KO NGĀ TAKE TURE MĀORI

A Relational Duty of Good Faith: Reconceptualising the Crown–Māori Relationship

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I INTRODUCTION

The nature of the relationship between the Crown and aboriginal peoples has a long history of confusion and controversy. In New Zealand, this debate is coloured by the Treaty of Waitangi (Treaty), which is commonly accepted as New Zealand's constitutional "founding document".[1] Indeed, a former President of the Court of Appeal has stated that the Treaty signifies a partnership between Māori and Pākehā, creating "responsibilities analogous to fiduciary duties".[2] This analogy with fiduciary relationships is well developed overseas. However, the validity of Cooke P's statement that the Crown owes duties analogous to fiduciary duties to Māori is now uncertain in New Zealand. Crown–Māori relations, and the nature of any potential common law duties, are at a crossroad.

There are three ways in which the New Zealand courts have articulated the relationship between Crown and Māori: as a fiduciary relationship, as analogous to a fiduciary relationship and as a relational duty of good faith. The first two of these views were recently set out in the *Te Arawa Cross Claim* litigation in the High Court and Court of Appeal.[3] The first potential duty was set out in the High Court judgment, where Gendall J "bravely"[4] asserted the existence of a "fiduciary duty of good faith" owed by the Crown to "all" Māori.[5] The second potential duty was demonstrated in the Court of Appeal's firm resistance to this notion and return to Cooke P's original statement of analogy:[6]

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1 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [3.1].

2 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664 per Cooke P [*Lands*].

3 *New Zealand Maori Council v Attorney-General* HC Wellington CIV-2007-485-95, 4 May 2007 [*Te Arawa Cross Claim* (HC)]; *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 [*Te Arawa Cross Claim* (CA)].

4 Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 202.

5 *Te Arawa Cross Claim* (HC), above n 3, at [94].

6 Ibid, at [81].

> The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty: good faith, reasonableness, trust, openness, and consultation. But it does so by analogy, not by direct application. ... If Gendall J was saying that the Crown has a fiduciary duty in a private law sense that is enforceable against the Crown in equity, we respectfully disagree.

In 2008 when a further appeal to the Supreme Court was withdrawn, the Supreme Court issued a short minute noting that the comments of the High Court and Court of Appeal concerning the Crown's fiduciary obligations to Māori were obiter dicta.[7] Without preferring either Court's views, the Supreme Court made it clear that neither is binding on any New Zealand court.

While the *Te Arawa Cross Claim* cases focused on the concept of fiduciary duties, the relationship between governments and indigenous peoples depends on the unique circumstances within each country. Therefore, while the concept of a fiduciary duty has been developed extensively overseas, especially in North America, it may not be appropriate in New Zealand.[8] In the latest case on the issue, *Attorney-General v Paki*, Hammond J outlined the third approach, stating that "at a broad level, there was undoubtedly a duty of good faith between the Crown and Māori".[9] His Honour argued that this relational duty of good faith is sourced in New Zealand's history, particularly, but not exclusively, in the signing of the Treaty. Hammond J developed Cooke P's original dicta into a relational duty of good faith, which is "a better vehicle ... for the largely inchoate duty of good faith".[10]

This article will examine these different options for how to formulate the relationship between, and the duties owed by, the Crown and Māori. It will begin by examining the traditional approach of formulating the relationship as a fiduciary one. The possible bases for a fiduciary relationship in the New Zealand context are then discussed, before examining the potential pitfalls with using the fiduciary model. The article suggests that there are a number of problems associated with the fiduciary model, and the model is found wanting.

The article goes on to examine Hammond J's new approach of a relational duty of good faith, and considers its potential consequences. This model is preferred. The article concludes that reconciliation through

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7 *New Zealand Maori Council v Attorney-General* SC 49/2007, 4 November 2008 at [2(b)]. See discussion in *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [101] [*Paki* (CA)]; Tom Bennion "NZ Māori Council and Ors v Attorney-General and Anor" [2008] Māori LR (Nov) 8.

8 *Te Arawa Cross Claim* (CA), above n 3, at [81]; *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [116] [*Paki* (HC)].

9 *Paki* (CA), above n 7, at [96]. Leave to appeal to the Supreme Court was granted on 21 July 2010 ([2010] NZSC 88), but the part of Hammond J's judgment that deals with a relational duty of good faith was not part of the grounds of appeal.

10 Ibid, at [104].

the means of such a relational duty is the way forward for the Crown–Māori relationship in New Zealand.

II FIDUCIARY RELATIONSHIPS

Whether the Crown–Māori relationship can be defined as fiduciary is uncertain. However, examination of the nature of fiduciary relationships offers a starting point. At the very least, fiduciary law will inform the key characteristics of the Crown–Māori relationship since the duties upon the Crown are "analogous to fiduciary duties".[11]

Equity examines the parties' consciences, and whether in light of that it would be appropriate to change their common law rights and obligations. Fiduciary law provides the clearest expression of equity's role to provide constraints on action where there may be a power imbalance between parties:[12]

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules.

Where a fiduciary relationship is found, equity will regulate the behaviour of the fiduciary with respect to the beneficiary.[13] A relationship is recognised as fiduciary if it falls within settled categories, such as solicitor and client or principal and agent.[14] A relationship may also be of a fiduciary nature where its "particular aspects" justify it being so classified.[15] It is important to note that these recognised categories are not closed.[16]

A fiduciary relationship is a "default" system. The fiduciary need not expressly undertake a fiduciary duty: if a court finds that a duty should apply due to the circumstances and facts at hand, then the duty will be imposed on the fiduciary.[17]

However, it is not always easy to determine whether a relationship is of a fiduciary nature. The courts are willing to find the existence of a fiduciary relationship in circumstances where none has been recognised in the past,[18] but the underlying reasons when they choose to do so are

11 *Lands*, above n 2, at 664.

12 *Hodgkinson v Simms* [1994] 3 SCR 377 at 422.

13 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [17.1].

14 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [73].

15 Ibid, at [75].

16 Ibid; *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 597 [*Lac Minerals*].

17 Butler, above n 13, at [17.2.11].

18 *Chirnside v Fay*, above n 14, is an example of this.

not always clear.[19] Some guidance can be found in the Court of Appeal's adoption of the Canadian three-stage formulation of the elements of a fiduciary relationship:[20]

> (1) the fiduciary has scope for the exercise of some discretion or power;
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
> (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The content of these principles has been applied in the context of Crown–aboriginal relations, most notably in North America.[21] The third element of vulnerability is particularly controversial in the context of aboriginal relations, and will be discussed in detail in Part IV of the article.

Once a fiduciary relationship is found, the fiduciary is generally held to the duty of utmost loyalty. This consists of various duties, particularly the no conflict and no profit rules. The difficulties with the application of these traditional rules to the Crown–Māori relationship will be examined in more detail below.

III A FIDUCIARY DUTY IN NEW ZEALAND?

