ARE HISTORICAL PERPETUAL LEASES ON MĀORI OWNED LAND (NATIVE RESERVES) A BASIS FOR CURRENTLY ENFORCEABLE FIDUCIARY OBLIGATIONS?

DARA DIMITROV*

ABSTRACT

Colonial perpetual leases over what were once native reserves continue to trouble the New Zealand government. The colonial Public Trust Office was tasked with managing and administering Māori property affairs, with a focus on the administration of the native reserves. However, if the perpetual leases continue to be viewed through the contractual lens, relief for the Māori landowners will not be forthcoming. Therefore, examining the rationale for imposing fiduciary duties upon the colonial Public Trust Office is essential. Where traditional legal fiduciary literature explores the onerous proscriptive duties that bind persons occupying a fiduciary position, this article establishes that the extensive statutory role assigned to colonial Public Trust officers in managing the native reserves for their Māori beneficiaries created a fiduciary relationship. Moreover, this article shows that, when the colonial Public Trust Office exercised its powers, this often led to conflicts of interest with their Māori beneficiaries.

I INTRODUCTION

The issue of whether the colonial Public Trust Office owed a fiduciary obligation to Māori arising from the colonial perpetual leases held over Māori-owned native reserves remains mostly unanswered. While several judgements explore fiduciary obligations owed to Māori by the Crown, these mainly consider fiduciary obligations arising from specific Acts,[1] directly from the Treaty of Waitangi (the Crown-indigenous relationship[2]) or from the legal perspective of attempting to make the Crown a trustee of either a constructive trust or an express trust.[3] This article proposes that the duty arises from the colonial Public Trustee's conduct in administering the native reserves, an argument that has yet to be judicially considered.

II BACKGROUND

New Zealand has a significant number of historical perpetual leases, most of which were established during the colonial settlement in the 1800s. These leases, primarily related to farming areas, also exist in many of New Zealand's major townships and cities. The connection

* Te Piringa, Faculty of Law, University of Waikato
Email: ddimitro@waikato.ac.nz
ORCID: 0000-0002-7324-7528

[1] See eg, *Paki (No 2) v Attorney-General* [2014] NZSC 118, where the Supreme Court rejected fiduciary obligations.
[2] These judgements are found mainly in Waitangi Tribunal records.
[3] See eg, *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17.

between the perpetual leases and the colonial settlement policy of establishing native reserves is less well-known.[4] The Public Trust Office had legal authority over the native reserves from 1882 and played a crucial role in developing the perpetual leases over those reserves. For the most part, the Public Trust Office administered the native reserves without the consent of the Māori landowners.

Historical perpetual leases continue to exist in modern New Zealand mainly because the Torrens land registration system and contract law protect them. Furthermore, it is unlikely that New Zealand's government will undertake a statutory law change anytime soon to address the issues of perpetual leases and the harm caused to Māori landowners. Thus, the equitable remedy of breach of fiduciary duty should be available to the Māori landowners against the Crown.

The creation of the perpetual leases served the interests of colonial settlement to the detriment of the Māori landowners. This article will show that the British colonial office and subsequent colonial (New Zealand) governments considered Māori, the indigenous people of New Zealand, incapable of managing their affairs. Ultimately, the Public Trust Office became guardians (trustees) of the native reserves. Through the lens of equity, this article explores whether imposing a fiduciary duty upon the Public Trust Office is appropriate, given the long-term impact the colonial perpetual leases have had and continue to have on the Māori landowners.

Implicit in the original formation of the perpetual leases was the fiduciary obligation owed to Māori, firstly by the colonial governors and later by the colonial Public Trust Office. This was reiterated when the relationship between the Public Trust Office and Māori was acknowledged as a fiduciary relationship where the Public Trust Office was required to deal with all native reserves on the 'principles of sincerity, justice and good faith'.[5] The Public Trust Office was responsible for ensuring that the native reserves provided the best possible financial return for Māori. The Public Trust Office duties were partly imposed by statute but derived principally from the New Zealand colonial government and British settlement policies. However, the Public Trust Office's decision to use perpetual leases means that Māori landowners may never reclaim their land for occupation or use, as the land is leased to tenants on a permanent basis. To date, many Māori landowners receive peppercorn rents despite the numerous government enquiries into the leases.[6] None has resulted in any meaningful remedy for the Māori landowners.

It is noted that courts have often criticised a government's conduct in its relationships with its indigenous peoples; however, they are reluctant to find that a fiduciary relationship exists. This has undoubtedly been the case in New Zealand. To date, only one *iwi* (tribe) has managed to establish a fiduciary relationship,[7] and while considered a landmark case at the time in 2017,

[4] This article is limited to a consideration of the native reserves.
[5] This was an established tenet set out by Lord Normandy in his instructions to Captain Hobson (the co-author of the Treaty of Waitangi) in 1839, immediately before the Treaty was signed.
[6] Commissions of inquiry occurred in 1890, 1891, 1906, 1912, 1913, 1927, 1934, 1948, 1965, and 1975.
[7] See *Wakatū* (n 3).

there is no likelihood of that case creating a general-purpose fiduciary application to all historical Crown-Māori interactions. Instead, it emphasised that a fiduciary relationship is case-by-case and situation-specific.[8]

The courts have been more likely to settle on 'higher trust' which could not be enforced by the courts.[9] Often termed a 'political trust', indigenous peoples find themselves without a legal remedy to right historical wrongs. However, it is argued that when examining the historical dealings between the Crown and Māori from an equity perspective, the Crown's position can only be seen as that of a fiduciary.

