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WAKATŪ: CROWN-MĀORI FIDUCIARY OBLGIATIONS AND THE ONGOING RELEVANCE OF TE TIRITI O WAITANGI

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Abstract

In 2017, the Supreme Court in Proprietors of Wakatū v Attorney-General *recognised for the first time in New Zealand that the Crown has enforceable private law fiduciary duties to Māori in relation to 19th century land purchases. Those duties arose as a result of the Crown's unilateral power to extinguish native title and enable the alienation of Māori land, coupled with an assumption of responsibility on the part of the Crown to act in the Māori proprietors' best interests. This paper submits that this recognition provides the springboard from which future courts might recognise the fiduciary duty as arising from the Treaty of Waitangi, based on the doctrine of Crown pre-emption embodied in article II. The recognition of Crown-Māori fiduciary duties has two key implications: first, fiduciary law is expanded to hold the Crown as fiduciary, thus blurring the traditionally distinct categories of public and private law in a way favourable to Māori; secondly, the availability of fiduciary duties will confer legitimacy on the current Treaty settlement process in acting as a legal backstop for Māori in the negotiations process. The recognition of specifically Treaty-based Crown-Māori fiduciary duties goes further; it has the potential to create a new area of jurisprudence, as some Treaty breaches will become enforceable in a court of law, and in particular in the law of fiduciaries. As a result,* Wakatū *has the potential to reconfigure the nature of the Crown-Maori relationship and the place of the Treaty of Waitangi within New Zealand's constitutional landscape.*

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I Introduction

In 2017, the Supreme Court in *Proprietors of Wakatū v Attorney-General* recognised for the first time in New Zealand that the Crown has enforceable private law fiduciary duties to Māori in relation to 19th century land purchases.[1] Those duties arose as a result of the Crown's unilateral power to extinguish native title and enable the alienation of Māori land, coupled with an assumption of responsibility on the part of the Crown to act in the Māori proprietors' best interests.

While the majority in *Wakatū* were careful to limit their decision to the particular facts, I submit that the decision provides the springboard from which future courts might recognise the fiduciary duty as arising from the Treaty of Waitangi, based on the doctrine of Crown pre-emption embodied in article II.[2] This submission is based on the commentary prior to *Wakatū* on how a Crown-Māori fiduciary duty might arise, the Canadian precedent on which the finding of fiduciary duties in *Wakatū* relied, and the judgments in *Wakatū* itself.

The recognition of Crown-Māori fiduciary duties in general has two key implications: first, fiduciary law is expanded to hold the Crown as fiduciary, thus blurring the traditionally distinct categories of public and private law in a way favourable to Māori; secondly, the availability of fiduciary duties will confer legitimacy on the current Treaty settlement process in acting as a legal backstop for Māori in the negotiations process. The recognition of specifically Treaty-based fiduciary duties goes further: it would allow for the enforcement of Treaty breaches (those which attract the fiduciary label) outside of the political realm. This has the potential to create a new area of jurisprudence, as Treaty breaches become enforceable in a court of law, and in particular in the law of fiduciaries, the remedies of which are considerably more substantive than those currently available under the political negotiations process.

In these ways, *Wakatū* and what might follow in its wake has the potential to reconfigure the nature of the Crown-Māori relationship and the place of the Treaty of Waitangi within New Zealand's legal landscape.

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1 *Proprietors of Wakatū v Attorney General* [*Wakatū*] [2017] NZSC 17.

2 Treaty of Waitangi 1840, article II.

II Wakatū*: the Recognition of Crown-Māori Fiduciary Duties*

The Supreme Court decision in *Wakatū* recognised the existence of a *sui generis* fiduciary duty owed by the Crown to Māori customary owners of land in Nelson. The justification for this duty came from the Canadian decision in *Guerin v The Queen*, in which the duty arose because of the existence of native title to land and its restricted alienability.[3] This creates a relationship where any alienation of land by customary owners must be surrendered to the Crown to then be re-granted. In the process of re-granting, the Crown is under a fiduciary obligation to regulate the manner in which it exercises its discretion in dealing with the lands on the customary owners' behalf.[4] In a New Zealand context, this relationship is embodied in the Crown's right of pre-emption and the guaranteed protection of customary rights under the Treaty of Waitangi.[5]

The *Wakatū* decision concerned an 1839 sale of land in Nelson by Ngāti Koata, Ngāti Rārua, Ngāti Tama and Te Ātiawa to the New Zealand Company (the Company). One of the terms of the sale was that a tenth of the land was to be reserved for the benefit of the customary owners (tenths reserves), and pā, urupā, and areas of actual cultivation (occupied lands) would be excluded.[6] Following the Treaty of Waitangi in 1840, however, all pre-Treaty sales were of no effect until confirmation after investigation by commissioners that the purchases had been "on equitable terms".[7] The Commissioner who investigated this claim found the purchase was on equitable terms on the basis that the tenths were reserved and that the occupied lands were excluded.[8] His determination cleared the land of native title and vested it in the Crown, then able to be granted by the Crown to the Company on the condition that the one-tenths reserves and the occupied lands would be excluded.[9] In reality, however, only one third of the tenths reserves were ever excluded from the grant, and not all of the occupied lands.

The majority of the Supreme Court in 2017 found that in relation to the tenths reserves that were excluded from the grant to the Company (and therefore were held by the Crown for the benefit of the customary owners), the two-thirds of the tenths reserves that were never

3 [1984] 2 SCR 335 at 376.

4 At 385.

5 Treaty of Waitangi 1840, article II.

6 *Wakatū*, above n 1, at [12].

7 At [11]; Land Claims Ordinance 1841 4 Vict 2, ss 2 and 3.

8 At [14].

9 At [17].

actually separated from the grant, and the non-excluded occupation lands, the Crown owed fiduciary duties to the Māori customary owners.[10] These duties arose as a result of the Crown's unilateral power to extinguish native title and enable the alienation of Māori land under the doctrine of Crown pre-emption, coupled with the corresponding vulnerability of the Māori proprietors to rely on the Crown to act in their interests in observing the terms which made it equitable for their land to be alienated.[11]

While the majority in *Wakatū* were careful to limit their decision to the particular assumption of responsibility owed by the Crown to the customary owners in this instance, the decision paves the way for judicial recognition of these fiduciary duties as arising from the Treaty of Waitangi, based on the exchange of radical title and pre-emption for the protection of property and customary rights between the Crown and Māori, as found in article II of the Treaty. This submission ties in with commentary prior to *Wakatū* which recognises that there are essentially two streams of thought as to how a Crown-Māori fiduciary duty might arise in New Zealand: first, because of the obligations taken on by the Crown in the Treaty of Waitangi, in which the Crown was required to deal equitably with native land alienated to it under the doctrine of Crown pre-emption (the Treaty-based duty); second, because of specific relationships or dealings between the Crown and Māori, thus arising *outside* of the Treaty (the specific duty).

Although commentators have specifically shown their approval for one characterisation of the duty or the other, there is considerable overlap between the two. For example, it is conceivable that where there are specific circumstances concerning the alienation of native title and the purchase or granting of that land on certain terms relied upon by the Māori customary owners, that will too satisfy the wider avenue through which to base the duty, as based on the obligations undertaken by the Crown in the Treaty to protect pre-existing property interests through the doctrine of Crown pre-emption. Prior to *Wakatū* however, a fiduciary duty of either characterisation had not been recgonised in a New Zealand court of law. In this way, *Wakatū* transformed the legal landscape.

10 At [1].

11 At [390] per Elias CJ; at [572] per Glazebrook J; and at [785] per Arnold and O'Regan JJ.

A Proprietors of Wakatū v Attorney-General

1 Background

As outlined, *Wakatū* concerned a sale of land in Nelson by Ngāti Koata, Ngāti Rārua, Ngāti Tama and Te Ātiawa to the New Zealand Company in 1839. One of the terms of the sale (and part of the consideration therefor) was that a tenth of the land, amounting to 15,100 acres and all occupied lands were to be reserved for the benefit of the customary owners.[12] Following the Treaty of Waitangi and the establishment of the Crown Colony government in 1840, however, all pre-Treaty sales were of no effect until confirmation after investigation by commissioners that the purchases had been "on equitable terms".[13] William Spain was the Commissioner who investigated the Company's claim, and found that the purchase of the Nelson districts were on equitable terms *on the basis* that the tenths were reserved and that the occupied lands were excluded.[14] His determination (known as the Spain award) cleared the land of native title and vested it as demesne lands of the Crown, then able to be granted by the Crown to the Company on the condition that the tenths reserves and the occupied lands would be excluded.[15] The Spain award, therefore, was the basis of the Crown grant in 1845 to the Company, and then again in 1848, and the Crown was obliged to grant the lands with the exclusions identified in the award.[16]

The town and suburban tenths, amounting to 5,100 acres out of the 15,100 acres that constituted the tenths reserves, were identified and excluded from the grant to the Company (the identified tenths). The Crown therefore continued to have title to the identified tenths, and proceeded to manage the land on the basis that it was held for the benefit of the customary owners.[17] The rural tenths, which were to amount to the remaining 10,000 acres, were never identified or excluded from the grant (the non-identified tenths), and nor were all the occupied lands.[18] The Crown and the Company were under an agreement that land surplus to the needs of the Company's settlement was to be held on trust by the Company

12 At [12].

13 At [11]; Land Claims Ordinance 1841 4 Vict 2, ss 2 and 3.

14 At [14].

15 At [17].

16 Although see William Young J in dissent at [918], who concluded that the Spain award was merely a set of recommendation which did not bind the 1848 grant.

17 At [25].

18 Sites of pā, urupā, and areas of occupation were either included as part of the tenths reserves (rather than kept separate), or not protected at all, which some exceptions.

for the Crown and returned back to it, from which the Crown would manage the remaining as yet unidentified tenths and occupied lands.[19] Contrary to this agreement, the Crown never received the land back from the Company.