In *R v Sparrow*, the Supreme Court of Canada stated that the fiduciary duty owed by the Crown to aboriginal peoples was sourced in "[t]he *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown".[22] In the New Zealand context, the Treaty is another important factor pointing toward a fiduciary relationship.[23]

The elements required for the finding of a fiduciary duty appear to be fulfilled in New Zealand's unique history. To establish a fiduciary duty in a particular situation, the Crown must be able to exercise some power or discretion that affects Māori interests, such that as a result Māori are vulnerable to the Crown's exercise of that power. While all citizens are vulnerable to the Crown's exercise of its powers, Māori are particularly vulnerable. Historically:[24]

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19 *Lac Minerals*, above n 16, at 643–644.

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

21 Gerald Lanning "The Crown–Maori Relationship: The Spectre of a Fiduciary Relationship" (1997) 8 Auckland U L Rev 445 at 446–449.

22 *R v Sparrow* [1990] 1 SCR 1075 at 1108.

23 Lanning, above n 21, at 457.

24 Ibid, at 456.

> [Māori] did not have the resources to combat the colonists. Instead they relied on the good faith of the colonial representatives. The result was that they suffered due to their vulnerability to the Crown.

Thus the requirement of vulnerability as a basis for the fiduciary duty is fulfilled. Whether continued vulnerability is required for a fiduciary relationship to be found is one of the problems associated with the use of the fiduciary concept, considered in more detail below.

In addition, while an undertaking is not strictly necessary to establish a fiduciary relationship, it is argued below that the Crown has made some form of undertaking with regard to Māori.[25]

The Treaty of Waitangi

The Treaty is a founding document in the relationship between the Crown and Māori. The Treaty is clearly part of the "course of specific dealings between Maori and the Crown" that could establish a fiduciary relationship.[26] The factors required for establishing a fiduciary relationship appear to be present in the Treaty.[27] However, the Crown's fiduciary obligations do not rely on the existence of, and are not limited by, the existence of the Treaty.

While a good faith requirement may be sourced in the Treaty, it goes too far to say that the Treaty itself gives rise to a fiduciary duty. Further, the significance of the Treaty is no longer confined to its exact words, but has transcended to a spirit of the Crown–Māori partnership.[28]

The existence of a treaty (such as the Treaty of Waitangi) merely strengthens the fiduciary duty[29] or may give rise to further rights.[30] The two overlap, such that they "tend to be partly the same in content"[31] and so it is no great impediment to finding a fiduciary relationship that the Treaty can only be enforced when specifically put into legislation.[32]

Originally the *Lands* case based the notions of partnership and utmost good faith on the Treaty itself,[33] but later commentators doubt whether the Treaty can be the sole basis for the existence of such a duty.

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25 Ibid, at 454.

26 E W Thomas "The Treaty of Waitangi" [2009] NZLJ 277 at 279.

27 See Lanning, above n 21; Donna Hall "The Fiduciary Relationship between Maori and the Government in New Zealand" in Law Commission of Canada (ed) *In Whom We Trust: a Forum on Fiduciary Relationships* (Irwin Law, Toronto, 2002) 123; Claire Charters "Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004: How Does it Compare and What Have Māori Lost?" in Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: The Latest Frontier* (Victoria University Press, Wellington, 2007) 143; Alex Frame "The Fiduciary Duties of the Crown to Maori: will the Canadian Remedy Travel?" (2005) 13 Wai L Rev 70 ["The Fiduciary Duties of the Crown to Maori"].

28 Noel Cox "The Treaty of Waitangi and the Relationship between Crown and Maori in New Zealand" (2002) 28 Brook J Intl Law 123 at 132.

29 See *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR (CA) 301 at 306 [*Sealord Fisheries*].

30 Hall, above n 27, at 138.

31 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 27.

32 *Hoani te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC) at 325.

33 *Lands*, above n 2, at 664 per Cooke P, at 682 per Richardson J, at 693 per Somers J, at 702–703 per Casey J.

Rather the fiduciary duty should be grounded in the historic transfer of power and the events of the time: the Treaty merely reinforces this as "an explicit and formal assumption of responsibility".[34]

Historical Background

As noted above, the Treaty cannot be the sole source of a duty owed by the Crown.[35] It is also important to examine other factors, such as the historical course of dealing between the parties.

Lord Normanby's instructions for colonisation to Captain Hobson on 14 August 1839 indicated his awareness of the imbalance of power inherent in the Crown–Māori relationship, and suggested the existence of some fiduciary duty on the Crown.[36] He gave explicit guidelines as to how dealings were to be carried out:[37]

- They were to be conducted with "sincerity, justice, and good faith".
- Maori "must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves". Hobson was not, for example, to "purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence".
- Acquisitions by the Crown of land for future British settlement were to be "confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves".
- To ensure the observance of this was to be "one of the first duties of their official protector".
- In all future dealings with Maori, the Crown (in this case, the Governor) would provide for and protect Maori interests.

A factor seen as significant in Canada in favour of a fiduciary relationship is Crown pre-emption, where the Crown has the first right to purchase from any aboriginal person wishing to sell their land. This right of pre-emption has been present in New Zealand since Lord Normanby's original instructions in 1839, continued with the Treaty, and was finally put in statute with the New Zealand Land Claims Ordinance 1841, which further covered leases of land as well as sale.[38] This power of pre-emption and ability to review transactions before 1840 gave the Crown complete

34 Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 249.

35 *Paki* (CA), above n 7, at [114].

36 Frame "The Fiduciary Duties of the Crown to Maori", above n 27, at 78.

37 Rose Daamen *The Crown's Right of Pre-emption and Fitzroy's Waiver Purchases* (Waitangi Tribunal, New Zealand, 1998) at [2.2].

38 Ibid, at [2.2], [2.3] and [3.4]. Arguably, it is unclear whether Māori actually agreed to Crown pre-emption via the Treaty.

control over land dealings for settlement of colonists in New Zealand, to the exclusion of the Māori who inhabited the land.[39]

In the New Zealand context, there would seem to be a sound basis to ground a fiduciary relationship between the Crown and Māori: in the unique nature of aboriginal title, in the Treaty, and in other historical dealings between the Crown and Māori.

IV PROBLEMS WITH A FIDUCIARY DUTY

Despite the particular vulnerability of Māori to the Crown, the courts have failed to agree on the nature of the Crown–Māori relationship. Key problems discussed in this part are: identifying the parties involved; the question of vulnerability; the parties' other obligations; and difficulties in determining exactly what the duty involves.

Identifying the Parties

There has generally been a lack of precision in the terminology used in this area. The term "Crown" has itself undergone various transformations since its feudal beginnings, and exists in many manifestations.[40] Any obligations of the Queen under the Treaty are now that of the Crown,[41] but it is unclear what body or bodies this term encompasses.[42]

Cooke P's view in the *Lands* case was that the Crown is the other Treaty partner. This is incongruous with the prevailing view in society that the Crown is the representative of the whole population. Curiously, Cooke P also refers to the relationship between Crown and Māori as a "partnership between races".[43] Not only is this rather inconsistent, but it also carries potentially undesirable implications.[44]

For practical purposes, while the Crown was originally the sovereign, the term now commonly refers to the government.[45] This can be in a narrow (referring merely to the executive) or broad sense (as encompassing all three branches of government: executive, legislature and judiciary). Both of the closely related bodies of the executive and the legislature are involved in the process of Treaty settlements with Māori.[46]

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39 An example is the dealings in the South Island with the Ngāi Tahu iwi. For details, see Harry C Evison *The Ngāi Tahu Deeds: a Window on New Zealand History* (Canterbury University Press, Christchurch, 2006).

