documents required the Crown to first obtain a Waitangi Tribunal recommendation before transferring any land or accumulated rentals. Most importantly for this paper, the claimants alleged that by failing to act fairly, reasonably, honourably and in good faith the Crown was in breach of its fiduciary duty to Māori interests generally, particularly by entering into the Te Arawa Settlement while cross-claims were still awaiting recommendation from the Waitangi Tribunal.¹⁸⁴

¹⁸⁰ The Te Arawa Deed of Settlement, September 2006. Te Arawa has chosen to engage in direct negotiations with the Crown, as opposed to having the Waitangi Tribunal first determine their interests in the forestry assets.

¹⁸¹ Deeming provisions are commonly used by the Crown in settlement legislation. Where a settlement land is to be transferred to an iwi group pursuant to a settlement, the provision will deem this transfer to have been made pursuant to final determination of the Waitangi Tribunal, even were the Tribunal has had no involvement. See *Forests* case 2007 -HC, above n 16, at [25].

¹⁸² NZMC and FOMA brought the case on behalf of all Māori interests, while Ngati Tuwharetoa was awaiting Waitangi Tribunal determination of their cross-claim and alleged that the Te Arawa Settlement negatively affected these claims.

¹⁸³ The Deed of Settlement, 20th July 1989; Crown Forest Assets Act 1989; Crown Forest Rental Trust Deed, 30th April 1990.

¹⁸⁴ *Forests* case 2007 -HC, above n 16, at [41].

c) Gendall J's fiduciary analysis

As the claim was based upon an alleged breach of the Te Arawa Settlement Deed, it was held to be non-justiciable, as legislation needed to be enacted for the deed to have any legal effect.¹⁸⁵ The legislation, once enacted, would then become law, so the declaration sought by the claimants was declined.¹⁸⁶ However, Justice Gendall proceeded to analyse the claim that the Crown had breached its fiduciary obligations to the claimants.¹⁸⁷ He stated that the *Lands* case “made it clear beyond all possible doubt that the Treaty created fiduciary duties on the Crown in favour of a specific class of people, Māori”.¹⁸⁸ Further, he stated that Treaty of Waitangi obligations must be recognised and enforced by the courts regardless of a specific statutory incorporation.¹⁸⁹

Justice Gendall explained that fiduciary obligations are underpinned by the central concept of loyalty.¹⁹⁰ He stated that the existence and scope of these obligations is determined by the nature of the relationship between the parties.¹⁹¹ Gendall J emphasised the principle that a fiduciary is not permitted to put themselves in a position where their own interest conflicts with the interests of the principal. Also, the fiduciary cannot profit from their position.¹⁹² It was claimed by the plaintiffs that the Crown intended to profit from a breach of this duty of loyalty by retaining the accumulated rental funds.¹⁹³

Despite finding that the claim was non-justiciable, Gendall J expressed his own opinion as to the Crown's proposed action under the Te Arawa Settlement Deed. He stated that Parliament was free to consider or ignore this opinion:¹⁹⁴

The Crown has a fiduciary duty of good faith to all Māori, and if it were to take for *itself* accumulated Crown rental funds in relation to Deferred Licensed Land by any process other

¹⁸⁵ See discussion in the introduction regarding the non-justiciable nature of Treaty settlement deeds.

¹⁸⁶ *Forests* case 2007 -HC, above n 16, [85] and [89].

¹⁸⁷ *Ibid*, from [52].

¹⁸⁸ *Ibid*, at [64].

¹⁸⁹ *Ibid*, at [66].

¹⁹⁰ *Ibid*, at [57].

¹⁹¹ *Ibid*, at [58].

¹⁹² *Ibid*, at [67].

¹⁹³ *Ibid*, at [70].

¹⁹⁴ *Ibid*, at [94]. (Emphasis in original)

than by a Waitangi Tribunal declaration or with the consent of Māori claimants to share in such funds, then such would be inconsistent with the Crown's fiduciary duty. Beyond that the Court cannot go.

4.2 *New Zealand Māori Council v Attorney General (Forests case 2007)* –The Court of Appeal decision

a) Grounds of appeal

The claimants appealed the High Court decision.¹⁹⁵ They sought a declaration from the Court of Appeal that the transfer of Crown forest land to Te Arawa without first obtaining a declaration from the Waitangi Tribunal was inconsistent with the Crown's fiduciary duty as well as the obligations it had undertaken to Māori.¹⁹⁶ NZMC and FOMA were concerned that Māori would be prejudiced by the transfer as the land would no longer be available for other claimant groups. The Crown had taken issue with Justice Gendall's view of the Crown's fiduciary obligations to Māori.

b) Decision of the Court of Appeal

The Court of Appeal held that the claim was non-justiciable because it was based upon a settlement that was to be enforced in legislation. Thus, any inconsistencies with the Crown's earlier obligations would be authorised by a new Act of Parliament.¹⁹⁷ However, in an obiter statement, the court addressed the conclusion reached by Gendall J as to the Crown's fiduciary obligations to Māori.¹⁹⁸ The Court of Appeal emphasised the orthodox principle from *Te Heuheu Tukino*,¹⁹⁹ and disagreed with

¹⁹⁵ *Forests case 2007* –CA, above n 16. O'Regan J delivered the judgment of the court on behalf of William Young P and Robertson J.

¹⁹⁶ These obligations were based upon the Deed of Settlement, 20th July 1989, The Crown Forest Assets Act 1989 and the Crown Forest Rental Trust Deed, 30th April 1990.

¹⁹⁷ *Forests case 2007* –CA above n 16, at [44]. Thus the Settlement Deed was a political compact, just as the Sealord's Settlement was found to be in *Te Runanga o Wharekauri Rekohu* above n 12.

¹⁹⁸ This discussion was obiter because the case was held to be non-justiciable. But also, Gendall J's comments had been made with regard to the Crown's proposed taking of the accumulated rentals, through the use of a statutory provision that was inconsistent to the Crown Forestry Rental Trust Deed 1990. However, the focus of the claim before the Court of Appeal was the transfer of Crown forestry assets to Te Arawa, at the possible expense of the future interests of other claimant groups.

¹⁹⁹ *Te Heuheu Tukino* above n 4; *Forests case 2007* –CA above n 16, at [64].

Justice Gendall's statement that Treaty of Waitangi obligations can be enforced in absence of statutory incorporation.²⁰⁰

The court explained that its own prior decisions had made it clear that the Crown's duty to Māori is *analogous* with a fiduciary duty, and saw no need to revisit this.²⁰¹ In New Zealand, fiduciary law applies to the Crown-Māori relationship by analogy only, not by direct application.²⁰² It is used to inform the key aspects of the relationship between the Treaty partners, such as good faith, reasonableness, trust, openness and consultation.²⁰³ With regard to Gendall J's obiter statement, the court stated that if he "was saying that the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity, we respectfully disagree".²⁰⁴

c) Appeal to the Supreme Court

NZMC and FOMA were granted leave to appeal to the Supreme Court.²⁰⁵ However, they reached a settlement with the Crown prior to the date of fixture so the hearing was unnecessary. The Supreme Court issued a minute stating that the fixture had been vacated. It also recorded the Crown's apology for its intention to become the confirmed beneficiary of the rental proceeds to the Deferred Licensed Land under the Te Arawa Deed.²⁰⁶ The Crown appreciated that the appellants did not consider it an act of good faith.²⁰⁷ Further, the parties acknowledge that the comments made by the High Court and the Court of Appeal as to the Crown's fiduciary obligations under the Treaty of Waitangi are obiter dicta.²⁰⁸

²⁰⁰ They also disagreed with his use of *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA) (the *Radio Frequencies* case) and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) to justify this point, as they stated, that these cases do not stand for the principle that Treaty obligations can be imposed in absence of express legislative incorporation *Forests* case 2007 –CA, above n 16, at [66] and [75]).

²⁰¹ Such as the *Lands* case, above n 124, and *Te Runanga o Murīwhenua*, above n 151; *Forests* case 2007 –CA, above n 16, at [78]-[81].

²⁰² *Forests* case 2007 –CA, above n 16, at [81].

²⁰³ *Ibid*, at [81].

²⁰⁴ *Ibid*.

²⁰⁵ *New Zealand Māori Council v Attorney-General* SC49/2007; SC50/2007.

²⁰⁶ *Ibid*, at [2](a).

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid*, at [2](b).

