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TREATY-BASED JUDICIAL REVIEW: THE TREATY SETTLEMENT NEGOTIATION PROCESS AND LEGITIMATE EXPECTATION

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I Introduction

This paper considers current models of executive accountability with respect to its decisions in Treaty of Waitangi settlement negotiations. It argues that affected iwi and hapū should be able to judicially review executive decision-making during negotiations because the executive is largely unaccountable currently as is illustrated by this extract:[1]

> No statute governs the Treaty settlement process, or the conduct of the negotiations. There is no Treaty Settlement Process Act, nor any legal requirement that the Crown or iwi engage in the settlement process at all. The Crown could withdraw, it seems, from the whole enterprise at any time, as a simple reversal of policy. That might constitute a gross breach of faith with Māori society, and might have significant political consequences, but no law, it seems, would be infringed. The Waitangi Tribunal operates under statutory authority, as does the MLC [Maori Land Court], but not the final Treaty settlement process. To regulate the settlement process by statute would turn many determinations within the process into statutory powers of decision. Those decisions would then become legitimate targets for judicial review.

Thus, the Treaty settlement process is currently a realm of significant unfettered executive discretion in circumstances where Māori rights are at stake.

This paper will investigate existing grounds of Treaty-based judicial review and consider their applicability in respect of the settlement negotiation process. It will then propose the legitimate expectation ground of judicial review as a possible alternative for future claimants. This paper considers that judicial review is important primarily because it can place legal controls on executive decision-making as it allows the courts to prescribe the boundaries of executive power.

[1] John Dawson and Abby Suszko "Courts and Representations Disputes in the Treaty Settlement Process" (2012) 1 NZLR 35 at 46.

II A Brief History of Treaty-Based Judicial Review

The fundamental constitutional document governing the relationship between the Crown and Māori is the Treaty of Waitangi. Treaty case law has been shifting and turbulent. Since the infamous *Wi Parata* decision, Aotearoa/New Zealand case law has steadily retreated from the controversial "simple nullity" position,[2] instead moving towards a worldview that posits the Treaty as one of, if not the most, important constitutional texts in our legal, political, and social domain.[3] An especially important decision for Treaty-based judicial review was *New Zealand Māori Council v Attorney-General* (the *SOE Lands* case) in which the Court of Appeal, led by Cooke P, used s 9 of the State Owned Enterprises Act 1987 to require that the executive act consistently with the "principles of the Treaty of Waitangi," a broad phrase that was interpreted to include the Crown's duty to act in good faith, and partnership.[4] Since then, a series of Treaty-based judicial review cases have passed through the Courts involving forestry, radio frequencies, and water rights with varying levels of success for claimants. More recently, the judiciary has taken a non-interventionist stance deferring to the executive on the grounds of not interfering in political process in cases where the judiciary has not been empowered by a statutory provision to scrutinize decisions made contrary to Treaty principles.[5]

There are at least three orthodox grounds of judicial review that enable courts to assess executive action against the standards set by the Treaty of Waitangi: (a) express reference review; (b) contextual review; and (c) legitimate expectation review. Grounds (a) and (b) are already firmly established in Treaty jurisprudence. Courts have been willing to curtail executive action where an empowering statute specifically mandates, for example, that the executive act in accordance with the principles of the Treaty (express reference review), as was the case in the *SOE Lands* case. Courts have similarly judicially reviewed decisions where the empowering

[2] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).
[3] *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [256] per Glazebrook J: "[The] common law of New Zealand should as far as is reasonably possible be applied and developed consistently with the Treaty of Waitangi."
[4] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*SOE Lands*] at 642.
[5] *Ririnui v Landcorp Farming Ltd* [[2016] NZSC 62, [2016] 1 NZLR 1056 at [89] per Arnold J: "Courts have treated decisions about Treaty of Waitangi settlements as inappropriate for judicial review, not simply because they often involve legislation but also because the issues involved in settlements – such as the nature, form and amount of redress – are quintessentially the result of policy, political and fiscal considerations that are the proper domain of the executive rather than the courts."

statute is silent as to the Treaty or its principles but the context of the decision-making is such that the Treaty should be a relevant consideration (contextual reference). The goal of this paper is to posit that (c), the ground of judicial review based on legitimate expectation, is under-developed by the courts and should exist as a valid ground under which Māori claimants can challenge executive decisions that are contrary to the principles of the Treaty. Legitimate expectation review could provide claimants recourse to the courts if they consider that the Treaty has been breached during settlement negotiations. This is an important development given the current lack of regulation in respect of the Treaty settlement process.

A Express Reference Review

This ground of Treaty-based judicial review exists in the limited circumstances where an empowering statute makes express reference to the Treaty of Waitangi usually stipulating that the executive must have regard to, or act in accordance with, its principles in its decision-making. An important example of such an empowering statute is the State Owned Enterprises Act 1986, where in section 9 it states: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." The courts have treated such provisions as meaning that Crown actions taken in opposition to, or inconsistent with, the principles of the Treaty of Waitangi would be unlawful. The most prominent of these was the abovementioned *SOE Lands* case, where the Court of Appeal held that in light of s9 of the SOE Act, the transfer of land to newly established state enterprises would be unlawful unless the Crown developed a mechanism to consider whether this transfer would be inconsistent with Treaty principles.[6] As indicated by Cooke P, the Court was empowered to restrict the Crown's action in such a manner explicitly by the statutory recognition granted to the Treaty principles. He said, "If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity [by enacting the SOE Act]."[7] As such, it is clear that statutory incorporation of Treaty principles will entitle the Court to strictly scrutinize executive action. However, judicial approaches to express reference review have been varied.

[6] *SOE Lands*, above n 4, at 642.
[7] At 668 per Cooke P.

The Court of Appeal in the subsequent *Broadcasting Assets* case, for example, held that s9 imposed a fetter only on executive action and that it was outside the domain of the Courts to intervene in political processes.[8] In this case, the New Zealand Māori Council (NZMC) challenged the decision of the Crown to transfer broadcasting assets into state-owned Radio New Zealand and Television New Zealand claiming that doing so would be in contravention of s9 of the SOE Act as the Crown would be failing its obligation to actively protect te reo Māori. As such, the NZMC asked the Court to find that the transfer of broadcasting assets, without also establishing a framework mechanism to safeguard and protect te reo Māori, would be unlawful. The majority of the Court of Appeal, however, declined to pass judgment on what it saw as being effectively a legislative policy decision. Cooke P, however, strongly dissented, opining that s9 of the SOE Act entitled the Court to construct Treaty principles and consider executive decisions in light of their consistency with those principles: "The fact that the action is legislative or administrative pursuant to legislation does not affect whether or not it is inconsistent with those principles."[9] In a subsequent appeal to the Privy Council, however, it was held that the Court of Appeal was mistaken to find that merely because: [10]

> the question of the manner in which the Crown chooses to fulfill its obligations under the Treaty is a matter of policy, [then] the Court has no power to intervene unless the Court is satisfied that the policy is unreasonable in a Wednesbury sense. The question is a matter on which the Court must form its own judgment on the evidence before the Court.

