LAWS 532: Comparative Indigenous Law

The Recognition and Justifiable Infringement of Indigenous Rights in Canada and New Zealand

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I Introduction

Canada and New Zealand are both nations with substantial indigenous populations, with the Māori in New Zealand constituting around 15 per cent and the Indian, Inuit and Métis peoples in Canada constituting around 4.5 per cent of the total population. Other parallels include a colonization effort that was largely led by England and subsequently Great Britain (for Canada certainly after the defeat of France in the Seven Years War in 1763) which brought with it a legal system that has its foundations primarily in English law. Despite these parallels, it should be noted that the colonization of New Zealand commenced substantially later than the one of Canada and occurred at a time when Great Britain already had a long history of engaging with the indigenous communities of territories it intended to colonize. Finally, while early relations with aboriginal communities in Canada were governed by both general proclamations and a variety of treaties with individual tribes, New Zealand has, in the Treaty of Waitangi (Treaty), a single overarching treaty between the British Crown on the one side and the Māori on the other side.

This paper will look at two elements of the rights of indigenous community. First, it will analyse how the rights of indigenous communities can be recognised. In Canada, this will entail an analysis of the relevant case law that sets out the test needing to be passed for rights to be recognised. For New Zealand, it will look at the various avenues how the Treaty can affect the domestic law of New Zealand. The paper will not look at the obligations of New Zealand and Canada under international frameworks, in particular the United Nations Declaration on the Rights of Indigenous Peoples, and to what extent such frameworks would require them to recognize rights. It will also focus on rights under the Treaty and s 35 of the Canadian constitution, with rights of indigenous communities arising out of common law aboriginal title and customary rights only touched upon sparingly.

Second, it will analyse how such rights can be justifiably infringed. For Canada, this will entail a review of the relevant conditions for such infringement set out by the Supreme Court. For New Zealand, it will analyse the concept of the *principles of the Treaty of Waitangi* that is incorporated in various statutes and to what extent such principles may affect the Crown when it wishes to make use of assets that are subject to claims by Māori under the Treaty, illustrated by way of *New Zealand Maori Council v Attorney-General* (*Mighty River Power*). [1]

Subsequently, it will aim to set out certain lessons that each jurisdiction can learn from the different approach that the other jurisdiction has taken, with the ultimate purpose being to protect the rights of indigenous communities in an effective manner while preserving the government's ability to infringe on such rights if it can prove that it has a legitimate purpose to do so.

[1] *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Mighty River Power*].

II Recognition of Rights

A Canada

1 The constitutional protection of section 35

Already in 1763, the Royal Proclamation issued by King George III contained several provisions protecting the rights of Native American tribes connected to him, including the following: [2]

> [that they] should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds

In addition to such general proclamation, the British Crown entered into a number of treaties with individual aboriginal tribes. However, both the proclamation as well as the various treaties often did not achieve the goal of effectively safeguarding the rights of aboriginal communities protected therein.

In 1982, the protection was lifted to the constitutional level. Section 35 para 1 of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK) provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Section 35 further sets out that aboriginal peoples include the Indian, Inuit and Métis people of Canada, that treaty rights includes rights that now exist by land claims agreements or may be so acquired and that the rights are guaranteed equally to male and female persons.[3] Finally, s 35.1 contains a commitment by the federal and provincial governments of Canada to consult with aboriginal peoples on any proposed amendments to s 35.

2 The recognition of aboriginal rights by the courts

However, even before the enactment of s 35, aboriginal rights were discussed in (and recognised by) the Canadian courts. Before the important Supreme Court judgment of *Calder v British Columbia (Attorney-General)*[4] in 1973, Asch describes aboriginal rights as a "rather amorphous and general set of rights, which had only a marginal effect on government actions and probably applied only in certain regions of Canada", with corresponding negative impacts on the ability of aboriginal people to seek redress.[5]

In *Calder*, the plaintiffs, representatives of the Nishga nation located in British Columbia, claimed that "aboriginal title, otherwise known as the Indian title, of the plaintiffs has never

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[2] "Royal Proclamation of 1763" (4 October 1763) 10354 *The London Gazette* 1.

[3] Section 35 paras 2 – 4 Constitution Act 1982, Schedule B to the Canada Act 1982 (UK).

[4] *Calder v. British Columbia (Attorney-General)* [1973] SCR 313, 1973 CarswellBC 83.

