A Commentary on the Supreme Court Decision of *Proprietors of Wakatū v Attorney-General*

By Karen Feint*

In 2017, the Supreme Court delivered a landmark decision, *Proprietors of Wakatū v Attorney-General*,[1] in which it held that the Crown owed fiduciary duties to the Māori customary owners of the land when it acted on their behalf in creating the Nelson tenths reserves in 1845. This is unquestionably the Court's most important decision yet on Māori legal issues – and certainly the longest, with the judgment running to 353 pages. The decision marks the first occasion that the courts of Aotearoa New Zealand have recognised that the Crown can owe legally enforceable obligations to Māori in circumstances when it has undertaken to protect their property rights. This is a marked departure from the courts' characterisation of the Crown's relationship with Māori as being defined by Treaty of Waitangi obligations that lie within the political realm, and not the legal domain. The case is also notable for the fact that the plaintiffs sought remedies for historical wrongs through the courts, rather than the political Treaty settlement process.

I. The Facts

A. The New Zealand Company's "Tenths" Scheme

In 1839, a private British colonisation venture, the New Zealand Company (NZC), arrived in Aotearoa eager to purchase as much land as it could from Māori before the country became a British colony. The NZC planned to build towns and profit from onselling the land to settlers. The "tenths" scheme was an integral component of the NZC's plans, so called because one-tenth of all the land that the company acquired would be reserved and held in trust as endowment reserves for the Māori customary owners of the land (Tenths). The NZC portrayed the Tenths as being the "true" consideration for the land.[2]

Shortly after arriving at Kāpiti Island, the NZC agent Colonel William Wakefield entered into a deed of purchase with Ngāti Toa rangatira, and he then sailed to Queen Charlotte Sound where he signed another with Te Ātiawa rangatira (1839 Deeds). Both deeds ostensibly purchased the same area of approximately 20 million acres of land on both sides of Cook Strait. In reality, it is highly unlikely that the rangatira had any intention of selling their land (an entirely foreign concept in

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1 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 [*Wakatū* SC].

2 At [109] per Elias CJ. Although the scheme was ostensibly designed to protect Māori interests, it also served the NZC's political objectives, as it was conscious of humanitarian concerns being raised in the United Kingdom about the impact of colonisation on the indigenous people of British colonies. Refer, for instance, to the 1837 *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* (Reprinted with comments by the "Aborigines Protection Society", London, 1837).

Māori law) and it is doubtful that even Wakefield believed the 1839 Deeds to be entirely genuine,[3] but the NZC had succeeded in putting a political stake in the ground before the establishment of New Zealand as a British colony.

In the Treaty of Waitangi in 1840, the Crown recognised Māori ownership of land held in accordance with tikanga Māori/ Māori law (customary title). Māori land could only be alienated by the Crown (under the doctrine of pre-emption).[4] Pursuant to the Land Claims Ordinance 1841, pre-1840 purchases were null and void until they had been inquired into and found to be on "equitable terms"[5] according to the "real justice and good conscience of the case".[6] If the purchase was allowed by the Crown, then customary title would be extinguished and the land would become Crown land available for grant. The Ordinance confirmed that the Crown was the only lawful source of title to land.[7]

Meanwhile, the NZC forged ahead with its plans to build its first settlements in Wellington and Nelson. In late 1840, the British government reached an accommodation with the NZC upon the basis on which the NZC would be allowed to proceed with its colonisation schemes. The agreement retrospectively adjusted and capped the amount of land the NZC could claim, according to the amount of money it had spent on colonisation, and (in cl 13) stated that the Crown would assume responsibility for reserving the Tenths in fulfilment of, and according to the tenor of, the NZC purchase terms (whereas in respect of all other lands, the Crown would make such arrangements as was deemed "just and expedient for the benefit of the Natives").[8] The NZC's vigorous efforts to obtain a Crown grant without inquiry into the validity of its 1839 Deeds were staunchly rebuffed, as by law "the Crown could not grant what the Crown did not possess",[9] and accordingly the NZC was required to prove that customary title had been lawfully extinguished.

In 1841, the NZC landed in Te Tau Ihu o Te Waka a Māui (the top of the South Island). At Kaiteretere Beach, the NZC met with the local rangatira and presented them with "gifts" in support of their asserted purchase under the 1839 Deeds (since it was by then unlawful to purchase land directly from Māori). For their part, the rangatira welcomed Pākehā settlement, but they expected in doing so that they would maintain their mana/authority over the settlers.[10] Thereafter, the historical narrative makes little mention of Māori agency, largely because from this point on tangata whenua seemingly had little knowledge of what the Crown was doing on their behalf, and even less control.

The NZC began laying out the town of Nelson, even though they had no legal right to do so as the land remained in Māori customary title. As Justice Clifford observed, there was at this point

3 Elias CJ described the New Zealand Company [NZC] claim as "one of the more audacious of the old land claims": *Wakatū* SC, above n 1, at [10].

4 At [96] per Elias CJ.

5 Land Claims Ordinance 1841 4 Vict 2, cl 3.

6 At cl 6.

7 *R v Symonds* (1847) NZPCC 387 (SC) at 394 per Martin CJ.

8 As cited in *Wakatū* SC, above n 1, at [111] per Elias CJ.

9 This was a point taken by both Lord Stanley, the Secretary of State for the Colonies, and Commissioner Spain. The maxim *nemo dat quod non habet* means that the Crown could not grant interests in land it did not have. *Wakatū* SC, above n 1, [116] and [120] per Elias CJ.

10 As Professor David Williams stated, in giving evidence in the High Court, "Tikanga Māori did not cease when the 'Tory' sailed in".

a "considerable gap between legal theory and on the ground 'practical' realities".[11] The first NZC settlers arrived in Nelson in late 1841, and in 1842 the selection of "town" and "suburban" sections took place (each allotment comprised of a one acre "town" section, a 50 acre "suburban" section and a 150 acre "rural" section). At the same time, the Police Magistrate in Nelson selected the first Tenths' sections on behalf of the Māori customary owners, comprising 100 town sections in Nelson and 100 suburban sections around Motueka and Moutere (5,100 acres in total). From 1842 onwards, the Tenths were treated as a trust, with intended trustees appointed, the sections leased out, and income received and held on trust.

Commissioner Spain was appointed to inquire into the validity of the NZC's 1839 Deeds, and he started his inquiry in Wellington. It soon became apparent that the NZC "purchase" was nothing of the sort, and this necessitated considerable political manoeuvring by the Crown and NZC, since the presence of a large number of settlers on the ground rendered it unpalatable to reject the purchase. The solution that the Crown arrived at, and which Governor FitzRoy implemented with Commissioner Spain's co-operation, was to preserve in Māori ownership the land that Māori occupied (since it stood to reason that Māori had never agreed to sell their homes and livelihood)[12] and to require the NZC to pay further financial compensation to the Māori customary owners of the land in order to "perfect" the sale. Commissioner Spain's 1844 inquiry in Nelson was adjourned to allow payments of £800 to be made to the local hapū and their rangatira signed "deeds of release" relinquishing their claims to the land apart from their "pahs, cultivation, burial-places, and wahi rongoa".[13]

In 1845, Commissioner Spain delivered his report into the Nelson purchase (Spain award) and found that the NZC's purchase was on equitable terms and that it was entitled to a grant of 151,000 acres of land in Tasman Bay and Golden Bay, upon the terms that:

1. one-tenth (15,100 acres) was to be reserved for the Māori customary owners of the land;[14] and
2. the land occupied by Māori – the pā, urupā and cultivations – was to be excluded from the grant, as it had not been sold.

Governor FitzRoy accepted Spain's recommendations and issued a grant in identical terms to the Spain award in 1845. However, the NZC rejected the grant as unsatisfactory, as it still did not have enough land to complete its Nelson settlement. Following further political manoeuvring in London, fresh arrangements were reached whereby the Crown issued a grant in 1848 to the Crown lands across the top of the South Island, vested in trust in the NZC on the basis that the NZC would act as the Crown's agent in selling land for the purposes of settlement.[15] A stark difference between the 1845 and 1848 grants was that the 1848 grant only referred to the extant Māori reserves. The

11 *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 [*Wakatū* HC] at [112].

12 This was agreed to by the NZC at a key meeting that Governor FitzRoy convened in Wellington in January 1844, and which was attended by Commissioner Spain. *Wakatū* SC, above n 1, at [122] per Elias CJ.

13 *Wakatū* SC, above n 1, at [130]. Elias CJ thought the deeds important for their stipulation that land occupied by Māori had not been sold (at [131]).

14 Commissioner Spain recognised the hapū in occupation of the land as the customary owners, rather than the signatories to the 1839 Deeds, notwithstanding that his jurisdiction was to inquire into the validity of the 1839 Deeds. In 1892, the Native Land Court inquired into the beneficiaries of the Tenths, and found that the Māori customary owners of the land sold to the NZC were hapū/whānau of Ngāti Rārua, Ngāti Tama, Te Ātiawa and Ngāti Koata, and a list of the beneficial owners was drawn up (referred to as the 254 tūpuna).

15 These arrangements were effected by the New Zealand Company Loans Act 1847 (UK) 10 & 11 Vict c 112, and the NZC was granted a loan to enable its colonisation operations to continue (*Wakatū* SC, above n 1, at [193] and [196] per Elias CJ).

entitlement to a full tenth of 15,100 acres, and the exclusion of pā, urupā and cultivations, had vanished.

