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The Honour of the Crown: A Review Mechanism for Māori?

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Abstract

The Honour of the Crown is a Canadian doctrine that obliges the Crown to act honourably in its dealings with indigenous groups. References to the doctrine can be found scattered through New Zealand caselaw but it has yet to take root and be applied as legal doctrine in New Zealand. This paper provides an overview of what the doctrine is and its development in Canada. It also assesses the utility of the doctrine for New Zealand, the treatment of the doctrine so far by New Zealand courts and examines a number of ways in which the doctrine could be applied in New Zealand.

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I Introduction

The honour of the Crown. The term leads one down streams of imagination to visualise of chivalrous knights and noble kings and queens in medieval kingdoms. It can also denote nostalgic ideas of imperial powers, colonial assimilation, the divine right of monarchs, and state paternalism. The term however is an ideal, and in countries like New Zealand with colonial past, it seems an anachronism that ignores the centuries of oppression, subrogation, alienation of native title, that Māori have suffered. It is important that in the development of the doctrine, the notion of an honourable Crown does not provide a reprieve from the historical reality of indigenous peoples. As Dr. Moana Jackson comments:[1]

> In every society, there can be a kind of social amnesia where people may innocently forget what might have happened in the past. But, in this country, there has been a deliberate misremembering of history that has obscured the reality of what colonisation really was and is. It has replaced the harsh reality of its racist violence and its illegitimate usurpation of power with a feel-good rhetoric of Treaty-based good faith and Crown honour.

The legal doctrine of the honour of the Crown simply is the legal principle that the Crown has a duty to act "honourably" in its dealing with indigenous groups. The doctrine originates from Canadian jurisprudence,[2] and was affirmed by the Supreme Court of Canada (SCC) in *Haida Nation v Province of British Columbia* (*Haida*).[3] It is still not settled whether the doctrine applies in New Zealand or even more pointedly whether there is a need for the doctrine to apply in New Zealand. Following the finding by the New Zealand Supreme Court (NZSC) in *Proprietors of Wakatu v Attorney-General* (*Wakatu*), that the Crown owed a fiduciary duty to the customary landowners in Te Tau Ihu,[4] there seems to be greater scope to consider whether the honour of the Crown doctrine applies,

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1 Dr. Moana Jackson "The connection between white supremacy and colonisation" (24 March 2019) E-Tangata <www.e-tangata.co.nz>.

2 For development of the doctrine in Canada, see T*aku River Tlingit First Nation v. British Columbia* [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 and *Manitoba Métis Federation v Canada,* 2013 SCC 14 at para 65, [2013] 1 SCR 623 and *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511 [hereon referred to as *Haida*].

3 *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2004] 3 SCR 511

4 *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 [2017] 1 NZLR 423. [hereon referred to as *Wakatu*].

particularly following the dissent by Williams J in *Stafford v Attorney-General*.[5] Whispers of the doctrine are scattered throughout obiter comments within New Zealand case law, incrementally inching the door open for application of the doctrine. As the SSC decision in *Guerin*,[6] led to the decision *Wewaykum*, which laid the foundation for the Court's finding in *Haida*,[7] perhaps *Wakatu* will be a catalyst for the acceptance of the doctrine in New Zealand. This paper argues that the doctrine would be a strong accountability mechanism to hold the Crown to account, strengthening the access to justice capability of Māori in New Zealand.

This paper will provide an overview of the doctrine, examining the development of the doctrine in Canada. It will then go on to explain the current status quo of the how New Zealand resolves claims by indigenous groups. It will then assess why the doctrine is necessary and outline the treatment of the doctrine by courts in New Zealand. It then examines how the doctrine could be employed in New Zealand and illustrates the utility of the doctrine by applying it to *Stafford/Wakatu* litigation and how if available the doctrine would be useful to Māori claimants.

II The Honour of the Crown – an introduction

The modern doctrine of the honour of the Crown is of Canadian origin. The concept itself however of an "honourable" Crown has roots that can be traced to old English jurisprudence which conceptualises the Crown as being 'honourable'.[8] The doctrine applies a normative review over the actions of the Crown, and is analogous to the moral precepts of good faith and fair dealing. The Crown under the doctrine is therefore considered to always be intended to fulfil its promises,[9] and requires the rights and interests

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5 *Stafford v Accident Compensation Corporation* [2020] NZCA 164, as per Williams J from [158] – [394].

6 *Guerin v The Queen* (1984) 13 DLR (4th). This leading decision which established that the Crown could owed fiduciary duties to indigenous groups in Canada. [hereon referred to as *Guerin*]

7 *Wewaykum Indian Band v Canada* [2002] 4 S.C.R. 245, 2002 SCC 79 and *Haida*, above n 2.

8 See *Roger Earl of Rutland's Case* (1608) 8 Co Rep 55a, 77 ER 555 (KB) and *The Case of the Churchwardens of St Saviour in Southwark* (1613) 10 Co Rep 66b, 77 ER 1025 (KB) and Canadian court trace the doctrines roots to *R v Badger* [1996] 1 SCR 771 at [41] as cited in *Haida Nation*, above n 3, at [19].

9 *Haida,* above n 3, at [20].

of indigenous groups as customary owners to be "determined, recognised and respected" by the Crown.[10]

This conceptualisation of the honour of the Crown originates from pre-Norman England, when public power centred around the Monarch, as a distinct figure, not the modern version of an abstract figurehead shrouded by government ministers who exercise their power.[11] The Monarch's power stemmed from their "good name" which was represented, and exercised in public, by their officials. If any of those officials spoke or acted in an embarrassing or dishonourable way – such as by breaching their word – they had discredited the Monarch's name and were consequently punished heavily.[12]

The doctrine simply is the "principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign."[13] It is a constitutional principle that shapes the way in which the Crown is obligated to discharge its duties, particularly where an indigenous people assert their interests will be affected by the actions of the State and the honour of the Crown therefore gives rise to a duty to consult.[14]

In Canada the doctrine has developed in disputes over land and resources involving mining, fracking, forestry, fishing and construction of roads and buildings, where indigenous people have claimed that the actions of the State required a duty to consult to ensure the aboriginal or treaty rights are not diminished before they are recognised in Canadian law.[15] The duty to consult in Canada does not equate to a veto power but a legal avenue to require proper process.[16] The doctrine imposes a broad obligation on the Crown to consult in good faith with indigenous peoples, to make necessary accommodations for indigenous peoples and to otherwise seek reconciliation.[17]

Dwight Newman explains that underlying the doctrine is the notion that "a settler people in ongoing encounter with Indigenous peoples must deal honourably with them, and more

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10 *Haida,* above n 3, at [25].

11 Judge David Arnot "Treaties as a Bridge to the Future" (2001) 50 UNBLJ 57 at 65.

12 Arnot, above n 11, at 66.

13 *Manitoba Métis Federation v Canada (Attorney General),* 2013 SCC 14, [2013] 1 SCR 623 at [65]. [hereon referred to as *Manitoba*]

14 Thomas McMorrow, "Upholding the Honour of the Crown," (2018) WYAJ 35(1) 311 at 314,

15 At 314.

16 At 314, citing *Beckman v Little Salmon Carmacks First Nation* 2010 SCC 53, [2010] 3 SCR 103 at [44].

17 Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (2006) 21 WRLSI 33 at 43.

generally, act in accordance with the virtue of honour."[18] The doctrine in Canada reframes the relationship between the Crown and indigenous peoples from the outdated notion of colonial conquest and *terra nullis* to a position of acceptance of past harms, acknowledgment of imposition of colonial oppression on indigenous people and movement towards true reconciliation.[19] Chief Justice McLachlin outlines in *Haida* that the honour of the Crown is engaged in the Crown's dealing with indigenous peoples due to the Crowns assertion of sovereignty and their assumption of de facto control of indigenous land and resources.[20] Under the Canadian conception of the doctrine, "the honour of the Crown is always at stake in its dealing with Aboriginal people."[21]

III The Canadian Doctrine

This section will provide an outline of how the doctrine is litigated in Canada through two seminal cases under the doctrine in Canada, *Haida* and *Manitoba Métis Federation v Canada* (*Manitoba*).[22] This will show how modern legal concept has transfigured from a normative concept to legal doctrine in Canadian law by the SCC.