[5] Michael Asch "From *Calder* to *Van der Peet* Aboriginal Rights and Canadian Law, 1973-96" in Paul Havemann (ed) *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (Oxford University Press, Oxford, 1999) 428 at 429-430.

been lawfully extinguished".[6] Six out of seven Supreme Court judges agreed that the Nishga's rights resulted from the fact that they occupied their traditional territory before contact with Europeans[7] though they split 3-3 on whether the Nishga were covered by the Royal Proclamation's geographical application.[8] They also split 3-3 on whether the Nishga's rights were extinguished, with three judges arguing that such could (and was) done by general legislation while the other three argued that it required specific legislation with a clear and plain intention to do so.[9] While Pigeon J ultimately let the appeal fail on a technicality,[10] it nevertheless set the important precedent that aboriginal rights existed at the time of first contact with Europeans (be it due to the Royal Proclamation or to "sources parallel to the common law").[11] Two fundamental questions, however, remained: Had aboriginal rights been extinguished in Canada (with the possible exception of treaties) and, if not, what was the exact content of such rights?[12]

In the case of *R v Sparrow*, the Supreme Court was for the first time asked to explore the scope of s 35 that had been introduced in 1982.[13] The case dealt with fishing rights of aboriginal communities (the plaintiff having been caught fishing with a larger net than permitted by his band's fishing license) and to what extent regulations may infringe on such rights. The Court first elaborated on the term existing rights set out in s 35, noting that it refers to those rights that were in existence when the Constitution Act came into force and thus not reviving previously extinguished rights.[14] It further noted that existing does not mean the specific form in which a right was regulated before 1982. The term has to be interpreted flexibly, with its evolution over time being permitted.[15] It also confirmed that to extinguish an aboriginal right, the Sovereign's intention to do so must be "clear and plain" (and that the provisions regulating fisheries were not sufficient in *Sparrow*).[16] The case also contained important principles how aboriginal rights can be infringed which will be discussed further below.

Following *Sparrow*, the Supreme Court did not have to undertake a substantive discussion of s 35 until the decision in *R v van der Peet.*[17] In such case, it elaborated on how the aboriginal rights recognized and affirmed by s 35 should be defined (a question that was left unresolved

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[6] *Calder*, above n 4, at [1]; Peter Kulchyski *Unjust Relations: Aboriginal Rights in Canadian Courts* (Oxford University Press, Don Mills (Ontario), 1994) at 61.

[7] At [26] and [136-137]; Asch, above n 5, at 431.

[8] *Calder*, above n 4, at [26] and [145-146].

[9] At [74] and [151]; Asch, above n 5, at 431.

[10] At [192].

[11] Asch, above n 5, at 431.

[12] Asch, above n 5, at 432.

[13] *R v Sparrow* 1990 1 SCR 1075 at [1].

[14] At [23].

[15] At [24-27].

[16] At [37-38].

[17] *R v Van der Peet* 1996 2 SCR 507; John Borrows and Leonard Rotman *Aboriginal Legal Issues Cases, Materials & Commentary* (4th ed, LexisNexis, Markham (Ontario), 2012) at 117.

in *Sparrow*).[18] Lamer CJ, with whom six out of eight judges agreed, first noted, by referring back to *Sparrow*, that when interpreting s 35, a purposive analysis should be undertaken and that a "generous, liberal interpretation of the words in the constitutional provision is demanded".[19] Before turning to test for recognising aboriginal rights under s 35, he noted that aboriginal rights were not created by s 35 but existed previously under common law[20] though without constitutional status, which meant that they could be extinguished or regulated by parliament. Rights affirmed under s 35, however, could not be extinguished but only regulated or infringed, subject to the test set out in *Sparrow* (discussed below).[21] Having set out the purpose underlying s 35 as being "the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions", he then set out that the test for identifying indigenous rights must "aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans".[22]

In order to pass such test, "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right".[23] A variety of factors needs to be taken into account. First, the court has to take the perspective of the aboriginal people that claim a right into account, though such perspective must be framed in terms that the Canadian constitutional and legal structure can understand.[24] Courts further have to identify the precise nature of the right that is claimed, which require them to consider factors such as the nature of actions taken pursuant to a claimed right, the nature of government regulation affected and the practice or custom being relied on to establish such right (bearing in mind that such action might be exercised in a modern form).[25] Furthermore, the aboriginal claimant must demonstrate that "the practice, custom or tradition was one of the things which made the culture of the society distinctive - that it was one of the things that truly made the society what it was" and that it was of independent significance.[26] While the practice may have evolved over time, it must have its origins in the period before contact with Europeans.[27] With regard to evidentiary rules, courts should further take into account the inherent difficulties in adjudicating aboriginal claims and they should decide claims on a specific rather than general basis.[28] As regards European influences, such influences would only be relevant if the

[18] At [1].

[19] At [21-25].

[20] See the decision in *Calder*, above n 4.

[21] At [28].

[22] At [40]

[23] At [46].

[24] At [49].

[25] At [53-54].

[26] At [55] and [70].

[27] At [60-67]; Asch, above n 5, at 436.

[28] At [68-69].

aboriginal practice existed because of such influence (which leads to the interesting question whether any practice, custom or tradition relating to horses can satisfy this element as horses were only introduced to the Americas by Europeans).[29] Finally, courts have to take into account both the relationship of aboriginal peoples to the land as well as their distinctive societies and cultures.[30]

In *Delgamuukw v British Columbia*,[31] the Supreme Court furthermore elaborated on the content and proof of a claim for aboriginal title. Regarding content, it held that the title contains the "right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" and that such uses "must not be irreconcilable with the nature of the group's attachment to that land".[32] Regarding proof of title, it required that the tribe occupied the land prior to the assertion of sovereignty by the Crown, that such occupation must have been exclusive at sovereignty and that if present occupation is used as proof for pre-sovereignty occupation, that there must be a continuity between the two.[33] Canada has thus developed sophisticated tests that need to be passed in order to have aboriginal rights asserted by the courts, though such tests take the particular circumstances of aboriginal claims to some extent into account.

