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**BETWEEN A ROCK AND A HARD PLACE:**

DOES THE TREATY OF WAITANGI PROVIDE AN AVENUE FOR  
IWI TO ASSERT LEGAL INTERESTS IN MINERALS IN THE  
CROWN OWNED CONSERVATION ESTATE?

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## INTRODUCTION

It has been a landmark year for the issue of mining in the conservation estate. In March 2010 the Government released a discussion paper entitled “Maximising our Mineral Potential: Stocktake of Schedule 4 of the Crown Minerals Act and beyond”.<sup>1</sup> The Government’s focus was on economic development and the extraction of minerals, and it had its eyes on the highly prized areas of New Zealand’s conservation estate. Mining has been prohibited in these Schedule 4 areas since 1997. This brought the mining debate to the fore, and a public clash between conservation ethics and economic development ensued. The government received 37, 552 submissions on the discussion paper, and 98 per cent of these were opposed to mining in Schedule 4 lands.<sup>2</sup> The outcome was that the Government decided not to remove any land from Schedule 4, and instead the Government turned its attention to non-Schedule 4 conservation land in Northland and the West Coast of the South Island.<sup>3</sup> In August 2010, the Government announced a review of the Crown Minerals Act 1991.<sup>4</sup>

In light of recent Government attention to the minerals resource in public conservation lands, it is timely to assess whether Maori interests in these resources exist. More specifically, this paper considers whether any Maori interests in minerals in the conservation estate arise from the Treaty of Waitangi.

There are several reasons behind taking a Treaty approach. First, the Treaty of Waitangi is an important part of New Zealand’s contemporary constitutional make-up, and the significance it holds for New Zealand cannot be taken away, even by legislative action. Second, the Crown Minerals Act 1991 and the Conservation Act 1987 have both incorporated the principles of the Treaty of Waitangi through specific sections to

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<sup>1</sup> Ministry of Economic Development “Maximising our Mineral Potential” (2010) <[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_\\_\\_42792.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC___42792.aspx)>

<sup>2</sup> Ministry of Economic Development “Stocktake of Schedule 4 Crown Minerals Act – Outcomes” (2010) <[http://www.med.govt.nz/upload/73966/Cabinet%20paper%20-%20Stocktake%20of%20Schedule%204%20Crown%20Minerals%20Act%20-%20Outcomes%20-%2020th%20July%202010%20\\_3\\_.pdf](http://www.med.govt.nz/upload/73966/Cabinet%20paper%20-%20Stocktake%20of%20Schedule%204%20Crown%20Minerals%20Act%20-%20Outcomes%20-%2020th%20July%202010%20_3_.pdf)>

<sup>3</sup> Ibid.

<sup>4</sup> Ministry of Economic Development “Crown Minerals Act Review” (2010) <<http://www.crownminerals.govt.nz/cms/news/2010/mineral-and-petroleum-permitting-review-begins>>.

that effect. Third, the courts and the Waitangi Tribunal provide a significant role in recognising and enforcing Treaty principles, and these roles can inform an approach for the recognition of Maori interests in minerals in the conservation estate. Finally, this paper draws on the comments of Eddie Durie when he considers whether or not Article II of the Treaty of Waitangi is simply declaratory of the common law rights of Indigenous peoples to customary or Aboriginal title.<sup>5</sup> Durie cites those who have analysed the Treaty of Waitangi from that point of view, but puts forward his view that the Maori text of the Treaty goes beyond that. In Durie's view, the common law protections were confirmed, but rights of development and self-government were also conferred. Together, these avenues will be examined to assess whether Maori interests in minerals in the conservation estate can be established.

This paper does not attempt to enter a rights-based discourse. Accordingly, it refers to "Maori interests" and to the "concept of development".

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<sup>5</sup> ETJ Durie "The Treaty in Maori History" in William Renwick (ed) *Sovereignty and Indigenous Rights – The Treaty of Waitangi in International Contexts* (Victoria University Press, Wellington, 1991) 156 at 157-158.

## **CHAPTER ONE: CURRENT MAORI LEGAL INTERESTS IN MINERALS IN THE CONSERVATION ESTATE.**

The purpose of this chapter is to explain the current management regime for mining in the conservation estate. This chapter explores what is meant by the “conservation estate” and examines how the Conservation Act 1987 provides for its management. It addresses Crown ownership of minerals in New Zealand, and examines the processes involved in gaining permits and access to mine in the conservation estate. The final part of this chapter explores how legislation in New Zealand currently recognises Maori legal interests in minerals in the conservation estate.

### **1.1 The Conservation Estate**

New Zealand’s conservation area is made up of the country’s most treasured public places. The conservation area comprises many of New Zealand’s most beautiful landscapes, mountains, forests, and marine areas. These areas are scientifically important, and contain fragile ecosystems.<sup>6</sup> Conservation areas are also home to New Zealand’s diverse and distinctive flora, fauna and wildlife. Over 30 per cent of New Zealand’s land area is protected and managed by the Department of Conservation (DOC) under the Conservation Act 1987, as well as over one million hectares of marine areas managed as marine reserves.<sup>7</sup> The majority of these areas are Crown-owned, and are held for the public.<sup>8</sup> The area that is Crown-owned is commonly known as the conservation estate.

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<sup>6</sup> National Parks Act 1980, s 4.

<sup>7</sup> Department of Conservation “DOC Annual Report for Year Ending 30 June 2009” (2009) Department of Conservation Government Website <<http://www.doc.govt.nz/publications/about-doc/annual-report-for-year-ended-30-june-2009/appendix-2/>>.

<sup>8</sup> Privately owned land can also be managed by the Department of Conservation (DOC) by agreement. Under s 27 of the Conservation Act 1987 any private landowner can enter into a covenant for conservation purposes with the Minister of Conservation. Section 27A provides for Nga Whenua Rahui kawenata; these concern Maori land, or Crown land held under a Crown lease by Maori. Under s 27A(1)(a) the owner or lessee of the land may agree that DOC manage the land in order to preserve and protect the natural, historic, spiritual or cultural values of the land. The Reserves Act 1977 has similar provisions. Section 77 of the Reserves Act provides that the Minister of Conservation can enter into conservation covenants with private land owners if satisfied the land is capable of being classified as a reserve within the purposes of the Act. Section 76 of the Reserves Act provides for the Minister to make

The Conservation Act was enacted in 1987 to facilitate the comprehensive management of New Zealand's natural and historic resources under one single state department. Prior to 1987 a series of government agencies managed these resources, including the Department of Lands and Survey, the New Zealand Forest Service and the Wildlife Service. Each department followed different ethics and objectives.<sup>9</sup> For example, the Department of Lands and Survey protected conservation land, but was also concerned with preparing the land for development.<sup>10</sup> To foster a more integrated approach, the Conservation Act created and empowered DOC to manage and administer New Zealand's natural and historic resources under the Conservation Act and those statutes listed in the First Schedule of the Conservation Act, such as the Wildlife Act 1953, the Reserves Act 1977, the Marine Mammals Protection Act 1978, and the National Parks Act 1980.<sup>11</sup> The Conservation Act is as an umbrella statute for protected areas, species and resources.

Section 6(a) of the Conservation Act directs DOC to manage all land and natural and historic resources under the Act for *conservation purposes*. During the legislative process, the word "utility" was removed from the definition of conservation.<sup>12</sup> "Conservation" is defined in s 2 of the Conservation Act:

Conservation means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their

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declarations of "protected private land" following an application by the owner of the land. The Minister may make the declaration if satisfied that the land possesses certain qualities, and that preservation is in the public interest. Once a declaration is made, the land is treated as if it were a reserve under the Act. Section 77A of the Reserves Act 1977 relates to Nga Whenua Rahui kawenata; it mirrors s 77A of the Conservation Act, with the exception that the land must fall within the particular purposes of the Reserves Act 1977. For further discussion on private land covenants see Kellie Ewing "Conservation Covenants and Community Conservation Groups: Improving the Protection of Private Land" (2008) 12 NZJEL 315 and Debra Donahue "Law and Practice of Open Space Covenants" (2003) 7 NZJEL 119 at 132.

<sup>9</sup> Euan Kennedy and Harvey Perkins "Protected Fauna Management in New Zealand" in P Ali Memon and Harvey Perkins (eds) *Environmental Planning and Management in New Zealand* (Dunmore Press Ltd, Palmerston North, 2000) 196 at 199.

<sup>10</sup> Bernie Napp "A Short History of the Department of Conservation: 1987-2007" (2007) Department of Conservation Government Website <<http://doc.govt.nz/publications/about-doc/a-short-history-of-doc/born-with-a-mission/>>.

<sup>11</sup> Conservation Act 1987, s 6(a).

<sup>12</sup> P Ali Memon *Keeping New Zealand Green: Recent Environmental Reforms* (University of Otago Press, Dunedin, 1993) at 67.



appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

Section 2 further defines “preservation” and “protection” as:

Preservation, in relation to any resource, means the maintenance, so far as is practicable, of its intrinsic values.

Protection, in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes—

- (a) Its restoration to some former state; and
- (b) Its augmentation, enhancement, or expansion.

These definitions make it clear that “conservation” is primarily focused on the intrinsic value and natural condition of resources. To this end, “protection” only allows activities which will improve the resource. The focus is therefore on the resource itself rather than any particular use for the resource.<sup>13</sup>

While the definition of “conservation” does not directly import the concept of “use” or “development”, the definition does allow for the use of the conservation area, and recognises that the conservation estate is important for the New Zealand tourism industry. The preservation and protection of the conservation estate is to be managed in a way that safeguards the options of future generations.<sup>14</sup> This signals that conservation under the Conservation Act has a longterm and forward-looking focus and that the conservation estate is important to the public. To this end, natural and historic resources are managed to allow for recreational enjoyment and appreciation. However,

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<sup>13</sup> This primary focus of protection and preservation of *all* land and resources in the conservation estate is exemplified in the concept of “stewardship areas”. These are a residual category of lands which have not been assigned any particular protected status but are managed by DOC. Under s 28 of the Conservation Act these areas are to be managed so that their “natural and historic resources are protected”. Therefore, even lands that are not especially protected cannot be utilised or developed without reference to conservation values.

<sup>14</sup> Conservation Act 1987, s 6.

any use of a natural resource for recreation or tourism is subject to the primary focus of the legislation which is preservation and protection.<sup>15</sup>

There are several means by which the Conservation Act enables DOC to protect resources and maintain their intrinsic value while still enabling recreation, tourism or other uses. Under s 18 the Minister of Conservation may confer additional protection statuses on land in the conservation estate. There are several specified types of “specially protected areas”.<sup>16</sup> The sections in the Conservation Act provide further guidance on the management of these areas, including when certain activities are prohibited.<sup>17</sup> Land may be given the status of a reserve, and therefore is managed by DOC under the purposes and principles of the Reserves Act 1977, or land can be designated part of a national park, and managed under the National Parks Act 1980. Finally, concessions also regulate activities within the conservation estate.<sup>18</sup>

In order to manage the conservation estate for conservation purposes, the Conservation Act provides a hierarchy of management documents. The highest of these management documents is a statement of general policy, which is drafted by the Director-General and is publicly notified.<sup>19</sup> This is envisaged to guide decisions of the Minister, as well as of the Director-General of Conservation and other agencies, boards and councils under the Conservation Act.<sup>20</sup> The second tier of management documents are Conservation Management Strategies. These set out the objectives for the integrated

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<sup>15</sup> Conservation Act 1987, s 6(e).

<sup>16</sup> These include conservation parks, wilderness areas, ecological areas, sanctuary areas, watercourse areas, amenity areas and wildlife management areas. The purposes of each of these areas, and any prohibited activities within them are contained in ss 19 to 23B of the Conservation Act.

<sup>17</sup> For example, s 20(1) prohibits the erection and construction of buildings and machinery and the use of vehicles in wilderness areas.

<sup>18</sup> Section 17O of the Conservation Act provides that any activity carried out in a conservation area must be authorised by a concession. Anyone may apply for a concession (s 17R). Exceptions include recreational activities where the person receives no gain or reward for carrying out that activity (s 17O(4)), or where the activity is necessary to save or protect life or health (s 17O(3)(c)). For the purposes of this paper the most important exception is that any mining activity authorised under the Crown Minerals Act 1991 does not require a concession (s 17O(3)(a)). The relationship between the Conservation Act and the Crown Minerals Act will be discussed later in this chapter.

<sup>19</sup> Conservation Act 1987, s 17B.

<sup>20</sup> Department of Conservation *Statement of General Policy* (2005) <<http://doc.govt.nz/publications/about-doc/role/policies-and-plans/conservation-general-policy/>> at 3.

management of specified areas in the conservation estate.<sup>21</sup> For example, public conservation lands in the West Coast of the South Island are managed under one Conservation Management Strategy. Each Conservation Management Strategy must be consistent with Statements of General Policy.<sup>22</sup> The third tier of management documents are Conservation Management Plans. These relate to more specific areas within Conservation Management Strategy areas. The most common plans at this level are National Park Management Plans. Under s 45 of the National Parks Act 1980, a management plan must be prepared for each National Park and they provide for the management of the Park in accordance with the National Parks Act and the Conservation Act. All statements of general policy and management plans are policy documents only, and have no legal force.

