The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship

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I: INTRODUCTION

> Once seen only in familiar environments - trusts, partnerships, agencies and the like - "fiduciary" has become the peripatetic adjective.[1]

The notion of the fiduciary relationship and its associated obligations has expanded rapidly over recent times. This article will examine the imposition of fiduciary obligations in the area of the Crown-Maori relationship.

In the course of examining the relationship between the Crown and Maori, the New Zealand Court of Appeal in *New Zealand Maori Council v Attorney General*[2] recognised that the responsibilities created by the relationship were analogous to fiduciary duties.[3] This has been followed by recognition of the same principle in subsequent Court of Appeal decisions. These decisions have drawn upon the jurisprudence of other countries in the common law world, particularly Canada.[4] There appears to be a general trend towards greater recognition of a duty owed in

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1 Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1.

2 [1987] 1 NZLR 641. This case concerned the State-Owned Enterprises Act 1986, specifically ss 9, 23, and 27, and the meaning of the phrase "principles of the Treaty of Waitangi".

3 For general discussion see McHugh, *The Maori Magna Carta* (1991) ch 8.

4 Other sources have been the United States of America where the "State Trust Doctrine" is well established, and now Australia with *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

equity by the Crown to indigenous peoples. There is a fear that, as often occurs in the area of indigenous people's rights, this action could be met with an equally large reaction:[5]

> Each action in the direction of the recognition and affirmation of Aboriginal rights in Canada, or the appropriate and principled characterization of Aboriginal-Crown relations, seems to prompt an equal and opposite reaction against giving rights or duties significant content. These ironies and principles are manifest in the recognition of the fiduciary relationship and the reticence to give it legal content through enforceable obligations and duties.

While there is a growing body of indigenous rights jurisprudence it is impossible to predict the impact it will have in the future. As will be revealed, the "fiduciary relationship" between the Crown and indigenous peoples rests on a very tenuous footing. Seemingly insurmountable problems occur when the questions of scope of liability and remedy are tackled. Traditional fiduciary law does not sit easily with the enormous policy considerations at issue. However, the fiduciary relationship may provide a useful framework upon which Maori claims against the Crown can be structured. It is a model that is far less vulnerable to the changing tide of politics, and that has a clarity often lacking in arguments framed in terms of constitutional law. One of the huge potential benefits for Maori, if a fiduciary relationship is established, is the wide array of remedial measures available for breach.

This paper will examine the issues in the following manner. First, it will ask whether it is possible to establish a "fiduciary relationship" between the Crown and Maori. This appears to be a less difficult hurdle to overcome in New Zealand than in the other jurisdictions. Second, this paper will attempt to define the liability of the Crown. This can be done by either defining the scope of the obligations, or by using notions of remoteness to limit liability. Both courses of analysis will be discussed. Third, there will be a discussion of ways in which a breach of the fiduciary duties can occur in this context. Finally, the issues related to remedies available for a breach of the obligations will be discussed.

II: ESTABLISHING A FIDUCIARY RELATIONSHIP

1. General Principles of the Fiduciary Relationship

Traditionally the concept of a "fiduciary obligation" was limited to relationships such as those found between trustee and beneficiary, solicitor and client, agent and principal. However, the principles underlying these relationships

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5 Hutchins, Schulze, and Hilling, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask L Rev 97, 98 (footnotes omitted).

have been extended into a number of other contexts including that which is the subject of this paper. It is clear that the categories of fiduciary obligation, like those of negligence, are not closed.[6] However it is vital, if the fiduciary doctrine is going to be utilised in different arenas, that a framework or set of principles is ascertained. The Canadian courts have developed what is perhaps the most sophisticated and, in this context, most useful body of jurisprudence with respect to fiduciary relationships.[7] However, Mason points out that, in his opinion, "there has been in Canada a greater willingness to find a fiduciary relationship than in Australia and New Zealand, reluctance to do so being perhaps even more marked in England."[8]

A useful starting point is the approach enunciated by Wilson J in *Frame v Smith.*[9] Her three point analysis has subsequently been adopted by the majority of the Supreme Court of Canada[10] and the New Zealand Court of Appeal.[11] Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:

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

According to a number of authorities the element of discretion is the sole essential element present in all fiduciary relationships:[12]

> The fiduciary obligation is the law's blunt tool for the control of this discretion. Its operation circumvents the need for inquiring into the good faith of the agent's behaviour by concentrating on the possibility that delegated discretion may be influenced by considerations of personal advantage.

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6 *Guerin v The Queen* [1984] 2 SCR 335, 384 per Dickson J. Approved in *LAC Minerals Ltd v InternationalCorona Resources Ltd* [1989] 2 SCR 574, 645 per La Forest J.

7 The landmark cases of *Guerin*, ibid, and *R v Sparrow* [1990] 1 SCR 1075 have been approved by both the New Zealand Court of Appeal and the High Court of Australia. See also supra at note 4 and accompanying text.

8 Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 3, 11.

9 [1987] 2 SCR 99, 136.

10 *LAC Minerals*, supra at note 6 at 645-646 per La Forest J and at 598-599 per Sopkina J; *Blueberry River Indian Band v The Queen in Right of Canada* [1995] 4 SCR 344, 371 per McLachlin J.

11 *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 22 per Richardson J.

12 Weinrib, "The Fiduciary Obligation" (1975) 25 Univ of Toronto LJ 1, 4. Cited and approved in *Guerin*, supra at note 6 at 384 per Dickson J.

This comment also raises the issue of whether the fiduciary doctrine is essentially a method of protecting those institutions that public policy deems as being worthy of protection. Weinrib notes that the development of the fiduciary doctrine has been anything but structured as the courts have expanded its use from trust law to a wide array of situations and contexts:[13]

> This piecemeal treatment, effective enough for the disposition of individual disputes as they arise, has not on the whole been appropriate for the elucidation of the broader problems of policy which underlie the whole fiduciary concept. Why is it that certain categories of actors and certain types of acts are singled out for the application of the fiduciary standard and its attendant severe remedies?

Tying in with Wilson J's second point that the discretion must affect the principal's legal or practical interests, Weinrib also points out the consequences of the fiduciary exercising the discretion:[14]

> Two elements thus form the core of the fiduciary concept and these elements can also serve to delineate its frontiers. First, the fiduciary must have scope for the exercise of discretion, and, second, this discretion must be capable of affecting the legal position of the principal.

Justice Wilson's third point is a corollary of the second. As the fiduciary can exercise a discretion which can affect the interests of the principal (or beneficiary) the principal is vulnerable to the fiduciary. In some contexts public policy will dictate that this vulnerability is deserving of protection by equity. There is some debate over whether the existence of "vulnerability" is sufficient in itself to warrant the imposition of a fiduciary obligation. There is authority for the proposition that it is not sufficient but that it is still a relevant consideration.[15] On the other hand there is the view that vulnerability by itself is sufficient.[16] The former view is preferable because one party can be vulnerable to another for various reasons. If it is accepted that the doctrine's function is to proscribe the use of a discretion or power then the only relevant vulnerability can be that which

13 Ibid, 1. See also La Forest J in *LAC Minerals*, supra at note 6 at 672: "[t]he essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions".