4.3 *Paki & Ors v Attorney-General*

a) Background

In 2009, representatives of the Pouakani hapu claimed before the High Court that the Crown had wrongfully dispossessed them of their common law interest to the riverbed.²⁰⁹ This was appealed to the Court of Appeal.²¹⁰ The Crown had progressively acquired Pouakani's land adjoining the Waikato River, up until 1899 through Native Land Court procedure. The representatives claimed that the Crown had acquired their riverbed interest under the doctrine of *usque ad medium filum aquae*.²¹¹ In doing so, the Crown had breached its fiduciary duty to act reasonably and in good faith to all Māori,²¹² because the members of the hapu at the time did not understand their interest to the riverbed would be lost along with their title to the land. They also claimed that the Crown had fiduciary obligations, or fiduciary-like obligations when dealing with the Pouakani land owners.²¹³

b) The High Court decision

Harrison J in the High Court held that the Waikato River was 'navigable' in 1903.²¹⁴ This meant that the bed of the river was deemed to have always been vested in the Crown.²¹⁵ Justice Harrison rejected the claim that the Crown owed a fiduciary duty to Māori. He stated that fiduciary law informs the Treaty relationship only by analogy.²¹⁶ At the time the Pouakani land was acquired, the Native Lands legislation governed the relationship between the Crown and the Pouakani hapu.²¹⁷ There was no requirement of absolute loyalty to the vendor, and the Crown was free to act in its own interests in purchasing the land.²¹⁸ Therefore, the Crown could not owe a paternalistic duty to the original owners

²⁰⁹ *Paki v Attorney General* [2009] 1 NZLR 72 (HC).

²¹⁰ *Paki* CA, above n 1.

²¹¹ This is the common law principle that the legal title of riparian land ran to the midpoint of the riverbed, *Paki* CA, above n 1, at [3].

²¹² *Ibid*, at [88].

²¹³ *Ibid*.

²¹⁴ *Paki v Attorney General* HC, above n 209, at [104].

²¹⁵ Under s14 of the Coal Mines Amendment Act 1903 which was re-enacted without change in s 3 of the Coal Mines Act 1905, then s 263 of the Coal Mines Act 1979, and it is preserved by s 354(c) of the Resource Management Act 1991.

²¹⁶ *Paki v Attorney-General* HC, above n 209, at [112]. Thus, he upheld the obiter statement made by the Court of Appeal in *Forests* case 2007 –CA, above n 16.

²¹⁷ Native Land Court Act 1886, *Paki v Attorney-General* above n 209, at [117].

²¹⁸ *Ibid*, at [122].

to advise them about whether or not to sell their land.²¹⁹ In Canada, the Crown does not owe fiduciary obligations at large to its Indigenous peoples, because the Crown must first undertake protection of a specific interest.²²⁰ He found that this was not established on the facts.

c) The Court of Appeal

The Court of Appeal upheld Harrison J's conclusion that the Waikato River was navigable in 1903.²²¹ Therefore, it was not strictly necessary to address the issue of the alleged breach of fiduciary duty as the Crown acquired its interest in the riverbed independently of the Pouakani hapu. However, Hammond J offered some suggestions.²²²

i. A general duty of good faith?

Hammond J stated that there is undoubtedly a duty of good faith between the Crown and Māori at a 'broad level' and judicial authority can be found for this in *Lands*.²²³ He noted that despite the acceptance of the notion that the Crown owes a duty of the 'utmost good faith' to Māori, the concept has struggled in terms of legal application, and has remained a largely inchoate cause of action.²²⁴ What is required, he suggested, is a vehicle in which the duty can be applied in a way that has the potential to generate successful outcomes.²²⁵

ii. The practical difficulties with the concept of fiduciary duties

Justice Hammond considered the concept of fiduciary duties to be inappropriate to apply in the Crown-Māori context. He considered that the 'legal baggage' associated with the fiduciary area of law is a good reason to avoid using it.²²⁶ Further, fiduciary relationships operate to compel the fiduciary,

²¹⁹ Ibid, at [121].

²²⁰ Ibid, at [141].

²²¹ *Pakei* CA, above n 1, at [81]-[85].

²²² Ibid, at [86]. He justified this on the basis that the claim had been argued before him in full and because there had been considerable professional and academic concern about the issue.

²²³ Ibid, at [97] and [98]. He quotes from *The Lands* case, n 124, at 664, per Cooke P and at 674, per Richardson J.

²²⁴ Ibid, at [100].

²²⁵ Ibid.

²²⁶ This is because traditionally, the circumstances in which fiduciary relationships tend to be recognised by the courts are restricted to confined established categories. Also, Hammond J notes that once a particular relationship is 'pigeon-holed' as being fiduciary, many other matters are then dictated by that characterisation, such as remedies (Ibid, at [102]).

here the Crown, to act with selflessness with regard to a disadvantaged party, the Māori. This implies that Māori are in an inferior position within their relationship with the Crown, which he noted, is contrary to the Treaty of Waitangi and the position of Māori today.²²⁷

v. A relational duty of good faith?

In discussing a potential way forward for the Crown-Māori relationship in New Zealand jurisprudence, Hammond J stated that the answer must lie within this country. He then explored the possibility of developing a relational duty of good faith which would apply in particular transactional contexts. He noted that such duties are central to employment law.²²⁸ The creation of such a duty would not be based solely on the Treaty of Waitangi.²²⁹ The Crown's obligation to act reasonably and in good faith towards Māori is already well established and accepted, and the Treaty of Waitangi would be just one aspect of this, thus, it would not be inconsistent with the principle of *Te Heuheu Tukino*.²³⁰ This duty would reflect what has already been done in the law, and allow both Māori and the Crown to pursue their own interests, but ensure that at the same time they have regard to the interests of each other.²³¹

Justice Hammond outlined a framework of the minimum requirements of a relational duty of good faith, which would enable the ideas of *Lands* to become a discrete, stand-alone cause of action, without the need to resort to the language of fiduciary obligations.²³²

- A co-operative element to achieve the shared premises (which in contract is the promise itself, and in this area, the principles of the Treaty);
- There has to be honest standards of conduct; and
- Those standards of conduct must be reasonable having regard to the proper interests of the parties.

²²⁷ Ibid, at [103].

²²⁸ Ibid, at [107].

²²⁹ Ibid, at [108].

²³⁰ *Te Heuheu Tukino* above n 4; Ibid, at [108].

²³¹ Ibid.

²³² Ibid, at [110].

4.4 Leave to appeal *Paki*

In July 2010, the Supreme Court granted the Pouakani representatives leave to appeal the Court of Appeal's decision.²³³ The grounds of appeal relate to issues of the appellant's standing, and the question relating to the Crown's interest in the riverbed under the Coalmines Amendment Act 1903.²³⁴ If the Crown is instead found to have acquired an interest in the riverbed under the common law,²³⁵ then the Court will determine whether it did so through breaching legally enforceable obligations owed to the original owners of the Pouakani land.²³⁶ The Supreme Court has reserved the right to review the expression of the grounds relating to the legally enforceable duties where considered appropriate.²³⁷ This demonstrates that the issue of the Crown's obligations to Māori are still very much an alive issue and that the Supreme Court intends to give this issue a significant amount of consideration.

4.5 Conclusion

It was not until 2007 that an opportunity was presented to the courts, in which an equitable type action, based on the Crown's breach of its fiduciary obligation could have been imposed. As these claims were held to be non-justiciable, the discussions as to the applicability of fiduciary duties between the Crown and Māori are not binding on future cases. The differences in opinion between the courts create uncertainty as to the future direction of this area of law. Further, in stating that the Crown's duties to Māori were only analogous to fiduciary duties, incorporating the concepts of reasonableness, trust, openness and consultation,²³⁸ the Court of Appeal has done little to clarify the issue. This is because the early cases are far from clear as to the application and content of the Crown's fiduciary-like obligations. As Chapter Four showed, broad principles can be drawn from the early cases. However, these principles lack universal applicability and do not demonstrate the use of fiduciary obligations at all. Instead the label is used as a type of judicial shorthand to denote application of ideas of fair dealing and good faith within the Crown and Māori relationship.

²³³ *Paki & Ors v Attorney-General* [2010] NZSC 88. The date for this appeal is set down for the 15-16 March 2011.

²³⁴ *Ibid*, at B(i)-(ii).

²³⁵ *Ibid*, at B(iii).

²³⁶ *Ibid*, at B(iv). The court would then consider time limitations and possible relief at *Ibid*, at B(v)-(vi).