40 Janet McLean "'Crown Him with Many Crowns': the Crown and the Treaty of Waitangi" (2008) 6 NZJPIL 35.

41 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517 [*Broadcasting Assets*].

42 McLean, above n 40, at 53.

43 *Lands*, above n 2, at 664.

44 Alex Frame "Consequences for Jurisprudence" in Jacinta Ruru (ed) *"In Good Faith": Symposium proceedings marking the 20th anniversary of the* Lands *case* (New Zealand Law Foundation and the Faculty of Law at University of Otago, Dunedin, 2008) 101 at 104–105.

45 Cox, above 28, at 148.

46 McLean, above n 40, at 53–54.

In addition, it is hard to say definitively to whom the duty is owed, at any more specific level than "Māori". Māori societal structures are not fixed within the cornerstones of iwi (nation, tribe, people) and hapū (clan, subtribe) — rather, they are constantly evolving to suit the needs of a changing group.[47] In addition, the borders of boundaries between different iwi are not set in stone. Occupation of an area may be disputed amongst multiple iwi or hapū, each of whom may have claims whose ranking of validity differs when considered under tikanga Māori or colonial law.[48]

Vulnerability within the Fiduciary Relationship

One of the problems with classifying the Crown–Māori relationship as fiduciary is the "legal baggage" that comes with it:[49]

> A fiduciary standard would impose an obligation on the Crown to act with real selflessness vis-à-vis a disadvantaged party (here, the Māori). In a real sense, this implies superiority on the part of the Crown and inferiority on the part of Māori. This is quite at odds both with the historical fact of the Treaty of Waitangi, and what is said about it and the position of Māori today. This resort to a fiduciary principle carries an unfortunate and erroneous affirmation of a most public kind as to the inferior position of Māori. This is quite wrong.

This implication of superiority is one of the main criticisms of a fiduciary duty being used in this area, with its connotations of exploitation and vulnerability.[50] Such language is an inevitable and inherent consequence of the fiduciary concept's historical origins. The classification seems to be "paternalistic or antithetical to Aboriginal self-determination".[51] As Thomas J noted extrajudicially:[52]

> [T]he fiduciary concept implies a relationship between the Crown and Maori which is to some extent incompatible with the perception of a compact based on the *equality* of the parties and the recognition of *mutual obligations*.

There is some disagreement about whether vulnerability is necessary to establish a fiduciary duty. The prevailing view seems to be that a

47 See Hall, above n 27, at 132; A W Reed *The Reed Concise Māori Dictionary* (6th ed (revised), Reed Publishing, Birkenhead, 2007) at 20 and 27.

48 See, for example, the dispute between Ngāti Toa and Ngāi Tahu over certain parts of the South Island, discussed in Evison, above n 39, at chapter 1.

49 *Paki* (CA), above n 7, at [103].

50 Thomas, above n 26, at 279.

51 Leonard I Rotman "Conceptualising Crown–Aboriginal Fiduciary Relations" in Law Commission of Canada (ed) *In Whom We Trust: a Forum on Fiduciary Relationships* (Irwin Law, Toronto, 2002) 25 at 52.

52 Thomas, above n 26, at 279 (emphasis added).

fiduciary relationship only exists where there is vulnerability on the part of the beneficiary, such that some power imbalance is a necessary precondition of the fiduciary duty. However, Rotman has suggested that these uncomfortable connotations are merely a misconception of how a fiduciary relationship originates:[53]

> While fiduciary law protects dependent parties from the improper actions of those who possess power and discretion over their interests, that does not entail that fiduciary relationships exist only between inherently unequal parties. The notion that fiduciary relations require an inequality in power between the parties *outside of their fiduciary interaction* is a myth that continues to hamper the understanding of fiduciary obligations. Inequality *may* be a pre-existing condition between the parties involved in fiduciary relations but it need not be. The vulnerability of beneficiaries that exists within any given fiduciary relationship does not create the fiduciary nature of a relationship but is an inevitable product of such forms of interaction. Regardless of whether a beneficiary's vulnerability was a pre-existing condition, fiduciary law focuses solely on the vulnerability that was created by the fiduciary nature of the relationship.

This conception of the fiduciary relationship places importance on the nature of the relationship between the Crown and aboriginal peoples, built up through a shared history and concluded treaties, rather than the relative power possessed by each party. The relative power will always be changing with time, yet this variation does not affect the underlying, binding relationship formed with colonisation. As Hutchins and Schulze have noted:[54]

> The essence of the relationship forged by the Aboriginal peoples with the Crown since contact and developed through the treaties is that Aboriginal peoples gave up some aspects of their external sovereignty in return for the Crown's promise of protection of their interests, notably their internal sovereignty. The enforceability of this promise does not ebb and flow with the advantages First Nations may have in particular rounds of bargaining.

Hence, the concern that a fiduciary duty leads to a perception of inferiority is in reality not as great a barrier as it appeared at first glance.

The Parties' Other Obligations

It is important to remember that not all acts of a fiduciary are subject to the fiduciary duty:[55]

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53 Rotman, above n 51, at 49–50 (emphasis in original).

54 Peter W Hutchins and David Schulze with Carol Hilling "When do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask L Rev 97 at 114.

55 Butler, above n 13, at [17.2.3].

> [E]ven if a relationship is of a generally non-fiduciary kind (eg a commercial relationship governed by contract under which each party is generally free to pursue its own interests) there may be aspects of it which engage fiduciary obligations.

Māori have two types of relationship with the Crown: as the indigenous people of New Zealand, and also as citizens. Therefore it may be possible for a fiduciary duty to exist in some dealings between the Crown and Māori but not others.[56] As the Court of Appeal has noted:[57]

> [W]e see difficulties in applying the duty of a fiduciary not to place itself in a position of conflict of interest to the Crown, which, in addition to its duty to Maori under the Treaty, has a duty to the population as a whole. ... [T]he Crown may find itself in a position where its duty to one Maori claimant group conflicts with its duty to another.

When the Crown is negotiating with one Māori group, its fiduciary duty to that group may conflict with duties to other Māori groups with similar interests at stake.[58] It has also been suggested that Māori, when negotiating with the Crown, themselves owe a fiduciary duty to other Māori.[59] There is a traditional reluctance to impose fiduciary duties on the Crown for these reasons, and the potential interference of these fiduciary duties with the Crown's political accountability to all New Zealanders.[60] The complexities of different groups with interests at stake demonstrate that rather than "once and for all" settlements, a more appropriate approach is to build ongoing relationships.

