

**Settling Indigenous Place:  
Reconciling Legal Fictions in Governing Canada and Aotearoa New Zealand's  
National Parks**

**by**

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**A Dissertation Submitted in Partial Fulfilment of the  
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## ***ABSTRACT***

New directions contained in section 2(2) of the *Canada National Parks Act 2000* and section 4 of Aotearoa New Zealand's *Conservation Act 1987* pose a strong challenge to the 21<sup>st</sup> century concept of the national park. Section 2(2) states: "For greater certainty, nothing in this Act shall be construed so as to abrogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act 1982*". Section 35 reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." In Aotearoa New Zealand, section 4 of the *Conservation Act 1987* (the umbrella statute to the *National Parks Act 1980*) states: "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi". These sections demand respect for Indigenous peoples and their relationships with land encased in national parks. This challenge frames the primary questions explored in this study. They are: if there is a new commitment to recognising Indigenous peoples in law, what ought this to mean in the context of owning and managing national parks? Or, to situate the question more theoretically, and examine it through the lens of law and geography: if law made colonial space permissible, what are the implications if contemporary law recalibrates its orientation to space and belatedly recognises Indigenous place? Interwoven into exploring these core questions are

themes of national identity, peoples' connections to land, the resilience of Indigenous laws, and the power of state law to re-imagine its foundations. Legislation, case law, and national park policy plans constitute the mainstay of the primary sources for this study. This thesis concludes by observing that while significant legislative and policy movement has occurred in recognising the special relationship Indigenous peoples have with lands within national parks, the process of reimagining healthier relationships has only just begun. Law needs to shift significantly more towards recognising Indigenous place and, in turn, Indigenous knowledge systems to achieve full and final reconciliation.

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## CHAPTER ONE

### *INTRODUCTION*

#### **I. PLACEMENT**

According to my father's ancestors, the land is Papatuanuku, our earth mother, and the sky is Ranginui, our sky father.<sup>1</sup> A long time ago, they, our primal parents, lived close to one another in a tight embrace. As their children began to grow older they longed to escape from their parents and hatched a plot to flee. After much trying, the strong young son Tane eventually succeeded by lying upon his mother on his back and used all the might in his legs to push against his father. As the explosion of light entered their domain a new world was created: Te Ao Marama (the world of light). All but one of the children marvelled at their freedom. Tane, the strong one, became god of the forest; Tangaroa, the god of the sea; Rongo, the god of cultivated food; Haumia-tiketike, the god of uncultivated food; and, the one that was angered at the separation, Tawhirimatea, became the god of the winds and storms. As these stories of creation are told, such as this one, valuable lessons for daily life are imparted. It was important to my ancestors to respect all that surrounded them; for us to see ourselves as tangata whenua (the people of the land). And while my ancestors were

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<sup>1</sup> For an introduction to Maori mythology and storytelling see: Ross Calman and A W Reed, *Reed Book of Maori Mythology* (Wellington: Reed Books, 2nd edn, 2004); Patricia Grace *Collected Stories* (Auckland: Penguin, 1994); and Witi Ihimaera *Pounamu Poumanu* (Auckland: Reed Publishing (NZ) Ltd, c2003).

far from perfect (greed and warfare most definitely existed), they had developed a society that worked. They had an intricate language (with, for example, more than 50 words for the colour grey), the greatest memories for storing information, and complex laws for creating order. My ancestors' ways have since faced what hopefully has been the greatest challenge to their existence – colonisation – and survived.

When the Europeans (who are also my ancestors) began arriving on the shores of Aotearoa New Zealand in the late 18<sup>th</sup> century, they brought with them a different way of viewing the world and a different way of doing things.<sup>2</sup> As they began to take hold in the country, they pressed their new ways onto the first peoples who had called these islands home, eventually overlaying Papatuanuku with a new language, new resources and new laws. They sought land for settlement, signing a treaty with nga iwi Maori (Maori tribes) agreeing to respect Maori property rights.<sup>3</sup> Unfortunately, the newcomers soon after became frustrated by their slow progress in gaining land and so they went to war against the Maori.<sup>4</sup> After a drawn out battle, which was somewhat indecisive, the newcomers turned to their law in an attempt to gain the land.<sup>5</sup> Through this law the newcomers declared the first peoples uncivilised,

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<sup>2</sup> See James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Penguin Press, 1996) and Michael King, *The Penguin History of New Zealand* (Auckland: Penguin Books (NZ) Ltd, 2003).

<sup>3</sup> The treaty signed was the Treaty of Waitangi. See Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987) and Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Bridget Williams Books, 2004).

<sup>4</sup> See James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Penguin, 1998).

<sup>5</sup> For example, see *New Zealand Settlements Act 1863*, *Suppression of Rebellion Act 1863*, *Native Schools Act 1858*, *Native Lands Act 1862*, *Tohunga Suppression Act 1908*. For

primitive, and savage. They used these fictions, including legal fictions of discovery, to claim that Maori lacked rights to property.<sup>6</sup> These laws cut deeply into Papatuanuku. In the next 100 years or so, Maori were unable to hold on to all that was dear to them. Today, with so little land left in the hands of Maori, the courts are now rethinking their earlier positions.<sup>7</sup> They are reshaping relationships between the Crown and Maori to again base them on that treaty signed those many years ago. Other former British colonies, such as Canada, are doing the same – revisiting their relationships with Indigenous peoples. New challenges now face these countries. Some in academia are blazing trails for the decolonisation of lands, fish, forests, plants, and laws.<sup>8</sup> This study focuses on national parks because they provide an obvious place for the journey of reconciliation to be realised.

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discussion see: Alan Ward, *A Show of Justice: Radical 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1973); David Williams, *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Wellington: Huia Publishers, 1999); and Richard Boast and Richard S. Hill (eds), *Raupatu: the Confiscation of Maori Land* (Wellington: Victoria University Press, 2009).

<sup>6</sup> See Jacinta Ruru, 'Asserting the Doctrine of Discovery in Aotearoa New Zealand: 1840-1960s' in Robert J. Miller et al, *Discovering Indigenous Lands. The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) pp 207-226.

<sup>7</sup> Less than 6 per cent of the country's landmass remains in Maori communal ownership (Maori freehold land). One of the landmark judicial cases includes *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>8</sup> For example, see John Borrows, *Recovering Canada. The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Douglas Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001); Bruce Braun, *The Intemperate Rainforest: Nature, Culture and the Power on Canada's West Coast* (Minneapolis: University of Minnesota Press, 2002); and Nancy J. Turner, *The Earth's Blanket. Traditional Teachings for Sustainable Living* (Vancouver: Douglas & McIntyre Ltd, 2005).

## II. FOCUS

National parks provide this thesis its unifying theme. National parks – at least those modelled on the first national park established in the ‘New World’, Yellowstone National Park in the United States – are places typically owned and managed by the Crown, set aside from private sale for present and future generations to use, enjoy, and gain an appreciation of the country’s distinctive scenery, ecological systems, and natural features. The national park label was used to transform the so-called ‘wild’ and ‘empty’ ‘spaces’ of these lands into ‘places’ for recreation, tourism and conservation. It was first applied in the 19<sup>th</sup> century by the European newcomers in the colonies of the United States, Australia, Canada and Aotearoa New Zealand. The national park concept has become embedded in colonial ideas related to landscape, and these concepts have been endorsed in the law. Thus, national parks provide an ideal focus point for exploring what is at the heart of this thesis: the decolonisation of place through the lenses of Indigenous/Crown reconciliation law and cultural geography.

This thesis focuses on national parks in two countries: Aotearoa New Zealand and Canada.<sup>9</sup> Aotearoa New Zealand’s 14 national parks, and Canada’s 35 national

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<sup>9</sup> For an introduction to these parks, see Department of Conservation website [www.doc.govt.nz](http://www.doc.govt.nz); Parks Canada website [www.pc.gc.ca](http://www.pc.gc.ca); Kevin McNamee, *The National Parks of Canada* (Toronto: Key Porter Books Limited, c2004). See also Stewart Elgie, “Protected Spaces and Endangered Species” in Elaine L. Hughes, Alastair R. Lucas, and William A. Tillemann II (eds), *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Limited); and John Swaigen, “Parks Legislation in Canada: A Comparison of the New *Canada National Parks Act* and Ontario’s Existing *Provincial Parks Act*” (2001) 10 *Journal of Environmental Law and Practice* 223.

parks and seven national park reserves, exist for similar reasons. Section 4(1) of the *Canada National Parks Act 2000* reads:

The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

Likewise, section 4(1) of the *National Parks Act 1980*, in Aotearoa New Zealand, states:

It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving in perpetuity as national parks, for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest.

In Aotearoa New Zealand, the *National Parks Act* further stipulates that national parks must be “preserved as far as possible in their natural state” including all sites and objects of archaeological and historical interest.<sup>10</sup> The values of the soil, water, and forests are to be maintained, and as a general policy “the native plants and

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<sup>10</sup> *National Parks Act*, s 4(2)(a) and (c).

animals of the parks shall as far as possible be preserved and the introduced plants and animals shall as far as possible be exterminated”.<sup>11</sup> Section 4(2)(e) then states:

Subject to the provisions of this Act and to the imposition of such conditions and restrictions as may be necessary for the preservation of the native plants and animals or for the welfare in general of the parks, the public shall have freedom of entry and access to the parks, so that they may receive in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features.

In Canada the “maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes”, is the first priority when “considering all aspects of the management of parks”.<sup>12</sup> The Act defines ecological integrity as: “a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes”.<sup>13</sup> In Aotearoa New Zealand the threshold management goal is conservation, defined as: “the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their

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<sup>11</sup> *Ibid.*, s 4(2)(d) and (b).

<sup>12</sup> *Canada National Parks Act*, s 8(2).

<sup>13</sup> Section 2.

appreciation and recreational enjoyment by the public, and safeguarding the options of future generations”.<sup>14</sup>

Ecological integrity (in Canada) and conservation (in Aotearoa New Zealand) are integral to the national park concept. This thesis does not aim to undermine these commitments. National parks are an essential management tool that gives priority to conserving biological diversity. But the present law also demands respect for Indigenous peoples. This is also a promising development. Section 2(2) of the *Canada National Parks Act 2000* states: “For greater certainty, nothing in this Act shall be construed so as to abrogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act 1982*”. Section 35 of the *Constitution Act 1982* reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” In Aotearoa New Zealand, section 4 of the *Conservation Act 1987* (the umbrella statute to the *National Parks Act*) states: “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. The Treaty of Waitangi was a document signed in 1840 by the British Crown and over 500 Maori chiefs from throughout the country which provided a blueprint for how Maori and the British could live together in Aotearoa New Zealand.<sup>15</sup>

This respectful stance is new in both Canada and Aotearoa New Zealand. These legislative provisions are steeped in a parallel legal reconciliation discourse that

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<sup>14</sup> *National Parks Act*, s 2 ‘conservation’. For an interesting discussion of the potential conflict between the twin goals of preservation and use within the United States of America national park legislation see: Harmony A. Mappes, “National Parks: For Use and ‘Enjoyment’ or for ‘Preservation’? and the Role of the National Park Service *Management Policies* in That Determination” (2007) 92 *Iowa Law Review* 601.

<sup>15</sup> For information on the Treaty, see Orange’s work, *supra* note 3.

began to emerge in the 1970s. Courageous Indigenous leaders led this discourse by, for example, taking specific claims to the courts, and in turn, brave judges for the first time began to listen and respond to those Indigenous calls for justice. For instance, the landmark 1973 Supreme Court of Canada decision in *Calder v Attorney-General of British Columbia*<sup>16</sup> gave the federal government the impetus to begin negotiating comprehensive claims with Aboriginal peoples and helped the judiciary a basis to develop a new rights jurisprudence. Canada's Aboriginal peoples have these rights because, as Chief Justice McLachlin has stated, they "were here when Europeans came, and were never conquered".<sup>17</sup> Therefore "[T]he Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests".<sup>18</sup> As the Supreme Court of Canada has explained: "[T]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions".<sup>19</sup> A similar jurisprudence has emerged in Aotearoa New Zealand. In the landmark 1987 Court of Appeal decision in the *New Zealand Maori Council* case, the court stated that the statutory incorporation of the Treaty of Waitangi principles in specific instances requires "the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality".<sup>20</sup> This developing jurisprudence in both countries has been instrumental

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<sup>16</sup> [1973] SCR 313.

<sup>17</sup> *Haida Nation v British Columbia* [2004] 3 SCR 511 at para 25.

<sup>18</sup> *Ibid.*, at para 25.

<sup>19</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69 at para 1.

<sup>20</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 667. For more information on this case see Jacinta Ruru, "In Good Faith" *Symposium Proceedings marking the 20<sup>th</sup> anniversary of the Lands case* (New Zealand Law Foundation and the

in creating a platform for the current statutory recognition of the importance of engaging with Indigenous peoples in the governance of national parks.

### III. QUESTIONS

It is the new direction contained in section 2(2) of the *Canada National Parks Act 2000* and section 4 of the *Conservation Act 1987* that pose a strong challenge to the 21<sup>st</sup> century concept of the national park. It is this challenge that frames the primary questions explored in this study. They are: if there is a new commitment to recognising Indigenous peoples in law, what ought this to mean in the context of owning and managing national parks? Or, to situate the question more theoretically, and examine it through the lens of law and geography: if law made colonial space permissible, what are the implications if contemporary law recalibrates its orientation to space and belatedly recognises Indigenous place? Interwoven into exploring these core questions are themes of national identity, peoples' connections to land, the resilience of Indigenous laws, and the power of state law to re-imagine its foundations.

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University of Otago, 2008). For more information generally about Maori and the Treaty see: Mason Durie, *Ngā Tai Matatū. Tides of Maori Endurance* (Oxford University Press, 2005) and Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited. Perspectives on the Treaty of Waitangi* (Oxford University Press, 2005).

#### IV. RATIONALE

Aotearoa New Zealand and Canada's national parks provide an ideal basis against which to assess the implications of the new more inclusive respectful legal relations aspirations. National parks are, after all, 1) ancestral lands of Indigenous peoples often containing last remnants of native flora and fauna essential for Indigenous cultural survival; 2) products of colonialism; 3) positioned as symbolic of our national identity and future; and 4) subject to a mandatory legal reconciliation discourse.

In regard to the first point, the Indigenous worldview is based in an understanding that humans are intimately related to the environment and that the environment records our stories of identity and knowledge. Some specific landmarks are especially important, including, in a Maori context, certain mountains in national parks. Mountain peaks, such as Tongariro, Taranaki/Mount Egmont and Aoraki/Mount Cook are the ancestors of the tribes that live beneath those summits.

For example, Aoraki was a son of Ranginui (the sky father) that paddled in a waka (boat) with his brothers searching for Papatuanuku (the earth mother). Unable to find her, they proceeded to say a karakia (prayer) to return them to their father. But they said the prayer incorrectly forcing their boat to hit a hidden reef. As they scrambled to the high end of the boat, they and their boat turned to stone and in the process of doing so created what we commonly call today the South Island (that in other legends is described as Maui's boat upon which he fishes up the North Island).<sup>21</sup> Another story tells of how the great mountains in the North Island came to their present standing spots. Once upon a time the mountains in the North were grouped in

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<sup>21</sup> See *Ngai Tahu Claims Settlement Act 1998*, schedule 80.

the centre of the Island where Tongariro (a male mountain) and Pihama (a female mountain) live. Other male mountains, including Taranaki, fought with Tongariro over the beautiful Pihama. Tongariro won. The other mountains were banished from the area, including Taranaki who fled, forging a major river in his path. This explains why this peak stands alone on the west coast. These mountains are integral to tribal identity, and each form is regarded with reverence as sacred ancestors.

For example, the people of Ngati Tuwharetoa who regard Tongariro as a sacred ancestor, acknowledge him in formally introducing themselves: Ko Tongariro te Maunga (Tongariro is the sacred mountain) Ko Taupo te moana (Taupo is the lake) Ko Te Heuheu te (Te Heuheu is the man) Ko Tuwharetoe te iwi (Tuwharetoa is the tribe). All tribes have similar pepeha (tribal sayings) that formally link their people with specific mountains and water. Significantly, Tongariro, Taranaki and Aoraki are all mountains encased in national park boundaries. They are governed by the Department of Conservation.<sup>22</sup> The Aboriginal peoples in Canada hold dear a similar personified holistic worldview and lands special to their identity lie similarly encased within national parks, mostly owned and managed by Parks Canada.<sup>23</sup> For example, the Inuit regard the lands now encased in the Torngat Mountains National Park as “More than a wilderness, this is an Inuit homeland”.<sup>24</sup>

Moreover, national parks, particularly in the Aotearoa New Zealand context where they overlie a significant part of the land, contain most of the last remaining

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<sup>22</sup> *Conservation Act*, s 6(a). For discussion see: Jacinta Ruru, “Indigenous Peoples’ Ownership and Management of Mountains: The Aotearoa/New Zealand Experience” (2004) 3 *Indigenous L. J.* 111.

<sup>23</sup> See Turner, *supra note* 8.

<sup>24</sup> Parks Canada, *Tongait KakKasuangita SilakKijapvinga Torngat Mountains National Park of Canada Management Plan* (Parks Canada, 2010) at ix, 1 and 2. For further examples, see discussion in chapter seven.

native flora and fauna. This is important because, as the Waitangi Tribunal recently stated, the Department of Conservation “has charge of much of the remaining environment in which mātauranga Maori [Maori knowledge] evolved, and which Maori culture needs for its ongoing survival”.<sup>25</sup> Thus national parks are important to Indigenous spiritual identity and cultural survival. But there is hope for aligned aspirations between Indigenous peoples and national park managers because both aspire to fulfilling the similar end goal of retaining these places for the benefit and enjoyment of future generations. Thus, on this first point, national parks provide an ideal focal point for exploring the current commitments to reconciliation.

To move to the second claim, that is that parks are products of colonialism, the national parks of Canada and Aotearoa New Zealand were modelled on the United States Yellowstone National Park (established in 1872). The British settlers arriving on the shores of the ‘new world’ wrongly regarded large expanses of land as empty spaces, untouched and wild. In an attempt to fill the void in the landscape and assert their identities on the land, the national park label proved useful.<sup>26</sup> It enabled the settlers to proclaim to their friends and families back home that they had travelled the seas to live in the most geographically beautiful parts of the world.<sup>27</sup> The colonial

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<sup>25</sup> Waitangi Tribunal, *Ko Aotearoa Tenei Wai* 262 (2011) at 297.

<sup>26</sup> For example, see William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983).

<sup>27</sup> See the work of John Shultis including his PhD thesis “Natural Environments, Wilderness and Protected Areas: An Analysis of Historical Attitudes and Utilisation, and Their Expression in Contemporary New Zealand” (unpublished, University of Otago, 1991), and “The Creation of National Parks and Equivalent Resources in Ontario and the Anitpodas: A Comparative History and its Contemporary Expression” in John S March and Bruce W Hodgins (eds), *Changing Parks. The History, Future and Cultural Context of Parks and Heritage Landscapes* (Toronto: Natural Heritage, 1998). See also Paul Sheldon Kopas, *Taking the Air: Ideas and change in Canada’s national parks* (Vancouver: UBC Press, 2007);

ideology empowered the colonisers to be blind to the first peoples' ways of life and lay their own histories and language over the various mountain peaks and river valleys.<sup>28</sup> Rationalised first as a tourist and recreation tool, it was not until the 20<sup>th</sup> century that national parks became firmly embedded in conservation goals. Thus the fact that the first national parks in Canada and Aotearoa New Zealand were established in an era that deemed Indigenous peoples 'wild', living on 'wild' lands, provides an ideal opportunity to investigate the ramifications of the present acceptance that national parks overlie Indigenous homelands.

Third, national parks are positioned as symbolic of our national identity and future. National parks continue to be intricately linked to national identity. When I first began this PhD, in 2006, Canada's national parks were being described as "what we represent as a country and what we stand for as citizens",<sup>29</sup> and as "icons of our nation ... part of national identity, and a source of pride for all Canadians".<sup>30</sup> They are "symbols of Canada to the world",<sup>31</sup> or, in Aotearoa New Zealand's Government's

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C Lloyd Brown-John "Canada's National Parks Policy: From Bureaucrats to Collaborative Managers", paper presented at the Canadian Political Science Association's Annual Conference, Toronto, June 2006 (available to download at: [www.cpsa-acsp.ca/papers-2006/Brown-John.pdf](http://www.cpsa-acsp.ca/papers-2006/Brown-John.pdf)); and Marina Unger 'The Role of Landscape Architects in Park Management, Planning and Design with Regard to Indigenous Peoples' (unpublished Master of Landscape Architecture thesis, University of Guelph, 1997).

<sup>28</sup> Bruce Braun has developed these types of arguments in relation to nature and forests: see Braun, *supra* note 8. See also Douglas Deur and Nancy J. Turner, *Keeping It Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Washington: University of Washington Press, 2005).

<sup>29</sup> Alan Latourelle Chief Executive Officer see: Parks Canada Agency, *Corporate Plan Summary 2004/05-2008/09* (Ottawa: Parks Canada, 2005), at 1 [*Corporate Plan 04/05*].

<sup>30</sup> Parks Canada, *Action on the Ground. Ecological Integrity in Canada's National Parks* 2005, at i, as stated by the then Minister of the Environment, Hon. Stephane Dion.

<sup>31</sup> *Corporate Plan 04/05, supra* note 29 at 1.

view, they are “the jewels of New Zealand’s public conservation lands”.<sup>32</sup> In 2007, the then Canadian Minister for the Environment, Rona Ambrose, described the land managed by Parks Canada as “some of our most enduring and cherished national treasures” and that “[T]hese outstanding riches are at the very heart of Canada’s identity – they represent the very best of our national environment and cultural vitality”.<sup>33</sup> In 2008, the then Canadian Minister for the Environment and Minister Responsible for Parks Canada stated that in order to meet the challenges of changing demographics, world climate change, tourism trends and environmental issues “Parks Canada works hand in hand with Aboriginal, government, community and business partners. Together, we honour and safeguard the natural and cultural features that have defined our country’s destiny and forged our Canadian identity and we ensure their preservation for the benefit of future generations”.<sup>34</sup> In 2011, as I conclude writing this thesis, similar descriptions of national parks remain. For example, Alan Latourelle, Chief Executive Officer for Parks Canada Agency, has recently claimed “Parks Canada’s network of national parks, national historic sites and national marine conservation areas has become symbolic of our national identity and is recognized

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<sup>32</sup> As stated by Kerry Marshall, Chairperson of the New Zealand Conservation Authority, in the foreword to the Department of Conservation, *General Policy for National Parks*, April 2005 [*General Policy for National Parks*].

<sup>33</sup> Parks Canada Agency, *Sustainable Development Strategy 2007-2009. Towards a Culture of Conservation* (Ottawa: Parks Canada, 2007) at 3. In a similar vein, in this same document, Parks Canada Agency referred to Canada’s national parks as “powerful symbols of our identity, and represent the vitality of our culture and the wonders of our natural environment” at 6.

<sup>34</sup> Parks Canada Agency, *Corporate Plan 2008/2009-2012/2013* (Ottawa: Parks Canada, 2008) at 1.

internationally as the greatest among the great”.<sup>35</sup> Such places thus deserve close attention. If the new Indigenous rights jurisprudence is to be believed (and the Department of Conservation has even condensed together, in one instance, the goal of strengthening national identity and upholding Treaty principles)<sup>36</sup> then national parks are places that ought to symbolise transformative relationships, showcasing how respectful relations with Indigenous peoples can be created, and how colonialist ideals of space can be displaced.

Moreover, turning to my fourth point, national parks are subject to a mandatory reconciliation discourse. In Canada, the *Canada National Parks Act* cannot be construed so as to abrogate existing Aboriginal or Treaty rights because of the commitment made to section 35 of the *Constitution Act*. In Aotearoa New Zealand, the *National Parks Act* (via the *Conservation Act*) must be interpreted and administered as to give effect to the Treaty of Waitangi principles. Significantly, in recent years, both the Department of Conservation and Parks Canada have been making attempts to embrace the new legal discourse of recognising Indigenous peoples and the Crown’s rights and responsibilities. When I began this thesis, the then relevant Parks Canada Agency’s *Corporate Plan Summary* stated that a key priority in the next ten years “must be an ever improving focus on First Peoples”.<sup>37</sup> The Chief Executive Officer, Alan Latourelle, acknowledged “The historic places of Aboriginal peoples go back ten thousand years in Canada. And frankly, we would be unable to establish and manage the majority of new national parks and many national

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<sup>35</sup> Parks Canada Agency, *Corporate Plan 2010/11-2014-2015* (Ottawa: Parks Canada, 2010), at 3.

<sup>36</sup> See: [http://www.doc.govt.nz/Publications/001~Corporate/Statement-of-Intent-\(2005-2008\)/002~Our-purpose.asp](http://www.doc.govt.nz/Publications/001~Corporate/Statement-of-Intent-(2005-2008)/002~Our-purpose.asp).

<sup>37</sup> *Corporate Plan 04/05*, *supra* note 29 at 5. See also Parks Policy at: [http://www.pc.gc.ca/docs/pc/poli/princip/part1/part1c\\_E.asp](http://www.pc.gc.ca/docs/pc/poli/princip/part1/part1c_E.asp).

historic sites without the enthusiastic determination of Aboriginal peoples”.<sup>38</sup> Latourelle claimed “I am confident that with the wise counsel of Elders and Chiefs across the country, we can continue on our journey of healing and learning to ensure that Aboriginal voices and stories become an inherent part of all Parks Canada programs”.<sup>39</sup> In early 2005, the commitment was restated at the Third Round Table on Parks Canada: “An important theme throughout the three-day meeting was that of furthering the engagement of Canada’s Aboriginal people as partners to tell their stories and teachings about Canada’s special places”.<sup>40</sup> In 2005, in Aotearoa New Zealand, the Director-General of the Department of Conservation similarly stated that the Department is “committed to supporting new opportunities to work with tangata whenua for conservation outcomes, and enhancing matauranga Maori (traditional Maori knowledge)”.<sup>41</sup> These aspirations remain true in 2011.

In addition to these four points, the international community has been aware and supportive of the need to recognise Indigenous peoples in the management of national parks for some time. While this thesis is focused on examining domestic law, and not international commitments or policies, I take a moment here to situate my thesis within an international context to illustrate that there is international support for the primary arguments posed here. Importantly, in 2000, the World Commission on Protected Areas (WCPA), in conjunction with the International Union for Conservation of Nature (IUCN) and the World Wildlife Federation (WWF), published a paper recording commitment to including Indigenous peoples in the operation of

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<sup>38</sup> *Corporate Plan 04/05*, *supra* note 29 at 5.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Department of Conservation, *Department of Conservation Annual Report for year ended 30 June 2005* (Wellington, Department of Conservation, 2005) at 88 [*Annual Report, 2005*].

national parks. For instance, it states “the rights of indigenous ... peoples inhabiting protected areas must be respected by promoting and allowing full participation in co-management of resources” and “governments and protected area managers should incorporate customary and indigenous tenure and resource use, and control systems, as a means of enhancing biodiversity conservation” but that this should occur “in a way that would not affect or undermine the objectives for the protected area as set out in its management plan”.<sup>42</sup> The WWF and IUCN/WCPA have committed to key principles that provide a respectful backdrop to this thesis:<sup>43</sup>

#### Principle 1

Indigenous and other traditional peoples have long associations with nature and a deep understanding of it. Often they *have made significant contributions to the maintenance of many of the earth’s most fragile ecosystems*, through their traditional sustainable resource use practices and culture-based respect for nature. Therefore, there should be no inherent conflict between the objectives of protected areas and the existence, within and around their borders, of indigenous and other traditional peoples. Moreover, they *should be recognised as rightful, equal partners* in the development and implementation of conservation strategies that affect their

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<sup>42</sup> Javier Beltran (ed), *Indigenous and Traditional Peoples and Protected Areas. Principles Guidelines and Case Studies* (ICUN World Commission on Protected Areas, 2000) at ix. (emphasis added). Note that principle 5 is not reproduced because it concerns protected areas that cross national boundaries which is not applicable to national parks in Canada and Aotearoa New Zealand. Note that this publication can be downloaded at: [http://www.iucn.org/about/union/commissions/wcpa/wcpa\\_puball/wcpa\\_bpg/?2181/Indigenous-and-traditional-peoples-and-protected-areas-principles-guidelines-and-case-studies](http://www.iucn.org/about/union/commissions/wcpa/wcpa_puball/wcpa_bpg/?2181/Indigenous-and-traditional-peoples-and-protected-areas-principles-guidelines-and-case-studies).

<sup>43</sup> *Ibid.* at ix – x.

lands, territories, waters, coastal seas, and other resources, and in particular in the establishment and management of protected areas.

#### Principle 2

Agreements drawn up between conservation institutions, including protected area management agencies, and indigenous and other traditional peoples for the establishment and management of protected areas affecting their lands, territories, waters, coastal seas and other resources *should be based on full respect for the rights of indigenous and other traditional peoples to traditional, sustainable use of their lands, territories, waters, coastal seas and other resources*. At the same time, such agreements should be based on the recognition by indigenous and other traditional peoples of *their responsibility to conserve* biodiversity, ecological integrity and natural resources harboured in those protected areas.

#### Principle 3

The principles of decentralisation, participation, transparency and accountability should be taken into account *in all matters* pertaining to the mutual interests of protected areas and indigenous and other traditional peoples.

#### Principle 4

Indigenous and other traditional peoples should be able to *share fully and equitably in the benefits associated with protected areas*, with due recognition to the rights of other legitimate stakeholders.

This international work also recognizes some key challenges that also become the mainstay of my study. The ICUN has concluded:<sup>44</sup>

- Most protected areas described here were proclaimed without the expressed consent of the people who previously inhabited lands or seas in the region. As a result, protected area authorities have been making decisions about species or ecosystems contained in these areas without the full involvement of the key stakeholders.
- Fortunately this situation is now changing. This is partly because a more general acceptance of indigenous peoples' rights is emerging; and partly because it is now widely recognised that the involvement of indigenous peoples is essential to ensure long-term sustainability of the protected areas in which they live or have an interest.
- However, in reality the involvement of indigenous and traditional peoples in the planning and decision-making processes, and empowerment of local groups, often fall short of the ideal. ...

Another significantly important international document is the Convention on Biological Diversity. The opening statement in the Convention's preamble reads that the contracting parties are "*Conscious* of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural,

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<sup>44</sup> *Supra* note **Error! Bookmark not defined.** at xi.

recreational and aesthetic values of biological diversity and its components”.<sup>45</sup> But the convention recognizes the value of Indigenous peoples’ knowledge of and their dependence on biological resources. The preamble includes a statement that the contracting parties are:

*recognizing* the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Article 8(j) states that each contracting party shall, as far as possible and as appropriate:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

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<sup>45</sup> To read the full text of the Convention see the Convention on Biological Diversity website at: [www.cbd.int/convention/text/](http://www.cbd.int/convention/text/).

Canada and Aotearoa New Zealand signed this Convention in June 1992.<sup>46</sup> It is an important convention that records commitments to biodiversity. National parks are obviously important mechanisms for protecting biodiversity and, as recorded in this convention, the role of Indigenous peoples in seeking to achieve these goals ought also to be respected. This thesis embraces these points. It celebrates that the national park label has preserved some of the last glimpses of what much of our lands looked like less than 200 years ago. It is not the end goal of caring for these environments that is questioned here. It is how we care for, and what values we prioritise in caring for, these environments that are examined in this study. The international policies support acknowledging Indigenous peoples' relationships with lands within national parks. What this ought to mean for domestic law is the focus of this study.

Moreover, still on the international stage, on September 23<sup>rd</sup>, 2007 the United Nations General Assembly adopted the Declaration of the Rights of Indigenous Peoples following a 143:4 vote.<sup>47</sup> Aotearoa New Zealand and Canada were two of those four countries that voted against the Declaration (Australia and the United States of America were the other two). However, in 2010, both Canada and Aotearoa New Zealand changed positions and endorsed the Declaration, albeit with attached caveats.<sup>48</sup> The Declaration's preamble constitutes twenty-four paragraphs and then

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<sup>46</sup> To view the full list of parties see: <http://www.cbd.int/convention/parties/list/>.

<sup>47</sup> To view the Declaration see the United Nations website at: <http://www.un.org/esa/socdev/unpfi/en/drip.html>.

<sup>48</sup> Aotearoa New Zealand endorsed the Declaration on 19 April 2010: see Hon Pita Sharples, Minister of Maori Affairs of NZ, "Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples" (Permanent Forum on Indigenous Issues, Ninth Session, 19 April 2010) available at: <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/0-19-April-2010.php>. See also Pita Sharples "Supporting UN Declaration restores NZ's mana" press release 20 April 2010, available at: <http://www.beehive.govt.nz/release/supporting-un-declaration-restores-nz039s-mana>. Canada

states 46 articles. At the heart of the Declaration is the urgent need for reconciliation, including reaching respectful relationships with Indigenous peoples in environmental management. For instance, one of the preamble paragraphs records the commitment to “*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”.

Even though my PhD here is focused on examining domestic law, and not international commitments or policies, it was important to briefly acknowledge this international work for several reasons. These international commitments and policies illustrate an important recognition of the role Indigenous peoples ought to play in governing protected areas, including national parks. They provide an essential foundation for respecting Indigenous peoples relationships with these lands. But this PhD is hereonin focused on national law because it is this law that asserts the legal framework for managing national parks in a domestic country, not International law and policy.

## **V. STRUCTURE**

This thesis consists of eight chapters. In brief, the next chapter, chapter two, provides the theoretical underpinnings to the thesis: the power to rethink state law from a

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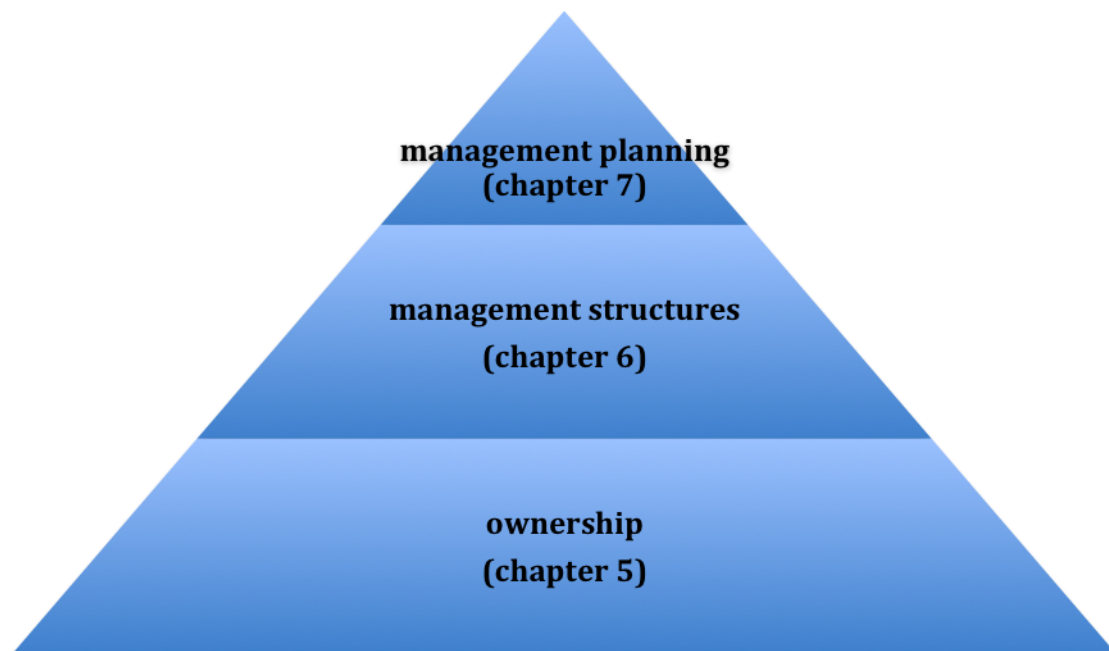
endorsed the Declaration on 12 November 2010: see Aboriginal Affairs and Northern Development Canada website at: <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>. For an excellent discussion of the Declaration see Claire Charters and Roldofo Stavenhagen (eds), *Making the Declaration Work. The Significance of the Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009).

platform of Indigenous legal thinking which gives new credence to an emerging discipline of law and geography. Chapters three and four generally explore how state law first created colonial space, then colonial place, and how it is now beginning to recognise Indigenous place in Aotearoa New Zealand and Canada. Chapters five, six and seven specifically explore what state law has done to the Indigenous place encased within national park boundaries. These three chapters address the primary question of this thesis: what should new laws related to reconciliation mean for owning and managing national parks. Interwoven through all of these chapters is a discussion of the challenges posed by Indigenous legal thinking for reimagining law. This thesis concludes, in chapter eight, by observing that while significant movement has occurred, in recognising the special relationship Indigenous peoples have with lands within national parks, the process of reimagining healthier relationships has only just begun. State law needs to shift significantly more towards recognising Indigenous place and, in turn, Indigenous aspirations to achieve full and final reconciliation.

This study can be viewed in two main parts. The first substantial part, which constitutes chapters 3 and 4, answers in the affirmative that there is in fact a new commitment to recognising Indigenous peoples in law. These two chapters also illustrate an important point of the theoretical question explored here, that is, that law did in fact make colonial space permissible. Chapter three explores the lengths to which the law denied the fact of original Indigenous place and seeks to substantiate an idea introduced in chapter two, that law is in fact social. Chapter four adds more weight to this idea that law is social through an examination that illustrates contemporary law has in fact recalibrated its orientation to space and belatedly recognised Indigenous place. But what is the significance of this for Indigenous

peoples? This crucial question becomes the focus of the second substantial part of this study: chapters five, six and seven. These chapters seek to explore the primary thesis question: if there is a new commitment to recognise Indigenous peoples in law (which chapter four establishes), what ought this to mean in the context of owning and managing national parks? This part can be viewed as a triangular approach (Table 1).

**Table 1. Triangular visioning of owning and managing national parks**



First, and at the bottom, does the law now recognise Indigenous peoples' ownership of their traditional lands now encased in national parks? Chapter five focuses on this question and introduces this sliding scale for ownership models (Table 2):

**Table 2. Indigenous ownership sliding scale model**

<b>(1)</b>	<b>Tupuna (ancestral) title</b>
<b>(2)</b>	<b>Kaitiakitangi (guardianship) title</b>
<b>(3)</b>	<b>Qualified exclusive native title</b>
<b>(4)</b>	<b>Treaty of Waitangi title</b>
<b>(5)</b>	<b>Whenua topu title</b>
<b>(6)</b>	<b>Legal personality</b>
<b>(7)</b>	<b>Native title bundle of rights</b>
<b>(8)</b>	<b>No one</b>
<b>(9)</b>	<b>Public domain</b>
<b>(10)</b>	<b>Crown title</b>

Second, does the law now recognise Indigenous peoples' rights to manage their traditional lands now encased in national parks? Chapter six focuses on this question. Third, I ask, "how have the colonial managers of national parks (Parks Canada and the Aotearoa New Zealand Department of Conservation) responded to the new legal commitments to recognise Indigenous peoples in law?" Chapter seven seeks to answer this by studying 36 current national park management plans. The analysis in chapters six and seven draw on theory in chapter two namely that relating to the Indigenous challenge to recognise, Indigenize, and decolonise, which is used to devise a sliding spectrum against which to assess management legislative and policy intentions (Table 3).

**Table 3. The reconciliation framework (Ruru ladder)**



Chapters six and seven explore whether the assessed legislation and national park management plans: recognise that national parks were once Indigenous place and have Indigenous heritage; seek to Indigenize parks through valuing Indigenous language (such as place names), Indigenous knowledge, Indigenous use of flora and fauna, and Indigenous enterprise (employment and businesses); and, encourage decolonisation of national park management through embracing Indigenous decision-making and management practices. The results from this assessment, along with chapter five, provide a basis upon which to better understand what is, and what potentially could be, happening in owning and managing national parks in a new era whereby colonial governments and courts now accept that they overlay historical and enduring Indigenous place.

## VI. REIMAGINING NATIONAL PARKS IN THE RECONCILIATION DISCOURSE

Some work on the broader topic of Indigenous peoples and national parks has been done, particularly in the United States of America and Australia, by professors of anthropology and history.<sup>49</sup> Some work has been done specifically by geography and law professors on the topic of Indigenous peoples and national parks, but the framework is usually from the co-management angle.<sup>50</sup> To my knowledge no comprehensive comparative academic work exists that is based in re-imagining national parks in Canada and Aotearoa New Zealand from the perspective of the new reconciliation legal discourse. Moreover, to my knowledge no work exists that approaches this specific issue against a backdrop that traces the tenuous Crown grasp on governance over smothered Indigenous place. It is the interdisciplinary angle of

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<sup>49</sup> P. Robert and D. Ostergren, “Evicting People from Nature: Indigenous Land Rights and National Parks in Australia, Russia, and the United States” (2002) 42 *Natural Resources J.* 331; J.R. Wunder, “Looking After the Country Properly’: A Comparative History of Indigenous Peoples in Australian and American National Parks” (2002) 2 *Indigenous L.J.* 27. Robert H. Keller and Michael F. Turek, *American Indians & National Parks* (Arizona: University of Arizona Press, 1998) (Keller is a historian). Although see Phyllis B. Jackson “National Parks and Indigenous Peoples” (1993) 4 *Colorado Journal of International Environmental Law & Policy* 502 but note that this article focuses on national parks in East Africa.

<sup>50</sup> D. Craig, “Recognising Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences” (2002) 6 *New Zealand J. of Environmental Law* 199. See also Philip Dearden and Steve Langdon, “Aboriginal Peoples and National Parks” in Philip Dearden and Rick Rollins (eds), *Parks and Protected Areas in Canada. Planning and Management* 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2009). See generally Benjamin J. Richardson and Donna Craig, “Indigenous Peoples, Law and the Environment” in Benjamin J. Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Oxford: Hart Publishing, 2006).

law and geography that grounds this work, along with the Indigenous and comparative angles.

But, first, some disclaimers. My study and the observations and conclusions reached about Indigenous peoples, the law, and national parks are only made in relation to two countries: Canada and Aotearoa New Zealand. This study does not seek to make wider claims about the rights of Indigenous peoples in all countries in regard to national parks.<sup>51</sup>

Moreover, it is important for me to highlight at the outset that I believe that it is absolutely essential for the survival of Indigenous peoples in these two countries that lands, resources and species within national parks flourish and continue to be protected for *all* future generations, not just Indigenous peoples and their descendants. National parks have been, and should continue to be, an essential land management protective tool for giving priority to biological diversity. But, in adding to this, I stress that it is not possible to create and manage national parks without human intervention and this is thus the point of my thesis where I am suggesting in Canada and Aotearoa New Zealand that Indigenous peoples must participate directly in these governance activities. I acknowledge that Western scientific methods of management are key to national park management, but in my thesis here I am arguing that in addition to these Western scientific methods, the legal methods of management should incorporate Indigenous peoples knowledge systems too. I argue this because

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<sup>51</sup> For interesting reading on national parks in the United States of America on the general proposition that national park borders are a contested terrain “caught in an overlapping, often conflicting geography of internal legal mandates, broader ecological realities, and omnipresent external threats” see Lary M. Dilsaver and William Wyckoff, “The Political Geography of National Parks” (2005) 74(2) *Pacific Historical Review* 237 at 266 (although note that this work does not specifically explore in any great detail the contested terrain of American Indian rights to these parks).

national parks overlies important Indigenous lands and because national parks are positioned as reflective of national identity. National parks thus provide an important place to pursue the reconciliation journey.

This work here is thus about what law has done to place and the exciting journey that law is on towards reaching reconciliation with the Indigenous peoples in Canada and Aotearoa New Zealand. This work is about the legal fictions that have come into play that allowed national parks to be created over Indigenous peoples' land and the consequences for the ownership and management of these places in law now that there is this legal commitment to reconciliation. To my mind, if this reconciliation is going to be enduring, then we need to, in the first instance, acknowledge that national parks lie over Indigenous peoples' lands and that those boundaries often encompass the lands and resources that give Indigenous peoples their spiritual and cultural identity. There is much scope here for real reconciliation to occur because there is alignment at the outset between the Crown and Indigenous peoples that the lands and resources within national parks must continue to flourish for future generations and for the survival of humans on this earth. It is non-negotiable that national parks as sanctuaries for the conservation of biological diversity must remain. But it is negotiable how best to achieve these conservation goals.

This thesis recognises the law and policy as at 31<sup>st</sup> July 2011.

## CHAPTER TWO

### *CRITICAL UNDERPINNINGS*

#### I. INTRODUCTION

In my early twenties, I spent years in lecture theatres learning about classical natural law theory, legal positivism, primary rules and secondary rules, clear cases and hard cases, all containing underlying messages that state law is objective and just. In many ways I struggled immensely with it.<sup>52</sup> In particular, I could not reconcile that standard of law with the stories my father's family told. Their stories are about dispossession from ancestral lands from the 1860s onwards through insidious legislation and local government rules. I knew our experiences were not unique; all Maori families (the Indigenous peoples of Aotearoa New Zealand) tell of similar accounts. Studying state law gave me an insight into how the law was used to achieve colonial goals; it did not convince me that law operates on an unbiased, neutral terrain.

This study is grounded in an understanding that law is biased and socially influenced, and not neutral. As parts one and two of this chapter illustrate, I have

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<sup>52</sup> A very vivid account of just how hard law school can be for Indigenous Peoples, see Patricia A. Monture, "Now that the Door is Open: First Nations and the Law School Experience" (1990) 15 Queen's L.J. 179; John Borrows, "Foreword: Issues, Individuals, Institutions and Ideas" (2002) 1 Indigenous Law Journal 1; Stephanie Milroy and Leah Whiu, "Waikato Law School: An Experiment in Bicultural Legal Education" (2005) 8.2 *Yearbook of Aotearoa/New Zealand Jurisprudence Special Issue Te Purenga* 173; Jacinta Ruru, "Legal Education and Maori" in C Geiringer and D R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Wellington: Victoria University of Wellington, 2008) pp 243- 249.

drawn much strength and inspiration from the challenges posed by emerging Indigenous legal theory, and the newly emerging discipline that mingles insights from law and geography. The remaining parts of this chapter explain the value of a comparative approach, the importance of situating myself in this work, and the rationale for focusing on lands now labelled as national parks.

## II. INDIGENOUS LEGAL THEORY

### A. Overview

The Aboriginal peoples of Canada (constituting the First Nations, Inuit and Métis) and the Maori tribes of Aotearoa New Zealand all have their own languages, laws and customs.<sup>53</sup> The intricacies of these distinct nations have their histories embedded in thousands of years of development. While colonial forces have drastically changed Indigenous realities, through technological modernisation and globalisation,

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<sup>53</sup> See e.g. James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights. Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006); John Borrows (Kegeedonce), *Drawing out law: a spirit's guide* (Toronto: University of Toronto Press, 2010); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); John Borrows, *Recovering Canada. The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Law Commission of Canada, Discussion Paper, *Justice Within: Indigenous Legal Traditions* (August 2006) [*Justice Within Indigenous Legal Traditions*]; E.T. Durie, "Will the Settlers Settle? Cultural Conciliation and Law" (1996) 8:4 Otago L.R. 449; Alex Frame and Paul Meredith, "Performance and Maori Customary Legal Process" (2005) 114 J. of the Polynesian Society 135; H.M. Mead, *Tikanga Maori. Living by Maori Values* (Wellington, N.Z.: Huia Publishers, 2003); New Zealand Law Commission, Study Paper, *Maori Custom and Values in New Zealand Law*, Study Paper 9 (Wellington, N.Z.: Law Commission, 1999) (March 2001) [*Maori Custom and Values*].

Indigenous peoples remain committed to preserving their own identities, and adapting their ancestral ways to make sense of the modern world. For many Indigenous communities, self-determination, in whatever form it is defined, is the end goal.<sup>54</sup> For some Indigenous communities, the vision might simply mean knowing that their ways of doing things are respected within a dominant colonial regime, and for others it might mean regaining total separate control of their own destinies.

In recent decades the Indigenous challenge to Western legal theory has gained momentum.<sup>55</sup> It is a separate and unique challenge to that posed by other critics of Western law. The Indigenous critique is concerned with exposing the cultural monopoly inherent in Western law, in addition to critiquing the hierarchies of class, race, gender, and other entrenched powers.<sup>56</sup> This critique seeks to expose the clash of Western and Indigenous worldviews for the purpose of creating opportunities for

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<sup>54</sup> E.g. in Canada see Hul'qumi'num Treaty Group, *Interim Strategic Land Plan, 2005*, online: Hul'qumi'num Treaty Group, <[http://www.hulquminum.bc.ca/pubs/HTG\\_LUP\\_Summary\\_Final.pdf/](http://www.hulquminum.bc.ca/pubs/HTG_LUP_Summary_Final.pdf/)>; and in Aotearoa, New Zealand see Te Runanga o Ngai Tahu, *Annual Report 2007*, online: Te Runanga o Ngai Tahu <<http://www.ngaitahu.iwi.nz>>. For commentary, see Roger Maaka & Augie Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa, New Zealand* (Dunedin, N.Z.: University of Otago Press, 2005); Michael Murphy, ed., *Canada: The State of the federation 2003. Reconfiguring Aboriginal-State Relations* (Montreal: McGill-Queen's University Press, 2005).

<sup>55</sup> For example, see Robert J. Miller, Jacinta Ruru, Larisaa Behrendt, Tracey Lindberg, *Discovering Indigenous Lands. The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

<sup>56</sup> For an excellent articulation of the inability of liberalism and critical alternatives to advance the Indigenous vision see: Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 *Indigenous Law Journal* 67. See also Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J. Richardson, Shin Imai and Kent McNeil, *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) pp. 195-231.

Indigenous law to be reasserted in the larger landscape. The resurgence of Indigenous law is not necessarily focused on reforming Western law, although this can be an important and valuable spin-off.

Indigenous peoples have challenged the mono-cultural nature of the Western legal system from the time it was first imposed upon them. The articulation of the Indigenous critique of law in published legal works, however, has its foundations in more recent times, most prominently in the work of the Cree legal academic, and now Saskatchewan provincial judge in Canada, Mary Ellen Turpel-Lafond. She began challenging the cultural authority evident in the legal system in the 1980s by asserting that the rule of law is simply “one particular cultural expression of social life”,<sup>57</sup> and “legal knowledge and processes are localized or contingent, both as matters of history and culture”.<sup>58</sup> Other Canadian Indigenous academics have blazed a trail for Indigenous scholars throughout the world. James (Sakej) Youngblood Henderson, Director of the Native Law Centre in Canada, agrees with Turpel-Lafond. He states that the values inherent in the mainstream legal system simply represent “the Anglocentric legal culture”<sup>59</sup> and that “legal decisions are the normative visions that protect the colonizers’ prosperity, their system of rights, and their institutions of government and adjudication”.<sup>60</sup> Gordon Christie, an Inuvialuit law scholar, has similarly held that legal liberalism is grounded in “a particular cultural and intellectual history”,<sup>61</sup> and that “fundamental principles underlying liberalism are alien to the

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<sup>57</sup> Mary Ellen Turpel, “Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Difference” (1989-1990) 6 C.H.R.Y.B 3, at 25.

<sup>58</sup> *Ibid.*, at 45.

<sup>59</sup> James (Sakej) Youngblood Henderson, “First Nations Legal Inheritances in Canada: The Mikmaq Model” (1996) 23 Manitoba Law Journal 1, at 11.

<sup>60</sup> *Ibid.*, at 12.

<sup>61</sup> Christie *supra* note 56, at 70.

belief-structures of Aboriginal peoples”.<sup>62</sup> The Anishnabe law professor, John Borrows, has observed the application of distinctive European legal customs to First Nations “as if there were no differences between cultures”.<sup>63</sup> He has stated that: “The culture of the common law ... is often inconsistent with Indigenous participation”<sup>64</sup> and “[t]he process of Indigenous exclusion within North American democracies has been greatly assisted by the operation of law”.<sup>65</sup> He warns that: “North Americans require different principles to judge Indigenous contributions because contemporary legal rules were developed within a cultural logic that erased prior Indigenous presence and ecological relationships”.<sup>66</sup>

In Aotearoa New Zealand, Moana Jackson, a Ngati Kahungunu lawyer, has been at the forefront of this challenge, claiming that Maori are “seeking to reclaim the validity of our own institutions, the specifics of our own faith, and the truths of our own history.” According to Jackson, this process of reclamation “will not only nourish once more the Maori soul, it will also eventually undermine the conceptual framework of the Pakeha word and the oppression which has flowed from it.”<sup>67</sup> Ani Mikaere, the Director of Maori Laws and Philosophy at Te Wananga o Raukawa, has more recently stated:<sup>68</sup>

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<sup>62</sup> *Ibid*, at 91.

<sup>63</sup> Borrows, *Recovering Canada*, *supra* note 53 at 4.

<sup>64</sup> *Ibid*, at 30.

<sup>65</sup> *Id.*

<sup>66</sup> *Ibid*, at 34.

<sup>67</sup> M Jackson, ‘The Treaty and the Word: the Colonization of Maori Philosophy’, in G Oddie and RW Perrett (eds), *Justice, Ethics, and New Zealand Society* (Auckland: Oxford University Press, 1992), at 9-10.

<sup>68</sup> Ani Mikaere, ‘The Treaty of Waitangi and Recognition of Tikanga Maori’ in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited. Perspectives on the Treaty of Waitangi* (Melbourne: Oxford University Press, 2005). See also Ani Mikaere,

Over one hundred and sixty years of trying to deny the authority of tikanga Maori, after all, has not achieved the peace of mind that Pakeha seem to crave. Given the impossibility of building a stable state upon an unstable foundation, this is unsurprising. So long as Pakeha have refused to confront their deep-rooted insecurities about the illegitimacy of the state that they have sought to create here, their sense of nationhood has remained shallow and meaningless.

These scholars ground their calls for respect for Indigenous peoples in providing insights into the Indigenous legal worldview.<sup>69</sup> Turpel writes about the four principles of social interaction in some First Nations communities – namely trust, kindness, sharing and strength. She states, “These are *responsibilities* which each person owes to others representing the larger function of social life”.<sup>70</sup> Henderson explains that the centre of the Mikmaq legal institutions and heritage was reflected in their verb-centred worldview which “emphasised the flux of the world, encouraging harmony in all relationships”.<sup>71</sup> They believed “that the world was made according to an implicit design that could be at least partially apprehended and enforced by them, not simply as a matter of balancing rights and wrongs or of reducing conflict resolution to trial by battle ...”.<sup>72</sup> Borrows has written at length about Anishinabek

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“Cultural Invasion Continued: The Ongoing Colonisation of Tikanga Maori” (2005) 8 *Yearbook of New Zealand Jurisprudence* 134.

<sup>69</sup> As do many other Indigenous legal scholars not cited here. For example, in Australia, see the work of Larissa Behrendt, *Achieving Social Justice. Indigenous Rights and Australia's Future* (Sydney: The Federation Press, 2003).

<sup>70</sup> Turpel *supra* note 57, at 29 (emphasis added).

<sup>71</sup> Henderson *supra* note 59 at 13.

<sup>72</sup> *Id.*

law, telling the legal stories of, for example, *Nanabush v Duck, Mudhen and Geese*, and *Nanabush the Trickster v. Deer, Wolf et al.*<sup>73</sup> According to Borrows, “Indigenous law originates in the political, economic, spiritual, and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders”.<sup>74</sup>

In Aotearoa New Zealand, Justice Eddie Durie of the High Court, and tribal member of Ngati Kauwhata, has strongly articulated the content, complexities and relevance of Maori law, as have many others.<sup>75</sup> Durie, for example, writes that “the regulation of Maori behaviour was governed not by rules but by concepts, like whanaungatanga, arohatanga, manaakitanga and utu, to name only some”.<sup>76</sup>

These scholars believe that Western legal theory has a different cultural base than the Indigenous worldview, and as such, the Western legal system as it currently stands has little to offer Indigenous peoples, or, as in Henderson’s words: “the law

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<sup>73</sup> See Borrows, *Recovering Canada*, *supra* note 53. Note, while this study relies primarily on the work of these four Canadian Indigenous scholars, it must be acknowledged that in recent years new and equally as strong Aboriginal voices are contributing to this theory. In particular see: Val Napoleon, “Ayook: Gitksan legal order, law, and legal theory” (unpublished, PhD thesis, University of Victoria, Canada, 2009); the contributions in Law Commission of Canada (ed), *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) and many of the articles published in the *Indigenous Law Journal*. See also Dale Turner, *This is Not a Peace Pipe. Towards Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006).

<sup>74</sup> *Ibid*, at 13.

<sup>75</sup> Durie, *supra* note 53. See also P Tohe, ‘Maori Jurisprudence: The Neglect of Tapu’ (1998) 8 *Auckland Universities Law Review* 884.

<sup>76</sup> *Ibid*, at 455.

cannot be the doctor if it is the disease”.<sup>77</sup> These scholars perceive answers in a combination of recognition, indigenization, and decolonisation.<sup>78</sup>

## **B. Recognise**

An important step is to recognise Indigenous peoples and to recognise that Indigenous peoples have a distinct and different worldview. According to Turpel, denial of difference is not legitimate for it “would continue oppression through the maintenance of the cultural monopoly or hegemony”.<sup>79</sup> Instead there must be “toleration of differences and the recognition of autonomous or incommensurable communities”.<sup>80</sup> The non-Indigenous legal scholar, Wilkins, agrees. He states that Aboriginal peoples should have the legal room to “address their own needs and imperatives in ways that they themselves consider effective and appropriate, even when those aims and ways differ substantially from what we in the mainstream culture might have done or preferred”.<sup>81</sup> Borrows articulates: “If indigenous peoples are to avoid being swallowed up in their intercultural interactions, they must set aside intellectual space to interpret and apply their own normative values. Strengthening a commitment to shared justice is best advanced through indigenous and non-indigenous peoples

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<sup>77</sup> James (Sakej) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 *Indigenous Law Journal* 1, at 27.

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<sup>79</sup> Turpel *supra* note 57, at 45.

<sup>80</sup> *Id.*

<sup>81</sup> Kerry Wilkins, “Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy” (2000) 27 *Manitoba Law Journal* 241, at 251.

creating a separate peace”.<sup>82</sup> These sentiments align with the New Zealand Law Commission where it stated in 2001:<sup>83</sup>

If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Maori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Maori is, how it is practiced and applied, and how integral it is to the social, economic, cultural and political development of Maori, still encapsulated within a dominant culture in New Zealand society.

Nonetheless, recognition is but one step in finding a solution for moving forward. There remains the need for Indigenous peoples to indigenize and reassert their own ways of knowing, and the need for all peoples, including Indigenous peoples, to work towards decolonising existing legal theory and legal application.

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<sup>82</sup> John Borrows, “A Separate Peace: Strengthening Shared Justice” in Catherine Bell and David Kahane (eds). *Intercultural Dispute Resolution in Aboriginal Contexts*. (Vancouver: UBC Press, 2004) at 361.

<sup>83</sup> New Zealand Law Commission above n, 1. Similar statements have been made by commissions in Canada: see *Report of the Royal Commission on Aboriginal Peoples. Vol 1. Looking Forward, Looking Back*. (1996), and Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (2006). In Australia: see Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report, The Interaction of Western Australian law with Aboriginal law and culture*. Project 94 (2006).

### C. Indigenise

Indigenous peoples want to live their lives, not in “someone else’s dream world”<sup>84</sup>, but in their own. While they now live in the modern world of inter-mixed and intermingled cultures, and possess other formal identities,<sup>85</sup> the marker of difference still exists and will do so for as long as Indigenous peoples wish to retain their ways of knowing. They “have solid ground on which to walk”<sup>86</sup> and “intellectual footprints”<sup>87</sup> that go back many thousands of years. Indigenous peoples now need the space to re-establish and reassert their laws. The scholars committed to this Indigenize vision recognise this.

Henderson, for example, has committed much of his time and energy to articulating an Indigenous pathway forward for Indigenous peoples. He states that Indigenous peoples “have to find the answers and solutions to contemporary quandaries in their hearts”,<sup>88</sup> and need to revitalise First Nations’ legal inheritances.<sup>89</sup> Indigenous peoples “have to refocus on our experiences as Indigenous peoples and what this means to us, in order to transform legal consciousness”.<sup>90</sup> Likewise, Borrows states that “it is critical that Indigenous people be afforded the opportunity to

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<sup>84</sup> Henderson, *supra* note 77 at 16.

<sup>85</sup> See Borrows, *supra* note 82 at 348.

<sup>86</sup> Christie, *supra* note 56 at 110.

<sup>87</sup> *Id.*

<sup>88</sup> Henderson, *supra* note 77 at 3.

<sup>89</sup> Henderson, *supra* note 59 at 1.

<sup>90</sup> Henderson, *supra* note 77 at 25.

learn and create their own laws, and then take the personal initiative to master them”.<sup>91</sup>

Christie’s message to Indigenous peoples is that they must “begin by reconfirming the existence of, and implications emanating from, the cultural divide separating their ways of life from those built on certain Western precepts”.<sup>92</sup> Indigenous peoples “need to reaffirm the validity of their perception that the law is alien and oppressive and come to terms with the reasons for the validity of this perception. They then need to acknowledge the *responsibilities* attendant on this reconfirmation and re-invigorate their societies in alignment with traditional wisdom, but in ways which provide for the complexities inherent in living in the contemporary world”.<sup>93</sup> Moreover, he urges: “if Aboriginal peoples are to continue living as Aboriginal people, to hold to the value of the ways of living of their ancestors, honouring their wisdom and sacrifice, they must resist coming to think of themselves as simply collections of people with interests in and claims to certain rights within the framework of the Canadian polity, or as communities whose identities can be entirely fluid and contingent”.<sup>94</sup>

The challenge for Indigenous peoples is great, and, yet, these scholars all recognise that it would be insufficient to only Indigenize – or, at least only Indigenize in the way I have defined the term here, namely as a project for Indigenous peoples to reassert their identities. As Linda Tuhiwai Smith has explained, the Indigenizing

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<sup>91</sup> Borrows, *Recovering Canada*, *supra* note 53 at 25.

<sup>92</sup> Christie, *supra* note 56, at 114.

<sup>93</sup> *Id* (original emphasis).

<sup>94</sup> *Id*.

project includes decolonising.<sup>95</sup> The legal scholars agree. Henderson warns, for example, that when Indigenous peoples have found solutions in their hearts then “they have to reveal their visions to all peoples”.<sup>96</sup> To this end Indigenous peoples have an important role to play in changing Eurocentric thought and analysis. But, still, they must be given the space to find themselves and their laws.

#### **D. Decolonise**

Christie’s challenge to the legal theorists is essentially to stop imposing universal visions of the nature of knowledge, the self and its relation to community. In decolonising liberalism, the “only glimmer of hope lies in the ability to awaken individuals working and living within the liberal system to the nature of the threat the liberalization of Aboriginal societies poses to the essential interest Aboriginal peoples have in maintaining control over the power of self-identification”.<sup>97</sup> The design of the liberal state would have to be reconceived: “its architectural principles being reconfigured along lines respecting the cultural divide between Aboriginal and non-Aboriginal peoples”.<sup>98</sup> In decolonising critical theory he states that these theorists must “move beyond the activity of ‘trashing’, for their work to contribute to the struggle of Aboriginal people to find an appropriate place in Canadian society, they

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<sup>95</sup> See Linda Tuhiwai Smith. *Decolonizing Methodologies: Research and Indigenous Peoples*. Eighth edition. (New York: Zed Books Ltd, 2005).

<sup>96</sup> Henderson, *supra* note 77 at 3.

<sup>97</sup> Christie, *supra* note 56 at 113.

<sup>98</sup> *Ibid*, at 113-114.

must develop a theory of inter-cultural relations beginning from the imperative of cultural difference”.<sup>99</sup>

Some good work is now being done on inter-cultural relations. For example, Natalie Oman builds on the work of Charles Taylor to argue for stronger intercultural understandings and a departure from the status quo, where the powerful colonizing party predetermines negotiated outcomes. She states: “If intercultural understanding is assigned a central place in the negotiating process, the fact that alternative *legitimate* (whether comprehensible or not) standards of value – and the worldviews they underpin – exist becomes inescapable, and the possibility of outcomes that challenge the assumptions and expectations of both parties become real”.<sup>100</sup> She adds “It is this sense of difference that inspires the moments of self- and cultural-transformation that must serve as the foundation for lasting and adaptable solutions to intercultural conflicts”.<sup>101</sup>

Borrows approves of Oman’s work, and has himself utilized Charles Taylor’s work to navigate intercultural understandings.<sup>102</sup> Borrows believes that it is possible to place Indigenous traditions in the ‘intersocietal context’ through culturally appropriate methodology. By doing this, he believes democracy would be enhanced:

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<sup>99</sup> *Ibid*, at 113.

<sup>100</sup> Natalie Oman, “Paths to Intercultural Understanding: Feasting, Shared Horizons, and Unforced Consensus” in Catherine Bell and David Kahane (eds). *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 86 (original emphasis). For one of Charles Taylor’s more influential works in this area: see “Understanding and Ethnocentricity” in *Philosophy and the Human Science: Philosophical Papers*, Vol 2. (Cambridge, U.K: Cambridge University Press, 1985).

<sup>101</sup> *Id*.

<sup>102</sup> For example: see Borrows’ early work: “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government” L.L.M thesis, University of Toronto, 1991 (unpublished), to more recent work, including Borrows, *supra* note 82.

“Locating Indigenous accounts of law within and beside Western interpretations of contemporary customary law encourages more inclusive democratic conversations”.<sup>103</sup>

As stated above, Henderson believes that Indigenous lawyers and law students have an important role to play in the decolonisation project. He states: “By using borrowed Eurocentric languages and skills, Indigenous lawyers can participate in unravelling Eurocentric visions. We can participate in constructing a fair and just society and an innovative postcolonial legal consciousness and remedies based on Indigenous teaching or by blending those teachings with Canadian law”.<sup>104</sup> A “legitimate system of rules by which a transcultural, postcolonial society can flourish” is Henderson’s vision for the future. Indigenous law can teach Western law many things. Or, as Len Findlay (an English professor who has influenced the work of Henderson) has observed: “This double strategy of working with and against, defining by connection and by difference, suggests that ... some of the master’s most important tools – like the domestic and international division of labour – *can* be used “to dismantle the master’s house,” though not if they are the only tools used and if they remain within dominant patterns of ownership of the means of production”.<sup>105</sup>

The work of Borrows probably fits best here for he sees potential in Western law, for example: “*Despite its potential to do otherwise*, the law has both inadvertently ignored and purposely undermined Indigenous institutions and ideas, and thus weakened ancient connections to the environment”.<sup>106</sup> He believes: “There

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<sup>103</sup> Borrows, *Recovering Canada*, *supra* note 53 at 35.

<sup>104</sup> Henderson, *supra* note 77 at 54.

<sup>105</sup> Les Findlay, “Always Indigenize! The Radical Humanities in the Postcolonial Canadian University” (2000) 31: 1&2 *ARIEL* 307, at 310 (original emphasis).

<sup>106</sup> Borrows, *Recovering Canada*, *supra* note 53 at 30 (emphasis added).

is much to be gained by applying this [Indigenous] knowledge within Aboriginal communities and within Canada as a whole”.<sup>107</sup> Borrows’ vision is for the legitimate place of both laws. He explains in the context of a pitched environmental development proposal where a “review could take place according to the principles and customs of both Anishinabek and Western law. Each party could conduct its own evaluation of any environmental impact according to its own rules and customs, and the groups could then compare their findings to see where improvements need to be made”.<sup>108</sup>

Although each of these theorists defines the obstacles and solutions slightly differently, the combined force of their message is insightful and gives hope for the imagining of a different future to the current well-worn path for owning and managing national parks. What do their messages mean for the law and geography discipline, or, in other words, how can the law and geography discipline become relevant to Indigenous peoples?

### **III. LAW AND GEOGRAPHY**

The beginning point of this thesis is that the new directions contained in section 2(2) of the *Canada National Parks Act 2000* and section 4 of the *Conservation Act 1987* pose a strong challenge to the 21<sup>st</sup> century concept of the national park. It is this challenge that frames the primary question explored in this study: if law constructed colonial space, what does it mean if contemporary law now recognises Indigenous

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<sup>107</sup> *Ibid*, at 147.

<sup>108</sup> *Ibid*, at 53.

place? The disciplines of law and geography have value in illustrating the first component of this question: the trouble with ‘space’.

‘Seeing the trouble with space’<sup>109</sup> may seem an odd assertion, especially embedded as a core argument in a legal thesis. Space is a theoretical concept key to exploring human geography.<sup>110</sup> Space is the antithesis of place. Both of these terms are difficult to define. But, in brief, as Tim Cresswell writes in his book dedicated to exploring this term place, place is “a way of seeing, knowing and understanding the world”.<sup>111</sup> He writes “When we look at the world as a world of places we see different things. We see attachments and connections between people and place. We see worlds of meaning and experience”.<sup>112</sup> Space thus is seen “in distinction to place as a realm without meaning”.<sup>113</sup> Space becomes place when humans invest meaning in it. It is possible, and common, for one person to look at, for example, land and see place and for another person to see space. In fact, this is an integral component of colonisation and thus a core theme in this thesis: the trouble with ‘space’.

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<sup>109</sup> This phrase is a play on William Cronon’s seminal work ‘The Trouble with Wilderness; or, Getting Back to the Wrong Nature’ in Cronon (ed), *Uncommon Ground: Toward Reinventing Nature* (New York: W.W. Norton & Company, 1995).

