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Questions Concerning Consultation with Maori: what is required from a Treaty perspective?

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Abstract
The New Zealand case law and Waitangi Tribunal jurisprudence have developed the meaning of consultation in the Treaty context. Recently, this has been informed by UNDRIP. Overall, New Zealand has always had substantive consultation obligations in certain circumstances but the duty has been interpreted too narrowly. Purely procedural consultation in some situations is insufficient to discharge the Crown’s duty to actively protect Maori or to discharge their duty of partnership. The level of consultation required is directly correlated to the taonga (interest) at stake, and interests in land are sufficient to trigger a substantive duty. The fears espoused in the SOE case have impeded the development of a substantive duty; however, the Canadian duty to accommodate and their spectrum analysis (shared by the Waitangi Tribunal) demonstrates that fear of creating an onerous duty is inflated and consultation can be developed in a way that balances the partnership between Maori and the Crown, as well as allowing a duly elected government to govern as it sees fit.

Key words
Canada
Consultation
Maori
Taonga
Treaty
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Introduction

Consultation developed in the common law context where a state decision having general effect required the input of those affected before the decision-making process commenced. One purpose of consultation is to enhance the prospects of success of decisions subsequently made by having the affected parties engaged and invested in those decisions. In New Zealand, it has been held that there is no absolute duty to consult, but where a duty arises consultation must be meaningful. However, what constitutes meaningful and the nature of the duty has been the subject of considerable debate. In particular, this debate has been extensive in the context of Te Tiriti o Waitangi (the Treaty), which continues to raise the question: what is required from consultation where the Treaty is concerned?

The Treaty obliges the Crown to consult with Maori on any matter that a responsible Treaty partner would do so, not just on major issues. The courts have held, however, that the Treaty does not impose a greater degree of consultation than that prescribed by legislation. Consequently, consultation with Maori is purely procedural. Procedural consultation does not require agreement, consent or veto rights that would characterise something akin to a substantive consultation obligation. However, this interpretation is a very narrow reading of New Zealand’s consultation jurisprudence. A considered reading of the consultation case law demonstrates that courts envisage situations where consultation with Maori imposes substantive obligations on the Crown, not only procedural.

Although the courts have held that consultation is not a standalone Treaty principle, it is considered essential to the principle of partnership and to the commitment to an enduring Crown-Maori relationship. Consequently, the Treaty principles underpin much of the

2 At 545.
3 Carter Holt Harvey Ltd v Te Runanga O Tawheretoo Ki Kawerau [2003] 2 NZLR 349 (HC); and Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA) [Ngai Tahu].
4 Te Heu Heu v Attorney-General [1999] 1 NZLR 98 (HC).
consultation jurisprudence. To realise its potential, we need to reconsider the role of consultation and the form it takes if, as the Waitangi Tribunal has stated:⁵

The partnership can move beyond grievance to a relationship of mutual advantage in which, through joint and agreed action, both partners can end up better off than they were before they started.

Although full authority tino rangatiratanga is no longer practicable, lesser options may be. These may include shared decision-making or, where shared decision-making is not possible, the ability for Maori to influence the decisions of others who affect their taonga.⁶ Thus where taonga is at stake, procedural consultation is inadequate for discharging the Crown’s duty of partnership. It requires something more.

Taonga in the form of Maori land is of particular significance because of its fundamental importance to the identity, and the cultural, social and economic well-being of tangata whenua. This essay argues that, where Maori land is concerned, the principle of partnership imposes substantive consultation obligations on the Crown in certain circumstances. It does this by first discussing the importance of land to Maori and the essential aspects of the Maori world view. Secondly, the case law concerning the duty to consult Maori is examined. Thirdly, New Zealand’s international obligations under the United Nations Declaration of the Rights of Indigenous Peoples are applied. Fourthly, Waitangi Tribunal jurisprudence is considered. Finally, a comparative analysis of the Canadian position on consultation is undertaken. Substantive obligations have always existed in New Zealand, with consultation being interpreted narrowly. Narrowly means purely procedural, whereas broad interpretations would encompass substantive elements. This essay sets out where a substantive duty arises and the form it takes according to the interest at stake.

⁵ Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity, Te Taumata Tuatahi (Wai 262, 2011) at 17 (emphasis added).
⁶ At 24.
II Whenua

Whenua is of fundamental importance to the identity, and the cultural, social and economic well-being of tangata whenua. Land is described as “tūrangawaewae” – “a place to stand” – without which the strength of the people will be diminished. For Maori, land is a taonga tuku iho, an ancestral treasure. Profound concepts underlie these views of Maori land and the relationship of Maori with their land can only be understood in light of their distinctive world view. The Muriwhenua Tribunal summarised the matters in this way:

Maori saw themselves as users of the land rather than its owners. While their use must equate with ownership for the purposes of English law, they saw themselves not as owning the land but as being owned by it. They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Maori people. Similarly, whenua, or land, meant also the placenta, and the people were the tangata whenua, which term captured their view that they came from the earth’s womb. As users of the earth’s resources rather than its owners, they were required to propitiate the earth’s protective deities. This, coincidentally, placed a constraint on greed.

Attachment to the land was reinforced by the stories of the land, and by a preoccupation with the accounts of ancestors, whose admonitions and examples provided the basis for law and a fertile field for its development. As demonstrated to us in numerous sayings, tribal pride and landmarks were connected and, as with other tribal societies, tribe and tribal lands were sources of self-esteem. In all, the essential Maori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group. That land descends from ancestors is pivotal to understanding the Maori land-tenure system. Such was the association between land and particular kin groups that to prove an interest in land, in Maori law, people had only to say who they were. While that is not the legal position today, the ethic is still remembered and upheld on marae.