It is noted that The Waitangi Tribunal has explored the appropriateness of imposing fiduciary duties on the colonial government in several claims.[10] It is also noted that formal administration of the native reserves by the Public Trust Office was the most beneficial option available at that time, despite the existence of other forms of administration.[11] However, this article deals specifically with the perpetual leases on native reserves administered by the Public Trust Office. Thus, it examines the fiduciary relationship between the Public Trust Office and Māori.

III NATIVE RESERVES AND SETTLERS

Māori already had a pre-colonial land tenure system. However, it was quite different from the traditional legal system of the colonisers and had little relevance to the general doctrines of English common law. Māori land tenure was based on collective ownership and strongly linked to their familial connections, the land's generational occupation, and usage of the resources found on the land. The *rangatira* (leaders) of the *iwi* had the authority to allocate the resources among the tribal members, and so it was not unusual for one *hapu* (family group) to access the land for their gardens while another hapu had access to the rivers and streams. Moreover, Māori's link to the land was more than a property right. For Māori, the land is integral to their culture, social fabric, and spiritual well-being. Therefore, parts of the land were sacred for Māori (for example, their *urupa* (burial grounds), and they had rules about how the land was managed and used.[12]

Often, Māori were actively involved in the sale and purchase of their land prior to colonisation.[13] However, after the arrival of the settlers, land transactions escalated.[14] Indeed, the settlers' desire for land was both insatiable and difficult to manage. Edward Said's observations of the British settlers were that 'to think about distant places, to colonise them, to populate or depopulate them: all of this occurs on, about, or because of land.' *The actual*

[8] See Alex Frame, 'The fiduciary duties of the Crown to Māori: Will the Canadian remedy travel?' (2005) 13 *Waikato Law Review* 70; Leonard Rotman, *Parallel Paths: Fiduciary doctrine and the crown-native relationships in Canada* (University of Toronto Press, 1996) 155.
[9] See eg, *Tito v Waddell (No 2)* [1977] I Ch 106.
[10] See eg, 'Muriwhenua Land Report – WAI 45' (Waitangi Tribunal, 1997).
[11] Ralph Johnson, 'The trust administration of Māori reserves, 1840-1913' (Waitangi Tribunal, 1997) 100-101.
[12] Roland L Jellicoe, *The New Zealand Company's Native Reserves* (Wellington, 1930) 15.
[13] Paul Moon, 'Thomas Shepherd and the first New Zealand Company' (2013) 47(1) *New Zealand Journal of History* 22.
[14] Bruce Kercher, 'Informal Land Titles: "Snowden v Baker" (1844)' (2010) 41(3) *Victoria University of Wellington Law Review* 605.

geographical possession of land is what the empire, in the final analysis, is all about.[15] Thus, the efficacy of taking Māori land was critical to the colony's success. However, Māori believed, as *tangata whenua* (people of the land), they would never be permanently separated from their lands. Instead, they thought they were providing the settlers the right to live on the land and use the land.[16]

The creation of New Zealand's native reserves began with the New Zealand Company (and its various incarnations).[17] Without Crown or colonial support, the New Zealand Company began selling land to settlers before the settlers had even left Britain. Without a formal land registration system to record the property transactions, the New Zealand Company created the land titles themselves. (Years later, the Company claimed it owned 20 million acres of land but subsequent land commission investigations found this claim to be incorrect.) Regardless, the New Zealand Company had a native policy, which meant that every township settlement would have land set aside for the local Māori. Once the land was purchased from Māori, the New Zealand Company sold parcel land lots to settlers – each lot usually consisted of one acre in the new settlement town and 100 acres of agricultural land (both sections were undeveloped).[18] Māori received a parcel lot for every ten parcel lots sold. These parcels became widely known as the tenths but were also considered the native reserves. All marae, traditional gardens and burial grounds were automatically excluded from the tenths, although this did not always occur. The native reserves were vested in the colonial government when New Zealand became a British colony in 1840. Māori often surrendered the native reserves to the colonial government of the day for administration and management. Before 1882, various colonial entities, such as Commissioners of Land and management boards, had oversight over the native reserves.

It is important to note that in some cases, the boundaries of native reserves were unclear or inaccurately marked on maps, leading to discrepancies with the colonial maps and planning documents.[19] Furthermore, subsequent case law has established that in some instances, while the documentation indicates the native reserves would be set aside for Māori, in practice, the native reserves were not identified nor set aside.[20] It remains unclear how many native reserves were established by the New Zealand Company and how many were withdrawn from the tenths scheme for endowments, Crown land grants, or to meet the obligations owed to arriving settlers.[21] Consequently, the colonial government struggled to identify native reserves, whether

[15] Edward W Said, *Culture and Imperialism* (Vintage, 1993) 78.
[16] Stuart Banner, 'Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand' (2000-01) 34(1) *Law & Society Review* 47.
[17] With the commercial success of the East India Company still fresh in the minds of business-minded men, a group of ambitious men in London established the New Zealand Company. There were three prior incarnations of the New Zealand Company – the first was the New Zealand Company (1825), the second was the New Zealand Association (1837), and the third was the New Zealand Colonisation Company (1838). The New Zealand Company was a joint stock company formed in 1839. By 1850, the New Zealand Company closed its doors.
[18] This was not always the case; some districts had one acre of township land, an accommodation block for Māori (50 acres – often called occupation reserves) and a rural section of 150 acres. This occurred in the Nelson settlement.
[19] Rosemarie Tonk. 'The first New Zealand land commissions, 1840-1845' (MA Thesis, University of Canterbury, 1996) 302.
[20] This was established in *Wakatū* (n 3).
[21] See *Tito v Waddell* (n 9)

the settler occupants had legal title to the land and whether a native reserve was set aside for Māori occupation. For example, the Land Commissioner, in his report about the native reserves in Southland to the Lands Commissioner of Otago, said 'the state of the records in the Land Office relation to the Native Reserves is so defective that I have been at great difficulty in ascertaining the actual state of the legal position of many Reserves, and my Report is therefore not so entirely satisfactory as I could desire'.[22] Regardless, despite the introduction of the Torrens Land System (the initial property land registry in New Zealand was based on the English deed system) in 1870, many of the native reserves failed to be entered into the land registry and were also commonly omitted from the previous deed system.