<sup>110</sup> For example, see: Mustafa Dikec, ‘Space, politics, and the political’ (2005) 23 *Environment and Planning D: Society and Space* 171; David Slater, ‘Other domains of democratic theory: space, power, and the politics of demoncratization’ (2002) 20 *Environment and Planning D: Society and Space* 255; Andrew Merrifield, ‘Place and Space: A Lefebvrian Reconciliation’ (1993) 18 *Transactions of the Institute of British Geographers* 516.

<sup>111</sup> Tim Cresswell, *Place a short introduction* (Oxford: Blackwell Publishing Ltd, 2004) at 11.

<sup>112</sup> *Ibid*, at 11.

<sup>113</sup> *Ibid*. at 10.

Space is not often linked to legal theory.<sup>114</sup> But space is a sinister term that underlies colonial legal foundations. Through conceptualizing the lived homes of Indigenous peoples as ‘space’, many British colonial governments successfully overlaid their laws and rules on Indigenous place. As explained in chapters four and five, European colonial settlers tended to view Indigenous lands in Aotearoa New Zealand and Canada as spaces of wilderness and thus blank canvases devoid of identities. Often in contradiction to Indigenous/Crown treaties, such as the Treaty of Waitangi in Aotearoa New Zealand, and the common law doctrine of native title, the new settlers had few qualms in asserting ownership and management regimes over the ‘empty spaces’ and thus putting them to ‘use’ as national parks.

The present reconciliation jurisprudence in Aotearoa New Zealand and Canada is beginning to recognise the fiction of colonial space.<sup>115</sup> Thus, a primary question explored in this thesis is: If law created colonial space and made it permissible, what are the implications if contemporary law recalibrates its orientation to that space and belatedly recognises it as also prior Indigenous place? This question ought to be central to all contemporary reconciliation initiatives.

One trouble with space is that the entire legal foundation is founded on it. But this does not make it right. As Anishnabe law professor John Borrows has asserted: “a house built upon a foundation of sand is unstable, no matter how beautiful it may

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<sup>114</sup> Nicholas K Blomley is recognised as advancing this pioneering work: see *Law, Space, and the Geographies of Power* (New York: The Guilford Press, 1994). See also Chris Butler, ‘Critical Legal Studies and the Politics of Space’ (2009) 18(3) *Social & Legal Studies* 313-332.

<sup>115</sup> The fiction of colonial space is explored generally in chapters three and four and more specifically in the context of national parks in chapters five to seven. But space cannot simply be understood within the framework of power. See: Kaarlo Tuori, Zenon Bankowski, and Jyrki Uusitalo (eds) *Law and Power. Critical and Socio-Legal Essays* (Liverpool: Deborah Charles Publications, 1997).

look or how many people may rely upon it”.<sup>116</sup> Hence, the problem with power may be only illusory until the trouble with space is confronted.

This thesis accepts that law *is* social and our relationship with nature *is* social and asks: will the current reconciliation agreements achieve full and final settlement if they do not take account of this fact? Classic jurisprudence and even critical legal theory provide little scope for exploring and validating these questions.<sup>117</sup> It took a geographer to challenge a matrix that “Modern legal ‘theory ... seems to have little time for the geographic imagination” and, in turn, capture my imagination for a more legitimate way to think about law.<sup>118</sup>

Since the publication of Nicholas Blomley’s book *Law, Space, and the Geographies of Power* in 1994,<sup>119</sup> the importance of the law and geography approach has grown. Several leading legal academics have embraced and advanced the subject. In 2001, Richard T Ford, a Stanford University Law Professor, and David Delaney, Professor of Law, Jurisprudence and Social Thought at Amherst College, joined Blomley to edit what has become a main text in this field: *The Legal Geographies*

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<sup>116</sup> Borrows, *Recovering Canada*, *supra* note 53 at 115.

<sup>117</sup> Numerous books have been published that provide excellent overviews of jurisprudence. Just three examples include: Denise Meyerson, *Understanding Jurisprudence* (Oxon: Routledge-Cavendish, 2007); Joseph Keim Campbell, Michael O’Rourke, and David Shier (eds), *Law and Social Justice* (Cambridge: Massachusetts Institute of Technology, 2005); Costas Douzinas and Adam Gearey, *Critical Jurisprudence. The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005).

<sup>118</sup> Blomley, *supra* note 114 at 4. See also Blomley’s other work in this field, for example: Nicholas K. Blomley and Gordon L. Clark “Law, Theory and Geography” (1990) 11 *Urban Geography* 433; Nicholas K. Blomley, “Text and context: rethinking the law-space nexus” (1989) 13 (4) *Progress in Human Geography* 512.

<sup>119</sup> *Ibid.*

*Reader. Law, Power, and Space.*<sup>120</sup> The book spans diverse topics from, for example, anti-homeless law, city spaces, school desegregation classes, residential rent controls, globalization and border crossings. In 2003, senior law lecturer, Jane Holder, and Professor of Geography, Carolyn Harrison, both from University College London, edited the comprehensive and seminal text *Law and Geography*.<sup>121</sup> Work of more than thirty contributors is divided into several categories: boundaries; land; property; nature; identity: people, persons, and places; culture and time; and, knowledge. A more recent text is that edited by William Taylor, a senior lecturer in architecture, landscape and visual arts at the University of Western Australia, *The Geographies of Law. Landscape, Identity and Regulation*, published in 2006.<sup>122</sup> It is a blossoming field, and is posing as an important challenge to orthodox legal thinking.<sup>123</sup> By combining the critical geographers and critical lawyers, the once assumed objectivity of law and space tumble, for both are social.

Some preliminary work in the context of Indigenous peoples has been done in this field. Sarah Whatmore, in ‘De/Re-Territorializing Possession: The Shifting

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<sup>120</sup> Nicholas Blomley, David Delaney, and Richard T Ford (eds), *The Legal Geographies Reader. Law, Power, and Space* (Oxford: Blackwell Publishers Ltd, 2001).

<sup>121</sup> Jane Holder and Carolyn Harrison (eds), *Law and Geography Current Legal Issues 2002, Vol 5* (Oxford: Oxford University Press, 2003).

<sup>122</sup> William Taylor (ed), *The Geography of Law. Landscape, Identity and Regulation* Onati International Series in Law and Society (Portland: Hart Publishing, 2006).

<sup>123</sup> Important articles by legal academics in this field include: David Delaney, ‘Making Nature/Marking Humans: Law as a Site of (Cultural) Production’ (2001) 91(3) *Annals of the Association of American Geographers* 487; W Wesley Pue, ‘Wrestling with Law: (Geographical) Specificity vs (Legal) Abstraction’ (1990) 11 *Urban Geography* 566; W. Wesley Pue, ‘Towards Geo-Jurisprudence? – Formulating Research Agendas in Law and Geography’ (1991) 3 *Windsor Rev. Legal & Social Issues* 71. See also Kim Economides, ‘Law and Geography New Frontiers’ in Philip A. Thomas (ed) *Legal Frontiers* (Aldershot: Dartmouth Publishing Company, 1996);

Spaces of Property Rights’, writes for a couple of pages on *Mabo* and the more than convenient fiction of *terra nullius*.<sup>124</sup> David F Martin also takes on *Mabo* and the native title management regime.<sup>125</sup> Alexandre (Sandy) Kedar, in ‘On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda’, explores the law, supreme courts, and the making of settler’s land regimes with some reference to the United States, Canada, Australia, and New Zealand, but mostly in reference to Israel.<sup>126</sup> While such works are exposing the historical wrongdoings of colonial states, I know of no work that uses the law and geography literature to challenge the contemporary Crown/Indigenous reconciliation discourse. As a result, colonial space and colonial place remain embedded in the legal foundations of many countries. I aspire to conduct useful research for Indigenous peoples by bringing an Indigenous lens to this discipline.

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<sup>124</sup> In Holder and Harrison (eds), *supra* note 121 at 215.

<sup>125</sup> David F Martin, ‘Designing Institutions in the ‘Recognition Space’ of Native Title’ in Sandy Toussaint (ed) *Crossing Boundaries. Cultural, legal, historical and practice issues in native title* (Melbourne: Melbourne University Press, 2004).

<sup>126</sup> Alexandre (Sandy) Kedar, “On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda” in Holder and Harrison (eds), *supra* note 121. See also Audrey Kobayashi, “Racism and Law in Canada: A Geographical Perspective” (1990) 11 (5) *Urban Geography* 447.

## IV. A COMPARATIVE INDIGENOUS LENS

### A. Comparative methodology

This research engages the obligations I feel as a Maori scholar: to conduct ‘useful’<sup>127</sup> and transformative research aimed towards creating “a better life for Indigenous peoples”,<sup>128</sup> and “an equitable society that never has been and yet must be”.<sup>129</sup> In writing about law my research stems from an Indigenous point of view.<sup>130</sup> Thus it is important to me that I construct this thesis in the first person,<sup>131</sup> and weave through

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<sup>127</sup> Smith, *supra* note 95 at 2.

<sup>128</sup> Henderson, *supra* note 77 at 3.

<sup>129</sup> *Ibid.*

<sup>130</sup> I am drawing a distinction here between writing from an Indigenous point of view and doing Indigenous research per se because, for instance, this research is not based in my Indigenous language. For a discussion on Indigenous research see: Smith, *supra* note 95; Russell Bishop, *Collaborative Research Stories: Whakawhanaungatanga* (Palmerston North: Dunmore Press, 1996); and Margaret Kovach, ‘Emerging from the Margins: Indigenous Methodologies’ in Leslie Brown & Susan Strega (eds), *Research as Resistance. Critical, Indigenous, & Anti-oppressive Approaches* (Toronto: Canadian Scholars’ Press/Women’s Press, 2005).

<sup>131</sup> See Kathy Absolon and Cam Willet, ‘Putting Ourselves Forward: Location in Aboriginal Research’ in Brown and Strega (eds), *ibid.* who explain the importance of location from an Indigenous First Nation’s perspective and which I believe is similarly important to Maori; and Kim Lane Scheppelle, ‘Foreward: Telling Stories’ (1989) 87 *Michigan Law Review* 2073, who introduces the deconstruction of ‘we’ in legal writing. See also Jacinta Ruru, “Layered Narratives in Site-Specific ‘Wild’ Places” in Hester Lessard, Rebecca Johnson, and Jeremy Webber (eds), *Stored Communities. Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) pp 211-226, and other contributions in this edited collection.

this thesis some of my own, and my whanau (wider families) personal experiences with the law and notions of space and place. It is at this point that it is apt for me make an important disclosure: I do not whakapapa (genealogically link) to any lands lying in national park boundaries. The lands encased in national park boundaries in Aotearoa New Zealand do not constitute my ancestral land. While I am of Maori descent, my tribal group lies to the north and north-west of the Tongariro National Park: Ngāti Raukawa and Ngāti Ranginui.<sup>132</sup>

This acknowledgment is important and links significantly with the underlying themes in this thesis concerning identity, recognition and decolonisation. National parks, I believe, can be symbols of the journey of coming to grips with our colonial past, recasting stories, and attempting to move forward together in respectful relationships. National parks have the power to shape our national identity so long as we accept and celebrate the cultural layering of their landscapes. In regard to the national parks in Aotearoa New Zealand, they help to give not just me, but all New Zealanders, a solid standing in this land, steeped today in respect for one another, including the mana whenua (the tribe/s with local authority) of the area. I sincerely believe that we need not fear the relationship that mana whenua have with these lands that all New Zealanders call home, for this is what contributes to making our places special and unique. It is this that helps to shape our identity as Pakeha New Zealanders living on land that once knew only the Maori way of doing things – and it is precious to our own forebears and future generations. We can all appreciate the places lying in national park boundaries. Thus, it is important for me, in working

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<sup>132</sup> To view Maori tribal boundaries see the Ministry of Maori Affairs website at: <http://www.tkm.govt.nz/map/>. To view a map of where Aotearoa New Zealand national parks are positioned see the Department of Conservation website at: <http://www.doc.govt.nz/parks-and-recreation/national-parks/>.

through the questions posed in this thesis, to clarify that I have both a Maori and Pakeha lens.

Furthermore, there is much strength in exploring these issues through a comparative legal approach. This is so even though comparative law, as a Western legal theory, historically produced poor results for Indigenous peoples. Older comparative studies ranged from worthless to destructive.<sup>133</sup> The problem is that comparative law produced a colonial binary of ethnocentricity, evaluating other races and cultures by criteria specific to one's own culture. Lawyers, legal academics, judges, and legislatures, have historically gazed at Indigenous Peoples for the purposes of eliminating differences. As the next chapter of this thesis will illustrate, European colonists in countries including Canada and Aotearoa New Zealand pursued a mission to destroy the cultures, laws, and governments of Indigenous peoples. A campaign to "civilize" these "others" by making illegal the practicing of all their ways of knowing was sought through the means of law. However, no comparative legal theorist would today desire "a larking adventure in prospecting" among "primitive" cultures as was once the situation.<sup>134</sup> The modern comparative law paradigm can provide a legitimate platform to explore the themes in this thesis. As von Nessen has stated:

Comparative law accepts the important relationship between law, history and culture, and operates on the basis that each legal system is a unique mixture of

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<sup>133</sup> For example, see: E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* 3 (Cambridge: Harvard University Press, 1954); and Jacinta Ruru, "Concluding Comparatively: Discovery in the English Colonies" in Miller et al, *supra* note 55, pp 247-267.

<sup>134</sup> Hoebel, *ibid.*

the spirit of its people and is the product of a complex matrix of historical events which have produced a ‘distinctive national character and ambience.’<sup>135</sup>

Significantly, Indigenous peoples have practiced their own versions of comparative law for centuries: the sharing of knowledge and the adaptation of legal traditions through spending time with other tribal groups. Henderson emphasizes the importance for contemporary Indigenous scholarship to “dialogue comparatively”.<sup>136</sup> He explains: “This methodology not only allows others to learn from the Indigenous experience, but also offers greater legitimacy for Indigenous peoples. The relevance of the ‘Indigenous Humanities’ to the postcolonial consciousness and law can provide teachings and lessons learned by Indigenous peoples around the world”.<sup>137</sup> Borrows has recognized: “Our intellectual, emotional, social, physical, and spiritual insights can simultaneously be compared, contrasted, rejected, embraced, and intermingled with those of others. In fact, this process has been operative since before the time that Indigenous peoples first encountered others on their shores”.<sup>138</sup> In fact, Indigenous peoples in the past and today continue to get much strength from comparative experiences, for example, in international gatherings such as at the United Nations Permanent Forum on Indigenous Peoples or at the regular World Indigenous Peoples Conferences on Education.

In completing this thesis, I have sought a comparative experience in Canada to better understand the power and implications of law. While my knowledge of

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<sup>135</sup> Paul von Nessen, *The Use of Comparative Law in Australia* (Pyrmont: Thomson Lawbook Co, 2006) 27-28.

<sup>136</sup> Henderson, *supra* note 77 at 4 (citing L.M. Findlay, ‘Always Indigenize! The Radical Humanities in the Postcolonial Canadian University’ (2000) 31 *Ariel* 307).

<sup>137</sup> *Ibid.*

<sup>138</sup> Borrows, *Recovering Canada*, *supra* note 53 at 147.

Aotearoa New Zealand is stronger by virtue of my own life-experience, this thesis aspires to be of use to Indigenous peoples, government agencies and others in both countries.

Some recent legal texts have already sought to better understand the encounter between the contemporary common law legal system and the Indigenous peoples of Canada and Aotearoa New Zealand. The most obvious works include that by Canadian law professors H. Patrick Glenn and Kent McNeil, Australian law professor Simon Young, and the later work by New Zealand born but United Kingdom-based Paul McHugh.<sup>139</sup> Glenn's seminal book includes a chapter on Indigenous peoples—classified by Glenn as “chthonic peoples”<sup>140</sup> and attempts to do something that I do not. The motivation for me to pursue comparative legal work in this thesis is not to describe who we are as Indigenous peoples or the Indigenous legal system, but rather to examine how the Western legal system has developed and applied notions of space and place that substantiate the continuing colonization of Indigenous peoples' land and resources.<sup>141</sup> McNeil, Young and McHugh do something different than Glenn –

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<sup>139</sup> H. Patrick Glenn, *Legal Traditions of the World* 3rd ed (New York: Oxford University Press, 2007); Kent McNeil, ‘Judicial Treatment of Indigenous Land Rights in the Common Law World’ in Benjamin J Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009); Simon Young, *The Trouble with Tradition. Native title and cultural change* (Sydney: Federation Press, 2008); and Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2004).

<sup>140</sup> Glenn, *ibid.* at 58-92.

<sup>141</sup> In saying this, I think I echo John Wigmore's 1931 definition of comparative law as “the tracing of an identical or similar idea or institution through all or many systems, with a view to discovering its differences and likenesses in various systems . . . . [I]n short, the evolution of the idea or institution, universally considered.” John H. Wigmore, ‘Comparative Law:

their works focus on the judicial interpretations and applications of the doctrine of native title. My comparative work is thus in a similar vein to Young, McNeil and McHugh. It is important to note that, of course, other academics are also working within a comparative legal paradigm,<sup>142</sup> and that, in particular, political scientists have completed impressive work, including the recent publications by Paul Keal,<sup>143</sup> Peter Russell,<sup>144</sup> and Christa Scholtz.<sup>145</sup>

## **B. Canada and Aotearoa New Zealand as the basis for comparative study**

Canada and Aotearoa New Zealand are aptly suited for comparative study. At one level Aotearoa New Zealand's colonial experiences resonate strongly with Indigenous peoples' experiences in Canada, and other similarly colonised countries such as Australia and the United States. British colonization undeniably affected who

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Jottings on Comparative Legal Ideas and Institutions' (1931-32) 6 *Tulane Law Review* 48, 51.

<sup>142</sup> For example, Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge: Harvard University Press, 2007); John Borrows, "Ground Rules: Indigenous Treaties in Canada and New Zealand" (2006) 22 *New Zealand Universities Law Review* 188.

<sup>143</sup> Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).

<sup>144</sup> Peter H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005). See also: Jacinta Ruru, "Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism by Peter Russell Toronto, University of Toronto Press, 2005" (2007) 45(2) *Osgoode Hall Law Journal* 425-431.

<sup>145</sup> Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States* (Hoboken: Routledge, 2006).

Maori were; disease and warfare decimated the population and legislation criminalized the Maori way of life.<sup>146</sup> But the tools for colonization and the recent remedies to overcome the disasters of colonization are in many ways unique to this South-West Pacific island country. There exists a single treaty, the Treaty of Waitangi, and legal institutions with counterparts not found elsewhere in the world: the Maori Land Court and the Waitangi Tribunal.<sup>147</sup> Today, Maori, as a significant and visible component of the population (currently constituting over 15 per cent of Aotearoa New Zealand's four million people),<sup>148</sup> are rebuilding their communities and ways of knowing.

Geographically, Aotearoa New Zealand constitutes of two large islands (the North Island and the South Island), a smaller third island (Stewart Island), and numerous other small islets. The majority of the population live on the North Island (and this was similarly true prior to the arrival of the Europeans). The lands were first discovered and peopled by the Maori tribes sometime on or after AD 800.<sup>149</sup> It is a mountainous landscape, densely forested with a comparatively cooler climate than the Pacific Islands. It swarmed with birds (many flightless) and teemed with fish (both freshwater and saltwater species). Grouped into distinct peoples, the Maori tribes

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<sup>146</sup> See Alan Ward, *A Show of Justice: Radical 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1973).

<sup>147</sup> For reading on the Maori Land Court see Richard Boast, Andrew Erueti, Doug McPhail, and Norman F. Smith, *Maori Land Law* 2<sup>nd</sup> ed. (Wellington: Lexis Nexis, 2004). For reading on the Waitangi Tribunal see Janine Hayward and Nicola R. Wheen (eds), *The Waitangi Tribunal* (Wellington: Bridget Williams Books, 2004); Giselle Byrnes, *The Waitangi Tribunal and New Zealand History* (Auckland: Oxford University Press, 2004).

<sup>148</sup> Statistics New Zealand, <http://www.stats.govt.nz/people> (showing New Zealand's current population).

<sup>149</sup> Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* (Auckland: Penguin Books, 2nd edn, 2004) 24. Others put it at about AD 1200: Michael King, *The Penguin History of New Zealand* (Auckland: Penguin Books, 2003) 48.

became, literally, the people of the land (*tangata whenua*), living upon Papatuanuku, the earth mother, with Ranginui, the sky father, above. The common language (with regional dialectal differences) captured this interrelationship. For instance, *hapu* means ‘sub-tribe’ and ‘to be pregnant’; *whanau* means ‘family’ and ‘to give birth’; and *whenua* means ‘land’ and ‘afterbirth’.<sup>150</sup> Of some 40 distinct *iwi* (tribes), and hundreds of *hapu*, each derived their identity from the mountains, rivers, and lakes.<sup>151</sup> The Europeans began arriving on these shores in the late 1700s. Today, Pakeha (the Maori name for British settlers) constitute about 67 per cent of the population.<sup>152</sup> A small but growing population from the Pacific Islands and Asia are now also making their home in this country.

Aotearoa New Zealand has a unicameral legislature. Its appeal courts constitute (in order from the first court of appeal to the final court of appeal): the High Court, Court of Appeal, and since 2002, the Supreme Court (prior to 2002, the Privy Council Judicial Committee was New Zealand’s highest court).<sup>153</sup> Under its constitutional system, Parliament is supreme and has no formal limits to its law-making power.<sup>154</sup> The Treaty of Waitangi is not part of the domestic law. Since the

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<sup>150</sup> For an introduction to the Maori language see H W Williams, *Dictionary of the Maori Language* (Wellington: GP Publications, 1992) and H M Ngata, *English-Maori Dictionary* (Wellington: Learning Media, 1993).

<sup>151</sup> For an introduction to Maori mythology see Ross Calman and A W Reed, *Reed Book of Maori Mythology* 2<sup>nd</sup> ed. (Wellington: Reed Books, 2004).

<sup>152</sup> According to the 2006 Census results: see Statistics New Zealand website <http://www.statistics.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/culture-and-identity/ethnic-groups-in-new-zealand.aspx>.

<sup>153</sup> See *Supreme Court Act 2003*. Note that the Privy Council Judicial Committee consists of senior judges and was formerly the supreme court of appeal for the entire British Empire. It continues to hear appeals from some Commonwealth countries.

<sup>154</sup> To better understand New Zealand’s constitutional system see Phillip Joseph, *Constitutional and Administrative Law in New Zealand* 2<sup>nd</sup> ed. (Wellington: Thompson

1980s, the Treaty is commonly said to form part of its informal constitution along with the *New Zealand Bill of Rights Act 1990* and the *Constitution Act 1986*. Therefore, for the judiciary or those acting under the law, the Treaty itself usually only becomes relevant if it has been expressly incorporated into statute. Even so, statutory incorporation of the Treaty has been a relatively recent phenomenon. It was once endorsed in the courts ‘as a simple nullity’.<sup>155</sup> It was not until the 1970s, when Maori visibly took action to highlight Treaty breaches, that the Treaty began to gain mainstream recognition and, in turn, the attention of those in Parliament and the judiciary.<sup>156</sup>

In regard to Canada, it is a country that geographically dwarfs Aotearoa New Zealand (Canada is the second largest country in total area in the world). On its west lies the Pacific Ocean; on its east the Atlantic Ocean; at its north is the Arctic Ocean; and, to its south lies the landmass of the United States of America. Canada consists of ten provinces and three territories.<sup>157</sup> Colloquially, the country is often split between ‘the North’ (meaning the three territories: Yukon, Northwest Territories, and Nunavut) and ‘the South’ (constituting the ten provinces).

The first people to make these lands their home are now referred to as the First Nations, Inuit and Métis, and collectively as the Aboriginal peoples. Aboriginal peoples have been living in these lands for thousands of years. Unlike in Aoteaora

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Brookers, 2007); Matthew Palmer, ‘Constitutional Realism About Constitutional Protection: Indigenous Rights Under a Judicialized and a Politicized Constitution’ (2007) 29 Dalhousie LJ 1 (explaining New Zealand’s constitutional system).

<sup>155</sup> *Wi Parata v Bishop of Wellington* [1877] 3 NZ Jur 72, 78 (NS).

<sup>156</sup> See Walker note 149.

<sup>157</sup> The ten provinces are [Alberta](#), [British Columbia](#), [Manitoba](#), [New Brunswick](#), [Newfoundland and Labrador](#), [Nova Scotia](#), [Ontario](#), [Prince Edward Island](#), [Quebec](#), and [Saskatchewan](#), while the three territories are [Northwest Territories](#), [Nunavut](#), and [Yukon](#).

New Zealand where Maori speak the one language, there are 11 Aboriginal language groups in Canada, made up of more than 65 distinct language families. Similar to Maori though, the Aboriginal peoples have a personified holistic worldview that creates a reciprocal relationship with the land (earth mother).<sup>158</sup>

Colonization in Canada occurred much earlier than in Aotearoa New Zealand, particularly on the east coast (late 15<sup>th</sup> century) by the British and the French. Colonization wrought similarly disastrous results to the Aboriginal peoples particularly through introduced diseases, confinement to reserves, and residential schooling. Today, Aboriginal peoples constitute about 4 per cent of the Canada's 34 million people.<sup>159</sup>

While Aotearoa New Zealand is a unitary state, Canada is a federal state. In accordance with the *British North America Act, 1867*, and *Constitution Acts, 1867 to 1982*, federal government has residuary power and is responsible for trade and commerce and issues concerning Aboriginal peoples. The principal provincial powers cover property and civil rights.<sup>160</sup> Since 1982, Aboriginal peoples have had constitutional protection through section 35 of the *Constitution Act 1982*: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Canada's highest court is the Supreme Court of Canada although cases commenced before 1949 could be appealed to the Judicial Committee of the Privy Council in the United Kingdom. The Supreme Court hears appeals from the appellate provincial courts. The French presence in the country means that the

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<sup>158</sup> See Tracey Lindberg, "The Doctrine of Discovery in Canada" in Robert et al, *supra* note 55, pp 88-125, particularly pp 88-89;

<sup>159</sup> See Statistics Canada website at [www.statcan.gc.ca](http://www.statcan.gc.ca).

<sup>160</sup> For an excellent discussion on Canada see Peter Hogg, *Constitutional Law of Canada* fifth ed. (Scarborough, Ont.: Thompson Carswell, 2007).

Quebec province is under civil law (common law applies to the rest of the country), and that Canada is a bilingual nation with both English and French as official languages at the federal level. Two of the territories, Nunavut and the Northwest Territories, officially recognise several Aboriginal languages.

## **V. CONTEXT SETTING**

In order to help situate the reader in the specific context for this thesis – the national parks in Canada and Aotearoa New Zealand – it will be helpful to the reader to provide a brief overview of the history and regimes under which national parks are owned and managed in the two countries. These are issues that will be the subject of more detailed elaboration and analysis later in the thesis.

### **A. Canada's National Parks and National Park Reserves**

Clear trends are apparent in tracing the establishment of Canadian national parks and national park reserves in the context of the Crown's understandings of Aboriginal peoples' rights and responsibilities. While subsequent chapters explore this in more detail, here is brief summary that helps to initially visualise these trends.<sup>161</sup> Canada's first seven national parks were created in the western mountains of Alberta and British Columbia: Banff (1885); Yoho (1886); Glacier (1886); Waterton (1895); Jasper (1907); Elk Island (1913); and Mount Revelstoke (1914). From 1914 to 1969,

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<sup>161</sup> To view a map depicting the placement of national parks in Canada see the Natural Resources Canada website at: [http://atlas.nrcan.gc.ca/auth/english/maps/reference/national/natpks\\_e](http://atlas.nrcan.gc.ca/auth/english/maps/reference/national/natpks_e).

13 more national parks were created. The first in: Ontario was St Lawrence (1914); Saskatchewan was Prince Albert (1927); Manitoba was Riding Mountain (1929); Nova Scotia was Cape Breton (1936), Prince Edward Island was Prince Edward Island (1937); New Brunswick was Fundy (1948); and Newfoundland was Terra-Nova (1957). Most of these parks were established with no recognition or inclusion of Aboriginal peoples as the traditional owners. Some had even been established by forcibly removing Aboriginal and other local peoples from the land.<sup>162</sup>

The 1970s marked a very new direction for Parks Canada. The first national park reserve (a label indicating that the Government of Canada accepts that there is an Aboriginal rights claim existing in regard to the area)<sup>163</sup> was created in British Columbia in 1970<sup>164</sup> (Pacific Rim National Park Reserve), and all other national parks since established in this province have been created as national park reserves (Gwaii Haanas (1987) and Gulf Islands (2003)). Quebec got its first national park, Forillon National Park in 1970, and now has a total of two national parks and one national park reserve (Mingan Archipelago). The Yukon's first national park was established as a national park reserve in 1972: now known as Kluane National Park and Reserve of Canada. Ivvavik National Park was the Yukon's second national park (established in 1984) and the first to be created in Canada with the support of the Aboriginal traditional owners pursuant to a lands claim agreement. The first park created entirely within the Northwest Territories occurred in 1972 with the establishment of Nahanni National Park Reserve. With the redrawing of boundaries and the creation of the

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<sup>162</sup> Parks Canada Agency, *Response of the Minister of the Environment to Recommendations Made at the Third Minister's Round Table on Parks Canada* (Ottawa: Parks Canada, 2005) at 5.

<sup>163</sup> See *Canada National Parks Act*, s 4(2).

<sup>164</sup> Although note that this park reserve was not gazetted until 2002.

Nunavut territory, three national parks were created (two of which had been established initially as national park reserves lying in the Northwest Territories). In 2003, the newest national park in the country was created in Nunavut (Ukkusiksalik National Park), and in 2005, the most recent national park reserve was established in Labrador (Torngat Mountains National Park Reserve).

Therefore, the national parks and national park reserves founded post 1970 in British Columbia, Northwest Territories, Nunavut, and the Yukon have all been established either as national park reserves in recognition of unresolved Aboriginal issues or as national parks with the actual support of the Aboriginal traditional owners, pursuant to land claims agreements. The most recent parks established in Quebec and Labrador have both been classified as national park reserves. Those parks that have been established post 1970 as national parks, and not as national park reserves, are: Forillon (1970) and La Mauricie (1970) in Quebec; Gros Morne (1970) in Newfoundland; Grasslands (1975) in Saskatchewan; Bruce Peninsula (1987) in Ontario; and Wapusk (1996) in Manitoba. In fact, in the provinces of Saskatchewan, Ontario and Manitoba the national park reserve label does not exist. These contemporary trends are discussed more fully later on in this dissertation.

## **B. Aotearoa New Zealand's national parks**

As to Aotearoa New Zealand, the trends are not as diverse. There are only 14 national parks. The national park reserve label does not exist. Aotearoa New Zealand was the fourth country to adopt the United States of America's Yellowstone National Park model for preservation of public land (Canada was the third country to do so). The 14 national parks are: Tongariro (1894); Egmont (1900); Arthurs Pass (1929); Abel

Tasman (1942); Fiordland (1952); Aoraki/Mount Cook (1953); Te Urewera (1954); Nelson Lakes (1956); Westland (1960); Mount Aspiring (1964); Whanganui (1986); Paparoa (1987); Kahurangi (1995); and Rakiura (2002).<sup>165</sup> The early history of acquiring land for national park purposes in Aotearoa New Zealand was similar to Canada; the parks were for the most part established with no recognition or inclusion of Indigenous peoples as the traditional owners. This is true despite the fact that, in 1887, the Ngati Tuwharetoa chief gifted to the nation the first block of land intended for a national park estate (and heralded the park as the first in the world to be created in support of its Indigenous peoples).<sup>166</sup> However, the subsequent creation of the park was mostly made on the presumption that the lands were wastelands, useless except for their scenery and public recreational use.<sup>167</sup> In more recent years, the Department of Conservation has been actively seeking to strengthen relationships with Maori, although to date there still remains no co-managed national park or an instance where national park land has been returned to Maori ownership.

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<sup>165</sup> To view a map of where Aotearoa New Zealand national parks are positioned see the Department of Conservation website at: <http://www.doc.govt.nz/parks-and-recreation/national-parks/>.

<sup>166</sup> See, for example, John Shultis, "Natural Environments, Wilderness and Protected Areas: An Analysis of Historical Attitudes and Utilisation, and Their Expression in Contemporary New Zealand" (unpublished, University of Otago, 1991) at 196. For a critique of this claim, see Jacinta Ruru, 'Indigenous Peoples' Ownership and Management of Mountains: The Aotearoa New Zealand Experience' (2004) 3 Indigenous Law Journal 111, at 123, where the concern is noted in that the Government took seven years to statutorily provide for this gift because the Government had sought fit to take the land surrounding the gifted area for the purposes of creating the national park. See *Tongariro National Park Act 1894*.

<sup>167</sup> See the work of Shultis, and Ruru, *ibid*.

### C. National park operations in Canada and Aotearoa New Zealand

In Aotearoa New Zealand, the Department of Conservation is Government funded at about \$280 million annually,<sup>168</sup> although other supplementary funding does exist, including, for example, in 2002, the Government introduced \$349 million to upgrade facilities over the next 10 years. The Department consists of a head office in Wellington, and thirteen regional conservancy offices throughout the country, each having several area offices. Two independent statutory bodies provide specific advice to the Minister, and approve, review and report on certain policy documents relating to national parks: the Aotearoa New Zealand Conservation Authority operates at a national level,<sup>169</sup> and the Conservation Boards operate at regional levels.<sup>170</sup> The Department is responsible for managing 30 per cent of Aotearoa New Zealand's landmass (26,224,500 hectares), most of which is classified as a national park.<sup>171</sup> The Department employs 1580 fulltime staff<sup>172</sup> (350-650 short term, and many volunteers), and:<sup>173</sup>

...manages more than 12,800 kilometres of walking track, 992 huts, 13,464 boardwalks, bridges, staircases and viewing platforms, more than 2,000 kilometres of road, more than 1500 information panels and signs, 148 campsites, 1680 toilets, 22 visitor centres, and thousands of other facilities

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<sup>168</sup> See Department of Conservation, *Annual Report, year ended June 2010* at 77.

<sup>169</sup> *Conservation Act*, ss 6A-6C.

<sup>170</sup> Sections 6L-6N, *ibid.*

<sup>171</sup> Department of Conservation, *Department of Conservation Annual Report for year ended 30 June 2005* (Wellington, Department of Conservation, 2005) at 155.

<sup>172</sup> *Ibid.* at 152.

<sup>173</sup> *Ibid.* at 73.

which include shelters, car parks, seats, drains, handrails, campground kitchens, water and sewage systems.

The Department of Conservation receives little funding through visitor use as access and parking is mostly offered free of charge (with visitors only incurring minimal charges if they wish to do overnight hikes in the parks). The Department does operate a booking system on several of the more popular multi-day hiking trails. In all, about 33 million visits are made to national parks per year with a substantial number of these being international visitors.<sup>174</sup> National parks contain, for the most part, all of the last bastions of Indigenous flora and fauna found in the country, with most of it labelled as endangered, and much critically so. The biggest threat to the conservation of the parks is the introduced flora and fauna, ranging from invasive weeds like radiata pine and gorse, mammals such as deer, pigs and goats, to fish species such as trout and salmon.<sup>175</sup>

In Canada, Parks Canada has the responsibility to “protect and present Canada’s natural and cultural heritage in every region of the country”.<sup>176</sup> It has an annual budget of approximately \$500 million and 4,000 full-time employees,<sup>177</sup> with a head office in Ottawa, and 32 field units.<sup>178</sup> The national park estate constitutes

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<sup>174</sup> *Ibid.* at 71.

<sup>175</sup> For example, see Alfred W. Crosby, *Ecological Imperialism: the biological expansion of Europe, 900-1900* (Cambridge: Cambridge University Press, 2004).

<sup>176</sup> Parks Canada Agency, *Annual Report 2003-2004* (Ottawa: Parks Canada Agency, 2004) at 17 [PCA *Annual Report* 2004]. See also *Parks Canada Agency Act 1998*.

<sup>177</sup> *Ibid.* at 17. See also Parks Canada Agency, *Performance Report for the period ending March 31, 2005* (Ottawa: Parks Canada Agency, 2005) at 14 [PCA *Performance Report* 2005].

<sup>178</sup> *Ibid.* at 19.

265,000 square kilometres (2.9% of Canada's total landmass).<sup>179</sup> Canada's national parks and national marine conservation areas serve as repositories of Canada's plant and animal heritage including 50 percent of the endangered species in Canada.<sup>180</sup> Ten of Canada's national parks and national park reserves are classified as world heritage sites.<sup>181</sup> Parks Canada manages five town sites that lie within national parks.<sup>182</sup> In the past five years, 25.9-27.6 million people have visited Parks Canada sites per year, with 15.8-16.3 of these people specifically visiting national parks per year.<sup>183</sup> The pressing concern for Parks Canada in many of its parks is providing safe wildlife corridors for the many mammals who rely on such places for their survival, including bears, moose, wolves and so on.

## VI. CONCLUSION

This chapter has sought to lay the critical theoretical and methodological underpinnings of this thesis in order to explore the core questions: if there is a new commitment to recognising Indigenous peoples in law, what ought this mean in the context of owning and managing national parks in Aotearoa New Zealand and Canada? Or, to state it more theoretically: if law helped create colonial space, what does it mean if contemporary law now refocuses its lens and recognises Indigenous place? As discussed here, Indigenous legal theory and the law and geography discipline provide an essential theoretical base to assert that both law and perceptions

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<sup>179</sup> *Ibid.* at 28.

<sup>180</sup> *Ibid.* at 20.

<sup>181</sup> *Ibid.* at 46.

<sup>182</sup> *Ibid.* at 76.

<sup>183</sup> *Ibid.* at 72.

of nature are social and biased. And, importantly, there is much power in recognising this because it gives credence to the notion that law and nature can be creatively re-imagined to capture a new era of aspired reconciled Crown/Indigenous relations. The comparative approach serves to strengthen the understanding of what law has done to place and what it should do for place.

## CHAPTER THREE

### *MAKING COLONIAL LEGAL SPACE AND PLACE*

#### I. INTRODUCTION

In my country there is a place where my father and his siblings tell of a past childhood, encompassing dirt floors, and eating delicacies such as specially prepared rotten corn, and family activities such as eeling. Today this Waikato land mostly lies in cattle-fenced squares. Our ownership remains in the urupa (cemetery) and marae (meeting house). Gone are the swamps and forests, and the gardens of kumara (sweet potato) and corn. Heard less often is the language that this landscape once only heard, and mostly forgotten is the personified and holistic knowledge pertaining to this place. Even though it is not my birth or childhood place (nor my father's adult life base), it is where I will lie when I pass away.

This chapter focuses on exploring the power and imagination of state law in relation to Indigenous peoples' ownership, management and governance of land and water in Canada and Aotearoa New Zealand. Unfortunately, the law is often blind to Indigenous rights. It has perpetuated the myth that these countries are literally built on a settling space. The purpose and importance of this chapter is to show how the legislature and judiciary in Canada and Aotearoa New Zealand played a central role in creating and endorsing colonial space and place and substantiating the claim that

colonialism viewed large stretches of Indigenous land and water as empty and untouched, awaiting civilisation and use.<sup>184</sup>

This chapter provides the background necessary to appreciate that there has been a legal shift that will be described in chapter 4. It is essential to understand this legal shift because it forms the heart of this thesis: if there is a new commitment to recognising Indigenous peoples in law, what ought this to mean in the context of owning and managing national parks? This chapter is also of critical importance in substantiating a vital component of this thesis: law is social – that is law is created and enacted within a social context. By exploring what colonial law did to Indigenous place, the magic of legal fictions that serve to create and support colonial space becomes apparent in this chapter.

## **II. INITIAL RECOGNITION OF INDIGENOUS PLACE**

It is important to acknowledge that Europeans first entering the shores of the Indigenous places of Canada and Aotearoa New Zealand often recognised, albeit initially, the lands as Indigenous place. This occurred not just through signing of treaties. Some early colonial courts recognised, in part, this fact.

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<sup>184</sup> As discussed in the previous chapter, place is a way of seeing, knowing and understanding the world whereas space is a realm without meaning: see Tim Creswell, *Place a short introduction* (Oxford: Blackwell Publishing Ltd, 2004).

## A. Treaties and proclamations

### *Friendship treaties*

The Europeans (namely the French and English) began arriving on the shores of eastern Canada some several hundred years earlier than their first forays into the waters of Aotearoa, New Zealand.<sup>185</sup> This intrusion onto Aboriginal lands led to the need for treaty making on both sides. Treaty making, in the form of commerce, law, peace, alliance and friendship agreements, between the Aboriginal peoples and the Europeans began as early as the 16th century.<sup>186</sup> Some treaties took the form of the Aboriginal peoples' law through, for example, the recording of agreements in wampum belts,<sup>187</sup> while other treaties first began to be recorded in accordance with

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<sup>185</sup> In the Aotearoa New Zealand context see: Anne Salmond, *The Trial of the Cannibal Dog. Captain Cook in the South Seas* (London: Penguin Books, 2003).

<sup>186</sup> See Robert A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica Publishing Inc, 1995); RA Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997); F Jennings, *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse: Syracuse University Press, 1985); R White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991).

<sup>187</sup> For more insight into these types of agreements see: John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver, UBC Press, 1997) at 155 and especially 162; and John Borrows, "Creating Indigenous Countries: Treaties in Canada and New Zealand" (2006) 22 N.Z.U.L. Rev. 188. See also Bradford W Morse, "Indigenous-Settler Treaty Making in Canada" in

the European custom of handwritten agreements in the 17th century. The general tenor of these written agreements recorded a truce to end fighting and that His Majesty's Government would show friendship and protection to the Indian tribes. It was often agreed that an Indian tribe should: have free liberty of continued hunting and fishing; right to sell produce such as skins, feathers, fowl and fish; be given quantities of bread and flour every half year, presents such as blankets, tobacco and powder and shot once every year; and seek justice for dispute resolution in His Majesty's Courts.<sup>188</sup> Aboriginal peoples saw value in these treaties because, for example, "[p]resents were important to First Nations because they were regarded as a necessary part of diplomacy which involved accepting gifts in return for others sharing their lands".<sup>189</sup>

### *Royal Proclamation*

In 1763, the Royal Proclamation was made in Canada "as a unilateral declaration of the Crown's will in its provisions relating to First Nations".<sup>190</sup> The provisions endorsed the concept of reserved lands for Aboriginal peoples, the Crown right of pre-emption, and a protective trade clause. It recorded that the lands not already ceded to "Us" or purchased by 'Us" are "reserved to the said Indians". The unilateral elements

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Marcia Langton et al. (eds), *Honour Among Nations? Treaties and agreements with Indigenous People* (Melbourne: Melbourne University Press, 2004) 50-68.

<sup>188</sup> For example, see the Miq'Mak Treaty of 1752, available to view at: <http://www.kstrom.net/isk/maps/novascotiatreaties.html> [accessed 14 June 2010].

<sup>189</sup> Borrows, "Wampum at Niagara", *supra* note 187 at 158. Note that Borrows cites the work of Bruce M. White, "A Skilled Game of Exchange: Ojibway Fur Trade Protocol" (1987) *Minnesota History* 229 for further discussion of this point.

<sup>190</sup> Borrows, *ibid.* at 154.

of the Proclamation were modified by later treaties with Indigenous peoples, including the 1764 Treaty at Niagara. The Proclamation, although unilateral in form, in fact reflects the codification of principles negotiated with Indigenous peoples.<sup>191</sup> The important point here is that the Crown recognized the sovereign nature of Aboriginal peoples and Indigenous place of the country. As the Supreme Court of Canada, in recent times (in 1990), stated in reference to the Royal Proclamation:<sup>192</sup>

We can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

Despite this early Crown recognition of Indigenous place and Indigenous sovereignty, law and society began to be recast in a new model that espoused colonial space and Indigenous primitiveness, as becomes obvious later in this chapter.<sup>193</sup>

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<sup>191</sup> See J Williams, *Te Mana Motuhake Me Te Iwi Maori: Indigenous Self-Determination* unpublished L.L.M Thesis, University of British Columbia, 1985. Note that Williams in his work draws interesting connections between the Royal Proclamation and Treaty of Waitangi wording, in particular see p 133.

<sup>192</sup> *R v Sioui* (1990) 70 D.L.R. (4<sup>th</sup>) 427 at 448 by Lamer J of the Supreme Court of Canada.

<sup>193</sup> See John Locke, *Two Treatises of Government: A critical edition with an introduction and an apparatus criticus by Peter Laslett* 2<sup>nd</sup> ed (Cambridge: Cambridge University Press, 1967; See also Robert A Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990).

### *Numbered treaties*

For those Aboriginal peoples who signed treaties with Canada between the late 19th century and the early 1920s, the treaties tended, from the European perspective, to cede or extinguish Aboriginal title in return for some combination of reserved lands, goods and a right to continue to hunt and fish on unoccupied Crown land. The Aboriginal understanding was quite different. As the Royal Commission on Aboriginal Peoples nearly a century later accepted:<sup>194</sup>

In general, the European understanding ... was that the monarch had, or acquired through treaty or alliance, sovereignty over the land and the people on it. The Aboriginal understanding, however, recognised neither European title to the land nor Aboriginal submission to a European monarch.

The numbered treaties tended to record the responsibilities of Her Majesty the Queen to lay aside land for reserves for bands and the presentation of gifts, including cash to individual band members, and silver medals, suitable flags, clothing, and hand tools to the bands' chiefs. The numbered treaties also secured the right of Indians to "pursue their usual vocations of hunting, trapping and fishing" throughout surrendered lands except when the Government requires to take up such land for "settlement, mining, lumbering, trading or other purposes".<sup>195</sup> Moreover, Her Majesty protected the Crown's position to be able to appropriate portions of reserve land for "public works,

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<sup>194</sup> Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, Vol 1. (Ottawa: The Commission, 1996) at 125.

<sup>195</sup> For example, see Treaty No. 8, entered into in Winnipeg, Manitoba on 22 September 1899.

buildings, railways, or roads of whatsoever nature” with due compensation made to the Indians.<sup>196</sup> The treaties also commonly included a clause that recorded Her Majesty’s responsibility to give to those Bands that wished to farm their reserves farm tools such as hoes, spades, hay forks, farm animals such as horses, and seeding for crops such as potatoes, barley, oats and wheat. Importantly, the treaties do not record that the Aboriginal peoples surrender their sovereignty to the Crown.

The underlying assumptions evident in these numbered treaties is the Crown’s wrongful assumptions that these Indigenous lands were colonial spaces that needed to be put to use either by the Aboriginal peoples for farming purposes, or by the newcomers for settlement, mining and lumbering.<sup>197</sup> These assumptions are even more obvious in the lands now classified as the province of British Columbia and in many of the northern territories where the Crown negotiated very few treaties with the Aboriginal peoples living there.<sup>198</sup> Nonetheless, where treaties were signed, they act as a powerful indicator of recognition to some extent of Indigenous sovereignty and thus Indigenous place.

### *Treaty of Waitangi*

In 1840, the British claimed sovereignty of the Aotearoa New Zealand through a combination of the English common law Doctrine of Discovery principles and the partially signed Treaty of Waitangi. Following the British explorer Captain James

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<sup>196</sup> *Ibid.*

<sup>197</sup> For example, see contemporary Supreme Court of Canada decisions in: *R v Horseman* [1990] 1 SCR 901; *R v Badger* [1996] 1 SCR 771; *R v Sundown* [1999] 1 SCR 393.

<sup>198</sup> For discussion, see Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990).

Cook's first visit to and circumnavigation of Aotearoa in 1779, European (consisting mostly of British and to a lesser extent French) explorers, whalers, and missionaries began arriving, bringing with them their own distinct world views, technology, goods, and animals.<sup>199</sup> In the 1830s Britain and France were seriously interested in claiming sovereignty of parts, or all, of New Zealand.<sup>200</sup> Britain strategically acknowledged the independent sovereignty of some of the Maori tribes in 1835,<sup>201</sup> and then set about annexation. There is no clear date upon which New Zealand became a British colony. The entire process has been described as 'tortuous'<sup>202</sup> and involved several interrelated events relating to the signing of the Treaty of Waitangi in 1840.

The British Crown presented the 'treaty of cession' in English and Maori for signing at Waitangi, a small settlement in the north of the North Island, in early February 1840.<sup>203</sup> Forty-three Maori chiefs, mostly from the northern tribe Nga Pahi, assented to the Maori version of the Treaty on 6 February 1840. Next, Hobson and his party travelled through the North Island seeking more signatures.<sup>204</sup> Hobson was spurred on to issue two proclamations of sovereignty when he became aware that the New Zealand Company settlement at the now named city of Wellington sought to establish its own form of government. The first was issued 'over the North Island "by

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<sup>199</sup> See, for example, James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Penguin Press, 1996).

<sup>200</sup> See, for example, Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen & Unwin, 1987).

<sup>201</sup> To read the Declaration of Independence and commentary, see Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Bridget Williams Books, 2004) 13–16.

<sup>202</sup> David V Williams, 'The Foundation of Colonial Rule in New Zealand' (1988) *New Zealand Univ L Rev* 56.

<sup>203</sup> For a good introduction to the signing of the Treaty of Waitangi see Orange, *An Illustrated History*, note 201; Orange, *The Treaty of Waitangi*, *supra* note 200.

<sup>204</sup> Orange, *The Treaty of Waitangi*, *supra* note 200, 60–91.

right of cession” and the other over the South Island “by right of discovery”.<sup>205</sup> The proclamations were made on 21 May 1840.<sup>206</sup> Meanwhile, Hobson had ordered Major Thomas Bunbury to proceed to the South Island to seek signatures to the Treaty of Waitangi.<sup>207</sup> On 30 May 1840, two Maori chiefs of the Ngai Tahu tribe signed the Treaty at Akaroa in the South Island.<sup>208</sup> Thereafter, Bunbury travelled down to the smaller southern Stewart Island, and landed at a part that was uninhabited. He duly proclaimed British sovereignty over Stewart Island based on Cook’s Discovery.<sup>209</sup> Bunbury began his return journey, stopping at a very small offshore island, Ruapuku Island. There he successfully attained the signature of three Maori chiefs on 10 June 1840.<sup>210</sup> Two chiefs at the Maori village at Tairaroa, at the head of the Otago harbour, marked the third and final signature point in the South Island. Stopping at Cloudy Bay, on 17 June 1840, Bunbury formally proclaimed the British Queen’s sovereignty over the South Island based on cession.<sup>211</sup>

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<sup>205</sup> Tipene O’Regan, ‘The Ngai Tahu Claim’ in I H Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 234, 240. See also Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End* 2<sup>nd</sup> ed. (Auckland: Penguin Books, 2004) at 97 (noting that Hobson ‘proclaimed South Island on the basis that it was *terra nullius*, thereby ignoring the existence of the Ngai Tahu. Only the arrogance born of metropolitan society and the colonizing ethos of the British Empire was capable of such self-deception, which was hardly excused by the desire to beat the imminent arrival of the French at Akaroa’).

<sup>206</sup> See Orange, *The Treaty of Waitangi*, *supra* note 200, at 81.

<sup>207</sup> *Ibid*, at 73.

<sup>208</sup> *Ibid*, at 78.

<sup>209</sup> *Ibid*.

<sup>210</sup> *Ibid* at 79.

<sup>211</sup> *Ibid* at 80. For a more detailed account of these South Island signings see, for example, O’Regan, *supra* note 205; and Waitangi Tribunal, *Ngai Tahu Rreport* vol 2 (Wellington: GP Publications, 1997).

The Treaty of Waitangi is a short document, consisting of three articles each expressed in an English version and a Maori version. As stated in the previous chapter, the Treaty of Waitangi is not part of domestic law unless it has been specifically incorporated into legislation. This has occurred in some instances as will be later discussed. Some of the controversy that currently surrounds the Treaty lies in the translation of the first two articles.<sup>212</sup> According to the English version, Maori ceded to the Crown absolutely and without reservation all the rights and powers of sovereignty (article 1), but retained full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties (article 2).<sup>213</sup> In contrast, in the Maori version, Maori ceded to the Crown governance only (article 1), and retained tino rangatiratanga (sovereignty) over their taonga (treasures).<sup>214</sup> Article 2 granted the Crown a preemptive right to purchase property from Maori, and article 3 granted Maori the same rights and privileges as British citizens living in Aotearoa New Zealand. Whereas the English version of the Treaty encapsulates the principles of the Doctrine of Discovery, the Maori version purports to be a blueprint for a different type of future bound more in respectful separation.

An important component of the Treaty for Maori is its assertion of protection of taonga. A general translation of taonga includes treasures or property – intangible and tangible – that is highly prized. Over the years, Maori have argued in the courts

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<sup>212</sup> For an analysis of the textual problems with the Treaty see Bruce Biggs, ‘Humpty-Dumpty and the Treaty of Waitangi’ in I H Kawharu (ed) note 205, 300–12; R M Ross, ‘Te Tiriti o Waitangi: Texts and Translations’ (1972) 6 *New Zealand J of History* 129 (reprinted in Judith Binney (ed), *The Shaping of History: Essays from the New Zealand Journal of History* (Wellington: Bridget Williams Books, 2001)).

<sup>213</sup> Articles 1 and 2 of the English version of the Treaty of Waitangi. To view a copy of the Treaty, see *Treaty of Waitangi Act 1975* sch 1.

<sup>214</sup> Articles 1 and 2 of the Maori version of the Treaty of Waitangi.

that many things constitute taonga including the Maori language and native flora and fauna.

The bilingual treaty of cession was certainly a unique contractual agreement not replicated elsewhere.<sup>215</sup> Humanitarian interests, along with the need to control the unruly behaviour of some of the new settlers, and to keep at bay the interests of France and to a lesser extent the United States of America, contributed to the British desire for a signed treaty.<sup>216</sup> Maori chiefs signed for similarly numerous reasons. On its face, the Treaty looked as if it was asking little of Maori and offering them much in return. Maori expected to increase trade, to receive assistance in handling the new changes occurring in society, and ‘not least, the possibility of manipulating British authority in inter-tribal rivalries’.<sup>217</sup>

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<sup>215</sup> See William Renwick, ‘A Variation of a Theme’ in William Renwick (ed), *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts* (Wellington: Victoria University Press, 1991) 199, 207 (explaining that by the time the treaties were signed on Vancouver Island, BC, Canada—a mere decade later—‘British imperial policy was determined by strategic considerations not humanitarian intentions’). See also Caren Wickliffe, ‘Te Timatanga: Maori Women’s Access to Justice’ (2005) 8(2) YB of NZ Jurisprudence Special Issue – Te Purenga 217, 229 (asserting that ‘The Treaty of Waitangi is fundamentally different to treaties in the Americas . . . [and] did not deal with the sovereign status of indigenous polities’).

<sup>216</sup> In particular, see the instructions issued by the Permanent Under-Secretary of the Colonial Office responsible for British policy in New Zealand: Peter Adams, *The Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland: Auckland University Press, 1977).

<sup>217</sup> Orange, *The Treaty of Waitangi*, note 200, 58. Note that a colonial government was established in 1852. For more discussion see Peter Spiller, Jeremy Finn, and Richard Boast (eds), *A New Zealand Legal History* 2<sup>nd</sup> ed. (Wellington: Brookers, 2001).

## **B. Case law: R. v Symonds and St Catherine's**

Some early court decisions recognised to some extent Indigenous place, in particular, as is discussed here, *R v Symonds* and to a lesser extent *St Catherine's Milling & Lumber Company v The Queen*.

### *Symonds* 1847

Following the signing of the Treaty of Waitangi, a colonial government was established.<sup>218</sup> The British began to make serious inroads into acquiring large tracts of land for British settlement.<sup>219</sup> At issue were those Europeans who had purchased land directly from Maori prior to 1840. Many individuals questioned whether Maori held valid title to the land. The purchasers argued that Maori did hold valid title because the British Crown had recognized the sovereignty of Maori in the Declaration of Independence and the Treaty of Waitangi. The purchasers said therefore Maori must

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<sup>218</sup> For an excellent account that argues that this constituted the original breach of the Treaty see Hanna Wilberg, 'Facing up to the Original Breach of the Treaty' (2007) *New Zealand L Rev* 527. See also F M Brookfield, *Waitangi & Indigenous Rights: Revolution, Law & Legitimation* (Auckland: Auckland University Press, 2nd edn, 2006); Hanna Wilberg, 'Judicial Remedies for the Original Breach?' (2007) *New Zealand L Rev* 713.

<sup>219</sup> See eg Richard Boast, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921* (Wellington: Victoria University Press, 2008).

be deemed to have had ‘the power to alienate land like any other sovereign’.<sup>220</sup> The courts settled the issue in 1847 in the *R v Symonds*<sup>221</sup> case.

*R v Symonds* served to reinforce the sovereign rights of Britain in New Zealand. The facts of the case are similar to *Johnson v M’Intosh*, in which the United States Supreme Court refused to recognize the validity in law of title to land purchased by individuals directly from the Indian owners.<sup>222</sup> The *Symonds* case involved a British individual who purchased land directly from Maori in accordance with a certificate issued by Governor Fitz Roy allowing him to do so.<sup>223</sup> The question that occupied the courts was whether the individual, Mr C Hunter McIntosh, had acquired legal title to the property. Both judges sitting on the case said no, and both did so by drawing on United States jurisprudence.<sup>224</sup> This case is said to represent the foundational principles of the common law relating to Maori.<sup>225</sup> Additionally, it was the first case to explicitly rely on the Doctrine of Discovery ideology in New Zealand law. In regard to this thesis, this is important because it is an early illustration of the magic of law (that is, that law is social) intertwined with a grappling of what to do

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<sup>220</sup> PG McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (New York, OUP, 2004) at 168.

<sup>221</sup> [1847] NZPCC 387.

<sup>222</sup> *Johnson v M’Intosh* 21 US (8 Wheat) 543 (1823). For an outstanding discussion of the influence of the United States jurisprudence, including *Johnson v M’Intosh*, on Justice Chapman see Mark Hickford, ‘“Decidedly the Most Interesting Savages on the Globe”: An Approach to the Intellectual History of Maori Property Rights, 1837–53’ (Spring 2006) 27 *History of Political Thought* 122–67.

<sup>223</sup> *R v Symonds* [1847] NZPCC 387.

<sup>224</sup> *Ibid.*

<sup>225</sup> See for example Mark Hickford, ‘Settling Some Very Important Principles of Colonial Law: Three ‘Forgotten’ Cases of the 1840s’ (2004) 35 *Victoria Univ of Wellington L Rev* 1.

with Indigenous place. The most famous quote in the case is that stated by Justice Chapman:<sup>226</sup>

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country; whatever may be their present clearer and still growing conception of their own dominion over land, *it cannot be too solemnly asserted that it is entitled to be respected, and it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.* But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the *Queen's exclusive right to extinguish it.* It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, *the Treaty of Waitangi*, confirmed by the Charter of the Colony, *does not assert either in doctrine or in practice any thing new and unsettled.*

The case held that the Queen had the *exclusive* right of preemption to purchase land from Maori as articulated in the Treaty of Waitangi. Justice Chapman observed that the 'intercourse of civilised nations'<sup>227</sup> (namely, Great Britain) with Indigenous communities (especially in North America) had led to established principles of law.

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<sup>226</sup> [1847] NZPCC 387, 390 (emphasis added). For a wider discussion of the early judgments by Justice Chapman see Shaunnagh Dorsett, 'Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of "Barbarous" Customs in New Zealand in the 1840s' (2009) 30 J of Legal History 175–97.

<sup>227</sup> *Ibid*, at 388.

This law, founded in the Doctrine of Discovery and encapsulated in the common law Doctrine of Native Title, stipulated that the Queen's preemptive right was exclusive. Thus, the doctrine stated that the Crown is the sole source of title for settlers. This was the exact same outcome as in *Johnson* which both judges in *Symonds* recognized. In fact, both judges in *Symonds* explicitly relied on several of the United States Supreme Court Chief Justice John Marshall's judgments.<sup>228</sup>

In *Symonds*, Justice Chapman observed that in guaranteeing Native title and the Queen's preemptive right, 'the Treaty of Waitangi . . . does not assert either in doctrine or in practice any thing new and unsettled'.<sup>229</sup> While this observation could be disputed, especially on reading the Maori version,<sup>230</sup> the decision marked a covert application of the Doctrine of Discovery. Nonetheless the strength of this decision was not to be repeated in the courts for a long time. In fact, it was to take another 150 years before a court was to hold that Maori have proprietary interests in land despite a change in sovereignty.<sup>231</sup> The significance of this for this thesis becomes apparent later in this chapter, as the law reconfigures to deny the fact of Indigenous place (via the legal magic of the fiction of terra nullius). This insight is also strengthened in later chapters, in the context of accepting a new aspiration of reconciliation, and what this ought to mean for governing national park lands.

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<sup>228</sup> McHugh, *supra* note 220 ('There is a strong congruence between the styles of reasoning in *R v. Symonds* and the Marshall cases').

<sup>229</sup> *R v Symonds* [1847] NZPCC 387, 390 (per Chapman J); see also per Martin CJ at 395.

<sup>230</sup> See eg Eddie Durie, 'The Treaty in Maori History' in Renwick, note 215.

<sup>231</sup> *Attorney-General v Ngati Apa* [2003] 2 NZLR 643. But see *In re 'The Landon and Whitaker Claims Act 1871'*, 2 NZ CA (1872). For commentary on the significance of *Symonds* and *In re Landon* see John William Tate, 'Pre-Wi Parata: Early Native Title Cases in New Zealand' (2003) 12 Waikato L Rev 112.

## *St Catherine's*

The widely regarded beginning point for understanding Canada's legal articulation of Aboriginal peoples' property rights to land is the 1888 Privy Council case *St Catherine's Milling & Lumber Company v The Queen*.<sup>232</sup> At issue in this case was whether the federal government, Canada, was permitted to issue a federal lumber permit to lands that it had ceded from the Ojibway people via Treaty No. 3 (entered into in 1873) and then placed in the provincial government of Ontario. The domestic courts of Canada, and the Privy Council, all agreed that the federal government did not have this power.

The trail judge, Chancellor Boyd, stated:<sup>233</sup>

The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, not any such claim thereto as to interfere with the plantations, and the general presecution of colonization. They were treated 'justly and graciously' as Lord Beacon advised, but no legal ownership of land was attributed to them.

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<sup>232</sup> (1888) 14 App. Cas. 46 (J.C.P.C.). *Reference re: British North America Act, 1867, s. 109 (Ont.)* (1888), 14 App. Cas. 46, 10 C.R.A.C. 13, affirming *St. Catherine's Milling and Lumber Co. v. R.* (1888), 13 S.C.R. 557 [*St. Catherine's*].

<sup>233</sup> *St. Catherines Milling* (1885) 10 OR. 196 at 206.

Boyd added later in his judgment:<sup>234</sup>

While in their nomadic state they may or may not choose to treaty with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them.

While Canada and Ontario were the parties in the case (and not the Ojibway people), the Privy Council decision made several significant comments about the nature of Indigenous title to land. The Privy Council recognised that the Royal Proclamation made provision for possession of land “in favour of all Indian tribes then living under the sovereignty and protection of the British Crown”.<sup>235</sup> The Privy Council thus recognised that the Ojibway had occupied the disputed lands from 1763 (the date of the Royal Proclamation) until 1873 (the date of Treaty No.3).<sup>236</sup> While the Privy Council recognised the inference that “the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign”,<sup>237</sup> their Lordships explicitly stated that they “do not consider it necessary to express any opinion upon the point” as to “the precise quality of the Indian right”.<sup>238</sup> Rather they were content to state:<sup>239</sup>

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<sup>234</sup> *Ibid*, at 229.

<sup>235</sup> *Ibid*, at 54.

<sup>236</sup> *Ibid*, at 54.

<sup>237</sup> *Ibid*, at 54.

<sup>238</sup> *Ibid*, at 55.

<sup>239</sup> *Ibid*, at 55.

It appears to [their Lordships] to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

The final decision reads:<sup>240</sup>

The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province. The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario.

This case illustrates that law is social in that it is endorsing a societal demand to limit the property rights of Aboriginal peoples in Canada. The enduring fact of Indigenous place is conditionally recognised. This stance remains largely unmodified until the late 1970s.

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<sup>240</sup> *Ibid*, at 60. For an Indigenous reflection on this case see Tracey Lindberg, "The Doctrine of Discovery in Canada" in Robert J Miller et al, *Discovering Indigenous Lands. The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010) 89-125, in particular at 124.

### III. RECASTING AS COLONIAL SPACE AND PLACE

While the fact that the European settlers were cognizant of Indigenous place in some areas (and even knew the potential ramifications of this fact, as seen in the *Symonds* case) both Canada and Aotearoa New Zealand moved into a more stark period following this, related to the denial of Indigenous rights. The legislature and courts endorsed this societal shift. These developments reveal an important component of this thesis: the smothering of Indigenous place with colonial space. Once these Indigenous lands were recast as empty and wild, these conceptions were put to use in creating the national park label, proving useful to their further development. The utilisation of some of these lands as national parks brought into existence colonial place. This reconfiguration was legitimated through law. This part discusses those legal initiatives. Importantly, the point of this review is not to deny the agency of Indigenous peoples, but to highlight the arrogance and wilful blindness of how the Europeans viewed Indigenous lands as empty and thus capable of becoming colonial place with marginalised Indigenous places in ringfenced reserves and land blocks.

#### A. Legislation: The Constitution Act 1867, Indian Act, and Native Land Acts

##### *Constitution Act 1867*

After a couple of centuries of contact (predominately in the east), in 1867 the first formation of the modern united Canada (namely Ontario, Québec, Nova Scotia and New Brunswick) emerged with the passing of the *British North America Act, 1867*, now called the *Constitution Act, 1867*. This Act gave the new federal Parliament the

exclusive legislative authority over “Indians and lands reserved for Indians”. This signified a dominant and still present theme of paternalism, but also the denial of Indigenous sovereignty, agency, and property rights.

### *Indian Act*

A decade after the enactment of the *Constitution Act*, Parliament passed the *Indian Act*,<sup>241</sup> the first federal statute to deal substantively and exclusively with Indians. Essentially, it aspired to assimilate Aboriginal peoples into mainstream Canadian society, control Indians’ relationships with the federal Crown, and protect a small amount of Canada’s land base for the exclusive use and benefit of Indians.<sup>242</sup> Pursuant to treaties or agreements with provincial governments (both pre- and post-1867), the new arrivals, in claiming ownership of land and resources, relocated Aboriginal peoples onto small, scattered, and mostly unproductive land blocks. Essentially this 1876 statute defined how bands could be created and what powers the band councils would have. The *Indian Act* has governed the reserve system ever since. This Act was used to further define Aboriginal peoples as either ‘status’ or ‘non-status’ Indians. Status Indians had rights to reside on specific reserves and receive certain tax exemptions for property situated on a reserve. In comparison, those Aboriginal peoples that relinquished their identity, and thereby became ‘non-status Indians’, had rights to pursue a ‘civilized’ lifestyle, for example, to vote in federal elections and to

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<sup>241</sup> *Indian Act* S.C. 1876, c. 18, especially s. 1.

<sup>242</sup> See e.g. Christa Scholtz, *Negotiating Claims : The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States* (New York: Routledge, 2006); and P.G. McHugh, *supra* note 220.

enrol in higher education.<sup>243</sup> Moreover, the *Indian Act* explicitly regulated almost every aspect of Indian community life, including Indian ceremonies such as the Potlatch.<sup>244</sup>

The federal government transferred ownership of Crown lands and the jurisdiction over their development to the provinces, and Aboriginal communities were segregated onto insufficient and scattered reserved lands, and “one scholar writes that ‘... today ... all Canadian Indian reserves combined constitute less than one half of the Navajo reservation in Arizona alone.’”<sup>245</sup> The Royal Commission of Canada has described the *Indian Act* as “discriminatory from start to finish”.<sup>246</sup>

### *Native Land Acts*

The initial British Governors in Aotearoa New Zealand exerted a distinct colonialist policy based on the assumption that ‘Maori were unusually intelligent (for blacks) and that intelligence translated into the desire to become British’.<sup>247</sup> Between 1840 and 1860, the tools for this evangelism—God, money, law and land—sought to convert Maori from ‘savages’ to ‘civilisation’ via assimilation by the ‘[m]ixing of the two peoples geographically’.<sup>248</sup> But the early evangelism had few complete successes. While many Maori did embrace Christianity, it was not at the exclusion of their own

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<sup>243</sup> *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act*, 31st Vict. C. 42, S.C. 1869, c. 6, s. 86(1).

<sup>244</sup> *Indian Act*, S.C. 1886, c. 43, s. 114.

<sup>245</sup> Scholtz, *supra* note 242 at 40. See also Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

<sup>246</sup> Report of the Royal Commission on Aboriginal People (1996) at 236.

<sup>247</sup> James Belich, ‘The Governors and the Maori (1840–72)’ in Keith Sinclair (ed), *The Oxford Illustrated History of New Zealand* (Auckland: Oxford University Press, 2nd edn, 1996) 78.

<sup>248</sup> *Ibid*, at 80.

religion. Rather, ‘Maori religion had always been open, able to incorporate new gods’.<sup>249</sup> Similarly, while many Maori tribes became commercialized (they dominated the food supply market from growing crops, to transporting and selling to the Pakeha), individualism did not flourish.<sup>250</sup>

By the late 1850s, however, the life of some tribes had been radically changed. Of significance, the British Crown had acquired most of the land in the South Island and the lower part of the North Island (constituting approximately 60 per cent of New Zealand’s land mass and where approximately 10 per cent of Maori lived).<sup>251</sup> In most instances the tribes had been duped. First, there was controversy about the actual land included in the purchase agreements. Second, there was unrest in that the Crown had not set aside land for reserves for them as per the agreements.<sup>252</sup> Deeply disturbed by the correlation between selling land and loss of independence, the North Island tribes, who still retained some land, began turning against land sales. Importantly, the pan-tribal sentiment saw the emergence of the Maori King Movement.<sup>253</sup> Perturbed that land selling would come to an end, and that as a consequence the amalgamation of Maori would come to a halt, the British concluded that the ‘law of nature’ required help. The British declared war against some Maori tribes, but underestimated tribal resistance.<sup>254</sup> The New Zealand wars, which began in March 1860, did not abate until

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<sup>249</sup> *Ibid*, at 78.