Thereafter, the Crown simply never fulfilled its commitment to give effect to the terms of the NZC purchase. The remaining 10,000 acres of "rural" sections were never selected, and nor were Māori pā, urupā and cultivations excluded from the NZC grant as they should have been. Further, the 5,100 acres of Tenths selected in 1842 were rapidly diminished with the disposal of 47 of the town sections in 1847 and various exchanges made over the years where suburban Tenths were exchanged for sections that Māori were living on (these exchanges were necessitated by the fact that their pā had not been reserved for them as they should have been). Consequently, there was a substantial shortfall in the "tenth" entitlement of 15,100 acres.

The Tenths were held on trust by the Crown and a succession of statutory trustees from 1845 until 1977, when a Māori incorporation of the beneficial owners, Proprietors of Wakatū (Wakatū), was formed to receive the remnant Tenths, putting the land back under Māori control for the first time in over 130 years.[16]

Led by kaumātua Rore Stafford, in 2010, High Court proceedings were launched to recover the remainder of the full "tenth", asserting that the Crown owed duties to the customary owners arising from either the law of trusts, fiduciary duty or good faith. The plaintiffs were Wakatū, Rore Stafford and Te Kāhui Ngahuru (a trust established to represent all the descendants of the Māori customary owners).

B. Claim Dismissed by the Lower Courts

After a trial lasting more than six weeks, the High Court made favourable factual findings – that one-tenth of the Spain award should have been reserved for Māori, in addition to the pā, urupā and cultivations being excluded, and that the Crown had assumed responsibility for implementing the terms of purchase determined by Spain. However, the plaintiffs failed to persuade both the High Court and Court of Appeal that the Crown's obligations were legally enforceable in the courts, essentially because the lower courts decided that the Crown's obligations were political in nature.

In considering the question of whether the Crown's obligations to reserve Tenths were legally enforceable, Justice Clifford's reasoning was that they were not, because although part of the Crown's role was to protect the interests of Māori, in doing so it was acting in a governmental capacity. The Crown was "involved in an exercise which fundamentally involved the balancing of competing interests"[17] – those of the Māori owners against those of the settlers (living on land they did not own) and the population more generally. The Crown was therefore not able to act with the absolute loyalty required of a fiduciary. In reaching this conclusion, the Court relied on the "political trust" doctrine espoused in cases like *Tito v Waddell*,[18] which postulates that when the Crown is acting as trustee, its duties may be in the nature of "higher" or "political" trust obligations, which (in contrast to private law duties) are unenforceable in the courts. The Court was also influenced by the Crown's intention to establish a statutory trust, although in fact the necessary legislation was not passed until 1856.

16 The Wakatu Incorporation Order 1977.

17 *Wakatū* HC, above n 11, at [301].

18 *Tito v Waddell (No 2)* [1977] Ch 106.

And yet, there is an inkling in Clifford J's judgment that such a doctrine is problematic when property rights are involved:[19]

> The more I have thought about it, the more it seems to me that the Crown could not have been acting in a vacuum, in terms of some form of enforceable legal accountability to Māori, during that [1845–1856] period.

That doubt encapsulated what became the key issue on appeal.

Surprisingly, the High Court also found that none of the plaintiffs had standing to bring the claim, notwithstanding Wakatū's position as trustee of the remnant Tenths and second plaintiff Rore Stafford's status as the rangatira that had led the Tenths' claim through both the Waitangi Tribunal and the High Court. The Court of Appeal allowed the appeal only in relation to the standing of Rore Stafford to bring the claim, in recognition that there has been a long tradition of rangatira bringing claims to the courts on behalf of the iwi and hapū they represent.[20] Otherwise, the Court of Appeal essentially agreed with Clifford J's analysis that the arrangements "reflected agreements of a political nature which were to be realised in legislation".[21]

II. The Supreme Court's Decision

Kaumātua Rore Stafford succeeded before the Supreme Court, with the Court allowing his appeal by a 4-1 majority (with Elias CJ, Glazebrook J, Arnold and O'Regan JJ comprising the majority, and Young J dissenting). The Court made a declaration that the Crown owed fiduciary duties to the Māori customary owners of the Nelson settlement land to reserve 15,100 acres for their benefit, and, in addition, to exclude their pā, urupā and cultivations from the land obtained by the Crown following the 1845 Spain award.[22]

The Supreme Court remitted the case back to the High Court to determine the outstanding matters relating to liability, loss and remedy in accordance with the reasons given in the Supreme Court. This will require determination of whether the Crown breached its duties, since that has not been the subject of High Court findings yet, as well as whether any of the Crown's remaining defences can succeed.[23]

Relevantly to the question of breach, however, the Supreme Court recorded in its "Summary of Result" the Crown's acknowledgement that 10,000 acres of the 15,100 acre entitlement were never reserved as Tenths.[24] Elias CJ and Glazebrook J went as far as finding that this failure to get in trust property was a breach of the Crown's duties, since there was no "lawful authority for such

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19 *Wakatū* HC, above n 11, at [307].

20 *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 [*Wakatū* CA] at [30].

21 At [123] per Ellen France J.

22 *Wakatū* SC, above n 1, order A. The reference to the land obtained by the Crown is to the land to be granted to the NZC once its purchase had been determined to be on equitable terms by the Land Claims Ordinance inquiry. The legal effect of the Spain award was to extinguish customary title and vest it in the Crown, thereby making it available for grant to the NZC.

23 *Wakatū* SC, above n 1, at [4]–[7]. The remaining defences are laches, a limitation defence in relation to equitable compensation, and the effect of the Treaty settlements.

24 At [6]. The Summary of Result is useful for recording the majority decision by the court.

executive interference with an interest in property".[25] They also considered it well arguable that the Crown had breached its duties in disposing of Tenths already held on trust.[26] The Crown had failed to identify any lawful authority to enable it to dispose of trust property, and the Crown's role in making governmental decisions about the settlement could not justify a breach of trust.[27]

Although the outcome is an emphatic 4-1 majority that the Crown owed fiduciary duties, there is a divergence in the reasoning underpinning that finding, and to make the analysis even more difficult the Court also splits different ways on different issues. Elias CJ centres the Crown's duty in the constitutional context of the Crown's obligations to Māori and its Treaty of Waitangi guarantees to protect Māori property rights, whereas the analysis of the other judges is more focussed on the transaction itself and the specific obligations that arose from the promise to create Tenths. In other key respects, the judgments of Elias CJ and Glazebrook J are most closely aligned, particularly in their finding that the fiduciary duties are those of trust, whereas the joint judgment of Arnold and O'Regan JJ does not even consider the trust argument. Significantly, however, a majority of three (Elias CJ, Arnold and O'Regan JJ) applied the Supreme Court of Canada decision of *Guerin*, which recognised that the Crown owes a sui generis fiduciary duty to indigenous people in relation to the surrender of their aboriginal title to the Crown.[28]

The judges differ on standing, with only Mr Stafford having his standing recognised to represent the Māori customary owners. The minority of Elias CJ and Glazebrook J take a more flexible public law approach to accommodate the difficulties for Māori in taking collective claims. The Court also diverges on the legal status of the pā, urupā and cultivations after the Spain award,[29] with Elias CJ considering that customary title was extinguished, while the other three judges opine that it was not as that land had not been sold.[30]

Finally, the majority are on common ground with their findings that Mr Stafford's claims are not barred by the Limitation Act 1950 to the extent that they are within the trust property exception in s 21(1)(b) of that Act, and that the Te Tau Ihu iwi Treaty settlements do not bar the claims due to the savings clause in the legislation that preserved the right to have the proceeding finally determined.[31]

A. The Crown's Fiduciary Duties

At a broad level, the common ground across the four judge majority is the agreement that fiduciary duties arose due to the Crown's assumption of responsibility, on behalf of the Māori customary

25 At [436] and [496] per Elias CJ and [719] per Glazebrook J.

26 This included the failure to exclude pā, urupā and cultivations from the NZC land; the disposal of the 47 town sections; the exchanges of the suburban sections for occupied land, which was necessitated by the failure to reserve occupied land and had the effect of diminishing the tenths; and the grant of over 900 acres to the Church for a school at Whakarewa: *Wakatū* SC, above n 1, at [437]–[445] per Elias CJ and [587] per Glazebrook J. Although Glazebrook J is less definitive on this point, saying only that there may have been breaches, like Elias CJ she questions what explicit power the Crown could have had to dispose of trust property, stating that the Crown's actions could not be justified on the basis that the Crown owed wider duties to the settlers (see [529] and [549]–[550] per Glazebrook J).

27 At [549] per Glazebrook J.

28 *Guerin v The Queen* [1984] 2 SCR 335. "Sui generis" is a Latin term meaning unique (literally "of its own kind") (see https://en.oxforddictionaries.com/explore/foreign-words-and-phrases/).

29 *Wakatū* SC, above n 1, at [91], [401] and [417] per Elias CJ.

