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**Kaitiakitanga and the conservation estate:
Protecting Māori guarantees under the Treaty of Waitangi
through the New Zealand Bill of Rights Act 1990**

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2018

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Abstract:

Māori are tangata whenua (people of the land) of Aotearoa New Zealand. The development, sustenance and transmission of mātauranga Māori (Māori knowledge) requires a relationship between tangata whenua and their taonga (everything that is held precious). Since the arrival of Europeans, this relationship has been compromised by environmental degradation, the alienation of tangata whenua from traditionally owned lands and urbanization.

The conservation estate is one of the few remaining avenues through which Māori can fulfil their cultural obligations as kaitiaki (guardians) over their taonga. Since the creation of the conservation estate, the Crown has assumed near-absolute management. As the Waitangi Tribunal's *Ko Aotearoa Tēnei* report identified, the exclusion of Māori from participation in the management of the estate renders the Crown in breach of both the governing legislation, the Conservation Act 1987, and the Treaty of Waitangi.

This paper considers whether the exclusion of Māori from the governance of the conservation estate, frustrating their ability to act as kaitiaki over their taonga, breaches two rights under the New Zealand Bill of Rights Act 1990. The paper asks whether the Crown's exclusion violates s 15, the right to manifest religion or belief, or s 20, the right to culture.

This paper concludes that the scope of both rights can incorporate, and protect, the exercise of kaitiaki obligations, with s 20 being the most appropriately tailored to protecting this practice. The analysis explores the parameters of both rights and considers whether similar claims taken in comparative jurisdiction can provide guidance for the inclusion of this practice under New Zealand Bill of Rights Act. Recognising kaitiaki obligations as protected under the Act provides that in acting as a gatekeeper between Māori and their ability to sustain a relationship with their taonga, the Crown is breaching human rights.

Kei raro i ngā tarutaru, ko ngā tuhinga a ngā tūpuna
Beneath the herbs and plants are the writings of the ancestors

Māori are tangata whenua (people of the land) of Aotearoa New Zealand. Their relationship with the native environment is underpinned by te ao Māori (the Māori worldview). In te ao Māori all elements of creation, animate and inanimate, are connected through a “web of common descent” and seen as alive and infused with mauri (living essence or spirit).¹ This familial relationship obliges Māori, as tangata whenua, to act as kaitiaki (guardians) over their taonga (everything that is held precious).²

Tikanga Māori (the Māori way of doing things) is sustained through mātauranga (Māori knowledge).³ Mātauranga is developed through the physical and spiritual relationship between tangata whenua and their taonga.⁴ This relationship led to the broader creation of Māori culture and distinctive tribal cultures. It is “essential to the maintenance of those cultures that ongoing interaction is sustained.”⁵

Through Crown policies, confiscations, and compulsory acquisitions, Māori have faced exclusion and isolation from their taonga and enormous tracts of traditionally owned lands.⁶ For Māori, dissociation from their taonga is dissociation from their ability to engage in, sustain and transmit their culture.⁷ The conservation estate, governed by the Department of Conservation (DOC), is one of the few avenues through which Māori can fulfil their

¹ Waitangi Tribunal *Ko Aotearoa Tēnei* (Wai 262, 2011) at 17.

² At 17.

³ Hirini Moko Mead *Tikanga Māori* (Rev ed, Huia Publishers, Wellington, 2016) at 5-6. This paper understands tikanga Māori to be a flexible, normative system of rules or principles that govern the correct way to do things. For substantive discussion on what types of practices and principles are encompassed within tikanga Māori refer to chapters 1-3.

⁴ At 314.

⁵ At 300.

⁶ David Williams *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Waitangi Tribunal, Wellington, 2001) at 20.

⁷ Wai 262, above n 1, at 300.

kaitiaki obligations given the destruction of natural habitats, decline of native species and their substantial loss of traditionally held lands.⁸

In 2011, the Waitangi Tribunal, the permanent inquiry established to investigate Crown breaches of the Treaty of Waitangi, released the seminal *Ko Aotearoa Tēnei* (Wai 262) report. The report addressed how the Crown's assumption of near-absolute control of the conservation estate, to the alienation of tangata whenua, has frustrated their ability engage in traditional practices and conserve relationships with their taonga. Despite the publication of Wai 262 seven years ago, the Crown has largely ignored the recommendations. No changes have been made to DOC's general policies or the legislative framework to incorporate Māori in the governance of the conservation estate.

Following the Government's refusal to engage with the Wai 262 conclusions, I consider the applicability of other legal avenues that may protect this practice. This paper focuses on whether the Crown, through DOC, has breached the human rights of Māori by acting as the gatekeeper between tangata whenua and their exercise of kaitiaki obligations over taonga.

I argue that the Crown is in breach of the New Zealand Bill of Rights Act 1990 (BORA), which has the capacity to protect the exercise of kaitiaki obligations over the DOC estate. I consider the potential of two rights enshrined within BORA: s 15, the right to manifest religion or belief, and s 20, the rights of minorities. I argue that both rights have the scope to include kaitiaki practices, however, s 20 is more appropriately tailored to protect the exercise of these cultural obligations. This inclusion means that, by excluding Māori from the DOC estate, the Crown is breaching the rights of Māori enshrined in two key constitutional documents; the Treaty of Waitangi and BORA.

This paper begins by considering the damaging effect that the isolation of tangata whenua from their taonga has had on their ability to engage in culture, and develop and transmit

⁸ At 300.

mātauranga Māori. To fully appreciate how this right is breached, I outline New Zealand's unique framework governing the recognition of Indigenous rights. The practices of tangata whenua are protected through both the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Having explored these protections, I consider how the legislation governing the conservation estate operates to exclude the interests of tangata whenua. This analysis concludes that not only is this exclusion an infringement of rights protected through the Treaty and UNDRIP but violates the protections of the governing legislation, the Conservation Act 1987. The Crown is not unaware of this breach. In this section I consider how the Waitangi Tribunal has already addressed the exclusion of iwi (tribal groupings) participation from the governance of the DOC estate, to no avail.

I proceed to consider whether the rights protected in BORA can fill this lacuna. Whether the exercise of kaitiaki practices over the conservation estate can be protected through either s 15, the right to manifest religion or belief manifestation, or s 20, the rights of minorities is evaluated. This involves an assessment of the scope of both rights. In outlining these parameters, I engage in a comparative exercise by evaluating the similarities and distinguishing features of analogous claims taken by Indigenous communities in the United States and Canada.

I propose that s 20 is not only capable of recognising kaitiaki obligations but is the most appropriate right for the practice to be recognised under. The incorporation of kaitiaki practices within the scope of the right is bolstered by the Treaty clause in the Conservation Act, and the protection of the rights of tangata whenua through the Treaty and UNDRIP.

I Māori exclusion from the conservation estate

The isolation of Māori from their taonga is a spiritual, physical and cultural injustice. Waitangi Tribunal reports have commented on the unquantifiable spiritual and physical loss to iwi in having their governance of, and relationship with, an area or resource

interfered with.⁹ This loss occurs because Māoritanga (Māori culture) does not divide the concepts of culture and religion, which are inseparably enmeshed. Spirituality and divinity in te ao Māori is derived from the land itself, with the spiritual wellbeing of the people being bound to sacred areas.¹⁰ This connection is understood through the concept of whanaungatanga. Whanaungatanga refers to the broad net of relationships between “people (living and dead), land, water, flora and fauna, and the spiritual world of atua (gods)” that are meshed together through whakapapa.¹¹ For example, the sea is not separate element of nature, but is the ancestor-god Tangaroa whose descendants are the fish and reptiles found in the waters.¹² The native plants of Aotearoa are descendants of Tāne-mahuta, who breathed life into the first woman.¹³

Tangata whenua can map their ancestry to the natural environment through the relationship of whakapapa, which describes the genealogical connection between the individual to the tribal cosmos.¹⁴ This familial relationship means that environmental degradation and species extinction is not an extraneous loss for tangata whenua, like in Western culture, but an innately personal loss.¹⁵

To prevent this destruction occurring, tangata whenua have an inherited responsibility to exercise kaitiakitanga over Aotearoa.¹⁶ This form of cultural guardianship imputes a set of reciprocal, unwavering obligations on tangata whenua in the spiritual and physical realm

⁹ Catherine Iorns Magallanes “Māori Cultural Rights Aotearoa New Zealand: Protecting the Cosmology That the Environment” (2015) 21 *Widener L. Rev.* 273 at 291, citing Waitangi Tribunal *Te Ia Whenua Rivers Report* (Wai 212, 1998) at 59-60.

¹⁰ *Ngāti Rangī Trust v Manawatū-Wanganui Regional Council* NZEnvC, A067/2004 at [318].

¹¹ Wai 262, above n 1, at 237.

¹² At 72.

¹³ At 72.

¹⁴ Wiremu Doherty “Mātauranga ā-Iwi as it Applies to Tūhoe” in *Enhancing Mātauranga Māori and Global Indigenous Knowledge* (New Zealand Qualifications Authority, Wellington, 2014) at 38.

¹⁵ Jacinta Ruru and others “Reversing the Decline in New Zealand’s Biodiversity: empowering Māori within reformed conservation law” (2017) *Policy Quarterly* 65 at 65.

¹⁶ Joseph Williams J “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law. (Harkness Henry Lecture)” (2013) 21 *WLR* 1 at 4.

to nurture the mauri of all taonga.¹⁷ Kaitiakitanga maintains harmony and balance through the exercise of manaaki (care) and rāhui (protection).¹⁸ Rāhui is an integral concept that provides for a temporary ban or ritual prohibition over an area to protect the fertility of either terrestrial or marine resources.¹⁹ Kaitiakitanga is best understood as a system of law.²⁰ The exercise of kaitiakitanga is not limited only to accessing and nurturing taonga in accordance with mātauranga and tikanga.²¹ Rather, it extends to having authority over taonga to determine who else may access, research or use the taonga for any other objective.²²

Following the establishment of the Treaty settlement process, Māori have recovered less than 6% of their original territories.²³ The jurisdiction of DOC is a conservation estate that covers over eight million hectares of land, almost one third of New Zealand, and 1.28 million hectares of marine reserves.²⁴ This includes land that was historically alienated from Māori through Crown actions.²⁵ Therefore, within the conservation estate is a large amount of the mōrehu (surviving remnants of taonga places and species) from which mātauranga developed.²⁶ Many of the native flora and fauna play important roles in ritual ceremonies, activities, medicines. The relationship of tangata whenua and the natural environment embodies “deep values built up through generations of interaction.”²⁷

¹⁷ M Roberts and others "Kaitiakitanga: Māori perspectives on conservation" (1995) 2 *Pacific Conservation Biology* 7 at 7.

¹⁸ Rachael Selby, Pātaka Moore and Malcolm Mulholland (eds) *Māori and the Environment: Kaitiaki* (Huia Publishers, Wellington, 2010) at vii.

¹⁹ Fiona McCormack “Rāhui: A blunting of teeth” (2011) 120 *The Journal of the Polynesian Society* 43 at 44.

²⁰ Williams, above n 16, at 4.

²¹ Wai 262, above n 1, at 300.

²² At 300.

²³ Paerau Warbrick “A cause for nervousness: The proposed Māori land reforms in New Zealand” (2016) 12(4) *AlterNative* 369 at 370.

²⁴ Wai 262, above n 1, at 299.

²⁵ Williams, above n 6, at 20.

²⁶ Wai 262, above n 1, at 300.

²⁷ At 297.

This paper is concerned with the protections available for a traditional practice exercised over native areas of significance to particular iwi. The DOC estate provides an avenue for Māori to reestablish their traditional relationships with taonga, through increased participation and control of the land both throughout the entire estate and specifically for important areas and species. Whilst there are the general obligations of kaitiaki practices that unite Māori culture, the relationship between iwi and their taonga is unique within each rohe, as the practice of kaitiakitanga is location-based.²⁸ The absolute Crown control of the estate operates as the barrier between Māori and the “places and species among which their culture developed.”²⁹ The right can be understood to be infringed both generally and discretely for particular iwi wishing to engage with their taonga held under DOC governance within their rohe.