## **1.2 Mining in the Conservation Estate**

While the Conservation Act's primary objective is conservation, preservation and protection of conservation land and natural resources, the Conservation Act does allow for the possibility of mining in the conservation estate. The Conservation Act specifies that mining activity that is authorised under the Crown Minerals Act 1991 does not require a concession under the Conservation Act.<sup>23</sup> Therefore, all permits for mining in the conservation area are authorised under the procedures in the Crown Minerals Act 1991. The Crown Minerals Act relates to Crown owned minerals only.<sup>24</sup> This part of the Chapter explores the ownership of minerals in New Zealand, and how decisions are made on mining permits and access arrangements in Crown land.

Most minerals in New Zealand are Crown owned.<sup>25</sup> The position at English common law was that the owner of the land also owned everything below the surface of the

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<sup>21</sup> Conservation Act 1987, s 17D(7).

<sup>22</sup> Conservation Act 1987, s 17D(4),

<sup>23</sup> Conservation Act 1987, s 17O(3)(a).

<sup>24</sup> In s 2 of the Crown Minerals Act 1991 this means "any mineral that is the property of the Crown".

<sup>25</sup> The most significant exception is coal. Around 50 per cent of known coal reserves remain in private ownership.

land.<sup>26</sup> But, the English common law exempted gold and silver from private ownership because the Crown had prerogative rights to these minerals in all land.<sup>27</sup> The English prerogative rights applied following the settlement of New Zealand,<sup>28</sup> although the first statutory recognition of Crown ownership of gold and silver was in the Mining Act 1971.<sup>29</sup> Moreover, there has been a long legislative tradition in New Zealand of reserving minerals to the Crown. The Land Act 1892 provided that any “mineral, mineral oil, gas, metal or valuable stone” found on Crown land could be reserved from the sale of that land.<sup>30</sup> Subsequent statutes continued these reservations to the Crown.<sup>31</sup>

The Crown Minerals Act is the most recent statute that provides for Crown ownership of minerals. Section 10 of the Crown Minerals Act declares certain ‘precious’ minerals to be the property of the Crown:

Notwithstanding anything to the contrary in the Act or in any Crown grant, certificate of title, lease, or other instrument of title, all petroleum, gold, silver and uranium existing in its natural condition in land (whether or not the land has been alienated from the Crown) shall be the property of the Crown.

This section consolidated prior statutory reservations of this kind.<sup>32</sup> The government views the specific resources in s 10—petroleum, gold, silver and uranium—as

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<sup>26</sup> Owen J Morgan “The Crown’s Right to Gold and Silver in New Zealand” (1995) 1 *Aus J Leg Hist* 51 at 52.

<sup>27</sup> *Case of Mines* (1568) 77 ER 472.

<sup>28</sup> Dr Robyn Anderson *Rangahaua Whanui National Theme in Goldmining Legislation and Policy* (Waitangi Tribunal, 1996), at 1. For further discussion on whether Crown prerogative rights to gold and silver applied in New Zealand see generally Morgan, above n 26, at 62-66 and David V Williams “Gold, the *Case of Mines* (1568) and the Waitangi Tribunal” 7 (2003) *Aust J Leg Hist* 157.

<sup>29</sup> Mining Act 1971, s 6.

<sup>30</sup> Land Act 1892, s 121.

<sup>31</sup> The most recent example is s 11(2) of the Crown Minerals Act 1991.

<sup>32</sup> The Crown believed it had property in gold and silver by way of prerogative rights under the common law. Regulation for the mining of gold proceeded on this basis, as embodied in the Goldfields Act 1858. The first statute to specifically provide that all gold and silver were the property of the Crown was the Mining Act 1971 under s 6. The Petroleum Act 1937 expropriated all property in the petroleum resource out of private ownership and into the ownership of the Crown. The Bauxite Act 1959 and the Steel Industry Act 1959 first asserted Crown ownership of uranium.

“nationalised” minerals and considers that these are managed and owned in the ‘national interest’.<sup>33</sup>

Section 11 provides for the reservation of minerals to the Crown when Crown land is alienated:

(1) Every alienation of land from the Crown made on or after the commencement of this Act (whether by sale, lease or otherwise) shall be deemed to be made subject to a reservation in favour of the Crown of every mineral existing in its natural condition in the land.

Section 11(2) is clear that all prior reservations of minerals by any enactment continue to be reserved in favour of the Crown. As stated above, these prior reservations date back to the Land Act 1892, although each enactment may have different definitions for what a mineral is and therefore any minerals that fell outside of a particular definition may have been retained in private ownership.

The Crown Minerals Act is designed so that the Crown retains control of all mining activity relating to Crown owned minerals. Section 8 of the Crown Minerals Act establishes the rule that no person can prospect, explore for or mine any Crown owned minerals in land unless the person holds a permit authorising that activity. The permit scheme is guided by minerals programmes. These programmes are issued in respect of any mineral which is, or is likely to be, the subject of a permit.<sup>34</sup> There can be several minerals programmes effective at any one time, as each permit continues to be managed under the minerals programme that was in force when the initial permit was granted.<sup>35</sup>

Minerals programmes detail the policies and procedures for the management of Crown

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<sup>33</sup> Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2003) at 94.

<sup>34</sup> Crown Minerals Act 1991, s 13.

<sup>35</sup> Section 22 of the Crown Minerals Act specifies that the Minister must exercise functions in a manner consistent with the ‘relevant minerals programme’. ‘Relevant minerals programme’ is defined in s 2 of the Crown Minerals Act as the minerals programme that applied when an application for an initial permit was made. The Government is currently reviewing the Crown Minerals Act and proposes to amend the Act so that only the most recent minerals programmes apply.

owned minerals, including when permits will be granted and extended, and when work programmes will be accepted.<sup>36</sup> The Governor-General issues minerals programmes by Order in Council.<sup>37</sup> The minerals programmes are delegated legislation and decision makers are accountable under judicial review.

The minerals programmes aim for the most efficient extraction of New Zealand's resources, and for the Crown to obtain the maximum financial return.<sup>38</sup> "Efficient extraction" means allocating resources to a permit holder who will take all efforts to prospect, explore or mine.<sup>39</sup> The focus is on the extraction of minerals. The financial return (predominantly in the form of a royalty) goes to the Crown and contributes to general public spending.

The permitting regime does not include a grant of access to land.<sup>40</sup> Under ss 53 and 54 of the Crown Minerals Act all permit holders must gain an access arrangement with the owner and occupier of land in order to prospect, explore or mine on or in that land. An access arrangement can either be agreed in writing, or determined by an arbitrator if the owner or occupier agrees to go to arbitration.<sup>41</sup> The Minister of Conservation must agree to any arbitration in respect of conservation estate lands, including for petroleum permits.<sup>42</sup> Once an owner or occupier agrees to arbitration, the permit holder will gain access to the land as the arbitrator *must* determine an access arrangement.<sup>43</sup>

Section 61(2) sets out how decisions are made on access arrangements for Crown lands:

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<sup>36</sup> Crown Minerals Act 1991, s 15.

<sup>37</sup> Crown Minerals Act 1991, s 18.

<sup>38</sup> Crown Minerals Act 1991, s 12.

<sup>39</sup> Minerals Programme for Petroleum (2005) at 2.11 and Minerals Programme for Minerals (Excluding Petroleum) (2008) at 2.3.

<sup>40</sup> Crown Minerals Act 1991, s 47.

<sup>41</sup> Crown Minerals Act 1991, s 63.

<sup>42</sup> Crown Minerals Act 1991, s 55(1) and s 55(2). Section 55(2) of the Crown Minerals Act applies to land held under the Conservation Act, and under any Acts listed in Schedule 1 of the Conservation Act; it further applies to covenants held over private land under the Conservation Act and the Reserves Act 1977. The effect of s 55(2) is that the parts of the Act that provide for compulsory arbitration on access to land for petroleum permit-holders do not apply to conservation land.

<sup>43</sup> Crown Minerals Act 1991, s 70.

- (2) In considering whether to agree to an access arrangement in respect of Crown land, the appropriate Minister shall have regard to—
- (a) The objects of any Act under which the land is administered; and
  - (b) Any purpose for which land is held by the Crown; and
  - (c) Any policy statement or management plan of the Crown in relation to the land; and
  - (d) The safeguards against any potential adverse effects of carrying out the proposed programme of work; and
  - (e) Such other matters as the appropriate Minister considers relevant.

The decision rests with the appropriate Minister. Therefore, the Minister of Conservation makes access decisions for conservation land. It would appear that there is an inherent conflict between the conservation ethic in the Conservation Act and the focus on the extraction of minerals in the Crown Minerals Act. Nonetheless there are several instances where mining occurs on conservation estate land.<sup>44</sup>

Following a recent public discussion paper entitled “Maximising our Mineral Potential: Stocktake of Schedule 4 of the Crown Minerals Act and Beyond”, the Government has decided to amend the Crown Minerals Act to require that access decisions for Crown owned land be jointly decided between the landholding Minister and the Minister of Energy and Resources.<sup>45</sup> A change in this direction would mean that considerations based on efficient allocation of minerals permits and the economic return to the Crown would be relevant in the decision-making process.<sup>46</sup> This will reduce the primary focus of the decision on preservation and protection of conservation estate land, as well as on the flora, fauna and wildlife contained in it.

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<sup>44</sup> For example see, Parliamentary Commissioner for the Environment “Mines on Ecological Areas” (2010) <<http://www.pce.parliament.nz/assets/Uploads/Ecological-mines.pdf>>.

<sup>45</sup> Ministry of Economic Development “Maximising our Mineral Potential: Stocktake of Schedule 4 of the Crown Minerals Act and Beyond” (August 2010) <[http://www.med.govt.nz/templates/MultipageDocumentTOC\\_\\_\\_\\_42792.aspx](http://www.med.govt.nz/templates/MultipageDocumentTOC____42792.aspx)>.

<sup>46</sup> Ibid.

Under s 61(1A) of the Crown Minerals Act the Minister of Conservation is prohibited from entering into any access arrangements for Crown owned land or internal waters contained in Schedule 4 of the Crown Minerals Act. Schedule 4 contains areas in New Zealand that have been ascribed high conservation values. It includes national parks, reserves, wilderness areas, sanctuary areas, wildlife sanctuaries, marine reserves and ecological areas.<sup>47</sup> Following the recent Government Stocktake and discussion paper, the current Government has opted to retain the prohibition on mining activity in Schedule 4 areas.<sup>48</sup> Therefore, some areas of the conservation estate are protected from mining activities regardless of their mineral potential or value.

### **1.3 Maori Interests in Minerals in the Conservation Estate**

The legislative framework for mining in the conservation estate has recognised some Maori interests. This part of the Chapter will examine what these interests are, with a view to later assessing whether further interests might be provided or called for.

#### *(a) Treaty Principles Sections*

The Crown Minerals Act and the Conservation Act include references to the “principles of the Treaty of Waitangi”. Section 4 of the Crown Minerals Act provides that:

All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Section 4 of the Conservation Act provides:

This Act shall be interpreted and administered to give effect to the principles of the Treaty of Waitangi.

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<sup>47</sup> Crown Minerals Act 1991, Schedule 4.

<sup>48</sup> Ministry of Economic Development “Maximising our Mineral Potential”, above n 45.



On the face of it, the language of the Treaty principles section in the Conservation Act requires stronger obligations than the formulation in the Crown Minerals Act. Chapter Two will explain how the principles of the Treaty of Waitangi sections have been interpreted for mining in the conservation estate. Chapter Three will examine if it is possible to take the Treaty principles sections in this legislative framework further than what is already provided for.

(b) *The Crown Minerals Act 1991*

The Crown Minerals Act provides specific rights in respect of land of importance to Maori iwi or hapu. Section 15(3) provides:

On the request of an iwi, a minerals programme may provide that defined areas of land of particular importance to its mana are excluded from the operation of the minerals programme or shall not be included in any permit.

This provides an opportunity for iwi to request that areas within the conservation estate be excluded from the permitting and access scheme. This section is discretionary, and therefore the ultimate decision lies with the Minister of Energy and Resources who recommends the minerals programmes.

(c) *Pounamu*

The most significant recognition of iwi interests in minerals was made by the legislature in the Ngai Tahu (Pounamu Vesting) Act 1997. This Act provides that the Ngai Tahu iwi has ownership and full management rights in the pounamu (New Zealand greenstone) resource.<sup>49</sup> It is likely that pounamu is the only mineral in the world where

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<sup>49</sup> Ngai Tahu (Pounamu Vesting) Act 1997, s 3.

a former colonial legislature has vested full ownership and management rights in an Indigenous peoples.<sup>50</sup>

Pounamu is found only in the South Island of New Zealand and is primarily located on the West Coast, which includes extensive conservation areas. Pounamu has a deep cultural significance to the life and culture of Ngai Tahu, and is integral to their mana. Pounamu is a taonga of the Ngai Tahu people and its retention was therefore guaranteed to them under Article II of the Treaty of Waitangi. However, when land was sold by Ngai Tahu to the Crown, the Crown assumed ownership and control over the pounamu resource.<sup>51</sup>

The Waitangi Tribunal heard the Ngai Tahu claim to historical breaches of the Treaty of Waitangi and released its Report in 1991. The Tribunal found that Ngai Tahu had not intended to part with pounamu when land was sold and that the Crown had failed to protect Ngai Tahu's wishes to retain rangatiratanga over pounamu.<sup>52</sup> The Crown's assumption of rights to pounamu was in breach of the Treaty of Waitangi.<sup>53</sup> The Waitangi Tribunal recommended that the Crown transfer ownership and control of all Crown-owned pounamu to Ngai Tahu as part of the Treaty settlement process.<sup>54</sup> The 1997 Act implemented this. Section 3 provides:

Notwithstanding any other enactments, all pounamu occurring in its natural condition in—

- (a) The Takiwa of Ngai Tahu Whanui; and
- (b) Those parts of the territorial sea of New Zealand (as defined by section 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977) that are adjacent to the Takiwa of the Ngai Tahu Whanui and the seabed and subsoil beneath those parts of the territorial sea—

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<sup>50</sup> Nicola R Wheen "Legislating for indigenous peoples' ownership and management of minerals: A New Zealand case study on *pounamu*" (2009) 20(5) *Management of Environmental Quality* 551 at 552. The First Nations

<sup>51</sup> Wheen, above n 50, at 552.

