THE CROWN'S OBLIGATIONS TO CONSULT IN NEGOTIATIONS WITH MAORI UNDER THE TREATY OF WAITANGI

Opinion Prepared for the Parliamentary Commissioner for the Environment

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THE CROWN'S OBLIGATIONS TO CONSULT IN NEGOTIATIONS WITH MAORI UNDER THE TREATY OF WAITANGI

Introduction

1. Treaty of Waitangi ("**Treaty**") settlements between Crown and Maori often have implications for the allocation, use and preservation of natural and physical resources. Some conservationists and environmental groups have complained to the Parliamentary Commissioner for the Environment ("**Commissioner**") that the public interest and the need to protect the environment have not been given adequate consideration in Crown/Maori negotiations, and that they have not been given any opportunity to ensure the protection of these interests due to the closed nature of the process adopted by the Government.

2. Most concern has focused on the use of Crown land or conservation estate and resources in the settlement of claims, and how this will affect public access, and the protection of conservation values. Environmental groups fear that the transfer of land and resources to Maori will mean that there is no accountability to the public for the management of these lands and resources. These groups have alleged a right to be consulted in the Crown/Maori negotiation process and queried the priority given to accommodating Maori interests over the rest of New Zealanders.

3. A paper put out by Public Access New Zealand ("**PANZ**") is a good example. It states that[1]:

> There is an urgent need for a public consultation process to restore public confidence in the Treaty settlement process by satisfying the public at large that -
>
> (a) the Treaty has been breached in regard to particular Crown-held lands and natural resources, and
>
> (b) remedies proposed by the Crown involving public lands and Crown lands of high public interest are consistent with the lawful findings of the Waitangi Tribunal and that alternative forms of reparation are inappropriate.

4. PANZ also contest that the Treaty gives rise to a partnership which accords a greater entitlement of Crown resources to Maori than to other citizens, and requires the Crown to share its management responsibility for public lands with Maori.

5. Finally, PANZ states that the identity of "the Crown" relative to the Executive is uncertain and refers to "confused judgements and commentary from the Court of Appeal" (pp 1-2). Furthermore, if the Crown acts on behalf of Pakeha or with respect to public lands and resources, then it needs a popular mandate to do so. Otherwise, its actions are illegal (p 3).

6. The Commissioner has identified the following issues concerning the Crown in the settlement of Treaty claims. What is the relationship between "the Crown" and the citizens of New Zealand? To whom is the Crown accountable for its actions? What should be the mechanisms for giving effect to such accountability? Specifically, in the context of the Treaty of Waitangi, when should the practice or

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[1] *Panz, "Investigation into Treaty of Waitangi negotiations and involvement of affected parties", 10 March 1994, p 9*

law regulating the processes of decisions provide for the participation of bodies, like environmental groups, other than the particular claimant and the Government?[2]

7. Under section 16(1)(a), (c) and (g) of the Environment Act 1986, the Parliamentary Commissioner has the following functions:

> (a) With the objective of maintaining and improving the quality of the environment, to review from time to time the system of agencies and processes established by the Government to manage the allocation, use, and preservation of natural and physical resources, and to report the results of any such review to the House of Representatives and to such other bodies or persons as the Commissioner considers appropriate.
>
> . . .
>
> (c) To:
>
> (i) Investigate any matter in respect of which, in the Commissioner's opinion, the environment may be or has been adversely affected, whether through natural causes or as a result of the acts or omissions of any person or body, to an extent which the Commissioner considers warrants investigation; and
>
> (ii) Advise, where necessary, the appropriate public authority and any other person or body the Commission thinks appropriate of the preventive measures or remedial action which the Commissioner considers should be taken; and
>
> (iii) Report the results of the investigation to the House of Representatives.
>
> . . .
>
> (g) To encourage preventive measures and remedial actions for the protection of the environment.

8. Consistent with these statutory functions, the Commissioner is currently drafting terms of reference to investigate, in the context of the Treaty, the adequacy of the process the Crown and government agencies use to manage the allocation, use and preservation of physical and natural resources.

9. This investigation will necessarily be complex due to:

(a) the wide range of natural resources which may be affected by Treaty negotiations, and the different legal regimes which apply. For example, very different issues arise for water as opposed to land, and the legal situation for land claimed by the Crown through statutory vesting, for example, is very different from that of land taken by other means, such as for public works, in negotiations for the return of this land to Maori;

(b) the differences between settling Treaty claims for the return of land and Treaty claims for Maori management of a resource; and

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2 *Extracted from letter sent by the Commissioner to environmental groups as issues surrounding the settlement of Treaty claims, particularly where Crown land is concerned.*

(c) some Crown/Maori negotiations being covered by statutes such as the Conservation Act or the Resource Management Act which expressly include procedural rights, including rights to consultation, while other negotiations are not covered by statute.

10. **To facilitate this review, the Commissioner has requested that we write an opinion on:**

(a) Who is the Crown; and

(b) To whom is it accountable in terms of process, if to anyone, in Treaty of Waitangi negotiations with Maori which have implications for managing the allocation, use and preservation of natural and physical resources.

11. The Commissioner stresses that the determination of what remedial action, if any, is needed will be for her office to decide. Thus, this opinion does not directly canvass that issue. Rather, it will provide the legal information on the basis of which that determination can be made by the Commissioner.

12. As the Federated Mountain Clubs of New Zealand (Inc) ("**FMC**") stated of the review the Parliamentary Commissioner intends to undertake[3]:

> the terms of reference must address what the rights of New Zealanders are. Without agreement on this, it would be impossible to determine whether the process is adequate. For example, if the Treaty disenfranchises all except the Executive Council and Iwi, as for instance Tainui argue, then a process that disregards everyone else would be legally justified (although not justified on any other grounds).

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3 *(Letter to Parliamentary Commissioner to the Environment, Helen Hughes, by President of FMC, Dr Hugh Barr, 11 November 1993)*

ISSUE (1) - WHO IS THE CROWN?

13. At the formal level, the Crown is the Queen in right of New Zealand or her representative, the Governor General, in both cases almost always acting on the advice of their responsible New Zealand Ministers. See section 2 of the State Owned Enterprises Act 1986 where "Crown" is defined as meaning "Her Majesty the Queen in Right of New Zealand". See also section 2(1) of the Constitution Act 1986. "The Sovereign in right of New Zealand is the Head of State of New Zealand, and shall be known by the Royal Style and Titles proclaimed from time to time". Section 2 of the Royal Titles Act 1974 proclaims these style and titles.

14. At a more practical level, the Crown is the Ministers of the Crown which form the cabinet or, as appropriate, individual Ministers or officials who are the Crown. This accounts for the composite definition of "Crown" and "Her Majesty" under the Public Finance Act 1989 as meaning "Her Majesty the Queen in Right of New Zealand; and includes all Ministers of the Crown and all departments" - the latter defined as "any department or instrument of the Crown, or any branch or division thereof". It also accounts for the composite definition under the Crown Proceedings Act 1950 that "Her Majesty" or "the Crown" means Her Majesty in right of her Government in New Zealand".

15. The Crown does not require an express popular mandate every time it seeks to act. If the situation is not governed by statute, or common law, then, as Sir Kenneth Keith stated in his letter to the Director of New Zealand Fish & Game Council, W B Johnson, 11 March 1994, in the context of the question "What persons comprise the Crown in the modern day context of the Treaty of Waitangi?":

> The basic political and constitutional fact is that the Ministers for the time being have the relevant powers of advice, of decision or of direction - in all cases within the law -since they have the support of the House of Representatives the members of which are elected by the people. The system is therefore democratic.

16. The Ministers have already been given a popular mandate to act, and do not further require the authorisation of a majority of electors at a referendum.

ISSUE 2 - LEGAL RIGHTS TO CONSULTATION IN CROWN NEGOTIATIONS WITH MAORI UNDER THE TREATY OF WAITANGI

17. The focus of this section is, in the context of the Treaty:

(a) whether environmental groups can assert legal rights to be consulted in Crown negotiations with Maori concerning land or resources; and

(b) whether non-claimant Maori groups, along with the Maori claimants who are negotiating with the Crown, have rights to be consulted even when non-Maori New Zealanders do not.

18. This opinion thus determines what duties of consultation, if any, does the Crown owe to:

- Maori claimants;
- Maori (non-claimant) groups in general; and
- environmental groups

under

(a) Administrative Law;

(b) section 27 of the New Zealand Bill of Rights Act;

(c) in the Direct Negotiation of Maori Claims Process.

(d) the Treaty of Waitangi;

(e) Customary Maori rights (Aboriginal Title); and

(f) fiduciary duty.

EXECUTIVE SUMMARY ON ISSUE (2): LEGAL RIGHTS TO CONSULTATION IN CROWN/MAORI NEGOTIATIONS UNDER THE TREATY

Environmental groups

19. The relevant statute(s) which apply to a particular Crown/Maori negotiation under the Treaty may expressly provide environmental groups with a right to consultation. If not, the courts will determine whether to imply in such rights taking into account:

(a) the apparent purpose of the legislation;

(b) the extent of the procedural rights already expressly provided;

(c) the scheme of the Act and any time constraints;

(d) the nature of the decision-making body, and the nature of its powers;

(e) the nature of the group's interest in the issue; and

(f) the impact of the Crown/Maori negotiation outcome on the interests of the environmental group.

20. Generally, environmental groups will have no rights which are directly affected by the Crown/Maori negotiation, but they may have indirect rights or legitimate expectations to be heard prior to the negotiation outcome being determined on the basis of:

(a) an express or implied undertaking by the Crown; or

(b) existing status, as a user of those lands and resources; or

(c) a long tradition of the Crown consulting them on issues concerning this land or resource.

21. Environmental groups would have difficulty establishing a legitimate expectation of consultation on the other basis of a special relationship arising from being uniquely affected by a decision, since all of the public will be affected if conservation estate or public resources are given to Maori.

22. For this same reason, environmental groups are unlikely to have rights to natural justice under section 27(1) of the New Zealand Bill of Rights Act ("**NZBORA**") since that requires evidence that a determination is "in respect of that person's right, obligations, or interests protected or recognised by law".

23. Environmental groups will also find it difficult to assert a legal right to consultation under the **Direct Negotiation Claims Process** due to the nature of the decision-making body (Ministers with approval at all stages by Cabinet), and the high policy and political content of the negotiation process. Thus, even if environmental groups would be given standing to challenge such negotiations under common law judicial review, questions arise as to the appropriateness of subjecting such negotiations to judicial scrutiny for lack of fair process.