Interestingly, Rotman has proposed that what is at work in the Crown–aboriginal context is a dual fiduciary relationship: "[T]here is a mutual fiduciary relationship between partners, with each partner occupying the role of both fiduciary and beneficiary".[61] But Rotman's concept of a dual fiduciary relationship does not acknowledge adequately the fact that as *citizens*, Māori (like other citizens) are vulnerable to the Crown's use of state powers. Surely when dealing with the Crown, Māori are entitled to consider their own interests first.

However, there is some merit in the dual fiduciary relationship concept. By considering the parties to be in a mutual fiduciary relationship,

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56 Jacinta Ruru "The Waitangi Tribunal" in Malcolm Mulholland and Veronica Tawhiri (eds) *Weeping Waters: the Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 127 at 138.

57 *Te Arawa Cross Claim* (CA), above n 3, at [81].

58 Consider *Te Arawa Cross Claim* (CA), above n 3, at [81]: "The present case [shows] ... the Crown may find itself in a position where its duty to one Maori claimant group conflicts with its duty to another."

59 Hall, above n 27, at 133.

60 David W Elliott *Law and Aboriginal Peoples in Canada* (5th ed, Captus Press, Ontario, 2005) at 88.

61 Rotman, above n 51, at 50.

the relationship between them now seems to resemble a "partnership"[62] (as said to have been "created"[63] or "signified"[64] by the Treaty), rather than a true fiduciary relationship where the fiduciary is to act in the beneficiary's best interest with utmost good faith. The essence of Rotman's suggestion is that there should be obligations on both parties to act together. The aim would be to achieve an outcome satisfactory to both parties, through "a process of balancing interests, of give and take".[65]

Scope of Fiduciary Duty

While fiduciaries are generally held to account by the rules against conflicting with or profiting from their fiduciary duties, these are far more difficult to enforce in the Crown–Māori context. The fact that the Crown is inevitably in a position of conflict in the use of its discretionary powers is obvious. The no profit rule is similarly problematic, since there are other legitimate claims upon the Crown's income, and loss to Māori may not necessarily have caused a corresponding profit to the Crown.[66]

In addition, fiduciary duties are proscriptive rather than prescriptive. As President Cooke stated in *Lands*:[67]

> [T]he duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable.

Hence, as well as being difficult to fulfil, the fiduciary standards are inadequate for holding the Crown to all that they are obliged to do by the unique historical background of New Zealand.

V A RELATIONAL DUTY OF GOOD FAITH

Given the problems with classifying the Crown–Māori relationship as a fiduciary duty, it seems problematic to persist with the fiduciary terminology, especially if continuous exceptions to the regular fiduciary duty are required. If the Crown–Māori relationship is truly unique, then the fiduciary construct at most only offers guidance, rather than a model for strict adherence. As this "unique" relationship seems to differ so widely from that of a traditional fiduciary relationship, surely a "better vehicle"

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62 As was found in *Chan v Zacharia* (1984) 154 CLR 178 at 196; G E Dal Pont and D R C Chalmers (eds) *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, Sydney, 2000) at 95.

63 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 169 [*Radio Assets*].

64 *Lands*, above n 2, at 664.

65 *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at [48] [*Haida Nation*].

66 Lanning, above n 21, at 467.

67 *Lands*, above n 2, at 664.

can be found to represent the Crown–Māori relationship.[68] As McHugh has noted:[69]

> [New Zealand's h]istory might require an equal model of fiduciary relationship, but the courts can deliver no more than the unequal version without Parliamentary initiative (or ... constitutional reform).

A less drastic alternative to parliamentary reform is to do away with the language of fiduciaries altogether. As stated earlier, Hammond J did exactly this in *Paki* by proposing that the relationship be considered under the framework of a "relational duty of good faith". This relational duty consists of at least three elements:[70]

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

While these elements seem similar to the "responsibilities analogous to fiduciary duties" from *Lands*, the relational duty is a "discrete, stand-alone cause of action" such that the language of fiduciaries is no longer required.[71] The scope of this relational duty is not limited to the Treaty, although the Treaty may give rise to further rights.[72]

The relational duty of good faith resembles the Canadian concept of the "honour of the Crown" as articulated in the *Haida Nation* case, rather than a fiduciary duty.[73] The relational duty provides an underlying guide to all dealings between Crown and Māori as the "honour of the Crown" does in Canada.[74] The new terminology of a relational duty allows a new way of thinking. Rather than adopting the fiduciary model wholesale, which does not adequately describe the relationship, the relational duty of good faith gives flexibility to how the Crown–Māori relationship can be developed.

The relational duty approach requires dialogue to identify where Māori interests are particularly at stake. The particular interests and duties of both parties may be based on the Treaty, the principles of the Treaty, or even historic actions or agreements. In these situations, the Crown must

68 *Paki* (CA), above n 7, at [104].

69 McHugh, above n 34, at 247.

70 *Paki* (CA), above n 7, at [110].

71 Ibid, at [111].

72 Ibid, at [108].

73 In *Haida Nation*, above n 65, the Supreme Court of Canada preferred the concept of the "honour of the Crown" over the language of fiduciary duties. For Canada's earlier fiduciary approach see *Guerin v R* [1984] 2 SCR 335 [*Guerin*].

74 *Haida Nation*, above n 65, at [16].

act to fulfil the relational duty of good faith, which may be met in a variety of ways, depending on the needs of the particular situation. The relational duty may even operate passively by providing a cause of action.

A relational duty of good faith allows for a uniquely New Zealand approach. The relational duty approach aims toward the mutual satisfaction of both parties by imposing the need to communicate and to negotiate in a nature similar to the employment context.[75]

Defining Good Faith

In *Paki*, Hammond J noted the key role that a relational duty of good faith plays in employment law.[76] The Employment Relations Act 2000 imposes a "legislative requirement" for good faith in dealings between parties in an employment relationship.[77] The Employment Relations Act defines "good faith" in s 4(1A):[78]

> The duty of good faith in subsection (1)—
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.

Thus in the employment context, the key elements of good faith include responsiveness, communication, access to relevant information and the ability to be heard. These translate well into the Crown–Māori relationship as guiding principles for how the relationship is to progress.

Cooperative Element

In addition to the basic definition of good faith, the Employment Relations Act gives a more detailed code of good faith where there is collective

75 *Paki* (CA), above n 7, at [107]–[108] and [116].
76 Ibid, at [107].
77 Employment Relations Act 2000, ss 3(a) and 4(1).
78 Ibid, s 4(1A).

bargaining.[79] Bargaining parties should develop good faith practices, since this is more likely to lead to "productive employment relationships".[80] They should agree on a process to be used in the bargaining that allows efficiency and effectiveness, which gives certainty and allows the substantive part of the bargaining to proceed.[81] The Employment Relations Act emphasises the importance of communication, noting that meetings "will provide an opportunity for the parties to explain, discuss and consider proposals relating to the bargaining".[82] Each party is also required to provide explanations that support their points of view.