It is also important to note that the creation of the native reserves continued after the New Zealand Company was liquidated as a matter of colonial government policy. The colonial government, acting under Acting Governor Shortland, pledged to Māori to fulfil the tenths policy of the New Zealand Company and continue to create native reserves for Māori.[23]

Initially, the colonial government attempted to manage the native reserves on a regional basis.[24] However, this occurred ad hoc. Any attempts to identify and follow the chains of titles for the native reserves were frustrated by a lack of consistent record-keeping.[25] In some cases, there were no records kept at all, and the native reserves found in Auckland are an example of this. Disputes over land transactions with Māori were not uncommon, and many of them continue to cause significant challenges even to this day. For example, as noted earlier, land of particular significance to Māori was not meant to be included in the native reserves. However, the land commissioners often ignored this when awarding land to the settlers.[26]

Furthermore, there was the issue of who legally 'owned' the native reserves. This was challenged in *R v Fitzherbert*,[27] a contentious case that determined the native reserves were demesne lands of the colonial government. Although this case focuses on the tribes of Te Ātiawa/Taranaki's legal action to have a Crown land grant returned to them, the ruling from this case had long-lasting implications for the native reserves and Māori.[28]

To complicate matters further, subsequent colonial governments were tasked with trying to provide a legal definition of a 'native reserve'. This was important because only land legally defined as a native reserve could come under the authority of the colonial Public Trust Office. So, while the first attempt at a definition is found in the *Native Reserves Act 1873* (NZ), this Act was never implemented. A definition was subsequently included in the amended *Native*

[22] William H Cutten, 'Chief Commissioner (1858)', *Parliamentary Papers* (Report, 2024) <https://paperspast.natlib.govt.nz/parliamentary/appendix-to-the-journals-of-the-house-of-representatives/1858/I/432>.
[23] 'Te Whanganui a Tara me ona takiwa; Report on the Wellington District (WAI 145)' (Waitangi Tribunal, 2003) 137.
[24] See *Tito v Waddell* (n 9)
[25] See Johnson (n 11) 10.
[26] Stephen Quinn, 'Report on: The Wellington Tenths Reserve Lands' (Waitangi Tribunal, 1995).
[27] *R v Fitzherbert* (1872) 2 NZCAR 143.
[28] See Quinn (n 26).

Reserves Act 1882 (NZ). The amendment meant that the definition could capture any land deemed native-reserved land.[29]

The idea of the native reserves may have initially been attractive to the colonial government as a way of providing protections for Māori, especially because the British colonisers assumed that Māori were incapable of managing their lands. This resulted in a series of administrative bodies that had oversight of the native reserves. However, this did not always result in an equitable outcome for either the settlers or Māori, so the land commissioners and other administrative bodies were abolished and replaced with the Public Trust Office. The prevailing belief at the time was that the Public Trust Office would be better placed to administer Māori land, and Māori would have a reliable income that would grow over time.[30] In reality, these beliefs were never fulfilled because the growing land law legislation favoured the lessees and consequently restricted any income that could go to Māori.[31]

IV THE COLONIAL PUBLIC TRUST OFFICE

Established by the *Public Trust Office Act 1872* (NZ), the Public Trust Office was a government department for over 125 years.[32] The colonial Public Trustee duties initially focused on providing trusteeship protections for minors, wives (women had few legal rights in colonial New Zealand) and those who were mentally incapable of looking after themselves.[33] The Board of Advice, otherwise more widely known as the Public Trust Office Board, determined whether a Public Trust officer was the most suitable person to deal with an estate. In practice, the first Public Trust Office had regional officers (Public Trust officers) across the country – with the intention that a local officer would be better able to handle property due to familiarity with the area. On the enactment of the *Public Trust Act 1872* (NZ), there was never any intention for the Public Trust to manage Māori affairs. However, this changed within the following years. In the case of the native reserves, the reserves were vested in the Public Trust Office by the colonial government by the 1882 Act. The Māori landowners of each reserve were named as the beneficiaries.

However, identifying the Māori landowners of each native reserve was not always straightforward, and thus, the Public Trust officer would apply to the Native Land Court to determine who the landowners were. Nevertheless, each legislative introduction or amendment defined the nature and extent of the powers the colonial Public Trust officers could exercise over the native reserves. Consequently, the colonial Public Trust Office was tasked with the historic responsibility of protecting Māori's private property rights by guarding the interests of Māori against the incursion of voracious colonial settlers seeking land.

[29] See Jellicoe (n 12) 79.
[30] See Johnson (n 11) 104.
[31] Hilary Mitchell and John Mitchell, 'The native tenth reserves', *The Prow* (Web Page, 2020) <https://www.theprow.org.nz/maori/the-native-tenths-reserves/>.
[32] The Public Trust Office became an autonomous Crown Entity in 2002.
[33] EJ Trevelyan et al, 'The Public Trustee in India, New Zealand, Australia, and England' (1916) 16(2) *Journal of the Society of Comparative Legislation* 110.