A Haida Nation v British Columbia

This decision concerned the Haida people, who had for a century claimed title to their traditional homeland, located to the west of the mainland of British Columbia, and to the waters surrounding it, but their title had never been legally recognised. They challenged decisions made by the Province of British Columbia Minister of Forests to grant the replacement of a licence to cut trees on the Haida homeland, and to subsequently transfer the licence to a corporation.

The Haida people challenged the Minister's decisions as being made without their consent and without prior consultation with them. At issue was whether the provincial government owed a duty to the Haida people, and specifically whether it owed a duty to consult with them about decisions to harvest the forests, and to accommodate their concerns about what

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18 Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich Press Ltd, Saskatoon, 2014) at 27.

19 See the discussion by the Majority in *Manitoba*, above n 13, at 67.

20 Felix Hoehn "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:(1) SLR 1 at 5, citing *Haida*, above n 2,3, at [25].

21 *Haida*, above n 3, at [16].

22 *Manitoba*, above n 13.

should be harvested, before they had proven their title to the land and their Aboriginal rights.

The SCC found that the government had a legal duty to consult with the Haida people about the harvest of timber from its traditional homeland, including on decisions regarding the issuance of licences and that good faith consultation may in turn lead to an obligation to accommodate Haida concerns.[23] This duty of consultation the Court held was "grounded in the honour of the Crown", and will always be at stake in Crown-indigenous dealings.[24] The Court makes clear that this is not some ideal but a enforceable legal doctrine stating "(i)t is not a mere incantation, but rather a core precept that finds its application in concrete practices".[25] The Court links the responsibility of the Crown to act honourably with principle of reconciliation between the Crown and indigenous group, noting:[26]

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, supra, at para. 186 …

The key motivation of the Court is to recognise that assertion the sovereignty of the Crown over Canada did not extinguish the existing rights of indigenous peoples, but the Crown's assertion of sovereignty carries with a duty to act honourably, stating:[27]

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. *Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples*, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people. As stated in Mitchell v. M.N.R., [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty]

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23 *Haida*, above n 3, at [10].

24 *Haida,* above n 3, at [16], citing *R. v. Badger* [1996] 1 SCR. 771, at [41] and *R. v. Marshall* [1999] 3 SCR. 456.

25 At [16].

26 At [17].

27 At [32].

> arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation"
> (emphasis added).

The doctrine is a legal mechanism for Canadian courts to uphold s 35 of the Canadian Constitution Act 1982, which recognises and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada. On that basis the SCC considered that the honour of the Crown requires that the relevant indigenous rights are determined, recognised and respected, and in turn the Crown is required to act honourably in its dealings with indigenous groups.[28] This point was affirmed by the Court in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director*), which held:[29]

> The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

It is important to note that the SCC in *Haida* makes clear that the doctrine is not founded on s 35 of the Constitution but is intrinsic to the relationship between the Crown and Indigenous peoples in the Crown's assumption of sovereignty and the Crowns consequent dealing with indigenous peoples.[30]

The SCC also links the doctrine to the principle established in *Guerin* that the Crown may owe fiduciary duties to indigenous peoples, considering that where the Crown assumes discretionary control over specific indigenous interests, "the honour of the Crown gives rise to a fiduciary duty".[31] This finding is important for later discussion in this paper on the applicability of the doctrine in New Zealand but it is important to note the connection between the fiduciary principle and the doctrine. *Haida* can be viewed as almost a rebellion from the possible notion of a 'general' fiduciary duty between the Crown and indigenous groups, that is alluded to in *Guerin*, and the uncomfortableness of this general duty idea

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28 *Haida,* above n 3, at [25].

29 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004) SCC 74, [2004] 3 S.C.R. 550, at [24].

30 *Haida*, above n 3, at [17].

31 *Haida,* above n 3, at [19], citing *Wewaykum Indian Band v Canada* [2002] 4 S.C.R. 245, 2002 SCC 79, at [79] and *Guerin v The Queen* (1984) 13 DLR (4th).

with traditional private law concepts of a fiduciary duty. Following *Guerin,* both doctrines seemed to flow together, like intertwined streams. However, in *Wewaykum,* the Court begins to disentangle the broader more flexible principle of "honour of the Crown" from the fiduciary doctrine, with the doctrinal streams completely diverging in *Haida*, and ultimate separation by the SCC's decision in *Manitoba*.

B Manitoba Métis Federation v Canada

The facts of *Manitoba* concern an agreement by the Canadian government to grant 1.4 million acres of land to the Métis children and to recognise existing landholdings. This was implemented by the Manitoba Act SC 1870 c 3. There were various problems which followed, including the acquisition of the Métis children's yet-to-be-granted interests in the lands by speculators and with decades later the position of the Métis having significantly deteriorated.

The majority of the SCC found the honour of the Crown required the Government to act with diligence in pursuit of the fulfilment of the promise. The majority rejected that there was a fiduciary duty, though noted that the relationship between the Métis and the Crown, 'viewed generally' is fiduciary in nature.[32] However, the majority considered that not all dealings between the parties in a fiduciary relationship are subject to fiduciary obligations.

The doctrine's ultimate purpose is held to be the reconciliation of pre-existing indigenous societies with the assertion of Crown sovereignty.[33] Similar to fiduciary obligations, the Court recognised that the doctrine imposes a heavy obligation and that not all Crown-indigenous interactions will engage it.[34] The majority considered that the doctrine will be engaged in situations involving the "reconciliation of aboriginal rights with Crown sovereignty",[35] where there is an explicit obligation to an indigenous group that is enshrined under s 35 of the Canadian Constitution, but it will not be engaged where there is simply a strong interest.[36] The majority concludes that the legal question is simply: "viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfilment of the purposes of the obligation?"[37]

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32 *Manitoba*, above n 13, at [48].

33 At [66].

34 At [68].

35 At [68].

36 At [72].

37 *Manitoba*, above n , at [83]

Haida and *Manitoba* are two leadings decision which had significant the development of the doctrine in Canada and they provide a background as to how the doctrine works and its key guiding principles. The next sections of this paper will consider the status quo of how indigenous rights or more aptly rights under the Treaty of Waitangi are enforced in New Zealand courts.

IV How are treaty rights claims litigated in NZ?

