A "Legal Backstop" for Historical Māori Grievances: Proprietors of Wakatū v Attorney-General

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I INTRODUCTION

On 28 February 2017, the Supreme Court delivered its long-awaited decision *Proprietors of Wakatū v Attorney-General*.[1] By a 4-1 majority, in a judgment no less than 954 paragraphs, the Supreme Court found that the Crown can owe equitable duties to Māori over specific interests in land and that the Crown had breached those duties to customary landowners in the Nelson region.

This case note assesses how the Supreme Court came to its decision. It begins in Part II by discussing the development of Crown-Native fiduciary duties in Canada. Part III then canvasses previous relevant New Zealand jurisprudence. Part IV outlines the historical context of the *Wakatū* claim and the lower court decisions. Parts V and VI address the obstacles facing the Supreme Court in light of this background and how the Court overcame them. Parts VII and VIII discuss the significance of the *Wakatū* decision, exploring how an enforceable Crown-Māori duty challenges political constitutionalism and may apply in the future.

II CANADIAN JURISPRUDENCE AND OVERCOMING AN UNENFORCEABLE PUBLIC LAW DUTY

Indigenous rights in Aotearoa New Zealand have been primarily dealt with in the political — rather than judicial — sphere. Traditional Crown obligations toward Māori derive from te Tiriti o Waitangi (the Treaty of Waitangi) and public law duties.[2] Consequently, the Treaty settlement process dominates the historical grievances resolution process. By contrast, Canada enjoys a rich jurisprudence of indigenous rights that are enforced by the courts in the form of fiduciary duties.

Canada's jurisprudence in this area originated in the landmark decision *Guerin v The Queen*.[3] In this case, the Supreme Court found that the Crown owed fiduciary duties to the Musqueam Band over land that the Band

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1 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 [*Wakatū SC decision*]. The hearing took place on 12, 13, 14 and 15 October 2015.

2 For example, the duty to consult.

3 *Guerin v The Queen* [1984] 2 SCR 335.

had surrendered to the Crown. The Crown breached this duty by leasing that land to a golf club on less favourable terms than those agreed with the Band. In the much-cited judgment, Dickson J drew upon fiduciary principles to determine the Crown's obligations to the Band. His Honour outlined that the Crown was afforded a discretion to deal with surrendered aboriginal land (the equivalent of New Zealand land subject to native title). This, in turn, created legal accountability in the form of a fiduciary duty. The Crown had an equitable obligation under this discretion to deal with reserve land for the benefit of the Band.[4]

Guerin was a watershed decision because it rejected the position previously held throughout the Commonwealth, as espoused in *Tito v Waddell*.[5] There, the Court determined that historic agreements between the British Phosphate Commission and Banaba Islanders concerning royalty payments for mining were unenforceable.[6] Megarry VC found that the Crown's dealings with indigenous groups were political *only* and judicially unenforceable. His Honour distinguished a "true trust" from a "trust in the higher sense" — the latter being an unenforceable political obligation.[7]

Following *Guerin,* multiple Canadian cases have upheld and further developed a Crown-Native fiduciary duty and rejected the *Tito* approach. In *R v Sparrow,* the duty was considered to transcend territorial rights to include fishing rights.[8] The Supreme Court clarified the duty's scope in *Wewaykum Indian Band v Canada*, emphasising that it could only apply to native interests that predated Crown interests.[9] The Court also established that, although the Crown wears "many hats" and has general responsibilities towards all sectors of the public, it can still be subject to specific enforceable fiduciary obligations relating to reserve land.[10] Clarifying the duty in this way addressed criticism that the Crown could not be in a position to owe loyalty to an indigenous group. Rather, *Wewaykum* determined that the Crown's political role cannot shield it from commitments to preserve native title interests. More recently, in *Tsilhqot'in Nation v British Columbia* the Supreme Court found that a fiduciary duty obliged the Government to recognise aboriginal title as a group interest benefitting present and future generations.[11] That interest could not be compromised if it harmed the benefit of the land for the aboriginal group's future generations.[12]

This small collection of cases, among others,[13] illustrates the active role that the Canadian courts have played in protecting indigenous rights.