In the words of Moana Jackson:

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7 Waitangi Tribunal He Kura Whenua Ka Rokohanga - report on claims about reform of Te Ture Whenua Maori Act 1993 (Wai 2478, 2016) at 17.
8 At 17.
9 At 17.
10 Waitangi Tribunal Muriwhenua Land Report (Wai 45, 1997) at 23–24.
11 Waitangi Tribunal He Kura Whenua Ka Rokohanga, above n 7, at 17.
One cannot fully be tangata whenua without a whenua to be tangata upon, and one cannot be a tangata whenua exercising the mana and rangatira handed down by the tīpuna without the authority to determine what happens to and with the whenua.

The centrality of land emphasises the importance of imposing substantive obligations on the Crown where whenua or interests in whenua exist. Knowledge of this inherent importance is central to this essay, and it is knowledge the Crown also possesses.

III Consultation with Maori

A General Consultation Principles

The common law consultation principles for consultation generally were described by the Court of Appeal in Wellington International Airport Ltd v Air New Zealand. Consultation must be real; not a charade. It does not mean to tell or present, nor can it be equated to negotiation. It is an intermediate situation involving meaningful discussion. The party consulting can have a work plan in mind, but must keep an open mind, and be ready to change and even start afresh. Any manner of oral or written interchange that allows adequate expression and consideration of views will suffice. It is essential that the consultation is fair and enables informed decisions to be made. There is no universal requirement regarding duration, but sufficient time must be allowed and a genuine effort to consult made. Those being consulted must know what is being proposed, and have a reasonable and sufficient opportunity to respond to the proposal. The overall focus is on fairness, underpinned by good faith.

Where the duty is statutory, the appropriateness of the consultation method is determined by the legislation rather than the circumstances of the case. However, where the statute is ambiguous, principles of natural justice can be used to determine whether a duty exists,

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12 Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671 (CA) at 683–684.
13 GXL Royalties Ltd v Minister of Energy [2009] NZAR 478 (HC) at [57].
14 Residential Care (New Zealand) Ltd v Health Funding Authority CA170 & 268/99, 17 July 2000.
15 Aboriginal Legal Rights Movement Inc v South Australia (No 2) (1995) 64 SASR 558 (FC); Port Louis Corporation v Attorney-General of Mauritius [1965] AC 1111 (PC).
which is likely to include the general common law principles of consultation.\textsuperscript{16} Notably, none of these general principles have substantive components. They are purely procedural requirements.

\textbf{B Consultation with Maori}

The following sub-sections analyse a selection of appellate court decisions that have specifically examined the Crown's duties with respect to consulting with Maori. These cases are chosen on the basis that they consider consultation where the Treaty is concerned.

\textit{1 Land: New Zealand Maori Council v Attorney-General (SOE case)}

The leading authority on consultation with Maori is the \textit{SOE case}. The Court of Appeal denied the existence of an absolute duty to consult with Maori in all circumstances as unworkable.\textsuperscript{17} In fulfilling its duty to act reasonably and in good faith, the Crown is obliged to make informed decisions so that proper regard is had to the impact of the treaty.\textsuperscript{18} Informed decisions require the Crown to be sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. Such situations will discharge the obligation to act reasonably and in good faith. Richardson J stated:\textsuperscript{19}

\begin{quote}
In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some cases \textit{extensive consultation and co-operation} will be necessary.
\end{quote}

Unfortunately, the Court did not define “cooperation”. However, the dictionary defines it as “working together towards the same end” and “help someone or comply with their

\textsuperscript{16} GDS Taylor and RM Taylor, above n 1, at 548 and 549; and \textit{R v Secretary of State for Transport, ex parte Greater London Council} [1986] QB 556, [1985] 3 All ER 300.

\textsuperscript{17} \textit{New Zealand Maori Council v Attorney-General} [1987] 1 NZLR 641 (CA) [\textit{SOE case}] at 665 (previously known as the \textit{Lands case}).

\textsuperscript{18} At 683.

\textsuperscript{19} At 683 (emphasis added).
requests”. 20 Thus the qualification that cooperation may sometimes be needed for the Crown to make informed decisions suggests something akin to substantive consultation. There would be situations, then, where purely procedural consultation might not discharge the Crown’s duty of active protection.

The Court placed considerable weight on the principle of partnership, which imposes on the partners the duty to act reasonably and in good faith. 21 The Treaty partnership creates responsibilities analogous to fiduciary duties. The duty to act in utmost good faith required the Crown to ensure that the powers in the State-Owned Enterprises Act were not used inconsistently with the principles of the Treaty. That in turn obliged the Crown to make an informed decision by satisfying itself, before transferring land, that known or foreseeable Maori claims did not require retention of certain land. 22 Richardson J thought the Crown’s duty included developing a system to give reasonable assurance that lands or waters will not be transferred in such a way as to prejudice Maori claims. 23 Although the Court considered the proposed system should be designed by the Crown, it stated that the proposal “should be submitted to the New Zealand Maori Council for agreement or comment”. 24 Thus the Court considered that transfer of land that could be part of a well-founded Treaty claim was something that could restrict the government’s actions, and a system to protect lands and waters created by the Crown could require agreement. Agreement is substantive; however here it is agreement on a procedure. This has a substantive element (agreement) suggesting that consultation sits on a spectrum, with the high-end including something like a veto right. However, the substantive element here is notable, because it seems to suggest cooperation; working together towards the same end.

21 SOE case, above n 17, at 662, 673, 693, 701 and 714.
22 At 666, 684, 696, 703, and 718.
23 At 665 and 666.
24 At 665 (emphasis added).
This case was concerned with alienation of land. However the Court states that the Crown’s duty is not passive but extends to active protection of Maori in their use of lands and waters to the fullest extent practicable, not just retention of land.\textsuperscript{25} Thus Crown action that impacts interests in Maori land (short of alienation) could require extensive consultation and cooperation in order to actively protect Maori.\textsuperscript{26} The Court does not state explicitly what triggers this duty but the discussions indicate that the existence of, and extent of the duty is determined according to the interest at stake: the stronger the claim and the more significant the interest at stake, the more onerous the duty, with full scale alienation of land being at the high end.