<sup>250</sup> *Ibid*, at 80.

<sup>251</sup> *Ibid*, at 84.

<sup>252</sup> See eg Waitangi Tribunal, *Ngai Tahu Report*, *supra* note 211, and O’Regan, note 211.

<sup>253</sup> For a discussion of Maori resistance movements, including the Maori King Movement see Lindsay Cox, *Kotahitangi: The Search for Maori Political Unity* (Auckland: Oxford University Press, 1993).

<sup>254</sup> See generally James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Penguin, 1998).

a decade later.<sup>255</sup> A tougher new evangelism emerged during this time with law becoming the central tool in destroying the Maori way of life.<sup>256</sup>

Large tracts of Maori land in the North Island were confiscated pursuant to legislation;<sup>257</sup> legislation stipulated that native schools could only receive funding if the curriculum was taught in the English language<sup>258</sup> (a policy which led to the near extinction of the Maori language and culture, and marginalized Maori ‘by a deliberate policy of training for manual labour rather than the professions’<sup>259</sup>); and legislation ensured that any person practicing traditional Maori healing could become liable for conviction<sup>260</sup> (a policy which led to the loss of much traditional knowledge).<sup>261</sup>

At the heart of the new cultural genocide<sup>262</sup> crusade was the establishment of the Native Land Court. The Crown now waived its right of preemption (as endorsed in the Treaty of Waitangi and common law doctrine of native title) in favour of permitting the Maori to freely alienate their land. However, Maori first had to obtain a certificate of title. The system sought to transform land communally held by *whanau*

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<sup>255</sup> *Ibid.*

<sup>256</sup> See generally Richard Boast, ‘The Law and the Maori’ in Spiller, Finn, and Boast (eds), *supra* note 217.

<sup>257</sup> See *New Zealand Settlements Act 1863*; *Suppression of Rebellion Act 1863*.

<sup>258</sup> See *Native Schools Act 1858*; *Native Schools Act 1867*; *Native Schools Amendment Act 1871*.

<sup>259</sup> Stephanie Milroy and Leah Whiu, ‘Waikato Law School: An Experiment in Bicultural Legal Education’ (2005) 8 YB of NZ Jurisprudence Special Issue – Te Purenga 173, 175.

<sup>260</sup> See *Tohunga Suppression Act 1908*.

<sup>261</sup> See Maui Solomon, ‘The Wai 262 Claim: A Claim by Maori to Indigenous Flora and Fauna: Me o Ratou Taonga Katoa’ in Michael Belgrave, Merata Kawharu, and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* 2<sup>nd</sup> ed. (Auckland: Oxford University Press, 2005).

<sup>262</sup> For a discussion of this term see D Williams, ‘Myths, National Origins, Common Law and the Waitangi Tribunal’ (2004) 11 Murdoch U Electronic J <[http://www.murdoch.edu.au/elaw/issues/v11n4/williams114\\_text.html](http://www.murdoch.edu.au/elaw/issues/v11n4/williams114_text.html)>.

and *hapu* (Maori customary land) into individualized titles derived from the Crown (Maori freehold title).<sup>263</sup> The preamble to the Native Lands Act 1862 explained this system as follows:<sup>264</sup>

whereas it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands . . . were assimilated as nearly as possible to the ownership of land according to British law.

A further significant statute was enacted in the 1860s: the Native Rights Act 1865. This Act made it clear that: (1) Maori were deemed to be a natural-born subject of Her Majesty; (2) the courts had jurisdiction in all cases touching the persons and property (real or personal) of Maori; (3) Native title was to be determined according to the ancient custom or usage of Maori; and (4) any case concerning title to Native title was to be directed to the Native Land Court.<sup>265</sup>

This legislation ensured ‘Maori could participate in the new British prosperity only by selling or leasing their land’.<sup>266</sup> Or, as Hon Sewell, a Member of the House

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<sup>263</sup> See generally David Williams, *Te Kooti Tango Whenua: The Native Land Court 1864–1909* (Wellington: Huia Publishers, 1999).

<sup>264</sup> *Native Lands Act 1862*. See also *Native Lands Act 1865*.

<sup>265</sup> See *Native Lands Act 1865*, ss 2–5.

<sup>266</sup> Waitangi Tribunal, *Turanga Tangata, turanga Whenua: The Report on the Turanganui a Kiwa Claims* vol 2, Wai 814 (Wellington: Legislation Direct, 2004)

Representatives in 1870, reflected, the Act had two objectives.<sup>267</sup> One objective was ‘to bring the great bulk of the lands of the Northern Island which belonged to the Natives . . . within the reach of colonization’.<sup>268</sup> The other objective was:

the detribalisation of the Natives,—to destroy, if it were possible, the principles of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Native race into our own social and political system.<sup>269</sup>

The Land Court was extraordinarily effective.<sup>270</sup> In the early years: a predatory horde of storekeepers, grog-sellers, surveyors, lawyers, land-agents, and money-lenders made advances to rival groups of Maori claimants and recouped the costs in land. Rightful Maori owners could not avoid litigation and expensive surveys if false claims were put forward, since Fenton [the Chief Judge], seeking to inflate the status of the Court, insisted that judgments be based only upon evidence presented before it.<sup>271</sup>

By the 1930s very little tribal land remained in Maori ownership (today it amounts to five per cent of Aotearoa New Zealand’s total landmass). The Court’s

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<sup>267</sup> The Parliament of Aotearoa New Zealand has two parts. One is the head of state, Queen Elizabeth II who is prepresented by the Governor-General. The other part if the House of Respresentatives. This comprises members of parliament who are elected every third year.

<sup>268</sup> Williams, note 263, 87–8 (quoting 29 August 1870, NZPD, vol 9, 361).

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> See A Ward, *An Unsettled History: Treaty Claims in New Zealand Today* (Wellington, Bridget Williams Books, 1999).

early work has been described as a ‘veritable engine of destruction for any tribe’s tenure of land’,<sup>272</sup> and ‘a scandal’.<sup>273</sup>

The Native Lands Act was therefore used to deny Indigenous place and associated Indigenous sovereignty. The courts in Aotearoa New Zealand quickly moved to endorse this position.

## **B. Early case law**

It was the infamous *Wi Parata v. Bishop of Wellington*<sup>274</sup> case in Aotearoa New Zealand that introduced the fiction of terra nullius (no man’s land) and in so doing completely denies the facts that not only Maori had lived on these lands for hundreds of years, but also that Maori were a people with laws, knowledge and history. Interestingly, there is no comparative case law in Canada probably because the reserve system there had been so successful in denying Aboriginal agency and place.

In Aotearoa New Zealand, by the late 1870s, the now-named High Court, in line with the new evangelism, began to rewrite history. Of most significance, in 1877, the High Court, in *Wi Parata*, denied that Maori had sovereignty prior to 1840, and

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<sup>272</sup> I H Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (Oxford: Clarendon Press, 1977) 15. See also B D Gilling, ‘Engine of Destruction? An Introduction to the History of the Maori Land Court’ (1994) 24 Victoria Univ of Wellington L Rev 115.

<sup>273</sup> M P K Sorrenson, ‘The Purchase of Maori Lands, 1865–1892’ (Masters thesis, The University of Auckland, 1955) 146 (citing *New Zealand Herald* (Auckland 2 March 1883) 4).

<sup>274</sup> [1877] 3 NZ Jur (NS) 72. For an excellent discussion of this case see: David V. Williams, *A Simple Nullity?: The Wi Parata Case in New Zealand Law and History* (Auckland: Auckland University Press, 2011).

thus rejected the Treaty of Waitangi as a valid treaty.<sup>275</sup> In doing so, the Doctrine of Discovery came to the forefront of judicial reasoning.

The *Wi Parata* case concerned a chief seeking to gift land to the Crown so that the Crown would establish a native school on the land. However, no school of any kind was ever established. The tribe sued, seeking return of the land.<sup>276</sup> Chief Judge Prendergast relied on a new version of historical events and ruled in favour of the Crown by stating:<sup>277</sup>

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at the time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.

Prendergast stressed that Britain had queried the capacity of Maori and pointed to the direction made by the British government to Captain Hobson, in stating that:<sup>278</sup>

we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political

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<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*, at 77.

<sup>278</sup> *Ibid.*, at 72.

relations to each other, and are incompetent to act, or even to deliberate, in concert.

Prendergast stated, in reference to this passage, that:<sup>279</sup>

Such a qualification nullifies the proposition to which it is annexed. In fact, the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government.

He further stated at length that:<sup>280</sup>

Had any body of law or custom, capable of being understood and administered by the Courts of a civilised country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. In this way British tribunals administer the old French law in Lower Canada, the Code Civil in the island of Mauritius, and Roman-Dutch law in Ceylon, in Guinea, and at the Cape. But in the case of primitive

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<sup>279</sup> *Ibid*, at 77.

<sup>280</sup> *Ibid*, at 77–8.

barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice.

In reference to the Treaty of Waitangi, Prendergast stated that:<sup>281</sup>

So far indeed as that instrument purported to cede the sovereignty—a matter with which we are not here directly concerned—it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.

Prendergast was referring to American authorities and expressly likens ‘the case of the Maoris’ to ‘that of the Indian tribes of North America’.<sup>282</sup> He concluded that ‘the title of the Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages’.<sup>283</sup>

In reaching this conclusion, Prendergast was not hindered by any purported conflicting stance in a statute. In particular, he referenced section 3 of the Native Rights Act 1865 that read in part that the courts have the same jurisdiction ‘in all cases touching the persons and property, whether real or personal, of the Maori

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<sup>281</sup> *Ibid.*, at 78.

<sup>282</sup> *Ibid.* In particular, see *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831). See McHugh, *supra* note 220 at 172 (noting this similarity).

<sup>283</sup> *Ibid.*

people, and touching the title to land held under Maori custom and usage . . .’ Prendergast reflected that the Act spoke ‘as if some such body of customary law did in reality exist’.<sup>284</sup> He added: ‘But a phrase in a statute cannot call what is non-existent into being.’<sup>285</sup> According to Prendergast, ‘no such body of law existed’.<sup>286</sup>

This case is Aotearoa New Zealand’s paramount Discovery case. It has played a significant role in New Zealand’s legal history and was not conclusively overruled until 2003. This case serves to illustrate just how social law can be. That is, law has the capacity to capture the dreams of the nation and find credence for these aspirations in the common law. In the 19<sup>th</sup> century, and for a large part of the 20<sup>th</sup> century, the dreams of the European nations in both countries revolved around colonisation and denial of Indigenous place.

Fortunately, today, colonisation is no longer the dream of the nation state. Instead the driver is towards reconciliation. But we should ask: how strong is that commitment to reconciliation? If law made colonial space permissible (which cases like *Wi Parata* demonstrate), what are the implications if contemporary law recalibrates its orientation to space and belatedly recognises Indigenous place. One would expect a reversal of the Discovery doctrine. This remainder of this chapter now briefly looks at how the hard colonist line begins to soften, and then moves into answering these larger questions in the following chapters.

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<sup>284</sup> *Ibid*, at 79.

<sup>285</sup> *Ibid*.

<sup>286</sup> *Ibid*.

#### IV. HARD LINE SOFTENING

From the 1900s through until the 1970s, the extreme hard line of colonialism begins to wane. This section traces some of the Privy Council decisions because there are some important Crown/Indigenous legal relations cases decided during this time that have implications today for recognising Indigenous place. Then, this section of the chapter focuses on a hardline assimilationist period that occurred both in Canada and Aotearoa New Zealand in the 1960s. The comparative strength here helps to bring alive the power of colonial space and colonial place ideology. The last part of this chapter then explores the remarkable shift that occurs in the following decade, the 1970s, where both countries begin to change direction and start to set in motion a process that initiates commitments to reconciliation, including recognising Indigenous place.

##### A. Early to mid 1900s Privy Council decisions

At the turn of the century the Privy Council had an opportunity to closely reflect on the *Wi Parata* decision and it did not like what it saw. In *Nireaha Tamaki v Baker*,<sup>287</sup> decided in 1901, Lord Davey, in delivering the judgment for their Lordships, began: ‘This is an appeal . . . in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised.’<sup>288</sup> The Crown

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<sup>287</sup> *Nireaha Tamaki v Baker* [1901] AC 561.

<sup>288</sup> *Ibid*, at 372.

argument, supported by the Court of Appeal, relied on the *Wi Parata* reasoning that there is no Maori customary law ‘of which the Courts of law can take cognizance’.

Lord Davey responded:<sup>289</sup>

Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss. 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that ‘a phrase in a statute “cannot call what is non-existent into being.” It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence’.

Moreover, Lord Davey recognized that Chapman J, in deciding the *Symonds* case, had made some ‘very pertinent’ observations that Native Title is entitled to be respected. But the final decision made by the Privy Council—in favour of the Maori applicant (and thus a reversal the Court of Appeal decision)—was dependent on statutory recognition of native title and not the common law recognition of it.

However, astonishingly, Aotearoa New Zealand’s domestic judiciary ignored the Privy Council’s ruling that *Wi Parata* had gone too far.<sup>290</sup> As recognized by Robin

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<sup>289</sup> *Ibid*, at 382. For more discussion see Jim Evans, ‘Reflections on *Nireaha Tamaki v Baker*’ (2007) 2 Te Tai Haruru J of Maori Legal Writing 101.

<sup>290</sup> For example, see *Hohepa Wi Neera v Bishop of Wellington* [1902] 21 NZLR 655 (CA). For commentary see Mark Hickford, ‘John Salmond and Native Title in New Zealand: Developing a Crown Theory on the Treaty of Waitangi, 1910–1920’ (2007) 38 Victoria Univ of Wellington L Rev 853; John William Tate, ‘Hohepa Wi Neera: Native Title and the Privy Council Challenge’ (2004) 35(1) *Victoria Univ of Wellington L Rev* 73; David V. Williams,

Cooke, who became President of the Court of Appeal in 1986 and himself a Law Lord in 1996, this was ‘the only recorded instance of a New Zealand Court’s publicly avowing its disapproval of a superior tribunal’.<sup>291</sup>

An important Privy Council decision was decided in 1921, though not on appeal from Aotearoa New Zealand or Canada. In *Amodu Tijani v Secretary, Southern Nigeria*,<sup>292</sup> the Privy Council laid the basis for several elements of the modern Aboriginal title doctrine, upholding a customary land claim and urging the need to “study of the history of the particular community and its usages in each case”.<sup>293</sup> The Privy Council stated that native title rights might ‘be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference’.<sup>294</sup> The implications of this strong statement are referred to in the post 1980s Canadian and New Zealand case law as is discussed in the next chapter.

In 1941, the Privy Council, in *Te Heuheu Tukino v Aotea District Maori Land Board*,<sup>295</sup> heard a case concerning whether the Maori rights acquired in the Treaty of Waitangi were cognizable in the courts. The Privy Council answered no. It held: ‘It is

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‘*Wi Parata is Dead, Long Live Wi Parata*’ in Claire Charters and Andrew Erueti (eds), *Maori Property Rights and the Foreshore and Seabed: The Last Frontier* (Wellington: Victoria University Press, 2007) 31–58.

<sup>291</sup> Sir Robin Cooke, ‘The Nineteenth Century Chief Justices’ in Robin Cooke (ed), *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Wellington: Reed, 1969) 36, 46. One of the more well-known cases to assert the *Wi Parata* precedent was *In Re Ninety Mile Beach* [1963] NZLR 461 (CA). See generally Richard Boast, ‘In Re Ninety Mile Beach Revisited: The Native Land Court and the Foreshore in New Zealand Legal History’ (1993) 23 Victoria Univ of Wellington L Rev 145.

<sup>292</sup> [1921] 2 AC 399 (PC).

<sup>293</sup> *Ibid.*

<sup>294</sup> *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 at 656.

<sup>295</sup> *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.<sup>296</sup> The Privy Council cited *Vajesingji Joravarsingji v Secretary of State for India*<sup>297</sup> as support for this finding and it is revealing to set out the passage cited because it clearly exposes its Discovery mindset:<sup>298</sup>

When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through its officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties.

Thus, according to the Privy Council, ‘So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi . . .’<sup>299</sup>

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<sup>296</sup> *Ibid*, at 596–7.

<sup>297</sup> [1924] LR, 51 Ind App 357.

<sup>298</sup> *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, 597—quoting from 360 of the *Vajesingji* case. For a critique of *Te Heuheu Tukino* see generally Alex Frame, ‘Hoani Te Heuheu’s Case in London 1940–1941: An Explosive Story’ (2006) 22 *New Zealand Univ L Rev* 148.

<sup>299</sup> *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, 597.

The precedents developed in these decisions are astounding for their endorsement of colonial space and colonial place sentiments. They show just how far a court can, and will, go to perpetrate a myth of colonial power over Indigenous place in order to deny Indigenous peoples' any legal recourse in the colonial courts even if a treaty was signed. It is important to understand the strength of these precedents for they constitute the (shaky) foundations of our legal system and put into doubt if a contemporary commitment to reconciliation can actually occur when these decisions still remain live. The following chapters explore this, but first, two more movements in this area need to be highlighted.

## **B. The last call for assimilation: cases and policy in the 1960s**

The 1960s are an interesting comparative time for Canada and Aotearoa New Zealand especially in terms of this thesis and the colonial cling to the fiction of Europeans discovering colonial space (and not Indigenous place).

### *White paper in Canada*

In 1969, the Minister of Indian Affairs, Jean Chretien, published the *Statement of the Government of Canada on Indian Policy 1969*.<sup>300</sup> This policy document, referred to as the White Paper, opens with this goal:<sup>301</sup>

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<sup>300</sup> This *White Paper* can be viewed on the Department of Indian and Northern Affairs Canada website at: <http://www.ainc-inac.gc.ca/ai/arp/ls/pubs/cp1969/cp1969-eng.asp>.

<sup>301</sup> *Ibid.* see the foreword at 3.

The Government believes that its policies must lead to the full, free and non-discriminatory participation of the Indian people in Canadian society. Such a goal requires a break with the past. It requires that the Indian people's role of dependence be replaced by a role of equal status, opportunity and responsibility, a role they can share with all other Canadians.

The paper:<sup>302</sup>

promises all Indian people a new opportunity to expand and develop their identity within the framework of a Canadian society which offers them the rewards and responsibilities of participation, the benefits of involvement and the pride of belonging.

According to the paper this aspiration required: 1) repeal of the Indian Act; 2) federal government transferring responsibility for Indians to provincial governments; 3) making interim funds available for Indian economic development; and 4) de-establishing the Department of Indian Affairs and Northern Development.<sup>303</sup>

The Aboriginal response was swift. Led most prominently by Harold Cardinal and the Indian Chiefs of Alberta, they damned the policy paper as assimilationist. They counter proposed the Red Paper that sought a review, not abolition of the *Indian Act* and a new kind of federal agency responsible for Indian affairs. A central concern was the creation of a new Aboriginal-government relationship, and key to achieving

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<sup>302</sup> *Ibid*, at 8.

<sup>303</sup> *Ibid*, at 7 – 8.

this was government recognition of treaty and aboriginal rights.<sup>304</sup> The White Paper was abandoned.

Interestingly, a similar government proposal took hold in Aotearoa New Zealand in the 1960s that similarly categorised the ‘Indigenous problem’ (such as low education, health, employment; high imprisonment) as a result of the myriad of special rules that separated Indigenous peoples from Europeans.

### *Cases and Policy in the 1960s Aotearoa New Zealand*

The *Wi Parata* type colonial space ideology – or rather mythology – that gave credence to lands as colonial place was still prevalent in the 1960s. Two significant Court of Appeal cases and two Government policy papers not only illustrate this, but also add momentum to the claim that law is social.

In the first case, *In Re Bed of Wanganui River*,<sup>305</sup> the Court of Appeal refused to accept a tribal interest in a riverbed, favouring instead a principle that endorsed individual ownership. The Court held that once a block of land fronting a non-tidal river has been investigated by the Maori Land Court and separate titles issued, the bed of the land adjoining the river becomes *ad medium filum* a part of that block and the property of the respective owners of that block. In other words, the English common law principle of *ad medium filum* trumped Maori law. Gresson P read down the nature of Maori property law as not being capable of encapsulating individual or personal

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<sup>304</sup> For a detailed examination of the policy-making leading up to the White Paper, and the political reaction, see Sally M Weaver, *Making Canadian Indian Policy. The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

<sup>305</sup> [1962] NZLR 600. For further discussion of this case see F M Jock Brookfield, ‘The Waitangi Tribunal and the Whanganui river-bed’ (2000) 1 New Zealand Univ L Rev 9.

interests ‘but was rather a right of occupancy and cultivation, somewhat analogous to a life interest as it is understood in English law’.<sup>306</sup> Gresson P espoused the superior nature of English law:<sup>307</sup>

...in short, the Maoris [sic] held the land tribally and communally. For this somewhat *vague* tenure there was substituted a *defined* proprietary tenure of individuals or sets of individuals so that thereafter the land ceased to be held under a native title but became freehold land held under English tenure . . .

Turner J, expressly denied the doctrine of native title as is evident in this passage:<sup>308</sup>

Upon the signing of the Treaty of Waitangi, the title to all land in New Zealand passed by agreement of the Maoris (sic) to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom. This obligation, however, was akin to a treaty obligation, and was not a right enforceable at the suit of any private persons as a matter of municipal law by virtue of the Treaty of Waitangi.

Turner J did not reference the *Wi Parata* decision to substantiate this point, but the reasoning is very similar to that earlier case. Likewise, Turner J did not reference the *Symonds* case which held a different view. The Doctrine of Discovery underlies the

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<sup>306</sup> *Ibid*, at 608.

<sup>307</sup> *Ibid*, at 609 (emphasis added). This type of language is repeated in the judgment, including for example the use of ‘primitive peoples’ in reference to Maori. *Ibid*, 618 (per Cleary J).

<sup>308</sup> *Ibid*, at 623.

rationale in the passage quoted above. This is a problem because it denies Indigenous place.

In the second case, *In Re Ninety-Mile Beach*,<sup>309</sup> decided a year later, in 1963, the Court of Appeal held that ‘once an application for the investigation of title to land having the sea as its boundary was determined, the Maori customary communal rights were then wholly extinguished’.<sup>310</sup> While the Court did not agree with the Crown’s blunt argument that ‘on the assumption of sovereignty the Crown by prerogative right became the owner of the foreshores of New Zealand’, the Court did hold that:<sup>311</sup>

[j]ust as in the *Wanganui River* case this Court reached the conclusion that the transformation of the communal rights of the Maori people into individual ownership carried the title of the owner *ad medium filum* so I think in the present case we should hold that an investigation of a block of land abutting the sea was complete for all purposes.

North J said this about the Treaty of Waitangi:<sup>312</sup>

in my opinion it necessarily follows that on the assumption of British sovereignty—apart from the Treaty of Waitangi—the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water

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<sup>309</sup> [1963] NZLR 461. For further discussion see Boast *supra* note 291.

<sup>310</sup> *Ibid*, at 473 (per North J).

<sup>311</sup> *Ibid*.

<sup>312</sup> *Ibid*, at 468.

mark. But as we all know, the Crown did not act in a harsh way and from earliest times was careful to ensure the protection of Native interests and to fulfil the promises contained in the Treaty of Waitangi.

This passage reiterates *Wi Parata* type sentiments that the fate of Maori legal rights is at the whim of the government with no recognition of the doctrine of native title guarantees. Gresson J, also part of this bench, reflected similarly on the Treaty:<sup>313</sup>

For the purposes of this case it is, I think, immaterial whether sovereignty was assumed by virtue of the Treaty of Waitangi in 1840, or by settlement or annexation before this date. In either event, after 1840, all titles had to be derived from the Crown, and it was for the Crown to determine the nature and incidents of the title which it would confer.

Gresson J went on to state:<sup>314</sup>

In the event, instead of exercising its prerogative right to extinguish Native title in any arbitrary fashion or contending that the Maoris' customary rights had been indirectly displaced by operation of the law, the Crown conscientiously set about transforming the communal rights of the Maoris into individual ownership through the machinery provided in the Native Lands Act of 1862, and the later Act of 1865.

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<sup>313</sup> *Ibid*, at 475.

<sup>314</sup> *Ibid*, at 478.

Here, Gresson is assuming that the Crown has the right to extinguish Native title, which, it is true, the doctrine of native title permits but only in certain circumstances such as via clear and plain legislation with compensation attached. The passage is indicative of the Doctrine of Discovery mindset. Thus, they help me demonstrate a main point of this thesis: that colonial space and colonial place ideology are firmly entrenched in the legal system and that the courts have gone to great lengths to protect and endorse this positioning.

These two Court of Appeal decisions closely followed the government's publication of its 1961 published *Report on Department of Maori Affairs* by J K Hunn (commonly referred to as the Hunn Report).<sup>315</sup> These reports often mirror the Canadian *White Paper* sentiments. The main thrust of this report can be viewed in this reproduced paragraph:<sup>316</sup>

When the first Europeans arrived in New Zealand about A.D. 1800, the Maoris [sic] were in much the same condition as the Ancient Britons at the time of the Roman invasion in 55 B.C. In the short century and a half since then, many Maoris [sic] have overtaken the pakeha lead and adopted the 1960 pattern of living in every way. A few others, the slowest moving members of the race, have probably not yet passed the 1860 mark. There is at least a century of difference between the most advanced and the most retarded Maoris [sic] in their adjustment to modern life. The Maoris [sic] today could be broadly classified in three groups:

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<sup>315</sup> J Hunn, *Report on Department of Maori Affairs, with Statistical Supplement*, (Wellington: Government Printer, 1961).

<sup>316</sup> *Ibid*, at 15–16.

- A. A completely detribalized minority whose Maoritanga is only vestigial.
- B. The main body of Maoris [sic], pretty much at home in either society, who like to partake of both (an ambivalence, however, that causes psychological stress to some of them).
- C. Another minority complacently living a backward life in primitive conditions.

The object of policy should presumably be to eliminate Group C by raising it to Group B, and to leave it to the personal choice of Groups B members whether they stay there or join Group A—in other words, whether they remain ‘integrated’ or become ‘assimilated’.

The Hunn Report had huge implications for law and policy relating to Maori.<sup>317</sup> Essentially, the policy advocated, like that of the White Paper in Canada, was to make special rules for Maori; Maori were to be treated like Europeans living in Aotearoa New Zealand. In Aotearoa New Zealand, however, unlike in Canada, the policy became implemented in law. For example, the *Matrimonial Property Act 1963* made no distinction between general and Maori land thus enabling Maori land to become subject to *inter vivos* matrimonial property disputes.<sup>318</sup> A poignant example was the *Maori Affairs Amendment Act 1967*. It amended the *Maori Affairs Act 1953* by introducing new rules for wills and intestate succession to estates containing Maori

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<sup>317</sup> See also I Prichard and H Waetford, *Report of Committee of Inquiry into the Laws Affecting Maori Land the Jurisdiction and Powers of the Maori Land Court* (Wellington: Department of Maori Affairs, 1965).

<sup>318</sup> For more information on this law see Jacinta Ruru, ‘Implications for Maori: Historical Overview’, in Nicola Peart, Margaret Briggs, and Mark Henaghan (eds), *Relationship Property on Death* (Wellington: Brookers, 2004) 445–65.

freehold land. In regard to wills, it stated that Maori were no longer restricted in devising their interests in Maori freehold land to essentially blood relatives. Maori were to have the same testamentary freedom rights as Europeans.<sup>319</sup> In regard to intestate succession, it stated that persons entitled to succeed to a Maori person's estate shall be determined 'in the same manner as if the deceased person were a European'.<sup>320</sup> This marked a distinct change where for 100 years children had succeeded equally. The new law meant that the spouse would now succeed. This policy of treating Maori like Europeans came under attack in the 1970s, but the legal precedents determined in this era continued. The 1963 *In Re Ninety Mile Beach* Court of Appeal case was not overruled until 2003. The 1962 *In Re Bed of the Wanganui River* case remains law although it has potential to be repealed in the future.

### **C. A new era borne: Indigenous initiatives in the 1970s**

A noticeable political and legal shift began to emerge in the 1970s in both Canada and Aotearoa New Zealand that created the new platform for recalibrating from a goal of colonisation to reconciliation.

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<sup>319</sup> Maori Affairs Act 1953 s 114 was repealed by Maori Affairs Amendment Act 1967 s 88(1).

<sup>320</sup> Maori Affairs Amendment Act 1967 s 76. For more information on this law see Ruru, *supra* note 318.

### *The Calder decision*

The four bands of the Nisga'a (Nishga) Nation, in British Columbia, decided to fight the Crown's assumptions of colonial space and colonial place that led them and the Crown all the way to Supreme Court of Canada. That Supreme Court decision, made on 31st January 1973, marked a new era for understanding Indigenous place in Canada. The Bands essential argument was that Aboriginal title has never been lawfully extinguished to a defined area that consists of 1,000 square miles. They disputed the right of the British Columbia province to make certain grants in their territory in fee simple, to exercise pre-emption, and issue mineral and mining rights, and petroleum permits, forestry rights and titles, and tree farm licences. The Bands lost at trial and in the British Columbia Court of Appeal. The Supreme Court of Canada decision was more profound. Three issues were asked: 1) does Aboriginal title exist at common law; 2) has the Nisga'a title been lawfully extinguished; and 3) a procedural point on the jurisdiction of the Court to grant such a declaration. Six of the seven judges answered yes to the first issue: Aboriginal title does exist at common law. This is the victory of the decision for the judges then split three to three on the second point.<sup>321</sup>

Judson J, writing the judgment for himself, Martland J and Ritchie J, began his judgment with a powerful recognition that the Nisga'a Nation was Indigenous place. They "are descendants of the Indians who have inhabited since time immemorial the

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<sup>321</sup> For an excellent account of this case and its importance to Canada and also Aotearoa New Zealand, see Hamar Foster, Heather Raven and Jeremy Webber, *Let Right Be Done. Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007).

territory in question, where they have hunted, fished and roamed”.<sup>322</sup> Judson J reproduced in his judgment this statement from one of the nineteenth century Nisga’a statesman, David Mackay, that brings alive the fact of Indigenous place:<sup>323</sup>

The Nishga answer to government assertions of absolute ownership of the land within their boundaries was made as early as 1888 before the first Royal Commission to visit the Naas Valley. Their spokesman said:

David Mackay — What we don't like about the Government is their saying this: 'We will give you this much land.' How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land — our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white people who live in towns and have their stores and other business, getting their

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<sup>322</sup> *Calder v Attorney-General of British Columbia* [1973] SCR 313 at para 2.

<sup>323</sup> *Ibid*, at para 7.

living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land.

This observation perfectly captures the heart of this thesis. The lands in Canada have been Indigenous place for thousands of years. Aboriginal peoples depend on that land for cultural survival. It is strange that other peoples who have been on the land for such a very short period of time can assert ownership of such land.

Still, the Supreme Court does not in the end concur that the Nisga'a Nation owns its lands. In many ways the *Calder* decision foreshadows the future of the doctrine of Aboriginal title litigation. The continuing theme is that while Aboriginal title may exist in legal theory, it is not a legal reality. Time and time again the courts, as will be shown in chapter 4, shy away from pronouncing that specific land continues to be owned by Aboriginal peoples, protected by the common law doctrine of Aboriginal title. This is important for this thesis because it indicates a continuing legal fallacy that remains embedded in protecting colonial place.

#### *Aotearoa New Zealand initiatives*

In 1972, the Labour political party, for the first time since 1957, came into Government with more willingness than the previous National Governments to listen to Maori concerns. Labour appointed Hon. Matiu Rata (Member for Northern Maori) as Minister of Maori Affairs and he became instrumental in responding to Maori protests, establishing the Waitangi Tribunal and initiating a review of the Maori Land Court. However, Labour's stint was short lived. During National's next reign (1975-

1984) Maori protests became prominent including one which lasted 507 days and ended after police and the army forcibly removed the occupants and destroyed the buildings.<sup>324</sup>

The Waitangi Tribunal was established in 1975 as a permanent commission of inquiry empowered to receive, report and recommend on alleged Crown contemporary breaches (post-1975) of the principles of the Treaty of Waitangi.<sup>325</sup> During Labour's next term in Government (commencing 1984), Labour passed legislation granting the Tribunal retrospective powers to investigate claims dating back to 1840.<sup>326</sup> The Tribunal's jurisdiction is to consider claims by Maori that they have been prejudicially affected by legislation, Crown policy or practice, or Crown action or omission on or after 6 February 1840. The Tribunal mostly can only make non-binding rather than binding recommendations to the Crown on redress for what it considers to be valid claims.

As becomes obvious in the subsequent chapters of this study, the Waitangi Tribunal's work is "at the forefront of a nation coming painfully to terms with its past for the first time".<sup>327</sup> It is symbolic of biculturalism, appointing both Maori and Pakeha as members, and comfortable in both Maori and Pakeha environments. Its quarter-century work has been immense. It is important to highlight the creation of the Tribunal in this study because it illustrates that Crown has become aware of the wrongdoings of the legal magic of colonialism. It signifies that the Crown now

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<sup>324</sup> See Merata Mita's film *Bastion Point: day 507* (Wellington, Awatea Films, 1980).

<sup>325</sup> *Treaty of Waitangi Act 1975*, s 6.

<sup>326</sup> *Ibid*, at s 6 as amended by the *Treaty of Waitangi Amendment Act 1985*. For commentary see: J Hayward and NR Wheen (eds), *The Waitangi Tribunal. Te Roopu Whakamana I te Tiriti o Waitangi* (Wellington, Bridget Williams Books, 2004) and Ward, *supra* note 271.

<sup>327</sup> P Hamer, 'A Quarter-century of the Waitangi Tribunal. Responding to the Challenge', in Hayward and Wheen (eds), *ibid*, at 6.

accepts that “the historical grievances of Maori about Crown actions that harmed whanau, hapu and iwi are real”.<sup>328</sup>

## V. CONCLUSION

This chapter has focused on exploring the legal foundations of Canada and Aotearoa New Zealand. The foundations consist of layers of ideology that deny Indigenous place (and thus associated Indigenous title, property rights, treaties, and history) in order to legitimate colonial space and consequently colonial place. The importance of this work for this thesis lies in providing context to John Borrows’ statement: “a house built upon a foundation of sand is unstable, no matter how beautiful it may look or how many people may rely upon it”.<sup>329</sup> The problem with power is only illusory until the trouble with space is confronted. This chapter has thus answered a core component of this thesis: law did make colonial space permissible. The following chapters now turn to query what therefore are the implications if contemporary law recalibrates its orientation to space and belatedly recognises Indigenous place? And more specifically, what ought this new commitment mean in the context of owning and managing national parks?

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<sup>328</sup> Office of Treaty Settlements, *Ka tika a muri, ka tika a mua. Healing the past, building a future* 2<sup>nd</sup> ed (Wellington, Office of Treaty Settlements, 2002) 3. Note: available to download at the Office of Treaty Settlements’ website: [www.ots.govt.nz](http://www.ots.govt.nz).

<sup>329</sup> John Borrows, *Recovering Canada. The Resurgence of Indigenous Law* (Toronto: University of Toronto, 2002) at 115. See chapter two at above n 116.

## CHAPTER FOUR

### *RECTIFYING COLONIAL LEGAL PLACE*

#### I. INTRODUCTION

I first travelled to Canada in the summer of 2002. Over about a week of conference proceedings, held in teepees erected on the Stoney Creek First Nation reserve in Alberta, I listened to young and old Aboriginal Canadians, and other Indigenous peoples from throughout the world, tell and perform their lived stories.<sup>330</sup> I smelt sweetgrass, overheard various Indigenous languages, saw traditional costumes and dances, and visited ancient rock drawing sites. I learnt many things but was struck most by how strong Indigenous peoples have always been in holding close what is dear to them and protesting strongly anything that threatened their very being.<sup>331</sup>

This chapter discusses how Indigenous peoples are starting to be successful in displacing colonialism's 'empty spaces'. They are replacing the doctrine of discovery's fictions through a state legal system that seeks to recognise the original and enduring fact of Indigenous place. Indigenous peoples have been somewhat successful in these endeavours. New legislation, new case law and new signed treaties now recognise a new legal starting point: the lands of Canada and Aotearoa New Zealand were once solely an Indigenous place. This discussion provides an important foundation for the later chapters that assess the legal shifts in the specific

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<sup>330</sup> World Indigenous Peoples Conference on Education is held annually. For more information see: <http://www.win-hec.org/?q=node/332>.

<sup>331</sup> See John Borrows, *Crown and Aboriginal Occupations of Land: A History & Comparison* (Oct. 15, 2005) (research paper commissioned by the Ipperwash Inquiry (Ontario, Canada)).

context of owning, managing and governing national parks. Essentially: what is the new reconciled law? how does it recognise Indigenous place? And accepting that it does do this, what are the implications for the ownership and management of that place? It appears that while legal systems now recognise Indigenous place, they do so most comfortably as a historical fact. The acceptance has not yet led to a reimagining of the actual ownership and management of lands. This fact becomes more apparent in the subsequent chapters 5 – 7, where case studies of these facets are demonstrated within a national park context.

## **II. NEW RECONCILIATION LAW**

In discussing the new reconciliation law in relation to Indigenous peoples I will be looking at the movement that has occurred on three different fronts: constitutional, jurisprudential and negotiated agreements.

### **A. Constitutional**

Indigenous peoples of Canada and Aotearoa New Zealand were successful in seeking constitutional protection in the 1980s. In Canada, in 1982, the new *Constitution Act* was enacted with section 35(1), in Part II, reading: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Section 25 in Part I of the *Constitution Act* also states: “the guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate

from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”.<sup>332</sup>

Due to the different constitutional nature of Aotearoa New Zealand, Maori do not have similar constitutional protection.<sup>333</sup> In Aotearoa New Zealand, as explained in chapter 2, Parliament is supreme. The status of the Treaty of Waitangi in the country’s informal constitution is not definitive. The judicial precedent is that the courts cannot have regard to the Treaty unless it is incorporated into the relevant statute under consideration.<sup>334</sup> The *Treaty of Waitangi Act 1975* was the first statute to use the term ‘the principles of the Treaty of Waitangi’ and the Waitangi Tribunal, by 1986, had begun creating the Treaty jurisprudence.<sup>335</sup> The courts entered this terrain post 1986 via the opening provided in the *State Owned Enterprises Act 1986*.<sup>336</sup> Section 9 states: “Nothing in this Act shall permit the Crown to act in a

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<sup>332</sup> For discussion on implementing section 35 see John J. Borrows, “Native Rights and the Constitution in Canada” in Garrick A. Bailey (ed) *Indians in Contemporary Society* (Washington: Smithsonian Institution, 2008) 157-165.

<sup>333</sup> To better appreciate the constitutional differences see Matthew S.R. Palmer, “Constitutional Realism about Constitutional Protection: Indigenous Rights under a judicialized and Politicized Constitution” (2006) 29 Dal. L.J 1.

<sup>334</sup> *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

<sup>335</sup> For commentary on Treaty principles: see Janine Hayward ‘Flowing from the Treaty’s Words’ The Principles of the Treaty of Waitangi’ in J Hayward and NR Wheen (eds), *The Waitangi Tribunal. Te Roopu Whakamana I te Tiriti o Waitangi* (Wellington, Bridget Williams Books, 2004). Note: that the Courts and Waitangi Tribunal have differed in interpreting the relationship between kawanatanga and rangatiratanga: see Jacinta Ruru “Managing Our Treasured Home: The Conservation Estate and the Principles of the Treaty of Waitangi” (2004) 8 New Zealand Journal of Environmental Law 243 [*Managing our Treasured Home*].

<sup>336</sup> The courts have defined the relationship by stating that the Tribunal’s opinions “are of great value to the Court” (*NZ Maori Council v A-G* [1987] 1 NZLR 641, 662) and “are entitled to considerable weight” (*Moana Te Aira Te Uri Karaka Te Waero v The Minister of*

manner that is inconsistent with the principles of the Treaty of Waitangi”. This wording was unique—no other statute had ever confined those with statutory power to have some level of regard to the Treaty of Waitangi. At that time, the judicial mindset was still mostly steeped in the *Wi Parata* idea that the Treaty was ‘a simple nullity’.<sup>337</sup> Maori took the opportunity afforded by the section to argue in the courts that the Crown had to act consistently with the Treaty in transferring its assets to state-owned business focused enterprises. They were successful. This case, *New Zealand Maori Council v Attorney-General*,<sup>338</sup> commonly referred to as the *Lands* case, is discussed later in this chapter.

Today, government departments, regional government bodies, and many other decision-making boards must have some level of regard to Treaty principles. The Department of Conservation, for example, must “give effect to”<sup>339</sup> and education institutions have a duty to “acknowledge”<sup>340</sup> the Treaty principles. All persons exercising functions and powers under the *Crown Minerals Act 1991*,<sup>341</sup> the *Resource Management Act 1991*,<sup>342</sup> the *Hazardous Substances and New Organisms Act 1996*,<sup>343</sup> and the *Energy Efficiency and Conservation Act 2000*<sup>344</sup> must “take into

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*Conservation and Auckland City Council* (HC, Auckland, M360-SW01, 19 February 2002, Harrison J), para 59) but can be freely dismissed.

<sup>337</sup> *Wi Parata v Bishop of Wellington* 3 NZ Jur (NS) 72, 78.

<sup>338</sup> [1987] 1 NZLR 641 (*Lands* case). To appreciate the importance of this case, see Jacinta Ruru (ed), *In Good Faith’ Symposium Proceedings marking the 20th anniversary of the Lands case* (Wellington: New Zealand Law Foundation, 2008).

<sup>339</sup> *Conservation Act 1987*, s 4. This is the strongest legislative threshold: see Ruru, ‘Managing Our Treasured Home’, *supra* note 335.

<sup>340</sup> *Education Act 1989*, s 181.

<sup>341</sup> Section 4.

<sup>342</sup> Section 8.

<sup>343</sup> Section 8.

<sup>344</sup> Section 6(d).

account” or “have regard to” Treaty principles. The Crown has recognised its responsibility to “take appropriate account of the principles of the Treaty of Waitangi” by explicitly providing in legislation the avenues for Maori contribution in the decision-making processes of local government, land transport, and health and disability services.<sup>345</sup> These bodies have since developed comprehensive Treaty of Waitangi policy statements.<sup>346</sup>

Thus, both countries have begun to accept the constitutional importance of respecting and providing for their Indigenous peoples.<sup>347</sup> How have the courts reacted? In particular, have the courts been bold enough to revisit earlier set legal

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<sup>345</sup> See *New Zealand Public Health and Disability Act 2000*, s 4; *Local Government Act 2002*, s 4; and *Land Transport Management Act 2003*, s 4.

<sup>346</sup> For example, see Environment Waikato Regional Council website at: [http://www.ew.govt.nz/enviroinfo/profile/maoriperspective.htm#Bookmark\\_tura](http://www.ew.govt.nz/enviroinfo/profile/maoriperspective.htm#Bookmark_tura). See also PG McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (New York, OUP, 2004) at 509-513 and 414-422. The Government has also been commissioning research by Maori to be conducted in accordance with kaupapa Maori. For example see: D Pitama, G Ririnui, A Mikaere, *Guardianship, Custody and Access: Maori Perspectives and Experiences* (Wellington: Ministry of Justice, 2002); and, F Cram, L Pihama, K Jenkins, M Karehana *Evaluation of Programmes for Maori Adult Protected Persons under the Domestic Violence Act 1995* (Wellington, Ministry of Justice and Department for Courts, 2002). Note, however, that Treaty references can still be politically contentious. See *Treaty of Waitangi Deletion Bill* (Member’s Bill, Rt Hon Winston Peters, Leader of NZ First) introduced on 10 February 2005; *Treaty of Waitangi (Principles) Bill* (Member’s Bill, Rodney Hyde, Leader of ACT) introduced 8 December 2005; and, *Treaty of Waitangi Deletion Bill* (Member’s Bill, Doug Woolerton, member of NZ First) introduced on 29 June 2006. None the Bills were supported through to select committee stage.

<sup>347</sup> Although, many Maori, in particular, argue that more formal constitutional recognition of the Treaty of Waitangi is required: see Malcolm Mulholland and Veronica Tawhai (eds), *Weeping Waters. The Treaty of Waitangi and Constitutional Change* (Wellington: Huia Publishers, 2010).

fictions that that deemed lands not Indigenous place but colonial space, empty for colonists to own and manage in an unfettered manner?

## **B. Jurisprudential**

### *Canada's judicial vision of honourable relations*

The new Constitution Act 1982, and specifically section 35(1), gave the Canadian judiciary the impetus to develop a set of legal principles arising from aboriginal and treaty rights centred on the “reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions”.<sup>348</sup> The Supreme Court in its *Van der Peet*<sup>349</sup> decision, and a year later in 1997 in its *Delgamuukw*<sup>350</sup> decision initiated the importance of reconciliation. At the heart of this jurisprudence is the concept that when the Crown deals with Aboriginal peoples, the Crown must act honourably – “[T]he honour of the Crown is always at stake in its dealings with Aboriginal peoples”<sup>351</sup> – and that the honour “gives rise to different duties in different circumstances”.<sup>352</sup> In several circumstances the courts have held that the Crown’s honour gives rise to a fiduciary duty.<sup>353</sup> In more recent years, in clarifying the extent

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<sup>348</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69 [*Mikisew*] at para 1, Binnie J.

<sup>349</sup> *R v Van der Peet* [1996] 2 SCR 507.

<sup>350</sup> *Delgamuukw v The Queen* [1997] 3 SCR 1010 [*Delgamuukw*].

<sup>351</sup> *Haida Nation v British Columbia* [2004] 3 SCR 511 [*Haida Nation*] at 522 (referencing *R v Badger* [1996] 1 SCR 771 and *R v Marshall* [1999] 3 SCR 456).

<sup>352</sup> *Ibid.* at 523.

<sup>353</sup> For example, see: *Wewaykum Indian Band v Canada* [2002] 4 SCR 245.

of another duty, the duty to consult, the Supreme Court of Canada has instituted a new aspect to the respectful relations goal.

In Canada, the government's duty to consult with Aboriginal peoples and accommodate their interests has been classified as constituting, in part, the honour of the Crown, irrespective of whether there has been a treaty entered into between the two peoples.<sup>354</sup> While the duty first began to emerge in earlier aboriginal title cases,<sup>355</sup> the Supreme Court of Canada, in a series of decisions beginning in late 2004, put this duty at the forefront of these interrelationships. In a case concerning whether the Province of British Columbia could transfer a tree farm license to a large forestry firm to harvest trees on land where it holds legal title but where the Haida are currently in the process of trying to prove Aboriginal title to that land, the Supreme Court of Canada held that the Province must first enter "meaningful consultation"<sup>356</sup> with the Haida Nation. The Court elaborated at length on the scope of the duty, including stating:<sup>357</sup>

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It

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<sup>354</sup> See John Borrows, "Let Obligations Be Done" in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right be Done. Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007) pp201-215.

<sup>355</sup> Such as *R v Sparrow* [1990] 1 SCR 1075, and *Delgamuukw*, *supra* note 348 at, in particular, at para 168 (p 1113). See also Robert Morales, "James Douglas meet Delgamuukw. The implications of the Delgamuukw decision on the Douglas Treaties" download at <http://www.delgamuukw.org/research/douglastreaties.htm>.

<sup>356</sup> *Haida Nation*, *supra* note 351 at para 79.

<sup>357</sup> *Ibid*, at 526.

may continue to manage the resource in question pending claims resolution. But, depending on the circumstances ... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

The Court explained “that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it”.<sup>358</sup> A year later, the Supreme Court of Canada, in a different case, held that the Crown had breached its duty to consult when it approved the building of a winter road over lands used for hunting, fishing and trapping. This case specifically concerned a treaty, Treaty 8. In situations where there is a treaty, the Court stated:<sup>359</sup>

... the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ... but in the variable content of the duty once triggered.

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<sup>358</sup> *Ibid*, at para 35.

<sup>359</sup> *Mikisew*, *supra* note 348 at para 34.

Thus, the Supreme Court of Canada has established a new precedent for engaging with Aboriginal peoples. A doctrine of discovery mindset is at least no longer so overt. The language is more respectful of Aboriginal peoples and more onerous of the Crown. The Crown now must act honourably, not dishonourably in recognising Aboriginal interests. Have the Aotearoa New Zealand courts developed a similar stance?

*Aotearoa New Zealand judicial vision of partnership*

In Aotearoa New Zealand, the jurisprudence of reconciliation is centered on the principles of the Treaty of Waitangi. According to the *Lands* case, the hallmarks of the expression “the principles of the Treaty of Waitangi” are partnership, reasonableness, and good faith. Cooke P, in this case, concluded: “[Treaty] principles require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality”.<sup>360</sup> He stressed the importance of not freezing Treaty principles in time: “What matters is the spirit. . . . The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas”.<sup>361</sup> Richardson J observed that: “the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi”,<sup>362</sup> and Somers J likewise stated: “Each party in my view owed to the other a duty of good faith”.<sup>363</sup> Casey J emphasized the importance of an “on-going

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<sup>360</sup> *Ibid*, at 667.

<sup>361</sup> *Ibid*, at 663.

<sup>362</sup> *Ibid*, at 682.

<sup>363</sup> *Ibid*, at 693.

partnership”,<sup>364</sup> and Bisson J described the Treaty principles as “the foundation for the future relationship between the Crown and the Maori race”.<sup>365</sup>

As in Canada, Aotearoa New Zealand’s judiciary has also identified the Crown’s duty to consult, but as part of the Treaty fabric, not aboriginal rights per se.<sup>366</sup> The justices deciding the landmark *Lands* case were hesitant to stipulate that the Crown is always under a duty to consult because such a “notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty”.<sup>367</sup> However, the justices did recognize that the Crown’s duty to act in good faith fairly and reasonably would mean that it had to make informed decisions, and in doing so consultation might be a necessary part of

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<sup>364</sup> *Ibid*, at 703.

<sup>365</sup> *Ibid*, at 714. Subsequent judicial decisions, including decisions from the Privy Council, have confirmed the underlying tenor of this landmark *Lands* decision, including respectfully not construing a finite list of Treaty principles. For example see: *Attorney-General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147 (CA); *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC); *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA); *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC); and *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau* [2003] 2 NZLR 349 (HC). Other important Treaty of Waitangi cases include: *Attorney-General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147 (CA); *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC); *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA); *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC); and *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau* [2003] 2 NZLR 349 (HC).

<sup>366</sup> Few cases in Aotearoa New Zealand have been decided purely in accordance with the common law doctrine of native title for a variety of reasons. See McHugh, *supra* note 346, and Jacinta Ruru “What Could Have Been? The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand” (2006) 32 *Monash University L Rev* 116 [*What Could Have Been?*]

<sup>367</sup> *Lands case*, *supra* note 338 at 683, Richardson J.

that process.<sup>368</sup> In later judgments, where consultation was deemed necessary, the courts have stressed on the one hand, for example, that the Treaty principles require active protection of Maori interests and “to restrict this to consultation would be hollow”,<sup>369</sup> and, on the other, that “[c]onsultation by itself without allowing the view of Maori to influence decision-making is no more than window dressing”.<sup>370</sup> In a recent Environment Court case, the Court has endorsed several consultation precedents, agreeing that:<sup>371</sup>

Consultation must be a meaningful process which enables the party consulted to be adequately informed so that it can make intelligent and useful responses. Consultation is a two-way process to be conducted in mutual good faith. ... The primary purpose of consultation is to enable decision-makers to make informed decisions. ... the party required to consult must approach the consultation with an open mind.

The judiciary in both Canada and Aotearoa New Zealand have thus developed a new way of speaking about commitments to their respective Indigenous peoples:

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<sup>368</sup> For example, see *ibid*, at 665, Cooke P; at 683, Richardson J; and at 693, Somers J.

<sup>369</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 [*Ngai Tahu*], at 560.

<sup>370</sup> *Takamore Trustees v Kapiti Coast District Council* (HC, Wellington, AP191-02, 4 April 2003, Ronald Young J, at para 86.

<sup>371</sup> *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council* [2010] NZRMA 285 paras 48-52, citing with approval *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671; *Rural Management Ltd v Banks Peninsula District Council* [1994] NZRMA 412; *Ngati Kahu v Tauranga District Council* [1994] NZRMA 481; *Winstone Aggregates Ltd v Franklin District Council* EnvC Auckland A080/02, 17 April 2002; *Ngati Kahu v Tauranga District Council* [1994] NZRMA 481; *Minister of Corrections v Northland Regional Council* EnvC A074/02, 8 April 2002.

honourable relations and akin to partners. This is important because it help answers the first component of my thesis question: there *is* a new commitment to recognising Indigenous peoples in law. Substantiating this new truth of an attempt to achieve a reconciled legal platform are the new legislated agreements developed between the Crown and Indigenous groups, as is now explored.

### **C. Negotiated agreements**

#### *Canada's land claims*

In the 1970s new commitments to interacting with Indigenous peoples in Canada arose. This was in part because of the *Calder* decision (as discussed in chapter 3) and the new focus on the lands and oil in the northern territories. Federal policies have emerged for negotiating settlements (specific claims) or in areas where no treaties were ever signed, new treaties (comprehensive claims).<sup>372</sup>

The most progress has been made on the comprehensive claim platform and mostly in the northern territories, and to a lesser extent in British Columbia, probably because of the federal and territorial governments' desires to settle property issues to allow exploitation of natural resources. To date, 26 final agreements have been implemented under this rubric of comprehensive claims.<sup>373</sup> Pursuant to the

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<sup>372</sup> For more detailed information: see Royal Commission on Aboriginal Peoples, *Restructuring the Relationship* vol 2 (Canada, 1996) at 527-556 [*Restructuring the Relationship*].

<sup>373</sup> Labrador Inuit Land Claim Agreement, Gwich'in Comprehensive Land Claim Agreement, Inuvialuit Final Agreement, Sahtu Dene and Metis Comprehensive Land Claim Agreement, Tlicho Agreement, Nunavut Land Claims Agreement, Nunavik Inuit Land Claims Agreement,

comprehensive claims policy, the negotiations are focused on dealing with claims based upon unextinguished Aboriginal title. The aim is to negotiate a treaty with the Crown, and both First Nations and Inuit have capacity to advance this type of claim. The final agreements are all substantial documents including not just financial compensation but often measures of self-government. The carving of the Northwest Territories into two, creating the new Nunavut territory, was a particularly significant development. The *Nunavut Land Claims Agreement Act 1993* recognises Inuit title to 350,000 square kilometres of land, provides compensation of \$580 million and a \$13 million training trust fund, and includes provisions for joint management and resource revenue sharing.<sup>374</sup> Examples of other negotiated agreements include the *Yukon First Nations Land Claims Settlement Act 1994*<sup>375</sup> with its provision of 44,000 square kilometres of land, \$260 million compensation, and the creation of Yukon-wide land-use planning council, regional planning commissions, and joint wildlife management

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James Bay and Northern Quebec Agreement, North Eastern Quebec Agreement, Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, Carcross/Tagish First Nation Final Agreement, Champagne and Aishihik First Nation Final Agreement, Kluane First Nation Final Agreement, Kwanlin Dun First Nation Final Agreement, Little Salmon/Carmacks First Nation Final Agreement, First Nation of Nacho Nyak Dun Final Agreement, Selkirk First Nation Final Agreement, Ta'an Kwach'an First Nation Final Agreement, Teslin Tlingit Council Final Agreement, Tr'ondëk Hwëch'in Final Agreement, Vuntut Gwitchin First Nation Final Agreement, Nisga'a Final Agreement, Tsawwassen First Nation Final Agreement, Maa-nulth First Nations Final Agreement (comes into effect April 2011), Sechelt Indian Band Self-Government Agreement, Westbank First Nation Self-Government Agreement. This information was taken from the Indian and Northern Affairs Canada website which was updated February 2010: <http://www.ainc-inac.gc.ca/al/ldc/ccl/ipt/index-eng.asp>.

<sup>374</sup> Report on the Royal Commission on Aboriginal Peoples, *Perspectives and Realities* Vol 4 (Canada, 1996) at 436 [*Perspectives and Realities*].

<sup>375</sup> SC 1994 c. 34.

boards.<sup>376</sup> A further example is the earlier Inuvialuit Final Agreement, signed in 1984, which recognised Inuvialuit title to 91,000 square kilometres of land in the western Arctic, and provided compensation of \$152,000 for the surrender of other land and \$17.5 million for economic development and social programs.<sup>377</sup>

Comprehensive claims pursued by First Nations in the province of British Columbia differ somewhat to procedures elsewhere. In British Columbia a Treaty Commission has been established as an independent body to monitor the six-stage negotiation process. Of the 49 sets of negotiations underway, 43 First Nations are at the stage four agreement-in-principle point, with eight First Nations at stage five, negotiating to finalize their treaties,<sup>378</sup> and one at stage six with a treaty implemented: Tsawwassen First National Final Agreement (implemented March 2009). This is the province's first urban treaty and the first modern treaty negotiated under the BC Treaty Commission. This Final Agreement includes a capital transfer and other one-time cash payments of \$33.6 million and self-government funding of \$2.9 million annually over the first five years of the treaty. The land component includes approximately 724 hectares, of which 434 hectares are provincial Crown land and 290 hectares are former Indian reserve.<sup>379</sup>

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<sup>376</sup> See *Perspectives and Realities*, *supra* note 374 at 417-423. Note: the James Bay and Northern Quebec Agreement, signed in 1975, is an earlier example which recognizes Inuit title to 8,400 square kilometres of land, and whereby the Crown gave the Northern Quebec Inuit Association (later renamed the Makivik Corporation) \$90 million in compensation for loss of the use of certain traditional lands.

<sup>377</sup> *Ibid*, at 433.

<sup>378</sup> See BC Treaty Commission's website at: [http://www.bctreaty.net/files\\_3/updates.html](http://www.bctreaty.net/files_3/updates.html).

<sup>379</sup> For copy of the Final Agreement see: <http://www.bctreaty.net/nations/tsawwassen.php>. For a summary of the Agreement see the BC Ministry of Aboriginal Relations and Reconciliation website: <http://www.gov.bc.ca/art/firstnation/tsawwassen/default.html>.

In regard to specific claims these deal with past grievances of First Nations. The specific claims policy covers claims upon failure to discharge 'historical' treaty obligations, improper alienation of reserve lands or assets, and other claims based upon breach of 'lawful obligation' by the federal government.<sup>380</sup> Since June 2007, the federal Government has taken action to quicken the resolution of specific claims. In the period from April 1, 2009 to March 31, 2010, 141 specific claims from across the country were addressed. Of these, 12 were settled through negotiation (66 were not accepted for negotiation because they did not give rise to any lawful obligations and the other 63 were addressed by means of file closure).<sup>381</sup> The third type of negotiation provides "administrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process".<sup>382</sup>

#### *Aotearoa New Zealand's Treaty claim settlements*

As discussed in chapter 3, the establishment of the Waitangi Tribunal in 1975 and its extended jurisdiction in 1985 to report on historical claims dating back to 1840, signified that the Crown now accepted that "the historical grievances of Maori about

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<sup>380</sup> *Restructuring the Relationship*, *supra* note 372 at 534.

<sup>381</sup> This information is available to view on the Indian and Northern Affairs Canada website at: <http://www.ainc-inac.gc.ca/al/ldc/spc/prp/index-eng.asp>.

<sup>382</sup> *Ibid.* at 534. Note: many have been critical of these processes including the Royal Commission in this volume at 527-556. See also Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada. Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 208; and Robert Joseph, "The Government of Themselves: Indigenous Peoples' Internal Self-Determination, Effective Self-Governance and Authentic Representation: Waikato-Tainui, Ngai Tahu and Nisga'a" (unpublished, PhD, Faculty of Law, University of Waikato, 2006).

Crown actions that harmed whanau, hapu and iwi are real”.<sup>383</sup> Its work has been “at the forefront of a nation coming painfully to terms with its past for the first time”.<sup>384</sup> It is symbolic of biculturalism, appointing both Maori and Pakeha as members, and comfortable in both Maori and Pakeha environments. Its quarter-century work has been immense. It has released numerous reports on iwi-region specific claims alleging historical breaches in the South Island, North Island and Chatham Islands, and has reported on an array of generic issues ranging from the use of the Maori language, customary fishing, the allocation of radio frequencies, petroleum, and aquaculture.<sup>385</sup> Of those generic claims that it has recommended Government action, in some instances the Government has accepted such claims and enacted appropriate legislation (for example, the *Maori Language Act 1987* and the *Maori Commercial Aquaculture Claims Settlement Act 2004*), but denied several others (for example, the reports on petroleum, and the foreshore and seabed).

In regard to historical claims pursued in the Waitangi Tribunal, the Crown’s response has been to engage in a ‘fair and final’ settlement process. The Crown does not require claimants to have first gone to the Tribunal, but many claimants find value in doing so. The settlement process itself is conducted through the Office of Treaty Settlements as a separate unit within the Ministry of Justice. The Office has the mandate to resolve historical Treaty claims (defined as claims arising from actions or omissions by or on behalf of the Crown or by or under legislation on or before 21

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<sup>383</sup> Office of Treaty Settlements, *Ka tika a muri, ka tika a mua. Healing the past, building a future* 2<sup>nd</sup> ed (Wellington, Office of Treaty Settlements, 2002) 3. Note: available to download at the Office of Treaty Settlements’ website: [www.ots.govt.nz](http://www.ots.govt.nz).

<sup>384</sup> P Hamer, ‘A Quarter-century of the Waitangi Tribunal. Responding to the Challenge’, in Hayward and When (eds), *supra* note 335 at 6.

<sup>385</sup> To view the reports: see the Tribunal’s website at <http://www.waitangi-tribunal.govt.nz/reports/>.

September 1992). There are five steps in the claims process encompassing several preliminary agreements, often including ‘terms of negotiation’, ‘agreement in principle’, ‘deed of settlement’ and finally settlement legislation.<sup>386</sup> The settlements aim to provide the foundation for a new and continuing relationship between the Crown and the claimant group based on the Treaty of Waitangi principles. Settlements thus contain Crown apologies of wrongs done, financial and commercial redress, and redress recognising the claimant group’s spiritual, cultural, historical or traditional associations with the natural environment.

The most significant pan-tribal settlement concerns commercial fisheries which included cash compensation, 50 per cent shareholding in Sealord Products Limited, 10 per cent of fish stocks introduced into the quota management system in 1986, and 20 per cent of all new stock brought into the system thereafter (now valued at around \$750 million).<sup>387</sup> This deal was negotiated in 1992 and dubbed the ‘Sealord deal’. More recently, an even more financially significant pan-tribal settlement for several North Island tribes has been legislated for, labelled the ‘treelord’ deal. The *Central North Island Forests Land Collective Settlement Act 2008* sees ownership of 170,000 hectares of forest valued at between \$170,000 million and \$190,000 million be returned to Maori, and about \$248,000 million paid to the claimant tribes. It is also

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<sup>386</sup> See Office of Treaty Settlements, *supra* note 383. For an insight into tribal governance entities see: New Zealand Law Commission, *Waka Umanga: A Proposed Law for Maori Governance Entities*. Report 92 (Wellington, NZLC, 2006) available to view online at: <http://www.lawcom.govt.nz/>; the *Waka Umanga (Maori Corporations) Bill 2007*; M Gibbs, ‘What Structures are Appropriate to Receive Treaty of Waitangi Settlement Assets?’ (2004) 21 *New Zealand Universities L Rev* 197; and R Joseph, ‘Contemporary Maori Governance: New Era or New Error?’ (2007) 22 *New Zealand Universities L Rev* 628.

<sup>387</sup> See *Treaty of Waitangi (Fisheries Claim) Settlement Act 1992* and *Maori Fisheries Act 2004*. For commentary on the settlement and legislation see Te Ohu Kaimoana’s website at: <http://teohu.maori.nz/index.htm>.

thought that the tradable carbon credits could be valued at between \$50 and \$70 million.<sup>388</sup>

In comparison, in regard to tribal settlements legislated for, more than 18 groups have received redress, amounting to a total value of more than \$718 million (with the largest cash compensation paid to a single tribe being \$170 million).<sup>389</sup> Nonetheless, several parameters determine the scope of the negotiations: the Crown “strongly prefers to negotiate claims with large natural groupings rather than individual whanau and hapu”,<sup>390</sup> and it is attempting to settle all grievances within a tight budget and timeframe.<sup>391</sup>

Thus, the point of this brief discussion has been to establish that overall a new reconciled law is emerging. There is new commitment from government, Parliament and the courts to recognise Indigenous peoples’ interests in legislation, case law and new treaties and treaty settlements. But what has this new era meant for Indigenous place? That is, because law once made colonial space permissible, does the recalibration of contemporary law to recognise Indigenous peoples interests necessarily mean that the fiction of colonial space has been displaced? Does the law now recognise Indigenous place?

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<sup>388</sup> For newspaper coverage, see: [www.stuff.co.nz/4505192a8153.html](http://www.stuff.co.nz/4505192a8153.html).

<sup>389</sup> See the Government’s official Treaty website at: <http://www.treatyofwaitangi.govt.nz/settlements/summary.php?i=8> but note these figures are conservative as they have not been updated since April 2005.

<sup>390</sup> Office of Treaty Settlements, *supra* note 383, 32. Note: cross-claim boundary disputes are often at issue. For example, see cases such as: *NZ Maori Council v Attorney-General* [2007] NZCA 269 and *Te Runanga o Ngai Tahu v Waitangi Tribunal* High Court, Wellington C97/01, 2001; and see Waitangi Tribunal reports, such as: *The Report on the Impact of the Crown’s Treaty Settlement Policy on Te Arawa Waka* (2007) and *Tamaki Makarau Settlement Process Report* (2007).

<sup>391</sup> See *Maori Purposes Bill* (No. 55-1), cl 18 (tabled June 2006).

### III. (RE-)RECOGNITION OF INDIGENOUS PLACE

Crown recognition of Indigenous place in Canada and Aotearoa New Zealand is not exactly new or novel. When the European travellers first arrived on the lands settled by Indigenous peoples, to some extent they recognised that these Indigenous peoples had made these lands their homes. Subsequent colonial settlement events rendered this recognition at best superficial and in most cases simply fleeting. But, as discussed above, a basis for reconciled law has begun to emerge. How exactly do the courts and the Crown now recognise Indigenous place in law?

#### A. Statutory acknowledgments and apologies

The new negotiated agreements between the Crown and respective Indigenous groups in Canada and Aotearoa New Zealand recognise the fact of historical Indigenous place and the continuing significance of that connection to place for Indigenous peoples. This part briefly canvasses some examples.

In Canada, the land claim agreements recognise Indigenous place. For example, the preamble to the Nisga'a Final Agreement starts "the Nisga'a Nation has lived in the Nass Area since time immemorial".<sup>392</sup> It recognizes that the "Nisga'a Nation has sought a just and equitable settlement of the land question since the arrival of the British Crown" and "Parties acknowledge the ongoing importance to the

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<sup>392</sup> The Nisga'a Final Agreement can be viewed at: <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nsga/nis/nis-eng.asp>.

Nisga'a Nation of the Simigat and Sigidimhaanak (hereditary chiefs and matriarchs) continuing to tell their Adaawak (oral histories) relating to their Ango'oskw (family hunting, fishing, and gathering territories) in accordance with the Ayuuk (Nisga'a traditional laws and practices)".<sup>393</sup> The Nunavut Land Claims Agreement, in its preamble, recognizes that the Inuit assert an aboriginal title "based on their traditional and current use and occupation of the lands, waters and land-fast ice therein in accordance with their own customs and usages".<sup>394</sup> The Tsawwassen First Nation Final Agreement begins by accepting that the "Tsawwassen First Nation claim aboriginal rights based on their assertion of a unique, current and historical, cultural connection and use, since time immemorial, to the lands, waters and resources surrounding those [named] areas".<sup>395</sup> In this agreement, it states that "Canada and British Columbia acknowledge the perspective of Tsawwassen First Nation that harm and losses in relation to its aboriginal rights have occurred in the past and express regret if any acts or omissions of the Crown have contributed to that perspective, and the Parties rely on this Agreement" to move them beyond the difficult circumstances of the past".<sup>396</sup> Moreover, the preamble states that "Canada and British Columbia acknowledge the aspiration of Tsawwassen First Nation and Tsawwassen people to participate more fully in the economic, political, cultural and social life of British Columbia in a way that preserves and enhances the collective identity of Tsawwassen

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<sup>393</sup> See preamble.

<sup>394</sup> The preamble can be viewed here: [http://www.collectionscanada.gc.ca/webarchives/20071124140910/http://www.ainc-inac.gc.ca/pr/agr/nunavut/pre\\_e.html](http://www.collectionscanada.gc.ca/webarchives/20071124140910/http://www.ainc-inac.gc.ca/pr/agr/nunavut/pre_e.html).

<sup>395</sup> See preamble. Note that this agreement can be downloaded at: [www.gov.bc.ca/.../tsawwassen\\_first\\_nation\\_final\\_agreement.pdf](http://www.gov.bc.ca/.../tsawwassen_first_nation_final_agreement.pdf).

<sup>396</sup> Preamble.

people as Tsawwassen First Nation, and to evolve and flourish in the future as a self-sufficient and sustainable community”.