However, the colonial government's primary focus was on the development of New Zealand so that townships would be established while, at the same time, productive farms were established. To this end, the *Native Reserves Act* (and its subsequent amendments) gave the colonial Public Trust Office the authority to exchange, lease or sell the native reserves without consultation with the Māori landowners.[34]

By the 1880s, it was clear that the colonial government controlled the colonial Public Trust Office, as the decisions of the Public Board closely mirrored those of the Executive.[35] An example of this is the *West Coast Settlement Reserves Act 1881* (NZ) which demonstrated that the colonial Public Trust officer acted to benefit Māori beneficiaries but simultaneously promoted land settlement. Moreover, the colonial Public Trust officers had the authority to determine and assess whether the native reserve lands were suitable for resettlement [by settlers] based on whether Māori had left the land vacant or unimproved. Based on that assessment, the colonial Public Trust officers often granted perpetual leases for the native reserves based on their evaluations.

From this perspective, the role and functions of the colonial Public Trust Office make it easier to establish a fiduciary relationship between Māori and the colonial government compared to other jurisdictions, such as Canada and Australia. This is mainly because it was explicitly expressed in documents published by the colonial Public Trust Office, colonial politicians (both British and New Zealanders) and historical [policy] documents. Justice Glazebrook reiterated this finding in the *Wakatū* case. However, where traditional legal literature explores the onerous proscriptive duties that bind persons occupying a fiduciary position of the 'profit' rule (the fiduciary must not make personally profit by virtue of the position) and the 'conflict' rule (the fiduciary must not place themselves in a position where the duty to the principal is in conflict with the other interests of the fiduciary);[36] the profit rule does apply in this case. Notably, this article will establish that the broad statutory role imposed on the colonial Public Trust officers to promote the development of colonial New Zealand led to conflicts with the interests of the Māori beneficiaries when they exercised their powers.

So, while traditional legal literature and case law have imposed strict, onerous proscriptive fiduciary duties on other colonial governments, few, if any, have explored the notion of conflict of interest the colonial Public Trust Office found itself in. Therefore, examining the rationale for imposing fiduciary duties upon the colonial Public Trust Office is essential.

V FIDUCIARY RELATIONSHIP

Traditionally, parties in a fiduciary relationship are based on trust and confidence.[37] Founded in common law, it imposes duties on individuals who have agreed to act for another, whether

[34] This was initially established by the *Native Land Act 1873* (NZ) but was consolidated under the *Public Revenues Act 1877* (NZ).
[35] See Johnson (n 11) 90.
[36] John McCamus, 'Prometheus unbound: Fiduciary obligation in the Supreme Court of Canada' (1997) 28(1) *Canadian Business Law Journal* 104.
[37] Tamar Frankel, 'Toward Universal Fiduciary Principles' (2013) 39(2) *Queen's Law Journal* 391.

explicitly or implicitly.[38] The fiduciary has agreed to undertakings [responsibilities] that require the fiduciary to act in a particular way.[39] It is also an arrangement rooted in equity rather than a proprietary right. Lord Millet said: 'A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.'[40]

In its broadest sense, fiduciary relationships are identified by the beneficiary's vulnerability to the fiduciary's power.[41] Thus, the fundamental core fiduciary duty is always acting in the beneficiary's best interests, which demands a duty of care from the fiduciary. More importantly, the duty of care is not derived from the fiduciary's position; rather, it arises from the fiduciary's undertakings.[42] Furthermore, a fiduciary's undertakings are distinct from those found in a contract, even if contractual duties may overlap with fiduciary duties.[43] Notably, it is worth emphasising that the courts have found limits on the reach of fiduciary duties by typically examining the nature of the fiduciary's undertakings.[44] In *Goldcorp,* the Privy Council emphasised that being party to a contract does not necessarily imply that fiduciary duties are also owed; the parties are already obliged to honestly and conscientiously so as to perform the contract as promised. Instead, 'the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself'.[45]

The legal literature also recognises that holding a government, or its agents, to fiduciary standards analogous to those found in private law, such as trusts, has been the subject of much scholarly debate, which has notably focused on the conflict and incompatibility between private-law fiduciary norms with the structure of public law norms.[46] Government officials have always had legal powers (authority) that impact the public when used. From this perspective, many scholars argue that creating and using statutory powers, while resulting in the public's vulnerability, does not establish a fiduciary relationship.

In addition, case law establishes that the judiciary is reluctant to act as a constraint on political discretion when fiduciary doctrine is used as a workaround for political morality.[47] Political discretion usually sits within the public law instrument of judicial review (and, by default, constitutional law) and is beyond this article's scope. Furthermore, determining whether politics are grounded in moral considerations is also beyond the scope of this article, even

[38] See McCamus (n 36).
[39] Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Mon-fiduciary Duties* (Hart Publishing, 2010) 33.
[40] *Mothew v Bristol & West Building Society* [1998] Ch 1 at 18 per Lord Millett.
[41] Consideration of the rules against making a profit is beyond the scope of this article.
[42] James Edelman, 'The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 21.
[43] Tamar Frankel, *Fiduciary Law* (Oxford University Press, 2011) 212.
[44] See McCamus (n 36).
[45] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98.
[46] Seth Davis, 'The false promise of fiduciary government' (2014) 89(3) *Notre Dame Law Review* 1145.
[47] See Conaglen (n 39).

though it is acknowledged that political power determines how a nation's resources are distributed (or not).[48]

In contrast, other scholars argue that a fiduciary relationship is a good fit despite the public law norms because government officeholders owe obligations that are analogous to those fiduciary obligations found in private law.[49] Galoob and Leib determined that if one focuses on the substance of fiduciary norms in the government space, three structural features are apparent.[50] These are adapted and discussed next.

Firstly, a public officeholder's deliberation should be shaped by pursuing the objects which ground the authority wielded. To do anything else is to fail to live up to the fiduciary norm of duty of care and loyalty. In this context, deliberation-sensitive thinking forms the attitude required of the public law norm and governs the behaviour of the public officer. This requires the public officer to be aware of their authority's objectives and carefully exercise the authority within the constraints of those objectives. Therefore, the success or breach of a public officer's exercise of power is based on whether the practical deliberations were appropriate and, by default, conformed with the fiduciary norm of duty of care.