A Crown control of the conservation estate

Despite being responsible for managing, protecting and preserving the ecosystems and habitats of nearly one-third of New Zealand’s land area, DOC is one of the least funded government ministries.³⁰ The Crown entity currently operates on the presumption that it lacks the resources to be a sustainable steward. It is structured to rely on a high level of stakeholder participation and community involvement.³¹ Given the states practical limitations, the historical, cultural and spiritual relationship of Māori to the land, and the obligation on DOC to administer their functions in a manner that gives effect to the principles of the Treaty of Waitangi, co-management and high levels of iwi participation would be the anticipated norm.³² However, this has not happened; collaboration between local iwi and DOC is the exception, and not the rule.³³

²⁸ Sharon Gemmell “Kaitiakitanga: Consciousness of Place” (Masters of Education, Victoria University of Wellington, 2013) at 9.

²⁹ Wai 262, above n 1, at 300.

³⁰ State Services Commission, Treasury and Department of the Prime Minister and Cabinet *Review of the Department of Conservation* (Performance Improvement Framework, 2014) at 48-49.

³¹ Wai 262, above n 1, at 335.

³² Conservation Act 1987, s 4.

³³ Wai 262, above n 1, at 300-303.

On the international stage, the 2011 report of the Special Rapporteur drew attention to the inconsistency in the procedures that govern iwi-Crown partnerships and the implementation of collaborations in a manner discordant with traditional Māori decision-making protocol.³⁴ During the Wai 262 hearing panels, iwi raised concerns about DOC's exclusionary decision-making processes - and failure to substantively consult them - in decisions related to their taonga.³⁵

The pūpū harakeke (flax snail) revival programme operated by DOC provided an apt example of this exclusion. The pūpū harakeke is a threatened species found within the Ngāti Kurī rohe. Ngāti Kurī attribute their historical survival to being warned by the sound of the shells being cracked under invaders feet.³⁶ As such, the pūpū harakeke are revered as sacred guardians of the tribe. Currently, the surviving pūpū harakeke are found on a DOC-administered science and nature reserve that requires all public, including Ngāti Kurī, to obtain a permit before entering.³⁷ Ngāti Kurī representatives gave evidence of being “excluded, barred and locked out’ from exercising rangatiratanga (authority) over pūpū harakeke sites”.³⁸

A major social factor in the exclusion of Māori from their taonga is a general suspicion and sometimes outright opposition to iwi-led conservation management.³⁹ Two primary reasons have been identified as the cause of this mistrust. Firstly, since the introduction of conservation law in New Zealand, the policy has been dominated by the preservationist approach, which will be further addressed below.⁴⁰ The second reason is believed to be a general lack of understanding and education of in the value of mātauranga Māori.⁴¹ A local environmental lobby group opposed to DOC's devolution of native species harvesting

³⁴ James Anaya *Report of the Special Rapporteur on the Rights of Indigenous Peoples, Addendum: The Situation of Māori People in New Zealand* (31 May 2011) A/HRC/18/35/Add.4 at [21].

³⁵ Wai 262, above n 1, at 304.

³⁶ At 304 citing Document D6 (Haana Murray, brief of evidence) at 7–8.

³⁷ At 304.

³⁸ At 304 citing Document D6 (Haana Murray, brief of evidence) at 8.

³⁹ At 311.

⁴⁰ At 311.

⁴¹ At 311.

decisions to iwi exemplified this issue. The group claimed that the ‘transfer of permit issuing functions to Māori groups is a dangerous and unfortunate precedent which will open the floodgates to unsustainable harvesting of threatened species’.⁴² The irony of such statements about the environmental practices of Māori, who have fulfilled their role as kaitiaki over their taonga for centuries prior to European arrival, were not lost on the iwi.⁴³

B Indigenous rights

Before we can properly address the problem this paper poses, a fundamental question concerning New Zealand’s unique constitutional structure must be answered. To consider the right of Māori to be incorporated in the governance of the conservation estate we must firstly consider what rights Māori have to be included in the management of the estate. This section addresses the role of two instruments in securing the rights, and recognising the interests, of Māori to participate in the governance of the DOC estate. These two legal tools are the Treaty of Waitangi/ te Tiriti o Waitangi and the UNDRIP.

1 Treaty of Waitangi/ te Tiriti o Waitangi

New Zealand is unique in that an unincorporated treaty, the Treaty of Waitangi occupies a central position in our “constitutional fabric”.⁴⁴ Despite not being an independent source of rights and obligations, the Treaty is the authority through which the Crown traces its legitimacy to govern.⁴⁵ The *New Zealand Māori Council v Attorney-General (Lands Case)* affirmed the overarching principle of partnership in their determination of the principles of the Treaty. They were identified as partnership in good faith, the duty to act reasonably and to make informed decisions, active Crown protection of Māori interests, redress and the Crown’s right to govern.⁴⁶ The Court was careful to recognise the Treaty as “an embryo, rather than a fully developed and integrated set of ideas”.⁴⁷ Accordingly, there is no final and complete list of Treaty principles.

⁴² Brad Coombes “Postcolonial Conservation and Kiekie Harvests at Morere New Zealand – Abstracting Indigenous Knowledge from Indigenous Polities” (2007) 45 *Geographical Research* 186 at 191.

⁴³ Wai 262, above n 1, at 345.

⁴⁴ *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).

⁴⁵ Andrew and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 10.

⁴⁶ *New Zealand Māori Council v Attorney-General (Lands Case)* [1987] 1 NZLR 641 (CA) at [642, 664-66].

⁴⁷ At [642].

The modern understanding of the Treaty focuses on its “spirit, intent, circumstances and terms”.⁴⁸ Māori agreed to relinquish sufficient authority to enable the Crown to govern and pursue the policy agenda that resulted in its election.⁴⁹ However, this right is qualified by a fiduciary relationship that imputes a positive obligation onto the Crown to protect the tino rangatiratanga (self-determination) of Māori.⁵⁰ The sovereignty of the Crown bestowed in Article One of the Treaty is curtailed by their obligation to recognise the rights encapsulated in Article Two.⁵¹ The Courts have been clear that the Treaty is a “living instrument” and the obligations are ongoing, adaptable and will “evolve from generation to generation as conditions change”.⁵² The Courts have further held that the Treaty must be a prevalent concern for the Executive in the discharge of their functions and failure to consider Treaty obligations may render administrative decisions unlawful.⁵³ This is a pertinent conclusion when considering DOC’s unilateral control of the conservation estate despite the explicit recognition of the Crown’s obligation to administer its functions in a manner that gives effect to the principles of the Treaty. The publication of the Wai 262 report substantively addressed that the sole Crown control of the conservation estate breached the Treaty.⁵⁴

⁴⁸ Te Puni Kōkiri *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri, Wellington, 2002) at 16.

⁴⁹ Wai 262, above n 1, at 322.

⁵⁰ At 322.

⁵¹ Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988) at 232.

⁵² *Lands case*, above n 46, at 656 and *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 656.

⁵³ M Smith *New Zealand Judicial Review Handbook* (Thomson Reuters, Wellington, 2011), ch 64 and further commentary in Butlers, above n 45, at 11. Consider the decision of *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA). The Court of Appeal granted the appeal in part because of the Director-General of Conservation’s failure to consider the special interests of iwi as protected through the Treaty of Waitangi when granting commercial whale watching permits. The Court emphasised that the specific fact situation, and recognition of Treaty obligations under s 4 of the Conservation Act 1987, entitled the claimants to a reasonable degree of preference in the Director-General’s decision to grant permits.

⁵⁴ Wai 262, above n 1, at 323.

2 *United Nations Declaration on the Rights of Indigenous Peoples*

On an international scale, the New Zealand Government has further sought to protect and recognise the rights of Māori. In 2010, New Zealand became a signatory to UNDRIP. The Declaration outlines the minimum standards that states must aspire to comply with to protect the rights of Indigenous people to self-determination, culture and participation in society. The Declaration does not have a formal means of monitoring state compliance and is soft law.⁵⁵

The purpose of the Declaration, to “enhance harmonious and cooperative relations between the State and Indigenous peoples”, is consistent with the purpose of the Treaty.⁵⁶ The Human Rights Commission has outlined that government decisions and policy are to consider the principles of UNDRIP and the Treaty in conjunction.⁵⁷ In the judicial sphere there has been a developing ethos of ensuring that administrative decisions are compliant with both domestic and international obligations that the Executive has recognised.⁵⁸

In supporting the Declaration, the Crown explicitly reaffirms the right of Māori to self-determine and “freely pursue their economic, social and cultural development.”⁵⁹ Self-determination is the “cornerstone” right of Māori as New Zealand’s Indigenous population.⁶⁰ Alongside the Treaty’s guarantee of *te tino rangatiratanga*, international law reaffirms state recognition of the right to a “range of alternatives including the right to participate in the governance of the State as well as the right to various forms of autonomy

⁵⁵ Tara Ward “The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law” (2011) 10 *Nw. J. Int’l Hum. Rts.* 54 at 58.

⁵⁶ Human Rights Commission “The Rights of Indigenous Peoples: What you need to know” (2016) Human Rights Commission <www.hrc.co.nz> at 5.

⁵⁷ At 6.

⁵⁸ Justice S Glazebrook and others “New Zealand: Country Report on Human Rights” (2009) 50 *VUWLR* 57 at 62.

⁵⁹ United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/Res/61/295 (2007), art 3.

⁶⁰ Fleur Adcock “Māori and the Bill of Rights Act: A Case of Missed Opportunities?” (2013) 11 *NZJIPL* 183 at 184.

and self-governance.”⁶¹ The Declaration goes further in clarifying the rights to be accorded to Indigenous peoples. The right of Indigenous peoples to maintain and strengthen their spiritual relationship with their lands and resources is explicitly affirmed.⁶² This includes the right to maintain, protect and practice their cultural and spiritual traditions with specific recognition to the role of sites.⁶³ Prima facie, the Crown’s unilateral control and dictation of tangata whenua access to taonga within the conservation estate is a breach of these rights.

II Māori rights and the conservation estate

The legal framework that governs the conservation estate rests on a foundation of recognising Indigenous rights. However, this is not reflected in conservation legislation, which is dominated by Western conservation values and anthropocentric understandings of nature. This part outlines how conservation legislation enshrines a preservationist approach that excludes the operation of tikanga Māori, and evaluates the limited provisions designed to enable the exercise of mātauranga Māori over the environment.

A Preservationist approach

A “Greco-Christian arrogance” that assumes humans to be the rightful masters of nature underpins the classical, Western construction of the environment.⁶⁴ Leading academics of the Industrial Age reiterated this anthropocentric conception to justify the parasitic relationship between man and nature required for the establishment of modern society.⁶⁵ The institution of private property rights is recognised as the vehicle that “makes civilization possible”.⁶⁶ Accompanying this bundle of rights is a generally unrestrained

⁶¹ Erica-Irene Daes *Special Rapporteur on the Rights of Indigenous Peoples, Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, United Nations E/CN.4/2004/30* (2004) at 17.

⁶² UNDRIP, art 25.

⁶³ Arts 11 and 12.

⁶⁴ John Passmore *Man’s responsibility for nature; ecological problems and Western Traditions* (Duckworth, London, 1974) at 5.

⁶⁵ Catherine Iorns Magallanes “Native American Values and Laws of Exclusion” in Keith Hirokawa (ed) *Environmental Law and Contrasting Ideas of Nature* (Cambridge University Press, Cambridge, 2014) 200 at 203.

⁶⁶ At 204 citing Montesquieu *Spirit of the Laws* (1748).

entitlement to exploit land and its resources for the beneficial use of the owner.⁶⁷ This myopic focus on economic interests, defining of capitalist societies, has left a wake of environmental destruction.