In Aotearoa New Zealand, all of the claim settlement statutes begin with extensive Crown apologies. For example, part 1 of the *Ngai Tahu Claims Settlement Act 1998* is dedicated to stating an apology first in Maori, then in English, with both versions more than 700 words in length. Each version contains eight points. In the first two points the Crown “recognises the protracted labours of the Ngāi Tahu ancestors in pursuit of their claims for redress and compensation against the Crown for nearly 150 years”, and “acknowledges the work of the Ngāi Tahu ancestors and makes this apology to them and to their descendants”.<sup>397</sup> The remaining five points detail the Crown’s “profound regret”<sup>398</sup> for acting “unconscionably and in repeated breach of the principles of the Treaty of Waitangi”<sup>399</sup> and “apologies unreservedly to all members of Ngāi Tahu Whānui for the suffering and hardship caused to Ngāi Tahu, and for the harmful effects which resulted to the welfare, economy and development of Ngāi Tahu as a tribe”.<sup>400</sup> Similar apologies exist in all other Treaty claim settlements.<sup>401</sup> The significance of these apologies is that they recognise the original fact of Indigenous place (that is, Maori were civil, rather than savage, peoples living in these lands) and that colonisation has threatened that connection. These settlement statutes then proceed to outline a process for cultural and commercial redress. The cultural components, in particular, seek to recognise the continuing importance of Indigenous place. For example, in the *Ngai Tahu Claims Settlement*

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<sup>397</sup> Section 6.

<sup>398</sup> *Ibid.*

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*

<sup>401</sup> *Ibid.*

*Act*, for certain purposes, “[T]he Crown acknowledges the statements made by Te Rūnanga o Ngāi Tahu of the particular cultural, spiritual, historic, and traditional association of Ngāi Tahu with the statutory areas”<sup>402</sup> specified in the certain schedules in the Act.<sup>403</sup> These schedules all relate to lands and waters, explaining in a detail that often runs for a page or two for each site, why and how lakes, mountains, rivers, valleys, and so on are culturally, spiritually, historically and traditionally important.

The economic dimension to connecting to Indigenous place is also recognised, as is also apparent in the Canadian claim agreements. For instance, the recent *Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010* is premised on a vision that seeks to restore the health and wellbeing of the Waikato River through providing for cooperative management of the river with those tribes that genealogically link to it. A key component of the vision is: “the restoration and protection of the relationships of Waikato River Iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships”.<sup>404</sup>

Exactly how these negotiated agreements move from recognising Indigenous place to associated Indigenous use, ownership and governance is briefly discussed later in this chapter (and more specifically in relation to national parks in chapters 5 and 6). As that later discussion will show, there are some exciting consequences emerging from legal recognition of Indigenous place, including some return of Crown land to Indigenous peoples and some inclusion of Indigenous peoples in managing Crown land.

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<sup>402</sup> Section 206.

<sup>403</sup> See schedules 14-77.

<sup>404</sup> Vision (3)(c).

## **B. The shift of doctrines: from discovery to Aboriginal title**

There has always been a mechanism within the English common law through the doctrine of Aboriginal title to recognise Indigenous place. But, as explained in chapter 3, the doctrine of discovery tended to find more traction in Aotearoa New Zealand and Canada than the doctrine of Aboriginal title. And as that historical chapter faded, that judicial position began to change in the 1970s through listening more attentively to Indigenous claims. In Canada, the *Constitution Act 1982* explicitly made relevant the doctrine of Aboriginal title and thus the necessary first step that these lands were once solely Indigenous places. The Aotearoa New Zealand judiciary, partly influenced by judicial movements in Canada, likewise began to recognise the doctrine's potential application. In doing this, how do the courts now recognise Indigenous place?

In the 1970s, the Supreme Court of Canada began to flag a new commitment to the doctrine of Aboriginal title in the *Calder v Attorney-General of British Columbia*<sup>405</sup> case as noted in chapter 3. As discussed above, in 1982, section 35(1) of the *Constitution Act* recognised and affirmed the “existing aboriginal and treaty rights of the aboriginal peoples of Canada”. This new legal platform allowed Aboriginal peoples in Canada to pursue an argument that land and natural resources were once solely theirs and that the law ought to continue to recognise this enduring fact. The courts began to listen.

In 1997, the Supreme Court of Canada issued its “seminal”<sup>406</sup> case on the doctrine of aboriginal title: *Delgamuukw v British Columbia*.<sup>407</sup> Here, the Aboriginal

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<sup>405</sup> [1973] SCR 313.

<sup>406</sup> As described by McLachlin CJ in *Haida Nation*, *supra* note 351 para 24.

Gitksan and Wet'suwet'en nations had lodged an ownership claim to 58,000 square kilometres of northwestern British Columbia. They used their oral histories as principal evidence in the case. Lamer's CJ judgment, supported by Cory and Major JJ, recognised the fact of historical Indigenous place, accepting that the area had been occupied for literally thousands of years and that the lands and rivers "were used for hunting and gathering for both food and ceremonial purposes".<sup>408</sup> Lamer CJ accepted the trial judge's observation that there were "physical and tangible indicators of their association with the territories".<sup>409</sup>

In accepting that parts of Canada were Indigenous place, the Court focused on exploring the scope of the doctrine of Aboriginal title to recognise this fact. The Court reinforced a spectrum approach with a right to an activity at one end and a right to the land itself at the other end. Drawing on then recent case law, in particular, *Van der Peet*,<sup>410</sup> Lamer CJ positioned that a right to activity are "those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right".<sup>411</sup> In regard to a right to land, it is "aboriginal title itself".<sup>412</sup> Lamer CJ made clear that Aboriginal title is *sui generis*, that is "its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems".<sup>413</sup> According to Lamer CJ, three dimensions make aboriginal title *sui*

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<sup>407</sup> *Supra* note 348.

<sup>408</sup> *Ibid*, at para 10.

<sup>409</sup> *Ibid*, at para 13.

<sup>410</sup> *Supra* note 348.

<sup>411</sup> *Delgamuukw*, *supra* note 348 at 138.

<sup>412</sup> *Ibid*, at para 138.

<sup>413</sup> *Ibid*, at para 112.

*generis*: its inalienability; its source; and, its communally held status.<sup>414</sup> Its source is of most interest to this part of this chapter. As Lamer CJ explains, Aboriginal title “arises from prior occupation of Canada by aboriginal peoples”.<sup>415</sup> That prior occupation is relevant because of “the physical fact of occupation” and is *sui generis* because “it arises from possession *before* the assertion of British sovereignty”.<sup>416</sup>

This recognition is hugely significant.<sup>417</sup> In fact, its significance cannot be overestimated. Here, in principle, the Supreme Court has recognised an historical fact: Canada was once solely an Indigenous place, not an empty space awaiting colonial settlement. Indigenous peoples lived there, the lands were their home, and they possessed those lands.<sup>418</sup>

In 2004, the Supreme Court of Canada, in *Haida Nation*<sup>419</sup> reinforced this judicial acceptance of Indigenous place within the context of the honour of Crown jurisprudence deriving from section 35(1) of the *Constitution Act, 1982*. In this decision, McLachlin CJ began her judgment with a description of the importance of the Queen Charlotte Islands [now officially Haida Gwaii] to the Haida:<sup>420</sup>

The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida

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<sup>414</sup> *Ibid*, see paras 112-115.

<sup>415</sup> *Ibid*, at para 114.

<sup>416</sup> *Ibid*, at para 114 (original emphasis).

<sup>417</sup> However, this was obiter dicta because the court sent the case back to trial.

<sup>418</sup> Although, note that the Court recognises Indigenous *possession* rather than *ownership*. Is this significant? Does it demote the impact of recognising Indigenous place? Later in this study, particularly in chapter 5, this point will be further discussed.

<sup>419</sup> *Supra* note 348.

<sup>420</sup> *Ibid*, at para 2.

people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

In holding that the government has a legal duty to consult with the Haida about harvesting cedar timber,<sup>421</sup> McLachlin CJ explains: “Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered”.<sup>422</sup>

To an untrained legal eye, such a statement may seem boringly obvious. It is not. This judicial recognition has potentially significant legal consequences which form the inquiry in the later part of this study within the context of national parks. For example, with recognition of Indigenous place, does recognition of initial and continuing ownership of land occur? Because it was once Indigenous place, how should it be managed today? These are serious legal questions which this thesis seeks to answer. But before doing so – the subject of the next chapters - it is important to ask: have the New Zealand courts given the same legal will recognition of Indigenous place?

The stumbling block for Maori had been the *Wi Parata*<sup>423</sup> 1877 precedent that denied the application of the doctrine of native title because there was “no body politic” capable of holding sovereignty or property rights in the country – Maori were not a people, but barbarian savages. This ideology asserted a narrative that while Maori did live here, they lived here as savages. Much of the lands were thus not Indigenous place (in the civilised sense), but empty and wild.

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<sup>421</sup> *Ibid*, see para 10.

<sup>422</sup> *Ibid*, at para 25.

<sup>423</sup> *Supra* note 337.

In 1986, the High Court in the case *Te Weehi v Regional Fisheries Officer*,<sup>424</sup> partly overruled that precedent by reintroducing the rights component of the doctrine of native title back into the country's common law: property rights in natural resources to take and use. To get to this point, the Court had to first accept that Maori lived here as civilised persons, that is, the lands were a place, not space. Justice Williamson did this in recognizing that the establishment of British sovereignty had not set aside the local laws and property rights of Maori. In this case, the common law right to take undersized shellfish without a licence was accepted as a protected native right.

In 2003, the Court of Appeal in the *Ngati Apa*<sup>425</sup> case, conclusively brought back into life the whole spectrum of the doctrine of native title, including its right hand component that accepts the possibility of native property rights in natural resources to own and govern. The justices strongly accepted the fact that Maori were civilised peoples in 1840 and that while, in accordance with the English version of the Treaty of Waitangi, Maori transferred sovereignty to the British Crown, this transfer “did not affect customary property”.<sup>426</sup> Thus Maori customary land “is not the creation of the Treaty of Waitangi or of statute, although it was confirmed by both. It was property in existence at the time Crown colony government was established in 1840”.<sup>427</sup>

So, how do the courts in Aotearoa New Zealand define the doctrine of native title? In short, they are defined very similarly to the Canadian judiciary. For example, in a 1994 Court of Appeal case, *Cooke P*, who drew heavily on the

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<sup>424</sup> *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

<sup>425</sup> *Attorney-General v Ngati Apa* [2003] 2 NZLR 643 (CA).

<sup>426</sup> *Ibid*, at 651 (per Elias CJ).

<sup>427</sup> *Ibid*, at 651 (per Elias CJ).

Canadian jurisprudence, elaborated on the nature of Native Title rights stating that they are usually communal, can be extinguished only with the free consent of the native occupiers, can be transferred to only the Crown, it is likely to be in breach of fiduciary duty if an extinguishment occurs by less than fair conduct or on less than fair terms; and if extinguishment is deemed necessary then free consent may have to yield to compulsory acquisition for recognized specific public purposes but upon extinguishment proper compensation must be paid.<sup>428</sup>

In another Court of Appeal case, decided in 1999, the majority, in reference to the then leading Canadian and Australian cases—*R v Sparrow*<sup>429</sup> and *Mabo v Queensland (No 2)*<sup>430</sup>—stated that native rights “are highly fact specific”.<sup>431</sup> They explained the test as follows:<sup>432</sup>

The existence of a right is determined by considering whether the particular tradition or custom claimed to be an aboriginal right was rooted in the aboriginal culture of the particular people in question and the nature and incidents of the right must be ascertained as a matter of fact.

In the 2003 Court of Appeal decision, *Ngati Apa*,<sup>433</sup> Justice Tipping began his judgment with the words “When the common law of England came to New Zealand

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<sup>428</sup> *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 2024.

<sup>429</sup> [1990] 1 SCR 1075 (SCC).

<sup>430</sup> [1992] 175 CLR 1 (HCA)

<sup>431</sup> *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA).

<sup>432</sup> *Ibid.* at 147. Note: Thomas J, in dissent, interestingly found in favour of a Maori customary right to fish for introduced species by basing his decision entirely on New Zealand law—no reference was made to overseas decisions.

<sup>433</sup> *Supra* note 425.

its arrival did not extinguish Maori customary title . . . title to it must be lawfully extinguished before it can be regarded as ceasing to exist”.<sup>434</sup> Justices Keith and Anderson, in a joint judgment, emphasized “the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain”.<sup>435</sup> Chief Justice Elias stated:<sup>436</sup>

[T]he common law as received in New Zealand was modified by recognised Maori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.

According to *Ngati Apa*, the common law of Aotearoa New Zealand is unique. Chief Justice Elias stressed this reality in stating:<sup>437</sup>

In British territories with native populations, they introduced common law adapted to reflect local custom, including property rights. That approach was applied in New Zealand in 1840. The laws of England were applied in New Zealand only ‘so far as applicable to the circumstances thereof’ . . . from the beginning the common law of New Zealand as applied in the Courts differed from the common law of England because it reflected local circumstances.

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<sup>434</sup> *Ibid*, at 693.

<sup>435</sup> *Ibid*, at 684.

<sup>436</sup> *Ibid*, at 668.

<sup>437</sup> *Ibid*, at 562.

In summary, the point here is that the common law doctrine of native title protects the historical and continuing fact of Indigenous place. The lands of Canada and Aotearoa New Zealand were once solely owned and used by Indigenous peoples and while a change of sovereignty has occurred, those Indigenous peoples still have property rights to own and use those lands. The courts now recognise this. But, what does it mean in reality? The next part of this chapter canvasses this generally, and the later chapters 5 – 7 focus on this specifically within the context of national parks.

#### **IV. IMPLICATIONS FOR INDIGENOUS OWNERSHIP AND USE**

There is a new starting point in law which holds that the lands of Canada and Aotearoa New Zealand were once solely an Indigenous place. It was an Indigenous lived landscape, not empty. Europeans were not the first peoples to discover these lands. In fact, the lands had been discovered, in some instances, thousands of years before Europeans first laid feet on such land. The Crown and the courts now recognise this fact. But in accepting this, has it resulted in Indigenous peoples achieving what they seek: rights to own and use such lands and resources in accordance with their own laws and customs? Or, to pitch it in the context of the core research question under examination in this thesis: if there is a new commitment to reconciled relations, what does it mean in reality? This part of this chapter now looks at how the Crown has expressed these rights, via new negotiated agreements, and the courts via the application of the doctrine of Aboriginal title.

## A. The courts' perspectives

With the courts now recognising Indigenous place, and thus the potential applicability of the doctrine of Aboriginal title, Indigenous peoples have begun seeking decisions from the courts to recognise their rights to own and/or use land and resources. Initially in the 1970s in Canada, but much more obviously in the 1980s and onwards in both Canada and Aotearoa New Zealand, the courts have been grappling with the implications of the common law doctrine of Aboriginal title. Both countries share a history of judicial denial of this doctrine as explored in the previous chapter 3. This part of this chapter focuses on how the courts in both countries revisited and eventually overruled previous precedents to hold the full applicability of the doctrine of Aboriginal title. This new inclusive stance has had implications for the governing of national parks, particularly in Canada, as becomes evident in the later chapters of this thesis. For example, in Canada there has emerged a “national park reserve” title, some cooperative (and even co) management of national parks.

### *Canada*

The Supreme Court of Canada has been elaborate in defining the consequences of accepting Indigenous place within the context of Aboriginal title. In the leading *Delgamuukw* case, Lamer CJ positioned that the content of Aboriginal title:<sup>438</sup>

... encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of

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<sup>438</sup> *Supra* note 348 at para 117.

those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and ... those protected uses must not be irreconcilable with the nature of the group's attachment to that land.

Lamer CJ accepts that a successful finding of aboriginal title would give to the Aboriginal group an exclusive right to the use and occupation of land “to the *exclusion* of both non-aboriginals and members of other aboriginal nations”.<sup>439</sup> The Aboriginal title definition recognises that connection to place need not be frozen in time, that is, Aboriginal peoples are not bound by historical uses of land in the present sense. However, the courts, including in *Delgamuukw*, have been very clear that if Aboriginal title to land is awarded, the Aboriginal owners cannot use it in a manner that would be “irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place”.<sup>440</sup> For example, if aboriginal title has been proved by historical and continuing evidence of using the land for hunting purposes, it would be wrong to strip mine it.<sup>441</sup> This point reinforces the *sui generis* notion that Aboriginal title includes a non-economic dimension because the “land has an inherent and unique value in itself” and thus the “community cannot put the land to uses which would destroy that value”.<sup>442</sup>

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<sup>439</sup> *Ibid*, at para 185 (emphasis added).

<sup>440</sup> *Ibid*, at para 128.

<sup>441</sup> See *ibid*, at para 128.

<sup>442</sup> *Ibid*, at para 129.

But while there is this recognition of Aboriginal title, the courts have not yet actually awarded Aboriginal title to an Aboriginal group.<sup>443</sup> Moreover, there has even been little acceptance of arguments for Aboriginal rights.<sup>444</sup> For example, in the leading Supreme Court of Canada decisions where there has been recognition of possible Aboriginal rights, the Court has often opted to order a retrial. For instance, the Supreme Court of Canada, in 1990 recognised that an Aboriginal person *might* be able to fish with a net larger than legally permitted because it could be a protected existing Aboriginal right.<sup>445</sup> But the Court did not actually decide this, instead ordered a retrial. Where the Supreme Court has accepted an Aboriginal right, it has often done so by “describing the boundaries of site-specific rights very vaguely”.<sup>446</sup> The Supreme Court of British Columbia, in 2007, listed these instances:<sup>447</sup>

*Cote*: “right to fish for food within the lakes and rivers of the territory of the Z.E.C.”<sup>448</sup>

*Adams*: “right to fish for food in Lake St. Francis”<sup>449</sup>

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<sup>443</sup> The courts are aware of this, for example, Justice Vickers states “A decision relating to infringement of Aboriginal title by government legislation or regulation has yet to be decided” *Tsilhqot’in Nation v British Columbia* 2007 BCSC 1700 at para 1063 (p 345) [*Tsilhqot’in*].

<sup>444</sup> For example, see work Gordon Christie, K McNeil and D Yarrow “Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition? (2007) 37 Supreme Court Law Review (2d) 177; Kent McNeil “Judicial Treatment of Indigenous Land Rights in the Common Law World” in Benjamin J Richardson, Shin Imai and Kent McNeil *Indigenous Peoples and the Law. Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009) 257-283.

<sup>445</sup> *R v Sparrow*, *supra* note 355.

<sup>446</sup> *Tsilhqot’in*, *supra* note 443 at para 1174 (p 388).

<sup>447</sup> *Ibid.* at para 1174 (p 388).

<sup>448</sup> *R v Cote* (1993) 107 DLR (4<sup>th</sup>) 28 at para 56.

*Powley*: “right to hunt for food in the environs of Sault Ste. Marie”<sup>450</sup>

*Sappier; Gray*: “right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by members of the Pabinueau First Nation”<sup>451</sup>.

### *Aotearoa New Zealand*

There is only one modern case in Aotearoa New Zealand where the courts have accepted an argument posed under the doctrine of native title. This was the 1986 *Te Weehi v Regional Fisheries Officer*<sup>452</sup> case where the High Court held that a Maori person had a right to take undersized shellfish, *paua* (abalone), even though it was in contravention of legislation, because no statute had plainly and clearly extinguished the customary right. According to the Court, “[i]t is a right limited to the Ngai Tahu tribe and its authorised relatives for the personal food supply”<sup>453</sup>. In reaching this decision, Williamson J recognized the significance of the Treaty of Waitangi for New Zealand: “obviously the rights which were to be protected by it arose by the traditional possession and use enjoyed by Maori tribes prior to 1840”<sup>454</sup>.

This case thus reintroduced the doctrine but only in regard to native fishing rights, not title. Williamson J did not feel bound by the earlier *Wi Parata* type case law, distinguishing those cases from the one he was hearing on the right to take undersized paua because it was a ‘non-territorial’ claim; this case was ‘not based upon

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<sup>449</sup> *R v Adams* [1996] 3 SCR 101 at para 36 .

<sup>450</sup> *R v Powley* [2003] 2 SCR 207, 2003 SCC 43 at para 19.

<sup>451</sup> *R v Sappier; R v Gray* [2006] 2 SCR 686, 2006 SCC 54 at para 53.

<sup>452</sup> *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

<sup>453</sup> *Ibid*, at 692.

<sup>454</sup> *Ibid*, at 686.

ownership of land or upon an exclusive right to a foreshore or bank of a river'.<sup>455</sup> It was important for Williamson J to emphasize this aspect otherwise he would have been bound by higher court precedent.

Subsequent case law in the 1990s reinforced the existence of the common law doctrine of native title in Aotearoa New Zealand, but did not accept the arguments posed under it. The first of the three prominent cases is the 1990 Court of Appeal case *Te Runanga o Muriwhenua Inc v Attorney-General*.<sup>456</sup> This case concerned processes relating to a Crown proposed settlement of Maori commercial sea fishing rights. The Court made several observations in obiter dicta. For example, Cooke P made extensive reference to the Canadian case law, describing it as “[a]lthough more advanced than our own . . . [which] is still evolving”,<sup>457</sup> likely to provide ‘major guidance’<sup>458</sup> for New Zealand. He added that New Zealand’s courts should give just as much respect to the rights of New Zealand’s Indigenous peoples as the Canadian Courts give to their Indigenous peoples.<sup>459</sup> President Cooke saw no reason to distinguish the Canadian jurisprudence on the basis of constitutional differences and emphasized the analogous approaches to the partnership and fiduciary obligations being developed in Canada under the doctrine of native title and in Aotearoa New Zealand under the Treaty of Waitangi. This comparison enabled Cooke P to confidently conclude that “[i]n principle the extinction of customary title to land does not automatically mean the extinction of fishing rights”.<sup>460</sup>

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<sup>455</sup> *Ibid*, at 692.

<sup>456</sup> [1990] 2 NZLR 641.

<sup>457</sup> *Ibid*, at 645.

<sup>458</sup> *Ibid*, at 655.

<sup>459</sup> *Ibid*, at 655.

<sup>460</sup> *Ibid*, at 655.

Four years later, in 1994, the Court of Appeal concluded that neither under the doctrine of Native title nor under the Treaty of Waitangi do Maori have a right to generate electricity by the use of water power.<sup>461</sup> In this case, *Te Runanganui o Te Ika Whenua*, Cooke P referred to Canadian and Australian case law in devising the nature of Native Title. He explained the doctrine:

On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights.<sup>462</sup>

Cooke P then explained the scope of Native Title in terms of a Canadian influenced spectrum:

The nature and incidents of aboriginal title are matters of fact dependent on the evidence in any particular case . . . . At one extreme they may be treated as approaching the full rights of proprietorship of an estate in fee recognised at common law. At the other extreme they may be treated as at best a mere permissive and apparently arbitrarily revocable occupancy.<sup>463</sup>

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<sup>461</sup> *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 25.

<sup>462</sup> *Ibid*, at 23–4.

<sup>463</sup> *Ibid*. The third of the three prominent cases was decided in 1990: *McRitchie v Taranaki Fish and Game Council*, *supra* note 431. Here, by majority, the Court of Appeal held that

In 2003, the Court of Appeal, in *Attorney-General v Ngati Apa*,<sup>464</sup> finally reintroduced the full spectrum of the Native Title doctrine and in doing so made significant strides towards displacing several Discovery elements. The factual situation of this case saw the Court accepting the possibility that native title could encompass land that was either permanently or temporarily under saltwater. The unanimous decision contributed significantly to the removal of the full force of the Doctrine of Discovery.<sup>465</sup> All five judges overruled *Wi Parata*.

Significantly, the *Ngati Apa* decision explicitly foreshadowed the possibility of the doctrine of Native Title by recognizing Indigenous peoples' exclusive ownership of the foreshore and seabed following a change in sovereignty. For example, Chief Justice Elias stated: 'Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature,'<sup>466</sup> and '[t]he content of such customary interest is a question of fact discoverable, if necessary, by evidence.'<sup>467</sup> Chief Justice Elias explained that '[a]s a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom.'<sup>468</sup> The Chief Justice then quoted from a 1921 Privy Council decision, *Amodu Tijani v Secretary, Southern Nigeria*,<sup>469</sup> stating that native title rights might 'be so complete as to reduce any radical right in

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Maori cannot claim under the doctrine of Native Title or under the Treaty a customary right to fish for introduced species.

<sup>464</sup> *Supra* note 425.

<sup>465</sup> See generally Jacinta Ruru, 'A Politically Fuelled Tsunami: The Foreshore/Seabed Controversy in Aotearoa/New Zealand' (2004) 113 J of Polynesian Society 57.

<sup>466</sup> *Ngati Apa*, *supra* note 425 at 655–6.

<sup>467</sup> *Ibid*, at 656.

<sup>468</sup> *Ibid*.

<sup>469</sup> [1921] 2 AC 399 (PC).

the Sovereign to one which only extends to comparatively limited rights of administrative interference'.<sup>470</sup> Chief Justice Elias substantiated this possibility with reference to Canada by stating:

The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructory rights to *exclusive ownership* with incidents equivalent to those recognised by fee simple title.<sup>471</sup>

The Court did not proceed to answer whether specific tribes exclusively held land under saltwater because the Court was reviewing the case on the issue of whether the Maori Land Court had jurisdiction to determine if the foreshore and seabed were Maori customary land (a land status rather than a Native Title issue). All five judges held that the Maori Land Court did have the necessary jurisdiction to consider an application from Maori which asserted that specific areas of the foreshore and seabed were Maori customary land.<sup>472</sup>

In summary, while the courts in Canada and Aotearoa New Zealand have accepted that the doctrine of native title does recognise Indigenous place, and the possibility for Indigenous use and ownership of that place and its resources, there are few instances where the courts have moved from theoretical support. Has the Crown

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<sup>470</sup> *Ngati Apa*, *supra* note 425 at 656.

<sup>471</sup> *Ibid* 656 (emphasis added). The Canadian case cited was *Delgamuukw*, *supra* note 348.

<sup>472</sup> *Ibid*. Note that in this decision there is extensive reliance on Canadian case law, and the Australian case *Mabo*, *supra* note 430. No post-*Mabo* Australian case was cited, including a case arguably on point, *Commonwealth v Yarmirr* [2001] 208 CLR 1. For a discussion on this see Ruru, 'What Could Have Been', *supra* note 366.

itself also been reluctant to recognise Indigenous ownership and use when reaching settlement agreements? This is the question of the next section of this chapter.

## **B. Commitments of the Crown**

Because the land claim agreements in Canada and the Treaty of Waitangi claim settlements in Aotearoa New Zealand are premised on cultural and commercial redress, the negotiated resolutions all contain return of Crown land and rights to use resources on so-called Crown land. For example, the preamble to the Nisga'a Final Agreement explicitly posits that its aim includes that: "the Parties intend that this Agreement will provide certainty with respect to Nisga'a ownership and use of lands and resources, and the relationship of federal, provincial and Nisga'a laws, within the Nass Area". Nearly 2,000 square kilometers of land was officially recognized as Nisga'a. As another Canadian example, the Nunavut Land Claims Agreement outlines in its preamble:

WHEREAS the Parties have negotiated this land claims Agreement based on and reflecting the following objectives:

- to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore;
- to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting;

- to provide Inuit with financial compensation and means of participating in economic opportunities;
- to encourage self-reliance and the cultural and social well-being of Inuit.

This agreement led to the creation of the new Canadian territory of Nunavut, including the government of Nunavut.

While no settlement statutes in Aotearoa New Zealand have resulted in an Indigenous led local government regime, the statutes do address commercial and property redress points. For example, the *Ngai Tahu Claims Settlement Act 1998* provides mechanisms for the transfer of specific Crown land and farm and forestry assets to Ngai Tahu ownership.<sup>473</sup> Some of the Crown land includes reserves and lake beds.<sup>474</sup> The Act also gives Ngai Tahu a right of first refusal on certain listed Crown property.<sup>475</sup>

This brief discussion portrays that, in contrast to the courts, the Crown itself has not been reluctant to recognise Indigenous ownership and use when reaching settlement agreements. The difference is not surprising. The settlement statute represents years of negotiation between Indigenous peoples and the Crown resulting in a politically acceptable agreement as to redress. In contrast, the court scenario is one of adversary and conflict. If the court were to declare lands to be held in accordance with the doctrine of Aboriginal or native title, societal conflict could

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<sup>473</sup> See sections 19-46.

<sup>474</sup> See the transfer of mahinga kai properties: sections 117-201.

<sup>475</sup> See sections 47-100. For some of the historical background leading to this new settlement era see: Christa Scholtz *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States* (Hoboken: Routledge, 2006).

simply be exacerbated.<sup>476</sup> The settlement statutes thus demonstrate that politically it is possible to re-imagine ownership of lands back to their traditional Indigenous owners.

## V. CONCLUSION

This chapter has sought to illustrate how the Crown and the courts have sought to rectify past colonial notions of the lands of Canada and Aotearoa New Zealand as empty space. The Crown and the courts now recognise that these lands were Indigenous place and that the acceptance of this fact brings certain responsibilities on the Crown and the courts to recognise specific Indigenous rights to own and use lands and resources in those places. Movement in this direction has occurred. Both countries are now committed in law to reconciled relations with their Indigenous peoples. With this being true, the critical issue that presents itself for examination in this thesis is what does it mean for the Crown owned lands encased in national parks?

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<sup>476</sup> For a glimpse into this possibility, see the reaction to the *Ngati Apa*, *supra* note 425 decision in Aotearoa New Zealand. For example, see N Tomas and K Johnston, “Ask that Taniwha Who Owns the Foreshore and Seabed of Aotearoa” (2004) 1 *Te Tai Haruru/Journal of Maori Legal Writing* 10; FM Brookfield, “Maori Claims and the ‘Special’ Juridical Nature of Foreshore and seabed” [2005] *New Zealand Law Review* 179; PG McHugh, “Aboriginal Title in New Zealand: A Retrospect and Prospect” (2004) 2 *New Zealand Journal of Public and International Law* 139; C Charters and A Erueti (eds), *Maori Property Rights and the Foreshore and Seabed: The Last Frontier* (Wellington: Victoria University Press, 2007).

## CHAPTER FIVE

### *OWNING NATIONAL PARKS*

#### I. INTRODUCTION

Land to all peoples is important. All peoples have traditions relating to land. The traditions passed down to me speak of land as our mother with a common adage that we belong to the land, the land does not belong to us. The land I know most well lies here in Aotearoa New Zealand, but in late 2005 and for most of 2006, I made a new country, Canada, my home and began this study. My arrival and departure coincided on the issuing of two important Supreme Court of Canada decisions: the *Mikisew*<sup>477</sup> case decided November 24<sup>th</sup>, 2005, and the *Sappier/Gray*<sup>478</sup> decision decided December 7<sup>th</sup>, 2006. These cases made strong commitments to reconciliation. It is these cases, and others like them, that I thought about deeply as I visited and walked over the Aboriginal peoples' lands now encased in national parks.

This chapter moves to bring to life the central questions in this study concerning what the movements in law from colonisation to reconciliation have meant for the ownership of land that became encased in national park boundaries. The legal recalibration from permitting colonial space to belatedly now recognising Indigenous place must surely have been felt in national parks. But is this so?

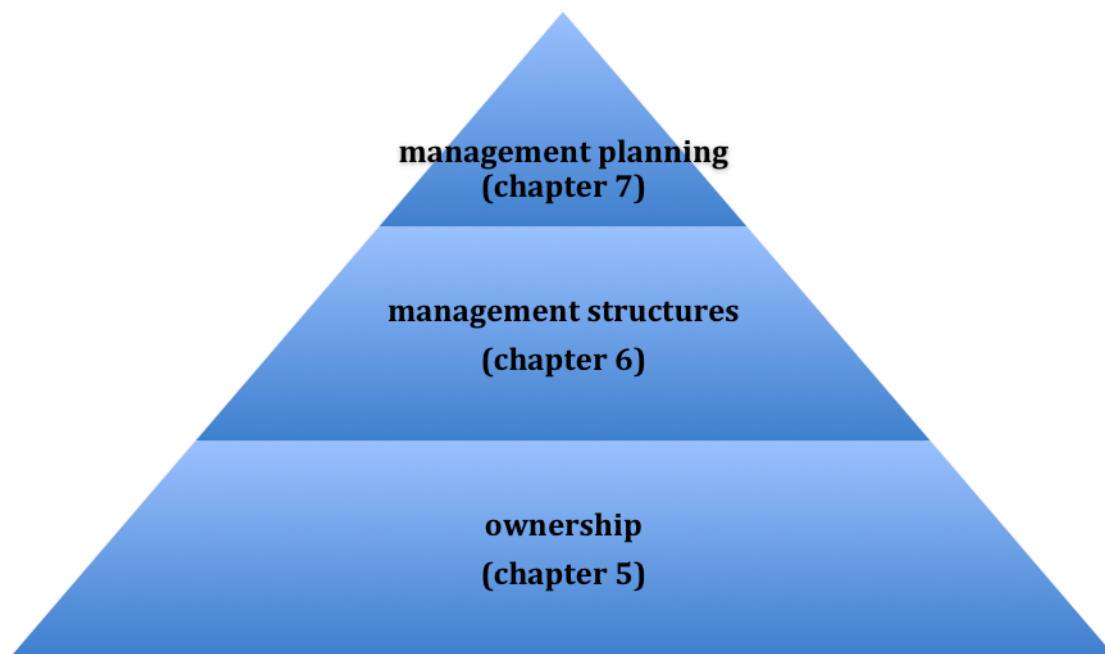
I discuss ownership, rather than management, because it is the foundation of our legal system. My triangular approach is apparent in this diagram:

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<sup>477</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69.

<sup>478</sup> *R v Sappier; R v Gray* [2006] 2 SCR 686, 2006 SCC 54.

**Table 1. Triangular visioning of owning and managing national parks**



The beginning point in both Canada and Aotearoa New Zealand is still that the Crown demands ownership of the national park estate. For example, in order for a landscape to be labelled a ‘national park of Canada’ under the *Canada National Parks Act*, Canada asserts that it must have “clear title to or an unencumbered right of ownership in the lands to be included in the park”.<sup>479</sup> This must be true before a park can be established or enlarged. It is not true for the creation of national park reserves, but “if the settlement provides that the park reserve or part of it is to become a park or part of one” then the Governor in Council must be “satisfied that Her Majesty in right of Canada has clear title to or an unencumbered right of ownership in the lands to be included in the park”.<sup>480</sup> The legislation in Aotearoa New Zealand does not similarly state that the Crown owns national park land in clear title, instead simply assuming it. The issue for both countries is whether Indigenous peoples can nonetheless challenge,

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<sup>479</sup> Section 5(1)(a).

<sup>480</sup> Section 6(2)(b).

in Canada, the assertion, and in Aotearoa New Zealand, the assumption?<sup>481</sup> On the one hand, there are examples of Indigenous peoples in northern Canada and southern Aotearoa New Zealand acquiescing to Crown ownership, and, on the other hand, examples of Indigenous peoples in southern Canada and northern Aotearoa New Zealand contesting Crown ownership.

This chapter first provides a brief background into how the law was used to transfer Indigenous lands into the national park estate. The second and third parts provide a more focused exploration of how Indigenous claims to ownership of lands now encased in national park boundaries are being argued and settled. While ownership can be a pressing issue for many Indigenous groups, for some it is less so. These parts canvass contemporary instances where Indigenous groups have acquiesced to Crown ownership, and situations where Indigenous groups remain in contention with the Crown as to who is the rightful owner. The fourth part draws recognition to the facts that 1) the Crown is accepting Indigenous ownership of other public lands, and 2) there are alternative ownership models to Crown title. The point of this is to bring to light the starkness of the exclusive Crown ownership stance for national parks and to begin the re-imagining project which ought to be regarded as essential if true reconciliation is to be achieved.

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<sup>481</sup> Note: in Aotearoa New Zealand in the context of the foreshore and seabed it was recently held that an assumption is not enough to extinguish native title. See *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

## II. THE INITIAL TRANSFER OF OWNERSHIP

Despite some initial instances in both Canada and Aotearoa New Zealand of European colonial recognition of Indigenous place, mostly via signing of treaties, an era of denial became entrenched in law in the second half of the 1800s. For example, in 1877, an Aotearoa New Zealand court declared these new lands “a territory thinly peopled by barbarians without any form of law or civil government”.<sup>482</sup> In 1888, the Privy Council, hearing a case on appeal from Canada, declared that the Aboriginal peoples had a tenure to land that was simply “a personal and usufructuary right, dependent upon the good will of the Sovereign”.<sup>483</sup> It was within this period that colonial governments began to see merit in putting aside deemed ‘waste’ lands for use as national parks, in particular, to attract tourist revenue. In fact, Canada was the third, and Aotearoa New Zealand, the fourth, country in the world to follow the United States Yellowstone National Park model. Canada’s first national park was created in 1885: Banff National Park. Aotearoa New Zealand’s first national park was created in 1894: Tongariro National Park.

This part briefly discusses the taking of these often mountainous lands to illustrate further the first point of this thesis: the deeming of Indigenous place as colonial space then colonial place. Specifically, how did the Crown acquire this land for national parks that was (and still is) Indigenous place?

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<sup>482</sup> *Wi Parata v Bishop of Wellington* 3 NZ Jur (Ns) 72, 77.

<sup>483</sup> *St Catherine’s Milling & Lumber Company v The Queen* (1888) 14 App. Cas. 46 (J.C.P.C), 54.

## **A. Canada**

In Canada there are now 37 national parks, five national park reserves, and one park – Kluane – which is part national park, part national park reserve. Eight of the 37 national parks lie in northern Canada: Ivvavik (1884, Yukon), Vuntut (1995, Yukon), Aulavik (1992, Northwest Territories), Tuktot Nogait (1998, Northwest Territories), Auyuittuq (2001, Nunavut), Quttinirpaaq (1988, Nunavut), Sirmilik (2001, Nunavut), and Ukkusiksalik (2003, Nunavut). Kluane National Park and National Park Reserve (1976, Yukon) and Nahanni National Park Reserve (1976, Northwest Territories) also lie in northern Canada.

There are four national parks - Glacier (1886), Kootenay (1920), Mount Revelstoke (1914), Yoho (1886) - and three national parks reserves in British Columbia: Gulf Islands (2003), Gwaii Haanas and Haida Heritage Site (1996), Pacific Rim (2000).

There are four national parks in Alberta: Banff (1885), Elk Island (1931), Jasper (1907), Waterton Lakes (1895). Wood Buffalo (1922) straddles both Alberta and Northwest Territories. Two national parks lie in Saskatchewan: Grasslands (2001) and Prince Albert (1927). Riding Mountain (1929) and Wapusk (1996) lie in Manitoba. Ontario has five national parks: Bruce Peninsula (1987), Georgian Bay Islands (1929), Point Pelee (1918), Pukaskwa (1978), St. Lawrence Islands (1914). Nova Scotia, New Brunswick and Newfoundland each have two national parks: Cape Breton Highlands (1936, Nova Scotia), Kejimikujik (1974, Nova Scotia), Fundy (1948, New Brunswick), Kouchibouguac (1979, New Brunswick), and Gros Morne (1970, Newfoundland), Terra Nova (1957, Newfoundland). Torngat Mountains (2005) lies in both Newfoundland and Labrador. Prince Edward Island (1937) is the only national park on Prince Edward Island. Two national parks - Forillon (1974) and

La Maurice (1977) - and one national park reserve lie in Quebec: Mingan Archipelago (1984).

In Canada, the early assumption of Crown ownership of lands enabled the Crown to establish its initial national parks without concern for possible Aboriginal claimed ownership of the lands.<sup>484</sup> Canada even forcibly removed Aboriginal groups from lands intended for national parks. As Binnema and Niemi have written about the removal of Aboriginal people in Banff National Park “aboriginal people were excluded from national parks in the interests of game (not wildlife) conservation, sport hunting, tourism, and aboriginal civilization, not to ensure that national parks became uninhabited wilderness”.<sup>485</sup> For example, as the current Prince Albert national park management plan states: “In the 1920s and 1930’s, Aboriginal residents were obliged to leave their homes to make way for the national park. Some families and communities continue to feel excluded”.<sup>486</sup>

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<sup>484</sup> For a wider discussion of the historical and contemporary establishment of national parks in Canada: see Kevin McNamee, “Filling in the Gaps: Establishing New National Parks” (2010) 27(2) *The George Wright Forum* 142-150.

<sup>485</sup> Theodore (Ted) Binnema and Melanie Niemi, “let the line be drawn now’: Wilderness, Conservation and the Exclusion of Aboriginal People from Banff National Park in Canada” (2006) 11 *Environmental History* 724.

<sup>486</sup> Parks Canada, *Prince Albert National Park of Canada Management Plan* (Parks Canada, January 2008) at 19. See John Sandlos’ excellent article “Federal Spaces, Local Conflicts: National Parks and exclusionary politics of the conservation movement in Ontario, 1900-1935” (2005) 16(1) *Journal of the Canadian Historical Association* 293, where in footnote 4 he states: “The research on the exclusion of local people from the national parks is not nearly as comprehensive in Canada as it is in the United States. For very brief discussion of the exclusion of the Stoney Indians from Rocky Mountains National Park, see Janet Foster, *Working for Wildlife: The Beginnings of Preservation in Canada*, Second Edition, (Toronto: University of Toronto Press, 1998), 30, 84. For the removal of Aboriginal people from Quetico Provincial Park in 1913, see David T. McNab, *Circles of Time: Aboriginal Land Rights and Resistance in Ontario* (Waterloo: Wilfrid Laurier University Press, 1999), 89-100.

The national park reserve label is a novel legislative tool that Canada introduced in the 1970s. The legal definition for a national park reserve is an area or a portion of an area proposed for a park that is subject to a claim in respect of aboriginal rights that has been accepted for negotiation by the Government of Canada.<sup>487</sup> But, as the legal definition demands, the national park reserve label is only used where Canada has accepted for negotiation a land claim. Thus, there are several instances where parks have been created post 1970 as national parks, not national park reserves.

## **B. Aotearoa New Zealand**

In Aotearoa New Zealand there are 14 national parks in Aotearoa New Zealand: Tongariro (1894); Egmont (1900); Arthurs Pass (1929); Abel Tasman (1942); Fiordland (1952); Aoraki/Mount Cook (1953); Te Urewera (1954); Nelson Lakes (1956); Westland (1960); Mount Aspiring (1964); Whanganui (1986); Paparoa

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The removal of the Golden Lake band from Algonquin Park in 1893 is discussed in Gerald Killan, *Protected Places: A History of Ontario's Provincial Parks System* (Toronto: Dundurn Press and the Ontario Ministry of Natural Resources, 1993), 14-5. The removal of the Montreal Lake Indians from former hunting grounds in Prince Albert National Park in 1927 is outlined briefly in William Waiser, *Saskatchewan's Playground: A History of Prince Albert National Park* (Saskatoon: Fifth House Publishers, 1989), 40-1. Finally, the removal of the encampments of the Keeseekowenin Indian Reserve at Clear and Battle Lakes in Riding Mountain National Park by 1936 is discussed in D.T. Tabulenas, *A Narrative Human History of Riding Mountain National Park and Area: Prehistory to 1980* (Parks Canada, Unpublished Manuscript, 1983), 70-1.” For an excellent discussion of the history of Canada’s national parks see: Alan MacEachern “Writing the History of Canadian Parks: Past, Present, and Future” (unpublished paper, Department of History, University of Western Ontario) available to download here: [dspace.ualgary.ca/bitstream/1880/46876/1/MacEachern.pdf](https://dspace.ualgary.ca/bitstream/1880/46876/1/MacEachern.pdf).

<sup>487</sup> See *Canada National Parks Act 2000*, s 4(2).

(1987); Kahurangi (1995); and Rakiura (2002).<sup>488</sup> All of these parks, although most particularly, those created prior to the 1990s, have a fraught history of Crown assumption of ownership as this part briefly discusses.

In Aotearoa New Zealand, the concept of reserving land for national park purposes has an interesting beginning in that an Indigenous tribal group, Ngati Tuwharetoa, were initially keen to gift summit land (Tongariro) to the Crown to create the country's first national park. Tongariro lies alongside the mountain peaks Ruapehu and Ngauruhoe in the middle of the North Island and is sacred to Ngati Tuwharetoa.<sup>489</sup> In 1887, the paramount chief of Ngati Tuwharetoa, decided that the best way to ensure that the mountain would not be "cut up"<sup>490</sup> and sold piece by piece to Pakeha, gifted the summit to the Crown for the specific purpose of labelling it as our first national park "for the use of both the Natives and Europeans".<sup>491</sup> The Crown became the legal owner of Tongariro in 1887, but the Government of the day took some seven years to fulfil the condition of the gift to give the summit national park status. The Government had sought ownership from Ngati Tuwharetoa of the surrounding Tongariro summit land for inclusion in the national park. The Members

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<sup>488</sup> To see a map depicting the placement of these national parks see the Department of Conservation website at: <http://www.doc.govt.nz/parks-and-recreation/national-parks/>. The bracketed information indicates when these lands were officially made national parks.

<sup>489</sup> For a brief description of the importance of this mountain to Ngati Tuwharetoa see: [www.learnz.org.nz/2k/tongariro/t\\_ngatoroirangi.htm](http://www.learnz.org.nz/2k/tongariro/t_ngatoroirangi.htm) and introductory comments in Chapter One. For more discussion of the creation of national parks in Aotearoa New Zealand, see Jacinta Ruru, "Indigenous Peoples' Ownership and Management of Mountains: The Aotearoa/New Zealand Experience" (2004) 3 *Indigenous Law Journal* 111.

<sup>490</sup> James Cowan *The Tongariro National Park, New Zealand. Its Topography, Geology, Alpine and Volcanic Features, History and Maori Folk-lore*. (Wellington: Tongariro National Park Board, 1927) at 30.

<sup>491</sup> Correspondence relative to the gift is contained in *Appendices to the Journals of the House of Representatives* (II) 1887, at G-4.

of the House believed the land was of no use to Ngati Tuwharetoa and valuable only for its scenery.<sup>492</sup> The eventual *Tongariro National Park Act 1894* allowed the Governor to forcibly take the land in return for monetary compensation, albeit a phantom concession considering the Government's perceived 'uselessness' of the area to Ngati Tuwharetoa.<sup>493</sup> The Member for Northern Maori, Mr Heke, called it a "monstrous piece of legislation" that "was entirely inconsistent with the Treaty of Waitangi".<sup>494</sup>

Interestingly the seven-year statutory delay has today been all but forgotten. Accordingly the country celebrated a century of national parks in 1987. Moreover, it is common to hear statements such as the Tongariro National Park being heralded as the "first Western country to reserve a national park in cooperation with its indigenous people".<sup>495</sup> While the 1887 gift illustrates cooperation, the Government's actions thereafter did not. Obviously it has become convenient for the image of good race relations to gloss over the seven-year delay.

Aotearoa New Zealand's second national park, the Egmont National Park, established in 1900, has as its centrepiece Taranaki/Mount Egmont, a near perfectly formed cone shaped mountain. Taranaki/Mount Egmont is linked by legend to the

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<sup>492</sup> Minister of Lands, Hon, McKenzie (80) *New Zealand Parliamentary Debates* 322 (28 July 1893).

<sup>493</sup> See *Tongariro National Park Act 1894*, s 2. For an example of the perceived uselessness of the area see comment by Hon. McKenzie (86) *New Zealand Parliamentary Debates* 679 (11 October 1894): "anyone who had seen the portion of the country ... which he might say was almost useless so far as grazing was concerned, would admit that it should be set apart as a national park for New Zealand".

<sup>494</sup> (86) *New Zealand Parliamentary Debates* 679 (11 October 1894).

<sup>495</sup> John Shultis, "Natural Environments, Wilderness and Protected Areas: An Analysis of Historical Attitudes and Utilisation, and Their Expression in Contemporary New Zealand" (unpublished, University of Otago, 1991), 196.

mountains of the central North Island.<sup>496</sup> As Maori retell, Taranaki and Tongariro, both mountains personified as male warriors, came into conflict over Pihanga, the only female personified mountain in the region. A battle ensued. Taranaki lost, and was exiled from the range. On its tragic flight from its ancestral home, it is said that Taranaki carved out the bed of the Whanganui River. Taranaki now stands alone on the western side of the country. The mountain is sacred to the Taranaki iwi (tribe).

Tension between the first settlers and Taranaki Maori concerning access to land accumulated after the signing of the Treaty of Waitangi. In 1860, war broke out, with the Government marching in troops to attack Maori villages. Legislation, including the *New Zealand Settlements Act 1863*, was used to confiscate millions of acres of land from Taranaki Maori, including Taranaki/Mount Egmont.<sup>497</sup> As the new owner of the mountain, the Crown initially protected Taranaki/Mount Egmont as a reserve, and then in 1900, declared it to be a national park in recognition that the area had the ability to generate monetary gain through tourism.<sup>498</sup>

Many decades later the Crown finally acknowledged that much of the land contained within the original Egmont National Park boundary had been unfairly confiscated from its Maori owners. In order to amend this historical wrong the *Mount Egmont Vesting Act 1978* returned ownership to Taranaki Maori, but at the same time stipulated that upon receipt of it, the descendants of the original Maori owners must automatically gift it back to the Crown. Doubt has since been cast on the credibility of the 1978 statute as a final settlement. In 1996, the Waitangi Tribunal stated that it

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<sup>496</sup> For example, see: [www.learnz.org.nz/2k/tongariro/t\\_tuwharetoa.htm](http://www.learnz.org.nz/2k/tongariro/t_tuwharetoa.htm).

<sup>497</sup> For an account of the Taranaki wars and Crown confiscations see Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi Wai 143* (Wellington: Waitangi Tribunal, 1996). See also the preamble and ss 7 and 9 of the *Ngati Ruanui Claims Settlement Act 2003*.

<sup>498</sup> See comment by McGurie, Member for Egmont, in *New Zealand Parliamentary Debates*, vol. 94 (11 August 1896) at 233.

found no evidence to suggest that the descendants of the original Maori owners agreed to the arrangement provided for in the Act.<sup>499</sup> As later stated in this chapter, today the rightful ownership of Taranaki/Mount Egmont remains a contentious issue.

Turning to another national park, the country's 6<sup>th</sup> national park (created in 1953), now named Aoraki/Mount Cook National Park. Aoraki/Mount Cook is the highest mountain in Aotearoa/New Zealand and lies within the Aoraki/Mount Cook National Park.<sup>500</sup> It is the tupuna of Ngai Tahu, their "most sacred of ancestors".<sup>501</sup> The Crown assumed ownership of Aoraki/Mount Cook following Governor Grey's instructions to Henry Kemp to purchase land in the South Island in the late 1840s.<sup>502</sup> Almost immediately after the sale, Ngai Tahu protested it. At contention was whether or not the deed of sale included the mountains which run down the centre spine of the South Island. According to Ngai Tahu, the mountains, including Aoraki/Mount Cook, were never included in the sale deed. After a century of unsuccessful protest, the late 1980s and 1990s saw a final resolution of this issue as is discussed later in this chapter.

The question that now begs an answer is how are Canada and Aotearoa New Zealand moving towards reconciliation in the context of accepting and settling Indigenous peoples' claims that national parks overlay continuing and enduring Indigenous place? As this chapter discusses, in some instances, Indigenous peoples have accepted Crown ownership, and in other instances, they have fervently challenged it.

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<sup>499</sup> *The Taranaki Report*, *supra* note 497 at 299.

<sup>500</sup> The Park name was officially changed to incorporate Aoraki in 1998: see *Ngai Tahu Claims Settlement Act 1998*, s 162(1).

<sup>501</sup> See *Ngai Tahu Claims Settlement Act 1998*, sch 80.

<sup>502</sup> See "Kemp's Purchase" in *Ngai Tahu Report. Volume Two. Wai 27*. (Wellington: Waitangi Tribunal, 1991) chp 8.

### III. CONTEMPORARY ACQUIESCENCES OF CROWN OWNERSHIP

#### A. Canada

The success stories for Parks Canada and Aboriginal peoples in relation to settling national park ownership issues lie in the territories of Canada (meaning the Yukon Territories, Northwest Territories, and Nunavut).<sup>503</sup> There are several reasons for this including: there was no pre-1970 policy of creating national parks in the north (except for Wood Buffalo National Park lying partly within the Northwest Territories); many of the Aboriginal peoples in the north have completed comprehensive land claims agreements; and there is not the same intense pressure for land as there is in southern Canada. For southerners, the north by and large remains a remote and isolated place thus lending to different issues than those faced in the more densely populated south.

In the north, there are examples both of landscapes being created first as national park reserves and later becoming national parks, and of landscapes being created immediately as national parks bypassing the initial reserve label. There are also examples where Aboriginal peoples have consented to the enlargement of existing national parks and national park reserves. In all of these instances a precedent is being set for Aboriginal acquiescence of Crown ownership of national park land. In fact, of the eleven parks that now exist in the territories, only one remains as a national park reserve (Nahanni), one is half and half (Kluane National Park and Reserve), and another has a special legislative regime (Wood Buffalo) which

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<sup>503</sup> For a wider discussion of the northern parks, see: Juri Peepre and Bob Jickling (eds) *Northern Protected Areas and Wilderness* (Whitehorse: Canadian Parks and Wilderness Society-Yukon Chapter and Yukon College, 1994).

is explained in this chapter. In all the other parks (that is, eight and half of them), the Aboriginal peoples have consented to the parks lying over their traditional territories.

For example, in Nunavut four national parks of Canada exist. Two had initially been established as national park reserves in the then Northwest Territories (Auyuittuq and the Quttinirpaaq (initially named Ellesmere Island)). In accordance with the *Nunavut Land Claims Agreement* and *Inuit Impact and Benefit Agreement* these two reserves became fully endorsed parks, and, under these agreements the new Sirmilik National Park also came into being. In 2003, the Ukkusiksalik National Park was created. The Crown has clear title to all these parks.<sup>504</sup>

In the Yukon, three parks exist: two as national parks, and one as a ‘national park and reserve’. The Ivvavik National Park was created as a result of the Inuvialuit Final Agreement 1984, and the Vuntut National Park was created when the *Vuntut Gwitchin First Nation Final Agreement* came into effect in 1995. These parks are in Crown ownership, as is the southeastern portion of the then Kluane National Park Reserve (now referred to as the Kluane National Park and Reserve) pursuant to the *Champagne and Aishihik First Nations Final Agreement*.<sup>505</sup>

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<sup>504</sup> See *CNPA*, s 6(2)(b) This section states that if settlement provides that the park reserve is to become a park then it will do so by amending Schedule 1 of the Act, but only if “the Governor in Council is satisfied that Her Majesty in right of Canada has clear title to or an unencumbered right of ownership in the lands to be included in the park”. See Terry Fenge, “National Parks in the Canadian Arctic: The Case of the Nunavut Land Claim Agreement” (1993) in Garth Cant, John Overton and Eric Pawson (eds) , *Indigenous Land Rights in Commonwealth Countries: Dispossession, Negotiation and Community Action. Proceedings of a Commonwealth Geographical Bureau Workshop, Christchurch, February 1992* (Christchurch: University of Canterbury: 1993).

<sup>505</sup> This part of the park is now labelled the Kluane National Park. The northwestern portion remains as a park reserve until the Kluane First Nation final agreement is signed, hence the full title of the park: the Kluane National Park and Reserve.

Two national parks and one national park reserve have been created within the Northwest Territories, and a further park, the Wood Buffalo National Park, encompasses Northwest Territories and Alberta lands. Both the Aulavik and Tuktut Nogait National Parks were created pursuant to express agreements with the Aboriginal peoples: Aulavik in accordance with the *Inuvialuit Final Agreement* and the subsequent *Western Arctic (Inuvialuit) Claim Settlement Act 1984*; and Tuktut Nogait, which also lies within the Inuvialuit settlement region, in accordance with the Tuktut Nogait Agreement.

In recent years, Aboriginal peoples in this territory have consented to the enlargement of national park boundaries. In 2005, the Minister and representatives of the Sahtu Dene and Métis of the Sahtu area signed an impact and benefit plan that will add an additional 1,850 km<sup>2</sup> to the southern region of Tuktut Nogait National Park of Canada.<sup>506</sup> But the most prominent concerns the expansion of the Nahanni National Park Reserve. In 2003, the then Minister of Canadian Heritage and the Grand Chief of the Deh Cho First Nations signed a Memorandum of Understanding concerning the expansion of this park.<sup>507</sup> After several years of negotiations, in June 2009, Canada's Environment Minister tabled legislation to enable the Nahanni National Park Reserve to expand six times its current size.<sup>508</sup> The statute, entitled *An Act Creating One of the World's Largest National Park Reserves 2000*,<sup>509</sup> is prefaced with a summary

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<sup>506</sup> See [http://www.pc.gc.ca/pn-np/nt/tuktutnogait/ne/index\\_E.asp](http://www.pc.gc.ca/pn-np/nt/tuktutnogait/ne/index_E.asp).

<sup>507</sup> For discussion: see Parks Canada, *Nahanni National Park Reserve of Canada Nah?a Dehe Management Plan* (Parks Canada, 2010). See also the information about the Nahanni Expansion Working Group at [http://www.pc.gc.ca/pn-np/nt/nahanni/natcul/natcul1g\\_e.asp](http://www.pc.gc.ca/pn-np/nt/nahanni/natcul/natcul1g_e.asp).

<sup>508</sup> See news release 'Government of Canada Announces the Expanded Boundary for Nahanni National Park Reserve of Canada' at Canada News Centre: <http://news.gc.ca/web/article-eng.do?m=/index&nid=457789>.

<sup>509</sup> S.C. 2009, c. 17.

statement that reads “the Dehcho First Nations, having a treaty relationship with Canada, have worked collaboratively with the Parks Canada Agency to protect the greater Nahanni ecosystem, and support the expansion of the Park Reserve”. In tabling this statute, the Minister made several references to the Dehcho First Nations, including:<sup>510</sup>

Truly, this is a remarkable place. The Dehcho First Nations have been blessed with a homeland that has sustained their lives and their spirituality for centuries. And now, with their assistance, we are helping to sustain the natural wonders of this region for all Canadians, and for the people of the world.

And then later, stated:<sup>511</sup>

Our achievement and our celebration today is the result of exemplary cooperation among many sectors including the Dehcho First Nations and other Aboriginal groups, the Government of the Northwest Territories, environmental groups, and the mining and energy sectors.

Like all Dene people, the Dehcho First Nations are inseparable from the land. I was deeply moved by this piece of Dehcho traditional wisdom: “The land is a living being given to us by the Creator. We live as part of it. The land takes care of us, and we take care of the land.”

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<sup>510</sup> The Honourable Jim Prentice, Minister of the Environment, Minister Speech, 9 June 2009, available to view on the Parks Canada website at: [http://www.pc.gc.ca/apps/SPC/page1\\_E.asp?oqAPPLICATION\\_ID=61&oqPOSTING\\_ID=3765&oqPARENT\\_ID=3765&oqAPP\\_CODE=&oqPgNum=1&oqSEARCHSTRING=&oqSOURCE=INDEX&fDate=&DateType=](http://www.pc.gc.ca/apps/SPC/page1_E.asp?oqAPPLICATION_ID=61&oqPOSTING_ID=3765&oqPARENT_ID=3765&oqAPP_CODE=&oqPgNum=1&oqSEARCHSTRING=&oqSOURCE=INDEX&fDate=&DateType=).

<sup>511</sup> *Ibid.*

The other park that lies partly within the Northwest Territories, Wood Buffalo National Park, is a park with an interesting legislative possibility attaching to it. It is an old park, established in 1922. The general Crown rule is that when the Constitution Act was enacted in 1982, no Aboriginal or treaty rights existed in already created national parks (only in those national park reserves). A couple of parks are exempted from this rule, including Wood Buffalo. Section 38(1) of the *Canada National Parks Act* states that specific lands may be withdrawn from Wood Buffalo National Park “for the establishment of an Indian reserve”,<sup>512</sup> or in accordance with any agreement between Canada and the Salt River First Nation or with any first nation formed from the division of that First Nation “for purposes of entitlement to land under Treaty Number Eight between Her Majesty the Queen and the Cree, Beaver, Chipewyan and other Indians”.<sup>513</sup> Land has been removed from the park, for example, the Peace Point Indian Reserve was excised from the park in 1988.<sup>514</sup> On September 14, 2009, the Canadian Environmental Assessment Agency permitted Parks Canada to exercise its power to remove land from the park to establish a new Indian reserve for the Little Red River Cree Nation Treaty 8 located at Garden River located within the park.<sup>515</sup>

In regard to the national parks and national park reserves of Canada lying in the provinces (meaning: Alberta, British Columbia, Manitoba, New Brunswick,

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<sup>512</sup> Section 38(1)(a).

<sup>513</sup> Section 38(1)(b).

<sup>514</sup> This is briefly discussed in Parks Canada, *Wood Buffalo National Park of Canada Management Plan* (Parks Canada, 2010) at 52. See the Parks Canada and the Mikisew Cree First Nation Treaty Land Entitlement Agreement signed December 23, 1986.

<sup>515</sup> See the Canadian Environmental Assessment Agency website at: <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=30180>.

Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan), there have been few instances where either the Crown or Aboriginal peoples have acquiesced in regard to ownership. The story here is very different to the northern territories. While it is possible for lands to be removed from a national park reserve and returned to Aboriginal ownership,<sup>516</sup> this has only occurred once to date and the situation there was extreme. In 2003, the Crown accented to the removal of 85 ha of land from the Pacific Rim National Park Reserve for the purposes of creating a new reserve for the Tla-o-qui-aht First Nation to address an acute housing shortage.<sup>517</sup>

The only other exceptions relate to Riding Mountain and Wapusk National Parks. In a like manner to the arrangement for Wood Buffalo National Park, the *Canada National Parks Act* states that Riding Mountain's description can be amended or replaced "for purposes of settling a claim of the Keeseekoowenin Band",<sup>518</sup> and the Wapusk's description can be amended or replaced "for purposes of entitlement to land under Treaty Number Five between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Berens River".<sup>519</sup> Section 37(2) then clarifies that "Lands withdrawn from Wood Buffalo National Park of Canada or Wapusk National

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<sup>516</sup> See *CNPA*, s 5(2) which gives the Governor in Council discretion to do so "If a court of competent jurisdiction finds that Her Majesty in right of Canada does not have clear title to or an unencumbered right of ownership in lands within park ...". Note that the Act singles out the Gwaii Haanas National Park Reserve stating that Governor in Council has the ability to alter the description of the Park "Pending the resolution of the disputes outstanding between the Haida Nation and the Government of Canada respecting their rights, titles and interests in or to the Gwaii Haanas Archipelago": see s. 41(3).

<sup>517</sup> Named the Esowista IR 3 Reserve.

<sup>518</sup> Section 38(1)(c).

<sup>519</sup> Section 38(1)(d)(i).

Park of Canada pursuant to subsection (1) are declared to be no longer required for park purposes”.

Do any similar examples of Indigenous acquiescence exist in Aotearoa New Zealand?

## **B. Aotearoa New Zealand**

The ownership issue in Aotearoa New Zealand, not surprisingly, is more akin to Canada’s policies that are in operation in the southern provinces where historical treaties were signed. The policy is just more obvious most probably because Aotearoa New Zealand has been (for more than a decade now) reaching settlement with tribes under the rubric of the Treaty of Waitangi (whereas in Canada the comprehensive lands claim process that has most affected national parks to date concerns those peoples that did not sign historical treaties).

In Aotearoa New Zealand the success stories for settling ownership issues all lie in the bottom two thirds of the South Island. This is the traditional land of Ngai Tahu. Seven national parks exist on their territory, and another two lie partly within their area. The *Ngai Tahu Claims Settlement Act* was negotiated within the realm of explicit Government policy that states that conservation land is not readily available for use in Treaty of Waitangi settlements.<sup>520</sup> Ngai Tahu achieved an exception (in part) to this policy. It is a good example of where a government has thought outside the box to attempt to recognise the importance of ownership issues for Indigenous peoples.

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<sup>520</sup> See Department of Conservation website at: [www.doc.govt.nz/Community/005~Conservation-and-Maori/Settlements/index.asp](http://www.doc.govt.nz/Community/005~Conservation-and-Maori/Settlements/index.asp).

The success story here concerns Aoraki/Mount Cook, the tallest mountain in Aotearoa New Zealand, and the centrepiece of the Aoraki/Mount Cook National Park. To recap, to Ngai Tahu this mountain is their most sacred landmark, personified as Aoraki, the son of Sky Father, who once travelled with his brothers looking for his mother.<sup>521</sup> Unable to find her, Aoraki misquoted the prayer which should have returned them to their father but instead caused their canoe to hit a hidden reef. As the boat began to turn, the brothers ran to the back of the canoe whereupon they and the boat turned to stone. The brothers became the Southern Alps; the boat formed the South Island.<sup>522</sup> The *Ngai Tahu Claims Settlement Act* acknowledges the importance of Aoraki to Ngai Tahu in several instances. One touches the ownership issue. The Act states that the Crown (who owns Aoraki and manages it as part of its national park estate) will vest the title of the peak in the Ngai Tahu tribal structure's name for a period of 7 days. Ngai Tahu will then gift the mountain back to the nation, both to ensure that the mountain remains within the National Park, and also as an enduring symbol of the tribe's commitment to the co-management of areas of high historic, cultural and conservation value with the Crown. Ngai Tahu have not yet actioned the vesting and will not do so until they are satisfied that all the settlement provisions have been implemented as agreed..<sup>523</sup>

Also of interest, in Aotearoa New Zealand some recent negotiations which occurred outside the Treaty settlement process have seen Maori negotiate conservation agreements with the Crown to manage parts of their private land 'as if it

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<sup>521</sup> Note that this story was initially told in chp 1 of this thesis.

<sup>522</sup> Note: this story belongs to Ngai Tahu, and is retold here with respect as it appears in *Ngai Tahu Claims Settlement Act 1998*, sch 14.

<sup>523</sup> Seem for example, 'Mt Cook set for double change of ownership' in *Otago Daily Times* (14 July 2006), available to view at: [http://subs.nzherald.co.nz/topic/story.cfm?c\\_id=262&objectid=10391211](http://subs.nzherald.co.nz/topic/story.cfm?c_id=262&objectid=10391211).

were a national park' in return for cash compensation. The Waitutu Incorporation negotiated with the Crown that the Department of Conservation would manage their land (situated in the lower South Island, bordering the Fiordland National Park) as if the land were a national park under the *National Parks Act* in return for \$13.55 million cash compensation. In exchange the Incorporation agreed not to commercially log the land. Importantly, they still own the land with rights to build a lodge on it and continue traditional hunting.<sup>524</sup> In another instance, the Rakiura Maori Land Trust negotiated with the Crown that the Land Trust would protect and preserve their lands on Stewart Island and manage their lands as if they were a national park (constituting in part the newest national park in Aotearoa New Zealand; Rakiura National Park). The Crown gave the Land Trust \$10.9 million and the Land Trust agreed in return not to commence commercial logging on the land.<sup>525</sup>

But how significant are these success stories in Canada and Aotearoa New Zealand? They certainly provide a cautious optimism that resolution can be sought and thus reconciliation can occur. However, the wins here for Parks Canada are predominantly in northern Canada and are couched in a specific context that give win/wins to both Canada and the Aboriginal peoples. The rules applicable in northern Canada do not necessarily flow to southern Canada. For example, the creation of the northern national parks do not (for the most part) impede the Aboriginal peoples continuing traditional use of these lands, as the next two chapters will explain. Moreover, turning to Aotearoa New Zealand, the Aoraki/Mount Cook success story may not in fact simply reflect free Indigenous acquiescence but resigned acceptance

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<sup>524</sup> See *Waitutu Block Settlement Act 1997*.

<sup>525</sup> *Tutae-Ka-Wetoweto Forest Act 2001*. For a discussion of this Act see: J Ruru, "Managing private land for the public benefit: the Tutae-Ka-Wetoweto Forest Act 2001" (Feb 2002) 4 *Butterworths Resource Management Bulletin* 105.

that this represented the best possible deal at the time. If this is so, then it dampens any celebrations of true reconciliation. A significant point however derives from the later scenarios where Maori owned land is being managed as if overlaid with a national park status. This illustrates that it is possible for Indigenous peoples to own land that is managed like a national park. This could be a solution for where contestation is rife (that is, transfer/vest title of national park lands in Indigenous peoples). How deep is the contestation? Overall, do instances of Indigenous acceptance outweigh Indigenous contestation? Contestation is now discussed.

#### **IV. CONTEMPORARY CONTESTATION OF CROWN OWNERSHIP**

##### **A. Canada**

Ownership issues predominantly occur in regard to those parks of Canada lying in the provinces. For example, no national park reserves in the south have been reclassified as a national park. Outstanding title issues remain in these places. For instance, while co-management has been entered into between the Council of the Haida Nation and the Government of Canada in regard to the Gwaii Haanas National Park Reserve and Haida Heritage Site,<sup>526</sup> the co-management agreement is prefaced with opposing opinions as to ownership. The Haida Nation states that it “owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly”.<sup>527</sup> The

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<sup>526</sup> The details of this will be explained in the next chapter, chapter 6.

<sup>527</sup> Gwaii Haanas Agreement, at para 1.1.

Government states that the same area is “Crown land”.<sup>528</sup> The parties have agreed to differ in order to forge an agreement regarding management.

There is a 1990s case where an Aboriginal group protested the process for creating a national park on their traditional lands. In this case, Nunavik Inuit as represented by Makivik Corporation brought a case that asked the court to answer: Has the Crown breached its legally enforceable positive duties towards Makivik and Nunavik Inuit in the treaty process?<sup>529</sup>

- a) by doggedly continuing towards the establishment of the Torngat National Park in Northern Labrador notwithstanding the treaty process engaged with Nunavik Inuit, and
- b) by systematically allowing Nunavik Inuit to be excluded from the substantive process leading to the establishment of the Park, and
- c) by refusing at the same time to discuss the establishment of the Park within the context of the treaty negotiations with Nunavik Inuit?