To bring a claim for the breach of the Treaty, there are a number of avenues available to a party which will be guided by the context in which the breach has arisen. The mechanism developed to deal with grievances of Māori is the Waitangi Tribunal (Tribunal). The Tribunal is a standing commission of inquiry, with exclusive jurisdiction to inquire into the meaning and effect of the Treaty of Waitangi.[38] The Tribunal is sanctioned to scrutinise the Crown's acts or omissions for compliance with the "principles of the Treaty" wherever such an inquiry is relevant.[39] This is in contrast to the ordinary courts who are guided by the doctrine of precedent outlined above and prevented from considering the direct legal effect of the Treaty. However, the Tribunal is limited in the enforceability of its determinations, with its main power being the ability to make recommendations to the government and have Ministerial responses to their recommendations. The Tribunal's jurisdiction is however non-binding. Tribunal inquires are a lengthy drawn out process, with many claimants passing away before their claim even comes to the hearing stage.[40]

Apart from the Tribunal, there are a number of ways in treaty rights are litigated in New Zealand courts. The starting position is that the enforcement of Treaty rights must to be latched on to some other form of law with the Treaty as guide or principle. Given that the Treaty is not enshrined in legislation or a Constitution, the Privy Council was clear in *Te Heuheu Tukino v Aotea District Māori Land Board,* that the Treaty was unenforceable so long as it remained "unrecognised in municipal law".[41] This has been affirmed by consequent courts like in *Huakina Development Trust v Waikato Valley Authority*, where the Court observed "the Treaty is not part of the municipal law of New Zealand in the sense

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38 Treaty of Waitangi Act 1975, s 5(2).

39 Edward Willis "Legal Recognition of Rights Derived from the Treaty of Waitangi" (2010) 8(2) NZJPIL 217, citing Treaty of Waitangi Act 1975, s 6.

40 Prof. Richard Boast QC. "The Waitangi Tribunal in the Context of New Zealand's Political Culture and Historiography" (2016) 18 JHIL 339 at 354.

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

that it gives rights enforceable in the courts by virtue of the Treaty itself."[42] These statements create a legal barrier for claimants to be able to directly rely on the Treaty as a mechanism for review of the Crown.

As discussed above, the current position is that the Treaty cannot be directly enforced. The alternative is that treaty rights are enforced are statutorily, either through a treaty provision within statute, which requires the relevant government agency to act in accordance with the Treaty or its principles, or using the Treaty as an interpretative aid.[43] This pathway for the enforcement of the Treaty has led to many of the key Treaty cases, like; the *Lands* case,[44] and most recently, *Ngāi Tai ki Tamaki v Minister Conservation*.[45]

The most recent avenue developed is the establishment of a fiduciary duty between the Crown and the relevant Māori grouping as found in *Wakatu*.[46] The fiduciary doctrine is still in its early stages and is not directly linked to the Treaty but rather is a private law concept with elements of public law. The relationship however is still derived from the same relationship of the Crown's assertion of sovereignty over the indigenous group as direct Treaty-rights litigation are.

It should also be noted that the courts have recognised Tikanga as part of the common law of New Zealand,[47] and this provides a further avenue to apply Treaty related rights in litigation, as most recently seen in the NZSC hearing of the Peter Ellis appeal, where the Court considered arguments of whether Tikanga Māori allowed a criminal appeal to continue on past the deal of the appellant.[48] The NZSC allowed the appeal to continue which indicates a positive treatment of Tikanga Māori, but have reserved their reasons to form part of the substantive hearing judgment.[49]

The next section will go on to assess the utility of the doctrine and it's treatment by courts in New Zealand.

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42 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

43 For further discussion, see Matthew S.R. Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207.

44 *New Zealand Māori Council v Attorney-General* [1987] NZCA 54/87, [1987] 1 NZLR 641 at 37.

45 *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

46 *Wakatu*, above n 4.

47 *Takamore v Clarke* [2012] NZSC 116.

48 *Ellis v R* [2020] NZSCTrans 19.

49 *Ellis v R* [2020] NZSC 89.

V Why is the doctrine relevant?

The first ideological hurdle for the doctrine is relevance. Why do we need this doctrine? What does it add that the current settings do not already provide for? This section considers the utility of the doctrine and review of the challenges the importation of the doctrine faces.

A Waitangi Tribunal

The first question is what the need is for such a doctrine, when Parliament has already established a system for resolving Treaty issues through the Waitangi Tribunal.

The primary issue is of judicial deference. This is a common argument raised by the Crown when claims are brought against it by Māori, on the basis that the Crown-Māori relationship is a political relationship, which falls within the realm of the executive and therefore not justiciable before the courts. As Charters explains, framing te Tiriti as a meeting between two sovereigns who treated with one another, leads to courts taking the position that claims involved the Treaty are political in nature and therefore beyond judicial oversight.[50] The idea of judicial deference has influenced Courts and even the Waitangi tribunal,[51] to consider judicial oversight as limited in this area, leaving for the claims to be resolved by the executive through treaty settlement negotiations.

The development of the doctrine is hindered by this line of precedent that the Courts are should resistant to interfere in treaty related claims brought by Māori, on the basis that these are issues to be dealt with by the Crown and the Parliament has established the Waitangi Tribunal process as the appropriate forum.[52] Therefore, if the Courts are deferential to the Crown in considering claims by Māori, the Courts may be even more resistant to take a further step of apply a enforceable legal doctrine against the Crown.

The difficulty with that of judicial deference, is that it seems to rest on the fallacy we posed in the beginning of this paper: that is the Crown is an ethical, altruistic entity that will act

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50 Claire Charters "Wakatū in Peripheral Vision: Māori Rights-Based Judicial Review of the Executive and the Courts' Approach to the United Nations Declaration on the Rights of Indigenous Peoples" (2019) 1 NZLR 85 at 90.

51 See Charters, above n 50, at 92.

52 See Ellen France J *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 (hereon *Wakatu NZCA*), at [91] and Harrison & French JJ, *Wakatu NZCA*, at [216].

fairly and equitably with Māori. However, if that were the case then such a system would not be needed in the first instance. The deference by courts to the executive, in regards to claims brought by Māori being deemed as non-justiciable or political issues, undermines Māori rights to access to justice and tino rangatiratanga.

Charters identifies however a shift in recent judgments of *Ngāti Whatua Ōrakei v Attorney-General,*[53] and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*,[54] with the courts being more willing to find executive action as justiciable and limiting and reading down the doctrine that limits judicial oversight of the executive.[55] This can also be clearly seen in the judgment of Glazebrook J in *Wakatu*, who rejected the proposition that the treaty settlement process negates the standing of claimant's stating that:[56]

> the Treaty of Waitangi Act 1975 was intended to sit alongside, and not oust, common law rights. Claims regarding property are properly brought to the courts. Further, access to other legally available remedies should not be denied just because there is a settlement process.

This shows the argument that any potential claims the doctrine would be utilised for are already dealt by the Waitangi Tribunal and Treaty Settlement process, can be overcome. A court is alive to the issues with those processes, and these judicial statements (and others identified by Charters) show a willingness to the Court's to not accept such claims as non-justiciable but provide for the access to justice for Māori. Williams J puts it well by turning the language of *Wi Parata* on its' head, stating His Honour "it would be wrong in principle and dangerous in practice for the courts to leave the Crown to "acquit itself as best it may" as the "sole arbiter of its own justice".[57]

Now that we have addressed the potential judicial barriers, the next point addressed considering the practical value that the doctrine adds. Firstly, if we consider of the position of the Treaty, while widely accepted as a constitutional document and a key interpretative guide, the Treaty is not an easy source of law to base a claim in a court of law against the executive unless legislated for. The Treaty instead is left as this spectral presence, that is both omnipresent and (sometimes) non-existent, to be interpreted by principles set out by the *Lands* case. The principles however remain as principles that guide conduct and can

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53 *Ngāti Whātua Ōrākei Trust v Attorney-Genera*l [2018] NZSC 84, [2019] 1 NZLR 116.

