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ARTICLE

In the Bonds of Trust We Meet: A Comparison of the United States Doctrine of Trust Responsibility and a Crown-Māori Fiduciary Relationship

EMMA HENSMAN*

Legal relationships between indigenous peoples and their colonising governments are complex. The doctrine of trust responsibility evolved judicially in the United States in response to this complexity. Arising from various statutes, treaties and the historical course of dealing, the relationship between the State and its indigenous peoples is characterised as trust-like, imposing fiduciary duties on the State to protect indigenous rights and interests. However, in New Zealand the courts have not yet provided a definitive answer to the question of whether the Crown can owe fiduciary duties to Māori, our indigenous people. Indeed, the New Zealand judiciary has firmly resisted the development of any fiduciary duties, despite cases which turn on this precise issue, such as *Proprietors of Wakatū v Attorney-General*.

This article undertakes a comparative analysis of state-owed fiduciary duties toward indigenous peoples in North America and New Zealand, focusing on the United States jurisdiction. After giving an overview of the existing legal framework around state-owed fiduciary duties, this article discusses the concepts of *public* and *private* trusts, the grounds for such onerous duties, and the role of equity in constraining actions and providing remedies where power balances and vulnerabilities exist between parties. The article concludes that the doctrine of trust responsibility should be developed in New Zealand.

* BA/LLB(Hons), University of Auckland. The author would like to thank Dr Claire Charters for her supervision and invaluable assistance, as well as Charlotte Best and Rachel Peeters for their constant support.

I Introduction

The legal relationship between colonisers and colonised peoples has been compared to a trust or fiduciary relationship.[1] Yet despite the acceptance of fiduciary duties owed by the government to indigenous peoples in North American law, the development of legally enforceable duties of trust responsibility has been almost non-existent in New Zealand.

The North American doctrine of trust responsibility has been "a cornerstone of federal Indian law for nearly 200 years".[2] Under this doctrine, the federal government has charged itself with the highest moral obligations towards indigenous peoples. This concept of a trust responsibility owed to Indians in North America evolved judicially and is often referenced in the creation of programmes for Indian tribes and their members.[3]

In the United States, governmental fiduciary duties owed to indigenous peoples arise from various statutes, treaties and the historical course of dealing. At its core, the relationship between the United States and Indian tribes has been held to resemble that of ward and guardian. Due to the overarching effect of plenary power, courts may not order Congress to undertake any action on behalf of Indians or tribes.[4] Therefore, no trust duties are legally enforceable except those explicitly assumed by the federal government. As a result, many duties imposed by the trust relationship are thus relegated to the realm of morality and ethics.

Yet the existence of the trust doctrine has powerfully shaped North American legal jurisprudence. Enforceable against federal officials, the trust doctrine has provided a valuable additional recourse for oppressed indigenous peoples and has led to the creation of many important programmes. The United States federal government is increasingly unlikely to breach its trust duties due to the political and moral implications of such actions.

In New Zealand, the question of whether the Crown owes fiduciary duties to Māori has been litigated.[5] However, the source and extent of any Crown-owed fiduciary duties is still unclear.

This article argues that the doctrine of trust responsibility should be recognised in New Zealand as in North America. It discusses the complex and uncertain nature of Crown-owed fiduciary duties, and arguments against their existence. It also contends that the New Zealand government can satisfy all elements of the fiduciary test in its relationship with Māori, as evidenced in the *Proprietors of Wakatū v Attorney-General* (*Wakatū*) litigation currently before the Supreme Court.[6]

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1 Sarah B Gordon "Indian Religious Freedom and Governmental Development of Public Lands" (1985) 94 Yale LJ 1447 at 1452.

2 Peter d'Errico "The sands of federal 'trust'" *Indian Country Today* (online ed, New York, 29 April 2009).

3 See Stephen L Pevar *The Rights of Indians and Tribes* (4th ed, Oxford University Press, New York, 2012) at 29. See also Nell Jessup Newton (ed) *Cohen's Handbook of Federal Indian Law* (2005 ed, LexisNexis, Washington) at 420.

4 Congressional plenary power is the extra-constitutional notion of complete, exclusive, pre-emptive and unlimited jurisdiction and authority of the federal government over tribal nations, their lands, resources and affairs. The basis for this power is uncertain, with many pointing to the commerce clause in the Constitution. See my discussion later in the article.

5 I will address most of these New Zealand cases later in the article.

6 *Proprietors of Wakatū v Attorney-General* [2015] NZSC 54. See also *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 [*Wakatū* (CA)].

The current judicial reluctance to establish the trust doctrine in New Zealand is unnecessary. A Crown-Māori fiduciary relationship would have a solid foundation in the unique nature of aboriginal title, the historical course of dealings in specific cases, and the Treaty of Waitangi. Also, the existence of the *public trust* need not negate simultaneous private law duties being owed in cases which satisfy the fiduciary test. The Treaty Settlement process is entirely separate from private law causes of action and should not negate the latter's existence. Moreover, the principle of Parliamentary sovereignty and the discretionary nature of equitable remedies allay any concerns of undue confinement of the Crown.

Finally, the implementation of the trust doctrine in New Zealand would be in line with international indigenous legal jurisprudential trends. The finding of trust duties owed by the Crown to Māori would bring our legal landscape in line with modern views and herald us into the next stage of political and national reconciliation.

I begin this article by laying down the foundations for my analysis: Part II briefly explains my choice to compare the New Zealand jurisprudence with the United States jurisprudence; Part III provides background about the *Wakatū* litigation; and Part IV explains foundational concepts relating to trusts and fiduciary duties. I then turn to examine the doctrine of trust responsibility in North America and New Zealand. Part V discusses the United States jurisprudence; and Part VI discusses the New Zealand jurisprudence. Returning to the *Wakatū* litigation, Part VII demonstrates the doctrine of trust responsibility in action. Finally, Part VIII considers how the doctrine could be developed further.

II Comparative Legal Analysis

The relationship between indigenous peoples and the government in each country depends on unique historical, political and legal circumstances. New Zealand shares a common history of colonisation with the United States and Canada, yet our indigenous legal jurisprudence has evolved separately from that of North America.

The concept of state-owed fiduciary duties to indigenous peoples has been extensively developed in North American jurisprudence. Due to our different history of Crown-indigenous relations, some theorists believe fiduciary duties may not be suited to the New Zealand context. Others argue that such duties are long overdue, and that the law should inform the key features of the Crown-Māori relationship, even if only to understand *analogous* duties.

Canadian and New Zealand courts have acknowledged in different ways the need to deal fairly and in good faith with their indigenous peoples: a sentiment expressed through the evolving concept of the "honour of the Crown" in Canadian jurisprudence[7] and the duty of "good faith, reasonableness, trust, openness and consultation" in New Zealand law.[8]

Most legal analysis of government-indigenous relations focuses on Canada. Countless articles have also been written applying the Canadian remedies to a New

7 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74, (2004) 245 DLR (4th) 193 at [24].

8 *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 [*Te Arawa Cross Claim* (CA)] at [81].

Zealand context.[9] However, far less comparative work has been undertaken regarding the application of United States jurisprudence to New Zealand.[10]

The protection of indigenous rights contained in the Constitution of Canada[11] forms a strong basis for judicial findings of a fiduciary duty on the part of the Crown, and this makes Canadian jurisprudence less relevant to a New Zealand context. By contrast, the United States is similar to New Zealand in its lack of constitutional protection of indigenous rights.

For these reasons, this article will primarily discuss United States law. I will consider how the fiduciary duties owed by the United States federal government could apply to the New Zealand Crown and I will do so using *Wakatū* as a test case.

III An Introduction to *Wakatū*

The *Wakatū* litigation involves Nelson land acquired in 1840 by the New Zealand Company and later granted by the Crown. The case revolves around complex trust and fiduciary issues. The plaintiffs claim that the Crown failed to implement land reserves promised to Māori vendors,[12] and these claims are based on express trust, resulting trust and constructive trust, with additional claims based on a relational duty of good faith and breach of fiduciary duty.[13]

The claims in *Wakatū* are extensive and raise a number of new issues to those arising in previous Crown-owed fiduciary duty cases, such as *Paki v Attorney-General*.[14] Litigation commenced in 2010 with a six-week hearing in the High Court. The Court found that the plaintiffs had failed to establish any of the six causes of action pleaded and were, therefore, not entitled to relief. The case progressed to the Court of Appeal in 2014 where all substantive causes of action were dismissed. The Supreme Court granted leave to appeal the decision and over 12–15 October 2015 the case was heard before a full Court. The parties are currently awaiting the Court's decision.

Whether fiduciary duties or relationships of trust exist is determined against a "close examination of the facts" in the specific case.[15] The question in *Wakatū*, therefore, is whether the Crown meets the fiduciary standard. If the facts do not satisfy the test for fiduciary obligations, I contend that the standard may never be met.

Establishing the doctrine of trust responsibility in New Zealand would provide a path for the judiciary to hold the Crown to a higher standard in its interactions with Māori. And it would do so without opening the way for other parties to claim against the Crown generally. Furthermore, the doctrine would provide justice for vulnerable indigenous parties in their cases against the Crown, which has benefitted—and continues to benefit—from historical mismanagement of indigenous property.

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9 For example, see Alex Frame "The Fiduciary Duties of the Crown to Maori: Will the Canadian Remedy Travel?" (2005) 13 Wai L Rev 70.

10 In the course of the research for this article I could not find any articles exclusively comparing the United States and New Zealand.

11 The Constitution of Canada affirms and recognises "existing aboriginal and treaty rights of the aboriginal peoples of Canada". Rights of the Aboriginal Peoples of Canada, Part 2 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c 11, s 35(1).

12 *Proprietors of Wakatū v Attorney-General* [2012] NZSC 102 at [3] [*Wakatū Direct Appeal*].

13 See generally *Wakatū Direct Appeal*.

14 *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 [*Paki* (CA)].