4 At 376.
5 *Tito v Waddell (No 2)* [1977] Ch 106.
6 At 235.
7 At 217.
8 *R v Sparrow* [1990] 1 SCR 1075.
9 *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [77].
10 At [96].
11 *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [2014] 2 SCR 257 at [86].
12 At [86].
13 See also *Calder v Attorney-General of British Colombia* [1973] SCR 313; *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Quebec (Attorney-General) v Canada (National Energy Board)* [1994] 1 SCR 159; *Blueberry River Indian Band v Canada* [1995] 4 SCR 344; *R v Van der Peet* [1996] 2 SCR 507; *British Columbia v Haida Nation* 2004 SCC 73, [2004] 3 SCR 511; *Ermineskin*

Acknowledging and enforcing a fiduciary duty on the Crown has given indigenous groups necessary leverage for political negotiations over lumber licences, pipeline consents, aboriginal title claims, residential school abuse redress, new treaties and more.[14]

III NEW ZEALAND JURISPRUDENCE PREDATING *WAKATŪ*

Indigenous rights in Canada are recognised via the Royal Proclamation 1763 and enshrined in the Constitution Act 1982.[15] Te Tiriti predominantly informs indigenous redress in New Zealand. However, both jurisdictions share a similar history of European colonisation and enforce equitable principles under common law legal systems.[16]

Despite both countries sharing a common law foundation, the Supreme Court's *Wakatū* judgment is New Zealand's first to recognise a fiduciary duty owed by the Crown to Māori. Prior to this, the issue of a duty had been frequently left for later courts to decide. While the courts repeatedly danced with the doctrine, the impetus to take it home was lacking.[17]

In the 1990s, Cooke P's comments in several Court of Appeal cases showed promise that the legal recognition of a fiduciary duty was on the horizon.[18] His Honour drew on Canadian jurisprudence, noting that removing native title via "less than fair conduct or on less than fair terms would likely … be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power".[19] His Honour rejected the argument that Canada's and New Zealand's constitutional differences were a barrier to the duty's domestic recognition. In his view "[t]here are constitutional differences between Canada and New Zealand, but the *Guerin* judgments do not appear to turn on these."[20]

However, two cases preceding *Wakatū* demonstrate that the duty's recognition has not always been as forthcoming as Cooke P's obiter suggests. In *New Zealand Māori Council v Attorney-General* (*Broadcasting*

Indian Band and Nation v Canada 2009 SCC 9, [2009] 1 SCR 222; *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261; and *Manitoba Metis Federation Inc v Canada (Attorney-General)* 2013 SCC 14, [2013] 1 SCR 623.

14 See Kent McNeil "Aboriginal Title and the Provinces after Tsilhqot'in Nation" (2015) 71 Supreme Court Law Review 67.

15 Royal Proclamation 1763 at 2; and 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.

16 This is not to diminish recognition of tikanga as the first law of Aotearoa. See Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 Yearbook of New Zealand Jurisprudence 24.

17 Kós J used this turn of phrase to describe the Court's treatment of the concept of substantive legitimate expectation in *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474 at [184]. The same applies here in relation to a Crown-Native fiduciary duty.

18 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA); *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (CA); and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

19 *Te Runanganui o Te Ika Whenua Inc Society*, above n 18, at 24.

20 *Te Runanga o Muriwhenua*, above n 18, at [63].

Assets Case), the Court of Appeal was unwilling to treat the case as one that concerned a fiduciary duty (as it was argued by the plaintiffs).[21] More recently, the Court of Appeal in *New Zealand Māori Council v Attorney-General* (*Forests Case*) unequivocally rejected that the Canadian-style fiduciary duty could ever apply in New Zealand due to fundamental constitutional differences between the two jurisdictions. O'Regan J (on behalf of William Young and Robertson JJ) found that the Treaty imposed duties analogous to fiduciary duties, but nothing more. His Honour declined to engage with the Canadian jurisprudence on the matter, noting that those decisions "reflect the different statutory and constitutional context in Canada".[22]

The most recent contemplation of a fiduciary duty prior to *Wakatū* was the Supreme Court's decision in *Paki v Attorney-General (No 2)*, which did not clarify the matter any further.[23] While the Court was invited to consider the case in relation to a fiduciary duty, the outcome was determined by other means, leaving comments on fiduciary duties as obiter. Elias CJ's analysis suggested that a sui generis duty could arise in the right circumstances.[24] However, William Young J endorsed O'Regan J's previous rejection of a duty and doubted that it could ever be appropriate in New Zealand.[25] McGrath J took a view somewhere in the middle, setting out considerations that should inform the Court's approach. While some considerations supported a duty, his Honour also noted that the judiciary should not allow a duty to "cut across" the statutory regime created by the Treaty of Waitangi Act 1975.[26] Glazebrook J left the issue for another day.[27]

IV *WAKATŪ*

Amidst this uncertainty, *Wakatū* provided an opportunity for our courts to provide a definitive answer to the question of whether or not New Zealand would recognise an enforceable fiduciary duty.