Importantly, although Treaty principles do not authorise unreasonable restrictions on a duly-elected Government to follow its chosen policy, it cannot choose any policy it wants.\textsuperscript{27} In order to fulfil its duty of active protection it must have due regard to potential Treaty claims. Land should not be transferred unless the Crown can satisfy itself that a claim or grievance is not well founded or that satisfactory safeguards are provided.\textsuperscript{28} In order to satisfy itself, this may require extensive consultation and co-operation.\textsuperscript{29} The interest at stake in the \textit{SOE case} was so significant (Maori land) that it was reasonable to restrict the Crown. The restriction included a substantive element to consultation (agreement on a procedure). This restriction demonstrates that substantive obligations may be required from the Crown in order to protect Maori interests and fulfil their duty of active protection.

2 \textit{Interests in land: Tainui Maori Trust Board v Attorney-General (Tainui)}

\textit{Tainui} is another key case that illustrates what type of interest may require extensive consultation and cooperation.\textsuperscript{30} \textit{Tainui} concerned interests in land (rather than alienation

\begin{footnotesize}
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\item \textsuperscript{25} At 662, 673, 693, 701 and 714 (emphasis added).
\item \textsuperscript{26} At 683.
\item \textsuperscript{27} At 666, 696 and 697.
\item \textsuperscript{28} At 696 and 697.
\item \textsuperscript{29} At 683.
\item \textsuperscript{30} \textit{Tainui Maori Trust Board v Attorney-General} [1989] 2 NZLR 513 (CA) [\textit{Tainui}].
\end{itemize}
\end{footnotesize}
of land) in the form of mining and ancillary licences. The Court held that the granting of such licences represented a transfer of “interests in the land” Second, it considered the transfers of land direct to third parties to be inconsistent with the principles of the Treaty and the Crown’s obligation to evolve a system for safeguarding Maori claims before the Tribunal.\(^{31}\) The Court stated that:\(^{32}\)

\[
\text{… the Crown should take no further action … in selling, disposing of or otherwise alienating the said lands until such time as the Crown has established a scheme of protection in respect of the rights of the plaintiffs.}
\]

The outcome demonstrates that the granting of licences is an interest that the courts will interfere with, in order to protect them. Therefore, it is an interest that triggers the duty of active protection. The Court held that this situation required the Crown not to act until the interests had been determined or a scheme established to adequately protect those interests, which in the *SOE case* required agreement or comment from the New Zealand Maori Council (NZMC) on behalf of Maori. This supports the preliminary conclusion that consultation requires more than procedure and extends to requiring something akin to agreement or consensus.

### 3 Interests in land: New Zealand Maori Council v Attorney-General (Forestry Assets)

In *Forestry Assets*, the Court made a number of important observations to support the proposition that the interest at stake may determine the action required by the Crown to fulfil its duty of active protection, including the nature of consultation. The Crown in this case proposed to sell forestry rights, but not the underlying ownership of the relevant land. The NZMC claimed that this was inconsistent with the *SOE case* decision. The Court reiterated the concept of partnership, stating that the good faith owed to each other by the parties to the Treaty “must extend to consultation on truly major issues”\(^{33}\). The Court

\(^{31}\) *Tainui*, above n 30.
\(^{32}\) At 527.
\(^{33}\) *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forestry Assets*] at 152.
agreed that for the Crown to proceed without consultation would be inconsistent with Treaty principles. Forestry assets, therefore, are an interest that triggers the duty to consult. However, whether this is an interest that would require substantive consultation is less clear.\textsuperscript{34}

The Court held that the sale of forestry licences was inconsistent with Treaty principles. It was not distinguishable from the \textit{SOE case} because it was not for wholesale alienation of land; critical was simply the interests in land and the importance of those interests.\textsuperscript{35} Consistent with the \textit{SOE case}, the Court reiterated that the Crown should not act until a scheme is in place to protect Maori interests. In the \textit{SOE case}, it should be recalled, such a scheme needed agreement from the Maori litigants. Thus, consistent with the \textit{SOE case}, forestry interests would be another situation that requires substantive obligations in the form of agreement on a procedure to safeguard Maori interests.

A less obvious point is discussed in \textit{Forestry Assets} that supports the imposition of substantive obligations concerned competing interests (between providing for Maori and the common interest of New Zealand as a whole). The Court stated that:\textsuperscript{36}

\begin{quote}
Partnership does not mean that every asset or resource in which Maori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Maori have some fair claim, other initiatives have still made the greater contribution. For example – and it is only an example – that might well be true of some pine forests. Moreover, the common interest may point to the sale of forestry rights, or some of them, to the best commercial advantage. But, as the Forestry Working Group recognised, it would be inconsistent with the principles of the Treaty to reach a decision as to whether there should be a general sale without consultation.
\end{quote}

\textsuperscript{34} The Canadian courts have affirmed that such interests would require something more than procedural consultation, a point that will be further developed in part four.

\textsuperscript{35} \textit{Forestry Assets}, above n 33, at 143.

\textsuperscript{36} \textit{Forestry Assets}, above n 33, at 152.
For a decision on unequal division where Maori have a justifiable claim, extensive consultation and compromise would arguably be necessary. If so, and if the Crown recognised forestry licences as an interest protected by the Treaty and had knowledge of a strong Maori claim, this would have triggered consultation. Applying the SOE case and Taimui, this would also require the Crown to cease activity until a system was in place to safeguard Maori interests, which in the former case required agreement on a procedure (substantive consultation obligations). Thus, the duty of active protection and to provide redress would require something more than procedural consultation in this case.