54 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

55 Charters, above n 50, at 93.

56 *Wakatu*, above n 4, at [695].

57 *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [63].

be overridden not being legal shields for Māori to hold against the Crown. If we also consider the principle of partnership, the Treaty is then considered as a two-way relationship, where there may be a point in time that the Crown may have expectations of Māori. This may seem like a radical notion, but the point is that framing the treaty in this way is not always appropriate. This is because it raises questions for reasonability and justice for the Māori who then face the danger of being placed in a position where they may maybe, even if only theoretically, obligated to the Crown, despite facing centuries of oppression.

These issues canvased above however are reasons for why the doctrine is relevant. It firstly gives teeth to the Treaty while technically not directly applying, arguably overcoming the *Te Heuheu* precedent. Secondly the doctrine provides an avenue that Māori can have enforceable outcomes to their claims that are not held up in the drawn-out processes of the Tribunal. This is not a criticism of the Tribunal, who craft detailed and comprehensive research into this historical background to claims. But for more contemporary claims, there needs to be the ability for Māori to be able to have their day in court and have a determination that is enforceable against the Crown.

If we take the situation in *Ngai Tai* for example, Ngāi Tai ki Tāmaki Trust sought judicial review of two decisions to grant concessions under s 17Q of the Conservation Act 1987.[58] The Ngāi Tai ki Tamaki Trust alleged that the Department of Conservation was obliged to refuse to grant concessions to other parties as part of its duty of active protection of Ngāi Tai's interests. The judicial review was brought on the basis of s 4 which places a duty on the Department of Conservation to give effect to the principles of the Treaty of Waitangi. However, what if s 4 did not exist? This would have made it much harder for Ngai Tai to bring its claim, and this is a challenge to many Māori who seek to bring just claims but are challenged by the lack of a clear basis to ground the Treaty in their claims. They would have to root their claim in some other principle or seek an urgent application before the Waitangi Tribunal. The doctrine enables Māori to effectively hold the Crown to account through the courts exercising its function of oversight of executive action and ascertain an enforceable remedy against the Crown.

Finally, the doctrine is a one-way relationship that places the onus on the Crown to act honourably and does not have any issues of bilateralism noted above. The doctrine could

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58 *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

therefore act as any normal accountability or executive review mechanism would against the Crown, where it takes into consideration the balance of power.

The next section asses how the usefulness of the doctrine, in comparison to the fiduciary doctrine established in *Wakatu*.[59]

B The fiduciary duty doctrine

The finding of a fiduciary duty following the NZSC in *Wakatu*, has arguably left more questions than answers. The diversity of how the three-majority judgments identify a fiduciary duty and the nature of such a duty, make it difficult to assess how the fiduciary duty doctrine would apply in other situations.

However, even on the most liberal view of the fiduciary doctrine as developed in *Guerin*, where the SSC first held the Crown could owe fiduciary duties to indigenous groups, the doctrine requires a certain set of facts to establish a trust-like relationship and most importantly, the Canadian courts have been clear that the Crown does not owe a fiduciary duty at large but the duty arises from an undertaking by the Crown to protect a specific interest. This is has been supported in New Zealand by both Elias CJ in the *Wakatu,*[60] and in the obiter comments of Harrison J in *Paki v Attorney-General*.[61] All these points reflect the difficulty of doctrine and this has been seen in Canada with a line of precedent that have shifted away from fiduciary doctrine and towards the honour of the Crown doctrine.[62] The reluctance towards a broader duty, is indicative of the conflicting nature of applying a private law principle in a public law context.

Dwight Newman QC considers that the hesitation of the NZSC in *Wakatu*, to not fully import the principles of *Guerin* reflect the difficulties of the fiduciary Crown doctrine.[63] The *Guerin* principle muddies the water, distorting the private law conceptualisation of fiduciary duties, to transfigure into a sui-generis creature, a mix of both public and private law but also not solely in either camp. This also reflect underlying uncomfortable premise

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59 *Wakatu*, above n 4.

60 *Wakatu*, above n 4, at [331].

61 *Paki & Ors v Attorney-General* 30/7/08, Harrison J, HC Hamilton CIV 2004-419-117 at [113].

62 See *Manitoba*, above n 13 and Dwight Newman QC's discussion of this shift at "Wakatū and Transnational Dimensions of Indigenous Rights Discourse" (2019) 1 NZLR 61 at 77.

63 Dwight Newman QC "Wakatū and Transnational Dimensions of Indigenous Rights Discourse" (2019) 1 NZLR 61 at 75.

within the fiduciary relationship, which has elements dependence and subservience of the indigenous group as beneficiary to the Crown as Fiduciary.[64] This is a further reason why the doctrine is more appropriate duty as a mechanism for review of executive action for Māori. The honour of the Crown is a public law mechanism and therefore this roots the doctrine in a public law analysis. This provides a mechanism that does not have the same distortion and negative premises associated with the fiduciary principle and difficulties of employing a private law mechanism to achieve public law ends. This can also have wider impacts on private indigenous-industry agreements as seen in Canada, with Dwight Newman QC highlighting that "the honour of the Crown has generated more tangible economic benefits for Indigenous communities than any fiduciary relationship ever did".[65]

C Tino Rangatiratanga

The doctrine also is constituent with uphold tino rangatiratanga or Māori self-determination. Self-determination can be defined as the entitlement of peoples to be 'full and equal participants' in the creation of institutions of government they live in and further live within a governing institutional order to be able to control their own destinies.[66] Indigenous self-determination is embodied within art. 3 of the United Nations Declaration of Indigenous Peoples (UNDRIP) which states that "indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development".[67]

Tino rangatiratanga reflects a high degree of Māori autonomy and connotes the distribution of political authority within Te Ao Māori and relationships between the State and Māori.[68] The Matike Mai report considered that the right for Māori to make decisions for Māori is the very essence of tino rangatiratanga.[69]

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64 Dwight Newman QC "Wakatū and Transnational Dimensions of Indigenous Rights Discourse" (2019) 1 NZLR 61 at 75.

65 Dwight Newman, above n 64, at 78.

66 James S. Anaya *Indigenous Peoples in International Law* (Oxford University Press, New York & Oxford, 1996) at 80.

67 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, 107th plen mtg, (2007) at art 3.

68 Dr Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 54.

69 *He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation* (Matike Mai Aotearoa, January 2016) at 8.

The doctrine provides for the greater access to justice of Māori to enforce and protect their rights and interests against the Crown. This increased access to justices is a form of greater autonomy of Māori to determine their futures and have their rights and interests recognised and respected. By being able to further enforce and protect their rights and interests, Māori have greater social, cultural, political and economic autonomy. The development of the doctrine is accordingly not only consistent with tino rangatiratanga but also New Zealand's obligations to indigenous self-determination under art. 3 of UNDRIP.

VI New Zealand and the Honour of the Crown?

The honour of the Crown doctrine has a nebulous position within New Zealand. While widely mentioned within cases, the doctrine remains in the margins of the law as a conceptual ideal rather than a solid legal duty that Māori can rely on. Firstly, it is important to recognise the differences between jurisdictions which impact any analysis of the application of the honour of the Crown doctrine. The doctrine is applied by Canadian courts as mechanism to enforce the recognition and protection of indigenous rights enshrined in s 35 of the Canadian Constitution.

