

THE DUTY TO CONSULT: WHAT AOTEAROA NEW ZEALAND CAN LEARN FROM CANADA

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INTRODUCTION

In 2004 the Foreshore and Seabed Act was passed in Aotearoa New Zealand.¹ 15-20,000 New Zealanders marched in a weeklong protest against the passing of the Act. Such an unprecedented reaction raised the question: what had broken down or was missing in the consultation processes of our democratic governing system? For Maori, who were the main group affected by the legislation, the answer was simple: while the law set clear general standards for consulting with individuals, group consultation rights for Maori were ad hoc and did not adequately reflect their interests. Their collective voices were being ignored and they had only peripheral involvement in crafting the Foreshore and Seabed Act.

In comparison, over the past thirty years the Canadian courts have developed clear guidelines setting out government-indigenous peoples' consultation rights. Indigenous Canadians possess the same individual consultation rights as other Canadians under administrative law. In 2004, however, the Supreme Court went further.² It recognised that the historic principle of the *honour of the Crown* meant that the Crown³ had a legal duty to consult Aboriginal groups when making decisions that may adversely impact lands and resources they claimed.⁴ In doing so the Court gave greater certainty to government-indigenous consultation standards and provided an avenue for challenging Crown actions that do not conform to those standards.⁵

In Aotearoa New Zealand, the government's consultation processes leading up to the passing of the Foreshore and Seabed Act in 2004 and its sale of State Owned Enterprises

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¹ The terms "Aotearoa" and "New Zealand" are used together to acknowledge an ongoing history in which Maori and British settlers combined into a single state after the signing of Te Tiriti o Waitangi/The Treaty of Waitangi in 1840. "New Zealand" and "Aotearoa" are used separately to indicate where one or other of the parties' interests prevails.

² *Haida Nation v British Columbia (Minister of Forests)* [2004] 2 SCR 511.

³ *Ibid*, para 16. The terms "government" and "Crown" are often used interchangeably in the political and legal arena to signify that some important government functions are exercised in the name of the "Crown" ie. by sovereign right, and upheld by law.

⁴ The legal source is section 35(1) of the Canadian Constitution Act 1982. Although section 35(1) covers Aboriginal and treaty rights, the specific peoples covered by the term "Aboriginal" remains problematic. The *Metis*, for example, do not have the same level of recognised group rights as the Nishga or the Inuit, both of which are dominant populations within historical territories that have long been recognised by the Canadian government as having independent, pre-existing, political rights. See discussion in P Chartrand (ed), *Who are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, Purich Publishing Ltd, Saskatoon, 2002.

⁵ This does not include non-status Indians and those who live off reserve, *Metis*, or Inuit who are not recognised members of an Inuit community. See discussion about "constitutionally protected Indians" and "Indian Act Indians" in J Giokas and R Groves, "Collective and Individual Recognition in Canada: The Indian Act Regime", in P Chartrand, *ibid*, 41-82.

into private ownership in 2013, graphically illustrate Maori dissatisfaction with those processes. This article explores the extent to which Aotearoa New Zealand can provide the same level of protection for indigenous consultation rights as exists in Canada.

The first part of the article sets out four sources of the duty to consult in Canada. Of these, the *honour of the Crown* is the most wide-ranging and robust source of the duty. This principle will be analysed to identify how it might be implemented in Aotearoa New Zealand. Triggers for the duty, content of the duty, and specific Canadian cases will be examined. The second part of the article uses the Foreshore and Seabed Act and the current sale of State Owned Enterprises, to highlight deficiencies in the consultation processes of Aotearoa New Zealand. Finally, I conclude that adopting a Canadian-type judicial approach, and recognising that the *honour of the Crown* underpins the Maori-Crown Treaty relationship, thus setting a higher standard for consultation than presently exists, would provide a clearer and fairer process for future government consultation with Maori.

ABORIGINAL CONSULTATION RIGHTS IN CANADA

Sources of the Duty to Consult

Judicial decisions concerning the duty to consult indigenous peoples in Canada are directly referable to section 35(1) of the Canadian Constitution Act 1982, which states:

The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

There are four sources of consultation rights for indigenous groups in Canada. They are: administrative law; the Crown's fiduciary relationship with its indigenous people; section 35(1) of the Canadian Constitution Act 1982; and, upholding the *honour of the Crown*.

(i) Administrative Law Procedures

The common law doctrine of procedural fairness applies to all Canadians. General consultation rights derive from the rule of natural justice known as *audi alteram partem* (hear the other side).⁶ The rule originally applied only in judicial contexts, but with the development of modern administrative law Canadian courts began applying it to executive bodies as well.⁷ It requires the Crown to follow fair procedures and exercise reasonable discretion whenever Crown actions affect the rights of its subjects. Thus, the rule has developed into a set of principles for government consultation.⁸ In its simplest terms, the common law rule requires that if the government, or a government body,

⁶ *Iwa v Consolidated-Bathurst Packaging Ltd* [1990] 1 SCR 282.

A similar New Zealand position is set out in P Joseph, *Constitutional and Administrative Law in New Zealand*, Brookers Ltd, Wellington, 2001, 860.

⁷ A Wicks, "Beyond Audi Alterum Partem: the Duty to Consult Aboriginal Peoples in Canada and New Zealand", *Journal of South Pacific Law* (2009) 13(1) 40.

⁸ *Iwa v Consolidated-Bathurst Packaging Ltd*, n6 at 290; Joseph, n6 at 861.

wants to act in a way that will affect a person's rights, it must consult with the person whose rights will be affected.⁹

The Supreme Court in *Baker v Canada*¹⁰ set out three factors that influence whether consultation is required: first, the closer the decision is to a judicial process, the more likely it is that consultation will be required; second, the statutory context is crucial in determining whether a decision-maker is required to consult; and, finally, the greater the effect of a decision on an individual and especially on individual rights, the more likely it is that consultation will be required. Section 35(1) of the Canadian Constitution Act 1982 extends this right to indigenous groups. If, for example, an indigenous treaty interest does not amount to an existing Aboriginal or treaty right, but is being impacted upon by the Crown through a procedure involving the Crown's duty of procedural fairness, the affected group will be entitled to the benefit of the duty.¹¹

(ii) The Crown's Fiduciary Duty

The second source of consultation rights is fiduciary duty. The landmark case of *R v Guerin*¹² affirmed that the Crown has a fiduciary duty to Aboriginal peoples in Canada, and that it is *sui generis* or unique. The quality of "uniqueness" stems from an analogy being drawn with private law. If Aboriginal peoples are the undisputed beneficial owners of specific Crown-held property then the Crown owes them a "public" fiduciary duty and a constructive trust arises.¹³ The fundamental principles of a constructive trust create an obligation on the trustee not to knowingly act contrary to the best interests of its beneficiary in order to benefit another interest.¹⁴

In *Guerin* the Supreme Court of Canada used this logic to establish that infringement of existing Aboriginal rights required consultation by the Crown in order to be correctly determined. Dickson J described the fiduciary obligations of the Crown in the following manner:¹⁵

where by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct ... in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

The Crown's fiduciary duty to Aboriginal peoples applies to virtually every facet of the Crown-Native relationship.¹⁶ In *Osoyoos Indian Band v Oliver (Town)*¹⁷ the broad nature of the Crown's fiduciary duty was analysed. The case established that if the fiduciary duty conflicts with the Crown's public duty to all Canadians, the fiduciary duty is appropriately exercised if there is minimal impairment of the affected Aboriginal rights.

⁹ Ibid.

¹⁰ *Baker v Canada* [1999] 2 SCR 817, para 23.

¹¹ See discussion in T Issac and A Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 *Alta LR* 49, 53.

¹² [1984] 2 SCR. 335, 385.

¹³ Ibid.

¹⁴ Issac and Knox, n11 at 51.

¹⁵ [1984] 2 SCR. 335, 336.

¹⁶ L Sealy, "Fiduciary Relationships" [1962] *Cambridge LJ* 69, 72.

¹⁷ *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746, para 4.

The Supreme Court analysed the application of section 35 of the Indian Act 1985; a provision which allows the Governor-in-Council to make use of reserve land for public purposes. It held that once it has been determined that the expropriation of Indian lands is in the public interest, the duty restricts Crown expropriation to the minimum interest needed to fulfill that public purpose, thus ensuring minimal impairment of the Aboriginal use and enjoyment of their lands.

