THE FIDUCIARY DUTIES OF THE CROWN TO MAORI: WILL THE CANADIAN REMEDY TRAVEL?

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I. INTRODUCTION

This article has three purposes. First, to analyse and identify the elements of the equitable remedy developed in recent years, mainly in Canada, under which the Crown may be held liable to indigenous peoples for acts and omissions in breach of a fiduciary duty, where such a duty is established on the facts. Secondly, the article will suggest that the remedy, and the principles on which it is based, appear, subject to one recent and controversial statutory exception, to be generally applicable in New Zealand as the law presently stands. Thirdly, an assessment will be attempted of the features of the Crown/Maori relationship most likely to provide occasion for the use of the remedy, together with an analysis of the important question of the effect of lapse of time on availability of the remedy.

The writer's interest in exploring the development in Canada of a remedy for breach of fiduciary duty by the Crown in respect of First Nations peoples was first aroused by an engagement to advise in Fiji on indigenous land rights in 2001. New Zealand lawyers are accustomed to using the Treaty of Waitangi as a starting point for inquiry into Maori rights *vis à vis* the Crown. As is well known, that Treaty, signed in Maori and English, stipulated some very definite conditions and protections as the price paid by the Crown for the acquisition of 'kawanatanga', and these had naturally become, and continue to be, the basis for Maori claims. In Fiji is found the Deed of Cession of 1874, signed only in English, which explicitly made the gifting of sovereignty to the Queen by Cakobau and the leading chiefs unconditional. The approach for a legal adviser was therefore to ask whether this very vulnerability might not itself contain the seeds of an alternative legal strategy. Could less be more? The open-hearted commitment of Cakobau and his fellow Chiefs to Queen Victoria and her representatives in 1874 seemed to indicate that the fundamental relationship was not intended to be a contractual bargain, but rather one of protection and trust. The question became whether such a relationship might in some respects be supervised and enforced by the courts of law.

This article has a technical legal purpose – to evaluate the possibilities of an untried legal remedy in the context of Aotearoa/New Zealand – and some preliminary observations are necessary about equity as a body of rules administered by our courts, and what it might mean to say that breach of fiduciary duty by the Crown is an equitable remedy.

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There were historically two strands in the English legal system. The rules of the common law administered in the King's courts had become somewhat rigid but it was possible to resort to the Lord Chancellor as an alternative source of a more flexible jurisprudence based on general concepts of fairness and good conscience. In time, the Chancellor's jurisdiction, which itself began to take on the character of fixed rules, came to be exercised by the Court of Chancery, and termed 'equity'. The growth area for its activities lay with the increasingly popular trusts – the arrangement by which property could be owned by one person on the understanding that it was held for the benefit of another. The great legal historian, Maitland, describes the process in this way:

> Common honesty requires that a man shall observe the trust that has been committed to him. If the common law will not enforce this obligation it is failing to do its duty. The chancellor intervenes, but in enforcing trusts he seizes hold of and adopts every analogy that the common law presents. For a long time English equity seems to live from hand to mouth … Even in the seventeenth century men said that the real measure of equity was the length of the chancellor's foot.[1]

Trusts were not the only arrangement which equity saw as evidencing a 'fiduciary' relationship requiring one party to act with particular care towards another; partners, solicitors and clients, company directors and shareholders, and other similar situations provided instances also. The fiduciary obligation would require a party fully to disclose to the other any relevant information, and, in particular, to refrain from profiting from opportunities which the position of power might offer.

Until 1873, the two strands of 'common law' and 'equity' continued to be administered in separate courts in England. Thereafter they became 'fused' in the single body of law applied in the general courts of law. In New Zealand, they were applied from the beginning by all courts in 'fused' form. In modern times the position is stated in section 5 of the Imperial Laws Application Act 1988:

> After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.

Is there any significance, therefore, in the origin of the remedy for breach of fiduciary duty in the equity jurisdiction? The answer lies in the discretionary nature of the remedy. The Chancellor's jurisdiction to make an order based on good conscience would only be exercised in favour of a plaintiff with a meritorious case. It was a remedy within the discretion of the Court, which would require the plaintiff to come to it with clean hands. Equitable remedies continue today to contain that condition, the significance of which will be explored later in this article.

II. The Crown as Fiduciary – a Higher but Unenforceable Duty

If our inquiry as to the availability of the equitable remedy of breach of fiduciary duty against the Crown were being made twenty years ago, we would have found the prospects bleak. We would quickly have discovered the massive 1976 judgment of Megarry V-C in *Tito v Waddell*[2] concerning the attempts of the Banaba islanders to hold the British Crown to an equitable fiduciary duty for the sequence of events which led to the virtual destruction of their island, and

1 H M Cam (ed), *Selected Historical Essays of F.W. Maitland* (1957), 133.

2 *Tito v Waddell (No.2)* [1977] 1 Ch 106.

the resettlement of its people in Fiji, as a result of the open-cast mining and export of phosphate. We must begin with an analysis of the Banaba case.

The measures and transactions by which the Banabans were induced to agree to the mining of their island are complex, but the core feature was the payment to the Crown by the mining interests of a royalty on every ton of phosphate exported. The variously-expressed concept was that these royalties would be dispensed by the Crown for the needs and in the interests of the islanders. During the Second World War Banaba (also known as Ocean Island) suffered a Japanese occupation which decimated the population, and in 1947 the survivors were persuaded to give their remaining lands over to mining and to re-settle in the island of Rabi in the Fiji group. In the 1970s some Banabans brought action in the High Court in London asserting that the Crown had failed to live up to the fiduciary duties it had explicitly and/or implicitly accepted to preserve the interests of the islanders.