Secondly, Galoob and Leib argue that conscientiousness is necessary to live up to the norm of 'good faith' and fits well with compliance. Therefore, although performance motivation may drive decision-making, the public officer's actions must meet the standards of correctness, and thus, any actions must be for the right reasons. At the same time, the authors argue that conscientiousness is also subject to the 'wrong kinds of reasons' problem.[51] A public officer is vulnerable to the wrong kinds of reasons problem when illicit or irrelevant reasons motivate the officer to act or deliberate in a certain way. Therefore, although the public officer deliberated and acted as required, their resultant actions are outside the reasonable fiduciary norm of acting in good faith.

Finally, Galoob and Lieb argue that public officers must be robust in all ways, as fiduciary norms demand. This is especially true because situations can change, and as a result, responsibilities change (the authors call this an updating requirement*).* This requires the public officer to monitor changes and modify their actions to align with the fiduciary norm of loyalty. For example, following a customary practice at odds with a statutory objective, even if considered a public good.

To summarise the above analysis, there is good reason to establish a fiduciary relationship between the colonial Public Trust Office and its Māori beneficiaries. The *Public Trust Office Act 1872* (NZ) established the Public Trust Office and its authority. However, it is

[48] Dorothy Emmet. 'Political Morality' in Dorothy Emmet (ed), *The Moral Prism* (Palgrave Macmillan, 1979). 18.
[49] David Guerrero, 'Looking for democracy in fiduciary government. Historical notes on an unsettled relationship (ca. 1520-1650)' (2020) 81 *Daimon: Revista Internacional de Filosofia* 19.
[50] Ethan J Leib and Stephen R Galoob, 'Fiduciary Political Theory: A Critique' (2015-2016) 125(7) *Yale Law Journal* 1820.
[51] For an argument that engaging in a negative activity remains detrimental even if a reward is received for doing so, see Mark Schroeder, 'Value and the Right Kind of Reason' (2010) 5 *Oxford Studies of Metaethics* 25.

acknowledged that the Public Trust officers had to be aware of many other acts and subsequent amendments while in their roles.

Regardless of the many Acts and amendments that applied, the Public Trust officers had a traditional guardianship role, which included the affairs of Māori. As an autonomous entity of the Crown, it was empowered to make decisions that impacted its beneficiaries independent of any government policy or interference. Therefore, any decision-making concerning the affairs of Māori, particularly the native reserves, should have been deliberate because the statute required the officers to be aware of the statute's objectives. Moreover, the decisions should have met the standard of correctness, and therefore, the Public Trust officers should have been making decisions for the right kind of reasons. This tasked the Public Trust officers to ignore irrelevant considerations when deciding on the property affairs of Māori (especially the native reserves). The Public Trust officers should not have been taking into consideration the objectives of the colonial Executive. Finally, the Public Trust officers used the perpetual leases over the native reserves as part of their customary practices, which was at odds with the statute's objectives and the best interest of their Māori beneficiaries.

This perspective of fiduciary norms focuses on how the decision-making power was used by the Public Trust Office rather than focusing on institutional arrangements (which arguably tend to muddy the waters). However, it is also noted that where no explicit fiduciary relationship exists, the courts have often undertaken a judicial examination of the relationship to find fiduciary obligations owed (frequently termed as a judicial expansion of the principles of fiduciary.[52] For example, the Canadian case of *LAC Minerals v International Corona Resources Ltd* determined that fiduciary obligations could be imposed on a relationship if:

> (1) the fiduciary has scope for the exercise of some discretion or power;
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
> (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[53]

The Māori landowners of the native reserves had no authority to overrule the decisions made by the colonial Public Trust Office, yet the decisions made by the colonial Public Trustee officers had an immediate impact on Māori legal interests and standing. This was established in the Sheehan Report,[54] which identified the contracting parties to the perpetual leases on the native reserves as the colonial settlers as lessees and the colonial Public Trust as the lessor. Māori (as beneficiaries) were excluded from the contracts. The Sheehan Report found that although Māori were the legally beneficial owners of the native reserves, they had no legal standing as parties to the perpetual lease contracts. As a result, they had no legal remedies available to them when they wanted to contest the perpetual leases.

[52] Marianna Valverde and Adriel Weaver, *The Crown Wears Many Hats: Canadian Aboriginal Law and the Black-boxing of Empire* (Edinburgh University Press, 2015).
[53] *LAC Minerals v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 27.
[54] Bartholomew Sheehan (Chairman), 'Report of Commission of Inquiry into Māori Reserved Land' (Government Printer, 1975).

Moreover, the colonial Public Trust Office had regional officers across the country, making it an attractive agency for managing and administering the native reserves. This could also explain why the colonial government eventually offloaded all the native reserves to the colonial Public Trust Office with the *Public Revenues Act 1877* (NZ). This Act not only gave the Public Trust officers the authority to legally convey the native reserves, but it also provided the officers with financial management over them. Moreover, the *Native Reserves Act* (NZ) (and its subsequent amendments) gave the Public Trust officers the authority to exchange, lease or sell the native reserves without consulting with the Māori landowners. Section 7 of the Act provides for this sole authority. From this perspective, few checks and balances were ever implemented on how the Public Trust Office exercised its authority despite the protests from the Māori landowners.