B New Zealand

1 The Treaty of Waitangi

Turning now to New Zealand, the central document is the Treaty of Waitangi concluded between a representative of the British Crown and various Māori chiefs on 6 February 1840. It was drafted in both an English and a Te Reo Māori version which are not fully consistent, with the Te Reo Māori version increasingly being seen as the official one.[34]

Its first article concerns the transfer of government (or sovereignty in the English version) to the British crown. The second, in the English version, confirms and guarantees to the "Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess", with a right of pre-emption of the Crown. The third article guarantees to Māori all the rights and privileges of British subjects.

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[29] At [73].

[30] At [74].

[31] *Delgamuukw v British Columbia* 1997 3 SCR 1010.

[32] At [117].

[33] At [143].

[34] Margaret Mutu "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 16 at 20; Hohaia Collier "A Kaupapa-based Constitution" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 199 at 202.

2 The Treaty's status in New Zealand domestic law

The status of the Treaty in New Zealand domestic law has seen considerable development over the years. In the beginning, the Treaty was largely absent from legislation and judgments, once being labelled as "a simple nullity".[35] Such approach changed in the 20th century. Palmer, after concluding that the Treaty constitutes a valid treaty under international law,[36] canvasses a variety of different avenues how the Treaty can affect the domestic laws of New Zealand:

First, given that New Zealand follows a dualist system, the Treaty (as every other internal treaty) is not directly applicable unless Parliament has done so in legislation, a view confirmed in the 1940s in *Te Heuheu Tukino v Aotea District Maori Land Board* as well as subsequently in *New Zealand Maori Council v Attorney-General (Lands).*[37]

The Treaty of Waitangi Act 1975, which stands at the start of legislatory references to the Treaty, scheduled the Treaty to the act. However, the Act, while incorporating the Treaty into legislation in full and setting up a specialized tribunal to hear claims of Māori regarding breaches of the Treaty, does not enable "general courts to interpret the Treaty.[38]

References to the Treaty, however, are not limited to the Act. Several other statutes that explicitly govern Māori affairs (such as the Maori Land Act 1993 or the Maori Fisheries Act 2004) each refer to the Treaty in their preamble and it is thus, according to Palmer, incorporated into New Zealand law in relation to the issues addressed in such acts.[39]

With regard to legislation, two approaches can be identified: The first uses varied wording such as "give effect"[40] or "have regard to"[41] the Treaty principles, with various wording in between.[42] This leads to the questions what is to be understood as Treaty principles addressed below. The second approach, which can be found in more recent legislation (such as the New Zealand Public Health and Disability Act 2000), reiterates the Crown's responsibility to take

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[35] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72; Linda Te Aho "Judicial Creativity" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 77 at 80.

[36] Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 167-168.

[37] *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 at 596-597; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands*] at 691; Palmer, above n 36, at 177; Tama W Potaka "Legislation and the Legislature" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 61 at 63.

[38] Palmer, above n 36, at 180.

[39] At 181.

[40] Conservation Act 1987 s 4.

[41] Crown Minerals Act 1991 s 4.

[42] Jacinta Ruru "The failing modern jurisprudence of the Treaty of Waitangi" in Mark Hickford and Carwyn Jones (eds) *Indigenous peoples and the state International perspectives on the Treaty of Waitangi* (Routledge, Oxford, 2018) 127 at 132.

appropriate account of the Treaty and then setting out specific provisions regarding the meaning of the Treaty in respect of that specific legislation.[43]

Section 5 of the Treaty of Waitangi Act sets out several areas where the Tribunal is active. In particular, it can hear claims submitted to it by Māori alleging that the Crown breached the Treaty (and it can examine and report on recommendaitons with regard to proposed legislation referred to it). Its jurisdiction is, however, primarily recommendatory or, as Cooke P put it in the *Lands* case with regard to the State Owned Enterprises Act 1986:[44]

> Section 9 of the 1986 Act requires the Court to interpret the phrase "the principles of the Treaty of Waitangi" when necessary. In doing so we should give much weight to the opinions of the Waitangi Tribunal expressed in reports under the Treaty of Waitangi Act 1975. In the reports made by the Tribunal so far, particular help is obtainable from [references to various reports]. We have benefited greatly from considering these.
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> At the same time it is necessary to say that the opinions of the Tribunal, expressed in reports under the 1975 Act, are not of course binding on Courts in proceedings concerned with other Acts.