30 At [569] and [585] per Glazebrook J and [752] per Arnold and O'Regan JJ.

31 At [4]–[6].

owners, for implementing the terms of the NZC purchase as to reservation of the Tenths and holding them on trust, and exclusion of the pā, urupā and cultivations from the NZC grant. The key to the analysis is the Land Claims Ordinance 1841 process, since this is the mechanism by which customary title was extinguished, upon the conditions on which Spain had approved the alienation.[32] When the Crown accepted the Spain award, this had the legal effect of vesting the land in the Crown and crystallising the Crown's fiduciary duties.[33] The land thereby became Crown land available for grant to the NZC, subject to the equitable interests of the Māori customary owners, in relation to both the 5,100 acres Tenths already allocated and the 10,000 acres that had not been reserved.

As the legal owner of the land, the Crown had the discretionary power to reserve the Tenths, and was obliged to act as a fiduciary with absolute loyalty to the customary owners in discharging its duties to reserve the Tenths and hold them on trust on behalf of the beneficial owners.[34] No question of balancing interests arose, as the rights of Māori and the NZC respectively had been determined by the Spain award.

The 1848 grant to the NZC did not affect the equitable interests of the customary owners, because – critically – the Spain award was the only mechanism by which customary title had been extinguished to the Nelson settlement land.[35] Moreover, the NZC was fully aware of the Tenths' entitlement, and thus took the Crown land subject to those equitable rights. After the collapse of the NZC in 1850, the land was revested in the Crown and the Crown could not reacquire land free from trust obligations.[36]

Viewed in this way, it could be said that the strong fact situation drove the outcome, since equity typically imposes fiduciary duties upon any person who is responsible for acting on behalf of others in relation to their property rights. Glazebrook J's judgment most closely relies upon orthodox equitable principles in finding that there was an express trust, on the basis that the Crown had interposed itself into the contract between the NZC and the vendors, and consequently when the NZC's "conditional contract" was confirmed, the Crown held equitable interests on behalf of the Māori customary owners.[37] The fact that a statutory trust was ultimately intended did not mean that there was no intention in the interim to hold the property on trust, especially when a trust was in fact how the responsible officials conceived of the Tenths at this time.[38] In their joint judgment, Arnold and O'Regan JJ also focussed on the circumstances of the transaction, and concluded that the nature of the Crown's obligation was "delivering on the deal"[39] that the NZC had struck with Māori. They reasoned that:[40]

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32 At [330] per Elias CJ.

33 Refer, for instance, at [568] per Glazebrook J: "In my view the process of inquiry (to ensure any sale was just and equitable) and the Crown's acceptance of the results of that inquiry extinguished customary title over all of the land covered by the contract and made all of that land (including the Tenths land) demesne land of the Crown. This process preceded the 1845 grant and was not dependent on it." (Footnotes omitted.)

34 At [388]–[390] per Elias CJ, [582] per Glazebrook J and [785] per Arnold and O'Regan JJ.

35 Refer to [91], [188] and [192] per Elias CJ, [568] per Glazebrook J and [762] per Arnold and O'Regan JJ.

36 At [586] per Glazebrook J.

37 At [561] per Glazebrook J.

38 At [573].

39 At [785] per Arnold and O'Regan JJ.

40 At [782] per Arnold and O'Regan JJ. Note that on Elias CJ's analysis, it is not accurate to say that the NZC obtained "cleared title", as it was the Crown that obtained title, making the land available for grant.

> The Crown's decision to accept Commissioner Spain's recommendations and allow the Company to obtain cleared title (albeit only to the extent of his award) crystallised the Company's obligations to Māori. Given the role that the Government assumed in relation to the Tenths reserves prior to the Spain award (for example, by appointing trustees) and its acceptance of the terms of that award, it is fair to say that the Crown stood in the Company's shoes, in the sense that it took it upon itself not only to ensure that the terms agreed by the Company were honoured (in particular, that land be reserved as agreed) but also to hold the Tenths reserves for the benefit of Māori in fulfilment of the Company's long-term obligations.

B. The Crown's Constitutional Role in Relation to Māori

While the reasoning in the section above appears on its face to sit within the bounds of conventional equitable principles, in my view it does not fully explain the basis for the decision, because it does not engage with the reality of the Crown's role in the transaction. The Crown can be "no ordinary fiduciary" when it "wears many hats and represents many interests".[41] Only the Crown could have fulfilled the terms of the Spain award, and accordingly the transaction cannot be viewed in isolation from the constitutional context within which the Crown acted. To truly understand the basis for the Crown's duties, it is necessary to consider the Crown's role in the extinction of customary title, and the reasons why the Crown felt compelled to intervene in the NZC's affairs in the first place. The explanation lies in the undertakings that the Crown had made to not only recognise, but also protect, pre-existing Māori property rights.

The Chief Justice's judgment squarely confronts the constitutional role of the Crown and its relationship with Māori. Her judgment concludes that the Crown's obligations were founded in its undertakings to protect indigenous property and the vesting of the land in the Crown following the extinguishment of customary title.[42]

The early constitutional arrangements – comprising the Treaty of Waitangi, the 1840 Charter[43] and the Land Claims Ordinance 1841[44] – were premised on the principle that Māori customary property rights were unaffected by the assumption of sovereignty by the Crown.[45] Moreover, the Crown's role was to protect those rights:[46]

> Such assumption of responsibility towards Māori in New Zealand began with the Treaty of Waitangi (a covenant which guaranteed to Māori the "full, exclusive, and undisturbed possession" of their lands and which set up the Crown's right of pre-emption) and the Charter of 1840 (which made it

41 *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [96] per Binnie J.

42 *Wakatū* SC, above n 1, at [91], [380] and [392] per Elias CJ.

43 Charter and Letters Patent for erecting the Colony of New Zealand 1840. The Charter provided that "nothing in the said charter … shall affect … the rights of any aboriginal natives … to the actual occupation or enjoyment … of any lands … then actually occupied or enjoyed by such natives" (cl 3). The Charter restricted the Governor's power to grant land to "waste land", that is Crown land upon which Māori customary title had been extinguished.

44 The Land Claims Ordinance 1841 4 Vict 2 provided in cl 2 that "all unappropriated lands" within the colony were Crown land, "subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants".

45 "From the start, they were treated as pre-existing rights of property which were exclusive and inalienable and able to descend according to Maori custom" (*Wakatū* SC, above n 1, at [340] per Elias CJ). The decision relies on *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); and see *R v Symonds* (1847) NZPCC 387 (SC) for a contemporary recognition of Māori customary title.

46 *Wakatū* SC, above n 1, at [380].

> clear that the Māori interest in land was inalienable and that the interests passed to the descendants of the occupiers).

Under the 1840 Charter, the Crown had no ability to grant land unless customary title had been extinguished.[47] There were only two legal mechanisms for doing so, the direct purchase of Māori land by the Crown (exercising its sole right of pre-emption) or the Land Claims Ordinance 1841 inquiry to determine the validity of the pre-1840 purchases according to whether they were on equitable terms. Upon extinction of customary title, the land would become Crown land available for grant.

The purpose of the Crown's undertakings was to prevent exploitation of Māori.[48] It is this factor that invokes the seminal Canadian Supreme Court decision of *Guerin*,[49] in which it had been held that the Crown owed a "sui generis" fiduciary duty to an indigenous First Nation band when acting on their behalf in arranging a lease of their reserve land for a golf course, and that it breached that duty by letting the land on less advantageous terms than the band had agreed to. Under the Indian Act RSC 1952 c 149, s 18(1) regime, aboriginal title was inalienable, except upon surrender to the Crown, so that any sale or lease could only be carried out with the Crown acting on the band's behalf and in their best interests. The roots of the duty lie in the sui generis nature of aboriginal title, and the historical powers and responsibility assumed by the Crown to protect indigenous property and prevent exploitation.[50]

The "enduring contribution"[51] of *Guerin* was to distinguish the political trust concept on the basis that pre-existing property rights of indigenous people could not be taken away except by lawful process, and must therefore be enforceable in the courts.[52] As Dickson J held in his majority judgment:[53]

> *… the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government.* The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, *it is nonetheless in the nature of a private law duty. Therefore, in this* sui generis *relationship, it is not improper to regard the Crown as a fiduciary*.

It is this distinction that explains where the lower courts in *Wakatū* went wrong, since they treated the Crown as having acted in its governmental capacity, even though property rights were in play. They were reluctant to impose equitable obligations on the Crown in the absence of a written undertaking of trust or statutory authority.[54] However, as Elias CJ pointedly observes, it is a long standing precept of public law – dating back to the Magna Carta – that the Crown has no prerogative

47 At [100]–[101] per Elias CJ.

48 At [348].

49 *Guerin v The Queen*, above n 28.

50 *Wewaykum Indian Band v Canada*, above n 41, at [78] per Binnie J.

51 At [74] per Binnie J, cited by Elias CJ in *Wakatū* SC, above n 1, at [347].

52 *Guerin v The Queen*, above n 28, cited in *Wakatū* SC, above n 1, at [345]–[347].

53 *Guerin v The Queen*, above n 28, at 385 per Dickson J (emphasis added).

54 There was an adverse precedent in the Court of Appeal authority of *R v Fitzherbert* (1872) 2 NZCAR 143. In that case, a challenge to the grant of a Wellington tenths' section for a hospital was dismissed on the basis that the Crown had never declared any trust in writing. Elias CJ considered that Fitzherbert was wrongly decided. See *Wakatū* SC, above n 1, at [303]–[330], in particular [327]–[329].

powers to deal with the property of others except by the operation of law.[55] That principle applies equally to the property of Māori.