²³⁷ *Ibid*, at C.

²³⁸ *Forests* case 2007 –CA above 16, at [81].

CHAPTER FIVE

A WAY FORWARD: CAN ENFORCEABLE FIDUCIARY-LIKE OBLIGATIONS BE IMPOSED WITHIN THE CROWN-MĀORI RELATIONSHIP?

5.0 Introduction

As has been demonstrated, the idea that the Crown owes fiduciary-like obligations to Māori has not developed into an enforceable, private law type of duty, capable of generating damages in the public law context. Currently, the scope of the Crown-Māori fiduciary idea remains difficult to define and there are uncertainties relating to its application. This is likely to be attributable to the piecemeal way in which the idea was developed throughout the early New Zealand cases in Chapter Three. Another reason for the lack of development in the idea could be due to early loss by Māori of the majority of their land, and extinguishment of important customary rights, such as fishing interests.²³⁹ Further, the New Zealand courts have tended to avoid defining the fiduciary idea and instead, define the Crown-Māori relationship by the Treaty of Waitangi principles in which the fiduciary idea is inherent.²⁴⁰ It follows, that any potential for fiduciary obligations to be enforced as an independent legal action, capable of generating equitable remedies or damages, stands on somewhat tenuous grounds.

The most common situation in which the fiduciary idea has been applied in New Zealand is as a tool of interpretation where the principles of the Treaty of Waitangi have been expressly incorporated into New Zealand legislation which is applicable to the case. Paul McHugh argues that the fiduciary obligations are merely a tool of interpretation, and in New Zealand, as a specific tool in themselves, they have been overshadowed by Treaty principle jurisprudence.²⁴¹ Although, Treaty of Waitangi principles have become of significant importance in New Zealand jurisprudence, these can only be applied when expressly incorporated into legislation,²⁴² or perhaps where it is appropriate that the Treaty will guide interpretation of a particular piece of legislation.²⁴³

²³⁹ Claire Charters, “Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004” above n 168, at 160.

²⁴⁰ Donna Hall, ‘The Fiduciary Relationship Between Māori and the Government of New Zealand’ in Law Commission of Canada *In Whom We Trust: A Forum on Fiduciary Relationships* (Law Commission of Canada, Toronto, 2002) 123, at 146.

²⁴¹ PG McHugh *Aboriginal Societies and the Common Law* above n 58, at 534.

²⁴² *Te Heuheukino* above n 4.

²⁴³ *Huakina Development Trust* above n 3.

The possibility that Māori could be owed fiduciary obligations by the Crown remains important, because unlike the Treaty of Waitangi, these duties could be directly enforced in the courts.²⁴⁴ Enforceable obligations against the Crown would enable the courts to provide remedies to Māori, particularly in cases where Treaty principles have not been incorporated into applicable legislation and there is no other legal avenue with which claimants can attempt to achieve justice. Thus, this chapter aims to examine, in light of the recent New Zealand cases and New Zealand's unique constitutional circumstances, whether it is possible for fiduciary obligations to be imposed upon the Crown in a way similar to private law obligations, and also whether Justice Hammond has suggested an alternative to fiduciary obligations that could be used in future.

5.1 'The Crown has a fiduciary duty of good faith to all Māori'

Gendall J, in obiter, said that the Crown owed fiduciary duties to all Māori.²⁴⁵ His discussion of the content of this duty indicates that it goes further than merely the 'good faith' idea espoused in the early New Zealand jurisprudence.²⁴⁶ This section will consider his discussion with reference to earlier New Zealand cases, as well as cases from comparative jurisdictions on the Crown's fiduciary relationship with Indigenous peoples to determine whether Gendall J's suggestion provides a workable remedy for future cases.

a) Characteristics giving rise to the Crown's fiduciary obligations

In describing the Crown-Māori relationship, Gendall J acknowledged that the Treaty has been recognised as forming something similar to a partnership.²⁴⁷ But in applying fiduciary obligations, he emphasised the vulnerability of Māori that he described as arising from the unequal bargaining power of Māori against the Crown and the Crown's power to adversely affect Māori through legislation.²⁴⁸

²⁴⁴ Claire Charters, "Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004", above n 168, at 146.

²⁴⁵ *Forests* case 2007-HC, above n 16, [64].

²⁴⁶ *Ibid*, [57]-[58].

²⁴⁷ *Ibid*, at [54].

²⁴⁸ *Ibid*, at [54]-[58].

With respect, this analysis is too general to justify imposing a specific duty. Although inequality of bargaining power can sometimes indicate a fiduciary relationship, this characteristic alone is insufficient to generate fiduciary obligations.²⁴⁹ Further, Australian courts have refused to impose fiduciary obligations upon the Crown where the claims were based on the Crown's legislative ability to adversely affect Indigenous interests and its adoption of a general protective role over Indigenous people.²⁵⁰ Gendall J did not identify a particular relationship or dealing between the Crown and Indigenous group which is required to impose fiduciary obligations.²⁵¹ He also failed to identify a reasonable expectation held by Māori that the Crown will exercise its power for their interest or benefit.²⁵² Gendall J stated that the Crown owes duties of loyalty to Māori,²⁵³ however, this goes much further than any of the 'Treaty principles' cases, which require the Crown to act in good faith, fairly and reasonably towards Māori.²⁵⁴

b) The scope of the Crown's fiduciary obligation to Māori

Despite earlier accurately describing the *Lands* case as recognising that the Treaty of Waitangi created a relationship of a fiduciary *nature* between the partners,²⁵⁵ Gendall J then went on to explain that the Treaty casts "fiduciary duties on the Crown in favour of a specific class of people, the Māori."²⁵⁶ This is clearly an extension of the *Lands* principle. It is unlikely that the Crown could be regarded as owing a general fiduciary duty to all Māori in absence of a specific relationship that gives rise to characteristics that justify fiduciary obligations. Even in Canada, where the concept of the Crown's fiduciary duties to Indigenous peoples is well established, it has been held that these obligations

²⁴⁹ *Hospital Products Ltd* above n 22, at 70.

²⁵⁰ *Bodney v Westralia Airports Corporation* (2000) 180 ALR 91 (FC), at 111. Indigenous claimants have attempted to enforce fiduciary obligations in Australia, the position of the law has been described by Kirby J: 'whether a fiduciary duty is owed by the Crown to the [I]ndigenous peoples of Australia remains an open question. This court has simply not determined it. Certainly, it has not determined it adversely to the proposition. On the other hand, there is no holding endorsing such a duty' in *Thorpe v Commonwealth of Australia (No.3)* (1997) 114 ALR 677 (HC), at 688.

²⁵¹ *Ibid.*

²⁵² This is usually regarded as a characteristic of the fiduciary relationship, see particularly *Chirside v Fay* above n 19, at [78]. Also, Canada's Crown-Indigenous doctrine can be contrasted with Gendall J's analysis, as the Crown's fiduciary obligation to Indigenous people arises from the Indian Act (Canada) 1952 which requires the Crown to use their discretion for the benefit of a particular Indigenous group, see s 18.

²⁵³ *Forests* case 2007-HC above n 16, at [62].

²⁵⁴ See above discussion of the *Lands* case, in chapter 3.

²⁵⁵ *Forests* case 2007-HC, above n 16, at [62] (Emphasis added).

²⁵⁶ *Ibid.*, at [64].

cannot apply wholesale to all Indigenous peoples. An undertaking of discretion or control is required to invoke responsibility that mirrors private law duties.²⁵⁷

c) Application of prior case law regarding the position of the Treaty of Waitangi in New Zealand law

Some statements made by Gendall J regarding the status of the Treaty of Waitangi within New Zealand's law are, with respect, problematic. In justifying the enforceability of Treaty obligations, he stated that these must be recognised and applied by the courts even in absence of explicit statutory incorporation of Treaty principles.²⁵⁸ However, due to the principle in *Te Heuheu* this is not the case.²⁵⁹ Even the Court of Appeal in the *Lands* case, was careful to constrain the duty of good faith resulting from express legislative incorporation.²⁶⁰ Justice Gendall relied on the statements made in *Tavita v Minister of Immigration* that it was an 'unattractive argument' that the executive was free to ignore international instruments and treaties in exercising discretionary powers under a statute which is silent on them.²⁶¹ However, the possibility that treaty obligations could be taken into account when exercising a statutory discretion is very different from enforcing international treaty obligations directly in a domestic New Zealand court.²⁶²

In discussing the constitutional strand of the Canadian fiduciary doctrine, Gendall J noted that the Constitution Act 1982 required any legislation that adversely affected protected Indigenous rights to meet the standard of justification arising from the fiduciary obligation.²⁶³ Although New Zealand has no equivalent act, he stated that we do have the Treaty of Waitangi.²⁶⁴ If he was suggesting that the Treaty could play a similar role to section 35 of Canada's Constitution Act, then

²⁵⁷ *Wewaykum Indian Band* above n 19, at 286.