The preservationist approach developed in the United States.⁶⁸ It arose as the product of a philosophical backlash against industrialization and promoted preserving sections of nature in their ‘wilderness’ state.⁶⁹ Framed through this romantic lens, nature was viewed as a tool for “renewing and regenerating the industrialized soul” and uniting the nation in the pursuit of a unique American identity.⁷⁰

American conservation values found a place in the legal framework of colonial New Zealand. Since the 19th century the Crown assumed near exclusive governance of New Zealand’s natural environment.⁷¹ As the forestry industry grew in momentum and the landscape began to rapidly change, the colonial Government drew inspiration from the American preservation approach to environmental management.⁷² The desire to create a unique national identity through the preservation of picturesque, unfarmable landscapes has resulted in New Zealand currently having the highest proportion of land protected for conservation, out of all other OECD countries.⁷³

Somewhat unexpectedly given the size of the conservation estate, New Zealand is experiencing one of the highest global rates of species extinction.⁷⁴ This is because the preservationist approach is fundamentally unsustainable. Since European arrival, two-thirds of native forests have been lost, wetlands have been reduced by 90%, soil quality has

⁶⁷ A M Honore “Ownership” in *Making Law Bind* (Clarendon Press, Oxford, 1987) at 165.

⁶⁸ Wai 262, above n 1, at 217.

⁶⁹ Magallanes, above n 65, at 217.

⁷⁰ At 217.

⁷¹ Wai 262, above n 1, at 299.

⁷² At 313.

⁷³ Ministry for the Environment *Legally Protected Conservation Land in New Zealand* (Ministry for the Environment, Wellington, 2010) at 1.

⁷⁴ Ministry for the Environment and Statistics New Zealand *New Zealand’s Environmental Reporting Series: Our land 2018* (Ministry for the Environment and Statistics New Zealand, 2018) at 98.

dramatically degraded and the health of many rivers and lakes is poor.⁷⁵ The effects of environmental destruction are reflected in the population decline of native species. In 2011, research predicted that over 26 million native bird eggs and chicks are predated annually.⁷⁶ This is alongside the extinction of 21% of New Zealand's native birds, 63% of freshwater fish and 18% of vascular plants that are either on the cusp of extinction or declining.⁷⁷ The devastating condition of New Zealand's natural environment speaks to the need for a fresh approach to our current conservation practices.

B Legislative framework

Despite developments in bi-cultural jurisprudence and the resurgence in Māoritanga in the civic sphere, the preservationist approach has prevailed throughout numerous changes in policy, Governments and legislation.⁷⁸ This section addresses how the legal framework enshrines western conservation values, to the exclusion of te ao Māori, and discusses the provisions within the conservation framework that are intended to facilitate Māori participation in conservation.

1 Conservation Act 1987

The conservation estate is governed by the Conservation Act 1987. DOC is the sole administrator, and creature, of the Conservation Act and the 22 additional Acts specified in the First Schedule.⁷⁹ The Conservation Act requires DOC to manage the estate for conservation purposes.⁸⁰ “Conservation” is interpreted in the Act, and all associated Acts, as “preservation and protection”.⁸¹ In administering their duties, the Department is required to act in a manner that “gives effect to the principles of the Treaty of Waitangi”.⁸² This obligation is a strong legislative requirement on the Crown to conduct themselves in a

⁷⁵ At 8-11.

⁷⁶ John Innes and others “Predation and Other Factors Currently Limiting New Zealand Forest Birds” (2010) 34 NZJE 86 at 90-97.

⁷⁷ Ministry for the Environment and Statistics New Zealand, above n 74, at 97-103.

⁷⁸ Wai 262, above n 1, at 313.

⁷⁹ Conservation Act, s 5.

⁸⁰ Section 6.

⁸¹ Section 2 and Schedule 1.

⁸² Section 4.

manner that reflects the Treaty partnership. This also affects the interpretation of the legislation such that the Act should always be presumed to uphold the Treaty. Only where there is a clear inconsistency with the provisions of any administered Acts and the principles of the Treaty of Waitangi, do the provisions prevail over Treaty obligations.⁸³ But even then, the subjugation of Treaty obligations may still amount to be a breach of the Treaty.

2 *General Policy for Conservation*

The Conservation Act obliges DOC to produce a General Policy for Conservation (GPC).⁸⁴ The GPC outlines the policies guiding DOC's discharge of routine operations and compliance with Treaty obligations.⁸⁵ All other policy documents must be consistent with the GPC. Essentially, the GPC outlines the processes for decision-making, goal setting and conducting operations across the entire organization.⁸⁶ It effectively determines how the preservationist ethos will be maintained and the extent that Māori will be able to discharge their obligations as kaitiaki within DOC managed land. The Treaty principles recognised in the policy are those published by the Government in 1989.⁸⁷ These principles are: the right of the Crown to govern, self-management of iwi, equality, reasonable cooperation between Crown and iwi on issues of common concern, and redress.

DOC's obligation to Māori is to form cooperative arrangements that provide for Māori interests and mātauranga.⁸⁸ The policy outlines three different levels of Treaty compliance in carrying out functions: 'will', 'should', or 'may'.⁸⁹ The GPC establishes that the Department 'will' consult tangata whenua on statutory planning documents and proposals involving areas of significance, 'will' seek relationships to enhance conservation and encourage tangata whenua involvement and participation in the estate, and 'will' seek to

⁸³ Department of Conservation *Conservation General Policy* (Wellington, Department of Conservation, 2005) at 15.

⁸⁴ Conservation Act, s 17A.

⁸⁵ *Conservation General Policy*, above n 83, at 8.

⁸⁶ Wai 262, above n 1, at 317.

⁸⁷ *Conservation General Policy*, above n 83, at 15.

⁸⁸ At 46.

⁸⁹ At 14.

avoid actions that may breach the Treaty.⁹⁰ Appropriate to local circumstances, the Department ‘should’ encourage partnerships to enhance conservation and recognise mana.⁹¹ Lastly the Department ‘may’ authorize customary use if it is consistent with the legislative scheme and may negotiate protocols and agreements to support relationships.⁹²

3 *National Parks Act 1980*

National parks are the jewels of the conservation estate.⁹³ The National Parks Act 1980 specifies that the parks are to be preserved in “perpetuity” as areas of national interest by containing “scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important”.⁹⁴ The Act navigates two conflicting purposes: being “preservation in perpetuity” and “public access and enjoyment”. Preservation is emphasized and the public may be completely or partially excluded from areas that require special protection.⁹⁵ The Act obliges that a separate general policy, the General Policy for National Parks (GPNP) to be produced.⁹⁶ The GPNP shares a number of commonalities with the GPC. The only substantive difference is that, where the GPC outlines that the Department ‘will’ support the participation of tangata whenua in the identification, preservation and management of their historical and cultural heritage, the GPNP outlines that it ‘should’.⁹⁷

4 *Ngā Whenua Rāhui*

The Conservation Act provides for Ngā Whenua Rāhui kawenata (covenants) designed to support tangata whenua in protecting Indigenous ecosystems on Māori owned land.⁹⁸ Ngā Whenua Rāhui is an avenue for Māori to exert influence over conservation management

⁹⁰ At 16-17.

⁹¹ At 16.

⁹² At 16.

⁹³ New Zealand Conservation Authority *General Policy for National Parks* (Wellington, New Zealand Conservation Authority, 2005) at 3.

⁹⁴ National Parks Act 1980, s 4.

⁹⁵ Section 12.

⁹⁶ Section 44.

⁹⁷ See *Conservation General Policy*, above n 83, at 27 and *General Policy for National Parks*, above n 93, at 29.

⁹⁸ Conservation Act, s 27A.

through supporting the use of mātauranga and exercise of kaitiaki responsibilities to achieve biodiversity goals.⁹⁹ The kawenata applies to Māori owned or leased land and can exist in perpetuity or for any specific term.¹⁰⁰ Two funds exist to “facilitate the voluntary protection of Indigenous ecosystems on Māori owned land.”¹⁰¹ These funds are the Ngā Whenua Rāhui Fund and the Mātauranga Kura Taiao Fund which are administered by the Ngā Whenua Rāhui Komiti. The Mātauranga Kura Taiao Fund reaffirms that “spirituality and cultural history are inseparable in Māori conservation/biodiversity initiatives” and is designed to strengthen and support the transmission of mātauranga Māori.¹⁰² These initiatives demonstrate the Crown seeking genuine partnerships with Māori to support the exercise of kaitiakitanga on Māori land. The funds are a model for how the Treaty obligations protected in the Conservation Act can be recognised.¹⁰³ However, while useful in supporting the exercise of kaitiakitanga they are of limited benefit given the comparatively minor proportion of land in Māori ownership.¹⁰⁴

C Breaching the Treaty of Waitangi/ te Tiriti o Waitangi

Despite the preservationist ethic that underpins the conservation framework, the greatest concern for iwi participation in the governance of the DOC estate is that the issue has already been substantively addressed. The Waitangi Tribunal has determined that Crown treatment of Māori in relation to the conservation estate breaches the Treaty.

1 Ko Aotearoa Tēnei

During the Wai 262 panel hearings, it was unquestioned that for both iwi and the Crown the health of the ecosystems, flora and fauna was paramount.¹⁰⁵ As an established Crown entity, iwi did not challenge that DOC was in the best position to continue to protect and

⁹⁹ Wai 262, above n 1, at 331 citing Doris Johnston, brief of evidence on behalf of Department of Conservation (21 November 2006, appendix 9) at 6-7.

¹⁰⁰ Conservation Act, s 27A(1)(b).

¹⁰¹ Department of Conservation “Ngā Whenua Rāhui Fund” (Department of Conservation), <www.doc.govt.nz>.

¹⁰² Wai 262, above n 1, at 333.

¹⁰³ At 345.

¹⁰⁴ At 339.

¹⁰⁵ At 340.

operationally manage the resources and taonga within its jurisdiction.¹⁰⁶ What was being sought by the claimants was greater involvement and participation in decision-making and governance of their taonga within their rohe.¹⁰⁷ They argued that their right to exercise tino rangatiratanga was not being honoured as the Crown controlled and restricted the ability of Māori to maintain and strengthen their kinship ties with their taonga.¹⁰⁸

The Tribunal advocated for a complete revision of the GPC and GPNP to fully incorporate Treaty principles, notably the partnership principle.¹⁰⁹ The Tribunal did not consider DOC's endorsement of the list of principles published by the Executive in 1989 to be an accurate reflection of contemporary Treaty expectations.¹¹⁰

For DOC to be compliant with its obligations under s 4 of the Conservation Act, partnership must be reflected through all angles of its work.¹¹¹ The Tribunal held that DOC's failure to issue policy documents that reflect its mandatory obligations under the Act is likely to render the documents in breach of s 4.¹¹² The reduction of the guarantee of tino rangatiratanga to "self-management" and the assignment of partnership with Māori as a 'should' obligation was not held to be sufficient.¹¹³ The Tribunal recommended that the partnership requirement be a mandatory 'will' obligation.¹¹⁴ Treaty-compliant behavior would frame partnership with iwi as a core performance indicator, "rather than the exceptional outcome driven by the wider pressures of Treaty settlements it now is."¹¹⁵

The Tribunal commended DOC on their consultation policies but clarified that consultation does not equate to partnership. DOC's policies did not comply with Treaty expectations

¹⁰⁶ At 338.

¹⁰⁷ At 345.

¹⁰⁸ At 338.

¹⁰⁹ At 346.

¹¹⁰ At 323.

¹¹¹ At 323.

¹¹² At 323.

¹¹³ At 323.

¹¹⁴ At 323.