In November 1976 Megarry V-C delivered his 241-page judgment. The central issue was quickly seen to be whether the Crown had placed itself in a fiduciary relationship which could be overseen and enforced by the Courts. The learned Judge drew a distinction between a 'true trust', which would place the Crown under fiduciary duties enforceable by the Court, and a 'trust in the higher sense', which would be a reflection of the general obligation of government, but not judicially enforceable. Megarry V-C stated in respect of the second category:

> Though this latter type of obligation is not enforceable in the Courts, many other means are available of persuading the Crown to honour its governmental obligations, should it fail to do so.[3]

A 'true trust' might have been one way to get to an enforceable fiduciary duty – which would have brought into play strict rules of equity about fair-dealing – but there were other routes to the same point. The Banabans had pointed to the statute empowering the Crown's officials to fix and receive the phosphate royalties:

> It is of course well settled that the fair-dealing rule, with or without modifications applied to many persons other than trustees, including agents, solicitors, company directors, partners and many others … The categories of fiduciary obligation are not closed, and I see no reason why statute should not create a relationship which carries with it obligations of a fiduciary nature. The question, however, is not what statute could do, but what this statute has done.[4]

Although the learned Judge found much to criticise in the conduct of the British government in relation to Banaba, specifically citing the process by which the level of royalty was fixed and the failure to provide independent advice to the Islanders in 1947, his Honour held that:

> My conclusion, therefore, is that the Crown was not in a fiduciary position … Throughout, the obligations of the Crown were governmental obligations and not fiduciary obligations enforceable in the courts.[5]

The Banaba case seemed therefore to exclude the possibility that the Crown might, in the course of the formation and eventual dissolution of the Empire, have assumed fiduciary duties in respect of indigenous people which could be enforced by the Courts. Megarry V-C's recognition that only a 'higher' trust could be discerned – one not enforceable in the Courts – seemed ironic but final.

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3 Ibid, 217.

4 Ibid, 235.

5 Ibid, 235.

III. The Canadian Development – Three Cases Discussed

The apparent dead-end of *Tito v Waddell* must now however be reconsidered in the light of the development in Canada of a refashioned concept of fiduciary duty in relations between the state and its indigenous peoples. Three cases in which the new doctrine is articulated will be examined.

A. Guerin v The Queen

The facts in *Guerin v The Queen*[6] were these. In the 1950s, the Indian Affairs Branch of the Federal Government of Canada granted a lease to a Golf Club over certain lands of the Musqueam Indian Band, descended from the original inhabitants of Vancouver in British Columbia. Although there had been consultation with the Band in general terms and the Band had agreed that its surplus lands could be leased for the proposed purposes, the terms of the lease (which were very unfavourable to the Band) were found by the trial judge to have been put to the Band 'only in the most general terms', and that when the Band agreed in 1957 to the 'surrender' of the relevant lands to the Crown, it did not have before it several of the most unfavourable features of the lease subsequently agreed between the Crown and the Golf Club. The Crown argued that once the surrender documents were signed, the Crown was free to lease on any terms it saw fit. The matter eventually came before the Supreme Court of Canada, which found that a fiduciary duty lay upon the Crown to deal with the lands for the benefit of the Musqueam Band, and that this duty was enforceable by the courts in the same way as if a trust were in effect.

The Supreme Court upheld the award of damages of ten million dollars to the Band. Dickson J, as he then was, stated:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
> … The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in land is inalienable except upon surrender to the Crown.[7]

The significance of this requirement that Indian lands could only be disposed of to the Crown was addressed by Dickson J:

> 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 … Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie … This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.[8]

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6 *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321, also [1986] LRC (Const.) 840. Page references here are to DLR.

7 *Guerin*, ibid, 334.

8 *Guerin*, ibid, 340.

Dickson J was careful to say that the Crown's fiduciary obligation was not a trust, but that it was 'trust-like' in character, and his Honour employed the trust analogy to assess damages.

Justice Wilson gave the other central judgment in *Guerin*. Her Honour was more ready to find a trust relationship:

> There is no magic in the creation of a trust. A trust arises, as I understand it whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries. I think that in the circumstances of this case as found by the learned trial judge the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the band members had approved as being for their benefit …[9]

The Supreme Court of Canada had thus broken free of the 'political trust' shackles of the British cases. It had fastened on to the open-ended character of the equitable concept of the fiduciary relationship. Dickson J had observed:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.[10]

The critical fact for the *Guerin* Court was that the Crown had mandatorily 'interposed' itself with a statutory discretion to determine what was in the interests of the Indian band.

B. Semiahmoo Indian Band v Canada

In *Semiahmoo Indian Band v Canada*[11] the facts were these. Government authorities wanted land at the Canada/US border for a customs facility and accordingly sought the surrender of reserve lands of the Semiahmoo Indian Band. The law provided for such surrender by consent either conditionally or unconditionally. However, more land than required for the customs facility was surrendered, and no reversionary condition was included to cover the situation where, as transpired, the land was not used for the purpose originally contemplated. The Federal Court of Appeal held that two distinct fiduciary duties on the State could be identified. First a pre-surrender duty to avoid an exploitative bargain and, secondly, a post-surrender duty to correct any breach of the pre-surrender fiduciary duty if the Crown retains control of the land. The Court found breaches of both duties. Isaac CJ stated:

> I find that the respondent did breach its fiduciary duty to the Band in its 1951 surrender even though the Band may have received compensation … somewhere in the neighbourhood of market value. [12]

The Court pinpointed the post-surrender breach or duty as occurring, for the purpose of limitation periods, when a reasonable person would have realised their original breach and exercised their power to correct it. As to remedies, the Court imposed a constructive trust in favour of the Band in respect of the land. The great significance of the post-surrender breach (converted into New Zealand circumstances it would become a 'post-taking breach') is that it avoids the limitation period which might otherwise have barred action on the original breach.

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9 *Guerin*, ibid, 361.

10 *Guerin*, ibid, 341.