Despite the Public Trust Office's statutory requirements to consider the interests of Māori, the Executive pressured it to retain the settlers.[55] The initial 21 or 30-year lease periods offered over the native reserves by the Public Trust Office were considered too short by the settlers; they argued they would be unable to reap the benefits of their labour, so unsurprisingly, many settlers wanted to return to Great Britain. Therefore, the offering of perpetual leases by the Public Trust Office provided a guarantee of tenure for the settlers while, at the same time, it was an effective land law mechanism to attain the objectives of the Executive: to develop New Zealand's townships and agricultural farms. This also demonstrates that the extraneous interests (those of the Executive) interfered with the Public Trust Office's decision-making, a clear breach of the fiduciary norm of the no-conflict rule.

So, while it is generally accepted that a fiduciary has the authority to determine how to promote the best interests of a beneficiary – it is also accepted that the fiduciary is bound to consider relevant considerations over irrelevant ones.[56] However, the interference of conflicting duties or interests is much less discussed or acknowledged in fiduciary literature, especially from a colonial public service perspective.

The modern Public Trust is an autonomous Crown entity and publicises its independence.[57] However, it is doubtful that this was the case during colonial settlement. In several historical reports and land commissions, it is evident that the Public Trust Office did not consult with Māori over the administration of their native reserves. This was established in the Sheehan Report but is also evident in other land commission enquiries. The Public Trust officer's decision-making was primarily based on securing the settlers to New Zealand's regions, which aligned with the objectives of the colonial Executive. These facts alone prove that the Public Trust failed to oversee and protect Māori's property interests (the native reserves) effectively.

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[55] Terry Boyd, 'Compensation Model for Leasehold Property Rights of Māori Reserve Land' (Queensland University, 2001) <https://dlc.dlib.indiana.edu/dlcrest/api/core/bitstreams/ed36d551-d511-4c85-82ed-79f1e35be8e3/content>.

[56] Remus Valsan, 'Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment' (2016) 62(1) *McGill Law Journal* 1.

[57] *Public Trust Act 2001* (NZ).

Colonial Public Trust officers also faced enduring conflicting roles when they exercised their authority. They were supposed to protect Māori's property interests while, at the same time, they acted in the colonial Executive's best interests when the native reserves were placed into perpetual leases; this dual role demonstrates a lack of good faith and shows that the Public Trust's exercise of its powers is relevant and sufficient to illustrate its breach of fiduciary norms.

In cases like *Tito v Waddell*, the Court ruled that when the Crown, as the Executive of the day, administers property as part of its governmental functions, no trust exists. Consequently, there are no fiduciary obligations imposed on the Crown. However, this is not the situation in New Zealand.[58] Whether the colonial Public Trust officers equated the creation of the perpetual leases on the native reserves as an opportunity to exploit Māori's vulnerability is not in question here. Rather, it is evident that the Public Office encountered a conflict of interest while trying to balance the interests of Māori and the Executive.

Furthermore, while traditional fiduciary literature refers to conflict of interest situations where the fiduciary's personal interest and those of the beneficiary usually point in opposite directions.[59] This also does not apply here. The Executive passed legislation that proscribed the creation of perpetual leases, even if the statute was unclear as to whether perpetual leases could or should be used.[60] The failure to properly understand the long-term impact of the Public Trust Office using perpetual leases over native reserve land as a legal model that ultimately informed property law developments in settler New Zealand is notable. Namely, because the use of the perpetual leases over the native reserves met the needs of the Executive of the day rather than those of the Māori landowners. For the most part, the Public Trust Office appears to have held no intention or motivation to defraud Māori of their land when they used the perpetual leases. Instead, the rationale for using perpetual leases was aligned with the Executive's wishes to keep settlers anchored in New Zealand with the lure of land, which degraded the Public Trusts office's fiduciary duty of loyalty to Māori as beneficiaries.

From this perspective, this article has shown that the court should be able to extend the reach and scope of the traditional fiduciary to impose a fiduciary relationship between the colonial Public Trust Office (and, by inference, the Executive) and obligations owed to Māori. So, while many commentators focus on whether the colonial government should or could be a fiduciary because of its political power,[61] this article argues that the colonial government incurred fiduciary obligations when it passed legislation allowing the Public Trust Office to manage the native reserves for the Māori landowners.

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[58] Alex Frame, 'Fiduciary duty – A few remarks on the Proprietors of Wakatū v AG [2017] NZSC 17' *Māori Law Review* (April 2017) <https://maorilawreview.co.nz/2017/04/fiduciary-duty-a-few-remarks-on-proprietors-of-wakatu-v-attorney-general-2017-nzsc-17/>.

[59] See Valsan (n 56).

[60] This was mainly discussed in the Sheehan Report (n 55), but it was also discussed in other Land Commission Inquiries.

[61] See eg, Robert Blowes, 'Governments: Can You Trust Them with Traditional title, Mabo and Fiduciary Obligations of Governments' (1993) 15(2) *Sydney Law Review* 254.

VI EXAMPLES OF FIDUCIARY OBLIGATIONS BY THE BRITISH COLONIAL OFFICE IN NEW ZEALAND

While it is beyond the scope of this article to include the appropriateness of introducing British institutions for the sole purpose of civilising Māori, it is noted that the British government considered that the Māori needed protections during colonial settlement. Yeo [62] argues that this position arose from the impact of the British's prior colonisation efforts in other parts of the British Empire on those indigenous peoples. It is also discussed in Wai 145,[63] where considerable numbers of settlers were already in New Zealand, and substantial numbers were following; the British government urgently needed to protect Māori from the adverse consequences of this incursion.