Historical Background

The history of this claim predates the European settlement of New Zealand. Four iwi inhabited the Te Tau Ihu area, known today as Nelson. Ngāti Koata, Ngāti Rarua, Ngāti Tama and Te Atiawa migrated from Raglan,

21 *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA).
22 *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 [*Forests Case*] at [81].
23 *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67. See David V Williams "The Role of Legal History in Developing New Zealand Common Law Following *Paki (No 2)*" [2016] NZ L Rev 755.
24 *Paki v Attorney-General (No 2)*, above n 23, at [162].
25 At [285]–[288].
26 At [191].
27 At [322].

Marokopa and Mt Taranaki between 1828 and 1834.[28] Specific tikanga of various whanau and hapu made up a series of kainga, creating a patchwork of land and use rights over the area.[29]

Upon European settlement, many local Māori were eager to benefit from commerce and trade with the settler population. In 1841, the formal process of land sales in the area of Nelson, Motueka and Golden Bay began, shepherded by the New Zealand Company.[30]

Multiple hui were held to initiate dialogue around the prospect of land sales. As part of the consideration for the sale of land, one tenth of the land sold (the Tenths) was to be reserved for the benefit of Māori, excluding pā, Māori cultivations, urupā and mahinga kai.[31] This kind of agreement was not new. The New Zealand Company had given Colonel Wakefield these instructions when he set sail for New Zealand.[32]

Following te Tiriti, the Land Claims Ordinance 1841 declared that all pre-Treaty sales were ineffective until commissioners confirmed that the purchases were on "equitable terms".[33] At this point, the land became Crown land able to be granted to the New Zealand Company.[34]

The physical manifestation of the Tenths was apparent from 1842. Nelson town was surveyed and the Tenths set aside. In the same year, the Colonel Secretary outlined a plan for the proposed trust over the Tenths and sent this to the Chief Justice.[35]

The transaction was formalised in 1845 when Governor FitzRoy accepted the contents of the government commissioned report prepared by William Spain (the *Spain Report*).[36] The *Spain Report* stated that, of the 151,000 acres to be awarded to the New Zealand Company, a tenth was to be reserved for the benefit of Māori — *excluding* pa, cultivations, and urupa.[37]

However, the New Zealand Company did not uphold the preservation of the Tenths and subsequently disagreed with the allocations set out in the *Spain Report*.[38] By 1847, the administration of the Tenths had

28 "Kaitiaki: Wakatū Incorporation" (broadcast, 9 October 2010) Maori Television at 3:00.

29 Andrew Erueti "Māori Customary Law and Land Tenure" in Richard Boast and others (eds) *Māori Land Law* (LexisNexis, Wellington, 2004) 41 at 41.

30 The following paragraphs are an abridged version of the land sale at Wakatū. For an in-depth account, see Chief Justice Elias's judgment in *Wakatū SC decision,* above n 1. See also *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 [*Wakatū HC decision*] per Clifford J.

31 *Wakatū HC decision*, above n 30, at [110].

32 *Wakatū SC decision*, above n 1, at [108].

33 At [104]–[107].

34 It is notable that the New Zealand Company disputed they were subject to this arrangement, yet the Crown reinforced its own obligations to Māori. This is evidence that the Imperial Government was aware that Māori were the proprietors of the land until native title was cleared. *Wakatū SC decision* above, n 1 at [116].

35 *Wakatū HC decision*, above n 30, at [121].

36 William Spain *Mr Commissioner Spain's Report to Governor Fitzroy, on the New Zealand Company's Claim to the Nelson District* (Office of the Commissioner for investigating and determining Titles and Claims to Land in New Zealand, Auckland, 31 March 1845) in Alexander Mackay (compiler) *A Compendium of Official Documents Relative to Native Affairs in the South Island* (Government Printer, Wellington, 1873) vol 1 54.

37 At 60.

38 The New Zealand Company considered that the exclusion of Māori occupied lands deprived it of sufficient certainty. *Wakatū SC decision*, above n 1, at [167] and [170].

languished.[39] In 1848, the government reduced the town section reserves by 47 sections and executed a further grant that covered a greater expanse of land. Only pā, burial sites and native reserves were reserved.[40]

By 1850, the New Zealand Company faced serious financial decline and the Crown took over its assets and obligations.[41] Throughout the period of Crown Colony government the presiding governor exercised his control over the Tenths, although the full allocation was never fully made.[42]

In 1893, the Māori Land Court found that rangatira of the four local iwi were entitled to distributions from the remnants of the Tenths.[43] This was not fully realised. More recently, in 1977, Wakatū Inc (Wakatū) was incorporated following public discussion around the Tenths.[44] 1,393 acres were transferred to Wakatū, whose shareholders are the descendants of Te Tau Ihu.[45] While this falls woefully short of the land originally contemplated in the 1841 agreement, Wakatū successfully manages numerous enterprises across several industries by utilising income derived from these lands. The incorporation supports its iwi by employing iwi members and administering social projects.[46]