11 *Semiahmoo Indian Band v Canada* (1997) 148 DLR (4th) 523.

12 *Semiahmoo*, ibid, 539.

This case makes it clear that the fiduciary doctrine as developed by the Canadian courts is not confined to land compulsorily acquired, but extends also to land acquired by consent, and even where market price may have been paid.[13]

C. Wewaykum Indian Band v Canada

In December 2002 Justice Binnie gave judgment for the Supreme Court of Canada in *Wewaykum Indian Band v Canada*.[14] The case arose from the claim by two Indian bands on Vancouver Island to each other's reserve lands. Each band asserted that, but for the Crown's failures, it would have been in possession of the other's reserves. Although the Supreme Court found against both bands, it took the opportunity to affirm and clarify the principles in what it termed the 'watershed decision in *Guerin*':

> The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people. A quasi-proprietary interest (e.g. reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public laws remedies only. The former raises considerations 'in the nature of a private law duty' (*Guerin* at page 385). Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations 'in the nature of private law duty' towards aboriginal people.[15]

The *Wewaykum* Court confirmed the distinction made in *Guerin* between the 'political trust' cases, which were about distributing government funds and property, and the Crown's dealings with pre-existing legal interests of indigenous peoples. The Court quoted from *Guerin* as follows:

> As the 'political trust' cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that duty is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[16]

The *Wewaykum* Court stressed that 'the fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples'[17] quoting with approval the comment by Professor Slattery that:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a 'weaker' or 'primitive' people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.[18]

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13 *Kruger v The Queen* (1985) 17 DLR (4th) 591 is an example of a case involving compulsory acquisition for public purposes where the fiduciary duty was held to apply.

14 *Wewaykum Indian Band v Canada* (2002) 220 DLR (4th) 1.

15 *Wewaykum,* ibid, 32.

16 *Wewaykum*, ibid, 33-34.

17 *Wewaykum*, ibid, 35.

18 *Wewaykum*, ibid, 35. The quotation is from B Slattery, 'Understanding Aboriginal Rights' (1987) 66 Can Bar Rev 727, 753.

Perhaps the greatest value of the *Wewaykum* review and affirmation of the *Guerin* doctrine lies in its statement of what the principle cannot do – its limits. The Court noted that since *Guerin* a 'flood' of fiduciary duty claims had come before Canadian courts. It listed some areas in which the fiduciary duty had been claimed; the organising of elections, the provision of social services, the rewriting of negotiated agreements, the suppression of public access to information about band affairs, legal aid funding, and the invalidation of a consent signed by an Indian mother to adoption of her child. The Court clearly doubted that the principle could be applied to these matters, and Binnie J stated:

> … I think it desirable for the Court to affirm the principle…that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature…and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.'[19]

The *Wewaykum* Court went on to list and discuss limiting features of the remedy. The duty varied with the nature and importance of the interest sought to be protected – it did not provide a general indemnity. The duty varies with subject matter, and it may also vary as between stages of dealing with the same subject matter. Where the Crown interposes itself between Indian bands and other interests, it must prevent 'exploitative bargains.' Enforcement of any equitable duty is subject to the usual equitable defences, in particular as to delay and acquiescence. The Court observed that Wilson J's comments in *Guerin*:

> … should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself … [20]

What standard would the Crown have to meet where it was found to be under a fiduciary duty? The *Wewaykum* Court thought that:

> In a substantive sense the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting with what it reasonably and with diligence regards as the best interest of the beneficiary.[21]

What told against the bands in *Wewaykum* was that their forbears had, as autonomous and fully informed actors, agreed to resolve their dispute by recognising each other's reserves. The cross claims now mounted seemed to the Court to be a technical device to enable breach of fiduciary duty to be alleged against the Crown:

> The various technical arguments arrayed by the bands are … singularly inappropriate in a case where they seek equitable remedies. As noted, each band has, over the past 65 or more years, reasonably relied on the repeated declarations and disclaimers of its sister band, and on the continuance of the status quo, to reside on and improve its reserve.[22]

Broadly then, the approach of the Canadian courts to finding a fiduciary duty owed by the Crown to First Nations has been faithful to the principles applying to fiduciary duties generically. These appear well-stated by Paul Finn:

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19 *Wewaykum*, ibid, para 83.

20 *Wewaykum*, ibid, para 100.

21 *Wewaykum*, ibid, para 94.

22 *Wewaykum*, ibid, para 105.

> What must be shown … is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interest in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence 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.[23]

Specifically, Dr Rotman summarises the result of the Canadian cases in this way:

> … the Crown may not unilaterally ignore the promises that it made to the Aboriginal peoples or the situation of dependence that it created without legal implication based on fiduciary principles.[24]

IV. Is the Canadian Jurisprudence Applicable in New Zealand?

As an abstract question of law, there is no reason why the Canadian development should not be applicable in Aotearoa/New Zealand. As seen in the introduction, the 'common law including the rules and principles of equity' are part of the law of New Zealand, and there is no reason to prefer articulations of that body of law from the High Court in London to more recent explications from the senior appellate courts in Canada. On the contrary, the similarities in colonial background and the common need to find a legal framework for assessing the claims of indigenous peoples make the Canadian jurisprudence more relevant to New Zealand circumstances. This view is supported by the former, and distinguished, President of the New Zealand Court of Appeal, now Lord Cooke, who stated from the bench in 1990:

> The judgments in *Guerin* ... delivered by Dickson J and Wilson J seem likely to be found of major guidance when such matters come finally to be decided in New Zealand ... There are constitutional differences between Canada and New Zealand, but the *Guerin* judgments do not appear to turn on these. Moreover, in interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of aboriginal peoples are in North America.[25]

Cooke P returned to the fiduciary ramparts in 1993 with a repetition of his belief that the doctrine had applicability elsewhere in the Commonwealth, including New Zealand. Noting the *Sparrow* case of 1990 in Canada, from which he quoted the sentence 'The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation', and the *Mabo* case of 1992 in Australia, the President of the Court of Appeal observed:

> In these judgments there have been further affirmations that the continuance after British sovereignty and treaties of unextinguished aboriginal title give rise to a fiduciary duty and a constructive trust on the part of the Crown … clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty.[26]

Yet again in 1994, Cooke P observed of the Crown's historical power to extinguish Maori customary title:

> 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.[27]

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23 P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries, and Trusts* (1989), 46.