24. These justiciability concerns may be overcome by applying for judicial review under section 27(2) of the NZBORA. Those who are simply "affected by a determination" can apply and the nature of the NZBORA scrutiny under section 5 of that Act may require the courts to determine the merits of government policy rendering traditional justiciability concerns inappropriate to the NZBORA context.

25. Despite environmental groups' lack of legal rights to consultation, it needs to be noted that there is an increasing practice of consultation in government decisionmaking (policy changes and the making of regulations) because open and transparent processes tend to generate durable solutions which are not later contested in the Courts. It would be difficult, however, to establish a generic process for all Crown/Maori negotiations whether it concerned land, water, or resources.

26. The complexity of the issues and the political sensitivity surrounding negotiations under the Treaty often mean that public participation would make any resolution of Maori grievances impossible. The government will need to retain control of any public consultation process in respect of who will be consulted and when consultation will occur.

27. However, the legal requirements of a statutory duty of consultation - in terms of reasonable information and opportunity to state views; when consultation should be undertaken and the need for "open minds" on the part of the Crown/Maori - may provide a useful basis for the Crown formulating "Principles of Public Participation" that it aims to work towards. These would not be binding on the Crown, but they would set out goals that the Government publicly commits itself to trying to work towards whenever possible in its negotiations with Maori.

28. The three major limitations on the scope of consultation are that:

(a) consultation cannot bring executive decision-making to a standstill;

(b) it cannot undermine the statutory regime and timeframes laid down in legislation; and

(c) the power of final decision must remain with the executive decision-maker, on the Crown/Maori claimant(s) in a negotiation.

Maori claimants and Maori non-claimant groups

29. Maori claimants who could establish rights to land and resources would clearly be entitled to consultation under Administrative Law, the NZBORA and the Direct Negotiations Claims Process. However, Maori groups who are not claimants in a particular negotiation, but may be claimants in other future negotiations may also be able to show a direct interest if the Government pursues a "fiscal envelope" policy for all Maori claims, or a legitimate expectation on the basis that they will be uniquely affected by the outcome of the negotiation.

30. Maori claimants and non-claimant groups can also point to three further bases on which they can/or may be able to claim a right to consultation which is greater than non-Maori claimants:

(a) **Treaty of Waitangi** - mainly when specifically incorporated into statute, including, it is arguable under section 20 of the NZBORA, but may be also even if the Treaty is not incorporated into statute, as a statutory tool of interpretation for ambiguous provisions or by establishing that the Treaty is a mandatory relevant consideration by implication to the Crown's decision. There is not currently a sufficient legal basis to argue that the Treaty is a Maori magna carta and is directly enforceable in court regardless of express statutory incorporation.

Source ?

The Treaty creates a partnership between the Crown and Maori which requires the Crown to consult Maori on truly major issues, or on decisions

which would directly affect tribes in their enjoyment of their lands, forests, fisheries or taonga protected by Article II of the Treaty;

(b) **Customary Maori rights (aboriginal title)** - these rights of use and occupancy of lands, waters and other resources are an established part of New Zealand Law and as they arise by common law, they do not require statutory authorisation to be enforced. But, customary rights can be extinguished if done so by clear and plain statutory provision.

(c) **Fiduciary duty** - (which would include consultation) - arising from aboriginal title; the historical and constitutional nature of the relationship between the Crown and indigenous people; and the Treaty of Waitangi. This duty also arises in common law and does not require statutory authorisation to be judicially enforceable. As a fiduciary, the Crown must act in good faith towards Maori, which includes consulting Maori on issues affecting their enjoyment of their Article II rights under the Treaty.

ADMINISTRATIVE LAW

31. A duty to consult is part of the rules of natural justice, specifically, of the right to be heard in one's own cause. Since the requirements of natural justice vary greatly depending on the facts of each individual case, consultation is that amount of natural justice which requires an opportunity to make submissions. See paragraph 53 ff below.

32. Some statutes triggered by Crown/Maori negotiations concerning land and resources in the context of the Treaty expressly provide rights to consultation. See, for example, the Resource Management Act. However, even in such statutes there may be scope for the courts to imply further rights to consultation. There may also be scope for judicial implication of rights to consultation where no such express rights are set out in the statute.

33. In determining whether or not an executive decision-maker has a duty to consult in the exercise of its discretion, the courts focus first on the statute. Does it set out a statutory duty to consult or does fairness require the court to supplement the Act by implying in a duty to consult? As Cooke J, as he then was, stated in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 141:

> [the] applicability and extent [of natural justice] depends either on what is to be inferred or presumed in interpreting the particular Act . . . or on judicial supplementation of the Act when this is necessary to achieve justice without frustrating the apparent purpose of the legislation.

34. There are five main factors the courts take into account in determining whether or not to imply in rights, or further rights to natural justice.

Parliamentary intention

35. First, the courts will only judicially supplement where that is not contrary to parliamentary intention as evidenced by the scheme of the Act. Thus, in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, the Court of Appeal declined to imply in a right to natural justice for the applicants under the National Development Act 1979 since:

(a) the Act already contained a careful pattern of procedural rights akin to a code; and

(b) a streamlining of procedures is the very purpose of the National Development Act which could be undermined by the Court implying in further rights of natural justice.

36. Thus if a particular Crown/Maori negotiation is governed by a statute setting out very full procedural rights excluding non-claimant Maori or environmental groups, it will be difficult for such groups to assert a right to be consulted, especially where the scheme of the statute connotes a tight timeframe for decision-making.

Nature of the decision-making body

37. The second factor influencing the Court of Appeal's decision not to imply in further rights to natural justice in *CREEDNZ* (cited above) was the nature of the decision-making body. Cooke J stated at 178 that:

> In a judgment delivered by Estey J the Supreme Court stressed that "the very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council". The Court said that it is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply. Applying this approach it was held that there was "no need for the Governor in Council to give reasons for his decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition.
>
> That decision illustrates how slow the Courts are to treat the Executive Council or Cabinet as under any duty to follow a procedure at all analogous to judicial procedure.

38. The decision-making body in *CREEDNZ* was the Executive Council or Cabinet Ministers sitting with the Governor General. As Richardson J stated at 188:

> Cabinet is not a fact-finding body in the ordinary sense. It is not accustomed to conducting hearings or receiving representations directly from public interest groups or private individuals . . . [G]iven the normal processes of decision-making of the Governor-General in Council and Cabinet, . . . it is inherently improbable that in delegating the power of decision, as it did in s 3(3), the legislation contemplated the injection of the requirements of natural justice in this respect into the decision-making process.

39. Thus, the success of environmental and Maori groups in gaining a right to consult may depend on who the "Crown" is in the particular negotiating process.

Nature of the power

40. A third factor relevant to the Court's decision not to imply in further rights to natural justice in *CREEDNZ* was the nature of the power being exercised. The exercise of power on a large scale as opposed to one relating solely to the treatment of an individual is more difficult for the Court to control by subjecting that power to duties of natural justice. Such exercises of power potentially affect such a wide range of interests that it is difficult for the courts to mandate a fair process for all affected without bringing the decision-making process to a halt.

41. The difficulty with Maori/Crown negotiations is that although a specific grievance may concern the treatment of an individual tribe, options for redress, for example, by handing over management of an area or by handing over public land in the conservation estate, may have implications for all New Zealanders. The wider the range of interests affected by a decision, the more difficult it will be for the courts to impose duties of consultation on the executive's exercise of power.

The *Durayappah* factors

42. Finally, in *Durayappah v Fernando* [1967] 2 AC 337, 349, the Privy Council set out three helpful guiding factors for determining whether the principle of fairness should be applied:

> First, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of the control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

43. Thus, for example, the stronger the nature of the interests involved, the more limited the scope of the decision-maker's discretion and the more severe the impact of the sanctions are, the more likely the courts are to find that fairness demands a right to natural justice.

Legitimate expectations

44. From the perspective of Maori claimants and non-claimant groups, and environmental groups, rights of natural justice arise where the executive decision-maker's exercise of discretion affects personal rights or "legitimate expectations". It is arguable that Maori groups who are not the immediate claimants in a specific negotiation, but who will be claimants in future negotiations scheduled with the Crown over other grievances, may have rights which will be affected by a decision if the Crown is operating a "fiscal envelope" policy for Maori claims as a whole. The consequence of such a policy is that the settlement the Crown enters into with the immediate Maori claimants will deplete the resources left in the envelope for the settlement of all other Maori grievances. Alternatively, these non-claimant Maori groups, and maybe also environmental groups, can argue that they have a legitimate expectation of a right to be consulted prior to the resolution of a Crown/Maori claim negotiation.

45. A legitimate expectation can arise from:

(a) an express or implied statement or promise;

(b) existing status, for example, as a licence holder;

(c) past practice, for example a long tradition of consultation; and

(d) the establishment of a special relationship, for example length of time in an industry, amount of money expended; being uniquely affected by a decision.

46. The expectation can be of receiving a substantive benefit or of procedural fairness prior to the making of a decision or the changing of a policy or regulation. However, the breach of such an expectation only entitles the applicant to a right to a fair hearing before the decision-maker acts inconsistently with their expectation. That means, a right to make submissions to the decision-maker which must be carefully considered prior to the decision-maker acting. This is akin to a right to consultation.

47. Legitimate expectations must be reasonable. The conduct of the applicant must not contradict the expectation. Expectations will not be legitimate if they are contrary to statute. For example, in *Wainuiomata District Council v Local Government Commission*, High Court, Wellington, CP 546/89, 20 September 1989, Greig J, the applicants claimed a legitimate expectation to an independent form of organisation on the basis of steps that had been taken from 1986 to constitute Wainuiomata as a separate district under the terms of the Local Government Act 1974. After the Government promised a programme of substantial local government reform in late 1987, the independence process continued past the deadline of 31 March 1988 on the strength of a dispensation. But then the Local Government Amendment (No 3) Act 1988 ("**Amendment Act**") was passed giving the Local Government Commission greatly strengthened powers to reorganise local government. The Commission then decided to abolish Wainuiomata as a separate entity and make it part of Lower Hutt City.