The identified tenths reserves were statutorily vested in the Public Trustee in 1882.[20] The current proceeding was confined to the period before this – from 1845 to 1882.[21] During this time, the reserves had been diminished further by exchanges and grants undertaken by the officials managing them, thus the initial 5,100 acres of land reserved (already only a third of the entitled 'tenths reserves') had been reduced to 2,744 acres. Wakatū Incorporation now holds the remaining identified tenths reserves on trust for the descendants and successors of those identified by the Native Land Court in 1893 as the beneficial owners (named beneficiaries).[22] The unidentified tenths reserves and occupied lands were never identified or recovered by the Crown.[23]

The Nelson tenths reserves were the subject of a claim to the Waitangi Tribunal seeking redress for the failures of the Crown to protect and recover the full tenths and adequately manage the identified reserves, as part of a wider Treaty settlement with the Crown for historical grievances in this region. Before the Tribunal, the Crown accepted that it had committed a number of breaches of Treaty principles including in relation to the tenths reserves. However, the Crown would not settle specifically with the Nelson iwi on the tenths as separate to the larger settlement claim it was considered a part of.[24] Ngāti Rarua and Ngāti Tama therefore bought this claim to the High Court.

2 Claim

There were three claimants in this case: Rore Pat Stafford who is kaumatua for Ngāti Rarua and Ngāti Tama and a descendant himself of a named beneficiary; the Wakatū Incorporation as the company that holds the remaining identified tenths lands on trust for the descendants and successors of the named beneficiaries;[25] and Te Kāhui Ngahuru Trust,

19 At [24].

20 Native Reserves Act 1882, s 3(4).

21 At [30].

22 At [42].

23 At [39].

24 At [45].

25 Although some of its membership includes persons who are not descendants of named beneficiaries and does not include all those who are descendants of named beneficiaries.

a trust created by Mr Stafford whose beneficiaries are all descendants of the named beneficiaries.[26] The basis of these parties' claim was that the Crown acted either in breach of trust or in breach of its fiduciary duties owed to the Māori customary owners of the land by failing to identify and set aside the remainder of the unidentified tenths reserves and occupied lands, and allowing the identified and set aside reserves held by the Crown to be diminished before 1882.[27] The claimants sought declarations that the Crown had acted in breach of its duties and that it holds any land it has in the Nelson district on constructive trust for the beneficiaries of the tenths reserves, and is obliged to restore the tenths reserves or pay compensation for the losses or, alternatively, to account for its profits in disposal of the land.[28] Also at issue in the case were the claimants' standing, whether the decision was barred by the Limitation Act 1950 or the doctrine of laches, and the effect of the Settlement Act 2014 between the Crown and some of the claimant parties, though this paper does not focus on these issues.

In response, the Attorney-General submitted that no trust over the tenths reserves was ever constituted, and in any event, the conditions upon which trusts are recognised in law are not present because there is insufficient certainty of subject matter, object, and intention to constitute a trust.[29] The Attorney-General also submitted that fiduciary duties cannot be present as they are inconsistent with the governmental role the Crown played throughout, in which it had public responsibilities to balance competing interests which are inconsistent with the duty of loyalty - the hallmark of a fiduciary.[30]

The High Court dismissed the claim because of lack of standing.[31] Justice Clifford left open the question of whether the Crown owed fiduciary duties in the management of the identified tenths, but only between 1845 and 1856, while rejecting such claims in relation to the unidentified tenths, and the occupied lands.[32] On appeal, the Court of Appeal found

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26 At [42]-[43].

27 At [77].

28 At [50].

29 At [84].

30 At [84].

31 *Proprietors of Wakatū Inc v The Attorney-General* [2012] NZHC 1461 at [311]-[316].

32 At [309]-[310]. Clifford J recognised that once the identified tenths were set aside in the 1845 grant, the Crown might be a fiduciary in respect of the reserves "as no-one but Māori had an interest in the recognised reserves". In 1856 however, the remaining identified tenths reserves began to be administered under the New Zealand Native Reserves Act 1856, and successive statutory regimes after that; as such, the nature and extent of Crown obligations would fall to be established by reference to those schemes. In any case, he did not conclude on this point as he found that the plaintiffs lacked standing to bring the proceedings.

that Mr Stafford had standing, but unanimously held that the Crown owed no fiduciary duties and that there was no trust relationship.[33] The claimants appealed to the Supreme Court.

3 Fiduciary obligations

The claim was heard in the Supreme Court by Chief Justice Sian Elias, Justice Glazebrook, Justice Arnold, Justice O'Regan, and Justice William Young. The majority of the Court (Elias CJ, Glazebrook, Arnold and O'Regan JJ) found that the Crown owed fiduciary duties to exclude the full tenths reserves and occupied lands from the grant to the Company following the 1845 Spain award, and in managing the identified reserves on behalf of the Māori customary owners.[34] In doing so, the majority distinguished the law of *Tito v Waddell* and the "political trust" doctrine that case upheld, where fiduciary duties or a trust relationship could not arise if the Crown was involved.[35]

All four majority judges applied basic fiduciary law to find a fiduciary relationship. A fiduciary relationship is one in which the fiduciary has scope for the exercise of some discretion or power, the fiduciary can unilaterally exercise that power or discretion so as to affect the principal's legal or practical interests, and the principal is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[36] The majority judges held that the Crown had the scope to exercise power in both commissioning the Spain award and thus effecting and legitimising the extinguishment of native title, and then granting the land to the Company on the conditions of that award.[37] They held the Crown could unilaterally exercise that power so as to affect the Māori proprietors legal interest due to the doctrine of Crown pre-emption, under which only the Crown could grant that property out to the Company on the terms agreed to.[38] Finally, they found that the Māori

33 *Proprietors of Wakatū v Attorney-General* [2014] NZCA 618. Harrison and French JJ found that the Crown acted throughout in a governmental capacity and so was precluded from being under a duty of loyalty to one group, at [206]-[209]; Ellen France J found that there was no reason why the Crown could not be subject to enforceable fiduciary duties and obligations, but concluded that on the facts, any such duty was excluded, at [121]-[146].

34 At [1].

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

36 Gerard Curry and Peter Whiteside, *Fiduciary Relationships: New Zealand Law Society seminar* (New Zealand Law Society, Continuing Legal Education, Wellington, 2016) at 6.

37 At [384] per Elias CJ; at [589] per Glazebrook J; and at [779]-[786] per Arnold and O'Regan JJ.

38 At [384] per Elias CJ; at [589] per Glazebrook J; and at [779]-[786] per Arnold and O'Regan JJ.

proprietors were peculiarly vulnerable as they were in the hands of the Crown in any dealings of land under the doctrine of Crown pre-emption and relied on the Crown to uphold any terms of the bargain, in this case, the exclusion of the tenths reserves and the occupied lands.[39] These circumstances set up "conditions of dependence and obligation in which the Crown was under a duty in equity to act in the interests of the Māori proprietors in observing the terms which made it equitable for their land to be alienated."[40]

Elias CJ and Glazebrook J went further to find a trust. Applying basic trusts law, the inherently fiduciary relationship of trustee/beneficiary requires that there is a transfer of property from the settlor to the trustee, under agreement that the trustee holds that property on trust for the benefit of the beneficiary.[41] As well as this, and despite Elias CJ's comment that "there is no magic to the creation of a trust",[42] trust law has established formalities which must be satisfied in order to create a trust: certainty of intention (to create a trust), certainty of object (the parties to the trust), and certainty of subject-matter (the trust property).[43]

Elias CJ and Glazebrook J considered all components were satisfied. They held that there was a 'transfer' of property when the Spain award cleared the land of native title and vested it in the Crown, under agreement that the Crown would hold a certain portion of that property for the benefit of the Māori proprietors.[44] Regarding certainty of intention, the judges held that the Crown grants of 1845 and 1848 evidence the Crown's "overwhelming" intention that the tenths reserves and occupied lands were to be set apart for the beneficiaries and that the Crown would act as a trustee.[45] Reinforcing this, the Crown did in fact deal with the identified tenths as trustee.[46] The Governor exercised direct control over the identified tenths reserves throughout the period of Crown Colony government and the Crown never had any beneficial interest in the land or in the income from it, which was

39 At [387]-[388] per Elias CJ; at [589] per Glazebrook J; and at [779]-[786] per Arnold and O'Regan JJ.

40 At [388].

41 Graham Virgo, *The Principles of Equity and Trusts* (Oxford University Press, 2012) at 48. It is worth noting that neither Elias CJ nor Glazebrook J ran through these basic concepts, but simply launched into the application to the facts. As such, it is unclear what they consider to be orthodox trust doctrine.

42 At [395], quoting Wilson J in *Guerin v The Queen*, above n 3.

43 *Knight v Knight* (1840) 49 ER 58.