The Tribunal has a stronger position with regard to certain specific areas such as land transferred to state-owned enterprises or crown forests, where it may make recommendations that, unless a settlement is reached, become final recommendations that require the Crown to resume land from the current owner (with compensation) and return it to the Māori having made a successful claim.[45]

Apart from these direct avenues how the Treaty influences the domestic law of New Zealand there are other, more indirect, approaches as well. Palmer describes the creation of fiduciary obligations of the Crown (as they exist, for example, in Canada) as one such approach, noting the consistent use of the concept by the Waitangi Tribunal.[46] Cooke P, in the *Lands* case, also noted "that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties".[47]

The treaty may also form part of the methodology when a court is tasked with interpreting statutes. As Cooke P put it in *Lands*:[48]

> The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles

[43] Palmer, above n 36, at 183-184.

[44] *Lands*, above n 37, at 661.

[45] Treaty of Waitangi Act ss 8A-8I; Palmer, above n 36, at 191.

[46] Palmer, above n 36, at 199 and 201.

[47] *Lands*, above n 37, at 664.

[48] At 655-656.

> of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.

The view that a court, absent clear wording to that effect, should not read into legislation an intention into a statute that would go against the principles of the Treaty is also echoed by JF Burrows and RI Carter, specifiying:that "a court would today do its utmost to avoid interpreting a statute in a sense that was repugnant to the Treaty of Waitangi."[49]

Finally, the Treaty may also affect the way that the executive comes to its decisions (ahead of any potential dispute before the courts or the Tribunal), by constituting a relevant consideration in administrative decisions or from commitments of the executive to uphold the Treaty.[50]

III Justification of Infringements

Following the discussion of how aboriginal rights can be recognised and how the Treaty can affect domestic legislation, the question now arising is how such rights can justifiably be infringed or how, for New Zealand, they can affect the Crown's ability to dispose of its assets.

A Canada

Having spoken in some detail about the tests applied by the Supreme Court when considering whether an aboriginal right, including an aboriginal title exists, it is now time to look on how such rights can be infringed by regulation.

The questions to be answered in a specific case were summarized by Lamer CJ in *van der Peet* (with references back to *Sparrow*). The first question concerns whether an applicant has demonstrated that the action was taken pursuant to an aboriginal right. The second asks whether such right has been extinguished. The third asks whether such right has been infringed, while the fourth asks if such infringement has been justified.[51] With regard to the second element, it is worth remembering the change brought on by the enactment of s 35. Before such time, the competent legislative authority could unilaterally extinguish aboriginal rights provided that

[49] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington 2009) at 501.

[50] Palmer, above n 36, at 206 and 215.

[51] *Van der Peet*, above n 17, at [2].

such legislation was sufficiently clear and plain.[52] The legislative authority was primarily Parliament.[53] Under s 35, such unilateral extinguishment is no longer possible.[54]

Thus, assuming that the first three elements (action taken pursuant to an aboriginal right, non-extinguishment of such right, infringement of such right) are given, the question turns to justification. *Sparrow* sets out two elements for justification, the first requiring a valid legislative objective for the regulation that infringes on an aboriginal right.[55] While the regulation being in the public interest would be too vague an objective, an objective can nevertheless be quite wide, such as conservation or resource management or "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims".[56] If such an object is found, the analysis turns to the second part of the justification test: The way in which such objective is attained must "uphold the honour of the Crown" and be "in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples".[57] As Mainville puts it, the government must have "fully discharged its fiduciary responsibilities and … the affected Aboriginal Peoples have been treated fairly and in a manner consistent with the preservation of the honour of the Crown."[58] This standards puts a high burden onto the Crown, which can assist in the Crown taking aboriginal rights seriously.[59]

The Supreme Court refined this test further in *R v Gladstone* which dealt with an aboriginal right to commercial fishing.[60] Therein, the Supreme Court distinguished between rights that were inherently limited (such as a right to fish for own consumption as well as social and ceremonial purposes analysed in *Sparrow*) and one that is not so limited (such as a right to fish commercially).[61] In the latter case, the interest of the aboriginal society in question has to be reconciled with the rest of Canadian society.[62]

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[52] *Sparrow*, above n 13, at [37-38]; Robert Mainville *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Purich Publishing, Saskatoon, 2001) at 73.

[53] Through s 91(24) of the Constitution Act 1867 (UK); section 88 of the Indian Act RSC 1985 c I-5 entitled provincial governments to make laws of general application affecting Indians, provided that they were not inconsistent with acts of Parliament or treaties.

[54] Mainville, above n 52, at 73.

[55] *Sparrow*, above n 13, at [71]

[56] At [72]; *Delgamuukw*, above n 31, at 165.

[57] *Sparrow*, above n 13, at [64].

[58] Mainville, above n 52, at 79.

[59] *Sparrow*, above n 13, at [81]; Mainville, above n 52, at 79.

[60] *R v Gladstone* [1996] 2 SCR 723.

[61] At [57].

[62] At [75]; Mainville, above n 52, at 81.