New Zealand does not have an equivalent broad reaching, 'higher law' legislative provision which courts can easily rely on as authority for the imposition of the honour of the Crown. This is the main obstacle for any party seeking to apply the honour of the Crown as a legal duty and will be explored later on in this paper in terms of ways in which the doctrine may be relied on in New Zealand. The Crown-indigenous relationships are different between jurisdictions as well, with New Zealand being based on the Treaty of Waitangi and its associated principles, while Canada's is defined by both, the Constitutional protections and multiple treaties negotiated between indigenous groupings and mainly federal provincial governments.[70]

Despite these differences, there is a significant commonality in both jurisdictions shared colonial past, and therefore an inheritance of the same concept in New Zealand of the 'honourable crown' from our shared Anglo-Saxon roots. There is also a common history of hara or hurt shared between jurisdictions within the Crown-indigenous relationship, a history of oppression, assimilation and alienation of indigenous rights.[71] I argue that these common threads provide a sufficient basis for New Zealand courts to consider the

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70 McMorrow, above n 14, at 324.

71 Dwight Newman QC, above n 18, at 68 & 69.

application of the honour of the Crown doctrine (though noting the need for proper legal authority) and this outweighs the jurisdictional differences. While New Zealand does not have an equivalent s 35, this has not prevented the doctrine from being pleaded by parties before New Zealand courts and also being referred to in New Zealand judgments.

A New Zealand Māori Council litigation – the Primary Period

The New Zealand courts of the late 80s and early 90's made huge inroads towards the application of the doctrine in New Zealand.[72] The series of litigation brought by the New Zealand Māori Council challenged the Crown-Māori relationship and arguably the Courts of that era were more courageous and progressive as finally giving property recognition to the Treaty and Māori rights from which todays courts build upon.

In the seminal *Lands* case, the New Zealand Court of Appeal considered the argument that the concept of the honour of the Crown can be linked to the Māori perception of the Treaty and Lord Normanby's Instructions of 14 August 1839, which noted the "faith of the British Crown" was to be reflected in the proposal for a treaty.[73] Lord Normanby's instructions emphasised that dealing with indigenous groups for their land should be conducted upon the "principles of sincerity, justice, and good faith".[74]

In the decision, Richardson J provides obiter comments about the doctrine, stating that in considering the role of the Crown and the conduct of government, "emphasis on the honour of the Crown is important".[75] His Honour stated that the Treaty is central to the life of the nation but explains that it does not clearly state the reciprocal duties of the Crown and Māori.[76] Justice Richardson considered that in New Zealand where the Treaty resides under the Treaty of Waitangi Act and the other relevant legislation, the obligation is to deal with each other and their treaty obligations in good faith.[77]

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72 See *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 143 (CA), *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (CA), *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA), *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) and *Te Rununga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

73 *New Zealand Māori Council v Attorney-General* [1987] NZCA 54/87, [1987] 1 NZLR 641 at 37.

74 At 37.

75 At 37.

76 At 37.

77 At 38.

The points raised by Richardson J are cited by Gendall J in the *Forests* case, where he states that the Court of Appeal has followed the lead of Canadian courts and imposed duties of a "fiduciary nature in respect of Māori" on the Crown.[78] His Honour considered that the *Lands* case recognises that the Treaty created a continuing relationship of a fiduciary nature, akin to a partnership, and that there is a positive duty to each party to act in good faith, fairly, reasonably and honourably towards the other.[79] In related litigation to the *Lands* case in the High Court, McGeehan J states that the parties are to continue to act in, and are entitled to expect, good faith. In regards to the expectations for Māori under s 9 of the State Enterprises Act 1986, McGeehan J outlines that "the Crown is expected to act in relation to Maori in accordance with the concept of honour of the Crown."[80]

These cases illustrate a dynamic period of development for Treaty jurisprudence. The cases show that the Courts saw the honour of the Crown as relevant to how the Treaty rights and its principles are enforced through legislative provisions which uphold Māori rights. The courts intertwine their discussion of "honour of the Crown" with the duty of good faith. These are two separate concepts, however the differences between the two are subtle and often overlap. For the purposes of this paper, we only note the synergy between the concepts but do not compare the two doctrines.

Following the obiter comments of Richardson J, the legal position of the honour of the Crown has not significantly progressed. Courts continue to recognise the concept, though stop short of determining it as a legal duty, like in *Baker v Waitangi Tribunal*, where the Court, noted that in such a process the honour of the Crown is at stake in relation to the treaty settlement process, and warned that Judges take careful account of what an honourable Crown represents.[81] The Court considered if that if this were not the case, there could be no confidence in the Treaty settlement process.

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78 *New Zealand Māori Council v Attorney-General* [2007] HC, Wellington, CIV-2007-485-95, 4 May 2007 at [62].

79 At [62].

80 *New Zealand Māori Council v Attorney-General* [1991] HC Wellington CP942/88, 29 September 1991 at 15.

81 *Baker v Waitangi Tribunal* [2014] NZHC 1176, [2014] 3 NZLR 390 at [53].

B Secondary Period Litigation

While there has been a lot of mention of the honour of the Crown, the treatment of the doctrine by Courts in their questioning of arguments raised by counsel or lack of it more indicates a reluctance by Courts towards the doctrine. This section analyses what this period calls the second period litigation, the more recent Treaty decisions from the mid 2000s to as recent as 2018. In *Ririnui v Landcorp Farming Ltd*, *Wakatu Ngāti Whatua Ōrakei v Attorney-General* and *Ngāti Te Ata*,[82] four leading treaty cases in the past decade, the honour of the Crown has floated in the margins of the decisions but with no real consideration of how it could or would apply in New Zealand.

At the Court of Appeal stage in *Wakatu*, the Court considered approach of the SCC in *Manitoba,* though the discussion is largely focused on the SCC's consideration of the fiduciary principle. The Court of Appeal commented that in the New Zealand context, if there was no other remedy available for the appellant this would support a more flexible approach to fiduciary duty and requirement of a duty of loyalty.[83] The doctrine was not a focus of the litigation at the Supreme Court stage.

Ririnui, concerned a dispute between Landcorp, a state-owned enterprise and Ngāti Whakahemo. Landcorp entered into an agreement to sell a farm to the highest bidder in a tender process, after being advised by the Office of Treaty Settlements (OTS) that the farm was not of potential interest for future Treaty settlements, based on the incorrect understanding that all iwi in the region had settled.[84] However, Ngāti Whakahemo had not and applied for a judicial review of Landcorp's decision to enter into the agreement, as well as OTS's decision to disclaim interest in the farm and the decision of Landcorp's shareholding Ministers to not intervene to stop the sale.[85] Key for our purposes is that in reviewing the request by Ministers to allow another iwi, which had not participated in the tender process to purchase the property, the Court considered that the Ministers had done so because "they considered that the honour of the Crown was engaged".[86]

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82 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056, *Ngāti Whātua Ōrākei Trust v Attorney-Genera*l [2018] NZSC 84, [2019] 1 NZLR 116, *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17 [2017] 1 NZLR 423 and *Te Ara Rangatu O Te Iwi O Ngati Te Ata Waiohua Incorporated v Atttorney-General* [2020] NZHC 1882.

83 *Wakatu*, above n 4, at [115].

84 *Ririnui*, above n 82, at [4]-[26].

85 At [4]-[26].

86 *Ririnui*, above n 82, at [69].