The Federal Court of Canada held in favour of the Makivik Corporation on three points:<sup>530</sup>

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<sup>528</sup> *Ibid.*, at para 1.1.

<sup>529</sup> *Nunavik Inuit v. Canada (Minister of Canadian Heritage)* 1998 CarswellNat 1504, 164 D.L.R. (4<sup>th</sup>) 463, [1998] 4 C.N.L.R. 68, 151 F.T.R. 69, (sub nom. Makivik Corp. v. Canada (Minister of Canadian Heritage)) [1999] 1 F.C. 38, 4 C.N.L.R. 68, 1 F.C. 38, [1998] F.C.J No. 1114 at para [3].

<sup>530</sup> *Ibid.* at para [128].

1. [Canada has] a duty to consult with [Makivik] prior to establishing a park reserve in Northern Labrador. The duty to consult includes both the duty to inform and to listen.
2. [Canada has] a duty to consult and negotiate in good faith with the applicant its claims to aboriginal rights in certain parts of Labrador, prior to the establishment of a national park in Northern Labrador.
3. If an agreement between the Government of Canada and the Government of Newfoundland and Labrador to establish such a national park is reached before final land claim settlement, the lands are to be set aside as a national park reserve, pending land claim negotiations.

The Torngat Mountains National Park Reserve was subsequently established when the legislation giving effect to the *Labrador Inuit Land Claims Agreement* was enacted on December 1, 2005. The national park reserve became the Tongait KakKasuangita SilakKijapvinga Torngat Mountains National Park when the *Nunavik Inuit Land Claims Agreement* came into legal effect on July 10, 2008. As discussed in the next two chapters, this park is cooperatively managed with Labrador Inuit and Nunavik Inuit.

However, ownership issues remain very real in many of the other national parks and national park reserves. In particular, the Crown's position that it has clear title to those national parks listed in schedule one of the *Canada National Parks Act* gives rise to a serious issue that requires close legal scrutiny. The issue is also fraught for those national parks that are currently being managed as national parks but have not yet been gazetted (that is, included in schedule 1 of the *Canada National Parks*

Act).<sup>531</sup> The Bruce Peninsula National Park of Canada is one of these parks. It was created post-1970 but not pursuant to the national park reserve system. Nonetheless, it has not yet been proclaimed under the *Canada National Parks Act* because there are “unresolved Aboriginal issues”<sup>532</sup> with some of these issues relating to appropriate ownership.<sup>533</sup> Moreover, while the Crown has had success in resolving ownership issues in the north, the precedents set there will not necessarily transfer easily to other parks and park reserves in the remaining parts of the country. The issues are different and this ought to be recognised. More novel solutions will be required for settling ownership issues in the south. The issue is very much alive.

For example, the Wesley First Nation is currently asserting a claim to various types of aboriginal rights over lands and resources covering much of the southern portion of the province of Alberta.<sup>534</sup> The Wesley First Nation’s claim is to unextinguished aboriginal title and existing aboriginal rights and treaty rights in their alleged traditional land, including all of the natural resources therein.<sup>535</sup> The Wesley

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<sup>531</sup> Note: today, the process for creating a new national park in Canada involves five steps including identifying an area, conducting a feasibility study, negotiating a park agreement, then, finally, proclaiming the park as protected under the *CNPA*. Once the Minister of Environment approves a park agreement, Parks Canada becomes responsible for the operation of the national park or national park reserve under the authority of various provincial, territorial and /or federal regulations. See *PCA Annual Report 2004*, *supra* note 176 at 122.

<sup>532</sup> *Ibid*, at 32, and *PCA Performance Report 2005*, *supra* note 177 at 26.

<sup>533</sup> Other parks and park reserves that have not been proclaimed include the new parks, such as the Gulf Islands National Park Reserve and Ukkusiksalik National Park, and other parks that have outstanding traditional use issues (Gros Morne and Wapusk National Parks). See *Annual Report*, *ibid* at 28 and 32; and *PCA Performance Report 2005*, *ibid* at 22-23 and 26.

<sup>534</sup> *Wesley First Nation v Alberta* 2009 CarswellAlta 1071, 2009 ABQB 418, [2009] A.W.L.D. 3398, 476 A.R. 82.

<sup>535</sup> *Ibid*, at para [5].

First Nation clearly articulates that their traditional lands include national and provincial parks.<sup>536</sup>

Moreover, many of the current national park management plans record evidence of contestation. For example, the Banff National Park Management Plan states: “The Government of Canada and the Siksika First Nation are also negotiating the resolution of a specific land claim near Castle Mountain”.<sup>537</sup> The Kootenay National Park Management Plan states: “Kootenay is part of an area identified by the Ktunaxa And Shuswap Nations as their traditional territories. The Ktunaxa Nation, British Columbia, and the federal government are negotiating a treaty that includes ‘Parks and Protected Areas’ and ‘cultural resources’ as a subject for negotiation. This management plan contains important direction concerning ongoing collaboration with First Nations to protect and present Aboriginal heritage”.<sup>538</sup> The Cape Breton Highlands National Park Management Plan states: “The Mi’kmaq of Nova Scotia claim unextinguished Aboriginal title, treaty rights, and other Aboriginal rights throughout Nova Scotia and adjacent areas of the offshore, including on federal lands of Cape Breton Highlands National park”.<sup>539</sup> The Forillon National Park Management Plan states: “In 2005, the Mi’kmaq submitted a map of the land claimed, which includes the entire Gaspé including the land of the Forillon National Park. To

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<sup>536</sup> *Ibid*, at para [54].

<sup>537</sup> Parks Canada, *Banff National Park of Canada Management Plan* (Parks Canada, 2010) at 8. See also Parks Canada, *Mount Revelstoke National Park of Canada, Glacier National Park of Canada, Rogers Pass National Historic Site of National Park of Canada Management Plan* (Parks Canada, 2010) at 14.

<sup>538</sup> Parks Canada, *Kootenay National Park of Canada Management Plan* (Parks Canada, 2000) at 5.

<sup>539</sup> Parks Canada, *Cape Breton Highlands National Park of Canada Management Plan* (Parks Canada, 2010) at 1.

date, discussions on this subject are still in the exploratory stage”.<sup>540</sup> And, the Wood Buffalo National Park Management Plan states: “Canada continues to negotiate three outstanding land claims processes with the Northwest Territories Metis Nation, the Akaitcho Dene and the Dehcho Dene and Metis. Each of these negotiations will have some impact on the management of the park and based on precedent they are expected to produce new opportunities for collaboration of park ecological and cultural resource management and the development of the park’s visitor experience offer”.<sup>541</sup>

In observation, it seems odd that a country that has legally recognised the potential of original Indigenous place and committed to reconciliation, has done little more to adapt the stance of Crown ownership of national parks. As the below will show, contention is also very evident in Aotearoa New Zealand.

## **B. Aotearoa New Zealand**

The Crown policy in Aotearoa New Zealand that conservation land should not be returned to tribal ownership is being strongly challenged, particularly by tribes in the North Island in regard to the Tongariro, Egmont, Urewera and Whanganui national parks.

Today the rightful ownership of Taranaki/Mount Egmont, which lies at the centrepiece of Egmont National Park, remains a contentious issue. To date the Crown has acknowledged that Mount Taranaki is of great traditional, cultural, historical and

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<sup>540</sup> Parks Canada, *Forillon National Park of Canada Management Plan* (Parks Canada, 2010) at 8.

<sup>541</sup> Parks Canada, *Wood Buffalo National Park of Canada Management Plan* (Parks Canada, 2010) at 51-52.

spiritual importance to the iwi of Taranaki but has not reached any settlement in regard to the mountain.<sup>542</sup> While some of the traditional owners of Taranaki/Mount Egmont National Park have settled their claims with the Crown, they have not done so as to the proper ownership of the Taranaki/Mount Egmont peak. That specific aspect remains outstanding in these settlements.<sup>543</sup> For example, the official Crown word reads in regard to one of these claims:<sup>544</sup>

There is no cultural redress or apology in the Deed of Settlement relating to the confiscation of Mount Taranaki. This matter will be addressed at a later

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<sup>542</sup> For example see Ngati Ruanui Deed of Settlement (12 May 2001) clauses 2.6-2.8. Deeds of Settlement can be viewed at [www.ots.govt.nz](http://www.ots.govt.nz).

<sup>543</sup> *Ngati Tama Claims Settlement Act 2003* (No. 126); *Ngati Mutunga Claims Settlement Act 2006* (No. 61); *Ngati Ruanui Claims Settlement Act 2003* (No. 20); *Nгаа Rauru Kiitahi Claims Settlement Act 2005* (No. 84).

<sup>544</sup> Office of Treaty Settlements, *Deed of Settlement between the Crown and Ngati Ruanui Summary* (2001) at 3 (available to view at: <http://www.atns.net.au/reference.asp?RefID=263>). The relevant clauses read in Office of Treaty Settlements, *Deed of Settlement of Historical Claims Ngati Ruanui* (2001) (available to view at <http://www.atns.net.au/reference.asp?RefID=264>):

2.6 Ngaati Ruanui and the Crown acknowledge that Mount Taranaki is of great traditional, cultural, historical and spiritual importance to iwi of Taranaki.

2.7 This Deed does not provide for an apology, or any cultural redress, by the Crown in relation to any of the Historical Claims that relate to Mount Taranaki as that is yet to be developed in conjunction with Ngaati Ruanui and other iwi of Taranaki.

2.8 Ngaati Ruanui and the Crown agree that:

2.8.1 the Governance Entity and the Crown will, as soon as practicable, work together with the mandated representatives of other iwi of Taranaki to develop an apology, and cultural redress, for Ngaati Ruanui and other iwi of Taranaki in relation to the Historical Claims, and the historical claims of other iwi of Taranaki, that relate to Mount Taranaki; and

2.8.2 the apology and cultural redress for Ngaati Ruanui in relation to the Historical Claims that relate to Mount Taranaki will not include any financial or commercial redress.

date in the settlement process in Taranaki when all the iwi of Taranaki are in a position to negotiate on these issues. There will be no additional financial or commercial redress in relation to the mountain. Any cultural redress and apology agreed with Ngati Ruanui will recognise the traditional, cultural, historical and spiritual significance of Mount Taranaki to all iwi of Taranaki while recognising the interests of the people of New Zealand generally in Mount Taranaki.

This commitment illustrates an important concern of this thesis: the Crown is prepared to accept that its perceived colonial place is in fact underlain as Indigenous place but not to an extent that will displace any power or values that rely on that place continuing to be colonial place. Here the Crown will at some point in the future apologise for the wrongdoings in assuming that this mountain was colonial space, free for the colonial settlers to do with as they wished – create a national park. But no financial or commercial redress will be associated with this apology. Can cultural redress include the transfer of Crown ownership to iwi? At this stage, this is an unknown. In the meantime, the issue of Maori ownership of national parks is heating up in the other three North Island parks.

For instance, while the Crown has become more accepting of the fact that the Tongariro National Park was initially an Indigenous place, it is uncertain whether the Crown will accept that it ought to return ownership to those tribes whose traditional area the park encases. In 1993, Aotearoa New Zealand became the first in the world to receive recognition under the revised World Heritage cultural landscapes criteria specifically recognising the value of this land to Ngati Tuwharetoa.<sup>545</sup> The recently

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<sup>545</sup> See UNSECO World Heritage site at: <http://whc.unesco.org/en/list/421>.

published management plan captures a new commitment to the tribes explicitly stating that management of the park must recognise and support the unique relationship Maori have with the park.<sup>546</sup> However, Ngati Tuwharetoa and Ngati Rangi remain mostly isolated from the management of the park. They have taken a claim to the Waitangi Tribunal asserting extensive Crown breaches of the Treaty of Waitangi in establishing the Park boundaries and subsequently managing it.<sup>547</sup> The Tribunal heard closing submissions in July 2007, and is due to make its recommendations in late 2011. The tribes and the Crown will then enter direct negotiations aiming for reconciliation.<sup>548</sup> If the Tribunal accepts that iwi ownership of the park should comprise part of these negotiations, then the Crown's stance to not negotiate ownership will come under intense fire.<sup>549</sup> But because the Crown is deemed to be sovereign, and Parliament is supreme, tribes will have no redress in the courts if the Crown decides to remain steadfast to this Discovery-influenced policy.

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<sup>546</sup> Department of Conservation, *Tongariro National Park Management Plan* (Wellington: Department of Conservation, 2006). This Plan is discussed further in chapter 6 and in more detail in chapter 7.

<sup>547</sup> For information about the claim see the Tribunal's website under the National Park Inquiry heading at: <http://www.waitangi-tribunal.govt.nz/inquiries/genericinquiries/nationalparkinquiry/>. See 'Maori want greater role in Tongariro National Park' 21 October 2006, available to view at: <http://www.stuff.co.nz/stuff/0,2106,3835995a8153,00.html>.

<sup>548</sup> See the work of the Office of Treaty Settlements at: [www.ots.govt.nz](http://www.ots.govt.nz).

<sup>549</sup> Other tribes are also challenging this policy. Eg see the Tuhoe Negotiators Report 2009 in relation to the Urewera National Park at [www.tekotahiatuhoe.iwi.nz/doclibrary/.../NegotiatorsReport-7.pdf](http://www.tekotahiatuhoe.iwi.nz/doclibrary/.../NegotiatorsReport-7.pdf).

A newspaper article, published in June 2010, with a headline reading ‘Tribe wants mountains and park back’ put the issue into the public spotlight. The article reads as follows:<sup>550</sup>

One of the country's largest tribes is seeking control of Tongariro National Park to defend the mountains from "desecration". Tuwharetoa's paramount chief has called for greater iwi control in the park's management, claiming the tribe was bullied into gifting the land. ... The 79,500ha park is one of Aotearoa New Zealand 's major tourist attractions. Its mountain slopes and world-class ski fields attract up to one million people every year. But Mr te Heuheu said the tribe had become increasingly frustrated by the number of tourists and commercial operators cashing in on the natural attraction and iwi had been marginalised. Speaking at a Waitangi Tribunal National Park inquiry, he said the mountains had been desecrated through pollution, the construction of infrastructure and commercial activities that took place on the slopes. *"We want everyone to continue to enjoy our national park, but we also want to ensure that the mountains are treated with respect."* At the tribunal, sitting at Otukou Marae at Lake Rotoaira, Mr te Heuheu also disputed a Government claim that the mountain peaks were gifted to the nation by his great-great-grandfather of Horonuku te Heuheu IV. Mr te Heuheu, who is also chairman of the World Heritage Committee, said misunderstanding over the definition of gift meant his ancestor didn't understand the consequences of transferring the peaks to the Crown. "There is an enormous chasm between

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<sup>550</sup> Jon Stokes, "Tribe wants mountains and park back" *NZ Herald* 21 October 2006 (view: [http://www.nzherald.co.nz/tongariro-national-park/news/article.cfm?l\\_id=500541&objectid=10406966](http://www.nzherald.co.nz/tongariro-national-park/news/article.cfm?l_id=500541&objectid=10406966)). Emphasis added.

the two cultures in their understanding of what was meant by the 'gift'. In 'gifting' the Tongariro peaks, my great-great-grandfather never intended the Crown would assume sole ownership and control of the mountains." The peaks were gifted to the Crown in 1887. The decision followed moves by the Maori Land Court to carve up Tuwharetoa lands into individual title, a situation that the chief feared would see the sacred mountain and burial site of ancestors sold or taken. Mr te Heuheu said the mountain peaks were gifted to the Crown as a last resort. "Fearing that the sacred Tongariro mountains would be lost if he did not act, Horonuku te Heuheu extended an invitation to Queen Victoria to join him in protecting the sanctity of the mountains." But expectation that the mountains would remain off limits to all were not realised. Mr te Heuheu said the tribe had not spoken publicly about its concerns before but concerns over pollution from high tourist numbers and commercial operators had forced it to go public. "We are trying to ensure the Crown is aware of our views. We want a greater role in how things are managed, environmentally and commercially." Ngati Tuwharetoa spokesman Paranapa Otimi said the tribe wanted tribal lands and mountains to be kept sacrosanct. "It is very clear we want our rights returned to us, so we can do what we think is our cultural and traditional rights to do."

This quote effectively highlights some of the issues in this study. Clear is the strength and reason of the Indigenous voice in speaking of this national park as 'our land' and 'our rights', and the consequences of losing power to protect and nourish Indigenous place, here a mountainous ancestor.

In regard to the Whanganui National Park, the Whanganui Conservation Management Strategy, published in 2007, records that the Whanganui Iwi and the Minister of Conservation have established the Te Ranga Forum to discuss and negotiate issues which affect Whanganui Iwi. The Strategy states that the Forum “agrees to disagree on certain issues but to continue to work together on those which can be jointly negotiated”.<sup>551</sup> The agreement states that broad agreement of the relationship see:<sup>552</sup>

Both parties recognising that there are substantial differences between their respective positions on power and control and on the ownership of natural resources which may not be capable of resolution in the Te Ranga Forum but which need not prevent discussions and negotiations taking place on issues mutually agreed to.

The Whanganui Iwi are awaiting a Waitangi Tribunal report.<sup>553</sup> However, interestingly, the Wanganui conservator Damian Coutts reportedly told the Waitangi Tribunal, as part of the hearing process, that “he’s ready, willing and able to consider with iwi” the possible designation of the Whanganui National Park becoming Aotearoa New Zealand’s first designated Maori national park.<sup>554</sup> No further public

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<sup>551</sup> Department of Conservation, *Conservation Management Strategy – Wanganui Conservancy* (Wellington: Department of Conservation, 2007) 33.

<sup>552</sup> *Ibid*, at 33.

<sup>553</sup> As at February 2011, the Waitangi Tribunal website states that the Whanganui District Inquiry is in the report writing phase.

<sup>554</sup> As reported by Laurel Stowell, ‘Maori national park for region?’ *Wanganui Chronicle*, 27 March 2009 (view: <http://www.wanganuichronicle.co.nz/local/news/Maori-national-park-for-region/3798218/>).

announcements as to this effect can be found. In fact, in light of what occurred with the Urewera National Park in 2010, the Prime Minister made it clear that this is highly unlikely.

In May 2010, it became front-page media news that the National-led Government had been considering returning Te Urewera National Park to Tuhoe ownership. According to Tuhoe, the agreement “was a done deal” but the Prime Minister John Key stated “Tuhoe were never promised ownership”.<sup>555</sup> Apparently, the Prime Minister announced that “sole ownership of the park by Tuhoe was unacceptable, even under conditions of universal access and managing it as a national park”.<sup>556</sup> To Tuhoe, ownership of the park is their bottom negotiating line. As reported “Tuhoe activist Tame Iti likened this week’s development to the theft of a vehicle. ‘It’s like a pinched car. The Government are prepared to return the car to us without the ownership papers, but we want the papers too’”.<sup>557</sup> Tariana Turia, co-leader of the Maori Party, then released a statement. While it is lengthy, it captures the essence of this thesis and is therefore reproduced in full here.<sup>558</sup>

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<sup>555</sup> See reported comments in [unnamed author] “Tuhoe were never promised Te Urewera – Key” *NZ Herald* 17 May 2010 (view at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10645529](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10645529)).

<sup>556</sup> As reported in Derek Cheng, “Tuhoe hold emergency talks over Key ‘betrayal’” *NZ Herald* 13 May 2010 (view at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10644555](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10644555)).

<sup>557</sup> *Ibid.*

<sup>558</sup> Tariana Turia, ‘Tariana Turia: Te Urewera and Tuhoe are inseparable’ *NZ Herald* 14 May 2010 (view at: [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10644720](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10644720)) (emphasis added).

I read a statement this week from Henare Nikora that instantly tugged at my heart.

"If Tuhoe talks to Tuhoe, then you are talking to Te Urewera. You cannot separate the two. We are all around and within it. "We have relations here, there and there. And we are all intertwined. Tuhoe and Te Urewera are one. It is incomprehensible to see them as separate."

Incomprehensible. Intertwined. You cannot separate the two. It is precisely the same feeling that I have as uri of Whanganui. Ko au te awa, ko te awa ko au - literally, I am the river and the river is me. It is a powerful, psychological, physical connection with our sense of place. This is what it is to be mana whenua, people of the land. The sense of place is so strong, the attachment so profound that it becomes an integral part of our identity. We are bonded to our rivers, our mountains, our land in ways which I can only explain as defining the essence of who we are. The deep connection that Tuhoe have to Te Urewera sustains them whether they live in Ruatahuna or New York. One of the many emails I received this week was from a young man living in Wellington who spoke with true Tuhoe passion, about the meaning of Te Urewera to him. He told me: "Te Urewera is a unique takiwa like no other in terms of the majority occupiers of the land - previous Treaty settlement case studies need not apply here. *Returning 'formal ownership' of the park to Tuhoe would be akin to merely affirming the 'reality' of the situation regarding the day-to-day living of Tuhoe still in occupation of Te Urewera.*" In as much as Te Urewera is unique, the distinctive character of the Children of the Mist has

grown out of a tight spiritual tie to the land. Some estimate that 95 per cent of the population living within Te Urewera are local Tuhoe - they look after themselves, they look after Te Urewera; as they have for a century and more. The rugged isolation of the Urewera environment has had a major say in shaping the Tuhoe spirit. For Tuhoe, the Urewera have a compelling spiritual strength, a place to return for healing and revitalisation. Yet this place of refuge - home to the mist, birds, insects - has also endured a savage history which every Tuhoe carries with them today. The New Zealand Settlements Act 1863 established the legislative framework for confiscation; a scheme ostensibly devised to punish those Maori deemed to be in rebellion against the Crown. But when the Crown confiscated Tuhoe land in the mid-1860s it was actually designed to punish other iwi. The Crown took Tuhoe land, and even when it realised that the original confiscation of Tuhoe's best land was a mistake and illegal it did nothing. The Waitangi Tribunal has noted that the Crown's actions were brutal, the repeated invasions of Tuhoe land unjustified. Military forces acted mercilessly, killing non-combatants intentionally; executing some prisoners and destroying homes, food supplies and taonga. *Few people know this history of a people treated so badly by the Crown.* The tribunal revealed that the senior military officer involved in the operations of 1869 spoke to his troops of "extermination". People were starved out of the region under the impact of the scorched earth policies. Many of Tuhoe died, either as casualties of armed conflict, or from hunger and deprivation. The tribunal concluded its report last year saying that "there is little for the Crown to be proud of in its actions during this period". But despite the lasting legacy of pain and suffering, the grievance has never been adequately addressed.

Over the past 18 months it finally appeared as if a breakthrough had occurred. That is, until Monday this week. One would think that the way in which Te Urewera has become so important we are talking about a prosperous resort, a lush national park that is the pride of all New Zealanders. In reality, locals would suggest the park has been sadly neglected under Crown ownership. The Urewera Forest Park DoC headquarters at Te Aniwaniwa, Waikaremoana, is now shut down and has been relocated to Murupara, well outside the park boundaries. Besides DoC huts, there are no essential services such as power lines, water and sewerage. Along a 120km strip of metal road on State Highway 38 there are only two petrol pumps – one at Ruatahuna and the other at the Waikaremoana Motor Camp. *So why all the fuss?* One argument has been that of precedent – not wanting to set a pattern for other iwi to follow. And yet it could be argued just as forcefully that the precedent was set in 1895 with the Native Reserves Act in which the Crown recognised Tuhoe ownership of land in the Urewera.

We have also been told that vesting sole ownership of the Urewera in Tuhoe hands would be outside the broad principles that have operated for other Treaty negotiations. I know only too well that with all other negotiations in good faith, adjustments have been enabled to respond to the unique circumstances of that iwi. One thing is clear. The reconciliation of trust and respect are at the heart of Tuhoe claims. It took Tuhoe nigh on a century to want to seek a relationship with the Crown: a relationship based on peace rather than war. Paramount in their aspirations was the desire to create opportunities for their people, to advance their drive for self-management, to

consolidate a strong cultural, economic and social base for Tuhoe founded on mana motuhake. *Intertwined throughout their claim was the central importance of Te Urewera as their home; a home into which they are happy to welcome others. Tuhoe hold their responsibility as guardians of Te Urewera with the utmost reverence. Tuhoe is Te Urewera, Te Urewera is Tuhoe - each belong to the other. They/We have come too far to let this moment pass.*

This quote necessarily highlights well a central issue in this study of how essential Indigenous place is to Indigenous identity, and the continuing harm that has occurred in being denied the ability to care, nourish and protect that place because of the colonial assertion of Crown ownership. The Urewera National Park debacle really invites close scrutiny of the country's commitment to reconciliation. As stated in this study: if there is a new commitment to recognising Indigenous peoples in law, what ought this to mean in the context of owning and managing national parks? As established earlier, there is a new commitment. Why then is Tuhoe ownership of Te Urewera National Park 'unacceptable'? And why is it unacceptable 'even under conditions of universal access and managing it as a national park'. As I stated at the outset to this study, surely, if national parks are symbols of our nation, then are they not the perfect place to illustrate reconciliation? The transfer of national park lands into Indigenous ownership would be an ideal mechanism to portray this even if the lands continued to be managed by the Crown (although hopefully in partnership with the Indigenous owners).<sup>559</sup>

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<sup>559</sup> In the final stages of submitting this thesis, the news headlines are reporting that local iwi are opposing the creation of Aotearoa New Zealand's proposed 15<sup>th</sup> national park: Kauri National Park in Northland. See Andrew Stone, "Iwi fights park plan for kauri forest"

Why does contemporary Crown recognition of Indigenous place not lead to the return to Indigenous ownership of lands encased in national park boundaries? The next part of this chapter attempts to provide a wider context in which to answer this question.

## V. RE-IMAGINING OWNERSHIP: POTENTIAL MODELS

### A. Property theory

As stated at the outset of this study, the new directions contained in section 2(2) of the *Canada National Parks Act 2000* and section 4 of the *Aotearoa New Zealand Conservation Act 1987* pose the strongest challenge to the 21<sup>st</sup> century concept of the national park. A core component of this challenge is the assumption and assertion of Crown ownership of national park lands. Patterns of ownership are, however, changing in a more general sense as countries grapple with reconfiguring ownership of once thought common property such as water,<sup>560</sup> and in addressing climate change issues such as carbon credits and emission trading.<sup>561</sup> But as property law writers also recognise, the rights of Indigenous peoples to property is without doubt a pressing

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NZHerald, 2 August 2011 available at: [http://www.nzherald.co.nz/politics/news/article.cfm?c\\_id=280&objectid=10742384](http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10742384).

<sup>560</sup> See generally Douglas Fisher, *the Law and Governance of Water Resources. The Challenge of Sustainability* (Cheltenham, UK: Edward Elgar Publishing, 2009). See more specifically Marama Muru-Lanning, “River Ownership: Inalienable Taonga and Impartible Tupuna Awa” (2009) (6) 2 Sites: New Series 32.

<sup>561</sup> See Kathy Baylis and Travis Allen, “Who owns carbon? Property rights issues in a market for greenhouse gas emissions” (unpublished working paper, 2005) available to view at: [http://works.bepress.com/kathy\\_baylis/doctype.html](http://works.bepress.com/kathy_baylis/doctype.html).

modern issue. For example, as the editors of one new book state, “The increased recognition of indigenous land rights may not only complicate questions of access to natural resources, but also bring different cultural understandings of the meaning of property in resources”.<sup>562</sup> This must surely be so especially as countries such as Canada and Aotearoa New Zealand seek to acknowledge and reconcile their earlier assertions of legal fictions of discovery and terra nullius. As the common law doctrine of native title holds at its core a change in sovereignty does not mean a change in property ownership. Today, both Canada and Aotearoa New Zealand’s legal systems accept this fact.<sup>563</sup> If colonial governments can cling to this legal magic and justify their Crown sovereignty,<sup>564</sup> Indigenous peoples ought to be able to

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<sup>562</sup> Aileen McHarg et al, “Property and the Law in Energy and Natural Resources” in Aileen McHarg et al, *Property and the Law in Energy and Natural Resources* (Oxford: Oxford University Press, 2010) at 4. See also: Roy Vogt, *Whose Property? The Deepening Conflict between Private Property and Democracy in Canada* (Toronto: University of Toronto Press, 1999) in particular, chapter 4 ‘Aboriginal Property Rights’; Christopher Rodgers, “Nature’s Place? Property Rights, Property Rules and Environmental Stewardship” (2009) 68 (3) *Cambridge Law Journal* 550; Laura Fraser, “Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991 (2008) 12 *New Zealand Journal of Environmental Law* 145; and Richard Barnes, *Property Rights and Natural Resources* (Oxford: Hart Publishing, 2009).

<sup>563</sup> See writings in chapter 4.

<sup>564</sup> An excellent observation of this is made in many writings, not just by Indigenous authors, for example, see Jedediah Purdy, *The Meaning of Property. Freedom, Community, and the Legal Imagination* (New Haven: Yale University Press, 2010) particularly at 1 and 83-86. See also Kristen A Carpenter, “Real Property and Peoplehood” (2008) 27 *Stan. Envtl. L. J* 313; Nicholas Blomley, “Remember Property” (2005) 29(2) *Progress in Human Geography* 125; Carol M Rose, “Possession as the Origin of Property” (1985) 52 *U. Chi. L. Rev* 73; Kristen A Carpenter, Sonia K Katyal, and Angela R Riley, “In Defence of Property” (2009) 118 *Yale Law Journal* 1022; Alex Frame, ‘Property and the Treaty of Waitangi: A Tragedy of the Commodities’ in Janet Mclean (ed), *Property and the Constitution* (Oxford: Hart Publishing, 1999); Bradley Bryan, “Property as Ontology: On Aboriginal and English

similarly find justice in law to justify ownership of their lands and natural resources. This ought to be the starting point. That is, land held by the Crown ought to be today assumed to be Indigenous lands. National parks provide the most logical starting point to begin this initiative. It is an estate that is in Crown hands and it is an estate that is held up as symbolising the identity of the nation. The legal system is capable of supporting this for law is social. This means that law has the capacity to recalibrate and reflect the dreams and nations of the modern country. For example, Jedediah Purdy, a Duke Law Professor, even accepts this point:<sup>565</sup>

An institution that we now often regard as intrinsically conservative is no inert inheritance but the achievement of a frequently radical tradition of imagination and reform that has perennially sought new ways to integrate with social order the multiple dimensions of human freedom. Property inheriting that tradition means carrying it forward in the same spirit.

This point aligns with Borrows' powerful observation, first reproduced earlier in chapter two: "a house built upon a foundation of sand is unstable, no matter how beautiful it may look or how many people may rely upon it".<sup>566</sup> This is why I positioned ownership as the foundation to my triangular structural approach.

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Understandings of Ownership" (2000) (13) 1 *Canadian Journal of Law and Jurisprudence* 3; and Carol M Rose, *Property & Persuasion. Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Press, 1994).

<sup>565</sup> Jedediah Purdy, *The Meaning of Property. Freedom, Community, and the Legal Imagination* (New Haven: Yale University Press, 2010) at 5.

<sup>566</sup> John Borrows, *Recovering Canada. The Resurgence of Indigenous Law* (Toronto: University of Toronto, 2002) at 115.

The debate about whether public land should be Crown owned or Indigenous owned has been at the forefront of contemporary Aotearoa New Zealand politics, significantly more so than in Canada. The most high profile recent example is the debate concerning the foreshore and seabed. In short, this debate refers to the political reaction to the *Attorney-General v Ngati Apa*<sup>567</sup> decision that held, in 2003, that the Maori Land Court has jurisdiction to determine if specific stretches of foreshore and seabed remain as Maori customary land. There are significant examples in both countries of where the Crown and the Indigenous peoples have negotiated a solution to ownership of, for example, parts of the conservation estate not encompassing national parks. As the following discussion briefly illustrates, that, politically and legally, governments in both countries are capable of brainstorming ownership solutions for public land which exposes the starkness and lack of legal imagination of the Government's stance of exclusive Crown ownership for national parks. The discussion focuses on examples in contexts outside national parks where the Crown has acknowledged Indigenous ownership. Most of these examples here are drawn from Aotearoa New Zealand, the country that I am most familiar with, and also a country that is in advanced stages of reconciliation via Treaty of Waitangi claim settlements.

In Aotearoa New Zealand, there is statutory recognition of Maori customary land, defined in law to mean land that is held in accordance with tikanga Maori.<sup>568</sup> However, it is said that so little of this dry land exists that it is not even quantifiable. In regard to Maori freehold land, up to six per cent of Aotearoa New Zealand is classified in this fee simple title where beneficial ownership has been determined by

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<sup>567</sup> *Supra* note 481. See discussion of this case above in chapter 4.

<sup>568</sup> *Te Ture Whenua Maori Act 1993*, s 129(2)(a).

the Maori Land Court by freehold order.<sup>569</sup> While Maori freehold land is a solid example of Indigenous ownership of land, the owners are subject to paternalistic statutory controls manned by the Maori Land Court that span from restricting testamentary freedom and powers to alienate to determining best management models for the land.

The most significant transition of land from Crown ownership to Indigenous ownership is occurring pursuant to the modern day Treaty of Waitangi claim settlements.<sup>570</sup> These settlement statutes record the Crown's return of specific Crown lands to tribes. The categories of where the government has recently returned Crown assumed property to Maori tribal ownership include: transferred Crown forest, and conservation estate, land; transferred, and leasebacked, high country station land; vesting of lakebeds; vesting of volcanic cones; and, commercial fish quota and aquaculture marine farm space. For example, the *Ngai Tahu Claims Settlement Act 1998*, an Act already profiled in this study, includes examples of the first three points.<sup>571</sup> The return of the conservation estate sites fall within the Crown's Treaty of Waitangi claim settlement policy because they are all small, discrete sites. They are not sites within national parks.

A recent agreement has seen the return of the Crown-owned parts of 11 volcanic cones in the Auckland region (including in the centre of the metropolitan

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<sup>569</sup> *Te Ture Whenua Maori Act 1993*, s 129(2)(b).

<sup>570</sup> It is interesting to note that in nearly all instances iwi demand that this land be returned with the land status of general fee simple title (rather than Maori freehold fee simple title). See Naomi Johnstone, "The Interwining of Two Streams: Tikanga, Te Ture Whenua Maori Act 1993 and Tainui" (2007) 1(2) *New Zealand Law Students' Journal*.

<sup>571</sup> For forestry assets see ss 31- 41; high country stations see ss 101-116; conservation estate land sites see ss 387-444; and lakebeds see 167-200.

area) being vested in the tribal group Nga Mana Whenua o Tamaki Makaurau. The agreement makes clear that:<sup>572</sup>

These volcanic cones/maunga will be held by the collective membership in trust and managed for the common benefit of the mana whenua iwi of Auckland and the people of Auckland city.

And that there are certain conditions:<sup>573</sup>

Transfer of title to Ngā Mana Whenua o Tāmaki Makaurau will be subject to conditions including:

Title of the maunga/volcanic cones cannot be alienated or mortgaged;

All maunga/volcanic cones will retain their reserve status with public access and other conditions; and

Auckland Council will retain control of all expenditure.

The pan-tribal commercial fisheries settlement,<sup>574</sup> the negotiated aquaculture space,<sup>575</sup> and the ownership of specific forests<sup>576</sup> are further examples of renegotiated

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<sup>572</sup> See *Summary of the Framework Agreement between Ngā Mana Whenua o Tāmaki Makaurau and the Crown*, signed 12 February 2010 (view at: <http://www.ngatiwhatuorakei.com/Orakei/agreement-between-nga-mana-whenua-o-tamaki-makaurau-and-the-crown.html>).

<sup>573</sup> *Ibid.*

<sup>574</sup> See Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 and Maori Fisheries Act 2004. For commentary on the settlement and legislation see Te Ohu Kaimoana's website at: <http://teohu.Maori.nz/index.htm>.

<sup>575</sup> *Maori Commercial Aquaculture Claims Settlement Act 2004* (No 107).

<sup>576</sup> *Central North Island Forests Land Collective Settlement Act 2008* (No 99).

property.<sup>577</sup> The point of these examples is that they reveal that it is possible to return land to Indigenous peoples. In particular, as the Auckland volcanic example shows, transferred ownership does not necessarily have to mean transferred power. The volcanic cones cannot be alienated (meaning that they cannot be sold, gifted, leased, mortgaged and so on), public access is guaranteed and the Auckland Council retains all control of finances. This is of course one model and not necessarily the ideal model for returning national parks (Indigenous peoples, for example, may want to restrict public access to sacred sites within national parks).

## **B. Models of ownership**

In Aotearoa New Zealand, in recent years, mostly as a result of the foreshore and seabed debate, the country has been brainstorming possible Indigenous and Crown ownership solution models. I have devised a sliding scale model to represent these possible ownership types. At the top end are those models that most align with Maori interests. At the bottom end are those models that most align with conservative Crown interests. While I have devised this model with the Aotearoa New Zealand context in mind, it has the potential to easily travel to other countries, including Canada. This is the model:

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<sup>577</sup> See discussion above in chapter 4.

**Table 2. Indigenous Ownership Sliding Scale Model**

<b>(1)</b>	<b>Tupuna (ancestral) title</b>
<b>(2)</b>	<b>Kaitiakitangi (guardianship) title</b>
<b>(3)</b>	<b>Qualified exclusive native title</b>
<b>(4)</b>	<b>Treaty of Waitangi title</b>
<b>(5)</b>	<b>Whenua topu title</b>
<b>(6)</b>	<b>Legal personality</b>
<b>(7)</b>	<b>Native title bundle of rights</b>
<b>(8)</b>	<b>No one</b>
<b>(9)</b>	<b>Public domain</b>
<b>(10)</b>	<b>Crown title</b>

Ten slots constitute this model with tupuna title and Crown title at opposite ends to one another. At the top of the model is the tupuna (ancestral) title idea. Hone Harawira, a Member of Parliament for the Maori Party, has advocated for this new Crown recognised Indigenous title in the context of seeking a solution to the foreshore and seabed ownership debate. The idea here is that land is vested in an ancestor, or as the Paeroa Declaration puts it: “in the ancient authority of rangatiratanga [sovereignty]”.<sup>578</sup> Some of the media coverage of this idea explains:

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<sup>578</sup> See ‘Backgrounding the Paeroa Declaration’ at: <http://www.converge.org.nz/pma/paeroa.htm>. Note that the Paeroa Declaration was signed in 2003 by a collection of iwi putting forward a proposed solution for the foreshore and seabed debate.

"It basically says that if the whole world already knows that Maori people were here first, then let's stop being ridiculous by making Maori go to court to prove it," he [Harawira] said.

"If the Government can assume ownership of the foreshore and seabed with one piece of legislation, they can just as easily give it back to Maori with another."

Mr Harawira said there would be a clause in the legislation ensuring Maori could never sell the foreshore and seabed.

"That fits with the Maori world view that we don't own land as a commodity, but rather we hold it as a taonga for future generations," he said.

I have placed the tupuna (ancestral) title at the top of this model because it is recognises most fully Indigenous agency in ownership. Tupuna title is not qualified in any manner by Western notions of ownership or subject in any manner to Crown control.

The kaitiakitanga model sits closely below the tupuna model simply because it encompasses only one dimension of rangatiratanga (sovereignty): stewardship and guardianship.<sup>579</sup> Nonetheless, the same criteria would apply in that the land in this title would be inalienable and public access would remain guaranteed.

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<sup>579</sup> For an excellent, and accessible, description of kaitiakitanga see: [http://www.kaiparaharbour.net.nz/management/issue.asp?PublicationIssues\\_ID=14](http://www.kaiparaharbour.net.nz/management/issue.asp?PublicationIssues_ID=14). Note that the 'Backgrounding the Paeroa Declaration' also makes this point, see *ibid*.

Qualified exclusive title is a concept that I attribute to the High Court of Australia, Justice Kirby. As a dissenting judge in *Commonwealth v Yarmirr*,<sup>580</sup> Kirby J believed that the majority had not gone far enough in recognising the possibility of exclusive Indigenous ownership of the sea country. He held that the common law doctrine of native title could, and should, recognise Aboriginal exclusive ownership of the sea and seabed but that public rights of navigation, fishing and passage should qualify it. Kirby J accepted that the Aboriginal people had their own laws.<sup>581</sup>

In the remote and sparsely inhabited north of Australia is a group of Aboriginal Australians living according to their own traditions. Within that group ... they observe their traditional laws and customs as their forebears have done for untold centuries before Australia's modern legal system arrived. They have a 'sea country' and claim to possess it exclusively for the group. They rely on, and extract, resources from the sea and accord particular areas spiritual respect. The sea is essential to their survival as a group.

Kirby J emphasised: "In earlier times, they could not fight off the 'white man' with his superior arms; but now the 'white man's' laws have changed to give them, under certain conditions, the superior arms of legal protection".<sup>582</sup> He devised a solution (which was different to that of the majority and its bundle of rights approach) - qualified exclusivity.<sup>583</sup>

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<sup>580</sup> (2001) 208 CLR 1.

<sup>581</sup> *Ibid*, at 101.

<sup>582</sup> *Ibid*, at 101.

<sup>583</sup> *Ibid*, at 101.

They yield their rights in their ‘sea country’ to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, they assert a present right under their own laws and customs, now protected by the ‘white man’s’ law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. If that right is upheld, it will have obvious economic consequences for them to determine – just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide.

Kirby J observed that the only limitations on recognition of native title rights and interests are those stated in *Mabo*: “namely that native title could not be recognised when to do so would ‘fracture a skeletal principle of our legal system’; or where to do so would be repugnant to the rules of natural justice, equity and good conscience”.<sup>584</sup>

I have argued elsewhere that Kirby’s qualified exclusive native title notion potentially aligns well with the Aoteaora New Zealand legal interpretation of the scope of the doctrine of native title, especially in the *Attorney-General v Ngati Apa* Court of Appeal decision.<sup>585</sup> Thus, I have placed this model at rung number three on my sliding scale.

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<sup>584</sup> *Ibid*, at 77.

<sup>585</sup> See Jacinta Ruru “What Could Have Been: The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand” (2006) 32(1) *Monash University Law Review* 116

The next model is the Treaty of Waitangi title. This has been proposed as a solution to the foreshore and seabed debate. For example, as the Ministry of Justice summary of submissions quotes:<sup>586</sup>

Many submitters suggested that the foreshore and seabed be held jointly by the Crown and Maori. Some of these specifically advocated a Treaty partnership model.

So as to reflect the Treaty Partnership, the concept of public domain should be replaced with a construct that vests the foreshore and seabed in the Crown and Iwi to hold in public interest. We urge you to put the foreshore and seabed in a Treaty of Waitangi title that recognises the relationship between the Treaty partners ... We consider that the Treaty partners could hold the foreshore and seabed together in the national interest.

To my mind the Treaty of Waitangi title sits below the qualified exclusive native title model because the Treaty title gives shared ownership whereas the qualified exclusive native title recognises Indigenous ownership. However, some may critique me on this placement. A primary criticism is that the Treaty represents an agreement between our ancestors and the Crown (it has Indigenous agency), compared to native title, which has its legacy in the colonial English common law. Nonetheless, I have placed the qualified exclusive native title higher because of what it gives an Indigenous

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<sup>586</sup> Ministry of Justice, *Reviewing the Foreshore and Seabed Act 2004. Summary of submissions* (Wellington: Ministry of Justice, 2010) at 17. To view this, and associated documents, see: [http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/foreshore-and-seabed/copy\\_of\\_reviewing-the-foreshore-and-seabed-act-2004](http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/foreshore-and-seabed/copy_of_reviewing-the-foreshore-and-seabed-act-2004).

group. Thus, it is at this point that it is probably worthwhile pointing out that the aspirations of Indigenous groups will differ in that their dream title may well fall at different points in this spectrum. That is to be respected.

Moving back to explaining the sliding scale, the next two – whenua topu and legal personality – are interesting models that have alignment with the Maori worldview. Whenua Topu title is specific to the Aotearoa New Zealand grounded in *Te Ture Whenua Maori Act 1993*. Since 1993, the Maori Land Court has had jurisdiction to establish a whenua topu trust in respect of any Maori land or general land owned by Maori “where the Court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the iwi and hapu”.<sup>587</sup> This trust model provides an opportunity for Maori to manage their land akin to cultural ambitions for collective benefit. However, few iwi and hapu have adopted this model probably because of the overlaying paternalistic jurisdiction of the Maori Land Court. For example, the management of these trusts become the subject of the attention of the Maori Land Court. Nonetheless, I believe that there is significant scope in this mechanism for creating Indigenous ownership of lands, including public lands such as national parks. For example, the trust deed could easily ensure that the land is inalienable and public access, for the most part, is guaranteed.

The legal personality concept has its origins in the work of the United States of America Professor of Law Christopher Stone. In the 1970s, he espoused a way forward for protecting the environment: all natural resources should have legal personality so as to give them legal standing in the courts with persons appointed as

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<sup>587</sup> *Te Ture Whenua Maori Act 1993*, s 216(2).

guardians to speak on their behalf.<sup>588</sup> In some work that I have recently done with James Morris, we have argued that the legal personality idea aligns with the Maori legal concept of a personified world.<sup>589</sup> We posited in the context of freshwater that a river could be vested in an ancestor, imbued with legal personality, and with a group then appointed as guardians to fight for the protection of that river. This is a concept that could also have some traction in thinking about an ownership model for a national park. While the legal personality concept is sympathetic to the Maori worldview, I have positioned it below the *whenua topu* idea because the institutional support required to determine who will speak for the environmental ancestors is likely to come from a government department, such as the Ministry for Environment, or, as Morris and I suggest in our article, the Parliamentary Commissioner for the Environment.<sup>590</sup> If the power to represent the environmental ancestors was placed solely in Maori hands, then this legal personality idea should fall higher in the spectrum along with the *tupuna* model.

The last four rungs on the sliding scale are not ones that I recommend as solutions to the contestation of claimed Indigenous ownership of national parks. Nonetheless, they are important to acknowledge because it is often at these points that the Crown is operating. The common law doctrine of native title ‘bundle of rights’ model is one that has found favour with many of the majority judgments in the High Court of Australia.<sup>591</sup> While the Aotearoa New Zealand and Canadian courts have

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<sup>588</sup> See C D Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (1972) 45 S. Cal. L. Rev. 450.

<sup>589</sup> James Morris and Jacinta Ruru, “Giving voice to rivers: legal personality as a vehicle for recognizing Indigenous Peoples’ relationships to water” (2011) 14(2) *Australian Indigenous Law Review* 49.

<sup>590</sup> For information on this office, see: <http://www.pce.parliament.nz/>.

<sup>591</sup> For example, see *Yarmirr*, *supra* note 580.

both accepted theoretically that native title can extend to qualified exclusive ownership,<sup>592</sup> it is possible that in reality they might only go as far as the bundle of rights recognition. Often the bundle of rights model gives Indigenous groups little more than what legislation already provides, for example, consultative rights.

The ‘no-one’ stance is one that is being currently advocated by the National-led government in Aotearoa New Zealand as its most favoured solution to the foreshore and seabed debate. Specifically, it touts the notion that neither the Crown nor Indigenous peoples own the foreshore and seabed because “it cannot be owned, by any person”.<sup>593</sup> This is a potentially neutral take on ownership designed to defuse the contestation.

Moving to the public domain idea, or alternatively it could have been labelled ‘the commons’, this is a position that has found favour amongst some in government in the context of resolving the foreshore and seabed debate in Aotearoa New Zealand. The public domain idea occupies a middle ground where neither the Crown nor Indigenous peoples own the land: it is owned instead by the public. However, with the Crown assuming control of this land, the power imbalance is tipped remarkably against Indigenous peoples.

The bottom rung model is the one that Aotearoa New Zealand, and Canada, have become most familiar with since colonisation: Crown ownership. The Crown asserts ownership of the national parks in Canada, and assumes ownership of the national parks in Aotearoa New Zealand. Indigenous peoples often want movement away from this dominant model. This Crown ownership rung is also aligned with the ‘silent’ model in that in silence the Crown assumes ownership.

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<sup>592</sup> See discussion in chapter 4.

<sup>593</sup> See *Marine and Coastal Area (Takutai Moana) Bill* (introduced 6 September 2010), explanatory note at 2.

The aim of designing this model, and brainstorming its rungs, is to illustrate that there are several options for seeking a reconciled solution to Indigenous contestation of Crown assumed and asserted ownership of lands encased in national park boundaries.

## **VI. CONCLUSION**

This study has so far established that, while there is a new commitment to recognising Indigenous peoples in law, it has meant very little in the context of re-imagining the existing colonial model of Crown ownership of national parks. While this may not be a problem for those Indigenous peoples who have acquiesced to Crown ownership, it is certainly an issue for other Indigenous groups who contest that ownership. If the Crown is serious about achieving long-lasting reconciliation, different ownership models must sit on the negotiating table. In my models of ownership I have collated some ideas for reconfigured ownership. As the next two chapters will show, although there has been movement in recognising Indigenous peoples in managing national parks, without major shifts in ownership, the foundations remain firmly colonial, with strong overtones of colonial space and colonial place ideology. This does not bode well for enduring reconciliation.

## CHAPTER SIX

### *MANAGING NATIONAL PARKS*

#### I. INTRODUCTION

Not that long ago, harakeke (a plant native to Aotearoa New Zealand that grows in an upright fanlike pattern) was essential to Maori well-being. Its leaves gave Maori the means to weave clothing and mats; its fibre was used for ropes and fishing lines and net making; its nectar was used as a food sweetener; and, its gum and boiled roots provided medical relief. With the modern age of shopping malls and supermarkets, the harakeke no longer has a central place in our daily lives for survival, but it remains important spiritually and culturally. The Maori laws surrounding the caring for and harvesting of harakeke continue to be passed on to the younger generations. Sustainable harvesting is non-negotiable. For instance, we are told that at the centre of the harakeke plant lies the baby leaf (the child) who is flanked on both sides by the guardians (the parents). The outside leaves are the grandparents and ancestors. Never is one able to harvest the baby or parent leaves. There are rules on how to cut the leaves and when to cut the leaves. These rules are extensive and essential to understanding Maori identity and culture.

The legal issue at the heart of this chapter queries if ownership has been accepted to lie with the Crown (either in the interim or permanently), then to what extent does the law expect Parks Canada and the Department of Conservation to commit to a rethought reconciliation paradigm? This question is being answered in both Canada and Aotearoa New Zealand in the context of land claims and Treaty settlements and is explored below. But beyond this, there still remains the issue of

what ‘respectful relations’ means now and in the future for interactions between the Crown and Indigenous peoples. This is the focus of this chapter. This imagining is important in many different aspects of society, including in the management of national parks.

First, this chapter begins by briefly explaining what agencies manage national parks and then moves to explore whether there are legislative and national policy directives that guide these agencies in committing to a reconciled future? Reconciliation is obviously important because section 2(2) of the *Canada National Parks Act 2000* states: “For greater certainty, nothing in this Act shall be construed so as to abrogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act 1982*”. As a reminder, section 35 of the *Constitution Act 1982* reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” In Aotearoa New Zealand, section 4 of the *Conservation Act 1987* (the umbrella statute to the *National Parks Act*) states: “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. The second part of this chapter thus focuses on these sections, in particular through discussing the judicial interpretation of these overarching directives.

The third and fourth parts of this chapter move to explore the national park legislation and general policy more broadly through a reconciliation framework. This chapter introduces this reconciliation framework as consisting of seven broad national park management constructions that encapsulate a committed journey towards reconciliation. This framework is founded in the Indigenous legal theory ideas presented in chapter two namely to recognise, Indigenise and decolonise. This

chapter then applies this framework to explore current national park legislative and general policy statement commitments made to the Indigenous peoples in Canada and Aotearoa New Zealand (and the next chapter will apply the framework to explore current management planning intentions as encapsulated in national park management plans). The overriding reason for introducing this framework and conducting this analysis is to determine whether we do in fact have solid foundations to attain reconciliation.

## II. MANAGEMENT OVERVIEW

Pursuant to the *Parks Canada Agency Act 1998*, the Parks Canada Agency is responsible for national parks,<sup>594</sup> including the implementation of policies of the Government of Canada that relate to national parks.<sup>595</sup> The preamble to this Act records the overall commitments to establishing an Agency “for the purpose of ensuring that Canada’s national parks ... are protected and presented for this and future generations and in order to further the achievement of the national interest as it relates to those parks ...”. The preamble then lists 13 points that clarify this commitment to national interest. The most relevant to this study are:

- (a) to protect the nationally significant examples of Canada’s natural and cultural heritage in national parks ... in view of their special role in the lives of Canadians and the fabric of the nation;

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<sup>594</sup> Section 4(1)(a).

<sup>595</sup> Section 6(1).

- (b) to present that heritage through interpretive and educational programs for public understanding, appreciation and enjoyment, both for international visitors and the Canadian public, thereby enhancing pride, encouraging stewardship and giving expression to our identity as Canadians; ...
- (e) to commemorate places, people and events of national historic significance, including Canada's rich and ongoing aboriginal traditions; ...
- (g) to maintain or restore the ecological integrity of national parks; ...
- (k) to provide Canadians with an opportunity to enjoy Canada's special places. ...

At the federal level there is an executive board headed by the Chief Executive Office (currently Alan Latourelle).<sup>596</sup> As the organizational chart below depicts, the Director of Aboriginal Affairs Secretariat sits directly below the CEO. This position was created in 1999 to provide national leadership, direction and support within the Parks Canada Agency on matters relating to Aboriginal relationship building (the current acting Director is Nadine Crooks). The Aboriginal Affairs Secretariat has five key corporate priorities: building meaningful relationships with Aboriginal peoples; creating economic partnerships; increasing programming at parks/sites; enhancing employment opportunities; and commemorating Aboriginal themes.<sup>597</sup> Service

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<sup>596</sup> For an excellent introduction to the management structure of Parks Canada see: Pamela Wright and Rick Rollins, "Managing the National Parks" in Philip Dearden and Rick Rollins (eds) *Parks and Protected Areas in Canada. Planning and Management*. 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2009). See also Paul Kopas, *Taking the Air: Ideas and Change in Canada's National Parks* (Vancouver: UBC Press, 2007).

<sup>597</sup> See Parks Canada website at: <http://www.pc.gc.ca/progs/celebrations/themes/juin-june/secretar.aspx>.

centres and field units are also part of the integral national park management structure.<sup>598</sup>

Turning to Aotearoa New Zealand, pursuant to the *Conservation Act 1987*, the Department of Conservation was created.<sup>599</sup> Its mandate is to advocate and promote the conservation of natural and historic resources.<sup>600</sup> In addition, it has a duty to: administer all Acts listed in the First Schedule of the *Conservation Act*, including the *National Parks Act 1980*; manage for conservation purposes all land and resources held under the Conservation Act; advocate the conservation of natural and historic resources; promote the benefits of conservation to present and future generations; educate and promote material relating to conservation; foster the use of natural and historic resources for recreation and tourism to the extent that this is not inconsistent with conservation; and advise the Minister of Conservation on relevant matters.<sup>601</sup>

The Department is divided into two parts: Head Office and regional conservancies. Head Office constitutes the Director-General (currently Alastair Morrison) six Deputy Director-Generals, including the Maori specific Kaupapa Atawhai Deputy Director-General (currently Tata Lawton).<sup>602</sup> Two regional offices and eleven area conservancies exist.<sup>603</sup> The Head Office develops national policies,

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<sup>598</sup> For an insight into some of these positions see Parks Canada website at: <http://www.pc.gc.ca/agen/empl/emp3.aspx>.

<sup>599</sup> Prior to 1987, national parks were managed by the Department of Lands and Survey.

<sup>600</sup> See *Conservation Act 1987*, s 6(a).

<sup>601</sup> *Conservation Act 1987*, s 6(a) - (g).

<sup>602</sup> For an overview of the Department's work see: Department of Conservation, *Department of Conservation. Annual Report. For the year ended 30 June 2010* (Wellington: Department of Conservation, 2010) available to view at: <http://www.doc.govt.nz/publications/about-doc/annual-report-for-year-ended-30-june-2010/>.

<sup>603</sup> See Department of Conservation website at: <http://www.doc.govt.nz/footer-links/contact-us/office-by-name/>.

provides leadership, and national service and support functions, whereas the day-to-day work is mainly delivered from the regional and conservancy offices. The Deputy Director-General, Kaupapa Atawhai, reports directly to the Director-General and is a member of the executive leadership team. This person sets the overall strategic direction for Department's work with tangata whenua, and provides guidelines and tools for staff to achieve that intent.<sup>604</sup> There exist also Pou Kura Taiao (loosely translated as Indigenous Conservation Ethics Managers) located in each of the Department's conservancy offices. They report directly to the Conservator, and represent, advise, manage and support the Conservator and Conservancy relationships with iwi.<sup>605</sup>

In 1990, additional bodies were established to provide independent advice to the Department: the New Zealand Conservation Authority and conservation boards.<sup>606</sup> The Conservation Authority is intricately involved in conservation planning, policy and management advice.<sup>607</sup> In general its responsibilities can be summarised as including: investigating any nature conservation matters that it considers are of national importance and advising the Minister of Conservation on such matters; considering and making proposals for the change of status of areas of national or international importance; encouraging and participating in educational and publicity activities for the purpose of bringing about a better understanding of nature

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<sup>604</sup> For more information on the role of this position see Department of Conservation website at: <http://www.doc.govt.nz/about-doc/role/Maori/kaupapa-atawhai-role/>.

<sup>605</sup> For more information on these roles see Department of Conservation website at: <http://www.doc.govt.nz/about-doc/role/Maori/kaupapa-atawhai-role/>.

<sup>606</sup> See *Conservation Act 1987*, ss 6A and 6L (as amended by the *Conservation Law Reform Act 1990*).

<sup>607</sup> For more information see the Department of Conservation website at: <http://www.doc.govt.nz/getting-involved/nz-conservation-authority-and-boards/nz-conservation-authority/>.

conservation in New Zealand; and, advising the Minister annually on priorities for the expenditure of money.<sup>608</sup>

Conservation boards provide for interaction between the community and the Department.<sup>609</sup> Like the Conservation Authority, the boards are independent statutory bodies appointed by the Minister of Conservation. In comparison, however, conservation boards operate at the regional level. There are 13 conservation boards each with a defined geographical area with up to 12 appointed members. Each board, for example, has the responsibility of: reviewing, amending and recommending the approval by the Conservation Authority of conservation management strategies; approving, reviewing and amending conservation management plans; advising the Conservation Authority on the implementation of such plans for areas within their jurisdiction; and advising the Conservation Authority on any proposed change of status of any area of national or international importance.<sup>610</sup>

Both Parks Canada and the Department of Conservation, as managers of national parks, now have legislative commitments to recognise, in Canada, treaty and Aboriginal rights, and in Aotearoa New Zealand treaty principles. Current national park law and national park general policy is now assessed within a newly devised reconciliation framework.

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<sup>608</sup> *Conservation Act 1987*, s 6B.

<sup>609</sup> For more information see the Department of Conservation website at: <http://www.doc.govt.nz/getting-involved/nz-conservation-authority-and-boards/conservation-board-information/>.

<sup>610</sup> See *Conservation Act 1987*, s 6M. To view a Department of Conservation structural organisation chart see: Department of Conservation website at: <http://www.doc.govt.nz/about-doc/structure/organisation-chart/>.

### III. THE TREATY AND ABORIGINAL RIGHTS DIRECTIVES

There are specific statutory obligations imposed on Parks Canada Agency and the Department of Conservation to have some level of consideration to treaty and Aboriginal rights. The rights and responsibilities that the present national park law and policy permits in regard to Indigenous Peoples involvement have developed against a background of, in Canada, section 35 of the *Constitution Act* and the land claims process, and, in Aotearoa New Zealand, the Treaty of Waitangi and the Treaty settlement process. Chapter four focused on exploring this material in general. This chapter moves to discuss these commitments in a more specific manner focusing on the management of national parks.

As stated at the outset of this chapter, in Canada, section 2(2) of the *Canada National Parks Act 2000* states: “For greater certainty, nothing in this Act shall be construed so as to abrogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act 1982*”. Section 35 of the *Constitution Act 1982* reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” In Aotearoa New Zealand, section 4 of the *Conservation Act 1987* (the umbrella statute to the *National Parks Act*) states: “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. Section 4 is pitched in the positive (“shall so be interpreted”) compared to the negative wording of section 2(2) of the *Canada National Parks Act 2000* (“nothing in this Act shall be construed”).

In Aotearoa New Zealand, the national park legislation, namely the *National Parks Act* and the *Conservation Act*, must be interpreted and administered as to give

effect to the principles of the Treaty of Waitangi. The Department of Conservation has developed eight guiding ‘Treaty principles’, stated as to: 1) recognise the Crown’s authority to make laws for the good order and security of the country; 2) recognise the right of Maori to exercise Iwi authority and control over their own land, resources and taonga; 3) recognise the rights of Maori and non-Maori alike to equality of treatment and privileges of citizenship; 4) act reasonably and in good faith; 5) make informed decisions; 6) where appropriate and to the fullest extent practicable, to take active steps to protect Maori interests; 7) avoid action which would create new Treaty grievances; and, 8) avoid actions which would prevent redress of claims.<sup>611</sup>

The Department of Conservation interprets the section 4 directive to mean that Treaty principles can be trumped by a provision in the legislation where there is a clear inconsistency between the two.<sup>612</sup> If there are no inconsistencies, then the commitment to give effect to the Treaty principles requires that relationships will be sought and maintained with Maori and these relationships will be based on “mutual good faith, cooperation and respect”.<sup>613</sup> There is legal support for this as is discussed below. In Canada, the courts have developed a similar ‘out’ for Government. While section 35 of the *Constitution Act* provides a mandatory direction, and is even a form

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<sup>611</sup> See any of post-2000 published national park management plans, and Jacinta Ruru “Managing Our Treasured Home: The Conservation Estate and the Principles of the Treaty of Waitangi” (2004) 8 New Zealand Journal of Environmental Law 243.

<sup>612</sup> Department of Conservation, *General Policy for National Parks* (Wellington: Department of Conservation, 2005). This Policy can be viewed on the Department of Conservation website at: <http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/general-policy-for-national-parks/>. See also Department of Conservation, *Conservation General Policy*, May 2005, at 15. Note: this stance is consistent with the judicial interpretation of the Treaty: see *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) (this case is discussed further in this chapter).

<sup>613</sup> *Ibid*, at 16, policy 2(a).

of supreme law, the Government is permitted to infringe on the constitutional rights of Indigenous peoples if the proposed action is ‘justified’.<sup>614</sup>

To date, the courts in both jurisdictions have had some (but not many) opportunities to explore in depth these legislative ramifications within the specific context of national parks. The existing case law is now discussed focusing on Canada first, then Aotearoa New Zealand.

### **A. Judicial interpretation of section 2(2) of the Canada National Parks Act 2000**

The most relevant case concerning Aboriginal peoples and national parks is the *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*<sup>615</sup> Supreme Court of Canada case. This case, decided 24 November 2005, concerned the process for the proposed placement of a winter road and its 200-metre no firearm corridor to track the boundary of the Peace Point First Nations reserve that lies within the boundaries of the Wood Buffalo National Park. At issue were what rights Mikisew

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<sup>614</sup> As emphasised in s. 35 case law, including *Delgamuukw*, *supra* note. For an overview of the court’s position see: Kathryn L Kickbush and Debbie Chan, ‘Provincial Legislation to Infringe Aboriginal Rights’ (2005) 63(6) *The Advocate* 881. For an explicit discussion on conservation-oriented regulation as a justifiable infringement on Aboriginal rights to hunt, see Lisa M. Shields, ‘Are Conservation Goals and Aboriginal Rights Incompatible?’ (2001) 10 *Journal of Environmental Law and Practice* 187; Shaun Fluker, ‘“Maintaining ecological integrity is our first priority” – policy rhetoric or practical reality in Canada’s National Parks? A case comment on *Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)*’ (2004) 13 *Journal of Environmental Law and Practice* 131.

<sup>615</sup> 2005 CarswellNat 3756, 2005 SCC 69, 259 D.L.R. (4<sup>th</sup>) 610, [2006] 1 C.N.L.R. 78, 21 C.P.C. (6<sup>th</sup>) 205, 37 Admin. L.R. (4<sup>th</sup>) 223, [2005] 3 S.C.R. 388, 342 N.R. 82. For discussion of the lower court decisions on this case see: Dayna Nadine Scott, ‘Standing in the Road: The Battle for Wood Buffalo National Park’ (2004) 13 *Journal of Environmental Law and Practice* 145.

had under Treaty 8 to be consulted in the placement of this road. Mikisew argued that the construction of the road and the corridor would adversely affect their rights to hunt, fish and trap and that therefore the duty to consult was triggered. The Supreme Court agreed. Justice Binnie, for the Court, held that the “Crown has a treaty right to ‘take up’ surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew”.<sup>616</sup> The Court grounded this finding in the honour of the Crown and its associated duty to consult principle.

The *Mikisew* decision clearly recognises the continuing Indigenous place of the lands encased within Wood Buffalo National Park: it has been “inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living hunting, fishing and commercial trapping within the Park boundaries”.<sup>617</sup> The Court explicitly recognised the impact of signing Treaty 8 in 1899: “It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price”.<sup>618</sup> Moreover, the Court set its judgment firmly within the context of reconciliation and recognised this as an evolving aspiration that began in this instance in 1899 with the signing of the treaty but that was the “first step in a long journey that is unlikely to end any time soon”.<sup>619</sup>

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<sup>616</sup> *Ibid*, at para [55].

<sup>617</sup> *Ibid*, at para [6].

<sup>618</sup> *Ibid*, at para [52].

<sup>619</sup> *Ibid*, at para 56. For discussion of this case within the context of consultation: see Heather L. Treacy, Tara L. Campbell, and Jamie D. Dickson, “The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development” (2007) 44(3) *Alberta Law Review* 571.

Another instrumental case is the Federal Court of Canada decision, *Moresby Explorers Ltd. v. Canada (Attorney General)*, where this court held in 2007 that the Archipelago Management Board for the Gwaii Haanas National Park Reserve and Haida Heritage Site was capable of limiting non-Haida tour operators access to the park.<sup>620</sup> As the Court put it “In the end the question is whether the allocation of access to the Park between Haida and non-Haida tour operators is contrary to public policy”.<sup>621</sup> The Court held no. This is because:<sup>622</sup>

Discrimination on the basis of race is contrary to public policy when the discrimination simply reinforces stereotypical conceptions of the target group. However, there is legislative support for the proposition that discrimination designed to ameliorate the condition of a historically disadvantaged group is acceptable.

In a judgment dated 17 December 2010, the New Brunswick Provincial Court heard a case where a father and son had been charged with offences relating to unauthorised harvesting of soft-shelled clams within the Kouchibouguac National Park.<sup>623</sup> The father and son admitted to the facts but claimed a constitutionally protected right under section 35 of the *Constitution Act, 1982* as Métis to fish for food within the park. The case turned on whether a distinctive Métis community ever emerged in the relevant area and if so, whether such a community continued over time

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<sup>620</sup> *Moresby Explorers Ltd. v. Canada (Attorney General)* (F.C.A.), 2007 FCA 273, [2008] 2 F.C.R. 341, available to view here <http://reports.fja.gc.ca/eng/2008/2007fca273.html>.

<sup>621</sup> *Ibid*, at para [30].

<sup>622</sup> *Ibid*, at para [31].

<sup>623</sup> *Canada v Vautour* 2010 CarswellNB 620, 2010 NBPC 39, [2011] 1 C.N.L.R. 283, 949 A.P.R. 201, 368 N.B.R. (2d) 201.

with rights that might be exercised within the park.<sup>624</sup> The Court answered no and held “... a constitutionally protected aboriginal right cannot be rooted a community that never had any visibility”.<sup>625</sup> And, so, the claimed constitutional right to take clams was not explored.

There are several cases that concern national parks generally (not issues arising under section 2(2)). For example, there is a 2008 Canadian Public Service Labour Relations Board case that concerned what matters can be included in an essential services agreement for Parks Canada staff.<sup>626</sup> The employer, Parks Canada, argued that it could not impede the public’s access to the Pukaskwa National Park of Canada and as custodians of the park, it must ensure that people are safe within the park. As part of this discussion and as evidence of a right of access, the Board recognised that “[M]embers of two nearby First Nations have a right of access to the park, including the right to exercise treaty rights (hunting, fishing and trapping) within the park”.<sup>627</sup> Of interest, in obiter dicta, the Board later observed that the “[T]he issue of a right of access to the park by virtue of aboriginal treaty is also salient. At the very least, no evidence was placed before the Board that the employer could lawfully interfere with the presence in the park of those First Nations’ members to whom treaty rights apply, even if the park is formally closed to the rest of the public”.<sup>628</sup>

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<sup>624</sup> *Ibid*, at para [4].

<sup>625</sup> *Ibid*, at para [79].

<sup>626</sup> *P.S.A.C. v Parks Canada Agency* 2008 CarswellNat 4697, 2008 CRTFP 97, 2008 PALRB 97.

<sup>627</sup> *Ibid*, at para 39.

<sup>628</sup> *Ibid*, at para 199.

## B. Judicial interpretation of section 4 of the Conservation Act 1987

To date there has been no case directly contesting the application of section 4 of the Conservation Act in national parks. There are cases that explore section 4 in the wider conservation estate and these cases are now discussed because they illustrate an interesting emerging jurisprudence.

An early case to consider the actual wording of section 4 of the Conservation Act was *Re Pouakani Block Application*,<sup>629</sup> a decision made by the Maori Land Court in 1988. This case concerned a dispute between a Maori land-owning trust and the Department of Conservation, as to land block boundaries bordering a Forest Park. Hingston J concluded:<sup>630</sup>

I am of the view that s 4 of the Conservation Act 1987 imposes an obligation on the Crown to ... act fairly, to ensure that the Maori people to be effected [sic] by any negotiations are properly represented. This at the very least, would require the Crown undertaking to meet the applicants [sic] legal and other costs irrespective of the outcome of negotiations. As well "partnership" means both parties together strive for an equitable solution and not approach the discussions as opponents. It may be difficult for those of us born to, and trained in the adversary method of solving problems to accept that there is another way - be that as it may - it has to be tried.