The Privy Council instead characterized the issue as one of evidence with the onus on the appellants to satisfy the Court that the proposed transfer was in breach of the Treaty principles.

The crucial point is that the most well-established way to challenge executive decisions that impinge upon Māori rights is through express reference review. This is where Courts have been the most active in holding the executive accountable but, given the requirement of explicit statutory incorporation of Treaty principles, it is also the most limited ground of Treaty-based judicial review.

[8] *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA) [*Broadcasting Assets*].
[9] At 585 per Cooke P.
[10] *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

B Contextual Review

This ground of Treaty-based judicial review exists where the empowering statute does not make explicit reference to the principles of the Treaty of Waitangi but the context of the decision requires that the principles be imported as a relevant consideration. The authority on this point comes from the *Huakina* judgment, in which a decision of the Waikato Valley Authority to grant a permit to discharge agricultural wastewater into the adjacent Kopuera Stream and Waikato River was challenged by the Huakina Development Trust.[11] The Trust alleged that the decision-makers had failed to take into account the Treaty of Waitangi and the High Court upheld this appeal, opining that since the grounds for granting a water permit under the relevant Act were unspecified, the Court was entitled to use extrinsic interpretive aids including the Treaty of Waitangi. This was a crucial development for Treaty-based judicial review as it significantly widened the purview of the courts' discretion i.e., enabling the judiciary to hold the executive to account in situations where the context required consideration of Treaty obligations. Writing extrajudicially, Robin Cooke opined, "[t]he Treaty is of such basic importance that it should be presumed to apply in the exercise of statutory discretions whether or not it is expressly mentioned in the statute."[12] In his view, the Treaty is a basic constitutional document and thus it forms part of the interpretive backdrop of any piece of legislation. Similarly, Joseph articulates contextual review as "an incident of the judicial power to uphold basic constitutional values."[13]

In the *Radio Frequencies* case, for example, the Court of Appeal upheld an order from the High Court restraining the allocation of radio frequencies until the Waitangi Tribunal had been given the opportunity to report back on the impact the allocation would have on the Crown's capacity to preserve and protect the Māori language.[14] Although there was no express statutory provision in the empowering statute, the Radiocommunications Act 1989, the Court considered that a failure to consider the report of the Waitangi Tribunal would be a failure to

[11] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).
[12] Robin Cooke "Empowerment and Accountability: The Quest for Administrative Justice" (1992) 18 Commw L Bull 1326.
[13] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* 2nd ed (Brookers, Wellington, 2001) at 921.
[14] *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA)

take into account a relevant consideration.[15] Of course, consideration of a Tribunal Report is qualitatively different to consideration of Treaty principles, but it nonetheless demonstrates the discretion of the Court to import considerations that it thinks appropriate to the context of the decision-making. Thus the Court advocated the contextual review approach similar to that in *Huakina*.

Similarly, in *Barton-Prescott*, the High Court was invited to consider whether it was necessary to interpret the Guardianship Act 1968 in a manner consistent with the Treaty of Waitangi.[16] The Court held that: [17]

> Since the Treaty of Waitangi was designed to have general application, that general application must color all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the Treaty in the statute.

Contextual review offers the Court wider discretion than the comparatively narrow ground of express reference review but, by the same token, Courts will be less bold when mandating the executive to adhere to certain behavior. While the Treaty can be imported as a relevant consideration, decision-makers are able to discharge their duty to consider the Treaty comparatively easier than in circumstances when explicitly required by statute.

C Legitimate Expectation Review

While this ground of Treaty-based judicial review is not one that has been firmly established in New Zealand law, this paper suggests that there have been highly persuasive obiter comments made in high-profile decisions that at the very least require serious consideration.

Legitimate expectation is a doctrine of administrative law generally seen to be an extension of the ideas of procedural propriety and natural justice. The doctrine maintains that where the decision-maker has given a party assurances that they will conduct themselves in a certain

[15] At 139 per Cooke P.
[16] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC).
[17] At 180.

manner, then such assurances will lend themselves to the proposition that decisions made in breach of those assurances will be prima facie justiciable. A legitimate expectation explicitly derives from the conduct of the decision-maker either through assurances or through a pattern of ongoing consultation or negotiation.[18] The conduct of the decision-maker in relation to the relevant decision is the key factor in a proposed application for judicial review based on legitimate expectation.

The first indication of the availability of a Treaty-based legitimate expectation can be found in the *Radio Frequencies* case when the Court of Appeal endorsed the reasoning of Justice Heron in the High Court, where it was articulated that: [19]

> Although the applicants in this case can point to no provision in the recently enacted Radiocommunications Act 1989 which requires Treaty principles to be taken into account (c.f. s 9 of the State-Owned Enterprises Act 1986 and s 88 of the Fisheries Act 1983) … the course of negotiations have been conducted against the background that Treaty considerations would apply. It would be not putting it too strongly I think to say that there was a legitimate expectation that Māori would be treated as to the disposal of resources which affect Treaty rights as they have been directed to be treated by the Court of Appeal in a number of recent decisions.

As indicated by this extract, the Court explicitly recognized the potential availability for a justiciable legitimate expectation deriving from the conduct of the Crown throughout the negotiations. The Privy Council also highlighted the idea of a legitimate expectation in respect of Treaty obligations in the *Broadcasting Assets* case, in which Lord Woolf maintained that:[20]

> The assurance [of acting in accordance with Treaty principles] once given creates the expectation, or to use the current parlance the "legitimate expectation", that the Crown would act in accordance with the assurance, and if, for no satisfactory reason, the Crown should fail to comply with it, the failure could give rise to a successful challenge on an application for judicial review.

[18] *Re Westminster City Council* [1986] AC 668.
[19] *New Zealand Māori Council v Attorney-General* HC Wellington CP 785/90, 21 September 1990 at 8 per Heron J.
[20] *Broadcasting Assets*, above n 8, at 525.