Because of the Crown's failure to realise the Tenths, and the unsatisfactory Treaty settlement negotiations,[47] Wakatū, Mr Rore Stafford[48] and the trustees of te Kāhui Ngahuru Trust[49] lodged proceedings in the High Court. The parties sought a declaration that the Crown had breached duties in its capacity as a trustee, or in equity. They argued that the Crown had breached equitable obligations as its behaviour towards the beneficiaries of the Tenths, in combination with various legal instruments, had crystallised the Crown grant of 1845. The Crown had, therefore, assumed a discretionary responsibility over the Tenths, creating an express trust.[50] In the alternative, the plaintiffs argued that, under general principles of equity, the Crown breached its fiduciary obligation to the iwi of Te Tau Ihu by failing to ensure the benefit of the Tenths remained with them. The Crown's behaviour was, accordingly, alleged to be unconscionable.[51]

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39 At [251].
40 At [188].
41 At [198].
42 At [289].
43 *New Zealand Company Tenths* (1893) 3 Nelson MB 153 as cited in *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2014] 2 NZLR 298 [*Watakū CA decision*] at [542], n 694.
44 "Establishment of Wakatū" Wakatū Incorporation <www.wakatu.org>.
45 "Establishment of Wakatū", above n 44.
46 See generally "Our Past, Our Future" Wakatū Incorporation <www.wakatu.org>.
47 The Government's policy of entering into Treaty settlement negotiations with only "large natural groupings" excluded a corporate (unnatural) grouping such as Wakatū Inc [Wakatū] from the settlement process. This is despite the Incorporation funding much of the work that brought the Te Tau Ihu claims to the Waitangi Tribunal. See Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past, Building a Future* (2002) at 39.
48 Kaumatua of Wakatū.
49 A trust the Native Land Court established to represent the descendants identified as beneficiaries of the Tenths.
50 *Wakatū HC decision*, above n 30, at [32].
51 At [33].

High Court

Clifford J found that the three plaintiffs did not have adequate standing to represent the interests of the customary owners. While his Honour found that there could have been some sort of equitable obligation owed to Māori in the 1840s and 1850s, he did not think that the Crown had sufficient intent to justify an express trust or fiduciary duty.[52] His Honour did, however, acknowledge that a fiduciary duty was possible in a New Zealand context.

Court of Appeal

The Court of Appeal upheld the High Court decision and unanimously rejected a fiduciary duty in the circumstances. Harrison and French JJ delivered a joint judgment, while Ellen France J delivered a single judgment.

Ellen France J used the foundational principles in *Chirnside v Fay* as a starting point.[53] That case highlighted that, while there are particular categories of fiduciary relationships, these can also be determined on a case-by-case basis.[54] Determination depends on whether a party has undertaken to act on behalf of another and proceeds to do so under an obligation of loyalty.[55] Her Honour found that the Crown undertook no such obligations in respect of the Tenths, and that the arrangements made were political in nature.[56]

Harrison and French JJ agreed that the Crown did not owe a fiduciary duty to the appellants. Although their Honours recognised the authority of *Guerin,* they viewed it as only applying to situations where there is an express undertaking of loyalty by the Crown.[57] This is because New Zealand has no legal instruments comparable to the Royal Proclamation 1763 or Constitution Act 1982. Their Honours explained that loyalty is a fundamental part of a fiduciary duty and the Crown was incapable of owing loyalty to one specific group within the public.[58] Rather, the Crown's overriding priority was the broader public interest. Moreover, their Honours found that the Treaty of Waitangi Act and its corresponding settlement negotiation process are the primary instruments to mediate negotiations between the Crown and Māori.[59] Accordingly, a fiduciary duty is inappropriate in New Zealand.

52 *Wakatū HC decision*, above n 30, at [307].
53 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [72]–[75] and [80] as cited in *Wakatū CA decision*, above n 43, at [98].
54 At [116].
55 At [116] with reference to *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18.
56 *Wakatū CA decision*, above n 43, at [123].
57 At [209].
58 At [209].
59 At [216].