44 At [388] and [394]-[395].

45 At [407] and [416] per Elias CJ; at [572]-[574] per Glazebrook J.

46 At [411]-[416] per Elias CJ; and [574] per Glazebrook J.

kept separate from Crown revenue.[47] Certainty of object was also satisfied as it was the members of the hapū identified by Spain who had the beneficial interest in both the land and income,[48] while the Governor had sufficient authority to bind the Crown and declare a trust.[49] Finally, the judges found it was sufficient for certainty of subject-matter in a case concerning land and pre-existing duties that the beneficial interest was in a specific proportion of a fixed and predetermined area of land and was intended to inhibit dealings with the whole quantity of land.[50] As a result, once the Crown became owner of the land cleared of native title, the Crown held the tenths reserves (both those identified and unidentified) and occupied lands for the benefit of the former Māori proprietors as trustee. Arnold and O'Regan JJs, on the other hand, found that there were fiduciary obligations owed but no corresponding trust arose.[51]

Despite the different characterisations of the fiduciary obligations owed, again the majority of the judges found that the fiduciary duties were likely to have been breached. Elias CJ and Glazebrook J found that the paramount obligation of a trustee is "recovering, securing, and duly applying the trust fund".[52] The Crown however failed to bring in and secure the unidentified tenths and occupied lands, and took part in transactions which diminished the identified tenths estate.[53] In relation to the unidentified tenths, they found there was enough evidence to find a breach of trust (to be remitted to the High Court for consideration of remedy).[54] While they found that the failure to exclude the occupied lands and the mismanagement of the identified tenths would likely put the Crown in breach of trust, they remitted it to the High Court to ascertain a breach with more evidence.[55] Arnold and O'Regan JJs, too, found that that there "appear[ed] on the face of it to have been breaches by the Crown of the fiduciary duties owed to the original customary owners", but also remitted the question back to the High Court to ascertain.[56]

47 At [293].
48 At [411] per Elias CJ; at [577] per Glazebrook J.
49 At [398].
50 At [420]-[432] per Elias CJ; at [578]-[579] per Glazebrook J.
51 At [770].
52 At [418] per Elias CJ, quoting *Re Brodgen, Billing v Brodgen* (1888) 38 Ch D 546 (CA) at 571.
53 At [430]-[440] per Elias CJ; at [587] per Glazebrook J.
54 At [436] per Elias CJ; at [587] per Glazebrook J.
55 At [437] and [444] per Elias CJ: at [587] per Glazebrook J.
56 At [789].

William Young J in the minority found that there were no fiduciary obligations owed as the Spain award was merely a set of recommendations which did not bind the 1848 grant.[57] As a result, the appellants' case, in which the Crown was obliged to grant the lands with the exclusions identified in the award, falls away.[58]

B Analysis: a Treaty-Based Fiduciary Duty

The way *Wakatū* was advanced by the claimants and the way the Supreme Court responded was to say that this case and its facts fall squarely within orthodox trust and fiduciary law, with the fiduciary duty based on the specific dealings of land between the Māori proprietors and the Crown. This will have huge ramifications for trust and fiduciary law if the definition and scope of the duty is seen as a purely private law duty and the analysis in *Wakatū* is used as precedent to expand orthodox fiduciary law.[59] I submit, however, that *Wakatū* provides the first incremental step towards recognising Crown-Māori fiduciary duties as based on a less case-specific set of circumstances, instead arising out of the Treaty of Waitangi. This view is based on an analysis of the New Zealand and Canadian jurisprudence on which the judges in *Wakatū* relied, and an examination of the judgments in *Wakatū* itself. The possibility for a further extension of this Treaty-based duty is also discussed, though it is not the focus of the remainder of this paper.

1 Reconciling Wakatū *with the prior jurisprudence*

Although the fiduciary duty arising in *Wakatū* itself is a limited and fact specific characterisation of the duty, reconciling it with the jurisprudence in both New Zealand and Canada, which Elias CJ, Arnold and O'Regan JJ explicitly based their finding on,[60] indicates that the duty may be expanded upon to recognise a Treaty-based fiduciary duty in the future. Prior to *Wakatū*, as outlined, there has been academic and judicial recognition in New Zealand of the potential for two ways to recognise a Crown-Māori fiduciary duty: a specific duty, arising out of specific dealings between Māori and the Crown; and a more generalised Treaty-based duty, arising out of obligations taken on by the Crown in the

57 At [909].

58 At [918].

59 See generally Jamie Dickson *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon, Purich Publishing Ltd, 2015) for the effects that the recognition of Crown-Native fiduciary duties have had on private fiduciary law in Canada.

60 At [384]-[385] and [390] per Elias CJ; at [726] per Arnold and O'Regan JJ.

Treaty of Waitangi in which the Crown was required to deal equitably with native land alienated to it under the doctrine of pre-emption.

In regards to the specific duty, the submission is that the fiduciary duty would arise in a particular instance from the course of specific dealings between the Crown and Māori "as seen through the prism of equity".[61] It would follow orthodox fiduciary law, in which the fiduciary has scope for the exercise of some discretion or power, the fiduciary can unilaterally exercise that power or discretion so as to affect the principal's legal or practical interests, and the principal is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[62] In a particular instance, the Crown would therefore need to be in a position where it has a power or discretionary control over an identifiable Māori interest, such as the Crown's monopsony on land purchases during this time, thus putting the Māori group in a position of vulnerability by being subject to this power.[63] On the face of it, this is the fiduciary duty that the Court in *Wakatū* recognised.

In regards to the Treaty-based fiduciary duty, although it too fulfils the orthodox fiduciary requirements, it can do so in a less case-specific way as it is recognised that this relationship is captured in the Treaty.[64] The recognition of this duty begins with the *Instructions* from Lord Normanby to Captain Hobson which provided the authority for, and the conditions of, the proposals leading to the Treaty of Waitangi in 1840.[65] These documents contain several expressions indicating the Crown assumed a fiduciary capacity, instructing that "[a]ll dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith", and the Crown must not be permitted to "purchase from them [Māori] any Territory the retention of which by them would be

61 Alex Frame "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?" (2005) 13 Waikato L.Rev. 70 at 79. See also Lindsey Breach "Fiducia in Public Law" (2017) 48 V.U.W.L.R. 413 at 428; Emma Hensman "In Bonds of Trust we Meet" (2016) 3 PILJNZ 96 at 98; FM (Jock) Brookfield "Aspects of Treaty of Waitangi Jurisprudence" in Jacinta Ruru (ed) *In Good Faith, Symposium proceedings marking the 20th anniversary of the Lands case* (University of Otago Press, Otago, 2008) 87 at 92-94; Kendall Luskie "The Relationship between the New Zealand Crown and Māori: A Future for Fiduciary Obligations?" (LLB (Hons) Dissertation, University of Otago, 2010) at 42-46; Kirsty Gover "The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism" (2016) 38 Syd LR 339 at 358.

62 Curry and Whiteside, above n 36, at 6.

63 Frame, above n 61, at 86; *Chirnside v Fay* [2006] NZSC 68 at [82]-[85].

64 Frame, above n 61, at 79; Luskie, above n 61, at 42-43; Evan Fox-Decent, "Fashioning Legal Authority from Power: The Crown-Native Fiduciary Relationship" (2006) 4 NZJPIL 91 at 109; Hensman, above n 61, at 98.

65 Frame, above n 61, at 78.

essential or highly conducive to their own comfort, safety or subsistence",[66] thus requiring the Crown to act in the interests of Māori proprietors. Similarly, article II of the Treaty itself contains language indicative of a fiduciary burden, requiring the Crown to protect Māori interests in land as well as introducing the doctrine of pre-emption,[67] one of the purposes of which was to provide protection to Māori by ensuring that land was purchased fairly.[68] Since *New Zealand Māori Council v Attorney General [Lands]*,[69] the Treaty principles and discussion around them also envisage obligations fiduciary in nature – for the Crown and Māori to act honourably towards each other and with the utmost good faith, and for active protection and equal treatment on the part of the Crown.[70]

This is not to say that there is a general duty owed by the Crown to all Māori in all circumstances. Instead, the duty is derived from the common law doctrine of customary title in association with Treaty obligations; that is, the Crown's assertion of sovereignty and corresponding right of pre-emption, effectively giving the Crown full discretion over the price of land whilst under a duty to protect Māori interests. It is this relationship which is captured in the Treaty.

It is also worth noting that early judicial commentary around the possibility of Crown-Māori fiduciary duties largely focused on the emergence of a Treaty-based fiduciary duty. In *Te Runanga o Wharekauri Rekohu*, Cooke P held that "the Treaty created an enduring relationship of a fiduciary nature", the principles of which require the Treaty partners "to act in good faith, fairly, reasonably and honourably towards the other".[71] In *Te Runanganui o Te Ika Whenua Inc Society*, Cooke P found that the extinguishment of Māori rights in land by "less than fair conduct or on less than fair terms" would be likely to not only be a breach of the Treaty itself, but also a breach of the fiduciary duty arising out of the Treaty that is "widely and increasingly recognised."[72] In a similar vein, Gendall J in *New Zealand Māori Council v Attorney-General* noted that it is "clear beyond all possible doubt that the Treaty created fiduciary duties on the Crown in favour of a specific class of people,

66 Lord Normanby's Instructions to Captain Hobson of 14 August 1839, found in W D McIntyre and W J Gardiner (eds) *Speeches and Documents on New Zealand History* (Oxford University Press, Wellington, 1971) at 12 and 14.

67 Treaty of Waitangi 1840, article II.

68 *R v Symonds* [1847] NZPCC 387 at 390.

69 *New Zealand Māori Council v Attorney-General [Lands]* [1987] 1 NZLR 641.

70 Waitangi Tribunal *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* (Wai 1353, 2007) at 22-23.

71 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 305.

72 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24.

Māori",[73] and in *Paki v Attorney-General (No 2),* the most recent case prior to *Wakatū* to discuss the nature of the Crown-Māori fiduciary relationship, McGrath J stated that "the Treaty of Waitangi provides "major support" for the existence of such [fiduciary] obligations in New Zealand".[74] Such statements provide ample recognition for the view that Crown-Māori fiduciary duties can arise not only out of specific dealings, but also from the Treaty as an inherent part of New Zealand's social contract.[75]

Elias CJ's analysis of the fiduciary duty in *Paki v Attorney-General (No 2)* also explicitly recognises the possibility of two reasons for the finding of a fiduciary duty – one being the Treaty itself, in which "the Crown was expected always to fulfil the requirements of equity and good conscience in its dealings, as indeed the express terms of article II of the Treaty of Waitangi require and as may also be inherent in the circumstances of the Crown's monopsony on purchases",[76] and the other deriving from a "particular context", in that case "the specific context of the purchase transactions".[77] As a result, the duty could arise *both* because of specific dealings between Māori and the Crown, such as purchases of land on certain terms; *and* because of the relationship envisioned in the Treaty arising out of native title and Crown pre-emption.