15 *Wakatū Direct Appeal*, above n 12, at [5].

IV Trusts and Fiduciary Duties

The doctrine of trust responsibilty developed from general trust law. To restate general trust law principles: a trust is created when property is placed under the control of one party (the trustee) for the benefit of a second party (the beneficiary). The law of equity imposes fiduciary duties upon the trustee regarding that property. At the very least the trustee must remain loyal to the beneficiary: they must act in the beneficiary's best interests with all skill, care, diligence and expertise available; and they must preserve and protect the trust property.[16]

Equity is an alternate source of "flexible jurisprudence" and is based on "general concepts of fairness and good conscience".[17] As it developed, equity concerned itself mainly with trusts—the legal arrangement where property could be owned by one person for the benefit of another. Such arrangements gave rise to fiduciary duties owed by the trustee to the trust's beneficiaries. Yet trusts were not the only relationship creating a fiduciary relationship which required one party to act with particular care towards the other: "partners, solicitors and clients, company directors and shareholders, and other similar situations" also fell under its umbrella.[18]

Equity regulates the behaviour of fiduciaries—fiduciary obligations require parties to fully disclose any relevant information, as well as to refrain from profiting from opportunities arising from their position of power.[19] It "examines the parties' consciences" and decides whether, in light of that, it would be just to modify their common law rights and obligations.[20] Fiduciary relationships are a perfect example of equity's role in constraining actions where a power imbalance exists between parties.[21] This is directly applicable to the parties in *Wakatū* where a power imbalance was present, as in the case of most Crown-indigenous interactions.

In *Bristol and West Building Society v Mothew* Millett LJ defined a fiduciary as "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence".[22] The parties need not expressly undertake a fiduciary relationship and where the courts find fiduciary duties should apply based on the circumstances and facts at hand, the duty shall be imposed on the fiduciary.[23]

Blanchard and Tipping JJ articulated the nature of fiduciary relationships in the leading case of *Chirnside v Fay*:[24]

> [When] we speak … [of] a fiduciary relationship, we are speaking of a relationship which gives rise to fiduciary obligations, irrespective of what may be the principle nature of the relationship … Relationships which do not generally give rise to fiduciary obligations may nevertheless have a fiduciary dimension.

16 Pevar, above n 3, at 31.
17 Frame, above n 9, at 71.
18 At 71.
19 At 71.
20 Ling Yan Pang "A Relational Duty of Good Faith: Reconceptualising the Crown-Māori Relationship" (2011) 17 Auckland U L Rev 249 at 251.
21 *Hodgkinson v Simms* [1994] 3 SCR 377 at [27].
22 *Bristol and West Building Society v Mothew* [1998] EWCA Civ 533, [1998] Ch 1 at 18. See also *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.
23 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [17.2.11].
24 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [72].

Chirnside v Fay established that there are two situations where the Courts will find that a relationship gives rise to fiduciary obligations:

(1) Relationships which are "inherently fiduciary" and fall into one of the recognised categories of fiduciary relationships;[25] and

(2) Relationships which are not classed as fiduciary based on their inherent nature, but upon examination of its particular aspects. There is no single universally accepted test to determine whether a relationship outside of the recognised categories is such that fiduciary obligations are owed. The recognised categories of fiduciary relationships are not closed.[26]

The distinguishing feature of a fiduciary is the obligation of loyalty: "[t]he principal is entitled to the single-minded loyalty of his fiduciary."[27] This means that the principal is prohibited from self-dealing, manifesting a conflict of interests and gaining a profit from the relationship.[28]

However, there are established conditions for cases where the fiduciary deals with his or her principal. According to the Court in *Bristol*, "[i]n such a case he [or she] must prove affirmatively that the transaction is fair and that in the course of the negotiations he [or she] made full disclosure of all facts material to the transaction."[29] This is relevant to fiduciary relationships between states and indigenous peoples, as it shows that parties can be in a fiduciary relationship and still deal.

Due to the *by default* nature of a fiduciary relationship, it is not always simple to determine whether a relationship is of a fiduciary nature. Although the courts are willing to find a fiduciary relationship in circumstances where none has previously been recognised,[30] the reasons behind the courts' decisions are not always clear-cut.[31]

The Canadian Court of Appeal developed a three-stage formulation of the elements of a fiduciary duty:[32]

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

These principles have been determinative in United States cases involving government-Indian relations. They have also been influential in New Zealand courts. In particular, the third element of *vulnerability* has been most controversial in the Crown-Māori context. The requirement on the principal not to profit and the rule against conflict of interests have also proved challenging. These points will be elaborated on in the following sections.

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25 At [73].

26 At [75]. See also *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 596–597.

27 *Bristol*, above n 22, at 18.

28 *Paki v Attorney-General* [2009] 1 NZLR 72 (HC) at [115] [*Paki* (HC)].

29 *Bristol*, above n 22, at 18.

30 See generally *Chirnside*, above n 24.

31 *Lac Minerals*, above n 26, at 643–644.

32 *Frame v Smith* [1987] 2 SCR 99 at [60]. See *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 22.

V United States Jurisprudence

In the United States the nature of the relationship between indigenous peoples and the government is characterised as trust-like, imposing fiduciary duties on the government to protect indigenous rights and interests. Specifically, the federal government has an obligation "to [honour] the trust relationship and to [fulfil] trust commitments"—namely, treaty and statutory obligations.[33]

The United States Supreme Court has confirmed that a general trust relationship exists between the United States and the Indian people.[34] A common-law trust had been created by the federal government's assumption of elaborate and extensive control over Indian property. All necessary equitable elements were provided: a trustee (the United States), a beneficiary (the Indian tribes and individuals) and trust property (the Indian land, funds and resources). The Court has stated that during the course of its relations with Indian tribes, the federal government "charged itself with moral obligations of the highest responsibility and trust"[35]—"obligations to the fulfillment of which the national honor has been committed".[36] Its purpose was "to ensure the survival and welfare of Indian tribes and people".[37]

The concept of a federal trust responsibility owed to Indians evolved judicially.[38] Early decisions of the Supreme Court established the relationship between the federal government and tribes as one of wardship and protection.[39] The analogy of the guardian and its ward led to the development of the trust relationship, where the United States acts as the trustee for the beneficiary tribe with regards to trust land and resources.[40] The status of the tribes as domestic dependant nations, with the accompanying decreased autonomy and increased reliance on the United States, created fiduciary duties on the part of the government.[41] On this basis, all government actions towards indigenous peoples—whether by treaty, congressional action or executive order—are subject to these duties.[42] These crucial concepts of sovereignty and trust responsibility are the "primary cornerstones of customary Native American law".[43]

33 Katherine J Wise "A Matter of Trust: The Elimination of Federally Funded Legal Services on the Navajo Nation" (1997) 21 Am Indian L Rev 157 at 179.

34 *United States v Mitchell* 463 US 206 (1983) at 225.

35 *Seminole Nation v United States* 316 US 286 (1942) at 296.

36 *Heckman v United States* 224 US 413 (1912) at 437.

37 American Indian Policy Review Commission *Final Report* (US Government Printing Office, Washington, 1977) at 130.

38 Rennard Strickland (ed) *Felix S Cohen's Handbook of Federal Indian Law* (1982 ed, The Michie Company, Virginia, 1982) at 220.

39 See *Cherokee Nation v The State of Georgia* 30 US 1 (1831) at 17; and *Worcester v The State of Georgia* 31 US 515 (1832) at 556–557.

40 Frank Pommersheim *Broken Landscape: Indians, Indian Tribes, and the Constitution* (Oxford University Press, New York, 2009) at 105.

41 Gary D Meyers "Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada" (1991) 10 UCLA J Envtl L & Poly 67 at 91.

42 At 91.

43 Michael A Burnett "The Dilemma of Commercial Fishing Rights of Indigenous Peoples: a Comparative Study of the Common Law Nations" (1995–1996) 19 Suffolk Transnatl L Rev 389 at 402.

A *Two sets of trust duties*

The trust doctrine in the United States creates two sets of duties, one broad duty and one specific set of duties.[44] In its broad conception, the trust doctrine requires the federal government to "support and encourage tribal self-government, self-determination and economic prosperity".[45] The specific duty owed by the federal government under the doctrine of trust responsibility is to "faithfully perform those tasks expressly set forth in these federal treaties".[46]

B *Origins of the doctrine in the United States*

The trust relationship originates from the *history of the relationship* between Indian tribes and the United States[47]—namely, the nearly 400 historic treaties signed by the United States with Indian tribes between 1787 and 1871.[48] According to the Supreme Court, these treaty promises established a trust relationship between the United States government and Indian tribes.[49] Inherent in this trust relationship are the trust responsibilities flowing from it, meaning that the federal government acquired a legal duty, as well as a moral obligation, to uphold its promises.[50]

Although the trust relationship was originally created to enforce treaty commitments, courts have now extended its application to federal statutes, agreements and executive orders (which all create trust relationships in the same way as treaties). The trust responsibility can also be created by statute as statutes are now Congress's means of creating the programmes and services necessary to fulfil its treaty obligations.[51] Congress has also passed laws which vest Indian property in federal agencies and require effective management of that property. Such laws necessarily impose a fiduciary duty on the agency to manage those resources wisely, in the manner instructed by Congress and in each tribe's best interests.[52]

In recent years the courts have also held executive action in Indian cases to be reviewable, not only under the terms of specific statutes and treaties, but also on the basis of ordinary standards of trust law.[53] A significant federal district court decision illuminates the application of ordinary trust standards to federal officials. In *Pyramid Lake Paiute Tribe v Morton* the Court struck down a regulation allowing diversions of water which negatively affected an Indian reservation.[54] Although the diversions violated no specific statute or treaty, the court found them to be in violation of the general trust responsibility, in accordance with standard fiduciary principles.[55]

The Supreme Court has held that any activities undertaken by the federal government pursuant to its trust obligations must "be judged by the most exacting

44 Pevar, above n 3, at 32.
45 At 32.
46 At 33.
47 *Navajo Tribe of Indians v United States* 624 F 2d 981 (Fed Cir 1980) at 987.
48 Pevar, above n 3, at 30.
49 Wise, above n 33, at 178.
50 Pevar, above n 3, at 30.
51 At 33.
52 See *Loudner v United States* 108 F 3d 896 (8th Cir 1997).
53 Strickland, above n 38, at 227.
54 *Pyramid Lake Paiute Tribe v Morton* 354 F Supp 252 (DDC 1972).
55 For instance, the duty of loyalty and the principle that a trustee should prioritise the interests of the beneficiary over their own interests. Strickland, above n 38, at 227.

fiduciary standards".[56] Under that standard, the federal government has a duty to act in good faith, remain loyal to the beneficiary and use its expertise on the beneficiary's behalf.[57] The set of fiduciary duties owed under trust depends on the circumstances creating the trust—that is, the specific statute or treaty.