<sup>52</sup> Waitangi Tribunal *Ngai Tahu Report 1991* (Wai 27, 1991) at 1051.

<sup>53</sup> *Ibid*, at 90.

<sup>54</sup> *Ibid*, at 1051.

that, immediately before the commencement of this Act, is the property of the Crown, ceases, on the commencement of this Act, to be the property of the Crown and vests in and becomes the property of Te Runanga o Ngai Tahu.

Existing holders of permits under the CMA are unaffected by the change in ownership and management, up until the expiry of that permit.<sup>55</sup>

Pounamu is now owned, managed and allocated by Ngai Tahu. Those who wish to gain access to conservation land in order to prospect, explore or mine for pounamu will only gain a successful application from DOC when the applicant has authorisation from Te Runanga o Ngai Tahu.<sup>56</sup>

The Ngai Tahu (Pounamu) Vesting Act rectified the breach of the Treaty of Waitangi in relation to the pounamu resource. The relative values placed on pounamu by the Treaty partners were a factor in this settlement.<sup>57</sup> For the Government, pounamu was “more trouble than it was worth”.<sup>58</sup> It has a low monetary value and the Crown found it difficult to monitor the permitting scheme.<sup>59</sup> By comparison, pounamu is highly valued by Ngai Tahu. The pounamu settlement demonstrates that mineral rights can be granted to Indigenous peoples in New Zealand, although this particular transfer is closely linked to the treasured nature of the pounamu resource.

(d) *Marine and Coastal Area (Takutai Maona) Bill 2010*

The Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) (the Bill) has been

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<sup>55</sup> Ngai Tahu (Pounamu Vesting) Act 1997, s 3.

<sup>56</sup> General Policy for National Parks, at 10.8(d).

<sup>57</sup> Wheen, above n 50, at 563.

<sup>58</sup> Meredith Gibbs “The Ngai Tahu (Pounamu Vesting) Act 1997 (2000) 4 NZJEL 257 at 262.

<sup>59</sup> Ibid, at 263.

drafted to replace the controversial Foreshore and Seabed Act 2004.<sup>60</sup> Both relate to the area from ‘the line of the mean high-water springs’ to the outer limits of the territorial sea (12 nautical miles).<sup>61</sup> This includes the subsoil and airspace (but not the air or water contained therein).<sup>62</sup> The Bill proposes that no person can own the marine and coastal area.<sup>63</sup> Instead, the coastal and marine area is to be held as a common area and the Bill recognises Maori customary rights and customary title to the marine area.

In relation to minerals, the Bill is clear that, despite the special status given to the marine and coastal area, ss 10 and 11 of the Crown Minerals Act continue to apply.<sup>64</sup> This means that the status quo for Crown ownership of minerals is continued into the marine and coastal areas. However, where it is determined that a group has customary marine title to an area, cl 82 of the Bill establishes that the group has ownership of all minerals (other than gold, silver, petroleum and uranium) in the marine title area. Therefore, once the ‘test’ for customary title is met, s 11 of the Crown Minerals Act—which recognises historic reservations of minerals in favour of the Crown—would no longer apply, and the ownership of those minerals would vest in the relevant hapu or iwi.<sup>65</sup> The ‘nationalised’ minerals in s 10 of the CMA continue to be vested in the Crown,<sup>66</sup> and Ngai Tahu ownership of pounamu is unaffected.<sup>67</sup> Other than these stated exceptions, any permit for mining and any access decisions would come from the relevant iwi and hapu.

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<sup>60</sup> Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) (explanatory note) at 1. The Foreshore and Seabed Act 2004 was passed following the *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 decision by the Court of Appeal, which held that common law doctrine of customary title (or, the doctrine of Aboriginal title) continues to exist in New Zealand. In *Ngati Apa* the Court of Appeal was not called on to decide substantively whether customary title existed on the facts and therefore this remained open. In response, Parliament passed the Foreshore and Seabed Act 2004. The Act vested title to the foreshore and seabed in the Crown and extinguished any customary title held by Maori. The explanatory note to the Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1) explains that ongoing national and international criticism of the 2004 Act led to a Government review.

<sup>61</sup> Foreshore and Seabed Act 2004, s 2 and Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1), cl 7

<sup>62</sup> *Ibid.*

<sup>63</sup> Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1), cl 11.

<sup>64</sup> Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1), cl 17.

<sup>65</sup> Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1), cl 82(3). This demonstrates the primacy that the government places on the four minerals in s 10 of the Crown Minerals Act 1991.

<sup>66</sup> Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1), cl 82(2).

<sup>67</sup> Marine and Coastal Area (Takutai Moana) Bill 2010 (201-1), cl 82(4).

This is a significant step, particularly in light of the strong legislative tradition in New Zealand to reserve minerals to the Crown. It provides those iwi and hapu who can meet the customary title ‘test’ with interests in minerals out to 12 nautical miles. This demonstrates the preparedness of the Crown to recognise rights to the sub-surface of the land when a *customary* interest is proven. This paper examines whether similar interests might be recognised by way of the Treaty of Waitangi also.

#### **1.4 Conclusion**

Chapter One provided the legislative context for the legal issue at hand. It is within this framework that this paper questions whether further recognition of Maori interests in minerals in the conservation estate can be established. Chapter Two explains how the Treaty principles sections in the legislative regime are currently interpreted, and thus provides further context for the analysis.

## **CHAPTER 2: THE “PRINCIPLES OF THE TREATY OF WAITANGI” IN THE STATUTORY FRAMEWORK.**

Chapter One outlined how mining in the conservation estate is managed, and identified existing Maori interests in minerals in the legislative framework. Chapter Two explores the legal standing of the Treaty of Waitangi and how the courts and the Waitangi Tribunal have interpreted the principles of the Treaty of Waitangi. The second part of the chapter explores how the Treaty principles have been interpreted in the context of minerals and the conservation estate. This chapter provides an important foundation for the assessment of whether Treaty principles can be a source of further Maori interests in minerals in the conservation estate.

### **2.1 The Treaty of Waitangi in New Zealand’s contemporary legal framework**

The Treaty of Waitangi was first signed at Waitangi on the 6 February 1840. There are two texts, one in English and one in Maori and these are not direct translations of one another.<sup>68</sup> New Zealand’s view of the Treaty of Waitangi has come a long way from the former position that it amounted to “a simple nullity”.<sup>69</sup> In 1987, the Court of Appeal decision *New Zealand Maori Council v Attorney General* (the *Lands* case) confirmed that the Treaty of Waitangi is a fundamental document for New Zealand’s legal system and for New Zealand’s unwritten constitution.<sup>70</sup> In the *Lands* case Richardson J held that the Treaty “must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible”.<sup>71</sup> The Treaty of Waitangi is equally significant for the contemporary Crown-Maori relationship. Richardson J referred to the Treaty as a “positive force in the life of the nation and so in the government of the country”.<sup>72</sup> The Crown has recognised historic breaches of the principles of the Treaty of Waitangi and is committed to the

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<sup>68</sup> The texts of the Treaty of Waitangi are located in Appendix 1.

<sup>69</sup> *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

<sup>70</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA) (“The *Lands* case”) at 656 per Cooke P.

<sup>71</sup> *Ibid*, at 673, per Richardson J.

<sup>72</sup> *Ibid*, at 682, per Richardson J.

negotiation full and final Treaty of Waitangi settlements with iwi.<sup>73</sup>

The consistently upheld approach to the Treaty of Waitangi is that the Treaty's application in New Zealand's contemporary legal system is subject to the common law doctrine of parliamentary sovereignty. To this end, the 1941 Privy Council decision *Te Heuheu v Aotea District Maori Land Board* has had a lasting effect on Treaty jurisprudence in New Zealand.<sup>74</sup> The Privy Council applied the common law rule that the Treaty of Waitangi, as an international treaty of cession, can only be enforced by the Courts if it has been recognised by the legislature and sufficiently incorporated into municipal law.<sup>75</sup> Thus, claims made in the New Zealand courts can therefore only be based on the Treaty if it has been recognised by statute.<sup>76</sup> The doctrine of parliamentary sovereignty means that even if the Treaty was given statutory recognition, it would be in the power of Parliament to amend that recognition by later enactments.<sup>77</sup>

Subsequent case law has not altered this proposition. For example, in *Love v Attorney-General*, a case addressing both the Treaty and minerals, the High Court refused a judicial review on the Government's decision to sell its shareholding in Petrocorp, a private company.<sup>78</sup> The judicial review was brought on the basis that the Waitangi Tribunal was likely to recognise an iwi's right to petroleum, gas and other minerals as a natural incident and consequence of land rights owed to the iwi under the Treaty of Waitangi. The High Court refused the judicial review because the Ministry of Energy Act 1977 did not contain a reference to the Treaty of Waitangi.<sup>79</sup> The court held that a statutory reference to the Treaty was the only means to restrain the actions or decision-making powers of the Crown.<sup>80</sup> The *Te Heuheu* precedent has been questioned by several commentators,<sup>81</sup> however, as yet, *Te Heuheu* remains firm.<sup>82</sup> It is therefore all

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<sup>73</sup> *Healing the past*, above n 33, at 3.

<sup>74</sup> *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

<sup>75</sup> *Ibid*, at 596-597.

<sup>76</sup> *Ibid*, at 597.

<sup>77</sup> *Ibid*, at 599.

<sup>78</sup> *Love v Attorney-General* CP135/88, 17 March 1988.

<sup>79</sup> *Ibid*, at 18.

<sup>80</sup> *Ibid*, at 21.

<sup>81</sup> Alex Frame has argued that the precedent in *Te Heuheu* is wrong in law ("Hoani Te Heuheu's Case in London 1940-1941: An Explosive Story" (2006) 22 NZULR 148 at 165). Frame recommended that the

the more significant that the Crown Minerals Act and the Conservation Act contain references to the principles of the Treaty of Waitangi.

The first active step taken by Parliament for the recognition of the Treaty of Waitangi was the establishment of the Waitangi Tribunal under the Treaty of Waitangi Act 1975.<sup>83</sup> The Treaty of Waitangi Act empowered Maori to bring to the Waitangi Tribunal claims that the Crown had breached the principles of the Treaty of Waitangi.<sup>84</sup> At first, the jurisdiction of the Waitangi Tribunal applied to Crown actions from the date of assent of the Act.<sup>85</sup> In 1985 the Act was amended to give the Waitangi Tribunal retrospective jurisdiction dating back to 6 February 1840.<sup>86</sup> The Waitangi Tribunal has the power to make recommendations to the Crown,<sup>87</sup> however, the Crown can refuse to accept or implement any recommendation made.<sup>88</sup> The Waitangi Tribunal has heard, and continues to hear, both area specific claims and “generic” nationalised claims, on a wide range of content matters.<sup>89</sup>

Since 1986, Parliament has incorporated the Treaty of Waitangi into domestic legislation.<sup>90</sup> The type of incorporation is usually a requirement that decision-makers under the Act have a particular level of regard to Treaty principles. These sections

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Treaty of Waitangi be made directly enforceable, either by an Act of Parliament or by reconsideration of prior precedent by the New Zealand Supreme Court.

<sup>82</sup> In the *Lands* case, Somers J acknowledged that the *Te Heuheu* had been criticised, however held that the precedent correctly set out the law. Cooke P considered that *Te Heuheu* represented “wholly orthodox legal thinking, at any rate from a 1941 standpoint”, and did not seek to reconsider the precedent as the facts did not require it.

<sup>83</sup> Treaty of Waitangi Act 1975, s 4.

<sup>84</sup> Treaty of Waitangi Act 1975, s 6.

<sup>85</sup> Paul Hamer “A Quarter-century of the Waitangi Tribunal” in Janine Hayward and Nicola Wheen (eds) *The Waitangi Tribunal* (Bridget Williams Books Limited, Wellington, 2004) 3 at 3.

<sup>86</sup> Treaty of Waitangi Act 1975, s 6 (as amended by the Treaty of Waitangi Amendment Act 1985). Section 6AA established an end date for the submission of historic claims. This was 1 September 2009. The Waitangi Tribunal is currently working through the remainder of the historic claims, and once these are concluded the Tribunal will once again hear only contemporary claims.

<sup>87</sup> Treaty of Waitangi Act 1975, s 6(3).

<sup>88</sup> For example, the Crown refused to accept the recommendations of the Waitangi Tribunal in the *Petroleum Report* (The Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003)) and the *Foreshore and Seabed Report* (The Waitangi Tribunal *The Foreshore and Seabed Report* (Wai 1071, 2004)).

<sup>89</sup> These include region-specific claims on an array of historic breaches across New Zealand, as well as generic issues, for example on fisheries, radio frequencies, Maori language and petroleum.