14 Ibid, 4 (footnotes omitted).

15 *LAC Minerals*, supra at note 6 at 662 per La Forest J; see also Finn, supra at note 1 at 46: "[w]hat must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement".

16 Ibid, 599 per Sopkina J. Sopkina J thought the existence of vulnerability was "indispensable" to the existence of a fiduciary relationship. He relied on the views of Dawson J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, at 142 and Weinrib's opinion that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion"; supra at note 12, at 7.

flows from the potential of a power or discretion being exercised. So vulnerability may be seen as the consequence of the potential for a power or discretion being exercised. For example, a beneficiary of a trust is only vulnerable vis à vis the trustee because the trustee is able to exercise a discretion that can directly affect the beneficiary's interests.

Justice La Forest in *LAC Minerals Ltd v International Corona Resources Ltd* pointed out that "[m]uch of the confusion surrounding the term 'fiduciary' stems from its undifferentiated use in at least three distinct ways".[17] The second use seems apt for the purposes of this paper:[18]

> The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected.

So the question must be asked: do the specific circumstances of the Crown-Maori relationship give rise to fiduciary obligations?

Before answering this question it is useful to examine other jurisdictions where fiduciary obligations have been imposed on the state with respect to its dealings with indigenous peoples. As the circumstances of each jurisdiction are unique, it is preferable, perhaps critical, that any fiduciary obligation be based on the broad fiduciary principles discussed above, rather than any strict analogy with the overseas case law.

III: FIDUCIARY OBLIGATIONS AND THE CROWN-MAORI RELATIONSHIP

1. Recognition of State Fiduciary Obligations in Other Jurisdictions

Both North American jurisdictions have recognised a fiduciary-like relationship existing between the State and First Nations peoples.

In the United States, the "trust doctrine" with the Federal State as trustee and the Indians as beneficiaries, has been developing since the early 19th century. It appears to have its origins in dicta from two decisions by Chief Justice Marshall in

17 *LAC Minerals*, supra at note 6 at 646.

18 Ibid, 648. The first use arises where the fiduciary obligations are presumed to exist from the factual or legal incidents of the relationship (eg: trustee and beneficiary, agent and principal). The third use arises where the court merely uses the language of the fiduciary doctrine in order to make use of associated remedies, appropriate to the circumstances, which might not otherwise be available: see ibid, 649-652. La Forest J sees this as reading equity backwards and thus as a misuse of the term "fiduciary": ibid, 652.

the 1830s.[19] Chief Justice Marshall did not draw on any legal precedent (there was none!) but on normative first principles. This was clearly a reflection of his own moral views on the matter. He found a "trust-like" relationship out of the circumstances of the State-Indian relationship, that is, the superior position of the State vis à vis the First Nations. As a result of the superiority of the State, there was a duty to protect the Indians. Chief Justice Marshall said in *Cherokee Nation v Georgia*, that the Indian Tribes "may, more correctly, perhaps, be denominated domestic dependent nations .... [T]hey are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian".[20] There are two elements in this conclusion that are manifestly at odds. It is acknowledged that the First Nations have the status of nations and yet, in the same breath, they are to be treated as children. It appears that many courts have placed most emphasis on the latter leading to a situation where the "trust doctrine" has been used against the interests of the Indians.[21]

It has been argued that this "trust" model is preferable to the more general "fiduciary" model.[22] The major reason given is that there is a larger body of law relating to trusts than to fiduciary obligations. The Canadian cases emphasise however that the relationship between the Crown and indigenous peoples is *sui generis*. So while it may resemble a trust or fiduciary relationship, the public law aspects cannot be ignored. It is these aspects that can affect the scope of the obligation and the remedies available. It is contended in this paper that the trust model is too restrictive. The fiduciary model, by virtue of its more principle-based approach, has the ability to adapt to this new context. In this manner it results in a more "honest" representation of the relationship.

The Canadian decisions rely more heavily on fundamental fiduciary principles, with analogies made to trust principles when they are seen as useful. The seminal case is that of the Supreme Court in *Guerin v The Queen*.[23] A detailed review of the facts is not necessary. Suffice to say that an Indian band surrendered their land to the Crown for lease to a golf club. The lease secured by the Crown was not on the same terms as that specified by the band. Consequently the band obtained a lower rent than that which they approved. The seven judges all agreed that the Crown was liable to the band because it had breached its fiduciary obligations. The two principal judgments are those of Dickson CJ and Wilson J.

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19 *Cherokee Nation v Georgia* (1831) 30 US 1, 8 L Ed 25; *Worcester v Georgia* (1832) 31 US 515, 8 L Ed 483. A good discussion is found in Note "Rethinking the Trust Doctrine in Federal Indian Law" (1984) 98 Harv L Rev 422.

20 (1831) 30 US 1, 8 L Ed 25, 31.

21 See Note, supra at note 19, at 427, where the writer states "Congress used this [plenary] power to seize tribal lands without just compensation, to disband tribes, and to exploit tribal assets as the government saw fit, contrary to the tribes' express wishes. A theory of "trust" that permits, indeed invites, such oppression of the 'beneficiary' is plainly a misnomer, and a cruel one."(footnotes omitted).

22 Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in Youdan, supra at note 1 at 423.

23 Supra at note 6.

Chief Justice Dickson was of the opinion that the fiduciary relationship predated the surrender of the land because of the nature of the pre-existing Indian title and the Crown's statutory obligation to the First Nation peoples. The statutory obligations stemmed from the "surrender" requirement.[24] Dickson J noted that the "purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited".[25] Upon a surrender the Crown has a discretion, pursuant to the Indian Act 1970 ("the Indian Act") to decide what is in the "best interests" of the native peoples.

The Crown's conduct in not leasing the land on the terms specified by the band was clearly a breach. While the relationship was not a trust relationship per se, it was trust-like, and while it was like an agency, the Crown was not an agent. This was a *sui generis* relationship although many trust principles could be applied, such as the measure of damages for breach.

Chief Justice Dickson's judgment is rich with the language of unconscionability and he concluded that "the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppel".[26] This conclusion will be referred to below with respect to breach.

Justice Wilson saw the Indian Act as recognising the existence of a fiduciary relationship, rather than creating one. She saw breach occurring when "the Crown acted in breach of trust when it barrelled ahead with a lease on terms which, according to the learned trial judge, were wholly unacceptable to its *cestui que trust*".[27] JusticeWilson then moved on to the difficult issue of measure of damages. The band was awarded damages to compensate for the "lost opportunity" in not being able to use the land in the most profitable manner. This will be discussed in more detail below.