Furthermore, in *Delgamuukw v British Columbia*,¹⁸ the Supreme Court stated that the fiduciary relationship between the Crown and Aboriginal people “may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands”.¹⁹ This waters down the content of the duty: the fiduciary duty “may” be satisfied as opposed to “must”, and only the “involvement” of Aboriginal peoples is sought, as opposed to any stronger decision-making rights or rights of veto.

(iii) Statutory Rights under the Canadian Constitution Act 1982

The Crown’s duty to Native peoples is entrenched in the Canadian Constitution Act 1982,²⁰ and the rights recognised and affirmed by section 35(1) now include a duty to consult.²¹

Constitutional entrenchment means that any Aboriginal rights still existing in 1982 can only be extinguished by legislation that shows a “clear and plain intention” to deny particular rights.²² Legislation that limits the exercise of Aboriginal rights will then only be valid if it meets the test justifying interference promulgated in *R v Sparrow*.²³

In *Sparrow* the first question to be asked is whether the legislation in question has the effect of interfering with an existing Aboriginal right.²⁴ The characteristics of any rights at stake must be analysed, and the Supreme Court noted that in doing so, while it is impossible to give easy definitions to various rights, it is crucial to be sensitive to the Aboriginal perspective of their meaning.²⁵ For example, *Sparrow* concerned fishing licences and restrictions on fishing. The Court emphasised that fishing rights in the Aboriginal context were not traditional property rights in the European sense, but rights held by the collective in keeping with the culture and existence of the group. It sought to avoid the outright application of traditional common law concepts of property.

The second question to be asked is whether there has been *prima facie* infringement of section 35(1) of the Canadian Constitution Act 1982. The Court will inquire whether the limitation is unreasonable, or if the regulation imposes undue hardship or denies to the holders of a right their preferred means of exercising that right.²⁶ The onus of proving a

¹⁸ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 14.

¹⁹ *Ibid.*

²⁰ Discussed in L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, University of Toronto Press, Toronto, 1996, 4.

²¹ Discussed in D Newman, *The Duty to Consult*, Purich Publishing Ltd, Saskatoon, 2009, 14.

²² *R v Sparrow* [1990] 1 SCR 1075, para 37.

²³ *Ibid.*

²⁴ *Ibid.*, para 68.

²⁵ *Ibid.*

²⁶ *Ibid.*, para 70.

prima facie infringement lies on the individual or group challenging the legislation.²⁷ In *Sparrow* the Court found that regulations determining how the Musqueam caught fish were an adverse restriction on the Musqueam's right to fish for food. The Court stated that the test involved asking whether the purpose or the effect of the restriction imposed on fishing net lengths would be to unnecessarily infringe the protected fishing right. This test would be met if, for example, the Musqueam were forced to spend undue time and money per fish caught, or if the net length reduction resulted in a hardship to the Musqueam in catching fish.²⁸

If a *prima facie* interference is found, analysis moves to the issue of justification.²⁹ This test also involves two steps. First, whether there is a valid legislative objective. In *Sparrow*, the Court inquired whether Parliament's objective in authorising regulations regarding fisheries was valid. An objective aimed at preserving section 35(1) rights by conserving and managing natural resources, for example, would be valid.³⁰ If a valid legislative objective is found, analysis proceeds to the second part of the justification test: application of the principle of the *honour of the Crown* in Crown dealings with Aboriginal peoples.³¹ This is where the duty to consult is crucial. The special trust relationship and the duty to consult Aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified.³² If it is found that the Crown has not consulted with Aboriginal peoples and has not met the judicial criteria of what the duty to consult entails in a particular consultation, then the legislation will not be justified and there cannot be an interference with the Aboriginal right.³³

It is also important to note the further comment made by the Supreme Court of Canada in *R v Cote*³⁴ that section 35(1) only sets *constitutional minimums* and that governments may choose to go beyond the standard set by section 35(1).

(iv) Honour of the Crown

The last source of the duty to consult in Canada is the *honour of the Crown*. The history of this duty is important as it indicates how such a duty can also be implemented in Aotearoa New Zealand.

Long before Canada agreed on a formal Charter of Rights, it inherited the British tradition of acting honourably for the sake of the sovereign.³⁵ This is a very ancient convention with its roots in pre-Norman England and a time when every yeoman owed personal allegiance to his chieftain or king. Anyone who was charged with speaking or acting on behalf of the King bore an absolute personal responsibility to lend credit to his master's good name.³⁶ Should he fail in this responsibility, or cause embarrassment, he

²⁷ Newman, n21 at 16.

²⁸ *Sparrow*, n22 at para 70.

²⁹ *Ibid*, para 71.

³⁰ *Ibid*.

³¹ *Ibid*, para 75.

³² *Ibid*.

³³ Newman, n21 at 19.

³⁴ [1996] 3 SCR 139, 169.

³⁵ D Arnot, "The Honour of the Crown" (1996) 60 *Sask L Rev* 339, 340.

³⁶ *Ibid*.

was required to answer personally to the King with his life and fortune.³⁷ These small societies were conscious of their heritage and kinship and a single act of irresponsibility could blemish a family's name for generations.³⁸ The Crown at this time was not an abstract or imaginary essence, but a real person whose power and prestige was directly dependent on the conduct of its advisors, captains, and messengers.³⁹

With the rise of the global British Empire in the 19th Century, the personal relationship between different sovereigns and their ministers weakened. British jurists began to mold this concept; appealing to the honour of the Crown was not seen as merely an appeal to the sovereign as a person, as it was originally, but to a "traditional bedrock of principles of fundamental justice that lay beyond persons and beyond politics".⁴⁰ Thus the *honour of the Crown* in its historical light was far more than a petty idea or a principle, it became in essence the "conscience of the country".⁴¹

The Canadian Royal Proclamation of October 7, 1763, by King George III, sought to organise Great Britain's New North American Empire and to give a policy guide to stabilise relations with the North American Aboriginal peoples through regulation of trade, settlement and land purchases.⁴² One of the principles to guide the Canadian government's dealings with Aboriginal people was that the historical relationship between the government in its interactions with Aboriginal peoples held the *honour of the Crown* to be at stake.⁴³

Flowing from the *honour* principle is a duty on the Crown to consult with Aboriginal peoples when any government activity may affect Aboriginal peoples' rights and interests. This duty was elevated from a moral obligation to one that is legally enforceable in the two landmark cases of *Haida*⁴⁴ and *Taku River Tlingit First Nation v British Columbia*⁴⁵ discussed later in this article. The *honour of the Crown* obliges the Crown to respect Aboriginal rights, by identifying them through negotiation with Aboriginal peoples.⁴⁶ It also obliges the Crown to consult with Aboriginal peoples in all cases where its activities may affect rights that are asserted but not yet proven.⁴⁷ These cases go further than *Sparrow*. Instead of reaffirming the duty to consult as a mere factor to be considered under the *Sparrow* justification test, they established the duty to consult as a doctrine in its own right. Thus, in *Haida*, the Supreme Court stated that the following obligation to consult arose:⁴⁸

³⁷ Ibid, 341.

³⁸ J Hartley, "Upholding the Honour of the Crown - *Haida Nation v British Columbia* [2004] 3 SCR 511", (2005) 6(9) *Indigenous Law Bulletin* 22.

³⁹ Ibid.

⁴⁰ Arnot, n35 at 345.

⁴¹ Ibid.

⁴² W Maton (ed), "The Royal Proclamation", *The Salon Law Archive* http://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html. (accessed 30 June 2013).

⁴³ Turtle Island Native Network "Aboriginal Policy, Legal and Constitutional Framework". (accessed 30 June 2013). <http://www.turtleisland.org/news/abpolicy.pdf>.

⁴⁴ *Haida*, n2.

⁴⁵ *Taku River Tlingit First Nation v British Columbia* [2004] 3 SCR 550.

⁴⁶ B Slattery "Aboriginal Rights and the Honour of the Crown" (2005) 29 *SCRL* 433, 436.

⁴⁷ *Haida*, n2 at para 35.

⁴⁸ Ibid, para 20.

Section 35 represents a promise of rights recognition, and it is always assumed that the Crown intends to fulfil its promises. This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of section 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights. This, in turn implies a duty to consult.