<sup>90</sup> The decision to recognise the Treaty of Waitangi in legislation came from cabinet in 1986 (Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 218.



apply across the statute as a whole; in this way, the Treaty of Waitangi plays a role in the implementation of the statute. Several statutes now include Treaty principles sections, such as the Environment Act 1986, the State Owned Enterprises Act 1986, the Conservation Act 1987, the Resource Management Act 1991, the Crown Minerals Act 1991, the Hazardous Substances and New Organisms Act 1986 and the Energy Efficiency and Conservation Act 2000.

There remains a great deal of uncertainty over what interests the Treaty sections confer on those given guarantees and protections under the Treaty of Waitangi. Because the Treaty principles sections apply generally to the Act, and the sections do not elaborate further on how they are to be implemented, a great deal is left up to the relevant decision-makers. The judiciary and the Waitangi Tribunal have been the authoritative sources of meaning for these Treaty principles.

The *Lands* case in 1987 marked the beginning of a concerted body of Treaty jurisprudence based on the principles of the Treaty of Waitangi. Section 9 of the State-owned Enterprises Act 1987 provides that “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”. The Court of Appeal unanimously held that the wording of s 9 restricted the Crown to acting under the State-Owned Enterprises Act in accordance with the principles of the Treaty.<sup>91</sup>

Cooke P interpreted the “spirit” of the Treaty as a “bargain”, for the Queen to govern and the Maori people to retain and gain protection over their chieftainship and possessions.<sup>92</sup> The Court of Appeal was unanimous that the “principles of the Treaty of Waitangi” involved a partnership between the Crown and Maori, which is characterised by reasonableness and good faith.<sup>93</sup> This “paramount principle”<sup>94</sup> was regarded by the Judges as the means of implementing the Treaty of Waitangi in modern times. The

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<sup>91</sup> The *Lands* case, above n 70, at 660, per Cooke P.

<sup>92</sup> *Ibid*, at 663, per Cooke P.

<sup>93</sup> *Ibid*, at 667.

<sup>94</sup> *Ibid*, at 680, per Richardson J.

principle of partnership contains duties and obligations on both sides. The duty on the Crown is that of active protection of Maori people and their lands and waters.<sup>95</sup> The duty for the Maori Treaty partner is a duty of loyalty to the Queen, full acceptance of the Government and reasonable cooperation.<sup>96</sup> The Maori partner should not place unreasonable restrictions on a duly elected Government to follow their chosen policy.<sup>97</sup> Overall, Cooke P held that the duty placed on the parties is ‘no light one’, and ‘infinitely more than a mere formality’.<sup>98</sup> A duty to consult was not expected in every case.<sup>99</sup> Richardson J qualified this conclusion with the concept that, in acting reasonably and in good faith, each party should make an informed decision.<sup>100</sup> An “informed decision” can involve varying extents of consultation, depending on the circumstance.<sup>101</sup>

On the facts of the *Lands* case, the Court of Appeal concluded that the transfer of land to State-Owned enterprises without provision for potential Maori claims was inconsistent with the principles of the Treaty of Waitangi. The impact of this decision was significant, as it potentially affected 14 million hectares of land.<sup>102</sup> The end result was an agreed solution between the Crown and the New Zealand Maori Council. This demonstrates the practical utility of Treaty jurisprudence in resolving issues and conflicts that have built up in New Zealand since 1840. Since, there have been many judgments which have considered the principles of the Treaty of Waitangi and built on the interpretations of the *Lands* case.<sup>103</sup>

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<sup>95</sup> Ibid, at 664, per Cooke P.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, at 664, per Cooke P.

<sup>98</sup> Ibid, at 664, per Cooke P.

<sup>99</sup> Ibid, at 683, per Richardson J and at 665, per Cooke P.

<sup>100</sup> Ibid, at 683, per Richardson J.

<sup>101</sup> Ibid. Richardson J considered that certain cases will require only some consultation, or none at all, but in other circumstances extensive consultation and cooperation will be necessary.

<sup>102</sup> The *Lands* case, above n 70, at 653.

<sup>103</sup> These include: *Mahuta v Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA); *Attorney-General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147 (CA); *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA); *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC); *Ngai Tahu Maori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 (CA); *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA).

The jurisdiction of the Waitangi Tribunal centres on Crown actions that are inconsistent with the principles of the Treaty.<sup>104</sup> The means by which the Tribunal has interpreted the phrase “the principles of the Treaty of Waitangi” offers an insight that is different to the courts. Neither the courts nor Parliament are required to accept the recommendations made by the Tribunal on the basis of their findings.<sup>105</sup> That said, many Waitangi Tribunal reports have led to settlements with the Crown,<sup>106</sup> and the courts have placed value on the Tribunal’s Reports.<sup>107</sup>

The Waitangi Tribunal Reports have identified the principles of partnership,<sup>108</sup> the principle of exchange of the right to make laws for the obligation to protect Maori interests,<sup>109</sup> the principle of active protection,<sup>110</sup> the principle of mutual benefit,<sup>111</sup> the principle of options,<sup>112</sup> and a distinct right of development.<sup>113</sup> The Waitangi Tribunal’s interpretation of the relationship between kawanatanga and rangatiratanga is different than that of the courts.<sup>114</sup> In the *Radio Spectrum Management and Development Final Report* the Waitangi Tribunal explained that “the Tribunal has usually taken the view that the Crown’s exercise of kawanatanga, or governance, needs to be tempered by respect for rangatiratanga, or chieftainship”.<sup>115</sup> By contrast, the courts appear to assume that rangatiratanga is subject to kawanatanga.<sup>116</sup>

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<sup>104</sup> Treaty of Waitangi Act 1975, s 6.

<sup>105</sup> Treaty of Waitangi Act 1975, s 6.

<sup>106</sup> Jacinta Ruru Jacinta Ruru “The Maori Encounter with Aotearoa: New Zealand’s Legal System” in Benjamin J Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law – Comparative and Critical Perspectives* (Hart Publishing, Portland, Oregon, 2009) at 120-121.

<sup>107</sup> The *Lands* case, above n 70, at 641 and 662, and *Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council* HC Auckland M360-SW01, 19 February 2002 at [59].

<sup>108</sup> The Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1989) and Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1996), The Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at [10.5.4].

<sup>109</sup> The Waitangi Tribunal *Orakei Claim*, above n 108.

<sup>110</sup> The Waitangi Tribunal *Muriwhenua Fishing Claim*, above n 108, at [10.5.4].

<sup>111</sup> *Ibid*, at [10.5.4].

<sup>112</sup> *Ibid*, at [10.5.4].

<sup>113</sup> For example in The Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998) at.

<sup>114</sup> Jacinta Ruru “Managing our Treasured Home: The Conservation Estate and the Principles of the Treaty of Waitangi” 8 NZJEL 243 at 255-256.

<sup>115</sup> The Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Wai 776, 1999) at 3.3.2.

<sup>116</sup> Jacinta Ruru “Managing Our Treasured Home”, above n 116, at 256. For example, see *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 at 24.

## **2.2 The Treaty Principles “In Action” –Application to Minerals in the Conservation Estate.**

It is prima facie left at the hands of the relevant decision-maker to interpret the Treaty principles sections in the Conservation Act and the Crown Minerals Act. For the Crown Minerals Act, the decision-makers are the Minister of Energy and Resources and the Ministry of Economic Development. For the Conservation Act, the decision-makers are the Minister of Conservation, the Director-General of Conservation and DOC. This part of the Chapter will analyse how the government departments, the Waitangi Tribunal and the courts have interpreted these sections in relation to minerals in the conservation estate.

### *(a) Crown Minerals Act 1991*

The main way in which the Crown Minerals Act “has regard” to the Treaty of Waitangi is through the minerals programmes. Because these are concerned with permits, the extent of recognised Treaty interests in the Crown Minerals Act is tied to the permitting process. This analysis will consider only the most recent minerals programmes: the Minerals Programme for Petroleum (2005) and the Minerals Programme for Minerals (Excluding Petroleum) (2008).

The purpose of the Minerals Programme for Petroleum (2005) is to promote the responsible discovery and development of New Zealand’s petroleum resources consistent with the efficient allocation of permits, ensuring a fair financial return to the Crown, and having due regard to the principles of the Treaty of Waitangi.<sup>117</sup> The Minerals Programme establishes what is meant by “due regard to the principles of the Treaty of Waitangi”. The Programme is clear that the principles of the Treaty must be carefully considered and weighed in all decisions under the Act.<sup>118</sup> Interestingly, a footnote following this comment provides a timely reminder that under s 10 of the

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<sup>117</sup> Minerals Programme for Petroleum 2005, at 2.16.

<sup>118</sup> Ibid, at 3.1.

Crown Minerals Act all petroleum is owned by the Crown.<sup>119</sup> The Minerals Programme for Petroleum specifies four ‘Treaty principles’ as generally relevant to decision making. First, the Crown must act reasonably and in utmost good faith to its Treaty partner.<sup>120</sup> Second, the Crown must make informed decisions.<sup>121</sup> Third, the principle of ‘redress’ was marked as one which will be more relevant where there is an existing claim for a grievance.<sup>122</sup> Fourth, the principle of “active protection” referred to mechanisms in the Crown Minerals Act and the Minerals Programme which provide for *land* of particular importance to iwi to be excluded from a Minerals Programme or permit area.<sup>123</sup> On this latter point, the principle of active protection is therefore intended to cover only interests in land, and the petroleum resource itself.

The key policy of the Minerals Programme for Minerals (Excluding Petroleum) (2008) is to “allow continuing investment in prospecting, exploration and mining” in a way that promotes good exploration and mining practice, efficiently allocates permits, provides the Crown with a fair financial return, has regard to the principles of the Treaty of Waitangi, and has regard to relevant international obligations.<sup>124</sup> The Programme provides a list which the programme implements to meet the Crown’s responsibility under s 4 of the Crown Minerals Act.<sup>125</sup> These are: that land of particular importance is not included in permits; that the Minister and Secretary must consult with iwi and hapu on specified matters; and, that consultation must follow certain principles and procedures.<sup>126</sup> The principles for consultation include the ‘Treaty principles’ that: the Crown will act reasonably and in utmost good faith to its Treaty partner; the Crown will make informed decisions; the Crown will be informed of the Maori perspective; and, the Crown will consider whether any decision would impede redress for Treaty claims.<sup>127</sup> These Treaty principles are identified as applying only in relation to consultation requirements, and not to the Programme as a whole.

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<sup>119</sup> Ibid, at footnote 3.

<sup>120</sup> Ibid, at 3.1.

<sup>121</sup> Ibid, at 3.3.

<sup>122</sup> Ibid, at 3.2

<sup>123</sup> Ibid, at 3.2.

<sup>124</sup> Minerals Programme for Minerals (Excluding Petroleum) 2008 at 2.1.

<sup>125</sup> Ibid at 1.11.

<sup>126</sup> Ibid at 1.11.

<sup>127</sup> Ibid at 1.11.

The level of consultation required by both minerals programmes is extensive. The Minerals Programme for Petroleum is clear that the Minister *must* consult with relevant iwi or hapu prior to the recommendation of a block offer permit, as well as when permit applications and amendments to existing permits are considered.<sup>128</sup> Under the Minerals Programme for Minerals (Excluding Petroleum) the Minister will “*ordinarily ensure*” consultation with iwi or hapu on all applications or proposals, including permit applications, extensions for permits, and each proposal to allocate permits by competitive tender.<sup>129</sup> The requirement for consultation is stronger in the Minerals Programme for Petroleum. There does not appear to be any rationale behind this discrepancy.

The form of consultation is clearly set out in the minerals programmes. Discussion must be meaningful;<sup>130</sup> consultation should occur early in the decision making process;<sup>131</sup> sufficient information must be provided to enable iwi and hapu to make informed submissions;<sup>132</sup> sufficient time should be given for the participation of iwi and for the consideration of their advice;<sup>133</sup> and, the Minister and Secretary must be receptive to Maori views and genuinely consider the advice.<sup>134</sup> In all instances, the time given for comment by iwi or hapu is an initial 20 working days, with the opportunity to request an additional 20 working days if required. In the Minerals Programme for Petroleum (2005) the overall aim of consultation is that it informs the Minister of Energy and Resources of the Treaty implications within particular issues.<sup>135</sup> Overall, the form of consultation provided for in the minerals programmes is relatively comprehensive. Information received during consultation with iwi or hapu might

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<sup>128</sup> Minerals Programme for Petroleum 2005 at 3.4.

<sup>129</sup> Minerals Programme for Minerals (Excluding Petroleum) 2008 at 1.12.

<sup>130</sup> Minerals Programme for Petroleum 2005 at 3.5 and Minerals Programme for Minerals (Excluding Petroleum) 2008 at Schedule 4 at 1(e).

<sup>131</sup> Minerals Programme for Petroleum 2005 at 3.5(a) and Minerals Programme for Minerals (Excluding Petroleum) 2008 at Schedule 4 at 1(e)(i).

<sup>132</sup> Minerals Programme for Petroleum 2005 at 3.5(b) and Minerals Programme for Minerals (Excluding Petroleum) 2008 at Schedule 4 at 1(e)(ii).

<sup>133</sup> Minerals Programme for Petroleum 2005 at 3.5(c) and Minerals Programme for Minerals (Excluding Petroleum) 2008 at Schedule 4 at 1(e)(iii).