Following this reasoning, once the executive gives an assurance, there is a legitimate expectation of behavior that is consistent with that assurance. Such reasoning was taken a step further by dissenting Justice Thomas in the *Radio New Zealand* case, where it was opined that a justiciable legitimate expectation did not have to be grounded in statutory assurances but could instead be grounded in the Treaty of Waitangi itself. Per Justice Thomas:[21]

> There is, in the first place, the Treaty of Waitangi itself, a document of fundamental constitutional importance guaranteeing to Māori the protection of its taonga. The Waitangi Tribunal Report on Te Reo Māori in 1986 added substantial weight to the claim of Māori that they have a legitimate expectation that the Crown will abide by its Treaty obligations. In the second place, a number of the decisions of the Courts have condoned the notion that the Crown is required to consider the principles of the Treaty as part of its obligations under the Treaty … Thirdly, regard need be had to the assurances given and reiterated by the Crown [which] … must convey a legitimate expectation that the Crown, in fact, will have full regard to its Treaty commitment … If an international treaty which has been signed and ratified but not passed into law can found a legitimate expectation, it is almost automatic that this country's recognised fundamental constitutional document, the Treaty of Waitangi, can also found a legitimate expectation.

Thus Justice Thomas considered that the Treaty itself could be the source of a legitimate expectation. The reasoning underpinning this passage is sound: given the volume of judicial decisions and executive statements supporting the notion of the Treaty of Waitangi being a crucial constitutional document, it should be a de facto presumption that the Crown's decision-making is, or should be, consistent with the Treaty. Joseph, for example, notes the Treaty "imposes extra-legal standards of legislation": pursuant to the *Cabinet Manual* and the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation*, bills submitted for approval must indicate compliance with the Treaty or give reasons for non-compliance and must involve consultation with Māori on decisions affecting Treaty interests.[22] Thus the legislature has clearly committed itself to an expectation that legislation be consistent with Treaty principles. Similarly, the Crown's Red Book on policy related to Treaty settlements contains a statement by the Crown that it has "accepted a moral obligation to resolve historical

[21] *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 183-185.
[22] Joseph, above n 13, at 561.

grievances in accordance with the principles of the Treaty of Waitangi."[23] Of course, the Crown's commitment to a moral, rather than legal, obligation is telling. The Crown clearly does not want to bind itself to a legal, justiciable obligation that the settlement process is conducted in accordance with the principles of the Treaty. This is not entirely an obstacle to the development of a legitimate expectation, however, as there is no requirement that the assurances or patterns of behavior that form the basis of a legitimate expectation bear any sort of legalistic character: the question is simply whether the Crown's commitment to a "moral obligation" can constitute an assurance that gives rise to a legitimate expectation?

In sum, the nascent ground of legitimate expectation could hold promise for aggrieved claimants who could potentially illustrate a legitimate expectation by virtue of any assurances or conduct by the Crown, and could also articulate that the Treaty of Waitangi imports a justiciable legitimate expectation that, for example, its principles be observed throughout the decision-making process. This would be a significant development in Treaty-based judicial review and would impose a fetter on executive decision-making throughout the Treaty settlement negotiation process.

III Judicial Review in the Treaty Settlement Negotiation Process

Executive accountability is of paramount importance in Treaty of Waitangi settlements for a number of reasons. The Crown maintains a full and final settlement policy, with settlements being passed into legislation with the accompanying rider that they are non-justiciable and that courts have no jurisdiction to review potentially unsatisfactory settlements. Furthermore, the noted gulf in negotiating power between Māori claimants and the Crown, and the lack of legal accountability of the Crown means that claimants may not be getting the best bargain. Despite these concerns, the Treaty settlement process has been characterized as existing "just below the level of the judicial gaze."[24] As has been noted, the orthodox position is that the Treaty settlement negotiation process is "a purely political process that involves no exercise of formal public power and does not directly affect rights or interests protected by law."[25] If, however,

[23] Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2002) at 6.
[24] Dawson and Suszko, above n 1, at 44.
[25] At 45.

it could be argued that claimants could derive a legitimate expectation that the Crown have regard to the Treaty of Waitangi when making decisions throughout the settlement negotiation process, then judicial review could feasibly exist to challenge decisions made in breach of that legitimate expectation.

A The Treaty Settlement Negotiation Process

While there is no statutory framework governing the process, the Office of Treaty Settlements has provided an indicative guide as to how settlement negotiations are conducted, commonly known as the "Red Book".[26] The Red Book mandates a four-step outline to the process: (1) preparing claims for negotiation; (2) pre-negotiations; (3) negotiations; and (4) ratification and implementation. Broadly, the settlement process involves claimant groups approaching the Crown in relation to settling a grievance, which the Crown will agree to negotiate depending on whether "there is a well-founded grievance, and the claimant group [meets] the Crown's preference for negotiating with large natural groupings."[27] The claimant group then must secure a mandate from the iwi it purports to represent and establish a governance entity suitable for conducting negotiations with the Crown and receiving assets from the Crown as a result of the settlement. Subsequent to the Crown's recognition of the iwi's support for the mandated representative, substantive negotiations will take place. Assuming the Crown and the mandated representative reach a satisfactory agreement in terms of redress, the Crown will draft a deed of settlement, which must be accepted by the majority of the claimant group to be then implemented legislatively.

The Crown's Treaty settlement process has been met with criticism since its inception. For example, Coxhead objected to the unilateral nature of the development of the Treaty settlement process, criticizing the "total lack of consultation with Māori regarding the development of the proposals," and that the Crown would evidently "make unilateral decisions in a number of steps" throughout the settlement process.[28] Durie, similarly, argued that:[29]

[26] Office of Treaty Settlements, above n 23.
[27] At 29.
[28] Craig Coxhead "Where are the Negotiations in the Direct Negotiations of Treaty Settlements" (2002) 10 Waikato Law Review 13 at 24.
[29] Mason Durie "Not standing apart" in Capper, R in conversation with Brown, A and lhimaera, W (eds) *Vision Aotearoa- Kaupapa New Zealand* (Bridget Williams Books, Wellington, 1994).

> What we seem to have is a government deciding what the process will be, what the negotiating structure will be, setting the terms, then deciding who it will deal with and how it will deal with them.

Such a unilateral approach was also the subject of criticism by Kelsey, who wrote that a more balanced approach to settling grievances would:[30]

> involve dialogue between sovereign representatives of the Crown and iwi on terms of parity, each of whose constituencies would have the right to mandate their own representatives in their own way. Instead Pākeha government is claiming the right unilaterally to decide what the Treaty means; what the process will be used to settle grievances; what is a reasonable outcome on a take it or leave it basis.