²⁵⁸ *Forests* case 2007-HC, n 16, at [66].

²⁵⁹ *Te Heuheu Tukino* above n4. However, as indicated above n 5, if this case was to be directly considered by the Supreme Court, there is a possibility that it could be overruled, it has been argued that the principle in this case is wrong in law.

²⁶⁰ This was emphasised by the Court of Appeal in the *Lands* case, above n 124, at 655, per Cooke P, and 691, per Somers J.

²⁶¹ *Tavita v Minister of Immigration* above n 200, at 266 cited in *Forests* case 2007-HC, at [65].

²⁶² *Forests* case 2001 –CA, above n 16, at [75].

²⁶³ *Forests* case 2007 –HC, above n 16, at [61].

²⁶⁴ *Ibid.*

in my view, this suggestion overstates the Treaty's current legal status due to Parliamentary sovereignty.²⁶⁵ This conclusion aligns with the Court of Appeal's view on this point.

d) Conclusion as to Gendall J's analysis

It seems unlikely that a court in future will impose fiduciary duties to all Māori upon the Crown in the broad way articulated by Gendall J. However, the case highlights the limitations of the courts in trying to reconcile Māori grievances arising from negotiated settlements with the Crown. Justice Gendall saw that the Crown's proposed action was capable of adversely affecting the interests of cross-claiming iwi in the rentals proceeds, and was contrary to the terms of the trust on which they were held.²⁶⁶ This could be considered to be inconsistent with the Crown's duty of good faith under the Treaty. Due to the principle of non-interference by the judiciary in the political system, and the unenforceability of the Treaty principles in absence of statutory incorporation, the Court could not provide any meaningful declaration or remedy to the appellants. This is likely why Gendall J attempted to establish a legally enforceable obligation which, despite its obiter status, could provide some force to his recommendation that the Crown attempt to reach a compromise with the claimants.²⁶⁷

5.2 Application of fiduciary obligations to specific property dealings between the Crown and Māori

a) The Court of Appeal's rejection of Crown fiduciary obligations

In addressing Gendall J's conclusions, the Court of Appeal, in obiter, disagreed with the idea that the Crown has a fiduciary duty in a private law sense to Māori, enforceable in equity. In attempting to close the door on the future applicability of Gendall J's statement, the Court of Appeal only did so with regard to an extremely broad proposition. That proposition was that the Crown owes all Māori a general fiduciary obligation.

²⁶⁵ Also refer back to chapter one, above n 5, for arguments that the principle in *Te Heuheu Tukino* is incorrect, and that the boundaries of Parliament's legislative power have yet to be fully tested in the courts.

²⁶⁶ The Te Arawa Deed of Settlement, September 2006 and the Crown Forest Rental Trust Deed, 30th April 1990.

²⁶⁷ *Forests* case 2007 –HC, above n 16, at [101].

The Court of Appeal refused to traverse the recent Canadian decisions because they were considered to be premised on the differing statutory and constitutional context of Canada.²⁶⁸ As discussed, the constitutional strand of Canada's Crown-Indigenous doctrine rests solely on the specific recognition accorded to certain Indigenous rights under the Constitution Act.²⁶⁹ Thus, in New Zealand's unwritten constitution, where there is no superior legislation and Parliamentary sovereignty is currently regarded as absolute, in my view, the Canadian constitutional strand of cases are not able to be applied directly.

However, the *Guerin* strand of Canada's doctrine rests upon the unique Indigenous interest in the land coupled with the Crown's discretionary control and protective function under the Indian Act which gives rise to the fiduciary duties. The common law doctrine of customary or aboriginal title applied also to Māori land in New Zealand,²⁷⁰ giving the Crown the right of pre-emption and thus effectively full discretion over the purchase price. Further, one of the purposes of the doctrine was to provide protection to Māori, by ensuring that their land was purchased fairly.²⁷¹ Thus, there could potentially have been room for the Crown to owe a fiduciary obligation to Māori in the exercise of this power.

This analysis, however, can no longer apply to Māori land because the Native Lands Act 1862 and successive Māori land statutes significantly altered Māori land law, ceasing the Crown's common law power.²⁷² The legislation abolished the Crown's right to pre-emption and enabled Māori to dispose of and alienate their land freely, after first transforming their title into Crown granted Māori freehold title through the Native Land Court.²⁷³ After successive Native Land legislation the Te Ture Whenua Māori Act 1993 was enacted. Under this Act, the Māori Land Court's function is to promote retention, occupation, development and utilisation of Māori freehold

²⁶⁸ *Forests* case 2007-CA, above n 16, at [81].

²⁶⁹ The Constitution Act (Canada) 1982, s 35. See chapter two at 2.3.

²⁷⁰ *R v Symonds* above n 158, at 390.

²⁷¹ *Ibid.*

²⁷² F.M (Jock) Brookfield, "Aspects of Treaty of Waitangi Jurisprudence" in Jacinta Ruru (ed) *In Good Faith, Symposium proceedings marking the 20th anniversary of the Lands case* (University of Otago, 2008) 87, at 93.

²⁷³ Native Lands Act 1862, preamble; and Jacinta Ruru, 'The Māori encounter with Aotearoa: New Zealand's legal system' in B Richardson, S Imai and K McNeil (eds) *Indigenous Peoples and the Law* (Osgoode, Oxford, 2009), at 117. However, there was a brief revival of the Crown's right to pre-emption from 1880-1909. From 1880, the Crown granted itself the right to pre-emption in three main regions where Māori had maintained their autonomy. Section 17 of the Native Land Court Act 1894 restored Crown rights of pre-emption to the whole country. However, the statutory right of Crown pre-emption ceased after the enactment of the Native Land Act 1909 (See Richard Boast, et al *Māori Land Law* (Butterworths, Wellington, 1999), at 80-86).

land.²⁷⁴ Thus New Zealand's statutory context with regard to Indigenous land differs from that of Canada. As the Crown has had no discretionary power with regard to Māori land for quite some time, in my opinion, there appears to be little room to enforce fiduciary obligations within this context.²⁷⁵

It follows, that I believe the Crown cannot owe fiduciary duties in a private law sense to all Māori, especially where they are founded on general notions such as Māori vulnerability as against the Crown due to unequal bargaining power in the settlement negotiation process, and being subject to the exercise of legislative power. Presently, the Treaty of Waitangi itself can be relied on only to the extent that it is incorporated into legislation.²⁷⁶ Even then, the principle of duties akin to fiduciary obligations will be applied only by way of analogy with private law concepts, as was the case in the early New Zealand jurisprudence.²⁷⁷ However, there remain *some* situations in the New Zealand context where private law type fiduciary obligations could be applied upon the Crown outside of the Treaty relationship and the Māori land statutory framework. This was not dealt with by the Court of Appeal.²⁷⁸ Consequently, there is not existing authority preventing such application in cases where the facts are appropriate.

b) The potential for the enforcement of fiduciary obligations to specific dealings between the Crown and Māori

It remains possible for fiduciary obligations to be applied within specific relationships between the Crown and Māori. In this context, fiduciary obligations would arise in situations that closely mirror those giving rise to such obligations in private law. In determining what the Crown's obligations

²⁷⁴ Te Ture Whenua Māori Act 1993, preamble, ss 2 and 17.

²⁷⁵ Although, it is possible that fiduciary obligations could have arisen from statutes that provided for reserves of land to be set aside for Māori. For example, under s12 of the Native Townships Act 1895, the Crown was required to hold the reserve land on trust for the use and enjoyment of the Māori. Also, under s 11 of the South Island Landless Natives (SILNA) Act 1906, permanent reserves could be set aside for Māori under ss 4, 5 and 6. If the occupiers wished to lease their interest in the reserve, then the Crown was required to act as an agent and obtain the best rates possible under s11.