Mainville identifies three factors that are to be taken into account when analysing whether the burden of justification has been discharged.[63] The first is that the right concerned is infringed as little as possible. The second requires consultation with the affected aboriginal people in good faith. This was confirmed by the Supreme Court in *Delgamuukw*. Therein, the Supreme Court held that "[w]hether the aboriginal group has been consulted is relevant for determining whether the infringement of aboriginal title is justified".[64] The scope of such duty will depend on the circumstances, though such consultation must always be held in good faith. In most cases, however, the government's obligations will go much further than mere consultation, up to full consent of the aboriginal nation.[65] In *Haida Nation v British Columbia (Minister of Forests),*[66] the Supreme Court too elaborated on the duty to consult. It held that the government has a "duty to consult with Aboriginal peoples and accommodate their interests … grounded in the honour of the Crown",[67] even if Aboriginal claims have not been finally resolved.[68] The scope of such duty is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed".[69]

The third element concerns compensation. In *Delgamuukw*, the Supreme Court noted that the fact that aboriginal title inherently has an economic aspect suggests that compensation is relevant for justification as well, with the amount of compensation varying with nature of the aboriginal title affected and the severity of the infringement, though it ultimately did not have to decide on the principles applicable to determining an appropriate level of compensation. [70] Thus, when aboriginal title or other aboriginal rights with economic aspects are infringed, compensation will likely play a role in the justification as well.[71]

B New Zealand

1 Principles of the Treaty

References to the principles of the Treaty enshrined in legislation is one of the, if not the, primary way how the Treaty influences the law of New Zealand. The question thus arises what exactly is to be understood under the term principles of the Treaty. This has been the subject of considerable analysis by both the Waitangi Tribunal and the courts. In this regard, it should

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[63] Mainville, above n 52, at 81-82.

[64] *Delgamuukw,* above n 31, at [168].

[65] At [168].

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

[67] At [16].

[68] At [38].

[69] At [39].

[70] *Delgamuukw,* above n 31, at [169].

[71] Mainville, above n 52, at 83.

be noted that, in the words of Cooke P, while the opinions of the Waitangi Tribunal are "of great value", the courts are not obliged to give effect to them.[72]

Te Puni Kōkiri (the Ministry of Māori Development) prepared a report entitled He Tirohanga o Kawa ki te Tiriti o Waitangi which, among else, provides an overview over how the Waitangi Tribunal and the courts have interpreted the term principles of the Treaty.[73] It enumerates a number of sources that inform treaty principles. It starts with the literal terms of both the English and the Te Reo Māori version of the Treaty, including the cultural meanings of the words used. It also includes the influences and events that gave rise to the Treaty, to the extent that these can be determined from historical source, as well as contemporary explanations and legal interpretations.[74] The principles discussed below are not necessarily exhaustive and they are further not set in stone but constantly evolving or, as Cooke P put it, the treaty obligations "will evolve from generation to generation as conditions change."[75] The necessity of such a dynamic interpretation is understandable as otherwise, they could not apply to new forms of land use such as using rivers to generate electrical power that did not exist in 1840 (which was the topic of the *Mighty River Power* case).

The first principle refers to partnership in describing the relation between Crown and Māori and is recognized by both the Tribunal and the courts. While the Tribunal has described it as a partnership between equals, the courts have not commented on the relative status of the two parties.[76] Both the courts and the tribunal recognize a duty to act reasonably, honourably, and in good faith as arising out of such partnership,[77] with the Privy Council specifying that the Treaty was "founded on reasonableness, mutual cooperation and trust",[78] requiring the Crown, when carrying out its Treaty obligations, to "such action as is reasonable in prevailing circumstances".[79] The Tribunal further recognised the element of reciprocity when considering the content of partnership, which includes the following elements: the Crown's obligation to actively protect Māori treaty rights, the duty to provide redress for past breaches and the duty to consult (discussed later) as well as the equal status of the parties.[80] With regard to the latter, the Tribunal has repeatedly stated that no party is subordinate to the other.[81] A further element of the partnership concept concerns the principle of mutual benefit recognised by the Tribunal,

[72] *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 652.

[73] Te Puni Kōkiri *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Te Puni Kōkiri) 2001 (*Report*).

[74] At 77.

[75] *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 656.

[76] *Report*, above n 73, at 77.

[77] At 77; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 304.

[78] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 [*Broadcasting Assets*] at 517.

[79] At 517.

[80] *Report*, above n 73, at 81.

[81] At 81-82.

stemming from the understanding that both the Crown and Māori expected to benefit from the Treaty.[82]

The second major principle concerns the duty to make informed decisions. The courts interpreted the Crown's obligation to act in good faith to mean that it has to be sufficiently informed about both facts and law in order to be able to say that its decision complied with the principles of the Treaty.[83] While consultation is not necessarily required in all circumstance, it constitutes an "an obvious way of demonstrating its [good faith's] existence".[84] In particular, with regard to major issues, consultation will almost always be required for the Crown to fulfil its obligation to act in good faith.[85] The Tribunal too places emphasis on informed decision making, in particular by the avenue of consultation, including through early discussions before formal consultations are held.[86]

The third major principle concerns the Crown's duty of active protection, which is already mentioned in the preamble to the Treaty where (in the English version) Queen Victoria regards "with Her Royal Favour the Native Chiefs and Tribes of New Zealand and [is] anxious to protect their just Rights and Property", while, in the third article (in the English version), she "extends to the Natives of New Zealand Her royal protection". In *Lands,* Cooke P held that "the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable".[87] In *Broadcasting Assets*, the Privy Council elaborated further on the exact scope of such duty:[88]

> It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Māori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.