24 L Rotman, 'Conceptualizing Crown-Aboriginal Fiduciary Relations', in Law Commission of Canada, *In Whom We Trust: A Forum on Fiduciary Relationships* (2002) 54.

25 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 655.

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

That judicial view might be thought to be strengthened by similarities between the historical factors regarded by the Canadian Supreme Court as favouring the imposition of a fiduciary duty on the Crown in Canada on the one hand, and those found in New Zealand on the other. Reference is particularly made to the feature repeatedly found relevant by Canadian Courts – the mandatory interposition of the Crown between Indian bands and other parties in dealings with Indian land interests. That feature is replicated in New Zealand in the form of the 'pre-emption' clause in the Treaty of Waitangi and the somewhat zigzagging incorporation of it in subsequent New Zealand legislation.[28]

Furthermore, the *Instructions* from Lord Normanby to Captain Hobson dated 14 August 1839, which provided the authority for, and the conditions of, the British proposals leading to the Treaty of Waitangi in 1840, contain several expressions indicative of a fiduciary duty assumed by the Crown. Lord Normanby instructed Hobson as follows:

> the benefits of British protection, and of Laws administered by Britiszh Judges would far more than compensate for the sacrifice by the Natives of a National independence which they are no longer able to maintain.
>
> All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all. They must not be permitted to enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any Territory the retention of which by them would be essential or highly conducive to their own comfort, safety or subsistence.[29]

The ensuing Treaty itself contains language correspondingly redolent of a fiduciary burden. The Maori chiefs heard in the preamble read out at Waitangi in February 1840 that Queen Victoria regarded them with her 'mahara atawai' (concern to protect), and that Her Majesty would 'tiakina … nga tangata maori katoa o Nu Tirani' (protect all the Maori people of New Zealand).[30]

However, at least one respected New Zealand academic commentator has doubted that the *Guerin* doctrine would be applied in New Zealand. Dr Paul McHugh has recently expressed this view:

> In New Zealand the possibility of any such extension of the 'fiduciary-like' obligations of the Crown (derived from common law in association with Treaty principles) was stemmed after *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (*Broadcasting Assets*) re-affirmed the orthodox rule that Treaty rights required a statutory basis. Moreover, in *Attorney-General v Maori Land Court and Proprietors of Tahora 2 F2 and Wairoa District Council* (unreported, CA, 9 December 1998), the Court of Appeal read narrowly the statutory jurisdiction of the Maori Land Court to declare land was held on a

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27 *Te Runanga o te Ika Whenua Inc v Attorney-General* [1994] 2 NZLR 20, 24.

28 See particularly New Zealand Constitution Act 1852 (UK) s 73 which provided that: 'It shall not be lawful for any person other than Her Majesty … to purchase, or in anywise acquire, or accept, from the aboriginal Natives, land of or belonging to or used or occupied by them in common as Tribes or Communities …' Although this section was repealed by the UK Parliament (which alone could do so) in the Statute Law Revision Act 1892 (UK) s 1, it was reinstated in substance, if not in name, by the Native Land Court Act 1894 (NZ) s 117 which made it unlawful for any person other than the Crown to acquire interests in Maori land.

29 Lord Normanby's Instructions to Captain Hobson of 14 August 1839. These may conveniently be consulted in W D McIntyre and W J Gardiner (eds) *Speeches and Documents on New Zealand History* (1971), 10, at 12 and 14.

30 The Chiefs signed the Maori version of the Treaty. The translations provided are those of Professor Sir Hugh Kawharu, whose literal and 'reconstructed' translations into English are widely accepted.

> fiduciary basis. The fiduciary doctrine therefore failed to take root in New Zealand public law, whereas in Canada it was potted in s. 35 of the *Constitution Act* 1982.[31]

With respect to Dr McHugh, who has made a valuable and well-known contribution to the development of our jurisprudence on Maori rights, the passage quoted contains several misconceptions which detract from the force of its overall conclusion.

(i) Use of the expression 'fiduciary-like' suggests a misapprehension of the nature of the *Guerin* remedy. Examination of the passages from the *Guerin* judgment quoted above will show that the Court found a true fiduciary duty to lie upon the Crown. Some judges, however, thought that the duty was founded on a 'trust-like' relationship.

(ii) The fiduciary duty of the Crown would not be 'derived from common law in association with Treaty principles', but rather from the circumstances of the course of dealings between the Crown and indigenous people as seen through the prism of equity. The Treaty of Waitangi is not a necessary element of the equitable remedy for breach of fiduciary duty.

(iii) The re-affirmation of 'the orthodox rule that Treaty rights required a statutory basis' in the Broadcasting Case referred to by Dr McHugh could not possibly have anything to do with the equitable remedy for breach of fiduciary duty found to be available in *Guerin* and other Canadian cases, and thought to apply in New Zealand by Lord Cooke.