Even where the parties have reached a deadlock or standstill over particular matters, the Employment Relations Act requires them to continue to "meet, consider and respond to each other's proposals on other matters".[83] The emphasis is not whether the ultimate outcome evidences good faith, but whether the processes utilised to reach the settlement was in good faith. It is important to consider the individual circumstances of each case.[84] As noted in *Lands*: "[T]he duty to act reasonably is not one sided".[85]

The need for involvement from both parties is clearly seen in the *Broadcasting Assets* case concerning the protection of Te Reo Māori, where the Privy Council noted that the Crown–Māori relationship is founded on "reasonableness, mutual cooperation and trust".[86] Hence obligations upon the Crown towards Māori are tempered by the surrounding circumstances:[87]

> [T]he Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

While the Crown has an active duty, the content and scope of the duty will vary. Māori themselves are obliged to take some action where this is reasonable.[88] In the *Broadcasting Assets* case, important considerations that influenced the extent of the Crown's duty included the fact that the Crown had ultimate control over the assets, and that the assets were not unique and could be replaced.[89]

The less stringent nature of the relational duty thus allows other

79 Ibid, s 35.

80 Code of Good Faith in Collective Bargaining 2005 at [1.4].

81 Ibid, at [2.1].

82 Ibid, at [3.11].

83 Ibid, at [3.16].

84 *Auckland City Council v New Zealand Public Service Association Inc* [2004] 2 NZLR 10 (CA) at [24]–[25].

85 *Lands*, above n 2, at 664.

86 *Broadcasting Assets*, above n 41, at 517.

87 Ibid.

88 Ibid, at 519.

89 Ibid, at 520 and 524.

factors to be considered. The Crown–Māori relationship does not operate in isolation, and the duties it imposes have potentially far-reaching impacts on other members of society. By using a relational duty, the court can acknowledge this wider context and take into account all of the relevant surrounding circumstances.

VI CONSEQUENCES OF A RELATIONAL DUTY OF GOOD FAITH

Substantive Consequences

While the exact scope of the relational duty of good faith is to be worked out between the two partners, some possible consequences of the duty can be explored. The next section on substantive consequences considers how the relational duty may be put into practice. In particular it will discuss: the duty to consult; the extent to which the courts can scrutinise legislation affecting Māori interests; and the law of legitimate expectations.

1 Duty to Consult

In certain circumstances the relational duty may lead to a requirement of consultation. The Court of Appeal has offered a number of different statements on the nature of the duty to consult. In the *Lands* case, Cooke P declared that any duty to consult would be "elusive and unworkable": it would be unclear who should be consulted, and the ultimate effect of wide-ranging consultations could be detrimental. However, where there was such a major change as the transfer of land to state-owned enterprises, some communication was required: "as a reasonable Treaty partner [the Crown] should take the Maori race into its confidence regarding the manner of implementation of the policy".[90]

In the same case, Richardson J offered a different formulation of the duty to consult:[91]

> [T]he responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith.

90 *Lands*, above n 2, at 665.

91 Ibid, at 683.

Richardson J's formulation gives a more nuanced conception of a specific duty to consult, dependent upon the particular circumstances.

Two years later in the *Forests* case, the Court of Appeal reassessed the duty to consult, emphasising the importance of partnership and stating that good faith requires the parties to the Treaty to consult on truly major issues.[92]

However, consultation should not be seen as the only or the most important obligation. Cooperation calls for active protection of Māori interests. In the *Whale Watch* case, the Court of Appeal stated that while active protection should not be an unreasonable burden, in many cases, "[t]o restrict [the duty on the Crown] to consultation would be hollow".[93] Rather, a "reasonable degree of preference" may be required.[94]

A duty of consultation is only imposed on the Crown, and does not apply where the action contemplated by the Crown is to present legislation to Parliament — in such cases review will be carried out by the courts after enactment.[95] The duty to consult also does not extend to situations where Māori interests are at stake but the other party is not the Crown or associated with the Crown.[96] To require consultation from non-Crown parties would need another source of law, usually a statute.[97]

2 *Justification of Legislation*

When legislation affecting Māori interests is enacted, the question arises as to the level of scrutiny the courts can give this legislation according to the relational duty of good faith. The Crown is usually taken to mean only the executive, which is accountable to the legislature and the courts.[98] By contrast, the legislature's enactments are "the highest source of law".[99] The legislature's law-making function cannot be bound by a fiduciary duty or relational duty.[100] Therefore, Acts of Parliament can alter the extent of any duty owed by the Crown. For example, statutes may strengthen the Crown's duty (for example by preserving a right of pre-emption), or entirely remove the duty (for example, s 9(c) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 declares that all Māori claims in commercial fishing are "fully and finally settled, satisfied, and discharged").[101] The explicit exclusion of the Crown from any duty in the latter situation, suggests that

92 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 152 [*Forests*].

93 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 560 [*Whale Watch*].

94 Ibid, at 562.

95 See *Sealord Fisheries*, above n 29, at 308.

96 *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 (HC) at [55(c)].

97 *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799 (HC) at [102]–[105].

98 Joseph, above n 1, at [7.4.1].

99 Ibid, at [7.2.1].

100 Charters, "Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004", above n 27, at 160.

101 *Guerin*, above n 73; Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9(c).

the legislature believes that, but for the existence of abrogating legislation, a fiduciary-like duty does exist and is incumbent upon the Crown.[102]

In New Zealand, the courts are particularly wary of reviewing the substantive content of primary legislation. However, in Canada, the Supreme Court has stated that the duties of the Crown to First Nations require the Crown to justify any statutes that infringe on aboriginal rights. As the Supreme Court of Canada stated in *Sparrow*:[103]

> Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

The Canadian position that primary legislation can be reviewed is at odds with New Zealand's strict form of parliamentary sovereignty, where the courts cannot judicially review statutes in any circumstances.

In contrast, the view that any Crown duty to Māori can only be enforced against the executive is in line with United States of America's position.[104] However, an important point of difference from the American constitutional system is that in New Zealand's system of government the membership of the executive is drawn from the legislature. The processes of the two bodies are so linked that "the Crown exercises much of its power or discretion through legislation".[105] Therefore, there is a greater argument in New Zealand that the Crown's duty of good faith should require some form of justification for statutes that influence Māori interests.

As noted above, the Canadian courts have set out a process where any interference with aboriginal rights through statute must be justified, as a valid objective that is consistent with the "honour of the Crown".[106] New Zealand's Parliament enjoys a more absolute sovereignty than its Canadian counterpart. However, the New Zealand courts do have the power under the New Zealand Bill of Rights Act 1990 (NZBORA) to scrutinise and interpret statutes so as to minimise their infringement of the NZBORA; although this falls short of the power to strike down statutes.