²⁷⁶ However, if there was to be movement from the orthodox principle of *Te Heuheuk Tukino* above at n 4, or, if New Zealand was to adopt a written constitution that incorporated the Treaty of Waitangi, it is likely that a more general Crown fiduciary obligation to Māori could be enforced. This is because in the Preamble of the Treaty (English text) the Crown sought to protect the rights and property of Māori, and in Article Two, the Crown guaranteed to protect the Māori possession of their lands, estates, forests, fisheries and other properties. See Treaty of Waitangi Act 1975, First Schedule).

²⁷⁷ *Forests* case 2007-CA, above n 16, at [81].

²⁷⁸ F.M (Jock) Brookfield, "Aspects of Treaty of Waitangi Jurisprudence" above n 272, at 93.

would be where they do arise, the Canadian Crown-Indigenous doctrine will be relevant. This is because it demonstrates the way in which private law type obligations can be imposed on the Crown. New Zealand's different statutory history regarding Māori land does not preclude recourse to the Canadian doctrine, because Canada's legislative framework is relevant only to the extent that it confers power upon the Crown to act for the benefit of Indigenous interests in land. Thus, if the Crown undertakes a power or discretion in New Zealand, the Canadian statements as to the content of the Crown's duty can still be applied. This section attempts to set out the situation in which fiduciary obligations could arise and the nature of the obligations.²⁷⁹

For fiduciary obligations to be imposed on the Crown in its dealings with Māori, the Crown would need to be in a position where it has a power or discretionary control over an identifiable Māori interest.²⁸⁰ By being subject to the exercise of this power the Māori group will be in a position of vulnerability.²⁸¹ This must then give rise to a relationship of trust and confidence. The group would be required to demonstrate a legitimate expectation that the Crown will not use its position in a way which is adverse to their interests.²⁸² The expectation could be a result of a specific undertaking or promise by the Crown or could be identified through analogy with established categories of fiduciary relationships and with case law.²⁸³ Despite the requirement of specific circumstances that give rise to fiduciary obligations, the relationship between the Crown and Māori group may be coloured by, or formed upon the general Crown-Māori relationship in which the Treaty and the concept of the honour of the Crown is a pretext.²⁸⁴

²⁷⁹ As was recognised in Chapter One, the application of fiduciary obligations to certain factual relationships is extremely dependant on the facts of the case. Equitable rules can only be stated in general terms, to enable them to be applied to a large number of diverse circumstances. Thus, this section aims to establish those general characteristics and rules which would need to be established by Māori. It is acknowledged that this is by no means conclusive, and that the particular facts of any case will need to be closely examined and considered. It is also recognised that procedural difficulties may arise in a particular case, such as limitation periods and the equitable defences of acquiescence and laches, however, these issues are outside the scope of this dissertation, as is the issue of available remedies. However, the SCC in *Guerin* stated that remedies would be determined by reference to trust law principles, see *Guerin* above n 62.

²⁸⁰ *Wewaykum Indian Band v Canada* above n 86, at 288-89; *Arkelow Investments* above n 33, at 5. This interest could be founded in recognised Māori land, or it could be founded in other property or resources in which the Māori group can establish a right under the doctrine of customary title, this is because the Court of Appeal confirmed the doctrine of customary title continues to apply in NZ in *Ngati Apa v Attorney-General* above n 160.

²⁸¹ *Arkelow Investments* above n 33, at 5; *Guerin* above n 62, at 340.

²⁸² *Chirnside v Fay* above n 19, at [82]-[85].

²⁸³ Jessica Palmer and Charles Rickett, "Joint Ventures and Fiduciary Law", above n 45, at 85.

²⁸⁴ Alex Frame "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?" (2005) 13 Waikato Law Review 70, at 86.

The content of the Crown's fiduciary obligation is likely to differ slightly to the traditional equitable analysis of proscribing the fiduciary from placing itself in a position where its duty and its interest conflict, or acting for its own benefit, or the benefit of a third person without the consent of the Māori principal.²⁸⁵ This is due to the Crown's unique duty to consider the interests of many different groups, some which may conflict.²⁸⁶ Thus, in exercising its fiduciary obligation of loyalty to Māori, in some situations, the Crown is likely to be unable to act solely in the interests of the Māori group but instead will have to consider the interests of the other groups and potentially balance them.²⁸⁷ However, when it does have to balance other interests, the Crown's obligation to the Māori group will still include loyalty, good faith, full disclosure of relevant information, ordinary prudence and protection of the Māori interest from exploitation.²⁸⁸ This argument would provide an answer to the Court of Appeal's concern that it would be impossible to require the Crown to avoid a conflict of interest between its fiduciary duty to Māori and its duty to the population as a whole.²⁸⁹

The Court of Appeal's second objection to the imposition of fiduciary obligations upon the Crown was that circumstances may arise whereby the Crown is placed in a position where its duties to one Māori group conflicts with another Māori group.²⁹⁰ This would be an inherent problem if the Crown was to owe a general fiduciary duty to all Māori as suggested by Gendall J. However, on this paper's more narrow analysis, it is unlikely to occur often, due to the specific circumstances in which the Crown's fiduciary obligations to one Māori group will arise. Also, the circumstances of the relationship in the case will define the scope of the Crown's duties to each particular group.

If, however, a situation was to arise where the Crown owed a duty to one Māori group that conflicted with its duty to another Māori group,²⁹¹ application of fiduciary obligations would be more problematic. The court could have regard to the Canadian cases which have dealt with similar situations. The Supreme Court of Canada stated that where the Crown owes fiduciary obligations to two Indigenous groups whose interests conflict, the Crown must go further than merely acting as an

²⁸⁵ *Bristol and West Building Society* above n 29, at 449 affirmed in *Arklow Investments* above n 33, at 5.

²⁸⁶ As was recognised by the SCC in *Wewaykum Indian Band* above n 86, at 293.

²⁸⁷ *Ibid*, at 293.

²⁸⁸ *Ibid*, at 292-295.

²⁸⁹ *Forests* case 2007 -CA, above n16, at [81].

²⁹⁰ *Ibid*.

²⁹¹ This could arise for instance, in a dispute between different hapu within a single iwi, where each hapu has an interest in the property in which the iwi as a collective have an interest in.

honest referee.²⁹² The Crown must preserve the true legal interest of each group.²⁹³ Determining each group's legal interest could be a difficult task for the court. Although, in New Zealand the High Court is able to state cases to the Māori Appellate Court to determine questions regarding Māori interests or rights in land or personal property or questions of tikanga Māori.²⁹⁴ This could provide a useful mechanism to identify the true legal interests of each of the conflicting groups.

Where the Crown is held to owe fiduciary obligations to a Māori group, determining whether the duty has been breached will depend heavily upon the facts of the particular case. This is because the content of the obligations depends upon the specific circumstances of the relationship.²⁹⁵ However, the Canadian cases indicate that the Crown must advance the interests of the Māori group to the greatest extent possible,²⁹⁶ prevent the group's exploitation by third parties,²⁹⁷ and act in accordance with the agreement that gave rise to the obligations.²⁹⁸ The standard of conduct required by the Crown will be that of a 'man of ordinary prudence in managing his own affairs.'²⁹⁹

It follows, that there is room for fiduciary obligations to be imposed within a specific relationship or dealing between the Crown and a particular Māori group. However, this is likely to only occur in a limited number of cases given that, by the early 1990s, very few Māori assets remained in direct government control.³⁰⁰ Further, in the current political climate, the emphasis in the Crown-Māori relationship is to achieve redress for past Treaty breaches in full and final settlements through mutual negotiations. These settlements aim, through the enactment of legislation, to set out a new and continuing relationship between the parties, which is founded on Treaty principles.³⁰¹ Nevertheless, in certain cases where appropriate facts exist, there is potential for fiduciary obligations to be enforced upon the Crown in a way similar to that in Canada.³⁰²

²⁹² *Wewaykum Indian Band* above n 86, at 298.

²⁹³ *Ibid.*

²⁹⁴ Te Ture Whenua Māori Act 1993, ss 61 and 62; F.M (Jock) Brookfield, "Aspects of Treaty of Waitangi Jurisprudence", above n 272, at 94.

²⁹⁵ *Wewaykum Indian Band* above n 86, at 292.

²⁹⁶ *Semiahmoo Indian Band* above n 83, at 543.

²⁹⁷ *Guerin*, above n 62, at 361.

²⁹⁸ *Ibid* and *Semiahmoo Indian Band* above n 83, at 543.

²⁹⁹ *Blueberry River Indian Band* above n 83, at 366 and 401.

³⁰⁰ PG McHugh *Aboriginal Societies and the Common Law* above n 241, at 534.