That there are two recognisable avenues through which to identify the Crown-Māori fiduciary duty also ties in with the discourse around *Guerin v The Queen*, the first case in Canada to recognise Crown-Native fiduciary duties.[78] The initial discourse around *Guerin* was that it was a narrow duty, arising out of a specific fact situation where "the Crown had very clearly been less than honourable."[79] However, some broad principles were decided that extended beyond the facts.[80] It has been later confirmed by the Canadian courts that the fiduciary relationship must consider the wider historical relationship between the Crown and First Nations *as well as* the particular facts of the dealings involved, precisely because of the latter's general vulnerability to the Crown's power to exercise its discretion

73 *New Zealand Māori Council v Attorney-General* HC Wellington, CIV-2007-485-95, 4 May 2007 at [64].

74 *Paki v Attorney-General (No 2)* [2014] NZSC 118 at [186], quoting Cooke P in *Te Runanga o Wharekauri Rekohu*, above n 71, at 306.

75 Breach, above n 61, at 429.

76 At [156].

77 At [159] and [148].

78 [1984] 2 SCR 335 at 376.

79 Camilla Hughes "Fiduciary Obligations of the Crown to Aborigines: Lessons From the United Stated and Canada" (1993) 16(1) UNSWLJ 70 at 91.

80 Hughes, above n 79, at 91.

in respect of their interests.[81] A similar analysis ought to apply in New Zealand; as Elias CJ noted in *Wakatū*, it is hardly to be supposed that the obligations owed by the Crown to the indigenous people of New Zealand were any less onerous than those in Canada.[82]

2 Comments made in Wakatū *itself*

As well as the general jurisprudence within which *Wakatū* sits, taking a closer look at the judgments in *Wakatū* it becomes apparent that, despite how the claimants framed their argument and how the Supreme Court approached the facts, Elias CJ did somewhat base her finding of fiduciary duties and trust on the Treaty of Waitangi. While the other majority judges too recognised the possibility of Treaty-based duties, they chose to keep their analysis to the specific duty in this instance.

In finding there were fiduciary obligations owed, Elias CJ explained that "[s]uch an assumption of responsibility towards Māori in New Zealand began with the Treaty (a covenant which guaranteed to Māori the "full, exclusive, and undisturbed possession" of their lands and which set up the Crown's rights of pre-emption)".[83] The Crown's obligations were therefore "amplified by the nature and extent of Māori property and its recognition in New Zealand from the first engagements of the Crown in the Treaty of Waitangi."[84] This paved the way for obligations "'in the nature of a private law duty"; in this "*sui generis* relationship" it was possible to regard the Crown as fiduciary.[85] Not only does her Honour ground the assumption of fiduciary responsibility directly in the Treaty, in particular in the doctrine of Crown pre-emption in article II, but the reference to the *sui generis*, or unique, relationship between the Crown and Māori arising out of the Treaty also indicates that the Treaty is relied upon to support the duty alongside the specific dealings between Māori and the Crown.

Glazebrook J touches on this reliance when she notes her different approach:[86]

> [My] analysis does not depend on any special fiduciary duty of the Crown in its dealings with the property of indigenous people. If it were necessary to rely on such

81 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 at [80].
82 At [390].
83 At [380].
84 At [385].
85 At [385], Elias CJ quoting Dickson J in *Guerin v The Queen* [1984] 2 SCR 335.
86 At [590].

> special duties, I consider the analysis of the Chief Justice on this point has much to recommend, at least in the circumstances of this case. It is not, however, necessary for the purposes of this judgment to come to a definitive view on that wider analysis.

While Glazebrook J did not find it necessary to base the fiduciary duty in anything other than the specific relationship present, she recognises that this is in contrast to the Chief Justice, who did base the fiduciary duty on something more than orthodox trust or fiduciary law. This 'something more' is the wider characterisation of the Treaty-based fiduciary duty; as Glazebrook J alludes to in that last sentence.

Similarly, Arnold and O'Regan JJ explicitly acknowledged in their judgment that, "on the basis of *Guerin*, it can be argued that the Crown has fiduciary duties to Māori arising from the Treaty of Waitangi and/or from the Crown's right of pre-emption."[87] Though they confirm that they "base the duty in this case on the particular dealings between the Company and Māori and the Crown and the Company", they recognise that "a broader basis for such a duty" is available, but simply unnecessary to rely on because the facts fit so clearly into the narrower source of the duty.[88] In essence, it was not necessary in their reasoning to situate the specific fiduciary relationship within one that more generally applied between the Crown and Māori. Yet collectively the judgments, and particularly that of the Chief Justice's, point to events and positions of the parties that have more general operation. In particular, the judgments leave open the prospect that the Treaty and pre-emption in article II may amount to an undertaking of fiduciary obligations.

The same flexibility is present in the finding of a trust, which, although separate to the analysis on fiduciary duties, supports the argument that the Chief Justice's approach to fiduciary law relied on the Treaty of Waitangi. Prima facie, there are some challenging implications for the finding of a trust, particularly as the decision seems to be in conflict with the leading authority on certainty of subject matter *Re: Goldcorp*.[89] In that case, it was held that property cannot be held on trust until it is ascertainable and appropriated from the bulk.[90] By their nature, the unidentified tenths and occupied lands were never appropriated from the bulk of land held by the Crown, yet the Chief Justice (with whom Glazebrook J agreed) held that a trust still existed over those lands.[91] Her reasons for departure from this

87 At [784].

88 At [784], see also footnote 1012.

89 *Re: Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385 (PC).

90 At 95.

91 At [393] per Elias CJ; at [571]-[582] per Glazebrook J.

precedent were that the land was not sold 'ex-bulk' and can be distinguished from the fungible property in *Re: Goldcorp*, finding that such cases "do not… stand for any rigid rule that a trust can never exist in non-segregated property".[92] There is no clear authority for treating indigenous land differently from other sorts of unappropriated trust property, and the Chief Justice does not explain how or why the generality plays out over the specific in these circumstances. As such, it is arguable that her decision for a more flexible approach is grounded in the fact that a special relationship exists between the Crown and Māori when dealing with Māori land and property interests, as upheld in article II of the Treaty of Waitangi.

In this way, the majority judges in *Wakatū* all recognised the possibility of a Treaty-based fiduciary duty, with Elias CJ explicitly relying on the Treaty in her fiduciary analysis. *Wakatū*, therefore, provides a clear pathway for future courts to recognise the duty as arising from article II of the Treaty of Waitangi *as well as* the specific relationship identified in the circumstances of the case. This analysis also ties in with extra-judicial comment from Elias CJ about the need to ensure judgments are not "overbold" or "ahead of their time".[93] The judges here can be seen as first creating the *space* for greater recognition of the Treaty in the courts, to then make way for a later decision that will recognise the fiduciary duty as based on the Treaty. This incremental approach ensures that the courts are not too bold to receive a contrary legislative response, or "too narrow to remove the option for second thoughts",[94] while at the same time familiarising the legal profession and the general public with the possibility of a different route for the recognition and enforcement of Treaty breaches, as well as Crown-Māori fiduciary duties in general. This is important because in looking to the future, as Elias CJ reflects, "we can expect to see change in the status of the Treaty as domestic law".[95]

3 A possible, further, extension

It is also worth noting that in Canada, the duty has since been considerably expanded upon. In *R v Sparrow*, while accepting that the finding in *Guerin* was limited to the Crown's fiduciary obligation to the Indians with respect to land, the Supreme Court explicitly

92 At [423].

93 Chief Justice Sian Elias "The Meaning and Purpose of the Treaty of Waitangi" (Hui-a-Tau Conference 2015, Te Hunga Roia Māori o Aotearoa, 4 September 2015).

94 Elias, above n 93.

95 Elias, above n 93.

"expanded" the duty, making it a general interpretive principle for the Constitution Act 1982.[96] This extended the duty beyond the civil liability of the Crown in respect of Indian interests concerning surrenders of lands to a duty governing the meaning of s 35 of the Constitution Act 1982.[97]

While the duties stemming from the Canadian fiduciary duty are therefore not confined to protecting indigenous interests when extinguishing native title, fiduciary protection "has not to date been recognized by this Court [the Supreme Court] in relation to Indian interests *other than land* outside the framework of s. 35(1) of the *Constitution Act* [emphasis added]."[98] Because New Zealand has no constitutional framework enshrining and putting into higher law the rights of Māori, and the post-*Sparrow* analysis of the fiduciary duty in Canada is exclusively about how the duty influences the courts' interpretation of the Constitution Act, the analysis in this paper is limited to a fiduciary duty flowing from the *Guerin* analysis as described above and remains tied to the doctrines of native title and Crown pre-emption. It is not based on the (considerably more expansive) *Sparrow* analysis which could translate into a broader duty based on the exchange of governance for general protection, despite the fact that that too could be founded in the Treaty of Waitangi.

That is not to say that the latter basis of recognising the fiduciary duty is not arguable, and indeed it is given the Treaty's constitutional place in the legal landscape of Aotearoa. It could be argued that the Crown's power to extinguish aboriginal title is linked to a broader historical fact of the Crown's assertion (and subsequent acquisition) of sovereignty.[99] As Dickson J noted in *Guerin*, the Crown's right of pre-emption was designed to interpose the Crown between the Indians and third parties so as to protect their interests and rights in land and prevent them from being exploited.[100] Thus "the Crown's ability to extinguish aboriginal title is a part of a broader protective relationship arising out of the acquisition of sovereignty."[101] In the words of one article cited by the Canadian Supreme Court in *Wewaykum*:[102]

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96 J. Timothy S. McCabe *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Lexis Nexis Canada, Ontario, 2008) at 52; *R v Sparrow* [1990] 1 SCR 1075.

97 McCabe, above n 96, at 52; citing *Wewaykum Indian Band v Canada* [2002] SCJ No 79, at [81].

98 *Wewaykum Indian Band v Canada* [2002] 4 SCR 245.