In *R v Hansen*, the Supreme Court of New Zealand set out the process through which the courts should review legislation for consistency with the NZBORA.[107] The court should first determine whether the legislation is inconsistent with a right or freedom protected by the NZBORA. If so, the legislation will prevail if the inconsistency is found to be justifiable

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102 See for example, Foreshore and Seabed Act 2004, s 13(4) (repealed): "The Crown does not owe any fiduciary obligation, or any obligation of a similar nature, to any person in respect of the public foreshore and seabed." See Charters, "Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004", above n 27, at 160; Frame "The Fiduciary Duties of the Crown to Maori", above n 27, at 80.

103 *Sparrow*, above n 22, at 1077.

104 McHugh, above n 34, at 243.

105 Lanning, above n 21, at 460.

106 *Haida Nation*, above n 65.

107 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

in a "free and democratic society" under s 5. If the inconsistency is not a justified limit under s 5, s 6 requires the courts to apply the interpretation of the legislation that is as consistent as possible with the rights and freedoms protected in the NZBORA. Where there is no possible consistent interpretation s 4 states that the statute must be enforced according to its natural meaning.[108]

A similar procedure could be adopted in New Zealand for ensuring that legislation is consistent with the Crown's relational duty of good faith. For example, a breach of the NZBORA could be substituted with a breach of the relational duty of good faith owed by the Crown to Māori. The "justifiable limit" provision in s 5 is similar to the valid legislative objective required under *Sparrow*, albeit with a slightly different emphasis.[109]

In *Hansen*, the Supreme Court was clear that s 5 should be considered before s 6, which requires an interpretation consistent with NZBORA to be given effect if found. Hence where justification of the legislation fails, such that it is in fact in breach of the Crown's relational duty, the next step under *Hansen* is to prefer an interpretation of the legislation that would be consistent with the relational duty where possible. Not only is this familiar territory from the NZBORA context,[110] but New Zealand courts already interpret statutes so as to be consistent with the Treaty.[111]

The practice of preferring a consistent meaning has been proposed by McHugh as a method for bringing to life the fiduciary duty at a minimum level of enforcement. While it cannot constrain the legislature, the practice can assist by defining the appropriate limits of the legislature's power, as a "presumptive presence".[112] Although a possible problem with this method is that it focuses the courts on "limit[ing] how a power is to be used, rather than ... restrain[ing] any power".[113]

As a concept wider than fiduciary duty, the relational duty of good faith perhaps has the potential to extend beyond a doctrine of interpretation. As noted in *Paki*, the inclusion of Treaty clauses in legislation indicates "formal acceptance by both Parliament and the Executive of the good faith concept underpinning the Treaty, and is a recognition that the concept can, and should, be given functional form".[114] However, if there is neither sufficient justification nor a consistent interpretation, the courts are ultimately bound by Parliament's intentions on the plain meaning of the words. Even Gendall J, in finding the Crown to be subject to a fiduciary duty, offered a note of caution:[115]

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108 Joseph, above n 1, at [27.4.3 (3)].

109 *Sparrow*, above n 22.

110 Joseph, above n 1, at [27.4.6 (1)].

111 Hall, above n 27, at 136; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

112 McHugh, above n 34, at 251.

113 Hall, above n 27, at 136.

114 *Paki* (CA), above n 7, at [112].

115 *Te Arawa Cross Claim* (HC), above n 3, at [86].

> I do not think the Court should shy away from expressing a view on questions of equitable and ethical duties, especially those which clearly arise out of the Treaty partnership and relationship. However, it is a delicate area and the Court cannot impose any restriction on Parliament passing such legislation as it thinks fit. If in the process the result is that the Crown takes to itself a benefit (in this case a very substantial benefit), to the detriment of possible potential claimants to whom fiduciary duties are owed and who might otherwise be entitled to share in those benefits, then Maori will be affronted, as is apparent from this case. That may have political, or policy, implications but they are beyond the Court.

3 Legitimate Expectations

A third way that a relational duty of good faith may be put into effect is through the creation of a legitimate expectation that the Crown will comply with its duties to Māori.[116] The power of the Crown to implement policy may be constrained by the courts where that policy would be unfair due to an expectation created by some prior action or inaction of the Crown.[117] While the relational duty of good faith is not based solely on the Treaty, the Treaty can be used to ground either a procedural or substantive legitimate expectation. The Treaty can be seen as a clear representation by the Crown that it will comply with its relational duty, although the Treaty is not the only possible route to establishing a legitimate expectation.[118] The Treaty may be a very powerful tool in holding the Crown to its relational duty as expressed in the Treaty:[119]

> Governments habitually state as a matter of general principle and in specific areas of policy that they seek to honour the Treaty. Accordingly, it would be possible for a determined Supreme Court to fashion a general, or more specific, legal obligation based on the principle of legitimate expectations that the Crown must act consistently with the Treaty of Waitangi unless it somehow refutes that expectation.

Proposals made by the Crown may not be directly enforceable in the courts, but may lead to legitimate expectations, due to the "bona fides of the Crown".[120] The established status of the Treaty as New Zealand's

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116 Palmer, above n 4, at 208.

117 GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at 591.

118 For discussion on the law of substantive legitimate expectations in New Zealand see *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC). However, note that it has been doubted whether legitimate expectations can bind the Crown other than where the Treaty is involved. See Thomas, above n 26, at 279 and *Radio Assets*, above n 63, at 183–185.

119 Palmer, above n 4, at 209.

120 *Broadcasting Assets*, above n 41, at 525.

"recognised fundamental constitutional document" gives extra weight to this proposal.[121] As Thomas J has noted:[122]

> [T]he legal effect of the Crown's recognised obligations to have regard to and comply with the treaty is much the same as its obligation to have regard to and comply with an assurance to that effect. Both can give rise to a legitimate expectation. Indeed, the obligations under the treaty must have a more substantial impact. It would be odd if a legitimate expectation could arise from an assurance but not directly from the obligations of the Crown under the treaty.

Enforcement of both procedural and substantive legitimate expectations may be possible, but will be highly dependent on the particular case.[123] It is important to note that "[i]t is the expectation, and the unfairness of its frustration, and not the treaty itself, which is the source of the remedy".[124]

Procedural Concerns

As well as the relational duty's substantive impact on the actions of the Crown and Māori, there are other practical concerns about how the relational duty of good faith would operate. This section will address these concerns, discussing the issues of: whether the Crown can delegate its duties; the effect of limitation periods on the Crown's duties; and the required standard of behaviour placed on the parties.

1 Possibility of Delegation

Fiduciaries are not able to delegate their fiduciary obligations to other parties. There is little reason why the Crown would be held to a lesser requirement under a relational duty of good faith simply because the duty is not a fiduciary one. Otherwise, any obligations imposed could be rendered meaningless by the imposition of an intermediary.

The Crown often delegates authority to state-owned enterprises. However, the mere delegation of authority should not entail that the Crown is no longer subject to any fiduciary or relational duty, since "these [state-owned] enterprises are performing functions formerly carried out by the Crown in its executive capacity".[125] Nor should the Crown be able to avoid its duties by direct delegation of authority to other bodies.

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121 *Radio Assets*, above n 63, at 185.