If the relevant taonga is threatened, it may further require the Crown to take particularly vigorous action.[89] The Tribunal too has emphasized the importance of the duty of active protection. In its Ngāwhā Geothermal Resources Report, it noted that the Crown's "duty of active protection applies to all interest guaranteed to Māori under article 2 of the

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[82] At 82-84.

[83] *Lands*, above n 37, at 683.

[84] At 693.

[85] *Report*, above n 73, at 86.

[86] At 89.

[87] *Lands*, above n 37, at 664.

[88] *Broadcasting Assets*, above n 78, at 517.

[89] At 517.

Treaty",[90] setting out further elements that need to be ensured. These include no unnecessary inhibition to using resources according to Māori's cultural preferences, protection from the action of others that would adversely affect the continued use or enjoyment of such resources, in spiritual or physical terms, the degree of protection accorded to Māori corresponding to the nature and value of the resource, with such value being determined by Māori, and that the Crown may not absolve itself form its responsibilities by delegating to local authorities or other bodies.

The fourth major principle concerns the principle of redress. Out of past wrongs must arise a right of redress, or as Cooke P put it: [91]

> if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever.

For example, if land held by the Crown is transferred to a state-owned enterprise, such transfer must not prejudice a Māori partner's right of redress (see the discussion of the *Mighty River Power* case below). Furthermore, mere monetary compensation may not be appropriate in all circumstances.[92] The Tribunal too accepts that the Crown has an obligation to remedy past breaches, which remediation may take different forms depending on the type of loss suffered by Māori. A settlement should allow to restore the resource base of the affected Māori groups and protect their interest and also entail a commitment by the Crown to honour the Treaty principles in the future, preventing continuing or new breaches.[93]

2 Mighty River Power

Various statutory provisions require respecting the principles of the Treaty. While the principles of the Treaty is a somewhat more vague concept than the test developed by the Canadian Supreme Court described above, they nevertheless have the potential to substantially limit the Crown in its ability to use and dispose of assets that are or can be subject to claims by Māori groups. This can be illustrated through the *Mighty River Power*[94] case.

The *Mighty River Power* case forms part of a number of cases that deal with proposed transfers of Crown assets to state-owned enterprises, commencing with the *Lands* case. In *Lands*, the

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[90] Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (Wai 304, 1993) at 100.

[91] *Lands*, above n 37, at 664-665.

[92] At 717.

[93] *Report*, above n 73, at 103; Natalie Coates "Future contexts for Treaty interpretation" in Mark Hickford and Carwyn Jones (eds) *Indigenous peoples and the state: International perspectives on the Treaty of Waitangi* (Routledge, Oxford, 2018) 186 at 188-191.

[94] *Mighty River Power*, above n 1.

Court of Appeal detailed its understanding of the principles of the Treaty (as described above), with Cooke P further setting out the following: [95]

> the transfer of assets to State enterprises without establishing any system to consider in relation to particular assets or particular categories of assets whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful.

Following *Lands*, the Treaty of Waitangi Act was amended (by way of the Treaty of Waitangi (State Enterprises) Act 1988) which allowed for the claw back of assets transferred to state-owned enterprises if a claim for breach of the Treaty is successful.

Mighty River Power Ltd, a state-owned enterprise, held use rights in the Waikato and other rivers. Such rivers were subject to long-standing claims by Māori under the Waitangi Tribunal process, with the Tribunal having found that such claims were well-founded and that the relevant Māori groups had rights in the nature of ownership regarding certain waters.[96] Breach of such rights consisted, among else, in the use of such water for electricity generation. Negotiation in order to provide redress for breach of such rights were still ongoing at the time the government decided to sell 49 per cent of its shareholding in Mighty River Power Ltd. The relevant act allowing for such sale to be made contains a provision that "Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."[97] After an interim report of the Tribunal on the effect of such partial privatisation and subsequent consultation with Māori about a proposal made by the Tribunal, the government decided to go ahead with the plan. Following an unsuccessful attempt in the High Court, the relevant Māori groups appealed directly to the Supreme Court.

In an unanimous decision, the Supreme Court first referred to the Tribunal's report and its recommendation that consultations be held and the subsequent consultation on the share-plus option which, however, ultimately failed.[98] It then concluded that the proposed sale of the shares fell within the scope of application of s 45Q and thus need to comply with the principles of the Treaty.[99] The Waikato River was also subject of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. Section 64 thereof provides, among else, that the Crown has to engage with Waikato-Tainui in accordance with the principles described in the Kiingitanga Accord before creating or disposing (or starting a statutory or other process to create or dispose) of a property right or interest in the Waikato River. While the Supreme Court accepted that the water permits used by Mighty River Power Ltd constituted interests in the Waikato River, it found that the partial privatisation of it did not constitute a disposal of such

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[95] *Lands*, above n 37, at 666.