(iv) The decision of the Court of Appeal in *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 has not been 'unreported' for quite some time. Justice Blanchard did not decide in that case anything about the applicability of the equitable remedy for breach of fiduciary duty by the Crown in New Zealand law. His Honour decided that the Maori Land Court's limited jurisdiction did not permit it to consider the question:

> In our view jurisdiction under s.18 (1) (i) (of Te Ture Whenua Maori Act 1993) is limited to the making of vesting orders and granting other relief consistent with the purposes of the Act. The Solicitor-General was able to refer us to examples of its use by the Court in connection with trusts realting to Maori land . But a use relating to General land or Crown land was not intended by Parliament. Claims of Maori to such land based upon the existence of a fiduciary duty *are for the High Court to adjudicate*… [32]

(v) The fiduciary doctrine did not 'fail to take root in New Zealand public law', but rather has not yet been seriously pleaded before the New Zealand courts with general jurisdiction, as Justice Blanchard explicitly foreshadowed.

(vi) The doctrine has not been 'potted' by section 35 of the Constitution Act 1982 in Canada, but rather has been determined to be alive and well there as recently as the *Wewaykum* case. The fiduciary remedy and section 35 were seen as capable of co-existence. See for example Binnie J's observation that:

> The *Guerin* concept of a *sui generis* fiduciary duty was expanded in *R. v Sparrow*…to include protection of the aboriginal people's pre-existing and still existing aboriginal and treaty rights within s. 35 of the Constitution Act, 1982 …[33]

A final reason for suspecting that Lord Cooke's conclusion as to the viability of the 'fiduciary duty' remedy in New Zealand is to be preferred to Dr McHugh's requires examination of the recently enacted and controversial Foreshore and Seabed Act 2004. The Act has the purpose of

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31 P McHugh, 'What a Difference a Treaty Makes – The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15 Public L Rev 87, 94.

32 *Attorney-General v Maori Land Court* [1999] 1 NZLR 689, 702, emphasis and parenthesis added.

33 *Wewaykum Indian Band v Canada* (2002) 220 DLR (4th) 1, para 78.

extinguishing common law customary rights in the foreshore and seabed and replacing these by the more circumscribed rights provided in the Act. Accordingly, the Bill as referred to the Select Committee provided in clause 9(3) that 'customary rights claims' were to be transmuted into the limited form provided in the Bill. The term 'customary rights claim' was then defined as follows:

> In this section, customary rights claim means any claim in respect of the public foreshore and seabed that is based on the recognition at common law of customary rights, customary title, aboriginal rights, aboriginal title, fiduciary duty of the Crown, or rights, titles, or duties of a similar nature.

Quite apart from the extraordinary opportunism of the Crown's advisers in 'potting', to use Dr McHugh's cheerful phrase, the fiduciary remedy *en passant* – and the present writer appeared before the Select Committee to oppose that aspect of the legislation[34] – the clause is noteworthy for its assumption that the remedy would otherwise apply. The exclusion was not couched in the 'for the avoidance of doubt' form familiar where the drafter is just making sure of a conclusion believed to apply anyway.

The final form of the Foreshore and Seabed Act 2004 as enacted by Parliament repeated the scheme of the Bill. Section 10 defines 'customary rights claim' – again for the purpose of their extinguishment and replacement by a more limited right:

> … 'customary rights claim' means any claim in respect of the public foreshore and seabed that is based on, or relies on, customary rights, customary title, aboriginal rights, aboriginal title, the fiduciary duty of the Crown, or any rights, titles, or duties of a similar nature, whether arising before, on, or after the commencement of this section and whether or not the claim is based on, or relies on, any 1 or more of the following:
> (a) a rule, principle, or practice of the common law or equity:
> (b) the Treaty of Waitangi;
> (c) the existence of a trust;
> (d) an obligation of any kind.

Just in case anyone has missed the point, section 13(4) of the Act thunders that:

> The Crown does not owe any fiduciary obligation, or any obligation of a similar nature, to any person in respect of the public foreshore and seabed

This is a little like Parliament enacting that 'the world shall be flat.' No sane person has ever argued that parliamentary legislative supremacy can reshape the real world. What Parliament means, and could undoubtedly accomplish in proper form, is that no fiduciary obligation of the Crown which may exist in respect of the foreshore and seabed shall be enforceable in the Courts. Parliament could require the courts to treat the world as if it were flat. A question arises in the writer's view whether Section 13(4) is an expression of legislative will in proper form, to which supremacy must be accorded under the 'ultimate legal principles' of our constitutional

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34 Submission of Dr Alex Frame to Fisheries and Other Sea-Related Legislation Select Committee, dated 12 July 2004. The writer appeared before the Committee to give evidence in support of the submission on 12 August 2004 and urged that 'the inclusion in clause 9(3) of the words 'fiduciary duty of the Crown' will have the effect of also extinguishing any right to redress where the Crown may, by word or conduct, have assumed fiduciary duties in relation to specific parts of the foreshore and seabed. If enacted it would appear to release the executive branch of government from any enforceable duty, past or future, to preserve interests which it may have committed the Crown's honour and good faith to protecting … It is submitted that it would be a very bad practice and precedent for the Executive branch of Government to be released from the consequences of its own breach of present and future fiduciary duties where these are established to the satisfaction of Her Majesty's Judges.'

arrangements,[35] or whether it is rather an attempt to make a judicial decree clothed in legislative form.