Thus, the Crown operates on a more unilateral basis throughout a large portion of negotiations. This has the capacity to cause many disputes, for example, in regards to the "large natural grouping" policy and the requirement that claimants agree to a mandated representative to conduct negotiations. The Crown's explicit preference for large natural groupings, for example, derives from a desire to streamline the settlement process: it "makes the process of settlement easier to manage and work through, and helps deal with overlapping interests. The costs of negotiations are also reduced for both the Crown and claimants."[31] While the Crown acknowledges, "in some circumstances, it may be possible to deal with distinct hapū or whānau interests that are separate from the main tribal claims within a settlement," there is an explicit preference towards negotiating at the iwi level.[32] Such a policy has not been without criticism. Birdling has observed that the Crown's unilateral decision to negotiate in such a manner sits in opposition to the "academic consensus that Māori society has traditionally been organized along smaller, hapū lines rather than in the larger groupings with which the Crown seeks to negotiate."[33] Similar issues arise in regard to the requirement that claimant groups provide a mandated representative for negotiations largely because the

[30] Jane Kelsey "The Mystery Envelope: What is the Government up to?" in Kelsey, *The Fiscal Envelope – Economics, Politics & Colonisation* (Moko Productions, Auckland, 1995) 21.
[31] Office of Treaty Settlements, above n 23, at 39.
[32] At 39.
[33] Malcolm Birdling "Healing the Past or Harming the Future – Large Natural Groupings and the Waitangi Settlement Process" (2004) 2 NZJPIL 259 at 260.

mandated entity is the product of attempting to shoehorn various hapū and whānau interests into a single structure. That is to say, "the grouping selected for negotiation sits uncomfortably with existing tribal dynamics, and … there are questions as to whether a particular hapū is appropriately included in a larger negotiating group, fits better with neighboring groups or even justifies negotiations of its own."[34] As such, there can often be difficulties determining whether a mandated entity is adequately representative of its constituent hapū and whānau concerns.

Furthermore, despite the Crown's commitment to actively monitor whether a mandated entity is sufficiently representative, and whether its large natural grouping policy can be reconciled with the actual structures of Māori society, settlement negotiations have often resulted in disputes. The Crown has a formal procedure developed to recognize mandates. The Office of Treaty Settlements will review deeds of mandate, as will Te Puni Kōkiri, to determine that the representatives are properly mandated and that they are accountable to the claimant group.[35] Nonetheless, disputes have still arisen, a recent example being the Ngāpuhi settlement disputes, which were addressed in the Waitangi Tribunal's *Ngāpuhi Mandate Inquiry Report* in September 2015.[36] The Report was in response to the Crown's recognition of the Tūhoronuku Independent Mandated Authority as the body with which it would commence negotiations relating to the settlement of Ngāpuhi's Treaty grievances. Various aggrieved Ngāpuhi hapū then applied for an urgent inquiry in the Waitangi Tribunal. It was alleged both that the Crown had predetermined its decision to recognize the mandate of the Tūhoronuku Independent Mandated Authority and by recognizing the mandate of a group that was not adequately representative of Ngāpuhi interests, that did not have the support of Ngāpuhi hapū, the Crown had breached the Treaty of Waitangi. The Tribunal found that while the Crown had not predetermined its decision to recognize the mandate of Tūhoronuku, it had nonetheless breached the Treaty. The Tribunal opined that: [37]

[34] Baden Vertongen "Legal Challenges to the Treaty Settlement Process" in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2004).
[35] Office of Treaty Settlements, above n 23, at 41 and 44.
[36] Waitangi Tribunal *The Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015).
[37] At x.

> The Treaty principle of partnership requires that the Crown has a primary duty to protect actively the right of hapū to determine how and by whom the settlement of their historical claims will be negotiated. We find that the Crown has failed to fulfill this duty by recognizing the mandate of an entity that undermines the authority of hapū and their leaders. This is evident in the structure and processes of the Tūhoronuku IMA, an entity that fails to uphold hapū rangatiratanga.

According to the aggrieved hapū, the Crown had been "motivated by a desire to settle all Ngāpuhi historical Treaty claims through a single settlement process with a single entity as quickly as possible, regardless of the preferences of Ngāpuhi claimants."[38] This dispute as of writing has still not reached a conclusion: internal divisions within Ngāpuhi have persisted and largely delayed the negotiation process to the extent that the Crown has explicitly withdrawn from the negotiating table until the mandating issues can be resolved.[39] Despite politicians such as Kelvin Davis and Chris Finlayson opting to frame the issue as one of leadership, it must be questioned whether the heart of the dispute lies in the Crown's continual insistence to negotiate with Ngāpuhi as a whole.[40] It seems conspicuous that Ngāpuhi, the largest iwi in the nation, is the iwi subject to a most high profile representation dispute. Rather than an indictment of Ngāpuhi's leadership, this should be an indictment of the Crown's determination to deal according to its large natural grouping policy. Arguably the problem that the Crown is facing in regards to its settlement negotiation policy is subsuming a host of varied and diverse interests and rights (including, most crucially, land rights) under the banner of a single iwi structure. In the context of the Waikato-Tainui claims, Linda Te Aho was particularly critical of such a policy because the Crown had arguably failed to recognize the distinct identity of Ngāti Korokī Kahukura, writing that the Crown:[41]

> [Did] not explicitly recognize the rights and interests of Ngāti Korokī Kahukura, despite their attempts to be proactive in ensuring their separate identity remains intact, and despite

[38] At 1-2.
[39] Mihingarangi Forbes "Crown steps back from Ngāpuhi treaty settlement" RNZ (6 June 2017).
[40] Kelvin Davis argued "It's really coming down to personalities just clashing - stubborn Ngāpuhi pride," while Chris Finlayson "blamed some of the negotiation stalling on Ngāpuhi leadership." Jo Moir "Treaty Minister: Eight years on and 'not a hope' of iwi settlement before the election" stuff.co.nz (March 28 2017).
[41] Linda Te Aho "Contemporary Issues in Māori Law and Society: The Tangled Web of Treaty Settlements Emissions Trading, Central North Islands Forests, and the Waikato River" (2008) 16 Waikato Law Review 229 at 244.

> agreement from all neighboring iwi that Ngāti Korokī Kahukura has the dominant interests as tangata whenua in its tribal domain, thus avoiding cross claimant and overlapping issues … The Crown's unilateral policy of deciding who it will engage with (recognised river iwi) and who it will not engage with, in relation to the Waikato River has the effect of forcing Ngāti Korokī Kahukura to be subsumed under the umbrella of a tribal entity in which Ngāti Korokī Kahukura has no representation and whose mandate explicitly excludes Ngāti Korokī Kahukura.

The Crown's desire to negotiate according to the large natural grouping policy thus compromises the interests of smaller iwi and hapū. Te Aho further wrote that: [42]

> The Crown's unbending practice of 'picking favorites' to engage with, in isolation of neighboring iwi, and choosing when and how it engages, has … wreaked havoc in the relationships between iwi and hapū.