V OBSTACLES TO THE SUPREME COURT FINDING A FIDUCIARY DUTY

In order to find a fiduciary duty in *Wakatū*, the Supreme Court had to overcome three obstacles that have continually presented themselves in New Zealand jurisprudence: whether New Zealand has an appropriate legal foundation for the duty; whether the Crown's loyalty to the public precludes a duty owed to a specific group; and whether political redress via the Treaty of Waitangi Act eclipses the duty.[60]

The Legal Foundation of a Fiduciary Duty

New Zealand courts have grappled with whether duties to Māori must be grounded in statute or whether they can also arise according to equitable principles. Some New Zealand jurisprudence suggests that the Canadian duty derives from particular statutory contexts, and is, therefore, inapplicable.[61] Alternatively, by construing the duty as statutory, New Zealand courts have wedded it to the Treaty. One subset of this view suggests that the Treaty — and, therefore, the duty — is only relevant when incorporated into statute, such as provisions that refer to the Treaty "principles".[62] The other subset of this view, taken by O'Regan J in the *Forests Case,* is that the Treaty is not relevant to a fiduciary duty. It merely creates obligations analogous to — but not the same as — a fiduciary duty.[63]

By contrast, New Zealand courts have also considered that the duty may arise independently of statute. Elias CJ in *Paki* adopted this approach when her Honour suggested that such a claim would arise "in equity".[64]

The Significance of Loyalty

The concept of loyalty is essential to a fiduciary duty. This creates a tension between the Crown's political duty to represent the interests of the public and any exclusive duty of loyalty towards Māori as an indigenous (and

60 Claire Charters specifies two of these obstacles (misunderstanding and judicial deference). See 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. However, I have approached these obstacles in a different way and added a third.

61 Harrison and French JJ distinguished *Guerin* on this basis. See *Wakatū CA decision,* above n 43, at [214].

62 This position has even been accepted by some claimants. In *Ngai Tahu Māori Trust Board v Director-General of Conservation* the claimants recognised that a fiduciary duty existed because of the incorporation of Treaty principles into statute. See *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 534. See also Donna Hall "The Fiduciary Relationship Between Māori and the Government in New Zealand" in Law Commission of Canada (eds) *In Whom We Trust: A Forum on Fiduciary Relationships* (Irwin Law, Toronto, 2002) 123 at 125. The Treaty's basis in partnership is also set out in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

63 *Forests Case,* above n 22, at [81].

64 *Paki*, above n 23, at [150].

minority) group.[65] O'Regan J's aforementioned comments reflect the view that the two are irreconcilable — a fiduciary duty would undermine the Crown's duties to "the population as a whole".[66] Harrison and French JJ shared this attitude in the Court of Appeal *Wakatū* decision. Elias CJ left the issue open in *Paki* when she questioned whether loyalty was a necessary element of Crown-Native fiduciary duties.[67] The Canadian decision in *Wewaykum*, on the other hand, suggested that while the Crown owes duties to the population as a whole, this need not detract from its obligations to specific groups.[68]

Political Constitutionalism

Arguably, the biggest obstacle to the Supreme Court recognising a fiduciary duty was not one of legal interpretation, but one embedded in New Zealand's constitutional culture. The "omnipotence" of Parliament has resulted in New Zealand courts regularly deferring to Parliament on indigenous matters — even where those matters are ostensibly legal rather than political.[69] Claimants are often barred from court action if the matter relates to the settlement process, owing to the court's role of non-interference in matters of policy.[70] The Treaty of Waitangi Act has accordingly been cited as a reason to bar a fiduciary duty.[71]

VI SUPREME COURT

The Supreme Court overcame these obstacles to find in favour of the appellants:

(1) A majority of the Court (William Young J dissenting) found that the Crown owed equitable obligations towards Māori in respect of the Tenths and that the High Court may determine matters of breach and remedy.
(2) A majority of the Court (William Young J dissenting) found that the claim was not barred by the Limitation Act 1950.
(3) A majority of the Court found that Mr Stafford had standing, whereas Wakatū and Te Kāhui Ngahuru Trust lacked standing.

65 Matthew Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, Oxford, 2010) at 60. Conaglen refers to the definition of loyalty in the *Oxford English Dictionary*. See JA Simpson and ESC Weiner *Oxford English Dictionary* (9th ed, Clarendon Press, Oxford, 1989) at 74.

66 *Forests Case,* above n 22, at [81].

67 *Paki*, above n 23, at [155].

68 *Wewaykum*, above n 9, at [96].

69 Claire Charters "Māori Rights: Legal or Political?" (2015) 26 PLR 231 at 236.

70 See, for example, *Kai Tohu Tohu o Puketapu Hapu Incorporated v Attorney-General* HC Wellington CP344/97, 5 February 1999 per Doogue J; *Watene v The Minister in Charge of the Treaty of Waitangi* HC Wellington CP120/01, 11 May 2001 per Goddard J; and *Milroy v Attorney-General* [2005] NZAR 562 per Gault J.

71 See, for example, *Paki*, above n 23, at [286] and [288]; and *Wakatū CA decision*, above n 43, at [216].

Elias CJ and Glazebrook J dissented as they found that all three parties had standing.