4 Other interests: Ngai Tahu Maori Trust Board v Director-General of Conservation (Ngai Tahu)

In Ngai Tahu, the issue of when consultation is required and what form it would take was discussed further. The Court also made important points regarding statutory Treaty provisions and the principle of partnership. The case concerned commercial whale watching permits held by Ngai Tahu. The Director-General issued a further permit to a third party. Ngai Tahu challenged the permit on the basis that it was entitled on Treaty principles to a period of operation protected from competition, or that the Director-General required their consent before issuing new permits.37

The Court held that statutory provisions for giving effect to the principles of the Treaty should not be interpreted narrowly.38 Despite that, the Court found that the interest at stake was not one that could be brought within the scope of the Treaty. This was because, however liberally Maori customary title and Treaty rights might be construed, tourism and whale-watching were remote from anything in fact contemplated by the original parties to the Treaty.39 However, the Court highlighted that, whilst a whale-watching business was not taonga or the enjoyment of a fishery within the contemplation of the Treaty, the interest was so linked to taonga and fisheries that a reasonable Treaty partner would recognise that

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37 Ngai Tahu, above n 3.
38 At 558.
39 At 559 and 560.
Treaty principles were relevant. The Court concluded that such issues are not to be approached narrowly and that:

The Crown is not right in trying to limit those principles to consultation ... since ... it has been established that principles require active protection of Maori interests. To restrict this to consultation would be hollow.

On the particular facts of this case the Court further stated that:

… the positive duty to act in good faith, fairly, reasonably and honourably towards Ngai Tahu, and of the statutory incorporation of the principles of the treaty in the conservation legislation, a reasonable treaty partner would not have restricted consideration of Ngai Tahu interests to mere matters of procedure. Ngai Tahu were entitled to a reasonable degree of preference and thus to succeed to a limited extent. The … Director-General, subject to the primary consideration of the preservation and protection of the whales, should take into account, among the factors relevant to whether or not he should grant any further permits for commercial whale-watching, protection of the interests of Ngai Tahu in accordance with Treaty of Waitangi principles.

Note the Court’s statement that some Maori interests required more than consultation, and that Ngai Tahu’s interest required more than mere procedural consideration. The case law has evolved such that consultation obligations for the Crown are, in certain situations, not limited to procedural matters but extend into substantive issues, although not including a veto right.

This may reflect the situation envisaged in the *SOE case* that requires “extensive consultation and co-operation”. Cooperation being analogous to working together toward

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40 At 558.
41 At 544 and 560.
42 At 561 (emphasis added).
a common end, which is supported by Wellington Airport. There, the Court noted that consultation does not include negotiation to agreement but it is not uncommon for that to follow because of a tendency in consultation to seek consensus.43

This conclusion is consistent with the Court’s comments in Tainui. The cautious wording in that decision reflects the obvious conflict between the duty of active protection and the right of a duly-elected government to govern as it sees fit in some cases. It appears the Court is suggesting that in such cases of conflict a balancing exercise may need to be undertaken; this would not entail full sale, nor would it entail a 50/50 split. Instead it would involve a compromise to be arrived at through consultation that, by the nature of its resolution, be substantive, not just procedural. In other words, such a situation may require substantive obligations in order to fulfil the duty of active protection.

5 Preliminary Conclusion

Overall, the consultation case law demonstrates that New Zealand has always had substantive consultation obligations but that the SOE case and subsequent cases have interpreted those obligations too narrowly. Statutory provisions for giving effect to the principles of the Treaty should not be interpreted narrowly; and the Crown should not try to limit the principles of the treaty to just consultation.44 The principles require the active protection of Maori interests, and to restrict this to just procedural consultation would be hollow.45 Although this duty is not absolute, the fears concerning its unworkability that were raised in the SOE case are misplaced because the case law itself demonstrates that, when consultation is triggered and what form that consultation may take (procedural or substantive), can be delineated. The delineation will be determined according to the interest at stake; the graver the interest, the greater the duty to actively protect Maori interests.

43 Wellington Airport, above n 12, at 674-676, and 683.
44 Ngai Tahu, above n 37, at 558; SOE case, above n 17; Te Runanga o Wharekauri Rekohu Inc v Attorney-General [1993] 2 NZLR 301 (CA); and Te Runanga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641 (CA).
45 Ngai Tahu, above n 37, at 560.
Thus, the interest at stake can determine where procedural obligations do or do not suffice to discharge the Crown’s duty of partnership.

International law provides insight into the question of what form substantive consultation may take. Next this essay will consider New Zealand’s international obligations where the Treaty is implicated and how the principle of consistency favours a broader interpretation of the Crown’s consultation obligations under the Treaty.

C The United Nation’s Declaration on the Rights of Indigenous Peoples (UNDRIP)

The domestic understandings of the triggers for, and nature of, consultation with Maori can be enhanced by examining the question relative to UNDRIP. The lack of reference to UNDRIP in the discussed cases probably reflects the date. UNDRIP was adopted by the United Nations General Assembly in 2007 and endorsed by New Zealand in 2010.46 It is an aspirational document which sets out a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples.47 As a resolution of the UN General Assembly, the Declaration is a non-binding international instrument with substantive influence on States’ activities.48 It contains a number of key rights such as the right to self-determination, self-government, traditional lands, culture, and measures aimed at restoring lands taken from indigenous peoples without their consent.49 Other significant rights include the right to consultation, and the right to Free Prior and Informed Consent (FPIC) to projects that might affect their territories, with a particular emphasis on extractive industry activities.50 The latter right recognises the impact industry has on indigenous peoples and their land. In particular, it recognises the

46 Pita Sharpels “Supporting UN Declaration restores NZ's Mana” (press release, 20 April 2010).
49 Andrew Erueti and Joshua Pietras, above n 48, at 40; and UNDRIP, above n 47.
50 UNDRIP, above n 47, art 32(2).
subordination of indigenous people’s fears because of poor planning and consultation processes used by States and companies.\textsuperscript{51} Information about a proposed project may be provided to indigenous peoples, but what they desire in most circumstances is effective participation in decision-making processes. This may extend to the right to consent or not to a proposed activity that may have a major impact on their lands and resources.\textsuperscript{52}

The right to consultation reflects other norms of international law, in particular a number of rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) in particular article 19(2).\textsuperscript{53}

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The ICCPR is binding international law, and the UNDRIP provisions are probably intended to reflect art 19(2). This article is read very broadly, particularly in the environmental context. Such that the right to freedom of expression includes the right to have sufficient information and an opportunity to develop a view.\textsuperscript{54} The right to sufficient information is at the heart of consultation because informed decisions require both parties to be fully informed.