Thus, the Crown's policy of macro-negotiation means several smaller iwi and hapū are left without specific redress precluding the view that they "should be engaged directly in relation to addressing their unique concerns."[43]

There are currently deficiencies in the Crown's Treaty settlement policy that go unchecked because there is no legal accountability of executive action and decision-making in Treaty settlements. While the Waitangi Tribunal has demonstrated a capacity to declare when the Crown is in breach of the Treaty in respect of settlement negotiations, this carries little weight given the ultimately advisory function of the Tribunal. The lack of accountability on the part of the Crown is even more visible when considering judicial responses to negotiation disputes.

B The justiciability of Treaty Settlement Negotiation Disputes

Despite the Crown's evident capacity to conduct the settlement process in an unsatisfactory manner, Courts have repeatedly refused to intervene in such disputes, largely for fear of encroaching upon the domain of the executive in policy matters. It has been argued that:[44]

[42] At 243.
[43] At 244.
[44] Vertongen, above n 34.

> The Courts provide little scope for claims to be made by groups that feel they are being prejudicially affected by the negotiation of a Treaty settlement … [T]he ultimate difficulty is that the negotiation process is a political one. The process has no statutory decision-making framework, and its outcomes are implemented by the passage of legislation through Parliament. The Courts will be reluctant to intervene no matter how the issue is presented to them.

A recent High Court case, *Manuiriangi v Ngā Hapū O Ngā Ruahine Iwi Inc,* exemplified the current orthodox judicial position in relation to the settlement negotiation process.[45] Ngā Ruahine were engaged with the Crown in Treaty settlement negotiations and the Crown made the decision that Ngā Hapū O Ngā Ruahine Iwi Incorporated ("Ngā Hapū"), an incorporated society, would be the mandate organization to represent Ngā Ruahine throughout the settlement process. Several members of Ngā Ruahine challenged this decision with the crux of their claim being that Ngā Hapū was not adequately representative of Ngā Ruahine and thus not the correct entity to be engaging in settlement negotiations. The applicants were particularly concerned that if settlements were to be agreed to by Ngā Hapū and the Crown, then this would preclude the possibility of any further redress down the line. In summing up the applicants' submissions, Justice Priestley stated that in the applicants' opinion:[46]

> It would be preferable for negotiations never to be concluded rather than for the iwi to run the risk of surrendering for all time certain rights. These iwi rights include many fundamental property and taonga … Of particular concern to the applicants were agreements by other iwi to settlement legislation which would prohibit access to New Zealand's Courts (particularly the High Court) to seek redress for an iwi's historical claims.

As such, it is evident that the non-justiciability of Treaty settlements once legislatively enacted and the essentially unfettered discretion of the executive throughout the Treaty settlement process (including the unilateral determination of which organizations are entitled to represent settlement claims) are very contemporary concerns among aggrieved iwi. In its decision, the High Court effectively declined to pass judgment on the executive's choice of mandate

[45] *Manuiriangi v Ngā Hapū O Ngā Ruahine Iwi Inc* [2011] NZAR 166 (HC).
[46] At [30].

organization, characterising the issues surrounding a deed of mandate as:[47]

> essentially a political matter. The [political] arena was not one the Courts would enter. The choosing of a mandate organization by the Crown, the deed of mandate, and the entire negotiating process, did not involve the exercise of any statutory power. Nor did they engage rights which could properly be the subject of judicial review.

Thus the Court maintained a hardline of non-intervention. As Dawson and Suszko have observed, the non-interventionist approach taken by the Courts has become the orthodoxy.[48] Such sentiments were echoed by the High Court in the judgments of *Hayes v The Waitangi Tribunal*, *Watene v The Minister in Charge of Treaty of Waitangi*, *Pouwhare v Attorney-General*, and *Milroy v Attorney-General*.[49] However, there are a series of problematic points in the reasoning usually asserted by the courts when refusing to intervene, specifically: that Treaty negotiations are a political, rather than legal, matter; that decisions not involving statutory power cannot be subject to judicial review; and that the rights engaged in the Treaty process cannot be subject to judicial review. These claims are questionable at best and will be briefly addressed before considering whether any of the three grounds for Treaty-based judicial review are suitable for Treaty settlement negotiation decisions.

C Are Treaty Settlement Negotiations Precluded from Judicial Review because they are a Political Matter?

As indicated earlier, the Privy Council has explicitly rebuffed the idea that the way in which the executive chooses to frame and pursue policy goals is off-limits from judicial review.[50] This sits in tension, however, with the judgment of the Supreme Court in *Ririnui*, in which it was opined that:[51]

> Courts have treated decisions about Treaty of Waitangi settlements as inappropriate for judicial review, not simply because they often involve legislation but also because the issues involved

[47] At [45].
[48] Dawson and Suszko, above n 1, at 36.
[49] *Hayes v The Waitangi Tribunal* HC Wellington CP111/01, 10 May 2001; *Watene v The Minister in Charge of Treaty of Waitangi* HC Wellington CP120/01, 11 May 2001: *Pouwhare v Attorney-General* HC Wellington CP78/02, 30 August 2002; *Milroy v Attorney-General* [2005] NZAR 562 (CA).
[50] *New Zealand Māori Council v Attorney-General* (PC), above n 10.
[51] *Ririnui,* above n 5, at [89] per Arnold J.

> in settlements – such as the nature, form and amount of redress – are quintessentially the result of policy, political and fiscal considerations that are the proper domain of the executive rather than the Courts.

There have been instances of the courts being called upon to make a ruling on the Treaty settlement negotiation process but such attempts have usually been stifled largely because Courts have been inclined to view settlement negotiations as a policy-oriented pre-legislative process. In *Milroy v Attorney-General* and *New Zealand Māori Council v Attorney-General (NZMC* decision), for example, the Court of Appeal was asked to judicially review the decisions of ministers to introduce bills into Parliament that would legislatively implement Treaty settlement deeds.[52] The Court both times rejected to do so holding that courts should not interfere with legislative process. In *Milroy*, the Court held that "the formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review."[53] Similarly, the Court of Appeal held in the *NZMC* decision that: [54]

> A Court would not interfere in parliamentary proceedings. Accordingly, a minister could not be prohibited from introducing a Bill into Parliament to give effect to the deed. In the present case, there was no action of the Crown other than the introduction of legislation, which could be the subject of a declaration. Given this, the political nature of the obligations in the deed meant that the issues arising from it were not justiciable.

Beyond the Treaty settlement context, in *CREEDNZ v Governor-General*, the Court of Appeal held:[55]

> [T]he larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene.