<sup>134</sup> Minerals Programme for Petroleum 2005 at 3.5(d) and Minerals Programme for Minerals (Excluding Petroleum) 2008 at Schedule 4 at (1)(e)(iv) and (1)(e)(v).

<sup>135</sup> Minerals Programme for Petroleum 2005 at 3.5(b).

influence the Minister's decision, although under s 4 of the Crown Minerals Act the Minister is only directed to "have regard" to the Treaty principles.

In addition to consultation, the minerals programmes provide that iwi and hapu can request amendments to the proposed permit, block offer or competitive tender allocation. The Minister of Energy and Resources has discretion whether to accept any proposed amendment. In respect of amendments which propose the exclusion of land, the respective minerals programmes list a number of matters that might be taken into account during the Minister's evaluation.<sup>136</sup> A relevant factor is the importance of the permit area to iwi.<sup>137</sup> The Minister is directed to take into account whether the importance of an area has already been demonstrated through legal avenues, such as any relevant Treaty claim, any iwi management plans that specify the importance of the area.<sup>138</sup> Other factors include the uniqueness of the area, the size and value of the potential resource if the area is excluded, and whether the area is already protected under other legislation such as the Conservation Act 1987.<sup>139</sup> It is important to note that these detailed considerations relate only to requests to exclude land from a permit area, and there is no further guidance for how other proposed amendments might be considered. This omission may simply indicate that it would be impossible to evaluate all other proposed amendments by pre-determined and similar criteria. However, the detailed provision for exclusion of land suggests that the minerals programmes anticipate most requests to be made on this basis.

Two assumptions regarding Maori interests in minerals appear to have been made in the minerals programmes. First, the minerals programmes assume that the requirement to "have regard to the principles of the Treaty of Waitangi" is discharged following consultation with iwi and hapu, and assessment of any amendments iwi and hapu

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<sup>136</sup> Minerals Programme for Petroleum 2005 at 3.12 and Minerals Programme for Minerals (Excluding Petroleum) 2008 at 5.3(3).

<sup>137</sup> Minerals Programme for Petroleum 2005 at 3.12 and Minerals Programme for Minerals (Excluding Petroleum) 2008 at 5.3(3)(a) – (c).

<sup>138</sup> Minerals Programme for Petroleum 2005 at 3.12 and Minerals Programme for Minerals (Excluding Petroleum) 2008 at 5.3(3)(d) – (g).

<sup>139</sup> Minerals Programme for Petroleum 2005 at 3.12 and Minerals Programme for Minerals (Excluding Petroleum) 2008 at 5.3(3)(i) and (j).

propose. In the Minerals Programme for Minerals (Excluding Petroleum) (2008) it is even thought to be sufficient that the Minister will “ordinarily ensure” consultation occurs.<sup>140</sup> This suggests that consultation may not be required in certain extreme circumstances. Moreover, the Minerals Programme for Minerals (Excluding Petroleum) 2008 only applies the Treaty principles to consultation, and not to the Minerals Programme as a whole. In Chapter Three, this dissertation will consider whether the Treaty principles can go further than consultation.

Second, the Minerals Programmes anticipate accommodation for Maori interests in land, but not necessarily accommodation for Maori interests in minerals. Maori interests in minerals can be asserted in the consultation process, and amendments can request that Maori interests in minerals be provided for. However, the principle of active protection in the Minerals Programme for Petroleum (2005) is applied only where *land* of particular importance to Maori is concerned,<sup>141</sup> and the Minerals Programme for Minerals (Excluding Petroleum) (2008) does not identify active protection of Maori interests as a relevant Treaty principle, even in relation to consultation. Further, the minerals programmes do not specifically provide mechanisms to consider or accommodate Maori interests in minerals or the subsurface of land.

To date, the standpoint taken by the minerals programmes has not been questioned. The courts have not been called on to assess the meaning of s 4 of the Crown Minerals Act. The Waitangi Tribunal in *The Petroleum Report* (2004) stated that:<sup>142</sup>

Section 4 of the current legislation provides that all persons exercising powers under its authority “shall have regard to the principles of the Treaty of Waitangi”. It is clear, however, that this provision is not intended to challenge the status quo regarding ownership or to restrict the Crown’s title to those resources specifically preserved under section 10.

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<sup>140</sup> Minerals Programme for Minerals (Excluding Petroleum) 2008, 1.12.

<sup>141</sup> Minerals Programme for Petroleum 2005, 3.2.

<sup>142</sup> The Waitangi Tribunal *The Petroleum Report*, above n 88, at 38.



This statement is probably valid in relation to *full* ownership of nationalised minerals, however the Waitangi Tribunal did not have cause to engage in the intricacies of what interests might still be afforded to Maori. The Waitangi Tribunal has not had an opportunity to comprehensively assess whether the current minerals programmes adequately give ‘regard to principles of the Treaty of Waitangi’.

For this reason, this paper seeks to assess whether or not the Treaty principles sections in the Crown Minerals Act and the Conservation Act can be taken further in order to recognise more substantive interests to minerals for the Indigenous people of New Zealand. It is timely to refer to the dissent of Thomas J in *McRitchie v Taranaki Fish and Game Council*,<sup>143</sup> in which Thomas J states:<sup>144</sup>

... in this area of statutory interpretation involving fundamental rights, I would place, little, if any, weight on subordinate legislation to support a statutory implication. The tail should not be permitted to wag the dog.

On this argument, the restriction of Treaty interests under the minerals programmes is not necessarily definitive of what is comprehensively required by the term “regard to the principles of the Treaty of Waitangi” in s 4 of the Crown Minerals Act.

*(b) Access decisions by the Minister of Conservation*

Under s 61(2) of the Crown Minerals Act, the Minister of Conservation makes decisions on access to conservation estate land for mining purposes. Section 61(2) specifies what considerations the Minister of Conservation must have regard to. It is important to note that s 61(2) only requires the Minister to “have regard to” the objectives, purposes and policy statements of the Conservation Act.<sup>145</sup> It is unclear whether the decision made

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<sup>143</sup> *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA).

<sup>144</sup> *Ibid*, at 159.

<sup>145</sup> This puts in place a lower test for mining than that of concessions for other commercial activities granted under the Conservation Act itself. Under s 17U(3) of the Conservation Act concessions must not

by the Minister of Conservation on access to land for mining purposes is required to “give effect” to the principles of the Treaty of Waitangi under s 4 of the Conservation Act. Even so, s 4 of the Conservation Act should come into play as an object of the Act and as an “other matter” relevant to the Minister. It would be an anomaly if s 4 of the Conservation Act was given no weight when the Minister of Conservation made decisions on access.

Currently, decisions on access to land for mining purposes are made at a conservancy level, and DOC has not yet completed development of a nationally consistent standard to guide this decision-making process.<sup>146</sup> The current draft for guidelines is believed to be based on the West Coast Conservation Management Strategy.<sup>147</sup> It must be remembered that Conservation Management Strategies are policy documents only, and therefore decisions made according to them, or according to any national standard developed by DOC, are not subject to the scrutiny of judicial review.<sup>148</sup> In any case, the West Coast Conservation Management Strategy does not flag the principles of the Treaty of Waitangi as a relevant consideration when making access decisions under the Crown Minerals Act.<sup>149</sup>

DOC’s interpretations of its responsibility to “give effect to” Treaty principles in its policy documents are very general in nature. The Statement of General Policy (2005) identifies the five Government-articulated “Principles for Crown Action on the Treaty of Waitangi” as relevant to its requirement to “give effect” to Treaty principles.<sup>150</sup> These principles are: government, self-management, equality, reasonable cooperation and redress.<sup>151</sup> More specifically, the Statement of General Policy interprets s 4 of the

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be granted if contrary to the Act or the purposes for which the land is held. The Parliamentary Commissioner for the Environment recently addressed this issue in Dr Jan Wright *Making Difficult Decisions: Mining the Conservation Estate* (2010) Parliamentary Commissioner for the Environment <<http://www.pce.parliament.nz/assets/Uploads/Reports/pdf/Mining-Report-FINAL.pdf>>.

<sup>146</sup> *Making Difficult Decisions*, above n 145, at 23.

<sup>147</sup> *Ibid*, footnote 45.

<sup>148</sup> A claim could be brought to the Waitangi Tribunal.

<sup>149</sup> West Coast Conservation Management Strategy 2010, at 153-154.

<sup>150</sup> Statement of General Policy 2005, at 15.

<sup>151</sup> David Lange *Principles for Crown Action on the Treaty of Waitangi* (1989). For further discussion see Matthew Palmer, above n 90, at 139-141 and Alex Frame “A State Servant Looks at the Treaty” (1990) 14 NZLUR 82. The two most relevant principles for Maori interests in minerals in the

Conservation Act as requiring: that relationships and partnerships with tangata whenua are “encouraged” and should be “sought and maintained”; that tangata whenua are consulted on statutory planning documents and when specific proposals involve places and resources of significance to them; that the involvement of tangata whenua in conservation be encouraged; that customary use of traditional materials and indigenous species be authorised on a case by case basis; and, that the “Department will seek to avoid actions which would be in breach of the Treaty of Waitangi”.<sup>152</sup> This latter policy appears to be almost the inverse of interpreting the Act in accordance with Treaty principles under s 4, and the others do not seem to place very firm obligations on the Crown. Therefore, at a policy level DOC does not seek to implement the Treaty principles sections in the Conservation Act or the Crown Minerals Act.

The Court of Appeal considered the s 4 directive in *Ngai Tahu Maori Trust Board v Director-General of Conservation*. The Court of Appeal held that s 4 of the Conservation Act applies to statutes listed in the First Schedule of the Act, subject to any inconsistency in the provisions of the statutes.<sup>153</sup> The Court of Appeal emphasised several Treaty principles as relevant, including the Crown’s right and duty to govern, the guarantee to Maori of te tino rangatiratanga over their lands and resources, active protection, the concept of reasonable Treaty partners, and a right to development.<sup>154</sup> The Court of Appeal interpreted what was required by s 4. First, Cooke P held that Treaty principles sections should “not be narrowly construed”.<sup>155</sup> Second, consultation

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conservation estate are the Principle of Self Management, and the Principle of Reasonable Cooperation. The former is described as requiring that “The iwi will have the right to organise as iwi, and, under the law, to control their resources as their own” is the most relevant to Maori interests in minerals. The Principle of Reasonable Cooperation establishes that “Both the Government and iwi are obliged to accord each other reasonable cooperation on major issues of common concern”. Arguably, these interpretations pitch the Treaty principles at a lower level than the interpretations of the courts and the Waitangi Tribunal (explained above).

<sup>152</sup> Statement of General Policy 2005, at 16-17.

<sup>153</sup> *Ngai Tahu*, above n 103, at 558. Jacinta Ruru has questioned the proviso that Treaty principles are subject to the governing Act, as this dilutes the wording of s 4 in that the Conservation Act must be “interpreted and administered to *give effect to*” Treaty principles (Jacinta Ruru “Managing Our Treasured Home”, above n 114, at 253).

<sup>154</sup> *Ngai Tahu*, above n 103, at

<sup>155</sup> *Ibid*, at 558.

alone was described as a “hollow” form of active protection.<sup>156</sup> The Court held that Director-General should “take into account, among the factors relevant ... protection of the interests of Ngai Tahu in accordance with the Treaty principles”.<sup>157</sup> However, “take into account” is likely a lesser requirement than the actual wording in s 4 of “interpreted and administered to *give effect to*”. The final conclusion of the Court of Appeal was that a reasonable Treaty partner would not restrict Ngai Tahu interests to “mere matters of procedure”.<sup>158</sup> In practical terms, Cooke P held that, subject to the overriding concerns of conservation, Ngai Tahu was entitled to a “reasonable degree of preference” in whale watching permitting decisions.<sup>159</sup>

In *McRitchie v Taranaki Fish and Game Council* the majority of the Court of Appeal held that Maori customary fishing rights did not include rights to introduced species of fish.<sup>160</sup> The majority judgment did not discuss s 4 of the Conservation Act, however Thomas J’s dissent provided a detailed interpretation of s 4 alongside s 26ZH which provides that “Nothing in this part of the Act shall affect any Maori fishing rights”.<sup>161</sup> Thomas J interpreted that:<sup>162</sup>

Section 4 recognises the fundamental constitutional status of the treaty, and it and s 26ZH are not to be demeaned. Parliament should not be thought to have enacted these provisions as mere window-dressing.

Thomas J held that s 4 gives effect to the guarantee of *te tino rangatiratanga* under Article II of the Treaty of Waitangi.<sup>163</sup> Further, Thomas J placed emphasis on the fact that s 4 directs that the entire Act should be *interpreted* so as to give effect to the Treaty principles. On Thomas J’s reasoning, s 4 is a very strong recognition of Treaty

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<sup>156</sup> Ibid, at 560. It is interesting to note that the Statement of General Policy (2005), which is the highest in the hierarchy of management documents in the Conservation Act, only requires consultation with Maori.

<sup>157</sup> Ibid, at 561.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid, at 562.

<sup>160</sup> *McRitchie*, above n 143, at 153.