In *Ngāti Whatua*, Ngāti Whātua Ōrakei sought declarations as to its legal rights and the lawfulness of the Crown's actions and policies in transferring land which Ngāti Whātua claim to have mana whenua status over.[87] This however was in conflict with overlapping interests of other iwi in the area. The doctrine was pleaded as part of the obligations in which the Crown is said to have breached, but the courts at all stages of the litigation have largely been silent to this point in its decision, basing their judgment on the other causes of actions pleaded.[88]

During oral arguments before the NZSC, counsel for Ngāti Whatua outlined the Canadian position on the doctrine citing *Haida* for the proposition that from the honour of the Crown stems the duty to consult in good faith and thus the duty to accommodate where consultation requires that appropriate recognition is given the existing rights.[89] Chief Justice Elias in questioning counsel on this argument, points out that the doctrine is based on s 35 of the Canadian Constitution, and so there needs to be a development of the "linkages" to domestic law, to root the doctrine as being applicable in New Zealand.[90] While counsel for Ngāti Whatua argued that this points towards it being a matter that should be argued at a full trial, Elias CJ explains that the "linkage" is a matter of law and foundational to what Ngāti Whatua is urging the Court to do.[91] The point is not taken further in the case nor particularly discussed in the judgment.

Finally, in *Te Ara Rangatu O Te Iwi O Ngāti Te Ata Waiohua Incorporated v Attorney-General*, Ngāti te Ata alleged that the Crown breached a number of duties (including a fiduciary duty) to it in its handling of land (that included Waahi tapu) that was confiscated under New Zealand Settlements Act 1863 during the Waikato wars.[92] The doctrine is mentioned as part of the relief by Ngāti te Ata for its claim that there was a claim of right and a legitimate expectation against the Crown in relation to Ngāti Te Ata's Treaty settlement redress. Under this cause of action, Ngāti Te Ata sought a declaration that the Crown failed to address Ngāti Te Ata's Treaty claims in accordance with the honour of the

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87 *Ngāti Whātua Ōrākei Trust v Attorney-Genera*l [2018] NZSC 84, [2019] 1 NZLR 116 at [1].

88 At [57].

89 *Ngāti Whātua Ōrakei Trust v Attorney-General* [2018] NZSCTrans 7 at 29.

90 At 30.

91 At 31.

92 *Te Ara Rangatu O Te Iwi O Ngati Te Ata Waiohua Incorporated v Atttorney-General* [2020] NZHC 1882.

Crown.[93] Justice Fitzgerald ultimately concludes that this cause of action fails and therefore does not have to engage with the question of relief sought and the doctrine.[94]

The Court's position in these cases indicate caution in the uptake of the doctrine within New Zealand. Though pleaded and particularly in the case of *Ngāti Whatua* where it was amply discussed during oral argument, the NZSC's judgment is largely silent about the honour of the Crown doctrine. It may be that courts are wanting to avoid seeming overeager in making a determination of the applicability of the doctrine in New Zealand, when the doctrine is not central to the proceedings. As Elias CJ made clear in her questioning, there needs to be a clear linkage for the doctrine to be applied in New Zealand. This remains the biggest hurdle for any party seeking to apply the doctrine in New Zealand.

C Stafford v Accident Compensation Corporation – the Next Frontier

The decision that directly addresses the doctrine is *Stafford*,[95] where (following their Supreme Court win) the plaintiffs in *Wakatu* launched a caveat on particular land held by ACC in the Nelson region, to prevent the sale of such land until their fiduciary duty claim was been decided.

The majority found against the plaintiff ultimately and ordered the caveat to be removed. The majority do not particularly engage with the doctrine apart from noting that counsel for Wakatu submit the argument that "the Crown is expected to act with honour and do what it can to make the land available to redress breaches of the fiduciary obligations".[96] However, the doctrine features in a rare dissent in the Court of Appeal by Williams J.

Justice Williams approaches the doctrine first in considering Canadian case law that deal with independent entities that are said to uphold Crown obligations rather than simply enjoy the privileges of the Crown. His Honour cites the case of *Hamlet of Clyde River v Petroleum Geo-Services Inc,* which concerned an oil and gas exploration licence which found that the National Energy Board owed duties of consultation as per s 35 of the

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93 *Ngāti Te Ata*, above n 92, at [682].

94 At [721] & [722].

95 *Stafford,* above n 5.

96 At [108].

Canadian constitution, a duty that is grounded in the honour of the Crown.[97] Justice Williams then considered the case of *Chippewas of the Thames,* which concerned authorisation to modify an existing oil pipeline.[98] In that decision, the Court found that provided the regulatory agency had the power and capacity to do what the Crown obligation required in the circumstances, the agency could be required to discharge that obligation despite its structural independence from the Crown as an independent entity.

Justice Williams observed that constitution background of the two cases (*Hamlet of Clyde River* and *Chippewas of the Thames*),[99] influences why the Canadian Supreme Court is willing to pierce the traditional notion of protecting the privilege of Crown agents, and apply responsibilities on them through the honour of the Crown.[100] He explains that as the obligations in issue were of constitutional importance, relating to the rights guaranteed under s 35 of the Canadian Constitution, with the Canadian Supreme Court repeatedly holding that "the honour of the Crown requires the courts to take a broad and purposive approach to the interpretation of legislation affecting the rights and interests of indigenous peoples", in order promote reconciliation.[101]

Justice Williams draws linkages between these two Canadian cases mentioned above and the circumstances in *Stafford*, stating that "(t)hey suggest that the courts should take a broad, non-technical and less restrictive approach to defining the Crown in the New Zealand context too."[102] At the legal hurdle of a lack of equivalent provision in New Zealand to s 35 of the Canadian Constitution, Williams J leaps over this issue by considering it not to be a material distinction.[103] His Honour draws analogy to the fact that while the Treaty of Waitangi is not recognised as higher law in the same regard as s 35, "it is nonetheless an important and potentially powerful aid to interpretation even where not expressly incorporated into the relevant statute".[104] His Honour acknowledges the uncodified nature of the law but seems to indicate that the position of the Treaty of

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97 *Stafford*, above n 5, at [337] – [338], citing *Hamlet of Clyde River v Petroleum Geo-Services Inc* [2017] SCC 40, [2017] 1 SCR 1069; at [36].

98 *Stafford*, above n 5, at [339], citing *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* [2017] SCC 41, [2017] 1 SCR 1099.

99 Where the Court has an obligation to uphold s 35 of the Canadian Constitution.

100 *Stafford*, above n 5, at [340]

101 At [340].

102 At [341].

103 At [341].

104 At [341].

Waitangi is so embedded as a sufficiently powerful source of law in our legal system, that it is able to be the requisite "linkage" for the application of the doctrine in New Zealand.

Justice Williams further engages with the doctrine when considering how the transfer of land would be facilitated and remarks that it must be assumed that both ACC and the Minister would act in accordance with the "honour of the Crown" and consistent with their fiduciary obligation.[105]

His Honour overall concludes that the shielding of crown agents like ACC from the obligations of the Crown is inconsistent with the honour of the Crown and partnership principles between the Crown and Māori, stating:[106]

> I do not consider it to be a barrier to the sustainability of the caveat, or the imposition of the Crown's obligations on ACC, that the discharge of such obligations would require the Minster and ACC to cooperate if necessary, pursuant to the Minister's formal powers of control. Cooperation within the corporation aggregate is the means whereby any rights of Tauihu iwi may be vindicated without undermining the long-term sustainability of the scheme. Resort in argument to reliance on the fact that the Crown and ACC are separate legal entities so as to avoid responsibility for the protection of Tauihu iwi rights is *inconsistent with the honour of the Crown and the way Treaty partners should behave towards each other.* (emphasis added).