48. Greig J concluded at 26 that until the Amendment Act was passed, Wainuiomata might have claimed a reasonably founded expectation that it would proceed to final reorganisation and ultimate independence as an autonomous district. However, "[o]nce the Amendment Act was passed then in my view the expectation and any reasonable grounds for it were no longer tenable."

49. Similarly, Maori or environmental groups cannot claim that they had a legitimate expectation to a certain outcome from Crown/Maori negotiations if that expectation is contrary to the law.

Consultations prior to the making of regulations

50. Where Crown/Maori negotiations result in a settlement which requires the creation of regulations then those parties directly affected by the creation of regulations can argue for a right to be consulted[4].

51. There has been a long-standing practice of consulting interest groups in the development of regulations, but whether interest groups who are not directly affected by the regulations could assert a right to be consulted is uncertain.

Is the duty only to consult with national groups, or with local groups too?

52. The obligation to consult will generally be with national groups, especially where the matter is a national one, unless local groups can show that their interests are substantially different from the national group and that is known to the decision-maker[5].

What does a duty of consultation comprise?

53. Consultation is that amount of national justice which requires that an opportunity be given to the consultee to make submissions oral or written submissions. The submissions do not necessarily need to be oral ones. Rather the test is what is fair:

- Can the person express themselves adequately in writing?
- Does the matter lend itself to written submissions?
- Have others been heard orally so that a refusal to allow oral submissions may be a breach of the duty of consultation?

54. Consultation has been variously defined in different cases. However, McGechan J's definition of consultation in *Air New Zealand Limited v Wellington International Airport Limited* unreported, High Court, Wellington Registry, CP No 403/91, 6 January 1992 ("**Air NZ (HC)**") captures the main ingredients of this concept well:

> Consultation must be allowed sufficient time and genuine effort must be made. It is to be a reality, not a charade. . . . To "consult" is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion.

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4 *See New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 and Turners & Growers Export Ltd v Moyle, High Court, Wellington, CP 720/88, 15 December 1988, McGechan J.*

5 *See Fowler & Roderique Ltd v AG [1987] 2 NZLR 56.*

55. What consultation requires has to be determined in the context of each particular case, and by the object and purpose of the consultation where that right is set out in statute. However, there appear to be four fundamental elements of consultation:[6]

(a) the consultor must provide the consultee with reasonable information;

(b) the consultor must give the consultee a reasonable opportunity to state his/her views;

(c) the consultor must consider the consultee's views with an open mind before making his/her decision; and

(d) the consultor may act if the consultee does not fully avail himself/herself of the opportunity of consultation.

56. **What** is "reasonable" in any given case must be guided by similar factors to the determination of **whether** there is a right to natural justice, in particular:

(a) the content of consultation must be consistent with the statutory regime and not be contrary to Parliament's intention;

(b) consultation cannot bring decision-making to a standstill or result in Government inertia; and

(c) the power of decision-making must remain with the decision-maker to whom Parliament has entrusted it.

57. Whether consultation is adequate will be determined on an objective basis[7].

The provision of reasonable information

58. How much information must the consultor grant the consultee? In terms of natural justice generally, the applicants must know what the case is against them that they are required to rebut. Otherwise, they cannot be said to have been given a chance to have a say. The general principle is that the consultee must be given sufficient information to be able to make an informed contribution to the consultor's decision-making. This includes all information which is prejudicial to their case. Thus, for example, if Maori claimants or groups or environmental groups have the right to be consulted they must be informed of information contrary to their preferred option for resolving the Crown/Maori negotiation of a claim.

59. The exception to the obligation to provide consultees with this information is where the consultor can show that the information is commercially sensitive or where there are reasons for withholding such official information under the Official Information Act 1982. For example, the Ombudsman upheld the Minister's refusal

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6 *See Hamilton City v Electricity Distribution Commission & Ors [1972] NZLR 605)*

7 *Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671 ("Air NZ (CA)")*

to release documents concerning its negotiations with Ngai Tahu since they were too commercially sensitive. Consultees may be able to prevent the withholding of such commercially sensitive information in some cases by providing undertakings as to confidentiality.

60. Consultees are also required to take every advantage of opportunities presented to be informed of the decision in contention. Thus, for example, in the *Air NZ (CA)* case, the Court of Appeal turned down the consultees' application for further information about the relevant pricing methodology since the consultees:

- took no advantage of an offer to meet with the consultors' primary consultant for tactical reasons; and
- when they were invited to indicate whether they needed any more information, they chose to remain silent (p 682).

61. In contrast, the consultors had provided further information when requested. Thus, placing an active obligation on consultees prevents failure to obtain all relevant documents being used by consultees to gain a tactical advantage over the consultor.

Reasonable opportunity to state views

62. **Notice**: Enough notice of the consultation must be given to enable the consultee to make an adequate response.[8]

63. **How long is a reasonable opportunity?**: Once again, this depends on the facts. As McGechan J stated in the *Air NZ* (HC) case[9]:

> In some situations, adequate consultation could take place in one telephone call. In other contexts, it might require years of formal meetings.

64. The length of time that must be given to the consultee depends on:

(a) the nature of the specific proposals/decision; and

(b) the degree of knowledge that the participants already have may also depend on what the consultee requests[10].

65. This must be balanced however, with the statutory scheme of the Act, and any statutory deadlines. Is a long drawn out consultation consistent with the statutory scheme? It was not in *Auckland City Council v Auckland Electric Power Board & Ors* Unreported, High Court, Auckland Registry, CP 26/93, 16 August 1993, p 25 ("**AEPB**").

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8 *See R v Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168 ("Brent London Borough Council")*

9 *McGechan J was cited in the Court of Appeal judgment at p675*

10 *See Port Louis Corporation v AG for Mauritius [1965] AC 1111 (PC). ("Port Louis Corporation")*

66. The Court of Appeal in *Air NZ* also stated that consultation is **not negotiation.** Thus, the consultees cannot demand "ongoing dialogue" with the object of arriving at agreement.

67. The Privy Council further stated in the *Port Louis Corporation* case at 1133, that "[i]t would not be reasonable to allow a situation to develop in which all initiative and all control of timing would pass from the Government". In *R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1, 4, the Court even stated that sometimes the consultor (or the executive decision-maker) will be the best placed to know how long should be allowed for consultation:

> . . . both the form or substance of new regulations and the time allowed for consulting, before making them, may well depend in whole or in part on matters of political nature, as to the force and implications of which it would be reasonable to expect the Secretary of State rather than the Court, to be the best judge.

68. This may often be the very context in which a request for consultation from Maori or environmental groups arises since Crown/Maori negotiations are often of a political nature. Thus, the courts may be more deferential towards the Crown's timeframe for consultation.

69. Finally, the consultor has a correlated obligation to take advantage of reasonable opportunities to state their views, and failure to do so for tactical reasons will not prevent the duty of consultation being fulfilled[11].

When does consultation have to take place?

70. What is reasonable in terms of period of notice and opportunity to state views will depend on **when** the consultation takes place. Consultation will obviously be pointless if it is conducted when plans lack any specificity at all, or after the final decision is a fait accompli.

71. In *Brent London Borough Council,* the Court stated that consideration must begin when the decision-making process is at a formative stage. Otherwise, it will not be consultation, but merely informing the parties of a fait accompli. This is probably what McGechan J meant when he stated in *West Coast United Council v Prebble* [1988] 12 NZTPA 399, 405 that:

> Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.

72. Thus, notification of decision, even with an open mind, to reconsider the decision after consultation may be inadequate. But approaching the consultee with potential options may comply with a duty of consultation. As the Court stated in *NZ Fishing Industry Association Inc v MAF*, High Court, Wellington, CP 649/87, 11 August 1988, p 41, ("**NZFIA**") as adopted by Cooke P in the Court of Appeal [1988] 1

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[11] *See Air NZ (CA) case at 682-683.*

NZLR 544, 551, the decision-maker "is not expected to approach the industry with an entirely open mind".

73. Finally **when** consultation is required to take place will also depend on the time frame and statutory scheme set out in the Act. For example, in *NZFIA*, where section 107G of the Fisheries Act 1983 required the Minister to "advise the Fishing Industry Board and others the Minister considers appropriate of the proposed recommendation and the reasons for it; to invite submissions in respect of the recommendation and to "have regard to" any submissions so made.

74. The scheme of the Act obviously intended the Minister to have proceeded sufficiently in his thinking to have arrived at a proposed recommendation which he announces to the industry along with the reasons for it. Thus the Minister was not guilty of predetermining the issue prior to consultation.

Did the consultor have an open mind?

75. How "open" does the consultor's mind have to be? An open mind is not a blank one, and as Cooke P stated in *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203, 207 and 208:

> As was recognised in *CREEDNZ*, even strong expressions of prior views do not disqualify persons on whom such task is imposed. They may have provisional views and policies, but they must keep open minds in the sense that at the time or period of decision they must genuinely consider the issues, applying prescribed criteria, and not merely go through the motions. In other words, as Mr Randerson accurately put it, they must remain amendable to argument. Fairness obviously requires as much.
>
> . . . As any Judge knows, the fact that new arguments do not persuade one to change views previously formed does not mean that one has approached the new arguments with a closed mind.

76. These observations were relied on by Williams J in the *AEPB* case. His Honour accepted counsel's submission at p 52 that the "onus . . . was upon those seeking to persuade, to do just that". He also referred to the onus on the Council to prove "closed minds":

> . . . the Council must prove to the civil standard that at the time of considering the public submissions and formulating the final establishment plan for submission to the Minister, the Board did not genuinely consider the issues, but merely went through the motions, while not remaining amenable to argument.

77. Proving that the decision-maker had a closed mind will obviously be more difficult where the statute intends the decision-maker to have formed some views prior to undertaking consultation[12].

Provision of Resources?

78. Although there are precedents of local authorities, for example, providing assistance to Maori groups to allow them to make an effective input via consultation under the

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12 *See NZFIA and CREEDNZ, both cited above.*

Resource Management Act 1991, it would be difficult to argue that there was any **duty** on the Crown to provide such assistance[13].

Mandatory relevant consideration by implication

79. Maori and environmental groups could also gain what is effectively a right to be consulted if they can establish that their views are so pertinent to a decision that it is akin to a mandatory relevant consideration by implication.