<sup>161</sup> Ibid, at 162.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

principles. However, this remains a dissenting opinion.<sup>164</sup>

In *Te Waero v Minister of Conservation and Auckland City Council* the High Court considered whether s 4 of the Conservation Act requires the Minister of Conservation to consult with iwi when classifying public land as a reserve.<sup>165</sup> The High Court reviewed the Court of Appeal's articulations of the Treaty principles in the *Lands* case and in *Ngai Tahu* and concluded that "consultation is not itself a discrete, substantive Treaty principle".<sup>166</sup> In the context of s 4, Harrison J held that consultation is a medium for Maori to advise the Minister of a distinct Treaty interest.<sup>167</sup> Harrison J could not find any valid Treaty interest on the facts.<sup>168</sup> Interestingly, Treaty principles under s 4 were again interpreted as something which should be "taken into account by the Minister", rather than "given effect to".<sup>169</sup> The judiciary has not been called upon to consider s 4 of the Conservation Act in any other significant cases to date.<sup>170</sup>

Overall, where s 4 of the Conservation Act has been considered by the courts, a positive obligation has been imposed on DOC or the Director-General of Conservation. There is a persuasive argument that "give effect to" is the strongest means of incorporating the principles of the Treaty of Waitangi into legislation to date.<sup>171</sup> It should be relevant to the Minister of Conservation's discretion in s 61(2) in the Crown Minerals Act, and yet neither the current policy documents, nor any conditions on access agreements with mining permit-holders reflect Treaty principles or Maori interests. The DOC policy

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<sup>164</sup> The High Court in *Livingstone v Department of Conservation* HC Rotorua CRI-2008-463-37, 15 May 2009 followed the precedent of the majority, without reference to Thomas J's dissent.

<sup>165</sup> *Te Waero v The Minister of Conservation*, above n 107.

<sup>166</sup> *Ibid.*, at [61].

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*, at [63].

<sup>169</sup> *Ibid.*, at [67].

<sup>170</sup> In *Reihana v Director-General of Conservation* HC Invercargill CIV-2005-425-75, 19 December 2007 the High Court assessed whether the Director-General of Conservation adequately consulted when amending the Titi (Muttonbird) Island Regulations 1978. The applicant for judicial review argued that the Director-General of Conservation was wrong for consulting beyond the beneficial owners of the land, but did not provide any criticism on the consultation process itself. The Court of Appeal had earlier held that the relevant section did not restrict consultation in the way contended by Reihana.<sup>170</sup> The only relevant case that has considered Maori issues under the Conservation Act 1987 without reference to the Treaty principles section is, *Livingstone v Department of Conservation*, above n 164.

<sup>171</sup> Jacinta Ruru "Managing our Treasured Home", above n 114, at 243.

documents appear to provide for “hollow” consultation,<sup>172</sup> and “mere procedural matters”.

### **2.3 Conclusion**

Treaty of Waitangi principles sections play an important role in the assertion of Maori rights and interests. The delegated legislation and policy documents that guide the day-to-day implementation of the Treaty principles sections in the Crown Minerals Act and Conservation Act have been assessed in Chapter Two. In my opinion, the current interpretations are insufficient to meet the statutory requirements. This is particularly clear when the Court of Appeal judgment in *Ngai Tahu Maori Trust Board* and Thomas J’s dissent in *McRitchie* are taken into account. Therefore, this paper will now assess what further interests in minerals in the conservation estate might arise out of the Treaty principles sections in the legislative framework.

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<sup>172</sup> *Ngai Tahu Maori Trust Board*, above n 103, at

## **CHAPTER THREE: HOW MUCH FURTHER CAN THE PRINCIPLES OF THE TREATY OF WAITANGI BE TAKEN?**

Chapter Three focuses on the possible opportunities afforded under the Treaty principles jurisprudence. As mentioned in the introduction to this paper, the extent of a right to development in Treaty principles provides an ongoing debate in Treaty jurisprudence. It is acknowledged that Maori did not actively use many of the minerals present in New Zealand prior to 1840. The central question is whether this should preclude Maori from asserting Treaty interests in minerals in the conservation estate in contemporary New Zealand. The Crown Minerals Act and the Conservation Act make the principles of the Treaty of Waitangi relevant to the ownership and management of minerals in the conservation estate. Currently, the Crown accepts that it owes a duty to relevant iwi and hapu, but conceptualises this at a consultative level. This paper questions whether the Treaty principles require that greater interests be recognised than consultation.

First, this chapter explores the Court of Appeal's and the Waitangi Tribunal's judgments and findings concerning Maori claims to resources that were not actively used prior to 1840. It then applies this discussion in order to analyse whether a duty of consultation is exhaustive of the Crown's responsibilities under the Treaty principles.

### **3.1 Do Treaty Principles Import a Concept of Development?**

#### *(a) Foundations*

The courts and the Waitangi Tribunal have consistently recognised that the principles of the Treaty of Waitangi are not frozen at 1840, when the Treaty was signed. This is evident in the Waitangi Tribunal's early reports, and in the Court of Appeal's first interpretation of the principles of the Treaty principles in the *Lands* case. These expressions are general in nature, and the question of development of Treaty interests did not arise on the facts of either case or hearing. However, there was a consensus

from the outset that Treaty principles encompassed a concept of development.

In the *Motunui-Waitara Report* (1983), the Waitangi Tribunal stated that:<sup>173</sup>

The Treaty was also more than an affirmation of existing rights. It was not intended to fossilise the status quo, but to provide a direction for further growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract. We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.

In the *Lands* case the separate judgments of the Court of Appeal provide scope for a concept of development in Treaty jurisprudence. Cooke P referred to the Treaty of Waitangi as “an embryo rather than a fully developed and integrated set of ideas”.<sup>174</sup> Richardson J envisaged a contemporary approach to the Treaty of Waitangi “which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise”.<sup>175</sup> Bisson J and Casey J referred to the principles of the Treaty of Waitangi as “the foundation for the future relationship between the Crown and the Maori race”,<sup>176</sup> and “the foundation for a developing social contract”.<sup>177</sup> Likewise, Somers J observed that at the Treaty’s making “all lay in the future”.<sup>178</sup>

The reality behind the above interpretations of the Treaty principles is that the Treaty of Waitangi was *not* regarded as a relevant social contract for a long period after the Treaty of Waitangi was signed by the Crown and Maori.<sup>179</sup> This has made the concept of development in the Treaty appear more remote in New Zealand’s contemporary legal framework, as the Crown has long asserted interests in lands and resources without reference to Maori interests. This mere fact does not mean that Maori interests derived

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<sup>173</sup> The Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983), at 10.3.

<sup>174</sup> The *Lands* case, above n 70, at 663 per Cooke P.

<sup>175</sup> *Ibid*, at 673 per Richardson J,

<sup>176</sup> *Ibid*, at 714 per Bisson J.

<sup>177</sup> *Ibid*, at 702 per Casey J.

<sup>178</sup> *Ibid*, at 692 per Somers J.

<sup>179</sup> Jacinta Ruru “The Maori Encounter with Aotearoa”, above n 106, at 115-119.



from a concept of development within the Treaty principles should not now be recognised in New Zealand, as prior assumptions could now be rectified by the judiciary or the Waitangi Tribunal.

The recognition of further Maori interests in minerals in the conservation estate could occur through two different avenues. Any interest claimed would rely on the Treaty principles being interpreted to include a concept of development. First, a judicial review of an executive decision can be brought on the basis that the decision-maker did not adequately consider the Treaty principles, or more specifically, the Maori interest in minerals arising from the Treaty principles. Second, a claim can be made to the Waitangi Tribunal that the current legislative framework for mining in the conservation estate is in breach of the principles of the Treaty of Waitangi because it does not adequately recognise and provide for Maori interests in minerals. The Waitangi Tribunal has recommendatory jurisdiction only, and therefore the Crown is not required to accept its findings. The Crown has already refused to accept Waitangi Tribunal findings in relation to petroleum.<sup>180</sup>

*(b) Application of the concept of development in the Court of Appeal*

The Court of Appeal first addressed the concept of development under Treaty principles in *Tainui Maori Trust Board v Attorney-General*.<sup>181</sup> The Court made a declaration that the Crown could not sell, dispose of or alienate certain lands, or the coal mining rights on those lands, until a negotiated system for protecting Maori claims was established.<sup>182</sup> This declaration was made under s 9 of the State-Owned Enterprises Act 1986, which prohibits anyone under the Act from acting inconsistently with Treaty principles. Cooke P provided a further “personal suggestion” that coal be classified as a “form of taonga”.<sup>183</sup> In coming to this conclusion, Cooke P placed emphasis on a limited Maori

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<sup>180</sup> The Crown disagreed with the findings of the Waitangi Tribunal’s *Petroleum Report* and did not recognise any Maori interests to the publicly owned petroleum assets or resources (New Zealand Government “Govt Response Waitangi Tribunal’s Petroleum Report” (press release, 21 November 2003) at <<http://www.scoop.co.nz/stories/PA0311/S00447.htm>> (“Government Press Release”))

<sup>181</sup> *Tainui Maori Trust Board*, above n 103.

<sup>182</sup> *Ibid*, at 527.

<sup>183</sup> *Ibid*, at 529.

use of coal prior to the Treaty of Waitangi, and the subsequent Maori contribution to the coal industry.<sup>184</sup> The Court therefore interpreted “taonga” broadly, so that something which was not of particular importance to Maori prior to signing the Treaty of Waitangi could nonetheless be asserted as a Maori interest. Cooke P anticipated that any settlement should recognise an entitlement to “the equivalent of a substantial proportion but still considerably less than half”.<sup>185</sup> This conclusion envisaged the potential for recognition of a spectrum of interests, with a lesser redress value placed on something that is not of traditional importance. Cooke P observed that “a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today’s world”.<sup>186</sup>

In *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* the Court of Appeal again considered whether something of importance in modern times could be considered a taonga.<sup>187</sup> A claim was advanced to the Ika Whenua river under aboriginal title rights, and it was claimed that these rights affected the ability of the Crown to transfer dams into State-Owned Enterprises. In its analysis, the Court of Appeal related the claim to the Treaty guarantee of tino rangatiratanga and taonga.<sup>188</sup> The Court of Appeal analysed the claim in terms of a right to generate electricity by harnessing water power, rather than in terms of the river itself.<sup>189</sup> The claim was not upheld by the Court of Appeal, on the basis that “such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840”.<sup>190</sup> The Court of Appeal acknowledged that “the Treaty of Waitangi is to be construed as a living instrument, but even so it could not sensibly be regarded today as intended to safeguard rights to generate electricity”.<sup>191</sup> This position goes back to the time of the Treaty, and looks forward from there so that a concept of development is not unlimited. This starting point does not appear to correspond with the idea that the Treaty is a “living document”. The Court concluded that if the Waitangi Tribunal found that Maori had a

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<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid, at 530.

<sup>187</sup> *Te Runanganui o Te Ika Whenua Inc Society*, above n 116.

<sup>188</sup> Ibid, at 24.

<sup>189</sup> The Court of Appeal acknowledged that the Waitangi Tribunal had adopted a concept that a river could be taonga, but did not take this approach.

<sup>190</sup> *Te Runanganui o Te Ika Whenua Inc Society*, above n 116, at 24.

<sup>191</sup> Ibid.

valid claim to electricity generation, the remedy would not involve surrender of the assets to Maori, or any modification of ownership.<sup>192</sup> The reasoning for this was that the assets were intended to serve district, regional and wider communities.<sup>193</sup> Because the Court had not found a Maori interest to the assets, it did not need to consider appropriate remedies. However, the Court was open to providing some lesser redress if the Waitangi Tribunal found a valid claim.<sup>194</sup>

In *Ngai Tahu Maori Trust Board* the use of coastal waters for viewing whales was held to be “analogous” to a taonga.<sup>195</sup> The connection was made by Cooke P on the basis that: historically, guiding visitors to see natural resources was a natural role of Indigenous people; whale-watching activities were essentially tribal, and the individuals emanate from Ngai Tahu; and, Ngai Tahu were the pioneers of whale-watching off Kaikoura.<sup>196</sup> A broad interpretation was taken of “taonga”, and the Crown was under a duty to actively protect the Ngai Tahu interest. The interest here, which arose from a concept of development in the Treaty principles, gave rise to a substantive requirement for the Director-General of Conservation to give Ngai Tahu “a reasonable degree of preference” in whale-watching permits.<sup>197</sup> Ngai Tahu’s claim to a right to veto was rejected by the Court of Appeal,<sup>198</sup> and therefore it cannot be absolute that a right will be provided when a Treaty interest is founded on the concept of development. The Court of Appeal made it clear that the judgment was a result of a unique combination of factors, and that its precedent value was likely limited.<sup>199</sup>

(c) *Application of the concept of development in the Waitangi Tribunal*

The Waitangi Tribunal has found that a distinct Treaty principle on development exists in the *Te Ika Whenua Rivers Report* (1998).<sup>200</sup> There, the Waitangi Tribunal found that

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<sup>192</sup> Ibid, at 25.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid, at 27.

<sup>195</sup> *Ngai Tahu Maori Trust Board*, above n 103, at 561.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid, at 562.

<sup>198</sup> Ibid, at 560.

<sup>199</sup> Ibid.

<sup>200</sup> The Waitangi Tribunal *Te Ika Whenua Rivers Report*, above n 113.

“the Crown’s article 2 guarantee of tino rangatiratanga over properties (taonga) ... in our view extends to the right of development”.<sup>201</sup> The Waitangi Tribunal, like the courts, assesses whether the resource or interest claimed can be viewed as a “taonga”.