¹¹⁵ At 323.

and new structures needed to be implemented to “allow the Crown and Māori to engage effectively to the benefit of both conservation and mātauranga Māori, at national and local levels.”¹¹⁶ A new Treaty-compliant framework was recommended as one where decisions on who and how taonga should be managed were made jointly in a manner that principally recognises the interests of the environment, whilst recognizing the role of Māori as kaitiaki and accommodating other stakeholders.¹¹⁷ To instigate this approach, the Tribunal advocated for the establishment of a national Kura Taiao Council and conservancy-based Kura Taiao boards to have similar responsibilities and occupy a concomitant role with the currently established conservation authorities.¹¹⁸ This would enable the evaluation on an individual basis of “the appropriate level of kaitiaki control, partnership, or influence for tangata whenua over individual taonga”.¹¹⁹

The Crown has refused to substantively engage with any recommendations made by the Waitangi Tribunal for over seven years.¹²⁰ No changes resulted from the report, legal or otherwise. This is because excluding limited situations, the Tribunal is only capable of making non-binding recommendations that hold political, not legal, weight.¹²¹

This concern has been criticized multiple times on the international stage. The United Nations Special Rapporteur report of 2011 recommended that the “Government’s adherence with the recommendations of the Waitangi Tribunal should be part of its obligations to cooperate in good faith with the Māori and is an important confidence-building gesture.”¹²² It was further suggested that if the Government chooses not to follow a recommendation that decision must be justified.

¹¹⁶ At 345.

¹¹⁷ At 342.

¹¹⁸ At 345.

¹¹⁹ At 345.

¹²⁰ Committee on the Elimination of Racial Discrimination *Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand* (CERD/C/NZL/CO/21-22, August 2017) at 4.

¹²¹ Treaty of Waitangi Act 1975, s 5.

¹²² Anaya, above n 34, at [28].

The Committee on the Elimination of Racial Discrimination also addressed the Crown's omission.¹²³ The Committee made a number of relevant recommendations including that the Crown give greater assurance to Māori in recognizing their obligation to establish shared governance with hapū (sub-tribes).¹²⁴ Notably, the Committee specified their concerns at the lack of progress in implementing the recommendations made in Wai 262 particularly regarding the ability of Māori to access and control taonga.¹²⁵ As a result, a specific recommendation was that the Crown "produce and publish a plan with targets and a timetable for implementing the remainder of the recommendations in the Wai 262 decision."¹²⁶ To support the implementation of Wai 262 the Committee recommended that the Crown freeze the legal recognition of acts, identified in the report, that fail to comply with the Treaty of Waitangi and UNDRIP.¹²⁷ As with the Wai 262 report, the Crown has declined to engage with these recommendations.

Since the publication of the report a body of scholarship has developed drawing attention to the antiquated ideals that the legal framework for conservation reiterates.¹²⁸ The need for the legal framework to holistically enable iwi and hapū leadership in conservation is undoubted.¹²⁹ Despite the lack of Crown engagement, the fact that kaitiaki obligations form an integral part of Māori culture suggests that there may be other avenues for protection.

III New Zealand Bill of Rights Act 1990

I argue that the New Zealand Bill of Rights Act 1990 (BORA) provides an alternative, and underutilized, legal avenue through which the right of Māori to participate in the governance of the conservation estate may be recognised. BORA protects two rights that are relevant to this analysis. They are the right to manifestation of religion and belief under s 15 and the right of minorities to practice their culture as protected under s 20. In

¹²³ Committee on the Elimination of Racial Discrimination, above n 120, at 4.

¹²⁴ At 4.

¹²⁵ At 4.

¹²⁶ At 5.

¹²⁷ At 5.

¹²⁸ Ruru and others, above n 15, at 65.

¹²⁹ At 66.

considering both these rights, I seek to analyse their scope and whether kaitiaki practices can be included. In assessing the parameters of these rights, I consider the results and reasoning of similar claims taken in comparative jurisdictions and whether they are illuminative of what types of practices the right can protect. It is considered that recognising kaitiaki obligations within the scope of either right is bolstered by the Conservation Act's explicit recognition of the obligation to give effect to the principles of the Treaty of Waitangi.

BORA was introduced to affirm New Zealand's international commitments and protect fundamental freedoms and human rights.¹³⁰ Despite being an ordinary statute, BORA is regarded as a constitutional document.¹³¹ This status has shaped the way that it is perceived by the judiciary, public, politicians and Government.¹³² The Act provides that if a BORA consistent interpretation of legislation is available then it is to be preferred.¹³³ However, legislation that is inconsistent with the provisions of BORA is not impliedly repealed, invalidated or inapplicable.¹³⁴

Surprisingly, there has been a major underutilization of BORA by Māori as a tool to enforce their rights.¹³⁵ Other legal avenues have proved more fruitful for Māori claims, depending on the level of Treaty recognition within a statute.¹³⁶ This lacuna is attributable to the current constitutional status of the Treaty, teetering "half in and half out of the legal system".¹³⁷ However, the lack of progress in implementing the report indicates that an innovative approach is required. I argue that BORA may be able to provide a remedy where the other exhausted legal avenues have failed to.

¹³⁰ International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) (ICCPR), affirmed in Bill of Rights Act 1990, long title (b).

¹³¹ Butlers, above n 45, at 9.

¹³² S Elias "Fundamentals: a constitutional conversation" (2011) 19 Wai L Rev 1 at 2.

¹³³ BORA, s 6.

¹³⁴ Section 4.

¹³⁵ Butlers, above n 45, at 694.

¹³⁶ Adcock, above n 60, at 183-189.

¹³⁷ Geoffrey Palmer "What the New Zealand bill of rights act aimed to do, why it did not succeed and how it can be repaired" (2016) 14 NZJPIIL 169 at 174.

On a cursory reading, both sections speak to the issue addressed in this paper. The kaitiaki relationship between tangata whenua and their culture can be framed as both an expression of culture and a manifestation of the belief system of tikanga Māori. Despite the potential recognition of the practice under both, I argue that the s 20 is better equipped to substantively protect the exercise of kaitiaki obligations. This is because it is tailored to the right of the minority to enjoy their culture and the scope is yet to be explored by the judiciary.

In the international context, the body of claims seeking to protect the cultural and religious practices of Indigenous populations have been taken under a similar right to s 15. Although, this paper does not consider this right to be the best suited to protect the exercise of kaitiaki obligations in New Zealand's context, the analysis of s 15 is essential to understanding how the law has approached similar issues in comparative jurisdictions. Analysing the scope offers insight into whether human rights law has the capacity to protect the exercise of this cultural/spiritual practice and how the right may be interpreted in the domestic context. Overseas decisions have opted to construe the scope of the right narrowly, to exclude Indigenous practices. Whilst I argue that the New Zealand courts will be more inclined to align with the dissenting opinions of these judgments, my analysis suggests that the court may be guided by these overseas conclusions when considering the parameters of the scope of the right. Analysing the parameters and limitations of the protections in s 15, explains why s 20 offers stronger and more robust protection for the exercise of kaitiaki obligations, by Māori, over the conservation estate.

A Section 15: A manifestation of religion or belief?

Whether the scope of s 15 can include the right of iwi to exercise kaitiakitanga over DOC-controlled areas within their rohe, as a practice of land-based spirituality, and how the courts have addressed similar claims in overseas jurisdictions shall be evaluated. Section 15 prescribes the right of an individual to “manifest their religion or belief in worship, observance, practice or teaching either individually or in community with others, and either in public or private.” Section 15 can be read as an individual or collective right. The section builds on the right enshrined in s 13 providing the freedom of an individual to adopt any thought, conscience, religion or belief without interference. The structure of ss 13 and 15

draw their origins from both art 18 of the International Covenant on Civil and Political Rights (ICCPR) and art 9 of the European Convention on Human Rights and Fundamental Freedoms 1950.¹³⁸ Unlike international law tools, BORA separates the two elements of the right to freedom of religion. Article 18 of the ICCPR is one of the few non-derogable rights.¹³⁹ Pluralism and the freedom of religion form the foundation of a democratic society.¹⁴⁰

Section 15 demonstrates the state's recognition that the freedom of religion and belief require special protection as they may be outside of normal societal behavior. For an act to be considered a manifestation of religion or belief, the motivation for a course of behavior must be because of, rather than incidental to, the belief.¹⁴¹ Essentially, the Court must ask; is the act integral to the manifestation of the belief? The determination of that question and the scope of the right has, unsurprisingly, resulted in a substantial body of jurisprudence and literature both in New Zealand and overseas.¹⁴²

Defining "religion" and "belief" has been recognised as a "fraught exercise" by inherently limiting the freedom of the enshrined rights in ss 13 and 15.¹⁴³ It brings forward the question of whether it is appropriate for the state to define what is recognised as a religion or belief system.¹⁴⁴ Often the two terms are used interchangeably and judicial commentary has not yet distinguished them.¹⁴⁵ In practice, these definitional concerns have not posed major issues in cases as the Courts have interpreted the right broadly and refrained from measuring the "validity" of a belief against some objective standard.¹⁴⁶ However, there

¹³⁸ Butlers, above n 45, at 690.

¹³⁹ ICCPR, art 4(2).

¹⁴⁰ Butlers, above n 45, at 690.

¹⁴¹ At 707, the Butlers extensively discuss the ECtHR decision of *SAS v France App* no 43835/11, 1 July 2014 (ECtHR) at [55] in which the Court held that for an act to count as "manifestation" of religion or belief it must be "intimately linked" to the beliefs in question. The Court goes on to say that the existence of a sufficiently close and direct nexus between the act and the underlying belief is something to be determined on the facts of each case.

¹⁴² At 689.

¹⁴³ At 701.

¹⁴⁴ At 698.

¹⁴⁵ At 698.

¹⁴⁶ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15 at [22].

must be some boundary through which “religion” and “belief” fall into and this scope shall be addressed. Religion has been defined, through the avenues of tax and charity law, as “belief or faith in a supreme being and worship of that being”.¹⁴⁷ The United Nations Human Rights Committee (UNHRC) has advocated for the right to recognise “theistic, non-theistic and atheistic beliefs” regardless of whether they have an institutionalized structure.¹⁴⁸ Belief is beyond mere opinion and must “attain a certain level of cogency, seriousness, cohesion and importance”.¹⁴⁹

The terms observance and practice offer the most in explaining the relevance of the section to the protection of kaitiaki obligations. ‘Observance’ protects the right of an individual to comply with the “code of conduct – not necessarily written – prescribed by one’s religion or belief”.¹⁵⁰ ‘Practice’ protects the situations where believers comply through their code of conduct by taking or avoiding actions based on their belief system.

Naturally long-established Abrahamic religions have influenced the operation and structure of governments and governance systems.¹⁵¹ Whilst major religions may differ in rituals, practices and dogma, they typically share two main commonalities. Firstly, spiritual guidance is drawn on from scriptures rather than from the physical environment. Secondly, only a limited number of demarcated sites are recognised as sacred. New Zealand law, and other commonwealth jurisdictions, is rooted in the worldview of Abrahamic religions.¹⁵² Historically, the law has struggled to recognise the spirituality of Indigenous peoples whose cultures do not conform to the majoritarian sacred/secular divide and draw spiritual guidance from their natural environment.¹⁵³

¹⁴⁷ *Liberty Trust v Charity Commission* HC Wellington CIV-2010-485-831, 2 June 2011 at [57].

¹⁴⁸ United Nations Human Rights Committee *General Comment No 22* HR1/GEN/1/Rev 1 (1994) at [2].

¹⁴⁹ Council of Europe/ECtHR Research Division *Overview of the Court’s Case-Law on Freedom of Religion* (31 October 2013) at [10].

¹⁵⁰ Paul Rishworth and others *The New Zealand Bill of Rights* (Auckland, Oxford University Press, 2003) at 294.

¹⁵¹ James Nafziger “The Functions of Religion” in Mark Janis (ed) *The Influence of Religion on the Development of International Law* (Maritnus Nijhoff Publishers, The Netherlands, 1991) 149 at 151.

¹⁵² Butlers, above n 45, at 698.

¹⁵³ At 698.