80. Establishing that the group's views are sufficiently important is difficult however, As Cooke P stated in *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 225 ("**Ashby**") it would be "exceptional" for a court to find that a matter was of "such overwhelming and manifest importance that the courts might hold what Parliament could not possibly have meant to allow it to be ignored". That is especially the case where the decision concerns an area of high policy, and high political content such as immigration in *Ashby*. Crown/Maori claims negotiations can be described as such an area.

81. Having said that, however, the Court in *Webster v Auckland Harbour Board* [1983] NZLR 646, 650 also stated that:

> This Court has indicated in several recent decisions that, while it may be difficult to show that legislation has impliedly made a certain consideration truly mandatory (as district from permissible), it is certainly not impossible.

82. In *Ashby*, Cooke J suggested that the Gleneagles Agreement might have been a mandatory relevant consideration by implication in determining whether or not to grant temporary permits to the visiting Springbok rugby team. However, he did not express a concluded opinion as the Minister had already taken it into account.

83. In *Valuer-General v Wellington Rugby Football Union Inc* [1982] 1 NZLR 678, an implied mandatory relevant consideration was found as was in *AG v NZMC* [1991] 2 NZLR 129[14].

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[13] *See Ministry for the Environment, "Resources Management: Consultation with Tangata Whenua", September 1991, p 12.*

[14] *This case is discussed in paragraphs 127-128 below.*

THE NEW ZEALAND BILL OF RIGHTS ACT 1990

84. The NZBORA applies to the actions of the executive and actions "[b]y any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law". Section 27(1) of the NZBORA provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination **in respect of that persons rights, obligations or interests protected or recognised by law.** (bolding added)

85. Assuming that the Crown is a "tribunal or public authority", and that the settlement of the Treaty of Waitangi claims involves a "determination", to whom does section 27(1) grant a right to natural justice? Natural justice, of course, includes the right to consultation.

86. Can Maori and environmental groups argue that Crown/Maori negotiations under the Treaty of Waitangi are "a determination in respect of that person's rights, obligations, or interests protected or recognised by law" such that they have a right to be consulted? The immediate Maori claimants in such a negotiation would obviously have such a right.[15]

87. In interpreting this phrase, it is important to note the broad approach the Court of Appeal has taken to the NZBORA. In *Noort v Ministry of Transport: Curran v Police* [1990/92] 1 NZBORR 97, at 151 ("**Noort**"), the Court of Appeal stated that the Long Title to the NZBORA has two implications for the interpretation of the Bill of Rights. First, paragraph (a) expresses a "positive commitment to human rights and fundamental freedoms" and reflects the "spirit [in which] interpretation questions are to be resolved". It requires that the Bill of Rights "be construed generously" in a manner which is "suitable to give to individuals the full measure of the fundamental rights of freedoms referred to" [16] A "rights-centred approach is necessary".[17]

88. Secondly, paragraph (b) of the Long Title recognises that the NZBORA was enacted to affirm New Zealand's commitment to the international Covenant on Civil and Political Rights ("**Covenant**"). Thus, "[i]n approaching the Bill of Rights it must be of cardinal importance to bear in mind the antecedents". (*Noort*, 142.) It is also implicit in paragraph (b) of the Long Title that the NZBORA reflects a commitment to International Human Rights standards.

89. The Court of Appeal has clearly indicated that the NZBORA must be interpreted primarily by reference to the provisions of the Covenant and internationally

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15 *Note that s29 of the BORA provides: "Application to legal persons - Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons."*

16 *Flickinger v Crown Colony of Hong Kong [1990/92] 1 NZBOOR 1, 4; Noort, 139-140).*

17 *R v Goodwin (1992) 9 CRNZ 1, 35-46 ("Goodwin").*

proclaimed Human Rights standards. The common law will be relevant to the proper interpretation of provisions in the NZBORA such as section 27(1) only insofar as it is consistent with New Zealand's international legal obligations under the covenant.

90. Would section 27(1) of the NZBORA confer rights of natural justice or consultation on Maori and environmental groups where the common law doctrine of natural justice or duties of consultation elaborated in the Administrative Law section above would not?

91. The answer is probably not. The phrase "in respect of [a] person's" rights, obligations or interests, was specifically included to make it clear that the determination must relate to and directly affect the individual, rather than being a general determination affecting persons as a class or indirectly affecting a person[18]. Thus although it would not be difficult for the Maori claimants in negotiations with the Crown to argue that the determination of those negotiations have serious and direct consequences for their rights, obligations or interests, it may be more difficult for Maori groups and environmental groups to successfully make the same arguments.

92. If the Crown adopts a "fiscal envelope" policy for resolving all Maori grievances, Maori groups who are not direct claimants in the negotiation may nevertheless argue that they are directly affected by the determination of that negotiation. If the determination grants the direct claimants a lot of resources, there will be less resources left for the resolution of their grievances. Maori groups may also be able to argue that they have a legitimate expectation since they will be uniquely affected by the determination. It is arguable that "interests" under section 27(1) of the NZBORA would include the common law ground of legitimate expectations[19].

93. Note that a "determination" would probably be interpreted as a decision, whether preliminary or final. Thus, the right to natural justice would have to be given even at the preliminary stage of decision-making in the Crown/Maori negotiation process.

94. Consultation is that level of natural justice which requires the ability to give submissions. Whether a right to natural justice under section 27(1) of the Bill of Rights Act will require consultation to be given depends on the facts of each case. However, the right-centred approach adopted by the Court of Appeal means that consultation will be given in most cases. As Hammond J stated in *Simpson v Police* unreported, High Court, Hamilton Registry, AP 58/91, 17 June 1993, p13, "a narrow view of the meaning of the term natural justice' in a Bill of Rights statute would be hopelessly wrong". It is certainly arguable that natural justice under section 27(1) of the NZBORA must be at least as broad in content as under the common law[20], and there have been cases, even under common law, suggesting

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18 *See the Bill of Rights White Paper (1985) para 10.169, p 119. Note that "in respect of" was also used in s 23 of the Official Information Act 1982 to limit its application in the same way.*

19 *See Kiao v West (1985) 150 CLR 550, 616-617.*

20 *See Byers and Ors v Auckland Area Health Board unreported, High Court, Auckland Registry, CP 57/93, 16 February 1993, p 10*

that natural justice goes beyond fair process and includes a substantive component![21]

95. Environmental groups would have a difficult time showing that the Treaty claims settlement process involves a determination "in respect of" their rights. They could argue that their rights as New Zealanders are affected if the settlement results in a granting of land currently in conservation estate to the particular Maori claimants; they, along with the New Zealand public would no longer be able to enjoy that piece of land. However, that appears to be exactly the sort of indirect interest that the phrase "in respect of that person's rights" was intended to exclude from the scope of section 27(1) of the NZBORA. They may also have difficulty arguing that a Crown/Maori negotiation will come to a determination "in respect of" their interests, or legitimate expectation.

THE DIRECT NEGOTIATION PROCESS

96. The National Government has continued with the direct negotiation of Maori claims process established by the Labour Government in 1989.[22]

97. This process allows Maori claimants to opt out of the Waitangi Tribunal/court process, and with the Crown's agreement, to enter into direct negotiation of their claim with the Crown.

98. Setting aside the questions of procedural rights in the Crown's determination of whether or not to accept a claim for negotiation, and the decision of what priority to give the claim on the negotiations register, is the Crown obliged to consult in working through the three stages of the negotiation process, and if so, with whom?

99. Environmental Groups have severely criticised the lack of "fair process" in these Crown/Maori negotiations. The FMC argues that "[t]here is no recognised guidelines or acceptable process. Most of it has been set by cabinet directive, without even getting Parliament's approval."[23] PANZ talks of the popular perception of secret deals due to the lack of public consultation[24] Greenpeace NZ speaks of the need for greater transparency prior to and during the negotiations.[25]

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21 *See NZFP Pulp and Paper Limited and Inca Products Limited v Thames Valley Electric Power Board unreported, High Court, Hamilton Registry, CP 35/93, 1 November 1993, p 37.*

22 *See "The Direct Negotiation of Maori Claims: An Information Booklet", Treaty of Waitangi Policy Unit for the Crown Task Force on Treaty of Waitangi Issues, 1990.*

23 *FMC Letter to Parliamentary Commissioner, 11 November 1993*

24 *PANZ letter to Parliamentary Commissioner, 10 March 1994.*

25 *Greenpeace NZ Letter to Parliamentary Commissioner, 18 November 1993*

100. The three steps of the Direct Negotiation Process comprise:

> **The Negotiation of a Framework Agreement:** This involves both claimants and the Crown reaching agreement on the agenda for detailed negotiations, that is to say the items and issues that could be negotiated. Both claimants and the Crown also need to agree on how the negotiations will be structured and on the appropriate procedures.
>
> The Framework Agreement may cover such items as the scope of negotiations (what will be included as well as any aspects to be kept out of negotiations), the anticipated timeframe, and the way the negotiations will be structured and organised. Procedures for ratifying (formalising) any agreements reached by both Government and the claimants will usually need to be decided upon. Agreement on any financial assistance to be provided during the next stage of negotiations will need to be reached.
>
> **Agreement in Principle:** Once the parties have concluded a Framework Agreement they would then enter into detailed negotiations to deal with the agenda they have already agreed upon. The Agreement in Principle consists of turning the Framework Agreement into a set of practical and workable solutions acceptable to both parties.
>
> All aspects of the claim and possible arrangements for settlement of the claim will be discussed. The objective will be to achieve agreement on some or all of the issues on the agenda and to arrive at solutions acceptable to both parties. Both parties will discuss once again how each will ratify the Agreement in Principle.
>
> **Detailed Agreement:** It is envisaged that this stage will focus on achieving final detailed agreement in all of the areas covered by the Agreement in Principle. Particular emphasis will be put on the way the agreements arrived at will be carried out in the future. Agreement will need to be reached on the way successful implementation will be measured.

101. In carrying out these direct negotiations, the Crown is not acting pursuant to any express statutory authority. Rather, as Sir Kenneth Keith stated in a recent letter to the Director of the New Zealand Fish and Game Council, 11 March 1994, in the context of the question "What persons comprise the Crown in the modern day context of the Treaty of Waitangi?":

> The basic political and constitutional fact is that the Ministers for the time being have the relevant powers of advice, of decision or of direction - in all cases within the law - since they have the relevant powers of advice, of decision or of direction - in all cases within the law - since they have the support of the House of Representatives the members of which are elected by the people. The system is therefore democratic.