In the *Radio Spectrum Final Report* the Waitangi Tribunal held that Maori had traditional knowledge of radio waves, but had not made use of the radio waves due to a lack of technology.<sup>202</sup> The Tribunal found that the electromagnetic spectrum was a taonga of Maori, and that Maori had the right to develop that taonga through technology.<sup>203</sup> In coming to this conclusion, the Tribunal drew on the more general idea that “the Treaty should not be fossilised at 1840 but be interpreted to meet new and changing circumstances”.<sup>204</sup> By contrast, in the *Kiwifruit Report*, the Waitangi Tribunal held that it was an “unjustified straining of Treaty principles to hold that the right to develop ... a treasure could extend all the way to the modern kiwifruit export trade”.<sup>205</sup> The Waitangi Tribunal found that the principle of active protection was not available in this circumstance.<sup>206</sup>

The Waitangi Tribunal considered Maori claims to petroleum resources in the Taranaki basin in *The Petroleum Report*.<sup>207</sup> The context behind this claim was that the Crown expropriated all property interests in petroleum in 1937 and vested them in the Crown.<sup>208</sup> The Waitangi Tribunal found that a petroleum resource could not be classified as taonga.<sup>209</sup> The evidential basis that was advanced was that petroleum was used for some purposes in traditional times,<sup>210</sup> and that surface manifestations of petroleum were tapu.<sup>211</sup> The Tribunal indicated that the “relatively generalised traditions” in relation to surface manifestations were insufficient to show that oil and gas were in the contemplation of the Treaty.<sup>212</sup> This reasoning is similar to that of the

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<sup>201</sup> Ibid.

<sup>202</sup> The Waitangi Tribunal *Radio Spectrum Final Report*, above n 115 at 3.3.6.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> The Waitangi Tribunal *The Kiwifruit Marketing Report* (Wai 449, 1995) at 4.3.

<sup>206</sup> Ibid.

<sup>207</sup> The Waitangi Tribunal *The Petroleum Report*, above n 88.

<sup>208</sup> Petroleum Act 1937, s 3(1).

<sup>209</sup> The Waitangi Tribunal *The Petroleum Report*, above n 88, at 42-43.

<sup>210</sup> Ibid, 42.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid, 42-43.

Court of Appeal in *Te Runanganui o Te Ika Whenua v Attorney-General*. The approach of the Waitangi Tribunal in the *Petroleum Report* can be contrasted to the Court of Appeal's conclusion in *Tainui Maori Trust Board* that coal, another mineral, could be a form of taonga.

In *The Petroleum Report* the Waitangi Tribunal developed a novel approach for the Maori claim to petroleum, that of a "Treaty interest". This was explained by the Tribunal as:<sup>213</sup>

... whenever legal rights are lost by means that are inconsistent with Treaty principles ... carries with it a right to a remedy and a corresponding obligation on the Crown to negotiate redress for the wrongful loss of the legal right.

In the context of lands taken by a Treaty breach that contained petroleum, the Tribunal suggested that the appropriate remedy would be in the petroleum resource itself.<sup>214</sup> The Tribunal disagreed with the Crown's position that petroleum assets are unsuitable as a form of redress.<sup>215</sup> The concept of a "Treaty interest" incorporates the concept of development into the Treaty principle of redress, in that the Crown could rectify past grievances in a way that provides opportunities for Maori in contemporary New Zealand. However, the Treaty interest concept was not accepted by the Crown.<sup>216</sup> This demonstrates the inherent limit in the recommendatory nature of the Waitangi Tribunal's jurisdiction.

### **3.2 Do The Treaty Principles Require More Than Consultation?**

Under the Treaty principles sections in the Crown Minerals Act and the Conservation Act, the Crown accepts that it owes a duty to consult with relevant iwi and hapu. This part of the Chapter assesses whether a concept of development applies to minerals, and whether further rights than consultation can be supported for minerals in the conservation estate.

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<sup>213</sup> Ibid, at 65.

<sup>214</sup> Ibid, at 65-69.

<sup>215</sup> Ibid, at 76.

<sup>216</sup> Government Press Release, above n 180.

(a) *Does the reasoning of the Court of Appeal and Waitangi Tribunal apply to mineral interests?*

The current incorporation of the development concept within Treaty principles leaves a great deal of uncertainty for whether future claims will be successful. The courts and the Waitangi Tribunal will sometimes acknowledge that a claimed interest is valid by way of a concept of development, and in other circumstances will not. Taken altogether, the Court of Appeal and the Waitangi Tribunal assert three alternative approaches to development. These are: an approach which broadens the concept of a taonga; an approach which first considers what was in the contemplation of the parties to the Treaty at 1840; and, an approach which incorporates the concept of development into the Treaty principle of redress. A further issue for future claims is that the relevant Court of Appeal decisions have not attempted to apply a more general right of development for Indigenous peoples in New Zealand.

Despite the concept of development in Treaty principles jurisprudence being uncertain, there is scope for recognition of Maori interests in minerals by way of the Treaty principles. The broad approach taken to “taonga” in *Tainui Maori Trust Board* recognised interests in coal, and this can be directly applied to minerals and petroleum in general. All that was required on the facts of *Tainui Maori Trust Board* was a limited use of coal in traditional times and some contribution to the industry generally. Likewise, in *Ngai Tahu Maori Council* very broad connections were made. While the Waitangi Tribunal did not apply the “taonga” approach to petroleum, the evidence that was advanced was arguably at a similar level to the foundations for development in *Tainui Maori Trust Board* and *Ngai Tahu Maori Council*. In *The Petroleum Report* the Waitangi Tribunal went to all lengths to recognise remedy for Maori in respect of interests in petroleum, and this is a signal that the Waitangi Tribunal will seek to uphold a concept of development within Treaty principles.

It is at this conclusion that the concept of “between a rock and a hard place” first appears. The courts and the Waitangi Tribunal could go either way. The general

approach of broadening the concept of “taonga” would arguably apply here, and therefore there is scope for the recognition that a Treaty interest in minerals can be established by reference to a concept of development.

(b) *What interests would be recognised?*

In *Ngai Tahu Maori Trust Board*, the Court of Appeal held that the Director-General of Conservation, as a reasonable treaty partner, “could not restrict consideration of Ngai Tahu interests to mere matters of procedure”. This is directly applicable to Maori interests in minerals in the conservation estate. The current level of consultation with relevant iwi and hapu is generally procedural in nature, and it is at the discretion of the relevant decision-maker whether to take any information received into account, or whether to implement proposed amendments. Under the reasoning in *Ngai Tahu Maori Trust Board*, it is evident that the way that the Treaty principles are currently interpreted and implemented in respect of minerals in the conservation estate is insufficient.

The Court of Appeal has consistently held that where a Treaty interest relies largely on a concept of development the redress available to Maori will generally be at a lesser level than where a claim is advanced on the basis of taonga or resources that are of traditional importance to Maori. In *Tainui Maori Trust Board*, Cooke P differentiated between Tainui’s interests in land and in coal mining rights, and held that redress for the latter should reflect the lesser traditional interest in the resource.<sup>217</sup> This approach is consistent with the Court of Appeal’s interpretation of the Treaty principle of partnership in *New Zealand Maori Council v Attorney General* (the *Forests* case).<sup>218</sup> The Court of Appeal observed that in practical terms, partnership did not mean that every asset or resource in which Maori had a justifiable claim should be divided equally; there may be other interests, or the common interest may be upheld.<sup>219</sup> Therefore, any approach to a remedy for Treaty principles in minerals would not provide for the full transfer of ownership. This is an important caveat, particularly

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<sup>217</sup> *Tainui Maori Trust Board*, above n 113, at 530.

<sup>218</sup> *New Zealand Maori Council v Attorney General* [1989] 2 NZLR 142

<sup>219</sup> *Ibid*, at 152.

given the Crown's refusal to negotiate on Maori interests in minerals in the past.<sup>220</sup> A recognition or indication by the courts and the Waitangi Tribunal that the remedy available should be in accordance with the current management framework,<sup>221</sup> or that the remedy should be pitched at a level that is relative to the interest asserted, could mean the Crown is more likely to engage in the negotiation or settlement process.

In *Tainui Maori Trust Board*, Cooke P held that interests in the coal resource should be "the equivalent of a substantial proportion but still considerably less than half of this particular resource".<sup>222</sup> Moreover, in *The Petroleum Report* (2003) the Waitangi Tribunal recommended that Crown-owned petroleum assets be put on the table for negotiation towards settlement, and therefore acknowledged that Maori had a relevant interest in them.<sup>223</sup> Therefore, Maori may be able to assert a claim to royalties on mineral developments that occur in the conservation estate.

This is a strong conclusion to come to, and must be tempered with some qualifications. First, this paper has not attempted to reconcile the relationship between s 4 of the Crown Minerals Act and s 10 of the Act, which vests property of the four "nationalised" minerals in the Crown. A determination on the relationship between these sections, and how that would affect any recognised Treaty interest, would need to take place. The proposed Marine and Coastal Area (Takutai Moana) Bill 2010 recognises Maori customary title interests in minerals, but excludes the s 10 minerals from this. This provides an indication of the Crown's bottom line on the four "nationalised" minerals. Second, as established above, a concept of development must first be imported into the Treaty principles in the context of minerals and the conservation estate. While this is a valid possibility, it is by no means a surety that the courts or the Waitangi Tribunal will accept the proposition.

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<sup>220</sup> The Crown disagreed with the findings of the Waitangi Tribunal's *Petroleum Report*. Further, the policy of the Office of Treaty Settlements is that the Crown owns and manages nationalised minerals under s 10 of the Crown Minerals Act in the national interest (Office of Treaty Settlements *Healing the Past, Building a Future*, above n 33, at 94).

<sup>221</sup> This would further be in accordance with the Treaty principle that Maori should not place unreasonable restrictions on the ability of the Crown to follow their chosen policy (The *Lands* case, above n 70, at 664).

<sup>222</sup> *Tainui Maori Trust Board*, above n 103, at 529.

<sup>223</sup> The Waitangi Tribunal *The Petroleum Report*, above n 88, at 76.



### **3.3 Conclusion.**

If the result of a judicial review or Waitangi Tribunal claim was that the Crown was found to be in breach of the Treaty principles sections in either the Crown Minerals Act or the Conservation Act, there would need to be a reconfiguration of the law to provide for the interests of iwi. Canada has extensively recognised Aboriginal peoples' interests in minerals and therefore Chapter Four looks to Canada for legal inspiration.

## CHAPTER FOUR: THE CANADIAN LEGAL RESPONSE TO MINERALS AND INDIGENOUS PEOPLES

### 4.1 Aboriginal title and rights in Canada.

Section 35(1) of the Constitution Act 1982 protects existing Aboriginal and treaty rights:

The existing aboriginal and treaty rights of the aboriginal peoples in Canada are hereby recognised and affirmed.

Canadian jurisprudence recognises a “spectrum” of Aboriginal interests in land and resources.<sup>224</sup> First, Aboriginal peoples can hold title to land, either by proof of Aboriginal title to land<sup>225</sup> or through an Aboriginal land claim agreement. It was accepted in *Delgamuukw* that Aboriginal title to land includes title to minerals.<sup>226</sup> Aboriginal land claim agreements also recognise interests in minerals.<sup>227</sup> Second, an Aboriginal land claim agreement may transfer ownership to the surface of land only, with the Crown retaining rights in the subsurface.<sup>228</sup> Third, Aboriginal peoples can prove Aboriginal rights which allow use and occupation of land, but not title to the land or to the subsurface of land.<sup>229</sup>

Aboriginal title and Aboriginal rights in Canada are not absolute.<sup>230</sup> The Supreme Court of Canada in *R v Sparrow* held that, while existing rights are constitutionally protected, government action and legislation can infringe those rights where an infringement is justified.<sup>231</sup> The concept of justifiable infringement is guided by the

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<sup>224</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [138].

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*, at [122].

<sup>227</sup> An example of a land claim agreement is the Nunavut Final Agreement, where Aboriginal rights to minerals were recognised in defined parts of the settlement area (Nunavut Final Agreement (1993), at 19.2.1(a) <[http://www.nucj.ca/library/bar\\_ads\\_mat/Nunavut\\_Land\\_Claims\\_Agreement.pdf](http://www.nucj.ca/library/bar_ads_mat/Nunavut_Land_Claims_Agreement.pdf)>).

<sup>228</sup> *Ibid.*, at 19.2.1(b).

<sup>229</sup> *Delgamuukw*, above n 224, at [138].

<sup>230</sup> *R v Sparrow* [1990] 1 SCR 1075 at 1109, *Delgamuukw*, above n 224, at [160].

<sup>231</sup> *R v Sparrow*, above n 231, at 1110.

fiduciary obligation owed by the Crown to Aboriginal peoples.<sup>232</sup> In *Delgamuukw v British Columbia* the Supreme Court characterised justifiable infringement in two parts. First, the legislative objective behind any infringement must be “compelling and substantial”.<sup>233</sup> This was construed broadly, and Lamer CJ classified mining and general economic development as objectives which could justifiably infringe Aboriginal interests.<sup>234</sup> Second, there must be an assessment on whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.<sup>235</sup> This assessment is particular to the “legal and factual context”,<sup>236</sup> but the degree of scrutiny will be shaped by the nature of the Aboriginal right.<sup>237</sup> In all cases, there is a minimum standard of consultation with the Aboriginal group affected.<sup>238</sup> The level of consultation will vary in the circumstances.<sup>239</sup> Following consultation, in some circumstances there is a requirement to accommodate Aboriginal interests in respect of the infringing action. The features of Aboriginal title—including exclusivity, the right to make decisions on use and the economic component of land—mean that the government is required to provide for Aboriginal interests within the infringing action or legislation.<sup>240</sup> Where Aboriginal title is infringed, the economic aspect suggests that fair compensation will be required.<sup>241</sup> By contrast, Aboriginal rights to use land or resources would give rise to a lesser level of accommodation.