99 Julia Cassidy "The Stolen Generation: Canadian and Australian Approaches to Fiduciary Duties" (1992) 34(2) Ottawa L.Rev. 175 at 231.

100 At 383.

101 Cassidy, above n 99, at 232.

102 At [79], citing W. R. McMurty and A. Pratt "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" (1986) 3 C.N.L.R. 19 at 31.

> [A]ll dealings between Indian people and the Crown are clothed with a fiduciary aspect, as the result of the Royal Proclamation [of 1763]… The Proclamation may have been unilateral, but it resulted in the Indians accepting that protection by keeping the peace. To translate this into legal language used by Mr Justice Dickson, the Indian people were induced by the promise of protection offered in the Royal Proclamation to alter their legal position… *The principle is the same in the grand scheme as in the paradigm fact situation of the Musqueam surrender* [that is, on the facts of *Guerin*, emphasis added].

The result is that the Crown thereby rendered itself subject to a fiduciary duty in some circumstances thereafter, in perpetuity.[103] This argument could translate into the New Zealand context, perhaps even more so than in Canada given the Treaty of Waitangi, however it would result in a much greater transformation of the constitution of New Zealand as well as fiduciary law than can be discussed in the scope of this paper.

For the purposes of this paper, then, the analysis and argument is restricted to the narrower Treaty-based fiduciary duty above-outlined, however it is worth making one last point: a recognition of the broader basis of the duty, as arising from the exchange of governance for general protection embodied in the Treaty, would be much more far-reaching; applying to essentially the entire Crown-Māori relationship, in perpetuity and outside of the (limited) doctrine of pre-emption.[104] This argument is, in my view, too radical to run in the current political and legal climate. As already noted, we ought to be wary of decisions that are overbold or ahead of the times.[105] Dame Silva Cartwright has too reflected on this issue, commenting that "if we are to make changes to our constitution to reflect the role of the Treaty of Waitangi… it is important that all New Zealanders walk together at more or less the same pace."[106] This is worth keeping in mind while the remainder of this paper focuses on that (narrower) Treaty-based fiduciary duty.

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103 McCabe, above n 96, at 53. Canadian jurisprudence has actually gone further and recognised, in *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, a parallel theory running alongside that of fiduciary law in relation to the Crown-Aboriginal relationship, the notion of the honour of the Crown. For more detail, see Dickson, above n 59, at 114-144; and McCabe, above n 96, at 57-146.

104 The doctrine of Crown pre-emption was, for the most part, discontinued with the Native Lands Act in 1862. While a huge amount of land was transferred under the doctrine between 1840 to 1862, the transactions subject to this narrower fiduciary duty are therefore more limited in New Zealand than they are in Canada, which still operates the doctrine of pre-emption.

105 Elias, above n 93.

106 Dame Silvia Cartwright, Governor-General of New Zealand "Our Constitutional Journey" (Legal Research Foundation, Northern Club, Auckland, 9 May 2006).

III Implications of Crown-Māori Fiduciary Obligations

The decision in *Wakatū* is transformative both because it is the first time Crown-Māori fiduciary duties at all have been recognised in New Zealand, a major finding on its own as it takes traditionally private fiduciary obligations into the public sphere, and because it provides a solid basis for recognising that those duties are based in the Treaty of Waitangi; thus providing for the Treaty's ongoing relevance outside of the political arena and within the law of fiduciaries. *Wakatū* therefore alters the legal landscape of both fiduciary law and Treaty jurisprudence. This section considers the practical and normative implications of first, expanding fiduciary law in this way to hold the Crown as a fiduciary, thus blurring the traditionally distinct categories of public and private law; secondly, recognising Crown-Māori fiduciary duties in the current Treaty settlement process; and thirdly, through the recognition of *Treaty-based* fiduciary duties, creating a new area of jurisprudence in which Treaty breaches (those which attract the fiduciary label) can be enforced outside of the political realm and within the law of fiduciaries, thus directly enforceable in a court of law.

A Crown as Fiduciary

The orthodox position is that fiduciary law is inherently a private law concept, concerned with the relationships and rights of private individuals to an agreement.[107] The Crown, acting on behalf of the public, is not usually viewed as a fiduciary; instead, public law regulates the Crown's conduct. However, the emergence of Crown-Native fiduciary duties has blurred these two traditionally distinct categories, bringing the private law of fiduciaries within the public law realm. This section analyses this overlap, and examines how these 'public' fiduciary duties differ from their orthodox, private law, counterparts.

1 Orthodox (private) fiduciary law

The purpose of orthodox fiduciary law is to uphold the integrity of a relationship where the role of one party (the fiduciary) is to serve the interests of the other. A fiduciary relationship can arise in two ways, either as a result of the fundamental nature of the particular relationship (some relationships are inherently fiduciary, for example solicitor-client and

107 Geoff McLay "What time will say: the lesson of Wakatū" (7 June 2017) Aratihi <www.geoffmclay.com>.

trustee-beneficiary), or because of the circumstances surrounding the relationship, the nature and scope of which give rise to fiduciary obligations.[108] If the fiduciary duties arise because of the circumstances surrounding the relationship, there are generally three characteristics which must be satisfied: the fiduciary had scope for the exercise of some discretion or power, the fiduciary could unilaterally exercise that power or discretion so as to affect the principal's legal or practical interests, and the principal was peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[109]

In such relationships (either inherently fiduciary or because of the circumstances), the law imposes enforceable obligations on the fiduciary to act in the interests of the other party (or parties) because of the particular vulnerability that other might have.[110] The key obligations flowing from these duties are the obligations to act in good faith, not to make a profit from a position of trust, and not to be in a position where duty and personal interest conflict without the informed consent of the principal.[111] When these obligations are breached, fiduciary law offers a wide range of remedies, including injunctions, account of profits, rescission, constructive trust, equitable compensation and contributory negligence.[112]

2 The Crown and public law

Fiduciary duties, therefore, usually arise only in relation to private law obligations, and the Crown is not typically viewed as a fiduciary in the exercise of its legislative or administrative functions.[113] Instead, the Crown acts pursuant to public law duties, and failure in respect of these duties gives rise to public law remedies. Public law, as opposed to private law, is concerned with the rules relating to the operation of the state; the allocation, regulation, and exercise of the state's responsibilities and powers.[114] It allows citizens to have access as of right to legal remedies for wrongs done to them by public

108 Curry and Whiteside, above n 36, at 7.

109 Curry and Whiteside, above n 36, at 9; *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 at 22.

110 Curry and Whiteside, above n 36, at 5.

111 Curry and Whiteside, above n 36, at 11; *Stevens v Premium Real Estate Ltd* [2009] NZSC 15 at [67].

112 Andrew Butler *Equity and Trusts in New Zealand* (Thomson Reuters, Wellington, 2009), at 569-574.

113 *Guerin v The Queen*, above n 3, at 385.

114 Breach, above n 61, at 414.

bodies' misuse of these responsibilities.[115] This has put pressure on the coherence of the notion of 'public' law, as where a citizen can use legal processes to challenge governing institutions, and the institutions themselves become defendants in their own right, "the shape of the procedure looks like a 'private' law procedure, and the substantive rules which apply may be those operating in 'private' law", albeit with (potentially) significant adaptations to fit them to the public context.[116] Where the challenged institution is an agent of a democratic state, there is also the inevitable tension between the interests of individual groups and (the political sovereignty of) the nation as a whole.[117]

3 Private law of fiduciaries within the public law realm; 'public' fiduciary duties

The courts have held in recent times, however, that the mere fact that it is the Crown that might be obligated to act on another's behalf "does not of itself remove the Crown's obligation from the scope of the fiduciary principle."[118] Where the exercise of public law duties involves independent legal interests, as opposed to interests created by the legislative or executive branches of government, fiduciary duties may take hold.[119] As such, it is possible for the courts to find that the Crown undertook, in the discharge of its other (public) duties, private law obligations towards indigenous groups and so be held a fiduciary in those circumstances.[120] As a result, fiduciary law is brought within the public law realm, resulting in an overlap of public and private law that is not often seen; as Matthew Palmer has noted, the recognition of Crown-Māori fiduciary duties and the subsequent "blending of the private law of equitable obligations with high constitutional public law is innovative in New Zealand", but certainly possible.[121]

This also ties in with more recent (and more radical) juridical recognition of an inherently fiduciary element to public law, arising as a response to social pressure for the judiciary to hold political actors to account.[122] David Dyzenhaus has argued that this broad fiduciary

115 Mark Elliott and David Feldman (eds) *The Cambridge Companion to Public Law* (University of Cambridge, Cambridge, 2015) at 26.

116 Elliot and Feldman, above n 115, at 26-27.

117 Elliot and Feldman, above n 115, at 27.

118 *Guerin v The Queen*, above n 3, at 385. Also Wakatū?

119 McCabe, above n 96, at 51.

120 *Wewaykum*, above n 98, at [74]

121 Matthew Palmer *The Treaty of Waitangi in New Zealand's law and constitution* (Victoria University Press, Wellington, 2008) at 199.

122 Breach, above n 61, at 422.

duty is necessary as a part of the wider culture of justification that is growing, particularly in Canada, which requires every legitimate exercise of sovereign power to be capable of public justification.[123] Although the recognition of Crown-Māori fiduciary duties as a result of a specific relationship identified in the Treaty of Waitangi does not go this far, it is in line with growing legal sentiment in which political actors are encouraged to have a higher regard for the interests of those affected by their decisions through higher standards of accountability.[124]

In this way, Crown-Native fiduciary obligations straddle both the public and private law spheres.[125] There is general academic consensus that these Crown-Native 'public' fiduciary obligations ought to be framed according to the established private law principles,[126] as outlined above; as such, they are 'in the nature of a private law duty'. However, such fiduciary relationships have qualities that distinguish them from their purely private law counterpart, largely by virtue of the Crown being involved and their existence in the public law realm.[127] That the Crown acts on behalf of all of society justifies applying to it "a set of legal requirements different from, or at least additional to, those imposed on ordinary people", and adapting the remedies of private law to ensure the Crown can still advance public interests.[128] As the Canadian Supreme Court held in *Wewaykum*, "the Crown can be no ordinary fiduciary; it wears many hats and represents may interests, some of which cannot help but be conflicting."[129] Similarly in *Paki (No 2)*, Elias CJ observed:[130]

> Although a usual characteristic of a fiduciary is loyalty, a fiduciary duty in the sense in which it has been recognised in respect of indigenous people in New Zealand and in Canada does not seem to depend on a relationship characterised by loyalty.