The most significant case specific to the section 4 directive in the Conservation Act is the Court of Appeal's *Ngai Tahu Maori Trust Board v Director-General of*

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<sup>629</sup> *Re Pouakani Block Application* (1988) 65 Taupo MB 1 (9/6/88, Judge Hingston) (MLC).

<sup>630</sup> *Ibid*, at para [11] (original emphasis).

*Conservation*<sup>631</sup> decision. Commonly referred to as the ‘whale watch case’, this 1995 decision clarified a significant point: the section 4 directive has relevance not solely to the Conservation Act, but also to those statutes listed in its First Schedule. More than twenty statutes appear in the First Schedule including the statute relevant to this case, the *Marine Mammals Protection Act 1978*. Other statutes listed include the *National Parks Act 1980*, *Reserves Act 1977* and the *Wildlife Act 1953*. Yet the Court confined the ramifications of its section 4 findings on two fronts. While it accepted that a statute listed in the First Schedule should be interpreted and administered so as to give effect to the Treaty principles, this should only occur where the statute does not contain an internal reference to the Treaty and then only to the extent that the provisions in the statute are not clearly inconsistent with the Treaty principles.

In other words, confronted with any clear conflict between a provision in a statute like the *Marine Mammals Protection Act 1978* and a Treaty principle, the provision in the statute trumps the Treaty principle and the Treaty principle loses. As will be shown in the study below, Department policy documents have embraced the Court of Appeal’s reading of section 4 in the whale watch case. To date this interpretation has not been challenged in the higher courts as to whether it is correct or not. Undoubtedly, the interpretation as it stands dilutes in real terms the impression first gained from the strongly worded ‘to give effect to’ section 4 direction.

The whale watch case extracted several Treaty principles relevant to the conservation estate. The Crown’s right and duty to govern was emphasised – the rights and interests of everyone in New Zealand, Maori and Pakeha and all others alike, must be subject to the overriding authority in Parliament to enact

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<sup>631</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

comprehensive legislation for the protection and conservation of the environment and natural resources.<sup>632</sup> The Crown's fiduciary duties owing to Maori and Maori rights to exercise tino rangatiratanga (unqualified exercise of chieftainship over their lands) were restated in reference to previous judicial decisions.<sup>633</sup> Emphasised was the point that the Treaty principles "require active protection of Maori interests" and "to restrict this to consultation would be hollow".<sup>634</sup> Moreover, the Crown and Maori must act as reasonable Treaty partners, and Maori have a right of development. The stated principles were entirely consistent with the Treaty jurisprudence being developed at that time in the courts in cases like the Court of Appeal state-owned enterprises 1987 case discussed above.<sup>635</sup>

In 2002, the High Court, *Te Waero v Minister of Conservation and Auckland City Council*,<sup>636</sup> considered whether the Minister of Conservation was required by section 4 to consult with a specific iwi when classifying public land as recreation reserves under the *Reserves Act 1977* (an Act listed in the First Schedule of the *Conservation Act* like the *Marine Mammals Protection Act 1978*). Harrison J stated: "consultation is not of itself a discrete, substantive Treaty principle".<sup>637</sup> Rather, the need to consult

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<sup>632</sup> *Ibid*, at 558.

<sup>633</sup> *Ibid*, at 558-559.

<sup>634</sup> *Ibid*, at 560.

<sup>635</sup> The scope of this thesis does not allow for an examination of the courts' decisions relating to Treaty principles decided using legislation other than the Conservation Act 1987. However, for a more general discussion of this jurisprudence: see Boast, R., "The Treaty of Waitangi. A Framework for Resource Management Law" (1989) 19 *Victoria University of Wellington Law Review Monograph* 1 469, and Te Puni Kokiri, Ministry of Maori Development. *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*. (2001).

<sup>636</sup> *Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council* (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) (HC).

<sup>637</sup> *Ibid*, at para 61.

arises only when a Treaty interest has been identified. Harrison J held that there were no specific Treaty principles relevant to the classification decision in this case.<sup>638</sup> Thus, there was no need to consult.<sup>639</sup> However, Harrison J observed in obiter that “The Department should have had a mechanism in place for specifically identifying any Treaty interests which may be relevant and thus should be taken into account by the Minister when considering classification.”<sup>640</sup> Although this was an important ‘rap on the knuckles’ for the Department, the Justice’s choice of words is interesting. ‘Take into account’ is the threshold test for decision makers acting, for example, under the Resource Management Act,<sup>641</sup> but it is not the test for those operating under the Conservation Act where to ‘give effect to’ is the threshold test.

Another case that discussed section 4 is *McRitchie v Taranaki Fish and Game Council*.<sup>642</sup> In 1998, the majority of the Court of Appeal in deciding the *McRitchie* case held that Maori have no customary fishing rights to take trout. In reaching this conclusion several statutes were examined, including the *Conservation Act*. While the then President of the Court Richardson P cited section 4 in his opening statement of the majority judgment, the section was not thereafter discussed. However, Thomas J, in his dissenting judgment, examined section 4 at length, along with another

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<sup>638</sup> *Ibid*, at para 70.

<sup>639</sup> This case aligns with other judicial discussions, for example, see *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau* [2002] 2 NZLR 349 paras 27-31. While Justice Heath in this case summarised Treaty principles, consultation is not included. Instead, he states that the duty to consult arises out of the relationship of Treaty partners, see paras 27-31.

<sup>640</sup> *Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council* (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) (HC), at para 67.

<sup>641</sup> *Resource Management Act 1991*, s 8.

<sup>642</sup> *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA).

provision in the Act, section 26ZH. This section states: “Nothing in this Part of this Act shall affect any Maori fishing rights”. Thomas J stated:<sup>643</sup>

Section 4 recognises the fundamental constitutional status of the treaty, and it and s 26ZH are not to be demeaned. Parliament should not be thought to have enacted these provisions as mere window-dressing. If, therefore, it is found that the guarantee of “their ... Fisheries” to Maori under the treaty includes the right to fish for food, irrespective of the species inhabiting the particular fishery, s 4 requires effect to be given to that guarantee. It requires the Act to be “interpreted” as well as administered to give effect to the principles of the treaty.

However strong, this statement still only comprises part of the dissenting judgment, and has not yet been picked up on in later cases.

Turning now to the Waitangi Tribunal, it has the functions of investigating claims of Crown breaches of Treaty principles and recommending redress. It has measurably advanced the discussion and understanding of the Treaty principles in the conservation realm.<sup>644</sup> Hence, the Tribunal has more clearly articulated to what extent the law expects the Department to commit to a rethought reconciliation paradigm. In summary, the Tribunal’s position is manifest in two ideas. First: the section 4 expression means that while the Crown has a right to govern, this right is qualified by the Maori right to exercise rangatiratanga (self-determination). Although in exceptional circumstances the Crown may override this fundamental right of

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<sup>643</sup> *Ibid*, at 162.

<sup>644</sup> For a detailed discussion of the Tribunal’s reports concerning the environment see Wheen, N. and J. Ruru, “The Environmental Reports”, in J Hayward and N Wheen (eds) *The Waitangi Tribunal. Te Roopu Whakamana i te Tiriti o Waitangi* (Wellington, Bridget Williams Books, 2004).

rangatiratanga, it may only do so as a last resort and if this is in the national interest. However, the "national interest in conservation is not a reason for negating Maori rights of property".<sup>645</sup> Second: if the resource in question is highly valued and of great spiritual and physical importance, then it is to be considered a taonga, and the Crown is under an affirmative obligation to ensure its protection to the fullest extent reasonably practicable.<sup>646</sup>

The Tribunal has progressed its first idea (that kawanatanga (governership) is generally subject to rangatiratanga) to a level where the courts, including the Court of Appeal, have not gone. The Tribunal has emphasised that cession of sovereignty to the Crown by Maori was qualified by the retention of tino rangatiratanga. Referred to as the leading Treaty principle, or the overarching and far-reaching Treaty principle, is the Tribunal's finding that: "Maori ceded sovereignty to the Crown in exchange for the protection by the Crown of Maori rangatiratanga".<sup>647</sup> The Tribunal has therefore been able to reach a level of comprehension between the rights, concluding that while the Crown has a right to govern, it must be proven to be in the national interest before governance is used to override an exercise of tino rangatiratanga.

While the Court of Appeal in the whale watch case recognised the Crown's right to govern and the Maori right to exercise tino rangatiratanga, it did not consider how the two should operate together. Instead it focused on the first right, the Crown's governance right: "The rights and interests of everyone in New Zealand, Maori and

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<sup>645</sup> Waitangi Tribunal, *The Whanganui River Report*. (Wai 167, 1999), at 330.

<sup>646</sup> See Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*. (Wai 153, 1993), and Waitangi Tribunal, *Mohaka River Report*. (Wai 119, 1992).

<sup>647</sup> Waitangi Tribunal, *Te Whanganui A Tara Me Ona Takiwa. Report on the Wellington District*. (Wai 145, 2003), at 74. For another example, see Waitangi Tribunal, *The Mohaka Ki Ahuriri Report*. (Wai 201, 2004), at 21.

Pakeha and all others alike, must be subject to that overriding authority”.<sup>648</sup> Even though it emphasises kawanatanga, it skips how kawanatanga, as an overriding authority, might relate to the right to exercise tino rangatiratanga. It simply focused on fiduciary duties, active protection, good faith and so on – in other words, how the Treaty parties should operate towards one another. It did not turn on what a right of tino rangatiratanga encompassed nor how it could operate alongside a Crown right to govern.

The Tribunal and the Court of Appeal’s understandings of the Treaty fail to mirror each other essentially because the Tribunal says kawanatanga is subject to rangatiratanga, whereas the Court of Appeal says rangatiratanga is subject to kawanatanga. A future re-examination of the Court of Appeal’s decision may disrupt the Court’s interpretation that other legislative provisions override Treaty principles. This would only succeed however, if the courts developed the Tribunal reasoning and accepted that the national interest in conservation is not a reason for negating Maori rights of property. For example, it would have to hold that any inconsistency between a policy directive, such as conservation or preservation, should give way to a Treaty principle. It is certainly arguable that this should be the true interpretation of the strongly worded section 4 directive to give effect to the principles of the Treaty. However, the majority judgment in the *McRitchie* case at any extent does not suggest movement in this direction – in fact, it is silent on the implication of section 4. Moreover, the Waitangi Tribunal jurisprudence is of course not binding on the courts. Even though the courts have stated that the Tribunal’s opinions “are of great value to

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<sup>648</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 558.

the Court”,<sup>649</sup> and “are entitled to considerable weight”,<sup>650</sup> the courts are free to dismiss these Tribunal statements.

Nonetheless, in regard to the second part of the Tribunal’s position, there appears to be more alignment between the Court of Appeal and the Tribunal. Both seem to accept that the requirement for a natural resource or activity must fall within the category of a taonga before the Crown should be subjected to certain duties to protect it. The Court of Appeal appears prepared to read taonga broadly: “Although a commercial whale-watching business is not taonga or the enjoyment of a fishery within the contemplation of the treaty, certainly it is so linked to taonga and fisheries that a reasonable treaty partner would recognise that treaty principles are relevant.”<sup>651</sup>

Moreover, as I complete writing this thesis, the Waitangi Tribunal has just released arguably its most powerful critique of the Department of Conservation in its *Ko Aotearoa Tenei* report.<sup>652</sup> It is important to spend a moment here discussing this report (the wider reconciliation ideas incorporated into this report will be discussed in the final chapter of this study). In *Ko Aotearoa Tenei* positions that partnership is the intellectual framework for understanding the principle of the Treaty of Waitangi and thus:<sup>653</sup>

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<sup>649</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), at 662.

<sup>650</sup> *Moana Te Aira Te Uri Karaka Te Waero v The Minister of Conservation and Auckland City Council* (HC, Auckland, M360-SW01, 19 February 2002, Harrison J) (HC), at para 59.

<sup>651</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA), at 560.

<sup>652</sup> Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Waitangi Tribunal, Wai 262, July 2011)

<sup>653</sup> *Ibid*, at 324.

[T]he department must be looking for partnership opportunities in everything that it does. ... opportunities to share power with tangata whenua should be a core performance indicator for the department rather than ... the exceptional outcome driven by the wider pressures of Treaty settlements it now is.

The Tribunal stated that the Department “must take a broad and unquibbling approach, one that is based on forward-looking partnership, not on damage control”.<sup>654</sup> One conclusion reached by the Tribunal reads that the *General Conservation Policy* and *General Policy for National Parks*:<sup>655</sup>

Must be amended to reflect the full range of relevant Treaty principles as articulated by the courts. The terms of section 4 plainly make that mandatory. Indeed DOC’s failure to include these in its lead general policy documents probably renders those documents in breach of that section. While Treaty principles as articulated by the Tribunal do not bind the department as a matter of law, it would be unduly restrictive for the department to treat them as irrelevant to its work.

The enactment of the section 4 directive recognised, at long last, the relationship Maori have with the conservation estate landscapes and the guarantees agreed to in the Treaty of Waitangi. In the jurisprudence since developed, there remains potential for further clarification of the exact effect of section 4. In particular, the Waitangi Tribunal has strongly critiqued the current interpretation of this section.

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<sup>654</sup> *Ibid*, at 324.

<sup>655</sup> *Ibid*, at 324.

In summary, the current legislation in Canada and Aotearoa New Zealand recognises an overarching commitment to respect Aboriginal and treaty rights and thus provide a platform for reconciliation. These legislative provisions have provided some relief for the Aboriginal peoples of Canada namely for Mikisew for stopping the building of a road within a park. Other than this example, the statutory commitments remain untested in both countries. This chapter now moves to explore the broader national park legislation, including other specific legislative commitments to Indigenous peoples, and does so within a seven pronged reconciliation framework.

#### **IV. INTRODUCING A RECONCILIATION FRAMEWORK**

There has been much work on co-management, including advocating co-management of national parks. One of the general leading works on inclusive management is Sherry Arnstien's ladder of citizen participation.<sup>656</sup> Arnstien's eight-rung ladder is intended to highlight that "citizen participation is a categorical term for citizen power" and that "Knowing these gradations makes it possible to cut through the hyperbole to understand the increasingly strident demands for participation from the have-nots as well as the gamut of confusing responses from the powerholders". At the bottom end of the ladder are 1) manipulation; and 2) therapy. These are categorised as non-participation. The next rungs are: 3) informing; 4) consultation; and, 5) placation. These are categorised as tokenism. The top rungs are: 6) partnership; 7) delegated power; and 8) citizen control. These are labelled as equating to citizen power. The

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<sup>656</sup> Sherry R. Arnstein, "A Ladder of Citizen Participation" (1969) 35(4) *JAIP* 216. This article was reprinted in Richard T. Gates and Frederic Stout (eds) *The City Reader* 2nd ed (Routledge Press, 1996). The article can be viewed at: <http://lithgow-schmidt.dk/sherry-arnstein/ladder-of-citizen-participation.html>.

ladder is incredibly useful in generating deeper understandings of power relations and offers by the power-holders to relinquish some power most of which often falls, at best, within the tokenism field.

Nonetheless, in the context of Indigenous peoples, Indigenous peoples are not simply ordinary citizens or even interested stakeholders. Indigenous peoples are more than this. The lands lying in national parks are their ancestral lands, often intricately linked to the very essence of Indigenous identity and thus cultural survival. Thus, in the context of Indigenous peoples, the end goal is not citizen control. This is because Indigenous peoples have been swamped in their lands by other peoples that now constitute as an overwhelming majority of the population. An essential issue therefore for Indigenous peoples is not merely power sharing within the context of management, but a reconfiguration of the power-holder's actual right to wield that power. As I asserted in chapter five, the question thus becomes one of rights of ownership. In the context of management, I further assert that it comes down to three essential actions: to recognise lands as Indigenous place with Indigenous heritage; to Indigenize the lands with once again permitting Indigenous languages, Indigenous knowledge systems, Indigenous uses and Indigenous enterprises to flourish; and, to decolonize how lands are managed by encouraging Indigenous decision-making. While recognizing the value in Arnstein's ladder in the context of better understanding the movement from tokenism to citizen power, I have chosen, in the context of Indigenous peoples, to introduce and apply my own (the Ruru) ladder that illustrates the journey towards reconciliation, through Indigenous recognition, Indigenization and decolonisation.

In chapter two, based on the work of Indigenous scholars, I identified the Indigenous challenge to the legal system of exposing the cultural monopoly in

Western law. I argued that interwoven into this challenge are three platforms for action that I articulated as recognise, Indiginise and decolonise. This framework for achieving true reconciliation includes recognising that Indigenous peoples have a distinct and different worldview and accepting that Indigenous peoples want to live their lives, not in “someone else’s dream world”<sup>657</sup> but in their own. Moreover, as stated by John Borrows, “Locating Indigenous accounts of law within and beside Western interpretations of contemporary customary law encourages more inclusive democratic conversations”.<sup>658</sup> A movement such as this within the national park management field would contribute to achieving decolonised societies.

This chapter uses this theoretical base to categorise the legislative national park management commitments made to Indigenous peoples. To my mind, there are seven broad national park management constructions that encapsulate a committed journey towards reconciliation. The following table is intended to help conceptualize and visualise my proposed reconciliation framework.

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<sup>657</sup> James (Sakej) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 *Indigenous Law Journal* 1, at 16.

<sup>658</sup> John Borrows, *Recovering Canada. The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 35.

**Table 3. The Reconciliation Framework (the Ruru Ladder)**



I believe that it is useful to then place these seven constructions within the reconciliation three-tiered framework of to recognise, Indigenize, and decolonise.

First, I have positioned Indigenous place and Indigenous heritage within the recognition category because I believe that these two fundamental components lay the foundation for initial reconciliation. This assessment will query whether the national park legislation recognises the fact of Indigenous place and Indigenous heritage and if so how. There are several interesting statutory tools that are being developed to recognise Indigenous place and Indigenous heritage that support a core theme in this study, that law is social and thus capable of being manipulated to reflect reconciliation dreams.

Second, I have positioned Indigenous language, Indigenous knowledge systems,<sup>659</sup> Indigenous use, and Indigenous enterprise initiatives within the Indigenize category. I believe that these initiatives require more active involvement than simply recognising Indigenous place and heritage. A legislative commitment to these four initiatives begins a journey that re-Indigenises how peoples view and interact with lands within national park boundaries. I will explore to what extent the law permits and encourages national park managers to utilise Indigenous language and knowledge, permit Indigenous use of flora and fauna and encourage Indigenous employment and enterprise within national parks.

Third, I have positioned only one initiative – Indigenous decision-making – within the decolonisation category. I believe that if the law makes commitments to embracing and equally valuing (or sometimes even preferring) Indigenous decision-making in the management of national parks, then the law has moved from the Indigenise project to a place that reconstructs power relationships: decolonisation. It is at this stage that commitments to shared management, comanagement, cooperative management or joint management aspirations transpire. At this chapter now explores, the law in Canada and Aotearoa New Zealand has begun to permit some opportunities for Indigenous peoples to exert some management influences. As will become apparent the excursion towards decolonised reconciliation has begun but remains for the most part primitive.

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<sup>659</sup> For a discussion of the importance and value of Indigenous knowledge systems see, for example, the contributions in Charles R. Menzies (ed), *Traditional Ecological Knowledge and Natural Resource Management* (Lincoln: University of Nebraska Press, 2006)

## IV. APPLYING THE RECONCILIATION FRAMEWORK

This chapter now turns to apply the reconciliation framework to explore current legislative and general policy statement commitments made to the Indigenous peoples in Canada and Aotearoa New Zealand. The reconciliation framework assessment helps to deeper investigate these broad commitments and provides a platform against which to better understand where current national park law and policy is at with engaging with Indigenous peoples.

### A. Recognise

A beginning point in reconciliation involves recognising Indigenous peoples as peoples (not as savages) and that Indigenous peoples had developed a complex ordered place before the arrival of Europeans. Does the legislative framework and national policy guidelines for national parks portray an intention to recognise Indigenous place and Indigenous heritage?

#### *Legislative purpose for national parks*

Section 4(1) of the *National Parks Act* declares that national parks must be preserved in perpetuity:<sup>660</sup>

for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive

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<sup>660</sup> Section 4(1).

quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest.

Section 4(1) of the *Canada National Parks Act 2000* reads:

The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

Distinctly missing from these declared purposes is expressed provision for the spiritual, cultural and historic relationship Aboriginal peoples have with land, such as mountains, within the national park estate. This is a significant oversight. Aboriginal peoples and Maori have extensive connections with lands contained within national parks. It is disappointing that this association is not expressly identified as a further reason for why land within a national park should be protected. There is thus no legislative recognition at this high level that national park lands are often the homelands of Indigenous peoples: Indigenous place and Indigenous heritage.

#### *Other legislative tools?*

While the statutory purpose for national parks does not recognise the fact of Indigenous place or Indigenous heritage, other legislative tools particularly developed in Aotearoa New Zealand provide some specific acknowledgements.

Three novel legislative tools have been implemented in Aotearoa New Zealand that recognise Indigenous place and Indigenous heritage of specific national

parks. These tools relate to Ngai Tahu as a result of the *Ngai Tahu Claims Settlement Act 1998*.<sup>661</sup> First, the provision in this Act that permits the vesting of Aoraki/Mount Cook (the centrepiece mountain of the Aoraki/Mount Cook National Park) in Te Runanga o Ngai Tahu for a period of seven days is a clear example of Indigenous place recognition.<sup>662</sup> Second, the *Ngai Tahu Claims Settlement Act* declares specific areas within national parks to be Topuni areas. The Topuni device is used to acknowledge "Ngai Tahu values"<sup>663</sup> which is further defined to mean the Ngai Tahu cultural, spiritual, historic, and traditional association with a Topuni.<sup>664</sup> The legal significance of a Topuni is that Ngai Tahu values are afforded a certain measure of protection. One example of this is that the New Zealand Conservation Authority or any conservation board must consult with Te Runanga o Ngai Tahu and "have particular regard to its views as to the effect on Ngai Tahu values of any policy, strategy, or plan" in regard to specific Topuni sites.<sup>665</sup>

Third, the *Ngai Tahu Claims Settlement Act* introduces a statutory acknowledgement regime. The statutory acknowledgements regime operates by the Crown acknowledging statements made by Te Runanga o Ngai Tahu in regard to its cultural, spiritual, historic, and traditional association with certain landscapes such as Aoraki/Mount Cook.<sup>666</sup> Statutory acknowledgements have the legal effect of

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<sup>661</sup> Many provisions in the Act are aimed at cultural redress, restoring Ngai Tahu's ability to give practical effect to its kaitiaki (guardian) responsibilities. For a discussion see the Ngai Tahu website at [www.ngaitahu.iwi.nz/office-claim-cultural-overview.html](http://www.ngaitahu.iwi.nz/office-claim-cultural-overview.html).

<sup>662</sup> For discussion of this legislative tool, see discussion in the prior chapter 5 of this study.

<sup>663</sup> Section 237.

<sup>664</sup> *Ibid.*

<sup>665</sup> Section 242.

<sup>666</sup> See Schedule 14. It explains the genealogical traditions that link Ngai Tahu with Aoraki/Mount Cook and the continued special importance that the area has to Ngai Tahu. For example, it states "The meltwaters that flow from Aoraki are sacred. On special occasions of

requiring authorities, such as the Department of Conservation, to "have regard"<sup>667</sup> to the association Ngai Tahu have with the area. It empowers a Minister of the Crown to enter into deeds of recognition.<sup>668</sup> In regard to Aoraki/Mount Cook a deed has been entered into thus requiring the Minister responsible for managing the statutory acknowledged area to consult with Te Runanga o Ngai Tahu and "have particular regard" to its views in relation to the management or administration of such areas.<sup>669</sup> However, the effects of the provisions are limited, as has been accepted by the Environment Court where it stressed "While recognising the real psychological and cultural importance of these statutory acknowledgements their main legal purpose seems to be procedural and/or consultative".<sup>670</sup>

While the topuni and statutory acknowledgement tools have been applied in other Treaty of Waitangi settlement statutes in relation to the conservation estate, the Ngai Tahu settlement is so far the only one to touch specifically on national parks. The Ngai Tahu provisions do provide evidence of legislative acceptance of national parks as important Indigenous places. However the recognition is managerially weak because these tools are not mandatory in nature.

In summary, overall, there is little legislative acceptance that national parks are Indigenous place with Indigenous heritage. This is extremely disappointing. It is difficult to envisage any real progress towards reconciliation without these

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cultural moment, the blessings of Aoraki are sought through taking of small amounts of its 'special' waters, back to other parts of the island for use in ceremonial occasions".

<sup>667</sup> Section 215(b).

<sup>668</sup> Section 215.

<sup>669</sup> Section 216. To cite a copy of the Deed of Recognition for Aoraki see *Aoraki/Mount Cook* supra n at appendix c.

<sup>670</sup> *Kemp & Billoud v Queenstown Lakes District Council* [2000] NZRMA 289 (EC NZ) at 310. See s 217(b).

fundamental recognitions. Even though contemporary national park management plans all now recognise the facts of Indigenous place and Indigenous heritage as will be shown in the next chapter, it may be some time before the law will do so. This is because any legislative recognition of national parks being prior Indigenous place will strengthen Indigenous peoples claims against the Crown for either ownership of national parks or compensation for accepting Crown ownership. That is, the issue is deeply political.

## **B. Indigenise**

It is essential that Indigenous peoples have the opportunity to be Indigenous. Does the legislative framework and national policy guidelines allow Indigenous peoples the opportunities to be themselves – to speak their own languages, apply their own knowledge in looking after the lands, apply their own rules in when and how to use flora and fauna within national parks boundaries, and to financially benefit directly from the lands through their own enterprises?

There are few legislative commitments relating to three of the four Indigenize platforms: Indigenous language, Indigenous knowledge and Indigenous enterprise. Nonetheless there are growing national park management planning intentions relating to these and will be discussed in detail in the next chapter. At this stage, the one point that does attract legislative and general policy commitments is Indigenous use. But first an overview of the other three points.

*Indigenous language, knowledge and enterprise*

Not many legislative directives exist for using Indigenous language or knowledge, and supporting Indigenous enterprise in national park legislation in Canada and Aotearoa New Zealand. Some national parks have been created with Indigenous names, most not. Some parks have been renamed through land claim and treaty claim settlements, for example Mount Cook National Park became Aoraki/Mount Cook National Park pursuant to the Ngai Tahu Claims Settlement Act 1998. There is this general policy directive in Aotearoa New Zealand that supports the use of te reo Maori (the Maori language):<sup>671</sup>

2(h) Public information and interpretation, where it refers to places or resources of spiritual or historical and cultural significance to tangata whenua, should be developed in consultation with them and should include Maori place and species names, make appropriate use of te reo Maori, and draw attention to tangata whenua values.

There is no legislative directive to have any level of regard to Indigenous knowledge in Aotearoa New Zealand but there is in Canada. Contained within the *Species at Risk Act 2002*,<sup>672</sup> section 18(1) states that the Committee on the Status of Endangered Wildlife in Canada must establish a subcommittee specializing in

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<sup>671</sup> Available to view on the Department of Conservation website at: <http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/general-policy-for-national-parks/2-treaty-of-waitangi-responsibilities/>.

<sup>672</sup> S.C. 2002, c. 29.

aboriginal traditional knowledge to assist in the preparation and review of status reports on wildlife species considered to be at risk.<sup>673</sup>

### *Indigenous use*

One of the more immediate issues in both countries is the ambit within which the legislation and national policy permits Indigenous peoples to access resources within national park boundaries. This is one instance of potential intense conflict between conservation/ecological integrity priorities and sustainable use ideologies. In Canada, the Aboriginal traditional owners may be permitted to continue to harvest traditional renewable resources in all the national park reserves of Canada.<sup>674</sup> The *Canada National Parks Act* also singles out several other parks where the Governor in Council may permit the continuance of the exercise of traditional renewable resource harvesting activities.<sup>675</sup> In addition, the Act adds that the Governor is permitted to make such regulations where a land claim agreement, that has been given effect to by an Act of Parliament, made provision for the continuance of such activities.<sup>676</sup> In those parks where the Governor in Council has discretion to make regulations for

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<sup>673</sup> Section 18(3) states “Subject to subsection (2), the chairperson and members of the aboriginal traditional knowledge subcommittee must be appointed by the Minister after consultation with any aboriginal organization he or she considers appropriate”.

<sup>674</sup> *Canada National Parks Act*, s 40.

<sup>675</sup> See s. 17(1), *ibid.* The parks singled out are: Wood Buffalo, Wapusk, and Gros Morne National Parks; the Mingan Archipelago National Park Reserve; and all other national parks established pursuant to an agreement specifying the continuation of such activities (note: this mostly relates to the parks and park reserves of Canada lying in the northern territories. The provision also includes ‘any national park of Canada established in the District of Thunder Bay in the Province of Ontario’. Gwai Haanas National Park Reserve and Haida Heritage Site is also singled out: see s. 41(2).

<sup>676</sup> Section 17(2), *ibid.*

such activities, the Act provides a detailed list of restrictions that may be included in the issuing of the regulation. The list is long, and worthwhile reproducing.<sup>677</sup>

- (a) specify what are traditional renewable resource harvesting activities;
- (b) designate categories of persons authorized to engage in those activities and prescribe the conditions under which they may engage in them;
- (c) prohibit the use of renewable resources harvested in parks for other than traditional purposes;
- (d) control traditional renewable resource harvesting activities;
- (e) authorize the removal and disposal of any equipment or harvested resources left in a park in contravention of the regulations, and provide for the recovery of expenses incurred in their removal and disposal; and
- (f) notwithstanding anything in this subsection, authorize the superintendent of a park (i) to close areas of the park to traditional renewable resource harvesting activities for purposes of park management, public safety or the conservation of natural resources, (ii) to establish limits on the renewable resources that may be harvested in any period, or to vary any such limits established by the regulations, for purposes of conservation, and (iii) to

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<sup>677</sup> Section 17(3), *ibid.* Note also that ss. 17(4) and (5) further stipulate that such regulations may be applied to the removal of stone for carving purposes, and that the superintendent of a park may vary any requirement of the regulations for public safety purposes or the conservation of natural resources in the park. Note also that in the Wood Buffalo National Park the Governor in Council must issue such regulations in accordance with the Wildlife Advisory Board's own regulations: see s. 37(2). See also the *Canadian Species at Risk Act* S.C. 2002, c. 29 (available to view at: <http://laws-lois.justice.gc.ca/Search/Search.aspx?txtS3archA11=Aboriginal&txtT1tl3=%22Species+at+Risk+Act%22&h1ts0n1y=0&ddC0nt3ntTyp3=Acts>).

prohibit or restrict the use of equipment in the park for the purpose of protecting natural resources.

These restrictions are similar to that which exist in Aotearoa New Zealand's National Park General Policy. It states that:<sup>678</sup>

The non-commercial customary use of traditional materials and indigenous species may be allowed on a case-by-case basis where:

- i) there is an established tradition of such use;
- ii) it is consistent with all relevant Acts, regulations, and the national park management plan;
- iii) the preservation of the species involved is not adversely affected;
- iv) the effects of use on national park values are not significant; and
- v) tangata whenua support the application.

The restrictions are, for the most part, paternalistic, illustrating clearly that power still remains with the government departments and there remains little trust in Indigenous peoples' environmental laws to regulate the taking of native plants and animals.

An interesting contextual observation is that sports fishing and sports hunting for introduced species is, if not an encouraged activity, then at least a permitted activity, in national parks (a cultural activity important to those with a British

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<sup>678</sup> *General Policy for National Parks*, *supra* note 612 at 16 (policy 2(g)). Available to view on the Department of Conservation website at: <http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/general-policy-for-national-parks/2-treaty-of-waitangi-responsibilities/>.

ancestry) even though introduced species threaten the survival of native flora and fauna. This is especially true in Aotearoa New Zealand where fishing for trout and salmon, and hunting for deer and pigs (all introduced species) are considered important New Zealander cultural traits and important for the Aotearoa New Zealand economy through attracting international tourists. In comparison, Indigenous peoples' taking of native flora and fauna is discouraged despite this being integral to the survival of their culture (and not done for fun or sport). It is thus in arenas like this, where reconciliation with Indigenous peoples on the ground, in site-specific places, provides one of the best gauges to assess whether new relations are in fact forming (or not).

Moreover, there is no legislative base to strongly support Indigenous use. This is unsurprising because the legislation in both countries is premised on a Western protection and preservation ideal. Conservation in the New Zealand Conservation Act is defined to mean:<sup>679</sup>

the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

In Canada the “maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes”, is the first priority when “considering all aspects of the management of parks”.<sup>680</sup> The Canadian Parks Canada

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<sup>679</sup> Section 2 “Conservation”.

<sup>680</sup> *Canada National Parks Act*, s 8(2).

Act defines ecological integrity as: “a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes”.<sup>681</sup>

The singular mandate of conservation through preservation and protection in Aotearoa New Zealand, and ecological integrity in Canada, theoretically allow little opportunity for Aboriginal peoples and Maori to practice their own environmental ethic or to have it enforced. For example, the inability to pay homage to a resource through use not only disrupts the natural world order, it also puts at risk the loss of knowledge pertaining to the resource including the appropriate manner in which it can be taken and used. This is a fundamental concern for Maori and Aboriginal peoples. While there remains in policy documents the expression that traditional uses of indigenous plants or animals for food or cultural purposes may occur, it is heavily qualified. The policy dictates that Maori have no right to take the flora or fauna if: other legislation prohibits it; demand is excessive, there are alternative sources outside the national park, there is intention to derive commercial gain or reward, or it will impact on other national park visitors.<sup>682</sup> Even if permission is granted, the gathering will be supervised by Government officials, and, in the case of indigenous protected birds, if the feathers are used to make korowai (cloaks), the korowai will be deemed Government property for all time.<sup>683</sup> Not surprisingly a Maori leader has aptly summarised that the protection mandate is “hostile to the customary principle of

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<sup>681</sup> Section 2.

<sup>682</sup> See *General Policy for National Parks*, *supra* note 612.

<sup>683</sup> See the *Wildlife Act 1953* and New Zealand Conservation Authority *Maori Customary Use of Native Birds, Plants and other Traditional Materials. Interim Report and Discussion Paper*. (Wellington: New Zealand Conservation Authority, 1997) at 143-144.

‘sustainable use’ and the spiritual linkage of iwi with indigenous resources is subjected to paternalistic control’.<sup>684</sup>

Indigenous peoples do not seek access to native plants and animals within national parks for fun or sport. And while it may not be necessary to access these plants and animals for physical survival, it is essential for cultural identity and cultural survival. This observation is not meant to detract from the international and national priority for the conservation of biological diversity. This is fundamental to the wellbeing of national parks. But Indigenous peoples and the Crown are in alignment on this point: the need for native plants and animals to flourish in national parks for future generations to enjoy is non-negotiable. Nonetheless, as part of this commitment, I believe that there is a role for some acceptance for Indigenous peoples to continue to care for native plants and animals within national parks. An integral component of this care must be use. In accordance with the environmental ethics and laws of Indigenous peoples, humans are not positioned above nature but as part of nature. There exists a symbiotic relationship between humans and nature.

In adopting a singular mandate of conservation and ecological integrity, and not a more encompassing plural mandate, the domestic legislation in Canada and Aotearoa New Zealand fails to represent any significant shift towards attempting to provide for an Indigenous environmental ethic that is integral to understanding Indigenous use. This is despite the fact that when the legislation in both countries was enacted there existed, on the world scene, a definition of conservation that was more

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<sup>684</sup> Edward Ellison “Deficiencies in Conservation Subsidiary Legislation.” Report to the New Zealand Conservation Authority, 25 July 2001. Unpublished.

accommodating of the Indigenous approach. The *World Conservation Strategy* defined conservation as:<sup>685</sup>

the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.

However, such a definition in the Aotearoa New Zealand context (and most likely in the Canadian context) would have proved very contentious especially if the motive was to give effect to the Maori environmental ethic.<sup>686</sup> Many oppose any re-introduction of the Maori environmental ethic and point to past experiences as evidence of why it would be destructive to incorporate such an ethic into present day mainstream practices. Common points of contention include the hunting of the moa (a giant flightless bird) to extinction and the use of fire as a tool for forest clearing. But, as Chanwai and Richardson have succinctly argued, this should not disqualify the Maori environmental ethic: “Pakeha development activities over the past 150 years have caused massive ecological damage, and yet this is not held to disqualify Pakeha

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<sup>685</sup> International Union for Conservation of Nature and Natural Resources *World Conservation Strategy: Living Resource Conservation for Sustainable Development*. Prepared by International Union for Conservation of Nature and Natural Resources (IUSN) with United Nations Environment Program (UNEP) and the World Wildlife Fund (WWF). (Gland, Switzerland, 1980) at 3.

<sup>686</sup> For example, while sustainable use concepts are applied to non-conservation resources in New Zealand, conservation resources are viewed as special, and in some instances, as the 'jewels' of the Crown. See *Resource Management Act 1991*, s 5(1): “The purpose of this Act is to promote the sustainable management of natural and physical resources”. While s 9 restricts what activities can take place on land, s 4(3) excludes the conservation estate from these restrictions.

society from seeking to improve environmental conditions today”.<sup>687</sup> As Chanwai and Richardson stress: “What is important is the development of new cross-cultural approaches to resource management that synthesise the contributions of both European science and technology with the traditional knowledge and cultural world-view offered by indigenous peoples”.<sup>688</sup>

It is worthwhile pointing out that the courts have not yet had the opportunity to assess the preservation commitments as potentially clashing with the legislative commitments to the principles of the Treaty of Waitangi in section 4 of the Conservation Act and treaty and Aboriginal rights in section 2(2) of the Canadian Parks Canada Act. As stated earlier in this chapter, in Aotearoa New Zealand, the Waitangi Tribunal has explicitly stated that the “national interest in conservation is not a reason for negating Maori rights of property”.<sup>689</sup> It is unclear how the courts would determine such an issue if the Department of Conservation and Maori were to clash over the conservation mandate and giving effect to the principles of the Treaty of Waitangi. The same is true for Canada.

In summary, just as there is little recognition of Indigenous peoples’ place and heritage in legislation and national policy, there is little evidence of legislative and policy encouragement for the Indiginisation of national parks. The law could be

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<sup>687</sup> K Chanwai and B Richardson “Re-working Indigenous Customary Rights? The Case of Introduced Species” (1998) 2 *New Zealand Journal of Environmental Law* 157 at 163. See also Robert L. Kelly and Mary M. Prasciunas, “Did the Ancestors of Native Americans Cause Animal Extinctions in Late-Pleistocene North America? And Does it Matter if They Did?” in Michael E. Harkin and David Rich Lewis (eds), *Native Americans and the Environment. Perspectives on the Ecological Indian* (Lincoln: University of Nebraska Press, 2006) where they conclude “it is also wrong to use Pleistocene extinctions as evidence that Native Americans are not capable of environmental stewardship” at 114.

<sup>688</sup> *Idem.*

<sup>689</sup> Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999), at 330.

amended to support recognising and Indigenizing national parks with possible ideas presented in the final chapter 8 of this study.

### **C. Decolonise**

As the Indigenous legal theorists relied on in chapter two put forward, decolonisation involves a critical reimagining of the liberal state. As Gordon Christie has claimed it would require “its architectural principles being reconfigured along lines respecting the cultural divide between Aboriginal and non-Aboriginal peoples”.<sup>690</sup> Within the context of national park management, is this occurring? This part examines whether the law exhibits intentions to rethink the operation of the national park, primarily its management structures to a point of embracing Indigenous decision-making.

#### *Canada*

In regard to legislative acknowledgement of the need to include Indigenous peoples in national park management, the *Canada National Parks Act* has a catch-all provision which states that the Minister must provide Aboriginal peoples with opportunities to participate in the development of parks policy and regulations; establishment of parks; and, formulation of management plans, land use planning and development in relation to park communities. This section 12(1) of the *Canada National Parks Act* reads:

The Minister shall, where applicable, provide opportunities for public participation at the national, regional and local levels, including participation by aboriginal organizations, bodies established under land

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<sup>690</sup> Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 *Indigenous Law Journal* 67, at 113-114.

claims agreements and representatives of park communities, in the development of parks policy and regulations, the establishment of parks, the formulation of management plans, land use planning and development in relation to park communities and any other matters that the Minister considers relevant

Section 10(1) also provides the Minister with discretion to “enter into agreements with federal and provincial ministers and agencies, local and aboriginal governments, bodies established under land claims agreements and other persons and organizations for carrying out the purposes of this Act”.<sup>691</sup> It is under this provision, and the need to consult (as stressed by the Supreme Court in the *Haida* case), that Parks Canada has developed an array of inclusive formal management structures (more so than in Aotearoa New Zealand).

The most acclaimed is the Gwaii Haanas Agreement, signed in 1993 between the Government of Canada and the council of the Haida Nation. Pursuant to the Agreement, the parties established the Archipelago Management Board (made up of two representatives from both the signatory parties) that has the responsibility to manage the Gwaii Haanas National Park Reserve.<sup>692</sup> The Board is committed to managing the area for “the protection and preservation of the environment, the Haida culture, and the maintenance of a benchmark for science and human

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<sup>691</sup> Note that s. 41(1) explicitly states that: “The Governor in Council may authorize the Minister to enter into an agreement with the Council of the Haida Nation respecting the management and operation of Gwaii Haanas National Park Reserve of Canada”.

<sup>692</sup> For an assessment of the Board: see Wendy Wheatley, “Co-Management of Gwaii Haanas National Park Reserve and Haida Heritage Site: Panarchy Theory as a Means of Assessing Linked Cultural and Ecological Landscapes for Sustainability” (unpublished MA thesis, Environmental Studies, University of Victoria, 2006).

understanding”.<sup>693</sup> Its function is to “examine all initiatives and undertakings relating to the planning, operation and management” of the area.<sup>694</sup> This includes: identifying sites of special spiritual-cultural significance to the Haida; communicating with other departments; developing guidelines for the care, protection and enjoyment of the area; issuing permits or licenses for commercial tour operations; developing annual work plans; formulating procedures in advance for dealing with possible emergencies concerning public safety; and developing strategies to assist Haida individuals and organizations to take advantage of the full range of economic and employment opportunities associated with the planning, operation and management of the area.<sup>695</sup> The Board strives to work in a “constructive and co-operative manner to achieve a consensus decision” in making recommendations to both the Government of Canada and the Council of the Haida Nation.<sup>696</sup> This co-management model has successfully operated for more than a decade, but has not been replicated to the same extent in any of the other national parks or national park reserves of Canada.<sup>697</sup>

The next most comprehensive formal inclusion of Aboriginal peoples takes place in the northern territories pursuant to land claims agreements. In the Nunavut territory the national parks of Canada are each managed by a Joint Inuit/Government Park Planning and Management Committee. These Committees have responsibility for: Park planning and management; water licenses; Park promotion; visitor access

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<sup>693</sup> Cl 3.1 of the Gwaii Haanas Agreement (1993), available to view on the Parks Canada website at: <http://www.pc.gc.ca/pn-np/bc/gwaiihaanas/plan/plan2.aspx>.

<sup>694</sup> Cl 4.1, *ibid.*

<sup>695</sup> Clause 4.3, *ibid.*

<sup>696</sup> Clause 5.1, *ibid.*

<sup>697</sup> Although note that some exciting initiatives are occurring in the management of provincial parks. For a discussion of provincial parks in Canada: see Chris Malcolm, “Protected Areas: The Provincial Story” in Philip Dearden and Rick Rollins (eds), *Parks and Protected Areas in Canada. Planning and Management*. 3rd ed (Ontario: Oxford University Press, 2009).

and use; certain economic opportunities; research and so on.<sup>698</sup> The Committees consist of six persons (three appointed by the Minister and three appointed by the QIA).<sup>699</sup> They must meet at least twice a year, conduct their business in Inuktitut, and make decisions by a majority of votes cast.<sup>700</sup> The Minister has the discretion to reject decisions made by the Committees, but must provide reasons in writing for doing so.<sup>701</sup>

The Inuvialuit and Parks Canada cooperatively manage Aulavik, Ivvavik, and Tukturnogait National Parks pursuant to the *Western Arctic (Inuvialuit) Claim Settlement Act 1984*. For example, in regard to the Tukturnogait National Park, its Management Board consists of an Inuvialuit Regional Corporation member (appointed on the advice of the Paulatuk Community Corporation), an Inuvialuit Game Council member (appointed on the advice of the Paulatuk Hunters and Trappers Corporation), two people appointed by the Minister, and chairperson.<sup>702</sup> Its functions include: co-ordinating the preparation and periodic amendment of the management plan, and co-ordinating and advising the Minister on a range of aspects such as Park research and annual staffing action plans.<sup>703</sup> In regard to the Vuntut National Park, the North Yukon Renewable Resources Council, the Vuntut Gwitchin

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<sup>698</sup> Article 5.1.3 of the Inuit Impact and Benefit Agreement for Auyuittuq, Quttinirpaaq and Sirmilik National Parks.

<sup>699</sup> Article 5.1.4, *ibid.*

<sup>700</sup> Articles 5.1.13, 5.1.16 and 5.1.15.

<sup>701</sup> Article 5.2.3 and 5.2.5.

<sup>702</sup> Clause 5.2 of the Tukturnogait National Park of Canada Agreement (available to view on Parks Canada's website at: [http://www.pc.gc.ca/pn-nt/tuktutnogait/docs/plan1/sec1/index\\_E.asp](http://www.pc.gc.ca/pn-nt/tuktutnogait/docs/plan1/sec1/index_E.asp)).

<sup>703</sup> Clause 6.1, *ibid.*

government and Parks Canada aspire to cooperatively manage this park.<sup>704</sup> In another Yukon site – the Kluane National Park and Reserve – Parks Canada is striving for a cooperative management approach with the Champagne and Aishihik First Nations, pursuant to their signed Final Agreement.<sup>705</sup> In accordance with the Deh Cho First Nations Interim Measures Agreement, signed 2001, and an Interim Park Management Arrangement, signed 2003, Parks Canada and the Deh Cho First Nations are developing a cooperative management approach for the Nahanni National Park Reserve.<sup>706</sup>

The cooperative management approach in the north is extensive. A new understanding of the national park label is being developed, distinct for the most part from the label's application in many of the other parts of Canada. A glance at the recently published management plans for these parks and park reserves illustrates this. The plans all explicitly state and describe the commitments by Parks Canada to work in co-operative or partnership type arrangements with the traditional owners in all aspects ranging from cultural heritage, traditional knowledge, traditional use, management, use of indigenous language, and providing economic and employment opportunities.<sup>707</sup> These commitments are discussed more fully in the next chapter.

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<sup>704</sup> See the Vuntut Gwitchin First Nation's Final Land Claims Agreement, and Parks Canada, *Vuntut National Park of Canada Management Plan* (2004).

<sup>705</sup> See Parks Canada, *Kluane National Park and Reserve of Canada Management Plan* (2010).

<sup>706</sup> This is illustrated in the recent Parks Canada, *Nahanni National Park Reserve of Canada Management Plan* (2010).

<sup>707</sup> For a wider discussion of co-management boards in northern Canada see: Stella Spak "Canadian Resource Co-Management Boards and Their Relationship to Indigenous Knowledge: Two Case Studies", PhD thesis, Department of Anthropology, University of Toronto, 2001.

Parks Canada has also entered into memorandums of understanding with Aboriginal peoples. These are designed to include Aboriginal peoples in the management of parks and park reserves in an advisory capacity. For instance, the ‘Interim Consultation Agreement Concerning the Cooperative Planning and Management of Gulf Islands National Park Reserve’, signed by the Hul’qumi’num Treaty Group and the Minister of Environment in May 2006, establishes a committee to provide advice to the Superintendent, and to provide a forum for Parks Canada to consult with. The committee meets about ten times per year, operates on a consensus basis,<sup>708</sup> and discusses topics ranging from presentation of Hul’qumi’num heritage in the Park Reserve,<sup>709</sup> management of archaeological, cultural, spiritual or historic sites of significance to the Hul’qumi’num,<sup>710</sup> to environmental assessments which have the potential to consider acknowledged First Nations interests.<sup>711</sup> Another example is the Parks Canada and the Mi’kmaq Confederacy of PEI Memorandum of Understanding (signed July 29, 2005) that deals with several areas of cooperation, including the *Parks Canada – Mi’kmaq Confederacy of PEI Partnership Process*.<sup>712</sup>

It is also worthwhile pointing out here that the *Species at Risk Act 2002* provides an example of Indigenous managerial representation. Section 8(1) directs that the Minister of the Environment “establish a Council, to be known as the National Aboriginal Council on Species at Risk, consisting of six representatives of the aboriginal peoples of Canada selected by the Minister based upon

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<sup>708</sup> Clause 12. Note that this document can be downloaded at: [www.hulquminum.bc.ca/pubs/HTG\\_GINPR\\_2006\\_Agreement.pdf](http://www.hulquminum.bc.ca/pubs/HTG_GINPR_2006_Agreement.pdf).

<sup>709</sup> Clause 13(d).

<sup>710</sup> Clause 16(b).

<sup>711</sup> Clause 16(g).

<sup>712</sup> For a news release on this, see the Parks Canada website at: [http://www.pc.gc.ca/APPS/CP-NR/release\\_e.asp?bgid=772&andor1=bg](http://www.pc.gc.ca/APPS/CP-NR/release_e.asp?bgid=772&andor1=bg).

recommendations from aboriginal organizations that the Minister considers appropriate”. According to this section, the role of the Council is to (a) advise the Minister on the administration of this Act; and (b) provide advice and recommendations to the Canadian Endangered Species Conservation Council.

### *Aotearoa New Zealand*

In comparison to Parks Canada, the Department of Conservation has fewer examples of co-management, cooperative management and formal advisory management type roles for Maori to be included in the management of Aotearoa New Zealand’s national parks. The *General Policy for National Parks* (and not the *National Parks Act*) states that Maori are to be consulted when statutory planning documents are being developed and on specific proposals that involve places or resources within national parks of spiritual or historical and cultural significance to them.<sup>713</sup> The relevant policies here are:<sup>714</sup>

2(a) Relationships will be sought and maintained with tangata whenua to maintain and support national parks. These relationships should be based on mutual good faith, cooperation and respect.

2(b) Partnerships, to recognise mana and to support national parks, should be encouraged and may be sought and maintained with tangata whenua whose rohe

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<sup>713</sup> *General Policy for National Parks*, *supra* note 612 at 16 (policies 2(d) and 2(e)).

<sup>714</sup> Available to view on the Department of Conservation website at: <http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/general-policy-for-national-parks/2-treaty-of-waitangi-responsibilities/>.

covers any national park or part of a national park. Such partnerships will be appropriate to local circumstances.

2(c) Protocols and agreements may be negotiated and implemented to support relationships and partnerships, by mutual consent between tangata whenua and the Department.

2(d) Tangata whenua will be consulted when statutory planning documents are being developed which cover national parks. Information will be made available to facilitate their contributions.

2(e) Tangata whenua will be consulted on specific proposals that involve places or resources within national parks of spiritual or historical and cultural significance to them.

2(f) Tangata whenua involvement and participation in conservation in national parks will be encouraged and may be supported with information and technical advice.

However, these policy commitments are not reflected in the legislation. Specific legislative rights mostly derive either from historical continuity or recent Treaty settlements. Importantly, there is nothing like section 10 of the *Canadian National Parks Act* that permits the Minister of Conservation to enter into management agreements with Maori tribes. Instead in Aotearoa New Zealand, the rights to be involved in decision-making tend to be at the representation level.

For instance, in regard to the Conservation Authority (the independent body that operates at the national level), it consists of 13 positions. The Minister of

Conservation consults with the Minister of Maori Affairs in relation to two of these appointments,<sup>715</sup> and one is nominated by Te Runanga o Ngai Tahu.<sup>716</sup>

In appointing persons onto Conservation Boards (independent statutory bodies that operate at the regional level and have responsibility to provide advice on all conservation areas in its vicinity, including national parks) the Minister of Conservation must have regard to a number of interests including those of the local iwi and hapu.<sup>717</sup> In addition some iwi have further representation rights. A lineal descendant of Te Heuheu Tukino must be appointed to the conservation board responsible for managing the Tongariro National Park.<sup>718</sup> The Taranaki Maori Trust Board and Whanganui River Maori Trust Board can respectively recommend a person to sit on the conservation board responsible for managing the national parks in their area: the Egmont National Park and Whanganui National Park.<sup>719</sup> Te Runanga o Ngai Tahu have a similar right to nominate one-two person(s) to sit on the conservation boards in their area.<sup>720</sup>

As part of the Crown-Ngai Tahu Treaty of Waitangi settlement legislation, Ngai Tahu have several specific recognition rights in relation to those national parks in the bottom two-thirds of the South Island. For example, the Minister of Conservation must have particular regard to the advice given by Te Runanga o Ngai Tahu when he/she is considering national park management plans, other conservation management plans, and when formulating written recommendations to the

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<sup>715</sup> Section 6D(1)(a) of the *Conservation Act*.

<sup>716</sup> Section 6D(1)(ca), *ibid*.

<sup>717</sup> Section 6D(1)(a), *ibid*.

<sup>718</sup> Section 6P(5)(b), *ibid*.

<sup>719</sup> Sections 6P(6)(b) and 6P(7)(b), *ibid*.

<sup>720</sup> Section 6P(7C)(a), *ibid*.

Conservation Authority.<sup>721</sup> The Conservation Authority and conservation boards must consult, and have particular regard to, Ngai Tahu values of a Topuni, and any specific principles agreed to between Te Runanga o Ngai Tahu and the Crown.<sup>722</sup> The Minister must have particular regard to the views of Te Runanga o Ngai Tahu if a deed of recognition has been entered into in regard to a Statutory Acknowledgement area within a national park.<sup>723</sup> Te Runanga o Ngai Tahu has the right to amend or cancel Department of Conservation protocols.<sup>724</sup> Te Runanga o Ngai Tahu has a right, when the Minister of Conservation makes policy decisions concerning the protection, management or conservation of certain taonga species, to be advised, consulted with, and to have the Minister take particular regard of their views.<sup>725</sup>

## V. CONCLUSION

The range of different management structures in these two countries is exciting. They provide a valuable glimpse into the initial re-workings of century old power

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<sup>721</sup> Section 233 of the *Ngai Tahu Claims Settlement Act 1998 [NTCSA]*.

<sup>722</sup> Sections 241 and 242 of the *NTCSA*. Note: a Topuni is an area of land, which can include land administered under the *National Parks Act*, has Ngai Tahu values, and has been declared a Topuni under the *NTCSA*.

<sup>723</sup> Sections 212, 213, 215 and 216, *ibid*.

<sup>724</sup> Sections 281 and 282, *ibid*. Note: Department of Conservation protocols are statements in writing, issued by the Crown through the Minister of Conservation to Te Runanga o Ngai Tahu which set out how the Department will exercise its functions, powers, and duties in relation to specified matters within the Ngai Tahu claim area, and how the Department will, on a continuing basis, interact with Te Runanga o Ngai Tahu and provide for Te Runanga o Ngai Tahu's input into its decision-making process.

<sup>725</sup> Section 293, *ibid*. Note: Taonga species means species of birds, plants and animals described in sch. 97 of the *NTCSA* and found within the Ngai Tahu claim area.

structures, and provide reflective thought for both countries in thinking of where to from here. But few of the parks give a level of priority to Indigenous decision-making processes. And even if they all did, it is doubtful that real change could occur. This is because, as this assessment has shown here, there is little legislative support for national parks being Indigenous place, imbued with Indigenous heritage, and little legislative motivation to fundamentally change national park management mindsets in regard to proactively utilising Indigenous languages, knowledge systems and enterprises. Without a firm platform for respecting Indigenous peoples' culture, history, values and knowledge, it is doubtful that providing Indigenous peoples with rights of single representation or even advisory type roles can be wholly effective. Of course, though, legislation does not capture ground level management operations. In fact, despite the silences in the law, many national park managers have in many instances progressed substantially towards fully recognising Indigenous place and heritage and attempting to positively incorporate Indigenous languages, knowledge systems, use, enterprise and decision-making. It is therefore important to examine these contemporary plans (which is now done in the next chapter) before making any concluding observations and recommendations.

## CHAPTER SEVEN

### *NATIONAL PARK MANAGEMENT INTENTIONS*

#### I. INTRODUCTION

This chapter completes the triangular case study I have conceptualized to answer the thesis question: if there is a new commitment to recognising Indigenous Peoples in law, *what ought this to mean in the context of owning and managing national parks?* It does so by focusing at the top of the pyramid on management planning.<sup>726</sup> It examines what the new legislative commitments for recognising Indigenous peoples has meant for Parks Canada and the Department of Conservation in the construction of national park management plans. Both Parks Canada and the Department of Conservation are required to implement management plans for national parks, and the purpose of such plans is to provide the strategic guide for future management of the parks. As discussed in the previous chapter, Parks Canada is required in law,<sup>727</sup> and the Department of Conservation is required by general policy,<sup>728</sup> to consult with the relevant Indigenous groups in developing national park management plans. Thus, the key question for this chapter is: Do the national park management plans do as expected by the law and policy, and recognise Indigenous peoples? Moreover, do the management plans do as Indigenous peoples, and all those committed to true reconciliation, and move beyond mere recognition, to Indigenise and decolonise

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<sup>726</sup> Diagram first introduced in Chapter One (Table 1).

<sup>727</sup> See section 12(1) of the *Canada National Parks Act*.

<sup>728</sup> Department of Conservation, *General Policy for National Parks* (Wellington: Department of Conservation, 2005) at 16 (policies 2(d) and 2(e)).

national park management? This chapter is thus different to other chapters in this study in that it is about management intentions. It has methodological value in providing useful comparative research in a legal geography framework and recognises that inclusive initiatives are occurring in the construction of national parks plans that could easily be overlooked if this thesis had focused solely on the law. Considering both law and management planning provides a strong platform upon which to launch into the final concluding chapter of this thesis that urges a reimagining of national parks.

This chapter thus uses the same theoretical ‘Reconciliation framework’ (Ruru ladder) developed in the previous chapter to assess national park management plan intentions: recognise, Indigenise and decolonise. It is similarly structured in that the management intentions are categorised under the seven broad initiatives with the first two points - (1) Indigenous place, and (2) Indigenous heritage – falling under the recognise banner. The next four points - (3) Indigenous language, (4) Indigenous knowledge, (5) Indigenous use, and (6) Indigenous enterprise – are classified as having the potential to Indigenize national park management. The final point - (7) Indigenous decision-making – encapsulates the potential to decolonise national park management.

## **II. SAMPLE PLANS**

This chapter canvases all available management plans from both countries dated post 2000. ‘All available’ here means all management plans that were available to download from the Parks Canada and Department of Conservation websites as of

August 2011. This selection criteria resulted in 36 Parks Canada and nine Department of Conservation national park management plans being analysed.

The four Parks Canada plans not discussed are Bruce Peninsula, Gulf Islands, Sirmilik and Ukkusiksalki. The Bruce Peninsula National Park Management Plan is not assessed here because it is unavailable,<sup>729</sup> and Parks Canada is still drafting new management plans for the Gulf Islands,<sup>730</sup> Sirmilik,<sup>731</sup> and Ukkusiksalik<sup>732</sup> national parks. It is important to note here that one plan discussed covers two parks: Mount Revelstoke and Glacier.

The four Department of Conservation national park management plans not discussed are Rakiura, Whanganui, Mount Aspiring and Paparoa. The Rakiura's first national park management plan is still in progress,<sup>733</sup> and the Whanganui National Park's operative management plan is not available to view on the internet.<sup>734</sup> A new plan for Mount Aspiring was announced on 5 July 2011,<sup>735</sup> but is currently not

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<sup>729</sup> This plan is not available to download from the Parks Canada website: see <http://www.pc.gc.ca/pn-np/on/bruce/plan.aspx>.

<sup>730</sup> The first plan for this park is still in draft stages: see <http://www.pc.gc.ca/pn-np/bc/gulf/plan/plan1b.aspx>

<sup>731</sup> The first plan for this park is still in process: see <http://www.pc.gc.ca/pn-np/nu/sirmilik/plan.aspx#plan>.

<sup>732</sup> Parks Canada website states that there is currently no information on the management planning of this park: see <http://www.pc.gc.ca/pn-np/nu/ukkusiksalik/plan.aspx>.

<sup>733</sup> See Department of Conservation website at: <http://www.doc.govt.nz/publications/getting-involved/consultations/closed/rakiura-national-park-management-plan/>.

<sup>734</sup> Note that the Department of Conservation website does state that this plan is under review: see <http://www.doc.govt.nz/getting-involved/consultations/closed/archive/whanganui-national-park-management-plan-review/>.

<sup>735</sup> For media coverage of this plan, see Otago Daily Times website at: <http://www.odt.co.nz/regions/central-otago/167712/national-park-plan-approved>.

available to download on the internet.<sup>736</sup> Paparoa National Park Management Plan is dated 1992.<sup>737</sup> The sample method is thus sample by default.

### *Canada*

In order to keep track of the 36 plans in the below discussion, I believe that it is helpful to categorise them into three loose groupings. The first category is labelled old western mountain parks. The park plans discussed within this category are those mountain parks that were established in British Columbia and Alberta from 1885-1931. The second category, for want of a better title, is grouped together as the middle era parks. This captures those parks established in Canada in the 1920s onwards that were done so without formal recognition that the park lands encompassed Aboriginal homes and that Aboriginal peoples may have continuing legal rights to own and manage those lands. The third category is labelled new formally inclusive plans. The park plans discussed here are those parks that have been established pursuant to a land claims agreement and/or through the national park reserve avenue. All of these plans attribute the respective land claims agreements to the new emphasis in the plans and/or acknowledge the significance of the national park reserve status.<sup>738</sup> Most, but not all, of these parks are in the northern parts of

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<sup>736</sup> For a copy of the Draft Management Plan, see Department of Conservation website at: <http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/national-park-management-plans/paparoa-national-park-management-plan/>.

<sup>737</sup> <http://www.doc.govt.nz/publications/about-doc/role/policies-and-plans/national-park-management-plans/paparoa-national-park-management-plan/>

<sup>738</sup> For Aulavik, see An Agreement for the Establishment of a National Park on Banks Island (1992); Inuvialuit Final Agreement (1984); Western Arctic (Inuvialuit) Claim Settlement Act (1984). For Ivvavik, see Inuvialuit Final Agreement (1984). For Kluane, see: Umbrella Final Agreement: Council for Yukon Indians (1993); Champagne and Aishihik First Nations Final Agreement (1993). For Mingan Archipelago, see Mamuitum and Nutashkuan First Nations

Canada and attract very few visitors, for example, the Ivvavik National Park has about 200 annual visitors. The main exceptions in this group is of course the Mingan Archipelago National Park Reserve that lies in Quebec that has over 30,000 annual visitors, and the Pacific Rim National Park Reserve that lies in British Columbia, on Vancouver Island. Here are these three groupings:

*Plans for the old Western Mountain parks*

1. Banff National Park of Canada Management Plan, published in 2010;<sup>739</sup>
2. Elk Island National Park of Canada Management Plan, published in 2004;<sup>740</sup>
3. Jasper National Park of Canada Management Plan, published in 2010;<sup>741</sup>
4. Kootenay National Park of Canada Management Plan, published in 2000;<sup>742</sup>
5. Mount Revelstoke National Park of Canada, Glacier National Park of Canada, Rogers Pass National Historic Site of Canada Management Plan, published in 2010;<sup>743</sup>

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General Agreement in Principle (2004). For Nahanni, see: Deh Cho First Nations Interim Measures Agreement (2001). For Tukturnogait, see: The Western Arctic Claim: Inuvialuit Final Agreement (1984) and Sahtu Dene and Metis Comprehensive Land Claim Agreement. For Vuntut, see: Umbrella Final Agreement: Council for Yukon Indians (1993); Vuntut Gwitchin First Nation Final Agreement (1995).

<sup>739</sup> Parks Canada, *Banff National Park of Canada Management Plan* (Parks Canada, 2010) [*Banff Plan*].

<sup>740</sup> Parks Canada, *Elk Island National Park of Canada Management Plan* (Parks Canada, November 2005) [*Elk Plan*]. Note that a new draft management plan exists: see [http://www.pc.gc.ca/pn-np/ab/elkisland/plan/Up\\_Ges.aspx](http://www.pc.gc.ca/pn-np/ab/elkisland/plan/Up_Ges.aspx).

<sup>741</sup> Parks Canada, *Jasper National Park of Canada Management Plan* (Parks Canada, 2010) [*Jasper Plan*].

<sup>742</sup> Parks Canada, *Kootenay National Park of Canada Management Plan* (Parks Canada, 2000) [*Kootenay Plan*].

<sup>743</sup> Parks Canada, *Mount Revelstoke National Park of Canada, Glacier National Park of Canada, Rogers Pass National Historic Site of National Park of Canada Management Plan* (Parks Canada, 2010) [*Mount Revelstoke and Glacier Plan*].

6. Waterton Lakes National Park of Canada Management Plan, published in 2010;<sup>744</sup>  
and,

7. Yoho National Park of Canada Management Plan, published in 2010.<sup>745</sup>

*Plans for the middle era parks*

1. Cape Breton Highlands National Park of Canada Management Plan, published in 2010;<sup>746</sup>

2. Forillon National Park of Canada Management Plan, published in 2010;<sup>747</sup>

3. Fundy National Park of Canada Management Plan, published in 2005;<sup>748</sup>

4. Georgian Bay Islands National Park of Canada Management Plan, published in 2010;<sup>749</sup>

5. Grasslands National Park of Canada Management Plan, published in 2010;<sup>750</sup>

6. Gros Morne National Park of Canada Management Plan, published in 2007,<sup>751</sup>

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<sup>744</sup> Parks Canada, *Waterton National Park of Canada Management Plan* (Parks Canada, 2010) [*Waterton Plan*].

<sup>745</sup> Parks Canada, *Yoho National Park of Canada Management Plan* (Parks Canada, 2010) [*Yoho Plan*].

<sup>746</sup> Parks Canada, *Cape Breton Highlands National Park of Canada Management Plan* (Parks Canada, 2010) [*Cape Breton Highlands Plan*].

<sup>747</sup> Parks Canada, *Forillon National Park of Canada Management Plan* (Parks Canada, 2010) [*Forillon Plan*].

<sup>748</sup> Parks Canada, *Fundy National Park of Canada Management Plan* (Parks Canada, November 2005) [*Fundy Plan*]. Note that a new draft management plan is underway: <http://www.pc.gc.ca/eng/pn-np/nb/fundy/plan/plan01.aspx>.

<sup>749</sup> Parks Canada, *Georgian Bay Islands National Park of Canada Management Plan* (Parks Canada, 2010) [*Georgian Bay Islands Plan*].

<sup>750</sup> Parks Canada, *Grasslands National Park of Canada Management Plan* (Parks Canada, 2010) [*Grasslands Plan*].

<sup>751</sup> Parks Canada, *Gros Morne National Park of Canada Management Plan* (Parks Canada, 2010) [*Gros Morne Plan*].

7. Kejimikujik National Park of Canada Management Plan, published in 2010;<sup>752</sup>
8. Kouchibouguac National Park of Canada Management Plan, published in 2010;<sup>753</sup>
9. La Mauricie National Park of Canada Management Plan, published in 2010;<sup>754</sup>
10. Point Pelee National Park of Canada Management Plan, published in 2010;<sup>755</sup>
11. Prince Albert National Park of Canada Management Plan, published in 2008;<sup>756</sup>
12. Prince Edward Island National park of Canada and Dalvay-By-The-Sea National Historic Site of Canada Management Plan, published in 2007;<sup>757</sup>
13. Riding Mountain National Park of Canada and Riding Mountain Park East Gate Registration Complex National Historic Site of Canada Management Plan, published in 2007;<sup>758</sup>
14. St. Lawrence Islands National Park of Canada Management Plan, published in 2010;<sup>759</sup> and,

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<sup>752</sup> Parks Canada, *Kejimikujik National Park of Canada Management Plan* (Parks Canada, 2010) [*Kejimikujik Plan*].

<sup>753</sup> Parks Canada, *Kouchibouguac National Park of Canada Management Plan* (Parks Canada, 2010) [*Kouchibouguac Plan*].

<sup>754</sup> Parks Canada, *La Mauricie National Park of Canada Management Plan* (Parks Canada, 2010) [*La Mauricie Plan*].

<sup>755</sup> Parks Canada, *Point Pelee National Park of Canada Management Plan* (Parks Canada, 2010) [*Point Pelee Plan*].

<sup>756</sup> Parks Canada, *Prince Albert National Park of Canada Management Plan* (Parks Canada, January 2008) [*Prince Albert Plan*].

<sup>757</sup> Parks Canada, *Prince Edward Island National Park of Canada and Dalvay-By-The-Sea National Historic Site of Canada Management Plan* (Parks Canada, February 2007) [*Prince Edward Island Plan*].

<sup>758</sup> Parks Canada, *Riding Mountain National Park of Canada and Riding Mountain Park East Gate Registration Complex National Historic Site of Canada Management Plan* (Parks Canada, October 2007) [*Riding Mountain Plan*].

<sup>759</sup> Parks Canada, *St. Lawrence Islands National Park of Canada Management Plan* (Parks Canada, 2010) [*St. Lawrence Islands Plan*].