In *Haida Nation* the Supreme Court upheld a duty to consult where courts had not yet determined the existence of claimed aboriginal rights or title.<sup>242</sup> In this circumstance, fiduciary obligations did not arise because the claimed rights were not yet specific enough.<sup>243</sup> Instead, the duty to consult arose from the honour of the Crown.<sup>244</sup> In *Haida Nation* the Supreme Court held that resource developers do not owe an

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<sup>232</sup> *Ibid.*, at 1114, and *Delgamuukw*, above n 224, at [166].

<sup>233</sup> *Delgamuukw*, above n 224, at [161].

<sup>234</sup> *Ibid.*, at [165].

<sup>235</sup> *Ibid.*, at [161].

<sup>236</sup> *Ibid.*, at [162].

<sup>237</sup> *Ibid.*, at [166].

<sup>238</sup> *Ibid.*, at [168].

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*, at [167].

<sup>241</sup> *Ibid.*, at [169].

<sup>242</sup> *Haida Nation v British Columbia (Minister of Forests)* 2004 3 SCR 511.

<sup>243</sup> *Ibid.*, at [18].

<sup>244</sup> *Ibid.*, at [20].

independent duty to consult with the aboriginal peoples because the duty arises from the special relationship with the Crown.<sup>245</sup>

Therefore, there is a constitutional duty to consult, and, where appropriate, accommodate relevant Aboriginal rights or interests when a mining development occurs on land where Aboriginal peoples have interests.

#### 4.2. Aboriginal Land Claim Agreements

Modern land claim settlement agreements recognise Aboriginal peoples' interests in land, including provision for mineral rights. This part of the Chapter will analyse the Blueberry River First Nations (BRFN) Final Agreement.<sup>246</sup> The Final Agreement between the Blueberry First Nations and the Province of British Columbia unites several negotiated agreements on a range of topics, including for economic benefits and on resources such as forestry, wildlife, and parks. For the purposes of this paper, the relevant agreements are the Mining and Minerals Protocol Agreement (2006),<sup>247</sup> and the Long Term Oil and Gas Agreement (2007).<sup>248</sup> These apply throughout the "settlement area", which covers national parks and protected areas also.<sup>249</sup> The overall settlement area encompasses land in which Aboriginal peoples do not have surface rights to land, and this can be likened to Maori and the conservation estate in New Zealand.

Both agreements provide for extensive consultation between the Province and BRFN.<sup>250</sup> There is a high level of detail for how consultation will occur.<sup>251</sup> Moreover, different types of mining activities have been assigned different "consultation values", so that the

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<sup>245</sup> Ibid, at [53].

<sup>246</sup> British Columbia and Blueberry River First Nations "Final Agreement" (signed 29 September 2008) Government of British Columbia <[http://www.gov.bc.ca/arr/treaty/key/down/Final\\_Agreement\\_10272008.pdf](http://www.gov.bc.ca/arr/treaty/key/down/Final_Agreement_10272008.pdf)>.

<sup>247</sup> British Columbia and Blueberry River First Nations "Mining and Minerals Protocol Agreement" (signed 20 December 2006) Government of British Columbia <[http://www.gov.bc.ca/arr/treaty/key/down/mining\\_minerals\\_protocol.pdf](http://www.gov.bc.ca/arr/treaty/key/down/mining_minerals_protocol.pdf)>.

<sup>248</sup> British Columbia and Blueberry River First Nations "Long Term Oil and Gas Agreement" (signed 15 January 2007) Government of British Columbia <[http://www.gov.bc.ca/arr/treaty/key/down/long\\_term\\_oil\\_gas\\_agreement.pdf](http://www.gov.bc.ca/arr/treaty/key/down/long_term_oil_gas_agreement.pdf)>.

<sup>249</sup> "Final Agreement", above n 246, at Appendix B.

<sup>250</sup> Mining and Minerals Protocol Agreement, above n 247, at 4.0, and "Long Term Oil and Gas Agreement", above n 248, at 5.0.

<sup>251</sup> Ibid.

consultation requirements increase with the significance of the infringement.<sup>252</sup>

Most importantly, consultation is accompanied by a process of accommodation of BRFN's interests into the proposed mining development. Both the Mining and Minerals Protocol Agreement and the Oil and Gas Agreement specify a process for the *minimum* amount of accommodation. BRFN, when responding to a proposed permit, can indicate options that would avoid or minimise the impacts of the proposed activity on them.<sup>253</sup> The relevant decision-maker must "seriously consider" the response, including the suggested options for mitigation or avoidance.<sup>254</sup> The parties to the agreement are then expected to "endeavour to resolve the concerns" together,<sup>255</sup> but if the concerns are not resolved a permit may still be granted.

Significantly, the agreements place responsibilities on the Province of British Columbia to bring the applicant for a permit into the accommodation process. In the Mining and Minerals Protocol Agreement, this ranges from the government requiring an applicant to submit a report on the applicant's efforts to engage with BRFN,<sup>256</sup> to government-facilitated meetings between the applicant and BRFN, and encouragement by the Government that the applicant consider entering an economic benefit agreement with BRFN.<sup>257</sup> Likewise, in the Oil and Gas Agreement the government is directed to encourage the industry to engage with BRFN at an early stage,<sup>258</sup> and the Agreement anticipates and provides for the scenario where an applicant has already accommodated BRFN's interests into the oil or gas development.<sup>259</sup> In a Government agreement, the recognition that the industry should engage with Aboriginal peoples and provide practical benefits as part of a mining development is significant. The Government is advocating that permit applicants consult with Aboriginal peoples at the crucial time

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<sup>252</sup> Mining and Minerals Protocol Agreement, above n 247, at Appendix 2, and "Long Term Oil and Gas Agreement", above n 248, at Appendix 3.

<sup>253</sup> Mining and Minerals Protocol Agreement, above n 247, at 5.0 and 6.0, and "Long Term Oil and Gas Agreement", above n 248, at 6.0.

<sup>254</sup> Mining and Minerals Protocol Agreement, above n 247, at 5.5, and "Long Term Oil and Gas Agreement", above n 248, at 6.5.

<sup>255</sup> Ibid.

<sup>256</sup> Mining and Minerals Protocol Agreement, above n 247, at Appendix 2(3)(A) and (B).

<sup>257</sup> Ibid, at Appendix 2(3)(D).

<sup>258</sup> "Long Term Oil and Gas Agreement", above n 248, at 7.1.

<sup>259</sup> Ibid, at Appendix 3(1)(4).

when they are also assessing the permit application. when the Government is assessing its permit application, is likely very compelling.

### **4.3 Private Impact Benefit Agreements.**

Even where modern settlement agreements have not been put in place, the minerals and petroleum industries have made it a common practice to engage with Aboriginal peoples. Impact benefit agreements are commonly undertaken by mining companies where mineral development is planned in or close to aboriginal or treaty lands.<sup>260</sup> Private impact benefit agreements are voluntary, and have the status of legally binding contracts.<sup>261</sup> Impact benefit agreements provide benefits and opportunities for the aboriginal community. They also provide certainty to a mining company, and enhance the company's relationship with the community they are working within.

The provisions in private agreements include employment opportunities, education and training, economic development, social and community support for Aboriginal groups, environmental and monitoring protection, and various forms of monetary compensation.<sup>262</sup> The exact terms of each agreement depends on what is negotiated in each case. Private agreements between the mining industry and aboriginal communities are negotiated bilaterally, and thus do not involve participation by the government or other affected aboriginal communities.<sup>263</sup> A bilateral process recognises greater aboriginal self-determination and self-management,<sup>264</sup> but provides for the potential for injustice if long-term benefits and equitable distributions are not bargained for. At any rate, they provide one avenue for accommodating Aboriginal interests, and their frequency demonstrates the mining companies' willingness to enter into these.

### **4.4 Application to New Zealand**

In Canada, the duties to consult, and where appropriate, to accommodate aboriginal

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<sup>260</sup> Courtney Fidler and Michael Hitch "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" (2007) 35(2) *Environments Journal* 49 at 50.

<sup>261</sup> *Ibid*,

<sup>262</sup> *Ibid*, Table 1 at 61.

<sup>263</sup> *Ibid*, at 51.

interests, arise out of the constitutional protection of aboriginal rights in s 35(1) of the Constitution Act 1982. The source of these rights is the doctrine of aboriginal title or signed treaties including new land claim agreements, and the rights are informed by the fiduciary duty and honour of the Crown. In New Zealand, the source of consultation and accommodation interests for mining in the conservation estate is in the principles of the Treaty of Waitangi. These are therefore two different avenues. However, what can be taken from the Canadian approach is that it anticipates some accommodation within the proposed infringement project itself. This part of the Chapter suggests amendment to incorporate some of the Canadian approach to enhance New Zealand's consultation requirement, but it further concludes that the New Zealand Treaty jurisprudence on the concept of development goes further than this still.

At the permitting stage, the Minister of Energy and Resources can impose conditions on the grant of a permit.<sup>265</sup> The minerals programmes provide that the Minister of Energy and Resources must notify relevant iwi and hapu about the proposed conditions on permits.<sup>266</sup> As part of consultation, the relevant iwi and hapu can request amendment to certain permit types.<sup>267</sup> Currently, the Minister of Energy and Resources does have the ability to consider proposed amendments. The Minister could decide to require that mineral development projects or mining companies provide substantive benefits to Maori. However, the current minerals programmes do not offer further guidance on how such an amendment might be considered.<sup>268</sup> Without clearer guidance, it may be that requests for amendments by iwi and hapu are not accepted and implemented by the Minister. This is especially so considering the emphasis of the minerals programmes on traditional associations with the land, rather than any interests in the subsurface of land. On the current legislative framework, importing benefits for iwi and hapu into a grant of a permit may bring uncertainty to the permitting process in the Crown Minerals Act. To

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<sup>265</sup> Crown Minerals Act, s 25.

<sup>266</sup> Minerals Programme for Petroleum 2005 at 3.7 and Minerals Programme for Minerals (Excluding Petroleum) 2008 at Schedule 4(3)(1)(d).

<sup>267</sup> The Minerals Programme for Minerals (Excluding Petroleum) provides that iwi or hapu may request an amendment to proposed competitive tenders (but not to work programme applications), and the Minerals Programme for Petroleum allows iwi and hapu to request amendments to block offer conditions.

<sup>268</sup> The Minerals Programme for Minerals (Excluding Petroleum) only provides guidance for how the Minister should assess requests to exclude land from a permit, and the Minerals Programme for Petroleum directs the focus of the Minister's consideration to the importance of the *land*, and not to any interests in minerals.

prevent uncertainty, an amendment would have to be made.

Alternatively, access agreements between the Minister of Conservation and the mining company could provide benefits to relevant iwi or hapu. Under s 60 of the Crown Minerals Act, an access arrangement can include a range of conditions, such as: conditions on the permit holders' ability to explore, prospect or mine on or in the land, environmental protections, the compensation to be paid to the land owner, and, such other matters as the parties agree. This provides an avenue for the Minister of Conservation to ensure that benefits are given to Maori, either at a nation-wide level or for affected iwi or hapu. This means of providing benefits to Maori is most consistent with the regulatory framework for mining in conservation estate land because the mining company is already required to enter into negotiations for an agreement at this point. An amendment that provides for the inclusion of Maori or iwi and hapu representation in the negotiation process would be consistent with the Canadian approach of enabling self-determination. This would be consistent with the Treaty principle of partnership. Crown involvement in the negotiation of benefits for Maori would provide certainty, and would ensure the fairest and most equitable result for Maori.

The Canadian approach provides many practical examples of how to accommodate Indigenous peoples interests with mineral development.



## CONCLUSION

This paper has shown that the current position towards Maori interests in minerals in the conservation estate is insufficient. For this reason, the paper explored further means of recognising Maori interests by way of the Treaty of Waitangi.

The Canadian approach implements a more involved consultation and engagement process with Indigenous peoples than provided for in New Zealand. This precedent could easily be incorporated into the existing provision for consultation in New Zealand, in order to engage with Maori over the minerals resource. Further, as explained above, the New Zealand government could require mining companies to engage with iwi and offer substantive benefits for mining that occurs in conservation land in their rohe.

It is possible, however, that the courts and the Waitangi Tribunal might recognise more substantive Indigenous interests in minerals in the conservation estate. The Court of Appeal in *Tainui Maori Trust Board* and the Waitangi Tribunal in *The Petroleum Report* both recognised that the Treaty principles gave rise to interests in the minerals and petroleum resources themselves. Once Maori have actual interests in minerals, then the Crown and mining companies are expected to consult and accommodate anyway. Any recognition of Maori interests in minerals in the conservation estate would be founded on a concept of development in the Treaty principles, and this is in no way a certainty as yet.

It can be seen that there are several valid possibilities for recognising Maori interests in minerals in the conservation estate. In order to determine if any of these will transpire, Maori action should be taken either through judicial review processes, the Waitangi Tribunal or by direct settlement or agreement with the Crown. The current Government's focus on mineral development, as shown by recent reviews of the Crown Minerals Act, show that minerals will be significant in New Zealand's future. This paper has shown that they should be significant for Maori interests and development also.

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