123 See generally David Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11; and Evan J Criddle "Mending Holes in the Rule of (Administrative) Law" (2010) 104 Nw.U.L.Rev. 309.

124 Breach, above n 61, at 439.

125 For more on this overlap between public and private law, see generally Evan Fox-Decent "New Frontiers in Public Fiduciary Law" in Evan J. Criddle, Paul B. Miller, Robert H. Sitkoff (eds) *Oxford Handbook of Fiduciary Law* (forthcoming, 2017).

126 Breach, above n 61, at 423.

127 Breach, above n 61, at 414.

128 Elliot and Feldman, above n 115, at 34.

129 At [96] (citations omitted).

130 At [155].

The exact extent to which these fiduciary duties differ is yet to be unequivocally ascertained, however it is clear that differences such as a softer approach to the duty of loyalty and the need to balance that duty against other interests are considered necessary where the Crown (and therefore a state's responsibility, powers, and resources) is involved. In this way, the decision in *Wakatū*, by recognising that the Crown can owe fiduciary duties to Māori, bridges that public and private legal divide in a novel way, thus changing the traditional understanding of the Crown-Māori relationship.

B The Treaty Settlement Process

As a result of this public and private law overlap, the recognition of Crown-Māori fiduciary duties will directly impact on the Crown-Māori relationship and therefore the political settlement process. As Dr Carwyn Jones has said:[131]

> Even if the relationship between Māori and the Crown continues to sit firmly within the traditional public law sphere, the parameters of that relationship will inevitably be shaped by the pressures of the kinds of private law duties that were found to exist in *Wakatū.*

There are two key ways in which the Treaty settlement process will be advantaged by the recognition of fiduciary duties. First, they can act as a legal backstop for iwi Māori in negotiations, and secondly, they can confer legitimacy on the settlement process as a whole.

Where the court identifies a fiduciary duty is owed, that duty can act as a legal backstop to give iwi and hapū better leverage in the Treaty settlement process.[132] Though this necessarily did not occur on the facts of *Wakatū* because the decision came after their settlement legislation, the injustices claimed of in this case are not unique.[133] Where settlement has not yet occurred, iwi Māori could now feasibly go to the court to establish a fiduciary duty, and use that to bring to the table in settlement negotiations. A declaration that there are fiduciary duties and that they have been breached will work alongside the Waitangi Tribunal's current non-binding powers to declare Treaty breaches in a way that will be advantageous to Māori, not least because the judicial process does not have to

131 Carwyn Jones "Analysis: Proprietors of Wakatū and Others v Attorney-General [2017] NZSC 17" (13 May 2017), IACL-AIDC blog <www.blog-iacl-aidc.org>.

132 In so far as the beneficiaries of that duty are congruent with those seeking a settlement.

133 Jones, above n 131.

remain declaratory in its remedies and the Crown can no longer be the sole arbiter of its obligations to Māori. The recognition of fiduciary duties can therefore act as a legal backstop, and go some way to address the current imbalance in bargaining power between Māori and the Crown.

A backstop of *legal* rights and remedies then encourages a fairer process, in attempting to put iwi and the Crown on a more even playing field. As the legitimacy of any political or legal process depends on the fairness of the process itself,[134] the recognition of Crown-Māori fiduciary duties thus encourages a more legitimate, and ultimately more successful, Treaty settlement process. In this way, even if political negotiations continue to govern the settlement of historical land claims, "from now on, those negotiations will all take place in the shadow (or the light?) of the *Wakatū* decision".[135]

There will, of course, be some limitations to the effectiveness of this remedy under the current Treaty settlement process, which is intended to be full and final.[136] First, recognising a new remedy to be exercised in relation to Treaty settlements may lead to the re-litigation of claims which previously were thought to have been settled. This severely compromises the finality and durability of Treaty settlements. Secondly, and in the alternative, most settlement acts have clauses in them discharging the liability of the Crown for the particular historical claims legislated for.[137] This particular claim was specifically excluded from the Ngati Koata, Ngati Rarua, Ngati Tama ki Te Tau Ihu and Te Atiawa o Te Waka-a-Maui Claims Settlement Act 2014 because litigation had begun before the settlement negotiations came to an end. If *Wakatū* opens up the possibility of a fiduciary claim which was not contemplated when the settlement was negotiated, and there is no such exclusory clause enabling further litigation on a matter, it is unclear whether the courts will be able to determine whether there is a fiduciary duty in the face of a general discharge of liability clause.

Notably, discharge of liability, or final settlement, clauses are only relevant to claims about matters that are settled. When final settlement clauses are considered in a context relating

134 Sarah Kerkin "Designing for Legitimacy: a Systems Perspective" (2017) 15 NZJPIL 67 at 72.

135 Jones, above n 131.

136 Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: Healing the past, building a future* (March 2015) at 16.

137 Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation" (LLB (Hons) Dissertation, University of Otago, 2016) at 4; see, for example, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9; Waikato Raupatu Claims Settlement Act 1995, s 9; Ngāi Tahu Claims Settlement Act 1998, s 461; Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 90(1).

to matters outside the scope of settlement, they are therefore likely to receive a narrow approach to their interpretation so as not to oust access to the courts where other interpretations are available.[138] It could be argued that a claim of fiduciary duties is a wholly different claim than what might have been negotiated for in the settlement process; as such, the ouster clause might not work in that situation. As assisting reconciliation is a stated purpose of the Treaty settlement process, it might be likely the courts would interpret such clauses with this in mind. On the other hand, most final settlement clauses in the Treaty context specifically exclude future claims made on the rights arising in or by the Treaty of Waitangi and also fiduciary duties.[139] It is unclear whether the courts would be able to read down such clauses so as to allow a fiduciary claim like the one that occurred in *Wakatū*. If the courts cannot, this could lead to inconsistencies between settlements, as those who have already 'settled' may miss out on having fiduciary duties recognised.

In this way, while the recognition of Crown-Māori fiduciary duties might work to provide iwi with a legal backstop and so legitimise the settlement process, the uncertainty as to how courts will be able to address these duties in the future has the potential to simultaneously compromise the finality and durability of the settlement process. This may not be so problematic, however, if we consider that the Treaty settlement process in itself denies the fact that a treaty embodies (by definition) an *ongoing* relationship, not something that can or ought to be finally settled.[140] The following section therefore considers how the finding of Treaty-based fiduciary duties might change the legal landscape outside of the settlement process, with the potential to create a new area of jurisprudence.

C A New Area of Jurisprudence

Outside of the Treaty settlement process, the implications of finding a *Treaty-based* fiduciary duty would be far greater, as it allows for the enforcement of Treaty breaches (those which attract the fiduciary label) outside of the political sphere and within the legal sphere of fiduciaries – thus directly enforceable in a court of law. This has the potential to dramatically reconfigure the nature of the Crown-Māori relationship and change the

138 To take a narrow approach where other interpretations are available is orthodox, see Bielski, above n 137, at 53; Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" [2015] NZ L.Rev. 617 at 634.

139 See, for example, Ngāi Tahu Claims Settlement Act 1998, s 10(1)(a).

140 Moana Jackson "Mana Wahine and Mana Tane" (Te Herenga Waka Marae, Mana Wahine Speaker Series, 22 August 2018).

constitutional landscape in New Zealand. The following sections analyse the practical and normative implications of first shifting Treaty jurisprudence from the political sphere into the legal sphere, and secondly having the law of fiduciaries work to further expand (and strengthen) Treaty jurisprudence and the Crown-Māori relationship, particularly in terms of remedies.

1 Shifting Treaty jurisprudence from political to legal

Recognising specifically Treaty-based fiduciary duties between the Crown and Māori means that such fiduciary duties will not only impact on the current settlement process, as outlined earlier, but the Treaty itself will become enforceable in the courts. There are four key points to be made in considering this shift of Treaty jurisprudence from the political and into the legal sphere: first, current ways of addressing and upholding Treaty breaches, such as the (political) Treaty settlement process, are inadequate; secondly, a more permanent and sustainable avenue through which to address Treaty breaches is necessary; thirdly, an independent referee, such as the courts, would confer some much needed legitimacy onto the process of addressing Treaty breaches; and finally, allowing for the Treaty to be enforced in the legal sphere does not remove it from the political sphere, thus enabling the Treaty to permeate both the political and legal constitution.

Despite the Treaty being recognised as a "part of the fabric of New Zealand society",[141] the orthodox view of the Treaty's role in the New Zealand legal system is that as an international treaty, it is not directly enforceable in the courts unless incorporated into statute.[142] While its principles and corresponding duties have been recognised as strong interpretive aids in judicial decision-making in applying both legislation and the common law,[143] and the Treaty is regarded as fundamental to New Zealand's constitutional legal framework,[144] the ability for Māori to directly enforce their rights under the Treaty remains limited to the settling of Treaty breaches under the political negotiation process.

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141 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

142 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590.

143 Matthew Palmer, above n 121, at 241-242. For example, in *Huakina*, above n 141, it was found that even without direct incorporation into legislation, enactments should be interpreted consistently with the principles of the Treaty.

144 See generally Matthew Palmer, above n 121; Interview with Moana Jackson (Helen Potter, Constitutional Transformation and Matike Mai Project: A Kōrero with Moana Jackson, December 2017) transcript provided by Economic and Social Research Aotearoa.