Justice Williams strong statements about the honour of the Crown show a robust advocacy for the doctrine's application in New Zealand. It is unclear however whether under his conceptualisation, the doctrine is to be framed as a guiding principle in review of the Crown's conduct against Māori or as an enforceable legal duty. His Honour's linkage to the Treaty of Waitangi denotes that perhaps it is more akin to a guiding principle.

This however seems somewhat at odds with his conclusion that the avoidance of responsibility would be inconsistent with the honour of the Crown, for this indicates the doctrine to be more akin to a ground of review that has greater enforceability than a guiding principle, if it results in determining public decisions as inconsistent with the doctrine. Justice Williams' dissent takes one step closer towards the application of the doctrine in New Zealand. The honour of the Crown doctrine's position remains tenuous still and perhaps will be crystalized in the ongoing *Wakatu* or *Ngāti Whatua* litigation.

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105 *Stafford*, above n 5, at [369].

106 At [392].

VII What roots the doctrine in Aotearoa?

The question posed by Elias CJ in the *Ngāti Whatua* Supreme Court hearing was what the legal linkages which help to root the doctrine in Aotearoa, is the main hurdle for any party in court looking to apply the doctrine. In this section I argue there to be a number of avenues available for the application of the doctrine in Aotearoa.

A Common Law Doctrine

It is important to note that derivation of the doctrine in Canada is not sourced in s 35 but in the English common law. The Canadian courts have noted that the honour of the Crown was invoked by early 17th century courts to ensure that a Crown grant was effective to accomplish its intended purposes,[107] citing the cases of *The Churchwardens of St. Saviour in Southwark*,[108] and *Roger Earl of Rutland's Case*.[109] Both of these cases show a common law linkages used by the Canadian courts to apply the doctrine, as discussed above. I argue the same linkage can be used by New Zealand court's to find that the doctrine is part of the laws of New Zealand, flowing from the laws inherited from England upon colonisation,[110] and as guaranteed to Māori by art. 3 of te Tiriti, which promised "all the rights and privileges of British subjects".

Janet McLean identifies that the notion of the 'honourable' Crown,[111] is reflected in the Monarch's prerogative writs, and in the model litigant policy of the Crown Law Office.[112] The notion of the 'honourable' Crown can be sourced in New Zealand to even the early days of British colonisation, with colonial documents of the Instructions to Captain Hobson in 1839 stating that all dealing with Māori were to be conducted under the principles of sincerity, justice and good faith.[113]

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107 As considered in *R v Marshall* [1999] 3 S.C.R. 456 at [43].

108 (1613), 10 Co. Rep. 66b, 77 E.R. 1025.

109 (1608), 8 Co. Rep. 55a, 77 E.R. 555.

110 Imperial Laws Application Act 1988, s 5.

111 Whereby the Monarch cannot (and does not) do wrong even if his officials may well do so.

112 Janet Mclean, "Crown, Empire and Redressing the Historical Wrongs of Colonisation in New England," (2015) 2 NZLR 187 at 202.

113 At 202, citing W David McIntyre and WJ Gardner (eds) *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) at 14.

The main issue here is what takes the honour of the Crown from being a normative precept of political rhetoric to an enforceable legal duty. As Mclean notes "(t)he idea of honour is all very well, so long as it can never be defined or enforced".[114]

I argue that the use of the doctrine as part of the process of colonisation and the assertion of sovereignty by the British, created a legal duty on the Crown to be honourable. The honour of the Crown is part of the story of colonisation in New Zealand and sits alongside the Treaty of Waitangi to provide legitimacy to the British assertion of sovereignty over New Zealand. The British Crown asserting sovereignty over Māori, was done on the premise it would be a 'honourable' sovereign as seen in the protections made for Māori within the Treaty of Waitangi. This created a legal duty on the Crown to act honourably in the protection and respect of the rights and interests of its indigenous citizens. The same rationale is employed in Canada where the honour of the Crown has been held by Courts to be derived from the Crown's assertion of sovereignty.[115]

These factors provide a sufficient foundation for a Court to find a common law duty exists for the doctrine of the honour of the Crown. Critics may consider this to be a tenuous position for such a duty, however I think the common law only provides the floor from which the whare of the Honour of the Crown can be built from. The common law foundation is then strengthened by te Tiriti and its principles.

A common law foundation will give comfort to conservative judges who are resistant to make develop the doctrine in New Zealand, as this takes the idea of the doctrine from being a radical development to a natural progression of a common law principle. There is an analogous argument to the legitimacy for public-law fiduciary duties used by Evan Fox-Decent which I employ here.[116] If the honour of the Crown doctrine is considered to be sourced in the common law, this confers a kind of legitimacy that it is intrinsic to and constitutive of, the Crown's legal authority. The notion of the honour of the Crown is not merely political, as this idea of the Crown being honourable reflects the extent to which exercises of power by the Crown conform to the demands of the legality or the rule of law. Therefore, subject to situations where the doctrine is considered to not applicable or justifiably limited, the exercises of Crown power manifest a measure of legal authority.

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114 Mclean, above n 112, at 204.

115 *Taku River Tlingit First Nation*, above n 29, at [24].

116 Evan Fox-Decent "Fashioning Legal Authority from Power: The Crown-Native Fiduciary Relationship" (2006) 4 NZJPIL 91 at 112.

B Fiduciary

My next contention is that the honour of the Crown may apply in New Zealand as being considered as part of the principle that the Crown may owe a fiduciary duty to indigenous groups in certain circumstances. The current dogmatic issue of the principle is how can the Crown owe duties of sole-minded loyalty in the traditional sense of trustee to its beneficiary,[117] the relevant indigenous group, while also being a fair and just sovereign to all it's citizens. The doctrine provides a useful guiding tool in applying a test of honourable conduct in dealings with the indigenous groups for the Crown to uphold its fiduciary obligations. However, as I have noted above, there are a number of negative connotations by framing the Crown-Māori relationship in a fiduciary sense, placing them in a trustee-beneficiary paradigm.[118]

A further difficulty is whether the doctrine when employed this way is merely a principle rather than an enforceable duty. There are analogies that can be drawn from the Canadian experience, where earlier Court following Guerin considered the honour of the crown doctrine underpinned the fiduciary doctrine, with the Canadian Supreme Court in *R v Sparrow* outlining that method by which legislative objectives are achieved must uphold the honour of the Crown, grounded in the history and policy between the Crown and Canada's Aboriginal peoples.[119] Eventually as I have elaborated above, this moved from a foundation of the fiduciary duty to the situation in *Manitoba* where we have a stand-alone duty that is independent of a fiduciary duty being found.

C The Justice Williams Approach

So, as we canvased above, Williams J provides the most recent jurisprudence of the doctrine in Aotearoa. He bases his conceptualisation of the doctrine within the Treaty itself. While accepting it is not recognised as higher law, in that it is not codified in statute of a Constitution, he pronounces that "it is nonetheless an important and potentially powerful aid to interpretation even where not expressly incorporated into the relevant statute".[120] It is first important to recognise that this position is consistent with the

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117 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA at 18, affirmed in *Arklow Investments v Maclean* [2000] 2 NZLR 1 (PC), at 5.

118 Dwight Newman QC, above n 63, at 75.

119 As per Dickson CJ and La Forest J in *R v Sparrow* (1990) 70 DLR (4th) 385 (SCC) at 1110 and 1114,

120 *Stafford*, above n 5, at [340].