Consultation was necessary in order to define Aboriginal rights.⁴⁹ The Crown claim that it could not know what rights existed before claims were resolved and therefore had no duty to consult or accommodate beforehand,⁵⁰ was rejected. While recognising that it might pose difficulties, the Court held that it is possible to reach an idea of asserted rights and their strength, sufficient to trigger an obligation to consult and accommodate, before final judicial determination or settlement.⁵¹ Consultation before final claims resolution should, therefore, occur.⁵² When the Crown has actual or constructive knowledge of the existence, or potential existence, of an Aboriginal right, and contemplates conduct that might adversely affect it, the *honour of the Crown* gives rise to a duty to consult.⁵³

Conclusion

In Canada, administrative law provides a general duty of consultation based on natural law and procedural fairness. This protection has now been extended to include claims made by indigenous groups. Imposing a fiduciary duty on the Crown provides some guidelines for consultation but focuses more on the impact of past governmental action in failing to protect rather than on the processes required to create new relationships with indigenous groups. Statutory protection of Aboriginal rights under section 35(1) of the Canadian Constitution Act 1982 is extremely important as it is the constitutional bedrock on which indigenous claims rest, and the Courts can interpret the sections in light of specific circumstances and monitor government activities that may adversely impact Aboriginal rights. However, the most wide-ranging, effective, and strongest source of the duty to consult rests on upholding the *honour of the Crown*. This principle underpins the other three sources and adds a strong legal imperative for the Crown not only to “engage” but also to “recognise” and “honour” its historical relationship with indigenous peoples.

Four Case Studies concerning the Duty to Consult in Canada

(i) Haida Nation

*Haida Nation v British Columbia (Minister of Forests)*⁵⁴ was an appeal by the Crown to the Supreme Court. In this case there was a strong *prima facie* claim to Aboriginal title. The Crown had granted a tree farm licence to a major forestry firm to harvest in forests, an activity which would, potentially, have serious impacts on Haida Nation rights and title.⁵⁵ The licence was then transferred by the Crown to various companies, despite

⁴⁹ Ibid, para 38.

⁵⁰ Ibid, para 36.

⁵¹ Ibid.

⁵² Ibid, para 33

⁵³ Ibid, para 35.

⁵⁴ *Haida*, n2.

⁵⁵ Ibid, para 15.

profuse Haida nation objections and refusal to give their consent.⁵⁶ The Crown knew of the Aboriginal rights and title and that the transfers could have a serious impact on them. The Chambers Judge had found that the Crown was under a moral, but not a legal duty to negotiate with the Haida Nation.⁵⁷ The British Columbia Court of Appeal reversed this decision, stating that the Crown had a legal obligation to consult with Aboriginal groups whose interests may be affected.⁵⁸

The Supreme Court held that the duty to consult is triggered when:⁵⁹

the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect them. The determination of such a duty depends both on the strength of the right that is being encroached upon as well as the negative impact and gravity of the government's conduct.

In order for the Crown to fulfill its duty to consult, Newman summarises the approach taken by the Supreme Court regarding the nature and content of the Crown-Indigenous relationship as follows:⁶⁰

Good consultations are about developing relationships and finding ways of living together in the encounter that history has thrust upon us. Focusing too narrowly on the legal form of the duty may contain hidden dangers to deeper forms of consultation and reconciliation. Focusing on the legal doctrine may result in a legalistic approach to a relationship that entails extensive attempts to formalise and document discussions which might well not be what best contributes to a relationship of trust.

There had been absolutely no consultation with the Haida nation.⁶¹ For this reason the Court found that the Crown had not met any of the content requirements of the duty to consult. The Court ruled that the decisions made by the Crown relating to the forestry licence consent should be reviewed in light of the necessary consultation requirements and that the Haida Nation could pursue an interlocutory injunction.⁶²

(ii) Taku River

*Taku River Tligit First Nation*⁶³ concerned a mining company, Redfern Resources Limited, which sought permission from the British Columbia government to re-open an old ore mine with deposits of copper, lead, zinc, gold, and silver. Taku River objected to the company's plan to build a road through a portion of their traditional territory. The proposed access road was 160 kilometres long. Experts reported that it would pass through an area critical to the Taku River domestic economy, adversely impact Taku River's continued ability to exercise its Aboriginal rights, and alter the landscape to which the group laid claim.⁶⁴

⁵⁶ Ibid, para 16.

⁵⁷ Ibid, para 23.

⁵⁸ Ibid, para 52.

⁵⁹ Ibid, para 35.

⁶⁰ Newman, n21 at 47.

⁶¹ Ibid, para 42.

⁶² Ibid, para 62.

⁶³ *Taku River*, n45.

⁶⁴ Ibid, para 31.

The Supreme Court held that the Province (Crown) had met its duty to consult meaningfully with the Taku River in its decision-making process for approving the project application by Redfern. In the circumstances, the content of the duty to consult extended beyond the minimal requirements of notice, disclosure, and consultation, to include what it termed a “level of responsiveness to the community’s concerns”.⁶⁵ Taku River were included as part of the Project Committee and had participated fully in the environmental review process and the consultation process under the Provincial Environmental Assessment Act. The views of Taku River were put before decision-makers, and the final project approval contained measures designed to address their immediate and long-term concerns. Thus, it was clear that the requirements of the duty to consult were met because meaningful opportunities for consultation were offered at all appropriate stages of the development of the project under consideration and the parties were able to negotiate accommodation of both parties’ interests.

(iii) *R v Douglas*

The duty to consult in Canada contains an element of shared responsibility in identifying the Aboriginal rights being claimed and their assessment. On the one hand, the Crown has an obligation to identify the relevant rights and failure to do so could result in a finding that the process of consultation is unreasonable.⁶⁶ On the other hand, once notified of government action, Aboriginal communities also have a responsibility to identify the rights they claim will be potentially affected and failure to do so may preclude the need for further consultation.⁶⁷

*R v Douglas*⁶⁸ demonstrates the reciprocity required for proper consultation. The case concerned a dispute between the Cheam First Nation and the Department of Fisheries and Oceans [DFO], over the Department’s decision to open a marine sport fishery and allow non-Aboriginal fishermen to retain early Stuart Sockeye salmon.⁶⁹ The fish are of special significance to the Cheam as they are the first run of their season and have a high-quality fat content. The Cheam argued that the Crown’s decision to open the marine sport fishery at a time when there were restrictions on the Aboriginal fishery was not in accordance with the *honour of the Crown*. It was alleged that the Crown was infringing the Cheam’s Aboriginal right to fish for food, and social and ceremonial purposes that are guaranteed under section 35(1) of the Canadian Constitution Act 1982. These actions were alleged to be in breach of the Crown duty to consult with the Cheam.

The British Columbia Court of Appeal ruled that the Crown consultation was adequate for two principal reasons. First, the Court found that the DFO had conducted appropriate consultations in developing and implementing its fishing strategy. It had conducted detailed and extensive consultation with the Cheam about Crown conservation objectives, including the provision of information and technical assistance to enable informed discussion. The DFO also provided opportunities for the Cheam to express their concerns, resourced and facilitated meetings, and made adjustments to its

⁶⁵ Ibid, para 32.

⁶⁶ *Metlakatla Indian Band v Canada (Minister of Transport)* 2007 FC 553.

⁶⁷ *R v Douglas* [2007] SCCA 352.

⁶⁸ Ibid.

⁶⁹ Ibid, para 10.

targets and exploitation rate in response to Cheam concerns.⁷⁰ In light of the above, the Court held that the DFO was not required to consult each First Nation individually on all openings and closures throughout the season, when its actions were consistent with an overall strategy that had previously been discussed with the group.⁷¹

Second, the Court found that the Cheam did not fulfill their reciprocal obligation to carry out their end of the consultation. Given this finding, to require the Crown to consult on a minor issue went beyond what is required to justify the Department's conduct.⁷² Although an unfortunate outcome for the Cheam, *Douglas* underlines the importance of the need for active participation and reciprocity in the relationship between the Crown and Aboriginal peoples.

Given the nature of the salmon fisheries, the number of Aboriginals involved, and the lack of unanimity between them on important issues, the DFO had insisted on joint consultations. Although joint consultations were an issue for the Cheam, the Court found that they were reasonable and appropriate in the circumstances. The Cheam, however, refused to participate in joint consultations, and the DFO then attempted to consult with them separately. The Cheam still failed to respond to repeated requests for meetings or to respond to major issues. They also failed to communicate their needs in concrete terms in response to DFO requests. The Court found that the Cheam “deliberately frustrated” DFO attempts to consult.⁷³ Thus, the refusal by the Cheam to meet, communicate, and attend group discussions undermined their own assertion that the consultation efforts of the government were flawed.