102. As this power is not granted by statute, yet it clearly has a public element, it is arguable that its exercise is subject to common law judicial review. Thus a duty of consultation may be argued by those Maori and environmental groups other than the particular Maori claimant.

103. The reality is, however, that such a duty to groups who are only indirectly affected by the negotiation process is unlikely to be found by the courts, especially as each step of the negotiation process needs to be approved by Cabinet[26].

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[26] *Refer to earlier comments on the nature of the decision-making body in CREEDNZ*

104. Furthermore, there may be justiciability concerns over the courts determining the legality of such a high policy, highly political exercise of executive power. The courts are likely to conclude that it is for the Crown to determine the best procedure to adopt. For example, it is unlikely that the court would have intervened to make the Crown consult environmental groups in its negotiations with Ngai Tahu. Rather, the courts are likely to accept the Crown decision that it would have been impossible to manage such a complex process if public consultation rights had been granted. There was a need to examine novel concepts which if only partially understood or prematurely revealed may have jeopardised the settlement. There was also a tight time frame which needed to be adhered to if the negotiations were to succeed.

105. Even where the Court is willing to undertake judicial review, the House of Lords in *R v Environment Secretary, ex parte Hammersmith London Borough Council* [1990] 3 WLR 898 stated that issues which turn on political judgment can generally only be reviewed on the narrow grounds of bad faith, improper purpose and manifest absurdity, not for breach of fair process.

106. Justiciability concerns and the courts' narrow approach to judicial review where the power of decision has high policy content and highly political ramifications may be overcome by applying for judicial review under section 27(2) of the Bill or Rights Act.

Judicial Review under section 27(2) NZBORA

107. Section 27(2) states:

> Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

"Affected by a determination"

108. Note that this provision only requires the determination to "affect" a person's rights, obligations or interests, whereas section 27(1) requires the determination to be "in respect of" a person's rights, obligations and interest to trigger a right to natural justice. The directness of the effect required is less.

109. This is consistent with the concept of standing in Administrative Law, with which, it is arguable, section 27(2) of the NZBORA must be at least as broad. There, the New Zealand courts have adopted the approach in *R v Inland Revenue Commissioner, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, where Diplock LJ held that a person or group has standing where there is no other effective way in which the legality of a decision can be challenged.

110. In *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA), the Court of Appeal concluded that in the exercise of their discretion, responsible public interest groups may be accepted as having sufficient standing under the National Development Act to challenge a decision by judicial review. The Environmental Defence Society was such a group.

111. Although this case can be said to leave open the question of standing under Acts other than the National Development Act, it has generally been accepted after this case that responsible public interest groups can have standing to bring judicial review challenges.

Judicial review "in accordance with the law"

112. Section 27(2) grants people "the right to apply for judicial review", and that has to be "in accordance with law". If the latter phrase is interpreted to mean that all of the common law and Judicature Amendment Act ("**JAA**") requirements of judicial review must be complied with, including the exercise of a "statutory power" within the definition in section 3 of the JAA and justiciability concerns, then section 27(2) would be redundant. If a person cannot get judicial review under common law or JAA requirements, then they will not be able to get judicial review under section 27(2) of the NZBORA either.

113. This appears inconsistent with the approach the Court of Appeal has adopted to the NZBORA, most often citing the approach of Lord Wilberforce in *Ministers of Home Affairs v Fisher* [1980] AC 319, 328 as the appropriate one to adopt in interpreting New Zealand's NZBORA: "a generous interpretation avoiding what has been called "the austerity of tabulated legalism" suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".

114. Furthermore, section 5 of the NZBORA may require courts to determine the merits of government policy. Thus, justiciability concerns are less appropriate in the NZBORA context. As Richardson J stated in *Noort*, 160:

> . . . in principle an abridging enquiry under section 5 will properly involve consideration of all economic, administrative and social implications. In the end it is matter of weighing (1) the significance in the particular case of the value underlying the Bill or Rights; (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights; (3) the limits sought to be placed on the application of the Bill provision in the particular case; and (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

115. Some confirmation of a broader approach to section 27(2) can be taken from the obiter statements of Cooke P in *Burt v Governor-General* [1992] 3 NZLR 672. The Court of Appeal held that they were not going to subject to judicial review the Governor-General's refusal to exercise the Royal Prerogative of mercy for full pardon of a conviction for a crime punishable by life imprisonment since there was no evidence that such an extension of common law judicial review was necessary. However, Cooke P, writing for the Court, raised the possibility of the appellant relying on section 27(2) of the NZBORA to bring a fresh application for judicial review of the refusal, and stated that "[we] do not think that the expression 'judicial review' is used in that subsection in any technical sense."

THE TREATY OF WAITANGI

116. In *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, 324, the Privy Council held that:

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except insofar as they have been incorporated in the municipal law.

Treaty's impact when incorporated into statute

117. In *New Zealand Maori Council v AG* [1987] 1 NZLR 641, ("***NZMC (1987)***") section 9 of the State Owned Enterprises Act 1986 ("**SOE Act**") expressly provided that:

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

118. In determining whether Treaty principles included a duty to consult, Cooke P stated at 665 that:

> In any detailed or unqualified sense this is elusive and unworkable. Exactly who should be consulted before any particular legislative or administrative step which might affect some Maoris, it would be difficult or impossible to lay down. Moreover, wide-ranging consultations could hold up the processes of Government in a way contrary to the principles of the Treaty.
>
> The transfer of Crown lands to State enterprises is such a major change that, although the Government is clearly entitled to decide on such a policy, as a reasonable Treaty partner, it **should** take the Maori race into its confidence regarding the **manner** of implementation of the policy. The Government has already shown willingness to listen to the Maori point of view . . . [Bolding added]

119. Although rejecting a generalised duty to consult, Cooke P clarified in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152, ("**Forestry Case**") that:

> In the judgments in 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties must extend to consultation on truly major issues.

120. In *NZMC* (1987), Richardson J also expressly rejected at p 683 that there was "an absolute duty of universal application superimposed on the consultation which takes place as part of the ordinary political and governmental processes". However, he found that as a Treaty partner, the Crown had to make informed decisions, or be sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to impact of Treaty principles. Sometimes that will require some consultation but the determination of whether or not the Crown had sufficient information, and who to consult remained with the Crown.

121. In the later case of *Tainui Maori Trust Board v AG* [1989] 2 NZLR 513, 530 ("**Tainui**"), Cooke P commented in passing that "[a]vailable means of redress cannot be foreclosed without agreement". However, no other judges referred to the consultation issue. *Tainui* concerned the Crown's attempt to sell off surplus land and coal mining rights without triggering the clawback provisions in the Treaty of

Waitangi (State Enterprises) Act 1988. Tainui saw the lands and mining rights as potential redress or compensation for confiscation of their lands after the so-called Maori Land Wars. Tainui had commenced negotiations with the Crown concerning the Raupatu (confiscated) lands and had lodged a claim with the Waitangi Tribunal.

Treaty's impact when not incorporated into statute

122. In *NZMC* (1987), Cooke P stated obiter:

> that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.

123. Thus, even where the Treaty is not specifically incorporated, it may nevertheless be used as a tool of statutory interpretation for ambiguous provisions. Consistency with Treaty principles may require consultation in the exercise of some statutory provisions/discretions.

124. In *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 ("**Huakina**"), Chilwell J found that the silence of the Water and Soil Conservation Act 1967 ("**Water Act**") on the Treaty did not automatically mean that Maori values were irrelevant. Rather, as the relevant criteria on an application for a water right under section 21 of the Water Act was unspecified and the grounds upon which a person could lodge an objection under section 24(4) were very broad and indefinite, the Court had to resort to extrinsic aids to remedy this deficiency in guidelines. Chilwell J found at 223 that:

> In this case those aids include the Treaty of Waitangi, the Treaty of Waitangi Act 1975, Waitangi Tribunal interpretations of the Treaty and the Town and Country Planning Act. Through all these agencies a common theme is found. It follows that, in an application for the grant of a water right under ss 21 and 24 of the Water Act, the primary tribunal and the Planning Tribunal cannot rule inadmissible evidence which tends to establish the existence of spiritual, cultural and traditional relationships with the natural water held by a particular and significant group of Maori people. In terms of s 24(4) that evidence must be directed to establishing that the grant of the application would prejudice the objector's interests in the spiritual, cultural and traditional relationships of the particular and significant group of Maori people with natural water or the interests of the public generally in those relationships.

125. Chilwell J's justification for finding the Treaty to be part of the context in which the Water Act was to be interpreted even though "the Treaty is not part of the municipal law of New Zealand," was that (at 210)

> [T]he Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people. Among the direct recognitions are the Treaty of Waitangi Act 1975 and the Waitangi Day Act 1976 both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it **is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.** [Bolding added]

126. It is significant to note that in *Huakina*, the Water Act was specifically linked to the Town & Country Planning Act 1977 ("**Planning Act**") under section 4 of the latter Act, and both specifically and generally, the Planning Act gives recognition to Maori concerns. Chilwell J stated that because of this, the Planning Act was also an extrinsic aid to interpretation along with the Treaty. Thus, the question remains whether he would have found the Treaty to be an extrinsic aid if the Water Act had not been part of a comprehensive statutory scheme with the Planning Act, the latter Act incorporating Maori concerns. Establishing that an Act which does not incorporate the Treaty is in a statutory scheme with one that does may be a necessary prerequisite to interpreting its provisions consistently with the Treaty. Only then might the Crown be required to consult with Maori groups to act consistently with the Treaty.

Mandatory relevant consideration by implication

127. In *AG v NZMC* [1991] 2 NZLR 129 ("***Airwaves* Case**") the Court of Appeal upheld the High Court decision to grant an interim declaration preventing the Minister from continuing with the sale of FM frequencies until he had read the Waitangi Tribunal Report on whether the Treaty required the Crown to give Maori a better share of FM frequencies. The Crown having conceded that the Waitangi Tribunal Report on Te Reo Maori (Maori language) was relevant to the Minister's decision to sell, it could hardly credibly argue that the Waitangi Tribunal Report specifically on FM frequencies was not also a mandatory relevant consideration by implication.

128. The majority of the Court thus concluded that despite the silence of the Radiocommunications Act 1989 as to Treaty obligations, the Waitangi Tribunal Report on FM frequencies was a mandatory relevant consideration **by implication** in the Minister's decision on sale of the frequencies.