15. Terra Nova National Park of Canada Management Plan, published in 2010.<sup>760</sup>

*Plans for the formally inclusive new parks*

1. Aulavik National Park of Canada Management Plan, published in 2002;<sup>761</sup>
2. Auyuittuq National Park of Canada Management Plan, published in 2010;<sup>762</sup>
3. Gwaii Haanas National Park Reserve and Haida Heritage Site Management Plan for the Terrestrial Area, published in 2002;<sup>763</sup>
4. Ivvavik National Park of Canada Management Plan, published in 2007;<sup>764</sup>
5. Kluane National Park and National Park Reserve of Canada Management Plan, published in 2010;<sup>765</sup>
6. Mingan Archipelago National Park Reserve of Canada Management Plan, published in 2005;<sup>766</sup>
7. Nahanni National Park Reserve of Canada Management Plan, published in 2010;<sup>767</sup>

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<sup>760</sup> Parks Canada, *Terra Nova National Park of Canada Management Plan* (Parks Canada, 2010) [*Terra Nova Plan*].

<sup>761</sup> Parks Canada, *Aulavik National Park of Canada Management Plan* (Parks Canada, 2002) [*Aulavik Plan*]. Note that a new draft management plan is underway: see <http://www.pc.gc.ca/pn-np/nt/aulavik/plan.aspx>.

<sup>762</sup> Parks Canada, *Auyuittuq National Park of Canada Management Plan* (Parks Canada, 2010) [*Auyuittuq Plan*].

<sup>763</sup> Parks Canada and Archipelago Management Board, *Gwaii Haanas National Park Reserve and Haida Heritage Site Management Plan for the Terrestrial Area* (Parks Canada, 2002) [*Gwaii Haanas Plan*].

<sup>764</sup> Parks Canada, *Ivvavik National Park of Canada Management Plan* (Parks Canada, 2002) [*Ivvavik Plan*].

<sup>765</sup> Parks Canada, *Kluane National Park and National Park Reserve of Canada Management Plan* (Parks Canada, 2010) [*Kluane Plan*].

<sup>766</sup> Parks Canada, *Mingan Archipelago National Park Reserve of Canada Management Plan* (Parks Canada, 2005) [*Mingan Archipelago Plan*].

8. Pacific Rim National Park Reserve of Canada Management Plan, published in 2010;<sup>768</sup>
9. Quttinirpaaq National Park of Canada Management Plan, published in 2009;<sup>769</sup>
10. Tongait KakKasuangita SilakKijapvinga Torngat Mountains National Park of Canada Management Plan, published in 2010;<sup>770</sup>
11. Tuktut Nogait National Park of Canada Management Plan, published in 2007;<sup>771</sup>
12. Vuntut National Park of Canada Management Plan, published in 2010;<sup>772</sup>
13. Wapusk National Park of Canada Management Plan, published in 2007;<sup>773</sup> and,
14. Wood Buffalo National Park of Canada Management Plan, published in 2010.<sup>774</sup>

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<sup>767</sup> Parks Canada, *Nahanni National Park Reserve of Canada Nah?a Dehe Management Plan* (Parks Canada, 2010) [*Nahanni Plan*]. Please note that I do not have the typeface to correctly type *Nah?a Dehe* and I apologise sincerely for this.

<sup>768</sup> Parks Canada, *Pacific Rim National Park Reserve of Canada Management Plan* (Parks Canada, 2010) [*Pacific Rim Plan*].

<sup>769</sup> Parks Canada, *Quttinirpaaq National Park of Canada Management Plan* (Parks Canada, 2009) [*Quttinirpaaq Plan*].

<sup>770</sup> Parks Canada, *Tongait KakKasuangita SilakKijapvinga Torngat Mountains National Park of Canada Management Plan* (Parks Canada, 2010) [*Torngat Mountains Plan*].

<sup>771</sup> Parks Canada, *Tuktut Nogait National Park of Canada Management Plan* (Parks Canada, 2007) [*Tuktut Nogait Plan*].

<sup>772</sup> Parks Canada, *Vuntut National Park of Canada Management Plan* (Parks Canada, 2010) [*Plan*].

<sup>773</sup> Parks Canada, *Wapusk National Park of Canada Management Plan* (Parks Canada, 2007) [*Wapusk Plan*]. This plan is included here despite no land claim agreement or national park reserve status because the Aboriginal peoples have legal recognition of the possibility of national park land being returned to them. See *Canada National Parks Act 2000*, s 38(1)(d). The Plan recognises this at p. 4: “The First Nations of the area maintain the right to select lands within the park to fulfil treaty land entitlements. Aboriginal and Treaty rights will be respected in the park”.

<sup>774</sup> Parks Canada, *Wood Buffalo National Park of Canada Management Plan* (Parks Canada, 2010) [*Wood Buffalo Plan*]. This plan is included here despite no land claim agreement or national park reserve status because the Aboriginal peoples have legal recognition of the

Even though there are only nine Department of Conservation national park management plans examined here, and thus easier to keep track of, two natural groupings exist based on geography. The two groupings here are:

***Plans for parks in the South Island***

1. Aoraki/Mount Cook National Park Management Plan, published in 2004;<sup>775</sup>
2. Arthur's Pass National Park Management Plan, published in 2007;<sup>776</sup>
3. Fiordland National Park Management Plan, published in 2007;<sup>777</sup>
4. Kahurangi National Park Management Plan, published in 2001;<sup>778</sup>
5. Nelson Lakes National Park Management Plan, published in 2003;<sup>779</sup>
6. Westland *Tai Poutini* National Park Management Plan, published in 2001.<sup>780</sup>

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possibility of national park land being returned to them. See *Canada National Parks Act 2000*, s 38(1) and (b).

<sup>775</sup> Department of Conservation, *Aoraki/Mount Cook National Park Management Plan* (Department of Conservation, August 2004) [*Aoraki/Mount Cook Plan*].

<sup>776</sup> Department of Conservation, *Arthur's Pass National Park Management Plan* (Department of Conservation, August 2004) [*Arthur's Pass Plan*].

<sup>777</sup> Department of Conservation, *Fiordland National Park Management Plan* (Department of Conservation, June 2007) [*Fiordland Plan*].

<sup>778</sup> Department of Conservation, *Kahurangi National Park Management Plan 2001-2011* (Department of Conservation, 2001) [*Kahurangi Plan*].

<sup>779</sup> Department of Conservation, *Nelson Lakes National Park Management Plan 2002-2009* (Department of Conservation, 2002) [*Nelson Lakes Plan*].

<sup>780</sup> Department of Conservation, *Westland/Tai Poutini National Park Management Plan 2001-2011* (Department of Conservation, August 2001) [*Westland/Tai Poutini Plan*].

### *Plans for parks in the North Island*

1. Egmont National Park Management Plan, published in 2002;<sup>781</sup>
2. Te Urewera National Park Management Plan, published in 2003;<sup>782</sup>
3. Tongariro National Park Management Plan, published in 2006.<sup>783</sup>

Five of the six South Island park plans lie in or partly in the Ngai Tahu takiwa (area) in the bottom two thirds of the South Island (the exception is the Nelson Lakes National Park). Ngai Tahu is in the post-settlement phrase as it settled with the Crown in 1998 pursuant to the *Ngai Tahu Claims Settlement Act 1998*. As discussed in chapters 5 and 6, Ngai Tahu, as part of this 1998 legislated settlement, have negotiated ownership and management interests. The remaining group of four plans - Egmont, Nelson Lakes, Te Urewera and Tongariro - encompass lands where the traditional iwi owners are still largely in the Treaty of Waitangi claims grievance phrase, as discussed particularly in chapter 5.

Before embarking on the examination of the national park management plans in Canada and Aotearoa New Zealand an important qualifier needs to be made. While this chapter focuses on the explicit references made to Indigenous peoples in the selected plans, there are limitations in my approach (other than that related to the sample by default method). Where policies, strategic goals, and key actions are expressed in a generic manner, they are not necessarily exclusive to Indigenous peoples. Moreover, the plans will not have captured all of the specific park

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<sup>781</sup> Department of Conservation, *Egmont National Park Management Plan 2002-2012* (Department of Conservation, February 2002) [*Egmont Plan*].

<sup>782</sup> Department of Conservation, *Te Urewera National Park Management Plan* (Department of Conservation, February 2003) [*Te Urewera Plan*].

<sup>783</sup> Department of Conservation, *Tongariro National Park Management Plan 2006-2016* (Department of Conservation, October 2006) [*Tongariro Plan*].

management practices. Importantly, this study does not evaluate the implementation of these plans. Some parks will undoubtedly be significantly more inclusive of Indigenous peoples than the plans portray. Nonetheless, the following study is still valuable for the powerful general impressions it reveals, particularly as it relates to my thesis regarding creating space for Indigenous peoples in the law dealing with national parks.

This chapter turns now to categorise the management intentions under the broad banners of to recognise, Indigenize and decolonise. I have decided against presenting this information in table format because it is merely the overall general impressions that I wish to convey here. The point of this discussion is not to rank management plans by concluding that one management plan is better than another. This is not the aim of this chapter (or this thesis). Rather, the aim here is to convey how management plans are expressly acknowledging Indigenous peoples and their relationships with lands encased in national park boundaries. Or, to express this more theoretically, how management intentions are beginning to recognise the fallacy of conceiving of national parks as simply colonial place.

### **III. RECOGNISE**

As explored in chapter 2, a beginning point in reconciliation involves recognising Indigenous peoples as peoples and that Indigenous peoples had developed a complex ordered place before the arrival of Europeans. As shown in the previous chapter, the legislation, as an overall observation, continues to mask the Indigenous place of national parks. As discussed in that chapter, the legislative purpose for national parks in both countries does not recognise that national park lands are culturally,

historically, spiritually and traditionally important to Indigenous peoples. There were some exceptions, notably the development of the unique topuni and statutory acknowledgment legislative tools. Do the management plans examined here accept or deny national park lands as Indigenous place imbued with deep Indigenous heritage?

## **A. Indigenous place**

### *Canada*

All Parks Canada plans I assessed acknowledge the thousands of years of Aboriginal historical presence on lands now encased in national park boundaries. For example, the Banff plan states “Aboriginal people have used these lands for more than 10,000 years”.<sup>784</sup> The Riding Mountain plan is to the point: “Indigenous people were the first to live here”.<sup>785</sup> In fact, many of the plans accept that the lands encased in national parks are the “home lands” of specifically named Aboriginal groups. For example, one of the old western mountain park plans, Mount Revelstone and Glacier, states: “Secwepemc, Ktunaxa and Syilx people have called these lands home for hundreds of centuries”.<sup>786</sup> The Cape Breton Highlands plan states: “For countless generations, the Mi’kmaq and their ancestors have called this place home ...”<sup>787</sup> and the Point Pelee plan – another middle era park – accepts that this park “is referred to as ‘our home’ by the Caldwell First Nation and ‘part of our house’ by the Walpole Island First

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<sup>784</sup> *Banff Plan*, *supra* note 739 at 10. For another example, see *Yoho Plan*, *supra* note at 745 at 8.

<sup>785</sup> *Riding Mountain Plan*, *supra* note 758 at 5.

<sup>786</sup> *Mount Revelstone and Glacier Plan*, *supra* note 743 at 7.

<sup>787</sup> *Cape Breton Highlands Plan*, *supra* note 746 at 19.

Nation”.<sup>788</sup> The Torngat Mountains plan states beautifully “More than a wilderness, this is an Inuit homeland. It is a place where Inuit say ‘Alianattuk’, which means ‘this is a good place to be’”.<sup>789</sup> The Georgian Bay Islands plan brings alive the reality of parks being homelands and does so in this management objective statement relating to helping provide opportunities for First Nations and Metis to visit the park “for spiritual reconnection with the land and to pay respect to ancestors buried in the park”.<sup>790</sup>

All of the plans tend to accept the continuing importance of these homelands to the Aboriginal peoples. The Waterton Lakes plan, for example, records that Piikani and the Kainai “continue to hold Waterton as a sacred and powerful place”.<sup>791</sup> The Kouchibouguac plan acknowledges the continuing importance of the lands for the Mi’kmaq: “Many of these communities continue to engage in traditional use and subsistence/ceremonial harvesting activities within the park, including harvesting eels, clams, sweet grass, and traditional plants”.<sup>792</sup> The Gwaii Haanas plan beautifully asserts the vision that “Gwaii Haanas will be a place that sustains the continuity of Haida culture”.<sup>793</sup>

All the formally inclusive new park plans hold the continuing importance of the lands to Aboriginal peoples as integral to park management as will be discussed further in this chapter. The Aulavik plan clearly acknowledges the historical and contemporary First Nations use of the park area,<sup>794</sup> as do all other formally inclusive

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<sup>788</sup> *Point Pelee Plan*, *supra* note 755 at 28.

<sup>789</sup> *Torngat Mountains Plan*, *supra* note 770 at ix, 1, and 2.

<sup>790</sup> *Georgian Bay Islands Plan*, *supra* note 749 at 19.

<sup>791</sup> *Waterton Plan*, *supra* note 744 at 9.

<sup>792</sup> *Kouchibouguac Plan*, *supra* note at 21.

<sup>793</sup> *Gwaii Haanas Plan*, *supra* note 763 at 19.

<sup>794</sup> See *Aulavik Plan*, *supra* note 761 at 6.

new park plans. But many of these plans, as all the others, still rely heavily on archaeological evidence. For example, the Aulavik plan states, under the subheading ‘Early inhabitants’:<sup>795</sup>

Some of the earliest archaeological sites in the Canadian Arctic are within Aulavik National Park. Banks Island ... stood on the route traversed first by Aboriginal hunters, some 3,800 years ago. These “Paleoeskimo” peoples are the first known inhabitants of the Canadian Arctic. The archaeological cultures are identified mainly on the basis of material goods such as tools, and by evidence of their lifestyles such as dwelling types and cache design. It is now confirmed that Thule peoples occupied the park area during AD 1000-1600. Thule peoples occupied sites on the south end of the island and practised an economy focused on bowhead whale harvesting.

In more recent times, Inuinnait from Victoria Island, who are the descendants of the Thule, travelled and lived in what is now the park. Caches for storing muskox or caribou meat and supplies, tent rings, hearths or fireplaces, possible graves and other features have been found. This evidence suggests that the Inuinnait were active in the park area throughout the 19<sup>th</sup> century.

The plan then describes in three paragraphs the ‘Post-European Contact Inhabitants’, and then under the heading Present Park Use, states “Inuvialuit have lived on Banks Island and in the area of Aulavik National Park for generations”.<sup>796</sup>

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<sup>795</sup> *Ibid*, at 6.

<sup>796</sup> *Ibid*, at 6. The *Wapusk Plan* does something similar, see *supra* note 773 at 18.

The Ivvavik and Tukturnogait plans explicitly recognise both historical and modern connection to the park as Indigenous place. For example, the first paragraph of the executive summary in the Ivvavik plan states that “People have been part of this landscape for millennia, harvesting its still-abundant resources and traveling (sp) its mountain valleys and coastal shores”<sup>797</sup> and that the plan “recognizes that the Inuvialuit culture is vibrant and active on the land today”.<sup>798</sup>

Some of the park plans explicitly recognise that the creation of a park caused the displacement of Aboriginal peoples from their homes. For example, the Jasper plan writes: “A number of Aboriginal groups lost their traditional connection with the area when Jasper became a forest reserve in 1907”.<sup>799</sup> The Kluane plan states as a management objective to “recognise and communicate the history of First Nation cabins and camps lost to First Nations when the park was established and work cooperatively towards resolution of this issue”.<sup>800</sup> The Torngat Mountains plan has a strong management objective to support Inuit with their families back in the Torngat Mountains, reconnecting to the traditional places they once occupied and connecting a new generation to their past.<sup>801</sup> The Banff plan claims, “For Aboriginal people, the park is a place to reconnect”.<sup>802</sup>

#### *Aotearoa New Zealand*

All of the selected plans strongly acknowledge that specific iwi regard national park lands as Indigenous place. Many begin by acknowledging the spiritual connection to

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<sup>797</sup> *Ivvavik Plan*, *supra* note 764 at i.

<sup>798</sup> *Ibid*, at ii.

<sup>799</sup> *Jasper Plan*, *supra* note 741 at 39.

<sup>800</sup> *Kluane Plan*, *supra* note 765 at 29. See also the *Prince Albert Plan*, *supra* note 756 at 14.

<sup>801</sup> *Torngat Mountains Plan*, *supra* note 770 at 25

<sup>802</sup> *Banff Plan*, *supra* note 739 at 42.

the lands. For example, the Aoraki/Mount Cook plan begins with the creation story of Aoraki, the mountain, that runs two pages of the plan.<sup>803</sup> The Egmont plan begins with the personified mountain battle of how Taranaki and Pihanga were in love, but Pihanga was betrothed to Tongariro, and after Taranaki and Tongariro had a mighty fight, Taranaki fled towards the western coast and still weeps mist and rain for his lost love, Pihanga.<sup>804</sup> The Fiordland plan begins “The Maori history of Fiordland reaches back more than 1000 years into the creation mythology of Ngai Tahu”.<sup>805</sup> The Kahurangi plan devotes a full page, following the preface, to recite a whakatauki (proverb) in both Maori and English. In English it reads:<sup>806</sup>

- Hold fast to the genealogy lines from the stars to oneself and all things
- Hold strong to the sacredness, prestige and awe of all things created
- Keep the garden of mother earth sacred and open through appropriate incantations for all things and when planting or gathering food
- If the environment is kept well and strong it will look after itself
- The one who teaches about the environment must understand the structure, lore and rituals pertaining to it.

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<sup>803</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 22-23.

<sup>804</sup> *Egmont Plan*, *supra* note 781 at 17 -18.

<sup>805</sup> *Fiordland Plan*, *supra* note 777 at 17 (see also pages 18-19). The other plans do something similar. For example, see *Kahurangi Plan*, *supra* note 778 at 13 -14 and 21-22.

<sup>806</sup> *Kahurangi Plan*, *ibid.* 2. Note that some other plans do something similar. For example, the *Nelson Lakes Plan* has a full page at the beginning dedicated to telling of a Maori legend, see *supra* note 779 at 6.

All of the plans acknowledge the relevant iwi who hold mana whenua (authority) over the lands encased in national parks.<sup>807</sup> For example, the 2001 published Westland plan states at the outset in its preface “The plan acknowledges mana whenua and tangata whenua status of Ngai Tahu over their ancestral lands and waters within the park”.<sup>808</sup> Under its Background heading, it begins:<sup>809</sup>

Ngai Tahu are the people who hold the rangatiratanga (chieftainship) and manawhenua (customary rights) over lands administered by the Department of Conservation on the West Coast ... Poutini Ngai Tahu define themselves as those Ngai Tahu who, by whakapapa (genealogical descent rights), derive their status as tangata whenua (people of the land) from their ancestors who held the customary title and aboriginal rights within the lands of Westland at the time of signing of the Treaty of Waitangi in 1840.

The Westland plan is upfront in stating at length the connection of Maori to the natural environment. A part of the plan reads, for example:<sup>810</sup>

The cultural heritage of Ngai Tahu follows a pathway from the time of the creation, the times of the spiritual beings known as atua through to today. The responsibilities for Poutini Ngai Tahu created through this strong cultural heritage are to ensure that the connections between themselves and these atua

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<sup>807</sup> Although some plans provide comparatively less discussion, for example, see *Arthur's Pass Plan*, *supra* note 776 at 27; and *Nelson Lakes Plan*, *ibid.* at 21 and 25; and, *Urewera Plan*, *supra* note 782 at 31.

<sup>808</sup> *Westland Plan*, *supra* note 780 at 5. See also *Fiordland Plan*, *supra* note 777 at 10 and 23.

<sup>809</sup> *Ibid.*, at 20.

<sup>810</sup> *Ibid.*, at 21.

[gods] are recognised and maintained in perpetuity. All the stages of time from the creation to the present day are known to the tangata whenua and are part of the landscape that is now Westland *Tai Poutini* National Park. The atua are closely associated with the waters, the air, the forests, the coastal environment, the fauna of the area and the very rocks of the land itself. The current infrastructure that is visible on the landscape is built on these lands which are valued so highly by Poutini Ngai Tahu. It is important to recognise that these relationships with atua are not degraded by the passage of time. As the people who hold mana whenua (power associated with the possession of the lands) in a traditional cultural sense, Ngai Tahu are seeking the protection, through the administration of the park, of all the cultural heritage that is paramount to them. Consistent with the philosophy of the National Parks Act 1980, Ngai Tahu are looking for protection of these natural and historic values in perpetuity. The cultural beliefs of Ngai Tahu are acknowledged by the Department. This management plan, through its policies and methods, seeks to ensure that the full extent of Ngai Tahu's cultural associations with the park are actively incorporated and accorded respect in day-to-day management.

The plans acknowledge historical physical connection to the national park lands, such as being places to go “for ceremonial and spiritual reasons, along with seasonal food gathering”.<sup>811</sup>

These Department of Conservation plans thus strongly recognise Indigenous place (generally in more detail than the Parks Canada plans). This recognition in both Department of Conservation and Parks Canada plans is hugely significant. For the

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<sup>811</sup> For example, see *Aoraki/Mount Cook Plan*, *supra* note 775 at 25.

longest time, European settlers have been deliberately blind to Indigenous place. No longer in law or in policy is this true. But, as has been queried in this thesis, what ought this to mean? This recognition must reflect Indigenous ownership and management too. Interestingly, the Urewera plan acknowledges a point of conflict for most national parks in Canada and Aotearoa New Zealand: Crown ownership of the park lands: “has been disputed by tangata whenua on the basis of the legality of the means by which land was acquired by the Crown”.<sup>812</sup> As concluded from chapters five and six, it is this fact that is at the heart of contestation. Recognition of Indigenous place necessarily brings into question present Crown ownership and in turn the colonial law that supports that Crown ownership. Law is social: it has supported the fiction of Crown ownership. But there is power in accepting this, for law can be remedied to recognise the ramifications of accepting colonial place as also Indigenous place. Thus, contemporary law and policy is beginning to accept the enduring fact of Indigenous place.

## **B. Indigenous heritage**

### *Canada*

All of the plans accept Aboriginal heritage and it is this point that is often elevated as a strategic priority management goal. For example, this is often stated like this: “Parks Canada and Aboriginal people collaborate on the protection and presentation of Aboriginal heritage” in the respective parks, and it is an objective “To highlight

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<sup>812</sup> *Urewera Plan*, *supra* note 782 at 6, see also page 31.

Aboriginal cultural heritage in collaboration with First Nations in ways that respect their traditions and values”.<sup>813</sup>

Many of the plans write of the importance of providing access and sites for spiritual and ceremonial use, often described as spiritual reconnection.<sup>814</sup> The Prince Albert plan states as a priority of action the need to protect and maintain Aboriginal archaeological sites and burial sites.<sup>815</sup> The Wapusk plan goes further, stating that “Access by visitors to the Park Land to any First Nations burial sites discovered thereon shall require the express written consent of the First Nations”.<sup>816</sup> The Prince Edward Island plan recognises that while a number of Aboriginal gravesites have been exposed by natural erosion and known remains removed, the site “retains spiritual significance for the Mi’kmaq”.<sup>817</sup>

Some of the plans indicate the desire to develop interpretative exhibits of the parks’ Aboriginal history and culture;<sup>818</sup> First Nation cultural interpretation programs;<sup>819</sup> a Visitor Reception Centre;<sup>820</sup> create heritage presentation programs that give understanding of the Aboriginal land claims and subsistence harvest rights;<sup>821</sup>

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<sup>813</sup> For example, see: *Elk Island Plan*, *supra* note 740 at 31. For similar sentiments see: *Waterton Plan*, *supra* note 744 at 2; *Riding Mountain Plan*, *supra* note 758 at 25.

<sup>814</sup> *Jasper Plan*, *supra* note 741 at 39 and 112; *Yoho Plan*, *supra* note at 745 at 27; *Cape Breton Highlands Plan*, *supra* note at 746 at 26; *Georgian Bay Islands Plan*, *supra* note 749 at vi.

<sup>815</sup> See *Prince Albert Plan*, *supra* note 756 at 20 and 50.

<sup>816</sup> *Wapusk Plan*, *supra* note 773 at 20. Note that this policy is taken directly from the Federal-Provincial Memorandum of Agreement for Wapusk National Park, policy 16(8).

<sup>817</sup> *Prince Edward Island Plan*, *supra* note 757 at 33.

<sup>818</sup> See: *Aulavik Plan*, *supra* note 761 at 26; *Ivvavik Plan*, *supra* note 764 at 45; and *Prince Edward Island Plan*, *ibid.* 58.

<sup>819</sup> See *Terra Nova Plan*, *supra* note 760 at 51.

<sup>820</sup> See *Wapusk Plan*, *supra* note 773 at 52, *Tuktut Nogait Plan*, *supra* note 771 at 46.

<sup>821</sup> See *Ivvavik Plan*, *supra* note 764 at 46.

support establishing national historic sites;<sup>822</sup> create a workplan for surveys and research related to Aboriginal cultural resources;<sup>823</sup> and develop a Cultural Resources Value Statement,<sup>824</sup> or a cultural landscape plan.<sup>825</sup> Many of the plans recognise the role of Aboriginal storytelling as, for example, “an important part of the park’s historic fabric and its future”.<sup>826</sup>

In the Prince Albert National Park lies the Paspiwin Cultural Heritage Site which the plan speaks about at length, including stating that an intended future action is that at this site “Aboriginal groups hold ceremonies such as cleansing sweat lodges, healing circles, fasts, and feasts. They share their culture, heritage, customs, and values with the youth and the public through teaching Traditional Knowledge, story telling, dances, drumming, and singing”.<sup>827</sup> Gros Morne states that the Parks Canada relationship there with its Aboriginal partners has led to “collaboration in the designation and commemoration of Mattie Mitchell, as a person of national historic significance, a travelling exhibit about Mi’kmaq history, and the delivery of teacher in-services focused on Aboriginal culture”.<sup>828</sup>

Many of the plans now recognise the value of heritage presentation not just to park visitors but also to the Aboriginal peoples themselves. The Wapusk plan posits

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<sup>822</sup> *Kootenay Plan, supra* note 742 at 27.

<sup>823</sup> *Cape Breton Highlands Plan, supra* note at 746 at 24.

<sup>824</sup> *Georgian Bay Islands Plan, supra* note 749 at vi, *Grasslands Plan, supra* note 750 at 30

<sup>825</sup> *St. Lawrence Islands Plan, supra* note 759 at 13.

<sup>826</sup> *Yoho Plan, supra* note at 745 at 38. See also *Jasper Plan, supra* note 741 at 114, *Banff Plan, supra* note 739 at 66 and 87, *Waterton Plan, supra* note 744 at 13, *Grasslands Plan, supra* note 750 at 27, *St. Lawrence Islands Plan, supra* note 759 at 12, *Pacific Rim Plan, supra* note 768 at 27. For an interesting discussion of the role of tourism and the Nakoda First Nation see: Tolly Bradford, “A Useful Institution: William Twin, ‘Indianness,’ and Banff National Park, c. 1860-1940” (2005) 16(2) *Native Studies Review* 77.

<sup>827</sup> *Prince Albert Plan, supra* note 756 at 43.

<sup>828</sup> *Gros Morne Plan, supra* note 751 at 21.

that it is a priority to deliver heritage presentation to local residents *and* First Nations because:<sup>829</sup>

These people must assume pride of ownership of the park, know the history of the park, and view the park as a place to maintain their cultural and historical ties. They understand the opportunities the park offers to learn, to explore, and to develop the regional economy, and they are the first line of defence for protecting the ecological integrity of the park.

But, still, the win/win benefits of committing to showcasing Aboriginal heritage linked with the park are not lost on Parks Canada. The plans, especially the old western mountain parks with high annual tourism numbers, state, for instance, as a management objective “*Improving the visitor experience* by facilitating opportunities for Aboriginal people to present their culture, history and perspectives to park visitors”.<sup>830</sup> Similarly, the Banff plan records a commitment to “showcase Aboriginal culture and traditions to the large number of visitors to the area”.<sup>831</sup> I do not mean to be too cynical in these observations because often these opportunities bring Aboriginal employment and business opportunities to the fore. It is, though, worthy of observation.

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<sup>829</sup> *Wapusk Plan*, *supra* note 773 at 50. For another example, see the *Ivvavik Plan*, *supra* note 764 at 46, and *Tuktut Nogait Plan*, *supra* note 771 at 47.

<sup>830</sup> *Jasper Plan*, *supra* note 741 at vi (emphasis added).

<sup>831</sup> *Banff Plan*, *supra* note 739 at 79. For other examples, see *Yoho Plan*, *supra* note at 745 at 27, *Waterton Plan*, *supra* note 744 at 31, *La Mauricie Plan*, *supra* note 754 at 40

The fact that most of the plans now recognise Indigenous place and Indigenous heritage reflects the wider legal, policy and societal shift towards accepting that these lands were once solely Aboriginal peoples' place.

#### *Aotearoa New Zealand*

All of the selected plans strongly recognise Maori heritage. For example, the Ngai Tahu plans state as a policy that the Department must preserve archaeological and historic objects and sites, and sites of significance to Ngai Tahu located within the park, and give effect to the Department's Protocol with Ngai Tahu for historic resources when managing the park.<sup>832</sup> These plans explain that as part of these Protocols the Department will consult with Ngai Tahu to ensure that any information pertaining to Ngai Tahu cultural values is accurately depicted.<sup>833</sup> Moreover, they make clear that when the Department issues concessions that seek to use or promote Ngai Tahu cultural information, the Department will request that the concessionaire consult with Ngai Tahu.<sup>834</sup> The Nelson Lakes plan clarifies that it is up to the relevant iwi, in consultation with the Department, to decide what to do with a found Maori artefact – it might be reburied, removed to a marae or placed in a museum.<sup>835</sup>

The Author's Pass plan states it is important to identify historic sites before work is undertaken that may affect them, and if "human bones are uncovered in the Park, work must stop immediately and the Policy, the Department and local tangata

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<sup>832</sup> *Westland Plan*, *supra* note 780 at 74. See also *Aoraki/Mount Cook Plan*, *supra* note 775 at 60; *Arthur's Pass Plan*, *supra* note 776 at 59; *Fiordland Plan*, *supra* note 777 at 113; *Kahurangi Plan*, *supra* note 778 at 51-52; *Nelson Lakes Plan*, *supra* note 779 at 48-50.

<sup>833</sup> For example, see *Westland Plan*, *supra* note 780 at 99, see also 98 and 127; *Aoraki/Mount Cook Plan*, *supra* note 775 at 95 – 97; *Fiordland Plan*, *supra* note 777 at 335-336.

<sup>834</sup> For example, see *Westland Plan*, *ibid* at 105; and, *Aoraki/Mount Cook Plan*, *ibid.* 103.

<sup>835</sup> *Nelson Lakes Plan*, *supra* note 779 at 49.

whenua be notified”.<sup>836</sup> This plan also explains that in regard to wahi tapu, wahi taonga and other sacred places that “Ngai Tahu may choose not to disclose, or disclose to a ‘silent file’ system, the location of wahi tapu sites to preserve the sacredness of these sites”.<sup>837</sup> A heritage aim of this plan reads “the places of special significance to Ngai Tahu are recorded or remembered and systems are established in such a way that these places and their values are preserved as far as possible”.<sup>838</sup> An interpretation policy for this park reads: “Work with Ngai Tahu to retain the memories and stories of the ara hiko through methods such as interpretation panels on walking tracks and in huts along the old ara hiko routes, and elsewhere”.<sup>839</sup>

The North Island plans similarly state that the Department must consult with tangata whenua when undertaking interpretation or developing information related to sites of historical or cultural significance to Maori.<sup>840</sup> Moreover, Maori must continue to be involved in management decisions related to sites of significance to them, including historical and archaeological sites.<sup>841</sup> And it is a policy aim for the Department to work particularly closely with Maori in regard to wahi tapu (sacred sites).<sup>842</sup> The Tongariro plan states that the Department “will encourage Ngati Tuwharetoa to take an active role in the interpreting cultural World Heritage values associated with the Tongariro Crossing”.<sup>843</sup>

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<sup>836</sup> *Arthur’s Pass Plan*, *supra* note 776 at 61.

<sup>837</sup> *Ibid.* 62. See also *Fiordland Plan*, *supra* note 777 at 105; *Kahurangi Plan*, *supra* note 778 at 53, and *Nelson Lakes Plan*, *supra* note **Error! Bookmark not defined.** at 49.

<sup>838</sup> *Arthur’s Pass Plan*, *supra* note 776 at 84.

<sup>839</sup> *Ibid.* 107; see also pages 108-110.

<sup>840</sup> *Urewera Plan*, *supra* note 782 at 40; *Egmont Plan*, *supra* note 781 at 62-63, and 90; and, *Tongariro Plan*, *supra* note 783 at 130.

<sup>841</sup> *Urewera Plan*, *ibid.* 22, and 65 and 67.

<sup>842</sup> *Egmont Plan*, *supra* note 781 at 42-43.

<sup>843</sup> *Tongariro Plan*, *supra* note 783 at 171.

This recognition, albeit belated, is extremely important in striving towards reconciliation. It conveys a sense of respect for Maori values and that action rather than mere acknowledgement is required. For example, if human bones are found, work *must* stop. There are thus mandatory consequences to recognising Indigenous heritage. It is commitments such as these that illustrate what it means to reconcile with Indigenous peoples. Thus these assurances provide initial answers to the thesis question: if there is a new commitment to recognising Indigenous peoples in law, what ought this to mean in the context of owning and managing national parks?

In many ways, recognising the fact of Indigenous place and Indigenous heritage is easy for the colonial managers because it has few implications for the actual management of the parks and in fact can have positive revenue spin-offs through attracting more visitors to the parks. Many tourists are interested in gaining knowledge of Indigenous peoples and in this way national parks are important arenas for exploring national history and national identity. The observation that it is easy to recognise Indigenous place and heritage is not to belittle these acknowledgments as they are essential first steps towards reconciliation. They create important pathways into understanding and appreciating Indigenous worldviews, history and traditions.

Overall, these new movements in both the New Zealand Department of Conservation and Parks Canada plans align with the Indigenous strategies to recognise, as discussed in chapter two. As I said in that chapter, an important step is to recognise that Indigenous peoples have a distinct and different worldview related to..... But do the plans attempt to grapple with the full implications of what mere recognition might entail? That is, do the plans also recognise the value of, for example, Indigenous language, Indigenous knowledge, Indigenous use and Indigenous employment and economic initiatives? These points require much more

than simple acknowledgment and as a consequence the reality of recognising Indigenous peoples becomes more intense for the colonial managers of national parks. These four points are now assessed under the Indigenise banner.

#### **IV. INDIGENISE**

The relevant field of inquiry is whether the management plans examined here allow Indigenous peoples the opportunities to be themselves – to speak their own languages, revive their own knowledge in caring for these lands, apply their own rules in using flora and fauna on these lands, and have opportunities to rebuild healthy economies connected to these lands?

##### **A. Indigenous language**

###### *Canada*

The stark difference between the formally inclusive park plans and most of the other plans, including the ‘Western Mountain’ parks, is obvious in regard to the recognition of the relevance of using Aboriginal languages. It is obvious in the Indigenous naming of the formally inclusive parks and in the content of the plans. Some of these plans explain the meaning of the park’s name such as the Ivvavik plan which translates Ivvavik as “a place for giving birth, a nursery” which is “a name that recognizes the park’s role as the calving ground for the Porcupine caribou herd – the traditional subsistence base for the Inuvialuit and other peoples of the Yukon North Slope for thousands of years”.<sup>844</sup> The Mingan Archipelago plan embraces the Indigenous language; the majority of the plan is translated into Innu and often appears

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<sup>844</sup> *Ivvavik Plan*, *supra* note 764 at 12.

alongside the English on the right hand side of the page. Some of the plans are available printed entirely in the relevant Indigenous language, namely the Auyuittuq plan,<sup>845</sup> Quttinirpaaq plan,<sup>846</sup> and Tongait KakKasuangita SilakKijapvinga Torngat Mountains plan.<sup>847</sup>

These formally inclusive plans are committed to recognising Indigenous place names. For example, the Aulavik plan expresses a commitment to acquire information on the historical and cultural basis of place names within and adjacent to the park and that “This information will be used in park management where possible”.<sup>848</sup> Parks Canada is to consult with Inuvialuit communities on the use of Inuvialuktun (the Inuvialuit language) and cultural information in park management and interpretive messages.<sup>849</sup> In the Vuntut plan, it states as a management objective to “[U]se Gwich’in place names in all communications about the park, so that they become comfortable, everyday language”.<sup>850</sup> The Nahanni Plan accepts that “Traditional Dene names connect culture and the land, linking local legends with places and history” and that there is a “need to enhance on-going efforts to incorporate Dene names, foster an understanding of name changes and initiate the process to formally change names”.<sup>851</sup> The Wapusk plan includes a one-page map of the park identifying some of the Cree place names.<sup>852</sup>

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<sup>845</sup> This plan is available to download in Inuktitut on the Parks Canada website at: <http://www.pc.gc.ca/pn-np/nu/ayuittuq/plan.aspx>.

<sup>846</sup> This plan is available to download in Inuktitut on the Parks Canada website at: <http://www.pc.gc.ca/pn-np/nu/quttinirpaaq/plan.aspx>.

<sup>847</sup> This plan is available to download in Inuktitut on the Parks Canada website at: <http://publications.gc.ca/site/eng/369407/publication.html>.

<sup>848</sup> *Aulavik Plan*, *supra* note 761 at 21.

<sup>849</sup> *Ibid.* 25.

<sup>850</sup> *Vuntut Plan*, *supra* note 772 at 28.

<sup>851</sup> *Nahanni Plan*, *supra* note 767 at 14.

Some of the other parks are beginning to acknowledge the importance of Indigenous place names as well. For example, the Prince Albert plan illustrates a desire to “Update the park map showing both gazetted names and their original Aboriginal or well-established local names”.<sup>853</sup> And, the Prince Edward Island plan states that Parks Canada is funding a Mi’kmaq Place Names Cultural Preservation Project.<sup>854</sup> The Kouchibouguac plan acknowledges that when the park was created in 1969 it was named using the Mi’kmaq language with the name Kouchibouguac meaning “river of the long tides”.<sup>855</sup> The Point Pelee plan states that Parks Canada will “explore how to bring the First Nations languages to the park visitor experience”.<sup>856</sup> The La Mauricie plan states as a management objective to: “[D]evelop our relations with representatives of the Atikamekw-Nehirowisiw First Nation and call upon their traditional knowledge and other sources to review the place names used in the park”.<sup>857</sup> The St. Lawrence Islands plan is interesting because the plan commences with a Thanksgiving Address written in both English and Haudenosaunee explaining that these words are still spoken at the opening and closing of all ceremonial and governmental gatherings held by the Haudenosaunee.<sup>858</sup>

Accepting that places have a history of Indigenous connection and then taking the next step to inquire, accept and use Indigenous languages in speaking and thinking about national parks is more than simple window dressing. Besides the obvious fact that it entails administrative costs, the commitment to using Indigenous languages

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<sup>852</sup> *Wapusk Plan*, *supra* note 773 at 21: see figure 4.1.

<sup>853</sup> *Prince Albert Plan*, *supra* note 756 at 29.

<sup>854</sup> *Prince Edward Island Plan*, *supra* note 757 at 58.

<sup>855</sup> *Kouchibouguac Plan*, *supra* note 753 at 11.

<sup>856</sup> *Point Pelee Plan*, *supra* note 755 at 30.

<sup>857</sup> *La Mauricie Plan*, *supra* note 754 at 39.

<sup>858</sup> *St. Lawrence Plan*, *supra* note 759 at opening page (not numbered).

moves from simply recognising Indigenous peoples and their place to actually changing the mindsets of how one thinks about a place. It is a significant shift towards a bicultural appearance and understanding of bicultural place (with European *and* Indigenous connections). The Parks Canada plans assessed show that while substantial commitments have been made in some parks, some other parks have yet to grapple with this issue. Utilizing an Indigenous language clearly conveys respect for the Aboriginal group and a commitment to work closely with that group. Moreover, languages provide the keys to understanding and appreciating cultures and this holds true for Aboriginal peoples and their languages. A commitment to reviving Indigenous languages is the essential first step in decolonising park management. Any management commitments to incorporate, for example, Indigenous knowledge, Indigenous use or Indigenous decision-making are potentially a farce without an understanding of the Indigenous worldview gained through an understanding of the Indigenous language.

#### *Aotearoa New Zealand*

All of the plans use te reo Maori (the Maori language) to varying degrees in the contexts of providing dual names for places and flora and fauna, and as subheadings throughout the plans. Some plans provide explanations of some of the words. For example, the Kahurangi plan begins by explaining Te Tapuae o te Kahu o te Rangi is a Maori name for sky blue, Princess, blue skies of Rangi, a precious type of stone “which all symbolise Kahurangi National Park” as “the meeting place of a great diversity of life forms and forces of nature, and a marker for the meeting place of

peoples”.<sup>859</sup> In the Arthur’s Pass plan, it explains that Kaimatua, the ancient Maori name for Mount Rolleston, embodies a tipua (a supernatural being) who also gave his name to ‘Arthur’s Pass’: Te Tarahaka o Kaimatua.<sup>860</sup> The Tongariro plan is the plan with the most extensive and consistent use of te reo Maori throughout its whole plan, including a Maori translation of all the key management philosophies for the park.<sup>861</sup>

The Westland plan states in regard to alpine guiding, that in processing a concession application for alpine guiding, consideration needs to be given to minimising the effects on the park’s natural, historic and cultural values and that this may include: “using the correct settlement place names, where relevant, in promotional material, as set out in the Ngai Tahu Claims Settlement Act 1998”.<sup>862</sup>

It is not surprising that the Department of Conservation plans utilise the Maori language more so than the Parks Canada plans utilise their relevant Aboriginal languages for several reasons. One is of course that in Aotearoa New Zealand, te reo Maori is an official language and this is not so of Aboriginal languages in Canada. Moreover, in Aotearoa New Zealand there is only one Indigenous language (with some dialectal differences) compared to the dozens of distinctly different Indigenous languages in Canada, and more than 30 alone in British Columbia.

Language provides an essential key to understanding a culture. While many Indigenous groups have lost their languages due to colonisation, where the language remains, every effort should be made to revive and utilise it on a daily basis. An essential ramification of recognising Indigenous place and Indigenous heritage ought to result in national park managers embracing Indigenous language. To not do so

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<sup>859</sup> *Kahurangi Plan*, *supra* note 778 at 11.

<sup>860</sup> *Arthur’s Pass Plan*, *supra* note 776 at 20.

<sup>861</sup> *Tongariro Plan*, *supra* note 783 at 39-44.

<sup>862</sup> *Westland Plan*, *supra* note 780 at 126.

could lead to claims that the recognition initiatives are merely superficial. That is, that Indigenous place and heritage are embraced to portray a sense of reconciliation to the international community and to attract the important tourist dollars rather than a real interest in language revitalization and use. A movement into the Indigenous initiatives requires specific acknowledgments and actions from the colonial managers that confront their settled daily management practices. The commitment requires enthusiasm and administrative costs from the colonial managers. Thus the recognition points are more passive than the Indigenous actions. Moreover, the Indigenous features also pose a challenge for the Indigenous groups. Indigenous groups need to have the space to revive their own languages, find application of their languages in the contemporary world, and to expect others to learn and respect their languages. The management plans in both countries reflect a general initial movement towards respecting Indigenous languages.

## **B. Indigenous knowledge**

### *Canada*

Most of the plans state as a management objective to understand and respectfully incorporate Aboriginal knowledge and perspectives into park management decision-making.<sup>863</sup> The Waterton park explains that Aboriginal people have a relationship with the landscape that pre-dates the creation of the park and thus:<sup>864</sup>

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<sup>863</sup> For example, see *Jasper Plan*, *supra* note 741 at 38; *Yoho Plan*, *supra* note at 745 at 26 and 27; *Mount Revelstone and Glacier Plan*, *supra* note 743 at 20 and 36; *Kootenay Plan*, *supra* note 742 at 19 and 27; *Point Pelee Plan*, *supra* note 755 at 29; *St. Lawrence Islands Plan*, *supra* note 759 at 13 and 16; *Wood Buffalo Plan*, *supra* note 774 at 16.

<sup>864</sup> *Waterton Plan*, *supra* note 744 at 15.

“Consequently, they have a unique and valuable perspective on the land, its processes, component parks and benefits. Parks Canada will work to establish regular ongoing consultation and foster significant, respectful relationships with Aboriginal communities. Our goal is to increase Aboriginal participation in park programs, to better understand and incorporate their knowledge and perspectives into visitor experiences and park management, in ways that respect cultural traditions and ownership of knowledge.”

The formally inclusive plans make a strong and detailed commitment to Indigenous knowledge. In these parks Indigenous knowledge must “be given equal consideration with scientific information in managing the park”.<sup>865</sup> The Nahanni plan accepts that “Traditional knowledge is an important source of information” and that it is “integrated in the decision making process for park management”.<sup>866</sup> The Kluane plan states that:<sup>867</sup>

The Intangible Cultural Resources indicator received a Poor rating, reflecting the loss of First Nations oral history and traditional knowledge resulting from the historic long-term exclusion of First Nations from the park and changes in lifestyle. The aging of Elders places additional stress on this indicator, as Elders’ traditional knowledge not passed on to future generations may be lost over time. A variety of methods and actions are needed to strengthen the preservation and continuation of intangible cultural resources in First Nation

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<sup>865</sup> For example, see: *Quttinirpaaq Plan*, *supra* note 769 at 14.

<sup>866</sup> *Nahanni Plan*, *supra* note 767 at 4.

<sup>867</sup> *Kluane Plan*, *supra* note 765 at 13.

traditional lands within the park. This is a joint responsibility with the First Nations and requires actions within the life of this management plan.

Moreover, the recognition of the importance of traditional knowledge in these formally inclusive plans has led Parks Canada to support extensive oral history projects.<sup>868</sup> Indigenous knowledge is recognised as key to the management of the Ivvavik park. This plan states as an objective, “To document, use, and present knowledge about Inuvialuit history and culture” and “To incorporate Inuvialuit knowledge, experience, and skills in park planning and management”.<sup>869</sup> The Mingan Archipelago plan includes a similar objective but does so in a context that sees the value of traditional knowledge and practices relating specifically to knowledge on “climatology, geography, botany, zoology, technical systems, material culture, world view, myths and legends, eco-ethics”.<sup>870</sup> This plan stipulates that such recognition will require park reserve management to make “adjustments ... so as to take the Aboriginal reality into account, notably by: Drawing on the communities’ traditional knowledge ...”.<sup>871</sup> The Tuktut Nogait plan has listed as a fifteen to twenty year vision that the Tuktut Nogait will be a park “that is an educational tool to encourage the passing down of knowledge and culture from the elders to Inuvialuit youth”.<sup>872</sup>

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<sup>868</sup> See *Aulavik Plan*, *supra* note 761 at 19; *Vuntut Plan*, *supra* note 772 at 17; *Tuktut Nogait Plan*, *supra* note 771 at 44 which clarifies that “This data will remain the property of the Inuvialuit”.

<sup>869</sup> *Ivvavik Plan*, *supra* note 764 at 43.

<sup>870</sup> *Mingan Archipelago*, *supra* note 766 at 52.

<sup>871</sup> *Ibid*, at 46.

<sup>872</sup> *Tuktut Nogait Plan*, *supra* note 771 at 14.

The Quttinirpaaq plan places Indigenous knowledge centre stage of its plan, commencing on the first pages explaining that:<sup>873</sup>

Inuit Qaujimajatuqangit refers to the knowledge and understanding of all things that affect the daily lives of Inuit and the application of that knowledge for the survival of a people and their culture. It is a knowledge that has sustained the past and that is to be used today to ensure an enduring future. Inuit Qaujimajatuqangit will be incorporated into the management of [the park].

This plan then lists the precise six guiding principles of Inuit Qaujimajatuqangit as:

1. Pijitsirnijiq: The concept of serving and providing for; a concept related to stewardship;
2. Aajiiqatigiingni: The Inuit way of decision-making by comparing views or taking counsel; consensus decision-making;
3. Pilnimmaksarniq: The passing on of knowledge and skills through observation, doing, and practice;
4. Piliriqatigiingniq: The concept of collaborative working relationships or working together for a common purpose;
5. Avatittinnik Kamattiarniq: The concept of environmental stewardship;
6. Qanuqtuurniq: The concept of being resourceful to solve problems.

M.M.R Freeman observed in the 1970s that: “Native expertise is beginning to be more widely accepted”.<sup>874</sup> Now, a quarter century later, acceptance is transforming

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<sup>873</sup> *Quttinirpaaq Plan*, *supra* note 769 at 1 and 2.

into a real commitment: “more and more, we are seeking to integrate their traditional knowledge into our management plans for parks”.<sup>875</sup> Thus, the management plans published in since 2000 reflect this new emphasis. For example, the Wapusk plan takes as given that Indigenous knowledge is valuable and normalises it. For example, the plan states: “The combined knowledge and experiences of Aboriginal people, staff, researchers, hunters, trappers, tour operators, guides, and park visitors will be incorporated into the management of Wapusk, providing the key elements for maintaining the ecological integrity of the park lands”.<sup>876</sup> And, an aspiration is that: “Members of the community and local First Nations share with visitors their knowledge of the land and their relationship with the land, creating enriched and inspired experiences”.<sup>877</sup> The Gwaii Haanas plan does likewise. It states that all decision-making will be reached by consensus based on scientific and traditional knowledge.<sup>878</sup>

#### *Aotearoa New Zealand*

Only few specific references to Indigenous knowledge are made in the Department of Conservation plans. The Kahurangi plan acknowledges “long-term research is

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<sup>874</sup> M.M.R. Freeman, “Traditional Land Users as a Legitimate Source of Environmental Expertise” in J.G. Nelson, R.D. Needham, S.H. Nelson and R.C. Scace (eds) *The Canadian National Parks: today and tomorrow. Conference II. Ten Years Later*. Studies in Land Use History and Landscape Change No. 7. (Waterloo: Faculty of Environmental Studies, University of Waterloo, 1979) at 353.

<sup>875</sup> Parks Canada Agency, *Response of the Minister of the Environment to Recommendations Made at the Third Minister’s Round Table on Parks Canada* (Parks Canada Agency, 2005) at 2.

<sup>876</sup> *Wapusk Plan*, *supra* note 773 at 12.

<sup>877</sup> *Ibid*, at 27.

<sup>878</sup> *Gwaii Haanas Plan*, *supra* note 763 at 8.

required to determine the ecological sustainability of the species and this research should include both scientific and traditional Maori practice concepts”.<sup>879</sup> The Egmont plan states, “Conservation will benefit from an increased depth of local and traditional knowledge”.<sup>880</sup> And later states as a policy “To strengthen the achievement of conservation goals by drawing on the cultural values of Maori in the management of the park”.<sup>881</sup>

The silence in the other plans is interesting and illustrates the potentially powerful leap in the seven point spectrum from its initial stages of recognising Indigenous place and heritage to Indiginizing management practices. The recognition points are obviously easier to acknowledge for they do not require a wholesale change in management practice or thinking. The Department of Conservation also gains from recognising Indigenous place and heritage especially through tourism marketing. But if the country is to achieve its aspirations of reconciliation, as argued in this thesis, it is not enough to simply recognise Maori.

At one level, the Department of Conservation plans do not emphasise Indigenous knowledge as well as Canadian plans do. I am not sure of the significance of this deficit; it might be that Indigenous knowledge permeates the Department plans. But that is perhaps an overly generous view. It seems that just as case law (chapter four), and legislation providing for the ownership and management of national parks (chapters five and six), are struggling to move beyond just recognising Indigenous peoples, so too are the management plans at this policy level. It is important to highlight this fact, because as this thesis strives to show, recent

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<sup>879</sup> *Kahurangi Plan*, *supra* note 778 at 76.

<sup>880</sup> *Egmont Plan*, *supra* note 781 at 36.

<sup>881</sup> *Ibid*, at 40.

initiatives, while exciting and praiseworthy, are overall not going far enough in grappling with the continuing mindset of colonial space and colonial place.

### C. Indigenous use

#### *Canada*

The Western Mountain plans tend to refer to First Nation use in the past tense. For example, the Mount Revelstone and Glacier plan states as an action to “Work with Aboriginal people in sharing stories of traditional use of the area”.<sup>882</sup> The middle era park plans tend to go somewhat further. The Prince Edward Island plan has as a management action: “Develop an agreement to facilitate traditional spiritual and ceremonial use of park lands by Mi’kmaq people”.<sup>883</sup> Furthermore, the Riding Mountain plan has an action to develop the best means for First Nations to use the park for their cultural camps.<sup>884</sup>

The formally inclusive plans go much further. This is because the *Canada National Parks Act* requires this to be so. As discussed in chapter 6, this Act permits that traditional renewable resource harvesting in national park reserves of Canada.<sup>885</sup> These plans thus acknowledge this in brief. These plans recognise the importance of the land to the First Nations peoples. For instance, the Aulavik plan endorses that the ties between the Inuvialuit and the land must be able to be maintained through

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<sup>882</sup> *Mount Revelstone and Glacier Plan*, *supra* note 743 at 62.

<sup>883</sup> *Prince Edward Plan*, *supra* note 757 at 58.

<sup>884</sup> *Riding Mountain Plan*, *supra* note **Error! Bookmark not defined.** at 34.

<sup>885</sup> See *Canada National Parks Act 2000*, s 40.

subsistence usage.<sup>886</sup> The Pacific Rim plan commits to facilitating drafting harvest protocol(s) by the local First Nations in mutually acceptable ways.<sup>887</sup> The Nahanni plan observes: “Traditional use is an integral part of the ecosystem. Subsistence harvest occurs in a respectful and sustainable manner, in accordance with Dene laws, values and principles”.<sup>888</sup> This plan permits First Nations and Metis people to use motorized access in the park in pursuing traditional subsistence harvesting activities.<sup>889</sup> But some plans go further than legislatively required. For example, the Vuntut plan blatantly states: “Subsistence activities will take priority over recreational activity”.<sup>890</sup>

In striving to increase visitor numbers to the Ivvavik National Park, the Ivvavik plan recognises the importance of protecting Indigenous use of the park in an explicit plan objective that reads: “To encourage appropriate day-use and multi-day activities that allow a wider variety and greater number of visitors to enjoy the park while not impairing the Inuvialuit uses of park lands”.<sup>891</sup> The plan clearly states that “In keeping with their traditions, Inuvialuit are guaranteed the right to continue subsistence harvesting activities” in the park.<sup>892</sup>

The Tuktut Nogait plan records an interesting agreement whereby the Inuvialuit have agreed not to exercise their right to sport hunt in the park.<sup>893</sup> The

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<sup>886</sup> *Aulavik Park*, *supra* note 761 at 12. See also *Torngat Mountains Plan*, *supra* note 770 at 8.

<sup>887</sup> *Pacific Rim Plan*, *supra* note 768 at 36.

<sup>888</sup> *Nahanni Plan*, *supra* note 767 at 3.

<sup>889</sup> *Ibid*, at 13.

<sup>890</sup> *Vuntut Plan*, *supra* note 772 at 20.

<sup>891</sup> *Ivvavik Plan*, *supra* note 764 at 51.

<sup>892</sup> *Ibid*, at 6.

<sup>893</sup> *Tuktut Nogait Plan*, *supra* note 771 at 8.

Gwaii Haanas plan prohibits extraction or harvesting by anyone of the resources of the lands for or in support of commercial enterprise, but does make an exception. The plan permits “trapping of fur-bearing animals or the cutting by Haida of selected trees for ceremonial purposes or for artistic purposes intended for public display”.<sup>894</sup> The Wapusk plan includes a useful table that illustrates the extent of the rights of Aboriginal people to access, use and take from the park.<sup>895</sup>

The most heartening observation here is that some of the Western and middle era plans are recognising Aboriginal use of lands and resources within parks. I use these observations in the next chapter as support for a call to amend the *Canada National Parks Act* to recognise the importance of permitting Aboriginal sustainable use in all parks.

#### *Aotearoa New Zealand*

All of the plans accept that customary use of native plants and animals can occur in accordance with the legislative and national policy objectives. As discussed in chapter 6, the *General Policy for National Parks* in Aotearoa New Zealand permits non-commercial customary use of traditional materials and species. The plans endorse this policy. For example, the Westland plan states that:<sup>896</sup>

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<sup>894</sup> *Gwaii Haanas Plan*, *supra* note 763 at 9.

<sup>895</sup> *Wapusk Plan*, *supra* note 773 at 48.

<sup>896</sup> *Westland Plan*, *supra* note 780 at 102 see also the further discussion of this policy on pages 102 and 103, and, also the acknowledgement of customary take of eels, page 94. See also *Arthur's Pass Plan*, *supra* note 776 at 123; *Fiordland Plan*, *supra* note 777 at 65, 361-364; *Kahurangi Plan*, *supra* note 778 at 28, 81-83; *Nelson Lakes Plan*, *supra* note 779 at 80-83; *Urewera Plan*, *supra* note 782 at 137-140; and *Egmont Plan*, *ibid.* 104-105.

Customary use or take of indigenous plants and animals may be permitted from the park by permit, with the consent of the Minister, where it is consistent with the objectives and other policies of this plan, National Parks Act 1980, other relevant legislation, and national policies.

The plans include some details of how and why Maori may wish to use native plants and animals. For example, the Aoraki/Mount Cook plan acknowledges that:<sup>897</sup>

Ngai Tahu has traditionally taken and used indigenous species and other natural materials within their rohe. These specifics and materials were essential to everyday life and a necessity for takata whenua. There is a present-day revival of former traditions and of the use of natural materials ... native plants used for food, weaving and medicine, native birds and other animals for their feathers and for food, clays and stones and water from sacred waters.

The Arthur's Plan policy statement indicates a cooperative approach: "The acknowledging of the Ngai Tahu history of customary use within the Park and the finding of ways for this use to continue in harmony with national park values".<sup>898</sup> At a later point, under the chapter heading of concessions, it states: "The acknowledging of the Ngai Tahu history of mahinga kai within the Park and the finding of ways for this mahinga kai to continue through customary use in harmony with national park

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<sup>897</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 101. See also the *Nelson Lakes Plan*, *ibid.* 81; and, *Urewera Plan*, *ibid.* 138.

<sup>898</sup> *Arthur's Pass Plan*, *supra* note 776 at 44.

values”.<sup>899</sup> The Fiordland plan is similarly cooperative in regard to indigenous fish, willing to “support customary fishing practices that protect the eel resource”.<sup>900</sup> As the Nelson Lakes plan acknowledges, eel is a species “of high importance to iwi and its use is an important expression of mana whenua and tikanga Maori”.<sup>901</sup>

The Nelson Lakes plan acknowledges the importance of relying on Indigenous knowledge in the context of whether to permit customary take. The plan states that there is a conflicting opinion on the potential effects of customary take from the waters of the Nelson Lakes National Park, thus “Kaitiaki will be appointed by iwi to advise the Department on customary take applications”.<sup>902</sup>

The commitments here are simply in accordance with the legislative and national policy objectives concerning Maori take of native flora and fauna. This stance was critiqued in chapter six. As said there, reconciliation is at risk of appearing as a farce as the country strives to protect in law and policy the colonial desire to fish and hunt for introduced species for recreation in national parks, but deny Maori a right to take for cultural survival native flora and fauna from the same parks. The inability to grapple with this tension illustrates that there has been no real recalibration in orientation to colonial space in now recognising Indigenous place.

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<sup>899</sup> *Ibid*, at 122.

<sup>900</sup> *Fiordland Plan*, *supra* note 777 at 84.

<sup>901</sup> *Nelson Lakes Plan*, *supra* note 779 at 83. Most of the plans, including the North Island plans, have policies for eels, for example, see *Urewera Plan*, *supra* note 782 at 136-137.

<sup>902</sup> *Ibid*, at 82.

## **D. Economic and employment opportunities**

### *Canada*

The formally inclusive plans give special priority to Aboriginal economic and employment opportunities within the parks. The provisions flow directly from the negotiated land claims agreements. For example, economic opportunities for the Champagne and Aishihnik First Nations are a priority for the management of the Kluane National Park and Reserve because, as the Kluane plan recognises, both final agreements “specify certain economic opportunities associated with the park, including direct employment, potential commercial operations (e.g. horse riding, dog sledding, motor-assisted boat tours) and trail construction and maintenance work”.<sup>903</sup>

The Nahanni plan states a key goal is to “ensure gainful employment opportunities for First Nations and Metis partners” and that Parks Canada supports this goal “through summer student work experience opportunities, specialised training, recruitment programs and providing a supportive environment for successful First Nations and Metis business opportunities in tourism”.<sup>904</sup> The Aulavik plan is more precise, for it states that a specific park management objective is to “To ensure that the majority of the economic benefits of the park accrue to the Sachs Harbour Inuvialuit”.<sup>905</sup> It emphasises that economic opportunities within the park should be provided to Inuvialuit on a preferred or priority basis.<sup>906</sup> Further to the west, the Vuntut plan

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<sup>903</sup> *Kluane Plan*, *supra* note 765 at 28.

<sup>904</sup> *Nahanni Plan*, *supra* note 767 at 4.

<sup>905</sup> *Aulavik Plan*, *supra* note 761 at 12.

<sup>906</sup> *Ibid*, at 29.

states a commitment to have at least 50 per cent of the public service employment positions in the park filled by qualified Vuntut Gwitchin citizens.<sup>907</sup> The bordering park to the north, Ivvavik, is likewise committed to ensuring the full participation of Inuvialuit “in opportunities for community and economic benefit that may arise out of park visitation and tourism”<sup>908</sup> and that such opportunities “should be provided to Inuvialuit on a preferred basis”.<sup>909</sup> The Aulavik plan uses strong language: it states that “Inuvialuit who meet or exceed the qualifications stipulated in any competition for public sector positions within the park shall be considered on a priority basis for recruitment to these positions”.<sup>910</sup>

The Wapusk plan is committed to providing opportunities for Aboriginal businesses and organizations to gain economic benefit from the park by, for example, reserving an area of the park for proposals from local Aboriginal businesses and organizations, and developing a back country lodge which will be restricted to Aboriginal businesses or public/Aboriginal partnerships.<sup>911</sup> The Quttinirpaaq plan makes similar commitments to increasing Inuit businesses and Inuit guide operations within the park with an attached goal of by 2020.<sup>912</sup> The Tongait KakKasuangita SilakKijapvinga Torngat Mountains plan identifies many initiatives including one where Parks Canada is also working with Cruise North, an Inuit-owned cruise ship company, to develop an environmental stewardship cruise to the park that will utilize scientists and Inuit Elders as guest lectures and resource people.<sup>913</sup> The Gwaii Haanas

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<sup>907</sup> *Vuntut Plan*, *supra* note 772 at 37.

<sup>908</sup> *Ivvavik Plan*, *supra* note 764 at 50.

<sup>909</sup> *Ibid*, at 8.

<sup>910</sup> *Aulavik Plan*, *supra* note 761 at 36.

<sup>911</sup> *Wapusk Plan*, *supra* note 773 at 35 and 36.

<sup>912</sup> *Quttinirpaaq Plan*, *supra* note 769 at 13 and 54.

<sup>913</sup> *Torngat Mountains Plan*, *supra* note 770 at 17.

plan goes even further in strongly supporting Haida enterprise. The plan states a commitment to “provide for commercial use allocation for Haida owned and operated businesses equal to that of existing commercial operators. This will result in a three-way split, divided equally between independent travellers, commercial operators, and Haida entrepreneurs”.<sup>914</sup>

However, some of the other parks are also beginning to recognise the important opportunities of encouraging Aboriginal employment and enterprise. For example, the Prince Albert Park plan states as a priority of action to continue to support and participate in initiatives such as the Aboriginal Leadership Development Program “to ensure Aboriginal employees have opportunities to advance to supervisory or management positions”.<sup>915</sup> This plan states that already more than a quarter of its workforce is of Aboriginal descent.<sup>916</sup>

The Prince Edward Island plan has as a management action to develop skills training and information to enable Mi’kmaq people to prepare for careers with Parks Canada and improve communication regarding career opportunities within the park.<sup>917</sup> The Kouchibouguac plan identifies, as a management action, continuing to provide employment opportunities to Aboriginal people and to encourage and work with Mi’kmaq “in the development of tourism offers or other economic development opportunities that are associated with or complement the park’s offer”.<sup>918</sup>

The Cape Breton Highlands plan states as an objective to “Encourage and work with local communities and the Mi’kmaq to develop tourism offers or other

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<sup>914</sup> *Gwaii Haanas Plan*, *supra* note 763 at 27.

<sup>915</sup> *Prince Albert Plan*, *supra* note 756 at 20.

<sup>916</sup> *Ibid*, at 19.

<sup>917</sup> *Prince Edward Island Plan*, *supra* note 757 at 58.

<sup>918</sup> *Kouchibouguac Plan*, *supra* note 753 at 38.

economic development opportunities associated with or complementary to the Park's offer and meet the needs and expectations of visitors".<sup>919</sup> The Point Pelee plan records a hope to increase the number of Caldwell First Nation and Walpole Island First Nation members that are part of the Parks Canada workforce, and to establish one or more enterprise initiatives with these First Nations by March 2015.<sup>920</sup> The Grassland plan states as an objective to "Increase opportunities for the hiring and training of staff from Aboriginal communities in support of park activities",<sup>921</sup> and the St. Lawrence Islands plan states a desire to "work closely with Akwesasne to ensure our friendship contributes economic and social value to both communities".<sup>922</sup> Even one of the old western mountain park plans now records a commitment to identify and facilitate opportunities for Aboriginal people to participate in the economic activity of the park.<sup>923</sup>

### *New Zealand*

The Department of Conservation plans are relatively silent on economic and employment opportunities for Maori as compared with many of the 'land claim agreement' Parks Canada plans. Scattered comments include this one in the Tongariro plan that states that the "Ski area development and management is of particular interest to tangata whenua".<sup>924</sup> However, the comparative silence may mean less than first assumed. Remember, Maori constitute over 15 per cent of the national population and have not been geographically isolated onto reserves. Thus, Maori are

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<sup>919</sup> *Cape Breton Highlands Plan*, *supra* note 746 at 23.

<sup>920</sup> *Point Pelee Plan*, *supra* note 755 at 29.

<sup>921</sup> *Grassland Plan*, *supra* note 750 at 47.

<sup>922</sup> *St. Lawrence Islands Plan*, *supra* note 759 at 16.

<sup>923</sup> *Jasper Plan*, *supra* note 741 at 39.

<sup>924</sup> *Tongariro Plan*, *supra* note 783 at 198.

more likely to be already employed by the Department of Conservation (although I have been unable to find any statistical evidence of this), and with Treaty of Waitangi claim settlements underway, some Maori tribes are now major economic players in society, in particular Ngai Tahu. Therefore, there may be less need to make these economic and employment commitments in the actual national park management plans. But, as also concluded under the Indigenous knowledge point where the Department of Conservation plans are likewise silent, these observations may be overly generous.

## **V. DECOLONISE**

Parallelling my analysis in chapter six, my inquiry here is directed to whether the selected national park management plans exhibit intentions to rethink the operation of the national park, primarily its management structures.

### **A. Indigenous decision-making**

#### *Canada*

All of the plans assessed make a commitment to include Aboriginal peoples in managing the parks. All of the formally inclusive plans ascribe to a ‘cooperative’ management regime between Parks Canada and the respective Aboriginal peoples, except the Gwaii Haanas plan that commits to ‘shared management’. This plan

commits to “cautious and deliberate management”<sup>925</sup> where management will accept that “human beings are a part of the natural world”.<sup>926</sup>

The cooperative management focus derives from the specific land claims agreements. For example, the Vuntut plan proudly states that the “relationship between Parks Canada and the Vuntut Gwitchin Government has evolved from one initially based on obligations from the Vuntut Gwitchin First Nation Final Agreement to one based on collaboration and respect”.<sup>927</sup> It is a management objective that the “Vuntut Gwitchin rights within the park are recognized, protected, understood and supported by park staff, visitors and other Canadians”.<sup>928</sup>

The Wood Buffalo plan has as key targets that collaboration and information sharing is improved between Wood Buffalo National Park and local communities by 2013; local Aboriginal groups participate in planning and management decisions under a collaborative park management structure by 2015; and, a representative park vision statement for Wood Buffalo National Park is created by 2015.<sup>929</sup> Moreover, by 2015 local Aboriginal groups will be given increased opportunity to engage in park research, monitoring, heritage presentation and public outreach education.<sup>930</sup>

The Kluane plan states that a greater awareness of cooperative management is a priority and that this “includes more clearly defining the roles and responsibilities of the cooperative management partners, leading to more effective cooperative management. It also includes further relationship building for a common understanding of shared visions and goals, as well as the practical implications of

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<sup>925</sup> *Gwaii Haanas Plan*, *supra* note 763 at 5

<sup>926</sup> *Ibid*, at 8.

<sup>927</sup> *Vuntut Plan*, *supra* note 772 at 6.

<sup>928</sup> *Ibid*, at 25.

<sup>929</sup> *Wood Buffalo Plan*, *supra* note 774 at 18.