(iv) Ka’a’ge Tu First Nation

In *Ka’a’gee Tu First Nation v Canada*⁷⁴ the Canadian Federal Court held that the Crown had failed to discharge its duty to consult, and, if necessary, accommodate the Ka’a’Gee Tu First Nation [KTFN] when approving a recommendation for an oil and gas project in the Northwest Territories.

In this case, Paramount Resources Limited was seeking land use permits and water licences for an extension of its existing oil and gas project in the Cameron Hills area north of the Alberta Border. The KTFN were a signatory party to Treaty No. 11, which gave them treaty rights to hunt, fish and trap in the area. Further, the KTFN were one of several Aboriginal groups claiming Aboriginal title to the area, and that claim had already been accepted by the Federal and North Western Territories governments.⁷⁵ Although the Ka’a’gee Tu had participated in early consultations, there was a final stage of decision-making in which modifications were considered without any input from them.

The Court emphasised the strength of the First Nations asserted Aboriginal claim and the seriousness of the potential impact of the proposed use of the land under the oil and

⁷⁰ Ibid, para 40.

⁷¹ Ibid, para 42.

⁷² Ibid, para 45.

⁷³ Ibid.

⁷⁴ *Ka’a’gee Tu First Nation v Canada (Indian Affairs and Northern Development)* [2007] FCJ No. 1007.

⁷⁵ This land claim process was known as the “Deh Cho Process”.

gas project. These factors attracted a higher duty, and necessitated formal participation throughout the entire decision-making process.

The Crown's duty was satisfied in the initial environmental review process and the First Nation benefited from formal participation. However, the Crown later decided to take advantage of the "consult-to-modify" process provided by section 130 of the Canadian Mackenzie Valley Resource Management Act.⁷⁶ Under this Act, when a Review Board issues its report and related recommendations, the responsible Ministers may agree to adopt, reject, or adopt with modifications, the recommendations, after consulting with the Review Board. In this case, the responsible Ministers met with the Review Board and substantially modified many of its recommendations concerning the KTFN.⁷⁷ During this consult-to-modify process, the KTFN were not given an opportunity to provide input into the proposed changes, nor were they allowed to participate in the meeting.⁷⁸

The Court held that the consult-to-modify process allowed the Crown to unilaterally change the outcome of what was, arguably, up until that point, a meaningful process of consultation.⁷⁹ Therefore, in respect of the new proposals, the Crown's duty to consult had not been met.

Conclusion

These important Canadian cases on the duty to consult allow the following conclusions to be drawn. First, the Crown is under a legal and not a moral duty to consult with Aboriginal peoples. Second, where a strong *prima facie* claim of potential Aboriginal rights exists and the Crown has knowledge of this, and no consultation occurs, there is a breach of the Crown duty. Third, when Aboriginal peoples are given opportunities for consultation at all the appropriate stages of a development under consideration, the requirements of the duty to consult are met. Fourth, when there has been formal participation of Aboriginal peoples for most of the process, if subsequent meetings arise that could have the potential to change the outcome or the direction of a development, and Aboriginal peoples are not included in any further discussions, the Crown will have breached its duty to consult.

All of the above are tempered by the reciprocal obligation to engage in consultation that is owed by Aboriginal peoples to the Crown. If the Court finds that the Crown has not fulfilled its duty to consult because Aboriginal groups have failed to reciprocate, the Court may find that the Crown duty has been unduly frustrated and that Crown decisions are, therefore, justified. Finally, if overarching strategies have been agreed upon during early formal consultations, and the requirements of good consultation have been met, further consultation by the Crown for later actions that are consistent with those strategies is not necessary.

⁷⁶ Department of Justice "Mackenzie Valley Resource Management Act" Department of Justice Canada <http://laws-lois.justice.gc.ca/eng/acts/M-0.2/index.html>.

⁷⁷ *Ka'a'gee Tu*, n74 at para 67.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, para 68.

Summary of the Duty to Consult in Canada

In two judgments delivered on the same day,^{80 81} the Supreme Court of Canada held that the duty to consult can arise without a proven Aboriginal or treaty right. It affirmed that the duty can be triggered where an Aboriginal right *prima facie* exists, or when it exists more generally as part of procedural fairness.

More important, however, *Haida* affirmed that the government duty to consult with Aboriginal peoples and to accommodate their interests is grounded in the principle of the *honour of the Crown*, a duty that must be interpreted “generously”.⁸² While unproven Aboriginal rights and title are not specific enough for the principle to make the Crown act as a fiduciary toward Aboriginal peoples, a generous interpretation prevents the Crown ignoring Aboriginal interests that are being seriously pursued in the process of treaty negotiations.⁸³

Haida states that the content of the duty to consult in particular circumstances is not fixed. This being so, Canadian courts use a spectrum analysis in setting the legal standard for consultation. As with any legal test that relies on multiple factors there is a great deal of space for interpretation of the specific requirements in particular instances.⁸⁴

The spectrum of the duty to consult arises from two principal factors: the strength of the Aboriginal claim, and the seriousness of the impact of contemplated government action on the interests underlying that claim. Where these two pre-conditions do not reach the threshold levels discussed earlier in this article, there is no duty to consult.⁸⁵ Furthermore, the scope of the duty can range from minimal notice requirements to a thorough duty to consult Aboriginal communities and accommodate their interests. Throughout this spectrum, each situation requires a meaningful effort by the government to act in a manner consistent with the *honour of the Crown*.⁸⁶ It requires the government to act adequately for the circumstances by providing notice of an issue and appropriate timelines for response, disclosing relevant information, engaging in meaningful discussions, responding to concerns raised in those discussions, and in appropriate circumstances, accommodating Aboriginal interests.⁸⁷

Later cases have built upon *Haida* and *Taku River*. In *Beckman v Little Salmon/Carmacks First Nations*⁸⁸ the Supreme Court considered the standard of consultation required when a treaty sets out specific requirements. The Court held that when a modern land claim treaty has been concluded, the first step is to look at its provisions and try to determine the parties’ respective obligations and whether there is some form of

⁸⁰ *Taku River*, n45.

⁸¹ *Haida*, n2.

⁸² *Ibid*, para 17.

⁸³ *Ibid*, para 27.

⁸⁴ *Ibid*, para 46.

⁸⁵ *Haida*, n2 at para 35.

⁸⁶ *Ibid*.

⁸⁷ *Taku River*, n45.

⁸⁸ [2010] 3 SCR 103.

consultation provided for in the treaty itself.⁸⁹ While consultation may be shaped by the agreement of the parties, the Crown cannot contract out of its honourable dealing with Aboriginal peoples.⁹⁰ The duty to consult is a doctrine that applies independent of the intention of the parties as expressed or implied in the treaty itself. In this light, modern treaties are protected by section 35 of the Canadian Constitution and are not to be interpreted strictly as if they were everyday contracts.⁹¹

In *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*⁹² the Supreme Court confirmed that the legislature can delegate the Crown's duty to consult to a tribunal. The mandate of the tribunal is restricted to the powers expressly or implicitly conferred on it by statute.⁹³ However, this also means that governments can set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process.⁹⁴ As already discussed, the duty to consult with Aboriginal groups is triggered when government decisions have the potential to adversely affect Aboriginal resource interests. This duty must be met. If the tribunal structure is incapable of dealing with potential adverse impacts on Aboriginal interests then the affected Aboriginal peoples must seek a court remedy.⁹⁵

Alongside the principle that the government must act consistently with the *honour of the Crown*, where the government has correctly conceived the seriousness of the claim or impact of the infringement, the decision affecting Aboriginal rights or interests will be set aside only if the government's consultation process is unreasonable. This means that perfect satisfaction for all parties in the consultation process is not required. The Canadian Federal Court of Appeal ruled in *Ahousaht Indian Band v Canada (Minister of Fisheries & Oceans)*⁹⁶ that "reasonable efforts to inform and consult would normally suffice to discharge the duty".⁹⁷ Thus while the content of the duty is informed by *honour*, review of consultation efforts in particular circumstances is limited to review for *reasonable* content.