But as clarified by the Supreme Court in 2011, the federal government "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute".[58] This means that to determine what trust has been created—if any at all—one must look to the relevant statute or treaty. Ultimately, the government has the final word in determining whether to create a trust responsibility and what scope the trust responsibility will be.[59] Indians must rely on the integrity and honour of the United States to administer programmes in their best interests.

(1) The guardianship concept: how trust responsibility began

The concept of a federal trust responsibility first appeared in 1831 when the Supreme Court conceptualised the relationship between tribes and the federal government as "that of a ward to his guardian".[60] In *Cherokee Nation v Georgia,* the Court decided that an Indian tribe, although a "distinct political society", was neither a state of the United States nor a foreign state.[61] Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations … in a state of pupillage".[62] This status of Indian tribes was confirmed and followed in many subsequent Supreme Court decisions.[63]

Modern theorists argue these findings should not be interpreted in the sense of Indian tribes being incapable of managing themselves, but with the meaning that the United States had pledged its word to assist and protect them, as well as fulfil all treaty promises.[64] As Chief Justice Marshall explained in *Georgia*:[65]

> This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.

The United States took it upon itself to be the *protector* of the indigenous peoples.[66] In exchange for peace, land and resources, the peoples were guaranteed their "security as distinct political communities".[67] Therefore, the United States assumed fiduciary responsibilities towards the Indian tribes under their protection.[68]

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56 *Seminole* above n 35, at 296.
57 Pevar, above n 3, at 34. See also *Wilkinson v United States* 440 F 3d 970 (8th Cir 2006).
58 *United States v Jicarilla Apache Nation* 564 US 131 (2011) at 188.
59 Pevar, above n 3, at 35.
60 *Cherokee*, above n 39, at 17.
61 At 16.
62 At 17.
63 See *Worcester*, above n 39; and *United States v Kagama* 118 US 375 (1886).
64 See generally Pommersheim, above n 40; Ray Torgerson "Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law" (1996) 2 Texas Forum on Civil Liberties & Civil Rights 165; and Robert N Clinton "Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law" (1993) 46 Ark L Rev 77.
65 *Worcester*, above n 39, at 555.
66 Strickland, above n 38, at 234.
67 At 234.
68 At 234.

(2) Problems with the guardianship concept

Many Indians take issue with this conceptualisation of federal-Indian relations, with its implications of inferiority. Rather than being used as a source of federal responsibility *to* Indians, historically the guardianship concept soon became used as a source of federal power *over* Indians.[69] Trust responsibility was used as a tool to dispose of treaty obligations and establish plenary power, an extra-constitutional notion of *full and complete* authority over Indians and tribes.[70] This plenary power is only limited by the *Due Process* and the *Just Compensation* clauses in the Fifth Amendment of the United States Constitution (which are rarely used to protect Indians or tribes).[71] In theory, the doctrine of trust responsibility should also be a limit on Congressional power. However, as previously outlined, the trust doctrine is not legally enforceable against the government (although it can be against federal officials).

It is understandable why many Indian law scholars remain suspicious of the doctrine of trust responsibility, with its roots in concepts like the *Doctrine of Discovery*, *Manifest Destiny* and *The White Man's Burden*—ideas which justified colonisation and the conquest of indigenous peoples.[72] Indeed, many legal scholars see an inherent conflict between the doctrine of trust responsibility and indigenous sovereignty.

Yet this doctrine, and its immense power, can be used for both good and bad: as "a shield to protect Indians or a sword to hurt them".[73] Since the 1960s, the federal government has largely repudiated its negative applications.[74] Also, a number of reforms have been undertaken to transform the trust relationship into a more "cooperative, horizontal relationship" and more analogous to a partnership than the relationship of *a ward to its guardian*.[75]

C *The effect of plenary power on the trust doctrine*

Courts may not order Congress to undertake any particular action on behalf of Indians or tribes because Congress has plenary power to regulate Indian affairs.[76] Therefore, the trust responsibility is a moral and ethical one, rather than a legally enforceable duty.[77] If Congress does decide to act—or fails to act—the courts have no authority to prevent or force it.[78] As a result, Indian tribes must rely on the mere good faith of Congress to keep the promises made centuries ago in exchange for Indian land.

69 See *Kagama*, above n 63, at 383–385.
70 See also *Lone Wolf v Hitchcock* 187 US 553 (1903).
71 US Const amend V.
72 Torgerson, above n 64, at 176.
73 Pevar, above n 3, at 32.
74 At 32.
75 Pommersheim, above n 40, at 113.
76 See Pevar, above n 3, at 55–80.
77 See *Tee-Hit-Ton Indians v United States* 348 US 272 (1955); and *United States v Mitchell*, above n 34. See also Mary C Wood "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited" (1994) Utah L Rev 1471.
78 See *Lone Wolf v Hitchcock*, above n 70; *Menominee Tribe of Indians v United States* 391 US 404 (1968); and *Yankton Sioux Tribe v US Dept of Health & Human Services* 869 F Supp 760 (DSD 1994).

Congress may also terminate its trust relationship with tribes at any time, with or without the consent of the affected tribes.[79] However, this can only occur by an express act of Congress—termination will not be implied[80] and even the tribes themselves cannot terminate the trust relationship.[81] On this basis, many critics say the analogy of a trust relationship is flawed because the government may "unilaterally abrogate trust agreements" and may, as sovereign, refuse to be sued.[82]

Yet the federal government is increasingly unlikely to terminate its trust relationships with Indian tribes due to the moral and political implications of such a move. In speaking out against the policy of forced termination, President Nixon expressed his strong belief that the trust relationship is not something that should be able to be revoked at will. According to Nixon, "the special relationship between Indians and the Federal government is the result … of solemn obligations which have been entered into by the United States government" and it should not be terminated at will as if it was merely "an act of generosity towards a disadvantaged people".[83]

Yet the trust doctrine *is* legally enforceable against federal officials who act outside express federal authority. The duty of trust responsibility imposes strict fiduciary standards on the conduct of executive agencies and Indian tribes, and individuals can compel officials to perform any duties delegated to them by Congress.[84] This is a useful legal tool for Indian tribes because "although Congress has the authority to modify a trust relationship, administrative agencies do not".[85] As in all matters of federal administrative law, federal executive officers are limited to the authority conferred upon them by statute.[86] Moreover, federal agencies are judged by the "stricter standards" that apply to fiduciaries.[87] Accordingly, the federal trust responsibility is an incredibly important limitation on executive authority and discretion to administer Indian property and affairs.[88]

United States jurisprudence has clearly shown that even though the government cannot always remain loyal to indigenous peoples at the exclusion of all other interests, the trust responsibility of the state to its indigenous inhabitants is more venerable and important than any other. Such a responsibility must be honoured unless a compelling need requires otherwise.

The fact that the trust doctrine can be more of a moral than a legal duty would still be helpful in a New Zealand context, as would its enforceability against government officials. Governmental programmes and policies frequently impede the faithful discharge of obligations to Māori groups. Non-indigenous groups are larger in number and frequently hold greater political power; and, as a result, substantial political pressure can be leveraged on executive officials to compromise or ignore Māori interests. Therefore, judicial enforcement of ordinary fiduciary principles would assure Māori that their rights

79 See *Rosebud Sioux Tribe v Kneip* 430 US 584 (1977) at 594. See also Reid Peyton Chambers "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stan L Rev 1213 at 1227.

80 See *United States v Nice* 241 US 591 (1916).

81 See *Kennerly v District Court of The Ninth Judicial District of Montana* 400 US 423 (1971).

82 Ellen MW Sewell "The American Indian Religious Freedom Act" (1983) 25 ACJ 429 at 439.

83 President Nixon *Special Message on Indian Affairs* (Pub Papers 575–576, 8 July 1970).

84 Strickland, above n 38, at 225.

85 Pevar, above n 3, at 34.

86 Strickland, above n 38, at 225.

87 *Jicarilla Apache Tribe v Supron Energy Corporation* 728 F 2d 1555 (10th Cir 1984) at 1567.

88 Strickland, above n 38, at 226.

are protected over conflicting public purposes—so long as such fiduciary duties were grounded in an instrument (a statute or treaty).

It should be noted that parliamentary sovereignty in New Zealand supports the development of this doctrine here. In a system with parliamentary sovereignty—as with plenary power—Parliament can avoid any overly onerous consequences if it wishes and this mitigates any risks which might arise from establishing the trust doctrine here.

The trust doctrine in the United States is shaping public thought and policy. Practically, it allows agencies—and the government, in some cases—to be held to account.

D *General benefits of the trust doctrine*

Indian tribes benefit from the doctrine of trust responsibility through the numerous services and programmes that Congress creates. Courts also have "substantial latitude" in fashioning effective remedies for mismanagement of Indian trust resources.[89]

Even when the law in a specific case does not expressly allow for damages, a money-mandating remedy may be inferred by the Court. Indeed, what is known as the *Mitchell doctrine* states that "[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."[90] This element of the trust doctrine would be most advantageous to the *Wakatū* plaintiffs.