Guerin, or more correctly, the spirit of *Guerin*, has been approved and applied in subsequent Supreme Court decisions.[28] For example in *R v Sparrow* Dickson CJ and La Forest J interpreted the section of the Constitution Act in question and concluded that:[29]

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than

24 Under s 37(9) of the Indian Act 1970, reserve lands can only be sold, alienated or leased after a surrender of the Indian title to the Crown by an Indian band.

25 *Guerin*, supra at note 6, at 383. This was reiterated by McLachlin J in *Blueberry River Indian Band*, supra at note 10 at 370, where she said "the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitive bargains". Note the obvious analogy with the pre-emption clause in the Treaty of Waitangi.

26 *Guerin*, supra at note 23, at 389.

27 Ibid, 355.

28 *R v Sparrow*, supra at note 7; *Blueberry River Indian Band*, supra at note 10; *Kruger v The Queen* [1986] 1 FC 3.

29 *R v Sparrow*, ibid, 1108.

> adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in the light of this historic relationship.

They then went on to develop a test as to whether an enactment would be in breach of the Crown's fiduciary obligation. This is discussed below in relation to the content and breach of obligations.

Closer to home is the High Court of Australia's decision in *Mabo v Queensland (No 2)*.[30] Justice Toohey's judgment is the most relevant for the purposes of this paper, as he relies solely on the fundamental equitable principles surrounding fiduciary relationships. He first deals with establishing the fiduciary relationship. He cites Mason J from *Hospital Products*,[31] refers to the Weinrib article,[32] and stresses the elements of discretion and vulnerability mentioned above.

It was argued by the Crown that, as the Crown can destroy aboriginal title there is no basis for a fiduciary obligation. His Honour rejected this argument on two fronts. The very fact that the Crown has this power or discretion means that there is a vulnerability that gives rise to the need for equitable principles, and secondly, the legislative and executive history reveals an intent to "protect" and care for aboriginal peoples.[33]

The Crown raised, in its defence, the issue of the "political trust" found in *Tito v Waddell (No 2)*[34] and *Kinloch v Secretary of State for India*.[35] These cases found that there were no equitable obligations incumbent upon the Crown. Instead any obligations were clearly founded in the political arena. This was again rejected by distinguishing those cases:[36]

> Ultimately the decisions in both *Kinloch* and *Tito v Waddell [No 2]* turned on the construction of an instrument to determine whether it created an express trust. The obligation relevant in the present case arises as a matter of law because of the *circumstances of the relationship*.

His Honour established the fiduciary obligations on the relative positions held by the Crown and the Aboriginal people:[37]

> [T]his power and corresponding vulnerability give[s] rise to a fiduciary obligation on the part of the Crown. The power to destroy or impair a people's interest in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. The fiduciary

30 Supra at note 4.
31 Supra at note 16.
32 Supra at note 12.
33 *Mabo*, supra at note 4, at 201.
34 [1977] Ch 106. Viscount Megarry at 222 comforted the residents of the Banaban Islands with the assurance that the trust was a political trust, a trust "in the higher sense".
35 (1882) 7 App Cas 619.
36 *Mabo*, supra at note 4, at 202 (emphasis added, footnotes omitted).
37 Ibid, 203.

relationship arises, therefore, out of the *power* of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power.

His Honour also concluded that the Crown's obligations were "in the nature of the obligation of a constructive trustee".[38] It is submitted that the judgment of Toohey J is one of the most useful in this area as he concentrates on the fundamental elements of a fiduciary relationship, unhindered by matters of legislative interpretation and legislative effect. His Honour's judgment will be referred to further in this paper.

With this brief overview of the manner in which other jurisdictions have dealt with the possible existence of Crown fiduciary obligations, it is now possible to examine the situation in New Zealand.

The following discussion will relate to the above review of the distinguishing themes of a fiduciary relationship. Yet before a fiduciary relationship can arise, there must be an undertaking by the fiduciary to act in the interests of the beneficiary. Once that undertaking has been found, the relationship is examined in an attempt to discover the themes and characteristics discussed above. As part of this discussion the element of property will also be examined, as property is another common theme running through several fiduciary relationships.

2. An Undertaking

It is important to note that there is some opinion that an undertaking is not a necessary requirement for the imposition of a fiduciary responsibility, as it is an imposed obligation rather than an assumed one.[39] In *Mabo,* Toohey J commented:[40]

The undertaking to act on behalf of, and the power detrimentally to affect, another may arise by way of an agreement between the parties, for example in the form of a contract, or from an outside source, for example a statute or a trust instrument. The powers and duties may be gratuitous and may be officiously assumed without request.

What did the Crown undertake with respect to the Maori? The first indication of a Crown undertaking to act in the interests of the Maori is found in the Preamble to the Treaty of Waitangi:[41]

HER MAJESTY VICTORIA Queen of the United Kingdom ... regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and *anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in*

38 Ibid, 204.

39 Supra at note 1, at 54.

40 Supra at note 4, at 200 (footnotes omitted).

41 European version (emphasis added).

> *consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand* ... [is] desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions ... to the native population....

Clearly the Crown was undertaking to protect Maori from the potential dangers or "evil consequences" of colonisation. There was also an undertaking, expressed more fully in the Second Article, that the Crown would respect and protect the undisturbed Maori possession of Maori resources and other taonga.[42] The pre-emption condition in the Second Article serves a similar function to the "surrender requirement" discussed in the Canadian cases above.[43]

Both the Waitangi Tribunal and the Court of Appeal have recognised that Maori exchanged with the Crown the right to make laws for the obligation to protect Maori interests. Justice Richardson in the 1987 *Maori Council Case* considered that:[44]

> There is ... one overarching principle [that] the Treaty of Waitangi must be viewed as a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible. For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees.

The Waitangi Tribunal in the Manukau Report remarked that:[45]

> The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them .... It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights.

It appears that there is sufficient expression of the Crown's undertaking to act in the interests of Maori for the possibility of a fiduciary relationship to exist.

3. Property

It is a requirement in many fiduciary relationships for the fiduciary to hold the property of the beneficiary. This requirement is obviously exemplified in the

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42 The Maori text of the Treaty refers to "taonga", which encompasses all dimensions of a tribal group's estate and cultural heritage, material and non material heirlooms and wahi tapu, ancestral lore and whakapapa etc. See Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (1989).

43 For examples see *Guerin*, supra at note 6, and *Blueberry River Indian Band,* supra at note 10.

44 Supra at note 2, at 673. The Court of Appeal adopted an "equal partner" approach in this case. However, this model was created for the purposes of legislative interpretation. A fiduciary relationship created by a court in its equitable jurisdiction will necessarily be an unequal relationship. See McHugh, "The Role of Law in Maori Claims" [1990] NZLJ 16, 19.