Parliament is sometimes referred to in New Zealand as 'the highest court in the land'. The metaphor is constitutionally misleading and dangerous to the extent that it tempts lawmakers to believe that they are judges. Parliament is not the 'highest court in the land' because it is not a court at all. Unlike the Parliament in London, whose House of Lords component is a court, the New Zealand Parliament has never had, and has not now, any judicial function whatsoever.[36]

Although this is not the place to rejoin the debate on Lord Cooke's speculation that 'some common law rights presumably lie so deep that even Parliament could not override them', it is permissible to wonder whether an alternative judicially-patrolled limitation on the legislative powers of Parliament might hinge on the form rather than the content of purported legislation. If Parliament purported to enact the Telephone Directory, and the Governor-General assented to it, a court might decline to treat the result as valid law not because Parliament lacked legislative capacity, but because what it enacted failed to attain the form of a law.[37] It is not necessary fully to espouse Lon Fuller's requirement for an 'inner morality' of law without which a lawmaker will fail to make law[38] to appreciate that some legislative utterances may fail to achieve the status of law. Courts have, for example, been prepared to deny the character of law to legislative attempts to intrude upon the judicial function.[39]

Dr Rotman has, in the Canadian context, doubted whether the fiduciary duty of the Crown to Native peoples is susceptible of legislative annulment:

> Therefore, even if it were possible to obtain a constitutional amendment removing the Crown's fiduciary duty to Native peoples from Section 35(1), that action would be insufficient to eliminate the Crown's duty … Even in the absence of any positive legal basis on which to ground the Crown's fiduciary obligations, the Crown's duty nonetheless exists on the extralegal plane, just as it existed prior to its judicial recognition in *Guerin*.[40]

The Act is even more specific than the preceding Bill. Truly, Parliament has sought to make the Crown a 'faithless fiduciary'! The Crown's advisers have seen the danger from the Canadian doctrine and have stomped quite specifically on it, in relation to the seabed and foreshore. But what are we to conclude as to the applicability of the fiduciary duty of the Crown in relation to all other land and interests in Aotearoa/ New Zealand? The conclusion is invited that the doctrine applies in full Canadian vigour – why else exclude it so methodically from application to claims concerning the seabed and foreshore?

Two helpful discussions of the relevance for New Zealand law of the fiduciary obligation are those of Gerald Lanning[41] and Claire Charters.[42] Lanning's careful treatment in 1996 rightly

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35 For a developed argument on the supremacy of Parliament as one of the three 'ultimate legal principles' of the New Zealand legal system, see A Frame, *Grey and Iwikau: A Journey into Custom* (2002) 68-70.

36 For a Commonwealth case on the point, see *M'wembe v The Speaker* [1996] 1 LRC 584, 594, per Kabazo Chanda J; internal disciplinary functions under Standing Orders are only that.

37 Lord Cooke's suggestion is found in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398. See Frame, above n 35, 68-70.

38 L Fuller, *The Morality of Law* (1969), chap 2, in which Fuller discusses 'Eight Ways to Fail to Make Law'.

39 See the Privy Council's decision in *Liyanage v The Queen* [1967] 1 AC 259 and, closer to home, that of the Court of Appeal of the Solomon Islands in *Kenilorea v Attorney-General* [1986] LRC (Const.) 126.

40 L I Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996) 257.

41 G Lanning, 'The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship', (1996) 8 Auck U L Rev 445.

dwells on the important Canadian case of *Frame v Smith*[43] which, although concerned with the quite different context of parental rights, is referred to in several of the Canadian First Nation cases as a useful statement of the fundamental elements giving rise to a fiduciary duty. In that case, Wilson J lists three general characteristics giving rise to the duty:

> (1) The fiduciary has scope for the exercise of some discretion or power
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[44]

Lanning pays close attention to the judgment of Toohey J in the Australian *Mabo* case,[45] describing it as 'one of the most useful in this area' which emphasises the overall power/vulnerability relationship between the Crown and Aboriginal people as evidencing a broad-based fiduciary relationship. Although the point is useful, a decade later it may be that the *Wewaykum* decision warns us of the danger of claiming a generalised all-purpose fiduciary umbrella, and of the need to be more specific as to the area in which, and the particular interest over which, the fiduciary relationship arises. This point is also emphasised in Dr Rotman's comprehensive commentary on the Canadian jurisprudence:

> The most vital aspect of fiduciary doctrine, and what ought to receive the bulk of judicial attention, is its focus on the specific characteristics of individual relationships … Because of its implementation on a case-by-case basis, fiduciary doctrine is most appropriately described as situation-specific.[46]

Another interesting suggestion made by Lanning relates to the general principle that a fiduciary duty cannot be delegated, and he proposes that state-owned enterprises may be 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.[47]

Most recently, Claire Charters' equally helpful discussion begins with a protest at what she terms 'the legislative override of Crown fiduciary duties under the Foreshore and Seabed Act 2004'. Ms Charters tackles the most recent of the Canadian cases, *Haida Nation v British Columbia (Minister of Forests)*,[48] showing that the Supreme Court of Canada has reinforced the Wewaykum Court's insistence on a specific context and a specific interest for a fiduciary duty to be enforceable, as well as the variable strength of the duty according to circumstance. On the other hand, the Chief Justice in Canada in the Haida case pithily summarised the source of the fiduciary duty:

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42 C Charters, 'What Could Have Been and What Should Be: A Comparative Analysis of Crown Fiduciary Duties to Indigenous Peoples and Maori Interests in the Foreshore and Seabed', paper presented at a conference 'Foreshore and Seabed: the New Frontier', 10 December 2004, Victoria University of Wellington.

43 *Frame v Smith* (1987) 42 DLR (4th) 81. As Lanning points out, the decision receives favourable mention from Richardson J in the New Zealand case *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, 22.

44 *Frame v Smith*, ibid, 99.

45 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

46 Rotman, above n 40, 155.

47 Lanning, above n 41, 463.

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

> Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.[49]

The sourcing of the fiduciary duty in the 'honour of the Crown' recalls Lord Cooke's observations in the *Muriwhenua* case quoted above, which we might now paraphrase in the comment that it should not come to be thought that the honour of the Queen is less guarded by her courts in New Zealand that by those in Canada.