While it was deemed acceptable by the colonial British government to colonise territories beyond Britain's borders, a report in 1837 determined that the British nation should 'take upon itself the task of defending those who are too weak and too ignorant to defend themselves'.[64] Thus, in 1840, George Clarke was appointed the first chief protector of Aborigines and became the guardian of Māori welfare. The government department for the Protectorate of Aborigines existed for six years in New Zealand.[65] The sole purpose of the Protectorate was to introduce and accustom Māori to British law, to protect Māori land rights against claims made by settlers and to mediate disputes between the settlers and Māori.[66] This issue of whether the Protectorate did its job well has been discussed in many Waitangi Tribunal investigations.

As a result, the Protector (the officeholder) or sub-protector would often attend judicial proceedings (like the land commission enquiries) 'in order to protect the rights and interests of the natives'.[67] Sub-protectors such as Edward Shortland are recognised for their work to protect Māori land, as settlers continually attempted to dismiss Māori land tenure.[68] Therefore, the express appointment of the Protectorate of Aborigines is the first instance in which the colonial government entered a fiduciary relationship with Māori, where the latter were the beneficiaries.

The British government also recognised that before colonisation could begin, Māori customary title (Aboriginal customary title) had to be extinguished. Māori customary title was considered a burden on the colonial government due to its governance by Māori customary law,[69] but it

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[62] Carol Yeo, 'Ideals, Policy & Practice: The New Zealand Protectorate of Aborigines 1840-1846' (MA Thesis, Massey University, 2001).
[63] 'Te Whanganui a Tara me ona takiwa; Report on the Wellington District (WAI 145)' (Waitangi Tribunal, 2003) 76.
[64] 1837 Select Committee on Aborigines identified the disastrous impact of colonisation on Indigenous peoples throughout the British Empire. See Parliamentary Select Committee (Great Britain), 'Report from the Select Committee on Aborigines (British Settlements)' (House of Commons,1837).
[65] Ray Grover, 'George Clarke' in *Dictionary of New Zealand Biography* (Web Page, 2020) <https://teara.govt.nz/en/biographies/1c18/clarke-george>.
[66] Marjan Lousberg, 'Edward Shortland and the Protection of Aborigines in New Zealand, 1840–1846' in Marjan Lousberg, Samuel Furphy and Amanda Nettleback (eds), *Aboriginal Protection and its Intermediaries in Britain's Antipodean Colonies* (Routledge, 2020).
[67] 'Muriwhenua Land Report – WAI 45' (n 10) 79.
[68] See Lousberg et al (n 66) 128.
[69] Mere Whaanga, 'Rata, the Effect of Māori Land Law on Ahikāroa' (PhD Thesis, University of Waikato, 2012) 130.

was also a recognition that all land belonged to Māori before it could be owned by either the settlers or the Crown. Article 2 of the Treaty of Waitangi provided pre-emption rights to the colonial government, so Māori land could only be sold to the colonial government. Māori had been persuaded that pre-emption was necessary to protect them and should be applied to all land dealings.

Pre-emption, where the alienation of native land was limited to the colonial government, was not new to the British. It had been used in other colonies, such as Australia, India and North America, and was considered a settled practice with indigenous tribes.[70] The Waitangi Tribunal determined that the fiduciary obligation was substantially significant because the colonial government declared itself the 'the protector of the Māori people and as a guardian of their interests'.[71] Therefore, pre-emption is the second instance where the colonial government expressly declared their fiduciary obligations to Māori.

It is also noted that the colonial New Zealand government enacted several statutes, taking Māori land with the intention of protecting its 'Māori beneficiaries'. An example of this can be found in the *Native Townships Act 1895* (NZ), which focused on promoting settlement in the North Island while at the same time providing native allotments. Expressly, the native allotments were vested in the Crown for 'the use and enjoyment of the Native owners'.[72] Lawfully taken, the Crown made clear its intention to hold the lands in favour of the Māori landowners and, thus, to whom the Crown owed a fiduciary obligation.

The power of the colonial government to extinguish Māori customary title to the land and then take possession of the land was likened to that of a constructive trustee in the Australian *Mabo v Queensland (No 2)*,[73] especially because the aboriginal customary rights had been destroyed. Furthermore, the colonial government wanted to avoid a double land tenure system, where Māori retained native titles subject to *tikanga* Māori (customary law), and settlers held a colonial government-derived title subject to British law. Pre-emption was a method of extinguishing the native title so the land could be freed up for settlement while at the same time removing the need for courts to rule in land disputes.

However, in the 1880s, legislation was enacted assigning the responsibility and guardianship of the native reserves to the Public Trust Office. This was done to ensure the welfare of the Māori. Thus, it could be argued that the Public Trust Office had a duty to prioritise the interests of Māori as beneficiaries and make decisions regarding native reserves based on the duties of loyalty and care because the decision-making directly affected Māori interests. Thus, the Public Trust Office is another example of where the colonial government entered into a fiduciary relationship with the Māori.

Arguably, the concept of protecting Māori and the governance challenges faced by the Public Trust Office led to the perpetual leases. Successive colonial governments wanted to protect

[70] Rose Daamen, 'Rangahaua Whanui national theme. D, The Crown's right of pre-emption and FitzRoy's waiver purchases' (Waitangi Tribunal, 1998) 1-2.
[71] See 'Muriwhenua Land Report - WAI 45)' (n 10).
[72] *Native Townships Act 1895* (NZ) s 12(3).
[73] *Mabo* (n 37).

Māori landowners from selling large tracts to land speculators but also allow Māori to benefit from colonial settlement by making land leases available.[74] The rental income of the leases was considered to be beneficial for Māori. However, there was, at that time, no suggestion that the leases should be perpetually renewable. More importantly, Māori thought that if they were to be alienated from their land to receive an income, it should be through leasehold instruments rather than an outright sale.[75] Perpetual leases are arguably tantamount to freehold ownership of the Māori land, for without statutory intervention, Māori will never be able to benefit from their land that is subject to perpetual leases.