1 Can kaitiaki obligations be included?

Māori custom and beliefs are subject to protection through both BORA and articles 2 and 3 of the Treaty of Waitangi.¹⁵⁴ The right of Māori to practice custom is protected as taonga under the Treaty.¹⁵⁵ This right is reaffirmed under article 3 which provides equality under the law for Māori and European settlers.¹⁵⁶

I argue that the exercise of kaitiaki practices of Māori over the DOC estate is capable of being included under the right to manifest belief through practice, in community. Tikanga Māori operates as a holistic, belief system in which spirituality, governance, resource management and people are enmeshed. To seek to divide aspects of te ao Māori to operate within the Western framework would be fallacious. Spirituality is not a discrete category in tikanga that can be separated from all other practices. As culture and religion are intertwined, tikanga Māori has the capacity to be included within the scope of the rights enshrined in s 15.¹⁵⁷

To practice land-based spirituality there must be the ability to form a relationship with the natural environment. This requirement exists regardless of ownership. This engagement leads to the reaffirmation, transmission and development mātauranga which is crucial to the survival of Māori culture. The unique cultural/spiritual relationship that Indigenous people enjoy with their territories has “been viewed as a hallmark of Indigencity around the globe”.¹⁵⁸ As such, Indigenous populations share a commonality in fostering a tradition of spiritual vulnerability between the people and their territories through their relationship with their land and veneration of sacred resources, species or areas.¹⁵⁹ Dissociation from

¹⁵⁴ At 694.

¹⁵⁵ Fiona Wright “Law, Religion and Tikanga Māori” (2007) 5 NZJPIL 261 at 285.

¹⁵⁶ Treaty of Waitangi, arts 2 and 3.

¹⁵⁷ Wright, above n 155, at 289.

¹⁵⁸ Natasha Bakht and Lynda Collins ““The Earth Is Our Mother”: Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada” (2017) 62 McGill L.J. 777 at 779.

¹⁵⁹ Bas Verschuuren and others *Sacred Natural Sites: Conserving Nature and Culture* (London, Earthscan, 2010) at 2.

or destruction of these areas has the capacity to threaten the “spiritual, psychological and social foundations of many Indigenous individuals and communities”.¹⁶⁰

This has been eloquently acknowledged in New Zealand. In discussing the effect of diversions of the Whanganui river on local iwi, the Environment Court held that “the most damaging effect of diversions on Māori has been on the wairua or spirituality of the people... Their spirituality is their "connectedness" to the river. To take away part of the river ... is to take away part of the iwi. To desecrate the water is to desecrate the iwi. To pollute the water is to pollute the people.”¹⁶¹

There are a limited number of claims taken by Māori seeking to protect their religious freedom under BORA through objecting to resource-management decisions that may affect or degrade sacred sites.¹⁶² These claims are few and were dismissed for differing reasons. The Resource Management Act 1991 (RMA) explicitly provides for the recognition of sacred sites and is a direct avenue through which these concerns can be addressed.¹⁶³ The RMA has proved a valuable avenue for protecting specific sacred areas in central and local government decision making but is not applicable to the conservation estate. The RMA also provides for Māori interests in a different way than the Conservation Act.¹⁶⁴ The Crown's obligations under the RMA are less stringent. However, it provides that in achieving the purpose of the Act actors are required to consider the concept of kaitiakitanga, the ethic of stewardship and the intrinsic value of ecosystems.¹⁶⁵

2 *Do overseas jurisdictions provide guidance?*

In considering whether s 15 provides the best protections for the exercise of kaitiaki practices over the DOC estate, this sub-part shall consider the approach taken in the United States and Canada in similar claims. In comparative jurisdictions, the protection of Indigenous spirituality has been inconsistent and subject to frequent breaches by the

¹⁶⁰ Bakht, above n 158, at 779.

¹⁶¹ *Ngati Rangī Trust v Manawatū-Wanganui Regional Council*, above n 10, at [318].

¹⁶² Rishworth, above n 150, at 307.

¹⁶³ Resource Management Act 1991, s 6.

¹⁶⁴ Section 8.

¹⁶⁵ Section 7.

legislature, executive and judiciary.¹⁶⁶ In both jurisdictions, attempts to protect sacred areas or assert a right to engage in traditional practices where the tribe is a non-owner have typically been taken under the entrenched protections of freedom of religion.¹⁶⁷

Canada

Historically, Canada has struggled to recognise the rights of Indigenous peoples.¹⁶⁸ This marginalization has led to a widespread failure across all branches of Government to respect the intertwinement of Indigenous spiritual beliefs and the natural environment.¹⁶⁹ For the Canadian Indigenous population, like Māori, the interrelatedness of the spiritual and physical worlds gives rise to “moral responsibilities and obligations”.¹⁷⁰ Canada’s entrenched constitution recognises both the right to freedom of religion and the existing common law and treaty rights of the Indigenous peoples.¹⁷¹ However, claims seeking to protect areas sacred to Indigenous groups have repeatedly come before the Canadian courts to no avail.¹⁷²

At the end of 2017, the Supreme Court delivered their judgment regarding the appeal of the Aboriginal claimants to the Court of Appeal decision in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations) (Ktunaxa Nation)*.¹⁷³ The

¹⁶⁶ Sari Graben “Resourceful Impacts: Harm and Valuation of the Sacred” (2014) 64(1) UTLJ 64 at 65.

¹⁶⁷ The US does not have an entrenched right recognising minorities but does have an entrenched right recognising the freedom of religion through US Const amend I. Canada has entrenched the right to freedom of religion through *Canadian Charter of Rights and Freedoms*, s 2(a), Part 1 of the Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c 11 and the rights of indigenous minorities through Constitution Act, s 35.

¹⁶⁸ See *Daniels v Canada (Indian Affairs and Northern Development)* 2016 SCC 12 at [1] and Mary Eberts “Still Colonizing after All These Years” (2013) 64 UNBLJ 123.

¹⁶⁹ Bakht, above n 158, at 789-793 which provides examples of state repression of indigenous spirituality.

¹⁷⁰ At 794.

¹⁷¹ Constitution Act 1982, ss 2(a), 35. (C)

¹⁷² See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations) (Ktunaxa Nation)* (2017) 2 SCR 386, *Poplar Point Ojibway Nation v Ontario* (1991) 29 ACWS (3d) 544 (ONCJ), *Cardinal v Windmill Green Fund LPV* [2016] ONSC 3456, *Mount Currie Indian Band v International Forest Products Ltd* (1991) 26 ACWS (3d) 263 (BCSC).

¹⁷³ *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* 2015 BCCA 352, leave to appeal to SCC granted 17 March 2016.

issue on appeal was whether the development of a jumbo ski resort on a site that was sacred to the Ktunaxa nation, could constitute a violation of freedom of religion.¹⁷⁴

The mountain on which the respondents, ski resort developers, sought to build on was a place of spiritual significance for the Ktunaxa people. The mountain, known as Qat'muk, was the home for the Grizzly Bear Spirit, their spiritual guidance and central leader of their religious beliefs and cosmology. Of critical concern to the Ktunaxa people was that if the development proceeded the Grizzly Bear spirit would be driven from the area, which would irrevocably destroy their spiritual beliefs.¹⁷⁵ The desecration of the sacred site and departure of the Grizzly Bear Spirit would both sever the Ktunaxa's connection to the land and render all songs, rituals and ceremonies related to the Spirit meaningless.¹⁷⁶

The appeal was dismissed by the majority. It was held that the Minister's decision to grant consent for the development of the ski resort did not interfere with the right to freedom of religion, as the right did not extend to protecting the spiritual focus of a religion.¹⁷⁷ For an infringement to the right to freedom of religion to be established it must be demonstrated that; firstly, the claimant sincerely believes that their practice or belief has a nexus with religion, and secondly, that the impugned state conduct interferes in a substantial and non-trivial manner with their ability to act in accordance with this belief.¹⁷⁸

It was uncontested that the first part of the test was met. The Ktunaxa sincerely believe in the existence of the Grizzly Bear Spirit who occupies a central position to their cosmology. The Court held that the claimants failed to meet the second part of the test. The onus was on the Ktunaxa to demonstrate that the Minister's decision to permit the development would interfere with their freedom to believe or manifest their belief in the Grizzly Bear Spirit. In the eyes of the Supreme Court, the Ktunaxa did not establish this limb. It was held by the majority that the Ktunaxa were not seeking protection for their freedom to believe in, or engage in spiritual practices associated with, the Grizzly Bear Spirit. Rather,

¹⁷⁴ *Ktunaxa Nation*, above n 172, at [1].

¹⁷⁵ At [117].

¹⁷⁶ At [117].

¹⁷⁷ At [71].

¹⁷⁸ At [68] citing *Multani v Commission scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256 at [34].

they were seeking the protection of the Spirit itself. The majority found this claim to be “novel” and outside the scope of what s 2(a) was capable of protecting.¹⁷⁹

The majority outlined that the Charter protects the freedom to worship, not the *object of worship*. The duty on the state is to protect the freedom of citizens to hold these beliefs and manifest them through worship, practice, dissemination or teaching.¹⁸⁰ Such, the Minister’s decision did not interfere with the Ktunaxa nation’s freedom to believe in the Grizzly Bear spirit or their freedom to manifest this belief.

Under the head of s 2(a), the appellants argued that the guarantee of freedom of religion had been enriched to incorporate the communal dimension of religion. Following the definition of religion in *R v Big M Drug Mart Ltd* the appellants argued that the state was not entitled to act in a manner that constrains or destroys the communal element of spiritual practices.¹⁸¹ The Ktunaxa contended that the Grizzly Bear Spirit’s continued occupation of Qat’muk was essential to their ability, as a peoples, to practice their religion. The majority agreed that the communal aspect of religion was well established, but that this too was constrained to the scope of freedom of religion under s 2(a).¹⁸²

The minority decision agreed with the final result, but held that right to freedom of religion was infringed. The judgment rejected the narrow conception of religion proposed by the majority. Religious beliefs carry spiritual significance and where the state removes the spiritual significance of a site for believers then s 2(a) has been violated.¹⁸³ Upon the desecration of Qat’muk and the departure of the Grizzly Bear Spirit, the Ktunaxa rituals, practices and songs pertaining to the area become void of any religious or spiritual meaning.¹⁸⁴ However, regardless of this finding of infringement, the decision held that the

¹⁷⁹ At [70].

¹⁸⁰ At [70].

¹⁸¹ At [73] citing the definition of religion established in *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 18 DLR (4th) 321 at 336.

¹⁸² At [74].

¹⁸³ At [118].

¹⁸⁴ At [118].

Minister had proportionately balanced the Ktunaxa's right under s 2(a) with the statutory objectives of administering and disposing Crown land in the public interest.¹⁸⁵

This result is disappointing. It was hoped that the decision of the Supreme Court would pioneer a new path towards reconciliation through recognising sites held sacred in Indigenous spiritual traditions.¹⁸⁶ Unfortunately, the Supreme Court decision reaffirms the precedent of undermining Indigenous beliefs and their religious association with sacred sites.¹⁸⁷ The minority decision demonstrated that it was open for the Court to recognise that the Minister's decision interfered with the right of Ktunaxa to practice their religion.

In my opinion, the majority interpretation is artificial. There is a direct relationship between the object and the ability to believe. The interpretation of the right as proposed by the majority fails to appreciate the inextricable connection between belief systems and the subject of worship.

It is interesting that the Court subjected s 2(a), a fundamental freedom guaranteed by the Canadian Charter, to the statutory objectives. A major emphasis of the decision was that the claim under s 35 was a judicial review of an administrative decision. The Court repeatedly emphasized their deference to the Minister's right in making the decision. In other situations, where freedom of religion has been infringed upon the Courts have been willing to protect the exercise of the fundamental freedom.¹⁸⁸

In releasing their decision, the Supreme Court referenced numerous international law tools protecting human rights but not UNDRIP.¹⁸⁹ This is surprising given that Canada

¹⁸⁵ At [119].

¹⁸⁶ Kathryn Teneese, the Ktunaxa Nation Council chair, and Perry Bellegarde, National Chief of the Assembly of First Nations, cited in Brian Platt "Supreme court ruling clears way for B.C. ski resort on sacred Indigenous land" *National Post* (2 November 2017) <nationalpost.com>.