129. In Crown/Maori negotiations, Maori groups who are the immediate claimants, and maybe even those who are not may argue that the Waitangi Tribunal Report on their claim is a mandatory relevant consideration by implication prior to the determination of the negotiation. In this way, they may be able to get their submissions "heard" and thus effectively exercise a right to be consulted.

130. This is exactly what the applicants argued in *Te Rununganui O Te Ka Whenua Incorporated Society v Minister of Energy* Unreported, High Court, Wellington Registry, CP 236/93, 15 June 1993; before there can be procedural fairness, the Minister must consider the recommendations of the Tribunal in respect of their claims. This argument only failed because Doogue J concluded at p 5 that:

> [T]here is nothing in the Act which gives rise to the faintest breath of an argument that the Minister's actions are subject in any way to a consideration of Treaty claims or a consideration of the manner in which such Treaty claims should be dealt with.

Doogue J expressly distinguished the *Airwaves* Case.

Maori Magna Carta

131. Cooke P has made statements which attempt to establish the Treaty as a fundamental constitutional document which, like the Magna Carta, is judicially enforceable regardless of express statutory incorporation.

132. In the *Airwaves* Case, Cooke P upheld the High Court's decision to grant an interim declaration preventing the Minister from continuing with the sale of FM frequencies on the Administrative law ground along with the rest of the Court of Appeal. However, as an alternative reason for his decision, Cooke P stated a "more fundamental basis" for his decision.

133. This must mean that Cooke P is treating the Treaty like a Maori Magna Carta. Apart from the administrative ground, there is no other basis on which such an obligation to take account of the Waitangi Tribunal report could be based considering the lack of the reference to the Treaty in the Radiocommunications Act.

134. The other judges in the *Airwaves* Case did not raise the Treaty of Waitangi and some judges expressly refrained from dealing with the Treaty since "the legal factual issues that truly arise in this appeal do not . . . call for separate consideration of the terms or principles of the Treaty of Waitangi".[27]

135. Consequently, in *New Zealand Maori Council & Ors v AG & Ors* [1992] 2 NZLR 576, ("**Broadcasting Assets**") where Cooke P found himself in sole dissent, he appeared to back down from his Maori Magna Carta stance stating at p 578 that:

> The bearing of the Treaty in cases outside s 9 [of the SOE Act] is a large and profound question on which it would be unwise, I think, to make any observations in this case.

136. In *Te Runanga o Wharekauri Re Kohu Incorporated v AG & Ors*, [1993] 2 NZLR 301 ("**Sealord**") Cooke P, writing the judgment for the Court of Appeal referred to the *Tainui case* stating that:

> In that case, . . . the basic arguments did not go beyond s 9 of the SOE Act and more fundamental questions of the place of the Treaty in the New Zealand constitutional system were left open. . . . Similarly the large questions were left unanswered and largely free of comment in the radio frequencies case. . . . Such dicta bearing on the wider questions as are to be found in these or other cases of recent times can be no more than obiter, for the subject of the foundations of the New Zealand constitutional system remains unargued, except that occasionally (as in the present case) it has been lightly touched on, and there is no need for or advantage in trying to embark on that profound subject in this judgment.

137. In conclusion, there may well come a time in future when the court recognises the Treaty as a Maori Magna Carta capable of being judicially enforced despite lack of specific statutory incorporation but, for now, the last word rests with the Privy Council in *NZMC v AG & Ors* [1994] 2 NZLR 254:

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[27] *Richardson J at 14 with whom Casey J concurred on this point.*

> The appellants have not attempted to challenge or attack the decision of the Privy Council in *Hoani Te Heuheu Tukino v Aotea District Maori Board* [1941] AC 308 where it was held that the Treaty was not normally directly enforceable by legal action.

138. Maori claimants and groups may find it difficult to assert rights to be consulted where the Treaty or its principles are not expressly incorporated into statute.

The Treaty and the NZBORA

139. It is arguable that the rights of Maori under the Treaty of Waitangi have been incorporated via section 20 of the NZBORA, which guarantees:

> A person who belongs to an ethnic, religious or linguistic minority in New Zealand . . . the right in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language of that minority.

140. Section 20 is identical to article 27 of the Covenant on Civil and Political Rights ("**Covenant**"). The comments of the Human Rights Committee (which supervises the implementation of the Covenant) on New Zealand's periodic report shows that an integral aspect of New Zealand's obligations under article 27 is to implement the Treaty of Waitangi. Thus, it is arguable that section 20 of the NZBORA must impose an identical obligation since it was designed to implement article 27 of the Covenant. On this basis it may be argued that Maori claimants have Treaty rights which can be said, to be recognised under New Zealand's domestic law.

141. Article 27 of the Covenant requires States to take positive measures to help minorities enjoy their culture. This interpretation can be justified by reference to the principle of effectiveness, which guarantees the effective exercise and enjoyment of human rights. Realistically, States must provide substantial assistance if minorities are effectively to enjoy their rights under article 27. Moreover, this interpretation is confirmed by an evolving international practice under article 27, as reflected in State Reports, the summary records of the meetings of the Human Rights Committee, views adopted by the Committee under the Optional Protocol to the Covenant and General Comments issued by the Committee. It is also significant that the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities clearly supports a positive interpretation of article 27.

142. With respect to Maori, one of the positive measures required of New Zealand under article 27 is the implementation of the Treaty of Waitangi. During the discussion of New Zealand's reports, several Members of the Human Rights Committee have implicity recognised that the implementation of the Treaty of Waitangi is an integral aspect of New Zealand's obligations under article 27. Furthermore, New Zealand's reports under article 27 implicity acknowledge the importance of the Treaty of Waitangi's implementation.

143. This arguably has direct consequences for the interpretation of section 20 of the NZBORA. Section 20 was enacted to affirm New Zealand's commitment to article 27 of the Covenant. Section 20 must be interpreted consistently with article 27. It follows that section 20 arguably also requires positive measures to help minorities

enjoy their culture; and, with respect to Maori, one of the measures required is the implementation of the Treaty of Waitangi.

THE DOCTRINE OF ABORIGINAL TITLE - CUSTOMARY MAORI RIGHTS

144. Customary rights are rights of use and occupancy in lands, waters and other resources which continue as a recognised legal interest after conquest, discovery or cession until they are extinguished by the colonising power. As customary rights, or aboriginal title doctrine, as it is sometimes known, is a rule of common law, it can be enforced in the ordinary courts without the need for statutory recognition. Thus it is extremely useful where Treaty principles have not been specifically incorporated into statute.

145. Customary rights have been repeatedly recognised in United States law and are also a feature of Canadian and Australian law[28]. There is no doubt that aboriginal title is part of the law of New Zealand[29].

146. In *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, Williamson J specifically rejected the argument that the phrase "any Maori fishing right" protected by section 88(2) of the Fisheries Act 1983 (now repealed) referred only to a right created by statute. Rather he found that s 88(2) protected customary rights which subsist until they have been validly extinguished.

147. Williamson J further stated that such customary rights were not extinguished by the substitution of Maori customary title with a title order pursuant to the Native Affairs Acts as earlier cases had found.[30] Rather, he adopted the test in the Canadian case of *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3D) 513 where Mahoney J stated that a statute had to express a "clear and plain intention to extinguish that right" before customary rights were extinguished.

148. Cooke P reiterated this test in *Te Runanganui o Te Ika Whenua Inc Society & Or v A G* [1994] 2 NZLR 20 (CA) at 23 where he stated of aboriginal title:

> Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, **the colonising power acquires a radical underlying title which goes with sovereignty**. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the **radical title is subject to the existing native rights.** They are usually, although not invariably, communal or collective. It has been authoratively said that **they cannot be extinguished** (at least in times of peace) **otherwise than by the free consent of the native occupiers and then only to the Crown and in strict compliance with the provisions of any relevant statutes.** [Bolding added]

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28 *See most recently, Mabo v Queensland (1992) 175 CLR 1.*

29 *See R v Symonds (1847) NZPCC 387; Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680.*

30 *See Inspector of Fisheries v Weepu [1956] NZLR 920 and Keepa v Inspector of Fisheries [1965] NZLR 322.*

149. The issue in New Zealand is not whether aboriginal title is part of the law of New Zealand, but what parts of that title have been extinguished and what parts remain extant and thus are still able to base a right of consultation.

150. For example, under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which gives effect to the Sealord Deal, section 9(c) provides that:

> all claims (current and future) in respect of, or directly or indirectly based on, rights and interests of Maori and commercial fishing are hereby fully and finally settled, satisfied and discharged.

Section 10(d) of the same Act also provides:

> the rights and interests of Maori and non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute or otherwise, shall henceforth have no legal effect, and accordingly - (1) are not enforceable in civil proceedings; and (2) shall not provide defence to any criminal, regulatory or other proceeding, - except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.

151. Questions also arise as to the extent to which Acts such as the Resource Management Act have extinguished aboriginal title to a particular resource such as geothermal resources, for example.

152. In conclusion, to the extent that common law customary rights have not been extinguished, they can form the basis of a right to consultation for groups whose customary rights are being affected.

THE CROWN'S FIDUCIARY DUTY TO MAORI

153. A Fiduciary is:[31]

> "[s]imply someone who undertakes to act for or on behalf of another on some particular matter or matters. That undertaking may be of a general character. It may be specific or limited. It is immaterial whether the undertaking is or is not in the form of a contract. It is immaterial that the undertaking is gratuitous. And the undertaking may be officiously assumed without request."

154. If the Crown owes a common law fiduciary duty to Maori, then it may be required to consult them in negotiations under the Treaty concerning land, waters and resources.

155. In *Attorney General of Quebec v Eastmain Band* (1992), 99 DCR (4th 16 (***"Eastmain Band"***) Décary JA described the fiduciary character of the relationship between the Crown and aboriginals as "requiring good faith and reasonableness on both sides and presumes that each party respects the obligations that it assumes toward the other". He then cited, with approval, the decision of Cooke P in *NZMC* (1987).

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[31] *P D Finn, Fiduciary Obligations [1977] at 20]*

156. In *NZMC* (1987), the "collective tenor" of the five separate Court of Appeal judgments was that[32]:

> . . . the Treaty created an enduring relationship of a fiduciary nature akin to partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

157. In the *Forestry* case (cited above) Cooke P stressed the concept of partnership at p152 and then stated:

> we think it right to say that the good faith owed to each other by the parties must extend to consultation on truly major issues . . ."