[96] *Mighty River Power*, above n 1, at 10; Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at [2.8.3(1)].

[97] *Mighty River Power*, above n 1, at [40]; section 45Q Public Finance Act 1989.

[98] At [26-30].

[99] At [64].

interests.[100] Furthermore, the Supreme Court held that the consultation process conducted by the government did not raise any issue that cannot be addressed in the issue of whether the sale of the shares was consistent with the Treaty.

With regard to test of whether the proposed sale of the shares was consistent with the Treaty, the Supreme Court referred to the view expressed in the *Broadcasting Assets* case which required a material impairment. [101] A court has to assess "the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity.[102] In addition, if one form of redress should be impaired the courts have to consider whether the Crown has the capacity to provide other forms of redress.[103] The Court summarized the approach as follows:[104]

> On this basis:
>
> (a) before intervening, the Court must be brought to the conclusion that the proposed privatisation is inconsistent with Treaty principles;
>
> (b) there will be inconsistency, if the proposed privatisation would "impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty"; and
>
> (c) the Court must address this issue directly and form its own judgment, along the lines discussed in [above].

When discussing materiality, the Court agreed that privatisation would diminish the Crown's ownership and control of Mighty River Power Ltd, given that it would have to be run in a manner that is consistent with the rights of minority shareholder and directors would have to act in the best interest of the company.[105] It then set out certain considerations to be taken into account, including the significance of the power-generating infrastructure for New Zealand as a whole, the substantial investment by the Crown into such power infrastructure, the fact that water control and use was the topic of regulatory review, the limited significance of shares as a form of redress and the limitation of water use rights to 35 years.[106] It further agreed with the Crown's view that shares, once sold, can always be bought back if required for purposes of a settlement (though this would require a willing seller).[107] It also noted the difficulty of other redress methods such as royalty payments or transfer of full ownership of the relevant water rights, [108] but

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[100] At [81-82].

[101] *Broadcasting Assets,* above n 78, at 519.

[102] *Mighty River Power,* above n 1, at [89].

[103] At [89].

[104] At [90].

[105] At [135].

[106] At [136].

[107] At [137].

[108] At [139-141].

did not consider the partial privatisation to substantially impede any future changes of the regulatory regime applicable to water use.[109]

Ultimately, the Supreme Court concluded that while the partial privatisation may affect the form of how the Crown can provide redress, it was not sufficient to constitute a material impairment.[110]

Thus, while the Māori groups were ultimately not successful in having the Court block the partial privatisation, the Court nevertheless set out in great detail the conditions under which the Crown may dispose of assets that are or may become subject to Treaty claims. In particular, the Crown has to ensure that it remains in a position to provide effective redress if it is found that it breached its obligations under the Treaty.

IV Lessons to be Learned

Having reviewed the approaches of Canada and New Zealand regarding the recognition and justifiable infringement of the rights of indigenous communities, the question arises what lessons the courts may learn from each other, taking into account the different circumstances of the two countries.

One element that New Zealand may borrow from Canada concerns the honour of the Crown element of the Canadian justification test. While the New Zealand courts had previously recognised that the relationship between the Treaty partners created responsibilities analogous to fiduciary duties,[111] these obligations could be strengthened further by ensuring that they are directly enforceable in courts, as also noted by Palmer.[112]

Another element concerns the legal effect of decisions. One advantage of the Canadian approach of funnelling decisions regarding aboriginal rights through the ordinary court systems is that they, if successful, have the full enforcement apparatus of such system behind them. The Waitangi Tribunal, on the other hand, has primarily a recommendatory jurisdiction, with the courts not being bound by such recommendations (though they do consider them of great value).[113] Strengthening their standing could ensure that such reports are followed more closely, e.g., by making the recommendations binding unless a negotiated agreement is reached (similar to the procedure already set out in the Treaty of Waitangi Act for certain types of land).

One element where Canada may borrow from New Zealand concerns how it approaches claims of aboriginal communities. For New Zealand, the primary adjudicator of such claims is the

[109] At [142-146].

[110] At [149-150].

[111] *Lands*, above n 37, at 664.

[112] Palmer, above n 36, at 199-203.

[113] *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 72, at 652.

Waitangi Tribunal, a specialized tribunal with specific requirements of its members while, in Canada, claims go through the ordinary court systems. This can lead to issues due to aboriginal communities being unfamiliar with the court system and procedures and judges being unfamiliar with the particularities of aboriginal claims, such as regarding the provision of evidence. While Canadian courts have taken some account of these issues, e.g. regarding rules on evidence,[114] Canada could go further, e.g., by setting up specialized tribunals or specialized chambers of judges in existing courts.