¹⁸⁷ See Bakht, above n 158, at 78 for further discussion.

¹⁸⁸ *R v Big M Drug Mart Ltd*, above n 181.

¹⁸⁹ The decision considers the American Convention on Human Rights 1144 UNTS 123 (1969), arts 12, 13; European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (1953), art 9; International Covenant on Civil and Political Rights 999 UNTS 171 (16 December 1966), generally and art 18; Universal Declaration of Human Rights, Res. 217(III)A (1948), generally and art 18.

announced its full, unqualified support of the Declaration in 2016. This was built on previous recognition, issued in 2010, that reaffirmed Canada's support for the principles and aspirational nature of the document.¹⁹⁰ The Indigenous and Northern Affairs Minister, at the announcement to the United Nations Permanent Forum on Indigenous Issues, declared the intention to adopt and implement the Declaration within the Canadian Constitution.¹⁹¹ With the greatest respect to the Supreme Court's decision, it is discordant with the intentions of the Executive in recognising and safeguarding Indigenous rights and with the purpose of reconciliation.

The consequences of this destruction for the Ktunaxa are far greater than being limited to the ruin of sacred areas. This is because First Nations hold these sacred areas central to their culture, religion and identity.¹⁹² Therefore, "Canada's attacks on First Nations sacred sites are attacks on First Nations peoples."¹⁹³ It has been argued that the failure of the judiciary to protect Indigenous rights through providing remedies for state infringements has arisen from the Courts general failure, or unwillingness to, understand the complexity and uniqueness of these systems.¹⁹⁴

United States of America

In the United States, the Native Americans have experienced similar treatment by various branches of government.¹⁹⁵ A quick appraisal of the legal framework surrounding the protection of Native American rights would give a foregone conclusion that their beliefs have the necessary legal safeguards. The First Amendment of the United States Constitution, comprising one of the ten amendments forming the United States Bill of Rights, ensures that Congress is prevented from making any law preventing the free

¹⁹⁰ Indigenous and Northern Affairs Canada "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (November 12 2010) Government of Canada <www.aadnc-aandc.gc.ca>.

¹⁹¹ Indigenous Affairs Minister Carolyn Bennett cited in Tim Fontaine "Canada officially adopts UN declaration on rights of Indigenous Peoples" (May 10 2016) CBC News <www.cbc.ca>.

¹⁹² Bakht, above n 158, at 796.

¹⁹³ Michael Lee Ross *First Nations Sacred Sites in Canada's Courts* (Vancouver, UBC Press, 2005) at 177.

¹⁹⁴ Bakht, above n 158, at 796.

¹⁹⁵ Walter Echo-Hawk *In the Courts of the Conqueror* (Colorado, Fulcrum Publishing, 2018) at 274.

exercise of religion or the state promotion of one religion over another.¹⁹⁶ Following the federal enactment of the American Indian Religious Freedom Act (AIRFA) in 1978, it would appear undoubtable that Native American beliefs are to receive due protection under the First Amendment.¹⁹⁷ AIRFA is clear in outlining that Native American traditions are worthy of constitutional protections available to other religious beliefs.¹⁹⁸ The Act was designed to clarify to all branches of government that the right was “including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”¹⁹⁹

Despite what appears to be a clear statement, judicial interpretation elucidated that AIRFA was found to “lack teeth” to provide enforceable protections for Native American beliefs.²⁰⁰ The Supreme Court in *Lyng v Northwest Cemetery Protective Association* (1988) established that AIRFA did not provide a basis to sustain a claim for the protection of a sacred to the Yurok, Karok and Tolowa peoples from the states development of a logging road.

This decision reversed that of the lower courts. The initial *Lyng* decision recognised the importance of the land to the cosmology of the Native American belief system and their ability to practice their rituals. The area in question was known as the “High Country” and was the holy land of the Indigenous peoples who had occupied the area for over 10,000 years.²⁰¹ It was a site so sacred that only those with years of religious preparation could be guided by a religious leader to undertake the days-long journey on foot to access the “majestic wilderness”.²⁰² The area contained medicine to “heal the sick, control the

¹⁹⁶ US Const amend I.

¹⁹⁷ American Indian Religious Freedom Act 42 USC § 1996.

¹⁹⁸ Michael D. McNally “Native American Religious Freedom Beyond the First Amendment” Courtney Bender and Pamela Klasse (eds) *After Pluralism: Reimagining Religious Engagement* (Columbia University Press, 2010) 225 at 228.

¹⁹⁹ American Indian Religious Freedom Act.

²⁰⁰ McNally, above n 198, at 229.

²⁰¹ Amy Bowers and Kristen Carpenter “Challenging the Narrative of Conquest: The Story of *Lyng v Northwest Indian Cemetery Protective Association*” C Goldberg and others (eds) *Indian Law Stories* (Foundation Press, 2010) 489 at 489.

²⁰² At 489.

weather, and bring peace to the world.”²⁰³ The sanctity of the High Country was necessary for the renewal of universe.²⁰⁴ It was an accepted fact, in all courts, that the development of the logging road would irreparably destroy the religious beliefs and rituals central and sacred to the Yurok, Karok and Tolowa peoples.²⁰⁵

Initially the Courts found for the Northwest Indian Cemetery Protective Association and granted an injunction against the construction of the road.²⁰⁶ Canby J recognised the area as sacred to the religion and worthy of protection under the First Amendment as the “proposed government operations would virtually destroy the plaintiff Indians' ability to practice their religion”.²⁰⁷

This conclusion was rejected by the majority of the Supreme Court.²⁰⁸ The majority held that the federal government’s planned project was not an infringement of the protection under the First Amendment’s Free Exercise Clause because it did not “coerce” the Indians into violating their beliefs. As there was no compulsion of behavior nor punishment for practicing a religion, it was held to be legally acceptable to irrevocably destroy the basis of the religion for the majoritarian state goal of economic development.²⁰⁹ The Court found that the “government simply could not operate if it were required to satisfy every citizen's religious needs and desires.”²¹⁰ In petitioning the Courts to recognise the centrality of the area in the right of Native American tribes to engage in their spiritual beliefs, the majority argued that to expand the protection to religious freedom to include the land would unjustly threaten the Government’s property rights.²¹¹ Before addressing the economic loss that had been sustained through the District Courts injunction on logging practices, the Court commented that “such beliefs could easily require de facto beneficial ownership of some

²⁰³ At 489.

²⁰⁴ McNally, above n 198, at 229.

²⁰⁵ *Lyng v Northwest Indian Cemetery Protective Association* 485 US 439 (1988) at 448-449 and 451.

²⁰⁶ *Lyng v Northwest Indian Cemetery Protective Association* 795 F 2d 688 (9th Cir 1986) at 693.

²⁰⁷ At 693.

²⁰⁸ *Lyng*, above n 205, at 452.

²⁰⁹ Magallanes, above n 65, at 207.

²¹⁰ *Lyng*, above n 205, at 452.

²¹¹ At 453.

rather spacious tracts of public property.”²¹² The Court did not seek to disguise their obvious suspicion of an underlying motive of the plaintiffs in gaining access to private Government property. The judgment reaffirmed that “whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.”²¹³

Such an interpretation and result has been subject to much criticism.²¹⁴ It has served to create a worrying precedent that permits the disregard of Indigenous spirituality and rights to religious freedom.²¹⁵ The decision resulted in AIRFA being understood to confer no “special religious rights on Indians”, effectively gutting the statute.²¹⁶ On this interpretation, the statute was held to require government agencies to recognise Indian spiritualism in their policies but it does not provide a basis for a cause of action in the face of infringements.²¹⁷

The dissenting judgment delivered by Brennan J, disagreed with the conclusions of the majority. Brennan J argued that it was difficult “to imagine conduct more insensitive to religious needs than the Government’s determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of the respondents’ religion impossible.”²¹⁸ Brennan J reaffirmed the meaning of the free exercise clause to be “written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”²¹⁹ Upon this basis, there is an obvious contradiction to the majority reasoning. It is untenable to assert fidelity to this principle yet find that the use of public land in a manner that threatens the existence of a Native American religion does not amount to state infringement on the right of religion.

²¹² At 453.

²¹³ At 453.

²¹⁴ See Magallanes, above n 65, at 207; Butlers, above n 45, at 750-751; McNally, above n 198, at 229.

²¹⁵ Butlers, above n 45, at 750.

²¹⁶ *Lyng*, above n 205, at 455.

²¹⁷ McNally, above n 198, at 229.

²¹⁸ *Lyng*, above n 205, at 477.

²¹⁹ At 457 quoting *Sherbert v Verner* 374 US 398 (1963) at 412.

The constitutional guarantee provided through the free exercise clause does not discriminate the types of restraints that religious freedom may be justifiably subjected to. Rather the clause is focused on prohibiting any governmental action that may fetter or prevent religious practice.²²⁰ The majority's failure to even acknowledge the threat that the Native American appellants faced to their religion left them with "absolutely no constitutional protection against perhaps the gravest threat to their religious practices".²²¹ The potential threat of claims seeking to place "religious servitudes" on federal property is not a justification for refusing to acknowledge the existence of the constitutional infringement.²²²

Brennan J outlines that in contrast to Western religions which are built upon doctrines, creeds and dogma, Native American faith is inextricably bound to the land.²²³ As such the Native American perception that land is a sacred, living being relies on site-specific religious practices. Congress specifically recognised the impact that government actions and environmental use decisions may have on Native American groups and required agencies to engage in consultation.

To entertain the argument that the destruction of sacred areas does not infringe on the free exercise of religion is to endorse an implausible interpretation of religiosity. With the greatest respect, the Supreme Court's reasoning, when scrutinized, lacks a sense of universality in its application and illustrates a bias against Indigenous traditions. It is a struggle to entertain the argument that the destruction of a site held sacred in a major world religion would be justified in the pursuit of environmental exploitation or economic development.

Commentary has outlined that interference with sacred areas can only be justifiably accepted if all other rights are exhausted and if the site is not integral to beliefs.²²⁴ That the

²²⁰ US Const amend I.

²²¹ *Lyn*, above n 205, at 459.

²²² At 476.

²²³ At 460.

²²⁴ *Butlers*, above n 45, at 751.

law could permit the destruction of a holy place which was central to a religious practice without “burdening” anyone’s right to practice religion is a legal fiction.²²⁵

The intertwining of religion, governance and culture in Native American societies has continued to baffle the federal courts.²²⁶ *Lyng* has effectively established that Native American worship of sacred sites on public land is unworthy of protection.²²⁷ The effect of this decision means that government agencies are entitled to destroy Native holy sites with constitutional impunity.²²⁸ The loophole that the doctrine has created in the right to religious freedom was viewed as a threat to the ability for other holy places to receive statutory protection. This led Congress to create a double standard for the protection of sacred areas through the passing of the Religious Land Use and Institutionalized Persons Act of 2000. If a claimant has “an ownership, leasehold, easement, servitude or other property interest in the regulated land” the Act will protect the religious use of the property.²²⁹ This requirement essentially protects holy areas such as a synagogue, church or mosque and land surrounding it. However, it deftly operates to exclude holy sites of Native Americans who are unlikely to fulfill the property ownership requirements through dispossession from their Indigenous lands.²³⁰

The United States have a long and documented history of state-led eradication of tribal religion.²³¹ This legacy of the colonial era, being the failure and refusal to respect Native American religious beliefs, has remained pervasive in judicial reasoning and the Courts approach to Native American claims.²³² Native American spirituality faced direct persecution from the state throughout the colonial era.²³³ It now struggles against the

²²⁵ *Lyng*, above n 205, at 477.

²²⁶ Allison Dussias “Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases” (1997) 49 *Stanford Law Review* 773 at 851.

²²⁷ *Echo-Hawk*, above n 195, at 349.

²²⁸ At 349.

²²⁹ Religious Land Use and Institutionalized Persons Act 42 USC § 2000cc.