New Zealand Law

158. That the Crown owes duties of a fiduciary nature to Maori is now established in New Zealand law. In the *Sealord case* Cooke P stated on behalf of the Court of Appeal that:

> The opinions expressed in this Court in the cases already mentioned as to fiduciary duties and a relationship akin to partnership have now been further strengthened by judgments in the Supreme Court of Canada and the High Court of Australia. In these judgments there have been further affirmations that the continuance after British sovereignty and treaties of unextinguished aboriginal title gives rise to a fiduciary duty and a constructive trust on the part of the Crown: See *R v Sparrow* . . . per Dickson CJ and LaForest J . . . **"The *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constituted the source of such a fiduciary obligation" . . .**
>
> . . .
>
> Clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty. **In New Zealand the Treaty of Waitangi is a major support for such a duty.** The New Zealand judgments are part of widespread international recognition that the rights of indigenous peoples are entitled to such effective protection and advancement. [Bolding added]

159. The cases in the Supreme Court of Canada recognising a fiduciary duty arising from aboriginal title are *Guerin v R* (1984) 13 DLR(4th) 321 and *Simon v R* (1985) 24 DLR (4th) 390. In *Te Runanga Muriwhenua Inc v AG* (1990) 2 NZLR 641,655 ("**Muriwhenua**"), Cooke P stated that "[t]here are constitutional differences between Canada and New Zealand, but the *Guerin* judgments do not appear to turn on these".[33]

160. The key case from the High Court of Australia is *Mabo v Queensland* (No 2) (1992) 175 CLR 1. There, the plaintiffs sought a declaration that the State of Queensland was under a fiduciary duty, or alternatively bound as a trustee, to the Meriam people, including the plaintiffs, to recognise and protect their rights and interests in the Murray Islands. They argued that such a duty arose because of annexation over which the Meriam people had no choice, the relative positions of power of the Meriam people vis-a-vis the Crown in right of Queensland concerning their interests

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[32] *Sealord case, p 304.*

[33] *See further the judgments in the Canadian Federal Court of Appeal Eastmain Band and Apsassin v R (1993), 100 DLR (4th) 504.*

in the islands, and the course of dealings by the Crown with the Meriam people and the Islands since annexation. Toohey J held that a fiduciary relationship existed between the parties arising from the Crown's power to extinguish traditional title by alienating the land. It did not depend on an exercise of that power (pp 156-161).

161. The quote from the *Sealord* case reveals that a fiduciary duty can arise from aboriginal title; the historical and constitutional nature of the relationship between the Crown and indigenous people; and on the basis of the Treaty of Waitangi.

162. Thus, even if aboriginal title has been extinguished, a claim to fiduciary duty can be based on the historical and constitutional nature of the relationships between Crown and Maori, and on the Treaty of Waitangi.[34]

163. This is supported by the Canadian case of *Guerin*, where Dickson J found that the fiduciary obligation was a result of the Indians' historical relations with the Crown. The obligation was treated as severable from aboriginal title in that Dickson J indicated that it continued beyond the extinguishment of aboriginal title.

164. The fiduciary duty is generically based rather than based on any special relations between a particular tribe and the government. Thus, Maori groups wanting to assert rights to consultation on the basis of the Crown's fiduciary duty just have to prove that they are indigenous.

Breaches of the fiduciary duty

165. In *Te Runanga O Te Ika Whenua Inc Society and Anor v Ag* [1994] 2 NZLR 20, at 24 ("**Dams Case**") Cooke P stated that:

> **An extinguishment by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power.** See the fisheries case, *Te Runanga o Muriwhenua Inc. v Attorney - General* (1990) 2 NZLR 641,655; the Sealord case at 306; the authorities mentioned in those two cases; and now further the judgments in the Canadian Federal Court of Appeal in *Attorney-General of Quebec v Eastmain Band* (1992) 99 DLR (4th) 16 and *Apassin v R* (1993) 100 DLR (4th) 504. It may be that the requirement of free consent has at times to yield to the necessity of the **compulsory acquisition of land or other property for specific public purposes which is recognised in many societies;** but there is an assumption that, on any extinguishment of the aboriginal title, **proper compensation will be paid,** as stated by Lord Denning, in delivering the judgment of a Judicial Committee of the Privy Council the other members of which were Earl Jowitt and Lord Cohen, in *Oyekan v Adele* [1957] 2 All ER 785,788. [Bolding added]

This is the most recent New Zealand case where fiduciary duty was raised.

166. On the facts of this case, the applicants sought a declaration that the Minister not approve the transfer of, inter alia, the Aniwhenua and Wheao Dams to energy companies since Te Ika Whenua, of which they were a part, had claims to the rivers on which these dams sat.

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[34] *See P McHugh, The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi (Oxford University Press, 1991).*

167. The Court of Appeal concluded at p13 that:

> the reason why the present appeal does not succeed is simply that rights to or in the dams themselves are not held by Maori, nor is there any substantial prospect of a change in that regard; **yet Maori claims to remedies not extending to the ownership of the dams will not be affected by the proposed transfers.** [Bolding added]

168. Thus, if the granting of rights to generate electricity has prejudiced their Treaty or fiduciary or customary rights without consent, Maori may have some ground for complaint and may claim relief through the Waitangi Tribunal or possibly in the ordinary Courts (p8-9). The assumption of control by the Crown implicit in the construction of the dams may be fundamental to the claim of breach of fiduciary duty, for example (p10).

169. Note that the approach of the NZ Court is consistent with the United States cases dealing with the protection of Indian property and resources. There the executive government has been:

(a) held to the standard of a private trustee in the administration of Indian Funds[35];

(b) held liable for the disposal of Indian land without compensation[36]; and

(c) held liable for mismanagement of Indian property or resources where the government has a pervasive or comprehensive control in the management of those resources[37].

Environmental Groups

170. In the *Dams Case*, p24, Cooke P stated that the Crown's fiduciary duty was not absolute, but that "it may be that the requirement of free consent has at times to yield to the necessity of the compulsory acquisition of land or other property for specific public purposes which is recognised in many societies".

171. Environmental groups will want to argue that the fiduciary duty owed by the Crown to Maori is qualified by the need for the Crown to consider the public interest. However, in *Pyramid Lake Paiute Tribe of Indians v Morton* (1973) 354 F Supp. 252 (DC), the Court stated that "the competing interest must be heavily compelling" to outweigh the fiduciary responsibilities owed by the Crown to the tribes.

172. The case concerned the decision of the Secretary of the Interior to issue regulations concerning the water level of the Pyramid Lake to meet a contractual undertaking with the Irrigation District contrary to his fiduciary duty to the tribe. The court found that more than "a mere judgment call" was needed. Rather, the Secretary

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[35] *Manchester Band of Pomo Indians v US 363 F Supp 1238 (1973) (ND Cal).*

[36] *US v Creek Nation 295 US 103 (1935).*

[37] *US v Mitchel 103 SCt 2961 (1983).*

needed to justify any diversion of water from the tribe with precision, and the competing interest needed to be heavily compelling to outweigh the fiduciary responsibilities to the tribe.

AGREEMENT

Between:

THE FIRST NATIONS SUMMIT (the "Summit")

And:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ("Canada") as represented by the Prime Minister of Canada and the Minister of Indian Affairs and Northern Development

And:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA ("British Columbia") as represented by the Premier of British Columbia and the Minister of Aboriginal Affairs.

WHEREAS:

A. The Summit, Canada and British Columbia (the "Principals") intend to participate in a process leading towards the negotiation of treaties;

B. The Principals support the recommendation of the British Columbia Claims Task Force (the "Task Force") to establish a Commission to facilitate the process of treaty negotiations in British Columbia;

C. The Premier of British Columbia is prepared to enter into this Agreement on behalf of British Columbia; the Minister of Aboriginal Affairs has been authorized to enter into this Agreement on behalf of British Columbia by Order in Council No. 623 approved and ordered April 23, 1992;

D. The Prime Minister and the Minister of Indian Affairs and Northern Development are prepared to enter into this Agreement on behalf of Canada; and

E. The Summit is authorized to enter into this Agreement by resolution dated May 15, 1992.

THE PRINCIPALS AGREE AS FOLLOWS:

1.0 DEFINITIONS

1.1 For the purposes of this Agreement and the recitals:

"Commission" means the British Columbia Treaty Commission.

"First Nation" means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.

"Member" means the Chief Commissioner or any of the Commissioners.

"Parties" means the parties to the negotiation of a treaty.

"Summit" means First Nations in British Columbia which have agreed to participate in the process provided for in this Agreement to facilitate the negotiation of treaties between First Nations, Canada and British Columbia.

2.0 ESTABLISHMENT OF THE COMMISSION

2.1 The Principals shall establish the Commission as follows:

(a) Canada shall introduce legislation to Parliament to establish the Commission as a legal entity to carry out the purposes of this Agreement;

(b) The Minister of Aboriginal Affairs shall introduce legislation to the British Columbia Legislature to establish the Commission as a legal entity to carry out the purposes of this Agreement;

(c) Until legislation is enacted, the Chief Commissioner and Commissioners shall be appointed by Orders in Council made by the Lieutenant Governor in Council of British Columbia and the Governor in Council of Canada; and

(d) The Summit shall establish the Commission by resolution.

3.0 ROLE OF THE COMMISSION

3.1 The role of the Commission is to facilitate the negotiation of treaties and, where the Parties agree, other related agreements in British Columbia.

4.0 MEMBERSHIP

4.1 The Commission shall consist of four Commissioners and a Chief Commissioner.

4.2 The Summit, British Columbia and Canada shall nominate two, one and one Commissioners respectively.

4.3 The Principals together shall nominate a Chief Commissioner who shall be the full-time Chief Executive Officer of the Commission and chair its meetings.

4.4 All nominees shall be appointed by the Lieutenant Governor in Council of British Columbia, the Governor in Council of Canada and the Summit.

4.5 Members shall be appointed:

(a) in the case of Commissioners, for a two year term;

(b) in the case of the Chief Commissioner, for a three year term; and

(c) in the case of replacements, for the unexpired term of the Member being replaced.

4.6 A Principal shall nominate within 60 days a replacement for a Commissioner it nominated who dies, resigns or is removed.

4.7 If the Chief Commissioner dies, resigns or is removed, the Principals shall nominate a new Chief Commissioner within 60 days.