Mitchell shows that different bases for the trust relationship lead to different duties of varying strengths, which in turn provide different remedies. This is particularly relevant to the New Zealand discussion of what circumstances give rise to a Crown-Māori fiduciary relationship. If New Zealand courts were to follow United States jurisprudence, Māori plaintiffs may find themselves in a far more favourable position. For instance, *Mitchell* might signal a shift in the trust doctrine towards enforceability over mere damages, which would prove particularly useful for Māori land cases such as *Wakatū*.[91]

A leading American case is *United States v Creek Nation*.[92] This case is analogous to *Wakatū*. Here the Supreme Court awarded monetary damages to a tribe against the federal government for lands excluded from their reservation and sold to non-Indians following the incorrect survey of reservation boundaries. The Court based its decision on the doctrine of trust responsibility: the tribal property and affairs were subject to the control and management of the government and the government's power to control and manage such property was "not absolute" but "subject to limitations inhering in such a guardianship" to protect and advance the tribe.[93] This case demonstrates the strictness of the standard of fiduciary duties that the federal executive is held to. The federal executive must exercise due care in the administration of Indian property—it cannot "give the tribal lands to others, or … appropriate them to its own purposes" as a result of a negligent survey.[94] This is exactly what happened in *Wakatū*, where the Crown mismanaged the Nelson Tenths Reserves resulting in the indigenous plaintiff losing land they were beneficially entitled to.

89 *Cobell v Norton* 391 F 3d 251 (DC Cir 2004) at 257.
90 *Mitchell*, above n 34, at 226.
91 Note that the *Wakatū* decision is limited to cases where the federal government has assumed a statutory duty and consented to suit for enforcement of that duty.
92 *United States v Creek Nation* 295 US 103 (1935).
93 At 109–110.
94 At 110.

Supreme Court decisions reviewing the legality of administrative conduct in managing Indian property have held executive officials to the "most exacting fiduciary standards".[95] Such an official is "bound by every moral and equitable consideration to discharge its trust with good faith and fairness".[96] In New Zealand, this would prove telling for cases like *Wakatū* where official conduct fell significantly below these standards.

VI New Zealand Jurisprudence

In the United States, the federal government's fiduciary duties to indigenous peoples arose from various statutes, treaties and the historical course of dealing. However, in the New Zealand context, the source and scope of any Crown-owed fiduciary duties is unclear. New Zealand courts have articulated the duties the Crown owes to Māori as: a fiduciary relationship; analogous to a fiduciary relationship; or a relational duty of good faith. Whether the Crown owes any of the above duties to Māori has been extensively litigated.

In 2007 the Court of Appeal firmly resisted the development of fiduciary duties owed by the Crown, returning to Cooke P's original statement of analogy:[97]

> The law of fiduciaries informs the analysis of the key characteristics of the duty arising from the relationship between Maori and the Crown under the Treaty: good faith, reasonableness, trust, openness and consultation. But it does so by analogy, not by direct application.

Yet the law is not yet settled: the above comments were merely obiter dicta and the Supreme Court made it clear that they are not binding on New Zealand law.[98]

Overall, the courts are hesitant to declare the Crown as a fiduciary in regards to indigenous peoples. Fiduciary duties owed to Māori would potentially interfere with the Crown's political accountability to all New Zealanders.[99] Conflicting duties negate the absolute duty of loyalty required under a fiduciary duty and the strong possibility of these conflicting duties leads to judicial reluctance to impose fiduciary relationships on the Crown.

In any case, many have argued that the Treaty of Waitangi evidences a fiduciary relationship.[100] The nature of the relationship between the Crown and Māori is strongly coloured by the Treaty and it is commonly accepted as New Zealand's constitutional "founding document".[101]

In this Part of the article I discuss the history of the Crown as a fiduciary, the concept of a *public trust*, difficulties with a Crown-Māori fiduciary relationship, and the origins of a New Zealand trust responsibility doctrine.

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95 *Seminole*, above n 35, at 297.
96 *United States v Payne* 264 US 446 (1924) at 448.
97 *Te Arawa Cross Claim* (CA), above n 8, at [81].
98 *New Zealand Māori Council v Attorney-General* SC 49/2007, 4 November 2008 at [2(b)].
99 Pang, above n 20, at 258.
100 See Gerald Lanning "The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship" (1997) 8 Auckland U L Rev 445 at 457–463.
101 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [3.1].

A *The history of the Crown as fiduciary*

Historically, the equitable remedy of breach of fiduciary duty against the Crown has been unavailable. *Tito v Waddell* was the first attempt to hold the British Crown to an equitable fiduciary duty.[102] In this case, Megarry VC drew a distinction between a "true trust", which would place the Crown under fiduciary duties enforceable by the Court, and a "trust in the higher sense", which would be a reflection of the general obligation of government, but not judicially enforceable.[103] The learned Judge stated in his judgment that "many other means are available of persuading the Crown to honour its governmental obligations, should it fail to do so" and, therefore, Crown fiduciary duties were not necessary.[104]

Yet even in this early case, the Court recognised that the categories of fiduciary obligation are not closed. Megarry VC stated there was no reason why statute should not create a relationship which carries with it obligations of a fiduciary nature. However, the question in this case was "not what a statute could do, but what this statute has done."[105]

B *The concept of a* public trust

Many academic and judicial figures have proposed that "the most fundamental of fiduciary relationships in our society is that which exists between the State (and its officers and agencies) and the community (the people)".[106] The issue is, therefore, how those standards of conduct can be legally enforced. Can trust and fiduciary principles circumscribe and channel the exercise of public power for the benefit of certain groups of people, such as indigenous groups?[107]

The abstract characterisation of the State as "a trustee of its powers of government for the people" is unlikely to provide workable criteria for the courts.[108] But many argue that this characterisation is fundamental to our understanding of modern States' constitutional arrangements.[109] The powers and authorities possessed by public officials and the state are not given for their own benefit, but for the interest of the public.[110] Holding our government to account protects not only the interests of individuals (such as Māori) but also protects the system of government itself and the legitimacy of the state—the "efficacy and credibility of which depend[s] upon the proper discharge of official functions".[111]

From the 19th century equity has policed the conduct of government officials in their *fiduciary* or *trust* relationship with the public (although predominantly in the context of misuse of public funds). With little by way of equity jurisprudence relating to the control

102 *Tito v Waddell (No 2)* [1977] 1 Ch 106. The case concerned the destruction of the Banaba Island and the resettlement of the Banaba islanders in Fiji.
103 Frame, above n 9, at 72.
104 *Tito*, above n 102, at 217.
105 At 235.
106 Paul Finn "Public Trusts, Public Fiduciaries" (2010) 38 FL Rev 335 at 335.
107 At 335.
108 At 336.
109 See Stephen Gageler "Beyond the text: a vision of the structure and function of the Constitution" (2009) 32 Aust Bar Rev 138.
110 Finn, above n 106, at 337.
111 At 337.

of public officials, it is, therefore, understandable that modern courts have struggled to justify imposing stricter fiduciary standards on governmental actions.

Yet the idea of public fiduciary responsibility is very much present in modern jurisprudence and informs our standards of governmental conduct. The metaphor that all branches of government exercise their powers in a "fiduciary capacity" is present in many public law contexts.[112] Supposedly, the metaphor functions to "signify that legal (or constitutional) constraints and obligations attach to the exercise of the public powers and discretions held".[113] In Australia this has been openly acknowledged.[114]

Private fiduciary powers and public statutory powers are similar in that they are conferred under specific instruments (either expressly or impliedly), be it legislation or private deed.[115] Also, such powers can only be exercised for the purposes specified.[116] However, private trusts and the *public trust* differ regarding what fiduciary powers are bestowed on the trustees. The holder of a private trust fiduciary power is entrusted to exercise it primarily for the benefit of the specific persons to whom the power is owed—namely, the beneficiaries. By contrast, the holder of *public* statutory powers possesses a duty to "further public purposes", not for the interests of specific persons.[117] Lord Brightman articulated it so: "[t]he duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense."[118]

The core question is thus: when can the Crown (or another public body or person) be a trustee or fiduciary and be subject to trust or fiduciary law? The commonly accepted rule is that absent clear words and intention, the Crown's obligation will always be characterised as a governmental or political trust—a trust "in the higher sense".[119] Clear words and intention are required before actions of the Crown will be subject to ordinary trust principles, even if described in the instrument in such terms.[120] This rule of construction—or *presumptive bias*—has been criticised, with Finn arguing that the status of public purpose statutes should be reached "as a matter of orthodox construction" not as a consequence of a privileged presumption which favours the Crown.[121]

A public body will normally only be found to be in a fiduciary relationship with an individual (or group) of the public if—in discharging a statutory function, power or purpose capable of affecting the interests of that person—it would be reasonable for that individual (or group) to expect that the public body:[122]

> (i) will act in his or her interests in discharging that function; or, exceptionally, [or]
> (ii) will act fairly to him or her, if the public body is to act in the interests of groups or persons having different rights and interests inter se in the particular matter.

112 Murray Gleeson "Judicial Legitimacy" (2000) 20 Aust Bar Rev 4 at [22].
113 Finn, above n 106, at 340.
114 *Hot Holdings Party Ltd v Creasy* [2002] HCA 51, (2002) 210 CLR 438 at [135].
115 Finn, above n 106, at 343.
116 At 343.
117 Finn, above n 106, at 343.
118 *Swain v The Law Society* [1983] 1 AC 598, [1982] 2 All ER 827 at 618.
119 *Kinloch v Secretary of State for India in Council* (1882) 7 App Cas 619 at 626.
120 Finn, above n 106, at 343.
121 At 344.
122 At 346. See also *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 815.

Essentially, a fiduciary relationship would arise because the statutory regime *itself* creates such a relationship.