Ms Charters reluctantly concludes, as does the present writer in respect of section 10 but with a reservation expressed as to section 13(4), that the legislative override of fiduciary duty in the Foreshore and Seabed Act 2004 is not itself challengeable in the New Zealand courts, but goes on to consider the likely approach of our courts to the doctrine generally:

> In summary, Court of Appeal cases in the early 1990's clearly endorsed the application of Canadian jurisprudence on Crown fiduciary duties to aboriginal peoples here. Cooke P seemed to be inviting a robust fiduciary duty claim … Nevertheless, it seems unlikely that the New Zealand courts would impose a fiduciary duty on the Crown when a breach of that duty takes place in a political process such as the development of legislation …[50]

V. Two Background Examples

It may be useful to consider two examples of New Zealand contexts in which the Crown might arguably be fixed, in the first case, with the duties of a trustee, and, in the second case, with a more general obligation as a fiduciary.

A. Example 1

A good historical example from the New Zealand context of the Crown holding compulsorily-acquired Maori land as a clear trustee for Maori beneficiaries is provided by the Native Townships Act 1895. The long title of the Act reveals the intention:

> Whereas, for the purpose of promoting the settlement and opening-up of the interior of the North Island, it is essential that townships be established at various centres: and Whereas in many cases the Native title cannot at present be extinguished in the ordinary way of purchase by the Crown, and other difficulties exist by reason whereof the progress of settlement is impeded…

The scheme of the 1895 Act was to empower the Executive branch of government to declare 'any parcel of Native land to be set apart as a site for a Native township'. As a concession, the Act required that 'native allotments', not to exceed twenty per cent of the total area, be reserved. The status of these allotments was dealt with in section 12(3) as follows:

> All Native allotments … shall be deemed to be … vested in Her Majesty in trust for the use and enjoyment of the Native owners…

All other allotments were also declared to be 'similarly vested in Her Majesty, in trust for the Native owners according to their relative shares or interests therein'. The streets and reserves other than the Native allotments, however, were 'deemed to be vested in Her Majesty for an estate in fee-simple in possession, free from encumbrance'. It is submitted that the Native and other allotments represent a clear instance of the creation of an explicit and full trust binding on the Crown and enforceable by the beneficiaries.[51]

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49 *Haida Nation*, ibid, per McLachlin CJ, p 523.

50 Charters, above n 42, 21.

B. Example 2

The next example is submitted to be of a clear fiduciary duty but probably falling short of an explicit and full trust. It concerns what are known as the 'Old Land Claims'. These were lands which were claimed to have been purchased from Maori before the accession to British sovereignty following the Treaty of Waitangi in 1840. The British Government had, both before and after the Treaty, made clear its intention not to recognise such purchases unless found, on formal inquiry, to have been transacted with the true owners, for proper value, and did not represent an excessive area concentrated in a single purchaser. The story of these 'Old Land Claims' is lengthy and convoluted,[52] but the question arising is, what was the fate of those lands which the various Land Commissions (as the formal inquiries were called) determined not to have been properly acquired within the three conditions laid down by Government?

The reader may be forgiven for thinking that the lands must surely have been returned to the Maori owners from whom they had been determined not to have been properly purchased. It seems, however, that this was not always the case; sometimes these lands were treated as 'surplus lands of the Crown', and we have no lesser authority for this conclusion than the distinguished jurist and Solicitor-General of New Zealand between 1910 and 1920, Sir John Salmond.[53] It is suggested that the lands found not to have been validly purchased from Maori must thereafter have been held by the Crown in a 'trust-like' relationship in favour of the true Maori owners to whom the Crown owed an apparent fiduciary duty.

VI. Procedural Difficulties – Limitations and Laches

A critical factor for claims by indigenous peoples against the Crown for acts and omissions in the colonial period and its aftermath will always be the lapse of time between the alleged dereliction and the realisation of the loss. In that regard, a considerable advantage of the Waitangi Tribunal process provided under the Treaty of Waitangi Act 1975, to be balanced against the disadvantage of the usually non-binding status of the result, is that claims may be founded on Crown policies and actions going back to 1840.[54]

Conventional civil proceedings must, however, face the obstacle of limitation periods which will typically appear in the form of a bar on legal action as a result of a statutory limitation period; the law will provide that no action for breach of a contract may be commenced after, say, twelve years from the time the cause of action arose. The reasons for such a restriction are understandable – human affairs require some finality and certainty and it would be impractical to allow the courts to entertain claims in respect of ancient history which people have come to regard as settled. As it is sometimes put, 'the world must move on.' In relation to Maori claims, the situation prior to the enactment of Te Ture Whenua Maori Act 1993 had been that the clauses drafted by Sir John

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51 For the sake of completeness I should add that the Native Townships Act 1910, No.18 transferred land in the Townships held in trust by the Crown under the 1895 Act to the Maori Land Boards in the respective Districts.

52 For a detailed treatment, see A Frame, *Salmond: Southern Jurist* (1995) chap 10.

53 Sir John Salmond's 'Printed Case' for the Webster Case, in the British records as CO 209.275, Paper 29936 [1912], a microfilm of which is available in the Turnbull Library in Wellington as Micro 499. For the conclusion, see Frame, *Salmond: Southern Jurist*, above n 52, 144.

54 Section 6 of the Treaty of Waitangi Act 1975 was amended in 1985 to permit claims to be founded on events stretching back to the date of the initial signing of the Treaty – 6 February 1840.