(4) A majority of the Court (William Young J dissenting) found that Mr Stafford's claims were not barred by the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 [the Settlement Act].

The reasoning of the Supreme Court on the key matters is set out below.

The Crown's Equitable Obligations

Elias CJ

Elias CJ's judgment sets out a comprehensive historical account of the Nelson Tenths, which, in her view, led to the formation of a fiduciary duty. Her Honour found that, because native groups have pre-existing land interests, the Crown has special obligations relating to those interests. These obligations go beyond general obligations to the wider public.[72] In New Zealand, the Crown's assumption of responsibility started with te Tiriti, under which the Crown guaranteed Māori "full, exclusive, and undisturbed possession" of their land.[73] In particular, the Crown's right of pre-emption for land purchase created duties for such land to be dealt with fairly.

Elias CJ accepted that, in some circumstances, the Crown "wears many hats and represents many interests", in which case it may not owe fiduciary duties to individuals, but only its governmental obligations to all.[74] However, the Crown can owe obligations as trustee to a specific group where it deliberately chooses to assume the role of trustee or agent and is not acting as the sovereign in dispensing justice or allocating benefit.[75]

Her Honour drew on the Canadian Supreme Court's comments in *Guerin*, finding that the *Spain Report* effected a surrender of land in exchange for an equitable interest in the land reserved in the course of that exchange.[76] A fiduciary duty arose because the Tenths represented a pre-existing interest in land that was alienated on specific and identifiable grounds.[77] Her Honour disagreed that the Treaty of Waitangi Act 1975 eclipses a fiduciary duty.[78] In her view, the existence of a potential avenue for political redress could not affect a claim in equity.[79]

Her Honour limited the duty's scope as she did not find that the Crown owed a duty to Māori at large. Instead, where there is a pre-existing and independent Māori property interest that could only be surrendered to

72 *Wakatū SC decision,* above n 1, at [379]. See also *Elder Advocates of Alberta Society,* above n 13, at [48].
73 *Wakatū SC decision,* above n 1, at [380].
74 At [379] in relation to *Wewaykum,* above n 9, at [96].
75 At [339].
76 At [384].
77 At [390].
78 At [386].
79 *Paki,* above n 23, at [165] as cited in *Wakatū SC decision,* above n 1, at [386].

the Crown, "a relationship of power and dependency may exist in which fiduciary obligations properly arise".[80] Here, the Crown had an equitable duty because the Māori proprietors were dependent on the Crown to protect their interests. This was because the Crown had obtained exclusive authority over the land.[81]

Furthermore, Elias CJ found that the nature of the Crown's fiduciary obligations in relation to the Tenths were those of a trust.[82] The Chief Justice rejected the Attorney-General's argument that the Crown did not intend to create a trust or that there was insufficient formality. Her Honour, therefore, found that the relationship was one of a true trust, in respect of which a fiduciary duty arose. Accordingly, the Crown breached its trust obligations by entering into transactions that diminished the Tenths and failing to properly set the rural reserves aside.[83]

Glazebrook J

Glazebrook J arrived at the same conclusion as the Chief Justice. Her Honour found that the circumstances surrounding the Tenths demonstrated all of the elements of a trust.[84] She rejected that governmental obligations precluded the Crown from owing loyalty to Māori.[85] Rather, the Crown had the power to take on such obligations, and the land subject to the trust was not available for general governmental purposes at any rate.[86] Consequently, her Honour found that the Crown breached its obligations regarding the Tenths.[87]

A fiduciary obligation was unnecessary to Glazebrook J's conclusions. However, her Honour noted that, if she were wrong, the Crown's obligations would be so close to that of a trustee that a fiduciary duty was an "inevitable" conclusion.[88]

Her Honour did not give a view on whether this reflected any special relationship between the Crown and Māori more generally. However, she did note that the Chief Justice's analysis on this point "has much to recommend it".[89] Glazebrook J, therefore, found that the Crown should have held the Tenths reserves on trust for customary owners. Even if this was not the case, a fiduciary obligation existed — although not in the sense that *Guerin* applied one, as she did not recognise any special kind of relationship between the Crown and Māori.

80 *Wakatū SC decision,* above n 1, at [391].
81 At [388].
82 At [393].
83 At [445].
84 Certainty of intention, certainty of object and certainty of subject matter.
85 At [582].
86 At [582].
87 At [587]. Her Honour left it to the High Court to determine the exact nature of these obligations.
88 At [588].
89 At [590].

Arnold and O'Regan JJ

Arnold and O'Regan JJ also found that the Crown had breached its obligations to the appellants. Unlike Elias CJ and Glazebrook J, their Honours did not focus on whether an express trust might exist on the facts, as a finding of a fiduciary duty would lead to the same outcome.[90] Instead, a trust-like relationship led their Honours to find a fiduciary duty.