45 *Report of the Waitangi Tribunal on the Manukau Claim (WAI-8)* (1985) 70.

context of a trust. "Upon the assumption of sovereignty over New Zealand the Crown acquired not only title to all land in New Zealand, but also the exclusive right of extinguishing Maori title, either by the free consent of the Maori occupiers or by legislation."[46] The Crown's right of pre-emption under Article 2 of the Treaty confirmed the situation at common law.[47] Presumably if this attitude had continued,[48] Maori would have had the option of using the common law to redress grievances.

Up until 1865, land was acquired by the Crown through the Crown's agents. Large amounts of land were acquired this way.[49] The Maori Lands Acts of 1862 and 1865 created the Maori Land Court which was empowered to ascertain the Maori customary titles and convert them into freehold titles. This then enabled third parties to purchase the freehold directly from the Maori proprietors. The pre-emption requirement was, in effect, side-stepped.

In *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General,* Cooke P referred to *R v Symonds*:[50]

> Chapman J also spoke of the practice of extinguishing native titles by fair purchase. An extinguishment by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.

So while the Crown cannot be said to be "holding" the property in the strict sense, it does have the ultimate power of alienating the land, just as a trustee has the power to alienate the beneficiary's property. This is somewhat analogous to the situation surrounding the "surrender" requirement discussed at length in *Guerin*.[51] It was concluded there by Wilson J that the surrender requirement was a statutory acknowledgment of the fiduciary relationship rather than a source of one.[52]

4. Discretion

The last two themes, namely discretion and vulnerability, are closely related

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46 Hinde, McMorland and Sim, *Introduction to Land Law* (2nd ed 1986) para 1.020 (footnotes omitted).

47 *R v Symonds* (1847) NZPCC 387, 390 per Chapman J, who said "in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled". See also supra at note 46, at para 1.019.

48 The approach changed with the decision of Prendergast CJ in *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (NS) SC 72, where, at 78 he declared the Treaty to be a "nullity". This was the orthodox view up until the late 1970s.

49 Supra at note 46, at para 1.020.

50 *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20, 24.

51 *Guerin*, supra at note 6.

52 Ibid, 348-350.

with the former probably having more importance. However, for the sake of completeness both will be examined.

As was stated above, the Crown had the ultimate power to alienate Maori customary title, either through direct purchase from the Maori occupiers, or through the operation of the Maori Land Court. By virtue of this power it had a discretion. What are "practical interests"? Could they include, in relation to this paper, Maori language, customs, or the right to self autonomy? These issues will be discussed below, in relation to the Crown's liability.

5. Vulnerability

In the words of Wilson J, as a result of the fiduciary holding a discretion of power, "[t]he beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary".[53] As was noted above, there is some opinion that vulnerability is not "a necessary ingredient in every fiduciary relationship",[54] but for the purposes of this discussion it will be assumed that it is necessary. Are Maori vulnerable vis à vis the Crown? The answer must surely be yes; but it must be said that all citizens are vulnerable to the state exercising its powers. What is important here is that the beneficiary is *particularly* vulnerable. Even when the Maori population greatly outnumbered that of the colonists, it is arguable that Maori were vulnerable to the colonists. The British were vastly experienced at colonising and had considerable resources to do so. The Crown was well aware of its own future plans to transport large numbers of people to New Zealand, and was equally aware of the effects it was going to have on the indigenous Maori; hence the concern expressed in the Preamble to the Treaty of Waitangi.

While it is acknowledged that Maori benefited in some respects from the presence of the colonists, they were, with respect, quite ignorant of what would occur. They did not have the resources to combat the colonists. Instead they relied on the good faith of the colonial representatives. The result was that they suffered due to their vulnerability to the Crown. The Crown acknowledged the power differential between Tainui and the Crown in the Waikato Raupatu Claims Settlement Act 1995:[55]

> In July 1863, after considered preparations by the New Zealand Government, military forces of the Crown unjustly invaded the Waikato south of the Mangatawhiri river, initiating hostilities against the Kiingitanga and the people. By April 1864, after persistent defence of their lands, Waikato and their allies had fallen back before the larger forces of the Crown and had taken refuge in the King Country ....

53 Supra at note 9, at 136.

54 *LAC Minerals*, supra at note 6, at 662 per La Forest J.

55 Preamble, para E (emphasis added).

The passage shows both the abuse of the Crown's power or discretion (in deciding to invade the Waikato) and the resulting vulnerability. As will be discussed more fully below, the effect of this type of activity on the part of the Crown led to further vulnerability as the Maori people and their resources were depleted.

It would appear that the judgment of Toohey J in *Mabo* is useful here. His judgment possesses a good degree of doctrinal clarity, and establishes the fiduciary relationship on the basic principles of power, discretion, and vulnerability. President Cooke, as he then was, noted favourably the *Mabo* decision but added also that the New Zealand courts may have a different "conception of the strength of the competing arguments and any others relevant to this country's circumstances".[56] He is clearly alluding to the fact that a fiduciary relationship, in this context, must be adapted to the social and political environment of each jurisdiction. While the relationship can be based on fundamental principles, it is shaped by public policy.

6. A Fiduciary Relationship?

In the context of the Crown-Maori relationship, there appears to be little difficulty in locating the elements which indicate fiduciary obligations. While the Canadian cases are useful in showing a general acceptance of fiduciary duties incumbent upon the Crown, they are tainted with the effect of legislative provisions. The fiduciary relationship is far easier to establish in the case of the Crown-Maori relationship because of the Treaty of Waitangi.

Many of the cases have had to reject the "political trust" concept. The cases from which this concept was born show a great deal of judicial conservatism.[57] It appears that the judges in those cases were concerned with the consequences of finding a fiduciary relationship. Nevertheless, it must be remembered that there are no rights to certain remedies in a court of equity - such remedies are discretionary.

Observers from Europe may think the whole proposition, that indigenous people could have past injustices remedied, as rather odd. Europe has an extensive history of invasions and unlawful land acquisitions. It would be quite absurd, in the context of such a long and complicated history, that unlawfully occupied land could be returned or the loss compensated.

However, like North America and Australia, the New Zealand situation can be distinguished from that of Europe. New Zealand has a relatively short history of immigration. The Treaty of Waitangi outlined the expectations of both the Crown and Maori, and they are essentially the only two parties to the dispute. It is now generally accepted that Maori acquired their traditional title by lawful means. This

56 Supra at note 50, at 25.

57 For example, *Tito v Waddell*, supra at note 34, and *Kinloch v Secretary of State for India*, supra at note 35.

last point raises another approach to fiduciary relationships. Finn concludes that:[58]

> [A] person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interest.

What were the reasonable expectations of Maori when European colonisation began? It is submitted that the Treaty supplies the answers to this question.

With a fiduciary relationship established, the next issue to be examined is what liability will arise from the fiduciary obligation. This issue, and those related to remedies, are fundamental as they determine the substantive effect of the fiduciary relationship.