Salmond in the Native Land Act 1909, no doubt on the instruction of his Ministers, and continued in subsequent legislation, had precluded almost all actions to assert customary Maori ownership of lands.[55]

The passage of Te Ture Whenua Maori Act 1993 repealed the remnants of Salmond's drafting and it was realised that the bars against claims would have to be replaced. This was effected by amending the Limitation Act 1950 to bring claims to Maori customary land within the purview of its provisions setting up general 'limitation periods' for proceedings in the New Zealand courts. Accordingly, new sections were inserted into the Limitation Act declaring that:

> Where any action to recover land that is Maori customary land … is brought against the Crown…this Act shall apply to that action; and where any action for damages or an injunction in respect of any trespass or injury to Maori customary land is brought against the Crown … this Act shall apply to that action.
> Limitation of actions in relation to Maori customary lands – no action to which this Act applies… shall be brought after the expiration of [12 years for recovery of land, and 6 years for damages for trespass or injury] from the date on which the right of action accrued to the person bringing the action or to some other person through whom the person bringing the action claims …
> For the avoidance of doubt, it is hereby declared that … the date on which the right of action … accrued shall be the date on which the wrong occurred, whether before or after the commencement of this Act …[56]

These limitation provisions might be thought to make it difficult for Maori claimants to bring actions in respect of alleged breaches of contracts, or other civil wrongs dating from the nineteenth and early twentieth centuries, when most Maori customary land was alienated. However, and this is a possible attraction of the equitable remedy for breach of trust and/or fiduciary duty, the Limitation Act 1950 recognises, in section 21, an exception as follows:

> No period of limitation …shall apply to an action by a beneficiary under a trust, being an action –
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was privy…
> (a) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee …

A further provision of the Limitation Act 1950, section 28, provides a more general postponement of the commencement of any limitation period in the case of 'fraud' or'concealment'. The period does not begin to run until the plaintiff discovers the fraud or concealment 'or could with reasonable diligence have discovered it'. It is important to understand that 'fraud' in sections 21 and 28 bears a much wider meaning than it does in the criminal law, or even popular, context. As Megarry V-C observed of the identical provision in UK law in *Tito v Waddell*:

> the word 'fraud' is here used in a sense which embraces conduct or inactivity which falls far short of fraud at common law: see, e.g., *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563… Indeed, as the authorities stand, it can be said that in the ordinary use of language not only does 'fraud' not mean 'fraud' but also 'concealed' does not mean 'concealed', since an unconscionable failure to reveal is enough.[57]

Use in Maori claims against the Crown of the section 21 exemption from any limitation period for trusts depends, of course, on acceptance of the view of Justice Wilson over that of Justice Dickson in *Guerin*. If a New Zealand court were not prepared to go as far as finding a full trust relationship, but preferred Justice Dickson's view that, although no trust could be established, a 'trust-like' status created a fiduciary relationship, then Maori litigants and their advisers would

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55 The matter is dealt with in detail in Frame, *Salmond: Southern Jurist*, above n 52, chap 9, p 113, n 14.

56 The amendments were effected by Te Ture Whenua Maori Act 1993 s 360.

57 *Tito v Waddell (No.2)* [1977] 1 Ch 106, 245.

doubtless wish to pay close attention to the finding in the *Semiahmoo* case discussed above, namely that two breaches of fiduciary duty could sometimes be identified – one before the taking of land and the other, later in time, when the Crown failed to provide redress when the extent of the prejudice had been drawn to its attention by the injured party. The second, and later, date would provide a new starting point for the running of any limitation period which might apply.

It will also have to be kept in mind that the remedy for breach of fiduciary duty by the Crown is an equitable remedy. As Binnie J observed in *Wewaykum*:

> One of the features of equitable remedies is that they not only operate 'on the conscience' of the wrongdoer, but require equitable conduct on the part of the claimant. They are not available as of right. Equitable remedies are always subject to the discretion of the court …
> Equity has developed a number of defences that are available to a defendant facing an equitable claim such as a claim for breach of fiduciary duty. One of them, the doctrine of laches and acquiescence is particularly applicable here…[58]

The doctrine of laches may be regarded as equity's more flexible form of limitation period. It does not work on numbers of years, but rather on a broader consideration of the respective positions of the parties. In Canada again, La Forest J expressed matters in this way in a 1992 case:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches … Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.[59]

In *Wewaykum*, Binnie J found that the doctrine of laches did apply to defeat any equitable claim by the two Indian bands. Again, this finding arose from the tactical nature of the claimants' case. The two bands had previously acquiesced in each others' reserves, with sufficient knowledge of the underlying facts, and, it seemed, had only erected the belated claims to provide a basis for engaging the Crown's fiduciary position.

VII. Conclusions – A Profile of the Fiduciary Remedy

We are now in a position to draw some general conclusions as to the factual matrices which appear to have persuaded Canadian courts to apply the equitable remedy of breach of fiduciary duty against the Crown. As valuable will be indications of circumstances which have not been persuasive.

A. Profile of the Remedy

- Where either a true Trust (example 1 above), or a 'Trust-like' (*Guerin* etc) relationship exists between the Crown and Maori, equity will detect and enforce a fiduciary relationship.
- For a trust-like relationship to be found the court must be shown specific circumstances, albeit coloured by the context of the general Crown/Maori relationship including the Treaty of Waitangi, and a specific Maori legal interest which pre-dated the Crown's intervention, over which the Crown has assumed a discretionary control.
- The remedy is unlikely to be available to constrain the Crown in its general administration of social services or the political system.

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58 *Wewaykum Indian Band v Canada* (2002) 220 DLR (4th) 1, 45.

59 La Forest J in *M(K) v M(H)* (1992) 96 DLR (4th) 289, quoted with approval by Binnie J in *Wewaykum*, ibid, 46-47.

- Breach of the fiduciary duty will occur where the Crown has failed fully to disclose relevant matters, or has acted in breach of the rules against profiting or self-dealing, or has failed to act with ordinary diligence in protecting the plaintiff's interests, or has permitted an exploitative bargain.
- The plaintiff must come to the Court 'with clean hands' and have commenced the proceedings within a reasonable time of either the acts or omissions complained about, or of the time when the Crown, having been made aware by the plaintiff of the complaint, has failed to provide redress.

B. General Conclusion

This article has concluded that the equitable remedy of breach of fiduciary duty is likely to be available against the Crown in New Zealand, except, probably, in relation to the foreshore and seabed, and that the circumstances for its application by New Zealand courts are likely to be those outlined by the Supreme Court of Canada in the line of cases beginning with *Guerin* in 1984 and which have been sketched above.