Arnold and O'Regan JJ adopted the *Guerin* approach to find that the Crown owed fiduciary duties to customary owners of the land purchased by the New Zealand Company.[91] The Crown took on obligations to allocate and manage these reserves in accordance with the owners' interests. These obligations were in addition to its own governmental responsibilities towards Māori. This assumption of responsibility at an early stage meant that the *Guerin* analysis applied. Their Honours' findings are a notable departure from O'Regan J's view in the *Forests Case* that *Guerin* could never apply in New Zealand.[92]

William Young J

William Young J gave a dissenting view regarding any equitable obligation the Crown might owe to Māori in respect of the Tenths. William Young J found on the facts that the 1845 grant was ineffective, meaning that no fiduciary duty arose to protect Māori interests under that grant.[93] Even if a fiduciary duty existed, his Honour found that it could not apply due to the Limitation Act 1950.[94]

Standing and Limitation

By a majority comprising William Young, Arnold and O'Regan JJ, the Court held that the Proprietors of Wakatū and Te Kahui Ngahuru Trust lacked standing to bring the claims on behalf of the customary owners. Elias CJ, and Glazebrook, Arnold and O'Regan JJ, granted standing to Mr Stafford.

Elias CJ agreed with Glazebrook J that a "flexible" approach to standing should be given to claims of this nature.[95] Accordingly, her Honour found that Wakatū could bring the claim in a representative capacity.[96] Furthermore, her Honour found that the Trust was a necessary addition to the proceedings because Wakatū does not account for all descendants of the customary owners.[97]

90 At [770].
91 At [779].
92 *Forests Case*, above n 22, at [81].
93 *Wakatū SC decision,* above n 1, at [919].
94 At [937]–[941].
95 At [499] per Elias CJ and [673] per Glazebrook J.
96 At [673].
97 At [673].

Conversely, the majority disagreed that a relaxed approach to standing was appropriate.[98] Their Honours rejected that Wakatū had standing, as it is not a successor trustee. The majority also found that the Trust could not gain representative status because the trust's beneficiaries are members of the class whom the trustees claim to be representing.[99]

While there was disagreement regarding Mr Stafford's status as a kaumatua of Wakatū, the majority found that Mr Stafford's role as a leader, and his close association with the claim, afforded him standing. William Young J did not view Mr Stafford as having any particular status to bring a claim, except as one individual of the collective group of beneficiaries. His Honour, therefore, denied Mr Stafford standing as it was precluded by the Settlement Act.

While a majority found that the Limitation Act 1950 did not bar the appellant's claim, the Court left it open for the High Court to determine breach and remedy with regard to the equitable doctrine of laches.

VII THE FIDUCIARY DUTY AS CHALLENGING POLITICAL CONSTITUTIONALISM

The Supreme Court's findings are significant for their acknowledgment of legally enforceable indigenous rights. In New Zealand, indigenous historical grievances are often deemed to be political matters, appropriately addressed in the political sphere through the Treaty settlement process. The extent of this was evident in the Supreme Court decision in *New Zealand Māori Council v Attorney-General* (*Water Case*).[100] In that case, the Court took the political process into account when it concluded that legislation did not breach Treaty principles because the Crown allowed Māori opportunity to negotiate their interests.[101] This example of deference demonstrates that the courts can be prone to adjusting their judicial role in cases where there may be a political consequence.[102]

The politicisation of indigenous rights in New Zealand is not a recent development. According to Professor Mark Hickford, the Colonial Office considered indigenous rights *political* — and not *legal* — matters as a matter of policy.[103] As an example, the Colonial Office avoided transposing native title into New Zealand. Without a legal framework, the post-confiscation and post-war era allowed only for political redress. Professor

98 At [799].
99 At [796] and [810].
100 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.
101 Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 94.
102 Matthew Palmer described this as an "unconscious calculation" of the political consequences of a decision. Palmer, above n 101, at 203.
103 Mark Hickford "'Vague Native Rights to Land' — British Imperial Policy on Native Title and Custom in New Zealand, 1837–53" (2010) 38 Journal of Imperial and Commonwealth History 175 at 180–183.

Michael Belgrave additionally asserts that, from World War I and immediately following World War II, the majority of Māori grievances were addressed by the Executive.[104]

The interpretation of the Treaty of Waitangi Act has further fuelled this deference to the political sphere. Courts have viewed the Act as the sole vehicle through which to address Māori rights and redress. McGrath J in *Paki* is a proponent of this view.[105]

This attitude is unjust. Māori entities often possess weaker bargaining power than the Crown, allowing the Crown to be a judge in its own Court. Commentators like Hickford argue that resolving grievances in the political realm yields an "enriched ... inheritance", yet the disillusionment that many Māori groups have felt through this process suggests otherwise.[106] Following decades of disappointment, it is no surprise that the *Wakatū* claimants sought a definitive legal outcome. Whilst the Crown has a duty to negotiate with Māori directly, this cannot override existing and enforceable legal rights and duties.