IV: THE CROWN'S LIABILITY

Justice Fisher in *Cook v Evatt (No 2)*[59] provided the next inquiry in the analysis:

> Even where a fiduciary relationship is established, the scope of the fiduciary's obligations is determined by the nature and extent of the reliance or trust which has been placed by the beneficiary upon or in the fiduciary.

This inquiry is pivotal. If the obligations are defined widely, the Crown will be more open to potential liability, while the reverse will be true if the obligations are prescribed in a limited way. So it is the "content" or "scope" of the obligations which defines liability.

However, there is an alternative way in which to define the parameters of the Crown's liability. A breach of a fiduciary obligation will be said to have "caused" a series of losses. For the purposes of compensation, damages will only be awarded for such of the losses as are not too "remote" from the breach,[60] and it is for this damage only that the Crown will be liable. Issues of causation and remoteness constitute relatively uncharted waters for equity, but as the use of the fiduciary relationship has expanded, new principles are required to achieve just and equitable outcomes. The "content" analysis will be discussed first, followed by the "remoteness" analysis.

1. The Content of the Obligations: Defining the Crown's Liability

The most express indication of what the Crown undertook, and what Maori

58 Supra at note 1, at 54.

59 [1992] 1 NZLR 676, 685.

60 Davis, "Equitable Compensation: 'Causation, Foreseeability and Remoteness'" in Waters, supra at note 8, at 297, 305.

expected, is found in the Treaty of Waitangi. The findings of the Court of Appeal and the Waitangi Tribunal which have attempted to apply the Treaty provisions to modern circumstances are helpful in this inquiry.

In *Mabo*, Toohey J noted that the content of the obligation "will be tailored by the circumstances of the specific relationship from which it arises"[61] but generally a fiduciary must act for the benefit of the beneficiaries:[62]

> On the one hand, a fiduciary must not delegate a discretion and is under a duty to consider whether a discretion should be exercised. And on the other hand, a fiduciary is under a duty not to act for his or her own benefit or for the benefit of any third person. The obligation on the Crown in the present case is to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders.

The basic duty could be described as a duty of good faith or fair dealing. This is highlighted by the two cardinal rules of any fiduciary relationships, the conflict rule and the profit rule. These will be examined in more detail in the discussion regarding breach of duty.

Equity is concerned with regulating strictly the conduct of the fiduciary. Generally equity will uphold the status of the fiduciary relationship by not permitting fiduciaries to place themselves in a position whereby a breach of the duty *may* be possible. It is the possibility of the fiduciary acting in bad faith which concerns equity.[63]

At the very least the Crown should manage the affairs of the Maori as if it were managing its own affairs. Justice McLachlin in *Blueberry River Indian Band v The Queen in Right of Canada* held:[64]

> The duty of the Crown as fiduciary [is] "that of a man of ordinary prudence in managing his own affairs": *Fales v Canada Permanent Trust Co.*, [1977] 2 SCR 302, at p.315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its own minerals. It should have done the same for the Band.

The obligations must extend to all the legal and practical interests of Maori. Much of the complaint by Maori is in relation to the intangible losses which have occurred as a result of Crown conduct. By Article 2 of the Treaty of Waitangi, the Crown expressly confirmed and guaranteed to Maori "the full exclusive and undisturbed possession of their Lands and Estates, Forests *and other properties* ... so long as it is their wish and desire to retain the same in their possession".[65]

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61 Supra at note 4, at 204.

62 Ibid (footnotes omitted).

63 *Keech v Sandford* [1558-1774] All ER Rep 230; *Boardman v Phipps* [1967] 2 AC 46.

64 [1995] 4 SCR 344, at 401.

65 (Emphasis added).

Clearly the Crown undertook to protect Maori possession of "property". This extends past the confines of physical property. The scope of the obligation will now be examined by discussing some of the areas of Crown activity which are relevant, namely, land acquisition, legislating, and delegating discretion. Finally the idea of an "on-going" fiduciary obligation will be canvassed.

2. Land Acquisition

When acquiring land, the Crown as fiduciary must be under an obligation to pay the best price available. The Crown must also be under an obligation to comply with any express or implied conditions associated with the acquisition. The reasonable expectations of Maori as beneficiaries must be met. As was mentioned above,[66] there is an obligation, when extinguishing native title, to do so on fair terms. In addition, as with most fiduciaries, the Crown may be under a duty to ensure that independent legal advice is taken by the beneficiary.[67] In *Mabo,* Toohey J concluded that "[i]n the present case, extinguishment or impairment of traditional title would not be a source of the Crown's obligation, but a breach of it".[68]

3. Legislating

The Crown exercises much of its power or discretion through legislation:[69]

> For nearly 150 years the Maori people have made submissions to various Parliamentary Select Committees considering legislation. Whether the legislation has concerned Maori fisheries or public finance, the essence of those submissions has had to be the same - the legislation ignored the Treaty of Waitangi, and was monocultural in its structure, its philosophy, and its application.

How does the fiduciary relationship affect the activities of the legislature? This is where the "public law" elements begin to enter the equation. How far can a fiduciary relationship, created by the courts, fetter the power of the legislature? Justice Toohey attempted to apply the traditional fiduciary duties to the activities of the Queensland legislature:[70]

> A fiduciary obligation on the Crown does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the titleholders, or if the process it establishes does not take account of those interests.

66 See supra at note 50, and accompanying text.

67 *Witten-Hannah v Davis* [1995] 2 NZLR 143, 149 (CA).

68 Supra at note 4, at 205.

69 Jackson, "Criminality and the exclusion of Maori" in Cameron (ed), *Essays on Criminal Law in New Zealand: Towards Reform?* (1990) 23.

70 *Mabo*, supra at note 4, at 205.

What will happen if the obligation is breached in the manner mentioned? Surely any useful remedy for breach will necessarily limit the legislative power of the government. Or is Toohey J merely saying that the interests of the Aborigines is a relevant consideration when creating legislation? This approach has analogies with the views expressed by Chilwell J in *Huakina Development Trust v Waikato Valley Authority.*[71]

Another, and probably preferable, way around this problem is to establish a "justificatory scheme" whereby the Crown has the onus of showing that an enactment does not conflict with Maori interests and, if it does, the conflict is both justified and minimal.

Such a scheme was developed by the Supreme Court of Canada in *R v Sparrow.*[72] In that case the Court had the unenviable task of interpreting a provision of the Fisheries Act which, prima facie, restricted the traditional fishing rights of First Nation peoples. It was held that the words of s 35(1) of the Constitution Act 1982 incorporated a fiduciary relationship: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." *Guerin* was used to provide guiding principles in interpreting the provision in question.[73]

On the one hand they wished to give the fiduciary relationship some teeth; yet they were able to see the policy ramifications of striking down legislation. As an answer to this dilemma they created a "justificatory standard".[74]

The first question is "whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement"[75] of the fiduciary obligation. Note that at this initial stage the onus is on the complainant to demonstrate such an interference. In order to decide whether there has been an interference, the following questions need to be asked:[76]

(i) Is the limitation unreasonable?
(ii) Does the regulation impose undue hardship?
(iii) Does the regulation deny to the holders of that right their preferred means of exercising that right?