The main issue to arise in such cases is the "construction and characterisation" of the statutory powers or duties which allegedly attract the fiduciary responsibility.[123] Most fiduciary claims, as in *Wakatū*, are lost because, in exercising its statutory powers consistently with their legislative purpose, the public body is entitled to consider, promote or protect a range of interests—some of which may conflict with the plaintiff's interests. When looking at legislation enacted to protect the public, the courts have shown immense reluctance to extrapolate fiduciary relationships between the bodies responsible for administering such legislation and the group(s) the legislation benefits.[124] The courts have consistently found the expectation that the public body should disregard all other interests to be unreasonable.

Yet this is not always the case. In *Bromley London Borough Council v Greater London Council*, the House of Lords held that a fiduciary duty was owed among other *public trust* duties and that those duties had to "be fairly balanced one against the other".[125] This finding was controversial in New Zealand courts and was treated with considerable caution.[126]

In United States law it is explicit that the courts will not accept the concept of a "general, free-standing fiduciary obligation being imposed on a public body … in the absence of such a requirement (express or implied) in treaty … statute, common law duty, or agreement".[127] However, the situation in New Zealand is less clear. For one, critics argue that fiduciary law principles are unsuited to regulating the issues arising from the relationship between State and indigenous peoples.[128]

The concepts of *public trust* and *public fiduciary* still serve "a vital function in informing and shaping the standards of conduct properly to be expected of public officers and agencies".[129] We currently live in an "age of statutes" and some jurists argue that if we are to properly regulate the discharge of public functions, it should be through the vehicles of statutory interpretation and the grounds of judicial review of statutory powers and discretions.[130] These critics argue that if the rights and interests of particular groups are to be protected or privileged, this will be better secured with the effective exercise of the judiciary through judicial review than by the application of principles of fiduciary law.[131]

An alternative argument to strengthen the case for the Crown being a fiduciary is the principle that not all acts of a fiduciary are subject to the fiduciary duty. Even in a relationship of a generally non-fiduciary kind (such as commercial relationships) there may be aspects of the relationship which do engage fiduciary obligations. Māori have two separate relationships with the Crown: as the indigenous people of New Zealand; and also as ordinary citizens. It is, therefore, possible for fiduciary obligations to exist in some

123 Finn, above n 106, at 347.
124 At 348.
125 *Bromley*, above n 122, at 815.
126 See *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA). See also *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA); and *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).
127 Finn, above n 106, at 349.
128 At 350.
129 At 350.
130 At 350.
131 At 351.

Crown dealings with Māori and not in others.[132] This would avoid some of the difficulties the Court of Appeal identified with a Crown-Māori fiduciary relationship, primarily that a conflict of interest could arise where the Crown **"**find[s] itself in a position where its duty to one Maori claimant group conflicts with its duty to another**"** or where the Crown owes a duty to Māori and a conflicting duty to the New Zealand population as a whole.[133]

According to Canadian jurisprudence, the existence of a public law duty does not exclude the possibility that **"**the Crown undertook, in the discharge of that public law duty, obligations 'in the nature of private law duty' towards aboriginal people**"**.[134] The concept of a political trust does not exhaust the potential legal character of **"**the multitude of relationships between the Crown and aboriginal people**"**.[135] And proprietary and quasi-proprietary interests raise considerations **"**in the nature of a private law duty**"**.[136]

Political trust cases concern the distribution of governmental funds and property, which can be distinguished from the Crown's dealings with **"**pre-existing legal interests of indigenous peoples**"**.[137] In this latter, sui generis category, it may be proper to regard the Crown as a fiduciary.[138]

The Canadian Supreme Court in *Wewaykum Indian Band v R* emphasised that the fiduciary duty exists because of the **"**high degree of discretionary control**"** assumed by the Crown over the lives of indigenous peoples.[139] The Court also clarified the limits of the doctrine, stating that not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature: [140]

> It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

The fiduciary duty varies with the nature and importance of the interest sought to be protected.[141] The **"**most vital aspect of fiduciary doctrine**"** is its focus on the **"**specific characteristics of individual relationships**"**.[142] Leonard Ian Rotman expressed it so: **"**[b]ecause of its implementation on a case-by-case basis, fiduciary doctrine is most appropriately described as *situation-specific*.**"**[143] This article argues that the focus on the specific characteristics of the individual relationship provides compelling weight to the argument that a fiduciary duty should exist between the Crown and Māori.

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132 Pang, above n 20, at 258.
133 *Te Arawa Cross Claim* (CA), above n 8, at [81].
134 *Guerin v R* [1984] 2 SCR 335 at 358 as cited in *Wewaykum Indian Band v R* 2002 SCC 79, [2004] 4 SCR 245 at [74].
135 *Wewaykum*, above n 134, at [74].
136 *Guerin*, above n 134, at [100].
137 Frame, above n 9, at 75.
138 See *Wewaykum*, above n 134, at [80].
139 At [79].
140 At [83].
141 Frame, above n 9, at 76.
142 Leonard Ian Rotman *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (University of Toronto Press, Toronto, 1996) at 155.
143 At 155.

C *The difficulties with a Crown-Māori fiduciary relationship*

As outlined, it would be difficult to establish the scope of the duties created by a Crown-Māori fiduciary relationship. Traditional fiduciaries are held to account by rules against profiting or conflicting with their duties, which would be far more difficult to enforce here. Due to its discretionary powers, the Crown is inevitably in a position of conflict.[144] Additionally, fiduciary duties are proscriptive not prescriptive: the "duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable".[145] This leads many academics to argue that fiduciary standards are not only difficult to fulfil, but also inadequate for "holding the Crown to all that they are obliged to do by the unique historical background of New Zealand".[146]

The courts have often failed to agree on the nature of the Crown-Māori relationship. Core issues arising with the concept of a fiduciary duty include: difficulties identifying the parties involved and their specific obligations; and the complex issue of *vulnerability*.

(1) The difficulty with defining parties

Over the years, the term *the Crown* has taken on different meanings. It is now unclear which bodies that term encompasses.[147] In terms of the fiduciary duty owed, the common view is that the Crown as fiduciary is merely the executive branch of government. Yet at other times a broader view is taken, which conceives the Crown as encompassing all three branches. This makes sense given that both the executive and the legislature are closely involved in Māori affairs, such as the making of Treaty settlements.[148] However, in *New Zealand Māori Council v Attorney-General* Cooke P also refers to the Crown-Māori relationship as a "partnership between races".[149] Such a finding would have undesirable implications, beyond mere inconsistency.

To whom the fiduciary duty is owed is also uncertain. Is it Māori as a general group? Or as specific iwi or hapū? Or subsets among them? The boundaries between different iwi are not certain and Māori societal structures are constantly evolving.[150]

However, such uncertainties could be answered on a case-by-case basis and have been navigated in the North American jurisprudence without overwhelming difficulty. Identifying the parties involved is a particular issue in *Wakatū*: the land at issue alternated between New Zealand Company and Crown ownership.[151] Also, uncertainty exists around the exact beneficiaries of Wakatū Incorporation who have standing to

144 Pang, above n 20, at 259.

145 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664 [*Lands*].

146 Pang, above n 20, at 259.

147 Janet McLean "'Crown Him with Many Crowns': The Crown and the Treaty of Waitangi" (2008) 6 NZJPIL 35 at 53.

148 Noel Cox "The Treaty of Waitangi and the Relationship between the Crown and Maori in New Zealand" (2002) 28 Brook J Intl L 123 at 149.

149 *Lands*, above n 145, at 664.

150 Donna Hall "The Fiduciary Relationship between Maori and the Government in New Zealand" in Law Commission of Canada (ed) *In Whom We Trust: a Forum on Fiduciary Relationships* (Irwin Law, Toronto, 2002) 123 at 133.

151 See *Proprietors of Wakatū v Attorney-General* [2014] NZHC 1461, [2012] BCL 396 [*Wakatū* (HC)] at [122], [125], [126], [160]–[161] and [164].

bring this case.[152] However, these difficulties would not be insurmountable and have not defeated the *Wakatū* claims so far.

(2) The difficulty with *vulnerability*

One argument against classifying the Crown-Māori relationship as fiduciary is the amount of "legal baggage" that the term carries.[153] Māori disadvantage, vulnerability and unequal bargaining power have been argued as critical factors in determining whether a fiduciary relationship existed.[154] That implication of legal superiority on the part of the Crown has been a main objection towards the finding of a fiduciary duty in the New Zealand context: [155]

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

However, such a duty would not need to have these connotations of exploitation and vulnerability.[156] Rotman argued that such uncomfortable connotations are a misconception of the origins of a fiduciary relationship. Although fiduciary law protects vulnerable parties, fiduciary relationships can also exist between equal parties.[157] Inherent inequality may be a "preexisting condition" between the parties involved in the fiducairy relationship, but this inequality does not create the fiduciary nature of the relationship. Rather, the vulnerability is an "inevitable product" of these forms of interaction.[158]

In this articulation of a fiduciary relationship, the nature of the Crown-Māori relationship (established through a shared history of mutual interactions) is most important, not the relative power of each party.[159] The fiduciary relationship was formed by colonisation; and the enforceability of its duties do "not ebb and flow with the advantages [indigenous peoples] may have in particular rounds of bargaining".[160]

Therefore, the concern that a fiduciary duty creates a misperception of inferiority may not be as large an obstacle as it appears. This is supported by the accepted fiduciary relationship that exists in a commercial partnership: the relationship between partners has been typically regarded as a classic fiduciary relationship because parties owe each other duties of loyalty and good faith; and they must put the interests of the partnership ahead of their own personal interests, despite neither party being more vulnerable than the other.[161]

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152 See at [311]–[316]. See also *Wakatū* (CA), above n 6, at [12]–[30].
153 *Paki* (CA), above n 14, at [103].
154 *Paki* (HC), above n 28, at [129].
155 *Paki* (CA), above n 14, at [103].
156 EW Thomas "The Treaty of Waitangi" [2009] NZLJ 277 at 279.
157 Rotman, above n 142, at 49–50.
158 At 49–50.
159 Pang, above n 20, at 257.
160 Peter W Hutchins, David Schulze and Carol Hilling "When Do Fiduciary Obligations To Aboriginal People Arise?" (1995) 59 Sask L Rev 97 at 114.
161 See generally *Chirnside*, above n 24.