The failure of the courts, however, to hold the executive accountable simply because

[52] *Milroy v Attorney-General*, above n 49; *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.
[53] At 565.
[54] At 318.
[55] *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) at 198.

settlements are enacted through legislation, and indeed the executive's practice of legislatively enacting the settlements, seems somewhat disingenuous given at least part of the reason for doing so is to keep settlements beyond the purview of the courts. Furthermore, the consistent refrain of the courts that Treaty settlements are a political matter obfuscates the real issue, that is, settling Treaty grievances are an obligation derived from a history of violations of the Treaty of Waitangi and are a crucially important constitutional issue. The Crown's Treaty obligations do not stem from a political mandate from the voting public but from their status as a Treaty partner. Thus classifying the manner in which the Crown pursues its Treaty obligations as merely policy is unsatisfactory. It is similarly inadequate to argue that there are already normative accountability regimes in place for executive policy: to say that executive policy regarding Treaty settlements is tempered by accountability to the voting public is to forget that the executive has previously enacted legislation in direct opposition to Treaty principles despite a surge in public protest in opposition.[56] It is inappropriate to consider the protection of Māori rights as a political issue that is subject to the whim of majority-rules. Particularly in light of the fact that the Waitangi Tribunal has explicitly found the Crown to be in breach of Treaty principles in respect of mandate disputes (as in the Ngāpuhi dispute), it seems unfortunate and unsatisfactory that the only current ramifications are political rather than legal. Furthermore, it seems a false equivalency to compare the way that the government approaches Treaty grievances as a matter of policy akin to that of, for example, infrastructure, education, or military spending. Settling Treaty claims is not a policy decision but obligation derived from historical grievances and breaches of the Treaty and a Crown obligation that the Courts should have discretion to evaluate. This is largely because the way the Crown chooses to fulfill its Treaty obligations is a crucial constitutional question and fundamentally engages the rights of Māori claimants, both in human rights and Treaty rights.

D Can Decisions that do not involve a Statutory Power be Subject to Judicial Review?

This is a very important question since the entire Treaty settlement negotiation process is conspicuously not governed by an overarching statute. Since there is no explicit statutory power being engaged when the Crown makes decisions pertaining to the Treaty settlement

[56] Foreshore and Seabed Act 2004.

process, it would seem that the source of authority being engaged is a de facto extension of the royal prerogative powers. It has been argued:[57]

> Although the negotiation process is a formal and standardized Crown process, there is no statutory framework under which Treaty settlement negotiations are conducted. The Treaty of Waitangi Act 1975 provides the basis for making claims of breaches of Treaty of Waitangi principles, and a mechanism for having those claims heard and reported, but neither this Act nor any other Act establishes the current process for the negotiation and settlement of those claims. Instead, the authority of the executive branch of government to enter into and conduct Treaty settlement negotiations resides in the prerogative power.

It is a settled point of law that prerogative powers can be subject to judicial review with the fundamental test being whether the subject matter engaged by the decision was justiciable.[58] In *Burt*, the Court of Appeal while discussing *CCSU*, held that: [59]

> [t]he mere fact that a decision had been made under the prerogative did not exempt it from review in the Courts. The test was rather whether the subject-matter of the decision was justiciable.

The *CCSU* was the watershed case in this respect: the Thatcher Government used the royal prerogative to ban Government Communications Headquarters' GCHQ employees joining trade unions for reasons of national security. While making an exception for matters of national security, the House of Lords in a landmark decision held that the royal prerogative was subject to judicial review. The key point, in the Treaty settlement context, is that the Crown cannot be exempted from judicial review of their decisions simply because those decisions engaged prerogative powers rather than a statutory power. The issue, rather, turns to one of justiciability, that is, whether the subject matter of the decision is viewed as within the discretion of the Court to review. The argument then becomes somewhat circular, as proponents of the orthodox view will maintain that the Treaty settlement process is essentially

[57] Vertongen, above n 34.
[58] *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6; *Burt v Governor-General* [1992] 3 NZLR 672.

a policy arrangement and a non-justiciable subject. In *Curtis v Minister of Defence*, the Court of Appeal held that "[a] non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved.[60]

This decision was in the context of the Minister of Defence's decision to disband the Royal New Zealand Air Force with the claimants arguing that such a decision left the air force insufficiently armed. The Court responded that there is no calculus or legal yardstick for determining what constitutes a sufficient level of armament. Such an example lies firmly in the realm of executive policy. Comparatively, Treaty settlement issues arguably do have a satisfactory legal yardstick – there is, for example, the Treaty and its principles, as evidenced in express review cases, alongside the UN Declaration on the Rights of Indigenous Peoples (the Indigenous Declaration). The Treaty and its principles prescribe a benchmark against which executive decisions should be scrutinized and thus issues surrounding the Treaty should not be considered as being non-justiciable, while similarly the Indigenous Declaration recognizes a basic standard of rights for indigenous peoples. Furthermore, it seems flimsy at best to say that executive decisions regarding the Treaty settlement process are not suitable for judicial review simply because of a lack of statutory authority, especially when those same decisions would be reviewable were there a statutory framework for the process.

Part of the issue is that the judiciary does not generally have a mandate to control the actions of the executive. The normative argument is that the Courts are neither elected nor accountable to the public and thus cannot be seen to dictate the policy arrangements of the government. The counterpoint, however, is that despite the Treaty settlement process not having a governing statute, it has evolved beyond the realm of a policy driven process arrangement and is now a well-established process that has become effectively entrenched in the political arena. It is a robust institution that has arguably developed beyond the realm of extra-legal executive discretion. For example, the Treaty settlement process is overseen by the Office of Treaty Settlements, a government entity, and is supported by a framework of ancillary institutions including the Waitangi Tribunal, Te Puni Kōkiri, and the Minister in Charge of Treaty of Waitangi Negotiations. This is to say, the Treaty settlement process has become

[60] *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [27].

less of a makeshift government policy and is a key facet of our contemporary legal and political environment. It exists less in the realm of prerogative discretion and the decisions throughout the process bear all the characteristics of determinations that would usually be an appropriate subject for judicial review were there a statute. For example, the Crown has committed itself to principles, which could be seen as analogous to mandatory relevant considerations. The Treaty should be seen as occupying a quasi-statutory role in the Treaty settlement process, and the courts should be able to use the Treaty and its principles as a benchmark against which to scrutinize executive action in the same manner they use empowering legislation to scrutinize decision-making in other circumstances. Furthermore as mentioned above, and while it seems so simple that it almost goes without saying, the heart of the government's fundamental constitutional role is the protection of rights. This necessarily includes Māori rights both under human rights regimes and the particular rights offered under the Treaty of Waitangi, to which the government is a legally bound Treaty partner.