³⁰¹ Jacinta Ruru, "The Māori encounter with Aotearoa" above n 273, at 121.

³⁰² Claire Charters has argued that *Ngai Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 could have been analysed through the application of private law type fiduciary obligations. This is because Ngai Tahu had surrendered their fishing rights to the Crown, the Crown had power over those assets, and could exercise discretion in a way that adversely affected Ngai Tahu's interests. This put Ngai Tahu in a position of vulnerability (Claire Charters

5.3 Fiduciary obligations between the Crown and Māori in relation to resources or commercial relationships

Another situation that could give rise to fiduciary obligations between the Crown and Māori would be through analogy with joint venture law, where both parties jointly exploited an opportunity, or managed a particular resource.³⁰³ This possibility could be more forward looking than fiduciary obligations arising from the undertaking of a proprietary interest, as the latter is likely to arise infrequently. Further, the future emphasis of the Crown-Māori relationship will soon move away from historic Treaty breaches, and claims to the Waitangi Tribunal and Crown-Māori negotiations will focus on Māori Treaty rights to modern resources.³⁰⁴ If Māori and the Crown were to engage in a joint endeavour, relating to such resources, both parties could potentially be held to owe mutual fiduciary obligations to one another. This section aims to discuss the concept of a joint venture, the fiduciary duties which can arise within it, as well as the characteristics that would need to be present within such a relationship between the Crown and Māori.

a) What is a 'joint venture'?

The term 'joint venture' does not have a definitive legal meaning. As a general description, the term connotes an arrangement for two or more parties to work together towards achieving a common commercial goal.³⁰⁵ Each party will usually contribute money, property or skill,³⁰⁶ and due to the common interest in shared objective, the parties will share in the risks and successes of the venture.³⁰⁷

"Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004", above n 168, at 167). An in depth analysis of this suggestion is outside the scope of this dissertation. However, determining whether fiduciary obligations could be imposed upon the Crown would depend upon the extent of the Crown's discretion over those fishing rights under the Treaty of Waitangi (Fisheries Claims Settlement) Act 1992. Further, it would require consideration as to the role of the Treaty of Waitangi Fisheries Commission with regard to the fisheries interests, as well as determination of the interests of all other New Zealand iwi, whose fishing rights were also at stake.

³⁰³ The idea for this section was provided by Jessica Palmer, Senior Lecturer at University of Otago, during a seminar on this dissertation.

³⁰⁴ This is because the final date for Māori to submit a claim to the Waitangi Tribunal for a historic grievance was 1 September 2008 (Treaty of Waitangi Act, ss6 and 6AA). Further, the Crown have indicated that they aim to settle all outstanding historical Treaty claims by 2020 (NZPA "Deluge of 11th hour Treaty claims" (1 September 2008) Fairfax New Zealand Ltd, <<http://www.stuff.co.nz/archived-stuff-sections/archived-national-sections/korero/607534>>).

³⁰⁵ *Chirnside v Fay* above n 19, at [91].

³⁰⁶ *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 (HC), at 10.

³⁰⁷ Gerald M.D Bean *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (Clarendon Press, Oxford, 1995), at 19.

Thus, the parties will often be required to subordinate their own self-interest in pursuing the common goal.³⁰⁸

Joint ventures will often be premised upon a contractual relationship.³⁰⁹ However, a variety of legal forms can be utilised, for example, contract, a company, trust or partnership.³¹⁰ A formal legal arrangement will not always be necessary if the relationship between the parties has advanced to the point that each party depends upon the other to achieve the common goal.³¹¹ However, more is required than a mere co-ownership or a contractual relationship to achieve a result, there must be a joint undertaking or activity with a view of making profit.³¹²

Joint ventures are often very similar to partnerships but are used to achieve a particular objective,³¹³ instead of an ongoing business relationship.³¹⁴ They usually arise where two parties come together to take advantage of a particular opportunity or resource.³¹⁵ The parties will combine and pursue the business opportunity together in order to maximise chances of success.³¹⁶ Thus, 'joint venture' denotes an undertaking to jointly achieve the common goal and share in the ultimate success of the activity.

³⁰⁸ Geoff McLay "Equity and Joint Ventures" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers Ltd, Wellington, 2009), at 1136.

³⁰⁹ *Commerce Commission v Fletcher Challenge* [1989] 2 NZLR 554 (HC), at 615.

³¹⁰ Jessica Palmer and Charles Rickett, "Joint Ventures and Fiduciary Law", above n 45, at 82.

³¹¹ *Chirnside v Fay* above n 19, at [91].

³¹² *Commerce Commission v Fletcher Challenge* above n 309, at 615.

³¹³ Justice McGechan in the High Court stated that the legal definition of a partnership in a commercial context is clear "In terms of s4(1) of the Partnership Act 1908 it is 'the relation which subsists between persons carrying on a business in common with a view to profit.' Section 4(2) specifically excludes the relationship between members of a company and there are particular rules under s5 relating to common ownership of property; the sharing of gross returns; and the receipt of a share of profits of a business. A partnership arises from contract, resulting from intention. Subject to contrary contractual arrangements, it carries recognised consequences both under the Partnership Act 1908 and the general law". In *Ibid*, at 616.

³¹⁴ *Ibid*, at 616. See also Jessica Palmer and Charles Rickett, "Joint Ventures and Fiduciary Law", above n 45 at 82 and Geoff McLay "Equity and Joint Ventures", above n 308, at 1137.

³¹⁵ Jessica Palmer and Charles Rickett, "Joint Ventures and Fiduciary Law", above n 45, at 81 and Geoff McLay "Equity and Joint Ventures" above n 308, at 1137.

³¹⁶ Jessica Palmer and Charles Rickett, "Joint Ventures and Fiduciary Law", above n45, at 81. This will usually be because each party is unlikely to be successful if they acted alone, so the two parties combine their skills, knowledge and resources.

b) Fiduciary obligations within joint ventures

The fact that a particular relationship can be defined as a ‘joint venture’ does automatically attach to it any particular duties.³¹⁷ However, in certain situations fiduciary obligations may be imposed. In *Chirnside*, Elias CJ stated that a joint venture “with a view to sharing the profit obtained...is inherently fiduciary” because on the facts, the parties’ relationship was “indistinguishable from a single transaction partnership.”³¹⁸ Tipping J also justified the imposition of fiduciary obligations due to the similarities between the relationship and a partnership.³¹⁹ Gault J noted that the term ‘joint venture’ can be applied to many forms of arrangement and fiduciary obligations will not necessarily arise within all of them.³²⁰ However, he stated that where a joint venture entailed a relationship of loyalty, then fiduciary obligations will prevent either party acting against the joint interest.³²¹

The Supreme Court has since sought to narrow the circumstances in which a joint venture will be held to give rise to fiduciary obligations.³²² It seems likely that a close examination of the facts of each case will be required to determine whether or not fiduciary obligations will exist. The Supreme Court, in *Paper Reclaim Ltd v International Ltd*,³²³ stated that characterising a commercial arrangement as a joint venture is not enough in itself to indicate that fiduciary obligations are to be owed to the parties.³²⁴ Instead, the court must first determine the terms of the parties’ agreement and then, whether any aspect of the relationship can be characterised as fiduciary.³²⁵ The contractual terms must be capable of accommodating the fiduciary obligation.³²⁶

More is required than merely showing that one party has contributed disproportionately to the relationship, or that one party depends upon the other. To justify the imposition of fiduciary obligations, it must be established that one party reposes trust and confidence in the other, and is entitled to do so.³²⁷ This requires more than mere co-operation between the parties.³²⁸ Where mutual

³¹⁷ Ibid, at 82.

³¹⁸ *Chirnside v Fay* above n 19, at [14] (Keith J also agreed on this point at [55]).

³¹⁹ Ibid, at [90]. (with whom Blanchard JJ concurred)

³²⁰ Ibid, at [52].

³²¹ Ibid.

³²² Jessica Palmer and Charles Rickett, “Joint Ventures and Fiduciary Law”, above n 45, at 87.

³²³ *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 3 NZLR 169 (SC).

³²⁴ Ibid, at [31].