New Zealand can learn a lot from the United States in how they respond to the objections to a trust doctrine. Facing many of the same legal hurdles, the United States judiciary has created a doctrine that allows numerous Indian tribes recourse through equity for historical (and recent) harm due to governmental mismanagement and maltreatment of indigenous people and their resources.

D *Origins of a New Zealand trust responsibility doctrine*

Logic dictates that fiduciary duties "should be imposed wherever the requisite circumstances [of undivided loyalty, good faith and trust] are found to exist *irrespective of the fact that one of the parties is the Crown*".[162] North American jurisprudence has clarified that the Crown's obligation to indigenous peoples regarding beneficiary interests is not a public law duty:[163]

> 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.

In 1993 President Cooke pointed to other jurisdictions[164] as authority that continuing unextinguished aboriginal title after British sovereignty and treaties "gives rise to a fiduciary duty and a constructive trust on the part of the Crown".[165] He elaborated that "the Treaty of Waitangi is major support for such a duty … [there is] widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement".[166]

Only one New Zealand statute has explicitly referred to fiduciary obligations between the Crown and Māori. This was the Foreshore and Seabed Act 2004 which stated that "[t]he Crown does not owe any fiduciary obligation, or any obligation of a similar nature, to any person in respect of the public foreshore and seabed."[167] The Act was repealed in 2011. However, leading jurists have used its reference to fiduciary duties to argue that fiduciary duties must normally exist—otherwise "why else exclude it so methodically from application to claims concerning the seabed and foreshore?"[168]

The Waitangi Tribunal has dismissed the notion of a Crown-Māori fiduciary relationship, acknowledging that the Courts have yet to determine whether such duties exist.[169] Similarly, New Zealand courts have consistently refused to accept that the Crown has any private law fiduciary duties that are enforceable in equity against Māori.

The following section outlines the grounds for the existence of Crown-Māori fiduciary duties that already exist in New Zealand. It also considers the issue in the foreground: what to do with the Treaty of Waitangi? Could a New Zealand doctrine of trust

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162 Thomas, above n 156, at 279 (emphasis added).

163 *Guerin*, above n 134, at [100].

164 *R v Sparrow* [1990] 1 SCR 1075; and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

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

166 At 306.

167 Foreshore and Seabed Act 2004, s 13(4).

168 Frame, above n 9, at 81. See generally Claire Charters "Fiduciary Duties to Māori and the Foreshore and Seabed Act 2004: How Does it Compare and What Have Māori Lost?" in Claire Charters and Andrew Erueti (eds) *Māori Property Rights and the Foreshore and Seabed: The Last Frontier* (Victoria University Press, Wellington, 2007) 143.

169 Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 16 June 2009) vol 1 at 1242.

responsibility be based on the Treaty alone? Or could the argument for such duties be made independently of the Treaty?

(1) The Treaty of Waitangi as a ground for trust responsibility

The Canadian development of a Crown fiduciary duty involved the Constitution Act 1982, which "casts upon the Canadian Government the duty to act in a fiduciary capacity".[170] As noted in *New Zealand Maori Council v Attorney-General*: "In New Zealand there is no similar constitution act, but there is the Treaty of Waitangi".[171] Accordingly, "[t]he starting point has to be the Treaty of Waitangi obligations and duties cast upon both the Crown and Maori."[172]

Gendall J proposed that the plaintiffs' true cause of action involves a layering process of private commercial documents, trust deeds and legislative provisions:[173]

> ... the fiduciary obligations exist because of the partnership relationship, as well as the vulnerability of Maori in the sense that they are subject to the Crown's ultimate power to legislate.

His Honour argued that the Treaty created fiduciary duties because of vulnerability (the unequal bargaining power in the Crown-Māori relationship) and the corresponding duties of loyalty and good faith vested in the Treaty partners.[174] According to his Honour: "Fiduciary obligations arise because of the overriding treaty obligations".[175] However, "the Court cannot impose any restriction on Parliament passing such legislation as it thinks fit."[176] If the Crown benefits "to the detriment of possible potential claimants to whom fiduciary duties are owed ... [t]hat may have political, or policy, implications but they are beyond the Court."[177]

On appeal, the Court of Appeal took a different view. They disagreed that the Crown has a fiduciary duty in a private law sense enforceable in equity.[178] The Court found difficulties in applying to the Crown the duty of a fiduciary not to place itself in a position with a conflict of interest. They argued that the Crown would easily find itself in a position where its duty to one Māori claimant group conflicts with its duty to another—or to the population as a whole.[179]

On the one hand, the Treaty of Waitangi contains language of a fiduciary nature: in the preamble, Queen Victoria regards the Māori signatories with her "mahara atawai" (concern to protect) and promises that she will "tiakina ... nga tangata maori katoa o Nu Tirani" (protect all the Māori people of New Zealand).[180] On the other hand, the core

170 *New Zealand Maori Council v Attorney-General* HC Wellington CIV-2007-485-95, 4 May 2007 at [61].
171 At [61].
172 At [52].
173 At [54].
174 At [58].
175 At [66].
176 At [86].
177 At [86].
178 *Te Arawa Cross Claim* (CA), above n 8, at [81].
179 At [81].
180 Te Tiriti o Waitangi 1840, preamble. Translation by Sir Hugh Kawharu as cited in Frame, above n 9, at 78. "The translations provided are those of Professor Sir Hugh Kawharu, whose literal and 'reconstructed' translations into English are widely accepted." At 78, n 30.

fiduciary standard charging one party to act selflessly with undivided loyalty to the interests of the other does not fit comfortably with the relationship established by the Treaty.[181] The language of *exploitation* on the part of the fiduciary and *vulnerability* on the part of the other party is also inapt.[182] That said, the obligation of good faith which permits each party to act in a self-interested manner, while at the same time requiring that party to have regard to the legitimate interests of the other, does arise logically and naturally out of the Treaty.[183] Arguably then the concept could be applied to circumstances arising in the Crown-Māori relationship.

(2) Is the Treaty necessary for trust responsibility?

The Treaty cannot by itself be the source of a fiduciary relationship as it does not create rights directly enforceable in New Zealand.[184] Fiduciary obligations based on Treaty rights must have a statutory basis.[185] Brookfield instead asks whether fiduciary duties or equitable obligations like those recognised in North America **"**could … survive in New Zealand in a context outside that of the Māori Land legislation and independently of the Treaty?**"**[186] He argues that there is no reason why fiduciary duties must be based exclusively on the Treaty.[187]

Many academics have argued that a fiduciary relationship between the Crown and Māori has a sound foundation in a combination of the Treaty of Waitangi, the *unique nature* of aboriginal title and the historical course of dealings. The Treaty of Waitangi does not give rise to a fiduciary duty alone, but is part of the **"**course of specific dealings between Maori and the Crown**"** which together could establish such a relationship.[188] Importantly, any fiduciary duty should be grounded in the **"**historic transfer of power and the events of the time**"**[189] which are merely reinforced by the Treaty as **"**an explicit and formal assumption of responsibility**"**.[190]

Certain historical factors have appeared to strengthen the imposition of a fiduciary duty on the Crown in the Supreme Court of Canada.[191] These factors include the **"**mandatory interposition of the Crown between [indigenous peoples] and other parties in dealings with [indigenous] land interests**"**.[192] This feature is also present in the New Zealand context—and the circumstances giving rise to the *Wakatū* case—in the form of the pre-emption clause contained in art 2 of the Treaty of Waitangi and its subsequent incorporation in early New Zealand legislation.[193]

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181 Thomas, above n 156, at 279.
182 At 279.
183 At 279.
184 *Paki* (HC), above n 28, at [116].
185 PG McHugh **"**What a difference a Treaty makes – the pathway of aboriginal rights jurisprudence in New Zealand public law**"** (2004) 15 PLR 87 at 94.
186 FM Brookfield **"**Aspects of Treaty of Waitangi Jurisprudence**"** in Jacinta Ruru (ed) *"In Good Faith": Symposium proceedings marking the 20th anniversary of the Lands case* (New Zealand Law Foundation, Wellington, 2008) 87 at 93.
187 At 94.
188 Thomas, above n 156, at 279.
189 Pang, above n 20, at 254.
190 Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 249.
191 Frame, above n 9, at 78.
192 At 78.
193 For example, see New Zealand Constitution Act 1852 (UK), s 73.

In North America pre-emption was a significant factor in the finding of a fiduciary relationship between the Crown and indigenous peoples. The right of pre-emption was present in New Zealand also, arising from the New Zealand Land Claims Ordinance 1841 and contained in Lord Normanby's original instructions.[194] This right of pre-emption is what gave the Crown *complete and absolute* control over Māori land dealings—and led to the *Wakatū* Land Grants.

Another potential source of a Crown fiduciary duty is the historic course of dealing between the parties. Historical evidence—such as Lord Normanby's 1839 colonisation instructions to Captain Hobson—appears to point to Crown intentions of a fiduciary nature.[195] These contain "several expressions indicative of a fiduciary duty assumed by the Crown" and indicate an awareness of the inherent power imbalance between the Crown and Māori.[196] They even suggest the existence of a fiduciary duty on the Crown at the time.[197]

Therefore, the Treaty of Waitangi is not a necessary basis for a judicial finding of a Crown-indigenous fiduciary duty. The fiduciary duty does not need to be "derived from common law in association with Treaty principles".[198] It could arise from the circumstances of the course of dealing between the Crown and the indigenous peoples. In this way the Treaty is merely further evidence of the manner of those courses of dealing. Accordingly, the fact that the Treaty of Waitangi is not part of law and may only be enforced when incorporated into legislation does not prevent it from strengthening the case for a fiduciary duty.[199]

VII The Trust Doctrine in Action: *Wakatū*

The *Wakatū* case involves complex legal issues regarding breach of trust and fiduciary duties. The plaintiffs claim that the Crown failed to implement reserves of one-tenth of the land acquired for the New Zealand Company settlement in the 1840s, which were promised to the Māori vendors.[200] These claims are based on express trust, resulting trust and constructive trust, with additional claims based on a relational duty of good faith and breach of fiduciary duty.