4.8 Until a new Chief Commissioner is appointed pursuant to 4.7, the Commissioners may designate by unanimous agreement one of them as acting Chief Commissioner.

4.9 A Member may be renominated at the end of his or her term of office.

5.0 FUNDING FOR THE OPERATIONS OF THE COMMISSION

5.1 During the first five years of the Commission's operations, Canada and British Columbia shall share the operating costs of the Commission as they may agree. Thereafter, or sooner if the Principals agree, these costs shall be shared as the Principals then agree.

5.2 Canada's share of the costs of the Commission shall be subject to annual appropriations by Parliament and approval by the federal Treasury Board; and that of British Columbia shall be subject to annual appropriations by the Legislature and approval by the provincial Treasury Board.

5.3 The Principals providing funds for the Commission's operations shall enter into a funding agreement with the Chief Commissioner to establish financial administration requirements for the Commission and to provide for remuneration of the Members.

6.0 LOCATION OF THE COMMISSION

6.1 The office of the Commission shall be located in British Columbia.

7.0 DUTIES OF THE COMMISSION

7.1 The Commission shall:

(a) Receive statements of intent to negotiate from First Nations which identify the following:

(i) the First Nation and the aboriginal people it represents;

(ii) the general geographic area of the First Nation's traditional territory within British Columbia; and

(iii) a formal contact for communication.

(b) Receive and consider any requirement for negotiation funding submitted by a First Nation.

(c) Forward the statement of intent to Canada and British Columbia, and acknowledge its receipt to the First Nation.

(d) Convene an initial meeting of the three Parties within 45 days of the Commission's receipt of the statement of intent.

(e) Allocate funds which have been provided to enable First Nations to participate in negotiations, in accordance with criteria agreed to by the Principals.

(f) Assess the readiness of the Parties to commence negotiation of a framework agreement in accordance with the following criteria:

(i) Each Party has:

A. appointed a negotiator;

B. confirmed that it has given the negotiator a comprehensive and clear mandate;

C. sufficient resources to carry out the procedure;

D. adopted a ratification procedure; and

E. identified the substantive and procedural matters to be negotiated.

(ii) In the case of a First Nation:

A. has identified and begun to address any overlapping territorial issues with neighbouring First Nations.

(iii) In the case of Canada and British Columbia respectively:

A. has obtained background information on the communities, people and interests likely to be affected by negotiations; and

B. has established mechanisms for consultation with non-aboriginal interests.

(g) Encourage timely negotiations following the six stage process outlined in the Report of the Task Force or such other process as the Parties may agree by assisting the Parties to establish a schedule and by monitoring their progress in meeting deadlines.

(h) Assist Parties to obtain dispute resolution services at the request of all the Parties.

(i) Maintain a public record of the status of negotiations.

(j) Develop an information base on negotiations to assist the Parties.

(k) Prepare and submit an annual budget for review and approval by the Principals.

(l) Not commit nor purport to commit Canada, British Columbia or the Summit to expenditures of funds except as provided in a funding agreement.

(m) At least annually, submit a report to the Principals on

(i) the progress of negotiations;

(ii) the operations of the Commission; and

(iii) any other matter the Commission deems appropriate

which shall be tabled in Parliament by the Minister of Indian Affairs and Northern Development and in the British Columbia Legislature by the Minister of Aboriginal Affairs.

(n) Manage and disburse operating funds in accordance with an approved annual budget, the applicable funding agreement and any applicable laws.

(o) Maintain proper records including those required for any auditing procedures of the Principals and provide access to and copies of such records to a Principal on request.

8.0 POWERS OF THE COMMISSION

8.1 The Commission may:

(a) adopt bylaws and procedures consistent with this Agreement;

(b) determine the times and places of its meetings;

(c) meet by tele-conference; and

(d) do such other things as are necessary to perform its duties.

8.2 The Chief Commissioner may for the purposes of the Commission:

(a) lease premises and engage the services of advisors, officers and staff as may be required to carry out the duties of the Commission; and

(b) enter into service agreements with Commissioners as required.

9.0 DECISIONS OF THE COMMISSION

9.1 The Chief Commissioner and one Commissioner nominated by each Principal shall comprise a quorum.

9.2 Decisions of the Commission shall be made by agreement of at least one Commissioner nominated by each Principal.

10.0 PROTECTION OF MEMBERS OF THE COMMISSION

10.1 The Principals shall not make any claim against the Commission, a Member, or any person holding an office or appointment under the Commission, for anything done or reported or said in the course of the exercise or intended exercise of his or her official functions, unless the matter arose from wilful misconduct or gross negligence.

10.2 The Principals shall indemnify in proportion to their funding obligations a Member against all claims, damages and penalties that are made against or incurred by a Member in the performance of his or her duties pursuant to this Agreement, except where the claim, damages or penalties arose from the Member's wilful misconduct or gross negligence.

11.0 TERM

11.1 The Principals shall terminate the Commission upon completion of the Commission's duties under this Agreement or where the Commission is no longer performing its duties.

11.2 This Agreement shall remain in effect until otherwise agreed by the Principals or until the Commission is terminated in accordance with 11.1 whichever occurs earlier.

12.0 REVIEW

12.1 The Principals shall review the effectiveness of the Commission at least once every three years following its establishment.

13.0 INTERPRETATION

13.1 The Commission may refer to the Report of the Task Force dated June 28, 1991 to provide the context for this Agreement and as an aid to its interpretation, but in the event of inconsistency between the Report and this Agreement, this Agreement shall prevail.

In witness whereof the Principals have executed this Agreement

the 21st day of September, 1992.

SIGNED on behalf of THE FIRST NATIONS SUMMIT by the following authorized representatives:
Chief Edward John, Chief Joe Mathias, Sophie Pierre, Miles G. Richardson and Tom Sampson, in the presence of:

Witness

Address

(as to all signatures)

Chief Edward John

Chief Joe Mathias

Sophie Pierre

Miles G. Richardson

Tom Sampson

SIGNED on behalf of HER MAJESTY THE QUEEN IN RIGHT OF CANADA, by the Right Honourable Brian Mulroney, Prime Minister of Canada and by the Honourable Tom Siddon, Minister of Indian Affairs and Northern Development, in the presence of:

Witness

Address

(as to both signatures)

The Prime Minister

The Minister of Indian Affairs and Northern Development

SIGNED on behalf of HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, by the Honourable Michael Harcourt, Premier of British Columbia and by the Honourable Andrew Petter, Minister of Aboriginal Affairs, in the presence of:

Witness

Address

(as to both signatures)

The Premier of British Columbia

The Minister of Aboriginal Affairs

APPENDIX 3

ENVIRONMENTAL ASSESSMENT INFORMATION FOR DECISION MAKERS

Fundamentals of environmental assessment

> *"Environmental impact assessment is a process whereby a conscious and systematic effort is made to assess the environmental consequences of choosing between various options which may be open to the decision maker .... Environmental assessment must begin at the inception of a proposal, when there is a real choice between various courses of action including the alternative of doing nothing."*[1]

The Environmental Protection and Enhancement Procedures make it clear it is the responsibility of government departments to ensure that environmental protection and enhancement are incorporated in their policies and operations and that a system of environmental assessment is implemented.

Environmental assessment aims to achieve the following:

- To ensure sound decisions through timely provision of information on the environmental implications of options available to decision makers.
- To ensure that full and balanced consideration is given to the environment before irrevocable project, policy or resource use decisions are taken.
- To ensure that all those who may be concerned about or affected by a proposal have an opportunity to influence its planning.
- To take advantage of opportunities to enhance the environment.[2]

The complexity and cost of environmental assessment should be no more than is appropriate given the nature of potential impacts, and the significance of the resources to affected parties and the public.[3]

Under the Environment Act 1986 (as amended 1991) and the Resource Management Act 1991, "environment" is defined as:

(a) Ecosystems and their constituent parts including people and communities; and
(b) All natural and physical resources; and

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1 Environmental Protection and Enhancement Procedures, 1987 Revision, Ministry for the Environment, pp. 2-3.

2 Ministry for the Environment, 1992: Scoping of Environmental Effects.

3 See s.88 (6)(a), Resource Management Act 1991.

(c) Those physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes; and

(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

An "effect" on the environment can thus be determined not only from a natural and physical perspective, but also from a social, economic, aesthetic and cultural perspective.

Fourth Schedule of the Resource Management Act 1991

Guidance on the assessment of effects on the environment are given in the Fourth Schedule, Resource Management Act 1991.

"1 Matters that should be included in an assessment of effects on the environment - Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88 (6)(b) should include -

(a) A description of the proposal:

(b) Where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:

(c) An assessment of the actual or potential effect on the environment of the proposed activity:

(d) Where the activity includes the use of hazardous substances and installations, an assessment of any risks to the environment which are likely to arise from such use:

(e) Where the activity includes the discharge of any contaminant, a description of -

(i) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects; and

(ii) Any possible alternative methods of discharge, including discharge into any other receiving environment:

(f) A description of the mitigation measures (safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect:

(g) An identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted:

(h) Where the scale or significance of the activity's effect are such that monitoring is required, a description of how, once the proposal is approved, effects will be monitored and by whom.

2 **Matters that should be considered when preparing an assessment of effects on the environment** - Subject to the provisions of any policy statement or plan, any person preparing an assessment of the effects on the environment should consider the following matters:

(a) Any effect on those in the neighbourhood and, where relevant, the wider community including any socio-economic and cultural effects:
(b) Any physical effect on the locality, including any landscape and visual effects:
(c) Any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity:
(d) Any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations:
(e) Any discharge of contaminants into the environment, including any unreasonable emission of noise and options for the treatment and disposal of contaminants:
(f) Any risk to the neighbourhood, the wider community, or the environment through natural hazards or the use of hazardous substances or hazardous installations."[4]

The goal of an environmental assessment is to provide the information necessary to give the community confidence that all environmental impacts have been considered and dealt with and to justify the choice of a particular option.

An essential feature of effective environmental assessment is *informed comment* by stakeholder groups. Persons who will be affected by proposed changes to natural and physical resources need to understand not only what is being proposed, but *why* it is considered essential and the options for mitigating adverse effects, before forming and expressing their views on the proposal(s). Having expressed their views, they also need to know the final decision, and whether their views have been taken into account.

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[4] Resource Management Act, Fourth Schedule.