The colonial Public Trust officers in each region were tasked with allocating land to Māori as they thought necessary for their occupation and leasing the remainder to settlers.[76] While the initial legislation was restricted to certain regions, subsequent amendments provided the Public Trust Office with the authority to lease the lands across the country (eg, the *Public Trust Office Amendment Act (1876)* (NZ)) and, in 1882, provided full administration and management of the lands for the Māori beneficial landowners.

Therefore, there is little doubt that a fiduciary relationship existed between the Public Trust Office and the Māori, but furthermore, the Public Trust Office held the superior position because of its ability to make decisions that the Māori were powerless to overturn. As a result of that superiority, the Public Trust Office was bound by equity to protect the beneficial interests of Māori, especially since the Māori beneficiaries were treated 'as children'.

VII CASE LAW AND FINDINGS OF HISTORICAL FIDUCIARY OBLIGATIONS

The application of fiduciary obligations to historical colonial governments is something that has been addressed in other jurisdictions. In the case of Canada, cases such as the *Haida Nation*,[77] the court found that the honour of the colonial government gives rise to a fiduciary obligation to Aboriginal interests. Chief Justice Lamer said: 'The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.'[78]

Case law in the United States has also identified a fiduciary obligation owed by its government to groups of indigenous groups. Examples include *Cherokee Nation v Georgia* 30 US 1 (1831) and *Worcester v Georgia* 31 US 350 (1832).

In *Mabo*, the plaintiffs sought a declaration from the High Court of Australia establishing that the colonial government owed a 'fiduciary duty or alternatively bound as a trustee to the

[74] Janine Ford, 'Title histories of the native reserves made in the Fitzroy, Grey and Omata purchases in Taranaki (1844-1848)' (Waitangi Tribunal, 1991).
[75] Cathy Marr, 'The alienation of Māori land in the Rohe Potae (Aotea Block). Part 2, 1900-1960' (Waitangi Tribunal, 1999).
[76] See Johnson (n 11) 106.
[77] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 2004 SCC 73.
[78] Ibid [18C].

Meriam people, including the plaintiffs, to recognise and protect their rights and interests in the Murray Islands'.[79]

However, it is also acknowledged that courts in many jurisdictions have struggled in two basic ways. In the first instance, difficulties arose in defining the relationship between an Aboriginal people and its colonial government, mainly because its role encompassed a wide range of activities, not all giving rise to fiduciary obligations. The hurdle of establishing a fiduciary relationship between Aboriginal peoples and colonial governments has, at times, appeared to be insurmountable in some jurisdictions. Arguably, courts have imposed a fiduciary relationship where none has previously existed.[80] Secondly, the extent and content of such obligations are important, especially because the courts have been asked to adapt the fiduciary principle to a broader range of circumstances.[81] This need has been primarily driven by plaintiffs who have no other option but to seek a remedy in equity.[82]

In the *Wakatū* case, the Supreme Court ruled that the Crown (New Zealand government) owed the customary Māori landowners' fiduciary duties. This was a landmark decision, but, referring to the Canadian *Guerin* case,[83] the court made it clear that the nature of the relationship was founded in the private law of fiduciary duty. So, while the courts determined a fiduciary relationship existed, it was predicated on being either a trust or a trust-like relationship. The court also emphasised that the case was situation-specific and limited the finding of a fiduciary relationship between the Crown and Māori. There have been no further rulings on the matter since the *Wakatū* decision.

Moreover, while any statutory limitations have not been discussed in this article, it is noted that until this case, the only resolution Māori could achieve for historical land losses could be found in the Waitangi Tribunal – where the findings are not binding on the government. This is an important consideration for Māori because the *Treaty of Waitangi Act 1975* (NZ) s 6 allows the Tribunal to investigate claims against the colonial Crown dating back to 1840. Thus, the conventional statutory bar of limitations, which prevents legal action, does not apply. However, as noted, the findings of the Waitangi Tribunal are not binding, therefore there has been little legal relief with regard to perpetual leases.

[79] See *Mabo* (n 37).
[80] Gerald Lanning, 'The Crown-Māori relationship: the spectre of a fiduciary relationship' (1997) 8(2) *Auckland University Law Review* 445.
[81] See Blowes (n 61).
[82] Michael Lang, 'The fiduciary principle in the commercial domain: Implications for syndicate loans' (1999) 6(4) *Auckland University Law Review* 1147.
[83] *Guerin v The Queen* [1984] 2 SCR 335.

VIII CONCLUSION

The Public Trust Office has been in existence in New Zealand since 1873 and is considered to be the first of its kind in the developed world[84]. However, this article has established that the Public Trust Office failed in its obligations to protect the interests of Māori. While others have attempted to use the traditional fiduciary legal doctrine to establish a fiduciary relationship between the Crown and Māori to find a legal remedy for the taking and administering of the native reserves, most have failed.

In contrast, this article argues that the Public Trust Office was primarily and statutorily tasked with protecting Māori interests, and thus a fiduciary relationship already existed. There is no need to try to establish whether the native reserves were held in trust; instead, adapting and using the legal framework provided by Galoob and Lieb, this article showed that the fiduciary relationship between the Public Trust Office and Māori was already there.

Furthermore, while this framework's utility successfully explains and justifies the fiduciary norms for the Public Trust Office, it also accepts that the framework is probably not compatible with making the Crown liable for all its functions. Finally, this article shows that if the perpetual leases over the native reserves continue to be viewed through the contractual lens, the Māori landowners will fail to receive a legal remedy for a historical wrong.

[84] '150 years – First in the world', *The Public Trust* (Web Page, 2023). <https://www.publictrust.co.nz/resources/150-years-first-in-the-world/>.