The right to FPIC directly addresses the necessity to obtain informed consent before the approval of any project on indigenous land.\textsuperscript{55} During negotiations, States (including New Zealand) considered that FPIC created an unworkable right of veto, a concern echoed in

\textsuperscript{51} Andrew Erueti and Joshua Pietras, above n 48, at 41.

\textsuperscript{52} Andrew Erueti and Joshua Pietras, above n 48, at 41.


\textsuperscript{55} UNDRIP, above n 47, art 32(2).
the SOE case.\textsuperscript{56} However, the content of the right has been clarified in the extractive industry context. In \textit{Saramaka People v Suriname} logging and mining concessions that infringed the Saramaka’s right to property were awarded without proper consultation. The Inter-American Court of Human Rights held that the Saramaka’s right to property here could not be justifiably infringed without complying with specific “safeguards” for protecting the Saramaka’s special relationship with their territory.\textsuperscript{57} Safeguards included the State ensuring effective participation of the Saramaka, in line with their customs and traditions, regarding any development, investment, exploration or extraction plan within their territory. Secondly, the State had a duty to consult with the Saramaka and to obtain their FPIC for any large-scale development or investment projects that would have a major impact on their territory.\textsuperscript{58}

The right to FPIC is argued not to be an absolute or “unworkable right of veto” over all activities. However, it is limited as a right to refuse only activities that may \textit{significantly} impact on indigenous peoples and their land.\textsuperscript{59} Importantly, only two articles in UNDRIP actually provide for a veto\textsuperscript{60}, as the obligation on States is only to engage in a consultation process which is aimed at achieving FPIC, not necessarily securing FPIC.\textsuperscript{61} The former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, stressed that the application of FPIC in relation to the extractive industries is not only about consent, but also on establishing a process that will result in full engagement of the indigenous peoples with the proposal.\textsuperscript{62} Consultation procedures thus provide an opportunity for indigenous peoples to actively contribute to the prior assessment of all potential impacts of the proposed activity, including the extent to which their substantive rights and interests may be affected. These procedures are essential to searching for less harmful alternatives.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{56} Andrew Erueti and Joshua Pietras, above n 48, at 41.
\item\textsuperscript{57} \textit{Saramaka People v Suriname (Judgment – Preliminary Objections, Merits, Reparations, and Costs)} Inter-American Court of Human Rights Ser C No 172, 28 November 2007 at [129]–[134].
\item\textsuperscript{58} At [129]–[134].
\item\textsuperscript{59} Andrew Erueti and Joshua Pietras, above n 48, at 42.
\item\textsuperscript{60} UNDRIP, above n 47, art 10 and 29.
\item\textsuperscript{62} At [59].
\end{itemize}
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Further, consultation should be a mechanism by which indigenous peoples can reach agreements that are in keeping with their own priorities and strategies for development, provide them tangible benefits and advance the enjoyment of their human rights.\(^{63}\)

The objective of FPIC is to involve indigenous peoples early in the decision-making process, including planning and preparation stages of a proposed project. For example, indigenous people may be involved in establishing regulatory frameworks for environmental conservation, natural resource allocation and strategic planning for resource extraction.\(^{64}\) Support for projects is more likely to occur where indigenous peoples have had early and meaningful participation in these processes and in specific projects.\(^{65}\) The concepts of early and meaningful participation are not unfamiliar in the New Zealand context, as reflected in *Wellington Airport*.

If UNDRIP and the right to FPIC is taken into consideration, there ought to be substantive consultation obligations on the Crown in cases likely to have substantial impacts on Maori interests. As set out above, New Zealand has already held that there is a duty to consult with Maori on *truly major issues* and the Courts imposed substantive obligations (agreement for a system of safeguards) in circumstances relating to land and interests in land. New Zealand’s position thus already reflects UNDRIP and is in consonance with the decision of *Saramaka*. The Court in *Saramaka* considered substantive consultation was required, which included FPIC in that specific situation. Thus parallels can be drawn that can assist New Zealand in delineating substantive consultation obligations according to the interest at stake and the strength of that interest. *Saramaka*’s discussion of safeguards also reflect the dicta in the *SOE case*. Thus the trigger for substantive consultation obligations includes an interest or a strong claim to an interest. Where the impact is high, as in *Saramaka*, the duty to consult is substantively higher.

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\(^{63}\) At [59].

\(^{64}\) Andrew Erueti and Joshua Pietras, above n 48, at 43.

\(^{65}\) Andrew Erueti and Joshua Pietras, above n 48, at 43.
The presumption of statutory consistency holds that so far as its wording allows, legislation should be read in a way that is consistent with New Zealand’s international obligations.\textsuperscript{66} The presumption of consistency only applies to international obligations and UNDRIP is not an international obligation. It is a non-binding declaration only. However, there is still domestic authority for looking towards international documents that NZ has signed up to as a guide to interpretation of domestic legislation. In particular, in \textit{Tavita v Minister of Immigration} the Court found the submission that the Minister and the New Zealand Immigration Service are entitled to ignore international instruments as unattractive. It implied that adherence to the international obligations were in part window-dressing.\textsuperscript{67} One reason then, for using international obligations as a tool for statutory interpretation, is that it is unattractive to sign up and then ignore. Further, New Zealand has also made international statements stating our intention to comply with UNDRIP.\textsuperscript{68} Thus the same principle applies.