If the prima facie interference is found then the analysis moves to the question

71 [1987] 2 NZLR 188. His Honour held that the Treaty was an extrinsic aid which had to be considered by authorities administering the Water and Soil Conservation Act 1967. The evidence established the existence of spiritual, cultural, and tribal relationships with the natural water in question. See also McHugh, *The Maori Magna Carta* (1991), 271-273.

72 Supra at note 7.

73 Supra at note 6.

74 Supra at note 7, at 1111.

75 Ibid.

76 Ibid, 1112.

of justification. The onus is now placed on the Crown to justify the interference. The justification analysis proceeds as follows:[77]

> First, is there a valid legislative objective? Second, is there a link between the question of justification and the allocation of priorities within the affected group? Third, is there as little infringement as possible in order to achieve the desired objective? The final requirement considers whether fair compensation is available, and/or whether consultation has occurred.

This appears to be a realistic attempt at reconciling the Crown's fiduciary obligations with the notion of parliamentary sovereignty.

4. Delegating Responsibility

The general rule is that a fiduciary cannot delegate his or her duty.[78] It would appear that, according to the Canadian jurisprudence, judicial authorities are exempt from any fiduciary obligation.[79] Yet what about quasi-judicial authorities and administrative decision makers? The test as to whether an authority is exempt or not from the obligation requires examination of how independent, in a judicial sense, the authority is from government:[80]

> [E]ven in the majority of cases where an administrative official is called upon to act judicially in making a decision - for example, when deciding whether or not to give out a permit - the official will still be acting without the required independence and the decision will still be subject to the Crown's fiduciary duty to Aboriginals.

All executive acts of government are also burdened by the duty. It could not be that the Crown could evade liability on the basis that it had delegated power to an administrator.[81]

In New Zealand, many services and assets formerly administered by government are now controlled by State-Owned Enterprises or have been privatised. Do these entities owe fiduciary obligations? Again, it seems wrong that the Crown can escape its fiduciary responsibilities by choosing to act through an intermediary.

State-Owned Enterprises, pursuant to s 9 of the State-Owned Enterprises Act 1986, have a statutory duty to comply with the "principles of the Treaty of Waitangi". It was this provision which the Court of Appeal examined in the 1987

77 Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 Univ of British Columbia L Rev 19, 38. This is a paraphrased version of the test which is found in *R v Sparrow*, supra at note 7, at 1113-1119.

78 *Mabo*, supra at note 4, at 204.

79 Supra at note 5, at 123.

80 Ibid.

81 Ibid, 124.

Maori Council Case.[82] If the Treaty of Waitangi is viewed as a manifestation of the Crown's fiduciary obligations then it arguably suggests that State-Owned Enterprises are subject to the Crown's fiduciary obligations. This must be the correct result given that these enterprises are performing functions formerly carried out by the Crown in its executive capacity. Further, the fact that each enterprise is accountable to the Minister of State-Owned Enterprises, means that there is no clear independence from the Crown.

5. Causation and Remoteness - Defining the Crown's Liability

This alternative course of analysis allows the scope and content of the fiduciary obligation to be defined conservatively. The concept of remoteness is used to define the parameters of potential liability. Note that this analysis is only relevant to the remedy of compensatory damages. The application of the remedy will be discussed below in more detail.

In most cases causation will not be a difficult hurdle. It appears that the "but for" type analysis, invoked in the case of a breach of fiduciary obligations in the traditional contexts such as the trust, is applicable. This is quite different from the causation analysis undertaken at common law where the question is whether the damage flowed from the breach.[83] There is a vast amount of evidence demonstrating that the cause of Maori losing land and other resources was the Crown breaching its fiduciary obligations. It would indeed be difficult to argue against this proposition. However it is often contended by Maori complainants that the loss of land led to widespread economic and social disadvantage. The Crown recognised this with respect to the Raupatu land[84] in the Waikato:[85]

> The Court of Appeal noted in [*R T Mahuta and Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513] that the Sim Commission's report had failed to convey "... an expressed sense of the crippling impact of Raupatu on the welfare, economy and potential development of Tainui..."

But how far should the courts go? How remote does the damage have to be for the Crown to be no longer liable?

6. Remoteness

The issue of formulating remoteness principles has been widely commented

82 Supra at note 2.

83 See for example *Day v Mead* [1987] 2 NZLR 443, 461 where Somers J states "[e]quitable compensation is not fettered by the requirements of foresight and remoteness which control awards of damages at law". See also *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWLR 211, 215 per Street J.

84 Confiscated land.

85 Supra at note 55, at Preamble, para N.

upon. One view is that "[w]e need to look both at the width of a fiduciary's obligations and at the ways in which they were acquired and breached".[86] This approach is a response to the uneasiness which arises when trust principles, appropriate to breaches causing loss to the trust estate, are applied to non-trustee fiduciaries.[87]

The "traditional approach" is outlined in what is known as the *Brickenden*[88] principle. This principle is conveyed in the commonly recited passage from Lord Thankerton's speech:[89]

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction .... Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

The inquiry moves straight from breach to remedy. It appears that this principle is still in vogue amongst some of the members of the Court of Appeal[90] despite the *Canson Enterprises*[91] decision by the Supreme Court of Canada. It is submitted that in the context of the Crown as fiduciary there needs to be, for public policy reasons, some limit to the Crown's liability through the operation of a remoteness rule.

There is debate over how remoteness principles should be developed. Essentially the debate is over whether or not analogies should be made with tort principles. In *Canson Enterprises* the majority thought that common law principles were most useful, while the minority were of the view that there should be no strict analogies made with tort principles. The minority was represented by the judgment of McLachlin J, and her "commonsense approach" was approved by Smellie J in the Equiticorp litigation.[92] Therefore, it is difficult to make any conclusions about what damage or loss the court would see as too remote in the context of the Crown-Maori relationship.

7. Liability - Associated Issues

(a) To Whom is the Obligation Owed?

This would not be an issue if there had not been the wide urbanisation of Maori

86 Supra at note 60, at 310.

87 Ingram and Maxton (leaders), *Equitable Remedies: New Zealand Law Society Seminar* (1994), 93.

88 *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC).

89 Ibid, 469.

90 Supra at note 67, at 148-149, 156; cf Smellie J, infra at note 92.

91 *Canson Enterprises Ltd v Broughton & Co* [1991] 3 SCR 534.