122 Ibid, at 183.

123 Ibid, at 185.

124 Ibid.

125 Lanning, above n 21, at 463.

2 Limitation Period

Māori claims against the Crown, especially for the return of land, have had mixed success. In part this is due to the passage of time. While the New Zealand limitation period for civil claims is only 6 years, s 28 of Limitation Act 2010 extends the limitation period for recovery of land to 12 years.[126] However, in the case of Māori land, this is often still not enough time to bring a claim.[127]

The Limitation Act does offer some exceptions from the general rule. Beneficiaries under a trust are not subject to a limitation period.[128] However, as fiduciary relationships are not limited to the context of trusts, a relational duty of good faith should not fall under this classification.[129]

Alternatively, where there has been fraud the limitation period does not run until the claimant knows or "ought reasonably to have known" about the fraud.[130] Where there was some fraud, then the relational duty is likely to have been breached. However, the relational duty may also be breached where there has been no fraud. Therefore, the exception to the limitation period for fraud will not apply in all situations where the relational duty has been breached.

In the employment relationship context of collective bargaining, perceived breaches of good faith should be raised "at an early stage to enable the other party to remedy the situation or provide an explanation".[131] Such an approach is consistent with the relational duty's equitable origins, and the equitable doctrine of laches. Laches is a more flexible form of limitation period.[132] Laches states that mere delay is insufficient to bar a claim. However, where a delay amounts to acquiescence or means that a claim is unreasonable, laches will act to bar the claim as "a matter of justice between the parties".[133] Hence, if laches is applied to the relational duty, an examination of the claimant's conduct as well as the Crown's is required. The relational duty is aimed towards future dealings and building a strong Crown–Māori relationship. Therefore, any perceived breaches of the duty should be communicated promptly to encourage timely resolution.

3 Standard of Behaviour Required by the Relational Duty

Since the relational duty is not a fiduciary duty, the standard of behaviour required of the parties is not confined to the no conflict and no profit

126 Limitation Act 2010, s 11.

127 Frame "The Fiduciary Duties of the Crown to Maori", above n 27, at 85.

128 Limitation Act 2010, s 49.

129 Frame "The Fiduciary Duties of the Crown to Maori", above n 27, at 85.

130 Limitation Act 2010, s 48.

131 Code of Good Faith in Collective Bargaining 2005 at [6.1].

132 Frame "The Fiduciary Duties of the Crown to Maori", above n 27, at 86.

133 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 at [109], quoting La Forest J in *M(K) v M(H)* [1992] 3 SCR 6 at 78.

rules. The standard of behaviour required from the Crown will depend on the particular case. As a fiduciary, "[a]t the very least the Crown should manage the affairs of the Maori as if it were managing its own affairs".[134] As a partner under a relational duty of good faith, the standard required from the Crown will be lower.

The Crown is in a unique position. In addition to considering its own needs and those of Māori, it must also consider those of the general populace. As discussed above, the imposition of a stringent duty is simply not practicable or desirable. Rather, a balancing of interests is required. Instead of concentrating on the strict requirements of fiduciary law, this article proposes a more general duty of care.

Under this unique relational duty, a wider set of obligations are imposed on the Crown compared to a fiduciary duty, but these are not necessarily as strict as a fiduciary duty. The relational duty of good faith applies to more of the Crown's actions, so the standard required correspondingly decreases and depends heavily on the particular circumstances. This echoes the Canadian case law, where, with the recognition of a wider duty, there was "an equal and opposite reaction against giving rights or duties significant content".[135]

Reconciliation

The final consequence of adopting the relational duty of good faith is that it encourages reconciliation between the Crown and Māori. As Hammond J noted:[136]

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

The role of the courts is not to supervise nor set out determinatively how the relational duty is to be fulfilled. The courts should merely provide a last resort for justice. Ultimately, it will be "a balancing of public policy considerations" that will determine the relationship's future, but at the very least the courts provide a method to resolve disputes: a forum to protect rights.[137]

It is difficult to reconcile indigenous and non-indigenous rights through the courts. Vickers J in *Tsilhqot'in Nation* was unequivocal: a

134 Lanning, above n 21, at 459.

135 Hutchins and Schulze, above n 54, at 98.

136 *Paki* (CA), above n 7, at [116].

137 Lanning, above n 21, at 471.

court is not the right place for such reconciliation of interests.[138] A court is limited to the "application of the jurisprudence to the facts of [the] case".[139] The use of principles of recognition and reconciliation (and presumably other similar tools) is "not a task for a court".[140]

As McNeil noted, Vickers J was very aware of the limitations of his role: "the courts cannot deliver because reconciliation can only be achieved through negotiation, not litigation."[141] The courts can only ever be "one step in the process of reconciliation".[142] By delivering a lengthy judgment that dealt with issues that did not need to be decided and without issuing any specific declaration as to the parties' position, Vickers J hoped to change the Crown's views on aboriginal title and "push the parties into honourable negotiations that would result in genuine reconciliation, a goal unattainable in court".[143] As Vickers J concluded:[144]

> Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsilhqot'in people can be achieved.

The relational duty also encourages reconciliation by focusing on the particular facts of each case. For example, in *Te Runanganui*, a dispute over hydro-electric electricity generation schemes, the Court of Appeal did not find in favour of the Māori claimants due to the passage of time.[145] The Court noted that a claim based on the Treaty will only go so far:[146]

> The Treaty of Waitangi is to be construed as a living instrument, but even so it could not sensibly be regarded today as meant to safeguard rights to generate electricity. ... It is inconceivable that 90 years after the Water-power Act 1903 [which first vested rights of electricity generation via water in the Crown] a New Zealand Court would order that power dams or incidental rights, duly authorised and conferred by legislation, should now be vested in Maori.

By contrast, the unique circumstances in the *Whale Watch* case meant that the judges were able to update the role of Ngāi Tahu in the area so as to afford them "a reasonable degree of preference" in granting permits for operating a commercial whale watching scheme.[147] Such an activity

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138 *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700, [2008] 1 CNLR 112 at [1357], [1360], [1368] and [1371] [*Tsilhqot'in Nation*].

139 Ibid, at [1369].

140 Ibid, at [1371].

141 Kent McNeil "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v British Columbia*" (2010) 8(1) Indigenous L J 7 at 11.

142 *Tsilhqot'in Nation*, above n 138, at [1375].

143 Ibid, at [1375]; McNeil, above n 141, at 13.

144 *Tsilhqot'in Nation*, above n 138, at [1382].

145 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, above n 31.

146 Ibid, at 25.

147 *Whale Watch*, above n 93, at 562.

was just as unheard of in the 1800s as the generation of electricity. A relational duty allows for these very different outcomes in accordance with each case's particular facts, and encourages the parties to find a solution themselves.