Crucially, the Chief Justice considered that the "alienation to the Crown of existing Māori property through the Land Claims Ordinance process was on terms which could only be fulfilled by the Crown", and the Crown's acceptance of that alienation "entailed assumption of responsibility to act in the interests of Māori whose interests were surrendered".[56] In this regard, "in circumstances of necessary vulnerability given the embryonic legal order then in place",[57] the Māori customary owners were "dependent on the Crown, in whom the land vested when cleared of native title, to protect their interests and fulfil the terms" of purchase.[58] There were no competing interests so far as the existing property rights of Māori were concerned, as these rights were "proprietary and exclusive".[59] The Chief Justice concluded that the *Guerin* approach constituted the Crown as a fiduciary, adding the intriguing inference that Māori indeed have a stronger case than their Canadian counterparts for imposing obligations on the Crown:[60]

> The obligation to act in the interests of the Indian band in *Guerin* is entirely comparable with the obligation which arose through alienation under the Land Claims Ordinance through the terms approved in Spain's award. As in *Guerin*, fiduciary obligations arose because the Crown acted in relation to "independent legal interests" (in *Guerin*, as in the present case, existing property interests) and on behalf of Māori. *The Crown's obligations in the present case are, if anything, amplified by the nature and extent of Māori property and its recognition in New Zealand from the first engagements of the Crown in the Treaty of Waitangi.* The resulting obligation, as was recognised in *Guerin*, was "in the nature of a private law duty"; in this "*sui generis* relationship" it was "not improper to regard the Crown as a fiduciary".

Therefore, although the Chief Justice agreed with the other judges that the circumstances of the NZC transaction imposed duties on the Crown to fulfil its terms, Her Honour also explicitly recognised that throughout the Crown was acting in its public capacity to fulfil its guarantees to protect Māori property:[61]

> *The Crown's general engagements to Māori in relation to pre-existing property interests* (inalienable except through the Crown), *and its assumption of responsibility to act on behalf of the native proprietors* (both under the Land Claims Ordinance procedure and in management of the reserves) *constituted the Crown a fiduciary on the approach taken in* Guerin.

Having applied *Guerin* to cast the Crown as a fiduciary, Elias CJ determined that the nature of the Crown's obligations were those of trust.[62] When the land vested in the Crown, the Crown was compelled in equity to hold the surrendered land in trust for the vendors of the land for fulfilment

55 *Wakatū* SC, above n 1, at [302], [331]–[339] and [436] per Elias CJ.

56 At [366] per Elias CJ.

57 At [413].

58 At [388].

59 At [389]–[390].

60 At [385] (emphasis added).

61 At [392] (emphasis added).

62 At [395], citing *Wilson J in Guerin v The Queen*, above n 28. She rejected the Crown's argument (which had succeeded in the lower courts) that without any declaration of trust there was insufficient certainty of intention to create a trust, pointing out that no formality was required as "there is no magic to the creation of a trust", and this was "simply application of the ordinary law to the Crown" (at [410]).

of the conditions upon which Spain approved the pre-1840 purchase.[63] As trustee, the Crown was obliged to get in the trust property by reserving the full tenth, hold the Tenths in trust for the Māori customary owners, and ensure that their occupied lands were excluded from the grant to the NZC.

C. Application of Guerin

Of the three judges who apply *Guerin*,[64] only the Chief Justice truly engages with what *Guerin* means. In this respect, however, Her Honour is in good company with the Cooke Court of Appeal, which back in the 1990s recognised the obvious historical parallels between the former British colonies, and pointed to a "substantial body of Commonwealth case law" supporting a fiduciary duty owed by the Crown to indigenous peoples.[65] Writing for the Court, President Cooke presciently foreshadowed the adoption of the *Guerin* principle in Aotearoa, opining that the Treaty of Waitangi is "major support" for a fiduciary duty to be owed by the Crown to Māori,[66] that the duty would arise in dealings relating to the extinguishment of customary title[67] and that if extinguishment happened "by less than fair conduct or on less than fair terms" it was likely to be a breach of the Crown's duties.[68]

Glazebrook J was the only majority judge that explicitly declined to apply *Guerin*, since in her view the duty did not depend on any "special fiduciary duty of the Crown in its dealings with the property of indigenous people".[69] Interestingly, however, Her Honour also indicated that were it necessary to decide the point, the Chief Justice's analysis had "much to recommend it".[70] The inference that she would favour the *Guerin* approach if required to decide, is consistent with the other respects in which her judgment is aligned with Elias CJ.[71] Moreover, on close analysis, Glazebrook J's judgment takes a more nuanced approach than her refusal to adopt *Guerin* suggests, as the Crown's public role in ensuring that pre-1840 transactions were equitable is key to her reasoning that the Crown's conscience was affected:[72]

> In light of the Crown's then concern to ensure that pre-1840 contracts were only validated if the transactions were just and equitable, it is inconceivable that it would have considered itself free to ignore the obligations to the customary owners that it had taken on with regard to the Tenths reserves.

63 At [401]–[402].

64 *Guerin v The Queen*, above n 28.

65 In reality, the "Commonwealth case law" referred to the Canadian jurisprudence, since in Australia, only dissenting opinions applied fiduciary principles (Toohey J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1). Refer to Elias CJ's analysis in *Wakatū* SC, above n 1, at [365].

66 At [381], citing *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 306.

67 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655. The Court intimated that the judgments in Guerin would likely be of "major guidance" in deciding such matters in New Zealand.

68 *Wakatū* SC, above n 1, at [381], citing *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.

69 *Wakatū* SC, above n 1, at [590] and n 957.

70 At [590].

71 For instance, Glazebrook J's recognition of the constitutional context, her view that the Crown permitted the NZC to proceed with its town before the NZC's title was confirmed, and her liberal approach on legal issues such as the express trust and standing.

72 *Wakatū* SC, above n 1, at [573] (footnote omitted). She also acknowledges that the 1840 agreement was a political compact, and that that was the basis that the Crown took on the NZC's obligations, but considered that this did not mean that the obligations were not true trust obligations (at [581] and [589]).

> If there was no trust, as the Crown now asserts, then part of the consideration for the sale would not have been honoured.

The joint judgment of Arnold and O'Regan JJ is the most difficult to unpick. On the one hand they acknowledge as "[a]n important part of the background"[73] the requirement for the Crown to lawfully extinguish Māori customary title, and explicitly apply *Guerin* (reasoning that the Crown's assumption of responsibility for the implementation of the NZC's obligations "brings into operation the *Guerin* analysis"),[74] but on the other, they state that they express no view about a "broader basis" for the fiduciary duty being founded in the Treaty of Waitangi or the Crown's right of pre-emption.[75] This disavowal is difficult to reconcile with the ratio of *Guerin*, since the nature of aboriginal title and its inalienability except upon surrender to the Crown underpinned the imposition of legally enforceable obligations by the Canadian Supreme Court.[76]

Key to Arnold and O'Regan JJ's reasoning is the emphasis they place on the distinction in cl 13 of the 1840 agreement between the Crown's role in ensuring the NZC met the Tenths' commitments and the government's role in otherwise reserving land for Māori.[77] They reason that the former is analogous to stepping into the shoes of a private company, but that the Crown undertook the latter function in the exercise of its general governmental responsibilities. However, on a *Guerin* analysis, this is simply not a valid distinction, since in both cases the surrender of Māori customary title is at issue. In either scenario, if the Crown has made a commitment to create reserves (say, in the latter case, to carve out a reserve on Crown purchase of a block), then the Crown equally has a duty to fulfil that term of the sale. It is hard to see why that would amount to an exercise of executive government responsibilities, since pre-existing independent property rights are concerned and the Crown would have no lawful authority to interfere with them (in the absence of legislation).

Arnold and O'Regan JJ also draw a distinction between the Crown's role during the Land Claims Ordinance process, in which they consider the Crown was acting in its governmental capacity to ensure that pre-1840 purchases were fair, and the Crown's duties to deliver the promised consideration following the Spain award, when the Crown was not called upon to take any decisions of a governmental nature, nor balance the interests of settlers and Māori.[78] That is, they considered the duty arose once the Spain award had determined the Māori entitlement, at which point the issue of competing interests did not arise. Again, however, arguably this sets up a false dichotomy, since in the 1840 agreement the Crown had interposed itself between the NZC and Māori on the basis of its public undertakings to Māori. Further, the *Guerin* duty is based on the surrender of customary title to the Crown, and the Canadian jurisprudence does not confine the fiduciary relationship only to situations in which the Crown can act with loyalty. Rather, it recognises the reality that the Crown is acting qua Crown, and that the existence of public law duties will not necessarily exclude the imposition of fiduciary duties.[79]

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73 At [730] per Arnold and O'Regan JJ.

74 At [784] per Arnold and O'Regan JJ; and see [779]: "We consider that the general approach adopted by the majority in *Guerin* applies to the present case".

75 *Wakatū* SC, above n 1, at n 1012.

76 *Guerin v The Queen*, above n 28, at 376.

77 *Wakatū* SC, above n 1, at [738] and [780].

78 At [785] per Arnold and O'Regan JJ.

79 At [354] per Elias CJ, citing *Wewaykum*, above n 41, at [85].

The inconsistency in Arnold and O'Regan JJ's reasoning is highlighted by their finding that the Crown also owed a fiduciary duty in relation to the pā, urupā and cultivations that were supposed to be excluded from the NZC grant, given that Māori had not sold these lands and "that full title to land could only come through the Crown".[80] In this regard, then, the Crown was not simply stepping into the shoes of NZC, since a private company could not have fulfilled that duty. It was acting as the Crown.