92 *Equiticorp Industries Group Ltd (in stat man) v R (No 38)* (1995) 7 NZCLC 260,873, 260,889; *Equiticorp Industries Group Ltd (In Statutory Management) v Attorney General (No 47)* High

in the last half of this century. The traditional structure of Maori society, comprising the political and economic units of the iwi and hapu, has weakened as Maori have lost traditional connections with their tribal group. There has been recent lobbying by urban Maori groups who feel that their members are not acquiring the benefits from tribal claim settlements and the "Sealords deal". There are also associated problems with some Maori having several connections with different tribes. These are difficult, perhaps insurmountable, issues and no conclusion is put forward. Allocation of resources returned by the Crown is a political question, and one which is beyond the scope of fiduciary law.

(b) An On-Going Obligation?

As will be discussed below, there is evidence to show that breaches of the Crown's fiduciary duty have, in some circumstances, led to a "crippling impact ... on the welfare, economy and potential development"[93] of some Maori tribes. It is a relatively small leap to conclude that many of the socio-economic problems being experienced by Maori are a direct result of the initial breaches of fiduciary duty. A consequence is that Maori are, arguably, vulnerable vis à vis the Crown. In this way it could be argued that the Crown owes an on-going fiduciary duty to Maori.

V: BREACH

In most cases the "conflict rule" and the "profit rule" prescribe the allowable conduct of the fiduciary. However, there is also a general duty of care,[94] which could be termed a duty of good faith and fair dealing. In *Guerin,* Dickson J saw unconscionability as the yardstick by which to assess the existence of breach:[95]

> The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal .... In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppel. The Crown cannot promise the Band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the Band to alter its legal position by surrendering the land, and then simply ignore the promise to the Bands [sic] detriment.

A topical example is the Ngai Tahu complaint concerning Crown purchases of vast areas of the South Island. The Crown negotiated with the tribe and secured the

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Court, Auckland, 12 July 1996, CP 2455/89, Smellie J, 255-258. Note that in the latter judgment his Honour opines that the Court of Appeal has expressed similar views.

93 Supra at note 55, at Preamble, para M.

94 Gummow, "Compensation for Breach of Fiduciary Duty" in Youdan, supra at note 1, at 58 and 66.

95 Supra at note 6, at 388-389.

purchases, conditional upon the Crown setting aside of reserves for the tribe and the protection of mahinga kai.[96] From the very beginning of the negotiations, the Crown was bound by fiduciary obligations. It is now doubtful whether the agreements were substantively fair, or whether the Crown has honoured its side of the agreement. Both of these afford possible grounds to establish a breach of fiduciary duty. Ngai Tahu have certainly altered their legal position by alienating the land, and on Dickson J's analysis, the Crown must be estopped from denying the promises it has made.

The applicability of the conflict and profit rules will now be examined with respect to the Crown-Maori fiduciary relationship.

1. The Conflict Rule

The conflict rule states that a fiduciary may not allow his or her own interests to conflict with the duty to the beneficiary.[97] The massive land confiscations were clearly a breach of this rule. The Crown's interests in acquiring the land were obviously in conflict with the Maori interests in the land.

Breach of the conflict rule was discussed in the case of *Kruger v The Queen*.[98] That case involved an Indian band seeking compensation for land expropriated for an airport, by the Department of Transport, on behalf of the Crown. The Transport Department and the Indian Affairs Department were involved in considerable negotiations that lasted for several years. After a detailed examination of the facts Heald J concluded that the Crown had not acted exclusively for the benefit of the Indians. Thus the Crown was subject to the conflict of interest and duty rule.[99] As a compromise he said:[100]

> [T]he Governor in Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations. If there was evidence in the record to indicate that *careful consideration and due weight* had been given to the pleas and representations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations had been made, I would have viewed the matter differently.

It was acknowledged that the Crown was in a conflict of interest situation and that the two Crown bodies had not negotiated in good faith. There were long delays and the wishes of the native peoples were seemingly ignored. In addition, there was insufficient disclosure of the facts.

Waters points out that an arbitrational process may be one solution to this dilemma. However he also notes that this may be looked upon as a fiduciary

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96 Customary food and flora gathering rights.

97 Supra at note 59, 694.

98 Supra at note 28.

99 Ibid, 25.

100 Ibid, 25-26 (emphasis added).

delegating its duty.[101]

In the same case Urie J, with whose judgment Stone J concurred, took a view of equal partnership which has parallels with that taken by the Court of Appeal in the 1987 *Maori Council* Case. Justice Urie saw the Transport Department as owing a duty to all peoples of Canada and not just indigenous people. Without making any conclusions on the matter of breach of the conflict rule, he held that the Crown, through the Indian Affairs Department, had discharged its duty by making strong representations on behalf of the Indians. Thus he relied on the concept of a divisible Crown. Waters is of the opinion that this argument will not prevail.[102] In the context of New Zealand, there is no body within Government charged with the responsibility of representing Maori interests in the same manner as the Indian Affairs Department.

The easiest way for a fiduciary to discharge his or her duty under the conflict rule is to disclose the potential conflict to the beneficiary, so that the beneficiary can give their consent:[103]

> In some circumstances and because of the insidious potential for conflict of interest, the discharge of that responsibility can only be established by ensuring that the client is independently advised. Ensuring independent advice is not a separate fiduciary duty but rather a means of discharging the responsibility of ensuring that the client is fully informed and freely consents to her [fiduciary's] participation in the transaction.

To take an extreme example: if the Tainui had given their informed consent to the Crown's invasion of the Waikato then the Crown could not be held in breach of their fiduciary obligations.

2. The Profit Rule

This is sometimes referred to as the "use of fiduciary position rule"[104] and put simply means that the fiduciary is not entitled to make a profit from his or her position as fiduciary. Again, the courts have traditionally looked harshly upon fiduciaries who make a profit,[105] even where the beneficiary actually benefits from the fiduciary's activities.[106] In the case of the Crown breaching this rule, there will be evidential problems concerning whether an actual profit was realised.

Many breaches by the Crown resulted in loss to Maori, but not Crown profit.

101 Supra at note 22, at 419.
102 Ibid, 420.
103 Supra at note 67, at 149 per Richardson J.
104 Supra at note 59, at 685.
105 *Keech v Sandford*, supra at note 63.
106 *Boardman v Phipps*, supra at note 63.

However, there are also many situations where it has been alleged that the Crown later sold Maori land at greatly increased prices. One of the ways in which the colonisation of New Zealand was funded was through land purchases, a clear breach of the profit rule.

With respect to the Tainui claim, the Crown acknowledges the Crown did profit from the land confiscations:[107]

> The Crown recognises that the lands confiscated in the Waikato have made a significant contribution to the wealth and development of New Zealand, whilst the Waikato tribe has been alienated from its lands and deprived of the benefit of its lands.

Assuming that a fiduciary relationship has been established, the parameters of the obligation have been defined and there has been a breach. The difficult issues relating to remedy must now be addressed. Up until now the claims that have been settled have been dealt with in the political arena. They are heavily influenced by policy and often involve protracted negotiations. For the purposes of this paper the remaining discussion will focus on the remedies of compensation and constructive trusts. While injunctive relief and account may be available, the remedies of compensation and constructive trust are probably the most useful in this matter.