\textbf{IV The Duty to Accommodate}

Internationally, Canada offers a useful comparison as it shares key legal concepts with New Zealand, such as aboriginal title, and a similar historical context in relation to aboriginal relations. Further, Canada recognises a constitutional duty to consult indigenous peoples that, in certain circumstances, extends to substantive obligations in the form of a duty to accommodate aboriginal interests. This is reflected in their endorsement of UNDRIP and FPIC. The Canadian experience may help understand the triggers for, and nature of substantive consultation obligations in the New Zealand context.

In Canada, Aboriginal and treaty rights are protected by s 35(1) of the Constitution Act 1982: The existing aboriginal and treaty rights of the aboriginal peoples in Canada are hereby recognised and affirmed.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{66} *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.
  \item \textsuperscript{67} *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.
  \item \textsuperscript{68} Pita Sharpels “Supporting UN Declaration restores NZ's Mana” (press release, 20 April 2010); Arawhetu Gray, Deputy-Secretary Policy Partnerships, Te Puni Kokiri “Implementation of the United Nations Declaration on the Rights of Indigenous Peoples” (Fourteenth session of the UN Permanent Forum on Indigenous Issues, 27 April 2015) available at <www.mfat.govt.nz>.
\end{itemize}
\end{footnotesize}
Canadian jurisprudence recognises a spectrum of Aboriginal interests in land and resources, including title to land and rights that allow use and occupation of land. These are the interests that trigger a consultation duty. The extent of the interest determines the level of consultation required.

Aboriginal title and aboriginal rights in Canada are not absolute. In *R v Sparrow*, the Supreme Court of Canada held that although aboriginal rights are constitutionally protected, legislation and government action can infringe those rights where an infringement is justified. The notion of justifiable infringement is guided by the fiduciary obligations owed by the Crown to Aboriginal peoples and the necessary application of the Honour of the Crown (to be discussed below). Whether the infringement can be justified is where the duty to consult is crucial; thus consultation with aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified (informed decision-making).

Justifiable infringement was characterised further in the Supreme Court case of *Delgamuukw v British Columbia*. First, there must be a compelling and substantial legislative objective. This was interpreted widely, with Lamer CJ classifying mining and general economic development as objectives that could justifiably infringe Aboriginal interests. Secondly, there must be an assessment on whether the infringement is consistent with the Crown’s special fiduciary relationship with Aboriginal peoples. This

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69 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [138].
70 At [138].
71 At [138].
72 At [168].
73 *R v Sparrow* [1990] 1 SCR 1075 at 1109; and *Delgamuukw v British Columbia*, above n 69, at [160].
74 *R v Sparrow*, above n 73, at 1110.
75 At [75] and 1114; and *Delgamuukw v British Columbia*, above n 69, at [166].
76 *R v Sparrow*, above n 73, at 1109; Sara Kate Battersby “The Duty To Consult: What Aotearoa New Zealand can Learn from Canada” (2013) 4 Te Tai Haruru at 8.
77 *Delgamuukw v British Columbia*, above n 69, at [161].
78 At [165].
79 At [161].
assessment is particular to the specific “legal and factual context”, but the nature of the right determines the degree of scrutiny required. Importantly, in all cases, there is a minimum standard of consultation with the affected group. The circumstances dictate what level of consultation is required, such as the nature of the interest at stake. Further, the nature of the interest may also trigger the duty to accommodate Aboriginal interests in respect of the infringing action. Where title is infringed, the economic aspect suggests that fair compensation will be required. However, if the interest only extends to a right to use land or resources, the right to accommodation is lessened.

In Haida Nation v British Columbia (Minister of Forests) the Supreme Court upheld a duty to consult where yet-unclaimed Aboriginal rights or title were concerned. The duty arose from the Honour of the Crown, as it was deemed that this should be applied generously. The Honour of the Crown is an ancient common-law doctrine. Essentially it “requires servants of the Crown to conduct themselves with honour whenever acting on behalf of the Sovereign”. It encompasses ideas of fundamental justice. In Haida Nation, it was held to arise “from the Crown’s assertion of sovereignty over a First Nation people and de facto control of land and resources that were formerly in control of that people”. The Court recognised that sovereignty was not legitimately gained from First Nation occupants of the land but rather imposed. The tension created by the assertion of the Crown’s de facto sovereignty and the legitimate but undermined sovereignty of the First Nation people creates this special relationship which requires the Crown to act honourably towards the

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80 At [162].
81 Delgamuukw v British Columbia [1997] 3 SCR 1010 at [166].
82 At [168] (emphasis added).
83 At [168].
84 At [167].
85 Haida Nation v British Columbia (Minister of Forests) [2004] 3 SCR 511.
86 Max Harris “Manitoba Métis Federation (Inc) v Attorney-General (Canada): A step forward for indigenous rights jurisprudence and an opportunity for New Zealand” (2013) May Maori LR 1 at 3.
88 Haida Nation, above n 85, at [32].
89 Manitoba Métis Federation v Attorney-General (Canada) [2013] SCC 14 at [66].
First Nation people. This relationship acknowledges that, at the time of imposition of the Crown’s law, the Crown had persuaded the indigenous peoples that it could be relied upon to protect their rights better than if they were left alone. Thus, the doctrine recognises the presence of the First Nation people, the injustice of the superimposition of the Crown's laws on those people and the impacts that unfamiliar legal system had on them.