²³⁰ *Echo-Hawk*, above n 195, at 349.

²³¹ Consider *Echo-Hawk*, above n 195, at 276 and Daniel Inouye “Discrimination and Native American Religious Rights” (1992) 23 *UWLA Law Review* 3 at 12.

²³² *Echo-Hawk*, above n 195, at 276.

²³³ At 276.

forcible push from the state in an attempt to overlay secular values and divide spirituality from other spheres of Native life. The pervasiveness of the Eurocentric “judicial mind-set produced noxious legal doctrines [...] so out of step with mainstream values that the task of protecting religious liberty has largely been taken away from the courts and placed into the hands of Congress”.²³⁴ In the *Lynx* scenario, Congress was required to intervene and provide the adequate protections for the religious site that the courts had failed to champion.²³⁵

3 *Lessons for NZ*

The conclusions reached by the Supreme Courts of both jurisdictions reflect the disappointing and myopic recognition of Indigenous rights that persist in their societies. Both Courts struggled to grapple with Indigenous spirituality; even in the face of direct and unopposed evidence of an area’s centrality to an Indigenous belief system and cosmology. To engage in the freedom of religion, sacred sites that sustain or form the basis for the religion or spiritual cosmology require protection.²³⁶ Religious pluralism requires recognition of both alternative forms of spirituality and differing sources.

There are parallels between the reasoning of the Supreme Courts of Canada and the United States. In both instances, the right to freedom of religion was narrowed through a concerning, and in my opinion, untenable interpretation. Although I argue that kaitiaki obligations can be included within the scope of the right, I do not consider s 15 to be best suited to the recognition of kaitiaki obligations within the DOC estate.

New Zealand has a legislative framework far more equipped and accustomed to recognising Indigenous rights. As such, I would expect that the courts in outlining the scope of the right would align with the minority approach or seek to shift away from the majority reasoning of both Supreme Courts. However, these decisions still taint what is expected to be included within the scope of the right. If these judgments were used as guiding tools for

²³⁴ At 280.

²³⁵ At 356. The destruction of the High Country area was foiled by the passing of the Smith River National Recreation Area Act 16 USC 1131 § 460.1. which included the area in the protected Siskiyou Wilderness.

²³⁶ Butlers, above n 45, at 750.

judicial interpretation, the conclusions of both courts have the potential to limit the likelihood that land-based cultural practices would be included within the scope of s 15.

B Section 20: A right to culture?

In light of these conclusions, I consider that s 20 is the most appropriate right to protect the exercise of kaitiaki obligations over the DOC estate. Section 20 protects the right of a person belonging to “an ethnic, religious, or linguistic minority” to “not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority.” This section shall consider the scope of this right, whether it is arguable that the practice of kaitiaki obligations can be included within it and whether similar claims have been taken in comparative jurisdictions that could serve to guide judicial interpretation in New Zealand.

Minority is interpreted in BORA as a “group that is numerically smaller than the rest of the population whose members share a recognisable ethnic, religious, or linguistic characteristic.”²³⁷ The group should also possess a desire to maintain their uniqueness through preserving their “culture, language, religion, or traditions.”²³⁸ Framed in this way, the collective right does not impute a positive obligation on the government to promote the enjoyment of culture, language or religion of the minority.²³⁹ However, it does outline a freedom from state interference by affirming “freedoms of the individual which the state is not to breach”.²⁴⁰ The Court of Appeal in *Mendelsohn v Attorney-General* commented that the purpose of this section is to protect the right “against acts of the various branches of the state.”²⁴¹

The section draws its structure from art 27 of the ICCPR. The UNHRC has interpreted that art 27 applies to Indigenous minorities to include protecting “a way of life which is closely

²³⁷ Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990* (Ministry of Justice, Wellington, 2004) at 69.

²³⁸ At 69.

²³⁹ Butlers, above n 45, at 896.

²⁴⁰ *Mendelsohn v Attorney-General* [1991] 2 NZLR 268 (CA) at 273.

²⁴¹ At 273.

associated with territory and use of its resources.”²⁴² The UNHRC outlined that although the article protects an individual right, it is an individual right to community. The realization of this right depends on the ability of a *group* to maintain their culture, religion or language.²⁴³ Positive state action may be required to prevent the denial of the right.²⁴⁴ However, the positive obligation on the State is to be balanced with art 26 of the ICCPR, namely equality of all before the law.²⁴⁵

The underutilization of the section is surprising given that Māori comprise 14.9% of the population, forming the largest minority group.²⁴⁶ Section 20 undoubtedly has the potential to provide an important safeguard in the protection of Māori rights.²⁴⁷ However, the scarcity of claims under s 20 indicates the availability of other legal avenues for Māori in the protection and enforcement of their rights.²⁴⁸ As discussed under s 15, claims by Māori asserting breach of culture through resource-management decisions are few and are more likely to be taken directly under the RMA.²⁴⁹ In the few situations where a claim has come before the courts asserting a breach of culture, it has been dismissed for reasons other than the merits of an argument under s 20.²⁵⁰

The ambit of s 20 has not been judicially explored in the domestic context and, as such, the extent of its application has not been determined. Commentary discussing the scope of the

²⁴² United Nations Human Rights Committee *General Comment No 23* CCPR/C/21/Rev1/Add5 (1994) at [3.2].

²⁴³ At [6.2].

²⁴⁴ Butlers, above n 45, at 896.

²⁴⁵ Equality before the law is incorporated in New Zealand’s legal framework through the Human Rights Act 1993 and the Bill of Rights Act 1990.

²⁴⁶ Statistics NZ “Māori population estimates: Mean year ended 31 December 2017” (2018) <www.stats.govt.nz>.

²⁴⁷ Adcock, above n 60, at 201.

²⁴⁸ At 201.

²⁴⁹ Resource Management Act, s 6. The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu (sacred sites), and other taonga are recognised as matters of national importance, that the decision maker must recognise and provide for when making resource-management decisions, under this section.

²⁵⁰ See *New Zealand Underwater Association Inc v Auckland Regional Council*, Planning Tribunal A 131/91, 16 Dec 1991 and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

section has relied on the determinations and reasoning of international forums.²⁵¹ In regards to art 27 the UNHRC has established that what constitutes an inference with the right contained in s 20 “cannot be determined in abstract but has to be placed in context.”²⁵² As such, what will (or will not) constitute an interference with a minority’s right will differ from situation to situation. ‘Culture’ in s 20 is an expansive term and includes a wide range of human activities.²⁵³ The current case law has established the types of activities of which interference with would lead to a breach of the right to enjoy culture.²⁵⁴ These included engaging in spiritual activities, and economic activities essential to culture such as hunting and fishing.²⁵⁵ The UNHRC has outlined that art 27 does not only protect a “frozen” traditional concept of minority culture but extends to the incorporation of modern practices generated through technological developments.²⁵⁶

Increasingly the judiciary is ensuring that domestic legislation is interpreted in a manner that ensures state compliance with international obligations.²⁵⁷ Section 20 is likely to be read in a manner that accommodates UNDRIP. It has been argued that s 20 recognises the right of Māori to self-determination, as acknowledged under the Treaty and UNDRIP, in domestic legislation.²⁵⁸ This section draws from the Treaty’s protection of taonga and the right to practice and revitalize cultural traditions and customs, including engaging in spiritual relationships with traditional lands as recognised under UNDRIP.²⁵⁹

1 Do kaitiaki obligations fall within the scope?

The Waitangi Tribunal has expressly stated that engagement with taonga is critical to the development of mātauranga and Māori culture.²⁶⁰ The land and its resources form part of

²⁵¹ Butlers, above n 45, at 894.

²⁵² *Kitok v Sweden Comm* no 197/1985, 27 July 1988 (HRC) at [9.3].

²⁵³ Rishworth, above n 150, at 401.

²⁵⁴ Butlers, above n 45, at 895.

²⁵⁵ At 895.

²⁵⁶ *Lansmann v Finland Comm* no 511/1992, 26 October 1994 (HRC) at [9.4].

²⁵⁷ Elias, above n 132, at 2.

²⁵⁸ Adcock, above n 60, at 185.

²⁵⁹ UNDRIP, art 11.

²⁶⁰ Wai 262, above n 1, at 300.

the whakapapa of New Zealand's Indigenous population.²⁶¹ The denial of access and engagement with these resources is a denial of culture. In interpreting this section, credence must be given to the sections' protection of culture as inclusive of the way of life associated with the land and territories.

State practices have resulted in Māori in substantially losing control over and ability to interact with their land.²⁶² It is difficult to substantively entertain the argument that the preservationist approach, a product of American scholarly and legal construction, has the right to trump the spiritual and cultural beliefs of the Indigenous population. The current conservation values promoted in our legislation are not mutually exclusive with Indigenous rights. They are not a trump card that can be utilized by the Crown as a means of opposing partnership developments.²⁶³

The right to engage with taonga is a right of Māori that has been recognised by the Crown since the signing of the Treaty. However, given the limited number of claims that have been pursued under this right, I shall proceed to consider whether similar claims taken in comparative jurisdictions inform what practices are likely to be included within the scope of the right.

2 *Do overseas jurisdictions provide guidance?*

Canada

The collective rights of Aboriginal people to practice their culture is recognised through s 35 of the Constitution Act 1982. At first glance this section protects the existing Aboriginal rights and those rights protected through treaties between the Crown and Indigenous

²⁶¹ Virginia Tamanui *Our unutterable breath: a Māori indigene's autoethnography of whanaungatanga* (Tuhi Tuhi Communications, Auckland, 2013) at 6.

²⁶² Chief Judge W Isaac "Māori Land Today" *Māori Land Court Judge's Corner* (2011) <www.Maorilandcourt.govt.nz>.

²⁶³ For example, consider the reasoning in *Ngāi Tahu Māori Trust Board v Director-General of Conservation*, above n 53, at 560. The Court held that if the special interests of iwi, guaranteed through the Treaty, came into conflict with conservation objectives, then conservation values are to be given primacy. By framing conservation values as the paramount consideration, the decision treated indigenous interests and conservation objectives as mutually exclusive.

communities. Canada pioneered a different path to New Zealand in the treatment and recognition of the rights of Indigenous peoples. As a federation, Canada engaged in numerous treaties with Indigenous nations. These treaties have provided for the removal of large segments of Aboriginal lands in return for small reserves where tribes could engage in their traditional practices and operate with minimal government interference.²⁶⁴ Whilst New Zealand has adopted a largely uniform process to responding to claims by Māori, Canada has applied a variety of approaches in redressing Indigenous grievances.²⁶⁵ Different policies govern the engagement of the Crown with the Indigenous population depending on the existence (or absence) of a historic treaty.²⁶⁶

‘Existing’ in the statute refers to the rights that were in existence when the Constitution Act came into effect. It has been interpreted that the section is not limited to rights that were formally given legal recognition by European colonizers.²⁶⁷ Rather the section is to be interpreted flexibly so that as Indigenous interests evolve the constitutional framework has the capacity to accommodate them.²⁶⁸ The protection extends to potential rights in unproven Aboriginal claims which pending negotiations impose obligations on the Crown to consult and accommodate Aboriginal interests.²⁶⁹ The extent of this duty on the Crown varies with the degree of infringement that the proposed development will have on a claimed Aboriginal right.²⁷⁰ Essentially, s 35 is a procedural right, constitutionalizing the obligation of the Crown to act honourably in their engagement with Indigenous populations.

²⁶⁴ Gary Nettheim, Gary D Meyers and Donna Craig (eds) *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* (Aboriginal Studies Press, Canberra, 2002) at 82.

²⁶⁵ Mark D Walters “Promise and Paradox: the Emergence of Indigenous Rights Law in Canada” in Benjamin J Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford, 2009) 21 at 30.

²⁶⁶ At 35.

²⁶⁷ *R. v Sparrow* [1990] 1 SCR 1075 at 1092.

²⁶⁸ *R. v Van der Peet* [1996] 2 SCR 507 at [64].