IV The Legitimate Expectation Model

A The Doctrine of Legitimate Expectation

The doctrine of legitimate expectation is invoked when an aggrieved party has a well-founded expectation to be treated by a decision-maker in a certain manner. The expectation is derived from the conduct of the decision-maker and can be induced by a promise or a pattern of established and ongoing consultation and/or behaviour. In *Re Westminster City Council*, it was posited that "a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation."[61]

This was approved by the Court in *Te Heu Heu v Attorney-General*, where the High Court went on to hold that the conduct of the decision-maker must be considered objectively to ascertain "whether the [decision-maker] by its words, actions or assurances, was offering something and failed to deliver."[62] Furthermore, the Court also approved of the reasoning of the Privy Council

[61] *Re Westminster City Council*, above n 18.
[62] *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC) at 127 per Robertson J.

in *Attorney-General of Hong Kong v Ng Yuen Shiu*, where it was considered that:[63]

> [T]he word 'legitimate' … falls to be read as meaning 'reasonable.' Accordingly, 'legitimate expectations' in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.

In *Green v Racing Integrity Unit Ltd*, the Court of Appeal outlined the current test, holding that:[64]

> In the administrative law context, to succeed in a claim for breach of a legitimate expectation requires demonstration that there was (1) a promise or commitment to act in a certain way, by for example, the adoption of a settled practice or policy; (2) legitimate or reasonable reliance on the promise or commitment; and (3) an appropriate remedy that should be granted. The promise can be implied from past practice or policy.

It has been noted that there are some uncertainties regarding the doctrine of legitimate expectation.[65] In particular, whether the legitimate expectation is "of a fair hearing or of the benefit actually sought."[66] That is to say, whether the expectation is procedural or substantive. In *Ali v Deportation Review Tribunal*, the High Court held that "legitimate expectation is an aspect of fairness in decision-making rather than in result.[67] Comparatively, however, in *New Zealand Association for Migration and Investments Inc v Attorney-General*, the High Court held that:[68]

> A legitimate expectation can provide substantive, as opposed to procedural, outcomes, but the Court cannot usurp the function of the Executive by directing the conferral of a substantive benefit to implement the expectation. The Court could direct the decision-maker to reconsider and to take into account in that reconsideration the legitimate expectation; where policy had been so altered.

[63] *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC) at 636-637.
[64] *Green v Racing Integrity Unit Ltd* [2014] NZCA 133, [2014] NZAR 623.
[65] *Laws of New Zealand* Administrative Law (online ed) at [62].
[66] At [62].
[67] *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 218 per Elias J.
[68] *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC).

The Administrative Law title of the *Laws of New Zealand* summarizes the uncertain position as follows:[69]

> The weight of authority favors the narrower formulation of the doctrine (expectation of a fair hearing), and legitimate expectations are generally limited to matters of process, not of result. However, in some cases there has been discussion of the proposition that legitimate expectation can apply not only to the procedures leading up to the making of a decision, but also to the decision itself.

Furthermore, there is authority for the proposition that Māori may hold a substantive legitimate expectation in regards to the Treaty of Waitangi. In *Ngāi Tahu Māori Trust Board v Director-General of Conservation*, the Court held that the principles of the Treaty imported a legitimate expectation of a "reasonable degree of preference."[70] While this decision is of limited value because the Treaty principles were only justiciable by virtue of being given statutory effect through s 4 of the Conservation Act 1987, it nonetheless poses the possibility of a substantive legitimate expectation of preferential treatment. In this case, Ngāi Tahu appealed the decision of the Director-General of Conservation to issue a permit to a business allowing it to engage in commercial whale-watching. Ngāi Tahu owned a similar whale-watching business and argued that the principles of the Treaty of Waitangi meant they should be entitled to operate their business free of competition for a period of time, or at least that the Director-General should engage in consultation with them before issuing new permits. While the Court considered that "tourism and whale-watching were remote from anything in fact contemplated by the original parties to the treaty," the Treaty principles were nonetheless relevant and those principles "required active protection of Māori interests."[71] It was held that the Treaty of Waitangi imports a positive duty to "act in good faith, fairly, reasonably, and honorably." Furthermore, the Court held, "a reasonable treaty partner would not have restricted consideration of Ngāi Tahu interests to mere matters of procedure. Ngāi Tahu were entitled to a reasonable degree of preference."[72] Thus the Court held that the positive duty of the Crown went beyond that of mere consultation.

[69] *Laws of New Zealand* Administrative Law (online ed) at [62].
[70] *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 562.
[71] *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 554.
[72] At 554.

Of course, there are reservations about extending the doctrine of legitimate expectation too far. The Court cannot occupy a didactic function by determining the executive's course of action. As indicated earlier, the High Court in *New Zealand Association for Migration and Investments Inc* asserted that it is not the role of the Court to "usurp the function of the Executive."[73] In that same case, the Court similarly maintained that:[74]

> The public interest in holding a public authority to promises made in the interest of proper public administration needed to accommodate the ambulatory duty of the public authority to change policy as circumstances dictate.

As such, the normative conception of legitimate expectation requires a balancing of the right of parties to reasonably expect that a certain executive policy, assurance, or practice of consultation will continue, and the right of the Executive to unilaterally determine policy. There is a lingering question, however, whether Māori interests deriving from the Treaty of Waitangi exist as an exception to this conception of legitimate expectation – that is, whether the rights of claimants throughout the Treaty settlement process can take priority over the Crown's policy determinations.

B Legitimate Expectation in Practice

Decisions made during the Treaty settlement negotiation process lack an empowering statute. As such, this means both express reference review and contextual review are inappropriate grounds upon which to base a claim for judicial review. Contextual review is deficient because there is no statute that governs or regulates the manner in which the Treaty settlement process is conducted. If there were, then the application of the contextual review regime would be straightforward. The proposed model for legitimate expectation review, however, does not rely upon the existence of an empowering statute, but can be grounded in any situation where the Crown has given assurances that it will conduct itself in a certain manner and subsequently breaches those assurances. The legitimate expectation model is particularly

[73] *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [159].
[74] At 45.

important because if the Crown were to entirely withdraw from the Treaty settlement process, there would currently be no legal ramifications. Comparatively, if the legitimate expectation model were applied, claimants could bring a successful claim for judicial review to preclude the Crown from doing so. For the model to work in practice, there needs to be a pattern of behavior or assurances on the part of the Crown that create a legitimate expectation on the part of aggrieved claimants. As mentioned earlier, the Treaty settlement process has evolved beyond the point of an ad-hoc policy arrangement and is an institutional feature of our political environment. At the very least, it is clear that Māori claimants have a reasonable expectation that based on the Crown's ongoing commitment to the Treaty settlement process, any unilateral decision to withdraw from the process should be prima facie justiciable under legitimate expectation grounds. Furthermore, the Crown's repeated assurances of how it will comport itself during the settlement process should be construed as justiciable assurances. The Red Book provides an indicative model that supposedly governs the Treaty negotiation process.[75] The six principles that the Crown maintains it will have regard to throughout the process are:[76]

1. Good faith – The negotiating process is to be conducted in good faith, based on mutual trust and co-operation towards a common goal.