MAORI CONSULTATION RIGHTS IN AOTEAROA NEW ZEALAND

Two examples that highlight severe deficiencies in New Zealand consultation processes and the need for a duty to consult similar to that of Canada are the Foreshore and Seabed Act 2004, and the sale of State Owned Enterprises by the New Zealand government in 2013.

(i) Consultation Process leading to the Foreshore and Seabed Act 2004

The Foreshore and Seabed Act 2004 is, arguably, the most controversial and contentious legislative act in recent New Zealand history. Nine years later its impact on Maori and

⁸⁹ Ibid, para 67.

⁹⁰ Ibid, para 69.

⁹¹ Ibid, para 102.

⁹² [2010] SCC 43.

⁹³ Ibid, para 55.

⁹⁴ Ibid, para 56.

⁹⁵ Ibid, para 63.

⁹⁶ [2008] FCA 212.

⁹⁷ Ibid, para 54.

the wider population of Aotearoa New Zealand still resonates. This debacle was brought to a head by the case of *AG v Ngati Apa*.⁹⁸ In *Ngati Apa* the New Zealand Court of Appeal held that the Maori Land Court had jurisdiction to determine customary ownership of the foreshore and seabed. In so doing the Court overruled the case of *Re 90 Mile Beach*⁹⁹ and over one hundred years of precedent holding that the English common law automatically displaced customary property ownership in New Zealand.

Five days after the judgment, the government announced that it would pass legislation certifying Crown ownership of the foreshore and seabed.¹⁰⁰ This legislation would substantially impact Maori interests in areas where customary rights still had to be quantified. The government had no binding guidelines for consulting with Maori prior to implementing such contentious national legislation: instead it employed an ad hoc approach which invited conflict between Maori and other New Zealanders.¹⁰¹ The government advocated the purpose of the proposed legislation as being “to protect access rights to the Foreshore and Seabed for all New Zealanders and to ensure customary rights were protected where those rights can be established”.¹⁰² Emphasising the principle of access for all, over Maori customary rights, actively encouraged conflict between Maori and Pakeha by pitting recreational interests against property rights that had yet to be investigated.

The New Zealand community was asked for its input. The government scheduled eleven public meetings in September 2003, in which an estimated three thousand Maori participated.¹⁰³ Members of Parliament held additional meetings in their individual electorates and public submissions were also invited.¹⁰⁴ In an effort to gain a unified position amongst Maori, many independent hui were organised by hapu and iwi. A major early meeting of national Maori leaders produced the Paeroa Declaration.¹⁰⁵ This Declaration upheld the Maori understanding of the foreshore and seabed as being Maori customary property. It further held that, as its customary owners, Maori had the right to approve any government proposals within the area. However, while Maori asserted their right to be heard early in the process, and hui continued to take place outside of the formal system, there was no adequate method of officially transmitting the outcomes of these meetings to the Crown.¹⁰⁶

Maori who participated in the government consultation found they risked not being heard. The *Full Report on the Analysis of Submissions* records that the government’s first

⁹⁸ [2003] 3 NZLR 643.

⁹⁹ *Re Ninety Mile Beach* [1963] NZLR 461.

¹⁰⁰ A Young “Quick move blocks Maori Bid to claim rights over Seabed” *New Zealand Herald*, 24 June 2003 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3509037.

¹⁰¹ T Toweill, *Maori Consultation under New Zealand Law*, LLM Thesis, University of Auckland, 2009, 49.

¹⁰² New Zealand Government “Extensive Consultation on Foreshore Proposal” The Official Website for the New Zealand Government <http://www.beehive.govt.nz/node/17835>.

¹⁰³ New Zealand Government “The Foreshore and Seabed of New Zealand - Full Report on the Analysis of Submissions” The Official Website for the New Zealand Government <http://www.beehive.govt.nz/foreshore/report/foreshore-seabed-report-full.pdf> [*Full Report on the Analysis of Submissions*].

¹⁰⁴ Toweill, n101 at 50.

¹⁰⁵ Tino Rangatiratanga “Te Takutai Moana” Kaupapa Maori http://www.kaupapaMaori.com/assets/iri/takutai_publicationv2.pdf.

¹⁰⁶ Toweill, n101 at 51.

proposal highlighted that the “purpose of the consultation was not a referendum”.¹⁰⁷ Instead it advocated the government position behind the legislation as its purpose. This suggests that the government only intended to act on public opinion if it agreed with its proposed course of action.¹⁰⁸

The government was also extensively criticised for failing to provide adequate information and for its brief consultation timeframe.¹⁰⁹ Many Maori took issue with the discussion document failing to represent Maori concepts in terms they recognised.¹¹⁰ Maori respondents said the discussion document was couched in terms of rights that are recognised in common law, rather than according to tikanga Maori.¹¹¹ Of grave concern was that only six weeks was allowed for submissions.¹¹² The control of the foreshore and seabed raised complex issues concerning customary rights and involved concepts about which the average New Zealander would need more than six weeks to mentally process, consider, and make an informed decision. Arguably, six months to one year would have provided a much better time period for reflection.

The objections recorded in the *Analysis of Submissions* are evidence of an inadequate consultation process. Despite this, the government proceeded to issue a framework for upcoming legislation in December 2003. Although the framework was intended to take into account the written submissions and public discussions that occurred throughout the consultation process,¹¹³ no significant changes were made between the first proposal of the Foreshore and Seabed Policy in August 2003 and the framework implemented in December, four months later.¹¹⁴

The Foreshore and Seabed Bill was introduced to Parliament four days after the Waitangi Tribunal Report on the Foreshore and Seabed Policy was submitted to parliament. Alarming, 94 percent of the 3946 submissions received by the Parliamentary Select Committee opposed the Bill.¹¹⁵ This level of objection made virtually no impact on the substance of the Bill. After only three days before parliament, the Foreshore and Seabed Bill became Law.^{116 117}

¹⁰⁷ *Full Report on the Analysis of Submissions*, n103 at para 1.2.1.

¹⁰⁸ Toweill, n101 at 51.

¹⁰⁹ *Full Report on the Analysis of Submissions*, n103 at para 2.2.2.

¹¹⁰ *Ibid*, para 2.2.2.

¹¹¹ *Ibid*, para 2.2.1.

¹¹² *Ibid*, para 2.2.2.

¹¹³ *Full Report on the Analysis of Submissions*, n103.

¹¹⁴ Waitangi Tribunal “Report on the Crown’s Foreshore and Seabed Policy” Official site for the Waitangi Tribunal <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/1071/00AEFB80-5FE0-4D2E-AD9E-0F45E36B91AE.pdf> at 2.

¹¹⁵ *Full Report on the Analysis of Submissions*, n103 at 12.

¹¹⁶ Foreshore and Seabed Act 2004.

¹¹⁷ The Marine and Coastal Area Act 2011 repeals the Foreshore and Seabed Act 2004. Following an agreement between the National Party and the Maori Party in November 2008, an independent Ministerial Review Panel undertook a nationwide consultation process in the first half of 2009 and concluded that the Foreshore and Seabed Act 2004 failed to balance the interests of all New Zealanders in the foreshore and seabed, and was discriminatory and unfair. In March 2010, the government released a consultation document outlining its preferred solution. The Attorney General consulted widely on this document, with consultation processes extending over eighteen months. They included twenty hui and public meetings with representatives of business, recreational, conservation and iwi groups. Although the consultation process has improved, clear statutory requirements as to the content of consultation, and consequences if they are not followed through, is still necessary to ensure that both parties understand

(ii) State Owned Enterprises Sales

The government also plans to sell several State Owned Enterprises [SOEs], including Genesis Energy, Meridian Energy, Mighty River Power and Solid Energy. Under new legislation the New Zealand government will retain at least 51 percent ownership, with individual shareholdings being limited to 10 percent.¹¹⁸ The issue for Maori was whether a Treaty of Waitangi¹¹⁹ clause in the New Zealand State Owned Enterprises Act 1986 extended to new legislation covering partial state asset sales, and the lack of consultation with Maori in making that decision.¹²⁰

Section 9 of the State Owned Enterprises Act 1986 states:

Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

The section was drafted during the 1980s, when, as part of various reforms taking place in the public sector, State Owned Enterprises were set up to improve efficiency in government trading operations such as postal services, telecommunications, railways, electricity and broadcasting. Maori were wary of the possibility of the business assets of these SOEs being sold into private ownership before Maori claims under the Treaty of Waitangi, to resources currently held by the Crown, had been taken into consideration.¹²¹ In order to show Maori that the government would act in accordance with the Treaty of Waitangi, the Labour government inserted section 9, which guarantees that Crown actions to privatise the nation's assets will not prejudice Maori rights under the Treaty.¹²² While the Crown thought this would be adequate protection for Maori, Maori sought further clarification from the Courts.