The claims in *Wakatū* are extensive and raise a number of different issues than those put forward in *Paki.* Whether fiduciary duties or relationships of trust exist is determined against a "close examination of the facts" in the particular case.[201]

A *The facts of the case*

In 1839 the New Zealand Company (the Company) entered into deeds with Ngāti Toa chiefs at Kapiti and Te Atiawa chiefs at Queen Charlotte Sound to acquire 20 million acres

194 Pang, above n 20, at 254.
195 See Lord Normanby's Instructions to Captain Hobson of 14 August 1839 as cited in W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, London, 1971) at 10–14.
196 Frame, above n 9, at 78.
197 At 78.
198 At 79.
199 *Hoani te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC) at 325.
200 *Wakatū Direct Appeal*, above n 12, at [3].
201 At [5].

of land in the Cook Strait region, including areas which later became the Nelson settlement. These deeds included a promise to reserve to the chiefs, their tribes and their families a "portion of the land ceded by them, suitable and sufficient for the residence and proper maintenance of the said chiefs, their tribes, and families" and to hold that land "in trust by them for the future benefit of the said chiefs, their families, tribes, and successors, for ever".[202] This promise reflected the Company's instructions to Edward Gibbon Wakefield to:[203]

> [Take] care to mention in every *booka-booka*, or contract for land, that a portion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe.

In 1841 the Land Claims Ordinance was passed and this confirmed the Crown's right of pre-emption—that is, that all titles to land in New Zealand would be null and void unless allowed by the Crown, excepting aboriginal and customary title.[204] Under the Ordinance, inquiries were conducted into all previous purchases of land from Māori on equitable terms. Commissioner Spain undertook the relevant inquiry into the land at issue in these proceedings and he reported that all land sold to the Company could be granted to it "saving and always excepting" the pa, burial grounds and cultivation areas of Māori.[205] Following this report, the Crown granted 151,000 acres of land to the Company in 1845 for the purposes of the Nelson Settlement (the 1845 Crown Grant) with the "entire quantity of land so reserved for the Natives being one-tenth of [the] 151,000 acres" granted to the Company.[206]

The Tenths were never reserved. In 1948 a new Crown Grant was made which made no mention of the reserved Tenths. In 1977 the remnants of the Nelson Tenths ultimately vested in the first plaintiff, the Wakatū Incorporation (Wakatū)—a Māori incorporation of the beneficial owners of the land legally vested in Wakatū.[207] The second plaintiff, Mr Stafford, is a kaumātua of Ngāti Rarua and Ngāti Tama, as well as a descendant of those intended to be beneficiaries of the Tenths. The third plaintiff is Te Kāhui Ngahuru Trust, established in 2010 by Mr Stafford for the purpose of representing the beneficiaries of claimed trusts over the Nelson Tenths.

B *The issues*

The plaintiffs contend that the circumstances of the relationship created by the 1845 Crown Grant give rise to private trust and equitable obligations and that there have been breaches of those obligations by the Crown.[208] In the High Court they argued that due to the 1845 Crown Grant, the Crown agreed—as a matter of private law—to hold on trust one-tenth of the land it acquired (at least 15,100 acres) as an endowment for local Māori

202 *Wakatū* (CA), above n 6, at [2].
203 *Wakatū* (HC), above n 151, at [1].
204 New South Wales Act 4 Vict No 7 Repealed Ordinance 1841 4 Vict No 2, cl 2. The Ordinance is commonly referred to as the Land Claims Ordinance 1841.
205 *Wakatū* (CA), above n 6, at [4].
206 At [4].
207 Wakatū Incorporation Order 1977.
208 *Wakatū* (CA), above n 6, at [8].

and their descendants forever.[209] The plaintiffs submitted that under an 1840 agreement between the Crown and the Company, the Crown agreed to assume responsibility for creating the Nelson Tenths and "[t]he conscience of the Crown was affected by that assumption of responsibility."[210] On this basis Māori had to—and did—repose "trust and confidence" in the Crown.[211] The plaintiffs submitted that the 1845 Crown Grant "crystallised" the private law trusts of the Nelson Tenths, which created equitable property rights over that land in favour of Māori.[212]

Despite all of this, the Crown did not fulfil the commitment as the full one-tenth was never allocated. Pa cultivations and burial grounds were not separated out and the Crown further removed land originally reserved. At no stage did Māori consent to these changes in position or control over the situation—the Crown was acting on their behalf and managing their interests.

The plaintiffs sought declarations that the Crown had failed to honour their obligations and is "liable for that breach of trust and must be held to account accordingly".[213] Alternatively, the plaintiffs sought declarations that the Crown breached broader fiduciary or public law duties, and sought equitable relief on that basis. The Crown acknowledged that it breached Treaty obligations regarding these matters, but argued that no private law trust ever came into existence and no legal obligations enforceable in the Court were breached, either of a private or public law character.

Six separate causes of action were pleaded in the High Court. Of these, three causes of action are based on more general equitable principles:[214]

(1) The Crown owed a more general relational duty of good faith to Māori, and their breach of this duty also gave rise to a remedial constructive trust regarding certain Nelson Tenths Reserve land;
(2) The Crown's treatment of certain Nelson Tenths Reserve land breached fiduciary duties owed to Māori by the Crown, giving rise to a remedial constructive trust; and
(3) The Crown's treatment of certain Nelson Tenths Reserve land was "unconscionable or fraudulent" behaviour, giving rise to an institutional constructive trust.[215]

The common thread running through each pleaded cause of action was the "unconscionable action of the Crown" in representing Māori interests but failing to protect their entitlement, with the result being that the Crown gained land it did not own while Māori were disenfranchised.

The plaintiffs sought declarations that:[216]

(1) The Crown was obliged to reserve and hold on trust in perpetuity the 15,100 acres and one-tenth of any further land acquired, and that it failed to do so;
(2) The land now owned by the Crown in the Nelson settlement area is held on constructive trust for the benefit of the descendants of the original customary owners; and

209 *Wakatū* (HC), above n 151, at [2].
210 At [28].
211 At [28].
212 At [28].
213 At [2].
214 At [29]–[33].
215 At [33](b).
216 At [34].

(3) The Crown is obliged to restore the endowment to the position it would have been in had no breach of trust occurred (either by transferring substitute land, by paying compensation or by accounting for the profits of sale).

The Attorney-General offered three arguments in defence:

(1) That the Crown was "acting as government" throughout, in a "fundamentally public capacity".[217] As in *Tito v Waddell*, the Attorney-General argued that any references to trusts were to "trusts of the higher, or public law, sense".[218]
(2) In terms of private law requirements, "no trust of any sort came into existence" and any "claims of fiduciary or more general duties of good faith [could not] be sustained".[219]
(3) Lastly, the plaintiffs "[did] not have standing to bring these claims", or, alternatively, the claims were "barred either by the Statute of Limitation or by the doctrine of laches for delay".[220]

The Court rejected the plaintiff's claim that the Crown owed a relational duty of good faith to Te Tau Ihu Māori in the 1840s, which it breached. Referencing *Paki*, the Court found that there was nothing to suggest that such a relational duty of good faith currently exists as a matter of New Zealand law[221]—nor that, if there was such a duty today, it was open to the Court to retrospectively recognise its existence.

Moreover, the High Court, following obiter in *Paki* and Canadian authorities, held that the Crown does not owe "a fiduciary duty at large to its indigenous people or a group of them".[222] Therefore the plaintiff's claim that a fiduciary duty did exist must be considered in light of close analysis of the particular factual and legal context. The High Court held that in the 1840s the Crown was involved in an "exercise which fundamentally involved the balancing of competing interests"—that is, the Crown was balancing the interests of Māori vendors against other parties, including the settlers of the Nelson area and the general New Zealand population.[223] The Crown's pre-emptive right was found to count against the existence of a duty of absolute loyalty to Māori.[224] Emphasising the essential feature of a fiduciary duty, namely the existence of a duty of absolute loyalty and good faith, the High Court held that such private law duties in the current case would be fundamentally incompatible with the Crown's role as government.[225]

As the High Court also found that the plaintiffs did not have standing to pursue such claims, the fiduciary duty issue was not taken any further.

C *The effect of the Waitangi Tribunal on this doctrine*

The Crown advanced the argument that the existence of private law claims unnecessarily strains settled legal principles, particularly when alternative remedies existed through the Treaty of Waitangi settlement process. This is important because the issues in the case at hand (the Crown's alleged failure regarding the creation and maintenance of the Nelson Tenths reserves) were grievances advanced before the Waitangi Tribunal in its

217 At [35].
218 At [35].
219 At [35].
220 At [35].
221 At [266].
222 At [281].
223 At [301].
224 At [307].
225 At [310].

inquiry into Te Tau Ihu.[226] Notably, Tainui-Taranaki iwi have initialed deeds with the Crown to settle their Treaty claims and these settlements, once formally executed and legislated for, will extinguish any private law rights to the Nelson Tenths, such as in these proceedings.[227]

Crown lawyers have consistently argued that legal claims predicated upon a relationship of an imbalance of power between Māori and the Crown (due to the economic and social consequences of colonisation) relate to grievances under the ambit of the Waitangi Tribunal. This body has jurisdiction and processes designed to deal with historical complaints. As claims based on alleged breaches of a fiduciary duty owed by the Crown are often pleaded as a Treaty breach, they are considered to be non-justiciable in ordinary courts. Yet supporters of a Crown-Māori fiduciary duty argue that if the facts justify the finding of such duties, alternative processes are irrelevant. These can be taken into account in the awarding of remedies, but the existence of other remedies—especially non-legal remedies, such as those provided by the Waitangi Tribunal—is not determinative. As Wakatū chairman, Paul Morgan, stated: **"**[a]s Maori we have property rights like everybody else and we are entitled to have them protected in the first instance.**"**[228]

By commencing these proceedings, the plaintiffs are clearly expressing their dissatisfaction with either (or both) the *process* and *substantive outcome* of the Treaty settlement negotiations.[229] One reason for this is that there are members of Wakatū who are not members of any of the four Tainui-Taranaki iwi and, therefore, would not qualify for any Treaty settlement.[230] This alone is a good reason for the court to seriously consider the merits of any argument based on fiduciary duties. Yet many historical grievances remain. Many Māori feel badly let down by the Native Land Court and by the Crown in relation to the pre-emptive purchase of land.[231] Additionally, Tribunal processes often do not secure for Māori the outcomes which they had hoped for (such as in the case of Wakatū).