In the SOE case the Court stated that the Treaty obliges the Crown to recognise the interests therein as well as actively protect them, and the principle of active protection is inherent in the concept of an on-going partnership founded on the Treaty. The Court considered these principles (active protection and partnership) to be an articulation of the Honour of the Crown, which they stated underlies all treaty relationships. The statement in the SOE case that the doctrine is reflected in the Treaty principles highlights the validity of looking at the Canadian jurisprudence when interpreting the Treaty. Further, Cooke P, in a later case considered the principles of partnership and fiduciary analogies to be consistent with the Canadian law. He stated that in interpreting legislation and common law, the New Zealand courts must “lean against any inference that in this democracy the rights of the Maori people are to be less respected than the rights of aboriginal peoples are in North America”. Thus the Canadian jurisprudence is a valid and persuasive consideration for the New Zealand courts.

The decision in Haida Nation created a constitutional duty to consult, with a view to accommodate, where appropriate, claimed Aboriginal interests before permitting any activities that may adversely affect those interests. Importantly, consultation was

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90 At [67].
91 At [66].
92 At [67].
93 SOE case, above n 17, at 702.
94 At 703.
95 At 703.
96 Te Runanga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641 (CA) at 655, per Cooke P.
97 At 655, per Cooke P.
considered essential for defining Aboriginal rights. The Court rejected the claim there was no duty to consult because the Crown did not know what rights existed before claims were resolved. Although this may pose difficulties, the Court thought it possible to determine an idea of asserted rights and their strength, sufficient to determine whether an obligation to consult and accommodate was triggered, before final judicial determination or settlement. The duty is triggered when:

… the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect them. The determination of such a duty depends both on the strength of the right that is being encroached upon as well as the negative impact and gravity of the government’s conduct. When the Crown has actual or constructive knowledge of the existence, or potential existence, of an Aboriginal right, and contemplates conduct that might adversely affect it, the Honour of the Crown gives rise to a duty to consult.

The Court also discussed the scope and content of the duty to consult and accommodate stating that generally, the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. In most cases, (the duty) will be significantly deeper than mere consultation, with some cases requiring the full consent of an Aboriginal nation. These sentiments reflect some of the discussion in the SOE case; however, the Court in Haida Nation very clearly sets out the parameters of the duty.

Haida Nation also provides a useful comparator with the New Zealand Forestry Assets case since both cases concerned unclaimed interests and forestry licences. In Haida Nation the granting of a forestry license was held to trigger a duty to consult and accommodate

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98 Haida Nation, above n 85, at [38].
99 At [36].
100 At [36].
101 At [35].
102 At [39].
103 Delgamuukw, above n 69, at [168], quoted in Haida Nation above n 98, at [40].
Aboriginal interests. This was because the Haida Nation had a good prima facie claim to title and a right to harvest red cedar. The granting of a licence to a third party risked serious impacts on their title and resource. In *Forestry Assets*, similar rights were at stake and the Court determined that consultation was required in order to be consistent with the Treaty principles. The Court did not discuss what consultation might require. It simply concluded that the interest was sufficiently linked to an interest protected in the *SOE case* and that the concept of partnership meant that the good faith owed to each other required consultation. By analogy, the Canadian Supreme Court in *Haida Nation* discussed the duty in terms of the Honour of the Crown, which requires good faith dealing and meaningful consultation. Thus arguably, if *Forestry Assets* had been decided in Canada, it would likely have triggered a duty to accommodate.

The Canadian Courts demonstrate that the fears raised in the *SOE case* concerning the onerous creation of an absolute formless duty to consult, are largely misplaced. There can be a duty to consult that may, in some cases, extend to substantive obligations in the form of agreement or accommodation of Maori interests. This duty can exist without disproportionately impacting on the rights of a duly-elected government to govern as it sees fit. The Canadian duty to accommodate may also help determine what is meant by cooperation and what interests may require more than procedural consultation with Maori.

An analysis of the Waitangi Tribunal jurisprudence provides further guidance about what may be required from consultation in a Treaty context. This jurisprudence echoes FPIC as well as the duty to accommodate.

### V Full, Free and Informed Consent

The Waitangi Tribunal has developed and qualified what consultation may mean in the Treaty context. Importantly, the Tribunal’s jurisdiction is based on Treaty principles so where it deals with consultation it is examining what would be required to act consistently with Treaty principles. The Tribunal’s conclusions on consultation – which are

104 Treaty of Waitangi Act 1975, preamble.
consistent with Canadian and international developments – have developed such that consultation with Maori requires substantive consultation in some cases, and this could encompass a duty to accommodate or obtain FPIC. The relevant Tribunal reports all emphasise the principle of partnership, exercised in good faith, and the duty of active protection. These themes underpin a duty to consult and in some circumstances a need to compromise or obtain full, free and informed consent from Maori. The importance of the Tribunal’s consultation jurisprudence can be gleaned from the Supreme Court’s consideration of consultation in the context of Treaty issues in New Zealand Maori Council v Attorney-General (Mighty River Power). The Court determined that there was no contention that, following the recommendations of the Waitangi Tribunal in its interim report on Freshwater, it was necessary for the Crown to consult further with Maori. Although the final approach adopted by the Crown was not consistent with the Tribunal’s recommendations, the consultation undertaken by the Crown was in line with the Tribunal’s recommendations and consistent with the principles of the Treaty.

Waitangi Tribunal reports have described the Crown’s duties as being fiduciary in nature, and as an exchange of sovereignty for protection of Maori rangatiratanga. This concept of exchange encompasses a duty to consult.

In the Ngawha Geothermal Resources Report 1993, the Tribunal stated that:

… with the Treaty principle of partnership, the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective. At the

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106 At [83].
107 At [83 – 87]; Waitangi Tribunal The Stage 1 Report on the National Freshwater and Geothermal Resources Claim (Wai 2358, 2012) [Freshwater Report] at [2.8.3(1)].
same time the Treaty guarantee of rangatiratanga requires a high priority for Maori interests when proposed works may impact on Maori taonga.