The decision in *Wakatū* challenges the "structural antagonism" of the judiciary that so often considers Māori rights as non-legal rights.[107] By finding justiciable equitable obligations, the Supreme Court recognised that historical agreements between the Crown and Māori are legally enforceable, and refrained from adhering to the kind of political constitutionalism that often pervades judicial findings on these matters.[108] In doing so, the Court rejected the idea that the Crown can be the arbiter of its obligations to Māori under the guise of political decision-making. Rather, agreements made between the Crown and Māori are subject to judicial supervision — as all formal agreements are. Kerensa Johnston, general counsel for Wakatū, recognised the significance of this, noting that the Courts in this instance were able to act as a "legal backstop" in upholding equitable obligations.[109]

The Supreme Court's attitude in *Wakatū,* therefore, raises optimism for future indigenous land rights cases. However, celebration may be premature. It is arguable that the courts in the *Wakatū* litigation were given a direct mandate to resolve the claim. This is because the Settlement Act specifically allowed for the *Wakatū* proceedings to continue, despite full and final settlement.[110] The courts may not be given such a clear mandate for future claims. Moreover, the instances where a fiduciary duty might apply are narrow. However, the decision sets a strong precedent for the courts to

104 Michael Belgrave *Historical Frictions: Māori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005) at 33.

105 *Paki*, above n 23, at [191] and [196].

106 Mark Hickford "The Historical, Political Constitution — Some Reflections on Political Constitutionalism in New Zealand's History and its Possible Normative Value" [2013] NZ L Rev 585 at 596.

107 Charters, above n 69, at 236.

108 For instance, the political constitutionalism that was espoused by *Tito,* above n 5.

109 Kerensa Johnston used this phrase when discussing the case at a presentation held at Victoria University. Kerensa Johnston and Alex Frame "The Wakatū Decision: A landmark moment in NZ law" (presentation to Victoria University, Wellington, 20 April 2017).

110 Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, s 25.

confidently apply legal obligations that the Crown owes to Māori groups. That is not to be dismissed lightly.

VIII THE FIDUCIARY DUTY AS A LEGAL FICTION

The distinction between trust obligations (Elias CJ) and trust-like obligations (Arnold and O'Regan JJ) may have implications for how the duty is applied in the future. Professor Alex Frame has noted that Arnold and O'Regan JJ's application of a "trust-like" relationship in the form of fiduciary duty could be construed as a legal fiction, designed to apply the obligations of a trust to worthy situations.[111]

Yet the fiduciary duty as a legal fiction reflects its very utility. In the High Court of Australia, Deane J noted that the process of applying a fiduciary duty to a specific relationship demands a flexible approach. His Honour warned that an inflexible approach would "convert equity into an instrument of hardship and injustice in individual cases".[112] Indeed, there are positive public policy reasons for having a regime which protects discretionary interests. Applying fiduciary law to new relationships is a manifestation of the jurisdiction's purpose — to allow just outcomes in otherwise unconscionable circumstances where there is a specific interest at stake.[113]

IX CONCLUSION

While the application of a fiduciary duty in New Zealand provides new legal leverage for indigenous groups, this does not mean the Supreme Court devised a novel legal concept. Rather, the Court applied longstanding equity and native title principles to the relationship between the Crown and Māori customary landowners within a specific context. The particular facts of this case gave rise to these obligations — such as the Crown's right of pre-emption over native title land, the findings of the *Spain Report* and the Land Claims Ordinance. Given that the Court did not find there was a general fiduciary duty, these contextual factors indicate the kinds of elements that may be needed to establish a duty in future claims.

By recognising that equitable obligations arose, the Supreme Court has demonstrated that the courts are willing to supervise rights stemming from native title and that such rights are not exclusively a political matter. This approach does not cut across the Treaty Settlement process, but instead

111 Alex Frame "Fiduciary duty — a few remarks on *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17" (2017) April Māori LR.

112 *Kak Loui Chan v Zacharia* (1984) 154 CLR 178 at [30].

113 Andrew S Butler "Fiduciary Law" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 471 at 485.

reinforces the courts as a "legal backstop" in the context of realising legal obligations in the judicial sphere. *Wakatū* acknowledges that native title land rights are very much a legal matter and the courts have a significant role to play in enforcing them.