In aiming for reconciliation it is important to distinguish between the principles of recognition and reconciliation:[148]

> *Principles of Recognition* govern the nature and scope of aboriginal title at the time of Crown sovereignty — what we have called *historical title*. This title provides the point of departure for any modern inquiry and a benchmark for assessing the actions of colonial governments and the scope of Indigenous dispossession. By contrast, *Principles of Reconciliation* govern the legal effects of aboriginal title in modern times. They take as their starting point the historical title of the Indigenous group, as determined by Principles of Recognition, but they also take into account a range of other factors, such as the subsequent history of the lands in question, the Indigenous group's contemporary interests, and the interests of third parties and the larger society. So doing, they posit that historical aboriginal title has been transformed into a *generative right*, which can be partially implemented by the courts but whose full implementation requires the negotiation of modern treaties.

The Crown and Māori are now dealing in the principles of reconciliation. It is no longer possible to have two party negotiations because the Crown and Māori are not the only interested parties: "reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate contemporary interests."[149] A focus on reconciliation and balance provides a way forward for those involved, and can result in solutions such as co-governance through partnership arrangements.[150] However, balance implies that such arrangements should not be entirely one-sided:[151]

> [T]o suggest that historical aboriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.

Methods such as veto are antithetical to the relationship that the Crown and Māori are building.[152] The relationship should be a cooperative one,

148 Brian Slattery "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255 at 281–282 (emphasis in original).

149 Ibid, at 283.

150 Human Rights Commission "Submission on Marine and Coastal Area (Takutai Moana) Bill to Māori Affairs Committee" (19 November 2010) at submission 8.

151 Slattery, above n 148, at 282.

152 Yvonne Tahana "Foreshore veto rights 'risk to airport expansion'" *The New Zealand Herald* (New Zealand, 2 December 2010).

and its effects are not limited to just the Crown and Māori, but extend to the whole population. Resources are finite, and to achieve a relationship that is mutually satisfactory requires effort from both sides. A partnership involves both give and take — it must flow in both directions — and the relational duty of good faith provides such a partnership model.

VII CONCLUSION

The *Te Arawa Cross Claim* litigation makes it clear that it is very uncertain how Crown–Māori relations are to develop in the future. Two divergent streams of thought emerged from the *Lands* case's recognition of duties "analogous to fiduciary duties". First, that the Crown owes a *sui generis* fiduciary duty to Māori; or, second that the Crown owes some duty of good faith to Māori, but that this is only analogous to a fiduciary duty.

Yet neither approach seems satisfactory as an appropriate or sufficiently certain conceptualisation of the relationship. In *Paki*, Hammond J proposed a third way: a relational duty of good faith. This is not a fiduciary duty, but a duty that draws on fiduciary concepts.

Drawing on Canadian jurisprudence and New Zealand precedent, this article has explored the notion of this relational duty, along with its potential effects. Ultimately, the exact requirements of this duty must be worked out between the Crown and each iwi concerned. The relational duty sets up the framework for dialogue, but that is only the first step toward reconciliation.

Each case needs to be assessed on its own individual facts and merits. Determining the rights of Māori as distinct from non-Māori members of society should be based on their historical political role, rather than broad racial identification as Māori. It is important that the Crown takes into account the different political groupings and local contexts of Māori when determining the rights of Māori:[153]

> [I]f a law treats Māori as a monolithic racial grouping and not as composite of political groupings, for example by expressly abolishing all *Māori* property interests, rather than the property interests of specific individual iwi, we might interpret that as a legal distinction based on race; as the distinction appears *not* to be premised on Māori as political units. It could, then, in such circumstances be viewed as a racial distinction and attract censure.

In addition, it is important when discussing the "Crown" to identify the particular body or government department that owes the relational duty of

153 Claire Charters "Do Māori Rights Racially Discriminate against Non Māori?" (2009) 40 VUWLR 649 at 657 (emphasis in original).

good faith.[154] Therefore, one cannot set out the exact content of the relational duty in any case until the particular facts are examined. There is a need, even when discussing a stricter fiduciary duty, to be sufficiently open to the individuality of each case and to "be more specific as to the area in which, and the particular interest over which, the fiduciary relationship arises".[155]

A particular benefit of the relational duty of good faith model is that it encourages political dialogue outside the forum of the courts, to make sure that communication and discussion occur.[156] The Treaty has already led to the creation of various methods for relationship building from the Cabinet, the key decision-making part of the executive.[157] In particular, the Guidelines on developing Crown–Māori Relationship Instruments (CMRI Guidelines) resonate with the theme of this article:[158]

> The Government is firmly committed to building positive working relationships with whānau, hapū, iwi and Māori organisations in all forms. The relationships between Māori and the Government are complex, multi-faceted and ongoing. These Guidelines provide a whole-of-Government approach to developing relationship instruments.

As Palmer has observed:[159]

> [T]he [CMRI Guidelines are] a fascinating mixture of facilitating well-intentioned relationship-building, realistic appreciation about the difficulty of doing this and the importance of mitigating legal risk in doing it.

The CMRI Guidelines show the power of the Treaty in bringing the parties to the table. The fact that it exists and its tenor demonstrate that the Treaty's influence goes beyond the strict words of the text.[160]

But while the Treaty is an important reference point and useful for enforcement of duties owed by the Crown, it can only go so far.[161] More is needed to guide future dealings between the Crown and Māori, and this article has argued that this is met by the relational duty of good faith, loosely based on the Canadian concept of the "honour of the Crown".

The relational duty of good faith has many forms as it covers a range of situations dealing with different rights and interests. This uncertainty

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154 McLean, above n 40, at 57–58.

155 Frame "The Fiduciary Duties of the Crown to Maori", above n 27, at 82. One may easily replace the "fiduciary duty" in this statement with the "relational duty of good faith".

156 Paul Havemann "The 'Pākehā Constitutional Revolution'? Five Perspectives on Māori Rights and Pākehā Duties" (1993) 1 Wai L Rev 53 at 76–77.

157 See Palmer, above n 4, at 215–226.

158 Ministry of Justice *Ngā tohutohu mo te kawanatanga me ngā tari kawanatanga. Crown–Māori Relationship Instruments: Guidelines and Advice for Government and State Sector Agencies* (2006) at Foreword.

159 Palmer, above n 4, at 223.

160 Ibid, at 225–226.

161 Ibid, at 226.

of content is inevitable in an area with so many possible variations of what is in issue, and where nearly every decision is a highly polycentric one. The relational duty is the courts' attempt to set up how public policy (particularly concerning the allocation of limited resources) is to be formulated and carried out by the Crown with regards to Māori rights and interests. As Professor Slattery notes:[162]

> [T]he Crown has the duty to achieve a just settlement of aboriginal claims by negotiation and treaty. ... [T]he Crown, with judicial assistance, has the duty to foster a new legal order for aboriginal rights, through negotiation and agreement with the Indigenous peoples affected.

So the variety of possible manifestations of the duty, such as consultation or justification of legislation, should be embraced. Rather than treating the Crown–Māori relationship as a dangerous area for judicial creativity and uncertainty, the courts are seeking to give both the Crown and Māori the tools with which to build their relationship in a way that is honourable and just. Ideally, the courts' role is merely to set up the framework to allow these negotiations and agreements to take place.

162 Slattery, above n 148, at 28, citing *Haida Nation*, above n 65, at [25].