VIII Further Application of the American Doctrine

The American judiciary has confirmed that whenever Congress removes an indigenous people's ability to manage its own resources—and instead confers that power on a federal agency—courts **"**must infer that Congress intended to impose on [that agency] traditional fiduciary duties unless Congress has equivocally expressed an intent to the contrary**"**.[232] In *Wakatū*, Māori land was clearly removed and placed under the power of the Crown, with an agreement that reserves would be set aside. This is one aspect of *Wakatū* which evinces the need for a finding of fiduciary duties owed to Māori. The following section of this article will outline further elements of the *Wakatū* case which

226 At [11].
227 At [12].
228 Laura Basham **"**Wakatu Incorporation fight to go to the Supreme Court**"** *Nelson Mail* (online ed, New Zealand, 9 May 2015).
229 *Wakatū* (HC), above n 151, at [13].
230 At [16].
231 *Paki* (CA), above n 14, at [113].
232 *National Labor Relations Board v Amax Coal Co* 453 US 322 (1981) at 330.

point towards such a duty being owed, including interpretive presumptions that should exist in New Zealand jurisprudence.

A *Interpretive presumptions*

The trust obligation of the United States towards Indians and tribes also constrains congressional power in a procedural sense.[233] Consistent with the doctrine of trust responsibility and the fiduciary duties it creates, the United States Supreme Court has developed canons of construction that must be used to interpret doubtful expressions in treaties or statutes regarding federal duties *liberally* in favour of the Indians affected.[234] Because of the "unique trust relationship between the federal government and Native Americans", if any ambiguities in a statute can "reasonably be construed as the Tribe would have it construed, it must be construed that way".[235] Under the trust doctrine, federal officials are to "interpret their responsibilities broadly" and "to the maximum extent allowable" under the treaty or statute being implemented.[236]

These canons of construction were first developed in treaty cases. The development of the canons was never based on the form of the transaction (whether treaty or statute) but arose from the special trust relationship between the tribes and the United States.

Acknowledging the unequal bargaining power of the signatories—partially due to the language and negotiating skills used at the time—the courts have required: that treaty terms are to be interpreted as Indians would have understood them at the time of signing;[237] that treaties are to be liberally construed in favour of the Indians;[238] that ambiguous expressions are to be resolved in favour of Indians;[239] and that treaties are to be interpreted to promote their central purpose and give effect to their provisions. Essentially, ambiguities are to be resolved in favour of indigenous people.[240]

Similar rules of construction have been applied to situations that do not involve treaties.[241] Statutes, agreements and executive orders have also been construed liberally in favour of Indian rights and interests.[242] The principle that there must be a "clear and plain statement" of congressional intent before Indian rights can be abrogated also applies in non-treaty contexts.[243]

Interpretation—statutory and otherwise—is now generally accepted to be "contextual and purposive in character".[244] Another important principle is that, where the option is open, a statute should not be construed to encroach upon common law rights and freedoms.[245] Accepted throughout common law jurisdictions, this principle forces Parliament to be irrefutably clear when they wish to overthrow fundamental legal

233 Strickland, above n 38, at 221.
234 See *Montana v Blackfeet Tribe* 471 US 759 (1985) at 766.
235 *Muscogee (Creek) Nation v Hodel* 851 F 2d 1439 (DC Cir 1988) at 1445.
236 Pevar, above n 3, at 34.
237 *United States v Winans* 198 US 371 (1905) at 380–381. See also the case list in Strickland, above n 38, at 222.
238 *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Voigt* 700 F 2d 341 (7th Cir 1983).
239 *McClanahan v State Tax Commission of Arizona* 411 US 164 (1973) at 174.
240 *Winters v United States* 207 US 564 (1908) at 576.
241 Strickland, above n 38, at 223.
242 At 224.
243 At 224.
244 Finn, above n 106, at 340.
245 At 340–341.

principles or infringe rights—forcing Parliament to acknowledge what it is doing and to *accept the political cost*.[246]

Using these canons of construction would aid plaintiffs in cases such as *Wakatū.* It would also help to establish the trust doctrine in New Zealand.

B *Grounds for the trust doctrine in* Wakatū

Despite continued judicial reluctance to make such a finding, the elements required for a fiduciary duty between the Crown and Māori in the case of *Wakatū* seem to be satisfied. To follow the *Frame v Smith* test: the Crown exercised their discretion or power (in purchasing the land and enacting the Reserves scheme); this exercise of power affected the beneficiaries' legal and practical interests in depriving them of possession and ownership of that Tenths Reserve land; and the beneficiaries were (and still are) vulnerable and at the mercy of the Crown.

Historically, Māori **"**did not have the resources to combat the colonists … they relied on the good faith of the colonial representatives … [and] they suffered due to their vulnerability to the Crown**"**.[247] This was certainly the case here. I contend that this meets the requirement for vulnerability on the part of Māori. In any case, as has already been established, vulnerability is not definitively required for the finding of a fiduciary relationship.[248]

To further their case, Wakatū are able to ground their claim for fiduciary duty in an instrument—again, an undertaking is not strictly required for a fiduciary relationship to exist, but it does strengthens the case for one. There were many such undertakings in this course of dealing, including: the deeds entered into with the New Zealand Company; the promises contained in those deeds; the Company's instructions; the 1841 Land Claims Ordinance; Commissioner Spain's Report; the Crown Grants; and the later Crown Grants. It could also be argued that the Crown made undertakings to the plaintiffs through the Treaty of Waitangi.[249] However, this need only be in addition to the separate pieces of legislation and personal agreements. Altogether, these undertakings provide a layered base for the establishment of such a duty. In light of this, as well as the practical circumstances and the power imbalance at the time, the United States canons of construction would certainly favour the Māori plaintiffs.

IX Conclusion

Fiduciary law is a central part of the law of equity. Its central focus is the **"**trusting relationship**"** where the fiduciary is expected to act in the interests of the beneficiary.[250] Because there is an opportunity for the fiduciary to benefit, equity sets duties of loyalty to discourage behaviour that is inconsistent with the nature of the relationship.

It has become more common in recent years for international jurisdictions, such as the United States, to expand the reach of fiduciary duties by establishing new doctrines like the trust responsibility owed by the government to indigenous peoples.

246 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131.
247 Lanning, above n 100, at 457.
248 Pang, above n 20, at 257.
249 Lanning, above n 100, at 453–454.
250 Butler, above n 23, at [17.1].

There is scope for the further development of fiduciary obligations in New Zealand law.[251] The key question is whether New Zealand courts will be prepared to follow North American jurisprudential development in expanding the fiduciary concept to include the relationship between the government and indigenous peoples.

In finding a fiduciary duty owed by the Crown, the approach of United States courts remains faithful to general fiduciary principles. What must be shown is that, in the actual circumstances of the relationship, one party is entitled to expect that the other will act in his interest in and for the purposes of the relationship: "Ascendancy, influence, vulnerability, trust, confidence or dependence" will undoubtedly be important in establishing this, but "only to the extent that they evidence a relationship suggesting that entitlement".[252]

Even if such a doctrine of trust responsibility was not always enforceable—due to parliamentary sovereignty in New Zealand—it would nevertheless have significant political power and influence on the nation's development. The Crown must not "unilaterally ignore the promises that it made to [indigenous] peoples or the situation of dependence that it created without legal implication based on fiduciary principles".[253]

At its core is the obligation of one party to act for the benefit of another, which may derive from various sources. In *Wakatū*, the plaintiffs demonstrate how Māori placed their trust and confidence in the Crown and relied upon its honour, in relation to their lands. Due to the language they used, their experience and the right of pre-emption, the Crown was in a privileged position and Māori were placed in a disadvantaged position of dependency. As a result, they experienced a process of land alienation.

In this case, there are strong grounds for finding a trust responsibility owed by the Crown—the essence of such a fiduciary duty deriving "from principle and the legal nature of the relationship itself".[254] Regardless of whether there was a power imbalance, vulnerability or disadvantage, the requirement of absolute loyalty can still be met: "the fiduciary must act solely and selflessly in the interests of the beneficiary".[255] While the concept of a Crown-Māori fiduciary relationship remains contentious, recognising a fiduciary relationship similar to the North American doctrine of trust responsibility would become a cornerstone of indigenous legal development in New Zealand.

251 Thomas, above n 156, at 279.

252 PD Finn "The Fiduciary Principle" in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) 1 at 46.

253 Leonard Rotman "Conceptualizing Crown–Aboriginal Fiduciary Relations" in Law Commission of Canada (ed) *In Whom We Trust: a Forum on Fiduciary Relationships* (Irwin Law, Toronto, 2002) 25 at 54.

254 *Paki* (HC), above n 28, at [132].

255 *DHL International (NZ) Ltd v Richmond Ltd*, above n 32, at 23.