²⁶⁹ *R v Sparrow*, above n 267, at 1105.

²⁷⁰ *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at [43-44].

In conjunction with their claim under s 2(a), the appellants in *Ktunaxa Nation* also asserted a violation of s 35 of the Canadian Constitution Act 1982. This claim, that the Minister failed to reasonably consult or accommodate Aboriginal interests, would have rendered the decision invalid if successful.²⁷¹ Unanimously, the Court did not agree and held that reasonable consultation had occurred by the Minister of Forests, Lands and Natural Resource Operations.²⁷² They reaffirmed that s 35 provided for a right to process, not a guarantee of particular outcome.²⁷³ It was held that the Minister had not acted unreasonably but rather had engaged in deep consultation regarding the spiritual concerns.²⁷⁴ The Crown had met its obligation to consult and accommodate regardless of whether the Minister had acceded to the condition demanded by the First Nation, being complete rejection of the project.²⁷⁵

The consultation process between the Crown and the Ktunaxa peoples spanned two decades. In making the decision the Minister explicitly recognised that permitting the development to proceed would effectively destroy the religion of the Ktunaxa nation.²⁷⁶ Conditions were imposed in permitting the development to proceed that were intended to reduce the impact of the ski resort on the grizzly bear population through which the Grizzly Bear Spirit manifested itself.²⁷⁷

The Court acknowledged that there was no “middle ground” in this situation.²⁷⁸ The conditions of the Minister’s decision would not prevent the Grizzly Bear Spirit leaving Qat’muk. This left two options for the Minister; approve or veto the development on the basis of the freedom of religion of the Ktunaxa nation. Similar to the *Lyng* decision, the court was concerned that if the development was vetoed, this would effectively give the

²⁷¹ *Ktunaxa Nation*, above n 172, at [76].

²⁷² At [135-155].

²⁷³ At [83].

²⁷⁴ At [87].

²⁷⁵ At [87].

²⁷⁶ At [144].

²⁷⁷ At [48].

²⁷⁸ At [149].

Ktunaxa a property interest in the area.²⁷⁹ The Supreme Court held that the right of religion for the Ktunaxa was limited as little as possible given the statutory objectives.²⁸⁰

As has been discussed, the decision fails to mention UNDRIP. This is particularly disappointing given that at the announcement to the United Nations, the Indigenous Affairs Minister specifically referred to the Declarations' potential to breathe life "into s 35 and recognise it as a full box of rights for Indigenous Peoples in Canada".²⁸¹ This judgment undermines that goal. The judicial interpretation continues to promote s 35 as a limited right to process. In my view, it was open to the Court to interpret s 35 in a manner consistent with the rights in UNDRIP. Such an interpretation would have had the potential to pioneer a new Canadian approach to Indigenous rights which substantively and flexibly protected their interests.

United States of America

The United States constitution promotes individual rights and is generally hostile to collective rights.²⁸² The collective and individual rights associated to the goal of self-determination promoted through the American Indian policy are anomalous in the constitution. Recognition of the collective rights of American Indians is, therefore, not framed in terms of human rights principles, but through the historical-legal background between American Indians and the state.²⁸³ As citizens of tribal nations and the United States, the right to culture is recognised through both their right to self-determination, to maintain their tribal identities, and AIRFA.

Following the majority decision of *Lyng*, AIRFA has been clarified to provide unenforceable constitutional protections for American Indian religion.²⁸⁴ As religiosity and spirituality are spheres that underpin all others of aspects of the American Indian

²⁷⁹ At [150-152].

²⁸⁰ At [155].

²⁸¹ Fontaine, above n 191.

²⁸² Douglas Sanders "Collective Rights" (1991) 13 Hum Rts Q 368 at 377.

²⁸³ At 377.

²⁸⁴ *Lyng*, above n 205, at 460.

worldview, this effectively enables state infringement and destruction of their culture. Not only is this interpretation inconsistent with the rights acknowledged by the United States in UNDRIP, but it enables the state and its actors to violate basic human rights.

C A unique New Zealand perspective?

Both ss 15 and 20 have the scope to protect the position of Māori as kaitiaki over the conservation estate. Whilst on the international stage similar claims by Indigenous peoples have been taken under the right of freedom of religion, I consider the right to culture to be more tailored to New Zealand's context. As a collective right, s 20 is more appropriate to protect the exercise of kaitiaki obligations over the conservation estate. The scope of the section captures the right of Māori as a minority to engage in their Indigenous and traditional practices of cultural guardianship within their territories. The frustration of this right has had a damaging effect on the practice of kaitiaki obligations and should be addressed by the Crown through amending DOC's policies and operational practices.

The protection of Māori rights as a minority is, regardless of varying public and political opinions, at the heart of the creation of our state. New Zealand's constitution owes its legitimacy and origin to the signing of the Treaty.²⁸⁵ It is from this foundation that the legislature is enabled to protect religious freedom and pluralism in our society. The constitutional context of comparative jurisdictions differs from that in New Zealand. The effect of their entrenched constitutions provides that the right to freedom of religion is protected as a supreme right. As we have an unwritten constitution, no rights are held above others making the argument for including kaitiaki practices under s 15 less persuasive.

Although the purpose of the right to freedom of religion is to recognise pluralism and equality of religion across all jurisdictions, the Supreme Court decisions of Canada and the United States illustrate that the section struggles to protect Indigenous beliefs. The freedoms contained in this section fundamentally arose from a foundation designed to protect the practices of major religions.²⁸⁶ The section has proved to be less indulgent when

²⁸⁵ Rishworth, above n 150, at 411.

²⁸⁶ Nafziger, above n 151, at 151.

the boundaries between culture, religion, spirituality and the environment blur. The judicial responses of both Supreme Courts demonstrate that s 15 has established parameters. Claims that confound majoritarian practices and fail to fall within such boundaries have not been accorded the same protections.

I propose that the judiciary, in the domestic consideration of s 15, is likely to distinguish the majority reasoning of similar claims in comparative jurisdictions and align with the minority judgments, which are compliant with fundamental freedoms and the rights protected UNDRIP. New Zealand has long championed itself as a leader in safeguarding Indigenous rights.²⁸⁷ The concerns underpinning the majority reasoning of both Supreme Court decisions are less pertinent considerations for our courts given the legislature's extensive recognition of Indigenous rights.²⁸⁸ Regardless of these constitutional differences, s 20 prevails as a more appropriate right to protect the exercise of kaitiaki obligations. This is because the scope of s 20, unlike s 15, has not been narrowed by any judicially established parameters. This undetermined scope increases the likelihood that kaitiaki practices would be included as the judiciary is not bound by potentially narrowing interpretations. Furthermore, in the contemporary context, the right is likely to be read in a manner consistent with international and domestic developments surrounding the protection of Indigenous rights. This reading of s 20 is consistent with the Treaty obligations imposed on the Crown in the Conservation Act. This interpretation of s 20 is open to the Courts to be incorporated through s 4 of the Conservation Act, which explicitly recognises the Crown's obligation to give effect to the principles of the Treaty of Waitangi.²⁸⁹ From this reasoning we can conclude that the legislative framework already exists for the incorporation to tikanga Māori into the protection of the DOC estate. As the Wai 262 report stated, "what remains to be seen [is] whether that possibility bears fruit."²⁹⁰

²⁸⁷ Fleur Adcock "The UN Special Rapporteur on the Rights of Indigenous Peoples and New Zealand: A study in compliance ritualism" (2012) 10 NZYIL 97 at 97.

²⁸⁸ For example consider the brief discussion of the effect of s 6 in the Resource Management Act, above n 249.

²⁸⁹ BORA, s 6.

²⁹⁰ Wai 262, above n 1, at 85.

If the scope of s 20 can be found to include the incorporation of Māori in the governance of Crown controlled areas then a widespread concern may arise that areas of the public sphere may be subject to the same treatment. New Zealand is not a stranger to responding to judicial acknowledgements of Indigenous rights with mass hysteria.²⁹¹ ‘Culture’ within s 20 is a broad term. However, s 20 is a negative right and it is unlikely that the Courts would interpret the section to infringe on the kāwanatanga (governance) of the Crown in their wider duties of public governance. In this particular scenario, the obligation to give effect to the partnership of the Treaty relationship is explicitly recognised in the Conservation Act. This is alongside the necessity for Māori to engage in a relationship with their taonga to protect the survival and development of Māori culture.

Whilst the preservationist approach in the legislation does not accord with the principles of tikanga Māori, these approaches are not mutually exclusive. The recognition of Indigenous rights is consistent with conservation goals. The current framework invites the participation of Māori regardless of its endorsement of a colonial conservation ethic. The Crown, through DOC, must step forward and recognise the need for Māori participation in conservation management by engaging in a grass-roots model of governance to provide for the incorporation of tikanga Māori. If it does not, I would argue that the rights of affected iwi protected through s 20 are implicated.

IV Conclusion

BORA provides an unexplored avenue for the recognition of the right of Māori to exercise their cultural obligations over their taonga that is currently held under unilateral Crown control in the conservation estate. The conservation estate contains much of the mōrehu of tangata whenua. As such it is one of the few avenues for Māori to reconnect with their cultural and spiritual heritage. The relationship between tangata whenua and their taonga is instrumental to the survival, development and transmission of mātauranga Māori and

²⁹¹ Paul McHugh “Setting the Statutory Compass: The Foreshore and Seabed Act 2004” (2005) 3 NZJPIL 255 at 259.

Māori culture. I have argued that their exclusion from the governance of the conservation estate and their taonga is a breach of their rights protected through BORA.

Since 2011 it has been established that Crown's unfettered control of the conservation estate, to the exclusion of Māori, breaches the Treaty of Waitangi. This flagrant contravention of Treaty obligations also places the Crown in breach of their obligations, to both the international community and to Māori, under UNDRIP. Lastly, as the Conservation Act provides that the Crown must give effect to the Treaty principles, through alienating Māori, DOC is operating in breach of its governing legislation. Therefore, in conjunction with these transgressions, the Crown is at risk of excluding tangata whenua from the conservation estate and frustrating their ability to connect with their taonga in breach of their rights and freedoms secured under BORA. Both the right to manifest belief and the right to culture can be argued to encompass the relationship between tangata whenua and their taonga.

In overseas jurisdictions, the right analogous to s 15 has been the avenue through which Indigenous people have sought to protect the exercise of sacred areas and their cultural/religious practices that are associated to the land. In both the American and Canadian experience, the Courts have declined to recognise the claims of the Indigenous groups.

As these jurisdictions have illustrated, the inability of the law to accommodate Indigenous perspectives that enmesh spirituality, culture and the physical relationship of Indigenous groups to the natural world is a compelling argument for why a similar, if not more expansive, practice should be recognised under a different right. I argue that s 20 provides the most robust protection for the exercise of kaitiakitanga. Not only does the section not yet have any judicially established parameters, as with s 15, but the protections of the right are consistent with the objectives of the Treaty of Waitangi.

In our unique constitutional context, a reading of the section that recognises the Crown's obligations under the Treaty and UNDRIP is consistent with contemporary developments in bi-cultural jurisprudence. The inclusion of kaitiaki practices within the scope s 20

provides that the right to engage in this relationship must be facilitated by Crown, through the obligation to give effect to the Treaty principles enshrined through s 4 of the Conservation Act. The kaitiaki relationship can be read into s 4 through, s 6 of BORA which specifies that if a BORA-consistent interpretation of a provision is available it is to be preferred.

The current legal framework governing the conservation estate has been used as a tool to bar Māori from fulfilling their obligations owed to their taonga as kaitiaki. This is inconsistent with the provisions in the Conservation Act, principles of tikanga Māori, the Treaty, UNDRIP and BORA. The exclusion of Māori is occurring at an operational level, and as outlined by the Waitangi Tribunal, incorporation does not require a statutory overhaul. What is required is a recognition of the objective of partnership that underpins the creation of our bi-cultural nation.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 13, 406 words.

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