This political settlement process has a number of issues, of which there is not the scope to go into in too much detail, but it is enough to note that the Crown's preference (insistence) to negotiate with 'large, natural groupings' is contrary to tikanga,[145] the Crown's overlapping policy actively avoids determining where actual interests lie and destabilises whanaungatanga,[146] and there is a huge imbalance in bargaining power between iwi and hapū and the Crown.[147] Although its aims are to provide redress for breaches of the Treaty and air grievances related to it, the creation, adjudication, and imposition of the process by one Treaty partner onto the other raises serious questions of legitimacy; because the "Crown sets the parameters of the process unilaterally and dictates both financial and conceptual limits on settlement redress… far from being an intercultural dialogue, there is a structural bias within the settlement process."[148]

Such 'financial and conceptual limits' are indicative of the (perceived to be) political rather than legal rights of those who have suffered a breach of the Treaty. Earlier this year, Ngāpuhi leader Hone Sadlier made a statement regarding the settlement negotiations Ngāpuhi is involved in, noting that the previous government "took them on board, put them in the boot and the Crown drove the car", but was "very optimistic" with the new Government leading Treaty negotiations.[149] This indicates that, at least from the iwi perspective, settlement packages can depend on the flexible and public-opinion based whim of the current government. Not only is the settlement process reliant on Crown-will, but questions of redress are put precariously in the hands of political will if a change of government is something that might help (or hinder) the ability to receive a just settlement. The scope, therefore, of the Treaty settlement process is limited by its political nature, and

145 The natural groupings of authority in te ao Māori are either the iwi or the smaller hapū, groupings which the Crown often considers too small to negotiate with; instead, the Crown 'lumps' multiple iwi and hapū together, often along geographical lines - linkages which may have no significance in terms of authority to iwi and hapū themselves. See, for example, *Te Runanga o Ngāti Manawa v CNI Holdings Ltd and others* [2016] NZHC 1183; Malcolm Birdling "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPIL 259; and Jessica Palmer "Administrative Review of the Treaty of Waitangi Settlement Process" (2008) 39 V.U.W.L.R. 225.

146 See the Office of Treaty Settlements, above n 136, at 53-54; *Ngāti Whātua Ōrākei v Attorney-General, Ngāti Paoa Iwi Trust and Marutūāhu Rōpū Ltd Partnership* [2018] NZSC 84; and Waitangi Tribunal *Ngāi Te Rangi Application for an Urgent Inquiry into the Crown's Settlement Negotiations Policy and Practice Concerning Hauraki Redress* (Wai 2616, 2017) at [91].

147 Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 161.

148 Above n 147, at 150-151.

149 Jo Moir "National Government only ever wanted a Treaty settlement on their terms – Ngāpuhi Leader" *Stuff* (New Zealand, 2 February 2018).

its durability, legitimacy, and ultimate success in redressing Treaty breaches is by no means certain.

A more permanent and sustainable avenue through which to address Treaty breaches is therefore necessary. Recognising the Treaty as creating binding fiduciary obligations in some instances, and the corresponding ability to enforce those legal rights, provides an alternative tool to the current settlement process with which to uphold Treaty grievances both *outside* the Treaty settlement process and *after* the Treaty settlement process (for historical claims) comes to an end.[150] This would be a first step to providing for the Treaty's sustainability in the legal sphere, as opposed to "half in and half out of the legal system."[151]

As well as this, enabling Treaty breaches to be upheld by a third party, such as the courts, stabilises how the relationships are managed and allows for the courts to be "an independent referee, guarding against offside play";[152] reducing (eliminating) the ability for redress to be dominated by both Crown and political will. Undoubtedly, some consider that the settling of Treaty grievances is better suited to the political arena of negotiations than the legal arena of enforceable rights and obligations examined by the courts.[153] This argument generally comes back to the idea that judges are not best placed to be interpreting and enforcing the Treaty and that the courts have not always been the best 'referee' of what is fair. More persuasive is the argument that directly enforcing Treaty breaches in the courts could result in a 'legal straitjacketing' of the rights and obligations owed.

The courts in New Zealand have, however, always been at the front of upholding the Treaty and the rights it conveys.[154] The most obvious example of this is in *Lands,* in which the Court of Appeal held that reference to the principles of the Treaty in the State-Owned Enterprises Act 1986 imposed far greater obligations on the Crown than had previously

150 Although there will be some time limitations on these legal processes, such as the doctrine of laches and the Limitation Act, these are decidedly more flexible than those imposed by the settlement process, in order to more accurately give effect to the rights of those involved. See *Wakatū*, above n 1, at [446]-[482].

151 Rt Hon Sir Geoffrey Palmer QC "Māori, the Treaty and the Constitution" (paper presented to the Māori Law Review Symposium on the Treaty of Waitangi and the Constitution, Wellington, 12 June 2013).

152 Matthew Palmer "What Place does the Treaty have in New Zealand's constitutional arrangements?" (The Treaty Debate Series 2013: My Voice Counts; Finding a Place for the Treaty, Te Papa, 24 January 2013) at 4.

153 Craig Linkhorn "The Treaty in the Constitution Conversation" (paper presented to the Māori Law Review Symposium on the Treaty of Waitangi and the Constitution, Wellington, 12 June 2013).

154 Matthew Palmer, above n 152, at 5.

been understood by Parliament,[155] a decision which has been left by Parliament to stand. It is also important to note that Treaty-based fiduciary duties do not render the Treaty *per se* as directly enforceable. Rather, article II creates a specific fiduciary relationship from which specific fiduciary duties can arise, and it is those duties that can be enforced directly; the Treaty can only be enforced in the courts where the fiduciary duties recognised arise as a result of an alienation of native title through Crown pre-emption. Fiduciary obligations, native title, and pre-emption have always been the purvey of the courts, and these phenomena already involve a strictly legal analysis; it simply has not been recognised before *Wakatū* that the Treaty could be the basis of the obligations. To submit that the courts are ill equipped to deal with recognising a Treaty-based fiduciary duty is to deny the reality that not only have the courts played the central role in creating fiduciary law, but also in ensuring the foundational place of the Treaty in New Zealand's current constitution.

This is not to say that the courts will not be wary of bringing into the legal realm what has previously been considered political; indeed, "[t]he extent to which the judicial branch of government is prepared to extend the reach of the law is influenced by a sometimes unconscious calculation of the long-term effects on the political position of the courts vis-à-vis the political branches."[156] It is to say, however, that just because Parliament has provided a bespoke procedure for addressing Treaty issues, does not mean they are only political.[157] Simply because the process has been considered a political one in the past does not mean that is the only way of doing things.

Finally, to uphold a Treaty-based fiduciary duty in the courts does not mean that the Treaty and the relationship it embodies between Māori and the Crown must correspondingly be removed from the political constitutional structures of New Zealand. Regarding the Treaty as a part of the "political constitutionalism" has its benefits; it allows the Treaty to function "in everyday life over and above legal tools and institutions", thus providing for its wider application throughout the fabric of society, applying to Parliamentary decisions and law-making, statutory interpretation, and indeed cultural change.[158] It also leaves room for the constitutional system to be entirely reimagined, in which the Treaty could become not merely an add on to the constitution or legal framework but *the* foundation of those

155 Above n 69.

156 Matthew Palmer, above n 121, at 201.

157 Elias, above n 93.

158 Māmari Stephens "Māori constitutionality (and the Treaty of Waitangi) (paper presented to the Māori Law Review Symposium on the Treaty of Waitangi and the Constitution, Wellington, 12 June 2013).

frameworks.[159] Recognising Treaty-based fiduciary duties in the courts would not remove the Treaty from that constitutional, political, dialogue; rather, it would strengthen the Treaty's place in that constitution, by expanding the remedies available to Māori to uphold their Treaty rights. As Elias CJ has recognised, the Treaty is not only law; it is also history, and politics, but perhaps "we need to pay more attention to the Treaty as law."[160]

In this way, the settling of Treaty breaches need not be confined solely to the political sphere. Allowing the Treaty to straddle both the political and legal spheres through the recognition that the Crown owes Treaty-based fiduciary duties to Māori which are recognisable and enforceable in the courts provides another pathway for upholding the Treaty of Waitangi and for Māori to enforce the rights and the obligations owed to them.

2 The enforcement of Treaty breaches and the law of fiduciaries

Not only does the recognition of Treaty-based fiduciary duties shift Treaty jurisprudence into the legal sphere, but within the legal sphere it is the law of fiduciaries that is engaged. Particularly in terms of remedies, fiduciary law would work to further expand and strengthen Treaty jurisprudence.[161] To the question "what the imposition of a fiduciary duty adds… [to that] already available at public law", the Court in *Wewaykum* responded, "[most] importantly, the imposition of a fiduciary duty opens access to an array of equitable remedies".[162] The benefit of having a legal remedy such as a fiduciary duty is that if successful, it can work to give damages for infringements and can require that property wrongly taken be restored.[163]

In *Wakatū*, the remedy sought in the Supreme Court was a declaration that the Crown had breached fiduciary obligations, to be remitted to the High Court to consider further remedies such as equitable compensation and an account of profits. It was recognised that to the extent the Crown profited from its breach, and if those profits could be represented

159 Jackson, above n 144.

160 Elias, above n 93.

161 This part of the paper focuses on Treaty-based rights, and therefore how Treaty jurisprudence is strengthened as a result. However, if duties were found owing through the specific fiduciary duty analysed earlier, the Crown-Māori relationship would be re-balanced and strengthened by a similar analysis, but in potentially different circumstances.

162 At [94].

163 McLay, above n 107.

by a particular property, a constructive trust could be imposed over that property.[164] Though the High Court case is yet to be heard, examining how these remedies might apply highlights how the addition of fiduciary law will help strengthen the enforceability of Treaty rights and so work to rebalance the Crown-Māori relationship.