V Conclusion

The two jurisdictions reviewed have chosen somewhat different approaches to protect the rights of indigenous communities within their countries. Canada has a more legalistic approach while New Zealand's is built more on negotiation, though both have elements of the other as well. New Zealand thus has the advantage of more flexibility which can be easier adapted to novel circumstances (which, however, makes it at least theoretically more susceptible to adverse changes in the political environment). Canada's approach, on the other hand, is more rigid, requiring aboriginal communities asserting rights to surmount the hurdles provided by the tests developed by the Supreme Court in order to have their rights recognised. However, once they have succeeded, they have the full force of law behind their rights, plus the fact that their rights are protected at the constitutional level. Both approaches have their advantages and disadvantages. In an ideal world, New Zealand would look to strengthen the position of Māori rights in the legal system further, while Canada would take even more account of the particularities of aboriginal claims and the issues associated with making such claims heard in the ordinary court system.

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[114] *Van der Peet*, above n 17, at [68-69].

Bibliography

A Cases

1 New Zealand

Attorney-General v New Zealand Maori Council [1991] 2 NZLR 129.

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

New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142.

New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513 [*Broadcasting Assets]*.

New Zealand Maori Council v Attorney-General [2013] NZSC 6, [2013] 3 NZLR 31 [*Mighty River Power*].

Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513.

Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590.

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

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

Wi Parata v Bishop of Wellington (1877) 3 NZ Jur (NS) SC 72.

2 Canada

Calder v British Columbia (Attorney-General) [1973] SCR 313, 1973 CarswellBC 83.

Delgamuukw v British Columbia 1997 3 SCR 1010.

Haida Nation v British Columbia (Minister of Forests) 2004 3 SCR 511.

R v Gladstone [1996] 2 SCR 723.

R v Sparrow 1990 1 SCR 1075.

R v Van der Peet 1996 2 SCR 507.

B Statutes

1 New Zealand

Conservation Act 1987.

Crown Minerals Act 1991.

Maori Land Act 1993.

Maori Fisheries Act 2004.

New Zealand Public Health and Disability Act 2000.

Public Finance Act 1989.

State Owned Enterprises Act 1986.

Treaty of Waitangi (State Enterprises) Act 1988.

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

2 Canada

Constitution Act 1867 (UK).

Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK).

Indian Act RSC 1985 c I-5.

C Treaties and Declarations

"Royal Proclamation of 1763" (4 October 1763) 10354 *The London Gazette* 1.

Treaty of Waitangi (Treaty).

United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, A/RES/61/295 (2007).

D Books and Chapters in Books

Michael Asch "From *Calder* to *Van der Peet* Aboriginal Rights and Canadian Law, 1973-96" in Paul Havemann (ed) *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (Oxford University Press, Oxford, 1999) 428.

John Borrows "Canada's Colonial Constitution" in John Borrows and Michael Coyle (eds) *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, Toronto, 2017).

John Borrows *Canada's Indigenous Constitution* (University of Toronto Press, Toronto, 2010).

John Borrows and Leonard Rotman *Aboriginal Legal Issues Cases, Materials & Commentary* (4th ed, LexisNexis, Markham (Ontario) 2012).

JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington 2009).

Hohaia Collier "A Kaupapa-based Constitution" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters*: *The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 199.

Natalie Coates "Future contexts for Treaty interpretation" in Mark Hickford and Carwyn Jones (eds) *Indigenous peoples and the state: International perspectives on the Treaty of Waitangi* (Routledge, Oxford, 2018) 186.

Michael Dreaver "Coming of Age: Transformation and the Treaty Settlement Process" in Rachael Bell, Margaret Kawharu, Kerry Taylor, Michael Belgrave and Peter Meihana *The Treaty on the Ground Where we are headed, and why it matters* (Massey University Press, Auckland, 2017) 111.

Sir Kenneth Keith "The Roles of the Tribunal, the Courts and the Legislature" in Geoff McLay (ed) *Treaty Settlements: The Unfinished Business* (New Zealand Institute of Advanced Legal Studies, Wellington, 1995) 39.

Peter Kulchyski *Unjust Relations: Aboriginal Rights in Canadian Courts* (Oxford University Press, Don Mills (Ontario), 1994).

Robert Mainville *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Purich Publishing, Saskatoon, 2001).

PG McHugh "From Sovereignty Talk to Settlement Time The Constitutional Setting of Māori Claims in the 1990s" in Paul Havemann (ed) *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (Oxford University Press, Oxford, 1999) 447.

Margaret Mutu "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters*: *The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 16.

Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

Tama W Potaka "Legislation and the Legislature" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters*: *The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 61.

Jacinta Ruru "The failing modern jurisprudence of the Treaty of Waitangi" in Mark Hickford and Carwyn Jones (eds) *Indigenous peoples and the state International perspectives on the Treaty of Waitangi* (Routledge, Oxford, 2018) 127.

Jacinta Ruru "The Waitangi Tribunal" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters*: *The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 88.

Linda Te Aho "Judicial Creativity" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters*: *The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 77.

E Waitangi Tribunal Reports

Waitangi Tribunal *Ngāwhā Geothermal Resources Report* (Wai 304, 1993).

Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

F Other

Te Puni Kōkiri *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Te Puni Kōkiri) 2001 (*Report*).