<sup>930</sup> *Ibid*, at 18.

their decisions in park use and management”.<sup>931</sup> The Kluane plan records an instance of where some management differences exist. This concerns the management desire to declare 95 per cent of the park wilderness, but the local First Nations stated a concern that to do so might impact on their economic opportunities within the park. This remains an ongoing topic of consultation.<sup>932</sup>

The Ivvavik plan speaks of the need for a “strong partnership”<sup>933</sup> with the Inuvialuit but uses cooperative management aspirations in expressing explicit plan objectives.<sup>934</sup> At a later point in the plan, the language of cooperation is mixed with ‘lead stewardship,’ which is an interesting terminological development. The plan states “Parks Canada and the Inuvialuit are the lead stewards in the protection of the park, but success can only be achieved through cooperation and shared stewardship with visitors, communities, cooperative management partners, tourism companies, the military, oil and gas industry, and other”.<sup>935</sup> Likewise, it is more common in the Aulavik plan to see references not to ‘cooperative’ management but ‘co-management’. For example, a specific park management objective is “To protect the integrity of ecosystems and cultural resources of the park by participating respectively with: the co-management process with the Inuvialuit Game Council (IGC) and co-management bodies”.<sup>936</sup> It is part of the Ivvavik’s key vision that “Inuvialuit beneficiaries are involved in the operation and management of the park”.<sup>937</sup>

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<sup>931</sup> *Kluane Plan*, *supra* note 765 at 35, and see at 60 for some specific details.

<sup>932</sup> *Ibid*, at 50.

<sup>933</sup> *Ivvavik Plan*, *supra* note 764 at 7, and see at 61.

<sup>934</sup> *Ibid*, at 21 and 47.

<sup>935</sup> *Ibid*, at 47.

<sup>936</sup> *Aulavik Plan*, *supra* note 761 at 12.

<sup>937</sup> *Ivvavik Plan*, *supra* note 764 at 12.

The Wapusk does something interesting by developing a management philosophy for the park that is grounded in recognising Indigenous place. The plan states under the heading ‘Keepers of the Land’:<sup>938</sup>

The Aboriginal people of the area recognize that they are part of the ecosystem and that their actions affect it. They believe that each person is responsible for observing and being sensitive to the consequences of their actions on the ecosystem and to take steps, collectively and individually, to ensure that the balance of the system is not disrupted. Aboriginal people refer to this responsibility as being keepers of the land, a philosophy that forms the foundation for the management of Wapusk.

This plan uses cooperative management terminology, rather than partnership, and has a two-level management board, although the details of board membership are not explained.<sup>939</sup>

The Tuktut Nogait plan, which is also strongly committed to cooperative management, includes a practical management example whereby Inuvialuit organizations will be consulted, along with others, on appropriate aircraft landing options within the park.<sup>940</sup>

The Mingan Archipelago plan clearly recognises the implications of its park’s status as a national park reserve and the issues that will confront park management once land claims have been negotiated and finalised. For example, the plan states that

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<sup>938</sup> *Wapusk Plan*, *supra* note 773 at 12.

<sup>939</sup> *Ibid*, at 40.

<sup>940</sup> *Tuktut Nogait Plan*, *supra* note 771 at 55.

park management “must take into account the needs expressed by the Innu community” and should “Support the Innu communities’ land claims negotiations”.<sup>941</sup>

Likewise, the plan for Pacific Rim, which also has national park reserve status, records that a key goal is to continue to build relationships with all nine First Nations partners.<sup>942</sup> It is implementing a strategy that will “encourage continuous dialogue and relationship building”.<sup>943</sup> Some of the targets include establishing cooperative management boards and ensuring board members have taken cross-cultural awareness training by 2012.<sup>944</sup>

As discussed in chapter six, the Nunavut territory national parks of Canada are each managed by a Joint Inuit/Government Park Planning and Management Committees. These committees were established in accordance with specific land claims agreements. The Nunavut national park plans discuss the roles of these committees, for example, in issuing water licences, considering park planning and management, research, park promotion and information, visitor access to and use of the park, employment and training of Inuit employees, economic opportunities, changes to the boundaries of the park.<sup>945</sup>

The Tongait KakKasuangita SilakKijapvinga Torngat Mountains plan discusses the success of a base camp initiative that was established in 2006 as a pilot project and has since become a permanent feature. The rationale for the camp is to “explore new and better ways of increasing Inuit presence in the park, and to support summer

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<sup>941</sup> *Mingan Archipelago Plan*, *supra* note 766 at 44.

<sup>942</sup> *Pacific Rim Plan*, *supra* note 768 at 21.

<sup>943</sup> *Ibid*, at 33.

<sup>944</sup> *Ibid*, at 33.

<sup>945</sup> For example see *Quttinirpaaq Plan*, *supra* note 769 at 4.

operational programs”.<sup>946</sup> Inuit manage the base camp and since 2007 it has been located on Inuit owned land. The camp operates for 5-6 weeks in the summer as the center of operations for the park, providing accommodation, meals, Inuit guides and polar bear monitors, and a staging area for day or multi-day trips for visitors through the park. The plan describes a typical day at the camp as:<sup>947</sup>

Inuit Elders sharing their knowledge of the land with scientists, park managers and Inuit youth; tourists visiting archaeological sites with Inuit guides and participating in traditional harvesting activities; Parks Canada senior managers enjoying a cup of tea with young Inuit students; and Inuit integrating into ongoing science and monitoring programs.

The middle era park plans all make commitments to Aboriginal peoples. For example, the Fundy plan is interesting in that at several points it states that it seeks “stronger relationships” with Aboriginal communities in the region,<sup>948</sup> and is exploring the “feasibility of establishing an Aboriginal advisory group to act as a liaison between First Nations and Parks Canada regarding park management, heritage and culture, and other opportunities in the national park and historic sites within the field unit”.<sup>949</sup> The plan records an instance where collaboration has commenced on the Atlantic salmon recovery program.<sup>950</sup> Likewise the Prince Albert Park records a

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<sup>946</sup> *Tornгат Mountains Plan*, *supra* note 770 at 13.

<sup>947</sup> *Ibid*, at 13-14.

<sup>948</sup> *Fundy Plan*, *supra* note 748 at 9, see also at 16 and 18.

<sup>949</sup> *Ibid*, at 18.

<sup>950</sup> *Ibid*, at 18 and 20.

commitment for ‘stronger relationships’<sup>951</sup> and ‘on-going dialogue’<sup>952</sup> with Aboriginal communities. It too seeks to establish an advisory board to “share the leadership”<sup>953</sup> but Aboriginal groups would simply constitute part of its membership, along with other regional and national stakeholders and scientific community representatives. Nonetheless, a key 2020 vision for this park is that it will become well known for collaborating with “Aboriginal people to preserve, present and protect the unique rich aboriginal history of the land, while incorporating Traditional Knowledge into science and decision-making”.<sup>954</sup> The Prince Albert Park recognises that “Through much of the park’s history, communication between the park and Aboriginal groups was limited, inconsistent, and generally confined to specific issues. The past decade has seen significant progress on all sides to strengthen links through consultation on management decisions and collaboration on cultural and interpretive activities”.<sup>955</sup>

The Prince Edward Island plan records a commitment to “foster and strengthen the consultative and working relationship” between Parks Canada and Mi’kmaq Confederacy of the Island,<sup>956</sup> and attaches to the plan a specific work plan that highlights immediate through to long-term goals involved with working with Mi’kmaq.<sup>957</sup> Moreover, the Riding Mountain plan recognises that the park management “needs to build upon its collaborative partnerships with First Nations

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<sup>951</sup> *Prince Albert Plan, supra* note 756 at 51.

<sup>952</sup> *Ibid*, at 19.

<sup>953</sup> *Ibid*, at 18.

<sup>954</sup> *Ibid*, at 1.

<sup>955</sup> *Prince Albert Plan, supra* note 756 at 19.

<sup>956</sup> *Prince Edward Plan, supra* note 757 at 57.

<sup>957</sup> See *ibid*, at 67.

...”.<sup>958</sup> This includes in areas of ecological integrity, commemorative integrity, and tourism, and increase local First Nation communities’ opportunities and roles in influencing management decisions”.<sup>959</sup>

The Cape Breton Highlands plan records a collaborative management relationship with Mi’kmaq, including consulting on preserving the moose population in the park,<sup>960</sup> and defining the Mi’kmaq role in research, protection, identification, interpretation and presentation, and Aboriginal artefacts;<sup>961</sup> creating positive relationships with Mi’kmaq schools through hosting field trips to the park;<sup>962</sup> and seeking to establish a Terms of Reference for a Collaborative Management Committee by 2015.<sup>963</sup> The Terra Nova plan states a commitment to “Develop partnerships with Aboriginal communities in Newfoundland and Labrador on projects of mutual interest and mutual benefit”.<sup>964</sup> The Forillon plan speaks of the Final Agreement between Gespeg and Parks Canada, signed in March 2009, for the establishment of a new partnership relationship and for the creation of the Micmac Nation of Gespeg Sites. This Agreement aims at “providing the foundations of a new partnership which supports the promotion of the Micmac presence and culture in Forillon National Park”.<sup>965</sup> The plan also records a commitment to create a cooperative board of trustees composed of three Parks Canada and three Aboriginal

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<sup>958</sup> *Riding Mountain Plan*, *supra* note **Error! Bookmark not defined.** at 53.

<sup>959</sup> *Ibid*, at 54.

<sup>960</sup> *Cape Breton Highlands Plan*, *supra* note 746 at 25 and 26.

<sup>961</sup> *Ibid*, at 26.

<sup>962</sup> *Ibid*, at 17.

<sup>963</sup> *Ibid*, at 26.

<sup>964</sup> *Terra Nova Plan*, *supra* note 760 at 51, see also at 36.

<sup>965</sup> *Forillon Plan*, *supra* note 747 at 81.

representatives to help implement the goals of the Agreement.<sup>966</sup> Similarly, the Point Pelee plan records a commitment to establish a First Nations Advisory Committee by March 2011 to develop a memorandum of understanding.<sup>967</sup> The Grasslands plan records a desire to initiate dialogue toward establishing Aboriginal advisory relationships with the park by 2013,<sup>968</sup> and a specific need to engage with First Nations and Metis in developing and implementing a hyper-abundance bison population management plan.<sup>969</sup>

The Georgian Bay Islands plan states that its Cultural Advisory Committee (comprising First Nations, Aboriginal and Metis representatives) already exists,<sup>970</sup> and that “Quarterly formal meetings will continue throughout the life of the plan to ensure that regional First Nations and Aboriginal groups have a forum that allows for meaningful contributions to park management”.<sup>971</sup>

The St. Lawrence Islands plan proudly assert that “Over the past three years, the park and the Mohawks of Akwesasne have made concerted efforts to establish a respectful and productive relationship” and that the park the regional community were “honoured in the summer of 2007 with a traditional Haudenosaunee Smoky Fire ceremony that formalized the park’s relationship with the Mohawk community of Akwesasne”.<sup>972</sup> This plan states as an objective the importance of establishing “mutually rewarding relationships”,<sup>973</sup> and pitches as a key action to “work closely

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<sup>966</sup> *Ibid*, at 81.

<sup>967</sup> Point Pelee Plan, *supra* note 755 at 29.

<sup>968</sup> *Grasslands Plan*, *supra* note 750 at 47.

<sup>969</sup> *Ibid*, at 27.

<sup>970</sup> *Georgian Bay Islands Plan*, *supra* note 749 at 2 and 6.

<sup>971</sup> *Ibid*, at 35.

<sup>972</sup> *St. Lawrence*, *supra* note 759 at 7.

<sup>973</sup> *Ibid*, at 16.

with Akwesasne to ensure our friendship contributes economic and social value to both communities”.<sup>974</sup> The plan then records a realisation that this will require the park to create training opportunities for all park and field unit staff to learn about Mohawk culture and history related to the park.<sup>975</sup>

Even the old western mountain park plans are inclusive. The Kootenay plan states: “Understanding the relationship between the people and the environment is the foundation of good decisions. Inspiration and understanding are derived from the human-land relationship of local First Nations”.<sup>976</sup> The Elk Island plan adds: “Recognition of the meaningful role played by Aboriginal peoples is essential.”<sup>977</sup> The Banff plan states that a management priority and challenge is to build more meaningful engagement with Aboriginal people.<sup>978</sup> The Jasper plan states a commitment to “Promote capacity building and effective involvement in park planning and management”,<sup>979</sup> and records the fact that Parks Canada has been working with more than twenty groups through the Jasper Aboriginal Forum, established in 2006, and since 2004 with the Council of Elders of the Descendants of Jasper.<sup>980</sup> The Waterton plan explains, “Parks Canada will actively and regularly consult with Aboriginal community on how to honour and restore their cultural connections to the park and facilitate their enduring involvement with the park. Seek

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<sup>974</sup> *Ibid*, at 16.

<sup>975</sup> *Ibid*, at 16.

<sup>976</sup> *Kootenay Plan*, *supra* note 742 at 7.

<sup>977</sup> *Elk Island Plan*, *supra* note 740 at 8.

<sup>978</sup> *Banff Plan*, *supra* note 739 at 20.

<sup>979</sup> *Jasper Plan*, *supra* note 741 at 39.

<sup>980</sup> *Ibid*, at 6.

the involvement of regional Aboriginal partners on a formal park management advisory committee”.<sup>981</sup>

The movement along the spectrum to permitting the incorporation of Indigenous management practices, philosophies and decision-making is a significant one that represents a shift from merely recognising Aboriginal peoples and even Indigenizing colonial management. Management practices have the potential to decolonise national parks as they go to the heart of power-sharing. Overall, the plans convey an impression that Parks Canada is making strong steps towards recognising the potential of cooperative management. However, as discussed in chapter six, cooperative management aspirations do not necessarily equate to co or joint management, and certainly not Indigenous led management. The dominant power remains with Parks Canada. This is, of course, only a problem if Aboriginal peoples are discontent with this.

#### *Aotearoa New Zealand*

All of the plans state as a management objective: “To give effect to the principles of the Tiriti o Waitangi/Treaty of Waitangi to the extent that the provisions of the National Parks Act 1980 are clearly not inconsistent with them”.<sup>982</sup> The plans acknowledge that the impetus for this objective comes from section 4 of the Conservation Act 1987.<sup>983</sup> The Egmont plan also puts this objective upfront as a

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<sup>981</sup> *Waterton Plan*, *supra* note 744 at 39.

<sup>982</sup> *Westland Plan*, *supra* note 780 at 56. See also *Aoraki/Mount Cook Plan*, *supra* note 775 at 39; *Arthur’s Pass Plan*, *supra* note 776 at 46; *Fiordland Plan*, *supra* note 777 at 35; *Kahurangi Plan*, *supra* note 778 at 30; *Nelson Lakes Plan*, *supra* note 779 at 33 and 37; *Urewera Plan*, *supra* note **Error! Bookmark not defined.** at 33; *Egmont Plan*, *supra* note 781 at 39; and, *Tongariro Plan*, *supra* note 783 at 41.

<sup>983</sup> See discussion on *Westland Plan*, *ibid.* 56-57; and, *Aoraki/Mount Cook Plan*, *ibid.* 39-40.

vision for the park at the beginning of the plan: “Recognising the special role of Tangata Whenua as kaitiaki, working co-operatively with Iwi and acknowledging their cultural values in the management of the park will aid its preservation”.<sup>984</sup> Most of the plans incorporate a stand alone chapter dedicated to discussing the Treaty of Waitangi relationship and the principles.

In regard to the Treaty relationship, the plans use a mix of language to explain it. Most do not use the language of partnership that the courts used most often in the 1980s and 1990s or even cooperative management label as is becoming common in Parks Canada plans. Instead, the plans often speak of a consultation role with iwi (some even stating that this is “the most appropriate way to help give effect” to Treaty principles<sup>985</sup>), or the need for iwi to be “actively involved”.<sup>986</sup> Several of Ngai Tahu plans talk of the importance of establishing and maintaining “a close relationship with Ngai Tahu to ensure that their concerns are heard and taken into account”.<sup>987</sup> Interesting, the Arthur’s Pass plan (another Ngai Tahu one) prefaces its discussion of the Treaty relationship with this statement:<sup>988</sup>

This section sits in front of the other policy sections of the management plan, in recognition of the Treaty of Waitangi relationship between the Crown,

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<sup>984</sup> *Egmont Plan*, *supra* note 781 at [page not numbered].

<sup>985</sup> *Westland Plan*, *supra* note 780 at 61.

<sup>986</sup> *Westland Plan*, *ibid.* 61; *Aoraki/Mount Cook Plan*, *supra* note 775 at 35; and, *Kahurangi Plan*, *supra* note 778 at 32.

<sup>987</sup> *Aoraki/Mount Cook Plan*, *ibid.* at 35 and 46. *Fiordland Plan*, *supra* note 777 at 35. Note that the Ngai Tahu commitments are driven by the Ngai Tahu Protocols which have been included in most of the Ngai Tahu plans. For example, see *Western Plan*, *ibid.* at *Appendix 2*; *Aoraki/Mount Cook Plan*, *Appendix D*; *Arthur’s Pass Plan*, *supra* note 776 at *Appendix B*; and *Fiordland Plan*, *Appendix E*.

<sup>988</sup> *Arthur’s Pass Plan*, *ibid.* at 46.

through Department, and Ngai Tahu. The management of the Park's values must be from the bi-cultural perspective, in accordance with the Crown's recognition of the Treaty.

The North Island Urewera plan sees value in developing and maintaining "...an ongoing effective working relationship between the Department and tangata whenua".<sup>989</sup> This plan acknowledges that there is a need to "give recognition to the Treaty partner and mana whenua status of tangata whenua and to make decisions on a fully-informed basis, which includes consultation."<sup>990</sup> The plan justifies this because tangata whenua live close to, or in privately owned enclaves in, the park and thus retain knowledge of the area important for park management; use the park for recreational deer and pig hunting; and, know that the park contains plants that may be collected for cultural purposes.<sup>991</sup>

The Egmont plan states as a management goal: "To recognise the range of spiritual and cultural values that people place on the park" and to "work co-operatively with Tangata Whenua".<sup>992</sup> This plan speaks of the need to place emphasis on establishing "common goals in conservation management ... so that the goal of traditional kaitiakitanga and the Department's guardianship role can be achieved".<sup>993</sup> Early, open, ongoing and effective communication is sought.<sup>994</sup> The Department states an intention to explore formal arrangements with Tangata Whenua in order to

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<sup>989</sup> *Urewera Plan, supra* note 782 at 36.

<sup>990</sup> *Ibid*, at 33 and 34.

<sup>991</sup> *Ibid*, at 34.

<sup>992</sup> *Egmont Plan, supra* note 781 at 35.

<sup>993</sup> *Ibid*, at 40.

<sup>994</sup> *Ibid*, at 40.

make better management decisions.<sup>995</sup> Interestingly, the Tongariro plan speaks of developing an effective conservation partnership with Tangata Whenua because of the section 4 requirement to give effect to Treaty principles.<sup>996</sup> It speaks of “co-operative conservation management.”<sup>997</sup>

In terms of the principles, most reproduce as an appendix a two-page statement that lists 8-9 principles regarding: Crown governance, traditional iwi authority, equality, guardianship, act reasonably and in good faith, informed decision-making, active protection, and avoid action that create new Treaty grievances or prevent redress of claims.<sup>998</sup> Some of the plans highlight the importance of kaitiakitanga (guardianship) as a central Treaty principle. The Fiordland plan explains that kaitiakitanga is central to Ngai Tahu and their role as mana whenua (Nelson Lakes does likewise except in relation to Ngai (Kai) Tahu, Ngati Apa, Ngati Kuia, Ngati Toa and Ngati Rarua).<sup>999</sup> The Fiordland plan goes further and explains the significance: “Ngai Tahu as mana whenua are linked with the land physically, spiritually and culturally through whakapapa. Mana whenua status carries with it an obligation to be kaitiaki. Kaitiakitanga is the means by which the mauri (life force) of

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<sup>995</sup> *Ibid*, at 41.

<sup>996</sup> *Tongariro Plan*, *supra* note 783 at 15.

<sup>997</sup> *Ibid*, at 48.

<sup>998</sup> See *Westland Plan*, *supra* note 780 at Appendix 1; *Kahurangi Plan*, *supra* note 778 at Appendix 4; *Urewera Plan*, *supra* note 782 at Appendix 1; and *Egmont Plan*, *supra* note 781 at Appendix 1. The Tongariro Plan lists the principles in a like manner in the main text, see *supra* note 783 at 48, and then in more detail on pages 50-52. Note that the *Aoraki/Mount Cook Plan*, *supra* note 775 at Appendix F, is slightly different because it incorporates paragraphs from the courts and the Waitangi Tribunal under each of the relevant principles. Note, also that Arthur’s Pass and Fiordland Plans, both 2007 published plans, do not include a like appendix to the other plans.

<sup>999</sup> See also the *Egmont Plan*, *ibid*. that also does this, see pages 39-40.

resources is restored, maintained and enhanced for present and future generations”.<sup>1000</sup>

It then goes on to state, as other Ngai Tahu plans do, the importance of thus having a close relationship with Ngai Tahu. Like some of the Ngai Tahu plans, the Urewera plan has as a policy objective to “recognise the role of tangata whenua as kaitiaki of nga taonga o Te Urewera”.<sup>1001</sup>

The North Island Tongariiro plan speaks of the Treaty principles in depth, and then uniquely lists over 15 issues that “need to be resolved to the satisfaction of iwi and the department in order to achieve co-operative conservation management” – the list reads:<sup>1002</sup>

- consultation between the parties;
- participation in conservation management projects;
- sharing of resource information;
- recognition of the parties’ perspectives and sharing of resources;
- development of resource management approaches to achieve the protection of taonga;
- involvement in the process of considering concession applications;
- iwi involvement in concession opportunities;
- cultural resource allocation;
- management of wahi tapu;
- participation of projects which give effect to the principles of tino rangatiratanga and kaitiakitanga;
- involvement in visitor services to achieve ongoing protection of taonga;

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<sup>1000</sup> *Fiordland Plan*, *supra* note 777 at 35. See also *Egmont Plan*, *ibid.* 39.

<sup>1001</sup> *Urewera Plan*, *supra* note 782 at 37.

<sup>1002</sup> *Tongariiro Plan*, *supra* note 783 at 53.

- identification of restoration projects for iwi participation;
- use of tikanga Maori in the department's work;
- staff development in cultural learning; and
- departmental involvement in relevant Treaty claims.

The commitment to the Treaty relationship and Treaty principles is evident in all of the plans. Here is a long list of some of the points that appear in many of the selected plans in a manner that requires the Department to consult with, or acknowledge, mana whenua:

- to establish practices for waste management, particularly human waste management, within the park<sup>1003</sup>;
- if a proposed military exercise may impact on iwi values;<sup>1004</sup>
- if an application has been made to access arrangements for mining operations,<sup>1005</sup> to take water for the generation of hydroelectricity,<sup>1006</sup> to allow utilities and easements in the park (such as telecommunication sites),<sup>1007</sup> new roading,<sup>1008</sup> or to locate and construct mountain huts and other

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<sup>1003</sup> *Westland Plan*, *supra* note 780 at 89.

<sup>1004</sup> *Ibid*, at 133. See also *Aoraki/Mount Cook Plan*, *supra* note 775 at 139, *Arthur's Pass Plan*, *supra* note 776 at 146-147.

<sup>1005</sup> *Ibid*, at 137, see also 139; and *Egmont Plan*, *supra* note 781 at 105 – 107.

<sup>1006</sup> *Ibid*, at 140; *Urewera Plan*, *supra* note 782 at 50.

<sup>1007</sup> *Ibid*, at 142; *Urewera Plan*, *ibid*, at 142.

<sup>1008</sup> *Ibid*, at 146.

infrastructure;<sup>1009</sup>

- when eradicating pests or other introduced species, including where propose to use toxins or new bio-control agents;<sup>1010</sup>
- concession permit planning,<sup>1011</sup> including permit planning for film making;<sup>1012</sup>
- in search and rescuer programmes, particularly in the retrieving and holding of bodies;<sup>1013</sup>
- marine mammal issues, including whale strandings;<sup>1014</sup>
- when requests are made to collect or sample plants and animals within the park for scientific and non-commercial purposes;<sup>1015</sup>
- throughout the planning and implementation of the ecosystem restoration programme;<sup>1016</sup> and

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<sup>1009</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 89, 92 and 132. See also *Fiordland Plan*, *supra* note 777 at 41; *Urewera Plan*, *supra* note 782 at 120; *Egmont Plan*, *supra* note **Error! Bookmark not defined.** at 65; *Tongariro Plan*, *supra* note 783 at 122, 135 and 141.

<sup>1010</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 52; *Fiordland Plan*, *supra* note 777 at 77; *Urewera Plan*, *supra* note 782 at 39 and 75.

<sup>1011</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 104; *Tongariro Plan*, *supra* note 783 at 171. See *Kahurangi Plan*, *supra* note 778 at 78, including the appropriateness of concessionaire activity in any cave, at 79; *Egmont Plan*, *supra* note 781 at 91 in terms of requiring prospective consent holders to consult with iwi. See also *Urewera Plan*, *supra* note 782 at 128. Note that this plan also encourages concessionaires to notify and consult with tangata whenua, see page 130. In this context, see also *Egmont Plan*, *supra* note 781 at 70.

<sup>1012</sup> *Urewera Plan*, *supra* note 782 at 156; *Egmont Plan*, *supra* note 781 at 97, *Tongariro Plan*, *supra* note 783 at 182..

<sup>1013</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 94; *Fiordland Plan*, *supra* note 777 at 41; *Egmont Plan*, *supra* note 781 at 101.

<sup>1014</sup> *Fiordland Plan*, *supra* note 777 at 97.

<sup>1015</sup> *Nelson Lakes Plan*, *supra* note 779 at 77.

<sup>1016</sup> *Urewera Plan*, *supra* note 782 at 44.

- in assessing the likely cultural, physical and social adverse impacts of a proposed recreational activity in the park.<sup>1017</sup>

In regard to Indigenous plants and animals (much more of an issue in Aotearoa New Zealand than Canada as many are threatened or at risk and not found elsewhere in the world), the Ngai Tahu plans make it very clear that managers must, for example:<sup>1018</sup>

Acknowledge the cultural, spiritual, historic and traditional association of Ngai Tahu with taonga species and when managing indigenous plants and animals have particular regard to the Department's Protocols with Ngai Tahu for freshwater fisheries and culling of species.

However, not all Indigenous plants and animals to Aotearoa New Zealand are welcome in all areas of the country. For example, the Fiordland park plan acknowledges that it will consult fully with Ngai Tahu about the removal of the weka bird population from an island in that park where it was introduced with disastrous results to the Indigenous flora.<sup>1019</sup>

In regard to water specifically, several of the plans explain the cultural importance of water. For example, the Aoraki/Mount Cook plan stipulates as a policy: "To manage the Park's waters and, in particular, the Aoraki Topuni area and

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<sup>1017</sup> *Westland Plan*, *supra* note 780 at 79. See also *Aoraki/Mount Cook Plan*, *supra* note 775 at 71, 75 and 78.

<sup>1018</sup> *Ibid*, at 65. See also *Aoraki/Mount Cook Plan*, *supra* note 775 at 44; *Arthur's Pass Plan*, *supra* note 776 at 51; *Fiordland Plan*, *supra* note 777 at 63.

<sup>1019</sup> *Fiordland Plan*, *supra* note 777 at 90. In this plan, see also the removal policy of black-backed gulls at 92.

the waters flowing from the area, so that as far as possible, the mauri of the waters for Ngai Tahu is protected”.<sup>1020</sup> The plan explains that “For Ngai Tahu, the snow and ice on Aoraki and the surrounding tipuna mountain and the waters that flow from them, have special significance, a mauri. Activities such as bathing or washing in the waters, waste water disposal, or defecating on the mountain, adversely affect Ngai Tahu values”.<sup>1021</sup> The plan then sets, along with the need to consult, the action that might be required to respect this position such as “Public facilities will be sited, designed or even removed and visitor information provided, so that inappropriate use of Topuni area source waterways is discouraged”<sup>1022</sup> that human waste will be managed through detailed policy including a “pack-it-in, pack-it-out” policy that extends to bodily human waste applicable to alpine climbers.<sup>1023</sup> The Aoraki/Mount Cook plan makes an additional point, stated as a policy: “To discourage the spreading of deceased persons’ ashes, especially where this may affect the Aoraki/Mount Cook Topuni area or the waters flowing from that area”.<sup>1024</sup> In fact, many of the plans note

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<sup>1020</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 50. Other Ngai Tahu plans also have specific policies on water. For example, the Arthur’s Pass plan states: “For Ngai Tahu, all springs have spiritual value, as they emerge from Papa-tu-a-nuku and should be respected. The springs were used along the ara hikoi, but their immediate source would have been protected and any cooking and bathing clearly separated, in that order, downstream of the spring source”, *supra* note 776 at 59.

<sup>1021</sup> *Ibid*, at 50.

<sup>1022</sup> *Ibid*, at 51.

<sup>1023</sup> See, *ibid*, at 51 and 99.

<sup>1024</sup> *Ibid*, at 60, 62 and 63.

the offensiveness of spreading of ashes in the national parks,<sup>1025</sup> and managing human waste.<sup>1026</sup>

In regard to summit climbing, several of the plans record that this is offensive to Maori. For example, the Aoraki/Mount Cook plan explains that for Ngai Tahu, “climbers standing upon the very top of Aoraki, the head of Aoraki the ancestral tipuna, denigrates its tapu status. By informal agreement, aided it must be said by currently unstable summit geology, climbers have in recent years been generally respectful of the wishes of Ngai Tahu. The Department wishes this respect to continue”.<sup>1027</sup> In recognition of the power and influence of law, the plan then states that while this issue also applies to other ancestral tipuna summits, “these summits and waters do not have the legal recognition of the Aoraki/Mount Cook Topuni”.<sup>1028</sup> Other plans recognise that to Maori, climbing to the summit of,<sup>1029</sup> and launching non-motorised aircraft off,<sup>1030</sup> specific mountains is offensive.

Some of the plans also talk of ways in which the Department and iwi can work together. For example, the Fiordland plan reads: “Explore with Ngai Tahu the means whereby customary Ngai Tahu conservation practices such as rahui (restrictions on

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<sup>1025</sup> See, for example, *Arthur’s Pass Plan*, *supra* note 776 at 62 and 63; *Egmont Plan*, *supra* note 781 at 101.

<sup>1026</sup> For example, it is a policy of Egmont that the Department investigate alternative options for sewage as disposal of sewage on the mountain is offensive to Maori: *Egmont Plan*, *supra* note 781 at 74 and see also page 75.

<sup>1027</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 84. Other plans also have general statements on summit climbing, for example, see *Arthur’s Pass Plan*, *supra* note 776 at 91: “In respect of summit climbing within the Park, where relevant interpretation and information is being provided, work with Ngai Tahu to explain the Ngai Tahu values for mountains and to encourage respect for these values”.

<sup>1028</sup> *Aoraki/Mount Cook Plan*, *supra* note 775 at 84.

<sup>1029</sup> *Egmont Plan*, *supra* note 781 at 81 – 83, and 88.

<sup>1030</sup> *Ibid*, at 85.

the use of resources) may be used and supported to achieve shared conservation goals”.<sup>1031</sup>

These Department of Conservation plans, overall, go much further than the Parks Canada plans on this management point in regard to listing specific management aspirations. The detailed assurances here bring alive my thesis question and in part answer it: if there is a new commitment to recognising Indigenous Peoples in law, *what ought this to mean in the context of owning and managing national parks?* Despite these Department of Conservation plans being less articulate to the Parks Canada plans in committing to utilising Indigenous knowledge, and not aspiring towards co- or joint management, the plans do portray the depth of thinking that has occurred to realise the ramifications of making respectful commitments to Maori. The stated commitments reveal at least some recalibration in orientation from viewing national parks as colonial place to accepting them also as Indigenous place. Importantly, this recognition has led to some changed management practices. But certainly not decolonised management – yet.

## VI. CONCLUSION

As this study has shown, a new movement in law is occurring in national parks planning. It is endeavouring to reverse the past discrimination of Indigenous peoples and realise reconciliation. Many spaces in society have thus become entangled in a discourse of legal rights and legal obligations, and national parks are no exception.

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<sup>1031</sup> *Fiordland Plan*, *supra* note 777 at 37. See also page 364 of this plan for an example of rahui over customary take of eels. Some other plans also recognise the possibility of rahui, see *Egmont Plan*, *supra* note 781 at 40.

Certain characteristics are becoming apparent in national park management plans. This chapter has focused on illustrating how the managers of national parks – here Parks Canada and the Department of Conservation – envisage the ramifications of belatedly recognising national parks as also Indigenous place.

The most obvious observation drawn from this study of national park management plans is that the managers are beginning to move in the middle spot of permitting some Indigenization of their management practices. As positioned in chapters five and six, there are no instances of moving towards real decolonisation to the extent of Indigenous decision-making taking priority in all situations. To my mind the stumbling block is the refusal to accept the natural collaborator that goes with recognising Indigenous place: Indigenous ownership. Only through grappling with the implications of Indigenous ownership will decolonisation occur and real reconciliation. These observations become more pronounced in the following short final concluding chapter.

## CHAPTER EIGHT

### *A CALL FOR LEGISLATIVE CHANGE*

#### I. INTRODUCTION

National parks are an essential place for the conservation of biological diversity. They are literally the lungs of our world. However, *how* national parks are owned and managed ought to be discussed if countries like Canada and Aotearoa New Zealand are serious about reconciling with their Indigenous peoples. This study has explored if there is a new commitment to recognising Indigenous peoples in law, what ought this to mean in the context of owning and managing national parks. I asked: if law made colonial space permissible, what are the implications if contemporary law recalibrates its orientation to space and belatedly recognises Indigenous place? I have shown that in general, and in regard to national parks specifically, the law in Aotearoa New Zealand and Canada is now committed to reconciling with Indigenous peoples. The journey towards reconciliation has begun. But it is still in its early stages. In order to achieve long-lasting deep reconciliation, the legal frameworks for owning and managing national parks must be rethought. In concluding this study, I provide here some examples of how law could be amended as an initial step to hasten this voyage towards reconciliation in relation to national parks. These ideas ought to be implemented as early evidence of reconciliation. Once again I use the reconciliation framework to recognise, Indigenize and decolonize to categorise these potential legislative changes.

## II. REIMAGINING NATIONAL PARK LAW TO *RECOGNISE* INDIGENOUS PEOPLES

National park law in both countries should be amended to provide better recognition of the Indigenous peoples of Canada and Aotearoa New Zealand. In summary, this is because the contemporary legal paradigm in both countries now recognises that the lands of Canada and Aotearoa New Zealand were the civilised homes of the civilised Aboriginal peoples and Maori respectively. The case law precedents no longer describe these Indigenous peoples as wild and savage, living on wild and savage (uncivilised) lands. With the overruling of these precedents, a new era of respect has emerged. Case law and legislation, in particular the land and treaty claims legislation, now accepts the fiction of the discovery doctrine in these countries. In Canada, the law today speaks of specific Aboriginal peoples living on specific lands “since time immemorial”.<sup>1032</sup> In Aotearoa New Zealand, the law acknowledges Maori cultural, spiritual, historic and traditional associations with certain lands.<sup>1033</sup> While there is some legislative recognition of this, and even in regard to parts of national parks,<sup>1034</sup> national park law ought to be amended to better recognise the fact that national park boundaries lie over Indigenous place. Moreover, I believe that national parks can be

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<sup>1032</sup> For example, see the Nisga’a Final Agreement; the preamble to the Tsawwassen First Nation Final Agreement, and *Haida Nation v British Columbia* [2004] 3 SCR 511 at para 2. For more examples, see discussion in chapter 4.

<sup>1033</sup> For example, see *Ngai Tahu Claims Settlement Act 1998*, section 206. For more examples, see discussion in chapter 4.

<sup>1034</sup> For example, see the topuni and statutory acknowledgments devices in the *Ngai Tahu Claims Settlement Act 1998* discussed in chapter 6.

symbols of the journey of coming to grips with our colonial past, recasting stories, and attempting to move forward together in respectful relationships. National parks are important to our national identity and we therefore need to ensure that national parks are places that embrace and celebrate respect for ourselves, our ancestors and all of our future children. This part thus provides two ideas for doing this: 1) amend the general purpose sections for national parks; and, 2) insert new sections that require adherence to treaties and aboriginal rights.

**A. Amend the purpose sections for national parks**

As discussed in chapter six, distinctly missing from section 4(1) of the *National Parks Act* and section 4(1) of the *Canada National Parks Act 2000* is express provision for the spiritual, cultural and historic relationship Indigenous peoples have with land, such as mountains, within the national park estate. As a reminder, here are these sections. Section 4(1) of the *National Parks Act* declares that national parks must be preserved in perpetuity:

for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest.

Section 4(1) of the *Canada National Parks Act 2000* reads:

The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

It is a significant oversight that there is no recognition of the importance of these places for Aboriginal peoples and Maori. These ‘purpose’ sections ought to be amended by adding in a statement that accepts these peoples’ inextricable relationships with these lands as lived places. This amendment would result in highlighting to the decision-makers – Parks Canada and Aotearoa New Zealand’s Department of Conservation - the importance of these lands to Indigenous peoples. Indigenous peoples’ relationships with these lands would become integral to the legislative framework and thus to decision-making.

In addition, such changes could make Indigenous peoples feel more content with the use of the national park label. For instance, in the mid 1980s members of the Tuhoe tribe in Aotearoa New Zealand rejected the idea of their traditional lands in the Urewera region being turned into a national park. Although there was no conflict between the Maori of Te Urewera and the Pakeha conservationists about preservation of the indigenous forests, Maori saw the forest as a place for them to live and hunt in,

and they viewed "Pakeha laws" and regulations as unwarranted restrictions on their life style and traditions.<sup>1035</sup>

The legislative amendment could be quite simple. For instance, below is an example of how Aotearoa New Zealand's *National Parks Act* could be amended by inserting this new subsection into section 4:

(1A) It is hereby further declared that the provisions of this Act shall be interpreted to recognise the historic, traditional, cultural, and spiritual relationship of the mana whenua with the lands, waters and flora and fauna within national parks.

Something similar could be inserted into the *Canada National Parks Act*.

There could be other significant benefits in implementing this suggested amendment. For example, in Aotearoa New Zealand, the Governor-General currently has the ability to set aside any part of a national park as a specially protected area. The Governor can only do this if it can be shown to enhance the purpose of the *National Park Act*.<sup>1036</sup> Once an area has special protection no person can enter the area unless they have a permit issued by the Minister of the Conservation. The device could therefore be introduced to ensure the protection of special sites to Maori. It could also be used to implement a Maori environmental protection law such as rahui (a concept that means 'temporary protection' that prohibits people from entering a defined place for a period of time often to allow the resources within that place to

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<sup>1035</sup> See Roy Perrett, "Indigenous Rights and Environmental Justice" *Environmental Ethics* 20 (1998) 377 at 381.

<sup>1036</sup> See section 12(1).

regenerate).<sup>1037</sup> In comparison, while section 14 of the *Canada National Parks Act* gives the Governor in Council the power to declare any area of a park to be a wilderness area, it does not explicitly relate back to section 4(1). Nonetheless, section 4(1) would still be of paramount importance in making any decision to declare an area to be a wilderness area. In fact, at the same time of amending section 4(1), section 14 ought also to be amended to link specifically to section 4(1). This would then ensure that the Governor would have to consider Aboriginal peoples' views when declaring an area to be wilderness.<sup>1038</sup>

There is precedent for environmental statutes to include a legislative purpose that recognises the importance of lands to Indigenous peoples, at least in Aotearoa New Zealand. For example, in this country, the *Hauraki Marine Gulf Park Act 2000* states that the life-supporting capacity of the environment within the Hauraki Gulf, its islands, and catchments are of national importance. It then defines the life-supporting capacity as including the capacity to provide for “the historic, traditional, cultural, and spiritual relationship of the tangata whenua of the Gulf with the Gulf and its islands”.<sup>1039</sup> Another example lies in the *Historic Places Act 1993*. This Act states the short purpose of the Act is “to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand” and then includes a longer subsection that lists a number of factors that all persons exercising

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<sup>1037</sup> For a discussion of how this term is already provided for in law see: Nicola Wheen and Jacinta Ruru, “Providing for *Rāhui* in the law of Aotearoa New Zealand” (2011) 120(2) *Journal of Polynesian Society* 169.

<sup>1038</sup> Note that I have explored the notion of wilderness from an Indigenous perspective and concluded that there are inherent conceptual difficulties in labelling an Indigenous lived place as wilderness, see: Jacinta Ruru, “Wilderness as a Walled Garden” in Mick Abbott and Richard Reeves (eds), *Wild Heart. The Possibility of Wilderness in Aotearoa New Zealand* (Dunedin: Otago University Press, 2011).

<sup>1039</sup> *Historic Places Act 1993*, s 7(2)(a)(i), see also s 8(c).

functions and powers under the Act “shall recognise”. This includes “The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga”.<sup>1040</sup> Other statutes contain similar protection. For example, all persons exercising functions and powers under the *Resource Management Act 1991* in relation to “managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance”. One of these matters is “The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”.<sup>1041</sup> The *Resource Management Act* is applicable to nearly all use of land, air and water in the country, but explicitly excludes the work or activity of the Crown within the boundaries of any area of land held or managed under the *Conservation Act 1987*.<sup>1042</sup> Thus the *Resource Management Act* recognition of the importance of ancestral lands to Maori is not, as a general rule, applicable to the Crown’s work within national parks.<sup>1043</sup>

Additionally, these section 4 purpose sections ought to be amended to reflect the lived places of national parks by Aboriginal and Maori peoples because it would bring Indigenous relationships with land to the forefront of decision-making. At the moment, judicial precedent in Aotearoa New Zealand holds that decision-makers can deviate from giving effect to the principles of the Treaty of Waitangi on the basis that the outcome would be inconsistent with the principles of the *National Parks Act*. This precedent was discussed in full in chapter 6. In Canada, as stated throughout this study, section 2(2) of the *Canada National Parks Act* states that this Act cannot be

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<sup>1040</sup> See *Historic Places Act 1993*, s 4(2)(c).

<sup>1041</sup> See *Resource Management Act 1991*, s 6(e).

<sup>1042</sup> See *Resource Management Act 1991*, s 4(3).

<sup>1043</sup> *Ibid.*

construed so as to abrogate or derogate from the protection provided in section 35 of the *Constitution Act* – namely, existing aboriginal or treaty rights. If the purpose for national parks explicitly recognised the importance of these lands for Indigenous peoples, it would remind decision makers of the importance of the guarantees provided to Indigenous peoples in signed treaties and within the common law especially in regard to the doctrine of Aboriginal rights.

Amending the section 4 sections ought to be regarded as a priority. To do so would clearly mark a new era of reconciliation for national park management and the end to the fictional colonial space ideology that is the history of national park creations.

#### **B. Insert requirements to adhere to treaties and aboriginal rights**

First, in the context of Aotearoa New Zealand, a new section should be inserted that requires the Department of Conservation, the New Zealand Conservation Authority and conservation boards to give effect to the principles of the Treaty of Waitangi when interpreting and administering the *National Parks Act* - a reflection of section 4 of the *Conservation Act*. It would be advantageous to have a direct reference to the Treaty in the *National Parks Act* in order to clarify and encourage the application of this duty in the management of national parks. It would also encourage the development of understanding the meaning of the phrase 'the principles of the Treaty of Waitangi' in relation to national parks specifically. The legislative amendment could be as simple as making this insertion:

#### 4A Treaty of Waitangi

This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi

In regard to Canada, the section 2(2) of the Canada *National Parks Act* provision is constructed in the negative ('Nothing in this Act ...') and is limited in scope as it only recognises the *existing* aboriginal or treaty rights that are *recognised and affirmed* in section 35 of the *Constitution Act*. Of course it would be a significant constitutional deviation to depart from the wording of section 35 and it is beyond the scope of this study to closely analyse this. However, as a brief observation, I believe that it is vitally important to move towards a more inclusive regime that accepts and recognises the rights of all Aboriginal peoples in Canada. At the moment, general recognition is generally only afforded, or expected to be afforded, to those Aboriginal groups that have completed, or are completing, new treaties and land claim settlements (namely in the northern territories and British Columbia). The treaty and aboriginal rights of, for example, most of the First Nations peoples whose lands fall in Ontario provide no opportunities for redress for how national parks there are owned and managed. This is disappointing.

This chapter now moves to explore some ideas for indigenising national park law.

### III. POSSIBILITIES FOR *INDIGENISING* NATIONAL PARK LAW

National park law and management practices should provide better opportunities for Indigenous peoples to be peoples in their own lands. As Sakej Henderson has stated, Indigenous peoples want to live their lives, not in “someone else’s dream world” but in their own.<sup>1044</sup> National parks encompass the lands of the Aboriginal peoples in Canada and Maori in Aotearoa New Zealand. These lands are often intricately tied to the survival of Indigenous identity. For example, as the Waitangi Tribunal wrote, in regard to the fundamental importance of the Department of Conservation’s role in safeguarding more than eight million hectares of the environment, “But for Maori the concern is of an altogether different nature and quality, because [the Department] has charge of much of the remaining environment in which mātauranga Maori evolved, and which Maori culture needs for its ongoing survival”.<sup>1045</sup> Or, as McLachlin CJ in the *Haida Nation* case accepted, albeit not in the context of cedar within national parks: “The cedar forest remains central to their life and their conception of themselves”.

The new commitment to reconciliation should result in new practices, and in particular, practices that have benefit for Indigenous peoples. The national park law ought to be reflecting a new era that recognises the value of these lands to Indigenous peoples. This part thus provides a call to amend the legislative definitions of ‘conservation’ and ‘ecological integrity’ to better enable Indigenous knowledge

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<sup>1044</sup> James (Sakej) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 *Indigenous Law Journal* 1, at 16.

<sup>1045</sup> Waitangi Tribunal, *Ko Aotearoa Tenei Wai* 262 (2011) at 297.

systems and uses to once again flourish in managing park lands; and, some more general recommendations for change to embrace Indigenous languages and enterprises.

**A. Amend “ecological integrity” and "conservation" to reflect an Indigenous sustainable use approach.**

As discussed in chapter six, the singular mandate of conservation through preservation and protection in Aotearoa New Zealand, and ecological integrity in Canada, theoretically allow little opportunity for Aboriginal peoples and Maori to practice their own environmental ethics or laws or to have them enforced. For example, the inability to pay homage to a resource through use not only disrupts the natural world order, it also puts at risk the loss of knowledge pertaining to the resource including the appropriate manner in which it can be taken or used. But, as discussed in that chapter, any such amendment would prove controversial. Nonetheless, discussions ought to progress on this topic. In fact, there is precedent for doing so in particular in the way that national park reserves and national parks of Canada in many of the northern territories are managed. This came to the fore particularly in the discussions in chapter seven. A slight change to how conservation and ecological integrity are defined could provide a stronger platform for Indigenous knowledge systems about, and Indigenous uses of, flora and fauna and place to become imbued in national park management. This suggestion for this legislative tweak should not undermine the non-negotiable importance of national parks in the role of conservation of biological diversity. Indigenous peoples too are committed to

this goal. A slight definitional change would signal trust in Indigenous peoples' laws, values and ethics.

I believe that there is international support for advancing this idea. For example, the ICUN Category II National Park primary objective is “To protect natural biodiversity along with its underlying ecological structure and supporting environmental processes, and to promote education and recreation”. But the ICUN then lists some other objectives including “To take into account the needs of indigenous people and local communities, including subsistence resource use, in so far as these will not adversely affect the primary management objective”.<sup>1046</sup>

#### **B. Utilise existing general provisions**

As chapter seven illustrated, some national park management intentions as recorded in specific management plans across both Canada and Aotearoa have made strong commitments to utilizing Indigenous languages and Indigenous knowledge systems and providing opportunities for Indigenous enterprise and Indigenous employment within national parks. If an amendment was made to the section 4 purpose provisions for national parks in both countries as discussed above, this would provide scope to encourage national park managers in other national parks to create similar opportunities. Direct legislative change may not be required.

As chapter 7 focused on exploring; there are a range of exciting provisions contained within the contemporary national park management plans in Canada and Aotearoa New Zealand that fall across the recognition, Indigenize and decolonize categories. All of the plans recognise the fact that Indigenous peoples have used the

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<sup>1046</sup>See

[http://www.iucn.org/about/work/programmes/pa/pa\\_products/wcpa\\_categories/pa\\_categoryiii/](http://www.iucn.org/about/work/programmes/pa/pa_products/wcpa_categories/pa_categoryiii/)

lands now encased in national parks and accept that protecting and presenting Indigenous heritage is an important management goal. But not all plans make commitments to understanding and utilising Indigenous languages, Indigenous knowledge systems or Indigenous enterprise opportunities. Likewise, not all the plans recognise that Indigenous peoples may need to access native flora and fauna within parks for contemporary cultural survival.

Parks Canada, the Aotearoa New Zealand Department of Conservation, and Indigenous peoples themselves might like to closely analyse these plans and adopt ideas to suit their respective parks. By making the comparative information readily available, conservation boards in Aotearoa New Zealand could be encouraged to adopt inclusive provisions practised in other conservancies and even parts of Canada. Section 46 of the Aotearoa New Zealand's *National Parks Act* allows amendments or review of management plans to take place so that account can be taken of "increased knowledge or changing circumstances". Hence, streamlining inclusive provisions is possible under existing legislation. There would be no need for conservation boards to wait until respective national park management plans became due for replacement (a ten year cycle). While the *Canada National Parks Act* does not have a similar provision – there is less need to do so because the plans there are on a five year review cycle<sup>1047</sup> – the comparative material would still be of benefit.

For Aboriginal peoples and Maori to be successful partners in managing the national park estate they should be adequately resourced. The Department of Conservation and Parks Canada should provide such resourcing. This could be by way of finances, access to training schemes and further education, and access to Department and Parks Canada resources such as meeting rooms, libraries, and

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<sup>1047</sup> See *Canada National Parks Act*, s 11(2).

equipment. The Department of Conservation and the Conservation Authority in Aotearoa New Zealand, and Parks Canada, could strengthen their commitment to providing education seminars, workshops, and retreats which focus on why lands within national parks are so important to specific Indigenous peoples. As highlighted in chapter 7, many park managers have already made commitments to these approaches. The point being made here is that all park managers should be encouraged to do this.

Moreover, there needs to be a more consistent approach to utilizing Indigenous languages in the national parks of both countries. On this point a legislative amendment could be inserted into the national park legislation in both countries to support this particularly in the use of place names and names for flora and fauna. This should be an obvious commitment within Aotearoa New Zealand as Maori is, along with English, an official language of the country. Of course some Maori language is used now, as chapters six and seven have discussed. But there are still immense possibilities for utilizing it more, for example, in embracing dual Maori and English names for all landmarks. Legislative amendments should occur in both countries that encourage the use of Indigenous languages in all interpretative signs and policy documents. Such a change would entail some expense but this commitment is important if recognising Indigenous place is to be given consequential meaning. An initial legislative amendment could be directed at encouraging bicultural names for national parks. For example, this insertion could be made to Aotearoa New Zealand *National Parks Act*:

#### Section 6A Naming national parks

(1) All national parks that are currently only named in English shall be also named in te reo Maori (the Maori language). In determining the appropriate te reo Maori name, advice shall be sought from the mana whenua.

#### IV. POTENTIAL FOR *DECOLONISING* NATIONAL PARK LAW

National park law ought to be amended to provide more real opportunities for the Aboriginal peoples of Canada and Maori of Aotearoa New Zealand to be involved in, and in fact lead in some circumstances, national park decision-making. As John Borrows has stated in regard to law generally “Despite its potential to do otherwise, the law has both inadvertently ignored and purposely undermined Indigenous institutions and ideas, and thus weakened ancient connections to the environment”.<sup>1048</sup> In order to truly commit to reconciliation, national park law must be amended to allow Indigenous peoples to reconnect with their places and an important component of this is recognise Indigenous peoples as integral to the governing of national parks. This part thus provides some ideas for decolonising the law in both countries. First, Aotearoa New Zealand’s *National Park Act* must be amended to permit devolved power to Maori in a like manner to how the *Canada National Parks Act* permits the Minister to enter into agreements with Aboriginal peoples for carrying out the

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<sup>1048</sup> John Borrows, *Recovering Canada. The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), at 30.

purposes of that Act. The second and third ideas relate to amending the law to ensure current national park managers seek the advice of Indigenous peoples and provide more opportunities for Indigenous peoples representation in national park decision-making.

**A. Amend the *National Parks Act* (NZ) to allow devolved power**

As discussed in chapter 6 of this study, section 10(1) the *Canada National Parks Act* permits the Minister responsible for the Parks Canada Agency to “enter into agreements with federal and provincial ministers and agencies, local and aboriginal governments, bodies established under land claims agreements and other persons and organizations for carrying out the purposes of this Act”. There is no like provision in Aotearoa New Zealand in the *National Parks Act* or the *Conservation Act*. There ought to be. A like provision would provide for the possibility for Maori to take control of managing aspects of national parks.

However, statutory provision for such devolution of power does not always mean that it will occur. The Canadian section 10(1) is discretionary – the Minister ‘may’ do this. In Aotearoa New Zealand, while there is no like provision in the national park legislation there is in another context. Section 33(1) of the *Resource Management Act* – an act that gives local authorities the power to determine the rules for use of land, air and water – states that “A local authority may transfer any one or more of its functions, powers, or duties under the act, except this power of transfer, to another public authority in accordance with this section. Section 33(2) states that a public authority includes an iwi authority. While this provision has been available for use since the Act was first enacted in 1991, no local authority has yet transferred any

powers to any iwi authorities.<sup>1049</sup> There is not the political will to do so because local authorities constitute elected members of the public. Thus a like section 10(1) inclusion in Aotearoa New Zealand's national park legislation may not in reality result in devolved power if there is not significant public support. This legislative amendment could read like this:

Section 42A: The Director-General may from time to time enter into agreements with recognised iwi authorities established under the Treaty of Waitangi claim settlements for carrying out the purposes of this Act.

**B. Insert requirements for decision-makers to seek Indigenous peoples' advice**

Both the Aotearoa New Zealand *National Parks Act* 1980 and the Canada *National Parks Act* ought to be amended to ensure decision-makers seek and have regard to the advice of Aboriginal peoples and Maori. A template for doing so can be found in section 30(2)(b) of the Aotearoa New Zealand *National Parks Act*. As discussed in chapter six, this paragraph states

The [Conservation] Board having jurisdiction in respect of the Whanganui National Park shall, in carrying out its functions,— ...

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<sup>1049</sup> See Natalie Coates, "Joint-Management Agreements in New Zealand: Simply empty promises?" (2009) 13(1) *Journal of South Pacific Law* 32 (available to view here: <http://www.paclii.org/journals/fJSPL/vol13no1/>).

(b) seek and have regard to the advice of the Whanganui River Maori Trust Board on any matter that involves the spiritual, historical, and cultural significance of the park to the Whanganui iwi.

This is the only Board that is currently obliged under statute to consult with a Maori tribe. Ngai Tahu has a similar right, but it is restricted to specific areas within national parks. That is, this right does not go to national parks per se. I believe that a generic provision should be included into the Aotearoa New Zealand *National Parks Act* and the *Canada National Parks Act*. The generic provision could read like this in the Aotearoa New Zealand context:<sup>1050</sup>

Every Board whose area of jurisdiction includes a national park must seek and have regard to the advice of the mana whenua of the area on any matter that involves the spiritual, historical, and cultural significance of the park to the mana whenua of the area.

These insertions would emphasise the standing that Indigenous peoples should have in regard to national park management. It would create a minimum consistent right for all Maori and Aboriginal peoples who have ancestral lands within a national park. It would not affect the requirement for respective conservation boards to “have regard to” the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi<sup>1051</sup> or to “have particular regard to” Topuni and Statutorily Acknowledged areas in South Island national parks. These are site specific and

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<sup>1050</sup> Note that mana whenua means customary authority exercised by an iwi or hapu in an identified area.

<sup>1051</sup> See *National Parks Act*, s 30(2)(a).

require a different standard of consultation. Section 30(2)(b), however, would become redundant. A like provision ought to be inserted into the *Canada National Parks Act* (replacing the term ‘mana whenua’ with ‘Aboriginal peoples’) perhaps as a new section 12(2).

### **C. Insert new opportunities for Indigenous representation**

The national park law in Canada and Aotearoa New Zealand ought to be amended to give more opportunities for Aboriginal peoples and Maori to be involved in the national park decision-making. One avenue is to provide mandatory representation of Aboriginal peoples and Maori on key decision-making boards. For example, in Aotearoa New Zealand, in regard to conservation boards, a new subsection could be inserted following section 6P(1):

(2) The Minister must appoint at least one person to every Board whose area of jurisdiction includes a national park on the recommendation of the mana whenua of the area.

Even if this insertion was made, the current statutory rights as discussed in chapter 6 should not be affected. That is:

- the Minister must still have regard to tangata whenua interests (along with several other interests) in making all other appointments to boards;
- a person of lineal descent of Te Heuheu Tukino must still have a right to sit on the Board whose area of jurisdiction includes the Tongariro National Park; and

- the Taranaki Maori Trust Board, the Whanganui River Maori Trust Board, and Te Runanga o Ngai Tahu must still have a right to recommend the appointment of one/two person/s to Boards whose jurisdictions include the Egmont National Park, Whanganui National Park and national parks in the Ngai Tahu takiwa.

These rights should be retained because they reflect special agreements between Maori and the Crown - a fundamental expression of partnership. The amendment, if made, would mean that mana whenua would have at least one, and up to three, statutorily-protected opportunities to sit on respective boards. This would be a marked improvement on the current inconsistent legislative approach to representation.<sup>1052</sup> If these amendments were made a marked progression towards including Maori in national park management would occur. Although these measures may not meet the full aspirations of Maori as Treaty partners, they would at least create a consolidated management regime that respected and included those Maori tribes who have had their ancestral lands deemed national park land.

Also, the Minister of Conservation has an unfettered right to appoint four persons onto the New Zealand Conservation Authority. The Minister could be encouraged to favour Maori in that selection process. A similar practice could be encouraged in making appointments to conservation boards, although this may not be as successful as the Minister has less discretion - a number of interests have to be considered. Maori interests are stipulated as one of many interests.

Moreover, section 44(1) of the *National Parks Act* allows the New Zealand Conservation to adapt statements of general policy for national parks to changing

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<sup>1052</sup> The proposition would link with movements to secure Maori representation on health boards and regional councils.

circumstances or in accordance with increased knowledge. The Conservation Authority could thus introduce a new statement that recognises the right for Maori to be accorded special status in the management process. Additionally, present policy statements could be amended to better reflect Maori aspirations. After all, providing for better inclusion of Maori supposed to be a key policy goal of the Department.

If changes were made to the law, and how the Ministers used their power under the law, Aboriginal peoples in Canada and Maori in Aotearoa New Zealand would be provided with more opportunities to be involved in decision-making. Of course though these changes are merely at the representation level and do not, on their own, begin a journey towards decolonisation, especially if Indigenous representation measures are tokenistic. That is, if Indigenous representatives are out-numbered by others in all decision-making, then there will be little satisfaction in holding these positions. However, if all decision-makers are committed to generating change that moves towards accepting the ramifications of national parks as Indigenous place, then Indigenous representation measures can provide important links between Indigenous communities and national park decision-makers.

## **V. SUMMARY OF LEGISLATIVE SUGGESTIONS**

In summary, I believe that legislative change could include:

- 1) amending the general purpose sections for national parks by adding in a statement that accepts that Indigenous peoples' have inextricable relationships with these lands as continued lived places;
- 2) inserting new sections that require adherence to treaties and aboriginal rights;

- 3) amending the legislative definitions of ‘conservation’ and ‘ecological integrity’ to better enable Indigenous knowledge systems and uses to once again flourish in managing park lands;
- 4) amending Aotearoa New Zealand’s *National Park Act* to permit devolved power to Maori in a like manner to how the *Canada National Parks Act* permits the Minister to enter into agreements with Aboriginal peoples for carrying out the purposes of that Act;
- 5) inserting requirements to ensure current national park managers seek the advice of Indigenous peoples in managing national parks; and,
- 6) inserting new opportunities for Indigenous representation in managing national parks.

I now turn to reproduce from the above discussion in this chapter some explicit examples of how Aotearoa New Zealand’s *National Park Act* could be amended to address some of these points.<sup>1053</sup>

I believe that a new section ought to be inserted into section 4. Section 4 is the pivotal section in the Act that explains the purpose for national parks. Currently there is no acknowledgment that lands within national parks are important to protect because they are the ancestral lands of Maori. Section 4 ought to be amended by inserting in a new subsection (1A) as follows (note that the bold type represents the proposed new insertion):

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<sup>1053</sup> Note that while I considered drafting a new stand alone national park statute, I decided against doing so for several reasons. First, New Zealand’s *National Park Act* is long – it contains 80 sections plus schedules - and many sections do not specifically concern Maori governance issues but would still need to exist within any new rewritten statute. Second, it is impossible to read the National Parks Act on its own as it must be read in conjunction with the Conservation Act 1987. This Act contains 65 sections.

## Insert new wording into section 4

### **Part 1**

National parks

Principles to be applied in national parks

**4** Parks to be maintained in natural state, and public to have right of entry

(1) It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving in perpetuity as national parks, for their intrinsic worth and for the benefit, use, and enjoyment of the public, areas of New Zealand that contain cultural landscapes and scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the national interest.

**(1A) It is hereby further declared that the provisions of this Act shall be interpreted to recognise the historic, traditional, cultural, and spiritual relationship of the mana whenua with the lands, waters and flora and fauna within national parks.**

(2) It is hereby further declared that, having regard to the general purposes specified in subsection (1), national parks shall be so administered and maintained under the provisions of this Act that—

(a) they shall be preserved as far as possible in their natural state:

(b) except where the Authority otherwise determines, the native plants and animals of the parks shall as far as possible be preserved and the introduced plants and animals shall as far as possible be exterminated:

(c) sites and objects of archaeological, **cultural** and historical interest shall as far as possible be preserved:

(d) their value as soil, water, and forest conservation areas shall be maintained:

(e) subject to the provisions of this Act and to the imposition of such conditions and restrictions as may be necessary for the preservation of the native plants and animals or for the welfare in general of the parks, the public shall have freedom of entry and access to the parks, so that they may receive in full measure the inspiration, enjoyment, recreation, and other benefits that may be derived from mountains, forests, sounds, seacoasts, lakes, rivers, and other natural features.

A new subsection ought to be included in section 2 (the interpretation section) that defines mana whenua. The wording for this definition could reproduce how other statutes define mana whenua, such as in the Resource Management Act 1991.

**Insert new definition in section 2**

**‘mana whenua’ means customary authority exercised by an iwi or hapu in an identified area**

Currently the Act does not reference the principles of the Treaty of Waitangi. I propose that a new section be inserted directly following the principles section of section 4. I have labelled this section 4A. The wording for this provision comes

directly from the Conservation Act 1987 that is the umbrella statute to the National Parks Act:

**Insert new section 4A**

**4A Treaty of Waitangi**

**This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi**

I believe that a new section 6A ought to be inserted into the Act that requires all those national parks with a sole English name to be given a dual name in te reo Maori to help promote the acceptance that these lands are special also to Maori.

**Insert new section 6A**

**Section 6A Naming national parks**

**(1) All national parks that are currently only named in English shall be also named in te reo Maori (the Maori language). In determining the appropriate te reo Maori name, advice shall be sought from the mana whenua.**

### **Amend section 30**

Section 30 ought to be amended with the deletion of the existing subsection (2) highlighted below in italics. I propose a new wording that is inclusive of all Maori tribes that have ancestral lands encased in national park boundaries.

#### 30 Functions of Boards

(1) In addition to the functions specified elsewhere in this Act or in any other Act, the functions of each Board shall be—

(a) to recommend management plans, and the review or amendment of such plans, for parks within the jurisdiction of the Board in accordance with sections 45 to 47:

(b) to consider and determine priorities for the implementation of management plans for national parks:

(c) to make recommendations to the Minister for the appointment of honorary rangers under section 40:

(d) to review and report to the Director-General or the Authority, as appropriate, on the effectiveness of the administration of the general policies for national parks within the jurisdiction of the Board:

(e) [Repealed]

(f) to give advice to the Director-General or the Authority—

(i) on the interpretation of any management plan for a park; and

(ii) on any proposal for the addition of land to any national park or the establishment of a new national park; and

(iii) on any other matter relating to any national park,—

within the jurisdiction of the Board.

*[delete - (2) The Board having jurisdiction in respect of the Whanganui National Park shall, in carrying out its functions,—*

*(a) have regard to the spiritual, historical, and cultural significance of the Whanganui River to the Whanganui iwi; and*

*(b) seek and have regard to the advice of the Whanganui River Maori Trust Board on any matter that involves the spiritual, historical, and cultural significance of the park to the Whanganui iwi.delete]*

**insert new section 30(2)**

**section 30(2)**

**Every Board whose area of jurisdiction includes a national park must seek and have regard to the advice of the mana whenua of the area on any matter that involves the spiritual, historical, and cultural significance of the park to the mana whenua of the area.**

Lastly, I believe that a new section 42A ought to be inserted into the National Parks Act to mirror the power that exists in the *Canada National Parks Act* to enter into agreements with Maori tribal authorities in order to delegate some national park managerial and governance powers to them.

### **Insert new section 42A**

**Section 42A: The Director-General may from time to time enter into agreements with recognised iwi authorities established under the Treaty of Waitangi claim settlements for carrying out the purposes of this Act.**

## **VI. A SATISFACTORY PLAN FOR PROGRESSION?**

The discussion in this final chapter has provided some ideas for legislative change to hasten the journey towards reconciliation. The suggestions are not radical. Many ought to be implemented as a priority if there is a real commitment to seek a new approach to recognising Indigenous peoples. These suggestions flow naturally from recognising the facts of Indigenous place. The ideas presented here ought to be relatively straightforward changes especially if the commitments to reconciled recognition of Indigenous place are real and deep.

But, of course, the point of this study was not to simply come to a conclusion that legislative amendment is required. An important component of this study has been to illustrate, through reliance on the law and geography discipline as discussed in chapter two, that space cannot be reconfigured by simply amending power relations through, for example, giving Indigenous peoples rights of representation on decision-making bodies or advisory group roles. Specifically, society should not be fooled into thinking that true and sound reconciliation can be found in such endeavours. This is

because there is danger that land will continue to be conceived as colonial place, albeit with some slight recasting through accepting it as once historical Indigenous place. The trouble with space therefore is that the entire legal foundation is founded on it. But this does not make it right. The problem with power is only illusionary until the trouble with space is confronted. And this was of course the point of chapter five that highlighted how deeply committed both countries are to Crown ownership of national parks. But if true reconciliation is sought, then Crown ownership is not the correct starting point (unless Indigenous peoples have freely consented to this). Chapter five sought to constructively contribute towards brainstorming how different legal titles could be created to own national parks. Any movement towards recognising national park lands as present Indigenous place may be considered radical but in reality is essential in this journey of reconciliation.

In fact, to be fair, some of the national park management plans record exciting visioning. I thought that it was appropriate to recognise one of these statements to conclude this discussion. Here is the ‘intended future’ statement contained within the Prince Albert National Park of Canada Management Plan:<sup>1054</sup>

“Aboriginal groups hold ceremonies such as cleansing sweat lodges, healing circles, fasts, and feasts. They share their culture, heritage, customs, and values with the youth and the public teaching their Traditional Knowledge, story telling, dances, drumming, and signing.

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<sup>1054</sup> Parks Canada, *Prince Albert National Park of Canada Management Plan* (Parks Canada, January 2008) at 43.

The Paspiwin Cultural site, and the relationships that develop around it, enable Aboriginal communities and individuals to interpret Traditional Knowledge and advise Parks Canada on the values, ethics, and historical traditions of Aboriginal ceremonies, rituals, and attitudes towards living things.

Aboriginal communities near the park benefit from self-sustaining economic opportunities, including eco-tourism, experiencing life at a tipi village, and the making and selling of traditional foods and crafts. The Paspiwin Cultural Site links park visitors and these opportunities in nearby communities.”

This vision, and others like it, is exciting because it recognises the importance of these national park lands to those Aboriginal peoples who have always regarded the lands as their home. It was their place and will continue to be their place. Moreover, this vision accepts that these Aboriginal peoples should gain spiritually, culturally and economically from this recognition. The vision welcomes these Aboriginal peoples and all that they can bring to how national parks are managed. Importantly, the vision enables Aboriginal peoples to begin once again implementing their dreams for how this place is governed. This vision illustrates an exciting early journey towards reconciliation.

## **VI. CONCLUSION**

National parks are important places for the conservation of biological diversity and thus the future survival of humans on earth. Moreover, national parks are positioned

in law and policy as important to all citizens of a country. There is potential for common pride in conserving lands and resources within national parks for future generations. However, Indigenous peoples are guided by their own motivating reasons for aspiring towards this conservation goal. National park lands encase the lived homes of Indigenous peoples. Today, the law reflects a new societal goal that seeks to reconcile with Indigenous peoples for the past wrongs of taking their lands and denying them the very means to be true to themselves, their ancestors, and their grandchildren. National parks have the potential to play an instrumental role in committing to this reconciliation journey. National parks are symbolic of our national identity and our future, and the parks contain Crown lands that thus enable the Crown to lead in implementing a new way of thinking about, owning, and managing national parks. As the Pacific Rim National Park Reserve of Canada National Park Management Plan states in its opening: “These treasured natural and historic places are intended to be a living legacy, connecting hearts and minds to a stronger, deeper understanding of the very essence of Canada”.<sup>1055</sup> The purpose of this study has been to contribute towards building academic work that is blazing the trails for the decolonisation of lands, fish, forests, plants and law. This study has focused on national parks and the law. I believe that legislative change ought to occur to better enable Indigenous peoples in Canada and Aotearoa New Zealand to reconnect with their lands and heritage, to revive their languages, knowledge systems, uses of flora and fauna, enterprise, and decision making in the places of national parks. I hope the ideas contained in here are of use in our voyages towards reconciliation.

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<sup>1055</sup> Parks Canada, *Pacific Rim National Park Reserve of Canada Management Plan* (Parks Canada, 2010) at 1.

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