Canadian position of where the doctrine derives from. The doctrine arises from the assertion of sovereignty by the Crown over indigenous people. If we consider what was guaranteed to Māori under the Treaty, Māori are guaranteed the continued protection of their land and resources under art. 2.[121] By rooting his conceptualisation of the doctrine in the Treaty, Williams J acknowledges the major distinction between Canadian and New Zealand, - Te Tiriti of Waitangi. Canada's Crown is engaged in multiple treaties and is still going through the process of engaging and negotiating treaties with its indigenous peoples to clarify their existing rights. Therefore, you would require a provision like s 35 to preserve these rights that are still being deliberated between the Crown and indigenous people. However, in Aotearoa the existence of an overarching Treaty already recognises and (should) protect the rights of Māori. Because of this distinction, the Treaty will and should always be the foundation for the doctrine in New Zealand.

Justice William's approach will however evidently face the '*Te Heuheu'* problem explained above; the line of precedence following *Te Heuheu* that support that the Treaty is not directly enforceable. If we are establishing the doctrine as being based in the treaty then arguably, to apply it through the doctrine of the Honour of the Crown correlates to a direct application of the Treaty. The approach may also face criticism that the status quo is that the Treaty is interpreted by its principles and so to apply in through the doctrine is inconsistent with the current well accepted practice of how the Treaty is to be given effect to.

I argue that the Williams approach is step in a longer journey towards acceptance of the doctrine in Aotearoa. It provides a basis for lawyers to springboard from and tear down the legal barriers of decisions like *Te Heuheu* and move towards a Crown-Māori relationship of true partnership where Māori are able to use the doctrine in exercise of their right to self-determination and being able to hold the Crown to account. The decision may form part of a larger incremental litigation for the slow and steady development of the doctrine with strategic litigation. Framing Williams J's approach this way, therefore, places a wero to lawyers to continue to plead and employ the doctrine in their claims, in a continuous advocacy for true Treaty partnership.

VIII What the honour of the Crown would have added?

The utility of the doctrine may be best illustrated by the value it would have added to situations that have come before the Courts. This section considers the factual scenario of

[121] Treaty of Waitangi 1840, art. 2.

if the doctrine did exist, what would it have added to proceedings brought by Māori, by apply the doctrine to the facts of *Stafford* and *Wakatu* litigation. It will provide further context of the litigation and consider the benefits the doctrine would have had litigation and any issues with its application.

A Stafford and *Wakatu*

As previously outlined, Mr Stafford launched a caveat over property owned by ACC, that ACC was in the process of selling.[122] The particular properly was identified as possibly falling within the Spain Award Area.[123] Essentially, the Mr Stafford is seeking to protect the rights recognised by the NZSC, that the Crown owed a fiduciary duty to the descendants of the Nelson tenths trust to reserve particular land in the Spain Award Area. Mr Stafford seeks to preserve the potential rights to Crown property it may have until questions as to liability, loss and remedy are able to be determined by the High Court.[124]

Prima facie, the utility of the doctrine is clear. The NZSC have recognised that the Crown had an obligation reserve land in the Nelson region for Mr Stafford, as a representative of the descendants of the Nelson Tenth's Trust beneficiaries (the customary owners).[125] These rights descendant's native title right as customary owners of the land. Under the doctrine of the honour of the Crown, the Crown is required to act in a manner that respects, recognises and protects the rights and interests of indigenous peoples. It therefore would be reasonable that in order to respect and protect what potential rights Mr Stafford and other descendants may have, the sales of Crown property in the relevant area should halted until the rights could be fully determined. If the doctrine were be available, Mr Stafford could rely on it solely as legal grounds for an injunction against the Crown to prevent the sale of property or in support of a caveat launched over property that were being sold. That the particular rights have not been determined, would not be a barrier for the application of the doctrine. In Canada, the doctrine recognises that rights of certain Indian nations are still undergoing treaty negotiations and thus the doctrine is applied to protect the potential rights that would be recognised through treaty between the indigenous group and the Crown (or Provinces in the case of Canada).[126]

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122 Stafford, above n 5, at [2] – [14].

123 At [13].

124 At [2].

125 *Wakatu*, above n 4.

126 *Haida,* above n 3, at [17].

The main issues with the application of the doctrine in the Stafford situation, is there is an added complication of determining what is the Crown and does the conception of the Crown in the Stafford situation mean a wider definition that includes Crown entities like ACC. This point is not delved into in this paper, but notably does raise an interesting issue of whether the honour of the Crown doctrine would apply to Crown entities.[127]

Taking a step back even further, and applying the doctrine to the original *Wakatu* claim, the pathway for the claimants in *Wakatu* would be much easier than the fiduciary route. Many of the difficulties faced by the claimants in the *Wakatu* litigation, was the uncomfortableness of trying to fit a constitutional relationship (Crown-Māori), through the private law lenses of a fiduciary relationship. This is demonstrated in the *Wakatu* judgments by the clear rejection of the fiduciary principle being owed at large by the Crown to Māori,[128] the requirement of an undertaking and its absence being a factor against the recognition of a fiduciary duty,[129] and the necessity of there being relationship characterised by loyalty for the existence of a fiduciary relationship.[130] The doctrine transcends these impediments, and is a duty that can be owed at large by the Crown, but does not necessarily need to be founded by a trustee/beneficiary relationship nor would it need loyalty or an undertaking. The doctrine shifts the courts inquiry from assessing whether the claimants can establish that a duty was owed to them by the Crown, to analysing the actions of the Crown and whether the rights and interests of the indigenous group had been sufficiently respected and protected. This seems a fairer balancing of the scales justice, given the years of oppression faced by indigenous peoples from the Crown and the power imbalance in regards to resources of the Crown in comparison indigenous claimants.

Overall, the doctrine alleviates the legal hurdles faced by Māori to protect and hold the Crown to account. The doctrine if applied in the *Stafford* and *Wakatu* situation would have made the enforcement of the rights and interests of the claimants in Wakatu much more easier and it is more likely the claimants would not have been left in the position where

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127 Notably as considered earlier this paper, Williams J cited the cases *Hamlet of Clyde River v Petroleum Geo-Services Inc* and *Chippewas of the Thames* to illustrate duties like the Honour of the Crown could be applied to Crown entity bodies.

128 See Elias CJ in *Wakatu*, above n 4, at [391], and Clifford J in *Proprietors of Wakatu v Attorney-General* [2012] NZHC 1461, at [277].

129 See Ellen France J in *Wakatu NZCA*, above n 52, at [135].

130 See Harrison and French JJ in *Wakatu NZCA*, above n 52, at [211].

they still need to endure another round of litigation to assess liability and loss. These would factor much earlier in the litigation process under the doctrine as it focuses on the Crown's actions and nature of the loss.

IX Conclusion

Overall, the status of the doctrine is tenuous in New Zealand, but Williams J judgment provides a torch to illuminate the path for the acceptance of the doctrine in Aotearoa. This paper has evaluated how the doctrine operates and its development in Canada. It has reviewed the current settings for the enforcement of Treaty rights in New Zealand and how the advantages of the doctrine rest in how it is not encumbered by the current hurdles for the application of the Treaty in New Zealand, nor the arduous process within the Waitangi Tribunal. The doctrine gives teeth to the Treaty and provides a mechanism that hold the Crown to account and gain an enforceable determination. This upholds Māori rights to access to justice and tino rangatiratanga as it gives Māori the right to take action and more effectively enforce their rights.

The doctrine is part of a societal shift within Aotearoa of the increased application of the Treaty in Aotearoa. The whakapapa of the doctrine as traced in this paper reflect a continued drive for that which was a whisper in past cases, to be transformed into a roar Māori may use to hold the Crown to account.

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