In my view, the Chief Justice's judgment is clearly the most authoritative, because her reasoning is grounded in the constitutional context that framed the basis of the Crown's actions, the vesting of the land in the Crown and the principles upon which *Guerin* was decided. The Crown intervened in the NZC transaction on behalf of the Māori customary owners precisely because it was the Crown, and had undertaken to respect Māori customary title and ensure property rights were only extinguished according to law. Fiduciary duties arose because the extinction of customary title vested the land in the Crown and gave it discretionary power to fulfil the terms of the NZC purchase. I do not, therefore, agree with Arnold and O'Regan's view that the Crown was effectively stepping into the NZC's shoes. The Crown was acting qua Crown and it could not permit a private company to perform public functions. It follows that the duties that the Supreme Court has recognised are not strictly speaking private law duties, although they are in the nature of private law duties and they give rise to private law remedies. They are truly sui generis.

D. Express Trust

From a precedential point of view, it is fortunate that Elias CJ and Glazebrook J were in the minority in recognising an express trust – a sui generis fiduciary duty based on *Guerin* is of far more significance for the development of the law concerning the legal relationship between Crown and Māori.

They recognised an express trust in relation to the entire 15,100 acres (including the 10,000 acres that had not been reserved), based on the Crown holding legal title to the land, its exercise of discretionary control in acting on behalf of the Māori customary owners in the Spain inquiry and its direct assumption of responsibility in the selection and management of the Tenths (including leasing them and receiving the income).[81]

The conceptual difficulty with an express trust lay with the 10,000 acres of unreserved Tenths, which raised the issue of whether the trust property could be identified. The conflicting authority on whether specific identification of trust property is required to establish the requisite certainty of subject matter for a trust was deftly resolved on the basis that there was no conceptual uncertainty, because there was clear entitlement of a fixed proportion of an identified geographical area and a ballot system for selecting the sections.[82]

In any event, little turns on the express trust/fiduciary duty distinction, since the same practical outcome was achieved in terms of the limitation period – the land was held under an express trust or an institutional constructive trust, but either way the claim fits within the trust property exception to the limitation period (as is discussed below).

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80 *Wakatū* SC, above n 1, at [786] per Arnold and O'Regan JJ.

81 At [394]–[397] and [414].

82 Elias CJ distinguished case law that found uncertainty of subject matter where trust property has not been segregated from generic property; see the discussion in *Wakatū* SC, above n 1, at [423]–[435]. Glazebrook J did not think it was necessary to resolve the conflicting cases because land is in a "special category" (at [579]).

E. Standing

The Supreme Court upheld the Court of Appeal's decision that "chiefs of high standing" have the customary authority under tikanga to bring representative claims on behalf of their people,[83] thereby recognising Rore Stafford's right as a rangatira and beneficiary to pursue the proceedings for the benefit of the collective customary group.

Significantly, however, a 3-2 majority (Arnold, O'Regan and Young JJ) ruled that the other appellants, Wakatū and Te Kāhui Ngahuru, did not have standing to take a representative claim on behalf of the Māori customary owners.[84] Notwithstanding Wakatū's historical connection with the Tenths (it was incorporated to receive the remnant Tenths), technically Wakatū was not a successor trustee, and as a matter of fact Wakatū's owners were not precisely the same collective group as the customary owners.[85] While Arnold and O'Regan JJ acknowledged that there may be a case for a more relaxed approach in relation to collective indigenous claims, they were uneasy about extending that to Wakatū, due to what they perceived as a contest as to representation between the court proceeding and the mandated body responsible for conducting the Treaty settlement process.[86] They also rejected the standing of Te Kāhui Ngahuru, a trust formed to represent the entire collective group of customary owners, since a trust cannot gain representative status merely because the trust's beneficiaries are members of the class whom the trustees claim to represent.[87]

The outcome on standing is the most unsatisfactory aspect of the decision, and illustrates the many difficulties that Māori face in taking proceedings against the Crown: iwi/hapū have traditionally not been afforded legal recognition by the courts; there are potentially multiple parties who could claim to represent the collective; there may be a disjunction between traditional iwi/hapū and legal entities representing individualised ownership structures imposed by colonisation; and there may be conflict between the rights of hapū (the collective that traditionally holds land rights) and a wider collective (iwi or the "large, natural groups" with whom the Crown negotiates Treaty settlements). Further, the Crown regularly makes standing arguments in proceedings brought on behalf of Māori collectives.[88]

The minority, comprising Elias CJ and Glazebrook J, were sympathetic to the procedural hurdles that Māori face in bringing collective claims, and were therefore prepared to accept the standing of both Wakatū and Te Kāhui Ngahuru. They considered that it was unjust to take a

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83 At [494] per Elias CJ, [673] per Glazebrook J and [807] per Arnold and O'Regan JJ. Many historical cases were taken by rangatira in the name of the collective, for example *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC).

84 *Wakatū* SC, above n 1, at [796]–[802].

85 There had been changes in ownership for various reasons, including legislation that had compulsorily acquired the uneconomic shares of over 300 owners.

86 *Wakatū* SC, above n 1, at [800]–[801]. Accordingly, Arnold and O'Regan JJ considered that it would have been preferable for Wakatū to have sought a representation order to resolve the competing claims to represent the collective group. The claimant groups were not in fact the same, contrary to what Arnold and O'Regan JJ suggest, since the iwi represented a wider collective across Te Tau Ihu than the hapū/whānau with customary ownership of the Nelson settlement area.

87 At [810] per Arnold and O'Regan JJ.

88 *Refer to Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277, where the Crown challenged the standing of trustees even though they had a representation order, and finally conceded the point during the Supreme Court appeal.

technical approach to the legal status of Wakatū when it was the Crown that had transformed collective customary tenure into an individualised ownership structure.[89]

Elias CJ and Glazebrook J considered that the courts need to adopt a more flexible approach to standing to recognise the collective nature of indigenous claims, which in line with public law principles would recognise the standing of anyone with an interest in the outcome of the proceeding, and not deny standing merely because there are potentially multiple representatives.[90]

In support, they drew on:

1. the right to redress in the United Nations Declaration of the Rights of Indigenous Peoples,[91] which affirms the right to "just and fair procedures" and "effective remedies" for dispute resolution;
2. the Canadian Supreme Court decision of *Manitoba Métis*, where the Court took a flexible and pragmatic approach and recognised the standing of an incorporated body to represent the collective interests of the Métis people, even though that body was not seeking relief in its own right;[92]
3. the distinction drawn by the Supreme Court in *Paki*[93] between standing (those entitled to take a representative claim) and relief (those entitled to remedies), with the Court considering it was preferable to address representation of the collective at the relief stage rather than as a matter of standing.

Given that there will potentially be multiple representatives for collective Māori claims, there is much to be said for the *Paki* distinction, which avoids the problem of standing being used as a procedural hurdle to defeat a meritorious claim. However, in light of the majority decision, the safest procedural course for Māori collective claims remains to name an acknowledged rangatira as plaintiff. Consideration should also be given to seeking a representation order.[94]

F. The Political Treaty Settlement Process

If the Cooke Court of Appeal had had an appropriate case on which to consider the Crown's duties to Māori, perhaps things might have turned out differently, but as it is the political Treaty claims settlement process has monopolised the response to historical Māori grievances over the past two decades. The relationship that the political process has to the Crown's legal obligations to Māori was first raised by McGrath J in *Paki v Attorney-General (No 2)*,[95] and then again in the Court of Appeal decision in *Wakatū*, where Ellen France J implied that there was no need to develop a fiduciary duty doctrine tailored to the Crown's relationship with Māori due to there being other (political)

89 *Wakatū* SC, above n 1, at [665].

90 At [491] per Elias CJ, and [657] and [673] per Glazebrook J.

91 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007), cited in *Wakatū* SC, above n 1, at [491] per Elias CJ, and footnote 867 per Glazebrook J.

92 The Canadian Supreme Court considered that the "presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court"; *Manitoba Métis Federation Inc v Canada (Attorney General)* 2013 SCC 14, [2013] 1 SCR 623 at [43], as cited in *Wakatū* SC, above n 1, at [491] per Elias CJ. A potential point of distinction is that only declarations were sought in *Manitoba Métis*, rather than private law relief.

93 *Paki v Attorney-General*, above n 88, cited in *Wakatū* SC, above n 1, at [491] per Elias CJ.

94 *Wakatū* SC, above n 1, at [641]–[662] per Glazebrook J and [800] per Arnold and O'Regan JJ.

95 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 [*Paki (No 2)*] at [189]–[196] per McGrath J.

avenues of redress already being available.[96] Certainly as a matter of practice the Waitangi Tribunal jurisdiction, combined with the political Treaty settlement process, has had a chilling effect on the development of the common law. However, it does not follow that the Tribunal displaces the courts, as the roles and jurisdictions are different.[97] The Tribunal is a commission of inquiry that was established to provide an avenue for Treaty breaches not amenable to legal remedies, and make recommendations to the Crown on the practical application of the Treaty, but it was never intended to oust common law rights and remedies.[98] Matters of property are properly brought before the courts.[99] In Canada, the legal remedies sit alongside the political processes, and go some way towards rebalancing the disparity of bargaining power in the political process.[100]

In *Wakatū*, between the High Court and Court of Appeal hearings, the Crown had entered into Treaty settlements with the four Te Tau Ihu iwi interested in the case, but had inserted a savings clause into the Ngāti Koata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 to protect the plaintiffs' right to pursue the appeal.[101] Although this clause explicitly protected the prosecution of the appeal, the Crown argued that its wording (which stated that it "does not preserve any claim by or on behalf of a person who is not a plaintiff"[102]) precluded relief being provided for the benefit of the collective customary groups.