It is an inflexible principle of equity that persons in a fiduciary position are not allowed to make a profit out of their trust. If they do, they are liable to account to the principal for that profit. The amount recoverable in an action claiming an account of profits is therefore dependent upon the profit made by the fiduciary, not the loss suffered by the principal.[165] Different orders for consequential or declaratory relief can then follow: that the fiduciary pay the principal the amount of the profit, or, where the traceable proceeds of the profit survive in an identifiable form in the fiduciary's hands, that the fiduciary hold the profit on constructive trust.[166] Where there is identifiable property resulting from the breach, the principal or beneficiary can therefore have the property which constitutes the trust assigned to them.[167]

Although we cannot be sure how the courts in New Zealand will approach this remedy given there has yet to be a decision on the issue,[168] in Canada, courts have been receptive to the constructive trust as a remedy in cases involving breach of fiduciary duty, particularly in cases concerning surrendered land.[169] In *Semiahmoo Indian Band v Canada*, the Court found that the "imposition of a constructive trust simply does for the respondent what its fiduciary duty required of it… it gives back to the Band an interest in the surrendered land."[170] This was held to be so "even if there is now a legitimate public need to build a new customs facility [on that land]".[171] In such circumstances, the Crown "should have to enter into good faith negotiations with the Band with a view to repurchasing, or leasing, the land that they used."[172] Mr Stafford then, as the only successful applicant in *Wakatū*, can claim to recover, through an institutional constructive trust, "land that came

164 At [922]. This being separate to the constructive trust recognised by Elias CJ and Glazebrook J in the case.

165 Ben McFarlane and Charles Mitchell *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (14th ed., Sweet & Maxwell Publishing, London, 2015) at 570.

166 At 571.

167 *Accident Compensation Corporation v Stafford* [2018] NZHC 218 at [48].

168 *Wakatū* has been remitted to the High Court but the decision is yet to be heard.

169 *Semiahmoo Indian Band v Canada* [1997] FCJ 843 at 20.

170 At 22.

171 At 23.

172 At 23.

into the hands of the Crown that should have been part of the Tenths reserves", that being the non-identified 10 000 acres.[173] Prima facie, it is clear that such a remedy would have far-reaching consequences to restore actual rights in property.

While the constructive trust is a strong remedy, it is important to recall the earlier discussion about these duties being 'public' fiduciary duties, or private fiduciary duties in the public law realm. As indicated, where land that is now in the hands of the Crown is concerned, how the fiduciary remedies apply might differ slightly to a strictly equitable analysis due to the Crown's unique duty to consider the interests of many different groups, some of which may conflict. While having regard to the Crown's need to balance multiple interests would not be necessary was it simply a relationship between two private individuals, the fact that the Crown is involved necessarily brings the scope of the obligations and the remedies available into the public sphere, which is why the characterisation of the fiduciary duties as arising *solely* in private law on the facts of *Wakatū* may be some cause for concern. It is conceivable that there might be some instances where property in use by the Crown which constitutes the trust property may not be available for re-assignment to the beneficiaries, for reasons of, for example, national security. In such situations, where the Crown could not feasibly repurpose the land, another option for the court might be to work out a rent arrangement whereby the Crown was required to pay the Māori proprietors for the use of that land for its own purposes, even paying arrears. This is similar to the arrangement indicated by the Court in *Semiahmoo*, though it goes further to recognise that there may be instances in which the court is prevented from re-assigning trust property in order to allow the Crown to balance its duties.

Similarly, in some circumstances, the equitable defence of *bona fide* purchaser for value without notice may intervene to make restoration *in specie* inequitable.[174] In such cases, equitable compensation can be awarded to compensate for the loss that results from the Crown's breach.[175] Again drawing on the Canadian jurisprudence, Dickson J in *Guerin* affirmed that the quantum of compensation "is to be determined by analogy with the principles of trust law."[176] Wilson J agreed, and found the proper measure of compensation comprised a monetary assessment of the Band's lost opportunity to develop the reserve land as a result of the Crown's breach; the compensation would be based on the difference between that monetary assessment and the value of the golf club lease obtained by the

173 *Wakatū*, above n 1, at [815].

174 McCabe, above n 96, at 208.

175 McCabe, above n 96, at 208.

176 At 390.

Crown (that being the profit).[177] Later analyses in Canada are consistent with this; in *Blueberry River Indian Band v Canada*, McLachlin J confirmed that a beneficiary of a fiduciary duty is entitled to have the property over which the duty falls restored or value in its place, even if the value of the property turns out to be much greater than that which could have been foreseen at the time of the breach.[178]

It is likely a similar analysis would apply in New Zealand, given the rules around equitable compensation in this regard are essentially the same.[179] It appears therefore, that compensation for breach of fiduciary duty should be assessed with the goal of placing the beneficiaries in the position they would have been in had there been no breach, applying the presumption that they would have put the relevant property to its most advantageous use. This is consistent with the principles of law that place the fiduciary in the position of determining and acting in accordance with what is in the best interest of the beneficiary.[180]

In this way, even with the public element to Crown-Māori fiduciary remedies, both the constructive trust and equitable compensation are powerful remedies. Recognising that the Crown is deemed to hold certain property on trust for certain iwi and that those iwi can have the property which constitutes that trust assigned to them requires the Crown to account for its breach of fiduciary duties in a substantial way. Most importantly, the remedy would be connected to the actual loss that the plaintiffs have suffered as a result of the Crown's breach. Where trust land or property cannot be the subject of an outright assignment into iwi hands, for reasons explained above, the Crown can still be required to compensate for that property in other ways, through rent, or through an agreement that when current leases are up on those lands they will be assigned to the Māori beneficiary. Similarly, the monetary value owed through equitable compensation is likely to be calculated on a much more certain, mathematical basis than is currently available to Māori proprietors who have suffered a breach of the Treaty under the settlement process, particularly as increases (and decreases) in value since the breach are included as an integral part of the quantum.[181] Again, the quantum would be connected to the actual loss

177 At 363.

178 *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)* [1995] 3 SCR 344 at [103].

179 See generally Charles E. F. Rickett "Equitable Compensation: Towards a Blueprint" (2003) 25(1) Syd LR 31; *Stevens*, above n 111, at [34]-[36].

180 *Stevens*, above n 111, at [25]-[27].

181 McCabe, above n 96, at 209.

that the plaintiffs have suffered as a result of the breach, rather than as close to the loss that the Crown thinks it can manage, financially and politically.[182]

In this way, the decision in *Wakatū*, which paves the way for recognition of a Treaty-based duty, has the potential to create a new area of jurisprudence in which (some) Treaty breaches are enforceable not only in the courts but in the law of fiduciaries; enabling access to powerful remedies which can require the Crown to make much more substantial redress than it is currently willing to provide. This would be a significant recognition of the seriousness of the duties breached, and go some way towards alleviating the disadvantages that some Māori experience as a direct result of Crown breaches of its obligations.

IV Conclusion

To conclude, the Supreme Court decision in *Wakatū* recognised for the first time in New Zealand that the Crown has enforceable private law fiduciary duties to Māori in relation to 19th century land purchases. Recognising Crown-Māori fiduciary duties has important implications for the public and private law divide, in which, traditionally, the Crown could not be seen to hold fiduciary obligations because of its public law nature. This decision therefore bridges those once considered separate legal realms, in line with recent juridical recognition of an inherently fiduciary element to public law, in a way that can be used to the benefit of iwi Māori. Crown-Māori fiduciary duties can also go some way towards legitimising the current settlement process, by acting as a legal backstop for Māori in negotiations.

In further bridging that divide, this paper has examined the implications of this decision for the Treaty of Waitangi and its ongoing place in Aotearoa's constitution. Despite the Treaty's clear constitutional significance, there remains debate as to how and in what forum it is to be kept relevant, upheld, and enforced. While such debate continues, the status quo remains: the Treaty does not give rise to directly enforceable legal rights and obligations unless and until the legislature incorporate it or its principles into statute. Treaty breaches are therefore not assessed by the courts, but by political processes, the scope of which are

182 The Office of Treaty Settlement's current approach is that even if an acceptable method for calculating losses resulting from the Crown's Treaty breaches could be developed, full compensation might be too much of a burden upon present and future generations of taxpayers." See Paul Goldstone, *Treaty of Waitangi Settlements Process: Executive Summary* (Law and Government, Parliamentary Library, Background Note, 23 August 2006) at 16.

limited by political will and the durability, legitimacy, and ultimate success of which remains unclear.

The identification of Crown-Māori fiduciary duties in *Wakatū*, however, provides the springboard from which a broader fiduciary duty might be judicially recognised based on the Treaty of Waitangi. A *Treaty-based* fiduciary duty then brings the enforcement of some Treaty breaches into the courts of law. The decision in *Wakatū* thus paves the way for an entirely new area of jurisprudence, in which the Treaty of Waitangi is upheld and enforceable both in the political sphere *and* in the legal realm. In addition, it is the law of fiduciaries that is engaged, bringing with it an array of equitable remedies that can provide more substantial redress than that currently available under the political negotiations process.

While the creation of a new area of jurisprudence is not something the courts will undertake lightly, in the words of Chief Justice Sian Elias:[183]

> [I]t is high time to get our ideas in order and to think more creatively. We need to understand that when dealing with fundamentals of the legal order, we need to think constitutionally. And constitutional thinking requires fluid tendencies and room for second thoughts.

In this extrajudicial statement, Elias CJ reflects on how the Treaty of Waitangi ought to be recognised within the legal system. Her sentiment is to think creatively, think constitutionally, and think incrementally. I submit that *Wakatū* provides the first incremental step towards transforming the constitutional landscape in Aotearoa, and reconfiguring the nature of the Crown-Māori relationship. In this way, another pathway for Māori to enforce some of the rights and obligations owed to them in the Treaty of Waitangi may be on the horizon.

183 Above n 93.

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