2. Restoration of relationship – The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement.

3. Just redress – Redress should relate fundamentally to the nature and extent of breaches suffered, with existing settlements being used as benchmarks for future settlements where appropriate.

4. Fairness between claims – There needs to be consistency in the treatment of claimant groups. In particular, 'like should be treated as like' so that similar claims receive a similar level of financial and commercial redress. This fairness is essential to ensure settlements are durable.

[75] Office of Treaty Settlements, above n 23, at 25.
[76] At 25.

5. Transparency - First, it is important that claimant groups have sufficient information to enable them to understand the basis on which claims are settled. Secondly, there is a need to promote greater public understanding of the Treaty and the settlement process.

6. Government-negotiated – The Treaty settlement process is necessarily one of negotiation between claimant groups and the government. They are the only two parties who can, by agreement, achieve durable, fair and final settlements. The government's negotiation with claimant groups ensures delivery of the agreed settlement and minimizes costs to all parties.

These principles provide a basic level of expectation that decisions made during the Treaty settlement process will achieve these goals. The Crown also has committed to operating according to a series of guidelines, for example, that settlements should not create further injustice, that settlements should be seen as fair, and that the dealings with claimant groups must be fair and equitable.[77] Furthermore, given that the Crown has regularly maintained the entire premise of the Treaty settlement process is to take steps to acknowledge and rectify historical grievances facilitated by breaches of the Treaty of Waitangi, then it should arguably be a presumption that the Treaty forms part of the contextual underpinning of the negotiation process. In the Red Book, the Crown has stated unequivocally that they have "accepted a moral obligation to resolve historical grievances in accordance with the principles of the Treaty of Waitangi."[78] The text and the principles of the Treaty should thus continually inform the decisions made during the settlement process. To restate the reasoning of the Privy Council, should the Crown commit to considering Treaty principles and subsequently "fail to comply with it, the failure could give rise to a successful challenge on an application for judicial review."[79] To similarly restate the most explicit advocacy of legitimate expectation that our courts have articulated, it "is almost automatic that this country's recognised fundamental constitutional document, the Treaty of Waitangi, can also found a legitimate expectation."[80]

In sum, the series of assurances by the Crown that it will conduct the settlement process in line with the series of guidelines and principles to which it has committed itself, as well as the principles of the Treaty, should form the baseline upon which Māori claimants can found a

[77] At 24-25.
[78] At 6.
[79] *New Zealand Māori Council v Attorney-General* (PC), above n 10, at 525.
[80] *New Zealand Māori Council v Attorney-General* (CA), above n 21, at 183-185.

legitimate expectation. Negotiations policies, such as the large natural grouping policy, should be read in the context of both the Crown-established principles of negotiation and the Treaty principles. Where there is inconsistency, claimants should be able to derive a legitimate expectation from these principles. The large natural grouping policy, for example, and the way in which it has regularly been applied to the detriment of smaller iwi and hapū whose interests have been ignored, should be seen as violating both the principle of fairness between claims, and the Treaty principle that the Crown has an obligation to actively protect taonga.

In sum, there are a series of practices adopted by the Crown in which Māori claimants should be entitled to base a justiciable legitimate expectation claim:

- Claimants should legitimately expect that the Treaty settlement process will continue until its satisfactory resolution and any unilateral decision on the part of the Crown to withdraw from the process would be justiciable. This is based on the ongoing practice of Treaty settlements, which has continued for more than two decades, in which claimants have a vested interest.
- Claimants should legitimately expect that the Crown will observe the principles of the Treaty throughout the negotiation process and take an active role in protecting Māori interests and taonga and any evident failure to do so should be justiciable. This is based on the Crown's commitment to honoring the principles throughout the Treaty settlement process.
- Claimants should legitimately expect that the Crown will willingly engage in settlement negotiations, and any refusal on the part of the Crown to engage by virtue of not meeting the 'large natural grouping' criteria should be justiciable. This is based on the Crown's ongoing commitment of fairness between claims and their evident capacity to negotiate settlements with smaller iwi such as Ngāti Korokī Kahukura means other smaller iwi and hapū should reasonably expect to receive redress. The Crown's desire for expediency should not defeat claimants' desire for satisfactory resolution of their grievances. Of course, the counterpoint to this is that changing the large natural groupings policy now will violate the principle of fairness in respect of groups that have already reached settlement. Perhaps the salient point in this respect is simply that the claimant group should have more agency in respect of being able to choose how they approach a settlement and that failing to meet the threshold of a large natural grouping

should not preclude redress.

- Claimants should legitimately expect the Crown not to recognize the mandate of an unrepresentative or unaccountable entity and that doing so would be justiciable. This is based on the Crown's obligation to actively protect Māori interests and taonga, and that to negotiate a settlement with an unrepresentative entity would compromise the interests of smaller iwi and hapū and subvert the goal of the settlement process.

These are just some examples, based on prior disputes, of the circumstances in which claimants may be entitled to ground a justiciable legitimate expectation claim to the courts. The underlying goal of arguing a legitimate expectation is to ensure that the executive is held accountable to Treaty principles throughout the Treaty settlement negotiation process.

V Conclusion

This paper has considered three models of Treaty-based judicial review: (a) express reference review; (b) contextual review; and (c) legitimate expectation review. The former two are well established in Treaty jurisprudence but the latter is proposed as a possible mechanism to alleviate the lack of executive accountability in the Treaty settlement negotiation process especially. Because the Treaty settlement negotiation process is lacking an empowering statutory authority to negotiate settlements, and instead depends on the prerogative of the Crown, express reference review is deficient, but legitimate expectation review may provide relief. Such accountability is required because the Crown has manifestly demonstrated an ability to breach the Treaty during the settlement process without legal ramifications. The development of a doctrine of Treaty-based legitimate expectation would give the judiciary scope to hold the executive to account and turn decisions made during the Treaty settlement process into justiciable questions of law. A legitimate expectation can derive from the conduct of the executive either through assurances or previous patterns of ongoing consultation and negotiation or directly from the Treaty of Waitangi. While such propositions have yet to be seriously tried in the judicial context, the reality is that the Crown, as a Treaty partner, should be held to account both for historical grievances and the process by which it seeks to resolve such grievances.