VI: REMEDIES

While the full body of equitable remedies are potentially available, the remedies of constructive trust, compensatory damages and account of profits seem the most applicable to remedy breaches of the Crown's fiduciary obligations.

In the context of the Crown-Maori relationship the differences in result are extremely important. While the Crown has, on occasions, recognised that loss to Maori resulted in the Crown making a profit, there are large evidential problems with establishing the full quantum of that profit. This is particularly the case where natural resources have been exploited. Often the damage done to Maori, caused by the Crown breaching its obligations, has involved not only economic loss, but the loss of fundamental social and cultural structures and taonga. Thus the loss to Maori bears no relationship to the profit made by the Crown. Therefore, it is submitted that in many situations damages will be preferable to the obligation to account.

The following discussion will, therefore, be restricted to the remedies of constructive trust and equitable compensation. These two remedies have analogies with the preferred remedies sought by Maori in their claims against the Crown at present:[108]

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107 Supra at note 55, at s 6(5).
108 Ibid, Preamble, para O.

> ... Waikato pursued compensation on the basis of their long established principles of "land for land"– "i riro whenua atu, me hoki whenua mai" ("as land was taken, land must be returned") and "ko te moni hei utu mo te hara" ("the money is the acknowledgment by the Crown of their crime") ....

The former is analogous to the remedial constructive trust, while the latter has parallels with the concept of compensatory and possibly exemplary damages.

1. The Remedial Constructive Trust

The remedial constructive trust is becoming more widely used in New Zealand. This has largely been a result of the fusion of the common law with equity. President Cooke noted the influence of this fusion on the constructive trust:[109]

> The constructive trust .... has come to be used as a device for imposing a liability to account on persons who cannot in good conscience retain a benefit in breach of their legal or equitable obligations. Its evolution or extension as a remedy may not yet have come to an end.

It appears from this statement that the constructive trust could replace the remedy of account. What is more important, however, is Cooke P's view that the constructive trust has the ability to change and adapt to new circumstances.

In *Pettkus v Becker* Dickson J noted that the principles of restitution lie at the heart of the constructive trust:[110]

> The principle of unjust enrichment lies at the heart of the constructive trust .... It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise .... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury.

Whether or not unjust enrichment is the basis for the constructive trust in New Zealand, the important point is the malleability and flexibility of the remedy. This unrestricted nature means that it has the ability to adapt to the unique circumstances of the Crown's fiduciary obligations.

While the potential is there, in all likelihood the courts are going to view compensation as a far more appropriate remedy. Where property is not privately owned the constructive trust could play a useful part in remedying breaches. However, this will not be the usual situation. Where the complaint is one of lost opportunity to develop, or loss of intangible resources such as language, the only useful remedy will be equitable compensatory damages, which cover both

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109 *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, 193.
110 [1980] 2 SCR 834, 847-848.

economic and non economic loss.[111]

2. Equitable Compensation

Ever since the landmark case of *Nocton v Ashburton*,[112] the availability of compensatory damages for breach of fiduciary duty has been beyond doubt. As mentioned above, however, the rules surrounding equitable compensation need much development. Justice McLachlin summarised her approach to equitable compensation in *Canson Enterprises*:[113]

> [C]ompensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's *lost opportunity*.

In *Guerin*[114] the Court had to deal with the difficult question of how much compensation should be awarded. The problem was that the golf club would not have entered into the lease on the terms specified by the band. Therefore, it seemed inappropriate to measure the damages as the difference between the value of the two leases. The trial judge had reached a global figure of $10 million which appeared to be based on an assumption that the band would have used the land for residential development. The Crown argued that this was an improper assumption as the band wanted to lease the land to a golf club. Justice Wilson rejected this, pointing out that, as the land was not leased on their terms, they may have decided to take another course of action.

Her Honour relied heavily upon Street J's judgment from *Re Dawson*.[115] Justice Street concluded that fluctuations in market values were for the fiduciary's account, and that the assessment of compensation was to be assessed at the time of restoration and not deprivation. Therefore the damages were to be assessed at the date of the trial, notwithstanding the huge increases in market value of the land. It was presumed that the band would have wished to develop its land in the most advantageous way during the period covered by the unauthorised lease. Thus, the "lost opportunity" was compensated for.

The reasoning of Wilson and Street JJ has been approved by the New Zealand Court of Appeal[116] and does seem appropriate for the types of complaints made by Maori against the Crown. The "lost opportunity" to develop land and other resources, such as fishing resources, is often at the heart of Maori claims against the Crown. For example, the recent Whakatohea settlement involved a claim for

111 Supra at note 87, at 90. There is also discussion of the possibility of exemplary damages, ibid, 91.
112 [1914] AC 932.
113 Supra at note 91, at 556 (emphasis added).
114 Supra at note 6.
115 Supra at note 83.
116 Supra at note 67, at 157.

3.5 million acres of Raupatu lands which were taken to punish the Whakatohea people in 1865.[117] The tribe was consequently forced into the hill areas and away from the fertile coastal areas. The settlement has given the Whakatohea people $40 million for losses of land worth substantially more. Surely this cannot have sufficiently taken into account the "lost opportunity" to the Whakatohea people of losing such a rich resource and the opportunity to develop it.

VII: CONCLUSION

The basic elements of a fiduciary relationship appear to exist in the relationship between Maori and the Crown. Although there is a growing body of jurisprudence within the Commonwealth jurisdictions, it is important to establish the relationship on those fundamental principles in light of the unique situation in New Zealand. Without doubt, difficulties arise when defining the scope of the obligations. Policy issues which are politically sensitive arise if it becomes necessary to recognise a special obligation on the Government with respect to Maori. Clearly the wider policy considerations and notions of parliamentary sovereignty cannot be ignored. But likewise, the Crown's undertakings vis à vis Maori cannot be ignored. Equity has the ability to recognise this undertaking and enforce it by imposing a fiduciary relationship. Surely it would be unconscionable or inequitable not to do so.

It is also important that the wider policy considerations which support the imposition of a fiduciary relationship are not forgotten either. In the words of Cooke P:[118]

> In New Zealand the Treaty of Waitangi is major support for [a fiduciary] duty. The New Zealand judgments are part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement.

Weinrib's view that there are "broader problems of policy which underlie the whole fiduciary concept"[119] highlights the context in which the Crown-Maori fiduciary relationship exists. It will ultimately be public policy or more correctly, a balancing of public policy considerations, which will dictate the future of such a relationship. However, at the very least it provides an avenue for Maori to have their disputes settled in court. And once in court, it provides a framework of principles upon which just and equitable outcomes may be attained.

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117 The alleged crime was the murder of Reverend Volkner. The accused, Mokomoko, was hung but posthumously pardoned in 1992. The tribe were actually forgiven a few weeks before the military were sent in to confiscate the land.

118 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 306.

119 Supra at note 12, at 1.