The majority gave short shrift to this argument and its implications for the right to justice.[103] The savings provision had been passed by Parliament with the intention of preserving the appellants' ability to pursue their private law claims and in full knowledge of the representative nature of the proceedings. There was a distinction between private law fiduciary claims and political Treaty settlements for Treaty breaches (a distinction drawn in the Select Committee report on the Bill, which considered that it would be "improper" to obstruct final determination of private law claims).[104] Accordingly it was "inconceivable" that Parliament would have made the "empty gesture" of preserving the appeal, but not permitting any meaningful outcome.[105]

However, the Treaty settlements were not necessarily irrelevant, and Glazebrook, Arnold and O'Regan JJ considered that the savings provision was designed to ensure that no "double recovery" would occur as between the settlements and the proceedings.[106] Glazebrook J thought that a broad

96 *Wakatū* SC, above n 1, at [70], citing Ellen France J in *Wakatū* CA, above n 20, at [115].

97 *Wakatū* SC, above n 1, at [488] per Elias CJ.

98 As the Hon Matiu Rata explained in introducing the Treaty of Waitangi Bill to Parliament, (8 November 1974) 395 NZPD 5726, cited in *Wakatū* SC, above n 1, at [474] per Elias CJ. The Treaty of Waitangi Act 1975 provides the Tribunal with jurisdiction to inquire into claims that the Crown has breached the principles of the Treaty of Waitangi, and to make non-binding recommendations as to the action that ought to be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future (Treaty of Waitangi Act 1975, s 6(1) and (3)).

99 *Wakatū* SC, above n 1, at [695] per Glazebrook J and [488] per Elias CJ.

100 See, for example, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74, [2004] 3 SCR 550.

101 Ngāti Koata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, s 25(6)–(8).

102 At s 25(7).

103 Refer to the New Zealand Bill of Rights Act 1990, s 27(3).

104 *Wakatū* SC, above n 1, at [481] and [488] per Elias CJ and [695] per Glazebrook J.

105 At [825] per Arnold and O'Regan JJ; and see also [482] per Elias CJ and [714] per Glazebrook J (The Crown's "very narrow interpretation" of the savings provision would "effectively rob it of all meaning").

106 At [716] per Glazebrook J and [826] per Arnold and O'Regan JJ.

view of the effect of the settlements would have to be taken in the High Court, given that the settlements covered all Te Tau Ihu Treaty claims (not just the Tenths), and the wider iwi (not just the hapū/whānau who were customary owners of the Nelson settlement lands).[107]

G. Doing Justice to a Historical Case – Defences Based on Time Bars

The historical nature of the proceeding, which relates to events dating back over 170 years, is a constant undercurrent running through the decision. In his dissenting judgment, Young J argued that it is not possible to "do justice to a claim of this antiquity",[108] as "[w]e cannot – at least with any confidence – recreate all the relevant thinking of the time".[109] And yet, as the majority pointed out, the historical record was in fact relatively intact and the thinking of the time was clearly revealed in the more than 500 primary documents on the record. Young J's scepticism as to whether it is possible to recreate the legal order or the historical events is not at all persuasive in light of Elias CJ's judgment, which reviews the documentary record in painstaking detail in order to convincingly demonstrate that there is in fact a high degree of certainty about the legal and constitutional framework of the period, and that it is possible to establish what happened with sufficient certainty to impose legal duties on the Crown. This rather suggests that it is Young J's approach that is ahistorical.[110]

Moreover, the majority acknowledges the need for courts to be responsive to grievances of indigenous peoples arising from the history of colonisation, and to recognise the historical prejudice that Māori have suffered which posed significant challenges in mounting a claim, including impoverishment and disempowerment by the authorities. It was also relevant that Māori had not sat on their hands, and there had been a history of concerted protest throughout the years, including an unsuccessful Court of Appeal case in 1872 in relation to the Wellington Tenths, which would have made the odds of succeeding with another court challenge seem "insuperable".[111] As Elias CJ pointed out, "it is rather unrealistic to suggest that [indigenous people] sat on their rights before the courts were prepared to recognize those rights".[112]

1. Laches

In remitting the proceeding to the High Court, the Court left open to the Crown the defence of laches (an equitable defence available where it is unjust in practice to grant a remedy due to the prejudice caused to the defendant by delay). It signalled, however, that delay on its own was insufficient and

107 At [695] and [716]–[717] per Glazebrook J.

108 At [949].

109 At [949].

110 It is also curious, as Elias CJ pointed out (at [382]) that Young J had accepted in *Paki (No 2)*, above n 95, at [281] that in principle a fiduciary relationship could be recognised "without undue awkwardness" in the circumstances in which "the Crown gained sovereignty over New Zealand and its radical title was burdened by customary ownership interests" and yet he rejects that possibility outright in *Wakatū*.

111 *Wakatū* SC, above n 1, at [466], citing the Court of Appeal decision in *R v Fitzherbert* (1872) 2 NZCAR 143, above n 54.

112 *Wakatū* SC, above n 1, at [467] per Elias CJ, citing *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [149]. The right to redress recognised in the *United Nations Declaration on the Rights of Indigenous Peoples*, above n 91, is also relevant in this regard; see art 40, cited in *Wakatū* SC, above n 1, at [491].

that the Crown would need to establish actual prejudice to mount the defence.[113] As Glazebrook J pointed out, the Crown could not argue that it had relied on having unencumbered title to land in Nelson when there was no justification for it to have held that view.[114] The more significant issue for determination by the High Court is whether the historical iwi Treaty settlements have affected the equities.

2. Limitation

The majority rejected the Crown's defence that the claims are time barred by the Limitation Act 1950, finding that to the extent that the claim seeks to recover trust property (that is, land still held by the Crown) or the proceeds of trust property, which is either in the possession of the Crown or has previously been received and converted to its use, it falls within the exception in s 21(1)(b) of that Act.[115] This long-standing "trust property" exception applies to express and institutional constructive trusts, but not remedial constructive trusts.[116]

The Court confirmed that the Crown would hold any Tenths land, or any land that came into its hands that should have been part of the Tenths but was never reserved (that is, the rural Tenths), on institutional constructive trust, because such a trust arises with respect to a fiduciary whose obligations precede the impugned acts.[117] The issue of whether equitable compensation would be time barred was left for the High Court to determine.[118]

III. Concluding Reflections

Wakatū represents a significant breakthrough in Aotearoa New Zealand law for its adoption of the *Guerin* concept of a sui generis fiduciary relationship between the Crown and Māori that imposes duties (and remedies) in the nature of private law. In my analysis, I have acknowledged that doubts may be raised as to the extent to which the *Guerin* doctrine truly represents the ratio of *Wakatū*. However, it seems to me that as a matter of logic, the only way to rationalise the decision is on the basis that the Court accepted the principle that the Crown must be legally accountable when dealing with the independent legal property rights of Māori. In time, I think that principle will bed down. The true significance of *Guerin* was that it consigned the "political trust" doctrine into historical oblivion by drawing the critical distinction between independent legal interests enforceable at law, and interests created by executive action or the legislature. Both Elias CJ and Cooke P appreciated the meaning of *Guerin*, and regarded its approach as a logical extension of

113 *Wakatū* SC, above n 1, at [459] per Elias CJ, [690] per Glazebrook J and [817] per Arnold and O'Regan JJ (for instance, in relation to a specific instance where gaps in the records render it impossible to say what happened in relation to a particular section).

114 At [692].

115 *Wakatū* SC, above n 1, at [4].

116 The distinction recognised by *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA). Note that the trust property exception has been amended in the Limitation Act 2010, s 49.

117 *Wakatū* SC, above n 1, at [450]–[453] per Elias CJ, [686] per Glazebrook J and [815] per Arnold and O'Regan JJ, citing *Paragon Finance plc v DB Thakerar & Co*, above n 116, which in applying the equivalent of s 21(1)(b) of the Limitation Act 1950, distinguished between institutional and remedial constructive trusts, finding that only the former fall within the exception.

118 *Wakatū* SC, above n 1, at [4], [500] per Elias CJ, [687] per Glazebrook J and [816] per Arnold and O'Regan JJ.

the recognition of customary title, since the rule of law requires the Crown to be held to account if it infringes independent property rights.[119]

Wakatū can be seen as further undermining the orthodox legal position in *Te Heuheu Tukino v Aotea District Māori Land Board* that the Treaty of Waitangi is not directly enforceable in law. While it remains the case that the Treaty does not have direct legal status, it follows from *Wakatū* that the Treaty's Article II property guarantees are enforceable.[120] Nonetheless, some circumspection is required, for as Elias CJ warned, it is overstating the case to say that the Crown–Māori relationship itself gives rise to legally enforceable obligations:[121]

> None of this is to suggest that there is a general fiduciary duty at large owed by the Crown to Māori. It is to say that where there are pre-existing and independent property interests of Māori which can be surrendered only to the Crown (as under the right of pre-emption) a relationship of power and dependency may exist in which fiduciary obligations properly arise.