The Tribunal further concluded that: ¹¹²

Before any decisions are made by the Crown … on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori [if the obligation of active protection by the Crown is to be fulfilled].

In the Maori Community Development Act Report, the Tribunal departed from traditional jurisprudence. It sought to address the relationship between the Treaty and UNDRIP, and determine how the latter may influence the interpretation and application of Treaty principles. In discussing the duties of active protection, informed decision-making, and the duty to consult, the Tribunal concluded that: ¹¹³

… the principle of active protection has been extended … to include the duty to obtain the full, free, and informed consent of Maori in certain settings. Where the respective spheres of authority held by the Crown and Maori overlap, the extent of what is needed to actively protect Treaty rights may need to be the subject of negotiation and compromise. The principle of active protection should be applied so as to reflect the appropriate level of Maori authority.

The Tribunal considered that this claim was “at the high end of the spectrum for consultation and cooperation” given the subject matter of the Maori Community Development Act and the surrounding policy. ¹¹⁴ As such, the Crown is on notice to actively

¹¹⁴ Waitangi Tribunal Maori Community Development Act, above n 113, at 43.
protect Maori interests by allowing Maori decision-making processes to occur so that Maori may give free, prior and informed consent to any review and reform that relates to its authority. Procedural consultation in the context of this specific legislation would not discharge the Crown of its duty of active protection.\textsuperscript{115}

The Tribunal referred to the \textit{Ko Aotearoa Tēnei} report as offering further guidance as to when it is appropriate for either: the Crown to consult and decide; for the Crown and Maori to consult each other and make decisions together; or for Maori alone to decide. The Tribunal found that there is a sliding scale, depending on the nature and strength of the rangatiratanga interest in the matter concerned. It found that:\textsuperscript{116}

\begin{quote}
There can be no “one size fits all” approach. Rather, the Treaty standard for Crown engagement with Maori operates along a sliding scale. Sometimes, it may be sufficient to inform or seek opinion … But there will also be occasions in which the Maori Treaty interest is so central and compelling that engagement should go beyond consultation to \textit{negotiation aimed at achieving consensus, acquiescence or consent}.
\end{quote}

The Tribunal also considered that the interest or taonga should determine the level of participation because not all taonga are of the same worth and thus the level of protection will differ.\textsuperscript{117} This differentiation meant that what is required is a system that allows all legitimate interests to be considered against an agreed set of principles, and balanced case by case (not a one-size-fits-all approach).\textsuperscript{118} Three levels of participation were identified: Maori control where no other interests exist; joint decision-making where partnership is the appropriate model; and the ability to influence generally.\textsuperscript{119}

The Tribunal also considered the principle of options, that is, consultation on multiple interests concerned by putting options to the consultees and seeking ‘direction’ from Maori

\textsuperscript{115} Waitangi Tribunal \textit{Maori Community Development Act,} above n 113, at 61.
\textsuperscript{116} Waitangi Tribunal \textit{Ko Aotearoa Tēnei,} above n 113, at 237 (emphasis added).
\textsuperscript{117} At 112.
\textsuperscript{118} At 112.
\textsuperscript{119} At 112.
as to which options should be adopted. However, the Crown’s process in that case misapplied the principle of options because the Maori interest was so central that “engagement should [have gone] beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent”. What was required, in effect, was collaborative agreement. The principle of options was described in the *Te Tau Ihu Report*:

The Treaty envisaged a place in New Zealand for two peoples with their own laws and customs, in which the interface was governed by partnership and mutual respect. Inherent in the Treaty relationship was that Maori, whose laws and autonomy were guaranteed and protected, would have options when settlement and the new society developed. They could choose to continue their tikanga and way of life largely as it was, to assimilate to the new society and economy, or to combine elements of both and walk in two worlds. Their choices were to be free and unconstrained.

The discussions in Wai 262 and the *Maori Community Development Act Claim* support that the nature of the interest will determine the level of consultation. The Canadian courts use the word spectrum, while the Wai 262 Tribunal called it a sliding scale. Thus the more significant the interest, the more that is required from consultation. This idea was further developed and subsequently applied to legislation dealing with land in the *Te Ture Whenua Maori Act Reform Claim*. In that claim the Tribunal concluded that the taonga was so significant in that case (Maori land) that the Maori interest was so central and so compelling that the Crown required fully informed broad based consent from Maori to proceed with the reforms; consultation extended to requiring full, free and informed consent.

**VI Conclusion**

The New Zealand case law and Waitangi Tribunal jurisprudence have developed the meaning of consultation in the Treaty context. Recently, this has been informed by

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120 Waitangi Tribunal *Maori Community Development Act*, above n 113, at 358.
121 Waitangi Tribunal *Ko Aotearoa Tēnei*, above n 113, at 237; Waitangi Tribunal *Maori Community Development Act*, above n 113, at 361.
122 Waitangi Tribunal *Maori Community Development Act*, above n 113, at 361.
124 Waitangi Tribunal *He Kura Whenua Ka Rokohanga*, above n 7, at 237.
UNDRIP, which supports the proposition that procedural consultation in some situations is insufficient to discharge the Crown’s duty to actively protect Maori or to discharge their duty of partnership. The level of consultation required is directly correlated to the taonga at stake, and interests in land are sufficient to trigger a substantive duty, whether that relates to title or use. Further, this should apply to interests irrespective of whether they are yet claimed under the Treaty, particularly where the claims are well founded. The fears espoused in the SOE case have impeded the development of a substantive duty; however, the Canadian duty to accommodate and their spectrum analysis (shared by the Waitangi Tribunal) demonstrates that fear of creating an onerous duty is inflated and consultation can be developed in a way that balances the partnership between Maori and the Crown, as well as allowing a duly elected government to govern as it sees fit. The Tribunal’s findings, although non-binding provide extensive consideration and thus may help inform the courts in the establishment and development of a duty to consult and where appropriate accommodate.

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VIII Word Count
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