In what came to be known as the "*Lands case*",¹²³ the New Zealand courts tested the Crown's actions against the principles of the Treaty for the first time in New Zealand's history. The Court of Appeal found that the Crown's intended transfer of assets, which involved the ownership of some 37 percent of New Zealand's total land area, did not accord with the principles of the Treaty of Waitangi.¹²⁴ The Court of Appeal went on to articulate the principles of the Treaty which the Crown needed to uphold in carrying out the business of devolving assets to SOEs. Although the process would not prevent sales, it would ensure that Maori interests were protected.¹²⁵

what is expected of them in order to reach decisions that are beneficial to both sides. See C Finlayson, "Marine and Coastal Area (Takutai Moana) Bill passes second reading", The Official Website of the New Zealand Government <http://www.beehive.govt.nz/release/marine-and-coastal-area-takutai-moana-bill-passes-second-reading>.

¹¹⁸ The Treasury "Mixed Ownership Model Consultation with Maori" (3 May 2012) The New Zealand Treasury <http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership/mom-cons-slides.pdf>.

¹¹⁹ The Treaty of Waitangi is also referred to as the "Treaty" in New Zealand and this paper.

¹²⁰ "Maori consultation paper for state asset law change released" (4 May 2012) New Zealand Herald http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10782758.

¹²¹ M Chen, *Public Law Tool Box: Solving Problems with Government*, LexisNexis, Wellington, 2012, 106.

¹²² *Ibid*, 107.

¹²³ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

¹²⁴ *Ibid*, 716.

¹²⁵ Chen, n121 at 107.

The proposed sale of SOEs in 2013, and the legislation necessary to facilitate these sales, shows why it is important to Maori that the wording of section 9 of the State Owned Enterprises Act 1986 be retained. As the Leader of the Maori Party, Dr Pita Sharples has stated: "Unless the Treaty clause is kept in there to protect and keep that interest there, then we are going to be up the lake without a paddle".¹²⁶ The New Zealand government was confident that there would be adequate consultation. The current New Zealand Prime Minister, John Key, stated at the start of the consultation process: "This is a consultation process, it starts today. Like all negotiations and discussions there'll be an end point to it but I'd be surprised if that end point was one that ends in tears".¹²⁷

In late January 2012, the New Zealand government announced that a series of hui would be held in early February to consult with Maori on legislative changes necessary before a minority shareholding in four State Owned Enterprises to New Zealanders was floated: that is, before the partial sale of state-owned assets began. It also announced that a formal written submission process would be undertaken in February. This consultation process, however, would not be an opportunity to stop partial sales from proceeding. The government had already decided to proceed with the partial sales and would not deviate from its decision. The consultation process was to allow interested parties to have a say on *how* the partial sales proceeded, and the legislative safeguards needed to ensure that Maori interests were best preserved.¹²⁸ Finance Minister, Bill English, stated at the beginning of the consultation process: "We promised to talk with iwi when we originally announced plans to partially sell the four energy companies and Air New Zealand last year. ... We want to understand Maori views before we take final decisions".¹²⁹

A formal report on this consultation process has yet to be released. However, some initial observations can be made. First, regarding the consultation time-line. The consultation document and information on how to make written submissions were made available to the public on 1 February, 2012.¹³⁰ The deadline for receipt of submissions was 5pm, on 22 February, 2012. Twenty-one days to make a submission is too short a timeframe for allowing responses to the wide-ranging effect these sales could have on Maori interests.¹³¹

Second, Mr English's comments that the aim of consultation was merely "to talk" with Maori and to "understand their view points". Given the potentially serious impact this legislation could have on Maori interests and the uncertainty at the time surrounding

¹²⁶ C Trevett, "Key fails to appease Maori party" New Zealand Herald, 1 February 2012, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10782577.

¹²⁷ Maori consultation paper for state asset law change released" New Zealand Herald, 1 February 2012 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10782758.

¹²⁸ J Hitchcock, "Government Consultation on Partial Sale of SOE's" *Maori Law and Politics* <http://roiaMaori.wordpress.com/2012/01/27/government-consultation-on-partial-sale-of-soes/>.

¹²⁹ W English, "Iwi consultation for partial SOE share floats" The Official Website of the New Zealand Government <http://www.beehive.govt.nz/release/iwi-consultation-partial-soe-share-floats>.

¹³⁰ The New Zealand Treasury, "Mixed Ownership Model Consultation with Maori", <http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership/mom-cons-slides.pdf>.

¹³¹ J Ruru, "Indigenous Restitution in Settling Waters Claims, the Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand", 22 *Pac Rim L & Pol'y J*, 311.

whether the Treaty of Waitangi clause was going to be included, it is arguable that this would have an adverse impact on Maori Interests. Instead of “talking” with Maori, the government should have been engaging in meaningful discussion, responding to concerns raised in those discussions and, in appropriate circumstances, accommodating Maori interests. These actions would have led to good consultation rather than merely information-sharing.

Third, the government’s claim that any consultation with Maori would not affect the sales going ahead as planned is worrisome. Given the seriousness of the potential impact of these sales if the Treaty of Waitangi clause was not included, and Maori claims to holding interests in the assets, the government should have formally involved Maori in each stage of the decision-making process. Not only would this involvement amount to good consultation, it would have the effect of strengthening the Crown-Maori relationship.

In *New Zealand Maori Council v Attorney-General*¹³² a Supreme Court case concerning the restructuring of the Crown's ownership of SOEs, the New Zealand Maori Council argued that the Crown was acting inconsistently with the principles of the Treaty of Waitangi. As part of this claim, it was contended that the consultation undertaken by the Crown with Maori in relation to the share sale of Mighty River Power Limited was inconsistent with the principles of the Treaty of Waitangi. However, the Supreme Court found that the consultation was not inadequate, stating the consultation was rushed but in accordance with the Waitangi Tribunal's recommendation which took account of the urgency with which the government needed to implement the privatisation.¹³³ It was also argued that the scope of the consultations was too narrow.¹³⁴ Again the Supreme Court found the scope was adequate as it was in accordance with the Waitangi Tribunal's recommendation which indicated that narrower consultation would suffice to meet its recommendation.¹³⁵ This finding of the Supreme Court of New Zealand is troublesome because it attempts to shift the blame for a flawed process on to the Waitangi Tribunal. The Crown, by way of the principle of “good faith” under the Treaty of Waitangi, should take responsibility to make sure that the consultation is adequate and meaningful, regardless of the Waitangi Tribunal's recommendations.

Conclusion

Both of these case studies, and the subordinate position of the Courts to Parliament in Aotearoa New Zealand, highlight the disparity between New Zealand and Canadian government consultation processes. In Aotearoa New Zealand the lack of consultation guidelines has produced frustration and lack of confidence in the government. Justice Baragwanath, in the New Zealand Court of Appeal, has noted that failure to provide such an opportunity leads to “feelings of unfairness, dashed hopes and risks of error”.¹³⁶ Implementing a duty akin to Canada’s duty would significantly increase the chances of Maori being adequately consulted on issues that affect them.

¹³² *New Zealand Maori Council v Attorney-General* [2013] NZSC 6.

¹³³ *Ibid*, para 83.

¹³⁴ *Ibid*, para 84.

¹³⁵ *Ibid*.

¹³⁶ *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72.

Sources of the Duty to Consult in Aotearoa New Zealand

Three legal grounds exist for implementing a duty to consult in Aotearoa New Zealand. They are administrative law; government's fiduciary duty; and the principles of the Treaty of Waitangi.

(i) Administrative Law

The legal principles for general rights of consultation in New Zealand and Canada are very similar.¹³⁷ In both countries these principles derive from the natural law rule of "audi alteram partem". In its simplest terms, the rule requires the government to consult anyone whose existing rights will be affected by its contemplated actions.

There has been much judicial commentary in New Zealand on the content of general consultation rights. In *Wellington International Airport v Air New Zealand*¹³⁸ the New Zealand Court of Appeal, endorsing the judgment of *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 111 held that consultation required:¹³⁹

the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done," [and that] "consultation must allow sufficient time, and a genuine effort must be made. It is a reality not a charade. ... Consultation is an intermediate situation involving meaningful discussion.