It seems to me that the true legacy of the *Wakatū* decision is that it represents a breakthrough in the courts' willingness to intervene (in the absence of legislation) and hold the Crown to account into what has hitherto largely been cast as a political relationship. This development is consistent with, and indeed required by, the values underpinning the rule of law, for, as Williams J has argued in the High Court in rejecting the political trust reasoning of *Wi Parata*, "it would be wrong in principle and dangerous in practice for the courts to leave the Crown to 'acquit itself as best it may' as the 'sole arbiter of its own justice'".[122] The role of the courts in protecting the legal rights of Māori is bolstered by contemporary conceptions of New Zealand's legal and constitutional framework and international human rights norms. The Supreme Court has observed that New Zealand legislation recognises "the importance of Māori society and culture in New Zealand",[123] pointing in particular to the right to culture of minorities in s 20 of the New Zealand Bill of Rights Act 1990, and the recognition that "land is a taonga tuku iho of special significance to Māori" in Te Ture Whenua Māori Act 1993.[124] Further, the Supreme Court has accepted that the principles in the United Nations Declaration on the Rights of Indigenous Peoples are consistent with the principles of the Treaty of Waitangi, and provide some support for the view that the principles of the Treaty should be construed broadly.[125]

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119 The Chief Justice, at [302], cited the Magna Carta as protecting property from being taken by the Crown, except by law.

120 I refer to property guarantees only, because courts would doubtless be far more reticent at recognising rangatiratanga/authority.

121 *Wakatū* SC, above n 1, at [391] per Elias CJ.

122 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [63] per Williams J, in reference to *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC), the infamous 1877 decision in which Prendergast CJ stated that the Crown must be the "sole arbiter of its own justice" in acquitting its obligation to respect Māori property rights. As Elias CJ stated in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [13], *Wi Parata* is "discredited authority".

123 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [101] per Elias CJ.

124 Preamble to Te Ture Whenua Māori Act 1993; *Ririnui v Landcorp* Farming Ltd [2016] NZSC 62, [2016] 1 NZLR 1056 at [43] ("land is of vital importance to Māori").

125 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Mixed Ownership Model case*] at [92], in the context of an argument concerning the right to development; see also *Wakatū* SC, above n 1, at footnote 867 per Glazebrook J.

A. The Development of the Law in Canada

In Canada, the watershed of the *Guerin* decision in 1984, coupled with constitutional recognition of aboriginal rights in s 35 of the Constitution Act 1982,[126] resulted in extensive further development of the law over the following decades. While there are constitutional and legal differences between our jurisdictions, the Canadian jurisprudence may serve to forecast the direction in which the law might develop here. There are two main limbs, the sui generis fiduciary duty and the "honour of the Crown" concept. These concepts are complementary, and each has a different scope; the former, duties (and remedies) in the nature of private law when independent legal interests are at stake, and the latter relating to the exercise of governmental responsibilities when indigenous interests may be affected.[127]

1. Sui generis fiduciary duty

A sui generis fiduciary duty may be recognised where there are:[128]

1. cognisable independent legal interests (such as aboriginal title or other aboriginal rights); and
2. an undertaking by the Crown to act on behalf of the indigenous group, whether by statute, agreement or a unilateral assumption of responsibility, in circumstances in which the Crown exercises discretionary control. This connotes an undertaking of loyalty to act in the beneficiaries' best interests.

It is also possible for an ad hoc fiduciary duty to arise, in the same way that a fiduciary duty can be recognised in private law.[129]

The existence of public law duties do not necessarily exclude the creation of a fiduciary relationship,[130] and fiduciary duties have been recognised in Canada in relation to cognisable interests other than customary title.[131] The Crown's public law duties are accommodated by shaping the content of the Crown's duties in a context-specific way, depending on the extent to which the Crown is required as the government to balance competing interests.[132] For instance, in relation to the creation of a new reserve in which there is no underlying aboriginal title, the Crown's fiduciary obligations may require process-oriented duties (such as acting in good faith, reasonably and with full disclosure), but once the reserve is created the Crown's duties become more onerous, and the Crown will then be required to protect and preserve the First Nations' property rights (for example, it may be required to prevent exploitative bargains, or even to withhold its own consent to surrender where the transaction is exploitative).[133]

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126 This is in the Canada Act 1982 (UK), sch B.

127 *Wakatū* SC, above n 1, at [355] per Elias CJ.

128 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [61]; *Guerin v The Queen*, above n 28, at 384 per Dickson J.

129 *Williams Lake Indian Band v Canada (Aboriginal Affairs and Development)* 2018 SCC 4. This recent decision has a useful summary of the Canadian jurisprudence.

130 *Wakatū* SC, above n 1, at [354] per Elias CJ, citing *Wewaykum Indian Band v Canada*, above n 41, at [85] per Binnie J.

131 So, for instance, a breach of fiduciary duty may arise in the case of expropriation of an existing legal reserve: *Wakatū* SC, above n 1, at n 405, citing *Wewaykum*, above n 41, at [98].

132 See, for example, *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [49]; *Wewaykum Indian Band v Canada*, above n 41, at [83], [86] and [92].

133 *Wakatū* SC, above n 1, at [355], citing *Wewaykum Indian Band v Canada*, above n 41, at [86(3)], [94]–[100], [353] and [358]; *Semiahmoo Indian Band v Canada* (1998) 148 DLR (4th) 523 (FC) at 538.

2. Honour of the Crown

The other significant development in Canada has been the recognition of a constitutional duty on the Crown to act with honour in its dealings with indigenous First Nations. Even where no fiduciary duty is owed, the "honour of the Crown" may require the courts to intervene and provide public law remedies to protect aboriginal rights or title. The special relationship between the Crown and indigenous First Nations means that the "honour of the Crown is always at stake".[134] The ultimate purpose of requiring the Crown to conduct itself honourably when exercising power is the "reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty",[135] reflecting the constitutional protection of aboriginal rights (which are entrenched in s 35 of the Constitution Act 1982[136]).

The duty arises when the Crown has actual or constructive knowledge of the potential existence of aboriginal rights or title, and contemplates conduct that might adversely affect those rights or title.[137] The content of the duty is determined by the strength and importance of the aboriginal right asserted and the degree of interference that the proposed conduct may have on it, so that it can be viewed as a spectrum, which may require bare consultation at one end, but compromise and accommodation of the aboriginal rights at the other.[138] The remedies can therefore have real teeth, since the courts are prepared to restrain developments if necessary to protect the infringement of aboriginal rights.

In the seminal case of *Haida Nation*, the Supreme Court of Canada invoked the honour of the Crown concept when British Columbia intended permitting the logging of red cedar trees on one quarter of the island of Haida Gwaii, even though the island was at that time subject to the unheard aboriginal title claim of Haida Nation, including a claimed right to harvest cedar.[139] The Court ruled that the province owed a duty of meaningful consultation, which might require workable accommodation to preserve the Haida interest pending resolution of their claims.[140]

Manitoba Métis was a historical case relating to the circumstances in which Manitoba had become part of Canada. The Manitoba Act 1870[141] provided for 1.4 million acres of land to be granted to Métis children, but the government failed to properly implement the entitlements. A fiduciary duty claim failed because a pre-existing communal aboriginal title interest was not at stake. Nonetheless, the Supreme Court considered that such a constitutional obligation to an Aboriginal group engages the honour of the Crown, and accordingly the Crown was required to act diligently to fulfil its statutory obligations. The Court made a declaration that the Crown had

134 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [68], citing *R v Badger* [1996] 1 SCR 771 at [41].

135 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92, at [66].

136 Canada Act 1982 (UK), sch B.

137 *Wakatū* SC, above n 1, at [73]–[74]; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 at [35].

138 At the lower end of the spectrum, a construction of a road that could infringe hunting rights required only consultation: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69, [2005] 3 SCR 388. In another case, a proposal to reopen a mine requiring the construction of a road through traditional territory raised serious concerns about the impact on wildlife and traditional uses of the land, and resulted in a mitigation plan that allowed the Court to conclude that the requirements of the duty to consult had been met: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, above n 100.

139 *Haida Nation v British Columbia (Minister of Forests)*, above n 137.

140 At [77].

141 Manitoba Act 1870 (UK) 33 Vict c 3.

failed to act with diligence in implementing the statutory entitlements, in the expectation that that declaration would be deployed by the Métis in negotiations with the Crown.[142]

B. Where Might the New Zealand Courts Venture?

The "honour of the Crown" concept provides an obvious path forward for the New Zealand courts to engage Treaty principles when the fiduciary standard is not met. After all, the concept is closely aligned with, if not identical to, the Treaty duty of acting with the "utmost good faith",[143] so it does not require an undue stretching of legal principle to apply it here. However, although the concept is familiar, the Canadian remedies requiring active reconciliation and accommodation of indigenous interests would represent a significant step forward for the New Zealand courts. While Canadian law should not be transplanted here uncritically, it does make sense to learn from the substantial body of jurisprudence that has considered in depth how to balance the Crown's executive government responsibilities with its obligations to its indigenous people.