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid, at [31].

loyalty to the shared interest does not exist between the parties, or the loyalty is owed by one party only, then the relationship will not be one in which mutual fiduciary obligation will arise.³²⁹

In *Amaltal Corporation Ltd v Maruba Corporation*, the Supreme Court offered further guidance to determining the existence of fiduciary obligations within joint venture obligations. The court stated that an incorporated vehicle could only be ‘loosely’ termed a joint venture, making it unlikely that the whole relationship would be fiduciary in nature.³³⁰ Because the parties have deliberately made themselves subject to obligations under the company’s constitution, companies’ law and their own contractual relationship, there is little room for the supplementation of fiduciary obligations.³³¹ However, even where a joint venture relationship is held not to be fiduciary overall, fiduciary obligations of loyalty could attach to particular aspects of the relationship, provided that one party is entitled to rely upon that loyalty.³³²

c) Application of fiduciary duties within joint ventures to Crown and Māori

In order for fiduciary obligations to arise within a joint activity between the Crown and Māori, both parties would need to undertake to work towards a project with shared objective and a view to sharing in the success of the activity.³³³ The arrangement would need to have proceeded further than a mere proposal, or mere negotiations with a view to achieving a common object.³³⁴

In pursuing the joint objective, each party must be entitled to repose trust and confidence that the interests of the joint venture will be put before the individual interests of each party.³³⁵ Trust and confidence is most likely to be established where the joint venture is very similar to a

³²⁸ Ibid, at [31].

³²⁹ Ibid, at [33].

³³⁰ *Amaltal Corporation Ltd v Maruba Corporation* [2007] 3 NZLR 192 (SC), at [20].

³³¹ Ibid, at [19].

³³² Ibid, at [21].

³³³ This would arise from a view of sharing in profits, or from a view to share in the success of a certain common goal within, perhaps for example, the co-management of a resource. Where the subject of the joint endeavour is a natural resource, then the relationship and the obligations within it may be governed by statutes or regulations. For example, the Resource Management Act 1991.

³³⁴ *LAC Minerals Ltd* above n 36, at 67-68, and *Arkelow Investments* above n 33, at 6. See also Jessica Palmer and Charles Rickett, “Joint Ventures and Fiduciary Law”, above n 45, at 90.

³³⁵ *Paper Reclaim Ltd* above n 323, at [31].

partnership.³³⁶ The relationship may be governed by contract, although fiduciary duties can still arise in absence of a contract if the other requirements are met.³³⁷ Where a contract does exist, fiduciary obligations will not be imposed if the parties have regulated the relationship through contractual terms and excluded fiduciary obligations from applying.³³⁸

If the joint venture is pursued through, for example, an incorporated vehicle, or another relationship that carries its own legal rules and obligations, then those rules and obligations will regulate the relationship, instead of fiduciary duties.³³⁹ In this situation the arrangement will only be loosely classified as a joint venture, and this will not justify the imposition of a fiduciary relationship.³⁴⁰ However, particular aspects of a “loose joint venture” relationship could still be classed as being fiduciary, but these fiduciary obligations will arise on their own facts and not simply because the relationship could be described as being a joint venture.³⁴¹

Where a joint venture between the Crown and Māori can be classed as a relationship of trust and confidence, fiduciary obligations will operate to prevent either party placing themselves in a position of conflict of interest with the joint venture.³⁴² Thus, neither party can elevate their own interests above the shared interest.³⁴³ Moreover, in enforcing the standard of loyalty, the fiduciary obligation will require either the Crown or Māori to account for any unauthorised profit obtained though an opportunity arising through the joint venture.³⁴⁴

5.4 A relational duty of good faith?

In *Paki*, Justice Hammond noted that the attempts by claimants to enforce fiduciary obligations against the Crown in a private law sense has arisen from an inability to enforce the Treaty partners’

³³⁶ Ibid, at [31], and *Chirnside v Fay* above n 19, at [14] and [71]. See also Jessica Palmer and Charles Rickett, “Joint Ventures and Fiduciary Law”, above n 45, at 90.

³³⁷ *Chirnside v Fay* above n 19, at [91].

³³⁸ *AUAG Resources Ltd v Waibi Mines Ltd* (1995) 5 NZBLC 103,601 (CA).

³³⁹ As demonstrated in *Amaltal Corporation Ltd* above n 330. See Jessica Palmer and Charles Rickett, “Joint Ventures and Fiduciary Law”, above n 45, at 90.

³⁴⁰ *Amaltal Corporation Ltd* above n 330, at [20].

³⁴¹ Ibid, at [21]. See Jessica Palmer and Charles Rickett, “Joint Ventures and Fiduciary Law”, above n45, at 91.

³⁴² *Chirnside v Fay* above n 19, at [15].

³⁴³ Ibid.

³⁴⁴ Ibid.

obligations of good faith through a concrete action.³⁴⁵ In his idea that a relational duty of good faith be developed between the Crown and Māori, Hammond J considers the possibility of transforming the duty of good faith which is accepted as existing between the Crown and Māori into a discrete, actionable obligation. This section seeks to explore the idea of common law duties of good faith, and consider how these could be argued to apply in the Crown-Māori context, as Justice Hammond suggested.

The relationship between the Crown and Māori has been repeatedly accepted as one involving the obligations of good faith. Judicial recognition of the Crown's duty of active protection of Māori interests and the reciprocal obligations of the Crown and Māori to act reasonably, co-operatively and in the utmost good faith can be found in *Lands* and subsequent cases.³⁴⁶ However, a relational duty of good faith would be a novel development because it would be based on a common law duty. Therefore, the duty would have a wider scope for application than the duty of good faith discussed in Chapter Three. The relational duty would arise within the relationship itself, and would not be dependant upon statutory incorporation of the Treaty, or the ability to import the Treaty into the interpretation of legislation or the exercise of a public power.

a) The duty of good faith

The duty of good faith is an obligation that arises within fiduciary relationships. However, the obligation of good faith can also exist as a stand-alone duty in circumstances in which there is no fiduciary relationship.³⁴⁷ The duty of good faith has developed within particular relationships under the common law, for example, in employment relationships and in some contractual situations.

The idea of good faith does not embrace a single definable concept, and it is not a doctrine of general application. Instead, it exists in separate and disparate areas of law in which it has

³⁴⁵ *Paki* CA, above n 1, at [99].

³⁴⁶ *Lands* case, above n 124, at 664, 682, 693, 703 and 715.

³⁴⁷ Matthew Conaglen, "Nature and Function of Fiduciary Loyalty", above n 55, at 456. See also *Forttext Group (In Receivership and Liquidation) v MacIntosh* [1998] 2 NZLR 171 (CA), at 180 and *University of Nottingham v Fisel and Another* [2000] ICR 1462 (CA), at 1492-1493. These cases explain that the obligation of good faith that applies to employment relationships does not mean that the relationship is fiduciary. The duty of good faith is one aspect of the particular relationship, and in order for the relationship to be defined as being fiduciary, would be determined by the particular facts of the relationship in question.

developed independently and in a piecemeal fashion.³⁴⁸ The themes that are common to these separate relationships are the “promotion of co-operation between parties to a relationship, the curtailment of the use of one’s power over another; and the exaction of “neighbourhood” responsibilities within a relationship.”³⁴⁹ Good faith allows both parties to a relationship to act in their own interests, while at the same time; each must have regard to the legitimate expectations of the other.³⁵⁰ One reason for the imposition of a duty of good faith upon a particular relationship is where one party has the power or capacity to unfairly prejudice the interests of the other.³⁵¹ In this instance, the good faith duty will regulate the use of that power.

b) Recognition of a duty of good faith in New Zealand

Two instances in New Zealand where the common law has imposed a duty of good faith is in process contracts arising from calls for tenders and in the employment relationship.³⁵² Within the employment relationship, such duties have been variously recognised as the duty of loyalty, good faith and trust and confidence.³⁵³ The rationale for this duty is to protect the close personal relationship which exists between the employee and employer, where the employee is often vulnerable.³⁵⁴ The duty requires the relationship of trust and confidence to be upheld, and will be breached where one of the parties acts in a way which, viewed objectively, is likely to breach that relationship.³⁵⁵ Thus, while the balance must be struck between the interests of each party, neither is required to subjugate their own interests.³⁵⁶

³⁴⁸ P.D Finn ‘The Fiduciary Principle’ in T.G Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) 1, at 24.

³⁴⁹ *Ibid*, at 11.

³⁵⁰ *Ibid*, at 4.

³⁵¹ *Ibid*, at 7.