The Court of Appeal further stated that:¹⁴⁰

there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful.

It appears that the content requirement for general consultation rights in New Zealand is quite strong for individuals. However the issue that arises for Maori, as a collective, is when these general consultation rights can be triggered by hapu and iwi.

A statute may require a decision-maker to consult.¹⁴¹ Where a statute is silent, the common law may impose a duty to consult depending on the power being exercised by the decision-maker and the nature of the decision.¹⁴² As held in *Baker v Canada*,¹⁴³ the closer the decision is to a judicial process, the more likely it will be that consultation will be required. A second point highlighted by the Canadian Court was that statutory context is of the utmost importance in determining whether a decision-maker is

¹³⁷ Wicks, n7 at 41.

¹³⁸ [1993] 1 NZLR 671.

¹³⁹ *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671, 675.

¹⁴⁰ *Ibid.*

¹⁴¹ Joseph, n6 at 956.

¹⁴² *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 144.

¹⁴³ [1999] 2 SCR 817, para 23, citing *Knight v Indian Head School Division No. 19* [1990] 1 SCR 653, 683.

required to consult. Finally, the Canadian Court held that the greater the effect on the individual and individual rights, the more likely it is that consultation will be required.

In the absence of statutory protection, these criteria show a clear imbalance between procedural and substantive justice. Natural resources are the subject of most decisions that impact Maori.¹⁴⁴ Decisions regarding natural resources have a high policy content and are generally considered to be closer to political rather than judicial decision-making.¹⁴⁵ This reduces the applicability of the *Baker* factors and, therefore, the general requirement for consultation.

Aboriginal rights are about collective group rights. They do not easily fit within the *Baker* requirement that “the greater the effect on the individual and individual rights, the more likely it is that consultation will be required”.¹⁴⁶ This has led to debate over whether Maori group rights should attract the same degree of protection as individual rights.¹⁴⁷ According to one commentator, Maori have great difficulty asserting consultation rights under this administrative law schema.¹⁴⁸

(ii) The Crown’s Fiduciary Duty

Another mechanism by which stronger consultation rights are implemented in Canada is by way of upholding the fiduciary relationship of the Canadian Crown with its Aboriginal peoples.

While this could have been a viable means of implementing the duty to consult in New Zealand, in 2009 the New Zealand Court of Appeal rejected a submission that Maori could make claims based on fiduciary duties. In *NZ Maori Council v AG*,¹⁴⁹ it was argued by the New Zealand Maori Council that the transfer of Crown forest land under a deed of settlement for historical breaches of the Treaty of Waitangi to Te Arawa iwi and hapu was inconsistent with the fiduciary duty of the Crown. O’Regan J stated that the law of fiduciaries informs the relationship between Maori and the Crown under the Treaty of Waitangi. That relationship is based on good faith, reasonableness, trust, openness and consultation.¹⁵⁰ However, it does so by analogy and not by direct application.¹⁵¹

O’Regan J emphasised the difficulty of placing the duty of a fiduciary upon the Crown when, in addition to its duty to Maori under the Treaty of Waitangi, it also has a duty to the population as a whole.¹⁵² Although acknowledging that in Canada the fiduciary concept is used in a direct rather than an analogous form to describe the Crown-Aboriginal relationship, he refused to traverse arguments based on the Canadian situation as “those decisions reflect the different and statutory constitutional context in Canada”.¹⁵³

¹⁴⁴ Wicks, n7 at 42.

¹⁴⁵ *Ibid*, 42.

¹⁴⁶ *Ibid*, 43.

¹⁴⁷ See M Durie "The Treaty of Waitangi, Equality of Citizenship and Indigeneity", Te Mata o te Tau Academy for Maori Research and Scholarship, Massey University, 2003.

¹⁴⁸ Wicks, n7 at 42.

¹⁴⁹ *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318, para 71.

¹⁵⁰ *Ibid*, para 81.

¹⁵¹ *Ibid*, para 81.

¹⁵² *Ibid*.

¹⁵³ *Ibid*.

In *Paki v Attorney-General*,¹⁵⁴ Hammond J, also in the Court of Appeal, expressed reluctance to employ the fiduciary concept to the Crown-Maori relationship as “it carries with it a substantial amount of legal baggage”.¹⁵⁵ Hammond J acknowledged that courts have traditionally restricted fiduciary duties to historically well-established categories or relationships that are based on special facts.¹⁵⁶ Once a particular relationship is “pigeon holed” as a fiduciary one, remedies are largely dictated by its categorisation.¹⁵⁷ By categorising the Crown–Maori relationship in this way, a fiduciary standard would impose an obligation on the Crown to act with “real selflessness” vis-a-vis a disadvantaged party, ie Maori.¹⁵⁸ This was at odds with the Treaty of Waitangi in that resort to fiduciary principles carried the unfortunate and erroneous affirmation of the inferior position of Maori.¹⁵⁹

The findings of the New Zealand Court of Appeal in the above two cases overlooks the common legal heritage shared by Canada and New Zealand, and the traditional practice of adopting and adapting case law by analogy between common law jurisdictions. Canada has successfully avoided the Crown’s duty to its Aboriginal peoples conflicting with its duty to the rest of the Canadian public by implementing the duty for minimal impairment of affected Aboriginal interests. This standard could be implemented in New Zealand. The idea that somehow this would place Maori in a subordinate Treaty position belies the fact that Maori *are* in a subordinate position to the government in political decision-making and to the courts in judicial decision-making.

It appears that New Zealand courts are reluctant to adopt the fiduciary relationship as a fully enforceable legal basis for government liability. Therefore, claims for consultation rights based on this line of authority are unlikely to succeed.

(iii) Principles of the Treaty of Waitangi and the *Honour of the Crown*

In Aotearoa New Zealand the principle of the *honour of the Crown* could be enforced either as an independent principle or used to reinforce the principles of the Treaty of Waitangi. The Treaty of Waitangi was signed in 1840 and is New Zealand’s founding document. Article 2 of the Treaty of Waitangi guarantees that the Crown will protect Maori customary rights. It states:

Her Majesty the Queen of England 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 Forest Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession:

These rights are far more specifically stated than those set out in section 35(1) of the Canadian Constitution Act, which provides simply that “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed”.

¹⁵⁴ [2009] NZCA 584.

¹⁵⁵ Ibid, para 102.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, para 81.

¹⁵⁸ Ibid, para 103.

¹⁵⁹ Ibid.

Many Maori believe that the Treaty of Waitangi should have constitutional force. However, unlike section 35(1) of the Canadian Constitution Act, in New Zealand the orthodox view of the Treaty of Waitangi is that it has no legal effect until it has been incorporated into New Zealand domestic law.¹⁶⁰

Differences in the Maori and English texts of the Treaty of Waitangi make it difficult to reconcile an English-based legal interpretation with Maori customary law. For this reason, obligations that have been derived and enforced under the Treaty of Waitangi have often been incorporated by reference to the principles of the Treaty of Waitangi.¹⁶¹ The Privy Council in *New Zealand Maori Council v Attorney-General*¹⁶² held that the principles of the Treaty of Waitangi are the “underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole”.

The principles of the Treaty of Waitangi can be given legal effect in two ways: first they can be incorporated into statutes. For example, the New Zealand Resource Management Act 1991 [RMA] provides in section 8 that all persons exercising functions and powers under the RMA are required to “take into account the principles of the Treaty of Waitangi”. This includes duties to act reasonably and in good faith and to actively protect Maori interests.¹⁶³ The other way Treaty principles can be given legal effect is that they may be relevant to interpreting legislative provisions or statutory discretions.¹⁶⁴ Maori rights would be strengthened considerably if the principles of the Treaty included a duty to consult.

Case law on consultation as a Treaty principle is inconsistent. In the 1987 *Lands case*, the Court of Appeal rejected the submission that consultation was a Treaty principle. The judges claimed such a principle would be “elusive and unworkable”.¹⁶⁵ However, Richardson J did accept that other Treaty principles such as “good faith” and “partnership” may sometimes require consultation. This position has been followed by the Waitangi Tribunal and the lower courts.