New Zealand courts are likely to be more receptive to drawing on Canadian jurisprudence in the wake of *Wakatū*. To sum up the current state of the law, overall, it appears that Māori legal jurisprudence has been going through a growth period, following a long hiatus after the Cooke Court of Appeal years of the late 1980s–early 1990s. This development appears to be driven by a combination of factors – the social and political changes of recent decades that have recognised the Treaty of Waitangi as part of the country's constitutional foundations and embedded the Treaty into executive government decision-making;[144] the increasing reach of administrative law; the establishment of the Supreme Court (with its statutory purpose to resolve important legal matters concerning the Treaty of Waitangi);[145] and (of practical significance) the existence of more Māori entities with sufficient resources to pursue litigation. Since the Supreme Court's inception, the Court has shown a willingness to venture down the path of better defining the legal and constitutional relationship between the Crown and Māori.[146] The Court has endorsed the *Lands* (SOE) case[147] as a decision "of great authority and importance to the law concerning the

142 *Manitoba Métis Federation Inc v Canada (Attorney General)*, above n 92. Métis are a people of mixed indigenous and French ancestry.

143 President Cooke's expression in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 664. Richardson J used the phrase "the honour of the Crown" in his judgment, drawing on Canadian authority at 682. See also "to act in good faith, fairly, reasonably and honourably towards the other": *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304. Note, too, *Paki (No 2)*, above n 95, at [276] per Young J "There are many New Zealand cases in which the view has been expressed that the relationship between the Crown and Māori is either analogous to a fiduciary relationship or actually is fiduciary in character".

144 The Treaty was recognised as "part of the fabric of New Zealand society" in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210. Matthew Palmer concludes that over the last 25 years there has been a "significant change" in the culture of executive government, and that the government complies with the Treaty as a "moral obligation", whilst disavowing it having any legal force: Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 225–226.

145 The Supreme Court was established as a court of final appeal, among others, to enable important legal matters relating to the Treaty of Waitangi "to be resolved with an understanding of New Zealand conditions, history, and traditions": Supreme Court Act 2003, s 3(1)(a)(ii) (now replaced by s 66 of the Senior Courts Act 2016).

146 Whether the Court continues along this path may depend, amongst other things, on the composition of the Court. Elias CJ has been at the forefront of the development of these legal principles, and there are few judges that match her knowledge of Treaty law.

147 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*].

relationship between the Crown and Māori".[148] The place of tikanga Māori (Māori customary law) within the law was explored in *Takamore*, and the Court determined that tikanga has always formed part of the values of the common law of New Zealand.[149] Interestingly, the Court has also left open the possibility that Māori customary title may subsist in rivers.[150]

The Treaty of Waitangi now has a cognisable influence in law and legal interpretation, albeit that its precise legal status is still "incoherent" and its legal force "inconsistent".[151] Matthew Smith considers that the "spirit and principles" of the Treaty inform the exercise of discretion by decision-makers and can form the basis of a challenge on judicial review.[152] In *Ririnui*, for instance, the Supreme Court was prepared to judge the actions of Crown ministers and a state-owned enterprise (SOE) according to Treaty standards. The case concerned a judicial review challenge to the sale of a farm by an SOE. The Supreme Court opined that the Crown's Treaty obligations "are not confined to righting historical wrongs but are continuing and forward-looking",[153] and declared that the Crown had acted unlawfully in not intervening to facilitate an iwi's commercial purchase of ancestral land.[154]

Yet for all these significant precedents, there is force to the observation made by academics Professor David Williams and Dr Claire Charters that while Māori legal jurisprudence has evolved through the establishment of principle, Māori have had rather less success in terms of achieving meaningful outcomes.[155] Effective remedies have often proven to be somewhat elusive for Māori, as the courts have preferred to encourage political solutions to be reached outside the courtroom – the 1987 *Lands* case and the 1989 *Forests* case (and the resulting resumption regimes) being classic cases in point.[156] In a more recent example, the *Mixed Ownership Model* case, the Supreme Court declined to intervene in the partial privatisation of SOEs, but did effectively put the Crown on notice that it expects to see progress made in providing for Māori interests in water, reasoning that "in the current legal and social environment, Māori can be confident that their claims will be addressed, something which was not as clear in 1987 as it is now".[157] Perhaps the courts' diffidence reflects a lingering view that to a large extent the Treaty relationship is political and the issues are for executive government to resolve.

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148 *Mixed Ownership Model case*, above n 125, at [52].

149 *Takamore v Clarke*, above n 123, at [94] per Elias CJ.

150 *Paki (No 2)*, above n 95.

151 Matthew SR Palmer, above n 144, at 358.

152 *Matthew Smith NZ Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at 907.

153 *Ririnui*, above n 124, at [51].

154 At [143] for the declarations made on judicial review. This decision is particularly interesting because the SOE regime was established to enable SOEs to operate at arm's length from the Crown, and yet in the circumstances, the Court found that the SOE had acted unlawfully as well.

155 Claire Charters "Maori Legal Issues in the Supreme Court 2004–2014: A Critical, Comparative and International Assessment" in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 139 at 141–142 and 167, citing David V Williams "Customary Rights and Crown Claims: Calder and Aboriginal Title in Aotearoa New Zealand" in Hamar Foster, Heather Raven and Jeremy Webber (eds) *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press, Vancouver, 2007) 155.

156 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*]; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests*].

157 *Mixed Ownership Model* case, above n 125, at [115] and [147].

Even so, political solutions are not always an effective means of enforcing legal rights, particularly when the "tyranny of the majority" places constraints on what is politically feasible. It seems to me that in the past the courts have tended to be overly deferential to the executive, and that it is essential to upholding the rule of law that the courts are able to play a supervisory role in the Crown–Māori relationship in order to protect Māori legal interests. It is encouraging that the Supreme Court has proved more willing to intervene than its predecessor, although the lower courts remain far more cautious. In *Haronga*, for example, the Supreme Court enforced the statutory right of Māori claimants to seek resumption of Crown forest land, in circumstances where the Waitangi Tribunal had not been using its resumption powers in deference to the political Treaty settlement process.[158] The Supreme Court recognised that Māori were entitled to benefit from the quid pro quo of the 1989 Crown forests agreement, whereby the Crown was able to implement its corporatisation policy in exchange for Māori gaining the opportunity to seek from the Tribunal bespoke Crown forest remedies that would be binding on the Crown.[159] Although at one level the decision is entirely conventional as an exercise in statutory interpretation, it is notable that to reach that outcome the Supreme Court had to overturn the decisions of the lower courts, who were reluctant to cut across the political process. Further, the fact that the Tribunal has (with one exception) not exercised its resumptive powers since 1987 is a reflection of the access to justice issues for the many Māori claimants who preceded *Haronga* but did not have the means to take a judicial review challenge all the way to the Supreme Court.[160] Nonetheless, *Haronga* is a significant decision for upholding the principle that Crown-Māori agreements ought to be enforced by the courts.

Wakatū builds on the Supreme Court's body of Māori legal jurisprudence, and notably not only by establishing an important precedent in principle, but by the prospect of a meaningful outcome through the proceeding having been remitted back to the High Court on liability and remedies. The *Wakatū* decision marks a significant evolution in the understanding of the Crown–Māori relationship, from one that is analogous to a fiduciary relationship and largely political in nature, to a relationship that may give rise to enforceable legal duties owed by the Crown. In time, I predict that *Wakatū* will have a far reaching impact on the law as the courts continue to build on the principles that define the circumstances in which the common law will intervene in the Crown–Māori relationship, in both a public and private law capacity, even though the situations in which fiduciary duties arise may prove to be relatively limited in practice.[161] Perhaps I should finish on a cautionary note, however,

158 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53. The Tribunal's subsequent decision not to order resumption was quashed by the courts again in *Haronga v Attorney-General* [2015] NZHC 1115 and *Attorney-General v Haronga* [2016] NZCA 626, [2017] 2 NZLR 394.

159 *Haronga*, above n 158, at [76] (the purpose of the Crown Forest Assets Act 1989 "was to protect claimants by supplementing their right to have the Tribunal inquire into their claim with the opportunity to seek from the Tribunal remedial relief which would be binding on the Crown"); and [105] ("this jurisdiction was enacted as significant redress and as part of a bargain in which the Crown also gained something of value to it"); and see also [88].

160 The only occasion on which the Tribunal used its resumptive powers and made interim recommendations for the return of SOE land was in *Waitangi Tribunal The Tūrangi Township Remedies Report* (Wai 84, 1998).

161 The peculiar facts of *Wakatū* are hardly likely to be replicated in the modern age, although there are many other historical occasions in which the Crown has acted in similarly paternalistic fashion and likewise not honoured its commitments. However, the likelihood of many further historical fiduciary duty cases has largely been overtaken by the progress made in settling historical Treaty claims. The standard extinguishment clause in Treaty settlement legislation is very broadly drafted to encompass not only historical Treaty claims (that is, predating 21 September 1992), but also any historical claims based on rights founded in legislation or common law, including fiduciary duties, although the clause does not appear to have been tested in court. See, for example, s 24 of the Ngāti Koata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014.

for as a practitioner I am conscious of how important the composition of the appellate courts is, and in particular the influential role that the current Chief Justice, Dame Sian Elias QC, has had in the significant Supreme Court decisions in this area of law (much as Lord Cooke of Thorndon had during his era as President of the Court of Appeal). The development of the common law is by its nature uneven and *Wakatū* may prove to be a high water mark for many years to come.

Tāria te wā …