³⁵² The requirement to deal fairly in the process of calling for and assessing tenders in New Zealand resembles a duty of good faith, although there is no general duty of good faith in contract law in New Zealand (Burrows, Finn and Todd *Law of Contract in New Zealand* (3rd ed, Lexis Nexis, Wellington, 2007), at 19). The duty of fairness and good faith in the tender process was affirmed in *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83; [2005] 2 NZLR 433 (PC), at [41]-[47]. The Employment Relationships Act 2000, s 4 now imposes a statutory obligation of good faith upon employees and employers within the employment relationship. However, prior to this legislation, an obligation of good faith was implied into the employment relationship at common law. This developed in the United Kingdom and was also applied in New Zealand cases. See, for example *Aoraki Corporation v McGavin* [1998] 3 NZLR 276 (CA), at 304, which recognised that the obligations of trust and confidence developed in the UK cases was ‘firmly established in New Zealand’.

³⁵³ *University of Nottingham* above n 347, at 1492.

³⁵⁴ *Malick v BCCI SA* [1997] 2 All ER 1 (HL), at 8.

³⁵⁵ *Ibid*, at 15 and 18. See also *Woods v W.M Car Services (Peterborough) Ltd* [1981] ICR 666 (ET), at 670-671 and *Lewis v Motorworld Garages Ltd* [1986] ICR 157 (CA), at 167.

³⁵⁶ *Malick v BCCI SA* above n 354, at 15-16 and *University of Nottingham* above n 347, at 1493.

c) Application of the duty of good faith to the Crown and Māori

Like employers and employees, the Crown and Māori share a special, ongoing relationship. This is demonstrated by the Treaty principles, the notions of partnership, the function of the Waitangi Tribunal and the intimate level at which dealings and negotiations occur between the state and Māori. As noted by Justice Hammond, both Parliament and the Executive have demonstrated acceptance of the good faith obligation by incorporating Treaty references in legislation, and by including Treaty clauses into public sector contracts.³⁵⁷ Further, as part of its Treaty settlement policy, the Crown endeavours to conduct the process in good faith, pursuing the common goal of achieving redress through mutual trust and co-operation.³⁵⁸ The relationship is thus open-ended, interactive and directed towards the future as opposed to discrete, one off dealings.³⁵⁹

Within the relationship, a disparity of power can also be seen, due to unequal bargaining power, which has been recognised in several cases,³⁶⁰ and the Crown's ability to directly influence the legislative process. Further, the number of cases arising from the Treaty settlement process demonstrates the difficulties Māori can encounter when dealing with the Crown.³⁶¹ At present, most complaints arising from the settlement process will not be heard by the courts, due to the process being political and the lack of legal basis upon which Māori can claim. Because, the court presently will not intervene, Māori are vulnerable to the Crown's ultimate ability to legislate in these cases. A relational duty of good faith would provide a legal basis in which the courts could ensure the Crown upholds reasonable standards of conduct in its dealing with Māori.

The notion of both the Crown and Māori owing mutual obligations of good faith is better suited to the idea of the partnership relationship than the idea of the Crown owing a broad fiduciary duty to Māori. It is also more suited to the way that the relationship presently operates, with the ability of Māori to deal directly with the Crown. This relationship of partnership sets New Zealand apart from North America where Crown-Indigenous relations are based upon paternalistic notions in

³⁵⁷ *Paki* CA, above n 1, at [112].

³⁵⁸ *Red Book* above n 7, at 30.

³⁵⁹ This consideration was recognised as being a factor that supported the imposition of relationships of good faith in *Dymocks Franchise Systems v Bigola Enterprises* 8 TCLR 612 (HC), at [93] and [97].

³⁶⁰ For example *Forests* case 2007 –HC, above n 16 and *Paki* CA, above n 1.

³⁶¹ For example *Tē Runanga o Wharekauri Rehobu Inc* above n 12; *Milroy v Attorney General* above n12; *Greensill v The Tainui Māori Trust Board* above n 14.

which the Crown has a significant amount of control over Indigenous peoples' lives.³⁶² Enforceable duties of good faith would enable both parties to pursue their own interest but would ensure reasonable, honest and co-operative standards of conduct between each party in doing so. It would also enable the Crown to take into consideration its duties to the rest of the population.

These aspects of the Crown-Māori relationship could justify the imposition of a common law duty of good faith. However, there is likely to be judicial reluctance in developing such a duty because it would require a sudden and significant change in the law. Thus far, developments in the obligations existing between the Treaty partners have been incremental, and courts have demonstrated a heavy emphasis upon legislative incorporation. Further, courts have already demonstrated a reluctance to engage in the arbitration of poly-centric political decisions,³⁶³ and may consider that, given the Crown's need to act on behalf a wide range of different interests, that defining a standard of reasonableness is outside of the court's role. As the settlement cases demonstrate, the courts are extremely tentative when it comes to making decisions that will involve questions as to Crown policy.³⁶⁴

Nevertheless, an enforceable duty of good faith would be used by the courts to regulate the conduct of the parties, as opposed to requiring the courts to consider the outcomes and content of decisions and policy. This is less objectionable as the courts already take an active role in ensuring proper procedure is followed in the exercise of public power. If a common law duty of good faith was to develop within the Crown-Māori relationship, it could apply to dealings and transactions between Māori groups and the Crown, for example negotiations.³⁶⁵ However, because the courts have repeatedly maintained that settlement deeds are non-justiciable, it is unlikely that a duty of good faith could be used to found an action after a settlement has been proposed or agreed upon.³⁶⁶ This considerably narrows the applicability of a good faith obligation. The idea of a relational duty of

³⁶² *Wewaykum Indian Band* above n 86, at [79]. Also see Joe Williams 'Future Directions' in Jacinta Ruru (ed) *In Good Faith: symposium proceedings marking the 20th anniversary of the Lands case* (University of Otago, Otago, 2008) 121, at 127 argues that the Court of Appeal's description of the Crown-Māori relationship as being akin to partnership is empowering to Māori, and such a description would not be used to define the relationship between the Crown and Indigenous peoples by the top courts in Australia, the United States or Canada.

³⁶³ Jessica Andrew 'Administrative Review of the Treaty of Waitangi Settlement Process' (2008) 39 VUWLR 225, at 255-260.

³⁶⁴ For example: *Te Runanga o Wharekauri Rebohu Inc* above n12; *Milroy v Attorney General* above n12; *Greensill v The Tainui Maori Trust Board* above n 14.

³⁶⁵ As it would be an established legal ground upon which claimants could base their case, as was held to be necessary by Doogue J in *Kai Tohu Tohu o Puketapu Hapu* above n 15, at 18.

³⁶⁶ See above n 364.

good faith between the Crown and Māori presently remains the obiter suggestion of one New Zealand judge. We await clarification from the Supreme Court as to whether there is any promise for the future development of the idea when they consider the appeal of *Paki v Attorney General*.

5.5 Conclusion

Despite the Court of Appeal's recent rejection that the Crown owes Māori private law fiduciary obligations that are enforceable in equity, it still remains open for such obligations to be enforced in a narrow set of circumstances. These circumstances would involve a particular dealing or relationship between the Crown and Māori that closely mirrors situations in which equity would enforce fiduciary obligations in the private law context. For example, when the Crown undertakes control over a Māori interest for the benefit of Māori, or where the Crown and Māori enter into a relationship that shares strong analogies with a commercial joint venture. However, the Crown is unlikely to be held to owe a wholesale fiduciary obligation to all Māori as stated by Justice Gendall. Further, there remains a possibility that a relational duty of good faith could eventually be developed at common law between the Crown and Māori. We await further guidance as to this idea from the Supreme Court.

CONCLUSION

The role that the New Zealand courts can play in reconciling the relationship between the Crown and Māori is one that is considerably limited. This is largely because the Crown chooses to deal with Māori in determining rights and entitlements, compensation and redress, and the future direction of the relationship in the political and not the legal sphere. Nevertheless, the courts have demonstrated that where they have the opportunity to arbitrate regarding this relationship, they will do so unless the matter before them is so inherently political that it will require the court to step outside of its judicial role and interfere with the legislative process. Within this role there is potential for enforceable obligations that draw on private law fiduciary duties to be imposed on the Crown to regulate its conduct toward Māori. Although, the circumstances in which these obligations could arise are considerably narrow. Further, there is possibility for the development of a stand alone, enforceable duty of good faith to develop in the common law to apply to the Crown-Māori relationship. This would apply in a broader range of circumstances than fiduciary obligations. However, neither obligation is likely to have any effect where the issue before the court involves a deed of settlement between the Crown and a Māori group. In this situation, resolution of disputes between the Crown and Māori must occur through political and not legal processes.

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