A conflicting line of authority is established by the Court of Appeal in the 1989 case, *New Zealand Maori Council v Attorney-General [Forests Case]*.¹⁶⁶ In the *Forests Case* the Court held that: “it is right to say the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues”. This standard was implemented by the Planning Tribunal in *Gill v Rotorua District Council*,¹⁶⁷ a case concerning an appeal pursuant to the RMA against the Rotorua District Council's decision allowing consent to develop eleven residential dwellings on the shores of Lake Tarawera, in Rotorua. Judge Kenderdine held that: “one of these principles is that of consultation with tangata whenua”. The requirement was also affirmed by the High

¹⁶⁰ Wicks, n7 at 43.

¹⁶¹ Joseph, n6 at 67.

¹⁶² *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 516.

¹⁶³ *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349, para 55.

¹⁶⁴ *Huakina Development Trust v Waikato Valley Authority & Bowater* [1987] 2 NZLR 188.

¹⁶⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. [*Lands Case*]

¹⁶⁶ [1989] 2 NZLR 142.

¹⁶⁷ [1993] 2 NZRMA 604, 616.

Court in *Quarantine Waste (NZ) Ltd v Waste Resources Ltd*,¹⁶⁸ a case concerning an application for judicial review of the consent given by Manukau City Council to authorise incineration of waste under the RMA. One of the issues for consideration was whether sections 6 and 8 of the RMA had been breached. Section 6 relates to the recognition and protection of Maori culture, traditions and customary rights; section 8 provides that when any powers or functions are exercised under the RMA, the principles of the Treaty of Waitangi must be taken into account. In deciding whether these sections had been breached, the High Court referred to the necessity for consultation. While the Court found that there had been no breach of the duty to consult Maori, the case clearly links the duty to the principles of the Treaty of Waitangi.

These cases raise a single point: what constitutes a “major issue”? As Wicks argues: “It is the uncertainty inherent in that concept that has allowed some lower courts to leave the law fairly unsettled in this area”.¹⁶⁹ Underlying this ambivalence is the New Zealand court’s duty not to unduly hinder government processes, while also providing legal protection to indigenous groups impacted by government actions in a way that other New Zealanders are not. This is the dilemma the Canadian courts have actively sought to overcome by extending the rules of procedural fairness to include indigenous groups, adapting the fiduciary relationship by analogy and giving a generous interpretation to treaty rights. Throughout the Canadian cases they have relied on the principle of the *honour of the Crown* to constrain government actions and prevent the trampling of indigenous rights, while also insisting that those groups reciprocate by participating fully in negotiations.

(iv) Implementing Consultation as a Treaty principle based upon the *Honour of the Crown*

Consultation could be implemented in Aotearoa New Zealand as a Treaty principle that is based upon upholding the *honour of the Crown*. The concern of the Court of Appeal in the *Lands case*¹⁷⁰ that consultation would be elusive and unworkable is not reflected in the Canadian experience. The criteria for implementing a duty to consult Maori are no less uncertain than the criteria set out for general consultation rights under administrative law in Canada. As highlighted earlier, general consultation rights are context specific: they vary according to the nature of the decision, the decision-maker, and the statute. Furthermore, the duty to consult Aboriginal peoples set out in *Haida* and *Taku River*, is triggered by the presence of actual or constructive knowledge. This acknowledges the superior position of the Crown vis-a-vis its indigenous peoples: it also imposes a legal duty to act honourably towards a Treaty partner, and calls the Crown to account if it fails to do so.

The Canadian cases show that the standard set for honourable behaviour is driven by practicality and reciprocity. *Haida* holds that if no consultation at all occurs there will be a breach of duty. In similar fashion, Maori should be given meaningful opportunities for consultation at all appropriate stages of any government action likely to affect the customary interests they hold in their traditional territories. This would be much easier to implement than the ad hoc consultation process preceding the enactment of the

¹⁶⁸ [1994] NZRMA 529.

¹⁶⁹ Wicks, n7 at 43.

¹⁷⁰ *Lands case*, n165.

Foreshore and Seabed Act, which left both Maori and Crown unsure of the correct procedure, and resulted in mass protests and discontent. Furthermore, the finding of the Canadian court in *R v Douglas* that the duty to consult is tempered by the reciprocal nature of the Crown-Aboriginal relationship mirrors the reciprocity underpinning the Treaty of Waitangi in Aotearoa New Zealand: a concept with which New Zealand courts are very familiar.

There has been tentative judicial movement toward such an approach in Aotearoa New Zealand; in the *Lands case*, Richardson J noted that the conduct of the government must conform to the *honour of the Crown*.¹⁷¹ It had been argued that the concept of the *honour of the Crown* lies at the heart of the Crown perception of the Treaty.¹⁷² The Court accepted that Lord Normanby's Instructions to Hobson of 14 August, 1839, to engage "the faith of the British Crown", reflected the approach of the British authorities to the proposal for the Treaty.¹⁷³ These Instructions emphasised that "all dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands".¹⁷⁴ Additionally, the Instructions from Lord Stanley issued on 13 June, 1845, after questions had been raised about the significance of the Treaty, directed Captain Grey as Lieutenant Governor, to "honourably and scrupulously fulfill the conditions of the Treaty of Waitangi".¹⁷⁵ Thus we see that Crown conduct in New Zealand was grounded in upholding the principle of the *honour of the Crown* just as it was in Canada.

The New Zealand Court of Appeal in the *Lands case* held that where the focus is on the role of the Crown and the conduct of the government, emphasis on the *honour of the Crown* is important. "It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country."¹⁷⁶ The Court also emphasised that inherent in the Treaty of Waitangi is the concept of an ongoing partnership founded on the expectation of good faith by both the Crown and Maori when dealing with each other: "To say this is to do no more than assert the maintenance of the 'honour of the Crown' underlying all its Treaty relationships".¹⁷⁷

Such comments from the New Zealand Court of Appeal contain strong undertones of the Canadian Supreme Court's view that the *honour of the Crown* is, in essence, the conscience of the country. The constitutional importance of the Treaty of Waitangi makes it pertinent to invoke the conscience of the country in Crown-Maori dealings under it.¹⁷⁸ Every aspect of modern New Zealand society has some causative link to the Treaty. Incorporating the principle of the *honour of the Crown* as a Treaty Principle would not only recognise its importance for the Crown in 1840 when the Treaty was signed, and the integral part the duty of the *honour of the Crown* has played in New Zealand's history, but also the ongoing importance that it has for New Zealanders today.

¹⁷¹ Ibid.

¹⁷² Ibid, 682.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid, 703.

¹⁷⁸ Discussed in M Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, Victoria University Press, 2008, 26.

Such a historically important and wide-ranging principle ought to be recognised as an overarching principle of the Treaty of Waitangi, under which set standards for consulting Maori naturally arise as a fundamental aspect of honourable conduct .

CONCLUSION

Four sources of consultation rights for Aboriginal Peoples exist in Canada. The strongest and most extensive of these sources is the principle of the *honour of the Crown* which has been elevated from a morally unenforceable political principle to a legally enforceable standard. The duty to consult is essentially the Crown seeking a fair decision, through fair procedures, in accommodating government sanctioned actions affecting Aboriginal people. It is triggered when the Crown has real or constructive knowledge of the potential existence of Aboriginal rights or title and is contemplating conduct that might adversely affect those rights. The content of the duty to consult is assessed using a spectrum analysis. It will vary according to the strength of the Aboriginal claim and the impact of the contemplated government action on the interests underlying the claim. Good consultation, according to the Supreme Court of Canada, occurs when Aboriginal peoples are given meaningful opportunities for consultation at all appropriate stages of the government action under consideration.

The Canadian experience highlights that the Crown is not free to engage in “ad hoc” consultation. Canadian case law has established set principles by which consultation should occur and by which to measure and hold the Crown accountable for its conduct.

The processes leading up to the Foreshore and Seabed Act and the recent sale of State Owned Assets demonstrate the absence of a similar duty to consult in Aotearoa New Zealand. This has led to disjointed and unsatisfactory consultation processes which would constitute a breach of duty in Canada. On a more positive note, New Zealand already has legal mechanisms by which a duty to consult similar to that in Canada could be implemented. The Crown’s historic dealings with Maori, including the signing of the Treaty of Waitangi, were specifically instructed to be undertaken in a manner consistent with upholding the *honour of the Crown*. It is, therefore, appropriate to incorporate the *honour of the Crown* as an overarching principle of the Treaty of Waitangi which produces a duty to consult whenever Treaty principles are invoked.